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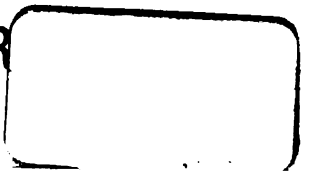

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For later Cases, Developments and Changes in the Law see Cumulative Annual Annotations, same title, page, and note number.
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CORPUS JURIS

BEING

A COMPLETE AND SYSTEMATIC STATEMENT

OF

THE WHOLE BODY OF THE LAW

AS EMBODIED IN AND

DEVELOPED BY

ALL REPORTED DECISIONS

EDITED BY

WILLIAM MACK, LL.D.

Editor-in-Chief of the Cyclopedia of Law and Procedure

AND

WILLIAM BENJAMIN HALE, LL.B.

Contributing Editor of the American and English Encyclopædia of Law and the Encyclopædia of Pleading and Practice

The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled.

GREENE, C.J., in *1 R. I. 356.*

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TO

CHARLES WALTER DUMONT

the author of the plan of the Cyclopedia of Law and Procedure, the inspiration of the organization which brought that work to completion, and whose creative genius has evolved the plan of Corpus Juris, these volumes are dedicated.

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*The Spanish words and phrases in this volume were prepared by CHARLES SUMNER LOBINGIER, Ph.D., LL.M.; Judge of the United States Court for China; Lecturer in Law in the University of the Philippines. Sometime Member of Nebraska Supreme Court Commission; Professor of Law in the University of Nebraska; and Judge of the Court of First Instance in the Philippines. Author of "The People's Law" (the Macmillan Co., 1909), "Philippine Practice," and "Territories" 38 Cyc 191.

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Pilots
Piracy
Plate-Glass Insurance
Pleading
Pledges
Poisons
Possessory Warrant
Post Office
Powers
Principal and Surety
Prisons
Private Roads
Prize Fighting
Process
Profanity
Prohibition
Property
Prosecuting, etc., Attorneys
Prostitution
Public Lands
Quieting Title
Quo Warranto
Railroads
Rape
Real Actions
Receivers
Receiving Stolen Goods
Recognizances
Records
Recoupment, Set-Off, and Counter-Claim
References
Reformation of Instruments
Reformatories
Registers of Deeds
Release
Religious Societies
Removal of Causes
Replevin
Reports
Rescue
Review
Rewards
Riot
Robbery
Sales
Salvage
Schools and School Districts
Scire Facias
Seals
Seamen
Searches and Seizures
Seduction
Sequestration
Sheriffs and Constables
Shipping
Signatures
Slaves
Sodomy
Specific Performance
Spendthrifts
States
Statutes
Steam
Stipulations
Street Railroads
Streets and Highways
Submission of Controversy
Subrogation
Subscriptions
Suicide
Summary Proceedings
Sunday
Supersedeas
Taxation
Telegraphs and Telephones
Tenancy in Common
Tender
Territories
Theaters and Shows
Theft Insurance
Threats
Time
Title Insurance
Toll Roads
Torts
Towage
Towns
Trade-Marks and Trade-Names
Trading Stamps
Treason
Treaties
Trespass
Trespass to Try Title
Trial
Trover and Conversion
Trusts
Undertakings
United States
United States Commissioners
United States Marshals
Unlawful Assembly
Use and Occupation
Usury
Vagrancy
Vendor and Purchaser
Venue
War
Warehousemen
Waste
Waters
Weapons
Weights and Measures
Wharves
Wills
Witnesses
Woods and Forests
Work and Labor

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TABLE OF ABBREVIATIONS

REPORTS AND TEXT BOOKS

A

A	Atlantic Reporter
Abb.	Abbott (U. S.)
Abb. Adm.	Abbott's Admiralty (U. S.)
Abb. Dec.	Abbott's Decisions (N. Y.)
AbbNCas	Abbott's New Cases (N. Y.)
AbbPr	Abbott's Practice (N. Y.)
AbbPrNS	Abbott's Practice New Series (N. Y.)
A'Beck. Res. Judgm.	A'Beckett's Reserved Judgments (Vict.)
[1906] AC	[1906] Appeal Cases (Can.)
[1891] A. C.	Law Reports [1891] Appeal Cases (Eng.)
Acton	Acton (Eng.)
Add.	Addison (Pa.)
Add. Eccl.	Addams' Ecclesiastical (Eng.)
A. & E.	Adolphus & Ellis (Eng.)
A&EEncL	American & English Encyclopaedia of Law
A&EEncL&Pr	American & English Encyclopaedia of Law & Practice
Aik.	Aikens (Vt.)
A. K. Marsh.	A. K. Marshall (Ky.)
Ala.	Alabama
Ala. A.	Alabama Appellate Court
Alaska	Alaska
AlbLJ	Albany Law Journal
Alc. & N.	Alcott & Napier (Eng.)
Alc. Reg. Cas.	Alcock's Registry Cases (Eng.)
Aleyn	Aleyn (Eng.)
Alison Pr.	Alison's Practice (Sc.)
Allen	Allen (Mass.)
Alta. L.	Alberta Law
AmBankr	American Bankruptcy (U. S.)
Ambl.	Ambler (Eng.)
AmCorpCas	American Corporation Cases
AmCr	American Criminal
AmD	American Decisions
Am&ECorpCas	American & English Corporation Cases
Am&ECorpCasNS	American & English Corporation Cases New Series
Am&EEqD	American & English Decisions in Equity
AmElectrCas	American Electrical Cases
Am&ERCas	American & English Railroad Cases
Am&ERCasNS	American & English Railroad Cases New Series
AmLJ	American Law Journal (Pa.)
AmLJNS	American Law Journal New Series (Pa.)
AmLRec	American Law Record (Oh.)
AmLReg	American Law Register
AmLRegNS	American Law Register New Series
AmLRev	American Law Review
AmNeglCas	American Negligence Cases
AmNeglR	American Negligence Reports
A. M. & O.	Armstrong, Macartney & Ogle (Ir.)
AmProb	American Probate
AmProbNS	American Probate New Series
AmPr	American Practice
AmR	American Reports
AmR&Corp	American Railroad & Corporation
AmRRep	American Railway Reports
AmSR	American State Reports
AmStRD	American Street Railway Decisions
And.	Anderson (Eng.)
Andr.	Andrews (Eng.)
AnnCas	American & English Annotated Cases
Anstr.	Anstruther (Eng.)
Anth. N. P.	Anthon's Nisi Prius (N. Y.)
App.	Appeal Cases (D. C.)
App. Cas.	Law Reports Appeal Cases (Eng.)
App. Div.	Appellate Division (N. Y.)
Ariz.	Arizona
Ark.	Arkansas
Ark. Just.	Arkley's Justiciary (Sc.)
Arn.	Arnold (Eng.)
Arn. & H.	Arnold & Hodges (Eng.)
Ashm.	Ashmead (Pa.)
Aspin.	Aspinwall's Maritime Cases (Eng.)
Atk.	Atkyn (Eng.)
AustrJur	Australian Jurist
AustrLT	Australian Law Times

B

Bacon Abr.	Bacon's Abridgment (Eng.)
B. & Ad.	Barnewall & Adolphus (Eng.)
B. & Ald.	Barnewall & Alderson (Eng.)
Baldw.	Baldwin (U. S.)
Balf. Pr.	Balfour's Practice (Sc.)
Ball & B.	Ball & Beatty (Ir.)
Bann. & A.	Banning & Arden (U. S.)
Barb.	Barbour (N. Y.)
Barb. Ch.	Barbour's Chancery (N. Y.)
B. & Arn.	Barron & Arnold (Eng.)
Barn.	Barnardiston King's Bench (Eng.)
Barn. Ch.	Barnardiston Chancery (Eng.)
Barnes Notes	Barnes' Notes (Eng.)
Batty	Batty (Ir.)
B. & Aust.	Barron & Austin (Eng.)
Bart.	Baxter (Tenn.)
B. & B.	Broderip & Bingham (Eng.)
B. C.	British Columbia
B. & C.	Barnewall & Cresswell (Eng.)
B. D. & O.	Blackham, Dundas & Osborne (Ir.)
Beatty	Beatty (Ir.)
Beav.	Beavan (Eng.)
Beaw. Lex Mer.	Beawes Lex Mercatoria (Eng.)
Bee	Bee (U. S.)
Bell.	Bellewe (Eng.)
Bell App. Cas.	Bell's Appeal Cases (Sc.)
Bell C. C.	Bell's Crown Cases (Eng.)
Bell Comm.	Bell's Commentaries (Eng.)
Bell Sc. Cas.	Bell's Scotch Court of Session Cases
Ben.	Benedict (U. S.)
Benl.	Benloe (Eng.)
Benl. & D.	Benloe & Dallison (Eng.)
B. & H. Cr. Cas.	Bennett & Heard Leading Criminal Cases (Eng.)
Bibb	Bibb (Ky.)
Bing.	Bingham (Eng.)
Bing. N. Cas.	Bingham's New Cases (Eng.)
Binn.	Binney (Pa.)
Biss.	Bissell (U. S.)
Black	Black (U. S.)
Blackf.	Blackford (Ind.)
Blair Co.	Blair County (Pa.)
Bland	Bland (Md.)
Blatchf.	Blatchford (U. S.)
Blatchf. & H.	Blatchford & Howland (U. S.)
Blatchf. Prize Cas.	Blatchford's Prize Cases (U. S.)
Bligh	Bligh (Eng.)
Bligh N. S.	Bligh New Series (Eng.)
B. Mon.	B. Monroe (Ky.)
Bond	Bond (U. S.)
B. & P.	Bosanquet & Puller (Eng.)
B. & P. N. R.	Bosanquet & Puller's New Reports (Eng.)
Bradf. Surr.	Bradford's Surrogate (N. Y.)
Brayt.	Brayton (Vt.)
BRC	British Ruling Cases
Brewst.	Brewster (Pa.)
Brightly	Brightly (Pa.)
Brightly El. Cas.	Brightly's Election Cases (Pa.)
Bro. Ch.	Brown's Chancery (Eng.)
Brock.	Brockenbrough (U. S.)
BrodixAm&EPatCas	Brodix's American & English Patent Cases
Bro. Just.	Broun's Justiciary (Sc.)
Brook Abr.	Brook's Abridgments (Eng.)
Brook N. Cas.	Brook's New Cases (Eng.)
Bro. P. C.	Brown's Parliament Cas. (Eng.)
Brown Adm.	Brown's Admiralty (U. S.)
Browne	Browne (Pa.)
Brown. & L.	Browning & Lushington (Eng.)
Brownl. & G.	Brownlow & Goldesborough (Eng.)
Bruce	Bruce (Sc.)
Brunn. Coll. Cas.	Brunner's Collective Cases (U. S.)
B. & S.	Best & Smith (Eng.)
Buck	Buck (Eng.)
Buller N. P.	Buller's Nisi Prius (Eng.)
Bulstr.	Bulstrode (Eng.)
Bunb.	Bunbury (Eng.)
Burn.	Burnett (Wis.)

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Burr.	Burrows (Eng.)
Burr. S. Cas.	Burrows' Settlement Cas. (Eng.)
Bush	Bush (Ky.)

C

Cab. & E.	Cababe & Ellis (Eng.)
Cai.	Caines (N. Y.)
Cai. Cas.	Caines' Cases (N. Y.)
Cal.	California
Cal. A.	California Appellate Court
Cald.	Caldecott (Eng.)
Call	Call (Va.)
Calthr.	Calthrop (Eng.)
Cal. Unrep. Cas.	California Unreported Cases
Cam. Cas.	Cameron's Cases (Can.)
Campb.	Campbell (Eng.)
Canal Zone	Canal Zone Supreme Court
CanAppCas	Canada Appeal Cases
CanCrCas	Canadian Criminal Cases
Can. Exch.	Canadian Exchequer
CanLJ	Canada Law Journal
CanLJNS	Canada Law Journal New Series
CanLTOccNotes	Canadian Law Times Occasional Notes
CanRCas	Canadian Railway Cases
Can. S. C.	Canada Supreme Court
Car. H. & A.	Carrow, Hamerton & Allen (Eng.)
Carter	Carter (Eng.)
Carth.	Carthew (Eng.)
Cartwr. Cas.	Cartwright's Cases (Can.)
Cary	Cary (Eng.)
Cas. t. Hardw.	Cases temp. Hardwicke (Eng.)
Cas. t. Holt	Cases temp. Holt (Eng.)
Cas. t. King	Cases temp. King (Eng.)
Cas. t. Talb.	Cases temp. Talbot (Eng.)
C. B.	Common Bench (Manning, Granger & Scott) (Eng.)
C. B. N. S.	Common Bench New Series (Manning, Granger & Scott New Series) (Eng.)
CCA	Circuit Court of Appeals (U. S.)
[1891] Ch.	Law Reports [1891] Chancery (Eng.)
Chandl.	Chandler (Wis.)
Chase	Chase (U. S.)
Ch. Cas.	Cases in Chancery (Eng.)
Ch. Chamb.	Chancery Chambers (U. C.)
Ch. D.	Law Reports Chancery Division (Eng.)
Chest. Co.	Chester County (Pa.)
Chit.	Chitty (Eng.)
Choyce Cas. Ch.	Choyce Cases in Chancery (Eng.)
Ch. Rep.	Chancery Reports (Eng.)
ChSent	Chancery Sentinel (N. Y.)
CincLBul	Weekly Law Bulletin (Oh.)
Cinc. Super.	Cincinnati Superior Court Reporter (Oh.)
CityHallRec	City Hall Recorder (N. Y.)
C. & K.	Carrington & Kirwin (Eng.)
C. & L.	Connor & Lawson (Ir.)
Clarke	Clarke's Chancery (N. Y.)
Clarke & S. Dr. Cas.	Clarke & Scully's Drainage Cases (Ont.)
C. L. Chamb.	Chamber's Common Law (U. C.)
ClevLRec	Cleveland Law Record (Oh.)
ClevLRep	Cleveland Law Reporter (Oh.)
Cl. & F.	Clark & Finnelly (Eng.)
Cliff.	Clifford (U. S.)
C. L. R.	Common Law Reports (Eng.)
C. & M.	Carrington & Marshman (Eng.)
C. M. & R.	Crompton, Meeson & Roscoe (Eng.)
CodeRep	Code Reporter (N. Y.)
CodeRepNS	Code Reports New Series (N. Y.)
Coff. Prob.	Coffey's Probate (Cal.)
Coke	Coke (Eng.)
Col. Cas.	Coleman's Cases (N. Y.)
Col. & C. Cas.	Coleman & Caines' Cases (N. Y.)
Coldw.	Coldwell (Tenn.)
Coll.	Collyer (Eng.)
Colles	Colles' Cases in Parliament (Eng.)
Colo.	Colorado
Colo A.	Colorado Appeals
Coltm.	Coltman (Eng.)
Comb.	Comberbach (Eng.)
ComL	Commercial Law (Can.)
Comyns	Comyns (Eng.)
Comyns Dig.	Comyns' Digest (Eng.)
Conn.	Connecticut
Conn. Surr.	Connoly's Surrogate (N. Y.)
Cooke	Cooke (Eng.)
Cooke	Cooke (Tenn.)
Cooke & A.	Cooke & Alcock (Ir.)
Cook Vice-Adm.	Cook's Vice-Admiralty (L. C.)
Coop.	Cooper's Chancery (Eng.)
Coop. Pr. Cas.	Cooper's Practice Cases (Eng.)
Coop. t. Brough.	Cooper's Cases temp. Brougham (Eng.)
Coop. t. Cott.	Cooper's Cases temp. Cottenham (Eng.)
Corb. & D.	Corbett & Daniell's Election Cases (Eng.)
Cow.	Cowen (N. Y.)
Cowp.	Cowper (Eng.)
Cox C. C.	Cox's Criminal Cases (Eng.)
Cox Ch.	Cox's Chancery (Eng.)
C. & P.	Carrington & Payne (Eng.)
C. P. D.	Law Reports Common Pleas Division (Eng.)
Crabbe	Crabbe (U. S.)
Cranch	Cranch (U. S.)
Cranch C. C.	Cranch's Circuit Court (U. S.)
Cranch Pat. Dec.	Cranch's Patent Decisions (U. S.)
Crawf. & D.	Crawford & Dix (Ir.)
Crawf. & D. Abr. Cas.	Crawford & Dix's Abridged Cases (Ir.)
CrLMag	Criminal Law Magazine
C. Rob.	Christopher Robinson's Admiralty (Eng.)
Cro. Car.	Croke Charles (Eng.)
Cro. Eliz.	Croke Elizabeth (Eng.)
Cro. Jac.	Croke James (Eng.)
Cromp. & J.	Crompton & Jervis (Eng.)
Cromp. & M.	Crompton & Meeson (Eng.)
CroswPatCas	Croswell's Collection of Patent Cases (U. S.)
Cr. & Ph.	Craig & Phillips (Eng.)
Ct. Cl.	Court of Claims (U. S.)
Cunn.	Cunningham (Eng.)
Curt.	Curtis (U. S.)
Curt. Eccl.	Curteis Ecclesiastical (Eng.)
Cush.	Cushing (Mass.)
Cyc	Cyclopedia of Law & Procedure

D

Dak.	Dakota
Dal. C. P.	Dalison's Common Pleas (Eng.)
Dall.	Dallam's Decisions (Tex.)
Dall.	Dallas (Pa.)
Dall.	Dallas (U. S.)
Dalr. Dec.	Dalrymple's Decisions (Sc.)
Daly	Daly (N. Y.)
Dan.	Daniell (Eng.)
Dana	Dana (Ky.)
Dans. & L.	Danson & Lloyd (Eng.)
D'Anv. Abr.	D'Anver's Abridgment (Eng.)
Dauph. Co.	Dauphin County (Pa.)
Dav. & M.	Davison & Merivale (Eng.)
Davys	Davys (Ir.)
Day	Day (Conn.)
D. B. & M.	Dunlop, Bell & Murray (Sc.)
D. C.	District of Columbia
D. Chipm.	D. Chipman (Vt.)
Deac.	Deacon (Eng.)
Deac. & C.	Deacon & Chitty (Eng.)
Deady	Deady (U. S.)
Dears. & B.	Dearsley & Bell (Eng.)
Dears. C. C.	Dearsley's Crown Cases (Eng.)
Deas & A.	Deas & Anderson (Eng.)
De Gex	De Gex (Eng.)
De G. F. & J.	De Gex, Fisher & Jones (Eng.)
De G. J. & S.	De Gex, Jones & Smith (Eng.)
De G. & J.	De Gex & Jones (Eng.)
De G. M. & G.	De Gex MacNaghten & Gordon (Eng.)
De G. & Sm.	De Gex & Smale (Eng.)
Del.	Delaware
Del. Ch.	Delaware Chancery
Del. Co.	Delaware County (Pa.)
Dem. Surr.	Demarest's Surrogate (N. Y.)
Den.	Denio (N. Y.)
Den. C. C.	Denison's Crown Cases (Eng.)
Dev. Ct. Cl.	Devereux's Court of Claims (U. S.)
Dick.	Dickens (Sc.)
Dill.	Dillon (U. S.)
Dirl. Dec.	Dirleton's Decisions (Sc.)
Dism.	Disney (Oh.)
D. & L.	Dowling & Lowndes (Eng.)
Dods.	Dodson's Admiralty (Eng.)
DomLR	Dominion Law Reports (Can.)
Donnelly	Donnelly (Eng.)
Dorion	Dorion's (L. C.)
Dougl.	Douglas (Eng.)
Dougl.	Douglass (Mich.)
Dow	Dow (Eng.)
Dow & Cl.	Dow & Clark (Eng.)
Dowl. P. C.	Dowling's Practice Cases (Eng.)
Dowl. P. C. N. S.	Dowling's Practice Cases New Series (Eng.)
D. & R.	Dowling & Ryland (Eng.)
Draper	Draper (U. C.)
Drew.	Drewry (Eng.)
Drinkw.	Drinkwater (Eng.)
D. & R. Mag. Cas.	Dowling & Ryland's Magistrate Cases (Eng.)
D. & R. N. P.	Dowling & Ryland's Nisi Prius (Eng.)
Dr. & Sm.	Drewry & Smale (Eng.)
Drury	Drury (Ir.)
Dr. & Wal.	Drury & Walsh (Ir.)
Dr. & War.	Drury & Warren (Ir.)
D. & Sw.	Deane & Swabey (Eng.)
Dudl.	Dudley (Ga.)
Dunlop	Dunlop (Sc.)
Durie	Durie (Sc.)
Duv.	Duval (Ky.)
Dyer	Dyer (Eng.)

E

East	East (Eng.)
EastLR	Eastern Law Reporter (Can.)
East P. C.	East's Pleas of the Crown (Eng.)
East. T.	Easter Term (Eng.)
E. & B.	Ellis & Blackburn (Eng.)
E. B. & E.	Ellis, Blackburn & Ellis (Eng.)
ECL	English Common Law
Eden	Eden (Eng.)
Edgar	Edgar (Sc.)
Edm. Sel. Cas.	Edmond's Select Cases (N. Y.)
E. D. Smith	E. D. Smith (N. Y.)
Edw.	Edwards (Eng.)
Edw.	Edwards' Chancery (N. Y.)
Edw. Adm.	Edwards' Admiralty (Eng.)

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E. & E.	Ellis & Ellis (Eng.)
EncPl&Pr	Encyclopædia of Pleading & Practice
EngCh	English Chancery
EngL&Eq	English Law & Equity
Eq. Cas. Abr.	Equity Cases Abridged (Eng.)
Eq. Rep.	Equity Reports (Eng.)
ERC	English Ruling Cases
Esp.	Espinasse's Nisi Prius (Eng.)
Euer	Euer (Eng.)
Exch.	Exchequer (Eng.)
Ex. D.	Law Reports Exchequer Division (Eng.)

F

Falc.	Falconer's Court of Sessions (Sc.)
Falc. & F.	Falconer & Fitzherbert (Eng.)
F. Cas. No.	Federal Cases (U. S.)
F. Ct. Sess.)	Fraser's Court of Sessions Cases (Sc.)
Fed.	Federal Reporter (U. S.)
Ferg. Cons.	Ferguson's Consistory (Eng.)
F. & F.	Foster & Finlason (Eng.)
Fish. Pat. Cas.	Fisher's Patent Cases (U. S.)
Fish. Pat. R.	Fisher's Patent Reports (U. S.)
Fish. Prize Cas.	Fisher's Prize Cases (U. S.)
Fitzg.	Fitzgibbon (Eng.)
Fitzh.	Fitzherbert's Abridgment (Eng.)
Fitzh. N. Br.	Fitzherbert's Natura Brevium (Eng.)
Fla.	Florida
Flipp.	Flippin (U. S.)
F. & K.	Flanagan & Kelly (Ir.)
Fonbl.	Fonblanque (Eng.)
Forbes	Forbes (Eng.)
Forr.	Forrest (Eng.)
Forrester	Forrester's Cases (Eng.)
Fortesc.	Fortescue (Eng.)
Fost.	Foster (Eng.)
Fount. Dec.	Fountainhall's Decisions (Sc.)
Fox & S.	Fox & Smith (Ir.)
Freem.	Freeman's Chancery (Eng.)
Freem.	Freeman's Chancery (Miss.)
Freem. K. B.	Freeman King's Bench (Eng.)

G

Ga.	Georgia
Ga. A.	Georgia Appeals
Ga. Dec.	Georgia Decisions
Gale	Gale (Eng.)
Gall.	Gallison (U. S.)
G. & D.	Gale & Davidson (Eng.)
Gibb. Surr.	Gibbon's Surrogate (N. Y.)
Giffard	Giffard (Eng.)
Gilb.	Gilbert's (Eng.)
Gilb. Cas.	Gilbert's Cases (Eng.)
Gilb. C. P.	Gilbert's Common Pleas (Eng.)
Gilb. Exch.	Gilbert's Exchequer (Eng.)
Gill	Gill (Md.)
Gill & J.	Gill & Johnson (Md.)
Gilm.	Gilmer (Va.)
Gilm. & Falc.	Gilmour & Falconer (Sc.)
Gilp.	Gilpin (U. S.)
Glasc.	Glascock (Ir.)
Glyn & J.	Glyn & Jameson (Eng.)
Godb.	Godbolt (Eng.)
Gosf.	Gosford (Eng.)
Gouldsb.	Gouldsborough (Eng.)
Gow	Gow (Eng.)
Grant	Grant's Cases (Pa.)
Grant Ch.	Grant's Chancery (U. C.)
Grant Err. & App.	Grant's Error & Appeal (U. C.)
Gratt.	Grattan (Va.)
Gray	Gray (Mass.)
Green Cr.	Green's Criminal Law (Eng.)
Greene	Greene (Iowa)
Gwill. T. Cas.	Gwillim's Tithe Cases (Eng.)

H

Hadd.	Haddington (Eng.)
Hagg. Adm.	Haggard's Admiralty (Eng.)
Hagg. Cons.	Haggard's Consistory (Eng.)
Hagg. Eccl.	Haggard's Ecclesiastical (Eng.)
Hailes Dec.	Hailes' Decisions (Sc.)
Hale	Hale's Common Law (Eng.)
Hale P. C.	Hale's Pleas of the Crown (Eng.)
Hall & T.	Hall & Twells (Eng.)
Halsbury L. Eng.	Halsbury's Laws of England
Handy	Handy (Oh.)
Hard.	Hardin (Ky.)
Hardres	Hardres (Eng.)
Hare	Hare (Eng.)
Harr.	Harrison's Chancery (Mich.)
Harr. Ch.	Harrison's Chancery (Eng.)
Harr. & H.	Harrison & Hodgins (U. C.)
Harr. & J.	Harrison & Johnson (Md.)
Harr. & M.	Harrison & McHenry (Md.)
Harr. & R.	Harrison & Rutherford (Eng.)
Harr. & W.	Harrison & Wollaston (Eng.)
Hask.	Haskell (U. S.)
Havil.	Haviland (Pr. Edw. Isl.)
Hawaii	Hawaiian
Hawaii Fed.	Hawaiian Federal
Hawk. P. C.	Hawkins' Pleas of the Crown (Eng.)
Hayes	Hayes (Ir.)
Hayes & J.	Hayes & Jones (Ir.)
Hay & M.	Hay & Marriott (Eng.)
Hayw.	Haywood (Tenn.)
Hayw. & H.	Haywood & Hasleton (U. S.)
HazReg	Hazard's Register (Pa.)
H. Bl.	Henry Blackstone (Eng.)
H. & C.	Hurlstone & Coltman (Eng.)
Head	Head (Tenn.)
Heisk.	Heiskell (Tenn.)
Hem. & M.	Hemming & Miller (Eng.)
Hempst.	Hempstead (U. S.)
Hen. & M.	Henning & Munford (Va.)
Het.	Hetley (Eng.)
H. & H.	Horn & Hurlstone (Eng.)
Hill	Hill (N. Y.)
Hilt.	Hilton (N. Y.)
Hil. T.	Hilary Term (Eng.)
H. L. Cas.	House of Lords Cases (Eng.)
H. & N.	Hurlstone & Norman (Eng.)
Hob.	Hobart (Eng.)
HodgEl	Hodgins' Election (U. C.)
Hodges	Hodges (Eng.)
Hoffm.	Hoffman's Chancery (N. Y.)
Hoffm. Land Cas.	Hoffman's Land Cases (U. S.)
Hog.	Hogan (Ir.)
Holmes	Holmes (U. S.)
Holt Eq.	Holt's Equity (Eng.)
Holt K. B.	Holt's King's Bench (Eng.)
Holt N. P.	Holt's Nisi Prius (Eng.)
Home	Home (Sc.)
Hope Dec.	Hope's Decisions (Sc.)
Hopk.	Hopkins' Chancery (N. Y.)
Hopk. Dec.	Hopkinson's Decisions (Pa.)
Hopw. & C.	Hopwood & Coltman (Eng.)
Hopw. & P.	Hopwood & Philbrick (Eng.)
Houst. Cr.	Houston's Criminal Cases (Del.)
How.	Howard (U. S.)
How. A. Cas.	Howard's Appeal Cases (N. Y.)
How. N. P.	Howell's Nisi Prius (Mich.)
HowPr	Howard's Practice (N. Y.)
HowPrNS	Howard's Practice New Series (N. Y.)
How. St. Tr.	Howell's State Trials (Eng.)
Hud. & B.	Hudson & Brooke (Ir.)
Hughes	Hughes (Ky.)
Hughes	Hughes (U. S.)
Hume	Hume's Decisions (Sc.)
Humphr.	Humphreys (Tenn.)
Hun	Hun (N. Y.)
Hurl. & W.	Hurlstone & Walmsley (Eng.)
Hutt.	Hutton (Eng.)

I

Ida.	Idaho
Ill.	Illinois
Ill. A.	Illinois Appellate Court
Ill. Cir.	Illinois Circuit Court
Ind.	Indiana
Ind. A.	Indiana Appellate Court
Ind. T.	Indian Territory
InsLJ	Insurance Law Journal
Int. Com. Commn.	Interstate Commerce Commission
Iowa	Iowa
[1891] Ir.	Law Reports [1891] Irish
Ir. Ch.	Irish Chancery
Ir. C. L.	Irish Common Law
Ir. Eq.	Irish Equity
Ir. R. C. L.	Irish Reports Common Law
Ir. R. Eq.	Irish Reports Equity
Irv. Just.	Irvine's Justiciary Cases (Eng.)

J

Jac.	Jacob (Eng.)
Jac. & W.	Jacob & Walker (Eng.)
J. Bridgm.	John Bridgman (Eng.)
J. & C.	Jones & Carey (Ir.)
Jebb & B.	Jebb & Bourke (Ir.)
Jebb C. C.	Jebb's Crown Cases (Ir.)
Jebb & S.	Jebb & Symes (Ir.)
Jeff.	Jefferson (Va.)
Jenk.	Jenkins (Eng.)
J. J. Marsh.	J. J. Marshall (Ky.)
J. & L.	Jones & La Touche (Eng.)
Johns.	Johnson (Eng.)
Johns.	Johnson (N. Y.)
Johns. Cas.	Johnson's Cases (N. Y.)
Johns. Ch.	Johnson's Chancery (N. Y.)
Johns. & H.	Johnson & Hemming (Eng.)
Jones Exch.	Jones' Exchequer (Ir.)
JournJur	Journal of Jurisprudence (Pa.)
J. P.	Justice of Peace (Eng.)
Jur.	Jurist (Eng.)
Jur. N. S.	Jurist New Series (Eng.)
JustLR	Justices' Law Reporter (Pa.)

K

Kames Dec.	Kames' Decisions (Sc.)
Kames Elucid.	Kames' Elucidation (Sc.)
Kames Rem. Dec.	Kames' Remarkable Decisions (Sc.)
Kames Sel. Dec.	Kames' Select Decisions (Sc.)
Kan.	Kansas
Kan. A.	Kansas Appeals
Kay	Kay (Eng.)
Kay & J.	Kay & Johnson (Eng.)

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[1901] K. B.	Law Reports [1901] King's Bench (Eng.)
Keb.	Keble (Eng.)
Keen	Keen (Eng.)
Keilw.	Keilway (Eng.)
Kel. C. C.	Kelyng's Crown Cases (Eng.)
Keyes	Keyes (N. Y.)
K. & G.	Keane & Grant (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)
Kirby	Kirby (Conn.)
Knapp	Knapp (Eng.)
Knapp & O.	Knapp & Ombler (Eng.)
Knox	Knox (N. S. Wales)
Knox & F.	Knox & Fitshardinge (N. S. Wales)
Kulp	Kulp (Pa.)
Ky.	Kentucky
Ky. Dec.	Kentucky Decisions
KyL	Kentucky Law Reporter

L

La.	Louisiana
La. Ann.	Louisiana Annual
Lab.	Labatt's District Court (Cal.)
LackJur	Lackawanna Jurist (Pa.)
LackLegN	Lackawanna Legal News (Pa.)
LackLegRec	Lackawanna Legal Record (Pa.)
Lalor	Lalor's Supplement to Hill & Denio (N. Y.)
LancBar	Lancaster Bar (Pa.)
LancLRev	Lancaster Law Review (Pa.)
Lane	Lane (Eng.)
Lans.	Lansing (N. Y.)
Latch	Latch (Eng.)
L. C.	Lower Canada
L. & C.	Leigh & Cave (Eng.)
LCJur	Lower Canada Jurist
LCLJ	Lower Canada Law Journal
LCRepSQu	Lower Canada Reports Seignorial Questions
L. D.	Law Dictionary
Ld. Ken.	Lord Kenyon (Eng.)
Ld. Raym.	Lord Raymond (Eng.)
Lea	Lea (Tenn.)
Leach C. C.	Leach's Crown Cases (Eng.)
L. ed.	Lawyers' Edition United States Supreme Court
Lee Eccl.	Lee's Ecclesiastical (Eng.)
Lee t. Hardw.	Lee temp. Hardwicke (Eng.)
LegChron	Legal Chronicle (Pa.)
LegGaz	Legal Gazette (Pa.)
Leg&InsR	Legal & Insurance Reporter (Pa.)
LegInt	Legal Intelligencer (Pa.)
LegOp	Legal Opinions (Pa.)
LegRec	Legal Record (Pa.)
LehighCoLJ	Lehigh County Law Journal (Pa.)
LehighValLR	Lehigh Valley Law Reporter (Pa.)
Leigh	Leigh (Va.)
Leon.	Leonard (Eng.)
Lev.	Levinz (Eng.)
Lew. C. C.	Lewin's Crown Cases (Eng.)
Ley	Ley (Eng.)
L. G.	Law Glossary
Liberian L.	Liberian Law
Litt.	Littell (Ky.)
Litt.	Littleton (Eng.)
Litt. Sel. Cas.	Littell's Select Cases (Ky.)
L. J. Adm.	Law Journal Admiralty New Series (Eng.)
L. J. Bankr.	Law Journal Bankruptcy New Series (Eng.)
L. J. Ch.	Law Journal Chancery New Series (Eng.)
L. J. Ch. O. S.	Law Journal Chancery Old Series (Eng.)
L. J. C. P.	Law Journal Common Pleas New Series (Eng.)
L. J. C. P. O. S.	Law Journal Common Pleas Old Series (Eng.)
L. J. Eccl.	Law Journal Ecclesiastical New Series (Eng.)
L. J. Exch.	Law Journal Exchequer New Series (Eng.)
L. J. Exch. O. S.	Law Journal Exchequer Old Series (Eng.)
L. J. K. B.	Law Journal King's Bench New Series (Eng.)
L. J. K. B. O. S.	Law Journal King's Bench Old Series (Eng.)
L. J. M. C.	Law Journal Magistrate Cases New Series (Eng.)
L. J. M. C. O. S.	Law Journal Magistrate Cases Old Series (Eng.)
L. J. P. C.	Law Journal Privy Council New Series (Eng.)
L. J. P. D. & Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
L. J. P. & M.	Law Journal Probate & Matrimonial New Series (Eng.)
L. J. Q. B.	Law Journal Queen's Bench New Series (Eng.)
Ll. & G. t. Pl.	Lloyd & Goold temp. Plunket (Ir.)
Ll. & G. t. S.	Lloyd & Goold temp. Sugden (Ir.)
Ll. & W.	Lloyd & Welsby (Eng.)
L. & M.	Lowndes & Maxwell (Eng.)
L. M. & P.	Lowndes, Maxwell & Pollack (Eng.)
Loc. Gov.	Local Government (Eng.)
Lofft	Lofft (Eng.)
Longf. & T.	Longfield & Townsend (Ir.)
Lowell	Lowell (U. S.)
LRA	Lawyers' Reports Annotated
L. R. A. & E.	Law Reports Admiralty & Ecclesiastical (Eng.)
LRANS	Lawyers' Reports Annotated New Series
L. R. C. C.	Law Reports Crown Cases (Eng.)
L. R. Ch.	Law Reports Chancery Appeal Cases (Eng.)
L. R. C. P.	Law Reports Common Pleas Cases (Eng.)
L. R. Eq.	Law Reports Equity Cases (Eng.)
L. R. Exch.	Law Reports Exchequer Cases (Eng.)
L. R. H. L.	Law Reports House of Lords (English & Irish Appeal Cases)
L. R. H. L. Sc.	Law Reports House of Lords (Scotch Appeal Cases)
L. R. Indian App.	Law Reports Indian Appeals (Eng.)
L. R. Ir.	Law Reports Irish
L. R. P. C.	Law Reports Privy Council (Eng.)
L. R. P. & D.	Law Reports Probate & Divorce (Eng.)
L. R. Q. B.	Law Reports Queen's Bench Cases (Eng.)
LT	Law Times (Pa.)
LTNS	Law Times New Series (Pa.)
L. T. Rep. N. S.	Law Times Reports New Series (Eng.)
Lush.	Lushington's Admiralty (Eng.)
Lutw.	Lutwyche (Eng.)
Lutw. Reg. Cas.	Lutwyche's Registration Cases (Eng.)
LusLegObs	Luserne Legal Observer (Pa.)
LusLegReg	Luserne Legal Register (Pa.)

M

MacA. Pat. Cas.	MacArthur's Patent Cases (D. C.)
MacFarl.	MacFarlane (Sc.)
Macl. & R.	Maclean & Robinson (Eng.)
Macn. & G.	Macnaghten & Gordon (Eng.)
Macph.	Macpherson (Sc.)
Macph. S. & L.	Macpherson, Shirreff & Lee (Sc.)
Macq.	Macqueen's Scotch Appeal Cases
Madd.	Maddock (Eng.)
Madd. Ch. Pr.	Maddock's Chancery Practice (Eng.)
Man.	Manitoba Law
ManLJ	Manitoba Law Journal
Mann. Unrep. Cas.	Manning's Unreported Cases (La.)
Manson	Manson (Eng.)
Man. t. Wood	Manitoba temp. Wood
March	March (Eng.)
Mars. Adm.	Marsden's Admiralty (Eng.)
Marsh.	Marshall (Eng.)
Mart.	Martin Old Series (La.)
Mart. N. S.	Martin New Series (La.)
Mart. & Y.	Martin & Yerger (Tenn.)
Mason	Mason (U. S.)
Mass.	Massachusetts
McAll.	McAllister (U. S.)
McC.	McCahon (Kan.)
McClell.	McClelland (Eng.)
McClell. & Y.	McClelland & Younge (Eng.)
McCrary	McCrary (U. S.)
McG.	McGloin (La.)
McLean	McLean (U. S.)
Md.	Maryland
Md. Ch.	Maryland Chancery
Me.	Maine
Meg.	Megone (Eng.)
Meigs	Meigs (Tenn.)
Meriv.	Merivale (Eng.)
Metc.	Metcalf (Mass.)
Metc.	Metcalfe (Ky.)
M. & G.	Manning & Granger (Eng.)
M. & H.	Murphy & Hurlstone (Eng.)
Mich.	Michigan
Mich. N. P.	Michigan Nisi Prius
Mich. T.	Michaelmas Term (Eng.)
Miles	Miles (Pa.)
Milw.	Milward (Ir.)
Minn.	Minnesota
Minor	Minor (Ala.)
Misc.	Miscellaneous (N. Y.)
Miss.	Mississippi
M. & M.	Moody & Malkin (Eng.)
Mo.	Missouri
Mo. A.	Missouri Appeals
Moak	Moak (Eng.)
Mod.	Modern (Eng.)
Molloy	Molloy (Ir.)
Mon.	Monaghan (Pa.)
Mont.	Montana
Mont.	Montagu (Eng.)
Mont. & A.	Montagu & Ayrton (Eng.)
Mont. & B.	Montagu & Bligh (Eng.)
Mont. & C.	Montagu & Chitty (Eng.)
Mont. D. & De G.	Montagu, Deacon & DeGex (Eng.)
Montg. Co.	Montgomery County Law Reporter (Pa.)
Mont. & M.	Montagu & McArthur (Eng.)
Montr. Cond. Rep.	Montreal Condensed Reports
Montr. Leg. N.	Montreal Legal News
Montr. Q. B.	Montreal Law Reports Queen's Bench
Montr. Super.	Montreal Law Reports Super. Court
Moody C. C.	Moody's Crown Cases (Eng.)
Moore C. P.	Moore's Common Pleas (Eng.)
Moore Indian App.	Moore's Indian Appeals (Eng.)
Moore K. B.	Moore's King's Bench (Eng.)
Moore P. C.	Moore's Privy Council Old Series (Eng.)
Moore P. C. N. S.	Moore's Privy Council New Series (Eng.)
Moore & S.	Moore & Scott (Eng.)
Morr.	Morris (Iowa)
Morr. Bankr. Cas.	Morrell's Bankruptcy Cases (Eng.)
Morr. St. Cas.	Morris' State Cases (Miss.)
Mosely	Mosely (Eng.)
M. & P.	Moore & Payne (Eng.)
M. & R.	Manning & Ryland (Eng.)
M. & Rob.	Moody & Robinson (Eng.)
M. & S.	Maule & Selwyn (Eng.)
MunCorpCas	Municipal Corporation Cases
Munf.	Munford (Va.)
Murr.	Murray (Sc.)
M. & W.	Meeson & Welsby (Eng.)
Myl. & C.	Mylne & Craig (Eng.)
Myl. & K.	Mylne & Keen (Eng.)
Myr. Prob.	Myrick's Probate (Cal.)

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N

NatBankrReg	National Bankruptcy Register (U. S.)
N. B.	New Brunswick
N. Benl.	New Benloe (Eng.)
N. B. Eq.	New Brunswick Equity
N. C.	North Carolina
N. Chipm.	N. Chipman (Vt.)
N. D.	North Dakota
NE	Northeastern Reporter
Nebr.	Nebraska
Nebr. (Unoff.)	Nebraska Unofficial
Nels.	Nelson (Eng.)
Nev.	Nevada
Newb. Adm.	Newberry's Admiralty (U. S.)
Newfoundl.	Newfoundland
New Rep.	New Reports in all Courts (Eng.
New Sess. Cas.	New Session Cases (Eng.)
New Zeal. L.	New Zealand Law
N. H.	New Hampshire
N. J. Eq.	New Jersey Equity
N. J. L.	New Jersey Law
N. J. L. J.	New Jersey Law Journal
N. M.	New Mexico
N. & M.	Nevile & Manning (Eng.)
N. & Macn.	Nevile & Macnamara (Eng.)
Nolan	Nolan (Eng.)
North.	Northington (Eng.)
North. Co.	Northampton County Reporter (Pa.)
NorthumbCoLegN	Northumberland County Legal News (Pa.)
Notes of Cas.	Notes of Cases (Eng.)
Noy	Noy (Eng.)
N. & P.	Nevile & Perry (Eng.)
N. S.	Nova Scotia
N. S. Dec.	Nova Scotia Decisions
N. S. Wales	New South Wales
N. S. Wales L.	New South Wales Law
NW	Northwestern Reporter
N. Y.	New York
NYAnnCas	New York Annotated Cases
N. Y. Annot. Dig.	New York Annotated Digest
NYCityCt	New York City Court
NYCityCtSuppl	New York City Court Supplement
NYCivProc	New York Civil Procedure
N. Y. Cr.	New York Criminal
NYLegObs	New York Legal Observer
NYLRec	New York Law Record
NYMonthLBul	New York Monthly Law Bulletin
NYS	New York Supplement
NYSt	New York State Reporter
N. Y. Super.	New York Superior Court
NYWklyDig	New York Weekly Digest

O

O. Bridgm.	Orlando Bridgman (Eng.)
Oh.	Ohio
Oh. Cir. Ct.	Ohio Circuit Court
Oh. Cir. Ct. N. S.	Ohio Circuit Court New Series
Oh. Cir. Dec.	Ohio Circuit Decisions
Oh. Dec. (Reprint)	Ohio Decisions (Reprint)
OhFDec	Ohio Federal Decisions
OhLJ	Ohio Law Journal
OhNP	Ohio Nisi Prius
Oh. Prob.	Ohio Probate
OhS&CP	Ohio Superior & Common Pleas Decisions
Oh. St.	Ohio State
Okl.	Oklahoma
Okl. Cr.	Oklahoma Criminal
Olcott	Olcott (U. S.)
O'M. & H.	O'Malley & Hardcastle (Ir.)
Ont.	Ontario
Ont. A.	Ontario Appeal
OntElCas	Ontario Election Cases
Ont. L.	Ontario Law
Ont. Pr.	Ontario Practice
OntWN	Ontario Weekly Notes
OntWR	Ontario Weekly Reporter
Op. Atty.-Gen.	Opinions of Attorneys-General (U. S.)
Or.	Oregon
Overt.	Overton (Tenn.)
Owen	Owen (Eng.)

P

P	Pacific Reporter
[1891] P.	Law Reports [1891] Probate (Eng.)
Pa.	Pennsylvania State
Pa. Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa. Co.	Pennsylvania County Court
Pa. C. Pl.	Common Pleas (Pa.)
Pa. Dist.	Pennsylvania District
Paige	Paige's Chancery (N. Y.)
Paine	Paine (U. S.)
PaLJ	Pennsylvania Law Journal
PaLJR	Clark's Pennsylvania Law Journal Reports
Palm.	Palmer (Eng.)
Park.	Parker (Eng.)
Park. Cr.	Parker's Criminal (N. Y.)
Park. Ins.	Parker's Insurance (Eng.)
Pars. Eq. Cas.	Parsons' Equity Cases (Pa.)
Pa. Super.	Pennsylvania Superior Court
Paton App. Cas.	Paton's Appeal Cases (Sc.)
PatrickElCas	Patrick's Election Cases (Can.)
Patt. & H.	Patton & Heath (Va.)
P. D.	Law Reports Probate Division (Eng.)
P. & D.	Perry & Davison (Eng.)
Peake N. P.	Peake's Nisi Prius (Eng.)
Pearson	Pearson (Pa.)
Peck	Peck (Tenn.)
Pennyp.	Pennypacker (Pa.)
Penr. & W.	Penrose & Watts (Pa.)
Pet.	Peters (U. S.)
Pet. Adm.	Peters' Admiralty (U. S.)
Pet. C. C.	Peters' Circuit Court (U. S.)
Phil.	Phillips (Eng.)
Phila.	Philadelphia (Pa.)
Philippine	Philippine
Phillim.	Phillimore Ecclesiastical (Eng.)
Pick.	Pickering (Mass.)
Pig. & R.	Pigott & Rodwell (Eng.)
Pig. Rec.	Pigott's Recoveries (Eng.)
Pinn.	Pinney (Wis.)
Pittsb.	Pittsburgh (Pa.)
PittsbLegJ	Pittsburgh Legal Journal (Pa.)
PittsbLegJNS	Pittsburgh Legal Journal New Series (Pa.)
P. & K.	Perry & Knapp (Eng.)
Plowd.	Plowden (Eng.)
Pollexf.	Pollexfen (Eng.)
Poph.	Popham (Eng.)
Port.	Porter (Ala.)
Porto Rico	Porto Rico
Porto Rico Fed.	Porto Rico Federal
Pow. Surr.	Powers' Surrogate (N. Y.)
P. R. & D. El. Cas.	Power, Rodwell & Dew's Election Cases (Eng.)
Prec. Ch.	Precedents in Chancery (Eng.)
Pr. Edw. Isl.	Prince Edward Island
Price	Price (Eng.)
Price Pr. Cas.	Price's Practice Cases (Eng.)
Pr. Rep.	Practice Reports (Eng.)
P. Wms.	Peere-Williams (Eng.)

Q

Q. B.	Queen's Bench (Adolphus & Ellis New Series) (Eng.)
[1891] Q. B.	Law Reports [1891] Queen's Bench (Eng.)
Q. B. D.	Law Reports Queen's Bench Division (Eng.)
Queensl. J. P.	Queensland Justice of the Peace
Queensl. L.	Queensland Law
QueenslLJ	Queensland Law Journal
Que. L.	Quebec Law
Que. Pr.	Quebec Practice
Que. Q. B.	Quebec Official Reports Queen's Bench
Que. Rev. Jud.	Quebec Revised Judicial
Que. Super.	Quebec Official Reports Superior Court
Quincy	Quincy (Mass.)

R

Rand.	Randolph (Va.)
Rawle	Rawle (Pa.)
R. & Can. Cas.	Railway & Canal Cases (Eng.)
R. & Can. Tr. Cas.	Railway & Canal Traffic Cases (Eng.)
Redf. & B.	Redfield & Bigelow's Leading Cases (Eng.)
Redf. R. Cas.	Redfield's Railway Cases (Eng.)
Redf. Surr.	Redfield's Surrogate (N. Y.)
Reeve Eng. L.	Reeve's English Law
Reports	Reports (Eng.)
Reprint	English Reprint
Rep. t. Finch	Cases temp. Finch (Eng.)
Res. & Eq. Judgm.	Reserved & Equity Judgments (N. S. Wales)
RevCrit	Revue Critique (Can.)
RevdeJur	Revue de Jurisprudence (Can.)
RevdeLegis	Revue de Legislation (Can.)
RevLeg	Revue Legale (Can.)
RevLegNS	Revue Legale New Series (Can.)
Rev. Rep.	Revised Reports (Eng.)
R. I.	Rhode Island
Rich. C. P.	Richardson's Practice Common Pleas (Eng.)
Ridg. L. & S.	Ridgeway, Lapp & Schoale (Ir.)
Ridg. P. C.	Ridgeway's Parliament Cases (Ir.)
Ridg. t. Hardw.	Ridgeway temp. Hardwicke (Eng.)
R. & M.	Ryan & Moody (Eng.)
R. M. Charlt.	R. M. Charlton (Ga.)
Rob.	Robinson (La.)
Rob.	Robinson (Va.)
Robb. Pat. Cas.	Robb's Patent Cases (U. S.)
Robert. App. Cas.	Robertson's Appeal Cases (Sc.)
Rob. Eccl.	Robertson's Ecclesiastical (Eng.)
Robin. App. Cas.	Robinson's Appeal Cases (Sc.)
Rolle	Rolle (Eng.)
Rolle Abr.	Rolle's Abridgment (Eng.)
Rom. Cas.	Romilly's Notes of Cases (Eng.)
Root	Root (Conn.)
Rose	Rose (Eng.)
Ross Lead. Cas.	Ross' Leading Cases (Eng.)
R. & R.	Russell & Ryan Crown Cases (Eng.)
Russ.	Russell (Eng.)
Russ. & C. Eq. Cas.	Russell's & Chesley's Equity Cases (N. S.)
Russ. Eq. Cas.	Russell's Equity Cases (N. S.)
Russ. & M.	Russell & Mylne (Eng.)

S

S	Southern Reporter
Salk.	Salkeld (Eng.)

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Sandf. Ch.	Sandford's Chancery (N. Y.)
Sask. L.	Saskatchewan Law
Saund.	Saunders (Eng.)
Saund. & C.	Saunders & Cole (Eng.)
Sau. & Sc.	Sausse & Scully (Ir.)
S. Austr. L.	South Australia Law
Sav.	Savile (Eng.)
Sawy.	Sawyer (U. S.)
Say.	Sayer (Eng.)
S. C.	South Carolina
[1907] S. C.	Court of Session Cases (Sc.)
S. C. Eq.	South Carolina Equity
Sch. & Lef.	Schoales & Lefroy (Ir.)
[1907] S. C. (J.)	Court of Justiciary Cases (Sc.)
Sc. Jur.	Scottish Jurist
S. C. L.	South Carolina Law
Sc. L. Rep.	Scottish Law Reporter
Scott	Scott (Eng.)
Scott N. R.	Scott's New Reports (Eng.)
Sc. Sess. Cas.	Scotch Court of Session Cases
SCt	Supreme Court Reporter (U. S.)
S. D.	South Dakota
SE	Southeastern Reporter
Sel. Cas. Ch.	Select Cases in Chancery (Eng.)
Seld.	Selden's Notes (N. Y.)
Selw.	Selwyn's Nisi Prius (Eng.)
Serg. & R.	Sergeant & Rawle (Pa.)
Sess. Cas.	Court of Session Cases (Eng.)
Shaw	Shaw (Sc.)
Shaw & D.	Shaw & Dunlop (Sc.)
Shaw Dec.	Shaw's Digest of Decisions (Sc.)
Shaw & M.	Shaw & MacLean (Sc.)
Sheld.	Sheldon (N. Y.)
Sheph. Sel. Cas.	Shepherd's Select Cases (Ala.)
Show.	Shower (Eng.)
Show. P. C.	Shower's Parliament Cases (Eng.)
Sid.	Siderfin (Eng.)
Silv. A.	Silvernail's Appeals (N. Y.)
Silv. Sup.	Silvernail's Supreme (N. Y.)
Sim.	Simons (Eng.)
Sim. N. S.	Simons New Series (Eng.)
Sim. & St.	Simons & Stuart (Eng.)
Skin.	Skinner (Eng.)
Smale & G.	Smale & Giffard (Eng.)
Smith	Smith (Ind.)
Smith	Smith (N. H.)
Smith & B.	Smith & Batty (Ir.)
Smith K. B.	Smith's King's Bench (Eng.)
Smith Lead. Cas.	Smith's Leading Cases (Eng.)
Smith Reg.	Smith's Registration (Eng.)
Sm. & M. Ch.	Smedes & Marshall Chancery (Miss.)
Smythe	Smythe (Ir.)
Sneed	Sneed (Tenn.)
Sol. J.	Solicitor's Journal (Eng.)
Spinks	Spinks' Admiralty (Eng.)
Spottisw.	Spottiswoode (Sc.)
Spottisw. Eq.	Spottiswoode's Equity (Sc.)
Sprague	Sprague (U. S.)
Stair	Stair (Sc.)
Stark.	Starkie Nisi Prius (Eng.)
Stew.	Stewart (Ala.)
Stew.	Stewart's Reports (N. S.)
Stew. & P.	Stewart & Porter (Ala.)
Stockt. Vice-Adm.	Stockton's Vice-Admiralty (N. B.)
Story	Story (U. S.)
Str.	Strange (Eng.)
Stuart Vice-Adm.	Stuart's Vice-Admiralty (L. C.)
Stu. M. & P.	Stuart, Milne & Peddie (Sc.)
Style	Style (Eng.)
Sumn.	Sumn. (U. S.)
SusqLegChron	Susquehanna Legal Chronicle (Pa.)
SW	Southwestern Reporter
Swab.	Swabey's Admiralty (Eng.)
Swab. & Tr.	Swabey & Tristram (Eng.)
Swan	Swan (Tenn.)
Swanst.	Swanston (Eng.)

T

Taml.	Tamlyn (Eng.)
Taney	Taney (U. S.)
Tapp.	Tappan (Oh.)
Taunt.	Taunton (Eng.)
Taylor	Taylor (U. C.)
T. B. Mon.	T. B. Monroe (Ky.)
Tenn.	Tennessee
Tenn. Cas.	Unreported Tennessee Cases
Tenn. Ch.	Tennessee Chancery
Tenn. Ch. A.	Tennessee Chancery Appeals
Terr. L.	Territories Law (Northwest Territories)
Tex.	Texas
Tex. A.	Texas Court of Appeals
Tex. A. Civ. Cas.	White & Wilson's Civil Cases (Tex.)
Tex. Civ. A.	Texas Civil Appeals
Tex. Cr.	Texas Criminal
Tex. Suppl.	Texas Supplement
Tex. Unrep. Cas.	Posey's Unreported Cases (Tex.)
Thach. Cr.	Thacher's Criminal Cases (Mass.)
Thomps. & C.	Thompson & Cook (N. Y.)
Thomps. Cas.	Thompson's Cases (Tenn.)
Tinw.	Tinwald (Sc.)
T. Jones	Thomas Jones (Eng.)
T. L. R.	Times Law Reports (Eng.)
T. & M.	Temple & Mew (Eng.)
Toth.	Tothill (Eng.)
T. R.	Term Reports (Durnford & East) (Eng.)
Transcr. A.	Transcript Appeals (N. Y.)
T. Raym.	Thomas Raymond (Eng.)
Treas. Dec.	Treasury Decisions (U. S.)
Tr. & H. Pr.	Troubat & Haly's Practice (Pa.)
Trin. T.	Trinity Term (Eng.)
Truem. Eq. Cas.	Trueman's Equity Cases (N. B.)
Tuck. Sel. Cas.	Tucker's Select Cases (Newfoundland)
Tuck. Surr.	Tucker's Surrogate (N. Y.)
T. U. P. Charlt.	T. U. P. Charlton (Ga.)
Turn. & R.	Turner & Russell (Eng.)
Tyler	Tyler (Vt.)
Tyrw.	Tyrwhitt (Eng.)
Tyrw. & G.	Tyrwhitt & Granger (Eng.)

U

U. C.	Upper Canada
U. C. C. P.	Upper Canada Common Pleas
U. C. Q. B.	Upper Canada Queen's Bench
U. C. Q. B. O. S.	Upper Canada Queen's Bench Old Series
U. S.	United States
Utah	Utah

V

Va.	Virginia
Va. Cas.	Virginia Cases
Van Ness Prize Cas.	Van Ness' Prize Cases (U. S.)
Vaugh.	Vaughan (Eng.)
Vaux	Vaux's Decisions (Pa.)
Vent.	Ventris (Eng.)
Vern.	Vernon's Cases (Eng.)
Vern. Ch.	Vernon's Chancery (Eng.)
Vern. & S.	Vernon & Scriven (Ir.)
Ves.	Vesey Senior (Eng.)
Ves. & B.	Vesey & Beames (Eng.)
Ves. Jr.	Vesey Junior (Eng.)
Ves. Jr. Suppl.	Vesey Junior Supplement (Eng.)
Ves. Suppl.	Vesey Senior Supplement (Eng.)
Vict.	Victorian
Vict. L.	Victorian Law
VictLT	Victorian Law Times
Vict. St. Tr.	Victorian State Trials
Vin. Abr.	Viner's Abridgment (Eng.)
Vt.	Vermont

W

Walk.	Walker (Pa.)
Walk.	Walker's Chancery (Mich.)
Wall.	Wallace (U. S.)
Wallis	Wallis (Ir.)
Wall. Jr.	Wallace Junior (U. S.)
Wall. Sr.	Wallace Senior (U. S.)
Ware	Ware (U. S.)
Wash.	Washington
Wash.	Washington (Va.)
Wash. C. C.	Washington Circuit Court (U. S.)
Wash. T.	Washington Territory
Watts	Watts (Pa.)
Watts & S.	Watts & Sergeant (Pa.)
W. Bl.	William Blackstone (Eng.)
Web. Pat. Cas.	Webster's Patent Cases (Eng.)
Welsh	Welsh Registry Cases (Ir.)
Wend.	Wendell (N. Y.)
West	West (Eng.)
WestLJ	Western Law Journal (Oh.)
WestLMonth	Western Law Monthly (Oh.)
WestLR	Western Law Reporter (Can.)
WestLT	Western Law Times (Can.)
West t. Hardw.	West temp. Hardwicke (Eng.)
WestWkly	Western Weekly (Can.)
Whart.	Wharton (Pa.)
Wheat.	Wheaton (U. S.)
Wheel. Cr.	Wheeler's Criminal (N. Y.)
White & T. Lead. Cas. Eq.	White & Tudor's Leading Cases in Equity (Eng.)
Whitm. Pat. Cas.	Whitman's Patent Cases (U. S.)
Wight.	Wightwicke (Eng.)
Wilcox	Wilcox (Pa.)
Willes	Willes (Eng.)
Wilm.	Wilmot's Notes (Eng.)
Wils.	Wilson (Ind.)
Wils. Ch.	Wilson's Chancery (Eng.)
Wils. C. P.	Wilson's Common Pleas (Eng.)
Wils. Exch.	Wilson's Exchequer (Eng.)
Wils. P. C.	Wilson's Privy Council (Eng.)
Wils. & S.	Wilson & Shaw (Sc.)
Winch	Winch (Eng.)
Wis.	Wisconsin
W. Jones	William Jones (Eng.)
W. Kel.	William Kelynge (Eng.)
WklyLGaz	Weekly Law Gazette (Oh.)
WklyNC	Weekly Notes of Cases (Pa.)
Wkly. Rep.	Weekly Reporter (Eng.)
W. N.	Weekly Notes (Eng.)
Wolf. & B.	Wolferstan & Bristow's Election Cases (Eng.)
Wolf. & D.	Wolferstan & Dew's Election Cases (Eng.)
Woll.	Wollastan (Eng.)
Woodb. & M.	Woodbury & Minot (U. S.)

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Woods	Woods (U. S.)
Woodw.	Woodward's Decisions (Pa.)
Woolw.	Woolworth (U. S.)
Wright	Wright (Oh.)
W. Rob.	William Robinson's Admiralty (Eng.)
W. Va.	West Virginia
W. W. & D.	Willmore, Wollaston & Davison (Eng.)
W. W. & H.	Willmore, Wollaston & Hodges (Eng.)
Wyo.	Wyoming
Wythe	Wythe's Chancery (Va.)
Wy. & W.	Wyatt & Webb (Vict.)
Wy. W. & A'Beck.	Wyatt, Webb & A'Beckett (Vict.)

Y

Y. B.	Year Book (Eng.)
Y. & C. Exch.	Younge & Collyer's Exchequer (Eng.)
Y. & Coll.	Younge & Collyer's Chancery (Eng.)
Yeates	Yeates (Pa.)
Yelv.	Yelverton (Eng.)
Yerg.	Yerger (Tenn.)
Y. & J.	Younge & Jervis (Eng.)
YorkLegRec	York Legal Record (Pa.)
Young Adm.	Young's Admiralty Decisions (N. S.)
Younge	Younge Exchequer (Eng.)

OTHER ABBREVIATIONS

aff	affirmed in, or affirming
aff reh	affirmed on rehearing, or affirming on rehearing
allowing app	allowing appeal
allowing reh	allowing rehearing
Alta.	Alberta
ante	before (in same volume)
app allowed	appeal allowed
app den	appeal denied
app dism	appeal dismissed
appr	approved in, or approving
B.C.	British Columbia
Can.	Canada
cert	certified from, or certified to
cit	cited in, or citing
crit	criticised in, or criticising
den app	denying appeal
den rearg	denying reargument
den reh	denying rehearing
den writ of error	denying writ of error
disappr	disapproved in, or disapproving
dism app	dismissing appeal
dis. op.	dissenting opinion
dist	distinguished in, or distinguishing
Eng.	England
expl	explained in, or explaining
foll	followed in, or following
infra	below (in same article or treatise)
Man.	Manitoba
mod	modified in, or modifying
N.B.	New Brunswick
Newfoundl.	Newfoundland
New Zeal.	New Zealand
N.S.	Nova Scotia
N.S. Wales	New South Wales
overr	overruled in, or overruling
post	after (in same volume)
Que.	Quebec
Queensl.	Queensland
quot	quoted in, or quoting
rearg den	reargument denied
reh allowed	rehearing allowed
reh den	rehearing denied
rev	reversed in, or reversing
rev reh	reversed on rehearing, or reversing on rehearing
Sask.	Saskatchewan
S. Austr.	South Australia
supra	above (in same article or treatise)
Terr.	Northwest Territories
transf	transferred from, or transferred to
Vict.	Victoria
writ of error den	writ of error denied

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CYC-CORPUS JURIS PARALLEL REFERENCE TABLE

The following table shows where every proposition in CYC (if still the law) is located in CORPUS JURIS. This table translates CYC citations into CORPUS JURIS citations. No matter where you get a CYC citation, whether in an opinion, a brief, an annotated statute, a textbook, or elsewhere, this table gives the corresponding CORPUS JURIS citation. The CYC Index and Concordance, by means of this table, becomes a Key to CORPUS JURIS, equally as well as to CYC. **This table makes Cyc Citations available in Corpus Juris.**

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CORPUS JURIS

VOLUME TWO

ADULTERATION

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[Matters not in this Title, treated elsewhere in this Work, see Cross References infra this page]

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CROSS REFERENCES

Imitation of, or substitute for, article of food or drink see **Food** [19 Cyc 1086]; **Intoxicating Liquors** [23 Cyc 43, 163].
Inspection of:
Articles of merchandise by public authorities see **Inspection** [22 Cyc 1363].
Fertilizer see **Agriculture** [2 Cyc 70].
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See also **Druggists** [14 Cyc 1078]; **Food** [19 Cyc 1084]; **Intoxicating Liquors** [23 Cyc 43]; **Poisons** [31 Cyc 896].

I. DEFINITION

[§ 1] **In its ordinary and usual sense** "adulteration" is the act of corrupting, debasing, or making impure by the admixture of a foreign and inferior substance.[1] And when the term is used in a statute which does not contain a definition of it, or otherwise indicate that it is used in a particular sense, it will

1. Black L. D.; Bouvier L. D.; Standard D.; Webster D.; U. S. v. St. Louis Coffee, etc., Mills, 189 Fed. 191, 193; Grosvenor v. Duffy, 121 Mich. 220, 222, 80 NW 19; St. Louis v. Jud, 236 Mo. 1, 6, 139 SW 441; Com. v. Hufnal, 185 Pa. 376, 377, 39 A 1052 [rev 4 Pa. Super. 301]; Com. v. Hough, 1 Pa. Dist. 51, 53.

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be presumed to have been used in its ordinary and usual sense.[2]

Statutory definitions. The term is expressly defined in many of the statutes prohibiting the sale of adulterated products generally or prohibiting the adulteration of particular articles, and under these statutory definitions actual addition of a debasing ingredient is not always essential.[3] Thus, under various statutes, adulteration may consist in abstracting from the product some necessary or valuable constituent,[4] in failing to remove before sale or in the process of manufacture impurities originally existing in the article,[5] or in selling one article under the name of another, or selling an imitation of the article intended to be purchased;[6] and it has even been provided by statute that the term "adulterated" shall include not only mixtures, but also diseased, decomposed, or tainted articles of food, whether manufactured or unmanufactured, and milk produced from diseased animals.[7]

Failure to maintain statutory standard of quality. Many of the statutes prescribe a standard of quality for particular articles or classes of articles, and a failure to maintain the standard is deemed to constitute adulteration regardless of the question whether anything has been actually added to or taken from the thing sold.[8] On the other hand, under some statutes, articles have been held not to be adulterated, although a foreign substance, not a necessary or usual ingredient, has been mixed therewith.[9]

[a] **Other definitions.**—A "treatment to simulate a better article;" an "artificial concealment of defects." Webster D. [quot St. Louis v. Jud, 236 Mo. 1, 6, 139 SW 441].

[b] **The term "adulteration" is derived** from the Latin adultero, which in its various inflections signifies to defile, to debase, to corrupt, to sophisticate, to falsify, to counterfeit, etc. Com. v. Curry, 4 Pa. Super. 356, 360, 40 WklyNCas 369 [rev 6 Pa. Dist. 143, 18 Pa. Co. 513].

[c] **"'Adulterate' means** to corrupt, debase, or make impure by an admixture of a foreign or baser substance." St. Louis v. Jud, 236 Mo. 1, 6, 139 SW 441 (per Lamm, J.). "In common usage, as recognized by lexicographers, the word 'adulterate,' applied to food, means to add some baser or cheaper substance, or to extract some necessary constituent, so that the article adulterated is, by reason thereof, rendered impure, spurious and inferior." Com. v. Hartman, 6 Pa. Dist. 136, 137 (per Audenried, J.). "One of the definitions of the term 'adulterate,' given by Worcester, is 'to corrupt by some foreign mixture, or by intermixing what is less valuable.'" Per Smith, P. J., in Peo. v. West, 44 Hun 162, 164, 7 NYSt 843, 26 NYWklyDig 215, 6 N. Y. Cr. 382 [aff 106 N. Y. 293, 12 NE 610, 60 AmR 452]. "In the absence of statutory definition, resort must be had to the dictionary, which gives as the meaning of adulterate, 'to corrupt, debase, or make impure by an admixture of baser materials;' that is to say, to inject something into the thing to be adulterated." Com. v. Hough, 1 Pa. Dist. 51, 53 (per Arnold, J.).

2. Pierre Viaus Maple Co. v. Dairy, etc., Comr., 154 Mich. 73, 76, 117 NW 553 (where it is said: "The word 'adulteration' in this statute means the mixture of any foreign substance, wholesome or unwholesome, with maple sugar").

[a] **The dilution of milk with water** is an adulteration. Peo. v. West, 44 Hun 162, 7 NYSt 843, 26 NYWklyDig 215, 6 N. Y. Cr. 382 [aff 106 N. Y. 293, 12 NE 610, 60 AmR 452]. But see Peo. v. Fauerback, 5 Park. Cr. (N. Y.) 311 (where it was held to be a question of fact for the jury as to whether the dilution of milk with water constituted an adulteration).

[b] **The term is not confined to the act of contamination,** but refers also to the condition of the product as a result of debasement. Hence, a statute entitled "An act to provide against the adulteration of food, and providing for the enforcement thereof" is effective to punish the sale of adulterated food, notwithstanding the subject of sale is not specifically mentioned in the title. Com. v. Arow, 22 Pa. Super. 1, 3.

3. See the statutes.

4. St. John v. New York, 201 U. S. 633, 26 SCt 554, 50 L. ed. 896, 5 Ann Cas 909; Reiter v. State, 109 Md. 235, 71 A 975; Com. v. Hufnal, 185 Pa. 376, 378, 39 A 1052 [rev 4 Pa. Super. 301]; Stephens' Case, 5 Pa. Dist. 104; Dyke v. Gower, [1892] 1 Q. B. 220; Pain v. Boughtwood, 24 Q. B. D. 353. And see Food [19 Cyc 1084].

[a] **A sale of cocoa,** a product resulting from removing the hulls and a portion of the oil of cocoa beans, drying, and powdering, is not a violation of the statute defining adulteration and prohibiting the sale of food from which "any valuable or necessary constituent or ingredient" has been abstracted. Rose v. State, 11 Oh. Cir. Ct. 87, 88, 5 Oh. Cir. Dec. 72.

[b] **Substitution of inferior substance.**—The provision of the statute that an article is adulterated "if any inferior or cheaper substance or substances have been substituted wholly or in part for it" should be construed in connection with the following provision, "if any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it"; and therefore means the substitution of a cheaper or inferior substance for an essential ingredient. Peo. v. Jennings, 132 Mich. 662, 667, 94 NW 216.

5. Stowell v. Standard Oil Co., 139 Mich. 18, 102 NW 227.

6. Groff v. State, 171 Ind. 547, 550, 85 NE 769, 17 AnnCas 133; State v. Dreher, 55 Oh. St. 115, 116, 44 NE 510; Stephens' Case, 5 Pa. Dist. 104.

[a] **New York statute; adulterated lemonade.**—Where defendant sold a preparation known as "Eiffel Tower Lemonade," which it appeared was manufactured of sugar, tartaric acid, citric acid, and five per cent oil of lemon, it was held that a conviction would properly lie under the New York Public Health Law § 41, for selling the product "under the name of another article." Peo. v. Park, 60 App. Div. 255, 258, 69 NYS 1120.

[b] **English statute; sale of wrong article not adulteration.**—A sale of an article which is pure in itself, but is wholly different from the article demanded by the purchaser, as a sale of savin on a demand for saffron, is not a sale of an adulterated article within the meaning of the English Food and Drugs Act (1875) § 60. Knight v. Bowers, 14 Q. B. D. 845.

7. Lansing v. State, 73 Nebr. 124, 125, 102 NW 254. See also Com. v. Hartman, 6 Pa. Dist. 136, 137; Pure Food v. Preserved Meat, 27 Pa. Co. 33. And see Food [19 Cyc 1084].

8. Com. v. Tobias, 141 Mass. 129, 6 NE 217; Com. v. Bowers, 140 Mass. 483, 5 NE 252; Com. v. Keenan, 139 Mass. 193, 29 NE 477; Peo. v. Bosch, 129 App. Div. 660, 114 NYS 65; State v. Smith, 69 Oh. St. 196, 68 NE 1044; State v. Luther, 20 R. I. 472, 40 A 9; State v. Smyth, 14 R. I. 100, 51 AmR 344.

[a] **In New Jersey, however,** it is held that mere failure to maintain the prescribed standard is not adulteration in the true sense of the term, but is a distinct statutory offense. State v. Newton, 45 N. J. L. 469.

[b] **The reasonableness of the statutory standard** is not open to inquiry on the trial. Weigand v. District of Columbia, 22 App. (D. C.) 559; St. Louis v. Liessing, 190 Mo. 464, 89 SW 611, 109 AmSR 774, 1 LRANS 918, 4 AnnCas 112; Peo. v. Cipperly, 101 N. Y. 634, 4 NE 107 [rev 37 Hun 319].

[c] **The United States pharmacopœia** is adopted by various statutes as a standard of purity and strength of the articles described in them, and articles which do not come up to its standard are deemed to be adulterated. State v. Williams, 93 Minn. 155, 100 NW 641; State Bd. of Pharmacy v. Gasua, 122 App. Div. 803, 107 NYS 409; State v. Hutchinson, 56 Oh. St. 82, 46 NE 71; American Oil Co. v. Wheaton, 25 S. D. 60, 125 NW 127, 41 LRANS 149 and note.

[d] **Adulteration of vinegar.**—(1) The New York Agricultural Law § 50, defines adulterated vinegar as "all vinegar which contains any proportion of lead, copper, sulphuric acid, or other ingredients injurious to health, or any artificial coloring matter, or which has not an acidity equivalent to the presence of at least four and one-half per centum, by weight, of absolute acetic acid, or cider vinegar which has less than such an amount of acidity, or less than two per centum of cider vinegar solids on full evaporation over boiling water." Peo. v. Windholz, 82 App. Div. 569, 571, 86 NYS 1015. (2) But the addition of pure water to vinegar to reduce an excessive percentage of acetic acid has been held not to constitute adulteration where the strength of the vinegar was not thereby reduced below the standard prescribed by statute. Peo. v. Henry J. Heinz Co., 90 App. Div. 408, 86 NYS 141.

9. Bartles Oil Co. v. Lynch, 109 Minn. 487, 124 NW 994, 25 LRANS 1234 and note.

[a] **Kerosene oil colored red** by the addition of red aniline has been held not to be adulterated under L. (1909) p 630 c 502, where it is shown that such coloring matter does not affect its illuminating qualities or render it less safe. Bartles Oil Co. v. Lynch, 109 Minn. 487, 124 NW 994, 25 LRANS 1234.

[b] **A mixture of two kinds of sugar,** known to the trade as a commercial unit of food, has been held not to constitute an adulteration. Adams v. New England Maple Syrup Co., 210 Mass. 475, 97 NE 85.

[c] **Mixtures or compounds** known as articles of food by their own distinctive names are specially declared by some statutes not to be adulterated if otherwise pure, and if properly labeled and sold for what they are. U. S. v. One Car Load of Corno Horse, etc., Feed, 188 Fed. 453.

II. STATUTORY REGULATION OR PROHIBITION

[§ 2] **A. Power to Regulate or Prohibit[10]—1. By Statute.** In the exercise of its police power a state may prohibit the adulteration of food,[11] and of other articles of commerce,[12] such as cottonseed meal,[13] linseed oil,[14] and kerosene oil;[15] and may prohibit the sale of such adulterated articles either absolutely[16] or unless so labeled or branded as to indicate their nature.[17]

[§ 3] **2. By Municipal Ordinance.** A city council in like manner, in the exercise of its police power, may adopt regulations prohibiting adulteration or the sale of adulterated food,[18] and a grant of power conferred upon a municipal corporation for this purpose is not repealed by a general statute upon the same subject pertaining to the entire state.[19]

[§ 4] **B. Construction of Statutes.**[20] Statutes regulating or prohibiting the manufacture or sale of adulterated articles should be construed with a view to effecting their objects in the preservation of the public health and the prevention of fraud.[21] Thus, it has been held that a statute prohibiting the adulteration of food and drugs applies to cream of tartar,[22] whisky,[23] and beer.[24] It has been held, however, that where the statute creates an arbitrary and artificial crime, without reference to criminal intent, it must receive a strict construction with due regard to popular comprehension.[25]

Judicial notice. In ascertaining the true intent and meaning of the statute the court may take judicial notice of the precedent evils, the mischiefs intended to be prevented, the character and importance of the interests of the state which may be affected and the usual course of business.[26]

III. NATURE AND ELEMENTS OF OFFENSE

[§ 5] **A. At Common Law.** It is a common-law offense to sell[27] or otherwise furnish[28] adulterated articles of food calculated to injure health, or to mix unwholesome or poisonous ingredients in food or drink designed for any person,[29] whether such acts are done through malice or a mere desire of gain.[30]

[§ 6] **B. Under Statutes—1. In General.** The law governing the offenses of adulteration, or of selling adulterated food, is for the most part laid down by statutes defining the offenses.[31]

[§ 7] **2. What Constitutes Adulteration—a. In General.** In many cases the statutes prescribe a standard or test by which it may be determined

10. Police power to regulate or prohibit see also Commerce [7 Cyc 407]; Constitutional Law [8 Cyc 695, 866]; Druggists [14 Cyc 1078]; Food [19 Cyc 1084]; Health [21 Cyc 382, 467]; Municipal Corporations [28 Cyc 692 et seq].

11. U. S.—U. S. v. 420 Sacks of Flour, 180 Fed. 518.

Iowa.—State v. Schlenker, 112 Iowa 642, 84 NW 698, 84 AmSR 360, 51 LRA 347; State v. Snow, 81 Iowa 642, 47 NW 777, 11 LRA 355.

Minn.—State v. Horrigan, 80 Minn. 446, 83 NW 417, 81 AmSR 268, 50 LRA 660; State v. Aslesen, 50 Minn. 5, 52 NW 220, 36 AmSR 620.

Nebr.—Beha v. State, 67 Nebr. 27, 93 NW 155, 2 AnnCas 846.

N. H.—State v. Campbell, 64 N. H. 402, 13 A 585, 10 AmSR 419.

N. J.—State v. Newton, 45 N. J. L. 469.

N. Y.—Peo. v. West, 106 N. Y. 293, 12 NE 610, 60 AmR 452; Peo. v. Cipperly, 101 N. Y. 634, 4 NE 107 [rev 37 Hun 319]; Polinsky v. Peo., 73 N. Y. 65; Peo. v. Eddy, 59 Hun 615, 12 NYS 628.

Pa.—Com. v. Kevin, 202 Pa. 23, 51 A 594, 90 AmSR 613.

12. See cases infra notes 13-15.

13. Alcorn Cotton Oil Co. v. State, 100 Miss. 299, 56 S 397, 40 LRANS 875.

14. State v. Williams, 93 Minn. 155, 100 NW 641; American Linseed Oil Co. v. Wheaton, 25 S. D. 60, 125 NW 127.

15. Bartles Oil Co. v. Lynch, 109 Minn. 487, 124 NW 994, 25 LRANS 1234.

16. State v. Williams, 93 Minn. 155, 100 NW 641; American Linseed Oil Co. v. Wheaton, 25 S. D. 60, 125 NW 127.

17. Stolz v. Thompson, 44 Minn. 271, 46 NW 410; Alcorn Cotton Seed Oil Co. v. State, 100 Miss. 299, 56 S 397, 40 LRANS 872 and note.

18. State v. Stone, 46 La. Ann. 147, 15 S 11; Kansas City v. Cook, 38 Mo. A. 660; Polinsky v. Peo., 73 N. Y. 65; Peo. v. Justices Ct. Spec. Sess., 7 Hun (N. Y.) 214. See Municipal Corporations [28 Cyc 709].

[a] **Regulations by board of health.**—In Polinsky v. Peo., 73 N. Y. 65, it was held that statutory provisions relating to the sale of adulterated milk in the city of New York did not cover the whole subject of traffic in milk, but that the board of health had power to make additional regulations. See Health [21 Cyc 382].

19. State v. Labatut, 39 La. Ann. 513, 2 S 550. See also State v. Fourcade, 45 La. Ann. 717, 13 S 187, 40 AmSR 249.

20. See generally Statutes [36 Cyc 1102].

21. State v. Williams, 93 Minn. 155, 100 NW 641; Alcorn Cotton Oil Co. v. State, 100 Miss. 299, 56 S 397, 40 LRANS 875; Palmer v. State, 39 Oh. St. 236, 48 AmR 429; Rose v. State, 11 Oh. Cir. Ct. 87, 5 Oh. Cir. Dec. 72. In Groff v. State, 171 Ind. 547, 85 NE 769, 17 AnnCas 133, while the general rule that criminal statutes must be strictly construed was recognized, it was held that the statute against adulteration should be reasonably viewed so as to effectuate the legislative intent to protect the public against fraud and imposition. And see Food [19 Cyc 1084].

[a] **Statutes as to linseed oil.**—(1) The Minnesota statute, Rev. Laws (1905) § 1772, forbidding the sale of any substance as either raw or boiled linseed oil or as a substitute for, or imitation of either, has been construed to forbid the sale as linseed oil of a compound called "linsol" which did not meet the test prescribed by statute for either raw or boiled linseed oil. American Linseed Oil Co. v. French, 193 Fed. 207. (2) It has also been held that L. (1897) c 217, as amended by L. (1901) c 332, directed against the adulteration of linseed oil applied to both raw and boiled oil, although boiled oil, which was specifically included in the original statute, was not mentioned in the amendment. State v. Williams, 93 Minn. 155, 100 NW 641. (3) But a chemical test prescribed by Code Suppl. (1907) § 2510e, for linseed oil has been held not intended to be applied to boiled linseed oil, a separate test for the latter being prescribed by § 2510f. State v. Manhattan Oil Co., 155 Iowa 453, 136 NW 197.

22. State Bd. of Pharmacy v. Gasau, 122 App. Div. 803, 107 NYS 409 [aff 52 Misc. 490, 102 NYS 539].

23. State v. Hutchinson, 56 Oh. St. 82, 46 NE 71 (holding whisky a drug under 87 L. 248, although it be sold as a beverage or commodity).

24. State v. Hutchinson, 55 Oh. St. 573, 45 NE 1043.

25. State v. Neslund, 141 Iowa 461, 120 NW 107; Com. v. Kebort, 212 Pa. 289, 61 A 895 [rev 26 Pa. Super. 584]; Com. v. Hufnal, 185 Pa. 376, 378, 39 A 1052 (where the court said, per Mitchell, J.: "The act in question deals with the affairs of every day life, and is highly penal in its provisions. There is therefore double reason why its language should be construed according to its popular practical every day use among the people"). And see Food [19 Cyc 1084].

[a] **Under a statute forbidding adulteration of illuminating oils,** Minn. L. (1909) c 502, the addition of one pound of red aniline to seven thousand gallons of kerosene oil has been construed as not constituting an adulteration unless such coloring matter in some substantial degree renders the oil impure, or impairs its illuminating qualities, or renders it less safe. Bartles Oil Co. v. Lynch, 109 Minn. 487, 122 NW 1, 124 NW 994, 25 LRANS 1234.

26. Ex p. Kohler, 74 Cal. 38, 15 P 436. See generally Evidence [16 Cyc 849]; Statutes [36 Cyc 1243].

27. Roscoe Cr. Ev. 379 [quot Goodrich v. Peo., 19 N. Y. 574, 577, 3 Park. Cr. 622, 627]; Rex v. Dixon, 4 Campb. 12.

28. State v. Buckman, 8 N. H. 203, 29 AmD 646.

29. State v. Buckman, 8 N. H. 203, 29 AmD 646; Reg. v. Baldock, 2 Chitty Cr. L. 556; Treeve's Case, 2 East P. C. 821, 4 Blackstone Comm. 162. See also Burnby v. Rollitt, 11 Jur. 827.

[a] **Polluting the drinking water in a well** used by a family is an indictable offense at common law. State v. Buckman, 8 N. H. 203, 29 AmD 646. See Waters [40 Cyc 593].

30. Goodrich v. Peo., 19 N. Y. 574 [aff 3 Park. Cr. 622].

31. U. S.—Hipolite Egg Co. v. U. S., 220 U. S. 45, 31 SCt 364, 55 L. ed. 364 (enactment by congress pursuant to power to regulate interstate commerce); U. S. v. Frank, 189 Fed. 195; U. S. v. 100 Barrels of Vinegar, 188 Fed. 471 (sufficiency of test); U. S. v. One Car Load of Corno Horse, etc., Feed, 188 Fed. 453; French Silver Dragée Co. v. U. S., 179 Fed. 824, 103 CCA 316; U. S. v. Johnson, 177 Fed. 313; Arbuckle v. Blackburn, 113 Fed. 616, 51 CCA 122, 65 LRA 864.

Iowa.—State v. Manhattan Oil Co., 155 Iowa 453, 136 NW 197; State v. Snow, 81 Iowa 642, 47 NW 777, 11 LRA 355.

La.—State v. Fourcade, 45 La. Ann. 717, 13 S 187, 40 AmSR 249; State v. Labatut, 39 La. Ann. 513, 2 S 550.

whether an article is adulterated,[32] and, if the article falls below the standard thus prescribed, it is to be deemed adulterated,[33] although in fact it may be wholesome[34] or harmless,[35] and may contain no foreign ingredient.[36] So under statutes where the gist of the offense is fraud on the purchaser in selling to him an article other than that demanded, it is of course immaterial that the substance used as an adulterant is harmless.[37] Where, however, the statute specifically defines what shall constitute adulteration, the courts may not extend the meaning of the term to include other things;[38] and, if the statute is aimed only at the admixture of poisonous or injurious ingredients, it is necessary to prove specifically that the adulterant used was poisonous or injurious.[39] If there is no statutory definition applicable to the particular article claimed to be adulterated, the fact of adulteration must necessarily depend upon the sufficiency of the evidence adduced to bring the offense within the term as ordinarily understood.[40]

[§ 8] **b. Milk.** Milk, being a common article of food, has received more statutory consideration on this account, and the statutes in addition to prohibiting its adulteration by the addition of a foreign substance[41] commonly prescribe a standard of pure milk, as that it shall contain a certain per cent

Mass.—Com. v. Warren, 160 Mass. 533, 36 NE 308; Com. v. Wetherbee, 153 Mass. 159, 26 NE 414; Com. v. Smith, 143 Mass. 169, 9 NE 631; Com. v. Tobias, 141 Mass. 129, 6 NE 217; Com. v. Bowers, 140 Mass. 483, 5 NE 469; Com. v. Evans, 132 Mass. 11; Com. v. Luscomb, 130 Mass. 42; Com. v. Farren, 9 Allen 489; Com. v. Flannelly, 15 Gray 195.

Mich.—Viaus Maple Co. v. Dairy, etc., Comr., 154 Mich. 73, 117 NW 553; Carmour v. State Dairy, etc., Comrs., 159 Mich. 1, 123 NW 580, 25 LRANS 616.

Minn.—State v. Williams, 93 Minn. 155, 100 NW 641; State v. Rumberg, 86 Minn. 399, 90 NW 1055.

Miss.—Alcorn Cotton Oil Co. v. State, 100 Miss. 299, 56 S 397, 40 LRANS 875.

N. H.—State v. Campbell, 64 N. H. 402, 13 A 585, 10 AmSR 419.

N. J.—State v. Newton, 45 N. J. L. 469.

N. Y.—Peo. v. West, 106 N. Y. 293, 12 NE 610, 60 AmR 452 [aff 44 Hun 162]; Peo. v. Hodnett, 68 Hun 341, 22 NYS 809; Peo. v. Mahaney, 41 Hun 26; Peo. v. Shaeffer, 41 Hun 23; State Bd. of Pharmacy v. Gasau, 52 Misc. 490, 102 NYS 539 (drugs); Peo. v. Thompson, 14 NYS 819; Peo. v. Eddy, 12 NYS 628; Peo. v. Bischoff, 14 NYSt 581.

Oh.—Weller v. State, 53 Oh. St. 77, 40 NE 1001; Bainbridge v. State, 30 Oh. St. 264; Rose v. State, 11 Oh. Cir. Ct. 87, 5 Oh. Cir. Dec. 72; Myer v. State, 10 Oh. Cir. Ct. 226, 6 Oh. Cir. Dec. 477.

Pa.—Com. v. Kevin, 202 Pa. 28, 51 A 594, 90 AmSR 613.

R. I.—State v. Groves, 15 R. I. 208, 2 A 884; State v. Smyth, 14 R. I. 100, 51 AmR 344.

Tex.—Mantel v. State, 55 Tex. Cr. 456, 117 SW 855, 131 AmSR 818; Cantee v. State, 10 SW 757; Sanchez v. State, 27 Tex. A. 14, 10 SW 756.

Eng.—Crofts v. Taylor, 19 Q. B. D. 524; Fitzpatrick v. Kelly, L. R. 8 Q. B. 337.

[a] **In Canada** the respective jurisdictions of the Dominion parliament and the provincial legislatures with respect to legislation as to adulteration overlap, and the Dominion may declare a particular act a crime, without impairing the force or effect of a provincial statute dealing with the same act in its civil aspect and imposing a penalty for its commission. Reg. v. Stone, 23 Ont. 46.

32. See cases infra notes 33–36.

33. American Linseed Oil Co. v. Wheaton, 25 S. D. 60, 125 NW 127, 41 LRANS 149 and note.

[a] **Adulterated butter.**—By Act Congr. May 9, 1902, c 784 § 4 (32 U. S. St. at L. 194) "adulterated butter" is defined to mean "a grade of butter produced by mixing, reworking, rechurning in milk or cream, refining, or in any way producing a uniform, purified, or improved product from different lots or parcels of melted or unmelted butter or butter fat, in which any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deodorizing or removing therefrom rancidity, or any butter or butter fat with which there is mixed any substance foreign to butter as herein defined, with intent or effect of cheapening in cost the product or any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream."

[b] **"Hydrogen peroxide."**—In an action by the state for a penalty for selling hydrogen peroxide below the standard it cannot be successfully contended that there is no standard of purity, because the name "hydrogen peroxide" does not appear in the United States pharmacopœia, where it appeared that "hydrogen dioxide," which is given therein, is the same drug. Peo. v. Straus, 81 Misc. 154, 142 NYS 326.

34. State v. Campbell, 64 N. H. 402, 13 A 585, 10 AmSR 419; Peo. v. Koster, 121 App. Div. 852, 106 NYS 793. And see Rex v. Dixon, 3 M. & S. 11, 14, 105 Reprint 516 (where the court says: "The statute having interdicted alum in the making of bread, shews that it must be considered as a perilous article").

35. American Linseed Oil Co. v. Wheaton, 25 S. D. 60, 125 NW 127.

36. Com. v. Warren, 160 Mass. 533, 36 NE 308; Peo. v. Bosch, 129 App. Div. 660, 114 NYS 65. And see supra note 8, and infra § 8.

37. Iowa.—State v. Schlenker, 112 Iowa 642, 84 NW 698, 84 AmSR 360, 51 LRA 347.

Mass.—Com. v. Schaffner, 146 Mass. 512, 16 NE 280; Com. v. Waite, 11 Allen 264, 87 AmD 711.

Mich.—Pierre Viaus Maple Co. v. Dairy, etc., Comr., 154 Mich. 73, 117 NW 553; Peo. v. Hinshaw, 135 Mich. 378, 97 NW 758.

Oh.—State v. Dreher, 55 Oh. St. 115, 44 NE 510; Weller v. State, 53 Oh. St. 77, 40 NE 1001.

Eng.—Webb v. Knight, 2 Q. B. D. 530; Pashler v. Stevenitt, 35 L. T. Rep. N. S. 862.

See State v. Newton, 50 N. J. L. 534, 14 A 604.

[a] **Addition of glucose to food.**—(1) Molasses to which glucose has been added is an article of adulterated food within the meaning of the statute. State v. Kelly, 54 Oh. St. 166, 43 NE 163. (2) But under the English Sale of Food and Drugs Act it has been held that the addition of glucose to marmalade did not constitute adulteration, it being shown that the glucose was noninjurious and tended to prevent chemical changes. Smith v. Wisden, 20 Cox C. C. 135.

38. State v. Weeden, 17 Wyo. 418, 100 P 114.

[a] **Substitution of a cheaper or inferior substance** for an essential ingredient has been held necessary under Pub. Acts (1895) No. 193, 2 Comp. L. § 5012, to constitute adulteration. Peo. v. Jennings, 132 Mich. 662, 94 NW 216.

39. Peo. v. Bischoff, 14 NYSt 581.

[a] **Injury resulting only from continued use.**—The addition of an ingredient which is poisonous or injurious when continuously or indiscriminately used is an offense against the pure food laws. State v. Hutchinson, 55 Oh. St. 573, 45 NE 1043.

[b] **Whether food itself must be rendered injurious.**—(1) Under the act of June 26, 1895 (P. L. 317), it is not the quantity but the nature of the substance added which is prohibited, and if a poisonous or injurious adulterant is used in food it is immaterial that the quantity is so small that the compound formed is not injurious to health. Com. v. Kevin, 202 Pa. 23, 51 A 594, 90 AmSR 613. (2) But under the English Sale of Food and Drugs Act (1875) § 3, it has been held that in order to support a conviction for adulteration of food with an injurious substance it must be found that the adulteration rendered the food itself injurious to health, and not merely that the substance used as an adulterant was injurious. Hull v. Horsnell, 20 Cox C. C. 759. (3) And under a statute prohibiting the sale of articles of food mixed with injurious ingredients, it was held that a sale of baking powder composed in part of ground rice and in part of an injurious substance was no offense, on the ground that baking powder was not an "article of food" when so composed, Hawkins, J., saying: "Of course it could be truly said that pure ground rice is an article of food for man; but it would cease to be so if it were mixed with an equal quantity of alum and 20 per cent. of bicarbonate of soda, and sold in little penny packets of an ounce each. Who would venture to describe such a mixture as food for man? With equal truth, might not powder composed of poison, mixed with flour, be called food for man because pure flour is used?" James v. Jones, [1894] 1 Q. B. 304, 308. (4) But a sale of cream mixed with a preservative injurious to the health of children and invalids, although not to adults, has been held to fall within the statute. Cullen v. McNair, 21 Cox C. C. 682. (5) Under the Federal Food and Drug Act of June 30, 1906 (U. S. Comp. St. Suppl. [1911] p 1356, 34 St. at L. 768 c 3915) the addition of poisonous substances to an article of food in such minute quantities that the health of consumers cannot be injured is not condemned, and in a proceeding to condemn such articles as adulterated the burden is on the government of proving that the added poisonous or deleterious substance is such as may render the article dangerous to health. U. S. v. Lexington Mill, etc., Co., 232 U. S. 339, 34 SCt 337.

40. Bartles Oil Co. v. Lynch, 109 Minn. 487, 124 NW 1, 994, 25 LRANS 1234 and note (question for jury). And see supra § 1.

[a] **A sale of catchup containing salicylic acid** is within the statute. Meyer v. State, 54 Oh. St. 242, 43 NE 164; Bissman v. State, 9 Oh. Cir. Ct. 714, 6 Oh. Cir. Dec. 712.

[b] **The addition of preservatives** to food may constitute criminal adulteration, at least when the preservative is injurious to health. Pure Food Law, 11 Pa. Dist. 423.

41. Com. v. Schaffner, 146 Mass. 512, 16 NE 280.

[a] **Milk colored with annatto.**—Under St. (1886) c 318, amending Pub. St. (1882) c 57 § 5, punishing the sale of milk "to which water or any foreign substance has been added," a person may be convicted who sells skimmed milk colored by adding to

of butter fat, and provide that all milk falling below this standard shall be deemed to be adulterated.[42]

[§ 9] **c. Water as an Adulterant.** Where the effect of using water as an adulterant is to lower or diminish the nutritive power of the substance with which it is mixed, the courts have almost invariably held that there is an adulteration within the meaning of the statute.[43]

[§ 10] **3. Sale or Possession for Sale—a. In General; Purpose of Sale.** The statutes are generally directed against sales of adulterated articles or having them in possession with intent to sell,[44] and under some of the statutes the use to which the article sold is to be put is a material element in determining whether the sale is unlawful.[45]

[§ 11] **b. What Constitutes Sale.**[46] The question whether a sale of the adulterated article has taken place is determined by the general principles as to what constitutes a sale.[47]

[§ 12] **4. Concealment of True Nature of Article—a. In General.** Concealment of the true nature and ingredients of an article sold, whereby the purchaser is misled as to what he is actually obtaining, is an offense under many of the statutes.[48] Under the English statute it is an offense to sell an article which is not "of the nature, substance, and quality" demanded by the purchaser.[49]

[§ 13] **b. Notice to Purchaser.** The gist of the offense, under enactments against concealing the nature of the article sold, is the false representation, and where the true nature is fully disclosed to the purchaser by the seller no offense is committed.[50]

it annatto. Com. v. Wetherbee, 153 Mass. 159, 26 NE 414. See also Com. v. Schaffner, 146 Mass. 512, 16 NE 280 (a prosecution for having in possession with intent to sell milk containing a certain foreign substance, to wit, "annatto coloring matter," where it was held to be immaterial whether a coloring matter put into milk is injurious or not, the addition of any foreign substance being an offense). In St. Louis v. Jud, 236 Mo. 1, 139 SW 441, having in possession skimmed milk to which annatto had been added was held an offense under an ordinance providing that milk should be deemed adulterated if "colored in any manner whereby damage or inferiority is concealed."

42. Iowa.—State v. Schlenker, 112 Iowa 642, 84 NW 698, 84 AmSR 360, 51 LRA 347.

Mass.—Com. v. Wetherbee, 153 Mass. 159, 26 NE 414; Com. v. Tobias, 141 Mass. 129, 6 NE 217; Com. v. Bowers, 140 Mass. 483, 5 NE 469; Com. v. Evans, 132 Mass. 11; Com. v. Luscomb, 130 Mass. 42.

N. H.—State v. Campbell, 64 N. H. 402, 13 A 585, 10 AmSR 419.

N. J.—State v. Newton, 45 N. J. L. 469.

N. Y.—Peo. v. Abramson, 147 App. Div. 491, 131 NYS 798 [aff 208 N. Y. 138, 101 NE 849]; Peo. v. Koster, 121 App. Div. 852, 106 NYS 793; Peo. v. Hodnett, 68 Hun 341, 22 NYS 809; Peo. v. Eddy, 59 Hun 615, 12 NYS 628; Peo. v. Schaeffer, 41 Hun 23; Peo. v. Thompson, 14 NYS 819.

R. I.—State v. Groves, 15 R. I. 208, 2 A 384; State v. Smyth, 14 R. I. 100, 51 AmR 344.

Eng.—Crofts v. Taylor, 19 Q. B. D. 524; Gage v. Elsey, 10 Q. B. D. 518.

[a] **Milk sold as given by the cows** has been held to be adulterated within the meaning of the Agricultural Law § 20, L. (1893) p 660 c 338. Peo. v. Bosch, 129 App. Div. 660, 114 NYS 65 (where the analysis showed that such milk was below the standard prescribed).

[b] **Skimmed milk.**—(1) Under the act of May 25, 1878, making it an offense to sell adulterated milk, and the act of July 7, 1885, declaring skimmed milk with less than six per cent of cream to be adulterated, selling skimmed milk does not constitute the offense of selling adulterated milk unless it contains less than six per cent of cream. Com. v. Hough, 1 Pa. Dist. 51. (2) And the sale as skimmed milk of milk from which the cream has been taken by the centrifugal or "separator" process is not an offense. Com. v. Hufnal, 185 Pa. 376, 39 A 1052 [rev 4 Pa. Super. 301, 40 WklyNC 360].

43. Iowa.—State v. Schlenker, 112 Iowa 642, 84 NW 698, 84 AmSR 360, 51 LRA 347.

Mass.—Com. v. Waite, 11 Allen 264, 87 AmD 711; Com. v. Farren, 9 Allen 489.

Mo.—St. Louis v. Kruempeler, 235 Mo. 710, 139 SW 446; St. Louis v. Ameln, 235 Mo. 669, 139 SW 429.

N. Y.—Peo. v. West, 44 Hun 162 [aff 106 N. Y. 293, 12 NE 610, 60 AmR 452]. In Peo. v. Fauerback, 5 Park. Cr. 311, it was held that whether the dilution of milk with pure water constituted an adulteration was a question of fact for the jury; but this decision is contrary to the otherwise uniform current of authority.

Pa.—Com. v. Darlington, 9 Pa. Dist. 700.

See American Oil Co. v. Wheaton, 25 S. D. 60, 68, 125 NW 127, 130 [cit Cyc].

[a] **Use of pure water in vinegar** has been held not an adulteration where its use served to reduce the percentage of acetic acid sufficiently to transform the vinegar from a chemical to a food product, but not below the standard fixed by law. Peo. v. Henry J. Heinz Co., 90 App. Div. 408, 86 NYS 141.

44. American Linseed Oil Co. v. Wheaton, 25 S. D. 60, 125 NW 127. And see statutory provisions.

Possession with intent to sell see infra § 15.

45. Haas v. State, 2 OhS&CP 177, 1 OhNP 248.

[a] **Sales for other than food purposes.**—"If a grocer bought a barrel of flour which he found to be impure, and so within the statute, if sold as food, it certainly would be lawful to sell it to make paste to be used in hanging paper." Haas v. State, 2 OhS&CP 93, 95, 1 OhNP 248. To same effect Com. v. Darlington, 9 Pa. Dist. 700.

[b] **Sale for purpose of analysis.**—(1) It has been held that a mandatory sale for the express purpose of analysis is not a sale on which a criminal prosecution for selling can be based. Lansing v. State, 73 Nebr. 124, 102 NW 254; Kelly v. State, 2 OhS&CP 239, 1 OhNP 238. (2) But on the other hand it has been held that the seller cannot shield himself by the plea that he made the sale for analysis. State v. Rippeth, 71 Oh. St. 85, 72 NE 298 (Crew, J., dissenting). (3) And if the sale is freely made in the ordinary course of trade without a demand therefor for the purpose of analysis, the fact that the purchaser intended to analyze the article and that the seller was aware of that intention will not exempt the seller from criminal prosecution. Lansing v. State, 73 Nebr. 124, 102 NW 254. See also infra note 51.

Prejudice of the purchaser, under the English statute, from sales for analysis see infra § 13.

46. **Sale by agent** see infra § 17.

47. Com. v. Haynes, 107 Mass. 194. And see Sales [35 Cyc 25].

[a] **Delivery without prior express contract.**—A delivery to a customer, without any previous contract for delivery or express contract of sale of the particular article at the time of delivery, may be deemed an act of sale of the adulterated article. Com. v. Haynes, 107 Mass. 194.

[b] **The delivery of milk to the purchaser of a table d'hôte breakfast,** as a part of such breakfast, is as much a sale of the milk, within St. (1886) c 318 § 2, as if a special price had been put on it or as if it had been bought and paid for by itself. Com. v. Warren, 160 Mass. 533, 36 NE 308.

[c] **Exposure for sale.**—Under the Agricultural Law (Consol. L. [1909] c 1) § 32, any person delivering milk to a railway station for shipment is deemed to expose or offer it for sale, whether it is delivered or consigned to himself or to another. Peo. v. Abramson, 147 App. Div. 491, 131 NYS 798.

48. Peo. v. Mahaney, 41 Hun (N. Y.) 26, 2 NYSt 663. See statutory provisions.

[a] **Illustration.**—Under a statute making it a misdemeanor to sell any substance not butter, the seller representing it to be butter, a conviction was held to be proper where a grocer sold as butter an article which contained about seventy-five per cent of butter and twenty-five per cent of foreign matter. Peo. v. Mahaney, 41 Hun (N. Y.) 26, 2 NYSt 663.

[b] **There need not be an express representation** or statement that the article is unadulterated; a failure to disclose the adulteration is sufficient. Fitzpatrick v. Kelly, L. R. 8 Q. B. 337.

49. Sale of Food and Drugs Act (1875) § 6.

[a] **Following standard of pharmacopœia.**—(1) The sale of a drug which is not prepared in accordance with the British pharmacopœia is deemed to be the sale of an article not of the nature, substance, or quality demanded by the purchaser, although the purchaser did not specifically refer to the pharmacopœia and request that the article be prepared under its formula. Dickins v. Randerson, [1901] 1 K. B. 487; Beardsley v. Walton, [1900] 2 Q. B. 1; White v. Bywater, 19 Q. B. D. 582. Compare Hudson v. Bridge, 20 Cox C. C. 425. (2) But evidence is admissible to show that there is a commercial standard of the article different from that prescribed by the British pharmacopœia. Boots Cash Chemists v. Cowling, 20 Cox C. C. 420.

[b] **Question of fact in absence of standard.**—Where no standard of purity has been fixed by regulation the question whether the article sold is of the nature, substance, or quality demanded is one of fact to be determined on the evidence before the magistrate. Webb v. Knight, 2 Q. B. D. 530; Wilson v. Wilson, 6 F. (Just. Cas.) 10.

[c] **A joint stock company is a "person"** who may be convicted of an offense under this provision of the English statute. Pearks v. Ward, [1902] 2 K. B. 1.

50. Higgins v. Hall, 51 J. P. 293.

[a] **A person who sells mustard mixed with flour and turmeric acid,** declaring at the time that he does not sell it as unadulterated mustard, is guilty of no offense against the Eng-

Prejudice of purchaser. Under the English Sale of Food and Drugs Act and amendments thereto the sale must be to the prejudice of the purchaser,[51] and where the seller gives actual notice of the admixture the sale is not to the purchaser's prejudice.[52] But it would seem that in the absence of disclosure by the seller, by label or otherwise, knowledge derived by the purchaser from independent sources will not prevent the sale from being to his prejudice.[53]

Requirement of label. Statutes frequently provide for giving notice to the purchaser by means of a label affixed to the article sold, specifying the ingredients of the article or stating that it is a mixture or compound, and exempt the seller from criminal prosecution for adulteration where such a label has been affixed.[54] In England it is held that the statute is not intended to make labeling the exclusive form of notice, and that it is sufficient if the purchaser is otherwise advised of the nature of the article he is obtaining.[55] Thus it may be sufficient that there is a notice prominently displayed in the place of sale stating the nature of the article sold,[56] and an oral statement by the seller to the purchaser at the time of sale has also been held to be sufficient.[57]

Where there was a fraudulent intent to increase the bulk of the article sold, the mere affixing of a label showing the ingredients of the article has been held not to constitute a defense.[58]

[§ 14] **c. Use of Coloring Matter.** The addition of coloring matter which tends to conceal inferiority or mislead the purchaser as to the kind and quality of article he is obtaining is an offense under the statutes directed against concealment of adulteration.[59]

[§ 15] **5. Knowledge and Intent.** The general rule, under statutes declaring criminal the sale of adulterated articles, without express mention of knowledge or intent, is that the crime is constituted by the act itself, irrespective of motive, and does not depend on any supposed turpitude of the seller, but follows solely from the statutory prohibition; and hence knowledge of the adulteration or criminal intent in making the sale is not requisite to constitute the offense, and lack of knowledge or criminal

lish statute. Pope v. Tearle, L. R. 9 C. P. 499.

[b] **A prior false representation** does not constitute the offense provided the true nature, substance and quality of the article are fully disclosed at the time when the sale actually takes place. Kirk v. Coates, 16 Q. B. D. 49.

51. Sale of Food and Drugs Act (1875) § 6; Betts v. Armstead, 20 Q. B. D. 771.

[a] **If the mixture is not what a customer would reasonably expect** a conviction is proper. Webb v. Knight, 2 Q. B. D. 530; Pashler v. Stevenitt, 35 L. T. Rep. N. S. 862.

[b] **Sale to officer for analysis.**—(1) A sale is not the less "to the prejudice of the purchaser" from the fact that it is made to an officer for the purpose of analysis. Horder v. Scott, 5 Q. B. D. 552; Hoyle v. Hitchman, 4 Q. B. D. 233. (2) And where it is made to an agent of the officer, the officer himself is the person prejudiced. Garforth v. Esam, 56 J. P. 521. See also Stace v. Smith, 45 J. P. 141. Sale for analysis in general see supra § 10.

52. Sandys v. Small, 3 Q. B. D. 449; Palmer v. Tyler, 61 J. P. 389; Bundy v. Lewis, 21 Cox C. C. 744.

53. Pearks v. Ward, [1902] 2 K. B. 1 (holding that the test is whether the sale would have been to the prejudice of a purchaser who had no special knowledge).

54. Iowa.—State v. Snow, 81 Iowa 642, 47 NW 777, 11 LRA 355.

Mass.—Com. v. Tobias, 141 Mass. 129, 6 NE 217.

Mich.—Pierre Vlaus Maple Co. v. Dairy, etc., Comrs., 154 Mich. 73, 117 NW 553.

Minn.—State v. Hanson, 84 Minn. 42, 86 NW 768, 54 LRA 468; State v. Aslesen, 50 Minn. 5, 52 NW 220, 36 AmSR 620.

N. Y.—Peo. v. Bischoff, 14 NYSt 581.

Oh.—State v. Hutchinson, 55 Oh. St. 573, 45 NE 1043; Palmer v. State, 39 Oh. St. 236, 48 AmR 429; Haas v. State, 2 OhS&CP 177, 1 OhNP 248.

Eng.—Jones v. Jones, 58 J. P. 653.

[a] **A "mixture" or "compound,"** within the meaning of the statute requiring that mixtures or compounds sold as food shall be labeled with the name and percentage of each ingredient, is something resulting from the putting together of parts or ingredients other than as nature has put them together. Cocoa from which an excess of natural oil has been abstracted does not come within the definition. Rose v. State, 11 Oh. Cir. Ct. 87, 5 Oh. Cir. Dec. 72.

[b] **Sales in small quantities.**—Under the statute, where the ordinary sized package put up for commercial use is properly labeled, a retail dealer is not liable to prosecution for taking a small quantity from such package and selling to a consumer without a separate label. State v. Neslund, 141 Iowa 461, 120 NW 107.

[c] **A label on the inner wrapper** in which blended butter was delivered has been held not to be sufficient within the English Sale of Food and Drugs Act. Pearks v. Houghton, [1902] 1 K. B. 889.

[d] **Evidence of a mistake** in inclosing the article sold in a wrapper which did not bear a label stating its contents correctly is admissible in defense. Kearley v. Tylor, 17 Cox C. C. 328.

[e] **Compounds not constituting adulteration.**—A statute defining adulteration and excepting from its provisions mixtures or compounds not injurious to health if they bear labels stating that they are mixtures or compounds, and showing the name and percentage of each ingredient, does not require such labels on compounds which do not fall within the definition of adulteration in the statute. State v. Weeden, 17 Wyo. 418, 100 P 114.

[f] **Labeling a linseed oil compound** "40 per cent thinner and 60 per cent linseed" does not inform the purchaser what he is buying, or relieve the transaction from the taint of fraud, for he is not notified by such label of what the "40 per cent thinner" is composed, and therein lies the opportunity for fraud. American Linseed Oil Co. v. Wheaton, 25 S. D. 60, 125 NW 127, 41 LRANS 149 and note.

[g] **That article was patented** is no defense to prosecution for sale without proper label. Palmer v. State, 39 Oh. St. 236, 48 AmR 429.

55. Sandys v. Small, 3 Q. B. D. 449; Palmer v. Tyler, 61 J. P. 389.

56. Pearks v. Houghton, [1902] 1 K. B. 889; Gage v. Elsey, 10 Q. B. D. 518.

[a] **Insufficient notice.**—(1) But where a purchaser, on demanding cheese, was supplied with a mixed article from a package that bore in small type the words "finest oleine," the purchaser receiving no label and being ignorant of the meaning of the word "oleine," it was held that there was no sufficient notice of the fact that the article supplied was a mixture, and hence that the sale was "to the prejudice of the purchaser." Collett v. Walker, 64 L. J. M. C. 267. (2) And a notice conspicuously displayed in a public house, to the effect that spirits sold are "not of any guaranteed strength," has been held not to relieve from liability for selling spirits diluted with water to a strength below the standard. Dawes v. Wilkinson, [1907] 1 K. B. 278.

57. Sandys v. Small, 3 Q. B. D. 449.

58. Horder v. Meddings, 44 J. P. 284; Liddiard v. Reece, 44 J. P. 233. See also Otter v. Edgley, 57 J. P. 457 (supporting the principle, but holding the evidence of fraudulent intent to increase bulk in the particular case to be insufficient).

59. Peo. v. Girard, 145 N. Y. 105, 39 NE 823, 45 AmSR 595; Weller v. State, 53 Oh. St. 77, 40 NE 1001 (under a statute specifically prohibiting the coloring of vinegar); Roberts v. Egerton, L. R. 9 Q. B. 494. See also State v. Newton, 50 N. J. L. 534, 14 A 604; Crossman v. Lurman, 171 N. Y. 329, 63 NE 1097, 98 AmSR 599 [aff 192 U. S. 189, 24 SCt 234, 48 L. ed. 401].

[a] **Illustration.**—In Peo. v. Hinshaw, 135 Mich. 378, 97 NW 758 [dist Peo. v. Jennings, 132 Mich. 662, 94 NW 216 (where the addition of harmless coloring matter to lemon extract was held to be no offense, on the ground that in the case of lemon extract the color is no indication of strength, and hence no one could be prejudiced or misled by the addition)], the addition of coloring matter to vanilla extract was held to be an offense, since the strength of this extract is commonly judged to some extent by its color.

[b] **Coloring by contact with vapor.**—A statute making it an offense to mix with or put into hops "any drug or ingredient, or other thing whatsoever, to alter the colour or scent thereof" is violated by passing sulphur vapor through the hops so as to brighten their color, although no deterioration results. Rex v. Pack, 6 T. R. 374, 101 Reprint 603. See also Rex v. Reason, 6 T. R. 375, 101 Reprint 603.

[c] **Appearance of "another kind" of article.**—Under a statute making it an offense to color seeds artificially so as to give to them "the appearance of seeds of another kind," it has been held that no offense was committed by coloring them so as to make them appear fresher than they were, although not of a different species. Francis v. Maas, 3 Q. B. D. 341.

[d] **Artificial coloring of vinegar.**—Where, in the manufacture of vinegar, low wine, formed from fermented grain, was passed through roasted malt for the sole purpose of coloring the vinegar, the vinegar contained artificial coloring matter within 84 L. (1887) 216 § 2, as amended 85 L. (1888) 259, prohibiting the adulteration and artificial coloring of vinegar.

intent forms no defense to a prosecution.[60] A dealer who has an adulterated article in his possession sells or delivers it at his peril.[61] It is no defense therefore that the article was pure when received by the vendor, but has been adulterated by some one else, without his knowledge or consent, prior to sale by him or by his agent,[62] or that it was pure when delivered by the vendor to a carrier or other agent for delivery to the purchaser and has been adulterated since it left the vendor's hands and without his knowledge.[63]

The reason of the rule is that the statutes have for their object the protection of the public against the hurtful consequences of adulterated food and drugs, and those consequences are in no degree increased by the vendor's knowledge, or diminished by his ignorance, of the adulteration of the articles which he offers for sale.[64]

Intent to sell requisite. But mere possession of an adulterated article, even with knowledge of the adulteration, is no offense, and where there is no actual sale it is necessary generally to prove an intent to sell or exchange,[65] and where the statute is directed against the adulteration of food it would seem to be necessary to prove an intent to sell as food.[66]

Knowledge required. It has been held, however, under some statutes, that knowledge is an essential element of the offense;[67] and where the statute spe-

Weller v. State, 53 Oh. St. 77, 40 NE 1001.

60. U. S.—U. S. v. Southern R. Co., 135 Fed. 122 (obiter).

D. C.—Weigand v. District of Columbia, 22 App. 559.

Ind.—Groff v. State, 171 Ind. 547, 85 NE 769, 17 AnnCas 133 and note.

Iowa.—State v. Schlenker, 112 Iowa 642, 84 NW 698, 84 AmSR 360, 51 LRA 347.

Mass.—Com. v. Warren, 160 Mass. 533, 36 NE 308; Com. v. Vieth, 155 Mass. 442, 29 NE 577; Com. v. Gray, 150 Mass. 327, 23 NE 47; Com. v. Evans, 132 Mass. 11; Com. v. Smith, 103 Mass. 444; Com. v. Waite, 11 Allen 264, 87 AmD 711; Com. v. Nichols, 10 Allen 199; Com. v. Farren, 9 Allen 489.

Mich.—Peo. v. Worden Grocer Co., 118 Mich. 604, 77 NW 315; Peo. v. Snowberger, 113 Mich. 86, 71 NW 497, 67 AmSR 449.

N. J.—Vandegrift v. Meihle, 66 N. J. L. 92, 49 A 16; State v. Newton, 50 N. J. L. 534, 14 A 604. See also Newton v. Connell, 9 N. J. L. J. 316.

N. Y.—Peo. v. Kibler, 106 N. Y. 321, 12 NE 795; Peo. v. West, 106 N. Y. 293, 12 NE 610, 60 AmR 452; Peo. v. Bosch, 129 App. Div. 660, 114 NYS 65; Peo. v. Laesser, 79 App. Div. 384, 79 NYS 470; Peo. v. Mahaney, 41 Hun 26, 2 NYSt 663; Peo. v. Schaeffer, 41 Hun 23, 2 NYSt 705; Peo. v. Thompson, 14 NYS 819; Peo. v. Eddy, 12 NYS 628.

Oh.—State v. Kelly, 54 Oh. St. 166, 43 NE 163 [rev 2 OhS&CP 239, 1 OhNP 238, which held good faith and lack of knowledge to be a good defense, and in effect overr on this point Haas v. State, 2 OhS&CP 177, 1 OhNP 248]; Myer v. State, 10 Oh. Cir. Ct. 226, 6 Oh. Cir. Dec. 477; Altschul v. State, 8 Oh. Cir. Ct. 214, 4 Oh. Cir. Dec. 402; Strong v. State, 3 OhS&CP 284, 2 OhNP 93.

Pa.—Com. v. Kebort, 212 Pa. 289, 61 A 895; Com. v. Weiss, 139 Pa. 247, 21 A 10, 23 AmSR 182, 11 LRA 530. See also Com. v. Darlington, 9 Pa. Dist. 700.

R. I.—State v. Smith, 10 R. I. 258.

Eng.—Pearks v. Knight, [1901] 2 K. B. 825; Goulder v. Rook, [1901] 2 K. B. 290; Parker v. Alder, [1899] 1 Q. B. 20; Spiers v. Bennett, [1896] 2 Q. B. 65; Dyke v. Gower, [1892] 1 Q. B. 220; Pain v. Boughtwood, 24 Q. B. D. 353; Betts v. Armstead, 20 Q. B. D. 771; Roberts v. Egerton, L. R. 9 Q. B. 494; Fitzpatrick v. Kelly, L. R. 8 Q. B. 337; Morris v. Corbett, 56 J. P. 649; Reg. v. Field, 64 L. J. M. C. 153; Reg. v. Woodrow, 16 L. J. M. C. 122. See also Laird v. Dodell, [1906] 1 K. B. 131.

Can.—Reg. v. McIntosh, 33 CanLJ NS 246.

[a] **Applications of the rule generally.**—(1) Thus, under a statute one section of which imposes a penalty upon any person who willfully admixes with any article of food or drink any injurious or poisonous ingredient to adulterate it for sale, and another section of which imposes a penalty on any person who shall sell any article of food or drink with which, to his knowledge, any ingredient injurious to health has been mixed, and on every person who shall sell as unadulterated any article of food or drink which is adulterated, it has been held that under the first section a guilty knowledge is required, while under the second section the fact that defendant should sell articles as "unadulterated" which are adulterated, and in such a way as to mislead the buyer, is sufficient without further proof of guilty knowledge. Fitzpatrick v. Kelly, L. R. 8 Q. B. 337. (2) In passing upon the question of guilty intent the court, in Peo. v. Schaeffer, 41 Hun (N. Y.) 23, 2 NYSt 705 [foll Peo. v. Mahaney, 41 Hun 26, 2 NYSt 663], said: "The offense aimed at by the statutes under consideration is the sale of adulterated milk. The offense is established by proof of a sale of milk, which is shown to be adulterated when tested by the standard set by the act. That the seller had knowledge of the adulteration need not be shown. The first section, which defines the offense of which defendant is convicted, is silent as to the intent, while other sections defining other offenses, make the intent a necessary ingredient." See also Peo. v. Cipperly, 101 N. Y. 634, 4 NE 107 [rev 37 Hun 319] (the decision in the court of appeals being based on the dissenting opinion of Learned, J., in the court below). (3) In Dilley v. Peo., 4 Ill. A. 52, it was held that an instruction to the effect that if the jury found that A had sold milk to B, and had delivered the same to one of his own servants, by whom the same was delivered to B in the same condition in which it was when he received it from A, and that on its delivery to B it was examined and found to be adulterated, they should find A guilty, was erroneous, as the milk might, as a matter of fact, have been adulterated when A delivered it to his servant, and still A might not have done it or been privy to the transaction.

[b] **Absence of criminal intent** on the part of the accused is immaterial under statutes forbidding the sale of (1) adulterated butter (Peo. v. Mahaney, 41 Hun (N. Y.) 26, 2 NYS 663) or (2) adulterated milk (Peo. v. Kibler, 106 N. Y. 321, 12 NE 795; Peo. v. West, 106 N. Y. 293, 12 NE 610, 60 AmR 452; Peo. v. Cipperly, 101 N. Y. 634, 4 NE 107; Peo. v. Schaeffer, 41 Hun (N. Y.) 23, 2 N. Y. St. 705).

[c] **Ignorance of injurious nature of adulterant.**—Under a statute providing that food shall be considered adulterated if it contains "any added substance or ingredient which is poisonous or injurious to health," a dealer in food who puts a foreign substance containing poison into the food which he sells cannot defend on the ground that he did not know that such substance contained poison. Lansing v. State, 73 Nebr. 124, 102 NW 254.

[d] **Rule not opposed to constitutional requirements.**—To convict and punish a man for the crime of adulteration without proof of guilty knowledge or criminal intent does not deprive him of liberty or property without due process of law, even though the conviction is based upon evidence arbitrarily prescribed, purely technical in character, and incapable of refutation by the ordinary modes of contradiction. Peo. v. Cipperly, 101 N. Y. 634, 4 NE 107 [rev 37 Hun 319, and adopting the dissenting opinion of Learned, P. J., at general term]. To same effect Peo. v. Eddy, 12 NYS 628.

[e] **Knowledge may constitute an aggravation** of the offense under particular statutes. See for example Com. v. Smith, 103 Mass. 444.

[f] **Professional milkmen.**—In Com. v. Flannelly, 15 Gray (Mass.) 195, 197, in speaking of the question of guilty knowledge, the court said: "The legislature, knowing the difficulty of proving the guilty knowledge or belief of adulteration, intended to hold those who were engaged in the sale of milk as a business or trade to a stricter rule, and to impose upon them the duty of ascertaining the purity of the article which they offered for sale."

61. Peo. v. West, 106 N. Y. 293, 12 NE 610, 60 AmR 452; State v. Rippeth, 71 Oh. St. 85, 72 NE 298; State v. Kelly, 54 Oh. St. 166, 43 NE 163; Bissman v. State, 9 Oh. Cir. Ct. 714, 6 Oh. Cir. Dec. 712.

[a] **Adulteration before importation.**—In Roberts v. Egerton, L. R. 9 Q. B. 494, a tea dealer was convicted of selling an adulterated tea which he had guaranteed as pure. It appeared that the tea had been adulterated before importation and the seller had no knowledge of such adulteration. It was held, however, that, being in the tea trade, defendant must be taken to have a competent knowledge of his profession, and, where it was shown that such knowledge was general among other dealers, the conviction should be allowed to stand.

62. Brown v. Foot, 17 Cox C. C. 509; Jones v. Bertram, 58 J. P. 478 (holding, however, that evidence that the adulteration was by defendant's servant without defendant's knowledge or consent might go in mitigation of the penalty). Compare Kearley v. Tylor, 17 Cox C. C. 328.

63. Parker v. Alder, [1899] 1 Q. B. 20; Brown v. Foot, 17 Cox C. C. 509.

64. State v. Kelly, 54 Oh. St. 166, 43 NE 163.

[a] **"The object was,** not to punish acts intrinsically wrong, but to prevent acts which in their results operated unjustly upon others. This object would be thwarted, if sales could be made with impunity by those ignorant of the ingredients of the article sold." State v. Newton, 50 N. J. L. 534, 537, 14 A 604.

65. Com. v. Rowell, 146 Mass. 128, 15 NE 154; Com. v. Smith, 143 Mass. 169, 9 NE 631; Peo. v. Timmerman, 79 App. Div. 565, 80 NYS 285 [aff 179 N. Y. 550, 71 NE 1136]; Peo. v. Hills, 64 App. Div. 584, 72 NYS 340; Peo. v. Fauerback, 5 Park. Cr. (N. Y.) 311; State v. Smyth, 14 R. I. 100, 51 AmR 344. See also Isenhour v. State, 157 Ind. 517, 62 NE 40, 87 AmSR 228.

66. See supra § 10.

67. Peo. v. Fulle, 12 AbbNCas (N.

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cifically requires knowledge, as by declaring that whoever shall "knowingly" sell adulterated articles shall be guilty of a crime, knowledge must of course be proved.[68] So, under a statute making knowledge of the adulteration of the article, or intent to sell it for food, or as something it is not, an element of the offense, proof of the absence of such knowledge or intent is a good defense.[69]

Belief in purity and prior warranty. Under the English Sale of Food and Drugs Act, a bona fide belief in the purity of the article sold is a good defense to a prosecution for selling an adulterated article if the seller purchased the article in the same condition as that in which he sold it, under a written warranty from his vendor.[70]

IV. DEFENSES

[§ 16] Defendant may always show such matters of defense as tend to remove him beyond the contemplation of the statute under which he is being prosecuted.[71] But where the statute in express terms declares the possession or sale of an adulterated article, or an article below a given standard, to be an offense, it is not a valid defense that no foreign substance has been added to the article sold,[72] or that the article was delivered under a special contract,[73] or that information as to its real nature or ingredients was conveyed to the purchaser by label,[74] or otherwise,[75] or that the purchaser had not posted notice of the statute as directed by law.[76]

V. PERSONS LIABLE

[§ 17] **Sales by Agent.** In accordance with the general principles of agency,[77] one who sells an adulterated article through an agent or a servant acting in the ordinary course of his employment may be convicted as the seller;[78] and the agent may also be convicted.[79]

The fact that the sale was inadvertently made by the servant has been held not to exempt the master.[80] But on the other hand it has been held that a charge of selling is not sustained by proof merely of delivery by mistake of an agent, demand for return by the principal on learning of the mistake, and refusal of the principal to take pay.[81]

VI. PENALTIES AND ACTIONS THEREFOR[82]

[§ 18] It is frequently provided by the statutes forbidding adulteration that upon a violation of their provisions an action may be brought for the recovery of a penalty prescribed therein.[83]

VII. CRIMINAL PROSECUTIONS[84]

[§ 19] **A. In General.** Criminal prosecutions for adulteration as a common-law offense are governed by the rules relating to prosecutions for common-law offenses in general.[85] In a case of prosecutions under statutes, the person by whom the prosecution is brought, the jurisdiction and procedure, and the period within which the prosecution must be instituted may be determined by the provisions of the several statutes.[86] But to the extent that such matters are not prescribed by statute they are governed by the rules relating to prosecutions of statutory offenses in general. With few exceptions all prosecutions for such statutory offenses have been for the adulteration of food or drugs, and they

Y.) 196, 1 N. Y. Cr. 172 (holding that "a fair, just construction of the act not only requires proof of the sale of an adulterated article, but also that the sale was made with a criminal intent, or under circumstances of such negligence as in law supplies the place of the criminal intent"); Core v. James, L. R. 7 Q. B. 135 (decided under St. 6 & 7 Wm. IV c 37 § 8, directed against the adulteration of bread).

[a] **In order to sustain a conviction for giving a false warranty** under the English Sale of Food and Drugs Act (1875) § 27, guilty knowledge must be shown. Derbyshire v. Houlston, [1897] 1 Q. B. 772.

68. State v. Nussenholtz, 76 Conn. 92, 55 A 589; Dilley v. Pec., 4 Ill. A. 52; Isenhour v. State, 157 Ind. 517, 62 NE 40, 87 AmSR 228; Com. v. Smith, 103 Mass. 444; Com. v. Flannelly, 15 Gray (Mass.) 195; Cantee v. State, (Tex. A.) 10 SW 757; Sanches v. State, 27 Tex. A. 14, 10 SW 756.

69. Com. v. Tobias, 141 Mass. 129, 6 NE 217; Kelly v. State, 2 OhS&CP 239, 1 OhNP 233.

70. Laidlaw v. Wilson, [1894] 1 Q. B. 74.

71. Margolius v. State, 4 OhS&CP 354, 1 OhNP 264.

[a] **Failure to supply sample for analysis.**—Upon a prosecution for failure to supply a sample for analysis as required under the statute, defendant should be allowed to prove that he did not offer for sale the articles in question. Margolius v. State, 4 OhS&CP 354, 1 OhNP 264.

72. Com. v. Bowers, 140 Mass. 483, 5 NE 469 (milk reduced below standard by removal of part of cream).

73. Com. v. Holt, 146 Mass. 38, 14 NE 930.

74. American Linseed Oil Co. v. Wheaton, 25 S. D. 60, 125 NW 127, 41 LRANS 149.

75. Com. v. Darlington, 9 Pa. Dist. 700.

[a] **Sale as "condemned"** of milk that has been adulterated with water is no defense. Com. v. Darlington, 9 Pa. Dist. 700.

[b] **Guaranty of purity by manufacturer as defense to seller.**—Guaranty under Federal Pure Food and Drugs Act no defense to prosecution under a state statute specifying requirements of a guaranty. Peo. v. Straus, 81 Misc. 154, 142 NYS 326.

76. Bainbridge v. State, 30 Oh. St. 264.

77. See Agency [31 Cyc 1175]; Criminal Law [12 Cyc 183]; Master and Servant [26 Cyc 1545].

78. Com. v. Proctor, 165 Mass. 38, 42 NE 335; Com. v. Warren, 160 Mass. 533, 36 NE 308; Com. v. Vieth, 155 Mass. 442, 29 NE 577; Com. v. Haynes, 107 Mass. 194; Meyer v. State, 54 Oh. St. 242, 43 NE 164; Parker v. Alder, [1899] 1 Q. B. 20; Brown v. Foot, 17 Cox C. C. 509; Morris v. Corbett, 56 J. P. 649. See also Com. v. Smith, 143 Mass. 169, 9 NE 631.

[a] **Intention of employer.**—(1) In State v. Smith, 10 R. I. 258, it was held that the servant must have been acting for and in accordance with the design of the master, in order to support a conviction of the master. (2) But in Groff v. State, 171 Ind. 547, 85 NE 769, 17 AnnCas 133, it was held that where knowledge or intent is not a necessary element of the offense an employer is properly convicted where a sale of adulterated food is made in his absence, without his knowledge, and even against his instructions, by a clerk acting in the regular course of business. To same effect Com. v. Vieth, 155 Mass. 442, 29 NE 577. (3) However, a sale made without authority and without the master's knowledge, by a servant employed exclusively for work entirely distinct from selling, will not support a conviction of the master. Diersing v. State, 29 Oh. Cir. Ct. 469.

79. Com. v. Haynes, 107 Mass. 194; Com. v. Kolb, 13 Pa. Super. 347; Hotchin v. Hindmarsh, [1891] 2 Q. B. 181.

[a] **Reason for rule.**—"The agent is within the terms of the statute because he personally participated in its violation; and the principal is responsible for what he does by another." Meyer v. State, 54 Oh. St. 242, 244, 43 NE 164 [aff 10 Oh. Cir. Ct. 226, 6 Oh. Cir. Dec. 477 (aff 2 OhS&CP 233, 1 OhNP 241)].

[b] **An agent who in good faith takes an order for pure goods** is not guilty of a violation of the Pure Food Law if his principal fills the order with adulterated goods. Peo. v. Morse, 131 Mich. 68, 90 NW 673; Peo. v. Skillman, 129 Mich. 618, 89 NW 330.

80. Com. v. Warren, 160 Mass. 533, 36 NE 308; Com. v. Gray, 150 Mass. 327, 23 NE 47.

81. Heider v. State, 4 OhS&CP 227.

82. **Penalties generally** see Penalties [30 Cyc 1331].

83. Vandegrift v. Meihle, 66 N. J. L. 92, 49 A 16; State Bd. of Pharmacy v. Gasau, 122 App. Div. 803, 107 NYS 409. And see Druggists [14 Cyc 1078]; Food [19 Cyc 1084].

84. **Criminal law and procedure generally** see Criminal Law [12 Cyc 70].

85. See supra § 5, and cases cited.

86. Peo. v. Austin, 49 Hun (N. Y.) 398, 3 NYS 573; Com. v. Spencer, 28 Pa. Super. 301; Cook v. White, [1896]

are accordingly treated in full under other titles.[87]

[§ 20] **B. Indictment, Information, or Complaint.[88] In General.** Indictments or complaints for the selling or having in possession adulterated substances, being based upon statutes defining the offense, will be held sufficient when they substantially follow the words of the particular statute under which they are drawn[89] and allege all the facts and circumstances necessary to bring defendant within the terms of the statute creating and defining the offense.[90]

Description of article adulterated. There should be a description of the article claimed to be adulterated sufficient to show that it is within the contemplation of the statute;[91] but there need be no particular description of the substance, as to either its ingredients or its use,[92] unless such a description is necessary to properly charge the offense as defined by the particular statute.[93]

Guilty knowledge or intent. It is not necessary to allege that defendant had knowledge that the article sold was adulterated,[94] unless such knowledge is by the particular statute made one of the essential ingredients of the offense.[95] Nor is it necessary to allege that it was defendant's intent to injure any particular person or person's health.[96]

[§ 21] **C. Evidence.[97]** As a general rule, upon a prosecution for adulteration, any evidence is admissible which tends to prove or disprove a violation of the statute under which the prosecution is brought.[98] Evidence of an analysis of the article in question is, under some statutes, necessary to a conviction, and is always admissible for the purpose of showing its character and ingredients.[99] But there should not be a conviction unless every element necessary to constitute the offense as charged is clearly established.[1]

ADULTERIUM NON PROBET CONTRA ALIUM SOLA MULIERIS CONFESSIONE.[2]

1 Q. B. 284; Batt v. Mattinson, 19 Cox C. C. 532.

87. See Druggists [14 Cyc 1078]; Food [19 Cyc 1084].

88. Criminal complaint generally see Criminal Law [12 Cyc 82].

Indictment or information generally see Indictments and Informations [22 Cyc 157].

Duplicity in indictment see Food [19 Cyc 1100]; Indictments and Informations [22 Cyc 380 et seq].

89. Com. v. Keenan 139 Mass. 193, 29 NE 477.

90. Com. v. Rowell, 146 Mass. 128, 15 NE 154.

91. Com. v. Chase, 125 Mass. 202.

[a] Liquor.—Under a statute providing for the inspection of liquor it was held that the liquor sold must be alleged to have remained uninspected, and that it was not sufficient to allege that it was not inspected in the county where the sale was made and that the cask bore no inspector's brand. Woodworth v. State, 4 Oh. St. 487.

92. Com. v. Keenan, 139 Mass. 193, 29 NE 477.

93. State v. Newton, 45 N. J. L. 469.

94. Com. v. Farren, 9 Allen (Mass.) 489.

95. Com. v. Flannelly, 15 Gray (Mass.) 195.

96. Rex v. Dixon, 3 M. & S. 11, 105 Reprint 516.

97. See Druggists [14 Cyc 1078]; Food [19 Cyc 1084].

98. Peo. v. Bowen, 182 N. Y. 1, 74 NE 489 [rev 97 App. Div. 642, 90 NYS 1108].

99. Weigand v. District of Columbia, 22 App. (D. C.) 559.

1. Peo. v. Glaser, 76 Misc. 214, 134 NYS 609 (spirits of turpentine). And see Bartles Oil Co. v. Lynch, 109 Minn. 487, 124 NW 994, 25 LRANS 1234 (which was not a criminal case, but in which it was held that the addition of one pound of red aniline to seven thousand gallons of kerosene oil did not constitute an adulteration, where it was not shown that the coloring matter rendered the oil impure, or impaired its illuminating qualities, or rendered it unsafe).

[a] Variance.—In Peo. v. Fulle, 12 AbbNCas (N. Y.) 196, defendant was indicted for selling an adulterated cream of tartar for a drug and food. Upon being forced to an election the prosecution went to trial upon the sale as a drug. Upon proof that the sale had been made as a food, it was held a variance notwithstanding the fact that under the statute sale as a food was an offense.

2. A maxim meaning "Adultery is not proved against another by the confession of the woman." Adams Gloss. [cit Betts v. Betts, 1 Johns. Ch. (N. Y.) 197, 199].

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ADULTERY

By Louis Lougee Hammon*

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 11]

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I. DEFINITIONS AND DISTINCTIONS

[§ 1] **A. Definitions.** Adultery,[1] by the common law, consisted of sexual intercourse with a married woman by a man, married or single, other than her husband,[2] and the same was true by the

1. Latin, adulterium, a contraction of the phrase ad alterum thorum vel uterum accesio—"access to another's bed or womb"; Spanish and Italian, adulterio; French, adultere; German, Eberbruch.

2. Kan.—Bashford v. Wells, 78 Kan. 295, 301, 96 P 663, 18 LRANS 580, 16 AnnCas 310.
Me.—State v. Weatherby, 43 Me. 258, 261, 69 AmD 59.
Mass.—Com. v. Call, 21 Pick. 509, 511, 32 AmD 284.
N. J.—State v. Lash, 16 N. J. L. 380, 387, 32 AmD 397.
Pa.—Com. v. Lehr, 2 Pa. Co. 341, 342.

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Roman law.[3] By the canon or ecclesiastical law adultery was defined to be voluntary sexual intercourse by a married person with any one other than the lawful spouse. Such intercourse was regarded as a violation of the marriage vow, and equally punishable whether the offender was the husband or the wife;[4] but as to an unmarried person the offense was fornication.[5] The term "adultery" implies sexual intercourse.[6]

[§ 2] **B. Other Offenses Distinguished.** The distinguishing characteristic of the crime of adultery is that, in order to commit the offense, at least one of the offenders must be married, at the time the offense is committed, to a person other than the participant in the crime.[7]

Bastardy and adultery are two separate and distinct offenses.[8]

Bigamy. The distinguishing element between adultery and bigamy is that in adultery the offenders are not married to each other, except sometimes in form, while in bigamy there must be a marriage in form;[9] and even though a marriage ceremony has been performed, the offense of adultery is not necessarily involved in bigamy.[10]

Fornication. While fornication is necessarily included in adultery, a distinction lies in the fact that in order to constitute the crime of fornication it is not necessary that either of the participants be married.[11]

Rape. Adultery is distinguished from rape in that rape must be committed by force or fraud and against the will of the female,[12] while in prosecutions for adultery the element of force is not essential.[13]

II. AS AN INDICTABLE OFFENSE

[§ 3] Although the crime of adultery was, in England, punishable in the ecclesiastical courts,[14] it was not an indictable offense at common law;[15] and therefore it is not punishable by indictment in the

3. Smitherman v. State, 27 Ala. 23, 25; State v. Weatherby, 43 Me. 258, 261, 69 AmD 59.

[a] **The woman must have been married,** as at common law. "The connexion of a married man with a single woman does not make him guilty of the crime of adultery." Com. v. Call, 21 Pick. (Mass.) 509, 511, 32 AmD 284 [quot Wood Inst. 272]; State v. Fellows, 50 Wis. 65, 67, 6 NW 239.

4. Iowa.—State v. Roth, 17 Iowa 336, 339.

Kan.—Bashford v. Wells, 78 Kan. 295, 299, 96 P 663, 18 LRANS 580, 16 AnnCas 310.

Mass.—Com. v. Call, 21 Pick. 509, 511, 32 AmD 284.

Nebr.—State v. Byrum, 60 Nebr. 384, 389, 83 NW 207.

Pa.—Com. v. Kilwell, 1 Pittsb. 255, 258.

Tex.—Price v. State, 18 Tex. A. 474, 484.

Vt.—State v. Searle, 56 Vt. 516, 517.

5. State v. Roth, 17 Iowa 336, 339; Com. v. Kilwell, 1 Pittsb. (Pa.) 255, 259.

[a] **According to the Scotch law,** adultery might be committed either by the intercourse of an unmarried man with a married woman, or that of a married man with a single woman. Ersk. Prin. L. Scotland (12th ed) 531; 1 Hume Cr. L. (2d ed) 451; Mackenzie Cr. L. 118 § 11.

6. U. S. v. Griego, 11 N. M. 392, 399, 72 P 20.

7. See infra § 7.

[a] **Gist of offense.**—"There are a great number of offenses, in all of which unlawful carnal connection is the body, as was said by Chief Justice Black in the case of Dinkey v. Com., 17 Pa. 129, 55 AmD 542: 'Illicit carnal connection is called by different names, according to the circumstances which attend it. Unaccompanied with any facts which tend to aggravate it, it is simple fornication; when it causes the birth of an illegitimate child, it is fornication and bastardy; where the man who commits it is married, it is adultery; when . . . the parties by whom it is done are related to one another within certain degrees of consanguinity, it becomes incest; where it is preceded by any fraud, including a promise of marriage to gain the consent of a female who is under twenty-one years of age, it assumes another name, and by the statute of 1860 is called seduction. But the body of all these offenses is the illicit connection. In each case the essential fact which constitutes the crime is fornication.'" Com. v. McIlvain, 17 Pa. Co. 174, 175. And see Peo. v. Rouse, 2 Mich. N. P. 209. The commonly accepted legal meaning of "fornication" is illicit sexual connection between a man and woman as husband and wife, not being such. By Rev. St. § 4580, when a man commits fornication with a single woman both of them shall be punished. The offense is limited to a man and a single woman, thus creating a clear distinction between fornication and adultery, which latter crime can be committed only by a married man or with a married woman. The crime of rape may be committed upon an unmarried woman not the wife of defendant. The crime of incest can be committed only with a woman of certain consanguinity or relationship with the man. The crimes of incest, adultery, and fornication differ therefore only as to the persons, while the crime of rape differs from the other crimes against chastity both as to the person and the manner of sexual connection, as by force and against the will of the woman. State v. Shear, 51 Wis. 460, 8 NW 287.

[b] **Incest** distinguished see supra this note [a].

[c] **Seduction** distinguished see supra this note [a].

8. Duncan v. Com., 4 Serg. & R. (Pa.) 449, 451 (holding therefore that the fact that the governor pardoned a man convicted of the crime of adultery did not toll his punishment for bastardy, or the judgment rendered against him for the maintenance of the bastard child, since such maintenance is designed to relieve the public from the cost of maintaining paupers, and has nothing whatever to do with the punishment of the other crime). See also Bastards [5 Cyc 622]; and supra note 7 [a].

9. See Bigamy [5 Cyc 687].

10. Owens v. State, 94 Ala. 97, 10 S 669; Hildreth v. State, 19 Tex. A. 195; Swancoat v. State, 4 Tex. A. 105.

[a] **Bigamy as barring conviction of adultery.**—Although the evidence may show that defendant is guilty of bigamy, yet such fact will not bar a conviction of adultery. Owens v. State, 94 Ala. 97, 10 S 669; Hildreth v. State, 19 Tex. A. 195.

11. Ala.—Banks v. State, 96 Ala. 78, 11 S 404; Buchanan v. State, 55 Ala. 154; Smitherman v. State, 27 Ala. 23.

Cal.—Peo. v. Stratton, 141 Cal. 604, 75 P 166.

Mich.—Peo. v. Rouse, 2 Mich. N. P. 209.

Mont.—Territory v. Whitcomb, 1 Mont. 359, 25 AmR 740.

N. J.—State v. Lash, 16 N. J. L. 380, 32 AmD 397.

N. C.—State v. Cowell, 26 N. C. 231.

Tex.—Kelley v. State, 32 Tex. Cr. 579, 25 SW 425.

Wis.—State v. Shear, 51 Wis. 460, 8 NW 287.

See Fornication [19 Cyc 1433], and supra note 7 [a].

12. State v. Shear, 51 Wis. 460, 8 NW 287. See Rape [33 Cyc 1412], and supra note 7 [a].

13. State v. Henderson, 84 Iowa 161, 50 NW 758; State v. Donovan, 61 Iowa 278, 16 NW 130; State v. Sanders, 30 Iowa 582; Com. v. Bakeman, 131 Mass. 577, 41 AmR 248. Compare Mathews v. State, 101 Ga. 547, 29 SE 424 (holding that where a married man forced a woman over on a lounge, and, as she testified, compelled her to consent, a verdict of adultery and fornication is justified, since the offense is not rape).

14. Iowa.—State v. Hasty, 121 Iowa 507, 96 NW 1115; State v. Roth, 17 Iowa 336.

Mass.—Com. v. Elwell, 2 Metc. 190, 35 AmD 398.

Miss.—Carotti v. State, 42 Miss. 334, 97 AmD 465.

Nebr.—State v. Byrum, 60 Nebr. 384, 83 NW 207.

N. H.—State v. Marvin, 35 N. H. 22.

Pa.—Com. v. Kilwell, 1 Pittsb. 255.

Vt.—State v. Cooper, 16 Vt. 551.

Va.—Anderson v. Com., 5 Rand. (26 Va.) 627, 16 AmD 776.

Eng.—Burgoyne v. Free, 2 Hagg. Eccl. 456; Wheatley v. Fowler, 2 Lee Eccl. 376; Watson v. Thorp, 1 Phillim. 269; 2 Burn Eccl. L. (Phillim. ed.) tit. Lewdness 401; Coote Eccl. Pr. 145.

15. Ark.—Cook v. State, 102 Ark. 363, 144 SW 221; Crouse v. State, 16 Ark. 566.

Iowa.—State v. Hasty, 121 Iowa 507, 96 NW 1115; State v. Roth, 17 Iowa 336.

Mass.—Com. v. Elwell, 2 Metc. 190, 35 AmD 398; Com. v. Call, 21 Pick. 509, 32 AmD 284; Com. v. Putnam, 1 Pick. 136.

Miss.—Carotti v. State, 42 Miss. 334, 97 AmD 465.

Nebr.—State v. Byrum, 60 Nebr. 384, 83 NW 207.

N. H.—State v. Marvin, 35 N. H. 22.

N. J.—State v. Lash, 16 N. J. L. 380, 32 AmD 397.

Pa.—Com. v. Lehr, 2 Pa. Co. 341; Com. v. Kilwell, 1 Pittsb. 255.

S. C.—State v. Brunson, 18 S. C. L. 149.

Vt.—State v. Cooper, 16 Vt. 551.

Va.—Com. v. Jones, 2 Gratt. (43 Va.) 555; Anderson v. Com., 5 Rand. (26 Va.) 627, 16 AmD 776.

Wash.—State v. Keith, 48 Wash. 77, 92 P 893.

W. Va.—Ex p. Richards, 53 W. Va. 555, 45 SE 341.

[a] **At one time capital offense in England.**—In 1650 adultery was made a capital offense without benefit of clergy in England, "but at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentious-

United States, unless made so by statute.[16] But adultery is now, by virtue of legislative enactment, a punishable crime in almost every jurisdiction.[17]

III. NATURE AND ELEMENTS OF OFFENSE

[§ 4] **A. In General.** Where the statute creating such offense defines it, the definition is controlling.[18] In the absence of a statutory definition, resort must be had to established definitions sanctioned by books of authority and adopted by long usage.[19] The courts, however, are not uniform in their decisions. In some jurisdictions they adhere to the common-law definition of adultery,[20] while in others they follow the principles of the ecclesiastical law.[21] This difference of opinion among the courts as to what constitutes the offense arises from the fact that the decisions are founded upon codes of law materially different from each other. Accordingly the doctrine announced in a particular case is dependent upon the individual statute under which defendant is being prosecuted.[22]

Living in adultery. In many jurisdictions statutes have been enacted which, although varying in phraseology, in effect punish the offense only when the adulterous intercourse has been carried on during a more or less extended period of time.[23] In the absence of such a statute adultery is not a continuous offense, but each act of adultery constitutes a separate offense;[24] and a single act of unlawful sexual intercourse falls within the definition of "adultery" or "fornication," according as to whether the party is married or not.[25]

[§ 5] **B. Persons Committing Offense—1. Married Persons.** The rule in most jurisdictions is that any married person who shall voluntarily have sexual intercourse with one who is not his or her spouse is guilty of adultery.[26] This is the canonical rule,

ness, it was not thought proper to renew a law of such unfashionable rigour." 4 Blackstone Comm. 64.

[b] **The gist of the offense at common law** was the injury to the innocent husband in that it might adulterate the issue, and turn the inheritance away from his own blood to that of a stranger, and consequently it was regarded as a civil injury. State v. Hasty, 121 Iowa 507, 96 NW 1115; Bashford v. Wells, 78 Kan. 295, 96 P 663, 18 LRANS 580 and note, 16 AnnCas 310 and note; Com. v. Call, 21 Pick. (Mass.) 509, 32 AmD 284; State v. Armstrong, 4 Minn. 335; State v. Lash, 16 N. J. L. 380, 32 AmD 397; Wilhelmi v. Wilhelmi, 9 Pa. Dist. 655; Com. v. Lehr, 2 Pa. Co. 341; State v. Searle, 56 Vt. 516; State v. Keith, 48 Wash. 77, 92 P 893; Buller N. P. 26.

16. Ind.—State v. Johnson, 69 Ind. 85.
Iowa.—State v. Roth, 17 Iowa 336.
Miss.—Carotti v. State, 42 Miss. 334, 97 AmD 465.
S. C.—State v. Brunson, 18 S. C. L. 149.
Tenn.—State v. Moore, 1 Swan 136.
Vt.—State v. Cooper, 16 Vt. 551.
Va.—Anderson v. Com., 5 Rand. (26 Va.) 627, 16 AmD 776.

[a] **Slander; charging single woman with adultery.**—To charge a single woman with adultery is not slanderous where there is no statute making single women capable of committing such offense. Adams v. Hannon, 3 Mo. 222. See generally Libel and Slander [25 Cyc 225].

17. See statutory provisions. And see State v. Hillman, 128 Mo. A. 172, 106 SW 603; State v. Norman, 16 Utah 457, 52 P 986.

[a] **It is otherwise in Arkansas.**—Cook v. State, 102 Ark. 363, 144 SW 221.

[b] **Act Congr. March 3, 1887, c 397** (24 U. S. St. at L. 635), relating to the crime of adultery, and prescribing a punishment, applies to the District of Columbia; hence adultery committed in the District is punishable under such statute. Falk v. U. S., 15 App. (D. C.) 446. It applies also to Hawaii. U. S. v. Ishibashyi, 3 Hawaii Fed. 517; U. S. v. Lee Sa Kee, 3 Hawaii Fed. 262.

[c] **Offense against state and spouse.**—Although the crime of adultery may be regarded as primarily an offense against the innocent spouse of the person guilty of it, yet it is also an offense against the state. State v. Clemenson, 123 Iowa 524, 99 NW 139; State v. Smith, 108 Iowa 440, 79 NW 115; State v. Corliss, 85 Iowa 18, 51 NW 1154; Com. v. Geary, 9 Pa. Co. 60.

[d] **Validity of statute.**—A statute imposing a penalty for adultery which provides that "adultery is the unlawful voluntary sexual intercourse of a married person with one of the opposite sex, and when the crime is committed between parties only one of whom is married, both are guilty of adultery," is not void for uncertainty on the ground that adultery not being an offense by the common law, and the statute not assuming to define what intercourse is lawful and what unlawful, it is impossible for the courts to apply the law to any given case. State v. Whealey, 5 S. D. 427, 59 NW 211.

18. State v. Roth, 17 Iowa 336; Edwards v. State, 10 Tex. A. 24.

19. Com. v. Call, 21 Pick. (Mass.) 509, 32 AmD 284; State v. Armstrong, 4 Minn. 335.

20. State v. Armstrong, 4 Minn. 335; State v. Lash, 16 N. J. L. 380, 32 AmD 397 (where there is an elaborate discussion in the opinion delivered by Ford, J., of the question whether the definition of the common law or that of the canonical law should be adopted in construing statutes which denounce adultery as a crime, but do not define the offense). And see infra §§ 5, 6.

21. Territory v. Whitcomb, 1 Mont. 359, 25 AmR 740; Helfrich v. Com., 33 Pa. 68, 75 AmD 579; Com. v. Kilwell, 1 Pittsb. (Pa.) 255; State v. Fellows, 50 Wis. 65, 6 NW 239. And see infra § 5.

[a] **Reasons for following ecclesiastical law.**—In State v. Hasty, 121 Iowa 507, 509, 96 NW 1115, it was said that "adultery at the common law was not denounced as a crime. As the basis of a civil right of action it consisted only of a man having sexual intercourse with a married woman other than his wife, thereby introducing the danger of spurious issue of the marriage. Connection with a single woman, though fornication, was not adultery. The same rule seems to have obtained under the Roman law, but was radically modified by the ecclesiastical courts, which denounced the offense as the sexual violation of the marriage relation, regardless of whether the offender was male or female. And the definition of the canonical law, according to Wharton, was accepted by every Christian state at the time of the colonization of America, and 'is no doubt a part of the common law brought with them by the colonists of all Christian nationalities.'"

[b] **Distinction in civil and criminal actions.**—In Smitherman v. State, 27 Ala. 23, 25, the court said: "The term adultery, as used in our Code, should be construed with reference to the subjects-matter with which it stands connected. When used with reference to divorce, it is to be taken in the canonical sense of that term, and embraces the infidelity of the husband to his wife . . . but when considered with reference to the criminal law, it imports such sexual intercourse as violates another man's bed—as may entail a spurious issue upon the defrauded husband."

22. Com. v. Call, 21 Pick. (Mass.) 509, 32 AmD 284; State v. Lash, 16 N. J. L. 380, 32 AmD 397.

23. See Lewdness [25 Cyc 209].

24. State v. Thompson, 31 Utah 228, 87 P 709.

25. State v. Byrum, 60 Nebr. 384, 83 NW 207; State v. Brown, 47 Oh. St. 102, 23 NE 747, 21 AmSR 790.

26. U. S.—Cartier v. U. S., 148 Fed. 804, 78 CCA 494.
Ala.—Banks v. State, 96 Ala. 78, 11 S 404; White v. State, 74 Ala. 31; State v. Glaze, 9 Ala. 283; State v. Hinton, 6 Ala. 864; Rich v. State, 1 Ala. A. 243, 55 S 1022.
Cal.—Ex p. Cooper, 162 Cal. 81, 121 P 318; Peo. v. Stratton, 141 Cal. 604, 75 P 166.
Ga.—Cook v. State, 11 Ga. 53, 56 AmD 410.
Hawaii.—U. S. v. Lee Sa Kee, 3 Hawaii Fed. 262.
Ill.—Lyman v. Peo., 198 Ill. 544, 64 NE 974; Miner v. Peo., 58 Ill. 59.
Ind.—Hood v. State, 56 Ind. 263, 26 AmR 21.
Ind. T.—Reynolds v. U. S., 7 Ind. T. 51, 103 SW 762.
Iowa.—State v. Anderson, 140 Iowa 445, 118 NW 772; State v. Hasty, 121 Iowa 507, 96 NW 1115; State v. Mahan, 81 Iowa 121, 46 NW 855; State v. Wilson, 22 Iowa 364; State v. Roth, 17 Iowa 336.
Kan.—Bashford v. Wells, 78 Kan. 295, 96 P 663, 18 LRANS 580 and note.
Me.—State v. Weatherby, 43 Me. 258, 60 AmD 59; State v. Hutchinson, 36 Me. 261.
Mass.—Com. v. Bakeman, 131 Mass. 577, 41 AmR 248; Com. v. Elwell, 2 Metc. 190, 35 AmD 398; Com. v. Call, 21 Pick. 509, 32 AmD 284.
Minn.—Pickett v. Pickett, 27 Minn. 299, 7 NW 144.
Mo.—State v. Holland, 162 Mo. A. 678, 145 SW 522.
Mont.—Territory v. Whitcomb, 1 Mont. 359, 25 AmR 740.
Nebr.—State v. Byrum, 60 Nebr. 384, 83 NW 207.
N. M.—U. S. v. Meyers, 14 N. M. 522, 525, 99 P 336 [cit Cyc].
Okl.—In re Smith, 2 Okl. 153, 37 P 1099.
Pa.—Helfrich v. Com., 33 Pa. 68, 75 AmD 579; Dinkey v. Com., 17 Pa. 126, 55 AmD 542; Respublica v. Roberts, 1 Yeates 6; Com. v. Lehr, 2 Pa. Co. 341; Com. v. Kilwell, 1 Pittsb. 255.
S. C.—Hull v. Hull, 21 S. C. Eq. 174.
S. D.—State v. Whealey, 5 S. D. 427, 59 NW 211.
Tex.—Parks v. State, 3 Tex. A. 337.
Utah.—State v. Greene, 38 Utah 389, 115 P 181; State v. Thompson, 31 Utah 228, 87 P 709.

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and, it will be observed, includes an errant husband as well as an errant wife. Since, however, the gist of the crime of adultery, independent of statutory enactments, is the danger of introducing spurious heirs into a family, whereby a man may be charged with the maintenance of children not his own,[27] the better rule would seem to be that laid down at common law, namely, that a married man is not guilty of the offense by having sexual intercourse with a single woman;[28] and where he is criminally liable for the offense, the fact arises from some feature of the statute which brings the act within the definition given of the crime.[29] If both parties are married, each to another person, both are guilty of adultery.[30]

[§ 6] **2. Single Persons. Statutes applying to both sexes.** Under the statutes of many jurisdictions a single person, whether male or female, who has voluntary sexual intercourse with a married person of the opposite sex, is, equally with such married person, guilty of adultery.[31]

Statutes applying to men only. But in some jurisdictions such legislation is directed only against single men who have illicit sexual intercourse with married women,[32] and that is the rule, in the absence of any express declaration in the statute, where the common-law definition of adultery is adopted.[33]

Statutes not applying to single persons of either sex. In yet other jurisdictions single persons, whether male or female, cannot be convicted of adultery.[34]

[§ 7] **C. Elements of Offense—1. Marriage of at Least One Party.** In order to constitute the crime of adultery it is essential that at least one of the persons charged with having committed the offense should have been married at the time the offense was committed to a person other than the participant in the crime.[35] If the marriage turns out to be void, there can be no conviction.[36] But, excepting in Georgia,[37] it is not necessary that both parties to the

Vt.—State v. Bisbee, 75 Vt. 293, 54 A 1081.
Wash.—State v. Keith, 48 Wash. 77, 92 P 893.
W. Va.—Ex p. Richards, 53 W. Va. 555, 45 SE 341.
Wis.—State v. Fellows, 50 Wis. 65, 6 NW 239; Hunter v. U. S., 1 Pinn. 91, 39 AmD 277.

[a] **"Single adultery"** is adultery committed between persons only one of whom is married. Hunter v. U. S., 1 Pinn. (Wis.) 91, 92, 39 AmD 277.

27. Ala.—Smitherman v. State, 27 Ala. 23.
Ind.—Hood v. State, 56 Ind. 263, 26 AmR 21.
Iowa.—State v. Hasty, 121 Iowa 507, 96 NW 1115.
Me.—State v. Weatherby, 43 Me. 258, 69 AmD 59.
Minn.—State v. Armstrong, 4 Minn. 335.
N. H.—State v. Wallace, 9 N. H. 515.
N. J.—State v. Lash, 16 N. J. L. 380, 32 AmD 397.
Oh.—State v. Connoway, Tapp. 90.
Philippine.—U. S. v. Mata, 18 Philippine 490.

28. Ind.—State v. Chandler, 96 Ind. 591; Hood v. State, 56 Ind. 263, 26 AmR 21; Names v. State, 20 Ind. A. 168, 50 NE 401; State v. Smith, 18 Ind. A. 179, 47 NE 685.
Minn.—State v. Armstrong, 4 Minn. 335.
N. J.—State v. Lash, 16 N. J. L. 380, 32 AmD 397.
Oh.—State v. Connoway, 1 Tapp. 90. Compare Holdren v. State, 29 Oh. St. 651 (where it was said that in order to render a married man guilty of deserting his wife and living and cohabiting with another woman in a state of adultery, it is not necessary that the woman with whom he lives and cohabits should be a married woman).
Vt.—State v. Searle, 56 Vt. 516 (prior to the adoption of the revised laws).
Va.—Com. v. Lafferty, 6 Gratt. (47 Va.) 672.

29. State v. Armstrong, 4 Minn. 335.

30. State v. Anderson, 140 Iowa 445, 118 NW 772; State v. Mahan, 81 Iowa 121, 46 NW 855; Bashford v. Wells, 78 Kan. 295, 96 P 668, 18 LRANS 580; State v. Hutchinson, 36 Me. 261 (dictum); State v. Fellows, 50 Wis. 65, 6 NW 239; Hunter v. U. S., 1 Pinn. (Wis.) 91, 39 AmD 277.

[a] **"Double adultery"** is adultery committed by persons both of whom are married. Hunter v. U. S., 1 Pinn. (Wis.) 91, 92, 39 AmD 277.

[b] **In Georgia,** under Pen. Code § 381, providing that "any man or woman who shall live together in a state of adultery, or fornication, or of adultery and fornication, or who shall commit adultery or fornication, or adultery and fornication, shall be severally indicted and shall be severally punished as for a misdemeanor," there are three kinds of indictable sexual intercourse, namely, adultery, fornication, and adultery and fornication, the offense in each case being a joint one. If both parties to the criminal act are married, each is guilty of adultery; if both are single, each is guilty of fornication; if one is married and the other single, each is guilty of adultery and fornication. Kendrick v. State, 100 Ga. 360, 28 SE 120 [overr Britt v. State, 33 Ga. Suppl. 56]; Williams v. State, 86 Ga. 548, 12 SE 743; Bigby v. State, 44 Ga. 344. To constitute adultery therefore both parties to crime must be married. Tison v. State, 125 Ga. 7, 53 SE 809; Zackery v. State, 6 Ga. A. 104, 64 SE 281.

31. Ala.—Walker v. State, 104 Ala. 56, 16 S 7; Banks v. State, 96 Ala. 78, 11 S 404; White v. State, 74 Ala. 31; State v. Glaze, 9 Ala. 283; State v. Henton, 6 Ala. 864; Rich v. State, 1 Ala. A. 243, 55 S 1022. In Buchanan v. State, 55 Ala. 154, however, it is said that, according to the better opinion, where one party is married and the other is single, the former is guilty of adultery and the latter of fornication.
Iowa.—State v. Hasty, 121 Iowa 507, 96 NW 1115; State v. Oden, 100 Iowa 22, 69 NW 270; State v. Mahan, 81 Iowa 121, 46 NW 855; State v. Wilson, 22 Iowa 364; State v. Roth, 17 Iowa 336.
Me.—State v. Weatherby, 43 Me. 258, 69 AmD 59.
Okl.—In re Smith, 2 Okl. 153, 37 P 1099.
S. C.—State v. Carroll, 30 S. C. 85, 8 SE 433, 14 AmSR 883; Hull v. Hull, 21 S. C. Eq. 174 (a civil case, but often cited and quoted as authority in this connection).
S. D.—State v. Whealey, 5 S. D. 427, 59 NW 211.
Tex.—Edwards v. State, 10 Tex. A. 25; Parks v. State, 3 Tex. A. 337.
Wash.—State v. Keith, 48 Wash. 77, 92 P 893.

32. Hawaii.—U. S. v. Lee Sa Kee, 3 Hawaii Fed. 262.
Ind.—State v. Chandler, 96 Ind. 591; Hood v. State, 56 Ind. 263, 26 AmR 21; State v. Pearce, 2 Blackf. 318; Names v. State, 20 Ind. A. 168, 50 NE 401.
Mass.—Com. v. Bakeman, 131 Mass. 577, 41 AmR 248; Com. v. Reardon, 6 Cush. 78; Com. v. Elwell, 2 Metc. 190, 35 AmD 398.
N. H.—State v. Taylor, 58 N. H. 331; State v. Wallace, 9 N. H. 515.
N. M.—U. S. v. Cook, 15 N. M. 124, 103 P 305; U. S. v. Meyers, 14 N. M. 522, 99 P 336.
Utah.—State v. Greene, 38 Utah 389, 115 P 181.
Wis.—State v. Fellows, 50 Wis. 65, 6 NW 239 (explaining the statutory change in the doctrine announced in Hunter v. U. S., 1 Pinn. 91, 39 AmD 277).

33. Smitherman v. State, 27 Ala. 23; State v. Chandler, 96 Ind. 591; State v. Pearce, 2 Blackf. (Ind.) 318.

34. U. S.—Cartier v. U. S., 148 Fed. 804, 78 CCA 494 (decided under Alaska code of criminal procedure).
Ill.—Lyman v. Peo., 198 Ill. 544, 64 NE 974 [aff 98 Ill. A. 386].
Kan.—State v. Chafin, 80 Kan. 653, 103 P 143.
Pa.—Respublica v. Roberts, 1 Yeates 6, 2 Dall. 124, 1 L. ed. 316; Com. v. Kilwell, 1 Pittsb. 255.
Va.—Com. v. Lafferty, 6 Gratt. (47 Va.) 672.

35. U. S.—Cartier v. U. S., 148 Fed. 804, 78 CCA 494.
Ala.—Banks v. State, 96 Ala. 78, 11 S 404; Buchanan v. State, 55 Ala. 154; Smitherman v. State, 27 Ala. 23.
Ga.—Elliott v. State, 125 Ga. 31, 53 SE 809; Kendrick v. State, 100 Ga. 360, 28 SE 120.
Ill.—Miner v. Peo., 58 Ill. 59.
Ind.—State v. Chandler, 96 Ind. 591; Hood v. State, 56 Ind. 263, 26 AmR 21.
Iowa.—State v. Anderson, 140 Iowa 445, 118 NW 772; State v. Mahan, 81 Iowa 121, 46 NW 855.
Me.—State v. Weatherby, 43 Me. 258, 69 AmD 59; State v. Thurstin, 35 Me. 205, 58 AmD 695.
Mass.—Com. v. Reardon, 6 Cush. 78; Moore v. Com., 6 Metc. 243, 39 AmD 724.
Mich.—Peo. v. Taylor, 1 Mich. N. P. 198.
Mo.—State v. Hillman, 128 Mo. A. 172, 106 SW 603.
Nebr.—Purdy v. State, 86 Nebr. 638, 126 NW 90.
N. J.—State v. Lash, 16 N. J. L. 380, 32 AmD 397.
Oh.—State v. Connoway, Tapp. 90.
Pa.—Com. v. Gamble, 36 Pa. Super. 146.
Tex.—Dixon v. State, 50 Tex. Cr. 385, 97 SW 692; Webb v. State, 24 Tex. A. 164, 5 SW 651; Swancoat v. State, 4 Tex. A. 105; Parks v. State, 3 Tex. A. 337.

36. Purdy v. State, 86 Nebr. 638, 126 NW 90; Com. v. Burton, Vaux (Pa.) 83.

[a] **Under Philippine Pen. Code art 433,** the infidelity of a married woman to her marital vows, even though it should be made to appear that she is entitled to have her marriage declared null and void, is declared to be adulterous, until and unless she actually secures a formal judicial declaration annulling the marriage. And the same is true even though the marriage be bigamous. U. S. v. Mata, 18 Philippine 490.

37. Tison v. State, 125 Ga. 7, 53 SE 809; Zackery v. State, 6 Ga. A. 104, 64 SE 281. See supra note 30.

adulterous intercourse be married,[38] although they may be.[39]

[§ 8] **2. Sexual Intercourse.** It is an essential element of the crime of adultery that the persons charged with the offense have illicit sexual intercourse with each other.[40] But it has been held that the sexual intercourse need not be completed by emission; penetration is sufficient.[41]

[§ 9] **3. Consent to Intercourse.** In order to constitute the crime of adultery the act must have been voluntary on the part of defendant.[42] But the consent of the woman is not necessary in order to establish guilt on the part of the man; he is guilty of the offense, although his intercourse with the woman was accomplished by force and against her will,[43] or without her knowledge.[44]

[§ 10] **4. Criminal Intent.** As in the case of most other crimes, the offense of adultery cannot be committed without a criminal intent.[45] However, a joint criminal intent is not necessary;[46] and the intent may be inferred from the act.[47]

[§ 11] **D. Grade of Offense.** The crime of adultery is generally classified as a misdemeanor,[48] and will not be considered a felony unless made so by statute;[49] but in some jurisdictions, upon statutory authority, it has been declared to be a felony.[50]

[§ 12] **E. Attempt.** Preparation for adultery necessarily consists of such preliminary arrangements as appointing the time and place of meeting, and repairing to the rendezvous; but after the parties are met and are disrobed or disrobing, and nothing but an extraneous cause, namely, one not moving from themselves, prevents the accomplishment of the intended criminal purpose, then the offenders have progressed beyond the stage of preparation, and are actually engaged in the attempted commission of crime.[51]

IV. DEFENSES

[§ 13] **A. Unauthorized Prosecution.** In jurisdictions wherein the right to institute proceedings for the prosecution of the crime of adultery is confined to particular persons, defendant may show in defense that the prosecution was not in fact commenced on the complaint of a person having the exclusive right to prosecute,[52] notwithstanding an averment in the indictment that it was so commenced.[53]

How defense established. In some courts it has been held that such a defense must be established by evidence produced on the trial of the indictment,[54] and in others that it must be set up by pleading corresponding to the common-law plea in abatement.[55]

[§ 14] **B. Former Acquittal. Acquittal on dif-**

38. White v. State, 74 Ala. 31. See supra § 6.

39. See supra § 5.

40. Swancoat v. State, 4 Tex. A. 105.

41. Com. v. Hussey, 157 Mass. 415, 32 NE 362. See also Peo. v. Payment, 109 Mich. 553, 67 NW 689 (where an instruction that "sexual intercourse must be proven" was held to be sufficient, without going into particulars regarding penetration and emission).

42. State v. Henderson, 84 Iowa 161, 50 NW 758; State v. Sanders, 30 Iowa 582; Swancoat v. State, 4 Tex. A. 105.

Consent as affecting intent see infra note 45 [a].

43. State v. Chambers, 87 Iowa 1 53 NW 1090, 43 AmSR 349; State v. Henderson, 84 Iowa 161, 50 NW 758; State v. Donovan, 61 Iowa 278, 16 NW 130; State v. Sanders, 30 Iowa 582; Com. v. Bakeman, 131 Mass. 577, 41 AmR 248; Alonzo v. State, 15 Tex. A. 378, 49 AmR 207.

[a] **Rape may be adultery also.**—In Com. v. Bakeman, 131 Mass. 577, 578, 41 AmR 248, it was said that "when a crime charged is one which consists in the concurrent act of two or more, such as conspiracy, such joint action must be alleged and proved. But adultery is not such a crime. One person may be alone guilty of it. The act of sexual intercourse by a married man with an unmarried woman, or by an unmarried man with a married woman, is adultery in the man without regard to the guilt of the woman. It is an act committed by him, between him and the woman, although she is not the criminal or conscious participant. And it is no less adultery that it is also rape. The offences are different in the nature of the wrong done, and in the facts which constitute them. Neither includes the other; and a defendant may be convicted of either without allegation or proof of some fact essential to the other. Carnal knowledge of a woman is the fact common to both; if it is with force and against her will the crime is rape, and the fact that she is married is immaterial; if she is a married woman the crime is adultery, and the fact that it is by force is immaterial. That a man cannot commit rape upon a married woman without also committing adultery, only shows that he commits both crimes by one act which includes all the elements of both."

[b] **In Georgia** a conviction of "adultery and fornication" cannot be sustained if the intercourse was without the consent of the female; and, even though the idea of consent does not exclude the use of force, it must appear, however the consent may have been induced, that the female actually consented before the intercourse was accomplished. Avery v. State, 12 Ga. A. 562, 77 SE 892; Nephew v. State, 5 Ga. A. 841, 63 SE 930.

44. Com. v. Bakeman, 131 Mass. 577, 41 AmR 248 (as where she was drugged).

45. Banks v. State, 96 Ala. 78, 11 S 404; Vaughan v. State, 83 Ala. 55, 3 S 530; State v. Audette, 81 Vt. 400, 70 A 833, 130 AmSR 1061, 18 LRANS 527.

[a] **Where the intercourse is effected by force,** the woman is not guilty of adultery. State v. Henderson, 84 Iowa 161, 50 NW 758.

Mistake of fact or law as affecting guilt see infra §§ 16, 17.

46. State v. Cutshall, 109 N. C. 764, 14 SE 107, 26 AmSR 599; State v. Eggleston, 45 Or. 346, 77 P 738; Alonzo v. State, 15 Tex. A. 378, 384, 49 AmR 207.

[a] **Rule discussed.**—"While it is true that, to constitute adultery, there must be a joint physical act, it is certainly not true that there must be a joint criminal intent. The bodies must concur in the act, but the minds may not. While the criminal intent may exist in the mind of one of the parties to the physical act, there may be no such intent in the mind of the other party. One may be guilty, the other innocent, and yet the joint physical act necessary to constitute adultery may be complete. Thus, if one of the parties was, at the time of committing the physical act, insane, certainly such party has committed no crime; but it certainly cannot be contended that the other party, who was sane, has committed no crime. So, if one of the parties was mistaken as to a matter of fact, after exercising due care to ascertain the truth in relation to such fact, which fact, had it been true, would have rendered the alleged criminal act legal and innocent, the party so acting under such mistake of fact would be innocent of crime. Pen. Code, art 15; Watson v. State, 13 Tex. A. 76. But suppose the other party was not mistaken as to such fact, but, on the contrary, well knew the true fact which rendered the connection illicit, would this party be regarded as guilty of no offense because the mistaken party was innocent?" Alonzo v. State, 15 Tex. A. 378, 384, 49 AmR 207 [quot State v. Cutshall, 109 N. C. 764, 768, 14 SE 107, 26 AmSR 599].

47. U. S.—Reynolds v. U. S., 98 U. S. 145, 25 L. ed. 244 (prosecution for bigamy).

Ind.—Hood v. State, 56 Ind. 263, 26 AmR 21.

Me.—State v. Goodenow, 65 Me. 30.

Mass.—Com. v. Mash, 7 Metc. 472; Com. v. Elwell, 2 Metc. 190, 35 AmD 398.

N. C.—State v. Cody, 111 N. C. 725, 16 SE 408.

Proof of intent see infra § 55.

48. Ga.—Kendrick v. State, 100 Ga. 360, 28 SE 120.

Kan.—Bashford v. Wells, 78 Kan. 295, 96 P 663, 18 LRANS 580, 16 AnnCas 310.

N. H.—State v. Marvin, 35 N. H. 22.

N. C.—State v. Manley, 95 N. C. 661.

Vt.—State v. Cooper, 16 Vt. 551.

W. Va.—Ex p. Richards, 53 W. Va. 555, 45 SE 341.

49. State v. Cooper, 16 Vt. 551.

50. State v. Clemenson, 123 Iowa 524, 99 NW 139; State v. Young, 52 Or. 227, 96 P 1067, 132 AmSR 689, 18 LRANS 688; State v. Keith, 48 Wash. 77, 92 P 893; Ketchingman v. State, 6 Wis. 426. And see State v. Avery, 7 Conn. 266, 18 AmD 105 (where it is said that adultery is "now punishable like most other felonies").

51. State v. Schwarzbach, 84 N. J. L. 268, 86 A 423.

52. State v. Mahan, 81 Iowa 121, 46 NW 855; State v. Roth, 17 Iowa 336.

53. State v. Briggs, 68 Iowa 416, 27 NW 358; State v. Henke, 58 Iowa 457, 12 NW 477; State v. Roth, 17 Iowa 336.

54. State v. Athey, 133 Iowa 382, 108 NW 224; State v. Briggs, 68 Iowa 416, 27 NW 358.

55. State v. Brecht, 41 Minn. 50, 42 NW 602 (where it was held that the proper manner to make an objec-

ferent charge. That defendant was tried and acquitted on an indictment charging another crime growing out of the same transaction is a good defense under a plea of former acquittal;[56] but it must appear that the transaction was the same.[57]

The acquittal of one of the persons charged with the crime of adultery is not available as a defense to the indictment on the trial of the other participant in the unlawful act,[58] and a like rule applies where the prosecution is dismissed as to one of several defendants on trial.[59]

[§ 15] **C. Prior Divorce.** A divorce decree granted prior to the commission of the offense charged constitutes a good defense to the indictment.[60] But the decree must of course be valid.[61]

[§ 16] **D. Mistake of Fact. Death of prior spouse.** In marriage the law does not presume death until after an unexplained absence of seven years, and a party to a marriage who remarries and cohabits before the expiration of that period may, under the statute, be guilty of the offense of adultery.[62] In such cases the marriage is presumed to continue until a dissolution by divorce or death is shown.[63] But a marriage contracted after the seven-year period is not adulterous if the parties act in good faith and in the belief that the former spouse is dead.[64]

Marriage. The fact that defendant did not know that the paramour was married is no defense to a prosecution for adultery.[65] Where, however, a marriage is void by reason of the fact that one of the parties thereto has a consort living, and the other is ignorant of that fact, the party who is without knowledge of the bigamous nature of the marriage does not, by sexual intercourse with the supposed husband or wife after the marriage and before such knowledge is obtained, become guilty of adultery;[66] but the continuance of such cohabitation with knowledge of the invalidity of the marriage constitutes the crime of adultery.[67]

[§ 17] **E. Mistake of Law.** It is no defense that the parties were mistaken as to the law and had no intention of committing the offense.[68]

[§ 18] **F. Innocence of Codefendant.** The innocence of a codefendant does not inure to the benefit of another defendant who is guilty.[69]

[§ 19] **G. Other Defenses.** It is no defense that the prosecution was instituted through malicious motives,[70] or that defendant's previous character was good,[71] or that the female participant in the crime was a common prostitute.[72] A prosecution which has been commenced by the injured husband or wife will not be barred by their subsequent divorce.[73] Nor can a party set up as a defense that she has

tion that the prosecution was not commenced on the complaint of a proper person was by motion to set aside the indictment, which, under the statute, took the place of the common-law plea in abatement).

56. Com. v. McIlvain, 17 Pa. Co. 174.

57. Cross v. State, 78 Ala. 430; State v. Shedrick, 69 Vt. 428, 38 A 75.

[a] **Former acquittal of bigamy** will not constitute a bar to a prosecution for adultery, for the reason that the offenses are not the same, nor maintainable upon the same testimony. Hildreth v. State, 19 Tex. A. 195; Swancoat v. State, 4 Tex. A. 105. Compare Owens v. State, 94 Ala. 97, 10 S 669 (holding that there may be a prosecution for living in adultery, although the parties may also be guilty of bigamy).

[b] **Former acquittal of rape.**—The acquittal of a defendant on a former trial of the charge of rape only bars the state from prosecuting the respondent for the adultery arising out of that same transaction, but not from prosecuting him for the commission of adultery with the same woman at another time. State v. Shedrick, 69 Vt. 428, 38 A 75.

58. State v. Cutshall, 109 N. C. 764, 14 SE 107, 26 AmSR 599 [overr State v. Mainor, 28 N. C. 340]; Alonzo v. State, 15 Tex. A. 378, 49 AmR 207.

Innocence of codefendant as defense see infra § 18.

59. Solomon v. State, 39 Tex. Cr. 140, 45 SW 706.

60. State v. Weatherby, 43 Me. 258, 69 AmD 59; Com. v. Putnam, 1 Pick. (Mass.) 136.

61. Hood v. State, 56 Ind. 263, 26 AmR 21; State v. Fleak, 54 Iowa 429, 6 NW 689.

[a] **Invalid divorce.**—Defendant is guilty of the offense, where, erroneously believing himself to be legally divorced, he remarries and cohabits under the second marriage (State v. Godenow, 65 Me. 30), especially where the decree is subsequently set aside for fraud (State v. Whitcomb, 52 Iowa 85, 2 NW 970, 35 AmR 258), and defendant continues to cohabit with his second wife (State v. Watson, 20 R. I. 354, 39 A 193).

[b] **Marriage in another state.**—The facts that a wife obtained a divorce for the fault of her husband, and that he subsequently married again in another state, do not render him guilty of adultery. State v. Weatherby, 43 Me. 258, 69 AmD 59.

62. State v. Henke, 58 Iowa 457, 12 NW 477; Com. v. Thompson, 11 Allen (Mass.) 23, 87 AmD 685; Com. v. Thompson, 6 Allen (Mass.) 591, 83 AmD 653.

[a] **Good faith immaterial.**—The absence of the husband for any time less than seven years will not render innocent the marriage of the wife to another person, although she honestly believes at the time of the second marriage that her husband is dead. State v. Henke, 58 Iowa 457, 12 NW 477; Com. v. Mash, 7 Metc. (Mass.) 472.

[b] **Absence of spouse.**—In Com. v. Thompson, 11 Allen (Mass.) 23, 87 AmD 685, it appears that defendant married a woman who had left her husband for good cause eleven years before and had not seen or heard from him since, but who had read of the killing of a man who bore the full name of her husband and whom she believed to have been her husband, and who told defendant before she married him that she was a widow. The court submitted nothing to the jury as to the good faith of defendant or the grounds of his belief, but instructed them that the facts testified to were not a legal justification. The supreme court sustained the conviction, saying that the seven-year provision did not apply, because it was the wife that left instead of the husband, and making that fact conclusive against defendant. But even in this extreme case it could be said that defendant knew that there had been a marriage, and that there was a former husband to be accounted for.

63. Peo. v. Stokes, 71 Cal. 263, 12 P 71. And see infra § 57.

64. Com. v. Thompson, 6 Allen (Mass.) 591, 83 AmD 653.

65. State v. Anderson, 140 Iowa 445, 118 NW 772; Com. v. Elwell, 2 Metc. (Mass.) 190, 35 AmD 398; Fox v. State, 3 Tex. A. 329, 30 AmR 144. Contra Peo. v. Birrier, 18 Porto Rico 260.

66. Ala.—Banks v. State, 96 Ala. 78, 11 S 404; Vaughan v. State, 83 Ala. 55, 3 S 530.

N. C.—State v. Cutshall, 109 N. C. 764, 14 SE 107, 26 AmSR 599.

Or.—State v. Eggleston, 45 Or. 346, 77 P 738.

Tex.—Hildreth v. State, 19 Tex. A. 195; Alonzo v. State, 15 Tex. A. 378, 49 AmR 207.

Vt.—State v. Audette, 81 Vt. 400, 70 A 833, 130 AmSR 1061, 18 LRANS 527 and note.

67. See cases infra this note.

[a] **Adultery not merged in bigamy.**—As to the contention of counsel that as the evidence showed that defendants married each other, they were guilty of bigamy and could not be convicted under an indictment charging adultery, the court said: "We can very well conceive, in this case, how the defendants might not, because of a mistake of fact, be guilty of bigamy, by intermarrying with each other, and yet be guilty of adultery. The fact that they were married to each other would make their cohabitation none the less adulterous, although such marriage may have been innocently entered into, if, after ascertaining that such marriage was unlawful and void, they continued to cohabit together." Hildreth v. State, 19 Tex. A. 195, 200 [foll Swancoat v. State, 4 Tex. A. 105]. In Owens v. State, 94 Ala. 97, 99, 10 S 669, it was held that "the offense of adultery is not necessarily involved in bigamy, and there may be a prosecution for living together in a state of adultery, although the parties may also be guilty of bigamy." See Bigamy [5 Cyc 687].

68. State v. Whitcomb, 52 Iowa 85, 2 NW 970, 35 AmR 258; State v. Goodenow, 65 Me. 30.

Mistake as to validity of divorce see supra § 15.

69. State v. Simpson, 133 N. C. 676, 45 SE 567; State v. Cutshall, 109 N. C. 764, 14 SE 107, 26 AmSR 599 [overr State v. Mainor, 28 N. C. 340 (foll State v. Rinehart, 106 N. C. 787, 11 SE 512)]; State v. Eggleston, 45 Or. 346, 77 P 738.

Discharge of one defendant as barring prosecution of codefendant see supra § 14.

70. State v. Donovan, 61 Iowa 278, 16 NW 130.

71. State v. Donovan, 61 Iowa 278, 16 NW 130.

72. Holland v. State, 14 Tex. A. 182.

73. State v. Russell, 90 Iowa 569, 58 NW 915, 28 LRA 195; Fox v. State, 3 Tex. A. 329, 30 AmR 144.

Right of injured spouse to prosecute after divorce see infra § 21.

subsequently obtained a divorce from her husband and married her paramour.[74] Formerly the civil-law rule making condonation by the offended spouse a defense to the prosecution prevailed in the Philippines,[75] but the rule has since been changed by statute.[76] By remarrying his former wife after being divorced from her, with knowledge of adultery committed by her with a third person during the former marriage, a husband does not condone the offense of the third person, so as to bar a criminal prosecution against him.[77] Nor is it a defense that the injured spouse consented to the commission of the crime.[78] Physical incapacity to commit the crime is of course a good defense.[79]

V. PARTIES TO OFFENSE

[§ 20] In some states a single woman may be indicted as a principal for participation in the act of adultery with a married man.[80]

VI. PROSECUTION IN GENERAL

[§ 21] **A. Persons Entitled to Prosecute.** In the absence of statutory authority neither husband nor wife can commence a prosecution for the crime of adultery against the other,[81] as such a prosecution must be commenced by a person who would be a competent witness against defendant if called to testify at the trial.[82] In some states, however, it is provided by statute that no prosecution for adultery can be commenced except by complaint of the husband or wife,[83] the object being to exempt the party from prosecution except at the instance of the husband or wife.[84]

Prosecution of married persons. Where the right to institute a prosecution for adultery is confined to the spouse of one of the offenders, the general rule is that a married person accused of the offense can be prosecuted by the spouse of either.[85]

Prosecution of single persons. In jurisdictions wherein an unmarried person may be guilty of adultery the prosecution can be instituted upon the complaint of the spouse of the person with whom the crime was committed.[86]

Effect of divorce. A former spouse cannot institute proceedings after divorce has been granted.[87] But upon the remarriage of a husband and wife after a divorce the husband may institute a complaint against a third person for adultery committed with the wife during their former marriage;[88] and the fact that the injured spouse obtains a divorce after having instituted a prosecution does not deprive the court of the power of proceeding to try and sentence defendant.[89]

Extent of prosecution by spouse. Statutes requiring the prosecution to be commenced by

74. Fox v. State, 3 Tex. A. 329, 30 AmR 144.

75. See cases infra this note.

[a] **Mere delay in lodging the complaint** does not constitute condonation. Mortiga v. Serra, 5 Philippine 34 [aff 204 U. S. 470, 27 SCt 343, 51 L. ed. 571] (five years); Gali v. Sahagun, 2 Philippine 425 (seven months).

[b] **Evidence held insufficient** to show condonation see U. S. v. Caday, 4 Philippine 431.

76. U. S. v. Hernandez, 14 Philippine 638.

77. State v. Smith, 108 Iowa 440, 79 NW 115.

78. U. S. v. Hernandez, 14 Philippine 638.

79. State v. Cushing, 86 Vt. 416, 85 A 770.

80. State v. Case, 61 Or. 265, 122 P 304 (holding also that in order for a woman to be an accomplice in adultery, it is not essential that she be absent and not directly participating in the criminal act).

81. State v. Berlin, 42 Mo. 572; Thomas v. State, 14 Tex. A. 70.

82. State v. Berlin, 42 Mo. 572; Thomas v. State, 14 Tex. A. 70. See Witnesses [40 Cyc 2133].

[a] **In Pennsylvania,** under a statute making the spouse a competent witness to prove the marriage in prosecutions for adultery, it has been held that a husband might institute a prosecution for the punishment of an act of adultery committed with his wife. Com. v. Barr, 25 Pa. Super. 609; Com. v. Vance, 29 Pa. Co. 257, 7 Dauph. Co. 232; Com. v. Geary, 9 Pa. Co. 60.

83. Iowa.—State v. Young, 148 Iowa 629, 127 NW 987; State v. Loftus, 128 Iowa 529, 104 NW 906; State v. Smith, 108 Iowa 440, 79 NW 115; State v. Oden, 100 Iowa 22, 69 NW 270; State v. Andrews, 95 Iowa 451, 64 NW 404; State v. Corliss, 85 Iowa 18, 51 NW 1154; State v. Maas, 83 Iowa 469, 49 NW 1037; State v. Mahan, 81 Iowa 121, 46 NW 855; State v. Stout, 71 Iowa 343, 32 NW 372; State v. Briggs, 68 Iowa 416, 27 NW 358; Bush v. Workman, 64 Iowa 205, 19 NW 910; State v. Henke, 58 Iowa 457, 12 NW 477; State v. Wilson, 22 Iowa 364; State v. Roth, 17 Iowa 336; State v. Dingee, 17 Iowa 232; State v. Baldy, 17 Iowa 39.

Mich.—Peo. v. Isham, 109 Mich. 72, 67 NW 819; Peo. v. Dalrymple, 55 Mich. 519, 22 NW 20; Peo. v. Davis, 52 Mich. 569, 18 NW 362; Bayliss v. Peo., 46 Mich. 221, 9 NW 257; Peo. v. Knapp, 42 Mich. 267, 3 NW 927, 36 AmR 438; Parsons v. Peo., 21 Mich. 509. And see Peo. v. Davis, 175 Mich. 594, 141 NW 667.

Minn.—State v. Brecht, 41 Minn. 50, 42 NW 602; State v. Armstrong, 4 Minn. 335.

N. D.—State v. Wesie, 17 N. D. 567, 118 NW 20, 19 LRANS 786 and note.

Okl.—Matter of Smith, 2 Okl. 153, 37 P 1099; Copeland v. State, (Cr. A.) 133 P 258.

Wash.—State v. La Bounty, 64 Wash. 415, 116 P 1073.

[a] **Consent of spouse.**—Under statutes providing that prosecutions for adultery shall be commenced only on the complaint of the husband or wife, one spouse may prosecute without the consent and against the wishes of the other. Peo. v. Knapp, 42 Mich. 267, 3 NW 927, 36 AmR 438.

[b] **Complaint not element of offense.**—The complaint required by the statute authorizing the commencement of the prosecution is not an element of the offense. It simply limits the authority of the court to set the law in motion for the punishment of the offense. State v. Harmann, 135 Iowa 167, 112 NW 632; State v. Athey, 133 Iowa 382, 108 NW 224; State v. Clemenson, 123 Iowa 524, 99 NW 139; State v. Andrews, 95 Iowa 451, 64 NW 404; State v. Maas, 83 Iowa 469, 49 NW 1037; State v. Mahan, 81 Iowa 121, 46 NW 855; State v. Donovan, 61 Iowa 278, 16 NW 130; Peo. v. Isham, 109 Mich. 72, 67 NW 819; State v. Brecht, 41 Minn. 50, 42 NW 602.

[c] **In the Philippines** the rule has been extended by statute so as to authorize the prosecution upon the complaint of the aggrieved person, or of the parents, grandparents, or guardian of such person. Act No. 1773 § 1. Pen. Code art 434, has not been repealed, but merely modified by Act No. 1773. U. S. v. Asuncion, 22 Philippine 358; U. S. v. Crug, 20 Philippine 363; Quilatan v. Caruncho, 21 Philippine 399; U. S. v. Guillermo, 19 Philippine 617; U. S. v. Salazar, 19 Philippine 233; U. S. v. Ortis, 19 Philippine 174; U. S. v. Hernandez, 14 Philippine 638; U. S. v. Narvas, 14 Philippine 410; U. S. v. Gomez, 12 Philippine 279, 7 Off. Gaz. 74. Prior to Act No. 1773, the lack of a complaint by the husband could not be cured by one presented by the fiscal. U. S. v. Gomez, supra. Act No. 1773 cannot be applied retroactively. U. S. v. Gomez, supra. In the absence of the father, who it seems has a preferential right, the complaint may now be instituted by the mother. U. S. v. Gariboso, 11 Off. Gaz. 1768.

84. State v. Oden, 100 Iowa 22, 69 NW 270; State v. Roth, 17 Iowa 336.

[a] **Such provisions are grounded** in the regard which the law has for the marital relation, and the right of the husband and wife to condone the wrongs of either toward the other. State v. Oden, 100 Iowa 22, 69 NW 270; State v. Corliss, 85 Iowa 18, 51 NW 1154; State v. Brecht, 41 Minn. 50, 42 NW 602.

85. Willson v. Daboll, 104 Mich. 155, 62 NW 293; Peo. v. Davis, 52 Mich. 569, 18 NW 362; State v. Brecht, 41 Minn. 50, 42 NW 602; State v. Wesie, 17 N. D. 567, 118 NW 20, 19 LRANS 786 and note.

[a] **In Iowa, however,** the rule is otherwise. State v. Mahan, 81 Iowa 121, 46 NW 855; Bush v. Wortsman, 64 Iowa 205, 19 NW 910. But Code § 4008, providing that no prosecution for adultery shall be commenced except on complaint of the husband or wife, does not prevent the prosecution, at the instance of the husband of the woman, of a man who was unmarried at the time the offense was committed, but who has been subsequently married. State v. Oden, 100 Iowa 22, 69 NW 270.

86. State v. Oden, 100 Iowa 22, 69 NW 270; State v. Wilson, 22 Iowa 364; Bayliss v. Peo., 46 Mich. 221, 9 NW 257.

87. State v. Loftus, 128 Iowa 529, 104 NW 906; In re Smith, 2 Okl. 158, 37 P 1099.

88. State v. Smith, 108 Iowa 440, 79 NW 115.

89. Ex p. Cranford, 3 Okl. Cr. 187, 105 P 367.

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the husband or wife do not demand that the same shall be prosecuted by the one or the other to conviction. After the prosecution has been commenced it may be continued without further coöperation on the part of either.[90]

[§ 22] **B. Sufficiency of Commencement.** A prosecution is sufficiently commenced by the spouse, either by making a complaint before the grand jury,[91] or by filing an information before a committing magistrate,[92] with the intention of prosecuting defendant.[93] So the verification of the information in a prosecution for adultery by the husband or wife of one of the accused, filed before the committing magistrate, is a sufficient commencement of the prosecution.[94] In some states, however, there must be a formal complaint by the injured spouse;[95] and a complaint to the county attorney is not a sufficient commencement of a prosecution.[96] A complaint authorizing the prosecution of one of the offenders will not justify a prosecution of the other.[97]

[§ 23] **C. Right to Discontinue.** Where the prosecution has been commenced on the complaint of a person having the exclusive right to prosecute, the authorities are divided as to the right of complainant to discontinue the prosecution. In some courts such discontinuances are allowed and the prosecution is thereupon dismissed,[98] while in others it has been held that having instituted the proceedings no further voluntary prosecution is necessary, the action being then within the control of the court.[99]

VII. INDICTMENT OR INFORMATION[1]

[§ 24] **A. In General.** In prosecutions for the crime of adultery all the constituent elements of the offense must be alleged in the indictment or information.[2] Nothing can be taken by intendment.[3]

[§ 25] **B. Charging in Language of Statute—1. In General.** An indictment which follows the language of the statute will generally be held sufficient.[4] The exact words of the statute, however, need not be used, as a substantial following of their meaning is all that is required.[5] But while the precise wording of the statute need not be used, the failure to use its equivalent will render the indictment defective.[6]

[§ 26] **2. Under Statutes Authorizing Prosecution Only on Complaint of Spouse.** Where the prosecution can be commenced only upon the com-

90. State v. Briggs, 68 Iowa 416, 27 NW 358; State v. Dingee, 17 Iowa 232; State v. Baldy, 17 Iowa 39.

Right to discontinue prosecution see infra § 23.

91. State v. Young, 148 Iowa 629, 127 NW 987; State v. Henke, 58 Iowa 457, 12 NW 477; State v. Baldy, 17 Iowa 39.

92. State v. Briggs, 68 Iowa 416, 27 NW 358; State v. Dingee, 17 Iowa 232.

93. State v. Roth, 17 Iowa 336.

[a] **Intention to prosecute.**—There must be an intention to prosecute. Where the spouse goes before the grand jury in response to a subpœna, and testifies under the belief that she is compelled to do so, but without intending to prefer a charge against defendant, it is not a sufficient complaint within the meaning of the law. State v. Loftus, 128 Iowa 529, 104 NW 906; State v. Stout, 71 Iowa 343, 32 NW 372; State v. Donovan, 61 Iowa 278, 16 NW 130.

[b] **Intention question for jury.**—The question whether the prosecution was commenced on the complaint of the injured spouse is to be determined by the jury upon the evidence given on the trial. State v. Briggs, 68 Iowa 416, 420, 27 NW 358 (where it was held that the trial court properly overruled a motion to dismiss the cause, which "was supported by the affidavit of defendant's wife, in which she swore that, while she signed and swore to the preliminary information accusing defendant of the crime, she did not do so voluntarily, but acted under duress, and the coercion of threats by her parents and other persons; and that she did not voluntarily appear before the grand jury when that body was investigating the charge, and that she requested them to dismiss the charge, and not return an indictment thereon against her husband").

94. Heacock v. State, 4 Okl. Cr. 606, 112 P 949.

95. State v. La Bounty, 64 Wash. 415, 116 P 1073.

96. State v. Loftus, 128 Iowa 529, 104 NW 906.

97. State v. Roth, 17 Iowa 336.

98. Hosford v. Gratiot Cir. Judge, 129 Mich. 302, 88 NW 627; Peo. v. Dalrymple, 55 Mich. 519, 22 NW 20.

99. State v. Leek, 152 Iowa 12, 130 NW 1062; State v. Athey, 133 Iowa 382, 108 NW 224; State v. Briggs, 68 Iowa 416, 27 NW 358; State v. Dingee, 17 Iowa 232; State v. Baldy, 17 Iowa 39.

1. Forms of indictments or informations see Love v. State, 124 Ala. 82, 27 S 217; Heath v. State, 91 Ga. 126, 16 SE 657; State v. Anderson, 140 Iowa 445, 118 NW 772; State v. Mahan, 81 Iowa 121, 46 NW 855; State v. Hutchinson, 36 Me. 261; State v. Clawson, 30 Mo. A. 139; Lord v. State, 17 Nebr. 526, 23 NW 507; State v. Tally, 74 N. C. 322; State v. Cowell, 26 N. C. 231; State v. Hayes, 51 Or. 466, 94 P 751; Helfrich v. Com., 33 Pa. 68, 75 AmD 579; Fox v. State, 3 Tex. A. 329, 30 AmR 144; State v. Moore, 36 Utah 521, 105 P 293; State v. Thompson, 31 Utah 228, 87 P 709; State v. Miller, 60 Vt. 90, 12 A 526; Ketchingman v. State, 6 Wis. 426.

Amendment see Indictments and Informations [22 Cyc 432].

Demurrer see Indictments and Informations [22 Cyc 427].

Duplicity see Indictments and Informations [22 Cyc 376].

Motion to quash or dismiss see Indictments and Informations [22 Cyc 410].

Waiver of defects see Indictments and Informations [22 Cyc 482].

2. Me.—State v. Thurstin, 35 Me. 205, 58 AmD 695.

Mass.—Moore v. Com., 6 Metc. 243, 39 AmD 724.

Mo.—State v. Hillman, 128 Mo. A. 172, 106 SW 603.

Tex.—Edwards v. State, 10 Tex. A. 25.

Vt.—State v. Miller, 60 Vt. 90, 12 A 526.

[a] **Intent.**—An information alleging an illicit intention by and between the prisoner and the particeps to have unlawful sexual connection with each other sufficiently alleged an illicit intention on the part of the particeps. State v. Grace, 86 Vt. 470, 86 A 162.

3. State v. Sekrit, 130 Mo. 401, 32 SW 977.

4. Ala.—Love v. State, 124 Ala. 82, 27 S 217.

Ga.—Bigby v. State, 44 Ga. 344; Cook v. State, 11 Ga. 53, 56 AmD 410.

Ill.—Lyman v. Peo., 198 Ill. 544, 64 NE 974 [98 Ill. A. 386]; Crane v. Peo., 168 Ill. 395, 48 NE 54 [aff 65 Ill. A. 492].

Ind.—State v. Chandler, 96 Ind. 591.

N. C.—State v. Stubbs, 108 N. C. 774, 13 SE 90; State v. Lyerly, 52 N. C. 158.

Pa.—Davis v. Com., 3 Pa. Cas. 474, 7 A 194.

Porto Rico.—Peo. v. Birrier, 18 Porto Rico 260.

Tex.—Swancoat v. State, 4 Tex. A. 105.

Vt.—State v. Miller, 60 Vt. 90, 12 A 526.

[a] **Extent and limits of the rule.**—Whether an indictment in the words of the statute is sufficient or not depends upon the manner of stating the offense in the statute; if every fact necessary to constitute the offense is charged or necessarily implied by following the language of the statute, an indictment in such language is sufficient; otherwise not. State v. Miller, 60 Vt. 90, 12 A 526.

[b] **Knowledge of marriage.**—Where the penal code does not make knowledge on defendant's part of the fact that the paramour was married an express part of the definition of the crime the complaint need not allege such knowledge. Peo. v. Birrier, 18 Porto Rico 260.

5. Ind.—State v. Chandler, 96 Ind. 591.

Mo.—State v. Clawson, 30 Mo. A. 139.

Nebr.—Lord v. State, 17 Nebr. 526, 23 NW 507.

N. M.—U. S. v. Griego, 11 N. M. 392, 72 P 20.

N. C.—State v. Stubbs, 108 N. C. 774, 13 SE 90; State v. Tally, 74 N. C. 322; State v. Lyerly, 52 N. C. 158.

Pa.—Gorman v. Com., 124 Pa. 536, 17 A 26.

S. C.—State v. Carroll, 30 S. C. 85, 8 SE 433, 14 AmSR 883.

Tex.—Holland v. State, 14 Tex. A. 182; Swancoat v. State, 4 Tex. A. 105.

[a] **Statute following common law.**—In Gorman v. Com., 124 Pa. 536, 17 A 26, it was said that as the statutory definition did not change the characteristic features of the offense, and there was no requirement to pursue the words of the statute, an indictment which would be declared good prior to the passage of the act was sufficient, although not in the language of the statute.

[b] **Knowingly, willfully, maliciously, or feloniously.**—An indictment which alleges the substantive facts constituting the offense of adultery is sufficient without charging that the act was done "knowingly, willfully, maliciously or feloniously." Reynolds v. U. S., 7 Ind. T. 51, 103 SW 762; State v. Anderson, 140 Iowa 445, 118 NW 772.

6. Maull v. State, 37 Ala. 160; State v. Johnson, 69 Ind. 85; Lord v.

plaint of the husband or wife it is not necessary to allege that the prosecution was so commenced;[7] and although the indictment does contain such an allegation it is not conclusive[8] or even presumptive[9] evidence of its truth.

[§ 27] **C. Certainty in General.** Setting out the offense so plainly and distinctly that the jury can clearly understand its nature will be sufficient,[10] and in some jurisdictions, under statutes applicable to indictments generally, it is sufficient to charge the offense in ordinary and concise language, so as to enable a person of common understanding to know what is intended.[11]

[§ 28] **D. Designation of Offense.** It is not necessary that the technical name of the crime be stated where the substantive facts constituting the offense are set out in the indictment,[12] and the indictment may be good in such a case, even though the offense is designated by another name.[13] In an indictment charging the crime, it is sufficient to allege that defendant "did commit adultery."[14]

[§ 29] **E. Description of Parties.** No particular description of the parties is required other than may be sufficient to bring them within the terms of the statute.[15] Hence it is not necessary to allege the age,[16] race,[17] or sex[18] of the parties; and the indictment may allege the woman's name to be unknown.[19]

[§ 30] **F. Averment of Marriage of at Least One Party.** It must be alleged that at least one of the parties was married,[20] at the time the crime is alleged to have been committed,[21] to some person other than the one with whom the offense is charged to have been committed.[22] But any form of allegation which clearly and distinctly shows this fact will be sufficient; it is generally enough to allege that one of the participants was, at the time the crime was committed, lawfully married to a person other than the alleged paramour.[23] Excepting in Georgia[24] it is not necessary to allege that both participants

State, 17 Nebr. 526, 23 NW 507; Edwards v. State, 10 Tex. A. 25.

7. State v. Anderson, 140 Iowa 445, 118 NW 772; State v. Harmann, 135 Iowa 167, 112 NW 632; State v. Andrews, 95 Iowa 451, 64 NW 404; State v. Maas, 83 Iowa 469, 49 NW 1037; State v. Mahan, 81 Iowa 121, 46 NW 855; State v. Briggs, 68 Iowa 416, 27 NW 358; Peo. v. Payment, 109 Mich. 553, 67 NW 689; Peo. v. Isham, 109 Mich. 72, 67 NW 819; State v. Brecht, 41 Minn. 50, 42 NW 602.

[a] **Assuming such an allegation to be necessary,** however, an indictment which states that it was found on the complaint of the wife of defendant is, in this respect, sufficient. State v. Hayes, 51 Or. 466, 94 P 751.

[b] **Admission by attorney.**—The complaint, warrant, and information need not allege that complainant is defendant's wife. It is enough that it appears that the marriage was admitted before the examining magistrate by defendant's attorney, the presumption being that the admission was made in defendant's presence, and such admission is binding on him. Peo. v. Isham, 109 Mich. 72, 67 NW 819.

8. State v. Briggs, 68 Iowa 416, 27 NW 358; State v. Roth, 17 Iowa 336.

9. State v. Henke, 58 Iowa 457, 12 NW 477.

10. Cook v. State, 11 Ga. 53, 56 AmD 410; Crane v. Peo., 168 Ill. 395, 48 NE 54 [aff 65 Ill. A. 492]; State v. Stubbs, 108 N. C. 774, 13 SE 90.

11. State v. Anderson, 140 Iowa 445, 118 NW 772; State v. Eggleston, 45 Or. 346, 77 P 738; State v. Nelson, 39 Wash. 221, 81 P 721.

12. State v. Baldy, 17 Iowa 39.

13. Disharoon v. State, 95 Ga. 351, 22 SE 698; Butt v. State, 83 Ga. Suppl. 56. And see State v. Nelson, 39 Wash. 221, 81 P 721 (where an indictment charging "living in a state of adultery" was held to be good, although it characterized the offense as "adultery," and although the crime of "adultery" is not punishable under the laws of Washington).

14. State v. Hinton, 6 Ala. 864; State v. Lash, 16 N. J. L. 380, 32 AmD 397; U. S. v. Griego, 11 N. M. 392, 72 P 20 [rev reh 12 N. M. 84, 75 P 30]; Gorman v. Com., 124 Pa. 536, 17 A 26; Helfrich v. Com., 33 Pa. 68, 75 AmD 579.

15. See infra §§ 30, 31.

16. State v. Ean, 90 Iowa 534, 58 NW 898.

17. Butt v. State, 83 Ga. Suppl. 56.

[a] **Miscegenation.**—An indictment against a white man and a negro need not set out the race of each. Mulling v. State, 74 Ga. 10.

18. McLeod v. State, 35 Ala. 395; State v. Glaze, 9 Ala. 283; Rich v. State, 1 Ala. A. 243, 55 S 1022; Hildreth v. State, 19 Tex. A. 195; Holland v. State, 14 Tex. A. 182.

[a] **"Maiden."**—The word "maiden," used in an indictment for adultery, does not necessarily mean a virgin, but merely a young unmarried woman. State v. Shedrick, 69 Vt. 428, 38 A 75.

[b] **"Spinster."**—So in State v. Guest, 100 N. C. 410, 6 SE 253, it was held no ground for an arrest of judgment that the indictment against two defendants described the female as a "spinster."

19. State v. Ean, 90 Iowa 534, 58 NW 898; Com. v. Tompson, 2 Cush. (Mass.) 551.

20. U. S.—Cartier v. U. S., 148 Fed. 804, 78 CCA 494.

Ala.—State v. Johns, 142 Ala. 61, 38 S 755.

Me.—State v. Hutchinson, 36 Me. 261; State v. Thurstin, 35 Me. 205, 58 AmD 695.

Mass.—Com. v. Reardon, 6 Cush. 78.

Tex.—Tucker v. State, 35 Tex. 113; Goodwin v. State, (Cr. A.) 158 SW 274; Garland v. State, 51 Tex. Cr. 643, 104 SW 898; Collum v. State, 10 Tex. A. 708; Clay v. State, 3 Tex. A. 499.

Vt.—State v. Bisbee, 75 Vt. 293, 54 A 1081; State v. Searle, 56 Vt. 516.

[a] **Implied allegation.**—In Alabama, where adultery consists in the illicit commerce of two persons of different sexes, one of whom at least is married, it has been held unnecessary to allege that either person is married, since the term "adultery" implies that fact without further allegation. State v. Hinton, 6 Ala. 864.

21. Cartier v. U. S., 148 Fed. 804, 78 CCA 494 (decided under Alaska code of criminal procedure).

[a] **Time of marriage.**—When the marriage of the woman is a material fact, that must not only be alleged, but it must also be alleged that she was married at the time when the offense was committed; an allegation which merely amounts to a statement that she is married at the time when the indictment is found is not sufficient. State v. Thurstin, 35 Me. 205, 58 AmD 695 (where an allegation "being a married woman and the lawful wife of" a person named was held to have reference to the time of the finding of the indictment, and not to the time of the offense).

[b] **Spouse living.**—In Names v. State, 20 Ind. A. 168, 50 NE 401, an allegation that "Anna Jones being then and there a married woman and the wife of one William Jones, did then and there," etc., necessarily implied that A. J.'s husband was living.

22. Me.—State v. Hutchinson, 36 Me. 261.

Mass.—Com. v. Reardon, 6 Cush. 78; Moore v. Com., 6 Metc. 243, 39 AmD 724.

Mo.—State v. Hillman, 128 Mo. A. 172, 106 SW 603.

N. H.—State v. Clark, 54 N. H. 456.

Pa.—Gorman v. Com., 124 Pa. 536, 17 A 26; Com. v. Corson, 4 PaLJR 271.

Tex.—Tucker v. State, 35 Tex. 113; Lee v. State, 47 Tex. Cr. 464, 83 SW 1110; Hildreth v. State, 19 Tex. A. 195; Clay v. State, 3 Tex. A. 499.

[a] **Implied from word "adultery."**—In Gorman v. Com., 124 Pa. 536, 17 A 26, it was held that the word "adultery" used in the indictment charging the offense necessarily implied that the alleged participants in the unlawful act were not married to each other.

23. Ill.—Lyman v. Peo., 198 Ill. 544, 64 NE 974 [aff 98 Ill. A. 386].

Ind.—Names v. State, 20 Ind. A. 168, 50 NE 401.

Iowa.—State v. Anderson, 140 Iowa 445, 118 NW 772; State v. Mahan, 81 Iowa 121, 46 NW 855.

Me.—State v. Hutchinson, 36 Me. 261.

Mass.—Com. v. Reardon, 6 Cush. 78; Com. v. Tompson, 2 Cush. 551; Moore v. Com., 6 Metc. 243, 39 AmD 724.

Or.—State v. Eggleston, 45 Or. 346, 77 P 738.

Pa.—Gorman v. Com., 124 Pa. 536, 17 A 26; Helfrich v. Com., 33 Pa. 68, 75 AmD 579; Davis v. Com., 3 Pa. Cas. 474, 7 A 194.

Tex.—Brown v. State, (Cr. A.) 154 SW 567; Lee v. State, 47 Tex. Cr. 464, 83 SW 1110; Lenert v. State, (Cr. A.) 63 SW 563; Thomas v. State, (Cr. A.) 26 SW 724; Hildreth v. State, 19 Tex. A. 195; Collum v. State, 10 Tex. A. 708.

Vt.—State v. Clark, 83 Vt. 305, 75 A 534, AnnCas1912A 261.

[a] **Sufficiency of allegation.**—(1) Thus an allegation that the woman is the lawful wife of another man is a sufficient allegation that she is not the wife of defendant (Names v. State, 20 Ind. A. 168, 50 NE 401; State v. Hutchinson, 36 Me. 261; Com. v. Reardon, 6 Cush. (Mass.) 78); (2) and where the indictment alleged the name of the wife and further alleged that defendant committed adultery with another named woman, without otherwise alleging carnal knowledge, it was held sufficient without a further allegation that the latter was not his wife (Helfrich v. Com., 33 Pa. 68, 75 AmD 579). (3) But an allegation showing merely that the persons charged with the unlawful act have different names is insufficient. Moore v. Com., 6 Metc. (Mass.) 243, 39 AmD 724.

24. Tison v. State, 125 Ga. 7, 53 SE 809; Kendrick v. State, 100 Ga. 360, 28 SE 120; Williams v. State, 86 Ga. 548, 12 SE 743.

in the unlawful act were married persons,[25] although the indictment may properly do so.[26]

[§ 31] **G. Naming Spouse of Defendant.** It being made apparent from the allegations that the parties do not occupy the relation of husband and wife, it is not necessary further to allege the name or names of the legal spouse or spouses.[27]

[§ 32] **H. Averment of Carnal Knowledge.** Any term or expression which clearly conveys the idea of illicit connection is sufficient.[28]

[§ 33] **I. Averments as to Time and Place.** While it is not necessary to allege the particular place within the county where the act was committed, yet it must appear from the evidence that it was within the jurisdiction of the court.[29] As a general rule the time of the act as laid is immaterial;[30] but an allegation that the crime was committed at some indefinite time between two specified days is bad.[31] After the time has been stated with certainty it may be referred to, in respect to other facts alleged, by the term "then and there," without being repeated.[32] An obvious clerical error in the averment as to time will not defeat the indictment.[33]

Statute of Limitations. If the indictment sets out a time showing that the prosecution is not barred by limitation, it is sufficient;[34] otherwise the indictment will be fatally defective.[35]

[§ 34] **J. Surplusage.** Unnecessary allegations contained in the indictment may be rejected as surplusage.[36]

[§ 35] **K. Joinder of Parties Defendant.** While it is not necessary to join both the man and the woman in the same indictment,[37] yet such course may be pursued at the election of the prosecution,[38] and in such cases the indictment must be construed as if it alleged that the acts constituting the offense, and charged to have been done by defendants jointly, were also done by each of defendants separately.[39]

25. Lyman v. Peo., 198 Ill. 544, 64 NE 974; State v. Mahan, 81 Iowa 121, 46 NW 855; State v. Hutchinson, 36 Me. 261; Com. v. Reardon, 6 Cush. (Mass.) 78.

26. State v. Hutchinson, 36 Me. 261 [quot Com. v. Reardon, 6 Cush. (Mass.) 78]; Brown v. State, (Tex. Cr. A.) 154 SW 567.

27. Gorman v. Com., 124 Pa. 536, 17 A 26; Davis v. Com., 3 Pa. Cas. 474, 7 A 194; Lenert v. State, (Tex. Cr. A.) 63 SW 563; Thomas v. State, (Tex. Cr. A.) 26 SW 724; Hildreth v. State, 19 Tex. A. 195; Collum v. State, 10 Tex. A. 708. Contra Com. v. Corson, 2 Pars. Eq. Cas. (Pa.) 475 (where it was held that upon an indictment against a married woman the name of her husband must be stated); Garland v. State, 51 Tex. Cr. 643, 104 SW 898 (where an allegation setting out the name of defendant's spouse was said to be necessary, and must be proved as laid).

28. Ind. T.—Reynolds v. U. S., 7 Ind. T. 51, 103 SW 762.

Mass.—Com. v. Squires, 97 Mass. 59 (holding that when used in an indictment the words "carnal knowledge" imply sexual bodily connection).

N. M.—U. S. v. Griego, 11 N. M. 392, 72 P 20 [rev reh on other grounds 12 N. M. 84, 75 P 30].

Pa.—Gorman v. Com., 124 Pa. 536, 17 A 26; Davis v. Com., 3 Pa. Cas. 474, 7 A 194.

Utah.—State v. Moore, 36 Utah 521, 105 P 293, AnnCas1912A 284 (holding that an indictment charging a married woman with adultery by then and there feloniously "permitting" M to have carnal knowledge of her body, etc., was not fatally defective in that it charged her only with permitting an act by another).

Vt.—State v. Bridgman, 49 Vt. 202, 24 AmR 124.

[a] **Indefinite allegation.**—Where the indictment alleged that defendant was found in bed with another man's wife "under circumstances affording presumption of an illicit and felonious intention," it was held bad for not alleging what the illicit intention was. State v. Miller, 60 Vt. 90, 12 A 526; State v. Chillis, Brayt. (Vt.) 131.

[b] **"Sexual" or "carnal."**—It is not a valid objection to an indictment for adultery that the crime is not described as "sexual" or "carnal" intercourse. U. S. v. Griego, 11 N. M. 392, 72 P 20 [rev reh on other grounds 12 N. M. 84, 75 P 30]; Helfrich v. Com., 33 Pa. 68, 75 AmD 579.

29. Com. v. Horton, 2 Gray (Mass.) 354; State v. Armstrong, 4 Minn. 335.

[a] **Name of the town.**—So it was held unnecessary to allege the name of the town where defendant resided, even where the officers of such town were entitled to a share in the fine. Duncan v. Com., 4 Serg. & R. (Pa.) 449.

[b] **Allegation held sufficient** see Peo. v. Birrier, 18 Porto Rico 260.

30. Ga.—Cook v. State, 11 Ga. 53, 56 AmD 410.

Iowa.—State v. Briggs, 68 Iowa 416, 27 NW 358.

Mass.—Com. v. Merriam, 14 Pick. 518, 25 AmD 420; Com. v. Putnam, 1 Pick. 136.

Mich.—Peo. v. Davis, 52 Mich. 569, 18 NW 362.

Tex.—Wood v. State, (Cr. A.) 51 SW 235.

31. Com. v. Fuller, 163 Mass. 499, 40 NE 764; State v. Thompson, 31 Utah 228, 87 P 709.

[a] **Divers other days and times.**—Although it is provided by statute that an indictment must charge but one offense, it has been held that an indictment for adultery which charges the commission of the offense on a special day "and divers other days and times" is not subject to demurrer on the ground that it charges a series of offenses. It was said in effect that time not being an ingredient of the offense, in making proof the state would be permitted to prove the commission of the offense either on the day specified or on any other day within the period limited for finding an indictment after the commission of the offense, but defendant could be convicted of but one offense under the indictment, and the allegation that he committed the offense on divers other days than the one specified might be rejected as surplusage. Cook v. State, 11 Ga. 53, 56 AmD 410; State v. Briggs, 68 Iowa 416, 27 NW 358; State v. Thompson, 31 Utah 228, 87 P 709.

32. Names v. State, 20 Ind. A. 168, 50 NE 401; State v. Hutchinson, 36 Me. 261; State v. Thurstin, 35 Me. 205, 58 AmD 695; State v. Eggleston, 45 Or. 346, 77 P 738.

33. Wood v. State, (Tex. Cr. A.) 51 SW 235 (holding that an allegation that the offense was committed in "one thousand eight hundred and nine seven" is sufficient to show its commission in 1897).

34. Iowa.—State v. Anderson, 140 Iowa 445, 118 NW 772; State v. Briggs, 68 Iowa 416, 27 NW 358.

Mass.—Com. v. Cobb, 14 Gray 57; Com. v. Merriam, 14 Pick. 518, 25 AmD 420.

Or.—State v. Eggleston, 45 Or. 346, 77 P 738.

Tex.—Swancoat v. State, 4 Tex. A. 105.

Utah.—State v. Hilberg, 22 Utah 27, 61 P 215.

35. State v. Ball, 30 W. Va. 382, 4 SE 645.

36. State v. Yocum, 9 Mo. A. 589 appendix; State v. Way, 5 Nebr. 283.

[a] **Illustrations of surplusage.**—(1) In State v. Mahan, 81 Iowa 121, 46 NW 855, an allegation that the prosecution was commenced by the spouse of one of the alleged offenders was held to be surplusage. (2) So, where the offense was alleged to have been committed on a specific day, an additional allegation that the crime was committed "on divers other days and times" was held to be unnecessary, and might therefore be rejected as surplusage. State v. Briggs, 68 Iowa 416, 27 NW 358. Similar allegations were so considered in Cook v. State, 11 Ga. 53, 56 AmD 410, and State v. Thompson, 31 Utah 228, 87 P 709. (3) In State v. Ean, 90 Iowa 534, 58 NW 898, an averment that the woman with whom the offense was committed was "over eighteen years of age" was held to be surplusage. (4) And in Collum v. State, 10 Tex. A. 708, it was held that an allegation setting out the name of the person to whom the adulterer was married might be rejected as surplusage. But see Garland v. State, 51 Tex. Cr. 643, 104 SW 898 (where such an averment was held to be material and necessary to prove).

37. Ga.—Disharoon v. State, 95 Ga. 351, 22 SE 698; Bigby v. State, 44 Ga. 344; Wasden v. State, 18 Ga. 264.

Ill.—Lyman v. Peo., 198 Ill. 544, 64 NE 974.

Iowa.—State v. Wilson, 22 Iowa 364; State v. Dingee, 17 Iowa 232; State v. Baldy, 17 Iowa 39.

Vt.—State v. Searle, 56 Vt. 516.

Wash.—State v. Nelson, 39 Wash. 221, 81 P 721.

[a] **In the Philippines** the prosecution must be directed against both offenders if living (U. S. v. Bacas, 14 Philippine 308), even where the male offender did not know that the woman was married, and is hence not guilty of the offense (U. S. v. Asuncion, 22 Philippine 358). The death of one offender, pending the prosecution, does not abate it. U. S. v. De la Torre, 11 Off. Gaz. 1457.

38. Iowa.—State v. Dingee, 17 Iowa 232.

Ky.—Frost v. Com., 9 B. Mon. 362.

Me.—State v. Bartlett, 53 Me. 446.

Mass.—Com. v. Thompson, 99 Mass. 444; Com. v. Cobb, 14 Gray 57; Com. v. Elwell, 2 Metc. 190, 35 AmD 398.

N. C.—State v. Parham, 50 N. C. 416.

Wash.—State v. Nelson, 39 Wash. 221, 81 P 721.

See also the following cases wherein it appears that the participants in the offense were jointly indicted, although the question of the right of joint indictment was not raised: McAlpine v. State, 117 Ala. 93, 23 S 130; Cotton v. State, 62 Ala. 12; State v. Roth, 17 Iowa 336; Com. v. Bakeman, 131 Mass. 577, 41 AmR 248; State v. Wilson, 31 N. J. L. 77; State v. Wiseman, 130 N. C. 726, 41 SE 884; State v. Cutshall, 109 N. C. 764, 14 SE 107, 26 AmSR 599; State v. Guest, 100 N. C. 410, 6 SE 253; McLean v. State, 32 Tex. Cr. 521, 24 SW 898; Alonzo v. State, 15 Tex. A. 378, 49 AmR 207.

39. Manel v. State, 37 Ala. 160;

[§ 36] **L. Joinder of Counts.** The indictment may contain several counts charging offenses growing out of the act of illicit intercourse between the same persons.[40] Thus an indictment may, in separate counts, charge adultery, fornication, and bastardy,[41] or adultery and fornication,[42] or adultery and bastardy,[43] or adultery and living in adultery;[44] and the married or single state of the participants in the offense may be charged in distinct counts as the circumstances may require.[45]

[§ 37] **M. Bill of Particulars.** Applications for bills of particulars in prosecutions for adultery are governed by the general rules of criminal procedure.[46]

VIII. ISSUES, PROOF, AND VARIANCE

[§ 38] **A. In General.** The fact that a prosecution for adultery was instituted by the spouse of accused may be proved, although the indictment contains no allegation to that effect.[47] And evidence of distinct acts of adultery may be given under an indictment containing several and distinct counts.[48] Former acquittal must be pleaded specially; it is not available under a plea of not guilty.[49]

Conviction where indictment contains one or more counts. Where the indictment contains but one count defendant can be convicted of but one criminal offense, although several offenses are proven on the trial[50] under the rule admitting such proof as corroborative evidence.[51] But where the indictment contains several counts there may be a conviction or acquittal on each or all of them.[52]

[§ 39] **B. Variance—1. In General.** The evidence adduced at the trial must correspond with all the essential allegations of the indictment, and any variance therefrom will be held a fatal defect.[53] But a variance does not arise because the proof fails to establish unnecessary averments[54] or such as need not be proved precisely as laid.[55]

[§ 40] **2. As to Names. Name of defendant.** Where defendant is charged in the indictment by a name other than his true one, but it appears that he is well known by the name charged, there is no variance.[56]

Name of paramour. Where the indictment charges the offense as having been committed with a particular person named therein, the proof must be confined to the person so designated,[57] unless it is satisfactorily shown that the person named in the indictment was known by different names, one of which is the name alleged, and by which he can be identified.[58]

Name of injured spouse. It seems that where the indictment alleges that accused was married to a person bearing a specified name, the allegation must be proved as laid.[59] In any event it is sufficient to

Com. v. Bakeman, 131 Mass. 577, 41 Am.R 248.

40. Bailey v. State, 36 Nebr. 808, 55 NW 241; State v. Marvin, 35 N. H. 22.

[a] **Illustration.**—In Sutton v. State, 124 Ga. 815, 53 SE 381, the indictment contained four counts, charging, first, fornication, alleging that both persons were unmarried; second, adultery, alleging that they were both married; third, adultery and fornication, alleging that the woman was single and the man married; and fourth, adultery and fornication, alleging that the man was single and the woman married. It was held that the indictment was good.

[b] **When adultery constitutes a felony,** the indictment should not charge distinct offenses in separate counts. Ketchingman v. State, 6 Wis. 426.

41. Gorman v. Com., 124 Pa. 536, 17 A 26; Com. v. Lehr, 2 Pa. Co. 341; Com. v. Burk, 2 Pa. Co. 12.

42. Sutton v. State, 124 Ga. 815, 53 SE 381; Butt v. State, 33 Ga. Suppl. 56; Garland v. State, 51 Tex. Cr. 643, 104 SW 898.

43. Gorman v. Com., 124 Pa. 536, 17 A 26.

44. Bailey v. State, 36 Nebr. 808, 55 NW 241; State v. Way, 5 Nebr. 283.

45. Sutton v. State, 124 Ga. 815, 53 SE 381; Williams v. State, 86 Ga. 548, 12 SE 743 (dictum); State v. Marvin, 35 N. H. 22.

46. See Indictments and Informations [22 Cyc 371].

[a] **Discretion of court.**—It is wholly within the discretion of the trial court to allow further specifications of the crime than those contained in the indictment. State v. Bridgman, 49 Vt. 202, 24 AmR 124.

[b] **Where defendant might be misled.**—The prosecuting attorney should be required to furnish to respondent's counsel a particular statement, specifying the times and places where the alleged acts of adultery upon which he expected to rely for a conviction were supposed to have been committed, where respondent may otherwise be altogether misled in his preparation for a defense. Peo. v. Davis, 52 Mich. 569, 18 NW 362.

[c] **Where the indictment sets forth the offense with common-law strictness and particularity,** defendant is not, as a matter of legal right, entitled to any further specifications of the crime with which he is charged. State v. Bridgman, 49 Vt. 202, 24 AmR 124.

47. State v. Harmann, 135 Iowa 167, 112 NW 632; State v. Andrews, 95 Iowa 451, 64 NW 404; State v. Maas, 83 Iowa 469, 49 NW 1037.

48. Ketchingman v. State, 6 Wis. 426.

49. Swancoat v. State, 4 Tex. A. 105.

50. State v. Briggs, 68 Iowa 416, 27 NW 358; State v. Hilberg, 22 Utah 27, 61 P 215.

51. See Criminal Law [12 Cyc 405].

52. Bailey v. State, 36 Nebr. 808, 55 NW 241.

53. Henderson v. State, 105 Ala. 139, 16 S 927; State v. Vittum, 9 N. H. 519; Garland v. State, 51 Tex. Cr. 643, 104 SW 898; State v. Dudley, 7 Wis. 664.

[a] **Variance as to marriage.**—(1) Where the indictment charges the offense to have been committed with a named woman alleged to be married, and the evidence shows that she is not married, a conviction cannot be sustained. Kendrick v. State, 100 Ga. 360, 28 SE 120. (2) So where the indictment charged adultery and fornication with an "unmarried" woman, and it appeared that she had a husband living six or seven years before the offense, it was held that there could be no conviction without evidence of his death. Williams v. State, 86 Ga. 548, 12 SE 743. (3) But under Act March 3, 1887, c 397 § 3, 24 St. 635, U. S. Comp. St. (1901) p 3636, providing that, when the act is committed between a married woman and a man who is unmarried, both are guilty, a single man committing the act with a married woman may be found guilty, although the indictment charges that he is married. U. S. v. Cook, 15 N. M. 124, 103 P 305.

54. State v. Ean, 90 Iowa 534, 58 NW 898; Collum v. State, 10 Tex. A. 708.

55. State v. Brecht, 41 Minn. 50, 42 NW 602.

56. State v. Brecht, 41 Minn. 50, 42 NW 602.

57. Henderson v. State, 105 Ala. 139, 16 S 927; State v. Vittum, 9 N. H. 519; State v. Dudley, 7 Wis. 664.

[a] **Illustrations.**—(1) Where the indictment alleged that defendant had been guilty of adultery with Dollie Croffit, but the evidence tended to show that the offense had been committed with a woman whom the witness called Dollie Crawford, it was held that there could be no conviction, in the absence of evidence that the woman's name was Croffit, or that she was sometimes known or called by that name. Henderson v. State, 105 Ala. 139, 16 S 927. (2) So where the indictment alleged that the adultery was committed with "Adaline Winders" and the proofs showed that it was committed with "Mary Adaline Winders" the variance was held fatal. State v. Dudley, 7 Wis. 664. (3) And where the indictment alleged that defendant committed adultery with one L W, without any further designation, and it appeared that there were in the same town two individuals of that name, father and son, and that the latter used the addition "junior" to his name, and was thereby well known and distinguished from his father, it was held that evidence of adultery with L W, junior, was not admissible under the indictment. State v. Vittum, 9 N. H. 519.

58. Ala.—Henderson v. State, 105 Ala. 139, 16 S 927; State v. Glaze, 9 Ala. 283.

Me.—State v. Libby, 44 Me. 469, 69 AmD 115.

Mass.—Com. v. Seeley, 167 Mass. 163, 45 NE 91.

Minn.—State v. Brecht, 41 Minn. 50, 42 NW 602.

S. C.—State v. Mims, 39 S. C. 557, 17 SE 850.

Tex.—Polk v. State, (Cr. A.) 148 SW 311.

Vt.—State v. Brink, 68 Vt. 659, 35 A 492.

59. Peo. v. Stokes, 71 Cal. 263, 12 P 71. So in Garland v. State, 51 Tex. Cr. 643, 104 SW 898, it was held to be a fatal variance where the indictment alleged that defendant was married to "Mollie Garland," and the proof was of defendant's marriage to "M. M. Allen" and failed to show that "M. M. Allen" was Mollie Allen and subsequently Mrs. Mollie Garland. But in Hildreth v. State, 19 Tex. A. 196, it was held that the state need not allege or prove the name of the person to whom one of the adulterers is married; and in Collum v. State,

show that the spouse was known and could be identified by the name alleged in the indictment.[60]

[§ 41] **3. As to Time of Commission of Offense.** Time is not of the essence of the offense, and proof of adulterous cohabitation during any portion of the period charged is sufficient.[61] Furthermore, although the indictment charges the commission of the offense on a specified day, the state is not required to confine its evidence to the crime so charged, but the act of adultery may be shown to have been committed at any time within the period of limitation ending when the indictment was found.[62]

IX. EVIDENCE[63]

[§ 42] **A. In General.** The rule is the same in respect to the admissibility of evidence in criminal prosecutions for adultery, in actions upon the case, and in proceedings for divorce.[64] As in other cases the evidence must be competent, relevant, and material to render it admissible.[65] The rule that evidence must be competent, relevant, and material applies against defendant as well as against the state.[66]

[§ 43] **B. Corpus Delicti[67]—1. Direct Evidence.** The corpus delicti, which is the actual sexual intercourse of the persons charged with the crime of adultery, may, when such evidence is available, be established by direct proof;[68] but such evidence is not essential or necessary in order to warrant or sustain a conviction.[69]

[§ 44] **2. Circumstantial Evidence—a. General Rules.** It being evident from the nature of the crime of adultery that, in the majority of prosecutions therefor, it can be established only by circumstantial evidence,[70] therefore the general rule is that the crime may be sufficiently established by proof of circumstances from which the jury may reasonably infer the guilt of defendant.[71]

10 Tex. A. 708, such an allegation was said to be surplusage.

60. Peo. v. Stokes, 71 Cal. 263, 12 P 71; State v. Brink, 68 Vt. 659, 35 A 492 (where, on the trial of an indictment charging that defendant and "Ida B.," wife of "S. B.," committed adultery, a certificate showing the marriage of "Ida C." to "C. B." was admitted to establish the marriage, where a witness testified that he knew "C. B." and his wife, and pointed them out in court, and the question as to whether he was the person called "S. B." in the indictment was submitted to the jury).

61. Bailey v. State, 36 Nebr. 808, 55 NW 241; State v. Way, 5 Nebr. 283.

62. Ala.—Gore v. State, 58 Ala. 391.
Ga.—Cook v. State, 11 Ga. 53, 56 AmD 410.
Iowa.—State v. Hasty, 121 Iowa 507, 96 NW 1115; State v. Smith, 108 Iowa 440, 79 NW 115; State v. Briggs, 68 Iowa 416, 27 NW 358.
Me.—State v. Williams, 76 Me. 480.
Mass.—Com. v. Cobb, 14 Gray 57; Com. v. Merriam, 14 Pick. 518, 25 AmD 420.
Mich.—Peo. v. Davis, 175 Mich. 594, 141 NW 667; Peo. v. Davis, 52 Mich. 569, 18 NW 362.
Minn.—State v. Brecht, 41 Minn. 50, 42 NW 602.
Or.—State v. Eggleston, 45 Or. 346, 77 P 738.
Tenn.—Cole v. State, 6 Baxt. 239.
Tex.—Swancoat v. State, 4 Tex. A. 105.
Utah.—State v. Thompson, 31 Utah 228, 87 P 709. And see State v. Moore, 126 P 322.

[a] **Acts subsequent to filing of complaint.**—Where the complaint upon which the information was based was filed one month before the information, and there was more evidence to show adultery after the complaint was filed than before, a charge of the court that authorized a conviction for an offense at any time within two years before the filing of the information was erroneous, since the time should have been limited prior to the filing of the complaint. Proctor v. State, 37 Tex. Cr. 366, 35 SW 172.

63. Cross references:
Evidence of:
Improper familiarities, prior or subsequent see Criminal Law.
Other similar offenses see Criminal Law [12 Cyc 405].
Objections to evidence see Criminal Law [12 Cyc 561].
Opinion evidence see Criminal Law.
Presumptions see Criminal Law [12 Cyc 384].

64. State v. Kimball, 74 Vt. 223, 52 A 430; State v. Brink, 68 Vt. 659, 35 A 492. And see State v. Grace, 86 Vt. 470, 86 A 162.

[a] **Evidence of physical incapacity.**—In a prosecution of a female for adultery, evidence that the male was doped or drunk to such an extent as to be physically unable to copulate at the time of the alleged offense should be admitted. State v Cushing, 86 Vt. 416, 85 A 770.

[b] **Parol evidence to show lack of jurisdiction.**—Where defendant introduces in evidence a decree of divorce granted by a court of another state in a suit by him against his wife, parol evidence is admissible, it has been held, to show that the court granting the decree had no jurisdiction. State v. Fleak, 54 Iowa 429, 6 NW 689.

65. Peo. v. Fowler, 104 Mich. 449, 62 NW 572 (holding that complaints made by a daughter of complainant's wife that her schoolmates twitted her that respondent was her brother's father were incompetent in a prosecution for adultery, and the error committed in admitting them was not cured by striking out the testimony); Quinn v. State, 51 Tex. Cr. 155, 101 SW 248 (holding that it was incompetent for the state to prove by a witness that he was on the jury that acquitted defendant's codefendant, and acquitted him on a technicality, although he believed both parties were guilty); State v. Colby, 51 Vt. 291.

[a] **Evidence of seduction.**—Evidence that accused was the first man with whom the other party to the adultery had had intercourse is irrelevant. State v. Hansen, 40 Utah 418, 122 P 375.

66. Sims v. State, 1 Ala. A. 240, 55 S 1027; Com. v. Trider, 143 Mass. 180, 9 NE 510 (holding that evidence that on other occasions than that of the alleged offense defendant's husband had accused her of similar acts, of which she was not guilty, is irrelevant); Lenert v. State, (Tex. Cr. A.) 63 SW 563.

[a] **Rebuttal of presumption of guilt.**—Where the parties were taken under circumstances warranting a presumption of guilt, they were not entitled to introduce evidence to show a conversation, before leaving home, in which no intention of adultery was expressed. Com. v. Bowers, 121 Mass. 45.

[b] **Defendant's reason for leaving wife.**—Where, on a prosecution for adultery, the proof of guilt was circumstantial, and one of the circumstances relied on was accused's leaving his wife and making his home elsewhere, the refusal to permit accused to testify, in explanation of his leaving the family home, that his wife had drawn a revolver on him, that she had taken a knife to her room and concealed it in her bed, and that by her conduct she had rendered life with her unhappy and unsafe, was reversible error. State v. Koller, 129 Iowa 111, 105 NW 391.

67. Admissions and confessions as evidence of corpus delicti see Criminal Law [12 Cyc 418, 459].

68. Hall v. State, 88 Ala. 236, 7 S 340, 16 AmSR 51; State v. Hasty, 121 Iowa 507, 96 NW 1115; State v. Austin, 108 N. C. 780, 13 SE 219.

69. See infra § 44.

70. Ga.—Sutton v. State, 124 Ga. 815, 53 SE 381.
Iowa.—State v. Hart, 94 Iowa 749, 64 NW 278.
Mass.—Thayer v. Thayer, 101 Mass. 111, 100 AmD 110.
N. M.—U. S. v. Griego, 11 N. M. 392, 72 P 20 [rev reh 12 N. M. 84, 75 P 30].
N. C.—State v. Rinehart, 106 N. C. 787, 11 SE 512; State v. Poteet, 30 N. C. 23.
Or.—State v. Eggleston, 45 Or. 346, 77 P 738.
Tenn.—Cole v. State, 6 Baxt. 239.
Vt.—State v. Kimball, 74 Vt. 223, 52 A 430; State v. Brink, 68 Vt. 659, 35 A 492.
Wis.—Till v. State, 132 Wis. 242, 111 NW 1109.

71. Ala.—Palmer v. State, 168 Ala. 124, 53 S 283; Palmer v. State, 165 Ala. 129, 51 S 358; Alsabrooks v. State, 52 Ala. 24; Lawson v. State, 20 Ala. 65, 56 AmD 182; State v. Crowley, 13 Ala. 172.
Conn.—State v. Green, Kirby 87.
Ga.—Sutton v. State, 124 Ga. 815, 53 SE 381; Eldridge v. State, 97 Ga. 192, 23 SE 832.
Hawaii.—King v. Kalailoa, 4 Hawaii 39.
Ill.—Crane v. Peo., 65 Ill. A. 492 [aff 168 Ill. 395, 48 NE 54]; Claypool v. Claypool, 65 Ill. A. 446.
Ind.—Jackson v. State, 116 Ind. 464, 19 NE 330.
Iowa.—State v. Baker, 146 Iowa 612, 125 NW 659; State v. Schadler, 116 Iowa 488, 90 NW 91; State v. Chaney, 110 Iowa 199, 81 NW 454; State v. Hart, 94 Iowa 749, 64 NW 278; State v. Ean, 90 Iowa 534, 58 NW 898.
Mass.—Com. v. Gray, 129 Mass. 474, 37 AmR 378; Com. v. Bowers, 121 Mass. 45.
N. M.—U. S. v. Griego, 11 N. M. 392, 72 P 20 [rev reh on other grounds 12 N. M. 84, 75 P 30].
N. C.—State v. Chancy, 110 N. C. 507, 14 SE 780; State v. Austin, 108 N. C. 780, 13 SE 219; State v. Eliason, 91 N. C. 564; State v. Poteet, 30 N. C. 23.
Or.—State v. La Mora, 53 Or. 261, 99 P 417; State v. Eggleston, 45 Or. 346, 77 P 738.
Pa.—Com. v. Mosier, 135 Pa. 221, 19 A 943; Com. v. Manock, 2 Cr. L. Mag. 239.
Philippine.—U. S. v. Lampano, 7 Off. Gaz. 680.
Tenn.—Cole v. State, 6 Baxt. 239.
Tex.—Richardson v. State, 34 Tex. 142; Brown v. State, (Cr. A.) 154 SW 567; Mabry v. State, 54 Tex. Cr. 449, 114 SW 378; Counts v. State, 49 Tex.

Sufficiency of evidence. But the circumstances must be such as will lead the guarded discretion of a reasonable man to the conclusion that the offense has been committed,[72] and should be so cogent as to exclude every reasonable hypothesis except that of guilt.[73] If the facts shown can be reconciled with innocence, they are insufficient to sustain a conviction.[74]

[§ 45] **b. Acts, Conduct, and Situation of Parties.** In prosecutions for adultery it is competent to prove the acts, conduct, and situation of the persons charged with the offense.[75]

Connection with crime charged. It must appear that the acts and conduct, evidence of which is offered, are sufficiently near in point of time and significant in character to have a tendency to establish the offense alleged in the indictment;[76] and in some jurisdictions the admission of such evidence is confined to proof of a continuing offense.[77]

[§ 46] **c. Adulterous Inclination and Opportunity to Satisfy It.** It has been laid down broadly that proof of an adulterous inclination in the minds of the parties, and of an opportunity to satisfy it, justifies an inference of sexual intercourse.[78] In any event when such inclination is shown to exist between the parties at the time of the alleged act, then mere opportunity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place.[79] Accordingly, it is competent to prove the mutual adulterous inclination of the persons charged with having committed the offense,[80] and any evidence is admissible which tends to show that they had an opportunity to satisfy that inclination.[81] But the inclination must extend to conduct reasonably suggesting a libidinous tendency of each of the parties toward the other,[82] and the opportunity must be more than a mere chance.[83] And to warrant the inference of intercourse, the adulterous inclination and the opportunity to satisfy it must concur.[84]

Evidence of adulterous inclination. Suspicious actions and incriminating circumstances are admissible as showing an adulterous inclination.[85]

Cr. 329, 94 SW 220; Stewart v. State, (Cr. A.) 43 SW 979.

Utah.—State v. Greene, 38 Utah 389, 115 P 181.

Vt.—State v. Sanderson, 83 Vt. 351, 75 A 961 (holding that where defendant's paramour gave birth to a child, it may be shown that on the death of the child defendant obtained a burial permit and buried the body, and that no one else was present); State v. Kimball, 74 Vt. 223, 229, 52 A 430 [cit Cyc]; State v. Brink, 68 Vt. 659, 35 A 492.

Wis.—Baker v. U. S., 1 Pinn. 641.

[a] **All surrounding circumstances** are proper to be weighed by the jury if they have any bearing on the ultimate fact. State v. Hicks, 170 Mo. A. 183, 155 SW 482.

[b] **Evidence of corpus delicti.**—On a trial for adultery, circumstantial evidence of the uncertain kind—that from which the conclusion is probable only—should not be limited merely to corroborating the direct evidence, but should be admitted to prove the corpus. State v. Brink, 68 Vt. 659, 35 A 492.

72. Ala.—Blackman v. State, 36 Ala. 295; State v. Crowley, 13 Ala. 172.

Iowa.—State v. Thompson, 133 Iowa 741, 111 NW 319; State v. Hart, 94 Iowa 749, 64 NW 278.

Mass.—Thayer v. Thayer, 101 Mass. 111, 100 AmD 110.

Nebr.—State v. Way, 5 Nebr. 283.

N. M.—U. S. v. Griego, 11 N. M. 392, 72 P 20 [rev reh on other grounds 12 N. M. 84, 75 P 30].

N. C.—State v. Eliason, 91 N. C. 564; State v. Poteet, 30 N. C. 23.

Pa.—Com. v. Manock, 2 Cr. L. Mag. 239.

Vt.—State v. Kimball, 74 Vt. 223, 229, 52 A 430 [cit Cyc].

Wis.—Till v. State, 132 Wis. 242, 111 NW 1109; Monteith v. State, 114 Wis. 165, 89 NW 828; Baker v. U. S., 1 Pinn. 641.

73. State v. Crowley, 13 Ala. 172; Lightner v. State, 126 Ga. 563, 55 SE 471; Weems v. State, 84 Ga. 461, 11 SE 501; Thompson v. State, 4 Ga. A. 846, 62 SE 568; State v. Thompson, 133 Iowa 741, 111 NW 319; State v. Hart, 94 Iowa 749, 64 NW 278; Green v. State, 53 Tex. Cr. 540, 110 SW 908; Kahn v. State, (Tex. Cr. A.) 38 SW 989.

[a] **Mere suspicion or jealousy** cannot be adduced as evidence. State v. Crowley, 13 Ala. 172; Weems v. State, 84 Ga. 461, 11 SE 501; State v. Pope, 109 N. C. 849, 13 SE 700; State v. Waller, 80 N. C. 401; Manuel v. State, 45 Tex. Cr. 96, 74 SW 30; Graham v. State, 28 Tex. A. 9, 11 SW 781, 19 AmSR 809.

74. Ga.—Weaver v. State, 74 Ga. 876.

Iowa.—State v. Chaney, 110 Iowa 199, 81 NW 454.

Mo.—State v. Clawson, 30 Mo. A. 189.

N. C.—State v. Pope, 109 N. C. 849, 13 SE 700; State v. Waller, 80 N. C. 401.

Tex.—Manuel v. State, 45 Tex. Cr. 96, 74 SW 30.

75. Ala.—Campbell v. State, 133 Ala. 158, 32 S 635.

Iowa.—State v. Taylor, 141 NW 946.

Tenn.—Cole v. State, 6 Baxt. 239.

Tex.—Brown v. State, (Cr. A.) 154 SW 567; Russell v. State, 53 Tex. Cr. 500, 111 SW 658; Counts v. State, 49 Tex. Cr. 329, 94 SW 220; Coons v. State, 49 Tex. Cr. 256, 91 SW 1085.

Vt.—State v. Grace, 86 Vt. 470, 86 A 162; State v. Kimball, 74 Vt. 223, 229, 52 A 430 [cit Cyc].

Wash.—State v. Moss, 73 Wash. 430, 131 P 1132.

[a] **Conduct toward defendant's wife.**—Where evidence tended to show adultery between accused and a married man, at a house in which accused, the man, and his wife lived, the state could show that accused and the man coöperated in driving the wife from the house, and that accused used abusive language toward the wife. Sims v. State, 1 Ala. A. 240, 55 S 1027.

76. Ala.—Alsabrooks v. State, 52 Ala. 24; Lawson v. State, 20 Ala. 65, 56 AmD 182; State v. Crowley, 13 Ala. 172.

Fla.—Brevaldo v. State, 21 Fla. 789.

Iowa.—State v. More, 115 Iowa 178, 88 NW 322.

Mass.—Com. v. Fuller, 168 Mass. 499, 40 NE 764; Thayer v. Thayer, 101 Mass. 111, 100 AmD 110.

Mich.—Peo. v. Hendrickson, 53 Mich. 525, 19 NW 169; Peo. v. Davis, 52 Mich. 569, 18 NW 362.

N. Y.—Jayne v. Jayne, 5 Misc. 307, 25 NYS 810.

S. D.—State v. Kruse, 24 S. D. 174, 123 NW 71.

Tex.—Quinn v. State, 51 Tex. Cr. 155, 101 SW 248; Counts v. State, 49 Tex. Cr. 329, 94 SW 220; French v. State, 47 Tex. Cr. 571, 85 SW 4; Bowers v. State, (Cr. A.) 71 SW 284; Bradshaw v. State, (Cr. A.) 61 SW 713; Guinn v. State, (Cr. A.) 65 SW 376.

[a] **Hugging and kissing.**—The fact that defendant and the woman were seen hugging and kissing for half an hour in a cemetery during the daytime is not alone sufficient to justify a conviction. State v. Wiltsey, 103 Iowa 54, 72 NW 415.

77. State v. Williams, 76 Me. 480; State v. Witham, 72 Me. 531; Peo. v. Hendrickson, 53 Mich. 525, 19 NW 169; Peo. v. Davis, 52 Mich. 569, 18 NW 362.

78. Jayne v. Jayne, 5 Misc. 307, 25 NYS 810; State v. Eggleston, 45 Or. 346, 77 P 738; State v. Scott, 28 Or. 331, 42 P 1 (semble); Till v. State, 132 Wis. 242, 111 NW 1109. Contra State v. Leek, 152 Iowa 12, 130 NW 1062; State v. Trachsel, 150 Iowa 135, 129 NW 736; State v. Thompson, 133 Iowa 741, 111 NW 319.

[a] **Evidence of actual cohabitation.**—While mere opportunity, together with evidence of an adulterous disposition, is not sufficient to establish adultery, evidence of actual cohabitation is unnecessary. State v. Taylor, (Iowa) 141 NW 946.

79. Ga.—Sutton v. State, 124 Ga. 815, 53 SE 381.

Iowa.—State v. Leek, 152 Iowa 12, 130 NW 1062.

Mass.—Thayer v. Thayer, 101 Mass. 111, 100 AmD 110 (per Colt, J., leading case wherein the earlier authorities are reviewed).

Mo.—State v. Hicks, 170 Mo. A. 183, 155 SW 482.

Nebr.—State v. Way, 5 Nebr. 283.

N. M.—U. S. v. Griego, 11 N. M. 392, 72 P 20 [rev reh on other grounds 12 N. M. 84, 75 P 30].

Or.—State v. Eggleston, 45 Or. 346, 77 P 738.

Vt.—State v. Kimball, 74 Vt. 223, 229, 52 A 430 [cit Cyc].

Wis.—Till v. State, 132 Wis. 242, 111 NW 1109; Monteith v. State, 114 Wis. 165, 89 NW 828.

80. Thayer v. Thayer, 101 Mass. 111, 100 AmD 110; State v. La More, 53 Or. 261, 99 P 417; State v. Eggleston, 45 Or. 346, 77 P 738; State v. Scott, 28 Or. 331, 42 P 1; State v. Kimball, 74 Vt. 223, 52 A 430.

81. Palmer v. State, 165 Ala. 129, 51 S 358; Gardner v. State, 81 Ga. 144, 7 SE 144.

82. Till v. State, 132 Wis. 242, 111 NW 1109.

83. Till v. State, 132 Wis. 242, 111 NW 1109.

84. State v. Scott, 28 Or. 331, 42 P 1; State v. Kimball, 74 Vt. 223, 229, 52 A 430 [cit Cyc]; State v. Way, 6 Vt. 311. And see Green v. State, 53 Tex. Cr. 540, 110 SW 908 (holding that since, in order to sustain a conviction of adultery, there must be acts of sexual intercourse, mere evidence of opportunity and suggestive circumstances is insufficient to establish the offense, the testimony of both parties denying acts of intercourse between them at any time not being contradicted).

85. Ala.—Palmer v. State, 168 Ala. 124, 53 S 283.

Mich.—Peo. v. Girdler, 65 Mich. 68, 31 NW 624.

Mo.—State v. Hicks, 170 Mo. A. 183, 155 SW 482.

N. H.—State v. Marvin, 35 N. H. 22.

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[§ 47] **d. Illustrations.** It has been held that the act of adultery may be inferred from evidence that a man and woman occupied the same bed and room,[86] or even that they occupied a room with a bed in it,[87] or that they were seen together in bed.[88]

Persuasive circumstances. So also it is admissible to prove in connection with other suspicious circumstances that one of the persons charged with the offense frequently visited the other,[89] and that the woman's husband was absent from home when she was visited by her alleged paramour,[90] or that they were often in each other's company,[91] or that they frequently met at unusual places,[92] or that they treated each other as husband and wife,[93] or that they were together in a room with the lights extinguished,[94] or that the man was seen in the woman's apartments, both partly disrobed.[95]

[§ 48] **3. Corroborative Evidence.**[96] In prosecutions for adultery it is competent to prove certain acts and conduct of the persons charged with having committed the offense, which, although occurring at different times, and not in themselves sufficient to justify a conviction, may be adduced in corroboration of more immediate proof of the carnal act to establish the probability of its commission, and to show the relation and mutual disposition of the parties.[97]

[§ 49] **4. Writings.** Letters or other writings containing matter material to the issue are competent evidence against the author thereof,[98] if properly proved.[99] Thus writings are admissible in evidence when couched in terms of endearment,[1] or when they contain tacit admissions of guilt,[2] or indicate improper intimacy,[3] or show an adulterous disposition.[4] But a writing with which defendant is not shown to have had any connection is not admissible against him.[5]

[§ 50] **5. Pregnancy; Birth of Children.** Evidence of the pregnancy of the female participant in the unlawful act, dating from about the time the offense is alleged to have been committed, is admissible to prove sexual intercourse on or about that time.[6] So the fact that an unmarried woman with whom the offense is alleged to have been committed gave birth to a child has been received in evidence in a number of cases as proof of the act of sexual intercourse.[7] And so it has been held competent to prove that a married woman gave

N. C.—State v. Stubbs, 108 N. C. 774, 13 SE 90; State v. Rinehart, 106 N. C. 787, 11 SE 512.
Or.—State v. La More, 53 Or. 261, 99 P 417; State v. Scott, 28 Or. 331, 42 P 1.
Tex.—Russell v. State, 53 Tex. Cr. 500, 111 SW 658.

86. Ala.—Collins v. State, 14 Ala. 608.
Iowa.—State v. Higgins, 121 Iowa 19, 95 NW 244.
Mass.—Com. v. Bowers, 121 Mass. 45.
Pa.—Com. v. Mosier, 135 Pa. 221, 19 A 943.
Tex.—Counts v. State, 49 Tex. Cr. 329, 94 SW 220; Fox v. State, 3 Tex. A. 329, 30 AmR 144.
Vt.—State v. Brink, 68 Vt. 659, 35 A 492 [overr State v. Way, 6 Vt. 311].
Wis.—Baker v. U. S., 1 Pinn. 641.

87. Ga.—Starke v. State, 97 Ga. 193, 23 SE 832; Eldridge v. State, 97 Ga. 192, 23 SE 832; Conner v. State, 3 Ga. A. 475, 60 SE 111 [dist Lightner v. State, 126 Ga. 563, 55 SE 471].
Iowa.—State v. Ean, 90 Iowa 534, 58 NW 898.
Mass.—Com. v. Clifford, 145 Mass. 97, 13 NE 845.
N. M.—U. S. v. Griego, 11 N. M. 392, 72 P 20 [rev reh on other grounds 12 N. M. 84, 75 P 30].
Tex.—Richardson v. State, 34 Tex. 142.

88. Blackman v. State, 36 Ala. 295; State v. Green, Kirby (Conn.) 87; Sutton v. State, 124 Ga. 815, 53 SE 381; Counts v. State, 49 Tex. Cr. 329, 94 SW 220; Collum v. State, 10 Tex. A. 708.

89. Ala.—Blackman v. State, 36 Ala. 295; Collins v. State, 14 Ala. 608.
Ga.—Sutton v. State, 124 Ga. 815, 53 SE 381.
Me.—State v. Witham, 72 Me. 531.
N. C.—State v. Austin, 108 N. C. 780, 13 SE 219; State v. Rinehart, 106 N. C. 787, 11 SE 512.
Tex.—Mabry v. State, 54 Tex. Cr. 449, 114 SW 378; Russell v. State, 53 Tex. Cr. 500, 111 SW 658; Counts v. State, 49 Tex. Cr. 329, 94 SW 220.

90. Peo. v. Girdler, 65 Mich. 68, 31 NW 624; Peo. v. Davis, 52 Mich. 569, 18 NW 362; State v. Nelson, 39 Wash. 221, 81 P 721.

91. Mass.—Com. v. Durfee, 100 Mass. 146.
Mich.—Peo. v. Girdler, 65 Mich. 68, 31 NW 624.
N. M.—State v. Griego, 11 N. M. 392, 72 P 20 [rev reh on other grounds 12 N. M. 84, 75 P 30].
N. C.—State v. Stubbs, 108 N. C. 774, 13 SE 90.
Tex.—Mabry v. State, 54 Tex. Cr. 449, 114 SW 378; Counts v. State, 49 Tex. Cr. 329, 94 SW 220.

92. State v. Marvin, 35 N. H. 22; Till v. State, 132 Wis. 242, 111 NW 1109.

93. Mass.—Com. v. Tarr, 4 Allen 315.
N. C.—State v. Chancy, 110 N. C. 507, 14 SE 780.
Tex.—Henderson v. State, (Cr. A.) 45 SW 707; Fox v. State, 3 Tex. A. 329, 30 AmR 144.
Utah.—U. S. v. Kershaw, 5 Utah 618, 19 P 194.
Vt.—State v. Brink, 68 Vt. 659, 35 A 492.

94. State v. Austin, 108 N. C. 780, 13 SE 219.

95. State v. Schaedler, 116 Iowa 488, 90 NW 91.

96. Corroboration of testimony of accomplice see Criminal Law [12 Cyc 453].
Evidence of:
Improper familiarities, prior or subsequent, see Criminal Law.
Other similar offenses see Criminal Law [12 Cyc 405].

97. Ala.—Alsabrooks v. State, 52 Ala. 24; Lawson v. State, 20 Ala. 65, 56 AmD 182.
Cal.—Peo. v. Koller, 142 Cal. 621, 76 P 500.
Fla.—Brevaldo v. State, 21 Fla. 789.
Ga.—Nobles v. State, 127 Ga. 212, 56 SE 125.
Iowa.—State v. More, 115 Iowa 178, 88 NW 322; State v. Butts, 107 Iowa 653, 78 NW 687.
La.—Houlton v. McGuirk, 122 La. 359, 47 S 681, 16 AnnCas 1117.
Me.—State v. Witham, 72 Me. 531.
Mass.—Brooks v. Brooks, 145 Mass. 574, 14 NE 777, 1 AmSR 485; Com. v. Nichols, 114 Mass. 285, 19 AmR 346; Thayer v. Thayer, 101 Mass. 111, 100 AmD 110; Com. v. Durfee, 100 Mass. 146; Com. v. Tarr, 4 Allen 315; Com. v. Pierce, 11 Gray 447.
Minn.—State v. Brecht, 41 Minn. 50, 42 NW 602.
Nebr.—State v. Way, 5 Nebr. 283.
N. H.—State v. Wallace, 9 N. H. 515.
N. J.—State v. Snover, 65 N. J. L. 289, 47 A 583.
N. C.—State v. Chancy, 110 N. C. 507, 14 SE 780; State v. Guest, 100 N. C. 410, 6 SE 253; State v. Pippin, 88 N. C. 646; State v. Kemp, 87 N. C. 538.
Or.—State v. Eggleston, 45 Or. 346, 77 P 738.
Tex.—Coons v. State, 49 Tex. Cr. 256, 91 SW 1085; Guinn v. State, (Cr. A.) 65 SW 376; Funderburg v. State, 23 Tex. A. 392, 5 SW 244.
Utah.—State v. Thompson, 31 Utah 228, 87 P 709; State v. Snowden, 23 Utah 318, 65 P 479; State v. Hilberg, 22 Utah 27, 61 P 215.
Vt.—State v. Potter, 52 Vt. 33; State v. Bridgman, 49 Vt. 202, 24 AmR 124.
Wash.—State v. Nelson, 39 Wash. 221, 81 P 721.
Wis.—Baker v. U. S., 1 Pinn. 641.

98. Ind. T.—Reynolds v. U. S., 7 Ind. T. 51, 103 SW 762.
Iowa.—State v. Briggs, 68 Iowa 416, 27 NW 358.
Mass.—Com. v. Nefus, 135 Mass. 533.
Mich.—Peo. v. Imes, 110 Mich. 250, 68 NW 157.
N. Y.—Jayne v. Jayne, 5 Misc. 307, 25 NYS 810.
N. C.—State v. Behrman, 114 N. C. 797, 19 SE 220, 25 LRA 449.
S. C.—State v. Carroll, 30 S. C. 85, 8 SE 433, 14 AmSR 883.
Tex.—Powell v. State, (Cr. A.) 44 SW 504.
Wash.—State v. Nelson, 39 Wash. 221, 81 P 721.

99. See Evidence [17 Cyc 409].

1. State v. Butts, 107 Iowa 653, 78 NW 687; Com. v. Nefus, 135 Mass. 533; State v. Moss, 73 Wash. 430, 131 P 1132; Monteith v. State, 114 Wis. 165, 89 NW 828.

2. State v. Hasty, 121 Iowa 507, 96 NW 1115; Com. v. Nefus, 135 Mass. 533; Powell v. State, (Tex. Cr. A.) 44 SW 504.

3. State v. Taylor, (Iowa) 141 NW 946; Com. v. Nefus, 135 Mass. 533; Monteith v. State, 114 Wis. 165, 89 NW 828.

4. State v. Taylor, (Iowa) 141 NW 946; State v. Butts, 107 Iowa 653, 78 NW 687.

5. State v. Loftus, 128 Iowa 529, 104 NW 906 (holding that letters written in the handwriting of defendant's alleged paramour, and found in different places in defendant's house, but not shown to have been connected with defendant, were inadmissible).

6. State v. Thompson, 31 Utah 228, 87 P 709.

7. Iowa.—State v. Hasty, 121 Iowa 507, 96 NW 1115.
Mass.—Com. v. Morrissey, 175 Mass. 264, 56 NE 285 [overr in effect Com. v. O'Connor, 107 Mass. 219]; Com. v. Tarr, 4 Allen 315.
N. C.—State v. Rinehart, 106 N. C. 787, 11 SE 512.
Tex.—Powell v. State, (Cr. A.) 44 SW 504; Merritt v. State, 10 Tex. A. 402.
Utah.—U. S. v. Bredemeyer, 6 Utah 143, 22 P 110; U. S. v. Kershaw, 5 Utah 618, 19 P 194.

birth to a child more than nine months after she had last cohabited with her husband.[8]

[§ 51] **6. Places Frequented.** It is competent to prove on the trial of a prosecution for the crime of adultery that the persons charged with having committed the offense visited places which afforded them an opportunity for the commission of the unlawful act;[9] and in such cases evidence is admissible to show the reputation of the place.[10]

[§ 52] **7. Character of Defendant and Paramour.** As in other criminal cases, defendant is entitled to introduce affirmative evidence of the good character of himself[11] and his alleged paramour.[12] But in rebuttal of such evidence it may be shown that defendant's reputation for virtue is bad.[13]

[§ 53] **8. Reputation of Woman.** It is competent for the prosecution to show the bad reputation for chastity of the woman with whom the act of adultery is alleged to have been committed;[14] and guilt may be inferred from the fact that a married man associated with a known prostitute.[15]

[§ 54] **9. Identity of Parties.** Evidence is admissible to identify the parties.[16] However, it is not always necessary to prove the identity of the alleged paramour.[17] But where the indictment charges the offense as having been committed with a person named, the proof must be confined to that person.[18]

[§ 55] **C. Criminal Intent.** The general rule is that in prosecutions for adultery it is not necessary for the state to prove a criminal intent on the part of defendant; the intent is inferred from the fact of intercourse, and any extenuating circumstances must be shown by defendant.[19] But where there is evidence tending to show that defendant cohabited with a man following a prima facie valid marriage between them, the burden is on the state to prove that she knew that the man already had a living wife.[20]

[§ 56] **D. Marriage[21]—1. Of Defendant and Paramour.** It is not incumbent upon the state to prove that the persons charged with having committed the crime are not married to each other, but this is an affirmative defense.[22]

[§ 57] **2. Of Defendant or Paramour and Third Person—a. In General.** The marriage of at least one of the persons charged with having committed the crime of adultery to a person other than a participant in the unlawful act being an essential element of the crime, it is necessary, in order to warrant a conviction that such marriage be proved;[23] and where, in order to constitute the crime of adultery, it is necessary that both parties be married, that fact must be proved.[24] It must of course appear from the evidence that the marriage was existing at the time the offense is alleged to have been committed.[25] But once a marriage is proved, the continuance of the relation will be presumed until a

Vt.—State v. Sanderson, 83 Vt. 351, 75 A 961 (holding that where it is shown, in a prosecution for adultery, that the parties lived in the same family, with opportunity for criminal intimacy, and two acts of intercourse are shown, although two years apart, evidence is admissible that the woman gave birth to a child a year after the first act shown); State v. Kimball, 74 Vt. 223, 52 A 430; State v. Brink, 68 Vt. 659, 35 A 492; State v. Potter, 52 Vt. 33.

8. State v. Chancy, 110 N. C. 507, 14 SE 780; State v. Nelson, 39 Wash. 221, 81 P 721.

9. Ga.—Sutton v. State, 124 Ga. 815, 53 SE 381.

Mass.—Com. v. Gray, 129 Mass. 474, 37 AmR 378.

N. H.—State v. Marvin, 35 N. H. 22.

Vt.—State v. Cushing, 86 Vt. 416, 85 A 770.

Wis.—Till v. State, 132 Wis. 242, 111 NW 1109.

10. Sutton v. State, 124 Ga. 815, 53 SE 381; Com. v. Gray, 129 Mass. 474, 37 AmR 378; State v. Cushing, 86 Vt. 416, 85 A 770.

11. Cauley v. State, 92 Ala. 71, 9 S 456; State v. Donovan, 61 Iowa 278, 16 NW 130; State v. Austin, 108 N. C. 780, 13 SE 219.

[a] **Weight of character evidence.**—Previous good character is not of itself a defense, but is a circumstance which should be considered by the jury in connection with all the other evidence, and it may be sufficient to turn the scales in defendant's favor; but its value as defensive evidence in any given case is to be determined by the jury. State v. Donovan, 61 Iowa 278, 16 NW 130.

12. Com. v. Gray, 129 Mass. 474, 37 AmR 378.

[a] **Reason for rule.**—In Com. v. Gray, 129 Mass. 474, 476, 37 AmR 378, Low, J., said: "And so in relation to the character of the person with whom the adultery is alleged to have been committed; the judgment could indeed have no effect upon her, but her character is so connected with and so contributing to her identity that it becomes as really one of the necessary surrounding circumstances as any fact in the case. At any time, upon a charge of adultery, the government, after showing the defendant's presence under suspicious circumstances with a woman, may show that that woman is a prostitute; and it would seem to be reversing the humane maxim of the law to permit the government to prove as an independent fact the bad character of a woman in support of an issue, and to deny to the defendant the right to introduce evidence upon the same subject upon the same issue."

13. Cauley v. State, 92 Ala. 71, 9 S 456.

[a] **"Foolishly fond of women."**—On cross-examination a witness cannot be allowed to state, without explanation, that defendant has the reputation of being foolishly fond of women, after defendant has adduced evidence of general good character. Cauley v. State, 92 Ala. 71, 9 S 456.

14. Ala.—Blackman v. State, 86 Ala. 295.

Ga.—Sutton v. State, 124 Ga. 815, 53 SE 381.

Mass.—Com. v. Gray, 129 Mass. 474, 37 AmR 378.

Or.—State v. Eggleston, 45 Or. 346, 77 P 738.

Vt.—State v. Snyder, 86 Vt. 449, 85 A 984; State v. Nieburg, 86 Vt. 392, 85 A 769.

Contra Guinn v. State, (Tex. Cr. A.) 65 SW 376.

[a] **In a prosecution for criminal elopement** under Revisal (1905) § 3360, making it a crime to elope with the wife of another man if she has, since marriage, been innocent and virtuous, evidence on the part of the state as to the general character of the woman for virtue is admissible. State v. Connor, 142 N. C. 700, 55 SE 787.

15. Sutton v. State, 124 Ga. 815, 53 SE 381.

16. Mackey v. State, (Tex. Cr. A.) 151 SW 802.

17. Henderson v. State, 105 Ala. 139, 16 S 927; State v. Glaze, 9 Ala. 283; State v. Ean, 90 Iowa 534, 58 NW 898; Com. v. Seeley, 167 Mass. 163, 45 NE 91; Com. v. Tompson, 2 Cush. (Mass.) 551; Collum v. State, 10 Tex. A. 708.

18. See supra § 40.

19. State v. Goodenow, 65 Me. 30; Com. v. Morrissey, 175 Mass. 264, 56 NE 285; Com. v. Elwell, 2 Metc. (Mass.) 190, 35 AmD 398; State v. Cody, 111 N. C. 725, 16 SE 408; State v. Cutshall, 109 N. C. 764, 14 SE 107, 26 AmSR 599; Alonzo v. State, 15 Tex. A. 378, 49 AmR 207; Fox v. State, 3 Tex. A. 329, 30 AmR 144.

20. Banks v. State, 96 Ala. 78, 11 S 404.

[a] **The proof of such knowledge must be strong enough** to repel all reasonable doubt. Vaughan v. State, 83 Ala. 55, 3 S 530.

21. **Evidence of marriage generally** see Marriage [26 Cyc 871].

22. State v. McDuffie, 107 N. C. 885, 12 SE 83; Peo. v. Colton, 2 Utah 457.

23. Ala.—Banks v. State, 96 Ala. 78, 11 S 404; Buchanan v. State, 55 Ala. 154; Smitherman v. State, 27 Ala. 23.

Ark.—Hopper v. State, 19 Ark. 143.

Ga.—Elliott v. State, 125 Ga. 31, 53 SE 809; Tison v. State, 125 Ga. 7, 53 SE 809.

Hawaii.—Hawaii v. Waipa, 10 Hawaii 442; Hawaii v. Kuhia, 10 Hawaii 440.

Ill.—Miner v. Peo., 58 Ill. 59.

Iowa.—State v. Sanders, 30 Iowa 582.

Me.—State v. Bowe, 61 Me. 171; State v. Hodgskins, 19 Me. 155, 36 AmD 742.

Mich.—Peo. v. Taylor, 1 Mich. N. P. 198.

Minn.—State v. Armstrong, 4 Minn. 335.

Mo.—State v. Hillman, 128 Mo. A. 172, 106 SW 603.

Mont.—Territory v. Whitcomb, 1 Mont. 359, 25 AmR 740.

N. H.—State v. Winkley, 14 N. H. 480.

N. C.—State v. Manly, 95 N. C. 661.

Pa.—Com. v. Gamble, 36 Pa. Super. 146.

Tex.—Tucker v. State, 35 Tex. 113; Garland v. State, 51 Tex. Cr. 643, 104 SW 898; Dixon v. State, 50 Tex. Cr. 385, 97 SW 692; Webb v. State, 24 Tex. A. 164, 5 SW 651; Clay v. State, 3 Tex. A. 499; Parks v. State, 3 Tex. A. 337.

Vt.—State v. Rood, 12 Vt. 396.

Wis.—Mills v. U. S., 1 Pinn. 73.

[a] **Although the fact is not denied** by defendant, proof of marriage must be made. State v. Manly, 95 N. C. 661.

24. Tison v. State, 125 Ga. 7, 53 SE 809; Kendrick v. State, 100 Ga. 360, 28 SE 120.

25. Cartier v. U. S., 148 Fed. 804, 78 CCA 494 (decided under Alaska

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dissolution by death or divorce is affirmatively shown.[26] Primarily the burden is on the state to show that an absent spouse was alive when the alleged offense was committed;[27] but if the spouse has not been absent and unheard of for seven years or more, and there is no evidence of his or her death, the burden of adducing evidence of death is on defendant.[28] If, in a prosecution for adultery with a married woman, it appears that her alleged husband was previously married, the state must show a dissolution of that marriage by death or divorce before the second marriage took place.[29]

Qualification of parties to marry. While it is incumbent upon the people to show a legal marriage of one of the alleged guilty parties, they are not bound to show that the parties to the marriage possessed the legal qualifications to enter into the marriage contract, that fact being presumed unless shown to the contrary.[30]

[§ 58] **b. Mode and Sufficiency of Proof—(1) In General.** It is frequently said that in a prosecution for adultery, as in the case of bigamy, the marriage of defendant or the paramour, as the case may be, must be established by strict proof;[31] that a marriage in fact, as distinguished from one inferable from circumstances, should be shown,[32] and that evidence of general reputation merely is not sufficient.[33] Cases are to be found, however, which are contrary to these general statements, or at least inconsistent therewith;[34] and moreover cohabitation and reputation may be shown, not as in themselves establishing a marriage, but in connection with direct or record evidence that a marriage was entered into at a particular time or place; and in this event they may afford strong corroboration of such evidence, and a marriage be thus established.[35]

[§ 59] **(2) Direct Proof—(a) Marriage Certificate or Record.** The most usual and direct proof of marriage is furnished by the production of the marriage certificate or a certified copy of the record.[36]

code of criminal procedure); State v. Thurstin, 35 Me. 205, 58 AmD 695.

26. Cameron v. State, 14 Ala. 546, 48 AmD 111; Peo. v. Stokes, 71 Cal. 263, 12 P 71; State v. Wilson, 22 Iowa 364; State v. Eggleston, 45 Or. 346, 77 P 738. And see supra § 16.

[a] **Whether the presumption that defendant's wife is still living** outweighs the presumption of innocence depends upon the facts in each case. Howard v. State, 75 Ala. 27.

27. Dixon v. State, 50 Tex. Cr. 385, 97 SW 692 (where the information charged that defendant, at the time of the offense, was married to a person of a certain name, and that the person thus alleged to be defendant's wife was then living, but the evidence showed that she had lived with defendant a while after their marriage and had left him and gone to another state, where, it was understood by the members of her family, at least by her father, she died, and showed that she had not been living with defendant for six or seven years, and it was held that it was incumbent on the state to prove that she was still living).

28. Cameron v. State, 14 Ala. 546, 48 AmD 111.

29. Purdy v. State, 86 Nebr. 638, 126 NW 90.

30. Peo. v. Taylor, 1 Mich. N. P. 198.

[a] **Woman under legal age.**—In Peo. v. Bennett, 39 Mich. 208, it was held that it was not sufficient to show a prior marriage of defendant to a woman under the legal age, but it must be further shown that she acquiesced in the marriage on arriving at the age of consent and before the offense.

31. Banks v. State, 96 Ala. 78, 11 S 404; Smitherman v. State, 27 Ala. 23; Territory v. Whitcomb, 1 Mont. 359; State v. Manly, 95 N. C. 661; Mills v. U. S., 1 Pinn. (Wis.) 73.

32. Miner v. People, 58 Ill. 59; State v. Libby, 44 Me. 469, 69 AmD 115; State v. Hodgskins, 19 Me. 155, 36 AmD 742; State v. Armstrong, 4 Minn. 335; State v. Winkley, 14 N. H. 480.

33. Ala.—Buchanan v. State, 55 Ala. 154.

Ga.—Wood v. State, 62 Ga. 406; Craft v. State, (A.) 73 SE 776.

Ill.—Miner v. Peo., 58 Ill. 59.

Me.—State v. Hodgskins, 19 Me. 155, 36 AmD 742.

Mo.—State v. Coffee, 39 Mo. A. 56.

34. See cases infra this note.

Admissions and confessions as proof of marriage see infra §§ 61, 62.

[a] **It is not necessary to prove a ceremonial marriage** in the presence of a civil or religious officer. Com. v. Gamble, 36 Pa. Super. 146.

[b] **Circumstantial evidence in general.**—The fact that the alleged participants were, respectively, a married man and a married woman may be shown directly or circumstantially. Miller v. State, 9 Ga. A. 827, 72 SE 279.

[c] **Cohabitation and reputation.**—(1) The fact of marriage may at least be shown prima facie, either by proof of general repute in the family (Civ. Code [1910] § 5764), by proof of general reputation, or by proof that the man or woman lives together with a person of the opposite sex as his or her spouse, with general recognition in the community. Miller v. State, 9 Ga. A. 827, 72 SE 279. (2) So evidence that witness supposed defendant to be a married man, and that he lived with a woman understood to be his wife several years before the prosecution, is admissible, and not objectionable as secondary or indefinite. So also testimony that witness understood that defendant had been married is not objectionable as hearsay. And testimony that witness understobd that defendant's paramour was a grass widow, and that defendant had said that she was a widow, is not irrelevant or immaterial. Coons v. State, 49 Tex. Cr. 256, 91 SW 1085.

[d] **Assumption of existence of marriage.**—The facts that the paramour testified that she saw defendant's wife the night they met, and that defendant in a letter afterward written spoke of his wife as if she were still living, taken together with the fact that no request was made by defendant's counsel for an instruction to the jury on the ground that there was no evidence of marriage, are sufficient to establish defendant's marriage. Reynolds v. U. S., 7 Ind. T. 51, 103 SW 762.

[e] **In the absence of proof of a ceremony and of direct evidence** of a marriage per verba de præsenti, there must be proof of conduct or declarations from which it may be presumed that the status of marriage has been entered into by the mutual consent of the parties. Com. v. Gamble, 36 Pa. Super. 146.

35. Ala.—Buchanan v. State, 55 Ala. 154 (declarations and conduct of parties living together, whereby they held themselves out to the world as man and wife, held admissible).

Ill.—Lyman v. Peo., 98 Ill. A. 386 [aff 198 Ill. 544, 64 NE 974] (testimony of eyewitness to ceremony, and evidence of cohabitation, held sufficient).

Nebr.—Lord v. State, 17 Nebr. 526, 23 NW 507 (marriage followed by cohabitation presumed valid).

Philippine.—U. S. v. Villafuerte, 4 Philippine 476.

S. C.—State v. Still, 68 S. C. 37, 46 SE 524, 102 AmSR 657 (general repute and declarations of parties held sufficient).

Wash.—State v. Nelson, 39 Wash. 221, 81 P 721 (testimony of officiating minister, and evidence of cohabitation and a holding out as husband and wife, held sufficient).

[a] **Irregularities in ceremony.**—(1) Proof of a marriage ceremony in a foreign country and subsequent cohabitation as man and wife is sufficient to establish the relation, although it does not show that the ceremony was in accordance with the laws of such country. Peo. v. Imes, 110 Mich. 250, 68 NW 157. (2) So where the parties were married by a justice of the peace outside of his own country, and cohabited for fourteen years. Peo. v. Girdler, 65 Mich. 68, 31 NW 624.

[b] **Testimony of spouse, together with proof of continued cohabitation,** raises a presumption of marriage. State v. Wilson, 22 Iowa 364. But testimony of the particeps criminis that she was "married . . . two years ago by Charles Littlefield, at his house," it not appearing that Charles Littlefield professed to be "a justice of the peace or an ordained or licensed minister of the gospel," or that the marriage was "consummated with a full belief on the part of either of the persons married, that they were lawfully married," is not sufficient. State v. Bowe, 61 Me. 171.

36. Cal.—Peo. v. Stokes, 71 Cal. 263, 12 P 71.

Me.—Wedgwood's Case, 8 Me. 75.

Mich.—Peo. v. Imes, 110 Mich. 250, 68 NW 157; Peo. v. Isham, 109 Mich. 72, 67 NW 819; Peo. v. Broughton, 49 Mich. 339, 13 NW 621.

Minn.—State v. Brecht, 41 Minn. 50, 42 NW 602.

N. H.—State v. Marvin, 35 N. H. 22; State v. Winkley, 14 N. H. 480; State v. Wallace, 9 N. H. 515.

N. C.—State v. Behrman, 114 N. C. 797, 19 SE 220, 25 LRA 449.

Or.—State v. Isenhart, 32 Or. 170, 52 P 569.

S. D.—State v. Walsh, 25 S. D. 30, 33, 125 NW 295, 297 [quot Cyc].

Tex.—Boger v. State, 19 Tex. A. 91.

Utah.—State v. Springer, 40 Utah 471, 121 P 976.

Vt.—State v. Brink, 68 Vt. 659, 35 A 492.

[a] **An unauthenticated certificate** of marriage solemnized in another state is not admissible to prove the fact of marriage. Com. v. Morris, 1 Cush. (Mass.) 391.

[b] **Sufficiency of copy.**—It was error to admit a copy of a certificate, which was offered to prove defendant's marriage, in which the town clerk certified to the name and official title of the person who solemnized the marriage, but which lacked the attestation and official signature of that person. State v. Brink, 68 Vt. 659, 35 A 492.

In some states statutes exist which, while not excluding other modes of proof,[37] make the record presumptive evidence of marriage in criminal cases.[38] Outside of the mere production of the marriage certificate or a certified copy thereof, however, there must be some evidence tending to establish the identity of the parties.[39]

[§ 60] **(b) Witnesses to Ceremony.** The marriage may be proved also by any person who was present when the marriage took place;[40] and it is sufficient that he is able to state that the marriage was celebrated according to the usual forms, without being able to state the words used.[41]

[§ 61] **(3) Admissions and Confessions—(a) Of Defendant.** While a deliberate and voluntary admission or confession of guilt is among the most weighty and effectual proofs known to the law,[42] the question whether a defendant can be convicted upon his own admissions or confessions of marriage has not met with a uniform decision, some of the courts holding that such evidence is insufficient to convict,[43] while others have held defendant guilty upon such direct evidence alone.[44] A distinction should be drawn in this class of cases between the mere admissibility of evidence and actual proof. That the mere uncorroborated admission or confession of defendant will establish a marriage in fact is doubted, but such evidence should be admitted to prove the fact;[45] and where the admission or confession is once made under circumstances which render it admissible, it is for the jury to determine the just degree of confidence which they may place in it.[46] Where the admissions or confessions are corroborated by other testimony, they are of course sufficient to establish the marriage.[47] The admissions or confessions of defendant are admissible to prove, not only that he was married at the time of the commission of the offense, but also that his wife was then living;[48] and a letter or other writing from which such an admission may be inferred is competent proof thereof.[49]

[§ 62] **(b) Of Paramour or Codefendant.** The admission of one of the participants in an act of adultery is not competent evidence against the other,[50] even though they be jointly indicted.[51]

[§ 63] **E. Commencement of Prosecution by Injured Spouse.** Where the right to institute a prosecution for adultery is confined to the spouse of one of the persons accused of having committed the crime, it has been held that the state must prove that the prosecution was so commenced,[52] whether that fact is alleged in the indictment[53] or not;[54] but such fact need not be established beyond a reasonable doubt.[55] The fact that the surname of the person

37. Peo. v. Stokes, 71 Cal. 263, 12 P 71; State v. Marvin, 35 N. H. 22 (holding that direct proof of the marriage by witnesses is admissible without showing that a copy of the record cannot be produced); State v. Nelson, 39 Wash. 221, 81 P 721.

38. Peo. v. Stokes, 71 Cal. 263, 12 P 71; State v. Brecht, 41 Minn. 50, 42 NW 602.

39. Cal.—Peo. v. Stokes, 71 Cal. 263, 12 P 71.
Me.—Wedgwood's Case, 8 Me. 75.
Mich.—Peo. v. Isham, 109 Mich. 72, 67 NW 819; Peo. v. Broughton, 49 Mich. 339, 13 NW 621.
N. H.—State v. Winkley, 14 N. H. 480; State v. Wallace, 9 N. H. 515.
Or.—State v. Isenhart, 32 Or. 170, 52 P 569.
Utah.—State v. Springer, 40 Utah 471, 121 P 976; State v. Thompson, 31 Utah 228, 238, 87 P 709 [cit Cyc].
Vt.—State v. Brink, 68 Vt. 659, 35 A 492.
[a] **Testimony of husband and admissions of defendant** are amply sufficient for this purpose. Peo. v. Broughton, 49 Mich. 339, 13 NW 621.
[b] **A witness at the ceremony** may identify the parties. Peo. v. Stokes, 71 Cal. 263, 12 P 71.
[c] **Discrepancy of names.**—Evidence that the real names of the parties differed from the names stated in the marriage certificate is admissible. Peo. v. Stokes, 71 Cal. 263, 12 P 71; State v. Brink, 68 Vt. 659, 35 A 492.

40. Cal.—Peo. v. Stokes, 71 Cal. 263, 12 P 71.
Ill.—Lyman v. Peo., 98 Ill. A. 386 [aff 198 Ill. 544, 64 NE 974].
Mass.—Com. v. Littlejohn, 15 Mass. 163; Com. v. Norcross, 9 Mass. 492.
Mich.—Peo. v. Imes, 110 Mich. 250, 68 NW 157.
Nebr.—Bailey v. State, 36 Nebr. 808, 55 NW 241; Lord v. State, 17 Nebr. 526, 23 NW 507.
N. H.—State v. Winkley, 14 N. H. 480.
Or.—State v. Eggleston, 45 Or. 346, 77 P 738.
Tex.—Boger v. State, 19 Tex. A. 91.
Wis.—Mills v. U. S., 1 Pinn. 73.
[a] **The officiating clergyman** may testify to the marriage. State v. Nelson, 39 Wash. 221, 81 P 721.
[b] **The testimony of the wife,** if she is a competent witness, is sufficient proof of the marriage of the husband. State v. Nieburg, 56 Vt. 392, 35 A 769.
[c] **Foreign marriage.**—The testimony of a clergyman and others participating in a marriage ceremony in a foreign country between defendant and a certain woman is admissible. Peo. v. Imes, 110 Mich. 250, 68 NW 157.

41. Lord v. State, 17 Nebr. 526, 23 NW 507.

42. Com. v. Manock, 2 Cr. L. Mag. (Pa.) 239.

43. Peo. v. Isham, 109 Mich. 72, 67 NW 819; State v. Armstrong, 4 Minn. 335.

44. Ala.—Owens v. State, 94 Ala. 97, 10 S 669; Cameron v. State, 14 Ala. 546, 48 AmD 111.
Ga.—Cook v. State, 11 Ga. 53, 56 AmD 410.
Iowa.—State v. Sanders, 30 Iowa 582.
Me.—State v. Libby, 44 Me. 469, 69 AmD 115; Ham's Case, 11 Me. 391; Cayford's Case, 7 Me. 57.
Mass.—Com. v. Holt, 121 Mass. 61.
Mo.—State v. McDonald, 25 Mo. 176.
Tex.—Boger v. State, 19 Tex. A. 91.
Utah.—State v. Greene, 38 Utah 389, 115 P 181; State v. Moore, 36 Utah 521, 105 P 293, AnnCas1912A 284 and note.
W. Va.—State v. Goodrich, 14 W. Va. 834.

45. Ala.—Owens v. State, 94 Ala. 97, 10 S 669; Green v. State, 59 Ala. 68; Cameron v. State, 14 Ala. 546, 48 AmD 111; Morgan v. State, 11 Ala. 289.
Ga.—Cook v. State, 11 Ga. 53, 56 AmD 410.
Hawaii.—Terr. v. Castro, 14 Hawaii 131.
Iowa.—State v. Sanders, 30 Iowa 582.
Ky.—Frost v. Com., 9 B. Mon. 362.
Me.—State v. Libby, 44 Me. 469, 69 AmD 115; Ham's Case, 11 Me. 391; Cayford's Case, 7 Me. 57.
Mass.—Com. v. Holt, 121 Mass. 61; Com. v. Thompson, 99 Mass. 444.
Mich.—Peo. v. Imes, 110 Mich. 250, 68 NW 157.
Mo.—State v. McDonald, 25 Mo. 176.
R. I.—State v. Medbury, 8 R. I. 543.
S. C.—State v. Still, 68 S. C. 37, 46 SE 524, 102 AmSR 657.
Tex.—Boger v. State, 19 Tex. A. 91.
Eng.—Reg. v. Simmonsto, 1 C. & K. 164, 47 ECL 164.
[a] **Hearsay.**—Testimony that the man with whom the accused was alleged to have committed the offense "claims to be a married man" is merely hearsay and has no probative value. Tison v. State, 125 Ga. 7, 53 SE 809.
[b] **Marriage of paramour.**—On a trial for adultery, accused's statement to a witness that the woman was married and that her husband is living is competent. Brown v. State, (Tex. Cr. A.) 154 SW 567.

46. State v. Libby, 44 Me. 469, 69 AmD 115; State v. Medbury, 8 R. I. 543; State v. Moore, 36 Utah 521, 105 P 293, AnnCas1912A 284.

47. Owens v. State, 94 Ala. 97, 10 S 669; Com. v. Tarr, 4 Allen (Mass.) 315.

48. Me.—State v. Libby, 44 Me. 469, 69 AmD 115.
Mass.—Com. v. Holt, 121 Mass. 61.
Mo.—State v. McDonald, 25 Mo. 176.
Tex.—Boger v. State, 19 Tex. A. 91.
W. Va.—State v. Goodrich, 14 W. Va. 834.

49. Reynolds v. U. S., 7 Ind. T. 51, 103 SW 762; State v. Behrman, 114 N. C. 797, 19 SE 220, 25 LRA 449.

50. Frost v. Com., 9 B. Mon. (Ky.) 362; Whicker v. State, (Tex. Cr. A.) 55 SW 47; Wiley v. State, 33 Tex. Cr. 406, 26 SW 723.
[a] **Admissions in defendant's absence.**—Declarations of defendant's paramour and her daughter, made in defendant's absence, that such paramour was a married woman with a living husband, are inadmissible to prove such fact as against defendant. Whicker v. State, (Tex. Cr. A.) 55 SW 47.

51. Terr. v. Castro, 14 Hawaii 131; Com. v. Thompson, 99 Mass. 444.

52. State v. Leek, 152 Iowa 12, 130 NW 1062; State v. Stout, 71 Iowa 343, 32 NW 372; State v. Briggs, 68 Iowa 416, 27 NW 358; State v. Donovan, 61 Iowa 278, 16 NW 130; State v. Henke, 58 Iowa 457, 12 NW 477; State v. Roth, 17 Iowa 336. Contra State v. Brecht, 41 Minn. 50, 42 NW 602.

53. State v. Henke, 58 Iowa 457, 12 NW 477; State v. Roth, 17 Iowa 336.

54. State v. Andrews, 95 Iowa 451, 64 NW 404; State v. Maas, 83 Iowa 469, 49 NW 1037.

55. State v. Harmann, 135 Iowa 167, 112 NW 632; State v. Athey, 133 Iowa 382, 108 NW 224; State v. Donovan, 61 Iowa 278, 16 NW 130.
[a] **Evidence held sufficient** to show that the prosecution was commenced by the injured spouse as required by statute. Peo. v. Davis, 175 Mich. 594, 141 NW 667.

signing the complaint is the same as that of the woman charged with the offense is not conclusive that he is her husband, in the absence of anything on the face of the complaint showing such fact, and in the absence of the evidence in the record.[56]

[§ 64] **F. Weight and Sufficiency in General.**[57] In a prosecution for adultery the weight to be given to the evidence is a question for the jury to decide, taking into consideration all the circumstances of the case,[58] and as in other criminal prosecutions,[59] the jury must be satisfied upon all the evidence beyond a reasonable doubt that the accused is guilty.[60] The oath of one credible witness is sufficient for conviction, in the absence of statutory provision to the contrary.[61] But a single act of adultery is not of itself sufficient to prove a prior act.[62] And proof showing only that one offender is guilty will not justify the conviction of the other,[63] even though they are jointly indicted.[64]

X. TRIAL[65]

[§ 65] **A. Reception of Evidence—1. In General.** The admission of evidence of other similar offenses in a prosecution for adultery[66] should be controlled by the court,[67] and the evidence be submitted to the jury with proper instructions as to its purpose and effect.[68] On a trial for adultery the state should not place the paramour of accused on the stand, unless she proposes to give evidence for the state; and it is error to place her on the stand and obtain from her a refusal to testify because of her privilege.[69]

[§ 66] **2. Election as to Act Relied Upon.** Where the evidence tends to show the commission of separate and distinct acts of adultery, or separate and distinct opportunities for committing the offense, the state may be compelled to elect the particular act or conduct upon which it relies for conviction;[70] but an election will not be exacted where the evi-

56. Solomon v. State, 39 Tex. Cr. 140, 45 SW 706.

57. **Sufficiency of circumstantial evidence** see supra § 44.

Sufficiency of corroboration of accomplice see Criminal Law [12 Cyc 455].

Weight of evidence of good character see supra § 52.

58. Ala.—Hall v. State, 88 Ala. 236, 7 S 340, 16 AmSR 51; Alsabrooks v. State, 52 Ala. 24; State v. Crowley, 13 Ala. 172.

Conn.—State v. Green, Kirby 87.

Iowa.—State v. Young, 148 Iowa 629, 127 NW 987; State v. Henderson, 84 Iowa 161, 50 NW 758; State v. Briggs, 68 Iowa 416, 27 NW 358; State v. Donovan, 61 Iowa 278, 16 NW 130; State v. Henke, 58 Iowa 457, 12 NW 477.

N. C.—State v. Rinehart, 106 N. C. 787, 11 SE 512; State v. Poteet, 30 N. C. 23.

S. C.—State v. Milan, 89 S. C. 149, 71 SE 833.

S. D.—State v. Walsh, 25 S. D. 30, 125 NW 295.

Tex.—Wallace v. State, (Cr. A.) 141 SW 95; Taylor v. State, 48 Tex. Cr. 216, 87 SW 148; Morrill v. State, 5 Tex. A. 447.

59. See Criminal Law [12 Cyc 489].

60. Ala.—Vaughan v. State, 83 Ala. 55, 3 S 530; Gore v. State, 58 Ala. 391.

Ga.—Sutton v. State, 124 Ga. 815, 53 SE 381; Weems v. State, 84 Ga. 461, 11 SE 501.

Iowa.—State v. Harmann, 135 Iowa 167, 112 NW 632; State v. Hart, 94 Iowa 749, 64 NW 278.

Me.—State v. Williams, 76 Me. 480.

N. M.—U. S. v. Griego, 12 N. M. 84, 75 P 30 [rev reh on other grounds 11 N. M. 392, 72 P 20].

N. C.—State v. Guest, 100 N. C. 410, 6 SE 253.

Or.—State v. La Mora, 53 Or. 261, 99 P 417.

Utah.—State v. Thompson, 31 Utah 228, 87 P 709.

[a] **Evidence held sufficient to support a conviction.**—Eldridge v. State, 97 Ga. 192, 23 SE 832; Conner v. State, 3 Ga. A. 475, 60 SE 111; Lyman v. Peo., 98 Ill. A. 386 [aff 198 Ill. 544, 64 NE 974]; Crane v. Peo., 65 Ill. A. 492 [aff 168 Ill. 395, 48 NE 54]; State v. Taylor, (Iowa) 141 NW 946; State v. Leek, 152 Iowa 12, 130 NW 1062; State v. Schaedler, 116 Iowa 488, 90 NW 91; State v. More, 115 Iowa 178, 88 NW 322; State v. Yocum, 9 Mo. A. 589 mem; State v. Milam, 89 S. C. 149, 71 SE 33; Richardson v. State, 34 Tex. 142; Brown v. State, (Tex. Cr. A.) 154 SW 567; Basquez v. State, 56 Tex. Cr. 329, 119 SW 861; Mabry v. State, (Tex. Cr. A.) 114 SW 378; Coons v. State, 49 Tex. Cr. 256, 91 SW 1085; Henderson v. State, (Tex. Cr. A.) 45 SW 707; State v. Hansen, (Utah) 122 P 375; State v. Greene, 38 Utah 389, 115 P 181; State v. Kimball, 74 Vt. 223, 52 A 430; State v. Brink, 68 Vt. 659, 35 A 492; Till v. State, 132 Wis. 242, 111 NW 1109.

[b] **Evidence held insufficient to support a conviction.**—Tison v. State, 125 Ga. 7, 53 SE 809; Thompson v. State, 5 Ga. A. 7, 62 SE 571; State v. Trachsel, 150 Iowa 135, 129 NW 736; State v. Brown, 146 Iowa 113, 124 NW 899; State v. Thompson, 133 Iowa 741, 111 NW 319; State v. Chaney, 110 Iowa 199, 81 NW 454; Blue v. State, 86 Nebr. 189, 125 NW 136; Price v. State, (Tex. Cr. A.) 142 SW 586; Eaton v. State, 60 Tex. Cr. 429, 132 SW 356; Smith v. State, 58 Tex. Cr. 106, 124 SW 919; Hutchinson v. State, (Tex. Cr. A.) 108 SW 378; Jackson v. State, 51 Tex. Cr. 220, 101 SW 807; Curlee v. State, (Tex. Cr. A.) 98 SW 840; Paul v. State, 49 Tex. Cr. 20, 90 SW 171; Taylor v. State, 48 Tex. Cr. 216, 87 SW 148; Manuel v. State, 45 Tex. Cr. 96, 74 SW 30; Burnett v. State, 44 Tex. Cr. 226, 70 SW 207; Bradshaw v. State, (Tex. Cr. A.) 61 SW 713; Kahn v. State, (Tex. Cr. A.) 38 SW 989.

[c] **Proof of corpus delicti.**—On a prosecution for adultery, it is not necessary to prove the corpus delicti apart from the act charged, but it is sufficient if such facts and circumstances are proved as of their own nature and tendency satisfy the jury that the act charged has been committed. State v. Kimball, 74 Vt. 223, 52 A 430.

[d] **Proof of consent.**—Although the woman testifies that the carnal knowledge was against her will, a verdict of guilty of adultery and fornication, under an accusation charging that offense, will not be set aside, if the jury are authorized to infer from all the circumstances surrounding the transaction that the woman consented; and the presence in an adjoining room of a woman who was the aunt of the female and the wife of the accused, failure to make outcry, repetition of the act at the same place and under the same circumstances, failure to make complaint, and the birth of a child in due season, were all circumstances tending to negative the claim of the female that the offense was rape. Avery v. State, 12 Ga. A. 562, 77 SE 892.

61. Com. v. Cregor, 7 Gratt. (48 Va.) 591.

62. Traverse v. State, 61 Wis. 144, 20 NW 724.

63. Gore v. State, 58 Ala. 391.

64. Com. v. Bakeman, 131 Mass. 577, 41 AmR 248; State v. Simpson, 133 N. C. 676, 45 SE 567; State v. Cutshall, 109 N. C. 764, 14 SE 107, 26 AmSR 599 [overr doctrine of State v. Mainor, 28 N. C. 340 (foll State v. Rinehart, 106 N. C. 787, 11 SE 512, and appr State v. Guest, 100 N. C. 410, 6 SE 253)].

65. **Arrest of judgment** see Criminal Law [12 Cyc 756].

Joint or separate trial of defendants see Criminal Law [12 Cyc 507].

Objections to evidence see Criminal Law [12 Cyc 561].

Verdict see Criminal Law [12 Cyc 686].

66. See Criminal Law [12 Cyc 405].

67. Crane v. Peo., 168 Ill. 395, 48 NE 54 [aff 65 Ill. A. 492]; State v. Witham, 72 Me. 531.

68. State v. More, 115 Iowa 178, 88 NW 322; State v. Henderson, 84 Iowa 161, 50 NW 758; State v. Witham, 72 Me. 531; State v. Guest, 100 N. C. 410, 6 SE 253; Funderburg v. State, 28 Tex. A. 392, 5 SW 244. See Smith v. Com., 109 Ky. 685, 60 SW 531, 22 KyL 1349 (a prosecution for incest).

69. Garland v. State, 51 Tex. Cr. 643, 104 SW 898.

70. State v. Loftus, 128 Iowa 529, 104 NW 906; Com. v. Fuller, 163 Mass. 499, 40 NE 764.

[a] **Necessity of requesting election.**—Where a defendant is indicted for a single act of adultery, and testimony is admitted tending to show the commission of several acts between the same parties at several times and under different circumstances, it is not reversible error to omit to require the prosecution to specify some particular act as the offense to be proved under the indictment, so long as no specification is asked for. State v. Smith, 108 Iowa 440, 79 NW 115; State v. Witham, 72 Me. 531.

[b] **Election by operation of law.**—"When evidence was introduced tending directly to the proof of one act, and for the purpose of securing a conviction upon it, from that moment that particular act became the act charged. No election having been made by the prosecution, the law made the election. What before this had been uncertain and contingent was now fixed and definite. This election having been thus made by proving the first act of intercourse as having taken place [specifying date] . . . no subsequent election could be made." State v. Hilberg, 22 Utah 27, 35, 61 P 215.

[c] **Irregular conduct of trial.**—Where it appeared that at the trial of an indictment for adultery, evidence was introduced of a succession of acts of familiarity between defendant and his paramour extending over more than a year; that the presiding judge declined to compel the prosecution, either at the beginning of the trial or at the close of its testimony, to elect on which occasion it would

dence shows a continued adulterous relationship during a specific period of time,[71] or where the evidence is confined to a particular transaction.[72]

Time for making election. The general rule is that the prosecution will not be compelled to elect the transaction upon which it intends to rely until it has closed its case.[73]

[§ 67] **B. Questions of Law and of Fact.** The general rule is that in prosecutions for the crime of adultery, as in other criminal prosecutions, the court should not give binding instructions for conviction.[74] On the other hand, if there is any evidence that would justify a verdict of guilty, the case should be submitted to the jury, since it is for them to determine the weight of the evidence.[75] The question whether a prosecution was instituted by the injured spouse as required by statute is ordinarily to be determined by the jury;[76] but where the testimony bearing thereon is undisputed, the court may state in its instructions whether the prosecution was properly instituted.[77]

[§ 68] **C. Instructions.** It is not necessary that the court in its instructions to the jury should define adultery[78] or sexual intercourse.[79] Instructions are to be construed as a whole.[80] They must, however, cover the issues[81] and be confined thereto.[82] So they must be applicable to the issues[83] and to the evidence.[84] They must not assume the existence of disputed facts,[85] and in some states they must not be upon the weight of the evidence.[86] If an accomplice testifies, the court should instruct as to the testimony of accomplices.[87] An instruction which assigns the correct reason for the rule that circumstantial evidence must be resorted to is not prejudicial.[88] On a trial for living in adultery by two persons, one or both of whom are married to others, an instruction authorizing a conviction on finding that one of the accused was a married man and had a wife living was erroneous, since it authorized a conviction, though the parties were married to each other.[89] Where it was insisted merely that the production of a license was necessary to the establishment of the marriage, there was no error in instructing that the marriage certificate was prima facie evidence of a legal marriage.[90]

Curing error. An erroneous instruction in a prosecution for adultery that the jury should consider the fact of prosecutrix's pregnancy as tending to connect defendant with the crime or corroborate her testimony is not cured by a subsequent clause that such fact is in itself insufficient to show that defendant had intercourse with her.[91]

XI. SENTENCE AND PUNISHMENT

[§ 69] The offense of adultery not being indictable at common law, the legality of a sentence punishing a person convicted of the crime rests wholly upon statutory authority,[92] and the courts have no

rely; that at the close of all the testimony the prosecution elected to rely on one of the earliest occasions of which there was any evidence, and that the judge treated the evidence relating to subsequent occasions as indicative of an adulterous disposition, without affording an opportunity to defendant to object to it as too remote—the trial was conducted irregularly, and without due regard to the rights of defendant. Com. v. Fuller, 163 Mass. 499, 40 NE 764.

71. State v. Higgins, 121 Iowa 19, 95 NW 244.

72. State v. Hasty, 121 Iowa 507, 96 NW 1115.

73. Sutton v. State, 124 Ga. 815, 53 SE 381; State v. Loftus, 128 Iowa 529, 104 NW 906; State v. Hilberg, 22 Utah 27, 61 P 215 (semble).

74. Com. v. Gamble, 36 Pa. Super. 146, 150 (which was a prosecution for adultery, and it was held to be error to give binding instructions for conviction. The court said: "It is only under very exceptional circumstances, if ever, that the court will be justified in giving binding direction to the jury to convict the defendant in a criminal case. Under no circumstances may this be done, without giving him a fair opportunity to present all of his relevant and material testimony, and according to him the constitutional right to be heard by his counsel upon the question").

[a] **Proof of prior cohabitation and reputation of marriage with a third person.**—On the trial of an indictment for adultery the court cannot charge the jury that the presumption of the prisoner's innocence is conclusively rebutted by proof of prior cohabitation and reputation of marriage with another woman than the one referred to in the indictment. Com. v. Gamble, 36 Pa. Super. 146.

75. See supra § 64.

76. State v. Leek, 152 Iowa 12, 130 NW 1062; State v. Loftus, 128 Iowa 529, 104 NW 906; State v. Briggs, 68 Iowa 416, 27 NW 358.

77. State v. Harmann, 135 Iowa 167, 112 NW 632.

78. Lyman v. Peo., 98 Ill. A. 386 [aff 198 Ill. 544, 64 NE 974].

79. Peo. v. Payment, 109 Mich. 558, 67 NW 689 (holding that it is sufficient to instruct that sexual intercourse must be proven, without going into particulars regarding penetration and emission).

80. Avery v. State, 12 Ga. A. 562, 77 SE 892.

81. Dixon v. State, 50 Tex. Cr. 385, 97 SW 692 (holding that the court should charge that it is necessary for the state to show that defendant's wife was alive at the time of the alleged offense, where the evidence presents that issue).

82. State v. Harmann, 135 Iowa 167, 169, 112 NW 632 (where the court said: "Upon motion of defendant the State was required to elect as to what act of adultery it relied upon, and the county attorney stated that he chose May 29, 1904, as the date when the adultery was committed. In instructing the jury the trial court did not observe this election, but permitted the jury to inquire as to whether adultery had been committed in a certain office building at any time within eighteen months before the finding of the indictment. As there was testimony of familiarity at other times in this building, we think the instruction was erroneous").

83. State v. Athey, 133 Iowa 382, 108 NW 224 (holding that an instruction that accused's adultery was a crime against his wife, and that if she condoned the offense the state could not complain, not connected with the question whether the wife instituted the proceedings, was properly refused).

84. Com. v. Kendall, 162 Mass. 221, 38 NE 504 (holding that if, at the trial of an indictment for adultery, defendant having obtained a divorce in another jurisdiction and married again, the evidence with its legitimate inferences may well satisfy the reason and judgment of the jury, and convince them to a reasonable and moral certainty that defendant's domicile remained in this commonwealth, and that his purpose in going into another state was to get a divorce and not to change his home, a request for a ruling that the jury were not justified, upon the evidence, in finding him guilty, as it failed to show beyond a reasonable doubt that he was an inhabitant of this commonwealth when the divorce was granted, is rightly refused).

85. State v. La More, 53 Or. 261, 99 P 417 (in which case, however, particular instructions were held not objectionable on this ground).

86. Williams v. State, (Tex. Cr. A.) 105 SW 788 (holding that it is error to charge that the woman is an accomplice, and that accused cannot be convicted upon her testimony, unless corroborated by other evidence); Garland v. State, 51 Tex. Cr. 643, 104 SW 898 (holding that a charge that the jury shall consider the evidence of a witness only as tending to establish an adulterous disposition of accused is erroneous).

87. Garland v. State, 51 Tex. Cr. 643, 104 SW 898; Jackson v. State, 51 Tex. Cr. 220, 101 SW 807 (holding that it is error to refuse to charge that in order to convict, the jury must not only believe the testimony of prosecutrix to be true, but must find that her testimony has been corroborated by other testimony, showing both the commission of the offense charged and connecting defendant therewith).

[a] **Improper request.**—An instruction on a trial for adultery, describing the female with whom the offense was committed as a self-confessed felon, and declaring that if a crime was committed she must be corroborated, not only as to the commission of the offense, but also as to the circumstances thereof, is properly refused. State v. Athey, 133 Iowa 382, 108 NW 224.

88. State v. La More, 53 Or. 261, 99 P 417.

89. State v. Hillman, 128 Mo. A. 172, 106 SW 603.

90. State v. Isenhart, 32 Or. 170, 52 P 569.

91. State v. Thompson, 31 Utah 228, 87 P 709.

92. State v. Gray, 37 N. J. L. 368; Smith v. State, 58 Tex. Cr. 106, 124 SW 919; Anderson v. Com., 5 Rand. (26 Va.) 627, 16 AmD 776; Ex p. Richards, 53 W. Va. 555, 45 SE 841.

power to impose a punishment other than that prescribed by the statute,[93] the punishment usually prescribed consisting of a fine and imprisonment or both.[94] Where the offense of adultery has been denounced and classified as a crime, and no particular punishment prescribed therefor, sentence may be passed in accordance with a statute providing for the punishment of crimes of that class generally.[95]

Under the Spanish law the mitigating circumstance of race cannot be applied to reduce the penalty of one convicted of adultery.[96] If both the offenders and the aggrieved spouse reside in the same house the circumstance of morado[97] cannot be considered.[98]

XII. APPEAL AND ERROR

[§ 70] Interlocutory orders in a prosecution for adultery will not be reviewed.[99] In some jurisdictions, in order to be entitled to consideration on appeal, defendant must have made his request for an election by the state as between different charges of adultery on the trial in the court below;[1] but in at least one jurisdiction—Utah—such request is unnecessary.[2] Objections to a complaint on a charge of adultery for lack of essential averments as to place, and knowledge on the part of the man that the woman was married, must be taken at the trial.[3] The judgment will not be reversed for harmless error.[4] The omission to set forth the name of defendant's wife in the indictment, if a defect, may be cured by amendment on appeal.[5] Premature appeals will be dismissed.[6]

AD VALENTIAM. Literally "To the value."[1]

AD VALOREM. Literally "According to value."[2] As applied to the subject of taxation the term is as well defined and fixed as any other used in political economy or legislation, and simply means a tax or duty upon the value of the article or thing

93. Ex p. Richards, 53 W. Va. 555, 45 SE 341.

[a] **Hard labor.**—Where a section in a statute relating to the crime of adultery provides that the offense shall be punished by fine not exceeding one hundred dollars or by imprisonment not exceeding the term of six months, a defendant who is convicted of the offense cannot be sentenced to imprisonment at hard labor in the state prison for six months, although in preceding sections of the statute the crime denounced is declared to be punishable by imprisonment at hard labor. State v. Gray, 37 N. J. L. 368.

[b] **Imprisonment** cannot be imposed where the statute prescribes that the offense shall be punished by a fine. Ex p. Richards, 53 W. Va. 555, 45 SE 341.

[c] **Cumulative sentences.**—Where an indictment in one count charges adulterous cohabitation, and in another count charges a single act of adultery within the period of the alleged adulterous cohabitation, but the evidence shows that the adulterous cohabitation had ceased before the commission of the single act of adultery, the single act of adultery constitutes a separate offense, and therefore a conviction and sentence upon each count do not amount to a double punishment for the same offense. Bailey v. State, 36 Nebr. 808, 55 NW 241.

94. Ala.—Palmer v. State, 168 Ala. 124, 53 S 283.

Ill.—Crane v. Peo., 168 Ill. 395, 48 NE 54.

Ind.—State v. Chandler, 96 Ind. 591.

Iowa.—State v. Maas, 83 Iowa 469, 49 NW 1037; State v. Mahan, 81 Iowa 121, 46 NW 855; State v. Roth, 17 Iowa 336.

N. H.—State v. Marvin, 35 N. H. 22.

N. J.—State v. Lash, 16 N. J. L. 380, 32 AmD 397.

Vt.—State v. Searle, 56 Vt. 516; State v. Way, 6 Vt. 311.

W. Va.—Ex p. Richards, 53 W. Va. 555, 45 SE 341.

Wis.—State v. Fellows, 50 Wis. 65, 6 NW 239.

[a] **Adultery between negroes and white persons.**—A statute prescribing a heavier punishment for adultery committed between negroes and white persons is constitutional. Pace v. State, 69 Ala. 231, 44 AmR 513 [aff 106 U. S. 583, 1 SCt 637, 27 L. ed. 207]; Green v. State, 58 Ala. 190, 29 AmR 739; Ford v. State, 53 Ala. 150; Ellis v. State, 42 Ala. 525.

[b] **Extreme penalty.**—Where defendant was proved to have been guilty of a long-continued adulterous intercourse with the young sister of his wife, a sentence of the extreme penalty of the law was held not excessive. State v. Hazen, 39 Iowa 648.

[c] **Under New York State Charities Law** § 226, the commitment of a female to the Western House of Refuge for Women for adultery for a term of three years, unless sooner discharged, is valid. Peo. v. Curtin, 152 App. Div. 364, 136 NYS 516, 27 N. Y. Cr. 535.

[d] **Alternative punishment.**—A judgment condemning defendant to the alternative punishment of a certain fine, or two months in jail in case of his failure to pay the fine, does not violate Pen. Code § 209, which provides for the imposition of a maximum fine, or imprisonment not exceeding five years or less than one year. Peo. v. Buitrago, 14 Porto Rico 718.

95. Ex p. Richards, 53 W. Va. 555, 45 SE 341.

[a] **Punishable as misdemeanor.**—In a prosecution under a statute against the offense of fornication and adultery which declared that it should be a misdemeanor, but did not prescribe any particular punishment, defendants were each sentenced to be imprisoned in the common jail of the county for the period of four months. There was a statute providing that in the case of misdemeanor, or where no special punishment was prescribed, the offense should be punishable as misdemeanor at common law. Hence it was held that punishment by imprisonment in the common jail for a period in the discretion of the court was allowable. State v. Manly, 95 N. C. 661.

96. U. S. v. Legaspi, 14 Philippine 38, 41 (where the court said: "The trial court, in imposing the penalty, gave the accused the benefit of the provisions of article 11 of the Penal Code, and sentenced them to two years, four months, and one day of prisión correccional, that being the minimum penalty prescribed for the crime of adultery: there is nothing in the record which discloses that the defendants are members of uncivilized or semicivilized tribes or persons of notably low order of intelligence, nor does it appear that the commission of the crime of adultery, of which they were convicted, was marked by such exceptional circumstances as to suggest a holding that they are entitled to the benefit of the provisions of this article, and this court has in general declined to affirm the extension of the benefits of its provisions to persons convicted of the crime of adultery (U. S. v. Borjal, 9 Philippine 140; [U. S. v. Mercado, 13 Philippine]").

97. That is the fact of commission in the dwelling of the injured party.

98. U. S. v. Destrito, 23 Philippine 28.

99. Hosford v. Gratiot Cir. Judge, 129 Mich. 302, 88 NW 627.

1. State v. Smith, 108 Iowa 440, 79 NW 115; State v. Witham, 72 Me. 531.

2. State v. Hilberg, 22 Utah 27, 61 P 215 (where it was held that the law made the election).

3. Serra v. Mortiga, 204 U. S. 470, 27 SCt 343, 51 L. ed. 571 [aff 5 Philippine 34].

4. Coons v. State, 49 Tex. Cr. 256, 91 SW 1085 (holding that testimony that witness did not know whether or not defendant had been divorced was harmless); State v. Nelson, 39 Wash. 221, 81 P 721 (holding that evidence that the paramour was married, if immaterial, was harmless, where defendant was married).

[a] **Prejudicial error.**—The admission of testimony that the accused was the first man with whom the woman involved had had intercourse was prejudicial error. State v. Hansen, 40 Utah 418, 122 P 375.

5. Davis v. Com., 3 Pa. Cas. 474.

6. Gore v. State, 58 Ala. 391.

1. Black L. D.

[a] **Use of phrase in indictments.**—In State v. Sparks, 30 W. Va. 101, 102, 3 SE 40, the court said: "When the theft is charged in the indictment for a living thing, as a horse or sheep, the regular way is to say pretii. 5 Saund. & C. If it be of a dead thing that is estimated in the indictment by weight or measure, there also it ought to be pretii; and so it may be if it be of any single thing, though dead, and not estimated by weight or measure. But if it be dead things in the plural number, then it ought to be ad valentiam. Lamb. 497; Cow. Law Dict. tits. 'Value,' 'Valentia;' 5 Bac. Abr. 77; 15 Vin. Abr. 385, 386; 2 Hawk. P. C. § 75 ch. 25; Bouv. Law Dict. 'Price.' Referring to the above distinction in these words, Lord Hale says: 'But this I take to be but clerkship, and not substantial; for if "pretii" be set instead of "ad valenciam" or e converso, I think it doth not vitiate the indictment: and so it is if one pretii or ad valenciam be added to several things, where, in true clerkship, it should be applied severally. It is good if the party be convicted of all; but possibly, if the party be convicted but of part, it is not good, because it will be uncertain whether grand or petit larceny.' 2 Hale, P. C. 183; Bafford v. Ventres, Noy 115, 74 Reprint 1080; No. 23, Car. I."

2. Kirst v. Street Imp. Dist No. 120, 86 Ark. 1, 9, 109 SW 526.

subject to taxation.[3]

ADVANCE or ADVANCES.

[§ 1] **A. As a Noun—1. In General.** A word of wide significance.[4] Broadly speaking, something which precedes;[5] something furnished or supplied in advance.[6]

[§ 2] **2. Money or Other Thing of Value.** In legal parlance the word is most frequently used to indicate advances of a pecuniary nature,[7] such as advances between husband and wife;[8] advances by a factor;[9] advances to become a lien upon crops,[10] or a lien for other purposes;[11] and advances under the Marine Insurance Law.[12] The term has been applied to money paid in advance of the proper

3. Bailey v. Fuqua, 24 Miss. 497, 501. See Customs Duties [12 Cyc 1104]; Taxation [37 Cyc 672].

[a] **An ad valorem tax** is a tax of so much per cent on the invoice or appraised money value of the goods subject to the tax. Ad valorem duties are always estimated on a certain per cent of the value of the property. A large proportion of the duties on imports are of this description, and so, sometimes, are many of the taxes which make up the internal revenue. By far the larger proportion of state taxation is also on property by valuation, and effect can be given to it only by means of assessors who value the property and apportion the taxes by their estimate. Pub. Acts (1881) No. 168, provides for the assessment of telegraph and telephone lines at their cash value, and a tax levied thereon at a rate equal to the average of general municipal and local taxes throughout the state during the year previous, in lieu of all other taxes, has been held to be an ad valorem tax. Pingree v. Auditor-Gen., 120 Mich. 95, 98, 78 NW 1025, 44 LRA 679.

[b] **Local assessments.**—(1) In Kirst v. Street Imp. Dist. No. 120, 86 Ark. 1, 9, 109 SW 526, the court, construing Const. art 19 § 27, providing that local assessments shall be ad valorem and uniform, said: "There is nothing in the Constitution to indicate that it [ad valorem] means according to value of property. . . . Under the old plan the county assessor valued the property itself, and the council levied against the property a percentage of that value; under the present plan the board of assessors values the benefits, and the council levies against the property a percentage of that value. Both plans conform to the ad valorem and uniform provision of the Constitution." (2) Compare Little Rock v. Little Rock Bd. of Impr., 42 Ark. 152, 162 (where it was said: "'Ad valorem' means a quotient part of the existing value of property, not an adjustment of burdens to each individual man, in view of his particular gains or damages"). See Municipal Corporations [28 Cyc 1102].

[c] **"License tax" distinguished.**—Levi v. Louisville, 97 Ky. 394, 401, 30 SW 973, 16 KyL 872, 28 LRA 480. See Licenses [25 Cyc 593].

[d] **"Specific tax" distinguished.**—Pingree v. Auditor-Gen., 120 Mich. 95, 111, 78 NW 1025, 44 LRA 679.

4. Campbell v. State, 121 Ga. 167, 168, 48 SE 920.

[a] **Popularly** almost numberless advances are spoken of by general good use. There are those hostile, friendly, social, amatory, business, pecuniary, etc. Ormsby County v. State, 6 Nev. 283, 287.

5. Strauss v. Cohen Bros. Co., 169 Ill. A. 337, 341; Gihon v. Stanton, 9 N. Y. 476, 477 [quot Matter of Atwood, 3 App. Div. 578, 581, 38 NYS 338; In re Joseph P. Murphy Co., 214 Pa. 258, 264, 63 A 745, 5 LRANS 1147, 6 AnnCas 308].

6. Cowen v. Adams, 78 Fed. 536, 546, 24 CCA 198.

7. See cases infra notes 8–12.

[a] **Under the supplemental Mechanic's Lien Law** Pub. L. (1895) p 313 § 35, providing that payments made by an owner on a building contract in advance of the terms of the contract shall be no defense to the claim of a subcontractor who serves a stop notice under the statute, payments made by the owner of the building to one to whom the contractor has assigned a part or the whole of any of his payments cannot be considered in any sense as a voluntary "advance payment," no matter when made, but wholly involuntary. In such case he pays because he cannot ultimately escape payment. The fact that he pays sooner than he would be obliged to pay is immaterial, because it does not affect the result; for if he should defer payment until, by the strict terms of the contract, the money was actually due to the contractor, he would still be obliged to pay the holders of the orders, and nobody can be injured by the payment in advance. In short, such payments lack the essential elements of advance payments from the owner to the contractor. Binns v. Slingerland, 55 N. J. Eq. 55, 59, 36 A 277.

8. Hodges v. Hodges, 9 R. I. 32, 35; Greig v. Smith, 29 S. C. 426, 436, 7 SE 610.

9. Laflin, etc., Powder Co. v. Burkhardt, 97 U. S. 110, 117, 24 L. ed. 973; Cain v. Pullen, 34 La. Ann. 511; Gihon v. Stanton, 9 N. Y. 476, 477; Matter of Atwood, 3 App. Div. 578, 581, 38 NYS 338; Hoy v. Reade, 31 N. Y. Super. 626, 633; In re Joseph P. Murphy Co., 214 Pa. 258, 264, 63 A 745, 5 LRANS 1147, 6 AnnCas 308; Balderston v. National Rubber Co., 18 R. I. 338, 344, 27 A 507, 49 AmSR 772.

[a] **Moneys paid by a factor** (1) to his principal on the credit of the goods consigned and in anticipation of the debt which will become due to the principal upon the sale of such goods constitute advances. Laflin, etc., Powder Co. v. Burkhardt, 97 U. S. 110, 117, 24 L. ed. 973; Balderston v. National Rubber Co., 18 R. I. 338, 344, 27 A 507, 49 AmSR 772 [quot In re Joseph P. Murphy Co., 214 Pa. 258, 264, 63 A 745, 5 LRANS 1147, 6 Ann Cas 308]. (2) An advance is "a prepayment on account of a debt anticipated by both parties to arise to that or a greater amount, from the consignor to the consignee, out of the performance by the consignee of a contract existing between them." Hoy v. Reade, 31 N. Y. Super. 626, 633 [quot Balderston v. National Rubber Co., supra].

[b] **Similar to ordinary advance.**—(1) An advance by a factor is a transaction somewhat similar to an ordinary advance. It is a prepayment; a mere anticipation of the avails of the goods consigned; and no more creates a debt in the first instance, than an advancement of a father to his son, in anticipation of his expected inheritance, creates a debt. It is true, that if the property proves insufficient to reimburse the factor for his advances, the law, in the absence of any agreement to the contrary, implies an undertaking to make up the deficiency. Gihon v. Stanton, 9 N. Y. 476, 482 [quot Balderston v. National Rubber Co., 18 R. I. 338, 344, 27 A 507, 49 AmSR 772]. And see Matter of Atwood, 3 App. Div. 578, 581, 38 NYS 338. (2) "It necessarily results that before the consignee can call on the consignor to pay back any portion of this prepayment, he must show the performance of this contract, and that his indebtedness arising thereout did not, as was anticipated, amount to the prepayment." Hoy v. Reade, 31 N. Y. Super. 626, 633 [quot Balderston v. National Rubber Co., supra].

[c] **Where a commission merchant accepts the drafts** of a planter "advances" in the commercial world are made, although the drafts are not yet paid. Turpin v. Reynolds, 14 La. 473, 477.

10. Cain v. Pullen, 34 La. Ann. 511, 519; Lumbley v. Gilruth, 65 Miss. 23, 26, 3 S 77; Lockhart v. Smith, 50 S. C. 112, 118, 27 SE 567; McCullough v. Kibler, 5 S. C. 468, 469.

[a] **Lien upon crops for advances.**—(1) A landlord lent corn to his tenant to be used in making the crop, the corn to be returned or paid for upon the close of the year. At the expiration of the year the tenant asked to be allowed to pay for the corn at the end of the ensuing year, and the landlord consented. This was held not to constitute advance for the second year within the lien law. The court said: "To constitute 'advance,' the landlord must furnish, or cause to be furnished, something not before the tenant's, and mere forbearance to demand something due him from the tenant in one year, does not give him a lien on the agricultural products of the leased premises for the next year, as against one who has a deed of trust embracing them, whatever may be his right as against the tenant." Lumbley v. Gilruth, 65 Miss. 23, 26, 3 S 77. (2) Such a lien law includes only such things as the landlord furnishes or causes to be furnished to the tenant which did not previously belong to him, which definition does not include the landlord's forbearance to demand something due him from the tenant. Lumbley v. Gilruth, supra. (3) Rev. St. § 2514, providing that "any person who shall make any advance or advances, either in money or supplies," to any person employed in the cultivation of the soil, shall be entitled to a lien on the crop, includes a note on which money is obtained from a corporation, which money was expended in the cultivation of the soil. Lockhart v. Smith, 50 S. C. 112, 118, 27 SE 567. (4) A like statute is construed not to include a mule furnished to be used in cultivating the soil, since the mule, "instead of being worn-out and rendered useless in producing a crop, may be in much better condition and more valuable after the crop is made than before." McCullough v. Kibler, 5 S. C. 468, 469.

11. See cases infra this note.

[a] **Ship lien.**—Under a law giving a lien "for advances made for the purpose of procuring necessaries of such ship or vessel, or for the insurance thereof," it was held that, to create a lien, the advances must be made for the purpose of obtaining the insurance, or paying off those who have a lien therefor; and where they are made merely for the purpose of repaying an old debt, not accompanied by any lien, no lien is created in favor of the person making such advances. The Alliance, 61 Fed. 507, 509.

[b] **Warehouseman's lien.**—Under a statute providing that a warehouseman shall have a lien on goods stored with him for his charges for storage, cartage, labor, freight, insurance, and "other advances" thereon, including weighing and cooperage in relation to the goods or other goods belonging to the same owner, and that he may detain the goods until the lien is paid, it was held that the term "advances," as so used, did not include loans made on security of the goods, but was limited to expenditures in handling and protecting the goods. Schwab v. Oatman, 56 Misc. 393, 400, 106 NYS 741 [aff 129 App. Div. 274, 113 NYS 910].

12. The Alliance, 61 Fed. 507, 509;

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time of payment;[13] money or goods furnished others in expectation of reimbursement,[14] or the property so furnished;[15] a loan or a gift, or money advanced, to be repaid conditionally.[16] It ordinarily includes money or chattels or both,[17] although it may be employed as referring only to money.[18]

Implying loan. While the word in its strictly etymological significance indicates money paid before or in advance of the proper time of payment,[19] and does not therefore imply a loan,[20] it has been so frequently used as its equivalent[21] that it may be said that the word, whether taken according to its meaning in law or according to its meaning in common usage, includes loans as well as gifts.[22]

Advancements distinguished. The word "advances," when taken in its strict legal sense, does not mean "advancements,"[23] but in legal parlance

Burnham v. Boston Mar. Ins. Co., 139 Mass. 399, 405, 1 NE 837; Wilson v. Martin, 11 Exch. 684, 694.

[a] **What covered.**—"Advances," as used in a policy of marine insurance, refers to money paid to the crew in advance, and to money advanced to the captain to buy bait on a fishing voyage, but does not cover the outfit of the vessel. Burnham v. Boston Mar. Ins. Co., 139 Mass. 399, 405, 1 NE 837.

[b] **"Advances on account of freight."**—Wilson v. Martin, 11 Exch. 684, 695. See also Hall v. Janson, 4 E. & B. 500, 509, 82 ECL 500, 119 Reprint 183.

13. Laflin, etc., Powder Co. v. Burkhardt, 97 U. S. 110, 117, 24 L. ed. 973; Gibbons v. The U. S., Dev. Ct. Cl. 51; Strauss v. Cohen Bros. Co., 169 Ill. A. 337, 341; Vail v. Vail, 10 Barb. (N. Y.) 69, 73; Balderston v. National Rubber Co., 18 R. I. 338, 344, 27 A 507, 49 AmSR 772.

[a] **For example,** this is the meaning of the word in a statute providing that any officer or person who has presented a claim against the state for services or "advances" authorized by law, which claim the board of examiners or state auditor has refused to allow, may commence an action for the recovery thereof. Ormsby County v. State, 6 Nev. 283, 286.

[b] **"As applied to the payment of money,** the term implies that the parties look forward to a time when the money will be due to the recipient. A debtor who voluntarily pays his debt before it is due is said to advance it." Gihon v. Stanton, 9 N. Y. 476, 482 [quot In re Joseph P. Murphy Co., 214 Pa. 258, 264, 63 A 745, 5 LRANS 1147, 6 AnnCas 308]. And see Strauss v. Cohen Bros. Co., 169 Ill. A. 337, 341; Matter of Atwood, 3 App. Div. 578, 581, 38 NYS 338; Lancey v. Brake, 10 Ont. 428.

[c] **An advance of money on contract,** strictly speaking, is payment made before an equivalent is received. Gibbons v. The U. S., Dev. Ct. Cl. 51.

14. Lee v. Byrne, 75 Ala. 132, 133; Nolan v. Bolton, 25 Ga. 352, 356; Ormsby County v. State, 6 Nev. 283, 287.

15. Webster D. [quot Ormsby v. State, 6 Nev. 283, 287].

16. Chase v. Ewing, 51 Barb. (N. Y.) 597, 613.

[a] **"Advanced"** may mean a giving beforehand without expectation of recompense; or, the furnishing of money or goods in expectation of reimbursement, according to the intention of the parties. High's App., 21 Pa. 283, 287.

17. Campbell v. State, 121 Ga. 167, 168, 48 SE 920; Cain v. Pullen, 34 La. Ann. 511. See also Schwab v. Oatman, 56 Misc. 393, 400, 106 NYS 741 [aff 129 App. Div. 274, 113 NYS 910].

[a] **Money or money's worth.**—An advance note given by the master of a vessel to one of the seamen stipulating that ten days after the ship sailed the undersigned agreed to pay, to any person who should "advance to Reuben Hill on this agreement the sum of 6£," was held to include any advance to that amount, whether in money or in money's worth. McKune v. Joynson, 5 C. B. N. S. 218, 230, 94 ECL 218, 141 Reprint 87.

[b] **A note** on which money is obtained and expended in the cultivation of land may be included. Lockhart v. Smith, 50 S. C. 112, 119, 27 SE 567. But compare Coleman v. State, 6 Ga. A. 398, 401, 65 SE 46 (under Labor Contract Law).

[c] **Rent.**—Within the meaning of a statute providing for the payment of claims against the state for services and advances, it was held that the word "advances" included the rent of premises occupied by the state. Ormsby County v. State, 6 Nev. 283, 287.

18. See Hodges v. Hodges, 9 R. I. 32, 34 (holding that "advances" in a decree reciting that certain advances had been made by a husband to his wife's estate, and that the estate was chargeable with the sums so advanced, should be construed as referring only to pecuniary advances, and not to advances in the shape of personal services); Greig v. Smith, 29 S. C. 426, 435, 7 SE 610 (holding that "advances," in a contract by which a married woman agreed to become responsible for "advances" to her husband, referred to advances in money only, and did not make her liable for liquidated damages arising from his failure to fulfill the terms of the contract for the delivery of personal property).

[a] **In the Labor Contract Act** (1903), p 90 the word "advance" has been said to mean a payment of money by the employer to the laborer which had not been earned. Fuller v. State, 2 Ga. A. 696, 699, 59 SE 1. See also Coleman v. State, 6 Ga. A. 398, 401, 65 SE 46.

19. Vail v. Vail, 10 Barb. (N. Y.) 69, 73; Schlesinger v. Burland, 42 Misc. 206, 208, 85 NYS 350. And see cases supra note 13.

20. Carpenter v. Plagge, 192 Ill. 82, 92, 61 NE 530; Arbaugh v. Shockney, 34 Ind. A. 268, 71 NE 232, 234, 72 NE 668; Schlesinger v. Burland, 42 Misc. 206, 208, 85 NYS 350.

[a] **Advances to agents or salesmen are not ordinarily loans.**—Arbaugh v. Shockney, 34 Ind. A. 268, 71 NE 232, 234, 72 NE 668; North Western Mut. L. Ins. Co. v. Mooney, 108 N. Y. 118, 125, 15 NE 303 (where, in construing an agreement that a principal was to advance money to an agent to be used in advancing the interest of the principal, the court said: "Thus the principal is to 'advance,' i. e., put forward to the agent, money, and in its turn the money is to be used in 'advancing,' that is, 'putting forward' the interests of the company. The first advance is not more a loan to the agent than the last advance is a loan by the agent to the company. He is responsible to them for its use and may be called on to account for, or show that it has been used for the purpose for which he received it. And for his failure to account the sureties would be bound by the express terms of the bond. They undertake that he shall 'discharge his duties as agent,' and they undertake that he 'shall pay over all moneys belonging to the company.' Money loaned ceases to be the money of the lender and becomes the property of the borrower. If the money in question was loaned, it was not in his hands as money belonging to the company"); Schlesinger v. Burland, 42 Misc. 206, 208, 85 NYS 350.

[b] **Intent of parties.**—(1) "Advances" are not always loans, but the word is capable of such construction when the intent of the parties appears from the evidence to have been the making of a loan. Onondaga Trust, etc., Co. v. Verity, 33 Misc. 4, 6, 67 NYS 918. (2) "Unquestionably, it may have the meaning of a loan if the verb ['advanced'] is used in connection with a promise, express or implied, to repay the money." Schlesinger v. Burland, 42 Misc. 206, 209, 85 NYS 350.

[c] **"Advancing," "lending money," and "discounting" distinguished.**—London Financial Assoc. v. Kelk, 26 Ch. D. 107, 134.

21. Morrow v. Turney, 35 Ala. 131, 137; Semi-Tropic Spiritualists Assoc. v. Johnson, 163 Cal. 639, 642, 126 P 488; Grone v. Economic L. Ins. Co., (Del. Ch.) 80 A 809, 816; Nolan v. Bolton, 25 Ga. 352, 355; Anderson v. Heileman Brewing Co., 104 Minn. 327, 329, 116 NW 655 [cit Cyc]; Luqueer's Est., Tuck. Surr. (N. Y.) 236, 239; Rogers v. Oxford Bank, 108 N. C. 574, 580, 13 SE 245; Oxford Bank v. Bobbitt, 108 N. C. 525, 538, 13 SE 177; Wright's App., 93 Pa. 82, 87, 89 Pa. 67.

[a] **For example,** where the question was whether a transaction was a mortgage or a conditional sale, the court said: "The parties certainly meant, by an advance of money, a loan. It was either a loan, or a payment. The import of the word 'advance' is such as rather to indicate that there was a loan, than a payment of purchase-money." Morrow v. Turney, 35 Ala. 131, 137.

[b] **Outlay or money out of pocket.**—Advances is a word usually employed to denote money paid which is to be repaid; but it does not necessarily mean more than "outlay" or "money out of pocket." Per Patterson, J., in Rose v. Hickey, 3 Ont. A. 309, 329.

[c] **Advance on stocks and bonds.**—"In common understanding, an advance or loan of money on stocks, bonds, bullion, bills of exchange, or promissory notes is an advance or loan where those species of property are pledged as collaterals, or are hypothecated to secure the return of the advance or the payment of the sum lent." Selden v. Equitable Trust Co., 94 U. S. 419, 421, 24 L. ed. 249.

22. Nolan v. Bolton, 25 Ga. 352, 355, 356 [quot Ebeling v. Ebeling, 61 Misc. 537, 540, 115 NYS 894] (where the court said: "The word advances means, say the counsel for the defendants, gifts—advancements; and does not mean loans; and, thence it follows, they insist, that the testator, notwithstanding the breadth of his first words, could not have meant the legatees to account for loans. But, in the first place, the word, 'advances,' when taken in its strict legal sense, does not mean gifts—advancements, and does mean a sort of loan; and when taken in its ordinary and usual sense, includes both loans and gifts—loans more readily, perhaps, than gifts. . . . Advancements, and advances, when both words are taken in their strict legal sense, mean quite different things, the former, gifts; the latter, loans. . . . In ordinary usage, therefore, the word, advances, includes loans, and, perhaps, gifts"); Linderman v. Carmin, 142 Mo. A. 519, 527, 127 SW 124 (where the court said: "It does not necessarily mean that money advanced must, under all circumstances, be returned; yet, that is the sense in which it is most commonly used").

23. Cowen v. Adams, 78 Fed. 536, 546, 24 CCA 198; Nolan v. Bolton, 25

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has a different and far broader signification.[24]

Context and attendant circumstances. While the use of the word in contracts has been in many instances construed,[25] the word has no such certain meaning that the court can determine the sense in which the term is used by the parties without examining the contract as an entirety and seeking the aid of the surrounding circumstances and the practical construction of the contract by the parties themselves.[26]

[§ 3] **B. As a Verb.** To put forward;[27] to supply beforehand; to furnish on credit or before goods are delivered or work done; to furnish as a part of a stock or fund;[28] to pay money before it is due;[29] to prepay on account of an anticipated debt;[30] to furnish money for a specified purpose, understood between the parties, the money or some equivalent to be returned.[31]

(Cross references.[32])

ADVANCEMENT. A term, although distin-

Ga. 352, 355; Chase v. Ewing, 51 Barb. (N. Y.) 597, 612; Luqueer's Est., Tuck. Surr. (N. Y.) 236, 240. But see Baker v. Comins, 110 Mass. 477, 488 (where an intent to the contrary was apparent).

24. Chase v. Ewing, 51 Barb. (N. Y.) 597, 612 [quot Ebeling v. Ebeling, 61 Misc. 537, 539, 115 NYS 894] (where the court said: "'Advancement' and 'advancements' are the terms used in the law dictionaries, and in our statutes, to designate money or property given by a father to his children, as a portion of his estate, and to be taken into account in the final partition or distribution thereof. 'Advances' is not the appropriate term for money or property thus furnished. The latter phrase, in legal parlance, has a different and far broader signification. It may characterise a loan or a gift, or money advanced, to be repaid conditionally. 'Lent and advanced' was the language of the old common count, in assumpsit, for money loaned or advanced, to be repaid").

[a] **In the case of an "advance," as distinguished from an "advancement,"** there arises the relation of debtor and creditor, or else the advance is in the nature of an absolute gift. Paine v. Copper Belle Min. Co., 13 Ariz. 406, 412, 114 P 964.

25. See Laflin, etc., Powder Co. v. Burkhardt, 97 U. S. 110, 117, 24 L. ed. 973; Fuller v. State, 2 Ga. A. 696, 699, 59 SE 1; Cain v. Pullen, 34 La. Ann. 511, 519; Binns v. Slingerland, 55 N. J. Eq. 55, 59, 36 A 277; Thorne v. French, 4 Misc. 436, 439, 24 NYS 694.

[a] **For example,** "an 'advance,' in connection with a contract, is something paid in anticipation of the performance of the contract—a part of the consideration paid in 'advance' of the delivery of the thing, or the performance of the work, bargained for." 25 Op. Atty.-Gen. 71, 73.

[b] **In a contract between an inventor and a manufacturer,** providing that the former should manufacture the article which he had invented, and that the corporation should "advance" to him from time to time certain materials entering into the composition of the article, it was held that the word meant "supply beforehand." Laflin, etc., Powder Co. v. Burkhardt, 97 U. S. 110, 117, 24 L. ed. 973.

[c] **In construing a theatrical contract** providing in part that for certain drawings defendant was to advance two hundred dollars the court said: "The meaning of the term 'advance' is that the defendant was to pay $200 before it would otherwise have become due." Thorne v. French, 4 Misc. 436, 439, 24 NYS 694.

[d] **In construing a memorandum of sale** containing a clause providing that the purchaser was to have advance for two weeks the court said: "We cannot say that the expression, 'he to have advance for two weeks,' refers to the market price at the end of two weeks. This language is quite as appropriate to indicate the highest advance during the said two weeks, as it is the advance at the end of said two weeks. We are bound to say either that this expression is so ambiguous that it cannot be construed by the court without extrinsic testimony, or that, properly construed, it fixed the compensation at the highest market price during those two weeks. If it fixed the highest market price during those two weeks, plaintiff was, as a matter of law, entitled to the verdict he received, and therefore defendants can complain of no error. If, on the other hand, the language is so ambiguous that it cannot be construed without the aid of extrinsic evidence, defendants are in no position to complain of the verdict." Chase v. Ainsworth, 135 Mich. 119, 122, 97 NW 404.

[e] **"After deducting for all advances."**—Where plaintiff and defendants entered into a written contract, whereby the former agreed to deliver to the latter logs at a stated price per thousand feet, and the latter agreed to pay, at the end of each month, for the logs delivered during that month, "after deducting for all advances" and commissions thereon at a specified rate, and it was held that defendants were not entitled to commissions on disbursements made by them from plaintiff's money, or when they were indebted to him for logs delivered under the contract; nor on an old indebtedness owing by plaintiff, and incurred prior to the execution of the contract. Lee v. Byrne, 75 Ala. 132, 133.

26. Paine v. Copper Belle Min. Co., 13 Ariz. 406, 412, 114 P 964; Chase v. Ainsworth, 135 Mich. 119, 122, 97 NW 404; Schlesinger v. Burland, 42 Misc. 206, 209, 85 NYS 350; Onondaga Trust, etc., Co. v. Verity, 33 Misc. 4, 6, 67 NYS 918.

27. North Western Mut. L. Ins. Co. v. Mooney, 108 N. Y. 118, 125, 15 NE 303.

[a] **"Advanced in value or condition."**—Talc sawed into cubes for use in making gas burners and insulators, the sawing being not merely to remove foreign matter and to put the material in shape for transportation, but to give it certain desired dimensions, has been "advanced in value or condition" within the meaning of the United States Tariff Act. Kraemer v. U. S., 180 Fed. 638, 639.

28. Webster D. [quot Bates v. State Bank, 2 Ala. 451, 479]; Laflin, etc., Powder Co. v. Burkhardt, 97 U. S. 110, 117, 24 L. ed. 973; Nolan v. Bolton, 25 Ga. 352, 356 [cit Webster D.]; Strauss v. Cohen Bros. Co., 169 Ill. A. 337, 341; Kissick v. Bolton, 134 Iowa 650, 652, 112 NW 95; Ormsby County v. State, 6 Nev. 283, 287 [cit Worcester D.]; Hartje v. Collins, 46 Pa. 268, 273 [cit Webster D.]; Balderston v. National Rubber Co., 18 R. I. 338, 344, 27 A 507, 49 AmSR 772.

29. Strauss v. Cohn Bros. Co., 169 Ill. A. 337, 341; Thorne v. French, 4 Misc. 436, 439, 24 NYS 694 [cit Webster D.]; Kinney v. Hynds, 7 Wyo. 22, 32, 49 P 403, 52 P 1081. See Fuller v. State, 2 Ga. A. 696, 59 SE 1.

[a] **For example,** (1) this is the meaning of the word as used in a statute providing that all contracts whereby any money is advanced to any person gaming or betting shall be void. Kinney v. Hynds, 7 Wyo. 22, 32, 49 P 403, 52 P 1081. (2) A like construction is given to the term as used in a contract for the production of an opera by defendants, which provided that defendant would "advance" a certain sum for drawings of scenes and costumes, which sum was to be deducted from the first fees due to plaintiffs under the contract. Thorne v. French, 4 Misc. 436, 439, 24 NYS 694.

[b] **In construing a clause in a will** providing that the trustee was to advance a certain sum to the wife for the first year and a half to give time to adjust family affairs, it was held that the word "advance" was equivalent to pay, and the payment must be made from the funds in the trustee's hands. Central Trust Co. v. Egleston, 47 Misc. 693, 694, 98 NYS 1055.

[c] **Money advanced by the United States.**—The word "advanced" in Rev. St. § 3739, 6 Fed. Annot. St. 129, which requires the return of money advanced by the United States on any contract wherein a member of congress is benefited, is used in its ordinary legal meaning, and does not apply to contracts that have been fully executed and payment thereon fully made. 25 Op. Atty.-Gen. 71.

30. Hoy v. Reade, 31 N. Y. Super. 626, 633 [quot Balderston v. National Rubber Co., 18 R. I. 338, 344, 27 A 507, 49 AmSR 772].

[a] **"Advanced royalty."**—In Kissick v. Bolton, 134 Iowa 650, 651, 112 NW 95, in construing the meaning of the phrase "advanced royalty" under a contract for the lease of a mine the court said: "There can be no doubt as to the meaning of the term 'advanced royalty.' It was employed with reference to a failure to take coal out in the years mentioned, and must have been intended as payment in advance for coal subsequently to be mined."

31. Strauss v. Cohn Bros. Co., 169 Ill. A. 337, 341; Ebeling v. Ebeling, 61 Misc. 537, 539, 115 NYS 894. See also Grone v. Economic L. Ins. Co., (Del. Ch.) 80 A 809, 816; Kinney v. Hynds, 7 Wyo. 22, 32, 49 P 403, 52 P 1081.

[a] **Advanced or borrowing members of a building and loan society** are those who apply for and receive a loan to the amount of their shares, upon mortgage security on freehold or leasehold property. These are the mortgagors of the society. In re St. John Bldg. Soc., 28 N. B. 597.

[b] **In advance.**—One who has paid more money or furnished more goods to another than the latter is entitled to is said to be in advance to him. Lee v. Byrne, 75 Ala. 132, 133.

32. **Advance:**
Cause on calendar see Appeal and Error [3 Cyc 204]; Criminal Law [12 Cyc 881]; Trial [38 Cyc 1285].
On bid ground for opening bidding see Judicial Sales [24 Cyc 42].
Advances:
Between husband and wife see Husband and Wife [21 Cyc 1278].
By:
Agent see Agency [31 Cyc 1533].
Executor or administrator to:
Legatee or distributee see Executors and Administrators [18 Cyc 615].
Pay claims see Executors and Administrators [18 Cyc 570].
Factor see Agriculture [2 Cyc 57 note 9]; Factors [19 Cyc 126, 152].
Guardian and ward see Guardian and Ward [21 Cyc 69 note 54].
Highway officer, recovery of see Highway [37 Cyc 233].
Landlord to tenant see Landlord and Tenant [24 Cyc 1137].
Merchant to agriculturist see Agriculture [2 Cyc 56].

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guishable from "advance,"[33] sometimes used as synonymous with "advance," referring to the payment of money in advance, or to money paid in advance.[34] Also improvement; furtherance.[35] (Cross references.[36])

ADVANTAGE. Preference or priority.[37]

ADVANTAGEOUS. Affording advantage; profitable; favorable.[38]

ADVANTAGEOUSLY. Beneficially; conveniently; profitably; gainfully.[39]

ADVENTITIOUS. Not existing inherently, but coming from without; extrinsic; foreign.[40]

By:—Continued
Partner to firm see Partnership [30 Cyc 441, 699].
Priest, reimbursement for see Religious Societies [34 Cyc 1145].
Warehouseman see Warehousemen [40 Cyc 454].
Commission to factor for see Factors [19 Cyc 152].
Contract for see Liens [25 Cyc 668 note 47].
Contract to repay, by:
Infant see Infants [22 Cyc 589].
Married woman see Husband and Wife [21 Cyc 1315].
Creating equitable lien see Liens [25 Cyc 668].
Criminal liability of servant receiving, on failure to perform services see Master and Servant [26 Cyc 1024].
Demand for repayment or security for see Factors [19 Cyc 126].
Effect of see Factors [19 Cyc 126].
Enforcement of liability for, against homestead see Homesteads [21 Cyc 519].
For freight charges and expenses see Carriers [6 Cyc 495].
Further, as affecting lien see Liens [25 Cyc 669 note 49].
Instructions as to see Factors [19 Cyc 126, 127].
Interest on see Interest [22 Cyc 1503].
Lien for:
Generally see Agriculture [2 Cyc 56]; Liens [25 Cyc 668].
Mechanic's lien see Mechanic's Lien [27 Cyc 47].
On railroad property see Railroads [33 Cyc 462].
Mortgage to secure:
Chattel mortgage see Chattel Mortgages [6 Cyc 1019].
Real estate mortgage see Mortgages [27 Cyc 1169].
Of wages to seaman see Seamen [35 Cyc 1214, 1259].
Priority of payment of see Railroads [33 Cyc 539].
Reimbursement for:
Between factor and principal see Factors [19 Cyc 127].
In joint adventure see Joint Adventures [23 Cyc 457].
Subrogation of person:
Advancing money to pay debt of another see Subrogation [37 Cyc 468].
Making advances for necessaries see Subrogation [37 Cyc 467].
Time when interest begins to run against see Interest [22 Cyc 1541].
To:
Infant for necessaries see Infants [22 Cyc 597].
Insane person prior to guardianship see Insane Persons [22 Cyc 1150 note 88].
Receiver see Receivers [34 Cyc 278].
Vessel:
Bottomry lien inferior to lien for advances see Shipping [36 Cyc 200].
In process of construction see Shipping [36 Cyc 48].
Liability for see Shipping [36 Cyc 156].
Maritime lien for see Maritime Liens [26 Cyc 764].

33. See ante p 32.

34. Century D.

[a] **An advancement by a factor** is a prepayment, a mere anticipation of the avails of the goods consigned, and no more creates a debt in the first instance than an advancement by a father to a son in anticipation of his expected inheritance creates a debt. Gihon v. Stanton, 9 N. Y. 476, 477; Matter of Atwood, 3 App. Div. 578, 581, 38 NYS 338; Balderston v. National Rubber Co., 18 R. I. 338, 344, 27 A 507, 49 AmSR 772.

[b] **On crops.**—An "advancement," in the sense of a statute relating to advancements to croppers, is anything of value pertinent for the purposes, to be used, directly or indirectly, in the making and saving of crops supplied in good faith to the lessee by the landlord. Thus, where the lessor furnishes table board to the lessee and his family in order that the latter may make and save his crops, such board at once becomes an advancement. Brown v. Brown, 109 N. C. 124, 127, 13 SE 797.

35. Webster New Int. D.

[a] **"Advancement in life"** is a phrase said not to be easy to define, since its meaning may depend to a greater or less degree on circumstances. Bailey v. Bailey, 16 R. I. 251, 253, 14 A 917 (where the court said: "The trustee argues that he has the power under that clause of the will which gives him a discretion to convey or pay over to either of the cestuis que trustent, 'for his or her advancement in life, the whole or any portion of his or her share of the trust estate,' his contention being that the words 'for his or her advancement in life' do not restrict his discretion, but are simply equivalent to 'for his or her use and benefit.' We think that such a construction is too lax. It may not be easy to define with precision what is meant by 'advancement in life' . . . but it seems to us to point to some occasion out of the every day course, when the beneficiary has in mind some new act or undertaking which calls for pecuniary outlay, and which, if properly conducted, holds out a prospect of something beyond a mere transient benefit or enjoyment. Thus, if the beneficiary were going to enter upon a business or profession, or to get married, or to build a dwelling-house, or to make some unusual repairs or renovation, it would be a proper occasion for the trustee to use his discretion").

36. Advancement:
Power to make under power see Powers [31 Cyc 1072].
To heir or distributee see Descent and Distribution [14 Cyc 162].
To legatee or devisee see Wills [40 Cyc 1921].

37. U. S. v. Preston, 27 F. Cas. No. 16,087, 4 Wash. C. C. 446, 451.

[a] **"Benefits or advantages."**—In an act prohibiting the conversion, loaning, or deposit for the benefit of officers, agents, and servants of public funds, and giving a right of action to municipalities against any such officer, agent, or servant who has contracted for or received any "benefits or advantages" because of the deposit of the public funds, the term "benefits or advantages" was clearly intended to include the interest on such deposits. State v. McFetridge, 84 Wis. 473, 519, 54 NW 1, 998, 20 LRA 223.

[b] **Eminent domain proceedings.**—(1) The advantages which may be taken into consideration in determining the "just compensation" to which the landowner is entitled upon the taking of his land are the direct and peculiar benefits or advantages accruing to him in particular in respect of the residue of his land unappropriated, and not any general benefit or increase of value received by such land in common with other lands in the neighborhood. Newby v. Platte County, 25 Mo. 258, 263 [foll Louisiana, etc., Plankroad Co. v. Pickett, 25 Mo. 535]. (2) The advantage resulting to the owner of a paper town from the crown making it the terminus of a government railway, and constructing within its limits a station house and other buildings, is an advantage within an expropriation act providing that the advantage accruing or likely to accrue to the claimant or his property, as well as the injury or damage occasioned by the public work, is to be considered. Paint v. Reg., 2 Can. Exch. 149. Compare In re Brown, 14 Ont. L. 629. See Eminent Domain [15 Cyc 764].

38. Standard D.

[a] **In construing an agreement to sell lands whenever regarded as most advantageous** to both parties the court said: "Counsel use the word 'advantageous,' in the sense of profit to the parties, or at least, no loss. . . . But we do not think that the word 'advantageous' is necessarily to be understood as referring solely to profits. If parties interested in real estate are continuously losing money on their investment, by decrease in value of the property and the payment of taxes and special assessments and loss of interest, so that they are continuously growing poorer by reason of holding the property, it may be greatly to their advantage to sell the property, in order to stop the loss which the holding of it entails." Mariner v. Ingraham, 127 Ill. A. 542, 547, 548 [aff 230 Ill. 130, 82 NE 577].

39. Garman v. Potts, 135 Pa. 506, 521, 19 A 1071. In this case a lessee agreed to mine so much ore at a certain rate, provided the ore could be advantageously mined. Plaintiff contended that the only effect of this clause was to release the lessee from hidden defects. The trial court instructed that the lessee was not liable under the lease unless the ore could be advantageously—that is, beneficially, conveniently, profitably, and gainfully—mined. The appellate court said: "The court below gave to the word 'advantageously' its common and popular meaning. It is not a technical word or term of art, and the parties must be presumed to have used it in its known sense."

[a] **It does not refer solely to pecuniary profit.**—Mariner v. Ingraham, 127 Ill. A. 542, 548.

40. Standard D.

[a] **What is meant by adventitious property,** and the rights of the father to its usufruct appears from the following extract from 1 Mason & C. Partidas p 558 law 5 tit 17 part Force: "The property which children acquire while they are under the power of their father is divided into three sorts. The first is that which children make out of the property of their father. This sort of acquisition is called in Latin, profectitium peculium; for all they acquire in this way, or by means of their father, belongs entirely to their father, who has them under his power. The second is that which the child acquires by the labor of his hands, or by some trade or science which he possesses, or in some other way; or from a donation which any one makes to him by will; or from the succession of his mother or of any of her relations, or in any other way; or where he finds a treasure or any other thing by chance. For that which the child acquires by any of these means, and which do not proceed from the estate of his father or grandfather, will be his own in right of property, and the usufruct thereof will belong to the father during his life, in virtue of the power which he has over his child. And this sort of acquisition is called in Latin adventitia, because it is derived from other sources than the

ADVENTURE. A risk or hazard;[41] a thing sent to sea, under the care of a supercargo, at the risk and for the benefit of the party sending it.[42] (Cross references.[43])

ADVERACION. In Spanish law certification. As applied to a testament it means the process of reducing to a public document a nuncupative will.[44]

ADVERSE. A general term, and one that in legal signification involves the element of hostility under a claim or color of title.[45] Phrases in which the word has been used have received judicial interpretation, such as "adverse claim,"[46] "adverse claimants,"[47] "adverse . . . enjoyment,"[48] "adverse holding,"[49] "adverse interest,"[50] "adverse party,"[51]

estate of the father." Sparks v. Spence, 40 Tex. 693, 700.

[b] **Adventitious value.**—In Central R. Co. v. State Bd. of Assessors, 49 N. J. L. 1, 8, 7 A 306, the court said: "It seems to us unquestionable that the marketable value of a successful railroad is generally greatly in excess of the value of its roadbed, equipments and other tangible possessions. The location of the road, the places or territories it connects, its capabilities for future expansion, are all elements going to make up its productiveness as a vendible thing in the market. It would be unreasonable to affirm that a road connecting two hamlets would, under usual conditions, bring as much, if sold, as a road connecting two large cities, the cost or abstract value of the two being equal. This additional value of the road, imparted to it by reason of its location, &c., will be called, for the sake of brevity, its adventitious value."

41. Moores v. Louisville Underwriters, 14 Fed. 226, 233; Cottam v. Mechanics', etc., Ins. Co., 40 La. Ann. 259, 260, 4 S 510.

[a] **The words "beginning the adventure,"** as used in a policy of marine insurance, are equivalent to the expression "risk commencing." Cottam v. Mechanics', etc., Ins. Co., 40 La. Ann. 259, 260, 4 S 510.

[b] **"Adventures"** is a timeworn word in policies of marine insurance, and is used as synonymous with "perils." It is often used by the writers to describe the enterprise or voyage as a "marine adventure" insured against. Moores v. Louisville Underwriters, 14 Fed. 226, 233 (where in the policy in question the term was associated with lakes, seas, rivers, canals, railroads, fires, and jettisons, merely as a convenient form of general policy to receive any risk within the scope of the company's business, and it was held that it must be construed with reference to the particular risk. The court said: "If it be on the 'lakes,' it is a risk limited to lake navigation; if on the 'seas,' to ocean navigation; if on the 'river,' as here, to river navigation; and if on 'railroads,' to railroad transportation; and the contract is to be read as if these words were not so associated").

[c] **"Adventures and perils of said rivers,"** in a marine policy on a barge and cargo against all loss in voyage by reason of the "adventures and perils of said rivers" and all other perils, has been construed not to include a loss occasioned by the vessel springing a leak and sinking at port. Gartside v. Orphans' Ben. Ins. Co., 62 Mo. 322, 324.

42. Burrill L. D.

43. **Adventure:**
In marine policy see Marine Insurance [26 Cyc 592].
Joint see Joint Adventures [23 Cyc 452].
Termination of see Shipping [36 Cyc 396].

44. Escriche Diccionario.

45. Eastern Oregon Land Co. v. Cole, 92 Fed. 949, 952, 35 CCA 100.

[a] **"Adverse" and "hostile"** mean practically the same thing. (1) That which is adverse in law is hostile, and that which is hostile is adverse. Eastern Oregon Land Co. v. Cole, 92 Fed. 949, 952, 35 CCA 100; Weller v. Wagner, 181 Mo. 151, 161, 79 SW 941. (2) "Adverse," in relation to the "adverse" possession of real estate, means "hostile and distinct." Miller v. Beck, 68 Mich. 76, 79, 35 NW 899.

46. See Bredell v. Alexander, 8 Mo. A. 110, 115; Norton v. Valentine, 151 App. Div. 392, 135 NYS 1084; Harding v. Harding, 46 Or. 178, 180, 80 P 97; Murphy v. Sears, 11 Or. 127, 129, 4 P 471.

Adverse claim:
Acquisition or assertion by:
Attorney against client see Attorney and Client [4 Cyc 958].
Heir of vendor see Vendor and Purchaser [39 Cyc 1617].
Purchaser see Vendor and Purchaser [39 Cyc 1617].
Vendor see Vendor and Purchaser [39 Cyc 1616].
Allegation as to in proceeding for partition see Partition [30 Cyc 217].
Necessity for interpleader see Interpleader [23 Cyc 5].
Of defendant necessary to suit to quiet title see Quieting Title [32 Cyc 1342, 1360, 1371].
Performance of contract for sale of goods as affected by interposition of see Sales [35 Cyc 161].
Right to jury trial in suit to determine see Juries [24 Cyc 119].
To:
Mining patent right see Mines and Minerals [27 Cyc 604].
Property:
Attached see Attachment [4 Cyc 724].
Garnished see Garnishment [20 Cyc 1130].
In hands of receiver see Receivers [34 Cyc 217].
In hands of trustee in bankruptcy see Bankruptcy [5 Cyc 329].
Levied on under execution see Executions [17 Cyc 1199].
Public land:
Determination in land office see Public Lands [32 Cyc 1008].
Same lot under town site law see Public Lands [32 Cyc 849].
Real property quieting title see Quieting Title [32 Cyc 1296].
See also Adverse Possession.

[a] **Mental state or condition.**—An "adverse claim" in or to the land of another, considered apart from the evidence by which its existence is usually manifested to others, may be regarded essentially as nothing more than a certain complex mental state or condition. In this sense a claim differs from any and all assertions of it, and these last are but evidence of its existence. Miles v. Strong, 68 Conn. 273, 289, 36 A 55.

47. See In re Kornit Mfg. Co., 192 Fed. 392, 396; In re Rathman, 183 Fed. 913, 920 (in bankruptcy).

Adverse claimant:
As proper party to:
Foreclosure suit see Chattel Mortgages [7 Cyc 97]; Mortgages [27 Cyc 1576].
Partition suit see Partition [30 Cyc 204].

48. See Cox v. Forrest, 60 Md. 74, 79.

Adverse enjoyment:
Generally see Adverse Possession [1 Cyc 968].
Of easement:
Generally see Easements [14 Cyc 1150, 1195].
In water:
Navigable see Navigable Waters [29 Cyc 305, 310, 352].
Unnavigable see Waters [40 Cyc 582, 594, 649, 676, 718, 728].
See also Adverse Possession.

49. See Coal Creek Consol. Coal Co. v. East Tennessee Iron, etc., Co., 105 Tenn. 563, 573, 59 SW 634.

50. See Jenkins v. International Bank, 106 U. S. 571, 573, 2 SCt 1, 27 L. ed. 304; Bailey v. Glover, 21 Wall. (U. S.) 342, 346, 22 L. ed. 636; Gildersleeve v. Gaynor, 15 Fed. 101, 103, 4 Woods 541; Doty v. Johnson, 6 Fed. 481, 482; Bowen v. Delaware, etc., R. Co., 153 N. Y. 476, 481, 47 NE 907, 60 AmSR 667.

Adverse interest:
Agent representing see Agency [31 Cyc 1571].
Ground for removal of:
Executor or administrator see Executors and Administrators [18 Cyc 162].
Guardian see Guardian and Ward [21 Cyc 55].
Trustee see Trusts [39 Cyc 263].
Knowledge acquired by officer adversely interested as imputable to corporation see Corporations [10 Cyc 1063].
Of party see Parties [30 Cyc 122].
Of witness see Witnesses [40 Cyc 2281].
Representation of by broker as affecting right to compensation see Brokers [19 Cyc 226].
Service of process on agent or officer of corporation adversely interested see Process [32 Cyc 554].

51. **Adverse party:**
Agency for see Agency [31 Cyc 1226].
As witness see Witnesses [40 Cyc 2159, 2272, 2414].
Attorney acting for as affecting right to compensation see Attorney and Client [4 Cyc 982].
Commissions from see Agency [31 Cyc 1500].
Compelling giving of testimony by see Witnesses [40 Cyc 2159].
Cross-examination of see Witnesses [40 Cyc 2473, 2474].
Examination of before trial see Discovery [14 Cyc 389].
Failure to serve notice of appeal on as ground for dismissal see Appeal and Error [2 Cyc 863, 864].
Notice of change of attorney to see Attorney and Client [4 Cyc 956].
Testimony as to transactions with person since deceased or incompetent see Witnesses [40 Cyc 2313].

[a] **Who will or will not be considered an adverse party** is a question dependent upon the circumstances of each particular case and upon the relation and interest that the party bears to the question at issue. In re Young, 149 Cal. 173, 85 P 145; U. S. v. Crooks, 116 Cal. 43, 45, 47 P 870; Harriman v. Menzies, 115 Cal. 16, 26, 44 P 660, 46 P 730, 56 AmSR 81, 35 LRA 318; In re Bullard, 114 Cal. 462, 46 P 297; In re Ryer, 110 Cal. 556, 42 P 1082; Harper v. Hildreth, 99 Cal. 265, 269, 33 P 1103; Randall v. Hunter, 69 Cal. 80, 82, 10 P 130; Berlin Mach. Works v. Bradford-Kennedy Co., 21 Ida. 669, 123 P 637; Titiman v. Alamance Min. Co., 9 Ida. 240, 74 P 529; Kells v. Nelson-Tenney Lumber Co., 74 Minn. 8, 10, 76 NW 790; Jenkins v. Carroll, 42 Mont. 302, 307, 112 P 1064; Anderson v. Red Metal Min. Co., 36 Mont. 312, 323, 93 P 44; Merk v. Bowery Min. Co., 31 Mont. 298, 304, 78 P 519; Yates v. Burch, 13 Hun (N. Y.) 622, 625; Cotes v. Carroll, 28 HowPr (N. Y.) 436, 446; Cooper Mfg. Co. v. Delahunt, (Or.) 51 P 649; The Victorian, 24 Or. 121, 127, 32 P 1040, 41 AmSR 838; Crouch v. Dakota, etc., R. Co., 22 S. D. 263, 264, 117 NW 145; Commercial Nat. Bank v. U. S. Savings, etc., Bldg. Co., 13 Utah 189, 198, 44 P 1043; Patterson v. Eakin, 87 Va. 49, 53, 12 SE 144; Seattle Trust Co. v. Pitner, 17 Wash. 365, 368, 49 P 505; Crowns v. Forest Land Co., 99 Wis. 103, 105, 74 NW 546.

[b] **"Adverse party" in probate proceedings.**—In re Koch, 148 Wis. 548, 572, 134 NW 663.

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"adverse possession,"[52] "adverse title,"[53] "adverse use,"[54] "adverse . . . user,"[55] "adverse verdict,"[56] "adverse witness."[57]

[c] **"Adverse party" in special proceeding.**—State v. Tripp County, 29 S. D. 358, 374, 137 NW 354.

[d] **Plaintiff serving an amended complaint after answer** must be deemed an "adverse party," within Code Civ. Proc § 798, providing that, if service on an adverse party is made through the post office, the time within which such adverse party is required to do an act is double the time specified. Bucklin v. Buffalo, etc., R. Co., 41 Misc. 557, 558, 85 NYS 114.

[e] **"Aggrieved party" synonymous.**—Fox v. West, 1 Ida. 782, 783; Garnsey v. Knights, 1 Thomps. & C. (N. Y.) 259, 263.

52. See Adverse Possession.

53. Hampshire v. Greeves, (Tex. Civ. A.) 130 SW 665, 667.

54. Sprow v. Boston, etc., R. Co., 163 Mass. 330, 339, 39 NE 1024 (defining the term as meaning a use under a claim of right, as distinguished from a use which is permitted).

[a] **Use of public waters.**—In Bullerdick v. Hermsmeyer, 32 Mont. 541, 554, 81 P 334 [quot Featherman v. Hennessy, 42 Mont. 535, 542, 113 P 751], it was said: "The use of the waters in the streams in this state is declared by the Constitution to be a public use. (Constitution, Art. III, sec. 15.) Such being the case, every citizen has a right to divert and use them, so long as he does not infringe upon the rights of some other citizen who has acquired a prior right by appropriation. Each citizen may divert and use them without let or hindrance when no prior right prevents. When his necessary use ceases, he must restore them to the channel of the stream, whereupon they may be used by any other person who needs them. In no case does such use become adverse until some superior right is infringed and the owner of it suffers deprivation. If it becomes and continues adverse and exclusive for the full period prescribed by the statute, and the owner suffers the consequent deprivation, such use ripens into a right by prescription." In Talbott v. Butte City Water Co., 29 Mont. 17, 26, 73 P 1111, we find this language: "The plaintiffs had use for the water only for agricultural and mining purposes, and, when not so using it, the law required them to turn it back into the stream for the use of this defendant, or any other person or corporation which might have a right to its use. No use of water by a subsequent appropriator can be said to be adverse to the right of a prior appropriator, unless such use deprives the prior appropriator of it when he has actual need of it. To take the water when the prior appropriator has no use for it, invades no right of his, and cannot even initiate a claim adverse to him." See also Smith v. Duff, 39 Mont. 374, 102 P 981, 133 AmSR 582 (where these cases are cited with approval).

55. See Cox v. Forrest, 60 Md. 74, 79 [quot Dummer v. U. S. Gypsum Co., 153 Mich. 622, 637, 117 NW 317].

Adverse user:

Generally see Adverse Possession.

Of:

Easement:

Generally see Easements [14 Cyc 1150].

In water:

Navigable see Navigable Waters [29 Cyc 305, 310, 353].

Unnavigable see Waters [40 Cyc 582, 594, 608, 649, 676, 728].

Franchise see Corporations [10 Cyc 1086].

Real property see Adverse Possession [1 Cyc 968].

Presumption of dedication from see Dedication [13 Cyc 478].

[a] **Adverse user** is a user without license or permission (Cox v. Forrest, 60 Md. 74, 79; Dummer v. U. S. Gypsum Co., 153 Mich. 622, 637, 117 NW 317); a use under a claim of right (Progress Blue Ribbon Farms v. Harter, 147 Wis. 133, 137, 132 NW 895); such a use of property as the owner himself would exercise (Harmon v. Harmon, 63 Me. 437). See Blanchard v. Moulton, 63 Me. 434, 437 (holding that where a party without permission from the owner of the soil uses the way as the owner would use it, disregarding claims entirely, using it as though he owned the property himself, it is an adverse user).

[b] **"Adverse user" is construed** by the court in Ward v. Warren, 82 N. Y. 265, 268, in speaking of the phrase that the user "must have been . . . 'with the knowledge and acquiescence' of the owner," as opposed to a use which is clandestine and by stealth. See also Hey v. Collman, 78 App. Div. 584, 586, 79 NYS 778.

[c] **"Limitation," "prescription," or "adverse user"** may be used interchangeably in setting up an easement of water in the land of another, as they mean substantially the same thing. "Prescription properly applies only to incorporeal hereditaments, and is of the same length of time as limitation by statute, and adverse user is the same." Murray v. Scribner, 74 Wis. 602, 604, 43 NW 549.

56. See Hamblin v. Barnstable County, 16 Gray (Mass.) 256, 259.

57. **Adverse witness:**

Contradiction of see Witnesses [40 Cyc 2765].

Impeachment of see Witnesses [40 Cyc 2557].

Right to examine at trial see Witnesses [40 Cyc 2159, 2281].

[a] **English statute.**—"Adverse," as used in 17 & 18 Vict. c 125, authorizing a party producing a witness whose testimony is adverse to contradict him by evidence of former contradictory statements made by him, construed as meaning "hostile," and not merely "unfavourable," and hence a witness cannot be contradicted by showing his former statements, unless he shows hostile mind to the party calling him. Greenough v. Eccles, 5 C. B. N. S. 786, 801, 94 ECL 786, 141 Reprint 315 [foll Herbert v. Mercantile F. Ins. Co., 43 U. C. Q. B. 384].

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ADVERSE POSSESSION

By William A. Martin*

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 49].

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Private crossing over railroad see **Railroads** [33 Cyc 921].
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Wharf or wharfage right see **Navigable Waters** [29 Cyc 342]; **Wharves** [40 Cyc 900].
Sale by personal representative of land held adversely see **Executors and Administrators** [18 Cyc 694].

I. DEFINITION, NATURE, AND ELEMENTS[1]

[§ 1] Adverse possession, generally speaking, is a possession of another's land which, when accompanied by certain acts and circumstances, will vest title in the possessor.[2] No matter in what jurisdiction the determination of what constitutes adverse possession may arise, the decisions and textbooks are unanimous in declaring that the possession must be actual,[3] visible,[4] exclusive,[5] hostile,[6] and continued during the time necessary to create a bar under the statute of limitations.[7] Whenever any of these elements,[8] or any other element required by statute, is lacking, no title by adverse possession can ripen.[9] It is, however, often a matter of some difficulty to determine from the facts of any particular case when these elements exist. These elements are hereinafter considered at length.[10] In addition to these elements, which, as already stated, must always concur to give title by adverse possession, some statutes make it necessary for the claimant to hold under color of title,[11] and under statutes which have been enacted in some jurisdictions payment of taxes for the entire statutory period is necessary.[12] That the possession shall be lawful[13] and peaceable[14] is also necessary under some statutes. Good faith is also an element of adverse possession in some jurisdictions, and that too in the absence of any special statutory requirements; but the decisions on this question are very conflicting.[15] Adverse possession necessarily involves a disseizin or ouster of the true owner,[16] and

1. **Adverse possession of chattels** see infra § 634 et seq.
Presumption of grant see infra § 650 et seq.
2. Black L. D.; Bouvier L. D.
3. See infra § 2.
4. See infra § 57.
5. See infra § 198.
6. See infra § 206.
7. See infra § 192.
[a] **Further enumeration of these elements** see Snowden v. Loree, 122 Fed. 493 [aff 128 Fed. 419, 63 CCA 161]; Frick v. Harper, 155 Ala. 231, 46 S 453; McDaniel v. Sloss Iron, etc., Co., 152 Ala. 414, 44 S 705; McCreary v. Jackson Lumber Co., 148 Ala. 247, 41 S 822; Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45; Jackson Lumber Co. v. McCreary, 137 Ala. 278, 34 S 850; Beasley v. Howell, 117 Ala. 499, 22 S 989; Costello v. Muheim, 9 Ariz. 422, 84 P 906; Jeffery v. Jeffery, 87 Ark. 496, 113 SW 27; Steckter v. Ewing, 6 Cal. A. 761, 93 P 286; Dallam v. Sanchez, 56 Fla. 779, 47 S 871; Hyer v. Griffin, 55 Fla. 560, 46 S 635; Walker v. Steffes, 139 Ga. 520, 77 SE 580; Stewart v. Andrews, 239 Ill. 186, 87 NE 864; Horn v. Metzger, 234 Ill. 240, 84 NE 893; Roby v. Calumet, etc., Canal, etc., Co., 211 Ill. 173, 71 NE 822; Worthley v. Burbanks, 146 Ind. 534, 45 NE 779; Law v. Smith, 4 Ind. 56; Willette v. Gifford, 46 Ind. A. 185, 92 NE 186; Watts v. Bryant, 144 Ky. 14, 137 SW 780; Sparks v. Jackson, 142 Ky. 17, 133 SW 959; Owsley v. Owsley, 117 Ky. 47, 77 SW 397, 25 KyL 1186; Gerrold v. Barnhart, 128 La. 1099, 55 S 688; Brewer v. Yazoo, etc., R. Co., 128 La. 544, 54 S 987; Atty.-Gen. v. Ellis, 198 Mass. 91, 84 NE 430, 15 LRANS 1120 and note; Bean v. Bean, 163 Mich. 379, 128 NW 413; Heiss v. Adams, 149 Mich. 645, 113 NW 358; Smeberg v. Cunningham, 96 Mich. 378, 56 NW 73, 35 AmSR 613; McCaughn v. Young, 35 Miss. 277, 37 S 839; Long v. Lackawanna Coal, etc., Co., 233 Mo. 713, 136 SW 673; Chilton v. Comanianni, 221 Mo. 685, 120 SW 1174; Adkins v. Tomlinson, 121 Mo. 487, 26 SW 573; Lanning v. Musser, 88 Nebr. 418, 129 NW 1022; Butler v. Smith, 84 Nebr. 78, 120 NW 1106, 28 LRANS 436; Beer v. Dalton, 3 Nebr. (Unoff.) 694, 92 NW 593; Rheinfort v. Abel, (N. J. Ch.) 80 A 1059; Johnston v. Albuquerque, 12 N. M. 20, 72 P 9; Bland v. Beasley, 145 N. C. 168, 58 SE 993; Enderlin Inv. Co. v. Nordhagen, 18 N. D. 517, 122 NW 390; Vaughan v. Holder, (Okl.) 137 P 672; Flesher v. Callahan, 32 Okl. 283, 122 P 489; Wade v. Crouch, 14 Okl. 593, 78 P 91; Chapman v. Dean, 58 Or. 475, 115 P 154; Sommer v. Compton, 52 Or. 173, 96 P 124, 1065; McNear v. Guistin, 50 Or. 377, 92 P 1075; Llewellyn v. Buechley, 198 Pa. 642, 48 A 864; Co-operative Bldg. Bank v. Hawkins, 30 R. I. 171, 73 A 617; Glover v. Pfeuffer, (Tex. Civ. A.) 163 SW 984; Raley v. Sullivan, (Tex. Civ. A.) 159 SW 99; Stevens v. Pedregon, (Tex Civ. A.) 140 SW 236; Jones v. Weaver, (Tex. Civ. A.) 122 SW 619; Louisiana, etc., Lumber Co. v. Kennedy, (Tex. Civ. A.) 119 SW 884 [rev on other grounds 103 Tex. 297, 126 SW 1110]; Hess v. Webb, (Tex. Civ. A.) 113 SW 618; International, etc., R. Co. v. Cuneo, 47 Tex. Civ. A. 622, 108 SW 714; Holland v. Ferris, (Tex. Civ. A.) 107 SW 102 [rev on other grounds 114 SW 346]; Gillum v. Fuqua, (Tex. Civ. A.) 61 SW 938; Dignan v. Nelson, 26 Utah 186, 72 P 936; Yellow Poplar Lumber Co. v. Thompson, 108 Va. 612, 62 SE 358; Creekmur v. Creekmur, 75 Va. 430; Coler v. Center, 61 Wash. 694, 112 P 94; Johnson v. Conner, 48 Wash. 431, 93 P 914; Point Mountain Coal, etc., Co. v. Holly Lumber Co., 71 W. Va. 21, 75 SE 197; Wilson v. Braden, 56 W. Va. 372, 49 SE 409, 107 AmSR 927; Maxwell v. Cunningham, 50 W. Va. 298, 40 SE 499; Heavner v. Morgan, 41 W. Va. 428, 23 SE 874; Swann v. Young, 36 W. Va. 57, 14 SE 426; Garrett v. Ramsey, 26 W. Va. 345; Core v. Faupel, 24 W. Va. 238; Bryant v. Cadle, 18 Wyo. 64, 104 P 28, 106 P 687.
[b] **Statutory provisions relating to champerty.**—Under Ky. St. (1903) § 2505, which requires an action for the recovery of land to be brought within fifteen years after the right to institute it accrues, and under the Champerty St. (1903) § 210, which provides that "all sales or conveyances . . . of any lands . . . of which any other person, at the time of such sale, contract or conveyance, has adverse possession, shall be null and void," the elements constituting adverse possession are the same. Scott v. Mineral Dev. Co., 130 Fed. 497, 64 CCA 659.
8. U. S.—Eastern Oregon Land Co. v. Cole, 92 Fed. 949, 35 CCA 100.
Ala.—Lawrence v. Alabama State Land Co., 144 Ala. 524, 41 S 612.
Ark.—Mooney v. Cooledge, 30 Ark. 640.
N. M.—Jenkins v. Maxwell Land Grant Co., 15 N. M. 281, 107 P 739.
Pa.—Groft v. Weakland, 34 Pa. 304; DeHaven v. Landell, 31 Pa. 120.
W. Va.—Core v. Faupel, 24 W. Va. 238.
9. Gillum v. Fuqua, (Tex. Civ. A.) 61 SW 938.
10. See infra § 2 et seq.
11. See infra § 333 et seq.
12. See infra § 415 et seq.
13. See infra § 321.
14. See infra § 322.
15. See infra § 404 et seq.
16. U. S.—Stanley v. Schwalby, 147 U. S. 508, 13 SCt 418, 37 L. ed. 259.
Ala.—Lecroix v. Malone, 157 Ala. 434, 47 S 725.
Hawaii.—Kapiolani v. Cleghorn, 14 Hawaii 330.

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the possession must be such as will give a right of action to such owner at any time during the period for which such possession must be held in order to acquire title by adverse possession.[17]

II. ACTUAL POSSESSION

[§ 2] **A. Necessity—1. In General.** That an adverse claim to land may ripen into a perfect title by virtue of the statutes of limitations it is primarily essential that the possession relied upon be actual possession[18] of some part of the land in

Ill.—**Chicago**, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088.

Minn.—**Glover** v. Sage, 87 Minn. 526, 92 NW 471.

Miss.—**Alexander** v. Polk, 39 Miss. 737.

Mo.—**Swope** v. Ward, 185 Mo. 316, 84 SW 895.

N. C.—**Parker** v. Banks, 79 N. C. 480.

Okl.—**Wade** v. Crouch, 14 Okl. 593, 78 P 91.

Wash.—**Johnson** v. Ingram, 63 Wash. 554, 115 P 1073.

See infra § 20.

[a] **The consent of the person dissaized** is of course unnecessary to the acquisition of title by adverse possession. **Middlesex County** v. Lane, 149 Mass. 101, 21 NE 228. "It is a possession, not under the legal proprietor, but entered into without his consent, either directly or indirectly given. It is a possession, by which he is dissseized and ousted of the lands so possessed." Per Ingersoll, J., in **Bryan** v. Atwater, 5 Day (Conn.) 181, 188, 5 AmD 136 [quot French v. Pearce, 8 Conn. 439, 443, 21 AmD 680].

17. Cal.—Sullivan v. Zeiner, 98 Cal. 346, 33 P 209, 20 LRA 730 and note; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 P 623.

Ky.—**Moss** v. Scott, 2 Dana 271.

Mont.—Chessman v. Hale, 31 Mont. 577, 79 P 254, 68 LRA 410, 3 AnnCas 1038.

N. C.—**Fuller** v. Elizabeth City, 118 N. C. 25, 23 SE 922; Shaffer v. Gaynor, 117 N. C. 15, 23 SE 154; Hamilton v. Icard, 114 N. C. 532, 19 SE 607, 117 N. C. 476, 23 SE 354; Cox v. Ward, 107 N. C. 507, 12 SE 379; Malloy v. Bruden, 86 N. C. 251; Osborne v. Johnston, 65 N. C. 22.

S. C.—**Lewis** v. Pope, 86 S. C. 285, 68 SE 680; Massey v. Duren, 3 S. C. 34; Harrington v. Wilkins, 13 S. C. L. 289.

Tex.—**Portis** v. Hill, 3 Tex. 273.

Wash.—**Northern Pac. R. Co.** v. Spokane, 45 Wash. 229, 88 P 135.

W. Va.—**Wilson** v. Braden, 56 W. Va. 372, 49 SE 409, 107 AmSR 927. In Core v. Faupel, 24 W. Va. 238, 246, the court said: "Unless the adverse claimant is so in possession of the land that he may at any time be sued as trespasser the statute will not run in his favor; and although he may have taken actual possession, if he does not continue there so that he may be sued at any time as a trespasser during the prescriptive bar, he cannot rely on the statute of limitations."

[a] **Thus** a mere claim to possession of wild land, accompanied by occasional cutting of timber, the prevention of trespasses, the payment of taxes, and the assertion of title, is insufficient, unless there was also such use or holding of the property as would make claimant by adverse possession continuously subject to be treated as a trespasser by the holder of the superior title. Wilson v. Braden, 56 W. Va. 372, 49 SE 409, 107 AmSR 927.

[b] **Invasion of rights necessary.** —An adverse claim must be accompanied by such invasion of the rights of the opposite party as to give a cause of action for the trespass. A mere claim of title, unaccompanied by adverse possession, gives no right of action to the person against whom it is asserted, and consequently his rights are unaffected. Abell v. Harris, 11 Gill & J. (Md.) 367.

18. U. S.—**Ward** v. Cochran, 150 U. S. 597, 14 SCt 230, 37 L. ed. 1195; White v. Burnley, 20 How. 235, 15 L. ed. 886; Anderson v. Bock, 15 How. 329, 14 L. ed. 716; Tompkins v. Creighton-McShane Oil Co., 160 Fed. 303, 87 CCA 427; Wright v. Phipps, 98 Fed. 1007, 38 CCA 702 [aff 90 Fed. 556]; Lemoine v. Dunklin County, 38 Fed. 567; Gray v. Jones, 14 Fed. 83, 4 McCrary 515; Potts v. Gilbert, 19 F. Cas. No. 11,347, 3 Wash. C. C. 475.

Ala.—Alexander-City Union Warehouse, etc., Co. v. Central of Georgia R. Co., 62 S 745; Cooper v. Slaughter, 175 Ala. 211, 57 S 477; Hooper v. Bankhead, 171 Ala. 626, 54 S 549; Doe v. McCullough, 155 Ala. 246, 46 S 472; Barron v. Barron, 122 Ala. 194, 25 S 55; Goodson v. Brothers, 111 Ala. 589, 20 S 443; Augusta Nat. Bank v. Baker Hill Iron Co., 108 Ala. 635, 19 S 47; Beasley v. Clarke, 102 Ala. 254, 14 S 744; Murray v. Hoyle, 97 Ala. 588, 11 S 797; Kerr v. Nicholas, 88 Ala. 346, 6 S 698; Lipscomb v. McClellan, 72 Ala. 151; Bernstein v. Humes, 71 Ala. 260; Jones v. Wilson, 69 Ala. 400; Rivers v. Thompson, 46 Ala. 335; Shipman v. Baxter, 21 Ala. 456; Dexter v. Nelson, 6 Ala. 68.

Ark.—Kirker v. Daniels, 73 Ark. 263, 83 SW 912; Spratlin v. Halliburton, 63 Ark. 647, 39 SW 712; Greer v. Anderson, 62 Ark. 213, 35 SW 215; Scott v. Mills, 49 Ark. 266, 4 SW 908; Calloway v. Cossart, 45 Ark. 81; Byers v. Danley, 27 Ark. 77; Trapnall v. Burton, 24 Ark. 371; Conway v. Kinsworthy, 21 Ark. 9.

Cal.—Nathan v. Dierssen, 146 Cal. 68, 79 P 739; Buckley v. Mohr, 58 P 261; Christy v. Spring Valley Water Wks., 97 Cal. 21, 31 P 1110; Hargro v. Hodgdon, 89 Cal. 623, 26 P 1106; Berniaud v. Beecher, 71 Cal. 38, 11 P 802; Wilson v. Atkinson, 68 Cal. 590, 10 P 203; Unger v. Mooney, 63 Cal. 586, 49 AmR 100; San Francisco v. Fulde, 37 Cal. 349, 99 AmD 278; Polack v. McGrath, 32 Cal. 15; Mattes v. Hall, (A.) 132 P 295; Madden v. Hall, (A.) 132 P 291.

Colo.—Gomer v. Chaffee, 6 Colo. 314; Fleming v. Howell, 22 Colo. A. 382, 125 P 551.

Conn.—Dubuque v. Coman, 64 Conn. 475, 30 A 777; Huntington v. Whaley, 29 Conn. 391.

Del.—Bartholomew v. Edwards, 6 Del. 17.

D. C.—Reid v. Anderson, 13 App. 30; Ebbinghaus v. Killian, 12 D. C. 247.

Fla.—Michigan Trust Co. v. Canada, 61 S 123; Barrs v. Brace, 38 Fla. 265, 20 S 991; Caro v. Pensacola City Co., 19 Fla. 766.

Ga.—Strong v. Powell, 92 Ga. 591, 20 SE 6; Walker v. Hughes, 90 Ga. 52, 15 SE 912; Scott v. Cain, 90 Ga. 34, 15 SE 816; Roe v. Doe, 30 Ga. 971; Durham v. Holeman, 30 Ga. 619; Carmichael v. Strawn, 27 Ga. 341; Hindsman v. Worthen, 22 Ga. 47.

Hawaii.—Akowai v. Lupong, 4 Hawaii 259.

Ill.—Roby v. Calumet, etc., Canal, etc., Co., 211 Ill. 173, 71 NE 822; Fuller v. Dauphin, 124 Ill. 542, 16 NE 917, 7 AmSR 388; Champaign v. McMurray, 76 Ill. 353; Clark v. Lyon, 45 Ill. 388; Cook v. Norton, 43 Ill. 391; Morrison v. Kelly, 22 Ill. 609, 74 AmD 169; Turney v. Chamberlain, 15 Ill. 271.

Ind.—Vandalia R. Co. v. Wheeler, 103 NE 1069; Armstrong v. Hufty, 156 Ind. 606, 55 NE 443, 60 NE 1080; Pittsburgh, etc., R. Co. v. Beck, 152 Ind. 421, 53 NE 439; Moore v. Hinkle, 151 Ind. 343, 50 NE 822; Worthley v. Burbanks, 146 Ind. 534, 45 NE 779; Silver Creek Cement Co. v. Union Lime, etc., Co., 138 Ind. 297, 35 NE 125, 37 NE 721; Maple v. Stevenson, 122 Ind. 368, 23 NE 854; Hoffman v. Zollman, 49 Ind. A. 664, 97 NE 1015.

Iowa.—Willcuts v. Rollins, 85 Iowa 247, 52 NW 199; Brown v. Rose, 55 Iowa 734, 7 NW 133; Booth v. Small, 25 Iowa 177; Robinson v. Lake, 14 Iowa 421.

Kan.—Hall v. Dodge, 18 Kan. 277.

Ky.—Terry v. Loudermilk, 158 Ky. 353, 164 SW 959; Combs v. Stacy, 147 Ky. 222, 144 SW 24; Whitley County Land Co. v. Powers, 146 Ky. 801, 144 SW 2; Young v. Pace, 145 Ky. 405, 140 SW 555; Courtney v. Ashcroft, 105 SW 106, 31 KyL 1324; Chambers v. Tharp, 93 SW 627; Row v. Johnson, 78 SW 906, 25 KyL 1799; Asher Lumber Co. v. Clemmons, 66 SW 12, 23 KyL 1771; King v. Hunt, 13 SW 214; Jones v. McCauley, 2 Duv. 14; Smith v. Morrow, 7 J. J. Marsh. 442; Weaver v. Froman, 6 J. J. Marsh. 213; Bodley v. Coghill, 3 A. K. Marsh. 614; Anderson v. Turner, 3 A. K. Marsh. 131; Curtis v. Forman, 4 Bibb 513; Green v. Keltmers, 2 KyL 312.

La.—Leader Realty Co. v. Lakewood Land Co., 63 S 253 (draining land insufficient); Castera v. New Orleans Land Co., 125 La. 877, 51 S 1021; Kernan v. Young, 119 La. 238, 44 S 1; Ramos Lumber, etc., Co. v. Labarre, 116 La. 559, 40 S 898; Clemens v. Meyer, 44 La. Ann. 390, 10 S 797; Dinkgrave v. Sloan, 13 La. Ann. 393; Dodeman v. Barrow, 11 La. Ann. 87; Hart v. Foley, 1 Rob. 378; Ellis v. Prevost, 19 La. 251; Green v. Hudson, 7 La. 120. Compare George v. Cole, 109 La. 816, 834, 33 S 784 (where it was said: "The prescription of ten years, under Civ. Code, art. 3479, 'must be supported by corporeal possession in the beginning, after which it may be preserved by external use and public signs announcing the possessor's intention to preserve the possession of the thing—as the keeping up of roads and levees, the payment of taxes, and other similar acts' ").

Me.—Proctor v. Maine Cent. R. Co., 100 Me. 27, 60 A 423, 109 AmSR 474; Jewett v. Whitney, 51 Me. 233; Putnam Free School v. Fisher, 38 Me. 324; Thayer v. McLellan, 23 Me. 417.

Md.—Sadtler v. Peabody Heights Co., 66 Md. 1, 10 A 599; Parker v. Wallis, 60 Md. 15, 45 AmR 703; Stump v. Henry, 6 Md. 201, 61 AmD 300; Hoye v. Swan, 5 Md. 237.

Mass.—Morrison v. Chapin, 97 Mass. 72; Simmons v. Nahant, 3 Allen 316; Cook v. Babcock, 11 Cush. 206; Bates v. Norcross, 14 Pick. 224; Kennebeck Purchase v. Springer, 4 Mass. 416, 3 AmD 227; Kennebeck Purchase v. Call, 1 Mass. 483.

Mich.—Beaufait v. Dolson, 110 Mich. 146, 67 NW 1110; Paldi v. Paldi, 95 Mich. 410, 54 NW 903; Yelverton v. Steele, 40 Mich. 538.

Minn.—Bazille v. Murray, 40 Minn. 48, 41 NW 238; Murphy v. Doyle, 37 Minn. 113, 33 NW 220; Coleman v. Northern Pac. R. Co., 36 Minn. 525, 32 NW 859; Greene v. Dwyer, 33 Minn. 403, 23 NW 546.

Miss.—Cameron v. Lewis, 59 Miss. 134; Davis v. Bowmar, 55 Miss. 671; Huntington v. Allen, 44 Miss. 654; Magee v. Magee, 37 Miss. 138.

Mo.—Brewster v. Laclede Land, etc., Co., 247 Mo. 223, 152 SW 302; Baker v. Thompson, 214 Mo. 500, 114 SW 497; Dixon v. Hunter, 204 Mo. 382, 103 SW 970; Sell v. McAnaw, 158 Mo. 466, 59 SW 1003; Whyte v. St. Louis, 153 Mo. 80, 54 SW 478; Ward v. Ihler, 132 Mo. 375, 34 SW 251; Ivy v. Yancey, 129 Mo. 501, 31 SW 937; Sherwood v. Baker, 105 Mo. 472, 16 SW 938, 24 AmSR 399; Farrar v. Heinrich, 86 Mo. 521; Avery v. Adams, 69

dispute.[19]

Pedis possessio. In this connection an actual possession is frequently spoken of as pedis possessio, or pedis positio.[20]

Mo. 603; Norfleet v. Hutchins, 68 Mo. 597; Mylar v. Hughes, 60 Mo. 105; Dalby v. Snuffer, 57 Mo. 294; Bowman v. Lee, 48 Mo. 336; DeGraw v. Taylor, 37 Mo. 310; Tayon v. Ladew, 33 Mo. 205; St. Louis v. Gorman, 29 Mo. 593, 77 AmD 586.

Mont.—Lockey v. Horsky, 4 Mont. 457, 2 P 19.

Nebr.—Twohig v. Leamer, 48 Nebr. 247, 67 NW 152; Omaha, etc., Land, etc., Co. v. Parker, 33 Nebr. 775, 51 NW 139, 29 AmSR 506.

Nev.—Chollar-Potosi Min. Co. v. Kennedy, 3 Nev. 361, 93 AmD 409.

N. H.—Manchester v. Duggan, 75 N. H. 33, 70 A 1075; Little v. Downing, 37 N. H. 355; Bailey v. Carleton, 12 N. H. 9, 37 AmD 190; Hale v. Glidden, 10 N. H. 397; Smith v. Hosmer, 7 N. H. 436, 28 AmD 354.

N. J.—Foulke v. Bond, 41 N. J. L. 527; Cornelius v. Giberson, 25 N. J. L. 1.

N. M.—Johnston v. Albuquerque, 12 N. M. 20, 72 P 9.

N. Y.—DeLancey v. Piepgras, 138 N. Y. 26, 33 NE 822 [mod 63 Hun 169, 17 NYS 681], 141 N. Y. 88, 35 NE 1089 [aff 73 Hun 607, 26 NYS 806]; Brinkerhoff v. Mooney, 42 App. Div. 420, 59 NYS 158; DeLancey v. Hawkins, 23 App. Div. 8, 49 NYS 469 [aff 163 N. Y. 587, 57 NE 1108]; Finn v. Lally, 1 App. Div. 411, 37 NYS 437; Bissing v. Smith, 85 Hun 564, 33 NYS 123; Ogden v. Jennings, 66 Barb. 301 [aff 62 N. Y. 526]; Becker v. Van Valkenburgh, 29 Barb. 319; Lane v. Gould, 10 Barb. 254; People v. Livingston, 8 Barb. 253; Miller v. Platt, 12 N. Y. Super. 272; Silliman v. Paine, 1 NYS 75; Buttery v. Rome, etc., R. Co., 14 NYSt 131; Livingston v. Peru Iron Co., 9 Wend. 511; Jackson v. Oltz, 8 Wend. 440; Doe v. Campbell, 10 Johns. 475.

N. C.—Locklear v. Savage, 159 N. C. 236, 74 SE 847; Flanner v. Butler, 131 N. C. 155, 42 SE 547, 92 AmSR 773; Brown v. Morisey, 124 N. C. 292, 32 SE 687; Shaffer v. Gaynor, 117 N. C. 15, 23 SE 154; Williams v. Wallace, 78 N. C. 354; Wallace v. Maxwell, 32 N. C. 110, 51 AmD 380; Den v. Herring, 5 N. C. 414; Cutler v. Blackman, 4 N. C. 368.

N. D.—J. B. Streeter Jr. Co. v. Fredrickson, 11 N. D. 300, 91 NW 692.

Oh.—Boal v. King, Wright 223; Ashley v. Toledo, 13 Oh. Cir. Ct. 1, 5 Oh. Cir. Dec. 675.

Or.—Thomas v. Spencer, 66 Or. 359, 133 P 822; Hamilton v. Flournoy, 44 Or. 97, 74 P 483; Springer v. Young, 14 Or. 280, 12 P 400.

Pa.—Bear Valley Coal Co. v. Dewart, 95 Pa. 72; McDermott v. Hoffman, 70 Pa. 31; Broad Top Coal, etc., Co. v. Riddlesburg Coal, etc., Co., 65 Pa. 435; Brolaskey v. McClain, 61 Pa. 146; Armstrong v. Caldwell, 53 Pa. 284; Hole v. Rittenhouse, 25 Pa. 491; Sheik v. McElroy, 20 Pa. 25; Murphy v. Springer, 1 Grant 73; Urket v. Coryell, 5 Watts & S. 60; Cranmer v. Hall, 4 Watts & S. 36; Naglee v. Albright, 4 Whart. 291; Sorber v. Willing, 10 Watts 141; Mercer v. Watson, 1 Watts 330; Cluggage v. Duncan, 1 Serg. & R. 111; Schwab v. Bickel, 11 Pa. Super. 312; Bradford v. Guthrie, 4 Brewst. 351; Messer v. Rhodes, 3 Brewst. 180.

S. C.—Steedman v. Hilliard, 37 S. C. L. 101; Slice v. Derrick, 31 S. C. L. 627; Alston v. McDowall, 26 S. C. L. 444; Harrington v. Wilkins, 13 S. C. L. 289; Turnipseed v. Busby, 12 S. C. L. 279; Bailey v. Irby, 11 S. C. L. 343, 10 AmD 609.

Tenn.—Elliott v. Cumberland Coal, etc., Co., 109 Tenn. 745, 71 SW 749; Brown v. Watkins, 98 Tenn. 454, 40 SW 480; Coal Creek Min. Co. v. Heck, 15 Lea 497; Jordan v. Maney, 10 Lea 135; Hicks v. Tredericks, 9 Lea 491; Peck v. Houston, 5 Lea 227; Smith v. Lee, 1 Coldw. 549; Allen v. Suseng, 1 Coldw. 204; Scales v. Cockrill, 3 Head 432; Snoddy v. Kreutch, 3 Head 301; Kincaid v. Meadows, 3 Head 188; Stewart v. Harris, 9 Humphr. 714; Dyche v. Gass, 3 Yerg. 397; Peterson v. Turney, 2 Tenn. Ch. A. 519; Hearn v. Jones, (Ch. A.) 64 SW 344; O'Dell v. Swaggerty, (Ch. A.) 42 SW 175.

Tex.—Conn v. Franklin, 19 SW 126; Evans v. Foster, 79 Tex. 48, 15 SW 170; Mhoon v. Cain, 77 Tex. 316, 14 SW 24; Porter v. Miller, 76 Tex. 593, 13 SW 555, 14 SW 334; Carley v. Parton, 75 Tex. 98, 12 SW 950; Mason v. Stapper, 8 SW 598; House v. Brent, 69 Tex. 27, 7 SW 65; Bracken v. Jones, 63 Tex. 184; Sellman v. Hardin, 58 Tex. 86; McDow v. Rabb, 56 Tex. 154; Moss v. Berry, 53 Tex. 632; Peyton v. Barton, 53 Tex. 298; Kilpatrick v. Sisneros, 23 Tex. 113; Hooper v. Acuff, (Civ. A.) 159 SW 934; Burnham v. Hardy Oil Co., (Civ. A.) 147 SW 330; Davis v. Adams, (Civ. A.) 129 SW 150; Culmell v. Borroum, 13 Tex. Civ. A. 458, 35 SW 942; Roach v. Fletcher, 11 Tex. Civ. A. 225, 32 SW 585; Brymer v. Taylor, 5 Tex. Civ. A. 103, 23 SW 635; Beall v. Evans, 1 Tex. Civ. A. 443, 20 SW 945.

Utah.—Dignan v. Nelson, 26 Utah 186, 72 P 936.

Vt.—Wells v. Austin, 59 Vt. 157, 10 A 405; Soule v. Barlow, 49 Vt. 329; Paine v. Hutchins, 49 Vt. 314; Oatman v. Fowler, 43 Vt. 462.

Va.—Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232; Harman v. Ratliff, 93 Va. 249, 24 SE 1023; Koiner v. Rankin, 11 Gratt. (52 Va.) 420; Hannon v. Hannah, 9 Gratt. (50 Va.) 146; Overton v. Davisson, 1 Gratt. (42 Va.) 211, 42 AmD 544; Taylor v. Burnsides, 1 Gratt. (42 Va.) 165.

W. Va.—Chilton v. White, 78 SE 1048; State v. Moore, 71 W. Va. 285, 76 SE 461; Newman v. Newman, 60 W. Va. 371, 55 SE 377, 7 LRANS 370; Wilson v. Braden, 48 W. Va. 196, 36 SE 367; Oney v. Clendenin, 28 W. Va. 34; Core v. Faupel, 24 W. Va. 238; State v. Moore, 71 W. Va. 285, 76 SE 461. See also Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 52 SE 445, 6 AnnCas 140 and note. A limitation of the rule recognized in this state is that a person claiming the title to land vested in the state under the second class specified in Const. art 13 § 3 need not have had possession. Jarrett v. Stevens, 36 W. Va. 445, 15 SE 177.

Wis.—Kurz v. Miller, 89 Wis. 426, 62 NW 182; Allen v. Allen, 58 Wis. 202, 16 NW 610; Sydnor v. Palmer, 29 Wis. 226; Lain v. Shepardson, 18 Wis. 59.

Eng.—Smith v. Lloyd, 9 Exch. 562. See also Philpot v. Bath, 20 T. L. R. 589.

Can.—Sherren v. Pearson, 14 Can. S. C. 581; McConaghy v. Denmark, 4 Can. S. C. 609; Gray v. Richford, 2 Can. S. C. 431.

Man.—Buckman v. Stewart, 11 Man. 625.

N. S.—Louisburg Land Co. v. Tutty, 16 N. S. 401; Des Barres v. Shey, 8 N. S. 327 [aff 29 L. T. Rep. N. S. 592].

Ont.—Huffman v. Rush, 7 Ont. L. 346, 3 OntWR 43; McIntyre v. Thompson, 1 Ont. L. 163; Hartley v. Maycock, 28 Ont. 508; Coffin v. North American Land Co., 21 Ont. 80; Delaney v. Canadian Pac. R. Co., 21 Ont. 11; Donovan v. Herbert, 4 Ont. 635; Walton v. Woodstock Gas Co., 1 Ont. 630; Steers v. Shaw, 1 Ont. 26; Drulard v. Welsh, 9 OntWR 491; Massey-Harris Co. v. Elliott, 1 OntWR 65; Arner v. McKenna, 9 Grant Ch. (U. C.) 226; Lloyd v. Henderson, 25 U. C. C. P. 253; Doe v. McGillis, 2 U. C. C. P. 124; Hall v. Evans, 42 U. C. Q. B. 190; Ingalls v. Arnold, 14 U. C. Q. B. 296; Ketchum v. Mighton, 14 U. C. Q. B. 99; Doe v. Bayleyr, 10 U. C. Q. B. 310; Doe v. Rattray, 7 U. C. Q. B. 321.

[a] **Applications of rule generally.**—(1) Land was purchased by plaintiff's father-in-law with money belonging to plaintiff and title taken in the name of plaintiff's wife without his knowledge or consent. The property was occupied by tenants, plaintiff making leases and collecting rents. It was held that as neither party was in actual physical possession, the wife could not, as against the husband, obtain title by limitation. Flanner v. Butler, 131 N. C. 155, 42 SE 547. (2) Where plaintiff has title to one half of a lot, and defendant has title to the other half, and there is a dispute as to the location of the line separating the two parts, a claim by one of them for more than fifteen years that the strip in controversy is its property will not give title to the strip, in the absence of inclosure or actual occupancy thereof adversely to all others. Paducah Cooperage Co. v. Paducah Veneer, etc., Co., 135 Ky. 53, 121 SW 986.

[b] **Interfering laps under conveyances.**—To produce a bar by possession under the statute, where there are interfering laps under conveyances, there must be an actual possession of some part of the land in dispute. O'Dell v. Swaggerty, (Tenn. Ch. A.) 42 SW 175. And see on this head infra § 24.

[c] **Actual possession either substantial or virtual.**—Actual possession may consist either in an occupancy in fact of the whole tract claimed or an occupancy of part thereof in the name of the whole, where there is sufficient evidence of the bounds of the whole that is claimed as one entirety, and the circumstances are such that the law extends the possession of the part that is occupied to these bounds. This latter may be termed a "virtual possession," in order to distinguish it from the other kind of actual possession which is called "substantial," or pedis possessio. But whatever terms may be used to give precision to the subject, the attributes which pertain to an actual possession belong to it, whether it be substantial or virtual. McColman v. Wilkes, 34 S. C. L. 465, 51 AmD 637.

[d] **Actual possession means the corporeal detention of the property,** when used in relation to adverse possession. Newcomer v. Crews, 98 Ky. 339, 32 SW 947; Carey v. Cagney, 109 La. 77, 33 S 89; Wallace v. Sache, 106 Minn. 123, 118 NW 360; Churchill v. Onderdonk, 59 N. Y. 134; Lilliianskyoldt v. Goss, 2 Utah 292.

19. Byrd v. Phillips, 120 Tenn. 14, 111 SW 1109 (holding that where a grantor embraced in his deed land which he did not own, and his grantee entered upon that part only to which the grantor had title, his possession did not give him constructive possession of the other part so as to operate as a disseizin of the real owner thereof, since possession of land, to produce a bar, must be actual possession of some part in dispute).

20. U. S.—Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 SCt 239, 35 L. ed. 1063.

Ala.—Stevenson v. Anderson, 87 Ala. 228, 6 S 285.

Cal.—Brumagin v. Bradshaw, 39 Cal. 24; Sunol v. Hepburn, 1 Cal. 254.

Mass.—Allen v. Holton, 20 Pick. 458.

Miss.—A. W. Stevens Lumber Co. v. Hughes, 38 S 769.

Mo.—Lajoye v. Primm, 3 Mo. 529.

N. J.—Pennsylvania R. Co. v. Breckenridge, 60 N. J. L. 586, 38 A 740; Cornelius v. Giberson, 25 N. J. L. 1.

N. Y.—Archibald v. New York Cent., etc., R. Co., 157 N. Y. 574, 52 NE 567; Roberts v. Baumgarten, 110 N. Y. 380, 18 NE 96; Lane v. Gould, 10 Barb. 254; Jackson v. Schoonmaker, 2 Johns. 230.

S. C.—Mims v. Weathersbee, 33 S. C. L. 184; Slice v. Derrick, 31 S. C. L. 627; Bailey v. Irby, 11 S. C. L. 343, 10

Ouster or disseizin. There must be an actual entry on the land which will amount to an ouster or disseizin of the owner to initiate the necessary actuality of possession.[21]

The constructive possession of land is always in the holder of the best title, unless he has renounced it, and this constructive possession can never be ousted by anything less than an actual possession maintained for the necessary period.[22]

[§ 3] **2. Effect of Color of Title.**[23] The fact that the claimant has color of title does not dispense with the necessity of a possession which is actual.[24] But it has been said that less frequency of acts of ownership is required with possession under color of title than without it.[25]

[§ 4] **3. Insufficiency of Mere Claim of Title.** A mere claim to land, unaccompanied by actual possession, will not ripen into a title, however long and persistently such claim is asserted,[26] and this principle is not affected by the fact that the claimant

AmD 609. See also McColman v. Wilkes, 34 S. C. L. 465, 51 AmD 637.

[a] **"Actual possession is the same as pedis possessio** or pedis positio, and these mean a foothold on the land, an actual entry, a possession in fact, a standing upon it, an occupation of it, as a real demonstrative act done. It is the contrary of a possession in law, which follows in the wake of title, and is called constructive possession." Churchill v. Onderdonk, 59 N. Y. 134, 136.

21. Ala.—Beasley v. Clarke, 102 Ala. 254, 14 S 744.

Ark.—Ringo v. Woodruff, 43 Ark. 469.

Cal.—Unger v. Mooney, 63 Cal. 586, 49 AmR 100; Thompson v. Pioche, 44 Cal. 508.

Conn.—State v. Wells, 31 Conn. 210; Huntington v. Whaley, 29 Conn. 391.

Fla.—Seymour v. Creswell, 18 Fla. 29.

Ga.—Eagle, etc., Mfg. Co. v. Brunswick Bank, 55 Ga. 44; Denham v. Holeman, 26 Ga. 182, 71 AmD 198.

Ill.—Ambrose v. Raley, 58 Ill. 506.

Ind.—Peterson v. McCullough, 50 Ind. 35.

Iowa.—Booth v. Small, 25 Iowa 177.

Ky.—Row v. Johnston, 78 SW 906, 25 KyL 1799; Helton v. Strubbe, 62 SW 12, 22 KyL 1919; Ohio, etc., R. Co. v. Wooten, 46 SW 681, 20 KyL 383.

La.—Michel v. Stream, 48 La. Ann. 341, 19 S 215.

Me.—Proctor v. Maine Cent. R. Co., 100 Me. 27, 60 A 423, 109 AmSR 474; Jewett v. Hussey, 70 Me. 433.

Md.—Beatty v. Mason, 30 Md. 409; Morrison v. Hammond, 27 Md. 604; Armstrong v. Risteau, 5 Md. 256, 59 AmD 115.

Mass.—Cook v. Babcock, 11 Cush. 206.

Mich.—Sparrow v. Hovey, 44 Mich. 63, 6 NW 93; Yelverton v. Steele, 40 Mich. 538.

Minn.—Washburn v. Cutter, 17 Minn. 361.

Miss.—Huntington v. Allen, 44 Miss. 654.

Mo.—Mather v. Walsh, 107 Mo. 121, 17 SW 755; Fugate v. Pierce, 49 Mo. 441; Bowman v. Lee, 48 Mo. 335; Knowlton v. Smith, 36 Mo. 507, 88 AmD 152.

Nebr.—Omaha, etc., Land, etc., Co. v. Parker, 33 Nebr. 775, 51 NW 139, 29 AmSR 506; Horbach v. Miller, 4 Nebr. 31.

N. M.—Johnston v. Albuquerque, 12 N. M. 20, 72 P 9.

N. Y.—Ogden v. Jennings, 66 Barb. 301 [aff 62 N. Y. 526]; Humbert v. Trinity Church, 24 Wend. 587.

N. C.—Fuller v. Elizabeth City, 118 N. C. 25, 23 SE 922; Malloy v. Bruden, 86 N. C. 251; Parker v. Banks, 79 N. C. 480.

Pa.—Bear Valley Coal Co. v. Dewart, 95 Pa. 72; Altemus v. Campbell, 9 Watts 28, 34 AmD 494; Miller v. Shaw, 7 Serg. & R. 129; Bradford v. Guthrie, 4 Brewst. 351.

S. C.—Pegues v. Warley, 14 S. C. 180.

Tenn.—Lieberman v. Clark, 114 Tenn. 117, 85 SW 258, 69 LRA 732 and note.

Tex.—Fuentes v. McDonald, 85 Tex. 132, 20 SW 43; Bracken v. Jones, 63 Tex. 184; Satterwhite v. Rosser, 61 Tex. 166; Whitehead v. Foley, 28 Tex. 268; Polk v. Beaumont Pasture Co., 26 Tex. Civ. A. 242, 64 SW 58.

Vt.—Soule v. Barlow, 49 Vt. 329.

Va.—Creekmur v. Creekmur, 75 Va. 430.

W. Va.—Core v. Faupel, 24 W. Va. 238.

Wis.—Pepper v. O'Dowd, 39 Wis. 538.

Ont.—McIntyre v. Thompson, 1 Ont. L. 163; Brooke v. Gibson, 27 Ont. 218.

22. U. S.—U. S. v. Arredondo, 6 Pet. 691, 8 L. ed. 547; Pacific Coal, etc., Co. v. Pioneer Min. Co., 205 Fed. 577, 590, 123 CCA 593 [quot Cyc]; Williams v. American Assoc., 197 Fed. 500, 118 CCA 1 (rule in Tennessee); Lamb v. Burbank, 14 F. Cas. No. 8,012, 1 Sawy. 227.

Ala.—Bonham v. Loeb, 107 Ala. 604, 18 S 300; Shipman v. Baxter, 21 Ala. 456.

Ark.—Woolfolk v. Buckner, 67 Ark. 411, 55 SW 168; Spratlin v. Halliburton, 63 Ark. 647, 39 SW 712; Ringo v. Woodruff, 43 Ark. 469; Miller v. Fraley, 23 Ark. 735; Conway v. Kinsworthy, 21 Ark. 9.

Colo.—Fleming v. Howell, 22 Colo. A. 382, 125 P 551.

Ill.—Ely v. Brown, 183 Ill. 575, 56 NE 181.

Iowa.—Burke v. Cutler, 78 Iowa 299, 43 NW 204.

Kan.—Standard Oil Co. v. Cook, 63 Kan. 866, 66 P 1000.

Ky.—Jones v. McCauley, 2 Duv. 14.

Mass.—Kennebeck v. Call, 1 Mass. 483.

Mo.—Gloyd v. Franck, 248 Mo. 468, 154 SW 744; Goltermann v. Schiermeyer, 125 Mo. 291, 28 SW 616.

Nebr.—Horbach v. Boyd, 64 Nebr. 129, 89 NW 644; Troxell v. Johnson, 52 Nebr. 46, 71 NW 968.

N. Y.—Archibald v. New York Cent., etc., R. Co., 157 N. Y. 574, 52 NE 567; Bliss v. Johnson, 94 N. Y. 242; Miner v. New York, 37 N. Y. Super. 171.

N. C.—Bland v. Beasley, 145 N. C. 168, 58 SE 993; London v. Bear, 84 N. C. 266; Johnston v. Pate, 83 N. C. 110; Williams v. Wallace, 78 N. C. 354; Dobbs v. Gullidge, 20 N. C. 197; Kennedy v. Wheatley, 3 N. C. 402.

Pa.—Hawk v. Senseman, 6 Serg. & R. 21; Bradford v. Guthrie, 4 Brewst. 351.

Tenn.—Lieberman v. Clark, 114 Tenn. 117, 85 SW 262, 69 LRA 732 and note.

Tex.—Murphy v. Welder, 58 Tex. 235.

Vt.—Holley v. Hawley, 39 Vt. 525, 94 AmD 350.

See Doe v. Nightingale, 5 U. C. Q. B. 518.

"In order that the Statute may operate against the owner out of possession, actual possession in fact in another is essential, in order that the rule of law which attributes a possession actually vacant to the person who has the legal title may be rendered inapplicable." Per Ritchie, J., in Gray v. Richford, 2 Can. S. C. 431, 454.

[a] **Applications of rule.**—(1) Mere intention, unaccompanied by an actual taking of possession, which is hostile and can be seen by the world, will not carry possession beyond the lines indicated by actual possession. Slaven v. Dority, 142 Ky. 640, 134 SW 1166. (2) A person claiming title by prescription to the water front appurtenant to the land of a riparian owner must show an ouster and an actual possession under a claim of right for the statutory period, and it is immaterial whether the riparian owner was in actual possession of the water front during such time. Montgomery v. Shaver, 40 Or. 244, 66 P 923. (3) The rule applies to adverse possession against the state. Whitley County Land Co. v. Powers, 146 Ky. 801, 144 SW 2.

[b] **Land not susceptible of cultivation.**—The rule that the true owner will be considered as constructively in possession unless the land is in the actual hostile possession of another under claim of title applies with special force to land not susceptible of actual occupation and cultivation. Archibald v. New York Cent., etc., R. Co., 157 N. Y. 574, 52 NE 567 [aff 1 App. Div. 251, 37 NYS 336, 2 App. Div. 617, 37 NYS 1143]; Bliss v. Johnson, 94 N. Y. 235.

23. See also infra § 545.

24. Ala.—Doe v. McCullough, 155 Ala. 246, 46 S 472.

Nebr.—Herbage v. McKee, 82 Nebr. 354, 117 NW 706.

N. J.—Foulke v. Bond, 41 N. J. L. 527.

Tex.—Word v. Box, 66 Tex. 596, 3 SW 93.

Wis.—Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905.

[a] **The fact that the claim is asserted under a deed, although recorded,** will not dispense with actual possession. Lipscomb v. McClellan, 72 Ala. 151; Eagle, etc., Mfg. Co. v. Brunswick Bank, 55 Ga. 44. See Brewster v. Laclede Land, etc., Co., 247 Mo. 223, 152 SW 302.

[b] **The extent of the right obtained by an adverse holding under an invalid deed** is not determined by the terms of the grant therein, but by actual occupation and use. Knight v. Cohen, 7 Cal. A. 43, 93 P 396.

[c] **The holder of a deed executed by a debtor in fraud of creditors** cannot claim by adverse possession when he has never taken possession of the land or exercised any rights of ownership over it. Jones v. Wilson, 69 Ala. 400.

25. Baker v. De Armijo, (N. M.) 128 P 73.

26. Cal.—Howell v. Slauson, 83 Cal. 539, 23 P 692; People v. Center, 66 Cal. 551, 5 P 263, 6 P 481; Unger v. Mooney, 63 Cal. 586, 49 AmR 100; Brumagim v. Bradshaw, 39 Cal. 46; Allen v. McKay, 6 Cal. Unrep. Cas. 993, 70 P 8.

Ga.—Wood v. McGuire, 15 Ga. 202.

Ind.—State v. Portsmouth Sav. Bank, 106 Ind. 435, 7 NE 379.

Ky.—Hillman Land, etc., Co. v. Marshall, 119 SW 180; Vincent v. Blanton, 85 SW 703, 27 KyL 489; Potter v. Benge, 67 SW 1005, 24 KyL 24; Sewell v. Nelson, 113 Ky. 171, 67 SW 985, 23 KyL 2438.

Me.—Dennett v. Crocker, 8 Me. 239.

Md.—Abell v. Harris, 11 Gill & J. 367.

Mich.—Lasley v. Kniskern, 152 Mich. 244, 115 NW 971.

Miss.—Leavenworth v. Reeves, 64 S 660; Paxton v. Valley Land Co., 68 Miss. 739, 10 S 77.

Mo.—Goltermann v. Schiermeyer, 125 Mo. 291, 28 SW 616.

N. H.—Linen v. Maxwell, 67 N. H. 370, 40 A 184; Johnson v. Conant, 64 N. H. 109, 7 A 116; Towle v. Ayer, 3 N. H. 57.

Or.—Willamette Real Est. Co. v.

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has paid taxes on the land.[27] And a statute giving a right of action against a mere claimant of title, unaccompanied by possession, does not change the rule requiring the possession to be actual.[28]

[§ 5] **B. Distinguished from Constructive Possession.** "Actual possession, as a legal phrase, is put in opposition to the other phrase, possession in law, or constructive possession. Actual possession is the same as pedis possessio or pedis positio, and these mean a foothold on the land, an actual entry, a possession in fact, a standing upon it, an occupation of it, as a real demonstrative act done. It is the contrary of a possession in law, which follows in the wake of title, and is called constructive possession."[29]

[§ 6] **C. What Constitutes—1. General Considerations Relating to the Subject—a. Acts Requisite to Show Actual Possession.** Possession, it is said, is always actual when it is an open and peaceable occupation.[30] Generally speaking actual possession of land consists in exercising acts of dominion over it, in making the ordinary use of it, and in taking the profits of which it is susceptible.[31] This dominion may consist in and be shown by a great number and almost endless combination of acts, and where the statutes of limitations have not designated certain things as requisites the law has prescribed no particular manner in which possession shall be maintained and made manifest.[32] Nor, on the other hand, has the law attempted to lay down any pre-

Hendrix, 28 Or. 485, 42 P 514, 52 AmSR 800.

Tenn.—Smith v. Lee, 1 Coldw. 549.

Tex.—Parker v. Baines, 65 Tex. 605.

Wis.—Fox River Flour, etc., Co. v. Kelley, 70 Wis. 287, 35 NW 744.

See also Rucker v. Jackson, (Ala.) 60 S 139.

[a] **A residence in the vicinity of the land merely, and a claim to it,** although such claim is generally recognized and spoken of in the neighborhood and affirmed by the vicinage, unaccompanied by any of the acts and indicia of ownership, are insufficient to constitute possession. Wood v. McGuire, 15 Ga. 202.

27. George v. Cole, 109 La. 816, 33 S 784.

28. East Tennessee Iron, etc., Co. v. Lawson, (Tenn.) 35 SW 456; Copeland v. Murphey, 2 Coldw. (Tenn.) 64. See however Hill v. Kricke, 11 Wis. 442 (tax title). In Smith v. Lee, 1 Coldw. (Tenn.) 549, 552, the court said: "The inference that, because by the recent statute a mere claim of title, unaccompanied by adverse possession, gives a right of action against such claimant, the Statute of Limitations, therefore attaches in his favor, by the mere force of such adverse claim, is utterly destitute of foundation in law."

29. Churchill v. Onderdonk, 59 N. Y. 134, 136.

30. Valcalda v. Silver Peak Mines, 86 Fed. 90, 29 CCA 591.

31. U. S.—Ewing v. Burnet, 11 Pet. 41, 9 L. ed. 624; Ellicott v. Pearl, 10 Pet. 412, 9 L. ed. 475.

Ala.—Bynum v. Hewlett, 137 Ala. 333, 34 S 391; Lee v. Thompson, 99 Ala. 95, 11 S 672.

Ark.—Brown v. Bocquin, 57 Ark. 97, 20 SW 813; Dorr v. School Dist. No. 26, 40 Ark. 237; Mooney v. Cooledge, 30 Ark. 640.

Cal.—Webber v. Clarke, 74 Cal. 11, 15 P 431; Brumagim v. Bradshaw, 39 Cal. 24; Barstow v. Newman, 34 Cal. 90.

Colo.—Potts v. Magnes, 17 Colo. 364, 30 P 58.

Conn.—Carver v. Staples, 52 Conn. 21.

Ga.—Walker v. Steffes, 139 Ga. 520, 77 SE 580; Scott v. Cain, 90 Ga. 34, 15 SE 816; Royall v. Lisle, 15 Ga. 545, 60 AmD 712.

Hawaii.—Paulo v. Malo, 6 Hawaii 390.

Ill.—Wahl v. Laubersheimer, 174 Ill. 338, 51 NE 860; French v. Goodman, 167 Ill. 345, 47 NE 737; Johns v. McKibben, 156 Ill. 71, 40 NE 449; Sullivan v. Eddy, 154 Ill. 199, 40 NE 482 [aff 164 Ill. 391, 45 NE 837]; St. Louis, etc., R. Co. v Nugent, 152 Ill. 119, 39 NE 263; Coleman v. Billings, 89 Ill. 183; Hubbard v. Kiddo, 87 Ill. 578; Kerr v. Hitt, 75 Ill. 51; Brooks v. Bruyn, 24 Ill. 372; Morrison v. Kelly, 22 Ill. 609, 74 AmD 169; Dills v. Hubbard, 21 Ill. 328.

Ind.—Moore v. Hinkle, 151 Ind. 343, 50 NE 822; Mason v. Calumet Canal, etc., Co., 150 Ind. 699, 50 NE 85; Worthley v. Burbanks, 146 Ind. 534, 45 NE 779; Dyer v. Eldridge, 136 Ind. 654, 36 NE 522; Collett v. Vanderburgh County, 119 Ind. 27, 21 NE 329, 4 LRA 321 and note; Bell v. Longworth, 6 Ind. 273.

Iowa.—Wilbur v. Cedar Rapids, etc., R. Co., 116 Iowa 65, 89 NW 101; St. Luke's Parish v. Miller, 84 NW 686; Dice v. Brown, 98 Iowa 297, 67 NW 253; Forey v. Bigelow, 56 Iowa 381, 9 NW 313; Clement v. Perry, 34 Iowa 564; Booth v. Small, 25 Iowa 177; Langworthy v. Myers, 4 Iowa 18.

Kan.—Dickinson v. Bales, 62 Kan. 865, 61 P 403; Anderson v. Burnham, 52 Kan. 454, 34 P 1056; Gilmore v. Norton, 10 Kan. 491.

Ky.—Vincent v. Blanton, 85 SW 703, 27 KyL 489.

La.—Dowdell v. Orphans' Home Soc., 114 La. 49, 38 S 16; Michel v. Stream, 48 La. Ann. 341, 19 S 215.

Me.—Soper v. Lawrence Bros. Co., 98 Me. 268, 56 A 908, 99 AmSR 397.

Md.—Merryman v. Cumberland Paper Co., 98 Md. 223, 56 A 364.

Mass.—Bates v. Norcross, 14 Pick. 224.

Mich.—Chabert v. Russell, 109 Mich. 571, 67 NW 902; Whitaker v. Erie Shooting Club, 102 Mich. 454, 60 NW 983; Deer Lake Co. v. Michigan Land, etc., Co., 89 Mich. 180, 50 NW 807.

Minn.—Wallace v. Sache, 106 Minn. 123, 118 NW 360; Butler v. Drake, 62 Minn. 229, 64 NW 559; Glencoe v. Wadsworth, 48 Minn. 402, 51 NW 377; Wood v. Springer, 45 Minn. 299, 47 NW 811; Costello v. Edson, 44 Minn. 135, 46 NW 299; Washburn v. Cutter, 17 Minn. 361.

Miss.—McCaughn v. Young, 85 Miss. 277, 37 S 839; Gathings v. Miller, 76 Miss. 651, 24 S 964; Massey v. Rimmer, 69 Miss. 667, 13 S 832; Kirkman v. Mays, 12 S 443; Magee v. Magee, 37 Miss. 138; Ford v. Wilson, 35 Miss. 490, 72 AmD 137.

Mo.—Leeper v. Baker, 68 Mo. 400; Fugate v. Pierce, 49 Mo. 441; Menkens v. Ovenhouse, 22 Mo. 70.

Mont.—National Min. Co. v. Powers, 3 Mont. 344.

Nebr.—Twohig v. Leamer, 48 Nebr. 247, 67 NW 152; Omaha, etc., Land, etc., Co. v. Parker, 33 Nebr. 775, 51 NW 139, 29 AmSR 506; Malcom v. Hanson, 32 Nebr. 50, 48 NW 883; Crawford v. Galloway, 29 Nebr. 261, 45 NW 628; Tourtelotte v. Pearce, 27 Nebr. 57, 42 NW 915; Levy v. Yerga, 25 Nebr. 764, 41 NW 773, 13 AmSR 525; Gue v. Jones, 25 Nebr. 634, 41 NW 555; Tex v. Pflug, 24 Nebr. 666, 39 NW 839, 8 AmSR 231; Horbach v. Miller, 4 Nebr. 31.

N. H.—Bailey v. Carleton, 12 N. H. 9, 37 AmD 190.

N. J.—Foulke v. Bond, 41 N. J. L. 527.

N. Y.—O'Donohue v. Cronin, 62 App. Div. 379, 70 NYS 737; Conger v. Kinney, 16 NYS 752.

N. C.—Locklear v. Savage, 159 N. C. 236, 74 SE 347; Currie v. Gilchrist, 147 N. C. 648, 61 SE 581; Wall v. Wall, 142 N. C. 387, 55 SE 283; Kennedy v. Maness, 138 N. C. 35, 50 SE 450; Moore v. Thompson, 69 N. C. 120; Williams v. Buchanan, 23 N. C. 535, 35 AmD 760.

Or.—Lais v. Smith, 63 Or. 206, 127 P 26.

Pa.—Llewellyn v. Buechley, 198 Pa. 642, 48 A 864.

R. I.—Dodge v. Lavin, 34 R. I. 409, 415, 83 A 1009 [quot Cyc].

S. C.—Congdon v. Morgan, 14 S. C. 587.

Tenn.—Sequatchie Valley Coal, etc., Co. v. Coppinger, 95 Tenn. 526, 32 SW 465; Copeland v. Murphey, 2 Coldw. 64; Savage v. Bon Air Coal, etc., Co., 2 Tenn. Ch. A. 594; Bell v. Whitehead, (Ch. A.) 62 SW 213; Cowan v. Hatcher, (Ch. A.) 59 SW 689.

Tex.—Richards v. Smith, 67 Tex. 610, 4 SW 571; Wright v. Nona Mills Co., (Civ. A.) 98 SW 917 [rev 102 SW 1118]; Ortiz v. State, (Civ. A.) 86 SW 46; Houston v. Finnigan, (Civ. A.) 85 SW 470; Iiams v. Root, 22 Tex. Civ. A. 413, 55 SW 411; McCarty v. Johnson, 20 Tex. Civ. A. 184, 49 SW 1098; Alley v. Bailey, (Civ. A.) 47 SW 821; Moore v. McCown, (Civ. A.) 20 SW 1112.

Vt.—Buck v. Squiers, 23 Vt. 498; Spear v. Ralph, 14 Vt. 400.

Va.—Lennig v. White, 20 SE 831; Andrews v. Roseland Iron, etc., Co., 89 Va. 393, 16 SE 252; Thomas v. Jones, 28 Gratt. (89 Va.) 383; Taylor v. Burnsides, 1 Gratt. (42 Va.) 165.

Wash.—Rogers v. Miller, 13 Wash. 82, 42 P 525, 52 AmSR 20; Flint v. Long, 12 Wash. 342, 41 P 49.

Wis.—Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905; Finn v. Wisconsin River Land Co., 72 Wis. 546, 40 NW 209.

Eng.—Smith v. Stocks, 38 L. J. Q. B. 306; Bevan v. London Portland Cement Co., 67 L. T. Rep. N. S. 615; Seddon v. Smith, 36 L. T. Rep. N. S. 168.

N. B.—Johnson v. Calnan, 38 N. B. 52.

N. S.—Lawson v. Whitman, 1 N. S. 208.

[a] **Possession in the law** does not mean that a man has to have his feet on every square foot of ground before it can be said that he is in possession. If he asserts the right of ownership over the property, such as improving it or using it for any purpose, that is possession, although the man may not live on it. The control, management, and direction that he may take with reference to the property, although he has never been on it, where it is under his control, management, and direction, may be sufficient to establish the possession. It may be established by inclosure, by cultivation, by the erection of buildings or other improvements, or, in fact, by any use that clearly indicates the appropriation and actual use of a person claiming to hold it. Latta v. Clifford, 47 Fed. 614.

32. McComb v. Saxe, 92 Ark. 321, 122 SW 987; Adams v. Clapp, 87 Me. 316, 32 A 911; Eastern R. Co. v Allen, 135 Mass. 13; Costello v. Edson, 44 Minn. 135, 46 NW 299; Stevens v. Pendregon, (Tex. Civ. A.) 140 SW 236. "Possession . . . must be considered in every case with reference to the peculiar circumstances. . . . The character and value of the prop-

cise rules by which the sufficiency of a given set of facts to constitute possession may be determined.[33] Actuality of possession is a question compounded of law and fact,[34] and its solution must necessarily depend upon the situation of the parties, the nature of the claimant's title,[35] the quantity[36] and character of the land, and the purpose to which it is adapted and for which it has been used.[37] All these circumstances must be taken into consideration by the jury whose peculiar province it is to pass upon the question.[38] The only rules of general applicability are that the acts relied upon to establish possession must always be as distinct as the character of the land reasonably admits of,[39] and be exercised with sufficient continuity to acquaint the owner, should he visit the land, with the fact that a claim of ownership adverse to his title is being asserted.[40]

erty, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests—all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession." Lord Advocate v. Lovat, 5 App. Cas. 273, 288 [quot with approval Kirby v. Cowderoy, 1912 A. C. 599, 603, 5 DomLR 675; Johnston v. O'Neill, 1911 A. C. 552, 583].

[a] **Exclusive possession.**—When the possession of the claimant does effectually exclude that of others, it is immaterial by what acts possession may be accomplished or manifested. One method of occupation may be more satisfactory than another as evidence of exclusive possession, but there is no rule of law that a title by adverse possession can be gained only by certain particular methods of occupation. Eastern R. Co. v. Allen, 135 Mass. 13. See infra § 198 et seq.

33. Polack v. McGrath, 32 Cal. 15.

[a] **Only most general rules feasible.**—(1) The difficulty attending the attempt to define actual possession, or to lay down precise rules by which the sufficiency of a given state of facts to constitute possession may be determined, has often been experienced and admitted by courts of the highest standing, and indeed none but very general rules can be laid down, leaving each case to depend mainly on its own circumstances. Draper v. Shoot, 25 Mo. 197, 69 AmD 462; Lewon v. Heath, 53 Nebr. 707, 74 NW 274; Foulke v. Bond, 41 N. J. L. 527; Dunn v. Taylor, (Tex. Civ. A.) 107 SW 952. (2) In Roberts v. Richards, 84 Me. 1, 10, 24 A 425, the court said: "The law does not undertake to specify the particular acts of occupation by which alone a title by adverse possession can be acquired. . . . Every case must from sheer necessity be determined by its own peculiar circumstances . . . for the essential particular acts are as various as the nature and locality of real property, the purposes for which it is adapted or to which the owner or claimant may choose to apply it."

34. Benne v. Miller, 149 Mo. 228, 50 SW 824; Draper v. Shoot, 25 Mo. 197, 69 AmD 462.

35. See Roberts v. Richards, 84 Me. 1, 24 A 425.

[a] **Thus** (1) when an entry has been made under color of title a less weight of evidence is required than when the entry was without color. Draper v. Shoot, 25 Mo. 197, 69 AmD 462. (2) Acts which, in the case of a person who enters on land without claim of title, may be treated as mere acts of trespass may, when done by a person under claim of title, be considered acts of ownership. Humphreys v. Helmes, 10 N. B. 59.

36. Brumagim v. Bradshaw, 39 Cal. 24.

37. U. S.—Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 SCt 239, 35 L. ed. 1063; Ewing v. Burnett, 11 Pet. 41, 9 L. ed. 624; Winnipisogee Paper Co. v. New Hampshire Land Co., 59 Fed. 542; Merrill v. Tobin, 30 Fed. 738.

Ala.—Goodson v. Brothers, 111 Ala. 539, 20 S 443; Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Bell v. Denson, 56 Ala. 444.

Ark.—Dorr v. School Dist. No. 26, 40 Ark. 237; Mooney v. Cooledge, 30 Ark. 640; Conway v. Kinsworthy, 21 Ark. 9.

Cal.—Webber v. Clarke, 74 Cal. 11, 15 P 431; Brumagim v. Bradshaw, 39 Cal. 24; Coryell v. Cain, 16 Cal. 567.

Del.—Bartholomew v. Edwards, 6 Del. 17.

D. C.—Johnson v. Thomas, 23 App. 141.

Ga.—Georgia Pac. R. Co. v. Strickland, 80 Ga. 776, 6 SE 27, 12 AmSR 282; Royall v. Lisle, 15 Ga. 545, 60 AmD 712.

Hawaii.—Mahukalilili v. Hobron, 5 Hawaii 104.

Ill.—Johns v. McKibben, 156 Ill. 71, 40 NE 449; Morrison v. Kelly, 22 Ill. 609, 74 AmD 169.

Ind.—Moore v. Hinkle, 151 Ind. 343, 50 NE 822; Mason v. Calumet Canal, etc., Co., 150 Ind. 699, 50 NE 85; Worthley v. Burbanks, 146 Ind. 534, 45 NE 779.

Iowa.—Brown v. Rose, 55 Iowa 734, 7 NW 133.

La.—Chamberlain v. Abadie, 48 La. Ann. 587, 19 S 574; Ranson v. Long, 13 La. Ann. 523.

Me.—Batchelder v. Robbins, 95 Me. 59, 49 A 210; Adams v. Clapp, 87 Me. 316, 32 A 911; Roberts v. Richards, 84 Me. 1, 24 A 425; Gardner v. Gooch, 48 Me. 487; Clancey v. Houdlette, 38 Me. 451.

Md.—Sadtler v. Peabody Heights Co., 66 Md. 1, 10 A 599.

Mass.—Houghton v. Wilhelmy, 157 Mass. 521, 32 NE 861; Bowen v. Guild, 130 Mass. 121; Wheeler v. Stone, 1 Cush. 313.

Mich.—Kingston v. Guck, 155 Mich. 264, 118 NW 967; Whitaker v. Erie Shooting Club, 102 Mich. 454, 60 NW 983; Murray v. Hudson, 65 Mich. 670, 32 NW 889.

Minn.—Wheeler v. Gorman, 80 Minn. 462, 83 NW 442; Sage v. Morosick, 69 Minn. 167, 71 NW 930; Butler v. Drake, 62 Minn. 229, 64 NW 559; Murphy v. Doyle, 37 Minn. 113, 33 NW 220; Washburn v. Cutter, 17 Minn. 361.

Miss.—McCaughn v. Young, 85 Miss. 277, 37 S 839.

Mo.—Benne v. Miller, 149 Mo. 228, 50 SW 824; Goltermann v. Schiermeyer, 125 Mo. 291, 28 SW 616; Cook v. Farrah, 105 Mo. 492, 16 SW 692; Ozark Plateau Land Co. v. Hays, 105 Mo. 143, 16 SW 957; Leeper v. Baker, 68 Mo. 400; Turner v. Hall, 60 Mo. 271; Draper v. Shoot, 25 Mo. 197, 69 AmD 462.

Nebr.—Twohig v. Leamer, 48 Nebr. 247, 67 NW 152; Lantry v. Parker, 37 Nebr. 353, 55 NW 962.

N. J.—Yard v. Ocean Beach Assoc., 49 N. J. Eq. 306, 24 A 729.

N. M.—Baker v. De Armijo, 128 P 73; Johnston v. Albuquerque, 12 N. M. 20, 72 P 9.

N. Y.—Bolton v. Schriever, 49 N. Y. Super. 168.

N. C.—Williams v. Buchanan, 23 N. C. 535, 35 AmD 760.

Or.—Hamilton v. Flournoy, 44 Or. 97, 74 P 483.

R. I.—New Shoreham v. Ball, 14 R. I. 566.

Tenn.—West v. Lanier, 9 Humphr. 762; Creech v. Jones, 5 Sneed 631; Cass v. Richardson, 2 Coldw. 28.

Tex.—Richards v. Smith, 67 Tex. 610, 4 SW 571. See also Ortiz v. State, (Civ. A.) 86 SW 45.

Va.—Hollingsworth v. Sherman, 81 Va. 668.

Wis.—Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550; Illinois Steel Co. v. Jeka, 123 Wis. 419, 101 NW 399; Clithero v. Fenner, 122 Wis. 356, 99 NW 1027, 106 AmSR 978; Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905.

Ont.—Beer v. Williams, 21 Ont. L. 49; Mulholland v. Conklin, 22 U. C. C. P. 372.

[a] **That the acts of ownership must be suitable to the character of the land** see Carl v. State, 125 Ala. 89, 28 S 505; Stevenson v. Anderson, 87 Ala. 228, 6 S 285; Woods v. Montevallo Coal, etc., Co., 84 Ala. 560, 3 S 475, 5 AmSR 393; Bell v. Denson, 56 Ala. 444; Farley v. Smith, 39 Ala. 38; Dickinson v. Bales, 59 Kan. 224, 52 P 447; Wheeler v. Goodman, 80 Minn 462, 83 NW 442; Huntington v. Allen, 44 Miss. 654; Nye v. Alfter, 127 Mo. 529, 30 SW 186; Currie v. Gilchrist, 147 N. C. 648, 61 SE 581; Shaffer v. Gaynor, 117 N. C. 15, 23 SE 154; Loftin v. Cobb, 46 N. C. 406, 62 AmD 173; Nona Mills Co. v. Wright, 101 Tex. 14, 102 SW 1118. In Stevenson v. Anderson, 87 Ala. 228, 231, 6 S 285, the court said: "The possession which a lapse of the statutory period will ripen into title, must consist of such corporal presence and physical control as the land reasonably admits of, as well as a present power and right of dominion over it; and is usually evidenced by occupation and such use as is appropriate to the locality and quality of the property." Thus where a separate tract which is half prairie and half timberland may be easily inclosed and is fit for cultivation the erection of temporary structures, pasturing of hogs, cutting of timber, and payment of taxes, under claim of ownership by one who resides at some distance from it, do not constitute adverse possession. Cook v. Farrah, 105 Mo. 492, 16 SW 692.

[b] **Distinction in application of rule.**—The rule requiring actual and visible occupancy will be more strictly construed in an old and populous country where land is usually improved and inclosed than in a new country recently settled in which the land is only partially inclosed. Murphy v. Doyle, 37 Minn. 113, 33 NW 220.

38. Morrison v. Kelly, 22 Ill. 609, 74 AmD 169; Bowen v. Guild, 130 Mass. 121; Murphy v. Doyle, 37 Minn. 113, 33 NW 220.

[a] **In order to acquire title to woodland** there must be actual use and occupation of it of such unequivocal character as will reasonably indicate to the owner visiting the premises during the statutory period that instead of such use and occupation suggesting only occasional trespasses they unmistakably indicate and assert exclusive appropriation and ownership. Adams v. Clapp, 87 Me. 316, 32 A 911.

39. Bell v. Denson, 56 Ala. 444; Farley v. Smith, 39 Ala. 38.

40. Ill.—Brooks v. Bruin, 18 Ill. 539.

Ky.—Price v. Beall, 40 SW 918, 19 KyL 420.

Me.—Fleming v. Katahdin Pulp, etc., Co., 93 Me. 110, 44 A 378.

Mich.—Whitaker v. Erie Shooting Club, 102 Mich. 454, 60 NW 983; Murray v. Hudson, 65 Mich. 670, 32 NW 889.

N. Y.—McTeague v. McTeague, 1 Silv. Sup. 98, 5 NYS 130 [aff 127 N. Y. 685, 29 NE 1501].

Tex.—Nona Mills Co. v. Wright,

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[§ 7] **b. Acts Sufficient to Show Actual Possession.** The usual tests of an actual possession, it is said, are actual occupation, residence, cultivation, and improvement of the land.[41] But it is ordinarily sufficient if the acts of ownership are of such a nature as a claimant would exercise over his own property and would not exercise over another's,[42] and that the acts amount to such use or dominion over the land as it is reasonably adapted to.[43] It is obvious that the character of the acts sufficient to constitute actual possession must vary according to the character and location of the land in dispute, for "what is adverse possession is one thing in a populous country, another thing in a sparsely settled one, and still a different thing in a town or village."[44] So it has been said that actual possession may be had without putting the land to any present beneficial use.[45] On the other hand trivial and disconnected acts, doubtful and equivocal in their character, and which do not clearly indicate the intention with which they are performed, cannot be regarded as amounting to possession.[46] If the rule

101 Tex. 14, 102 SW 1118 [rev (Civ. A.) 98 SW 917]; Kimbro v. Hamilton, 28 Tex. 560.

W. Va.—State v. Moore, 71 W. Va. 285, 76 SE 461.

41. Ala.—Lee v. Thompson, 99 Ala. 95, 11 S 672; Bell y. Denson, 56 Ala. 444.

Cal.—Hesperia Land, etc., Co. v. Rogers, 83 Cal. 10, 23 P 196, 17 AmSR 209.

Ga.—McMullin v. Erwin, 58 Ga. 427.

Ill.—Martin v. Judd, 81 Ill. 488; Smith v. Jackson, 76 Ill. 254.

Ky.—Singleton v. School Dist. No. 34, 10 SW 793, 10 KyL 851.

Me.—Goodwin v. Sawyer, 33 Me. 541.

Mass.—Morse v. Sherman, 155 Mass. 222, 25 NE 523; Cutter v. Cambridge, 6 Allen 20; Bennett v. Clemence, 6 Allen 10; Bates v. Norcross, 14 Pick. 224; Poignard v. Smith, 6 Pick. 172.

Minn.—Costello v. Edson, 44 Minn. 135, 46 NW 299.

Miss.—Kirkman v. Mays, 12 S 443.

N. Y.—Finlay v. Cook, 54 Barb. 9; Jackson v. Warford, 7 Wend. 62; Erwin v. Olmsted, 7 Cow. 229.

Oh.—Humphries v. Huffman, 33 Oh. St. 395.

Or.—Silverton v. Brown, 63 Or. 418, 128 P 45.

Pa.—Schuylkill, etc., Imp., etc., Co. v. McCreary, 58 Pa. 304.

Tex.—Read v. Allen, 63 Tex. 154; Hunton v. Nichols, 55 Tex. 217; Jacks v. Dillon, 6 Tex. Civ. A. 192, 25 SW 645.

Va.—Lennig v. White, 20 SE 831; Taylor v. Burnsides, 1 Gratt. (42 Va.) 165.

W. Va.—Core v. Faupel, 24 W. Va. 238.

In Coryell v. Cain, 16 Cal. 567, 573, Field, C. J., said: "By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation—by a substantial enclosure—by cultivation, or by appropriate use, according to the particular locality and quality of the property."

42. U. S.—Harris v. McGovern, 99 U. S. 161, 25 L. ed. 317 [aff 11 F. Cas. No. 6,125, 2 Sawy. 515]; Ewing v. Burnet, 11 Pet. 41, 9 L. ed. 624; Boyreau v. Campbell, 3 F. Cas. No. 1,760, McAll. 119 [aff 21 How. 223, 16 L. ed. 96].

Ala.—Farley v. Smith, 39 Ala. 38.

Cal.—Knight v. Cohen, 7 Cal. A. 43, 93 P 396.

Conn.—Alderman v. New Haven, 81 Conn. 137, 70 A 626, 18 LRANS 74.

Ill.—Swedish Evangelist Lutheran Church v. Jackson, 229 Ill. 506, 82 NE 348; Hubbard v. Kiddo, 87 Ill. 578; Morrison v. Kelly, 22 Ill. 609, 74 AmD 169.

Mich.—Whitaker v. Erie Shooting Club, 102 Mich. 454, 60 NW 983; Murray v. Hudson, 65 Mich. 670, 32 NW 889.

Minn.—Costello v. Edson, 44 Minn. 135, 46 NW 299.

Miss.—McCaughn v. Young, 85 Miss. 277, 37 S 839.

[a] **Reason for rule.**—"As the character of the possession depends on the nature and situation of the property, and the uses to which it can be applied, or to which the owner may choose to apply it, it is evident that resort must be had to the usual and ordinary conduct of owners of such land to determine if it is sufficient. If this possession comports with the ordinary management of similar lands by their owners, it furnishes satisfactory evidence of adverse occupation." Clark v. Potter, 32 Oh. St. 49, 64 [app Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905].

[b] **Applications of rule.**—(1) A town conveyed land granted to it for a public use. The grantees went into immediate possession by going over it and prospecting for minerals, digging a hole near the center of it and taking out what they found and blasting a rock, and by doing something on the lot almost every year up to the time the town foreclosed the purchase-money mortgage, and they were in possession at the time the town gave them a quitclaim deed. It was held that the acts of the grantees were acts of ownership constituting possession and an eviction of the town, seized only by virtue of its title. It is intimated, however, that these acts might be mere trespasses if committed by a stranger. Capen v. Sheldon, 78 Vt. 39, 61 A 864. (2) Possession under a tax deed for more than two years, evidenced by fencing the land with a substantial wire fence, repairing the fence in case of a break, and using the land for hay cutting part of the time, and leasing the same at another time, such possession being open, continuous, and adverse, gives title to the possessor. Carpenter v. Smith, 76 Ark. 447, 88 SW 976.

43. U. S.—Fletcher v. Fuller, 120 U. S. 534, 7 SCt 667, 30 L. ed. 759; Latta v. Clifford, 47 Fed. 614; Zeilin v Rogers, 21 Fed. 103.

Ala.—Alabama State Land Co. v. Matthews, 168 Ala. 200, 53 S 174.

Ark.—Chicot Lumber Co. v. Dardell, 84 Ark. 140, 104 SW 1100.

Cal.—Webber v. Clarke, 74 Cal. 11, 15 P 431.

Ill.—Godfrey v. Dixon Power, etc., Co., 228 Ill. 487, 81 NE 1089; O'Laughlin v. Covell, 222 Ill. 162, 78 NE 59.

Iowa.—Rogers v. Turpin, 105 Iowa 183, 74 NW 925; Dice v. Brown, 98 Iowa 297, 67 NW 253; Forey v. Bigelow, 56 Iowa 381, 9 NW 313; Colvin v. McCune, 39 Iowa 502; Teabout v. Daniels, 38 Iowa 158; Clement v. Perry, 34 Iowa 564.

Kan.—Dickinson v. Bales, 62 Kan. 865, 61 P 403.

Mich.—Whitaker v. Erie Shooting Club, 102 Mich. 454, 60 NW 983 (use for hunting and fishing club).

Minn.—Backus v. Burke, 63 Minn. 272, 65 NW 459.

Miss.—Sproule v. Alabama, etc., R. Co., 78 Miss. 88, 29 S 163.

Nebr.—Lantry v. Parker, 37 Nebr. 356, 55 NW 962.

N. M.—Johnston v. Albuquerque, 12 N. M. 20, 72 P 11.

N. Y.—Bennett v. Kovarick, 23 Misc. 73, 51 NYS 752 [aff 44 App. Div. 629, 60 NYS 1133].

In Merrill v. Tobin, 30 Fed. 738, 741, the court said: "It will ordinarily be sufficient evidence of actual possession if the person claiming title puts the premises to the use which they are naturally fitted for; or, in other words, such a use as the actual owner would ordinarily put them to, when using them at all."

[a] **Application of rule.**—(1) Thus where one disregarding any right or claim of others took measures to protect wild lands from trespassers, and as soon as the same were drained began to use the land for pasture and to cut hay therefrom, and remained in open possession without disturbance for longer than the statutory period, he acquired a perfect prescriptive title. Folley v. Thomas, 46 Ind. A. 559, 93 NE 181. (2) Where the property is so situated as not to admit of any permanent useful improvement, neither actual occupation, cultivation, nor residence is necessary. Draper v. Shoot, 25 Mo. 197, 69 AmD 462.

[b] **Special statutory provision.**—In Maine a recent statute recognizing the practical distinction between acts constituting possession of wild lands and those accepted as proof of possession of cultivated land extends the same relative protection to possessory titles of the former as has hitherto been afforded to the latter. Soper v. Lawrence Bros. Co., 98 Me. 268, 275, 56 A 908, 99 AmSR 397 [aff 201 U. S. 359, 26 SCt 473, 50 L. ed. 788]. In this case it was said: "It had been repeatedly held by this court that title to wild lands could not be acquired by adverse possession by merely taking a deed of a township or tract of timber land, running lines around it, keeping off trespassers and making occasional lumbering operations upon it for a period of twenty years. The exercise of such acts of ownership had not been deemed sufficient or effectual to establish title by disseizin of the true owner. Hudson v. Coe, 79 Me. 83, 8 A 249, 1 AmSR 288; Chandler v. Wilson, 77 Me. 76. Thus while title to farming land might be acquired by twenty years of such 'adverse' possession as comports with the ordinary management of that kind of land by the owner, title to wild lands could not be acquired by twenty years of the qualified possession above described, although it was ordinarily the only kind of occupancy of which wild lands are capable. It was the obvious purpose of that portion of the statute of 1895, applicable to this case, to extend the same relative protection to possessory title to wild lands that all other lands enjoyed under the law. It declares that 'when a person claims under a recorded deed describing wild lands etc.' and has 'held such exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of wild lands in Maine,' no action shall be maintained to recover the land if all the other requirements of the act are fulfilled."

44. Per Scott, J., in Draper v. Shoot, 25 Mo. 197, 203, 69 AmD 462 [quot Benne v. Miller, 149 Mo. 228, 237, 50 SW 824]. See also Leavenworth v. Reeves, (Miss.) 64 S 660.

45. Per Rhodes, J., in Polack v. McGrath, 32 Cal. 15, 20.

46. U. S.—Bump v. Butler County, 93 Fed. 290.

Ala.—Bynum v. Hewlett, 137 Ala. 336, 34 S 391; Jackson Lumber Co. v. McCreary, 137 Ala. 278, 34 S 850; Reddick v. Long, 124 Ala. 260, 27 S 402; Elyton Land Co. v. Denny, 108 Ala. 553, 18 S 561; Wiggins v. Kirby, 106 Ala. 262, 17 S 354.

Ark.—Boynton v. Ashabranner, 75 Ark. 415, 88 SW 568, 1011, 91 SW 20;

were otherwise a man might be disseized without his knowledge, and the statutes of limitations might run against him while he had no ground to believe that his seizin had been interrupted.[47] And acts amounting merely to the exercise or enjoyment of an easement, to which the claimant was entitled, cannot operate as a possession of the land which is subservient to the easement.[48]

[§ 8] **2. Application to Particular Acts—a. Actual Residence.** Although the actual residence of the claimant upon the land in dispute is one of the most effectual modes of manifesting possession,[49] not sufficient, in connection with the payment of taxes and the open claim of title, to constitute adverse possession. Brown v. Bocquin, 57 Ark. 97, 20 SW 813.

[e] **The making of one crop on land** is insufficient to constitute adverse possession. Conn v. Franklin, (Tex.) 19 SW 126.

[f] **The fact that a person planted tobacco beds on different portions of land for more than the statutory period,** but not on one spot for more than two years in succession, the land not being inclosed except during the period of cultivation, is not evidence of adverse possession. Hamilton v. Icard, 117 N. C. 476, 23 SE 354; Hamilton v. Icard, 114 N. C. 532, 19 SE 607.

[g] **Mere erection of a cabin or a shanty upon land,** (1) without use or occupation thereof, does not constitute an adverse possession. Wickliffe v. Ensor, 9 B. Mon. (Ky.) 253. (2) And the fact that one occupied a shanty on certain wild lands while removing timber therefrom does not show a bona fide and actual possession thereof as against the legal owner. McKinnon v. Meston, 104 Mich. 642, 62 NW 1014.

[h] **The occupation of a building each summer for the entertainment of picnic parties** for about ten or twelve years, after which it was abandoned and no further use made of it, did not constitute adverse possession giving title to the occupant. Brookhaven v. Dyett Sand-Lime Brick Co., 75 Misc. 310, 135 NYS 165.

[i] **That a railroad mowed weeds outside of its right of way** did not give title by adverse possession to the land mowed. Scheer v. Long Island R. Co., 127 App. Div. 267, 111 NYS 569.

[j] **Driving cows occasionally into the locus in quo and occasionally carrying off a fallen tree** to burn as firewood are not evidence of adverse possession. Johnson v. Thomas, 23 App. (D. C.) 141.

[k] **Riding over land at long intervals.**—That the purchaser of land at a tax sale rode over it for three hours at a time about six times a year for a few years after the attempted sale was not of itself evidence of actual adverse possession. Doe v. Styles, (Ala.) 64 S 345.

47. Kennebeck Purchase v. Springer, 4 Mass. 416, 3 AmD 227; Merritt v. Westroman, 165 Mich. 535, 131 NW 66 [quot Cyc entire section B]; Costello v. Edson, 44 Minn. 135, 46 NW 299.

48. Stetson v. Veazie, 11 Me. 408.

49. Bennett v. Kovarick, 23 Misc. 73, 51 NYS 752 [aff 44 App. Div. 629, 60 NYS 1133]; Carlock v. Willard, (Tex. Civ. A.) 149 SW 363; Wade v. McDougal, 59 W. Va. 113, 52 SE 1026; Seale v. Johnston, 13 Ont. A. 349. And see Matter of North Fifth St., 64 App. Div. 611, 71 NYS 644.

[a] **Thus** (1) one claiming under a certificate of entry cleared portions of each forty acres covered thereby, and got wood and timber from all parts of the land, living meanwhile in a house built by him on forty acres adjoining the land covered by his certificate. He sold forty acres, but this did not sever the forty on which his house stood from the rest of the tract. It was held that his possession was adverse. Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 S 43. (2) Possession by one's cattle and residence for a sufficient number of years are sufficient to make the possession actual. Den v. Mulford, 3 N. C. 358.

Brown v. Bocquin, 57 Ark. 97, 20 SW 813.

D. C.—Johnson v. Thomas, 23 App. 141.

Ga.—Carrol v. Gillion, 33 Ga. 539; Durham v. Holeman, 30 Ga. 619; Denham v. Holeman, 26 Ga. 182, 71 AmD 198; Royall v. Lisle, 15 Ga. 545, 60 AmD 712.

Ill.—Travers v. McElvain, 200 Ill. 377, 65 NE 623; Stalford v Goldring, 197 Ill. 156, 64 NE 395; Walker v. Converse, 148 Ill. 622, 36 NE 202; Chicago, etc., R. Co. v. Galt, 133 Ill. 657, 23 NE 425, 24 NE 674; Robbins v. Moore, 129 Ill. 30, 21 NE 934; Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508; Ambrose v. Raley, 58 Ill. 506; Welch v. Louis, 31 Ill. 446; Morrison v. Kelly, 22 Ill. 609, 74 AmD 169; McClellan v. Kellogg, 17 Ill. 498; Irving v. Brownell, 11 Ill. 402.

Iowa.—Stern v. Fountain, 112 Iowa 96, 83 NW 826; Brown v. Rose, 48 Iowa 231.

Kan.—Dickinson v. Bales, 59 Kan. 224, 52 P 447; Nicholson v. Aronson, 58 Kan. 814, 48 P 917.

Ky.—Combs v. Combs, 72 SW 8, 24 KyL 1691; Helton v. Strubbe, 62 SW 12, 22 KyL 1919; Barr v. Potter, 57 SW 478, 22 KyL 416; Price v. Beall, 40 SW 918, 19 KyL 420; Strange v. Spalding, 29 SW 137, 17 KyL 305; Degman v. Elliott, 8 SW 10, 9 KyL 982; Jones v. McCauley, 2 Duv. 14; Covington v. McNickle, 18 B. Mon. 282.

La.—Macarty v. Foucher, 12 Mart. 11.

Me.—Hudson v. Coe, 79 Me. 83, 8 A 249, 1 AmSR 288.

Md.—Parker v. Wallis, 60 Md. 15, 45 AmR 703; Thistle v. Frostburg Coal Co., 10 Md. 129.

Mass.—Richmond Iron Works v. Wadhams, 142 Mass. 569, 9 NE 1; Blood v. Wood, 1 Metc. 528.

Mich.—Judson v. Duffy, 96 Mich. 255, 55 NW 837.

Minn.—Bazille v. Murray, 40 Minn. 48, 41 NW 238; Greene v. Dwyer, 33 Minn. 403, 23 NW 546.

Miss.—Leavenworth v. Reeves, 64 S 660; Mitchell v. Bond, 84 Miss. 72, 36 S 148.

Mo.—Robinson v. Claggett, 149 Mo. 153, 50 SW 280; Coleman v. Drane, 116 Mo. 387, 22 SW 801; Cook v. Farrah, 105 Mo. 492, 16 SW 692; Norfleet v. Hutchins, 68 Mo. 597; Musick v. Barney, 49 Mo. 458.

N. H.—Aiken v. Ela, 62 N. H. 400.

N. J.—Foulke v. Bond, 41 N. J. L. 527; Cornelius v. Giberson, 25 N. J. L. 1.

N. Y.—Archibald v. New York Cent., etc., R. Co., 157 N. Y. 574, 52 NE 567; Price v. Brown, 101 N. Y. 669, 5 NE 434; Bliss v. Johnson, 94 N. Y. 235; Miller v. Long Island R. Co., 71 N. Y. 380; East Hampton v. Kirk, 68 N. Y. 459; Wheeler v. Spinola, 54 N. Y. 377; Corning v. Troy Iron, etc., Factory, 44 N. Y. 577; Freedman v. Oppenheim, 102 App. Div. 622, 92 NYS 878 [rev on other grounds 187 N. Y. 101, 79 NE 841, 116 AmSR 595]; College Point Sav. Bank v. Vollmer, 44 App. Div. 619, 60 NYS 389; Roberts v. Baumgarten, 51 N. Y. Super. 482.

N. C.—Prevatt v. Harrelson, 132 N. C. 250, 43 SE 800; McLean v. Smith, 114 N. C. 356, 19 SE 279; Cox v. Ward, 107 N. C. 507, 12 SE 379; Ruffin v. Overby, 88 N. C. 369; Gudger v. Hensley, 82 N. C. 481; Williams v. Wallace, 78 N. C. 354; Williams v. Buchanan, 23 N. C. 535, 35 AmD 760.

Or.—Hodgkin v. Boswell, 63 Or. 589, 127 P 985.

Pa.—Young v. Herdic, 55 Pa. 172; Rifener v. Bowman, 53 Pa. 313; Wheeler v. Winn, 53 Pa. 122, 91 AmD 186; Ewing v. Alcorn, 40 Pa. 492; Washabaugh v. Entriken, 34 Pa. 74, 36 Pa. 513; Beaupland v. McKeen, 28 Pa. 124, 70 AmD 115.

S. C.—McCullough v. Wall, 38 S. C. L. 68, 53 AmD 715.

Tenn.—Sequatchie Valley Coal, etc., Co. v. Coppinger, 95 Tenn. 526, 32 SW 465; Hicks v. Tredericks, 9 Lea 491; Pullen v. Hopkins, 1 Lea 741; Cass v. Richardson, 2 Coldw. 28; Hearn v. Jones, (Ch. A.) 64 SW 344; Fuller v. Jackson, (Ch. A.) 62 SW 274.

Tex.—Pendleton v. Snyder, 5 Tex. Civ. A. 427, 24 SW 363.

Vt.—Wells v. Austin, 59 Vt. 157, 10 A 405.

Va.—Trotter v. Newton, 30 Gratt. (71 Va.) 582.

Wis.—St. Croix Land, etc., Co. v. Ritchie, 78 Wis. 492, 47 NW 657.

Eng.—Philpot v. Bath, 20 T. L. R. 589.

Can.—Horton v. Casey, 22 Can. S. C. 739; Sherren v. Pearson, 14 Can. S. C. 581; Wason v. Douglas, 21 Can. L. T. 521.

Ont.—Reynolds v. Trivett, 7 Ont. L. 623; McIntyre v. Thompson, 1 Ont. L. 163; Coffin v. North American Land Co., 21 Ont. 80; Doe v. Rattray, 7 U. C. Q. B. 321.

[a] **A mere scrambling possession** of land is not sufficient to confer title by adverse possession. Cohn v. Smith, 94 Miss. 517, 49 S 611; Mitchell v. Bond, 84 Miss. 72, 36 S 148. "Scrambling possession" defined see 35 Cyc 1162.

[b] **Occasional acts of trespass upon lands,** (1) not amounting to an exclusive appropriation thereof, and not made under a bona fide ownership or under circumstances indicating such a claim, do not constitute an adverse possession (Chicago, etc., R. Co. v. Galt, 133 Ill. 657, 23 NE 425, 24 NE 674; Aiken v. Ela, 62 N. H. 400; Cornelius v. Giberson, 25 N. J. L. 1; Currie v. Gilchrist, 147 N. C. 648, 61 SE 581; Young v. Herdic, 55 Pa. 172), (2) although continued for a number of years (Price v. Beall, 40 SW 918, 19 KyL 420; State v. Moore, 71 W. Va. 285, 76 SE 461).

[c] **Occasional entries upon unenclosed and unimproved lands,** (1) not a part of and unconnected with improved and occupied lands, do not constitute actual possession. Miller v. Long Island R. Co., 71 N. Y. 380. (2) A mere annual entry upon another man's land, to cut timber, to feed cattle, to hunt, or to fish, can never give title. Wheeler v. Winn, 53 Pa. 122, 91 AmD 186. (3) Occupation of a spot for five or six weeks annually, as a fishing place, is not a possession sufficient for the statute of limitations. McCullough v. Wall, 38 S. C. L. 68, 53 AmD 715. (4) The agent of one claiming to own wild land as purchaser at a sheriff's sale was personally on it very often, visiting it, to protect the possession and warn off intruders, and the purchase and agency were generally known in the neighborhood, but there was no trespassing on the lot, and no other person exercised any ownership over it. The agent returned the land and paid taxes on it for the alleged owner, but did not live on it or build any house, fence, or other structure on it. It was held that there was not such possession as would support a title by prescription. Scott v. Cain, 90 Ga. 34, 15 SE 816.

[d] **Fitful acts of ownership of land situated in a city,** such as permitting persons on two occasions to erect a lemonade stand on the land, to be used for a day at a time, and causing some paving stone for a sidewalk to be deposited on the land, are

still personal occupation, except where required by statute,[50] is not an indispensable condition where the other circumstances sufficiently prove an established and continuous dominion.[51]

[§ 9] **b. Improvement—(1) In Absence of Statute—(a) Necessity.** In the absence of statute requiring it, it is not essential that the land should be improved,[52] or as a general rule that its condition should be changed.[53] It will suffice if visible and notorious acts of ownership are exercised over the land in controversy for the statutory period.[54] Possession is gauged by the actual state of the land, and not with reference to its capability of being changed into another state which would admit of a different character of possession.[55]

[§ 10] **(b) Efficacy.** The making of permanent improvements on land,[56] as by building permanent

[b] **Actual possession may be either by residence or cultivation,** but need not be by both. Susquehanna, etc., R., etc., Co. v. Quick, 68 Pa. 189.

[c] **When the land claimed consists of several contiguous tracts, within a single inclosure,** residence within the inclosure on one tract will constitute a residence on all. Davis v. Young, 2 Dana (Ky.) 299. In Wharton v. Bunting, 73 Ill. 16, 19, the court said: "A person can not, in the nature of things, actually reside upon all portions of a tract of land. Nor can it be denied, if one occupies a tract of land composed of one or more legal sub-divisions as one entire farm divided into different fields, that he actually resides upon each field. His actual residence is upon the farm, which farm is made up of several legal sub-divisions; therefore he actually resides upon each sub-division in contemplation of the law. To give to the statute a construction less liberal than this would go far to defeat the object of its framers, which was to quiet titles."

[d] **The actual residence need not be by the claimant personally,** but may be through his tenant or agent. Martin v. Judd, 81 Ill. 488; White v. Bates, 7 J. J. Marsh. (Ky.) 538. And see infra § 48 et seq.

[e] **Encroachment.**—Title by adverse possession may be acquired by the encroachment of a building upon land so claimed. Lambert v. Huber, 22 Misc. 462, 50 NYS 793.

50. See statutory provisions.

[a] **In Illinois** in order to gain title to land under the Limitation Law of 1835 (Hurd Rev. St. [1905] c 83 § 4) providing that actions to recover lands actually resided upon by one having a record title must be brought within seven years after possession taken, there must be actual residence thereon, actual possession not being sufficient. Manternach v. Studt, 230 Ill. 356, 82 NE 829, 120 AmSR 310; Burton v. Perry, 146 Ill. 71, 34 NE 60; Stoltz v. Deering, 112 Ill. 234; Heacock v. Lubuke, 107 Ill. 396; Stumpf v. Osterhage, 94 Ill. 115; Martin v. Judd, 81 Ill. 488; Elston v. Kennicott, 46 Ill. 187; Cook v. Norton, 43 Ill. 391; Jayne v. Gregg, 42 Ill. 413; Collins v. Smith, 18 Ill. 160; Woodward v. Blanchard, 16 Ill. 424.

[b] **So, under the Kentucky Seven Years' Law of 1808,** actual residence on the land was required to constitute adverse possession. Watson v. Wilson, 150 Ky. 27, 149 SW 1120; Sanders v. Barbee, 3 SW 528; Webbs v. Hynes, 9 B. Mon. 388, 50 AmD 515; Chiles v. Jones, 4 Dana 479; Myers v. Buford, 7 J. J. Marsh. 250; Hart v. Bowmar, 6 J. J. Marsh. 452; Robinson v. Neal, 5 T. B. Mon. 212; May v. Jones, 4 Litt. 21; Hog v. Perry, 1 Litt. 171; Bodley v. Coghill, 3 A. K. Marsh. 614; Anderson v. Turner, 3 A. K. Marsh. 131.

[c] **In Texas** the possession which, under the statutes of limitation (Paschal Dig. art 4624), gives to a naked possessor full property in six hundred and forty acres of land must be continuous for the full period of ten years. The possessor must actually reside upon the land, and not merely cultivate it for ten consecutive years. Sloan v. Martin, 33 Tex. 417; Carlock v. Willard, (Civ. A.) 149 SW 363.

[d] **In Wisconsin** it is held that actual occupancy of premises, so as to indicate at every instant of time, by mere observation, the extent of the hostile use is not necessary to satisfy a statute providing that for the purpose of constituting an adverse possession land shall be deemed to have been occupied only when it has been protected by an inclosure or has been usually cultivated. Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905.

51. U. S.—Ewing v. Burnet, 11 Pet. 41, 9 L. ed. 624; Ellicott v. Pearl, 10 Pet. 412, 9 L. ed. 475.

Ala.—Farley v. Smith, 39 Ala. 38.

Ark.—Dorr v. School Dist. No. 26, 40 Ark. 237.

Ill.—Coleman v. Billings, 89 Ill. 183; Kerr v. Hitt, 75 Ill. 51.

Iowa.—Booth v. Small, 25 Iowa 177.

Kan.—Anderson v. Burnham, 52 Kan. 454, 34 P 1056.

La.—Chamberlain v. Abadie, 48 La. Ann. 587, 19 S 574.

Mich.—Merritt v. Westerman, 165 Mich. 535, 131 NW 66.

Minn.—In re St. Louis Register Title, 147 NW 655; Wheeler v. Gorman, 80 Minn. 462, 83 NW 442; Dean v. Goddard, 55 Minn. 290, 56 NW 1060; Costello v. Edson, 44 Minn. 135, 46 NW 299.

Miss.—McCaughn v. Young, 85 Miss. 277, 37 S 839; Ford v. Wilson, 35 Miss. 490, 72 AmD 137.

Mo.—Plaster v. Grabeel, 160 Mo. 669, 61 SW 589; Turner v. Hall, 60 Mo. 271; Draper v. Shoot, 25 Mo. 197, 69 AmD 462.

N. J.—Cooper v. Jersey City, 44 N. J. L. 634; Foulke v. Bond, 41 N. J. L. 527.

Pa.—Thompson v. Philadelphia, etc., Coal, etc., Co., 133 Pa. 46, 19 A 346; Susquehanna, etc., R., etc., Co. v. Quick, 68 Pa. 189; Stephens v. Leach, 19 Pa. 262; Hoey v. Furman, 1 Pa. 295, 44 AmD 129; Mackentile v. Savoy, 17 Serg. & R. 104; Johnston v. Irwin, 3 Serg. & R. 291.

S. C.—Alderman v. McKnight, 78 SE 982; Lewis v. Pope, 86 S. C. 285, 68 SE 680.

Tenn.—Sequatchie Valley Coal, etc., Co. v. Coppinger, 95 Tenn. 526, 32 SW 465; Cass v. Richardson, 2 Coldw. 28; West v. Lanier, 9 Humphr. 762; Cowan v. Hatcher, (Ch. A.) 59 SW 689.

Tex.—Cantagrel v. Von Lupin, 58 Tex. 570; Kimbro v. Hamilton, 28 Tex. 560; Travis v. Hall, 37 Tex. Civ. A. 143, 83 SW 425; Hodges v. Ross, 6 Tex. Civ. A. 437, 25 SW 975. See Chandler v. Rushing, 38 Tex. 591; Sloan v. Martin, 33 Tex. 417.

Wash.—Olson v. Howard, 38 Wash. 15, 80 P 170; Bellingham Bay Land Co. v. Dibble, 4 Wash. 764, 31 P 30.

Wis.—Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905; Hill v. Kricke, 11 Wis. 442.

Can.—Bentley v. Peppard, 33 Can. S. C. 444.

Ont.—Piper v. Stevenson, 28 Ont. L. 379; Hartley v. Maycock, 28 Ont. 508; Lewis v. Kelly, 17 U. C. C. P. 259.

[a] **Adverse possession of unproductive lands** is shown by the recording of the deed under which the occupant claims, by payment of taxes, by the cutting of all the valuable timber, by going upon the land at intervals, by claiming absolute ownership, by the employment of agents in the neighborhood to look after it, and by the building of a brush fence around a portion cleared, without proof of actual occupancy. Worthley v. Burbanks, 146 Ind. 534, 45 NE 779.

52. U. S.—Ewing v. Burnet, 11 Pet. 41, 9 L. ed. 624; Quindaro Tp. v. Squier, 51 Fed. 152, 2 CCA 142.

Ala.—Pearson v. Adams, 129 Ala. 157, 29 S 977.

Ga.—Royall v. Lisle, 15 Ga. 545, 60 AmD 712.

Ill.—Hubbard v. Kiddo, 87 Ill. 578. And see Illinois Cent. R. Co. v. Noyes, 252 Ill. 178, 96 NE 830 (holding that where, in ejectment by a railroad company for a strip of land claimed to be a part of its right of way, the company showed the erection of a fence thirty-three feet from the track and its claim to the land up to the fence, the mere fact that the section men had mowed the grass for only twenty-five feet from the track did not destroy the company's possession up to the fence).

Mich.—Henry v. Henry, 122 Mich. 6, 80 NW 800.

Mo.—Benne v. Miller, 149 Mo. 228, 50 SW 824; Goltermann v. Schiermeyer, 125 Mo. 291, 28 NW 616; Mississippi County v. Vowels, 101 Mo. 225, 14 SW 282; Leeper v. Baker, 68 Mo. 400; Key v. Jennings, 66 Mo. 356; Musick v. Banney, 49 Mo. 458; Fugate v. Pierce, 49 Mo. 441.

N. M.—Baker v. De Armijo, 128 P 78.

[a] **"A fence, building or other improvement** is not essential to constitute adverse possession." Mississippi County v. Vowels, 101 Mo. 225, 14 SW 282; Leeper v. Baker, 68 Mo. 400.

[b] **Permanent building.**—A purchaser of land from one who has dedicated it for a street acquires title thereto by adverse possession where his occupation of the entire street, to the exclusion of the public, is continued for a period of twenty-one years, although no permanent building is erected thereon. Mott v. Toledo, 17 Oh. Cir. Ct. 472, 7 Oh. Cir. Dec. 216.

53. Goodson v. Brothers, 111 Ala. 589, 20 S 443.

[a] **But in Virginia** it has been held that while patented lands remain uncleared or in a state of nature they are not susceptible of adverse possession against an elder patentee, unless by act of ownership perfecting a change in their condition. Whealton v. Doughty, 112 Va. 649, 72 SE 112; Harman v. Ratliff, 93 Va. 249, 24 SE 1023; Kolner v. Rankin, 11 Gratt. (52 Va.) 420; Overton v. Davisson, 1 Gratt. (42 Va.) 211, 42 AmD 544.

54. Goltermann v. Schiermeyer, 125 Mo. 291, 28 SW 616; Draper v. Shoot, 25 Mo. 197, 69 AmD 462.

55. Brand v. U. S. Car Co., 128 Ala. 579, 30 S 60; Goodson v. Brothers, 111 Ala. 589, 20 S 443; Copeland v. Murphey, 2 Coldw. (Tenn.) 64.

[a] **Impossibility of permanent improvement.**—Where the property is so constituted as not to admit of any permanent useful improvements, and the continuous claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right and would not exercise over property which he did not claim, such possession will create a bar under the statute of limitations. Morrison v. Kelly, 22 Ill. 609, 74 AmD 169.

56. Ill.—Grim v. Murphy, 110 Ill. 271; Hill v. Coal Valley Min. Co., 103 Ill. A. 41.

Iowa.—St. Luke's Parish v. Miller, 84 NW 686.

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structures upon it,[57] clearing it of its incumbent growth,[58] reducing it to a state of cultivation,[59] opening up mines[60] or quarries,[61] cutting roads through it,[62] digging ditches to drain it,[63] building a dike about it,[64] erecting division fences,[65] planting orchards,[66] etc., is always to be regarded as a most significant act of adverse possession, because such an occupancy is of a character well calculated to inform the owner both of the fact of possession and that the intrusion is not intended as a mere temporary trespass;[67] and it is not material on what part of the land in dispute the improvements are made.[68] However, the mere erection on the land of temporary sheds or buildings, or making other improvements without any other acts of dominion, is itself insufficient to show possession.[69]

[§ 11] **(2) Under Special Statutory Provisions.** In some jurisdictions the statutes contain special provisions relating to improvements. For instance, in Florida and Wisconsin the statutes provide that where the claimant is without color of title the premises must have been protected by a substantial inclosure, or must have been cultivated or improved for the full statutory period.[70] No particular kind of an improvement is required "so long as it satisfies what is usual under the circumstances and indicates clearly the boundaries of the adverse occupancy,"[71] and it has been held that it is not even

Kan.—Chellis v. Coble, 37 Kan. 558, 15 P 505.
Mich.—Merritt v. Westerman, 165 Mich. 535, 131 NW 66; Deer Lake Co. v. Michigan Land, etc., Co., 89 Mich. 180, 50 NW 807.
N. J.—Den v. White, 1 N. J. L. 111.
N. Y.—Smith v. Burtis, Anth. N. P. 152.
Oh.—McCleery v. Alton, 29 Oh. Cir. Ct. 97.
Or.—Silverton v. Brown, 63 Or. 418, 128 P 45.
Pa.—Lenhart v. Ream, 74 Pa. 59.
W. Va.—Lyons v. Fairmont Real Est. Co., 71 W. Va. 754, 77 SE 525.

[a] **If a railroad locates** its right of way over a strip of land and enters thereon, throws up its embankments, and prepares its roadbed, these acts must be considered as constituting actual possession. Nashville, etc., R. Co. v. Mathis, 109 Ala. 377, 19 S 384; Daniels v. Gualala Mill Co., 77 Cal. 300, 19 P 519.

57. Ill.—Hill v. Coal Valley Min. Co., 103 Ill. A. 41.
Ky.—Latonia v. Latonia Agricultural Assoc., 109 SW 356, 33 KyL 138.
Oh.—McCleery v. Alton, 29 Oh. Cir. Ct. 97.
Or.—Silverton v. Brown, 63 Or. 418, 128 P 45.
S. C.—Congdon v. Morgan, 14 S. C. 587.
Tenn.—Cowan v. Hatcher, (Ch. A.) 59 SW 689.

[a] **Dwelling houses.**—In Williams v. Dongan, 20 Mo. 186, it appeared that defendant bought a claim to a tract of land and soon afterward took possession of it, built a dwelling upon it and lived therein, cultivated the tract for eight or ten years, and then moved to another state. Afterward he paid all the taxes upon the land, had tenants on it part of the time, and, when not tenanted, had an agent in the neighborhood to rent it out for him and protect it from trespasses. It was held that this was an actual adverse possession.

[b] **Sheds and cisterns.**—Occupancy, for the statutory period of ten years, of a strip of land along a dedicated but practically unused street by sheds and cisterns, the inclosure of the strip by a high board fence, the conducting of a hide and soap business therein, and the erection of other buildings and continued maintenance of the inclosure gave title to the strip by adverse possession. Houston v. Finnigan, (Tex. Civ. A.) 85 SW 470.

[c] **Where a person erects upon a city lot** of which he claims title a permanent brick building which he claims to own throughout its entire length, the circumstances attending his act amount to such a claim of title to the land upon which his building is erected as may by lapse of time ripen into title by adverse possession. Crapo v. Cameron, 61 Iowa 447, 16 NW 523.

58. Ill.—Johns v. McKibben, 156 Ill. 71, 40 NE 449.
Ky.—King v. See, 87 SW 758, 27 KyL 1011.
N. C.—Smith v. Bryan, 44 N. C. 180.
Tenn.—Savage v. Bon Air Coal, etc., Co., 2 Tenn. Ch. A. 594.
W. Va.—Wade v. McDougal, 59 W. Va. 113, 52 SE 1026.

[a] **Meadow land.**—Where one took possession of hay land under a void tax deed, and dug out small trees from the growing grass, so as to improve the land, and made hay thereon, and permitted others to do the same, and permitted the land to be inclosed, and granted privileges in regard to the same, his possession was sufficient, when continued for the statutory period, to give him title. Twohig v. Leamer, 48 Nebr. 247, 67 NW 152. See also Lantry v. Parker, 37 Nebr. 353, 55 NW 962.

[b] **Proof of clearing and cultivating new fields,** turning out old fields when worn out, and cutting wood promiscuously is sufficient to constitute adverse possession. Wallace v. Maxwell, 32 N. C. 110, 51 AmD 380.

[c] **Village lots.**—It has been held that proof of entry, under color of title, by one not the owner, upon platted village lots covered with a growth of brush, and the cutting and burning of this growth, and the grubbing and complete clearing of the land, and the payment of taxes thereon, were sufficient to constitute a finding of disseizin and adverse possession. Costello v. Edson, 44 Minn. 135, 46 NW 299.

[d] **Partial clearings.**—One who, under a claim of sole ownership of a lot of wild land, has for over twenty years made partial clearings on portions of the lot, but whose occupation has been intermittent, connected a good deal with lumbering operations, does not thereby effect a disseizin of the true owners who stand in relation of cotenants with him. Fleming v. Katahdin Pulp, etc., Co., 93 Me. 110, 44 A 378.

59. Kan.—Hughes v. Ridgeway, 86 Kan. 852, 122 P 871.
Minn.—Butler v. Drake, 62 Minn. 229, 64 NW 559.
Miss.—Kirkman v. Mays, 12 S 443.
Nebr.—Horbach v. Miller, 4 Nebr. 31.
N. Y.—Bennett v. Kovarick, 23 Misc. 73, 51 NYS 752 [aff 44 App. Div. 629, 40 NYS 1133].
Or.—Lais v. Smith, 63 Or. 206, 127 P 26.
Tex.—Trueheart v. Graham, (Civ. A.) 141 SW 281; Stevens v. Pedregon, (Civ. A.) 140 SW 236.
Vt.—Soule v. Barlow, 49 Vt. 329; Robinson v. Douglass, 2 Alk. 364.
W. Va.—Lyons v. Fairmont Real Est. Co., 71 W. Va. 754, 77 SE 525.
Ont.—Piper v. Stevenson, 28 Ont. L. 379.

60. Stephenson v. Wilson, 50 Wis. 95, 6 NW 240; Wilson v. Henry, 40 Wis. 594.

[a] **Thus** (1) where defendant entered on land under a claim of title, and removed the iron ore therefrom to supply an adjoining factory, but without any actual inclosure, such entry and removal constituted an adverse possession. West v. Lanier, 9 Humphr. (Tenn.) 762. (2) But the mere digging of coals in the winter, with an abandonment of the property for the rest of the year, is not sufficient. Jackson v. Stoetzel, 87 Pa. 302. See also Sequatchie Valley Coal, etc., Co. v. Coppinger, 95 Tenn, 526, 32 SW 465.

61. Jackson v. Oltz, 8 Wend. (N. Y.) 440.

[a] **Thus** (1) the operations of building a shed, quarrying rock, erecting a limekiln, and cutting wood, to burn it for the purpose of making lime on the land in dispute, continued uninterruptedly for more than seven years, constitute such a possession as will give a good title to the person claiming adversely under it. Moore v. Thompson, 69 N. C. 120. (2) But occasionally digging sand on the land and selling it are not sufficient. Parker v. Wallis, 60 Md. 15, 45 AmR 703.

62. Spear v. Ralph, 14 Vt. 400; Finn v. Wisconsin River Land Co., 72 Wis. 546, 40 NW 209.

63. Tredwell v. Reddick, 23 N. C. 56.

[a] **For example** the entering upon, the ditching, and the making of roads in a cypress swamp, for the purpose of getting shingles therein, and cutting down the timber trees and making shingles out of them, constitute in law a possession of the swamp. Tredwell v. Reddick, 23 N. C. 56.

64. Chabert v. Russell, 109 Mich. 571, 67 NW 902.

65. Hill v. Coal Valley Min. Co., 103 Ill. A. 41.

66. Hill v. Coal Valley Min. Co., 103 Ill. A. 41.

67. Costello v. Edson, 44 Minn. 135, 46 NW 299 (where it is held that such acts upon their face manifest a use, possession, and dominion assumed over the land itself, naturally distinguishable from a mere trespass upon the land). And see Hill v. Coal Valley Min. Co., 103 Ill. A. 41; Lyons v. Fairmont Real Est. Co., 71 W. Va. 754, 77 SE 525.

68. Merriman v. Blalack, 57 Tex. Civ. A. 270, 122 SW 403.

69. Cal.—DeFrieze v. Quint, 94 Cal. 653, 30 P 1, 28 AmSR 151 and note.
Ga.—Durham v. Holeman, 30 Ga. 619; Royall v. Lisle, 15 Ga. 548, 60 AmD 712.
Ill.—White v. Harris, 206 Ill. 584, 69 NE 519.
Ky.—Barr v. Potter, 57 SW 478, 22 KyL 416; Wickliffe v. Ensor, 9 B. Mon. 253.
Mass.—Slater v. Jepherson, 6 Cush. 129.
Mich.—McKinnon v. Meston, 104 Mich. 642, 62 NW 1014.
Mo.—Cook v. Farrah, 105 Mo. 492, 16 SW 692.
N. Y.—De Lancey v. Piepgras, 138 N. Y. 26, 33 NE 822; Miller v. Downing, 54 N. Y. 631.
Tenn.—Hubbard v. Godfrey, 100 Tenn. 155, 47 SW 81; Cass v. Richardson, 2 Coldw. 28.
Wash.—Blake v. Shriver, 27 Wash. 593, 68 P 330 (squatter).

[a] **The mere erection and maintenance of posts** around a parcel of land does not constitute such possession as to meet the requirement of the statute. Peden v. Crenshaw, 98 Tex. 365, 84 SW 362 [rev (Civ. A.) 81 SW 369].

70. Baugher v. Boley, 63 Fla. 75, 58 S 980. And see cases cited infra notes 71, 72.

71. Illinois Steel Co. v. Bilot, 109

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necessary that the value of the premises should be enhanced.[72] Under the New York statute which is similar to those of Wisconsin and Florida it has been held that putting land to the exclusive use of the claimant for collection of seaweed is a "usual improvement" of land adapted for that purpose,[73] but that the taking of wood for fuel from the land and using it as a sugar bush,[74] or the driving of piles on land marking out a space not otherwise occupied by the claimant,[75] is not cultivating or improving it within the meaning of the statute. Under a statute of California providing that the elements of adverse possession not based on color of title are either that the land be protected by substantial inclosures or usually cultivated or improved, it is held that the requirement as to improvement is satisfied, if the land is improved in the manner or to the extent usual in the case of similar property.[76] If so improved it is not necessary that the land should be either cultivated or inclosed.[77]

[§ 12] c. **Cultivation.** To show an actual possession, it is not essential that the land be cultivated.[78] And on the other hand, where the land is suitable for farming purposes, a sufficient actual possession may be obtained by using it for such purpose,[79] provided the use is exclusive of the use of all others, in opposition to their claims,[80] and of such a character as to give them notice that the land is held adversely.[81] It will suffice that the cultivation is only during the season customary for raising crops,[82] although it is essential that it should amount to more than mere occasional acts.[83] Where there is cultivation no inclosure is necessary.[84]

[§ 13] d. **Inclosure—(1) Necessity and Efficacy—(a) In Absence of Statutory Regulation.** Except in one state, Tennessee,[85] it is not necessary, to constitute actual possession, that there should be an inclosure of the premises, unless this is required by statute.[86] Any occupation of the property, visible

Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905.

[a] **In a territory suitable for cheap resident lots,** and occupied by numerous persons as such, a hostile entry and commencement of improvement, plainly indicating a purpose to lay out such a lot, is a proper basis for a finding of disseizin of the true owner under the second paragraph of the statute. Illinois Steel Co. v. Jeka, 123 Wis. 419, 101 NW 399.

72. Illinois Steel Co. v. Bilot, 109 Wis. 418, 441, 84 NW 855, 85 NW 402, 83 AmSR 905 (where it was said: "That use may be, as it often is, one that adds nothing to the value of the premises. It may even destroy the natural and actual value, as, for instance, a highway may be acquired by twenty years' uninterrupted adverse use. No one would claim that it would improve the property in the particular lexiconic sense of the word. . . . The right to flow land may be acquired by twenty years' continuous hostile use thereof for that purpose, though the result be to destroy the value thereof").

[a] **Occupation of a locality for a burial lot,** such as Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905, would partially or wholly destroy its value, may be as effective an improvement as any other, according to the circumstances.

73. East Hampton v. Kirk, 84 N. Y. 215, 38 AmR 505.

74. Voight v. Meyer, 42 App. Div. 350, 59 NYS 70.

75. Fortier v. Delaware, etc., R. Co., 93 App. Div. 24, 86 NYS 896.

76. Gray v. Walker, 157 Cal. 381, 108 P 278; Allen v. McKay, 120 Cal. 332, 52 P 828.

[a] **Buildings or structures** are not necessarily meant by the term "improvements." Allen v. McKay, 120 Cal. 332, 52 P 828.

77. Gray v. Walker, 157 Cal. 381, 108 P 278; Daniels v. Gualala Mill Co., 77 Cal. 300, 19 P 519.

78. U. S.—Harris v. McGovern, 99 U. S. 161, 25 L. ed. 317 [aff 11 F. Cas. No. 6,125, 2 Sawy. 515]; Ewing v. Burnet, 11 Pet. 41, 9 L. ed. 624.

Ala.—Goodson v. Brothers, 111 Ala. 589, 20 S 443.

Cal.—Arrington v. Liscom, 34 Cal. 365, 94 AmD 722.

Ill.—Hubbard v. Kiddo, 87 Ill. 578.

Ind.—Dyer v. Eldridge, 136 Ind. 654, 36 NE 522.

Iowa.—Booth v. Small, 25 Iowa 177.

Mass.—Kennebec Purchase v. Skinner, 4 Mass. 416, 3 AmD 227.

Mich.—Henry v. Henry, 122 Mich. 6, 80 NW 800.

Miss.—McCaughn v. Young, 85 Miss. 277, 37 S 839.

Mo.—Draper v. Shoot, 25 Mo. 197, 69 AmD 462.

N. Y.—Jackson v. Howe, 14 Johns. 405.

Wash.—Bellingham Bay Land Co. v. Dibble, 4 Wash. 764, 31 P 30.

79. Ark.—Dorr v. School Dist. No. 6, 40 Ark. 237.

D. C.—Johnson v. Thomas, 23 App. 141.

Fla.—Seymour v. Creswell, 18 Fla. 29.

Iowa.—Booth v. Small, 25 Iowa 177.

Ky.—Abbott v. Perkinson, 144 Ky. 495, 139 SW 745, AnnCas1913A 747 and note.

Minn.—Wallace v. Sache, 106 Minn. 123, 118 NW 360.

Mo.—Plaster v. Grabeel, 160 Mo. 669, 61 SW 589.

Nebr.—Malcom v. Hanson, 32 Nebr. 50, 48 NW 883; Tourtelotte v. Pearce, 27 Nebr. 57, 42 NW 915; Tex v. Pflug, 24 Nebr. 666, 39 NW 839, 8 AmSR 231.

Tenn.—Copeland v. Murphey, 2 Coldw. 64.

Tex.—Cook v. Spencer, (Civ. A.) 91 SW 813.

W. Va.—Wade v. McDougle, 59 W. Va. 113, 52 SE 1026.

[a] **Filling in shore front and cultivating grass.**—Filling in of the shore front of land bordering on the sea and the cultivation of grass thereon are sufficient possession to ripen into prescriptive title. Dodge v. Lavin, 34 R. I. 409, 83 A 1009 [reargument den 34 R. I. 514, 84 A 857].

80. Doe v. Roe, (Del.) 80 A 352.

81. Johnson v. Thomas, 23 App. (D. C.) 141.

82. Perry v. Lawson, 112 Ala. 480, 20 S 611; Doe v. Anderson, 79 Ala. 209.

[a] **The yearly cutting of grass from salt meadows** for purposes of husbandry, which is the only use to which the meadows are adapted, satisfies the requirements of a statute which provides that for the purpose of constituting adverse possession by one without color of title land is deemed to have been possessed where it has been usually cultivated or improved. Koch v. Elwood, 138 App. Div. 584, 586, 123 NYS 502 (where it was said: "To this and this use only the land is adaptable. To mow annually salt grass from a salt marsh is equivalent to the annual mowing of a superior quality of grass on firmer and dryer ground, and the humbler and less profitable and productive crop is none the less in the quality of the act a cultivation of the soil. If such cultivation does not meet the requirements of the statute, such land cannot become the subject of adverse possession through cultivation"); Shinnecock Hills, etc., Realty Co. v. Aldrich, 132 App. Div. 118, 116 NYS 532 [aff 200 N. Y. 533, 93 NE 1132, and dist Price v. Brown, 101 N. Y. 669, 5 NE 434; Wheeler v. Spinola, 54 N. Y. 377].

83. Ill.—Robbins v. Moore, 129 Ill. 30, 21 NE 934.

Iowa.—Brown v. Rose, 55 Iowa 734, 7 NW 133.

Kan.—Nicholson v. Aronson, 58 Kan. 814, 48 P 917.

Mass.—Morris v. Callanan, 105 Mass. 129.

Mo.—Nye v. Alfter, 127 Mo. 529, 30 SW 186.

84. Abbott v. Perkinson, 144 Ky. 495, 139 SW 745, AnnCas1913A 747 and note.

[a] **Cultivation is equivalent to inclosure** it is said for the purpose of acquiring title by adverse possession. Johnson v. Thomas, 23 App. (D. C.) 141. Inclosure see infra §§ 13–19.

85. **In this state** in order to constitute adverse possession there must be an actual inclosure, "where such inclosure is practicable;" but, while this is so, an actual inclosure or residence on land is not always absolutely necessary to constitute possession if there is such use and occupation of the land as from its nature and character it is capable of. Sequatchie Valley Coal, etc., Co. v. Coppinger, 95 Tenn. 526, 32 SW 465; Garrett v. Belmont Land Co., 94 Tenn. 459, 29 SW 726; Hicks v. Tredericks, 9 Lea (Tenn.) 491; Copeland v. Murphey, 2 Coldw. (Tenn.) 64; Cass v. Richardson, 2 Coldw. (Tenn.) 28; West v. Lanier, 9 Humphr. (Tenn.) 762; Cowan v. Hatcher, (Tenn. Ch. A.) 59 SW 689.

86. U. S.—Fletcher v. Fuller, 120 U. S. 534, 7 SCt 667, 30 L. ed. 759; Ewing v. Burnet, 11 Pet. 41, 9 L. ed. 624; Ellicott v. Pearl, 10 Pet. 412, 9 L. ed. 475 [aff 8 F. Cas. No. 4,386, 1 McLean 206]; Quindaro Tp. v. Squier, 51 Fed. 152, 2 CCA 142; Zeilin v. Rogers, 21 Fed. 103; Boyreau v. Campbell, 3 F. Cas. No. 1,760, McAll. 119 [aff 21 How. 223, 16 L. ed. 96].

Ala.—Pearson v. Adams, 129 Ala. 157, 29 S 977; Goodson v. Brothers, 111 Ala. 589, 20 S 443; Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Doe v. Anderson, 79 Ala. 209; Bell v. Denson, 56 Ala. 444.

Cal.—Andrus v. Smith, 133 Cal. 78, 65 P 320; Daniels v. Gualala Mill Co., 77 Cal. 300, 19 P 519; Webber v. Clarke, 74 Cal. 11, 15 P 431; Sheldon v. Mull, 67 Cal. 229, 7 P 710; McCreery v. Everding, 44 Cal. 246; Hicks v. Coleman, 25 Cal. 122, 85 AmD 103.

Conn.—Miller v. Dow, 1 Root 412; Smith v. Isaacs, 1 Root 151.

Del.—Truitt v. Osler, 90 A 467; Pennington v. Lewis, 20 Del. 447, 56 A 378; Doe v. Stephens, 6 Del. 31; Bartholomew v. Edwards, 6 Del. 17; Inskeep v. Shields, 4 Del. 345.

D. C.—Howison v. Mason, 29 App. 338; Johnson v. Thomas, 23 App. 141; Holtzman v. Douglas, 5 App. 397; Keefe v. Bramhall, 14 D. C. 551.

Ga.—Royall v. Lisle, 15 Ga. 545, 60 AmD 712; Conyers v. Kenan, 4 Ga. 308, 48 AmD 226. See also McCook v. Crawford, 114 Ga. 337, 40 SE 225.

and notorious, of which the property is susceptible,[87] as for instance residence, cultivation, or clearing,[88] and which excludes the true owner,[89] is sufficient. And on the other hand, while inclosure is evidence of actual possession,[90] by the weight of authority, it is not by itself such actual possession as may ripen into title by adverse possession,[91] especially where the alleged inclosure is constructed through woodland by merely felling and lapping trees or piling brush,[92] or where the inclosure is not complete.[93]

[§ 14] **(b) Under Statutory Provisions.** Under the statutes of some states, where the claimant is without color of title, the land must either be pro-

Ill.—O'Flaherty v. Mann, 196 Ill. 304, 63 NE 727; Horner v. Reuter, 152 Ill. 106, 38 NE 747; Fisher v. Bennehoff, 121 Ill. 426, 13 NE 150; Hubbard v. Kiddo, 87 Ill. 578; Scott v. Delany, 87 Ill. 146; Kerr v. Hitt, 75 Ill. 51; Austin v. Rust, 73 Ill. 491; Brooks v. Bruyn, 24 Ill. 372.

Ind.—Worthley v. Burbanks, 146 Ind. 534, 45 NE 779; Dyer v. Eldridge, 136 Ind. 654, 36 NE 522.

Iowa.—Dice v. Brown, 98 Iowa 297, 67 NW 253; Forey v. Bigelow, 56 Iowa 381, 9 NW 313; Colvin v. McCune, 39 Iowa 502; Booth v. Small, 25 Iowa 177; Langworthy v. Myers, 4 Iowa 18.

Kan.—Dickinson v. Bales, 59 Kan. 224, 52 P 447; Anderson v. Burnham, 52 Kan. 454, 34 P 1056.

Ky.—Abbott v. Perkinson, 144 Ky. 495, 139 SW 745, AnnCas1913A 747 and note; Fuller v. Mullins, 143 Ky. 639, 137 SW 243; Webbs v. Hynes, 9 B. Mon. 388, 50 AmD 515; Moss v. Scott, 2 Dana 271.

Me.—Adams v. Clapp, 87 Me. 316, 32 A 911; Tilton v. Hunter, 24 Me. 29 (under statute providing that inclosure is not necessary).

Md.—Storr v. James, 84 Md. 282, 35 A 965; Warner v. Hardy, 6 Md. 525 (under a statute providing in express terms that actual inclosure shall not be necessary. Before the enactment of this statute it was held that where a person claims by possession only, without showing any title, he must show an exclusive adverse possession by inclosure, and his claim cannot extend beyond it); Hoye v. Swan, 5 Md. 237; Armstrong v. Risteau, 5 Md. 256, 59 AmD 115; Cresap v. Hutson, 9 Gill 269; Hammond v. Warfield, 2 Harr. & J. 151; Casey v. Inloes, 1 Gill 430, 39 AmD 658.

Mich.—Sauers v. Giddings, 90 Mich. 50, 51 NW 265; Greene v. Anglemire, 77 Mich. 168, 43 NW 772; Beecher v. Galvin, 71 Mich. 391, 39 NW 469; Murray v. Hudson, 65 Mich. 670, 32 NW 889; Curtis v. Campbell, 54 Mich. 340, 20 NW 69.

Minn.—Wallace v. Sache, 106 Minn. 123, 118 NW 360; Young v. Grieb, 95 Minn. 396, 104 NW 131; Sage v. Morosick, 69 Minn. 122, 71 NW 923.

Mo.—Benne v. Miller, 149 Mo. 228, 50 SW 824; Robinson v. Claggett, 149 Mo. 153, 50 SW 280; Irwin v. Woodmansee, 104 Mo. 403, 16 SW 486; Mississippi County v. Vowels, 101 Mo. 225, 14 SW 282; Leeper v. Baker, 68 Mo. 400; Schultz v. Lindell, 30 Mo. 310; Menkens v. Ovenhouse, 22 Mo. 70.

Nebr.—Lantry v. Parker, 37 Nebr. 353, 55 NW 962; Brownfield v. Bleekman, 4 Nebr. (Unoff.) 443, 94 NW 714.

N. J.—Cooper v. Morris, 48 N. J. L. 607, 7 A 427; Foulke v. Bond, 41 N. J. L. 527; Southmayd v. McLaughlin, 24 N. J. Eq. 181.

Oh.—Clark v. Potter, 32 Oh. St. 49.

Pa.—Thompson v. Philadelphia, etc., Coal, etc., Co., 133 Pa. 46, 19 A 346; Sheaffer v. Eakman, 56 Pa. 144; Criswell v. Altemus, 7 Watts 565; Thompson v. Milford, 7 Watts 442.

Tex.—Gunter v. Meade, 78 Tex. 634, 14 SW 562; Richards v. Smith, 67 Tex. 610, 4 SW 571; Cook's Hereford Cattle Co. v. Barnhart, (Civ. A.) 147 SW 662; Stevens v. Pedregon, (Civ. A.) 140 SW 236, 239 [cit Cyc]; Dunn v. Taylor, 42 Tex. Civ. A. 241, 94 SW 347; Zapeda v. Hoffman, 31 Tex. Civ. A. 312, 72 SW 443.

Vt.—Buck v. Squiers, 23 Vt. 498. But see Hodges v. Eddy, 38 Vt. 327.

Wash.—Bellingham Bay Land Co. v. Dibble, 4 Wash. 764, 31 P 30.

W. Va.—Lyons v. Fairmont Real Est. Co., 71 W. Va. 754, 77 SE 525; Wade v. McDougle, 59 W. Va. 113, 52 SE 1026.

Wis.—Batz v. Woerpel, 113 Wis. 442, 85 NW 516; Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905.

Ont.—Steers v. Shaw, 1 Ont. 26; Heyland v. Scott, 19 U. C. C. P. 165; Shepherdson v. McCullough, 46 U. C. Q. B. 573; Davis v. Henderson, 29 U. C. Q. B. 344.

"A fence or inclosure is not an essential element of adverse possession." Doe v. Anderson, 79 Ala. 209, 215.

[a] **The ordinary use and the taking of ordinary profits of land** will suffice to constitute adverse possession without actual fencing of the tract. Wallace v. Sache, 106 Minn. 123, 118 NW 360.

[b] **In the case of a farm,** in which possession is open and notorious, comporting with the ordinary management of farms, it is not necessary that the whole farm be either improved or inclosed, at least where the unimproved part, as woodland, is subservient and connected to that which is improved. Murphy v. Doyle, 37 Minn. 113, 33 NW 220.

[c] **Residence and improvements without inclosure.**—One who himself or by a tenant actually resides upon a large tract and claims it for ten years acquires title to one hundred and sixty acres thereof, including his improvements, or the acreage included in his deed if he claims under a deed, irrespective of whether such tract is inclosed. Frazer v. Seureau, (Tex. Civ. A.) 128 SW 649. See also Miller v. Goodin, (Ky.) 124 SW 818.

87. Howison v. Masson, 29 App. (D. C.) 338; Curtis v. Campbell, 54 Mich. 340, 20 NW 69.

[a] **Where acts done on land are such as to give unequivocal notice of a claim thereto adverse to all others,** accompanied by actual possession, exclusive in character, limitations run in favor of the adverse possessor from the time occupancy commenced, whether the land is inclosed or not. Pennington v. Lewis, 20 Del. 447, 56 A 378; Zapeda v. Hoffman, 31 Tex. Civ. A. 312, 72 SW 443.

88. Fuller v. Mullins, 143 Ky. 639, 137 SW 243; Dryden v. Makey, (Tex. Civ. A.) 160 SW 302; Wade v. McDougle, 59 W. Va. 113, 52 SE 1026.

89. Holtzman v. Douglas, 5 App. (D. C.) 397 [aff 168 U. S. 278, 18 SCt 65, 42 L. ed. 466].

90. Ala.—Perry v. Lawson, 112 Ala. 480, 20 S 611.

Ark.—Carpenter v. Smith, 76 Ark. 447, 88 SW 976.

D. C.—Johnson v. Thomas, 23 App. 141.

Iowa.—Ritzmann v. Aspelmeier, 89 Iowa 179, 56 NW 421.

Ky.—Hillman v. White, 44 SW 111, 19 KyL 1682.

Md.—Storr v. James, 84 Md. 282, 35 A 965; Armstrong v. Risteau, 5 Md. 257, 59 AmD 115; Smith v. Middleton, 1 Harr. & M. 521.

Mich.—Lamoreaux v. Creveling, 103 Mich. 501, 61 NW 783; Flynn v. Detroit, 93 Mich. 590, 53 NW 815.

Mont.—Lockey v. Horsky, 4 Mont. 457, 2 P 19.

Nebr.—Malcom v. Hanson, 32 Nebr. 50, 48 NW 883; Tourtelotte v. Pearce, 27 Nebr. 57, 42 NW 915; Horbach v. Miller, 4 Nebr. 31.

Or.—Sommer v. Compton, 52 Or. 173, 96 P 124, 1065; Hamilton v. Fluornoy, 44 Or. 97, 74 P 483; Ambrose v. Huntington, 34 Or. 484, 56 P 513.

Pa.—Miller v. Shaw, 7 Serg. & R. 129; Laird v. McConachy, 3 Serg. & R. 290.

Tenn.—Cowan v. Hatcher, (Ch. A.) 59 SW 692.

Tex.—Church v. Waggoner, 78 Tex. 200, 14 SW 581; Taliaferro v. Butler, 77 Tex. 578, 14 SW 191; Cantagrel v. Von Lupin, 58 Tex. 570; Stevens v. Pedregon, (Civ. A.) 140 SW 236; Harris v. Bryson, 34 Tex. Civ. A. 532, 80 SW 105; Galveston Land, etc., Co. v. Perkins, (Civ. A.) 26 SW 256; Moore v. McCown, (Civ. A.) 20 SW 1112.

Vt.—Soule v. Barlow, 49 Vt. 329.

Wis.—Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905.

91. Russell v. Davis, 38 Conn. 562; Iowa Cent. R. Co. v. Homan, 151 Iowa 404, 131 NW 878; Dunn v. Taylor, 102 Tex. 80, 113 SW 265 [rev (Civ. A.) 107 SW 952]; Stevens v. Pedregon, (Tex. Civ. A.) 140 SW 236, 239; Hermann v. Fenn, (Tex. Civ. A.) 129 SW 1139; McDonald v. McCrabb, 47 Tex. Civ. A. 259, 105 SW 238; Niday v. Cochran, 42 Tex. Civ. A. 292, 93 SW 1027; Stovel v. Gregory, 21 Ont. A. 137; Campeau v. May, 19 OntWR 751, 2 Ont WN 1420. But see Palmer v. Safft, 56 N. Y. Super. 594, 3 NYS 250 (holding that under the code of civil procedure an inclosure for the statutory period constitutes actual possession). And compare Thompson v. Philadelphia, etc., Coal, etc., Co., 133 Pa. 46, 19 A 346 (holding that where there is some evidence to show that a fence has been maintained for twenty-one years around the land sued for, it is held proper to submit the question of adverse possession to the jury, although no one lived on the land during that time and it was not cultivated continuously).

[a] **The inclosure of land** without use is not sufficient to constitute adverse possession. Appel v. Childress, 53 Tex. Civ. A. 607, 116 SW 129.

[b] **In connection with other acts.**—(1) A railroad company which has occupied land as right of way, under a conveyance taken in good faith, for more than seven years, during which time it has kept it inclosed by fence, and has paid all taxes legally assessed against it, is the legal owner, under 2 Starr & C. Annot. St. p 1539 § 6, to the extent and purport of its paper title. Chicago, etc., R. Co. v. Grant, 167 Ill. 489, 47 NE 750. (2) Exclusive and continuous possession of an inclosed tract of land, embracing half a million acres, claimed under a deed, and used for pasture purposes only for over twelve years, on which taxes were paid each year during that time, satisfies the five-year statute of limitations, although there were no improvements on the land and no fencing, except that inclosing the pasture. Harris v. Bryson, 34 Tex. Civ. A. 532, 80 SW 105. (3) Where defendant held part of plaintiff's right of way, more than one hundred feet from the center thereof in hostility to the world, having inclosed it and erected substantial improvements thereon, his possession, being known to plaintiff, was not that of a mere squatter but was adverse and would ripen into prescriptive title. Northern Pac. R. Co. v. Concannon, 75 Wash. 591, 135 P 652. See also Hogan v. Burneson, 44 Pa. Super. 409 (as to efficacy of inclosure and improvements).

92. Slater v. Jepherson, 6 Cush. (Mass.) 129; Coburn v. Hollis, 3 Metc. (Mass.) 125; Hale v. Glidden, 10 N. H. 397; Smith v. Hosmer, 7 N. H. 436, 28 AmD 354.

93. Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255.

tected by a substantial inclosure or "usually cultivated or improved."[94] The requirement that land shall be protected by substantial inclosure to acquire title by adverse possession without color of title should be applied with reference to the facts of each case.[95]

In Wisconsin it has been held that a statute of this nature does not render it imperative that there should be either inclosure, cultivation, or improvement, and that there can be actual occupancy without any of them,[96] and it has been held that if a usual improvement is relied on to establish adverse possession an inclosure of any character, partly or wholly marking the boundary claimed, or any other method of clearly defining such boundary, accompanied with circumstances satisfactory to a jury to establish the essential facts, is sufficient.[97]

A statute of Texas declaring that a peaceable and adverse possession shall be construed to embrace not more than one hundred and sixty acres, including the improvements, or the number of acres actually inclosed should the same exceed one hundred and sixty acres, although not requiring that all the land in the possession of one who seeks title by limitation should be actually inclosed or improved, calls for adverse possession thereof which necessarily includes a claim to all of it, the statute never contemplating the conferring of rights where none were claimed, and adverse possession may extend to an entire tract of land not exceeding one hundred and sixty acres, although all of it was not actually inclosed.[98]

[§ 15] **(2) Requisites and Sufficiency of Inclosure—(a) Inclosure Must Be Substantial.** Where an inclosure is relied on to establish adverse possession, it must be of a substantial character, so as to be a protection against outside interference in adapting the premises to some suitable use.[99] Its sufficiency depends somewhat upon the character of the land inclosed.[1] In the case of land used for pasturage[2] or agricultural purposes,[3] the fence must be of such a character as to afford reasonable protection against the intrusion of cattle.[4] An inclosure, however, need not be such as to prevent persons from climbing over or breaking in.[5] An inclosure of the land by felling trees and lapping them one upon another,[6] or by the erection of a

94. U. S.—Woodruff v. North Bloomfield Gravel Min. Co., 18 Fed. 753.
Fla.—Michigan Trust Co. v. Canada, 61 S 123; Baugher v. Boley, 63 Fla. 75, 58 S 980.
Ida.—Brown v. Brown, 18 Ida. 345, 110 P 269.
Mont.—Lockey v. Horsky, 4 Mont. 457, 2 P 19.
N. Y.—Matter of Lent, 152 App. Div. 868, 137 NYS 1052; Wiechers v. McCormick, 122 App. Div. 860, 107 NYS 835; McFarlane v. Kerr, 23 N. Y. Super. 249; McAvoy v. Cassidy, 8 Misc. 595, 29 NYS 321.
Utah.—Funk v. Anderson, 22 Utah 238, 61 P 1006.

95. Baugher v. Boley, 63 Fla. 75, 58 S 980.
[a] **What amounts to substantial inclosure.**—(1) Although there be occasional breaks for roads and standing water in a fence, yet it may be a substantial inclosure when there has been for the full statutory period a conspicuous effort to maintain a fence around the land commensurate with the attending circumstances for the obvious purpose of exercising rights of ownership. Baugher v. Boley, 63 Fla. 75, 58 S 980. (2) Where lands are wild and uncultivated and are used for pasturage or for obtaining timber or fuel, a substantial inclosure might consist of a wire fence sufficient to indicate a purpose to claim the ownership and use of the land and to protect it from passing vehicles, riders, or stock. Baugher v. Boley, 63 Fla. 75, 58 S 980. (3) Where land claimed by adverse possession was used in connection with an adjoining tract, and both were inclosed together until the adjoining tract was put to different use, when a partition fence was built, it constituted a sufficient inclosure of the land under the statute to give title by adverse possession. Mansfield v. Neff, (Utah) 134 P 1160.
[b] **In California and Louisiana** inclosure is necessary where there is no color of title. Mattes v. Hall, 21 Cal. A. 552, 132 P 295; Albert Lumber Co. v. Hanson Cypress Co., 130 La. 772, 58 S 567.
[c] **In Tennessee,** in order to obtain the benefit of Act (1819) c 28 § 2, a person in actual possession of land for seven years without title must actually occupy the land by a definite and notorious inclosure. Dyche v. Gass, 3 Yerg. 396.

96. Batz v. Woerpel, 113 Wis. 442, 449, 89 NW 516 (where it was said: "The inclosure, cultivation, and improvement so mentioned in the statute are, at most, evidence of such possession and occupancy").

97. Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905.

98. Webb v. Lyerla, 43 Tex. Civ. A. 124, 94 SW 1095.

99. Cal.—Jones v. Hodges, 146 Cal. 160, 79 P 869; Nathan v. Dierssen, 146 Cal. 63, 79 P 739; Polack v. McGrath, 32 Cal. 15; Borel v. Rollins, 30 Cal. 408.
Fla.—Adams v. Fryer, 59 Fla. 112, 52 S 611.
Ida.—Brown v. Brown, 18 Ida. 345, 110 P 269.
Ky.—Helton v. Strubbe, 62 SW 12, 22 KyL 1919; Wohlwend v. Weingardner, 40 SW 928, 19 KyL 429.
N. M.—Johnston v. Albuquerque, 12 N. M. 20, 72 P 9.
N. Y.—Achibald v. New York Cent., etc., R. Co., 157 N. Y. 574, 52 NE 567 [aff 1 App. Div. 251, 37 NYS 336].
Or.—Lais v. Smith, 63 Or. 206, 127 P 26.
Tex.—Sharrock v. Ritter, (Civ. A.) 45 SW 156; Freedman v. Bonner, (Civ. A.) 40 SW 47.
Utah.—Mansfield v. Neff, 134 P 1160.
Wis.—Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905.
[a] **Purpose with which erected.**—(1) Where one claimed title and paid taxes on vacant land for several years, and then, desiring to perfect his title by a fine and common recovery, inclosed the land with a fence and performed the other necessary acts to constitute a disseizin sufficient to support the fine, the fact that the fence was erected purely and only in order that the fine might be levied will not render the disseizin insufficient. McGregor v. Comstock, 17 N. Y. 162. (2) Where the land in dispute is within the boundaries of defendant's deed, a fence erected by him within his lines and for his own purposes is not an inclosure of plaintiff, an adjoining owner, and hence affords no evidence of adverse possession in the latter. Storr v. James, 84 Md. 282, 35 A 965. And see Ebersol v. Trainor, 81 Ill. A. 645. (3) Where land was claimed by actual possession and inclosure in fences, and was bounded on one side by a pond and on the other sides by other lands to which claimant had good title, although his fences did in fact surround the land in question on all sides except that next the pond, it was held to have been properly left to the jury to determine whether they were erected by claimant for the purpose of inclosing the land in controversy, or merely for the protection of his own. Dennett v. Crocker, 8 Me. 239.

1. Baugher v. Boley, 63 Fla. 75, 58 S 980; Koch v. Ellwood, 138 App. Div. 584, 123 NYS 502; Bolton v. Schriever, 49 N. Y. Super. 168.

2. Sharrock v. Ritter, (Tex. Civ. A.) 45 SW 154.

3. Polack v. McGrath, 32 Cal. 15.
[a] **Sufficient fence.**—A fence need not be so high, strong, and close as to preclude the possibility of being broken, but only such a fence as a prudent farmer erects to protect his growing crops; but it has been held that a fence made of posts five feet high and set eight feet apart and joined by two boards is not a sufficient inclosure. Polack v. McGrath, 32 Cal. 15.
[b] **Suffering fence to go to decay.**—(1) Placing a fence, consisting of small posts with two rails nailed on, around a piece of land without actually occupying the land or any part of it, and suffering the fence to go to decay in a year or two, so that it will not keep out cattle, is not sufficient to constitute prima facie evidence of title to the land by actual possession as against one who enters into the actual occupation and possession of a portion of the land after the fence is broken down. Borel v. Rollins, 30 Cal. 408. (2) But a fence which the owner attempts to keep in repair constitutes an actual inclosure for the purpose of adverse possession, although a plank is sometimes off or a panel down. Hillman v. White, 44 SW 111, 19 KyL 1682.
[c] **Inclosing uncultivated land** with a fence consisting of posts seven feet apart and one board six inches wide nailed to the posts, totally insufficient for any purpose except to mark a line, is not sufficient to sustain an action of ejectment as against a party in possession of a part of the tract under a deed of the whole. Baldwin v. Simpson, 12 Cal. 560.

4. Dunn v. Taylor, (Tex. Civ. A.) 143 SW 311; and cases cited in following notes.

5. Polack v. McGrath, 32 Cal. 15; Bolton v. Schriever, 49 N. Y. Super. 168; Seese v. Maumee, 28 Oh. Cir. Ct. 768.

6. Coburn v. Hollis, 3 Metc. (Mass.) 125; Jackson v. Schoonmaker, 2 Johns. (N. Y.) 230 (where it was said that this was too loose a mode of taking possession to be considered adverse possession).

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brush fence,[7] or an inclosure by stakes,[8] or the maintenance of a fence which is "crooked, rickety and dilapidated,"[9] or stretching around a twenty-five hundred acre tract one barbed wire nailed to trees and saplings and a few posts at about four feet from the ground, and under the barbed wire two strands of telephone wire,[10] is not sufficient. In case of submerged lands it has been held that the construction of a logboom by driving piles and connecting them by boomsticks, completely surrounding the submerged tract and constituting a boundary and inclosure for the boom sufficient for all the purposes to which the same was or could be applied, is sufficient.[11] A fence relied on as part of an inclosure, made necessary by statute for the acquisition of title by adverse possession, cannot be disregarded merely because it was a partition fence or became such by the acquisition of adjacent inclosed land.[11½]

[§ 16] **(b) Inclosure Must Be Complete.** The land must be completely inclosed.[12] A partial inclosure of land capable of total inclosure, leaving part of the boundary open, will not suffice.[13] It is not required, however, that the lot should be inclosed on every side by an artificial inclosure; a natural barrier in part may be utilized, provided it be of such a character as, in connection with the fence, will constitute a substantial inclosure of the land,[14] and provided it is sufficient to indicate dominion over the premises and to give notoriety to the claim of possession.[15] Where use of natural barriers in connection with artificial barriers is relied on, "the natural barriers must be so used in connection with artificial barriers as to indicate that they are relied on to inclose the land and to keep out persons desiring access thereto."[16] Where the natural barriers relied on as part of the inclosure constitute the greater part of the inclosure, the inclosure may be deemed insufficient, because of the great extent of the land claimed[17] or of the connection between the artificial and the alleged

7. Hutton v. Schumaker, 21 Cal. 453; Hale v. Glidden, 10 N. H. 397; Smith v. Hosmer, 7 N. H. 436, 28 AmD 354.

[a] **But a brush and pole fence is a substantial inclosure,** the erection of which is sufficient to create an adverse possession. Hill v. Edie, 49 Hun 605, 1 NYS 480 [aff 127 N. Y. 650, 27 NE 856].

8. Slater v. Rawson, 6 Metc. (Mass.) 439.

9. Wohlwend v. Welngardner, 40 SW 928, 19 KyL 429 (especially where the claimant acquiesced in the erection of a building by his neighbor over the line indicated).

10. Adams v. Fryer, 59 Fla. 112, 52 S 611.

11. Allen v. McKay, 120 Cal. 332, 52 P 828.

11½. Howard v. Skolant, (Tex. Civ. A.) 162 SW 978.

12. Morrison v. Chapin, 97 Mass. 72; Doolittle v. Tice, 41 Barb. (N. Y.) 181; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255. See McIntyre v. Thompson, 1 Ont. L. 163. Compare Baugher v. Boley, 63 Fla. 75, 58 S 980 (occasional breaks for roads or water).

[a] **Fencing of two sides.**—(1) Land fenced only on two sides, one of the other sides abutting upon an unfenced highway, and the other indicated only by marked trees, is not protected by a substantial inclosure. Pope v. Hanmer, 74 N. Y. 240. (2) But the fact that a portion of one end of a narrow strip lies open to the highway will not defeat adverse possession where the entire length of the strip was within the fences inclosing claimant's premises and was cultivated as part of them. Hill v. Edie, 49 Hun 605, 1 NYS 480 [aff 127 N. Y. 650, 27 NE 856].

[b] **The fencing of three sides of an oblong or square piece of land** (1) is not a sufficient inclosure to make an adverse possession so as to vest title in a wrongdoer as against the real owner, although such fences exclude the latter from the use and enjoyment of the land. Armstrong v. Risteau, 5 Md. 256, 59 AmD 115. (2) However, it has been held that where plaintiff, claiming title to a lot, incloses it on three sides with a fence, so that it makes a complete inclosure in connection with an adjoining lot, the owner of which makes no claim to the first lot but has given his individual covenant of quiet enjoyment in an executor's deed thereof, there is a substantial inclosure of the lot, within Code Civ. Proc. §§ 370, 372, providing that such an inclosure constitutes adverse possession. Brown v. Doherty, 93 App. Div. 190, 195, 87 NYS 563 (aff 185 N. Y. 383, 78 NE 147, 113 AmSR 915]. In this case it was said, per Laughlin, J.: "The lot was completely inclosed against every one except the plaintiff's father, who makes no claim of title and who was under a personal covenant of quiet enjoyment contained in his deed as executor. In these circumstances the mere fact that the lot was left open on the side toward the premises of the plaintiff's father, which premises were otherwise completely inclosed, does not, we think, deprive the plaintiff of the benefit of the claim that her premises were 'protected by a substantial inclosure.'"

[c] **Leaving opening for convenience' sake.**—If, in an action of ejectment, defendant claims title by possession, and it appears that the fence of his adjoining land was so constructed, and so far extended toward the disputed land, as to give notice to the public and to all concerned that defendant and his grantors claimed to exercise exclusive dominion over the disputed land by extending their fence so as to include this land whenever it should be convenient to complete the inclosure, and that it was left open for the time, for convenience of use, or because it was not then of sufficient importance to be inclosed, and this has been continued for fifteen years, it will be regarded as a sufficient possession to give title. Buck v. Squiers, 23 Vt. 498.

13. Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255.

14. Ark.—Doniphan Lumber Co. v. Case, 87 Ark. 168, 112 SW 208; Dowdle v. Wheeler, 76 Ark. 529, 89 SW 1002, 113 AmSR 106.

Cal.—Goodwin v. McCabe, 75 Cal. 584, 17 P 705; Brumagim v. Bradshaw, 39 Cal. 24.

N. Y.—Sanders v. Riedinger, 30 App. Div. 277, 51 NYS 937 [aff 164 N. Y. 564, mem, 58 NE 1092, mem]; East Hampton v. Kirk, 84 N. Y. 215, 38 AmR 505 (sea); Becker v. Van Valkenburgh, 29 Barb. 319; Sanders v. Riedinger, 19 Misc. 289, 43 NYS 127 (Bronx river); Jackson v. Halstead, 5 Cow. 216. Compare McFarlane v. Kerr, 23 N. Y. Super. 249 (Harlem river).

Tex.—Randolph v. Lewis, (Civ. A.) 163 SW 647; Dunn v. Taylor, (Civ. A.) 107 SW 952 [rev on other grounds 102 Tex. 80, 113 SW 265]; Loring v. Jackson, 43 Tex. Civ. A. 306, 95 SW 19.

Wis.—Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905.

[a] **River.**—(1) A tract of land is sufficiently inclosed where it is fenced on three sides and bounded by a river on the fourth. Sanders v. Riedinger, 19 Misc. 289, 43 NYS 127; Dunn v. Taylor, 102 Tex. 80, 113 SW 265 [rev on other grounds (Civ. A.) 107 SW 952]; Randolph v. Lewis, (Tex. Civ. A.) 163 SW 647; Frazer v. Seureau, (Tex. Civ. A.) 128 SW 649. See also Loring v. Jackson, 43 Tex. Civ. A. 306, 95 SW 19. (2) But land is not sufficiently inclosed where it is inclosed by a creek and river and a fence erected by the claimant from stream to stream, where the fence is not on the land in dispute. Dowdle v. Wheeler, 76 Ark. 529, 89 SW 1002, 113 AmSR 106; Thomas v. Dowdle, (Ark.) 89 SW 1004.

[b] **Ditch and creek.**—Land surrounded in part by a ditch and in part by a branch of a creek is "substantially inclosed." Koch v. Ellwood, 138 App. Div. 584, 123 NYS 502.

[c] **Cliff.**—Where there was a fence on the south and west sides of the premises, and on the east and southeast was a ledge of rocks from two hundred to four hundred feet high, along which there was no artificial fence, it was held that the ledge completed the inclosure as much as a fence would have done. Becker v. Van Valkenburgh, 29 Barb. (N. Y.) 319. To same effect East Hampton v. Kirk, 84 N. Y. 215, 38 AmR 505.

[d] **The high bluff of a river,** fixed in low places so as to turn stock, is a natural barrier, and, where completing the inclosure in connection with fences, is sufficient evidence of adverse possession to support title by limitation. Doniphan Lumber Co. v. Case, 87 Ark. 168, 112 SW 208.

[e] **An inclosure which excludes the party claiming possession** by reason of it and admits the other party cannot be called adverse to the admitted party. Silliman v. Paine, 1 NYS 75.

[f] **Marsh.**—Inclosure of a tract of land in part, one end of which was bounded by a marsh through which cattle could and did enter, is insufficient. McIntyre v. Thompson, 1 Ont. L. 163.

15. Thomas v. U. S., 136 Fed. 159, 69 CCA 157; Thomas v. Dowdle, (Ark.) 89 SW 1004; Dowdle v. Wheeler, 76 Ark. 529, 89 SW 1002, 113 AmSR 106; Goodwin v. McCabe, 75 Cal. 584, 17 P 705.

16. Polk v. Beaumont Pasture Co., 26 Tex. Civ. A. 242, 64 SW 58.

"The boundaries may be artificial in part and natural in part if the circumstances are such as to clearly indicate that the inclosure, partly artificial and partly natural, marks the boundaries of the adverse occupancy." Illinois Steel Co. v. Bilot, 109 Wis. 418, 441, 84 NW 855, 85 NW 402, 83 AmSR 905. "The question, after all in such cases is whether the inclosure, like other acts of possession and claim of ownership, is sufficient to 'fly the flag' over the land, and put the true owner upon notice that his land is held under an adverse claim of ownership." Dowdle v. Wheeler, 76 Ark. 529, 534, 89 SW 1002, 113 AmSR 106.

17. Hyde v. McFaddin, 140 Fed. 433, 72 CCA 655; Brumagin v. Bradshaw, 39 Cal. 24 (fence across neck of large peninsula); Polk v. Beaumont Pasture Co., 26 Tex. Civ. A. 242, 64 SW 58.

[a] **Application of rule.**—Where a large pasture, containing over forty-

natural inclosure.[18]

[§ 17] **(c) Duration of Inclosure.**[19] The inclosure relied on as showing an actual possession must be maintained during the period of limitation.[20] A mere temporary inclosure will not be sufficient.[21]

[§ 18] **(d) Inclosure Including Other Lands—aa. Other Lands Belonging to Claimant.** It is not necessary that the particular tract claimed should be separated by a fence from other land owned or claimed by the party relying on adverse possession, but the two tracts may be fenced in together as one inclosure,[22] and this rule is not affected by the fact that the claimant permits persons, not the owners of the land claimed by adverse possession, to occupy and use it for the purposes for which it is adapted.[23]

[§ 19] **bb. Other Lands Belonging to Third Persons.** But it has been held that when lands of an adjoining owner are placed under a common inclosure with the land claimed by adverse possession, and the lands of such adjoining owner are actually occupied by him, the inclosure is not sufficient.[24] And it has similarly been held that a general inclosure of a large tract of land is not sufficient to constitute an actual and exclusive possession of a specific parcel within it, when it appears that much of the land within the inclosure is not claimed, and that much of it is in the actual occupancy of those claiming and holding adverse possession.[25]

[§ 20] **e. Taking Natural Products of Land—(1) Cutting Timber—(a) In Absence of Statutory Provision—aa. In General.** While evidence of the cutting of timber is of course evidence to be considered, together with other acts of ownership, on the question of actuality of possession,[26] the mere occasional cutting of timber on land is not alone such a possession thereof as will ripen into title by

eight thousand acres, was inclosed by the construction of one fence and the use of natural barriers, consisting of bayous, a lake, a river, and a marsh, which constituted five sixths of the entire barriers, such inclosure is not an actual and visible appropriation of the land sufficient to establish adverse possession, the natural barriers not being of a character to inform all persons that they constituted such barriers. Polk v. Beaumont Pasture Co., 26 Tex. Civ. A. 242, 64 SW 58 [foll Hyde v. McFaddin, 140 Fed. 442, 72 CCA 655, on the same state of facts].

18. Western Pac. R. Co. v. Southern Pac. Co., 151 Fed. 376, 80 CCA 606 [rev 144 Fed. 160]. In this case a tract of tide land, bounded on one side by the shore along which ran railroad tracks owned by the owner of the tract and lying between a training wall built by the United States for the improvement of navigation and a mole built out to deep water in a bay for the passage of railroad trains, neither of which was ever used or claimed to be an inclosing wall or structure, with the fourth side open to the bay, is not "inclosed," within the meaning of Cal. Code Civ. Proc. § 323, so as to be deemed in the actual possession and occupancy of the owner under said section.

19. Temporary breaks in inclosure see infra § 183.

20. Cutting v. Burns, 57 App. Div. 185, 68 NYS 269; Townshend v. Thomson, 60 N. Y. Super. 454, 18 NYS 870; Whittlesey v. Hoppenyan, 72 Wis. 140, 39 NW 355. See also Settegast v. O'Donnell, 16 Tex. Civ. A. 56, 41 SW 84.

21. Cutting v. Burns, 57 App. Div. 185, 68 NYS 269 (holding that the erection of a fence around a house and lot for the protection of property therein and its existence for a few years until destroyed for a bonfire is not sufficient to establish a substantial inclosure as proof of adverse possession).

22. Cal.—Botsford v. Eyraud, 148 Cal. 431, 83 P 1008.

Ida.—Urquide v. Flanagan, 7 Ida. 163, 61 P 514.

Md.—Hall v. Gittings, 2 Harr. & J. 380.

N. Y.—Sanders v. Riedinger, 30 App. Div. 277, 51 NYS 937 [aff 164 N. Y. 564, 58 NE 1092].

Tex.—Church v. Waggoner, 78 Tex. 200, 14 SW 581.

And see as sustaining this view Howison v. Masson, 29 App. (D. C.) 338, which contains a dictum to the effect that the fact that a claimant, by adverse possession of city lots used by him for many years as a truck garden, encroached with his fence upon a public street, the lines of which were not marked, would not prevent the fence from being considered an inclosure of the lots, although he could not acquire title to the street by adverse possession.

[a] **Application of rule.**—A purchased of B a tract of land which was inclosed by a fence. Within the inclosure was a small tract of land not within the description of the deed given by B to A. All the land in the inclosure remained in the possession of, and was occupied, used, and claimed by A for a period of fourteen years. It was held that the facts were sufficient to perfect A's title to the small tract by adverse possession. Urquide v. Flanagan, 7 Ida. 163, 61 P 514.

23. Church v. Waggoner, 78 Tex. 200, 14 SW 581. In this case defendant completed a post and wire fence around lands in which were inclosed all the lands in controversy. It was proved that the pasture contained a few thousand acres not owned or leased by defendant and that a few other people lived inside of and owned cattle that ranged within the inclosure, but that defendant controlled the fence and gates, and that except the cattle of persons permitted by him to remain in the pasture he caused the stock of other people to be turned out and at all times asserted his right to exercise the dominion of an owner over it. It was held that his possession was sufficient on which to acquire title by limitations.

24. Webber v. Wannemaker, 39 Colo. 425, 89 P 780 (holding that where for a time land was fenced in with land belonging to other persons, and for a time it was not fenced at all, the possession was not actual and could not be included in determining the period necessary to give the person in possession title); Doolittle v. Tice, 41 Barb. (N. Y.) 181. See also Hamilton v. Flournoy, 44 Or. 97, 102, 74 P 483 (holding that where the inclosure relied on was common to claimant and to others holding within its limits, and the use, which consisted wholly of pasture of stock, was common as to all, such possession was not actual and was wanting in an essential element to adverse possession). Compare infra § 202.

[a] **Rule explained.**—In Sanders v. Riedinger, 30 App. Div. 277, 280, 51 NYS 937 [aff 164 N.Y. 564, 58 NE 1092], the court referring to Doolittle v. Tice, 41 Barb. (N. Y.) 181, said: "There is to be found in the opinion in that case, in reference to the inclosure required by the statute, the following sentence: 'It must be an inclosure of the lot alone, upon the lines claimed by the party, and not embracing premises adjoining, extending in part a great distance from the lines.' But this must be construed with reference to the subject-matter then before the court. In that case the adjoining premises were neither the property of nor in the possession of the defendant, but belonged to and were occupied by a third person, and there was no fence or barrier between such lands and the lands claimed to be held adversely. It was held that it was insufficient, to constitute an adverse possession, that the property should be inclosed in connection with adjoining lands of another owner. But that is a very different question from inclosing lands in connection with other lands of the occupant. Many times, if not in the majority of cases, the question of adverse possession arises with reference to a disputed boundary line. If, in such cases, it were necessary, to constitute a good statutory possession, that there should be a fence on the true line, so as to separate the property in dispute from the remainder of the defendant's premises, the defense of adverse possession could rarely prevail. If such a fence were erected, we should regard it as almost conclusive that the defendant knew his true line and was not entitled to anything beyond it." See also Brown v. Doherty, 93 App. Div. 190, 87 NYS 563 [aff 185 N. Y. 383, 78 NE 147, 113 AmSR 915].

25. Walsh v. Hill, 41 Cal. 571; Bloomfield v. Coziah, 160 Ill. A. 291. See also as tending to sustain this view Hyde v. MacFaddin, 140 Fed. 433, 72 CCA 655 (a case, however, based mainly on the ground that under the particular circumstances artificial barriers were not sufficient to satisfy the requirements of the statute).

[a] **In Texas** (1) it has been held that Sayles Civ. St. Suppl. art 3195a declaring that a tract of land owned by one person, "entirely surrounded" by a tract or tracts owned, claimed, or fenced by another, is not in the adverse possession of the latter unless separated from the circumscribing land by a fence has no application to a case where the land owned by one is merely adjacent to, and not surrounded by, that claimed and fenced by another. Green v. Boon, 14 Tex. Civ. A. 307, 37 SW 187. (2) Under the act of 1891, inclosure of a tract of five hundred and fifty-five acres in a common inclosure of ten thousand acres embracing several tracts belonging to others is not such possession as will set the statute in motion; "after the passage of the Act of 1891, such inclosure would not support the defense of limitation where it included more than 5,000 acres, unless there was separation or segregation of the land claimed from the other tracts, or actual possession, or cultivation of one-tenth of the land claimed." Flack v. Bremen, 45 Tex. Civ. A. 473, 480, 101 SW 537 (per Reese, J.). But see Texas cases cited infra § 202.

26. Ala.—Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45; Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 S 43.

Ark.—Crease v. Lawrence, 48 Ark. 312, 3 SW 196.

Del.—Doe v. Roe, 80 A 352; Bartholomew v. Edwards, 6 Del. 17.

Ill.—Johns v. McKibben, 156 Ill. 71, 40 NE 449; Horner v. Reuter, 152 Ill. 106, 38 NE 747; Fisher v. Bennehoff, 121 Ill. 426, 13 NE 150; Scott v. Delany, 87 Ill. 146.

adverse possession against the true owner,[27] and | this is especially true where the land is suited for

Ind.—Worthley v. Burbanks, 146 Ind. 534, 45 NE 779.

Iowa.—Brett v. Farr, 66 Iowa 684, 24 NW 275; Forey v. Bigelow, 56 Iowa 381, 9 NW 313; Spitler v. Scofield, 43 Iowa 571; Colvin v. McCune, 39 Iowa 502; Clement v. Perry, 34 Iowa 564.

Mich.—Merritt v. Westerman, 165 Mich. 535, 131 NW 66; Kingston v. Guck, 155 Mich. 264, 118 NW 967; Henry v. Henry, 122 Mich. 6, 80 NW 800; Murray v. Hudson, 65 Mich. 670, 32 NW 889; Curtis v. Campbell, 54 Mich. 340, 20 NW 69.

Mo.—Goltermann v. Schiermeyer, 111 Mo. 404, 19 SW 484, 20 SW 161; St. Louis Merchants' Bank v. Clavin, 60 Mo. 559; Holliday-Klotz Land, etc., Co. v. Markham, 96 Mo. A. 51, 75 SW 1121.

N. Y.—Bennett v. Kovarick, 44 App. Div. 629, 60 NYS 1133 [aff 23 Misc. 73, 51 NYS 752].

N. C.—Tredwell v. Reddick, 23 N. C. 56.

Pa.—Wolf v. Ament, 1 Grant 150, 33 Pa. 331; Criswell v. Altemus, 7 Watts 565.

Wash.—Bellingham Bay Land Co. v. Dibble, 4 Wash. 764, 31 P 30.

Wis.—Finn v. Wisconsin River Land Co., 72 Wis. 546, 40 NW 209.

Ont.—McGregor v. Keiller, 9 Ont. 677.

27. U. S.—Northern Pac. R. Co. v. Littlejohn, 198 Fed. 760; Bump v. Butler County, 93 Fed. 290.

Ala.—Williams v. Lyon, 61 S 299; Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45; Croft v. Thornton, 125 Ala. 391, 28 S 84; Adler v. Prestwood, 122 Ala. 367, 24 S 999; Wiggins v. Kirby, 106 Ala. 262, 17 S 354; Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Alexander v. Savage, 90 Ala. 383, 8 S 93; Burks v. Mitchell, 78 Ala. 61; Childress v. Calloway, 76 Ala. 128; Rivers v. Thompson, 46 Ala. 335; Farley v. Smith, 39 Ala. 38. And see Rucker v. Jackson, 60 S 139.

Ark.—Langhorst v. Rogers, 88 Ark. 318, 114 SW 915; Files v. Jackson, 84 Ark. 587, 106 SW 950; Earle Imp. Co. v. Chatfield, 81 Ark. 296, 99 SW 84; Connerly v. Dickinson, 81 Ark. 258, 99 SW 82; Boynton v. Ashabranner, 75 Ark. 415, 88 SW 566, 1011, 91 SW 20; Driver v. Martin, 68 Ark. 551, 60 SW 651.

Cal.—Stockton v. Garfrias, 12 Cal. 315.

Conn.—Johnson v. Gorham, 38 Conn. 513.

Fla.—Lightfoot v. Head, 64 Fla. 364, 60 S 752; Hyer v. Griffin, 55 Fla. 560, 46 S 635.

Ga.—McCook v. Crawford, 114 Ga. 337, 40 SE 225; Hilton v. Singletary, 107 Ga. 821, 33 SE 715; Strong v. Powell, 92 Ga. 591, 20 SE 6; Hall v. Gay, 68 Ga. 442; Carrol v. Gillion, 33 Ga. 539; Durham v. Holeman, 30 Ga. 619; Long v. Young, 28 Ga. 130; Keller v. Dillon, 26 Ga. 701; Watts v. Griswold, 20 Ga. 732, 65 AmD 647; Royall v. Lisle, 15 Ga. 545, 60 AmD 712.

Ill.—White v. Harris, 206 Ill. 584, 69 NE 519; Travers v. McElvain, 200 Ill. 377, 65 NE 623; Travers v. McElvain, 181 Ill. 382, 55 NE 135; Harms v. Kransz, 167 Ill. 421, 47 NE 746; Horner v. Reuter, 152 Ill. 106, 38 NE 747; Austin v. Rust, 72 Ill. 491.

Ky.—Kelley v. Bicknell, 147 Ky. 401, 144 SW 88; Muse v. Payne, 144 Ky. 30, 137 SW 788; Ramsey v. Thomas, 140 Ky. 356, 131 SW 11; Arthur v. Humble, 140 Ky. 56, 130 SW 958; Ward v. Middleton, 124 SW 828; Auxier v. Herald, 96 SW 915, 29 KyL 1093; Rogers v. Cuyler, 89 SW 2, 28 KyL 129; Hall v. Blanton, 77 SW 1110, 25 KyL 1400; Combs v. Combs, 72 SW 8, 24 KyL 1691; Patterson v. T. J. Moss Tie Co., 71 SW 930, 24 KyL 1571; Barr v. Potter, 57 SW 478, 22 KyL 416; Ohio, etc., R. Co. v. Wooten, 46 SW 681, 20 KyL 383; Wait v. Gover, 12 SW 1068, 11 KyL 750; Degman v. Elliott, 8 SW 10; Caskey v. Lewis, 15 B. Mon. 27; Wilson v. Stivers, 4 Dana 634; Smith v. Morrow, 7 J. J. Marsh 442; Bradford v. Southgate, 4 KyL 890.

La.—LaCroix v. Crane, 133 La. 227, 62 S 657; Frederick v. Goodbee, 120 La. 783, 45 S 606; St. Paul v. Louisiana Cypress Lumber Co., 116 La. 585, 40 S 906; Gardner v. Leger, 5 La. Ann. 594; Macarty v. Foucher, 12 Mart. 11.

Me.—Smith v. Sawyer, 108 Me. 485, 81 A 868; Millett v. Mullen, 95 Me. 400, 49 A 871; Fleming v. Katahdin Pulp, etc., Co., 93 Me. 110, 44 A 378; Hudson v. Coe, 79 Me. 83, 8 A 249, 1 AmSR 288; Chandler v. Wilson, 77 Me. 76; Frye v. Gragg, 35 Me. 29.

Md.—Thistle v. Frostburg Coal Co., 10 Md. 129.

Mass.—Morris v. Callanan, 105 Mass. 129; Parker v. Parker, 1 Allen 245; Slater v. Jepherson, 6 Cush. 129.

Mich.—Chabert v. Russell, 109 Mich. 571, 67 NW 902. See also McKinnon v. Meston, 104 Mich. 642, 62 NW 1014.

Minn.—Kreuger v. Market, 124 Minn. 393, 145 NW 30; Bazille v. Murray, 40 Minn. 48, 41 NW 238; Washburn v. Cutter, 17 Minn. 361.

Mo.—Crain v. Peterman, 200 Mo. 295, 98 SW 600; Weir v. Cordz-Fisher Lumber Co., 186 Mo. 388, 85 SW 341; Robinson v. Claggitt, 149 Mo. 153, 50 SW 280; Carter v. Hornback, 139 Mo. 238, 40 SW 893; Herbst v. Merrifield, 133 Mo. 267, 34 SW 571; Nye v. Alfter, 127 Mo. 529, 30 SW 186; Goltermann v. Schiermeyer, 125 Mo. 291, 28 SW 616; Pharis v. Jones, 122 Mo. 125, 26 SW 1032; Cook v. Farrah, 105 Mo. 492, 16 SW 692; Pike v. Robertson, 79 Mo. 615; McQuiddy v. Ware, 67 Mo. 74; Ware v. Johnson, 55 Mo. 500; Musick v. Barney, 49 Mo. 458; Morgan v. Pott, 124 Mo. A. 371, 101 SW 717. But see Powell v. Davis, 54 Mo. 315.

N. H.—Cushing v. Miller, 62 N. H. 517; Livingston v. Pendergast, 34 N. H. 544; Hale v. Glidden, 10 N. H. 397.

N. J.—Townsend v. Reeves, 44 N. J. L. 525; Cornelius v. Giberson, 25 N. J. L. 1.

N. Y.—Mission of Immaculate Virgin v. Cronin, 143 N. Y. 524, 38 NE 964; Wiechers v. McCormick, 122 App. Div. 860, 107 NYS 835; Erkson v. Johnston, 8 App. Div. 31, 40 NYS 401; Lane v. Gould, 10 Barb. 254.

N. C.—Campbell v. Miller, 165 N. C. 51, 80 SE 974; Shaffer v. Gaynor, 117 N. C. 15, 23 SE 154; Hamilton v. Icard, 114 N. C. 532, 19 SE 607; McLean v. Smith, 114 N. C. 356, 19 SE 279; Cox v. Ward, 107 N. C. 507, 12 SE 379; Williams v. Wallace, 78 N. C. 354; Bartlett v. Simmons, 49 N. C. 295; Loftin v. Cobb, 46 N. C. 406, 62 AmD 173; Green v. Harman, 15 N. C. 158.

Or.—Wheeler v. Taylor, 32 Or. 421, 52 P 183, 67 AmSR 540.

Pa.—Boyer v. Lengel, 224 Pa. 357, 73 A 323; Lackawanna Lumber Co. v. Kelley, 221 Pa. 238, 70 A 724; Henry v. Huff, 143 Pa. 548, 22 A 1046; Heller v. Peters, 140 Pa. 648, 21 A 416; Olewine v. Messmore, 128 Pa. 470, 18 A 495; Douglass v. Lucas, 63 Pa. 9; Rifener v. Bowman, 53 Pa. 313; Wheeler v. Winn, 53 Pa. 122, 91 AmD 186; Ewing v. Alcorn, 40 Pa. 492; Hole v. Rittenhouse, 37 Pa. 116; Hughes v. Stevens, 36 Pa. 320; Washabaugh v. Entriken, 34 Pa. 74, 36 Pa. 513; Beaupland v. McKeen, 28 Pa. 124, 70 AmD 115; Pentz v. Corley, 4 Walk. 368; Murphy v. Springer, 1 Grant Cas. 73; Sorber v. Willing, 10 Watts 141; Wickham v. Sutton, 33 Pa. Super. 868.

S. C.—Slice v. Derrick, 31 S. C. L. 627; Porter v. Kennedy, 26 S. C. L. 354; McBeth v. Donnelly, 23 S. C. L. 177; White v. Reid, 11 S. C. L. 534; Bailey v. Irby, 11 S. C. L. 343, 10 AmD 609.

Tenn.—Lieberman v. Clark, 114 Tenn. 117, 85 SW 258, 69 LRA 732; Sequatchie Valley Coal, etc., Co. v. Coppinger, 95 Tenn. 526, 32 SW 465; Hicks v. Tredericks, 9 Lea 491; Pullen v. Hopkins, 1 Lea 741; Call v. Cozart, (Ch. A.) 48 SW 812.

Tex.—Broom v. Pearson, 98 Tex. 469, 85 SW 790, 86 SW 733; Boone v. Hulsey, 71 Tex. 176, 9 SW 531; Griffin v. Ford, 60 Tex. 501; Stegall v. Huff, 54 Tex. 193; Noland v. Weems, (Civ. A.) 141 SW 1031; Davis v. George, (Civ. A.) 136 SW 506; Haynes v. Texas, etc., R. Co., 51 Tex. Civ. A. 49, 111 SW 427; Perry v. Stevens, 44 Tex. Civ. A. 108, 97 SW 1075; Soape v. Doss, 18 Tex. Civ. A. 649, 45 SW 387; Cook v. Lister, (Civ. A.) 38 SW 380.

Vt.—Demerett v. Parker, 82 Vt. 59, 71 A 833; Wells v. Austin, 59 Vt. 157, 10 A 405; Swift v. Gage, 26 Vt. 224.

Va.—Whealton v. Doughty, 112 Va. 649, 656, 72 SE 112 [quot Cyc]; Anderson v. Harvey, 10 Gratt. (51 Va.) 386; Pasley v. English, 5 Gratt. (46 Va.) 141.

W. Va.—Chilton v. White, 78 SE 1048; State v. Moore, 71 W. Va. 285, 76 SE 461; Wade v. McDougle, 59 W. Va. 113, 52 SE 1026; Wilson v. Braden, 56 W. Va. 372, 49 SE 409, 107 AmSR 927; Yokum v. Fickey, 37 W. Va. 762, 17 SE 318; Oney v. Clendenin, 28 W. Va. 34.

Wis.—Kurz v. Miller, 89 Wis. 426, 62 NW 182; Austin v. Holt, 32 Wis. 478; Ladd v. Hildebrant, 27 Wis. 135, 9 AmR 445.

Can.—Wood v. LeBlanc, 34 Can. S. C. 627; McConaghy v. Denmark, 4 Can. S. C. 609.

N. B.—Hovey v. Long, 33 N. B. 462; Gidney v. Bates, 10 N. B. 395; Doe v. White, 3 N. B. 595.

N. S.—Ogilvie v. Grant, 41 N. S. 1.

Ont.—Reynolds v. Trivett, 7 Ont. L. 623, 3 OntWR 463; Huffman v. Rush, 7 Ont. L. 346, 3 OntWR 43; McIntyre, v. Thompson, 1 Ont. L. 163; Kay v. Wilson, 2 Ont. A. 133 [aff 24 Grant Ch. (U. C.) 212]; Hartley v. Maycock, 28 Ont. 508; Allison v. Rednor, 14 U. C. Q. B. 459.

Compare Brett v. Farr, 66 Iowa 684, 24 NW 275 (holding the possession sufficient where claimant used the land continuously to supply wood, rails, and other timber, and the land had never been used for any other purpose); Forey v. Bigelow, 56 Iowa 381, 9 NW 313 (holding the possession sufficient where claimant cut timber and hay from uninclosed land and let the right of such cutting to others).

[a] **The cutting of rail, post, building, and board timber, and firewood** on land is not alone sufficient to constitute adverse possession. Langhorst v. Rogers, 88 Ark. 318, 114 SW 915.

[b] **The occasional taking of firewood** from land for domestic use is not such an act of adverse possession as to indicate that the persons hauling the wood were claiming title to the tract of land. Petticrew v. Greenshields, 61 Wash. 614, 112 P 749.

[c] **The cutting of trees in small quantities and at long intervals on an isolated tract of swamp land,** unaccompanied by external and public signs indicating intention to hold possession, does not constitute that actual, corporal possession required as the basis of the prescription of ten and thirty years. Frederick v. Goodbee, 120 La. 783, 45 S 606; Dowdell v. Orphans' Home Soc., 114 La. 49, 38 S 16. "Isolated acts of this kind, leaving hardly a trace in a virgin forest, do not constitute the 'corporeal detention' of the thing which is required to initiate the current of prescription" (per Land, J.).

[d] **Interference.**—Recovering possession of an interference between a seated and an unseated tract of land in an action by the owner of the seated tract against a mere intruder, and cutting timber on the interference without actual occupancy thereof, will not, under the statute of limitations, protect the owner of the seated tract in ejectment by the owner of the unseated tract having the better title to such interference. McArthur v. Kitchen, 77 Pa. 62. To same effect Olewine v. Messmore, 128 Pa. 470, 18 A 495.

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other beneficial uses.[28] Such acts, it has been said, "were mere successive acts of trespasses, nothing more."[29]

[§ 21] **bb. In Connection with Other Acts.** So the additional circumstances that the claimant made a survey of the tract and marked its boundaries,[30] or paid taxes on it[31] and excluded trespassers,[32] or on his removal from the neighborhood asked others to do so,[33] or cultivated one[34] or two[35] crops on a small part of the tract, or buried potatoes there for several years,[36] or made bricks,[37] or boiled sugar,[38] or cleared up the land,[39] or pastured hogs or cattle there occasionally,[40] or sold to others the right to cut timber on the land and herded cattle on it,[41] or built a cabin on the land without actual residence thereon,[42] or offered to sell the land,[43] or made a road on the land to enable him to remove the timber,[44] or did other similar acts,[45] will not constitute actual possession. But if a person enters upon land and uses it thereafter as a wood lot appurtenant to his farm, in the usual and ordinary way, and exercises such acts of ownership over it as are necessary to enjoy it, such acts have been held to amount to actual possession.[46]

[§ 22] **(b) Under Special Statutes.** In some jurisdictions it has been provided by statute that uninclosed land shall be deemed possessed when it has been used for the supply of fuel or fencing

28. Childress v. Calloway, 76 Ala. 128; Copeland v. Murphey, 2 Coldw. (Tenn.) 64. And see Southern Iron, etc., Co. v. Schwoon, 124 Tenn. 176, 135 SW 785 (holding that where one for many years cut timber on land in controversy, but the evidence showed that the land was susceptible of other forms of possession, there was no adverse possession, although the adverse party alleged that the land was valuable principally for its timber).

29. Gent v. Lynch, 23 Md. 58, 65, 87 AmD 558 [quot with appr Peters v. Tilghman, 111 Md. 227, 73 A 726] (per Bartol, J.).

[a] **Cutting timber and firewood at intervals under a claim of title is a trespass** only as against the true title or actual possession of an adversary, and does not set limitations running in favor of such trespassers. Hillman Land, etc., Co. v. Marshall, (Ky.) 119 SW 180.

30. Slice v. Derrick, 31 S. C. L. 627. Compare also infra § 33.

31. Scott v. Mills, 49 Ark. 266, 4 SW 908; Lacroix v. Crane, 133 La. 227, 62 S 657; Brannock v. McHenry, 252 Mo. 1, 158 SW 385; Stone v. Perkins, 217 Mo. 586, 117 SW 717; Call v. Cozart, (Tenn. Ch. A.) 48 SW 312; Pullen v. Hopkins, 1 Lea (Tenn.) 741. And see Howell v. Metropolitan Land Co., 127 La. 399, 53 S 664 (holding that acts of possession of swamp land, consisting of occasionally cutting cordwood and making staves, and the hauling or floating out of the same, and the payment of taxes in some years, are insufficient to show possession which will ripen into title by prescription). See also infra §§ 30, 31.

32. Pharis v. Jones, 122 Mo. 125, 26 SW 1032; Morgan v. Pott, 124 Mo. A. 371, 101 SW 717.

[a] **Posting against trespassers.**— Where plaintiff never had any actual possession of certain land in controversy, nor exercised acts of ownership or occupancy over the same, except to cut rails, boards, and some pine or light wood from the same, and he testified that he posted the land against trespassers, such acts were insufficient to sustain a finding that he had acquired title by adverse possession. A. W. Stevens Lumber Co. v. Hughes, (Miss.) 38 S 769.

33. Files v. Jackson, 84 Ark. 587, 106 SW 950.

34. Lane v. Gould, 10 Barb. (N. Y.) 254. See also McInnes v. Stewart, 45 N. S. 435.

[a] **Thus** occupancy consisting merely in occasionally cutting and removing timber, and in raising one crop of turnips, without having inclosed any of the parcel in controversy, is insufficient to confer title. Degman v. Elliott, (Ky.) 8 SW 10; Porter v. Kennedy, 26 S. C. L. 354.

35. Cox v. Ward, 107 N. C. 507, 12 SE 379 (holding that acts during a period of eighteen years, consisting of cultivating a field for two years, occasionally cutting timber, and having an underground distillery in a swamp near the boundary, do not show sufficient open, continuous, adverse possession to go to the jury, it not appearing how long the distillery was used).

36. Miller v. Downing, 54 N. Y. 631.

37. Williams v. Wallace, 78 N. C. 354.

38. Ewing v. Alcorn, 40 Pa. 492; Washabaugh v. Entriken, 34 Pa. 74, 36 Pa. 513. See also Voight v. Meyer, 42 App. Div. 350, 59 NYS 70.

39. Carter v. Hornback, 139 Mo. 238, 40 SW 893. See Slater v. Jephenson, 6 Cush. (Mass.) 129, infra note 45 [a].

40. Royall v. Lisle, 15 Ga. 545, 60 AmD 712; Loftin v. Cobb, 46 N. C. 406, 62 AmD 173; Swift v. Gage, 26 Vt. 224; Whealton v. Doughty, 112 Va. 649, 656, 72 SE 112 [quot Cyc]. See also infra §§ 25, 26.

[a] **Continuous use and occupancy for the time required by law for the purpose of range for cattle and hogs,** and repeated occupation for the purpose of cutting timber, will not alone amount to actual possession of lands, although the lands are so situated as to be unfit for actual physical residence, and unfit for cultivation, and suitable only for the purposes above named. McCook v. Crawford, 114 Ga. 337, 40 SE 225.

41. Crain v. Peterman, 200 Mo. 295, 98 SW 600 (even though done under color and actual claim of title). See Thistle v. Frostburg Coal Co., 10 Md. 129, infra note 45 [a]. But see Forey v. Bigelow, 56 Iowa 381, 9 NW 313.

42. Barr v. Potter, 57 SW 478, 22 KyL 416.

43. Rucker v. Jackson, (Ala.) 60 S 139.

44. Wickham v. Sutton, 33 Pa. Super. 368. See also Talbot v. Cook, 57 Or. 535, 112 P 709.

45. Whealton v. Doughty, 112 Va. 649, 656, 72 SE 11 [quot Cyc]. See cases infra this note.

[a] **Other acts in addition to cutting timber** held not sufficient to constitute actual possession: (1) The taking of dead timber from the land at the rate of two one-horse wagon loads a week, even though during the entire statutory period of seven years, for use as fuel at another place or for sale, no trees being felled for the purpose, and the occasional cutting of fence posts from the land. Hyer v. Griffin, 55 Fla. 560, 46 S 635. (2) Cutting timber and giving permission to others to cut the same, as well as offering to sell the land, going upon it, walking over it, locking up the house upon it, and carrying away the key. Thistle v. Frostburg Coal Co., 10 Md. 129. (3) Cutting timber and trimming trees, as well as in one instance, within twenty years, cutting off entire growth of wood upon the land. Parker v. Parker, 1 Allen (Mass.) 245. (4) Cutting timber for use and sale, as well as clearing the land for cultivation, running lines, and marking them by lapping trees, and selling a part of the land. Slater v. Jepherson, 6 Cush. (Mass.) 129. (5) Cutting such timber as was profitable to remove, protecting the remainder against trespassers, looking after the land, and making log roads. Himmelberger-Harrison Lumber Co. v. McCabe, 220 Mo. 154, 119 SW 357. (6) Cutting rails, as well as paying the taxes for several years, erecting a temporary structure upon the land, openly claiming to own the same, but not occupying, improving, or inclosing it. Musick v. Barney, 49 Mo. 458. (7) Cutting wood for use on farm and for sale, cutting road through premises, and inclosing two sides with a single wire. Wiechers v. McCormick, 122 App. Div. 860, 107 NYS 835. (8) Where a separate tract of land, half prairie and half timber, might be easily inclosed, being fit for cultivation, the erection of a temporary structure, pasturing hogs, cutting timber, and payment of taxes under claim of ownership by one residing a mile and a half from it. Cook v. Farrah, 105 Mo. 492, 16 SW 692. (9) Occasional cutting of sod or timber, pasturing cows, or a fence once built but suffered to decay, or destroyed by persons stealing and burning its rails, leaving nothing but a line of posts, thus breaking the continuity of possession. Wade v. McDougle, 59 W. Va. 113, 127, 52 SE 1026 [cit Cyc]. (10) Taking hay and berries. Smith v. Sawyer, 108 Me. 485, 81 A 868.

46. Hubbard v. Kiddo, 87 Ill. 578; Brooks v. Bruyn, 18 Ill. 539; Colvin v. McCune, 39 Iowa 502; Henry v. Henry, 122 Mich. 6, 80 NW 800; Murray v. Hudson, 65 Mich. 670, 32 NW 889; Goltermann v. Schiermeyer, 111 Mo. 404, 19 SW 484, 20 SW 161.

[a] **Other acts in addition to cutting timber** held sufficient to constitute adverse possession: (1) Possession of rough lands mostly unfit for cultivation, and payment of all the taxes thereon which were taxed in claimant's name, cutting lumber therefrom, blazing the outlines of it, claiming ownership, and offering it for sale. Moore v. Hinkle 151 Ind. 343, 50 NE 822. (2) An entry upon land under a deed, and possession by leasing parts of it and occasionally cutting wood upon it during the period required by the statute, although for a period of a few years no acts of ownership were exercised. Menkens v. Ovenhouse, 22 Mo. 70. (3) One who took possession of timberlands and built a shanty thereon, cut timber at various times preparatory to cultivation, and remained in possession off and on for the statutory period, since he actually occupied the land in the only manner in which, and for the only purposes for which, it was reasonably capable of being used and occupied. Backus v. Burke, 63 Minn. 272, 65 NW 459. (4) The occupation of pine land by annually making turpentine on it, being such an actual possession as will oust a constructive possession by one claiming merely under a superior paper title. Bynum v. Carter, 26 N. C. 310. See also Flannery v. Hightower, 97 Ga. 592, 25 SE 371. (5) So it has been held that where those under whom defendants in ejectment claim title to an island in a nonnavigable river have been in possession for over fifty years under color of title consisting of ownership and possession of the mainland on both sides of the river, and have taken timber from the land constantly for various purposes and pastured goats and cattle there, and cleared a part of the land, this was sufficient actual possession under color of title to ripen into an indefeasible title. Wall v. Wall, 142 N. C. 387, 55 SE 283. (6) And that adverse possession of unproductive

timber for the purpose of husbandry or the ordinary use of the occupant.[47] Using premises for a wood lot, the adverse possessor taking wood therefrom for his ordinary use annually for the full statutory period, "satisfies to the letter" statutes of this character.[48] So the cutting of firewood for the use of his family by an agent having the care and control of the land satisfies the requirements of these statutes, as this amounts to an act of possession by the principal.[49] The statutes do not apply, however, when the timber has been cut for general sale.[50]

[§ 23] **(2) Deadening Timber.** The mere deadening of the timber on land without other acts of ownership thereafter does not show an actual possession.[51]

[§ 24] **(3) Cutting Grass.** While the annual cutting of grass is evidence to be considered with other acts of dominion to show an actual possession,[52] the occasional or periodical entry upon land to cut wild grass is not an act manifesting a purpose to take possession as owner, and does not constitute actual possession.[53] So such cutting of grass, when taken in connection with other acts, such as letting stock run over the pasture on it,[54] or tying horses thereon and unloading lumber from cars and piling it thereon,[55] or other similar acts,[56] will not, as a rule, constitute actual possession. Construing the New York statute,[57] however, it has been held that where the claimant openly and notoriously, for a sufficient length of time to create the presumption of a grant, cut and removed yearly for purposes of husbandry the hay which grew on salt meadow land, the only purpose for which the land could be used there was such an act of ownership as to constitute a technical adverse possession within a statute providing that land is deemed to have been possessed where it has been "usually cultivated or improved" by one claiming title founded upon a written instrument.[58]

[§ 25] **(4) Grazing Live Stock—(a) In General.** While grazing live stock over land is of course to be considered with other acts of dominion to show a possession,[59] the mere occupancy of land by grazing live stock upon it, without substantial inclosures or other permanent improvements, is not sufficient to support a plea of limitations,[60] and this is

lands, consisting of barren sand hills cut up by sloughs, is shown by recording the deed under which the occupant claims, cutting all the timber of any value thereon, having the land surveyed and boundary lines grubbed out and staked, going upon the land at intervals, claiming absolute ownership, clearing a small portion, building a brush fence around the portion cleared, employing agents in the neighborhood of the land to look after it, and paying taxes, without proof of actual occupation. Worthley v. Burbanks, 146 Ind. 534, 45 NE 779.

47. Murphy v. Dafoe, 18 S. D. 42, 99 NW 86; Pitman v. Hill, 117 Wis. 318, 94 NW 40; Pepper v. O'Dowd, 89 Wis. 538; Du Pont v. Davis, 35 Wis. 631.

[a] **In Maine** it has been expressly enacted that woodland belonging to farm land may be deemed actually possessed where it is used as a wood lot in the ordinary management of the farm. Adams v. Clapp, 87 Me. 316, 32 A 911; Tilton v. Hunter, 24 Me. 29.

48. Putman v. Hill, 117 Wis. 318, 94 NW 40. See also Bardin v. Commercial Ins., etc., Co., 82 S. C. 358, 64 SE 165.

49. Murphy v. Dafoe, 18 S. D. 42, 99 NW 86.

50. Munro v. Merchant, 26 Barb. (N. Y.) 383 [rev on other grounds 28 N. Y. 9]. See also Du Pont v. Davis, 35 Wis. 631.

51. Scott v. Mills, 49 Ark. 266, 4 SW 908; Durham v. Holeman, 30 Ga. 619.

52. U. S.—Merrill v. Tobin, 30 Fed. 738.

Del.—Bartholomew v. Edwards, 6 Del. 17.

Iowa.—Dice v. Brown, 98 Iowa 297, 67 NW 253; Dorweiler v. Callanan, 91 Iowa 299, 57 NW 74.

Kan.—Guinn v. Spillman, 52 Kan. 496, 35 P 13.

Nebr.—Lantry v. Parker, 37 Nebr. 353, 55 NW 962.

N. C.—Burton v. Carruth, 18 N. C. 2 (cutting grass on meadow, stacking same, and fencing stacks).

53. Ill.—McCloskey v. Hayden, 169 Ill. 297, 48 NE 432; Hayden v. McCloskey, 161 Ill. 351, 43 NE 1091.

Kan.—Dickinson v. Bales, 59 Kan. 224, 52 P 447.

Ky.—Barr v. Potter, 57 SW 478, 22 KyL 416.

Me.—Smith v. Sawyer, 108 Me. 485, 81 A 868; Hudson v. Coe, 79 Me. 83, 8 A 249, 1 AmSR 288.

Mass.—Com. v. Roxbury, 9 Gray 451; Kennebeck Purchase v. Springer, 4 Mass. 416, 3 AmD 227.

Minn.—Sage v. Morosick, 69 Minn. 167, 71 NW 930; Lambert v. Stees, 47 Minn. 141, 49 NW 662; Bazille v. Murray, 40 Minn. 48, 41 NW 238.

N. H.—Livingston v. Pendergast, 34 N. H. 544.

N. Y.—Roberts v. Baumgarten, 110 N. Y. 380, 18 NE 96 [aff 51 N. Y. Super. 482]; Price v. Brown, 101 N. Y. 669, 5 NE 434 (occasional foray for thatch); Bliss v. Johnson, 94 N. Y. 235 (cutting grass on side of highway); Wheeler v. Spinola, 54 N. Y. 377; Scheer v. Long Island R. Co., 127 App. Div. 267, 111 NYS 569 (railway company cutting weeds and grass outside of right of way); Doolittle v. Tice, 41 Barb. 181.

Va.—Whealton v. Doughty, 112 Va. 649, 656, 72 SE 112 [quot Cyc].

N. B.—Cairns v. Horsman, 35 N. B. 436; Hovey v. Long, 33 N. B. 462.

N. S.—McDonald v. McIsaac, 38 N. S. 163.

Ont.—McIntyre v. Thompson, 1 Ont. L. 163.

54. Markusen v. Mortensen, 105 Minn. 10, 116 NW 1021; Sage v. Larson, 69 Minn. 122, 71 NW 923.

55. Illinois Cent. R. Co. v. Hasenwinkle, 232 Ill. 224, 83 NE 815, 15 LRANS 129.

56. See infra this note.

[a] **Other similar acts.**—(1) The facts that a person cuts hay on uninclosed land, lets his cattle roam over and pasture upon it just as they pasture on adjacent uninclosed lands, and prevents people from cutting and stealing wood on the land, are not sufficient to constitute adverse possession. Lambert v. Stees, 47 Minn. 141, 49 NW 662. (2) But the fact that defendant and his predecessors in title gathered seaweed on inclosed land, while not alone evidence of adverse possession, may be evidence of such possession when taken in connection with the fact that they prevented other freeholders of the town from gathering seaweed there and did so under claim of exclusive right as owners, which claim was known to plaintiffs. East Hampton v. Kirk, 84 N. Y. 215, 38 AmR 505; East Hampton v. Kirk, 68 N. Y. 459. (3) So in ejectment evidence that plaintiff's grantor had raked and hauled straw off the land one or two years, and that plaintiff's father had farmed an acre or two of the land, was insufficient to show adverse possession. Prevatt v. Harrelson, 132 N. C. 250, 43 SE 800.

57. Code Civ. Proc. § 370.

58. Koch v. Elwood, 138 App. Div. 584, 123 NYS 502; Shinnecock Hills, etc., Realty Co. v. Aldrich, 132 App. Div. 118, 116 NYS 532 [aff 200 N. Y. 538, 93 NE 1132, and dist Price v. Brown, 101 N. Y. 669, 35 NE 434; Wheeler v. Spinola, 54 N. Y. 377] (in which it was said that to "cultivate" meant to improve the product of the earth by manual industry, and "improved" land generally meant such as had been reclaimed and was used for husbandry, whether for tillage, meadow, or pasture).

59. Bartholomew v. Edwards, 6 Del. 17; Webbs v. Hynes, 9 B. Mon. (Ky.) 388, 50 AmD 515.

60. U. S.—Bergere v. U. S., 168 U. S. 66, 18 SCt 4, 42 L. ed. 383; Northern Pac. R. Co. v. Littlejohn, 198 Fed. 700. See also Whitney v. U. S., 167 U. S. 529, 17 SCt 857, 42 L. ed. 263.

Cal.—Mattes v. Hall, 21 Cal. A. 552, 132 P 295. See also Watkins v. Lynch, 71 Cal. 21, 11 P 808 (sowing grain and pasturing cattle on the sides of a public roadbed).

Ga.—McCook v. Crawford, 114 Ga. 337, 40 SE 225; Royall v. Lisle, 15 Ga. 545, 60 AmD 712.

Ill.—Hayden v. McCloskey, 161 Ill. 351, 43 NE 1091.

Kan.—Haase v. Kelley, 8 Kan. A. 648, 56 P 535.

Ky.—Courtney v. Ashcraft, 105 SW 106, 31 KyL 1324; Hall v. Blanton, 77 SW 1110, 25 KyL 1400.

Mass.—Richmond Iron Works v. Wadhams, 142 Mass. 569, 9 NE 1.

Mich.—Judson v. Duffy, 96 Mich. 255, 55 NW 837.

Minn.—Sage v. Larson, 69 Minn. 122, 71 NW 923; Lambert v. Stees, 47 Minn. 141, 49 NW 662.

Mo.—Crain v. Peterman, 200 Mo. 295, 98 SW 600; Carter v. Hornback, 139 Mo. 238, 40 SW 893; Pharis v. Jones, 122 Mo. 125, 26 SW 1032; Cook v. Farrah, 105 Mo. 492, 16 SW 692.

Nebr.—Knight v. Denman, 64 Nebr. 814, 90 NW 863.

N. Y.—Erkson v. Johnston, 8 App. Div. 31, 40 NYS 401; Smith v. Floyd, 18 Barb. 522.

N. C.—Loftin v. Cobb, 46 N. C. 406, 62 AmD 173; Andrews v. Mulford, 2 N. C. 311.

Pa.—Wheeler v. Winn, 53 Pa. 122, 91 AmD 186; De Haven v. Landell, 31 Pa. 120.

Tenn.—Hicks v. Tredericks, 9 Lea 491; Calloway v. Sanford, (Ch. A.) 35 SW 776.

Tex.—De las Fuentes v. MacDonald, 85 Tex. 132, 20 SW 43; Mason v. Stapper, 8 SW 598; Murphy v. Welder, 58 Tex. 235; Sellman v. Hardin, 58 Tex. 86; Andrews v. Marshall, 26 Tex. 212; Patrucio v. Selkirk, (Civ. A.) 160 SW 635; Noland v. Weems, (Civ. A.) 141 SW 1031; Stevens v. Pedregon, (Civ. A.) 140 SW 236; Haynes v. Texas, etc., R. Co., 51 Tex. Civ. A. 49, 111 SW 427; Zapeda v. Hoffman, 31 Tex. Civ. A. 312, 72 SW 443; Vineyard v. Brundrett, 17 Tex. Civ. A. 147, 42 SW

especially true where the claimant used no means to restrain the live stock to any particular land,[61] or where the live stock of others was not excluded from the land.[62] Such a use, it has been said, is to be deemed merely permissive, whether the lands are public or private, and may be terminated at any time.[63]

[§ 26] **(b) Taken in Connection with Other Acts.** So the use of land for grazing purposes taken in connection with other acts, such as the occasional cutting of wood,[64] or hay,[65] or wild grass to be used as a dressing for lands owned by the claimant,[66] or paying taxes thereon,[67] does not amount to such a possession as may ripen into title by adverse possession; and the fact that cattle were pastured in an inclosure for about three years, in addition to proof that some timber was also cut within the inclosure, without proof that the use was continuous or that the timber was cut on the land in controversy as distinguished from other land also within the inclosure was insufficient to establish adverse possession, since cultivation, use, and enjoyment must supplement possession in order to create title by adverse possession.[68] But entering into possession of lands under color of title,[69] followed by the construction and maintenance of a substantial fence, under continued use and occupation of the land for pasturage, the only purpose for which it was adapted, under claim of title, has been held to constitute an adverse possession of the land inclosed,[70] and it has been held that continuous use of marsh land by grazing cows, cutting hay and sod, and granting permission to shoot over it, is adverse and sufficient to vest title if continued the statutory period.[71]

[§ 27] **(5) Making Sugar.** The occupancy of woodland for a short season each year, for the purpose of making maple sugar, is not such a possession as will create a title by adverse possession, although continued annually for the statutory period.[72] Such an occupancy is too desultory and fugitive to fulfill the intent of the statute. Annual entries to tap sugar trees and boil the sap constitute rather a succession of trespasses than an actual and permanent occupancy of the ground.[73]

[§ 28] **(6) Turpentine Farming.** The cultivation of a turpentine farm on the land in dispute may constitute an actual possession.[74] Whether or not the cultivation of a turpentine farm on a tract of land is such an occupancy as may be the basis of prescriptive title to the land itself is a question of fact depending on the character of the possession, the extent of visible signs of occupancy, etc.[75]

[§ 29] **(7) Quarrying Stone and Taking Sand, Gravel, Etc.** The occasional quarrying of stone upon the land is not an actual possession, and the same has been held true as regards the occasional taking of sand, gravel, and the like.[76] Especially does the

232; Pendleton v. Snyder, 5 Tex. Civ. A. 427, 24 SW 363. Compare Pierson v. McClintock, 34 Tex. Civ. A. 360, 78 SW 706.

Vt.—Swift v. Gage, 26 Vt. 224.

Va.—Whealton v. Doughty, 112 Va. 649, 72 SE 112; Turpin v. Saunders, 32 Gratt. (73 Va.) 27; Trotter v. Newton, 30 Gratt. (71 Va.) 582.

W. Va.—Wade v. McDougle, 59 W. Va. 113, 52 SE 1026.

Wyo.—Anthony Wilkinson Live Stock Co. v. McIlquam, 14 Wyo. 209, 83 P 364, 3 LRANS 733.

Can.—Harris v. Keith, 16 WestLR 433.

N. S.—McDonald v. McIsaac, 38 N. S. 183.

Ont.—Dominion Impr., etc., Co. v. Lally, 24 Ont. L. 115, 2 OntWN 1224, 19 OntWR 462, 2 OntWN 155, 17 OntWR 151; Reynolds v. Trivett, 7 Ont. L. 623, 3 OntWR 463; McIntyre v. Thompson, 1 Ont. L. 163.

Compare Chamberlain v. Abadie, 48 La. Ann. 587, 590, 19 S 574 (in which it was said: "The corporal possession necessary to support the prescription is governed by the use for which the land is destined. If it is for pasturage, the grazing of cattle upon it is an act of corporal possession").

[a] **Possession of an improvement used only to herd cattle, and abandoned every year** when the pasture season ends, is not a possession for the purposes of the statute of limitations, or twenty-one years' adverse possession, although corners and lines were marked and cabins built upon it. Wheeler v. Winn, 53 Pa. 122, 91 AmD 186.

[b] **In California** it is provided by statute that land shall be deemed possessed, although uninclosed, where it is used for pasturage, and it has been held that it is sufficient if the land is used for pasturage during the grazing season. Webber v. Clarke, 74 Cal. 11, 15 P 431. See also Marshall v. Beysser, 75 Cal. 544, 17 P 644.

61. Sunol v. Hepburn, 1 Cal. 254.

62. Lanning v. Musser, 88 Nebr. 418, 129 NW 1022.

63. McIlquham v. Anthony Wilkinson Live Stock Co., 18 Wyo. 53, 104 P 20. See also Hafner v. Chase, 146 Iowa 231, 232, 124 NW 1087 (holding that evidence that cattle strayed from an owner's land and crossed a river and pastured on uninclosed land on the other side is no evidence tending to show adverse possession of the uninclosed land in the absence of any claim of title. In this case it was said: "Even then it would be doubtful whether his acts were not referable to express or implied permission on the part of the owner of the legal title").

64. Nye v. Alfter, 127 Mo. 529, 30 SW 186; Fuentes v. McDonald, 85 Tex. 135, 20 SW 43; Haynes v. Texas, etc., R. Co., 51 Tex. Civ. A. 49, 111 SW 427.

65. McCloskey v. Hayden, 169 Ill. 297, 48 NE 432.

66. Whealton v. Doughty, 112 Va. 649, 72 SE 112.

67. McVey v. Carr, 159 Mo. 648, 60 SW 1034; Nye v. Alfter, 127 Mo. 529, 30 SW 186. But see Dice v. Brown, 98 Iowa 297, 67 NW 253 (holding that, where it appeared that defendant's grantors, claiming under color of title, had entered upon the lands while they were unfenced, wild prairie lands, and that by themselves or their lessees they had occupied the lands continuously as a pasture for cattle from 1881 to 1891, paying taxes thereon, this was sufficient occupation to give defendants title by adverse possession).

68. Noland v. Weems, (Tex. Civ. A.) 141 SW 1031. See also Kelley v. Bicknell, 147 Ky. 401, 144 SW 88.

69. See Goodwin v. McCabe, 75 Cal. 584, 17 P 705; Webber v. Clarke, 74 Cal. 11, 15 P 431. See also Bullock v. Rouse, 81 Cal. 590, 595, 22 P 919; Anderson v. Burnham, 52 Kan. 454, 34 P 1056.

70. Ambrose v. Huntington, 34 Or. 484, 56 P 513; Griswold v. Comer, (Tex. Civ. A.) 161 SW 423. To same effect Hardy Oil Co. v. Burnham, (Tex. Civ. A.) 124 SW 221.

71. Myers v. Mayhew, 32 App. (D. C.) 205. And see Alderman, etc., Co. v. McKnight, 95 S. C. 245, 78 SE 982 (holding that where swamp lands were incapable of cultivation and could not well be used except for pasturage, fishing, and timber purposes, their use for such purposes was sufficient as adverse possession).

72. Courtney v. Ashcraft, 105 SW 106, 31 KyL 1324; Caskey v. Lewis, 15 B. Mon. (Ky.) 27; Ewing v. Alcorn, 40 Pa. 492; Washabaugh v. Entriken, 34 Pa. 74, 36 Pa. 513; Adams v. Robinson, 6 Pa. 271; Wilson v. Blake, 53 Vt. 305; Kay v. Wilson, 2 Ont. A. 133 [aff 24 Grant Ch. (U. C.) 212].

73. Adams v. Robinson, 6 Pa. 271.

74. Richbourg v. Rose, 53 Fla. 173, 44 S 69, 125 AmSR 1061, 12 AnnCas 274; Baxter v. Wetherington, 128 Ga. 801, 58 SE 467; Flannery v. Hightower, 97 Ga. 592, 25 SE 371; Bynum v. Carter, 26 N. C. 310. See also Carr v. Carr, 20 N. C. 317; Green v. Harman, 15 N. C. 158.

[a] **"Back-boxing" of trees on land for turpentine purposes** may constitute possession upon which prescription can be founded. Mitchell v. Crummey, 134 Ga. 383, 67 SE 1042.

75. Flannery v. Hightower, 97 Ga. 592, 25 SE 371. And see Walker v. Steffes, 139 Ga. 520, 77 SE 580 (holding that a charge that the occasional entering upon land and cutting of trees and working of turpentine may or may not constitute possession requisite to prescriptive title, according to the nature of the things done, was not accurate, as it was calculated to lead the jury to believe that occasional acts might be sufficient, rather than to lead them to determine whether the possession was continuous within the law).

76. Ky.—Strange v. Spalding, 29 SW 137, 17 KyL 305.

Md.—Parker v. Wallis, 60 Md. 15, 45 AmR 703.

Mass.—Jeffries Neck Pasture v. Ipswich, 153 Mass. 42, 26 NE 239.

Mo.—Herbst v. Merrifield, 133 Mo. 267, 34 SW 571.

N. Y.—New York Cent., etc., R. Co. v. Moore, 137 App. Div. 461, 121 N. Y. Suppl. 884 [aff 203 N. Y. 615, 97 NE 41].

Pa.—Susquehanna County v. Deans, 33 Pa. 131.

[a] **Mere occasional cutting of sod** on land does not constitute adverse possession under the statute of limitations. Wade v. McDougle, 59 W. Va. 113, 52 SE 1026.

[b] **The taking of seaweed** from an open and uninclosed beach, and the selling of stones therefrom from time to time, are insufficient to operate as a disseizin of the true owner. Litchfield v. Ferguson, 141 Mass. 97, 6 NE 721.

[c] **The occasional sale of shell**

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rule apply where the evidence does not disclose what portion of the land was occupied or that the occupation was exclusive.[77]

[§ 30] **f. Payment of Taxes—(1) In General.** The payment of taxes upon land does not constitute actual possession of it.[78] In some jurisdictions the fact is not even regarded as evidence of possession,[79] and so not admissible in proof on behalf of the claimant.[80] But in other jurisdictions the courts, although regarding it as entitled to little weight, yet admit it in proof as a circumstance to show possession.[81]

[§ 31] **(2) In Connection with Other Acts.** The accompanying circumstances that the claimant had the lands surveyed and mapped,[82] and executed a mortgage covering them,[83] and occasionally entered upon the lands to look after them[84] or employed an agent to do so,[85] or occasionally cut and carried off firewood and rails therefrom,[86] or sold or occasionally

from a shell bank on the land claimed was not such adverse possession as would support a claim of title by limitation. Allen v. Clearman, (Tex. Civ. A.) 128 SW 1140.

[d] **Digging and carrying away muck and taking stones** from the bed of a pond for a cellar were not an adverse possession sufficient to constitute title by prescription. Linen v. Maxwell, 67 N. H. 370, 40 A 184.

[e] **Digging coal.**—Where it was not claimed that the land in question was included within a marked boundary, evidence that plaintiff and his predecessors in possession had occasionally dug coal on the tract did not show possession. White v. McNabb, 140 Ky. 828, 131 SW 1021.

77. New York Cent., etc., R. Co. v. Moore, 137 App. Div. 461, 121 NYS 884 [aff 203 N. Y. 615, 97 NE 41].

[a] **The mere act of mining coal on land,** it has been held, does not give such actual adverse possession as would defeat the constructive possession of the record owner under his title. Pearce v. Aldrich Min. Co., (Ala.) 64 S 321.

78. U. S.—Holtzman v. Douglas, 168 U. S. 278, 18 SCt 65, 42 L. ed. 466; Ewing v. Burnet, 8 F. Cas. No. 4,591, 1 McLean 266 [aff 11 Pet. 41, 93 L. ed. 624]; Girard v. Philadelphia, 10 F. Cas. No. 5,459, 2 Wall. Jr. 301. See Northern Pac. R. Co. v. Littlejohn, 198 Fed. 700.

Ala.—Knight v. Hunter, 155 Ala. 238, 46 S 235; Reddick v. Long, 124 Ala. 260, 27 S 402; Wiggins v. Kirby, 106 Ala. 262, 17 S 354; Alexander v. Savage, 90 Ala. 383, 8 S 93; Jay v. Stein, 49 Ala. 514.

Ariz.—Seaverns v. Costello, 8 Ariz. 308, 71 P 930.

Ark.—Boynton v. Ashabranner, 75 Ark. 415, 88 SW 566, 1011, 91 SW 20; Driver v. Martin, 68 Ark. 551, 60 SW 651; Spratlin v. Halliburton, 63 Ark. 647, 39 SW 712; Brown v. Bocquin, 57 Ark. 97, 20 SW 813; Scott v. Mills, 49 Ark. 266, 4 SW 908; Byers v. Danley, 27 Ark. 77; Blakeney v. Ferguson, 20 Ark. 547.

D. C.—Keefe v. Bramhall, 14 D. C. 551.

Ga.—Parrott v. Baker, 82 Ga. 364, 9 SE 1068.

Ill.—Timmons v. Kidwell, 149 Ill. 507, 36 NE 974; Irving v. Brownell, 11 Ill. 402.

Iowa.—Hays v. McCormick, 83 Iowa 89, 49 NW 69; Raymond v. Morrison, 59 Iowa 371, 13 NW 332; Sioux City, etc., Town Lot, etc., Co. v. Wilson, 50 Iowa 422; Brown v. Rose, 48 Iowa 231, 55 Iowa 734, 7 NW 133.

Kan.—Dickinson v. Bales, 59 Kan. 224, 52 P 447.

Ky.—Overton v. Overton, 123 Ky. 311, 96 SW 469, 29 KyL 736.

La.—George v. Cole, 109 La. 816, 33 S 784; Chamberlain v. Abadie, 48 La. Ann. 587, 19 S 574; Searles v. Costello, 12 La. Ann. 203.

Me.—Millett v. Mullen, 95 Me. 400, 49 A 871; Little v. Megquier, 2 Me. 176.

Md.—Sadtler v. Peabody Heights Co., 66 Md. 1, 10 A 599.

Mass.—Whitman v. Shaw, 166 Mass. 451, 44 NE 333.

Mich.—Lee v. Livingston, 143 Mich. 203, 106 NW 713; Miller v. Davis, 106 Mich. 300, 64 NW 338; Whitaker v. Erie Shooting Club, 102 Mich. 454, 60 NW 983; Cook v. Rounds, 60 Mich. 310, 27 NW 517.

Minn.—Young v. Grieb, 95 Minn. 396, 104 NW 131; Murphy v. Doyle, 37 Minn. 113, 33 NW 220.

Mo.—Hays v. Pumphrey, 226 Mo. 119, 125 SW 1109; Stone v. Perkins, 217 Mo. 586, 117 SW 717; McVey v. Carr, 159 Mo. 648, 60 SW 1034; Swerlingen v. St. Louis, 151 Mo. 348, 52 SW 346; Herbst v. Merrifield, 133 Mo. 267, 34 SW 571; Nye v. Alfter, 127 Mo. 529, 30 SW 186; Pharis v. Jones, 122 Mo. 125, 26 SW 1032; Cook v. Farrah, 105 Mo. 492, 16 SW 692; Pike v. Robertson, 79 Mo. 615; Bradstreet v. Kensella, 76 Mo. 63; McQuiddy v. Ware, 67 Mo. 74; Chapman v. Templeton, 53 Mo. 463; Musick v. Barney, 49 Mo. 458; Bollinger v. Chouteau, 20 Mo. 89; Morgan v. Pott, 124 Mo. A. 371, 101 SW 717; Cashman v. Cashman, 50 Mo. A. 663 [cert 123 Mo. 647, 27 SW 549].

N. J.—Cornelius v. Giberson, 25 N. J. L. 1.

N. Y.—Consolidated Ice Co. v. New York, 166 N. Y. 92, 59 NE 713; Archibald v. New York Cent., etc., R. Co., 157 N. Y. 574, 52 NE 567; Mission of Immaculate Virgin v. Cronin, 143 N. Y. 524, 38 NE 964; Greenleaf v. Brooklyn, etc., R. Co., 141 N. Y. 395, 36 NE 393; Miller v. Long Island R. Co., 71 N. Y. 380; Thompson v. Burhans, 61 N. Y. 52, 79 N. Y. 93; Stevens v. Rhinelander, 28 N. Y. Super. 285.

N. C.—Fuller v. Elizabeth City, 118 N. C. 25, 23 SE 922; Ruffin v. Overby, 88 N. C. 369; Malloy v. Bruden, 86 N. C. 251.

Or.—Willamette Real Est. Co. v. Hendrix, 28 Or. 485, 42 P 514, 52 AmSR 800.

Pa.—Bear Valley Coal Co. v. Dewart, 95 Pa. 72; McDermott v. Hoffman, 70 Pa. 31; Hoffman v. Bell, 61 Pa. 444; Philadelphia v. Riddle, 25 Pa. 259; Murphy v. Springer, 1 Grant 73; Urket v. Coryell, 5 Watts & S. 60; Naglee v. Albright, 4 Whart. 291; Sorber v. Willing, 10 Watts 141; Lund v. Brown, 2 Chest. Co. 221, 14 Wkly NC 489. See however Truman v. Raybuck, 207 Pa. 357, 56 A 944; Sailor v. Hertzogg, 10 Pa. 296.

Tenn.—Garrett v. Belmont Land Co., 94 Tenn. 459, 29 SW 726; Pullen v. Hopkins, 1 Lea 741; Fuller v. Jackson, (Ch. A.) 62 SW 274.

Tex.—Griffin v. Ford, 60 Tex. 501; Hunter v. Hodgson, (Civ. A.) 95 SW 637; Lutcher v. Allen, 43 Tex. Civ. A. 102, 95 SW 572; Wall v. Club Land, etc., Co., (Civ. A.) 88 SW 534; Texas Tram, etc., Co. v. Gwin, 29 Tex. Civ. A. 1, 67 SW 892, 68 SW 721; Hull v. Woods, 14 Tex. Civ. A. 590, 38 SW 256; Hilburn v. Harris, (Civ. A.) 29 SW 923; Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 21 SW 405.

Utah.—Ives v. Grange, 134 P 619.

Vt.—Langdon v. Templeton, 66 Vt. 173, 28 A 866; Tillotson v. Prichard, 60 Vt. 94, 14 A 302, 6 AmSR 95; Paine v. Hutchins, 49 Vt. 314; Reed v. Field, 15 Vt. 672.

Wash.—Bryant Lumber, etc., Mill Co. v. Pacific Iron, etc., Works, 48 Wash. 574, 94 P 110.

W. Va.—State v. Moore, 71 W. Va. 285, 76 SE 461; Waldron v. Harvey, 54 W. Va. 608, 46 SE 603, 102 AmSR 959.

Ont.—Dominion Impr., etc., Co. v. Lally, 24 Ont. L. 115, 2 OntWN 1224, 19 OntWR 462, 2 OntWN 155, 17 OntWR 151; Jarvis v. Cook, 29 Grant Ch. (U. C.) 303; Doe v. Rattray, 7 U. C. Q. B. 321.

And see Leavenworth v. Reeves, (Miss.) 64 SW 660 (holding that payment of taxes will not render a defective possession a sufficient possession to ripen into title, and, at most, constitutes evidence of claim of ownership).

[a] **"The payment of taxes may announce the possessor's intention** to preserve the possession of the thing, when he or his predecessor has once had a corporal possession, but it will not constitute a corporal possession." Searles v. Costello, 12 La. Ann. 203.

[b] **In Arkansas** while the statute provides that the payment of taxes is not sufficient as against one in the possession of the part of land improved, the rule is otherwise as to uninclosed and unimproved land. Fenton v. Collum, 104 Ark. 624, 150 SW 140 (holding that the term "wild" is interchangeable with the statutory words "unimproved and uninclosed").

79. Jay v. Stein, 49 Ala. 514; Raymond v. Morrison, 59 Iowa 371, 13 NW 332; Sioux City, etc., Town Lot, etc., Co. v. Wilson, 50 Iowa 422; Krueger v. Market, 124 Minn. 393, 145 NW 30; Archibald v. New York Cent., etc., R. Co., 157 N. Y. 574, 52 NE 567; Miller v. Long Island R. Co., 71 N. Y. 380; Langdon v. Templeton, 66 Vt. 173, 28 A 866. See Brooklyn, etc., R. Co. v. Bird, 76 Misc. 62, 134 NYS 1.

80. Whitman v. Shaw, 166 Mass. 451, 44 NE 333; Stevens v. Rhinelander, 28 N. Y. Super. 285; McBeth v. Donnelly, 23 S. C. L. 177.

81. Kan.—Dickinson v. Bales, 59 Kan. 224, 52 P 447.

Mich.—Sauers v. Giddings, 90 Mich. 50, 51 NW 265; Murray v. Hudson, 65 Mich. 670, 32 NW 889.

Mo.—Draper v. Shoot, 25 Mo. 197, 69 AmD 462.

R. I.—Cosgrove v. Franklin, 35 R. I. 527, 87 A 544.

Ont.—Noble v. Noble, 25 Ont. L. 379, 20 OntWR 168, 889.

82. Byers v. Danley, 27 Ark. 77. Compare also infra § 33.

83. Seymour v. Creswell, 18 Fla. 29.

84. Reddick v. Long, (Ala.) 27 S 402; Dickinson v. Bales, 59 Kan. 224, 52 P 447; Sorber v. Willing, 10 Watts (Pa.) 141. And see Stalford v. Goldring, 197 Ill. 156, 64 NE 395 (holding that possession, to support a claim to vacant land under color of title and payment of taxes for seven successive years, is not shown by evidence that claimant drove out to the property in question on an average of twice a year and on one occasion plucked flowers thereon).

85. Reddick v. Long, 124 Ala. 260, 27 S 402; Ruffin v. Overby, 88 N. C. 369. See also John Henry Shoe Co. v. Williamson, 64 Ark. 100, 40 SW 703.

[a] **For example** evidence that a person claiming title to land arranged with a neighboring farmer to look after the land and thereafter paid the taxes assessed thereon, and that the farmer sometimes drove his cattle to the land to pasture and authorized others to cut grass thereon, it being wild and unfenced and used by the cattle of the neighborhood as a common, and the grass being cut by any one without molestation, is not sufficient to prove actual possession. Judson v. Duffy, 96 Mich. 255, 55 NW 837.

86. Wiggins v. Kirby, 106 Ala. 262, 17 S 354; Driver v. Martin, 68 Ark. 551, 60 SW 651; Pike v. Robertson, 79 Mo. 615. And see Boynton v. Ashabranner, 75 Ark. 415, 88 SW 566, 1011, 91 SW 20 (holding that a claim of

sold timber from the land,[86½] or erected a temporary structure which he afterward removed,[87] do not constitute actual possession. So it has been held that claim of ownership of land for a number of years, the payment of taxes thereon, the occasional cutting of timber, and the employment of agents to maintain a watch to prevent other persons from trespassing thereon, were only "fitful acts of ownership" and insufficient to establish adverse possession.[88] On the other hand it has been held that payment of taxes with claim of right in connection with the best and most practicable use of the soil for which it is adapted satisfies the requirements as to possession.[89] And where plaintiff in ejectment was shown to have paid all the taxes for thirty years, and defendant had refused to have the land assessed in his name, it was held that plaintiff had the better title.[90]

[§ 32] **g. Depositing Material.** The depositing of material or refuse on another's land does not ordinarily constitute such actual possession thereof as may ripen into title by adverse possession.[91]

[§ 33] **h. Surveying Land and Marking Boundaries.** Entering upon land and surveying it and fixing the boundaries of the tract claimed is not actual possession,[92] and the fact that the claimant pays the taxes[93] and enters from time to time to cut timber[94] is no more effective. So the mere marking of the boundaries of the land claimed by blazing trees, etc., will not amount to an actual possession,[95] and one living on land outside the claim of another cannot obtain adverse possession of the land within the latter's elder patent by marking off a boundary and taking a deed from some one to it, without putting anything on the land to give the owner notice of an adverse claim, the owner being in constructive possession.[96]

[§ 34] **i. Keeping Away Trespassers and Posting Notices.** The mere driving away from the land as trespassers persons who went thereon is not a sufficient actual possession,[97] and a fortiori the mere employment of a third person to look after the land

ownership, payment of taxes, and the exercise of fitful, disconnected acts of possession, and the cutting of timber and firewood, were insufficient to establish adverse possession). See also supra § 20 et seq.

86½. Davis v. Davis, 157 Ky. 530, 163 SW 468; Meredith v. Mitchell, (Tex. Civ. A.) 167 SW 189.

87. Musick v. Barney, 49 Mo. 458.

88. Connerly v. Dickinson, 81 Ark. 258, 99 SW 82.

89. Wheeler v. Gorman, 80 Minn. 462, 83 NW 442. And see Moore v. Hinkle, 151 Ind. 343, 345, 50 NE 822 (holding that adverse possession of rough land, mostly unfit for cultivation, is shown by paying all the taxes thereon, which were taxed in the occupant's name, cutting timber thereon, blazing the outlines of it, and by claiming ownership and offering it for sale; and where it was said: "The acts of ownership . . . seem to have been such as lands of like character were reasonably adapted to; and they were exercised without let or hindrance from anyone, and in disregard of all others. This was sufficient").

90. Kelsey v. Murray, 9 Watts (Pa.) 111.

91. See cases infra this note.

[a] **The mere throwing of manure on another's land** is not such an adverse possession as will give any right under the statute of limitations to him who does it, much less to a third person. Shroder v. Breneman, 21 Pa. 225.

[b] **Depositing old machinery from a factory** on land of another does not constitute actual possession. Corning v. Troy Iron, etc., Factory, 44 N. Y. 577.

[c] **The depositing of débris in a stream which is carried upon the land of another** does not show possession of such land. Woodruff v. North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441.

[d] **Piling wood** (1) on the land of another does not constitute actual possession. Miller v. Downing, 54 N. Y. 631. (2) Occupancy of an alley by a lumber dealer who piled his lumber which was continually being changed or removed partly in the alley and partly on his own land, both being portions of a common at the time of purchase, constituted a permissive user of the unused public way and not adverse possession. "It is common knowledge that merchants are permitted, without objection by the public, to occupy parts of streets and sidewalks in front of their stores to exhibit goods for sale. It has never been held that by so doing they could acquire title by adverse possession." Weber v. Detroit, 159 Mich. 14, 18, 123 NW 540, 36 LRANS 1056.

[e] **Plowing two furrows on two sides of land, and placing a stack of boards on the land** a short time afterward, are not sufficient evidence of occupancy or claim of possession to start the running of the statute of limitations. Nicholson v. Aronson, 58 Kan. 814, 48 P 917.

[f] **Occasionally dumping a few poles, and sometimes a cord of wood or an odd lot of sand,** with the owner's permission, on a vacant uninclosed lot separated from the claimant's own premises by a fence cannot be called a possession. Donovan v. Herbert, 12 Ont. A. 298.

92. U. S.—Bump v. Butler County, 93 Fed. 290. Compare Winnipisiogee Paper Co. v. New Hampshire Land Co., 59 Fed. 542.

Ala.—Stevenson v. Anderson, 87 Ala. 228, 6 S 285.

Ga.—Dillon v. Mattox, 21 Ga. 113.

Iowa.—Mead v. Illinois Cent. R. Co., 112 Iowa 291, 83 NW 979; Brown v. Rose, 55 Iowa 734, 7 NW 133.

Ky.—King v. Hunt, 13 SW 214, 11 KyL 802.

Me.—Hudson v. Coe, 79 Me. 83, 8 A 249, 1 AmSR 288; Tilton v. Hunter, 24 Me. 29; Thayer v. McLellan, 23 Me. 417.

Md.—Beatty v. Mason, 30 Md. 409.

Mass.—Kennebeck Purchase v. Springer, 4 Mass. 416, 3 AmD 227.

N. Y.—Mission of Immaculate Virgin v. Cronin, 143 N. Y. 524, 38 NE 964; Thompson v. Burhans, 61 N. Y. 52.

Pa.—Altemus v. Trimble, 9 Pa. 232, 34 AmD 494.

S. C.—Alston v. McDowall, 26 S. C. L. 444.

Vt.—Paine v. Hutchins, 49 Vt. 314; Kidder v. Kennedy, 43 Vt. 717.

Can.—Wood v. Leblanc, 34 Can. S. C. 627.

Ont.—Kay v. Wilson, 2 Ont. A. 133, 24 Grant Ch. (U. C.) 213.

[a] **A blazed line running around the whole of the land** in question, run by a private surveyor at the instance of the occupant, will not establish in his favor a title by possession, although no disturbance thereof was made for the statutory period, as such act lacks publicity and conveys no sufficient intimation that the occupant is claiming title to the whole of the area included within the blazed lines. Swinehammer v. Hart, 5 DomLR 106, 11 EastLR 260.

93. Bradstreet v. Kinsella, 76 Mo. 63; Gauthier v. Masson, 27 Can. S. C. 575 (holding that marking the boundaries of a lot purchased, causing it to be assessed to the purchaser, and payment of all municipal taxes thereon, are sufficient actual possession, although the lot is unoccupied and uninclosed). See also supra § 30.

94. Travers v. McElvain, 200 Ill. 377, 65 NE 623; Livingston v. Pendergast, 34 N. H. 544; Mission of Immaculate Virgin v. Cronin, 143 N. Y. 524, 38 NE 964.

[a] **In New Hampshire** adverse possession under color of title sufficient to create possessory title may be established in the case of wild lands by showing surveys, prosecutions for trespass, depositions in perpetuam, grants, and payment of taxes. Winnipisiogee Paper Co. v. New Hampshire Land Co., 59 Fed. 542.

95. Ill.—White v. Harris, 206 Ill. 584, 69 NE 519 (placing of stone monuments on the corners of the quarter sections); Travers v. McElvain, 200 Ill. 377, 65 NE 623 (blazing the boundary lines of part of a large tract of thickly wooded swamp lands).

Ky.—Sanders v. Barbee, 3 SW 528.

Mass.—Slater v. Jepherson, 6 Cush. 129; Kennebeck Purchase v. Springer, 4 Mass. 416, 3 AmD 227.

Mo.—Bradstreet v. Kinsella, 76 Mo. 63.

N. H.—Livingston v. Pendergast, 34 N. H. 544.

N. Y.—Mission of Immaculate Virgin v. Cronin, 143 N. Y. 524, 38 NE 964.

Pa.—Broad Top Coal, etc., Co. v. Riddlesburg Coal, etc., Co., 65 Pa. 435; Altemus v. Trimble, 9 Pa. 232; Bishop v. Lee, 3 Pa. 214.

S. C.—Slice v. Derrick, 31 S. C. L. 627.

Tex.—Peden v. Crenshaw, 98 Tex. 365, 84 SW 362 (erecting posts); Montgomery v. Gunther, 81 Tex. 320, 16 SW 1073; Freedman v. Bonner, (Civ. A.) 40 SW 47 (setting posts far apart).

Vt.—Oatman v. Fowler, 42 Vt. 462.

See also Stephenson v. Doe, 8 Blackf. (Ind.) 508, 46 AmD 489.

96. Bowling v. Breathitt Coal, etc., Co., 134 Ky. 249, 120 SW 317.

97. U. S.—Snowden v. Loree, 122 Fed. 493 [aff 128 Fed. 419, 63 CCA 161]; Bump v. Butler County, 93 Fed. 290; Ewing v. Burnet, 8 F. Cas. No. 4,591, 1 McLean 266 [aff 11 Pet. 41, 9 L. ed. 624].

Ala.—Alexander v. Savage, 90 Ala. 383, 8 S 93.

Ga.—Scott v. Cain, 90 Ga. 34, 15 SE 816.

Ill.—White v. Harris, 206 Ill. 584, 69 NE 519; Travers v. McElvain, 200 Ill. 377, 65 NE 623.

Ky.—Chenault v. Quisenberry, 81 SW 690, 26 KyL 462.

Me.—Hudson v. Coe, 79 Me. 83, 8 A 249, 1 AmSR 288.

Minn.—Lambert v. Stees, 47 Minn. 141, 49 NW 662.

Mo.—Pharis v. Jones, 122 Mo. 125, 26 SW 1032.

W. Va.—State v. Moore, 71 W. Va. 285, 76 SE 461; Wilson v. Braden, 56 W. Va. 372, 49 SE 409, 107 AmSR 927.

and prevent trespassers thereon does not show an actual possession.[98] So the fact that the claimant of land posts notices upon it merely indicates an intention to hold the land and is not sufficient proof of adverse possession.[99]

[§ 35] **j. Flooding Lands.** The mere flooding of lands, however long continued, is not a possession thereof which will ripen into title to the land,[1] although an easement to flow the land may be so acquired.[2] The flooding of one's land, it has been said, "is a trespass for which the owner may recover damages or may be estopped therefrom if he acquiesced in the trespass, but such considerations do not determine the title to or possession of the premises on which the trespass was committed."[3]

[§ 36] **k. Sale of Land.** The sale and conveyance by the claimant of parts of a tract of land is not itself sufficient to show an actual possession of the portion of the tract unsold,[4] although evidence thereof is admissible as part of the acts showing adverse possession.[5] So the fact that the claimant offered the whole tract for sale and listed it for taxation is not sufficient to show actual possession.[6]

[§ 37] **1. Passage of Ordinances and Execution of Contracts for Work.** Title to a wharf by adverse possession cannot be shown in a city by ordinance passed by it, and contracts for work in the river, for while these may be acts of ownership they do not constitute possession.[7]

[§ 38] **3. Application to Particular Kinds of Land—a. Burial Plots.** If one enters upon, sets apart, and asserts an exclusive right to a plot of land as a family burial ground for a series of years, the use of the land for such a purpose constitutes an actual possession,[8] even though the burial plot is not inclosed.[9] But where the possession is not under color of title the holding will be confined to such part of the land as is covered by the graves;[10] and where the burial plot was inclosed by a fence and situated in a larger tract of land to which the claimant had color of title, it has been held that the possession would not be extended beyond the inclosure of the burial plot.[11]

[§ 39] **b. Mines.**[12] It is a general presumption that one who has the possession of the surface of land has possession of the subsoil also.[13] But when, by conveyance or reservation, a separation has been made of the ownership of the surface of land from that of the underground minerals, the owner of the former can acquire no title to the latter by his exclusive and continued enjoyment of the surface.[14] Nor does the owner of the minerals lose his right or his possession by any length of nonusage;[15] he must be disseized to lose his right, and there can be

[a] **Occasionally riding along a road over land to warn off trespassers,** if any should be found, is not such actual possession as to give title by adverse possession. Bass v. Jackson Lumber Co., 169 Ala. 455, 53 S 800.

98. Wiggins v. Kirby, 106 Ala. 262, 17 S 354; Files v. Jackson, 84 Ark. 587, 106 SW 950; Connerly v. Dickinson, 81 Ark. 258, 99 SW 82; Ruffin v. Overby, 88 N. C. 369.

99. A. W. Stevens Lumber Co. v. Hughes, (Miss.) 38 S 769; Lynde v. Williams, 68 Mo. 360.

[a] **Using dead wood and putting up signs.**—A grantee in possession under a deed of one out of forty acres does not acquire possession of the remainder by merely using deadwood thereon and putting up signs as against one who fences the entire forty acres and cultivates a part of it. Lightfoot v. Head, 64 Fla. 364, 60 S 752.

1. Simpson v. Wabash R. Co., 145 Mo. 64, 46 SW 739; Everett v. Dockery, 52 N. C. 390; Green v. Harman, 15 N. C. 158, 160 (where it was said: "The overflowing of land by an act not done on it, but by stopping a water course below, on one's own land, is not an ouster of the owner from the land overflowed. There is no entry, which is necessary to make a disseizin"); Costello v. Harris, 162 Pa. 397, 29 A 874; Mims v. Weathersbee, 33 S. C. L. 184. And see Jones v. Fisher, 17 Can. S. C. 515. Contra Hammon v. Zehner, 21 N. Y. 118 (holding that the overflowing of another's land to such an extent as to make it useless constitutes an actual adverse possession, no reason being assigned for this view). And compare La Roque v. Kennedy, 156 N. C. 360, 373, 72 SE 454 [dist Green v. Harman, 15 N. C. 158] (holding that an overflowing by water of land claimed under a deed by the person causing the overflow may be an act of adverse possession). In this case it was said: "The principle declared [in Green v. Harman, supra,] is not applicable to the facts in this case, as according to all the evidence here the dam was on the land of the defendant and the water does not extend beyond the claim of the defendant."

[a] **The exercise of a right reserved by a deed to overflow land** is not evidence of adverse possession of such land. Linen v. Maxwell, 67 N. H. 370, 40 A 184.

2. Costello v. Harris, 162 Pa. 397, 29 A 874. See also Green v. Harman, 15 N. C. 158. And see Easements.

[a] **Thus** an easement in lands by adverse possession may be acquired by the construction and maintenance of a dam across a stream, thereby causing the land to be continuously submerged for the statutory period. Simons v. Munch, 107 Minn. 370, 120 NW 373, 121 NW 878; Swan v. Munch, 65 Minn. 500, 67 NW 1022, 60 AmSR 491, 35 LRA 743.

3. Simpson v. Wabash R. Co., 145 Mo. 64, 82, 46 SW 739.

4. Stevenson v. Anderson, 87 Ala. 228, 6 S 285; Slater v. Jepherson, 6 Cush. (Mass.) 129; Brooklyn, etc., R. Co. v. Bird, 76 Misc. 62, 134 NYS 1; Worth v. Simmons, 121 N. C. 357, 28 SE 528.

5. Dowdell v. Orphans' Home Soc., 114 La. 49, 38 S 16.

6. Rucker v. Jackson, (Ala.) 60 S 139 (offer to sell); Fuller v. Elizabeth City, 118 N. C. 25, 23 SE 922.

7. Whyte v. St. Louis, 153 Mo. 80, 54 SW 478.

8. Ala.—Bonham v. Loeb, 107 Ala. 604, 18 S 300.

Ark.—Mooney v. Cooledge, 30 Ark. 640.

Ga.—Roumillot v. Gardner, 113 Ga. 60, 38 SE 362, 53 LRA 729.

Ill.—Zirngibl v. Calumet, etc., Canal, etc., Co., 157 Ill. 430, 42 NE 431.

Ky.—Hook v. Joyce, 94 Ky. 450, 22 SW 651, 15 KyL 337, 21 LRA 96.

Tex.—El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 SW 21 (federal burying ground).

Can.—Steenson v. Palmerston, 25 CanLTOccNotes 147.

See also Baker v. Oakwood, 123 N. Y. 16, 25 NE 312, 10 LRA 387 [aff 49 Hun 416, 3 NYS 570]; Meiggs v. Hoagland, 68 App. Div. 182, 74 NYS 284; Conger v. Weyant, 3 Silv. Sup. 588, 7 NYS 809 [aff 132 N. Y. 259, 30 NE 505].

And see May v. Belson, 10 Ont. L. 686, 6 OntWR 462.

[a] **No possession of a burying ground by the living** is required in order to prevent the acquisition of title by adverse possession thereof. There can be no actual ouster or adverse possession to put in operation the statute of limitations so long as the dead are buried there and their graves are marked and any acts are done tending to preserve their memory and mark their last resting place. Hines v. State, 126 Tenn. 1, 6, 149 SW 1058, 42 LRANS 1138 and note.

[b] **Sufficiency of evidence.**—(1) Proof, in ejectment, of the use of land, conveyed by a defective deed, as a burial plot for over twenty-five years, and of an interment in a grave on the undisturbed portion thereof, of the placing of a headstone thereon, and of the planting of trees and shrubbery from twelve to fifteen years prior to the action, is sufficient proof of adverse possession to constitute the finding of the jury that title was thereby acquired by defendant. Conger v. Kinney, 16 NYS 752. (2) But evidence that plaintiff's ancestors and husband and children were buried in a certain lot, that as long as she lived in the locality she visited the lot and kept it in good repair, and when she went away left a person in charge of it, who visited it frequently and cared for it, and that the person purchasing the land more than ten years before suit promised that the lot should never be troubled, is insufficient to show title to the lot by adverse possession. Bonham v. Loeb, 107 Ala. 604, 18 S 300.

9. Mooney v. Cooledge, 30 Ark. 640.

10. Mooney v. Cooledge, 30 Ark. 640.

11. Zirngibl v. Calumet, etc., Canal, etc., Co., 157 Ill. 430, 42 NE 431.

12. **Acquisition of rights** in:
Mining location see Mines and Minerals.
Unmined minerals see Mines and Minerals.

13. Pardee v. Murray, 4 Mont. 234, 2 P 16.

[a] **Possession of the surface of a mining claim** location is possession of all veins, lodes, and ledges, the tops or apexes of which are inside the surface lines, although such veins, lodes, and ledges as they go downward may extend outside such surface lines; and possession of the surface ground protects such veins, lodes, and ledges from the operation of the statute of limitations. Pardee v. Murray, 4 Mont. 234, 2 P 16. See also Armstrong v. Caldwell, 53 Pa. 284.

14. White v. Miller, 78 Misc. 428, 139 NYS 660; French v. Lansing, 78 Misc. 80; 132 NYS 523; Armstrong v. Caldwell, 53 Pa. 284; Caldwell v. Copeland, 37 Pa. 427, 78 AmD 436.

15. White v. Miller, 78 Misc. 428, 139 NYS 660; Smith v. Lloyd, 9 Exch.

no disseizin by an act which does not actually take the minerals out of his possession.[16]

[§ 40] **c. Highways.** Under the Massachusetts statute it has been held that maintaining a fence within the limits of a highway for the statutory period under a claim of right gives to the owner an absolute right to continue it there as against the public,[17] but the contrary has been held in Indiana, Ohio, and Ontario.[18] Merely sowing grain and pasturing cattle on the sides of the road,[19] or occasionally piling lumber there and annually mowing and taking the grass therefrom,[20] does not amount to possession.

[§ 41] **d. Submerged Lands—(1) Tidewater and Navigable Flats—(a) Exclusive Use and Occupation.** The title of every one in flats over which the tide ebbs and flows, as long as they remain unoccupied and uninclosed, is subject to the public right of navigation; and therefore it has been held that the use by anyone of flats by passing in vessels or boats over them and anchoring thereon is not a disseizin, and, although frequent or long continued, will not give a title by adverse possession.[21] Like the travel upon a highway, such use is presumed to be in the exercise of a public right and is not adverse to the owner of the fee.[22] But if flats are inclosed or otherwise actually occupied by a person claiming a right to the soil to the exclusion of all others, such use constitutes a disseizin.[23] Thus building a wharf and using the flats covered by the water at the end and sides of it to float vessels for the purpose of loading and unloading them is a disseizin of the land covered by the wharf[24] and at the end and sides thereof as far as it has been exclusively used by such vessels.[25] So erecting two buildings over ground which was covered by a mill pond upon piles under which the water flowed but where boats could not pass has been held to be a disseizin of the land under the buildings and under the water in the open space between the buildings used as a passageway between them;[26] and it has been held that inclosing the flats by a dam to make a tidewater mill pond, exercising exclusive control over the pond, and excluding the public from all use of the land covered by the pond, will constitute an actual possession of such land.[27]

[§ 42] **(b) Planting Oysters.** No title to land under water can be acquired, as against the state or its grantee, by planting oysters thereon for any length of time without other title than that so sought to be acquired.[28]

[§ 43] **(2) Land between High Water and Low Water Marks.** The fact that the owner of land, bounded on one side by high water mark, continues the fences on his lines running to the water down to low water mark to prevent cattle passing around them is not such an occupancy or inclosure of the land between high water mark and low water mark as will constitute adverse possession.[29] Nor does the construction of a marine railway for the conveyance of boats between the land above high water mark and the water give any title to the land between high water mark and low water mark over which the railway runs, especially when the structure is allowed to decay and is washed away before the completion of the statutory period.[30] A title in fee will never be presumed from user where an easement only will secure the privilege enjoyed.[31]

[§ 44] **(3) Ponds.** Cutting ice on a pond and occupying part of the surface with men and horses for that purpose during a few weeks of each winter do not constitute an actual possession of the pond.[32]

[§ 45] **(4) Unnavigable Streams.** In a stream not navigable, keeping up fish traps therein, erecting and repairing dams across it, and using it every year, during the entire fishing season, for the purpose of catching fish, have been held to constitute an unequivocal possession thereof.[33]

[§ 46] **(5) Island Subject to Overflow.** If an island which is subject to overflow is used by a claimant in the way most appropriate, considering its nature and liability to be inundated, by pasturing his stock thereon during such portion of the year as the state of the stream permits, such use has been held

562; Seaman v. Vawdrey, 16 Ves. Jr. 390, 33 Reprint 1032.

16. Armstrong v. Caldwell, 53 Pa. 284. And see Yellow Poplar Co. v. Thompson, 108 Va. 612, 62 SE 358 [quot Cyc entire section].

17. Cutter v. Cambridge, 6 Allen (Mass.) 20. See also in Tennessee Morristown v. Cain, (Ch. A.) 44 SW 471.

18. Cheek v. Aurora, 92 Ind. 107; Brooks v. Riding, 46 Ind. 15; McClelland v. Miller, 28 Oh. St. 488. See Nash v. Glover, 24 Grant Ch. (U. C.) 219.

[a] **Fencing in a small portion of a highway,** not sufficient seriously to obstruct public travel, although done by an adjoining landowner under claim of title, does not constitute an adverse possession which can ripen into title. Brooks v. Riding, 46 Ind. 15; McClelland v. Miller, 28 Oh. St. 488; Lane v. Kennedy, 13 Oh. St. 42.

[b] **Occupancy by a private person of the streets of a city** by cheap, temporary wooden structures cannot confer on him any rights against the city, no matter how long continued. Cheek v. Aurora, 92 Ind. 107.

19. Watkins v. Lynch, 71 Cal. 21, 11 P 808.

20. Bliss v. Johnson, 94 N. Y. 235.

[a] **Defendant having included a private alleyway** over the rear of his lot within the fence which surrounded his lot, and having held it adversely for ten years, paying taxes and assessments thereon, an adjoining lot owner who during such time made no claim of right thereto cannot maintain an action for removal of obstructions therefrom. Ritzmann v. Aspelmeier, 89 Iowa 179, 56 NW 421.

21. Drake v. Curtis, 1 Cush. (Mass.) 395.

[a] **The use of water for floating rafts and lumber** does not constitute actual possession of the land covered by the water. Barker v. Dignan, 25 S. C. 252.

22. Tufts v. Charlestown, 117 Mass. 401.

23. See cases infra this note.

[a] **Driving piles.**—The construction of a log boom by driving piles and connecting them by boom sticks, completely surrounding a tract of submerged land, is an actual possession of it. Allen v. McKay, 120 Cal. 332, 52 P 828. In ejectment to determine title to part of a wharf projecting into a navigable lake it appeared that defendant had driven a line of piles between twenty and thirty years before the commencement of suit, which would exclude from plaintiff's occupancy all the disputed territory, and which was done to fix boundaries. It was held that a finding for plaintiff was error. Jones v. Lee, 77 Mich. 35, 43 NW 855.

24. Nichols v. Boston, 98 Mass. 39.

25. Wheeler v. Stone, 1 Cush. (Mass.) 313; Rust v. Boston Mill Corp., 6 Pick. (Mass.) 158.

26. Boston Mill Corp. v. Bulfinch, 6 Mass. 229.

27. Eastern R. Co. v. Allen, 135 Mass. 13; Tufts v. Charlestown, 117 Mass. 401.

28. Peo. v. Lowndes, 55 Hun (N. Y.) 469, 8 NYS 908 [rev on other grounds 130 N. Y. 455, 29 NE 751]. See also Huntington v. Lowndes, 40 Fed. 625 [aff 153 U. S. 1, 14 SCt 758, 38 L. ed. 615].

29. McFarlane v. Kerr, 23 N. Y. Super. 249.

30. DeLancey v. Piepgras, 138 N. Y. 26, 33 NE 822, 34 NE 513; Geneva v. Henson, 140 App. Div. 49, 124 NYS 588 (submerged crib).

31. DeLancey v. Piepgras, 138 N. Y. 26, 33 NE 822; DeLancey v. Hawkins, 23 App. Div. 8, 49 NYS 469 [aff 163 N. Y. 587, 57 NE 1108].

[a] **Illustration.**—Where land above high water mark was granted to one person, and the beach in front, between high water and low water marks, to another, merely passing over the shore with boats at high water or landing boats on the shore at low water by the proprietors of the land above high water mark, and passing to and fro over the beach for a period of twenty years, do not amount to possession, there being nothing to define a possession in any particular portion of the land, and the acts being consistent with the exercise of a public right of passage when the beach was covered with water, and with an easement in the proprietor of the adjoining land, when the beach was uncovered. Doe v. Littlehale, 10 N. B. 121.

32. Gouverneur v. National Ice Co., 57 Hun 474, 11 NYS 87 [rev on other grounds 134 N. Y. 355, 31 NE 865, 30 AmSR 669, 18 LRA 695].

33. Williams v. Buchanan, 23 N. C. 535, 35 AmD 760.

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to constitute an adverse possession, although the island may not have been inclosed or improved.[34] But it has been held in the same state that the mere fact that one hauls sand from a barren island at intervals for over twenty years does not constitute possession adverse to a riparian owner whose deed includes the island, although such possession was as complete as the character of the island would allow.[35]

[§ 47] **e. Riparian Lands.** Use of riparian land as a boatyard and woodyard and as a means of ingress and egress to and from the river, and assertion of right to receive pay for mooring logs in the river adjoining the land, and long use of the land by claimant's tenant, show adverse possession.[36]

[§ 48] **4. Possession of Others in Behalf of Claimant—a. By Tenant or Agent for Lessor or Principal—(1) Statement of Rule.**[37] It is not necessary that the person claiming title by adverse possession should have been in personal occupation of the land. Possession by an agent or by a tenant under him inures to his benefit and satisfies the requirements of the statute of limitations.[38] What a man may do himself, in the matter of taking and holding possession of real estate, he may do by another.[39] It is immaterial whether the lessees held under a written or verbal lease to make their holding available for the lessor's adverse possession.[40]

34. Webbs v. Hynes, 9 B. Mon. (Ky.) 388, 1 AmD 515.

35. Strange v. Spalding, 29 SW 137, 17 KyL 305.

36. Quinn v. Willamette Pulp, etc., Co., 62 Or. 549, 126 P 1.

37. Constructive possession acquired by tenant or agent see infra §§ 542, 543.

38. U. S.—Holtzman v. Douglas, 168 U. S. 278, 18 SCt 65, 42 L. ed. 466; Stanley v. Schwalby, 147 U. S. 508, 13 SCt 418, 37 L. ed. 259; Gregg v. Forsyth, 24 How. 179, 16 L. ed. 731; Houston Oil Co. v. Goodrich, 213 Fed. 136 (holding that one who digs and removes sand from the premises under license from the adverse claimant is in effect his agent); Scaife v. Western North Carolina Land Co., 90 Fed. 238, 33 CCA 47; Westenfelder v. Green, 76 Fed. 925; Coyle v. Franklin, 54 Fed. 644, 4 CCA 538; Ellicott v. Pearl, 8 F. Cas. No. 4,386, 1 McLean 206 [aff 10 Pet. 412, 9 L. ed. 475]; Roberts v. Moore, 20 F. Cas. No. 11,905, 3 Wall. Jr. 292.

Ala.—Alabama State Land Co. v. Hogue, 164 Ala. 657, 51 S 320; Smith v. Keyser, 115 Ala. 455, 22 S 149; Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 S 43; Elliott v. Dycke, 78 Ala. 150; Smith v. Roberts, 62 Ala. 83; Jay v. Stein, 49 Ala. 514.

Ark.—Cox v. Dougherty, 62 Ark. 629, 36 SW 184.

Cal.—Millett v. Lagomarsino, 107 Cal. 102, 40 P 25; Lucas v. Richardson, 68 Cal. 618, 10 P 183; Barstow v. Newman, 34 Cal. 90.

Del.—Willin v. Wright, 25 Del. 197, 78 A 773.

D. C.—Holtzman v. Douglas, 5 App. 397.

Fla.—Coogler v. Rogers, 25 Fla. 353, 7 S 391.

Ga.—Smith v. Donalson, 137 Ga. 465, 73 SE 577; Moore v. Ensign Oscamp Co., 131 Ga. 421, 62 SE 229; Knorr v. Raymond, 73 Ga. 749; McMullin v. Erwin, 58 Ga. 427; Hanks v. Phillips, 39 Ga. 550.

Ill.—Glos v. Dyche, 214 Ill. 417, 73 NE 757; Kepley v. Scully, 185 Ill. 52, 57 NE 187; Martin v. Judd, 81 Ill. 488; Wharton v. Bunting, 73 Ill. 16; Kane v. Footh, 70 Ill. 587; Williams v. Ballance, 23 Ill. 193, 74 AmD 187.

Iowa.—Clifton Heights Land Co. v. Randell, 82 Iowa 89, 47 NW 905.

Ky.—Carver v. Elmore, 147 Ky. 521, 144 SW 1062; Middlesboro Waterworks Co. v. Neal, 105 Ky. 586, 49 SW 428, 20 KyL 1403; South v. Marcum, 22 SW 844, 15 KyL 339.

Me.—Goodwin v. Sawyer, 33 Me. 541.

Md.—Hackett v. Webster, 97 Md. 404, 55 A 480; Jacob Tome Inst. v. Crothers, 87 Md. 569, 40 A 261.

Mass.—Atty.-Gen. v. Ellis, 198 Mass. 91, 84 NE 430, 15 LRANS 1120 and note; Murphy v. Com., 187 Mass. 361, 73 NE 524; Smith v. Lincoln, 170 Mass. 488, 49 NE 743.

Mich.—Pastorino v. Detroit, 148 NW 231; Harrison v. Spencer, 110 Mich. 215, 68 NW 125.

Minn.—Ramsey v. Glenny, 45 Minn. 401, 48 NW 322, 22 AmSR 736; St. Paul v. Chicago, etc., R. Co., 45 Minn. 287, 48 NW 17; Sherin v. Brackett, 36 Minn. 152, 30 NW 551.

Miss.—Lindenmayer v. Gunst, 70 Miss. 693, 13 S 252, 35 AmSR 685; Harvey v. Briggs, 68 Miss. 60, 8 S 274, 10 LRA 62; Wilson v. Williams, 52 Miss. 487; Griffin v. Sheffield, 38 Miss. 359, 77 AmD 646.

Mo.—Heinemann v. Bennett, 144 Mo. 113, 45 SW 1092; Pharis v. Jones, 122 Mo. 125, 26 SW 1032; Farrar v. Heinrich, 86 Mo. 521; Fugate v. Pierce, 49 Mo. 441; Williams v. Dongan, 20 Mo. 186; Walser v. Graham, 45 Mo. A. 629.

Mont.—Burton v. Laughrey, 18 Mont. 43, 44 P 406.

Nebr.—Johnson v. Sherman County Irr., etc., Co., 71 Nebr. 452, 98 NW 1096; Lantry v. Parker, 37 Nebr. 853, 55 NW 962; Omaha, etc., Land, etc., Co. v. Parker, 33 Nebr. 775, 51 NW 139, 29 AmSR 506.

N. Y.—Landon v. Townshend, 129 N. Y. 166, 29 NE 71; Finlay v. Cook, 54 Barb. 9; Jackson v. Ellis, 13 Johns. 118.

N. C.—Weaver v. Love, 146 N. C. 414, 59 SE 1041; Cochran v. Linville Impr. Co., 127 N. C. 386, 37 SE 496; McNeill v. Fuller, 121 N. C. 209, 28 SE 299; Alexander v. Gibbon, 118 N. C. 796, 24 SE 748, 54 AmSR 757.

Or.—Strom v. Hancock Land Co., 140 P 458, 461 [quot Cyc]; Wheeler v. Taylor, 32 Or. 421, 52 P 183, 67 AmSR 540.

Pa.—Thompson v. Kauffelt, 110 Pa. 209, 1 A 267; Black v. Moore, 1 Pa. 344; Schwab v. Bickel, 11 Pa. Super. 312.

R. I.—New Shoreham v. Ball, 14 R. I. 566.

S. C.—McColman v. Wilkes, 34 S. C. L. 465, 51 AmD 637; Johnson v. McMillan, 32 S. C. L. 143; Williams v. McAliley, 25 S. C. L. 200.

S. D.—Sutton v. Whetstone, 21 S. D. 341, 112 NW 850; Murphy v. Dafoe, 18 S. D. 42, 99 NW 86.

Tenn.—Woodruff v. Roysden, 105 Tenn. 491, 58 SW 1066, 80 AmSR 905; McLemore v. Durivage, 92 Tenn. 482, 22 SW 207; Brown v. Brown, 14 Lea 253, 52 AmR 169; Sims v. Eastland, 3 Head 368; Waddle v. Stuart, 4 Sneed 534; Hammett v. Blount, 1 Swan 385; Ross v. Blair, Meigs 525; Cowan v. Hatcher, (Ch. A.) 59 SW 689; Hornsby v. Davis, (Ch. A.) 36 SW 159; Savage v. Bon Air Coal, etc., Co., 2 Tenn. Ch. A. 594.

Tex.—Dunn v. Taylor, 102 Tex. 80, 113 SW 265; Chamberlain v. Pybas, 81 Tex. 511, 17 SW 50; Warren v. Fredericks, 76 Tex. 647, 13 SW 643; Mims v. Rafel, 73 Tex. 300, 11 SW 277; Read v. Allen, 63 Tex. 154; Texas Land Co. v. Williams, 51 Tex. 51; Virginia Bank v. Hedges, 38 Tex. 614; Whitehead v. Foley, 28 Tex. 1; Wallace v. Wilcox, 27 Tex. 60; Gillespie v. Jones, 26 Tex. 343; Cochrane v. Faris, 18 Tex. 850; Smith v. De la Garza, 15 Tex. 150, 65 AmD 147; Johnson v. Sullivan, (Civ. A.) 163 SW 1015; Carlock v. Willard, (Civ. A.) 149 SW 363; Combs v. Stringer, (Civ. A.) 142 SW 668; Cleveland v. Smith, (Civ. A.) 113 SW 547; Harris v. Iglehast, 52 Tex. Civ. A. 6, 113 SW 170; Hulett v. Platt, 49 Tex. Civ. A. 377, 109 SW 207; Travis v. Hall, 37 Tex. Civ. A. 143, 83 SW 425; Neyland v. Texas Yellow Pine Lumber Co., 26 Tex. Civ. A. 417, 64 SW 696; Iams v. Root, 22 Tex. Civ. A. 413, 55 SW 411; Collier v. Couts, (Civ. A.) 45 SW 485 [rev on other grounds 92 Tex. 234, 47 SW 525]; Bateman v. Jackson, (Civ. A.) 45 SW 224; Parker v. Cockrell, (Civ. A.) 31 SW 221; Sealy v. Maris, (Civ. A.) 29 SW 828; Carothers v. Covington, (Civ. A.) 27 SW 1040; Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 21 SW 405; Rushing v. Chandler, 2 Tex. Unrep. Cas. 600.

Vt.—Wing v. Hall, 47 Vt. 182.

Va.—Virginia Min., etc., Co. v. Hoover, 82 Va. 449, 4 SE 689.

W. Va.—Camden v. West Branch Lumber Co., 59 W. Va. 148, 53 SE 409; State v. Harman, 57 W. Va. 447, 50 SE 828.

Wis.—Krebs v. Dodge, 9 Wis. 1.

Eng.—Haigh v. West, [1893] 2 Q. B. 19; Doe v. Massey, 17 Q. B. 373, 79 ECL 373; Williams v. Pott, L. R. 12 Eq. 149.

Can.—Bradshaw v. Patterson, 18 WestLR 402.

Ont.—Reynolds v. Trivett, 2 OntWR 486. And see Toronto v. Ward, 18 Ont. L. 214, 11 OntWR 653, 12 OntWR 426 [aff 13 OntWR 312]; Arnold v. Cummer, 15 Ont. 382; Hopkins v. Hopkins, 3 Ont. 223; Coulter v. Rockwell, 6 OntWR 537; Heyland v. Scott, 19 U. C. C. P. 165.

[a] **The sole and exclusive possession of one claiming ownership of land** is not affected by the fact that he allows tenants to reside on the land. Sutton v. Whetstone, 21 S. D. 341, 112 NW 850.

[b] **Actual possession in drilling and producing oil and gas** by a lessee is actual possession of the land by the lessor for adversary possession. Lloyd v. Mills, 68 W. Va. 241, 69 SE 1094, 32 LRANS 702.

[c] **A son's possession of land with the permission of his father** who claims the land by adverse possession should be treated as a tenant's possession under the father. Alabama State Land Co. v. Hogue, 164 Ala. 657, 51 S 320.

[d] **Predecessor's tenants.**—Possession of land through tenants by plaintiff's predecessor inures to plaintiff's benefit on a claim of title by adverse possession. Wright v. Giles, (Tex. Civ. A.) 129 SW 1163.

[e] **Widow remaining in possession after sale of homestead.**—A widow remaining in possession of a house and grounds after a sale by her of her homestead interest holds as the tenant of the purchaser, so that such purchaser could assert title by adverse possession. Carver v. Elmore, 147 Ky. 521, 144 SW 1062.

[f] **Permissive possession.**—One who occupies land through permission of one claiming it by adverse possession does not thereby adversely interrupt such claimant's possession but holds for his benefit. Jacob Tome Inst. v. Crothers, 87 Md. 569, 40 A 261.

39. Camden v. West Branch Lumber Co., 59 W. Va. 148, 163, 53 SE 409 (per Poffenberger, J.).

40. Wolf v. Wilhelm, (Tex. Civ. A.) 146 SW 216.

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[§ 49] **(2) Extent and Limits of Rule.** The rule applies whether the lease be by parol or in writing,[41] or whether the tenancy is created by an arrangement with the claimant personally or through an agent;[42] and its operation is not affected by the fact that the person claiming title was out of the state a part of the time.[43] Furthermore the rule applies although the tenant repudiates the tenancy and attorns to a third person, provided the claimant institutes suit against the lessee and recovers possession.[44] Nevertheless the possession of the tenant must be actual, and the rule does not apply unless he went into possession under the lease.[45] So, to enable the claimant to obtain the benefit of the possession of the agent or tenant, it is essential that the agent or tenant should hold the land as such,[46] and that he should do so for the full statutory period.[47] And ordinarily the claimant cannot avail himself of the tenant's possession of land not included in the lease.[48] So it is obvious that if the acts which an agent or tenant is authorized to perform in relation to the land in dispute do not amount to possession if committed by the claimant himself, the performance of such acts by the agent or tenant cannot avail the claimant in the acquisition of title by adverse possession.[49] However, such acts of ownership by the tenant as the character of the land admits of will suffice.[50] Where at the time of a tax sale the land was in the possession of a tenant, and the possession relied on to show an adverse possession in the tax sale purchaser was that of the tenant under an alleged attornment to the purchaser, such attornment must be shown by clear proof.[50½]

[§ 50] **b. By Employees for Employer.** Where the employees of a railroad company by its permission build houses on plaintiff's land, but the houses were removed after notice from plaintiff to the company requiring it, such occupation by the company's employees was not for railroad purposes and was not possession by the company so as to entitle it to claim title by adverse possession.[51]

[§ 51] **c. By Vendee for Vendor.** One taking possession under an executory contract of purchase from the claimant is deemed to hold as the quasi tenant or agent of the claimant, so that his possession will inure to the benefit of the claimant and thus perfect his title;[52] if, however, such vendee was in possession adversely to his vendor the agreement to purchase will not by relation back entitle the vendor to the benefit of the vendee's prior possession.[53] Where land is conveyed by one holding adversely to the true owner the possession of his

41. Smith v. Donalson, 137 Ga. 465, 73 SE 577; Gillespie v. Jones, 26 Tex. 343; Cochrane v. Faris, 18 Tex. 850.

[a] **Recording lease.**—The statute does not require the tenancy to be created or proved by a recorded deed. Gillespie v. Jones, 26 Tex. 343. See also Atty.-Gen. v. Ellis, 198 Mass. 91, 84 NE 430, 15 LRANS 1120.

42. Tilton v. Emery, 17 N. H. 536.

43. McFarland v. Cornwell, 151 N. C. 428, 66 SE 454; Weaver v. Love, 146 N. C. 414, 59 SE 1041. See also Driver v. Martin, 68 Ark. 551, 60 SW 651.

44. Coyle v. Franklin, 54 Fed. 644, 4 CCA 538. Compare Van Deventer v. Lott, 172 Fed. 574, 590 [aff 180 Fed. 378, 103 CCA 524] (in which it was held that, where tenants leasing from defendants took new leases from complainant, an adverse claimant, before their occupancy had been long enough to give defendants title by adverse possession, their further occupancy cannot be counted as possession by defendants. "It does not seem that since the making of the new leases by the complainant to these tenants any act of theirs could perfect a title by adverse possession in the defendant").

45. Beasley v. Clarke, 102 Ala. 254, 14 S 744; Russell v. Marks, 3 Metc. (Ky.) 37; Wright v. Nona Mills Co., (Tex. Civ. A.) 98 SW 917 [rev on other grounds 101 Tex. 14, 102 SW 1118]; Hill v. Harris, 26 Tex. Civ. A. 408, 64 SW 820; Brymer v. Taylor, 5 Tex. Civ. A. 103, 23 SW 635. See also Interstate Inv. Co. v. Bailey, (Ky.) 93 SW 578, 29 KyL 468 (conveyance of lands held adversely).

[a] **Reason for rule.**—"The fact that the lessee was faithless to his contract must, in such connection, be visited upon the lessor, rather than the true owner of the land, who is entitled to know, from the fact of actual occupancy, that a claim adverse to him is being asserted." Beasley v. Clarke, 102 Ala. 254, 259, 14 S 744.

46. U. S.—Palmer v. Lansburgh, 102 Fed. 376.

Cal.—Mason v. Wolff, 40 Cal. 246.

Ky.—Chenault v. Quisenberry, 56 SW 410, 21 KyL 1771, 57 SW 234, 22 KyL 79.

Mass.—Holmes v. Turner's Falls Co., 150 Mass. 535, 23 NE 305, 6 LRA 283.

Mo.—Robert v. Walsh, 19 Mo. 452.

Tex.—Johnson v. Garratt, 25 Tex. Suppl. 13; Watts v. Bruce, 31 Tex. Civ. A. 347, 72 SW 258.

[a] **Possession must be by direction or with consent** of landlord. Bayne v. Brown, 60 Or. 110, 118 P 282.

47. Wiley v. Bargman, (Tex. Civ. A.) 90 SW 1116.

[a] **Where the tenant claimed the land as his own** during a part of the statutory period, the landlord could not acquire title by virtue of his possession. Watts v. Bruce, 31 Tex. Civ. A. 347, 72 SW 258.

48. See cases infra this note.

[a] **If a landlord authorize a tenant to enter on one tract, and he enter on another, without authority,** his entry does not invest the landlord with the possession of the latter. West v. Price, 2 J. J. Marsh. (Ky.) 380.

[b] **Encroachment on lot.**—(1) Where the landlord places a tenant in possession of a lot and the latter knowingly encroaches on a part of an adjoining lot to which the lease gives him no right, without the landlord's knowledge, the tenant's occupation does not inure to the benefit of the landlord. The landlord is not responsible for the trespass and therefore can derive no benefit from it. Doe v. Leavens, 3 U. C. Q. B. 411 [foll Bruyea v. Rose, 19 Ont. 483]. (2) It has been held, however, that where a tenant erected a building which encroached on the land of an adjoining owner, and the lessor, although it did not appear affirmatively that beforehand he had authorized the work to be done, nevertheless knew of, consented to, and approved the tenant's act while the work was in progress and accepted the benefit of the work after it had been done, the possession of the tenant inured to the benefit of the lessor. Schwab v. Bickel, 11 Pa. Super. 312.

49. White v. Harris, 206 Ill. 584, 69 NE 519 (holding that the facts that one employed an agent to keep people from cutting oak timber on vacant land permitted the agent to cut ash timber and to pasture his cattle thereon, and that the agent went on the land once a week or once a month, and at different times prevented persons from cutting timber, did not constitute such possession as would enable the principal to claim the land); Travers v. McIlvain, 181 Ill. 382, 55 NE 135; Interstate Inv. Co. v. Bailey, 93 SW 578, 29 KyL 468; Wheeler v. Taylor, 32 Or. 421, 52 P 183, 67 AmSR 540 (holding that occupancy of a wood lot by a lessee under a lease of a farm, which permitted him merely to take firewood and a certain number of rails from the lot, is not sufficient to constitute an adverse possession thereof in favor of the lessor, the two tracts being distinct and four miles apart).

50. Smith v. Keyser, 115 Ala. 455, 22 S 149.

50½. Ashbrook v. Bailey, (Va.) 81 SE 64.

51. Mead v. Illinois Cent. R. Co., 112 Iowa 291, 83 NW 979.

52. Ga.—Studstill v. Wilcox, 94 Ga. 690, 20 SE 120. See also Payne v. McKinney, 30 Ga. 83.

Ill.—Hale v. Gladfelder, 52 Ill. 91.

Ky.—Chiles v. Jones, 4 Dana 479.

Mo.—Dollarhide v. Mabary, 125 Mo. 197, 28 SW 332; Mabary v. Dollarhide, 98 Mo. 198, 11 SW 611, 14 AmSR 639.

N. C.—Stewart v. Lowdermilk, 147 N. C. 583, 61 SE 523; McNeill v. Fuller, 121 N. C. 209, 28 SE 299; Bradshee v. Hightower, 118 N. C. 399, 24 SE 120; Rhodes v. Brown, 13 N. C. 195.

Tex.—Cook v. Coleman, (Civ. A.) 33 SW 756.

Wash.—McAuliff v. Parker, 10 Wash. 141, 38 P 744.

W. Va.—State v. Harman, 57 W. Va. 447, 50 SE 828.

See Ellege v. Cooke, 5 Lea (Tenn.) 622.

[a] **Application of rule.**—A deed from a mortgagee in possession to defendants was a valid link in the chain of title by virtue of seven years' possession under color of title, under known and visible lines and boundaries, since an intervening possession of a person under an unfulfilled verbal bargain and sale amounted to possession as the mortgagee's tenant at will, and inured to defendants' benefit. Stewart v. Lowdermilk, 147 N. C. 583, 61 SE 523.

[b] **Possession by the grantee in a deed to land placed in escrow,** but never delivered, is the possession of the grantor for the purposes of adverse possession. McAuliff v. Parker, 10 Wash. 141, 38 P 744.

[c] **The possession by a vendee of part of a tract of land** will not inure to the vendor's benefit as to the remainder of the tract out of which the purchase was taken. Mosely v. Withie, 26 Tex. 720; Neill v. Gody, 26 Tex. 286. See also Carlyle v. Pruett, 37 Tex. Civ. A. 384, 84 SW 372.

53. Botts v. Shields, 3 Litt. (Ky.) 32 (holding that where there are an elder and a junior patent, and a person takes possession under a claim adverse to both, and the possessor afterward contracts with the junior patentee for the purchase of his title, such contract will not relate back to the time of his taking possession so

grantee thereafter is not deemed his possession so as to entitle him to the land in case the deed is set aside on the ground of infancy, by virtue of a title perfected by his grantee by his continued possession.[54]

[§ 52] **d. By Donee for Donor.** The possession of one who goes into possession of land under a promise that he shall receive a gift of the land by deed in the future inures to the benefit of the donor for the purpose of acquisition of title by adverse possession by the latter.[55]

[§ 53] **e. By Dowress for Heirs.** One holding as dowress, by virtue of dower proceedings instituted against heirs in possession claiming exclusive title in fee, holds for such heirs, as against other persons claiming to be heirs.[56]

[§ 54] **f. By Inhabitants for Municipality.** As regards municipal corporations, it has been held that the use of lands by the individual inhabitants not shown to be acting by authority of the municipality cannot inure to the benefit of the municipality to show possession by it.[57]

[§ 55] **g. By Husband for Wife.** Conduct of a husband in occupying, managing, and operating land, the ostensible legal title to which was in his wife, as a part of the farm on which they resided, must be referred to her title, and his adverse possession considered as her possession, in the absence of a contrary showing.[58]

[§ 56] **h. By One Cotenant for Another.** Where color of title is held by cotenants, the possession of one inures to the benefit of all so as to ripen title in each according to his respective interests.[59]

[§ 56½] **i. By Trustee for Cestui Que Trust.** Where a trustee holds property adversely to other claimants, his adverse holding inures to the benefit of the cestui que trust.[59½]

III. OPEN AND NOTORIOUS POSSESSION

[§ 57] **A. Necessity—1. Statement of Rule.** Most courts and text-writers, in defining what is meant by the term "adverse possession," include as one of the essential elements thereof "open and notorious" possession. It is in general true that title by adverse possession cannot be acquired unless the possession is open and notorious, but the rule must be understood with some qualification. A more correct statement of the rule is: In order to make good a claim of title by adverse holding the true owner must have actual knowledge of the hostile claim,[60] or the possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally and with a purpose to assert a claim of title adversely to his,[61] or so patent that

as to make it the possession of the junior patentee).

54. Norcum v. Sheahan, 21 Mo. 25, 64 AmD 214; Norcum v. Gaty, 19 Mo. 65.

55. Bond v. Garrison, (Tex. Civ. A.) 127 SW 839.

56. Westenfelder v. Green, 76 Fed. 925.

57. Green v. Chelsea, 24 Pick. (Mass.) 71.

[a] **In determining whether the possession of an actual occupant is the possession of the town** all the acts of a town, done in connection with land, the title to which it claims, must be considered. Murphy v. Com., 187 Mass. 361, 73 NE 524.

58. Hatch v. Lusignan, 117 Wis. 428, 94 NW 332. See also Bowman v. Owens, 133 Ga. 49, 65 SE 156; Walker v. Neil, 117 Ga. 733, 45 SE 387; Bradshaw v. Patterson, 18 WestLR 402.

59. Weaver v. Love, 146 N. C. 414, 59 SE 1041; Woodruff v. Roysden, 105 Tenn. 491, 58 SW 1066, 80 AmSR 905. And see Elliott v. Holder, 3 Head (Tenn.) 698; Foster v. Johnson, 89 Tex. 640, 36 SW 67; Read v. Allen, 63 Tex. 154. But see Frey v. Myers, (Tex. Civ. A.) 113 SW 592 (where one tenant in common held possession, claiming a half interest in herself and the other half interest in the other tenant in common).

59½. Ratcliff v. Ratcliff, (Tex. Civ. A.) 161 SW 30.

60. U. S.—Oregon, etc., R. Co. v. Grubissich, 206 Fed. 577, 124 CCA 375.

Ala.—Alexander City Union Warehouse, etc., Co. v. Central of Georgia R. Co., 62 S 745; Eureka Co. v. Norment, 104 Ala. 625, 16 S 579; Ponder v. Cheeves, 104 Ala. 307, 16 S 145; Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 9 S 537; Woods v. Montevallo, etc., Co., 84 Ala. 560, 3 S 475, 5 AmSR 393.

Cal.—Bath v. Valdez, 7 P 487; Thompson v. Pioche, 44 Cal. 508; Mattes v. Hall, 21 Cal. A. 552, 132 P 295; Madden v. Hall, 21 Cal. A. 541, 132 P 291.

Ill.—Roby v. Calumet, etc., Canal, etc., Co., 211 Ill. 173, 71 NE 822.

Ind.—Richwine v. Presbyterian Church, 135 Ind. 80, 34 NE 737.

Ky.—Owsley v. Owsley, 117 Ky. 47, 77 SW 397, 25 KyL 1186; Buford v. Cox, 5 J. J. Marsh. 582.

Mass.—White v. Shippee, 216 Mass. 23, 102 NE 948; Pray v. Pierce, 7 Mass. 381, 5 AmD 59.

Mich.—Bean v. Bean, 163 Mich. 379, 128 NW 413.

Minn.—Glover v. Sage, 87 Minn. 526, 92 NW 471.

Miss.—McCaughn v. Young, 85 Miss. 277, 37 S 839.

Mo.—Harper v. Morse, 114 Mo. 317, 21 SW 517; Wilkerson v. Thompson, 82 Mo. 317.

Nebr.—Roberts v. Sioux City, etc., R. Co., 73 Nebr. 8, 102 NW 60, 2 LR ANS 272 and note, 10 AnnCas 992 and note.

N. M.—Johnston v. Albuquerque, 12 N. M. 20, 29, 72 P 9 [cit Cyc].

N. Y.—Bartlett v. Judd, 21 N. Y. 200, 78 AmD 131; Tarplee v. Sonn, 109 App. Div. 241, 96 NYS 6 (allegation in pleading in action for partition not sufficient notice); Timmermann v. Cohn, 70 Misc. 327, 128 NYS 770 [aff 146 App. Div. 924, 131 NYS 1146 (rev on other grounds 204 N. Y. 614, 97 NE 589)].

N. C.—Barfield v. Hill, 163 N. C. 262, 79 SE 677; Snowden v. Bell, 159 N. C. 497, 75 SE 721; Locklear v. Savage, 159 N. C. 236, 74 SE 347; King v. Wells, 94 N. C. 344; Gilchrist v. McLaughlin, 29 N. C. 310.

Okl.—Flesher v. Callahan, 32 Okl. 283, 122 P 489; Wade v. Crouch, 140 Okl. 593, 78 P 91.

Or.—Thomas v. Spencer, 66 Or. 359, 133 P 822; Lais v. Smith, 63 Or. 206, 127 P 26.

Pa.—Henry v. Huff, 143 Pa. 548, 22 A 1046; Green v. Simpson, 49 Pa. Super. 334.

Tex.—Hooper v. Acuff, (Civ. A.) 159 SW 934.

Utah.—Dignan v. Nelson, 26 Utah 186, 72 P 936.

W. Va.—State v. Moore, 71 W. Va. 285, 76 SE 461.

Can.—Sherren v. Pearson, 14 Can. S. C. 581; McConaghy v. Denmark, 4 Can. S. C. 609.

N. B.—Turnbull Real Est. Co. v. Segee, 4 N. B. 372.

N. S.—McInnes v. Stewart, 45 N. S. 435.

Ont.—Coffin v. North American Land Co., 21 Ont. 80; Young v. Elliott, 23 U. C. Q. B. 420.

61. U. S.—Tompkins v. Creighton-McShane Oil Co., 160 Fed. 303, 87 CCA 427; Bump v. Butler County, 93 Fed. 290; National Waterworks Co. v. Kansas City, 78 Fed. 428.

Ala.—Bynum v. Hewlett, 137 Ala. 333, 34 S 391; Eureka Co. v. Norment, 104 Ala. 625, 16 S 579; Ponder v. Cheeves, 104 Ala. 307, 16 S 145; Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 9 S 537; Lucy v. Tennessee, etc., R. Co., 92 Ala. 246, 8 S 806; Woods v. Montevallo Coal, etc., Co., 84 Ala. 560, 3 S 475, 5 AmSR 393; Dothard v. Denson, 72 Ala. 541; Alexander v. Wheeler, 69 Ala. 332; Lucas v. Daniels, 34 Ala. 188; Brown v. Cockerell, 33 Ala. 38; Benje v. Creagh, 21 Ala. 151.

Ariz.—Costello v. Muheim, 9 Ariz. 422, 84 P 906.

Ark.—Johnson v. Elder, 92 Ark. 30, 121 SW 1066; St. Louis, etc., R. Co. v. Ruttan, 90 Ark. 178, 118 SW 705.

Cal.—Mauldin v. Cox, 67 Cal. 387, 7 P 804; Unger v. Mooney, 63 Cal. 586, 49 AmR 100; Grimm v. Curley, 43 Cal. 250; Mattes v. Hall, 21 Cal. A. 552, 132 P 295; Madden v. Hall, 21 Cal. A. 541, 132 P 291.

Fla.—Watrous v. Morrison, 33 Fla. 261, 14 S 805, 39 AmSR 139.

Ga.—Walker v. Steffes, 139 Ga. 520, 77 SE 580; McCook v. Crawford, 114 Ga. 337, 40 SE 225; Morgan v. Taylor, 55 Ga. 224; Carroll v. Gillion, 33 Ga. 539; Doe v. Roe, 32 Ga. 572; Denham v. Holeman, 26 Ga. 182, 71 AmD 198; Watts v. Griswold, 20 Ga. 732, 65 AmD. 647.

Ill.—Towle v. Quante, 246 Ill. 568, 92 NE 967; Horn v. Metzger, 234 Ill. 240, 84 NE 893; Kerr v. Hitt, 75 Ill. 51; Truesdal v. Ford, 37 Ill. 210; Morrison v. Kelly, 22 Ill. 609, 74 AmD 169; McClellan v. Kellogg, 17 Ill. 498; Irving v. Brownell, 11 Ill. 402.

Ind.—Vandalia R. Co. v. Wheeler, 103 NE 1069; King v. Carmichael, 136 Ind. 20, 35 NE 509, 43 AmSR 303.

Iowa.—Grube v. Wells, 34 Iowa 148.

Ky.—Brown v. White, 153 Ky. 452, 156 SW 96; Young v. Pace, 145 Ky. 405, 140 SW 555; King v. Eagle Coal Co., 144 Ky. 660, 139 SW 863; Arthur v. Humble, 140 Ky. 56, 130 SW 958; Thruston v. Masterson, 9 Dana 228; Buford v. Cox, 5 J. J. Marsh. 582.

La.—Ramos Lumber, etc., Co. v. Sanders, 117 La. 615, 42 S 158; Simon v. Richard, 42 La. Ann. 842, 8 S 629.

Me.—Carter v. Clark, 92 Me. 225, 42 A 398; Foxcroft v. Barnes, 29 Me. 128; Tilton v. Hunter, 24 Me. 29; Little v. Megquier, 2 Me. 176.

Md.—Beatty v. Mason, 30 Md. 409.

Mass.—Cook v. Babcock, 11 Cush. 206; Boston, etc., R. Corp. v. Sparhawk, 5 Metc. 469; Sparhawk v. Bullard, 1 Metc. 95; Kennebeck Purchase

the owner could not be deceived, and such that if he remains in ignorance it is his own fault.[62] "The claimant must exercise such acts of ownership and occupancy as are sufficient to 'hoist his flag' over the lands, so that all may observe it."[63] A clandestine entry or possession will not set the statute in motion,[64] and mere declarations as to title in himself by the claimant where the possession is not visible or actual amount to nothing.[65] The owner will not be condemned to lose his land because he has failed to sue for its recovery, when he had no notice that it was held or claimed adversely.[66]

[§ 58] **2. Reason for Rule.** The reason on which the rule is based is that the doctrine of adverse possession by which title may be acquired rests on the presumed acquiescence of the landowner, and, as acquiescence cannot be presumed unless the owner has or may be presumed to have notice of the possession, notoriety and openness of possession are important constituents as facts on which the presumption of the owner's knowledge may be predicated.[67] To hold otherwise it has been said, "would be to establish a principle by which every proprietor of vacant land might be disseized without his knowl-

v. Springer, 4 Mass. 416, 3 AmD 227; Kennebeck Purchase v. Call, 1 Mass. 483. See White v. Shippee, 102 NE 948; Tinker v. Bessel, 213 Mass. 74, 99 NE 946.

Mich.—Chabert v. Russell, 109 Mich. 571, 67 NW 902.

Minn.—Murphy v. Doyle, 37 Minn. 113, 33 NW 220.

Miss.—Dixon v. Cook, 47 Miss. 220; Gordon v. Sizer, 39 Miss. 805; Alexander v. Polk, 39 Miss. 737; Magee v. Magee, 37 Miss. 138; Ford v. Wilson, 35 Miss. 490, 72 AmD 137.

Mo.—Herbst v. Merrifield, 133 Mo. 267, 34 SW 571; St. Louis v. Priest, 103 Mo. 652, 15 SW 988; Musick v. Barney, 49 Mo. 458; Fugate v. Pierce, 49 Mo. 441; Kellogg v. Mullen, 39 Mo. 174.

Nebr.—Woodcock v. Crosby, 92 Nebr. 723, 139 NW 646; Lanning v. Mussers, 88 Nebr. 418, 129 NW 1022; Roberts v. Sioux City, etc., R. Co., 73 Nebr. 8, 102 NW 60, 2 LRANS 272 and note, 10 AnnCas 992 and note.

N. H.—Manchester v. Duggan, 75 N. H. 33, 70 A 1075; Little v. Downing, 37 N. H. 355; Hale v. Glidden, 10 N. H. 397; Smith v. Hosmer, 7 N. H. 436, 28 AmD 354.

N. J.—Foulke v. Bond, 41 N. J. L. 527; Cobb v. Davenport, 32 N. J. L. 369; Cornelius v. Giberson, 25 N. J. L. 1.

N. M.—Jenkins v. Maxwell Land Grant Co., 15 N. M. 281, 107 P 739; Johnston v. Albuquerque, 12 N. M. 20, 29, 72 P 9 [cit Cyc].

N. Y.—Hammond v. Zehner, 21 N. Y. 118; Hamlin v. Peo., 155 App. Div. 680, 140 NYS 643; Geneva v. Henson, 140 App. Div. 49, 124 NYS 588; Heughes v. Galusha Stove Co., 133 App. Div. 814, 118 NYS 109; Union College v. Wheeler, 5 Lans. 160, 59 Barb. 585 [aff 61 N. Y. 88]; Hindley v. Metropolitan El. R. Co., 42 Misc. 56, 85 NYS 561 [aff 103 App. Div. 504, 93 NYS 53]; Jackson v. Sharp, 9 Johns. 163, 6 AmD 267; Jackson v. Schoonmaker, 2 Johns. 230. See Monnot v. Murphy, 207 N. Y. 240, 100 NE 742.

N. C.—Barfield v. Hill, 163 N. C. 262, 79 SE 677; Locklear v. Savage, 159 N. C. 236, 74 SE 347; King v. Wells, 94 N. C. 344; Moore v. Thompson, 69 N. C. 120; Gilchrist v. McLaughlin, 29 N. C. 310.

Or.—Thomas v. Spencer, 133 P 822; Lais v. Smith, 63 Or. 206, 127 P 26; McNear v. Guistin, 50 Or. 377, 92 P 1075; Bowman v. Bowman, 35 Or. 279, 57 P 546.

Pa.—Long v. Mast, 11 Pa. 189; Hawk v. Senseman, 6 Serg. & R. 21.

R. I.—Draper v. Monroe, 18 R. I. 398, 28 A 340.

S. C.—Barker v. Deignan, 25 S. C. 252.

Tenn.—Smith v. Lee, 1 Coldw. 549.

Tex.—Titel v. Garland, 99 Tex. 201, 85 SW 1152; Gillespie v. Jones, 26 Tex. 343; Galveston v. Menard, 23 Tex. 349; Portis v. Hill, 3 Tex. 273; Bartine v. McElroy, (Civ. A.) 123 SW 1174.

Utah.—Bingham Livery, etc., Co. v. McDonald, 37 Utah 457, 468, 110 P 56 [cit Cyc].

Vt.—Soule v. Barlow, 49 Vt. 329.

Va.—Harman v. Ratliff, 93 Va. 249, 24 SE 1023; Turpin v. Saunders, 32 Gratt. (73 Va.) 27; Dawson v. Watkins, 2 Rob. (41 Va.) 259.

W. Va.—State v. Moore, 71 W. Va. 285, 76 SE 461.

Wis.—Illinois Steel Co. v. Tamms, 154 Wis. 340, 141 NW 1011; Jones v. Collins, 16 Wis. 594. See Reitler v. Lindstrom, 126 Wis. 562, 106 NW 388.

Can.—Couture v. Couture, 34 Can. S. C. 716; Sherren v. Pearson, 14 Can. S. C. 581; McConaghy v. Denmark, 4 Can. S. C. 609.

N. B.—Cairns v. Horsman, 35 N. B. 436; Doe v. Littlehale, 10 N. B. 121.

Ont.—Piper v. Stevenson, 28 Ont. L. 379; Reynolds v. Trivett, 7 Ont. L. 623, 3 OntWR 463; Kay v. Wilson, 2 Ont. A. 133, 24 Grant. Ch. (U. C.) 212; Hartley v. Maycock, 28 Ont. 508; Massey-Harris Co. v. Elliott, 1 Ont WR 65.

[a] **As otherwise expressed** (1) the possession must be of such a character as is calculated to give the owner notice of the adverse holding (Bynum v. Hewlett, 137 Ala. 333, 34 S 391; Clark v. Gilbert, 39 Conn. 94; Hackett v. Webster, 97 Md. 404, 55 A 480; Musick v. Barney, 49 Mo. 458; Fugate v. Pierce, 49 Mo. 441; Bowman v. Bowman, 35 Or. 279, 57 P 546; Nona Mills Co. v. Wright, 101 Tex. 14, 102 SW 1118; Craver v. Ragon, (Tex. Civ. A.) 110 SW 489), (2) or of such notoriety that the true owner may be presumed to know of it (Morse v. Williams, 62 Me. 445; Turpin v. Saunders, 32 Gratt. (73 Va.) 27; Core v. Faupel, 24 W. Va. 238); (3) or such as will reasonably indicate to the owner, visiting and inspecting the land, an assertion of ownership, instead of the probable invasion of a mere trespasser (Roberts v. Richards, 84 Me. 1, 24 A 425; Sparrow v. Hovey, 44 Mich. 63, 6 NW 93; Pike v. Robertson, 79 Mo. 615). (4) "When one speaks of the possession being notorious, that means that it must be so public that, in the natural order of things, knowledge of it would be brought home to the owner of the land, so that the owner could take such steps as might be necessary to prevent the occupancy by another ripening into a title by limitation." Per Britton, J., in Beer v. Williams, 21 Ont. L. 49, 53, 15 OntWR 868.

[b] **The term "notorious,"** (1) used in defining adverse possession, means that the character of the holding must possess such elements of notoriety that the owner may be presumed to have notice of it and of its extent. Watrous v. Morrison, 33 Fla. 261, 14 S 805, 39 AmSR 139. (2) "Notorious" possession as an element of title by limitation is possession which is generally known and talked of, and universally recognized, conspicuous, widely, or commonly known. Long v. Lackawanna Coal, etc., Co., 233 Mo. 713, 136 SW 673.

[c] **As between adjoining owners.**—Title by adverse possession cannot originate between adjoining owners of land in possession of the same tenant without knowledge of the adverse claim brought home to the proprietor. Harper v. Morse, 114 Mo. 317, 21 SW 517.

[d] **As between persons claiming title from a common grantor.**—In ejectment, defendant testified that he supposed his deed from a common grantor covered the lot in issue, and that he fenced and planted it, but did not testify that he had ever claimed title to the knowledge of the grantor or of plaintiff, or had done any act which would charge them with knowledge of such claim or would be inconsistent with permissive occupancy. It was held that he failed to show that his occupancy amounted to a disseizin of the grantor which would bar plaintiff's action. Draper v. Monroe, 18 R. I. 398, 28 A 340.

[e] **As between holders of conflicting patents.**—Where uncleared lands have been granted by the state by conflicting patents, testimony of the junior patentee that he had possession of the lands in controversy, without any showing of visible acts of ownership, is insufficient to show adverse possession. Harman v. Ratliff, 93 Va. 249, 24 SE 1023. See also Thruston v. Masterson, 9 Dana (Ky.) 228 (where it was held that the party claiming under a junior grant is not presumed to have had notice of an adverse claim until adverse possession is taken under an elder grant, or some distinct and notorious assertion of right is made under it).

[f] **Effect of occupation under color of title.**—(1) The fact that the disseizor holds under color of title will not dispense with the necessity of possession which is actual, exclusive, and notorious as the foundation of title by adverse possession. Foulke v. Bond, 41 N. J. L. 527. (2) "The possession necessary under a colourable title to oust the title of the true owner must be just as open, actual, exclusive, continuous and notorious as when claimed without such colour, the only difference being that the actual possession of part is extended by construction to all the lands within the boundaries of the deed, but only when and while there is that part occupation." Wood v. Leblanc, 34 Can. S. C. 627, 635 (per Davies, J.).

62. Pastorino v. Detroit, (Mich.) 148 NW 231; Leavenworth v. Reeves, (Miss.) 64 S 660; Musick v. Barney, 49 Mo. 458; Fugate v. Pierce, 49 Mo. 441; Young v. Elliott, 23 U. C. Q. B. 420. See also Monnot v. Murphy, 207 N. Y. 240, 100 NE 742.

63. McComb v. Saxe, 92 Ark. 321, 323, 122 SW 987 (per McCulloch, J.). The adverse claimant "must keep his flag flying in a visible and hostile manner." Pierce v. Barney, 209 Pa. 132, 58 A 152; Plummer v. Hillside Coal, etc., Co., 160 Pa. 483, 28 A 853.

64. Thompson v. Pioche, 44 Cal. 508; Delaware, etc., Canal Co. v. Hughes, 183 Pa. 66, 38 A 568, 63 AmSR 743, 38 LRA 826.

[a] **One who secretly enters on coal** through an opening in land other than that in which the coal is situated cannot obtain title to the coal by adverse possession, even by continuous mining. Pierce v. Barney, 209 Pa. 132, 58 A 152; Delaware, etc., Canal Co. v. Hughes, 183 Pa. 66, 38 A 568, 63 AmSR 743, 38 LRA 826.

65. Swope v. Ward, 185 Mo. 316, 84 SW 895.

66. Thompson v. Pioche, 44 Cal. 508.

67. Ala.—Brown v. Cockerell, 33 Ala. 38; Benze v. Creagh, 21 Ala. 151.

Cal.—Thompson v. Pioche, 44 Cal, 508.

Fla.—Watrous v. Morrison, 33 Fla. 261, 14 S 805, 39 AmSR 139.

Ga.—English v. Register, 7 Ga. 387.

Me.—Roberts v. Richards, 84 Me.

edge, or even the possibility of protecting himself.'"[68]

[§ 59] **B. Effect as Constructive Notice to Disseisee—1. In Absence of Special Statutory Regulation.** In the absence of some special statutory provision to the contrary, in order to perfect title by adverse possession it is not necessary that the true owner should have had actual knowledge or notice of the claim. If the claimant's possession is open and notorious under claim of title it is sufficient in its character, whether the true owner knew the facts or not.[69] The claimant need not otherwise repudiate the title of others claiming the land, or notify them of his claim of title.[70] On open, visible, and notorious possession by the adverse claimant the law presumes notice to the true owner[71] in the absence of evidence that inquiries of the true owner, prosecuted with due diligence, did not disclose such possession.[72] Such possession is the equivalent of actual notice of the claim under which it is held,[73] and if the owner fails to look after his interests until the title of the adverse claimant grows into maturity he has no one but himself to blame for the loss of his estate.[74] Where the possession is notorious no declaration of abandonment of possession on the part of the owner is necessary in order that his title may be barred.[75]

[§ 60] **2. Under Statutory Provisions Requiring Claimant to Give Notice of Adverse Holding. In Alabama** it is provided by statute that a person who

1, 24 A 425; Lockwood Co. v. Lawrence, 77 Me. 297, 52 AmR 763.

Md.—Hackett v. Webster, 97 Md. 404, 55 A 480.

Minn.—Glencoe v. Wadsworth, 48 Minn. 402, 51 NW 377.

Mo.—Fugate v. Pierce, 49 Mo. 441.

N. J.—Cobb v. Davenport, 32 N. J. L. 369.

Tex.—Gillespie v. Jones, 26 Tex. 343; Craver v. Ragon, (Civ. A.) 110 SW 489.

Vt.—Soule v. Barlow, 49 Vt. 329.

W. Va.—Core v. Faupel, 24 W. Va. 238.

"Until then the owner cannot know that his possession has been invaded. Until he has, or ought to have, such knowledge he is not called upon to act, for he does not know that action in the premises is necessary, and the law does not require absurd or impossible things of anyone." Delaware, etc., Canal Co. v. Hughes, 183 Pa. 66, 70, 38 A 568, 63 AmSR 743, 38 LRA 826.

"The ground upon which the disseisor acquires title by adverse possession is the laches of the owner. He sees his boundaries invaded by an adverse claimant, asserting title, and if he remains passive under such circumstances a sufficient length of time, he is held to acquiesce in the adverse claim; hence the possession must be open, notorious, and under a claim of right. This is required to enable the owner to be informed of the invasion of his rights that he may assert and enforce them by an action against the wrongdoer." Richmond Cedar Works v. Pinnix, 208 Fed. 785, 795.

68. Kennebeck Purchase v. Springer, 4 Mass. 416, 3 AmD 227; Monnot v. Murphy, 207 N. Y. 240, 100 NE 742 [rev 144 App. Div. 896, 129 NYS 1136]; Turpin v. Saunders, 32 Gratt. (73 Va.) 27; Dawson v. Watkins, 2 Rob. (41 Va.) 259. And see Tinker v. Bessel, 213 Mass. 74, 76, 99 NE 946 (in which it was said: "An adverse use must be under such circumstances of notoriety that the person against whom it is being exercised may be enabled to know about it and resist . . . the acquisition of the right before the period of limitation has run").

69. U. S.—Holtzman v. Douglas, 168 U. S. 278, 18 SCt 65, 42 L. ed. 466; Central Coal, etc., Co. v. Penny, 173 Fed. 340, 97 CCA 600; Florida Southern R. Co. v. Loring, 51 Fed. 932, 2 CCA 546.

Ala.—Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 9 S 527.

Ark.—Little Rock, etc., R. Co. v. Rankin, 156 SW 431.

Cal.—Gurnsey v. Antelope Creek, etc., Water Co., 6 Cal. A. 387, 92 P 326.

Conn.—Carney v. Hennessey, 74 Conn. 107, 49 A 910, 92 AmSR 199, 53 LRA 699; Thompson School Dist. No. 8 v. Lynch, 33 Conn. 330.

Hawaii.—Paulo v. Malo, 6 Hawaii 390.

Ill.—Illinois Cent. R. Co. v. Noyes, 252 Ill. 178, 96 NE 830; Ronan v. Bluhm, 173 Ill. 277, 50 NE 694; St. Louis, etc., R. Co. v. Nugent, 152 Ill. 119, 39 NE 263; Jefferson v. Jefferson, 96 Ill. 551; Lyman v. Russell, 45 Ill. 281; Barlow v. Cooper, 109 Ill. A. 375.

Ind.—Rennert v. Shirk, 163 Ind. 542, 72 NE 546; King v. Carmichael, 136 Ind. 20, 35 NE 509, 43 AmSR 303.

Iowa.—Close v. Samm, 27 Iowa 503.

Ky.—Whitley County Land Co. v. Powers, 146 Ky. 801, 144 SW 2; Black v. Cox, 82 SW 278, 26 KyL 599.

Me.—Abbott v. Abbott, 51 Me. 575; Alden v. Gilmore, 13 Me. 178.

Mass.—Atty.-Gen. v. Ellis, 198 Mass. 91, 84 NE 430, 15 LRANS 1120; Samuels v. Borrowscale, 104 Mass. 207; Cook v. Babcock, 11 Cush. 206; Poignard v. Smith, 6 Pick. 172.

Mich.—Howatt v. Green, 139 Mich. 289, 102 NW 734; Bird v. Stark, 66 Mich. 654, 33 NW 754.

Minn.—Kelly v. Palmer, 91 Minn. 133, 97 NW 578.

Miss.—Wilson v. Williams, 52 Miss. 487.

Mo.—Swope v. Ward, 185 Mo. 316, 84 SW 895; Boyce v. Missouri Pac. R. Co., 168 Mo. 583, 68 SW 920, 58 LRA 442; Miller v. Rosenberger, 144 Mo. 292, 46 SW 167; Key v. Jennings, 66 Mo. 356; Scruggs v. Scruggs, 43 Mo. 142; Warfield v. Lindell, 38 Mo. 561, 90 AmD 443.

Mont.—National Min. Co. v. Powers, 3 Mont. 344.

Nebr.—Williams v. Shepherdson, 4 Nebr. (Unoff.) 608, 95 NW 827.

N. H.—Forest v. Jackson, 56 N. H. 357.

N. Y.—Barnes v. Light, 116 N. Y. 34, 22 NE 441; Green v. Horn, 128 App. Div. 686, 112 NYS 993; New York Cent., etc., R. Co. v. Brennan, 12 App. Div. 103, 42 NYS 529; Stephens v. Hockemeyer, 19 NYS 666; Humbert v. Trinity Church, 24 Wend. 587.

N. C.—Kennedy v. Maness, 138 N. C. 35, 50 SE 450; Pittman v. Weeks, 132 N. C. 81, 43 SE 582.

Pa.—Jones v. Porter, 3 Penr. & W. 132.

S. C.—Love v. Turner, 71 S. C. 322, 51 SE 101; Bryce v. Cayce, 62 S. C. 546, 40 SE 948.

Tex.—Thomson v. Weisman, 98 Tex. 170, 82 SW 503; Craig v. Cartwright, 65 Tex. 413; Brownson v. Scanlan, 59 Tex. 222; Merriman v. Blalack, 57 Tex. Civ. A. 270, 122 SW 403; Gibbs v. Eastham, (Civ. A.) 143 SW 323; Davis v. Houston Oil Co., 50 Tex. Civ. A. 597, 111 SW 219.

Vt.—Jangraw v. Mee, 75 Vt. 211, 54 A 189, 98 AmSR 816.

Wash.—Bowers v. Ledgerwood, 25 Wash. 14, 64 P 936.

W. Va.—Talbott v. Woodford, 48 W. Va. 449, 37 SE 580.

Wis.—Illinois Steel Co. v. Tamms, 154 Wis. 340, 141 NW 1011.

Eng.—Rains v. Buxton, 14 Ch. D. 537.

[a] **What constitutes claim of title.**—(1) Where a grant to a railroad conveyed a strip one hundred feet wide through certain lots, a deed thereafter executed by the grantors to such lots, "except that part upon which the track of the . . . Railroad Company is laid" constitutes notice of a claim of ownership of all that part except that covered by the track. St. Louis, etc., R. Co. v. Ruttan, 90 Ark. 178, 118 SW 705. (2) Where one who has occupied land stating that he was not claiming it but that he desired to buy it from the owner thereof sells the land, this amounts to an assertion of title in himself, and he is not bound to do more to bring notice of his adverse claim to the owner. Louisiana, etc., Lumber Co. v. Southern Pine Lumber Co., (Tex. Civ. A.) 147 SW 604.

[b] **Who are bound with notice.**—Where those claiming under the husband had been in actual and exclusive possession, it was notice to the heirs of the wife, putting them upon inquiry which would have led to an investigation of the records showing evidence of a chain of title and the payment of taxes, and hence the facts constituted an ouster and notice thereof to the heirs of the wife, notwithstanding their nonresidence and actual ignorance. Hardy Oil Co. v. Burnham, (Tex. Civ. A.) 124 SW 221.

70. Merriman v. Blalack, 57 Tex. Civ. A. 270, 122 SW 403.

71. Ala.—Kidd v. Borum, 61 S 100; Black v. Tennessee, etc., Co., 93 Ala. 109, 9 S 537; Murray v. Hoyle, 92 Ala. 559, 9 S 368; Newsome v. Snow, 91 Ala. 641, 8 S 377, 24 AmSR 934; Bernstein v. Humes, 75 Ala. 241, 71 Ala. 260.

Cal.—Montecito Valley Co. v. Santa Barbara, 144 Cal. 578, 72 P 1113; Unger v. Mooney, 63 Cal. 586, 49 AmR 100; Davis v. Baugh, 59 Cal. 568; Thompson v. Pioche, 44 Cal. 508; Gurnsey v. Antelope Creek, etc., Water Co., 6 Cal. A. 387, 92 P 326.

Conn.—Quigg v. Zeugin, 82 Conn. 437, 74 A 753; Alderman v. New Haven, 81 Conn. 137, 70 A 626, 18 LRANS 74; Carney v. Hennessey, 74 Conn. 107, 49 A 910, 92 AmSR 199, 53 LRA 699.

Ill.—Illinois Cent. R. Co. v. Noyes, 252 Ill. 178, 96 NE 830; Illinois Cent. R. Co. v. Houghton, 126 Ill. 233, 18 NE 301, 9 AmSR 581, 1 LRA 213 and note; Metropolitan Bank v. Godfrey, 23 Ill. 579.

Ind.—Rennert v. Shirk, 163 Ind. 542, 547, 72 NE 546 [cit Cyc]; King v. Carmichael, 136 Ind. 20, 35 NE 509, 43 AmSR 303.

Mass.—Samuels v. Borrowscale, 104 Mass. 207.

Mich.—Merritt v. Westerman, 147 NW 483.

Mo.—Dausch v. Crane, 109 Mo. 323, 19 SW 61; Warfield v. Lindell, 38 Mo. 561, 90 AmD 443; Draper v. Shoot, 25 Mo. 197, 69 AmD 462.

N. C.—Kennedy v. Maness, 138 N. C. 35, 50 SE 450.

Tex.—Wimberly v. Bailey, 58 Tex. 222.

[a] **This presumption applies to corporations** as well as to private persons. Gurnsey v. Antelope Creek, etc., Water Co., 6 Cal. A. 387, 92 P 326.

72. Davis v. Baugh, 59 Cal. 568; Kennedy v. Maness, 138 N. C. 35, 50 SE 450.

73. Murray v. Hoyle, 92 Ala. 559, 9 S 368.

"The requirement of notoriety of the adverse holding is to establish general notice to all, which is only equivalent to and takes the place of direct proof of actual notice to the true owner." Love v. Turner, 71 S. C. 322, 330, 51 SE 101 (per Woods, J.).

74. Royall v. Lisle, 15 Ga. 545, 60 AmD 712.

75. Middlesex Co. v. Lane, 149 Mass. 101, 21 NE 228.

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without color of title, or bona fide claim of purchase, or inheritance, enters on real estate and asserts adverse possession thereof must give notice thereof by filing in the office of the probate judge his written declaration setting forth such claim.[76] The statute, it has been held, is not unconstitutional, although operating on adverse possession current at the time of its passage.[77] The statute of course has no application where prior to its enactment the claimant[78] or his predecessor[79] had acquired title to the land in dispute by adverse possession. So it applies only to one in possession as a trespasser or mere squatter and not to one who claims under a bona fide claim of purchase[80] or who has color of title;[81] and one can have a bona fide claim of purchase without having color of title.[82] If, however, the claimant has not color of title, and does not hold under a bona fide claim of purchase[83] or inheritance,[84] he cannot acquire title by adverse possession without giving the required notice. Since the statute in express terms requires written notice, it will not suffice that the owner has actual notice.[85]

In Kentucky it is provided by statute that limitations shall not commence to run as to actions by a town or city for the recovery of any street or alley until notice has been received from the person in possession that his possession is adverse.[86] Under this statute the notice must be followed by a continuous, actual, and adverse possession for the statutory period.[87] The statute is held to apply to anyone in possession of a street at the time of its enactment, provided the city was not then barred by the statute of limitations.[88] But it of course has no application where title by adverse possession to the street in question was acquired before the passage of the statute,[89] and in any event the easement of a public highway must exist in the city during the period of adverse holding to prevent the running of the statute.[90] It has been held to apply not only to actions brought by a city to recover possession of a street but also to actions brought against a city by a party asserting that a strip is not a street.[91]

In Michigan a purchaser at a tax sale must give notice of his intention to take possession in order to entitle him to the benefit of the five-year statute relating to tax deeds.[92]

[§ 61] **C. The Effect of Actual Knowledge by the Disseizee.** If the owner has actual knowledge that the possession is adverse to his title the occupancy need not be open, visible, and notorious,[93] and within this rule actual knowledge of an agent will be imputed to his principal.[94] Notoriety is important only where the adverse character of the possession is to be brought home to the owner by presumption, because no other person has any legal interest in the question or right to be informed by notoriety or otherwise.[95]

[§ 62] **D. Knowledge or Notice from Particular Source Unnecessary.** In the absence of statute pro-

76. Code (1896) § 1541. This section has been amended by Code (1907) § 2830, but so far as the matter considered in § 60 is concerned the amendment does not seem to have made any material difference.

77. Brasher v. Shelby Iron Co., 144 Ala. 659, 40 S 80; Scales v. Doe, 127 Ala. 582, 29 S 63.

[a] **Reason for rule.**—"Adverse possession short of a period of ten years confers no right whatever and no interference with vested rights can be involved in any provision the legislature may make respecting it. It is indeed essentially tortious, incapable of being made the basis of any rights. And the legislature without violence to any organic provision might either extend the period of its duration necessary to its ripening into right or barring the assertion of the original and true title, or it might strike down the whole doctrine of the acquisition of title by possession adverse to the title by muniments." Scale v. Doe, 127 Ala. 582, 589, 29 S 63 (per McClellan, J.).

78. Doe v. Webb, 171 Ala. 638, 54 S 627; Roe v. Doe, 159 Ala. 614, 48 S 1033.

79. Roe v. Doe, 159 Ala. 614, 48 S 1033.

80. Howard v. Martin, (Ala.) 62 S 99; Owen v. Moxon, 167 Ala. 615, 52 S 527; Roe v. Doe, 159 Ala. 614, 48 S 1033; Brannan v. Henry, 142 Ala. 698, 39 S 92, 110 AmSR 55; Sledge v. Singley, 139 Ala. 346, 37 S 98; Holt v. Adams, 121 Ala. 664, 25 S 716.

81. Mobile, etc., R. Co. v. Rutherford, (Ala.) 63 S 1003; Howard v. Martin, (Ala.) 62 S 99; Gilbert v. Pinkston, 167 Ala. 490, 52 S 442, 140 AmSR 89 (holding that one claiming land under a deed from the administrator of a decedent or as the heir of the decedent need not record her claim of adverse possession because such deed is at least color of title).

[a] **Color of title by inheritance; formal claim unnecessary.**—That defendant in ejectment, relying on adverse possession, failed to make formal claim by inheritance did not deprive him of the advantage conferred by Code (1907) § 2830, which dispenses with the necessity of record of color of title by one who derives by descent, where defendant proved possession by his ancestor under claim of right followed by his own possession after the ancestor's death. Jordan v. Smith, (Ala.) 64 S 317.

82. Knight v. Hunter, 155 Ala. 238, 46 S 235.

83. Bowles v. Lowery, (Ala.) 62 S 107; Walker v. Wyman, 157 Ala. 478, 47 S 1011; Powers v. Hatter, 152 Ala. 636, 44 S 859; Campbell v. Noble, 145 Ala. 233, 41 S 745; Brasher v. Shelby Iron Co., 144 Ala. 659, 40 S 80; Bowling v. Mobile, etc., R. Co., 128 Ala. 550, 29 S 584; Scales v. Doe, 127 Ala. 582, 29 S 630.

84. Brasher v. Shelby Iron Co., 144 Ala. 659, 40 S 80.

85. Scales v. Otts, 127 Ala. 582, 29 S 63.

[a] **Reason of rule.**—"To hold that any other notice may be substituted for the notice thus required, would be not only to reentangle ourselves in the evils the statute was intended to remedy, but to annul the plain terms of the enactment by judicial legislation. . . . It is one thing to provide that recordation of a claim shall be constructive notice of it, having the same effect as actual notice, and quite another to provide that the claim shall have no legal status or existence until it is recorded, as is provided by the statute under consideration." Per McClellan, J., in Scales v. Doe, 127 Ala. 582, 588, 29 S 63.

86. St. §§ 2546, 2547.

87. Faith v. Owensboro, 145 Ky. 276, 140 SW 312; Hurst v. Swango, 144 Ky. 22, 137 SW 794.

[a] **Reason of rule.**—If the rule were otherwise the purpose of the statute would be defeated. Faith v. Owensboro, 145 Ky. 276, 140 SW 312.

88. Covington v. Hall, 98 SW 317, 30 KyL 356.

89. Cadiz v. Hillman, 50 SW 49, 20 KyL 1776.

90. Latonia v. Latonia Agricultural Assoc., 109 SW 356, 33 KyL 138.

91. Covington v. Hall, 98 SW 317, 30 KyL 356.

92. Cook Land, etc., Co. v. McDonald, 155 Mich. 175, 118 NW 959.

93. Ala.—Alabama Coal, etc., Co. v. Gulf Coal, etc., Co., 171 Ala. 544, 54 S 585; Thompson v. Logan, 166 Ala. 45, 48, 51 SE 985 [quot Cyc]; Brown v. Cockrell, 33 Ala. 38.

Ark.—Trotter v. Neal, 50 Ark. 340, 7 SW 384.

Conn.—Clark v. Gilbert, 39 Conn. 94.

Ky.—Thomson v. Thomson, 93 Ky. 435, 20 SW 373, 14 KyL 513.

Mich.—Lasley v. Kniskern, 152 Mich. 244, 115 NW 971.

Miss.—McCaughn v. Young, 85 Miss. 277, 37 S 839.

Mo.—Dausch v. Crane, 109 Mo. 323, 19 SW 61; Allen v. Mansfield, 108 Mo. 343, 18 SW 901; Key v. Jennings, 66 Mo. 356.

N. J.—Outcalt v. Ludlow, 32 N. J. L. 239.

Oh.—Smith v. Pittsburgh, etc., R. Co., 26 Oh. Cir. Ct. 44.

Pa.—Sheaffer v. Eakman, 56 Pa. 144; Jones v. Porter, 3 Penr. & W. 132.

Wash.—McAuliff v. Parker, 10 Wash. 141, 38 P 744.

Ont.—Beer v. Williams, 21 Ont. L. 49, 15 OntWR 868.

See Batchelder v. Robbins, 95 Me. 59, 49 A 210; Cook v. Babcock, 11 Cush. (Mass.) 206.

[a] **Possession of land by a son under parol gift from his father** is adverse as against the father, and will, if continued for the requisite statutory period, protect his title, as against the father and his children, without it having been notorious. Trotter v. Neal, 50 Ark. 340, 7 SW 384.

[b] **What constitutes actual notice.**—After plaintiff's predecessor in title had been in possession of the land in controversy for nearly twenty years, he stated to the holders of the record title in 1887 that he had bought the land in 1867 and concluded to live there as long as he lived. They replied that they would eject him, and he told them to "go ahead," and declined to pay the rent demanded. Suit was not brought to recover the land until March 7, 1898. It was held that such conversation constituted personal notice to the holders of the record title of the possessor's adverse claim to the land, and that plaintiff had acquired title by adverse possession. Swope v. Ward, 185 Mo. 316, 84 SW 895.

94. Illinois Cent. R. Co. v. Noyes, 252 Ill. 178, 96 NE 830.

95. Thompson v. Logan, 166 Ala. 45, 48, 51 S 985 [quot Cyc]; Clark v.

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viding otherwise,[96] in order to set limitations in motion in favor of an adverse possessor, it is not necessary that the knowledge of the legal title holder of the hostile possession be derived from the adverse possessor or from any particular source, but, if the legal title holder acquires knowledge or notice of the hostile possession from any source, it is sufficient.[97]

[§ 63] **E. What Constitutes Such Possession.** The rule is that in determining whether possession is open, visible, and notorious, so as to charge the owner with notice of an adverse claim, the nature, situation, and uses of the property are to be considered,[98] and also the quantity or proportion of the land actually occupied.[99] There is no particular manner by which such possession may be indicated or made manifest and no particular acts or series of acts are required to be done on the land.[1] It is therefore difficult or impossible to specify the acts which will, under every condition, constitute open and visible possession,[2] and, while the circumstances of possession must be such as to preclude a belief by the owner that a mere trespass was being committed,[2½] the general rule is that it is sufficient if the land is appropriated in such manner as to apprise the community that the land is in the possession and enjoyment of the person claiming it,[3] and that openness and exclusiveness are shown by such acts as will ordinarily be performed by the true owner in appropriating the land and its avails to his own use and preventing, as far as practicable, all others from using it;[4] and this seems to be the rule deducible from the majority of cases.[5] It is not essential that the occupation should be such as to inform a passing

Gilbert, 39 Conn. 94; Lasley v. Kniskern, 152 Mich. 244, 115 NW 971.

96. See supra § 60.

97. Howatt v. Green, 139 Mich. 289, 102 NW 734.

98. Ind.—Worthley v. Burbanks, 146 Ind. 534, 45 NE 779.

Ky.—Buford v. Cox, 5 J. J. Marsh. 582.

Me.—Batchelder v. Robbins, 95 Me. 59, 49 A 210.

Mass.—Tinker v. Bessel, 213 Mass. 74, 99 NE 946. See also Richmond Iron Works v. Wadhams, 142 Mass. 569, 9 NE 1; Parker v. Parker, 1 Allen 245.

Minn.—Murphy v. Doyle, 37 Minn. 113, 33 NW 220.

Miss.—Alexander v. Polk, 39 Miss. 737; Ford v. Wilson, 35 Miss. 490, 72 AmD 137.

Va.—Dawson v. Watkins, 2 Rob. (41 Va.) 259.

[a] **Swamp lands.**—The rule that the possession must be open applies equally to swamp lands. Ramos Lumber, etc., Co. v. Sanders, 117 La. 615, 42 S 158.

99. King v. Eagle Coal Co., 144 Ky. 660, 139 SW 863; Alexander v. Polk, 39 Miss. 737.

1. McNear v. Guistin, 50 Or. 377, 380, 92 P 1075 (per Bean, J.). And see Gurnsey v. Antelope Creek, etc., Water Co., 6 Cal. A. 387, 92 P 326.

2. St. Louis, etc., R. Co. v. Nugent, 152 Ill. 119, 39 NE 263; Buford v. Cox, 5 J. J. Marsh. (Ky.) 582; Murphy v. Doyle, 37 Minn. 113, 33 NW 220.

2½. In re St. Louis Register Title, (Minn.) 147 NW 655.

3. Ill.—St. Louis, etc., R. Co. v. Nugent, 152 Ill. 119, 39 NE 263; Eckert v. Weilmuenster, 103 Ill. A. 490.

Mich.—Whitaker v. Erie Shooting Club, 102 Mich. 454, 60 NW 983.

N. M.—Baker v. De Armijo, 17 N. M. 383, 128 P 73.

N. Y.—Timmermann v. Cohn, 70 Misc. 327, 128 NYS 770 [aff 146 App. Div. 924, 131 NYS 1146 (rev on other grounds 204 N. Y. 614, 97 NE 589)].

Ont.—Piper v. Stevenson, 28 Ont. L. 379.

4. Kidd v. Borum, (Ala.) 61 S 100; Goodson v. Brothers, 111 Ala. 589, 20 S 443; Leader Realty Co. v. Lakeview Land Co., 133 La. 646, 63 S 253; Piper v. Stevenson, 28 Ont. L. 379. To same effect Murray v. Hudson, 65 Mich. 670, 32 NW 889; Glencoe v. Wadsworth, 48 Minn. 402, 51 NW 377.

[a] **Thus** these acts may consist in erecting, repairing, and occupying buildings on the land in controversy, collecting rents, leasing the land, and selling and conveying it, and offering to sell and convey it as improved. Rennert v. Shirk, 163 Ind. 542, 547, 72 NE 546 [cit Cyc].

[b] **Wild lands.**—Acts of adverse possession or ownership with regard to wild, unfenced lands or lands not capable of cultivation need be exercised only in such way as is consistent with the use to which the lands may be put and the situation of the property without actual residence or occupancy, the law not being as strict as with regard to lands capable of cultivation. Alderman, etc., Co. v. McKnight, 95 S. C. 245, 78 SE 982.

5. U. S.—Ewing v. Burnet, 11 Pet. 41, 9 L. ed. 624; Florida Southern R. Co. v. Loring, 51 Fed. 932, 2 CCA 546.

Ind.—Worthley v. Burbanks, 146 Ind. 534, 45 NE 779; Jeffersonville, etc., R. Co. v. Oyler, 82 Ind. 394.

Kan.—Dickinson v. Bales, 62 Kan. 865, 61 P 403.

Ky.—Davis v. Young, 2 Dana 299.

Me.—Alden v. Gilmore, 13 Me. 178.

Mich.—Merritt v. Westerman, 147 NW 483.

Mont.—National Min. Co. v. Powers, 3 Mont. 344.

Nebr.—Murray v. Romine, 60 Nebr. 94, 82 NW 318.

N. J.—Foulke v. Bond, 41 N. J. L. 527.

N. Y.—Pearsall v. Westcott, 45 App. Div. 34, 60 NYS 816.

Pa.—Wolf v. Ament, 1 Grant 150.

Tenn.—Fuller v. Jackson, (Ch. A.) 62 SW 274; Cowan v. Hatcher, (Ch. A.) 59 SW 689.

Tex.—El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 SW 21; Wimberly v. Bailey, 58 Tex. 222; Texas, etc., R. Co. v. Maynard, (Civ. A.) 51 SW 255; McCarty v. Johnson, 20 Tex. Civ. A. 184, 49 SW 1098.

Wash.—Flint v. Long, 12 Wash. 342, 41 P 49.

Wis.—Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 835, 85 NW 402, 83 AmSR 905.

See also Bonham v. Loeb, 107 Ala. 604, 18 S 300; Mills v. Zion Chapel, 119 Md. 510, 87 A 257.

[a] **Illustrations of possession sufficiently open and notorious:** (1) Inclosing the land with a three-wire fence. McComb v. Saxe, 92 Ark. 321, 122 SW 937. And see Sanders v. Moore, (Tex. Civ. A.) 157 SW 441. (2) Maintenance of wire fence around land except when occasionally broken by high water and grazing cattle thereon. McComb v. Saxe, supra. (3) A railroad company's possession and continued occupancy of its roadbed. Jeffersonville, etc., R. Co. v. Oyler, 82 Ind. 394. (4) Continued occupation of land as a home, coupled with payment of taxes. Lake Shore, etc., R. Co. v. Johnson, 157 Mich. 115, 121 NW 267. (5) Entry into possession under an invalid contract of purchase from one in possession who had an interest in the land, removal of the barn from the lot, building a kitchen thereon, shingling the house, and building a fence. Kelly v. Palmer, 91 Minn. 133, 97 NW 578. (6) Where defendant's grantor held possession of a piece of land several years without color of title, pasturing and partly fencing it, and then verbally transferring it to defendant who occupied it by pasturing cattle, cutting hay, and building additional fences, and such possession continued for more than ten years. Murray v. Romine, 60 Nebr. 94, 82 NW 318. (7) Where a stranger had taken from a cotenant of certain seabeach lands a deed for the whole estate, and enlarged a boarding house thereon, built docks, cut hay on the meadows, and paid taxes on the whole, claiming to be exclusive owner. Foulke v. Bond, 41 N. J. L. 527. (8) Cultivation and continued occupancy of land as a farm. Wolf v. Ament, 1 Grant (Pa.) 150. (9) The building by claimant of a cabin which was occupied by himself and family from two to four weeks each summer, the fencing of land about the cabin, the cultivation of the same, and the keeping of the cabin closed in claimant's absence. Cowan v. Hatcher, (Tenn. Ch. A.) 59 SW 689. (10) Fencing part of the land and occupying a house thereon in such part. Parrish v. Williams, (Tex. Civ. A.) 79 SW 1097. (11) The recording of deeds held by claimant, occupation, improvement, and cultivation of the land, and the payment of all taxes due thereon for more than five years next prior to the institution of trespass to try title. Stubblefield v. Hanson, (Tex. Civ. A.) 94 SW 406. (12) Fencing on three sides land bounded by a bayou on the fourth side. Fraser v. Seureau, (Tex. Civ. A.) 128 SW 649. (13) Erecting a house partly on the land in controversy, and a smokehouse and crib wholly on such land, and the cultivation of a small part thereof. Jones v. Weaver, (Tex. Civ. A.) 122 SW 619. (14) Using the land in controversy as a yard in connection with claimant's blacksmith shop in which he resided, one corner of which was on the premises, and permitting teamsters, peddlers, and others who had occasion to do so to use it as a camp ground when such usage did not interfere with his own use and occupation of the lot. Bingham Livery, etc., Co. v. McDonald, 37 Utah 457, 111 P 56. (15) Where a purchaser of a city lot built a fence around three sides of it, the land being inaccessible from the fourth side due to the roughness of the ground, cleared it of brush and timber, a considerable quantity of which was on it and the surrounding lots, and planted shrubbery thereon. Flint v. Long, 12 Wash. 342, 41 P 49. (16) Where the United States inclosed part of the land it had purchased from an administrator under a conveyance valid on its face, and maintained it as a cemetery for the burial of soldiers, marking the graves with monuments. El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 SW 21 [rev (Civ. A.) 71 SW 799]. (17) Where defendant cleared a part of the land, cultivated a part, and treated a line fence as the division line between the land and plaintiff's farm. Dreyer v. Budde, 133 Wis. 516, 113 NW 950. (18) Where a person establishes a drainage pump for draining an entire tract constituting a wild swamp segregated into squares by the dedication of streets merely on a map and opens roads along the lines marked on the map for the streets. Leader Realty Co. v. Lakeview Land Co., 133 La. 646, 63 S 253. (19) So it has been held that the carrying on of farm work and building operations on land is an open

stranger that some one is asserting title.[6] The fact that the possession of land is disputed does not make it any the less adverse, but rather the contrary, since this would necessarily seem to make more open and notorious the adverse character of such possession.[7]

IV. DURATION AND CONTINUITY OF POSSESSION

[§ 64] **A. Necessity of Continuous Possession—1. In General.** In order to perfect title by adverse possession, such possession must be continuous for the whole period prescribed by the statute of limitations; any break or interruption of the continuity of the possession will be fatal to the claim of the party setting up title by adverse possession;[8]

and visible possession, although during that time, owing to the destruction of buildings thereon, the occupant does not actually reside on the land. Hartley v. Maycock, 28 Ont. 508. (20) And where, in trespass to try title, it appeared that defendant's father procured a resurvey to be made, and filed for record corrected field notes, but did not have his patent corrected in accordance with such survey, the subsequent filing of defendant's deeds, including the land in controversy within their calls, together with the later removal of the fence so as to include the disputed strip and defendant's subsequent holding thereof, was notice of an adverse claim which on the expiration of the statutory period vested title to such strip in defendant by limitations. Hill v. Collier, (Tex. Civ. A.) 135 SW 1084. (21) A lessee's occupancy of a house and garden under a lease binding him to permit no trespass on the entire premises of which the house and garden were a part was sufficient to apprise the original owners, had they been in view of the premises, that adverse claims were being asserted to the entire tract, although insufficient to inform a passing stranger that some one was asserting title. Merritt v. Westerman, (Mich.) 147 NW 483. (22) The actual possession of fifteen or twenty acres of a one hundred and sixty-acre tract cannot as a matter of law be held insufficient to give notice to the owner of the one hundred and sixty acres that the person in possession was claiming a part of it, although the latter supposed when he first went upon the land that it was vacant public land, where he continued to claim the land after learning that it was not. Fielder v. Houston Oil Co., (Tex. Civ. A.) 165 SW 48.

[b] **Illustrations of possession not sufficiently open and notorious:** (1) Cutting timber on all of the land, and clearing and inclosing about four acres of it. Croft v. Doe, 125 Ala. 391, 28 S 84. (2) The keeping of a cutter and wagon when not in use on a small unfenced lot in a small village, and the storing of lumber thereon while building a house on an adjoining lot. "Liberties of this character are too frequently taken with vacant, unused lots in small towns to amount to a disseizin of the absent owner." Hodgkin v. Boswell, 63 Or. 589, 593, 127 P 985. (3) Extending an inclosure on adjoining land over the line of another lot some ten or fifteen feet wide, and taking within such inclosure a strip of land of that width and running half across the lot, under a claim of title. Carrol v. Gillion, 33 Ga. 539. (4) The building of a small cowpen on the boundary line separating two lots of land and immediately contiguous to defendant's lands, the occasional felling of trees, and the permitting of cattle to range over the uncultivated land. Royall v. Lisle, 15 Ga. 545, 60 AmD 712. (5) The cutting for five years, from an uninclosed pine lot by the owner of a sawmill located near such lot, of sticks to be worked up in said mill, the making of roads for hauling such logs to the mill, and the cutting, for several years more, of firewood from said lot. Watts v. Griswold, 20 Ga. 732, 65 AmD 647. (6) The making of a fence on wild land by cutting and lopping trees. Coburn v. Hollis, 3 Metc. (Mass.) 125. (7) The taking possession of land, recording of deeds, and making entries on the books showing what property he owned in the neighborhood of such property. Glos v. Wheeler, 229 Ill. 272, 82 NE 234. (8) The act of plowing one or more furrows around the land, it appearing that persons passed over the land without seeing these furrows, which probably had in a short time become hidden by being grown up with grass. Jones v. Goss, 115 La. 926, 40 S 357. (9) Remaining in possession by an original vendor of a very small piece of a woodland tract—part of a larger tract sold by him. Vanzant v. Bodcaw Lumber Co., 128 La. 923, 55 S 577. (10) Remnants of pillars flush with the ground and barely noticeable, under a statute providing that a man may retain possession of an estate sufficient to prescribe, as long as there remains any vestige of the work erected by him. John T. Moore Planting Co. v. Morgan's Louisiana, etc., R. etc., Co., 126 La. 840, 53 S 22. (11) The registry of a deed of land, executed and acknowledged by a grantor who had no right to the granted premises, registry of a deed being constructive notice only to after-purchasers under the same grantor. Bates v. Norcross, 14 Pick. (Mass.) 224. (12) The occupation of a street by an adjoining lot owner, and the keeping of some kind of a fence in the middle of the street while such street was yet little used, which fence, however, was permitted to decay and disappear. Ashley v. Toledo, 13 Oh. Cir. Ct. 1, 5 Oh. Cir. Dec. 675. (13) The mere cutting of firewood by the mortgagor on uninclosed and unoccupied land for use at her residence on other land, and passing over it on a roadway thereon. Northern Pac. R. Co. v. Littlejohn, 198 Fed. 700; Talbot v. Cook, 57 Or. 535, 112 P 709. (14) Cultivation of a few acres of a one hundred and sixty acre tract by one not living thereon, in connection with a larger tract adjacent thereto, it being merely "a small encroachment on the tract in controversy, insufficient to give notice to the true owner of an adverse claim." Callen v. Collins, 56 Tex. Civ. A. 620, 120 SW 546. See also Wm. M. Rice Inst. v. Goolsbee, (Tex. Civ. A.) 134 SW 397. (15) The inclosure, cultivation, and enjoyment of a small strip of land by the owner and occupant of an adjoining tract, who has extended his inclosure a short distance over the line, whether by design or by mistake. Downs v. Powell, 54 Tex. Civ. A. 119, 116 SW 873. (16) So it has been held that occupation by defendants of land to which plaintiff made no claim did not charge plaintiff with notice that defendants made any hostile claim to plaintiff's adjoining land, and did not put plaintiff on inquiry in respect to the nature of defendants' possession. Rich v. Victoria Copper Min. Co., 147 Fed. 380, 77 CCA 558. (17) So the fact that a person by draining lands in his possession drains noncontiguous lands not in his possession does not constitute the "public and unequivocal" possession required for acquiring title by the prescription of ten years. Leader Realty Co. v. Lakeview Land Co., 133 La. 646, 63 S 253. (18) So it has been held that there is reason for applying the rule with some strictness to property like the fee of a spring of water surrounded by the land of another, where the title by adverse user is rested upon withdrawal of a fraction of the yield of the spring by a subterranean pipe and occupation of surrounding land under another and an admitted title. The opportunity of the real owner to observe interference with his title is small in such case, nothing being shown on the surface of the land in the vicinity of the spring to indicate that it was occupied adversely. Tinker v. Bessel, 213 Mass. 74, 99 NE 946. (19) For other illustrations of possession held insufficient see Northern Pac. R. Co. v. Littlejohn, 198 Fed. 700; Palmer v. Lansburgh, 102 Fed. 376; Penix v. Rice, 93 Ark. 176, 124 SW 747; Johnson v. Elder, 92 Ark. 30, 121 SW 1066; Keller v. Harrison, 151 Iowa 320, 128 NW 851, 131 NW 53, AnnCas1913A 300; Hooper v. Leavitt, 109 Me. 70, 82 A 547; Red Jacket v. Pinton, 126 Mich. 194, 85 NW 567; Himmelberger-Harrison Lumber Co. v. McCabe, 220 Mo. 154, 119 SW 357; Timmerman v. Cohn, 204 N. Y. 614, 97 NE 589; Geneva v. Henson, 140 App. Div. 49, 124 NYS 588; Bender v. Brooks, 103 Tex. 329, 127 SW 168, AnnCas1913A 559 [cert (Civ. A.) 130 SW 653]; Bartine v. McElroy, (Tex. Civ. A.) 123 SW 1174. (20) Where a tenant of an uninclosed lot built and used a smokehouse near to his own adjoining lot, the act was not so notorious as to impress any one that he did it to make the ground a part of his own lot. Kilpatrick v. Trotter, (Ala.) 64 S 589.

6. Worthley v. Burbanks, 146 Ind. 534, 45 NE 779; Merritt v. Westerman, (Mich.) 147 NW 483; Whitaker v. Erie Shooting Club, 102 Mich. 454, 60 NW 983; Murray v. Hudson, 65 Mich. 670, 32 NW 889.

[a] **But possession is not sufficiently open and notorious** when neither the original owner nor a stranger in passing over the land can see any indication of possession. Lasley v. Kniskern, 152 Mich. 244, 115 NW 971.

7. Liddon v. Hodnett, 22 Fla. 442.

[a] **The owner of land is chargeable with notice** of its locality and boundaries, and of the meaning and locality of every settlement that is made upon it by another without his authority. One holding the superior title cannot set up his ignorance of the claim of right under which his land was occupied by an adverse claimant, in person or by agent, to defeat limitations. Brownson v. Scanlan, 59 Tex. 222.

8. U. S.—Peabody v. U. S., 175 U. S. 546, 20 SCt 219, 44 L. ed. 267; Holtzman v. Douglas, 168 U. S. 278, 18 SCt 65, 42 L. ed. 466; Sharon v. Tucker, 144 U. S. 533, 12 SCt 720, 36 L. ed. 532; Christy v. Alford, 17 How. 601, 15 L. ed. 256; Ewing v. Burnet, 11 Pet. 41, 9 L. ed. 624; Pacific Coal, etc., Co. v. Pioneer Min. Co., 205 Fed. 577, 123 CCA 593; Snowden v. Loree, 122 Fed. 493 [aff 128 Fed. 419, 63 CCA 161]; Arrowsmith v. Burlingim, 1 F. Cas. No. 563, 4 McLean 489.

Ala.—Swindall v. Ford, 63 S 651; Alexander City Union Warehouse, etc., Co. v. Central of Georgia R. Co., 62 S 745; Williams v. Lyon, 61 S 299; Rucker v. Jackson, 60 S 139; Montgomery, etc., R. Co. v. Rutland, 165 Ala. 311, 51 S 831; Alabama State Land Co. v. Hogue, 164 Ala. 657, 51 S 320; Hays v. Lemoine, 156 Ala. 465, 47 S 97; Doe v. McCullough, 155 Ala. 246, 46 S 472; Frick v. Harper, 155 Ala. 231, 46 S 453; McCreary v. Jackson Lumber Co., 148 Ala. 247, 41 S 822; Henry v. Brown, 143 Ala. 446, 39 S 325; Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45; Jackson Lumber Co. v. McCreary, 137 Ala. 278, 34 S 850; Wilkinson v. Lehman-Durr Co., 136 Ala. 463, 34 S 216;

and the length of time a break or interruption in the possession exists is immate-

Adler v. Prestwood, 122 Ala. 367, 24 S 999; Beasley v. Howell, 117 Ala. 499, 22 S 989; Davidson v. Alabama Iron, etc., Co., 109 Ala. 383, 19 S 390; Carter v. Chevalier, 108 Ala. 563, 19 S 798; Elyton Land Co. v. Denny, 108 Ala. 553, 18 S 561; Wiggins v. Kirby, 106 Ala. 262, 17 S 354; Parks v. Barnett, 104 Ala. 438, 16 S 136; Murray v. Hoyle, 97 Ala. 588, 11 S 797; Ross v. Goodwin, 88 Ala. 390, 6 S 682; Tayloe v. Dugger, 66 Ala. 444; Philippi v. Philippi, 61 Ala. 41; Ladd v. Dubroca, 61 Ala. 25; Bell v. Denson, 56 Ala. 444; Riggs v. Fuller, 54 Ala. 141; Merritt v. Phenix, 48 Ala. 87; Farley v. Smith, 39 Ala. 38; McArthur v. Carrie, 32 Ala. 75, 70 AmD 529; Doe v. Eslava, 11 Ala. 1028.

Ark.—Collins v. Bluff City Lumber Co., 86 Ark. 202, 110 SW 806; Earle Impr. Co. v. Chatfield, 81 Ark. 296, 99 SW 84; Boynton v. Ashabranner, 75 Ark. 415, 88 SW 566, 1011, 91 SW 20; Rowland v. Wadly, 71 Ark. 273, 72 SW 994; Richards v. Howell, 60 Ark. 215, 29 SW 461; Scott v. Mills, 49 Ark. 266, 4 SW 908; Brown v. Hanauer, 48 Ark. 277, 3 SW 27.

Cal.—Nathan v. Dierssen, 146 Cal. 63, 79 P 739; Dietz v. Mission Transfer Co., 25 P 423; Unger v. Mooney, 63 Cal. 586, 49 AmR 100; Hagar v. Spect, 48 Cal. 406; Lovell v. Frost, 44 Cal. 471; San Francisco v. Fulde, 37 Cal. 349, 99 AmD 278; Mattes v. Hall, 21 Cal. A. 552, 132 P 295; Steckter v. Ewing, 6 Cal. A. 761, 93 P 286.

Colo.—Manitou v. International Trust Co., 30 Colo. 467, 70 P 757; Upham v. Weisshaar, 23 Colo. A. 277, 128 P 1129; Fleming v. Howell, 22 Colo. A. 382, 125 P 551; Hurd v. McClellan, 1 Colo. A. 327, 29 P 181.

Conn.—Dubuque v. Coman, 64 Conn. 475, 30 A 777; Smith v. Chapin, 31 Conn. 530; Fanning v. Willcox, 3 Day 258.

Del.—Truitt v. Osler, 90 A 467; Nevin v. Disharoon, 22 Del. 278, 66 A 362; Inskeep v. Shields, 4 Del. 345.

D. C.—Reid v. Anderson, 13 App. 30; Bradshaw v. Stott, 4 App. 527; Ebbinghaus v. Killian, 12 D. C. 247.

Fla.—Hyer v. Griffin, 55 Fla. 560, 46 S 635; Barrs v. Brace, 38 Fla. 265, 20 S 991; Sloan v. Sloan, 25 Fla. 53, 5 S 603.

Ga.—Martin v. Seaboard Air-Line R. Co., 139 Ga. 807, 77 SE 1060; Walker v. Steffes, 139 Ga. 520, 77 SE 580; Hansen v. Owens, 137 Ga. 708, 74 SE 244; Clark v. White, 120 Ga. 957, 48 SE 357; Greer v. Raney, 120 Ga. 290, 47 SE 939; Johnson v. Girtman, 115 Ga. 794, 42 SE 96; Georgia R., etc., Co. v. Gardner, 113 Ga. 897, 39 SE 299; Briscoe v. Holder, 111 Ga. 877, 36 SE 960; Flemister v. Flemister, 83 Ga. 79, 9 SE 724; Jones v. Johnson, 81 Ga. 293, 6 SE 181; Hobby v. Alford, 73 Ga. 791; McDougald v. Reedy, 71 Ga. 750; Veal v. Robinson, 70 Ga. 809; Rider v. Waters, 70 Ga. 716; Shiels v. Roberts, 64 Ga. 370; Ford v. Holmes, 61 Ga. 419; Thursby v. Myers, 57 Ga. 155; Hill v. Waldrop, 57 Ga. 134; Wingfield v. Davis, 53 Ga. 655; McKay v. Kendrick, 44 Ga. 607; Garrett v. Adrain, 44 Ga. 274; Laramore v. Minish, 43 Ga. 282; Doe v. Roe, 32 Ga. 572; McGee v. Guthry, 32 Ga. 307; Joiner v. Borders, 32 Ga. 239; Williams v. Cash, 27 Ga. 507, 73 AmD 739; Denham v. Holeman, 26 Ga. 182, 71 AmD 198; Holcombe v. Austell, 19 Ga. 604; Byrne v. Lowry, 19 Ga. 27; Conyers v. Kenan, 4 Ga. 308, 48 AmD 226.

Ida.—Northern Pac. R. Co. v. Pyle, 19 Ida. 3, 112 P 678; Brown v. Brown, 18 Ida. 345, 110 P 269.

Ill.—Glos v. Wheeler, 229 Ill. 272, 82 NE 234; Roby v. Calumet, etc., Canal, etc., Co., 211 Ill. 173, 71 NE 822; Blackaby v. Blackaby, 185 Ill. 94, 56 NE 1053; Reuter v. Stuckart, 181 Ill. 529, 54 NE 1014; Harms v. Kransz, 167 Ill. 421, 47 NE 746; Burns v. Edwards, 163 Ill. 494, 45 NE 113; Gage v. Thompson, 161 Ill. 408, 43 NE 1062; Downing v. Mayes, 153 Ill. 330, 38 NE 620, 46 AmSR 896; Robbins v. Moore, 129 Ill. 30, 21 NE 934; Ambrose v. Raley, 58 Ill. 506; Morrison v. Kelly, 22 Ill. 609, 74 AmD 169.

Ind.—Vandalia R. Co. v. Wheeler, 103 NE 1069; Maple v. Stevenson, 122 Ind. 368, 23 NE 854; Peck v. Louisville, etc., R. Co., 101 Ind. 366; Winslow v. Winslow, 52 Ind. 8; Boyd v. Doty, 8 Ind. 370; Doe v. Brown, 4 Ind. 143; Law v. Smith, 4 Ind. 56; McCaslin v. State, 38 Ind. A. 184, 75 NE 844.

Iowa.—Matson v. Poncin, 152 Iowa 569, 132 NW 970, 38 LRANS 1020; Boltz v. Colsch, 134 Iowa 480, 109 NW 1106; Stern v. Fountain, 112 Iowa 96, 83 NW 826.

Ky.—Terry v. Loudermilk, 158 Ky. 353, 164 SW 959; Young v. Pace, 145 Ky. 405, 140 SW 555; Chestnut v. Tracy, 144 Ky. 753, 139 SW 966; Richie v. Owsley, 137 Ky. 63, 121 SW 1015; Hillman Land, etc., Co. v. Marshall, 119 SW 180; Brown v. Wallace, 116 SW 763; Horn v. Bates, 114 SW 763; Louisville, etc., R. Co. v. Rayl, 107 SW 298, 32 KyL 870; Courtney v. Ashcraft, 105 SW 106, 31 KyL 1324; Overton v. Overton, 123 Ky. 311, 96 SW 469, 29 KyL 736; Hughes v. Owens, 92 SW 595, 29 KyL 140; Barr v. Potter, 57 SW 478, 22 KyL 416; Price v. Beall, 40 SW 918, 19 KyL 420; Hibbard v. Wilson, 32 SW 1086, 17 KyL 930; Rogers v. Moore, 9 B. Mon. 401; Wickliffe v. Ensor, 9 B. Mon. 253; Price v. Evans, 4 B. Mon. 386; Griffith v. Dicken, 2 B. Mon. 20; Forman v. Ambler, 2 Dana 108; Jones v. Chiles, 2 Dana 25; Norton v. Doe, 1 Dana 14; May v. Jones, 4 Litt. 21; Trotter v. Cassady, 3 A. K. Marsh. 365, 13 AmD 183; Phillips v. Rothwell, 2 A. K. Marsh. 13; Voorhies v. Graham, 1 A. K. Marsh. 233; Smith v. Mitchel, 1 A. K. Marsh. 207; Braxdale v. Speed, 1 A. K. Marsh. 105; McGee v. Morgan, 1 A. K. Marsh. 62.

La.—Roussel v. Railways Realty Co., 132 La. 379, 61 S 409, 833; Gerrold v. Barnhart, 128 La. 1099, 55 S 688; Brewer v. Yazoo, etc., R. Co., 128 La. 544, 54 S 987; Lane v. Cameron, 37 La. Ann. 250; Innis v. Miller, 10 Mart. 289, 13 AmD 330.

Me.—Proctor v. Maine Cent. R. Co., 101 Me. 459, 64 A 839; Fleming v. Katahdin Pulp, etc., Co., 93 Me. 110, 44 A 378; Stillwell v. Foster, 80 Me. 333, 14 A 731; Lockwood Co. v. Lawrence, 77 Me. 297, 52 AmR 763; Robinson v. Brown, 32 Me. 578; Stetson v. Veazie, 11 Me. 408.

Md.—Joseph v. Bonaparte, 118 Md. 591, 85 A 962; Hackett v. Webster, 97 Md. 404, 55 A 480; Parker v. Wallis, 60 Md. 15, 45 AmR 703; Baker v. Swan, 32 Md. 355; Morrison v. Hammond, 27 Md. 604; Gittings v. Moale, 21 Md. 135; Ridgely v. Bond, 17 Md. 14; Armstrong v. Risteau, 5 Md. 256, 59 AmD 115; Hall v. Gittings, 2 Harr. & J. 112; Ringgold v. Malott, 1 Harr. & J. 299.

Mass.—White v. Shippee, 102 NE 948; Old South Soc. v. Wainwright, 156 Mass. 115, 30 NE 476; Haynes v. Boardman, 119 Mass. 414; Sawyer v. Kendall, 10 Cush. 241; Pollard v. Barnes, 2 Cush. 191; Kilburn v. Adams, 7 Metc. 33, 39 AmD 754; Melvin v. Merrimack River Locks, etc., 5 Metc. 15, 38 AmD 384.

Mich.—Beecher v. Ferris, 117 Mich. 108, 75 NW 294; Millard v. Hayward, 107 Mich. 219, 65 NW 104; Paldi v. Paldi, 95 Mich. 410, 54 NW 903; Cook v. Clinton, 64 Mich. 309, 31 NW 317, 8 AmSR 816; Sparrow v. Hovey, 44 Mich. 63, 6 NW 93; Yelverton v. Hilliard, 38 Mich. 355.

Minn.—Krueger v. Market, 124 Minn. 393, 145 NW 30; Olson v. Burk, 94 Minn. 456, 103 NW 335; Bazille v. Murray, 40 Minn. 48, 41 NW 238; Witt v. St. Paul, etc., R. Co., 38 Minn. 122, 35 NW 862.

Miss.—McCaughn v. Young, 85 Miss. 277, 37 S 839; Davis v. Bowmar, 55 Miss. 671; Hicks v. Steigleman, 49 Miss. 377; Nixon v. Porter, 38 Miss. 401; Tegarden v. Carpenter, 36 Miss. 404.

Mo.—Versteeg v. Wabash R. Co., 250 Mo. 61, 156 SW 689; Stone v. Perkins, 217 Mo. 586, 117 SW 717; Brown v. Hartford, 173 Mo. 183, 73 SW 140; Patton v. Smith, 171 Mo. 231, 71 SW 187; McVey v. Carr, 159 Mo. 648, 60 SW 1034; Hendrickson v. Grable, 157 Mo. 42, 57 SW 784; Hunnewell v. Burchett, 152 Mo. 611, 54 SW 487; Three States Lumber Co. v. Rogers, 145 Mo. 445, 46 SW 1079; Goltermann v. Schiermeyer, 125 Mo. 291, 28 SW 616; Adkins v. Tomlinson, 121 Mo. 487, 26 SW 573; Wilkerson v. Eilers, 114 Mo. 245, 21 SW 514; Dausch v. Crane, 109 Mo. 323, 19 SW 61; Brown v. Chicago, etc., R. Co., 101 Mo. 484, 14 SW 719; Moore v. Harris, 91 Mo. 616, 4 SW 439; Huckshorn v. Hartwig, 81 Mo. 648; Bartlett v. O'Donoghue, 72 Mo. 563; Norfleet v. Hutchins, 68 Mo. 597; Bradley v. West, 60 Mo. 33; Dalby v. Snuffer, 57 Mo. 294; Fugate v. Pierce, 49 Mo. 441; Bowman v. Lee, 48 Mo. 335; Nelson v. Brodhack, 44 Mo. 596, 100 AmD 328; Scruggs v. Scruggs, 43 Mo. 142; Harrison v. Cachelin, 35 Mo. 77, 23 Mo. 117.

Nebr.—Knight v. Denman, 64 Nebr. 814, 90 NW 863 [aff reh 68 Nebr. 383, 94 NW 622]; Hull v. Chicago, etc., R. Co., 21 Nebr. 371, 32 NW 162.

N. J.—Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605; Cornelius v. Giberson, 25 N. J. L. 1.

N. M.—Johnston v. Albuquerque, 12 N. M. 20, 72 P 9.

N. Y.—Bliss v. Johnson, 94 N. Y. 235; Hamlin v. Peo., 155 App. Div. 680, 140 NYS 643; Kellum v. Corr, 149 App. Div. 200, 210, 133 NYS 784 [cit Cyc]; Brinkerhoff v. Mooney, 42 App. Div. 420, 59 NYS 158; Cleveland v. Crawford, 7 Hun 616; Miller v. Platt, 12 N. Y. Super. 272; Brookhaven v. Dyett Sand-Lime Brick Co., 75 Misc. 310, 135 NYS 165; Peo. v. Denison, 17 Wend. 312.

N. C.—Campbell v. Miller, 165 N. C. 51, 80 SE 974; Barfield v. Hill, 163 N. C. 262, 79 SE 677; Locklear v. Savage, 159 N. C. 236, 74 SE 347; Haddock v. Leary, 148 N. C. 378, 62 SE 426; Monk v. Wilmington, 137 N. C. 322, 49 SE 345; Brinkley v. Smith, 131 N. C. 130, 42 SE 566; Cox v. Ward, 107 N. C. 507, 12 SE 379; Ruffin v. Overby, 105 N. C. 78, 11 SE 251; Mobley v. Griffin, 104 N. C. 112, 10 SE 142; Emery v. Raleigh, etc., R. Co., 102 N. C. 209, 9 SE 139, 11 AmSR 727; Cowles v. Hall, 90 N. C. 330; Gudger v. Hensley, 82 N. C. 481; Williams v. Wallace, 78 N. C. 354; Ward v. Herrin, 49 N. C. 23; Holdfast v. Shepard, 28 N. C. 361; Blair v. Miller, 13 N. C. 407; Sheppard v. Sheppard, 4 N. C. 545; Jones v. Ridley, 4 N. C. 280; Den v. Mulford, 2 N. C. 311.

Oh.—Dietrick v. Noel, 42 Oh. St. 18, 51 AmR 788; Dayton v. Cooper Hydraulic Co., 10 OhS&CP 192, 7 OhNP 495.

Okl.—Wade v. Crouch, 14 Okl. 593, 78 P 91.

Pa.—Hillside Coal, etc., Co. v. Zeigler, 218 Pa. 319, 67 A 617; Kille v. Ege, 79 Pa. 15; Huffman v. McCrea, 56 Pa. 95; Armstrong v. Caldwell, 53 Pa. 284; Wheeler v. Winn, 53 Pa. 122, 91 AmD 186; Groft v. Weakland, 34 Pa. 304; De Haven v. Landell, 31 Pa. 120; Hawk v. Senseman, 6 Serg. & R. 21; Pederick v. Searle, 5 Serg. & R. 236; Com. v. Bierly, 37 Pa. Super. 496; Messer v. Rhodes, 3 Brewst. 180.

S. C.—Wingo v. Caldwell, 14 SE 827; Hill v. Saunders, 40 S. C. L. 62; McCullough v. Wall, 38 S. C. L. 68, 53 AmD 715; Steedman v. Hilliard, 37 S. C. L. 101; Jackson v. Lewis, 25 S. C. L. 259; King v. Smith, 24 S. C. L. 10; Turnipseed v. Busby, 12 S. C. L. 279; Porter v. Kenny, 12 S. C. L. 205; Heyward v. Bennet, 6 S. C. L. 329.

Tenn.—Jordan v. Maney, 10 Lea 135; Pullen v. Hopkins, 1 Lea 741; Graham v. Nelson, 5 Humphr. 605; Dyche v. Gass, 3 Yerg 397; Grimmett v. Midgett, (Ch. A.) 57 SW 399.

Tex.—Phillipson v. Flynn, 83 Tex. 580, 19 SW 136; Gunter v. Meade, 78 Tex. 634, 14 SW 562; Holstein v.

rial.[9] Continuity is the very essence of the doctrine and policy of the statute of limitations.[10] It has been said that if there be one element more distinctly material than another in conferring title by adverse possession, where all requisites are so, it is the existence of a continuous adverse possession.[11] There must be such continuity of possession as will furnish a cause of action for every day during the whole period required to perfect title by adverse possession;[12] and the possession must be more than a possession which will enable a person, on the ground of possessory title, to maintain trespass or ejectment against a stranger.[13] Hence occasional trespasses or acts of ownership do not constitute such continuous possession as will ripen into a title by adverse possession,[14] although extending over the statutory period,[15] and a mere claim of ownership does not of itself amount to a continuation of possession so as to support a title by adverse possession.[16] However, where adverse possession for the requisite period is shown, it is of no consequence that the possession before the commencement of that period was not continuous;[17] and it has been held that it is not essential that the possession should be held continuously against the same person for the statutory period.[18]

[§ 65] **2. Effect of Holding under Color of Title.** The necessity for a continuity of possession is equally imperative whether the holding is under color of title or not.[19]

[§ 66] **B. Tacking Possessions of Successive Occupants—1. Necessity for Continuity of Possession in One Person—a. General Rule.** It does not follow from anything heretofore said that continuous possession in any one person is necessary for the acquisition of title by adverse possession. On the contrary it is a rule of almost universal application that, if there is privity between successive occupants holding adversely to the true title continuously, the successive periods of occupation may be united or tacked to each other to make up the time of adverse holding prescribed by the statute as against such

Adams, 72 Tex. 485, 10 SW 560; Ivey v. Petty, 70 Tex. 178, 7 SW 798; Bracken v. Jones, 63 Tex. 184; Satterwhite v. Rosser, 61 Tex. 166; Chandler v. Rushing, 38 Tex. 591; Paschal v. Dangerfield, 37 Tex. 273; Sloan v. Martin, 33 Tex. 417; Cook v. Knott, 28 Tex. 85; Sapp v. Newsom, 27 Tex. 537; Mosley v. Withie, 26 Tex. 720; Kilpatrick v. Sisneros, 23 Tex. 113; Wheeler v. Moody, 9 Tex. 372; Glover v. Pfeuffer, (Civ. A.) 163 SW 984; Raley v. Sullivan, (Civ. A.) 159 SW 99; Purington v. Broughton, (Civ. A.) 158 SW 227; Snow v. Letcher, (Civ. A.) 154 SW 355; Allen v. Courtney, 24 Tex. Civ. A. 86, 58 SW 200; Wille v. Ellis, 22 Tex. Civ. A. 462, 54 SW 922; Boyd v. Miller, 22 Tex. Civ. A. 165, 54 SW 411; Settegast v. O'Donnell, 16 Tex. Civ. A. 56, 41 SW 84; Parker v. Covey, (Civ. A.) 28 SW 64; Pendleton v. Snyder, 5 Tex. Civ. A. 427, 24 SW 363; Franklin v. Piper, 5 Tex. Civ. A. 253, 23 SW 942; Beall v. Evans, 1 Tex. Civ. A. 443, 20 SW 945.

Utah.—Lund v. Wilcox, 34 Utah 205, 97 P 33; Dignan v. Nelson, 26 Utah 186, 72 P 936 (under statute).

Vt.—Wells v. Austin, 59 Vt. 157, 10 A 405; Wilson v. Blake, 53 Vt. 305; Soule v. Barlow, 49 Vt. 329; Hapgood v. Burt, 4 Vt. 155.

Va.—Atkinson v. Smith, 24 SE 901; Hollingsworth v. Sherman, 81 Va. 668; Stonestreet v. Doyle, 75 Va. 356, 40 AmR 731; Koiner v. Rankin, 11 Gratt. (52 Va.) 420; Taylor v. Burnsides, 1 Gratt. (42 Va.) 165.

W. Va.—State v. Moore, 71 W. Va. 285, 76 SE 461; Maxwell v. Cunningham, 50 W. Va. 298, 40 SE 499; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255; Oney v. Clendenin, 28 W. Va. 34; Hall v. Hall, 27 W. Va. 468; Core v. Faupel, 24 W. Va. 238.

Wis.—Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830; Allis v. Field, 89 Wis. 327, 62 NW 85; Whittlesey v. Hoppenyan, 72 Wis. 140, 39 NW 355; Smith v. Sherry, 54 Wis. 114, 11 NW 465; Sydnor v. Palmer, 29 Wis. 226.

Eng.—Trustees, etc., Co. v. Short, 13 App. Cas. 793.

Can.—Couture v. Couture, 34 Can. S. C. 716; Handley v. Archibald, 30 Can. S. C. 130; Sherren v. Pearson, 14 Can. S. C. 581; McConaghy v. Denmark, 4 Can. S. C. 609.

N. B.—Doe v. Littlehale, 10 N. B. 121.

Ont.—Robinson v. Osborne, 27 Ont. L. 248; McIntyre v. Thompson, 1 Ont. L. 163; Hartley v. Maycock, 28 Ont. 508; Coffin v. North American Land Co., 21 Ont. 80; Hyatt v. Mills, 20 Ont. 351 [rev on other grounds 19 Ont. A. 329]; Fox v. Ross, 23 OntWR 244, 3 OntWN 1347, 8 DomLR 878; Drulard v. Welsh, 9 OntWR 491; Massey-Harris Co. v. Elliott, 1 OntWR 65; In re Bell, 3 Ch. Chamb. (U. C.) 239; Young v. Elliott, 25 U. C. Q. B. 330.

[a] **What is not continuous possession illustrated.**—(1) Proof that under claim of right a person has, for a number of years, paid taxes on land, occasionally cut timber thereon, and caused his agents to prevent others from trespassing does not show such a continuous holding as will give title by adverse possession. Connerly v. Dickinson, 81 Ark. 258, 99 SW 82. (2) Carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession, and it is not exclusive where other persons lumbered on the land continuously or at intervals during any portion of such period. Wood v. Le Blanc, 34 Can. S. C. 627. (3) Where the common source of title of both plaintiff and defendant owning adjoining property conveyed one of the lots to plaintiff and the other to defendant, designating them by number according to plat, and the deeds under which they claimed were made in 1904, neither had held title for sufficient length of time to acquire a right to an adjoining strip of land by adverse possession. McCoy v. Witten, 237 Mo. 725, 141 SW 588; Patton v. Smith, 171 Mo. 231, 71 SW 187. (4) The facts that for several years a claimant of land by adverse possession, who purchased the tax title thereto at a tax sale, had cut timber thereon to the extent of several hundred cords, and that no one except himself and those to whom he gave permission had cut such timber after the purchase of such tax title, did not show such continuous and notorious occupation and dominion over the land as would indicate to the true owner an unmistakable intention by another to exclusively appropriate the land so as to constitute adverse possession, where such cutting of timber was not all done upon one continuous and unbroken incursion upon the land, nor by many continuous, successive trespasses. Earle Impr. Co. v. Chatfield, (Ark.) 99 SW 84.

[b] **Lapse of statutory period before suit brought necessary.**—The fact that before final determination of an action to oust him the claimant had been in possession for the statutory period will not suffice; it is essential that he should have been in possession for the full statutory period before the action was commenced. Belcher v. Belcher, 134 App. Div. 726, 119 NYS 144.

9. D. C.—Reid v. Anderson, 13 App. 30.

Ill.—Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088.

Mich.—Yelverton v. Steele, 40 Mich. 538.

Pa.—Brolaskey v. McClain, 61 Pa. 146; Olwine v. Holman, 23 Pa. 279; Deppen v. Bogar, 7 Pa. Super. 434.

Tenn.—Free v. Fine, (Ch. A.) 59 SW 384.

Wis.—Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019.

10. Winn v. Coggins, 53 Fla. 327, 42 S 897.

11. Reid v. Anderson, 13 App. (D. C.) 30; Groft v. Weakland, 34 Pa. 304.

12. Logan v. Williams, (Ky.) 167 SW 124; White v. McNabb, 140 Ky. 828, 131 SW 1021; Arthur v. Humble, 140 Ky. 56, 130 SW 958; Courtney v. Ashcraft, 105 SW 106, 31 KyL 1324; Barr v. Potter, 57 SW 478, 22 KyL 416; Jones v. McCauley, 2 Duv. (Ky.) 14; Broxdale v. Speed, 1 A. K. Marsh. (Ky.) 105; Chessman v. Hale, 31 Mont. 577, 79 P 254, 68 LRA 410, 3 AnnCas 566.

13. Coburn v. Hollis, 3 Metc. (Mass.) 125.

14. Ala.—Elyton Land Co. v. Denny, 108 Ala. 553, 18 S 561.

Ky.—Overton v. Overton, 123 Ky. 311, 96 SW 469, 29 KyL 736; Barr v. Potter, 57 SW 478, 22 KyL 416; Forman v. Ambler, 2 Dana 108; Braxdale v. Speed, 1 A. K. Marsh. 105.

N. C.—Ruffin v. Overby, 105 N. C. 78, 11 SE 251; Gudger v. Hensley, 82 N. C. 481.

Tex.—Raley v. Sullivan, (Civ. A.) 159 SW 99.

W. Va.—State v. Moore, 71 W. Va. 285, 76 SE 461.

Can.—Sherren v. Pearson, 14 Can. S. C. 581.

[a] **Application of rule.**—(1) The putting of stock on land in the summer or of hogs in the fall and winter when there was mast was not such continuous possession as was required to acquire title by adverse possession. Ashcraft v. Courtney, (Ky.) 121 SW 625. (2) Where defendant had never fenced the land in controversy, and the receipts produced by him to show that he had paid the taxes described another piece of land, the fact that he went on the land about every other year and occasionally sent others to cut wood therefrom, but did not know that they did so, was not sufficient to constitute title by adverse possession, since the possession was neither continuous nor open and notorious. Stern v. Fountain, 112 Iowa 96, 83 NW 826.

15. Sparks v. Jackson, 142 Ky. 17, 133 SW 959; Barr v. Potter, 57 SW 478, 22 KyL 416.

16. Myers v. McMillan, 4 Dana (Ky.) 485.

17. Olcott v. Squires, (Tex. Civ. A.) 144 SW 314.

18. Jones v. Devereux, 90 S. C. 513, 73 SE 1027.

19. Joiner v. Borders, 32 Ga. 239; Fleming v. Katahdin Pulp, etc., Co., 93 Me. 110, 44 A 378; Roberts v. Richards, 84 Me. 1, 24 A 425; Robinson v.

title.[20] "Practically all statutes of limitations of this country relating to the recovery of land," it has been said, "permit the tacking of possessions, as did the parent English statute,"[21] and some statutes have in express terms authorized it.[22] By disseizin the disseizor acquires an inchoate title in and to the land of which he becomes possessed which is so far recognized by the law that he can transmit it to those in privity with him,[23] and if possessions of others than the true owner of land join by delivery from the predecessor to the successor there is no opportunity for the true owner to become seized and no break in the continuity of possession.[24]

[§ 67] **b. Right to Tack as Affected by Phraseology of Statute.** Notwithstanding the fact that the right of successive occupants in privity with each other to tack possessions in order to make up the statutory period of limitation is almost universally conceded, it is none the less true that the right is always subordinate to the particular statute upon which the claimant relies to establish his title.[25]

[§ 68] **2. Necessity for Privity between Successive Occupants.**

[a] **The only essential to the transfer of possession under the rule as to tacking** is that the predecessor passes it to the successor by mutual consent, as distinguished from his abandoning it generally. Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550.

20. U. S.—Lea v. Polk County Copper Co., 21 How. 493, 16 L. ed. 203; Doswell v. De la Lanzo, 20 How. 29, 15 L. ed. 824; Christy v. Alford, 17 How. 601, 15 L. ed. 256; Walden v. Gratz, 1 Wheat. 292, 4 L. ed. 94; Alexander v. Pendleton, 8 Cranch 462, 3 L. ed. 624; Barger v. Miller, 2 F. Cas. No. 979, 4 Wash. 280; Harris v. McGovern, 11 F. Cas. No. 6,125, 2 Sawy. 515; Shuffleton v. Nelson, 22 F. Cas. No. 12,822, 2 Sawy. 540. The case of Potts v. Gilbert, 19 F. Cas. No. 11,347, 3 Wash. C. C. 475, has frequently been cited as opposed to this rule, but as explained in Barger v. Miller, supra, there was no privity of estate or title between the successive holders.

Ala.—Roe v. Doe, 159 Ala. 614, 48 S 1033; Campbell v. Bates, 143 Ala. 338, 39 S 144; Robinson v. Allison, 124 Ala. 325, 27 S 461; Barron v. Barron, 122 Ala. 194, 25 S 55; Carter v. Chevalier, 108 Ala. 563, 19 S 798; Louisville, etc., R. Co. v. Philyaw, 88 Ala. 264, 6 S 837; Black v. Pratt Coal, etc., Co., 85 Ala. 504, 5 S 89; Riggs v. Fuller, 54 Ala. 141.

Ark.—Wilson v. Rogers, 97 Ark. 369, 134 SW 318; Robinson v. Nordman, 75 Ark. 593, 88 SW 592; Cox v. Dougherty, 36 SW 184; Cunningham v. Brumback, 23 Ark. 336.

Cal.—Collins v. Gray, 154 Cal. 131, 97 P 142; Botsford v. Eyraud, 148 Cal. 431, 83 P 1008; Cook v. McKinney, 11 P 799.

Conn.—Smith v. Chapin, 31 Conn. 530; Fanning v. Willcox, 3 Day 258.

D. C.—Reid v. Anderson, 13 App. 30.

Fla.—Coogler v. Rogers, 25 Fla. 853, 7 S 391; Kendrick v. Latham, 25 Fla. 819, 6 S 871; Wade v. Doyle, 17 Fla. 522. See Johnson v. Rhodes, 62 Fla. 220, 56 S 439.

Ga.—Walker v. Steffes, 139 Ga. 520, 77 SE 580; Hansen v. Owens, 137 Ga. 708, 74 SE 244; A. G. Garbutt Lumber Co. v. Camp, 137 Ga. 592, 73 SE 841; Verdery v. Savannah, etc., R. Co., 82 Ga. 675, 9 SE 1133; Farrow v. Bullock, 63 Ga. 360; Rutherford v. Hobbs, 63 Ga. 243; Pollard v. Tait, 38 Ga. 439; Wyatt v. Elam, 23 Ga. 201, 68 AmD 518; De Lorme v. Pease, 19 Ga. 220.

Ill.—Kuhn v. Glos, 257 Ill. 289, 100 NE 1003; Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088; Kepley v. Scully, 185 Ill. 52, 57 NE 187; Ely v. Brown, 183 Ill. 575, 56 NE 181; Lourance v. Goodwin, 170 Ill. 390, 48 NE 903; Faloon v. Simshauser, 130 Ill. 649, 22 NE 835; Kruse v. Wilson, 79 Ill. 233; Weber v. Anderson, 73 Ill. 439; Hale v. Gladfelder, 52 Ill. 91.

Iowa.—Sires v. Melvin, 135 Iowa 460, 113 NW 106; Kilbourne v. Lockman, 8 Iowa 380.

Ky.—Hughes v. Owens, 92 SW 595, 29 KyL 140; Slusher v. Howard, 88 SW 1109, 28 KyL 122; Tucker v. Price, 29 SW 857, 17 KyL 11; Adams v. Tiernan, 5 Dana 394; Beal v. Brooks, 7 J. J. Marsh. 232, 23 AmD 401; Winn v. Wilhite, 5 J. J. Marsh. 521; Hord v. Walton, 2 A. K. Marsh. 620; Shannon v. Kinney, 1 A. K. Marsh. 3, 10 AmD 705; Bowles v. Sharp, 4 Bibb 550; Riddle v. McBee, 4 KyL 898.

La.—Moulierre v. Coco, 116 La. 845, 41 S 113; In re Schmidt, 114 La. 78, 38 S 26; Dowdell v. Orphans' Home Soc., 114 La. 49, 38 S 16; Gauthier v. Cason, 107 La. 52, 31 S 386; Innis v. Miller, 10 Mart. 289, 13 AmD 330.

Md.—Wickes v. Wickes, 98 Md. 307, 56 A 1017; Hanson v. Johnson, 62 Md. 25, 50 AmR 199; Morrison v. Hammond, 27 Md. 604; Armstrong v. Risteau, 5 Md. 256, 59 AmD 115; Casey v. Inloes, 1 Gill 430, 39 AmD 658.

Mass.—Frost v. Courtis, 172 Mass. 401, 52 NE 515; Leonard v. Leonard, 7 Allen 277; Sawyer v. Kendall, 10 Cush. 241; Wade v. Lindsey, 6 Metc. 407; Melvin v. Merrimack River Locks, etc., 5 Metc. 15, 38 AmD 384; Allen v. Holton, 20 Pick. 458; Ward v. Bartholomew, 6 Pick. 409.

Mich.—Vincent v. Kalamazoo, 111 Mich. 230, 69 NW 501; Whitford v. Crooks, 54 Mich. 261, 20 NW 45; Riopelle v. Gilman, 23 Mich. 33.

Minn.—Hanson v. Sommers, 105 Minn. 434, 117 NW 842; Hall v. Connecticut Mut. L. Ins. Co., 76 Minn. 401, 79 NW 497; St. Paul v. Chicago, etc., R. Co., 45 Minn. 387, 48 NW 17; Sherin v. Brackett, 36 Minn. 152, 30 NW 551.

Miss.—Crowder v. Neal, 100 Miss. 730, 57 S 1; Tegarden v. Carpenter, 36 Miss. 404; Huntington v. Cotton, 31 Miss. 253; Benson v. Stewart, 30 Miss. 49.

Mo.—Adair v. Mette, 156 Mo. 496, 57 SW 551; Bakewell v. McKee, 101 Mo. 337, 14 SW 119; Cooper v. Ord, 60 Mo. 420; Shaw v. Nicholay, 30 Mo. 99; Chouquette v. Barada, 28 Mo. 491.

Nebr.—Montague v. Marunda, 71 Nebr. 805, 99 NW 653; Pohlman v. Evangelical Lutheran Trinity Church, 60 Nebr. 364, 83 NW 201; Murray v. Romine, 60 Nebr. 94, 82 NW 318; Lantry v. Wolff, 49 Nebr. 374, 68 NW 494; Myers v. McGavock, 39 Nebr. 843, 58 NW 522, 42 AmSR 627; Hardy v. Riddle, 24 Nebr. 670, 39 NW 841; Stettnische v. Lamb, 18 Nebr. 619, 26 NW 374; Williams v. Shepherdson, 4 Nebr. (Unoff.) 608, 95 NW 827.

N. H.—Locke v. Whitney, 63 N. H. 597, 3 A 920; Edmunds v. Griffin, 41 N. H. 529.

N. J.—United New Jersey R., etc., Co. v. Consolidated Fruit Jar Co., 55 A 46; Davock v. Nealon, 58 N. J. L. 21, 32 A 675.

N. Y.—Miner v. New York Cent., etc., R. Co., 123 N. Y. 242, 25 NE 339; Barnes v. Light, 116 N. Y. 34, 22 NE 441; Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134; Lewine v. Gerardo, 60 Misc. 261, 112 NYS 192; Northrop v. Wright, 7 Hill 476; Simpson v. Downing, 23 Wend. 316; Jackson v. Thomas, 16 Johns. 292; Doe v. Campbell, 10 Johns. 475; Brandt v. Ogden, 1 Johns. 156.

N. C.—Campbell v. Everhart, 139 N. C. 503, 52 SE 201; Atwell v. Shook, 133 N. C. 387, 45 SE 777; Lewis v. Overby, 126 N. C. 347, 35 SE 623; Alexander v. Gibbon, 118 N. C. 796, 24 SE 748, 54 AmSR 757; Miller v. Bumgardner, 109 N. C. 412, 13 SE 935.

N. D.—Nash v. Northwest Land Co., 15 N. D. 566, 108 NW 792; J. B. Streeter, Jr., Co. v. Fredrickson, 11 N. D. 300, 91 NW 692.

Oh.—McNeely v. Langan, 22 Oh. St. 32; Puntt v. Zimmer, 29 Oh. Cir. Ct. 721; Morehouse v. Burgot, 22 Oh. Cir. Ct. 174, 12 Oh. Cir. Dec. 163.

Or.—Parker v. Wolf, 138 P 463; Wheeler v. Taylor, 32 Or. 421, 52 P 183, 67 AmSR 540; Clark v. Bundy, 29 Or. 190, 44 P 282; Low v. Schaffer, 24 Or. 239, 33 P 678; Rowland v. Williams, 23 Or. 515, 32 P 402; Vance v. Wood, 22 Or. 77, 29 P 78.

Pa.—Covert v. Pittsburg, etc., R. Co., 204 Pa. 341, 54 A 170; Collins v. Lynch, 157 Pa. 246, 27 A 721, 37 AmSR 723; Schrack v. Zubler, 34 Pa. 38; Hughs v. Pickering, 14 Pa. 297; Cunningham v. Patton, 6 Pa. 355; Scheets v. Fitzwater, 5 Pa. 126; Graffius v. Tottenham, 1 Watts & S. 488, 37 AmD 472; Hunt v. Devling, 8 Watts 403; Parker v. Southwick, 6 Watts 374; Overfield v. Christie, 7 Serg. & R. 173.

Philippine.—De Castro v. Echarri, 20 Philippine 23.

S. C.—Jones v. Devereux, 90 S. C. 513, 73 SE 1027; Love v. Turner, 71 S. C. 322, 51 SE 101; Sutton v. Clark, 59 S. C. 440, 38 SE 150, 82 AmSR 848; Congdon v. Morgan, 14 S. C. 587; State Bank v. Smyers, 33 S. C. L. 24; Caston v. Caston, 19 S. C. Eq. 1.

Tenn.—Rembert v. Edmondson, 99 Tenn. 15, 41 SW 935, 63 AmSR 819; Marr v. Gilliam, 1 Coldw. 488; Clark v. Chase, 5 Sneed 636; Chilton v. Wilson, 9 Humphr. 399.

Tex.—Collier v. Couts, 92 Tex. 234, 47 SW 525; Warren v. Frederichs, 76 Tex. 647, 13 SW 643; Mims v. Rafel, 73 Tex. 300, 11 SW 277; Heflin v. Burns, 70 Tex. 347, 8 SW 48; Medlin v. Wilkins, 60 Tex. 409; Johnson v. Nash, 15 Tex. 419; Horton v. Crawford, 10 Tex. 382; Wheeler v. Moody, 9 Tex. 372; Portis v. Hill, 3 Tex. 273; Moran v. Moseley, (Civ. A.) 164 SW 1093; Dunn v. Taylor, (Civ. A.) 143 SW 311; Williams v. Texas, etc., R. Co., 52 Tex. Civ. A. 217, 114 SW 877; Weston v. Meeker, (Civ. A.) 109 SW 461; Lamberida v. Barnum, (Civ. A.) 90 SW 698; Houston v. Finnigan, (Civ. A.) 85 SW 470; Bateman v. Jackson, (Civ. A.) 45 SW 224; Freedman v. Bonner, (Civ. A.) 40 SW 47; O'Connor v. Dykes, (Civ. A.) 29 SW 920.

Utah.—Wells v. Wells, 7 Utah 68, 24 P 752.

Vt.—Day v. Wilder, 47 Vt. 583; Winslow v. Newell, 19 Vt. 164.

Wash.—Northern Pac. R. Co. v. Concannon, 75 Wash. 591, 135 P 652; Naher v. Farmer, 60 Wash. 600, 602, 111 P 768 [quot Cyc].

W. Va.—Jarrett v. Stevens, 36 W. Va. 445, 15 SE 177.

Wis.—Progress Blue Ribbon Farms v. Harter, 147 Wis. 133, 132 NW 895; Mielke v. Dodge, 135 Wis. 388, 115 NW 1099; Ryan v. Schwartz, 94 Wis. 403, 69 NW 178; Allis v. Field, 89 Wis. 327, 62 NW 85.

Wyo.—Bryant v. Cadle, 18 Wyo. 64, 86, 87, 104 P 23, 106 P 687 [cit Cyc].

N. B.—Doe v. Baxter, 7 N. B. 377.

Ont.—Ker v. Little, 25 Ont. A. 387; Simmons v. Shipman, 15 Ont. 301; Bright v. McMurray, 1 Ont. 172; Cahuac v. Cochrane, 41 U. C. Q. B. 436.

See Kapiolani v. Cleghorn, 14 Hawaii 330.

21. J. B. Streeter, Jr., Co. v. Fredrickson, 11 N. D. 300, 303, 91 NW 692.

22. Lamberida v. Barnum, (Tex. Civ. A.) 90 SW 698 (Rev. St. [1895] art 3350).

23. Wickes v. Wickes, 98 Md. 307, 56 A 1017.

24. Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550.

25. J. B. Streeter, Jr., Co. v. Fredrickson, 11 N. D. 300, 91 NW 692.

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cessive Occupants—a. Statement of Rule. In order that possessions of successive occupants may be tacked it is essential that privity, either of contract, estate, or blood, should exist between the successive occupants.[26] The entry of the succeeding occupant must be with the consent of his predecessor, evidenced by contract or by an act of the law passing the estate from the latter to the former.[27] Different entries at different times by different persons between whom there is no privity or connected claim of rightful holding are but a succession of trespasses, and neither can furnish any support to the other.[28] Each possession is a distinct and independent wrong for which an action may be maintained,[29] and the

[a] **In accordance with this principle** (1) it is held, under a statute providing that "all titles to real property vested in any person or persons who have been or hereafter may be in . . . possession of the land under such title for a period of ten years . . . shall be and the same are declared good and valid in law," that the possession of successive persons, although in privity, cannot be tacked to make up the required period. J. B. Streeter, Jr., Co. v. Fredrickson, 11 N. D. 300, 91 NW 692. (2) So under a statute providing that the exclusive possession by a child of lands belonging originally to the father for the space of seven years shall convey title to the child the child must himself hold possession for the required time and his possession cannot be tacked to that of his grantee for the purpose of making up the necessary period. Burch v. Burch, 96 Ga. 133, 22 SE 718. (3) On the other hand the general rule is in no way affected by a statute providing that "every suit to be instituted to recover real estate, as against him, her, or them, in possession, under title or color of title, shall be instituted within three years next after cause of action shall have accrued, and not afterwards." Christy v. Alford, 17 How. (U. S.) 601, 15 L. ed. 256.

26. U. S.—Doswell v. De la Lanzo, 20 How. 29, 15 L. ed. 824; Patterson v. Gaines, 6 How. 550, 12 L. ed. 553; Alexander v. Pendleton, 8 Cranch 462, 3 L. ed. 624; Potts v. Gilbert, 19 F. Cas. No. 11,347, 3 Wash. C. C. 475; Shuffleton v. Nelson, 22 F. Cas. No. 12,822, 2 Sawy. 540.

Ala.—Wilkinson v. Lehman-Durr Co., 136 Ala. 463, 34 S 216; Robinson v. Allison, 124 Ala. 325, 27 S 461; Carter v. Chevalier, 108 Ala. 563, 19 S 798; Lucy v. Tennessee, etc., R. Co., 92 Ala. 246, 8 S 806; Ross v. Goodwin, 88 Ala. 390, 6 S 682; Louisville, etc., R. Co. v. Philyaw, 88 Ala. 264, 6 S 837; Black v. Pratt Coal, etc., Co., 85 Ala. 504, 5 S 89; Riggs v. Fuller, 54 Ala. 141. And see Alabama State Land Co. v. Hogue, 164 Ala. 657, 51 S 320.

Ark.—Haggart v. Ranney, 73 Ark. 344, 84 SW 703; Cunningham v. Brumback, 23 Ark. 336.

Cal.—Allen v. McKay, 120 Cal. 332, 52 P 828; San Francisco v. Fulde, 37 Cal. 349, 99 AmD 278.

Conn.—Ferriday v. Grosvenor, 86 Conn. 698, 86 A 569; Smith v. Chapin, 31 Conn. 530.

D. C.—Reid v. Anderson, 13 App. 30; Neale v. Lee, 19 D. C. 5.

Fla.—Kendrick v. Latham, 25 Fla. 819, 6 S 871.

Ga.—Jenkins v. Means, 59 Ga. 55; Roe v. Doe, 30 Ga. 971; Hester v. Coats, 22 Ga. 56; Morrison v. Hays, 19 Ga. 294.

Ill.—Rich v. Naffziger, 255 Ill. 98, 99 NE 341; Illinois Cent. R. Co. v. Hatter, 207 Ill. 88, 69 NE 751; Ely v. Brown, 183 Ill. 575, 56 NE 181; Thompson v. McLaughlin, 66 Ill. 407.

Ind.—McEntire v. Brown, 28 Ind. 347; Doe v. Brown, 4 Ind. 143.

Ky.—Jones v. Chiles, 2 Dana 25; Winn v. Wilhite, 5 J. J. Marsh. 521.

Me.—Carville v. Hutchins, 73 Me. 227.

Md.—Peters v. Tilghman, 111 Md. 227, 73 A 726; Hanson v. Johnson, 62 Md. 25, 50 AmR 199; Armstrong v. Risteau, 5 Md. 256, 59 AmD 115.

Mass.—Sawyer v. Kendall, 10 Cush. 241; Plumer v. Brown, 8 Metc. 578; Wade v. Lindsey, 6 Metc. 407; Melvin v. Merrimack River Locks, etc., 5 Metc. 15, 38 AmD 384; Ward v. Bartholomew, 6 Pick. 409.

Mich.—Sheldon v. Michigan Cent. R. Co., 161 Mich. 503, 126 NW 1056.

Minn.—Hall v. Connecticut Mut. L. Ins. Co., 76 Minn. 401, 79 NW 497; Ramsey v. Glenny, 45 Minn. 401, 48 NW 322, 22 AmSR 736; Witt v. St. Paul, etc., R. Co., 38 Minn. 122, 35 NW 862; Sherin v. Brackett, 36 Minn. 152, 30 NW 551.

Miss.—Crowder v. Neal, 100 Miss. 730, 57 S 1.

Mo.—Patton v. Smith, 171 Mo. 231, 71 SW 187; Wilson v. Purl, 133 Mo. 367, 34 SW 884; Adkins v. Tomlinson, 121 Mo. 487, 26 SW 573; Turner v. Baker, 64 Mo. 218, 27 AmR 226; Crispen v. Hannavan, 50 Mo. 536; Shaw v. Nicholay, 30 Mo. 99; Menkens v. Blumenthal, 27 Mo. 198; Chouquette v. Barada, 23 Mo. 331.

Nebr.—Chicago, etc., R. Co. v. Erskine, 83 Nebr. 95, 118 NW 1098; Rice v. Kelly, 81 Nebr. 92, 115 NW 625; Holdrege v. Livingston, 79 Nebr. 238, 112 NW 341; Montague v. Marunda, 71 Nebr. 805, 99 NW 653; Zweibel v. Myers, 69 Nebr. 294, 95 NW 597; Pohlman v. Evangelical Lutheran Trinity Church, 60 Nebr. 364, 83 NW 201; Carson v. Dundas, 39 Nebr. 503, 58 NW 141.

N. H.—Locke v. Whitney, 63 N. H. 597, 3 A 920.

N. J.—Davock v. Nealon, 58 N. J. L. 21, 32 A 675; Colgan v. Pellens, 48 N. J. L. 27, 2 A 633; Murray v. Pannaci, 64 N. J. Eq. 147, 53 A 595 [aff 67 N. J. Eq. 724, 57 A 1132].

N. Y.—College Point Sav. Bank v. Vollmer, 44 App. Div. 619, 60 NYS 389 [aff 161 N. Y. 626, 55 NE 1094]; Smith v. Reich, 80 Hun 287, 30 NYS 167 [aff 151 N. Y. 642, 45 N. E. 1134]; Kelly v. Kremm, 78 Misc. 576, 138 NYS 626; Berkowitz v. Brown, 3 Misc. 1, 23 NYS 792; Simpson v. Downing, 23 Wend. 316; Jackson v. Leonard, 9 Cow. 653; Doe v. Campbell, 10 Johns. 475; Brandt v. Ogden, 1 Johns. 156.

N. C.—Jennings v. White, 139 N. C. 23, 51 SE 799; Johnston v. Case, 131 N. C. 491, 42 SE 957; Brinkley v. Smith, 131 N. C. 130, 42 SE 566.

Oh.—Morehouse v. Burgot, 22 Oh. Cir. Ct. 174, 12 Oh. Cir. Dec. 163.

Or.—Low v. Schaffer, 24 Or. 239, 33 P 678; Vance v. Wood, 22 Or. 77, 29 P 73.

Pa.—Pittsburg, etc., R. Co. v. Peet, 152 Pa. 488, 25 A 612, 19 LRA 467; Schrack v. Zubler, 34 Pa. 38; Moore v. Collishaw, 10 Pa. 224; Overfield v. Christie, 7 Serg. & R. 173; Shaffer v. Lauria, 50 Pa. Super. 135.

S. C.—Hodge v. Hodge, 56 S. C. 263, 34 SE 517; Golson v. Hook, 35 S. C. L. 23; King v. Smith, 24 S. C. L. 10. See also McLeod v. Rogers, 36 S. C. L. 19.

Tenn.—Erck v. Church, 87 Tenn. 575, 11 SW 794, 4 LRA 641 and note; Nelson v. Trigg, 4 Lea 701; Baker v. Hale, 6 Baxt. 46; Marr v. Gilliam, 1 Coldw. 488; Clark v. Chase, 5 Sneed 636; Hobbs v. Ballard, 5 Sneed 394; Vance v. Fisher, 10 Humphr. 211; Graham v. Nelson, 5 Humphr. 604.

Tex.—Mariposa Land, etc., Co. v. Silliman, 87 Tex. 142, 26 SW 978; Warren v. Frederichs, 76 Tex. 647, 13 SW 643; Stout v. Taul, 71 Tex. 438, 9 SW 329; Heflin v. Burns, 70 Tex. 347, 8 SW 48; Brownson v. Scanlan, 59 Tex. 222; Dotson v. Moss, 58 Tex. 152; Truehart v. McMichael, 46 Tex. 222; Ryan v. Jackson, 11 Tex. 391; Wheeler v. Moody, 9 Tex. 372; Henderson v. Beaton, 1 Tex. Unrep. Cas. 17; Williams v. Randall, (Civ. A.) 158 SW 253; Dunn v. Taylor, (Civ. A.) 143 SW 311; Mitchell v. Stanton, (Civ. A.) 139 SW 1033; Moore v. Loggins, (Civ. A.) 114 SW 183; Poland v. Porter, 44 Tex. Civ. A. 334, 98 SW 214; Johnson v. Foster, (Civ. A.) 34 SW 821.

Vt.—Austin v. Bailey, 37 Vt. 219, 86 AmD 703; Winslow v. Newell, 19 Vt. 164.

Va.—Yellow Poplar Lumber Co. v. Thompson, 108 Va. 612, 62 SE 358; Hollingsworth v. Sherman, 81 Va. 668.

W. Va.—Jarrett v. Stevens, 36 W. Va. 445, 15 SE 177.

Wis.—Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550; Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830; Ryan v. Schwartz, 94 Wis. 403, 69 NW 178; Allis v. Field, 89 Wis. 327, 62 NW 85; Dhein v. Beuscher, 83 Wis. 316, 53 NW 551.

Eng.—Doe v. Barnard, 13 Q. B. 945, 66 ECL 945; Dixon v. Gayfere, 17 Beav. 421, 51 Reprint 1097; Nepean v. Doe, 2 M. & W. 894.

Can.—McConaghy v. Denmark, 4 Can. S. C. 609. But see Handley v. Archibald, 30 Can. S. C. 130 (holding that possession by a series of persons during the period will bar the title, although some of them were not in privity with their predecessors, no reason being stated).

Ont.—Ryerse v. Teeter, 44 U. C. Q. B. 8; Kipp v. Toronto Diocese, 33 U. C. Q. B. 220; Malloch v. Derivan, 22 U. C. Q. B. 54.

Que.—Butler v. Legare, 7 Que. L. 307; Stoddart v. Lefebvre, 11 L. C. 481 [both foll Hamel v. Ross, 3 Dom LR 860].

"To sustain separate successive disseisins as constituting a continuous possession, and conferring a title upon the last disseisor, there must have . . . existed, as between the different disseisors, in regard to the estate of which a title by disseisin is claimed, some such relation as that of ancestor and heir, grantor and grantee,—or devisor and devisee." Sawyer v. Kendall, 10 Cush. (Mass.) 241, 244 (per Bigelow, J.).

[a] **Application of rule.**—(1) Where one person entered upon land and held adversely to the true owner and then another, claiming adversely to the former, took possession by consent pursuant to a compromise between them, it was held that there was no privity between the two and that their possessions could not be tacked. Jackson v. Leonard, 9 Cow. (N. Y.) 653. (2) So where one person occupies property for ten years and abandons it and another person obtains possession, not under the first occupant but independently, these facts do not establish title by possession in the last occupant. Morehouse v. Burgot, 22 Oh. Cir. Ct. 174, 12 Oh. Cir. Dec. 163.

27. Shaw v. Nicholay, 30 Mo. 99.

28. Ala.—Alabama State Land Co. v. Hogue, 164 Ala. 657, 51 S 320; Ross v. Goodwin, 88 Ala. 390, 6 S 682.

Ky.—White v. McNabb, 140 Ky. 828, 131 SW 1021; Wickliffe v. Ensor, 9 B. Mon. 253.

Mo.—Maysville v. Truex, 235 Mo. 619, 139 SW 390.

Pa.—Overfield v. Christie, 7 Serg. & R. 173; Shaffer v. Lauria, 50 Pa. Super. 135.

Tenn.—Marr v. Gilliam, 1 Coldw. 488; Clark v. Chase, 5 Sneed 636.

29. Hobbs v. Ballard, 5 Sneed (Tenn.) 394.

[a] **Successive possessions by strangers to title.**—The mere fact that two strangers to the title succeeded each other in the possession of land raises no presumption of privity between them, and therefore, in computing the period which will

facts that there is no appreciable interval between the possessions of such successive holders and that the line of successive possessions is practically unbroken and continuous are immaterial.[30]

[§ 69] **b. Reason for Rule.** Privity is necessary in order that the successive possessions may be connected with each other.[31] In the absence of such privity a new and distinct disseizin is made by each disseizor.[32] As soon as the former adverse holder quits possession, the true owner, by virtue of his legal title, is again instantly seized or possessed of the premises by operation of law, and thereby the continuity of the possession between the adverse claimants is broken.[33]

[§ 70] **c. Statutory Exceptions to Rule.** Some statutes have dispensed with the necessity of privity between successive occupants.[34]

[§ 71] **3. Between Whom Privity Exists—a. In General.** Privity denotes merely a succession of relationships created by deed or other act or by operation of law,[35] a continuous possession by mutual consent, so that possession of the true owner shall not constructively intervene.[36] It is not essential that there should be conveyances between successive occupants provided they claim under each other in some sufficient way.[37]

[§ 72] **b. Vendor and Vendee—(1) Voluntary Conveyances—(a) The General Rule.** The general rule is well settled that such privity exists between vendor and vendee as will authorize the tacking of their successive possessions to perfect title by adverse possession in the vendee.[38] The rule applies,

give title by prescription, the last occupant is not entitled to count the time of his predecessor's possession. Lucy v. Tennessee, etc., R. Co., 92 Ala. 246, 8 S 806.

30. Davock v. Nealon, 58 N. J. L. 21, 32 A 675.

31. Sawyer v. Kendall, 10 Cush. (Mass.) 241.

32. Sawyer v. Kendall, 10 Cush. (Mass.) 241; Witt v. St. Paul, etc., R. Co., 38 Minn. 122, 35 NW 862.

33. U. S.—Potts v. Gilbert, 19 F. Cas. No. 11,347, 3 Wash. C. C. 475; Shuffleton v. Nelson, 22 F. Cas. No. 12,822, 2 Sawy. 540.

Ala.—Riggs v. Fuller, 54 Ala. 141.

Cal.—San Francisco v. Fulde, 37 Cal. 349, 99 AmD 278.

Ga.—Morrison v. Hays, 19 Ga. 294.

Ind.—McEntire v. Brown, 28 Ind. 347.

Md.—Armstrong v. Risteau, 5 Md. 256, 59 AmD 115.

Mass.—Sawyer v. Kendall, 10 Cush. 241; Melvin v. Merrimack River Locks, etc., 5 Metc. 15, 38 AmD 384.

Mo.—Crispen v. Hannavan, 50 Mo. 536.

Or.—Low v. Schaffer, 24 Or. 239, 33 P 678; Vance v. Wood, 22 Or. 77, 29 P 73.

Tenn.—Erck v. Church, 87 Tenn. 575, 21 SW 794, 4 LRA 641 and note.

Tex.—Brownson v. Scanlan, 59 Tex. 222.

34. See statutory provisions.

[a] **In Michigan** under Rev. St. (1838) pp 573, 574 § 1, which provides that "no person shall commence an action for the recovery of any lands, nor make any entry thereupon, unless within twenty years after the right to make such entry or bring such action first accrued, or within twenty-five years after he, or those from, by or under whom he claims, shall have been seized or possessed of the premises," it was held that the landowner is barred by the lapse of twenty-five years, although there may have been no privity between successive disseizors in possession of the property during twenty-five years, but to be barred in twenty years there must be privity between the successive disseizors. Riopelle v. Gilman, 23 Mich. 33.

35. Atwell v. Shook, 133 N. C. 387, 394, 45 SE 777 [quot Cyc]; Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550. See also Shuffleton v. Nelson, 22 F. Cas. No. 12,822, 2 Sawy. 540; Sherin v. Brackett, 36 Minn. 152, 30 NW 551.

[a] **Otherwise stated.**—(1) The relation of privies may be created by operation of law, by descent, or by voluntary or involuntary transfers from one person to another and denotes mutual or successive relationship to the same rights of property. Nelson v. Trigg, 4 Lea (Tenn.) 701. (2) "All that is necessary to privity between successive occupants of property, and in regard thereto, is that one receive his possession from the other by act of such other or by operation of law." Illinois Steel Co. v. Budzisz, 106 Wis. 499, 508, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830 (per Marshall, J.).

36. Rich v. Naffziger, 255 Ill. 98, 99 NE 341.

37. Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830; Simmons v. Shipman, 15 Ont. 301.

38. U. S.—Lea v. Polk County Copper Co., 21 How. 493, 16 L. ed. 203; Alexander v. Pendleton, 8 Cranch 462, 3 L. ed. 624; Barger v. Miller, 2 F. Cas. No. 979, 4 Wash. C. C. 280; Harris v. McGovern, 11 F. Cas. No. 6,125, 2 Sawy. 515 [aff 99 U. S. 161, 25 L. ed. 317].

Ala.—Kidd v. Borum, 61 S 100; Campbell v. Bates, 143 Ala. 338, 39 S 144; Barron v. Barron, 122 Ala. 194, 25 S 55; Doe v. Adams, 121 Ala. 664, 25 S 716; Riggs v. Fuller, 54 Ala. 141. See Alabama State Land Co. v. Hogue, 164 Ala. 657, 51 S 320.

Ark.—Robinson v. Nordman, 75 Ark. 593, 88 SW 592.

D. C.—Neale v. Lee, 19 D. C. 5.

Fla.—Johnson v. Rhodes, 62 Fla. 220, 56 S 439; Coogler v. Rogers, 25 Fla. 853, 7 S 391.

Ga.—Walker v. Steffes, 139 Ga. 520, 77 SE 580; Smith v. Samuels, 133 Ga. 790, 66 SE 1086; Roberson v. Downing Co., 126 Ga. 175, 54 SE 1020.

Ill.—Faloon v. Simshauser, 130 Ill. 649, 22 NE 835; Hale v. Gladfelder, 52 Ill. 91.

Iowa.—Kilbourne v. Lockman, 8 Iowa 380.

Kan.—Hughes v. Ridgeway, 86 Kan. 852, 122 P 871.

Ky.—Roark v. Read, 148 Ky. 172, 146 SW 1; Beal v. Brooks, 7 J. J. Marsh. 232, 23 AmD 401.

Md.—Hanson v. Johnson, 62 Md. 25, 50 AmR 199.

Mass.—Frost v. Courtis, 172 Mass. 401, 52 NE 515.

Mich.—Gildea v. Warren, 173 Mich. 28, 138 NW 232.

Minn.—St. Paul v. Chicago, etc., R. Co., 45 Minn. 387, 48 NW 17; Witt v. St. Paul, etc., R. Co., 38 Minn. 122, 35 NW 862; Sherin v. Brackett, 36 Minn. 152, 30 NW 551.

Miss.—Crowder v. Neal, 100 Miss. 730, 57 S 1.

Mo.—St. Louis v. St. Louis, etc., R. Co., 248 Mo. 10, 154 SW 55; Cooper v. Ord, 60 Mo. 420.

Nebr.—Montague v. Marunda, 71 Nebr. 805, 99 NW 653; Murray v. Romine, 60 Nebr. 94, 82 NW 318; Lantry v. Wolff, 49 Nebr. 374, 68 NW 494; Stettnische v. Lamb, 18 Nebr. 619, 26 NW 374.

N. Y.—Staples v. Schnackenberg, 148 App. Div. 161, 132 NYS 1092; Baker v. Duff, 136 App. Div. 13, 120 NYS 184 [aff 202 N. Y. 570, 96 NE 1109]; Smith v. Reich, 80 Hun 287, 30 NYS 167 [aff 151 N. Y. 642, 45 NE 1134].

Oh.—McNeely v. Langan, 22 Oh. St. 32.

Or.—Clark v. Bunby, 29 Or. 190, 44 P 282; Rowland v. Williams, 23 Or. 515, 32 P 402.

Pa.—Covert v. Pittsburg, etc., R. Co., 204 Pa. 341, 54 A 170; Hughs v. Pickering, 14 Pa. 297; Cunningham v. Patton, 6 Pa. 355; Graffius v. Tottenham, 1 Watts & S. 488, 37 AmD 472; Overfield v. Christie, 7 Serg. & R. 173.

Philippine.—Clemente v. Marasigan, 19 Philippine 120.

Porto Rico.—Soler v. Parkhurst, 4 Porto Rico Fed. 335.

Tenn.—Baker v. Hale, 6 Baxt. 46; Marr v. Gilliam, 1 Coldw. 488; Chilton v. Wilson, 9 Humphr. 399.

Tex.—Heflin v. Burns, 70 Tex. 347, 8 SW 48; Ft. Worth, etc., R. Co. v. Western Stockyards Co., (Civ. A.) 151 SW 1172; Campbell v. San Antonio Mach., etc., Co., (Civ. A.) 133 SW 750; McManus v. Matthews, (Civ. A.) 55 SW 589; Bateman v. Jackson, (Civ. A.) 45 SW 224.

Vt.—Day v. Wilder, 47 Vt. 583.

Wash.—Northern Pac. R. Co. v. Concannon, 75 Wash. 591, 135 P 652.

Wis.—Progress Blue Ribbon Farms v. Harter, 147 Wis. 133, 132 NW 895; Closuit v. John Arpin Lumber Co., 130 Wis. 258, 110 NW 222; Clithero v. Fenner, 122 Wis. 356, 99 NW 1027, 106 AmSR 978.

N. B.—Doe v. Baxter, 7 N. B. 377.

Ont.—Beigle v. Dake, 42 U. C. Q. B. 250.

[a] **It is immaterial when such possession commenced,** so long as grantor and grantee together held adversely for more than ten years before suit was brought. Barron v. Barron, 122 Ala. 194, 25 S 55.

[b] **Application of rule generally.**—Where the owner of property sold on execution thereafter buys it from the purchaser at tax sale on assessment against the purchaser at execution sale, he can, for purposes of prescription, tack his vendor's possession to his own. Gauthier v. Cason 107 La. 52, 31 S 386.

[c] **Successive possessions of unincorporated society and corporation; presumption of conveyance.**—Where an unincorporated society holding property adversely becomes duly organized as a corporation, its possession prior to incorporation may be tacked to that subsequent thereto for the purpose of establishing title under the statute of limitations. The reason for this is that "the corporation . . . succeeded without any formal conveyance to all the property of the society and to all property held for its use. . . . The case must be treated as if the society organized the corporation and transferred to it all the right and possession which it had." Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134, 144. To same effect Bakersfield Town Hall Assoc. v. Chester, 55 Cal. 98.

[d] **The adverse possession of a grantee of a tenant in common** may be tacked to that of the latter before the conveyance, and if together they equal twenty years the defense of title by prescription to a petition for partition by the other cotenant is made out. Frost v. Courtis, 172 Mass. 401, 52 NE 515.

[e] **Possession continued by successive grantees inures to the benefit of a subsequent grantee** claiming thereunder and is available to him in

although the conveyance is not recorded,[39] and although the vendor remains in possession, since his possession by intendment of law is the possession of his vendee,[40] or although the vendee did not receive a deed at the date of the purchase if he took possession on that date.[41] So the fact that the vendor had previously conveyed the premises as security will not affect the operation of the rule where the vendor remained in undisturbed possession and during the entire time of such possession owned the entire beneficial interest in the land;[42] nevertheless in order to tack the possession of a vendee to that of a vendor it must be against some one to whom the grantor held adversely,[43] and a vendor cannot avail himself of the possession of his vendee to make up the statutory period, where the vendee repudiates the title of his vendor, to perfect title by adverse possession.[44]

[§ 73] **(b) The Rule in North Dakota and South Carolina.** In North Dakota because of the peculiar wording of the statute,[45] and in South Carolina by judicial declaration,[46] the possessions of vendor and vendee cannot be tacked in order to make up the full statutory period.

[§ 74] **(2) Involuntary Conveyances.** A purchaser of land at a judicial sale may tack his possession to that of the person whose land is so sold to make up the statutory period,[47] but the sale must

establishing a prescriptive title. Hassam v. J. E. Safford Lumber Co., 82 Vt. 444, 74 A 197.

[f] **Tenant acquiring title from landlord.**—While the possession of land by a tenant inures to the benefit of his landlord, yet if the tenant acquires title from the landlord he may assert whatever rights the latter acquired by such possession. Harris v. Iglehart, 52 Tex. Civ. A. 6, 113 SW 170.

[g] **The fact that the vendee is a railroad company** and cannot set up adverse possession for the statutory period for the reason that the law presumes that when a railroad company takes land for its corporate purposes it does so under its right of eminent domain and not as a willful trespasser whose trespass may grow into title does not prevent it from purchasing the right of a trespasser on the land, and tacking such prior possession of its vendor with its own to make up the statutory period. "The reason of the law in the case of a simple taking by a railroad company possessing the right of eminent domain does not exist when it becomes a purchaser, and cessante legis, cessat lex." Covert v. Pittsburg, etc., R. Co., 204 Pa. 341, 344, 54 A 341 [rev 18 Pa. Super. 541] (per Brown, J.).

[h] **No question as right of successive grantees to such possessions arises** where an owner of land, claiming adverse possession to an adjoining strip, conveys the land to a third party by a deed not describing the strip, simultaneously taking back a lease and remaining in possession of the whole until he secures a reconveyance of land. Rice v. Kelly, 81 Nebr. 92, 115 NW 625.

39. Northern Pac. R. Co. v. Concannon, 75 Wash. 591, 135 P 652.

40. Files v. Railroad Lands Co., 123 La. 110, 48 S 763; Clithero v. Fenner, 122 Wis. 356, 99 NW 1027, 106 AmSR 978.

41. Barron v. Barron, 122 Ala. 194, 25 S 55.

42. Collins v. Gray, 154 Cal. 131, 97 P 142.

43. Goozee v. Grant, 81 Nebr. 597, 116 NW 508; Sluyter v. Schwab, 73 Nebr. 370, 102 NW 757.

[a] **Application of rule.**—Where the owner of two contiguous lots conveys one of them to A and the other to B, in a contest between the grantees concerning the boundary line, A cannot, for the purpose of establishing title by adverse possession against B, tack his own possession to that of the common grantor. Sluyter v. Schwab, 73 Nebr. 370, 102 NW 757.

44. Payne v. McKinney, 30 Ga. 83.

45. See cases infra this note.

[a] **A statute** provides that all titles to real property of persons who have been or may be in the adverse possession thereof for ten years and shall have paid taxes legally assessed thereon shall be valid. It was held that the doctrine of tacking possessions is not applicable under this statute, and that the statute does not permit one claiming title thereunder to make out an otherwise insufficient adverse possession by adding thereto the prior adverse possession of his grantor. In support of this view it was said that the statute in question, "instead of presenting any question as to the possession of the claimant out of possession, deals entirely with persons in possession, and extends the benefits of its provisions to such persons by boldly declaring that their title is good if they have been in the actual, open, adverse, and undisputed possession of the land for ten years, and have paid all taxes and assessments legally levied thereon. The inquiry under this statute is not whether a claimant out of possession has been in possession at any time within ten or twenty years, or at any time, but is merely whether the party relying upon the statute has been in the adverse possession of the premises and has paid the taxes legally levied thereon for the statutory period. If he has, the benefits of the statute are extended to him; otherwise not." The court also adverts to similar statutes of other states in which express provision was made for tacking, and points out that in the statute under consideration this feature is omitted, and says: "We must assume that the omission was intentional." J. B. Streeter Co. v. Fredrickson, 11 N. D. 300, 305, 306, 91 NW 692 (per Young, J.).

46. See cases infra this note.

[a] **In this state** (1) the rule has been settled from the earliest period to the present time that where possession of land is conveyed by the disseizor before the expiration of the statutory period necessary to bar the real owner continuity of possession is broken, and the grantee of the disseizor cannot unite his possession with that of the disseizor in order to show adverse possession for the requisite period. Lewis v. Pope, 86 S. C. 285, 68 SE 680; Epperson v. Stansill, 64 S. C. 485, 42 SE 426; Burnett v. Crawford, 50 S. C. 161, 27 SE 645; Garrett v. Weinberg, 48 S. C. 28, 26 SE 3; Johnson v. Cobb, 29 S. C. 372, 7 SE 601; Boykin v. Ancrum, 28 S. C. 486, 6 SE 305, 13 AmSR 698; Ellen v. Ellen, 16 S. C. 132; Congdon v. Morgan, 14 S. C. 587; Pegaus v. Warley, 14 S. C. 180; Beadle v. Hunter, 34 S. C. L. 331; King v. Smith, 24 S. C. L. 10; Mazyck v. Wight, 4 S. C. L. 151, 153. (2) The doctrine on which these decisions rest has been stated as follows: "Until the party in possession has acquired a right of possession, and an indefeasible title by the operation of the limitation act, and the title and right of the true owner of the land is [are] completely barred, the party in possession is, in the eye of the law, to be regarded in the light of a trespasser; and as a trespasser can acquire no right, he can convey none. Therefore it follows, that unless some one trespasser, or joint trespassers, shall continue their trespass for five entire years, without any interruption, or variation, the act will not operate in their favor; and that every change of possession produces a new trespass, for which an action will lie, which distinct trespasses cannot be united in order to make up the period of time which is necessary to furnish a right to the possession, and quiet enjoyment." Per Brevard, J., in Mazyck v. Wight, supra. (3) In applying the foregoing rule it has been held that where one in possession of land by an adverse claim conveyed the same in fee before the expiration of the statutory period, reserving to himself by deed the use for life, and continued in possession until his death, thus completing the necessary period to bar recovery by the owner, the deed conveyed no title to the grantee, as, prior to the time when an adverse claim has ripened into a title, there is no interest in the claimant which can be transferred by deed. Ellen v. Ellen, 16 S. C. 132. (4) However, it has been held in this state that in establishing the presumption of a grant the possession of grantor and grantee may be tacked. Sutton v. Clark, 59 S. C. 440, 38 SE 150, 82 AmSR 848; McLeod v. Rogers, 31 S. C. L. 19. (5) And a grantee in possession under an executory contract of purchase may tack his possession prior to receiving a deed to his possession thereafter because his entire possession was at all times adverse to all save his vendor. State Bank v. Smyers, 33 S. C. L. 24.

47. Ark.—Memphis, etc., R. Co. v. Organ, 67 Ark. 84, 55 SW 952.

Fla.—Kendrick v. Latham, 25 Fla. 819, 6 S 871.

Ill.—Rich v. Naffziger, 255 Ill. 98, 99 NE 341.

Mass.—Peele v. Chever, 8 Allen 89.

N. C.—Miller v. Bumgardner, 109 N. C. 412, 13 SE 935.

Or.—Clark v. Bundy, 29 Or. 190, 44 P 282.

Pa.—Scheetz v. Fitzwater, 5 Pa. 126.

Tenn.—Cooper v. Great Falls Cotton Mills Co., 94 Tenn. 588, 30 SW 353.

Tex.—Collier v. Couts, 92 Tex. 234, 47 SW 525; Cochrane v. Faris, 18 Tex. 850.

Wis.—Mortenson v. Murphy, 153 Wis. 389, 393, 141 NW 273 [cit Cyc].

[a] **The rule has been applied to:** (1) Sales under a mortgage foreclosure. Memphis, etc., R. Co. v. Organ, 67 Ark. 84, 55 SW 952; Dunbar v. Aldrich, 79 Miss. 698, 31 S 341; Atchison v. Pease, 96 Mo. 566, 10 SW 159; Cooper v. Great Falls Cotton Mills Co., 94 Tenn. 588, 30 SW 353. (2) Sales in partition proceedings. Rich v. Naffziger, 255 Ill. 98, 99 NE 341; Clark v. Bundy, 29 Or. 190, 44 P 282; Congdon v. Morgan, 14 S. C. 587; Taylor v. Brown, 8 Tex. Civ. A. 261, 27 SW 911. (3) Sales by a receiver appointed for the predecessor. Verdery v Savannah, etc., R. Co., 82 Ga. 675, 9 SE 1133. (4) Sales by executors or administrators. Riggs v. Fuller, 54 Ala. 141; Ricker v. Butler, 45 Minn. 545, 48 NW 407; Shaw v. Nicholay, 30 Mo. 99; Cochrane v. Faris, 18 Tex. 850. (5) Sales under foreclosure of mechanics' liens. Mortenson v. Murphy, 153 Wis. 389, 141 NW 273. (6) Where in divorce proceedings the court set off

rest on a valid decree, judgment, or order.[48] A possession under a sheriff's deed without judgment and execution against the former occupant cannot be tacked to that of such former occupant,[49] and the mere possession of such deed is not of itself sufficient evidence to establish privity because it is not of itself evidence of the officer's authority to sell.[50] So it has been held that where title has been adjudicated in the plaintiff in an action of ejectment, but the defendant in possession has been decreed to have a lien upon the land, and the land has been ordered sold to satisfy it, the purchaser at a sale under such decree cannot, in a subsequent action of ejectment against him, tack the prior possession of the lienors to his own possession, subsequent to the sale, for the purpose of establishing a title by adverse possession against another who claims under the same source of title as the plaintiff in the action where the sale was had.[51]

[§ 75] **c. Vendor and One Holding under Executory Contract of Purchase.** The occupancy of the vendee in a contract for the purchase of land is that of a tenant. It inures to the benefit of the vendor for the purpose of perfecting title of the latter by adverse possession, and may be tacked to his possession to perfect title in him,[52] and it is immaterial that the contract of sale is not consummated.[53] As a consequence of this rule the possession of such vendee cannot be tacked to that of his grantee to make up the statutory period, for the purpose of perfecting title by adverse possession in the vendee.[54] However, where the vendee, after occupying the land under his contract of purchase, subsequently acquires a deed thereto, his possession before and after the acquisition of the deed may be tacked to perfect title in himself by adverse possession.[55]

[§ 76] **d. Donor and Donee.** Adverse possession of inclosed land by a donee before he has received a deed may be coupled with adverse possession after deed to make out the statutory period necessary to give title by adverse possession.[56]

[§ 77] **e. Landlord and Tenant.** The possession of landlord and tenant may be tacked to complete the bar of the statute of limitations in behalf of the landlord,[57] especially where there is an agreement that the adverse occupancy of the tenant shall inure to the benefit of the landlord.[58] And it is not necessary that the possession should be that of a single tenant. The landlord may tack the possession of several tenants to complete the statutory period.[59] So a temporary vacancy, such as is incident to a change of tenants, does not prevent the tacking of the various possessions.[60] Nevertheless it must appear that there was continued possession of the tenant or of persons claiming under him acknowledging the landlord's title.[61]

An encroachment originating with the vendee will not inure to the benefit of the vendor.[62]

[§ 78] **f. Ancestor and Heir.**[63] Privity such as will authorize the tacking of possessions exists between two successive holders where the latter takes under the earlier by descent.[64] This rule proceeds

to the wife the possession of lands held adversely by the husband, her possession being properly tacked to his. Wells v. Wells, 7 Utah 68, 24 P 752.

48. Kendrick v. Latham, 25 Fla. 819, 6 S 871; Hester v. Coats, 22 Ga. 56; Collier v. Couts, 92 Tex. 234, 47 SW 525.

49. Hester v. Coats, 22 Ga. 56.

50. Kendrick v. Latham, 25 Fla. 819, 6 S 871; Haynes v. Jones, 2 Head (Tenn.) 372.

51. Carson v. Dundas, 39 Nebr. 503, 58 NW 141.

52. Ill.—Kruse v. Wilson, 79 Ill. 233; Hale v. Gladfelder, 52 Ill. 91.

Ky.—Jarboe v. McAtee, 7 B. Mon. 279; Beal v. Brooks, 7 J. J. Marsh. 232, 23 AmD 401.

Mass.—Sargent v. Ballard, 9 Pick. 251.

Mo.—Dollarhide v. Mabary, 125 Mo. 197, 28 SW 332; Mabary v. Dollarhide, 98 Mo. 198, 11 SW 611, 14 AmSR 639.

Nebr.—Oldig v. Fisk, 1 Nebr. (Unoff.) 124, 95 NW 492.

N. C.—Brown v. Brown, 106 N. C. 451, 11 SE 647.

Or.—Stephenson v. Van Blokland, 60 Or. 247, 256, 118 P 1026 [cit Cyc]; Rowland v. Williams, 23 Or. 515, 32 P 402; Anderson v. McCormick, 18 Or. 301, 22 P 1062.

Tenn.—Valentine v. Cooley, Meigs 613, 33 AmD 166.

Tex.—Cook v. Coleman, (Civ. A.) 33 SW 756.

Wash.—McAuliff v. Parker, 10 Wash. 141, 38 P 744.

[a] **Possession by a purchaser under a deed reserving a lien for purchase money** is available to the vendor as against an adverse claimant. Kirby v. Boaz, (Tex. Civ. A.) 131 SW 533 [aff (Civ. A.) 121 SW 223].

[b] **Where the vendee repudiates the vendor's title** their respective possessions cannot be tacked. Payne v. McKinney, 30 Ga. 83.

53. McAuliff v. Parker, 10 Wash. 141, 38 P 744.

54. Plumer v. Brown, 8 Metc. (Mass.) 578.

55. State Bank v. Smyers, 33 S. C. L. 24; Valentine v. Cooley, Meigs (Tenn.) 613, 33 AmD 166. See also Oldig v. Fisk, (Nebr.) 95 NW 492; Brown v. Brown, 106 N. C. 451, 11 SE 647. Contra Barnes v. Vickers, 3 Baxt. (Tenn.) 370.

56. Sanders v. Logue, 88 Tenn. 355, 12 SW 722.

57. Ala.—Riggs v. Fuller, 54 Ala. 141.

Ga.—Roberson v. Downing Co., 126 Ga. 175, 54 SE 1020.

Ill.—Schneider v. Botsch, 90 Ill. 577.

Mass.—Murphy v. Com., 187 Mass. 361, 73 NE 524; Melvin v. Merrimack River Locks, etc., 5 Metc. 15, 38 AmD 384.

N. C.—Alexander v. Gibbon, 118 N. C. 796, 24 SE 748, 54 AmSR 757.

Or.—Quinn v. Willamette Pulp, etc., Co., 62 Or. 549, 553, 126 P 1 [cit Cyc]; Stephenson v. Van Blokland, 60 Or. 247, 118 P 1026; Rowland v. Williams, 23 Or. 515, 32 P 402; Anderson v. McCormick, 18 Or. 301, 22 P 1062.

S. C.—King v. Smith, 24 S. C. L. 10.

Tenn.—Cowan v. Hatcher, (Ch. A.) 59 SW 689.

Tex.—Virginia Bank v. Hedges, 38 Tex. 614; Combs v. Stringer, (Civ. A.) 142 SW 668; Cleveland v. Smith, (Civ. A.) 113 SW 547. See Wolf v. Wilhelm, (Civ. A.) 146 SW 216. And see Travis v. Hall, 37 Tex. Civ. A. 143, 83 SW 425.

W. Va.—Pickens v. Stout, 67 W. Va. 422, 68 SE 354.

Ont.—Coulter v. Coulter, 4 OntWR 65.

[a] **Tenant and grantee of premises leased.**—(1) Where plaintiff became a tenant of premises occupied under an adverse possession and later purchased the premises, whereupon another tenant who was in possession prior to and during plaintiff's occupancy attorned to plaintiff and paid him rent, it would be inferred that the attorning tenant was the tenant of plaintiff's vendor, so that plaintiff's possession would be tacked to that of the attorning tenant. Houston v. Finnigan, (Tex. Civ. A.) 85 SW 470. (2) So it has been held that, where after leasing the land the claimant conveys, the continued possession of the tenants under the lease, although without attornment to the grantee, is regarded as the possession of the grantee and does not interrupt the adverse possession. Doe v. Clayton, 73 Ala. 359.

[b] **Where a tenant of the adverse claimant attempted to claim adversely** to such claimant and the latter immediately dispossessed the tenant by summary proceedings for unlawful detainer, it was held that the claimant's continuity of possession was not broken by the possession of his tenant. Barron v Barron, 122 Ala. 194, 25 S 55.

58. Coler v. Alexander, (Tex. Civ. A.) 128 SW 664.

59. Minn.—Ramsey v. Glenny, 45 Minn. 401, 48 NW 322, 22 AmSR 736; Sherin v. Brackett, 36 Minn. 152, 30 NW 551.

N. Y.—Landon v. Townshend, 129 N. Y. 166, 29 NE 71.

N. C.—Stewart v. Lowdermilk, 147 N. C. 583, 61 SE 523; Weaver v. Love 146 N. C. 414, 59 SE 1041.

Pa.—Thompson v. Kauffelt, 110 Pa 209, 1 A 267.

S. C.—Johnson v. McMillan, 32 S. C. L. 143.

Tenn.—Sims v. Eastland, 3 Head 368.

Tex.—Johnson v. Nash, 15 Tex. 419; Bayle v. Norris, (Civ. A.) 134 SW 767.

60. Thompson v. Kauffelt, 110 Pa. 209, 1 A 267; Bayle v. Norris, (Tex. Civ. A.) 134 SW 767 (vacancies of not more than two months at a time). And see infra § 182.

61. Houston Oil Co. v. Kimball, (Tex.) 122 SW 533 [aff (Civ. A.) 114 SW 662, and reh den 124 SW 85].

62. Doe v. Leavens, 3 U. C. Q. B. 411.

63. See also infra § 179.

64. Ala.—Riggs v. Fuller, 54 Ala. 141.

D. C.—Neale v. Lee, 19 D. C. 5.

Ill.—Rich v. Naffziger, 255 Ill. 98, 99 NE 341.

Md.—Wickes v. Wickes, 98 Md. 307, 56 A 1017; Hanson v. Johnson, 62 Md. 25, 50 AmR 199; Doe v. Fletcher, 37 Md. 430.

Mass.—Frost v. Courtis, 172 Mass. 401, 52 NE 515; Haynes v. Boardman, 119 Mass. 414; Currier v. Gale,

upon the theory that there is no new entry or trespass but that the possession of the ancestors is cast by operation of law upon the heir, and that there is therefore no break in the continuity of the possession.[65] In such case the ouster and disseizin made by the ancestor is continued by the heirs and relates back to his original entry.[66] So the possession of a tenant holding under the ancestor inures to the benefit of the heirs,[67] and where one heir enters into possession his possession will inure to the benefit of the estate.[68] On the other hand there is no such privity between a predecessor and one who supposes himself to be his heir, but in fact is not, as to enable their possessions to be tacked.[69]

[§ 79] **g. Members of Family.** There is a privity of possession between one who lives on premises with his family and the members of his family who continue to occupy it as a home after his death.[70]

[§ 80] **h. Testator and Devisee.** Such privity exists between testator and devisee as will authorize the tacking of the two possessions to make up the period necessary to acquire title by prescription,[71] and the fact that the will is not executed in compliance with the statutory requirements does not alter the rule.[72] So it has been held that there is sufficient privity between the testator, the person to whom he has devised land for life, and the remainderman under his will, to establish a title by adverse possession if the possession by the testator and by the devisees is continuous for the statutory period of limitations, privity here being based upon the fact that both devisees claim one title under the same will,[73] and it has also been held that where the life tenant under a will never enters into possession, and the remainderman takes possession thereunder, his possession and that of the testator may be tacked to make up the statutory period.[74]

[§ 81] **i. Decedent and Personal Representative.** In the absence of any statutory provisions to the contrary the occupation of an intestate and his personal representative cannot be tacked to make up the statutory period,[75] and a fortiori the possession of the intestate and of a grantee of the administrator cannot be tacked.[76] Where, however, the administrator has the legal right by statute to take possession and control of his real estate, his possession is in privity with that of the intestate,[77] and the fact that a brief time elapses between the decedent's death and the appointment of the administrator does not break the continuity of the adverse possession.[78]

[§ 82] **j. Bankrupt and Trustee of His Estate.** Since a bankrupt is civiliter mortuus, and the trustee

9 Allen 522; Sawyer v. Kendall, 10 Cush. 241; Melvin v. Merrimack River, 5 Metc. 15, 38 AmD 384; Miller v. Miller, 15 Pick. 57; Melvin v. Whiting, 13 Pick. 184.

Minn.—Ramsey v. Glenny, 45 Minn. 401, 48 NW 322, 22 AmSR 736; Witt v. St. Paul, etc., R. Co., 38 Minn. 122, 35 NW 862; Sherin v. Brackett, 36 Minn. 152, 30 NW 551.

Miss.—Harvey v. Briggs, 68 Miss. 60, 8 S 274, 10 LRA 62; Wilson v. Williams, 52 Miss. 487; Hanna v. Renfro, 32 Miss. 125.

Mo.—Fugate v. Pierce, 49 Mo. 441.

Nebr.—Montague v. Marunda, 71 Nebr. 805, 99 NW 653.

N. C.—Barrett v. Brewer, 153 N. C. 547, 69 SE 614, 42 LRANS 403 and note; Atwell v. Shook, 133 N. C. 337, 45 SE 777; Alexander v. Gibbon, 118 N. C. 796, 24 SE 748, 54 AmSR 757; University Trustees v. Blount, 4 N. C. 455.

Or.—Low v. Schaffer, 24 Or. 239, 33 P 678; Rowland v. Williams, 23 Or. 515, 32 P 402.

Pa.—Graffius v. Tottenham, 1 Watts & S. 488, 37 AmD 472; Overfield v. Christie, 7 Serg. & R. 173.

S. C.—Bardin v. Commercial Ins., etc., Co., 82 S. C. 358, 64 SE 165. Powers v. Smith, 80 S. C. 110, 61 SE 222; Brucke v. Hubbard, 74 S. C. 144, 54 SE 249; Kilgore v. Kirkland, 69 S. C. 78, 48 SE 44; Epperson v. Stansill, 64 S. C. 485, 42 SE 426; Turpin v. Sudduth, 58 S. C. 295, 31 SE 245, 306 (decided under a statute providing that the right of a person to the possession of real property shall not be impaired by reason of the death of a person in possession); Burnett v. Crawford, 50 S. C. 161, 27 SE 645; Miller v. Cramer, 48 S. C. 282, 26 SE 657; Duren v. Kee, 26 S. C. 219, 2 SE 4; Williams v. McAliley, Cheves 200.

Tenn.—Woodruff v. Roysden, 58 SW 1066; East Tennessee Iron, etc., Co. v. Broyles, 95 Tenn. 612, 32 SW 761; Marr v. Gilliam, 1 Coldw. 488.

Tex.—Olive v. Bevil, 55 Tex. 423; Williamson v. Simpson, 16 Tex. 433. See Kennon v. Miller, (Civ. A.) 143 SW 986.

Vt.—Alexander v. Stewart, 50 Vt. 87.

N. S.—Smyth v. McDonald, 5 N. S. 274.

65. Burnett v. Crawford, 50 S. C. 161, 27 SE 645.

"The possession of the heir is regarded as a continuance of that of the ancestor on account of his privity of blood." Montague v. Marunda, 71 Nebr. 805, 812, 99 NW 653 (per Letton, C.).

66. Montague v. Maranda, 71 Nebr. 805, 99 NW 653.

67. Williams v. McAliley, 25 S. C. L. 200.

[a] **Where on the ancestor's death his tenant continues in possession as tenant of the heirs** the possession of the tenant after the death of the ancestor is the possession of the heirs and the two possessions may be tacked. Melvin v. Merrimack River, 5 Metc. (Mass.) 15, 38 AmD 384.

68. Graffius v. Tottenham, 1 Watts & S. (Pa.) 488, 37 AmD 472; Watson v. Gregg, 10 Watts (Pa.) 289, 36 AmD 176; Alexander v. Stewart, 50 Vt. 87.

69. Western Union Beef Co. v. Thurman, 70 Fed. 960, 17 CCA 542.

70. Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550. See also Cunningham v. Brumback, 23 Ark. 336; Mielke v. Dodge, 135 Wis. 388, 115 NW 1099.

[a] **Decedent and son-in-law.**—If a person die in adverse possession of a tract of land, and his son-in-law succeed him in the possession, the relation the latter sustained to the deceased will constitute such privity as will entitle him to connect his possession with that of his father-in-law so as to give him the benefit of the latter's adverse possession. The possession of the deceased descends to his children, and if a person marries one of them the marriage will constitute such privity as will entitle him to tack his possession to that of his wife's father. St. Louis v. Gorman, 29 Mo. 593, 77 AmD 586; St. Louis v. Keitley, 29 Mo. 593 note.

71. D. C.—Neale v. Lee, 19 D. C. 5.

Md.—Morrison v. Hammond, 27 Md. 604.

Mass.—Haynes v. Boardman, 119 Mass. 414; Sawyer v. Kendall, 10 Cush. 241. See also Peele v. Chever, 8 Allen 89.

Minn.—Sherin v. Brackett, 36 Minn. 152, 30 NW 551.

Miss.—Dunbar v. Aldrich, 79 Miss. 698, 31 S 341.

Mo.—Chouquette v Barada, 23 Mo. 331.

Nebr.—Montague v. Marunda, 71 Nebr. 805, 99 NW 653.

Pa.—Hart v. Williams, 189 Pa. 31, 41 A 983.

Tenn.—Marr v. Gilliam, 1 Coldw. 488.

Can.—Bradshaw v. Patterson, 18 WestLR 402.

[a] **The possession of land held in trust by the executor for the devisee** is not a break in the continuity of possession, as it is the possession of the devisee and in no sense adverse. McLavy v. Jones, 31 Tex. Civ. A. 354, 72 SW 407.

[b] **In South Carolina** the rule is contrary to that stated in the text. As has been shown in a previous section (see supra § 73) it is the law in this state that the possessions of vendor and vendee cannot be tacked to make up the statutory period. And on the principle that "a devisee under a will does not take possession of the devise as heir, but rather as the grantee or purchaser of the testator" (Burnett v. Crawford, 50 S. C. 161, 167, 27 SE 645, per Jones, J.), it is held that the possession of testator and devisee cannot be tacked (Burnett v. Crawford, supra). And see Kilgore v. Kirkland, 69 S. C. 78, 48 SE 44 (which recognizes this principle, although not involved in the decision).

72. Hanson v. Johnson, 62 Md. 25, 50 AmR 199.

73. Roberts v. Cox, 259 Ill. 232, 102 NE 204; Haynes v. Boardman, 119 Mass. 414. Contra Austin v. Rutland R. Co., 45 Vt. 215.

74. Miller v. Miller, 15 Pick. (Mass.) 57.

75. Bullen v. Arnold, 31 Me. 583; East Tennessee Iron, etc., Co. v. Ferguson, (Tenn. Ch.) 35 SW 900. See also Marr v. Gilliam, 1 Coldw. (Tenn.) 488; Norment v. Smith, 1 Humphr. (Tenn.) 46.

[a] **Reason for rule.**—This rests upon the common-law rule that the administrator has no right of control over the real estate of his intestate, and any authority which as such the administrator assumes to exercise over it is usurped authority which can communicate no right whatever to the person in whose favor it is exercised. East Tennessee Iron, etc., Co. v. Ferguson, (Tenn. Ch. A.) 35 SW 900.

76. Vance v. Fisher, 10 Humphr. (Tenn.) 211.

77. Cannon v. Prude, (Ala.) 62 S. 24; Ricker v. Butler, 45 Minn. 545, 48 NW 407; Fugate v. Pierce, 49 Mo. 441; Shaw v. Nicholay, 30 Mo. 99; Rowland v. Williams, 23 Or. 515, 32 P 402. See also Spotts v. Hanley, 85 Cal. 155, 24 P 738.

78. Ricker v. Butler, 45 Minn. 545, 48 NW 407.

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of his estate is in fact his administrator, the possession of the trustee may be tacked on to the possession of the bankrupt for the purpose of completing the bar of the statute of limitations.[79]

[§ 83] **k. Husband and Wife.** At common law before assignment of dower a wife has no such privity of estate with her husband in land of which he died in adverse possession that her continued adverse possession after his decease, without deed or devise from him, can be tacked to his to give her a complete title by disseizin.[80] The reason for this is that a wife has no title, seizin, or right of entry as dowress until the assignment of dower.[81] This rule is in no way affected by the fact that she resided on the land with him during his possession.[82] Where, however, by virtue of statute the widow is entitled to occupy in common with the heir any lands in which she is entitled to dower before assignment and until the heir shall object thereto, such an occupancy by her until objection is made by the heir will be a continuance of the possession of the husband, and such privity will exist between them as to authorize the tacking of her possession to her husband's to enable her to defeat an action by the real owner for possession.[83] It has also been held that where, by statute, the widow is entitled to quarantine in the whole property until dower is assigned to her, her possession is in privity with that of her husband.[84] If a woman in adverse possession of land marries and continues in such possession after her husband's death, her possession and his may be tacked together to make one continued adverse possession because the husband's possession is in legal effect the possession of the wife,[85] and the duration of the possession by a husband of land claimed by him to belong to his wife, and to which he made no claim in any other right, may be added to the widow's possession to sustain a title by adverse possession in her.[86] An estate by the curtesy is in the nature of an estate by descent rather than by purchase, and possession under such an estate may be tacked to the preceding possession of the wife so as to raise the bar of the statute of limitations.[87] The result thereof is an investiture of title in the heirs subject to the husband's life tenancy.[88] It has been held that where the owner of a lot incloses therewith a strip of land and afterward conveys the lot to his wife and continues to live there with her, he thereafter having no actual possession of the strip, any subsequent possession of his cannot be joined with his prior possession to give title by adverse possession to the strip and there being no privity of estate between her and him any possession of hers cannot be tacked to his prior possession to give title to either by adverse possession.[89]

[§ 84] **l. Tenants in Common.** Successive possessions by several tenants in common holding under color of title, and not adversely to each other, may be tacked to make up the period of adverse possession which is required by the statute of limitations.[90] But the possession of one tenant who is subsequently dispossessed by his cotenant cannot be tacked by the latter to his own possession for the purpose of defeating a paper title acquired by the former to enlarge or fortify his own estate.[91]

[§ 85] **m. Mortgagor and Mortgagee.** Where the

79. Cannon v. Prude, (Ala.) 62 S 24, 26 (in which it was said: "Stepping, as he does, into the shoes of the bankrupt, his possession, while held for the benefit of the creditors, is the possession of the bankrupt, and may be tacked onto the possession of the bankrupt for the purpose of completing the bar of the statute of limitations").

80. Ind.—McEntire v. Brown, 28 Ind. 347.

Mass.—Sawyer v. Kendall, 10 Cush. 241.

N. Y.—Timmermann v. Cohn, 70 Misc. 327, 330, 128 NYS 770 [aff 146 App. Div. 924, 31 NYS 1146 (rev on other grounds 204 N. Y. 614, 97 NE 589), and cit Cyc].

Pa.—Collins v. Lynch, 7 Kulp 15.

Tenn.—Baker v. Hale, 6 Baxt. 46; Marr v. Gilliam, 1 Coldw. 488; East Tennessee Iron, etc., Co. v. Walton, (Ch. A.) 35 SW 459.

Eng.—Doe v. Barnard, 13 Q. B. 945, 66 ECL 945; Dixon v. Gayfere, 17 Beav. 421, 51 Reprint 1097.

And see Johnson v. Johnson, 106 Ark. 9, 152 SW 1017, 1019 [cit Cyc].

[a] **Reason for rule.**—(1) The possession of the widow inures to the benefit of the heirs and for the purpose of perfecting title in them may be tacked to that of the husband, and this because she cannot, without the assent of the heirs, change the character of the possession from an adverse to a friendly one. Mills v. Bodley, 4 T. B. Mon. (Ky.) 248. And see Larson v. Anderson, 74 Nebr. 361, 104 NW 925. (2) Where land held by a widow's husband adversely was awarded after his death to the widow as a part of her homestead, and she thereafter continued to occupy the same adversely, her possession was not adverse but in subordination to the rights of her husband's heirs and was therefore properly tacked to the possession of her husband in order to complete the period of adverse possession in their favor. Atwell v. Shook, 133 N. C. 387, 45 SE 777. In this case it was said that, although the allotment of the homestead was invalid and conferred no rights upon the widow, yet if she remained in possession under and by virtue thereof she was not a new disseisor, but such possession was a continuation of that of her husband and inured to the benefit of the heirs.

[b] **Statutory change of rule.**—Under Kirby Dig. § 2704, providing that a widow may remain in the dwelling house with the farm thereto attached until her dower shall be assigned, a widow's possession is in privity with that of her husband, and she can tack it to his to give the heirs title by adverse possession and have dower assigned to her. Johnson v. Johnson, 106 Ark. 9, 152 SW 1017.

81. McEntire v. Brown, 28 Ind. 347; Sawyer v. Kendall, 10 Cush. (Mass.) 241.

[a] **Reason for rule.**—"It was urged by the counsel for the tenant, that the right of the wife to dower, in land of which her husband died seised, would create sufficient privity of estate between them in regard to the land in question, to enable her to connect his possession of it with her own. But the answer to this suggestion is obvious. The right of dower confers no title to any part of the husband's land after his death, until assignment of dower is made. Until then, the wife has no seisin, or right of entry, in any part of her husband's land, and the heir can well maintain his writ of entry against her, to which her claim of dower would constitute no defence." Sawyer v. Kendall, 10 Cush. (Mass.) 241, 245.

82. Marr v. Gilliam, 1 Coldw. (Tenn.) 488, 503 (Wright, J., said that the rule applied whether the widow "resided upon the land concurrently with him or succeeded to the possession upon his death"); East Tennessee Iron, etc., Co. v. Walton, (Tenn. Ch. A.) 35 SW 459.

83. Johnson v. Johnson, 106 Ark. 9, 152 SW 1017; McEntire v. Brown, 28 Ind. 347. See also Mielke v. Dodge, 135 Wis. 388, 115 NW 1099 (where a similar conclusion was reached. In this case it was held that where defendant claimed premises by adverse possession under a conveyance from her husband made before such conveyances were authorized by law, and the husband held possession a year after delivery of the deed but died before the action involving the title was commenced, under St. (1898) § 3872, authorizing a widow to occupy land of which her husband died seized, or to receive one third of the rents and profits, without assigning dower, so long as the other persons interested do not object, there was such privity between defendant and her husband as to constitute a continuity of adverse possession from the husband to defendant in any event).

84. Hickman v. Link, 97 Mo. 482, 10 SW 600; Chouquette v. Barada, 23 Mo. 331. Contra Robinson v. Allison, 124 Ala. 325, 27 S 461 (where it was held that the right of quarantine establishes no privity, and that it is not an estate in land but a mere temporary privilege to occupy it and have its rents and profits).

[a] **In Kentucky** it was held that a widow could tack the adverse possession of her husband before his death to her own adverse possession. Tippenhauer v. Tippenhauer, 158 Ky. 639, 166 SW 225. No statute is mentioned in this case, but the statutes of Kentucky contain a similar provision to that of Missouri.

85. Den v. Lloyd, 32 N. J. L. 326.

86. Holton v. Whitney, 30 Vt. 405.

87. Stricklin v. Moore, 98 Ark. 30, 135 SW 360; Coigan v. Pellens, 48 N. J. L. 27, 2 A 633; Mimms v. Ewing, 15 Lea (Tenn.) 667.

88. Stricklin v. Moore, 98 Ark. 30, 135 SW 360.

89. Maher v. Brown, 183 Ill. 575, 56 NE 181 (three judges dissenting).

90. Woodruff v. Roysden, 105 Tenn. 491, 58 SW 1066, 80 AmSR 905.

91. Ryerse v. Teeter, 44 U. C. Q. B. 8.

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mortgagee passes the legal title and the right of possession, the possession of the mortgagee is in privity with the mortgagor, not adverse to him, and may be tacked to the possession of the mortgagor to make up the statutory period.[92]

[§ 86] **n. Life Tenant and Remainderman.** While it has been held that where one in the adverse possession of land transfers the same, creating a life estate in one person with remainder to another, there is privity between the life tenant and the remainderman so that their possessions may be tacked,[93] there is also authority to the contrary based on the ground that there can be no privity because the remainderman does not take from the life tenant.[94]

[§ 87] **o. Former Occupant and Person Acquiring Title by Compromise.** Where one person enters into possession and another claims adversely to him and takes possession under such claim by consent of the first possessor pursuant to a compromise between them, this is not a continuity of the first possession, there being no privity between the parties.[95]

[§ 88] **p. Squatters and Purchasers of Tax Title.** Where a purchaser of land at a void tax sale, relying on his tax deed, recovers possession of land from squatters thereon, the prior possession of the squatters is not by this recovery rendered available to the tax purchaser to perfect title by adverse possession against the true owner.[96]

[§ 89] **q. Receivers.** Where a receiver is appointed at the instance of creditors of the adverse claimant the possession of such receiver is a continuance of the possession of the adverse claimant, if the true owner is not a party to the proceedings, and they may be tacked together.[97] But it has been held that where land was occupied by a receiver in proceedings to foreclose a mortgage thereon, persons holding under a sale in such proceedings were not entitled to tack the time of such receiver's possession to the time of their subsequent holding in order to establish title by adverse possession.[98]

[§ 90] **4. What Conveyances or Transfers Create Privity—a. Necessity of Writing.** While in Massachusetts devolution and possession are regarded as transfers of title to land which can pass only by deed, by law, or by descent,[99] the great weight of authority is to the effect that the privity requisite to constitute continuous adverse possession by tacking the possession of the original entryman to that of another may be effected by any conveyance, agreement, or understanding that has for its object a transfer of the possession and is accompanied by a transfer in fact.[1] It does not follow that because a deed is required to transfer the title to real estate

92. Wilson v. Rogers, 97 Ark. 369, 134 SW 318.

93. Haynes v. Boardman, 119 Mass. 414, 415 (where the court said: "It is claimed that there is no such privity between the life tenant and the remainderman, because the latter in no sense claims under the former. But the answer is, that both claim under the same will by one title. The disseisin, which was commenced by the testatrix, is continued by each in accordance with that title, and is referred by each only to the entry of the testatrix. There has been no loss of possession; no restoration of the seisin to the true owner; no new entry. The disseisin which commenced with the testatrix has been continuous in her devisees, and establishes her title by lapse of time. It is plainly distinguished from a case of successive entries and new disseisins by different and independent parties. It does not follow, because no act of the life tenant in disparagement of his title, and no disseisin of him, will be permitted to injure the remainderman, that an adverse possession maintained by the tenant under his title, will not inure to the benefit of the former. The test of title is that there has been no interruption of possession, and no new entry required. If the possession ends before the expiration of the time required to establish the presumption, the seisin of the true owner is restored, and he comes in by right, and not by disseisin, as against all parties"). See also Hickman v. Link, 97 Mo. 482, 10 SW 600 (holding that where the widow is entitled to quarantine in the whole plantation until dower is assigned her possession will not be adverse to the heirs, and their possession may be tacked to hers to make up the statutory period of limitation).

94. Austin v. Rutland R. Co., 45 Vt. 215.

95. Jackson v. Leonard, 9 Cow. (N. Y.) 653.

96. Bell v. Fry, 5 Dana (Ky.) 341. See also Wilson v. Purl, 133 Mo. 367, 34 SW 884.

[a] **The reason for this** is that squatters by intendment of law hold under the legal title and their possession inures to its benefit. Bell v. Fry, 5 Dana (Ky.) 341.

97. Verdery v. Savannah, etc., R. Co., 82 Ga. 675, 9 SE 1133. See also Anonymous, 2 Atk. 15, 26 Reprint 406.

98. Wilkinson v. Lehman-Durr Co., 136 Ala. 463, 34 S 216.

[a] **Reason for rule.**—"He is not the agent or representative of either party to the action, but is uniformly regarded as the officer of the court, exercising his functions in the interest of neither plaintiff nor defendant, but for the common benefit of all the parties. . . . His appointment 'does not determine any right, or affect the title of either party, in any manner whatever.' As to this, the status quo of the parties is unaffected and preserved, and the appointment 'is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may, ultimately, appear to be entitled to it.' Wilkinson v. Lehman-Durr Co., 136 Ala. 463, 467, 34 S 216 (per Haralson, J.).

99. Sawyer v. Kendall, 10 Cush. (Mass.) 241; Ward v. Bartholomew, 6 Pick. (Mass.) 409.

1. U. S.—Alexander v. Pendleton, 8 Cranch 462, 3 L. ed. 624; Shuffleton v. Nelson, 22 F. Cas. No. 12,822, 2 Sawy. 540.

Ala.—Oliver v. Williams, 163 Ala. 376, 50 S 937; Holt v. Adams, 121 Ala. 664, 25 S 716.

Ark.—St. Louis Southwestern R. Co. v. Mulkey, 100 Ark. 71, 75, 139 SW 643, AnnCas1913C 1339 [cit Cyc]; Wilson v. Rogers, 97 Ark. 369, 134 SW 318; Memphis, etc., R. Co. v. Organ, 67 Ark. 34, 55 SW 952.

Conn.—Smith v. Chapin, 31 Conn. 530; Fanning v. Willcox, 3 Day 258.

Fla.—Kendrick v. Latham, 25 Fla. 819, 6 S 871.

Ill.—Rich v. Naffziger, 255 Ill. 98, 99 NE 341; Kepley v. Scully, 185 Ill. 52, 57 NE 187; Kruse v. Wilson, 79 Ill. 233; Weber v. Anderson, 73 Ill. 439.

Minn.—Hall v. Connecticut Mut. L. Ins. Co., 76 Minn. 401, 79 NW 497; Vandall v. St. Martin, 42 Minn. 163, 44 NW 525.

Miss.—Crowder v. Neal, 100 Miss. 730, 736, 57 S 1 [quot Cyc].

Nebr.—Montague v. Marunda, 71 Nebr. 805, 99 NW 653; Murray v. Romine, 60 Nebr. 94, 82 NW 318.

N. H.—Munroe v. Wilson, 68 N. H. 580, 41 A 240.

N. J.—Davock v. Nealon, 58 N. J. L. 21, 32 A 675.

Or.—Sommer v. Compton, 52 Or. 173, 96 P 124, 1065; Clark v. Bundy, 29 Or. 190, 44 P 282.

Pa.—Collins v. Lynch, 157 Pa. 246, 27 A 721, 37 AmSR 723; Scheetz v. Fitzwater, 5 Pa. 126.

Tenn.—East Tennessee Iron, etc., Co. v. Broyles, 95 Tenn. 612, 32 SW 761; Chilton v. Wilson, 9 Humphr. 399.

Tex.—Cook v. Dennis, 61 Tex. 246; Houston Oil Co. v. Gore, (Civ. A.) 159 SW 924.

Wis.—Clithero v. Fenner, 122 Wis. 356, 99 NW 1027, 106 AmSR 978; Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830.

[a] **A paper transfer** evidencing a change of possession by succession is not necessary to blend the first possession into the second. The right of a person holding possession adversely may be transferred by parol if there is an actual transfer in fact. Holt v. Adams, 121 Ala. 664, 25 S 716; Wilson v. Rogers, 97 Ark. 369, 134 SW 318; Cunningham v. Brumback, 23 Ark. 336; Smith v. Chapin, 31 Conn. 530; Kendrick v. Latham, 25 Fla. 819, 6 S 871; Rich v. Naffziger, 255 Ill. 98, 99 NE 341; Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088; Kepley v. Scully, 185 Ill. 52, 57 NE 187; Faloon v. Simshauser, 130 Ill. 649, 22 NE 835; Weber v. Anderson, 73 Ill. 439; Nauman v. Burch, 91 Ill. A. 48; Hughes v. Ridgeway, 86 Kan. 852, 122 P 871; Viking Refrigerator, etc., Co. v. Crawford, 84 Kan. 203, 114 P 240, 35 LRANS 498; Wishart v. McKnight, 178 Mass. 356, 59 NE 1028, 86 AmSR 486; Vandall v. St. Martin, 42 Minn. 163, 44 NW 525; Sherin v. Brackett, 36 Minn. 152, 30 NW 551; Moore v. Helvy, 235 Mo. 443, 138 SW 481; Crispen v. Hannavan, 50 Mo. 536; Menkens v. Blumenthal, 27 Mo. 198; South Omaha v. Meehan, 71 Nebr. 230, 98 NW 691; Murray v. Romine, 60 Nebr. 94, 82 NW 318; Lantry v. Wolff, 49 Nebr. 374, 68 NW 494; Davock v. Nealon, 58 N. J. L. 21, 32 A 675; Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134 [rev 5 Lans. 206]; Jackson v. Moore, 13 Johns. (N. Y.) 513, 7 AmD 398; Stewart v. Lowdermilk, 147 N. C. 583, 61 SE 523; McNeely v. Langan, 22 Oh. St. 32; Sommer v. Compton, 52 Or. 173, 96 P 124, 1065; West v. Edwards, 41 Or. 609, 69 P 992; Rowland v. Williams, 23 Or. 515, 32 P 402; Vance v. Wood, 22 Or. 77, 29 P 73; Collins v.

the same solemnity must be observed in the transfer of the possession where the title and possession are not united in the same person.[2] The rule is not affected by a statute providing that no estate or interest in lands other than leases for a term not exceeding one year shall be created, granted, or assigned unless by act or operation of law, or by deed or conveyance in writing, and the reason for this is that the person in possession has no "estate" until the lapse of the statutory period;[3] but of course it is not necessary that the transfer should have been effective to give title.[4]

[§ 91] **b. Deed Void on Its Face.** A deed from one possessor to another, void on its face, does not create privity so as to authorize the tacking of their respective possessions to create a title by prescription.[5]

[§ 92] **c. Fraudulent Deeds.** Where several are in adverse possession, and the period of such several possessions is more than the period of limitations, but the possessors claim from the first by successive deeds in fee simple, the possession may be connected although the deeds were fraudulent.[6]

[§ 93] **d. Defectively Executed Deed.** A deed executed by a married woman who is not privily examined creates privity between herself and her grantee.[7]

[§ 94] **e. Unrecorded Deeds.** In the absence of statute providing otherwise[8] it is not essential that a deed should be recorded to give it efficacy as color of title.[9]

[§ 95] **f. Deeds in Which Mistake Is Made in Grantee's Name.** A variance between the name of the grantee in a deed executed in pursuance of a decree and the name of the purchaser as given in the decree does not destroy the effect of the deed as color of title, and such deed will enable the grantee therein to tack his possession to that of the parties whose interests are sold to make out title by adverse possession.[10]

[§ 96] **g. Conveyances or Transfers Omitting Description of or Misdescribing Land—(1) The General Rule.** The general rule is that possessions cannot be tacked to make out title by prescription where the deed under which the last occupant claims title does not include the land in dispute.[11] It must clearly appear that the particular premises were embraced in the deed or transfer, in whatever form it may have been made.[12]

[§ 97] **(2) Exceptions to Rule.** However, the

Lynch, 157 Pa. 246, 27 A 721, 37 AmSR 723; Hughs v. Pickering, 14 Pa. 297; Cunningham v. Patton, 6 Pa. 355; Rembert v. Edmondson, 99 Tenn. 15, 41 SW 935, 63 AmSR 819; Erck v. Church, 87 Tenn. 575, 11 SW 794, 4 LRA 641 and note; Baker v. Hale, 6 Baxt. (Tenn.) 46; Thompson v. Dutton, (Tex. Civ. A.) 69 SW 641; McManus v. Matthews, (Tex. Civ. A.) 55 SW 589; Johnson v. Simpson, 22 Tex. Civ. A. 290, 54 SW 308; Mexia v. Lewis, 3 Tex. Civ. A. 113, 21 SW 1016; Illinois Steel Co. v. Pacocha, 139 Wis. 23, 119 NW 550; Mielke v. Dodge, 135 Wis. 388, 115 NW 1099; Clithero v. Fenner, 122 Wis. 356, 99 NW 1027, 106 AmSR 978; Illinois Steel Co. v. Jeka, 119 Wis. 122, 95 NW 97; Illinois Steel Co. v. Budziss, 106 Wis. 499, 81 NW 1027, 82 NW 534; Ryan v. Schwartz, 94 Wis. 403, 69 NW 178; Allis v. Field, 89 Wis. 227, 62 NW 85; McIntyre v. Canada Co., 18 Grant Ch. (U. C.) 367. See however Johnson v. Nash, 15 Tex. 419. See also Simmons v. Shipman, 15 Ont. 301. "It may be by a parol bargain and sale, or other understanding, that the possession shall pass accompanied by delivery." Sommer v. Compton, 52 Or. 173, 181, 96 P 124, 1065. "The mode adopted for the transfer of the possession may give rise to questions between the parties to the transfer; but, as respects the rights of third persons against whom the possession is held adversely, it seems to us to be immaterial, if successive transfers of possession were in fact made, whether such transfers were effected by will, by deed, or by mere agreement, either written or verbal." McNeely v. Langan, 22 Ohio St. 32, 37.

[b] **A verbal sale of improvements and right of possession** by one holding under the ten-year statute of limitations, made before the statute had run, is sufficient to constitute privity and enable the vendee to tack his possession to that of his vendor. Houston Oil Co. v. Gore, (Tex. Civ. A.) 159 SW 924.

2. Weber v. Anderson, 73 Ill. 439.

3. Illinois Steel Co. v. Budziss, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830.

[a] **Reason of rule.**—The right of a person in the peaceable, although wrongful, possession of land to protection against hostile invasion of that possession by a person having no better right is not an interest in land, within the meaning of the statute that no estate or interest in land shall be created or granted unless by operation of law or by deed or conveyance in writing. Hence a person in wrongful possession of land may, by oral agreement, surrender such possession to a successor in possession, and, where the aggregate of their continuous possession exceeds twenty years, it will defeat an action to recover possession by the owner. Illinois Steel Co. v. Budziss, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830.

4. Oldig v. Fisk, 1 Nebr. (Unoff.) 124, 95 NW 492.

5. Simpson v. Downing, 23 Wend. (N. Y.) 316.

6. Clark v. Chase, 5 Sneed (Tenn.) 636. Compare Hughes v. Owens, 92 SW 595, 29 KyL 140.

7. Miller v. Bumgardner, 109 N. C. 412, 13 SE 935.

8. See cases infra this note.

[a] **Under a statute** (1) if a grantee in possession of land fails to record his deed in a reasonable time, the adverse possession of his grantor under a registered deed is lost, and the grantee's adverse possession will not begin until his own deed is registered. Gillum v. Fuqua, (Tex. Civ. A.) 61 SW 938. To same effect Logan v. Robertson, (Tex. Civ. A.) 83 SW 395. (2) Every muniment of the record title must be duly registered. McLavy v. Jones, 31 Tex. Civ. A. 354, 356, 72 SW 407. "The purpose of the statute requiring [adverse] possession under a recorded deed is to give notice of the character of the adverse possession, and it must be such as is required in the registration of deeds, and the right of the party in possession to prescribe may be derived from a deed to a predecessor in title in privity with whom he holds. Possession may be tacked, and the title may be deraigned through several parties, in order to give the necessary five years, but every muniment of the record title must be recorded, and the possession must be unbroken, and must be accompanied by the payment of taxes for the requisite period. Corley v. Matlock, 79 Tex. 304, 15 SW 261; Van Sickle v. Catlett, 75 Tex. 404, 13 SW 31; Cook v. Dennis, 61 Tex. 246; Medlin v. Wilkins, 60 Tex. 409; Porter v. Chronister, 58 Tex. 53." McLavy v. Jones, supra (per Garrett, C. J.).

9. Roberson v. Downing Co., 120 Ga. 833, 48 SE 429, 102 AmSR 128, 1 AnnCas 757 and note.

10. Clark v. Bundy, 29 Or. 190, 44 P 282.

11. U. S.—Trager v. Jenkins, 136 U. S. 651, 10 SCt 1074, 34 L. ed. 557.

Cal.—Messer v. Hibernia Sav., etc., Soc., 149 Cal. 122, 84 P 835.

Colo.—Evans v. Welch, 29 Colo. 355, 68 P 776.

Ill.—Rich v. Naffziger, 255 Ill. 98, 99 NE 341; Illinois Cent. R. Co. v. Hatter, 207 Ill. 88, 69 NE 751.

La.—Sibley v. Pierson, 125 La. 478, 514, 51 S 502 [cit Cyc]; Vicksburg, etc., R. Co. v. Le Rosen, 52 La. Ann. 192, 26 S 854.

Mich.—Sheldon v. Michigan Cent. R. Co., 161 Mich. 503, 511, 126 NW 1056 [quot Cyc]; Nichols v. New England Furniture Co., 100 Mich. 230, 59 NW 155.

Mo.—Patton v. Smith, 171 Mo. 231, 71 SW 187.

Nebr.—Pohlman v. Evangelical Lutheran Trinity Church, 60 Nebr. 364, 83 NW 201.

N. Y.—Staples v. Schnackenberg, 148 App. Div. 161, 132 NYS 1092; Smith v. Reich, 80 Hun 287, 30 NYS 167.

N. C.—Jennings v. White, 139 N. C. 23, 26, 51 SE 799 [quot Cyc]; Blackstock v. Cole, 51 N. C. 560.

Wis.—Allis v. Field, 89 Wis. 327, 62 NW 85; Ablard v. Fitzgerald, 87 Wis. 516, 58 NW 745; Dhein v. Beuscher, 83 Wis. 316, 53 NW 551; Sheppard v. Wilmott, 79 Wis. 15, 47 NW 1054; Graeven v. Dieves, 68 Wis. 317, 31 NW 914.

12. Potts v. Gilbert, 19 F. Cas. No. 11,347, 3 Wash. C. C. 475; Evans v. Welch, 29 Colo. 355, 68 P 776; Jennings v. White, 139 N. C. 23, 26, 51 SE 799 [quot Cyc]; Ryan v. Schwartz, 94 Wis. 403, 69 NW 178; Allis v. Field, 89 Wis. 327, 62 NW 85.

[a] **This rule has been applied** (1) where the former possessor by mistake occupies land not included within the boundaries defined in the deed under which he holds and conveys by the description of his own deed. According to the weight of authority his possession of the land not included in such deed cannot be tacked to his successor's possession of such land to give the latter a prescriptive title. Ely v. Brown, 183 Ill. 575, 56 NE 181; Fell, etc., Co. v. Pennsylvania R. Co., (N. J.) 20 A 63; Erck v. Church, 87 Tenn. 575, 11 SW 794, 4 LRA 641 and note; Graeven v. Dieves, 68 Wis. 317, 31 NW 914. Compare Neale v. Lee, 19 D. C. 5. (2) "Where a person, having acquired a particular described tract of land, has taken possession of an adjoining tract, or, having acquired a specific interest in a particular tract, has taken possession of the whole, with a view of acquiring the additional tract, or interest, mere-

mere fact that the land in dispute was not included in the deed will not of itself operate to deprive the grantee's possession of the land of the attribute of privity.[13] Even though the deed may have contained such a defective description as to require correction, yet sufficient privity exists between the successive occupants where there was a parol delivery of possession,[14] and there are numerous decisions to the effect that a mistake in a deed whereby a portion of the premises intended to be conveyed has been omitted in the description does not prevent the grantee from acquiring title by prescription to such portion if there is an actual transfer of the possession thereof.[15] But an actual transfer of possession is of course necessary where the land is not included in the deed.[16] So it has been held that independently of any question of mistake successive grantors may transfer their possession of a strip of land successively and continuously occupied as part of the granted premises, but not included in the description in any of the deeds, and that by such continuity of possession for the prescriptive period title by limitations may be acquired.[17] The decisions in this and the preceding section, it may be observed, are readily distinguishable. In the first line of decisions the deed is relied on to establish privity, while in the second line of decisions the actual transfer and delivery of possession is relied on. This, as was shown in a preceding section,[18] is sufficient to create privity a parol transfer accompanied by delivery being sufficient for that purpose.

[§ 98] **5. Character of Possession of Predecessor Requisite to Authorize Tacking—a. In General.** The possession of a prior occupant, of a character insufficient to give title by adverse possession, cannot be united with a subsequent possession of another to protect title by adverse possession in the latter,[19] and it is not material that the claimant was not

ly by holding possession of it under a claim of ownership, he does not convey such possession to a vendee, to whom he sells the tract or interest described, and such vendee cannot, for the purpose of aiding himself in the acquisition by prescription of property not included in his title, add his vendor's possession to his own, there being no privity between him and his vendor in that respect." Sibley v. Pierson, 125 La. 478, 514, 51 S 502 (per Monroe, J.). (3) Where A entered and occupied the land which consisted of several lots, and the land was subsequently sold for taxes, and still later the owner of the tax title conveyed his interest in some of the lots to A who subsequently conveyed to B by a description which recited "intending to convey only those lots . . . which have been quit-claimed to said parties of the first part, or either of them, by conveyance of tax titles" the possession of B must be referred to the deed, and as to those lots not included in the tax deed there was not privity between him and A. Witt v. St. Paul, etc., R. Co., 38 Minn. 122, 126, 35 NW 862. (4) Defendant, in ejectment to recover lot 2, claimed title by adverse possession, his contention being that his possession and that of his grantors had been adverse. The only privity between him and his original grantor, who he claimed held the land, was a deed to lot 1. It was held that, in the absence of any showing of mistake in description, defendant had shown no privity between himself and that holder and could not tack the two possessions. Moore v. Helvy, 235 Mo. 443, 138 SW 481. (5) Where a right of way of fifty feet on each side of the center of the track was conveyed to a railroad company and the company fenced in twenty-five to thirty feet on each side of the track, adverse possession of successive owners of an adjoining tract cannot be tacked to complete title, in the absence of a parol agreement by the prior owner giving the subsequent owner the right to the possession of the disputed tract, and where the deed between them excepted the right of way conveyed to the railroad company. Sheldon v. Michigan Cent. R. Co., 161 Mich. 503, 126 NW 1056.

13. Hamachek v. Duvall, 135 Wis. 108, 115 NW 634; Gilman v. Brown, 115 Wis. 1, 91 NW 227.

14. Kepley v. Scully, 185 Ill. 52, 57 NE 187. And see Bateman v. Jackson, (Tex. Civ. A.) 45 SW 224 (holding that, although the deed does not accurately describe the premises intended to be conveyed, it will nevertheless create sufficient privity to authorize the tacking of the successive possessions if the acts of the parties make clear what was intended to be conveyed).

15. Ark.—St. Louis Southwestern R. Co. v. Mulkey, 100 Ark. 71, 139 SW 643, AnnCas1913C 1339.

Minn.—Vandall v. St. Martin, 42 Minn. 163, 44 NW 525.

Miss.—Crowder v. Neal, 100 Miss. 730, 57 S 1.

Or.—West v. Edwards, 41 Or. 609, 69 P 992.

Wash.—Naher v. Farmer, 60 Wash. 600, 111 P 768.

Wis.—Mielke v. Dodge, 135 Wis. 388, 115 NW 1099. And see State v. Lloyd, 133 Wis. 468, 113 NW 964; Gilman v. Brown, 115 Wis. 1, 91 NW 227.

See Davock v. Nealon, 58 N. J. L. 21, 32 A 675. See also Moore v. Helvy, 235 Mo. 443, 138 SW 481.

[a] **Reason for rule.**—Under these circumstances "the presumption that the conveyance must be limited to the calls of the deed is overcome by the established facts that respondent [claimant] obtained possession of the tract outside of the description as a part of the premises purchased under the deed. Such a transfer establishes a successive relationship to the tract in controversy, making the parties to the transfer privies in possession." Clithero v. Fenner, 122 Wis. 356, 361, 99 NW 1027, 106 AmSR 978 (per Dodge, J.).

[b] **Applications of rule.**—(1) Although the land described in a deed did not include a strip claimed adversely by the grantee, if the grantors, who had held it adversely, thought it did, and in fact transferred possession of such strip, there was such privity as to entitle the grantee to tack her adverse possession to that of her grantors. St. Louis Southwestern R. Co. v. Mulkey, 100 Ark. 71, 139 SW 643, AnnCas1913C 1339. (2) Where the grantee of lot 4 incloses it and part of another, and then gives a deed, in terms, of lot 4, both he and his grantee supposing the inclosed land to be lot 4, there being nothing on the ground to indicate the contrary, his deed will be held to include all the inclosed land, so that the holdings by him and his grantee will be tacked to make out title by adverse possession. Naher v. Farmer, 60 Wash. 600, 111 P 768. (3) Where plaintiff's father had acquired adverse possession of certain land in controversy adjoining his farm, and, on conveying the farm to plaintiff, the father transferred possession to the strip in question, and plaintiff took possession of the whole and occupied the farm and the adjoining strip as an entirety, such transfer established a successive relationship to the tract in controversy between the father and the son, making the parties privies in possession, and conferring all the rights of the father to the land on the son, although the description in the deed did not cover such land. Clithero v. Fenner, 122 Wis. 356, 99 NW 1027, 106 AmSR 978.

16. Humes v. Bernstein, 72 Ala. 546; Illinois Cent. R. Co. v. Hatter, 207 Ill. 88, 69 NE 751. And see cases cited in preceding note.

17. Jordan v. Riley, 178 Mass. 524, 60 NE 7; Wishart v. McKnight, 178 Mass. 356, 59 NE 1028, 86 AmSR 486 [disappr Ward v. Bartholomew, 6 Pick. (Mass.) 409, and other Massachusetts decisions founded on Potts v. Gilbert, 19 F. Cas. No. 11,347, 3 Wash. C. C. 475, and expl Sawyer v. Kendall, 10 Cush. (Mass.) 241].

[a] **Presumption as to transfer of seizin and possession.**—Where a strip of land inclosed with a dwelling house and lot is occupied and used by the successive grantors of the dwelling house and lot as if belonging to the premises, although not included in the description in any of the deeds, the maintenance of possession of the house and strip by the successive owners as if they belonged together creates a presumption of fact that the seizin and possession of the strip were in each case transferred at the same time as the seizin and possession of the house and lot, so as to enable the successive holders to tack their several possessions. Wishart v. McKnight, 184 Mass. 283, 68 NE 237.

18. See supra § 90.

19. U. S.—Holtzman v. Douglas, 168 U. S. 278, 18 SCt 65, 42 L. ed. 466.

Ala.—Wilkinson v. Lehman-Durr Co., 136 Ala. 463, 468, 34 S 216 [quot Cyc]; Trufant v. White, 99 Ala. 526, 13 S 83.

Ark.—Hagerman v. Moon, 68 Ark. 279, 57 SW 935; McCann v. Smith, 65 Ark. 305, 45 SW 1057; Gates v. Kelsey, 57 Ark. 523, 22 SW 162; Steward v. Scott, 57 Ark. 153, 20 SW 1088; Wheeler v. Ladd, 40 Ark. 108.

Cal.—Pulliam v. Bennett, 55 Cal. 368.

Ga.—Worthy v. Kinamon, 44 Ga. 297.

Ill.—Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088.

Ky.—Bell v. Fry, 5 Dana 341.

La.—Brewer v. Yazoo, etc., R. Co., 128 La. 544, 54 S 987.

Md.—Baker v. Swan, 32 Md. 355; Hoye v. Swan, 5 Md. 237.

Mass.—Plumer v. Brown, 8 Metc. 578.

Mo.—Patton v. Smith, 171 Mo. 231, 71 SW 187; Brown v. Chicago, etc., R. Co., 101 Mo. 484, 14 SW 719.

Nebr.—Sluyter v. Schwab, 73 Nebr. 370, 102 NW 757.

N. J.—Outcalt v. Ludlow, 32 N. J. L. 239.

Or.—Bayne v. Brown, 60 Or. 110, 118 P 282.

Ont.—Robinson v. Osborne, 27 Ont. L. 248.

But see Pennsylvania decisions infra this note.

[a] **A possession of the claimant's predecessor which had been abandoned** cannot be tacked to the claimant's possession to make up the statutory period. Kirby v. Boaz, 103

aware of the character of his predecessor's possession.[20] "That possession only which sets the statute in motion can be tacked to other possession for the purpose of completing the statutory bar to the maintenance of actions for the recovery of land."[21]

[§ 99] **b. Effect of Possession Originating in Fraud.** To entitle an occupant of land to tack the possession of his predecessor to his own to make up the statutory period, the possession of the former must not have originated in fraud of the rights of the true owner.[22]

[§ 100] **c. Effect of Possession without Color of Title.** It is not necessary, however, that the possession of the prior occupant should have been under color of title,[23] unless it is otherwise provided by statute.[24]

[§ 101] **d. Effect of Possession without Claim of Right.** Nevertheless such possession must at least be under claim of right or title.[25]

[§ 102] **6. Effect of Intervals between Possessions of Prior and Subsequent Occupants.** The possession of a prior occupant cannot be tacked to that of a subsequent occupant claiming under him, where any interval of time, whether of long or short duration, intervenes between the two possessions.[26] When premises are left vacant the adverse possession follows the title of the true owner,[27] and the statute will run only from the commencement of the last adverse possession.[28]

[§ 103] **7. Tacking Possessions of Same Person Temporarily Interrupted.**[29] Since the constructive possession of the true owner revives when actual possession by the adverse claimant ceases, a renewed adverse possession by him after temporary interruption constitutes a new disseizin and cannot be tacked to his prior possession to make out the statutory period.[30] However, it is said that the rule requiring continuity of possession is not one of absolute

Tex. 525, 131 SW 533 [aff (Civ. A.) 121 SW 223].

[b] **Possession of trespassers.**—(1) In strict accordance with the rule stated in the text it has been held that the possession of trespassers cannot be tacked to the possession of subsequent claimants under color of title so as to make out possession for the statutory period. Haggart v. Ranney, 73 Ark. 344, 84 SW 703; Arthur v. Humble, 140 Ky. 56, 130 SW 958; Brewer v. Yazoo, etc., R. Co., 128 La. 544, 54 S 987; Bonner v. Bonner, 34 Tex. Civ. A. 348, 78 SW 535. (2) But in Pennsylvania the contrary doctrine is maintained. Covert v. Pittsburg, etc., R. Co., 204 Pa. 341, 54 A 170; Hughs v. Pickering, 14 Pa. 297; Lehigh Valley R. Co. v. Frank, 39 Pa. Super. 624. In an early decision it was said: "I have no manner of doubt, that one who enters as a trespasser, clears land, builds a house and lives in it, acquires something which he may transfer to another; and if the possession of the two, added together, amounts to twenty-one years, and was adverse to him who had the legal title, the act of limitations, will be a bar to his recovery." Overfield v. Christie, 7 Serg. & R. Pa.) 173, 177 (per Tilghman, J.).

[c] **A prior possession which is merely permissive** cannot be tacked to that of claimant to make up the requisite period. Davies v. Collins, 43 Fed. 31; Sawyer v. Kendall, 10 Cush. (Mass.) 241.

[d] **Where the predecessor's possession was under a claim to an estate for life,** it cannot be availed of by the adverse claimant in support of its claim to title in fee. Doherty v. Matsell, 119 N. Y. 646, 23 NE 994; Bedell v. Shaw, 59 N. Y. 46; De Lancey v. Hawkins, 23 App. Div. 8, 49 NYS 469 [aff 163 N. Y. 587, 57 NE 1108]; Kelly v. Kremm, 78 Misc. 576, 138 NYS 626.

[e] **Where plaintiff's predecessor merely claimed an easement,** such possession cannot be tacked to plaintiff's possession to make up the statutory period for acquisition of title in fee. Shaffer v. Lauria, 50 Pa. Super. 135.

20. Farrow v. Bullock, 63 Ga. 360; Mills v. Buchanan, 14 Pa. 59.

21. Hagerman v. Moon, 68 Ark. 279, 283, 57 SW 935 (per Battle, J.).

22. Hammond v. Crosby, 68 Ga. 767; Farrow v. Bullock, 63 Ga. 360; Worthy v. Kinamon, 44 Ga. 297; Walling v. Eggers, 104 SW 360, 31 KyL 1009; Kohlman v. Glandi, 52 La. Ann. 700, 27 S 116; Innis v. Miller, 10 Mart. (La.) 289, 13 AmD 330.

23. Ala.—Owen v. Moxon, 167 Ala. 615, 52 S 527; Pearson v. Adams, 129 Ala. 157, 29 S 977.

Ky.—Bowles v. Sharp, 4 Bibb 550.

Md.—Wickes v. Wickes, 98 Md. 307; 56 A 1017.

Nebr.—Murray v. Romine, 60 Nebr. 94, 82 NW 318.

Pa.—Collins v. Lynch, 157 Pa. 246, 27 A 721, 37 AmSR 723; Parker v. Southwick, 6 Watts 377; Overfield v. Christie, 7 Serg. & R. 172.

Tex.—Cochrane v. Faris, 18 Tex. 850.

Vt.—Day v. Wilder, 47 Vt. 583.

[a] **Illustrations of rule.**—(1) Where a trespasser on land commences an improvement, makes a gift of his right to another or authorizes a sale of it, and leaves the possession, and it is sold, and the tenant takes possession under pursuance of the contract, possession of the trespasser can be tacked to his own so as to give title to the tenant by the statute of limitations. Hughs v. Pickering, 14 Pa. 297. (2) And one who enters and incloses land beyond his true line is in possession to the inclosed boundary and it is not necessary that possession should be held under color of title to render it transferable and to enable his purchaser to join his possession to the prior possession to complete the bar of limitations. Walling v. Eggers, 104 SW 360, 31 KyL 1009. (3) So the fact that plaintiff's deed from his grantor antedated the deed from his grantor's grantor was not fatal to the deed as color of title, nor did it deprive plaintiff of the right to tack the possession of the grantor's grantor and of his grantor to his own, it appearing that his grantor had been let into possession under his grantor. Owen v. Moxon, 167 Ala. 615, 52 S 527.

24. Morrison v. Craven, 120 N. C. 227, 26 SE 940.

[a] **In North Carolina** it is held that color of title in a prior occupant is necessary under a statute (Code § 141) which provides that when the person in possession of any real property, or those under whom he claims, shall have been in possession of the same under known and visible lines and boundaries under colorable title for seven years no entry shall be made or action sustained against such possessor, etc. Morrison v. Craven, 120 N. C. 227, 26 SE 940.

25. Holtzman v. Douglas, 168 U. S. 278, 18 SCt 65, 42 L. ed. 466; Ward v. Cochran, 150 U. S. 597, 14 SCt 230, 37 L. ed. 1195; Wade v. Johnson, 94 Ga. 348, 21 SE 569; Bakewell v. McKee, 101 Mo. 337, 14 SW 119. See Bayne v. Brown, 60 Or. 110, 118 P 282. But see Parker v. Southwick, 6 Watts (Pa.) 377 (where it is said that in Pennsylvania actual possession, although founded on no pretense of right, is a legitimate subject of transfer); and Pennsylvania cases supra § 98 note 19 [b].

[a] **The rule has been applied** (1) in a case where the predecessor in possession at no time claimed title (Brown v. Chicago, etc., R. Co., 101 Mo. 484, 14 SW 719); (2) or at all times recognized the rights of the owner (Original Consol. Min. Co. v. Abbott, 167 Fed. 681).

26. U. S.—Western Union Beef Co. v. Thurman, 70 Fed. 960, 17 CCA 542.

Ala.—Hoyle v. Mann, 144 Ala. 516, 41 S 835; Louisville, etc., R. Co. v. Philyaw, 88 Ala. 264, 6 S 887.

Ga.—Hines v. Rutherford, 67 Ga. 606; Rutherford v. Hobbs, 63 Ga. 243.

Ill.—Rich v. Naffziger, 255 Ill. 98, 99 NE 341.

Ky.—Griffith v. Dicken, 4 Dana 561.

Miss.—Tegarden v. Carpenter, 36 Miss. 404; Benson v. Stewart, 30 Miss. 49.

Mo.—Turner v. Baker, 64 Mo. 218, 27 AmR 226.

N. Y.—Kelly v. Kremm, 78 Misc. 576, 138 NYS 626. See also Bliss v. Johnson, 94 N. Y. 235; Kellum v. Corr, 149 App. Div. 200, 133 NYS 784.

Tex.—Warren v. Frederichs, 76 Tex. 647, 13 SW 643; Wheeler v. Moody, 9 Tex. 372; Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 21 SW 405.

Vt.—Winslow v. Newell, 19 Vt. 164.

Can.—Handley v. Archibald, 30 Can. S. C. 130.

[a] **Applications of rule.**—(1) Where A has adverse possession for two years only, and conveys his estate several years afterward to B who has adverse possession for eighteen years, the two years' possession by A cannot be added in order to make up the statutory period. Kilburn v. Adams, 7 Metc. (Mass.) 33, 39 AmD 754. (2) Where a husband in adverse possession of land transferred it to a third person who without taking possession immediately transferred it to the wife of the first holder, it was held that the several holdings could not be tacked together, because there was a momentary interruption in the several possessions while the title was in the grantee of the husband. Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088. See however Heflin v. Burns, 70 Tex. 347, 8 SW 48.

27. Turner v. Baker, 64 Mo. 218, 27 AmR 226.

28. Benson v. Stewart, 30 Miss. 49.

29. See also infra § 189.

30. Ala.—Farley v. Smith, 89 Ala. 38.

Ark.—Brown v. Hanauer, 48 Ark. 277, 3 SW 27.

Ga.—Walker v. Steffes, 139 Ga. 520, 77 SE 580; Clark v. White, 120 Ga. 957, 48 SE 357.

Miss.—Tegarden v. Carpenter, 36 Miss. 404.

Tex.—Lawless v. Wright, 39 Tex. Civ. A. 26, 86 SW 1039.

W. Va.—Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255.

[a] **Where the claimant abandons possession** (1) before the statutory bar is complete, such possession cannot be tacked to a possession subsequently retaken in order to make up the statutory period. Farley v. Smith, 39 Ala. 38; Brown v. Hanauer, 48 Ark. 277, 3 SW 27; Tegarden v. Carpenter, 37 Miss. 404; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470,

mathematical continuity and that there may be slight intervals in which the prescriber or agent of the tenant is not actually on the land or short intervals of temporary absence.[31] But while one is not obliged to remain actually on the land during the entire prescriptive period, "it is necessary that, during the whole time . . . there should be something to give notice that another is doing such acts or holding out such signs as to indicate the existence of a possession adverse to the true owner."[32]

[§ 104] **8. Tacking Possessions of Same Person, One of Which Would Not Set Statute in Motion.** Two possessions by the same person, one of which is not of such a character as will set the statute of limitations in motion, cannot be tacked for the purpose of making up the period required by the statute to give title by adverse possession.[33]

[§ 105] **9. Tacking Possession of Different Tracts.** Ordinarily the possession of one part of a tract of land cannot be joined to the possession of another part so as to make up the statutory period. There must be continuity of possession in point of locality as well as in point of time.[34] And it has been held that where an adverse claimant of a tract of land in actual occupancy of a portion of it only, before his possession had ripened into title by prescription, sold and conveyed a part of that not so occupied, his subsequent possession of the remainder did not inure to the benefit of his grantee.[35]

[§ 106] **10. Tacking Possession of Growing Trees and Possession of Surface of Land.** Where there has been a severance of title of the surface of land and of the trees growing thereon, even though there was such adverse possession of the trees as would ripen into title if the adverse claimant should hold for the statutory period, yet the possession of the trees after severance of title cannot be added to the possession of the owner of the surface and those under whom he claims so as to complete the period of the statutory bar to a recovery of the trees by the true owner thereof.[36]

[§ 107] **11. Tacking Possession under Color of Title and Possession without Color of Title.** Where color of title is by statute requisite to the acquisition of title by adverse possession, possession of one without color of title cannot be tacked to a possession by the same person under color of title to make up the statutory period.[37]

[§ 108] **12. Tacking Constructive Possession of Grantor and Actual Possession of Grantee.** The constructive possession of the grantor and the actual possession of the grantee may be tacked for the purpose of vesting title by adverse possession in the grantee, and the fact that at some time during the grantor's constructive possession a third person acquired a tax deed to the land does not affect the operation of the rule where the holder of the tax deed never took possession, since there was no interruption of the constructive possession.[38]

[§ 109] **13. Tacking Possessions under Different Statutes.** Part performance of the requirements of one statute cannot be tacked to part performance of the provisions of another statute; but, to constitute the bar, all the provisions of one or the other of the sections must be complied with.[39]

[§ 110] **14. Tacking Possessions of Promoters and Corporation.** Where the promoters of a corporation take adverse possession of land and such possession is afterward transferred to the corporation when organized, the two possessions may be tacked together.[40]

[§ 111] **C. Interruption or Breach of Continuity.—1. What Constitutes Interruption or Breach—a. In General.** The continuity of an adverse possession may be broken in three ways only: (1) By some act of the real owner, (2) by some act of a stranger, or (3) by some act of the adverse claimant.[41]

[§ 112] **b. Denial of Claimant's Right by Former Owner.** The mere denial by the owner of the right of the adverse occupant,[42] or loose verbal

27 SE 255. (2) Thus continuous possession for five years, and, after an abandonment for several years, a possession for six months, followed by an occupancy of a storehouse for several years, but less than seven, do not make that continuous adverse possession sufficient to create title by prescription under color. Clark v. White, 120 Ga. 957, 48 SE 357.

[b] **Where one conveyed the premises before he had perfected his title** by adverse possession, and thereby surrendered his claim of right, he was not entitled to tack the possession held by him prior to the conveyance to the possession subsequently held by him in computing the period of adverse occupancy. Taylor v. Breathitt Coal, etc., Co., 185 Fed. 854; Coler v. Alexander, (Tex. Civ. A.) 128 SW 664.

[c] **Intermediate tortious possession of third person.**—An adverse holder cannot tack together his own several holdings when he has allowed another person to acquire the intermediate tortious possession before his own has ripened into title. Ross v. Goodwin, 88 Ala. 390, 6 S 682; Austin v. Bailey, 37 Vt. 219, 86 AmD 703.

31. Walker v. Steffes, 139 Ga. 520, 77 SE 580.

32. Walker v. Steffes, 139 Ga. 520, 521, 77 SE 580; Clark v. White, 120 Ga. 957, 48 SE 357 (per Lamar, J.).

33. Hagerman v. Moon, 68 Ark. 279, 57 SW 935 (holding that possession under a certificate of donation does not set the statute in motion, and such possession cannot be tacked to subsequent possession under a donation deed to make up the two years).

34. U. S.—Potts v. Gilbert, 19 F. Cas. No. 11,347, 3 Wash. C. C. 475.

Cal.—Dietz v. Mission Transfer Co., 25 P 423.

Ill.—Ely v. Brown, 183 Ill. 575, 56 NE 181; Peoria, etc., R. Co. v. Tamplin, 156 Ill. 285, 40 NE 960.

Iowa.—Messer v. Reginnitter, 32 Iowa 312.

Mo.—Griffith v. Schwenderman, 27 Mo. 412.

N. C.—Hamilton v. Icard, 114 N. C. 532, 19 SE 607.

S. C.—Mahoney v. Southern R. Co., Carolina Div., 82 S. C. 215, 64 SE 228

Tex.—Smith v. Huff, (Civ. A.) 164 SW 429; Sparks v. Hall, 29 Tex. Civ. A. 177, 67 SW 916.

[a] **A mere roving possession** from one part of a tract to another will not bar a right of entry by the owner upon any portion of the tract which has not been held adversely for the statutory period. Messer v. Reginnitter, 32 Iowa 312.

[b] **Extent and limits of rule.**—(1) The fact that a person planted tobacco beds on different portions of land for more than the statutory period, but not on one spot for more than two years in succession, the land not being inclosed except during the period of cultivation, will not operate as a bar to a recovery by the true owner. Hamilton v. Icard, 114 N. C. 532, 19 SE 607. (2) But if a substantial adverse possession of land is initiated, the act of changing the location of lumber piles from one part of the tract to another will not destroy its adverse character, although some portions of the tract are thus left unoccupied, provided the limits of occupation are clearly defined. Pim v. St. Louis, 122 Mo. 654, 27 SW 525.

35. Houston Oil Co. v. Dowden, 202 Fed. 714, 121 CCA 176.

36. Yellow Poplar Lumber Co. v. Thompson, 108 Va. 612, 62 SE 358.

37. Barnes v. Vickers, 3 Baxt. (Tenn.) 370.

38. Scott v. Conrad, 24 Colo. A. 452, 135 P 135.

39. Duck Island Club v. Bexstead, 174 Ill. 435, 51 NE 831.

[a] **Applications of rule.**—(1) Where there was no possession under a recorded deed from the date of its execution until more than a year afterward when it was recorded, the possession after the recording of the deed could not be connected with prior possession so as to establish title under the five-year statute of limitations. Dunn v. Taylor, 102 Tex. 80, 113 SW 265 [rev (Civ. A.) 107 SW 952]. (2) Where adverse possession without color of title had not ripened into a title before the adoption of code (1907) § 2830, requiring the claimant to list the land for taxation, which he did not do, the time of his possession before the adoption of the code cannot be tacked to the time between its adoption and the bringing of suit. Kilpatrick v. Trotter, (Ala.) 64 S 589.

40. Bakersfield Town Hall Assoc. v. Chester, 55 Cal. 98; Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134.

41. Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Doe v. Anderson, 79 Ala. 209.

42. Cox v. Clough, 70 Cal. 345, 11 P 732; Carr v. Alexander, (Tex. Civ. A.) 149 SW 218.

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claims of title in himself,[43] or ineffectual protests short of a disturbance of the rights of the adverse claimant in a legal sense, and short of the assertion of a right in himself,[44] will not interrupt the running of the statute or prevent its becoming a bar.

[§ 113] **c. Entry by Original Owner—(1) General Rule as to Effect of Entry.** The general rule is that entry on the land by the original owner before the expiration of the statutory period necessary to acquire title by adverse possession arrests the running of the statute;[45] especially is this true if after entry the owner holds possession, although jointly with the claimant.[46] "While it is true . . . that a temporary interruption by a mere trespasser, if speedily redeemed, will not interrupt the continuity of the possession, as to him, yet this principle does not apply to the holder of the legal title entering under a claim of right."[47]

[§ 114] **(2) Reason for Rule.** "An entry is thus operative because, although at the moment there exists in fact a mixed possession, it is yet legally regarded as residing exclusively in the true owner, by virtue of his superior right. . . . It is only by the application of this principle that any effect is consistently given to a temporary entry. The presence of the intruder is eclipsed by the better title of the entering owner, and thus the necessary character of exclusiveness is, in contemplation of law, conferred upon a holding which otherwise would be equally shared by the antagonist parties."[48]

[§ 115] **(3) Statutory Exceptions to Rule.** The common-law rule stated in the preceding section has been abrogated or materially modified by statute in many jurisdictions.[49]

[a] **A notice to the adverse claimant to quit the possession** does not interrupt his adverse possession. Doe v. Minthorne, 3 U. C. Q. B. 423.

43. Ky.—Abner v. Creech, 79 SW 247, 25 KyL 1981.
Me.—Beal v. Gordon, 55 Me. 482.
N. J.—Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605.
N. Y.—Robinson v. Phillips, 56 N. Y. 634 [aff 65 Barb. 418, 1 Thomps. & C. 151].
Pa.—Malson v. Fry, 1 Watts 433.
S. C.—Jordan v. Lang, 22 S. C. 159.
Tex.—Carr v. Alexander, (Civ. A.) 149 SW 218.
Vt.—Kimball v. Ladd, 42 Vt. 747.
Wis.—Illinois Steel Co. v. Kohnke, 151 Wis. 410, 416, 138 NW 995 [cit Cyc].

44. Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605; Jordan v. Lang, 22 S. C. 159.

[a] **Application of rule.**—Where C.'s building wall encroached on T.'s land, if C. was holding adversely, T.'s statement to C., when rebuilding the wall, that it encroached on T.'s land, which C. denied, and T.'s order not to throw rubbish in T.'s yard, were too casual to suspend the adverse possession. Chavez v. Torlina, 15 N. M. 53, 99 P 690.

[b] **Dispossession of defendant pursuant to verdict in ejectment** is necessary to interruption of statute. Jackson v. Haviland, 13 Johns. (N. Y.) 229; Doe v. Minthorne, 3 U. C. Q. B. 423.

45. U. S.—Henderson v. Griffin, 5 Pet. 151, 158, 8 L. ed. 79; Holtzapple v. Phillibaum, 12 F. Cas. No. 6,648, 4 Wash. C. C. 356; Walton v. Coulson, 29 F. Cas. No. 17,132, 1 McLean 120 [aff 9 Pet. 62, 9 L. ed. 51].
Ala.—Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45.
Cal.—Thompson v. Pioche, 44 Cal. 508.
Ill.—Schenck v. White, 53 Ill. 358.
Ky.—Blakeley v. Pitman Coal Co., 44 SW 447, 19 KyL 1810; McGowan v. Crooks, 5 Dana 65.
La.—Brewer v. Yazoo, etc., R. Co., 127 La. 544, 54 S 987.
Me.—Batchelder v. Robbins, 93 Me. 579, 45 A 837; Day v. Philbrook, 89 Me. 462, 36 A 991; Stillwell v. Foster, 80 Me. 333, 14 A 731.
Md.—Schlossnagle v. Kolb, 97 Md. 285, 54 A 1006.
Mass.—Brickett v. Spofford, 14 Gray 514; Allen v. Holton, 20 Pick. 458.
Minn.—Kipp v. Hagan, 108 Minn. 384, 388, 122 NW 317 [cit Cyc].
N. H.—Hopkins v. Deering, 71 N. H. 353, 52 A 75; Locke v. Whitney, 63 N. H. 597, 3 A 920; Wendell v. Moulton, 26 N. H. 41; Campbell v. Wallace, 12 N. H. 362, 37 AmD 219.
N. J.—Johnston v. Fitzgeorge, 50 N. J. L. 470, 14 A 762.
N. Y.—Fortier v. Delaware, etc., R. Co., 93 App. Div. 24, 86 NYS 896; Brinkerhoff v. Mooney, 42 App. Div. 420, 59 NYS 158; Jackson v. Leonard, 9 Cow. 653. Compare Landon v. Townshend, 129 N. Y. 166, 29 NE 71 (in which it was said that in order to interrupt the continuity of the adverse possession there must be not only an entry but also a taking of possession).
N. C.—Malloy v. Bruden, 86 N. C. 251.
Pa.—Handley v. Barrett, 176 Pa. 246, 35 A 133; Hole v. Rittenhouse, 19 Pa. 305; Smith v. Steele, 17 Pa. 30; Hoopes v. Garver, 15 Pa. 517; Ingersoll v. Lewis, 11 Pa. 212, 51 AmD 536; Hinman v. Cranmer, 9 Pa. 40; Altemus v. Long, 4 Pa. 254, 45 AmD 688; Altemus v. Campbell, 9 Watts 28, 34 AmD 494; Hood v. Hood, 2 Grant 229; Carothers v. Dunning, 3 Serg. & R. 373; Sprenkle v. Thomas, 13 York LegRec 89.
Tex.—Evitts v. Roth, 61 Tex. 81; Chicago, etc., R. Co. v. Johnson, (Civ. A.) 156 SW 253; Hull v. Woods, (Civ. A.) 25 SW 458.
Vt.—Earl v. Griffith, 52 Vt. 415; Hale v. Rich, 48 Vt. 217.
Va.—Taylor v. Burnsides, 1 Gratt. (42 Va.) 165.
Wis.—Illinois Steel Co. v. Budziss, 115 Wis. 68, 90 NW 1019; Cornell University v. Mead, 80 Wis. 387, 49 NW 815; Finn v. Wisconsin River Land Co., 72 Wis. 546, 40 NW 209; Warren v. Putnam, 63 Wis. 410, 24 NW 58; Smith v. Sherry, 54 Wis. 114, 11 NW 465; Haseltine v. Mosher, 51 Wis. 443, 8 NW 273; Wilson v. Henry, 35 Wis. 241; Lewis v. Disher, 32 Wis. 504.
Eng.—Locke v. Matthews, 13 C. B. N. S. 753, 106 E. C. L. 753; Worssam v. Vandenbrande, 17 Wkly. Rep. 53.
Can.—Ryan v. Ryan, 5 Can. S. C. 387.
Ont.—Dominion Impr., etc., Co. v. Lally, 24 Ont. L. 115, 2 OntWN 1224, 19 OntWR 462, 2 OntWN 155, 17 Ont WR 151; Workman v. Robb, 7 Ont. A. 389 [aff 28 Grant Ch. (U. C.) 243]; Griffith v. Brown, 5 Ont. A. 303; Coffin v. North American Land Co., 21 Ont. 80; McDiarmid v. Hughes, 16 Ont. 570; Arnold v. Cummer, 15 Ont. 382; Hooker v. Morrison, 28 Grant Ch. (U. C.) 369; Canada Co. v. Douglas, 27 U. C. C. P. 339; Palmer v. Thornbeck, 27 U. C. C. P. 291; Clements v. Martin, 21 U. C. C. P. 512; Henderson v. Harris, 30 U. C. Q. B. 360. And see Smith v. Keown, 46 U. C. Q. B. 163; Cooper v. Hamilton, 45 U. C. Q. B. 502.
"It is settled law, that an entry on land, by one having the right, has the same effect in arresting the progress of the limitations as a suit." Henderson v. Griffin, 5 Pet. (U. S.) 151, 158, 8 L. ed. 79. "Immediately upon entry the party is by law remitted to his previous estate, that is to say, he becomes seized or possessed of the land for such an estate therein, (if any) as was legally vested in him before and at the time of the entry." Arnold v. Cummer, 15 Ont. 382, 387 (per McMahon, J.).

[a] **Interruption of constructive possession.**—Actual or constructive possession of land under a tax deed for the full period of three years is necessary to bar recovery by the former owner by limitations; an interruption of the mere constructive possession created by recording a tax deed of vacant and unoccupied land, by actual possession for any period by the former owner within three years after such recording, tolls the statute of limitations in favor of the former owner, which, if not interrupted by action by the tax title claimant, or actual possession by him within three years after the recording, will terminate all rights under the deed. Kathan v. Comstock, 140 Wis. 427, 122 NW 1044, 28 LRANS 201; Midlothian v. Belknap, 108 Wis. 198, 84 NW 169; Cornell Univ. v. Mead, 80 Wis. 387, 49 NW 815.

46. Chastang v. Chastang, 141 Ala. 451, 463, 37 S 799, 109 AmSR 45.

47. Chastang v. Chastang, supra.

48. Smith v. Steele, 17 Pa. 30, 37; Altemus v. Campbell, 9 Watts (Pa.) 28, 34 AmD 494.

49. See cases infra this note.

[a] **Under the statutes of Michigan** (1) providing that no person shall be deemed to have been in possession of land merely by reason of having made an entry thereon unless he shall have continued in open and peaceable possession of the premises for at least one year or unless an action shall have been commenced upon such entry and seizin within one year after he shall have been dispossessed, mere disturbance of the possession of one claiming land does not interrupt the running of the statute. Place v. Place, 139 Mich. 509, 102 NW 996. (2) An adverse holding of land may, however, be interrupted in other ways than by bringing suit. Shearer v. Middleton, 88 Mich. 621, 50 NW 737.

[b] **In Missouri** "no entry can be held to be sufficient or valid as a claim unless suit be commenced thereon within one year after making such entry, and within the time limited for bringing an action of ejectment." In this case Hough, J., said: "It may well be doubted whether the common law right of entry, though apparently recognized in the second section of our statute of limitations, has any existence in this State; if it has, it is certainly of no practical importance." Ferguson v. Bartholomew, 67 Mo. 212, 219.

[c] **In Pennsylvania,** (1) by virtue of special statutory enactments, an entry on lands held adversely does not interrupt the running of the statute of limitations unless an action of ejectment be commenced within a year thereafter. Douglas v. Irvine, 126 Pa. 643, 17 A 802. (2) This statute relates to an entry during the running of the statute, and to the proceedings necessary to make the entry, from its date, arrest the running of the statute. Hasson v. Klee, 181 Pa. 117, 37 A 184.

[d] **In Tennessee** it has been held under the act of 1819, which provides that any person or persons who shall neglect or who shall have neglected

[§ 116] **(4) Requisites and Sufficiency of Entry—(a) Necessity of Entry on Land Claimed.** The entry must be on the land claimed[50] or some part of it,[51] but as a general rule an entry on any part of the land in the adverse possession of the claimant is an entry on the whole and will interrupt the adverse possession as to the whole.[52] Nevertheless the bar of the statute is not tolled by an entry into an adjoining tract held by the same party unless the property be held together as one acquisition or estate,[53] and where there are several possessors the entry must be on each parcel possessed,[54] and if the land is situate in two or more counties there must be an entry on the parcel lying in each county.[55] It has also been held that where the adverse claimant is in actual possession of a part of a tract and constructively in possession of the entire tract by reason of color of title to the whole, an entry into the part of which constructive possession is held will not interrupt the actual adverse possession,[56] although it will interrupt the entire constructive possession.[57]

[§ 117] **(b) Necessity of Intent to Take Possession.** When a person is once dispossessed it is not every entry upon the premises without permission that will disturb the adverse possession. He may tread upon his own soil and still be as much out of possession of it there as elsewhere.[58] An entry, to defeat a subsisting actual possession, must be with the actual intention of taking possession.[59] "An entry by stealth, under circumstances that go to show that the party claimed no right to enter, or an entry for other purposes than those connected with a right to enter, would not be sufficient to break the continuity of exclusive possession in another."[60]

[§ 118] **(c) Necessity of Indicating Intent to Take Possession—aa. Statement of Rule.** While the essentials of an entry effective to interrupt an adverse possession will vary according to the character of the premises involved,[61] yet it must not be of a casual or secret character but must be either known to the occupant[62] or "be made under such circumstances as to enable the party in possession, by the use of reasonable diligence, to ascertain the right and claim of the party making the entry,"[63] and thus enable him to resort to legal remedies for its protection.[64] "There must be an explicit declaration, or an act of notorious dominion, by which the claimant challenges the right of the occupant; or it cannot perhaps be better defined than by saying that the entry must bear, on the face of it, an unequivocal intent to resume the actual possession."[65] If, however, the acts are of such a character as to afford

for a term of seven years to avail themselves of the benefit of any title, legal or equitable, which he, she, or they may have to any lands by suit at law or in equity effectually prosecuted against the person or persons in adverse possession, shall be forever barred, that the running of the statute could not be interrupted by an entry where the adverse claimant did not acquiesce in such entry. Norvell v. Gray, 1 Swan 96.

[e] **In Texas** it is held that "the rule of the common law that a sufficient entry by the owner of premises, adversely held, operates, of itself, as an interruption of the statute of limitations in favor of the possessor" is "changed by the statute which defines a peaceable possession as one which is 'continuous and not interrupted by adverse suit to recover the estate.'" A possession which is continuous can only be interrupted by suit. Cobb v. Robertson, 99 Tex. 138, 147, 87 SW 1148 [allowing reh 86 SW 746]; Shields v. Boone, 22 Tex. 193; Glover v. Pfeuffer, (Civ. A.) 163 SW 984.

[f] **In Ontario** a formal entry by the owner is not effectual to avoid the statute, unless action is brought within a year and prosecuted with effect. Piper v. Stevenson, 28 Ont. L. 379.

50. Pender v. Jones, 3 N. C. 463.

51. Wickes v. Wickes, 98 Md. 307, 56 A 1017. And see Harbaugh v. Moore, 11 Gill & J. (Md.) 283; Ridgely v. Ogle, 4 Harr. & M. (Md.) 123.

52. U. S.—Hunnicutt v. Peyton, 102 U. S. 333, 26 L. ed. 113; Green v. Liter, 8 Cranch 229, 3 L. ed. 545.
Md.—Schlossnagle v. Kolb, 97 Md. 285, 54 A 1006.
Pa.—Altemus v. Long, 4 Pa. 254, 45 AmD 688.
Tex.—Evitts v. Roth, 61 Tex. 81; Hull v. Woods, (Civ. A.) 25 SW 458.
Ont.—Great Western R. Co. v. Lutz, 32 U. C. C. P. 166.

53. Nearhoff v. Addleman, 31 Pa. 279. See Great Western R. Co. v. Lutz, 32 U. C. C. P. 166.

54. Green v. Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545; Pender v. Jones, 3 N. C. 463; Coke Litt. 252b.

55. Hord v. Walker, 5 Litt. (Ky.) 22, 15 AmD 39.
[a] **Reason for rule.**—In ejectment brought in one county land lying in another county cannot be recovered. Whenever a person has been ousted of his possession it is a settled rule that to regain the possession by entry the entry must pursue the action for its recovery. Hord v. Walker, 5 Litt. (Ky.) 22, 15 AmD 39.

56. Green v. Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545; Shields v. Boone, 22 Tex. 193.

57. Hunnicutt v. Peyton, 102 U. S. 333, 26 L. ed. 113; Evitts v. Roth, 61 Tex. 81; Hays v. Barrera, 26 Tex. 78; Freedman v. Bonner, (Tex. Civ. A.) 40 SW 47; Hull v. Woods, (Tex. Civ. A.) 25 SW 458; Earl v. Griffith, 52 Vt. 415; Taylor v. Burnsides, 1 Gratt. (42 Va.) 165.

58. Burrows v. Gallup, 32 Conn. 493, 87 AmD 186; Doe v. Hasson, 8 N. B. 451. See Brock v. Benness, 29 Ont. 468.

59. U. S.—Fuller v. Fletcher, 44 Fed. 34; Holtzapple v. Phillibaum, 12 F. Cas. No. 6,648, 4 Wash. C. C. 356.
Ala.—Doe v. Clayton, 81 Ala. 391, 2 S 24.
Conn.—Burrows v. Gallup, 32 Conn. 493, 87 AmD 186.
Iowa.—Brett v. Farr, 66 Iowa 684, 24 NW 275; Griffith v. Carter, 64 Iowa 193, 19 NW 903; Ellsworth v. Low, 62 Iowa 178, 17 NW 450.
Ky.—Maysville, etc., R. Co. v. Holton, 100 Ky. 665, 39 SW 27, 19 KyL 1; Young v. Withers, 8 Dana 165; McDowell v. Kenney, 3 J. J. Marsh. 516.
Me.—Batchelder v. Robbins, 93 Me. 579, 45 A 837; Peabody v. Hewett, 52 Me. 33, 83 AmD 486; Robison v. Swett, 3 Me. 316.
Md.—Wickes v. Wickes, 98 Md. 307, 56 A 1017; Harbaugh v. Moore, 11 Gill & J. 283; Ridgely v. Ogle, 4 Harr. & M. 123.
Mass.—Sharon First Baptist Church v. Harper, 191 Mass. 196, 77 NE 778 (attendance at church service); Murphy v. Com., 187 Mass. 361, 73 NE 524; Bowen v. Guild, 130 Mass. 121.
N. H.—Antrim First Presb. Soc. v. Bass, 68 N. H. 333, 44 A 485.
N. J.—Johnston v. Fitzgeorge, 50 N. J. L. 470, 14 A 762.
N. M.—Chavez v. Torlina, 15 N. M. 53, 99 P 690.
N. Y.—Jackson v. Schoonmaker, 4 Johns. 390.
N. C.—McLean v. Smith, 106 N. C. 172, 11 SE 184; Ransom v. Lewis, 63 N. C. 43.
Pa.—McCombs v. Rowan, 59 Pa. 414; Hollinshead v. Nauman, 45 Pa. 140; Hood v. Hood, 25 Pa. 417; Hinman v. Cranmer, 9 Pa. 40; Altemus v. Campbell, 9 Watts 28, 34 AmD 494; Miller v. Shaw, 7 Serg. & R. 129; Bradford v. Guthrie, 3 Pittsb. 213.
R. I.—New Shoreham v. Ball, 14 R. I. 566.
Tenn.—Creech v. Jones, 5 Sneed 631.
Utah.—Bingham Livery, etc., Co. v. McDonald, 37 Utah 457, 110 P 56.
Wis.—Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019; St. Croix Land, etc., Co. v. Ritchie, 78 Wis. 492, 47 NW 657.
Eng.—Doe v. Danvers, 7 East 299.
Ont.—Brock v. Benness, 29 Ont. 468.
[a] **Applications of rule.**—(1) Thus, where the adverse possession is held through tenants of the claimant, the continuity of his possession is not broken by the owner going on the land several times and endeavoring to induce the tenants to acknowledge him as their landlord. Doe v. Clayton, 81 Ala. 391, 2 S 24. (2) Where the adverse claimant was in possession of the land through a tenant and the owner entered and stated to the tenant that he claimed the land but withdrew on being told by the tenant that he must settle the matter with the claimant, it was held that this was not sufficient to interrupt the adverse possession. Murphy v. Com., 187 Mass. 361, 73 NE 524.

60. Burrows v. Gallup, 32 Conn. 493, 499, 87 AmD 186 (per Park, J.).

61. Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019.

62. Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019.
[a] **The entry must not be accidental or by invitation of the party in possession;** if it is, it will not be effectual to toll the statute of limitations. Hood v. Hood, 25 Pa. 417; Doe v. Tidd, 10 N. B. 569.

63. Wing v. Hall, 47 Vt. 182, 217; Thomas v. Spencer, 69 Wash. 433, 436, 125 P 361 [quot Cyc]; Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019; Dominion Impr., etc., Co. v. Lally, 24 Ont. L. 115, 2 OntWN 1224, 19 OntWR 462, 2 OntWN 155, 17 OntWR 151.

64. McCombs v. Rowan, 59 Pa. 414; Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019.

65. Altemus v. Campbell, 9 Watts (Pa.) 28, 31, 54 AmD 494 (per Gibson, C. J.). To same effect Holtzapple v. Phillibaum, 12 F. Cas. No. 6,648, 4 Wash. C. C. 356; Maysville, etc., R. Co. v. Holton, 100 Ky. 665, 39 SW 27, 19 KyL 1; Robison v. Swett, 3 Me. 316; Murphy v. Com., 187 Mass. 361, 73 NE 524; Donovan v. Bissell, 53 Mich. 462, 19 NW 146; Hood v. Hood, 25 Pa. 417; Bradford v. Guthrie, 3 Pittsb. (Pa.) 213; Markley v. Amos, 18 S. C. L. 603.
[a] **The acts should be open and notorious** and continue unbroken for

reasonable notice of claim of ownership it is not essential that the claimant should have had actual knowledge thereof.[66] "It would be a task of great difficulty and in most cases practically impossible for a land-owner to prove such actual knowledge."[67] It may be observed in this connection that there is close analogy between the acts necessary to interrupt an adverse possession and those necessary to constitute open and notorious possession for the purpose of acquiring title by adverse possession.[68]

[§ 119] **bb. Occasional or Temporary Intrusions.** Occasional or temporary intrusions upon the land will not be sufficient to interrupt the running of the statute,[69] because such acts evidence no certain intention of the assertion of claim as rightful owner and are often in fact done by mere naked trespassers.[70]

[§ 120] **cc. Permissive Entry.** An entry by the true owner with the permission of the adverse claimant, and not under claim of right, will not interrupt the adverse possession.[71]

[§ 121] **dd. Entry with Proposed Purchaser.** An entry on the land with a proposed purchaser, pointing out the boundaries and claiming ownership, and an offer to convey have been held sufficient to interrupt the disseizin.[72]

[§ 122] **ee. Entry to Inspect Condition of Land.** An entry merely for the purpose of inspecting the condition of the land is not necessarily sufficient to interrupt the claimant's adverse possession.[73]

[§ 123] **ff. Entry for Purpose of and Making Survey.** An entry for the purpose of and the making of a survey, with intent to take possession, is a sufficient entry to interrupt the adverse possession,[74] but a mere survey of land with the intent of ascertaining its locality is not a sufficient entry to inter-

a sufficient time to give notice to the person interested that a claim of right is intended by them. Robison v. Swett, 3 Me. 316; Ransom v. Lewis, 63 N. C. 43; Creech v. Jones, 5 Sneed (Tenn.) 631; St. Croix Land, etc., Co. v. Ritchie, 78 Wis. 492, 47 NW 657; Coffin v. North American Land Co., 21 Ont. 80 (holding that pulling down an old fence and erecting a new one on the land in controversy by the true owners must be taken to be an entry in the capacity of owners and a temporary resumption of possession sufficient to interrupt the running of the statute).

[b] **But where the owner takes possession and fences** and uses the land, this will interrupt the continuity of adverse possession, although the adverse possessor is out of the state and ignorant of the entry by the owner. Brinkerhoff v. Mooney, 42 App. Div. 420, 59 NYS 158. And see Bliss v. Johnson, 73 N. Y. 529.

[c] **Words and declarations are unnecessary.**—The intent may be inferred from acts and circumstances. Johnston v. Fitzgeorge, 50 N. J. L. 470, 14 A 762; Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019.

66. Batchelder v. Robbins, 93 Me. 579, 45 A 837.

[a] **Acts sufficient to indicate intention.**—(1) During the three years immediately following the record of a tax deed which was void for irregularities the original owner entered upon the land to remove the pine timber, and cut roads, built sledways, and cut and hauled the pine from the land during two successive lumber seasons of three or four months each, but did not place any building thereon. This occupancy was open and continuous for two seasons. It terminated when the pine timber was all removed, and the land, although fitted for agricultural purposes, continued unimproved during the whole period. This was held sufficient to interrupt the running of the statute of limitations. Haseltine v. Mosher, 51 Wis. 443, 8 NW 273. (2) Plaintiffs entered on "iron lands" previously owned by them but bid in by defendant at a tax sale, the land being unoccupied when the tax deeds were recorded. Plaintiffs employed a force of men who erected a substantial log cabin, explored for iron, and dug substantial pits extending over the entire tract, the operations continuing for about eight months and ending before the expiration of three years from the time of the tax sale. It was held that the occupancy was actual, open, visible, and continuous, and hence sufficient to interrupt the running of the three-year limitation in favor of defendant. Midlothian Iron Min. Co. v. Belknap, 108 Wis. 198, 84 NW 169. For other applications of the general principles stated in this section see the following sections.

[b] **Acts insufficient to indicate intention.**—The peaceable possession of lands was not broken by the building of a fence thereon by an adverse claimant, which fence was torn down by the party in possession shortly after its building, where the adverse claimant did not otherwise take possession of the land or exercise any act of dominion or control in reference to it. Cochran v. Moerer, 47 Tex. Civ. A. 372, 105 SW 1138.

67. Batchelder v. Robbins, 93 Me. 579, 586, 45 A 837 (per Whitehouse, J.).

68. See supra § 57 et seq.

69. Ky.—Young v. Withers, 8 Dana 165; McDowell v. Kenney, 3 J. J. Marsh. 516.

Mass.—Bowen v. Guild, 130 Mass. 121.

Minn.—Musser-Sauntry Land, etc., Co. v. Tozer, 56 Minn. 443, 57 NW 1072.

N. C.—McLean v. Smith, 106 N. C. 172, 11 SE 184.

Pa.—Hollinshead v. Nauman, 45 Pa. 140.

Tenn.—Creech v. Jones, 5 Sneed 631.

Wash.—Thomas v. Spencer, 69 Wash. 433, 436, 125 P 361 [quot Cyc].

Wis.—St. Croix Land, etc., Co. v. Ritchie, 78 Wis. 492, 47 NW 657; Stephenson v. Wilson, 87 Wis. 482.

[a] **Applications of rule.**—(1) Where there are conflicting grants, and persons claiming under the junior patent prior to any entry under the senior patent enter within the lap, and make an inclosure, claiming to the extent of their boundary, and this adverse claim and possession continue uninterruptedly for fifteen years, the title of the junior patentee or those claiming under him is perfected as against the senior patentee, notwithstanding occasional entries by him for the purpose of cutting timber, raising rock, or operating sugar camps. Swafford v. Herd, 65 SW 803, 23 KyL 1556. (2) Where defendant used a lot as a yard in connection with his blacksmith shop and permitted teamsters, peddlers, and others, who had occasion to do so, to use it as a camp ground when this did not interfere with his own use and occupation of it, the occasional driving over it by plaintiff in going to and from its barn was not an interference with or interruption of his possession. Bingham Livery, etc., Co. v. McDonald, 37 Utah 457, 110 P 56. (3) Adverse possession of land by a son against his father is not interrupted by acts by the father, such as the pasturing of sheep and the occasional cutting of firewood, where the acts are done with the assent of the son and not with the intention of interfering with his possession. Kaulbach v. Cook, 39 N. S. 500. (4) Continuity of possession is not interrupted by occasional and unintentional trespasses by cattle of the holder of the record title straying in on the locus in quo from the highway. Zellmer v. Martin, 157 Wis. 341, 147 NW 371.

70. Creech v. Jones, 5 Sneed (Tenn.) 631.

71. Marshall v. Taylor, [1895] 1 Ch. 641; Doe v. Tidd, 10 N. B. 569. See also Pearson v. Adams, 129 Ala. 157, 29 S 977; Jacob Tome Inst. v. Crothers, 87 Md. 569, 40 A 261; McCowan v. Armstrong, 3 Ont. L. 100, 1 OntWR 28.

[a] **The fact that the true owner pays a friendly visit** on the premises of the claimant does not interrupt the latter's adverse possession. McCowan v. Armstrong, 3 Ont. L. 100, 1 OntWR 28; Brock v. Benness, 29 Ont. 468; Hartley v. Maycock, 28 Ont. 508; Williams v. McDonald, 33 U. C. Q. B. 423.

72. Brickett v. Spofford, 14 Gray (Mass.) 514. See also Warner v. Bull, 13 Metc. (Mass.) 1; Oakes v. Marcy, 10 Pick. (Mass.) 195; Knox v. Jenks, 7 Mass. 488.

73. Bowen v. Guild, 130 Mass. 121, 123 (in which Lord, J., said: "The entry in this case was followed by no act of ownership, and was simply a passing over the land for the purpose of ascertaining its condition, to see whether any use had been made of it, or whether any buildings or structures had been erected upon it, and to see whether there was any evidence of a disseisin. It did not appear that such passing over the land was in presence of the defendant, or that he ever in any mode had any knowledge of it. The circumstances under which it was made, and the time of day or night, do not appear, except as it may be inferred from the known character of the gentlemen under whose direction it appears to have been done. It is consistent with the actual use by the defendant of the land upon every other day of the twenty years. It was a question for the jury whether in fact it was an interruption of the defendant's possession").

74. Hoopes v. Garver, 15 Pa. 517; Ingersoll v. Lewis, 11 Pa. 212, 51 AmD 536; Miller v. Shaw, 7 Serg. & R. (Pa.) 129.

[a] **Thus,** (1) where the holder of the legal title to land causes the premises in dispute to be surveyed on the ground and a conditional line to be established between the tract in dispute and the adjoining one, in the presence and with the knowledge of the person claiming under the statute of limitations, and without objection on his part, it in law constitutes such an entry on and exercise of ownership over the premises as stops the running of the statute of limitations. Hood v. Hood, 2 Grant (Pa.) 229. (2) Entry by the true owner on premises not physically occupied adversely, the premises being marsh or overflowed land not inclosed, and a survey of the premises, stakes being located to indicate the boundaries thereof, and exploring and traversing the premises from day to day for a considerable time, so as to reasonably charge the adverse occupant with knowledge that his possession is challenged, are sufficient to break the con-

rupt the running of the statute.[75]

[§ 124] **gg. Recording Conveyance.** The recording of a conveyance is not an entry interrupting adverse possession of the land.[76]

[§ 125] **hh. Entry by Agent.** The general rule that entry by the owner interrupts the running of the statute of limitations in favor of the adverse claimant applies whether the entry is made by the owner in person,[77] or by agent,[78] provided the latter is duly authorized.[79] And it has been held that a subsequent ratification of an entry on land by an unauthorized agent is equivalent to an entry by previous command for the purpose of suspending the running of the statute.[80]

[§ 126] **ii. Entry by Cotenant.** An entry by one of several cotenants is presumed to be in maintenance of the rights of all, and will inure to the benefit of all.[81]

[§ 127] **jj. Entry Pendente Lite.** The continuity of possession of a defendant in ejectment is not broken by entry of the owner on the land pending the action. An entry pendente lite cannot affect a possession held at the beginning of the suit.[82]

[§ 128] **kk. Necessity of Peaceable Entry.** It has been said that, to interrupt the running of the statute in favor of a claimant by adverse possession, the entry by the owner must be peaceable, and "not with force and strong hand."[83] A rule which would allow the owner of land to arrest the operation of the statute of limitations by forcible intrusion upon the peaceable possession of an adverse occupant and by the expulsion of the latter from the premises would be followed by the most pernicious consequences.[84] It has been held, however, that a peaceable entry upon the actual adverse possession of another, followed by an unlawful detainer, does not interrupt the adverse possession if an action for the forcible entry and detainer is commenced within a reasonable time and prosecuted to a successful termination.[85]

[§ 129] **d. Entry or Intrusion by Stranger.** The mere temporary entry or intrusion[86] or occasional trespass[87] by a stranger does not interrupt the running of the statute in behalf of the adverse occupant. The intrusion of a trespasser will in no case interrupt the continuity of adverse possession unless continued for such a length of time that knowledge of the intrusion is presumed, or so as to become the

tinuity of the disseisin. Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019.

75. Maysville, etc., R. Co. v. Holton, 100 Ky. 665, 39 SW 27, 19 KyL 1; McCombs v. Rowan, 59 Pa. 414; Hollinshead v. Nauman, 45 Pa. 140, 11 PittsbLegJ 394; Doe v. Hasson, 8 N. B. 451; Des Barres v. Shey, 8 N. S. 327. And see Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550 (holding that the presence of surveyors locating points on the premises in dispute does not conclusively establish invasion of the possession of one in adverse possession of a lot fenced and occupied as a residence and garden sufficient to constitute a disseisin). In this case it was said: "In a city such work is so frequent and so frequently under municipal sanction that the failure of an occupant of premises to protest against the entry on his premises for the purpose of measurement or running lines is not necessarily to be construed a submission to a title held by the employer of the surveyors, especially when, as here, the acts of the surveyors are not clearly shown to have come to the knowledge of the occupant" (per Dodge, J.).

76. Finnegan v. Pennsylvania Trust Co., 5 Pa. Super. 124.

77. See supra § 113.

78. Me.—Batchelder v. Robbins, 93 Me. 579, 45 A 837; Peabody v. Hewett, 52 Me. 33, 83 AmD 486.

N. H.—Wendell v. Moulton, 26 N. H. 41; Campbell v. Wallace, 12 N. H. 362, 37 AmD 219.

N. J.—Johnston v. Fitzgeorge, 50 N. J. L. 470, 14 A 762.

Pa.—Ingersoll v. Lewis, 11 Pa. 212, 51 AmD 536; Hinman v. Cranmer, 9 Pa. 40.

Wis.—Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019.

Ont.—Arnold v. Cummer, 15 Ont. 382. See Canada Co. v. Douglas, 27 U. C. C. P. 339.

79. Workman v. Guthrie, 29 Pa. 495, 72 AmD 654; Hughes v. Smith, 4 Pennyp. (Pa.) 210.

[a] **An entry under power of attorney** from the owner as administrator of another is not sufficient. Workman v. Guthrie, 29 Pa. 495, 72 AmD 654.

80. Campbell v. Wallace, 12 N. H. 362, 37 AmD 219; Hinman v. Cranmer, 9 Pa. 40.

81. Peabody v. Hewett, 52 Me. 33, 83 AmD 486; Carothers v. Dunning, 3 Serg. & R. (Pa.) 373; Harris v. Mudie, 7 Ont. A. 414.

82. Middlesboro Waterworks Co. v. Neal, 105 Ky. 586, 49 SW 428, 20 KyL 1403.

83. Ala.—Beard v. Ryan, 78 Ala. 37; Ladd v. Dubroca, 61 Ala. 25.

Fla.—Gould v. Carr, 33 Fla. 523, 15 S 259, 24 LRA 130.

Iowa.—Mendenhall v. Price, 88 Iowa 203, 55 NW 321; Pella v. Scholte, 24 Iowa 283, 95 AmD 729.

Mo.—Cary v. Edmonds, 71 Mo. 523; Ferguson v. Bartholomew, 67 Mo. 212.

Tenn.—Norvell v. Gray, 1 Swan 96; Hornsby v. Davis, (Ch. A.) 36 SW 159.

But see San Jose v. Trimble, 41 Cal. 536; San Francisco v. Fulde, 37 Cal. 349, 99 AmD 278 (both holding that a forcible entry by the true owner will interrupt the continuity of the adverse possession, although the adverse claimant regains possession by legal proceeding).

84. Ferguson v. Bartholomew, 67 Mo. 212.

85. Cary v. Edmonds, 71 Mo. 523; Ferguson v. Bartholomew, 67 Mo. 212.

86. U. S.—Henderson v. Griffin, 5 Pet. 151, 8 L. ed. 79.

Ala.—Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Woodstock Iron Co. v. Roberts, 87 Ala. 436, 6 S 349; Beard v. Ryan, 78 Ala. 37; Ladd v. Dubroca, 61 Ala. 25; Bell v. Denson, 56 Ala. 444; Riggs v. Fuller, 54 Ala. 141; Doe v. Eslava, 11 Ala. 1023.

Ga.—Shingler v. Bailey, 135 Ga. 666, 70 SE 563.

Ill.—Prouty v. Tilden, 164 Ill. 163, 45 NE 445.

Iowa.—Whalley v. Small, 29 Iowa 288.

Ky.—Wickliffe v. Ensor, 9 B. Mon. 253.

Me.—Batchelder v. Robbins, 95 Me. 59, 49 A 210.

Mass.—Jeffries Neck Pasture v. Ipswich, 153 Mass. 42, 26 NE 239.

Nebr.—Ballard v. Hansen, 33 Nebr. 861, 51 NW 295.

N. Y.—Donahue v. O'Connor, 45 N. Y. Super. 278.

Oh.—Clark v. Potter, 32 Oh. St. 49.

Pa.—Workman v. Guthrie, 29 Pa. 495, 72 AmD 654; Green v. Kellum, 23 Pa. 254, 62 AmD 332; Hole v. Rittenhouse, 19 Pa. 305; Smith v. Steele, 17 Pa. 30.

R. I.—New Shoreham v. Ball, 14 R. I. 566.

S. C.—Love v. Turner, 78 S. C. 513, 519, 59 SE 529 [quot Cyc]; Duren v. Sinclair, 22 S. C. 361.

Tenn.—McColgan v. Langford, 6 Lea 108; Cowan v. Hatcher, (Ch. A.) 59 SW 689.

Tex.—Glover v. Pfeuffer, (Civ. A.) 163 SW 984; Cochran v. Moerer, 47 Tex. Civ. A. 372, 105 SW 1138.

Vt.—Webb v. Richardson, 42 Vt. 465.

Wis.—Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550 (presence of surveyors on land).

See Point Mountain Coal, etc., Co. v. Holly Lumber Co., 71 W. Va. 21, 75 SE 197.

[a] **Quartering of army on premises.**—Where possession is disturbed by an army quartering on the property, such interference will not arrest the running of the statute where defendants resume their possession as soon thereafter as they reasonably can. McColgan v. Langford, 6 Lea (Tenn.) 108.

[b] **Temporary dispossession by Indians.**—In trespass to try title against one who has been run off the land by Indians and resumed possession as soon as it was safe to return, defendant cannot compute the period of his absence under a plea of limitation. Fitch v. Boyer, 51 Tex. 336.

[c] **A single instance of attempted interruption** of an adverse user of a private way resulting in no actual interruption, and followed by no attempt to test the right, does not destroy the presumption of a grant founded upon the user. Connor v. Sullivan, 40 Conn. 26, 16 AmR 10.

[d] **The fact that the land may be swept by the guns of an adjoining fortress** is not an interruption of the adverse claimant's possession. Morand v. New Orleans, 5 La. 226.

87. Cohasset v. Moors, 204 Mass. 173, 90 NE 978; Jeffries Neck Pasture v. Ipswich, 153 Mass. 42, 26 NE 239; Ray v. Anders, 164 N. C. 311, 80 SE 403; New Shoreham v. Ball, 14 R. I. 566; Love v. Turner, 78 S. C. 513, 519, 59 SE 529 [quot Cyc]. See Grady v. Dundon, 30 Or. 333, 47 P 915.

[a] **Application of rule.**—Where the tenant of those claiming under a junior grant from the state built a cabin on the land, and occupied it adversely, the occupation of it in the tenant's absence, occasionally, by hunters and herders, making no claim of right, did not interrupt the continuity of the tenant's possession so as to interrupt the running of the statute of limitations against the senior grantees. Cowan v. Hatcher, (Tenn. Ch. A.) 59 SW 689.

[b] **Trespassing cattle.**—Continuity of possession is not interrupted by occasional trespasses caused by the straying in or upon the premises from the highway of cattle of other persons claiming no title to the land. Zell-

assertion of an adverse right.[88] If they are known they become assertions of right and operate to break the continuity unless legal remedies are resorted to within a reasonable time to regain possession and are prosecuted to a successful determination.[89] If the claimant acquiesces in the entry and taking of possession by a third person who claims to own the land, this will interrupt his adverse possession, although such third person subsequently surrenders possession to the claimant.[90] But where legal proceedings against the intruder are promptly and successfully prosecuted there is no interruption of the continuity,[91] and the period during which the possession was interrupted cannot be deducted in computing the length of adverse possession by the claimant.[92] The use of the land by third persons with the permission of the claimant will not interrupt the latter's possession.[93]

[§ 130] **e. Abandonment of Possession by Claimant or His Tenant—(1) Effect of Abandonment—(a) In General.** Where an adverse occupant abandons possession before the statutory period has run he loses all rights acquired by his adverse holding, and the rightful owner by such abandonment is placed in the same position in all respects as he was before the intrusion took place,[94] and the fact that the claimant continues to pay taxes on the land will not prevent this interruption.[95] The adverse occupant is concluded to the same extent as if he had been evicted by process of law.[96] If the claimant abandons possession after judgment in ejectment against him this stops the running of the statute, although plaintiff in ejectment did not take possession.[97] Where a tenant has been put into possession

mer v. Martin, 157 Wis. 341, 147 NW 371.

88. Bell v. Denson, 56 Ala. 444; Doe v. Eslava, 11 Ala. 1028; Love v. Turner, 78 S. C. 513, 519, 59 SE 529 [quot Cyc].

[a] **To constitute "disseisin,"** the person in possession must be forcibly expelled from the land, or there must be some act regarded in law as equivalent to an expulsion; a mere entry on another's land is no disseisin unless accompanied by expulsion. Glover v. Pfeuffer, (Tex. Civ. A.) 163 SW 984.

89. Woodstock Iron Co. v. Roberts, 87 Ala. 436, 6 S 349; Beard v. Ryan, 78 Ala. 37; Sparks v. Bodensick, 72 Kan. 5, 8, 82 P 463 [cit Cyc]; Love v. Turner, 78 S. C. 513, 519, 59 SE 529 [quot Cyc].

[a] **Reason for rule.**—"If they [interruptions] were known, and the trespasses have been repeated without legal proceedings being instituted, they become . . . legitimæ interruptiones, and are converted into adverse assertions of right; and if not promptly and effectually litigated they defeat the claim of rightful prescription." Doe v. Eslava, 11 Ala. 1028, 1043.

90. Ala.—Ross v. Goodwin, 88 Ala. 390, 6 S 682; Woodstock Iron Co. v. Roberts, 87 Ala. 436, 6 S 349; Doe v. Eslava, 11 Ala. 1028.

Cal.—Lacoste v. Eastland, 117 Cal. 673, 49 P 1046.

Nebr.—Maxwell v. Higgins, 38 Nebr. 671, 57 NW 388.

Tex.—Greenlee v. Taylor, 79 Tex. 149, 14 SW 1056; Warren v. Fredericks, 76 Tex. 647, 13 SW 643; Chandler v. Rushing, 38 Tex. 591.

Vt.—Austin v. Bailey, 37 Vt. 219, 86 AmD 703.

Wis.—Stephenson v. Wilson, 50 Wis. 95, 6 NW 340.

See Wren v. Parker, 57 Conn. 529, 18 A 790, 14 AmSR 127, 6 LRA 80.

91. Ala.—Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Ladd v. Dubroca, 61 Ala. 25; Doe v. Eslava, 11 Ala. 1028. See also Beard v. Ryan, 78 Ala. 37.

Fla.—Gould v. Carr, 33 Fla. 523, 15 S 259, 24 LRA 130 [limiting Townsend v. Edwards, 25 Fla. 582, 6 S 212].

Ill.—Prouty v. Tilden, 164 Ill. 163, 45 NE 445.

Ky.—Turner v. Thomas, 13 Bush 518.

Mo.—Cary v. Edmonds, 71 Mo. 523. Compare Turner v. Baker, 64 Mo. 218, 27 AmR 226.

Pa.—Hockenbury v. Snyder, 2 Watts & S. 240.

S. C.—Love v. Turner, 78 S. C. 513, 59 SE 529.

Tenn.—Hornsby v. Davis, (Ch. A.) 36 SW 159.

[a] **Application of rule.**—Where a landlord prosecutes successfully an unlawful detainer suit against his tenant, as soon as he ascertains that he was claiming the land adversely, the tenant's possession does not break the continuity of the landlord's possession which was also adverse. Barron v. Barron, 122 Ala. 194, 25 S 55.

[b] **In California** it has been held that if the adverse claimant is forcibly evicted by a third person, the continuity of his possession is broken, although he regains possession by process of law. San Jose v. Trimble, 41 Cal. 536; San Francisco v. Fulde, 37 Cal. 349, 99 AmD 278. Compare Cavanaugh v. Wholey, 143 Cal. 164, 76 P 979.

92. Ladd v. Dubroca, 61 Ala. 25.

93. Tome Inst. v. Crothers, 87 Md. 569, 40 A 261.

94. Ala.—Hoyle v. Mann, 144 Ala. 516, 41 S 835; Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 S 43; Louisville, etc., R. Co. v. Philyaw, 88 Ala. 264, 6 S 837.

Ark.—Driver v. Martin, 68 Ark. 551, 60 SW 651; Sharp v. Johnson, 22 Ark. 79.

Conn.—Dubuque v. Coman, 64 Conn. 475, 30 A 777.

Ga.—Bennett v. Atlantic Coast Line R. Co., 126 Ga. 411, 55 SE 177; Clark v. White, 120 Ga. 657, 48 SE 357; Hines v. Rutherford, 67 Ga. 606; Rutherford v. Hobbs, 63 Ga. 243; Thursby v. Myers, 57 Ga. 155; Virgin v. Land, 32 Ga. 572; Joiner v. Borders, 32 Ga. 239; Denham v. Holeman, 26 Ga. 182, 71 AmD 198; Holcombe v. Austell, 19 Ga. 604; Byrne v. Lowry, 19 Ga. 27.

Ill.—Burns v. Edwards, 163 Ill. 494, 45 NE 113; Gage v. Thompson, 161 Ill. 403, 43 NE 1062; Downing v. Mayes, 153 Ill. 330, 38 NE 620, 46 AmSR 896.

Iowa.—Davenport v. Sebring, 52 Iowa 364, 3 NW 403.

Ky.—Hibbard v. Wilson, 82 SW 1086, 17 KyL 930; Smith v. Shackleford, 9 Dana 452; Smith v. Morrow, 7 J. J. Marsh. 442. See also Halbert v. Maysville, etc., R. Co., 98 Ky. 661, 33 SW 1121.

Me.—Moore v. Moore, 21 Me. 350; Hamilton v. Paine, 17 Me. 219.

Md.—Stump v. Henry, 6 Md. 201, 61 AmD 300.

Mass.—Small v. Proctor, 15 Mass. 495. See Gifford v. Westport, 190 Mass. 323, 76 NE 1042.

Mich.—Pendill v. Marquette County Agricultural Soc., 95 Mich. 491, 55 NW 384.

Minn.—Blomberg v. Montgomery, 69 Minn. 149, 72 NW 56; Morris v. McClary, 43 Minn. 346, 46 NW 238.

Miss.—Nixon v. Porter, 38 Miss. 401; Tegarden v. Carpenter, 36 Miss. 404; Harper v. Tapley, 35 Miss. 506.

Mo.—Versteeg v. Wabash R. Co., 250 Mo. 61, 156 SW 689; Dausch v. Crane, 109 Mo. 323, 19 SW 61; Brown v. Chicago, etc., R. Co., 101 Mo. 484, 14 SW 719; Crispen v. Hannavan, 50 Mo. 536; Menkens v. Blumenthal, 27 Mo. 198; Lajoye v. Primm, 3 Mo. 529.

N. H.—Linen v. Maxwell, 67 N. H. 370, 40 A 184.

N. Y.—Cook v. Travis, 20 N. Y. 400; Cleveland v. Crawford, 7 Hun 616; Poor v. Horton, 15 Barb. 485.

N. C.—Ward v. Herrin, 49 N. C. 23; Holdfast v. Shepard, 28 N. C. 361.

Or.—Barrell v. Title Guarantee, etc., Co., 27 Or. 77, 39 P 992.

Pa.—Susquehanna, etc., R., etc., Co. v. Quick, 68 Pa. 189; Groft v. Weakland, 34 Pa. 304; Stephens v. Leach, 19 Pa. 262.

S. C.—Love v. Turner, 78 S. C. 513, 59 SE 529; Garlington v. Copeland, 32 S. C. 57, 10 SE 616.

Tex.—Kirby v. Boaz, 103 Tex. 525, 131 SW 533 [aff (Civ. A.) 121 SW 223]; Phillipson v. Flynn, 83 Tex. 580, 19 SW 136; Virginia Bank v. Hedges, 38 Tex. 614; Adels v. Joseph, (Civ. A.) 148 SW 1154; Veatch v. Gray, 41 Tex. Civ. A. 145, 91 SW 324; Wilson v. Nugent, (Civ. A.) 91 SW 241; Anderson v. Carter, 29 Tex. Civ. A. 240, 69 SW 78; Hull v. Woods, 14 Tex. Civ. A. 590, 38 SW 256.

Va.—Hollingsworth v. Sherman, 81 Va. 668; Taylor v. Burnsides, 1 Gratt. (42 Va.) 165.

Wash.—Noyes v. Douglas, 39 Wash. 314, 81 P 724.

W. Va.—Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255; Core v. Faupel, 24 W. Va. 238.

Wis.—Whittlesey v. Hoppenyan, 72 Wis. 140, 39 NW 355.

Eng.—Trustees, etc., Co. v. Short, 13 App. Cas. 793.

Can.—Handley v. Archibald, 30 Can. S. C. 130.

Ont.—Robinson v. Osborne, 27 Ont. L. 248; Coffin v. North American Land Co., 21 Ont. 80; Pringle v. Allan, 18 U. C. Q. B. 575.

[a] **Application of rule.**—(1) Title by adverse possession is not established by the occupation of land for eight years, after which the occupant removes therefrom and only manages the land for his mother, who owns a life estate therein, during the remainder of the statutory period. Anderson v. Carter, 29 Tex. Civ. A. 240, 69 SW 78. (2) Where a widow, in possession with her daughters of land owned jointly by her husband and his deceased brother, repudiated the interest of the brother's heirs but removed from the land before the ten years required by the statute of limitations, leaving the daughters in possession, the adverse possession was broken, in the absence of evidence showing that the daughters were holding for their mother or under a claim from her. Williams v. Randall, (Tex. Civ. A.) 158 SW 253.

[b] **Extent of rule.**—The fact that the occupant intended to return does not alter the rule. Louisville, etc., R. Co. v. Philyaw, 88 Ala. 264, 6 S 837; Susquehanna, etc., R., etc., Co. v. Quick, 68 Pa. 189; Stephens v. Leach, 19 Pa. 262.

[c] **If one of two tenants in common who hold by disseisin abandons the land,** the other cotenant continues to hold the whole against the person disseized in the same manner as if he had been sole disseizor. Allen v. Holton, 20 Pick. (Mass.) 458.

95. Louisville, etc., R. Co. v. Philyaw, 88 Ala. 264, 6 S 837.

96. Poor v. Horton, 15 Barb. (N. Y.) 485.

97. Van Deventer v. Lott, 172 Fed. 574 [aff 180 Fed. 378, 103 CCA 524] (holding that an occupant of land who

with an understanding that he is to hold for a certain time, his abandonment of possession, although in violation of his agreement, will interrupt the adverse possession.[98] The understanding that he was to hold possession will not keep the possession continuous.[99]

[§ 131] **(b) Intention to Abandon.** If the adverse claimant in fact ceases to exercise control over the land, he will be regarded as having abandoned the possession, although he does not intend to do so, and it is therefore immaterial in such a case that the claimant may have intended to return.[1]

[§ 132] **(c) Enforced Abandonment.** The fact that the abandonment of occupation and the exercise of control over the land are involuntary, or are caused by casualty, will not prevent the adverse possession from being interrupted, as where the land was submerged for years and the claimant was thereby forced to abandon the possession;[2] or where the claimant was forced to abandon possession by reason of Indian uprisings and raids.[3]

[§ 133] **(d) Abandonment after Statutory Period Has Elapsed.**[4] Where the statutory period has already run and the claimant has thereby acquired title his subsequent abandonment of possession does not defeat the title acquired,[5] but such abandonment is evidence to show that his prior possession was not in fact adverse.[6]

[§ 134] **(2) What Constitutes Abandonment.** In determining what acts constitute an abandonment the character of the property and the uses for which it can be adapted are of considerable importance. As every case presents a different state of facts no general rule can be stated as to what constitutes abandonment.[7]

[§ 135] **f. Surrender of Possession by Claimant.**

after being ejected, although the judgment in ejectment was afterward reversed for want of jurisdiction in the court, abandoned the land and did not return, cannot set up title by adverse possession in a suit commenced several years later. "Under these circumstances it must be held that his possession of the property which he had previously occupied did not continue down to the time of the bringing of the action"); Doe v. Stephens, 6 Del. 31.

98. Thursby v. Myers, 57 Ga. 155; Phillips v. Beattyville Mineral, etc., Co., (Ky.) 88 SW 1058, 28 KyL 12; Yelverton v. Hilliard, 38 Mich. 355. Compare Walser v. Graham, 45 Mo. A. 629.

99. Thursby v. Myers, 57 Ga. 155.

[a] **Possession of the intruder which is ineffectual for the purpose of transferring title** ceases, upon its abandonment, to be effectual for any purpose. Trustees, etc., Co. v. Short, 13 App. Cas. 793.

1. Ala.—Louisville, etc., R. Co. v. Philyaw, 88 Ala. 264, 6 S 837.

Ga.—Clark v. White, 120 Ga. 957, 48 SE 357; Virgin v. Land, 32 Ga. 572; Denham v. Holeman, 26 Ga. 182, 71 AmD 198.

Ky.—Myers v. McMillan, 4 Dana 485.

Mo.—Turner v. Hall, 60 Mo. 271.

Pa.—Susquehanna, etc., R., etc., Co. v. Quick, 68 Pa. 189; Stephens v. Leach, 19 Pa. 262.

[a] **Reason for rule.**—(1) "The very gist of the claim by adverse possession is that for ten years the claimant has occupied the land, so openly visibly, adversely, notoriously and continuously, that the owner is presumed to have known it. It would be a strange principle then, which would allow a man to go on the land, set up adverse possession, and then leave it, and claim that his possession remained adverse, merely because he intended to return." Hoyle v. Mann, 144 Ala. 516, 522, 41 S 835 (per Simpson, J.). (2) "The question is not, what did the out-going occupant intend, but, what did he do? Did he keep his flag flying, and present a hostile front to adverse pretensions? An adverse possession ought to be such as to challenge the right of all the world; but when an occupant evacuates the place and suffers it to go to wreck, he hauls down his colors, and his challenge is withdrawn." Stephens v. Leach, 19 Pa. 262, 265 (per Gibson, J.).

2. Western v. Flanagan, 120 Mo. 61, 25 SW 531. See also Strange v. Spalding, 29 SW 137, 17 KyL 305. But see Robinson v. Nordman, 75 Ark. 593, 88 SW 592. In this case a grantee took possession of land by virtue of his deed, and held adversely for about six years when the land was overflowed, compelling the occupant to leave it. During the six years the grantee cleared a part of the land and made other improvements on it. Because of his acts of exclusive ownership the land became generally known as his land. During the year of the overflow it remained idle. Subsequently he planted trees on the land. No one questioned his possession for about nine years. It was held that he acquired title by adverse possession.

3. Fitch v. Boyer, 51 Tex. 336.

4. See also infra § 559.

5. Ark.—Jacks v. Chaffin, 34 Ark. 534.

D. C.—Todd v. Kauffman, 19 D. C. 304.

Ga.—Milliken v. Kennedy, 87 Ga. 463, 13 SE 635.

Me.—School Dist. No. 4 v. Benson, 31 Me. 381, 52 AmD 618.

N. Y.—Sherman v. Kane, 86 N. Y. 57.

Pa.—Jones v. Hughes, 16 A 849; Hoffman v. Bell, 61 Pa. 444; Schall v. Williams Valley R. Co., 35 Pa. 191.

Tex.—Spofford v. Bennett, 55 Tex. 293; Erhard v. Hearne, 47 Tex. 469.

6. Vickery v. Benson, 26 Ga. 582; Russell v. Slaton, 25 Ga. 193; Smoke v. Smoke, 44 S. C. L. 433.

7. See Saxton v. Corbett, (Tex. Civ. A.) 122 SW 75; West v. Webster, 39 Tex. Civ. A. 272, 87 SW 196; Pringle v. Allan, 18 U. C. Q. B. 575; Piper v. Stevenson, 28 Ont. L. 379; and cases infra this note.

[a] **Removed from land.**—(1) A mere removal from the land without an intent to abandon it, but with an intent still to use and claim it, has been held no waiver of a previous possession. Harper v. Tapley, 35 Miss. 506. And see Hunter v. Pinnell, 193 Mo. 142, 91 SW 472. (2) If a person enters on land under color of title and cultivates the land except for one year, during which he pastures it and keeps up the fences, it cannot be said, as a matter of law, that he has abandoned the possession because no one actually resides on the land. Perry v. Lawson, 112 Ala. 480, 20 S 611. (3) It has also been held that where a person took possession of forty acres of swampy land under claim of title, fenced it, and built a house on it, but, after living on it several years, left it vacant for two years because he was unable to find a tenant, but his improvements remained on the land and no one else took possession, he did not thereby lose possession. Downing v. Mayes, 153 Ill. 330, 38 NE 620, 46 AmSR 896. (4) "A man does not discontinue his possession by locking up his house in town, or suspending his cultivation in the country, provided he did not suffer the building in the one case, or the fields in the other, to be thrown open; but he is bound to continue a positive appearance of ownership, by treating the property as his own, and holding it within his exclusive control." Stephens v. Leach, 19 Pa. 262, 265 [quot Montgomery, etc., Lumber Co. v. Quimby, 164 Cal. 250, 253, 128 P 402]. (5) But where one leaves the ground personally he must leave it under circumstances indicating that he still holds possession. Susquehanna, etc., R., etc., Co. v. Quick, 68 Pa. 189. (6) "It is true, that, when an intruder enters upon the land of another person, and afterwards leaves and abandons the possession, so as to evince a design to allow it to return to the condition in which he found it, the constructive possession will revest in the owner, and the statute be removed. But it is not necessary that the intruder should be constantly in the actual occupancy. Strong marks of affinity and analogy exist between his possession and that of the actual settler, to whom the law allows considerable absence for justifiable reasons, where the animus revertendi exists. We see no good reasons why the same rule should not be extended to those who settle upon appropriated lands. The individual who enters may, or may not, be aware that the land is appropriated; but when it is not appropriated, his entry is good against the Commonwealth, and will be available to prevent her from granting the land to another person, although the settler may be absent for four months for suitable reasons, when the animus residendi is present and the animus revertendi brings the wanderer back." Cunningham v. Patton, 6 Pa. 355, 358. (7) "When the actual, open and notorious occupancy of land is temporarily prevented by floods or fire, the possessor has a reasonable time after the flood or fire has ceased to resume his actual, open and notorious possession of the land, without there being a discontinuation of his adverse possession during the time that his occupancy was so interrupted." Thomas v. Spencer, 66 Or. 359, 368, 133 P 822.

[b] **Failure to exercise acts of ownership over timberland for eleven years** does not conclusively show an abandonment of possession, the question being one for the jury. To constitute a continuous possession it is not necessary that the occupant should be actually upon the premises continually. The mere fact that time intervenes between successive acts of occupancy does not necessarily destroy the continuity of possession. Aldrich v. Griffith, 66 Vt. 390, 29 A 376.

[c] **Temporary nonuser during period of unfitness for occupancy.**—Where a nonpossessor cleared, cultivated, and used the land adversely to and with the full knowledge of the alleged owner, and without any intent on his part to assert title, and the fence was accidentally burned, thereby rendering the active occupation of the premises unfit for use during several years, it was held that the statute did not cease to run during that nonuser where there was no evidence tending to show abandonment except nonuser. Ford v. Wilson, 35 Miss. 490, 72 AmD 137.

[d] **Temporary nonuser, when not needed.**—The adverse user of an irri-

When an adverse claimant surrenders possession to the disseizor before the expiration of the time necessary to acquire title by prescription, this puts an end to the running of the statute in his favor, and the possession thus interrupted is not effectual for any purpose.[8] This is true, although the surrender is induced by threats of the true owner that he would resort to legal proceedings.[9] An agreement to surrender before expiration of the statutory period, based on a valuable consideration, also stops the running of the statute,[10] and continued possession thereunder will not be regarded as adverse;[11] but an agreement by the adverse occupant to surrender after title has been acquired by adverse possession for the statutory period is void for want of consideration and does not divest him of the title.[12]

[§ 136] **g. Disclaimer of Title.** A disclaimer by the adverse claimant of any title to the land will interrupt the continuity of his adverse possession;[13] but it has been held that mere declarations acknowledging that the adverse claimant has not the true title, where such declarations do not evidence any intention on the part of such claimant to abandon his adverse possession or not to acquire title thereby, will not affect the character of his original possession,[14] and a disclaimer of title to a part of the land held adversely will not interrupt the adverse character of the possession as regards the balance.[15]

[§ 137] **h. Recognition of Title in Another—(1) Effect of Recognition—(a) Statement of Rule.**[16] Interruption of the continuity necessary to acquire title by prescription occurs when the adverse claimant recognizes the title of the disseizee. On recognition of such title his adverse possession ceases to be adverse, no matter how hostile it may previously have been,[17] and limitation does not again begin to run against the person whose title is acknowledged

gating ditch through the lands of another only during the cropping season, the ditch not being needed at other times, constitutes a continuous adverse user, as the omission to use when not needed does not break the continuity of the user. Hesperia Land, etc., Co. v. Rogers, 83 Cal. 10, 23 P 196, 17 AmSR 209.

[e] **That the house on an inclosed lot was unoccupied for a short time** did not break the continuity of the adverse possession. Hubbard v. Swofford Bros. Dry Goods Co., 209 Mo. 495, 108 SW 15, 123 AmSR 488. See also Cameron v. Walker, 19 Ont. 212.

[f] **Leaving family in possession of premises.**—(1) A temporary absence by the adverse claimant from his home, he leaving his family in possession, is not such an interruption of possession as to stop the running of the statute (Cunningham v. Brumback, 23 Ark. 336; Smith v. De la Garza, 15 Tex. 150, 65 AmD 147); (2) especially where the adverse claimant claims in right of his wife (Smith v. De la Garza, 15 Tex. 150, 65 AmD 147). (3) Where plaintiff occupied the floor of a building as a workshop which, during summer time, he closed up on Saturday morning, returning on Monday, the fact that he once went to another city for three weeks, leaving his goods on the premises and an agent in charge, did not amount to an abandonment of possession, so as to interrupt the running of the statute of limitations. Iredale v. Loudon, 14 Ont. L. 17, 8 OntWR 963 [rev on other grounds 15 Ont. L. 286].

[g] **Failure to divide land in controversy.**—The fact that defendant's predecessors, on whose adverse possession, joined to his own, he relies, did not divide the land in controversy when they partitioned their other real estate does not prove an abandonment of their claims. Freedman v. Bonner, (Tex. Civ. A.) 40 SW 47.

[h] **Removal of improvements.**—A purchaser located the land on the ground, took possession of, cleared, and fenced it and planted it with fruit trees, etc. He continued to so occupy for about nine years when he procured a survey to be made which showed that the boundaries of the land as located extended over on the land of adjacent owners. He then improved the land with reference to the new survey and removed the improvements from the strip outside of its boundaries. Two years later he placed a house on the strip. It was held that there was an abandonment of the strip outside of the boundaries fixed by the survey. Noyes v. Douglas, 39 Wash. 314, 81 P 724.

[i] **Where the cestui que trust, under a deed to secure the payment of a debt,** holds for two years the property adversely to the debtor, and afterward surrenders it to the trustee to be sold under the deed of trust, and becomes himself the purchaser, it seems that he does not relinquish any right which he may have acquired by adverse possession. Turner v. Smith, 11 Tex. 620.

[j] **"One who owns a house for rental** does not abandon or lose his possession every time it remains vacant during intervals between tenancies." Montgomery, etc., Lumber Co. v. Quimby, 164 Cal. 250, 253, 128 P 402.

8. School Dist. No. Four v. Benson, 31 Me. 381; Dausch v. Crane, 109 Mo. 323, 19 SW 61; Blaisdell v. Martin, 9 N. H. 253; Warren v. Putnam, 63 Wis. 410, 24 NW 58.

[a] **Quitclaim to original owner.**—Within three years after the recording of a tax deed the grantee quitclaimed to the original owner but the deed was not recorded. Subsequently he conveyed to a third person who had no knowledge of the quitclaim and who duly recorded his conveyance. The land remained unoccupied for more than three years after the tax deed had been recorded. It was held that such quitclaim deed operated as an abandonment and surrender to the original owner of the constructive adverse possession which arose in the grantor's favor by virtue of his taking such tax deed and recording it, and that after such constructive adverse possession had ceased the statute of limitations of three years ceased to run in favor of his title, and ran in favor of the original owner, and barred any right of action in favor of those claiming under the tax deed after the expiration of the three years from the recording thereof. Warren v. Putnam, 63 Wis. 410, 24 NW 58.

[b] **Surrender to one of several cotenants.**—The relinquishment and yielding up to one of several tenants in common by the disseizor, after a disseizin of five years, of all the right, seizin, possession, and betterments which the disseizor had in and to the proportion of that tenant in common in the premises, have the effect to put all the tenants in common in the seizin and possession of their shares, respectively, and to prevent the operation of the statute of limitations against any of them prior to that time. Vaughan v. Bacon, 15 Me. 455, 33 AmD 628.

9. Shaffer v. Lowry, 25 Pa. 252.

10. Stephenson v. Van Blokland, 60 Or. 247, 256, 118 P 1026 [cit Cyc]; Eldridge v. Parish, 6 Tex. Civ. A. 35, 25 SW 49; Cornell University v. Mead, 80 Wis. 387, 49 NW 815.

11. Stephenson v. Van Blokland, 60 Or. 247, 256, 118 P 1026 [cit Cyc]; Eldridge v. Parish, 6 Tex. Civ. A. 35, 25 SW 49.

12. Parham v. Dedman, 66 Ark. 26, 48 SW 673.

13. Dillon v. Center, 68 Cal. 561, 10 P 176; Hamilton v. Paine, 17 Me. 219; Love v. Turner, 78 S. C. 513, 59 SE 529.

14. Patterson v. Reigle, 4 Pa. 201, 45 AmD 684.

15. Barnett v. Templeman, (Tex. Civ. A.) 31 SW 78. See also Rabbermann v. Carroll, 207 Ill. 253, 69 NE 759; O'Flaherty v. Mann, 196 Ill. 304, 63 NE 727.

16. See also infra §§ 145–147.

17. U. S.—Cleveland v. Cleveland, etc., R. Co., 93 Fed. 113 [rev on other grounds 147 Fed. 171, 77 CCA 467]; Davels v. Collins, 43 Fed. 31; Adams v. Burke, 1 F. Cas. No. 49, 3 Sawy. 415.

Ala.—Sample v. Reeder, 107 Ala. 227, 18 S 214; Trufant v. White, 99 Ala. 526, 13 S 83; Collins v. Johnson, 57 Ala. 304; Russell v. Irwin, 38 Ala. 44.

Ark.—Shirey v. Whitlow, 80 Ark. 444, 97 SW 444. See also Vittitow v. Burnett, 165 SW 625.

Cal.—Dillon v. Center, 68 Cal. 561, 10 P 176; Abbey Homestead Assoc. v. Willard, 48 Cal. 614; Hayes v. Martin, 45 Cal. 559; Judson v. Malloy, 40 Cal. 299; McCracken v. San Francisco, 16 Cal. 591; Jensen v. Hunter, 5 Cal. Unrep. Cas. 83, 41 P 14.

Conn.—Paton v. Robinson, 81 Conn. 547, 71 A 730.

Ida.—Hesse v. Strode, 10 Ida. 250, 77 P 634.

Ill.—Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088; McMahill v. Torrence, 163 Ill. 277, 45 NE 269; Nickrans v. Wilk, 161 Ill. 76, 43 NE 741.

Ind.—Howard v. Twibell, 100 NE 372; Price v. Hall, 140 Ind. 314, 39 NE 941, 49 AmSR 196.

Iowa.—Boltz v. Colsch, 134 Iowa 480, 109 NW 1106; Lake City v. Fulkerson, 122 Iowa 569, 98 NW 376; Litchfield v. Sewell, 97 Iowa 247, 66 NW 104; Devoe v. Smeltzer, 86 Iowa 385, 53 NW 287; Hempsted v. Huffman, 84 Iowa 398, 51 NW 17; McNamee v. Moreland, 26 Iowa 96.

Kan.—Pratt v. Ard, 63 Kan. 182, 65 P 255.

Ky.—Roberts v. McGraw, 11 Bush 26; Croan v. Joyce, 8 Bush 454; Ray v. Barker, 1 B. Mon. 364; Crockett v. Lashbrook, 5 T. B. Mon. 530, 17 AmD 98.

La.—New Orleans v. Shakspeare, 39 La. Ann. 1033, 3 S 346; Baker v. Pena, 20 La. Ann. 52; Gillis v. Nelson, 16 La. Ann. 275; Templet v. Baker, 12 La. Ann. 658.

Me.—Lamb v. Foss, 21 Me. 240; Millay v. Millay, 18 Me. 387; Vaughan v. Bacon, 15 Me. 455, 33 AmD 628.

Md.—Campbell v. Shipley, 41 Md. 81; Stump v. Henry, 6 Md. 201, 61 AmD 300.

Mass.—Small v. Procter, 15 Mass. 495.

Mich.—Campau v. Lafferty, 43 Mich. 429, 5 NW 648.

Minn.—Olson v. Burk, 94 Minn. 456, 458, 103 NW 335 [cit Cyc]; Sage v. Rudnick, 67 Minn. 362, 69 NW 1096; St. Paul v. Chicago, etc., R. Co., 62

until the claimant repudiates his title.[18] A prior recognition of the title of the owner, however, does not affect a subsequent actual adverse possession;[19] and of course the running of the statute cannot be affected by any admissions made by the grantor of the adverse claimant.[19½]

[§ 138] **(b) Recognition Made to Third Person.** The recognition of the true owner's title need not be made directly to such owner; an unqualified recognition made to a third person is sufficient.[20]

[§ 139] **(c) Mental Incapacity as Affecting Operation of Rule.** Want of mental capacity on the part of the adverse claimant does not alter the effect of his recognition of the title of the true owner.[21]

[§ 140] **(d) Recognition by Husband as Affecting Possession of Wife.** Where the husband is in possession as head of the family, recognition of the title of the true owner by him will conclude his wife after his death.[22] This is true notwithstanding the facts that the husband is a drunkard and that the wife supports the family by her industry.[23]

[§ 141] **(e) Recognition after Completion of Statutory Period.**[24] A recognition of the title of the true owner after the bar of the statute has run, so as to complete the title of the adverse claimant, will not alone defeat the title so acquired,[25] but such recognition is evidence to be considered in determining whether in fact the prior possession of the adverse claimant was in fact adverse or a possession in subordination to the title of the true owner.[26] If after an adverse claimant has been in possession for a sufficient time to vest title in him he recognizes and continues in possession in subordination to the

Minn. 330, 63 NW 267, 65 NW 649, 68 NW 458.

Miss.—Dean v. Tucker, 58 Miss. 487.

Mo.—Tomlinson v. Lynch, 32 Mo. 160.

Nebr.—Oldig v. Fisk, 53 Nebr. 156, 73 NW 661; Nebraska R. Co. v. Culver, 35 Nebr. 143, 52 NW 886; Hull v. Chicago, etc., R. Co., 21 Nebr. 371, 32 NW 162.

N. M.—Chambers v. Bessent, 17 N. M. 487, 134 P 237.

N. Y.—Olean v. Steyner, 135 N. Y. 341, 32 NE 9, 17 LRA 640; Devyr v. Schaefer, 55 N. Y. 446; Hindley v. Manhattan R. Co., 103 App. Div. 504, 93 NYS 53 [aff 42 Misc. 56, 85 NYS 561]; DeLancey v. Hawkins, 23 App. Div. 8, 49 NYS 469; New York v. Mott, 60 Hun 423, 15 NYS 22; Brady v. Begun, 36 Barb. 533; Corning v. Troy Iron, etc., Factory, 34 Barb. 485; Hindley v. Metropolitan El. R. Co., 42 Misc. 56, 85 NYS 561 [aff 103 App. Div. 504, 93 NYS 53, and rev on other grounds 185 N. Y. 335, 78 NE 276]; Keneda v. Gardener, 4 Hill 469.

N. C.—Williams v. Scott, 122 N. C. 545, 29 SE 877; Graham v. Davidson, 32 N. C. 245.

Or.—Barrell v. Title Guarantee, etc., Co., 27 Or. 77, 39 P 992.

Pa.—Truman v. Raybuck, 207 Pa. 357, 56 A 944; Cadwalader v. App, 81 Pa. 194; Olwine v. Holman, 23 Pa. 279; Ingersoll v. Lewis, 11 Pa. 212, 51 AmD 536; Calhoun v. Cook, 9 Pa. 226; Read v. Thompson, 5 Pa. 327; Sailor v. Hertzogg, 2 Pa. 182; Buckholder v. Sigler, 7 Watts & S. 154; Criswell v. Altemus, 7 Watts 565; Miller v. Keene, 5 Watts 348; Deppen v. Bogar, 7 Pa. Super. 434; Bradford v. Guthrie, 3 Pittsb. 213.

R. I.—Co-operative Bldg. Bank v. Hawkins, 30 R. I. 171, 73 A 617.

S. C.—Garlington v. Copeland, 32 S. C. 57, 10 SE 616; Congdon v. Morgan, 14 S. C. 587; Abel v. Hutto, 42 S. C. L. 42; Moore v. Johnston, 29 S. C. L. 288; Markley v. Amos, 18 S. C. L. 603; Harrington v. Wilkins, 13 S. C. L. 289.

Tenn.—McBurney v. Glenmary Coal, etc., Co., 121 Tenn. 275, 118 SW 694; Free v. Fine, (Ch. A.) 59 SW 384.

Tex.—Burrell v. Adams, 104 Tex. 183, 135 SW 1156; Texas, etc., R. Co. v. Speights, 94 Tex. 350, 60 SW 659; Robinson v. Bazoon, 79 Tex. 524, 15 SW 585; Oury v. Saunders, 77 Tex. 278, 13 SW 1030; Satterwhite v. Rosser, 61 Tex. 166; Portis v. Hill, 14 Tex. 69, 65 AmD 99; Kane v. Sholars, 41 Tex. Civ. A. 154, 90 SW 937; Whitaker v. Thayer, 38 Tex. Civ. A. 537, 86 SW 364; Weisman v. Thomson, (Civ. A.) 78 SW 728; Eldridge v. Parish, 6 Tex. Civ. A. 35, 25 SW 49.

Vt.—Lyman v. Little, 15 Vt. 576.

Va.—Erskine v. North, 14 Gratt. (55 Va.) 60.

W. Va.—Jarvis v. Grafton, 44 W. Va. 453, 30 SE 178.

Wis.—Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019; Cornell Univ. v. Mead, 80 Wis. 337, 49 NW 815.

Eng.—Ball v. Riversdale, Beatty 550; Hodle v. Healey, 6 Madd. 181, 56 Reprint 1061, 1 Ves. & B. 536, 35 Reprint 209, 22 Rev. Rep. 270.

Ont.—Miller v. Brown, 3 Ont. 210; Ferguson v. Whelan, 28 U. C. C. P. 112; Ruttan v. Smith, 35 U. C. Q. B. 165; Doe v. Walker, 8 U. C. Q. B. 571.

See McAllister v. Hartzell, 60 Oh. St. 69, 53 NE 715.

[a] **The fact that the claimant continues in possession of the premises** does not affect the operation of the rule. St. Paul v. Chicago, etc., R. Co., 63 Minn. 330, 63 NW 267, 65 NW 649, 68 NW 458, 34 LRA 184.

[b] **Rule applicable between cotenants.**—Where a tenant in common in possession recognizes his cotenant's right in the land, his possession then ceases to be adverse. House v. Williams, 16 Tex. Civ. A. 122, 40 SW 414.

[c] **In Ohio** neither a mere offer to buy within the twenty-one years, nor an acknowledgment by the claimant within that time that the title was in another or that the claimant did not own the land, will interrupt the statute. "Such acts and declarations raise no conclusive implication that the claimant intends to attorn to the holder of the title, or yields the possession." McAllister v. Hartzell, 60 Oh. St. 69, 93, 53 NE 716.

18. Shirey v. Whitlow, 80 Ark. 444, 97 SW 444; Sage v. Rudnick, 67 Minn. 362, 69 NW 1096; St. Paul v. Chicago, etc., R. Co., 63 Minn. 330, 63 NW 267, 65 NW 649, 68 NW 458, 34 LRA 184; House v. Williams, 16 Tex. Civ. A. 122, 40 SW 414.

19. Daughtrey v. New York, etc., Land Co., (Tex. Civ. A.) 61 SW 947.

19½. Guadalupe County v. Poth, (Tex. Civ. A.) 163 SW 1050.

20. Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088; Whitaker v. Thayer, 38 Tex. Civ. A. 537, 86 SW 364. Contra Farmers, etc., Bank v. Wilson, 10 Watts (Pa.) 261 (holding that an acknowledgment of title in land to take a possession out of the statute must be made to the owner or his agent, known as such, and he must admit his title to be good and agree to leave the land or hold as tenant).

[a] **Thus** where a railroad company, in an action against it by a third person to oust it from an alleged street, pleads as a defense a license from the municipality to occupy the street, it cannot subsequently as against the municipality claim that its occupation of the street was adverse to the city. Cleveland v. Cleveland, etc., R. Co., 93 Fed. 113 [rev on other grounds 147 Fed. 171, 77 CCA 467]. See also Heard v. Connor, (Tex. Civ. A.) 84 SW 605.

21. Daveis v. Collins, 43 Fed. 31. See also New York v. Mott, 60 Hun 423, 15 NYS 22.

22. Daveis v. Collins, 43 Fed. 31; Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088; Browneller v. Wells, 109 Iowa 230, 80 NW 351; Texas, etc., R. Co. v. Speights, 94 Tex. 350, 60 SW 659 [rev (Civ. A.) 59 SW 572].

[a] **Application of rule.**—Where a widow and her child were in adverse possession of land, and she married, and the family so formed held possession, an agreement by the husband with the true owner to purchase the land stopped the running of limitations in favor of the widow and child, since the head of the family controlled the possession. Texas, etc., R. Co. v. Speights, 94 Tex. 350, 60 SW 659.

[b] **Community property.**—At any time before the ten-year limitation is completed for title by adverse possession the husband may change the character of the possession by acknowledging occupancy as a tenant, whether such title would have been separate or community property. Burrell v. Adams, 104 Tex. 183, 135 SW 1156 [aff (Civ. A.) 127 SW 581].

23. Daveis v. Collins, 43 Fed. 31.

24. And see infra § 560.

25. Ala.—Lee v. Thompson, 99 Ala. 95, 11 S 672.

Ark.—Hudson v. Stillwell, 80 Ark. 575, 98 SW 356; Shirey v. Whitlow, 80 Ark. 444, 97 SW 444; Parham v. Dedman, 66 Ark. 26, 48 SW 673.

Ga.—Long v. Young, 28 Ga. 130. See Cook v. Long, 27 Ga. 280.

Ky.—Walling v. Eggers, 104 SW 360, 31 KyL 1009.

Minn.—Sage v. Rudnick, 67 Minn. 362, 69 NW 1096.

Or.—Coventon v. Seufert, 23 Or. 548, 32 P 508; Rowland v. Williams, 23 Or. 515, 32 P 402.

Pa.—Olwine v. Holman, 23 Pa. 279; Bradford v. Guthrie, 4 Brewst. 351.

Tex.—Thurmond v. Trammell, 28 Tex. 371, 91 AmD 321; Morgan v. White, (Civ. A.) 110 SW 491; Barrett v. McKinney, (Civ. A.) 93 SW 240; Whitaker v. Thayer, 39 Tex. Civ. A. 537, 86 SW 364.

Wis.—Tobey v. Secor, 60 Wis. 310, 19 NW 99.

See Leonard v. Detroit, 108 Mich. 599, 66 NW 488; Stevens v. Shannon, 6 Oh. Cir. Ct. 142, 3 Oh. Cir. Dec. 386.

26. Ala.—Trufant v. White, 99 Ala. 526, 13 S 83; Lee v. Thompson, 99 Ala. 95, 11 S 672.

Cal.—Pacific Mut. L. Ins. Co. v. Stroup, 63 Cal. 150.

Ky.—Walling v. Eggers, 104 SW 360, 31 KyL 1009.

Me.—School Dist. No. 4 v. Benson, 31 Me. 381, 52 AmD 618.

Mich.—Red Jacket v. Pinton, 126 Mich. 194, 85 NW 567.

Minn.—Sage v. Rudnick, 67 Minn. 362, 69 NW 1096.

Nebr.—Webb v. Thiele, 56 Nebr. 752, 77 NW 56.

N. Y.—Greene v. Couse, 127 N. Y. 386, 28 NE 15, 24 AmSR 458, 13 LRA 206.

N. C.—Graham v. Davidson, 32 N. C. 245.

Pa.—St. Clair v. Shale, 20 Pa. 105; Sailor v. Hertzogg, 2 Pa. 182.

Tex.—Bruce v. Washington, 30 Tex. 368, 15 SW 1104; Nichols v. Nichols, 79 Tex. 332, 15 SW 272; Barrett v.

title of the true owner for another full statutory period, this will revest the title in the true owner.[27] Where a wife holding under color of title has acquired title by adverse possession, no subsequent acts or declarations on the part of her husband recognizing the title of the original owner can affect her title.[28]

[§ 142] **(2) What Constitutes Recognition—(a) In General.** Title in another may be recognized in many different ways, as by agreeing to hold under another,[29] whether the owner or a third person,[30] or to vacate in consideration of the conveyance to him of other land;[31] by confessing title when sued in ejectment instead of pleading and going to trial;[32] by accepting money for taxes on the land from the true owner, knowing it to be paid by him as taxes due by him and not accepted as a gift or loan;[33] by instituting an action against the owner, based on a continuance of the title of the owner;[34] by consenting to a conveyance by the true owner to a third person from whom the claimant takes a bond for deed;[35] by declaring title to be in another,[36] or by written admission of title in another;[37] or by contesting with the officers of the state and municipality a claim of a preference right to purchase the lands in question.[38] Proceedings to foreclose a mortgage by advertisement is such an acknowledgment of the right of the mortgagor to redeem as to repel the presumption otherwise arising from occupation for more than the statutory period by the mortgagee.[39] So it has been held a recognition of the owner's title where a company, both prior and subsequent to entering the land, attempted to condemn it,[40] and proceedings by a company for the vacation of certain streets adversely to a city have been held such a recognition of the rights of the city as to break the continuity of the adverse possession.[41] On the other hand the mere facts that one in possession of land, claiming it as his own, expressed an intention of making a settlement with another who also claimed it, and that on his deathbed he requested a friend to aid his children in securing a deed for the land, are not a recognition of the other's title,[42] and where a landowner is in adverse possession of a part of land adjoining his tract the fact that at the request of the true owner of such adjoining land he makes a change in the use of such land is not necessarily a recognition of the title of the owner of such land so as to interrupt the continuity of his adverse possession.[43]

[§ 143] **(b) Taking Out and Recording Patent in Name of Owner.** It has been held that the fact that a widow takes out a patent to the land held adversely by her in the name of her deceased husband who is entitled thereto will not operate as a recognition of the title of the heirs of the husband so as to break the continuity of her adverse possession, the taking out of such patent being necessary to perfect the title of the husband.[44]

McKinney, (Civ. A.) 93 SW 240; McLane v. Canales, (Civ. A.) 25 SW 29; Hand v. Swann, 1 Tex. Civ. A. 241, 21 SW 282.

27. Trufant v. White, 99 Ala. 526, 13 S 83.

28. Collins v. Lynch, 157 Pa. 246, 27 A 721, 37 AmSR 723.

29. Ky.—Ray v. Barker, 1 B. Mon. 364.
Pa.—Moore v. Small, 9 Pa. 194; Read v. Thompson, 5 Pa. 327.
Tenn.—Free v. Fine, (Ch. A.) 59 SW 384.
Tex.—Burrell v. Adams, 104 Tex. 183, 135 SW 1156; Weisman v. Thomson, (Civ. A.) 78 SW 728.
Wis.—Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019; Cornell Univ. v. Mead, 80 Wis. 387, 49 NW 815.
See Henderson v. Henderson, 23 Ont. A. 577.
[a] **Under express statutory provisions** the acknowledgment must be given to the person entitled to the land or to his agent, and must be in writing and signed by the person in possession. Beigle v. Dake, 42 U. C. Q. B. 250; Ruttan v. Smith, 35 U. C. Q. B. 165. Sufficient acknowledgment in writing illustrated see Miller v. Brown, 3 Ont. 210.

30. Robinson v. Bazoon, 79 Tex. 524, 15 SW 585 (holding that when a possessor acknowledges himself the tenant of another his possession in his own right ceases, not only against the person to whom he attorns but also against the true owner).

31. Eldridge v. Parish, 6 Tex. Civ. A. 35, 25 SW 49.

32. Keneda v. Gardner, 4 Hill (N. Y.) 469.
[a] **Conditional agreement to hold under another.**—Where there is an agreement by the possessor under a junior grant that if the elder patentee should prevail in an ejectment against a certain other person he would thenceforth hold under him, and such elder patentee did prevail in the action before the limitation had run, the plea of continued adverse possession will not avail. Crockett v. Lashbrook, 5 T. B. Mon. (Ky.) 530, 17 AmD 98.

33. McCandless v. Mahelona, 12 Hawaii 258.

34. Nickrans v. Wilk, 161 Ill. 76, 43 NE 741. In this case, where one tenant in common in possession of the entire tract filed a bill to annul a prior decree of partition and to obtain a new partition, it was held to constitute a recognition of the title of his cotenants so as to interrupt his adverse holding.

35. Millay v. Millay, 18 Me. 387.

36. Deppen v. Bogar, 7 Pa. Super. 434; Dominion Impr., etc., Co. v. Lally, 24 Ont. L. 115, 2 OntWN 1224, 19 OntWR 462, 2 OntWN 155, 17 OntWR 151.
[a] **A parol acknowledgment of title in another** must be such as to show that the possessor does not intend to hold adversely but in future under the party making claim of right to the land against him, and must be such as to induce the latter to believe that he will so hold it. Sailor v. Hertzog, 4 Whart. (Pa.) 259. Declarations that a person in the adverse possession of land stated to a third person that he intended to go to A and purchase of A if he had title was held not to be necessarily an acknowledgment of A's title so as to interrupt his adverse possession. Miller v. Shaw, 7 Serg. & R. (Pa.) 129.

37. Lamb v. Foss, 21 Me. 240; Dill v. Westbrook, 226 Pa. 217, 75 A 252; Ingersoll v. Lewis, 11 Pa. 412, 51 AmD 536; Sailor v. Herzogg, 2 Pa. 182; Criswell v. Altemus, 7 Watts 565; Miller v. Keene, 5 Watts (Pa.) 348. See Doe v. Henderson, 3 U. C. Q. B. 486 (statute); McIntyre v. Canada Co., 18 Grant Ch. (U. C.) 367. Compare Cap Rouge Pier, etc., Co. v. Duchesnay, 44 Can. S. C. 130.
[a] **"Nothing can more effectually interrupt the running of the statute** than an express acknowledgment of the owner's title." Dill v. Westbrook, 226 Pa. 217, 227, 75 A 252.
[b] **Admission by bill in equity.**—Where defendant, as plaintiff in a former suit, admitted in her bill that defendant had title to land on which portions of a house and barn therein specified were located, it interrupted continuity of her adverse possession of land on which such portions then stood. Co-operative Bldg. Bank v. Hawkins, 30 R. I. 171, 73 A 617.
[c] **Acknowledgment held insufficient.**—Where the claimant set up title by adverse possession to a part of the bed of a river, a letter to the holder of the paramount title inclosing a check in payment for "use of your interest in Cap Rouge River this year" with an indorsement by the holder of the paramount title acknowledging receipt of the funds, "with the understanding that the navigation of the river is not to be prevented," is too vague to serve as an acknowledgment to defeat title of the claim. Cap Rouge Pier, etc., Co. v. Duchesnay, 44 Can. S. C. 130 [rev 13 Can. Exch. 116, Girouard and Idington, JJ., dissenting].

38. Port Townsend v. Lewis, 34 Wash. 413, 75 P 982.

39. Calkins v. Isbell, 20 N. Y. 147.

40. Nebraska R. Co. v. Culver, 35 Nebr. 143, 52 NW 886; Hull v. Chicago, etc., R. Co., 21 Nebr. 371, 32 NW 162.

41. St. Paul v. Chicago, etc., R. Co., 63 Minn. 330, 63 NW 267, 65 NW 649, 68 NW 458. See also Lake City v. Fulkerson, 122 Iowa 569, 98 NW 376 (holding that the owners of lots abutting on a street, who petition the city council to vacate it, are thereby estopped from claiming title thereto by adverse possession before the expiration of the requisite period from the time of filing such petition for acquiring title by adverse possession). Contra Stevens v. Shannon, 6 Oh. Cir. Ct. 142, 3 Oh. Cir. Dec. 386.
[a] **For other instances of recognition of title in another** see Sample v. Reeder, 107 Ala. 227, 18 S 214; Hesse v. Strode, 10 Ida. 250, 77 P 634; Campbell v. Shipley, 41 Md. 81; Devyr v. Schaefer, 55 N. Y. 446; New York v. Mott, 60 Hun 423, 15 NYS 22; Heard v. Connor, (Tex. Civ. A.) 84 SW 605; Lyman v. Little, 15 Vt. 576.

42. Rowland v. Williams, 23 Or. 515, 32 P 402.

43. Layton v. Bailey, 77 Conn. 22, 58 A 355 (holding that where the claimant piled lumber on the land in dispute to such a height as to annoy the adjoining owner and at the latter's request changed the manner of piling the lumber, it was held not necessarily a recognition of the latter's title to the lands).
[a] **For other acts held insufficient to constitute recognition** see Newsome v. Snow, 91 Ala. 641, 8 S 377, 24 AmSR 934; Layton v. Bailey, 77 Conn. 22, 58 A 355; Ray v. Barker, 1 B. Mon. (Ky.) 364; Mills v. Bodley, 4 T. B. Mon. (Ky.) 248; Truman v.

sary to prevent an escheat of the lands.[44] And the fact that the claimant caused a patent to the true owner to be recorded is not a recognition of the latter's title so as to interrupt the continuity of his adverse possession.[45]

[§ 144] **(c) Necessity for Writing.** In the absence of a statutory requirement the recognition of the superior title is not required to be in writing.[46] But in England and Canada the recognition of the superior title by the adverse claimant is expressly required by statute to be in writing.[47]

[§ 145] **i. Taking or Offering to Take Lease—(1) Taking Lease—(a) Statement of Rule.** The acceptance of a lease by the claimant before the statutory period has run is a waiver of adverse possession previously originated as against the person from whom the lease is accepted,[48] and gives a fresh point of departure under the statute.[49]

[§ 146] **(b) Extent and Limits of Rule.** The rule applies whether the lease is taken from the holder of the legal title[50] or from a stranger,[51] and it applies in the case of parol as well as of written leases.[52] It has also been held that it is immaterial that the lease is taken by the claimant without any intention of abandoning any rights he may have acquired by virtue of his prior possession,[53] or that the lease is without any monetary consideration on his part,[54] and that the mental capacity of the person in possession after executing a lease, thereby acknowledging another's ownership, cannot be inquired into as against an innocent purchaser.[55]

The taking of a lease by a husband who in the eye of the law is the head of the family is binding upon the wife in so far as it operates as a recognition of the title of the true owner.[56]

Lease procured by fraud. If the true owner by fraud should induce the adverse claimant to take the lease and without any intention on the part of the latter to become the tenant of the owner it would not interrupt the claimant's adverse possession.[57]

Lease of part. Where one of two adjoining owners was in the adverse possession of a part of the land of the other included within the fence of the former, the fact that he took a lease of the balance of the land of such other has been held not to be a recognition of the title of such other to the land of which he was in the adverse possession.[58] Under these circumstances the character of the possession over the two parcels of land is different and distinct.[59] So also where the claimant is in the adverse possession of a tract of land, part of which belongs to one person and part to another, the taking of a lease from one of the part belonging to him does not affect the adverse possession of the other part.[60]

The acceptance of a void lease, it has been held, raises a mere presumption of the recognition of the title of the lessor which may be negatived by conduct showing that no such recognition was intended.[61]

[§ 147] **(2) Offer to Take Lease.** An offer by the claimant to lease the land from another also breaks the continuity of the adverse possession as against such other.[62]

[§ 148] **j. Offer or Attempt to Purchase Out-**

Raybuck, 207 Pa. 357, 56 A 944; Harrington v. Wilkins, 13 S. C. L. 289; Barnett v. Templeman, (Tex. Civ. A.) 31 SW 78.

44. Paulo v. Malo, 6 Hawaii 390.

45. Oldig v. Fisk, 53 Nebr. 156, 73 NW 661.

46. Reeks v. Postlethwaite, Coop. t. Eld. 161.

47. Markwick v. Hardingham, 15 Ch. D. 339; Kirkwood v. Lloyd, 12 Ir. Eq. 585 [aff 11 Ir. Eq. 561]; Lucas v. Dennison, 13 Sim. 584, 36 EngCh 584; Doe v. Henderson, 3 U. C. Q. B. 486.

[a] **Under St. 3 & 4 Wm. IV c 27 § 14,** requiring the acknowledgment of title to be in writing, an answer by the person through whom a defendant in ejectment claims in the course of a chancery suit between him and plaintiff with reference to the same property, and containing an admission by him of the then plaintiff's title, is a sufficient acknowledgment of plaintiff's title to prevent the action from being barred. Goode v. Job, 1 E. & E. 6, 102 ECL 6.

48. U. S.—Bell v. North American Coal, etc., Co., 155 Fed. 712, 84 CCA 60; Davels v. Collins, 43 Fed. 31.

Cal.—Baldwin v. Temple, 101 Cal. 396, 35 P 1008; Thompson v. Felton, 54 Cal. 547; Abbey Homestead Assoc. v. Willard, 48 Cal. 614.

Ill.—Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088.

Ky.—Ray v. Barker, 1 B. Mon. 364; Boling v. Ewing, 9 Dana 76; Crockett v. Lashbrook, 5 T. B. Mon. 530, 17 AmD 98; Gay v. Moffitt, 2 Bibb 506, 5 AmD 633.

Mich.—Campau v. Lafferty, 50 Mich. 114, 15 NW 40.

Minn.—Olson v. Burk, 94 Minn. 456, 103 NW 335.

N. Y.—Corning v. Troy Iron, etc., Factory, 34 Barb. 485; Luce v. Carley, 24 Wend. 451, 35 AmD 637.

S. C.—Abel v. Hutto, 42 S. C. L. 42.

Tenn.—Free v. Fine, (Ch. A.) 59 SW 384.

Tex.—Burrell v. Adams, 104 Tex. 183, 135 SW 1156 [aff (Civ. A.) 127 SW 581]; Hermann v. McIver, 51 Tex. Civ. A. 270, 111 SW 766; O'Connor v. Dykes, (Civ. A.) 29 SW 920. See Smith v. Adoue, (Civ. A.) 154 SW 258 (effect on wife's possession of taking of lease by husband from third person).

Wash.—Northern Pac. R. Co. v. George, 51 Wash. 303, 98 P 1126.

Wis.—Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019.

Ont.—Dominion Impr., etc., Co. v. Lally, 24 Ont. L. 115, 2 OntWN 1224, 19 OntWR 462, 2 OntWN 155, 17 Ont WR 151; Smith v. Keown, 46 U. C. Q. B. 163; Cooper v. Hamilton, 45 U. C. Q. B. 502.

[a] **Illustration.**—In trespass to try title it appeared that plaintiff and defendant were adjoining owners but that the boundary was in dispute. All of the land in question and other land belonging to plaintiff was east of a certain railway. Defendant inclosed the portion which he claimed to own, but, before the statute of limitations had run, plaintiff leased to defendant all of plaintiff's land east of the railway. It was held that from the time of taking possession under the lease defendant's possession ceased to be adverse to plaintiff. Hermann v. McIver, 51 Tex. Civ. A. 270, 111 SW 766.

49. Smith v. Keown, 46 U. C. Q. B. 163.

50. Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088; Campau v. Lafferty, 43 Mich. 429, 5 NW 648; Abel v. Hutto, 42 S. C. L. 42.

51. See cases infra this note.

[a] **An attornment by a tenant to a stranger claiming the land,** although it might be ineffectual to create the relation of landlord and tenant in consequence of an estoppel in favor of the landlord under whom he entered, would nevertheless take from the possession its adverse character. Russell v. Erwin, 38 Ala. 44; Custer v. Hall, 71 W. Va. 119, 76 SE 183.

52. Campau v. Lafferty, 43 Mich. 429, 5 NW 648.

53. Abbey Homestead Assoc. v. Willard, 48 Cal. 614. But see Broad v. Beatty, 73 Ark. 106, 83 SW 339.

54. Abbey Homestead Assoc. v. Willard, 48 Cal. 614.

55. Davels v. Collins, 43 Fed. 31.

56. Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088.

57. Bidwell v. Evans, 156 Pa. 30, 26 A 817.

[a] **Thus** in Bidwell v. Evans, supra, an instruction to the jury that if the lease which was taken from S, the true owner, by K, the adverse claimant, was made while K was in possession claiming the land as his own, not for the purpose of creating the relation of landlord and tenant between S and K but under pretense on the part of S that it was for the protection of K and under promise that S would perfect K's title by conveying to him any right S might have, it would not stop the running of the statute of limitations in favor of K as against S was held not to be erroneous.

58. Rabbermann v. Carroll, 207 Ill. 253, 69 NE 759; O'Flaherty v. Mann, 196 Ill. 304, 63 NE 727; Levy v. Yerga, 25 Nebr. 764, 41 NW 773, 13 AmSR 525; Tex v. Pflug, 24 Nebr. 666, 39 NW 839, 8 AmSR 231; Dixon v. Baty, L. R. 1 Exch. 259.

59. O'Flaherty v. Mann, 196 Ill. 304, 63 NE 727.

60. Williams v. Galveston, (Tex. Civ. A.) 58 SW 551.

61. Broad v. Beatty, 73 Ark. 106, 83 SW 339 (holding that, where a person, claiming to hold adversely land belonging to a municipality, appeared before the council to procure a lease which proved void and claimed a perfect title and rightful possession, but asked for the lease merely for the purpose of removing a cloud upon his title, there was no recognition of title in the municipality which would interrupt the continuity of his possession. This case involved, however, a controversy between the adverse claimant and another property owner to compel the removal by the former of structures from alleged public grounds).

62. Risher v. Madsen, 94 Nebr. 72, 142 NW 700; Horton v. Davidson, 136 Pa. 186, 19 A 934; Deppen v. Bogar, 7 Pa. Super. 434. But see Doe v. Hasson, 8 N. B. 451 (holding that a verbal offer to lease from the owner

standing Title. On the question whether an offer or attempt by the adverse occupant to buy an outstanding title will break the continuity of his possession the decisions show diversity of opinion. Some of the decisions hold or seem to hold without qualification that an attempt to buy the title or right of the true owner will operate to break the continuity of the possession.[63] Nevertheless the better view, and the one supported by the weight of authority, is that a mere offer by the adverse claimant to purchase an outstanding title or interest, whether of the true owner or of a third person, does not necessarily amount to such a recognition of title in another as will break the continuity of possession.[64] The rule of these decisions is that "each case will depend upon its own facts and circumstances, and the intention of the parties as to whether the fact of purchase is intended as an acknowledgment of the true title or a mere effort to extinguish an adverse claim."[65] If the offer or attempt is made not merely to quiet title and protect the claimant from litigation, it amounts to a recognition of the owner's title and will stop the running of the statute;[66] and on the other hand if it is made in order to quiet the claimant's title, and not as a recognition of the superiority of the title sought to be acquired and a desire to hold under it, there is no interruption of the running of the statute.[67] It has also been held that an attempt by the adverse occupant to purchase an interest consistent with and not opposed to his own rights will not arrest the running of the statute,[68] and mere negotiations not amounting to an offer to purchase should not, it seems, be regarded as an interruption.[69] The fact that a vendee who enters into possession without a deed demands a deed from his vendor is not an offer to purchase from the vendor or a recognition of the latter's title so as to interrupt his adverse possession.[70]

[§ 149] **k. Agreement to Purchase Outstanding Title.** It has been held that where the adverse claimant enters into a contract with the owner to purchase the land he thereby recognizes the title of the owner and interrupts his adverse possession,[71] but the entering into an agreement for the purchase of a part of the tract of land held adversely is not necessarily a recognition of the title of the owner to the remainder of the land so as to interrupt the adverse possession as to such part.[72]

[§ 150] **l. Purchase of Outstanding Claim or Interest—(1) In General.** With the exception of at least one decision in which it has been broadly ruled that the purchase of an outstanding title or interest by the adverse claimant interrupts the continuity of his possession,[73] it seems to be very generally conceded that an adverse occupant may purchase an outstanding title without thereby interrupting the continuity of his possession.[74] A person, it is said, may very well deny the validity of an adverse claim

is not an acknowledgment of title within the meaning of the statute).

[a] **Applications and extent of rule.**—(1) A letter written by one in possession of land to the attorney of other claimants, in which he offers to lease the land from them, is a recognition of that title so as to prevent him from claiming adverse possession, although he afterward held longer than the statutory period, when he does nothing to indicate that such possession is adverse. Horton v. Davidson, 135 Pa. 186, 19 A 934. (2) An owner dedicated a lake and park to the public, and the property was used by a city which had grown up around it as a public park. Defendant claimed the property under a deed executed in 1892, fenced the property, and charged admission. It was held that an attempt by defendant in 1896 to rent the property of the city was a sufficient recognition of the city's title by dedication to prevent the running of the statute of limitations prior to that date. Gillean v. Frost, 25 Tex. Civ. A. 371, 61 SW 345. (3) But in Doe v. Edmonds, 6 M. & W. 295, 299, where a party in possession of land, being applied to by the party claiming title to it to pay rent, and being offered a lease of it, wrote as follows: "Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have at length made up my mind to accede to the proposal you made, of paying a moderate rent, on an agreement for a term of twenty-one years," and the bargain subsequently went off, and no rent was paid nor lease executed, it was held that this letter was not an acknowledgment of title.

62. Ky.—Gay v. Moffitt, 2 Bibb 506, 5 AmD 633.
Me.—Moore v. Moore, 21 Me. 350.
N. M.—Chambers v. Bessent, 17 N. M. 487, 134 P 237.
N. Y.—Jackson v. Britton, 4 Wend. 507.
Tex.—Raley v. Sullivan, (Civ. A.) 159 SW 99.

64. Cal.—Montgomery, etc., Lumber Co. v. Quimby, 164 Cal. 250, 128 P 402.
Iowa.—Litchfield v. Sewell, 97 Iowa 247, 66 NW 104.
Mass.—Warren v. Bowdran, 156 Mass. 280, 31 NE 300.
Mich.—Chapin v. Hunt, 40 Mich. 595.
Mo.—Walbrun v. Ballen, 68 Mo. 164.
Nebr.—Webb v. Thiele, 56 Nebr. 752, 77 NW 56; Oldig v. Fisk, 53 Nebr. 156, 73 NW 661.
Oh.—McAllister v. Hartzell, 60 Oh. St. 69, 53 NE 715.
Tenn.—Headrick v. Fritts, 93 Tenn. 270, 24 SW 11.
Wis.—Clithero v. Fenner, 122 Wis. 356, 99 NW 1027, 106 AmSR 978.

65. Headrick v. Fritts, 93 Tenn. 270, 272, 24 SW 11 (per Wilkes, J.). And see cases supra note 64.

66. Pacific Mut. L. Ins. Co. v. Stroup, 63 Cal. 150; Central Pac. R. Co. v. Mead, 63 Cal. 112; Lovell v. Frost, 44 Cal. 471; Litchfield v. Sewell, 97 Iowa 247, 66 NW 104.

67. Mass.—Warren v. Bowdran, 156 Mass. 280, 31 NE 300.
Mo.—Walbrunn v. Ballen, 68 Mo. 164; Foster v. Evans, 51 Mo. 39.
Nebr.—Wrich v. Union Pac. R. Co., 77 Nebr. 48, 108 NW 178 [aff 208 U. S. 250, 28 SCt 599, 52 L. ed. 473]; Wiese v. Union Pac. R. Co., 77 Nebr. 40, 108 NW 175 [aff 208 U. S. 234, 28 SCt 294, 52 L. ed. 466].
N. Y.—Jackson v. Newton, 18 Johns. 355.
Oh.—McAllister v. Hartzell, 60 Oh. St. 69, 53 NE 715.
Pa.—Bannon v. Brandon, 34 Pa. 263, 75 AmD 655; Bell v. Hartley, 4 Watts & S. 32.
Tenn.—Headrick v. Fritts, 93 Tenn. 270, 24 SW 11.
Wis.—Tobey v. Secor, 60 Wis. 310, 19 NW 99.

[a] **Where plaintiff persisted in claiming title to land** by adverse possession, negotiations for a settlement of the dispute with the true owner, involving offers to purchase the strip from defendant, did not constitute a relinquishment of plaintiff's adverse rights to the land. Clithero v. Fenner, 122 Wis. 356, 99 NW 1027, 106 AmSR 978.

[b] **An attempt to acquire title from the United States** under the act of March 3, 1887, c 376 (24 U. S. St. at L. 556), enacted in behalf of bona fide purchasers of land excepted from the operation of a railroad land grant with the view of removing a cloud upon the title, is not an act of recognition or acknowledgment of a superior title, either in the United States or in the railroad company, which can operate to interrupt the continuity of an adverse possession. Missouri Valley Land Co. v. Wrich, 208 U. S. 250, 28 SCt 299, 52 L. ed. 473 [aff 77 Nebr. 48, 108 NW 178]; Missouri Valley Land Co. v. Wiese, 208 U. S. 234, 28 SCt 294, 52 L. ed. 466 [aff 77 Nebr. 40, 108 NW 175].

[c] **The promise of officers of a corporation to pay for land** occupied and used by it within the period of limitation is not an admission of title so as to prevent the running of the statute. The court said that a promise to pay for land, although evidence of the debt, is not inconsistent with a title in the possessor to the land, as, for instance, where title has been conveyed before payment is made of the purchase money. James v. Indianapolis, etc., R. Co., 91 Ill. 554.

68. Bean v. Bachelder, 74 Me. 202.

69. Chapin v. Hunt, 40 Mich. 595.

70. Missouri Valley Land Co. v. Wrich, 208 U. S. 250, 28 SCt 299, 52 L. ed. 473 [aff 77 Nebr. 48, 108 NW 178]; Missouri Valley Land Co. v. Wiese, 208 U. S. 234, 28 SCt 294, 52 L. ed. 466 [aff 77 Nebr. 40, 108 NW 175]; Newsome v. Snow, 91 Ala. 641, 8 S 377, 24 AmSR 934; Webb v. Thiele, 56 Nebr. 752, 77 NW 56.

71. Ky.—Gay v. Moffitt, 2 Bibb 506, 5 AmD 633.
Me.—Moore v. Moore, 21 Me. 350.
Minn.—Olson v. Burk, 94 Minn. 456, 103 NW 335.
Tex.—Texas, etc., R. Co. v. Speights, 94 Tex. 350, 60 SW 659 [rev (Civ. A.) 59 SW 572]; Cook v. Knott, 28 Tex. 85.
Ont.—Cahuac v. Cochrane, 41 U. C. Q. B. 436; Doe v. Bayley, 10 U. C. Q. B. 310.

72. Doty v. Jameson, 93 SW 638, 29 KyL 507.

73. Croan v. Joyce, 3 Bush (Ky.) 454. Compare Briscoe v. McGee, 1 A. K. Marsh. (Ky.) 189.

74. U. S.—Elder v. McClaskey, 70 Fed. 529, 17 CCA 251.
Ariz.—Singer Mfg. Co. v. Tillman, 3 Ariz. 122, 21 P 818.
Ark.—Price v. Greer, 89 Ark. 300, 116 SW 676, 118 SW 1009.
Cal.—Winterburn v. Chambers, 91 Cal. 170, 27 P 658; Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205.

of title and yet choose to buy his peace at a smaller price than be at great expense and annoyance in litigating it.[75] He has the right to quiet his possession and protect himself from litigation in any lawful mode that appears to him most advantageous and desirable.[76] The adverse occupant does not "rely upon his purchased title in preference to the one which he previously possessed. He joins the two together and possesses whatever title both may give him."[77] On the other hand it is also conceded that continuity of possession may be interrupted by the purchase of an outstanding claim or title.[78]

[§ 151] **(2) Interruption of Continuity against Former Owner—(a) Purchase of Tax Title.** In a considerable number of decisions it has been held that a purchase by an adverse occupant of the tax title to the land is not an interruption of the continuity of the possession as against the former owner,[79] unless the purchase is made for the owner under an agreement to lease the land or a portion thereof.[80] It has been held, however, that if the claimant purchases a tax certificate and accepts payment for the same for the record owner it is a recognition of his superior title.[81]

[§ 152] **(b) Purchase of Title from Third Person.** So in a number of other decisions it has been held that continuity of possession as against the rightful owner is not broken by purchase of some interest or title from a third person,[82] and that he is not estopped by such acceptance to deny that the title was in such third person, but that he may rely upon either or both sources of title.[83]

[§ 153] **(c) Purchase of Former Owner's Interest.** While it has been said that a purchase from the rightful owner of his interest or title prima facie divests the possession of its hostile character,[84] it is none the less true that where the claimant purchases title from the record owner with the intent of quieting title or preventing litigation the continuity of the possession will not be interrupted;[85] because as already shown he has the right to quiet his possession and protect himself from litigation in any lawful manner that he may see fit.[86] Nevertheless the purchase of the owner's interest by the adverse claimant may, in view of the circumstances attending the transaction, amount to a recognition of his title.[87]

[§ 154] **(3) Purchase of One Cotenant's Inter-**

Ill.—O'Neal v. Boone, 53 Ill. 35; Clark v. Peckenpaugh, 46 Ill. 11.

Mich.—Ripley v. Miller, 165 Mich. 47, 52, 130 NW 345, AnnCas1912C 952 and note [quot Cyc]; Chapin v. Hunt, 40 Mich. 595; Johnstone v. Scott, 11 Mich. 232.

Minn.—Dean v. Goddard, 55 Minn. 290, 56 NW 1060.

Mo.—Mather v. Walsh, 107 Mo. 121, 17 SW 755.

Nebr.—Oldig v. Fiske, 53 Nebr. 156, 73 NW 661; Omaha, etc., L. & T. Co. v. Hansen, 32 Nebr. 449, 49 NW 456.

N. Y.—Monnot v. Rudd, 139 App. Div. 651, 124 NYS 210 [aff 129 NYS 1136 mem]; Burhans v. Van Zandt, 7 Barb. 91 [rev 7 N. Y. 523, Seld. 31]; Northrop v. Wright, 7 Hill 476; Jackson v. Newton, 18 Johns. 355; Jackson v. Smith, 13 Johns. 406; Jackson v. Given, 8 Johns. 137.

Pa.—Owens v. Myers, 20 Pa. 134, 57 AmD 693.

Wis.—Meyer v. Hope, 101 Wis. 123, 77 NW 720.

[a] **Purchase of improvements.**—An occupant's buying of the improvements made on an interfering claim does not render his possession amicable to that interfering claim. Briscoe v. McGee, 1 A. K. Marsh. (Ky.) 189.

75. Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205; Ripley v. Miller, 165 Mich. 47, 52, 130 NW 345, AnnCas 1912C 952 and note [quot Cyc]; Oldig v. Fisk, 53 Nebr. 156, 73 NW 661. And see Price v. Greer, 89 Ark. 300, 116 SW 676, 118 SW 1009.

76. Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205; Bryant v. Prewitt, 132 Ky. 799, 117 SW 343; Mather v. Walsh, 107 Mo. 121, 17 SW 55; Omaha, etc., L. & T. Co. v. Hansen, 32 Nebr. 449, 49 NW 456.

77. Oldig v. Fisk, 53 Nebr. 156, 159, 73 NW 661. To same effect Wrich v. Union Pac. R. Co., 77 Nebr. 48, 108 NW 178 [aff 208 U. S. 250, 28 SCt 599, 52 L. ed. 473]; Wiese v. Union Pac. R. Co., 77 Nebr. 40, 108 NW 175 [aff 208 U. S. 234, 28 SCt 294, 52 L. ed. 466, and foll Oldig v. Fisk, supra].

78. Litchfield v. Sewell, 97 Iowa 247, 66 NW 104; Liggett v. Morgan, 98 Mo. 39, 11 SW 241; Jackson v. Sears, 10 Johns. (N. Y.) 435. And see Gray v. Richford, 2 Can. S. C. 431.

79. Cal.—Hayes v. Martin, 45 Cal. 559.

Mo.—Mather v. Walsh, 107 Mo. 121, 17 SW 755; Ridgeway v. Holliday, 59 Mo. 444.

Nebr.—Zweibel v. Myers, 69 Nebr. 294, 95 NW 597; Omaha, etc., L. & T. Co. v. Hansen, 32 Nebr. 449, 49 NW 456; Griffith v. Smith, 27 Nebr. 47, 42 NW 749.

N. Y.—Monnot v. Murphy, 207 N. Y. 240, 100 NE 742; Monnot v. Rudd, 139 App. Div. 651, 124 NYS 210 [aff 129 NYS 1136 mem].

Pa.—Bannon v. Brandon, 34 Pa. 263, 75 AmD 655.

Tex.—Converse v. Ringer, 6 Tex. Civ. A. 51, 24 SW 705.

Wash.—Silverstone v. Hanley, 55 Wash. 458, 104 P 767.

See Merritt v. Westerman, 165 Mich. 535, 131 NW 66.

[a] **"The taking of the tax certificate was but a recognition of the taxing power of the state.**—The respondent could have paid the taxes without recognizing a superior title, and we do not regard the acceptance of the certificate as having any greater force." Silverstone v. Hanley, 55 Wash. 458, 460, 104 P 767 (per Gose, J.).

80. Hayes v. Martin, 45 Cal. 559.

81. Zweibel v. Myers, 69 Nebr. 294, 95 NW 597.

82. O'Neal v. Boone, 53 Ill. 35; Clark v. Peckenpaugh, 46 Ill. 11; Coakley v. Perry, 3 Oh. St. 344; Owens v. Myers, 20 Pa. 134, 57 AmD 693.

[a] **Purchase of outstanding title as between grantor and grantee.**—A grantee in a deed holds adversely to the grantor and may strengthen his title from any other source without interrupting the continuity of his possession. Funkhouser v. Lay, 78 Mo. 458; Mattison v. Ausmuss, 50 Mo. 551.

[b] **Where the seller's title was not deraigned through a judgment** but from another source, the act of the buyer in purchasing his title is not a recognition of the buyer's title to the land under and by virtue of such judgment. Pendleton v. McMains, 32 Tex. Civ. A. 575, 75 SW 349.

83. Levi v. Mathews, 145 Fed. 152, 76 CCA 122.

84. Carpentier v. Small, 35 Cal. 346; Cook v. Clinton, 64 Mich. 309, 31 NW 317, 8 AmSR 816; Marsh v. Webb, 19 Ont. A. 564. See also Jensen v. Hunter, 5 Cal. Unrep. Cas. 83, 41 P 14.

85. Ariz.—Singer Mfg. Co. v. Tillman, 21 P 818.

Cal.—Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205.

Ky.—Anderson v. Proctor Coal Co., 128 SW 85.

Me.—Richardson v. Watts, 94 Me. 476, 48 A 180; Bean v. Bachelder, 74 Me. 202.

Mich.—Ripley v. Miller, 165 Mich. 47, 130 NW 345, AnnCas1912C 952 and note.

Minn.—Dean v. Goddard, 55 Minn. 290, 56 NW 260.

Tenn.—Cooper v. Great Falls Cotton Mills Co., 94 Tenn. 588, 30 SW 353.

Wis.—Ovig v. Morrison, 142 Wis. 243, 125 NW 449.

[a] **The fact that the occupant may believe that he is thereby acquiring the true title** has been held not to affect the operation of the rule. Oldig v. Fisk, 53 Nebr. 156, 73 NW 661.

[b] **Purchase from heirs of former owner.**—Where a party has purchased a tax title, and has had possession of the premises purchased for the period necessary to perfect title, the fact that after getting a tax title he bought out the interests or claims of some of the former owner's heirs does not prevent his title from being adverse to them, as he could buy his peace without admitting their title. Houston Oil Co. v. Davis, (Tex. Civ. A.) 132 SW 808. To same effect Richardson v. Watts, 94 Me. 476, 48 A 180; Meyer v. Hope, 101 Wis. 123, 77 NW 720.

[c] **Deed from widow of owner of community property.**—The adverse possession of devisees of community property as against the widow of the testator is not destroyed by their acceptance of a deed from her, they continuing their adverse possession as it commenced, claiming title as devisees, and their acceptance of the deed being merely to avoid any possible question that might arise because of the grantor being the widow of the testator, and his wife when he acquired the property. Frey v. Myers, (Tex. Civ. A.) 113 SW 592.

[d] **If the disseizor takes from the disseizee a naked release of all his interest** in the land, no relations arise between them by which one is placed in subordination to the other, and the disseizor is not estopped from denying that the disseizee had any title in the land. Fox v. Widgery, 4 Me. 214.

86. See supra § 150.

87. Jackson v. Sears, 10 Johns. (N. Y.) 435.

[a] **Where the adverse claimant takes a deed from the owner for less than the fee,** this will interrupt his prior adverse possession. Keith v. Keith, 80 Mo. 125; Gray v. Richford, 2 Can. S. C. 431.

[b] **Where the adverse claimant takes a deed from the owner and gives back a purchase money mortgage** this may operate as a recognition of the owner's title. Koons v.

est as Affecting Continuity of Possession against Other Cotenants. The fact that an adverse claimant in possession under color of title of land, the title to which is in tenants in common, takes a deed to the land from one of the tenants in common is not necessarily a recognition of the title of the other tenants in common so as to interrupt the adverse possession of the claimant as against such other cotenants.[88] This principle has been applied where the adverse claimant, after the death of the owner at the time of the disseizin, takes a deed from one of several coheirs.[89]

[§ 155] **m. Sales or Transfers—(1) By Claimant's Grantor.** The execution of a mortgage by a donor subsequently to the entry of the donee in possession does not change the character of the latter's possession nor operate to suspend the running of the statute in his favor.[90] Especially is this true where the donee had made valuable and lasting improvements and the mortgagee took the mortgage with notice of the donee's possession.[91]

[§ 156] **(2) By Persons Other than Claimant's Grantor.** Where an adverse occupant is in possession under color of title, the fact that the land was embraced in a deed to another person executed by a person other than the claimant's grantor is not sufficient to deprive him of his title.[92]

[§ 157] **(3) By Adverse Occupant—(a) In General.** Where land held adversely is sold by the adverse occupant before title in him has matured, this does not necessarily interrupt the running of the statute.[93] As shown in another connection the possessions of grantor and grantee may be united to make up the statutory period.[94] Nevertheless the conveyance must be followed by delivery of possession[95] and a reasonable time will be allowed for the purchaser to take possession before a break in the running of the statute will be declared.[96] Adverse possession is not interrupted by a conveyance of the premises where possession is retained and a mortgage is taken for the purchase money and subsequently foreclosed. Nor is it material that the foreclosure proceedings are defective.[97] It has also been held that where one who was holding land adversely procured a conveyance thereof to be made to another for his benefit and continued in possession under such deed, claiming that the grantee thereunder held the title so conveyed in trust for him, he was entitled to compute the time of his possession under the deed as a part of the time required by a statute providing that every suit to recover land as against any person having adverse possession and claiming under a deed duly recorded shall be instituted within five years.[98]

Severance of title. Where an adverse claimant of a tract of land in actual occupancy of a portion of it only before his possession had ripened into title by prescription sold and conveyed a part of that not

Steele, 19 Pa. 203; Chalifour v. Parent, 31 Can. S. C. 224.

[c] **Taking deed of part of tract from owner.**—(1) Where a claimant in possession of a large tract under color of title purchases a great part thereof from the owner, this may constitute a recognition of the owner's title to the whole tract so as to interrupt his adverse possession of the remainder of the tract. Ingersoll v. Lewis, 11 Pa. 212, 51 AmD 536; Hughes v. Wright, (Tex. Civ. A.) 97 SW 525 [rev on other grounds 100 Tex. 511, 101 SW 789, 123 AmSR 827, 11 LRANS 643]. (2) Thus where possession of land was taken under a deed from one having no title, and afterward the grantee received a deed from the owner of a large part of the same tract, it was held that it was a question for the jury whether such grantee did not intend thereby to yield and abandon his possessory title to the whole tract on thus obtaining a perfect title to a large part of it so as to interrupt his adverse possession. Schwartz v. Kuhn, 10 Me. 274, 25 AmD 239. (3) A fortiori the rule will apply where the deed taken contains an express reservation of the rest of the tract. Olwine v. Holman, 23 Pa. 279.

88. U. S.—Elder v. McClaskey, 70 Fed. 529, 17 CCA 251 [rev 47 Fed. 154].

Cal.—Adams v. Hopkins, 69 P 228; Winterburn v. Chambers, 91 Cal. 170, 27 P 658; Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205; Carpentier v. Small, 35 Cal. 346. See however Carpentier v. Mendenhall, 28 Cal. 484, 87 AmD 135.

Conn.—Bryan v. Atwater, 5 Day 181, 5 AmD 136.

Hawaii.—Smith v. Hamakua Mill Co., 13 Hawaii 717; Mahukalilili v. Hobron, 5 Hawaii 104.

Me.—Richardson v. Watts, 94 Me. 476, 48 A 180; Fox v. Widgery, 4 Me. 214.

Mich.—Cook v. Clinton, 64 Mich. 309, 31 NW 317, 8 AmSR 816.

Minn.—St. Paul v. Chicago, etc., R. Co., 45 Minn. 387, 48 NW 17.

N. Y.—Northrop v. Wright, 7 Hill 476; Jackson v. Smith, 13 Johns. 406.

Oh.—Coakley v. Perry, 3 Oh. St. 344.

Tenn.—Cooper v. Great Falls Cotton Mills Co., 94 Tenn. 588, 30 SW 853.

Tex.—Lewis v. Terrell, 7 Tex. Civ. A. 314, 26 SW 754; Converse v. Ringer, 6 Tex. Civ. A. 51, 24 SW 705.

Compare Parker v. Merrimack River Locks, etc., 3 Metc. (Mass.) 91, 37 AmD 121.

89. Elder v. McClaskey, 70 Fed. 529, 17 CCA 251 [rev 47 Fed. 154]; Mahukalilili v. Hobron, 5 Hawaii 104; Richardson v. Watts, 94 Me. 476, 48 A 180; Cook v. Clinton, 64 Mich. 309, 31 NW 317, 8 AmSR 816.

90. Schafer v. Hauser, 111 Mich. 622, 625, 70 NW 136, 66 AmSR 403, 35 LRA 835 and note (where it was said by Moore, J.: "We cannot subscribe to the contention that a mortgagee can assert a right against one in possession of land holding adversely that could not be asserted by the mortgagor if the mortgage had not been made. To do so would be to hold that the owner of the legal title could at any time suspend the running of the statute of limitations by simply executing a mortgage payable at some time in the future").

91. Lewis v. Lewis, 5 KyL 858.

92. Jones v. Graham, 80 Ga. 591, 5 SE 632.

93. Roberson v. Downing Co., 126 Ga. 175, 54 SE 1020; Hardy v. Riddle, 24 Nebr. 670, 39 NW 841.

[a] **Conveyance to person incompetent to take title.**—Where the statute of limitations has commenced to run against the owners of lands in the possession of another, a conveyance and delivery of possession by such adverse occupier to one incompetent to take title will not arrest the running of the statute against the owners. Title does not revert to the original owner merely because the grantee is incompetent. Myers v. McGavock, 39 Nebr. 843, 58 NW 522, 42 AmSR 627.

[b] **Grantor remaining in possession.**—The continuity of possession of real estate is not broken by a deed to a third party not the owner, executed by the person in possession who continues to remain in possession after execution of the deed. His possession will be regarded as that of the grantee. Viking Refrigerator, etc., Co. v. Crawford, 84 Kan. 203, 114 P 240, 35 LRANS 498 and note. Contra Dunn v. Taylor, (Tex. Civ. A.) 143 SW 311; Cocke v. Texas, etc., R. Co., 46 Tex. Civ. A. 363, 103 SW 407.

94. See supra § 720.

95. Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088; Ramsey v. Thomas, 140 Ky. 356, 131 SW 11; Holstein v. Adams, 72 Tex. 485, 10 SW 560; Boone v. Hulsey, 71 Tex. 176, 9 SW 581; Dunn v. Taylor, (Tex. Civ. A.) 143 SW 311. And see Taylor v. Breathitt Coal, etc., Co., 185 Fed. 854.

[a] **Application of rule.**—Where the original owner did not hold possession long enough to claim title it was incumbent on defendants claiming under him to supplement his possession by that of his vendee. It did not appear that they took actual possession or that the grantor's agent who was in possession continued to hold it for them as their tenant. The agent, not being in the actual possession of the land, sold to defendants' grantors. Defendants' grantors owned the land only a few days when they sold it to defendants, but they had nothing to show that they ever expected to take actual possession so as to raise the question as to whether they should be allowed a reasonable time to do this. Nor did it appear that they were acting as agents of defendants so as to connect defendants' possession with that of the original grantor. It was held that there was a complete break in the adverse possession of the land while it was owned by defendants' grantors. Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 21 SW 405.

96. Gary v. Woodham, 103 Ala. 421, 15 S 840; Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 21 SW 405. And see infra § 182.

97. Whitford v. Crooks, 54 Mich. 261, 20 NW 45.

98. Thomson v. Weisman, 98 Tex. 170, 174, 82 SW 503 [rev (Civ. A.) 78 SW 728] (in which it was said by Thompson, J.: "We can see no reason why the person in whom the title is may not as well hold the possession under the deed which conveys the title to his trustee as that a tenant, or an heir, should hold under a deed to his landlord or to his ancestor. If Williams, the trustee, had gone into

so occupied, his subsequent possession of the remainder did not inure to the benefit of his grantee.[99]

[§ 158] **(b) Sale of Improved Part of Tract.** Where the unimproved part of a tract of land is severed by sale from the improved part, limitations based on occupancy of the improved part cease to run, unless actual possession is taken of the unimproved part.[1]

[§ 159] **(4) By Vendee of Grantor Remaining in Possession.** Where a grantor remains in possession and holds adversely to his grantee, and before expiration of the statutory period the grantee sold the land to a third person who never recognized such possession and had no notice of the repudiation of the deed by the original grantor, the adverse possession of the latter was interrupted by such sale.[2]

[§ 160] **(5) Sales under Execution or Foreclosure against True Owner.** The continuity of an adverse claimant's possession is not broken merely by a sale under execution against the original owner to which he was not a party.[3] It is interrupted, however, by the levy of an execution and delivery of seizin to the creditor.[4] A purchaser of land at a foreclosure sale succeeds to the mortgagor's title and cannot bring suit and recover the land against a party in adverse possession after the lapse of the statutory period from the time the cause of action accrued to the mortgagor or to those under whom he claims.[5]

[§ 161] **(6) Mortgage by Former Owner.** If one is in adverse possession of land the continuity thereof is interrupted by a mortgage thereof by the true owner, where the claimant represents to the mortgagee that the land belonged to the person mortgaging it.[6]

[§ 162] **(7) Sales or Forfeitures for Taxes.** Where, during the running of the statute of limitations in favor of the adverse occupant of land, the land is forfeited to the state for taxes, the general rule is that continuity of possession is interrupted for the reason that the statute of limitations does not run against the state in the absence of some special provision to that effect.[7] However, such forfeiture does not interrupt the running of the statute where the state is by special provision subject to the operation thereof as well as private persons.[8] And continuity is not interrupted where the state never acquired any title under the tax proceedings.[9] So if an individual purchases at the tax sale, the better rule seems to be that the continuity of the claimant's possession is not interrupted thereby where the claimant remains in possession. The tax purchaser is disseized by the claimant's continued adverse possession.[10] Of course if the statutory period is complete before forfeiture to the state for taxes or sale to an individual for taxes such title will not be thereby affected.[11]

[§ 163] **(8) Forfeiture to State for Nonpayment of Interest on Purchase Price.** Where land held adversely is forfeited to the state for nonpayment of interest on the purchase price in accordance with a statute authorizing this procedure, title is thereby reinvested in the state, and the continuity of possession is interrupted because the state is not subject to the operation of the statute of limitations.[12]

[§ 164] **n. Execution of Lease of Premises by Claimant.** Continuity of adverse possession of land necessary to keep the statute of limitations running is not interrupted by the possession of one who occupies as a tenant of the alleged adverse possessor.[13] Whenever a person is prevented from exercising his legal remedy by some paramount authority the time during which he is thus prevented is not to be counted against him in determining whether the statute of limitations has barred his right, even though the statute makes no specific exception in favor of such case.[14]

[§ 165] **o. Interruption by Legal Proceedings—(1) Contests in United States Land Department.** The institution and pendency of a contest in the land department of the United States does not inter-

actual possession, that possession would have inured to the benefit of Thompson, the beneficiary; for a stronger reason the possession of the latter would sustain his own claim").

[a] **Retention of possession, after selling part not occupied,** of part previously occupied does not inure to the benefit of the grantee. Houston Oil Co. v. Dowden, 202 Fed. 714, 121 CCA 176.

99. Houston Oil Co. v. Dowden, 202 Fed. 714, 121 CCA 176.

1. Kirkpatrick v. Tarlton, 29 Tex. Civ. A. 276, 69 SW 179; Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 21 SW 405.

[a] **Reason for rule.**—The constructive possession being dependent upon the actual, the vendor in such case having parted with that which gave him actual possession of part of the tract, loses the constructive possession of the remainder unless he took actual possession of it. Cunningham v. Frandtzen, 26 Tex. 34.

2. Garst v. Brutsche, 129 Iowa 501, 105 NW 452.

3. Goodson v. Brothers, 111 Ala. 589, 20 S 443; Lamar v. Raysor, 41 S. C. L. 509; Moody v. Moeller, 72 Tex. 635, 10 SW 727, 13 AmSR 839; Kennon v. Miller, (Tex. Civ. A.) 143 SW 986 [dist Blum v. Rogers, 71 Tex. 668, 9 SW 595].

4. Clark v. Pratt, 55 Me. 546.

5. Le Roy v. Rogers, 30 Cal. 229, 89 AmD 88. Compare Stovall v. Haynes, 78 SW 895, 25 KyL 1789 (holding that where one claiming under a foreclosure sale under which no writ of possession has been issued sues for the land within fifteen years from the order for the deed, the widow of the mortgagor's heir, who has remained in possession, cannot successfully plead adverse possession, the heir having been a party to the foreclosure suit).

6. Boys v. Wood, 39 U. C. Q. B. 495.

7. Armstrong v. Morrill, 14 Wall. (U. S.) 120, 20 L. ed. 765 [aff 17 F. Cas. No. 9822]; Braxton v. Rich, 47 Fed. 178; Monroe v. Morris, 7 Oh. 262; Reusens v. Lawson, 91 Va. 226, 21 SE 347. See also Maxwell v. Higgins, 38 Nebr. 671, 57 NW 388. Compare Davels v. Collins, 43 Fed. 31.

[a] **Extent of rule.**—The fact that the true owner, by virtue of special statutory authorization, is subsequently permitted to redeem the land does not alter the rule. Armstrong v. Morrill, 14 Wall. (U. S.) 120, 20 L. ed. 765.

8. Harrison v. Dolan, 172 Mass. 395, 52 NE 513.

9. Merritt v. Westerman, 165 Mich. 535, 131 NW 66.

10. Harrison v. Dolan, 172 Mass. 395, 52 NE 513.

11. Jordan v. Higgins, 63 Tex. 150; Sellers v. Simpson, 53 Tex. Civ. A. 205, 115 SW 888; Reusens v. Lawson, 91 Va. 226, 21 SE 347.

12. Lawless v. Wright, 39 Tex. Civ. A. 26, 86 SW 1039.

[a] **Effect of statute authorizing reinstatement of claims.**—This is so notwithstanding another statute provides that in case of such forfeiture the purchasers may have their claims reinstated on their written request by paying the full amount due up to the time of reinstatement, since this statute "in no way weakens or affects the proposition that a forfeiture restores the land to the public domain and reinvests the title in the State." Lawless v. Wright, 39 Tex. Civ. A. 26, 29, 86 SW 1039.

13. Sherin v. Brackett, 36 Minn. 152, 30 NW 551; Fugate v. Pierce, 49 Mo. 441; Stettnische v. Lambe, 18 Nebr. 619, 26 NW 374. And as sustaining this doctrine see supra § 48.

[a] **Lease by administrator of occupant.**—If land held adversely is rented by the administrator of the occupant the possession is not thereby interrupted or abandoned. Southern Pac. R. Co. v. Whitaker, 109 Cal. 268, 41 P 1083; Northern Pac. R. Co. v. Pyle, 19 Ida. 3, 112 P 678; Fugate v. Pierce, 49 Mo. 441.

[b] **Application of rule.**—Where plaintiff claimed title to certain land by virtue of a land grant and defendant took possession and made application to enter it as a homestead, which was denied, and by successive appeals kept the matter in litigation in the land department for several years, at the end of which time the contest was decided for plaintiff, the time during which the contest was thus pending is not to be counted against plaintiff in determining whether the statute of limitations has barred his right to the land. St. Paul, etc., R. Co. v. Olson, 87 Minn. 117, 91 NW 294, 94 AmSR 693.

14. St. Paul, etc., R. Co. v. Olson, 87 Minn. 117, 91 NW 294, 94 AmSR 693.

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rupt the running of a state statute of limitations in favor of the occupant of the land.[15]

[§ 166] **(2) Unsuccessful Actions—(a) Against Adverse Claimant.** While it is the rule in some jurisdictions that the mere bringing of suit against the adverse claimant breaks the continuity of possession,[16] the decided weight of authority is that an unsuccessful action leading to no change of possession does not arrest the running of the statute of limitations,[17] and this is true whether the action is prosecuted to judgment[18] or compromised,[19] or whether the suit is voluntarily abandoned or dismissed for want of prosecution.[20] In the latter case this is especially true when it appears that the adverse claimant must ultimately prevail.[21] While the adverse possession of a defendant in ejectment during the pendency of the suit cannot ripen into an absolute title, yet the effect of the statute of limitations is neutralized only in respect of the particular suit and plaintiff therein, and after the determination of that suit, the statutory limitations having meanwhile expired, no subsequent action can be brought to question that title or possession.[22]

[§ 167] **(b) By Adverse Claimant.** Where a person in adverse possession of land brings suit to remove a cloud from title and is defeated, his rights as against strangers to the suit are not affected, and as to such strangers limitations continue to run.[23]

[§ 168] **(3) Judgment or Decree against Claimant without Change of Possession—(a) Judgment in Ejectment.** According to the weight of authority the mere recovery of a judgment in ejectment will not of itself stop the running of the statute of limitations. There must be an actual change of possession by virtue of such judgment,[24] and where plaintiff in ejectment neglects to enforce his judg-

15. Northern Pac. R. Co. v. Pyle, 19 Ida. 3, 112 P 678.

16. Woods v. Glos, 257 Ill. 125, 100 NE 516; Butler v. Secrist, 92 Nebr. 506, 138 NW 749; Butler v. Smith, 84 Nebr. 78, 120 NW 1106, 28 LRANS 436 (both holding that service of summons in ejectment arrests the running of limitations in favor of a defendant claiming by adverse possession, although the form of action is subsequently changed to a suit to redeem); McKeighan v. Hopkins, 19 Nebr. 33, 26 NW 614; Hopkins v. Crisp, (N. C.) 81 SE 1069; Illinois Steel Co. v. Kohnke, 151 Wis. 410, 138 NW 995 (where in referring to numerous cases cited by an unsuccessful appellant the court said: "It may be said that they are to the effect that a judgment in an action of ejectment against a tenant who is a party does not operate to deprive a landlord who is not a party of either his title or of his future right of possession. They do not hold that the commencement of an action against the tenant does not interrupt the running of the statute of limitations in favor of the landlord. The authorities passing upon this question directly are not numerous. The Texas court has passed upon it and held that where one person was holding possession of lands by his tenant, that possession ceased to be peaceable when the tenant was sued for possession. Continuing, the court said: 'A claimant of land who brings his action against the party whom he finds in possession thereby stops the running of limitation in favor of that party's landlord. There is such privity between the tenant and landlord that, for the purpose of stopping limitation, the suit against the tenant is as effectual as if brought against the landlord also.' Read v. Allen, 56 Tex. 176, 181. Other cases to the same effect are Stout v. Taul, 71 Tex. 438, 9 SW 329; Allen v. Read, 66 Tex. 13, 17 SW 115; Read v. Allen, 58 Tex. 380; Galbraith v. Howard, 11 Tex. Civ. A. 230, 32 SW 803, 807. A question closely akin to the one under discussion was before this court. The action was one to quiet title, plaintiff claiming to have been in possession of an interest in the premises by virtue of the occupancy of the land by a tenant. An action of ejectment had been commenced and prosecuted to judgment against the tenant by another claimant to the land, the landlord not being made a party to such suit. The plaintiff recovered judgment and the tenant against whom the action was brought then leased the premises from such plaintiff. The effect of the judgment was considered, and it was held that the possession was adversely and completely changed by virtue of the judgment, and that 'the landlord is, so far, bound by the judgment, notwithstanding the want of notice, though he is not bound as to the title, or future right of possession. The tenant who neglects to give notice violates his allegiance to his landlord, but that is only a matter between him and his landlord, and not one which can affect the party who has recovered possession from the tenant, except the recovery be collusive, or obtained by tampering with the tenant. It is the same as if the tenant had delivered over the possession wrongfully to another person. The landlord must bring an action of ejectment to recover it.' Stridde v. Saroni, 21 Wis. 173, 178. The court holds in this case that the judgment operates to change the possession from the landlord to the plaintiff in the action, although it is not conclusive as to title or future right of possession. If such is the effect of a judgment where the tenant only is made a party defendant, it would seem to follow logically enough that the commencement of the action to recover possession would interrupt the running of the statute of limitations in favor of the landlord"). And see Wilner v. Stearns, (Utah) 120 P 490 (holding that while the running of the statute in favor of one in adverse possession is arrested by the bringing against him of an action disputing his title, it is thereby arrested only for the purpose of that action and not for any other action subsequently brought, although by the same person).

17. U. S.—Moore v. Greene, 19 How. 69, 15 L. ed. 533.

Ala.—Doe v. Reynolds, 27 Ala. 364. See also Bradford v. Wilson, 140 Ala. 633, 37 S 295.

Cal.—Langford v. Poppe, 56 Cal. 73.

Ky.—Martin v. Hall, 152 Ky. 677, 684, 153 SW 997 [quot Cyc].

Or.—Barrell v. Title Guarantee Co., 27 Or. 77, 39 P 992.

Pa.—Workman v. Guthrie, 29 Pa. 495, 72 AmD 654.

Tex.—Bullock v. Smith, 72 Tex. 545, 10 SW 687.

Ont.—Laing v. Avery, 14 Grant Ch. (U. C.) 33; Doe v. Bennett, 21 U. C. Q. B. 405. Compare Young v. Hobson, 30 U. C. C. P. 431.

See also Cunningham v. Brumback, 23 Ark. 336 (where it was held that where adverse possession has been held for more than the statutory period the fact that there has been a protracted litigation in respect to it, the adverse party having the equitable title and a third party the legal title, does not remove the bar of the statute or prevent it from running until the legal is joined with the equitable title).

[a] **Inference in second action as to disposition of cause in prior action.**—Where an ejectment bill was filed in 1842, stating that plaintiff's alleged right to the land accrued in 1812, that a bill had been filed in 1824 to recover the property, and that an ejectment had been brought in 1832, which was stayed until plaintiff had paid the costs of the former ejectment, but not stating the result of the suit or action, it was held that it must be inferred that they had failed, and that they did not prevent the operation of the statute of limitations. Bampton v. Birchall, 5 Beav. 67, 49 Reprint 502.

18. See cases supra note 17.

19. Peden v. Crenshaw, (Tex. Civ. A.) 81 SW 369.

20. Cal.—Langford v. Poppe, 56 Cal. 73.

Ga.—Kile v. Fleming, 78 Ga. 1.

Ill.—Miller v. Pence, 132 Ill. 149, 23 NE 1030.

Iowa.—Mendenhall v. Price, 88 Iowa 203, 55 NW 321.

La.—Smith v. Gibbon, 6 La. Ann. 684.

Minn.—Holmgren v. Isaacson, 104 Minn. 84, 116 NW 205.

Pa.—Workman v. Guthrie, 29 Pa. 495, 72 AmD 654.

Tex.—Shields v. Boone, 22 Tex. 193.

Va.—Caperton v. Gregory, 11 Gratt. (52 Va.) 505.

Eng.—Dixon v. Gayfere, 17 Beav. 421, 51 Reprint 1097; Sterling v. Penlington, 9 Mod. 247.

[a] **Dismissing suit as to one of several tracts in litigation.**—Where a bill which had been filed to settle all litigations concerning title to several tracts of land that had become confused by the nonpayment of mortgage money and adverse claims under junior grants among the tracts was withdrawn from litigation, it was held that a decree as to the remaining tracts in controversy did not prevent the possession of the tract withdrawn by an adverse claimant under color of title from ripening into a good title. Wellborn v. Finley, 52 N. C. 228.

21. In re Butrick, 185 Mass. 107, 69 NE 1044.

22. Hopkins v. Calloway, 7 Coldw. (Tenn.) 37.

23. Miller v. East, 91 Tex. 335, 43 SW 263 [mod 16 Tex. Civ. A. 274, 41 SW 396]. And see Welner v. Stearns, (Utah) 120 P 490 (holding that one in adverse possession does not arrest the running in his favor of the statute by commencing an action, under Comp. Laws [1907] § 3511, to quiet title in him; and while, as is necessary, he alleges that defendant claims an estate or interest in the property adverse to him, he does not admit his title, but alleges that her claim is baseless and without right, she not appearing).

24. U. S.—Elder v. McClaskey, 70 Fed. 529, 17 CCA 251; Smith v. Trabue, 22 F. Cas. No. 13,116, 1 McLean 87.

Ala.—Bradford v. Wilson, 140 Ala. 633, 37 S 295; Doe v. Reynolds, 27 Ala. 364.

Cal.—McGrath v. Wallace, 85 Cal. 622, 24 P 793; Carpenter v. Natoma Water, etc., Co., 63 Cal. 616.

Del.—Doe v. Stevens, 6 Del. 240.

ment within the period laid in his demise, his right of entry under that judgment is altogether gone.[25] The judgment can only give a right to enter during the continuance of the demise laid in the declaration for which the judgment was rendered, and after the demise has expired the right to enter upon the land in virtue of the judgment no longer exists.[26]

[§ 169] **(b) Judgment in Forcible Entry and Detainer.** Likewise a recovery in forcible entry and detainer by the owner against the adverse claimant is not effective to interrupt the adverse possession where no possession was taken or attempted to be taken under the judgment.[27]

[§ 170] **(c) Judgment in Trespass to Try Title.** Where the judgment in an action of trespass to try title is final as an adjudication of the title to the land, it has been held that it operates as a suspension of the statute of limitations,[28] and the fact that the judgment was rendered by agreement does not affect the operation of the rule.[29] But where the court is without jurisdiction the judgment will not interrupt the continuity of possession.[30]

[§ 171] **(4) Miscellaneous Decrees, Judgments, and Orders.** The continuity of adverse possession is broken by a decree requiring the occupant to convey the land even if the actual possession is not disturbed. The decree has the effect of a voluntary conveyance.[31] Likewise a decree of a competent court, finding in substance that claimant had no interest in the land, directing him to surrender possession, and enjoining him from asserting any claim of title, stops the running of the statute.[32] It has also been held that when proceedings are instituted between adjoining landowners to establish boundaries, a decree therein establishing the boundary interrupts an adverse possession by one beyond such established boundary.[33] Where one in adverse possession, but before lapse of the seven years necessary for title, commenced action against S to quiet title and obtained a default judgment, and after a lapse of the seven years B came into the action, for his own benefit, as grantee of S, by application to vacate the judgment on the ground that it was based on constructive service on S, and that she had not appeared in the action, the running of the statute in favor of plaintiff is not interrupted as it would have been by the timely appearance of B or his grantor.[34]

An order appointing a receiver for a corporation puts him in possession only of such property of the

Fla.—Gould v. Carr, 83 Fla. 528, 15 S 259, 24 LRA 130.

Kan.—Forbes v. Caldwell, 39 Kan. 14, 17 P 478.

Ky.—Martin v. Hall, 152 Ky. 677, 153 SW 997; Batterton v. Chiles, 12 B. Mon. 348, 54 AmD 539; Smith v. Hornback, 4 Litt. 232, 14 AmD 122.

Mo.—Dunn v. Miller, 75 Mo. 260.

N. Y.—Jackson v. Haviland, 13 Johns. 229.

N. S.—McKeen v. McKay, Russ. Eq. Cas. 121.

Ont.—Doe v. Minthorne, 3 U. C. Q. B. 423.

And see Shingler v. Bailey, 135 Ga. 666, 70 SE 563 (where it was said that the mere pendency of a lawsuit against one in adverse possession of land would not necessarily cause a breach in the continuity of the adverse possession).

[a] **Thus** a sheriff's entry upon land in executing an execution by laying down fence rails and his departure without disturbing possession is not such an interference with possession as will stop the running of limitations in favor of the one in possession. Martin v. Hall, 152 Ky. 677, 153 SW 997.

[b] **A judgment in ejectment which was perpetually enjoined, having been fraudulently obtained,** does not interrupt the continuity of an adverse possession. Harmon v. Dyer, 10 D. C. 292.

[c] **Judgment subsequently set aside.**—Where the United States obtained judgment canceling a patent on land, then held adversely by defendants, because of the patentee's fraud, which judgment was afterward set aside, the temporary revestiture of the title in the action by the judgment of cancellation was not, as against the patentee's successors, an interruption of the statute of limitations so as to break the continuity of defendants' adverse possession, their possession having been uninterrupted while the judgment was in force. Casey v. Anderson, 17 Mont. 167, 42 P 761.

[d] **Quashal of execution and restitution of possession.**—So proof that an adverse possession was interrupted and converted into an amicable and subordinate one by the execution of a habere facias possessionem, and the acceptance of a lease, etc., by the tenant, may be effectually rebutted by a record showing that the habere facias possessionem was quashed and restitution awarded after legal notice and an appearance of the adverse party. Boling v. Ewing, 9 Dana (Ky.) 76.

[e] **In Missouri** (1) it has been held that the adverse possession would be suspended during the life of the judgment in ejectment, although no writ of restitution was issued. Rogers v. Johnson, 168 SW 613; Sanford v. Herron, 161 Mo. 176, 61 SW 839, 84 AmSR 703; Estes v. Nell, 140 Mo. 649, 41 SW 940; Snell v. Harrison, 131 Mo. 495, 32 SW 37, 52 AmSR 642 and note [overr Mabary v. Dollarhide, 98 Mo. 198, 11 SW 611, 14 AmSR 639]. (2) But if the judgment expired or ceased for any reason to have an operative effect, the continuity of the possession would remain the same as if no action had been commenced. Snell v. Harrison, supra. (3) So it has been held that a judgment in ejectment does not suspend the running of limitations in favor of the party in possession not a party to the action nor in privity with a party thereto, and who thereafter continued in possession, although he subsequently took a conveyance from defendant in ejectment. Rogers v. Johnson, 168 SW 613.

[f] **In Pennsylvania** the language used in a decision of the supreme court (Brolaskey v. McClain, 61 Pa. 146) is broad enough to warrant the inference that the court considered that the rendition of a judgment in ejectment against the adverse claimant of itself operated to interrupt the running of the statute in his favor. Decisions rendered subsequently thereto by the superior court (Rook v. Greenewald, 22 Pa. Super. 641; Duffy v. Duffy, 20 Pa. Super. 25, 29) are in accord with the rule stated in the text and one of them, Duffy v. Duffy, supra [cit Cyc as authority] explains the Brolaskey case as follows: "In Brolaskey v. McClain, supra, Mr. Justice Williams says: 'If Wester and his heirs had the continued and adverse possession of the lot during all this time, it would be sufficient to give them a title under the statute; but, as we have already seen, Richard Peters brought an action of ejectment against Henry Wester in 1818 and recovered a verdict and judgment therein in 1825. This recovery stopped the running of the statute and, even if the Westers held adverse possession of the lot thereafter until the house was torn down in 1838, they acquired no title, under the statute of limitations.' If there were nothing else in this case and it stood alone in Pennsylvania, it would, of course, be conclusive upon us as to that question, but it was said with reference to all the facts of the case, which included the issuing of a hab. fa. pos. and a return by the sheriff, 'levied and sheriff received costs in a judgment in ejectment involving the same premises although against a different defendant.' It is, therefore, to be presumed that the sheriff did his duty and delivered the possession, as required by his writ, to the plaintiff in the ejectment and, if so, the case itself, whatever the language of the opinion judge may be, cannot be relied upon as authority for the contention of the appellee. With this single exception, the authorities in Pennsylvania seem to be in entire harmony with the general rule." After the above discussion of the Brolaskey case, the court in the instant case cites other Pennsylvania decisions which sustain or tend to sustain the general rule.

[g] **In West Virginia** a verdict and judgment in ejectment, by which plaintiff recovers the contested land, destroy all title in defendant at the date of the judgment. Defendant, by adverse possession beginning after judgment, may acquire title, but possession prior to the judgment cannot be considered. Wade v. McDougle, 59 W. Va. 113, 52 SE 1026.

25. Jackson v. Haviland, 13 Johns. (N. Y.) 229. And see cases supra note 24.

"This judgment [in ejectment], like all others, only concludes the parties, as to the subject-matter of it. Therefore, beyond the time laid in the demise, it proves nothing at all." Aslin v. Parkin, 2 Burr. 667, 668 (per Lord Mansfield, J.).

26. Smith v. Hornback, 4 Litt. (Ky.) 232, 233, 234, 14 AmD 122 (per Boyle, J.).

27. Forbes v. Caldwell, 39 Kan. 14, 17 P 478.

28. Reed v. Allen, 56 Tex. 180; Anderson v. Wynne, 25 Tex. Civ. A. 440, 62 SW 119; Bailey v. Laws, 3 Tex. Civ. A. 529, 23 SW 20.

29. Anderson v. Wynne, 25 Tex. Civ. A. 440, 62 SW 119.

30. Barrett v. McKinney, (Tex. Civ. A.) 93 SW 240.

31. Gower v. Quinlan, 40 Mich. 572.

32. Oberein v. Wells, 163 Ill. 101, 45 NE 294.

33. Heinz v. Cramer, 84 Iowa 497, 51 NW 173.

34. Welner v. Stearns, (Utah) 120 P 490.

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corporation as is at the time in its actual or constructive possession and does not interrupt the running of the statute of limitations in favor of an adverse claimant and occupant of land, the legal title to which is in the corporation, or change his status or rights in any way, either as to the portion of the land in his actual occupancy or the remainder of the tract claimed, as to which his possession is constructive.[35]

Judgment in favor of two tenants in common, one having possession of the land as against his cotenant, in an action of ejectment brought in their joint names, and entry of judgment therein gave a fresh right of entry to both and interrupted the prescription accruing in favor of the tenant in possession.[36]

[§ 172] **(5) Agreement to Abide by or Acquiescence in Judgment or Decree.** An agreement that defendant shall deliver possession to plaintiff, or consent to abide the judgment for dispossession, is equivalent to dispossession and interrupts the running of the statute.[37]

[§ 173] **(6) Judgment against Claimant and Change of Possession.** Where a judgment has been obtained against the adverse claimant, and a change of possession has been made in accordance therewith, the continuity of the running of the statute is broken,[38] and this is so, although the claimant subsequently regained and continued to hold possession.[39] A suit that eventually ripens into possession stops the running of the statute of limitations regardless of whether the entry thereunder is before or after the expiration of the statutory period.[40] In contemplation of law possession acquired by plaintiff under a judgment puts an end to the adverse possession of defendant as of the date of the institution of the suit.[41]

[§ 174] **(7) Judgment against Claimant after Completion of Statutory Period.** Where the claimant has been in adverse possession for the statutory period so as to confer on him a positive title, the fact that the original owner recovers in ejectment does not affect his title, and the claimant may recover possession from such original owner,[42] and it is immaterial that the judgment in ejectment was by confession[43] or by default;[44] and where a wife has remained in possession under color of title for the statutory period a recovery thereafter in ejectment by the original owner against her husband does not affect her title.[45]

[§ 175] **(8) Judgment in Relation to Other Land.** The running of the statute as to a tract of land of which one has adverse possession is not affected by a suit and adverse judgment against him, during such possession as to another tract.[46]

[§ 176] **(9) Judgment in Action to Which Claimant Was Not a Party.** The continuity of possession of one in the actual occupancy of land under claim of title is not broken so as to affect the running of the statute in his favor by a judgment of ouster rendered in an action of ejectment for the land, brought against one not at the time in privity with him in title or possession where he was not made a party and did not appear or employ counsel in such action.[47-48] This is on the theory that a decree or judgment has no legal efficacy against a

35. Houston Oil Co. v. Dowden, 202 Fed. 714, 121 CCA 176.

[a] **"The receivership interrupts the running of the statute** only as to property of the corporation, which is not at the time of the seizure in the adverse possession, actual or constructive, of another. Property of the latter character can only be taken out of the possession of the adverse possessor and into that of the court, through its receivers, by adversary proceedings against such adverse possessor." Houston Oil Co. v. Dowden, 202 Fed. 714, 717, 121 CCA 176.

36. Handley v. Archibald, 30 Can. S. C. 130 [aff 32 N. S. 1].

37. Mabary v. Dollarhide, 98 Mo. 198, 11 SW 611, 14 AmSR 639.

[a] **Thus** a recovery in ejectment by one having the better title, and the attorning of defendant's tenant to plaintiff, under the pressure of a writ of habere facias possessionem, are sufficient to break the continuity of the possession. Groft v. Weakland, 34 Pa. 304.

[b] **Acquiescence in decree.**—During the period for which defendant claimed to have held adverse possession of the land in controversy plaintiff instituted proceedings for the ascertainment of the boundary between his land and that of defendant; the latter was made a party and a decree was made establishing the boundary where plaintiff claimed it to be. There was evidence that defendant was satisfied with the result. It was held that the jury were warranted in finding that there had been an interruption of adverse possession. Heinz v. Cramer, 84 Iowa 497, 51 NW 173.

38. Ala.—Bishop v. Truett, 85 Ala. 376, 5 S 154.

Cal.—Breon v. Robrecht, 118 Cal. 469, 50 P 689, 51 P 33, 62 AmSR 247; McGrath v. Wallace, 85 Cal. 622, 24 P 793.

Del.—Doe v. Stephens, 6 Del. 31.

Ill.—Bradish v. Grant, 119 Ill. 606, 9 NE 332.

Ky.—Riley v. Rosch, 118 SW 321; Boling v. Ewing, 3 Dana 132; Jones v. Chiles, 2 Dana 25; Doe v. Lively, 1 Dana 60.

La.—Williams v. Leblanc, 14 La. Ann. 757.

Mich.—Millard v. Hayward, 107 Mich. 219, 65 NW 104.

Mo.—Kopp v. Blessing, 121 Mo. 391, 25 SW 757; Dunn v. Miller, 75 Mo. 260; Bradley v. West, 68 Mo. 69.

N. Y.—Brady v. Begun, 36 Barb. 533; Jackson v. Rightmyre, 16 Johns. 314 [aff 13 Johns. 367].

Or.—Barrell v. Title Guarantee Co., 27 Or. 77, 39 P 992.

Pa.—Potts v. Wright, 82 Pa. 498; Pederick v. Searle, 5 Serg. & R. 236.

Tex.—Muhle v. New York, etc., R. Co., 86 Tex. 459, 25 SW 607.

Ont.—Turley v. Williamson, 15 U. C. C. P. 538.

See also Fortner v. Fell, 74 Kan. 886, 88 P 66.

39. Riley v. Roach, (Ky.) 118 SW 321.

[a] **Effect of reversal.**—An ouster of the adverse claimant under a judgment in ejectment against him will interrupt his adverse possession, although such judgment is subsequently reversed on appeal, the action is dismissed, and the adverse claimant reënters under a writ of restitution. Gould v. Carr, 33 Fla. 523, 15 S 259, 24 LRA 130. See also Millard v. Hayward, 107 Mich. 219, 65 NW 104.

40. Barrell v. Title Guarantee Co., 27 Or. 77, 39 P 992.

41. Ala.—Beard v. Ryan, 78 Ala. 37; Agee v. Williams, 30 Ala. 636.

Cal.—Breon v. Robrecht, 118 Cal. 469, 50 P 689, 51 P 33, 62 AmSR 247; Spotts v. Hanley, 85 Cal. 155, 24 P 738.

Ky.—Hackworth v. Harlan, 19 SW 172, 14 KyL 76; Boling v. Ewing, 3 Dana 132; Jones v. Chiles, 2 Dana 25; Doe v. Lively, 1 Dana 60.

Mo.—Dunn v. Miller, 75 Mo. 260.

Or.—Barrell v. Title Guarantee Co., 27 Or. 77, 39 P 992.

S. C.—Hood v. Palmer, 41 S. C. L. 138.

Tex.—Moody v. Moeller, 72 Tex. 635, 10 SW 727, 13 AmSR 839; Upson v. Campbell, (Civ. A.) 99 SW 1129.

[a] **Applications of rule.**—(1) Where ejectment was brought within the statutory period, the facts that defendant remained in possession during the pendency of the proceedings, and that five years elapsed from the time he took possession until his eviction under the judgment, gave him no right to set up a title by prescription acquired by those remaining in possession. Breon v. Robrecht, 118 Cal. 469, 50 P 689, 51 P 33, 62 AmSR 247. (2) An executed judgment for plaintiff in ejectment, where suit has been commenced within the period of limitations, is conclusive against defendant of any asserted right founded merely upon his possession either at the time of the commencement of the action or at the time of the judgment. During the pendency of the action he can acquire no new right as against plaintiff by the mere fact that he remains in possession. During that period his right of possession is sub judice—before the judge awaiting judicial determination—and a judgment against him judicially determines that down to the date of its rendition his possession, as against plaintiff, has been wrongful. Breon v. Robrecht, supra. To same effect Hackworth v. Harlan, 19 SW 172, 14 KyL 76.

42. Pederick v. Searle, 5 Serg. & R. (Pa.) 236.

43. Pederick v. Searle, 5 Serg. & R. (Pa.) 236.

44. Jackson v. Dieffendorf, 3 Johns. (N. Y.) 269.

45. Collins v. Lynch, 157 Pa. 246, 27 A 721, 37 AmSR 723.

46. Parham v. Dedman, 66 Ark. 26, 48 SW 673. And see Wellborn v. Finley, 52 N. C. 228; Dumble v. Larush, 27 Grant Ch. (U. C.) 187. See supra § 168.

47-48. Rigney v. De Graw, 100 Fed. 213 [rev on other ground 107 Fed. 545]; Butts v. Caffall, (Tex. Civ. A.) 24 SW 373.

person not a party or privy to the suit in which it is pronounced.[49] It has also been held that one in the adverse possession of land who is not a party to a suit between others involving the land is not affected by the execution of the writ under such judgment by the sheriff's entry upon the land so as to stop the running of limitations in his favor, he continuing to hold the land.[50] So too it has been held that a suit against a lessee for the possession of the demised premises is not an interruption of the possession of the lessor.[51]

[§ 177] **(10) Constructive Possession as Affected by Suit to Quiet Title.** The constructive adverse possession created by the payment of taxes on vacant land is broken by the bringing of suit by the owner to quiet title to the land before the expiration of seven years from the date of the first payment.[52]

[§ 178] **p. Agreement to Arbitrate or Suspend Suit.** The statute of limitations ceases to run against a right of entry when the claimants agree that the matter in dispute shall be referred to an arbitrator, and that in the meantime the party who occupies the land shall continue in possession.[53] And where title is claimed by adverse possession up to a certain boundary an agreement to submit the disputed boundary to arbitration will defeat the operation of the statute.[54] So it has been held that an agreement between the adverse claimant and the true owner that no suit shall be brought for a certain length of time for the recovery of the land interrupts the running of the statute.[55] It has been held, however, that the fact that the claimant at the request of the owner dismisses a suit brought against a trespasser on the land and agrees not to sue others for similar trespasses does not necessarily interrupt the running of the statute.[56]

[§ 179] **q. Death of Former Owner.** The running of the statute of limitations in favor of persons in adverse possession of land is not suspended by the death of the former owner[57] in the absence of statute providing otherwise.[58] By the descent cast the heirs are placed exactly in the shoes of their ancestor; and, the statute having commenced running against him in his lifetime, it continues to run without intermission against his heirs,[59] and this too irrespective of any disabilities under which they may have been at the death of the ancestor.[60]

[§ 180] **r. Issuance to Another of Patent of Land Occupied.** If one is in possession, under color of title, of lands with known and visible boundaries, but, before possession is continued long enough to raise the presumption of a grant, a patent is issued to another, including a part of such land, the presumption of a grant is suspended as to the lappage if the party claiming by prescription is not in actual possession of the land included therein.[61] The presumption is not suspended, however, where the party claiming by prescription is in the actual possession of the land included in the lappage.[62]

[§ 181] **s. Absence of Occupant in Compliance with Military Orders.** The involuntary absence of one in possession of land caused by the issuance of a military order does not break the continuity of his possession[63] unless the order is operative against both the owner and the adverse claimant. In this case the continuity of possession will be deemed to have been interrupted because it operated to prevent the owner from taking possession as well as to cause the adverse claimant to relinquish it.[64]

[§ 182] **t. Temporary Vacancy Incident to Change of Owners or Tenants.** Periods of vacancy incident to or occasioned by change of possession or by the substitution in the possession of one tenant for another, which are not of longer duration than is reasonable in view of the character of the land and the uses to which it is adapted and devoted, do not constitute interruptions of possession destroying its continuity in legal contemplation when there is no intention to abandon the possession. They are but incidents of that continuous possession which the land inherently, and in relation to the manner of its use, admits of.[65] This rule proceeds upon the theory that notwithstanding such inter-

49. Martin v. Hall, 152 Ky. 677, 153 SW 997. And see Rigney v. De Graw, 100 Fed. 213, 214 [rev on other grounds 107 Fed. 545] (where it was said: "Judgments bind only the parties to the record and their privies in blood, or estate, or in law. No one is privy to a judgment whose succession to the rights of property thereby affected occurred previous to the institution of the suit").

[a] **An action of ejectment is not lis pendens as to one, not a party,** who has no notice of the action, actual or constructive, and who is in possession under a bond for deed from defendant in ejectment. And such possession will ripen into an adverse title so as to defeat a writ of possession issued on a judgment rendered therein after the party in possession had occupied the premises for a sufficient length of time to acquire title by prescription. Wallace v. Arnold, 10 SW 647, 10 KyL 752; Wallace v. Marquett, 88 Ky. 130, 10 SW 374, 10 KyL 750.

50. Martin v. Hall, 152 Ky. 677, 153 SW 997.

51. Scott v. Rhea, 21 Tex. 708.

52. Sibly v. England, 90 Ark. 420, 119 SW 820; Updegraff v. Marked Tree Lumber Co., 88 Ark. 154, 103 SW 606.

53. Devyr v. Schaefer, 55 N. Y. 446; Perkins v. Blood, 36 Vt. 273. See also Burrus v. Meadors, 90 Ala. 140, 7 S 469. Compare Anderson v. Canter, 10 Kan. A. 167, 63 P 285 (holding that, where the statute of limitations governing actions to recover the possession of lands, Code Civ. Proc. § 16, begins to run, it will not be suspended by the parties in interest entering into negotiations for a compromise).

54. Hunt v. Guilford, 4 Oh. 310.

55. Devyr v. Schaefer, 55 N. Y. 446; Dietrick v. Noel, 42 Oh. St. 18, 51 AmR 788.

56. East Hampton v. Kirk, 84 N. Y. 215, 38 AmR 505.

57. Iowa.—Hanson v. Gallagher, 154 Iowa 192, 134 NW 421.

Kan.—Davis v. Threlkeld, 58 Kan. 763, 51 P 226.

Ky.—Mounts v. Mounts, 155 Ky. 863, 159 SW 818; McIntire v. Funk, 5 Litt. 38.

Mich.—De Mill v. Moffat, 49 Mich. 125, 13 NW 387.

Tenn.—Haynes v. Jones, 2 Head 371.

Tex.—Appel v. Childress, 53 Tex. Civ. A. 607, 116 SW 129.

See also Massey v. Rimmer, 69 Miss. 667, 13 S 832.

[a] **Adverse possession by wife as against heirs of husband.**—Possession of land by a divorced wife of the owner claiming under a void order rendered in adverse proceedings allotting the land to her is not changed into possession under her dower right by the death of the husband pending the running of the statute of limitations. Jones v. Thomas, 124 Mo. 586, 590, 28 SW 76 (where the court said: "As her possession was, in its inception, adverse to her divorced husband and to the plaintiff, it continued to be adverse . . . and the fact that she became entitled to dower after the adverse possession began can not change the result").

[b] **Even though infants became entitled to a remainder in the property of the owner,** the statute will not be tolled by his death. Delano v. Air, 157 Ky. 369, 163 SW 216.

58. See statutory provisions.

[a] **Under a statute of Texas** death of the owner of land suspends, for one year after the death, or until an executor or administrator shall have qualified, the running of limitations in favor of one in possession of the land. Meurin v. Kopplin, (Civ. A.) 100 SW 984.

59. Haynes v. Jones, 2 Head (Tenn.) 371.

60. See infra § 195 et seq.

61. Kitchen v. Wilson, 80 N. C. 191; Brown v. Potter, 44 N. C. 461.

62. Hamilton v. Icard, 114 N. C. 532, 19 SE 607. See Whitley County Land Co. v. Powers, 146 Ky. 801, 144 SW 2.

63. Hamilton v. Boggess, 63 Mo. 233; La Frombois v. Jackson, 8 Cow. (N. Y.) 589, 18 AmD 463. See Yatco v. Gana, 13 Philippine 305 (interruption during rebellion and reconcentration period in Philippine Islands). See also Jackson v. Moore, 13 Johns. (N. Y.) 513, 7 AmD 398.

64. Holliday v. Cromwell, 37 Tex. 487.

65. U. S.—Fuller v. Fletcher, 44 Fed. 34.

Ala.—Beasley v. Howell, 117 Ala. 499, 22 S 989; Perry v. Lawson, 112 Ala. 480, 20 S 611; Gary v. Woodham, 103 Ala. 421, 15 S 840.

ruptions of actual occupancy there is in fact no actual interruption of such acts of possession as the land is reasonably susceptible of.[66] And on the other hand vacancies of unreasonable length in the occupancy will operate to interrupt the continuity of possession.[67] And it has been held that necessity of the continuous use of land to create title by adverse possession is not affected by difficulty in procuring tenants, but that he who would acquire land by limitation must perform the conditions prescribed by law.[68] In the notes hereto are set out decisions illustrative of the foregoing principles.[69]

[§ 183] **u. Temporary Breaks in Fences and Inclosures.** While in a general sense it is true that an inclosure relied upon to establish adverse possession must stand continuously and uninterruptedly for the statutory period,[70] mere temporary breaks in portions of an inclosure relied on to establish adverse possession, whether resulting from the acts or omissions of the claimants or of third persons, or from accidental causes such as fire or flood, do not constitute a breach in the continuity of possession when repaired within a reasonable time.[71] For such breaches to destroy continuity it is es-

Ark.—Bradbury v. Dumond, 80 Ark. 82, 96 SW 390.

Cal.—Botsford v. Eyraud, 148 Cal. 431, 83 P 1008 [quot and adopting text statement].

Ga.—Walker v. Steffes, 139 Ga. 520, 77 SE 580; Hansen v. Owens, 137 Ga. 708, 74 SE 244; Roberson v. Downing Co., 126 Ga. 175, 54 SE 1020; King v. Sears, 91 Ga. 577, 18 SE 830; Milliken v. Kennedy, 87 Ga. 463, 13 SE 635; Hudgins v. Crow, 32 Ga. 367; Jones v. Nunn, 12 Ga. 469.

Ill.—Thomas v. Burnett, 128 Ill. 37, 21 NE 352, 4 LRA 222.

Ky.—Martin v. Hall, 152 Ky. 677, 683, 153 SW 997 [quot Cyc]; Singleton v. School Dist. No. 34, 10 SW 793, 10 KyL 851; Turner v. Thomas, 13 Bush 518.

Mass.—Wishart v. McKnight, 184 Mass. 283, 68 NE 237.

Mich.—Rayner v. Lee, 20 Mich. 384.

Minn.—Costello v. Edson, 44 Minn. 135, 46 NW 299.

Mo.—Hubbard v. Swofford Bros. Dry Goods Co., 209 Mo. 495, 108 SW 15, 123 AmSR 488; Hunter v. Pinnell, 193 Mo. 142, 91 SW 472.

Nebr.—Richards v. Haskins, 72 Nebr. 195, 100 NW 151; Stettnische v. Lamb, 18 Nebr. 619, 26 NW 374.

N. H.—Antrim First Presb. Soc. v. Bass, 68 N. H. 333, 44 A 485.

Pa.—Thompson v. Kauffelt, 110 Pa. 209, 1 A 267; Sailor v. Hertzogg, 10 Pa. 296; Cunningham v. Patton, 6 Pa. 355.

S. C.—Mahoney v. Southern R. Co., Carolina Div., 82 S. C. 215, 64 SE 228; Wilson v. McLenaghan, 16 S. C. Eq. 35.

Tenn.—Cowan v. Hatcher, (Ch. A.) 59 SW 689; Hornsby v. Davis, (Ch. A.) 36 SW 159.

Tex.—De la Vega v. Butler, 47 Tex. 529; Elliott v. Mitchell, 47 Tex. 445; Whitehead v. Foley, 28 Tex. 1; Rushing v. Chandler, 2 Tex. Unrep. Cas. 600; Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 21 SW 405.

Vt.—Aldrich v. Griffith, 66 Vt. 390, 29 A 376; Webb v. Richardson, 42 Vt. 465; Patchin v. Stroud, 28 Vt. 394.

Wis.—Ovig v. Morrison, 142 Wis. 243, 125 NW 449.

Ont.—McLaren v. Morphy, 19 U. C. Q. B. 609.

"It is an elementary rule that where adverse possession of land has once been fully established, occasional absences or intervals of there being no person residing on the premises, such circumstance not being of a character to evidence abandonment, and there being no actual interruption by re-entry of the person originally dispossessed, do not change the nature of the adverse possession." Ovig v. Morrison, 142 Wis. 243, 246, 125 NW 449 (per Marshall, J.).

[a] **Application of rule.**—Under Code Civ. Proc. § 323, subds 3, 4, designating what shall constitute adverse possession, the abandonment of a lumberyard as a lumberyard, and its rental without a disturbance of possession, were held not a break in the continuity of possession which would defeat a title by prescription. One who owns a house for rental does not abandon or lose his possession every time it remains vacant during intervals between change in tenants. Montgomery, etc., Lumber Co. v. Quimby, 164 Cal. 250, 128 P 402.

66. Gary v. Woodham, 103 Ala. 421, 15 S 840; Botsford v. Eyraud, 148 Cal. 431, 83 P 1008 [quot and adopting text statement].

67. Terry v. Loudermilk, 158 Ky. 353, 164 SW 959 (ten or twelve years' break in possession); Dunn v. Taylor, 102 Tex. 80, 113 SW 265.

68. Dunn v. Taylor, 102 Tex. 80, 113 SW 265 [rev (Civ. A.) 107 SW 952]. Compare Hugh v. Pickering, 14 Pa. 297, 301 (where it was said: "In order to destroy the continuity of possession, the vacancy must not be merely occasional, such as occurs in every case where a party, from some cause, unable to obtain a tenant, shuts up his property for a short, or, indeed, for a long time").

69. See cases infra this note.

[a] **Change of possession by conveyance.**—(1) An interval of some days between the execution of a deed and the record thereof will not break the continuity of possession under the recorded deed where the adverse possession of both grantor and grantee is necessary to make up the statutory period of adverse possession. A reasonable time must ordinarily intervene between the date of the deed and its record and the change of possession in conformity with the title of record. De la Vega v. Butler, 47 Tex. 529; Jacks v. Dillon, 6 Tex. Civ. A. 192, 25 SW 645. (2) The conveyance of land by one in adverse possession under color of title and the failure of the grantee to enter into physical possession of the land for a year after the conveyance do not constitute an interruption of the continuity of possession in the absence of any physical abandonment of possession, and where the claim of those in adverse possession is indicated by a substantial inclosure of the land and the withholding of possession from the rest of the world. Botsford v. Eyraud, 148 Cal. 431, 83 P 1008. Compare Tegarden v. Carpenter, 36 Miss. 404 (where it was held that where the vendor vacated the premises for a short time before he sold to his grantee and before the latter took possession, and it did not appear that during this time either of them exercised any ownership over the land, the adverse possession was not continuous and the two possessions could be tacked together).

[b] **Change of possession by substitution of tenants.**—(1) If one and those claiming under him hold possession of land and make a crop on it every year for seven years, an interval of two or three months between one tenant's going out and another's coming in does not amount to such an interruption of the possession as to defeat the statute of limitations. Hudgins v. Crow, 32 Ga. 367. (2) In an action where adverse possession was pleaded it appeared that one who had been put in possession of the land in controversy in 1880 by the grantor of defendant, after beginning to make a crop, abandoned the land, without the landlord's knowledge, in May of that year, and that in the summer or fall of the same year the landlord put another tenant in possession. It was held that these facts did not necessarily constitute a break in the continuity of the landlord's possession. Beasley v. Howell, 117 Ala. 499, 22 S 989. (3) Where the evidence showed actual possession by the location and operation of a sawmill on a part of a tract of land held under color of title for part of the statutory period, followed by sale of the land and removal of the mill, then an interval of nine months and a resumption by the purchaser of actual possession for a term sufficient to complete the statutory period, in the absence of proof of acts indicating an intent to abandon it was not erroneous, on the question of whether there was title to the entire tract, to direct a verdict in favor of the prescription. Roberson v. Downing Co., 126 Ga. 175, 54 SE 1020. (4) Where the grantee in a deed constituting color of title went into possession and cleared and cultivated the land, but during one year it was occupied neither by the grantee nor by any tenant under him, but, although the fences were broken down in places, clear fields and houses remained, it was held that there was no such abandonment as broke the continuity of possession. Bradbury v. Dumond, 80 Ark. 82, 96 SW 390. (5) On the other hand it has been held that an interval of several years elapsing between the possessions of the incoming and outgoing tenants is a temporary vacancy within the meaning of the rule just stated. Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 S 43. (6) So it has been held that intervals of four or six months or even a year are "too great to be disregarded as the reasonable times allowed by the law for changes of occupants" where the possession itself was not of the clearest character and where at times when the land was not grazed there was not any indication of a continued dominion over it. Dunn v. Taylor, 102 Tex. 80, 113 SW 265.

[c] **Although in the interim between harvest and recropping no person was actually on the land,** and nothing was done thereon, yet, if such cropping continued from year to year, this would be a continuous and notorious occupancy within the definition above given. Cook v. Clinton, 64 Mich. 309, 31 NW 317, 8 AmSR 816.

[d] **Resumption of possession by landlord.**—Where the possession of land is left vacant for a short time upon the quitting of a tenant, the possession of the landlord will be deemed to have been uninterrupted if he takes possession within a reasonable time. Wilson v. McLenaghan, 16 S. C. Eq. 35.

70. Baldwin v. Durfee, 116 Cal. 625, 48 P 724.

71. Ark.—McComb v. Saxe, 92 Ark. 321, 122 SW 987.

Cal.—Jones v. Hodges, 146 Cal. 160, 79 P 869; Andrus v. Smith, 133 Cal. 78, 68 P 320; Baldwin v. Durfee, 116 Cal. 625, 48 P 724.

Md.—Morrison v. Hammond, 27 Md. 604.

sential that they be permitted to remain for such length of time as to show that the occupant did not intend to continue the exclusive appropriation of the premises.[72] To hold otherwise it has been said would be to place such a construction on the statute as "would sacrifice substance to shadow."[73] So the fact that fences are permitted to become dilapidated during a period when not necessary for the protection of crops does not destroy the continuity of possession,[74] and it has been held that the destruction of a division fence under claim of ownership does not break the continuity of the adverse possession of the adjacent owner.[75] On the other hand, where after inclosure of land the fence goes to decay and the land remains open for several years before the person making the inclosure again takes possession, it does not constitute continuous adverse possession.[76]

[§ 184] **v. Attornment of Claimant's Tenant to Another.** According to the weight of authority the continuity of possession by an adverse claimant is not broken by the attornment of his tenant to another without his knowledge or consent,[77] and much less can mere negotiations or disclaimers on the part of the tenant have the effect of breaking the continuity of the landlord's possession.[78] Nor will continuity of possession be interrupted by attornment to another, although known to the claimant, where he institutes successfully and without delay a proceeding to recover the possession from the tenant.[79] However, if the lessor has knowledge of the attornment and takes no steps to regain possession,[80] or if he elects to consider the attornment of the tenant as a disseizin,[81] or it is made in pursuance of a judgment, decree, or order of court,[82] or the person to whom the attornment is made enters peaceably upon the land in assertion of his title,[83] the continuity of possession is interrupted. It has also been held that where the true owner has no knowledge and after reasonable inquiry fails to obtain any knowledge that one in possession of his land to whom he executes a lease is occupying the land as tenant of another, the effect of the acceptance of the lease is to interrupt the

Miss.—Ford v. Wilson, 35 Miss. 490, 72 AmD 137.

Mo.—Crispen v. Hannavan, 50 Mo. 536; Menkens v. Ovenhouse, 22 Mo. 70.

N. Y.—East Hampton v. Kirk, 84 N. Y. 215, 38 AmR 506.

Tex.—Kane v. Sholars, 41 Tex. Civ. A. 154, 90 SW 937. See also Gunter v. Mead, 78 Tex. 634, 14 SW 562 (holding that a temporary break in the inclosure is not an interruption, if there is still an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claims of all others); Williams v. Rand, 9 Tex. Civ. A. 631, 30 SW 509 (holding that temporary breaks in fences or inclosures, relied upon to constitute adverse possession, will not stop the running of the statute of limitations if enough of the fence or inclosure remains to give notice of the extent of the adverse claim).

W. Va.—Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255.

See also Martin v. Hall, 152 Ky. 677, 684, 153 SW 997 [quot Cyc]; Davies v. Wickstrom, 56 Wash. 154, 161, 105 P 454 [cit Cyc].

[a] **To enable passage through premises.**—A partial removal at times of the fences by the adverse claimant to enable himself and others to pass through his premises does not destroy the continuity. Morrison v. Hammond, 27 Md. 604.

[b] **Temporary removal to facilitate the clearing of brush, etc.,** does not interrupt the running of the statute. Hill v. Edie, 49 Hun 605, 1 NYS 480.

[c] **Removal to protect from loss by flood or tide** does not constitute a breach in the continuity of possession. "The removal of the fences during the winter was to protect them from being swept away by the ice and tides. If they had not been removed, but had been left to be carried away each winter by the sea, the defendant could, we think, have replaced them in the spring, and would not have lost his right under the statute. By the voluntary removal of the fences he simply anticipated the action of the elements; and having restored them when the danger was passed, and maintained them during the season when the use of the beach for taking seaweed was practicable, the purpose of notice, upon which the statute proceeds, was met." East Hampton v. Kirk, 84 N. Y. 215, 221, 38 AmR 505.

[d] **That the wire fence inclosing land was occasionally broken by spring floods,** after which it would be repaired to hold cattle, as soon as the water went off, did not break the continuity of his possession. McComb v. Saxe, 92 Ark. 321, 122 SW 987.

[e] **Occasional breaking of the fence by cattle or cutting of its wires by others** letting cattle in does not interrupt possession, unless it is left so long unfit to keep cattle out as to justify belief that there is no intent to continue exclusive appropriation of the land. Sharrock v. Ritter, (Tex. Civ. A.) 45 SW 156.

[f] **That a river which formed one side of the inclosure of land at times went dry** would not, as a matter of law, show a want of adverse possession, since actual, visible, exclusive possession of the land would be sufficient, although at times there were breaks in the inclosure. Dunn v. Taylor, 42 Tex. Civ. A. 241, 94 SW 347.

[g] **A temporary interruption of actual residence,** caused by the unlawful and violent acts of strangers in tearing down the house and rendering the premises untenantable for the time being, will not prevent the statute from continuing to run where there is no adverse entry or offer to redeem, and where the claimant continues to exercise all acts of ownership and dominion over the premises of which the nature of the land and its condition will admit. Clark v. Potter, 32 Oh. St. 49.

72. Jones v. Hodges, 146 Cal. 160, 79 P 869.

73. Baldwin v. Durfee, 116 Cal. 625, 48 P 724.

74. Doe v. Anderson, 79 Ala. 209. See also Morrison v. Hammond, 27 Md. 604.

75. Donovan v. Bissell, 53 Mich. 462, 19 NW 146. See also Hopkins v. Robinson, 3 Watts (Pa.) 205 (where it was held that evidence of interruption resulting from the demolition of fences between the adverse holder and the person ousted does not break the continuity of the possession).

76. Settegast v. O'Donnell, 16 Tex. Civ. A. 56, 41 SW 84.

77. Ala.—Doe v. Reynolds, 27 Ala. 364. But see Russell v. Irwin, 38 Ala. 44.

Ga.—Sparks v. Conrad, 99 Ga. 643, 27 SE 764; Smith v. Granberry, 39 Ga. 381, 99 AmD 464.

Kan.—Ellsworth v. Eslick, 91 Kan. 287, 137 P 973 (under statute expressly providing that attornment of a tenant to a stranger shall be void).

Ky.—Middlesboro Waterworks Co. v. Neal, 105 Ky. 586, 49 SW 428, 20 KyL 1403; Turner v. Thomas, 13 Bush 518.

Mass.—Haynes v. Boardman, 119 Mass. 414.

Mo.—Sutton v. Casselleggi, 5 Mo. A. 111.

N. Y.—Donahue v. O'Connor, 45 N Y. Super. 278.

Tex.—Cobb v. Robertson, 99 Tex. 138, 87 SW 1148, 122 AmSR 609 [aff reh 86 SW 748]; Warren v. Fredericks, 76 Tex. 647, 13 SW 643; Hurley v. Lockett, 72 Tex. 262, 12 SW 212; Dawson v. Ward, 71 Tex. 72, 9 SW 106; Combs v. Stringer, (Civ. A.) 142 SW 668; Saxton v. Corbett, (Civ. A.) 122 SW 75; Hulett v. Platt, (Civ. A.) 109 SW 207. See also Louisiana, etc., Lumber Co. v. Alexander, (Civ. A.) 154 SW 233, 234 [cit Cyc].

W. Va.—Pickens v. Stouk, 67 W. Va. 422, 68 SE 354.

Eng.—Hovendon v. Annesley, 2 Sch. & Lef. 607.

Compare Illinois Steel Co. v. Budzisz, 115 Wis. 68, 87, 90 NW 1019. In this case in addition to circumstances sufficient to constitute an interruption by the true owner it was shown that he had obtained acknowledgments from the claimant's tenants that their occupancy was by permission of the true owner, such acknowledgments being in the form of leases. The court said that "the latter circumstance alone was amply sufficient to interrupt any existing adverse occupancy."

78. Cobb v. Robertson, 99 Tex. 138, 87 SW 1148, 122 AmR 690 [aff reh 86 SW 746].

79. Coyle v. Franklin, 54 Fed. 644, 4 CCA 538.

80. Custer v. Hall, 71 W. Va. 119, 76 SE 183.

81. Cobb v. Robertson, 99 Tex. 138, 86 SW 746, 87 SW 1148, 122 AmSR 609.

82. Turner v. Thomas, 13 Bush (Ky.) 518 (where it was said that the holding of the tenant so attorning will be treated as the possession of the person under whom he entered); Donahue v. O'Conor, 45 N. Y. Super. 278; Groft v. Weakland, 34 Pa. 304; Cobb v. Robertson, 99 Tex. 138, 87 SW 1148, 122 AmSR 609 [aff reh 86 SW 746].

[a] **Attornment under judgment.**—A recovery in ejectment by one having the better title and the attornment of defendant's tenant to plaintiff under pressure of a writ of habere facias possessionem break the continuity of the possession. Actual eviction of the tenant before accepting a lease from plaintiff in ejectment is not necessary. The surrender is equally involuntary where the attornment is the alternative of actual ouster. Groft v. Weakland, 34 Pa. 304.

83. Schlossnagle v. Kolb, 97 Md. 285, 54 A 1006.

running of the statute in favor of such other,[84] and that there is an interruption of continuity "when the attornment is to the owner of the property, and is obtained by him without any notice that the person in possession, who makes the attornment, is holding under one claiming adversely to him."[85]

[§ 185] **w. Absence of Claimant from State.** Since the disseizor or his successor in the adverse holding may continue the adverse possession by tenants or agents against whom the owner may have his action to recover possession, the absence from the state of such disseizor or his successor does not interrupt the running of the time within which an action must be brought, if he in fact retains control of the land.[86]

[§ 186] **x. Acquisition of Interest by Act of Law.** Where a claimant is in the adverse possession of land the fact that an interest in the land subsequently devolves on him by act of law does not interrupt his prior adverse possession.[87] But where an adverse claimant acquires the full legal title, of course his interest through adverse possession is merged in his superior right.[88]

[§ 187] **y. Revesting of Title in Government.** In the jurisdictions in which the statute of limitations does not run against the government, if the title to the land in the adverse possession of the claimant revests in the government the continuity of the adverse possession is broken.[89]

[§ 188] **z. Miscellaneous. Failure to record deed.** Where a deed in the chain of title under which one claims title by adverse possession under the five-year statute of limitations has not been duly recorded, the possession essential to constitute title by adverse possession is broken.[90]

Levy of execution. Where the claimant is in the adverse possession of the land of a judgment debtor, a levy of an execution thereon and delivery of seizin to the creditor interrupt the claimant's adverse possession.[91]

Payment of taxes. A purchaser at a tax sale may stop the running of the statute against him by subsequent payment of taxes on the premises.[92]

The intervention of curtesy, it has been held, operates as a suspension of the statute because the land does not descend so as to give a right of entry.[93]

What will not interrupt possession. On the other hand a conveyance by the holder of paper title to land of coal thereunder and the record of the deed do not interrupt the running of the statute as to a stranger to the transaction who is in possession.[94] So the acquisition of land held adversely before a county acquired title thereto is not interrupted by such acquisition.[95] The title of parties claiming by adverse possession is not affected by an involuntary interruption of their possession through the establishment of a wagon road by county authorities.[96] And an agreement by adjoining landowners to have an existing boundary line resurveyed is not such an admission of its incorrectness as will interrupt a claim of adverse possession by either.[97] It has also been held that the use of small tracts of land for gardens by trespassers or squatters,[98] the subsequent creation of a new county including a part of the land in dispute, where the claimant held under a patent and was in possession to the extent of his boundary,[99] voluntary insolvency proceedings on the part of the adverse occupant who claims the land as his homestead,[1] and the making of repairs to premises occupied by a church society with its permission,[2] do not constitute an interruption of adverse possession. And when an actual, open, and notorious occupancy of land is temporarily prevented by floods or fire, the possessor has a reasonable time after the flood or fire has ceased to resume his actual, open, and notorious possession of the land, without there being a discontinuance of his adverse possession during the time that his occupancy was so interrupted.[3]

[§ 189] **2. Effect of Interruption—a. Before Completion of Statutory Period.** An interruption of the possession of the adverse claimant at any time before the statutory period has elapsed at once arrests the running of the statute.[4] The possession of the true owner constructively intervenes and the previous possession is unavailing. If the adverse holder thereafter assumes possession, the statute of limitations runs in support of his claim only from the time of the resumption.[5]

84. Thompson v. Felton, 54 Cal. 547; Thompson v. Pioche, 44 Cal. 508.

85. Louisiana, etc., Lumber Co. v. Alexander, (Tex. Civ. A.) 154 SW 233, 234 [cit Cyc].

86. St. Paul, etc., R. Co. v. Minneapolis, 45 Minn. 400 note, 48 NW 22; St. Paul v. Chicago, etc., R. Co., 45 Minn. 387, 48 NW 17; McCaughn v. Young, 85 Miss. 277, 37 S 839; Hunton v. Nichols, 55 Tex. 217.

[a] **Foreign corporation.**—The question whether a foreign corporation was absent from the state so as to suspend the running of the statute in its favor, where it depends upon whether agents acting for it in certain classes of matters, but not in all, were "local agents" upon whom service could have been made, is to some extent one of fact, and its determination by the court is error. Chambliss v. Simmons, 165 Fed. 419, 91 CCA 369.

87. Jones v. Thomas, 124 Mo. 586, 28 SW 76 (holding that an adverse possession by a divorced wife of the owner, claiming under a void order rendered in the divorce proceedings assigning the land to her, is not interrupted and changed into possession under a dower right by the death of the husband pending the running of the statute of limitations. The court, in this case, said that it would have been otherwise, however, if her dower had been assigned to her in proceedings to which she was a party).

88. Patton v. Smith, 171 Mo. 231, 71 SW 187.

89. Armstrong v. Morrill, 14 Wall. (U. S.) 120, 20 L. ed. 765; Braxton v. Rich, 47 Fed. 178 [aff 158 U. S. 375, 15 SCt 1006, 39 L. ed. 1022]; Lawless v. Wright, 39 Tex. Civ. A. 26, 86 SW 1039; Reusens v. Lawson, 91 Va. 226, 21 SE 347; Doe v. McDonnell, Draper (U. C.) 374.

90. Cook v. Dennis, 61 Tex. 246; Porter v. Chronister, 58 Tex. 56; Dunn v. Taylor, (Tex. Civ. A.) 143 SW 311.

[a] **Failure to record deed in reasonable time** breaks continuity in Texas. Snow v. Letcher, (Civ. A.) 154 SW 355.

91. Clark v. Pratt, 55 Me. 546.

92. Dunnington v. Hudson, 217 Mo. 93, 116 SW 1083.

93. Jackson v. Johnson, 5 Cow. (N. Y.) 74, 15 AmD 433. But see Beattie v. Whipple, 154 Ill. 273, 40 NE 340.

94. Finnegan v. Stineman, 5 Pa. Super. 124.

95. McGrath v. Nevada, 188 Mo. 102, 86 SW 236.

96. Kirchhoffer v. Harris, 68 Wash. 316, 123 P 455.

97. Batv v. Elrod, 66 Nebr. 735, 743, 92 NW 1032, 97 NW 343 (in which it was said: "We do not think that one who merely agrees with his neighbor to have his land surveyed and his boundaries adjusted thereby impeaches his title or yields his claim to the ownership of the land. He may be certain of the correctness of his boundaries, and still, in order to satisfy his neighbor, consent to a formal survey") (per Lobingier, C.).

98. Batchelder v. Robbins, 95 Me. 59, 49 A 210.

99. Kentucky Union Co. v. Cornett, 112 Ky. 677, 66 SW 728, 23 KyL 1922.

1. Harris v. Duarte, (Cal.) 70 P 298.

2. Antrim First Presb. Soc. v. Bass, 68 N. H. 333, 44 A 485.

3. Thomas v. Spencer, 66 Or. 359, 133 P 822.

[a] **Other decisions in which the facts were held not to constitute an interruption** see Waggoner v. Wabash R. Co., 185 Ill. 154, 56 NE 1050; Richardson v. Sketchley, 150 Iowa 393, 130 NW 407; Canton Co. v. Baltimore, 106 Md. 69, 66 A 679, 67 A 274, 11 LRANS 129; Cobb v. Robertson, 99 Tex. 138, 86 SW 746, 87 SW 1148, 122 AmSR 609; Hamachek v. Duvall, 135 Wis. 108, 115 NW 634.

4. Cohasset v. Moors, 204 Mass. 173, 90 NE 978. And see supra § 113 and infra § 559.

5. U. S.—Armstrong v. Morrill, 14

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In other words he must begin de novo to obtain the benefit of the statute,[6] although the continuity of possession is broken only for a single day,[7] and continue such possession for the full statutory period.[8]

[§ 190] **b. After Completion of Statutory Period.** Where the adverse claimant has remained in the continuous adverse possession of the land for the full statutory period necessary to operate as a bar to the recovery of possession by the owner, a subsequent break in his actual possession does not in any way affect his rights; the continuity of possession has reference to the time the statute is running and is not necessary after the bar has attached.[9]

[§ 191] **c. During Period When Statute Was Suspended.** An interruption, although occurring during a period when the statute of limitations is suspended, is nevertheless sufficient to break the continuity of possession,[10] in the absence of any provision in the suspending statute that limitations should continue to run notwithstanding a break in the possession occurring during the designated period.[11]

[§ 192] **D. Time Requisite for Acquisition of Title by Adverse Possession—1. Statutory Provisions.** The time requisite for the acquisition of title by adverse possession is a matter regulated solely by the particular statute under which title is sought to be established. Practically every state has several statutes of limitations prescribing the time within which actions must be brought to recover land adversely held, and the period fixed by these statutes varies greatly according to the circumstances accompanying the adverse holding. Under statutes which make color of title an element of adverse possession the period is usually much shorter than in cases where color of title is not necessary to the acquisition of title by adverse possession, and some of the statutes prescribe a period even shorter than

Wall. 120, 20 L. ed. 765; Davels v. Collins, 43 Fed. 31.

Ark.—Brown v. Hanauer, 48 Ark. 277, 3 SW 27.

D. C.—Reid v. Anderson, 13 App. 30.

Ill.—Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088; Sullivan v. Eddy, 154 Ill. 199, 40 NE 482; Clark v. Lyon, 45 Ill. 388.

Ind.—Steeple v. Downing, 60 Ind. 478; McEntire v. Brown, 28 Ind. 347.

Ky.—Ashcraft v. Courtney, 121 SW 625.

Me.—Bullen v. Arnold, 31 Me. 583.

Md.—Casey v. Inloes, 1 Gill 430, 39 AmD 658.

Mass.—Bowen v. Guild, 130 Mass. 121.

N. J.—Johnston v. Fitzgeorge, 50 N. J. L. 470, 14 A 762; Cornelius v. Giberson, 25 N. J. L. 1.

N. C.—Brinkley v. Smith, 131 N. C. 130, 42 SE 566.

Or.—Thomas v. Spencer, 66 Or. 359, 133 P 822.

Pa.—Olwine v. Holman, 23 Pa. 279.

Tex.—Wm. M. Rice Inst. v. Goolsbee, (Civ. A.) 134 SW 397; Wilson v. Nugent, (Civ. A.) 91 SW 241; Wille v. Ellis, 22 Tex. Civ. A. 462, 54 SW 922; Boyd v. Miller, 22 Tex. Civ. A. 165, 54 SW 411; Hull v. Woods, 14 Tex. Civ. A. 590, 38 SW 256.

Va.—Reusens v. Lawson, 91 Va. 226, 21 SE 347; Stonestreet v. Doyle, 75 Va. 356, 40 AmR 731.

W. Va.—Wade v. McDougle, 59 W. Va. 113, 52 SE 1026; Core v. Faupel, 24 W. Va. 238.

Wis.—Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019.

Can.—Fox v. Ross, 3 DomLR 878, 3 OntWN 1347, 22 OntWR 244.

Ont.—Coffin v. North American Land Co., 21 Ont. 80; McDiarmid v. Hughes, 16 Ont. 570.

"When the continuity of the possession has been once broken it is not possible afterwards to take up its raveled threads and bind them together so as to make a continuous whole." Lawless v. Wright, 39 Tex. Civ. A. 26, 29, 86 SW 1039 (per Fly, J.).

[a] **Where the real owners are under disability on resumption of possession by the claimant** after a break in his possession and thereafter remain under disability, the statute does not commence to run again in favor of the claimant. Wille v. Ellis, 22 Tex. Civ. A. 462, 54 SW 922.

6. Reid v. Anderson, 13 App. (D. C.) 30; St. Paul v. Chicago, etc., R. Co., 63 Minn. 330, 63 NW 267, 65 NW 649, 68 NW 458, 34 LRA 184; Co-operative Bldg. Bank v. Hawkins, 30 R. I. 171, 73 A 617.

7. Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088; Bullen v. Arnold, 31 Me. 583; Olwine v. Holman, 23 Pa. 279.

8. Ark.—Brown v. Hanauer, 48 Ark. 277, 3 SW 27; Byers v. Danley, 27 Ark. 77; Sharp v. Johnson, 22 Ark. 79.

D. C.—Reid v. Anderson, 13 App. 30.

Fla.—Keech v. Enriquez, 28 Fla. 597, 10 S 91; Townsend v. Edwards, 25 Fla. 582, 6 S 212.

Ind.—Steeple v. Downing, 60 Ind. 478.

Ky.—Hibbard v. Wilson, 32 SW 1086, 17 KyL 980.

Md.—Armstrong v. Risteau, 5 Md. 256, 59 AmD 115.

Minn.—Olson v. Burk, 94 Minn. 456, 103 NW 335.

Mo.—Harrison v. Cachelin, 23 Mo. 117.

S. C.—Barker v. Deignan, 25 S. C. 252.

Tex.—Phillipson v. Flynn, 33 Tex. 580, 19 SW 136; Lawless v. Wright, 39 Tex. Civ. A. 26, 86 SW 1039.

W. Va.—Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255.

Wis.—Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019.

9. Ala.—Tennessee Coal, etc., Co. v. Linn, 123 Ala. 112, 26 S 245, 82 AmSR 108.

Ark.—Chicot Lumber Co. v. Dardell, 84 Ark. 140, 104 SW 1100; Parham v. Dedman, 66 Ark. 26, 48 SW 673; Jacks v. Chaffin, 34 Ark. 534.

Cal.—Webber v. Clarke, 74 Cal. 11, 15 P 431; Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205.

D. C.—Todd v. Kauffman, 19 D. C. 304.

Ky.—Walling v. Eggers, 104 SW 360, 31 KyL 1009; Sanders v. Barbee, 3 SW 528. See however Dorch v. Thompson, 12 B. Mon. 379 (construing the Kentucky act of 1809).

Minn.—Sage v. Rudnick, 67 Minn. 362, 69 NW 1096; Dean v. Goddard, 55 Minn. 290, 56 NW 1060.

Miss.—Geohegan v. Marshall, 66 Miss. 676, 6 S 502.

Mo.—Harper v. Morse, 114 Mo. 317, 21 SW 517; Allen v. Mansfield, 82 Mo. 688.

N. Y.—Sherman v. Kane, 86 N. Y. 57; Jackson v. Dieffendorf, 3 Johns. 269.

N. C.—Christenbury v. King, 85 N. C. 229.

N. D.—Stiles v. Granger, 17 N. D. 502, 117 NW 777.

Or.—Rowland v. Williams, 23 Or. 515, 32 P 402.

Pa.—Jones v. Hughes, 16 A 849; Hoffman v. Bell, 61 Pa. 444; Schall v. Williams Valley R. Co., 35 Pa. 191; Pederick v. Searle, 5 Serg. & R. 236; Bradford v. Guthrie, 3 Pittsb. 213.

S. C.—Mazyck v. Birt, 4 S. C. L. 155.

Tex.—Burton v. Carroll, 96 Tex. 320, 72 SW 581; Porter v. Miller, 84 Tex. 204, 19 SW 467; Mims v. Rafel, 73 Tex. 300, 11 SW 277; Branch v. Baker, 70 Tex. 190, 7 SW 808; Spofford v. Bennett, 55 Tex. 293; Thurmond v. Trammell, 28 Tex. 371, 91 AmD 321; Lamberida v. Barnum, (Civ. A.) 90 SW 698; MacGregor v. Thompson, 7 Tex. Civ. A. 32, 26 SW 649; Cuellar v. Dewitt, 5 Tex. Civ. A. 568, 24 SW 671.

Wash.—Kirchhoffer v. Harris, 68 Wash. 316, 123 P 455.

W. Va.—Summerfield v. White, 54 W. Va. 311, 46 SE 154; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255.

Wis.—Tobey v. Secor, 60 Wis. 310, 19 NW 99.

See Vickery v. Benson, 26 Ga. 582; Converse v. Dunn, 166 Ill. 25, 46 NE 747 (Illinois statute as to payment of taxes on unoccupied land).

See also infra § 559.

10. Malloy v. Bruden, 86 N. C. 251; Collier v. Couts, 92 Tex. 234, 47 SW 525 [rev (Civ. A.) 45 SW 485]; Hollingsworth v. Sherman, 81 Va. 668. Compare Cathcart v. Matthews, 91 S. C. 464, 74 SE 985, AnnCas1914A 36 (effect of adjudication of insanity).

[a] **Reason for rule.**—Provisions suspending the operation of statutes of limitation are intended for the relief of those against whom limitation might be pleaded and not for the benefit of those who might plead the statute. Hence it is not true that the effect of such provisions is to obliterate the period of suspension and that in applying the statute such period should be treated as if it never existed. Collier v. Couts, 92 Tex. 234, 47 SW 525.

[b] **Application of rule.**—In Hollingsworth v. Sherman, 81 Va. 668, 675, the effect of the Virginia act of 1866, March 2 (Code [1873] c 146 § 6), which provides that "the period between the 17th day of April, 1861, and the passage of this act, shall be excluded from the computation of the time within which, by the terms or operation of any statute or rule of law, it may be necessary to commence any action or other proceeding, or to do any other act to preserve, or to prevent the loss of any civil right," was involved, and the court in delivering the opinion said: "The statute was not enacted to create a wrong, but to preserve a right. And until their [defendants] wrongful entry upon the lands of the plaintiff in error had been ripened into a complete title, they had no claim which could avail them against the better title of the plaintiff. And this break in the continuity of their possession is not aided by the provisions of the statute in question."

11. Collier v. Couts, 92 Tex. 234, 47 SW 525 [rev (Civ. A.) 45 SW 485].

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that required when the claimant holds under color of title. As these statutes are subject to frequent change the investigator should in all cases consult the statutes of his own jurisdiction which are a much safer guide in respect of the period of possession necessary to give title by adverse possession than any decision, however recent.[12]

[§ 193] **2. Effect of Diminution of Statutory Period during Possession.** Where pending an adverse possession of land the period prescribed is shortened by statute, the adverse occupant gets the benefit of the statute.[13]

[§ 194] **3. Effect of Suspension of Statute during Possession—a. In General.** Where, during the period of adverse possession, the statute of limitations is suspended for a time, in computing the time necessary to perfect title by adverse possession the adverse occupant cannot avail himself of possession during the time the statute was suspended.[14] However, it has been held that provisions suspending the operation of the statute for a time are merely to prevent the suspended period from being taken into account in the computation of the time required by the statute to bar an action, and that such provision cannot operate to restore a disability which has been removed.[15]

[§ 195] **b. Effect of Disabilities Arising before or after Possession Commences—(1) Disabilities Affecting Former Owner—(a) Disability Arising before Possession Commences.** Where the statutes of limitations relating to adverse possession of land do not make any exception in favor of persons under disability the fact that the owner of the land was under disability at the time the adverse possession

12. For decisions in which the number of years requisite to acquire title by adverse possession was declared see Crittenden Cattle Co. v. Ainsa, 14 Ariz. 306, 127 P 733 (three years' statute); Sibly v. Gomillion, 76 Ark. 442, 91 SW 22 (two years' possession under donation deed sufficient); Newton v. Bateman, 65 Ark. 631, 47 SW 110 (two years' possession sufficient under donation deed); Nathan v. Dierssen, 146 Cal. 63, 79 P 739 (five years' possession necessary under Code Civ. Proc. § 321); Dangerfield v. Williams, 26 App. (D. C.) 508 (twenty years' possession before code went into effect); Winn v. Coggins, 53 Fla. 327, 42 S 897 (seven years' possession necessary under Laws of 1847–1848); Benedict v. Gammon Theological Seminary, 122 Ga. 412, 50 SE 162; Mason v. Odum, 210 Ill. 471, 71 NE 386, 102 AmSR 180 (twenty years' possession sufficient); Mayer v. C. P. Lesh Paper Co., 45 Ind. A. 250, 89 NE 894, 90 NE 651 (twenty years' possession sufficient); Wiggins v. Holley, 11 Ind. 2 (twenty years' possession sufficient); Ratliff v. Sowards, 152 Ky. 97, 153 SW 25; Ganucheau v. Monnot, 130 La. 463, 58 S 150; Gerrold v. Barnhart, 128 La. 1099, 55 S 688 (ten years' possession without title insufficient); Decuir v. Loeb, 118 La. 332, 42 S 955 (ten years' possession under title translation of property sufficient for possession in good faith); Ramos Lumber, etc., Co. v. Sanders, 117 La. 615, 42 S 158 (ten years' possession in good faith under title translation of property necessary); Moullerre v. Coco, 116 La. 845, 41 S 113; Ramos Lumber, etc., Co. v. Labarre, 116 La. 559, 40 S 898; Penn v. Prevost, 114 La. 1080, 38 S 865 (ten years' possession under title translation of property sufficient); Mortimer v. Hodgson, 105 La. 734, 30 S 104 (thirty years' possession sufficient to acquire title); Maryland Univ. v. Calvary M. E. Church South, 104 Md. 635, 65 A 398 (twenty years' possession sufficient); Turner v. Hart, 71 Mich. 128, 38 NW 890, 15 AmSR 243 (fifteen years' possession sufficient); Crain v. Peterman, 200 Mo. 295, 98 SW 600 (one year sufficient under Rev. St. [1899] § 4208); Bushey v. Glenn, 107 Mo. 331, 17 SW 969 (ten years necessary against one whose right of action for the recovery of military bounty land had accrued prior to act Aug. 1, 1866); Neilson v. Chariton County, 60 Mo. 386; Davis v. Wheeling, etc., Co., 26 Pa. Super. 364; Clemente v. Marasigan, 19 Philippine 120; Dexter v. Arzuaga, 4 Porto Rico Fed. 344; Soriano v. Arrese, 1 Porto Rico Fed. 198; Mitchell v. Hamilton, (S. C.) 82 SE 425 (ten years); Alderman v. McKnight, 95 S. C. 245, 78 SE 982; Burton v. Carroll, 96 Tex. 320, 72 SW 581 (ten years' possession sufficient); Frazier v. Houston Oil Co., (Tex. Civ. A.) 161 SW 20; Cole v. Webb, (Tex. Civ. A.) 149 S. W. 245; Bunnell v. Sugg, (Tex. Civ. A.) 135 SW 701 (three years' possession without color of title insufficient); Barrera v. Guerra, (Tex. Civ. A.) 122 SW 902 (three years' possession without color of title insufficient); Beale v. Johnson, 45 Tex. Civ. A. 119, 99 SW 1045 (three years' possession without color of title insufficient); Nolan v. Mundine, 34 Tex. Civ. A. 606, 79 SW 638 (five years' possession without color of title insufficient); Lackey v. Bennett, (Tex. Civ. A.) 65 SW 651 (five years' possession without color of title insufficient); Smith v. Kenney, (Tex. Civ. A.) 54 SW 801 (five years where possession under color of title sufficient); Funk v. Anderson, 22 Utah 238, 61 P 1006 (seven years' possession sufficient); Lusk v. Pelter, 101 Va. 790, 45 SE 333 (twenty years necessary under statute prior to July 1, 1830); Kincheloe v. Tracewells, 11 Gratt. (52 Va.) 587 (fifteen years' possession when unaided by descent case necessary until the act of March 30, 1837); Port Townsend v. Lewis, 34 Wash. 413, 75 P 982 (seven years' possession without color of title insufficient); Myers v. Greely, 9 U. C. C. P. 297. See Winters v. Powell, (Ala.) 61 S 96 (can be no prescription where there is no default in duty or delay in assertion of rights); Brooke v. Gibson, 27 Ont. 218; Cahuac v. Scott, 22 U. C. C. P. 551; Shaw v. Shaw, 8 U. C. C. P. 270. See also McCoy v. Witten, 237 Mo. 725, 141 SW 588; Carlock v. Willard, (Tex. Civ. A.) 149 SW 363; Cole v. Webb, (Tex. Civ. A.) 149 SW 245; Burnham v. Hardy Oil Co., (Tex. Civ. A.) 147 SW 330.

[a] **In Porto Rico** prescriptive title cannot be obtained in less than thirty years as against a registered owner unless holder claims in good faith and has written title. Dexter v. Arzuaga, 4 Porto Rico Fed. 344.

13. Pike v. Wilbur, 29 R. I. 202, 203, 69 A 849 (holding that under Gen. Laws [1896] c 205 § 2, changing the required term of adverse possession in order to vest title in the possessor from twenty to ten years, where a party claims adverse possession to certain land his title would not be affected by the fact that he had had such possession for more than ten years, although his possession began under the statute requiring twenty years' possession. "If the defendant has had ten years' uninterrupted, peaceable, adverse possession . . . it cannot defeat his title that he has had such possession for more than ten years. Radican v. Radican, 22 R. I. 405, 48 A 143; Union Sav. Bank v. Taber, 13 R. I. 683").

14. Ala.—Anniston City Land Co. v. Edmondson, 127 Ala. 445, 30 S 61.

Ga.—Harrison v. Young, 47 Ga. 302.

Ky.—Faith v. Owensboro, 145 Ky. 276, 140 SW 312 (statute providing that limitation shall not run against a municipality until written notice to such municipality).

N. C.—Kitchen v. Wilson, 80 N. C. 191; Benbow v. Robbins, 71 N. C. 338.

Tex.—Moore v. Loggins, (Civ. A.) 114 SW 183.

[a] **Application of rule.**—(1) In computing the statutory period of ten years necessary to complete the bar of the statute of limitations and to give title by adverse possession, the period of the war between the states, between Jan. 11, 1861, and Sept. 21, 1865, must be excluded. Anniston City Land Co. v. Edmondson, 127 Ala. 445, 30 S 61; Inglis v. Webb, 117 Ala. 387, 23 S 125. (2) The time during which the courts of the loyal states were closed to citizens of seceding states cannot be considered in making up title by adverse possession in one residing in a loyal state as against the true owner residing in a seceding state. Douthitt v. Stinson, 63 Mo. 268 [cit Hanger v. Abbott, 6 Wall. (U. S.) 532, 18 L. ed. 939]. But compare O'Neal v. Boone, 53 Ill. 35, 38 (which seems to be in conflict with this view. In this case it was held that the fact that plaintiff in ejectment voluntarily entered and remained within the Confederate lines, no matter for what purpose, after defendant's adverse possession had commenced did not suspend the running of the statute. The court said: "If he went there to join the public enemy, that would be an extraordinary reason for claiming that the operation of our laws should be suspended in order that he may lose no rights. If he went there on legitimate business, or as a loyal citizen our courts would never have been closed against his suit. But whatever his motive or his business, his act was purely voluntary, and that consideration disposes of his claim that the statute of limitations ceased to run").

[b] **Execution of trust not dependent on intervention of courts.**—The doctrine that the statute of limitations was suspended during the war does not apply to the case of a mere personal trust which could have been executed by the trustee without the intervention of a court. Where the trustee neglected for more than seven years, embracing the time of the war, to execute such a trust, it was held that the statute was not suspended as against one in the adverse possession of land which was the subject of the trust. Mayo v. Cartwright, 30 Ark. 407.

15. Ragsdale v. Barnes, 68 Tex. 504, 5 SW 68 (holding that where by the terms of a statute of limitations the disability of coverture pertains only to such women as were covert when the adverse possession began, a suspension of the statute will not enable one who was an infant before and during the period of such suspension and when the adverse possession began, and whose disability of infancy was removed by coverture before the operation of the statute was restored, to avoid the effect of limitations on account of such coverture).

commenced does not suspend the running of the statute in his favor during the period of disability.[16] However, most statutes of this character contain saving clauses in favor of persons under disability, and it is very generally held that where the owner is under disability when the adverse possession commences the statute does not run against him so long as the disability continues.[17] And it has been held that if several disabilities exist together the statute does not run until all are removed.[18] Nevertheless this is not true under all statutes relating to adverse possession. It has been held that disability of coverture cannot be added to that of infancy and thus prevent the running of the statute until the removal of the disability of coverture.[19] Even if existing laws permit the tacking of disabilities during the period of suspension of the statute of limitations, it is competent for the legislature to modify these laws and provide that one disability shall not supervene upon another.[20]

[§ 196] **(b) Disability Arising after Possession Commences.** If the disability accrues after the adverse possession commences, this disability has no effect on the running of the statute; only those disabilities which exist at the time the right of action accrues can be availed of.[21]

[§ 197] **(2) Disability Affecting Heirs of Former Owner.** If an adverse possession commences in the lifetime of the ancestor it will continue to run against the heir notwithstanding any existing disability on the part of the latter, where the right accrues to him or to her.[22] Although they are infants, married women, or persons of unsound mind, they are nevertheless bound to sue before the expiration of the statutory period just as much as their ancestor would have been had he lived.[23]

V. EXCLUSIVE POSSESSION

[§ 198] **A. Introductory Statement.** The rule is broadly stated in a very considerable number of decisions that exclusiveness of possession is a necessary element of title by adverse possession;[24] and

16. De Hatre v. Edmonds, 200 Mo. 246, 98 SW 744.

17. U. S.—Mercer v. Selden, 1 How. 37, 11 L. ed. 38.
Ala.—Bradford v. Wilson, 140 Ala. 633, 37 S 295.
Iowa.—Clarity v. Sheridan, 91 Iowa 304, 59 NW 52.
Ky.—Godsey v. Robinson, 4 KyL 890.
N. H.—Little v. Downing, 37 N. H. 355; Wallace v. Fletcher, 30 N. H. 434.
N. M.—Neher v. Armijo, 9 N. M. 325, 54 P 236.
S. C.—Fore v. Berry, 94 S. C. 71, 78 SE 706.
Tex.—Veeder v. Gilmer, 47 Tex. Civ. A. 464, 105 SW 331.
N. B.—Starkie v. Parks, 6 N. B. 556 (infancy of wife of owner does not affect statute as against suit by husband).
Ont.—In re Taylor, 28 Grant Ch. (U. C.) 640 (lands of infants).

[a] **In Kentucky** by express statutory provision no disability whatever can save the right to bring an action for the recovery of real property adversely held for a longer period than thirty years from the time the right of action first accrued. Stillwell v. Leavy, 84 Ky. 379, 1 SW 590, 8 KyL 321.

[b] **In North Carolina** (1) it is provided by statute that "in any action in which the defense of adverse possession is relied upon, the time computed as constituting such adverse possession shall not include any possession had against a feme covert during coverture, prior to 13 February, 1899." It has been held that the effect of this statute is to repeal the disability of coverture since Febr. 13, 1899, and that where defendant had taken actual possession of the locus in quo and subjected himself to a suit in ejectment by plaintiff to have his deed canceled as a cloud on title, and her right of entry and title were defeated by defendants' adverse possession for seven years under color of title before the action was commenced the plea of coverture will not avail her. Bond v. Beverly, 152 N. C. 56, 63, 67 SE 55. (2) However, this statute is not retroactive. "By its terms no adverse possession prior to 13 February, 1899, should be counted against a married woman." Norcum v. Savage, 140 N. C. 472, 474, 53 SE 289 (per Clark, J.).

[c] **Time within which suit must be brought.**—Owners who are under disability when their rights are first encroached on and the right of action first accrues have, by the statute, five years to bring action after removal of the disability, although the period of twenty years may not have expired. Wallace v. Fletcher, 30 N. H. 434.

[d] **The disability of one of several tenants in common or coparceners** does not avail their cotenants or coparceners, although once under the like disability, where they failed to sue to recover their respective interests in the land within the period limited for bringing suit after removal of disabilities. Each is barred by the lapse of such period, where the statute enables any person to sue for and recover any undivided share of a tract of land in which he has an interest. Pickens v. Stout, 67 W. Va. 422, 68 SE 354.

18. Jackson v. Johnson, 5 Cow. (N. Y.) 74, 15 AmD 433; Stowel v. Zouch, Plowd. 353, 75 Reprint 536.

19. Quick v. Rufe, 164 Mo. 408, 64 SW 102.

20. Ragsdale v. Barnes, 68 Tex. 504, 5 SW 68.

21. U. S.—Mercer v. Selden, 1 How. 37, 11 L. ed. 38.
Conn.—Griswold v. Butler, 3 Conn. 227.
Ga.—Arnold v. Limeburger, 122 Ga. 72, 49 SE 812.
Mass.—Allis v. Moore, 2 Allen 306.
N. H.—Wallace v. Fletcher, 30 N. H. 434.
N. Y.—Jackson v. Johnson, 5 Cow. 74, 15 AmD 433.
S. C.—Sutton v. Clark, 59 S. C. 440, 38 SE 150, 82 AmSR 848.
Tex.—Houston Oil Co. v. Griffin, (Civ. A.) 166 SW 902.

[a] **Application of rule.**—(1) If an owner of land has been disseized, his subsequent insanity does not prevent the adverse title from maturing by twenty years' adverse possession. Allis v. Moore, 2 Allen (Mass.) 306. (2) Under Rev. St. (1911) art 5711, providing that, when limitations begin to run, they shall continue notwithstanding supervening disability of the party entitled to sue, the appointment of a receiver of the owner of land did not stop the running of limitations in favor of an adverse claimant. Houston Oil Co. v. Griffin, (Tex. Civ. A.) 166 SW 902.

22. Conn.—Griswold v. Butler, 3 Conn. 227.
Del.—Lynch v. Cannon, 12 Del. 386, 32 A 391.
Fla.—Armstrong v. Wilcox, 57 Fla. 30, 49 S 41, 131 AmSR 1080; Doyle v. Wade, 23 Fla. 90, 1 S 516, 11 AmSR 331.
Ky.—Mounts v. Mounts, 155 Ky. 363, 159 SW 818; Rose v. Ware, 115 Ky. 420, 74 SW 188, 24 KyL 2321 [reh den 76 SW 505, 25 KyL 947]. Compare McIntire v. Funk, 5 Litt. 33.
Nebr.—McNeill v. Schumaker, 94 Nebr. 544, 143 NW 805; Keleher v. Kelly, 89 Nebr. 127, 130 NW 1032; Lyons v. Carr, 77 Nebr. 883, 110 NW 705.
N. Y.—Muller v. Manhattan R. Co., 124 App. Div. 295, 108 NYS 852 [aff 195 N. Y. 539, 88 NE 1126]; Becker v. Van Valkenburgh, 29 Barb. 319; Fleming v. Griswold, 3 Hill 85.
N. C.—Seawell v. Bunch, 51 N. C. 195.
Tenn.—Haynes v. Jones, 2 Head 371.
Tex.—Pease v. Bergen, 6 Tex. Civ. A. 639, 25 SW 803.
W. Va.—Pickens v. Stout, 67 W. Va. 422, 68 SE 354.
Eng.—Murray v. Watkins, 62 L. T. Rep. N. S. 796; Stowel v. Zouch, Plowd. 353, 75 Reprint 536; Garner v. Wingrove, 2 Eng. Ch. 233.
Ont.—Wigle v. Stewart, 28 U. C. Q. B. 427. Compare Rumrell v. Henderson, 22 U. C. C. P. 180.

[a] **Rule under Kentucky statute.**—(1) The act of 1809 does not bar the right of persons upon whom the title is cast at the time they are laboring under any disability, unless the statute has fully run against the ancestor; and this is true, although they may inherit it jointly with others laboring under no disability. But under the act of 1796 if, the ancestor dies after the statute commences, but before the right is barred, it descends upon his heirs. While laboring under such disability the right of the heirs to sue is saved. McIntire v. Funk, 5 Litt. 33. (2) But the disability must exist in the heirs at the time the right or title first descends to them. Clark v. Trail, 1 Metc. 35.

23. Lynch v. Cannon, 12 Del. 386, 32 A 391; Gray v. Richford, 2 Can. S. C. 431; Wigle v. Stewart, 28 U. C. Q. B. 427.

24. U. S.—Peabody v. U. S., 175 U. S. 546, 20 SCt 219, 44 L. ed. 267; Whitney v. U. S., 167 U. S. 529, 17 SCt 857, 42 L. ed. 263; Lowndes v. Huntington, 153 U. S. 1, 14 SCt 758, 38 L. ed. 615; Ward v. Cochran, 150 U. S. 597, 14 SCt 230, 37 L. ed. 1195; Deputron v. Young, 134 U. S. 241, 10 SCt 539, 33 L. ed. 923; Brownsville v. Cavazos, 100 U. S. 138, 25 L. ed. 574 [aff 4 F. Cas. No. 2,043, 2 Woods 293]; Armstrong v. Morrill, 14 Wall. 120, 20 L. ed. 765; Doswell v. De la Lanzo, 20 How. 29, 15 L. ed. 824; Tyee Consol. Min. Co. v. Langstedt, 136 Fed. 124, 69 CCA 548; Hatch v. Helm, 86 Fed. 436, 30 CCA 171; Larwell v. Stevens, 12 Fed. 559, 2 McCrary 311.
Ala.—Swindall v. Ford, 63 S 651; Alexander-City Union Warehouse, etc., Co. v. Central of Georgia R. Co., 62 S 745; Bowles v. Lowery, 62 S 107; Crowder v. Doe, 162 Ala. 151, 50 S 230, 136 AmSR 17; McCreary v. Jackson Lumber Co., 148 Ala. 247, 41 S 822; Jordan v. Jordan, 39 S 992; Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45; Beasley v. Howell, 117 Ala. 499, 22 S 989; Goodson v. Brothers, 111 Ala. 589, 20 S

that possession must be exclusive as well as hostile.[25] It may be observed in this connection that in the great majority of decisions this statement is found merely in the enunciation of the general rule that in order to acquire title by adverse possession the possession must be actual, continuous, open, and notorious, exclusive, and hostile. In the absence of other decisions stating the doctrine more specifically the legitimate inference would be that the exclusive possession meant is a possession exclusive of all persons whomsoever. This latter phase of the question has frequently been directly considered. And in many decisions it is either held or said that the possession must be exclusive of all persons whomsoever, and no qualification of this doctrine is recognized by them.[26] Nevertheless the decisions on

443; Boulo v. New Orleans, etc., R. Co., 55 Ala. 480.

Ark.—Pulaski County v. Stale, 42 Ark. 118.

Cal.—Unger v. Mooney, 63 Cal. 586, 49 AmR 100; Semple v. Cook, 50 Cal. 26; Thompson v. Pioche, 44 Cal. 508; Lovell v. Frost, 44 Cal. 471; Mattes v. Hall, 21 Cal. A. 552, 132 P 295.

Canal Zone.—Cruise v. Allen, 1 Canal Zone 36 (exclusive of tenant of original owner).

Colo.—Manitou v. International Trust Co., 30 Colo. 467, 70 P 757.

Conn.—Tracy v. Norwich, etc., R. Co., 39 Conn. 382.

Del.—Truitt v. Osler, 90 A 467; Pennington v. Lewis, 20 Del. 447, 56 A 378; Bartholomew v. Edwards, 6 Del. 17; Inskeep v. Shields, 4 Del. 345.

D. C.—Reid v. Anderson, 13 App. 30; Bradshaw v. Stott, 4 App. 527.

Ga.—Walker v. Steffes, 139 Ga. 520, 77 SE 580; McCook v. Crawford, 114 Ga. 337, 40 SE 225; Burch v. Burch, 96 Ga. 133, 22 SE 718; Rider v. Waters, 70 Ga. 716; Shiels v. Roberts, 64 Ga. 370; Hill v. Waldrop, 57 Ga. 134; Mitchell v. Rome, 49 Ga. 19, 15 AmR 669; Laramore v. Minish, 43 Ga. 282.

Ill.—Horn v. Metzger, 234 Ill. 240, 84 NE 893; Nelson v. Randolph, 222 Ill. 531, 78 NE 914; Clark v. Jackson, 222 Ill. 13, 78 NE 6; Roby v. Calumet, etc., Canal, etc., Co., 211 Ill. 173, 71 NE 822; Ely v. Brown, 183 Ill. 575, 56 NE 181; Travers v. McElvain, 181 Ill. 382, 55 NE 135; McCloskey v. Hayden, 169 Ill. 297, 48 NE 432; Harms v. Kransz, 167 Ill. 421, 47 NE 746; Illinois Cent. R. Co. v. Houghton, 126 Ill. 233, 18 NE 301, 9 AmSR 581, 1 LRA 213; McClellan v. Kellogg, 17 Ill. 498; Turney v. Chamberlain, 15 Ill. 271; Irving v. Brownell, 11 Ill. 402; Eckert v. Wellmuenster, 103 Ill. A. 490.

Ind.—Law v. Smith, 4 Ind. 56.

Iowa.—Willson v. Beck, 142 NW 78; Boltz v. Colsch, 134 Iowa 480, 109 NW 1106; Hempsted v. Huffman, 84 Iowa 398, 51 NW 17; Elliot v. Lane, 82 Iowa 484, 48 NW 720, 31 AmSR 504.

Kan.—Trezise v. Lacy, 22 Kan. 742.

Ky.—Burke v. Trabue, 137 Ky. 580, 126 SW 125; Owsley v. Owsley, 117 Ky. 47, 77 SW 397, 25 KyL 1186; Spencer Christian Church v. Thomas, 84 SW 750, 27 KyL 250; McConnell v. Wilborn, 24 SW 627, 15 KyL 596; Townsend v. Chenault, 17 SW 185, 13 KyL 319.

La.—Ribas v. Bennett, 5 La. 271.

Me.—Roberts v. Richards, 84 Me. 1, 24 A 425; Morse v. Williams, 62 Me. 445; Chadbourne v. Swan, 40 Me. 260; Putnam Free School v. Fisher, 34 Me. 172; Tilton v. Hunter, 24 Me. 29; Little v. Libby, 2 Me. 242, 11 AmD 68.

Md.—Hackett v. Webster, 97 Md. 404, 55 A 480; Baker v. Swan, 32 Md. 355; Morrison v. Hammond, 27 Md. 604; Gittings v. Moale, 21 Md. 135; Ridgely v. Bond, 17 Md. 14; Thistle v. Frostburg Coal Co., 10 Md. 129; Stump v. Henry, 6 Md. 201, 61 AmD 300; Armstrong v. Risteau, 5 Md. 256, 59 AmD 115; Casey v. Inloes, 1 Gill 430, 39 AmD 658.

Mass.—Atty.-Gen. v. Ellis, 198 Mass. 91, 84 NE 430, 15 LRANS 1120; Litchfield v. Ferguson, 141 Mass. 97, 6 NE 721; Bellis v. Bellis, 122 Mass. 414; Hittinger v. Eames, 121 Mass. 539; Cook v. Babcock, 11 Cush. 206; Drake v. Curtis, 1 Cush. 395; Sparhawk v. Bullard, 1 Metc. 95; Leach v. Woods, 14 Pick. 461; Hunt v. Hunt, 14 Pick. 374, 25 AmD 400; Bates v. Norcross, 14 Pick. 224; Pray v. Pierce, 7 Mass. 381, 5 AmD 59; Boston Mill Corp. v. Bulfinch, 6 Mass. 229, 4 AmD 120; Kennebeck Purchase v. Springer, 4 Mass. 416, 3 AmD 227; Kennebeck Purchase v. Call, 1 Mass. 483. See also Smith v. New York, etc., R. Co., 142 Mass. 21, 6 NE 842.

Mich.—Cass Farm Co. v. Detroit, 139 Mich. 318, 102 NW 848; Paldi v. Paldi, 95 Mich. 410, 54 NW 903; Marble v. Price, 54 Mich. 466, 20 NW 531; Sparrow v. Hovey, 44 Mich. 63, 6 NW 93; Yelverton v. Steele, 40 Mich. 538.

Minn.—Sherin v. Brackett, 36 Minn. 152, 30 NW 551; Washburn v. Cutter, 17 Minn. 361.

Miss.—McCaughn v. Young, 85 Miss. 277, 37 S 839; Louisville, etc., R. Co. v. Gulf of Mexico Land, etc., Co., 82 Miss. 180, 33 S 845, 100 AmSR 627.

Mo.—Brown v. Hartford, 173 Mo. 183, 73 SW 140; Kirton v. Bull, 163 Mo. 622, 63 SW 927; Brown v. Chicago, etc., R. Co., 101 Mo. 484, 14 SW 719; Robert v. Walsh, 19 Mo. 452.

Nebr.—Hanlon v. Union Pac. R. Co., 40 Nebr. 52, 58 NW 590; Smith v. Mount, 38 Nebr. 111, 56 NW 793; Smith v. Hitchcock, 38 Nebr. 104, 56 NW 791; Ballard v. Hansen, 33 Nebr. 861, 51 NW 295; Pettit v. Black, 13 Nebr. 142, 12 NW 841; Beer v. Dalton, 3 Nebr. (Unoff.) 694, 92 NW 593.

N. H.—Manchester v. Duggan, 75 N. H. 33, 70 A 1075; Little v. Downing, 37 N. H. 355; Waldron v. Tuttle, 4 N. H. 371.

N. J.—Foulke v. Bond, 41 N. J. L. 527.

N. M.—Johnston v. Albuquerque, 12 N. M. 20, 28, 72 P 9 [cit Cyc].

N. Y.—Kneller v. Lang, 137 N. Y. 589, 33 NE 555; Driggs v. Phillips, 103 N. Y. 77, 8 NE 514; Bridges v. Wyckoff, 67 N. Y. 130; Cahill v. Palmer, 45 N. Y. 478; Peo. v. Gloversville, 128 App. Div. 44, 112 NYS 387; Miller v. Platt, 12 N. Y. Super 272; Hindley v. Metropolitan El. R. Co., 42 Misc. 56, 85 NYS 561; La Tourette v. Decker, 18 NYS 840; Jackson v. Johnson, 5 Cow. 74, 15 AmD 433.

N. C.—Locklear v. Savage, 159 N. C. 236, 74 SE 347; Lindsay v. Austin, 139 N. C. 463, 51 SE 990; Gilchrist v. McLaughlin, 29 N. C. 310.

Oh.—Morehouse v. Burgot, 22 Oh. Cir. Ct. 174, 12 Oh. Cir. Dec. 163.

Okl.—Flesher v. Callahan, 32 Okl. 283, 122 P 489; Wade v. Crouch, 14 Okl. 593, 78 P 91.

Or.—Thomas v. Spencer, 66 Or. 359, 133 P 822; Silverton v. Brown, 63 Or. 418, 128 P 45; Lais v. Smith, 63 Or. 206, 127 P 26; Hamilton v. Fluornoy, 44 Or. 97, 74 P 483; Altschul v. O'Neill, 35 Or. 202, 58 P 95.

Pa.—Armstrong v. Caldwell, 53 Pa. 284; Wheeler v. Winn, 53 Pa. 122, 91 AmD 186; Long v. Mast, 11 Pa. 189; Mercer v. Watson, 1 Watts 330; Overfield v. Christie, 7 Serg. & R. 173; Hawk v. Senseman, 6 Serg. & R. 21; Johnston v. Irwin, 3 Serg. & R. 291; Green v. Simpson, 49 Pa. Super. 334; Bradford v. Guthrie, 4 Brewst. 351; In re Old Eagle School Property, 36 WklyNC 348. See Delaware, etc., R. Co. v. Tobyhanna County, 232 Pa. 76, 81 A 132.

R. I.—Healey v. Kelly, 24 R. I. 581, 54 A 588.

S. C.—Owens v. Goode, 34 S. C. L. 474 note; Heyward v. Bennett, 5 S. C. L. 113.

Tenn.—Story v. Saunders, 8 Humphr. 663; Cowan v. Hatcher, (Ch. A.) 59 SW 689.

Tex.—Bender v. Brooks, 103 Tex. 329, 127 SW 168, AnnCas1913A 559 [cert (Civ. A.) 130 SW 65*]; Allen v. Peters, 77 Tex. 59, 13 SW 767; Richards v. Smith, 67 Tex. 610, 4 SW 571; Peyton v. Barton, 53 Tex. 298; Gillespie v. Jones, 26 Tex. 343; Galveston v. Menard, 23 Tex. 349; Glover v. Pfeuffer, (Civ. A.) 163 SW 984; Purington v. Broughton, (Civ. A.) 158 SW 227; Burnham v. Hardy Oil Co., (Civ. A.) 147 SW 330; Pendleton v. Snyder, 5 Tex. Civ. A. 427, 24 SW 363; Franklin v. Piper, 5 Tex. Civ. A. 253, 23 SW 942.

Vt.—Partch v. Spooner, 57 Vt. 583; Ames v. Beckley, 48 Vt. 395.

Va.—Hollingsworth v. Sherman, 81 Va. 668; Creekmur v. Creekmur, 75 Va. 430; Trotter v. Newton, 30 Gratt. (71 Va.) 582; Cline v. Catron, 22 Gratt. (63 Va.) 378; Taylor v. Burnsides, 1 Gratt. (42 Va.) 165.

Wash.—Turner v. Ladd, 42 Wash. 274, 84 P 866; Lohse v. Burch, 42 Wash. 156, 84 P 722; Wilcox v. Smith, 38 Wash. 585, 80 P 803.

W. Va.—Chilton v. White, 78 SE 1048; Wilson v. Braden, 56 W. Va. 372, 49 SE 409, 107 AmSR 927; Maxwell v. Cunningham, 50 W. Va. 298, 40 SE 499; Jarvis v. Grafton, 44 W. Va. 453, 30 SE 178; Heavner v. Morgan, 41 W. Va. 428, 23 SE 874; Ketchum v. Spurlock, 34 W. Va. 597, 12 SE 832; Core v. Faupel, 24 W. Va. 238.

Wis.—Illinois Steel Co. v. Tamms, 154 Wis. 340, 141 NW 1011; Jansen v. Huerth, 143 Wis. 363, 127 NW 945; Lins v. Seefeld, 126 Wis. 610, 105 NW 917; Reitler v. Lindstrom, 126 Wis. 562, 106 NW 388; Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019; Lampman v. Van Alstyne, 94 Wis. 417, 69 NW 171; Jones v. Collins, 16 Wis. 594.

Wyo.—Bryant v. Cadle, 18 Wyo. 64, 104 P 23, 106 P 687.

Eng.—Littledale v. Liverpool College, [1900] 1 Ch. 19.

Can.—Wood v. Le Blanc, 34 Can. S. C. 627; McConaghy v. Denmark, 4 Can. S. C. 609.

N. B.—Cairns v. Horsman, 35 N. B. 436; Doe v. Mosher, 15 N. B. 355; Doe v. Littlehale, 10 N. B. 121; Doe v. Marks, 5 N. B. 659; Turnbull Real Estate Co. v. Segee, 4 N. B. Eq. 372.

Ont.—McIntyre v. Thompson, 1 Ont. L. 163; Henderson v. Henderson, 23 Ont. A. 577; Russell v. Romanes, 3 Ont. A. 635; Rennie v. Frame, 29 Ont. 586; Donovan v. Herbert, 9 Ont. 89 [aff 12 Ont. A. 298]; Dominion Impr., etc., Co. v. Lally, 2 OntWN 155, 17 OntWR 151; Pirie v. Parry Sound Lumber Co., 11 OntWR 11; Sims v. Seifert, 3 OntWR 176; Massey-Harris Co. v. Elliott, 1 OntWR 65; Foley v. Foley, 26 Grant Ch. (U. C.) 463; Foster v. Emerson, 5 Grant Ch. (U. C.) 135; Canada Permanent Loan, etc., Co. v. McKay, 32 U. C. C. P. 51; McArthur v. McArthur, 14 U. C. Q. B. 544; Doe v. Rattray, 7 U. C. Q. B. 321. See Coffin v. North American Land Co., 21 Ont. 80.

[a] **Cropping the land** in summer and doing nothing to it in winter except to draw some loads of manure upon it by one not living on the land or having any color of right thereto do not constitute an occupation to the exclusion of the true owner. Coffin v. North American Land Co., 21 Ont. 80.

25. Big Three Min., etc., Co. v. Hamilton, 157 Cal. 130, 107 P 301, 137 AmSR 118; Burke v. Adams, 80 Mo. 504, 50 AmR 510.

26. U. S.—Ward v. Cochran, 150 U. S. 597, 14 SCt 230, 37 L. ed. 1195; Kirk v. Smith, 9 Wheat. 241, 6 L. ed. 81; Bracken v. Union Pac. R. Co., 75 Fed. 347, 21 CCA 387.

Ala.—Dothard v. Denson, 75 Ala.

this question are by no means in harmony. In a number of decisions it has been held that a person may, while admitting title in the federal or state government, hold exclusive of all others.[27] And in others it is held that in ejectment against the person setting up adverse possession it will be sufficient to defeat the action that a claim exclusive of the title of and adverse to plaintiff in ejectment was made, and that it is not necessary that it should be against all the world.[28]

[§ 199] **B. Possession in Common with Owner.** However much the courts may disagree in respect of exclusiveness as an element of adverse possession, there is no, nor can there be any, dissent from the proposition that a possession of the adverse claimant in common with the rightful owner is fatally wanting in exclusiveness and can never ripen into title by adverse possession.[29] In these circumstances the possession in law is deemed to follow the title.[30] There can be no disseizin unless the rightful owner is altogether deprived of possession.[31] Whether such acts on the part of the owner as would amount merely to the exercise of an easement if he were not the owner will destroy the exclusive-

482; New Orleans, etc., R. Co. v. Jones, 68 Ala. 48; Boulo v. New Orleans, etc., R. Co., 55 Ala. 480.

Del.—Nevin v. Disharoon, 22 Del. 278, 66 A 362.

Md.—Gittings v. Moale, 21 Md. 135; Thistle v. Frostburg Coal Co., 10 Md. 129.

Mass.—Leach v. Woods, 14 Pick. 461.

Nebr.—Ballard v. Hansen, 33 Nebr. 861, 51 NW 295; Horbach v. Miller, 4 Nebr. 31.

N. Y.—Kneiler v. Lang, 137 N. Y. 589, 33 NE 555; Howard v. Howard, 17 Barb. 663; Humbert v. Trinity Church, 24 Wend. 587; Smith v. Burtis, 9 Johns. 174.

Or.—Altschul v. O'Neill, 35 Or. 202, 58 P 95.

Va.—Nowlin v. Reynolds, 25 Gratt. (66 Va.) 137.

W. Va.—Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255; Hudson v. Putney, 14 W. Va. 561.

27. Francoeur v. Newhouse, 43 Fed. 236; Lord v. Sawyer, 57 Cal. 65; McManus v. O'Sullivan, 48 Cal. 15; Hayes v. Martin, 45 Cal. 559; Page v. Fowler, 28 Cal. 605; Gibson v. Chouteau, 39 Mo. 536; Clemens v. Runckel, 34 Mo. 41, 84 AmD 69; Moore v. Brownfield, 7 Wash. 23, 34 P 199. See also Fellows v. Evans, 33 Or. 30, 53 P 491.

28. Skipwith v. Martin, 50 Ark. 141, 6 SW 514; Mather v. Walsh, 107 Mo. 121, 17 SW 755; Parker v. Newberry, 83 Tex. 428, 18 SW 815; Beaumont Pasture Co. v. Polk, (Tex. Civ. A.) 55 SW 614. And see Point Mountain Coal, etc., Co. v. Holly Lumber Co., 71 W. Va. 21, 75 SE 197; Illinois Steel Co. v. Tamms, 154 Wis. 340, 141 NW 1011 (both holding that possession need not be exclusive of all persons but only of the true owner).

29. U. S.—Deputron v. Young, 134 U. S. 241, 10 SCt 539, 33 L. ed. 923; Brownsville v. Cavazos, 100 U. S. 138, 25 L. ed. 574; Larwell v. Stevens, 12 Fed. 559, 2 McCrary 311.

Ala.—Wallace v. Feibelman, 60 S 290; Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45; Scruggs v. Decatur Mineral, etc., Co., 86 Ala. 173, 5 S 440; Hawkins v. Hudson, 45 Ala. 482; Bragg v. Massie, 38 Ala. 89, 79 AmD 82.

Ark.—Pulaski County v. State, 42 Ark. 118.

Cal.—Reed v. Smith, 125 Cal. 491, 58 P 139.

Del.—Quillen v. Betts, 17 Del. 53, 39 A 595; Inskeep v. Shields, 4 Del. 345.

Ill.—Wright v. Stice, 173 Ill. 571, 51 NE 71.

Iowa.—Boltz v. Colsch, 133 Iowa 480, 109 NW 1106; Truth Lodge A. F. & A. M. v. Barton, 119 Iowa 230, 93 NW 106, 97 AmSR 303.

Ky.—Ward v. Edge, 100 Ky. 757, 39 SW 440, 19 KyL 59; Spencer Christian Church v. Thomas, 84 SW 750, 27 KyL 250.

La.—Duplessis v. Miller, 6 La. Ann. 683.

Me.—Eaton v. Jacobs, 49 Me. 559.

Mass.—Bellis v. Bellis, 122 Mass. 414; Winter v. Stevens, 9 Allen 526; Milton v. Milton First Cong. Parish, 10 Pick. 447; Norcross v. Widgery, 2 Mass. 506. See also Tappan v. Young, 8 Dane Abr. 368.

Mich.—LeRoy v. Collins, 176 Mich. 465, 475, 142 NW 842 [cit Cyc].

Miss.—Louisville, etc., R. Co. v. Gulf of Mexico Land, etc., Co., 82 Miss. 180, 33 S 845, 100 AmSR 627.

Mo.—Brown v. Chicago, etc., R. Co., 101 Mo. 484, 14 SW 719; Missouri Pac. R. Co. v. Maffitt, 94 Mo. 56, 6 SW 600.

Nebr.—Smith v. Mount, 38 Nebr. 111, 56 NW 793; Smith v. Hitchcock, 38 Nebr. 104, 56 NW 791.

N. H.—Kenniston v. Hannaford, 55 N. H. 268; Bailey v. Carleton, 12 N. H. 9, 37 AmD 190; Waldron v. Tuttle, 4 N. H. 371.

N. Y.—Culver v. Rhodes, 87 N. Y. 348; Andrews v. Delhi, etc., Tel. Co., 36 Misc. 23, 72 NYS 50 [aff 66 App. Div. 616, 73 NYS 1129].

N. C.—Johnston v. Case, 131 N. C. 491, 42 SE 957.

Oh.—Haimeyer v. Teitig, 9 Oh. Dec. (Reprint) 438, 13 CincLBul 540.

Pa.—Gowan v. Bailey, 179 Pa. 470, 36 A 325; O'Hara v. Richardson, 46 Pa. 385.

S. C.—Lloyd v. Rawl, 63 S. C. 219, 41 SE 312.

Tenn.—Fancher v. De Montegre, 1 Head 39; McCammon v. Pettitt, 3 Sneed 242; Berry v. Walden, 4 Hayw. 174.

Va.—Taylor v. Burnsides, 1 Gratt. (42 Va.) 165.

N. B.—Turnbull Real Estate Co. v. Segee 4 N. B. Eq. 372.

Ont.—Rooney v. Petry, 22 Ont. L. 101, 17 OntWR 83; Griffith v. Brown, 5 Ont. A. 303; Rennie v. Frame, 29 Ont. 586; Re Hewitt, 3 OntWN 902, 3 DomLR 156; Drulard v. Welsh, 9 OntWR 491; Stephen v. Simpson, 12 Grant Ch. (U. C.) 493 [aff 15 Grant Ch. (U. C.) 594]; Orr v. Orr, 31 U. C. Q. B. 13; McArthur v. McArthur, 14 U. C. Q. B. 544.

Que.—Tremblay v. St. Alexis, 21 Que. K. B. 284.

[a] **Applications of rule.**—(1) Where defendant entered into possession of land in 1889 and remained in possession until 1902, having received a grant in 1890, but a cotenant of plaintiff was until 1896 in possession of a part of the land so that defendant's possession did not become exclusive until then, defendant's possession had not in 1902 ripened into title. Lindsay v. Austin, 139 N. C. 463, 51 SE 990. (2) A woman at the time of her marriage, was the owner and in possession of land. She and her husband lived thereon until her death. The husband, during the marriage, acquired a deed from a grantee having no title. It was held that the possession of the husband during the marriage, subsequent to the execution of the deed, was not adverse under color of title. "Two persons cannot hold the same property adversely to each other at the same time." Hinton v. Farmer, 148 Ala. 211, 213, 42 S 563, 121 AmSR 63. (3) Where, although a terminal company made some use of the tracks of a railroad company, its possession was not exclusive, the railroad operating its trains thereover and having possession for the purpose of maintaining the roadbed and track until within ten years before suit, the terminal company did not acquire title by adverse possession. Chicago, etc., R. Co. v. Des Moines Union R. Co., (Iowa) 144 NW 54.

[b] **Common occupancy by tenant with tenant of another.**—(1) Occupancy by a tenant for the limitation period does not confer title by adverse possession to the premises occupied by the tenant where the tenant's possession is not exclusive but is shared in common with one who is in possession as tenant of another and there is nothing to show the confines of the property actually occupied by the tenant through whose possession title is claimed. Wiley v. Bargman, (Tex. Civ. A.) 90 SW 1116. (2) In view of St. (1911) § 4216, making the tenant's possession that of the landlord, the claim of one partner to ownership apart from the partnership lease and while the actual possession was in the partnership was not exclusive of that of the tenant or the legal owner; mixed possession with tenant of owner is insufficient. Illinois Steel Co. v. Tamms, 154 Wis. 340, 141 NW 1011.

[c] **Possession held exclusive.**—(1) Taking possession of land and fencing it by the claimant with his own land in pursuance of an agreement with the owner and with intent to hold exclusively is sufficiently exclusive possession. Quigg v. Zeugin, 82 Conn. 437, 74 A 753. (2) Where plaintiff religious society was in sole occupation of land alleged to have been purchased for it by defendant's ancestor who took the title in his own name, but did not assert any individual right antagonistic to plaintiff's claim of a freehold, as shown by the erection and maintenance of a church on the land and the pecuniary support of regular preaching, the understanding inferable therefrom that those things were not done with the ancestor's permission and for his sole benefit as a landowner was sufficient to repel any presumption that his attendance on divine worship was for the purpose of making a technical entry in conformity with his legal title so that it can be said that there was a mixed possession. Sharon First Baptist Church v. Harper, 191 Mass. 196, 77 NE 778. (3) Where a one hundred acre tract inclosed by fence was occupied by an agent for his principal, till the principal sold him a seven acre tract out of it, including the land in dispute, after which he continued to occupy the seven acres as his own land, and the remainder as agent, although for a time the entire one hundred acres were inclosed by a common fence and the agent lived on a portion other than that he had purchased, there was no such common or mixed possession by the principal and agent as interrupted the continuity of disseizin of the former owner of the land in dispute. Strom v. Hancock Land Co., (Or.) 140 P 458.

30. U. S.—Larwell v. Stevens, 12 Fed. 559, 2 McCrary 311.

Ala.—Scruggs v. Decatur Mineral, etc., Co., 86 Ala. 173, 5 S 440.

Del.—Bartholomew v. Edwards, 6 Del. 17; Inskeep v. Shields, 4 Del. 345.

Ill.—Towle v. Quante, 246 Ill. 568, 92 NE 967.

Ky.—Spencer Christian Church v. Thomas, 84 SW 750, 27 KyL 250.

31. Towle v. Quante, 246 Ill. 568, 92 NE 967 (where it was said that a joint possession by two, although the claim of each is adverse to the

ness of the claimant's possession is a question in respect of which the courts are not in agreement. There are decisions both for and against the position that such possession is not exclusive.[32]

[§ 200] **C. Possession in Common with Public or Third Persons.** In accordance with the doctrine that possession must be exclusive it is very generally held that occupation, when in common with the public, or with third persons, is not such exclusive possession as will constitute the basis of a title by adverse possession.[33]

[§ 201] **D. Possession of Land in Which Public Exercises Easement.** According to the weight of authority the possession of land, in respect of which the public exercises an easement, is not exclusive and cannot ripen into title.[34] But there is authority to the contrary.[35]

[§ 202] **E. Use of Land in Common Inclosure with Other Lands.** According to some decisions where an inclosure of land relied on to give title by adverse

other, is not a disseizin of one by the other).

32. See cases infra this note.

[a] **Maintenance of drain under premises.**—The fact that the owner maintains and keeps in repair an underground drain through the land of which the claimant has possession does not necessarily prevent the latter's possession from being exclusive. Marshall v. Taylor, [1895] 1 Ch. 641.

[b] **Eaves of house projecting and discharging water on premises.**—(1) In Randall v. Sanderson, 111 Mass. 114, it was held that a title adverse to the owner of a house may be acquired by another by adverse possession in a strip of land adjacent thereto, although the eaves of the house project and discharge water over the strip. This it was held does not prevent the possession from being exclusive. (2) And in Sowles v. Butler, 71 Vt. 271, 44 A 355, and Rooney v. Petry, 22 OntL 101 [applying Marshall v. Taylor, [1895] 1 Ch. 641] a similar conclusion was reached. (3) On the other hand it was held in Lins v. Seefeld, 126 Wis. 610, 105 NW 917, that a strip of land which was at all times subject to drippings from the eaves of the barn of the person having the legal title was not in such exclusive possession of another person as would ripen into title by adverse possession even subject to such drippings.

[c] **Use of owner for light and air.**—In Haimeyer v. Tietig, 9 Oh. Dec. (Reprint) 438, 13 CincLBul 540, it was held that one using property in dispute, during the period of prescription, as a way to his premises, cannot be said to have been in exclusive possession where the owner of the record title has used it during the same period to furnish light and air to his building. Where one has been using his property for the purpose of furnishing light and air, and another has been using it for a different purpose, neither can be said to have had the exclusive use of the property.

33. U. S.—Bracken v. Union Pac. R. Co., 56 Fed. 447, 5 CCA 548.

Ala.—Boulo v. New Orleans, etc., R. Co., 55 Ala. 480.

Conn.—Black v. O'Hara, 54 Conn. 17, 5 A 598; Tracy v. Norwich, etc., R. Co., 39 Conn. 382.

D. C.—Bradshaw v. Stott, 4 App. 527.

Ky.—McConnell v. Wilborn, 24 SW 627, 15 KyL 596.

Md.—Gittings v. Moale, 21 Md. 135.

Mass.—Litchfield v. Ferguson, 141 Mass. 97, 6 NE 721; Hittinger v. Eames, 121 Mass. 539.

Mich.—LeRoy v. Collins, 176 Mich. 465, 475, 142 NW 842 [cit Cyc].

Mo.—Union El. Co. v. Kansas City Suburban Belt R. Co., 135 Mo. 353, 36 SW 1071.

N. H.—Bailey v. Carleton, 12 N. H. 9, 37 AmD 190.

N. Y.—Brooklyn, etc., R. Co. v. Bird, 76 Misc. 62, 134 NYS 1.

S. C.—Southern R. Co. v. Gossett, 79 S. C. 372, 60 SE 956; Heyward v. Bennett, 5 S. C. L. 118.

Vt.—Hunter v. Emerson, 75 Vt. 173, 53 A 1070.

Va.—Austin v. Minor, 107 Va. 101, 57 SE 609; Trotter v. Newton, 30 Gratt. (71 Va.) 582.

Wis.—Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019.

[a] **Applications of rule.**—(1) Possession of land is not exclusive, where the land was for the greater part of the statutory period used as a common pasturage for those who desired to graze their live stock thereon, and where those who desired to do so went on the land and took dirt and other substance from it at their pleasure. Johnston v. Albuquerque, 12 N. M. 20, 72 P 9. To same effect Opp v. Smith, (Nebr.) 147 NW 672. (2) The facts that during alleged adverse possession the adverse owner exercised no more ownership over one part of the land than over the other, that many persons appropriated part thereof without consulting him or recognizing him as proprietor, and that he made no objections and never treated the premises as his property, as an owner naturally would, are sufficient to defeat a claim of adverse possession. Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019. (3) In a suit to remove a cloud on title it appeared that the property was valuable only for hunting, fishing, and trapping, and that a great many people hunted, fished, and trapped thereon. The persons under whom complainant claimed used and enjoyed it in these respects far more than any one else, but it was also hunted over, used, and enjoyed by defendant and others. It was held insufficient to show such use and occupation of the premises by any one as was necessary to constitute adverse possession. Austin v. Minor, 107 Va. 101, 57 SE 609. (4) Plaintiff was not entitled to land by virtue of the statute of limitations where it appeared that a fence erected by her predecessor, inclosing a portion of the premises, had long since been destroyed, and that for nearly twenty years last past the land had been open to the commons and no more in the possession of plaintiff and her predecessor than in the possession of any one else. Turner v. Ladd, 42 Wash. 274, 84 P 866. (5) Exclusive, actual possession, as against another adverse occupant, is not acquired up to an alleged boundary by setting posts a great distance apart along such boundary. Freedman v. Bonner, (Tex. Civ. A.) 40 SW 47. (6) Merely going in the winter time on land inclosed and used as a pasture by another and cutting and taking away wood, failing to do even this some years, is not a continuous or exclusive possession. Harms v. Kranss, 167 Ill. 421, 47 NE 746. (7) Where one who claimed title by adverse possession to the water front appurtenant to the land of a riparian owner drove some piling therein extending out to the old wharf line but did nothing further to complete the structure, and part of the space was once used as a ferry slip, upon the authority of claimant for about six months, and boats have occasionally tied up to the piling, but otherwise there has been no occupancy or user by the claimant, there was not exclusive use. Montgomery v. Shaver, 40 Or. 244, 66 P 923. (8) The facts that a person lays a pavement on land, plants shade trees thereon, and uses the land as a sidewalk for over twenty-one years do not give him title by adverse possession if it appears that he used the walk in question in common with all other people in the community for the purpose of reaching a railroad station. Green v. Simpson, 49 Pa. Super. 334.

[b] **Acts amounting to exclusive possession.**—(1) Possession of an unfenced lot for the purpose of marble and stone cutting, involving the scattering of stone all over the lot, is sufficiently exclusive. Holtzman v. Douglas 168 U. S. 278, 18 SCt 65, 42 L. ed. 466. (2) Where a tenant of one claiming a tract of land under a junior grant from the state built a cabin which was occupied by himself and family from two to four weeks each summer, fenced land about the cabin and cultivated the same, and the cabin was kept closed in the tenant's absence, such possession, continued the seven years necessary to acquire title by adverse possession, extinguished the title of the claimant under the senior grant, the possession being exclusive because under a claim of right. Cowan v. Hatcher, (Tenn. Ch. A.) 59 SW 689. (3) One may obtain title to streets which have been regularly laid out and opened by adverse possession to the exclusion of the public for a period of twenty-one years, and it makes no difference how frail the barrier may be that excludes the public from the streets if it is sufficient to exclude the public during that period. Seese v. Maumee, 28 Oh. Cir. Ct. 768.

[c] **Use under implied license.**—The passing and repassing over shore land, without apparent claim of right, by persons under implied license given for the user's accommodation by one claiming the land by adverse possession would not interfere with the exclusiveness of such person's possession. Dodge v. Lavin, 34 R. I. 514, 84 A 857.

34. Union El. Co. v. Kansas City Suburban Belt R. Co., 135 Mo. 353, 36 SW 1071 (holding that an elevator company by laying a track on a public levee to connect with a railroad and by using the same from ten to fourteen years does not exercise such an exclusive and adverse use as to confer on it the exclusive right to the part of the levee occupied by the track); Morehouse v. Burgot, 22 Oh. Cir. Ct. 174, 12 Oh. Cir. Dec. 163 (holding that the owner of land adjoining a public road cannot get possession of it so long as it is occupied by the public, notwithstanding this occupancy may be very small, since occupancy defeats possession by another under the statute of limitations); Kelley v. Salvas, 146 Wis. 543, 550, 551, 131 NW 436 (where it was held that adverse possession of part of the bed of a navigable river through the building of docks and user thereof does not give the occupant a title superior to that of the owner extending beyond that part of the river bed covered by such structures and an area sufficient to lay a boat at the dock. "So long as this land was covered by the river, any person, whether riparian owner or not, could lawfully pass over the same with a boat, whether a mere passer-by or bound for any dock or wharf." To hold that title might be acquired by adverse possession it would be necessary to "assert that the owner of the river bed may prevent persons passing over the same in boats on the water. To make such acts the foundation of title by adverse possession would conflict with settled law").

35. Webber v. Clarke, 74 Cal. 11, 15 P 431 (right of way).

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possession is common to claimant and to others owning lands within its limits and the use which consists wholly in the pasturage of stock is common as well to all, such possession is not exclusive within the rule making exclusiveness an element of adverse possession.[36] On the other hand it has been held by the supreme court of Texas that where the land in dispute, and that of other owners, was surrounded by a common inclosure, all of which owners used the entire inclosure in common for grazing purposes and respected each other's rights, but were adverse to all others, such concurrent use "would not militate against the exclusiveness in a legal sense of his [claimant's] possession, nor make it the less adverse in its character,"[36½] and this view seems to be fully sustained by numerous other decisions of the courts of this state.[36½]

[§ 203] **F. Permissive Use as Affecting Exclusiveness of Possession.** A mere permissive use does not militate against the exclusiveness of an adverse claimant's possession.[37] To constitute exclusive possession it is not essential to exclude every one from all entry on the land.[38]

[§ 204] **G. Possession by Cotenants.** Two or more persons claiming as cotenants may as such have such a possession as will ripen into title.[39]

VI. HOSTILE POSSESSION

[§ 205] **A. Term Defined and Explained.** The term "hostile" is used in the sense that the claimant must be in possession as owner, in contradistinction to holding in recognition of or in subordination to the true owner.[40] Every possession is adverse which is not in subservience to the title of another, either by a direct acknowledgment or by an open or tacit disavowal of right on the part of the occupant, and it is in the latter case only that the law adjudges the possession of one to the benefit of another.[41] The term "hostile," "when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill-will, or that [the claimant] is an enemy of the person holding the legal title, but means an occupant who holds, and is in possession, as owner, and therefore against all other claimants of the land."[42] Nor is it necessary, to constitute a disseizin, that the intention of the disseizor must in all cases be wrongfully to possess himself of property known to him to belong to another. The animus furandi is not essential.[43]

[§ 206] **B. Necessity of Hostile Possession—1. Statement of General Rule.** The principle is well settled that to make a disseizin that will be the commencement of a new title, producing a change by which the estate is taken from the rightful owner and placed in the wrongdoer, the possession taken by the disseizor must be hostile or adverse in its character, importing a denial of the owner's title in the property claimed; otherwise, however open, notorious, constant, and long continued it may be, the owner's action will not be barred.[44] The mere fact that the claimant has had possession of the

36. Hamilton v. Fluornoy, 44 Or. 97, 74 P 483. To same effect Webber v. Wannemaker, 39 Colo. 425, 433, 89 P 780 (where it was held that where for a time land was fenced in with other land belonging to other persons, and for a time it was not fenced at all, the possession was not exclusive and could not be included in determining the period necessary to give the person in possession title). In this case it was said: "It is not actual and exclusive possession, but a possession in conjunction with other land owners and it falls far short of that kind of adverse possession which deprives the true owner of his title."

36½. Parker v. Newberry, 83 Tex. 428, 431, 18 SW 815 (in which it was further said: "Especially is this so where that use or concurrent enjoyment of it by others was in subordination to appellee").

36¾. Moran v. Moseley, (Tex. Civ. A.) 164 SW 1093; Johnson v. Sullivan, (Tex. Civ. A.) 163 SW 1015; Randolph v. Lewis, (Tex. Civ. A.) 163 SW 647; Burnham v. Hardy Oil Co., (Tex. Civ. A.) 147 SW 330; Cunningham v. Matthews, (Tex. Civ. A.) 57 SW 1115; Smith v. Kenny, (Tex. Civ. A.) 54 SW 801.

37. Woodruff v. Langford, (Iowa) 115 NW 1020 (holding that use of a way over the premises by third persons does not affect the exclusiveness of the claimant's possession where the use was through the permission of the claimant who maintained gates at either end of the way so long as it was traveled).

38. Burrows v. Gallup, 32 Conn. 483, 87 AmD 186.

39. Woodruff v. Roysden, 105 Tenn. 491, 58 SW 1066, 80 AmSR 905; Burleson v. Burleson, 28 Tex. 383; Hutchinson v. Chicago, etc., R. Co., 41 Wis. 541. See also Kauhikoa v. Hobron, 5 Hawaii 491.

[a] **Joint possessors in indivision,** under titles covering the whole property, are entitled to plead the prescription of ten years and to support it by proof of joint or common possession, and are not required to show separate possession by each coowner of a defined part of the property. Le Blanc v. Robertson, 41 La. Ann. 1023, 6 S 720.

40. Conn.—French v. Pearce, 8 Conn. 442, 21 AmD 680.
D. C.—Neale v. Lee, 19 D. C. 5.
Ind.—Davis v. Waggoner, 42 Ind. A. 115, 83 NE 381, 84 NE 1105.
Mich.—Greene v. Anglemire, 77 Mich. 168, 43 NW 772.
Minn.—Cool v. Kelly, 78 Minn. 102, 80 NW 861.
Nebr.—Ballard v. Hansen, 33 Nebr. 861, 51 NW 295.
N. Y.—Miller v. Platt, 12 N. Y. Super. 272.

41. Davis v. Waggoner, 42 Ind. A. 115, 83 NE 381, 84 NE 1105.

42. Ballard v. Hansen, 33 Nebr. 861, 51 NW 295 [quot with approval Hoffine v. Ewings, 60 Nebr. 729, 734, 84 NW 93]. To same effect Silvarer v. Hansen, 77 Cal. 579, 20 P 136; Taylor v. Hover, 77 Nebr. 97, 108 NW 149; Knight v. Denman, 64 Nebr. 814, 90 NW 863; Griffin v. Mulley, 167 Pa. 339, 31 A 664 (per Schuyler, P. J.).

[a] **"There need be no illwill, malevolence, or desire to injure anyone,** and the element of hostility in that sense does not necessarily enter into the case." Ballard v. Hansen, 33 Nebr. 861, 866, 51 NW 295.

[b] **It is not necessary that there be a dispute** in order to make the possession hostile. Helm v. Wilson, 76 Cal. 476, 18 P 604; Webb v. Rhodes, 28 Ind. A. 393, 61 NE 735.

43. Worcester v. Lord, 56 Me. 265, 96 AmD 456.

44. U. S.—Peabody v. U. S., 175 U. S. 546, 20 SCt 219, 44 L. ed. 267; Lowndes v. Huntington, 153 U. S. 1, 14 SCt 758, 38 L. ed. 615; Harvey v. Tyler, 2 Wall. 328, 17 L. ed. 871; Doswell v. De la Lanzo, 20 How. 29, 15 L. ed. 824; Clarke v. Courtney, 5 Pet. 319, 8 L. ed. 140; Kirk v. Smith, 9 Wheat. 241, 6 L. ed. 81; Tyee Consol. Min. Co. v. Langstedt, 121 Fed. 709, 58 CCA 129; Larwell v. Stevens, 12 Fed. 559, 2 McCrary 311; Adams v. Burke, 1 F. Cas. No. 49, 3 Sawy. 415; Jackson v. Porter, 13 F. Cas. No. 7,143, 1 Paine 457.
Ala.—Alexander-City Union Warehouse, etc., Co. v. Central of Georgia R. Co., 62 S 745; Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45; Ashford v. Ashford, 136 Ala. 631, 34 S 10, 96 AmSR 82; Hicks v. Swift Creek Mill Co., 133 Ala. 411, 31 S 947, 91 AmSR 38, 57 LRA 720; Beasley v. Howell, 117 Ala. 499, 22 S 989; Goodson v. Brothers, 111 Ala. 589, 20 S 443; Newton v. Louisville, etc., R. Co., 110 Ala. 474, 19 S 19; Wiggins v. Kirby, 106 Ala. 262, 17 S 354; Parks v. Barnett, 104 Ala. 438, 16 S 136; Trufant v. White, 99 Ala. 526, 13 S 83; Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Murray v. Hoyle, 97 Ala. 588, 11 S 797; East Tennessee, etc., R. Co. v. Davis, 91 Ala. 615, 8 S 349; Williams v. Higgins, 69 Ala. 517; Alexander v. Wheeler, 69 Ala. 332; New Orleans, etc., R. Co. v. Jones, 68 Ala. 48; Boykin v. Smith, 65 Ala. 294; Collins v. Johnson, 57 Ala. 304; Merritt v. Phenix, 48 Ala. 87.
Ark.—Hardin v. Watson, 104 Ark. 641, 148 SW 506; St. Louis, etc., R. Co. v. Martin, 104 Ark. 274, 149 SW 69; Collins v. Bluff City Lumber Co., 86 Ark. 202, 110 SW 806; Little Rock v. Wright, 58 Ark. 142, 23 SW 876; Ringo v. Woodruff, 43 Ark. 469; Pulaski County v. State, 42 Ark. 118; Ellsworth v. Hale, 33 Ark. 633.
Cal.—Southern California R. Co. v. Slauson, 68 P 107; Smith v. Smith, 80 Cal. 323, 21 P 4, 22 P 186, 549; Unger v. Mooney, 63 Cal. 586, 49 AmR 100; Farish v. Coon, 40 Cal. 33; McCracken v. San Francisco, 16 Cal. 591; Cohen v. Anderson, 22 Cal. A. 634, 135 P 1096; Janke v. McMahon, 21 Cal. A. 781, 133 P 21; Madden v. Hall, 21 Cal. A. 541, 132 P 291.
Colo.—Evans v. Welch, 29 Colo. 355, 68 P 776; Hurd v. McClellan, 1 Colo. A. 327, 29 P 181.
Conn.—Russell v. Davis, 38 Conn. 562; Hanchett v. King, 4 Day 360.
Del.—Jones v. Short, 77 A 968 (under statute declaratory of common-law rule); Doe v. Pepper, 16 Del. 221, 43 A 90; Cooper v. McBride, 9 Del. 461; Inskeep v. Shields, 4 Del. 345.
D. C.—Bradshaw v. Stott, 4 App. 527.
Fla.—Dallam v. Sanchez, 56 Fla. 779, 47 S 871; Barrs v. Brace, 38 Fla. 265, 20 S 991.

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land for the statutory period will not suffice to | satisfy the rule requiring the disseizor's possession

Ga.—David v. Tucker, 140 Ga. 240, 78 SE 909; Rucker v. Rucker, 136 Ga. 830, 72 SE 241; Doris v. Story, 122 Ga. 611, 50 SE 348; Rider v. Waters, 70 Ga. 716; Shiels v. Roberts, 64 Ga. 370; Moses v. Eagle, etc., Mfg. Co., 62 Ga. 455; Hill v. Waldrop, 57 Ga. 134; Mitchell v. Rome, 49 Ga. 19, 15 AmR 669; Gay v. Mitchell, 35 Ga. 139, 89 AmD 278; Roe v. Doe, 30 Ga. 971.

Hawaii.—Bishop v. Kala, 7 Hawaii 590; Kahukuleionohi v. Kaikainahaole, 6 Hawaii 183; Judd v. Kuanalewa, 6 Hawaii 329; Akowai v. Lupong, 4 Hawaii 259.

Ida.—Davis v. Devanney, 7 Ida. 742, 65 P 500.

Ill.—Mason v. Truitt, 257 Ill. 18, 100 NE 202; Purtle v. Bell, 225 Ill. 523, 80 NE 350; Page v. Bellamy, 222 Ill. 556, 78 NE 938; Roby v. Calumet, etc., Canal, etc., Co., 211 Ill. 173, 71 NE 822; Brumback v. Brumback, 198 Ill. 66, 64 NE 741; Chicago Sanitary Dist. v. Allen, 178 Ill. 330, 53 NE 109; Wright v. Stice, 173 Ill. 571, 51 NE 71; Timmons v. Kidwell, 138 Ill. 13, 27 NE 756; Shaw v. Schoonover, 130 Ill. 448, 22 NE 589; Dexter v. Tree, 117 Ill. 532, 6 NE 506; Bolden v. Sherman, 101 Ill. 483; Smith v. Stevens, 82 Ill. 554; Ambrose v. Raley, 58 Ill. 506; Turney v. Chamberlain, 15 Ill. 271.

Ind.—Winstandley v. Stipp, 132 Ind. 548, 32 NE 302; Law v. Smith, 4 Ind. 56; Chicago, etc., R. Co. v. Wood, 30 Ind. A. 650, 66 NE 923; Webb v. Rhodes, 28 Ind. A. 393, 61 NE 735.

Iowa.—Willson v. Beck, 142 NW 78; Follett v. Meader, 155 Iowa 405, 136 NW 216; Boltz v. Colsch, 134 Iowa 480, 109 NW 1106; McClenahan v. Stevenson, 118 Iowa 106, 91 NW 925; Schrimper v. Chicago, etc., R. Co., 115 Iowa 35, 82 NW 916, 87 NW 731; Gill v. Candler, 114 Iowa 332, 86 NW 300; Friday v. Henah, 113 Iowa 425, 85 NW 768; Hayes v. Tyler, 85 Iowa 126, 52 NW 116; Hempsted v. Huffman, 84 Iowa 398, 51 NW 17; Donahue v. Lannan, 70 Iowa 73, 30 NW 8; Davenport v. Sebring, 52 Iowa 364, 3 NW 403; Brown v. Rose, 48 Iowa 231; Colvin v. McCune, 39 Iowa 502; Grube v. Wells, 34 Iowa 148; Wright v. Keithler, 7 Iowa 92.

Kan.—Grigsby v. Williams, 89 Kan. 758, 132 P 1001; Dewey v. McLain, 7 Kan. 126, 12 AmR 418.

Ky.—Young v. Pace, 145 Ky. 405, 140 SW 555; Kelly v. Pettus, 145 Ky. 250, 799, 140 SW 189; Ward v. Edge, 100 Ky. 757, 39 SW 440, 19 KyL 59; Halbert v. Maysville, etc., R. Co., 98 Ky. 661, 33 SW 1121; Oldhams v. Jones, 5 B. Mon. 458; Bell v. Fry, 5 Dana 341.

La.—Minor v. New Orleans, 115 La. 301, 38 S 999; Prevost v. Ellis, 11 Rob. 56; Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 36 AmD 624.

Me.—Lancey v. Parks, 102 Me. 135, 66 A 311; Worcester v. Lord, 56 Me. 265, 96 AmD 456; Eastport v. Belfast, 40 Me. 262; Chadbourne v. Swan, 40 Me. 260; Gray v. Hutchins, 36 Me. 142; Kinsell v. Daggett, 11 Me. 309; Pejepscot v. Nichols, 10 Me. 256; Little v. Libby, 2 Me. 242, 11 AmD 68.

Md.—Hackett v. Webster, 97 Md. 404, 55 A 480; Jacob Tome Inst. v. Crothers, 87 Md. 569, 40 A 261; Winter v. White, 70 Md. 305, 17 A 84; Sadtler v. Peabody Heights Co., 66 Md. 1, 10 A 599; Baker v. Swan, 32 Md. 355; Morrison v. Hammond, 27 Md. 604; Dean v. Brown, 23 Md. 11, 87 AmD 555; Nutwell v. Tongue, 22 Md. 419; Gittings v. Moale, 21 Md. 135; Stump v. Henry, 6 Md. 201, 61 AmD 300; Armstrong v. Risteau, 5 Md. 256, 59 AmD 115; Hammond v. Ridgely, 5 Harr. & J. 245, 9 AmD 522.

Mass.—Prescott v. Prescott, 175 Mass. 64, 55 NE 805; Loud v. Brigham, 28 NE 7; Smith v. New York, etc., R. Co., 142 Mass. 21, 6 NE 842; Morrill v. Titcomb, 8 Allen 100; Oakes v. Marcy, 10 Pick. 195; Sargent v. Ballard, 9 Pick. 251,

Mich.—Weber v. Detroit, 159 Mich. 14, 123 NW 540, 36 LRANS 1056 and note; Lasley v. Kniskern, 152 Mich. 244, 115 NW 971; Pugh v. Schindler, 127 Mich. 191, 86 NW 515; St. Joseph v. Seel, 122 Mich. 70, 80 NW 987; Patrick v. Young Men's Christian Assoc., 120 Mich. 185, 79 NW 208; Beecher v. Ferris, 110 Mich. 537, 68 NW 269; Paldi v. Paldi, 95 Mich. 410, 54 NW 903; Miller v. Beck, 68 Mich. 76, 35 NW 899; Perkins v. Nugent, 45 Mich. 156, 7 NW 757; Sparrow v. Hovey, 44 Mich. 63, 6 NW 93; Yelverton v. Steele, 40 Mich. 538.

Minn.—Backus v. Burke, 63 Minn. 272, 65 NW 459; St. Paul, etc., R. Co. v. Hinckley, 53 Minn. 398, 55 NW 560; Wayzata v. Great Northern R. Co., 50 Minn. 438, 52 NW 913; Sherin v. Brackett, 36 Minn. 152, 30 NW 551; Washburn v. Cutter, 17 Minn. 361.

Miss.—McCaughn v. Young, 85 Miss. 277, 37 S 839; Wilmot v. Yazoo, etc., R. Co., 76 Miss. 374, 24 S 701; Dean v. Tucker, 58 Miss. 487; Davis v. Bowmar, 55 Miss. 671; Rothschild v. Hatch, 54 Miss. 554; Adams v. Guice, 30 Miss. 397; Green v. Miselle, 54 Miss. 220.

Mo.—Himmelberger-Harrison Lumber Co. v. Craig, 248 Mo. 319, 154 SW 73; Crowl v. Crowl, 195 Mo. 338, 92 SW 890; Weller v. Wagner, 181 Mo. 151, 79 SW 941; Stevenson v. Black, 168 Mo. 549, 68 SW 909; Baber v. Henderson, 156 Mo. 566, 57 SW 719; Hunnewell v. Williams, 154 Mo. 135, 55 SW 221; Hunnewell v. Burchett, 152 Mo. 611, 54 SW 487; Ivy v. Yancey, 129 Mo. 501, 31 SW 937; Comstock v. Eastwood, 108 Mo. 41, 18 SW 39; Mather v. Walsh, 107 Mo. 121, 17 SW 755; Meier v. Meier, 105 Mo. 411, 16 SW 223; Crawford v. Ahrnes, 103 Mo. 88, 15 SW 341; Mabary v. Dollarhide, 98 Mo. 198, 11 SW 611, 14 AmSR 639; Burke v. Adams, 80 Mo. 504, 50 AmR 510; Dalby v. Snuffer, 57 Mo. 294; Thomas v. Babb, 45 Mo. 384; Desloge v. Pearce, 38 Mo. 588; Pease v. Lawson, 33 Mo. 35; Johnson v. Prewitt, 32 Mo. 553; Draper v. Shoot, 25 Mo. 197, 69 AmD 462; McLain v. Winchester, 17 Mo. 49; Smoot v. Wathen, 8 Mo. 522; Taylor v. Planet Property, etc., Co., 78 Mo. A 137; Morris v. Sellenreick, 10 Mo. A. 585.

Mont.—Alderson v. Marshall, 7 Mont. 288, 16 P 576.

Nebr.—Knight v. Denman, 264 Nebr. 814, 90 NW 863; Hoffine v. Ewings, 60 Nebr. 729, 84 NW 93; Pohlman v. Evangelical Lutheran Trinity Church, 60 Nebr. 364, 83 NW 201; Johnson v. Butt, 46 Nebr. 220, 64 NW 691; Smith v. Mount, 38 Nebr. 111, 56 NW 793; Smith v. Hitchcock, 38 Nebr. 104, 56 NW 791; Ballard v. Hansen, 33 Nebr. 861, 51 NW 295; Colvin v. Republican Valley Land Assoc., 23 Nebr. 75, 36 NW 361, 8 AmSR 114; Gatling v. Lane, 17 Nebr. 77, 22 NW 227 [reh den 17 Nebr. 80, 22 NW 453]; Roggencamp v. Converse, 15 Nebr. 105, 17 NW 361; Beer v. Dalton, 3 Nebr. (Unoff.) 694, 92 NW 593.

N. H.—Manchester v. Duggan, 75 N. H. 33, 70 A 1075; Johnson v. Conant, 64 N. H. 109, 7 A 116; Marshall v. Pierce, 12 N. H. 127.

N. M.—Jenkins v. Maxwell Land Grant Co., 15 N. M. 281, 107 P 739; Johnston v. Albuquerque, 12 N. M. 20, 28, 72 P 9 [cit Cyc].

N. Y.—Rathbunville Union Cemetery Assoc. v. Betson, 208 N. Y. 364, 101 NE 892; Lewis v. New York, etc., R. Co., 162 N. Y. 202, 56 NE 540 [aff 40 App. Div. 343, 57 NYS 1053]; Heller v. Cohen, 154 N. Y. 299, 48 NE 527; Kneller v. Lang, 137 N. Y. 589, 33 NE 555; Doherty v. Matsell, 119 N. Y. 646, 23 NE 994; Gross v. Welwood, 90 N. Y. 638; Sherman v. Kane, 86 N. Y. 57; St. Vincent Female Orphan Asylum v. Troy, 76 N. Y. 108, 32 AmR 286; Borden v. South Side R. Co., 67 N. Y. 588 [aff 5 Hun 184]; Burbank v. Fay, 65 N. Y. 57; Sands v. Hughes, 53 N. Y. 287; Babcock v. Utter, 1 Abb. Dec. 27, 1 Keyes 115, 397, 32 HowPr 439; Weeks v. Dominy, 161 App. Div. 414, 146 NYS 624; Hamlin v. Peo., 155 App. Div. 680, 140 NYS 643; Monnot v. Rudd, 139 App. Div. 651, 124 NYS 210; Mott v. Eno, 97 App. Div. 580, 90 NYS 608 [rev on other grounds 181 N. Y. 346, 74 NE 229]; Miller v. Warren, 94 App. Div. 192, 87 NYS 1011 [aff 182 N. Y. 539, 75 NE 1131]; Allerton v. Steele, 59 App. Div. 622, 69 NYS 594; Brinkerhoff v. Mooney, 42 App. Div. 420, 59 NYS 158; Miner v. Hilton, 15 App. Div. 55, 44 NYS 155; Bird v. New Jersey, etc., R. Co., 3 App. Div. 344, 38 NYS 281; Coleman v. Pickett, 82 Hun 287, 31 NYS 480; Kathan v. Rockwell, 16 Hun 90; Hoyt v. Dillon, 19 Barb. 644; Casey v. Dunn, 57 N. Y. Super. 381, 8 NYS 305; Sturges v. Parkhurst, 50 N. Y. Super. 306; Miner v. New York, 37 N. Y. Super. 171; Miller v. Platt, 12 N. Y. Super. 272; Jacob v. Oyster Bay, 73 Miss. 283, 132 NYS 657 [aff 155 App. Div. 913, 140 NYS 1124 mem]; Timmermann v. Cohn, 70 Miss. 327, 128 NYS 770 [aff 146 App. Div. 924 mem, 131 NYS 1146 mem (rev on other grounds 204 N. Y. 614, 97 NE 589)]; Luce v. Carley, 24 Wend. 451, 35 AmD 637; Colvin v. Burnet, 17 Wend. 564.

N. C.—Caldwell Land, etc., Co. v. Cloyd, 165 N. C. 595, 81 SE 752; Gobble v. Orrell, 163 N. C. 489, 79 SE 957; Everett v. Newton, 118 N. C. 919, 23 SE 961; Felton v. Simpson, 33 N. C. 84; Gilchrist v. McLaughlin, 29 N. C. 310.

Oh.—Lane v. Kennedy, 13 Oh. St. 42; Dayton v. Cooper Hydraulic Co., 10 OhS&CP 192, 7 OhNP 495.

Or.—Lais v. Smith, 63 Or. 206, 127 P 26; Putnam v. Ray, 62 Or. 159, 124 P 205; Stephenson v. Van Blokland, 60 Or. 247, 118 P 1026; Chapman v. Dean, 58 Or. 475, 115 P 154; Abraham v. Owens, 20 Or. 511, 26 P 1112; Curtis v. La Grande Hydraulic Water Co., 20 Or. 34, 23 P 808, 25 P 378, 10 LRA 484 and note; Anderson v. McCormick, 18 Or. 301, 22 P 1062; Lawrence v. Lawrence, 14 Or. 77, 12 P 186.

Pa.—Hillside Coal, etc., Co. v. Zeigler, 218 Pa. 319, 67 A 617; Cole v. Philadelphia, 199 Pa. 464, 49 A 308; Llewellyn v. Buechley, 198 Pa. 642, 48 A 864; Main Tp. School-Dist. v. Reichard, 142 Pa. 226, 21 A 821; Pennsylvania R. Co. v. Freeport, 138 Pa. 91, 20 A 940; Armstrong v. Caldwell, 53 Pa. 284; Long v. Mast, 11 Pa. 189; Hood v. Hood, 2 Grant 229; Hawk v. Senseman, 6 Serg. & R. 21; Morris v. Vanderen, 1 Dall. 64, 1 L. ed. 38; Green v. Simpson, 49 Pa. Super. 334; Bradford v. Guthrie, 4 Brewst. 351; Messer v. Rhodes, 3 Brewst. 180.

Philippine.—Pascual v. Mina, 20 Philippine 202.

R. I.—Draper v. Monroe, 18 R. I. 398, 28 A 340.

S. C.—Metz v. Metz, 48 S. C. 472, 26 SE 787; Wingo v. Caldwell, 35 S. C. 609, 14 SE 827; Harvey v. Harvey, 26 S. C. 608, 2 SE 3; Bowen v. Team, 40 S. C. L. 298, 60 AmD 127; Hill v. Saunders, 40 S. C. L. 62; Wadsworthville Poor School v. Meetze, 38 S. C. L. 50; Lawton v. Rivers, 13 S. C. L. 445, 13 AmD 741.

S. D.—Wallace v. Dunton, 30 S. D. 598, 139 NW 345.

Tenn.—Dyche v. Gass, 3 Yerg. 397; Long v. Hall, (Ch. A.) 46 SW 343.

Tex.—Warren v. Frederichs, 83 Tex. 380, 18 SW 750; Parker v. Baines, 65 Tex. 605; Bracken v. Jones, 63 Tex. 184; Satterwhite v. Rosser, 61 Tex. 166; Chance v. Branch, 58 Tex. 490; Flanagan v. Boggess, 46 Tex. 330; Gillespie v. Jones, 26 Tex. 343; Wheeler v. Moody, 9 Tex. 372; Guadalupe County v. Poth, (Civ. A.) 163 SW 1050; Chicago, etc., R. Co. v. Johnson, (Civ. A.) 156 SW 253; Snow v. Letcher, (Civ. A.) 154 SW 355; Weatherford v. Weatherford, (Civ. A.) 153 SW 353; Hermann v. Thomas, (Civ. A.) 141 SW 574; Cox v. Sherman Hotel Co., (Civ. A.) 47 SW 808; Parker

to be hostile.[45] As was said by Chief Justice Marshall, "it would shock that sense of right which must be felt equally by legislators and by judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title."[46]

[§ 207] **2. Effect of Special Statutory Provisions.** The necessity of hostile possession is not dispensed with by a statute providing that no person shall commence an action to recover land within twenty years after the right of action accrued or after he or they under whom he claims have been seized or possessed of the premises.[47]

[§ 208] **3. Time During Which Hostility of Possession Must Exist.** To acquire title by adverse possession the possession must be hostile for the entire period prescribed by the statute of limitations.[48]

[§ 209] **4. Insufficiency of Exclusive Possession.** So title cannot be acquired by holding the land "exclusively."[49] The reason for this is that possession may be exclusive and yet not hostile.[50] Hostility of possession cannot be assumed, as a matter of law, from mere exclusive possession, no matter how long continued.[51]

[§ 210] **5. Necessity of Possession Hostile in Its Inception.**[52] While there are a number of decisions in which it is either held or said that possession, in order to ripen into title, must be hostile in its inception,[53] the great weight of authority is to the effect that, although the original entry upon lands is made in subordination to the title of the real owner, the possession may become adverse.[54] "The occupant's intention at the time he took possession is not necessarily a controlling factor. It is sufficient if possession is taken, and the premises held" for the statutory period, "under a claim of right and ownership."[55] Nevertheless having begun in consistency with the rightful title it must clearly appear that its character has been changed. Otherwise the possession will retain its original quality through any succession of occupants of the land and will be presumed to be in subservience to the rightful interest.[56] It follows therefore that where the possession of the claimant was in its inception taken with the permission of the owner and in subordination to his title, it cannot become adverse without a distinct and open disavowal of the title of the owner, brought home to the owner.[57]

v. Covey, (Civ. A.) 28 SW 64; Clark v. Kirby, (Civ. A.) 25 SW 1096; Franklin v. Piper, 5 Tex. Civ. A. 253, 23 SW 942. See Haggard v. Martin, (Civ. A.) 34 SW 660.

Utah.—Salt Lake Inv. Co. v. Fox, 32 Utah 301, 304, 90 P 564, 125 AmSR 865, 13 LRANS 627 and note [cit Cyc]; Dignan v. Nelson, 26 Utah 186, 72 P 936.

Vt.—Caledonia County Grammar School v. Howard, 84 Vt. 1, 77 A 877; Lathrop v. Levarn, 83 Vt. 1, 74 A 331; Hunter v. Emerson, 75 Vt. 173, 53 A 1070; Hatch v. Vermont Cent. R. Co., 28 Vt. 142.

Va.—Nowlin v. Reynolds, 25 Gratt. (66 Va.) 137; Early v. Garland, 13 Gratt. (54 Va.) 1; Clarke v. McClure, 10 Gratt. (51 Va.) 305.

Wash.—Port Townsend v. Lewis, 34 Wash. 413, 75 P 982; Northern Counties Inv. Trust v. Enyard, 24 Wash. 366, 64 P 516.

W. Va.—Custer v. Hall, 71 W. Va. 119, 76 SE 183; Norfolk, etc., R. Co. v. Stipp, 70 W. Va. 700, 75 SE 60; Maxwell v. Cunningham, 50 W. Va. 298, 40 SE 499; Jarvis v. Grafton, 44 W. Va. 453, 30 SE 178.

Wis.—Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830; Meyer v. Hope, 101 Wis. 123, 77 NW 720; Chloupek v. Perotka, 89 Wis. 551, 62 NW 537, 46 AmSR 858; Ayres v. Reidel, 84 Wis. 276, 54 NW 588; Fairfield v. Barrette, 73 Wis. 463, 41 NW 624.

Eng.—Doe v. Millett, 11 Q. B. 1036, 63 ECL 1036, 116 Reprint 760; Doe v. Thompson, 5 A. & E. 532, 31 ECL 719, 111 Reprint 1266; Cholmondeley v. Clinton, 2 Jac. & W. 1, 37 Reprint 527, 14 ERC 578.

Can.—McConaghy v. Denmark, 4 Can. S. C. 609.

N. B.—Doe v. Littlehale, 10 N. B. 121.

Ont.—Noble v. Noble, 27 Ont. L. 342 [rev 25 Ont. L. 379, 20 OntWR 168, 889, 1 DomLR 516]; Dominion Impr., etc., Co. v. Lally, 24 Ont. L. 115, 2 OntWN 1224, 19 OntWR 462, 2 Ont WN 155, 17 OntWR 151; Coffin v. North American Land Co., 21 Ont. 80.

See also Martin v. Cox, 31 Okl. 543, 122 P 511.

45. Ala.—Newton v. Louisville, etc., R. Co., 110 Ala. 474, 19 S 19.

Ark.—Collins v. Bluff City Lumber Co., 86 Ark. 202, 110 SW 806.

Iowa.—Wright v. Keithler, 7 Iowa 92.

Mo.—Crowl v. Crowl, 195 Mo. 338, 92 SW 890.

N. Y.—Matter of New York, 143 App. Div. 564, 128 NYS 371 [rev on other grounds 203 N. Y. 570, 96 NE 1133].

Pa.—Jenkins v. McMichael, 17 Pa. Super. 476, 479 [cit Cyc].

46. Kirk v. Smith, 9 Wheat. (U. S.) 241, 288, 6 L. ed. 81.

47. Evans v. Welch, 29 Colo. 355, 68 P 776.

48. Collins v. Bluff City Lumber Co., 86 Ark. 202, 110 SW 806; Crawford v. Ahrnes, 103 Mo. 88, 15 SW 341; Rushing v. Lanier, (Tex. Civ. A.) 132 SW 528.

49. Conn.—Russell v. Davis, 38 Conn. 562.

Me.—Eastport v. Belfast, 40 Me. 262; Little v. Libby, 2 Me. 242, 11 AmD 68.

Md.—Winter v. White, 70 Md. 305, 17 A 84.

Minn.—St. Paul, etc., R. Co. v. Hinckley, 53 Minn. 398, 55 NW 560.

Wash.—Delacey v. Commercial Trust Co., 51 Wash. 542, 99 P 574, 130 AmSR 1112.

Wis.—Chloupek v. Perotka, 89 Wis. 551, 62 NW 537, 46 AmSR 858.

50. Eastport v. Belfast, 40 Me. 262; St. Paul, etc., R. Co. v. Hinckley, 53 Minn. 398, 55 NW 560.

51. Russell v. Davis, 38 Conn. 562.

52. Compare infra §§ 220, 228 et seq, 251 et seq.

53. Kirk v. Smith, 9 Wheat. (U. S.) 241, 6 L. ed. 81; Adams v. Burke, 1 F. Cas. No. 49, 3 Sawy. 415; Maring v. Meeker, 263 Ill. 136, 140, 143, 105 NE 31 [cit Cyc]; Purtle v. Bell, 225 Ill. 523, 80 NE 350; Alsup v. Stewart, 194 Ill. 595, 62 NE 795, 88 AmSR 169; Reuter v. Stuckart, 181 Ill. 529, 54 NE 1014; Downing v. Mayes, 153 Ill. 330, 38 NE 620, 46 AmSR 896; Medley v. Elliott, 62 Ill. 532; Ambrose v. Raley, 58 Ill. 506; Whiting v. Nicholl, 46 Ill. 230, 92 AmD 248; Turney v. Chamberlain, 15 Ill. 271; Jackson v. Waters, 12 Johns. (N. Y.) 365; Brandt v. Ogden, 1 Johns. (N. Y.) 156.

[a] **What is possession hostile in its inception.**—One entering into possession under deeds from a grantor based on tax deeds enters in hostility to the owner, and such possession, continued for the statutory time of twenty years, will ripen into title. Maring v. Meeker, 263 Ill. 136, 105 NE 31.

54. U. S.—Holtzman v. Douglas, 168 U. S. 278, 18 SCt 65, 42 L. ed. 466 [aff 5 App. (D. C.) 397].

Ala.—Woodstock Iron Co. v. Roberts, 87 Ala. 436, 6 S 349.

Conn.—St. Peter's Church v. Beach, 26 Conn. 355.

Iowa.—Hamilton v. Wright, 30 Iowa 480.

Mich.—Ward v. Nestell, 113 Mich. 185, 71 NW 593; Michigan Land, etc., Co. v. Thoney, 89 Mich. 226, 50 NW 845.

N. J.—Van Wickle v. Alpough, 3 N. J. L. 446.

N. Y.—Sherman v. Kane, 86 N. Y. 57; Millard v. McMullin, 68 N. Y. 345; De St. Laurent v. Gescheidt, 18 App. Div. 121, 45 NYS 730; Jackson v. Mancius, 2 Wend. 357; Jackson v. Brink, 5 Cow. 483.

Or.—Pearson v. Dryden, 28 Or. 350, 43 P 166.

S. C.—Langston v. Cothran, 78 S. C. 23, 58 SE 956.

Tex.—Davis v. Hurst, 14 SW 610; Olcott v. Squires, (Civ. A.) 144 SW 314.

Vt.—North v. Barnum, 10 Vt. 220; Greeno v. Munson, 9 Vt. 37, 31 AmD 605.

Va.—Virginia Midland R. Co. v. Barbour, 97 Va. 118, 33 SE 554; Creekmur v. Creekmur, 75 Va. 430.

Wis.—Mielke v. Dodge, 135 Wis. 388, 115 NW 1099; Meyer v. Hope, 101 Wis. 123, 77 NW 720; Bartlett v. Secor, 56 Wis. 520, 14 NW 714.

See Monroe Water Supply Co. v. Starner, 242 Pa. 18, 88 A 782.

And see infra §§ 228 et seq, 250 et seq, 271 et seq.

[a] **The distinction** between this class of cases and those in which no privity exists is in the degree of proof required to establish the adverse character of the possession. Zeller v. Eckert, 4 How. (U. S.) 289, 11 L. ed. 979; Creekmur v. Creekmur, 75 Va. 430.

[b] **Applications of rule.**—A tax lessee may originate adverse possession during the running of the lease. McLain v. Bird, 120 NYS 1032. For other applications of the rule see infra §§ 228 et seq, 250 et seq, 271 et seq.

55. Andrews v. Hastings, 85 Nebr. 548, 550, 123 NW 1035 (per Root, J.).

56. Omodt v. Chicago, etc., R. Co., 106 Minn. 205, 118 NW 798; Collins v. Colleran, 86 Minn. 199, 90 NW 364; Tyler Ejectm. 860.

57. U. S.—Root v. Woolworth, 150 U. S. 401, 14 SCt 136, 37 L. ed. 1123 [aff 40 Fed. 723]; Zeller v. Eckert, 4 How. 289, 11 L. ed. 979; Willison v. Watkins, 3 Pet. 43, 7 L. ed. 596; Cleveland v. Cleveland, etc., R. Co., 93 Fed. 113 [rev on other grounds 147 Fed. 171, 77 CCA 467]; Graydon v. Hurd, 55 Fed. 724, 5 CCA 258; McClaskey v. Barr, 42 Fed. 609; Heermans v. Schmaltz, 7 Fed. 566, 10 Biss. 3213.

Ala.—Lecroix v. Malone, 157 Ala. 434, 441, 47 S 725; Ashford v. Ashford, 136 Ala. 631, 34 S 10, 96 AmSR 82;

[§ 211] **C. Claim of Ownership or Title as an Element of Hostility of Possession—1. Necessity and Requisites of Claim of Ownership or Title—a. Statement of Rule.** As will be shown in a subsequent chapter, it is a rule of universal application that color of title is not necessary to the acquisition of title by adverse possession in the absence of some special statutory provision requiring it.[58] But in respect of claim of ownership or title different considerations control. With the exception of a limited number of decisions in which language is used from which a contrary rule might be inferred,[59] and of a few others based on special statutes,[60] the decisions are practically unanimous to the effect that claim of ownership or title is essential to the acquisition of title by adverse possession.[61]

Louisville, etc., R. Co. v. Massey, 136 Ala. 156, 33 S 896, 96 AmSR 17; Butler v. Butler, 133 Ala. 377, 32 S 579; Sample v. Reeder, 107 Ala. 227, 18 S 214; Ponder v. Cheeves, 104 Ala. 307, 16 S 145; Trufant v. White, 99 Ala. 526, 13 S 83; DeJarnette v. McDaniel, 93 Ala. 215, 9 S 570; Burrus v. Meadors, 90 Ala. 140, 7 S 469; Woodstock Iron Co. v. Roberts, 87 Ala. 436, 6 S 349; Jones v. Pelham, 84 Ala. 208, 4 S 22; Dothard v. Denson, 72 Ala. 541; Alexander v. Wheeler, 69 Ala. 332; Potts v. Coleman, 67 Ala. 221; Boykin v. Smith, 65 Ala. 294; Collins v. Johnson, 57 Ala. 304; Hawkins v. Hudson, 45 Ala. 482; Lucas v. Daniels, 34 Ala. 188; Benje v. Creagh, 21 Ala. 151; Harrison v. Pool, 16 Ala. 167; Shelton v. Doe, 6 Ala. 230.

Ark.—Chicot Lumber Co. v. Dardell, 84 Ark. 140, 104 SW 1100; Shirey v. Whitlow, 80 Ark. 444, 97 SW 444; Hope v. Shiver, 77 Ark. 177, 90 SW 1003; Coldcleugh v. Johnson, 34 Ark. 312.

Cal.—Jensen v. Hunter, 41 P 14; Millett v. Lagomarsino, 38 P 308.

Del.—Cooper v. McBride, 9 Del. 461.

Ga.—Allen v. Napier, 75 Ga. 276; Hines v. Rutherford, 67 Ga. 606; Ford v. Holmes, 61 Ga. 419; Garrett v. Adrian, 44 Ga. 274; Roe v. Morrison, 30 Ga. 971; Williams v. Cash, 27 Ga. 507, 73 AmD 739; Spalding v. Grigg, 4 Ga. 75.

Hawaii.—Kalaeokekoi v. Kahanu, 4 Hawaii 481.

Ill.—Kirby v. Kirby, 236 Ill. 255, 86 NE 259; Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088; Rigg v. Cook, 9 Ill. 336, 46 AmD 462.

Iowa.—Chicago, etc., R. Co. v. Snyder, 120 Iowa 532, 95 NW 183; McClenahan v. Stevenson, 118 Iowa 106, 91 NW 925.

Ky.—Robinson v. Huffman, 113 SW 458; Ross v. Veech, 58 SW 475, 22 KyLR 578; James v. Louisville, 40 SW 912, 19 KyL 447; Chalfin v. Malone, 9 B. Mon. 496, 50 AmD 525; Ray v. Barker, 1 B. Mon. 364.

Me.—Lancey v. Parks, 102 Me. 135, 66 A 311; Moore v. Moore, 21 Me. 350; Lamb v. Foss, 21 Me. 240; Millay v. Millay, 18 Me. 387.

Md.—Nicolai v. Baltimore, 100 Md. 579, 60 A 627; Waltemeyer v. Baughman, 63 Md. 200; Gwynn v. Jones, 2 Gill & J. 173.

Mass.—Hall v. Stevens, 9 Metc. 418.

Mich.—Howatt v. Green, 139 Mich. 289, 102 NW 734; St. Joseph v. Seel, 122 Mich. 70, 80 NW 987; Campau v. Lafferty, 50 Mich. 114, 15 NW 40.

Minn.—Omodt v. Chicago, etc., R. Co., 106 Minn. 205, 118 NW 798; Collins v. Colleran, 86 Minn. 199, 90 NW 364; Cameron v. Chicago, etc., R. Co., 60 Minn. 100, 61 NW 814.

Miss.—Davis v. Bowmar, 55 Miss. 671; Green v. Mizelle, 54 Miss. 220.

Mo.—McCune v. Goodwillie, 204 Mo. 306, 102 SW 997; Missouri Lumber, etc., Co. v. Jewell, 200 Mo. 707, 98 SW 578; Coberly v. Coberly, 189 Mo. 1, 87 SW 957; Stevenson v. Black, 168 Mo. 549, 68 SW 909; Downing v. Dinwiddie, 132 Mo. 92, 33 SW 470, 575; Pitzman v. Boyce, 111 Mo. 387, 19 SW 1104, 33 AmSR 536; Comstock v. Eastwood, 108 Mo. 41, 18 SW 39; Meier v. Meier, 105 Mo. 411, 16 SW 223; Handlan v. McManus, 100 Mo. 124, 13 SW 207, 18 AmSR 533; Spencer v. O'Neill, 100 Mo. 49, 12 SW 1054; Gordon v. Eans, 97 Mo. 587, 4 SW 112, 11 SW 64, 370; Wilson v. Lerche, 90 Mo. 473, 2 SW 799; Wilkerson v. Thompson, 82 Mo. 317; Estes v. Long, 71 Mo. 605; Fulkerson v. Brownlee, 69 Mo. 371; Budd v. Collins, 69 Mo. 129; Hamilton v. Boggess, 63 Mo. 233.

Nebr.—Johnson v. Butt, 46 Nebr. 220, 64 NW 691; Smith v. Mount, 38 Nebr. 111, 56 NW 793; Smith v. Hitchcock, 38 Nebr. 104, 56 NW 791.

N. J.—Townsend v. Reeves, 44 N. J. L. 525.

N. Y.—Lewis v. New York, etc., R. Co., 162 N. Y. 202, 56 NE 540; Bartlett v. Judd, 21 N. Y. 200, 78 AmD 131; Monohan v. New York Cent., etc., R. Co., 31 Misc. 619, 66 NYS 37; Jackson v. Denison, 4 Wend. 558.

Or.—Coquille Mill, etc., Co. v. Johnson, 52 Or. 547, 98 P 132, 132 AmSR 716.

Pa.—Cadwalader v. App, 81 Pa. 194; Bannon v. Brandon, 34 Pa. 263, 75 AmD 655; Martin v. Jackson, 27 Pa. 504, 67 AmD 489; Long v. Mast, 11 Pa. 189; Dikeman v. Parrish, 6 Pa. 210, 47 AmD 455; Read v. Thompson, 5 Pa. 327; Hood v. Hood, 2 Grant 229; Leeds v. Bender, 6 Watts & S. 315; Rush v. Barr, 1 Watts 110; McMasters v. Bell, 2 Penr. & W. 180; Lund v. Brown, 2 Chest. Co. 221, 14 WklyNC 489.

S. C.—McCutchen v. McCutchen, 77 S. C. 129, 57 SE 678, 12 LRANS 1140 and note; Lamar v. Raysor, 41 S. C. L. 509; Floyd v. Mintsey, 41 S. C. L. 181; Moore v. Johnston, 29 S. C. L. 288; Markley v. Amos, 18 S. C. L. 603.

Tenn.—Duke v. Harper, 6 Yerg. 280, 27 AmD 462.

Tex.—Davis v. Hurst, 14 SW 610; Satterwhite v. Rosser, 61 Tex. 166; Meurin v. Kopplin, (Civ. A.) 100 SW 984; Surghenor v. Taliaferro, (Civ. A.) 98 SW 648.

Va.—Thompson v. Camper, 106 Va. 315, 55 SE 674; Hulvey v. Hulvey, 92 Va. 182, 23 SE 233; Wilcher v. Robertson, 78 Va. 602; Creekmur v. Creekmur, 75 Va. 430; Clarke v. McClure, 10 Gratt. (51 Va.) 305.

W. Va.—Hudson v. Putney, 14 W. Va. 561.

Wis.—Allen v. Ellis, 125 Wis. 565, 104 NW 739; Watts v. Owens, 62 Wis. 512, 22 NW 720; Bartlett v. Secor, 56 Wis. 520, 14 NW 714; Furlong v. Garrett, 44 Wis. 111; Pepper v. O'Dowd, 39 Wis. 538; Hoyt v. Jones, 31 Wis. 389; Quinn v. Quinn, 27 Wis. 168.

And see infra §§ 229 et seq, 251 et seq, 272.

In Lecroix v. Malone, supra, the court said: "The theory upon which adverse possession becomes a perfect title is that the true owner has by his own fault and neglect failed to assert his right against the hostile holding for the full period of the statute. If the entry then, is not hostile and under claim of right in its inception, notice of any change in the character of the possession must be brought home to the owner to impute laches or neglect to him as the basis of limitations. Of course, we do not mean to say that this notice must be direct and express, but, if it rests upon implication, it must be founded upon such facts and circumstances as to bring home to the owner information that the holding has become hostile. 'In such case, while it may be open to the jury to find from the circumstances of the possession that the owner had notice of its hostile and exclusive character, no exclusiveness of possession, no hostility, no claim of right antagonistic to the title will necessarily in any case take the place of direct proof of knowledge on the part of the owner that the possession is no longer held in subserviency to him.'"

58. See infra § 332.

59. Stevens v. Smoker, 84 Conn. 569, 80 A 788; Carney v. Hennessey, 74 Conn. 107, 49 A 910 [cit without comment Johnson v. Gorham, 38 Conn. 513; French v. Pearce, 8 Conn. 439, 21 AmD 680; Bryan v. Atwater, 5 Day (Conn.) 181, 5 AmD 136; Campau v. Dubois, 39 Mich. 274].

60. See cases infra this note.

[a] **Under some of the statutes of Texas** relating to adverse possession claim of title is not necessary. Thus under Rev. St. (1895) art 3343, providing that an action to recover land "against another having peaceable and adverse possession thereof, cultivating, using, and enjoying the same," must be brought within ten years after the cause of action accrued; under art 3348, defining "peaceable possession" to be such as is "continuous and not interrupted by adverse suit to recover the estate"; and under art 3349, defining "adverse possession" to be "an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another," an adverse holder need not claim to own the land during his possession in order that the limitation may run in his favor. Cox v. Sherman Hotel Co., (Civ. A.) 47 SW 808.

[b] **In England and Canada** the statutes have done away with the necessity for the element of claim of title. Lyell v. Kennedy, 14 App. Cas. 437, 16 ERC 342; Littledale v. Liverpool College, [1900] 1 Ch. 19; Philpot v. Bath, 21 T. L. R. 634; Finch v. Gilray, 16 Ont. A. 484; McNish v. Munro, 25 U. C. C. P. 290; McCracken v. Warnock, 43 U. C. Q. B. 214; Cole v. Brunt, 35 U. C. Q. B. 103; Doe v. Sexton, 8 U. C. Q. B. 264; Doe v. Servos, 5 U. C. Q. B. 284.

61. U. S.—Sharon v. Tucker, 144 U. S. 533, 12 SCt 720, 36 L. ed. 532; Harvey v. Tyler, 2 Wall. 328, 17 L. ed. 871; Jackson v. Huntington, 5 Pet. 402, 8 L. ed. 170; Kirk v. Smith, 9 Wheat. 241, 6 L. ed. 81; Richmond Cedar Works v. Pinnix, 208 Fed. 785; Northern Pac. R. Co. v. Littlejohn, 198 Fed. 700; Arrowsmith v. Burlington, 1 F. Cas. No. 563, 4 McLean 489; Granger v. Swart, 10 F. Cas. No. 5,685, 1 Woolw. 88; Holtzapple v. Phillibaum, 12 F. Cas. No. 6,648, 4 Wash. C. C. 356; Jackson v. Porter, 13 F. Cas. No. 7,143, 1 Paine 457; M'Iver v. Reagan, 16 F. Cas. No. 8,832, Brunn. Coll. Cas. 240 [aff 2 Wheat. 25, 4 L. ed. 175]; Nelson v. Madison, 17 F. Cas. No. 10,110, 3 Biss. 244; Patton v. Hynes, 18 F. Cas. No. 10,835, Brunn. Coll. Cas. 231; Sacket v. McDonnell, 21 F. Cas. No. 12,202, 3 Biss. 394; Taggart v. Stanbery, 23 F. Cas. No. 13,724, 2 McLean 543; Wilkes v. Elliott, 29 F. Cas. No. 17,660, 5 Cranch C. C. 611.

Ala.—Swindall v. Ford, 63 S 651; Alexander-City Union Warehouse, etc., Co. v. Central of Georgia R. Co., 62 S 745; McLester Bldg. Co. v. Upchurch, 60 S 173; Montgomery, etc., R. Co. v. Rutland, 165 Ala. 311, 51 S 831; Frick v. Harper, 155 Ala. 231, 46 S 453; Louisville, etc., R. Co. v. Higginbotham, 155 Ala. 334, 44 S 872; McDaniel v. Sloss-Sheffield Steel, etc., Co., 152 Ala. 414, 417, 44 S 705 [cit Cyc]; Gillespie v. Gillespie, 149 Ala. 184, 43 S 12; McCreary v. Jackson Lumber Co., 148 Ala. 247, 41 S 822; Henry v. Brown, 143 Ala. 446, 39 S 325; Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45; Dorlan v. Westervitch, 140 Ala. 283, 37 S 382, 103 AmSR 35; Pearson v. Adams, 129 Ala. 157, 29 S 977; Bowling v. Mobile, etc., R. Co., 128 Ala. 550, 29

As otherwise expressed it is the intention to | claim title which makes the possession ad-

:S 584; Stiff v. Cobb, 126 Ala. 381, 28 S 402, 85 AmSR 38; Nashville, etc., R. Co. v. Hobbs, 120 Ala. 600, 24 S 933; Beasley v. Howell, 117 Ala. 499, 22 S 989; Murray v. Hoyle, 97 Ala. 588, 11 S 797; Bernstein v. Humes, 78 Ala. 134; Humes v. Bernstein, 72 Ala. 546; Alexander v. Wheeler, 69 Ala. 332; Potts v. Coleman, 67 Ala. 221; Hawkins v. Hudson, 45 Ala. 482; Ormond v. Martin, 37 Ala. 598; Brown v. Cockerell, 33 Ala. 38; Kennedy v. Townsley, 16 Ala. 239; Doe v. Eslava, 11 Ala. 1028; Badger v. Lyon, 7 Ala. 564.

Ark.—Ringo v. Woodruff, 43 Ark. 469; Trapnall v. Burton, 24 Ark. 371; Phelps v. Henry, 15 Ark. 297.

Cal.—Huntley v. San Francisco Sav. Union, 130 Cal. 46, 62 P 255; Rix v. Horstmann, 93 Cal. 502, 29 P 120; Unger v. Mooney, 63 Cal. 586, 49 AmR 100; Greer v. Tripp, 56 Cal. 209; Thompson v. Felton, 54 Cal. 547; Thompson v. Pioche, 44 Cal. 508; McCracken v. San Francisco, 16 Cal. 591; Janke v. McMahon, 21 Cal. A. 781, 133 P 21; Dresser v. Allen, 17 Cal. A. 508, 120 P 65; Knight v. Cohen, 7 Cal. A. 43, 93 P 396. See Stanton v. Freeman, 19 Cal. A. 464, 126 P 377.

Colo.—Manitou v. International Trust Co., 30 Colo. 467, 70 P 757.

Conn.—Roberts v. Merwin, 80 Conn. 347, 68 A 377. See Stevens v. Smoker, 84 Conn. 569, 80 A 788 (possessor need not claim land as his own).

Del.—O'Daniel v. Wilmington Bakers' Union, 9 Del. 488.

D. C.—Ebbinghaus v. Killian, 12 D. C. 247.

Fla.—Seymour v. Creswell, 18 Fla. 29.

Ga.—Walker v. Steffes, 139 Ga. 520, 77 SE 580; Wade v. Johnson, 94 Ga. 348, 21 SE 569; Laramore v. Minish, 43 Ga. 282; Lawson v. Cunningham, 21 Ga. 454; Morrison v. Hays, 19 Ga. 294; Wood v. McGuire, 17 Ga. 303; Riley v. Griffin, 16 Ga. 141, 60 AmD 726; Whittington v. Doe, 9 Ga. 23; English v. Doe, 7 Ga. 387.

Hawaii.—Iona v. Uu, 16 Hawaii 432.

Ill.—Stewart v. Andrews, 239 Ill. 186, 87 NE 864; Kirby v. Kirby, 236 Ill. 255, 86 NE 259; Page v. Bellamy, 222 Ill. 556, 78 NE 938; Clark v. Jackson, 222 Ill. 13, 78 NE 6; Roby v. Calumet, etc., Canal, etc., Co., 211 Ill. 173, 71 NE 822; Illinois Cent. R. Co. v. Hatter, 207 Ill. 88, 69 NE 751; McCloskey v. Hayden, 169 Ill. 297, 48 NE 432; Nickrans v. Wilk, 161 Ill. 76, 43 NE 741; Walker v. Converse, 148 Ill. 622, 36 NE 202; Chicago, etc., R. Co. v. Galt, 133 Ill. 657, 23 NE 425, 24 NE 674; Shaw v. Schoonover, 130 Ill. 448, 22 NE 589; McNamara v. Seaton, 82 Ill. 498; Turney v. Chamberlain, 15 Ill. 271.

Ind.—Maple v. Stevenson, 122 Ind. 368, 23 NE 854; Parish v. Kaspare, 109 Ind. 586, 10 NE 109; Peck v. Louisville, etc., R. Co., 101 Ind. 366; Pennington v. Flock, 93 Ind. 378; McCardle v. Barricklow, 68 Ind. 356; Buckley v. Taggart, 62 Ind. 236; Palmer v. Wright, 58 Ind. 486; Peterson v. McCullough, 50 Ind. 35; Moore v. Worley, 24 Ind. 81; Wiggins v. Holley, 11 Ind. 2; Law v. Smith, 4 Ind. 56.

Iowa.—Willson v. Beck, 142 NW 78; Goulding v. Shonquist, 141 NW 24, 25 [cit Cyc]; McClenehan v. Jesup, 144 Iowa 352, 120 NW 74; Vorhes v. Ackley, 127 Iowa 658, 103 NW 998; Pettit v. Grand Junction, 119 Iowa 352, 93 NW 381; Mead v. Illinois Cent. R. Co., 112 Iowa 291, 83 NW 979; Schrimper v. Chicago, etc., R. Co., 82 NW 916; Kahl v. Schmidt, 107 Iowa 550, 78 NW 204; Agne v. Seitsinger, 60 NW 483; Wickham v. Henthorn, 91 Iowa 242, 59 NW 276; Knudson v. Litchfield, 87 Iowa 111, 54 NW 199; McCarty v. Rochel, 85 Iowa 427, 52 NW 361; Doolittle v. Bailey, 85 Iowa 398, 52 NW 337; Hempsted v. Huffman, 84 Iowa 398, 51 NW 17; Weimig v. Holcomb, 73 Iowa 143, 34 NW 787; Donahue v. Lannan, 70 Iowa 73, 30 NW 8; Davenport v. Sebring, 52 Iowa 364, 3 NW 403; Solberg v. Decorah, 41 Iowa 501; Larum v. Wilmer, 35 Iowa 244; McDunn v. Des Moines, 34 Iowa 467; Grube v. Wells, 34 Iowa 148; McNamee v. Moreland, 26 Iowa 96; Clagett v. Conlee, 16 Iowa 487; Jones v. Hockman, 12 Iowa 101; Wright v. Keithler, 7 Iowa 92.

Kan.—Winn v. Abbles, 35 Kan. 85, 10 P 443, 57 AmR 138.

Ky.—Griffith v. Griffith, 152 Ky. 185, 153 SW 229; Arthur v. Humble, 140 Ky. 56, 130 SW 958; Richie v. Owsley, 121 SW 1015; Cuyler v. Bush, 84 SW 579, 27 KyL 148; Vincent v. Willis, 82 SW 583, 26 KyL 842; Sizemore v. Trimble, 80 SW 477, 26 KyL 8; Caudill v. Caudill, 52 SW 957, 21 KyL 713; Ward v. Edge, 100 Ky. 757, 39 SW 440, 19 KyL 59; Halbert v. Maysville, etc., R. Co., 98 Ky. 661, 33 SW 1121; Schieble v. Hart, 12 SW 628, 11 KyL 607; Haffendorfer v. Gault, 84 Ky. 124; Russell v. Mark, 3 Metc. 37; Bell v. Fry, 5 Dana 341; Norton v. Doe, 1 Dana 14; Smith v. Morrow, 5 Litt. 210; Louisville, etc., R. Co. v. Sparks, 14 KyL 398.

La.—Dowdell v. Orphans' Home Soc., 114 La. 49, 38 S 16; Clemens v. Meyer, 44 La. Ann. 390, 10 S 797; Simon v. Richard, 42 La. Ann. 842, 8 S 629; Stille v. Shull, 41 La. Ann. 816, 6 S 634; Chaffe v. Abercrombie, 26 La. Ann. 685; Spivey v. Wilson, 31 La. Ann. 653; Crane v. Allen, 11 La. Ann. 496.

Me.—Lockwood Co. v. Lawrence, 77 Me. 297, 52 AmR 763; Worcester v. Lord, 56 Me. 265, 96 AmD 456; Abbott v. Abbott, 51 Me. 575; Lamb v. Foss, 21 Me. 240; Ross v. Gould, 5 Me. 204; Bethum v. Turner, 1 Me. 111, 10 AmD 36.

Md.—Davis v. Furlow, 27 Md. 536; Dean v. Brown, 23 Md. 11, 87 AmD 555.

Mass.—Holloran v. Holloran, 149 Mass. 298, 21 NE 374; Bond v. O'Gara, 177 Mass. 139, 58 NE 275, 83 AmSR 265; Simmons v. Nahant, 3 Allen 316; Church v. Burghardt, 8 Pick. 327; Purchase Proprietors v. Springer, 4 Mass. 416, 3 AmD 227.

Mich.—Beecher v. Ferris, 110 Mich. 537, 68 NW 269; Smeberg v. Cunningham, 96 Mich. 378, 56 NW 73, 35 AmSR 613; Marble v. Price, 54 Mich. 466, 20 NW 531; Bunce v. Bidwell, 43 Mich. 542, 5 NW 1023; White v. Hapeman, 43 Mich. 267, 5 NW 313, 38 AmR 178.

Minn.—Mitchell v. Green, 145 NW 404; Sawbridge v. Fergus Falls, 101 Minn. 378, 112 NW 385; Glencoe v. Wadsworth, 48 Minn. 402, 51 NW 377; Sherin v. Brackett, 36 Minn. 152, 30 NW 551.

Miss.—Jones v. Gaddis, 67 Miss. 761, 7 S 489; Davis v. Bowmar, 55 Miss. 671; Ford v. Wilson, 35 Miss. 490, 72 AmD 137; Snodgrass v. Andrews, 30 Miss. 472, 64 AmD 169; Adams v. Guice, 30 Miss. 397.

Mo.—Himmelberger-Harrison Lumber Co. v. Craig, 248 Mo. 319, 330, 154 SW 73; Dulce Realty Co. v. Staed Realty Co., 245 Mo. 417, 151 SW 415; Feller v. Lee, 225 Mo. 319, 124 SW 1129; Crowl v. Crowl, 195 Mo. 338, 92 SW 890; Kansas City v. Scarritt, 169 Mo. 471, 69 SW 283; Stevenson v. Black, 168 Mo. 549, 68 SW 909; Baber v. Henderson, 156 Mo. 566, 57 SW 719, 79 AmSR 540; Hunnewell v. Williams, 154 Mo. 135, 55 SW 221; Hunnewell v. Adams, 153 Mo. 440, 55 SW 95; McCabe v. Bruere, 153 Mo. 1, 54 SW 450; Hunnewell v. Burchett, 152 Mo. 611, 54 SW 487; Kansas City Milling Co. v. Riley, 133 Mo. 574, 34 SW 835; Downing v. Dinwiddie, 132 Mo. 92, 33 SW 470, 575; Ivy v. Yancey, 129 Mo. 501, 31 SW 937; Pharis v. Jones, 122 Mo. 125, 26 SW 1032; Wilkerson v. Eilers, 114 Mo. 245, 21 SW 514; DeBernardi v. McElroy, 110 Mo. 650, 19 SW 626; St. Louis v. Priest, 103 Mo. 652, 15 SW 988; Nave v. Smith, 95 Mo. 596, 8 SW 796, 6 AmSR 79; Burke v. Adams, 80 Mo. 504, 50 AmR 510; Mylar v. Hughes, 60 Mo. 105; Bradley v. West, 60 Mo. 33; Fugate v. Pierce, 49 Mo. 441; Bowman v. Lee, 48 Mo. 385; Thomas v. Babb, 45 Mo. 384; Knowlton v. Smith, 36 Mo. 507, 88 AmD 152; Pease v. Lawson, 33 Mo. 35; Tomlinson v. Lynch, 32 Mo. 160; Draper v. Shoot, 25 Mo. 197, 69 AmD 462; Lajoye v. Primm, 3 Mo. 529; Taylor v. Planet Property, etc., Co., 78 Mo. A. 137.

Mont.—Peter v. Stephens, 11 Mont. 115, 27 P 403, 28 AmSR 448; Pardee v. Murray, 4 Mont. 234, 2 P 16.

Nebr.—Andrews v. Hastings, 85 Nebr. 548, 123 NW 1035; Beer v. Plant, 96 NW 348; Knight v. Denman, 64 Nebr. 814, 90 NW 863; Lantry v. Wolff, 49 Nebr. 374, 68 NW 494; Colvin v. Republican Valley Land Assoc., 23 Nebr. 75, 36 NW 361, 8 AmSR 114; Hull v. Chicago, etc., R. Co., 21 Nebr. 371, 32 NW 162; Roggencamp v. Converse, 15 Nebr. 105, 17 NW 361; Beer v. Dalton, 3 Nebr. (Unoff.) 694, 92 NW 593; Ritter v. Myers, 3 Nebr. (Unoff.) 684, 92 NW 638.

Nev.—McDonald v. Fox, 20 Nev. 364, 22 P 234.

N. H.—Little v. Downing, 37 N. H. 355; Fellows v. Fellows, 37 N. H. 75; Straw v. Jones, 9 N. H. 400; Lund v. Parker, 3 N. H. 49.

N. Y.—Long Island R. Co. v. Mulry, 212 N. Y. 108, 105 NE 806; Rathbunville Union Cemetery Assoc. v. Betson, 208 N. Y. 364, 101 NE 892; De Lancey v. Hawkins, 163 N. Y. 587, 57 NE 1108 [aff 23 App. Div. 8, 49 NYS 469]; Heller v. Cohen, 154 N. Y. 299, 48 NE 527; Doherty v. Matsell, 119 N. Y. 646, 23 NE 994; East Hampton v. Kirk, 84 N. Y. 215, 38 AmR 505; Bridges v. Wyckoff, 67 N. Y. 130; Bedell v. Shaw, 59 N. Y. 46; Tripp v. Richter, 158 App. Div. 136, 142 NYS 563; Miller v. Warren, 94 App. Div. 192, 87 NYS 1011 [aff 182 N. Y. 539 mem, 75 NE 1131 mem]; Fortier v. Delaware, etc., R. Co., 93 App. Div. 24, 86 NYS 896; Willey v. Greenfield, 64 App. Div. 220, 71 NYS 1046; De St. Laurent v. Gescheidt, 18 App. Div. 121, 45 NYS 730; Tindale v. Powell, 88 Hun 193, 34 NYS 659; Smith v. Reich, 80 Hun 287, 30 NYS 167 [aff 151 N. Y. 642, 45 NE 1134]; McCabe v. Kenny, 52 Hun 514, 5 NYS 678; Smith v. Floyd, 18 Barb. 522; Casey v. Dunn, 57 N. Y. Super. 381, 8 NYS 305; Sturges v. Parkhurst, 50 N. Y. Super. 306; Miller v. Platt, 12 N. Y. Super. 272; Andrews v. Delhi, etc., Tel. Co., 36 Misc. 23, 72 NYS 50 [aff 66 App. Div. 616 mem, 73 NYS 1129]; Monohan v. New York Cent., etc., R. Co., 31 Misc. 619, 66 NYS 37; Berkowitz v. Brown, 3 Misc. 1, 23 NYS 792; Humbert v. Trinity Church, 24 Wend. 587; Jackson v. Oltz, 8 Wend. 440; Jackson v. Thomas, 16 Johns. 293; Jackson v. Sharp, 9 Johns. 163, 6 AmD 267; Smith v. Burtis, 6 Johns. 197, 5 AmD 218; Brandt v. Ogden, 1 Johns. 156.

N. C.—Barfield v. Hill, 163 N. C. 262, 79 SE 677; Haddock v. Leary, 148 N. C. 378, 62 SE 426; Hamilton v. Buchanan, 112 N. C. 463, 17 SE 159; Malloy v. Bruden, 86 N. C. 251; Duvall v. Rollins, 71 N. C. 218; Gilchrist v. McLaughlin, 29 N. C. 310; Armour v. White, 3 N. C. 236. See however Jackson v. Hillsborough, 18 N. C. 177.

Okl.—Adkins v. Wright, 37 Okl. 771, 131 P 686; Flesher v. Callahan, 32 Okl. 283, 122 P 489; Wade v. Crouch, 14 Okl. 593, 78 P 91.

Or.—Thomas v. Spencer, 66 Or. 359, 133 P 822; Bayne v. Brown, 60 Or. 110, 118 P 282; Chapman v. Dean, 58 Or. 475, 115 P 154; Stout v. Michelbook, 58 Or. 372, 114 P 929; Coquille Mill, etc., Co. v. Johnson, 52 Or. 547, 98 P 132, 132 AmSR 716; Sommer v. Copton, 52 Or. 173, 96 P 124, 1065; Altschul v. O'Neill, 35 Or. 202, 58 P 95; Beale v. Hite, 35 Or. 176, 57 P 322, 58 P 102; Swift v. Mulkey, 14 Or. 59, 12 P 76.

Pa.—McCombs v. Rowan, 52 Pa.

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verse.[62] No matter how continuous, exclusive, and hostile to the true owner the possession may be in appearance, it cannot be effectually adverse unless accompanied by the intent on the part of the occupant to make it so.[63] To say that the possession must be hostile "is equivalent to saying that it must be under a claim of right."[64] Nevertheless this principle must not be so extended as to contravene another principle applicable to adverse possession "that a party may claim adversely, though he knows that his title is defective, but he must claim a right to the land."[65]

[§ 212] **b. Reason for Rule.** The reason on which the rule is based has nowhere been more clearly stated than in an opinion of the supreme court of the United States. "Possession, per se," it was said, "evidences no more than the mere fact of present occupation by right; for the law will not presume a wrong; and that possession is just as consistent with a present interest, under a lease for years or for life, as in fee. From the very nature of the case, therefore, it must depend upon the collateral circumstances, which is the quality and extent of the interest claimed by the party; and to that extent, and that only, will the presumption of law go in his favor."[66]

[§ 213] **c. Applications of Rule.** In accordance with the principles stated it is held that the possession of a mere squatter[67] will not ripen into title.[68] So also if one enters into possession with the inten-

414; Potts v. Everhart, 26 Pa. 493; Marsh v. Weckerly, 13 Pa. 250; Ingersoll v. Lewis, 11 Pa. 212, 51 AmD 536; Long v. Mast, 11 Pa. 189; Criswell v. Altemus, 7 Watts 565; Comegys v. Carley, 3 Watts 280, 27 AmD 356; Rung v. Shoneberger, 2 Watts 23, 26 AmD 95; Schwab v. Bickel, 11 Pa. Super. 312; Omensetter v. Kemper, 6 Pa. Super. 309, 41 WklyNC 501; Schwab v. Bickel, 9 Kulp 158; Bradford v. Guthrie, 3 Pittsb. 213.

Philippine.—Cumagun v. Allingay, 19 Philippine 415.

S. C.—Carr v. Mouzon, 86 S. C. 461, 68 SE 661; Markley v. Amos, 18 S. C. L. 603.

Tenn.—Duke v. Helms, 100 Tenn. 249, 46 SW 761; Hubbard v. Godfrey, 100 Tenn. 150, 47 SW 81; Jordan v. Maney, 10 Lea 135; Turner v. Turner, 2 Sneed 27; Rutherford v. Franklin, 1 Swan 321; Story v. Saunders, 8 Humphr. 663; East Tennessee Iron, etc., Co. v. Ferguson, (Ch. A.) 35 SW 900.

Tex.—Holland v. Nance, 102 Tex. 177, 114 SW 346; Schleicher v. Gatlin, 85 Tex. 270, 20 SW 120; Texas Western R. Co. v. Wilson, 83 Tex. 153, 18 SW 325; Forsod v. Golson, 77 Tex. 666, 14 SW 232; Mhoon v. Cain, 77 Tex. 316, 14 SW 24; Ivey v. Petty, 70 Tex. 178, 7 SW 798; Brown v. Simpson, 67 Tex. 225, 2 SW 644; Satterwhite v. Rosser, 61 Tex. 166; Chance v. Branch, 58 Tex. 490; Portis v. Hill, 3 Tex. 273; Chicago, etc., R. Co. v. Johnson, (Civ. A.) 156 SW 253; Shaw v. Windham, (Civ. A.) 155 SW 636; Watkins v. Watkins, (Civ. A.) 119 SW 145; Texas, etc., R. Co. v. Broom, 53 Tex. Civ. A. 78, 114 SW 655; Wiess v. Goodhue, 46 Tex. Civ. A. 142, 102 SW 793; Earnest v. Lake, 45 Tex. Civ. A. 463, 101 SW 479; Fischer v. Giddings, 43 Tex. Civ. A. 393, 95 SW 33; Webb v. Lyerla, 43 Tex. Civ. A. 124, 94 SW 1095; Whitaker v. Thayer, 38 Tex. Civ. A. 537, 86 SW 364; Woods v. Texas Land, etc., Co., (Civ. A.) 67 SW 155; Lackey v. Bennett, (Civ. A.) 65 SW 651; Peterson v. Ward, 5 Tex. Civ. A. 208, 23 SW 637; Beall v. Evans, 1 Tex. Civ. A. 443, 20 SW 945; Norton v. Collins, 1 Tex. Civ. A. 272, 20 SW 1113.

Utah.—Pioneer Inv., etc., Co. v. Salt Lake City Bd. of Education, 35 Utah 1, 99 P 150, 136 AmSR 1016; Salt Lake Inv. Co. v. Fox, 32 Utah 301, 90 P 564, 125 AmSR 865, 13 LRANS 627 and note; Dignan v. Nelson, 26 Utah 186, 72 P 936 (under statute).

Vt.—Blondin v. Brooks, 83 Vt. 472, 76 A 184; Demeritt v. Parker, 82 Vt. 59, 71 A 833; Hunter v. Emerson, 75 Vt. 173, 53 A 1070; Soule v. Barlow, 48 Vt. 132, 49 Vt. 329; Atkinson v. Patterson, 46 Vt. 750; Plimpton v. Converse, 42 Vt. 712.

Va.—Yellow Poplar Lumber Co. v. Thompson, 108 Va. 612, 62 SE 358; Davis v. Owen, 107 Va. 283, 58 SE 581, 13 LRANS 728; Haney v. Breeden, 100 Va. 781, 42 SE 916; Harman v. Stearns, 95 Va. 58, 27 SE 601; Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232; Atkinson v. Smith, 24 SE 901; Creekmur v. Creekmur, 75 Va. 430; Nowlin v. Reynolds, 25 Gratt. (66 Va.) 137; Erskine v. North, 14 Gratt. (55 Va.) 60; Kincheloe v. Tracewells, 11 Gratt. (52 Va.) 587; Wild v. Serpell, 10 Gratt. (51 Va.) 405.

Wash.—State v. Sturtevant, 76 Wash. 158, 135 P 1035, 138 P 650; McNaught-Collins Impr. Co. v. May, 52 Wash. 632, 101 P 237; Morgan v. Northern Pac. R. Co., 50 Wash. 480, 97 P 510; Lohse v. Burch, 42 Wash. 156, 84 P 722; Yesler v. Holmes, 39 Wash. 34, 80 P 851; Blake v. Shriver, 27 Wash. 593, 68 P 330.

W. Va.—Maxwell v. Cunningham, 50 W. Va. 298, 40 SE 499; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255; Heavner v. Morgan, 41 W. Va. 428, 23 SE 874; Hall v. Hall, 27 W. Va. 468; Storrs v. Feick, 24 W. Va. 606; Core v. Faupel, 24 W. Va. 238.

Wis.—Allen v. Ellis, 125 Wis. 565, 104 NW 739; Davis v. Appleton, 109 Wis. 580, 85 NW 515; Kurz v. Miller, 89 Wis. 426, 62 NW 182; Childs v. Nelson, 69 Wis. 125, 33 NW 587; McCormick v. Herndon, 67 Wis. 648, 31 NW 303; Reilly v. Racine, 51 Wis. 526, 8 NW 417; Pepper v. O'Dowd, 39 Wis. 538; Austin v. Holt, 32 Wis. 478.

Que.—Stuart v. Ives, 1 L. C. 193.

See McAllister v. Hartzell, 60 Oh. St. 69, 53 NE 715.

[a] **Tentative claim of title.**—If one claims land against the world the statute of limitations is set in motion; but if he merely claims it tentatively, subject to the result of inquiry as to whether it is within his boundaries, the claim is not adverse. Wiess v. Goodhue, 46 Tex. Civ. A. 142, 102 SW 793.

62. Kirby v. Kirby, 236 Ill. 255, 86 NE 259; McNamara v. Seaton, 82 Ill. 498; Ewing v. Burnet, 11 Pet. (U. S.) 41, 9 L. ed. 624; Beale v. Hite, 35 Or. 176, 57 P 322, 58 P 102; Haney v. Breeden, 100 Va. 781, 42 SE 916; Brock v. Bear, 100 Va. 562, 42 SE 307.

"It is elementary law that adverse possession which will ripen into a title must be under a claim of right . . . or, as it has been thought more accurate to say, 'with an intention to appropriate and hold the same as owner, and to the exclusion, rightfully or wrongfully, of every one else.'" Bond v. O'Gara, 177 Mass. 139, 143, 58 NE 275, 83 AmSR 265 (per Holmes, C. J.). "The intention with which possession is taken or held is regarded as a controlling factor in determining whether or not it is adverse. There must be an intention to claim the title as owner, and in derogation of the rights of the true owner." Swope v. Ward, 185 Mo. 316, 324, 84 SW 895 (per Marshall, J.).

63. Ill.—Kirby v. Kirby, 236 Ill. 255, 86 NE 259.

Ind.—Wiggins v. Holley, 11 Ind. 2.

Iowa.—Bradley v. Burkhart, 139 Iowa 323, 115 NW 597, 130 AmSR 328.

Mo.—Spicer v. Spicer, 249 Mo. 582, 155 SW 832; Baker v. Thompson, 214 Mo. 500, 114 SW 497; Kansas City v. Scarritt, 169 Mo. 471, 69 SW 283.

Nebr.—Ryan v. Lincoln, 85 Nebr. 539, 123 NW 1021; Knight v. Denman, 64 Nebr. 814, 90 NW 868 [aff reh 68 Nebr. 383, 94 NW 622]; Colvin v. Republican Valley Land Assoc., 23 Nebr. 75, 36 NW 361, 8 AmSR 114; Beer v. Plant, 1 Nebr. (Unoff.) 372, 96 NW 348.

N. Y.—Timmermann v. Cohn, 70 Misc. 327, 128 NYS 770.

Tex.—Holland v. Nance, 102 Tex. 177, 114 SW 346 [rev (Civ. A.) 107 SW 102].

Vt.—Lathrop v. Levarn, 83 Vt. 1, 74 A 331.

Va.—Haney v. Breeden, 42 SE 916, 100 Va. 781.

Wash.—Delacey v. Commercial Trust Co., 51 Wash. 542, 99 P 574, 130 AmSR 1112; Port Townsend v. Lewis, 34 Wash. 413, 75 P 982.

W. Va.—Flynn v. Lee, 31 W. Va. 487, 7 SE 430.

"A mere passive possession, without intending to claim the property, is insufficient, regardless of the length of time such a possession continues, or however open, notorious, or exclusive it may have been. . . . It is not the mere possession that determines the rights of the parties, but it is the character of the possession that controls." Pioneer Inv., etc., Co. v. Salt Lake City Bd. of Education, 35 Utah 1, 7, 99 P 150, 136 AmSR 1016 (per Frick, J.).

64. Lathrop v. Levarn, 83 Vt. 1, 4, 74 A 331 (per Rowell, C. J.). To same effect Brown v. Clark, 73 Vt. 233, 5 A 1066; Morse v. Churchill, 41 Vt. 649.

[a] **"The claim of right is the very essence of the proceeding by which the new title is acquired,** and without it occupancy can never rise to the dignity of disseisin. A disclaimer of all ownership or right would dispel any idea of adverse holding, but an omission to make such a claim, either by word or act, will not advance or promote such idea." Altschul v. O'Neill, 35 Or. 202, 211, 58 P 95 (per Wolverton, J.).

[b] **"It is the bud of such 'claim' that flowers finally into title** by ten years' adverse possession." Feller v. Lee, 225 Mo. 319, 327, 124 SW 1129 (per Lamm, J.).

65. McDaniel v. Sloss-Sheffield Steel, etc., Co., 152 Ala. 414, 417, 44 S 705, 126 AmSR 48 (per Simpson, J.).

66. Ricard v. Williams, 7 Wheat. (U. S.) 59, 105, 5 L. ed. 398 [quot with approval Coquille Mill, etc., Co. v. Johnson, 52 Or. 547, 98 P 132, 132 AmSR 716]. And see Adams v. Guice, 30 Miss. 397 (where it was said that the reason is that it may not have been taken originally, or subsequently held, with the intention to claim the property as owner, and may have been with a perfect understanding between the possessor and the proprietor that the latter is all the time to be regarded as such).

67. **Squatter defined** see 36 Cyc 811.

68. U. S.—Clarke v. Courtney, 5 Pet. 319, 8 L. ed. 140; Jasperson v. Scharnikow, 150 Fed. 571, 80 CCA 373, 15 LRANS 1178 and note; Sacket v. McDonnell, 21 F. Cas. No. 12,202, 8 Biss. 394.

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tion of purchasing from the owner[69] or as lessee[70] his possession is not adverse. And where in a boundary line dispute no prescriptive title was claimed no right of either party was surrendered by occupancy.[71] Other applications of the principle are set out in the notes.[72]

[§ 214] **d. Effect of Possession without Claim of Title.** Where a person enters upon land and takes possession without claim of title or right, his occupation is subservient to the paramount title, not adverse to it.[73] Naked possession unaccompanied by any claim of right will never constitute a bar but will inure to the advantage of the real owner.[74] Entry and taking possession without claim of right are nothing more than a trespass,[75] and, no matter how long continued, can never ripen into a good title,[76] no matter how exclusive and hostile to him the possession may be in appearance.[77]

[§ 215] **e. Effect of Disclaimer of Title.** Where the occupant expressly disclaims title in himself he cannot of course acquire title by adverse possession,[78] unless after such disclaimer he subsequently sets up a claim of title and holds adversely for the statutory period, which he may do.[79]

[§ 216] **f. Requisites and Sufficiency of Claim of Title.** Declarations or assertions by the occupant are not essential to claim of title which may be made by acts alone quite as effectively as by declarations.[80] Customary acts of ownership and control of the land inconsistent with the title and possession of the true owner will suffice,[81] and it has been said that this is the only proof of which

Ala.—Bernstein v. Humes, 78 Ala. 134.

Ga.—Doe v. Roe, 36 Ga. 321; Gay v. Mitchell, 35 Ga. 139, 89 AmD 278.

Ky.—Bell v. Fry, 5 Dana 341.

Mich.—Kingston v. Guck, 155 Mich. 264, 118 NW 967; Smeberg v. Cunningham, 96 Mich. 378, 56 NW 73, 35 AmSR 613.

Mo.—Feller v. Lee, 225 Mo. 319, 124 SW 1129.

N. Y.—In re New York, 18 NYS 82.

Or.—Beale v. Hite, 35 Or. 176, 57 P 322, 58 P 102.

[a] **An entry with intent to remain in possession until the real owner claims the land** or demands rent is not hostile. Smeberg v. Cunningham, 96 Mich. 378, 56 NW 73, 35 AmSR 613.

[b] **But** if a person enters on land intending to hold the same until forced to leave by the true owner it may be a sufficient claim of title to render his possession adverse. Hollinshead v. Nauman, 45 Pa. 140; Patterson v. Reigle, 4 Pa. 201, 45 AmD 684. See also Slater v. Reed, 37 Or. 274, 60 P 709.

[c] **One is not a mere squatter** who entered in the beginning under a claim of ownership with an intention to claim the land. Swope v. Ward, 185 Mo. 316, 84 SW 895.

69. Warren v. Frederichs, 83 Tex. 380, 18 SW 750; Mhoon v. Cain, 77 Tex. 316, 14 SW 24; Long v. Young, 28 Ga. 130; Cook v. Long, 27 Ga. 280.

70. Goulding v. Shonquist, (Iowa) 141 NW 24.

71. Myers v. Reynolds, 47 Ind. A. 233, 94 NE 345.

72. Other applications of rule.—(1) Possession of land which is merely incidental and subsidiary to the commission of a trespass on the land, as by cutting and removing the timber and abandonment when that object is accomplished, although it may have continued for some weeks or months, is not such an adverse possession as will prevent the true owner of the land from maintaining trover or replevin for the timber thus taken. Austin v. Holt, 32 Wis. 478. (2) So digging away some of the soil and piling railroad ties on land, when not done under claim of ownership or by the possessor of a paper title, do not constitute adverse possession within the meaning of the statute of limitations. Chicago, etc., R. Co. v. Galt, 133 Ill. 657, 23 NE 425, 24 NE 674. (3) Where the public has had the use of a park and mineral springs for many years, but it has never been claimed by the authorities that the park was public property, and the owners have improved and controlled the same, closing it entirely at times, the municipality could base no claim to the property by virtue of prescription. Manitou v. International Trust Co., 30 Colo. 467, 70 P 757. (4) Where the owner of property abutting on the street knowingly inclosed a portion of the street with a temporary fence and built a temporary sidewalk in the street, knowing that the improvements encroached upon the street, but made no claim to the land inclosed, neither he nor one claiming under him acquired title by adverse possession. Vorhes v. Ackley, 127 Iowa 658, 103 NW 998. (5) Where one purchased property as lots according to a town plat and inclosed with the lots the parts of the streets on which the lots abutted, not then needed by the public, and the property was taxed as lots only, and aside from such possession and use of the entire tract for agriculture there was nothing to show that such person claimed any rights in the streets hostile to the public, his possession was not adverse. McClenehan v. Jesup, 144 Iowa 352, 356, 120 NW 74. (6) Where property used as a road by a turnpike company, having only an easement for a highway, was used by the public, after abandonment of the road by the company, for over twenty years as a roadway, there was no such user by the company under claim of title in fee, hostile to the owner of the record title, as constituted adverse possession thereto. Brooklyn, etc., R. Co. v. Bird, 76 Misc. 62, 134 NYS 1.

73. U. S.—Harvey v. Tyler, 2 Wall. 328, 17 L. ed. 871.

Ala.—Badger v. Lyon, 7 Ala. 564.

Mo.—Mylar v. Hughes, 60 Mo. 105.

N. Y.—Humbert v. Trinity Church, 24 Wend. 587.

Pa.—Monroe Water Supply Co. v. Starner, 242 Pa. 18, 88 A 782.

Va.—Nowlin v. Reynolds, 25 Gratt. (66 Va.) 137.

Wis.—Austin v. Holt, 32 Wis. 478.

And see Nicolai v. Baltimore, 100 Md. 579, 60 A 627.

[a] **In presumption of law.**—Where a person is in possession, making no claim whatever to the premises, his title is in amity with and subservient to the true title. Altschul v. O'Neill, 35 Or. 202, 58 P 95; Beale v. Hite, 35 Or. 176, 57 P 322, 58 P 102.

74. Roberts v. Merwin, 80 Conn. 347, 68 A 377; Heckescher v. Cooper, 203 Mo. 278, 101 SW 658; Colvin v. Republican Valley Land Assoc., 23 Nebr. 75, 36 NW 361, 8 AmSR 614; Lohse v. Burch, 42 Wash. 156, 84 P 722.

75. Jackson v. Porter, 13 F. Cas. No. 7,143, 1 Paine 457; Mylar v. Hughes, 60 Mo. 105; Morehouse v. Burgot, 22 Oh. Cir. Ct. 174, 12 Oh. Cir. Dec. 163.

76. Ala.—McDaniel v. Sloss-Sheffield Steel, etc., Co., 152 Ala. 414, 417, 44 S 705, 126 AmSR 48 [quot Cyc on all of this section].

Iowa.—Goulding v. Shonquist, 141 NW 24, 25 [cit Cyc].

Ky.—Carver v. Elmore, 147 Ky. 521, 144 SW 1062.

La.—Zagame v. New Orleans, 128 La. 388, 54 S 916.

Mich.—Kingston v. Guck, 155 Mich. 264, 118 NW 967.

Va.—Yellow Poplar Lumber Co. v. Thompson, 108 Va. 612, 62 SE 358; Nowlin v. Reynolds, 25 Gratt. (66 Va.) 137.

77. Colvin v. Republican Valley Land Assoc., 23 Nebr. 75, 36 NW 361, 8 AmSR 114.

78. Ark.—Shirey v. Whitlow, 80 Ark. 444, 97 SW 444.

Ga.—Wade v. Johnson, 94 Ga. 348, 21 SE 569; Long v. Young, 28 Ga. 130; Cook v. Long, 27 Ga. 280; Simmons v. Lane, 25 Ga. 178.

Ill.—Kirby v. Kirby, 236 Ill. 255, 86 NE 259.

Ind.—Logsdon v. Dingg, 32 Ind. A. 158, 69 NE 409.

Mich.—Tyler v. Wright, 164 Mich. 606, 610, 130 NW 205 [quot Cyc].

Mo.—Baber v. Henderson, 156 Mo. 566, 57 SW 719, 79 AmSR 540.

Tenn.—McBurney v. Glenmary Coal, etc., Co., 121 Tenn. 275, 118 SW 694.

See Houston Oil Co. v. McGrew, (Tex. Civ. A.) 143 SW 191.

[a] **What amounts to disclaimer.**—Where a husband, on conveying certain property to his wife, did not include in the deed an adjoining strip of the property in controversy, which had been inclosed by a fence and was used as a passway, such deed amounted to a disclaimer by him of any claim of ownership in the strip, and hence the wife could not establish a claim of title to the strip by adverse possession on the strength of any claim of title which had previously been made by her husband. Ridley v. Walter, 153 App. Div. 65, 137 NYS 1050.

79. Langston v. Cothran, 78 S. C. 23, 58 SE 956. And see McCutchen v. McCutchen, 77 S. C. 129, 57 SE 678, 12 LRANS 1140 and note.

80. Cal.—Knight v. Cohen, 7 Cal. A. 43, 47, 93 P 396 (per Shaw, J.).

Ill.—Lyons v. Stroud, 257 Ill. 350, 100 NE 973.

Ind.—Null v. Williamson, 166 Ind. 537, 78 NE 76; Southern Indiana R. Co. v. Norman, 165 Ind. 126, 74 NE 896.

Iowa.—Wilbur v. Cedar Rapids, etc., R. Co., 116 Iowa 65, 89 NW 101.

Minn.—Sawbridge v. Fergus Falls, 101 Minn. 378, 112 NW 385.

Miss.—Magee v. Magee, 87 Miss. 138.

Nebr.—Ryan v. Lincoln, 85 Nebr. 539, 123 NW 1021; Florence v. White, 50 Nebr. 516.

N. Y.—Barnes v. Light, 116 N. Y. 34, 22 NE 441; Timmerman v. Cohn, 70 Misc. 327, 128 NYS 770; LaFrombois v. Jackson, 8 Cow. 589, 18 AmD 463.

81. Ala.—Holt v. Adams, 121 Ala. 664, 25 S 716.

Ill.—James v. Indianapolis, etc., R. Co., 91 Ill. 554.

Ind.—Craven v. Craven, 103 NE 333; Rennert v. Shirk, 163 Ind. 542, 547, 72 NE 546 [cit Cyc].

Iowa.—Wilbur v. Cedar Rapids, etc., R. Co., 116 Iowa 65, 89 NW 101.

Mass.—Atty.-Gen. v. Ellis, 198 Mass. 91, 84 NE 430, 15 LRANS 1120.

Va.—Brock v. Bear, 100 Va. 562, 42 SE 307.

"The claim of title may be inferred from particular actions, or the general course of the occupant in dealing with the land." Carr v. Mouson, 86 S.

a claim of title to a very large proportion of property is susceptible.[82] It is not necessary that the claim of right be a valid and legal one. An invalid claim is as effectual, as a constituent of the notice to the rightful owner that the occupation under it is in defiance of his title, as a valid claim.[83]

[§ 217] **g. Time at and during Which Claim Must Exist.**[84] As a general rule the claim of ownership need not exist at the time of entry and, where a person after entry sets up a claim of ownership, his possession may then become adverse, although the entry in the first instance was without claim of ownership.[85] Nevertheless, when the claim of ownership is made subsequently to the entry the possession is adverse only from the time of making such claim,[86] and it is essential that the claim extend over the entire period requisite to give title by adverse possession.[87]

[§ 218] **2. Necessity of Claim of Title in Fee.** The claim must be of title or ownership in fee,[88] and to be of any avail must be to the entire title, not simply to a part of it.[89] Accordingly no right in the fee can be acquired by adverse possession under a claim of an easement,[90] or of a term of years under a lease,[91] or under a claim merely to the improvements on land.[92] However, it has been said that the foregoing rule merely means that a possession of the character adverted to will not be adverse to a higher title under or subservient to which it is held.[93] Hence, although the claim of title is to a less estate in the land than a fee simple, the possession may be adverse to the extent of such claim so as to ripen title in the claimant to the extent of his claim.[94] And where an instrument confers color of title to a life estate upon one person with remainder to another the entry of the former under the instrument claiming the life estate is sufficient to render his possession adverse so as to ripen title in himself to a life estate with remainder to the latter.[95]

[§ 219] **3. Necessity of Claim of Title Hostile to Whole World—a. Decisions Holding Claim of This Character Necessary.** In a number of decisions it is held or said that the statute of limitations runs only in favor of parties in possession claiming title adverse to the whole world.[96]

C. 461, 468, 68 SE 661 (per Woods, J.).

[a] **Acts held sufficient.**—(1) Executing a lease of the premises amounts to a declaration and claim of title thereto. Atty.-Gen. v. Ellis, 198 Mass. 91, 84 NE 430, 15 LRANS 1120. (2) A duly recorded deed is sufficient notice of claim of title as a basis for adverse possession. Sinclair v. Gunzenhauser, 179 Ind. 78, 98 NE 37, 100 NE 376. (3) Defendant constructed a fence in 1895 on a specified line claimed by him as the boundary between his lands and those of plaintiffs and inclosed the land in dispute. Defendant commenced to clear the land soon after inclosing it, and set out a portion for an orchard. He built a corduroy road along and near the alleged line fence with a gate in his water front fence, where it bordered on a sound, and maintained the fence from that time, although a portion became in bad repair. It was held that the construction of the fence and defendant's possession were notice to plaintiffs that defendant claimed and intended to claim it as the division line, and that defendant had acquired title to the land up to the fence by adverse possession. Davies v. Wickstrom, 56 Wash. 154, 105 P 454, 134 AmSR 1100.

[b] **Acts held insufficient.**—(1) Where a tract of land was surveyed, staked, and platted by defendants in their private plat book as a part of their right of way and depot grounds, such action did not constitute a claim of right on which adverse possession could be based. "These things are done to ascertain what the company wants, and right thereto is acquired by purchase, condemnation, or gift." Mead v. Illinois Cent. R. Co., 112 Iowa 291, 298, 83 NW 979. (2) A city had no power to erect public buildings on property dedicated for street purposes, and hence, where the city made no claim to the ground so used, except that it was part of a public street, it acquired no title thereto by adverse possession. Pettit v. Grand Junction, 119 Iowa 352, 93 NW 381.

[c] **Acts not inconsistent with claim of title.**—The fact that one in possession of land acquiesced in its being flowed by the owner of a milldam, under the supposition that the mill owner had the right of flowage, is not inconsistent with his claim of title and will not prevent his possession from being deemed adverse. Lampman v. Van Alstyne, 94 Wis. 417, 69 NW 171.

82. James v. Indianapolis, etc., R. Co., 91 Ill. 554.

83. Goulding v. Shonquist, (Iowa) 141 NW 24; Monnot v. Murphy, 207 N. Y. 240, 246, 100 NE 742; Sands v. Hughes, 53 N. Y. 287; Humbert v. Trinity Church, 24 Wend. (N. Y.) 587; Jackson v. Camp, 1 Cow. (N. Y.) 605.

84. **Necessity of possession hostile in its inception** see supra § 210.

85. Cervena v. Thurston, 59 Nebr. 343, 80 NW 1048; Webb v. Thiele, 56 Nebr. 752, 77 NW 56; De St. Laurent v. Gescheidt, 18 App. Div. 121, 45 NYS 730; Mitchell v. Hamilton, (S. C.) 82 SE 425.

86. Wickham v. Henthorn, 91 Iowa 242, 59 NW 276; Hamilton v. Wright, 30 Iowa 480.

87. Ill.—Roby v. Calumet, etc., Canal, etc., Co., 211 Ill. 173, 71 NE 822.

Mo.—Hunnewell v. Williams, 154 Mo. 135, 55 SW 221.

Or.—Altschul v. O'Neill, 35 Or. 202, 58 P 95.

Tex.—Fischer v. Giddings, 43 Tex. Civ. A. 393, 95 SW 38.

Wash.—Port Townsend v. Lewis, 84 Wash. 413, 73 P 982.

W. Va.—Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255.

[a] **An adverse claim to land made shortly before the beginning of the action** in which it is set up is not available to give title by adverse possession. Kidd v. Bell, (Ky.) 122 SW 232.

88. Ark.—Hardin v. Watson, 104 Ark. 641, 148 SW 506 (life estate).

Hawaii.—Iona v. Uu, 16 Hawaii 432.

N. Y.—Doherty v. Matsell, 119 N. Y. 646, 23 NE 994; Gross v. Welwood, 90 N. Y. 638; Bedell v. Shaw, 59 N. Y. 46; McLain v. Bird, 120 NYS 1032; Jackson v. Johnston, 5 Cow. 74, 15 AmD 433.

Pa.—Breidegam v. Hoffmaster, 61 Pa. 223.

Tex.—Louisiana, etc., Lumber Co. v. Southern Pine Lumber Co., (Civ. A.) 147 SW 604.

See also Louisville, etc., R. Co. v. Massey, 136 Ala. 156, 33 S 896, 96 AmSR 17.

89. De Bernardi v. McElroy, 110 Mo. 650, 659, 19 SW 626.

90. Ala.—Dothard v. Denson, 75 Ala. 482.

Del.—Bartholomew v. Edwards, 6 Del. 17.

Ind.—Indianapolis, etc., R. Co. v. Ross, 47 Ind. 25.

Me.—Stetson v. Veazie, 11 Me. 408.

N. Y.—Roe v. Strong, 107 N. Y. 350, 14 NE 294; Watson v. New York Cent. R. Co., Sheld. 159, 6 AbbPrNS 91 [aff 47 N. Y. 157].

Tex.—Texas Western R. Co. v. Wilson, 83 Tex. 153, 18 SW 325.

91. Iona v. Uu, 16 Hawaii 432; Bedell v. Shaw, 59 N. Y. 46.

[a] **Reason for rule.**—"A claim for a term of years under a lease . . . implies that there is an outstanding fee in someone, under whom the lessee holds. That being the case the lessee cannot depend on the plea of adverse possession against the owner of the fee but is forced to rely upon the validity of his claim under the lease, and this is so even though he obtained the lease from one who had no authority to give it." Iona v. Uu, 16 Hawaii 432, 434 (per Frear, J.).

[b] **A claim under a tax lease for a term of years** is not adverse to the owner in fee and will not, by lapse of time, create a valid title. Obermeyer v. Behn, 123 App. Div. 440, 108 NYS 289 [aff 195 N. Y. 588, 89 NE 1106]; Sanders v. Riedinger, 30 App. Div. 277, 51 NYS 937 [aff 164 N. Y. 564, 58 NE 1092]; McLain v. Bird, 120 NYS 1032.

92. Hunnewell v. Adams, 153 Mo. 440, 55 SW 95.

93. Howard v. Howard, 17 Barb. (N. Y.) 663; Jackson v. Johnson, 5 Cow. (N. Y.) 74, 15 AmD 433.

94. La Crosse v. Cameron, 80 Fed. 264, 25 CCA 399; Fairbanks v. San Francisco, etc., R. Co., 115 Cal. 579, 47 P 450; Long Island R. Co. v. Mulry, 212 N. Y. 108, 105 NE 806 [rev 149 App. Div. 924 mem, 133 NYS 1130 mem, and overr Scheer v. Long Island R. Co., 127 App. Div. 267, 111 NYS 569]; Miner v. New York Cent., etc., R. Co., 123 N. Y. 242, 25 NE 339; Wilklow v. Lane, 37 Barb. (N. Y.) 244 (claim of leasehold). And see Easements [14 Cyc 1145 et seq].

[a] **Easement.**—A railroad's right of way easement acquired by an order in condemnation proceedings, being hostile to the fee owner, is an assertion of title which adverse possession will render unassailable after the requisite period of time. Long Island R. Co. v. Mulry, 212 N. Y. 108, 105 NE 806.

95. Hanson v. Johnson, 62 Md. 25, 50 AmR 199. See also Brittain v. Daniels, 94 N. C. 781; Wells v. Wells, 7 Utah 68, 24 P 752.

96. Ward v. Cochran, 150 U. S. 597, 14 SCt 230, 37 L. ed. 1195; Pillow v. Roberts, 13 How. (U. S.) 472, 14 L. ed. 228; Bracken v. Union Pac. R. Co., 75 Fed. 347, 21 CCA 387; Ashford v. Ashford, 136 Ala. 631, 34 S 10, 96 AmSR 82; McCracken v. San Francisco, 16 Cal. 591; Risher v. Madsen, 94 Nebr. 72, 142 NW 700; Ballard v. Hansen, 33 Nebr. 861, 51 NW 295; Calvin v. Republican Valley Land Assoc., 23 Nebr. 75, 36 NW 361, 8 AmSR 114; Horbach v. Miller, 4 Nebr. 31; Green v. Simpson, 49 Pa. Super. 334.

[§ 220] **b. Decisions Adopting Less Stringent Rule—(1) Introductory Statement.** Nevertheless the trend of modern authority is in the direction of a less stringent and exacting rule.[97]

[§ 221] **(2) Admission of Title in Government—(a) In General.** While the decisions are far from harmonious, and that too in the same courts, the weight of authority in cases where the question is directly involved is that a person may admit title in the government and yet hold adversely to all others.[98]

[§ 222] **(b) Possession with Intent to Acquire Title from Government.** The question arises most frequently in cases where the claimant enters and holds possession of land under the mistaken belief that it belongs to the public domain and with intent to acquire title from the government. In some states the rule is that possession so held is not adverse to the true owner and cannot ripen into title against him,[99] while in others title may be acquired by a possession of this character.[1]

[§ 223] **(3) Corporation Incompetent to Acquire Title.** In one state, Nebraska, it has been held that a corporation chartered by act of congress, incom-

See also Northern Pac. R. Co. v. Kranich, 52 Fed. 911 (where this is recognized as the general rule, but in which it is held that there are exceptions).

97. See infra §§ 221–225.

98. U. S.—Harvey v. Holles, 160 Fed. 531; Northern Pac. R. Co. v. Kranich, 52 Fed. 911; Francœur v. Newhouse, 43 Fed. 236.

Cal.—Lord v. Sawyer, 57 Cal. 65, 67 (in which it was said: "It is well settled in this Court that such possession, though held in admitted subordination to the title of the Government, may nevertheless be adverse to every one not holding under the Government"); McManus v. O'Sullivan, 48 Cal. 15; Hayes v. Martin, 45 Cal. 559. And see Allen v. McKay, 120 Cal. 332, 52 P 828.

Ida.—Northern Pac. R. Co. v. Pyle, 19 Ida. 3, 112 P 678 (holding that in ejectment to recover land in the state defendant may admit title in the United States either with or without claim on his part of the right to procure title from the United States, and it is sufficient if he has such possession as is required by the Idaho statute and claims title adversely to plaintiff and all others except the United States).

Kan.—Rathbone v. Boyd, 30 Kan. 485, 2 P 664.

Tex.—Stewart v. Williams, (Civ. A.) 167 SW 761.

See Marshall v. McDaniel, 12 Bush (Ky.) 378.

See also for cases for and against this doctrine infra § 222.

99. See cases infra this note.

[a] **Alabama.**—McDaniel v. Sloss-Sheffield Steel, etc., Co., 152 Ala. 414, 44 S 705, 126 AmSR 48. And see Alabama State Land Co. v. Beck, 108 Ala. 71, 19 S 802.

[b] **Iowa.**—Keller v. Harrison, 151 Iowa 320, 128 NW 851, 131 NW 53, AnnCas1913A 300.

[c] **Washington.**—In Yesler v. Holmes, 39 Wash. 34, 80 P 851, it was held that an entry on the lands of another under a mistaken but honest belief that they are public lands and subject to entry does not work a disseizin of the rightful owner within the statute of limitations, since an entry, in order to work a disseizin, must be under a claim of right and for the purpose of dispossessing the owner. But in Johnson v. Conner, 48 Wash. 431, 434, 93 P 914, it was held that "while an entry upon the land of another, under the supposition and belief that it is government land and that the party entering may hold the same as such, may not of itself constitute an entry under claim of right, yet where such an entry is made in good faith, and the entryman upon discovering his mistake proceeds to openly and notoriously hold the same adversely and in hostility to the title of the actual owner or claimant . . . this constitutes an adverse holding and disseizin under a claim of right as understood in this state." However, the latest decision on the subject, McNaught-Collins Impr. Co. v. May, 52 Wash. 632, 635, 636, 101 P 237, expressly overrules Johnson v. Conner, supra, and holds that in order to set limitations running possession must be adverse and with color of title or claim of right, and that entry upon the land of another believing it to be government land constitutes no claim of right as against the real owner so as to give title by adverse possession, although, after entry and discovery that the land belongs to another, the possession is continued for a period necessary to obtain title under the statute. In support of this view it was said: "When the claimant settles upon the land believing it to be government land, his possession is subservient to the government. It is true, by observing the rules prescribed by the government, he may claim some rights under his possession when he comes to make formal application for the land. But in no sense could he be said to be holding possession hostile or adverse to the government. Hence, there is no hostile possession adverse to the true owner at that time. Now, under the theory upon which this case was decided, the hostile and adverse possession commenced at the time when the respondents discovered that the title of the land was not in the government, but was in some private individual. If it was at that time that the statute was set in motion by the commencement of the adverse possession by reason of the disseizin of the true owner, then there certainly was no settlement under claim of right, because the claimants knew that the title was not in the government but in someone else, and they would logically then be in the same position as though no settlement had ever been made, under the theory that the land was government land. It is not consistent to hold that this right of possession adverse to the owner commenced after they were aware that the title was not in the government, and at the same time allow them to date back their claim of right to a period beyond their knowledge on this question" (per Dunbar, J.). It was further said in support of the expediency of this rule that "no hardship can be imposed upon any one under this rule, for it is a matter of easy ascertainment whether land which a party desires to settle upon is government land or whether the title has passed from the government" (per Dunbar, J.).

[d] **Wisconsin.**—See Woodward v. McReynolds, 2 Pinn. 268, 1 Chandl. 244 (holding that the possession of government lands under preëmption laws is not adverse as against either the government or its grantee).

[e] **In Missouri** (1) it has been held that where one at the time of buying a claim to land, erroneously thought that it was government land and intended to make a homestead of it, his possession thereof prior to learning his mistake was not under a claim adverse to the true owner so as to give title by adverse possession. Hunnewell v. Burchett, 152 Mo. 611, 54 SW 487. (2) And it was also held that where defendant purchased the improvements and claim of one in possession of agricultural college lands believing that he could acquire title to the same from the United States under the Homestead Act, and it did not appear that he ever changed the character of his possession on learning that he could not acquire title therefrom, nor did it appear when he began to hold adversely, if at all, he was not entitled to the land against a grantee of the state under a claim of adverse possession. Hunnewell v. Adams, 153 Mo. 440, 55 SW 95.

1. See cases infra this note.

[a] **Idaho.**—Northern Pac. R. Co. v. Pyle, 19 Ida. 3, 112 P 678.

[b] **Minnesota.**—Maas v. Burdetzke, 93 Minn. 295, 298, 101 NW 182, 106 AmSR 436 [cit Cyc] (holding that a person who takes possession of land in the erroneous belief that it is public land, with the intention of claiming it under the Homestead Law, may acquire title thereto by adverse possession against the true owner). It was said that "if a person enters upon land, erroneously believing it to belong to the United States, with the intention of acquiring the title to the exclusion of all others by his entry and settlement under the Homestead Law, how can it be reasonably claimed that, because he did not further intend to do that which was a legal impossibility [acquire title against the general government], his possession is not adverse, within the true meaning of the rule. It must be held, upon principles and authority, that the rule excludes by necessary implication the United States, and that a person may admit its title to the premises, if any it has, and hold them adversely to the exclusion of all others."

[c] **Oregon.**—The earlier Oregon decisions are to the effect that the entry upon and the occupation of land with recognition of the supposed title of the government, and with the intention to acquire such title, are not adverse as to one who had previously, without the possessor's knowledge, acquired the title from the government. Altschul v. O'Neill, 35 Or. 202, 221, 58 P 95 (in which it was said: "It is inconceivable that a person who claims to have the fee simple title—the absolute and only existing title—and to have acquired it through adverse possession, could have obtained it without holding adversely to all others"); Beale v. Hite, 35 Or. 176, 57 P 322, 58 P 102. These decisions are based on the ground that possession must be adverse to the whole world. A recent decision (Boe v. Arnold, 54 Or. 52, 102 P 290, 20 AnnCas 533 and note) expressly overrules these cases and holds to the contrary. But a later decision (Stout v. Michelbook, 58 Or. 372, 375, 114 P 929) contains a dictum in line with the earlier decisions. In this case it was said: "The legal proposition of defendant that to constitute an adverse holding by plaintiff it must be under claim of title and with an unconditional intent to hold the land against all the world is not controverted." It is rather remarkable that the court should subscribe to this proposition when only two years previous the contrary doctrine was announced in Boe v. Arnold, supra, after a most exhaustive review of the decisions on the subject and an extensive argument to support its view. The latest decisions on the subject, Spath v. Sales, 141 P 160; Sharpe v. Catron, 136 P 20, follows Boe v. Arnold, supra, and must be taken as settling the law.

[d] **Texas.**—In this state the decisions are very numerous and also very conflicting. One of the earliest cases on the subject (Schleicher v. Gatlin, 85 Tex. 270, 20 SW 120) was decided by the court of last resort. This case, it is believed, sustains the doctrine that one who takes possession and hold

petent to acquire title in such state, may nevertheless maintain a possession adverse to all persons except the state.[2]

[§ 224] **(4) View That Holding Need Not Be Adverse except as to Plaintiff Asserting Title in Himself.** Some decisions hold that, to claim land under limitations, defendant's possession need not be adverse to the whole world but only as to plaintiff who is asserting title in himself.[3] These decisions proceed upon the theory that plaintiff in ejectment must ultimately recover, if at all, on the strength of his own title,[4] and if it is not meant to hold more than that the claimant in possession has sufficient right in the land to defeat an action by any person whomsoever, except the true owner, they are undoubtedly correct, because naked possession, that is, possession without even a claim of title, vests a right of property in the person who has such possession, sufficient to permit him to hold the land against all the world except the true owner.[5] But if ever the person in possession were bringing the action for the recovery of land to which he claims title by adverse possession, an altogether different question would be presented and he should not be permitted to recover,[6] since a title which is all-sufficient as a shield may be entirely ineffective as a sword.[7]

[§ 225] **(5) View That Possession Need Not Be Adverse except as against True Owner.** According to some decisions possession need not be hostile except as to the true owner.[8]

[§ 226] **D. Character of Possession by Permission or License from Owner—1. Ordinary Status of Possession—a. General Rule.** A possession by permission or license from the owner is not adverse and cannot ripen into title, no matter how long con-

under the mistaken belief that it is public land, intending to acquire title from the government, does not hold adversely to the true owner and does not, by such holding, acquire title as against him, and this is clearly held in numerous decisions of the different divisions of the court of appeals, some of which are of very recent date. Henderson v. Louisiana, etc., Lumber Co., (Civ. A.) 128 SW 671; Jones v. Weaver, (Civ. A.) 122 SW 619; Flewellen v. Randall, 32 Tex. Civ. A. 361, 74 SW 49 [foll Blum Land Co. v. Rogers, 11 Tex. Civ. A. 184, 32 SW 713 (cited infra this note, and referring to the fact that a writ of error had been denied in that case by the supreme court)]; Newton v. Alexander, (Civ. A.) 44 SW 416; Beaumont Lumber Co. v. Ballard, (Civ. A.) 23 SW 920, 921 (in which it was said: "So long as the plaintiff labored under the erroneous impression that the premises were a part of the public domain, his possession was not an adverse possession"); Blum Land Co. v. Rogers, supra; Norton v. Collins, 1 Tex. Civ. A. 272, 20 SW 1113. On the other hand, many of the decisions of the court of appeals hold squarely to the contrary of the rule above stated. Sellers v. Simpson, 53 Tex. Civ. A. 205, 210, 115 SW 888 (where Dunklin, J., said: "The fact that some of the appellees thought the land claimed by them respectively was public domain is not consistent with the claiming that their possession of the land was adverse"); Williams v. Texas, etc., R. Co., 52 Tex. Civ. A. 217, 114 SW 877 (in which it was said that the fact that a person in possession may have been mistaken in the right under which he held the land would not prevent him or his successors from acquiring title by adverse possession); Morgan v. White, 50 Tex. Civ. A. 318, 110 SW 491; Texas, etc., R. Co. v. Haynes, 44 Tex. Civ. A. 272, 97 SW 849; Village Mills Co. v. Manley, 42 Tex. Civ. A. 420, 94 SW 102; Titel v. Garland, (Civ. A.) 85 SW 466 [aff 99 Tex. 201, 87 SW 1152, the court stating, however, that it was not necessary to pass on this proposition]; Price v. Eardley, 34 Tex. Civ. A. 60, 77 SW 416 (in which it was said that where persons hold land for the specific purpose of obtaining a patent under the mistaken belief that it was public land they must necessarily have been holding it adversely to every one else); Cartwright v. Pipes, 9 Tex. Civ. A. 309, 29 SW 690 (opinion written by the same judge who wrote the opinion in Schleicher v. Gatlin, supra). And see Hoencke v. Lomax, 55 Tex. Civ. A. 189, 118 SW 317 [writ of error to review proceedings den 102 Tex. 487, 119 SW 842]. The first of these decisions in point of time is Converse v. Ringer, 6 Tex. Civ. A. 51, 57, 24 SW 705, and it occupies the somewhat unique position of a court of intermediate appellate jurisdiction disapproving and expressly declining to follow a decision of the court of last resort. Schleicher v. Gatlin, supra. In a later decision following it (Morgan v. White, supra, this note), it is said to "overrule" Schleicher v. Gatlin, supra, although if this be so, it is not easy to figure out the source from which it derives its authority for such action. The reasoning in Converse v. Kinger, supra, is as follows: "While it is true that limitation would not run if the land was vacant, and that when so holding under the supposition that it is vacant, and by his actual occupancy he will acquire it from the state, may exclude the idea that he has any formed design or intention to hold it adversely to other titles of which he at that time was ignorant; still, when such title is urged in defeat of his right, his possession may be given such effect as the manner of his possession and the character of his holding may indicate. In other words, his possession, to be adverse, need not be with the specific purpose and intent to hold adversely, because he may not have formed any intent about that matter; being ignorant of hostile claims, and supposing that the land was vacant, he is not supposed to contemplate the existence of an adverse title of which he is ignorant, and consequently to form any purpose to hold against it. The purpose and intent with which the property is held may be very important in some cases in ascertaining if the possession is or is not adverse. But the express or formed intent to hold adversely is not in all cases essential, for the possessor may be ignorant of the title with which he is subsequently confronted. Under such circumstances, effect should be given to the character and manner of his possession, and if they indicate it was adverse, it should be so declared, although he has formed no intent to so hold. . . . It is the open assertion of a right inconsistent with and antagonistic to the title or claim of the true owner, with an actual, exclusive possession, using the land as his own, that makes his holding adverse to that title. These are the facts that give character to his possession, and when they are ascertained to exist it ought to be held that his possession is adverse, although he may be mistaken in the fact that the land is vacant, and may not have formed any intent to hold adversely. But even under the ten years statute it is not necessary that the disseizor should claim to hold by virtue of a title in order to prescribe under that statute. All that is essential is, that he should enter into actual possession, using and holding the land as his own, although he may be a wrongdoer or naked trespasser, without the semblance of title" (per Fisher, J.). Subsequently to most of the decisions by the court of appeals the question was brought before the supreme court on writ of error. Hoencke v. Lomax, 102 Tex. 487, 119 SW 842 (and the court said: "When a case shall be presented in which it becomes necessary to determine whether or not a possession is adverse to the true owner from its commencement which is taken and held in the belief that the land belongs to the state and with the purpose to acquire it lawfully from the state, we shall not consider that question concluded. In all the cases which we now recall in which the question has been raised in applications for writs of error it has been deemed immaterial, as it is in this case"). The latest utterance of that court on the subject in which the question was squarely raised may be summarized as follows: A possession taken and held under the mistaken belief that the land is public domain, with the purpose of acquiring it by complying with the law authorizing the acquisition of public land, is insufficient to show that the possession was hostile; but the possession of one holding in subordination to the state is not necessarily inconsistent with a holding in hostility to others, and, where the possessor openly disputes the claims of others while asserting the belief of title in the state, his possession is adverse as against other claimants. Smith v. Jones, 103 Tex. 632, 636, 132 SW 469, 31 LRANS 153 and note [cit Cyc]. See also Glover v. Pfeuffer, (Civ. A.) 163 SW 984, where Smith v. Jones, supra, is cited with approval.

2. Hanlon v. Union Pac. R. Co., 40 Nebr. 52, 58 NW 590; Myers v. McGaylock, 39 Nebr. 843, 58 NW 522, 42 AmSR 627.

3. Skipwith v. Martin, 50 Ark. 141, 6 SW 514; Mather v. Walsh, 107 Mo. 121, 17 SW 755.

4. Mather v. Walsh, 107 Mo. 121, 17 SW 755.

5. See Tiedeman Real Prop. 692.

6. Skipwith v. Martin, 50 Ark. 141, 6 SW 514.

7. Skipwith v. Martin, 50 Ark. 141, 6 SW 514.

8. Smith v. Badura, (Or.) 139 P 107; Boe v. Arnold, 54 Or. 52, 102 P 290, 20 AnnCas 533; Portis v. Hill, 14 Tex. 69, 65 AmD 99; Longley v. Warren, 11 Tex. Civ. A. 269, 33 SW 304; Converse v. Ringer, 6 Tex. Civ. A. 51, 24 SW 705. And see Liddon v. Hodnett, 22 Fla. 442, 462, 466 (where Raney, J., said: "When the possession is shown to have been held by one adversely in law to the owner of the legal title, and there is nothing in the testimony to show that the possession so claimed to constitute a statutory title has not been in the right of the person so holding, the effect of the testimony is that the holding is in law that of such person actually in possession and is exclusive of the legal title, and it is not necessary for such person to prove affirmatively or otherwise that he claimed to hold against the whole world").

tinued or however exclusive it may be.[9] The possession of the occupant under such circumstances is

9. U. S.—Lowndes v. Huntington, 153 U. S. 1, 14 SCt 758, 38 L. ed. 615; Northern Pac. R. Co. v. Littlejohn, 198 Fed. 700; Cleveland v. Cleveland, etc., R. Co., 93 Fed. 113 [rev on other grounds 147 Fed. 171]; Larwell v. Stevens, 12 Fed. 559, 2 McCrary 311.

Ala.—Alexander-City Union Warehouse, etc., Co. v. Central of Georgia R. Co., 62 S 745; Montgomery, etc., R. Co. v. Rutland, 165 Ala. 311, 51 S 831; Louisville, etc., R. Co. v. Higginbotham, 153 Ala. 334, 44 S 872; Hicks v. Swift Creek Mill Co., 133 Ala. 411, 31 S 947, 91 AmSR 38, 57 LRA 720; Jesse French Piano, etc., Co. v. Forbes, 129 Ala. 471, 29 S 683, 87 AmSR 71; Collins v. Johnson, 57 Ala. 304.

Ark.—Pulaski County v. State, 42 Ark. 118; Ellsworth v. Hale, 33 Ark. 633; Carter v. Reagan, 23 Ark. 74; Blakeney v. Ferguson, 20 Ark. 547.

Cal.—Davis v. Martin, 157 Cal. 657, 108 P 866; Huntley v. San Francisco Sav. Union, 130 Cal. 46, 62 P 255; Jensen v. Hunter, 41 P 14; Nieto v. Carpenter, 21 Cal. 455; Madden v. Hall, 21 Cal. A. 541, 132 P 291.

Colo.—Omaha, etc., Smelting, etc., Co. v. Tabor, 13 Colo. 41, 21 P 925, 16 AmSR 185, 5 LRA 236.

Conn.—Dunham v. New Britain, 55 Conn. 378, 11 A 354; Catlin v. Decker, 38 Conn. 262.

Ga.—Jay v. Whelchel, 78 Ga. 786, 3 SE 906; Ford v. Holmes, 61 Ga. 419.

Ida.—Davis v. Devanney, 7 Ida. 742, 65 P 500.

Ill.—Illinois Cent. R. Co. v. Noyes, 252 Ill. 178, 96 NE 830; Carroll v. Rabberman, 240 Ill. 450, 88 NE 995; Page v. Bellamy, 222 Ill. 556, 78 NE 938; Chicago Sanitary Dist. v. Allen, 178 Ill. 330, 53 NE 109.

Iowa.—Boltz v. Coisch, 134 Iowa 480, 109 NW 1106; McClenahan v. Stevenson, 118 Iowa 106, 91 NW 925.

Kan.—Shanline v. Wiltsie, 70 Kan. 177, 182, 78 P 436, 3 AnnCas 140 and note [cit Cyc]. And see Grigsby v. Williams, 89 Kan. 758, 132 P 1001.

Ky.—Carver v. Elmore, 147 Ky. 521, 144 SW 1062; Wolford v. Smith, 146 Ky. 341, 142 SW 1055; Mullins v. Conger, 22 SW 546, 880, 15 KyL 171; Townsend v. Boyd, 18 SW 365, 13 KyL 755; Hall v. McLeod, 2 Metc. 98, 74 AmD 400; Shackleford v. Smith, 5 Dana 232; Chiles v. Jones, 4 Dana 479; Miller v. Shackleford, 4 Dana 264; Bruce v. Taylor, 2 J. J. Marsh. 160; Ryan v. Kanella, 7 KyL 358.

Me.—Lancey v. Parks, 102 Me. 135, 138, 66 A 311 [cit Cyc]; Bucknam v. Bucknam, 30 Me. 494; Tinkham v. Arnold, 3 Me. 120.

Md.—Armstrong v. Risteau, 5 Md. 256, 59 AmD 115.

Mass.—Prescott v. Prescott, 175 Mass. 64, 55 NE 805; Gray v. Bartlett, 20 Pick. 186, 32 AmD 208.

Mich.—Dillie v. Longwell, 163 Mich. 439, 128 NW 782; Jasper Tp. v. Martin, 161 Mich. 336, 126 NW 437; St. Joseph v. Seel, 122 Mich. 70, 80 NW 987.

Minn.—Omodt v. Chicago, etc., R. Co., 106 Minn. 205, 118 NW 798; Cameron v. Chicago, etc., R. Co., 60 Minn. 100, 61 NW 814.

Miss.—Adams v. Guice, 30 Miss. 397.

Mo.—Himmelberger-Harrison Lumber Co. v. Craig, 248 Mo. 319, 154 SW 73; Dulce Realty Co. v. Staed Realty Co., 245 Mo. 417, 151 SW 415; Simpson v. Wabash R. Co., 145 Mo. 64, 46 SW 739; Meier v. Meier, 105 Mo. 411, 16 SW 223; Handlan v. McManus, 100 Mo. 124, 13 SW 207, 18 AmSR 533; Budd v. Collins, 69 Mo. 129.

Nebr.—Thuresson v. Seifert, 94 Nebr. 823, 144 NW 777; Hoffine v. Ewings, 60 Nebr. 729, 84 NW 93; Carson v. Broady, 56 Nebr. 648, 77 NW 80, 71 AmSR 691; Johnson v. Butt, 46 Nebr. 220, 64 NW 691; Smith v. Mount, 38 Nebr. 111, 56 NW 793; Smith v. Hitchcock, 38 Nebr. 104, 56 NW 791; Colvin v. Republican Valley Land Assoc., 23 Nebr. 75, 36 NW 361, 8 AmSR 114.

Nev.—Reno Brewing Co. v. Packard, 31 Nev. 433, 103 P 415, 104 P 801.

N. H.—Blaisdell v. Portsmouth, etc., R. Co., 51 N. H. 483; Dodge v. McClintock, 47 N. H. 383; Campbell v. Campbell, 13 N. H. 483; Atherton v. Johnson, 2 N. H. 31.

N. J.—Kipp v. Den, 24 N. J. L. 854.

N. M.—Bergere v. Chaves, 14 N. M. 352, 367, 93 P 762 [cit Cyc].

N. Y.—Timmermann v. Cohn, 204 N. Y. 614, 97 NE 589; Lewis v. New York, etc., R. Co., 162 N. Y. 202, 56 NE 540 [aff 40 App. Div. 343, 57 NYS 1053]; Babcock v. Utter, 1 Abb. Dec. 27, 32 HowPr 437; Allerton v. Steele, 59 App. Div. 622, 69 NYS 594; Bird v. New Jersey, etc., R. Co., 3 App. Div. 344, 38 NYS 281; Coleman v. Pickett, 82 Hun 287, 31 NYS 480; Borden v. South Side R. Co., 5 Hun 184 [aff 67 N. Y. 588 mem]; New York Cent., etc., R. Co. v. Buffalo, 85 Misc. 78, 147 NYS 209; Luce v. Carley, 24 Wend. 451, 35 AmD 637; Jackson v. French, 3 Wend. 337, 20 AmD 699.

N. C.—Mitchell v. Freeman, 161 N. C. 322, 77 SE 230; Rogers v. Mabe, 15 N. C. 180.

Oh.—Smith v. Pittsburgh, etc., R. Co., 26 Oh Cir. Ct. 44.

Or.—Thayer v. Thayer, 138 P 478; Putnam v. Ray, 62 Or. 159, 124 P 205; Stephenson v. Van Blokland, 60 Or. 247, 118 P 1026; Coquille Mill, etc., Co. v. Johnson, 52 Or. 547, 98 P 132, 132 AmSR 716; Abraham v. Owens, 20 Or. 511, 26 P 1112; Curtis v. La Grande Hydraulic Water Co., 20 Or. 34, 23 P 808, 25 P 378, 10 LRA 484 and note; Anderson v. McCormick, 18 Or. 301, 22 P 1062.

Pa.—Citizens' Electric Co. v. Susquehanna Boom Co., 227 Pa. 448, 76 A 203; Main Tp. School Dist. v. Reichard, 142 Pa. 226, 21 A 821; Kittaning Academy v. Brown, 41 Pa. 269; Susquehanna County v. Deans, 33 Pa. 131; Black v. Moore, 1 Pa. 344.

Philippine.—San Carlos Seminary v. Cebu, 19 Philippine 32.

S. C.—Wadsworthville Poor School v. Meetze, 35 S. C. L. 50; Whaley v. Whaley, 28 S. C. L. 225, 40 AmD 594.

S. D.—Wallace v. Dunton, 30 S. D. 598, 139 NW 345.

Tenn.—Peeler v. Norris, 4 Yerg. 331; Bugg v. Norris, 4 Yerg. 325; Long v. Hall, (Ch. A.) 46 SW 343.

Tex.—Evans v. Berlocher, 83 Tex. 612, 19 SW 158; Ferrell v. Delano, (Civ. A.) 144 SW 1039.

Vt.—Hunter v. Emerson, 75 Vt. 173, 53 A 1070; Eddy v. St. Mars, 53 Vt. 462, 38 AmR 695.

Wash.—Seattle, etc., R. Co. v. Seattle, 70 Wash. 264, 126 P 531.

W. Va.—Taylor v. Philippi, 35 W. Va. 554, 14 SE 130.

Wis.—Pritchard v. Lewis, 125 Wis. 604, 104 NW 989, 110 AmSR 873, 1 LRANS 565 and note; Nau v. Brunette, 79 Wis. 664, 48 NW 649; Schwallback v. Chicago, etc., R. Co., 69 Wis. 292, 34 NW 128, 2 AmSR 740.

Eng.—Cholmondeley v. Clinton, 2 Jac. & W. 1, 37 Reprint 527, 14 ERC 578.

N. B.—Doe v. Thompson, 3 N. B. 568.

N. S.—Forsyth v. Griffin, 2 N. S. 241.

Ont.—Noble v. Noble, 25 Ont. L. 379, 20 OntWR 168, 889; Dominion Impr., etc., Co. v. Lally, 24 Ont. L. 115, 2 OntWN 1224, 19 OntWR 462, 2 OntWN 155, 17 OntWR 151; Workman v. Robb, 7 Ont. A. 389; Donovan v. Herbert, 9 Ont. 89 [aff 12 Ont. A. 298]; Donovan v. Herbert, 4 Ont. 635.

See Mathewson v. Mathewson Co., 35 R. I. 311, 86 A 885.

See also infra § 268.

"In judging of the significance of the acts relied upon for showing possession as a basis for prescription, it is important to observe the distinction between acts which are hostile in their character and those which may be considered to be simply of toleration." John T. Moore Planting Co. v. Morgan's Louisiana, etc., R., etc., Co., 126 La. 840, 53 S 22 (per Land, J.).

[a] **Illustrations.**—(1) Where possession of Mexican lands was taken under a permit from the Spanish government in 1784 for their occupancy for grazing purposes, and was held until the death of the occupant in 1804, and after that they were occupied by his descendants who made partition of the property among themselves, it was held that the written permit prevented the acquisition of a prescriptive title. Nieto v. Carpenter, 21 Cal. 455. (2) One who has come into possession under a parol agreement with the disseizor to hold adverse possession until the original owner should be barred by the statute of limitations and to receive a moiety of the land is not protected by that statute against the disseizor. Black v. Moore, 1 Pa. 344. (3) Where a water company obtains a license to build a dam and lays pipes on and through the property of the landowner, it acquires no rights which are available as an ouster by long use against the owner. Curtis v. La Grande Hydraulic Water Co., 20 Or. 34, 23 P 808, 25 P 378, 10 LRA 484 and note. (4) Where use of an alley was permissive only and not made under a claim of right or with the intent to enjoy it without regard to the wishes of the owner of the land, the possession is not adverse. Dexter v. Tree, 117 Ill. 532, 6 NE 506. (5) A licensee to whom the owner of land on which there is an alley has given a revocable license to erect a structure over the alley, reserving ingress and egress, cannot claim title by adverse possession after twenty-one years. Wilson v. Cather, 214 Pa. 3, 63 A 190. (6) Where a railroad constructed the abutments to a bridge company under a license from the landowner and not under a claim of title it could not acquire the land on which the abutments rested, by adverse possession, in the absence of evidence of ouster. Nicolai v. Baltimore, 100 Md. 579, 60 A 627. (7) Where after a contract by a county to convey swamp lands in payment for reclamation work, with a provision that actual settlers might purchase land in their possession, a party obtained possession of a clearing and made further improvements and his wife and children subsequently applied for patents under the contract, his possession and that of his wife and children were not adverse to the county's title. Himmelberger-Harrison Lumber Co. v. Craig, 248 Mo. 319, 154 SW 73. (8) Where plaintiff and defendant, who were abutting property owners on land used as an alley, each used the other's land for alley purposes, it would be presumed that the use was permissive only and not adverse. Le Roy v. Collins, 176 Mich. 465, 142 NW 842. (9) Where a person purchases a lot of ground and at the time of the purchase has an understanding with the grantor that he may use a strip of land adjoining the land purchased for the purpose of ingress and egress, the grantee cannot acquire title to it by adverse possession. Russel v. Woodbury, 53 Pa. Super. 618. (10) Where an heir entered upon the land of his ancestor under a contract with the other heirs to care for an idiot sister, his holding did not become adverse to his brothers and sisters until notice of that fact was brought home to them. McClanahan v. Brown, 157 Ky. 450, 163 SW 467.

[b] **What is a permissive use.**—(1) By "permissive" use is meant a license exercised in subordination to another's claim and ownership. Alper v. Tormey, 7 Cal. A. 8, 93 P 402. (2) Where there was a subsidence of the water in a millpond leaving it dry so that cattle in an adjoining pasture could and did wander over the bottom of the former pond, it was held that such possession of the land was per-

considered as the possession of him upon whose pleasure it continues.[10]

[§ 227] **b. Extent of Rule.** The rule applies whether the license or permission is from a private individual,[11] a municipal corporation,[12] or the state or federal government,[13] and to a possession continued after the license has been revoked by sale of the property, supposing the license to be in operation.[14] Nor is the rule affected by the fact that the agreement conferring the permission or license is for any reason void.[15] So the rule has been held to apply, in case of mere permissive trespasses,[16] to an occupation of land under an agreement with the owner whereby the occupant was to have the use of the land in consideration of his paying the taxes thereon;[17] to an occupation under a simple license to occupy until some terms should be arranged between the parties;[18] to a possession and use of land in accordance with an agreement, on the ceasing of which use the land was to revert,[19] and to an occupant entering upon land owned by tenants in common by license of one of them.[20] The rule likewise applies to the case of a transferee of a license, although the transfer or possession terminates the license and gives the licensor the right, if he so elects, to treat the transferee as a trespasser.[21]

[§ 228] **2. Capacity of Permissive Occupant to Hold Adversely.** Notwithstanding the fact that a possession is permissive in its inception the possession may nevertheless become adverse.[22]

[§ 229] **3. What Is Requisite to Give Permissive.** Eddy v. St. Mars, 53 Vt. 462, 38 AmR 695. (3) Where defendant entered on her father's land at his invitation and made improvements with money furnished her by him, her possession was permissive. Brettmann v. Fischer, 216 Ill. 142, 74 NE 777. (4) Where C paid the price of land purchased by A and took title in his own name, and A remained in possession, his possession and that of his heirs after his death were permissive. Doris v. Story, 122 Ga. 611, 50 SE 348. (5) Where a devisee accepts the provisions of the will and goes into the possession of the land devised to her, by permission of the executor, and on the understanding that the land will be surrendered when needed to pay debts, and such relation is never repudiated, such possession is not adverse. Jones v. Shomaker, 41 Fla. 232, 26 S 191. (6) The use by adjoining landowners of otherwise unused parts of the right of way of a railroad company for grazing and cultivation is not adverse to the enjoyment of the easement. Roberts v. Sioux City, etc., R. Co., 73 Nebr. 8, 102 NW 60, 2 LRANS 272 and note, 10 AnnCas 992 and note. (7) For a further illustration of permissive use see Surghenor v. Taliaferro, (Tex. Civ. A.) 98 SW 648.

[c] **What is not permissive.**—(1) Where a strip of land is inclosed by a fence as if it belonged to an adjoining dwelling house and lot and always is used with the house which cannot be entered without passing over it, and the strip is not occupied or used otherwise than with the house, if the owner of both the strip and the house sells the house while a tenant is in possession of it and gives a deed which does not include the strip, it may be inferred that possession of the strip was given by the landlord to the tenant and afterward was surrendered by the tenant to the landlord, and that upon the sale of the house possession of the strip was transferred to the purchaser with the seizin and possession of the house and thenceforth was adverse to the landlord. The possession, if permissive originally, was adverse after the termination. Wishart v. McKnight, 184 Mass. 283, 285, 68 NE 237 (per Knowlton, C. J.). (2) For another illustration of use not permissive see Sharon First Baptist Church v. Harper, 191 Mass. 196, 77 NE 778.

10. Lecroix v. Malone, 157 Ala. 434, 47 S 725; Trufant v. White, 99 Ala. 526, 13 S 83; Dothard v. Denson, 72 Ala. 541; Pulaski County v. State, 42 Ark. 118; Mowe v. Stevens, 61 Me. 592; Johns v. Johns, 244 Pa. 48, 90 A 525.

11. See cases supra § 226.

12. Colo.—Denver v. Girard, 21 Colo. 447, 42 P 662.
Ind.—Indianapolis, etc., R. Co. v. Ross, 47 Ind. 25.
Mich.—St. Joseph v. Seel, 122 Mich. 70, 80 NW 987.
N. Y.—Lewis v. New York, etc., R. Co., 162 N. Y. 202, 56 NE 540 [aff 40 App. Div. 343, 57 NYS 1053]; St. Vincent Female Orphan Asylum v. Troy, 76 N. Y. 108, 32 AmR 286.
Or.—Oregon v. Oregon, etc., R. Co., 44 Or. 165, 74 P 924.
W. Va.—Taylor v. Philippi, 35 W. Va. 554, 14 SE 130.

[a] **License to use street.**—(1) The owner of lots on each side of a street, who has inclosed and who uses the street by permission of the town, does not hold in such manner as to acquire title to the street by adverse possession. Taylor v. Philippi, 35 W. Va. 554, 14 SE 130. (2) Where a city authorized the fencing of a strip of the street for protection of trees growing thereon, such fencing was permissive and not adverse. Field v. Lincoln, 85 Nebr. 781, 124 NW 468.

[b] **License to use street fee of which is in private individual.**—Occupation under municipal license by a railroad company with its tracks of a street, the fee of which is in adjoining lot owners, is not adverse to them, where the only claim of right to operate the tracks is based on such license. The license "did not purport to, as it could not legally, give any rights against plaintiffs [lot owners]. . . . Neither defendant nor its predecessors have ever made any claim as against plaintiffs of title thereunder or otherwise, except by mere occupation." Monohan v. New York Cent., etc., R. Co., 31 Misc. 619, 621, 66 NYS 37.

[c] **What amounts to license to use street.**—(1) An ordinance granting two owners of abutting lots the right to occupy a designated portion of the sidewalk with a booth for the sale of merchandise is but a license revocable at any time, and possession thereunder is not adverse. Denver v. Girard, 21 Colo. 447, 42 P 662. (2) An entry of a railroad company on a street granted to a city for street purposes, under resolution of the common council reciting that the land was at the time owned by the city, to which resolution the company expressly assented, is permissive. Lewis v. New York, etc., R. Co., 162 N. Y. 202, 56 NE 540 [aff 40 App. Div. 343, 57 NYS 1053].

[d] **License to use highway.**—When a railroad company entered upon and occupied a highway by permission of, and under contract with, the county court, its possession was not adverse to the public. Turney v. Southern Pac. Co., 44 Or. 280, 75 P 144, 76 P 1080.

[e] **License to fish.**—A person who has a license from the officers of a town to use a reservoir for fishing and sailing during his natural life cannot, by the use of this license, obtain an absolute title by prescription to last forever. Dunham v. New Britain, 55 Conn. 378, 11 A 354.

13. Lowndes v. Huntington, 153 U. S. 1, 14 SCt 758, 38 L. ed. 615; Budd v. Collins, 69 Mo. 129.

[a] **Entry on public mineral lands.**—An entry made on public mineral lands is at most an entry under license from the government, and a subsequent sale to another person by the government and the issue of a receiver's receipt for the price thereof so divest the government of the title that the license is eo instanti revoked, and the licensee cannot set up his previous possession as adverse. Omaha, etc., Smelting, etc., Co. v. Tabor, 13 Colo. 41, 21 P 925, 16 AmSR 185, 5 LRA 236.

[b] **Statutory authority to build academy.**—Where lands are held in trust for county buildings, a legislative authorization for the erection of an academy on the premises is but a license to the academy by the county, expressed through the legislature, to hold at will, and the holding is not adverse so as to give title by limitation. Kittaning Academy v. Brown, 41 Pa. 269.

[c] **Temporary permission to occupy for the consideration of improvements.**—A, who had settled on a lot of state land, was allowed to remain there in consideration of improvement made by him until the legislature should otherwise direct. A sold his settler's right to B and remained in possession until his death. The heirs of B obtained an order for the sale of the land on partition, and one of them, C, purchased it, receiving a sheriff's deed, and held possession for thirteen years, when D purchased the land from the estate. The legislature having passed an act providing for the sale of such land, it was held that C's possession had not been adverse to the estate. Budd v. Collins, 69 Mo. 129.

14. Bond v. O'Gara, 177 Mass. 139, 58 NE 275, 83 AmSR 265.

15. Hoban v. Cable, 102 Mich. 206, 60 NW 466; St. Vincent Female Orphan Asylum v. Troy, 76 N. Y. 108, 32 AmR 286 [rev 12 Hun 317].

[a] **Reason for rule.**—If the contract is a nullity the possessor holds as tenant at will to the person from whom he derived possession, and the relation still exists. Chiles v. Jones, 4 Dana (Ky.) 479.

[b] **Possession, under ultra vires resolution by a city council,** of a portion of the street is not adverse. St. Vincent Female Orphan Asylum v. Troy, 76 N. Y. 108, 32 AmR 286 [rev 12 Hun 317].

[c] **Unauthorized agreement in behalf of minors.**—The occupation of lands under an agreement with an assumed representative of minor owners, whether he has authority to act or not, is not adverse possession against the minor owners. Hoban v. Cable, 102 Mich. 206, 60 NW 466.

16. Susquehanna County v. Deans, 33 Pa. 131.

17. Johnson v. Butt, 46 Nebr. 220, 64 NW 691.

18. Bird v. New Jersey, etc., R. Co., 3 App. Div. 344, 38 NYS 281.

19. Montgomery County v. Bean, 82 SW 240, 26 KyL 568.

20. Buckham v. Bucknam, 30 Me. 494.

21. Cameron v. Chicago, etc., R. Co., 60 Minn. 100, 61 NW 814.

22. Ward v. Nestell, 113 Mich. 185, 71 NW 593; Stevenson v. Black, 168 Mo. 549, 68 SW 909; De St. Laurent v.

sive Possession Hostile Character—a. Surrender of Possession. In order to give a hostile character to a possession permissive in its inception, it is not necessary that the land should have been first surrendered to the owner,[23] and on the other hand the surrender by a lessee of a fence built by him inclosing land of his lessor, not included in the leased premises, does not make the possession of the transferee adverse until notice of the transfer is brought home to the true owner.[24]

[§ 230] **b. Knowledge or Notice to Disseizee of Hostile Claim.** Nevertheless, the theory on which adverse possession becomes a perfect title is that the true owner has by his own fault failed to assert his right against the hostile holding,[25] and where possession is originally taken and held under the true owner, a clear, positive, and continued disclaimer and disavowal of title, and an assertion of an adverse right brought home to the true owner, are indispensable before any foundation can be laid for the operation of the statute of limitations.[26] Without this the length of the occupancy is immaterial and does not affect the title,[27] and possession for the full period of limitation must have elapsed after such repudiation before title based thereon can be acquired.[28] If the rule were otherwise the greatest injustice might be done. Without such knowledge the adverse claimant has the right to rely upon the fiduciary relation under which the possession was originally taken and held.[29]

[§ 231] **c. What Knowledge or Notice Sufficient—(1) In General.** The statute of limitations does not begin to run until the true owner has actual notice of a hostile holding against him, or until there are acts or declarations on the part of the claimant showing the possession to have become hostile, done or made in such manner and under such circumstances as to leave no doubt that they came to the knowledge of the owner or to some one representing him.[30] It must be shown that the true

Gescheidt, 18 App. Div. 121, 45 NYS 730.

23. Whelchel v. Gainesville, etc., R. Co., 116 Ga. 431, 42 SE 776.

24. Northern Pac. R. Co. v. Littlejohn, 198 Fed. 700 (where it was said that the inclosure by the lessee not being hostile to the owner in the first instance would not become so merely by surrendering his interest in the fence to a third person and that the owner would have no knowledge or means of knowing that the latter was asserting title because of it).

25. Lecroix v. Malone, 157 Ala. 434, 47 S 725.

26. U. S.—Harvey v. Tyler, 2 Wall. 328, 17 L. ed. 871; Zeller v. Eckert, 4 How. 289, 11 L. ed. 979; Willison v. Watkins, 3 Pet. 43, 7 L. ed. 596; Kirk v. Smith, 9 Wheat. 241, 6 L. ed. 81; Graydon v. Hurd, 55 Fed. 724, 5 CCA 258.

Ala.—Alexander-City Union Warehouse, etc., Co. v. Central of Georgia R. Co., 62 S 745; Lay v. Fuller, 59 S 609; Lecroix v. Malone, 157 Ala. 434, 47 S 725; Foy v. Wellborn, 112 Ala. 160, 20 S 604; Robinson v. Allison, 97 Ala. 596, 12 S 382, 604; Dejarnette v. McDaniel, 93 Ala. 215, 9 S 570; Burrus v. Meadors, 90 Ala. 140, 7 S 469; Woodstock Iron Co. v. Roberts, 87 Ala. 436, 6 S 349; Bishop v. Truett, 85 Ala. 376, 5 S 154; Dothard v. Denson, 72 Ala. 541; Alexander v. Wheeler, 69 Ala. 332; Collins v. Johnson, 57 Ala. 304; Benje v. Creagh, 21 Ala. 151; Harrison v. Pool, 16 Ala. 167.

Cal.—Jensen v. Hunter, 41 P 14; Kerns v. Dean, 77 Cal. 555, 19 P 817.

Conn.—Harrall v. Leverty, 50 Conn. 46, 47 AmR 608.

Ga.—Williams v. Cash, 27 Ga. 507, 73 AmD 739; Lawson v. Cunningham, 21 Ga. 454; Stamper v. Griffin, 20 Ga. 312, 65 AmD 628.

Ill.—Kirby v. Kirby, 236 Ill. 255, 86 NE 259; Smith v. Stevens, 82 Ill. 554; Busch v. Huston, 75 Ill. 343; Riggs v. Cook, 9 Ill. 336, 46 AmD 462.

Iowa.—Davenport v. Sebring, 52 Iowa 364, 3 NW 403.

Ky.—Tippenhauer v. Tippenhauer, 158 Ky. 639, 166 SW 225; Padgett v. Decker, 145 Ky. 227, 140 SW 152; Upchurch v. Sutton, 142 Ky. 420, 134 SW 477; Ross v. Veech, 58 SW 475, 22 KyL 578; Russell v. Marks, 3 Metc. 37; Gossom v. Donaldson, 18 B. Mon. 241.

Me.—Lancey v. Parks, 102 Me. 135, 138, 66 A 311 [cit Cyc]; Alden v. Gilmore, 13 Me. 178.

Mass.—Percival v. Chase, 182 Mass. 371, 65 NE 800.

Mich.—Ann Arbor Fruit, etc., Co., v. Ann Arbor R. Co., 136 Mich. 599, 605, 99 NW 869, 66 LRA 431 [cit Cyc]. See also Joseph v. Geel, 122 Mich. 70, 80 NW 987; Burke v. Douglass, 115 Mich. 197, 73 NW 133; Campau v. Lafferty, 50 Mich. 114, 15 NW 40; Perkins v. Nugent, 45 Mich. 156, 7 NW 757. And see LeRoy v. Collins, 176 Mich. 465, 142 NW 842.

Minn.—Cameron v. Chicago, etc., R. Co., 60 Minn. 100, 61 NW 814.

Miss.—Green v. Mizelle, 54 Miss. 220.

Mo.—McClanahan v. McClanahan, 167 SW 991, 993 [quot Cyc]; McCune v. Goodwillie, 204 Mo. 306, 102 SW 997; Stevenson v. Black, 168 Mo. 549, 68 SW 909; Hunnewell v. Adams, 153 Mo. 440, 55 SW 95; Hannibal, etc., R. Co. v. Miller, 115 Mo. 158, 21 SW 915; Comstock v. Eastwood, 108 Mo. 41, 18 SW 39; Spencer v. O'Neill, 100 Mo. 49, 12 SW 1054; Gordon v. Eans, 97 Mo. 587, 4 SW 112, 11 SW 64, 370; Campbell v. Laclede Gas Light Co., 84 Mo. 352; Estes v. Long, 71 Mo. 605; Fulkerson v. Brownlee, 69 Mo. 371; Budd v. Collins, 69 Mo. 129; Hamilton v. Boggess, 63 Mo. 238; Pease v. Lawson, 33 Mo. 35.

Nebr.—Dringman v. Keith, 93 Nebr. 180, 139 NW 1044; Blake v. West, 89 Nebr. 794, 132 NW 394; Smith v. Hitchcock, 38 Nebr. 104, 56 NW 791.

N. Y.—Lewis v. New York, etc., R. Co., 162 N. Y. 202, 56 NE 540 [aff 40 App. Div. 343, 57 NYS 1063]; Treadwell v. Inslee, 120 N. Y. 458, 24 NE 651; Monnot v. Rudd, 139 App. Div. 651, 124 NYS 210.

N. C.—Bradsher v. Hightower, 118 N. C. 399, 24 SE 120.

Okl.—Acton v. Culbertson, 38 Okl. 280, 132 P 812.

Or.—Crowley v. Grant, 63 Or. 212, 127 P 28; Putnam v. Ray, 62 Or. 159, 124 P 205; Curtis v. La Grande Water Co., 20 Or. 34, 23 P 808, 25 P 373, 10 LRA 484 and note; Anderson v. McCormick, 18 Or. 301, 22 P 1062; Springer v. Young, 14 Or. 280, 12 P 400.

Pa.—Johns v. Johns, 244 Pa. 48, 90 A 535; Cadwalader v. App, 81 Pa. 194; Bannon v. Brandon, 34 Pa. 263, 75 AmD 655; Hood v. Hood, 2 Grant 229.

S. C.—McCutchen v. McCutchen, 77 S. C. 129, 57 SE 678, 12 LRANS 1140 and note; Weathersby v. Wilson, 10 S. C. L. 373 note; Floyd v. Mintsey, 28 S. C. Eq. 181.

Tex.—Mhoon v. Cain, 77 Tex. 316, 14 SW 24; Harle v. Harle, (Civ. A.) 166 SW 674; Meurin v. Kopplin, (Civ. A.) 100 SW 984; Kane v. Sholars, 41 Tex. Civ. A. 154, 90 SW 937.

Vt.—Robinson v. Sherwin, 36 Vt. 69; Ripley v. Yale, 18 Vt. 220.

Va.—Thompson v. Camper, 106 Va. 315, 55 SE 674; Hulvey v. Hulvey, 92 Va. 182, 23 SE 233; Chapman v. Chapman, 91 Va. 397, 21 SE 813, 50 AmSR 846; Hannon v. Hounihan, 85 Va. 429, 12 SE 157; Creekmur v. Creekmur, 75 Va. 430; Clarke v. McClure, 10 Gratt. (51 Va.) 305.

W. Va.—Maxwell v. Cunningham, 50 W. Va. 298, 40 SE 499; Hudson v. Putney, 14 W. Va. 561.

Wis.—Allen v. Allen, 58 Wis. 202, 16 NW 610; Bartlett v. Secor, 56 Wis. 520, 14 NW 714; Quinn v. Quinn, 27 Wis. 168.

[a] **As otherwise expressed** "the rule requires that the specific acts or declarations relied upon as showing a change from the original tenure must be equivalent to an actual ouster." Johns v. Johns, 244 Pa. 48, 54, 90 A 535.

[b] **Application of rule.**—The possession by a turnpike company of the land constituting its highway after abandonment of the highway is presumptively under its right to only an easement for highway purposes until it does something evidencing a holding hostile to the owner of the fee and claims to be the owner of the fee. Brooklyn, etc., R. Co. v. Bird, 76 Misc. 62, 134 NYS 1.

27. Lay v. Fuller, (Ala.) 59 S 609; Tillotson v. Doe, 5 Ala. 407, 39 AmD 330.

28. Original Consol. Min. Co. v. Abbott, 167 Fed. 681, 683 (per Hunt, J.); Rucker v. Rucker, 136 Ga. 830, 72 SE 241.

29. Zeller v. Eckert, 4 How. (U. S.) 289, 11 L. ed. 979; Hulvey v. Hulvey, 92 Va. 182, 23 SE 233.

"The presumption that every one knows the law cannot . . . be held to convert a permissive and rightful use into a wrongful and hostile one, without some act to indicate that the parties understand the changed conditions and their consequences, and either do or say something to clearly indicate a hostile intent." Toney v. Knapp, 142 Mich. 652, 658, 106 NW 552 [cit Cyc] (per Grant, J.).

[a] **It would be a harsh doctrine,** converting the statute of limitations into a statute for the encouragement of fraud, if tenants of particular estates, or tenants having had a limited or qualified interest or holding by mere sufferance or permission, could, without the knowledge of the true owners, and without notice to them of any facts putting them on inquiry, convert their possessions into adversary possession by mere claim of title, which the statute of limitations will protect. Kirk v. Smith, 9 Wheat. (U. S.) 241, 6 L. ed. 81; Foy v. Wellborn, 112 Ala. 160, 20 S 604; Hannon v. Hounihan, 85 Va. 429, 12 SE 157.

30. U. S.—Zeller v. Eckert, 4 How. 289, 11 L. ed. 979; Original Consol. Min. Co. v. Abbott, 167 Fed. 681.

Ala.—Lucy v. Tennessee, etc., R. Co., 92 Ala. 246, 8 S 806; Dothard v. Denson, 72 Ala. 541; Harrison v. Pool, 16 Ala. 167.

Ill.—Kirby v. Kirby, 236 Ill. 255, 86 NE 259.

Mich.—Weber v. Detroit, 159 Mich. 14, 123 NW 540, 36 LRANS 1056 and note.

N. Y.—Lewis v. New York, etc., R. Co., 162 N. Y. 202, 56 NE 540; Morris

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owner had knowledge of the adverse holding, or it must be so open and notorious as to raise a presumption of notice to him equivalent to actual notice.[31]

[§ 232] **(2) Necessity of Actual Knowledge.** Except where it is otherwise provided by statute[32] actual knowledge on the part of the owner is not an absolutely indispensable element of adverse holding by one who has entered under and in recognition of title of the true owner. The acts of the party in possession may be such as will warrant the presumption and finding that the true owner had knowledge of the adverse claim.[33] This doctrine applies in all cases where there is no fiduciary or trust relation between the parties.[34]

[§ 233] **E. Effect of Recognition or Admission of Title in Another—1. Before Statutory Period Has Elapsed—a. Statement of General Rule.** The possession of one who recognizes or admits title in another before the statutory period has elapsed either by declaration or conduct is not adverse to the title of such other[35] until such occupant has

v. Morris, 114 App. Div. 346, 99 NYS 964; Stillman v. Olean, 72 Misc. 196, 129 NYS 515.

Okl.—Acton v. Culbertson, 38 Okl. 280, 132 P 812.

Or.—Coquille Mill, etc., Co. v. Johnson, 52 Or. 547, 98 P 132, 132 AmSR 716.

Pa.—Hood v. Hood, 2 Grant 229.

Tex.—Mhoon v. Cain, 77 Tex. 316, 14 SW 24.

Va.—Hulvey v. Hulvey, 92 Va. 182, 23 SE 233.

W. Va.—Clifton v. Weston, 54 W. Va. 250, 46 SE 360.

See Quigg v. Zeugin, 82 Conn. 437, 74 A 753; Lancey v. Parks, 102 Me. 135, 138, 66 A 311 [cit Cyc] (unequivocal act must be brought to knowledge of owner).

[a] **Express notice** has been said to be essential, but by this term is meant no more than actual notice. Johns v. Johns, 244 Pa. 48, 90 A 535.

[b] **Acts held insufficient to charge with notice.**—(1) Proceedings for the partition of land, brought by persons holding possession under license from the true owner, and to which he is not a party, followed by a sale to one of the parties and continued exclusive possession by him, are insufficient to charge the true owner with notice of a hostile claim. Budd v. Collins, 69 Mo. 129. (2) Mere declarations of intent to hold adversely by the occupant are insufficient to set in motion the statute of limitations in his favor, where he entered in subserviency to the title of another. Cadwalader v. App, 81 Pa. 194. (3) And a fortiori a mere undisclosed intent on the part of such occupant to hold adversely is insufficient. Some notice or act indicative of the intent is necessary. Comstock v. Eastwood, 108 Mo. 41, 18 SW 39; Bannon v. Brandon, 34 Pa. 263, 75 AmD 655. (4) "A possession commencing friendly or in subordination to the true title does not change into a hostile one by a mere change in mental attitude." McCune v. Goodwillie, 204 Mo. 306, 339, 102 SW 997 (per Lamm, J.). (5) Paying taxes, making repairs, taking rents and profits, and cutting timber are not sufficient acts to constitute adverse possession on the part of one who enters into possession of land in privity with another against whom such possession is asserted. Hulvey v. Hulvey, 92 Va. 182, 23 SE 233. (6) The record of a deed from the owner of the tax title to one in possession under permission of the owner does not affect the owner with notice that the possession of the grantee thereafter was adverse to his title. Millett v. Lagomarsino, (Cal.) 38 P 308. (7) And one who enters upon lands by permission and arrangement with the owner must, if intending to claim, adverse possession under a subsequent deed from the owner's grantor, give notice to the owner of such claim since a landowner is not compelled by the recording act to watch the records for conveyances of his own property. Lewis v. New York, etc., R. Co., 162 N. Y. 202, 56 NE 540 [aff 40 App. Div. 343, 57 NYS 1053]. (8) Use of the land in no other way than pitching camp thereon is not sufficient to indicate an intent to appropriate to his own use. Nona Mills Co. v. Wright, 101 Tex. 14, 102 SW 1118. (9) Where one held possession of land before receiving a deed thereto by permission of the real owner who remained in possession of a small portion of the same tract, and his possession after receiving the deed from a third party was of the same character as before, it is not shown to be adverse. Dringman v. Keith, 93 Nebr. 180, 139 NW 1044.

[c] **The receipt of rents and profits** from real estate is not of itself such a possession as to prove an ouster of the party holding the legal title and to render void a conveyance by him, but is consistent with the supposition that the possession is in some way subordinate to the title of the owner. Averill v. Sanford, 36 Conn. 345.

[d] **Acts held sufficient to charge with notice.**—(1) Although defendant went into possession by consent of claimant's intestate, and subsequently mortgaged the premises, and the intestate witnessed the instrument, this was sufficient to warrant the conclusion that a hostile possession by defendant then existed. Meyer v. Hope, 101 Wis. 123, 77 NW 720, (2) Even though there was a permissive use of certain premises up to a certain fence claimed to have been improperly located as a line fence, the erection of a new line fence along the same line is a distinct, hostile entry upon the property, and, when maintained for twenty years without objection, overcomes the presumption previously existing in favor of the true owner and makes it necessary for him to establish permissive use after such entry. Mielke v. Dodge, 135 Wis. 388, 115 NW 1099. (3) Where husband and wife occupy lands held by her by license from the owner, and the wife dies, the license determines and the husband's continued occupation thereafter is adverse if accompanied by the indicia of adverse possession. Page v. Gaskill, 84 N. J. L. 615, 87 A 460.

[e] **To whom notice may be given.**—Where there was no person holding the seizin because of the death of all the trustees of an express trust, a permissive possession could not be converted into an adverse possession until the appointment of new trustees, for until that time there was no one on whom notice of the change in the character of the possession could be given. Lecroix v. Malone, 157 Ala. 434, 47 S 725.

31. Robinson v. Allison, 97 Ala. 596, 12 S 382, 604.

[a] **Surrender of possession by licensee to stranger** does not of itself mark inception of hostile possession. Northern Pac. R. Co. v. Littlejohn, 198 Fed. 700.

32. See cases infra this note.

[a] **In Georgia** under Civ. Code (1910) § 4164, providing that permissive possession cannot be the foundation of a prescription until an adverse claim and actual notice to the other party, where possession is inceptively permissive, title by prescription under twenty years' possession will not ripen until the expiration of twenty years from actual notice to the party under whom possession originated of the adverse claim of the one setting up prescription. Rucker v. Rucker, 136 Ga. 830, 72 SE 241.

[b] **In Kentucky** as against a municipality written notice is necessary to start the running of the statute. Faith v. Owensboro, 145 Ky. 276, 140 SW 312.

33. Ala.—Alexander v. Wheeler, 69 Ala. 332. See also Alabama cases infra this note.

Ga.—Stamper v. Griffin, 20 Ga. 312, 65 AmD 628.

Ill.—Knight v. Knight, 178 Ill. 553, 53 NE 306; Illinois Cent. R. Co. v. Houghton, 126 Ill. 233, 18 NE 801, 9 AmSR 581, 1 LRA 213 and note.

Iowa.—Hanson v. Gallagher, 154 Iowa 192, 134 NW 421.

Me.—Alden v. Gilmore, 13 Me. 178.

Miss.—Green v. Mizelle, 54 Miss. 220.

Mo.—Comstock v. Eastwood, 108 Mo. 41, 18 SW 39.

S. C.—Bryce v. Cayce, 62 S. C. 546, 40 SE 948.

Tex.—Sanders v. Moore, (Civ. A.) 157 SW 441; Hill v. Collier, (Civ. A.) 135 SW 1084.

Ont.—Noble v. Noble, 27 Ont. L. 342 [rev 25 Ont. L. 379, 20 OntWR 168, 889, 1 DomLR 516].

[a] **"It is not necessary to prove express notice** to the owner of the claim of title." Carr v. Mouzon, 86 S. C. 461, 469, 68 SE 661 (per Woods, J.).

[b] **Nevertheless it has been said in a recent decision** that "no kind or degree of actual hostility will of itself convert such a permissive into an adverse possession. No sort of claim of ownership on the part of the party in possession will of itself have this effect. And while it may be open to the jury in some cases to find from the circumstances of the possession that the owner had notice of its hostile and exclusive character, no exclusiveness of possession, no hostility, no claim of right antagonistic to the title will necessarily in any case take the place of direct proof of knowledge on the part of the owner that the possession is no longer held in subserviency to him. At most in any case, the circumstances of hostility, exclusiveness and claim of right are only for the jury to consider as tending to show knowledge on the part of the owner, the argument being that the circumstances of the possession were such as that he must have known them, and from them, that the possession was no longer held under him and in recognition of his title." Trufant v. White, 99 Ala. 526, 535, 13 S 83; Lecroix v. Malone, 157 Ala. 434, 441, 47 S 725 [quot this statement with approval]. To same effect Benje v. Creagh, 21 Ala. 151.

34. Bryce v. Cayce, 62 S. C. 546, 40 SE 948.

35. U. S.—Cleveland v. Cleveland, etc., R. Co., 93 Fed. 113 [rev on other grounds 147 Fed. 171]; Adams v. Burke, 1 F. Cas. No. 49, 3 Sawy. 415; Stillman v. White Rock Mfg. Co., 23 F. Cas. No. 13,446, 3 Woodb. & M. 538.

Ala.—Butler v. Butler, 133 Ala. 377, 32 S 579.

Ark.—Vittitow v. Burnett, 165 SW 625; Hudson v. Stillwell, 80 Ark. 575, 98 SW 356; Shirey v. Whitlow, 80 Ark. 444, 97 SW 444.

Cal.—Smith v. Smith, 80 Cal. 323, 21 P 4, 22 P 186, 549; Farish v. Coon, 40 Cal. 33; McCracken v. San Francisco, 16 Cal. 591.

Conn.—Paton v. Robinson, 81 Conn. 547, 71 A 730; Smith v. Martin, 17

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changed the character of his possession either by express declaration or by the exercise of actual ownership inconsistent with a subordinate character.[36] Such recognition likewise prevents acquisition of title by adverse possession by his heirs and representatives.[37]

[§ 234] **b. Assertion of Title Subsequent to Recognition of Title in Another.** Notwithstanding rec-

Conn. 399; Deming v. Carrington, 12 Conn. 1, 30 AmD 591.

Ga.—Wood v. McGuire, 17 Ga. 303.

Ill.—Alsup v. Stewart, 194 Ill. 595, 62 NE 795, 88 AmSR 169; Busch v. Huston, 75 Ill. 343.

Iowa.—Gill v. Candler, 114 Iowa 332, 86 NW 300; Browneller v. Wells, 109 Iowa 230, 80 NW 351; Litchfield v. Sewell, 97 Iowa 247, 66 NW 104; McNamee v. Moreland, 26 Iowa 96.

Kan.—Viking Refrigerator, etc., Co. v. Crawford, 84 Kan. 203, 205, 114 P 240, 35 LRANS 498 and note [quot Cyc].

Ky.—Upchurch v. Sutton, 142 Ky. 420, 423, 134 SW 477 [cit Cyc]; Haffendorfer v. Gault, 84 Ky. 124.

Me.—Lamb v. Foss, 21 Me. 240.

Mich.—Tyler v. Wright, 164 Mich. 606, 610, 130 NW 205 [quot Cyc]; Dillie v. Longwell, 163 Mich. 439, 128 NW 782; Butler v. Bertrand, 97 Mich. 59, 56 NW 342.

Miss.—Rothschild v. Hatch, 54 Miss. 554.

Mo.—Himmelberger-Harrison Lumber Co. v. Craig, 248 Mo. 319, 154 SW 73; Peters v. St. Louis, 226 Mo. 62, 125 SW 1134, 21 AnnCas 1069; Boynton v. Miller, 144 Mo. 681, 46 SW 754; Tomlinson v. Lynch, 32 Mo. 160.

Nebr.—Risher v. Madsen, 94 Nebr. 72, 142 NW 700; Roggencamp v. Converse, 15 Nebr. 105, 17 NW 361.

N. Y.—Monnot v. Rudd, 139 App. Div. 651, 124 NYS 210; Erkson v. Johnston, 8 App. Div. 31, 40 NYS 401; Jackson v. Johnson, 5 Cow. 74, 15 AmD 433.

N. C.—Graham v. Davidson, 32 N. C. 245.

Or.—Crowley v. Grant, 63 Or. 212, 127 P 28.

Pa.—Horton v. Davidson, 135 Pa. 186, 19 A 934; Weaver v. Oberholtzer, 31 Pa. Super. 425.

Philippine.—San Carlos Seminary v. Cebu, 19 Philippine 32.

S. C.—Moore v. Johnston, 29 S. C. L. 288; Markley v. Amos, 185 S. C. L. 603.

S. D.—Wallace v. Dunton, 30 S. D. 598, 139 NW 349.

Tex.—Warren v. Frederichs, 83 Tex. 380, 18 SW 750; Texas Western R. Co. v. Wilson, 83 Tex. 153, 18 SW 325; Satterwhite v. Rosser, 61 Tex. 166; Bennett v. Louisiana, etc., Lumber Co., (Civ. A.) 148 SW 1189; Makey v. Dryden, (Civ. A.) 128 SW 633; Cox v. Sherman Hotel Co., (Civ. A.) 47 SW 808.

Va.—Griffin v. Cunningham, 19 Gratt. (60 Va.) 571; Erskine v. North, 14 Gratt. (55 Va.) 60.

W. Va.—Jarvis v. Grafton, 44 W. Va. 453, 30 SE 178.

Ont.—Dominion Impr., etc., Co. v. Lally, 24 Ont. L. 115, 2 OntWN 1224, 19 OntWR 462, 2 OntWN 155, 17 OntWR 151; Marsh v. Webb, 19 Ont. A. 564; Moffatt v. Walker, 15 Grant Ch. (U. C.) 155.

[a] **"A single lisp of acknowledgment** by the defendant that he claims no title, fastens a character upon his possession which makes it unavailable for ages." Warren v. Frederichs, 83 Tex. 380, 384, 18 SW 750 [quot McDonald v. McCrabb, 47 Tex. Civ. A. 259, 267, 105 SW 238]; Texas Western R. Co. v. Wilson, 83 Tex. 153, 18 SW 325; Hand v. Swann, 1 Tex. Civ. A. 241, 21 SW 282. And see Criswell v. Noble, 61 Misc. 483, 113 NYS 954; Colvin v. Burnet, 17 Wend. (N. Y.) 564, 569 (where practically the same language is used).

[b] **Admission by deeds.**—(1) The possession by defendant, who has by deeds and partitions acknowledged the title of plaintiff, is not adverse to such title. Tomlinson v. Lynch, 32 Mo. 160. (2) Possession of land by defendant and other grantors, accompanied by the erection of wharves and other buildings thereon, is not adverse when the conveyance under which they claim shows that they had no title to the accepted land, and their own subsequent conveyance recognizes and repeats the exception. New York v. Law, 6 NYS 628 [aff 125 N. Y. 380, 26 NE 471]. (3) The reservation of a particular lot in a conveyance of the surrounding land is sufficient recognition by the grantee of title in another to bar his claim to that lot under the statute of limitations. Olwine v. Holmann, 23 Pa. 279.

[c] **Admission, by sworn pleading,** of title in another will prevent adverse possession. Cleveland v. Cleveland, etc., R. Co., 93 Fed. 113 [rev on other grounds 147 Fed. 171].

[d] **Admissions during trial of ejectment for land.**—In ejectment against one who for more than twenty years had continuously operated a submarine railway, extending five hundred and fifty feet beyond high water mark, defendant set up a grant procured from the state of the premises in question. At the trial he testified that he got the grant because he wanted the right to work the railway and did not claim to own any land below high water mark in fee. It was held that this admission disposed of his claim of having previously held by adverse possession. De Lancey v. Hawkins, 23 App. Div. 8, 49 NYS 469 [aff 163 N. Y. 587, 57 NE 1108].

[e] **Acceptance by a tax lessee of money paid by the owner to redeem land** is a recognition of the owner's title, precluding possession hostile to the owner. Monnot v. Rudd, 139 App. Div. 651, 124 NYS 210.

[f] **If the purchaser of a tax certificate accepts payment of the same from the record owner** through the county treasurer such act is a recognition of a superior title. Zweibel v. Myers, 69 Nebr. 294, 95 NW 597.

[g] **Failure to assert rights in land when asked** to pay rent amounts to a recognition of title in another. Cutting v. Burns, 57 App. Div. 185, 68 NYS 269.

[h] **Express written admission.**—If the occupant admits in writing that the land on which he lives belongs to the proprietor it is a voluntary submission to that title and a surrender of any rights acquired by prior possession. Lamb v. Foss, 21 Me. 240.

[i] **Verbal admission.**—(1) In trespass to try title, although the apparent weight of evidence sustained defendants' contention that they had held a small portion of the land adversely to plaintiff for more than ten years, testimony that two of defendants had stated within less than ten years that all the land in their inclosure claimed by plaintiff belonged to him was sufficient to sustain a finding that defendants' holding of such land was not adverse. Mass v. Bromberg, 28 Tex. Civ. A. 145, 66 SW 468. (2) So on the issue of adverse possession of three lots the fact that defendant stated, in regard to an inclosed portion of one lot, that he did not claim the property and agreed with the owners to remove the fence precludes him from claiming that his possession was then adverse to the owners in respect to the part of the particular lot then inclosed, but does not affect the adverse character of his possession of the remainder of that lot and of the other lots. Kane v. Sholars, 41 Tex. Civ. A. 154, 90 SW 937. Compare Patterson v. Reigle, 4 Pa. 201, 45 AmD 684 (holding that where one enters on unseated land with the intention to leave when the real owner comes but not until then the owner being unknown, and holds continuous possession for twenty-one years, he acquires a perfect title against the real owner which is not affected by his endeavoring to find the real owner or purchase his title or by his declarations to strangers of his want of title and his desire and intention to buy it or be paid for his improvements when the real owner appeared).

[j] **An acknowledgment of intent to purchase from the true owner** made before the statutory period has elapsed is fatal to a claim of adverse possession. Mhoon v. Cain, 77 Tex. 316, 14 SW 24; Whitaker v. Thayer, 38 Tex. Civ. A. 537, 86 SW 364.

[k] **Attempt to purchase.**—Where plaintiff did not have actual possession of land in controversy up to any definite line, and at all times during his possession regarded the line as in dispute, and had attempted to buy the tract in question, he was not entitled to claim the same by adverse possession. Liddle v. Blake, 131 Iowa 165, 105 N. W. 649.

[l] **Mutual agreement not to sue.**—Adverse possession ceases to be such on agreement between the parties, for sufficient consideration, not to bring suit during the lifetime of either. Dietrick v. Noel, 42 Oh. St. 18, 51 AmR 788.

[m] **Recognition by purchase from cotenant.**—Where in partition land cannot be divided and is assigned to one heir on condition that the value of another's share be paid in money, a purchaser with knowledge from the heir who takes conditional possession cannot hold the land adversely to the right to enforce payment of the assessment against it. McKibben v. Salinas, 41 S. C. 105, 19 SE 302.

[n] **What does not amount to recognition of title in another.**—(1) Evidence that a roadmaster, in the construction of a sidetrack over land, promised one claiming to be the owner that he would be paid for the land occupied is insufficient to prove that the company entered in recognition of his title. Hanlon v. Union Pac. R. Co., 40 Nebr. 52, 58 NW 590. (2) Purchase from cotenant by claimant who is ignorant of the cotenancy is not an acknowledgment of title in another cotenant. Smith v. Hamakua Mill Co., 13 Hawaii 716. (3) A wife, abandoned by her husband, had a receiver appointed to manage the husband's property for the benefit of the wife and children. Thereafter the wife obtained a divorce, the decree directing that the husband's real and personal estate remain under control of the receiver in trust for the benefit of the wife and children until further order. On the receiver's discharge an order was entered giving the wife the absolute control of the estate for the sole use and benefit of herself and children. The wife took possession of the real estate, executed mortgages thereon and finally a deed purporting to convey the fee absolutely, and delivered possession to the grantee. During her possession the wife leased the land at times and dealt with it as the owner and one vested with title. It was held that the fact that in her petitions for leave to mortgage and later to sell the land she referred to it as belonging to the estate of her former husband did not constitute admission of a superior title in him, and hence her possession was hostile and under a claim of right. Bryant v. Cadle, 18 Wyo. 64, 104 P 23, 106 P 687.

36. Shirey v. Whitlow, 80 Ark. 444, 97 SW 444; Crowley v. Grant, 63 Or. 212, 127 P 28; Bannon v. Brandon, 34 Pa. 263, 75 AmD 655; Moore v. Johnston, 29 S. C. L. 288; Satterwhite v. Rosser, 61 Tex. 166.

37. Upchurch v. Sutton, 142 Ky. 420, 134 SW 477.

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ognition of title in another by one in possession of land, he may thereafter change the character of his possession to one that is adverse, and his recognition of title prior thereto will not prevent his acquisition of title by adverse possession.[38] But, in order to change the character of the possession the true owner must be given actual notice of claim of title or the repudiation of his title by the claimant must be so notorious as to raise the presumption of notice thereof.[39]

[§ 235] **2. After Statutory Period Has Elapsed.** Where title by limitation has become vested in the adverse claimant, a mere recognition of some other title does not revest the title acquired by adverse possession.[40] Acknowledgment of title made after possession for the statutory period is merely evidence tending to show that the possession was not adverse.[41]

[§ 236] **F. Effect of Agreement of Adjoining Proprietors in Relation to Boundaries—1. Fixing Permanent Boundaries—a. Statement of Rule.** Where proprietors of adjoining lands agree upon, fix, and establish a boundary line between their respective tracts, and each occupies up to the boundary line, their possession is mutually adverse to each other, and, if continued for the length of time prescribed by the statute of limitations, will ripen into a perfect title[42] which cannot be affected

38. Criswell v. Noble, 61 Misc. 483, 113 NYS 954 [aff 134 App. Div. 994 mem, 119 NYS 1122 mem].

[a] **Thus** where one in possession of land of another sells it as his own he asserts title in himself, hostile to the owner's title, sufficient to ripen into title by limitation, although he had previously stated that he was not claiming the land but desired to buy from the owner. Louisiana, etc., Lumber Co. v. Southern Pine Lumber Co., (Tex. Civ. A.) 147 SW 604.

39. Houser v. Williams, 16 Tex. Civ. A. 122, 40 SW 414.

40. Hudson v. Stillwell, 80 Ark. 575, 98 SW 356; Shirey v. Whitlow, 80 Ark. 444, 97 SW 444; Whitaker v. Thayer, 38 Tex. Civ. A. 537, 86 SW 364.

41. Bracken v. Jones, 63 Tex. 184; Whitaker v. Thayer, 38 Tex. Civ. A. 537, 86 SW 364; Cuellar v. Dewitt, 5 Tex. Civ. A. 568, 24 SW 671. And see Hudson v. Stillwell, 80 Ark. 575, 98 SW 356.

42. U. S.—Boyd v. Graves, 4 Wheat. 513, 4 L. ed. 628; Brown v. Leete, 2 Fed. 440, 6 Sawy. 332; Stark v. Starr, 22 F. Cas. No. 13,307, 1 Sawy. 15.

Ala.—Ashford v. McKee, 62 S 879; McLester Bldg. Co. v. Upchurch, 60 S 173; Williams v. Bedsole, 174 Ala. 125, 56 S 567; Davis v. Grant, 173 Ala. 4, 55 S 210; Pittman v. Pittman, 124 Ala. 306, 27 S 242; Hess v. Rudder, 117 Ala. 525, 23 S 136, 67 AmSR 182; Hoffman v. White, 90 Ala. 354, 7 S 816; Alexander v. Wheeler, 69 Ala. 332; Brown v. Cockerell, 33 Ala. 38.

Cal.—Diersen v. Nelson, 138 Cal. 394, 71 P 456; White v. Spreckels, 75 Cal. 610, 17 P 715; Johnson v. Brown, 63 Cal. 391; Cooper v. Vierra, 59 Cal. 282; Biggins v. Champlin, 52 Cal. 113; Moyle v. Connolly, 50 Cal. 295; Columbet v. Pacheco, 48 Cal. 395; Sneed v. Osborn, 25 Cal. 619; Smith v. Robarts, 2 Cal. Unrep. Cas. 604, 9 P 104.

Conn.—Rathbun v. Geer, 64 Conn. 421, 30 A 60.

Fla.—Watrous v. Morrison, 33 Fla. 261, 14 S 805, 39 AmSR 139.

Ga.—Shiels v. Lamar, 58 Ga. 590; Watt v. Ganahl, 34 Ga. 290; Howard v. Reedy, 29 Ga. 152, 74 AmD 58; Riley v. Griffin, 16 Ga. 141, 60 AmD 726.

Ill.—Kincaid v. Vickers, 217 Ill. 423, 75 NE 527; Sheets v. Sweeney, 136 Ill. 336, 26 NE 648; Illinois Cent. R. Co. v. Houghton, 126 Ill. 233, 18 NE 301, 9 AmSR 581, 1 LRA 213 and note; Fisher v. Bennehoff, 121 Ill. 426, 13 NE 150; Darst v. Enlow, 116 Ill. 475, 6 NE 215; Bitter v. Saathoff, 98 Ill. 266; Hubbard v. Stearns, 86 Ill. 35; McNamara v. Seaton, 82 Ill. 498; Kerr v. Hitt, 75 Ill. 51; Cutler v. Callison, 72 Ill. 113.

Ind.—Dyer v. Eldridge, 136 Ind. 654, 36 NE 522; Wingler v. Simpson, 93 Ind. 201; Brown v. Anderson, 90 Ind. 93; Main v. Killinger, 90 Ind. 165; Ball v. Cox 7 Ind. 453.

Iowa.—Atkins v. Pfaffee, 114 NW 187; Lougee v. Shuhart, 127 Iowa 173, 102 NW 1125; Handorf v. Hoes, 121 Iowa 79, 95 NW 226; English v. Crawford, 94 NW 276; O'Callaghan v. Whisenand, 119 Iowa 566, 93 NW 579; Buch v. Flanders, 119 Iowa 164, 93 NW 101; Lawrence v. Washburn, 119 Iowa 109, 93 NW 73; Corey v. Ft. Dodge, 118 Iowa 742, 92 NW 704; Klinkner v. Schmidt, 114 Iowa 695, 87 NW 661; Kulas v. McHugh, 114 Iowa 188, 86 NW 288; Miller v. Mills County, 111 Iowa 654, 82 NW 1038; Boyd v. Shoop, 107 Iowa 10, 77 NW 482; Wilson v. Gunning, 80 Iowa 331, 45 NW 920; Davis v. Curtis, 68 Iowa 66, 25 NW 932; Heinrichs v. Terrell, 65 Iowa 25, 21 NW 171; Tracy v. Newton, 57 Iowa 210, 10 NW 636; Skinner v. Crawford, 54 Iowa 119, 6 NW 144; Hiatt v. Kirkpatrick, 48 Iowa 78; Foulke v. Stockdale, 40 Iowa 99; Burdick v. Heivly, 23 Iowa 511. See also McGovern v. Heery, 141 NW 435; Axmear v. Richards, 112 Iowa 657, 84 NW 686. But see Kahl v. Schmidt, 107 Iowa 550, 78 NW 204.

Kan.—Edwards v. Fleming, 83 Kan. 653, 663, 112 P 836, 33 LRANS 923 [cit Cyc]; Sheldon v. Atkinson, 38 Kan. 14, 16 P 68; Zimmerman v. Ginther, 10 Kan. A. 331, 63 P 657.

Ky.—Williams v. Brush Creek Coal Co., 149 Ky. 188, 148 SW 372 (case not within rule); Deskins v. Williams, 145 Ky. 355, 140 SW 546; Warden v. Addington, 131 Ky. 296, 115 SW 241; Grider v. Davenport, 60 SW 866, 22 KyL 1455; Liter v. Sherley, 35 SW 550, 18 KyL 107; Hawkins v. Walker, 15 SW 519, 12 KyL 789; Schieble v. Hart, 12 SW 628, 11 KyL 607; Hammond v. Williams, 9 SW 711, 10 KyL 525. See also Cornish v. Follis, 45 SW 1050, 20 KyL 300.

La.—D'Arby v. Blanchet, 7 La. 256. See also Bisso v. Calvo, 20 La. Ann. 343.

Me.—Walker v. Simpson, 80 Me. 143, 13 A 580; Abbott v. Abbott, 51 Me. 575; Faught v. Holway, 50 Me. 24; Moody v. Nichols, 16 Me. 23; Gove v. Richardson, 4 Me. 327.

Mass.—Holloran v. Holloran, 149 Mass. 298, 21 NE 374; Boston, etc., R. Corp. v. Sparhawk, 5 Metc. 469; Burrell v. Burrell, 11 Mass. 294. See also Coyle v. Cleary, 116 Mass. 208.

Mich.—Greene v. Anglemire, 77 Mich. 168, 43 NW 772; Jones v. Pashby, 67 Mich. 459, 35 NW 152, 11 Am SR 589; Bird v. Stark, 66 Mich. 654, 33 NW 754; Bunce v. Bidwell, 43 Mich. 542, 5 NW 1023; White v. Hapeman, 43 Mich. 267, 5 NW 313, 38 AmR 178.

Minn.—Benz v. St. Paul, 89 Minn. 31, 93 NW 1038.

Mo.—Barnes v. Allison, 166 Mo. 96, 65 SW 781; Lemmons v. McKinney, 162 Mo. 525, 63 SW 92; Schwartzer v. Gebhardt, 157 Mo. 99, 57 SW 782; Flynn v. Walker, 151 Mo. 545, 52 SW 342; Ward v. Ihler, 132 Mo. 375, 34 SW 251; Goltermann v. Schiermeyer, 125 Mo. 291, 28 SW 616; Irwin v. Woodmansee, 104 Mo. 403, 16 SW 486; Handlan v. McManus, 100 Mo. 124, 13 SW 207, 18 AmSR 533; Krider v. Milner, 99 Mo. 145, 12 SW 461, 17 AmSR 549; Atchison v. Pease, 96 Mo. 566, 10 SW 159; Jacobs v. Moseley, 91 Mo. 457, 4 SW 135; Walbrunn v. Ballen, 68 Mo. 164; Houx v. Batteen, 68 Mo. 84; Hamilton v. West, 63 Mo. 93; West v. St. Louis, etc., R. Co., 59 Mo. 510; Major v. Rice, 57 Mo. 384; Kincaid v. Dormey, 51 Mo. 552; Tamm v. Kellogg, 49 Mo. 118; Betts v. Brown, 3 Mo. A. 20. Compare Knowlton v. Smith, 36 Mo. 507, 88 AmD 152.

Nebr.—Trussel v. Lewis, 13 Nebr. 415, 14 NW 155, 42 AmR 767.

N. Y.—Sherman v. Kane, 86 N. Y. 57; Jones v. Smith, 64 N. Y 180; Reed v. Farr, 35 N. Y. 113; Baldwin v. Brown, 16 N. Y. 359; Allerton v. Steele, 59 App. Div. 622, 69 NYS 594; Race v. Stewart, 5 App. Div. 598, 39 NYS 438; Robinson v. Phillips, 65 Barb. 418, 1 Thomps. & C. 151 [aff 56 N. Y. 634]; Ford v. Schlosser, 13 Misc. 205, 34 NYS 12; Becken v. Weeks, 15 NYS 585; Rock v. Doerr, 15 NYS 14; Eldridge v. Kenning, 12 NYS 693; Vauth v. Landis, 26 NY WklyDig 502; Adams v. Rockwell, 16 Wend. 285; Dibble v. Rogers, 13 Wend. 536; McCormick v. Barnum, 10 Wend. 104.

Oh.—Smith v. McKay, 30 Oh. St. 409; Bobo v. Richmond, 25 Oh. St. 115; Yetzer v. Thoman, 17 Oh. St. 130, 91 AmD 122; Ries v. Wolf, 18 Oh. Cir. Ct. 552, 9 Oh. Cir. Dec. 255.

Or.—Gist v. Doke, 42 Or. 225, 70 P 704; Pearson v. Dryden, 28 Or. 350, 43 P 166.

Pa.—Miles v. Pennsylvania Coal Co., 91 A 211; Reiter v. McJunkin, 173 Pa. 82, 33 A 1012; Rider v. Maul, 46 Pa. 376; McCoy v. Hance, 28 Pa. 149; Brown v. McKinney, 9 Watts 565, 36 AmD 139; Kuhns v. Fennell, 10 Pa. Cas. 551, 15 A 920; Grove v. McAlvey, 5 Pa. Cas. 124, 8 A 210; McManus v. McIlvaine, 2 Woodw. 146.

R. I.—O'Donnell v. Penney, 17 R. I. 164, 20 A 305.

Tenn.—Mayse v. Lafferty, 1 Head 60.

Tex.—Harn v. Smith, 79 Tex. 310, 15 SW 240, 23 AmSR 340; Geroge v. Thomas, 16 Tex. 74, 67 AmD 612; Hayward Lumber Co. v. Bonner, 56 Tex. Civ. A. 208, 120 SW 577; McDonald v. McCrabb, 47 Tex. Civ. A. 259, 105 SW 238.

Utah.—Rydalch v. Anderson, 37 Utah 99, 109, 107 P 25 [quot Cyc]; Switzgable v. Worseldine, 5 Utah 386, 16 P 400 [aff reh 5 Utah 315, 15 P 144].

Vt.—Davis v. Judge, 46 Vt. 655; Child v. Kingsbury, 46 Vt. 47; Hodges v. Eddy, 38 Vt. 327; Sheldon v. Perkins, 37 Vt. 550; Clark v. Tabor, 28 Vt. 222; Spaulding v. Warren, 25 Vt. 316; Ackley v. Buck, 18 Vt. 395; Burton v. Lazell, 16 Vt. 158; White v. Everest, 1 Vt. 181. See also Beecher v. Parmele, 9 Vt. 352, 31 AmD 633.

Va.—Harris v. Crenshaw, 3 Rand. (24 Va.) 14.

Wash.—Lindley v. Johnston, 42 Wash. 257, 84 P 822.

Wis.—Reilly v. Howe, 101 Wis. 108, 76 NW 1114; Wollman v. Ruehle, 100 Wis. 31, 75 NW 425; Eiden v. Eiden, 76 Wis. 435, 45 NW 322; Donahue v. Thompson, 60 Wis. 500, 19 NW 520; Tobey v. Secor, 60 Wis. 310, 19 NW 99; Bartlett v. Secor, 56 Wis. 520, 14 NW 714; Bader v. Zeise, 44 Wis. 96.

Ont.—Does v. Radich, Taylor (U. C.) 499; Elliott v. Bulmer, 27 U. C. C. P. 217; Martin v. Weld, 19 U. C. Q. B. 631. And see McGregor v. Keiller, 9 Ont. 677; Cole v. Brunt, 35 U. C. Q. B. 103.

And see Laurentide Mica Co. v. Fortin, 39 Can. S. C. 680.

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by any subsequent parol agreement in respect of the line so established.[43] Where an agreement of this character exists, it is of course immaterial that the line thus agreed upon is not the correct one.[44] Such agreements are not within the statute of frauds[45] and may be either by writing or by parol[46] because they are not considered as extending to the title. They do not operate as a conveyance so as to pass title from one to the other, but proceed upon the theory that the true line of separation is in dispute and to some extent unknown, and in such case the agreement serves to fix the line to which the title of each extends.[47] If, however, the true line were known, the rule would be otherwise, for "parties may not by parol agree upon some other point as the boundary line, and in that way pass title to land by parol."[48] And it has been held that where the agreement is not executed by marking the line or taking possession and is without consideration, it is within the statute of frauds.[49]

[§ 237] **b. Extent and Limits of Rule.** These agreements are binding on the heirs of the parties[50] and on their grantees,[51] and, after possession has been held for the statutory period conformably to the line agreed upon, a deed by one purporting to convey the land thus in possession of the other passes nothing to the grantee.[52] While a disputed boundary line between adjoining proprietors may be settled by agreement between them as to where the line shall be, followed by occupancy for the time necessary to bar an entry, and such occupancy will confer title regardless of where the true line is, the same is not true of the projection of such agreed line beyond the point of occupancy, and in the latter case the agreement is within the statute of frauds, and the possession of each will follow his title to the true line, to be determined by the government corners and field notes.[53]

[§ 238] **c. Doctrine of Estoppel as Applicable to Agreements.** In a number of jurisdictions it seems to be well settled that, where a boundary line is established by an agreement between two adjoining owners, title up to the line thus fixed may be acquired by estoppel as well as by adverse possession. Where adjoining landowners agree upon a boundary line and enter into possession and improve the lands according to the line thus agreed upon, the parties will be concluded from afterward disputing that the line thus agreed upon is the true one, even if the statute of limitations has not run.[54] However, the agreement itself must be made to appear before mere use to a mistaken line, surveyed in an attempt to ascertain the true line, can be used to estop either adjoining owner from later claiming to the true line,[55] and whether one is estopped from claiming land beyond an agreed boundary acquiesced in by him must be decided largely upon the particular facts of the case; no absolute rule can be applied in every case.[56]

[§ 239] **2. Occupation up to Provisional Line until True Line Is Established.** Where owners of adjacent tracts, being ignorant of the location of

[a] **Party wall.**—A wall built and used continuously for twenty-one years by an adjoining owner becomes a party wall, whether the same was erected equally on the lot of each or is wholly within the lot of one of the adjoining owners. McVey v. Durkin, 136 Pa. 418, 20 A 541.

[b] **Accretions formed after agreement.**—Where two owners of adjoining land abutting a river agreed to the construction of a line fence, and defendant occupied and claimed title to the fence erected under such agreement from its erection in 1880 for a period sufficient to confer title by adverse possession, defendant was entitled to accretions to the land so held. English v. Craford, (Iowa) 94 NW 276.

[c] **What does not amount to an agreement.**—(1) Where adjoining owners, having a well defined and recognized line between their lands, together built a fence wherever they could build the cheapest and easiest, not pretending to build on the true line, it was held that possession up to such fence would not be available to either owner to gain title beyond the true line. Morse v. Churchill, 41 Vt. 649. (2) Where two adjoining owners endeavoring to ascertain and conform to the true line between them employ a surveyor to locate that line, but instead he locates an erroneous line, it cannot be said that this erroneous line is an agreed line. Patton v. Smith, 171 Mo. 231, 71 SW 187.

[d] **Evidence of agreement sufficient to go to jury.**—Where adjoining owners for more than twenty years had occupied up to an old fence, each owner by agreement keeping up his half, it showed such a possession, in pursuance of the location of the boundary line, as to require the submission of the question to the jury. Jones v. Smith, 64 N. Y. 180.

[e] **Possession for statutory period necessary.**—To establish title to an agreed line possession must be taken and held under the agreement for such length of time as will support a title by adverse possession. Williams v. Brush Creek Coal Co., 149 Ky. 188, 148 SW 372.

43. Schwartzer v. Gebhardt, 157 Mo. 99, 57 SW 782.

44. Ala.—Hoffman v. White, 90 Ala. 354, 7 S 816.
N. Y.—Baldwin v. Brown, 16 N. Y. 359.
Oh.—Smith v. McKay, 30 Oh. St. 409.
Pa.—Kuhns v. Fennell, 10 Pa. Cas. 551, 15 A 920.
Utah.—Rydalch v. Anderson, 37 Utah 99, 109, 107 P 25 [quot Cyc].
Ont.—Dennison v. Chew, 5 U. C. Q. B. O. S. 161.

45. Cal.—Wilson v. White, 161 Cal. 453, 119 P 895; White v. Spreckels, 75 Cal. 610, 17 P 715; Smith v. Robarts, 9 P 104.
Fla.—Watrous v. Morrison, 33 Fla. 261, 14 S 805, 39 AmSR 139.
Mass.—Gray v. Kelley, 190 Mass. 184, 76 NE 724; Beckman v. Davidson, 162 Mass. 347, 39 NE 38; Proctor v. Putnam Mach. Co., 137 Mass. 159.
Mo.—Barnes v. Allison, 166 Mo. 96, 65 SW 781; Ward v. Ihler, 132 Mo. 375, 34 SW 251; Atchison v. Pease, 96 Mo. 566, 10 SW 159; Jacobs v. Moseley, 91 Mo. 457, 4 SW 135; Kincaid v. Dormey, 47 Mo. 337.
N. H.—Orr v. Hadley, 36 N. H. 575.
Pa.—Kellun v. Smith, 65 Pa. 86; Hagey v. Detweiler, 35 Pa. 409; Perkins v. Gay, 3 Serg. & R. 327, 7 AmD 653.
Contra White v. Hapeman, 43 Mich. 267, 5 NW 313, 38 AmR 178.

46. Edwards v. Fleming, 83 Kan. 653, 663, 112 P 836, 33 LRANS 923 [cit Cyc]; Boston, etc., R. Corp. v. Sparhawk, 5 Metc. (Mass.) 469.

47. White v. Spreckels, 75 Cal. 610, 17 P 715; Amburgy v. Burt, etc., Lumber Co., 121 Ky. 580, 89 SW 680, 28 KyL 551; Rydalch v. Anderson, 37 Utah 99, 109, 107 P 25 [quot Cyc]. And see Watrous v. Morrison, 33 Fla. 261, 14 S 805, 39 AmSR 139 (where it is said that the line becomes binding, not upon the principle that the title to real estate can be passed by parol, but for the reason that the proprietors have by such consent agreed permanently upon the limits of the extent of their respective lands).

"The agreement is not within the statute of frauds, upon the idea that the parties have simply by agreement settled the location of the line which was in doubt, instead of having the court settle it for them." Warden v. Addington, 131 Ky. 296, 304, 115 SW 241 (per O'Rear, J.).

48. Rydalch v. Anderson, 37 Utah 99, 111, 107 P 25 (per Frick, J.).

49. Amburgy v. Burt, etc., Lumber Co., 121 Ky. 580, 89 SW 680, 28 KyL 551; Robinson v. Corn, 2 Bibb (Ky.) 124.

50. Kerr v. Hitt, 75 Ill. 51.

51. Hiatt v. Kirkpatrick, 48 Iowa 78.

52. Boston, etc., R. Corp. v. Sparhawk, 5 Metc. (Mass.) 469.

53. Ward v. Ihler, 132 Mo. 375, 34 SW 251; Ferrier v. Moodie, 12 U. C. Q. B. 379. Compare Doe v. Nightingale, 5 U. C. Q. B. 518.

54. Ark.—Miller v. Farmers' Bank, etc., Co., 104 Ark. 99, 148 SW 513.
Cal.—Johnson v. Brown, 63 Cal. 391; Cooper v. Vierra, 59 Cal. 282; Biggins v. Champlin, 59 Cal. 113; Moyle v. Connolly, 50 Cal. 295.
Ga.—Clark v. Hulsey, 54 Ga. 608 (where it was held that neither party will be permitted to repudiate the agreement and claim a different line, whatever may have been his legal rights independent thereof).
Ill.—McNamara v. Seaton, 82 Ill. 498; Bauer v. Gottmanhausen, 65 Ill. 499; Yates v. Shaw, 24 Ill. 367; Crowell v. Maughs, 7 Ill. 419, 43 AmD 62.
Ind.—Curless v. State, 172 Ind. 257, 87 NE 129, 88 NE 339; Adams v. Betz, 167 Ind. 161, 170, 78 NE 649 [cit Cyc].
Utah.—Rydalch v. Anderson, 37 Utah 99, 109, 107 P 25 [quot Cyc].

55. Foard v. McAnnelly, 215 Mo. 371, 114 SW 990. See also Patton v. Smith, 171 Mo. 231, 71 SW 187 (holding that conforming to an erroneous line while in good faith believing it to be the true line does not estop the adjoining owner, however long the possession of the other may be, from claiming to the true line when it is ascertained).

56. Rydalch v. Anderson, 37 Utah 99, 107 P 25.

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the true line, occupy up to a line which they agree is merely provisional and is to continue only until the true line is thereafter determined, neither can acquire title to any land not within the true line.[57] So where a landowner builds a fence, knowing it is not on the true line, between his land and that of an adjoining owner and intending, when the true line is established, to conform to it, his possession is not adverse as to the land within his fence but outside the true line.[58]

[§ 240] **3. Fixing Provisional Line for Convenience.** If a line is established merely for convenience, the parties thereto recognizing the true line, the possession by either of the other's land, no matter how long continued, cannot ripen into title.[59]

[§ 241] **4. Effect of Joint Use of Party Wall.** The joint use of a party wall is not an adverse use by one of the parties of the land of the other.[60]

[§ 242] **G. Effect of Possession under Mistake as to Boundaries—1. View That Possession Is Necessarily Adverse.** A few decisions hold without qualification that one who, through a misapprehension as to the boundaries of his land, occupies and possesses land of another for the statutory period thereby acquires title by adverse possession to such land.[61]

[§ 243] **2. View That Possession without Intent to Claim Is Not Adverse—a. Statement of Rule.** Nevertheless, according to the great weight of authority, where the occupation of the land is by a mere mistake and with no intention on the part of the occupant to claim as his own land which does not belong to him, but with the intention to claim only to the true line wherever it may be, the holding is not adverse.[62] The theory on which these deci-

57. Cal.—Peters v. Gracia, 110 Cal. 89, 42 P 455; Calanchina v. Branstetter, 84 Cal. 249, 24 P 149; Quinn v. Windmiller, 67 Cal. 461, 8 P 14; Irvine v. Adler, 44 Cal. 559.
Ind.—Logsdon v. Dingg, 32 Ind. A. 158, 69 NE 409.
Iowa.—McNamee v. Moreland, 26 Iowa 96.
Mich.—Pugh v. Schindler, 127 Mich. 191, 86 NW 515; Bunce v. Bidwell, 43 Mich. 542, 5 NW 1023.
N. C.—Bryson v. Slagle, 44 N. C. 449.
Tenn.—Lowe v. Cunningham, (Ch. A.) 39 SW 1052.
Tex.—Crosby v. El Paso First Presb. Church, 45 Tex. Civ. A. 111, 99 SW 584; Thompson v. Slater, (Civ. A.) 34 SW 357.
Vt.—Clark v. Dustin, 52 Vt. 568; Burnell v. Maloney, 39 Vt. 579, 94 AmD 358.
Wash.—Phinney v. Campbell, 16 Wash. 203, 47 P 502.
Wis.—Fairfield v. Barrette, 73 Wis. 463, 41 NW 624.
Ont.—Doe v. Mathews, 6 U. C. Q. B. O. S. 461.
Compare Pierson v. Mosher, 30 Barb. (N. Y.) 81 (where it was held that forty years' possession under such agreement would give title).
"Neighbors constantly run up fences within or beyond the boundary lines and join their fences, doing so with the knowledge and understanding that such acts are merely temporary and done subsidiarily to and with reference to the right of both to ultimately ascertain and fix rights by an action of boundary or through a formal legal survey. Until this happens the lands held by each are in the occupancy and not in the adverse possession of either." Williams v. Bernstein, 51 La. Ann. 115, 124, 25 S 411.
[a] **Application of rule.**—If two grants of land lap, and if, while neither grantee is settled on the lapped part, the junior grantee enters on the lappage and clears and cultivates a field upon it with the permission of the senior grantee, on his agreeing to set back his fence whenever it shall appear by survey that it is over the line of the elder grant, his possession of the field will not prevent the elder grantee, or one claiming under him, from having his lines run according to the calls of his grant. Bryson v. Slagle, 44 N. C. 449.

58. Carroll v. Rabberman, 240 Ill. 450, 88 NE 995; Grim v. Murphy, 110 Ill. 271.

59. Burrell v. Burrell, 11 Mass. 294; White v. Hapeman, 43 Mich. 267, 5 NW 313; Clark v. Tabor, 28 Vt. 222. See also Fewell v. Kinsella, (Tex. Civ. A.) 144 SW 1174 (party wall); Fairfield v. Barrette, 73 Wis. 463, 41 NW 624.

60. Fewell v. Kinsella, (Tex. Civ. A.) 144 SW 1174.

61. Conn.—Searles v. De Ladson, 81 Conn. 133, 70 A 589; French v. Pearce, 8 Conn. 440, 21 AmD 686.
Ida.—Bayhouse v. Urquides, 17 Ida. 286, 105 P 1066.
Miss.—Metcalfe v. McCutchen, 60 Miss. 145.
Oh.—Yetzer v. Thoman, 17 Oh. St. 130, 91 AmD 122.
Wis.—Ovig v. Morrison, 142 Wis. 243, 125 NW 449; Mielke v. Dodge, 135 Wis. 388, 115 NW 1099 (although claimant admitted that he did not intend to claim more than up to the true line); Illinois Steel Co. v. Budzisz, 119 Wis. 580, 97 NW 166; Gilman v. Brown, 115 Wis. 1, 91 NW 227; Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905; Bishop v. Bleyer, 105 Wis. 330, 334, 81 NW 413 (although he disclaimed all land not included in his deed); Wollman v. Ruehle, 104 Wis. 603, 80 NW 919. For rule under previous decisions see infra § 243.
Ont.—Doe v. Sexton, 8 U. C. Q. B. 264.
[a] **The following reasons** have been advanced in support of the above doctrine: (1) In French v. Pearce, 8 Conn. 440, 21 AmD 680, it was said that, although the intention of the possessor to claim adversely is an essential ingredient, the very nature of the act of entering on land believing and claiming it to be one's own amounts to an assertion of his own title and a denial of the title of all others, that it is immaterial that the possessor was mistaken, and that he would not have entered on the land if he had been better informed. (2) In Bayhouse v. Urquides, 17 Ida. 286, 295, 105 P 1066, a similar line of reasoning was advanced. Ailshie, J., said: "Even though a party enters upon land and erects a fence not only inclosing his own land but a portion of his neighbor's, and continuously thereafter improves, occupies, and uses the land of his neighbor thus inclosed, the possession for all practical and visible purposes, is just as adverse where the entry has been through mistake as where it has been wilful and deliberate; in either event the occupant is occupying and possessing it under some claim of right, and if not under a license, then it must be adversely to the true owner and all the world. Neither the courts nor anyone else can tell or conjecture what the party might have intended to do in the event he discovered later that he had been mistaken as to the true line. If he acted in ignorance of the true line and in good faith, then of course he could have had no intention whatever with reference to a possible future discovery of any mistakes. So far as he was then concerned, he was acting on a verity." (3) In Wisconsin the peculiar wording of the statute seems to be relied on to some extent. In Ovig v. Morrison, 142 Wis. 243, 248, 125 NW 449, Marshall, J., said: "The only sensible, safe, and really equitable rule is to make the physical characteristics of possession, excluding all other persons, the sole test of adverse possession, and so it was written in the Code. It has been lost sight of at times. Experience has demonstrated, clearer and clearer, as time has progressed and the importance of stability of titles has grown with increase in value of property, the wisdom of the Code makers in incorporating into their work the simple test of adverse possession indicated."

62. U. S.—Schraeder Min., etc., Co. v. Packer, 129 U. S. 688, 9 SCt 385, 32 L. ed. 760.
Ala.—Mobile, etc., R. Co. v. Rutherford, 63 S 1003; Ashford v. McKee, 62 S 879; McLester Bldg. Co. v. Upchurch, 60 S 173; Cooper v. Slaughter, 175 Ala. 211, 57 S 477; Barrett v. Kelly, 131 Ala. 878, 30 S 824; Holt v. Adams, 121 Ala. 664, 25 S 716; Hess v. Rudder, 117 Ala. 525, 23 S 136, 67 AmSR 182; Taylor v. Fomby, 116 Ala. 621, 22 S 910; Davis v. Caldwell, 107 Ala. 526, 18 S 103; Alexander v. Wheeler, 78 Ala. 167, 69 Ala. 332; Humes v. Bernstein, 72 Ala. 546; Brown v. Cockerell, 33 Ala. 38.
Ark.—Couch v. Adams, 164 SW 728; Butler v. Hines, 101 Ark. 409, 142 SW 509; Goodwin v. Garibaldi, 83 Ark. 74, 76, 102 SW 706 [cit Cyc]; Shirey v. Whitlow, 80 Ark. 444, 445, 97 SW 444 [cit Cyc]; Murdock v. Stillman, 72 Ark. 498, 82 SW 834; Wilson v. Hunter, 59 Ark. 626, 28 SW 419; Phelps v. Henry, 15 Ark. 297.
Cal.—Peters v. Gracia, 110 Cal. 89, 42 P 455; Woodward v. Faris, 109 Cal. 12, 41 P 781; Gordon v. Booker, 97 Cal. 586, 32 P 593; Smith v. Robarts, 9 P 104; Sheils v. Haleig, 61 Cal. 157; Irvine v. Adler, 44 Cal. 559; Janke v. McMahon, 21 Cal. A. 781, 133 P 21.
Colo.—Brownlee v. Williams, 32 Colo. 502, 77 P 250.
D. C.—Neale v. Lee, 19 D. C. 5.
Fla.—Watrous v. Morrison, 33 Fla. 261, 14 S 805, 39 AmSR 139; Liddon v. Hodnett, 22 Fla. 442.
Ga.—Shiels v. Roberts, 64 Ga. 370; Howard v. Reedy, 29 Ga. 152, 74 AmD 58; Keel v. Pace, 20 Ga. 190; Riley v. Griffin, 16 Ga. 141, 60 AmD 726.
Ill.—Carroll v. Rabberman, 240 Ill. 450, 88 NE 995; Grim v. Murphy, 110 Ill. 271; McNamara v. Seaton, 82 Ill. 498.
Ind.—Pittsburgh, etc., R. Co. v. Stickley, 155 Ind. 312, 58 NE 192 (per Baker, J.); Silver Creek Cement Corp. v. Union Lime, etc., Co., 138 Ind. 297, 35 NE 125, 37 NE 721; Logsdon v. Dingg, 32 Ind. A. 158, 69 NE 409.
Iowa.—Webster v. Shrine Temple Co., 141 Iowa 325, 117 NW 665; Boltz v. Solsch, 134 Iowa 480, 109 NW 1106; Liddle v. Blake, 131 Iowa 165, 105 NW 649; Palmer v. Osborne, 115 Iowa 714, 87 NW 712; Miller v. Mills County, 111 Iowa 654, 82 NW 1038; Kahl v. Schmidt, 107 Iowa 550, 78 NW 204; Jordan v. Ferree, 101 Iowa 440, 70 NW 611; Greer v. Powell, 89 Iowa 740, 56 NW 440; Van Sickle v. Keith, 88 Iowa 9, 55 NW 42; Goldsborough v. Pidduck, 87 Iowa 599, 54 NW 431; Heinz v. Cramer, 84 Iowa 497, 51 NW 173; Fisher v. Muecke, 82 Iowa 547, 48 NW 936; Bolton v. McShane, 79 Iowa 26, 44 NW 211;

sions proceed is that in cases of mistake as to the true line between adjoining lands the real test as to whether or not a title will be acquired by a holding for the period prescribed by the statute of

Wacha v. Brown, 78 Iowa 432, 43 NW 269; Sweny v. Bruns, 74 Iowa 701, 39 NW 165; Mills v. Penny, 74 Iowa 172, 37 NW 135, 7 AmSR 474; Skinner v. Crawford, 54 Iowa 119, 6 NW 144; State v. Schilb, 47 Iowa 611; State v. Gould, 40 Iowa 372; Grube v. Wells, 34 Iowa 148; State v. Welpton, 34 Iowa 144.

Kan.—Edwards v. Fleming, 83 Kan. 653, 112 P 836, 33 LRANS 923 and note; Crawford v. Hebrew, 78 Kan. 401, 96 P 348; Scott v. Williams, 74 Kan. 448, 87 P 550; Winn v. Abeles, 35 Kan. 85, 10 P 443, 57 AmR 138; Conrad v. Sackett, 8 Kan. A. 635, 56 P 507; Rasdell v. Shumway, 6 Kan. A. 45, 49 P 631 [aff 58 Kan. 818, 51 P 285].

Ky.—Turner v. Morgan, 158 Ky. 511, 165 SW 684; Cuyler v. Bush, 84 SW 579, 27 KyL 148; Small v. Hamlet, 68 SW 395, 24 KyL 238; Rudd v. Monarch, 32 SW 1083, 17 KyL 893; Crutchlow v. Beatty, 23 SW 960, 15 KyL 464; Pollit v. Bland, 22 SW 842, 15 KyL 227; Holmes v. Herringer, 13 SW 359, 913, 12 KyL 22; Schieble v. Hart, 12 SW 628, 11 KyL 607; Rugles v. Fannian, 9 SW 373, 10 KyL 687; Hunter v. Crisman, 6 B. Mon. 463; McKinny v. Kenny, 1 A. K. Marsh. 460; Houston v. Kidwell, 1 KyL 425.

La.—Williams v. Bernstein, 51 La. Ann. 115, 25 S 411; Gaude v. Williams, 47 La. Ann. 1325, 17 S 844; Dufresne v. Haydel, 7 La. Ann. 660; Frederick v. Brulard, 6 La. Ann. 382.

Me.—Preble v. Maine Cent. R. Co., 85 Me. 260, 27 A 149, 35 AmSR 366, 21 LRA 829 and note; Ricker v. Hibbard, 73 Me. 105; Hitchings v. Morrison, 72 Me. 331; Dow v. McKenney, 64 Me. 138; Worcester v. Lord, 56 Me. 265, 96 AmD 456; Abbott v. Abbott, 51 Me. 575; Lincoln v. Edgecomb, 31 Me. 345; Otis v. Moulton, 20 Me. 205; Ross v. Gould, 5 Me. 204; Brown v. Gay, 3 Me. 126.

Md.—Davis v. Furlow, 27 Md. 536; Cresap v. Hutson, 9 Gill 269.

Mass.—Holmes v. Turner's Falls Lumber Co., 150 Mass. 535, 23 NE 305, 6 LRA 283; Cleaveland v. Flagg, 4 Cush. 76; Burrell v. Burrell, 11 Mass. 294.

Mich.—Hockmoth v. Des Grand Champs, 71 Mich. 520, 39 NW 737; Bird v. Stark, 66 Mich. 654, 33 NW 754.

Mo.—Maysville v. Truex, 235 Mo. 619, 139 SW 390; Milligan v. Fritts, 226 Mo. 189, 125 SW 1101; Foard v. McAnnelly, 215 Mo. 371, 114 SW 990; Schwartzer v. Gebhardt, 157 Mo. 99, 57 SW 782; McCabe v. Bruere, 153 Mo. 1, 54 SW 450; Flynn v. Wacker, 151 Mo. 545, 52 SW 342; Brummell v. Harris, 148 Mo. 430, 50 SW 93; Roecker v. Haperla, 138 Mo. 33, 39 SW 454; Ernsting v. Gleason, 137 Mo. 594, 39 SW 70; McWilliams v. Samuel, 123 Mo. 659, 27 SW 550; Pharis v. Jones, 122 Mo. 125, 26 SW 1032; Adkins v. Tomlinson, 121 Mo. 487, 26 SW 573; Shotwell v. Gordon, 121 Mo. 482, 26 SW 341; Goltermann v. Schiermeyer, 111 Mo. 404, 19 SW 484, 20 SW 161; Battner v. Baker, 108 Mo. 311, 18 SW 911, 32 AmSR 606; Kunze v. Evans, 107 Mo. 487, 18 SW 36, 28 AmSR 435; Finch v. Ullman, 105 Mo. 255, 16 SW 863, 24 AmSR 383 and note; Crawford v. Ahrnes, 103 Mo. 88, 15 SW 341; Skinker v. Haagsma, 99 Mo. 208, 12 SW 659; Krider v. Milner, 99 Mo. 145, 12 SW 461, 17 AmSR 549; Schad v. Sharp, 95 Mo. 573, 8 SW 549; Keen v. Schneller, 92 Mo. 516, 2 SW 312 [rev 15 Mo. A. 590]; Jacobs v. Moseley, 91 Mo. 457, 4 SW 135; Wilson v. Lerche, 90 Mo. 473, 2 SW 799; Huckshorn v. Hartwig, 81 Mo. 648; Acton v. Dooley, 74 Mo. 63; Cole v. Parker, 70 Mo. 372; Walbrunn v. Ballen, 68 Mo. 164; Houx v. Batteen, 68 Mo. 84; Hamilton v. West, 63 Mo. 93; West v. St. Louis, etc., R. Co., 59 Mo. 510; Kincaid v. Dormey, 47 Mo. 337; Thomas v. Babb, 45 Mo. 384; Knowlton v. Smith, 36 Mo. 507, 88 AmD 152; St. Louis Univ. v. McCune, 28 Mo. 481; Cutter v. Waddingham, 22 Mo. 206; Betts v. Brown, 3 Mo. A. 20.

Nev.—McDonald v. Fox, 20 Nev. 364, 22 P 234.

N. H.—Enfield v. Day, 7 N. H. 457, 28 AmD 360.

N. Y.—Robinson v. Kime, 70 N. Y. 147; Crary v. Goodman, 22 N. Y. 170; Jacobus v. Willis, 74 Misc. 591, 134 NYS 455; Danziger v. Boyd, 12 NYSt 64. See Timmermann v. Cohn, 204 N. Y. 614, 97 NE 589.

N. C.—King v. Wells, 94 N. C. 344; Gilchrist v. McLaughlin, 29 N. C. 310; Bynum v. Carter, 26 N. C. 310; Green v. Harman, 15 N. C. 158.

Or.—Dunnigan v. Wood, 58 Or. 119, 112 P 531; Kanne v. Otty, 25 Or. 531, 36 P 537; Ramsey v. Ogden, 23 Or. 347, 31 P 778; King v. Brigham, 23 Or. 262, 31 P 601, 18 LRA 361; Caufield v. Clark, 17 Or. 473, 21 P 443, 11 AmSR 845.

Pa.—Thompson v. Kauffelt, 110 Pa. 209, 1 A 267; Potts v. Everhart, 26 Pa. 493; Comegys v. Carley, 3 Watts 280, 27 AmD 356; Bradford v. Guthrie, 4 Brewst. 351.

Tex.—Blassingame v. Davis, 68 Tex. 595, 5 SW 402; Shaw v. Windham, (Civ. A.) 155 SW 636; Wiess v. Goodhue, 46 Tex. Civ. A. 142, 102 SW 793; Kane v. Sholars, 41 Tex. Civ. A. 154, 90 SW 937; Hand v. Swann, 1 Tex. Civ. A. 241, 21 SW 282.

Va.—Clinchfield Coal Co. v. Viers, 111 Va. 261, 68 SE 976; Schaubuch v. Dillemuth, 108 Va. 86, 89, 60 SE 745, 15 AnnCas 825 and note [cit Cyc]; Davis v. Owen, 107 Va. 283, 58 SE 581, 13 LRANS 728.

Wash.—Milbank v. Rowland, 63 Wash. 519, 115 P 1053; Weingarten v. Shurtleff, 51 Wash. 602, 99 P 739; Thomley v. Andrews, 45 Wash. 413, 88 P 757; Noyes v. Douglas, 39 Wash. 314, 81 P 724; Wilcox v. Smith, 38 Wash. 585, 80 P 803; Suksdorf v. Humphrey, 36 Wash. 1, 77 P 1071; Bowers v. Ledgerwood, 25 Wash. 14, 64 P 936; Phinney v. Campbell, 16 Wash. 203, 47 P 502.

W. Va.—Union Trust, etc., Co. v. Paulhamus, 81 SE 547.

Wis.—Reilley v. Howe, 101 Wis. 108, 76 NW 1114; Fuller v. Worth, 91 Wis. 406, 64 NW 995; Fairfield v. Barrette, 73 Wis. 463, 41 NW 624. For rule under existing statute see supra § 242.

Wyo.—Fieldhouse v. Leisburg, 15 Wyo. 207, 88 P 214.

Can.—Horton v. Casey, 22 Can. S. C. 739.

Ont.—Doe v. Nightingale, 5 U. C. Q. B. 518. Contra Doe v. Sexton, 8 U. C. Q. B. 264 (under late statute).

"There is no intention on the part of the occupant to exercise, or on the part of the owner to suffer, any dominion beyond the true line, wherever it may be." Scott v. Williams, 74 Kan. 448, 87 P 550; Shanline v. Wiltsie, 70 Kan. 177, 182, 78 P 436, 3 AnnCas 140 and note. See also Brown v. Cockerell, 33 Ala. 38.

[a] **Applications of rule.**—(1) Where defendant's claim was limited to a lot of a certain number but his possession extended to and covered a part of the adjoining lot embraced in his inclosure, this did not constitute adverse possession. Grube v. Wells, 34 Iowa 148. (2) Where a person claims title to only a certain quarter of a section and occupies certain land because he believes it to be a part of such quarter, and it is not a part thereof, his possession is not adverse. Fisher v. Muecke, 82 Iowa 547, 48 NW 936. (3) In ejectment between owners of conterminous subdivisions of a lot of land in a city plaintiff claimed under a conveyance describing his subdivision as being "about twenty-nine feet" in width. Conveyances of the other subdivisions of the lot by metes and bounds demonstrated the fact that plaintiff's lot was only twenty-seven feet in width. Plaintiff had always supposed and claimed that his lot was twenty-nine feet wide but had never been in the occupancy of or claimed any of the two feet beyond the true boundary. It was held that he had not acquired title to the strip of two feet by adverse possession. Kunze v. Evans, 107 Mo. 487, 18 SW 36, 28 AmSR 435. (4) Where a bond for title describes land as lying outside of a certain circle and the vendor, on making the sale, explains to the vendee that he is selling only so much of the land as lies out of the circle, that within it belonging to another, the possession by the vendee of land within the circle is not adverse in the absence of evidence that he holds it with any intention not consistent with the information so given. Cuyler v. Bush, 84 SW 579, 27 KyL 148. (5) The erection of a part of a church building and the location of a graveyard on another's land under the mistaken belief that the same was part of land of one who had authorized such erection and location, and without any claim of right by those performing such acts or by those authorizing the same, cannot ripen into title by adverse possession. Davis v. Owen, 107 Va. 283, 58 SE 581, 13 LRANS 728. (6) Where the owner of a city lot undertook to erect a building upon his own ground but by inadvertence and ignorance of the true line of his lot placed a portion of the wall four inches over the dividing line and upon the adjoining lot with no intention then or afterward to claim any portion of such adjoining lot as his own, and the adjoining lot owner had no knowledge of such encroachment, the possession thus taken was held not to be adverse. Winn v. Abeles, 35 Kan. 85, 10 P 443, 57 AmR 138. (7) In 1866 plaintiff's grantor owned lots five and six, between which a fence was run, but which was not located on the true line. The grantor conveyed lot six to defendant and later sold lot five to plaintiff. The fence was repaired from time to time on practically the same line which was made by attaching the fence to convenient trees. Plaintiff, for the purpose of finding the line, had a party stake it out and thereafter grubbed her own lot down to the line marked by the stakes. In 1902 the parties agreed to rebuild the fence after having the lots surveyed. The survey coincided with the stakes set by plaintiff and defendant erected a fence on this line, after which plaintiff claimed the old line as the true one by acquiescence. It was held that plaintiff's possession was not adverse because her acts did not show an intent to claim to the old fence, irrespective of where the true line might be. Boltz v. Colsch, 134 Iowa 480, 109 NW 1106.

[b] **Agreement to conform to true line when established.**—If a person builds a fence, being in doubt as to whether it is within the true boundary, and takes possession, stating that he will conform to the true line when established, his possession is not adverse. Grim v. Murphy, 110 Ill. 271; Wiess v. Goodhue, 46 Tex. Civ. A. 142, 102 SW 793.

[c] **Possession of tenant for landlord.**—The possession of a tenant beyond the boundaries of the land contained in his lease cannot be regarded as the possession of his landlord where the latter has never had possession of the land or claimed title to it, even though the tenant believes that he is occupying only the land demised. Holmes v. Turner's Falls Lumber Co., 150 Mass. 535, 23 NE 305, 6 LRA 283.

[d] **Possession of tenant for him-**

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limitations is the intention of the party holding beyond the true line.[63] It is not merely the existence of a mistake but the presence or absence of the requisite intention to claim title that fixes the character of the entry and determines the question of disseizin.[64] There must be an intention to claim title to all land within a certain boundary, whether it eventually be the correct one or not.[65]

[§ 244] **b. Change of Character of Possession.** Notwithstanding the fact that the occupant takes possession of land by mistake without intent to claim beyond the boundaries of his deed, he may begin an adverse occupancy thereof.[66] However, it will not become adverse until notice is brought home to the holder of the legal title of the change of the character of the possession into one that is hostile and adverse.[67]

[§ 245] **3. View That Possession with Intent to Claim Is Adverse.** Where a person, acting under a mistake as to the true boundary line between his land and that of another, takes possession of land of another believing it to be his own, up to a mistaken line, claims title to it and so holds, the holding is adverse and, if continued for the requisite period, will give title by adverse possession.[68] And the fact that on taking possession he had no intention of claiming beyond the boundaries of his deed does not prevent the possession from being adverse.[69]

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self.—A tenant of two adjoining lots owned by different lessors divided them, for convenience in cultivation, by a fence not on the true division line and afterward purchased the lot thus enlarged. It was held that his occupancy of the ground taken from the other lot could not be set up as an adverse possession under the statute of limitations. Betts v. Brown, 3 Mo. A. 20.

[c] **In Tennessee** (1) a considerable number of decisions seem to support the rule stated in the text without limitation. Kirkman v. Brown, 93 Tenn. 476, 27 SW 709; Gates v. Butler, 3 Humphr. 447; East Tennessee Iron, etc., Co. v. Ferguson, (Ch. A.) 35 SW 900; Calloway v. Sanford, (Ch. A.) 35 SW 776; East Tennessee, Iron, etc., Co. v. Lawson, (Ch. A.) 35 SW 456. (2) However, in two decisions, Williams v. Hewitt, 164 SW 1198, and Erck v. Church, 87 Tenn. 575, 578, 11 SW 794, 4 LRA 64, it was held that if a purchaser of land inclose a parcel contiguous to his purchase by mistake, believing that he is putting his fence on the true boundary, and hold such parcel as his own for seven years, such possession is adverse, and will avail against the true owner. In Erck v. Church, supra, the court cites with approval French v. Pearce, 8 Conn. 439, 21 AmD 680, and distinguishes Gates v. Butler, supra, the leading case on the subject in Tennessee, as follows: "In that case plaintiff asserted title by constructive possession of a large tract, a portion of which he claimed to have held adversely for seven years by actual possession. This possession, if it existed, came by inclosing a small portion of the land in the disputed grant by mistake in placing the fence on the supposed boundary line of a contiguous tract, held by a different title. The proof made it most probable that the fence was on the true boundary line. The Court said: 'Under these circumstances the Court charged that the accidental and unintended inclosure of a small part of the land for seven years would not vest a valid title, etc. In this we think there was no error, and we affirm the judgment.' There is a wide difference between a plaintiff actively setting up a title, claimed to be perfected by accidental possession of a portion of land embraced in an instrument giving a color of title, and one defending by a possessory right to the extent of his actual inclosures. A Court would be slow to assist one who, though having a color of title to a tract of land, by mistake, and without intention to assert his title, had inclosed an insignificant portion of the tract, and afterward, on discovering his accidental holding, sought to extend, by construction, this possession, so as to invest himself with an indefeasable title to the whole, and thus convert the possession, which might be a shield for defense commensurate with his actual occupancy, into a weapon of attack as far reaching as the limits embraced in his deed."

62. Watrous v. Morrison, 33 Fla. 261, 14 S 805, 39 AmSR 139; Edwards v. Fleming, 83 Kan. 653, 659, 112 P 836, 33 LRANS 923 and note [quot Cyc].

[a] **"The reason** why such an occupancy and possession could not be adverse with us is, because . . . intention to hold adversely is an indispensable element of adversary possession . . . and it is wanting where the occupant does not intend to claim the fence as his line unless it be the true line." Schaubuch v. Dillemuth, 108 Va. 86, 89, 60 SE 745, 15 AnnCas 825 and note (per Buchanan, J.).

64. Liddon v. Hodnett, 22 Fla. 442; Edwards v. Fleming, 83 Kan. 653, 659, 112 P 836, 33 LRANS 923 [quot Cyc]; Preble v. Maine Cent. R. Co., 85 Me. 260, 27 A 149, 35 AmSR 366, 21 LRA 829 and note.

65. Preble v. Maine Cent. R. Co., 85 Me. 260, 27 A 149, 35 AmSR 366, 21 LRA 829; Hockmoth v. Des Grand Champs, 71 Mich. 520, 39 NW 737; Jacobs v. Moseley, 91 Mo. 457, 4 SW 135.

66. Mather v. Walsh, 107 Mo. 121, 17 SW 755.

67. Lecroix v. Malone, 157 Ala. 434, 47 S 725; Rasdell v. Shumway, 6 Kan. A. 45, 49 P 631 [aff 58 Kan. 818, 51 P 285].

68. U. S.—Brown v. Leete, 2 Fed. 440, 6 Sawy. 382.

Ala.—Ashford v. McKee, 62 S 879; Barrett v. Kelly, 131 Ala. 378, 30 S 824; Holt v. Adams, 121 Ala. 664, 25 S 716; Hess v. Rudder, 117 Ala. 525, 23 S 136, 67 AmSR 182; Taylor v. Fomby, 116 Ala. 621, 22 S 910; Hoffman v. White, 90 Ala. 354, 7 S 816; Alexander v. Wheeler, 69 Ala. 332; Brown v. Cockerell, 33 Ala. 38.

Ark.—Couch v. Adams, 164 SW 728; Butler v. Hines, 101 Ark. 409, 142 SW 509; O'Neal v. Ross, 100 Ark. 555, 560, 140 SW 743 [cit Cyc]; St. Louis Southwestern R. Co. v. Mulkey, 100 Ark. 71, 139 SW 643, Ann Cas1913C 1339; Johnson v. Elder, 92 Ark. 30, 121 SW 1066; Wells v. Bentley, 87 Ark. 625, 113 SW 639; Goodwin v. Garibaldi, 83 Ark. 74, 76, 102 SW 706 [cit Cyc]; Shirey v. Whitlow, 80 Ark. 444, 445, 97 SW 444 [cit Cyc]; Bayles v. Daugherty, 77 Ark. 201, 91 SW 304; Wilson v. Hunter, 59 Ark. 626, 28 SW 419, 43 AmSR 63; Phelps v. Henry, 15 Ark. 297.

Cal.—Powers v. Oroville Bank, 136 Cal. 486, 69 P 151; California Mortg., etc., Bank v. Hampton, 57 P 1073; Woodward v. Faris, 109 Cal. 12, 41 P 781; Silvarer v. Hansen, 77 Cal. 579, 20 P 136; Grimm v. Curley, 43 Cal. 250; Smith v. Robarts, 2 Cal. Unrep. Cas. 604, 9 P 104.

Del.—O'Daniel v. Baker's Union, 9 Del. 488.

D. C.—Rudolph v. Peters, 35 App. 438, 445, AnnCas1912A 446 and note [cit Cyc]; Johnson v. Thomas, 23 App. 141; Neale v. Lee, 19 D. C. 5.

Fla.—Watrous v. Morrison, 33 Fla. 261, 14 S 805, 39 AmSR 139; Liddon v. Hodnett, 22 Fla. 442; Seymour v. Creswell, 18 Fla. 29.

Ga.—Robson v. Shelnutt, 122 Ga. 322, 50 SE 91; Shiels v. Roberts, 64 Ga. 370; Watt v. Ganahl, 34 Ga. 290.

Hawaii.—Booth v. Beckley, 11 Hawaii 518.

Ill.—Rich v. Naffziger, 248 Ill. 455, 94 NE 1; Daily v. Boudreau, 231 Ill. 228, 83 NE 218; Schoonmaker v. Doolittle, 118 Ill. 605, 8 NE 839; Grim v. Murphy, 110 Ill. 271; Schneider v. Botsch, 90 Ill. 577; McNamara v. Seaton, 82 Ill. 498.

Ind.—Rosenmeier v. Mahrenholz, 179 Ind. 467, 101 NE 721; Rennert v. Shirk, 163 Ind. 542, 72 NE 546; Pittsburgh, etc., R. Co. v. Stickley, 155 Ind. 312, 58 NE 192; Burr v. Smith, 152 Ind. 469, 53 NE 469; Palmer v. Dosch, 148 Ind. 10, 47 NE 176; Dyer v. Eldridge, 136 Ind. 654, 36 NE 522; Richwine v. Noblesville Presb. Church, 135 Ind. 80, 34 NE 737; Riggs v. Riley, 113 Ind. 208, 15 NE 253; Brown v. Anderson, 90 Ind. 93; Davis v. Waggoner, 42 Ind. A. 12, 83 NE 381, 84 NE 1105; Cline v. Hays, 37 Ind. A. 329, 76 NE 257; Logsdon v. Dingg, 32 Ind. A. 158, 69 NE 409; Webb v. Rhodes, 28 Ind. A. 393, 61 NE 735.

Iowa.—Griffith v. Murray, 147 NW 855; Anderson v. Buchanan, 139 Iowa 676, 116 NW 694; Bradley v. Burkhart, 139 Iowa 323, 115 NW 597, 130 AmSR 328; Lougee v. Shuhart, 127 Iowa 173, 102 NW 1125; Axmear v. Richards, 112 Iowa 657, 84 NW 686; Miller v. Mills County, 111 Iowa 654, 82 NW 1038; Fullmer v. Beck, 105 Iowa 517, 75 NW 366; Doolittle v. Bailey, 85 Iowa 398, 52 NW 337; Wilson v. Gunning, 80 Iowa 331, 45 NW 920; Heinrichs v. Terrell, 65 Iowa 25, 21 NW 171; Crapo v. Cameron, 61 Iowa 447, 16 NW 533; Meyer v. Weigman, 45 Iowa 579; Brown v. Bridges, 31 Iowa 138.

Kan.—Edwards v. Fleming, 83 Kan. 653, 112 P 836, 33 LRANS 923 and note; Moore v. Wiley, 44 Kan. 736, 25 P 200.

Ky.—Turner v. Morgan, 158 Ky. 511, 165 SW 684; Liter v. Sherley, 35 SW 550, 18 KyL 107; Louisville, etc., R. Co. v. Quinn, 94 Ky. 310, 22 SW 221, 15 KyL 83; Hawkins v. Walker, 15 SW 519, 12 KyL 789; Schieble v. Hart, 12 SW 628, 11 KyL 607; Summers v. Green, 4 J. J. Marsh. 137.

La.—Frederick v. Brulard, 6 La. Ann. 382; Zeringue v. Harang, 17 La. 349; D'Arby v. Blanchet, 7 La. 256.

Me.—Richardson v. Watts, 94 Me. 476, 48 A 180; Preble v. Maine Cent. R. Co., 85 Me. 260, 27 A 149, 35 AmSR 366, 21 LRA 829; Ricker v. Hibbard, 73 Me. 105; Hitchings v. Morrison, 72 Me. 331; Abbott v. Abbott, 51 Me. 575.

Md.—Hiss v. McCabe, 45 Md. 77; Hammond v. Ridgely, 5 Harr. & J. 245, 9 AmD 522.

Mass.—Jordan v. Riley, 178 Mass. 524, 60 NE 7; Bond v. O'Gara, 177 Mass. 139, 58 NE 275, 83 AmSR 265; Harrison v. Dolan, 172 Mass. 395, 52 NE 513; Beckman v. Davidson, 162 Mass. 347, 39 NE 38; Holloran v. Holloran, 149 Mass. 298, 21 NE 374; Burrell v. Burrell, 11 Mass. 294; Melvin v. Merrimack River Locks, etc., 5 Metc. 15, 38 AmD 384. See also Thacker v. Guardenier, 7 Metc. 484.

Mich.—Gildea v. Warren, 173 Mich. 28, 138 NW 232; Pugh v. Schindler, 127 Mich. 191, 86 NW 515; Carpenter v. Monks, 81 Mich. 103, 45 NW 477; Greene v. Anglemire, 77 Mich. 168, 43 NW 772.

Minn.—Weeks v. Upton, 99 Minn. 410, 109 NW 828; Diers v. Ward, 87 Minn. 475, 92 NW 402; Ramsey v. Glenny, 45 Minn. 401, 48 NW 322, 22 AmSR 736; Brown v. Morgan, 44 Minn. 432, 46 NW 913; Seymour v. Carli, 31 Minn. 81, 16 NW 495.

tion of taking what did not belong to him,[69] or claimed that he had no desire or intention to take any land belonging to the adjoining owner,[70] or that he would have surrendered possession if he had known that the land in dispute was not within the calls of his deed,[71] or that the owner of the record title was ignorant of the location of the true boundary line or of the fact that the land was his,[72] or supposed that the adverse occupant intended to claim only what he actually owned,[73] or the fact

Miss.—Crowder v. Neal, 100 Miss. 730, 57 S 1.

Mo.—Acord v. Beaty, 244 Mo. 126, 148 SW 901, 41 LRANS 400; Koch v. Gordon, 231 Mo. 645, 133 SW 609; Foard v. McAnnelly, 215 Mo. 371, 114 SW 990; Davis v. Braswell, 185 Mo. 576, 84 SW 870; McCabe v. Bruere, 153 Mo. 1, 54 SW 450; Brummell v. Harris, 148 Mo. 430, 50 SW 93; Shotwell v. Gordon, 121 Mo. 482, 26 SW 341; Goltermann v. Schlermeyer, 111 Mo. 404, 19 SW 484, 20 SW 161; Battner v. Baker, 108 Mo. 311, 18 SW 911, 32 AmSR 606; Mather v. Walsh, 107 Mo. 121, 17 SW 755; Finch v. Ullman, 105 Mo. 255, 16 SW 863, 24 AmSR 383 and note; Handlan v. McManus, 100 Mo. 124, 16 SW 207, 18 AmSR 533; Atchison v. Pease, 96 Mo. 566, 10 SW 159; Cole v. Parker, 70 Mo. 372; Walbrunn v. Ballen, 68 Mo. 164; Hamilton v. West, 63 Mo. 93; West v. St. Louis, etc., R. Co., 59 Mo. 510; Major v. Rice, 57 Mo. 384; Kincaid v. Dormey, 51 Mo. 552; Tamm v. Kellogg, 49 Mo. 118; Thomas v. Babb, 45 Mo. 384; Keen v. Schnedler, 15 Mo. A. 590, [rev on other grounds 92 Mo. 516, 2 SW 312].

Mont.—Jennings v. Gorman, 19 Mont. 545, 48 P 1111.

Nebr.—Zweiner v. Vest, 147 NW 1129; Andrews v. Hastings, 85 Nebr. 548, 123 NW 1035; Baty v. Elrod, 66 Nebr. 735, 92 NW 1032, 97 NW 343; Obernalte v. Edgar, 28 Nebr. 70, 44 NW 82; Levy v. Yerga, 25 Nebr. 764, 41 NW 773, 13 AmSR 525; Tex v. Pflug, 24 Nebr. 666, 39 NW 839, 8 AmSR 231; Williams v. Shepherdson, 4 Nebr. (Unoff.) 608, 95 NW 827; Brownfield v. Bleekman, 4 Nebr. (Unoff.) 443, 94 NW 714.

N. J.—Southmayd v. McLaughlin, 24 N. J. Eq. 181.

N. Y.—Crary v. Goodman, 22 N. Y. 170; Roulston v. Stewart, 40 App. Div. 200, 57 NYS 1061; Race v. Stewart, 5 App. Div. 598, 39 NYS 438; Smith v. Faulkner, 48 Hun 186; Swettenham v. Leary, 18 Hun 284; Eldridge v. Kenning, 12 NYS 693 [aff 129 N. Y. 625, 29 NE 1028]; Dale v. Jackson, 8 NYS 715; Jackson v. Dieffendorf, 3 Johns. 269.

N. C.—Sinclair v. Teal, 156 N. C. 458, 72 SE 487; Mode v. Long, 64 N. C. 433. See Pittman v. Weeks, 132 N. C. 81, 43 SE 582.

Oh.—Yetzer v. Thoman, 17 Oh. St. 130, 91 AmD 122; Puntt v. Zimmer, 29 Oh. Cir. Ct. 721.

Or.—Parker v. Wolf, 138 P 463; Stout v. Michelbook, 58 Or. 372, 114 P 929; Moore v. Fowler, 58 Or. 292, 114 P 472; Dunningen v. Wood, 58 Or. 119, 112 P 531; Sommer v. Compton, 52 Or. 173, 96 P 124, 1065; Cooper v. Blair, 50 Or. 394, 92 P 1074; Gist v. Doke, 42 Or. 225, 70 P 704 [dist King v. Brigham, 23 Or. 262, 31 P 601, 18 LRA 361, on the ground that in that case there was no intent to claim beyond the true line when ascertained]; Rowland v. Williams, 23 Or. 515, 32 P 402; Ramsey v. Ogden, 23 Or. 347, 31 P 778; Hicklin v. McClear, 18 Or. 126, 22 P 1057; Caufield v. Clark, 17 Or. 473, 21 P 443, 11 AmSR 845.

Pa.—Reiter v. McJunkin, 173 Pa. 82, 33 A 1012; Davis v. Russell, 142 Pa. 426, 21 A 870; McVey v. Durkin, 136 Pa. 418, 20 A 541; McCullough v. McCall, 10 Watts 367; Chew v. Morton, 10 Watts 321; Brown v. McKinney, 9 Watts 565, 36 AmD 139; Mowday v. Moore, 9 Montg. Co. 14.

R. I.—Dodge v. Lavin, 34 R. I. 514, 518, 84 A 857 [cit Cyc]; O'Donnell v. Penney, 17 R. I. 164, 20 A 305.

Tenn.—Erck v. Church, 87 Tenn. 575, 11 SW 794, 4 LRA 641; Copeland v. Murphey, 2 Coldw. 64; Hightower v. Smith, 7 Yerg. 500; Louisville Trust Co. v. Alford, (Ch. A.) 53 SW 974.

Tex.—Holland v. Nance, 102 Tex. 177, 114 SW 346; Titel v. Garland, 99 Tex. 201, 87 SW 1152; Bruce v. Washington, 80 Tex. 368, 15 SW 1104; Harn v. Smith, 79 Tex. 310, 15 SW 240, 23 AmSR 340; Bracken v. Jones, 63 Tex. 184; Arnold v. Evans, (Civ. A.) 140 SW 497; Cannon v. Producers' Oil Co., (Civ. A.) 138 SW 803; Bartine v. McElroy, (Civ. A.) 123 SW 1175; Bennette v. Collins, 54 Tex. Civ. A. 16, 116 SW 618; Logan v. Meads, 43 Tex. Civ. A. 477, 98 SW 210; Mann v. Schueling, (Civ. A.) 68 SW 292; Daughtrey v. New York, etc., Land Co., (Civ. A.) 61 SW 947; Jayne v. Hanna, (Civ. A.) 51 SW 296; Bisso v. Casper, 14 Tex. Civ. A. 19, 36 SW 345; Barnett v. Templeman, (Civ. A.) 31 SW 78; Hand v. Swann, 1 Tex. Civ. A. 241, 21 SW 282.

Vt.—Brown v. Clark, 73 Vt. 233, 50 A 1066; Swerdferger v. Hopkins, 67 Vt. 136, 31 A 153; Burnell v. Maloney, 39 Vt. 579.

Wash.—Wissinger v. Reed, 69 Wash. 684, 125 P 1030; Kirchhoffer v. Harris, 68 Wash. 316, 123 P 455; Johnson v. Ingram, 63 Wash. 554, 115 P 1073; Milbank v. Rowland, 63 Wash. 519, 115 P 1053; McCormick v. Sorenson, 58 Wash. 107, 107 P 1055, 137 AmSR 1047; Davies v. Wickstrom, 56 Wash. 154, 105 P 454, 134 AmSR 1100; Schlossmacher v. Beacon Place Co., 52 Wash. 588, 100 P 1013; Weingarten v. Shurtleff, 51 Wash. 602, 99 P 739; Thornely v. Andrews, 45 Wash. 413, 88 P 757; Erickson v. Murlin, 39 Wash. 43, 80 P 853; Wilcox v. Smith, 38 Wash. 585, 80 P 803; Hesser v. Siepman, 35 Wash. 14, 76 P 295; Bowers v. Ledgerwood, 25 Wash. 14, 64 P 936.

W. Va.—Point Mountain Coal, etc., Co. v. Holly Lumber Co., 71 W. Va. 21, 75 SE 197; Harman v. Alt, 69 W. Va. 287, 71 SE 709; Teass v. St. Albans, 38 W. Va. 1, 17 SE 400.

Wis.—Progress Blue Ribbon Farms v. Harter, 147 Wis. 133, 132 NW 895; Mielke v. Dodge, 135 Wis. 388, 115 NW 1099; Bishop v. Bleyer, 105 Wis. 330, 81 NW 413; Fuller v. Worth, 91 Wis. 406, 64 NW 995.

Ont.—Elliott v. Bulmer, 27 U. C. C. P. 217.

[a] **Applications of rule.**—(1) Where defendants and predecessors in interest, although claiming under and through deeds conveying lots by number, had always claimed that the dividing line was established and marked by a survey between former owners, about 1893, their possession up to such line having been open, notorious, exclusive, adverse, and under a claim of right for more than the statutory period, such line constituted the boundary, regardless of the location of the original line between lots as platted. Weingarten v. Shurtleff, 51 Wash. 602, 99 P 739. (2) Where defendant bought a lot which was fenced, erroneously including a strip twenty-one inches wide, and entered into possession, built a house, the drip from the eaves of which fell on such strip, improved such strip the same as the remainder of the land, and exercised the same acts of ownership over it all, her possession continued actual, open, notorious, continuous, and under claim of right. It was held that her possession was adverse. Erickson v. Murlin, 39 Wash. 43, 80 P 853. (3) Defendant in ejectment had filed upon certain land as his homestead. In locating his fence he included a tract in dispute which was outside of the limits of his location, and for more than ten years he retained uninterrupted occupancy of such tract, making improvements thereon. Plaintiff, with knowledge of the facts, purchased adjoining land under a conveyance giving title to the land in controversy. It was held, that defendant had acquired the land by adverse possession, although the original inclosure was made by mistake as to the true boundary line. Bowers v. Ledgerwood, 25 Wash. 14, 64 P 936.

[b] **Facts sufficient to show intent to claim.**—(1) Plaintiff and her grantors built a fence on what they believed to be the true line of their lot, thereby inclosing a strip of land owned by defendant which they used continuously for twenty-five years and on which they erected a residence, when defendant built a fence on the true line. The evidence showed that the latter fence touched one corner of the house, was within two feet of a door on one side of the house, and shut off access from the house to the major part of the yard. It was held that the evidence warranted a finding that plaintiff and her grantors claimed to own to the fence they erected. Pittsburg, etc., R. Co. v. Stickley, 155 Ind. 312, 58 NE 192. (2) Where plaintiff's grantor cultivated a strip of land lying between the true line of his premises and a fence supposed to mark the boundary, erected a barn and outhouse thereon, constructed a lattice so that the strip could be entered only through a private door, built a sidewalk near the fence, and paid half the cost of rebuilding such fence, his possession was hostile. Webb v. Rhodes, 28 Ind. A. 393, 61 NE 735. (3) Maintaining a possession for many years is strong but not conclusive evidence of location or claim to that boundary, but such evidence may be explained or contradicted upon circumstances equally strong and conclusive. Potts v. Everhart, 26 Pa. 493.

[c] **Facts insufficient to show intent to claim.**—(1) The fact that one, after receiving a deed of a farm, occupies it all the time up to an existing fence which is beyond the true boundary line is not enough to show that his possession of the intervening strip is adverse, since it will be presumed that he entered under his deed claiming only the title and possession which it gave him. Fuller v. Worth, 91 Wis. 406, 64 NW 995. (2) Adjoining landowners, being in doubt as to the dividing line, caused a survey to be made which by mistake gave plaintiff more than the number of acres claimed by him. It was never agreed that the line surveyed should be the dividing line, and plaintiff stated on numerous subsequent occasions that he did not claim more than the number of acres he purchased, but after the mistake had been discovered, claimed the excess by adverse possession. It was held that the parties occupied under a mistaken belief that the line located was correct, and that neither intended to claim more than the true amount; hence plaintiff did not hold the excess adversely. Kahl v. Schmidt, 107 Iowa 550, 78 NW 204.

69. Daily v. Boudreau, 231 Ill. 228, 83 NE 218; Milligan v. Fritts, 226 Mo. 189, 125 SW 1101.

70. Davis v. Braswell, 185 Mo. 576, 84 SW 870; Gist v. Doke, 42 Or. 225, 70 P 704.

71. Crowder v. Neal, 100 Miss. 730, 57 S 1.

72. Pittman v. Weeks, 132 N. C. 81, 43 SE 582.

73. Peterson v. Hollis, 90 Kan. 655, 659, 136 P 258 (where it was said: "It does not follow that in order for the holding to be adverse each owner must in fact understand that a claim is made to the barrier, irrespective of whether it corresponds with the original boundary. In order to make

that both owners were mistaken as to the true boundary line,[74] does not affect the operation of the rule. Nor is the character of his possession changed by reason of the fact that the claimant obtained permission of the owner of the adjacent property of which the portion claimed adversely was a part to use the whole property for a pasture.[75] In all cases the intention and not the mistake is the test by which the character of the possession is determined,[76] it being prima facie sufficient that actual, visible, and exclusive possession is taken under a claim of right without reference to the fact that the possession was based on mistake.[77]

[§ 246] **H. Character of Possession as Affected by Relationship or Situation of Parties toward Each Other—1. By Grantor against Grantee in Absolute Deed—a. Possession Usually Not Adverse—(1) Statement of Rule.**[78] By the execution and delivery of a deed of land the entire legal interest in the premises vests in the grantee, and if the grantor continues in possession afterward his possession will be that either of tenant or trustee of the grantee. He will be regarded as holding the premises in subserviency to the grantee, and nothing short of an explicit disclaimer of such relation and a notorious assertion of right in himself will be sufficient to change the character of his possession and render it adverse to the grantee.[79] And under some

his possession adverse, an occupant who openly holds possession up to a fence need not add to this act any affirmative declaration that he renounces the surveyed line. The fact that he has the actual possession puts the adjoining occupant on inquiry as to the extent of his right, and so long as he does nothing inconsistent with an assertion of absolute ownership his neighbor can derive no advantage from assuming that he claims only the land to which he has a paper title").

74. Weeks v. Upton, 99 Minn. 410, 109 NW 828; Ramsey v. Glenny, 45 Minn. 401, 48 NW 322, 22 AmSR 736; Hedges v. Pollard, 149 Mo. 216, 50 SW 889.

[a] **Thus** where an owner of adjacent lots conveyed them to separate grantees, the boundary between the lots was staked off on the ground, the grantees improved their lots with reference to such boundary and assumed that it was the true boundary, and the correctness thereof was not disputed until after the statutory period had elapsed, it was held that the owners of the lots, claiming to the boundary line as staked off on the ground, acquired title by adverse possession. Thornely v. Andrews, 45 Wash. 413, 88 P 757.

75. Crowder v. Neal, 100 Miss. 730, 57 S 1.

76. Ricker v. Hibbard, 73 Me. 105, 107 (where it was said: "It is not unusual for an adverse possession to begin under a mistake as to the title; perhaps it is so in most cases where the party is honest. If he goes into possession, fully believing he has a good title, and intending to hold under that title, surely such a claim would not be rendered invalid by a discovery after twenty years that the title was not good"). And see cases supra note 74.

[a] **Good faith.**—The question of the good or bad faith of the transaction, or the intention of the party taking possession of land, is not material, provided the intention is to take and hold possession adversely." Bayles v. Daugherty, 77 Ark. 201, 203, 91 SW 304 (per McCulloch, J.).

77. Rennert v. Shirk, 163 Ind. 542, 72 NE 546.

78. **Cross references:**

By cestui que trust against trustee see Trusts.

By grantee of life tenant against remainderman or reversioner see Estates.

By grantee of one cotenant against cotenant see Joint Tenancy; Tenancy in Common.

By mortgagee against mortgagor see Mortgages [27 Cyc 1149].

By mortgagor or his grantee against mortgagee see Mortgages [27 Cyc 1149].

By one cotenant against another see Joint Tenancy [23 Cyc 492]; Tenancy in Common [38 Cyc 23].

By stranger against trustee see Trusts.

By tenant and person holding under him against landlord see Landlord and Tenant [24 Cyc 952].

By tenant for life or years against remainderman or reversioner see Estates.

By trustee or those holding under him against cestui que trust see Trusts.

79. U. S.—Higginson v. Mein, 4 Cranch 415, 2 L. ed. 664; Woolworth v. Root, 40 Fed. 723; Jones v. Miller, 3 Fed. 334, 1 McCrary 535.

Ala.—Kilpatrick v. Trotter, 64 S 589; Daniels v. Williams, 177 Ala. 140, 58 S 419; Chancellor v. Teel, 141 Ala. 634, 37 S 665; Ivey v. Beddingfield, 107 Ala. 616, 18 S 139; Yancey v. Savannah, etc., R. Co., 101 Ala. 234, 13 S 311; Williams v. Higgins, 69 Ala. 517.

Ark.—Waits v. Moore, 89 Ark. 19, 115 SW 931; Stuttgart v. John, 85 Ark. 520, 109 SW 541; El Dorado v. Ritchie Grocery Co., 84 Ark. 52, 104 SW 549; Graham v. St. Louis, etc., R. Co., 69 Ark. 562, 65 SW 1048, 66 SW 344; Little Rock v. Wright, 58 Ark. 142, 23 SW 876; Ringo v. Woodruff, 43 Ark. 469; Miller v. Fraley, 23 Ark. 735; Harris v. King, 16 Ark. 122.

Cal.—Tulley v. Tulley, 137 Cal. 60, 69 P 700; Reed v. Smith, 125 Cal. 491, 58 P 139; Gernon v. Sisson, 21 Cal. A. 123, 128, 131 P 85 [quot Cyc].

Conn.—Beach v. Catlin, 4 Day 284, 4 AmD 221.

Ga.—Jay v. Whelchel, 78 Ga. 786, 3 SE 906.

Ind.—Cashman v. Brownlee, 128 Ind. 266, 27 NE 560; Henry v. Stevens, 108 Ind. 281, 9 NE 356; Ronan v. Meyer, 84 Ind. 390; Jeffersonville, etc., R. Co. v. Oyler, 82 Ind. 394; Record v. Ketcham, 76 Ind. 482; Rowe v. Lewis, 30 Ind. 163; Rowe v. Beckett, 30 Ind. 154, 95 AmD 676; Crassen v. Swoveland, 22 Ind. 427; Fite v. Doe, 1 Blackf. 127; Folley v. Thomas, 46 Ind. A. 559, 93 NE 181, 183 [cit Cyc].

Iowa.—Iowa Cent. R. Co. v. Homan, 151 Iowa 404, 131 NW 878; Walsh v. Doran, 145 Iowa 110, 123 NW 999; Garst v. Brutsche, 129 Iowa 501, 504, 105 NW 452 [cit Cyc]; Chicago, etc., R. Co. v. Snyder, 120 Iowa 532, 534, 95 NW 183 [quot Cyc]; Luckhart v. Luckhart, 120 Iowa 248, 94 NW 461; McClenahan v. Stevenson, 118 Iowa 106, 91 NW 925; Clarity v. Sheridan, 91 Iowa 304, 59 NW 52; Garstang v. Davenport, 90 Iowa 359, 57 NW 876; Livermore v. Maquoketa, 35 Iowa 358.

Kan.—Viking Refrigerator, etc., Co. v. Crawford, 84 Kan. 208, 205, 114 P 240, 35 LRANS 498 and note [cit Cyc]; Dotson v. Atchison, etc., R. Co., 81 Kan. 816, 106 P 1045; Bird v. Whetstone, 71 Kan. 430, 80 P 942; Hockman v. Thuma, 68 Kan. 519, 75 P 486; Sellers v. Crossan, 52 Kan. 570, 35 P 205; McNeil v. Jordan, 28 Kan. 7.

Ky.—Halbert v. Maysville, etc., R. Co., 98 Ky. 661, 33 SW 1121, 17 KyL 1225; Rudd v. Monarch, 32 SW 1083, 17 KyL 893; Carpenter v. Carpenter, 8 Bush 283.

La.—Roe v. Bundy, 45 La. Ann. 398, 12 S 759.

Me.—Currier v. Earl, 13 Me. 216.

Mass.—Stearns v. Hendersass, 9 Cush. 497, 57 AmD 65; Hennessey v. Andrews, 6 Cush. 170.

Mich.—Nugent v. Peterman, 137 Mich. 646, 100 NW 895; Paldi v. Paldi, 84 Mich. 346, 47 NW 510; Jeffery v. Hursh, 45 Mich. 59, 7 NW 221; Humphrey v. Hurd, 29 Mich. 44.

Minn.—Omodt v. Chicago, etc., R. Co., 106 Minn. 205, 118 NW 798; Kelly v. Palmer, 91 Minn. 133, 97 NW 578; Collins v. Colleran, 86 Minn. 199, 90 NW 364.

Mo.—Ivy v. Yancey, 129 Mo. 501, 31 SW 937; DeBernardi v. McElroy, 110 Mo. 650, 19 SW 626; Brown v. Brown, 106 Mo. 611, 17 SW 640; Kellogg v. Mullen, 39 Mo. 174.

Nebr.—Horbach v. Boyd, 64 Nebr. 129, 89 NW 644; Roggencamp v. Converse, 15 Nebr. 105, 17 NW 361.

N. H.—Saunders v. Farmer, 62 N. H. 572.

N. J.—Van Keuren v. Central R. Co., 38 N. J. L. 165.

N. Y.—Monnot v. Rudd, 139 App. Div. 651, 124 NYS 210 [aff 129 NYS 1136]; Burhans v. Van Zandt, 7 Barb. 91 [rev on other grounds 7 N. Y. 523]; Sherman v. Kane, 46 N. Y. Super. 310 [aff 86 N. Y. 57]; Buttery v. Rome, etc., R. Co., 14 NYSt 131; Swart v. Service, 21 Wend. 36, 34 AmD 211; Butler v. Phelps, 17 Wend. 642; Doe v. Butler, 3 Wend. 149; Jackson v. Burton, 1 Wend. 341. And see Bissing v. Smith, 85 Hun 564, 33 NYS 123.

N. C.—McNeill v. Riddle, 66 N. C. 290; Johnson v. Farlow, 35 N. C. 84.

Oh.—Pittsburg, etc., R. Co. v. Canton, 10 Oh. Cir. Ct. 414.

Okl.—Flesher v. Callahan, 32 Okl. 283, 122 P 489.

Or.—Gardner v. Wright, 49 Or. 609, 91 P 286.

Pa.—Pierce v. Barney, 209 Pa. 132, 58 A 152; Connor v. Bell, 152 Pa. 444, 25 A 802; Ingles v. Ingles, 150 Pa. 397, 24 A 677; Olwine v. Holman, 23 Pa. 279; Buckholder v. Sigler, 7 Watts & S. 154; Union Canal Co. v. Young, 1 Whart. 410, 30 AmD 212; Kunkle v. Wolfersberger, 6 Watts 126; Scott v. Gallagher, 14 Serg. & R. 333, 16 AmD 508; Hads v. Tiernan, 25 Pa. Super. 14 [aff 213 Pa. 44, 62 A 172].

S. C.—Love v. Turner, 78 S. C. 513, 520, 59 SE 529 [quot Cyc]; McCutchen v. McCutchen, 77 S. C. 129, 57 SE 678.

Tenn.—Boxarth v. Watts, (Ch. A.) 61 SW 108.

Tex.—Thomson v. Weisman, 98 Tex. 170, 82 SW 503 [rev (Civ. A.) 78 SW 728]; Evans v. Berlocher, 83 Tex. 612, 19 SW 158; Voight v. Mackle, 71 Tex. 78, 8 SW 623; Evans v. Templeton, 69 Tex. 375, 6 SW 843, 5 AmSR 71; Harris v. Hardeman, 27 Tex. 248; Hemming v. Zimmerschitte, 4 Tex. 159; McAllen v. Alonzo, 46 Tex. Civ. A. 449, 102 SW 475; Woods v. Texas Land, etc., Co., (Civ. A.) 67 SW 155; Culmell v. Borroum, 3 Tex. Civ. A. 458, 35 SW 942; Thompson v. Slater, (Civ. A.) 34 SW 357. Compare Smith v. Montes, 11 Tex. 24; Dickey v. Forrester, (Civ. A.) 148 SW 1181 (in both of which cases expressions are found which do not seem to be in harmony with the cases supra).

Utah.—English v. Openshaw, 28 Utah 241, 78 P 476.

Vt.—Warner v. Page, 4 Vt. 291, 24 AmD 607.

Va.—Schaubuch v. Dillemuth, 108 Va. 86, 89, 60 SE 745, 15 AnnCas 825 [cit Cyc]; Virginia Midland R. Co. v. Barbour, 97 Va. 118, 33 SE 554; Rowletts v. Daniel, 4 Munf. 473; Duval v. Bibb, 3 Call 362.

statutes, in order to render the possession adverse, it is further essential that no taxes should have been levied and assessed on the land or that the grantor had paid all taxes which were levied thereon.[80]

[§ 247] **(2) Reason for Rule.** Where a grantor executes and delivers a deed of conveyance to go upon record he says to the world, "Though I am yet in the possession of the premises conveyed, it is for a temporary purpose, without claim of right, and merely as a tenant at sufferance of my grantee."[81]

[§ 248] **(3) Application, Extent, and Limits of Rule—(a) In General.** The rule applies in case of conveyances to corporations as well as to individuals,[82] of conveyances by a father to his children,[83] and of conveyances to those holding under the grantor as well as to himself.[84] So the operation of the rule is not affected by the fact that the possession of the grantors is under a claim that the conveyance was in trust for them,[85] or by the fact that the deed was in fraud of creditors.[86] So it has been held that the general rule that open, notorious, unequivocal, and exclusive possession of real estate, under an apparent claim of ownership, is notice to the world of whatever claim the possessor asserts does not apply to a vendor remaining in possession, so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed;[87] and where plaintiff and defendant in ejectment derive title to distinct parcels from a common vendor, in whom the possession has been united in less than twenty years, although the legal title is in another from whom plaintiff procures a deed, the possession of the common vendor is not hostile to plaintiff, nor will it toll his right of entry.[88] So also in an action of forcible detainer, where defendant, foster mother of the wife of plaintiff's grantor, lives in the house as a member of the family after the grantor has conveyed the premises to plaintiff and continued in possession under a lease from plaintiff, her possession is not distinct and hostile to that of plaintiff.[89] It has been held, however, that where the deed is invalid the continued possession of the grantor is not regarded as that of the grantee,[90] and it seems that the presumption that the grantor's continued possession was in subordination to the grantee's title would not obtain where third persons have, in good faith and relying on appearances, acquired rights under him.[91]

[§ 249] **(b) Dedicator against Dedicatee.** The rule applicable to grantors generally who remain in possession after execution of a conveyance applies to persons who have dedicated property.[92] The rule, however, has no application where one who merely offers to dedicate property for public use remains in possession.[93]

Wash.—Spaulding v. Collins, 51 Wash. 488, 497, 99 P 306 [quot Cyc].

W. Va.—Duffy v. Currence, 66 W. Va. 252, 66 SE 755; Parkersburg Nat. Bank v. Neal, 28 W. Va. 744; Core v. Faupel, 24 W. Va. 238.

Wis.—Munkwitz Realty, etc., Co. v. Milwaukee, 143 Wis. 230, 126 NW 542; McCormick v. Herndon, 86 Wis. 449, 56 NW 1097, 67 Wis. 648, 31 NW 303 (construing Rev. St. § 1210); Riha v. Pelnar, 86 Wis. 408, 57 NW 51; Schwallback v. Chicago, etc., R. Co., 69 Wis. 292, 34 NW 128, 2 AmSR 740, 73 Wis. 137, 40 NW 579; Allen v. Allen, 58 Wis. 210, 16 NW 610; Furlong v. Garrett, 44 Wis. 111.

Can.—Massawippi Valley R. Co. v. Reed, 33 Can. S. C. 457, 471 (holding that where the grantor continues to occupy part of property his possession is not adverse to the grantee. "He being their warrantor could not, if he had been called en garantie, be admitted to impugn himself the title he gave them and attempt thereby to derive a benefit from his failure to perform his obligation to deliver what he had so sold").

Compare Williams v. McDonald, 33 U. C. Q. B. 423 (the status of a grantor remaining in possession is that of a tenant at will which terminates one year from the date of conveyance, and the statute does not commence to run against the grantee until the termination of such tenancy).

"The statute of limitations would not begin to run until the presumption of holding in subserviency to the title of the grantee was in some way overcome." Bird v. Whetstone, 71 Kan. 430, 432, 80 P 942 (per Johnston, J.).

[a] **Analogy between holding of this character and that of lessee.**—"In such a case the grantee's holding is not essentially different from that of a lessee who remains in possession after the expiration of his term without the consent of his lessor. Such possession by a lessee is not adverse; he is a tenant at sufferance; and for like reasons the grantee of an estate upon a condition subsequent should not be regarded as holding adversely to his grantor, even after a reasonable time has elapsed to comply with the condition, where the land remains vacant, and nothing has been done with it to prevent a future compliance with the condition, or to indicate that the grantee does not intend at some time to comply therewith." Union Pac. R. Co. v. Cook, 98 Fed. 281, 284, 39 CCA 86 (per Thayer, J.).

80. Allen v. Allen, 159 Cal. 197, 113 P 160; Reynolds v. Williard, 80 Cal. 605, 22 P 262.

81. McNeil v. Jordan, 28 Kan. 7, 16 (where it was further said that "the object of the law in holding possession [to be] constructive notice is to protect the possessor from the acts of others who do not derive their title from him, not to protect him against his own acts, not to protect him against his own deed"); Dillard v. Cochran, (Tex. Civ. A.) 153 SW 662. To same effect Paldi v. Paldi, 84 Mich. 346, 47 NW 510; Bloomer v. Henderson, 8 Mich. 395, 77 AmD 453.

82. Graham v. St. Louis, etc., R. Co., 69 Ark. 562, 65 SW 1048, 66 SW 344 (land conveyed to railroad company for railroad purposes); Jeffersonville, etc., R. Co. v. Oyler, 82 Ind. 394.

[a] **Thus** where a landowner remained in possession of a part of land over which a railroad right of way had been granted, such possession, in the absence of evidence that his holding was adverse to the railroad company's rights, and that it had knowledge thereof, would be construed to be subservient to the rights of the railroad company. Chicago, etc., R. Co. v. Snyder, 120 Iowa 532, 95 NW 183.

83. Tully v. Tully, 137 Cal. 60, 69 P 700 (holding that where the owner of realty executed conveyances to his children the facts that he had remained in possession for more than eight years up to the time of his death, used the land, and paid the taxes thereon, did not divest such grantees of their title).

84. Horbach v. Boyd, 64 Nebr. 129, 89 NW 644.

[a] **Rule applicable to heirs of grantor.**—Where G, the owner of land, sold it to B and after the sale remained in possession until his death, it was held that no title passed to G's heirs but that they were mere possessors without title and could not plead the statute of limitations. Harris v. Hardeman, 27 Tex. 248.

[b] **Putting third person in possession.**—Where one who has given a warranty deed of land afterward puts a third person into possession of the land, he may be presumed to have acted in so doing as the agent of the grantee, and such possession will inure to the benefit of the grantee. Warner v. Page, 4 Vt. 291, 24 AmD 607.

85. McClenahan v. Stevenson, 118 Iowa 106, 111, 91 NW 925 (where it was said, per Deemer, J.: "At law the cestui que trust is regarded as a tenant at will to the trustee, and until this tenancy is terminated there can be no adverse possession").

86. McClenahan v. Stevenson, 118 Iowa 106, 91 NW 825; Collins v. Colleran, 86 Minn. 199, 90 NW 364.

[a] **The reason** is that a fraudulent deed is good as between the parties and all persons claiming in privity with them. McClenahan v. Stevenson, 118 Iowa 106, 91 NW 925; Collins v. Colleran, 86 Minn. 199, 90 NW 364.

87. Smith v. Phillips, 9 Okl. 297, 302, 60 P 117.

88. Speers v. Baylor, 2 A. K. Marsh. (Ky.) 194.

89. Haas v. Juul, 178 Ill. A. 397, 398 (in which it was said: "In view of the fact that she was the foster mother of Juul's wife and continued to live in the family with them without giving notice or making assertion of any claim to the premises on her part, and shared their occupancy with knowledge, actual or constructive, that Juul during that time had, after asserting title to the premises, parted with it to appellee and later had leased the premises from him, her possession, being thus used and enjoyed in common with Juul, could not be said to be distinct and hostile to that of appellee").

90. Parks v. Barnett, 104 Ala. 438, 16 S 136.

91. Jeffery v. Hursh, 45 Mich. 59, 7 NW 221.

92. Stuttgart v. John, 85 Ark. 520, 109 SW 541; Little Rock v. Wright, 58 Ark. 142, 23 SW 876; Lee v. Mound Station, 118 Ill. 304, 8 NE 759; Hempsted v. Huffman, 84 Iowa 398, 51 NW 17; Livermore v. Maquoketa, 35 Iowa 358; Matter of Public Park Com'rs, 53 Hun 556, 6 NYS 779. See also Derby v. Alling, 40 Conn. 410.

93. Canton Co. v. Baltimore, 106 Md. 69, 66 A 679, 67 A 274, 11 LRANS 129.

[§ 250] **b. Capacity of Grantor to Hold Adversely.** While, as stated in a preceding section,[94] the continued possession of land by the grantor thereof after execution of a deed is presumed, in the absence of any showing to the contrary, to be in subordination to the title of the grantee, it is none the less true that the conveyance does not of itself prevent the grantor from acquiring title by adverse possession against his grantee.[95] There is nothing in the relation of vendor and vendee by deed executed and not executory which will prevent the vendor who may remain in possession, or who may afterward take possession from claiming adversely to the vendee and relying on the statute of limitations.[96] The covenant of warranty contained in the deed will not defeat title by limitations acquired after the deed. Such title is no breach of the covenant, which cannot be extended to cover future laches of the grantee whereby he loses the title conveyed to him.[97]

[§ 251] **c. Under What Circumstances Possession Becomes Adverse—(1) General Principles Stated.** It is not necessary that the grantor should first surrender possession to the grantee before asserting an adverse title,[98] and while actual notice that the grantor is claiming title in himself is of course sufficient to set the statute of limitations in motion,[99] express, written, or verbal notice to the grantee that the grantor is claiming title in himself is not necessary. Knowledge of the adverse claim may be brought home to the grantee by acts so open, notorious and hostile as to clearly show that the grantor is claiming adversely, and such acts will suffice to initiate adverse possession by the grantor;[1]

94. See supra § 246.

95. U. S.—Jones v. Miller, 3 Fed. 384, 1 McCrary 535.

Ala.—Yancey v. Savannah, etc., R. Co., 101 Ala. 234, 13 S 311; Meeks v. Garner, 93 Ala. 17, 8 S 378, 11 LRA 196; Abbett v. Page, 92 Ala. 571, 9 S 332.

Ark.—Graham v. St. Louis, etc., R. Co., 69 Ark. 562, 65 SW 1048, 66 SW 344.

Cal.—Allen v. Allen, 159 Cal. 197, 113 P 160; Baker v. Clark, 128 Cal. 181, 60 P 677; Garabaldi v. Shattuck, 70 Cal. 511, 11 P 778; Lord v. Sawyer, 57 Cal. 65; Hartman v. Reed, 50 Cal. 485; Dorland v. Magilton, 47 Cal. 485; Franklin v. Dorland, 28 Cal. 175, 87 AmD 111.

Ill.—Knight v. Knight, 178 Ill. 553, 53 NE 306; Peoria, etc., R. Co. v. Tamplin, 156 Ill. 285, 40 NE 960.

Iowa.—McClenahan v. Stevenson, 118 Iowa 106, 91 NW 925.

Kan.—Bird v. Whetstone, 71 Kan. 430, 80 P 942.

Ky.—Fain v. Miles, 60 SW 939, 22 KyL 1584; Chalfin v. Malone, 9 B. Mon. 496, 50 AmD 525.

La.—Zebriska's Succ., 119 La. 1076, 44 S 893; Roe v. Bundy, 45 La. Ann. 398, 12 S 759.

Me.—Hines v. Robinson, 57 Me. 324, 99 AmD 772; Traip v. Traip, 57 Me. 268.

Md.—Canton Co. v. Baltimore, 106 Md. 69, 66 A 679, 67 A 274 (land dedicated to public use); Waltemeyer v. Baughman, 63 Md. 200; Alexander v. Walter, 8 Gill 239, 50 AmD 688.

Mass.—Elwell v. Hinckley, 138 Mass. 225 (deed in fraud of grantor's creditors); Stearns v. Hendersass, 9 Cush. 497, 57 AmD 65.

Mich.—Paldi v. Paldi, 84 Mich. 346, 47 NW 510; Bennett v. Robinson, 27 Mich. 26; Bower v. Earl, 18 Mich. 367.

Minn.—Kelly v. Palmer, 91 Minn. 133, 97 NW 578; Collins v. Colleran, 86 Minn. 199, 90 NW 364.

Miss.—Mitchell v. Woodson, 37 Miss. 567.

Mo.—Fox v. Windes, 127 Mo. 502, 30 SW 323, 48 AmSR 648; Brown v. Brown, 106 Mo. 611, 17 SW 640; Hughes v. Israel, 73 Mo. 538.

N. H.—Tilton v. Emery, 17 N. H. 536.

N. J.—Snyder v. Snover, 56 N. J. L. 20, 27 A 1013.

N. Y.—Sherman v. Kane, 86 N. Y. 57 [aff 46 N. Y. Super. 310]; Mannix v. Riordan, 75 App. Div. 135, 77 NYS 357; Hasbrouck v. Burhans, 42 Hun 376; Cramer v. Benton, 4 Lans. 291; Wilklow v. Lane, 37 Barb. 244; Kent v. Harcourt, 33 Barb. 491; Burhans v. Van Zandt, 7 Barb. 91 [rev on other grounds 7 N. Y. 523]; Jackson v. Oltz, 8 Wend. 440; Jackson v. Burton, 1 Wend. 341; Stiles v. Jackson, 1 Wend. 103; Jackson v. Brink, 5 Cow. 483.

N. C.—Chatham v. Lansford, 149 N. C. 363, 63 SE 81, 25 LRANS 129 and note; Scarboro v. Scarboro, 122 N. C. 234, 29 SE 352; Eddleman v. Carpenter, 52 N. C. 616.

Or.—Gardner v. Wright, 49 Or. 609, 91 P 286.

Pa.—Pierce v. Barney, 209 Pa. 132, 58 A 152; Milnes v. Van Gilder, 197 Pa. 347, 47 A 197, 80 AmSR 828; Ingles v. Ingles, 150 Pa. 397, 24 A 677; Olwine v. Holman, 23 Pa. 279; Union Canal Co. v. Young, 1 Whart. 410, 30 AmD 212; Watson v. Gregg, 10 Watts 289, 36 AmD 176; Pipher v. Lodge, 4 Serg. & R. 310; Hads v. Tiernan, 25 Pa. Super. 14 [aff 213 Pa. 44, 62 A 172].

Tenn.—Keaton v. Thomasson, 2 Swan 138, 57 AmD 55.

Tex.—Thomson v. Weisman, 98 Tex. 170, 82 SW 503; Harn v. Smith, 79 Tex. 310, 15 SW 240, 23 AmSR 340; Smith v. Montes, 11 Tex. 24; Texas, etc., R. Co. v. Maynard, (Civ. A.) 51 SW 255; Mexia v. Lewis, 3 Tex. Civ. A. 113, 21 SW 1016.

Utah.—Center Creek Water, etc., Co. v. Lindsay, 21 Utah 192, 60 P 559.

Vt.—Stevens v. Whitcomb, 16 Vt. 121; North v. Barnum, 12 Vt. 205.

Va.—Virginia Midland R. Co. v. Barbour, 97 Va. 118, 33 SE 554; Creekmur v. Creekmur, 75 Va. 430.

Wis.—Finn v. Wisconsin River Land Co., 72 Wis. 546, 40 NW 209; Brinkman v. Jones, 44 Wis. 498; Hoyt v. Jones, 31 Wis. 389.

"To say, then, that the grantor, remaining in possession after his deed, is incapable of committing a disseizin upon his grantee, involves an absurdity too gross almost for argument. He is a mere tenant by sufferance, whom the grantee may elect to treat as a tenant, or as a disseizor. He may bring ejectment, or treat him as an occupier under himself. But if the grantor set up a claim of title in himself, and this be made known to the grantee, the grantor, from that time, becomes a disseizor in fact, —the grantee can no longer treat him as a tenant." Stevens v. Whitcomb, 16 Vt. 121, 124.

[a] **Presumption not conclusive.**—The presumption that, where a grantor remains in possession after conveyance, the possession is permissive is not conclusive, if he asserts claim to title in himself and his claim is made known to the grantee. Kelly v. Palmer, 91 Minn. 133, 97 NW 578.

96. Cal.—Lord v. Sawyer, 57 Cal. 65; Dorland v. Magilton, 47 Cal. 485.

N. H.—Tilton v. Emery, 17 N. H. 536.

N. C.—Chatham v. Lansford, 149 N. C. 363, 63 SE 81, 25 LRANS 129 and note.

Or.—Gardner v. Wright, 49 Or. 609, 91 P 286.

Pa.—Watson v. Gregg, 10 Watts 289, 36 AmD 176.

Tex.—Smith v. Montes, 11 Tex. 24.

97. U. S.—Jones v. Miller, 3 Fed. 384, 1 McCrary 535.

Ala.—Doolittle v. Robertson, 109 Ala. 412, 19 S 851; Abbett v. Page, 92 Ala. 571, 9 S 332.

Cal.—Garabaldi v. Shattuck, 70 Cal. 511, 11 P 778.

Iowa.—McClenahan v. Stevenson, 118 Iowa 106, 91 NW 925.

La.—Zebriska's Succ., 119 La. 1076, 44 S 893.

Me.—Hines v. Robinson, 57 Me. 324, 99 AmD 772; Traip v. Traip, 57 Me. 268.

Mass.—Stearns v. Hendersass, 9 Cush. 497, 57 AmD 65.

Nebr.—Horbach v. Boyd, 64 Nebr. 129, 89 NW 644.

N. Y.—Sherman v. Kane, 86 N. Y. 57; Kent v. Harcourt, 33 Barb. 491.

N. C.—Chatham v. Lansford, 149 N. C. 363, 63 SE 81.

Pa.—Milnes v. Van Gilder, 197 Pa. 347, 47 A 197, 80 AmSR 828.

Tex.—Harn v. Smith, 79 Tex. 310, 15 SW 240, 23 AmSR 340.

98. Virginia Midland R. Co. v. Barbour, 97 Va. 118, 33 SE 554.

99. See cases infra this note.

[a] **Illustrations.**—(1) Refusal to deliver the premises to the grantee is sufficient notice of an adverse claim to get the statute in motion. Canton Co. v. Baltimore, 106 Md. 69, 93, 66 A 679, 67 A 274, 11 LRANS 129 [cit Cyc]; Milnes v. Van Gilder, 197 Pa. 347, 47 A 197, 80 AmSR 828; Mexia v. Lewis, 3 Tex. Civ. A. 113, 21 SW 1016; Virginia Midland R. Co. v. Barbour, 97 Va. 118, 33 SE 554 (especially where the grantor emphasizes his claim by driving the grantee away from the premises with a gun). (2) In Harn v. Smith, 79 Tex. 310, 15 SW 240, 23 AmSR 340, defendant and his wife sold part of a tract to M through whom plaintiff claimed. By agreement between defendant and H the latter built a division fence which under the agreement was to be considered the boundary line between the part of the tract sold and the part not sold. Through mistake a part of the tract sold was left on defendant's side of the fence. Defendant occupied and cultivated all the land on his side of the fence for the ten-year period, claiming it as his own. Under these circumstances it was held that he had acquired title to the land erroneously fenced in with his own, because M by reason of the agreement had actual knowledge of the extent of defendant's claim.

[b] **Any claim of title actually made known to the grantee** will satisfy the requirement as to disclaimer. Stevens v. Whitcomb, 16 Vt. 121. See also North v. Barnum, 12 Vt. 205.

1. Ala.—Abbett v. Page, 92 Ala. 571, 9 S 332.

Ill.—Knight v. Knight, 178 Ill. 553, 53 NE 306.

Iowa.—Garst v. Brutsche, 129 Iowa 501, 105 NW 452.

Minn.—Kelly v. Palmer, 91 Minn. 133, 97 NW 578.

Tex.—Thomson v. Weisman, 98 Tex. 170, 82 SW 503.

Vt.—Stevens v. Whitcomb, 16 Vt. 121.

Wis.—Meyer v. Hope, 101 Wis. 123, 77 NW 720.

"The statute may be set in motion by any distinct act on the part of the party in possession which suffi-

and this is true, although he knows his title to be bad.[2] Nor is it essential to the acquisition of title by the grantor against his grantee that there should be an intervening paper title.[3]

[§ 252] **(2) Principles Applied to Particular States of Facts—(a) Acts Sufficient to Initiate Adverse Possession.** In accordance with the principles stated in the foregoing section the following acts have been held sufficient to initiate an adverse holding by the grantor: Remaining in possession for the statutory period, openly claiming the land as his own;[4] conveying the property by warranty deed to a third person for a valuable consideration,[5] especially where the latter is put in possession;[6] leasing the property to a third person, disavowing the sale, and entry and occupation by the lessee;[7] reëntry upon the possession of the grantee several years after the conveyance;[8] reëntry under a conveyance of the premises subsequently received from a third person; and subsequent reëntry by the grantor, making leases, paying taxes, and improving the property.[9] Where an entryman on public lands, after deeding his rights to plaintiffs' ancestor, took out grants to himself and recorded them, this put him in an adverse relation to plaintiffs' ancestor, who then had a cause of action under his deed, and plaintiffs cannot recover the land fifty-seven years later without rebutting the presumption of abandonment and the bar of limitations.[9½]

[§ 253] **(b) Acts Insufficient to Initiate Adverse Possession—aa. In General.** On the other hand it has been held insufficient to initiate adverse possession by a grantor remaining in possession that he placed improvements upon the land.[10] So also the taking of a patent in his own name by one who has transferred a military land claim warrant before the land is located thereunder,[11] purchases, and records of outstanding tax titles;[12] the retaining of land granted as before the sale within an inclosure of other land of the grantor, the grantee not making any public announcement of his title and claim;[13] continuance in possession under a parol agreement that he should hold the land during his life;[14] continuance in possession under a deed reserving a homestead right;[15] or entry by the grantor and occupation of the premises after nonpayment of ground rent by virtue of the express provisions of the deed,[16] does not initiate an adverse possession.

[§ 254] **bb. Remaining in Possession and Using Premises as before Conveyance.** While the decisions are not free from conflict the decided weight of authority is to the effect that the mere fact that the grantor remains in possession, using the property as before conveyance, does not amount to such claim of ownership by the grantor as will be sufficient to bind the grantee with notice that the grantor is holding adversely to him.[17] This doctrine has been held to apply both in cases where the land sold was at the time of sale in a common inclosure with other land of the grantor,[18] and in cases where the land sold was inclosed with other land of the grantor after the sale,[19] and it makes no difference how long the possession is continued.[20] Furthermore the rule applies where the possession is by the grantor's heirs or tenants as well as by the grantor himself.[21] So it has been held that the additional fact that the grantor paid taxes on the land does not affect the rule, and that the grantor cannot by

ciently indicates to the grantee that his grantor is holding adverse to him." Iowa Cent. R. Co. v. Homan, 151 Iowa 404, 413, 131 NW 878 (per Evans, J.). "From the time when the grantor explicitly disclaims holding under the grantee, and openly asserts his title to the premises, in hostility to the title claimed under his own previous deed, his possession becomes adverse." Burhans v. Van Zandt, 7 Barb. (N. Y.) 91 [rev on other grounds 7 N. Y. 523].

2. Burhans v. Van Zandt, 7 Barb. (N. Y.) 91 [rev on other grounds 7 N. Y. 523].

3. Kent v. Harcourt, 33 Barb. (N. Y.) 491.

4. Meeks v. Garner, 93 Ala. 17, 8 S 378, 11 LRA 196. See also Freeman v. Funk, 85 Kan. 473, 117 P 1024, 46 LRANS 487 and note (holding that, where the grantor constantly and persistently for seventeen years claims ownership and exercises all the rights incident thereto and the grantee from time to time concedes the possession of only a proper title which is to be revested upon request of the grantor, he acquires title by adverse possession against the grantee).

[a] **Living on the premises, paying the taxes, mortgaging, improving, and treating them as his own** constitute an adverse holding by the grantor. Mannix v. Riordan, 75 App. Div. 135, 77 NYS 357.

5. Iowa Cent. R. Co. v. Homan, 151 Iowa 404, 131 NW 878 (where it was said that this was an act distinctly hostile to the alleged title of his grantee); Galveston v. Williams, 69 Tex. 449, 6 SW 860. And see Mexia v. Lewis, 3 Tex. Civ. A. 113, 21 SW 1016. Contra Rowlett v. Daniel, 4 Munf. (18 Va.) 473.

6. Smith v. Samuels, 133 Ga. 790, 66 SE 1086.

7. Pipher v. Lodge, 4 Serg. & R. (Pa.) 310 (where it was further held that where the grantee's heirs leave the land and the grantor places a tenant on it and proves possession continuous for the statutory period it is erroneous to charge that the putting out of the tenant was not an ouster unless the grantor intended to commit an ouster).

8. Horbach v. Boyd, 64 Nebr. 129, 89 NW 644.

9. Waltemeyer v. Baughman, 63 Md. 200; Watson v. Gregg, 10 Watts (Pa.) 289, 36 AmD 176.

[a] **Further applications of principles.**—(1) If grantees accept a deed of correction from their grantor, conveying land different from that conveyed to them by a prior deed misdescribing the land intended to be conveyed, and sell the land conveyed to them by the deed of correction, the fact that the original grantor does not remit to them all of the purchase money received by him from their grantee does not affect their election to take the land conveyed to them by the deed of correction, nor does it affect the original grantor's adverse possession of the land described in the prior deed containing the misdescription. Fox v. Windes, 127 Mo. 502, 30 SW 323, 48 AmSR 648. (2) So it has been held that where P deeded certain land to M who never took possession, or shortly thereafter abandoned it, returning the deed to P, P's subsequent possession was adverse and coextensive with the boundaries of his original title, without any claim or declaration of adverse possession, under Acts (1893) p 478. Kretzer v. Jackson, (Ala.) 62 S 811.

9½. Ditmore v. Rexford, 165 N. C. 620, 81 SE 994.

10. Luckhart v. Luckhart, 120 Iowa 248, 94 NW 461; Pillsbury-Washburn Flour-Mills Co. v. Kistler, 53 Minn. 123, 54 NW 1068.

11. Culmell v. Borroum, 13 Tex. Civ. A. 458, 35 SW 942. See also Kent v. Harcourt, 33 Barb. (N. Y.) 491.

12. Paldi v. Paldi, 84 Mich. 346, 47 NW 510.

13. Ivey v. Beddingfield, 107 Ala. 616, 18 S 139; Evans v. Templeton, 69 Tex. 375, 6 SW 843, 5 AmSR 71.

14. Carpenter v. Carpenter, 8 Bush (Ky.) 283.

15. Stevens v. Wait, 112 Ill. 544.

16. McCracken v. Roberts, 19 Pa. 390.

17. U. S.—Jones v. Miller, 3 Fed. 384, 1 McCrary 535.

Iowa.—Garst v. Brutsche, 129 Iowa 501, 105 NW 452; McClenahan v. Stevenson, 118 Iowa 106, 91 NW 925. See also Luckart v. Luckart, 120 Iowa 248, 94 NW 461.

Mass.—Hennessey v. Andrews, 6 Cush. 170.

N. Y.—Jackson v. Burton, 1 Wend. 341.

Oh.—Pittsburg, etc., R. Co. v. Canton, 10 Oh. Cir. Ct. 414, 6 Oh. Cir. Dec. 511.

Pa.—Connor v. Bell, 152 Pa. 444, 35 A 802; Olwine v. Holman, 23 Pa. 279; Buckholder v. Sigler, 7 Watts & S. 154; Union Canal Co. v. Young, 1 Whart. 410, 30 AmD 212.

See also Kelly v. Palmer, 91 Minn. 133, 97 NW 578 (all of which in a sense sustain this proposition, but not to the fullest extent because the grantor and the grantee in these two cases were father and son, and the relation was closer than in the case of conveyance from one stranger to another).

Contra Brinkman v. Jones, 44 Wis. 498; Hoyt v. Jones, 31 Wis. 389.

18. Connor v. Bell, 152 Pa. 444, 35 A 802; Olwine v. Holman, 23 Pa. 279; Buckholder v. Sigler, 7 Watts & S. (Pa.) 154. And see Ivey v. Beddingfield, 107 Ala. 616, 18 S 139.

19. Jones v. Miller, 3 Fed. 384, 1 McCrary 535.

20. Jackson v. Burton, 1 Wend. (N. Y.) 341 (twenty-seven years); Pittsburg, etc., R. Co. v. Canton, 10 Oh. Cir. Ct. 414, 6 Oh. Cir. Dec. 511.

21. McClenahan v. Stevenson, 118 Iowa 106, 91 NW 925; Pittsburg, etc., R. Co. v. Canton, 10 Oh. Cir. Ct. 414, 6 Oh. Cir. Dec. 511.

so doing acquire title by adverse possession either against his grantee or one purchasing from him.[22]

[§ 255] **2. By Grantor against Grantee in Deed Conveying Life Estate.** Where a grantor intends to convey the fee but the deed by its terms gives only a life estate, and the grantee with the grantor's knowledge and without objection on his part takes actual possession of the land, believing that he has acquired the fee, and occupies it continuously for the statutory period under claim of right and title known to the grantor, there is such adverse possession as will ripen into title.[23]

[§ 256] **3. By Grantee against Grantor in Deed Containing Exceptions or Reservations—a. Reservation of Part of Tract of Land.** The grantee, by accepting a deed containing an exception of certain lands previously sold and conveyed to another and then entering into the possession of the land thus excepted, will be deemed in law to have entered in subserviency to the title of the grantee of the excepted land and to continue to hold in subserviency thereto unless he can establish the contrary by some unequivocal act or claim of title in himself;[24] but a possession of the land reserved, with an open and notorious claim of title, will be adverse.[25]

[§ 257] **b. Reservation of Right of Possession or Right of Way.** The mere occupancy of a grantor in a deed reserving the right of possession is not adverse to his grantee,[26] and possession of the grantor after making a conveyance with a verbal agreement that he was to hold possession of the land during his life is not adverse to the grantee.[27]

[§ 258] **c. Reservation of Minerals.** Where the deed conveying land reserves the underlying minerals therein occupancy of the surface is not adverse as to the minerals,[28] since such occupancy is entirely consistent with the right of another to mine under the soil.[29] In order to make such holding adverse there must be some denial of the right of the owner of the minerals or some assertion of a claim inconsistent with his right.[30]

[§ 259] **d. Reservation of Timber.** Where, before a grantee of real estate acquires title, a purchaser of the timber thereon holds the timber under deeds recorded within the grantee's chain of title, mere possession by the grantee is not sufficient to bar the right of the purchaser of the timber as the grantee's holding, in the absence of a contrary showing, is in subordination to the purchaser's right to the timber and is consistent therewith.[31] So it has been held that, where a grantor of farm land reserves the standing timber on a part of it and a right of way to and from the same, the fact that his grantee of an adjoining farm going into possession under a deed assuming to convey the right to take the wood and timber from the first mentioned

22. Garst v. Brutsche, 129 Iowa 501, 105 NW 452; Collins v. Colleran, 86 Minn. 199, 90 NW 364. See also Union Canal Co. v. Young, 1 Whart. (Pa.) 410, 30 AmD 212 (a case in which it did not appear definitely whether the grantor remaining in possession was assessed for the whole tract. It was held that the fact that he remained in possession using the whole tract as before and paying taxes on the whole did not show a claim of ownership in himself).

23. Breland v. O'Neal, 88 Miss. 449, 40 S 865.

24. Rosseel v. Wickham, 36 Barb. (N. Y.) 386.

[a] **Illustrations.**—(1) Where a tract of land was excepted from a conveyance, its inclosure by one holding under the grantee in the conveyance and the use thereof for fifteen years as a hog lot would not give title by adverse possession in the absence of a claim of right to such user. Sowles v. Minot, 82 Vt. 344, 73 A 1025. (2) Where a grantor of lands adjoining a lake reserves the "right or use of the land . . . over which the waters may flow now or hereafter," possession by the grantee and use of the land for pasturing, when the waters are low, are not hostile and adverse to the grantor's right to the use of the land when overflowed. Swan v. Goff, 39 App. Div. 95, 56 NYS 690.

25. McKinney v. Lanning, 139 Ind. 170, 38 NE 601.

26. Ill.—Stevens v. Wait, 112 Ill. 544.

Ind.—Chicago, etc., R. Co. v. Wood, 30 Ind. A. 650, 66 NE 923 (reservation, in deed of railway right of way, of right of cultivation).

Iowa.—Beechley v. Beechley, 134 Iowa 75, 108 NW 762, 120 AmSR 412, 9 LRANS 955, 13 AnnCas 101. See also Mosle v. Kuhlman, 40 Iowa 108.

La.—Hood v. Segrest, 12 Rob. 210.

Mass.—Atkins v. Bordman, 20 Pick. 291.

N. C.—Ladd v. Byrd, 113 N. C. 466, 18 SE 666; Turner v. Williams, 108 N. C. 210, 12 SE 989.

Pa.—Lulay v. Barnes, 172 Pa. 331, 34 A 52; Kingsley v. Hillside Coal, etc., Co., 144 Pa. 613, 23 A 250; Armstrong v. Caldwell, 53 Pa. 284; Caldwell v. Copeland, 37 Pa. 427, 78 AmD 436; McCracken v. Roberts, 19 Pa. 390.

Va.—King v. Norfolk, etc., R. Co., 90 Va. 210, 17 SE 868.

[a] **Applications of rule generally.**—(1) It has been so held in case of a deed reserving a homestead (Stevens v. Wait, 112 Ill. 544), (2) and a deed of a railroad right of way reserving the right of cultivation (Chicago, etc., R. Co. v. Wood, 30 Ind. A. 650, 66 NE 923), (3) and where under a deed of land reserving to the grantor the right to manage the land and make such changes or improvements on the buildings as he chose, but not to deprive the grantee of a home, the grantor remained on the land putting up buildings and collecting rents, a portion of which he paid to the grantee who also resided on the premises, his possession was held to be not adverse to the grantee. Turner v. Williams, 108 N. C. 210, 12 SE 989.

[b] **Where the grantor of land reserves a life estate** and marries after the conveyance, his subsequent possession and improvement of the land do not constitute a possession adverse to his grantee or establish a trust for the benefit of his wife. Beechley v. Beechley, 134 Iowa 75, 108 NW 762, 120 AmSR 412, 9 LRANS 955, 13 AnnCas 101.

[c] **Reservation of right of way.**—The owner of two adjoining messuages fronting on a street on the east conveyed the southerly of the two, in 1703, by a deed in which he reserved free liberty of ingress and egress through a gate and passageway about five feet wide, leading from the street into the yard of the said messuage, for the purpose of carrying wood or other material in case such carrying did not annoy or injure the grantee or his heirs or assigns. It was held that, although the owner of the northerly messuage had enjoyed the passageway for a period sufficient to gain a prescriptive title, such use having been consonant with the deed, the easement would be deemed to have been under, and not adverse to, the reservation. Atkins v. Bordman, 20 Pick. (Mass.) 291.

27. Carpenter v. Carpenter, 8 Bush (Ky.) 283.

28. Scadden Flat Gold-Min. Co. v. Scadden, 121 Cal. 33, 53 P 440; Manning v. Kansas, etc., Coal Co., 181 Mo. 359, 81 SW 140; Murray v. Allred, 100 Tenn. 100, 43 SW 355, 66 AmSR 740, 39 LRA 249; Farquharson v. Barnard Oil, etc., Co., 22 Ont. L. 319, 2 OntWN 276, 17 OntWR 523; Dodge v. Smith, 3 Ont. L. 305, 1 OntWR 46. And see Louisville, etc., R. Co. v. Massey, 136 Ala. 156, 159, 33 S 896, 96 AmSR 17 (holding that where defendant took possession of land under a contract with a third person which expressly reserved the mineral interests and, although he testified that he at one time told the agent of the third person that he repudiated the contract, afterward made a payment under it, had it recorded, etc., he could not acquire title by adverse possession to the entire land, including the mineral interests, as against the real owner. "His possession of the land being under a claim which did not embrace the minerals was not adverse to the true owner as to the minerals").

[a] **Against grantee of minerals.**—The possession of the land by one under a conveyance which excepts a prior grant of the underlying coal to a third person is not hostile to the title of the grantee of the coal. Kingsley v. Hillside Coal, etc., Co., 144 Pa. 613, 23 A 250.

29. Murray v. Allred, 100 Tenn. 100, 43 SW 355, 66 AmSR 740, 39 LRA 249.

30. Murray v. Allred, 100 Tenn. 100, 43 SW 355, 66 AmSR 740, 39 LRA 249.

[a] **Acts insufficient to constitute adverse holding.**—Where a grantor conveyed land containing limestone ledges, reserving from the grant the minerals in the granted premises and the right to enter to dig and carry away the same, the grantor's heirs were not deprived of their title to the minerals by the fact that the grantees had been in possession for a period sufficient to acquire title by adverse possession and occasionally burnt a little of the lime deposits on the premises. "There has been nothing like an open, notorious, continuous possession of the mines and minerals hostile to the rights of the true owners." Brady v. Smith, 88 App. Div. 427, 432, 84 NYS 1119 [rev on other grounds 181 N. Y. 178, 73 NE 963, 106 AmSR 531, 2 AnnCas 636].

31. Collins v. Bluff City Lumber Co., 86 Ark. 202, 110 SW 806.

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farm resides on his own land for the statutory period, testifying that during all that time he took wood and timber from the "reservation," so-called, on the first farm whenever he desired, with the knowledge of the owners thereof, is not sufficient to vest in him title to either the land or timber thereon.[32]

[§ 260] **4. By Grantee in Absolute Deed against Grantor.** Where the purchaser is in possession under a deed purporting to convey an absolute title to the land he will be considered as holding adversely to the grantor.[33] The rule has been held to apply, although the land conveyed is homestead property,[34] and it is not essential that the conveyance should have been a valid one,[35] and a reservation in a grant in fee of a small quitrent does not prevent the grantee from claiming title against the world.[36] If, however, the grantee sues and recovers back his purchase money because of a want of title in the grantor, he cannot set up adverse possession based on his purchase against the holder of the true title,[37] and where the purchaser of a tract of land, through mistake or fraud, enters upon another tract of the same grantor the entry is under a claim of title assumed to have been derived from the grantor and is in subordination to the grantor's title.[38] It has also been held that where the contract of purchase of land is fraudulent and voidable by the judgment creditors of the vendor the possession of the land by the purchaser is not adverse to the vendor but in trust for him.[39]

[§ 261] **5. By Grantee in Conditional Deed against Grantor.** The possession of a grantee of land conveyed on condition is generally considered in subordination to the right of the grantor to enter for condition broken until some act is done which is tantamount to a disavowal of his obligation to perform the condition.[40]

[§ 262] **6. By Grantees of Common Grantor against Each Other.** Where a grantor while in possession executes a second conveyance of the premises, the possession of the second grantee will not be presumed to be adverse to the first grantee without proof of ouster or of some unequivocal act amounting to an open denial of his title.[41] If, however, the second grantee enters and holds the land at the time thought sufficient to pass both the legal and equitable title to the premises, the possession so taken and maintained will be held to have been adverse to the vendor, although it should thereafter appear that the writings under which the possession was taken did not amount to the transfer of title but was in law only a mortgage. Fountain v. Lewiston Nat. Bank, 11 Ida. 451, 83 P 505.

32. Decker v. Hunt, 111 App. Div. 821, 98 NYS 174.

33. U. S.—Society for Propagation of Gospel v. Pawlet, 4 Pet. 480, 7 L. ed. 927; Schlawig v. Purslow, 59 Fed. 848, 8 CCA 315; Stansbury v. Taggart, 22 F. Cas. No. 13,292, 3 McLean 457.

Ala.—Perry v. Lawson, 112 Ala. 480, 20 S 611; Cooper v. Watson, 73 Ala. 252.

Cal.—Robinson v. Thornton, 102 Cal. 675, 34 P 120; Mulford v. LeFranc, 26 Cal. 88.

Conn.—Spencer v. Howe, 26 Conn. 200 (stranger to deed entering under reservation in his favor deemed to hold adversely); Price v. Lyon, 14 Conn. 279; South School Dist. v. Blakeslee, 13 Conn. 227; Griswold v. Butler, 3 Conn. 227.

Ga.—Pace v. Payne, 73 Ga. 670.

Ida.—Fountain v. Lewiston Nat. Bank, 11 Ida. 451, 83 P 505.

Ill.—Grand Tower Min., etc., Co. v. Gill, 111 Ill. 541.

Ky.—Hatfield v. Hatfield, 113 SW 59; Sutton v. Pollard, 96 Ky. 640, 29 SW 637; Brown v. Swango, 28 SW 156, 16 KyL 381; Ray v. Thurman, 15 SW 1116, 13 KyL 3; Medlock v. Suter, 80 Ky. 101; Gossom v. Donaldson, 18 B. Mon. 230, 68 AmD 723; Ring v. Gray, 6 B. Mon. 368; Lyne v. Commonwealth Bank, 5 J. J. Marsh. 571; Hoy v. Shawhon, 3 Litt. 134; Moore v. Farrow, 3 A. K. Marsh. 41; Voorhies v. White, 2 A. K. Marsh. 26.

Me.—Gookin v. Whittier, 4 Me. 16.

Md.—Zion Church v. Hilken, 84 Md. 170, 35 A 9; Gump v. Siley, 79 Md. 165, 28 A 977.

Mass.—Wishart v. McKnight, 184 Mass. 283, 68 NE 237.

Mich.—Schafer v. Hauser, 111 Mich. 622, 70 NW 136, 66 AmSR 403, 35 LRA 835; Michigan Land, etc., Co. v. Thoney, 89 Mich. 226, 50 NW 845; Hyne v. Osborn, 62 Mich. 235, 28 NW 821; Case v. Green, 53 Mich. 615, 19 NW 554.

Mo.—Hannibal, etc., R. Co. v. Miller, 115 Mo. 158, 21 SW 915; Mattison v. Ausmuss, 50 Mo. 551; Macklot v. Dubreuil, 9 Mo. 477, 43 AmD 550. See Norcum v. Gaty, 19 Mo. 65.

N. Y.—Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134; Peo. v. Trinity Church, 22 N. Y. 44; Abrams v. Rhoner, 44 Hun 507; Corwin v. Corwin, 9 Barb. 219 [rev on other grounds 6 N. Y. 342, 57 AmD 453]; Averill v. Wilson, 4 Barb. 180; Osterhout v. Shoemaker, 3 Hill 513; Jackson v. Newton, 18 Johns. 355; Bogardus v. Trinity Church, 4 Sandf. Ch. 633.

Tex.—De la Vega v. Butler, 47 Tex. 529; Nichols v. Philgraim, 20 Tex. 426; Thompson v. Thompson, 12 Tex. 327; Mexia v. Lewis, 3 Tex. Civ. A. 113, 21 SW 1016. See also Eskridge v. Patterson, 78 Tex. 417, 14 SW 1000.

Va.—Nowlin v. Reynolds, 25 Gratt. (66 Va.) 137; Clarke v. McClure, 10 Gratt. (51 Va.) 305.

W. Va.—Waldron v. Harvey, 54 W. Va. 608, 46 SE 603, 102 AmSR 959; Ketchum v. Spurlock, 34 W. Va. 597, 12 SE 832; Parkersburg Nat. Bank v. Neal, 28 W. Va. 744; Core v. Faupel, 24 W. Va. 238.

Wis.—Roberts v. Decker, 120 Wis. 102, 97 NW 519.

Can.—McVity v. Tranouth, 36 Can. S. C. 455.

Compare Eichelberger v. Gitt, 104 Pa. 64; McGregor v. McGregor, 27 Grant Ch. (U. C.) 470.

[a] **Possession under deed executed by one cotenant.**—The possession which one takes under a deed of part of the owners, purporting to convey all the property, warranting against all claims, and guaranteeing the title against infants whose conveyance, on their attaining their majority, the grantors undertake to get is adverse and not as a joint tenant. Wise v. Wolf, 120 Ky. 263, 85 SW 1191, 27 KyL 610; Pope v. Brassfield, 110 Ky. 128, 61 SW 5, 22 KyL 1613.

[b] **Undisclosed outstanding leases.**—A person who takes a warranty deed and relies on the record title, not knowing of an outstanding life lease in the grantor, may hold adversely as against such grantor. Case v. Green, 53 Mich. 615, 19 NW 554.

[c] **Delay in giving deed.**—If one agrees to buy and another to sell land, and no consideration is paid or deed given, and the buyer enters into possession, the fair inference is that the entry and possession are not adverse and a disseizin but are by consent of the owner and in subordination to his title until payment is made and a deed given. But if, on such agreement, the consideration is paid and the owner consents that the buyer may own and hold the land as his own, and the delay in giving a deed is by accident or mistake or because a deed cannot be immediately procured, and the owner agrees to give a deed without further consideration or condition, and the buyer thereupon enters into possession, such entry and possession are not to be deemed subordinate to the title of the owner, but as adverse and a disseizin. Brown v. King, 5 Metc. (Mass.) 173.

[d] **Possession under mortgage considered by both parties to be absolute conveyance.**—Where the full purchase price agreed upon was at the time paid, and the purchaser took possession under written instruments which both the vendor and the vendee

34. Donnelly v. Tregaskis, 154 Cal. 261, 97 P 421.

35. See cases infra this note.

[a] **Deed of married woman in which husband did not join.**—Perry v. Lawson, 112 Ala. 480, 20 S 611; Updegrove v. Blum, 117 Pa. 259, 10 A 785.

[b] **Deed of person non compos mentis.**—Ellington v. Ellington, 103 N. C. 54, 9 SE 208; Doe v. Teal, 7 U. C. Q. B. 370.

[c] **Deed executed by agent without authority.**—Godsey v. Standifer, 101 SW 921, 31 KyL 44.

36. Peo. v. Trinity Church, 22 N. Y. 44. Compare Tyler v. Heidorn, 46 Barb. (N. Y.) 439 (where it was held that where land was conveyed in 1794 in fee, reserving a perpetual yearly rent to the grantor and his heirs and assigns, which the grantee, for himself and his heirs and assigns, covenanted to pay, the possession of the grantee's assigns who claimed under the conveyance was not adverse to that of the grantor's assignees).

37. Davenport v. Sebring, 52 Iowa 364, 3 NW 403.

38. Farish v. Coon, 40 Cal. 33.

39. Daniel v. McHenry, 4 Bush (Ky.) 277. Compare Bobb v. Woodward, 50 Mo. 95 (holding that possession of a grantee in fraud of creditors of the grantor is deemed adverse to the grantor where it is sought to make him a trustee against his will).

40. Union Pac. R. Co. v. Cook, 98 Fed. 281, 39 CCA 86.

[a] **Deed retaining vendor's lien.**—Where husband and wife conveyed land and retained a vendor's lien to secure purchase-money notes, the vendee did not hold adversely to the wife, although the deed as to her was void because defectively acknowledged. Vanderwolk v. Matthael, (Tex. Civ. A.) 167 SW 304.

41. U. S.—Dredge v. Forsyth, 2 Black 563, 17 L. ed. 253; Gregg v. Forsyth, 24 How. 179, 16 L. ed. 731.

Ill.—Cook v. Norton, 48 Ill. 20.

Ind.—Jeffersonville, etc., R. Co. v. Oyler, 82 Ind. 394.

Mass.—Barker v. Barrows, 138 Mass. 578.

Mich.—Matthews v. Lake Shore,

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for the statutory period, claiming title in himself, the rights of the prior grantee are barred.[42] Where by mutual mistake the deed does not include the land intended by both grantor and grantee to be conveyed, but the grantee occupies the property to the line pointed out by his grantor for the statutory period, he acquires title up to the line as against a subsequent purchaser from the same grantor of the adjoining tract.[43]

[§ 263] **7. By Grantees in Conditional Deeds against Each Other.** Where different persons claim the same premises under conflicting grants from the same source. each grant being on condition that the grantee is the true owner of the adjacent lands, possession under such grant by one who is not the true owner of the adjacent land cannot be deemed adverse so as to ripen into title against the owner.[44]

[§ 264] **8. By Grantee in Absolute Deed against Third Person—a. In General.** In general the possession of the grantee in an absolute deed is adverse not only to the grantor but also to all persons whomsoever.[45]

[§ 265] **b. By Grantee against Creditors of Grantor.** It has been held that, although a conveyance be in fraud of creditors, the grantee therein may nevertheless acquire title by adverse possession.[46] Nevertheless the statute does not commence to run in favor of the grantee as against creditors of the grantor until they discover the facts constituting the fraud,[47] nor can a possession not brought home to the notice of the creditors be adverse to them.[48] It has also been held that the possession of the grantee cannot in any event be considered adverse to the grantor's creditors before they have acquired a right of entry by levy of execution on the land under a judgment procured against the grantor.[49]

[§ 266] **9. By Parties to Exchange of Lands against Each Other.** Where two parties exchange real estate and enter into possession under a bona fide claim of ownership, such possession is adverse each to the other, and, if maintained for the requisite period, with all the legal elements of adverse possession, title thereto will vest in each bargainor.[50] The rule applies to verbal as well as to written exchanges;[51] but a verbal agreement between parties to an exchange of land, each being immediately put in possession of the lands exchanged, to wait five years before executing deeds each to the other will not preclude a subsequent grantee of one of the parties, in good faith and without knowledge of such verbal agreement, from successfully pleading the statute of limitations in an action of ejectment by the original owner of the land, provided the possession of such grantee was peaceable, uninterrupted, continuous, under claim of

etc., R. Co., 110 Mich. 170, 67 NW 1111, 64 AmSR 336; Reilly v. Blaser, 61 Mich. 399, 28 NW 151.

Mo.—Wilcoxon v. Osborn, 77 Mo. 621.

N. C.—Reynolds v. Cathens, 50 N. C. 437.

Vt.—Seymour v. Hubbard, 62 Vt. 213, 19 A 716.

Wis.—Riha v. Pelnar, 86 Wis. 408, 57 NW 51; Schwallback v. Chicago, etc., R. Co., 69 Wis. 292, 34 NW 128, 2 AmSR 740, 73 Wis. 137, 40 NW 579.

See Flesher v. Callahan, 32 Okl. 283, 122 P 489.

Compare Smith v. Osage, 80 Iowa 84, 45 NW 404, 8 LRA 632 (where it was held that where a conveyance of land was not acknowledged and the grantor, having remained in possession for several years, executed a new deed in proper form to another and gave him possession he held adversely to the title of the first grantee).

[a] **Acquiescence of prior grantee in second conveyance.**—While, strictly speaking, a grantor who has conveyed all his interest in lands cannot make a second grant, yet for many practical purposes he may do so, as where a grantee encourages and acquiesces in a second grant, by his grantor, under which the second purchaser takes possession and holds adversely to the former grant, in which case his grant will ripen into title. Burkhalter v. Edwards, 16 Ga. 593, 60 AmD 744.

[b] **Vendee in executory contract of purchase.**—(1) The possession of the vendee in an executory contract of purchase is not adverse to one to whom his grantor has previously conveyed the premises (Fite v. Doe, 1 Blackf. (Ind.) 127), (2) and the subsequent execution of a deed to such purchaser does not by relation back render his prior possession adverse (Fite v. Doe, supra).

42. Reynolds v. Cathens, 50 N. C. 437.

43. Lougee v. Shuhart, 127 Iowa 173, 174, 102 NW 1125 (where it was said: "This is not . . . a case coming within the rule of those precedents which hold that title by adverse possession cannot be based upon a mere mistake as to the location of a boundary line. Here there is no mistake as to the line to which Mrs. O'Dell attempted to convey, but the mistake was in describing the land which both parties supposed to be included in the deed. That all parties concerned supposed and believed the deed conveyed all the land covered by the house is clear beyond reasonable doubt. For more than ten years they have acted in strict harmony with that understanding, and it would be grossly inequitable to permit the grantor or a subsequent purchaser of the adjoining tract to now reap any advantage from the mistake."

44. Towle v. Tolan, 24 N. Y. Super. 473; Towle v. Palmer, 24 N. Y. Super. 437, 1 AbbPrNS 81.

45. U. S.—Croxall v. Sherrerd, 5 Wall. 268, 18 L. ed. 572; Jackson v. Huntington, 5 Pet. 402, 8 L. ed. 170.

Ala.—Woodstock Iron Co. v. Roberts, 87 Ala. 436, 6 S 349.

Cal.—Andrus v. Smith, 133 Cal. 78, 65 P 320.

Iowa.—Bacon v. Chase, 83 Iowa 521, 50 NW 23; Smith v. Osage, 80 Iowa 84, 45 NW 404, 8 LRA 633.

Ky.—Call v. Phelps, 45 SW 1051, 20 KyL 507; Gossom v. Donaldson, 18 B. Mon. 230, 68 AmD 723; Stith v. Jones, 4 B. Mon. 375; Thompson v. Peebles, 6 Dana 387.

La.—Jordan v. Richards, 114 La. 329, 38 S 206.

Me.—French v. Rollins, 21 Me. 372; Otis v. Moulton, 20 Me. 205.

Md.—Wickes v. Wickes, 98 Md. 307, 56 A 1017.

Mass.—Bellis v. Bellis, 122 Mass. 414; Milton v. First Cong. Parish, 10 Pick. 447; Warren v. Childs, 11 Mass. 222; Higbee v. Rice, 5 Mass. 344, 4 AmD 63; Tappan v. Young, 3 Dane Abr. 368.

Mich.—Lasley v. Kniskern, 152 Mich. 244, 115 NW 971; Reilly v. Blaser, 61 Mich. 399, 28 NW 151.

Miss.—Nelson v. Ratliff, 72 Miss. 656, 18 S 487.

Mo.—Sell v. McAnaw, 138 Mo. 267, 39 SW 779.

Nebr.—McKesson v. Hawley, 22 Nebr. 692, 35 NW 883.

N. Y.—De St. Laurent v. Gescheidt, 18 App. Div. 121, 45 NYS 730; Davis v. Burroughs, 5 Silv. Sup. 422, 8 NYS 379; Jackson v. Thomas, 16 Johns. 292; Jackson v. Smith, 13 Johns. 406.

N. D.—Brynjolfson v. Dagner, 15 N. D. 332, 109 NW 320, 125 AmSR 595.

Va.—Nowlin v. Reynolds, 25 Gratt. (66 Va.) 137.

Wash.—Schlarb v. Castaing, 50 Wash. 331, 97 P 289.

Wis.—Sydnor v. Palmer, 29 Wis. 226.

46. Reeves v. Dougherty, 7 Yerg. (Tenn.) 222, 27 AmD 496; Porter v. Cocke, Peck (Tenn.) 28; Reynolds v. Lansford, 16 Tex. 286. See also B. C. Evans Co. v. Guipel, (Tex. Civ. A.) 35 SW 940 (where it was held that where, after the recording of a fraudulent deed by a husband to his wife, the husband occupied the land for her and as her separate estate and paid taxes thereon the wife's possession was adverse to the rights of his creditors, within the three-year statute of limitations of Texas requiring suit to recover land against persons in possession under title or color of title to be instituted within three years after the cause of action shall have accrued, and defining title as a regular chain of transfer from or under the sovereignty of the soil down to such person under possession). But see Dobson v. Erwin, 20 N. C. 201.

47. Farear v. Bernheim, 74 Fed. 435, 20 CCA 496; Garvin v. Garvin, 40 S. C. 435, 19 SE 79; Hart v. Bates, 17 S. C. 35. And see Richardson v. Mounce, 19 S. C. 477; Beattie v. Pool, 13 S. C. 379.

48. Belt v. Raguet, 27 Tex. 471. See also Suber v. Chandler, 36 S. C. 344, 15 SE 426.

49. Beach v. Catlin, 4 Day (Conn.) 284, 4 AmD 221; McBee v. Bearden, 7 Lea (Tenn.) 731; Martel v. Somers, 26 Tex. 551. See also Reynolds v. Lansford, 16 Tex. 286 (dictum). Compare Yatco v. Gana, 13 Philippine 305.

50. Ala.—Wilkinson v. Bottoms, 174 Ala. 122, 56 S 948; Tennessee Coal, etc., Co. v. Linn, 123 Ala. 112, 26 S 245, 82 AmSR 108; Inglis v. Webb, 117 Ala. 387, 23 S 125; Alexander v. Wheeler, 78 Ala. 167.

Hawaii.—Ikalia v. Kopaea, 4 Hawaii 198.

Ky.—Chiles v. Boothe, 3 Dana 566.

Me.—Martin v. Maine Cent. R. Co., 83 Me. 100, 21 A 740.

Pa.—Jermyn v. McClure, 195 Pa. 245, 45 A 938; Brown v. Bailey, 159 Pa. 121, 28 A 245; Mass v. Culver, 64 Pa. 414, 3 AmR 601.

Wis.—Bartlett v. Secor, 56 Wis. 520, 14 NW 714.

N. S.—Forsyth v. Griffin, 2 N. S. 241.

51. Quigg v. Zengin, 82 Conn. 437, 74 A 753.

right, and known to plaintiff.[52]

[§ 267] **10. By Donee against Donor.** A donee who holds possession of land claiming title under a deed of gift for the statutory period acquires title by adverse possession;[53] but if one enters upon land by the owner's permission, expecting merely that the owner will give it to him, such permission and entry under it will not constitute a hostile holding,[54] without notice to the owner of an adverse holding.[55] His possession is that of a tenant at will until there has been such adverse possession by him as, if continued for the statutory period, will work a divestiture of the donor's title.[56] So possession under a parol gift without claim of right by the donee cannot be considered adverse.[57] However, the fact that the donee cannot acquire the title by adverse possession against the donor does not in any way affect the right of a third person to so acquire the land donated.[58] Possession of land by a donee under a mere parol gift, accompanied with a claim of right, is adverse as against the donor, and if continued without interruption for the statutory period is protected by the statute of limitations and matures into a good title.[59] The

52. Snow v. Rich, 22 Utah 123, 61 P 336 (where it was further said that even though she knew of the agreement she could under these circumstances acquire title by adverse possession).

53. Carmody v. Chicago, etc., R. Co., 111 Ill. 69; Murphy v. Newingham, 151 Ky. 360, 151 SW 930; Monroe Water Supply Co. v. Starner, 242 Pa. 18, 88 A 782. See also Albright v. Albright, 153 Iowa 397, 133 NW 737.

54. McClenahan v. Stevenson, 118 Iowa 106, 91 NW 925; Murphy v. Newingham, 151 Ky. 360, 151 SW 930; Com. v. Gibson, 85 Ky. 666, 4 SW 453, 9 KyL 205; Chamberlain v. McKinney, 6 KyL 365.

55. Robinson v. Huffman, (Ky.) 113 SW 458.

56. Gillespie v. Gillespie, 149 Ala. 184, 43 S 12.

57. Potts v. Coleman 67 Ala. 221; Comins v. Comins, 21 Conn. 413. See also Collins v. Johnson, 57 Ala. 304 (where it was held that to convert the possession by a donee under a parol gift into an adverse possession within the statute of limitations there must have been, for the period prescribed, an absence of recognition of the title of the donor). And see Doe v. Murray, 15 N. B. 375 (where it was held that where one person gives a bond to another by parol and puts him in possession the donee is in under the donor and, as the title does not pass by such a gift, the donee is in possession simply by permission of the donor, and consequently, in contemplation of law, is a tenant at will, the possession of the donee being that of the donor). Compare Page v. Gaskill 84 N. J. L. 615, 87 A 460 (possession of donee's husband becomes adverse upon her death).

[a] **Thus** assessment to and payment by the donor of taxes on the alleged subject of the gift for a period of nearly twenty years is, when unexplained, inconsistent with a possession by a donee that may ripen into a fee estate, and such acquiescence in the annual proclamation by a donor of his title is a fact of strong probative force that the donee's possession was in subordination to the title and in recognition of it. Gillespie v. Gillespie, 149 Ala. 184, 43 S 12.

[b] **Where a child enters into the possession of land under a parol gift from his father** his possession, however long continued, does not become adverse until asserted so notoriously as to raise the presumption of notice to his father. Boykin v. Smith, 65 Ala. 294.

[c] **Occupancy under parol agreement to convey.**—Where a mother and her illegitimate children reside upon different parts of the same tract of land, the latter under a parol agreement of a conveyance from their mother subject to a life estate in her, their respective possessions are consistent with her title and, however long continued, no presumption of a deed arises from them. Matthews v. Smith, 19 N. C. 287.

58. Jenkins v. Svarva, 131 La. 749, 752, 60 S 232 (where it was said: "If the donor stands by, silent and inactive, and permits a third person to take and hold adverse possession of the property, he, like any other owner, takes the chances of such adverse possession ripening into a legal title. The nullity of the donation does not prevent a third person from acquiring the property by the prescription of 30 years based on adverse possession alone, nor does it prevent a third person from acquiring the property by the prescription of ten years, based on a title translative of property, and on adverse possession. In neither case does the validity of the title of the possessor depend on the validity of the donation").

59. Ala.—Lee v. Thompson, 99 Ala. 95, 11 S 672; Gafford v. Strauss, 89 Ala. 282, 7 S 248, 18 AmSR 111, 7 LRA 568; Vandiveer v. Stickney, 75 Ala. 225; Boykin v. Smith, 65 Ala. 294; Collins v. Johnson, 57 Ala. 304.

Ark.—Brown v. Norvell, 74 Ark. 484, 86 SW 306; Trotter v. Neal, 50 Ark. 340, 7 SW 384.

Cal.—Reed v. Smith, 125 Cal. 491, 58 P 139; Bakersfield Town Hall Assoc. v. Chester, 55 Cal. 93.

Conn.—New Haven Trust Co. v. Camp, 83 Conn. 360, 76 A 1100; New Haven Trust Co. v. Camp, 81 Conn. 539, 71 A 788; Bolton Southwest School Dist. v. Williams, 48 Conn. 504; Clark v. Gilbert, 39 Conn. 94; Comins v. Comins, 21 Conn. 413; South School Dist. v. Blakeslee, 13 Conn. 227.

Ga.—Studstill v. Willcox, 94 Ga. 690, 20 SE 120.

Hawaii.—Macfarlane v. Damon, 10 Hawaii 495.

Ill.—Stewart v. Duffy, 116 Ill. 47, 6 NE 424.

Ind.—Wilson v. Campbell, 119 Ind. 286, 21 NE 893.

Iowa.—Albright v. Albright, 153 Iowa 397, 133 NW 737; Quinn v. Quinn, 76 Iowa 565, 41 NW 316.

Ky.—Delano v. Air, 157 Ky. 369, 163 SW 216; Murphy v. Newingham, 151 Ky. 360, 151 SW 930; Murphy v. Roney, 82 SW 396, 26 KyL 634; Owsley v. Owsley, 117 Ky. 47, 77 SW 397, 25 KyL 1186; Gilbert v. Kelly, 57 SW 228, 22 KyL 353; Lynn v. Cannada, 49 SW 461, 20 KyL 1438; Thomson v. Thomson, 93 Ky. 435, 20 SW 373, 14 KyL 513; Spradlin v. Spradlin, 18 SW 14, 13 KyL 723; Ray v. Thurman, 15 SW 1116, 13 KyL 3; Com. v. Gibson, 85 Ky. 666, 4 SW 453, 9 KyL 205; Medlock v. Suter, 80 Ky. 101; Moore v. Webb, 2 B. Mon. 282; Lewis v. Lewis, 5 KyL 858. And see Robinson v. Huffman, 113 SW 458. Contra Woolfolk v. Overton, 3 Litt. 21.

Me.—Webster v. Holland, 58 Me. 168.

Mass.—Wheeler v. Laird, 147 Mass. 421, 18 NE 212; Duff v. Leary, 146 Mass. 533, 16 NE 417; Summer v. Stevens, 6 Metc. 337. See also Motte v. Alger, 15 Gray 322.

Mich.—Schafer v. Hauser, 111 Mich. 622, 70 NW 136, 66 AmSR 403, 35 LRA 835 and note; Potter v. Smith, 68 Mich. 212, 35 NW 916.

Minn.—In re St. Louis Register Title, 147 NW 655.

Miss.—Davis v. Davis, 68 Miss. 478, 10 S 70; Geohegan v. Marshall, 66 Miss. 676, 6 S 502; Niles v. Davis, 60 Miss. 750; Davis v. Bowmar, 55 Miss. 671.

Mo.—Allen v. Mansfield, 108 Mo. 343, 18 SW 901; Hargis v. Kansas City, etc., R. Co., 100 Mo. 210, 13 SW 680; St. Louis International Bank v. Fife, 95 Mo. 118, 8 SW 241; Rannels v. Rannels, 52 Mo. 108.

N. Y.—Jackson v. Moore, 13 Johns. 513, 7 AmD 398.

N. C.—Grimes v. Bryan, 149 N. C. 248, 63 SE 106.

Pa.—Williams v. Beam, 196 Pa. 341, 46 A 432; Moreland v. Moreland, 121 Pa. 573, 15 A 655; Campbell v. Braden, 96 Pa. 383; Kennedy v. Wible, 8 Pa. Cas. 299, 11 A 98.

S. C.—Harvey v. Harvey, 26 S. C. 608, 2 SE 3; Golson v. Hook, 35 S. C. L. 23; McElwee v. Martin, 20 S. C. L. 496; Sumner v. Murphy, 20 S. C. L. 488, 27 AmD 397; Hunter v. Parsons, 18 S. C. L. 59.

Tenn.—Jordan v. Ransom, 10 Lea 135; Haynes v. Jones, 2 Head 372.

Tex.—Thompson v. Thompson, 12 Tex. 327; Shepard v. Galveston, etc., R. Co., 2 Tex. Civ. A. 535, 22 SW 267.

Utah.—Raleigh v. Wells, 29 Utah 217, 81 P 908, 110 AmSR 689.

Vt.—Pope v. Henry, 24 Vt. 560.

Wis.—Bartlett v. Secor, 56 Wis. 520, 14 NW 714.

See also Clarke v. McClure, 10 Gratt. (51 Va.) 305; Western Canada Loan Co. v. Garrison, 16 Ont. 81.

[a] **Possession distinguished from that of holder under title bond.**—"While . . . one holding under a title bond does not hold adversely to his vendor to whom he looks for title, a different rule is applied in the case of a parol gift for the reason that the parol gift not being enforcible by law, the donor has a present right of action to recover the land; but the vendor who has given a title bond cannot maintain an action to recover the land from his vendee." Delano v. Air, 157 Ky. 369, 371, 163 SW 216.

[b] **Applications of rule.**—(1) Where a parol gift of land was made by a father-in-law to his son-in-law who entered, made valuable improvements upon, and continued in possession of it for more than seven years during the life of his father-in-law, claiming the land as his own, and then conveyed it to a purchaser for value, the legal representative of the father-in-law cannot, in an action brought more than thirty years after the gift, recover the land from one possessing under title derived from the son-in-law through successive vendees. Studstill v. Willcox, 94 Ga. 690, 20 SE 120. (2) Where a wife, who was abandoned by her husband, after a decree of divorce from him remained in open, notorious, adverse, and continuous possession of land under a parol gift from him at the time of the abandonment for more than twenty years, she acquired an absolute title. Ross v. McCain, 145 Mo. 271, 46 SW 955. (3) Complainants' ancestor in 1855 stated to defendant that if he and his wife would take care of such ancestor's mother, who was also the mother of defendant's wife, the land in controversy which such ancestor had inherited from his father should go to defendant. Defendant and his wife took care of the mother until she died in 1862. Defendant retained possession of the land thereafter and listed the same and paid taxes thereon in his own name since 1879. It was held that such facts justified a finding that defendant held the land adversely as against complainants. Dean v. Gupton, 136 N. C. 141, 48 SE 576. (4)

statute of frauds does not prevent one from entering and claiming under a parol gift and acquiring title by adverse possession.[60] That such a parol gift conveys no title and operates only as a mere tenancy at will capable of revocation or disaffirmance by the donor at any time before the bar is complete is immaterial; it is evidence of the beginning of an adverse possession by the donee which can be repelled only by showing a subsequent recognition of the donor's superior title,[61] or by the donor reclaiming or reasserting his title.[62] One entering upon land under an express unconditional gift or a parol purchase need not, in order to claim the property, openly assert his right thereto adversely or in a notorious way, provided he exercises ordinary acts of ownership, such as payment of taxes, etc.[62½]

[§ 268] **11. By Vendee in Executory Contract of Purchase against Vendor—a. Written Contracts or Bonds for Title—(1) Statement of Rule.** Where one enters into and holds possession of land under an executory contract of purchase[63] or bond

Where one moved on and improved land on the faith of a verbal gift and claimed to own one hundred and sixty acres of a larger tract claimed by the donor, the donor never having asserted any claim to the one hundred and sixty acres after the gift, the entry on the land was not by permission, but title could be acquired by adverse possession without notice of repudiation of a permissive possession and a claim under right. Lutcher v. Grant, (Tex. Civ. A.) 143 SW 1190.

[c] **Facts held not to bring case within rule.**—A plural wife who had lived for forty-six years on premises belonging to her husband did not acquire title by adverse possession based on a parol gift, where her residence was merely as a plural wife and her husband had himself exercised ownership and dominion over the property, paid the taxes, made and paid for improvements, made declarations consistent with ownership, agreed to lease a part of the property shortly prior to his death, and had devised the property by will, and she did not assert any legal claim to the property at the time of the distribution of her husband's estate but acquiesced in the terms of the will. In this case it was said: "Courts watch gifts, inter vivos with caution, especially where . . . their enforcement would result in an inequitable distribution of the decedent's property." Raleigh v. Wells, 29 Utah 217, 223, 81 P 908, 110 AmSR 689 (per Bartch, J.).

[d] **The fact that the donor remains on the land with the donee, disclaiming title in himself,** does not affect the operation of the rule. Owsley v. Owsley, 117 Ky. 47, 77 SW 397, 25 KyL 1186.

[e] **Effect of subsequently receiving deed.**—One who takes possession of land under a parol gift and begins to hold adversely may continue to be an adverse holder after subsequently receiving a deed, which is not conclusive evidence that he did not hold adversely. And if the deed was invalid because insufficiently attested the validating act validates the deed as against the grantor and all persons acquiring an interest under him with notice did not change the character of the holding and make it subservient to the deed. New Haven Trust Co. v. Camp, 83 Conn. 360, 76 A 1100.

[f] **The fact that there was no consideration for the gift** does not affect the operation of the rule. Murphy v. Roney, 82 SW 396, 26 KyL 634.

[g] **Materiality of understanding of donee.**—In determining the character of the possession of one claiming by gift the question is not so much what was intended by the donor as what was the donee's understanding, what he claimed and what he did, and if it be found that he believed the gift to be absolute and went into possession under that belief and held adversely for the statutory period the verdict must be for him. Moreland v. Moreland, 121 Pa. 573, 15 A 655.

[h] **Donee under parol gift for life.**—An open, exclusive, and uninterrupted possession of land for more than twenty years, taken, held, and claimed under a parol gift from plaintiff in ejectment for a life not yet terminated, is not such an adverse possession as will bar the action. Clarke v. McClure, 10 Gratt. (51 Va.) 305.

60. Davis v. Davis, 68 Miss. 478, 10 S 70.

61. Vandiveer v. Stickney, 75 Ala. 225.

62. Sumner v. Stevens, 6 Metc. (Mass.) 337.

62½. Tippenhauer v. Tippenhauer, 158 Ky. 639, 166 SW 225.

63. U. S.—Lucas v. Brooks, 18 Wall. 436, 21 L. ed. 779; Kirk v. Smith, 9 Wheat. 241, 6 L. ed. 81; Heermans v. Schmaltz, 7 Fed. 566, 10 Biss. 323; Stansbury v. Taggart, 22 F. Cas. No. 13,292, 3 McLean 457.

Ala.—Perry v. Lawson, 112 Ala. 480, 20 S 611; Beard v. Ryan, 78 Ala. 37; Potts v. Coleman, 67 Ala. 221; Toyloe v. Dugger, 66 Ala. 444; Russell v. Irwin, 38 Ala. 44; Ormond v. Martin, 37 Ala. 598; Seabury v. Doe, 22 Ala. 207, 58 AmD 254.

Cal.—Woodard v. Hennegan, 128 Cal. 293, 60 P 769; Kerns v. Dean, 77 Cal. 555, 19 P 817; Kerns v. McKean, 65 Cal. 411, 4 P 404; Hooper v. Young, 10 Cal. A. 590, 102 P 950.

Conn.—Harral v. Leverty, 50 Conn. 46, 47 AmR 608.

Del.—Lynch v. Cannon, 12 Del. 386, 32 A 391.

Fla.—Spratt v. Livingston, 32 Fla. 507, 14 S 160, 22 LRA 453; Petty v. Mays, 19 Fla. 652; Hart v. Bostwick, 14 Fla. 162.

Ga.—Brown v. Huey, 103 Ga. 448, 30 SE 429; Hawkins v. Dearing, 93 Ga. 108, 19 SE 717; Ford v. Holmes, 61 Ga. 419; Paxson v. Bailey, 17 Ga. 600; Stamper v. Griffin, 12 Ga. 450.

Ill.—Tilghman v. Little, 13 Ill. 239.

Ind.—Rucker v. Steelman, 97 Ind. 222; Clouse v. Elliott, 71 Ind. 302.

Kan.—Hughes v. Ridgeway, 86 Kan. 852, 122 P 871.

Ky.—Padgett v. Decker, 145 Ky. 227, 140 SW 152; New Domain Oil, etc., Co. v. Gaffney, 134 Ky. 792, 121 SW 699; Kirk v. Taylor, 8 B. Mon. 262; Chiles v. Jones, 4 Dana 479; Muldrow v. Muldrow, 2 Dana 386; Sprigg v. Albin, 6 J. J. Marsh. 158; Doe v. Million, 4 J. J. Marsh. 395; Hawkins v. Page, 4 T. B. Mon. 136; Hamilton v. Taylor, 1 Litt. Sel. Cas. 444; Grundy v. Jackson, 1 Litt. 11; Strother v. Cyrus, 5 KyL 58.

Md.—Dean v. Brown, 23 Md. 11, 87 AmD 555.

Mass.—Hilbourn v. Fogg, 99 Mass. 11; Brown v. King, 5 Metc. 173; Knox v. Hook, 12 Mass. 329.

Mich.—Rodgers v. Beckel, 172 Mich. 544, 138 NW 202; Jasper v. Martin, 161 Mich. 336, 126 NW 437, 137 AmSR 437; Burke v. Douglass, 115 Mich. 197, 73 NW 133; Wolf v. Holton, 92 Mich. 136, 52 NW 459.

Miss.—Moring v. Ables, 62 Miss. 263, 52 AmR 186; Benson v. Stewart, 30 Miss. 49; McClanahan v. Barrow, 27 Miss. 664.

Mo.—Hannibal, etc., R. Co. v. Miller, 115 Mo. 158, 21 SW 915; Adair v. Adair, 78 Mo. 630; Lockwood v. Hannibal, etc., R. Co., 65 Mo. 233; Ridgeway v. Holliday, 59 Mo. 444; Cole v. Roe, 39 Mo. 411; Ash v. Holder, 36 Mo. 163; Tibeau v. Tibeau, 19 Mo. 78, 59 AmD 329.

Mont.—Alderson v. Marshall, 7 Mont. 288, 16 P 576.

N. H.—Drew v. Towle, 30 N. H. 531, 64 AmD 309.

N. J.—Van Blarcom v. Kip, 26 N. J. L. 351; Appleby v. Obert, 16 N. J. L. 336.

N. M.—Bergere v. Chaves, 14 N. M. 352, 367, 93 P 762 [quot Cyc].

N. Y.—In re Dept. of Public Parks, 73 N. Y. 560; Fosgate v. Herkimer Mfg., etc., Co., 12 Barb. 352 [aff 12 N. Y. 580]; Griswold v. Little, 13 Misc. 281, 34 NYS 703; Jackson v. Spear, 7 Wend. 401; Jackson v. Walker, 7 Cow. 637; Jackson v. Camp, 1 Cow. 605; Jackson v. Foster, 12 Johns. 488; Jackson v. Harder, 4 Johns. 202, 4 AmD 262.

N. C.—Young v. Irwin, 3 N. C. 157.

Oh.—Woods v. Dille, 11 Oh. 455.

Okl.—Jennings v. Brown, 20 Okl. 294, 302, 94 P 557 [cit Cyc].

Or.—Stephenson v. Van Blokland, 60 Or. 247, 118 P 1026; Bayne v. Brown, 60 Or. 110, 118 P 282; Anderson v. McCormick, 18 Or. 301, 22 P 1062.

Pa.—Eichelberger v. Gitt, 104 Pa. 64; Jenkins v. McMichael, 17 Pa. Super. 476.

S. C.—Munro v. Jeter, 24 S. C. 29; Blackwell v. Ryan, 21 S. C. 112; Richardson v. Broughton, 11 S. C. L. 417; Gregorie v. Bulow, 9 S. C. Eq. 235; Richards v. McKie, 5 S. C. Eq. 184.

Tenn.—Knox v. Thomas, 5 Humphr. 572.

Tex.—McKelvain v. Allen, 58 Tex. 383; Howard v. McKenzie, 54 Tex. 171; Keys v Mason, 44 Tex. 140; Lander v. Rounsaville, 12 Tex. 195; Wichita Falls First Nat. Bank v. Zundelowitz, (Civ. A.) 168 SW 40; Glenn v. Rhine, 53 Tex. Civ. A. 291, 115 SW 91; Wilson v. Nugent, (Civ. A.) 91 S. W. 241; Runge v. Gilbough, (Civ. A.) 87 SW 832, 835 [quot Cyc as stating correct rule]; Shotwell v. McCardell, 19 Tex. Civ. A. 174, 47 SW 39.

Vt.—Robinson v. Sherwin, 36 Vt. 69; Ripley v. Yale, 18 Vt. 220; Hall v. Dewey, 10 Vt. 593; Greeno v. Munson, 9 Vt. 37, 31 AmD 605.

Va.—Alleghany County v. Parrish, 25 SE 882; Chapman v. Chapman, 91 Va. 397, 21 SE 813, 50 AmSR 846; Creekmur v. Creekmur, 75 Va. 430; Nowlin v. Reynolds, 25 Gratt. (66 Va.) 137; Clarke v. McClure, 10 Gratt. (51 Va.) 305.

W. Va.—State v. Harman, 57 W. Va. 447, 50 SE 828; Ketchum v. Spurlock, 34 W. Va. 597, 12 SE 832; Core v. Faupel, 24 W. Va. 238; Hudson v. Putney, 14 W. Va. 561.

Wis.—Furlong v. Garrett, 44 Wis. 111; Quinn v. Quinn, 27 Wis. 168; Miller v. Larson, 17 Wis. 624.

Eng.—Doe v. Caperton, 9 C. & P. 112, 38 ECL 76.

"As long as the vendee looks to his vendor for title, his possession is not adverse, and . . . he can not avail himself of possession under such a contract to prove his title." Creech v. Abner, 106 Ky. 239, 245, 50 SW 58, 20 KyL 1812 (per Guffy, J.).

[a] **Illustrations.**—(1) Defendant made an agreement to purchase certain lands of plaintiff and with plaintiff's permission entered into immediate possession, no deed being executed until two years later. In fact plaintiff had no authority to sell at the time. It was held that defendant's possession under the agreement to purchase was subordinate to plaintiff's title and did not become adverse until the date of the deed. Phelan v. Smith, 100 Cal. 158, 34 P 667. (2) The intestate and A verbally made an exchange of lands, whereby A was to have the demanded prem-

for title,[64] the entry and possession are in subordination to the vendor. In such case a privity exists which precludes the idea of a hostile, tortious possession, pending the completion of the contract, which could silently ripen into title by adverse possession under the statute of limitations.[65] Such possession retains its subordinate character until payment or performance of all conditions by the vendee[66] or until the vendor has distinctly and unequivocally repudiated the title of his vendor,[67] which repudiation is brought expressly or by legal implication to the vendor's knowledge,[68] or until

ises if he should pay the difference in value between them and the land for which they were exchanged. A went into possession of the premises under the contract and occupied them for more than fifteen years, claiming no title thereto except by virtue of the contract, and had them set to him in the list and paid the taxes thereon. A never paid the difference, and no deeds of the lands were ever executed, and finally A surrendered the premises to the intestate and retook possession of the land he let him have. It was held that A acquired no title to the premises by possession and that after such surrender he had no interest therein which could be taken on a debt existing before the surrender. Adams v. Fullam, 47 Vt. 558. (3) Plaintiff's decedent paid the purchase price for lands, took the title in his own name, and put defendant in possession under an agreement of sale whereby defendant was to have a certain time in which to pay the original price to plaintiff and was meanwhile to pay interest on such sum, but no taxes, and a bond for title was given. It was held that defendant, being in possession under a contract to purchase of plaintiff, could not assert title against him by adverse possession. Woodard v. Hennegan, 128 Cal. 293, 60 P 769.

[b] **Effect of acceptance of lease from stranger.**—One who holds land under a contract of purchase cannot, by accepting a lease from a stranger, convert his holding into an adverse possession as against his vendor, and if one so holding abandons the land and afterward reëntered under a lease from a stranger without having rescinded his contract and without any one having in the meantime taken possession, his reëntry will be held to relate back and continue the original possession and not to create a new and adverse possession. Pratt v. Canfield, 67 Mo. 50.

[c] **What is not an executory contract to purchase.**—The possession of one who has bought land on condition and paid for it on an agreement that a deed shall be made is adverse to the vendor. This is an executed contract of sale and not merely an agreement of purchase. Ridgeway v. Holliday 59 Mo. 444.

[d] **In Canada** a vendee is regarded as a tenant at will of the vendor, where no provision in the contract of sale is inserted entitling him to possession, and under the statute his possession is adverse after the first year of his possession. Jones v. Cleaveland, 16 U. C. Q. B. 9; Doe v. Henderson, 3 U. C. Q. B. 486. See also Doe v. Caperton, 9 C. & P. 112, 38 ECL 76.

64. U. S.—Lewis v. Hawkins, 23 Wall. 119, 23 L. ed. 113.
Ala.—McQueen v. Ivey, 36 Ala. 308; Sellers v. Hayes, 17 Ala. 749.
Ark.—Little Rock, etc., R. Co. v. Rankin, 107 Ark. 487, 156 SW 431; Dickson v. Sentell, 83 Ark. 385, 104 SW 148; Coldcleugh v. Johnson, 34 Ark. 312.
Cal.—Kilburn v. Ritchie, 2 Cal. 145, 56 AmD 326.
Colo.—Brownlee v. Williams, 32 Colo. 502, 77 P 250.
Ga.—Hawkins v. Dearing, 93 Ga. 108, 19 SE 717; Allen v. Napier, 75 Ga. 275; Paxson v. Bailey, 17 Ga. 600.
Ind.—Allen v. Smith, 6 Blackf. 527.
Ky.—Henderson v. Dupree, 82 Ky. 678; Fowke v. Darnall, 5 Litt. 316.
Me.—Gray v. Hutchins, 36 Me. 142.
N. M.—Bergere v. Chaves, 14 N. M. 352, 367, 93 P 762 [quot Cyc].
N. C.—Bradsher v. Hightower, 118 N. C. 399, 24 SE 120.
S. C.—Secrest v. McKenna, 27 S. C. Eq. 72.
Tenn.—Gudger v. Barnes, 4 Heisk. 570 [overr Ray v. Goodman, 1 Sneed 586].
Tex.—Smith v. Lee, 82 Tex. 124, 17 SW 598; Clark v. Adams, 80 Tex. 674, 16 SW 552.

[a] **Bond conditioned for conveyance before purchase money due.**—When a bond for title is conditioned for a conveyance at a certain time, which will arrive before the purchase money will be due, the possession of the vendee until such time is not deemed adverse. Ormond v. Martin, 37 Ala. 598.

[b] **Possession of interlock.**—The owner of land made a bond for a deed and afterward conveyed the land to plaintiff so as to take in part of the land included in the title bond. It was held that possession under the title bond of the interlock would not be adverse to the owner while holding the legal title but would be adverse to the owner's grantee from the date of the deed to him. King v. Thompson, 58 W. Va. 455, 52 SE 487.

[c] **An Iowa statute** provides that in cases where the vendor of real estate has given a bond or other writing to convey the same on payment of the purchase money, and such money or any part of it remains unpaid after the day fixed for payment, whether time is or is not of the essence of the contract, the vendor may file his petition asking the court to require the purchaser to perform his contract or to foreclose and sell his interest in the property. The vendee shall in such cases, for the purpose of the foreclosure, be treated as a mortgagor of the property purchased, and his rights may be foreclosed in a similar manner. Under this statute it has been held that possession of a vendee under bond or title is, contrary to the rule which obtains in most states, adverse to that of the vendor. Knudson v. Litchfield, 87 Iowa 111, 54 NW 199; Montgomery County v. Severson, 64 Iowa 326, 17 NW 197, 20 NW 458.

65. Johnson v. Peterson, 90 Minn. 503, 97 NW 384; Clarke v. McClure, 10 Gratt. (51 Va.) 305; Core v. Faupel, 24 W. Va. 238; Hudson v. Putney, 14 W. Va. 561.

66. U. S.—Stansbury v. Taggart, 22 F. Cas. No. 13,292, 3 McLean 457.
Ala.—Rankin v. Dean, 157 Ala. 490, 47 S 1015; Beard v. Ryan, 78 Ala. 37; McQueen v. Ivey, 36 Ala. 308; Seabury v. Doe, 22 Ala. 207, 58 AmD 254.
Del.—Lynch v. Cannon, 12 Del. 386, 32 A 391.
Fla.—Dannelly v. Russ, 54 Fla. 285, 45 S 496; Smith v. Klay, 47 Fla. 216, 36 S 54; Gamble v. Hamilton, 31 Fla. 401, 12 S 229; Hart v. Bostwick, 14 Fla. 162.
Ga.—Brown v. Huey, 103 Ga. 448, 30 SE 429; Hawkins v. Dearing, 93 Ga. 108, 19 SE 717; Parrott v. Baker, 82 Ga. 364, 9 SE 1068; Allen v. Napier, 75 Ga. 275; Hines v. Rutherford, 67 Ga. 606; Stamper v. Griffin, 20 Ga. 312, 65 AmD 628; Paxson v. Bailey, 17 Ga. 600.
Ill.—Alsup v. Stewart, 194 Ill. 595, 62 NE 795, 88 AmSR 169; Davis v. Howard, 172 Ill. 340, 50 NE 258.
Ind.—Rucker v. Steelman, 97 Ind. 222; Clouse v. Elliott, 71 Ind. 302; Cole v. Wright, 70 Ind. 179.
Mich.—Burke v. Douglass, 115 Mich. 197, 73 NW 133.
Minn.—Johnson v. Peterson, 90 Minn. 503, 97 NW 384.
Miss.—Benson v. Stewart, 30 Miss. 49.
Mo.—Long v. Kansas City Stock-Yards Co., 107 Mo. 298, 17 SW 656, 28 AmSR 413.
Nebr.—Lanham v. Bowlby, 86 Nebr. 148, 125 NW 149; Beer v. Dalton, 3 Nebr. (Unoff.) 694, 92 NW 593.
N. M.—Bergere v. Chaves, 14 N. M. 352, 367, 93 P 762 [aff 231 U. S. 482, 34 SCt 144, and quot Cyc].
N. Y.—Vrooman v. Shepherd, 14 Barb. 441; Griswold v. Little, 13 Misc. 281, 34 NYS 703; Jackson v. Camp, 1 Cow. 605.
Oh.—Woods v. Dille, 11 Oh. 455.
Pa.—Eichelberger v. Gitt, 104 Pa. 64.
S. C.—Blackwell v. Ryan, 21 S. C. 112; Milhouse v. Patrick, 40 S. C. L. 350; State Bank v. Smyers, 33 S. C. L. 24; Ellison v. Cathcart, 26 S. C. L. 5; Secrest v. McKenna, 27 S. C. Eq. 72.
Tenn.—Ray v. Goodman, 1 Sneed 586.
Tex.—Clark v. Adams, 80 Tex. 674, 16 SW 552; Roosevelt v. Davis, 49 Tex. 463; Lander v. Rounsaville, 12 Tex. 195; Wilson v. Nugent, (Civ. A.) 91 SW 241; Shotwell v. McCardell, 19 Tex. Civ. A. 174, 47 SW 39.
Vt.—Adams v. Fullam, 43 Vt. 592.
And see Litz v. Lowry, 69 W. Va. 181, 188, 71 SE 263 [cit Cyc].

[a] **Deed in escrow.**—Where a party placed a deed in escrow to be delivered whenever the grantee, a railroad company, should build a depot at a designated location, the platting of the land and the payment of taxes thereunder by the grantee did not entitle him to protection by adverse possession. Sioux City, etc., Town Lot, etc., Co. v. Wilson, 50 Iowa 422.

67. Ark.—Tillar v. Clayton, 76 Ark. 405, 88 SW 972; Williams v. Young, 71 Ark. 164, 71 SW 669; Whittington v. Flint, 43 Ark. 504, 51 AmR 572.
Cal.—Kerns v. Dean, 77 Cal. 555, 19 P 817; Kerns v. McKean, 65 Cal. 411, 4 P 404.
Conn.—Harral v. Leverty, 50 Conn. 46, 47 AmR 608.
Fla.—Spratt v. Livingston, 32 Fla. 507, 14 S 160, 22 LRA 453; Petty v. Mays, 19 Fla. 652.
Ga.—Williams v. Cash, 27 Ga. 507, 73 AmD 739.
Mich.—Burke v. Douglass, 115 Mich. 197, 73 NW 133.
Minn.—Johnson v. Peterson, 90 Minn. 503, 97 NW 384.
Mo.—Hannibal, etc., R. Co. v. Miller, 115 Mo. 158, 21 SW 915.
Nebr.—Lanham v. Bowlby, 86 Nebr. 148, 125 NW 149.
N. M.—Bergere v. Chaves, 14 N. M. 352, 367, 93 P 762 [quot Cyc].
N. C.—Worth v. Wrenn, 144 N. C. 656, 57 SE 388; Bradsher v. Hightower, 118 N. C. 399, 24 SE 120.
Pa.—Jenkins v. McMichael, 17 Pa. Super. 476.
Tex.—Smith v. Lee, 82 Tex. 124, 17 SW 598; Pearson v. Boyd, 62 Tex. 541; Roosevelt v. Davis, 49 Tex. 463; Keys v. Mason, 44 Tex. 140; Tipton v. Tipton, 55 Tex. Civ. A. 192, 118 SW 842; Smith v. Pate, (Civ. A.) 43 SW 312.
Vt.—Robinson v. Sherwin, 36 Vt. 69; Ripley v. Yale, 18 Vt. 220; Greeno v. Munson, 9 Vt. 37, 31 AmD 605.
Va.—Marbach v. Holmes, 105 Va. 178, 52 SE 828; Chapman v. Chapman, 91 Va. 397, 21 SE 813, 50 AmSR 846; Creekmur v. Creekmur, 75 Va. 430; Clarke v. McClure, 10 Gratt. (51 Va.) 305.
See also Sioux City, etc., Town Lot, etc., Co. v. Wilson, 50 Iowa 422.

68. Ark.—Little Rock, etc., R. Co. v. Rankin, 107 Ark. 487, 156 SW 431; Perry v. Arkadelphia Lumber Co., 83 Ark. 374, 103 SW 724; Tillar v. Clayton, 76 Ark. 405, 88 SW 972.
Cal.—Kerns v. Dean, 77 Cal. 555, 19 P 817.

he surrenders the possession which he had under the articles of agreement.[69] The vendee is equitably estopped from claiming that the possession is adverse.[70] There are also a number of decisions in which it is held that a person entering into possession under an agreement to purchase cannot dispute the title of him under whom he enters until after a surrender of the possession.[71] The general rule applies, although the contract under which the vendee holds is a forgery,[72] or although through mistake the vendee enters on another tract than that purchased,[73] and where the contract is executed by an agent in the name of joint principals, and the agent was unauthorized to bind such principals, the vendee's possession is not deemed adverse to any of the principals.[74]

[§ 269] **(2) Reason for Rule.** The reason of the rule forbidding a person who has gone into possession under a contract to purchase to dispute the title of his vendor, it has been said, is the same as in cases of landlord and tenant, namely, the injustice of allowing a person who has obtained possession by admitting title of another to enjoy that title and, in case of failure in proof of it, to hold the premises himself;[75] in some decisions the rule is based on the supposed trust relation which the parties sustain to each other.[76]

[§ 270] **b. Parol Contracts.** The possession of a vendee holding under a parol executory contract of purchase is not adverse to that of his vendor until he has performed the conditions thereof or repudiated the latter's title.[77] Where, however, the terms of the contract have been performed, the possession thereafter is adverse.[78]

[§ 271] **c. Capacity of Vendee to Hold Adversely.** The possession of one who enters under a contract of purchase may become so far adverse that he will acquire title by limitation.[79]

[§ 272] **d. Under What Circumstances Possession Becomes Adverse—(1) Repudiation of Vendor's Title Brought to His Notice.** The possession of one entering under an executory contract of purchase becomes adverse where he repudiates the title of his vendor, and he may acquire title by adverse possession by occupying the land for the statutory period after such repudiation.[80] The repudiation,

Fla.—Hart v. Bostwick, 14 Fla. 162.
Mich.—Burke v. Douglass, 115 Mich. 197, 73 NW 133.
N. M.—Bergere v. Chaves, 14 N. M. 352, 367, 93 P 762 [quot Cyc].
Tex.—Smith v. Pate, 91 Tex. 596, 45 SW 6; McCulloch v. Nicholson, (Civ. A.) 162 SW 432.
Vt.—Ripley v. Yale, 18 Vt. 220.
Va.—Marbach v. Holmes, 105 Va. 178, 52 SE 828; Chapman v. Chapman, 91 Va. 397, 21 SE 813, 50 AmSR 846.

69. Jenkins v. McMichael, 17 Pa. Super. 476.

70. Rodgers v. Beckel, 172 Mich. 544, 138 NW 202.

71. Heermans v. Schmaltz, 7 Fed. 566, 10 Biss. 323; Jackson v. Spear, 7 Wend. (N. Y.) 401; Miller v. Larson, 17 Wis. 624. And compare Davis v. Howard, 172 Ill. 340, 50 NE 258 (holding that one who enters under an agreement to purchase land cannot dispute the vendor's title until after a surrender of possession). Contra Catlin v. Decker, 38 Conn. 262.

72. Stamper v. Griffin, 20 Ga. 312, 65 AmD 628.

73. Farish v. Coon, 40 Cal. 33.

74. Ormond v. Martin, 37 Ala. 598.

75. Bergere v. Chaves, 14 N. M. 352, 366, 93 P 762 [cit Cyc]; Howard v. McKenzie, 54 Tex. 171. See Brown v. Huey, 103 Ga. 448, 450, 30 SE 430 (where it was said: "It would shock that sense of right which must be felt equally by legislators and by judges, if a possession which was permissive and entirely consistent with the title of another, should silently bar that title"). And see Heermans v. Schmalz, 7 Fed. 566, 10 Biss. 323; Potts v. Coleman, 67 Ala. 221; Hawkins v. Dearing, 93 Ga. 108, 19 SE 717; Tilghman v. Little, 13 Ill. 239; Carrico v. McGee, 1 Dana (Ky.) 5; Kirk v. Taylor, 8 B. Mon. (Ky.) 262; Turner v. Thomas, 13 Bush (Ky.) 518; Wolf v. Holton, 92 Mich. 136, 52 NW 459; Jones v. Madison County, 72 Miss. 777, 18 S 87; Wade v. Thompson, 52 Miss. 367; Cromwell v. Craft, 47 Miss. 44; Dollarhide v. Mabary, 125 Mo. 197, 28 SW 332; Jackson v. Spear, 7 Wend. (N. Y.) 401; Cook v. Coleman, (Tex. Civ. A.) 33 SW 756; Quinn v. Quinn, 27 Wis. 168; Miller v. Larson, 17 Wis. 624.

[a] **Analogy to relation of landlord and tenant.**—The possession of a vendee under an executory contract of purchase is analogous to that of landlord and tenant. Kirk v. Taylor, 8 B. Mon. (Ky.) 262; McKelvain v. Allen, 58 Tex. 383. He does not enter under a specific claim of title but upon condition that he cannot have a title until he shall have performed certain acts stipulated in the contract. Clouse v. Elliott, 71 Ind. 302.

76. Rankin v. Dean, 157 Ala. 490, 492, 47 S 1015 (where the court said: "The relation between the vendee in possession and the vendor is that of trust; the vendee being the trustee, for the vendor, of the unpaid balance of the purchase money, and the vendor being the trustee, for the vendee, of the legal title remaining in such vendor. . . . This is the foundation for the doctrine that inhibits the creation of any right, effecting the title of the vendor, by mere lapse of time or presumptions usually arising therefrom"); King v. Thompson, 58 W. Va. 455, 457, 52 SE 487 (where Brannon, J., said: "The vendor holds the legal title in trust for the vendee, and the vendee holds the equitable title in trust for his vendor to pay purchase money. The vendee recognizes the still subsisting right of the vendor; the vendor is trustee, the vendee beneficiary of the trust. Their relation is mutual and friendly, and forbids adversary possession. They claim under the same title, both at law and in equity"); State v. Harman, 57 W. Va. 447, 50 SE 828.

77. Ala.—Bishop v. Truett, 85 Ala. 376, 5 S 154.
Del.—Doe v. Jefferson, 10 Del. 477.
Fla.—Gamble v. Hamilton, 31 Fla. 401, 12 S 229; Petty v. Mays, 19 Fla. 652.
Ga.—Ford v. Holmes, 61 Ga. 419.
Ky.—Padgett v. Decker, 145 Ky. 227, 140 SW 152.
Miss.—McClanahan v. Barrow, 27 Miss. 664.
Mo.—Manning v. Kansas, etc., Coal Co., 181 Mo. 359, 81 SW 140; Ridgeway v. Holliday, 59 Mo. 444; Cole v. Roe, 39 Mo. 411.
Nebr.—Blake v. West, 89 Nebr. 794, 132 NW 394. And compare Hunt v. Antelope County School Dist. No. 14, 147 NW 1117 (holding that one who agrees to sell a site for a schoolhouse, where the district erects a schoolhouse thereon and uses it for twenty-five years without objection by the vendor, and without any demand for the nominal price, cannot restrain the district from enlarging the school building on the ground that it had no title to the site).
N. C.—Mitchell v. Freeman, 161 N. C. 322, 77 SE 230.
Okl.—Jennings v. Brown, 20 Okl. 294, 302, 94 P 557 [quot Cyc].
Pa.—Harris v. Richey, 56 Pa. 395.
S. C.—Watts v. Witt, 39 S. C. 356, 17 SE 822.
See also Lamme v. Dodson, 4 Mont. 560, 2 P 298.
Contra Wilson v. Campbell, 119 Ind. 286, 21 NE 893.

[a] **Possession not adverse to mortgagee.**—The possession of one under an oral agreement with the owner to purchase is not a possession adverse as against the mortgagee of the vendor. Petty v. Mays, 19 Fla. 652.

[b] **Surrender before payment of purchase money.**—Where a party goes into possession of land under a parol purchase and surrenders it before having paid any of the purchase money, his possession will not inure to his benefit as against the one from whom he purchased. Moore v. Mobley, 123 Ga. 424, 51 SE 351. And see Brown v. Huey, 103 Ga. 448, 30 SE 429.

78. Ward v. Cochran, 71 Fed. 127, 18 CCA 1; Newsome v. Snow, 91 Ala. 641, 8 S 377, 24 AmSR 934; Quinn v. Quinn, 76 Iowa 565, 41 NW 316; Miller v. Wireman, 80 SW 517, 25 KyL 2300; Pope v. Brassfield, 110 Ky. 128, 61 SW 5, 22 KyL 1613; Gilbert v. Kelly, 57 SW 228, 22 KyL 353.

[a] **Collateral agreement of vendor to make deed on reaching majority.**—Where a minor made a parol sale of land, and the vendee took possession and paid the purchase price, his possession was adverse and was not that of a vendee in possession under an unexecuted contract of sale merely because the minor had promised to execute a deed when he attained majority. Ogle v. Hignet, 161 Mo. 47, 61 SW 596.

[b] **Effect of part payment.**—Where a vendee purchases land by parol contract, and the vendor puts him into possession, and part of the purchase money remains unpaid, the possession of the vendee is not adverse to the title of the vendor but is in subordination thereto. Gamble v. Hamilton, 31 Fla. 401, 12 S 229.

79. Peyton v. Stith, 5 Pet. (U. S.) 485, 8 L. ed. 200; Willison v. Watkins, 3 Pet. (U. S.) 43, 7 L. ed. 596; Spradlin v. Spradlin, 18 SW 14, 13 KyL 723; Medlock v. Suter, 80 Ky. 101; Moore v. Webb, 2 B. Mon. (Ky.) 282; Howard v. McKenzie, 54 Tex. 171; Greeno v. Munson, 9 Vt. 37, 31 AmD 605. And see cases infra § 272 et seq.

[a] **Mistake as to estate held.**—Where a title bond, purporting to be the obligation of several joint owners of realty referred to therein, was not signed by all the owners named in the bond, the fact that the owners on whom the bond was not binding erroneously supposed, as did the obligees, that their father who signed the bond had a life estate did not prevent limitations from running against them. Ignorance of one's rights does not prevent the statute from running. Pope v. Brassfield, 110 Ky. 128, 61 SW 5, 22 KyL 1613.

80. U. S.—Zeller v. Eckert, 4 How. 289, 11 L. ed. 979.

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however, must be manifested by explicit and unequivocal acts brought home to the vendor's knowledge,[81] and the possession thereafter must be continued for the full statutory period.[82]

[§ 273] **(2) Effect of Payment or Performance.** While the law seems to be otherwise in some states,[83] the decided weight of authority is to the effect that a vendee of land in possession under a contract of sale by parol or in writing holds adversely to his vendor from the moment of payment or performance of the conditions of the contract, although a deed is not executed,[84] and if this possession is continued for the statutory period the purchaser acquires title by the statute of limitations.[85] However, the vendee

Ala.—Marston v. Rowe, 39 Ala. 722.
Fla.—Hart v. Bostwick, 14 Fla. 162.
Ga.—Payne v. McKinney, 30 Ga. 83.
Ky.—New Domain Oil, etc., Co. v. Gaffney Oil Co., 134 Ky. 792, 121 SW 699; Pope v. Brassfield, 110 Ky. 128, 61 SW 5, 22 KyL 1613; Creech v. Abner, 106 Ky. 239, 50 SW 58, 20 KyL 1812; Whipple v. Earich, 93 Ky. 121, 19 S 237, 14 KyL 85; Henderson v. Dupree, 82 Ky. 678; Medlock v. Suter, 80 Ky. 101.
Mich.—Fenton v. Miller, 94 Mich. 204, 53 NW 957; Michigan Land, etc., Co. v. Thoney, 89 Mich. 226, 50 NW 845; Cook v. Hopkins, 68 Mich. 514, 36 NW 790.
Miss.—Niles v. Davis, 60 Miss. 750.
Mo.—Hannibal, etc., R. Co. v. Miller, 115 Mo. 158, 21 SW 915.
N. J.—Den v. Alpaugh, 3 N. J. L. 38.
Tenn.—James v. Patterson, 1 Swan 309, 55 AmD 737.
Tex.—Howard v. McKenzie, 54 Tex. 171; Cook v. Knott, 28 Tex. 85; Robertson v. Wood, 15 Tex. 1, 65 AmD 140; Wichita Falls First Nat. Bank v. Zundelowitz, (Civ. A.) 168 SW 40; McManus v. Matthews, (Civ. A.) 55 SW 589; Durst v. Skillern, (Civ. A.) 45 SW 840.
Vt.—Greeno v. Munson, 9 Vt. 37, 31 AmD 605.
Wis.—Simpson v. Sneclode, 83 Wis. 201, 53 NW 499.

81. Ala.—Sample v. Reeder, 107 Ala. 227, 18 S 214.
Ark.—Cleveland v. Aldridge, 94 Ark. 51, 125 SW 1016; Coldcleugh v. Johnson, 34 Ark. 312.
Cal.—Kerns v. Dean, 77 Cal. 555, 19 P 817.
Mo.—Hannibal, etc., R. Co. v. Miller, 115 Mo. 158, 21 SW 915; Estes v. Long, 71 Mo. 605.
Vt.—Ripley v. Yale, 18 Vt. 220.
Va.—Marbach v. Holmes, 105 Va. 178, 52 SE 828; Chapman v. Chapman, 91 Va. 397, 21 SE 813, 50 AmSR 846.

[a] **The notice need not be formal or express** but may be shown by acts so openly hostile to the claim of the vendor as necessarily to put him upon notice. Shotwell v. McCardell, 19 Tex. Civ. A. 174, 47 SW 39; Durst v. Skillern, (Tex. Civ. A.) 45 SW 840; Smith v. Pate, (Tex. Civ. A.) 43 SW 312.

[b] **Acts sufficient as a repudiation.**—(1) If a dispute arises as to whether the consideration has been paid in full, and the purchaser notifies the vendor that he claims full payment and demands a deed, such acts constitute such an assertion of ownership by the purchaser that his possession thereafter will be adverse and vest him with absolute title upon running for the statutory period of ten years. Cook v. Hopkins, 68 Mich. 514, 36 NW 790; Lanham v. Bowlby, 86 Nebr. 148, 125 NW 149. (2) Defendant contracted to purchase land, of which he was in possession, from M who failed to execute a deed and furnish notes for defendant's execution for the price, as agreed, whereupon defendant requested M's agent to surrender field notes of a survey which defendant had procured in pursuance of the contract and notified such agent that he did not believe that M had any title to the land. It was held that such acts constituted a repudiation of the contract to convey, and, ten years having expired after such repudiation, defendant was entitled to the land by adverse possession. McManus v. Matthews, (Tex. Civ. A.) 55 SW 589. (3) The vendor surveyed land held under a contract of purchase and notified the purchaser to get off. The purchaser refused to quit and claimed the land as his own. An action for possession of the land was brought but defendant refused to recognise the claim of plaintiff or to pay any sum, or to pay costs of suit. It was held that the jury were justified in finding that defendant's possession was adverse. Durst v. Skillern, (Tex. Civ. A.) 45 SW 840.

[c] **Acts insufficient as a repudiation.**—(1) The usual acts of ownership consistent with the possession of a vendee in possession under a contract of purchase are not evidence of an adverse claim of ownership. Hannibal, etc., R. Co. v. Miller, 115 Mo. 158, 21 SW 915. (2) Thus payment of taxes by a vendee in possession, the making of improvements, and claims of ownership, not being inconsistent with the rights of the vendor, are insufficient to indicate an adverse holding as against him. Cleveland v. Aldridge, 94 Ark. 51, 125 SW 1016. See also Brownlee v. Williams, 32 Colo. 502, 77 P 250. (3) Leasing part of the land in controversy to tenants for a portion of the period remaining and cutting timber and firewood thereon are not such acts of actual occupation as will convert the permissive holding of a vendee in possession into one of actual hostility. Sample v. Reeder, 107 Ala. 227, 18 S 214.

82. Lanham v. Bowlby, 86 Nebr. 148, 112 NW 324.

83. Roxbury v. Hutson, 37 Me. 42; Rodgers v. Beckel, 172 Mich. 544, 138 NW 202; Chapman v. Chapman, 91 Va. 397, 21 SE 813, 50 AmSR 846; Nowlin v. Reynolds, 25 Gratt. (66 Va.) 137; Williams v. Snidow, 4 Leigh (31 Va.) 14; King v. Thompson, 58 W. Va. 455, 52 SE 487; Core v. Faupel, 24 W. Va. 238. And see Litz v. Lowry, 69 W. Va. 181, 187, 71 SE 263 [quot Cyc] (as to the rule obtaining in these states, but a dictum in this case by Judge Brannon gives strong support to the rule settled by the weight of authority).

84. U. S.—Dolton v. Cain, 14 Wall. 472, 20 L. ed. 830; Boone v. Chiles, 10 Pet. 177, 9 L. ed. 388; Schauble v. Schulz, 137 Fed. 389, 69 CCA 581; Ward v. Cochran, 71 Fed. 127, 18 CCA 1; Shuffleton v. Nelson, 22 F. Cas. No. 12,822, 2 Sawy. 540; Stark v. Starr, 22 F. Cas. No. 13,307, 1 Sawy. 15.
Ala.—Cannon v. Prude, 62 S 24; Alabama State Land Co. v. Matthews, 168 Ala. 200, 207, 53 S 174 [cit Cyc]; Tennessee Coal, etc., Co. v. Linn, 123 Ala. 112, 26 S 245, 82 AmSR 108; Barron v. Barron, 122 Ala. 194, 25 S 55; Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Jernigan v. Flowers, 94 Ala. 508, 10 S 437; Newsome v. Snow, 91 Ala. 641, 8 S 377, 24 AmSR 934; East Tennessee, etc., R. Co. v. Davis, 91 Ala. 615, 8 S 349; Beard v. Ryan, 78 Ala. 37; Morgan v. Casey, 73 Ala. 222; Tillman v. Spann, 68 Ala. 102; Potts v. Coleman, 67 Ala. 221; Tayloe v. Dugger, 66 Ala. 444; Farley v. Smith, 39 Ala. 38; McQueen v. Ivey, 36 Ala. 308.
Ark.—Dickson v. Sentell, 83 Ark. 385, 104 SW 148.
Conn.—Catlin v. Decker, 38 Conn. 262; Bryan v. Atwater, 5 Day 181, 5 AmD 136.
Del.—Lynch v. Cannon, 12 Del. 386, 32 A 391.
Fla.—Hart v. Bostwick, 14 Fla. 162.
Ga.—Hawkins v. Dearing, 93 Ga. 108, 19 SE 717; Newton v. Mayo, 62 Ga. 11; Brown v. Newsom, 24 Ga. 466; Stamper v. Griffin, 12 Ga. 450; Pendergeast v. Gullatt, 10 Ga. 218; Fain v. Garthright, 5 Ga. 6.
Ill.—Davis v. Howard, 172 Ill. 340, 50 NE 258; Schneider v. Botsch, 90 Ill. 577.
Ind.—Clouse v. Elliott, 71 Ind. 302.
Ky.—Padgett v. Decker, 145 Ky. 227, 140 SW 152; New Domain Oil, etc., Co. v. Gaffney Oil Co., 134 Ky. 792, 121 SW 699; Gilbert v. Kelly, 57 SW 228, 22 KyL 353.
Mass.—Brown v. King, 5 Metc. 173; Barker v. Salmon, 2 Metc. 32.
Miss.—Moring v. Ables, 62 Miss. 263, 52 AmR 186; Niles v. Davis, 60 Miss. 750; Gladney v. Barton, 51 Miss. 216; Magee v. Magee, 37 Miss. 138; Benson v. Stewart, 30 Miss. 49; Grafton v. Grafton, 16 Miss. 77.
Mo.—Ogle v. Hignet, 161 Mo. 47, 61 SW 596; Williams v. Mitchell, 112 Mo. 300, 20 SW 647; Ridgeway v. Holliday, 59 Mo. 444.
N. J.—Van Blarcom v. Kip, 26 N. J. L. 351.
N. Y.—Howland v. Newark Cemetery Assoc., 66 Barb. 366; Fosgate v. Herkimer Mfg., etc., Co., 12 Barb. 352 [aff 12 N. Y. 580]; Briggs v. Prosser, 14 Wend. 227; Clapp v. Bromagham, 9 Cow. 530; La Frombois v. Jackson, 8 Cow. 589, 18 AmD 463.
N. C.—Dean v. Gupton, 136 N. C. 141, 48 SE 576.
Oh.—Barton v. Morris, 15 Oh. 408.
Or.—Ambrose v. Huntington, 34 Or. 484, 56 P 513; Anderson v. McCormick, 13 Or. 301, 22 P 1062.
S. C.—Watts v. Witt, 39 S. C. 356, 17 SE 822; Ellison v. Cathcart, 26 S. C. L. 5.
Tenn.—Stokely v. Slayden, 8 Baxt. 307; Ray v. Goodman, 1 Sneed 586.
Tex.—Roemer v. Meyer, 17 SW 597; Newsom v. Davis, 20 Tex. 419; Vardeman v. Lawson, 17 Tex. 10; Robertson v. Wood, 15 Tex. 1, 65 AmD 140; Mitchell v. Sheppard, 13 Tex. 484; Hemming v. Zimmerschitte, 4 Tex. 159.
Vt.—Adams v. Fullam, 43 Vt. 592.
Va.—Nowlin v. Reynolds, 25 Gratt. (66 Va.) 137.
Wis.—Simpson v. Sneclode, 83 Wis. 201, 53 NW 499; Furlong v. Garrett, 44 Wis. 111.

[a] **Fiduciary character of vendor's interest.**—It has been said that where the vendee has performed all his obligations the vendor's subsequent possession or interest in the land is held in trust and in subordination to the superior equitable right of the vendee and that this possession continues to maintain its fiduciary character until the vendor manifests an intention to refuse performance or to claim and enjoy the land as his own. Hemming v. Zimmerschitte, 4 Tex. 159.

[b] **The fact that the deed was executed by an unauthorized agent of the vendor** does not affect the operation of the rule. Newsome v. Snow, 91 Ala. 641, 8 S 377, 24 AmSR 934.

[c] **Effect of demand for conveyance.**—The rule that the possession of the vendee after performance of the conditions of the contract is adverse has been held not to be affected by a demand by the vendee for a conveyance. Newsome v. Snow, 91 Ala. 641, 8 S 377, 24 AmSR 934. See also Bryan v. Atwater, 5 Day (Conn.) 181, 5 AmD 136.

85. Lynch v. Cannon, 12 Del. 386, 32 A 391; Van Blarcom v. Kip, 26 N. J. L. 351; Watts v. Witt, 39 S. C. 356, 17 SE 822; Ellison v. Cathcart, 26 S. C. L. 5. See also cases supra note 84.

[a] **Illustrations of rule.**—(1) A died intestate, seized of certain lands, leaving four minor heirs and his widow. During the minority of the heirs defendant entered upon the land and at the time took a bond from the widow who was administratrix of A's estate, conditioned that the heirs of A should, in a reasonable time after they had arrived at majority, convey their interest in the land to B. The price agreed to be paid for the land

may, by express recognition of the vendor's title, defeat the adverse character of his possession.[86]

[§ 274] **(3) Tender of Performance and Part Performance.** Tender of performance by the vendee in an executory contract of purchase has been held sufficient to start the running of the statute.[87] Part performance, however, does not have such effect.[88]

[§ 275] **(4) Execution of Deed by Vendor.** After the execution of a deed to the vendee in an executory contract of purchase, the possession of the vendee is adverse to the vendor,[89] and this, it seems, is true, although the purchase price has not been paid.[90]

[§ 276] **12. By Purchaser from Vendee in Executory Contract of Purchase against Vendor.** According to the weight of authority the possession of a purchaser from a vendee in an executory contract is as a general rule on the same footing as that of the original vendee. Such possession cannot, as a basis of prescription, be upon any higher or better footing than the possession of the original vendee himself,[91] and it is held that this principle applies, although the original vendor has actual knowledge of the possession of the purchaser from his vendee.[92] But after a purchaser from the vendee has paid his purchase money his continued possession is deemed adverse to the vendee and consequently to the original vendor, although the latter has not been paid,[93] and this principle is especially applicable where the original vendor purposely concealed from the vendee the existence of his vendor's lien.[94] So it has been held that the possession of a person who takes a deed of conveyance from the vendee, without notice of the nature of the vendee's title, is deemed adverse to the vendor,[95] but where such person in addition to taking such deed also takes an assignment of the contract of sale, he will be deemed to hold under the contract of sale and in subordination to the vendor's title, in the absence of a repudiation of the vendor's title brought to the knowledge of the vendor.[96]

[§ 277] **13. By Widow of Vendee in Executory Contract of Purchase against Vendor.** The widow of a vendee in an executory contract who continues possession after his death stands upon the same footing with regard to the vendor as her husband did.[97]

[§ 278] **14. By Vendee in Executory Contract of Purchase against Persons Other than Vendor.** One entering under an executory contract of purchase may, and generally does, hold adversely as against all persons except his vendor.[98]

[§ 279] **15. By Vendee against Vendor in Deed**

was paid by B and subsequently two of the heirs conveyed their interest to B. B continued in possession for more than fifteen years and more than five years after all the heirs had arrived at full age, holding out against all persons and taking the rents and profits to himself, and, at the end of fifteen years, demanded of the obligor a fulfillment of the condition of her bond. In an action of disseisin brought by the two heirs of A who had not conveyed their interest to B, it was held that the possession of B was an adverse one and that it had vested in him the legal title to the land. Bryan v. Atwater, 5 Day (Conn.) 181, 5 AmD 136. (2) Where a railroad company takes possession of land bought, its possession becomes adverse to that of the seller upon the performance of the consideration, namely, the building of a spur track. East Tennessee, etc., R. Co. v. Davis, 91 Ala. 615, 8 S 349.

[b] **Payment at inception of contract.**—If, on an agreement to sell lands, the consideration is paid and the owner consents that the buyer may have and hold the land as his own, such entry and possession cannot be deemed subordinate to the title of the seller but is adverse and a disseizin, and, if continued for the statutory period, will ripen into title. Adams v. Fullam, 43 Vt. 592.

[c] **Subsequent conveyance by vendor.**—A conveyance by the vendor to a third person after payment of the purchase money by the vendee in an executory contract of sale is void. Jernigan v. Flowers, 94 Ala. 508, 10 S 437.

86. Newsome v. Snow, 91 Ala. 641, 8 S 377, 24 AmSR 934.

87. Dolton v. Cain, 14 Wall. (U. S.) 472, 20 L. ed. 830; Den v. Alpaugh, 3 N. J. L. 38.

88. Gamble v. Hamilton, 31 Fla. 401, 12 S 229; Hawkins v. Dearing, 93 Ga. 108, 19 SE 717.

89. Moore v. Farrow, 3 A. K. Marsh. (Ky.) 41; Robertson v. Wood, 15 Tex. 1, 65 AmD 140. See also Ford v. Holmes, 61 Ga. 419.

90. Perry v. Lawson, 112 Ala. 480, 20 S 611.

91. U. S.—Lewis v. Hawkins, 23 Wall. 119, 23 L. ed. 113.

Ark.—Little Rock, etc., R. Co. v. Rankin, 107 Ark. 487, 156 SW 431.

Ga.—Brown v. Huey, 103 Ga. 448, 30 SE 429; Hawkins v. Dearing, 93 Ga. 108, 19 SE 717. Compare Wingfield v. Davis, 53 Ga. 655.

Mo.—Hannibal, etc., R. Co. v. Miller, 115 Mo. 158, 21 SW 915; Fulkerson v. Brownlee, 69 Mo. 371.

N. Y.—Swartwout v. Burr, 1 Barb. 495; Jackson v. Bard, 4 Johns. 230, 4 AmD 267; Champion v. Brown, 6 Johns. Ch. 398, 10 AmD 343.

Pa.—Jenkins v. McMichael, 17 Pa. Super. 476.

Tex.—Clark v. Adams, 80 Tex. 674, 16 SW 552; Pearson v. Boyd, 62 Tex. 541; Atteberry v. Burnett, (Civ. A.) 130 SW 1028; Runge v. Gilbough, (Civ. A.) 87 SW 832, 836 [quot Cyc]. And see Glenn v. Rhine, 53 Tex. Civ. A. 291, 115 SW 91.

W. Va.—Ketchum v. Spurlock, 34 W. Va. 597, 12 SE 832.

Wis.—Quinn v. Quinn, 27 Wis. 168. See also Timmons v. Kidwell, 138 Ill. 13, 27 NE 756.

Compare Ripley v. Miller, 165 Mich. 47, 130 NW 345, AnnCas1912C 952 and note. In this case a purchaser of a grantee in a tax deed entered into possession and thereafter contracted to purchase the record title from a third person. Six years later he conveyed the land to a grantee, having no notice of the contract, which was unrecorded. A claimant under the grantee had no notice of the contract, and he and his predecessors in title were in continuous and hostile possession for seventeen years, making improvements on the land. It was held that the claimant acquired title as against the vendor in the land contract.

[a] **Purchaser at execution sale.**—The rule has been held to apply to the possession of the purchaser of such interest at an execution sale. Fosgate v. Herkimer Mfg., etc., Co., 9 Barb. (N. Y.) 287. See also Gillison v. Savannah, etc., R. Co., 7 S. C. 173 (where it appeared that a railroad company was authorized by its charter to acquire a right of way by proceedings for the valuation thereof, the lands to "vest in the said company in fee simple as soon as the valuation thereof may be paid, or tendered and refused." After valuation of the land by such proceedings, but before payment, the company became insolvent and its property was sold. It was held that the possession taken by such purchaser under the sale is not adverse to the owner of the land).

[b] **The assignee of contract of sale** stands on the same footing as his assignor. Laraway v. Zenor, 100 Iowa 181, 69 NW 416; Wendell v. Moulton, 26 N. H. 41; Warren v. Frederichs, 83 Tex. 380, 18 SW 750; Keys v. Mason, 44 Tex. 140.

92. Little Rock, etc., R. Co. v. Rankin, 107 Ark. 487, 156 SW 431.

93. Beard v. Ryan, 78 Ala. 37; Montgomery County v. Severson, 64 Iowa 326, 17 NW 197, 20 NW 458.

94. Burnett v. Atteberry, 105 Tex. 119, 145 SW 582 [mod (Civ. A.) 130 SW 1028].

95. Ala.—Woodstock Iron Co. v. Roberts, 87 Ala. 436, 6 S 349; Beard v. Ryan, 78 Ala. 37; Walker v. Crawford, 70 Ala. 567; State v. Connor, 69 Ala. 212; Tayloe v. Dugger, 66 Ala. 444; Miller v. State, 38 Ala. 600.

Ga.—Janes v. Patterson, 62 Ga. 527; Wingfield v. Davis, 53 Ga. 655.

N. J.—Foulke v. Bond, 41 N. J. L. 527.

N. Y.—Northrop v. Wright, 7 Hill 476; Clapp v. Bromagham, 9 Cow. 530. See however Jackson v. Bard, 4 Johns. 230, 4 AmD 267.

S. C.—Hunter v. Parsons, 18 S. C. L. 59. See however Gillison v. Savannah, etc., R. Co., 7 S. C. 173.

Tex.—Allen v. Hoxey, 37 Tex. 320; Robertson v. Wood, 15 Tex. 1, 65 AmD 140. Contra Gilbough v. Runge, 99 Tex. 539, 91 SW 566, 122 AmSR 659.

See Snow v. Rich, 22 Utah 123, 61 P 336; Quinn v. Quinn, 27 Wis. 168.

Compare Cameron v. Chicago, etc., R. Co., 60 Minn. 100, 61 NW 814; Hannibal, etc., R. Co. v. Miller, 115 Mo. 158, 21 SW 915.

96. Keys v. Mason, 44 Tex. 140.

97. Reeder v. Dargan, 15 S. C. 175, 182 [quot Blackwell v. Ryan, 21 S. C. 112, 123] (where it is said: "When there is no new entry but the heir is in as of his ancestor's possession, the possession of the heir is that of the ancestor").

98. U. S.—Schauble v. Schulz, 137 Fed. 389, 69 CCA 581.

Ala.—Alabama State Land Co. v. Matthews, 168 Ala. 200, 206, 53 S 174 [cit Cyc].

Fla.—Coogler v. Rogers, 25 Fla. 853, 7 S 391; Hart v. Bostwick, 14 Fla. 162.

Ga.—Adams v. Guerard, 29 Ga. 651, 76 AmD 624; Stamper v. Griffin, 20 Ga. 312, 65 AmD 628; Fain v. Garthright, 5 Ga. 6.

Iowa.—Knudson v. Litchfield, 87 Iowa 111, 54 NW 199; Montgomery County v. Severson, 64 Iowa 326, 17 NW 197, 20 NW 458.

Ky.—Chestnut v. Tracy, 144 Ky.

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Reserving Lien for Purchase Money. The vendee in possession under a deed which retains a vendor's lien to secure payment of the purchase money holds in subordination to the title of the vendor[99] until payment of the purchase price[1] or repudiation of the vendor's title,[2] with notice to the vendor of such repudiation.[3]

[§ 280] **16. By Vendor in Executory Contract of Purchase against Vendee.** Where, after breach on the part of the vendee of the conditions in the bond for title, the vendor resumes possession, his possession is deemed adverse to the vendee,[4] and a fortiori the vendor who remains in possession is not precluded by reason of his relation to his vendee from establishing an adverse holding in fact.[5] On the other hand, where there has been no default on the part of the vendee, the continued possession by the vendor will not be deemed adverse,[6] until he has done some acts showing an intention of holding the land adversely to the vendee,[7] or until he has given the purchaser actual notice,[8] because he is in effect the trustee of the legal title for the vendee.[9]

[§ 281] **17. By Party in Possession under Option to Purchase against Owner.** Defendant's possession is not adverse to plaintiff where it began under an instrument by which plaintiff authorized defendant to occupy the premises for a stated time, with the option of purchasing within such time, and defendant never surrendered the possession so obtained.[10]

[§ 282] **18. By Parent against Child.** The possession by a parent of his child's land will not, in general, be deemed adverse to the child.[11] Such

753, 139 SW 966; Smith v. Lockridge, 3 Litt. 19.

Miss.—Magee v. Magee, 37 Miss. 138.

Mo.—Long v. Kansas City Stock-Yards Co., 107 Mo. 298, 17 SW 656, 28 AmSR 413.

N. Y.—Howland v. Newark Cemetery Assoc., 66 Barb. 366; Vrooman v. Shepherd, 14 Barb. 441; Fosgate v. Herkimer Mfg., etc., Co., 12 Barb. 352 [aff 12 N. Y. 580]; Whitney v. Wright, 15 Wend. 171; Clapp v. Bromagham, 9 Cow. 530; Clapp v. Bromagham, 9 Cow. 304; La Frombois v. Jackson, 8 Cow. 589, 18 AmD 463.

S. C.—State Bank v. Smyers, 33 S. C. L. 24; Bradley v. Herndon, 33 S. C. L. 18.

Tex.—Pearson v. Boyd, 62 Tex. 541; Roosevelt v. Davis, 49 Tex. 463; Elliott v. Mitchell, 47 Tex. 445; Keys v. Mason, 44 Tex. 140; Barrett v. McKinney, (Civ. A.) 93 SW 240.

Utah.—Welner v. Stearns, 120 P 490, 493 [quot Cyc].

W. Va.—King v. Thompson, 58 W. Va. 455, 52 SE 487; Ketchum v. Spurlock, 34 W. Va. 597, 12 SE 832. See however Parkersburg Nat. Bank v. Neal, 28 W. Va. 744.

[a] **Relation back of deed.**—"It is now the generally accepted rule that the possession of a vendee who enters under an executory contract for the sale of land, and subsequently receives a conveyance in fulfillment thereof, is adverse from the time of the entry as to all the world except the vendor. Montgomery County v. Severson, 64 Iowa 326, 17 NW 197, 20 NW 458; Howland v. Newark Cemetery Assoc., 66 Barb. (N. Y.) 366; Whitney v. Wright, 15 Wend. (N. Y.) 171, 180; Clapp v. Bromagham, 9 Cow. (N. Y.) 530, 550; State Bank v. Smyers, 33 S. C. L. 24; Simpson v. Sneclode, 83 Wis. 201, 53 NW 499." Schauble v. Schulz, 137 Fed. 389, 395, 69 CCA 581. To same effect Weener v. Stearns, (Utah) 120 P 490.

[b] **Applications of rule.**—(1) As against the heirs or grantees of the vendor, who succeed to the title of the vendor, the vendee is still deemed to hold in subordination, and not adversely, to the vendor's title. Heard v. Phillips, 101 Ga. 691, 31 SE 216, 44 LRA 369; Fulkerson v. Brownlee, 69 Mo. 371. But see Marbach v. Holmes, 105 Va. 178, 52 SE 828. (2) In ejectment plaintiffs, a surviving partner and the heirs of a deceased partner, relied solely on a tax deed given to the firm in 1887. Defendant relied on a bond for title, dated in 1881, from another firm composed of the two partners and another and showed that he was in possession before the tax title was acquired and when sued, and that he had been in possession for more than ten years. It was held that plaintiffs were barred by the ten-year statute of limitations, defendant's possession being presumed adverse to an intervening tax purchaser until a recognition of a holding subordinate to the tax title. Graham v. Warren, 81 Miss. 330, 33 S 71.

99. Eichelberger v. Gitt, 104 Pa. 64; Lincoln v. Purcell, 2 Head (Tenn.) 142, 73 AmD 196; Roosevelt v. Davis, 49 Tex. 463; Shotwell v. McCardell, 19 Tex. Civ. A. 174, 47 SW 39; Smith v. Pate, (Tex. Civ. A.) 43 SW 312. See also De Barnardi v. McElroy, 110 Mo. 650, 19 SW 626. Compare Jones v. Lickliter, 154 Ky. 848, 159 SW 652.

[a] **By vendee against heirs.**—Where, in an action to recover land, plaintiffs claimed as heirs of a decedent, and defendants claimed under decedent as their vendor, retaining a vendor's lien for the unpaid price, without asserting title under any other source, both parties claimed under a common source of title, and the possession of defendants and their purchasers was not adverse as against the heirs until they repudiated the title under decedent. Lumpkin v. Story, (Tex. Civ. A.) 134 SW 298.

[b] **By vendee against purchaser at sale on foreclosure of lien.**—Where land is held under a deed reserving a vendor's lien, the holders thereof cannot, after foreclosure of the lien, plead the time that they held the land prior to such foreclosure as a bar by limitation to an action by those deriving title from the foreclosure sale. Henry v. McNew, 29 Tex. Civ. A. 288, 69 SW 213.

1. Eichelberger v. Gitt, 104 Pa. 64; Roosevelt v. Davis, 49 Tex. 463.

2. Roosevelt v. Davis, 49 Tex. 463; Runge v. Gilbough, (Tex. Civ. A.) 87 SW 832, 836 [aff 99 Tex. 539, 91 SW 566, 122 AmSR 659] [quot Cyc]; Smith v. Pate, (Tex. Civ. A.) 43 SW 312. See Burnett v. Atteberry, (Tex.) 145 SW 582 (possession by purchaser from vendee).

3. Runge v. Gilbough, (Tex. Civ. A.) 87 SW 832, 836 [aff 99 Tex. 539, 91 SW 566, 122 AmSR 659] [quot Cyc]; Smith v. Pate, (Tex. Civ. A.) 43 SW 312.

4. Love v. Butler, 129 Ala. 531, 30 S. 735; Richter v. Noll, 128 Ala. 198, 30 S 740; McCoy v. Gentry, 73 Ala. 105; Southern Pine Co. v. Pigott, 93 Miss. 281, 47 S 381; Pipher v. Lodge, 16 Serg. & R. (Pa.) 214. See also Hickman v. Link, (Mo.) 7 SW 12.

5. Mitchell v. Woodson, 37 Miss. 567; Pipher v. Lodge, 16 Serg. & R. (Pa.) 214; Abernathy v. Stone, 81 Tex. 430, 16 SW 1102; Early v. Sterrett, 18 Tex. 113; Holman v. Criswell, 15 Tex. 394; Smith v. Montes, 11 Tex. 24; Burleson v. Burleson, 11 Tex. 2; De Cordova v. Smith, 9 Tex. 129, 58 AmD 136.

6. Ark.—Coleman v. Hill, 44 Ark. 452; Harris v. King, 16 Ark. 122.

Cal.—Luco v. De Toro, 91 Cal. 405, 18 P 866, 27 P 1082. See also Scadden Flat Gold-Min. Co. v. Scadden, 121 Cal. 33, 53 P 440.

Ky.—Spicer v. Holbrook, 66 SW 180, 23 KyL 1812.

Pa.—Union Canal Co. v. Young, 1 Whart. 410, 30 AmD 212.

Tex.—Howard v. Stubblefield, 79 Tex. 1, 14 SW 1044; Yeary v. Cummins, 28 Tex. 91; Moore v. Bullard, 24 Tex. 149; Newsom v. Davis, 20 Tex. 419; Early v. Sterrett, 18 Tex. 113; Holman v. Criswell, 15 Tex. 394; Smith v. Montes, 11 Tex. 24; Hemming v. Zimmerschitte, 4 Tex. 159; Culmell v. Borroum, 13 Tex. Civ. A. 458, 35 SW 942.

See DeBernardi v. McElroy, 110 Mo. 650, 19 SW 626.

7. Coleman v. Hill, 44 Ark. 452; Graham v. Nelson, 5 Humphr. (Tenn.) 605; Newsom v. Davis, 20 Tex. 419; Early v. Sterrett, 18 Tex. 113. See also Michigan Land, etc., Co. v. Thoney, 89 Mich. 226, 50 NW 845.

8. Coleman v. Hill, 44 Ark. 452.

9. Sellers v. Hayes, 17 Ala. 749; Fleishman v. Woods, 135 Cal. 256, 67 P 276; Muldrow v. Muldrow, 2 Dana (Ky.) 386; Grundy v. Jackson, 1 Litt. (Ky.) 11; Graham v. Nelson, 5 Humphr. (Tenn.) 605.

10. Harison v. Caswell, 17 App. Div. 252, 45 NYS 560.

11. Ark.—White v. White, 52 Ark. 188, 12 SW 201.

Cal.—Tully v. Tully, 137 Cal. 60, 69 P 700; Brown v. McKay, 125 Cal. 291, 57 P 1001.

Ga.—Parker v. Salmons, 101 Ga. 160, 28 SE 681, 65 AmSR 291.

Ill.—Kirby v. Kirby, 236 Ill. 255, 86 NE 259; Horn v. Metzger, 234 Ill. 240, 84 NE 893; Wright v. Stice, 173 Ill. 571, 51 NE 71.

Ky.—Irvine v. Irvine, 89 SW 193, 28 KyL 262; Fields v. Napier, 80 SW 1110, 26 KyL 240.

Mich.—Nugent v. Peterman, 137 Mich. 646, 100 NW 895. And see dictum in Tyler v. Wright, 164 Mich. 606, 609, 130 NW 205 [cit Cyc].

Minn.—Collins v. Colleran, 86 Minn. 199, 90 NW 364; O'Boyle v. McHugh, 66 Minn. 390, 69 NW 37. See also Malone v. Malone, 88 Minn. 418, 93 NW 605.

Mo.—Meddis v. Kenney, 176 Mo. 200, 75 SW 633, 98 AmSR 496. And see Thomas v. Black, 113 Mo. 66, 20 SW 657.

N. H.—Atherton v. Johnson, 2 N. H. 31.

Or.—Lawrence v. Lawrence, 14 Or. 77, 12 P 186.

Pa.—Collins v. Lynch, 167 Pa. 635, 31 A 921; Hall v. Mathias, 4 Watts & S. 331; Cook v. Nichols, 2 Watts & S. 27.

R. I.—Searle v. Laraway, 27 R. I. 557, 65 A 269.

Tex.—McDougal v. Bradford, 80 Tex. 558, 16 SW 619; Lewis v. Castleman, 27 Tex. 407; Oury v. Saunders, 5 Tex. Civ. A. 310, 24 SW 341. And see Evans v. Berlocher, 83 Tex. 612, 19 SW 158.

Wis.—Allen v. Ellis, 125 Wis. 565, 104 NW 739; Allen v. Allen, 58 Wis. 202, 16 NW 610.

Eng.—In re Hobbs, 36 Ch. D. 553; Doe v. Harbrow, 3 A. & E. 67, 30 ECL 53, 111 Reprint 338, 1 N. & M. 422, 28 ECL 544; Thomas v. Thomas, 2 Kay & J. 79, 69 Reprint 701; Tinker v. Rodwell, 69 L. T. Rep. N. S. 591.

Ont.—Clarke v. Macdonell, 20 Ont. 564.

"The close relationship of parent and children has an important bear-

possession will be presumed to be permissive and not adverse,[12] and the rule is not affected by the facts that the occupant has paid all taxes, made valuable improvements, and apparently is exercising complete dominion over the premises, for all this follows and is to be expected from the relationship.[13] However, where children are of full age and are not shown to be on friendly terms with the parent the mere relationship raises no conclusive presumption that a father's possession while holding a deed from the mother to the children is in subordination to the title of the children.[14] And there is nothing in the relation of parent and child which will prevent the parent's possession of the child's land from becoming adverse.[15] But in order to make it adverse there must be some open assertion of hostile title other than mere possession, notice of which must be brought home to the owner of the land.[16]

[§ 283] **19. By Child against Parent.**[17] Possession by a child of land belonging to his parent will not ordinarily be considered adverse.[18] Thus where a child enters by consent of the parent, looking to the parent for title, the possession is not adverse[19]

ing in determining whether the possession of the father of the lands of his children is adverse or subordinate to their title, and, in the absence of a contrary showing, particularly in the case of minor children, may raise a conclusive presumption of possession in subordination to their title and for their benefit." Tyler v. Wright, 164 Mich. 606, 609, 130 NW 205 [cit Cyc] (per Blair, J.).

[a] **Applications of rule generally.**—(1) A father, going into possession of land with the consent of his son and under an agreement to occupy and cultivate the farm for his own benefit and with the further agreement that the title shall remain in the son, and continuing such possession up to the time of his death, without anything to indicate that there was any change in the character of the possession, does not gain title by adverse possession. Allen v. Ellis, 125 Wis. 565, 104 NW 739. (2) Where a father furnished money to his son to purchase realty, under an agreement that the title should be taken in the son's name and that it should be understood by other persons that the land belonged to the son, occupancy by the father was not adverse possession. Fields v. Napier, 80 SW 1110, 26 KyL 240.

[b] **Where a parent is in possession of real estate which he admits belongs to his child** he cannot acquire title thereto by adverse possession. Owsley v. Owsley, 117 Ky. 47, 77 SW 397, 25 KyL 1186; Lawrence v. Lawrence, 14 Or. 77, 12 P 186; Sibley v. Sibley, 38 S. C. 184, 70 SE 615, Ann Cas1912C 1170. See Wilson v. Sutton, 153 Ky. 96, 154 SW 394.

[c] **Remaining in possession after conveyance.**—(1) Where a father conveyed real estate to his son without consideration and thereafter remained in possession, the legal presumption is that the possession of the father was in accordance with the deed. Collins v. Colleran, 86 Minn. 199, 90 NW 364. (2) Where a father who conveys real property to his children remains in possession thereof but does not claim any interest therein adverse to the children, their interest therein is not defeated by adverse possession. Bozarth v. Watts, (Tenn. Ch. A.) 61 SW 108.

[d] **Possession and cultivation from year to year by a mother, for her exclusive benefit,** of land belonging to her children do not, in view of the relation of the parties, constitute her possession adverse without an open assertion of hostile title brought to the children's notice in some way other than by possession alone. O'Boyle v. McHugh, 66 Minn. 390, 69 NW 37.

[e] **Where parent and child reside on the land as a family** the possession of the parent will not be regarded as adverse. Reed v. Smith, 125 Cal. 491, 58 P 139; Musham v. Musham, 87 Ill. 80; Clayton v. Clayton, 12 SW 312, 11 KyL 472; Frazer v. Naylor, 1 Metc. (Ky.) 593; Driskell v. Hanks, 18 B. Mon. (Ky.) 855; Roberts v. Nelson, 87 Mo. 229; Livingston v. Pendergast, 34 N. H. 544; Atherton v. Johnson, 2 N. H. 31; Knapp v. Burton, 7 NYCiv Proc 448; Malloy v. Bruden, 86 N. C. 251; Lawrence v. Lawrence, 14 Or. 77, 12 P 186; Clark v. Trindle, 52 Pa. 492; Beedy v. Dine, 31 Pa. 13; Hall v. Mathias, 4 Watts & S. (Pa.) 331; Cook v. Nicholas, 2 Watts & S. (Pa.) 27; McMasters v. Bell, 2 Penr. & W. (Pa.) 180; Hannon v. Hounihan, 85 Va. 429, 12 SE 157.

[f] **Entry of mother,** as a member of the family of which her son was one, cannot be assumed as an entry under color of title so as to become a starting point for the statute of limitations relating to an implied or resulting trust as against the son. Clark v. Trindle, 52 Pa. 492.

[g] **Land bought with father's money.**—Where one gives his son money to pay for land on condition that he be provided with a home there, his subsequent residence on the premises as a member of the family is not adverse. Hoyt v. Zumwalt, 149 Cal. 381, 86 P 600.

[h] **Entry by stepfather; presumption.**—Where title to certain land was in minor children and their mother, and her second husband entered on such land, in the absence of proof as to the husband's intention he will be taken to have entered in the right of the mother as natural guardian and not adversely to the children. McMasters v. Bell, 2 Penr. & W. (Pa.) 180.

[i] **If a father is a tenant in common with his children, for some of whom he is guardian,** (1) he cannot make out a case of adverse holding without showing that he held solely for himself and adversely to the others and that they knew of such claim and holding. Davis v. Harrell, 101 Ark. 230, 142 SW 156; Ganaway v. Tarpley, 1 Coldw. (Tenn.) 571. (2) Where a father caused himself to be appointed guardian for his two minor sons who had inherited from their mother an undivided two-thirds interest in one tract and an undivided half interest in another, being their tenant in common, he managed the property until his death, and when one son became of age leased the latter tract to him and in his will devised his one-third interest in the former tract to the sons, it was held that the father did not hold either tract adversely to the sons beyond his own interest. Brown v. McKay, 125 Cal. 291, 57 P 1001.

[j] **Fraudulent acts of father.**—(1) If the father takes possession of land deeded to his child and conceals the fact, although it has been so deeded, possession, however long held, cannot give title since his possession commences in fraud. Parker v. Salmons, 101 Ga. 160, 28 SE 681, 65 AmSR 291. (2) And where father and son had agreed to buy land jointly, and the son paid one half of the first payment, and the father fraudulently procured the erasure of the son's name from the deed, the father could not acquire title against the son by limitations in the absence of actual notice to the son that he was claiming adversely. Weatherford v. Weatherford, (Tex. Civ. A.) 153 SW 853.

[k] **Adopting parent.**—Notwithstanding the fact that an adopting parent exercises every act of ownership over the land of an adopted child, his possession will not be deemed adverse in the absence of evidence of an intent to hold adversely. Ray v. Thomas, 140 Ky. 570, 131 SW 503.

12. Collins v. Colleran, 86 Minn. 199, 90 NW 364; O'Boyle v. McHugh, 66 Minn. 390, 69 NW 37. And see cases supra note 11.

13. Collins v. Colleran, 86 Minn. 199, 90 NW 364.

14. Tyler v. Wright, 164 Mich. 606, 130 NW 205.

15. U. S.—Mercer v. Selden, 1 How. 37, 11 L. ed. 38; Longworth v. Close, 15 F. Cas. No. 8,489, 1 McLean 282.

Iowa.—McCarthy v. Colton, 134 Iowa 658, 108 NW 217.

Ky.—French v. Branger, 121 SW 437.

Mo.—Fox v. Windes, 127 Mo. 502, 30 SW 323, 48 AmSR 648.

N. H.—Livingston v. Pendergast, 34 N. H. 544; Atherton v. Johnson, 2 N. H. 31.

N. J.—Den v. Lane, 2 N. J. L. 397.

N. C.—Scarboro v. Scarboro, 122 N. C. 234, 29 SE 352.

Pa.—Sayers v. Pollock, 219 Pa. 274, 68 A 732.

Eng.—Doe v. Jauncey, 8 C. & P. 99, 34 ECL 631.

16. Collins v. Colleran, 86 Minn. 199, 90 NW 364; O'Boyle v. McHugh, 66 Minn. 390, 69 NW 37.

[a] **Acts held sufficient to render possession adverse.**—Where parents, after having deeded land to children, remained in possession under claim of ownership, occupying and renting the land to some of the grantees for more than twenty years, title was reinvested in the parents if the grantees ever had title under the deed. Scarboro v. Scarboro, 122 N. C. 234, 29 SE 352.

17. **Possession of child under parol gift** see supra § 267.

18. Mass.—Silva v. Wimpenney, 136 Mass. 253; Hunt v. Hunt, 3 Metc. 175, 37 AmD 130.

Mich.—Gifford v. Gifford, 100 Mich. 258, 58 NW 1000. See also Beaufait v. Dolson, 110 Mich. 146, 67 NW 1110.

Minn.—O'Boyle v. McHugh, 66 Minn. 390, 69 NW 37.

Mo.—O'Bryan v. Allen, 108 Mo. 227, 18 SW 892, 32 AmSR 595.

Nebr.—Tillson v. Holloway, 94 Nebr. 635, 143 NW 939.

N. Y.—Dunham v. Townshend, 118 N. Y. 281, 23 NE 367.

Pa.—Johns v. Johns, 244 Pa. 48, 90 A 535.

Tenn.—Bozarth v. Watts, (Ch. A.) 61 SW 108.

Tex.—Haggard v. Martin, (Civ. A.) 34 SW 660.

N. S.—Cahoon v. Parks, 25 N. S. 1.

Ont.—Noble v. Noble, 25 Ont. L. 379, 1 DomLR 516, 3 OntWN 519, 20 OntWR 168, 889.

See also Davis v. Bowmar, 55 Miss. 671.

[a] **Under the statutes of Georgia** the exclusive possession by a child of land belonging to the father for a designated time without payment of rents, etc., creates a conclusive presumption of a gift and vests title in the child. Burch v. Burch, 96 Ga. 133, 22 SE 718.

19. Ala.—Butler v. Butler, 133 Ala. 377, 32 S 579; Burrus v. Meadors, 90 Ala. 140, 7 S 469.

Ark.—Ellsworth v. Hale, 33 Ark. 633.

Ky.—Well v. Head, 12 B. Mon. 166.

Minn.—O'Boyle v. McHugh, 66 Minn. 390, 69 NW 37.

Mo.—O'Bryan v. Allen, 108 Mo. 227, 18 SW 892, 32 AmSR 595.

Tex.—Haggard v. Martin, (Civ. A.)

in the absence of some act or declaration indicating an intention to claim adversely.[20] And when the parent and child are living on the land as a family, the law refers the possession to the title, and therefore prima facie the possession is in the parent and the child has no adverse possession.[21] Nevertheless it is well settled that the relation of parent and child does not preclude the child from establishing an adverse possession of the parent's land by the child,[22] but in order to render the possession adverse there must be an open disclaimer of the parent's title and assertion of a hostile title brought home to the parent.[23]

[§ 284] **20. By Guardian against Ward.** The possession by a guardian of property of the ward, either real or personal, is not adverse,[24] being that of an express trustee,[25] and cannot become so in the absence of a distinct and unequivocal repudiation of the latter's title,[26] and according to one decision, even after the ward reaches majority, possession does not become adverse to the ward except by going out or delivering up possession to the ward.[27] Where one who has entered into possession of property as agent for the owner and after such owner's death has been appointed guardian of his children continues to hold the property, his possession is that of his wards and is adverse to any others claiming to be children and heirs of the decedent, and the owner's death and appointment as guardian are sufficient notice to such claimants that the agency is terminated and that his holding is adverse to them.[28]

[§ 285] **21. By Widow against Heirs—a. Before Assignment of Dower—(1) Statement of Rule.** The general rule is well settled that the widow's possession of lands of which her husband died seized before assignment of dower is not adverse to his heirs.[29] When she has taken possession or continues

34 SW 660; Jester v. Francis, (Civ. A.) 31 SW 245.

N. S.—Phelan v. Phelan, 2 N. S. 184.

Ont.—Foster v. Emerson, 5 Grant Ch. (U. C.) 135; Rumrell v. Henderson, 22 U. C. C. P. 180.

[a] **Rule applicable to possession of son-in-law.**—Possession by defendant of a part of the land of his father-in-law will be presumed to be permissive occupancy unless there is very strong evidence to show adverse possession. Smith v. McKenzie, 2 N. S. 228.

[b] **Lessee of children against parent.**—Where children go into possession with the consent of their parent, a lease by them to a stranger does not convey any more permanent rights than they themselves enjoy. Ellsworth v. Hale, 33 Ark. 633.

20. Ellsworth v. Hale, 33 Ark. 633.

21. Ala.—Butler v. Butler, 133 Ala. 377, 32 S 579.

Ga.—Wyatt v. Elam, 23 Ga. 201, 68 AmD 518.

Ky.—Irvine v. Irvine, 89 SW 193, 28 KyL 262; Ward v. Edge, 100 Ky. 757, 39 SW 440, 19 KyL 59.

Mo.—Hume v. Hopkins, 140 Mo. 65, 41 SW 784; Spencer v. O'Neill, 100 Mo. 49, 12 SW 1054.

N. C.—Matthews v. Smith, 19 N. C. 287.

Pa.—Douglas v. Irvine, 126 Pa. 643, 17 A 802.

S. C.—Hill v. Gray, 45 S. C. 91, 22 SE 802.

N. S.—Cahoon v. Parks, 25 N. S. 1.

22. Conn.—Lane v. Coply, 1 Root 68.

Ind.—Wilson v. Campbell, 119 Ind. 286, 21 NE 893.

Ky.—Robinson v. Huffman, 113 SW 468.

Minn.—Malone v. Malone, 88 Minn. 418, 93 NW 605.

N. C.—Grimes v. Bryan, 149 N. C. 248, 63 SE 106.

S. C.—Roberts v. Roberts, 13 S. C. L. 268, 13 AmD 721.

N. B.—Doe v. Savoy, 28 N. B. 168.

Ont.—Noble v. Noble, 27 Ont. L. 342 [allowing app 25 Ont. L. 379, 1 DomLR 516, 3 OntWN 519, 20 OntWR 168, 889].

Compare Wallace v. Feibelman, (Ala.) 60 S 290 (where parent in actual occupancy).

[a] **Thus** a gift of land by a father to his son accompanied by actual delivery of possession and followed by a continuous and exclusive possession by the son extending over a period of twenty years confers a title upon the son under the statute of limitations. Kaulbach v. Cook, 39 N. S. 500.

23. Butler v. Butler, 133 Ala. 377, 32 S 579; Burrus v. Meadors, 90 Ala. 140, 7 S 469; Boykin v. Smith, 65 Ala. 294; Ellsworth v. Hale, 33 Ark. 633; Brettmann v. Fischer, 216 Ill. 142, 74 NE 777; Well v. Head, 12 B. Mon. (Ky.) 166.

[a] **The presumption arising against the claims of the child** may be rebutted by evidence and in all cases the character of the possession is a question for the jury. Roberts v. Roberts, 13 S. C. L. 268, 13 AmD 721.

[b] **Facts held to show adverse possession.**—Where a father made a deed of certain land to his son, reserving possession of the land for life and not recording the deed, but afterward placed the son in full possession and control, who made many valuable improvements, the son's possession was adverse to the father and was not that of a tenant. Cyrus v. Holbrook, 106 SW 300, 32 KyL 466.

[c] **Facts held not to show adverse possession by child.**—(1) Where the person claiming title to land, yet not residing on it, frequently visited her son who did live there, and there was constant communication between them, it was held that the son's possession was not adverse. Dunham v. Townshend, 118 N. Y. 281, 23 NE 367. (2) So it has been held that the declarations of a boy nine years old, living in the family of his father, to the effect that the land occupied by the family belonged to him were not admissible to show his adverse possession to the land as against his father. Douglas v. Irvine, 126 Pa. 643, 17 A 802. (3) Where a father was insane, and one of his sons who had lived at his house returned and took charge of his farm, with the acquiescence of the mother and the rest of the family, for several years until the father's death, it was held that the father continued seized while he lived and that the taking of the profits of the farm by the son must be considered for the use and benefit of the father. Hunt v. Hunt, 3 Metc. (Mass.) 175, 37 AmD 130.

24. Halliburton v. Fletcher, 22 Ark. 453; Brown v. McKay, 125 Cal. 291, 57 P 1001; Lewis v. Castleman, 27 Tex. 407. Compare Boyce v. Warren, 19 N. C. 498 (after termination of guardianship).

[a] **Illustration.**—The mother of minors, who as their guardian is in possession of their lands, cannot, by any action on her part during their minority, claim adversely to the children so as to set in operation the bar effected by Gen. Laws [1896] c 205 §§ 2, 3, although, literally construed, the statute is effective in all relations. Searle v. Laraway, 27 R. I. 557, 65 A 269.

[b] **Legality of guardian's appointment.**—The question as to the legality of the appointment of a guardian who holds property for minor heirs does not affect the fact of his possession or its adverse character in favor of those whom he assumes to represent. Westenfelder v. Green, 76 Fed. 925.

[c] **Possession of both guardian and ward.**—If the infant and guardian are both in possession of the land, the guardian's possession is not adverse to that of the infant, because, in case of the common possession by two persons, the ownership draws to it the possession and it is presumed to be in him who has the title. Gaylord v. Respass, 92 N. C. 553.

25. Clarke v. Macdonell, 20 Ont. 564; Hickey v. Stover, 11 Ont. 106.

26. See cases infra this note.

[a] **Release of claim to father.**—Where a father held chattels as the guardian of his child who, on arriving at full age, released all claim to the father, the latter will be considered as holding adversely and five years' possession will bar all claim to the property. Findley v. Patterson, 2 B. Mon. (Ky.) 76.

[b] **Possession by guardian's representative.**—Where the legal representative of the guardian takes possession of chattels as his own and continues in peaceable possession under claim of title for five years, he may acquire title thereto by adverse possession. Halliburton v. Fletcher, 22 Ark. 453.

27. Kent v. Kent, 20 Ont. 445 [rev 20 Ont. 158, and not foll Clarke v. Macdonell, 20 Ont. 564; Hickey v. Stover, 11 Ont. 106, both of which apparently hold that the coming of age of the ward automatically starts the running of the statute in the guardian's favor, although the reason for this conclusion is by no means obvious].

28. Westenfelder v. Green, 76 Fed. 925 [foll 24 Or. 448, 34 P 23].

29. U. S.—Zeller v. Eckert, 4 How. 289, 11 L. ed. 979.

Ala.—Sloss-Sheffield Steel, etc., Co. v. Taff, 59 S 658; Allison v. Robinson, 136 Ala. 434, 34 S 966; Stiff v. Cobb, 126 Ala. 381, 28 S 402, 85 AmSR 38; Johnson v. Oldham, 126 Ala. 309, 28 S 487, 85 AmSR 30; Foy v. Wellborn, 112 Ala. 160, 20 S 604; Robinson v. Allison, 97 Ala. 596, 12 S 382, 604.

Ark.—Jarrett v. Jarrett, 167 SW 482; Hardin v. Watson, 104 Ark. 641, 148 SW 506; Watson v. Hardin, 97 Ark. 33, 132 SW 1002; Padgett v. Norman, 44 Ark. 490. See also Carnall v. Wilson, 21 Ark. 62, 76 AmD 351.

Ga.—McQueen v. Fletcher, 77 Ga. 444.

Ill.—Loughran v. Gorman, 256 Ill. 46, 99 NE 886 [aff 168 Ill. A. 113]; Dewitt v. Shea, 203 Ill. 393, 67 NE 761, 96 AmSR 311; Reuter v. Stuckart, 181 Ill. 529, 54 NE 1014; Gosselin v. Smith, 154 Ill. 74, 39 NE 980; Downing v. Mayes, 153 Ill. 330, 38 NE 620, 46 AmSR 896; Riggs v. Girard, 133 Ill. 619, 24 NE 1031; Mettler v. Miller, 129 Ill. 630, 22 NE 529; Hunter v. Dennis, 112 Ill. 568; Reynolds v. McCurry, 100 Ill. 356; Musham v. Musham, 87 Ill. 80; Wilson v. Byers, 77 Ill. 76; Ambrose v. Raley, 58 Ill. 506.

in possession of the land as widow, her possession is in privity with the heirs or devisees of her husband.[30] Some decisions seem to hold that the widow cannot hold adversely before assignment of dower.[31] Nevertheless according to the weight of authority the possession of the widow, although not in hostility to the heirs, may be converted into an adverse holding which will ripen into title if continued for the statutory period.[32] But for this purpose it is essential that there should be some plain, decisive, unequivocal act or conduct on the part of the widow amounting to an open denial of the rights of the heirs and putting them out of possession.[33] It has been held, however, that actual

Ind.—McEntire v. Brown, 28 Ind. 347.

Ky.—Griffith v. Griffith, 152 Ky. 185, 153 SW 229; Bush v. Fitzgeralds, 125 SW 716; Lindsey v. Smith, 131 Ky. 176, 114 SW 779; Moore v. Gulley, 98 SW 1011, 30 KyL 442; Clayton v. Clayton, 12 SW 312, 11 KyL 472; Frazer v. Naylor, 1 Metc. 593; Driskell v. Hanks, 18 B. Mon. 855.

Mich.—Carpenter v. Carpenter, 126 Mich. 217, 85 NW 576; Richards v. Richards, 75 Mich. 408, 42 NW 954.

Miss.—Smith v. Cunningham, 79 Miss. 425, 30 S 652.

Mo.—Shoultz v. Lee, 168 SW 1146; Moran v. Stewart, 246 Mo. 462, 151 SW 439; Meddis v. Kenney, 176 Mo. 200, 75 SW 633, 98 AmSR 496; Roberts v. Thomason, 174 Mo. 378, 74 SW 624; Westmeyer v. Gallenkamp, 154 Mo. 28, 55 SW 231, 77 AmSR 747; Melton v. Fitch, 125 Mo. 281, 28 SW 612; Fischer v. Siekmann, 125 Mo. 165, 28 SW 435; Thomas v. Black, 113 Mo. 66, 20 SW 657; Null v. Howell, 111 Mo. 273, 20 SW 24; Colvin v. Hauenstein, 110 Mo. 575, 19 SW 948; Sherwood v. Baker, 105 Mo. 472, 16 SW 938, 24 AmSR 399; Hickman v. Link, 97 Mo. 482, 10 SW 600; Holmes v. Kring, 93 Mo. 452, 6 SW 347; Roberts v. Nelson, 87 Mo. 229; Brown v. Moore, 74 Mo. 633; Chouquette v. Barada, 28 Mo. 491. And see Givens v. Ott, 222 Mo. 395, 121 SW 23.

Nebr.—Larson v. Anderson, 74 Nebr. 361, 104 NW 925.

N. H.—Livingston v. Pendergast, 34 N. H. 544; Atherton v. Johnson, 2 N. H. 31.

N. J.—Reed v. Hackney, 69 N. J. L. 27, 54 A 229.

N. Y.—Knapp v. Burton, 7 NYCiv Proc 448.

N. C.—Everett v. Newton, 118 N. C. 919, 23 SE 961; Page v. Branch, 97 N. C. 97, 1 SE 625, 2 AmSR 281; Nixon v. Williams, 95 N. C. 103; Melvin v. Waddell, 75 N. C. 361.

Pa.—Breidegam v. Hoffmaster, 61 Pa. 223; Irvine v. Sibbetts, 26 Pa. 477; Iddings v. Cairns, 2 Grant 88; Hall v. Mathias, 4 Watts & S. 331; Cook v. Nichols, 2 Watts & S. 27; Harmon's App., 2 WklyNC 62.

Tenn.—Meriwether v. Vaulx, 5 Sneed 300.

Tex.—Humphreys v. Edwards, 89 Tex. 512, 36 SW 333, 434; Harvey v. Carroll, 72 Tex. 63, 10 SW 334; Clemons v. Clemons, (Civ. A.) 45 SW 199; Taylor v. Taylor, (Civ. A.) 26 SW 889.

Va.—Hulvey v. Hulvey, 92 Va. 182, 23 SE 233; Hannon v. Hounihan, 85 Va. 429, 12 SE 157; Wiseley v. Findlay, 3 Rand. (24 Va.) 361, 15 AmD 712.

See also Doe v. Haslewood, 6 A. & E. 167, 33 ECL 108, 112 Reprint 63.

[a] **"The reason for this rule** is, that under section 2955, Revised Statutes 1899, and previous revisions, the widow is entitled to the possession and occupancy of the mansion house of her deceased husband, and the messuages or plantation thereto belonging, called 'her quarantine,' until dower is assigned." Givens v. Ott, 222 Mo. 395, 421, 121 SW 23 (per Woodson, J.); Roberts v. Nelson, 86 Mo. 21.

[b] **Possession presumed to be in right of dower.**—Where a widow, after the death of her husband, remains in possession of lands of which he died seized, it is in law presumed to be her possession in right of dower, until dower is assigned. Reed v. Hackney, 69 N. J. L. 27, 54 A 229.

[c] **Applications of rule.**—(1) The mere entry by a widow into lands of her deceased husband, claiming them and taking the rents and profits for twenty-one years, is no disseizin of the heirs at law. To make it such there must be some plain, decisive, unequivocal act or conduct on the widow's part amounting to disseizin of the heirs. Hall v. Mathias, 4 Watts & S. (Pa.) 331. (2) Where a husband in adverse possession of land dies and the widow continues in possession, her right is by virtue of the marital relation and will not be considered hostile to that of her husband's heirs unless she brings to their attention the fact that she claims to own the property in her own right and adversely to any right derived through her husband. Larson v. Anderson, 74 Nebr. 361, 104 NW 925. (3) Land descended to decedent's children, subject to his widow's right of dower, and she remained in possession under an oral arrangement with the children. She erected a house thereon, and one or the other of the children occupied the premises with her, some of them being minors. She asserted that she would hold the premises against the children or any deed they might give, considered herself the owner of the land, and on her death devised it to two of the children. It was held, in an action of ejectment by one claiming the interest of one of the children against the grantees of the widow's devisees, that the widow's possession was not adverse to the children. "She did not enter in opposition to their rights, and we do not find an expression of an intention to deny their rights to the property after her death." Carpenter v. Carpenter, 126 Mich. 217, 85 NW 576.

[d] **Special statutory provisions as affecting rule.**—Under a statute which makes seven years' payment of taxes, with color of title and possession, constitute good title, the possession, under her right of quarantine, of the widow of one who had color of title and her payment of taxes during her possession inure in favor of the heirs of the deceased since her relation to them is substantially that of tenant. Riggs v. Girard, 133 Ill. 619, 24 NE 1031.

[e] **Where the widow had a right of homestead,** her possession was not adverse to the brother and sole heir of decedent, he having no right to possession, and hence he was not required to sue within ten years after knowledge of defendant's claim to prevent it from ripening into a title. Perkins v. Perkins, (Tex. Civ. A.) 166 SW 915.

30. Brinkley v. Taylor, (Ark.) 163 SW 521; Hulvey v. Hulvey, 92 Va. 182, 23 SE 233.

31. Givens v. Ott, 222 Mo. 395, 121 SW 23; Roberts v. Nelson, 86 Mo. 21. See also Missouri cases supra note 29.

32. Ala.—Sloss-Sheffield Steel, etc., Co. v. Taff, 59 S 658; Hays v. Lemoine, 156 Ala. 465, 47 S 97; Johnson v. Oldham, 126 Ala. 309, 28 S 487, 85 AmSR 30; Robinson v. Allison, 97 Ala. 596, 12 S 382, 604.

Ark.—Brinkley v. Taylor, 163 SW 521.

D. C.—Hogan v. Kurtz, 8 D. C. 135.

Hawaii.—Jones v. Pooloa, 11 Hawaii 755; Paulo v. Mayo, 4 Hawaii 536.

Iowa.—Williams v. Thomas, 65 Iowa 183, 21 NW 509.

Ky.—Reno v. Blackburn, 72 SW 775, 24 KyL 1976; Frazer v. Naylor, 1 Metc. 593; Driskell v. Hanks, 18 B. Mon. 855; Yeatman v. McDonald, 4 KyL 348.

N. H.—Munroe v. Wilson, 68 N. H. 580, 41 A 240; Livingston v. Pendergast, 34 N. H. 544; Atherton v. Johnson, 2 N. H. 31.

N. J.—Colgan v. Pellens, 48 N. J. L. 27, 2 A 633.

N. Y.—Criswell v. Noble, 61 Misc. 483, 488, 113 NYS 954 [aff 134 App. Div. 994 mem, 119 NYS 1122 mem, and cit Cyc].

Pa.—Davis v. Dickson, 92 Pa. 365; Iddings v. Cairns, 2 Grant 88; Hall v. Mathias, 4 Watts & S. 331.

Tex.—Humphreys v. Edwards, 89 Tex. 512, 36 SW 333, 434.

Va.—Hannon v. Hounihan, 85 Va. 429, 12 SE 157.

Ont.—Johnston v. Oliver, 3 Ont. 26. "Claim and possession [of the widow] might have been of such a nature as to amount to an entire disseizin of the heir and an entire denial of his rights, so as to result in an acquisition of title by adverse possession." Watson v. Hardin, 97 Ark. 33, 36, 132 SW 1002.

[a] **Entry under claim of ownership.**—Where a widow enters upon and claims the ownership of land in her husband's possession at the time of his death, but to which he had no record title or title by adverse possession, and continues in possession thereof for over thirty years under claim of ownership, her entry upon the property cannot be said to have been in aid of her right of dower and her possession to have been in subordination to the rights of her husband's heirs; and, her possession under claim of title having been continued for more than the statutory period, she is entitled, in a suit in equity by her against such heirs at law, to a decree declaring the legal title to be vested in her by adverse possession. Hooper v. Stuart, 23 App. (D. C.) 434.

33. Ark.—Hardin v. Watson, 104 Ark. 641, 148 SW 506; Watson v. Hardin, 97 Ark. 33, 132 SW 1002.

Ill.—Lambert v. Hemler, 244 Ill. 254, 91 NE 435.

Mo.—Meddis v. Kenney, 176 Mo. 200, 75 SW 633, 98 AmSR 496.

Nebr.—Larson v. Anderson, 74 Nebr. 361, 104 NW 925.

Pa.—Hall v. Mathias, 4 Watts & S. 331.

Va.—Hannon v. Hounihan, 85 Va. 429, 12 SE 157.

See also cases supra note 29.

[a] **Occupation under deed from one of the heirs.**—Where a widow had held a parcel of her husband's estate for nearly thirty years under a deed in fee from one of the heirs, it was held that in an action by another of the heirs for an undivided portion of the same land it could not be presumed, against the deed under which she had entered and claimed, that she held as tenant in dower. "The deed in connection with these circumstances, excludes all presumption that she entered into and claimed the estate as and in lieu of dower." Hale v. Portland, 4 Me. 77.

[b] **A divestiture of her dower right,** as by a release to the heir or tenant, or other act amounting to a relinquishment of dower brought to the notice of the legal owner would enable the widow thereafter to set up a possession which would be adverse. Robinson v. Allison, 124 Ala. 325, 27 S 461.

[c] **Occupation under destroyed will and claim of title.**—Where a widow occupied land of her deceased husband under a destroyed will and held actual, notorious, adverse possession thereof for more than fifteen years, claiming the land in fee and not as a homestead merely, she thereby ac-

direct notice of a hostile claim to land by a widow is not necessary to set in motion the statute of limitations.[34]

[§ 286] **(2) Extent of Rule.** Where the widow continues to live upon the land with her infant children, the heirs at law, or enters and takes possession with the infant heirs, after her husband's decease, she is presumed to hold for her own benefit in reference to her dower only, and for the infant heirs as their natural guardian,[35] and the possession of a decedent's land by his widow and child is not adverse to his children by a former marriage.[36] So the character of her possession is not changed by her subsequent removal from and lease of the premises,[37] or by the fact that she compromised an outstanding adverse claim to the land and took a deed therefor in her own name, paying for it with money obtained from her father's estate, although she had money left her by her husband,[38] or procured a tax deed from the state to the property, the land having been sold for taxes prior to the sale to her husband,[39] or purchased lands of the estate at a judicial sale, with funds in her hands as administratrix, for which she never accounted,[40] or paid off an encumbrance placed on the land by decedent and had it conveyed to herself, where she inventoried the land as that of decedent and occupied it as a homestead together with the sole heir,[41] or by purchasing the land at an administrator's sale and claiming it as her own.[41½] And where the heir at law permits the widow of the owner of the fee to occupy the whole of the estate during her life under a verbal arrangement with the heir understood to be in lieu of dower, but with no definite agreement or understanding to that effect, the widow's possession is not adverse to the heir at law, and the statute of limitations will not run against the right of entry.[42] Likewise where a widow occupied land as widow and did not claim adversely to the heirs, and a third person purchased an interest in the land, taking subject to the widow's claim, and acted as her agent in renting the land, the possession of neither was such as to start the running of the statute of limitations against the heirs.[43] So if she marries again the possession of herself and husband will be for the heirs as well as for themselves,[44] unless the circumstances attending the possession amount to an actual ouster of the heirs and in fact exclude them from the land.[45] If the widow continues in possession of land adversely held by her husband under an understanding with her children that she should hold for life, she cannot claim title by adverse possession as against the children,[46] and, although she remains in possession for a length of time sufficient to acquire title by adverse possession, declarations that the husband devised the lands to the widow to enjoy during her widowhood negative any decisive claim or intention to claim by the statute of limitations.[47] It has been held, however, that where the wife holds the land of which the husband is seized for more than the statutory period after his death under claim of

quired title by adverse possession as against her husband's heirs. Reno v. Blackburn, 72 SW 775, 24 KyL 1976.

[d] **Changing character of possession by partition.**—Where a surviving wife has a life estate in her husband's homestead, the character of her possession may be changed by a parol partition to which she and the heirs of the husband agree so as to make her possession adverse. Whittemore v. Cope, 11 Utah 344, 40 P 256.

34. Humphreys v. Edwards, 89 Tex. 512, 36 SW 333, 434.

35. Westenfelder v. Green, 76 Fed. 925; Livingston v. Pendergast, 34 N. H. 544; Atherton v. Johnson, 2 N. H. 31.

36. Hulvey v. Hulvey, 92 Va. 182, 23 SE 233. And see Thomas v. Black, 113 Mo. 66, 20 SW 657. In this case it appeared that the testator, having been twice married and leaving surviving him children by both wives, left a will devising his farm to his second wife during her life, with remainder to her children begotten by him, and made no other mention of his children in the will. It was held that the possession of the widow, whether she be regarded as tenant of the homestead or in possession under her right of quarantine or under the will, was not adverse to the children of the first wife, and that the statute of limitations would not begin to run as to them prior to her death.

37. Foy v. Wellborn, 112 Ala. 160, 20 S 604; Lee v. Livingston, 143 Mich. 203, 106 NW 713 (holding that where the owner of a dower interest unassigned assumes to leave the entire premises to one who enters thereunder, whether the agreement is or is not binding on the owners of the fee, the entry is not hostile to their title, and that after entry it could not become hostile as to them by the agreement or the acquiescence of the owner of the dower interest). See also Melvin v. Waddell, 75 N. C. 361 (holding that possession taken by a tenant under the widow of a farm owner, she having no authority to give it, was not adverse to the heirs of the owner). And see Dillard v. Cochran, (Tex. Civ. A.) 153 SW 662 (holding that where land constituting the separate property of a husband was occupied by himself and wife as his homestead, her possession thereof after his death, either in person or by a tenant renting it temporarily, was not adverse to a grantee of a child of the parties).

38. Scott v. Proctor, 13 SW 790, 12 KyL 57.

39. Richards v. Richards, 75 Mich. 408, 42 NW 954.

40. Clayton v. Clayton, 12 SW 312, 11 KyL 472 (holding that in such case she holds in trust for the heirs, in the absence of evidence that the estate was indebted to her, especially where she retains possession during her life and does not account for the price of part of the land sold by her).

41. Hinter v. Dennis, 112 Ill. 568.

41½. Shoultz v. Lee, (Mo.) 168 SW 1146.

42. Lloyd v. Gillis, 37 N. B. 190.

43. Lindsey v. Smith, 131 Ky. 176, 114 SW 779.

44. Dewitt v. Shea, 203 Ill. 393, 396, 67 NE 761, 96 AmSR 311 (where Wilkin, J., said: "He would naturally appear to be the head of the house and in control of the premises, but to hold that he thereby came into adverse possession would be to require each child, on coming of age, to dispossess the mother and break up the family relations"); Livingston v. Pendergast, 34 N. H. 544; Irvine v. Sibbetts, 26 Pa. 477; Cook v. Nicholas, 2 Watts & S. (Pa.) 27. See also Foy v. Wellborn, 112 Ala. 160, 20 S 604; Westmeyer v. Gallenkamp, 154 Mo. 28, 55 SW 231, 77 AmSR 747.

[a] **Where the widow marries the grantee of her husband** of land conveyed by a deed in which she did not join and lives with him on the land, the possession is that of the wife until her dower is assigned, not that of the husband, and such possession by the husband cannot be set up by those claiming under him as a possession which will draw to it the possession of an adjoining tract left in the possession of the widow and over which her right of dower extends in order to support a title to such adjoining tract by adverse possession. Reed v. Hackney, 69 N. J. L. 27, 54 A 229.

[b] **Possession of second husband after widow's abandonment of premises.**—A widow was authorized by the will of her deceased husband to continue in the possession of the land eleven years after his death. She married again within nine months, resided upon the property about one year, and then left the possession; but her second husband and those claiming under him occupied it for thirty-five years, some twenty-five years after the right of entry by the owner had accrued. It was held that the possession of the second husband was in privity with the estate of the owner and that nothing short of an open and explicit disavowal of a holding under that title and an assertion of title in himself, brought home to the owner's notice, would make his possession adverse. Zeller v. Eckert, 4 How. (U. S.) 289, 11 L. ed. 979.

45. Livingston v. Pendergast, 34 N. H. 544. See also Irvine v. Sibbetts, 26 Pa. 477.

[a] **Acts amounting to ouster.**—One who had married a widow received a quitclaim deed from the mortgagee of lands in which the widow had an unassigned right of dower and on which he was then living with her. Immediately thereafter they mortgaged it and from time to time they deeded away portions of it. It was held an adverse possession, disseizing the heirs of deceased, the children of the widow, who lived on the premises with their mother and stepfather, and entitling them to bring an action for possession, so that the limitation of twenty years (Rev. St. c 181 §§ 1, 2) then commenced to run. "The facts . . . leave no ground for a presumption . . . that his possession was held by virtue of his wife's right of dower and the children's inherited interests. Such being the character of his possession, it disseized the heirs and entitled them to bring an action to recover possession." Munroe v. Wilson, 68 N. H. 580, 581, 41 A 240.

46. Williams v. Williams, 170 Ala. 143, 54 S 107; Chouquette v. Barada, 28 Mo. 491.

47. Breidegan v. Hoffmaster, 61 Pa. 223.

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absolute title to the whole the claims of the heirs are barred.[48]

[§ 287] **b. After Assignment of Dower.** It has been held that where dower is assigned and the widow goes into possession she cannot acquire any right against the heir by the statute of limitations, at least without some open, positive change of possession, accompanied with some manifestations of an unequivocal purpose to hold adversely to the heir, such as would have subjected the person coming in under such change of possession to an action at the instance of the heir.[49]

[§ 288] **22. By Assignee or Grantee of Widow against Heirs.** Where a person goes into possession of land under a deed from a widow conveying her unassigned dower interest, his possession as to the heirs is not adverse.[50] It has been held, however, that where a widow succeeding to and claiming possession of lands of which the husband died seized makes a deed purporting to pass the fee, her grantee may hold in hostility to the heirs,[51] and that where the widow marries again and joins with her husband in conveying the entire premises to a stranger who places the deed on record and takes possession the possession becomes adverse to the heirs and, if continued for twenty-one years, will bar their right to entry.[52]

[§ 289] **23. By Owner's Concubine against Heirs.** Possession of land after the owner's death by a woman who knows that she is not his wife and is not entitled to dower, is hostile and adverse to his lawful wife's children, although she has been living with him as his wife.[53]

[§ 290] **24. By Heirs or Their Grantees against Widow.** While the heirs of a deceased husband are in possession of his lands, the statute of limitations does not run against the widow's claim for dower;[54] and where some of the heirs convey their interests in the land, the possession of the purchaser before allotment of dower is not adverse to the widow's claim therefor.[55] So where the widow and son by agreement reside together on land of the deceased husband, the facts that the son executes a quitclaim deed of the land to his wife for a nominal consideration and that she resides on the land jointly with the widow and pays taxes for the statutory period do not render her possession adverse to that of the widow and bar the dower right.[56]

[§ 291] **25. By Widow against Mortgagees or Creditors of Husband.** If the decedent's land is admittedly subject to a lien, the continued possession of the widow is in subordination thereto in the absence of an express disclaimer and an express hostile occupancy with the claimant's knowledge,[57] and it has been held that the widow's possession of land assigned to her as dower is not adverse to the mortgagee of her husband or to the assignee of the latter,[58] and this is true, although she made substantial improvements on the land while in possession.[59]

[§ 292] **26. By Widow against Purchaser at Administrator's Sale.** The possession of a widow before assignment of dower and subsequent to an administrator's sale is not adverse to one who does not get a deed and allows her to remain on the premises and does not extinguish the title acquired by the purchaser.[60]

[§ 293] **27. By Surviving Husband or His Grantee against Heirs.** Continued possession of the husband after the wife's death as tenant by the curtesy of lands of which she died seized is not adverse to her heirs[61] and, where the wife dies without issue

48. Hogan v. Kurtz, 8 D. C. 135; Williams v. Thomas, 65 Iowa 183, 21 NW 509.

49. Malloy v. Bruden, 86 N. C. 251. And see Reno v. Blackburn, 72 SW 775, 24 KyL 1976.

50. Melton v. Fitch, 125 Mo. 281, 28 SW 612; Colvin v. Hauenstein, 110 Mo. 575, 19 SW 948; Brown v. Moore, 74 Mo. 633. See also Gosselin v. Smith, 154 Ill. 74, 39 NE 980; Herring v. Keneipp, (Ind.) 102 NE 834 (holding that where land which a widow held under defeasible title in fee was sold under execution during her second marriage, the purchaser took no more than the widow's estate which was determinable upon her death during the existence of the marriage, and consequently his possession of the property until the widow's death during coverture was not adverse as to the children of her first marriage); Roberts v. Thomason, 174 Mo. 378, 74 SW 624 (holding that where the right of possession of property which had been set off to a widow as a homestead was conveyed by her to defendants, their possession was not adverse to other heirs of the deceased husband during the widow's lifetime). But see Fletcher v. Joseph, 105 Ark. 646, 152 SW 293 (holding that a widow's deed of her alleged homestead before assignment thereof to her constituted an abandonment of her rights, and, being void, a purchaser's possession thereunder was adverse from the time he entered as against the heirs of the widow's deceased husband); Russell v. Tennant, 63 W. Va. 623, 60 SE 609, 129 AmSR 1024 (holding that the dower of a widow confers no right of possession upon her, except as to the mansion house and curtilage, until after the assignment, and that before assignment it is no obstacle to the right of entry on the part of an heir and does not prevent the running of the statute of limitations against him in favor of an adverse claimant in possession who has procured a relinquishment of the dower in his favor by purchase thereof).

51. Cooper v. Watson, 73 Ala. 252, 253 (where it was said: "The defendant [grantee] sustained no relation to the intestate, or to his personal representative, or to his heirs, or to the title which they could assert, which estopped him from taking and holding possession of the lands in hostility to them"). See also Dixon v. Patterson, 135 Ga. 183, 69 SE 21 (holding that, if an intestate's property had not been divided among the widow and children, and the widow had not conveyed part of it to others who took possession, prescription might have ripened with possession having the proper characteristics and for the proper time).

52. Irvine v. Sibbetts, 26 Pa. 477.

53. Griffith v. Griffith, 152 Ky. 185, 153 SW 229.

54. Livingston v. Cochran, 33 Ark. 294; Makauhana v. Pua, 6 Hawaii 651; Brumback v. Brumback, 198 Ill. 66, 72, 64 NE 741; Sill v. Sill, 185 Ill. 594, 57 NE 812.

[a] **Reason of rule.**—"It is the duty of the heir to assign dower, and, for this reason, his possession is not regarded as adverse to the owner of the dower estate, for, otherwise, he would be allowed to take advantage of his own wrong." Brumback v. Brumback, 198 Ill. 66, 72, 64 NE 741 (per Magruder, C. J.).

[b] **Applications of rule.**—(1) The unassigned dower right of a wife is not barred in favor of a son who resides for that time on the land with the wife under an agreement with her that she is to live with him and make her home on the place. Brumback v. Brumback, 198 Ill. 66, 64 NE 741. (2) Where, during the time she remained single, the widow resided in a house on the land but at first a half and subsequently a larger portion of the premises were cultivated for the heirs, all parties being ignorant of the widow's homestead rights, the heirs did not hold such adverse possession as would start the statute of limitations running against the widow's homestead title. Wheelock v. Ovenshine, 110 Mo. 100, 19 SW 640. (3) So it has been held that three years' adverse possession of a homestead by one holding for the children of a deceased intestate owner will not bar the right of the widow to her life interest of one third. Cockrell v. Curtis, 83 Tex. 105, 18 SW 436.

55. Sergent v. North Cumberland Mfg. Co., 112 Ky. 888, 892, 66 SW 1036, 23 KyL 2226 (where it was said: "Appellee, claiming title through the husband, may be said to hold not adversely to his title, but in amity with it. Until dower is allotted, it may be questioned whether the widow has a right of action therefor").

56. Brumback v. Brumback, 198 Ill. 66, 73, 64 NE 741 (where Magruder, J., said, that the doctrine that the widow's dower may be barred as against a stranger or purchaser has no application. The son's wife "was a mere volunteer, and occupied no different attitude towards the appellee [the widow] from that which had been occupied by her husband before the deed to her was executed").

57. Oury v. Saunders, 77 Tex. 278, 13 SW 1030.

58. Williams v. Bennett, 26 N. C. 122; Neilson v. Grignon, 85 Wis. 550, 55 NW 890.

59. Neilson v. Grignon, 85 Wis. 550, 55 NW 890.

60. Sherwood v. Baker, 105 Mo. 472, 16 SW 938, 24 AmSR 399.

61. Ala.—Hinton v. Farmer, 149 Ala. 211, 42 S 563, 121 AmSR 62; Ed-

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so that the husband does not acquire an estate by curtesy consummate, his continued possession of the wife's lands will not, as a general rule, be deemed adverse to her heirs.[62] So the possession or right acquired by a purchaser of the curtesy rights of a husband is not adverse to the children of the deceased wife to whom the land descended on her death, subject to the husband's curtesy,[63] and does not become so until the death of such tenant, since the heirs have no right to enter upon the land and no right of action until his death.[64]

[§ 294] **28. By Surviving Husband in His Own Right against Holder of Outstanding Paramount Title.** Where a husband deeds land of which he is in possession to his wife who never enters into possession, his continued possession after her death is in his own right and not as tenant by curtesy, and where such possession is continued for the statutory period it inures not to the benefit of the wife's heirs but to his own benefit and vests title in him as against the holder of an outstanding paramount title.[65]

[§ 295] **29. By Survivor of Community against Heirs.** The possession of community property by the survivor of a community qualified as such is not adverse to the heirs of deceased in the absence of notice to them that the survivor is claiming adversely,[66] and occupancy by the widow and her children without repudiating the title of his children by a former wife will not sustain a plea of the statute of limitations where such homestead is community property of the first marriage.[67] But where a widow in community, holding either no title at all to her husband's half of a piece of community property or at best a testamentary usufruct in the same, sells the property in its entirety to a third person who at once takes possession of it, prescription immediately commences running in his favor.[68]

[§ 296] **30. By Devisee against Survivor of Community.** That community property is inventoried by the executor as the estate of the testator is not inconsistent with possession by the devisee of the property being adverse to the testator's wife to the extent of her half interest.[69]

[§ 297] **31. By Purchaser against Party against Whom Judgment or Decree for Sale Was Rendered.** The possession of the purchaser of land sold under a judgment or decree is adverse to the party against whom the judgment or decree was rendered,[70] and this is ordinarily so even though the sale was invalid.[71] However, the sale must be complete. Possession of the purchaser prior to completion of the

wards v. Bender, 121 Ala. 77, 25 S 1010.

Ark.—Stricklin v. Moore, 98 Ark. 30, 135 SW 360.

Ky.—Holmes v. Lane, 136 Ky. 21, 123 SW 318; Clinton v. Franklin, 33 SW 142, 26 KyL 1056; Williams v. Williams, 76 SW 413, 25 KyL 836, 77 SW 184, 25 KyL 1085.

Mich.—Brown v. Clark, 44 Mich. 309, 6 NW 679.

N. Y.—Jackson v. French, 3 Wend. 337, 20 AmD 699.

See Norcum v. Savage, 140 N. C. 472, 53 SE 289 (holding that where a deed to the wife who bought and paid for the land was stolen or lost without registration, and after her death her husband procured another deed to be executed to himself, the husband held the land by implication of law as trustee for their children, subject to his life estate as tenant by the curtesy).

[a] **The reason for this is obvious.**—The heirs, during the existence of the husband's estate by the curtesy, have no right of entry and possession, and therefore their right cannot be barred when there is no right of suit for it. McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 SE 508, 62 LRA 562.

[b] **Application of rule.**—Although a husband, for thirty years after the execution to him of a deed by commissioners, pursuant to a judgment awarding him his wife's share in her deceased father's real estate, was in possession of the land, yet as it does not clearly appear that he did not, during the lifetime of his wife, claim the land by virtue of his marital right and after her death by virtue of his title by curtesy, his possession cannot be regarded as adverse. Black v. Black, 51 SW 456, 21 KyL 403.

[c] **Curtesy created by statute after wife's acquisition of land.**—The rule that the possession of a tenant by the curtesy is not adverse to the heirs applies, although the curtesy was created by a statute which did not go into effect until after the conveyance of the bond to the wife. Brown v. Clark, 44 Mich. 309, 6 NW 679.

[d] **Where a surviving husband occupied land under his right of homestead and dower,** although his dower was never assigned, it would require acts of the most unequivocal character to render his possession adverse to his children who inherited the fee. Kirby v. Kirby, 236 Ill. 255, 86 NE 259.

[e] **Effect of execution of deed by wife to husband.**—Where a husband and wife reside on land after the execution of a void deed thereof by the wife to the husband, the possession of the husband and persons claiming under him after the death of the wife is adverse to the wife's heirs. Berkowitz v. Brown, 3 Misc. 1, 23 NYS 792.

[f] **Occupancy in connection with heirs.**—Where a father and his children occupy land together, the possession of the father is in no sense adverse to the children whether he claims the land by right of curtesy or by deed. Wilson v. Sutton, 153 Ky. 96, 154 SW 394.

62. Marshall v. Pierce, 12 N. H. 127 (holding that the presumption is that he remains in possession under the heirs. There must be evidence to show that he continued the possession adversely, aside from the occupation itself). To same effect Jackson v. Cairns, 20 Johns. (N. Y.) 301. But see Pattison v. Dryer, 98 Mich. 564, 57 NW 814 (where it was held that where a husband holds over on his wife's land after her death he is a trespasser in whose favor limitations run against his wife's heirs, under a statute providing that the right of an heir of one who died seized to recover land accrues at the time of the ancestor's death, if there be no estate intervening).

63. Kohle v. Hobson, 215 Mo. 213, 114 SW 952; Jackson v. Mancius, 2 Wend. (N. Y.) 357; McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 SE 508, 62 LRA 562.

64. Meraman v. Caldwell, 8 B. Mon. (Ky.) 32, 46 AmD 537.

[a] **The purchaser at execution sale of the title of a tenant by the curtesy** is not adverse to the heirs. He stands on the same footing as a tenant by the entry. Stricklin v. Moore, 98 Ark. 30, 135 SW 360.

65. Stricklin v. Moore, 106 Ark. 14, 151 SW 1009, 1183.

66. Taylor v. Taylor, (Tex. Civ. A.) 26 SW 889.

67. Clemons v. Clemons, (Tex. Civ. A.) 45 SW 199.

[a] **It has been held that limitations begin to run** against the recovery of an interest in land by a former wife when the executor under decedent's will giving the entire property to an alleged second wife takes possession of the property with the administration of the estate under the will. Anderson v. Stewart, 15 Tex. 285.

68. Jordan v. Richards, 114 La. 329, 38 S 206 (holding further that the fact that there stood registered at the date of the sale a conveyance of the property by her husband's heir to a third person did not per se prevent the running of prescription).

69. Frey v. Myers, (Tex. Civ. A.) 113 SW 592.

70. Stith v. Jones, 4 B. Mon. (Ky.) 375; Waldron v. Harvey, 54 W. Va. 608, 618, 46 SE 603, 102 AmSR 959 [quot Cyc]. See also Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Miller v. State, 38 Ala. 600; Barnes v. Born, 133 Ind. 169, 30 NE 509, 32 NE 833.

[a] **A purchaser of land at a sheriff's sale** is presumed to hold adversely to the patentee or those claiming under him. Stith v. Jones, 4 B. Mon. (Ky.) 375.

[b] **Partition sales.**—Where land is sold by a court of ordinary for partition and the purchaser goes into possession under the ordinary's deed and holds adversely for twenty years, giving due notice to those interested of such holding, he will be deemed to have acquired fee simple title to the land. Few v. Keller, 63 S. C. 154, 41 SE 85.

[c] **Where a proceeding to sell land of a ward purports also to dispose of the interest of adult parties** who are before the court, representing the ward, and the purchaser enters into exclusive possession, limitations run against such adult parties. Myers v. McGavock, 39 Nebr. 843, 58 NW 522, 42 AmSR 627.

[d] **Where land has been sold on execution against the vendee in an executory contract,** the purchaser at the sale who secures a sheriff's deed is deemed to hold adversely. Miller v. State, 38 Ala. 600; McClanahan v. Barrow, 27 Miss. 664.

[e] **By purchaser against heirs of judgment defendant.**—Where purchasers at a foreclosure sale take actual possession, claiming title, and they and their grantees hold adversely for more than ten years after the mortgagor's heirs attain their majority, the right to redeem is barred by limitations. McNeill v. Storitz, 94 Nebr. 547, 143 NW 806; McNeill v. Schumaker, 94 Nebr. 544, 143 NW 805.

71. Ala.—Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45.

Cal.—Webb v. Winter, 135 Cal. 455, 67 P 691.

sale is not adverse;[72] and where redemption from such sales is allowed and the purchaser is entitled to possession in the meantime, it seems that the possession will not be deemed adverse until after the expiration of the period for redemption.[73] But if during the period of redemption the purchaser who is not entitled to possession nevertheless goes into possession his possession is deemed adverse from the time he takes possession not merely from the expiration of the time for redemption.[74]

[§ 298] **32. By Owner of Land Sold under Judgment or Decree against Purchaser.** Where land is sold by virtue of a judgment or decree the relation of defendant in the action to the purchaser is that of a quasi tenant, and his continued possession is not adverse until such relation is distinctly disclaimed by him.[75] In the absence of all testimony manifesting the actual character of his holding, his possession is regarded as consistent with the title of the purchaser,[76] and where the purchaser has paid the price in full the rule applies, although he has not been given a deed.[77] Nevertheless his possession may be adverse to that of the purchaser at a sale under the judgment or decree where he claims title in himself openly and notoriously, and possession thus continued for the statutory period will ripen into a title by adverse possession.[78]

[§ 299] **33. By Judgment Defendant against Plaintiff after Decree Quieting Title.** Where a defendant in a suit to quiet title remains in possession or assumes possession after a decree adverse to him and vesting title in another, his possession is presumed to be in subordination to the true owner and does not become adverse without express notice of

Ind.—Marley v. State, 147 Ind. 145, 46 NE 466.

Kan.—Goodman v. Nichols, 44 Kan. 22, 23 P 957.

Ky.—Austin v. Colson, 37 SW 486, 18 KyL 631; Gregory v. Nesbit, 5 Dana 419.

La.—Stackhouse v. Zuntz, 41 La. Ann. 415, 6 S 666.

Nebr.—Hall v. Hooper, 47 Nebr. 111, 66 NW 33; Myers v. McGavock, 39 Nebr. 843, 58 NW 522, 42 AmSR 627.

S. C.—Carolina Sav. Bank v. McMahon, 37 S. C. 309, 16 SE 31.

W. Va.—Waldron v. Harvey, 54 W. Va. 608, 46 SE 603, 102 AmSR 959. Compare Mullan v. Carper, 37 W. Va. 215, 234, 16 SE 527 (holding that where a purchaser of land held possession under a void sale the statute of limitations did not run against the wife of the owner during coverture, where the nature of his color of title and the holding thereunder were not repugnant but consistent to her contingent right of dower. "The nature of the purchaser's color of title shows that his possession was not intended to be adverse to the wife's inchoate right of dower").

[a] **Rule applied** in case of sales by executors or administrators. Winterburn v. Chambers, 91 Cal. 170, 27 P 658; Mitchell v. Campbell, 19 Or. 198, 24 P 455. See also Myers v. McGavock, 39 Nebr. 843, 58 NW 522, 42 AmSR 627. See however Casey v. Morgan, 67 Ala. 441.

72. Watson v. New York Cent. R. Co., 6 AbbPrNS (N. Y.) 91, Sheld. 159 [aff 47 N. Y. 157]; Williams v. Council, 53 N. C. 229; Miller v. Larson, 17 Wis. 624.

[a] **Illustration.**—Where the successful bidder at a partition sale of the land of a surviving widow and infant children did not comply with his bid and subsequently married the widow and entered into possession, the presumption was that his entry and possession were based on his marital rights so that on his entry he became a tenant for life of a third interest, and that he and the infant children held possession as cotenants. Sibley v. Sibley, 88 S. C. 184, 70 SE 615, Ann Cas1912C 1170.

[b] **In Alabama** it has been held, as regards purchasers at judicial or at sheriffs' sales who enter into possession under their purchases and subsequently receive a deed, that their possession is to be deemed adverse from the time of entry, not merely from the date of the delivery of the deed. Ladd v. Dubroca, 61 Ala. 25 (tax sale).

73. Morse v. Seibold, 147 Ill. 318, 35 NE 369.

74. Parsons v. Viets, 96 Mo. 408, 9 SW 908.

75. U. S.—Graydon v. Hurd, 55 Fed. 724, 5 CCA 258.

Ala.—Sellers v. Farmer, 151 Ala. 487, 43 S 967; Robinson v. Allison, 97 Ala. 596, 12 S 382, 604; Brunson v. Morgan, 86 Ala. 318, 5 S 495.

Cal.—Leonard v. Flynn, 89 Cal. 585, 26 P 1097, 23 AmSR 500.

Ind.—Rucker v. Steelman, 97 Ind. 222; Bradford v. Russell, 79 Ind. 64; Webb v. Thompson, 23 Ind. 428; Law v. Smith, 4 Ind. 56; Foust v. Moorman, 2 Ind. 17.

Iowa.—Bosley v. Stewart, 140 Iowa 101, 105, 117 NW 1103 [cit Cyc]; Hintrager v. Smith, 89 Iowa 270, 56 NW 456.

Ky.—Jones v. Lickliter, 154 Ky. 848, 159 SW 652; Woodward v. Johnson, 122 Ky. 160, 90 SW 1076, 28 KyL 1091; Chalfin v. Malone, 9 B. Mon. 496, 50 AmD 525; Snowden v. McKinney, 7 B. Mon. 258.

Mo.—Rogers v. Johnson, 125 Mo. 202, 28 SW 635.

N. Y.—Hasbrouck v. Burhans, 42 Hun 376; De Silva v. Flynn, 9 NYCiv Proc 426; Hubbell v. Wildon, Lalor 139; Jackson v. Collins, 3 Cow. 89; Jackson v. Graham, 3 Cai. 188; Jackson v. Sternbergh, 1 Johns. Cas. 153.

N. C.—Hamilton v. Buchanan, 112 N. C. 463, 17 SE 159.

Tenn.—Bradford v. Foster, 87 Tenn. 4, 9 SW 195; Keaton v. Thomasson, 2 Swan 138, 57 AmD 55; Wood v. Turner, 7 Humphr. 517; Mitchell v. Lipe, 8 Yerg. 179, 29 AmD 116.

Va.—Whitlock v. Johnson, 87 Va. 323, 12 SE 614; Evans v. Spurgin, 6 Gratt. (47 Va.) 107, 52 AmD 105.

Wis.—Swift v. Agnes, 33 Wis. 228. See Cook v. Knowles, 38 Mich. 316.

"It is undoubtedly the rule that, when land is sold under foreclosure or other legal proceedings, and the debtor retains possession, his relation to the purchaser is that of a quasi tenant, and his continued possession is not adverse until some affirmative claim is made by him antagonistic to the title of the purchaser." Bosley v. Stewart, 140 Iowa 101, 104, 117 NW 1103 (per Sherwin, J.). "The hostile intention to appropriate [the land] as their own in spite of the conveyance on their behalf by the sheriff must have been so evinced by the former owners as to bring notice home to the rightful owner of such intent." Woodward v. Johnson, 122 Ky. 160, 173, 90 SW 1076, 28 KyL 1091.

[a] **Deed subsequently ratified.**—Commissioners appointed by an interlocutory decree to sell lands, but not authorized to make a deed, sold the lands and also made a deed to the purchaser, the original owner and his heirs remaining in possession. Several years later the commissioners made a report of the proceedings, which the court confirmed by final decree, thus rendering it valid. It was held that the possession of the original owner was not adverse to the purchaser because the decree of the court was essential to the validity of the deed, and in the meantime the owner held subject to the order of the court under such title and not adversely thereto. Evan v. Spurgin, 6 Gratt. (47 Va.) 107, 52 AmD 105.

[b] **Property bid in for judgment debtor.**—Where a judgment debtor procured a third person to bid off his land at a sheriff's sale with privilege to him to redeem, a continued possession of the property by the debtor was not adverse to the rights of the purchaser. Neal v. Pressell, 4 Ind. 594. And see Martin v. Martin, (Iowa) 94 NW 493 (holding that possession of mortgagor holding over after foreclosure under an alleged agreement that the foreclosure purchaser held title by their consent, subject to their right to a reconveyance when he was reimbursed, was not adverse to the holder of the legal title).

[c] **Grantee of mortgagor made party to foreclosure proceedings.**—If lands are sold under a decree of foreclosure, the grantee of the mortgagor being made a party to the foreclosure suit, the sale extinguishes the title of such grantee; and if he remains in possession after the sale his possession is that of a tenant by sufferance, in subordination to the title of the purchaser at the sale, and does not become adverse until such relation is disavowed and the purchaser has knowledge of the disavowal. Graydon v. Hurd, 55 Fed. 724, 5 CCA 258.

[d] **Possession by the grantee of a judgment debtor of land subject to the judgment lien** cannot be adverse to the judgment creditor so long as the latter merely has such lien which does not entitle him to possession or use of the land, and so can be adverse to the purchaser at execution sale only from date of the sale. Jones v. Short, (Del.) 77 A 968.

76. Chalfin v. Malone, 9 B. Mon. (Ky.) 496, 50 AmD 525.

77. Whitlock v. Johnson, 87 Va. 323, 12 SE 614.

78. Ill.—Oberein v. Wells, 163 Ill. 101, 45 NE 294.

Iowa.—Bosley v. Stewart, 140 Iowa 101, 105, 117 NW 1103 [cit Cyc].

Ky.—Chalfin v. Malone, 9 B. Mon. 496, 50 AmD 525.

S. C.—DuPont v. Charleston Bridge Co., 65 S. C. 524, 44 SE 86.

Tenn.—Keaton v. Thomasson, 2 Swan 137, 58 AmD 55.

"There is no peculiar sacredness in a title to land obtained through a judgment that lifts it out of the scope and purview of statutes of limitation, and if the possession be adverse for ten years, whether it be by the defendant in the judgment or anyone else, it will perfect a title." Pendleton v. McMains, 32 Tex. Civ. A. 575, 577, 75 SW 349. See also Thomson v. Weisman, 98 Tex. 170, 174, 82 SW 503 (where the above statement is quoted with approval).

[a] **Application of rule.**—Where, after the execution of sheriff's deeds to defendant, plaintiff's grantor continued in possession as owner, paid taxes, kept the premises in repair, executed a mortgage on the premises as his own, and in every respect treated the premises as belonging to him in his own right, it was sufficient to show possession adverse to the holder of the sheriff's deeds. Gray v. Bloom, 151 Iowa 566, 132 NW 42.

his adverse claim brought home to said owner.[79]

[§ 300] **34. By Unsuccessful Defendant in Ejectment against Plaintiff.** Where defendant in an ejectment suit has been put out of possession by the sheriff, by virtue of an execution on a judgment in favor of plaintiff in ejectment, and defendant subsequently reënters, this reëntry unexplained should be deemed to be in recognition of the rights thus established, since "it cannot be supposed in the absence of proof that he undertook to reassert rights in the face of a judgment determining that he had none."[80]

[§ 301] **35. By Owner against Purchaser at Tax Sale.** It has been held that the continued possession of the owner of land after a sale for taxes will not be deemed adverse to the holder of the tax title;[81] but that where one was in the adverse possession of land as that of the true owner at the time it was sold for taxes, his continued possession, as against the purchaser at such sale, will be deemed to continue adverse.[82]

[§ 302] **36. By Purchaser at Tax Sale against Owner during Period of Redemption.** The general rule is that where land is sold for taxes the possession of the purchaser and those to whom he has sold the land, during the period of redemption, is not adverse but consistent with the title of the owner;[83] going into possession under and by virtue of the tax sale certificate is, in effect, an admission on the part of the purchaser at the tax sale that the property is held subject to the owner's right of redemption,[84] an admission inconsistent with adverse possession.[85] However, if by special statutory provisions the owner of the land is entitled to possession between the date of the tax certificate and the date of the deed in confirmation thereof, possession of the holder of the tax certificate will be adverse, since the owner by proper proceedings can oust him at any time up to the date of the deed.[86]

[§ 303] **37. By Purchaser at Administrator's Sale against Heirs.** Before payment of purchase money for lands sold by an administrator the purchaser holds in subordination, not adversely, to the heirs, but after payment his possession is presumed to be hostile and will ripen into title after possession for the statutory period.[87] An administrator who purchases at his own sale[88] or procures a conveyance of the land to himself individually by the purchaser[89] may acquire title thereto by openly occupying it under claim of title for the statutory period. And this is so even though the sale is void.[90]

[§ 304] **38. By Heirs against Purchaser at Administrator's Sale.** Possession of heirs is not adverse to a purchaser at an administrator's sale for the payment of debts because they take subject to the payment of the ancestor's debts.[91]

[§ 305] **39. By Purchaser Pendente Lite against Parties to Suit.** The statute of limitations does not run in favor of a pendente lite purchaser. Such person in possession of land will not be regarded as holding it adversely to the parties to the suit during the litigation.[92] If the rule were otherwise alienations made by parties during the pendency of the suit might defeat its whole purpose and there would be no end to litigation.[93]

[§ 306] **40. By Parties to Contest in Land Office against Each Other.** It has been held that where two persons are claiming the right to reside on a homestead, and one of them institutes contest proceedings against the entry of the other filed in the land office, and both parties continually contest for the right to acquire title to the land until the commencement of the suit for possession thereof, the possession of the latter is adverse, although his entry is finally canceled and the land is awarded to the contestor.[94]

[§ 307] **41. By Heirs against Creditors.** Heirs having entered as such cannot acquire title to the land descended, as against the debts of the ancestor, by a claim of adverse possession as against the title descended,[95] although it may be, where an heir claims in his own right and his possession is considered adverse, that such possession, if continued for the statutory period, will divest the lien of a judgment obtained against the ancestor in his lifetime.[96]

[§ 308] **42. By Devisees against Creditors.** Devisees having entered as such cannot acquire title to the lands descended or devised as against the debts of the devisor by a claim of adverse possession as against the title devised.[97] Having accepted

79. Woolworth v. Root, 40 Fed. 723 [aff 150 U. S. 401, 14 SCt 136, 37 L. ed. 1123]. And see DuPont v. Charleston Bridge Co., 65 S. C. 524, 44 SE 86.

80. Monont v. Rudd, 139 App. Div. 651, 655, 124 NYS 210 (per Miller, J.).

81. Fortmann v. Wheeler, 84 Hun 278, 32 NYS 384; Hubbell v. Weldon, Lalor (N. Y.) 139. See also Major v. Brush, 7 Ind. 232. See however Crocker v. Dougherty, 139 Cal. 521, 73 P 429.

[a] **Attornment to third person.**—Where the owner of land sold for taxes remained in possession after the issuance of the tax deed and, after the sale on execution subsequently issued against his interest in the land, continued in possession, the character of his occupancy was not rendered adverse to the tax sale purchaser by attornment to some other person without notice to such purchaser. Swift v. Agnes, 33 Wis. 228.

82. Graham v. Warren, 81 Miss. 330, 33 S 71.

83. Pease v. Lawson, 33 Mo. 35; Young v. Jackson, 50 Tex. Civ. A. 351, 110 SW 74; Salt Lake Inv. Co. v. Fox, 32 Utah 301, 90 P 564, 125 AmSR 865, 13 LRANS 627 and note.

84. Pease v. Lawson, 33 Mo. 35; McKeighan v. Hopkins, 14 Nebr. 361, 15 NW 711; Salt Lake Inv. Co. v. Fox, 32 Utah 301, 90 P 564, 125 AmSR 865, 13 LRANS 627.

85. Pease v. Lawson, 33 Mo. 35.

86. Chambers v. Bessent, 17 N. M. 487, 497, 134 P 237.

87. Morgan v. Casey, 73 Ala. 222.

[a] **If the sale of the land has been confirmed** and a deed duly executed by the purchaser, his possession is adverse to the heirs, notwithstanding the administration of the estate has not terminated. Mitchell v. Campbell, 19 Or. 198, 24 P 455.

88. Mason v. Odum, 210 Ill. 471, 71 NE 386, 102 AmSR 180.

89. Hysmith v. Patton, 72 Ark. 296, 80 SW 151.

90. Mason v. Odum, 210 Ill. 471, 71 NE 386, 102 AmSR 180.

91. Rogers v. Johnson, 125 Mo. 202, 28 SW 635.

92. U. S.—Walden v. Bodley, 9 How. 34, 13 L. ed. 36; Bowen v. Clymer, 79 Fed. 53, 24 CCA 446.

Cal.—Christy v. Spring Valley Water Works, 97 Cal. 21, 31 P 1110; In re Grider, 81 Cal. 571, 22 P 908.

Ky.—Wallace v. Marquett, 88 Ky. 130, 10 SW 374, 10 KyL 750; Adams v. Casaway, 7 KyL 533.

Tex.—Portis v. Hill, 30 Tex. 529, 98 AmD 481; Wille v. Ellis, 22 Tex. Civ. A. 462, 54 SW 922.

W. Va.—Parker v. Clarkson, 39 W. Va. 184, 19 SE 431; Hall v. Hall, 27 W. Va. 468; Lynch v. Andrews, 25 W. Va. 751.

The statute of limitations "ceases to run at the time the litigation commences if it has already commenced; and if the cause of action arises during the pendency of the litigation, the statute does not commence to run until the litigation has ended." The purchasers "stand in the same relation to the land in controversy as does their vendor . . . they are his vendees, privies in estate, holding and claiming as pendente lite purchasers; and as such they are as much bound by the proceedings in the suit as their vendor." Lynch v. Andrews, 25 W. Va. 751, 757 (per Snyder, J.).

93. Lynch v. Andrews, 25 W. Va. 751.

94. Phillips v. Keysaw, 7 Okl. 674, 56 P 695. And see Littlefield v. Todd, 3 Okl. 1, 42 P 10; Peckham v. Faught, 2 Okl. 173, 37 P 1085.

95. Brock v. Kirkpatrick, 69 S. C. 231, 237, 48 SE 72 [cit Cyc and expl Cleveland v. Mills, 9 S. C. 430]; Wheeler v. Floyd, 24 S. C. 413.

96. Wheeler v. Floyd, 24 S. C. 413.

97. Alexander-City Union Warehouse, etc., Co. v. Central of Georgia R. Co., (Ala.) 62 S 745; Brock v. Kirkpatrick, 69 S. C. 231, 237, 48 SE 72; Rhett v. Jenkins, 25 S. C. 453; Roberts v. Smith, 21 S. C. 455.

the will and entered into possession under it, they cannot now, in order to evade paying the debts of the testator, disconnect themselves entirely from him, and, while enjoying his patrimony, disclaim that they received and held it under his will.[98]

[§ 309] **43. By Heirs against Trust Created by Ancestor.** Persons who go into possession of lands as heirs of their ancestor are bound by a secret trust attached to their ancestor's deed and cannot claim title by adverse possession.[99]

[§ 310] **44. By Heirs against Each Other—a. Possession Usually Not Adverse.** Where one of several heirs enters into or remains in possession of land on the death of the ancestor, his possession will, in general, be considered the possession of his coheirs and for their benefit.[1]

[§ 311] **b. Under What Circumstances Possession Becomes Adverse.** There is, however, nothing in the relation between heirs which will prevent the possession of one from becoming adverse to the others.[2] But in order to render his possession adverse there must be plain, decisive, unequivocal acts or conduct on his part amounting to an ouster or disseizin of the others.[3] No mere act of ownership will render the possession adverse.[4] It has been held, however, that the possession of land by grantees in a deed, wherein the grantors describe themselves as the "sole heirs" of the original owner, is adverse to the other heirs of the original owner from the time that the deed is placed on record.[5] And where heirs consent to the possession of their father of community property, he having survived his wife, and he continues in possession until his death, an heir who lived on the land with his father during his life and after his death lived on a part of the land as his by inheritance and partition occupied adversely to his coheirs.[6] So it has been held that where one of the heirs takes possession of the whole of the land and exercises acts of ownership over it for a number of years and then conveys the whole, his possession is adverse to that of the other heirs, and possession by himself and his grantee for the statutory period will perfect title by adverse possession.[7]

[§ 312] **45. By Legatee against Colegatee.** Any entry or acts of possession of one of several legatees, or of anyone claiming under such legatee, down to the distribution of the real estate in pursuance of the will, whether with or without color or claim of title, cannot be operative toward gaining a title by adverse possession.[8]

[§ 313] **46. By Heirs or Devisees against Ex-**

[a] **Reason of rule.**—"The creditor's equity to subject lands devised to the payment of the testator's debts does not arise until the execution has been exhausted and return of nulla bona. . . . Until then plaintiff [the creditor] had no right of action against defendants [the devisees], and defendants' possession and use of the land was entirely consistent with a devise held subject to the rights of testator's creditors. The devisees' possession of devised land, in order to be adverse and exclusive so as to bar the equity of the testator's creditors, must be hostile to such equity, and can only have starting point when right of action accrues in favor of the creditor." Brock v. Kirkpatrick, 69 S. C. 231, 237, 48 SE 72 (per Jones, J.).

[b] **The possession of a widow claiming as devisee and executrix** cannot be deemed adverse to the rights of her husband's creditors, and the character of such widow's possession is not changed by relation back, upon it appearing subsequently that there was no will. Roberts v. Smith, 21 S. C. 455.

98. Rhett v. Jenkins, 25 S. C. 453, 460 (per McGowan, J.).

99. McSween v. McCown, 23 S. C. 342. And see Kennedy v. Linn Orphan Asylum, 103 SW 340, 31 KyL 706; In re Defoe, 2 Ont. 623.

1. Ark.—Blakeney v. Ferguson, 20 Ark. 547.

Ill.—Shaw v. Schoonover, 130 Ill. 448, 22 NE 589; Ball v. Palmer, 81 Ill. 370; Bonham v. Badgley, 7 Ill. 622.

Mass.—Hunt v. Hunt, 3 Metc. 175, 37 AmD 130.

Mo.—Wommack v. Whitmore, 58 Mo. 448.

N. H.—Campbell v. Campbell, 13 N. H. 483.

N. Y.—Phelan v. Kelly, 25 Wend. 389; Jackson v. Benjamin, 8 Johns. 101.

Pa.—Tulloch v. Worrall, 49 Pa. 133; Forward v. Deetz, 32 Pa. 69; Miller's App., 3 Grant 247; Graffins v. Tottenham, 1 Watts & S. 488, 37 AmD 472; Watson v. Gregg, 10 Watts 289, 36 AmD 176; Phillips v. Gregg, 10 Watts 158, 36 AmD 158.

S. C.—Roberts v. Smith, 21 S. C. 455.

Tex.—Phillipson v. Flynn, 83 Tex. 580, 19 SW 136; Gilkey v. Peeler, 22 Tex. 663; Alexander v. Kennedy, 19 Tex. 488, 70 AmD 358.

[a] **By heirs against pretermitted heirs.**—Where in ejectment defendant claims under a will whereby the land was to become his absolute property upon the death of his mother, no possession held by him under the testator, or afterward during the life of his mother, can be considered as adverse to pretermitted heirs of the testator. McCracken v. McCracken, 67 Mo. 590.

[b] **Entry as tenant of father.**—Where a father puts one of his children in possession of land and he holds it as the tenant of his father and by his permission, his subsequent possession, after the death of his father, must be regarded as having been for the benefit of himself and his coheirs as joint owners unless it is proved that he held adversely. Blakeney v. Ferguson, 20 Ark. 547.

[c] **Joint possession of coheir with widow.**—The possession of one of the heirs of land of which his father died seized is not adverse to that of the other heirs by reason of his having resided with his mother after the death of her husband. Stevenson v. Huddleson, 13 B. Mon. (Ky.) 299. To same effect McArthur v. McArthur, 14 U. C. Q. B. 544.

[d] **Where a child inherited all the property of his father to the exclusion of the father's collateral heirs,** a warranty deed given by the collaterals was an assertion of right hostile to the child. Hughes v. Wyatt, 146 Iowa 392, 125 NW 334.

[e] **Presumption.**—The law presumes that there is no intention on the part of an heir to abate the shares of his coheirs but to preserve them for their use. Tulloch v. Worrall, 49 Pa. 133.

2. Bell v. Adams, 81 N. C. 118; McCall v. Webb, 88 Pa. 150; Alexander v. Kennedy, 19 Tex. 488, 70 AmD 358; De Leon v. McMurray, 5 Tex. Civ. A. 280, 23 SW 1038. See also Bozeman v. Bozeman, 83 Ala. 416, 3 S 784; Bozeman v. Bozeman, 82 Ala. 389, 2 S 732; Doe v. Allen, 7 N. B. 191.

[a] **Joint possession of two against others.**—Where a brother and his sister and her successors lived for forty years upon land left by their father, and, in an action for partition by a granddaughter of the sister and the other children of the original owner against the brother's grantee, the evidence is conflicting whether the brother retained all the rents and profits or shared them with his sister and her successors, an instruction that the possession of the granddaughter can be taken only as a circumstance tending to show that the brother's possession was not adverse to that of the other plaintiffs is error, since the joint possession of the brother and sister and her successors may have been adverse to the other children. Henning v. Warner, 109 N. C. 406, 14 SE 317.

3. Wommack v. Whitmore, 58 Mo. 448; Velott v. Lewis, 102 Pa. 326; Tulloch v. Worrall, 49 Pa. 133; Forward v. Deetz, 32 Pa. 69; Hall v. Mathias, 4 Watts & S. (Pa.) 331; Phillips v. Gregg, 10 Watts (Pa.) 158, 36 AmD 158; Roberts v. Smith, 21 S. C. 455; Gilkey v. Peeler, 22 Tex. 663.

[a] **Surrendering possession.**—It has been held that adverse possession cannot be gained by one coheir without first surrendering possession to his coheirs. Phelan v. Kelly, 25 Wend. (N. Y.) 389.

4. Velott v. Lewis, 102 Pa. 326, 327 (holding that the mere leasing of the property, receiving the rents, and erecting fences and buildings thereon are insufficient); Miller's App., 3 Grant (Pa.) 247; Phillipson v. Flynn, 83 Tex. 580, 19 SW 136; Gulkey v. Peeler, 22 Tex. 663; Alexander v. Kennedy, 19 Tex. 488, 70 AmD 358.

[a] **An acknowledgment by the widow** and one of the coheirs in possession that the person claiming was the owner of the premises and that they held under him was not sufficient to establish an ouster, by such person, of his coheirs. Forward v. Deetz, 32 Pa. 69.

[b] **Entry into the land of an ancestor,** claiming it all, and taking the rents and profits for twenty-one years, do not constitute a disseizin of other heirs. Hart v. Gregg, 10 Watts (Pa.) 185, 36 AmD 166.

[c] **Exclusive possession** for a long period of time is not of itself sufficient. Tulloch v. Worrall, 49 Pa. 133.

5. De Leon v. McMurray, 5 Tex. Civ. A. 280, 23 SW 1038 (the reason being that the record of the deed is an express notice of repudiation of any cotenancy with the other heirs).

6. Honea v. Arledge, 56 Tex. Civ. A. 296, 120 SW 508.

7. Doe v. Allen, 7 N. B. 191; Doe v. White, 3 N. B. 595.

8. Ames v. Beckley, 48 Vt. 395 (the reason being that such acts are consistent with such legatee's relations as tenant in common with the other legatees and are to be construed

ecutor or Administrator. An heir may hold possession of the decedent's land adversely to the executor or administrator;[9] but where he goes into possession, claiming under the decedent as his heir or devisee, his possession is not deemed adverse to the right of the executor or administrator to sell the land for payment of the indebtedness of the estate.[10]

[§ 314] **47. By Executor or Administrator against Heirs or Devisees.** Where the executor or administrator is authorized to take possession of the lands of the decedent, a possession so taken is not adverse to the heirs or devisees,[11] and where an administrator takes and holds the lands of the decedent, assuming that he has power to do so, when in fact he has no such power, his possession is not adverse to the heirs, since he holds the lands, not as his own, but as the lands of the estate, in clear recognition of the title of the heirs.[12] Nevertheless an executor or administrator is not, by reason of his official position, precluded from holding land of the decedent adversely to the heirs or devisees.[13] He may establish an adverse possession, even though he is entitled to possession.[14] But in any event, in order to render his possession adverse there must be an open disclaimer of the title of the heirs and devisees brought home to them.[15]

[§ 315] **48. By Holder of Legal Title against Holder of Equitable Title.** Laches of the rightful owner of an equitable estate for the period required by a court of law to give title by adverse possession will bar the equitable title if during all that period the possession has been held under a claim unequivocally adverse and without anything having been done or said directly or indirectly to recognize such rightful owner's title.[16]

[§ 316] **49. By Agent or Servant against Principal.** Where one enters into possession of land as agent or servant, his possession is that of his principal or master and cannot become adverse while sustaining such relation,[17] and this is so although he

as done in pursuance of his rights and relations as such tenant in common).

9. Davitte v. Southern R. Co., 108 Ga. 665, 34 SE 327; Duke v. Read, 64 Tex. 705.

10. U. S.—Bowen v. Clymer, 79 Fed. 53, 24 CCA 446.

Cal.—Blair v. Hazzard, 158 Cal. 721, 112 P 298.

Fla.—Jones v. Shomaker, 41 Fla. 232, 26 S 191.

Mo.—Rogers v. Johnson, 125 Mo. 202, 28 SW 635.

S. C.—Rhett v. Jenkins, 25 S. C. 453; Wheeler v. Floyd, 24 S. C. 413; Roberts v. Smith, 21 S. C. 455.

[a] **Reason of rule.**—"From the very nature of the case title by adverse possession cannot be acquired against the administrator or executor. Such a title would be as foreign to our law as would be the claim of a tenant that he had acquired title by adverse possession against his landlord while holding under strict tenancy. The entry of a devisee or heir under such circumstances and his holding after, as matter of law, cannot be in hostility to the estate's rights. . . . The administrator's or executor's possession never has been and never will be construed as possession in hostility to the heir or devisee, and per contra the possession of the heir or devisee while the estate is in the course of administration can never be construed to be in hostility to the rights over that property with which the law clothes the estate." Blair v. Hazzard, 158 Cal. 721, 725, 112 P 298 (per Henshaw, J.).

11. Ala.—Hart v. Kendall, 82 Ala. 144, 3 S 41; Comer v. Hart, 79 Ala. 389.

Ark.—Harriet v. Swan, 18 Ark. 495.

Cal.—Spotts v. Hanley, 85 Cal. 155, 24 P 738.

S. C.—Thompson v. Caldwell, 13 S. C. L. 390; Ramsay v. Deas, 2 S. C. Eq. 233. See also Henry v. Archer, 8 S. C. Eq. 535.

Tex.—McCelvey v. McCelvey, 15 Tex. Civ. A. 105, 38 SW 473.

Vt.—North v. Barnum, 12 Vt. 205.

[a] **That dower rights were never assigned to the widow** does not prevent the running of the statute against the heirs in favor of one in possession of the land under a deed by the administrator. Hicks v. Watson, (Mo.) 167 SW 533.

12. Ashford v. Ashford, 136 Ala. 631, 34 S 10, 96 AmSR 82.

13. Ark.—Hysmith v. Patton, 72 Ark 296, 80 SW 151.

Hawaii.—Kalakaua v. Keaweamahi, 4 Hawaii 571.

Ill.—Mason v. Odum, 210 Ill. 471, 71 NE 386, 102 AmSR 180.

La.—Sojourner v. Fourney, 35 La. Ann. 918.

Minn.—Davis v. Townsend, 45 Minn. 528, 48 NW 405.

N. C.—McNeill v. Fuller, 121 N. C. 209, 28 SE 299.

S. C.—Thompson v. Caldwell, 13 S. C. L. 390.

Compare Dozier v. McWhorter, 117 Ga. 786, 792, 45 SE 61 (where it was said: "When once the title is shown to have existed in the estate, it can only be divested by showing a compliance with the rules and forms of law. He can not acquire title by holding adversely to the estate. . . . Possession can be as readily referred to him in his representative as in his individual capacity").

14. Hart v. Kendall, 82 Ala. 144, 3 S 41; Bland v. Fleeman, 58 Ark. 84, 23 SW 4; Smith v. Granberry, 89 Ga. 381, 99 AmD 464.

15. Ashford v. Ashford, 136 Ala. 631, 34 S 10, 96 AmSR 82; Hart v. Kendall, 82 Ala. 144, 3 S 41; London v. Bear, 84 N. C. 266; Ramsay v. Deas, 2 S. C. Eq. 233; Bradshaw v. Mayfield, 18 Tex. 21.

[a] **Acts sufficient to show adverse possession.**—(1) Where an executor to whom real estate was devised in trust took possession of the same and held it, claiming title under the will, for a length of time equal to that fixed by the state statute of limitations, an action for its recovery by an heir at law of the testator, based on the invalidity of the will, is barred. John v. Smith, 91 Fed. 827 [aff 102 Fed. 218, 42 CCA 275]. (2) Where a testator made no disposition of after-acquired land, and his executrix sold such land, under an order of the probate court, to one who conveyed it to her individually, and she openly held adverse possession thereof under the deed for more than seven years, she acquired title thereto. Hysmith v. Patton, 72 Ark. 296, 80 SW 151.

[b] **Acts showing that there was no adverse possession.**—Act of an executor in placing in the inventory land owned by his decedent, and selling part of it to satisfy debts, warrants a finding that his subsequent possession of the land was not adverse to the estate, although he was one of the grantees in a deed of the land by testator. McCelvey v. McCelvey, 15 Tex. Civ. A. 105, 38 SW 473.

16. Miller v. McIntyre, 6 Pet. (U. S.) 61, 8 L. ed. 320; Elmendorf v. Taylor, 10 Wheat. (U. S.) 152, 6 L. ed. 289; Fussell v. Hughes, 8 Fed. 384 [aff 113 U. S. 550, 5 SCt 631, 28 L. ed. 993]; Cresap v. McLean, 5 Leigh (32 Va.) 381. See also Gray v. Gray, 13 Nebr. 453, 14 NW 390; Cholmondeley v. Clinton, 2 Jac. & W. 1, 37 Reprint 527, 14 ERC 578. Compare Reihl v. Likowski, 33 Kan. 515, 6 P 886 (holding that when the legal title to realty is in one person and the real interest is in another the statute of limitations will not run as between them until there is a renunciation of the trust or until the person holding the legal title by some act or declaration asserts a claim adverse to the interests of the real owner).

[a] **Application of rule.**—The right of the holder of a certificate of purchase under a tax sale to his deed after the expiration of the period of redemption, although amounting to an equitable title, may be adjudged void in an action to quiet title by the owner of the legal title who has held the land adversely for the statutory period. Crocker v. Dougherty, 139 Cal. 521, 73 P 429.

17. Ala.—Lucy v. Tennessee, etc., R. Co., 92 Ala. 246, 8 S 806; Baucum v. George, 65 Ala. 259.

Ark.—Hoskins v. Byler, 53 Ark. 532, 14 SW 864.

Cal.—Hunt v. Swyney, 4 Cal. Unrep. Cas., 108, 33 P 854.

Ky.—Farrow v. Edmundson, 4 B. Mon. 605, 41 AmD 250; Whiting v. Taylor, 8 Dana 403.

La.—Neel v. Hibard, 30 La. Ann. 808.

Mass.—Peabody v. Tarbell, 2 Cush. 226; Com. v. Dudley, 10 Mass. 403.

Mo.—Combs v. Goldsworthy, 109 Mo. 151, 18 SW 1130.

Pa.—Huzzard v. Trego, 35 Pa. 9; Martin v. Jackson, 27 Pa. 504, 67 AmD 489.

Tex.—Richardson v. Bruce, (Civ. A.) 75 SW 835.

Wis.—Peabody v. Leach, 18 Wis. 657.

Eng.—Williams v. Pott, L. R. 12 Eq. 149; Smith v. Bennett, 30 L. T. Rep. N. S. 100; Atty.-Gen. v. London, 2 Macn. & G. 247, 48 EngCh 190, 42 Reprint 95.

Can.—Heward v. O'Donohoe, 19 Can. S. C. 341 [foll Ryan v. Ryan, 5 Can S. C. 387 (rev 4 Ont. A. 563 [rev 29 U. C. C. P. 449])].

Ont.—Henderson v. Henderson, 23 Ont. A. 577; Coulter v. Coulter, 4 Ont WR 65; Greenshields v. Bradford, 28 Grant Ch. (U. C.) 299; Rumrell v. Henderson, 22 U. C. C. P. 180; Doe v. Henderson, 3 U. C. Q. B. 486.

Compare Carney v. Hennessey, 77 Conn. 577, 60 A 129.

[a] **One who acts as manager of property for a corporation,** and in that capacity has possession and control of the property, cannot, while sustaining such relation to his principal, convert the principal's possession into possession for himself. Buckhorn Plaster Co. v. Consolidated Plaster Co., 47 Colo. 516, 108 P 27.

[b] **By servant against master.**—(1) Where a servant, in connection with his service and for the necessary or better performance thereof, occupies a house free of rent upon the premises of the master, such possession is not adverse to the master.

takes possession without authority.[18] Nevertheless there is nothing in such relation which renders the agent legally incapable of acquiring title by adverse possession.[19] But in order to render the possession adverse there must be a disclaimer of the principal's title and the assertion of a hostile claim.[20] Where the entry is originally in a fiduciary character there must be some decisive act or declaration to render the possession adverse.[21]

[§ 317] **50. By Claimant of Easement against Owner of Fee.** A claim merely of an easement, or of any other right less than the entire fee, does not give any adverse right to the fee,[22] and where the grantee of an easement maintains only such possession as is necessary to the enjoyment thereof his possession is not adverse to the owner.[23] So it has been held that a title in fee will not be implied from user where an easement only will secure the privilege and enjoyment.[24] Where the chain of conveyances through which a landowner holds expressly reserves a right of way for the benefit of another landowner, the possession of the former will not be presumed to be adverse to the rights of the latter until he commits some act which brings home to the latter notice of his intention to repudiate the existence of the right of way.[25]

[§ 318] **51. By Preëmptioner against Government.** The possession of government lands under preëmption laws is not adverse to the government.[26]

[§ 319] **52. By One Using Land for Public Purpose against Government.** The use of land necessary to the performance of a contract with the government is in subordination to the title of the government and not adverse thereto.[27]

[§ 320] **53. By Owner against Municipality Holding Perpetual Lien for Assessments.** A municipality holding a perpetual lien for an assessment for benefits to real estate, unlike a mortgagee, does not acquire the legal title to the land and the right to

Mackenzie v. Minis, 132 Ga. 323, 63 SE 900, 23 LRANS 1003, 16 AnnCas 723. (2) A son who, in compensation for services in his father's business, is given the rent of a house and afterward the use and occupation thereof cannot acquire title by adverse possession by length of employment during such possession. Coulter v. Coulter, 4 OntWR 65.

[c] **Agent appointed guardian for heirs of children.**—An agent in possession of property, who after his principal's death, is appointed guardian of his children and continues to hold the property, is deemed to hold for them and adversely to others who claim to be children and heirs. Westenfelder v. Green, 76 Fed. 925; Westenfelder v. Green, 24 Or. 448, 34 P 23.

18. Ashford v. Ashford, 136 Ala. 631, 34 S 10, 96 AmSR 82.

19. Carney v. Hennessey, 77 Conn. 577, 585, 60 A 129 (where it was said by Hamersley, J.: "The existence of such confidential relation may operate as evidence that the agent or guardian, in a particular entry upon land or assertion of ownership, does the act in behalf of his principal or ward and not on his own behalf, which will be more or less convincing according to the circumstances proved in each case; but does not render him legally incapable of doing any act that can constitute, as against his principal or ward, a disseizin or commencement of an adverse possession"); Farrow v. Edmundson, 4 B. Mon. (Ky.) 605, 41 AmD 250 (holding that as regards lands on which one originally enters as agent of the owner he may establish an adverse possession, which through lapse of time ripens into title, by a repudiation of the agency and an open disclaimer of his principal's title and assertion of a hostile title brought home to the principal).

20. Farrow v. Edmundson, 4 B. Mon. (Ky.) 605, 41 AmD 250; Whiting v. Taylor, 8 Dana (Ky.) 403. See also Pendergrast v. Foley, 8 Ga. 1.

[a] **What amounts to adverse possession by agent.**—It has been held that a public claim by an agent to hold in his own right, selling parts of the land by conveyances and delivery during twenty years, amounts to presumptive notice of an adverse holding. Farrow v. Edmundson, 4 B. Mon. (Ky.) 605, 41 AmD 250.

[b] **What does not amount to adverse possession by agent.**—(1) Where an agent employed by the owners of land to pay the taxes thereon procures, from the purchaser at a treasurer's sale, a conveyance in his own name but professedly for the owners, the latter are not barred by the statute of limitations. Huzzard v. Trego, 35 Pa. 9. (2) So it has been held that giving receipts for rent by an agent in his own name is not such an act as will give notice to the principal of an adverse holding by the agent. Martin v. Jackson, 27 Pa. 504, 67 AmD 480. (3) And where it appeared, in trespass to try title, that an agent selected certain land for his principal and took possession thereof as agent or tenant, there was some evidence that he asserted a claim to it, but none that he repudiated his agency or tenancy, and that knowledge of such fact was brought home to the principal, there was nothing requiring the submission of any question on the statute of limitations. Richardson v. Bruce, (Tex. Civ. A.) 75 SW 835.

21. Martin v. Jackson, 27 Pa. 504, 67 AmD 489.

[a] **Surrender of property.**—It has been held that where one enters as agent for another there must be an actual surrender of the property to the principal before his holding can become adverse. Peabody v. Leach, 18 Wis. 657. But this decision, it is believed, is against the weight of authority.

22. Dothard v. Denson, 75 Ala. 482; Stetson v. Veazie, 11 Me. 408; Cincinnati, etc., R. Co. v. Wachter, 70 Oh. St. 113, 70 NE 974; Texas Western R. Co. v. Wilson, 83 Tex. 153, 18 SW 325. And see Illinois Cent. R. Co. v. Hasenwinkle, 232 Ill. 224, 83 NE 815; Pennsylvania R. Co. v. Breckenridge, 60 N. J. L. 583, 38 A 740 (holding that the right asserted by a railroad company to build, maintain, and use a bridge over a highway for the passage of trains is consistent with and not inherently adverse to the right asserted by other persons to possess the land, subject to the public easement, and to lay pipe beneath the surface of the highway, since all these rights may be exercised without interference. Things that can coexist in harmony are not mutually adverse).

[a] **Reason of rule.**—"An easement implies necessarily a fee in another, and it follows that it is a right, by reason of such ownership, to use the land for a special purpose, and one not inconsistent with the general property in the land of the owner of the fee, his property rights, however, to be exercised in such way as not to unreasonably interfere with the special use for which the easement was acquired." Cincinnati, etc., R. Co. v. Wachter, 70 Oh. St. 113, 118, 70 NE 974 (per Spear, J.).

23. Downing v. Dinwiddie, 132 Mo. 92, 33 SW 470, 575; Pinkum v. Eau Claire, 81 Wis. 301, 51 NW 550.

[a] **Applications of rule.**—(1) Where the owner of land has granted a right of way through the same to a railroad company, the possession of the right of way by the company for railroad purposes is not adverse to the rights remaining in the owner of the fee, and hence his right to a private crossing over such right of way, where the same is necessary to the convenient use of his two parcels of land lying on either side, is not barred by the statute of limitations of twenty-one years. Cincinnati, etc., R. Co. v. Wachter, 70 Oh. St. 113, 70 NE 974. (2) Where plaintiff by his deed had a right of way over a certain lot, the fact that he used other portions of the lot for teams to stand upon does not give him the right by prescription, the use being substantially in accordance with the grant. Smith v. Wiggin, 52 N. H. 112. (3) The grantee in a deed describing the property as bounded by the line of a street, which at the time is platted but unopened, takes an easement only over the bed of the unopened street and enters into possession by privity with the original owner and in subservience to his title, so that adverse possession cannot commence until the privity is broken by some unequivocal act. Cole v. Philadelphia, 199 Pa. 464, 49 A 308.

[b] **Presumption.**—The use of land by one having an easement therein is presumed to be in accordance with his rights and not adverse to the owner of the fee. Mowe v. Stevens, 61 Me. 592; Stetson v. Veazie, 11 Me. 408; Downing v. Dinwiddie, 132 Mo. 92, 33 SW 470, 575.

24. Roe v. Strong, 107 N. Y. 350, 14 NE 294.

25. Lathrop v. Elsner, 93 Mich. 599, 53 NW 791.

26. Alabama State Land Co. v. Beck, 108 Ala. 71, 19 S 802; Woodward v. McReynolds, 2 Pinn. (Wis.) 268.

[a] **Reason for rule.**—A preëmptioner is one who by settlement and improvement of public land acquires the right to purchase the same in preference to others by paying the minimum price thereof, provided it is, or when it becomes, open for sale. The United States does not enter into a contract with a settler, or incur any obligation that the land occupied by him shall ever be put up for sale. Alabama State Land Co. v. Beck, 108 Ala. 71, 19 S 802.

27. Jackson v. Porter, 13 F. Cas. No. 7,143, 1 Paine 457.

[a] **In Louisiana** it has been held that under the laws regulating the public use of battures and river banks their possession and public use can in no case form a basis of prescription. It is said that the municipal possession is purely administrative, destined in its nature to terminate on a certain contingency, and, not being incompatible with ownership in the riparian proprietor, cannot avail against him as the possession of an adverse title in the corporation. Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 36 AmD 624.

immediate possession, and the possession of the owner can never be adverse to it.[28]

VII. LAWFUL POSSESSION

[§ 321] Some of the statutes of limitations relating to adverse possession require that the possession shall be "lawful."[29] One is in "lawful" possession within the provisions of the statute when he has entered, not as a mere trespasser, but in good faith claiming to be the owner, although he has not a perfect title,[30] or even color of title.[30½] "If the possession, to be lawful, must be taken under title, the aid the section undertakes to give would be useless."[31]

VIII. PEACEABLE POSSESSION

[§ 322] In some cases the courts, in enumerating the elements of a possession which are necessary to render it effectual to ripen into title, state that the possession must be peaceable.[32] The term "peaceable," as so used, merely means that the possession must be undisturbed so as to render it continuous.[33]

IX. COLOR OF TITLE

[§ 323] **A. Defined and Explained—1. A Mere Semblance of Title.** "Color of title" is a technical term,[34] and for the purpose of adverse possession under the statutes of limitations as to land is that which has the semblance or appearance of title, legal or equitable, but which is in fact no title.[35]

[§ 324] **2. Distinguished from Claim of Title.** "'Color of title' and 'claim of title' are often confounded; the terms being used as if synonymous, whereas in fact they are very different things. 'Claim of title' is where one enters and occupies land, with the intent to hold it as his own, against

28. Hartford v. Mechanics' Sav. Bank, 79 Conn. 38, 63 A 658.

29. See Shumate v. Snyder, 140 Mo. 77, 41 SW 781 (for a recital of the provisions of the statute).

30. Abeles v. Pillman, (Mo.) 168 SW 1180; Collins v. Pease, 146 Mo. 135, 47 SW 925. To same effect Shumate v. Snyder, 140 Mo. 77, 41 SW 781 (holding that where plaintiff took possession under sheriff's deed conveying to him land sold under judgment and execution in favor of the collector against one who had purchased it for taxes, although the deed was not effectual to pass the title, his possession was "lawful").

30½. Abeles v. Pillman, (Mo.) 168 SW 1180.

31. Shumate v. Snyder, 140 Mo. 77, 84, 41 SW 781.

32. Ga.—Walker v. Steffes, 139 Ga. 520, 77 SE 580; Laramore v. Minish, 43 Ga. 282.

Mo.—Lajoye v. Primm, 3 Mo. 529.

S. C.—Duren v. Sinclair, 22 S. C. 361; Heyward v. Bennet, 6 S. C. L. 329.

Tex.—East Texas Land, etc., Co. v. Shelby, 17 Tex. Civ. A. 685, 41 SW 542.

Utah.—Coleman v. Hines, 24 Utah 360, 67 P 1122.

Wash.—Laurendeau v. Fugelli, 5 Wash. 632, 32 P 465.

33. McAvoy v. Cassidy, 8 Misc. 595, 29 NYS 321.

In Heller v. Hawley, 28 Oh. Cir. Ct. 678, 681, the trial court charged: "By the claim of adverse possession the defendant and her predecessors must have been in open, notorious, continuous, adverse and undisputed possession of the land for twenty-one years in order that she may have the right thereto." The court on appeal said: "We hold that the word 'undisputed' should not have been used. The fact that the plaintiff or any other owner 'disputed' the defendant's right to occupy would not of itself interfere with the running of the statute of limitations. The requisites of adverse possession are, that it be, as stated by Judge Follett, in the opinion in Dietrick v. Noel, 42 Oh. St. 18, 21, 51 AmR 788, 'actual, open, continuous, hostile and exclusive.'"

[a] **The Texas statute** defines "peaceable possession" within the statute relating to limitations of actions for the recovery of land to be such as is "continuous and not interrupted by adverse suit to recover the estate." Glover v. Pfeuffer, (Civ. A.) 163 SW 984; Logan v. Meads, 43 Tex. Civ. A. 477, 98 SW 210; Barrett v. McKinney, (Civ. A.) 93 SW 240; White v. Pingenot, (Civ. A.) 90 SW 672.

34. U. S. v. Casterlin, 164 Fed. 437.

35. U. S.—Wright v. Mattison, 18 How. 50, 15 L. ed. 280; W. O. Whitney Lumber, etc., Co. v. Crabtree, 166 Fed. 738, 92 CCA 400 [aff (Ind. T.) 104 SW 862]; U. S. v. Casterlin, 164 Fed. 437; Latta v. Clifford, 47 Fed. 614; McIntyre v. Thompson, 10 Fed. 531, 4 Hughes 562; Cowly v. Monson, 5 Fed. 779; Field v. Columbet, 9 F. Cas. No. 4,764, 4 Sawy. 523.

Ala.—Bowles v. Lowery, 62 S 107; Crowder v. Doe, 162 Ala. 151, 50 S 230, 136 AmSR 17; Nashville, etc., R. Co. v. Mathis, 109 Ala. 377, 19 S 384; Torrey v. Forbes, 94 Ala. 135, 10 S 320; Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 9 S 537; Saltmarsh v. Crommelin, 24 Ala. 347; Abercrombie v. Baldwin, 15 Ala. 363.

Ariz.—U. S. v. Cameron, 3 Ariz. 100, 21 P 177.

Ark.—Bloom v. Strauss, 70 Ark. 483, 69 SW 548, 72 SW 563; White v. Stokes, 67 Ark. 184, 53 SW 1060.

Cal.—Packard v. Moss, 68 Cal. 123, 8 P 818; Bernal v. Gleim, 33 Cal. 668.

Colo.—De Foresta v. Gast, 20 Colo. 307, 38 P 244; Knight v. Lawrence, 19 Colo. 425, 36 P 242; Lebanon Min. Co. v. Rogers, 8 Colo. 34, 5 P 661; Jackson v. Larson, 24 Colo. A. 548, 136 P 81.

Ga.—Floyd v. Ricketson, 129 Ga. 668, 59 SE 909; English v. Marshall, 128 Ga. 730, 58 SE 351; Tumlin v. Perry, 108 Ga. 520, 34 SE 171; Veal v. Robinson, 70 Ga. 809.

Ida.—Little v. Crawford, 13 Ida. 146, 88 P 974; Johnson v. Hurst, 10 Ida. 308, 77 P 784.

Ill.—Bolden v. Sherman, 110 Ill. 418.

Ind.—Wilson v. Johnson, 145 Ind. 40, 38 NE 38, 43 NE 930.

Iowa.—Lindt v. Uihlein, 116 Iowa 48, 89 NW 214.

Md.—Erdman v. Corse, 87 Md. 506, 40 A 107; Kopp v. Herrman, 82 Md. 339, 33 A 646; Baker v. Swan, 32 Md. 355.

Mich.—Miller v. Clark, 56 Mich. 337, 23 NW 35.

Minn.—McLellan v. Omodt, 37 Minn. 157, 33 NW 326; Seigneuret v. Fahey, 27 Minn. 60, 6 NW 403.

Mo.—Abeles v. Pillman, 168 SW 1180.

N. C.—Fisher v. Toxaway Co., 165 N. C. 663, 81 SE 925; Caldwell Land, etc., Co. v. Cloyd, 165 N. C. 595, 81 SE 752; Seals v. Seals, 165 N. C. 409, 81 SE 613; Barrett v. Brewer, 153 N. C. 547, 69 SE 614, 42 LRANS 403; Smith v. Proctor, 139 N. C. 314, 51 SE 889, 2 LRANS 172; Barker v. Southern R. Co., 125 N. C. 596, 34 SE 701, 74 AmSR 658; Keener v. Goodson, 89 N. C. 273; Dobson v. Murphy, 18 N. C. 586; Rogers v. Mabe, 15 N. C. 180; Doe v. Southard, 10 N. C. 119, 14 AmD 578.

Or.—Swift v. Mulkey, 17 Or. 532, 21 P 871.

S. D.—Wood v. Conrad, 2 S. D. 334, 50 NW 95.

Tenn.—Darby v. McCarrol, 5 Hayw. 286.

Tex.—Thompson v. Cragg, 24 Tex. 582.

Va.—Knight v. Grim, 110 Va. 400, 66 SE 42, 19 AnnCas 400 and note; Sharp v. Shenandoah Furnace Co., 100 Va. 27, 37, 40 SE 103 [quot Cyc]. See also Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232.

W. Va.—Point Mountain Coal, etc., Co. v. Holly Lumber Co., 71 W. Va. 21, 75 SE 197; Pickens v. Stout, 67 W. Va. 422, 444, 68 SE 354 [quot Cyc] (per Williams, J.); Stover v. Stover, 60 W. Va. 285, 54 SE 350; Randolph v. Casey, 43 W. Va. 289, 27 SE 231; Swann v. Thayer, 36 W. Va. 46, 14 SE 423. See also Oney v. Clendenin, 28 W. Va. 34; Adams v. Alkire, 20 W. Va. 480.

Wis.—Whitcomb v. Provost, 102 Wis. 278, 78 NW 432; Edgerton v. Bird, 6 Wis. 527, 70 AmD 473.

[a] **Other definitions.**—(1) "Anything in writing connected with the title which serves to define the extent of the claim." Field v. Boynton, 33 Ga. 239, 242 [quot Street v. Collier, 118 Ga. 470, 473, 45 SE 294]. (2) "That which is apparently good title, but which, by reason of some defect not appearing on its face, does not in fact amount to title." Knight v. Grim, 110 Va. 400, 405, 66 SE 42, 19 AnnCas 400 [cit Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232; Newell Ejectm. p 772, § 87] (per Harrison, J.). (3) "A color of title is, where a conveyance is made by an apparent owner, or person apparently having an authority over his estate, which conveyance would actually have passed the title, had the circumstances existed which were reputed to exist." Darby v. McCarrol, 5 Hayw. (Tenn.) 286, 288. (4) "A title apparently good, although in fact it may be bad." Cowly v. Monson, 5 Fed. 779, 782. (5) "A writing upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used—a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law." Beverly v. Burke, 9 Ga. 440, 444, 54 AmD 351; Bond v. Beverly, 152 N. C. 56, 61, 67 SE 55. (6) "Any writing which on its face professes to pass a title, but which it fails to do either from want of title in the person making it or from the defective mode of conveyance employed . . . [and] is necessary not so much to show good faith, as to fix the extent or boundaries of the land to which title might be acquired by continuous and adverse possession." Burns v. Stewart, 162 N. C. 360, 365, 78 SE 321.

[b] **Under special statutory provisions.**—(1) "Title," as used in the Texas statute prescribing the three-year limitation, means a regular chain of transfer from the sovereignty of the soil; "color of title" means a consecutive chain of transfer down to

the world, irrespective of any shadow or color or right or title as a foundation for his claim. 'Color of title' is the semblance or appearance of title, but which in reality is not. They are distinct from, but supplementary to, each other. Color of title, without claim, is of little effect. Claim of title, without color, may ripen into title to the land actually occupied, while, with it, it may ripen into title not only to the land actually occupied, but to all described in the color of title, if that actually occupied be a part thereof. 'Claim of title,' or at least of right, is necessary to acquire title by adverse possession; but 'color of title' is not, unless so required by statute. A claimant must enter and hold the land as his own, to the exclusion of all others; but the title thus acquired does not extend beyond the land actually occupied, that which the claimant stands on, 'pedis possessio.' The right and title thus acquired is commensurate with the use. 'Color of title,' by a pure and legal fiction, extends this claim of title and actual possession to the entire tract which it describes."[36]

[§ 325] **3. Valid Title Unnecessary.** To constitute color of title it is not essential that the title under which the party claims should be a valid one.[37] It is not "the instrument which gives the title, but adverse possession under it for the requisite period with color of title."[38] A claim asserted to property under the provisions of a conveyance, however inadequate to carry the true title to such property and however incompetent may have been the power of the grantor in such conveyance to pass a title to the subject thereof, is strictly a claim under color of title and one which will draw to the possession of the grantee the protection of the statute of limitations, other requisites of those statutes being complied with.[39] Whenever this defense is set up the

the person in possession, without, however, being regular, as where some muniments of title are not registered or not duly registered. Rice v. Willis, 87 Fed. 626, 628, 31 CCA 154. (2) Color of title is "such a defective muniment of title as is not wanting in 'intrinsic fairness and honesty.'" Hussey v. Moser, 70 Tex. 42, 44, 7 SW 606; Veeder v. Gilmer, 47 Tex. Civ. A. 464, 105 SW 331.

[c] **"'Color of title in fee' . . . means color of title in fee in the occupying claimant himself, or in the person under whom he claims."** Hall v. Torrens, 32 Minn. 527, 21 NW 717 [expl Wheeler v. Merriman, 30 Minn. 372, 15 NW 665 (which gives the phrase a more restricted meaning)].

36. Crowder v. Doe, 162 Ala. 151, 156, 50 S 230, 136 AmSR 17 (per Mayfield, J.).

37. U. S.—Cameron v. U. S., 148 U. S. 301, 13 SCt 595, 37 L. ed. 459; Hall v. Law, 102 U. S. 461, 26 L. ed. 217; Pillow v. Roberts, 13 How. 472, 14 L. ed. 228; Latta v. Clifford, 47 Fed. 614; Field v. Columbet, 9 F. Cas. No. 4,764, 4 Sawy. 523.

Ala.—Goodson v. Brothers, 111 Ala. 589, 20 S 448; Cooper v. Watson, 73 Ala. 252.

Cal.—Wilson v. Atkinson, 77 Cal. 485, 20 P 66, 11 AmSR 299; Packard v. Moss, 68 Cal. 123, 8 P 818; Nemo v. Farrington, 7 Cal. A. 443, 94 P 874, 877; Knight v. Cohen, 7 Cal. A. 43, 93 P 396.

Colo.—Schlageter v. Gude, 30 Colo. 310, 70 P 428; De Foresta v. Gast, 20 Colo. 307, 38 P 244.

D. C.—Dangerfield v. Williams, 26 App. 508.

Fla.—Carn v. Haisley, 22 Fla. 317; Horne v. Carter, 20 Fla. 45.

Ga.—Turner v. Neisler, 141 Ga. 27, 80 SE 461; English v. Marshall, 128 Ga. 730, 58 SE 351; Beverly v. Burke, 9 Ga. 440, 54 AmD 351.

Ida.—Fountain v. Lewiston Nat. Bank, 11 Ida. 451, 470, 83 P 505 [cit Cyc].

Ill.—Nelson v. Davidson, 160 Ill. 254, 43 NE 361, 52 AmSR 338, 31 LRA 325; Coleman v. Billings, 89 Ill. 183; Fagan v. Rosier, 68 Ill. 84; Rawson v. Fox, 65 Ill. 200; Elston v. Kennicott, 46 Ill. 187; McClellan v. Kellogg, 17 Ill. 498.

Ind.—Doe v. Hearick, 14 Ind. 242.

Iowa.—Chicago, etc., R. Co. v. Allfree, 64 Iowa 500, 20 NW 779; Hamilton v. Wright, 30 Iowa 480; Close v. Samm, 27 Iowa 503.

Ky.—Overton v. Perry, 129 Ky. 415, 111 SW 369, 33 KyL 931; Beard v. Hudnall, 4 KyL 54.

Md.—Erdman v. Corse, 87 Md. 506, 40 A 107; Hoye v. Swann, 5 Md. 237.

Mo.—Joplin Brewing Co. v. Payne, 197 Mo. 422, 429, 94 SW 896, 114 AmSR 770; Quick v. Reefe, 164 Mo. 408, 64 SW 102; Wilson v. Taylor, 119 Mo. 626, 25 SW 199; Suddarth v. Robertson, 118 Mo. 286, 24 SW 151; Allen v. Mansfield, 108 Mo. 343, 18 SW 901; Hickman v. Link, 97 Mo. 482, 10 SW 600; Hickman v. Link, 7 SW 12; Hamilton v. Boggess, 63 Mo. 238; Fugate v. Pierce, 49 Mo. 441.

N. H.—Farrar v. Fessenden, 39 N. H. 268; Grant v. Fowler, 39 N. H. 101.

N. Y.—Hindley v. Manhattan R. Co., 185 N. Y. 335, 78 NE 276; Sands v. Hughes, 53 N. Y. 287; Munro v. Merchant, 28 N. Y. 9; Green v. Horn, 128 App. Div. 686, 112 NYS 993; Ledoux v. Samuels, 116 App. Div. 726, 102 NYS 43; De St. Laurent v. Gescheidt, 18 App. Div. 121, 45 NYS 730; Kent v. Harcourt, 33 Barb. 491; Mosher v. Yost, 33 Barb. 277; Jackson v. Newton, 18 Johns. 355; Jackson v. Ellis, 13 Johns. 118; Smith v. Burtis, 9 Johns. 174.

Or.—Swift v. Mulkey, 17 Or. 532, 21 P 871.

S. C.—Fore v. Berry, 94 S. C. 71, 78 SE 706 [cit Cyc].

Tex.—Hunton v. Nichols, 55 Tex. 217; Glasscock v. Dimmitt, (Civ. A.) 141 SW 822. And see Milby v. Hester, (Civ. A.) 94 SW 178.

Va.—Yellow Poplar Lumber Co. v. Thompson, 108 Va. 612, 62 SE 358; Shanks v. Lancaster, 5 Gratt. (46 Va.) 110, 50 AmD 108.

W. Va.—Robinson v. Lowe, 50 W. Va. 75, 40 SE 454; Mullan v. Carper, 37 W. Va. 215, 16 SE 527; Jones v. Lemon, 26 W. Va. 629; Cooey v. Porter, 22 W. Va. 120; Adams v. Alkire, 20 W. Va. 480.

Wis.—Hatch v. Lusignan, 117 Wis. 428, 94 NW 332; McCann v. Welch, 106 Wis. 142, 81 NW 996.

[a] **It is immaterial** whether the want of validity results from its original and inherent defects or from other matters transpiring subsequently, or whether such want of validity it attributable to individual or judicial action. Hamilton v. Wright, 30 Iowa 480; Swift v. Mulkey, 17 Or. 532, 21 P 871. And see Mullan v. Carper, 37 W. Va. 215, 16 SE 527.

[b] **"Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title,** whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims his title." Cameron v. U. S., 148 U. S. 301, 308, 13 SCt 595, 37 L. ed. 459.

[c] **A deed, although actually conveying nothing,** may be sufficient on which to found a tangible, successful claim of adverse possession, if such possession continues sufficiently long. Tarplee v. Sonn, 109 App. Div. 241, 96 NYS 6; Criswell v. Noble, 61 Misc. 483, 113 NYS 954 [aff 134 App. Div. 994 mem, 119 NYS 1122 mem].

[d] **Deed of husband conveying wife's property.**—A deed by a husband executed prior to the Married Women's Act of 1896, assuming to convey his wife's interest in undivided estate and before he took possession, is good as color of title. Street v. Collier, 118 Ga. 470, 474, 45 SE 294 (where Cobb, J., said: "Remembering that at that time, if the estate had been divided, Prindle could have reduced his wife's interest to possession, and have conveyed it and made a good title, it is hardly to be charged that a non-professional, who is not shown to have had any knowledge or skill in law, was bound to know that the making of a conveyance before actual division would make a legal difference and prevent the deed from being even color of title. If Collier knew that clearly and distinctly, he knew more than many of the highest courts of the country seem to have known").

38. La Crosse v. Cameron, 80 Fed. 264, 25 CCA 399; McMillan v. Wehle, 55 Wis. 685, 13 NW 694.

[a] **"If the instrument itself passes, or constitutes title, it is not color of title.**—It is in a sense the title itself. The very term implies that it is not valid to pass title." Crowder v. Doe, 162 Ala. 151, 156, 50 S 230, 136 AmSR 17 (per Mayfield, J.).

39. U. S.—Wright v. Mattison, 18 How. 50, 15 L. ed. 280.

Ill.—Nelson v. Davidson, 160 Ill. 252, 254, 43 NE 361, 52 AmSR 338, 31 LRA 325. Compare Brooks v. Bruyn, 35 Ill. 392.

Mo.—Hickman v. Link, 97 Mo. 482, 10 SW 600.

Or.—Swift v. Mulkey, 17 Or. 532, 21 P 871.

Va.—Hulvey v. Hulvey, 92 Va. 802, 23 SE 233.

W. Va.—Mullan v. Carper, 37 W. Va. 215, 16 SE 527; Swann v. Swann, 36 W. Va. 46, 14 SE 423.

Compare Goodson v. Brothers, 111 Ala. 589, 20 S 443.

[a] **Reason of rule.**—"To hold . . . that the paper is not color of title, because the persons executing it had not the full authority of law which, if they had, would make it not color but title, would destroy the distinction between color and title." Street v. Collier, 118 Ga. 470, 473, 45 SE 294.

[b] **Application of rule generally.**—Where a husband, joint grantee with his wife, returned a deed to the grantor and requested the execution of a new one to the wife, which was done, and the wife took possession and claimed title thereunder, such second deed, as it purported to convey the fee, was a good color of title on which to base adverse possession, although it passed no additional title to the wife for the reason that the grantor had no title to impart. Poindexter v. Rawlings, 106 Tenn. 97, 59 SW 766, 82 AmSR 869.

[c] **Conveyance by trustee without authority of court.**—Where a duly qualified trustee's successor, without authority from the court, conveyed a

idea of right is excluded;[40] otherwise the statute of limitations would be of little use for protecting those who could otherwise show only an indefeasible title to the land.[41]

[§ 326] **4. Necessity for Writing.**[42] It is familiar law that color of title is given by descent cast,[43] by judgments or decrees,[44] and by statutes.[45] This much is well settled, but there is much conflict of authority as to whether color of title not acquired by one of the methods enumerated must be acquired by some instrument in writing. In a number of decisions it is either held or said that a written instrument is not necessary to give color of title but that it may be created by acts in pais.[46] Nevertheless, if there is no writing purporting to convey, there must be some visible acts, signs, or indications which are apparent to all, showing the extent of the boundaries of the land claimed, to amount to color of title.[47] Be this as it may, it is believed that the decided weight of authority is to the effect that some writing is necessary in order to give color of title. This has been held or said in a considerable number of decisions, some of which embody this idea in defining color of title.[48] In other decisions some written instrument is held necessary because of the wording of the statute under which title by adverse possession is claimed.[49] And it has been held that the evidence of title cannot be partly in writing and partly in parol.[50]

[§ 327] **5. Necessity for Possession under Claim of Right.** To render an instrument operative as color of title it is essential that possession should be taken of the land,[51] or of part of it,[52] and that there should be a claim of title to the whole.[53] Furthermore, the instrument will be effective only on proof of adverse possession for the requisite period thereunder.[53½]

[§ 328] **6. Necessity for Continuity of Posses-**

portion of the trust estate, such deed, although ineffective to convey a valid title to the property, when taken in good faith under the belief that he had authority to sell, induced by his representation that an order had been passed conferring it, constituted color of title. Maynard v. Greer, 129 Ga. 709, 59 SE 798.

[d] **Although the grantor was mentally incompetent to make a conveyance** it may nevertheless be good as color of title. Parker v. Betts, 47 Colo. 428, 107 P 816.

40. Smith v. Burtis, 9 Johns. (N. Y.) 174.

41. Pillow v. Roberts, 13 How. (U. S.) 472, 14 L. ed. 228; Sharp v. Shenandoah Furnace Co., 100 Va. 27, 33, 40 SE 103 [quot Cyc entire section].

"If the statute could only run in favor of a valid title, it could have no function to perform. The holder of a valid title has no need of the statute." Hughes v. Wyatt, 146 Iowa 392, 396, 125 NW 334 (per Evans, J.). "These statutes of repose presuppose defects in or total want of title, and are enacted to establish the claim of one in adverse possession under defective title, or under an instrument which in law conveys no title." La Crosse v. Cameron, 80 Fed. 264, 269, 25 CCA 399 (per Jenkins, J.).

42. See also infra § 393.

43. See infra § 399.

44. See infra § 394 et seq.

45. See infra § 397.

46. See cases infra this note.

[a] **The doctrine of these cases** is that when a person is in possession pursuant to a state of facts which of themselves show the character and extent of his entry and claim, such facts, whatever they may be in a given case, sufficiently perform the office of color of title. Hawkins v. Hudson, 45 Ala. 482; Lebanon Min. Co. v. Rogers, 8 Colo. 34, 5 P 661; McClellan v. Kellogg, 17 Ill. 498; Bell v. Longworth, 6 Ind. 273; Blankenhorn v. Lenox, 123 Iowa 67, 98 NW 556; Libbey v. Young, 103 Iowa 258, 72 NW 520; Teabout v. Daniels, 38 Iowa 158; Boyce v. Blake, 2 Dana (Ky.) 127; Taylor v. Buckner, 2 A. K. Marsh. (Ky.) 18, 12 AmD 354; Davis v. Davis, 68 Miss. 478, 10 S 70; Hughes v. Israel, 73 Mo. 538; Cooper v. Ord, 60 Mo. 420; Mylar v. Hughes, 60 Mo. 105; Rannels v. Rannels, 52 Mo. 108; Neal v. Nelson, 117 N. C. 393, 23 SE 428, 53 AmSR 590; Hollinshead v. Nauman, 45 Pa. 140; Green v. Kellum, 23 Pa. 254, 62 AmD 332; Fitch v. Mann, 8 Pa. 503; Bell v. Hartley, 4 Watts & S. (Pa.) 32; McCall v. Neely, 3 Watts (Pa.) 69; Cluggage v. Duncan, 1 Serg. & R. (Pa.) 111; Craig v. Craig, 8 Pa. Cas. 357, 11 A 60. See also Niles v. Davis, 60 Miss. 750; Davis v. Bowmar, 55 Miss. 671; Hargis v. Kansas City, etc., R. Co., 100 Mo. 210, 13 SW 680; McElwee v. Martin, 20 S. C. L. 496.

47. Lebanon Min. Co. v. Rogers, 8 Colo. 34, 5 P 661; Cooper v. Ord, 60 Mo. 420.

48. U. S.—Deffeback v. Hawke, 115 U. S. 392, 6 SCt 95, 29 L. ed. 423; U. S. v. Casterlin, 164 Fed. 437; Oliver v. Pullam, 24 Fed. 127.

Ala.—Crowder v. Doe, 162 Ala. 151, 50 S 230, 136 AmSR 17; Howell v. Henry, 157 Ala. 43, 47 S 132; Baucum v. George, 65 Ala. 259. And see Hawkins v. Hudson, 45 Ala. 482; Saltmarsh v. Crommelin, 24 Ala. 347.

Ark.—King v. Campbell, 89 Ark. 450, 116 SW 899; White v. Stokes, 67 Ark. 184, 53 SW 1060; Teaver v. Akin, 47 Ark. 528, 1 SW 772.

Ga.—Street v. Collier, 118 Ga. 470, 45 SE 294; Acme Brewing Co. v. Central R., etc., Co., 115 Ga. 494, 42 SE 8; Connell v. Culpepper, 111 Ga. 805, 35 SE 667; Hobby v. Alford, 73 Ga. 791; Veal v. Robinson, 70 Ga. 809; White v. Rowland, 67 Ga. 546, 44 AmR 731; Burdell v. Blain, 66 Ga. 169; Field v. Boynton, 33 Ga. 239; Walls v. Smith, 19 Ga. 8; Gittens v. Lowry, 15 Ga. 336; Beverly v. Burke, 9 Ga. 440, 54 AmD 351.

Ill.—Brooks v. Bruyn, 35 Ill. 392.

Iowa.—Lindt v. Uihlein, 116 Iowa 48, 89 NW 214; Hamilton v. Wright, 30 Iowa 480.

Md.—Walsh v. McIntire, 68 Md. 402, 13 A 348.

Minn.—Seigneuret v. Fahey, 27 Minn. 60, 6 NW 403.

Mo.—Shaffer v. Detie, 191 Mo. 377, 90 SW 131; Allen v. Mansfield, 108 Mo. 343, 18 SW 901 [disappr Rannels v. Rannels, 52 Mo. 108]; Crispen v. Hannavan, 50 Mo. 536; Fugate v. Pierce, 49 Mo. 441. See also Mylar v. Hughes, 60 Mo. 105; Long v. Higginbotham, 56 Mo. 245.

N. M.—Armijo v. Armijo, 4 N. M. 133, 13 P 92.

N. Y.—Thompson v. Burhans, 79 N. Y. 93.

N. C.—Barrett v. Brewer, 153 N. C. 547, 69 SE 614, 42 LRANS 403; Williams v. Scott, 122 N. C. 545, 29 SE 877 [overr Neal v. Nelson, 117 N. C. 393, 23 SE 428, 53 AmSR 590]; Smith v. Allen, 112 N. C. 223, 16 SE 932; Keener v. Goodson, 89 N. C. 273; Dobson v. Murphy, 18 N. C. 586; Doe v. Southard, 10 N. C. 119, 14 AmD 578. See also Rogers v. Mabe, 15 N. C. 180.

S. C.—Golson v. Hook, 35 S. C. L. 23.

S. D.—Wood v. Conrad, 2 S. D. 334, 50 NW 95.

Tenn.—Slatton v. Tennessee Coal, etc., Co., 109 Tenn. 415, 423, 75 SW 926 (where McAllister, J., said: "The idea of a parol sale being color of title so as to make out an adverse possession under the statute . . . is . . . out of the question").

Vt.—Hodges v. Eddy, 38 Vt. 327.

W. Va.—Swann v. Thayer, 36 W. Va. 46, 14 SE 423.

[a] **One holding land under a verbal agreement to sell** has no color of title. King v. Campbell, 89 Ark. 450, 116 SW 899.

[b] **Occupancy by permission of government.**—A mere occupancy of public land by an Indian by permission of the government does not give him color of title thereto. U. S. v. Casterlin, 164 Fed. 437.

49. Cal.—Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 P 113.

Colo.—Lower Latham Ditch Co. v. Louden Irr. Canal Co., 27 Colo. 267, 60 P 229, 83 AmSR 80; De Foresta v. Gast, 20 Colo. 307, 38 P 244; Knight v. Lawrence, 19 Colo. 425, 36 P 242 [disappr dictum Lebanon Min. Co. v. Rogers, 8 Colo. 34, 5 P 661]. The above cases are decided under a statute copied from the Illinois statute relating to color of title, set forth infra this note, and differing only in the length of the period required and in the use of the words "proper title" instead of "paper title." The words "proper title" are evidently a clerical error.

Ill.—Converse v. Calumet River R. Co., 195 Ill. 204, 62 NE 887; Sontag v. Bigelow, 142 Ill. 143, 31 NE 674, 16 LRA 326 and note; Rigor v. Frye, 62 Ill. 507; Morrison v. Norman, 47 Ill. 477; Huls v. Buntin, 47 Ill. 396; Cook v. Norton, 43 Ill. 391; Brooks v. Bruyn, 35 Ill. 392; Shackleford v. Bailey, 35 Ill. 387; Dickenson v. Breeden, 30 Ill. 279; Bride v. Watt, 23 Ill. 507; McClellan v. Kellogg, 17 Ill. 498; Woodward v. Blanchard, 16 Ill. 424. The above cases are decided under a statute providing that every person in the actual possession of lands under claim and color of title shall be adjudged the legal owner of such lands to the extent and according to the purport of his "paper title."

Tex.—Hodges v. Robbins, 23 Tex. Civ. A. 57, 56 SW 565; Finch v. Trent, 3 Tex. Civ. A. 568, 22 SW 132, 24 SW 679. And see Craddock v. Burleson, 21 Tex. Civ. A. 250, 52 SW 644.

Wis.—Hatch v. Lusignan, 117 Wis. 428, 94 NW 332; Furlong v. Garrett, 44 Wis. 111; North v. Hammer, 34 Wis. 425.

See Doyle v. Wade, 23 Fla. 90, 1 S 516, 11 AmSR 334.

50. Baird v. Evans, 58 Ga. 350.

[a] **Thus** an attachment, execution, and sale were held not to constitute color of title in defendant for the reason that, the purchase being proved by parol only, one of the essentials of color of title was lacking. Doe v. Southard, 10 N. C. 119, 14 AmD 578.

51. Roe v. Doe, (Ala.) 63 S 949; Coursey v. Coursey, 141 Ga. 65, 80 SE 462; Turner v. Neisler, 141 Ga. 27, 80 SE 461; Hines v. Moye, 125 N. C. 8, 34 SE 103.

52. Henry v. Frolichstein, 149 Ala. 330, 43 S 126.

53. Henry v. Frolichstein, 149 Ala. 330, 43 S 126; Custer v. Hall, 71 W. Va. 119, 76 SE 183.

53½. Caldwell Land, etc., Co. v.

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sion in One Person. "It is not necessary that land held adversely under color of title be held for the statutory period by one person. Provided the 'possessio pedis' be held continuously by successive persons in privity, the color may pass from one to another by a paper chain of title. But if a hiatus occurs in the paper chain, it is fatal as to so much of the land as is claimed by mere color."[54] A conveyance by one having mere color of title, but who never takes possession, creates no color of title in the grantee additional to that arising from the conveyance to him.[54½]

[§ 329] **7. Necessity for Unbroken Chain of Title—a. General Rule.** As shown in another connection, for a deed to give color of title it is not necessary that the grantor should have had title to the land, in the absence of some statutory requirement to that effect.[55] Hence an unbroken chain of title is unnecessary to give color of title.[56] As otherwise expressed, "One who has color of title acquired in good faith need not trace his title to the source to see whether it is apparently perfect and free from defects. So far as he is concerned, it is entirely immaterial what the state of the title may be as shown by the record."[57]

[§ 330] **b. Under Special Organic or Statutory Provisions.** Under the three-year statute of limitations of Texas[58] there must be a chain or transfer of title from or under the sovereignty of the soil,[59] necessarily presupposing a grant from the government as the basis of transfer,[60] and the grant must be effective to convey to the grantee whatever right the government had in the land at the time of the grant.[61] It need not necessarily carry with it the paramount title, but it must be title as against the government, valid in itself when tested by itself, and not tried by the title of others.[62] It must have intrinsic validity as between the parties to it, although it may be relatively void as respects the rights of third persons.[63] Under a statute of Tennessee,[64] pro-

Cloyd, 165 N. C. 595, 81 SE 752; Hamilton v. Icard, 114 N. C. 532, 19 SE 607.

54. 3 Washburn Real Prop. (6th ed) § 1987; Morgan v. Pott, 124 Mo. A. 371, 101 SW 717. See also Osterman v. Baldwin, 6 Wall. (U. S.) 116, 18 L. ed. 730; League v. Atchison, 6 Wall. (U. S.) 112, 18 L. ed. 764.

54½. Turner v. Neisler, 141 Ga. 27, 80 SE 461.

55. See infra § 351.

56. Green v. Neal, 6 Pet. (U. S.) 291, 8 L. ed. 402; Sawyer v. Shannon, 21 F. Cas. No. 12,045, 1 Overt. (Tenn.) 465. Compare Hedges v. Paulin, 11 F. Cas. No. 6,319, 5 Biss. 177; Long v. Parmer, 81 Ala. 384, 1 S 900; Waterman Hall v. Waterman, 220 Ill. 569, 77 NE 142, 4 LRANS 776 and note; Coleman v. Billings, 89 Ill. 183; Kelly v. Donlin, 70 Ill. 378; Rawson v. Fox, 65 Ill. 200; Dickenson v. Breeden, 30 Ill. 279; Hinchman v. Whetstone, 23 Ill. 185; Dawley v. Van Court, 21 Ill. 460; Goewey v. Urig, 18 Ill. 238; Woodward v. Blanchard, 16 Ill. 424; Gray v. Darby, Mart. & Y. (Tenn.) 396; Harris v. Bledsoe, Peck (Tenn.) 234; Barton v. Shall, Peck (Tenn.) 215; Weatherhead v. Bledsoe, 2 Overt. (Tenn.) 352; Hampton v. McGinnis, 1 Overt. (Tenn.) 286.

57. Waterman Hall v. Waterman, 220 Ill. 569, 577, 77 NE 142, 4 LRANS 776 (per Cartwright, J.).

58. The Texas three-year statute of limitations defines color of title as a consecutive chain of transfer from or under the sovereignty of the soil down to such person in possession without being regular, as if one or more of the memorials or muniments were unregistered or not duly registered or were only in writing. Thompson v. Cragg, 24 Tex. 582; Linberg v. Finks, 7 Tex. Civ. A. 391, 25 SW 789.

59. Osterman v. Baldwin, 6 Wall. (U. S.) 116, 18 L. ed. 730; League v. Atchison, 6 Wall. (U. S.) 112, 18 L. ed. 764; Chandler v. Von Roeder, 24 How. (U. S.) 224, 16 L. ed. 633; Nelson v. Cooper, 108 Fed. 919, 48 CCA 140; Rice v. Willis, 87 Fed. 626, 31 CCA 154; Haring v. Shelton, (Tex.) 122 SW 13 [aff (Civ. A.) 114 SW 389]; Pohle v. Robertson, 102 Tex. 274, 115 SW 1166; Garner v. Black, 95 Tex. 125, 65 SW 876; Baldwin v. Root, 90 Tex. 546, 40 SW 3 [rev (Civ. A.) 38 SW 630]; Grigsby v. May, 84 Tex. 240, 19 SW 343; Cockrell v. Curtis, 83 Tex. 105, 18 SW 436; Green v. Hugo, 81 Tex. 452, 17 SW 79, 26 AmSR 824; Browning v. Pumphrey, 81 Tex. 163, 16 SW 870; Jones v. Andrews, 72 Tex. 5, 9 SW 170; Horst v. Herring, (Tex.) 8 SW 306; Telfener v. Dillard, 70 Tex. 139, 7 SW 847; Hussey v. Moser, 70 Tex. 42, 7 SW 606; Paxton v. Meyer, 67 Tex. 96, 2 SW 817; Calhoun v. Burton, 64 Tex. 510; League v. Rogan, 59 Tex. 427; Clark v. Smith, 59 Tex. 275; Brownson v. Scanlan, 59 Tex. 222; Long v. Brenneman, 59 Tex. 210; Parker v. Bains, 59 Tex. 15; Buford v. Bostick, 58 Tex. 63; Morris v. Meek, 57 Tex. 385; Saunders v. Silvey, 55 Tex. 46; Bryan v. Crump, 55 Tex. 1; Veramendi v. Hutchins, 48 Tex. 531; Lewis v. Ames, 44 Tex. 319; Burleson v. Burleson, 28 Tex. 383; Cox v. Bray, 28 Tex. 247; Whitehead v. Foley, 28 Tex. 1; Sapp v. Newsom, 27 Tex. 537; Pearson v. Burditt, 26 Tex. 157, 80 AmD 649; Burditt v. Silsbee, 15 Tex. 604; Thompson v. Cragg, 24 Tex. 582; Kilpatrick v. Sisneros, 23 Tex. 113; Smith v. Power, 23 Tex. 29; Marsh v. Weir, 21 Tex. 97; Wilson v. Palmer, 18 Tex. 592; Williamson v. Simpson, 16 Tex. 433; Mason v. McLaughlin, 16 Tex. 24; Castro v. Wurzbach, 13 Tex. 128; Douglass v. Moore, 2 Tex. Unrep. Cas. 262; Henderson v. Beaton, 1 Tex. Unrep. Cas. 17; Saxton v. Corbett, (Tex. Civ. A.) 122 SW 75; Keith v. Guedry, (Tex. Civ. A.) 114 SW 392; Gilbert v. Harris, (Tex. Civ. A.) 109 SW 392; Hulett v. Platt, 49 Tex. Civ. A. 377, 109 SW 207; Watts v. Bruce, 31 Tex. Civ. A. 347, 72 SW 258; Sheppard v. Avery, 28 Tex. Civ. A. 479, 69 SW 82; Gillaspie v. Murray, 27 Tex. Civ. A. 580, 66 SW 252; Bartell v. Kelsey, (Tex. Civ. A.) 59 SW 631; Watson v. Watson, (Tex. Civ. A.) 55 SW 183; Wille v. Ellis, 22 Tex. Civ. A. 462, 54 SW 922; Arnold v. Hodge, 20 Tex. Civ. A. 211, 49 SW 714; Baldwin v. Root, (Tex. Civ. A.) 38 SW 630; McCown v. McCafferty, 14 Tex. Civ. A. 77, 36 SW 517; Cole v. Grigsby, (Tex. Civ. A.) 35 SW 680; Illies v. Frerichs, 11 Tex. Civ. A. 575, 32 SW 915; Latimer v. Logwood, (Tex. Civ. A.) 27 SW 960; Hicks v. Hicks, (Tex. Civ. A.) 26 SW 227; Linberg v. Finks, 7 Tex. Civ. A. 391, 25 SW 789; Baird v. Patillo, (Tex. Civ. A.) 24 SW 813; Finch v. Trent, 3 Tex. Civ. A. 568, 22 SW 132, 24 SW 679; Texas Land, etc., Co. v. State, 1 Tex. Civ. A. 616, 23 SW 258.

[a] **Conveyance of land in excess of amount mentioned in patent.**—Defendants held a tract of land as tenants in common under mesne conveyances from a patentee, and, while their deeds purported to grant to them all the land comprehended in the surveys referred to in their deeds, the total of the land in the surveys exceeded the total number of acres mentioned in the patentee's original deeds. It was held that, as defendants had no deeds or title to such excess in their chain of title from the patentee, they could not show the regular chain of transfers from the sovereignty necessary to an acquisition of it under the three-year statute of limitations. Wadsworth v. Vinyard, (Tex. Civ. A.) 131 SW 1171.

[b] **Insufficiency of transfers to connect with sovereignty of soil; prior conveyance to third person.**—(1) Where a patentee of certain land conveyed to a third person before conveying to defendants' prior grantors, and it was not shown that there had been any reconveyance of such outstanding title, defendants had no color of title from the sovereignty of the soil. Saxton v. Corbett, (Tex. Civ. A.) 122 SW 75. To same effect Dixon v. Cruse, (Tex. Civ. A.) 127 SW 591. (2) A widow and children transferred to T a land certificate issued to the deceased husband's heirs and also the land to be surveyed under it. Afterward the land was located and was patented to the heirs, the widow having died. Subsequently the heirs conveyed the land to defendants. It was held that the latter conveyance could not serve as a basis for the three-year limitation, it being insufficient to connect defendants with the sovereignty of the soil. Baldwin v. Root, (Tex. Civ. A.) 38 SW 630 [rev on other grounds 90 Tex. 546, 40 SW 3].

[c] **Conveyance pending suit to determine title to property.**—The three-year statute will not apply where the instrument under which title is claimed was executed during the pendency of a suit involving the title to the property, to which the grantors were parties, and the judgment rendered found that the grantors had no interest in the land. Wille v. Ellis, 22 Tex. Civ. A. 462, 54 SW 922.

[d] **A deed given under an unauthorized sale to enforce a vendor's lien** breaks the chain of title required by the statute. Thompson v. Cragg, 24 Tex. 582; Linberg v. Finks, 7 Tex. Civ. A. 391, 25 SW 789.

[e] **Conveyance under execution sale after conveyance by debtor.**—The statute does not apply to one purchasing at execution sale after the title has passed from the judgment debtor to his wife. Watts v. Bruce, 31 Tex. Civ. A. 347, 72 SW 258.

60. Smith v. Power, 23 Tex. 29; Hulett v. Platt, 49 Tex. Civ. A. 377, 109 SW 207.

61. Smith v. Power, 23 Tex. 29; Hulett v. Platt, 49 Tex. Civ. A. 377, 109 SW 207.

62. Smith v. Power, 23 Tex. 29.

[a] **Junior patentees.**—In the case of junior patents upon lands previously titled by the state it seems to be well settled that such junior patentees or persons holding title under them hold under the sovereignty of the soil, and may prescribe under the statute of limitation of three years as against the holder under the senior patent. League v. Rogan, 59 Tex. 427; Galan v. Goliad, 32 Tex. 776; Whitehead v. Foley, 28 Tex. 1; Smith v. Power, 23 Tex. 29; Campbell v. Gibbs, (Tex. Civ. A.) 161 SW 430; Texas Land, etc., Co. v. State, 1 Tex. Civ. A. 616, 23 SW 258.

63. Smith v. Power, 23 Tex. 29.

64. Acts (1797) c 43 § 4.

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viding that one having possession for seven years under a deed "founded upon a grant" shall be entitled to preference in possession, it is not necessary that the occupant should have an uninterrupted chain of title connected with such grant, and therefore a sale of land on execution against one who was not shown to have derived any title from the original grantee is nevertheless effectual as a basis for a claim under the statute.[65] Under a constitutional provision of Kentucky fixing a five-year period of limitation,[66] it is held that only persons in possession under a patent from the state to them or their vendors are entitled to the benefit of its provisions.[67]

[§ 331] **8. Effect of Color of Title.** The effect of color of title is merely to fix the character of the occupant's possession, to define its extent and limits,[68] and to shorten the period during which the possession must be held in order to give title by adverse possession.[69]

[§ 332] **B. Necessity for Color of Title—1. In the Absence of Statutes Requiring It.** It is a rule of universal application that color of title is not necessary to perfect title by adverse possession in the absence of any statutory provision which expressly or by clear implication requires it,[70] and it may be added in this connection that statutes which merely prescribe what is essential to acquisition of title by adverse possession under color of title do not prevent acquisition of title by adverse possession by one who makes no claim under a written instru-

65. Weatherhead v. Bledsoe, 2 Overt. (Tenn.) 352; Sawyer v. Shannon, 1 Overt. (Tenn.) 465; Hampton v. McGinnis, 1 Overt. (Tenn.) 286.

66. Shaw v. Robinson, 111 Ky. 715, 722, 64 SW 620, 23 KyL 998.

The constitutional provision that no action shall be maintained for lands, where it is necessary for the claimant to rely for his recovery on any grant or patent from the state prior to 1820, against any person claiming such land by possession to a well-defined boundary under a title of record, unless such action "shall be instituted within five years after this Constitution shall go into effect or within five years after the occupant may take possession" protects only persons in possession under a patent from the state to them or their vendors. Shaw v. Robinson, supra.

67. Shaw v. Robinson, 111 Ky. 715, 64 SW 620, 23 KyL 998 (holding that "title of record" means title derived from the commonwealth); Fairbairn v. Means, 4 Metc. (Ky.) 323.

68. Ga.—Veal v. Robinson, 70 Ga. 809; Walls v. Smith, 19 Ga. 8.

S. C.—Fore v. Berry, 94 S. C. 71, 77, 78 SE 706 [cit Cyc].

Utah.—Weiner v. Stearns, 120 P 490.

Vt.—Hassam v. J. E. Safford Lumber Co., 82 Vt. 444, 74 A 197. See also Aldrich v. Griffith, 66 Vt. 390, 29 A 376.

Va.—Creekmur v. Creekmur, 75 Va. 430.

W. Va.—Robinson v. Lowe, 50 W. Va. 75, 40 SE 454.

Ordinarily "the question of color of title is only material in so far as the possession claimed is derived from and depends upon the instrument constituting the color of title; that is, it applies only to the constructive possession which such an instrument gives the claimant." Carpenter v. Coles, 75 Minn. 9, 10, 77 NW 424 (per Mitchell, J.).

69. See the statutory provisions.

70. U. S.—Probst v. Presbyterian Church Mission Bd., 129 U. S. 182, 9 SCt 263, 32 L. ed. 642; Harpending v. Reformed Protestant Dutch Church, 16 Pet. 455, 10 L. ed. 1029; Ewing v. Burnet, 11 Pet. 41, 9 L. ed. 624; Clarke v. Courtney, 5 Pet. 319, 8 L. ed. 140; Elder v. McClaskey, 70 Fed. 529, 17 CCA 251; Quindaro v. Squier, 51 Fed. 152, 2 CCA 142; McIntyre v. Thompson, 10 Fed. 531, 4 Hughes 562; Roberts v. Pillow, 20 F. Cas. No. 11,909, Hempst. 624 [rev on other grounds 13 How. 472, 14 L. ed. 228]; Shuffleton v. Nelson, 22 F. Cas. No. 12,822, 2 Sawy. 540.

Ala.—Crowder v. Doe, 162 Ala. 151, 50 S 230, 136 AmSR 17; Knight v. Hunter, 155 Ala. 238, 46 S 235; Pearson v. Adams, 129 Ala. 157, 29 S 977; Edmondson v. Anniston City Land Co., 128 Ala. 589, 29 S 596; Stewart v. Tucker, 106 Ala. 319, 17 S 385; Parks v. Barnett, 104 Ala. 438, 16 S 136; Murray v. Hoyle, 92 Ala. 559, 9 S 368; Newsome v. Snow, 91 Ala. 641, 8 S 377, 24 AmSR 934; Dothard v. Denson, 75 Ala. 482; State v. Conner, 69 Ala. 212; Wilson v. Glenn, 68 Ala. 383; Ryan v. Kilpatrick, 66 Ala. 332; Steele v. Steele, 64 Ala. 438, 38 AmR 15; Smith v. Roberts, 62 Ala. 83; Ladd v. Dubroca, 61 Ala. 25; Bernstein v. Humes, 60 Ala. 582, 31 AmR 52, 75 Ala. 241; Riggs v. Fuller, 54 Ala. 141; Dillingham v. Brown, 38 Ala. 311; Herbert v. Hanrick, 16 Ala. 581; Bohannan v. Chapman, 13 Ala. 641; Doe v. Eslava, 11 Ala. 1028.

Ark.—Bradbury v. Dumond, 80 Ark. 82, 85, 96 SW 390 [cit Cyc]; Trotter v. Neal, 50 Ark. 340, 7 SW 384; Ferguson v. Peden, 33 Ark. 150; Mooney v. Cooledge, 30 Ark. 640.

Cal.—Kimball v. Lohman, 31 Cal. 154; Page v. Fowler, 28 Cal. 605; Wolfe v. Langford, 14 Cal. A. 359, 112 P 203.

Conn.—Comins v. Comins, 21 Conn. 413.

Fla.—Horne v. Carter, 20 Fla. 45.

Ga.—Hall v. Gay, 68 Ga. 442; Laramore v. Minish, 43 Ga. 282; Doe v. Gullatt, 10 Ga. 218; English v. Doe, 7 Ga. 387.

Ill.—Noyes v. Heffernan, 153 Ill. 339, 38 NE 571; Horner v. Reuter, 152 Ill. 106, 38 NE 747; Stewart v. Duffy, 116 Ill. 47, 6 NE 424; Flaherty v. McCormick, 113 Ill. 538; Kerr v. Hitt, 75 Ill. 51; Weber v. Anderson, 73 Ill. 439; Turney v. Chamberlain, 15 Ill. 271.

Ind.—May v. Dobbins, 166 Ind. 331, 77 NE 353; Burr v. Smith, 152 Ind. 469, 53 NE 469; Moore v. Hinkle, 151 Ind. 343, 50 NE 822; Marley v. State, 147 Ind. 145, 46 NE 466; Wilson v. Johnson, 145 Ind. 40, 38 NE 38, 43 NE 930; Dyer v. Eldridge, 136 Ind. 654, 36 NE 522; Irey v. Mater, 31 NE 69; Herff v. Griggs, 121 Ind. 471, 23 NE 279; Bowen v. Swander, 121 Ind. 164, 22 NE 725; L'Hommedieu v. Cincinnati, etc., R. Co., 120 Ind. 435, 22 NE 125; Collett v. Vanderburgh County, 119 Ind. 27, 21 NE 329, 4 LRA 321 and note; O'Donahue v. Creager, 117 Ind. 372, 20 NE 267; Riggs v. Riley, 113 Ind. 208, 15 NE 253; Roots v. Beck, 109 Ind. 472, 9 NE 698; State v. Portsmouth Sav. Bank, 106 Ind. 435, 7 NE 379; Brown v. Anderson, 90 Ind. 93; Sims v. Frankfort, 79 Ind. 446; Vanduyn v. Hepner, 45 Ind. 589; Doe v. Hearick, 14 Ind. 242; Wood v. Ripley, 27 Ind. A. 356, 61 NE 608.

Iowa.—Griffith v. Murray, 147 NW 855; Montgomery County v. Severson, 64 Iowa 326, 17 NW 197, 20 NW 458; Solberg v. Decorah, 41 Iowa 501; Colvin v. McCune, 39 Iowa 502; Hamilton v. Wright, 30 Iowa 480; Robinson v. Lake, 14 Iowa 421. Compare Wickham v. Henthorn, 91 Iowa 242, 59 NW 276.

Kan.—Viking Refrigerator, etc., Co. v. Crawford, 84 Kan. 203, 114 P 240, 35 LRANS 498; Pratt v. Ard, 63 Kan. 182, 65 P 255; Schrimpcher v. Stockton, 58 Kan. 758, 51 P 276; Guinn v. Spillman, 52 Kan. 496, 35 P 13; Anderson v. Burnham, 52 Kan. 454, 34 P 1056; Gildehaus v. Whiting, 39 Kan. 706, 18 P 916; Wood v. Missouri, etc., R. Co., 11 Kan. 323.

Ky.—Hillman Land, etc., Co. v. Marshall, 119 SW 180; Krauth v. Hahn, 65 SW 18, 23 KyL 1261; Young v. Cox, 14 SW 348, 12 KyL 347; Farmer v. Lyons, 87 Ky. 421, 9 SW 248, 10 KyL 375; Marshall v. McDaniel, 12 Bush 378; Campbell v. Thomas, 9 B. Mon. 82; Gregory v. Nesbit, 5 Dana 419; Chiles v. Jones, 4 Dana 479; Com. Bank v. McWilliams, 2 J. J. Marsh. 256; Herndon v. Wood, 2 A. K. Marsh. 44; Taylor v. Buckner, 2 A. K. Marsh. 18, 12 AmD 354.

La.—Chef Menteur Land Co. v. Mercier, 129 La. 1042, 57 S 329; Landry v. Landry, 105 La. 362, 29 S 900; Cannon v. Female Orphan Soc., 24 La. Ann. 452; Devall v. Choppin, 15 La. 566; Rousseau v. Henderson, 12 Mart. 635.

Mich.—Bean v. Bean, 163 Mich. 379, 128 NW 413; Ward v. Nestell, 113 Mich. 185, 71 NW 593; Beecher v. Ferris, 112 Mich. 584, 70 NW 1106; Barnard v. Brown, 112 Mich. 452, 70 NW 1038, 67 AmSR 432; Vier v. Detroit, 111 Mich. 646, 70 NW 139; Campau v. Lafferty, 50 Mich. 114, 15 NW 40; Campau v. Dubois, 39 Mich. 274.

Minn.—Cool v. Kelly, 78 Minn. 102, 80 NW 861; Carpenter v. Coles, 75 Minn. 9, 77 NW 424; Glencoe v. Wadsworth, 48 Minn. 402, 51 NW 377; Vandall v. St. Martin, 42 Minn. 163, 44 NW 525; Seymour v. Carli, 31 Minn. 81, 16 NW 495.

Miss.—Moore v. Crump, 84 Miss. 612, 37 S 109; Welborn v. Anderson, 37 Miss. 155.

Mo.—Swope v. Ward, 185 Mo. 316, 84 SW 895; Quick v. Rufe, 164 Mo. 408, 64 SW 102; Allen v. Mansfield, 108 Mo. 343, 18 SW 901; Bushey v. Glenn, 107 Mo. 331, 17 SW 969; Mather v. Walsh, 107 Mo. 121, 17 SW 755; Smith v. McCorkle, 105 Mo. 135, 16 SW 602; Cooper v. Ord, 60 Mo. 420; Mylar v. Hughes, 60 Mo. 105; Chapman v. Templeton, 53 Mo. 463; Draper v. Shoot, 25 Mo. 197, 69 AmD 462.

Mont.—Minnesota, etc., Land, etc., Co. v. Brasier, 18 Mont. 444, 45 P 632; National Min. Co. v. Powers, 3 Mont. 344.

Nebr.—Schwartz v. Anderson, 92 Nebr. 603, 139 NW 219; Dredla v. Patz, 78 Nebr. 506, 111 NW 136; Murray v. Romine, 60 Nebr. 94, 82 NW 318; Lantry v. Wolff, 49 Nebr. 374, 68 NW 494; Omaha, etc., R. Co. v. Rickards, 38 Nebr. 847, 57 NW 739; Omaha, etc., Loan, etc., Co. v. Barrett, 31 Nebr. 803, 48 NW 967; Fitzgerald v. Brewster, 31 Nebr. 51, 47 NW 475; Haywood v. Thomas, 17 Nebr. 237, 22 NW 460; Gatling v. Lane, 17 Nebr. 80, 22 NW 453; Gatling v. Lane, 17 Nebr. 77, 22 NW 227.

N. H.—Wendell v. Moulton, 26 N. H. 41.

N. Y.—Crary v. Goodman, 22 N. Y. 170; Abrams v. Rhoner, 44 Hun 507, 9 NYSt 207; Kent v. Harcourt, 33 Barb. 491; Eldridge v. Kenning, 12 NYS 693; Humbert v. Trinity Church, 24 Wend. 587; Bradstreet v. Clarke, 12 Wend. 602; Jackson v. Camp, 1 Cow. 605; Jackson v. Newton, 18 Johns. 355; Jackson v. Wheat, 18 Johns. 40; Bogardus v. Trinity Church, 4 Paige 178 [aff 15 Wend. 111]; Bogardus v. Trinity Church, 4 Sandf. Ch. 633. Compare Jackson v. Frost, 5 Cow. 346.

N. C.—Hawkins v. Richmond Cedar Works, 122 N. C. 87, 30 SE 13.

Oh.—McAllister v. Hartzell, 60 Oh. St. 69, 53 NE 715; McNeely v. Langan,

ment.[70½] Expressions found in a few decisions to the effect that the entry in order to work an ouster of the holder of the legal title and operate as an adverse possession must have been made under claim and color of title[71] are clearly obiter dicta, or were inadvertently made confounding "claim of title" with "color of title" or as referring to the sufficiency of the evidence to show that the possession of the claimant was in fact adverse in the sense of hostile to the true owner. The only effect of claiming under a deed or paper title upon the question of adverse possession is to enlarge and extend the possession, beyond the portion actually occupied, to the whole lot described in the deed.[72] To constitute an adverse possession of land, entry and possession under claim of right or title is sufficient.[73]

[§ 333] **2. Under Special Statutory Provisions—a. In General.** In most jurisdictions the statutes contain more than one period of limitation for the acquisition of title by adverse possession, and those fixing the shorter periods of limitation ordinarily make color of title an element of adverse possession.[74] The decisions of the courts of the state in which the land is situated are binding upon the federal courts as regards the necessity of color of title.[75]

[§ 334] **b. Under Spanish Law.** Under the Spanish law as administered in the territory acquired by the federal government from Spain, it was essential to the acquisition of title by adverse possession that the possession should have been under "just title," and therefore color of title was essential to the acquisition of title by adverse possession.[76]

22 Oh. St. 32; Yetzer v. Thoman, 17 Oh. St. 130, 91 AmD 122; Paine v. Skinner, 8 Oh. 159; Rowland v. Rowland, 8 Oh. 40; Smith v. Pittsburgh, etc., R. Co., 26 Oh. Cir. Ct. 44.

Or.—Swift v. Mulkey, 14 Or. 59, 12 P 76.

Pa.—Mead v. Leffingwell, 83 Pa. 187; Ege v. Medlar, 82 Pa. 86; Hollinshead v. Nauman, 45 Pa. 140; Patterson v. Reigle, 4 Pa. 201, 45 AmD 684; Watson v. Gregg, 10 Watts 289, 36 AmD 176; Parker v. Southwick, 6 Watts 377; Malson v. Fry, 1 Watts 433; Munshower v. Patton, 10 Serg. & R. 334, 13 AmD 678; Overfield v. Christie, 7 Serg. & R. 173; McKinley v. Neely, 1 Phila. 76.

Porto Rico.—Soriano v. Arrese, 1 Porto Rico Fed. 198.

S. C.—Turpin v. Brannon, 14 S. C. L. 261; Anderson v. Gilbert, 1 S. C. L. 375.

S. D.—Bennett v. Moore, 18 S. D. 109, 99 NW 855.

Tenn.—Nelson v. Trigg, 4 Lea 701; Marr v. Gilliam, 1 Coldw. 488; Haynes v. Jones, 2 Head 372; Cannon v. Phillips, 2 Sneed 211; Jarnigan v. Mairs, 1 Humphr. 473; Brown v. Baldridge, Meigs 1; Dyche v. Gass, 3 Yerg. 397; Mulloy v. Paul, 2 Tenn. Ch. 156.

Tex.—Tarrant County v. McLemore, 8 SW 94; Parker v. Baines, 65 Tex. 605; Craig v. Cartwright, 65 Tex. 413; Melton v. Turner, 38 Tex. 81; Hendricks v. Snediker, 30 Tex. 296; Moody v. Holcomb, 26 Tex. 714; Gotoskey v. Grawunder, (Civ. A.) 158 SW 249; Campbell v. San Antonio Mach., etc., Co., (Civ. A.) 133 SW 750.

Utah.—Toltec Ranch Co. v. Cook, 24 Utah 453, 67 P 1123 [aff 191 U. S. 532, 24 SCt 166, 48 L. ed. 291]; Toltec Ranch Co. v. Babcock, 24 Utah 183, 66 P 876.

Vt.—Jakeway v. Barrett, 38 Vt. 316; Whitney v. French, 25 Vt. 663.

Va.—Sharp v. Shenandoah Furnace Co., 100 Va. 27, 40 SE 103; Virginia Midland R. Co. v. Barbour, 97 Va. 118, 33 SE 554; Blakey v. Morris, 89 Va. 717, 17 SE 126; Creekmur v. Creekmur, 75 Va. 430; Thomas v. Jones, 28 Gratt. (69 Va.) 383; Kincheloe v. Tracewells, 11 Gratt. (52 Va.) 587; Shanks v. Lancaster, 5 Gratt. (46 Va.) 110, 50 AmD 108. See also Atkinson v. Smith, 24 SE 901; Stonestreet v. Doyle, 75 Va. 356, 40 AmR 731. See however Nowlin v. Reynolds, 25 Gratt. (66 Va.) 127.

Wash.—Hesser v. Siepmann, 35 Wash. 14, 76 P 295; Moore v. Brownfield, 7 Wash. 23, 34 P 199.

W. Va.—Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255.

Wis.—Chicago, etc., R. Co. v. Groh, 85 Wis. 641, 55 NW 714.

Wyo.—Bryant v. Cadle, 18 Wyo. 64, 86, 104 P 23, 106 P 687 [cit Cyc].

70½. Zellmer v. Martin, 157 Wis. 341, 147 NW 371.

71. Ewing v. Burnet, 11 Pet. (U. S.) 41, 9 L. ed. 624; Dixon v. Cook, 47 Miss. 220.

72. Crowder v. Doe, 162 Ala. 151, 50 S 230, 136 AmSR 17; Lane v. Gould, 10 Barb. (N. Y.) 254; Sharp v. Shenandoah Furnace Co., 100 Va. 27, 37, 40 SE 103 [quot Cyc]; Bryant v. Cadle, 18 Wyo. 64, 104 P 23, 106 P 687.

73. U. S.—Shuffleton v. Nelson, 22 F. Cas. No. 12,822, 2 Sawy. 540.

Ala.—Herbert v. Hanrick, 16 Ala. 581.

Ill.—Turney v. Chamberlain, 15 Ill. 271.

Md.—Jacobs v. Disharoon, 113 Md. 92, 77 A 258; Rother v. Sharp St. M. E. Church, 85 Md. 528, 37 A 24; Sadtler v. Peabody Heights Co., 66 Md. 1, 10 A 599; Hiss v. McCabe, 45 Md. 77.

Mich.—Sanscrainte v. Torongo, 87 Mich. 69, 49 NW 497.

Minn.—Glencoe v. Wadsworth, 48 Minn. 402, 51 NW 377.

N. Y.—Jackson v. Camp, 1 Cow. 605; Jackson v. Ellis, 13 Johns. 118; Smith v. Lorillard, 10 Johns. 338.

Vt.—Jakeway v. Barrett, 38 Vt. 316.

Va.—Sharp v. Shenandoah Furnace Co., 100 Va. 27, 37, 40 SE 103 [quot Cyc].

Wash.—Moore v. Brownfield, 7 Wash. 23, 34 P 199.

See Wolfe v. Langford, 14 Cal. A. 359, 112 P 203 (holding that actual possession under claim of ownership is a sufficient showing of title in a plaintiff as against one who establishes no right or title in himself).

74. U. S.—Osterman v. Baldwin, 6 Wall. 116, 18 L. ed. 730; Archer v. Beihl, 136 Fed. 113, 69 CCA 101 (Alaska statute); Anoweurth v. Burlingin, 1 F. Cas. No. 478, 6 WestLJ (Oh.) 431; Arrowsmith v. Burlingim, 1 F. Cas. No. 563, 4 McLean 489. See also Powell v. Harman, 2 Pet. 241, 7 L. ed. 411; Patton v. Easton, 1 Wheat. 476, 4 L. ed. 139 (construing Tennessee statute); Lea v. Polk County Copper Co., 21 How. 493, 16 L. ed. 203.

Cal.—Figg v. Mayo, 39 Cal. 262.

Colo.—Knight v. Lawrence, 19 Colo. 425, 36 P 242; Lebanon Min. Co. v. Rogers, 8 Colo. 34, 5 P 661.

Ga.—Cowart v. Young, 74 Ga. 694; Hobby v. Alford, 73 Ga. 791; Laramore v. Minish, 43 Ga. 282.

Ill.—Horn v. Horn, 234 Ill. 268, 84 NE 904; Glos v. Wheeler, 229 Ill. 272, 82 NE 234; Chicago, etc., R. Co. v. Abbott, 215 Ill. 416, 74 NE 412; Converse v. Calumet River R. Co., 195 Ill. 204, 62 NE 887; Allmendinger v. McHie, 189 Ill. 308, 59 NE 517; Hawley v. Hawley, 187 Ill. 351, 58 NE 332; Duck Island Club v. Bexstead, 174 Ill. 435, 51 NE 831; Wright v. Stice, 173 Ill. 571, 51 NE 71; Robbins v. Moore, 129 Ill. 30, 21 NE 934; Stoltz v. Doering, 112 Ill. 234; Clark v. Lyon, 45 Ill. 388.

Ky.—Shaw v. Robinson, 111 Ky. 715, 64 SW 620, 23 KyL 998; Hunter v. Ayres, 15 B. Mon. 210; Chiles v. Jones, 4 Dana 479; Henly v. Gore, 4 Dana 133; Poage v. Chinn, 4 Dana 50; Robinson v. Neal, 5 T. B. Mon. 212; Anderson v. Turner, 3 A. K. Marsh. 131; Herndon v. Wood, 2 A. K. Marsh. 44; Taylor v. Buckner, 2 A. K. Marsh. 18, 12 AmD 354.

La.—Louisiana, etc., R. Co. v. Louisiana R., etc., Co., 127 La. 587, 53 S 872; Ramos Lumber, etc., Co. v. Sanders, 117 La. 615, 42 S 158; Clark v. Comford, 45 La. Ann. 502, 12 S 763; Beer v. Leonard, 40 La. Ann. 845, 5 S 257; Devall v. Choppin, 15 La. 566; Rousseau v. Henderson, 12 Mart. 635.

Mo.—Turner v. Hall, 60 Mo. 271.

Mont.—Peter v. Stephens, 11 Mont. 115, 27 P 403, 28 AmSR 448.

N. Y.—Kneller v. Lang, 137 N. Y. 589, 33 NE 555 [aff 63 Hun 48, 17 NYS 443]; Freedman v. Oppenheim, 80 App. Div. 487, 81 NYS 110.

N. C.—Haddock v. Leary, 148 N. C. 378, 62 SE 426; Simpson v. Hyatt, 46 N. C. 517; Den v. Turner, 5 N. C. 14; Grant v. Winborne, 3 N. C. 56.

Tenn.—Brown v. Watkins, 98 Tenn. 454, 40 SW 480; Barnes v. Vickers, 3 Baxt. 370; Norris v. Ellis, 7 Humphr. 463; Wallace v. Hannum, 7 Humphr. 443, 34 AmD 659; Waterhouse v. Martin, Peck 392; Harris v. Bledsoe, Peck 234; Barton v. Shall, Peck 215; Wilson v. Kilcannon, 4 Hayw. 182; Schmittou v. McFall, (Ch. A.) 39 SW 886. See however Marr v. Gilliam, 1 Coldw. 488; Love v. Shields, 3 Yerg. 405; Dyche v. Gass, 3 Yerg. 397; Napier v. Simpson, 1 Overt. 448.

Tex.—Garner v. Black, 95 Tex. 125, 65 SW 876; Stout v. Taul, 71 Tex. 438, 9 SW 329; Horst v. Herring, 8 SW 206; Coleman v. Thurmond, 56 Tex. 514; Cox v. Bray, 28 Tex. 247; Thompson v. Cragg, 24 Tex. 582; Kilpatrick v. Sisneros, 23 Tex. 113; Smith v. Power, 23 Tex. 29; Williamson v. Simpson, 16 Tex. 433; Mason v. McLaughlin, 16 Tex. 24; Castro v. Wurzbach, 13 Tex. 128; Runkle v. Smith, 52 Tex. Civ. A. 186, 114 SW 865; Hulett v. Platt, 49 Tex. Civ. A. 377, 109 SW 207; Beale v. Johnson, 45 Tex. Civ. A. 119, 99 SW 1045; Nolan v. Mundine, 34 Tex. Civ. A. 606, 79 SW 638; Welsman v. Thomson, (Civ. A.) 78 SW 728; Watts v. Bruce, 31 Tex. Civ. A. 347, 72 SW 258; Smith v. Bunch, 31 Tex. Civ. A. 541, 73 SW 559; Mass v. Bromberg, 28 Tex. Civ. A. 145, 66 SW 468; Massie v. Meeks, (Civ. A.) 28 SW 44; Hardy v. Dunlap, 7 Tex. Civ. A. 339, 26 SW 852; Bailey v. Laws, 3 Tex. Civ. A. 529, 23 SW 20.

Wash.—Hesser v. Siepmann, 35 Wash. 14, 76 P 295; Port Townsend v. Lewis, 34 Wash. 413, 75 P 982.

W. Va.—Mills v. Henry Oil Co., 57 W. Va. 255, 50 SE 157, 4 AnnCas 427.

Wis.—Childs v. Nelson, 69 Wis. 125, 33 NW 587.

See also statutory provisions which should invariably be consulted in determining whether color of title is necessary.

[a] **Where a statute requires paper title** there can be no adverse possession without color of title. Hesser v. Siepmann, 35 Wash. 14, 76 P 295.

[b] **In Michigan** it has been held that while it may be necessary for one who asserts adverse possession to show color of title the color of title in the contestant of the adverse claim is not essential to maintenance of the adverse claim. Klatt v. Detroit, 162 Mich. 186, 127 NW 409.

75. Patton v. Easton, 1 Wheat. (U. S.) 476, 4 L. ed. 139; Elder v. McClaskey, 70 Fed. 529, 17 CCA 251.

76. Kennedy v. Townsley, 16 Ala. 239.

[§ 335] **C. What Gives Color of Title—1. Sufficiency of Instrument Generally.**[77] An instrument to show color of title need not be executed and proved with the same formality as one which conveys title.[77½] An instrument, in order to operate as color of title, must purport to convey title to the claimant thereunder, or to those with whom he is in privity,[78] and must describe and purport to convey the land in contro-

77. U. S.—Deffeback v. Hawke, 115 U. S. 392, 6 SCt 95, 29 L. ed. 423; Osterman v. Baldwin, 6 Wall. 116, 18 L. ed. 730.

Ala.—Matthews v. Tennessee Coal, etc., Co., 157 Ala. 23, 47 S 78.

Cal.—Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 P 113; King v. Randlett, 33 Cal. 318; Nieto v. Carpenter, 21 Cal. 455.

Colo.—Sayre v. Sage, 47 Colo. 559, 108 P 160; Laughlin v. Denver, 24 Colo. 255, 50 P 917; Warren v. Adams, 19 Colo. 515, 36 P 604; Omaha, etc., Smelting, etc., Co. v. Tabor, 13 Colo. 41, 21 P 925, 16 AmSR 185, 5 LRA 236.

Ill.—Horn v. Metzger, 234 Ill. 240, 84 NE 893; Chicago, etc., R. Co. v. Abbott, 215 Ill. 416, 74 NE 412; Converse v. Calumet River R. Co., 195 Ill. 204, 62 NE 887; Lightcap v. Bradley, 186 Ill. 510, 58 NE 221; Burns v. Edwards, 163 Ill. 494, 45 NE 113; Nelson v. Davidson, 160 Ill. 254, 43 NE 361, 52 AmSR 338, 31 LRA 325; Bolden v. Sherman, 110 Ill. 418; Coleman v. Billings, 89 Ill. 183; Kruse v. Wilson, 79 Ill. 233; Rigor v. Frye, 62 Ill. 507; Dickenson v. Breeden, 30 Ill. 279.

La.—Ramos Lumber, etc., Co. v. Sanders, 117 La. 615, 42 S 158; Pendegast v. Schawtz, 30 La. Ann. 590; Melancon v. Bringier, 13 La. Ann. 206.

Md.—Walsh v. McIntire, 68 Md. 402, 13 A 348.

Mo.—Mylar v. Hughes, 60 Mo. 105.

Nebr.—McKeighan v. Hopkins, 14 Nebr. 361, 15 NW 711.

N. H.—Livingston v. Pendergast, 34 N. H. 544.

N. C.—Smith v. Proctor, 139 N. C. 314, 51 SE 889, 2 LRANS 172; Carson v. Carson, 122 N. C. 645, 30 SE 4; Keener v. Goodson, 89 N. C. 273.

S. D.—Skelly v. Warren, 17 S. D. 25, 94 NW 408.

Tex.—Craddock v. Burleson, 21 Tex. Civ. A. 250, 52 SW 644.

Vt.—Atkinson v. Patterson, 46 Vt. 750.

Va.—Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232.

[a] **An estate in fee** (1) is the interest which the instrument must purport to convey. Southern Iron, etc., Co. v. Schwoon, 124 Tenn. 176, 135 SW 785. (2) And where an administrator's deed purported to convey property to the grantee in fee, but provided that he should not have possession of the premises until after the death of another, neither the grantee nor those holding under him could base a prescription on such deed as color of title during the life of the person entitled to possession. Floyd v. Ricketson, 129 Ga. 668, 59 SE 909.

[b] **Interest of tenant.**—Where a deed purports to convey only one's right, title, and interest in land, which is merely that of a tenant holding under another, it cannot form the basis for limitation, as a holding thereunder is not adverse possession. Bruce v. Richardson, 26 Tex. Civ. A. 615, 64 SW 785.

[c] **A partition** is merely declamatory and not translative of ownership and cannot serve as a basis for prescription. Pearce v. Ford, 124 La. 851, 50 S 771. And see Kernan v. Baham, 45 La. Ann. 799, 13 S 155.

[d] **A sale on the condition that it shall be found that the vendor was the owner** of the property is not a basis for prescription if the vendor was not such owner, and the accomplishment of the condition retroacts to the date of the sale, placing matters in the same situation in which they would have been if the sale had not been made, and any possession by the vendee is one without a title. Albert Hanson Lumber Co. v. Angelloz, 118 La. 861, 43 S 529.

[e] **Donee of power of sale.**—A mere donee of a power to sell land, such as an executor, does not have color of title. Stearns v. Gittings, 23 Ill. 387.

[f] **A lease by the claimant** does not confer upon the claimant color of title. White v. Rosser, (Tex. Civ. A.) 27 SW 1062.

[g] **Assignment of homestead.**—The assignment of a homestead does not constitute color of title. It is not a conveyance, nor does it profess to pass title to the land, but simply attaches to the existing estate of the homesteader a quality of exemption from sale under execution. Keener v. Goodson, 89 N. C. 273.

[h] **Mortgage.**—In Illinois it has been held that a mortgage will not confer color of title upon the mortgagee who takes possession thereunder without foreclosure. Johnson v. Davidson, 162 Ill. 232, 44 NE 499. See also Edwards v. Tipton, 85 NC 479.

[i] **Agreement to pay for conveyance or remove from land.**—Where, pending suit to recover real estate, defendants agreed with plaintiffs to pay a certain sum for a conveyance of the interest in the land claimed by plaintiffs, otherwise to remove from the land and surrender it to plaintiffs, the agreement is insufficient to establish color of title. "They did not undertake to convey any title they had to the land, nor did they derive any title by the instrument from them." Craddock v. Burleson, 21 Tex. Civ. A. 250, 52 SW 644.

[j] **A reservation** in a grant (1) does not confer color of title on the grantor to the part or thing reserved. Hood v. Segrest, 12 Rob. (La.) 210. (2) Where a patent is issued for land, reserving land within its limits "previously granted," possession under such patent, but outside of the land previously granted, has been held not to give constructive possession of the excepted land, and it has been held that the patent was not color of title to the land so excepted, although the burden was on the person claiming under the exception to show that the land in question came within the exception. Basnight v. Smith, 112 N. C. 229, 16 SE 902; Eastern Carolina Land, etc., Co. v. Frey, 112 N. C. 158, 16 SE 902. See however Kellogg v. Forsyth, 2 Black (U. S.) 571, 17 L. ed. 256; Dredge v. Forsyth, 2 Black (U. S.) 563, 17 L. ed. 253; Gregg v. Tesson, 1 Black (U. S.) 150, 17 L. ed. 74; Gregg v. Forsyth, 24 How. (U. S.) 179, 16 L. ed. 731; Meehan v. Forsyth, 24 How. (U. S.) 175, 16 L. ed. 730; Bryan v. Forsyth, 19 How. (U. S.) 334, 15 L. ed. 674.

[k] **Conveyance to grantee incapable of taking.**—A deed to a partnership in its firm name, being to a grantee incapable of taking title, does not on its face purport to convey the legal title, but amounts to no more than a contract to convey, and a subsequent purchaser from the partners cannot make it the foundation of a claim of color of title to support his possession. Burns v. Edwards, 163 Ill. 494, 45 NE 113.

[l] **Effect of ambiguity in deed.**—Where the written color of title, under which adverse possession has been claimed beyond the statutory period, is so ambiguous upon its face that it is doubtful whether it should be construed as a deed conveying land so as to confer color of title or as a testamentary paper, the benefit of the doubt will be given to the one claiming possession under it. Westmoreland v. Westmoreland, 92 Ga. 233, 17 SE 1033.

77½. Big Sandy Iron, etc., Co. v. Williams, (Ala.) 63 S 1011.

78. Ala.—Howell v. Henry, 157 Ala. 43, 46, 47 S 132 [quot Cyc]; Matthews v. Tennessee Coal, etc., Co., 157 Ala. 23, 47 S 78.

Cal.—Nieto v. Carpenter, 21 Cal. 455.

Ill.—Wells v. Wells, 262 Ill. 320, 104 NE 649; Converse v. Calumet River R. Co., 195 Ill. 204, 62 NE 887; Nelson v. Davidson, 160 Ill. 254, 43 NE 361, 52 AmSR 338, 31 LRA 325; Bolden v. Sherman, 110 Ill. 418; Coleman v. Billings, 89 Ill. 183; Dickenson v. Breeden, 30 Ill. 279.

Minn.—O'Mulcahy v. Florer, 27 Minn. 449, 8 NW 166.

N. C.—Barrett v. Brewer, 153 N. C. 547, 69 SE 614, 42 LRANS 403.

S. D.—West v. Middlesex Banking Co., 33 S. D. 465, 146 NW 598; Skelly v. Warren, 17 S. D. 25, 30, 94 NW 408 [cit Cyc]; Seymour v. Cleveland, 9 S. D. 94, 68 NW 171; Wood v. Conrad, 2 S. D. 334, 50 NW 95.

See also White v. Rowland, 67 Ga. 546, 44 AmR 731.

[a] **Application of rule.**—A sheriff's deed which purports to convey only the interest in the premises which the judgment debtor had on a certain day does not include the dower right of one who was the debtor's wife before that day and hence cannot be made the basis of an adverse holding of her dower interest in the premises so as to bar her right of action to recover the same after the lapse of ten years by virtue of the statute. Cowan v. Lindsay, 30 Wis. 586.

[b] **A certified copy of the record of a deed which contains the name of no grantee,** although a marginal entry by the clerk on such record gives the name of grantor and grantee, is inadmissible in evidence to show title or color of title from the government in a defendant claiming under subsequent conveyances not otherwise connected with the title of the patentee in order to entitle such defendant to rely on the three-year limitation in Tex. Rev. St. (1895) arts 3340, 3341; and in the absence of such connecting link the subsequent deeds are also inadmissible to support such plea of limitation. Nelson v. Cooper, 108 Fed. 919, 48 CCA 140.

[c] **An instrument describing the land and containing a warranty of title but no words of transfer** is color of title. Doe v. Edmondson, 145 Ala. 557, 564, 40 S 505 (where it was said: "By force of the warranty Maddox [the vendor] was forever estopped to claim title to the land against Edmondson [the vendee]. If he had the title to the land when this instrument was executed, he could never recover it from Edmondson; nor could he defeat Edmondson's right of recovery against him after its execution. And if he had not the title at the time of its execution, but afterwards acquired it, he could never assert it against Edmondson"). See also Brown v. Manter, 21 N. H. 528, 53 AmD 223.

[d] **Term "privity" explained and applied.**—(1) The term "privity," within the rule that color of title must purport to convey title to the claimant thereunder or to those with whom he is in privity, means privity of possession and not privity in blood, for a "privity in blood" is one who derives his title by descent, and applies to a real title which can descend, not to a mere colorable title. Barrett v. Brewer, 153 N. C. 547, 69 SE 614, 42 LRANS 403. (2) To show privity of possession so as to avail of the color of title of a prior occupant the later occupant must enter under the prior one and obtain his possession either by purchase or descent from him. Barrett v. Brewer, supra. (3) In an

versy.[79] It cannot be aided by parol evidence.[80] However, any instrument having a grantor and a grantee, and containing a description of the lands intended to be conveyed and apt words for their conveyance, will ordinarily give color of title to the lands described;[81] and it is immaterial whether title is claimed under one conveyance of the whole tract or under several conveyances of the several parts thereof.[82] A person cannot by making a grant create color of title in himself, although he may do so in favor of his grantee.[82½]

[§ 336] **2. Deeds—a. Void or Defective Deeds—(1) In General.** A deed, although it be defective, will constitute color of title.[83] So the rule is broadly stated in a very large number of decisions that a deed purporting to convey the land in controversy will give color of title to a possession taken under it, even though it be void.[84]

[§ 337] **(2) Deed Void for Matter dehors the**

action to recover the possession of land, where defendants' ancestor was put into possession of the land under a deed from H, who had color of title, and the conveyance by H was void as a deed, it clearly established the privity between H and defendants' ancestor, so that defendants can rely on the color of title in H to perfect their own title; and where their ancestor's possession was adverse to plaintiff and all others except as to H and was continuous and notorious for seven years, it inured to the benefit of H's title and matured that into a good title. Bond v. Beverly, 152 N. C. 56, 67 SE 55.

[e] **A deed to a third person holding for the benefit of the claimant** has been held sufficient as color of title under the five-year statute of limitation of Texas. In reaching this conclusion it was said: "It will be observed that the statute does not prescribe that the person in possession [of land] shall claim under a deed in his own name. A tenant claims land under the deed to his landlord and the heir claims under the deed to his ancestor, yet the possession of either tenant or heir under such a deed will support a plea of five years limitation. Thomson claimed the land for himself under deeds duly registered and was within the terms of our statute." Thomson v. Weisman, 98 Tex. 170, 174, 82 SW 503 [rev (Civ. A.) 78 SW 728]. To same effect Callen v. Collins, 56 Tex. Civ. A. 620, 120 SW 546.

[f] **Assurance of title.**—A deed purporting to convey the grantor's right, title, and interest to a specified tract, aided by proof of a deed purporting to convey title to the grantor, is "assurance of title" within Shannon Code § 4456. Southern Iron, etc., Co. v. Schwoon, 124 Tenn. 176, 135 SW 785.

[g] **"A lien is not a title.**—A transfer thereof, though called a relinquishment of any equitable interest in the land, does not purport to convey the land itself or any title or specific interest therein; and such a transfer does not amount to color of title." Turner v. Neisler, 141 Ga. 27, 80 SE 461.

79. Matthews v. Tennessee Coal, etc., Co., 157 Ala. 23, 47 S 78; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 P 113; Freedman v. Oppenheim, 80 App. Div. 487, 81 NYS 110. And see infra § 339 et seq.

[a] **A lien** is not a title, and a transfer thereof does not purport to convey title to the land or amount to color of title. Turner v. Neisler, 141 Ga. 27, 80 SE 461.

80. Converse v. Calumet River R. Co., 195 Ill. 204, 62 NE 887.

81. Wells v. Wells, 246 Ill. 469, 92 NE 932; Lewis v. Pleasants, 143 Ill. 271, 30 NE 323, 32 NE 384; Brooks v. Bruyn, 35 Ill. 392; McCagg v. Heacock, 34 Ill. 476, 85 AmD 327; Dickenson v. Breeden, 30 Ill. 279; Hassam v. J. E. Safford Lumber Co., 82 Vt. 444, 74 A 197. See also Dunnington v. Hudson, 217 Mo. 93, 116 SW 1083.

82. Sharp v. Shenandoah Furnace Co., 100 Va. 27, 40 SE 103.

82½. Turner v. Neisler, 141 Ga. 27, 80 SE 461.

83. Ala.—McBride v. Lowe, 175 Ala. 408, 57 S 832; Henry v. Brown, 143 Ala. 446, 39 S 325; Carter v. Chevalier, 108 Ala. 563, 19 S 798; Bernheim v. Horton, 103 Ala. 380, 15 S 822; Saltmarsh v. Crommelin, 24 Ala. 347.

D. C.—Mackall v. Mitchell, 18 App. 58.

Ga.—Collins v. Boring, 96 Ga. 360, 23 SE 401.

Ill.—Maring v. Meeker, 263 Ill. 136, 140, 143, 105 NE 31 [cit Cyc]; Sanitary Dist. v. Allen, 178 Ill. 330, 53 NE 109; Whitney v. Stevens, 77 Ill. 585; Rawson v. Fox, 65 Ill. 200; Elston v. Kennicott, 46 Ill. 187; McCagg v. Heacock, 42 Ill. 153 (deed absolute on its face); McClellan v. Kellogg, 17 Ill. 498; Woodward v. Blanchard, 16 Ill. 424.

Ind.—Hearick v. Doe, 4 Ind. 164.

Iowa.—Putbrees v. James, 144 NW 607; Hughes v. Wyatt, 146 Iowa 392, 125 NW 334.

Ky.—Hatfield v. Hatfield, 113 SW 59; Logan v. Bull, 78 Ky. 607.

Md.—Erdman v. Corse, 87 Md. 506, 40 A 107; Kopp v. Herrman, 82 Md. 339, 33 A 646.

Minn.—Murphy v. Doyle, 37 Minn. 113, 33 NW 220.

Miss.—Carroll County v. Estes, 72 Miss. 171, 16 S 908; Nash v. Fletcher, 4 Miss. 609.

N. H.—Farrar v. Fessenden, 39 N. H. 268; Bailey v. Carleton, 12 N. H. 9, 37 AmD 190.

N. Y.—Jackson v. Newton, 18 Johns. 355.

N. C.—Ipock v. Gaskins, 161 N. C. 673, 77 SE 843; Taylor v. Smith, 121 N. C. 76, 28 SE 295; McMillan v. Gambill, 106 N. C. 359, 11 SE 273; Den v. Putney, 7 N. C. 562 (sheriff's deed signed by deputy clerk).

Or.—Swift v. Mulkey, 17 Or. 532, 21 P 871.

S. C.—Bryan v. Donnelly, 87 S. C. 388, 69 SE 840; Few v. Keller, 63 S. C. 154, 41 SE 35; Carolina Sav. Bank v. McMahon, 37 S. C. 309, 16 SE 31 (deed omitting words of inheritance).

Tenn.—Nelson v. Trigg, 4 Lea 701.

Tex.—Peden v. Crenshaw, 98 Tex. 365, 84 SW 362; Hays v. Barrera, 26 Tex. 78.

Vt.—Stevens v. Hollister, 18 Vt. 294, 46 AmD 154.

W. Va.—Ritz v. Ritz, 64 W. Va. 107, 60 SE 1095; Russell v. Tennant, 63 W. Va. 623, 60 SE 609, 129 AmSR 1024; Randolph v. Casey, 43 W. Va. 289, 27 SE 231; Mullan v. Carper, 37 W. Va. 215, 16 SE 527; Cooey v. Porter, 22 W. Va. 120.

Wis.—Hacker v. Horlemus, 74 Wis. 21, 41 NW 965.

N. B.—Johnson v. Calnan, 38 N. B. 52.

[a] **Deed lacking apt words of conveyance.**—If it appears from an instrument that it was the intention of the grantors to transfer lands described to the grantees in division of an estate, it is sufficient to constitute color of title in the grantees to support an adverse possession, although it may lack apt words of conveyance, technically speaking. Henry v. Brown, 143 Ala. 446, 39 S 325.

[b] **A deed directly from a husband to his wife,** although inoperative, will give color of title. Mielke v. Dodge, 135 Wis. 388, 115 NW 1099.

[c] **A deed, although dated as of a time prior to its execution,** is color of title from the time of its execution. "The antedating of it did not destroy its binding efficacy between the parties." Doe v. Edmondson, 145 Ala. 557, 567, 40 S 505.

[d] **Deed by person not in possession.**—A deed may give color of title, although the person assuming to convey the land was not in possession. McBride v. Low, 175 Ala. 408, 57 S 832; Henry v. Brown, 143 Ala. 446, 39 S 325.

84. U. S.—Beaver v. Taylor, 1 Wall. 637, 17 L. ed. 601; Wright v. Mattison, 18 How. 50, 15 L. ed. 280; Pillow v. Roberts, 13 How. 472, 14 L. ed. 228; McIntyre v. Thompson, 10 Fed. 531, 4 Hughes 562.

Ala.—Crowder v. Doe, 162 Ala. 151, 50 S 230, 136 AmSR 17; Perry v. Lawson, 112 Ala. 480, 20 S 611; National Bank v. Baker Hill Iron Co., 108 Ala. 635, 19 S 47; Torrey v. Forbes, 94 Ala. 135, 10 S 320; Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 9 S 537; Cooper v. Watson, 73 Ala. 252; Stovall v. Fowler, 72 Ala. 77; Riggs v. Fuller, 54 Ala. 141.

Ark.—Logan v. Jelks, 34 Ark. 547.

Conn.—Taylor v. Danbury Public Hall Co., 35 Conn. 430.

Fla.—Carn v. Haisley, 22 Fla. 317.

Ga.—Burkhalter v. Edwards, 16 Ga. 593, 60 AmD 744; Beverly v. Burke, 9 Ga. 440, 54 AmD 351; Moody v. Fleming, 4 Ga. 115, 48 AmD 210.

Ill.—Burton v. Perry, 146 Ill. 71, 34 NE 60; Sloan v. Graham, 85 Ill. 26; Brooks v. Bruyn, 35 Ill. 392; Holloway v. Clark, 27 Ill. 483.

Ind.—Irey v. Markey, 132 Ind. 546, 32 NE 309; Walker v. Hill, 111 Ind. 223, 12 NE 387; Wright v. Kleyla, 104 Ind. 223, 4 NE 16; Vancleave v. Milliken, 13 Ind. 105 (administrator's deed void as against heirs for want of notice); Bell v. Longworth, 6 Ind. 273.

Iowa.—Chicago, etc., R. Co. v. Allfree, 64 Iowa 500, 20 NW 779; Douglass v. Tullock, 34 Iowa 262; Thomas v. Stickle, 32 Iowa 71.

Kan.—Goodman v. Nichols, 44 Kan. 22, 23 P 957.

La.—Bernard v. Shaw, 9 Mart. 49.

Md.—Zion Church v. Hilken, 84 Md. 170, 35 A 9; Gump v. Sibley, 79 Md. 165, 28 A 977; Lurman v. Hubner, 75 Md. 268, 23 A 646; Hanson v. Johnson, 62 Md. 25, 50 AmR 199.

Mich.—Hecock v. Van Dusen, 80 Mich. 359, 45 NW 348; Hoffman v. Harrington, 28 Mich. 90.

Minn.—Washburn v. Cutter, 17 Minn. 361.

Miss.—Nash v. Fletcher, 44 Miss. 609; Welborn v. Anderson, 37 Miss. 155; Harper v. Tapley, 35 Miss. 506.

Mo.—Dunnington v. Hudson, 217 Mo. 93, 116 SW 1083; Stevens v. Martin, 168 Mo. 407, 68 SW 347; Smith v. Johnson, 107 Mo. 494, 18 SW 21; Hickman v. Link, 97 Mo. 482, 10 SW 600; Bartlett v. Kauder, 97 Mo. 356, 11 SW 67; Sutton v. Casseleggi, 77 Mo. 397; Hamilton v. Boggess, 63 Mo. 233; Fugate v. Pierce, 49 Mo. 441.

Nebr.—Lantry v. Parker, 37 Nebr. 353, 55 NW 962.

N. H.—Sanborn v. French, 22 N. H. 246.

N. Y.—Kent v. Harcourt, 33 Barb. 491.

N. C.—McFarland v. Cornwell, 151 N. C. 428, 66 SE 454; McNeill v. Fuller, 121 N. C. 209, 28 SE 299; Williams v. Council, 49 N. C. 206 (deed by clerk after expiration of term of office).

S. D.—Murphy v. Pierce, 17 S. D. 207, 95 NW 925; Wood v. Conrad, 2 S. D. 334, 50 NW 95.

Tenn.—Hubbard v. Godfrey, 100 Tenn. 150, 47 SW 81; Hunter v. O'Neal, 4 Baxt. 494; Clark v. Chase, 5 Sneed 636; Vance v. Johnson, 10 Humphr. 213; Love v. Shields, 3 Yerg. 404; Gray v. Darby, Mart. & Y. 396.

Tex.—Schleicher v. Gatlin, 85 Tex. 270, 20 SW 120; Lambert v. Weir, 27 Tex. 359; Hays v. Barrera, 26 Tex. 78; Wofford v. McKinna, 23 Tex. 36, 76

Instrument. A deed void for matters dehors the instrument will constitute color of title, provided it purports to convey the land in controversy.[85]

[§ 338] **(3) Deed Void on Its Face.** There is great conflict of authority as to whether a deed which is void on its face will give color of title. Many decisions hold that such deeds do not give color of title.[86] But the weight of authority is to the effect that a deed void on its face may give color of title as effectually as though the deed was regular on its face and void for reasons dehors the instrument.[87] And it has been held that this is especially

AmD 53; Charle v. Saffold, 13 Tex. 94. See also Texas Water, etc., Co. v. Cleburne, 1 Tex. Civ. A. 580, 21 SW 393.

Vt.—Hassam v. J. E. Safford Lumber Co., 82 Vt. 444, 74 A 197; Rice v. Chase, 74 Vt. 362, 52 A 967; Aldrich v. Griffith, 66 Vt. 390, 29 A 376; Chandler v. Spear, 22 Vt. 388.

Va.—Yellow Poplar Lumber Co. v. Thompson, 108 Va. 612, 620, 62 SE 358 [cit Cyc]; Lennig v. White, 20 SE 831.

Wash.—Hoko River Boom Co. v. Fairservice, 69 Wash. 357, 125 P 145; Miller v. Simmons, 67 Wash. 294, 121 P 462; Baylis v. Kerrick, 64 Wash. 410, 116 P 1082; Lara v. Sandell, 52 Wash. 53, 100 P 166; Hamilton v. Witner, 50 Wash. 689, 97 P 1084, 126 AmSR 921; Ward v. Huggins, 7 Wash. 617, 32 P 740, 1015, 36 P 285.

W. Va.—Calvert v. Murphy, 81 SE 403; Goad v. Walker, 80 SE 873; Stover v. Stover, 60 W. Va. 285, 292, 54 SE 350 [cit Cyc]; Bennett v. Pierce, 50 W. Va. 604, 40 SE 395; Robinson v. Lowe, 50 W. Va. 75, 40 SE 454; Randolph v. Casey, 43 W. Va. 289, 27 SE 231; Swann v. Thayer, 36 W. Va. 46, 14 SE 423; Cooey v. Porter, 22 W. Va. 120.

Wis.—Cornell Univ. v. Mead, 80 Wis. 337, 49 NW 815; Oconto County v. Jerrard, 46 Wis. 317, 50 NW 591; Austin v. Holt, 32 Wis. 478.

Wyo.—Bryant v. Cadle, 18 Wyo. 64, 104 P 23, 106 P 687.

[a] **A deed commenced by one sheriff and left unfinished,** and afterward completed by his successor, can operate as color of title only from the date of its completion. Walls v. Smith, 19 Ga. 8.

[b] **Sheriff's deed of sale based on invalid execution.**—Where a sheriff's deed is only introduced as color of title on which adverse possession is predicated, the exclusion of the execution on which the sheriff's deed was based, which was offered to show that the deed was void, was not error. Johnson v. Rhodes, 62 Fla. 220, 56 S 439; Kendrick v. Latham, 25 Fla. 819, 6 S 871.

[c] **Exception to rule.**—A void grant will not constitute the basis of a link in the chain of transfer of title from or under the sovereignty of the soil, and is not color of title within the three-year statute of limitations. Parker v. Bains, 59 Tex. 15; Cox v. Bray, 28 Tex. 247; Whitehead v. Foley, 28 Tex. 1; Lambert v. Weir, 27 Tex. 359; Smith v. Power, 23 Tex. 29; Marsh v. Weir, 21 Tex. 97; Wall v. Lubbock, 52 Tex. Civ. A. 405, 118 SW 886.

[d] **A deed executed by a deputy sheriff** is admissible as evidence of color of title, although it is void because the grantor was without authority to execute it. Goad v. Walker, (W. Va.) 80 SE 873.

85. U. S.—Wright v. Mattison, 18 How. 50, 15 L. ed. 280; Bartlett v. Ambrose, 78 Fed. 839, 24 CCA 397; Westenfelder v. Green, 76 Fed. 925; Latta v. Clifford, 47 Fed. 614.

Ala.—Pugh v. Youngblood, 69 Ala. 296.

Ariz.—Work v. United Globe Mines, 12 Ariz. 339, 100 P 813.

Cal.—Webber v. Clarke, 74 Cal. 11, 15 P 431; Packard v. Moss, 68 Cal. 123, 8 P 818; Russell v. Harris, 38 Cal. 426, 99 AmD 421.

Ga.—Beverly v. Burke, 9 Ga. 440, 54 AmD 351.

Ill.—Taylor v. Hamilton, 173 Ill. 392, 50 NE 1064; Nelson v. Davidson, 160 Ill. 254, 43 NE 361, 52 AmSR 338, 31 LRA 325; Stubblefield v. Borders, 92 Ill. 279; Foster v. Lets, 86 Ill. 412; Busch v. Huston, 75 Ill. 343; Fagan v. Rosier, 68 Ill. 84; Holloway v. Clark, 27 Ill. 483; Phillips v. Peo., 11 Ill. A. 340.

Ind.—Buckley v. Taggart, 62 Ind. 236; Cain v. Hunt, 41 Ind. 466.

Iowa.—Gebhard v. Sattler, 40 Iowa 152.

Kan.—Sapp v. Morrill, 8 Kan. 677; Carithers v. Weaver, 7 Kan. 110; Shoat v. Walker, 6 Kan. 65.

Minn.—Seigneuret v. Fahey, 27 Minn. 60, 6 NW 403.

Miss.—McClanahan v. Barrow, 27 Miss. 664.

Tenn.—Vance v. Johnson, 10 Humphr. 214.

Tex.—El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 SW 21; Fry v. Baker, 59 Tex. 404; Kilpatrick v. Sisneros, 23 Tex. 113; Wofford v. McKinna, 23 Tex. 36, 76 AmD 53; Charle v. Saffold, 13 Tex. 94; Harris v. Bryson, 34 Tex. Civ. A. 532, 80 SW 105.

Va.—Yellow Poplar Lumber Co. v. Thompson, 108 Va. 612, 62 SE 358.

Wis.—Cornell Univ. v. Mead, 80 Wis. 337, 49 NW 815; Lander v. Bromley, 79 Wis. 372, 48 NW 594; Austin v. Holt, 32 Wis. 478; Edgerton v. Bird, 6 Wis. 527, 70 AmD 473.

[a] **Deed referring to another deed void on its face.**—A deed not void on its face but referring as a part of its description to another deed which is void on its face is "color of title." Work v. United Globe Mines, 12 Ariz. 339, 100 P 813.

[b] **Although a conveyance of land held adversely to the grantor by a third person is invalid,** it will confer color of title on the grantee. Hoyle v. Mann, 144 Ala. 516, 41 S 835.

86. U. S.—Redfield v. Parks, 132 U. S. 239, 10 SCt 83, 33 L. ed. 327; Beaver v. Taylor, 1 Wall. 637, 17 L. ed. 601; Moore v. Brown, 17 F. Cas. No. 9,753, 4 McLean 211.

D. C.—Keefe v. Bramhall, 16 D. C. 551.

Kan.—Larkin v. Wilson, 28 Kan. 513; Waterson v. Devoe, 18 Kan. 223; Shoat v. Walker, 6 Kan. 65.

La.—Marmion v. McPeak, 51 La. Ann. 1631, 26 S 376; Train v. Cronan, 46 La. Ann. 551, 15 S 368; Ford v. Mills, 46 La. Ann. 331, 14 S 845; Pattison v. Maloney, 38 La. Ann. 885; Hall v. Mooring, 27 La. Ann. 596; Frique v. Hopkins, 4 Mart. N. S. 212; Dufour v. Comfranc, 11 Mart. 607, 13 AmD 360; Carrel v. Cabaret, 7 Mart. 375.

Mich.—Fitschen v. Olson, 155 Mich. 320, 119 NW 3.

N. C.—Dickens v. Barnes, 79 N. C. 490. See Williams v. Scott, 122 N. C. 545, 29 SE 877.

Okl.—Keller v. Hawk, 19 Okl. 407, 91 P 778.

Tex.—Schleicher v. Gatlin, 85 Tex. 270, 20 SW 120 (under the five-year statute of limitations providing that suits against those in peaceable and adverse possession of lands under duly registered deeds shall be instituted within five years); Green v. Hugo, 81 Tex. 452, 17 SW 79, 26 AmSR 824 (under the three-year statute defining color of title as a chain of transfer from or under the sovereignty of the soil down to the person in possession without being regular, but possessing such defect as may not extend to or include the want of intrinsic fairness and honesty).

Wyo.—Matthews v. Blake, 16 Wyo. 116, 92 P 242, 27 LRANS 339 and note.

And see Knight v. Grim, 110 Va. 400, 66 SE 42 (which in defining color of title makes it essential that the defect invalidating the instrument claimed as color of title should not appear on its face).

[a] **Under Spanish law in the Philippines.**—A wholly unauthorized grant of public land in the Philippine Islands by subordinate Spanish officials, showing its invalidity on its face, cannot serve as the basis of a prescriptive title under the Spanish royal decree of June 25, 1880, under which a prescriptive right can be founded on possession for ten years under just title and in good faith. Tigiao v. Insular Govt., 215 U. S. 410, 30 SCt 129, 54 L. ed. 257.

87. U. S.—Deputron v. Young, 134 U. S. 241, 10 SCt 539, 33 L. ed. 923 (announcing rule in Nebraska); Hoge v. Magnes, 85 Fed. 355, 29 CCA 564 (announcing Colorado rule); La Crosse v. Cameron, 80 Fed. 264, 25 CCA 399; Latta v. Clifford, 47 Fed. 614; McIntyre v. Thompson, 10 Fed. 531, 4 Hughes 562.

Ala.—Doe v. Edmondson, 145 Ala. 557, 40 S 505; Henry v. Brown, 143 Ala. 446, 39 S 325; Dorlan v. Westervitch, 140 Ala. 283, 37 S 382, 103 AmSR 35; Bowling v. Mobile, etc., R. Co., 128 Ala. 550, 29 S 584; Reddick v. Long, 124 Ala. 260, 27 S 402; Perry v. Lawson, 112 Ala. 480, 20 S 611; Goodson v. Brothers, 111 Ala. 589, 20 S 443; Gist v. Beaumont, 104 Ala. 347, 16 S 20; Torrey v. Forbes, 94 Ala. 135, 10 S 320; McInerny v. Irvin, 90 Ala. 275, 7 S 841; Beard v. Ryan, 78 Ala. 37; Pugh v. Youngblood, 69 Ala. 296. Compare Alexander v. Savage, 90 Ala. 383, 8 S 93.

Ark.—Dorr v. School Dist. No. 26, 40 Ark. 237.

Cal.—Wilson v. Atkinson, 77 Cal. 485, 20 P 66, 11 AmSR 299 [overr in effect Oglesby v. Hollister, 76 Cal. 136, 18 P 146, 9 AmSR 177; Bernal v. Gleim, 33 Cal. 668; Woodworth v. Fulton, 1 Cal. 295; Suñol v. Hepburn, 1 Cal. 254].

Ga.—Williamson v. Tison, 99 Ga. 791, 26 SE 766; Veal v. Robinson, 70 Ga. 809; Burdell v. Blain, 66 Ga. 169; Field v. Boynton, 33 Ga. 239; Williams v. Cash, 27 Ga. 507, 73 AmD 739; Walls v. Smith, 19 Ga. 8; Gittens v. Lowry, 15 Ga. 336; Beverly v. Burke, 9 Ga. 440, 54 AmD 351; Fain v. Garthright, 5 Ga. 6; Conyers v. Kenan, 4 Ga. 308, 48 AmD 226.

Ill.—Chicago Sanitary Dist. v. Allen, 178 Ill. 330, 53 NE 109; Whitney v. Stevens, 77 Ill. 585; Dalton v. Lucas, 63 Ill. 337; Hardin v. Crate, 60 Ill. 215; McClellan v. Kellogg, 17 Ill. 498.

Ind.—Bell v. Longworth, 6 Ind. 273. See Bender v. Stewart, 75 Ind. 88.

Iowa.—McBride v. Caldwell, 142 Iowa 228, 119 NW 741; Sater v. Meadows, 68 Iowa 507, 27 NW 481; Laraway v. Larue, 63 Iowa 407, 19 NW 242; Colvin v. McCune, 39 Iowa 502; Hamilton v. Wright, 30 Iowa 480; Close v. Samm, 27 Iowa 503. See also Douglass v. Tulloch, 34 Iowa 362; Thomas v. Stickle, 32 Iowa 71.

Me.—Gookin v. Whittier, 4 Me. 16; Robison v. Swett, 3 Me. 316.

Md.—Erdman v. Corse, 87 Md. 506, 40 A 107; Zion Church v. Hilken, 84 Md. 170, 35 A 9; Gump v. Sibley, 79 Md. 165, 28 A 977. Compare Baker v. Swan, 32 Md. 355.

Minn.—Miesen v. Canfield, 64 Minn. 513, 67 NW 632 [expl O'Mulcahy v. Florer, 27 Minn. 449, 8 NW 166; Cogel v. Raph, 24 Minn. 194]; Ricker v. Butler, 45 Minn. 545, 48 NW 407; Murphy v. Doyle, 37 Minn. 113, 33 NW 220.

Miss.—Nash v. Fletcher, 44 Miss. 609; Welborn v. Anderson, 37 Miss. 155; Hanna v. Renfro, 32 Miss. 125.

Mo.—Pharis v. Bayless, 122 Mo. 116, 26 SW 1030; Allen v. Mansfield, 108 Mo. 343, 18 SW 901; Cook v. Farrah, 105 Mo. 492, 16 SW 692; Hickman v. Link, 97 Mo. 482, 10 SW 600; Sutton v. Casseleggi, 77 Mo. 397; Hamilton v. Boggess, 63 Mo. 233; Long v. Hig-

true where the defects are such as only a person of legal learning and experience could by a critical examination discover.[88]

[§ 339] **b. Deeds Not Describing or Improperly Describing Land—(1) Necessity of Description.** It is elementary law that a deed is color of title only as to land actually described in it.[89] All the decisions hold that it is necessary that the extent of the

ginbotham, 56 Mo. 245. Compare Mason v. Crowder, 85 Mo. 526.

Nebr.—Gatling v. Lane, 17 Nebr. 77, 80, 22 NW 227, 453.

N. H.—Stevens v. Johnson, 55 N. H. 405.

N. Y.—Simpson v. Downing, 23 Wend. 316 (dictum).

N. D.—Power v. Kitching, 10 N. D. 254, 86 NW 737, 88 AmSR 691.

Or.—Smith v. Shattuck, 12 Or. 362, 7 P 355.

S. D.—Bliss v. Tidrick, 25 S. D. 533, 127 NW 852, 32 LRANS 854, AnnCas 1912C 671; Murphy v. Dafoe, 18 S. D. 42, 99 NW 86; Murphy v. Pierce, 17 S. D. 207, 95 NW 925; Parker v. Vinson, 11 S. D. 381, 77 NW 1023.

Tenn.—Love v. Shields, 3 Yerg. 405.

Vt.—Aldrich v. Griffith, 66 Vt. 390, 29 A 376; Beach v. Sutton, 5 Vt. 209.

Wash.—Ward v. Huggins, 7 Wash. 617, 32 P 740, 1015, 36 P 285.

W. Va.—Ritz v. Ritz, 64 W. Va. 107, 60 SE 1095; Russell v. Tennant, 63 W. Va. 623, 628, 60 SE 609, 129 AmSR 1024 [quot Cyc]; Bennett v. Pierce, 50 W. Va. 604, 40 SE 395; Robinson v. Lowe, 50 W. Va. 75, 40 SE 454; Randolph v. Casey, 43 W. Va. 289, 27 SE 231; Swann v. Thayer, 36 W. Va. 46, 14 SE 423.

Wis.—Hatch v. Lusignan, 117 Wis. 428, 94 NW 332; Hacker v. Horlemus, 74 Wis. 21, 41 NW 965; Whittlesey v. Hoppenyan, 72 Wis. 140, 39 NW 355; Killey v. McKeon, 67 Wis. 561, 31 NW 324; Meade v. Gilfoyle, 64 Wis. 18, 24 NW 413; Zweitusch v. Watkins, 61 Wis. 615, 21 NW 821; McMullan v. Wehle, 55 Wis. 685, 13 NW 694; Lindsay v. Fay, 25 Wis. 460; Sprecher v. Wakeley, 11 Wis. 432; Edgerton v. Bird, 6 Wis. 527, 70 AmD 473.

"An attempt is made to found a distinction upon the difference between deeds, void for matter not apparent upon the faces thereof, and deeds, the invalidity whereof is apparent on their faces; it being claimed that a judicial declaration of invalidity is sometimes necessary to work its destruction, when the defect is apparent, and that it is necessary in such cases as this. We are unable to concur in this view. The maxim, importing that all men are deemed to know the law, applies. If the invalidity of the deed is apparent upon its face, it is a void deed, no matter that its invalidity has not been declared, and a layman, or even a lawyer, might regard it as valid. His ignorance of the potentiality of the apparent defect avails him nothing, if he relies upon the deed alone. The virtue or efficacy which the law accords to such a deed, when possession has been held under it for a period of ten years, seems to stand upon mere tenderness of the law in favor of one, who, although bound to know it was void, has relied upon it, and held possession under it, mistakenly believing it to be good, or relying upon the acquiescence in his claim of title by all those whose interest it was to deny it. Title in such cases is not imparted by the deed. The deed is only an incident or circumstance bearing upon the conduct of the parties, disclosing intent, which the statute of limitations converts into good title. Without possession under it, the deed is absolutely worthless. Both courts and juries must disregard it. Possession without the deed would be worthless except to the extent of the actual enclosure. But both the deed and the possession produce a situation or relationship between the parties which the statute of limitations converts into good title, by denying a right of entry." Russell v. Tennant, 63 W. Va. 623, 627, 60 SE 609, 129 AmSR 1024 (per Poffenbarger, J.).

[a] **In Colorado** (1) the earlier decisions seem to hold that a tax deed void on its face constitutes color of title under which one may acquire title by adverse possession under the five-year statute of limitations. Hoge v. Magnes, 85 Fed. 355, 29 CCA 564 (stating Colorado rule); Bennet v. North Colorado Springs Land, etc., Co., 23 Colo. 470, 48 P 812, 58 AmR 281; De Foresta v. Gast, 20 Colo. 307, 38 P 244; Brinker v. Union Pac., etc., R. Co., 11 Colo. A. 166, 55 P 207. (2) But the rule deducible from the numerous later decisions in which the question has arisen is that a deed void on its face is sufficient color of title under the seven-year statute of limitations, but is not good as color of title under the five-year statute of limitations. Silford v. Hayes, 54 Colo. 255, 130 P 330; Silford v. Stratton, 54 Colo. 248, 130 P 327; Carnahan v. Hughes, 53 Colo. 318, 125 P 116; Walters v. Webster, 52 Colo. 549, 123 P 952, AnnCas1914A 23; Hughes v. Webster, 52 Colo. 475, 122 P 789; Sayre v. Sage, 47 Colo. 559, 108 P 160; Page v. Gillett, 47 Colo. 289, 107 P 290; Sedgwick v. Culp, 24 Colo. A. 566, 136 P 88; Foster v. Gray, 24 Colo. A. 247, 133 P 146. But see Dussart v. Abdo Mercantile Co., 140 P 806 (which holds that a deed void on its face is not sufficient as color of title for acquisition of title by adverse possession under the seven-year statute of limitations).

88. Bloom v. Strauss, 70 Ark. 483, 69 SW 548, 72 SW 563; De Foresta v. Gast, 20 Colo. 307, 38 P 244; Brinker v. Union Pac., etc., R. Co., 11 Colo. A. 166, 55 P 207; Avent v. Arrington, 105 N. C. 377, 10 SE 991; Ellington v. Ellington, 103 N. C. 54, 9 SE 208; McConnell v. McConnell, 64 N. C. 342; Dobson v. Murphy, 18 N. C. 586; Tate v. Southard, 10 N. C. 119, 14 AmD 578.

[a] **The presumption that every man knows the law,** (1) it has been said, has no application in determining what is and what is not color of title (Perry v. Perry, 99 N. C. 270, 6 SE 86); and (2) in endeavoring to ascertain whether or not a particular instrument is so obviously defective as not to give color of title this rule is to be excluded (McConnell v. McConnell, 64 N. C. 342).

89. U. S.—Cameron v. U. S., 148 U. S. 301, 13 SCt 595, 37 L. ed. 459; Ellicott v. Pearl, 10 Pet. 412, 9 L. ed. 475; Archer v. Beihl, 136 Fed. 113, 69 CCA 101; Jenkins v. Trager, 40 Fed. 726 [aff 136 U. S. 651, 10 SCt 1074, 34 L. ed. 557].

Ala.—Hale v. Tennessee Coal, etc., R. Co., 62 S 783; Wyman v. Walker, 177 Ala. 72, 58 S 403; McBride v. Lowe, 175 Ala. 408, 57 S 832; Rogers v. Keith, 148 Ala. 225, 42 S 446; Brannan v. Henry, 142 Ala. 698, 39 S 92, 110 Am SR 55; Dorlan v. Westervitch, 140 Ala. 283, 37 S 382, 103 AmSR 35; Reddick v. Long, 124 Ala. 260, 27 S 402; Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 9 S 537; Jones v. Pelham, 84 Ala. 208, 4 S 22; Louisville, etc., R. Co. v. Boykin, 76 Ala. 560; Russell v. Irwin, 38 Ala. 44.

Ariz.—U. S. v. Cameron, 3 Ariz. 100, 21 P 177.

Ark.—Dickson v. Sentell, 83 Ark. 385, 104 SW 148; Woodall v. Edwards, 83 Ark. 334, 104 SW 128; Gannon v. Moore, 83 Ark. 196, 104 SW 139; Dickinson v. Arkansas City Impr. Co., 77 Ark. 570, 92 SW 21, 113 AmSR 170.

Cal.—Hess v. Winder, 30 Cal. 349. Compare Tryon v. Huntoon, 67 Cal. 325, 7 P 741.

Colo.—Dussart v. Abdo Mercantile Co., 140 P 806; Laughlin v. Denver, 24 Colo. 255, 50 P 917.

Conn.—Dubuque v. Coman, 64 Conn. 475, 30 A 777.

Ga.—Hawes v. Elam, 131 Ga. 323, 62 SE 227; Whitehead v. Pitts, 127 Ga. 774, 56 SE 1004; Priester v. Melton, 123 Ga. 375, 51 SE 330; Crawford v. Verner, 122 Ga. 814, 50 SE 953; Pitts v. Whitehead, 121 Ga. 704, 49 SE 693; Luttrell v. Whitehead, 121 Ga. 699, 49 SE 691; Tumlin v. Perry, 108 Ga. 520, 34 SE 171; Williamson v. Tison, 99 Ga. 791, 26 SE 766; Etowah, etc., Min. Co. v. Parker, 73 Ga. 51; Kilpatrick v. Strosier, 67 Ga. 247; Burdell v. Blain, 66 Ga. 169; McKay v. Kendrick, 44 Ga. 607.

Ill.—Wells v. Wells, 262 Ill. 320, 104 NE 649; Hanna v. Palmer, 194 Ill. 41, 61 NE 1051, 56 LRA 93; Allmendinger v. McHie, 189 Ill. 308, 59 NE 517; Zilch v. Young, 184 Ill. 333, 56 NE 318; Ohio, etc., R. Co. v. Barker, 125 Ill. 303, 17 NE 797; Holbrook v. Forsythe, 112 Ill. 306; Lancey v. Brock, 110 Ill. 609; Bolden v. Sherman, 101 Ill. 483; Wray v. Chicago, etc., R. Co., 86 Ill. 424; Weaver v. Wilson, 48 Ill. 125; Brooks v. Bruyn, 35 Ill. 392; Shackleford v. Bailey, 35 Ill. 387; Hinchman v. Whetstone, 23 Ill. 185.

Ind.—Wilson v. Johnson, 145 Ind. 40, 38 NE 38, 43 NE 930 (holding that a deed referring for description to another deed which contains no description whatever does not give color of title); Noblesville, etc., R. Co. v. Lake Erie, etc., R. Co., 130 Ind. 1, 29 NE 484.

Iowa.—Fisher v. Muecke, 82 Iowa 547, 48 NW 936; Sater v. Meadows, 68 Iowa 507, 27 NW 481. Compare Childs v. Shower, 18 Iowa 261.

Ky.—Burks v. Cox, 150 Ky. 511, 150 SW 662; Chenault v. Quisenberry, 56 SW 410, 21 KyL 1771, 57 SW 234, 22 KyL 79; Henderson v. Howard, 1 A. K. Marsh. 26.

La.—Roussell v. Railways Realty Co., 132 La. 379, 69 S 409, 833; Albert Hanson Lumber Co. v. Angelloz, 118 La. 861, 43 S 529; Ramos Lumber, etc., Co. v. Labarre, 116 La. 559, 40 S. 898; Dowell v. Orphans' Home Soc., 114 La. 49, 38 S 16; Cooper v. Falk, 109 La. 474, 33 S 567; Bossier v. Maskell, 10 La. Ann. 671; Wilson v. Marshall, 10 La. Ann. 327; Kittridge v. Landry, 6 Rob. 477; Reeves v. Towles, 10 La. 276; Broussard v. Duhamel, 3 Mart. N. S. 11; Babineau v. Cormier, 1 Mart. N. S. 456.

Me.—Jewett v. Whitney, 51 Me. 233.

Md.—Davis v. Furlow, 27 Md. 536.

Mich.—Nichols v. New England Furniture Co., 100 Mich. 230, 59 NW 155.

Mo.—Slicer v. Owens, 241 Mo. 319, 145 SW 428; Goltermann v. Schiermeyer, 111 Mo. 404, 19 SW 484, 20 SW 161; Campbell v. Laclede Gas Light Co., 84 Mo. 352; Hamilton v. Boggess, 63 Mo. 233. See however Long v. Higginbotham, 56 Mo. 245.

N. H.—Bellows v. Jewell, 60 N. H. 420; Minot v. Brooks, 16 N. H. 374; Woods v. Banks, 14 N. H. 101.

N. J.—Pennsylvania R. Co. v. Breckenridge, 60 N. J. L. 583, 38 A 740.

N. Y.—Arents v. Long Island R. Co., 156 N. Y. 1, 50 NE 422 [aff 89 Hun 126, 34 NYS 1085]; Pope v. Hanmer, 74 N. Y. 240; Wheeler v. Spinola, 54 N. Y. 377 (holding that a deed, the lines of which do not describe or inclose any land, is insufficient); Lane v. Gould, 10 Barb. 254; Casey v. Dunn, 57 N. Y. Super. 381, 8 NYS 805; Jackson v. Woodruff, 1 Cow. 276, 13 AmD 525.

N. C.—Fisher v. Toxaway Co., 165 N. C. 663, 81 SE 925; Marshall v. Corbett, 137 N. C. 555, 50 SE 210; Barker v. Southern R. Co., 125 N. C. 596, 34 SE 701, 74 AmSR 658; Carson v. Carson, 122 N. C. 645, 30 SE 4; Basnight v. Smith, 112 N. C. 229, 16 SE 902; Davis v. Stroud, 104 N. C. 484, 10 SE 666; King v. Wells, 94 N. C. 344; Smith v. Fite, 92 N. C. 319; Price v. Jackson, 91 N. C. 11; Davidson v. Arledge, 88 N. C. 326; Dickens v. Barnes, 79 N. C. 490; Brown v. Coble, 76 N. C. 391; Capps v. Holt, 58 N. C.

claim should be defined by the deed.[90] One who goes beyond the limits of the land described in his deed and claims to hold the same adversely is without color of title thereto and is limited to his actual inclosures.[91] The reason is obvious; to permit one to prescribe to a line beyond the calls of his deed under any interpretation of those calls would be to authorize a prescription against the deed and not under it.[92]

[§ 340] **(2) Effect of Mistaken Belief of Parties That Deed Includes Land.** There is some contrariety of opinion as regards the effect of a mistaken belief of the parties that the deed conveys the lands. Thus it has been held that the fact that the holder of the deed honestly believed or that the grantor supposed that it covered the land claimed will not affect the operation of the rule where there is nothing to show that the descriptive words embraced in the deed were other than those intended to be used.[93] It has been held, however, that where by mistake a deed does not describe the land actually intended to be conveyed, but the vendor takes possession thereof notwithstanding the defect in the deed, his holding is under color of title.[94]

[§ 341] **(3) Effect of Subsequent Correction of Description.** Where the deed as originally executed does not describe the land, but is afterward corrected, such correction does not relate back to the

153; McRae v. Williams, 52 N. C. 430; Doe v. Southard, 10 N. C. 119, 14 AmD 578.

Oh.—Humphries v. Huffman, 33 Oh. St. 395.

S. C.—Garvin v. Garvin, 40 S. C. 435, 19 SE 79.

S. D.—Coulter v. Gudehus, 30 S. D. 616, 139 NW 330; Wood v. Conrad, 2 S. D. 334, 50 NW 95.

Tenn.—Wright v Hurst, 122 Tenn. 656, 127 SW 701; Slatton v. Tennessee Coal, etc., Co., 109 Tenn. 415, 75 SW 926; Gudger v. Barnes, 4 Heisk. 570; Marr v. Gilliam, 1 Coldw. 488; Smith v. Gernt, 2 Tenn. Civ. A. 65.

Tex.—Cook v. Oliver, 83 Tex. 559, 19 SW 161; Bassett v. Martin, 83 Tex. 339, 18 SW 587; McDonough v. Jefferson County, 79 Tex. 535, 15 SW 490; Tarrant County v. McLemore, 8 SW 94; Berrendo Stock Co. v. Kaiser, 66 Tex. 352, 1 SW 257; Kilpatrick v. Sisneros, 23 Tex. 113; Wofford v. McKinna, 23 Tex. 36, 76 AmD 53; Gilmore v. O'Neil, (Civ. A.) 139 SW 1162; Kimbell v. Powell, 57 Tex. Civ. A. 57, 121 SW 541; Lake v. Earnest, 53 Tex. Civ. A. 555, 116 SW 865; McCaleb v. Campbell, (Civ. A.) 116 SW 111; Runkle v. Smith, 52 Tex. Civ. A. 186, 114 SW 865; Mars v. Morris, 48 Tex. Civ. A. 216, 106 SW 430; Atascosa County v. Alderman, (Civ. A.) 91 SW 846; Ward v. Forrester, (Civ. A.) 87 SW 751; Nolan v. Mundine, 34 Tex. Civ. A. 606, 79 SW 638; Bruce v. Richardson, 26 Tex. Civ. A. 615, 64 SW 785; Bean v. Whitney, 25 Tex. Civ. A. 72, 60 SW 782; Simpson v. Johnson, (Civ. A.) 44 SW 1076; Williams v. Thomas, 18 Tex. Civ. A. 472, 44 SW 1073 (holding that a deed purporting to convey one tract does not give color of title to another); Newton v. Alexander, (Civ. A.) 44 SW 416; Bowles v. Smith, (Civ. A.) 34 SW 381; Alexander v. Newton, 11 Tex. Civ. A. 618, 33 SW 305; Crumbley v. Busse, 11 Tex. Civ. A. 319, 32 SW 438; Curdy v. Stafford, (Civ. A.) 27 SW 823; McKinzie v. Stafford, 8 Tex. Civ. A. 121, 27 SW 790; Willis v. Burke, 7 Tex. Civ. A. 239, 27 SW 217; Baird v. Patillo, (Civ. A.) 24 SW 813; Masterson v. Todd, 6 Tex. Civ. A. 131, 24 SW 682.

Vt.—Blondin v. Brooks, 83 Vt. 472, 76 A 184; Hull v. Fuller, 7 Vt. 100.

Va.—Sharp v. Shenandoah Furnace Co., 100 Va. 27, 40 SE 103; Blakey v. Morris, 89 Va. 717, 17 SE 126.

Wash.—Miller v. O'Leary, 44 Wash. 172, 87 P 113; Flint v. Long, 12 Wash. 342, 41 P 49.

W. Va.—Chilton v. White, 78 SE 1048.

Wis.—Elofrson v. Lindsay, 90 Wis. 203, 63 NW 89; Sheppard v. Wilmott, 79 Wis. 15, 47 NW 1054; Childs v. Nelson, 69 Wis. 125, 33 NW 587; Graeven v. Dives, 68 Wis. 317, 31 NW 914.

See Boley v. McMillan, 66 Fla. 159, 63 S 703, 706 [quot Cyc].

Compare Vandall v. St. Martin, 42 Minn. 163, 44 NW 525.

[a] **Applications of rule.**—(1) Where plaintiff's deed called for J's land as its northern boundary, and also gave courses and distances, his color of title extended no further than J's line. Connor v. Johnson, 59 S. C. 115, 37 SE 240. (2) Where the south half of a section is partitioned between plaintiff and defendant's husband, plaintiff being given one quarter and defendant's husband the other quarter, and subsequently defendant's husband conveys to a third person who conveys in turn to defendant, the deed does not constitute color of title, supporting adverse possession of a strip of land which belongs in the quarter taken by plaintiff. Walker v. Wyman, 157 Ala. 478, 47 S 1011. (3) Where land is occupied outside the boundaries described in a deed, the vendee cannot sustain adverse possession by asserting that, being a tenant at will of his vendor, his possession was his vendor's possession, and the latter's deed was color of title, which inured to him, as a vendee under parol contract holds for himself and not as tenant of the vendor. Slatton v. Tennessee Coal, etc., Co., 109 Tenn. 415, 75 SW 926.

[b] **"A deed containing a description, whose lines do not close,** cannot be the basis of an adverse possession under a claim of title founded on a written instrument. Wheeler v. Spinola, 54 N. Y. 377." Green v. Horn, 207 N. Y. 489, 498, 101 NE 430.

[c] **Land expressly excluded from operation of deed.**—"Where a state grant includes within its boundaries, but excludes from its operation, all older and superior claims, it is not operative as a color of title to the lands so excluded, and sufficiently identified and located within the grant, and shown to be covered by older and superior title, and possession of part or all of such included and excluded land is not possession under color of title." Smith v. Gernt, 2 Tenn. Civ. A. 65, 77.

[d] **Claim founded on "written instrument" or "deed."**—(1) A deed which does not contain a description of the land cannot be the basis of a claim founded on a "written instrument" or "deed." Arents v. Long Island R. Co., 156 N. Y. 1, 50 NE 422; Pope v. Hanmer, 74 N. Y. 240 [aff 8 Hun 265]; Wheeler v. Spinola, 54 N. Y. 377; Cook v. Oliver, 83 Tex. 559, 19 SW 161; McDonald v. Hamblen, 78 Tex. 628, 14 SW 1042; Harber v. Dyches, (Tex.) 14 SW 580; Carley v. Parton, 75 Tex. 98, 12 SW 950; Brokel v. McKechnie, 69 Tex. 32, 6 SW 623; Berrendo Stock Co. v. Kaiser, 66 Tex. 352, 1 SW 257; Murphy v. Welder, 58 Tex. 235; Kilpatrick v. Sisneros, 23 Tex. 113; Wofford v. McKinna, 23 Tex. 36, 76 AmD 53; Ward v. Forrester, (Tex. Civ. A.) 87 SW 751; Rountree v. Thompson, 30 Tex. Civ. A. 595, 71 SW 574, 72 SW 69; Bruce v. Richardson, 26 Tex. Civ. A. 615, 64 SW 785; Simpson v. Johnson, (Tex. Civ. A.) 44 SW 1076; Newton v. Alexander, (Tex. Civ. A.) 44 SW 416; Bowles v. Smith, (Tex. Civ. A.) 34 SW 381; Alexander v. Newton, 11 Tex. Civ. A. 618, 33 SW 305; Crumbley v. Busse, 11 Tex. Civ. A. 319, 32 SW 438; Curdy v. Stafford, (Tex. Civ. A.) 27 SW 823; McKinzie v. Stafford, 8 Tex. Civ. A. 121, 27 SW 790; Clark v. Kirby, (Tex. Civ. A.) 25 SW 1096; Masterson v. Todd, 6 Tex. Civ. A. 131, 24 SW 682; Brient v. Bruce, 5 Tex. Civ. A. 580, 24 SW 35; McCurdy v. Bullock, 2 Tex. Civ. A. 223, 20 SW 1110; McCurdy v. Locker, 2 Tex. Civ. A. 220, 20 SW 1109. (2) A deed, the boundaries stated in which describe a mere line, is a nullity, and a claim under such deed is not a claim under a written instrument which can afford the foundation for a constructive adverse possession. When a party claims to hold a lot adversely by proving actual occupancy of a part only, his claim must be under a deed or paper title, describing the whole premises. Jackson v. Woodruff, 1 Cow. (N. Y.) 276, 13 AmD 525.

[e] **Effect of subsequent agreement.**—Where land claimed under tax title is not included within the boundaries given in the assessment, the adjudication, or the sheriff's deed of sale, the fact that its subsequent purchasers gave as between themselves additional boundaries to the land gave the sale no force and effect as to the land which it did not originally include, and did not make it the basis for prescription. Ramos Lumber, etc., Co. v. Labarre, 116 La. 559, 40 S 898.

90. Luttrell v. Whitehead, 121 Ga. 699, 49 SE 691.

[a] **The principal purpose of color of title** is to define boundaries, and if it fails to do so with reasonable certainty, it is not admissible in evidence. Goad v. Walker, (W. Va.) 80 SE 873.

91. Sherry v. Frecking, 11 N. Y. Super. 452; Heavner v. Morgan, 41 W. Va. 428, 23 SE 874.

92. Runkle v. Smith, (Tex. Civ. A.) 114 SW 865.

93. Williamson v. Tison, 99 Ga. 791, 793, 26 S 766 (where Gober, J., said: "To state the proposition is to argue it. There would be no certainty under a rule that substituted a man's belief for what a deed shows. This belief would be often under the pressure of personal interest"). And see McKay v. Kendrick, 44 Ga. 607 (holding that the fact that through mistake or design the grantor at the time of the conveyance points out land as included in the deed, which is not included in the description, will not render the deed effective to confer color of title to the land so pointed out).

94. Schlossmacher v. Beacon Place Co., 52 Wash. 588, 592, 100 P 1013 [quot Como v. Pointer, 87 Miss. 712, 720, 40 S 260, as follows: "The contemporaneous construction by vendor and vendee evidenced by giving of possession will fix the true meaning and intent of the parties"].

[a] **Application of rule.**—(1) Where land had been platted into lots by actually staking it out on the face of the earth, a deed purporting to convey certain of the lots was sufficient to constitute color of title for a bona fide entry, although the recorded plat of the lands might not include such lots within the bounds of the platted tract as described therein. Flint v. Long, 12 Wash. 342, 41 P 49. (2) Where, at the time deeds to a city lot were given to plaintiff and her husband, it was understood that a strip excepted by the deed from the lot was a portion of the lot which was occupied by a street, and that the lot which was purchased

time of the original execution, but is only available as color of title from the time of correction.[95] Color of title subsequently acquired cannot be invoked to perfect, by relation, the adverse possession,[96] and an unauthorized correction is of course altogether ineffectual to give the deed the attribute of color of title.[97]

[§ 342] **(4) Requisites and Sufficiency of Description.**[98] The same certainty of description which is requisite to constitute an instrument a conveyance of title is required in an instrument which is relied on as color of title.[99] The deed must describe the land with sufficient certainty to identify it.[99½] Of course any description which, unaided by extrinsic facts, satisfies the mind that the land adversely occupied is embraced within the description contained in the deed, will be sufficient;[1] yet "to constitute color of title it is not necessary that the title under which the party claims should be so certain, in the description of the land as that there should be no indefiniteness in it."[2] On the contrary, a description, although indefinite, is sufficient if the court can, with the aid of extrinsic evidence which does not add to, enlarge, or in any way change the description, fit it to the property conveyed by the deed.[3] It is necessary, however, that the description be such that it can be

reached to the line of the street or avenue, and there was no intention to purchase a lot with such a strip intervening between the boundary of the lot purchased and the street, the deed to the lot as actually conveyed was sufficient to constitute color of title to the strip. Hesser v. Siepmann, 35 Wash. 14, 76 P 295.

95. Zilch v. Young, 184 Ill. 333, 56 NE 318; Weaver v. Wilson, 48 Ill. 125; Slicer v. Owens, 241 Mo. 319, 145 SW 428; Smith v. Shattuck, 12 Or. 362, 7 P 335; Slatton v. Tennessee Coal, etc., Co., 109 Tenn. 415, 75 SW 926. Compare Kendal v. Slaughter, 1 A. K. Marsh. (Ky.) 375.

[a] **Application of rule.**—The rule has been held to apply where the deed was subsequently corrected by a decree. Zilch v. Young, 184 Ill. 333, 56 NE 318.

96. Slatton v. Tennessee Coal, etc., Co., 109 Tenn. 415, 75 SW 926.

97. Claiborne v. Elkins, 79 Tex. 380, 15 SW 395.

98. **As a prerequisite to registration** see infra § 349.

99. Crawford v. Verner, 122 Ga. 814, 816, 50 SE 958 (per Evans, J.). To same effect Hanna v. Palmer, 194 Ill. 41, 61 NE 1051, 56 LRA 93; Allmendinger v. McHie, 189 Ill. 308, 59 NE 517; Brooks v. Bruyn, 35 Ill. 392; Shackleford v. Bailey, 35 Ill. 387. Compare Brannan v. Henry, 175 Ala. 454, 464, 57 S 967 (where it was said: "Where one holds land adversely claiming under a paper title which describes indifferently the tract held and another, whether the ambiguity be latent or patent, and though the paper title be void for other reasons, possession so held puts the true owner on inquiry which, it must be presumed, will disclose the character and territorial extent of the adverse claim").

[a] **A deed void for indefiniteness and uncertainty of description** does not operate either (1) as a conveyance (Crawford v. Verner, 122 Ga. 814, 50 SE 958), or (2) as color of title (Hardy v. Randall, 173 Ala. 516, 55 S 997; Crawford v. Verner, supra; Hanna v. Palmer, 194 Ill. 41, 61 NE 1051, 56 LRA 93).

99½. Griswold v. Comer, (Tex. Civ. A.) 161 SW 423.

1. Day v. Needham, 2 Tex. Civ. A. 680, 22 SW 103; Capen v. Sheldon, 78 Vt. 39, 61 A 864.

"All that appears to be necessary is that there should be such a designation that the land may be identified by the description." Fore v. Berry, 94 S. C. 71, 77, 78 SE 706.

2. Mulder v. Stokes, (Ala.) 63 S 563; Dorlan v. Westervitch, 140 Ala. 283, 295, 37 S 382, 103 AmSR 35 [cit Cyc] (per Haralson, J.); Boley v. McMillan, 66 Fla. 159, 63 S 703, 706 [quot Cyc].

3. Ala.—Mulder v. Stokes, 63 S 563; Hardy v. Randall, 173 Ala. 516, 55 S 997; Rogers v. Keith, 148 Ala. 225, 229, 42 S 446 [quot Cyc]; Dorlan v. Westervitch, 140 Ala. 283, 37 S 382, 103 AmSR 35; Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 9 S 537.

Fla.—Boley v. McMillan, 66 Fla. 159, 63 S 703, 706 [quot Cyc].

Ga.—Bennett v. Atlantic Coast Line R. Co., 126 Ga. 411, 55 SE 177; Tumlin v. Perry, 108 Ga. 520, 34 SE 171; Hunt v. Dunn, 74 Ga. 120; McMullin v. Erwin, 58 Ga. 427.

Ill.—Clayton v. Feig, 179 Ill. 534, 54 NE 149; Chicago Sanitary Dist. v. Allen, 178 Ill. 330, 53 NE 109; Coleman v. Billings, 89 Ill. 183; McNamara v. Seaton, 82 Ill. 498. See Bolden v. Sherman, 110 Ill. 418.

Ind.—Noblesville v. Lake Erie, etc., R. Co., 130 Ind. 1, 29 NE 484.

Ky.—Sackett v. Burt, etc., Lumber Co., 150 Ky. 748, 150 SW 997.

La.—Booksh v. New Iberia Sugar Co., 115 La. 516, 39 S 545.

Minn.—McRoberts v. McArthur, 62 Minn. 310, 64 NW 903.

Mo.—Lynde v. Williams, 68 Mo. 360; Thornton v. Missouri Pac. R. Co., 40 Mo. A. 265.

N. Y.—Jackson v. Frost, 5 Cow. 346.

N. C.—Davis v. Stroud, 104 N. C. 484, 10 SE 666; Henley v. Wilson, 81 N. C. 405.

Or.—Hamilton v. Fluornoy, 44 Or. 97, 74 P 483; Smith v. Shattuck, 12 Or. 362, 7 P 335.

S. C.—Fore v. Berry, 94 S. C. 71, 77, 78 SE 706, 709 [quot Cyc]; Evans v. Corley, 43 S. C. L. 143; Eubanks v. Harris, 28 S. C. L. 183.

Tenn.—Lieberman v. Clark, 114 Tenn. 117, 85 SW 258, 69 LRA 782; Hebard v. Scott, 95 Tenn. 467, 32 SW 390; Marr v. Gilliam, 1 Coldw. 488; Childers v. Ryan, (Ch. A.) 43 SW 126; Hornsby v. Davis, (Ch. A.) 36 SW 159; Cohen v. Woollard, 2 Tenn. Ch. 686.

Tex.—Club Land, etc., Co. v. Wall, 99 Tex. 591, 91 SW 778, 122 AmSR 666; Allen v. Boggess, 94 Tex. 83, 58 SW 833; Udell v. Peak, 70 Tex. 547, 7 SW 786; Craig v. Cartwright, 65 Tex. 413; Jones v. Powers, 65 Tex. 207; Cantagrel v. Von Lupin, 58 Tex. 570; Flanagan v. Boggess, 46 Tex. 330; Randolph v. Lewis, (Civ. A.) 163 SW 647; Hinkle v. Hays, (Civ. A.) 162 SW 435; Pratt v. Townsend, (Civ. A.) 125 SW 111; Kimbell v. Powell, 57 Tex. Civ. A. 57, 64, 121 SW 541, 543 [cit Cyc]; Moore v. Loggins, (Civ. A.) 114 SW 183; Hill v. Harris, 26 Tex. Civ. A. 408, 64 SW 320; Hodges v. Ross, 6 Tex. Civ. A. 437, 25 SW 975; Day v. Needham, 2 Tex. Civ. A. 680, 22 SW 103; McCurdy v. Locker, 2 Tex. Civ. A. 220, 20 SW 1109; Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 21 SW 405.

Vt.—Capen v. Sheldon, 78 Vt. 39, 61 A 864.

Va.—Sharp v. Shenandoah Furnace Co., 100 Va. 27, 33, 40 SE 103 [quot Cyc].

Wash.—Hesser v. Siepmann, 35 Wash. 14, 76 P 295; Flint v. Long, 12 Wash. 342, 41 P 49.

Wis.—Heinselman v. Hunsicker, 103 Wis. 12, 79 NW 23.

[a] **"The maxim that 'That is certain which can be made certain' applies."** "The true test of the sufficiency of a description . . . is that it should be sufficient to give notice to the true owner of the point to which the holder of such deed is claiming." Noland v. Weems, (Tex. Civ. A.) 141 SW 1031, 1036.

[b] **Descriptions held sufficient.**—(1) A description, which, although technically inaccurate, is such as would enable a surveyor to locate the property. Dorlan v. Westervitch, 140 Ala. 283, 37 S 382, 103 AmSR 35; Boley v. McMillan, (Fla.) 63 S 703, 706 [quot Cyc]; Burt, etc., Lumber Co. v. Sackett, 147 Ky. 232, 144 SW 34; Cadwalader v. Price, 111 Md. 310, 73 A 273, 134 AmSR 603 and note, 19 AnnCas 547 and note; Kampfer v. East Side Syndicate, 95 Minn. 309, 104 NW 290; Doherty v. Real Estate Title Ins., etc., Co., 85 Minn. 518, 89 NW 853; Allen v. Boggess, 94 Tex. 83, 58 SW 833 [aff (Civ. A.) 56 SW 195]; Hill v. Harris, 26 Tex. Civ. A. 408, 64 SW 320; Bean v. Whitney, 25 Tex. Civ. A. 72, 60 SW 782. (2) "All that part of the west half of the northwest quarter of section 19, township 17, range 3 west, that lies south of Black Creek." Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 9 S 537. (3) "Town, Ft. Des Moines, Lots 3, 6, 7, Block 2." Childs v. Shower, 18 Iowa 261. (4) "Six hundred and twenty acres of the headright of David Brown, situate about twelve miles north of Henderson, in the neighborhood of Bellview." Flanagan v. Boggess, 46 Tex. 330, 332. (5) A recorded deed, which described the land as "all the land" which the grantor owned "in Harris county," when it was shown that the grantor had a recorded deed describing the particular land. Cantagrel v. Von Lupin, 58 Tex. 570. (6) A claim to land described as one hundred and sixty acres, within definite north, east, and west boundaries, leaving the location of the south boundary line only a matter of measurement and describing a tract of one hundred and sixty acres. Griffin v. Houston Oil Co., (Tex. Civ. A.) 149 SW 567. (7) A deed conveying grantor's undivided interest in certain surveys, and reciting that the land is the same as that conveyed by K to T, there being no other surveys of the same number, and the deed from K to T being on record. Clifton v. Creason, (Tex. Civ. A.) 145 S. W. 323. (8) A deed which describes the land conveyed as an undivided seven hundred and eighty and one-half acres out of a part of a designated grant clearly described and identified, and which further describes the land conveyed as a one-eighth interest of the designated grant, contains a sufficient description to satisfy the requirements of the rule. Merriman v. Blalack, 57 Tex. Civ. A. 270, 122 SW 403. (9) "The entire survey number 118, of 738 acres, of Robert Wheally, in Kinney County, Texas." Hodges v. Ross, 6 Tex. Civ. A. 437, 439, 25 SW 975. (10) A description, "200 acres of land in Hill County, Texas, lying about 6 miles northeast from Hillsboro, and located by virtue of part of M. B. Atkinson 320-acre certificate," it being made plain by other evidence in the record that this composed the whole of the survey at that place, and that the deed did not refer to two hundred acres to be taken out of the larger tract. Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 109, 21 SW 405. (11) Where a railroad under the power given it in its charter lays out a right of way two hundred feet wide, and maintains that width by keeping it clear of trees and undergrowth, its successor in title acquires color of title to the full width of two hundred feet, although the instrument of conveyance merely describes it as the grantor's "right of way," where by

rendered certain by such evidence.[4] It is not indispensable that the colorable deed should in terms contain a complete description of boundaries; it may expressly refer to and adopt some other existing paper containing them, and a paper thus referred to becomes a part of such colorable deed.[4½]

Matter amounting to false description may be disregarded where other parts of the deed contain description sufficient to identify the land.[5] "To hold otherwise," it has been said, "would be to permit that which is false to overthrow and destroy that which is correct and certain."[6]

[§ 343] **c. Unsigned Deeds.** It has been held that an unsigned deed gives the grantee color of title.[7]

[§ 344] **d. Unsealed Deeds.** A deed purporting to convey title will constitute color of title, although it be without seal,[8] and a fortiori an unsealed instrument may be admissible to show claim of title and so show an adverse possession, on the principle

taking together the description in the bond and extrinsic evidence introduced for the purpose of identifying the lands, they may be definitely located. Bennett v. Atlantic Coast Line R. Co., 126 Ga. 411, 55 SE 177. (12) For other instances of descriptions held sufficient see Burdell v. Blain, 66 Ga. 169; Bolden v. Sherman, 110 Ill. 418; Hebard v. Scott, 95 Tenn. 467, 32 SW 390; Cohen v. Woollard, 2 Tenn. Ch. 686; Jones v. Powers, 65 Tex. 207; Cappen v. Sheldon, 78 Vt. 39, 61 A 864; Flint v. Long, 12 Wash. 342, 41 P 49; Heinselman v. Hunsicker, 103 Wis. 12, 79 NW 23. (13) Where a deed describes land by section and certificate numbers, but refers to the patent and field notes, which otherwise designate the land, for the description of the land, the record of such deed is sufficient notice of an adverse holding to the extent of the boundaries in the field notes. Payne v. Ellwood, (Tex. Civ. A.) 163 SW 93.

[c] **Descriptions held insufficient.**—(1) A description of the land as the "middle one-third part" of a certain tract of forty acres. Beardsley v. Hill, 85 Ark. 4, 106 SW 1169. (2) A deed to two hundred and fifty acres "more or less" in a specified half section "outside of the Spanish Grant intersecting the section," where there were two such grants. Hickman v. Fletcher, 125 La. 788, 51 S 899. (3) A description in general terms referring to no particular land. Dowdell v. Orphans' Home Soc., 114 La. 49, 38 S 16. (4) An instrument describing the boundaries as unknown. Cooper v. Falk, 109 La. 474, 33 S 567. (5) A description of land as the residue of the tract sold by W to D, and not previously conveyed by D, in the absence of evidence identifying the boundaries of the residue. Davis v. Stroud, 104 N. C. 484, 10 SE 666. (6) A description of premises as beginning at a stake and fixing the corners by nothing more definite than a stake. Barker v. Southern R. Co., 125 N. C. 596, 34 SE 701. (7) A deed describing the land as "one tract of land lying and being in the county aforesaid, adjoining the lands of John J. Phelps and Norfleet Pender, containing twenty acres more or less." Dickens v. Barnes, 79 N. C. 490. (8) A deed conveying "all the right, title, interest, and claim that I have in or to 450 acres of land situated in Houston County, on the east bank of Trinity River, and the same known as the Brookfield Bluff place, and same now occupied by said Murphy," in the absence of parol evidence to identify the land. Cook v. Oliver, 83 Tex. 559, 561, 19 SW 161. (9) A description of the land as "one-third of the Rezin Byrn league and labor survey in Llano County, 'which said one-third of said league and labor is more particularly described in a deed of conveyance from said Rezin Byrn to the administratrix of Richard S. Royall's estate, dated the 20th day of March, A. D. 1850'"; the only deed offered in evidence from B to the administratrix being dated March 13th, and no proof being offered that B executed to the administratrix more than one deed. Roundtree v. Thompson, 30 Tex. Civ. A. 595, 597, 71 SW 574, 72 SW 769. (10) A description of land as "100 acres deeded to B. out of a certain survey," but referring to no specific conveyance. Bruce v. Richardson, 26 Tex. Civ. A. 615, 64 SW 785. (11) An instrument conveying one half of six hundred and forty-acre certificate, and containing a clause authorizing the grantee to convey the land surveyed, there being nothing in the instrument itself or anything referred to therein to identify any land. Masterson v. Todd, 6 Tex. Civ. A. 131, 24 SW 682. (12) A deed of "400 acres . . . to be taken in a square as near as practicable out of the survey . . . beginning at the northeast corner thereof." Willis v. Burke, 7 Tex. Civ. A. 239, 240, 27 SW 217. (13) A deed calling for the "north line" of a town as the north line of the land conveyed gives color of title to land lying between the true north line of the town and a line claimed farther north, if the line was claimed by the town, its inhabitants, and the parties to the deed as the true line. Aldrich v. Griffith, 66 Vt. 390, 29 A 376. (14) For other cases of descriptions held insufficient to give color of title see Ohio, etc., R. Co. v. Barker, 125 Ill. 303, 17 NE 797; Wray v. Chicago, etc., R. Co., 86 Ill. 424; Bellows v. Jewell, 60 N. H. 420; Williams v. Thomas, 18 Tex. Civ. A. 472, 44 SW 1073.

[d] **Description by reference to another deed.**—A deed purporting to convey lands in Vermont is not destroyed, as color of title, by the fact that it was returned by the grantee to the grantor, who struck out the word "Vermont" and inserted "Illinois," and returned the deed to the grantee. This is not a material alteration where the deed before the change referred to another recorded deed for a more particular description which was correctly drawn. Sanitary Dist. v. Allen, 178 Ill. 330, 53 NE 109.

[e] **Mesne conveyances.**—Where a claimant and his predecessors have been in actual possession for more than forty years under deeds duly recorded, the descriptions in the most of which exactly correspond to the lines of occupation, it is immaterial that the descriptions in some of the old deeds are defective. Bay v. Posner, 78 Md. 42, 26 A 1084.

4. Whitehead v. Pitts, 127 Ga. 774, 56 SE 1004; Pitts v. Whitehead, 121 Ga. 704, 49 SE 693; Luttrell v. Whitehead, 121 Ga. 699, 701, 703, 49 SE 691 [cit Cyc]; Castera v. New Orleans Land Co., 125 La. 877, 51 S 1021; Dickens v. Barnes, 79 N. C. 490; Rountree v. Thompson, 30 Tex. Civ. A. 595, 71 SW 574, 72 SW 69. See also Boley v. McMillan, 66 Fla. 159, 63 S 703.

In Luttrell v. Whitehead, supra, Evans, J., said: "Unless the land is sufficiently described in the instrument itself, or, the description is of such a character that it furnishes the means of identification, the extent of the claim cannot be defined. The description in an instrument offered as color of title must afford the means, by the application of aliunde proof, of identifying the land; and if it is utterly defective in this respect, the instrument is not good as color."

4½. Goad v. Walker, (W. Va.) 80 SE 873, 876 (where it was said: "It is well-settled law that a deed referring to another deed, paper, or map, for description of the land intended to be conveyed, thereby incorporates and makes a part of the deed itself the paper so referred to." As against the contention that this principle applied only to deeds which conveyed title and not to deeds serving only as color of title the court said: "We see no good reason why a paper offered as color of title may not incorporate some other paper, the same as may be done by other written instruments").

5. Rogers v. Concho Cattle Co., 90 Tex. 555, 39 SW 1081 [rev (Civ. A.) 38 SW 656]; Jones v. Andrews, 62 Tex. 652.

[a] **Thus** (1) where the description in an application to purchase specifies every requirement expressed by the statute and is sufficient to identify the land, the number of the certificate incorrectly describing the land may be disregarded as a false description. Rogers v. Concho Cattle Co., 90 Tex. 555, 39 SW 1081 [rev (Civ. A.) 38 SW 656]. (2) And where a call in the description of premises conveyed is inconsistent with other calls, which, taken together, under the rules for the construction of surveys, are sufficient to locate the property intended to be conveyed, the repugnant call may be rejected as surplusage, and the deed construed to convey the premises falling within the consistent calls, so as to be sufficient color of title on which to base claim of adverse possession. Heinselman v. Hunsicker, 103 Wis. 12, 79 NW 23. Compare Brown v. Hudson, 14 Tex. Civ. A. 605, 38 SW 653.

6. Rogers v. Concho Cattle Co., 90 Tex. 555, 39 SW 1081 [rev (Civ. A.) 38 SW 656].

7. Reddick v. Long, 124 Ala. 260, 27 S 402; Hammond v. Winchester, 82 Ala. 470, 2 S 892; Aldrich v. Griffith, 66 Vt. 390, 29 A 376. See also Childress v. Calloway, 76 Ala. 128. Compare Wallace v. Feibelman, (Ala.) 60 S 290 (holding that, where a homestead was continuously occupied by the husband, wife, and children until within a year or so from the commencement of an action involving the title, a deed executed by the husband to the wife and children which was not signed and acknowledged by the wife, was not admissible in support of a claim of adverse possession made by the children as against the mortgagee of the husband and wife).

[a] **Failure of some of the owners to sign.**—A deed purporting to convey the entire title may operate as color of title, although not signed by all the owners. Hansen v. Owens, 132 Ga. 648, 64 SE 800.

[b] **Tax deeds not executed.**—Where a tax deed is offered in evidence in ejectment to show color of title it is not necessary that its execution be proved. Brannan v. Henry, 142 Ala. 698, 39 S 92, 110 AmSR 55; Gist v. Beaumont, 104 Ala. 347, 16 S 20; Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 S 43.

[c] **Proof of execution.**—Where a paper writing is offered to show color of title it is not necessary that its execution be proved. Brannan v. Henry, 142 Ala. 698, 39 S 92, 110 AmSR 55; Gist v. Beaumont, 104 Ala. 347, 16 S 20; Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 S 43.

8. U. S.—Deputron v. Young, 134 U. S. 241, 10 SCt 539, 33 L. ed. 923. See also Pillow v. Roberts, 13 How. 472, 14 L. ed. 228; Latta v. Clifford, 47 Fed. 614.

Ala.—McBride v. Lowe, 175 Ala. 408, 57 S 832.

Fla.—Kendrick v. Latham, 25 Fla. 819, 6 S 871.

Ill.—Sanitary Dist. v. Allen, 178 Ill.

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that an instrument which is insufficient to confer color of title is nevertheless competent evidence of claim of title and to show the character of the possession.[9]

[§ 345] **e. Deeds Not Attested.** An instrument purporting to convey land may confer color of title, although it is insufficiently attested.[10]

[§ 346] **f. Deeds Not Acknowledged or Improperly Acknowledged.** It is very generally held that a deed which purports to convey title will give color of title, although it be not acknowledged,[11] or although it be defectively acknowledged.[12]

[§ 347] **g. Deeds Not Delivered to Grantee.** An instrument, although signed, is not available to prove color of title unless it has been delivered.[13]

[§ 348] **h. Unregistered or Improperly Registered Deeds—(1) Statement of General Rule.** A deed, although unregistered, will give color of title in the absence of any statute expressly or impliedly providing otherwise.[14] Such a deed, it has been said,

330, 53 NE 109; Kruse v. Wilson, 79 Ill. 233; Barger v. Hobbs, 67 Ill. 592; Watts v. Parker, 27 Ill. 224.

Mass.—Aylward v. O'Brien, 160 Mass. 118, 35 NE 313, 22 LRA 206.

Mo.—Perkins Land, etc., Co. v. Irvin, 200 Mo. 485, 98 SW 580; Hamilton v. Boggess, 63 Mo. 233; Crispen v. Hannavan, 50 Mo. 536.

N. H.—Farrar v. Fessenden, 39 N. H. 268.

N. Y.—Jackson v. Newton, 18 Johns. 355.

[a] **The rule has been applied** (1) in the case of a sheriff's deed without seal (Kruse v. Wilson, 79 Ill. 233), and (2) in the case of a deed of a master in chancery (Sanitary Dist. v. Allen, 178 Ill. 330, 53 NE 109).

[b] **Seal affixed after delivery.**—A master's deed for land sold under a decree apparently regular on its face, and properly describing the land and purporting to convey it, is good as color of title, although sealed by the master several years after its delivery. Davis v. Hall, 92 Ill. 85.

[c] **Writing in the form of a deed,** signed and delivered by a person since deceased, purporting to convey land, but not sealed as required by law, is sufficient to give color of title. Avent v. Arrington, 105 N. C. 377, 10 SE 991.

9. McCoy v. Dickenson College, 5 Serg. & R. (Pa.) 254.

10. Swindall v. Ford, (Ala.) 63 S 651; Dorlan v. Westervitch, 140 Ala. 283, 37 S 382, 103 AmSR 35; McInerny v. Irvin, 90 Ala. 275, 7 S 841; Beard v. Ryan, 78 Ala. 37. See also Lyles v. Kirkpatrick, 9 S. C. 265.

[a] **A deed not attested by any witness** will give color of title. Dorlan v. Westervitch, 140 Ala. 283, 37 S 382, 103 AmSR 35.

11. Reddick v. Long, (Ala.) 27 S 402; McInerny v. Irvin, 90 Ala. 275, 7 S 841; Ritz v. Ritz, 64 W. Va. 107, 113, 60 SE 1095 [quot Cyc].

[a] **Unacknowledged sheriff's deed.**—A sheriff's deed which is invalid as a conveyance because it was not acknowledged is good as color of title. Baird v. St. Louis Hospital Assoc., 116 Mo. 419, 22 SW 726.

[b] **Under the three-year statute of limitations of Texas** an unacknowledged deed of a married woman does not constitute color of title. Berry v. Donley, 26 Tex. 737; Silcock v. Baker, 25 Tex. Civ. A. 508, 61 SW 939.

12. U. S.—La Crosse v. Cameron, 80 Fed. 264, 25 CCA 399.

Ala.—Swindall v. Ford, 63 S 651; Clarke v. Dunn, 161 Ala. 633, 50 S 93; Davis v. Arnold, 143 Ala. 228, 39 S 141; Dorlan v. Westervitch, 140 Ala. 283, 37 S 382, 103 AmSR 35; Augusta Nat. Bank v. Baker Hill Iron Co., 108 Ala. 635, 19 S 47; Jones v. Hagler, 95 Ala. 529, 10 S 345; Watson v. Mancill, 76 Ala. 600.

Iowa.—Cramer v. Clow, 81 Iowa 255, 47 NW 59, 9 LRA 772 and note.

Miss.—Avera v. Williams, 81 Miss. 714, 33 S 501.

Mo.—Campbell v. Laclede Gas Light Co., 84 Mo. 352; Dalton v. St. Louis Bank, 54 Mo. 105.

R. I.—Union Sav. Bank v. Taber, 13 R. I. 683.

Tex.—Harris v. Wells, 85 Tex. 312, 20 SW 68; Fry v. Baker, 59 Tex. 404.

W. Va.—Ritz v. Ritz, 64 W. Va. 107, 113, 60 SE 1095 [quot Cyc].

But see Matthews v. Blake, 16 Wyo. 116, 92 P 242, 27 LRANS 339 and note (holding that a tax deed void on its face because not acknowledged before the proper officer did not constitute color of title).

[a] **An administrator's deed not acknowledged in court** as required by law will give color of title. Campbell v. Laclede Gas Light Co., 84 Mo. 352.

[b] **A deed acknowledged in a county other than the one in which the land was located** will give color of title. Perkins Land, etc., Co. v. Irvin, 200 Mo. 485, 98 SW 580. Compare Matthews v. Blake, 16 Wyo. 116, 92 P 242, 27 LRANS 339.

[c] **A deed of a trustee, although the private examination of the beneficiary was not taken,** is good as color of title, although the beneficiary was a married woman. Smith v. Allen, 112 N. C. 223, 16 SE 932.

[d] **A deed of a homestead without a certificate of the wife's separate examination** is good as color of title, although inoperative as a conveyance. Watson v. Mancill, 76 Ala. 600.

[e] **A deed executed by a married woman without privy examination** having been taken furnishes color of title. Pearse v. Owens, 3 N. C. 415; Hanks v. Folsom, 11 Lea (Tenn.) 555; Ferguson v. Kennedy, Peck (Tenn.) 321, 14 AmD 761.

[f] **A deed, although defectively acknowledged by the wife,** (1) is operative as color of title under the ten-year statute of limitation of Texas (New Orleans State Nat. Bank v. Roberts, (Civ. A.) 103 SW 454), (2) and also under the five-year statute of that state (New Orleans State Nat. Bank v. Roberts, supra). (3) However, such deed is not by itself color of title under the three-year statute, but it may be made sufficient to show color by parol proof showing that it was properly explained and acknowledged. Veeder v. Gilmer, 47 Tex. Civ. A. 464, 105 SW 331.

[g] **Deed without notarial seal.**—A deed may constitute color of title, although the notary's seal was omitted from the acknowledgment. McBride v. Lowe, 175 Ala. 408, 57 S 832.

13. Cowling v. Nelson, 76 Ark. 146, 88 SW 913; Avent v. Arrington, 105 N. C. 377, 10 SE 991. To same effect Nye v. Alfter, 127 Mo. 529, 30 SW 186.

[a] **Deed delivered as an escrow.**—A deed delivered as an escrow to be delivered absolutely on the performance of a certain act, if finally rejected by the bargainee, does not give his possession color of title. Chastien v. Philips, 33 N. C. 255.

[b] **Proof of delivery.**—The delivery of a paper writing offered to show color of title may be proved by parol. Avent v. Arrington, 105 N. C. 377, 10 SE 991.

[c] **Deed from grantee in undelivered deed.**—One claiming under deed from purchaser at sheriff's sale, to whom the sheriff had never delivered a deed, claims under color of title. McVey v. Carr, 159 Mo. 648, 60 SW 1034.

14. U. S.—Lea v. Polk County Copper Co., 21 How. 493, 16 L. ed. 203; La Crosse v. Cameron, 80 Fed. 264, 25 CCA 399.

Ala.—Dorlan v. Westervitch, 140 Ala. 283, 37 S 382, 103 AmSR 35; Woods v. Montevallo Coal, etc., Co., 84 Ala. 560, 3 S 475, 5 AmSR 393; Hall v. Doe, 19 Ala. 378; Doe v. Eslava, 11 Ala. 1028.

Ark.—Paragould Abstract, etc., Co. v. Coffman, 100 Ark. 582, 140 SW 730.

Cal.—Packard v. Moss, 68 Cal. 123, 8 P 818.

Ga.—Shingler v. Bailey, 135 Ga. 666, 70 SE 563; Dodge v. Cowart, 131 Ga. 549, 62 SE 987; Floyd v. Ricketson, 129 Ga. 668, 59 SE 909; O'Brien v. Fletcher, 123 Ga. 427, 51 SE 405; Roberson v. Downing, 120 Ga. 833, 48 S 429, 102 AmSR 128, 1 AnnCas 757 and note (all holding that it was not necessary that deeds executed prior to the code of 1895 should be registered to render them effective as color of title).

Ill.—Jaques v. Lester, 118 Ill. 246, 8 NE 795; Holbrook v. Forsythe, 112 Ill. 306; Dickenson v. Breeden, 30 Ill. 279; Collins v. Smith, 18 Ill. 160.

Ky.—Krauth v. Hahn, 65 SW 18, 23 KyL 1261; Ring v. Gray, 6 B. Mon. 368; Poage v. Chinn, 4 Dana 50. See Mosley v. Morgan, 141 Ky. 557, 133 SW 226.

La.—Bernstine v. Leeper, 118 La. 1098, 43 S 889; Bracy v. Buck, 11 La. Ann. 100; Winston v. Prevost, 6 La. Ann. 164.

Mass.—Phillips v. Watuppa Reservoir Co., 184 Mass. 404, 68 NE 848.

Minn.—Murphy v. Doyle, 37 Minn. 113, 33 NW 220.

Miss.—Hanna v. Renfro, 32 Miss. 125.

Mo.—Fields v. Bollinger, 234 Mo. 190, 136 SW 293; Adams v. Gossom, 228 Mo. 566, 129 SW 16; Plaster v. Grabeel, 160 Mo. 669, 61 SW 589; Ozark Plateau Land Co. v. Hays, 105 Mo. 143, 16 SW 957.

N. H.—Bellows v. Jewell, 60 N. H. 420; Newmarket Mfg. Co. v. Pendergast, 24 N. H. 54; Minot v. Brooks, 16 N. H. 374, 378 (in which it was said: "Some of the language in Prescott v. Nevers, 19 F. Cas. No. 11,390, 4 Mason 326, might perhaps be regarded as implying that a record was of some importance, but, if so, the position is not sustained elsewhere nor by the reason of the thing").

N. Y.—Tarplee v. Sonn, 109 App. Div. 241, 96 NYS 6, 17 NYAnnCas 366.

N. C.—Brown v. Hutchinson, 155 N. C. 205, 71 SE 302; Janney v. Robbins, 141 N. C. 400, 53 SE 863; Utley v. Wilmington, etc., R. Co., 119 N. C. 720, 25 SE 1021; Smith v. Allen, 112 N. C. 223, 16 SE 932; Lewis v. John L. Roper Lumber Co., 109 N. C. 19, 13 SE 701; Turner v. Williams, 108 N. C. 210, 12 SE 989; Brown v. Brown, 106 N. C. 451, 11 SE 647; Avent v. Arrington, 105 N. C. 377, 10 SE 991; Hunter v. Kelly, 92 N. C. 285; Davis v. Higgins, 91 N. C. 382; Kron v. Hinson, 53 N. C. 347; Hardin v. Barrett, 51 N. C. 159; Chastien v. Philips, 33 N. C. 255; Doe v. McArthur, 9 N. C. 33, 11 AmD 738.

S. C.—Gordon v. Parsons, 1 S. C. L. 37.

Tenn.—Smith v. Cross, 125 Tenn. 159, 140 SW 1060; Byrd v. Phillips, 120 Tenn. 14, 111 SW 1109; Meriwether v. Vaulx, 5 Sneed 300; Stewart v. Harris, 2 Swan 655; Jones v. Perry, 10 Yerg. 58, 30 AmD 430; Cohen v. Woollard, 2 Tenn. Ch. 686; Mulloy v. Paul, 2 Tenn. Ch. 156. See also Hornsby v. Davis, (Ch. A.) 36 SW 159.

Tex.—Cook v. Knott, 28 Tex. 85.

Vt.—Aldrich v. Griffith, 66 Vt. 390, 29 A 376; Spaulding v. Warren, 25 Vt. 316.

Va.—Nowlin v. Reynolds, 25 Gratt. (66 Va.) 137.

Wash.—Hesser v. Siepmann, 35 Wash. 14, 76 P 295.

Wis.—Whittlesey v. Hoppenyan, 72

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shows the nature of the possession taken under it to be adverse just as much as if it were recorded.[15] It has been held, however, that a deed which has not been recorded cannot be given in evidence as color of title without proof of its execution.[16] So a deed is good to show color of title, although improperly admitted to registration.[17]

[§ 349] **(2) Effect on Rule of Special Statutory Provisions—(a) In Texas.** The five-year statute of limitations in Texas provides that every suit to be instituted to recover real estate against any person having visible and adverse possession thereof, cultivating, using, or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, etc.[18] Under this statute the deed under which possession is held, in order to constitute color of title, must be duly registered.[19] A strict compliance with the terms of the statute is essential where a deed is relied on to give color of title.[20] Under this statute it is not sufficient that some former deed in the claimant's chain of title has been so registered. It is necessary that the deed to the claimant himself be recorded.[21] And the deed must have been of record for the full statutory period of five years before the institution of the suit.[22] So it is held that a deed is not "duly registered" within the meaning of the statute where there is such uncertainty in the description of the land that the deed will not suffice to give notice to the owner that the party in possession is claiming under the deed,[23] or where, although

Wis. 140, 39 NW 355; McMillan v. Wehle, 55 Wis. 685, 13 NW 694.

"Facts and circumstances showing sufficient notoriety of claim, and of its nature and extent, may sometimes impart to an unrecorded document the effect of color." Ozark Plateau Land Co. v. Hays, 105 Mo. 143, 150, 16 SW 957 (per Barclay, J.).

[a] **A tax deed** not filed for record within five years after its execution is admissible in ejectment to show color of title to all of the land described therein. Dorlan v. Westervitch, 140 Ala. 283, 37 S 382, 103 AmSR 35.

[b] **The recording of a sheriff's deed** is not essential to its operation as color of title to sustain a title by adverse possession. Tarplee v. Sonn, 109 App. Div. 241, 96 NYS 6, 17 NYAnn Cas 366.

[c] **Subsequently altered deed.**—Where an alteration is made in a deed with the knowledge and the consent of the grantor, the part altered need not be registered to make it color of title. Doe v. McArthur, 9 N. C. 33, 11 AmD 738.

[d] **Incorrect abstract number.**—Where defendants were in possession of the land in controversy under color of title, and exercised acts of ownership and paid the taxes, the fact that the abstract number under which the land was rendered up to 1904 was not the proper abstract number of the survey will not prevent their acquisition of title by adverse possession where the survey had not been given a separate abstract number until 1904, but was located under headright certificate consisting of two surveys, and was regarded by all until 1904 as having the same abstract number as the larger tract. Cleveland v. Smith, (Tex. Civ. A.) 156 SW 247.

[e] **Spanish and Mexican grants.**—An incomplete claim to land under Spanish authority is admissible for the purpose of laying a predicate from which it may be presumed that defendant and those under whom he claims had been in possession for twenty years, so as to give title by prescription, although the evidence of title had not been recorded as required by the acts of congress relating to Spanish grants. Doe v. Eslava, 11 Ala. 1028.

15. Doe v. McArthur, 9 N. C. 33, 11 AmD 738.

16. Roe v. Williams, 38 Ga. 597.

17. Brown v. Brown, 106 N. C. 451, 11 SE 647.

18. Rev. St. art 3342.

19. Sorley v. Matlock, 79 Tex. 304, 15 SW 261; Van Sickle v. Catlett, 75 Tex. 404, 13 SW 31; Harvey v. Cummings, 68 Tex. 599, 5 SW 513; Cook v. Dennis, 61 Tex. 246; Medlin v. Wilkins, 60 Tex. 409; Adams v. Hayden, 60 Tex. 223; Porter v. Chronister, 58 Tex. 53; Woodson v. Allen, 54 Tex. 551; De la Vega v. Butler, 47 Tex. 529; Kilpatrick v. Sisneros, 23 Tex. 113; Callen v. Collins, 56 Tex. Civ. A. 620, 120 SW 546; Merriman v. Blalack, 56 Tex. Civ. A. 594, 121 SW 552; Young v. Trahan, 43 Tex. Civ. A. 611, 97 SW 147; Logan v. Robertson, (Tex. Civ. A.) 83 SW 395; Henning v. Wren, 32 Tex. Civ. A. 538, 75 SW 905; McLavy v. Jones, 31 Tex. Civ. A. 354, 72 SW 407; Watts v. Bruce, 31 Tex. Civ. A. 347, 72 SW 258; Lackey v. Bennett, (Tex. Civ. A.) 65 SW 651; Gillum v. Fuqua, (Tex. Civ. A.) 61 SW 938; Allen v. Courtney, 24 Tex. Civ. A. 86, 58 SW 200; Hodges v. Robbins, 23 Tex. Civ. A. 57, 56 SW 565; Wille v. Ellis, 22 Tex. Civ. A. 462, 54 SW 922; Taylor v. Brymer, 17 Tex. Civ. A. 517, 42 SW 999; Adkins v. Galbraith, 10 Tex. Civ. A. 175, 30 SW 291; Davidson v. Wallingford, (Tex. Civ. A.) 30 SW 286; Butts v. Caffal, (Tex. Civ. A.) 24 SW 373; McCurdy v. Locker, 2 Tex. Civ. A. 220, 20 SW 1109; Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 21 SW 405.

[a] **Term "deed duly registered" defined and explained.**—"By the terms 'a deed duly registered' the statute intends an instrument which is really and in fact a deed, possessing all the legal essentials to constitute it such in law, an instrument by its own terms, or with such aid as the law requires, assuming and purporting to operate as a conveyance; not that it shall proceed from a party having title, or must actually convey title to land, but it must have all the constituent parts, tested by itself, of a good and perfect deed." Chambliss v. Simmons, 165 Fed. 419, 420, 91 CCA 369 (per McCormick, J.); Schleicher v. Gatlin, 85 Tex. 270, 20 SW 120.

[b] **"The object of the statute,** in making registry of the deed necessary to enable the possessor to avail himself of the five years limitations, is to give notice to the owner that the defendant in possession is claiming under the deed. . . . Flanagan v. Boggess, 46 Tex. 330; Kilpatrick v. Sisneros, 23 Tex. 113." Young v. Trahan, 43 Tex. Civ. A. 611, 615, 97 SW 147; Henning v. Wren, 32 Tex. Civ. A. 538, 546, 75 SW 905.

[c] **Mistake of clerk in copying deed.**—(1) It is not essential that the deed should have been correctly copied in every particular by the recording clerk. If it is copied with sufficient accuracy to enable persons examining the record to see that the record and the deed are for the same land, it is sufficient. Woodson v. Allen, 54 Tex. 551. (2) It has been held, however, that a mistake in the name of the grantor in copying a deed for record is fatal. Carleton v. Lombardi, 81 Tex. 355, 16 SW 1081.

[d] **Premature recording.**—While a tax deed cannot be used as a muniment of title or as a basis for possession under the five-year statute of limitation until the period for redemption expires, still it would be a sufficient deed after the expiration of the time, and if duly registered while in abeyance the registration would be good after it ripened into an absolute deed by lapse of time. Davis v. Hurst, (Tex.) 14 SW 610.

[e] **Recording before delivery.**—A deed for land, the purchase money on which had not been paid, was delivered to an attorney, who at once recorded and retained the same, with directions to deliver it formally when the purchase money was due, two years thereafter. It was held that the final delivery two years after the execution of the deed related back to the date of its execution and registration, so as to constitute the possession of the purchaser a holding under a deed duly recorded. Parker v. Spencer, 61 Tex. 155.

20. Adams v. Hayden, 60 Tex. 223.

21. Cook v. Dennis, 61 Tex. 246; Medlin v. Wilkins, 60 Tex. 409; Porter v. Chronister, 58 Tex. 53; Logan v. Robertson, (Tex. Civ. A.) 83 SW 395.

22. Harvey v. Cummings, 68 Tex. 599, 5 SW 513 (holding that an adverse possession antedating the registration of the deed cannot be estimated in computing the five-year period of limitation); Allen v. Courtney, 24 Tex. Civ. A. 86, 58 SW 200; Adkins v. Galbraith, 10 Tex. Civ. A. 175, 30 SW 291. See also Haring v. Shelton, (Tex.) 122 SW 18 [aff (Civ. A.) 114 SW 389].

[a] **Limitation of rule.**—Where title was complete in defendant's remote grantor at the latter's death it was immaterial to defendant's right to claim title by adverse possession that deeds of subsequent grantors were not recorded a sufficient length of time before the commencement of the action to base a claim by limitations thereon. Merriman v. Blalack, 57 Tex. Civ. A. 270, 122 SW 403.

23. Flanagan v. Boggess, 46 Tex. 330; Young v. Trahan, 43 Tex. Civ. A. 611, 97 SW 147; Henning v. Wren, 32 Tex. Civ. A. 538, 75 SW 905.

[a] **Character of description essential.**—To support a claim under the five-year statute of limitations the recorded deed must be sufficient to enable one examining the record to ascertain what land is conveyed, and that the record and deed embrace the same land. Eastham v. Gibbs, (Tex. Civ. A.) 125 SW 372.

[b] **Descriptions held insufficient.**—(1) Where there is such uncertainty of description in a deed that the land cannot be identified without extrinsic evidence it cannot be considered a deed "duly registered" under the five-year statute of limitation. Young v. Trahan, 43 Tex. Civ. A. 611, 97 SW 147. (2) Where a deed described land "as my undivided one-half interest in the David Wilson league and labor of land," but the deed as recorded described it as the "Daniel Wilson survey," the record was insufficient to support the five-year statute of limitations. Henning v. Wren, 32 Tex. Civ. A. 538, 75 SW 905. (3) A deed which contains no description whatever of the land, but which refers to another deed not of record for the description, is insufficient. McDonough v. Jefferson County, 79 Tex. 535, 15 SW 490.

[c] **Descriptions held sufficient.**—(1) A deed referring for description to a deed of record sufficiently describing the property is sufficient. Cantagrel v. Von Lupin, 58 Tex. 570. See also Wood v. Mistretta, 20 Tex. Civ. A. 236, 49 SW 236, 50 SW 135. (2) A deed

recorded, it is not entitled to record because of defects in the acknowledgment or certificate thereof,[24] or where it is recorded in another county than that in which the land is situated.[25] On the other hand a deed executed by two of the directors of a foreign corporation by authority of its board of directors is sufficient when recorded as "a deed duly registered";[26] and slight delay on the part of the grantor in recording his deed is immaterial when his possession is to be tacked to that of his grantee.[27] It has also been held that the statute does not require that the person in possession must claim under a deed to himself in order to acquire title but only that he claim under a deed.[28] Under another statute of this state[29] providing that possession of land must be held under a written memorandum of title, duly registered, fixing the boundaries, in order to render available the bar of the statute as to more than a designated grant of land, possession of a greater tract would not enable a claimant to plead the statute to an action to recover the excess, in the absence of such a memorandum made and recorded.[30] This statute, it is held, applies to deeds as well as to written memoranda of title.[31]

[§ 350] **(b) In Other Jurisdictions.** In other jurisdictions also statutes have been enacted making registration essential in order that a deed may operate as color of title.[32]

which locates a corner and gives courses and distances is sufficiently definite to sustain the five-year statute of limitations by reason of the grantee's possession for five years, although it refers to an unrecorded deed. A description is not insufficient because boundaries called for therein are to be determined by courses and distances from a corner of another tract in the survey conveyed by unrecorded deed. Club Land, etc., Co. v. Wall, 99 Tex. 591, 91 SW 778, 122 AmSR 666 [rev (Civ. A.) 88 SW 534, and reh den 92 SW 984]. (3) So it has been held that resort may be had to a judgment of the district court not recorded in the county clerk's office as provided by statute, to help out a description of land in a registered deed, to support limitation in the same way and to the same extent as a recorded deed. "A description in a deed can be just as effectually and readily made certain by reference to a judgment recorded in one book as a deed recorded in another, both being public records, kept in the same building and quite frequently in the same room." Kimbell v. Powell, 57 Tex. Civ. A. 57, 64, 121 SW 541 (per Reese, J.).

24. Taylor v. Harrison, 47 Tex. 454, 26 AmR 304; Veeder v. Gilmer, 47 Tex. Civ. A. 464, 105 SW 331; Hughes v. Wright, (Tex. Civ. A.) 97 SW 525.

[a] **Application of rule.**—A deed by a married woman and her husband recited "that I, E. M., joined by my husband, in consideration of $175 to me paid, have bargained and sold, etc., said land having been willed to me by my father, etc., and I do hereby bind myself, my heirs and assigns to forever warrant," etc. It was held that it so clearly appeared from the face of the deed that the land was the separate property of the wife, whose acknowledgment thereto was defective, that plaintiff who claimed thereunder could not justify on the ground that it was a properly registered deed of the husband, and as such was a sufficient basis to support title by limitation. Kimmey v. Abney, (Tex. Civ. A.) 107 SW 885.

[b] **Where an essential part of the certificate of acknowledgment was omitted** (1) (Merriman v. Blalack, 57 Tex. Civ. A. 270, 122 SW 403), as (2) where it did not state that the grantor was known to the acknowledging official as the person whose name was subscribed thereto (Callen v. Collins, 56 Tex. Civ. A. 620, 120 SW 546); (3) or failed to disclose the official character of the officer by whom the acknowledgment was taken (Whitehead v. Foley, 28 Tex. 268), the deed is not duly registered, and (4) the fact that the deed was in truth properly acknowledged and such acknowledgment properly certified by the officer does not cure the defect in the record (Callen v. Collins, 56 Tex. Civ. A. 620, 625, 120 SW 546, in which it was said, per Pleasants, J.: "The five-years statute of limitation requires that the deed under which title may be acquired by five years adverse possession shall be duly recorded, and this . . . means not only that the deed must be properly acknowledged and certified for record, but that the record itself must show this fact"; Merriman v. Blalack, 56 Tex. Civ. A. 594, 121 SW 552).

25. Adams v. Hayden, 60 Tex. 223 (holding that this is so, no matter how clear the mistake, or from what cause it originated).

26. Chambliss v. Simmons, 165 Fed. 419, 91 CCA 369.

27. Jacks v. Dillon, 6 Tex. Civ. A. 192, 25 SW 645.

28. Thompson v. Weisman, 98 Tex. 170, 82 SW 503 (holding that one who buys and pays for land, the deed to which is taken in the name of another who holds in trust for him, may prescribe under the five-year statute); Griswold v. Comer, (Tex. Civ. A.) 161 SW 423 (holding that where the heirs of the holder of a duly recorded tax deed by partition deed partitioned his land, the possession of one of the heirs thereafter was under a registered deed within the meaning of the five-year statute, although she did not record her own deed, since she prescribed under her ancestor's deed as to the whole tract and not merely as to her distributive share); Kirby v. Hayden, 44 Tex. Civ. A. 207, 99 SW 746 (holding that where a vendee bought and paid for land and caused the deed to be executed in the name of another to secure an indebtedness which the vendee owed to the grantee, such deed was sufficient to enable the vendee to obtain title by prescription under the five-year statute of limitations); McLavy v. Jones, 31 Tex. Civ. A. 354, 72 SW 407.

[a] **Two parties claiming under same deed.**—In trespass to try title between persons, each claiming to be the surviving wife of a deceased landowner, whose deeds were recorded, defendant claimed that decedent had put her in possession and made a parol gift accompanied by delivery of such deeds. It was held that plaintiff having the older right, defendant could not use the deeds under which plaintiff claimed as a basis for the five-year statute of limitations. Hammond v. Hammond, 43 Tex. Civ. A. 284, 94 SW 1067.

29. Tex. Rev. St. art 3344.

30. Hodges v. Robbins, (Tex. Civ. A.) 56 SW 565.

31. Doom v. Taylor, 35 Tex. Civ. A. 251, 253, 79 SW 1086 (where Pleasants, J., said: "The purpose of the statute in requiring the memorandum of title to be recorded is to give notice of the extent of the claim, and the propriety of requiring such notice is as obvious when the claim is under a deed as it is when such claim is under any other written memorandum").

32. Colo.—Sayre v. Sage, 47 Colo. 559, 108 P 160 (holding that under a statute providing that when a tax deed is recorded it vests in the grantee the title of the former owner, a tax deed does not purport to convey any title to real estate until it has been filed for record in the proper office; and a statute relating to possession of lands under color of title does not give the grantee in a tax deed color of title until it has been filed for record). To same effect Marks v. Morris, 54 Colo. 186, 129 P 828; Carnahan v. Hughes, 53 Colo. 318, 125 P 116; Westenburg v. Karme, 53 Colo. 258, 125 P 118; Hughes v. Webster, 52 Colo. 475, 122 P 789; Morris v. St. Louis Nat. Bank, 17 Colo. 231, 29 P 802; Scott v. Conrad, 24 Colo. A. 452, 135 P 135; Empire Ranch, etc., Co. v. Howell, 23 Colo. A. 386, 128 P 474; Wason v. Major, 10 Colo. A. 181, 50 P. 741.

La.—Prevost v. Ellis, 11 Rob. 56; Duplessis v. Boutte, 11 La. 342 (holding that the deeds should be registered in the county where the land lies).

Mo.—Nye v. Alfter, 127 Mo. 529, 30 SW 186; Blodgett v. Schaffer, 94 Mo. 652, 7 SW 436.

Tenn.—Smith v. Cross, 125 Tenn. 159, 140 SW 1060 (holding that one could not claim land by adverse possession under a grant from the state not registered in the county in which the land was situated. It was held, however, that a deed as registered was sufficient where it described the land as that on which T lived, his place being prominently located on a public road and well known, even though the boundaries were confused in transcribing the deed upon the registration books); Breckenridge Cannel Coal Co. v. Scott, 121 Tenn. 88, 114 SW 930 (holding that under Act Febr. 13, 1895, Laws [1895] p 54 c 38, requiring registration of deeds as a prerequisite to their use as color of title, a deed, the registration of which was void because of an insufficient acknowledgment, was ineffective as color of title); Byrd v. Phillips, 120 Tenn. 14, 111 SW 1109 (holding to the same effect); Snider v. Brown, (Ch. A.) 48 SW 877 (holding that the statute applied to deeds executed before its enactment).

Wis.—McMillan v. Wehle, 55 Wis. 685, 13 NW 694.

[a] **Under a statute of Illinois** which provides that "whoever has resided on a tract of land for . . . seven successive years prior to the commencement of an action of ejectment, having a connected title in law or equity deducible of record from the State or the United States, can plead the possession in bar of the suit," it is not necessary that the entire title of defendant be evidenced by acts of record; if the source or foundation of the title is of record it is available to every person claiming a legal title who can connect himself with it by such evidence as applies to the nature of the rights set up. Dolton v. Cain, 14 Wall. (U. S.) 472, 476, 20 L. ed. 830; Rawson v. Fox, 65 Ill. 200; Dickenson v. Breeden, 30 Ill. 279; Collins v. Smith, 18 Ill. 160. See also Mattison v. Walker, 16 F. Cas. No. 9,297, 1 Biss. 62.

[b] **In Kentucky** the same conclusion was reached under a similar statute. Poage v. Chinn, 4 Dana 50.

[c] **In North Carolina** (1) it has been held that a statute providing that contracts of sale of land shall be inadmissible in evidence without registration does not make registration essential to the use of a deed to show color of title where there is a claimant in possession under it. Avent v. Arrington, 105 N. C. 877, 10 SE 991; Hunter v. Kelly, 92 NC 285. (2) Revisal (1905) § 980, making registration nec-

[§ 351] **i. Deeds of Person without Title or with Title to Part Only.** In order that a deed may give color of title it is not necessary that the grantor should have had title either to the whole[33] or to any part of the land conveyed,[34] unless there is some statute from which this requirement may be inferred.[35] A deed from a mere volunteer is good color of title.[35½] A title founded on adverse possession unnecessary for a deed to operate as color of title (see Janney v. Robbins, 141 N. C. 400, 405, 53 SE 863), does not extend to a claim by adverse possession held for the requisite time under a deed foreign to the title under which the opposite party claims. Gore v. McPherson, 161 N. C. 638, 77 SE 835; Janney v. Robbins, supra [dist Austin v. Staten, 126 N. C. 783, 36 SE 338]; Collins v. Davis, 132 N. C. 106, 43 SE 579. Compare Moore v. Johnson, 162 N. C. 266, 78 SE 158. (3) "As to such deeds and claimants, our present registration law does not, and does not intend to, modify or interfere with the doctrine of maturing title by adverse occupation as heretofore expounded and applied by the decisions of this court." Per Hoke, J., in Janney v. Robbins, supra. (4) Hence, one not the grantee may show color of title to land under a registered deed validly conveying title from the state. Brown v. Hutchinson, 155 N. C. 205, 71 SE 302. (5) Under a statute providing that, where real estate is situate in two or more counties, probate of a deed conveying the same, made before the clerk of the superior court of either county, is sufficient, a deed to land situate in two counties, but registered in one only, is admissible to show color of title. Lewis v. John L. Roper Lumber Co., 109 N. C. 19, 13 SE 701.

33. Crowder v. Doe, 162 Ala. 151, 50 S 230, 136 AmSR 17; Henry v. Brown, 143 Ala. 446, 456, 39 S 325 [cit Cyc]; Tarver v. Deppen, 132 Ga. 798, 65 SE 177, 24 LRANS 1161; Hinchman v. Whetstone, 23 Ill. 185; Allen v. Van Bibber, 89 Md. 434, 43 A 758; Caldwell Land, etc., Co. v. Cloyd, 165 N. C. 595, 81 SE 752.

[a] **Conveyance of undivided interest.**—Actual possession of a part of a tract under a deed conveying an undivided interest in the tract, which describes the whole, is sufficient to confer title by adverse possession to the entire tract described as against the true owner. Chamberlain v. Ahrens, 55 Mich. 111, 20 NW 814; Marr v. Gilliam, 1 Coldw. (Tenn.) 488. Compare Lancey v. Brock, 110 Ill. 609.

[b] **A conveyance of the entire fee by one tenant in common** gives color of title. Prescott v. Navers, 19 F. Cas. No. 11,390, 4 Mason 326. And see infra § 355.

[c] **Community property.**—Notwithstanding a widow has but an undivided one-half interest in community property owned by her deceased husband, a deed from her purporting to convey the entire property gives the grantee color of title under which he may obtain title by adverse possession. Coe v. Sloan, 16 Ida. 49, 100 P 354.

[d] **Although the land conveyed belonged to a partnership** of which the grantor was a member, and there was no conveyance of the land to the grantor by the partnership, the deed, nevertheless, constituted color of title. Tarver v. Deppen, 132 Ga. 798, 65 SE 177, 24 LRANS 1161.

[e] **Life estate.**—"It is immaterial that the fee-simple deeds under which the entries were made actually vested only the title to a life estate or an undivided interest. The extent of the estate purporting to be conveyed characterizes the entry and subsequent possession, and shows beyond doubt that they were made under a claim to the whole, and were with intent to oust all others asserting an interest." Elder v. McClaskey, 70 Fed. 529, 539, 17 CCA 251.

[f] **A deed of the homestead by the husband in which the wife does not join** gives color of title. Avera v. Williams, 81 Miss. 714, 33 S 501.

[g] **Land previously deeded to another.**—A recorded deed, including in its description a strip of land previously deeded by the grantor to another, is color of title to such strip for adverse possession. Koch v. Gordon, 231 Mo. 645, 133 SW 609.

[h] **Grantor having rights of mortgagee.**—A deed which purports to convey a complete title may be sufficient to give color of title, although the grantor had in fact only the rights of a mortgagee. Stewart v. Lowdermilk, 147 N. C. 583, 61 SE 523; Stevens v. Brooks, 24 Wis. 326.

[i] **A sheriff's deed, defective** because the deed conveyed a tract of land, part of which was in another county and which the sheriff in consequence had no right to convey, is good to show color of title to the whole tract. Beverly v. Burke, 9 Ga. 440, 54 AmD 351, 14 Ga. 70.

[j] **A deed by a wife after the death of her husband conveying the land of the husband** gives color of title. Stiff v. Cobb, 126 Ala. 381, 28 S 402, 85 AmSR 38; Watson v. Mancill, 76 Ala. 600; Vandiveer v. Stickney, 75 Ala. 225; Barnett v. Meacham, 62 Ark. 313, 35 SW 533; Irey v. Markey, 132 Ind. 546, 32 NE 309.

[k] **Administrator's deed.**—An administrator's deed purporting to convey an entire tract in fee would constitute good color of title, although the intestate owned only an undivided moiety. Gilbert v. Hopkins, 204 Fed. 196, 204, 122 CCA 432, 440.

34. U. S.—Lea v. Polk County Copper Co., 21 How. 493, 16 L. ed. 203; Field v. Columbet, 9 F. Cas. No. 4,764, 4 Sawy. 523; Stark v. Starr, 22 F. Cas. No. 13,307, 1 Sawy. 15.

Ala.—Crowder v. Doe, 162 Ala. 151, 50 S 230, 136 AmSR 17; Hoyle v. Mann, 144 Ala. 516, 41 S 335; Henry v. Brown, 143 Ala. 446, 456, 39 S 325 [cit Cyc]; Ryan v. Kilpatrick, 66 Ala. 332; Riggs v. Fuller, 54 Ala. 141.

Cal.—Millett v. Lagomarsino, 107 Cal. 102, 40 P 25; Silvarer v. Hansen, 77 Cal. 579, 20 P 136; Webber v. Clarke, 74 Cal. 11, 15 P 431; Nemo v. Farrington, 7 Cal. A. 443, 94 P 874, 877; Knight v. Cohen, 7 Cal. A. 43, 93 P 396. Compare Kile v. Tubbs, 23 Cal. 431.

D. C.—Harmon v. Dyer, 10 D. C. 292.

Ga.—Bennett v. Walker, 64 Ga. 326; McMullin v. Erwin, 58 Ga. 427; Gittens v. Lowry, 15 Ga. 336.

Ill.—Clayton v. Feig, 179 Ill. 534, 54 NE 149; Nelson v. Davidson, 160 Ill. 254, 43 NE 361, 52 AmSR 338, 31 LRA 325; Lewis v. Pleasants, 143 Ill. 271, 30 NE 323, 32 NE 384; Stumpf v. Osterhage, 111 Ill. 82; Coleman v. Billings, 89 Ill. 183; Austin v. Rust, 73 Ill. 491; Lake Shore, etc., R. Co. v. Pittsburg, etc., R. Co., 71 Ill. 38; Barger v. Hobbs, 67 Ill. 592; Hardin v. Osborn, 60 Ill. 93; Brooks v. Bruyn, 35 Ill. 392, 18 Ill. 539; Prettyman v. Wilkey, 19 Ill. 235; Davis v. Easley, 13 Ill. 192.

Ind.—O'Donahue v. Creager, 117 Ind. 372, 20 NE 267.

Iowa.—Blankenhorn v. Lenox, 123 Iowa 67, 98 NW 556; Roth v. Munzenmaier, 118 Iowa 326, 91 NW 1072.

Ky.—Carson v. Turk, 146 Ky. 733, 143 SW 393, 42 LRANS 384; Mullins v. Faulkner, 20 SW 273, 14 KyL 436; Thomas v. Harrow, 4 Bibb 563.

La.—Brewster v. Hewes, 113 La. 45, 36 S 883; Cooper v. Falk, 109 La. 474, 33 S 567; Landry v. Tullier, 9 La. Ann. 100.

Me.—Coombs v. Persons Unknown, 82 Me. 326, 19 A 826; Noyes v. Dyer, 25 Me. 468; Robison v. Swett, 3 Me. 316; Kennebec Purchase v. Laboree, 2 Me. 275, 11 AmD 79.

Md.—Allen v. Van Bibber, 89 Md. 434, 43 A 758; Lurman v. Hubner, 75 Md. 268, 23 A 646.

Mich.—Reilly v. Blaser, 61 Mich. 399, 28 NW 151.

Miss.—Welborn v. Anderson, 37 Miss. 155.

Mo.—McVey v. Carr, 159 Mo. 648, 60 SW 1034; Hamilton v. Boggess, 63 Mo. 233; Crispen v. Hannavan, 50 Mo. 536.

Nebr.—Gatling v. Lane, 17 Nebr. 77, 22 NW 227.

N. H.—Forest v. Jackson, 56 N. H. 357.

N. J.—Ocean Beach Assoc. v. Yard, 48 N. J. Eq. 72, 20 A 763 [aff 49 N. J. Eq. 306, 24 A 729].

N. Y.—Sands v. Hughes, 53 N. Y. 287; Bissing v. Smith, 85 Hun 564, 33 NYS 123; Northrop v. Wright, 7 Hill 476.

N. C.—Ingram v. Colson, 14 N. C. 445; Ray v. McCulloch, 1 N. C. 543.

S. D.—Wood v. Conrad, 2 S. D. 334, 50 NW 95.

Tenn.—Poindexter v. Rawlings, 106 Tenn. 97, 59 SW 766, 82 AmSR 869; Hubbard v. Godfrey, 100 Tenn. 150, 47 SW 81; Love v. Shields, 3 Yerg. 404.

Tex.—Harris v. Wells, 85 Tex. 312, 20 SW 68; McDonough v. Jefferson County, 79 Tex. 535, 15 SW 490; Peden v. Crenshaw, (Civ. A.) 81 SW 369; Wille v. Ellis, 22 Tex. Civ. A. 462, 54 SW 922; Midkiff v. Stephens, 9 Tex. Civ. A. 411, 29 SW 54.

Vt.—Hunt v. Taylor, 22 Vt. 556.

Va.—Stull v. Rich Patch Iron Co., 92 Va. 253, 23 SE 293; Hulvey v. Hulvey, 92 Va. 182, 23 SE 233; Nowlin v. Reynolds, 25 Gratt. (66 Va.) 137.

Wis.—Sinnott v. Chicago, etc., R. Co., 81 Wis. 95, 50 NW 1097.

[a] **Thus** where a person at his death had no title to certain land, it having been sold on execution sale, and his executors conveyed it as his property by a deed sufficient in form to pass the title, the deed was color of title in the grantee. Bond v. Beverly, 152 N. C. 56, 67 SE 55. To same effect Woodstock Iron Co. v. Roberts, 87 Ala. 436, 6 S 349.

[b] **Deed of husband conveying lands of wife.**—A deed by a husband, prior to the Married Woman's Act of 1866 (Act Dec. 13, 1866, p 146) purporting to convey lands of the wife, is good as color of title, although the husband had not reduced the property to possession. Arnold v. Limeburger, 122 Ga. 72, 49 SE 812.

[c] **Where grantee subsequently acquires title.**—Where a person conveys by warranty deed land to which he has no title, and afterward a deed of the property is made to him and he conveys it to a second grantee, the said deed to him cannot be relied on by his second grantee as color of title in good faith within the meaning of the statute of limitations, since the title acquired by such deed inured to the benefit of the first grantee. Guertin v. Mombleau, 144 Ill. 32, 33 NE 49.

35. See cases infra this note.

[a] **Under the Texas five-year statute** it is not necessary that the grantor should have had title in order that a deed given by him may confer color of title. Harris v. Wells, 20 SW 68; McDonough v. Jefferson County, 79 Tex. 535, 15 SW 490; Hunton v. Nichols, 55 Tex. 217; Massie v. Meeks, (Civ. A.) 28 SW 44.

[b] **Under the Texas three-year statute** the purchaser from one whose interest in land was sold under a valid judgment and execution sale to another before the date of his purchase cannot prescribe. Grigsby v. May, 84 Tex. 240, 19 SW 343; Blum v. Rogers, 71 Tex. 668, 9 SW 595; Brownson v. Scanlan, 59 Tex. 222; Long v. Brenneman, 59 Tex. 210; Harris v. Hardeman, 27 Tex. 248; Wright v. Daily, 26 Tex. 730; Illies v. Frericks, 11 Tex. Civ. A. 575, 32 SW 915.

35½. Maring v. Meeker, 263 Ill. 136, 105 NE 31.

der a deed which purports to convey the title is wholly independent of prior conveyances or of the grantor's actual title.[36]

[§ 352] **j. Deeds of Persons under Disability.** A deed by a married woman, void because her husband did not join in the execution thereof, will nevertheless give color of title,[37] and, although a deed from a wife to her husband is void, it may nevertheless serve as color of title, and a prescription may arise under such deed in favor of the husband if the parties are not living together or in case of the death of the wife.[38] So also a deed by an infant[39] or by a person non compos mentis[40] may give color of title.

[§ 353] **k. Deeds of Persons Acting in Representative Capacity—(1) Personal Representatives and Trustees.**[41] A deed signed by a personal representative is good as color of title, although not purporting on its face to have been executed pursuant to an order of court,[42] or although the will confers no such power.[43] So too a conveyance by a trustee under a deed of trust with power of sale confers color of title, although such conveyance is not made pursuant to the power.[44]

[§ 354] **(2) Agents or Attorneys.** A deed executed by an agent duly authorized to sell is of course as effectual to give color of title as if executed by the principal himself.[45] And it has been held that a deed executed by an agent or attorney who has no authority,[46] except perhaps where the grantee knew of the agent's want of authority,[47] or a deed executed by one under a defective power of attorney, will have the same effect.[48] And where a deed purports to be executed by virtue of a power of attorney it will be good as color of title, although the power of attorney is not shown.[49]

[§ 355] **l. Deeds of Tenants in Common.** Where real estate is held in common, and one tenant assumes to convey the entire estate and does convey it by metes and bounds, the deed will give color of title as to the whole tract, and an entry by the purchaser thereunder claiming title to the whole will operate as an actual ouster and disseizin of the cotenant.[50] If, however, the deed conveys only an undivided interest it is color of title only as to the interest conveyed.[51] A deed by a grantee in a deed of partition by heirs of the deceased owner to a third person of the land conveyed to the grantee in the partition is "color of title" within the seven-year statute of limitations, where the third person had no interest in the land outside of the deed.[51½]

[§ 356] **m. Deeds of Survivors of Community.** An unauthorized conveyance by the surviving husband of community property after the death of the

36. Scott v. Mineral Dev. Co., 130 Fed. 497, 64 CCA 659; Elder v. McClaskey, 70 Fed. 529, 17 CCA 251. See also Owen v. Moxon, 167 Ala. 615, 52 S 527.

37. Ala.—Southern R. Co. v. Hays, 150 Ala. 212, 43 S 487; Perry v. Lawson, 112 Ala. 480, 20 S 611.

Colo.—Knight v. Lawrence, 19 Colo. 425, 36 P 242.

Ga.—Floyd v. Ricketson, 129 Ga. 668, 59 SE 909.

Ind.—Irey v. Markey, 132 Ind. 546, 32 NE 309; Wright v. Kleyla, 104 Ind. 223, 4 NE 16.

Mo.—Sutton v. Casseleggi, 77 Mo. 397.

N. H.—Sanborn v. French, 22 N. H. 246.

Tex.—Fry v. Baker, 59 Tex. 404.

W. Va.—Calvert v. Murphy, 81 SE 403; Cooey v. Porter, 22 W. Va. 120.

[a] **Where married woman has capacity to convey.**—Defendant having taken possession of land under a recorded deed from a divorced wife who had legal title and power to convey, subject to the homestead, the deed afforded defendant more than color of title, and she acquired title as against the grantor's husband by adverse possession maintained for the statutory time and under statutory conditions. Donnelly v. Tregaskis, 154 Cal. 261, 97 P 421.

38. Central of Georgia R. Co. v. Williams, 5 Ga. A. 647, 63 SE 671.

39. Den v. Shanklin, 20 N. C. 431.

40. Ellington v. Ellington, 103 N. C. 54, 9 SE 208.

41. See also infra §§ 360, 361.

42. Dodge v. Cowart, 131 Ga. 549, 62 SE 987; Street v. Collier, 118 Ga. 470, 45 SE 294.

[a] **Thus** where the administrator of one who executed a deed to secure a debt without order of court agrees that the grantee shall cancel the notes and be vested with absolute title and the grantee surrenders the notes and goes into possession under the deed, such possession is color of title. English v. Marshall, 128 Ga. 730, 58 SE 351.

[b] **Agreement to partition lands.**—A written agreement to divide lands owned or claimed in common, although made by the administrator of one of the tenants in common, without an order from court for the partition thereof, is admissible in evidence as color of title. Shiels v. Lamar, 58 Ga. 590.

[c] **A deed by the administrator acting under a special act of the legislature which is unconstitutional** will nevertheless confer color of title. Fagan v. Rosier, 68 Ill. 84.

43. Dodge v. Cowart, 131 Ga. 549, 62 SE 987.

44. Gottlieb v. Thatcher, 51 Fed. 373, 2 CCA 278; Gebhard v. Sattler, 40 Iowa 152; Priest v. St. Louis, 103 Mo. 657, 15 SW 989; Swann v. Young, 36 W. Va. 57, 14 SE 426; Swann v. Thayer, 36 W. Va. 46, 14 SE 423.

45. Pike v. Evans, 94 U. S. 6, 24 L. ed. 40; Godsey v. Standifer, 101 SW 921, 31 KyL 44; Williams v. Bradley, (Tex. Civ. A.) 67 SW 170.

[a] **Agent acting by parol authority.**—Although a deed is void as a muniment of title where its execution is consummated, in the absence of the grantor, by an agent who filled out the blanks, such agent acting by authority in parol, yet it is admissible as color of title. Ingram v. Little, 14 Ga. 173, 58 AmD 549.

46. Ala.—Standifer v. Swann, 78 Ala. 88.

Ga.—Street v. Collier, 118 Ga. 470, 45 SE 294; Connell v. Culpepper, 111 Ga. 805; 35 SE 667; Millen v. Stines, 81 Ga. 655, 8 SE 315; Payne v. Blackshear, 52 Ga. 637.

Ill.—Coward v. Coward, 148 Ill. 268, 35 NE 759.

La.—Hall v. Mooring, 27 La. Ann. 596.

Me.—Bracket v. Persons Unknown, 53 Me. 228.

N. Y.—Thompson v. Burhans, 61 N. Y. 52.

N. C.—Smith v. Allen, 112 N. C. 223, 16 SE 932; Hill v. Wilton, 6 N. C. 14.

Tex.—Cantagrel v. Von Lupin, 58 Tex. 570; Wofford v. McKinna, 23 Tex. 36, 76 AmD 53; Moses v. Dibrell, 2 Tex. Civ. A. 457, 21 SW 414. Compare Willis v. Burke, 7 Tex. Civ. A. 239, 27 SW 217. Contra Cox v. Bray, 28 Tex. 247.

Wash.—Bellingham Bay Land Co. v. Dibble, 4 Wash. 764, 31 P 30.

Compare Breeding v. Taylor, 13 B. Mon. (Ky.) 477.

[a] **Reason of rule.**—"If it were shown that the persons signing the deed as attorneys in fact had authority to do so, so far as their principal was concerned, it would be title, not color." Street v. Collier, 118 Ga. 470, 473, 45 SE 294 (per Cobb, J.).

[b] **Deed executed by trustees of town.**—Exclusive use and possession of the street of a town for more than fifteen years, under a purchase from the trustees of the town, vested the purchaser with title, whether or not the trustees of the town were invested with authority to sell. Brown v. Stubblefield, 4 KyL 351.

[c] **A deed of gift by attorney with power to make an executory contract of sale only** was at most only color of title. Lackawanna Lumber Co. v. Kelley, 221 Pa. 238, 70 A 724.

[d] **Revocation of power by death of principal.**—(1) Although a power of attorney is revoked by the death of the principal, before the sale is made thereunder, possession under such sale is nevertheless with color of title. Dolton v. Erb, 53 Ill. 289. (2) It has been held, however, that a deed by an agent after the death of the principal is void and not such color of title as will support the defense of limitation under the three-year statute of limitations of Texas. Cox v. Bray, 28 Tex. 247; Wall v. Lubbock, 52 Tex. Civ. A. 405, 118 SW 886.

47. Livingston v. Peru Iron Co., 9 Wend. (N. Y.) 511.

48. Hawley v. Zigerly, 135 Ind. 248, 34 NE 219.

49. Munro v. Merchant, 28 N. Y. 9; Smith v. Allen, 112 N. C. 223, 16 SE 932; Cantagrel v. Von Lupin, 58 Tex. 570. See also Connell v. Culpepper, 111 Ga. 805, 35 SE 667; Payne v. Blackshear, 52 Ga. 63.

50. U. S.—Prescott v. Nevers, 19 F. Cas. No. 11,390, 4 Mason 326.

Cal.—Bath v. Valdez, 70 Cal. 350, 11 P 724; Packard v. Moss, 68 Cal. 123, 8 P 818; Spect v. Hagar, 65 Cal. 443, 4 P 419. Compare Seaton v. Son, 32 Cal. 481.

Ga.—Street v. Collier, 118 Ga. 470, 45 SE 294.

Ill.—Hinchman v. Whetstone, 23 Ill. 185.

N. H.—Newmarket Mfg. Co. v. Pendergast, 24 N. H. 54.

N. C.—Ross v. Durham, 20 N. C. 182.

Pa.—Culler v. Motzer, 13 Serg. & R. 356, 15 AmD 604.

Tenn.—Morelock v. Bernard, 15 Lea 169; Weisinger v. Murphy, 2 Head 674; Waterhouse v. Martin, Peck 392.

Tex.—Rosborough v. Cook, (Civ. A.) 148 SW 1120.

51. Merriman v. Blalack, 56 Tex. Civ. A. 594, 121 SW 552.

51½. Betts v. Gahagan, 212 Fed. 120.

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wife does not convey title or color of title.[52]

[§ 357] **n. Deeds of Homestead in Which Wife Does Not Join.** A deed to a homestead in which a grantor's wife did not join, although void, is available as color of title to sustain a claim by adverse possession as against third persons.[53]

[§ 358] **o. Deed to Wife of Land Purchased with Husband's Money.** Where a husband purchases land and procures the deed to be made to his wife, the presumption is that he intended it as a gift and no trust results in his favor. Accordingly he cannot, as against the wife and those claiming title under her, claim the benefits of the deed to her as color of title.[54]

[§ 359] **p. Quitclaim Deeds.** A quitclaim deed is sufficient color of title on which to base adversary possession under the statute of limitations,[55] and it has been held that this is so, although there is nothing contained therein showing that the grantor claimed any interest in the property at the time the deed was executed,[56] or although the deed was not sealed or properly acknowledged.[57] As respects color of title a quitclaim deed stands on the same footing as a warranty deed.[58] It has been held, however, that a quitclaim from one who is shown never to have been in possession nor to have had any color of title to the land will not confer color of title,[59] and that a quitclaim deed purporting to convey land abutting a private alley and describing such alley as "known as a private alley" is insufficient as color of title thereto since it impeaches rather than asserts title.[60]

[§ 360] **q. Deeds Executed under Void or Voidable Decrees or Judgments.**[61] A deed executed under and by virtue of a judgment or decree gives color of title, although such judgment or decree is voidable or absolutely void.[62] However, a deed issued upon a foreclosure sale does not relate back wher issued to the date of certificate of sale, so as to

52. Hardy Oil Co. v. Burnham, (Tex. Civ. A.) 124 SW 221.

53. Avera v. Williams, 81 Miss. 714, 33 S 501; Ford v. Ford, 24 S. D. 644, 124 NW 1108.

[a] **Under three-year statute of Texas.**—A deed of part of the homestead of a married man, executed by him alone, being a nullity does not constitute "title or color of title," within Rev. St. art 3341, requiring title and color of title under which three years' adverse possession becomes a bar to a suit to recover real estate, to be in accordance with "intrinsic fairness and honesty." Garner v. Black, 95 Tex. 125, 65 SW 876 [aff (Civ. A.) 63 SW 918]; Watson v. Watson, (Civ. A.) 55 SW 183.

54. Poole v. Oliver, 89 Ark. 578, 117 SW 747.

55. U. S.—Archer v. Beihl, 136 Fed. 113, 69 CCA 101.

Ala.—Zundel v. Baldwin, 114 Ala. 328, 21 S 420; Torrey v. Forbes, 94 Ala. 135, 10 S 320.

Ga.—Johnson v. Girtman, 115 Ga. 794, 42 SE 96; Wooding v. Blanton, 112 Ga. 509, 37 SE 720; Hammond v. Crosby, 68 Ga. 767; Castleberry v. Black, 58 Ga. 386; McCamy v. Higdon, 50 Ga. 629; Roberts v. Foreman, 22 Ga. 283.

Ida.—Little v. Crawford, 13 Ida. 146, 88 P 974.

Ill.—Waterman Hall v. Waterman, 220 Ill. 569, 77 NE 142, 4 LRANS 776 and note; Safford v. Stubbs, 117 Ill. 389, 7 NE 653; Winslow v. Cooper, 104 Ill. 235; Busch v. Huston, 75 Ill. 343; Holloway v. Clark, 27 Ill. 483.

Iowa.—Tremaine v. Weatherby, 58 Iowa 615, 12 NW 609. Compare McBride v. Caldwell, 142 Iowa 228, 119 NW 741; Knight v. Campbell, 76 Iowa 730, 39 NW 829.

La.—Read v. Hewitt, 120 La. 288, 45 S 143; Templet v. Baker, 12 La. Ann. 658.

Mo.—McVey v. Carr, 159 Mo. 648, 60 SW 1034.

N. H.—Wells v. Jackson Iron Mfg. Co., 47 N. H. 235; Minot v. Brooks, 16 N. H. 374 (holding that a quitclaim deed of all the grantor's title under a collector's deed is color of title, although no interest may have passed by such deed). Compare Woods v. Banks, 14 N. H. 101 (holding that a quitclaim by release of all the right, title, and interest by one not shown to have had any color of title or possession is not color of title).

N. Y.—Sanders v. Riedinger, 30 App. Div. 277, 51 NYS 937 [aff 164 N. Y. 564, 58 NE 1092]; Jackson v. Waltermire, 7 Cow. 353.

N. D.—Stiles v. Granger, 17 N. D. 502, 117 NW 777.

Or.—Swift v. Mulkey, 14 Or. 59, 12 P 76.

S. C.—Carolina Sav. Bank v. McMahon, 87 S. C. 309, 16 SE 31.

Tex.—Parker v. Newberry, 83 Tex. 428, 18 SW 815; McDonough v. Jefferson County, 79 Tex. 535, 15 SW 490; Wofford v. McKinna, 23 Tex. 36, 76 AmD 53; Merriman v. Blalack, 56 Tex. Civ. A. 594, 121 SW 552. Compare Kirby v. Pitchfork Land, etc., Co., (Civ. A.) 129 SW 1151; Merriman v. Blalack, 57 Tex. Civ. A. 270, 122 SW 403.

W. Va.—Lloyd v. Mills, 68 W. Va. 241, 69 SE 1094, 32 LRANS 702.

Compare Southern Iron, etc., Co. v. Schwoon, 124 Tenn. 176, 135 SW 785 (holding that certain deeds were not mere quitclaim deeds and therefore constituted titles).

[a] **In support of this doctrine** Land, J., in Read v. Hewitt, 120 La. 288, 291, 45 S 143, said: "There is no material difference between the sale of property and the sale of all the vendor's right, title, and interest therein, because such a transfer includes all that the vendor can sell or the purchaser acquire. . . . 'A conveyance of all the grantor's right, title, and interest in and to certain described property will be construed as a conveyance of all his estate in such property, and the whole estate will vest in the grantee.'" And Cartwright, C. J., in Waterman Hall v. Waterman, 220 Ill. 569, 574, 77 NE 142, 4 LRANS 776, said: "A warranty deed and a quitclaim deed both purport to accomplish the same thing and have the same effect in transferring title. The covenants of a warranty deed do not pass the title but create a liability, and a quit-claim deed which purports to convey the property is as good color of title as a warranty deed."

[b] **Extent of grantor's interest.**—(1) "A quit-claim deed which conveys only the right, title and interest of the grantor in the property limits the estate to such right and interest as the grantor may have, and if the grantor is a tenant in common, the deed is not color of title for anything more than his interest." Waterman Hall v. Waterman, 220 Ill. 569, 575, 77 NE 142, 4 LRANS 776 (per Cartwright, C. J.). (2) Where a person in possession of land of which his wife is seized as heir of an undivided part takes a quitclaim from one of the other heirs who is seized of an undivided one-fourth thereof, and he simply releases and quitclaims all his right, title, and interest, such deed will constitute good color of title to the extent of the grantor's interest and no further. Busch v. Huston, 75 Ill. 343.

[c] **Lands not included in deed.**—A conveyance by quitclaim of a tract of land will not give the grantee the benefit of the grantor's interest in other land, and such deed cannot, therefore, operate as color of title to such other land. Wells v. Jackson Iron Mfg. Co., 48 N. H. 491.

[d] **A deed with limited covenants of warranty** gives color of title. McBride v. Caldwell, 142 Iowa 228, 119 NW 741.

56. Archer v. Beihl, 136 Fed. 113, 69 CCA 101.

57. Perkins Land, etc., Co. v. Irvin, 200 Mo. 485, 98 SW 580.

58. Waterman Hall v. Waterman, 220 Ill. 569, 77 NE 142, 4 LRANS 776.

59. Woods v. Banks, 14 N. H. 101.

60. Dulce Realty Co. v. Staed Realty Co., 245 Mo. 417, 151 SW 415.

61. See also infra § 362 et seq.

62. U. S.—Hall v. Law, 102 U. S. 461, 26 L. ed. 217; H. B. Claflin Co. v. Middlesex Banking Co., 113 Fed. 958; Lewis v. Barnhardt, 43 Fed. 854 [aff 145 U. S. 56, 12 SCt 772, 36 L. ed. 621]; Balkham v. Woodstock Iron Co., 43 Fed. 648, 11 LRA 230 [aff 154 U. S. 177, 14 SCt 1010, 38 L. ed. 953]. Compare Walker v. Turner, 9 Wheat. 541, 6 L. ed. 155.

Ala.—Lowery v. Davis, 8 S 79; Woodstock Iron Co. v. Fullenwider, 87 Ala. 584, 6 S 197, 13 AmSR 73; Molton v. Henderson, 62 Ala. 426.

Cal.—Brind v. Gregory, 120 Cal. 640, 53 P 25, 122 Cal. 480, 55 P 250; Webber v. Clarke, 74 Cal. 11, 15 P 431; Packard v. Moss, 68 Cal. 123, 8 P 818; Russell v. Harris, 38 Cal. 426, 99 AmD 421.

Ga.—Maynard v. Greer, 129 Ga. 709, 59 SE 798.

Ill.—Wright v. Stice, 173 Ill. 571, 51 NE 71; Sexson v. Barker, 172 Ill. 361, 50 NE 109; Reedy v. Camfield, 159 Ill. 254, 42 NE 833; Burton v. Perry, 146 Ill. 71, 34 NE 60; Mason v. Ayers, 73 Ill. 121; Winstanly v. Meacham, 58 Ill. 97; Dolton v. Erb, 53 Ill. 289; Hinkley v. Greene, 52 Ill. 223; Hassett v. Ridgely, 49 Ill. 197; Huls v. Buntin, 47 Ill. 396.

Ind.—Paxton v. Sterne, 127 Ind. 289, 26 NE 557; Goodell v. Starr, 127 Ind. 198, 26 NE 793; English v. Powell, 119 Ind. 93, 21 NE 458; Sims v. Gay, 109 Ind. 501, 9 NE 120; Wright v. Kleyla, 104 Ind. 223, 4 NE 16; Brenner v. Quick, 88 Ind. 546; Brown v. Maher, 68 Ind. 14; Vail v. Halton, 14 Ind. 344; Vancleave v. Milliken, 13 Ind. 105.

Kan.—Goodman v. Nichols, 44 Kan. 22, 23 P 957.

Ky.—Bustard v. Gates, 4 Dana 429.

La.—Leverett v. Loeb, 117 La. 310, 41 S 584; Ross v. Enaut, 46 La. Ann. 1250, 15 S 803; Robinson v. Williams, 45 La. Ann. 485, 12 S 499; Louaillier v. Castille, 14 La. Ann. 777.

Mich.—Lang v. Osceola Consol. Min. Co., 145 Mich. 370, 108 NW 678.

Miss.—Nash v. Fletcher, 44 Miss. 609; Welborn v. Anderson, 37 Miss. 162.

Mo.—Joplin Brewing Co. v. Payne, 197 Mo. 422, 94 SW 896, 114 AmSR 770 (want of jurisdiction); Shaffer v. Detie, 191 Mo. 377, 90 SW 131; McVey v. Carr, 159 Mo. 648, 60 SW 1034; Crispen v. Hannavan, 50 Mo. 536.

N. H.—Clark v. Clough, 65 N. H. 43, 23 A 526.

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make the certificate color of title from the time of its issue.[62½]

[§ 361] r. Deeds Executed under Void or Defective Sales.[63] As a general rule deeds executed in pursuance of a sale give color of title, although the sale is irregular or void.[64] The statute "would be set apart as a homestead to the grantor, with the approval of the ordinary that the sale be made attached thereto, is admissible in evidence as color of title. Connell v. Culpepper, 111 Ga. 805, 35 SE 667.

[f] **A sheriff's deed on sale under execution based on a personal money judgment for alimony** constituted color of title, although no jurisdiction was obtained over the person of defendant in divorce. Joplin Brewing Co. v. Payne, 197 Mo. 422, 94 SW 896, 114 AmSR 770.

[g] **Want of jurisdiction.**—(1) A deed under a judicial sale void because the decree is without jurisdiction is good as purporting to pass the title of the owners. Waldron v. Harvey, 54 W. Va. 608, 46 SE 603, 102 AmSR 959 [exp] and dist Hall v. Hall, 27 W. Va. 468; Sturm v. Fleming, 26 W. Va. 54; Lynch v. Andrews, 25 W. Va. 751]. (2) But under the three-year statute of limitations of Texas an order for sale which is beyond the court's jurisdiction does not give color of title. Arnold v. Hodge, 20 Tex. Civ. A. 211, 49 SW 714.

62½. West v. Middlesex Banking Co., 33 S. D. 465, 146 NW 598.

63. See also infra § 362 et seq.

64. U. S.—Pike v. Evans, 94 U. S. 6, 24 L. ed. 40; Gottlieb v. Thatcher, 51 Fed. 373, 2 CCA 278; Balkham v. Woodstock Iron Co., 43 Fed. 648, 11 LRA 230 [aff 154 U. S. 177, 14 SCt 1010, 38 L. ed. 953]; McIntyre v. Thompson, 10 Fed. 531, 4 Hughes 562.

Ala.—Bernheim v. Horton, 103 Ala. 330, 15 S 822; Long v. Parmer, 81 Ala. 384, 1 S 900; Boykin v. Smith, 65 Ala. 294; Lay v. Lawson, 23 Ala. 377. See also Big Sandy Iron, etc., Co. v. Williams, 63 S 1011.

Ark.—Fletcher v. Josephs, 105 Ark. 646, 152 SW 293, 294 [cit Cyc]. Compare Gaither v. Gage, 82 Ark. 51, 100 SW 80 (holding that when land is sold by judicial sale the five-year statute of limitations runs in favor of the purchaser at the sale only against the parties thereto).

Cal.—Webber v. Clarke, 74 Cal. 11, 15 P 431; Packard v. Moss, 68 Cal. 123, 8 P 818.

D. C.—Mackall v. Mitchell, 18 App. 58.

Fla.—Kendrick v. Latham, 25 Fla. 819, 6 S 871.

Ga.—Cox v. Goodman, 139 Ga. 25, 76 SE 357; Johnson v. Cook, 122 Ga. 524, 50 SE 367; Wade v. Garrett, 109 Ga. 270, 34 SE 572; Knox v. Yow, 91 Ga. 367, 17 SE 654; Kile v. Fleming, 78 Ga. 1; Hammond v. Crosby, 68 Ga. 767; Field v. Boynton, 33 Ga. 239; Sutton v. McLoud, 26 Ga. 638; Simmons v. Lane, 25 Ga. 178; Hester v. Coats, 22 Ga. 56; Walls v. Smith, 19 Ga. 8; Burkhalter v. Edwards, 16 Ga. 593, 60 AmD 744; Beverly v. Burke, 9 Ga. 440, 54 AmD 351.

Ill.—Lewis v. Pleasants, 143 Ill. 271, 30 NE 323, 32 NE 384; Fritz v. Joiner, 54 Ill. 101; Oetgen v. Ross, 54 Ill. 79; Brooks v. Bruyn, 35 Ill. 392; Baily v. Doolittle, 24 Ill. 577; Laflin v. Herrington, 16 Ill. 301.

Ind.—Orr v. Owens, 128 Ind. 229, 27 NE 493; Souders v. Jeffries, 107 Ind. 552, 8 NE 288; Lafayette Second Nat. Bank v. Corey, 94 Ind. 457; Ray v. Detchon, 79 Ind. 56; Brown v. Maher, 68 Ind. 14; Hatfield v. Jackson, 50 Ind. 507; Gray v. Stiver, 24 Ind. 174; Doe v. Hearick, 14 Ind. 242.

Iowa.—Gebhard v. Sattler, 40 Iowa 152.

Ky.—Bell v. Fry, 5 Dana 341; Bustard v. Gates, 4 Dana 429; Hoskins v. Helm, 4 Litt. 309, 14 AmD 133. See also Riggs v. Dooley, 7 B. Mon. 236.

La.—Decuir v. Loeb, 118 La. 332, 42 S 955; Leverett v. Loeb, 117 La. 310, 41 S 584; Booksh v. New Iberia Sugar Co., 115 La. 516, 39 S 545; Stackhouse v. Zuntz, 41 La. Ann. 415, 6 S 666; Louaillier v. Castille, 14 La. Ann. 777; Brien v. Sargent, 13 La. Ann. 198; Leduf v. Bailly, 3 La. Ann. 8; Walden v. Canfield, 2 Rob. 466.

Miss.—Brougher v. Stone, 72 Miss. 647, 17 S 509.

Mo.—Thompson v. Stilwell, 253 Mo. 89, 161 SW 681; Dollarhide v. Mabary, 125 Mo. 197, 28 SW 332; Suddarth v. Robertson, 118 Mo. 286, 24 SW 151; Jackson v. Magruder, 51 Mo. 55; Crispen v. Hannavan, 50 Mo. 536.

N. Y.—O'Connor v. Huggins, 113 N. Y. 511, 21 NE 184; Tarplee v. Sonn, 109 App. Div. 241, 96 NYS 6, 17 NY AnnCas 366; Davis v. Burrows, 55 Hun 604, 8 NYS 379; Van Voorhis v. Kelly, 31 Hun 293; Hilton v. Bender, 2 Hun 1, 4 Thomps. & C. 270 [rev on other grounds 69 N. Y. 75]; Northrop v. Wright, 7 Hill 476 [rev 24 Wend. 221]; La Frombois v. Jackson, 8 Cow. 589, 18 AmD 463.

N. C.—Neal v. Nelson, 117 N. C. 393, 23 SE 428, 53 AmSR 590; Falls of Neuse Mfg. Co. v. Brooks, 106 N. C. 107, 11 SE 456; McCulloh v. Daniel, 102 N. C. 529, 9 SE 413; Jones v. Putney, 7 N. C. 562.

S. C.—Gourdin v. Davis, 31 S. C. L. 481, 45 AmD 745.

Tex.—Overand v. Menczer, 83 Tex. 122, 18 SW 301; Brown v. O'Brien, 11 Tex. Civ. A. 459, 33 SW 267; Halbert v. Martin, (Civ. A.) 30 SW 383. But see Allen v. Courtney, 24 Tex. Civ. A. 86, 58 SW 200.

W. Va.—Hitchcox v. Morrison, 47 W. Va. 206, 34 SE 993; Swann v. Young, 36 W. Va. 57, 14 SE 426; Swann v. Thayer, 36 W. Va. 46, 14 SE 423.

Wis.—North v. Hammer, 34 Wis. 425.

Compare Hogsett v. Ellis, 17 Mich. 351.

[a] **Sale without effort to find personalty.**—A sheriff's deed to land, made in pursuance of a sale under a justice's court execution, accompanied by possession, is good as color of title, although upon the execution there was no entry of a search and failure to find personalty upon which to levy the same. Wade v. Garrett, 109 Ga. 270, 34 SE 572.

[b] **Irregularity in trustee's sale.**—One who entered into possession of land under a trustee's deed purporting to convey the same and notified the grantor in the deed of trust that he had purchased and held the land as owner occupied in hostility to the former owner of the land, even though the trustee's sale at which he purchased was void on account of some irregularity of which he had no knowledge. McCaughn v. Young, 85 Miss. 277, 37 S 839.

[c] **Purchase by administrator at his own sale.**—Where an administrator caused realty belonging to the estate to be bid off for him, and the bidder gave a deed of the property to the administrator individually, it was color of title under which the administrator individually might prescribe, although he had no authority to purchase the land. McNeill v. Fuller, 121 N. C. 209, 28 SE 299. To same effect Sloan v. Graham, 85 Ill. 26.

[d] **Decree recorded after expiration of lien.**—Title to land under purchase at a judgment sale is not sufficient to defeat possession under a properly recorded convevance made after judgment was rendered, where it appears that the decree of sale was not recorded until after the judgment lien had expired and that the person claiming under such sale did not take any steps toward securing possession for more than six years. Hines v. Moye, 125 N. C. 8, 34 SE 103.

[e] **Guardian's sale.**—Adverse possession for five years under a title vested by a guardian's sale bars an action by the ward to recover the land on account of irregularity in the sale (Code § 211). Webster v. Bebinger, 70 Ind. 9.

[f] **Guardian's deed.**—Possession of land under a conveyance of a guardian made in pursuance of a void decree of the probate court for its sale is supported by color of title. Molton v. Henderson, 62 Ala. 426. See also Lowery v. Davis, (Ala.) 8 S 79; Rawlins v. Bailey, 15 Ill. 178 (deed not reported and confirmed by court); Walker v. Hill, 111 Ind. 223, 12 NE 387.

[e] **Deed of homestead.**—A deed reciting that the land conveyed had been

N. Y.—Tarplee v. Sonn, 109 App. Div. 241, 96 NYS 6, 17 NYAnnCas 366.

N. C.—Sutton v. Jenkins, 147 N. C. 11, 60 SE 643; Falls of Neuse Mfg. Co. v. Brooks, 106 N. C. 107, 11 SE 456 (dormant judgment).

N. D.—Brynjolfson v. Dagner, 15 N. D. 332, 109 NW 320, 125 AmSR 595.

Tenn.—Whiteside v. Singleton, Meigs 207; Gray v. Darby, Mart. & Y. 396.

Va.—Lennig v. White, 20 SE 881.

Wash.—Hamilton v. Witner, 50 Wash. 689, 694, 97 P 1084, 126 AmSR 921 [quot Cyc]; Schlarb v. Castaing, 50 Wash. 331, 97 P 289; Johnson v. Bartlett, 50 Wash. 114, 96 P 833.

W. Va.—Wade v. McDougle, 59 W. Va. 113, 52 SE 1026; Waldron v. Harvey, 54 W. Va. 608, 46 SE 603, 102 AmSR 959; Hitchcox v. Morrison, 47 W. Va. 206, 34 SE 993; Mullan v. Carper, 37 W. Va. 215, 16 SE 527.

Wis.—Steinberg v. Salzman, 139 Wis. 118, 120 NW 1005.

[a] **A deed executed pursuant to a void or voidable decree of foreclosure** gives color of title. H. B. Claflin Co. v. Middlesex Banking Co., 113 Fed. 958; Webb v. Winter, 135 Cal. 455, 67 P 691 [rev reh 65 P 1028]; Jones v. Hiller, 65 Fla. 532, 62 S 583; Reedy v. Camfield, 159 Ill. 254, 42 NE 833; Mason v. Ayres, 73 Ill. 121; Chickering v. Failes, 26 Ill. 507; Brenner v. Quick, 88 Ind. 546; Mitchell v. Vest, (Iowa) 136 NW 1054; Melvin v. Merrimack River, 5 Metc. (Mass.) 15, 38 AmD 384; Sutton v. Jenkins, 147 N. C. 11, 60 SE 643; Cox v. Tompkinson, 39 Wash. 70, 80 P 1005.

[b] **Deed of executor or administrator.**—(1) A deed of an executor or administrator, although executed in pursuance of a void or voidable order or decree of court, may give color of title. Balkham v. Woodstock Iron Co., 43 Fed. 648, 11 LRA 230 [aff 154 U. S. 177, 14 SCt 1010, 38 L. ed. 953]; Brian v. Melton, 125 Ill. 647, 18 NE 318; Marley v. State, 147 Ind. 145, 46 NE 466; Vancleave v. Milliken, 13 Ind. 105 (want of notice to heirs); Root v. McFerrin, 37 Miss. 17, 75 AmD 49 (void for defects in order of sale); O'Connor v. Huggins, 113 N. Y. 511, 21 NE 184 (defects in proceedings for sale by administrator); McCulloh v. Daniel, 102 N. C. 529, 9 SE 413 (want of service of process on some of the devisees). (2) Where real estate is sold by an administrator pursuant to a decree of a competent court to raise assets to pay debts due from the estate, the administrator's deed is color of title. Woodstock Iron Co. v. Fullenwider, 87 Ala. 584, 6 S 197, 13 AmSR 73; Fletcher v. Josephs, 105 Ark. 646, 152 SW 293, 294 [cit Cyc]; Stumpf v. Osterhage, 111 Ill. 82; Conner v. Goodman, 104 Ill. 365; Irey v. Mater, 134 Ind. 238, 33 NE 1018; Steinberg v. Salzman, 139 Wis. 118, 120 NW 1005; Whittlesey v. Hoppenyan, 72 Wis. 140, 39 NW 355.

[c] **Order of sale in partition.**—Where an order of sale of a decedent's land in partition by the devisees purports to be of the entire interest in the land, and the deed is in conformity therewith, it gives color of title, and the possession of the purchaser under it and of those claiming under him is adverse from the date of the sale. Amis v. Stephens, 111 N. C. 172, 16 SE 17; McCulloh v. Daniels, 102 N. C. 529, 9 SE 413.

[d] **Guardian's deed.**—Possession of land under a conveyance of a guardian made in pursuance of a void decree of the probate court for its sale is supported by color of title. Molton v. Henderson, 62 Ala. 426. See also Lowery v. Davis, (Ala.) 8 S 79; Rawlins v. Bailey, 15 Ill. 178 (deed not reported and confirmed by court); Walker v. Hill, 111 Ind. 223, 12 NE 387.

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robbed of its virtue if it was confined to cases where the sale was valid, for such sales do not need the protection of such a statute.'"[65]

[§ 362] **8. Tax Deeds—(1) In General.** A tax deed may give color of title,[66] although it be invalid,[67] or even where absolutely void,[68] unless the land in controversy is not described therein or is so insufficiently described as to render identification

[f] **Sale under execution fraudulently issued.**—In Texas a sheriff's deed on a sale under an execution fraudulently issued will not support a claim of color of title by the execution purchaser or his privies attempting to hold the premises by adverse possession within the three-year statute of limitations. Garvin v. Hall, 83 Tex. 295, 18 SW 731.

65. Miller v. Sullivan, 17 F. Cas. No. 9,592, 4 Dill. 340, 344 (per Dillon, J.).

66. U. S.—McIntyre v. Thompson, 10 Fed. 531, 4 Hughes 562.

Ala.—Big Sandy Iron, etc., Co. v. Williams, 63 S 1011; National Bank v. Baker Hill Iron Co., 108 Ala. 635, 19 S 47; Rivers v. Thompson, 43 Ala. 633; Dillingham v. Brown, 38 Ala. 311.

Colo.—Laws v. Newkirk, 39 Colo. 78, 88 P 861.

D. C.—Mackall v. Mitchell, 18 App. 58.

Ga.—Peeples v. Wilson, 140 Ga. 610, 79 SE 466; Kile v. Fleming, 78 Ga. 1.

Ill.—Lewis v. Pleasants, 143 Ill. 271, 30 NE 323, 32 NE 384; Chicago v. Middlebrooke, 143 Ill. 265, 32 NE 457; Gage v. Hampton, 127 Ill. 87, 20 NE 12, 2 LRA 512 and note; Coleman v. Billings, 89 Ill. 183; Scott v. Delany, 87 Ill. 146; Hardin v. Crate, 78 Ill. 533; Whitney v. Stevens, 77 Ill. 585; Henrichsen v. Hodgen, 67 Ill. 179; Morrison v. Norman, 47 Ill. 477; Holloway v. Clark, 27 Ill. 483; Phillips v. Peo., 11 Ill. A. 340.

Ind.—Hearick v. Doe, 4 Ind. 164.

Iowa.—Chicago, etc., R. Co. v. Allfree, 64 Iowa 500, 20 NW 779.

Ky.—Fitch v. Gentry, 92 SW 586, 29 KyL 210.

Mo.—De Graw v. Taylor, 37 Mo. 310.

Tex.—Wofford v. McKinna, 23 Tex. 36, 76 AmD 53; Wier Lumber Co. v. Conn, (Civ. A.) 156 SW 276; Kobs v. New York, etc., Land Co., (Civ. A.) 63 SW 1087.

[a] **A tax deed is a "deed"** within Rev. St. (1895) art 3342 providing that every suit to recover real estate as against any person enjoying peaceable and adverse possession thereof, etc., and claiming under deeds duly registered, shall be instituted within five years, etc., and will support a plea of limitations of five years without proof of prerequisites necessary to authorize the sale of the land for taxes. Lamberida v. Barnum, (Tex. Civ. A.) 90 SW 698.

[b] **Where a statute requires title "deducible of record from the commonwealth"** possession under a tax sale by a sheriff will not suffice. Griffin v. Sparks, 70 SW 30, 24 KyL 849.

67. U. S.—Lewis v. Barnhart, 145 U. S. 56, 12 SCt 772, 36 L. ed. 621 [aff 43 Fed. 854]; Pillow v. Roberts, 13 How. 472, 14 L. ed. 228; Van Gunden v. Virginia Coal, etc., Co., 52 Fed. 838, 3 CCA 294; Cowly v. Monson, 5 Fed. 779.

Ala.—Hooper v. Bankhead, 171 Ala. 626, 54 S 549; Dorlan v. Westervitch, 140 Ala. 283, 37 S 382, 103 AmSR 35; Doe v. Anderson, 79 Ala. 209; Stovall v. Fowler, 72 Ala. 77; Pugh v. Youngblood, 69 Ala. 296; Ladd v. Dubroca, 61 Ala. 25; Dillingham v. Brown, 38 Ala. 311.

Ark.—McConnell v. Swepston, 66 Ark. 141, 49 SW 566; Finley v. Hogan, 60 Ark. 499, 30 SW 1045; Woolfork v. Buchner, 60 Ark. 163, 29 SW 372; Cooper v. Lee, 59 Ark. 460, 27 SW 970; Elliott v. Pearce, 20 Ark. 508.

D. C.—Todd v. Kauffman, 19 D. C. 304.

Ga.—Bower v. Cohen, 126 Ga. 35, 54 SE 918 (holding that a statute relating to color of title and providing that, if the writing is forged or fraudulent and the holder has notice of the same, no prescription can be based thereon does not apply to one buying at a tax sale under the honest belief that he is acquiring good title, who goes into possession under the sheriff's deed, because of a mistake of law as to the validity of the sale).

Ill.—Coleman v. Billings, 89 Ill. 183; Whitney v. Stevens, 89 Ill. 53 (omission to file with sheriff a sufficient affidavit as required by statute before taking the tax deed); Whitney v. Stevens, 77 Ill. 585 (omission to file affidavit); Bally v. Doolittle, 24 Ill. 577 (sale without judgment).

Ind.—English v. Powell, 119 Ind. 93, 21 NE 458; Wiggins v. Holley, 11 Ind. 2.

Iowa.—Hunt v. Gray, 76 Iowa 268, 41 NW 14; Douglass v. Tullock, 34 Iowa 262; Thomas v. Stickle, 32 Iowa 71 (sale of land in bulk).

La.—Hickey v. Smith, 118 La. 169, 42 S 762 (deed containing interlineations under circumstances justifying the belief that such interlineations were made by the officer executing the deed); Jopling v. Chachere, 107 La. 522, 32 S 243 [aff 192 U. S. 94, 24 SCt 214, 48 L. ed. 359] (defect in a tax sale resulting from a defect in the assessment); Boyle v. West, 107 La. 347, 31 S 794 (irregularity in description of name of owner); Smith v. New Orleans, 43 La. Ann. 726, 9 S 773; Breaux v. Negrotto, 43 La. Ann. 426, 9 S 502.

Minn.—Ricker v. Butler, 45 Minn. 545, 48 NW 407.

Mo.—Dunnington v. Hudson, 217 Mo. 93, 116 SW 1083.

N. Y.—Finlay v. Cook, 54 Barb. 9.

N. D.—Woolfolk v. Albrecht, 22 N. D. 36, 40, 133 NW 310 [cit Cyc].

S. D.—Cain v. Ehrler, 33 S. D. 536, 146 NW 694.

Tenn.—Hubbard v. Godfrey, 100 Tenn. 150, 47 SW 81.

Tex.—Seemuller v. Thornton, 77 Tex. 156, 13 SW 846; Griswold v. Comer, (Civ. A.) 161 SW 423 (holding that a tax deed is not insufficient as a basis for prescription because of an incorrect reference to the name of the survey and the certificate number, and that for a tax deed to be sufficient as a basis for prescription under the five-year statute, all the prerequisites of the law need not be complied with in making the tax sale).

Utah.—Welner v. Stearns, 120 P 490.

Va.—Yellow Poplar Lumber Co. v. Thompson, 108 Va. 612, 620, 62 SE 358 [quot Cyc]; Lennig v. White, 20 SE 831.

Wis.—Edgerton v. Bird, 6 Wis. 527, 70 AmD 473.

[a] **Michigan; notice of adverse possession.**—Under a recent statute of Michigan (Pub. Acts [1897] p 296, Act No. 299 § 142) which repeals by implication Comp. Laws § 3896, a person holding under an invalid tax deed cannot acquire title by adverse possession unless he has given notice to the parties in interest before taking possession. Cook Land, etc., Co. v. McDonald, 155 Mich. 175, 118 NW 959.

68. U. S.—Treece v. American Assoc., 122 Fed. 598, 58 CCA 266 (void because tax collector proceeded under repealed statute); Bartlett v. Ambrose, 78 Fed. 839, 24 CCA 397; East Tennessee Iron, etc., Co. v. Wiggin, 68 Fed. 446, 15 CCA 510.

Ala.—C. W. Zimmerman Mfg. Co. v. Dunn, 163 Ala. 272, 50 S 906; Brannan v. Henry, 142 Ala. 698, 39 S 92, 110 AmSR 55.

Ark.—Chicot Lumber Co. v. Dardell, 84 Ark. 140, 104 SW 1100; Osceola Land Co. v. Chicago Mill, etc., Co., 84 Ark. 1, 103 SW 609; Carpenter v. Smith, 76 Ark. 447, 88 SW 976; Boynton v. Ashabranner, 75 Ark. 514, 88 SW 568; Crill v. Hudson, 71 Ark. 390, 74 SW 299; Woolfolk v. Buckner, 67 Ark. 411, 55 SW 168; Cooper v. Lee, 59 Ark. 460, 27 SW 970; Helena v. Hornor, 58 Ark. 151, 23 SW 966.

Cal.—Wilson v. Atkinson, 77 Cal. 485, 20 P 66, 11 AmSR 299.

Colo.—Bennet v. North Colorado Springs Land, etc., Co., 23 Colo. 470, 48 P 812, 58 AmSR 281. Compare Brinker v. Union Pac. R. Co., 11 Colo. A. 166, 55 P 207 (holding that a prescriptive title to land under Act 1877, as amended by Sess. Laws [1885] p 320, limiting actions to recover land sold for taxes to five years after execution and delivery of a treasurer's deed, cannot be sustained if the tax deed was void).

Fla.—Gilbert v. Southern Land, etc., Co., 53 Fla. 319, 43 S 754.

Ill.—Burton v. Perry, 146 Ill. 71, 34 NE 60; Gage v. Hampton, 127 Ill. 87, 20 NE 12, 2 LRA 512; Dalton v. Lucas, 63 Ill. 337; Morrison v. Norman, 47 Ill. 477; Holloway v. Clark, 27 Ill. 483.

Iowa.—McCash v. Penrod, 131 Iowa 631, 109 NW 180; Chicago, etc., R. Co. v. Allfree, 64 Iowa 500, 20 NW 779; Colvin v. McCune, 39 Iowa 502.

Mich.—Pence v. Miller, 140 Mich. 205, 103 NW 582; Hoffman v. Harrington, 28 Mich. 90.

Mo.—Pharis v. Bayless, 122 Mo. 116, 26 SW 1030; Morgan v. Pott, 124 Mo. A. 371, 101 SW 717 (void because the owners were not made parties to the suit to recover the delinquent taxes).

Nebr.—White v. Musser, 87 Nebr. 628, 630, 127 NW 1058 [cit Cyc]; Lantry v. Parker, 37 Nebr. 358, 56 NW 962.

N. C.—Greenleaf v. Bartlett, 146 N. C. 495, 60 SE 419, 14 LRANS 660 (failure to record a receipt from the sheriff to a tax sale purchaser).

N. D.—Stiles v. Granger, 17 N. D. 502, 117 NW 777 (sale for taxes for prior year).

S. D.—Murphy v. Dafoe, 18 S. D. 42, 99 NW 86.

Tenn.—Southern Iron, etc., Co. v. Schwoon, 124 Tenn. 176, 135 SW 785 (assessment of taxes against deceased owner); Hubbard v. Godfrey, 100 Tenn. 150, 47 SW 81 (land sold part of another county when deed delivered); Sharp v. Van Winkle, 12 Lea 15; Hunter v. O'Neal, 4 Baxt. 494; Love v. Shields, 3 Yerg. 405.

Va.—Yellow Poplar Lumber Co. v. Thompson, 108 Va. 612, 620, 62 SE 358 [quot Cyc]; Lennig v. White, 20 SE 831; Flanagan v. Grimmet, 10 Gratt. (51 Va.) 421.

Wash.—Lara v. Sandell, 52 Wash. 53, 100 P 166; Hamilton v. Witner, 50 Wash. 689, 97 P 1084, 126 AmSR 921; Ward v. Huggins, 7 Wash. 617, 32 P 740, 1015, 36 P 285.

W. Va.—State v. Harman, 57 W. Va. 447, 470, 50 SE 828 [cit Cyc]; Bryant v. Groves, 42 W. Va. 10, 24 SE 605.

Wis.—McMillan v. Wehle, 55 Wis. 685, 13 NW 694; Oconto County v. Jerrard, 46 Wis. 317, 50 NW 591; Lindsay v. Fay, 25 Wis. 460; Sprechler v. Wakeley, 11 Wis. 432.

See also supra § 338.

In support of this view it has been said: "We are aware that there are cases holding that a void tax deed will not constitute a basis for the running of the statute of limitations. But we think such decisions overlook both the philosophy and the object of such statutes. Statutes of limitation are strictly statutes of repose, and the policy upon which they are founded is, that a reasonable lapse of time shall put an end to legal strife and controversy, and that he who neglects or refuses to assert his rights within such a time as the legislature may deem reasonable shall be conclusively presumed to have waived them. If it is necessary for one claiming the benefit and protection of the statute to first prove a perfect and indefeasible title, it is impossible to perceive for what purpose such statutes are enacted. A perfect title needs no

impossible.[69] Whatever may be the source of the invalidity of the deed, if it purports to convey land and in form passes what purports to be the title, it gives color of title.[70]

[§ 363] **(2) Void for Matters dehors the Instrument.** It is very generally held that a tax deed purporting to convey the land in controversy, although invalid for matter dehors the instrument, gives color of title.[71]

[§ 364] **(3) Void on Its Face.** As is the case with deeds generally,[72] there is a conflict of authority as to whether a tax deed void on its face gives color of title. In many jurisdictions such a deed is held sufficient to give color of title.[73] But in others the contrary view has been adopted.[74]

[§ 365] **t. Deeds Executed Pursuant to Power**

extraneous aid, and if imperfect ones are not within the purview of the statute, then the law, in either case, is entirely ineffectual and useless, and might well be eliminated from the body of statutes." Ward v. Huggins, 7 Wash. 617, 624, 32 P 740, 1015, 36 P 285.

[a] **Possession under the deed,** however, is necessary for the operation of this rule. National Bank v. Baker Hill Iron Co., 108 Ala. 635, 19 S 47; Kirker v. Daniels, 73 Ark. 263, 83 SW 912.

[b] **The rule has no application to a void deed executed before title passed out of the state.**—"The deed was not color of title while title was in the State, and did not become such when title passed to the State's vendee, who, by his purchase, took title free of all cloud." Brinneman v. Scholem, 95 Ark. 65, 70, 128 SW 584.

[c] **Under the three-year statute of limitations of Texas** (1) defining color of title as a consecutive chain of transfers from or under the sovereignty of the soil down to the person in possession, one purchasing at execution sale after title has passed from the judgment debtor to his wife does not acquire color of title. Watts v. Bruce, 31 Tex. Civ. A. 347, 72 SW 258. (2) And under this statute a tax deed is not a support for a plea under color of title without evidence that it was executed in completion of a sale regularly made for taxes duly levied and assessed. Telfener v. Dillard, 70 Tex. 139, 7 SW 847; Gillaspie v. Murray, 27 Tex. Civ. A. 580, 66 SW 252.

69. Brannan v. Henry, 142 Ala. 698, 39 S 92, 110 AmSR 55; Berrendo Stock Co. v. Kaiser, 66 Tex. 352, 1 SW 257; Crumbley v. Busse, 11 Tex. Civ. A. 319, 32 SW 438; Yellow Poplar Lumber Co. v. Thompson, 108 Va. 612, 620, 62 SE 358 [quot Cyc]. See also supra § 341.

[a] **A tax deed for imperfect and uncertain description** does not give color of title. Gannon v. Moore, 83 Ark. 196, 104 SW 139; Dickinson v. Arkansas City Impr. Co., 77 Ark. 570, 576, 92 SW 21, 113 AmSR 170 ("a deed failing to describe the land is equivalent to no deed at all").

70. Maring v. Meeker, 263 Ill. 136, 140, 143, 105 NE 31 [cit Cyc]; Chicago, etc., R. Co. v. Allfree, 64 Iowa 500, 20 NW 779.

71. U. S.—Bartlett v. Ambrose, 78 Fed. 839, 24 CCA 397.

Ark.—Bradbury v. Dumond, 80 Ark. 82, 96 SW 390, 11 LRANS 772 and note; Dickinson v. Hardie, 79 Ark. 364, 96 SW 355; Wade v. Goza, 78 Ark. 7, 96 SW 388; Ross v. Royal, 77 Ark. 324, 91 SW 178.

Fla.—Florida Finance Co. v. Sheffield, 56 Fla. 285, 48 S 42, 23 LRANS 1102 and note, 16 AnnCas 1142 and note.

Ill.—Peabody v. Burri, 255 Ill. 592, 99 NE 690; Taylor v. Hamilton, 173 Ill. 392, 50 NE 1064.

La.—Soniat v. Donovan, 118 La. 847, 43 S 462; Cooper v. Falk, 109 La. 474, 33 S 567; Cane v. Herndon, 107 La. 591, 32 S 33; Wykoff v. Miller, 48 La. Ann. 475, 19 S 478; Michel v. Stream, 48 La. Ann. 341, 19 S 215; Giddens v. Mobley, 37 La. Ann. 417.

Mo.—Wilson v. Taylor, 119 Mo. 626, 25 SW 199.

Tex.—El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 SW 21; Schleicher v. Gatlin, 85 Tex. 270, 20 SW 120; Fowler v. Simpson, 79 Tex. 611, 15 SW 682, 23 AmSR 370; Seemuller v. Thornton, 77 Tex. 156, 13 SW 846; Wofford v. McKinna, 23 Tex. 36, 76 AmD 53; Callen v. Collins, 56 Tex. Civ. A. 620, 120 SW 546; Gillaspie v. Murray, 27 Tex. Civ. A. 580, 66 SW 252; Villareal v. McLaughlin, (Civ. A.) 62 SW 98.

72. See supra § 338.

73. U. S.—Deputron v. Young, 134 U. S. 241, 10 SCt 539, 33 L. ed. 923.

Ala.—Reddick v. Long, 124 Ala. 260, 27 S 402 (for want of acknowledgment).

Iowa.—McBride v. Caldwell, 142 Iowa 228, 119 NW 741; Colvin v. McCune, 39 Iowa 502.

Miss.—Hamner v. Yazoo Delta Lumber Co., 100 Miss. 349, 56 S 466; Root v. McFerrin, 37 Miss. 17, 75 AmD 49. A limitation of this principle is that where lands owned by the state and not subject to taxation are sold for taxes, the tax deed is wholly void and three years' occupancy under such tax deed will not bar suit. Leavenworth v. Reeves, 64 S 660; Hoskins v. Illinois Cent. R. Co., 78 Miss. 768, 39 S 518, 84 AmSR 644.

Nebr.—Gatling v. Lane, 17 Nebr. 80, 22 NW 453 (failure to recite place of sale).

N. C.—Greenleaf v. Bartlett, 146 N. C. 495, 60 SE 419, 14 LRANS 660 (failure of sheriff to comply with Laws [1881] p 218 c 117 § 36, requiring him to bid in land sold for taxes for the county if no one will pay the tax for a less number of acres than the whole).

N. D.—Power v. Kitching, 10 N. D. 254, 86 NW 737, 88 AmSR 691 and note (deed void by reason of irregularities in the tax proceeding which appear on the face of the deed sufficient to render it void on its face).

Wyo.—Matthews v. Blake, 16 Wyo. 116, 92 P 242, 27 LRANS 339 and note (tax deed not acknowledged before the clerk of the district court as required by statute).

74. U. S.—Redfield v. Parks, 132 U. S. 239, 10 SCt 83, 33 L. ed. 327 (sale not held at proper time); Alexander v. Gordon, 101 Fed. 91, 41 CCA 228 (officer making sale without authority, and tax for which sale made levied contrary to law); Moore v. Brown, 17 F. Cas. No. 9,753, 4 McLean 211 (holding that a deed for land sold for taxes, which on its face shows that legal notice of the sale was not given, is void and cannot avail a person who sets up the defense of adverse possession).

D. C.—Keefe v. Bramhall, 14 D. C. 551.

Kan.—Larkin v. Wilson, 28 Kan. 513; Waterson v. Devoe, 18 Kan. 223; Shoat v. Walker, 6 Kan. 65.

La.—Marmion v. McPeak, 51 La. Ann. 1631, 26 S 376. See also Tensas Delta Land Co. v. Fleischer, 132 La. 1021, 1036, 62 S 129 (holding that a prescriptive right in land could not be acquired under a forfeiture to the state for nonpayment of taxes, where such forfeiture was an absolute nullity. In this case it was said: "In so far as the Constitution of 1898 is referred to, article 233 of that instrument was intended to apply to forfeitures. The article refers to tax sales, not to forfeitures for nonpayment of taxes. There is a difference between a sale and a forfeiture. Moreover, the asserted forfeitures . . . so entirely null that it is not within any curative effect of any constitution").

Me.—Fleming v. Katahdin Pulp, etc., Co., 93 Me. 110, 44 A 378.

Mich.—Fitchen v. Olson, 155 Mich. 320, 119 NW 3.

Minn.—O'Mulcahy v. Florer, 27 Minn. 449, 8 NW 166; Cogel v. Raph, 24 Minn. 194. Compare Miesen v. Canfield, 64 Minn. 513, 67 NW 632; Washburn v. Cutter, 17 Minn. 361.

Okl.—Keller v. Hawk, 19 Okl. 407, 91 P 778.

Tex.—Schleicher v. Gatlin, 85 Tex. 270, 20 SW 120 (sale of land in gross, contrary to statute); McKnight v. Clark, 24 Tex. Civ. A. 89, 58 SW 146 (sale of land in gross, contrary to statute).

"The legislature did not intend that time should breathe life and force into an instrument from the face of which it could be seen that it was absolutely void. The law was intended to protect purchasers at tax sales and their grantees from hidden defects in the proceedings, and not from those which the tax deed shows upon its face, and which, under the law, persons dealing with the title are bound to know." Keller v. Hawk, 19 Okl. 407, 413, 91 P 778 (per Burwell, J.).

[a] **In Colorado** (1) the earlier decisions hold that a tax deed void on its face is sufficient to give color of title for the acquisition of title by adverse possession under the five-year statute of limitations. This principle was applied in a number of decisions where the tax deed showed on its face that the land was sold in gross. Bennet v. North Colorado Springs Land, etc., Co., 23 Colo. 470, 48 P 812, 58 AmR 281; De Foresta v. Gast, 20 Colo. 307, 38 P 244; Brinker v. Union Pac., etc., R. Co., 11 Colo. A. 166, 55 P 207. (2) Such was the construction placed on these decisions in Hoge v. Magnes, 85 Fed. 355, 29 CCA 564, and followed in that case. Later decisions in this state, however, distinctly hold that a tax deed void on its face is not sufficient for acquisition of title under the five-year statute (Carnahan v. Hughes, 53 Colo. 318, 125 P 116; Sayre v. Sage, 47 Colo. 559, 108 P 160; Page v. Gillet, 47 Colo. 289, 107 P 290; Empire Ranch, etc., Co. v. Weldon, (A.) 141 P 138; Miller v. Weldon, (A.) 140 P 930; Scott v. Ramsier, 25 Colo. A. 540, 139 P 1121; Bloomer v. Cristler, 22 Colo. A. 238, 123 P 966). (3) And in applying this principle it was held that a tax deed, which shows on its face that several noncontiguous tracts of land were offered and sold in bulk for a gross sum, being void on its face, does not give color of title. Hughes v. Webster, 52 Colo. 475, 122 P 789. (4) So the latest decision of the supreme court holds that possession under a tax deed void on its face, coupled with a payment of taxes, will not set in motion the seven-year statute of limitations because not in good faith. Dussart v. Abdo Mercantile Co., 140 P 806. (5) Comparatively recent decisions in this state, however, seem to be squarely in conflict with this view. See Walters v. Webster, 52 Colo. 549, 123 P 952, AnnCas1914A 23; Sedgwick v. Culp, 24 Colo. A. 566, 136 P 88; Jackson v. Larson, 24 Colo. A. 548, 136 P 81.

[b] **Under the Missouri three-year statute of limitations** as to recovery of land sold for taxes the tax deed must be valid on its face to set in motion the statute. Pitkin v. Reibel, 104 Mo. 505, 16 SW 244; Kinney v. Forsythe, 96 Mo. 414, 9 SW 918; Duff v. Neilson, 90 Mo. 93, 2 SW 222; Callahan v. Davis, 90 Mo. 78, 2 SW 216; Pearce v. Tittsworth, 87 Mo. 635; Hopkins v. Scott, 86 Mo. 140; Mason v. Crowder, 85 Mo. 526.

under Will. If a deed is made pursuant to a power conferred by will it will give color of title.[75] But one whose interest in property depends upon the will does not, by deed from the executor purporting to be executed under the will, acquire any greater interest than would pass by the will, so that such deed cannot be used as a color to lay the foundation of a prescriptive title against those whom the grantor was bound to recognize as owners under the will.[76]

[§ 366] **u. Deeds Executed in Violation of Constitutional or Statutory Provisions.** A deed, although void as being in contravention of organic[77] or statutory[78] law, may nevertheless operate as color of title.

[§ 367] **v. Forged Deeds.** It has been held that a forged deed in the hands of a bona fide holder constitutes color of title when regular on its face.[79] But under the statutes of most jurisdictions a forged deed cannot constitute the basis of a prescriptive title to land where the grantee participates in or has knowledge of the forgery.[80]

[§ 368] **w. Fraudulent Deeds.** There is some conflict of opinion as to whether a fraudulent deed constitutes color of title. It has been held that deeds, although fraudulent on the part of the grantor, if accepted bona fide by the grantee and without knowledge of the fraud give color of title.[81] And there are some decisions which go to the extent of holding that a deed, although procured by the grantee's fraud, will constitute color of title.[82] Other decisions, however, maintain the contrary view,[83] especially where the conveyance is made with intent to defraud creditors.[84]

[§ 369] **x. Deeds Adjudged Invalid.** It has been held that there cannot be a holding under color of title where the paper relied on as giving color of title has been adjudged void in another suit to which the holder was a party. Such a paper does not give "appearance of title,"[85] and possession subsequent

75. Dubuque v. Coman, 64 Conn. 475, 30 A 777.

[a] **A deed executed by the grantors as executors and trustees under a will** and in execution of a power to convey the whole title, and which conveys all interest in the land, is color of title. Waterman Hall v. Waterman, 220 Ill. 569, 77 NE 142, 4 LRANS 776.

[b] **"Assurance of title."**—A deed by an executor which shows on its face that he undertakes to act pursuant to a power conferred on him as executor by testator, and which conveys all the right, title, and claim of testator holding under tax deeds purporting to convey an estate in fee, is assurance of title within Shannon Code § 4456, vesting title in one who has had seven years' adverse possession of land holding under an assurance of title. Southern Iron, etc., Co. v. Schwoon, 124 Tenn. 176, 135 SW 785.

[c] **Void limitation in will.**—A father devised land to his son R with a limitation over to his son C in case R should die without issue. R died without issue and C conveyed by deed to L, which deed was duly recorded. It was held that, although the limitation was void as being after an indefinite failure of issue, yet the deed gave L color of title, and his entry thereunder vested in him adverse possession of the whole tract. Lurman v. Hubner, 75 Md. 268, 23 A 646.

76. Sanders v. Thompson, 123 Ga. 4, 5, 50 SE 976 (where it was said: "If available as color of title at all, it was simply color as to the rights under the will, whatever they might be").

77. Maryland Univ. v. Calvary M. E. Church, 104 Md. 635, 65 A 398; Zion Church v. Hilton, 84 Md. 170, 35 A 9; Gump v. Sibley, 79 Md. 165, 28 A 977 (all three of which apply this principle to conveyances to churches, void because not sanctioned by the legislature as required by the Declaration of Rights).

78. Schrimpcher v. Stockton, 58 Kan. 758, 51 P 276 [aff 183 U. S. 290, 22 SCt 107, 46 L. ed. 203]; Murphy v. Nelson, 19 S. D. 197, 102 NW 691; Murphy v. Pierce, 17 S. D. 207, 95 NW 925.

[a] **Illustrations.**—(1) A deed executed by an Indian patentee incompetent to convey because he took under a patent which provided that the land should never be conveyed by the grantee without the consent of the secretary of the interior is color of title to his grantee who had no notice of any defect in the title of his grantor. Schrimpscher v. Stockton, 183 U. S. 290, 22 SCt 107, 46 L. ed. 203 [aff 58 Kan. 758, 51 P 276]. (2) So a deed by an Indian, conveying land patented to him by an instrument in the usual form of homestead patents, constitutes color of title whether or not such deed is actually void under the United States laws prohibiting Indians from conveying land within five years from the date of patents to them. Murphy v. Nelson, 19 S. D. 197, 102 NW 691; Murphy v. Pierce, 17 S. D. 207, 95 NW 925. But see Smythe v. Henry, 41 Fed. 705; Taylor v. Brown, 5 Dak. 335, 40 NW 525 (in which cases it was held that a conveyance of land by an Indian in violation of a statute of the United States which forbids such conveyance is void and confers no color of title).

[b] **Where there is a question as to whether a conveyance was within a statutory prohibition** and subsequently the grantors therein have executed a deed to certain persons who are holding as heirs of one claiming under the former deed and adversely to others claiming to be heirs of the same person, the latter deed is sufficient to constitute color of title and set the statute of limitations running in favor of the grantees therein. Westenfelder v. Green, 76 Fed. 925.

79. Shingler v. Bailey, 135 Ga. 666, 70 SE 563; Millen v. Stines, 81 Ga. 655, 8 SE 315; Parker v. Waycross, etc., R. Co., 81 Ga. 387, 8 SE 871; Stamper v. Griffin, 20 Ga. 312, 65 AmD 628; Griffin v. Stamper, 17 Ga. 108; Fisher v. Toxaway Co., 165 N. C. 663, 81 SE 925.

80. Parker v. Waycross, etc., R. Co., 81 Ga. 387, 8 SE 871; Hunt v. Dunn, 74 Ga. 120; Livingston v. Peru Iron Co., 9 Wend. (N. Y.) 511.

[a] **In Texas.**—(1) A forged deed is insufficient to give color of title under the three-year statute of limitations which defines color of title required to support the statutory bar of three years as such a muniment of title as is "not wanting in intrinsic fairness and honesty." Hussey v. Moser, 70 Tex. 42, 7 SW 606. (2) And the five-year statute of limitations expressly provides that such statute shall not be applicable to one who deraigns his title through a forged deed. Logan v. Robertson, (Civ. A.) 83 SW 395; Macdonnell v. De Los Fuentes, 7 Tex. Civ. A. 136, 26 SW 792; Chamberlain v. Showalter, 5 Tex. Civ. A. 226, 23 SW 1017; Moses v. Dibrell, 2 Tex. Civ. A. 457, 21 SW 414. (3) As regards the ten-year statute it has been said in Byne v. Wise, (Civ. A.) 31 SW 1069, that it seems that the fact that a person claims under a forged deed will not prevent him from prescribing under the ten-year statute, which provides that suits against anyone having peaceable and adverse possession of lands, cultivating, using, or enjoying the same, shall be brought within ten years next after the cause of action shall have accrued.

81. Griggs v. Sayre, 8 Pet. (U. S.) 244, 8 L. ed. 932; Butterfield v. Mabee, 22 U. C. C. P. 230. And see Smith v. Cross, 125 Tenn. 159, 140 SW 1060 (holding that deed which purported to convey the fee, although void as in fraud of the rights of minor owners, was an assurance of title so as to support a claim of title by adverse possession thereunder and cause limitations to run in favor of such possession).

[a] **Under the three-year statute of Texas** fraud of the husband in procuring the wife to join in a conveyance of the homestead will render the conveyance ineffectual as color of title, although the vendor was ignorant of the fraud. Black v. Garner, (Civ. A.) 63 SW 918 [aff 95 Tex. 125, 65 SW 876].

82. Oliver v. Pullam, 24 Fed. 127; Seals v. Seals, 165 N. C. 409, 81 SE 613; Blantire v. Whitaker, 11 Humphr. (Tenn.) 313; Porter v. Cocke, Peck (Tenn.) 28.

[a] **In support of this view** it was said: "If a deed is color of title, though the grantee may know that another than his grantor has the true title . . . why is not a fraudulent deed, which passes the title, unless action is taken by the grantor to set it aside? Color of title presupposes that the deed does not pass a good and indefeasible title, and there is no reason why this principle should not apply to a fraudulent deed, which may or may not pass the title, being voidable only at the election of the grantor, or the person defrauded." Seals v. Seals, 165 N. C. 409, 416, 81 SE 613.

83. Parker v. Salmons, 101 Ga. 160, 28 SE 681, 65 AmSR 291; Brown v. Wells, 44 Ga. 573 (decided under a statute expressly providing that adverse possession must not commence in fraud); Livingston v. Peru Iron Co., 9 Wend. (N. Y.) 511; Hussey v. Moser, 70 Tex. 42, 7 SW 606.

[a] **Applications of rule.**—A quitclaim deed by a husband to his wife of land held by him under a contract for its purchase, which to her knowledge had become subject to forfeiture because of his nonperformance, was insufficient to vest her with color of title on which to rest a claim of adverse possession, based on the going into possession of husband and wife, as against the other party to the contract of purchase to his successors, although she paid for the assignment made to him with her separate property. Laraway v. Zenor, 100 Iowa 181, 69 NW 416.

[b] **Possession under a pretended contract of purchase** is not adverse. Haberly v. Treadgold, 67 Or. 425, 136 P 334.

84. Farrar v. Bernheim, 74 Fed. 435, 20 CCA 496; High v. Nelms, 14 Ala. 350, 48 AmD 103; Pickett v. Pickett, 14 N. C. 15; Garvin v. Garvin, 40 S. C. 435, 19 SE 79.

85. Lebanon Min. Co. v. Rogers, 8 Colo. 34, 5 P 661; Sholl v. German Coal Co., 139 Ill. 21, 28 NE 748; Hintrager v. Smith, 89 Iowa 270, 56 NW 456; Presley v. Holmes, 83 Tex. 476.

thereto is tortious as against the true owners.[86] So a purchaser at a partition sale, in a suit wherein the title of a grantee of a tax deed is declared void, cannot avail himself of the adverse possession of such grantee in asserting title against one who is not a party to the suit.[87]

[§ 370] **y. Rescinded, Canceled, or Lost Deeds—(1) Rescinded or Canceled Deeds.** It has been held that where the parties to a deed undertake by verbal contract to rescind the deed, and the grantor thereafter remains in the actual possession of a part of the land, he is in possession under color of title.[88]

[§ 371] **(2) Lost Deeds.** A lost deed, the contents of which are proved on the trial and which is shown to have been executed and delivered, will give color of title to the possession of a defendant in ejectment.[89]

[§ 372] **z. Deeds of Doubtful Meaning or Construction.** Where possession is taken and held under an instrument the meaning or construction of which is doubtful and ambiguous, public policy will solve the doubt in favor of the claimant.[90]

[§ 373] **3. Other Instruments in Writing—a. Patents or Grants—(1) In General.** A patent or grant from the state or federal government ordinarily constitutes color of title to the same extent as conveyances between individuals.[91] It is of course essential that the land claimed should be described

86. Presley v. Holmes, 33 Tex. 476.

87. College Point Sav. Bank v. Vollmer, 44 App. Div. 619, 60 NYS 389 [aff 161 N. Y. 626 mem, 55 NE 1094 mem].

88. Hughes v. Israel, 73 Mo. 538. Compare Bullock v. Smith, 72 Tex. 545, 10 SW 687 (where it was held that possession assumed by the grantor is not under color of title of his original grant and that his claim under the statute is restricted to the limits of his actual occupation).

[a] **Abandonment of possession.**—Where a vendor sells part of a tract of land, being in possession of the whole, and the vendee pays but a part of the purchase price and abandons the possession taken under the purchase and the vendor takes control of the whole, his claim will be defined by his former ownership and his title limited thereby. Hickman v. Link, 97 Mo. 482, 10 SW 600.

[b] **Cancellation of certificate of entry.**—Cancellation by the commissioner of a bona fide certificate of entry without the purchaser's knowledge will not destroy his color of title and remit him, in his right of recovery, to that portion of the land actually in his possession for the period prescribed by the statute of limitations. Hannibal, etc., R. Co. v. Clark, 68 Mo. 371.

89. Harbison v. School Dist. No. 1, 89 Mo. 184, 1 SW 30. But see Marsh v. Sevin, 28 La. Ann. 326 (holding that a lost trust deed of which there is no record cannot be the basis of a prescriptive title).

90. Schlawig v. Purslow, 59 Fed. 848, 8 CCA 315 (where it was held that possession under an instrument which the parties intend as a deed, followed by unequivocal acts of ownership without objection, will show adverse possession, although it is doubtful whether the instrument on its face is a mortgage or a deed); Westmoreland v. Westmoreland, 92 Ga. 233, 17 SE 1033.

91. U. S.—Texas, etc., R. Co. v. Smith, 159 U. S. 66, 15 SCt 994, 40 L. ed. 77; Dredge v. Forsyth, 2 Black 563, 17 L. ed. 253; Gregg v. Tesson, 1 Black 150, 17 L. ed. 74; Meehan v. Forsyth, 24 How. 175, 16 L. ed. 730; Bryan v. Forsyth, 19 How. 334, 15 L. ed. 674; Mills v. Denver, etc., R. Co., 198 Fed. 137 [rev on other grounds 199 Fed. 988, 117 CCA 663]; East Tennessee Iron, etc., Co. v. Wiggin, 68 Fed. 446, 15 CCA 510; Oliver v. Pullam, 24 Fed. 127.

Ala.—Austin v. Meaher, 165 Ala. 211, 51 S 799; Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 S 43.

Ark.—Logan v. Jelks, 34 Ark. 547.

Conn.—Comins v. Comins, 21 Conn. 413.

Fla.—Sanford v. Cloud, 17 Fla. 557.

Ga.—Moody v. Fleming, 4 Ga. 115, 48 AmD 210.

Ill.—Payne v. Markle, 89 Ill. 66; Williams v. Ballance, 23 Ill. 193, 74 AmD 187; Lender v. Kidder, 23 Ill. 49.

Ky.—Middlesboro Waterworks v. Neal, 105 Ky. 586, 49 SW 428; Swope v. Schafer, 4 SW 300, 9 KyL 160; Skyles v. King, 2 A. K. Marsh. 385.

La.—Wilcoxon v. Rogers, 16 La. 6.

Mo.—Hannibal, etc., R. Co. v. Clark, 68 Mo. 371; Carondelet v. Simon, 37 Mo. 408.

N. J.—North Hudson County R. Co. v. Vanderbeck, 49 N. J. L. 693, 13 A 45; Colgan v. Pellens, 48 N. J. L. 27, 2 A 633.

N. C.—Kron v. Hinson, 53 N. C. 347; Protestant Episcopal Church v. Newbern Academy, 9 N. C. 233.

Pa.—Farr v. Swan, 2 Pa. 245; Lawrence v. Hunter, 9 Watts 64.

Tenn.—East Tennessee Iron, etc., Co. v. Broyles, 95 Tenn. 612, 32 SW 761.

Tex.—Converse v. Langshaw, 81 Tex. 275, 16 SW 1031; Burleson v. Burleson, 28 Tex. 383; Smith v. Power, 23 Tex. 29; Sabine Valley Timber, etc., Co. v. Cagle, (Civ. A.) 149 SW 697; Harris v. Iglehart, 52 Tex. Civ. A. 6, 113 SW 170; Williamson v. Brown, (Civ. A.) 109 SW 412; Hulett v. Platt, (Civ. A.) 109 SW 207; Robles v. Cooksey, (Civ. A.) 70 SW 584.

Va.—Koiner v. Rankin, 11 Gratt. (52 Va.) 420; Shanks v. Lancaster, 5 Gratt. (46 Va.) 110, 50 AmD 108.

There is "no good reason why a defectively executed patent from the state, as well as a defectively executed deed by a private individual, or a void tax deed, however lacking in the essentials of a muniment of title, should not operate as color of title, where it purports to convey the land or the right to its possession into the party asserting adverse possession, provided the party claims under it in good faith." Southern R. Co. v. Cleveland, 169 Ala. 22, 27, 53 S 767.

[a] **Land excluded from patent.**—Where a patent for land excepts land lying within its limits "previously granted," possession under the patent but outside of the land previously granted is not constructive possession of the excepted land and the patent is not color of title to the land so excepted. Basnight v. Smith, 112 N. C. 229, 16 SE 902.

[b] **Where a grant includes within its boundaries, but excludes from its operation, all older and superior claims,** it is not operative as color of title to the land so included and excluded, sufficiently identified and located within the grant, and shown to be covered by an older and superior title, and possession of part or all of such included and excluded land is not possession under color of title. Wright v. Hurst, 122 Tenn. 656, 127 SW 701.

[c] **"Donation" deeds.**—"Two years open, continuous, exclusive and adverse possession under a donation deed gives title." Sibley v. Gomillion, 76 Ark. 442, 91 SW 22.

[d] **A Mexican or Spanish grant** may give color of title. Hall v. Doe, 19 Ala. 378; Pueblo of Nambe v. Romero, 10 N. M. 58, 61 P 122 (holding that uninterrupted, open, visible, notorious, exclusive, and adverse possession for more than ten years before suit instituted of a tract of land embraced within the pueblo of Nambe, entry being under an alleged deed of conveyance from said pueblo long prior to the act of confirmation by congress of said pueblo's grant, vests a perfect title by adverse possession by virtue of the statute).

[e] **A grant from the republic of Texas** may constitute color of title. Galan v. Goliad, 32 Tex. 776.

[f] **A grant by one state of land lying in and belonging to another state** has been held not to confer color of title. Baker v. Swan, 32 Md. 355.

[g] **French-Canadian grant.**—A possession of land in New York, under a grant from the French-Canadian government prior to the conquest of Canada by the British, is not such an adverse possession as will prevent or defeat the operation of the subsequent grant of the same land under the provincial government of New York but will be considered as held in subordination to the latter title. Jackson v. Waters, 12 Johns. (N. Y.) 365.

[h] **Patent subject to rights of claimants under act of congress of 1823.**—Patent for lands situate in Peoria, Ill., subject to claims of citizens of that town under the act of 1823, designed for their relief, is a fee simple title on its face and gives color of title. Gregg v. Tesson, 1 Black (U. S.) 150, 17 L. ed. 74; Meehan v. Forsyth, 24 How. (U. S.) 175, 16 L. ed. 730; Bryan v. Forsyth, 19 How. (U. S.) 334, 15 L. ed. 674; Williams v. Ballance, 23 Ill. 193, 74 AmD 187; Lender v. Kidder, 23 Ill. 49.

[i] **Under the Texas three-year statute,** (1) requiring color of title to be a chain of transfer "from or under the sovereignty of the soil," a void patent and mesne conveyances thereunder do not constitute color of title from and under the sovereignty of the soil. Bryan v. Crump, 55 Tex. 1; Smith v. Power, 23 Tex. 29, 33; Hamilton v. Avery, 20 Tex. 612; Keith v. Guerdry, (Civ. A.) 114 SW 392; Williamson v. Brown, 49 Tex. Civ. A. 402, 109 SW 412; Gilbert v. Harris, (Civ. A.) 109 SW 392; Sheppard v. Avery, 28 Tex. Civ. A. 479, 69 SW 82 [cert 95 Tex. 501, 68 SW 505]. (2) A grant from the state, to constitute title or color of title, "must be effectual to convey to the grantee whatever right or title the government had in the land, at the time of making the grant. It need not necessarily carry with it the paramount title; but it must be title, as against the government, valid in itself when tested by itself, and not tried by the title of others. It must have intrinsic validity, as between the parties to it; though it may be relatively void, as respects the rights of third persons. If it be absolutely void, a nullity, it cannot be said to be a grant, or the basis of a transfer of the title from the government." Smith v. Power, supra; Williamson v. Brown, supra. (3) It has accordingly been held that a patent void for want of authority of the officer issuing it does not give color of title. Bates v. Bacon, 66 Tex. 348, 1 SW 256; League v. Rogan, 59 Tex. 427; Texas Land, etc., Co. v. State, 1 Tex. Civ. A. 616, 23 SW 258. (4) And under a constitutional provision reserving land for a school fund and providing for a sale thereof under regulation prescribed by law a patent as a homestead donation of land reserved as school land is neither title nor color of title within the stat-

in the instrument.[92]

[§ 374] **(2) Junior Patents or Grants.** A junior patent or grant has usually been held to give color of title,[93] and the fact that the junior grantee is a nonresident does not affect the operation of the rule where the land conveyed is occupied by his tenants.[94]

[§ 375] **b. Preëmption Claims.** An unperfected preëmption claim does not give color of title.[95]

[§ 376] **c. Inchoate Right of Purchaser of School Lands.** The inchoate right of a person whose application for the purchase of school lands has been accepted, and where the acquisition of title thereto is dependent on occupancy for a period of time not expired, is no higher than the right of a preëmptor and does not constitute color of title under the three-year statute of limitations of Texas[96] because it does not show an already existing right in the land.[97] So where the certificate is located on land already titled or equitably owned under color of title from the state, a further reason exists why it should not constitute color of title, namely, that such certificate being in direct contravention of a constitutional inhibition is "utterly void for all purposes and as to all persons."[98]

[§ 377] **d. Surveys.** A survey never returned to the land office is not evidence of an adverse title without a warrant or other evidence of one,[99] and it has been held that the record of a survey of land

ute of limitations. Williamson v. Brown, supra.

[j] **Effect of prior assignment of certificate.**—(1) A patent to S's heirs vested sufficient title in them to sustain a plea of three-year limitations, although he had previously assigned the certificate under which the patent was granted, no warranty of title appearing to have accompanied the assignment. "They were words of purchase and not of limitation, and had the effect of vesting whatever was conveyed in those individuals who at that time were the heirs at law of Archibald Smith. Grigsby v. May, 84 Tex. 240, 19 SW 343. (2) It is immaterial that this conveyance from the state vested no beneficial interest in the grantees. 'The officer who issued the patent, having the power to issue it, it is title, and the fact that there may have been a superior equity cannot make it less.' League v. Rogan, 59 Tex. 427. (3) Such a title loses none of its potency as a basis for an acquisition of the property by adverse possession, except in the hands of those whom the law estops to assert it. It therefore logically follows that if the heirs of Archibald Smith are not subject to the estoppel invoked the chain of title is complete." Sabine Valley Timber, etc., Co. v. Cagle, (Tex. Civ. A.) 149 SW 697, 701.

92. Goltermann v. Schiermeyer, 111 Mo. 404, 19 SW 484, 20 SW 161; Harris v. Iglehart, 52 Tex. Civ. A. 6, 113 SW 170; Atascosa County v. Alderman, (Tex. Civ. A.) 91 SW 846.

93. U. S.—East Tennessee Iron, etc., Co. v. Wiggin, 68 Fed. 446, 15 CCA 510.

Ill.—Payne v. Markle, 89 Ill. 66.

Ky.—Bryant v. Strunk, 151 Ky. 97, 151 SW 381; Middlesboro Waterworks v. Neal, 105 Ky. 586, 49 SW 428, 20 KyL 1403; Farmer v. Lyons, 87 Ky. 421, 9 SW 248, 10 KyL 375; Franklin Academy v. Hall, 16 B. Mon. 472; Roberts v. Sanders, 3 A. K. Marsh. 28; Thomas v. Harrow, 4 Bibb 563. But see Davidson v. Coombs, 5 KyL 812.

N. C.—Weaver v. Love, 146 N. C. 414, 59 SE 1041.

Tenn.—Cowan v. Hatcher, (Ch. A.) 59 SW 689.

Tex.—Payne v. Ellwood, (Civ. A.) 163 SW 93 (five-year statute); Robles v. Cooksey, (Civ. A.) 70 SW 584 (under five-year statute).

[a] **In North Carolina.** Revisal (1905) § 1699, providing that a junior grant shall not be color of title so far as it covers land previously granted, under the express terms of that section, does not apply to grants issued before March 6, 1893. Weaver v. Love, 146 N. C. 414, 59 SE 1041.

[b] **Under the three-year statute of Texas.**—(1) By the weight of authority a junior patent or grant is sufficient to give color of title under the three-year statute of limitations (Grigsby v. May, 84 Tex. 246, 19 SW 343; Converse v. Langshaw, 81 Tex. 275, 16 SW 1031; Williamson v. Brown, 49 Tex. Civ. A. 402, 109 SW 412; Hulett v. Platt, 49 Tex. Civ. A. 377, 109 SW 207), because within the rule laid down in Smith v. Power, 23 Tex. 29 (see supra note 91 [i]), it is effectual to convey to the grantee therein whatever right the government had in the land at the time, although because of a previous grant only an inferior title is conveyed (Williamson v. Brown, 49 Tex. Civ. A. 402, 109 SW 412). (2) And it has been held that the rule is not changed by a constitutional provision "that all genuine land certificates heretofore or hereafter issued shall be located, surveyed, or patented only upon vacant and unappropriated public domain, and not upon any land titled or equitably owned under color of title from the sovereignty of the State, evidence of the appropriation of which is on the county records or in the General Land Office, or when the appropriation is evidenced by the occupation of the owner, or of some person holding for him." It was said that the constitutional provision "applies alone to land certificates, and can not be construed to deny to any person the right to acquire any of the public domain subject to such acquisition by any lawful means, except by location under a land certificate." Howell v. Hanrick, 88 Tex. 383, 412, 29 SW 762, 30 SW 856, 31 SW 611; Hulett v. Platt, 49 Tex. Civ. A. 377, 109 SW 207. (3) There are, however, decisions apparently not in accord with the views above stated. Thus in Keith v. Guedry, (Civ. A.) 114 SW 392, it was held that a patent issued upon a location and survey made subsequently to a valid and subsisting survey and appropriation of the same land is void and cannot serve as a link in a chain of title or as color of title to support a three-year limitation. (4) In Gilbert v. Harris, (Civ. A.) 109 SW 392, it was held that a preëmption, location, and patents thereunder on land which was not vacant and unappropriated public domain at the time of the entry cannot serve as a basis of a chain of title or color of title to support a title under the three-year statute of limitations.

[c] **Under the five-year statute in Texas.**—A junior patent regularly issued which conveyed all of the title the state then had if any would constitute color of title to support a claim under the five-year limitations. It is not void but only voidable by the senior grantee. Horton v. Halff, (Tex. Civ. A.) 147 SW 735.

94. Weaver v. Love, 146 N. C. 414, 59 SE 1041 (because plaintiff could have taken action to turn the tenant out and stop the running of the statute of limitations).

95. Spellman v. Curtenius, 12 Ill. 409; Basseron v. McRae, 9 La. Ann. 281; Milligan v. Hargrove, 6 Mart. N. S. (La.) 337; Buford v. Bostick, 58 Tex. 63; Wolffarth v. De Lay, (Tex. Civ. A.) 142 SW 617; Garrison v. Arnett, (Tex. Civ. A.) 126 SW 611.

[a] **Reason of rule.**—"A pre-emption claim, until perfected, is not a title defeasible upon the non-performance of conditions subsequent, but is a mere inchoate right which may ripen into a perfect title upon the performance of certain conditions precedent. Neither is it an already existing and certain demand for land, issued by the government upon an executed consideration, as a certificate of headright, land warrant or land script, but is a mere privilege or right of possession, sufficient under the statute, as against all but those holding under a superior right or title, to maintain trespass to try title, but not sufficient to defeat this superior right or title by limitations." Buford v. Bostwick, 58 Tex. 63, 70 (per Bonner, J.).

[b] **Preëmption of titled land.**—(1) A right of preëmption cannot be acquired upon titled land, and such a claim constitutes neither title nor color of title to support the plea of the statute of limitations. Sutton v. Carabajal, 26 Tex. 497; Gilbert v. Harris, (Tex. Civ. A.) 109 SW 392. (2) "No right of pre-emption could be acquired in land already held by a private individual under a patent, or a location and survey upon which he was by law entitled to a patent. Such pre-emption right can only attach to an actual occupation, in accordance with the provisions of law, of vacant land belonging to the state, and subject to pre-emption." Clark v. Smith, 59 Tex. 275, 279.

96. This statute, Tex. Rev. St. art 3341, defines color of title as a consecutive chain of transfer from or under the sovereignty of the soil down to such person in possession, without being regular, as if one or more of the memorials or muniments were not registered, or not duly registered, or were only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty, or where the person in possession shall hold the same by a certificate of headright, land warrant, or land scrip, with a chain of transfer down to him in possession.

97. Morrow v. Conoway, (Tex. Civ. A.) 157 SW 430; Wolffarth v. De Lay, (Tex. Civ. A.) 142 SW 617; Johnson v. Knippa, (Tex. Civ. A.) 127 SW 905; Besson v. Richards, 24 Tex. Civ. A. 64, 58 SW 611 (where it was said that up to the time of completion of occupancy the purchaser of school land holds possession under a contract that contemplates title only upon the performance of certain conditions precedent, independent of the payment of the purchase price).

98. Besson v. Richards, 24 Tex. Civ. A. 64, 58 SW 611. To same effect Pohle v. Robertson, 102 Tex. 274, 115 SW 1166 (holding that an award of school land after it has once been sold and while the sale continues in force has no effect upon the title to the land, either of the state or of the first purchaser, and is not a "transfer" either regular or irregular, such as is required by the statute, because it is insufficient to pass any right or title from the state. This case adopts the reasoning of Clark v. Smith, 59 Tex. 275 [supra § 375 note 95 [b] (2)], a case where the instrument relied on as color of title and deemed to be such was a location of a preëmption claim upon appropriated land, and said: "It may be said with at least equal force that no right can be acquired by an attempt to purchase school land already covered" by an existing deed).

99. Kester v. Rockel, 2 Watts & S. (Pa.) 365. See also Sulphur Mines

does not of itself constitute color of title thereto, although it may be evidence tending to show a claim of title.[1]

[§ 378] **e. Executory Contracts and Bonds for Title.** While there are decisions which hold without any qualification that an executory contract of purchase or bond for title does not constitute color of title, on the ground that such instrument does not purport to convey title,[2] the weight of authority is that such an instrument will give color of title as against all persons whomsoever after payment of the purchase money,[3] especially after he has received a conveyance under a decree of court.[4] On the other hand, according to the fair weight of authority, an executory contract to convey or bond for title does not give color of title before payment of the purchase money as against the vendor,[5] although there is ample authority for the view that it will give color of title against a stranger.[6]

Defective description. An executory contract of

Co. v. Thompson, 93 Va. 293, 25 SE 232 (where it was held that a private survey and map never recorded or referred to, when made a part of the deed under which a person relying on it claims, cannot be considered color of title. Possession under color of title, as distinct from color of title, extends only to that portion of land where all claim is in actual possession).

1. Atkinson v. Patterson, 46 Vt. 750. See also Suit v. Republic Iron, etc., Co., 172 Ala. 101, 55 S 639. Compare Nauerth v. Duke, (Iowa) 79 NW 271 (holding that a recorded plat of land, made by one without title to the land platted, is sufficient basis for a claim of title by adverse possession, and actual, notorious, and adverse possession thereof by the grantees under successive mesne conveyances for more than ten years will vest the title in the adverse claimant as against the grantee of the holder of the patent title).

[a] **Land covered by older survey.**—Where, even if the survey under which defendants in trespass to try title claimed covered the land in controversy, the same was covered by plaintiff's admittedly valid older survey, the three-year statute of limitations would not apply and defendants could acquire no title thereunder, they having no title or color of title, their claim being void. Johnson v. Knippa, (Tex. Civ. A.) 127 SW 905.

[b] **Unauthorized and illegal surveys** cannot be made the basis of a prescriptive title. Melançon v. Bringier, 13 La. Ann. 206. See also Mason v. Calumet Canal, etc., Co., 150 Ind. 699, 50 NE 85 [aff 190 U. S. 452, 23 SCt 651, 47 L. ed. 1134]. Compare Lawrence v. Hunter, 9 Watts (Pa.) 64.

2. U. S.—Osterman v. Baldwin, 6 Wall. 116, 18 L. ed. 730 (where it was held that "an agreement to convey title at some future period, is not color of title, within the meaning of the law," although the purchase price has been paid).

Ala.—Howell v. Henry, 157 Ala. 43, 47 S 132.

Ark.—Beasley v. Equitable Securities Co., 72 Ark. 601, 84 SW 224; White v. Stokes, 67 Ark. 184, 53 SW 1060.

Cal.—Kilburn v. Ritchie, 2 Cal. 145, 56 AmD 326.

Ill.—Smith v. Tucker, 250 Ill. 50, 95 NE 45; Converse v. Calumet River R. Co., 195 Ill. 204, 62 NE 887; Burns v. Edwards, 163 Ill. 494, 45 NE 113; Hardin v. Crate, 78 Ill. 533; Rigor v. Frye, 62 Ill. 507; Dunlap v. Daugherty, 20 Ill. 397.

La.—Clark v. Comford, 45 La. Ann. 502, 12 S 763.

Tenn.—Norris v. Ellis, 7 Humphr. 463; King v. Travis, 4 Hayw. 279; Wilson v. Kilcannon, 4 Hayw. 181; Dale v. Good, 2 Overt. 394. These cases are decided under a statute requiring that the person relying on seven years' possession as a bar must base his claim on a registered conveyance or deed.

3. Ala.—Woods v. Montevallo Coal, etc., Co., 84 Ala. 560, 3 S 475, 5 AmSR 392; Beard v. Ryan, 78 Ala. 37; Farley v. Smith, 39 Ala. 38; Ormond v. Martin, 37 Ala. 598; McQueen v. Ivey, 36 Ala. 308. See however Nashville, etc., R. Co. v. Mathis, 109 Ala. 377, 19 S 384.

Ga.—Fain v. Garthright, 5 Ga. 6. See also Tumlin v. Perry, 108 Ga. 520, 34 SE 171.

Miss.—Benson v. Stewart, 30 Miss. 49. See also Moring v. Ables, 62 Miss. 263, 52 AmR 186; Niles v. Davis, 60 Miss. 750.

N. Y.—Fosgate v. Herkimer Mfg., etc., Co., 12 Barb. 352; Briggs v. Prosser, 14 Wend. 227; La Frombois v. Jackson, 8 Cow. 589, 18 AmD 463; Jackson v. Foster, 12 Johns. 488.

N. C.—Avent v. Arrington, 105 N. C. 377, 10 SE 991.

Pa.—Stroud v. Prager, 130 Pa. 401, 18 A 637.

S. C.—State Bank v. Smyers, 33 S. C. L. 24; Ellison v. Cathcart, 26 S. C. L. 5.

Tenn.—Chandler v. Stockton, 2 Tenn. Ch. A. 488.

Tex.—Lander v. Rounsaville, 12 Tex. 195; Tenzler v. Tyrrell, 32 Tex. Civ. A. 443, 75 SW 57; Craddock v. Burleson, 21 Tex. Civ. A. 250, 52 SW 644.

Vt.—Pearsal v. Thorp, 1 D. Chipm. 92.

Va.—Chesterman v. Bolling, 102 Va. 471, 46 SE 470.

Wis.—Simpson v. Sneclode, 83 Wis. 201, 53 NW 499; Link v. Doerfer, 42 Wis. 391, 24 AmR 417.

See also Miller v. Wireman, 30 SW 517, 25 KyL 2300; Howton v. Gilpin, 69 SW 766, 24 KyL 630; Hornsby v. Davidson, 55 SW 684, 21 KyL 1531.

[a] **Where a bond for title is unconditional and calls for no future payment,** the presumption, in the absence of any evidence to the contrary, is that the price was paid before or at the time of the signing, so that it is color of title. Betts v. Gahagan, 212 Fed. 120.

[b] **Conditional bond for title.**—An instrument in form of a bond for title, with the condition expressed that on the happening of a certain event no title should pass but that the agreement should be rescinded, is not such a deed as is required by a statute of limitations providing that every suit to be instituted to recover real estate as against any person in the peaceable and adverse possession thereof, cultivating, using, or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued. Winters v. Laird, 27 Tex. 616.

[c] **Title bond taken for benefit of another but not assigned.**—A title bond from A to B, taken by B for the benefit of C but never assigned to him, is not sufficient color of title in C to enable him, by claiming thereunder, to protect the title by the statute of limitations as against the paramount paper title. An imperfect equity resting in parol cannot serve a defendant in ejectment as color of title. Roe v. Kersey, 32 Ga. 152.

[d] **A void contract of sale** is not such color of title as will prevent a recovery under the Texas three-year statute of limitations. Green v. Hugo, 81 Tex. 452, 17 SW 79, 26 AmSR 824.

[e] **A written agreement to divide lands** owned or claimed in common, although made by an administrator of one of the tenants in common without order of court for partition thereof, is admissible as color of title. Shiels v. Lamar, 58 Ga. 590; McMullin v. Erwin, 58 Ga. 427. But see Richards v. Williams, 3 Baxt. (Tenn.) 186 (where it was held that seven years' adverse possession of land under a mere written agreement for a division thereof, containing the boundaries but not purporting to vest a fee simple title, is not sufficient to perfect a title).

[f] **What is not an executory contract.**—An instrument purporting to convey land in fee, in consideration of services performed and to be performed, is not a mere executory contract, insufficient as a basis for adverse possession, under the five-year statute. Yarbrough v. Whitman, 50 Tex. Civ. A. 391, 110 SW 471.

4. Chesterman v. Bolling, 102 Va. 471, 46 SE 470.

5. Ala.—Ormond v. Martin, 37 Ala. 598; McQueen v. Ivey, 36 Ala. 308; Seabury v. Doe, 22 Ala. 207, 58 AmD 254.

Ga.—Brown v. Huey, 103 Ga. 448, 30 SE 429; Burdell v. Blain, 66 Ga. 169; Beverly v. Burke, 14 Ga. 70; Stamper v. Griffin, 12 Ga. 450.

Miss.—Louisville, etc., R. Co. v. Gulf of Mexico Land, etc., Co., 82 Miss. 180, 33 S 845, 100 AmSR 627; Moring v. Ables, 62 Miss. 263, 52 AmR 186; Benson v. Stewart, 30 Miss. 49.

N. Y.—Fosgate v. Herkimer Mfg., etc., Co., 12 Barb. 352; Jackson v. Johnson, 5 Cow. 74, 15 AmD 433; Jackson v. Camp, 1 Cow. 605.

Oh.—Woods v. Dille, 11 Oh. 455.

S. C.—Secrest v. McKennan, 27 S. C. Eq. 72.

Tex.—Lander v. Rounsaville, 12 Tex. 195.

W. Va.—McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 SE 508, 62 LRA 562.

Wis.—Furlong v. Garrett, 44 Wis. 111.

See Spitler v. Scofield, 43 Iowa 571.

[a] **The reason for the rule** is that under such instrument the quasi relation of landlord and tenant exists until the purchase money is paid. Beverly v. Burke, 14 Ga. 70; Stamper v. Griffin, 12 Ga. 450.

6. Ga.—Burdell v. Blain, 66 Ga. 169; Fain v. Garthright, 5 Ga. 6. See also Roe v. Kersey, 32 Ga. 152.

S. C.—State Bank v. Smyers, 33 S. C. L. 24.

Tenn.—Brown v. Johnson, 1 Humphr. 261.

Tex.—Ellis v. Le Bow, 96 Tex. 532, 74 SW 528 [aff 30 Tex. Civ. A. 449, 71 SW 576]; Elliott v. Mitchell, 47 Tex. 445 [appr Downs v. Porter, 54 Tex. 59]; Scarborough v. Arrant, 25 Tex. 129; Wille v. Ellis, 22 Tex. Civ. A. 462, 54 SW 922.

W. Va.—McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 SE 508, 62 LRA 562; Adkins v. Purlock, 46 W. Va. 139, 33 SE 121.

And see Jackson v. McCoy, 56 Miss. 781 (holding that an invalid title bond is good color of title as against a stranger. In this case the report does not disclose whether payment of purchase money had been made and presumably the court must have considered payment or the absence of it of no importance).

"Between the parties the possession is not adverse; and as to strangers, what is it to them that the contract has or has not been complied with? It is none the less a holding hostile to them. . . . If I sell to A a boundary of land and put him in possession under written contract binding me to convey that boundary, where is the sense in allowing a hostile claimant, against whom A has held for the statutory period, to say to A, 'You have no legal title or semblance of title?' A should be allowed to present his actual possession and impute it

purchase or bond for title like a deed will not give title if the description of the land is so defective that it cannot be identified,[7] although it is otherwise as to an indefinite description which can be made certain by parol evidence.[8]

[§ 379] **f. Agreements between Cotenants for Partition.** Written agreements between cotenants for the partition of land, by virtue of which possession is taken by each cotenant of his respective share, constitute color of title.[9] And this is so, although the agreement was not under seal,[10] and although no deeds were executed in pursuance of the agreement.[11] So also deeds executed pursuant to such an agreement constitute color of title.[12]

[§ 380] **g. Mortgages.** Possession taken under a mortgage before foreclosure, because of the failure to pay interest due or because of other breaches, is not possession under color of title;[13] but where the mortgage conveys the legal title possession of the mortgagee thereunder is under color of title.[14] In no event, however, is the mortgage color of title so long as the mortgagor retains possession.[15]

[§ 381] **h. Certificates of Purchase—(1) Of Land Sold for Taxes.**[16] A certificate of purchase issued at a tax sale does not purport to convey title and does not constitute color of title,[17] and a tax deed when executed does not relate back to the time of sale so as to confer on the purchaser color of title from such time.[18]

[§ 382] **(2) Of Public Lands.** Certificates of entry or purchase of public lands, of which the consideration has been paid and the purchaser has become entitled to a patent, have been held to confer color of title.[19] Certificates of purchase from the land office, made in accordance with law, operate as an equitable severance of the land from the public domain, and it has been held that they constitute sufficient evidence of title, when accompanied with possession, to form the basis of prescription against the holder of a patent issued subsequently to the acquisition of such prescription.[20]

[§ 383] **(3) At Sheriff's or Judicial Sale.** Certificates of purchase at an execution or attachment sale do not confer color of title,[21] and the same is true with regard to certificates of purchase at judicial sales,[22] and a deed executed in pursuance of

to his vendor's title for color. . . . But if this position be not sound, then I refer to Code, section 20, chapter 90, providing that 'A vendor, or any person claiming under him, shall not at law recover against a vendee, or those claiming under him, lands sold by such vendor to such vendee, when there is a writing stating the purchase, and the terms thereof, signed by the vendor or his agent.' And then, too, I may refer to Code, chapter 98, clause 6, saying tnat no one shall without a writing be chargeable 'upon any contract for the sale of real estate, or of the lease thereof for more than a year.' These statutes give an executory contract for the sale of land validity, operation and effect in all courts, law or equity. The first utterly changes the rule that a vendor can turn out his purchaser. He must now go into equity to enforce his rights according to the contract, and can no longer recover possession at law, whether the purchaser owes for the land or not. . . . Upon these statutes I hold that such a contract is recognized at law even against the vendor to defend the vendee's possession, (though not as color of title, and for a stronger reason has it virtue against a stranger to show color of title) and give bounds to the possession." McNeeley v. South Penn Oil Co., 52 W. Va. 616, 633, 44 SE 508, 62 LRA 562 (per Brannon, J.).

7. Dickson v. Sentell, 83 Ark. 385, 104 SW 148; Priester v. Melton, 123 Ga. 375, 51 SE 330.

8. Tumlin v. Perry, 108 Ga. 520, 34 SE 171.

9. Shields v. Lamar, 58 Ga. 590; Stover v. Stover, 60 W. Va. 285, 54 SE 350.

[a] **Parol partition** between tenants in common, followed by possession in conformity therewith, does not give each cotenant color of title to the entire fee of the part held by him. Sontag v. Bigelow, 142 Ill. 143, 31 NE 674, 16 LRA 326 and note.

[b] **In Louisiana** to enable a person to claim protection under the ten-year statute his claim must be based on an instrument translative of property; a partition between cotenants is insufficient for such purpose. Kernan v. Baham, 45 La. Ann. 799, 13 S 155.

10. Tuttle v. Warren, 153 N. C. 459, 69 SE 426.

11. Edwards v. Chilton, 4 W. Va. 352.

12. Bynum v. Thompson, 25 N. C. 578; Thurston v. North Carolina University, 4 Lea (Tenn.) 513; Duncan v. Gibbs, 1 Yerg. (Tenn.) 256.

13. Johnson v. Davidson, 162 Ill. 232, 44 NE 499.

14. Stewart v. Lowdermilk, 147 N. C. 583, 61 SE 523.

15. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 SE 666.

16. See also infra § 388.

17. U. S.—Davis v. Chapman, 24 Fed. 674; Holden v. Collins, 12 F. Cas. No. 6,599, 5 McLean 189. Compare Wilkes v. Elliot, 29 F. Cas. No. 17,660, 5 Cranch C. C. 611.

Ala.—Nashville, etc., R. Co. v. Mathis, 109 Ala. 377, 19 S 384.

Ark.—Townsend v. Penrose, 84 Ark. 316, 105 SW 588 [disappr dictum Worthen v. Fletcher, 71 Ark. 886, 42 SW 900] (under a statute providing that unimproved and uninclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he have color of title thereto, the deed executed pursuant to the statute being the only evidence of title under a tax sale); Harvey v. Douglass, 73 Ark. 221, 83 SW 946.

Ill.—Harrell v. Enterprise Sav. Bank, 183 Ill. 538, 56 NE 63; Duck Island Club v. Bexstead, 174 Ill. 435, 51 NE 831; Burns v. Edwards, 163 Ill. 494, 45 NE 113; Dickenson v. Breeden, 30 Ill. 279; Bride v. Watt, 23 Ill. 507; Dunlap v. Daugherty, 20 Ill. 397.

Ind.—Barton v. McWhinney, 85 Ind. 481.

Minn.—O'Mulcahy v. Florer, 27 Minn. 449, 8 NW 166.

Mo.—Nye v. Alfter, 127 Mo. 529, 30 SW 186; De Graw v. Taylor, 37 Mo. 310.

Nebr.—Gatling v. Lane, 17 Nebr. 80, 22 NW 453; McKeighan v. Hopkins, 14 Nebr. 361, 15 NW 711.

S. D.—Jackson v. Bailey, 19 S. D. 594, 104 NW 268.

Vt.—Wing v. Hall, 47 Vt. 182. See also Langdon v. Templeton, 66 Vt. 173, 28 A 866.

See Philadelphia Mortg., etc., Co. v. Palmer, 32 Wash. 455, 73 P 501.

See also supra § 362.

Compare Winters v. Hainer, 107 Tenn. 337, 64 SW 44 (holding that the tax certificate is color of title where it describes the land).

18. Holden v. Collins, 12 F. Cas. No. 6,599, 5 McLean 189; Harrell v. Enterprise Sav. Bank, 183 Ill. 538, 56 NE 63; Bride v. Watt, 23 Ill. 507; De Graw v. Taylor, 37 Mo. 310; Wing v. Hall, 47 Vt. 182.

19. U. S.—Texas, etc., R. Co. v. Smith, 159 U. S. 66, 15 SCt 994, 40 L. ed. 77; Cawley v. Johnson, 21 Fed. 492.

Ala.—Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 S 43.

La.—Gay v. Ellis, 33 La. Ann. 249.

Mo.—Hannibal, etc., R. Co. v. Clark, 68 Mo. 371.

Nebr.—Carroll v. Patrick, 23 Nebr. 834, 37 NW 671.

Tex.—Scott v. Rhea, 5 Tex. 258.

[a] **In California** it has been held that a certificate of purchase of swamp land, regular on its face, gives color of title under a statute declaring it "evidence that the holder . . . is the owner of the tract described therein." Goodwin v. McCabe, 75 Cal. 584, 17 P 705.

[b] **In Tennessee** a special entry of land, it has been held, may give color of title to the extent of the calls. Childers v. Ryan, (Ch. A.) 43 SW 126. See also Meriwether v. Vaulx, 5 Sneed 300; Ramsey v. Monroe, 3 Sneed 328.

[c] **Donation certificate.**—Sandel & H. Dig. § 4819, affording protection to a person holding land under a donation deed, affords no protection to one holding under a donation certificate. Hagerman v. Moon, 68 Ark. 279, 57 SW 935.

[d] **An unapproved land certificate** will not relieve the owner entering under it from the character of a mere naked disseizor without color of right. Whitehead v. Foley, 28 Tex. 268.

[e] **An assignment of a certificate of entry of government land,** in terms conveying the same and the land therein described, is a sufficient written instrument on which to found adverse possession, although the purpose of the parties was to make a mortgage and not a conveyance of the title. Pitman v. Hill, 117 Wis. 318, 94 NW 40.

20. Gay v. Ellis, 33 La. Ann. 249.

21. Baird v. Evans, 58 Ga. 350; Field v. Boynton, 33 Ga. 239; Walls v. Smith, 19 Ga. 8; Blount v. Robeson, 56 N. C. 73; Dobson v. Murphy, 18 N. C. 586; West v. Middlesex Banking Co., 33 S. D. 465, 146 NW 598. See however Philadelphia Mortg., etc., Co. v. Palmer, 32 Wash. 455, 73 P 501.

[a] **When the purchaser has paid the purchase money and become entitled to a deed** the rule seems to be otherwise. Neal v. Nelson, 117 N. C. 393, 23 SE 428, 53 AmSR 590.

22. Lightcap v. Bradley, 186 Ill. 510, 58 NE 221; Livingston v. Pendergast, 84 N. H. 544.

[a] **In Washington** a certificate of sale issued to the purchaser at a mortgage foreclosure sale constitutes color of title. Gietter v. Moore, 53 Wash. 5, 101 P 365; Johnson v. Bartlett, 50 Wash. 114, 96 P 833; Cox v. Tompkinson, 39 Wash. 70, 80 P 1005; Olson v. Howard, 38 Wash. 15, 80 P 170; Philadelphia Mortg., etc., Co. v. Palmer, 32 Wash. 455, 463, 73 P 501. In support of this view it was said: "This court . . . has uniformly held that it [the certificate of sale] vested in the purchaser the right to the possession of the land sold against the claim of the owner and every other person except one holding under an unexpired lease

such sales will operate as color of title only from the time of its actual execution and will not relate back for such a purpose to the time of the sale.[23]

[§ 384] **i. Certificates of Delinquency in Payment of Taxes.** A statute providing that a certificate of delinquency in payment of taxes shall have the same effect as a judgment, execution, and sale of the premises included therein, but also providing for foreclosure of the certificate, does not entitle the holder to possession of the land, and possession of the land under such certificate is not under color of title.[24]

[§ 385] **j. Instrument Transferring Remainderman's Right of Possession.** A written document transferring the right of possession of land from a remainderman, although not a formal conveyance and impotent to transfer possession before the life tenant's death, is sufficient upon which to base a claim of right to possession as against all the world except the life tenant and will support title by adverse possession after the life tenant's death.[25]

[§ 386] **k. Wills.** A devise of land may give color of title, possession under which for the statutory period will ripen into a good title by adverse possession.[26] As is the case with deeds,[27] a will, to constitute color of title, must purport to convey the land to the claimant thereunder or to those with whom he is in privity,[28] and should contain such a description of the land that it may be identified.[29] So in some decisions it has been held that the will must have been probated and acted upon as conferring a right.[30] However, it has been held that the fact that the probate of a will was defective will not prevent it from constituting color of title.[30½]

[§ 387] **l. Assignment of Right to Deed.** An assignment of a grantee's right, title, and interest in and to a deed of land does not give color of title.[31]

[§ 388] **m. Receipts.** It has been held that a receipt containing a description of land, issued by the receiver of the land office upon payment of its purchase price to the government, is such a conveyance as is contemplated by a statute requiring an adverse claim to be founded "upon some written instrument as being a conveyance of the premises in question."[32]

[§ 389] **n. Sheriff's or Appraisers' Return.** A

from the time of the sale until redemption . . . the court . . . construed the statutes as giving him all the benefits of ownership. . . . A proceeding which, if valid, will give to an execution purchaser of land a substantial title, as well as all the rights and privileges which follow title, ought, when invalid, if pursued in good faith under a belief and claim of right, to give color of title sufficient to start in motion the statute of limitations."

23. Blount v. Robeson, 56 N. C. 73.

24. Flueck v. Pedigo, 55 Wash. 646, 650, 104 P 1119 (where it was said: "The meaning of this provision is not entirely clear, but it must be construed as a legislative definition of the nature and extent of the tax lien, and nothing more. The very next section of the act provides for a foreclosure of the certificate and a judgment and sale, so that the preceding section cannot be given the force and effect claimed for it. A certificate in and of itself gives the holder no right to the possession of the property therein described, and cannot be made the basis of an adverse claim").

25. Mansfield v. Neff, (Utah) 134 P 1160.

26. Ga.—Harriss v. Howard, 126 Ga. 325, 329, 55 SE 59 [cit Cyc].

Ill.—Peabody v. Burri, 255 Ill. 592, 99 NE 690; Waterman Hall v. Waterman, 220 Ill. 569, 77 NE 142, 4 LRANS 776; Baldwin v. Ratcliff, 125 Ill. 376, 17 NE 794.

Iowa.—Daniels v. Dingman, 140 Iowa 386, 118 NW 373.

La.—Provost v. Provost, 13 La. Ann. 574; Sides v. Nettles, 4 Rob. 170. See also Griffon v. Blanc, 12 La. Ann. 5.

Miss.—Green v. Miselle, 54 Miss. 220.

N. C.—John L. Roper Lumber Co. v. Richmond Cedar Works, 165 N. C. 83, 80 SE 982; McConnell v. McConnell, 64 N. C. 342; Den v. Satterfield, 5 N. C. 413; University Trustees v. Blount, 4 N. C. 455.

Pa.—Holloway v. Jones, 143 Pa. 564, 22 A 710; Stewart v. Stewart, 25 Pa. 234.

S. C.—Love v. Turner, 78 S. C. 513, 59 SE 529; Love v. Turner, 71 S. C. 322, 51 SE 101.

Tenn.—Brown v. Brown, 14 Lea 253, 52 AmR 169; Thurston v. North Carolina Univ., 4 Lea 513; Cox v. Peck, 3 Yerg. 435; King v. Travis, 4 Hayw. 279.

Tex.—Charle v. Saffold, 13 Tex. 94 (where it was held that a will, although void, is color of title when recognized as a legal will by proper authority).

See Gildersleeve v. New Mexico Min. Co., 6 N. M. 27, 27 P 313.

[a] **Although not properly attested** a will may give color of title. McConnell v. McConnell, 64 N. C. 342; Love v. Turner, 71 S. C. 322, 51 SE 101.

[b] **Land to which testator had a mere claim.**—Where the devise is of land "to me belonging and being in the State of Illinois," the will does not give color of title to land to which the testator merely had a claim but which did not belong to him. Holbrook v. Forsythe, 112 Ill. 306.

[c] **Land previously conveyed by testator.**—A will did not, as to land conveyed by the testator the day before his death and on the day on which his will was made, constitute color of title under which a life tenant or remainderman named therein could prescribe against the successors in title of the grantees. Heatley v. Long, 135 Ga. 153, 68 SE 783.

[d] **Will subsequently set aside.**—Where possession has been held for the statutory period under a will duly proved and recorded, it is immaterial that the will is subsequently set aside. Brown v. Brown, 14 Lea (Tenn.) 253, 52 AmR 169.

[e] **The fact that a void will may be introduced in evidence as color of title,** in an action for the possession of real estate, does not show that the will conveyed title. Love v. Turner, 78 S. C. 513, 59 SE 529.

27. See supra § 339.

28. White v. Rowland, 67 Ga. 546, 44 AmR 731 (holding that a will leaving a devise to others than the claimant or those with whom he is in privity does not give color of title); Baker v. Thompson, 214 Mo. 500, 114 SW 497 (holding that where a testator made no adverse claim to land occupied by him, which adjoined his own property, and made no attempt to devise it, although it was at the time inclosed with land actually devised, his devisee acquired from the testator no legal or colorable title to such land).

29. Peabody v. Burri, 255 Ill. 592, 99 NE 690 (holding that mere "devise of all lands belonging to the testator in this state" will not constitute color of title, within the Limitation Law § 6). Waterman Hall v. Waterman, 220 Ill. 569, 77 NE 142, 4 LRANS 776; Anderson v. Meadows, 162 N. C. 400, 78 SE 279. And see Harriss v. Howard, 126 Ga. 325, 55 SE 59 (holding that a will whereby the testator leaves to his sons "all of my lands" contains a sufficient description to operate as color of title to land in the county of his residence to which he had recorded deeds, which formed a part of a plantation known by his name, and of which he died in possession).

30. Rothschild v. Hatch, 54 Miss. 554. See also Harriss v. Howard, 126 Ga. 325, 55 SE 59; Callender v. Sherman, 27 N. C. 711 (where it was held that a paper purporting to be a will of lands which has but one subscribing witness and which has never been proved as a will is not such color of title as will ripen a seven years' possession under it into good title). See however Pettit v. Black, 13 Nebr. 142, 12 NW 841.

"A will is an instrument in writing, and when probated passes title to lands devised therein as effectually as does a deed, and no good reason occurs to us why a will may not be held to be color of title." Baldwin v. Ratcliff, 125 Ill. 376, 384, 17 NE 794.

[a] **A copy, taken from the will book,** of a writing purporting to be a will, but without any evidence that the same had been proved before the proper tribunal, does not constitute color of title. Sutton v. Westcott, 48 N. C. 283.

[b] **Informal order to record will.**—An order to record a will, although informal, will support prescription. It is as translative of property as a donation inter vivos. Clark v. Barham, 4 Mart. N. S. (La.) 411.

[c] **The five-year statute of limitations of Texas** which provides that every suit to be instituted to recover land against any person having visible and adverse possession thereof, cultivating, using, or enjoying the same and paying taxes thereon, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued has no application to wills, and one adversely in possession of land may prescribe under a recorded deed to one who devised the land to him without a muniment record of the will. McLavy v. Jones, 31 Tex. Civ. A. 354, 72 SW 407.

30½. John L. Roper Lumber Co. v. Richmond Cedar Works, 165 N. C. 83, 80 SE 982.

31. King v. Randlett, 33 Cal. 318 (the reason being that title passes by a deed and not by an assignment of a deed to the assignee).

32. Cawley v. Johnson, 21 Fed. 492 (construing Wis. Rev. St. [1898] § 4211).

[a] **"The duplicate receipt of the receiver of any land office,** or, if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver, that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent." Code Civ. Proc. § 411, and is sufficient color

fieri facias with the sheriff's return thereon setting forth levy on land therein described, a sale thereof, and payment of the purchase price will give color of title.[33] So it has been held that the return of appraisers, setting apart real property to a widow as a year's support, is color of title so that where she held notoriously, peaceably, and adversely for seven years she acquired a prescriptive title.[34]

[§ 390] **o. Letter Surrendering Rights.** Where in ejectment defendant relies on adverse possession under color of title, a letter addressed to one under whom defendant claims and signed by one under whom plaintiff claims, surrendering all the rights of the writer to the addressee, shows good color of title.[35]

[§ 391] **p. Notice of Location of Mining Claim.** Under a statute requiring a person claiming title by adverse possession to found his claim on an instrument of writing, a person claiming by adverse possession under notice of the location of a mining claim must have taken the possession thereunder, and the notice must at least purport to convey the property.[36]

[§ 392] **q. Awards.** An award is sufficient to give color of title, although the agreement to submit to arbitration does not constitute an actual submission because the instrument failed to designate the arbitrators, and although there is nothing to show that the persons who signed the award were in fact the persons to whom the matter was submitted.[37]

[§ 393] **4. Parol Gift or Purchase.** As heretofore shown[38] the weight of authority is to the effect that a written instrument is necessary to give color of title, and where this view prevails a vendee or donee in possession under a parol gift or purchase holds without color of title,[39] although his vendor may have what would be color of title in him if he were in possession of the premises.[40] But in jurisdictions where a written instrument is unnecessary a person holding under a parol purchase or gift is considered as holding under color of title.[41]

[§ 394] **5. Judgments or Decrees—a. In General.** Judgments or decrees purporting to vest title under which possession of land is taken constitute color of title,[42] and this is in general true, although the decree or judgment is for any reason irregular or even void.[43] However, as is the case with instruments generally,[44] a judgment or decree does not give color of title where it does not purport to convey

of title under which a person may hold adverse possession. Carroll v. Patrick, 23 Nebr. 834, 847, 37 NW 671.

[b] **A written receipt by a sheriff,** acknowledging payment of the purchase price of certain land at sheriff's sale, is sufficient color of title. Field v. Boynton, 33 Ga. 239.

33. Walls v. Smith, 19 Ga. 8; Neal v. Nelson, 117 N. C. 393, 404, 23 SE 428, 53 AmSR 590 (where the court said: "The trend of judicial opinion is towards the reasonable view that a purchaser, who has paid the price for which he bought whether from a public officer at auction sale or from an individual contractor if he is in the occupation of the land bought, holds it adversely to all the world under any writing that describes the land and defines the nature of his claim"); Doe v. Southard, 10 N. C. 119, 14 AmD 578. Compare Downey v. Murphey, 18 N. C. 82.

34. Stewart v. Jones, 139 Ga. 68, 76 SE 574.

35. Wooding v. Blanton, (Ga.) 37 SE 720.

36. Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 P 113.

37. Fore v. Berry, 94 S. C. 71, 78 SE 706.

38. See supra § 326.

39. Acme Brewing Co. v. Central R., etc., Co., 115 Ga. 494, 42 SE 8; Cook v. Long, 27 Ga. 280; Watson v. Tindal, 24 Ga. 494, 71 AmD 142; Allen v. Mansfield, 108 Mo. 343, 18 SW 901; Golson v. Hook, 35 S. C. L. 23.

[a] **Effect of deed executed subsequently to the taking of possession.**—Where A under a parol gift from B enters into possession of a lot of land and some five years thereafter B executes to A a quitclaim deed to the lot, the title does not relate back so as to constitute adverse possession under color of title from the time when A took possession under the parol gift. Watson v. Tindal, 24 Ga. 494, 71 AmD 142.

40. Acme Brewing Co. v. Central R., etc., Co., 115 Ga. 495, 42 SE 8.

41. Davis v. Davis, 68 Miss. 478, 10 S 70; Niles v. Davis, 60 Miss. 750; Davis v. Bowmar, 55 Miss. 671. But see Magee v. Magee, 37 Miss. 138.

[a] **In Alabama** (1) it is held that a parol sale, gift, or exchange of land will, as between the vendor or donor and the vendee or donee, give color of title so as to entitle the vendee or donee to the benefit of the rule of constructive possession of the whole of a tract from the possession of a part. Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45. (2) Still as against third persons the color of title must be in writing in order to entitle the claimant to the benefit of such rule, and therefore in case of a parol sale or exchange of land the rule as to constructive possession is not applicable. Tennessee Coal, etc., Co. v. Linn, 123 Ala. 134, 26 S 245, 82 AmSR 108; Bell v. Denson, 56 Ala. 444. See also Hawkins v. Hudson, 45 Ala. 482.

42. U. S.—Keener v. Union Pac. R. Co., 31 Fed. 126.

Ala.—Cogsbill v. Mobile, etc., R. Co., 92 Ala. 252, 9 S 512; Mobile, etc., R. Co. v. Gilmer, 85 Ala. 422, 5 S 138.

Cal.—Owsley v. Matson, 156 Cal. 401, 104 P 983; Brind v. Gregory, 120 Cal. 640, 53 P 25; Wilson v. Atkinson, 77 Cal. 435, 20 P 66, 11 AmSR 299; Packard v. Johnson, 4 P 632; Kimball v. Lohmas, 31 Cal. 154.

Ga.—Wardlaw v. McNeill, 106 Ga. 29, 31 SE 785; Salter v. Salter, 80 Ga. 178, 4 SE 391, 12 AmSR 249 (holding that, where a decree has been rendered vesting the title to certain land in a trustee for a wife and her children, possession of the property under the decree is color of title sufficient to support the plea of adverse possession).

Ill.—Peters v. Dicus, 254 Ill. 379, 98 NE 560; Wright v. Stice, 173 Ill. 571, 51 NE 71; Huls v. Buntin, 47 Ill. 396.

La.—Hargrave v. Mouton, 109 La. 533, 33 S 590; Goodwin v. McNeely, 104 La. 19, 28 S 893.

Mo.—Jones v. Thomas, 124 Mo. 586, 28 SW 76.

N. C.—Burns v. Stewart, 162 N. C. 366, 366, 78 SE 321 [cit Cyc].

Tenn.—Southern Iron, etc., Co. v. Schwoon, 124 Tenn. 176, 135 SW 785; Patton v. Dixon, 105 Tenn. 97, 58 SW 299; Whiteside v. Singleton, Meigs 207; Duncan v. Gibbs, 1 Yerg. 256.

W. Va.—Waldron v. Harvey, 54 W. Va. 608, 46 SE 603, 102 AmSR 959.

Compare Bartell v. Kelsey, (Tex. Civ. A.) 59 SW 631.

[a] **A judgment in a petitory action in favor of one holding under a certificate of purchase from the state** is a sufficient basis of prescription of ten years against those claiming under and through those cast in the suit. Hargrave v. Mouton, 109 La. 533, 33 S 590.

[b] **Adverse possession under a probate decree distributing land purchased at a sheriff's sale,** the land being inclosed as provided by Code Civ. Proc. § 323, will bar ejectment by the debtor's heir where such possession has been held for the period prescribed by § 318. Gavin v. Phillips, 12 Cal. A. 34, 106 P 424.

[c] **A railroad company which purchased a line of road, under a judicial decree** ordering a sale of the road and its franchise to satisfy a judgment, and took and retained possession claiming title as against a mortgage executed subsequently to the judgment, which it refused to recognize or pay, held adversely to the mortgagees. Gunnison v. Chicago, etc., R. Co., 117 Fed. 629 [aff 130 Fed. 259, 64 CCA 505].

[d] **A decree confirming a chancery sale and vesting title in the purchaser** is color of title so that adverse possession thereunder for seven years gives title under Shannon Code § 4456. Patton v. Dixon, 105 Tenn. 97, 58 SW 299.

[e] **A decree in divorce proceedings setting apart land to the wife** may confer color of title. Jones v. Thomas, 124 Mo. 586, 28 SW 76.

43. U. S.—Keener v. Union Pac. R. Co., 31 Fed. 126.

Ala.—Cogsbill v. Mobile, etc., R. Co., 92 Ala. 252, 9 S 512; Mobile, etc., R. Co. v. Cogsbill, 85 Ala. 456, 5 S 188.

Cal.—Brind v. Gregory, 120 Cal. 640, 53 P 25; Winterburn v. Chambers, 91 Cal. 170, 27 P 658; Packard v. Johnson, 2 Cal. Unrep Cas. 365, 4 P 632.

Ill.—Reedy v. Camfield, 159 Ill. 254, 42 NE 833; Rawson v. Fox, 65 Ill. 200; Hassett v. Ridgely, 49 Ill. 197; Chickering v. Faile, 38 Ill. 342; Street v. McConnell, 16 Ill. 125.

Mo.—Jones v. Thomas, 124 Mo. 586, 28 SW 76.

Tenn.—Whiteside v. Singleton, Meigs 207.

See also Bustard v. Gates, 4 Dana (Ky.) 429.

[a] **A decree of foreclosure,** (1) it has been held, will give color of title even though it may be void. Reedy v. Camfield, 159 Ill. 254, 42 NE 833; Chickering v. Failes, 26 Ill. 507; Sedwick v. Ritter, 128 Ind. 209, 27 NE 610; Melvin v. Merrimack River Locks, etc., 5 Metc. (Mass.) 15, 38 AmD 384. (2) Thus a decree of foreclosure and a sheriff's sale thereunder, although void as to the holder of the legal title who was not a party thereto, were sufficient to give to the purchaser and those claiming under him color of title. Goodell v. Starr, 127 Ind. 198, 26 NE 793.

[b] **A void judgment of sequestration** may constitute color of title. Jones v. Thomas, 124 Mo. 586, 28 SW 76.

44. See supra § 335.

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title[45] to the land in controversy,[46] or is fatally defective for uncertainty,[47] or for failure to sufficiently describe the land in controversy,[48] or where no claim of title or right of possession is ever founded on it,[49] or where it is vacated and set aside shortly after its entry,[50] or where the judge was not properly judge of the court in which the proceedings were had, not having been selected in any manner known to the laws of the state.[51] So it has been held that a judgment in proceedings to settle the estate of a person who, although represented to be dead, turns out to be alive cannot support a claim by adverse possession under a statute authorizing such claim when founded on "the judgment of some competent court," as the proceedings are void for all purposes.[52]

[§ 395] **b. In Suits for Partition.** Possession under a decree in partition is ordinarily held good color of title, even though the decree is irregular or even void.[53] Possession under partition proceedings, it has been said, is taken under a permanent, written, and recorded muniment of title and constitutes color of title as much as if the parties had made a deed to each other.[54]

[§ 396] **c. In Condemnation Proceedings.** Condemnation proceedings may constitute color of title when possession has been taken and held under them, notwithstanding irregularities of procedure which may render them invalid.[55] But in order for

45. Converse v. Calumet River R. Co., 195 Ill. 204, 62 NE 887; Southern Iron, etc., Co. v. Schwoon, 124 Tenn. 176, 135 SW 785.

[a] **Thus** a judgment of nonsuit in an action of ejectment where the defense is the statute of limitations constitutes no color of title in defendant to the suit. A record in an ejectment suit cannot, as a writing, constitute color of title as it does not even purport to convey any title good or bad. Hickman v. Link, 97 Mo. 482, 10 SW 600. And see Vandiver v. Vandiver, 115 Ala. 328, 22 S 154.

[b] **Proceedings for the assignment of a homestead** do not constitute color of title. Keener v. Goodson, 89 N. C. 273 (the reason being that the assignment of homestead is in no sense a conveyance of land, nor does it profess to pass any title whatever. It creates no new estate but simply attaches to the existing estate a quality of exemption from sale under execution).

46. Horn v. Metzger, 234 Ill. 240, 84 NE 893 (holding that, where a decree of the chancery court operated only to convey to defendant's grantor the share which defendants in that suit took as heirs of their mother and not that part of it which they took as heirs of the younger children, the decree did not constitute color of title to support a claim by adverse possession to the latter part).

47. Hawes v. Elam, 131 Ga. 323, 62 SE 227.

48. Waldron v. Harvey, 54 W. Va. 608, 46 SE 603, 102 AmSR 959.

"The decree, in order to be a color for prescription to run, must on its face cover a description of the property in dispute." Napier v. Little, 137 Ga. 242, 248, 73 SE 3, 38 LRANS 91, AnnCas1913A 1013.

49. Van Matre v. Swank, 147 Wis. 93, 131 NW 982, 132 NW 904.

50. Van Matre v. Swank, 147 Wis. 93, 131 NW 982, 132 NW 904.

51. Wilson v. Palmer, 18 Tex. 592; Latimer v. Logwood, (Tex. Civ. A.) 27 SW 960.

52. Melia v. Simmons, 45 Wis. 334, 30 AmR 746.

53. Cal.—Brind v. Gregory, 120 Cal. 640, 53 P 25.

Ill.—Peters v. Dicus, 254 Ill. 379, 98 NE 560; Carpenter v. Fletcher, 239 Ill. 440, 88 NE 162; Wright v. Stice, 173 Ill. 571, 51 NE 71; Rawson v. Fox, 65 Ill. 200; Hinkley v. Green, 52 Ill. 223; Hassett v. Ridgely, 49 Ill. 197; Chickering v. Faile, 38 Ill. 342; Louvalle v. Menard, 6 Ill. 39, 41 AmD 161.

La.—Ledoux v. Lavedan, 52 La. 311, 27 S 196. But see Kernan v. Baham, 45 La. Ann. 799, 13 S 155 (where it was held that an act of partition cannot serve as a basis for a claim of adverse possession).

Md.—Wickes v. Wickes, 98 Md. 307, 56 A 1017.

N. J.—Den v. Kelty, 16 N. J. L. 517.

N. C.—John L. Roper Lumber Co. v. Richmond Cedar Works, 165 N. C. 83, 80 SE 982 (holding that an allotment in partition is color of title, although all tenants in common are not parties, the proceeding professing to operate on the entire estate in the land as being in the cotenants therein and to pass the entire interest in it); Lindsay v. Beaman, 128 N. C. 189, 192, 38 SE 811 (where it was said: "In partition proceedings between tenants in common no title passes, only the unity of possession is dissolved and title vests in severalty, notice of which is fully given by the record itself—the common source of title resting undisturbed"); Smith v. Tew, 127 N. C. 299, 37 SE 330; Bynum v. Thompson, 25 N. C. 578.

Tenn.—Duncan v. Gibbs. 1 Yerg. 256.

Tex.—Hardin v. Clark, 1 Tex. Civ. A. 565, 21 SW 977.

[a] **Failure to make all tenants parties.**—(1) It has been held that the decree of a proper court making partition purports on its face to convey title and constitutes good color of title, even though some of the tenants in common are not made parties to the suit in which it is rendered. Wright v. Stice, 173 Ill. 571, 51 NE 71. (2) However, under another statute of this state which provides that the title relied on must be "deducible of record, from this State or the United States," mere color of title is not sufficient and a prima facie title is required. Hence a title based on a decree for partition rendered in a suit in which certain persons were not parties and hence not bound is not prima facie title against them and cannot be availed of as a bar under this section. Carpenter v. Fletcher, 239 Ill. 440, 88 NE 162. (3) And in another jurisdiction it has been held that the statute cannot be invoked to sustain the title to land acquired under a judicial sale in a partition suit between strangers to the true title, as against the real owner who was not a party to such suit. Alexander v. Gordon, 101 Fed. 91, 98, 41 CCA 228 (where it was said: "If the purpose of this statute was to devest the title of the owner of land in this way, it is unconstitutional. . . . It would be a proceeding which condemns without hearing, proceeds without inquiry, and renders judgment without trial. It would not be due process of law").

[b] **Description of property.**—Where an administrator applied for leave to sell certain lands to pay his decedent's debts, and defendant claimed the land in controversy by possession under color of title and introduced the record in partition proceedings to show color of title, it was immaterial whether the tract in controversy was embraced in the record or set out in the petition in partition, it appearing that plaintiff's intestate had been present when it was agreed in the partition proceeding that such land should be incorporated in the record. Lindsay v. Beaman, 128 N. C. 189, 38 SE 811.

[c] **Recording decree.**—The five-year statute of limitations of Texas, providing that every suit to be instituted to recover land against any person having visible and adverse possession thereof, cultivating, using, or enjoying the same and paying taxes thereon and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, has no application to an order of court setting apart land to a claimant in possession under partition of land of the ancestor. McLavy v. Jones, 31 Tex. Civ. A. 354, 357, 72 SW 407 (where it was said that such order is not "a deed or a link in the title necessary to be recorded in order to give notice").

[d] **Deed executed pendente lite.**—A deed to certain land sought to be partitioned, executed to a defendant in partition by his codefendants while the proceeding is pending, cannot avail such defendant in acquiring a prescriptive title to the lands so conveyed against plaintiff in the partition proceedings. Christy v. Spring Valley Water Works, 97 Cal. 21, 31 P 1110.

[e] **Devise of land to which testator had no title.**—A partition of land among the devisees under a will which gives to each devisee a fee in the land constitutes an assurance of title, although the testator had in fact no title. Thurston v. North Carolina Univ., 4 Lea (Tenn.) 513.

54. Bynum v. Thompson, 25 N. C. 578.

55. Keener v. Union Pac. R. Co., 31 Fed. 126 (proceedings invalid for want of sufficient notice); Cogsbill v. Mobile, etc., R. Co., 92 Ala. 252, 9 S. 512; Mobile, etc., R. Co. v. Gilmer, 85 Ala. 422, 5 S 138; Mississippi, etc., R. Co. v. Devaney, 42 Miss. 555, 2 AmR 608; Knight v. Grim, 110 Va. 400, 66 SE 42, 19 AnnCas 400. See Hindley v. Manhattan R. Co., 185 N. Y. 335, 78 NE 276.

[a] **Decrees under condemnation for a part of a right of way and the filing and approval of a map** under the act of March 3, 1875 c 152 (18 U. S. St. at L. 482) granting rights of way through unoccupied land constituted color of title. This is "color of title under all definitions of the term." Ainsa v. New Mexico, etc., R. Co., 13 Ariz. 320, 114 P 971.

[b] **In Illinois** because of the peculiar wording of the statute the rule stated in the text does not obtain. It is there held that a condemnation judgment authorizing a railroad company, on payment of damages awarded, to enter upon land and use it for the uses and purposes of its railroad according to law is not, although followed by payment of damages, an entry upon the land, color of title within a statute providing that every person in actual possession of land under color of title shall be adjudged the legal owner to the extent of his paper title, since the question of payment of compensation to make the title complete must be established by parol. Converse v. Calumet River R. Co., 195 Ill. 204, 62 NE 887 [dist Cogsbill v. Mobile, etc., R. Co., 92 Ala. 252, 9 S 512, on the ground that the Alabama statute does not provide that such possession shall be held under paper title, and Keener v. Union Pac. R. Co., 31 Fed. 126, on the ground that it was decided under a statute providing that the ownership of land shall be adjudged to the extent and according to the purport of his "proper" title instead of "paper" title, as in Illinois]. And see Chicago, etc., R. Co. v. Abbott,

the judgment or decree to constitute color of title it is essential that it should describe the land[56] and purport to convey title,[57] and that a final order should have been entered confirming the commissioners' report and reciting that the damages have been paid, and limitations do not start to run until such order.[58] Occupation under irregular condemnation proceedings which did not in any manner indicate the bounds of the proposed right of way or the quantity of land to be appropriated is confined to the pedis possessio, and such proceedings do not give color of title.[59]

[§ 397] **6. Statutes.** An act of the legislature may give color of title, although unconstitutional,[60] and a writing which purports to be made in accordance with a statute enacted for the relief of persons whose title deeds have been destroyed will have the same effect.[61]

[§ 398] **7. Vote or Ordinance.** The vote of a town to convey land according to an ordinance in a warrant for a town meeting, accompanied by entry in pursuance of the vote, has been held to constitute color of title.[62]

[§ 399] **8. Descent Cast.**[63] A title by descent cast is color of title. So, where a person dies in possession of land and the possession is continued by his heirs, their possession is under color of title;[64] this is true, although the ancestor held under a mere claim of right and without color of title himself,[65] and where the ancestor had title the heir has color of title, although the ancestor was not in possession.[66] Nevertheless an heir cannot inherit color of title, and hence after the ancestor's death his heir cannot avail himself of colorable title consisting of a paper writing made to his ancestor when the latter refused or failed to claim any rights under it himself.[67]

[§ 400] **9. Sale without Deeds.** A mere sale with or without order of court, and without a deed executed in pursuance thereof[68] and actually delivered,[69] does not constitute color of title.

[§ 401] **D. Time of Vesting of Color of Title.** Although a person who has entered on land without color of title may, by a subsequent transaction, acquire color of title which will place him in the same legal position as though his original entry had been under color of title,[70] still his color of title does not relate back to the time of his entry, but he is to be considered as holding under color of title only from the time he acquired such color of title.[71] The claimant of land under a tax deed has color of title only from the date of deed and not from date of sale.[72]

[§ 402] **E. Divestiture of Color of Title.** A

215 Ill. 416, 74 NE 412 [cit Converse v. Calumet River R. Co., 195 Ill. 204, 62 NE 887]. In this case a commissioner's report, in condemnation proceedings for a railroad right of way, recited the taking and allowing for use of the railroad for right of way a strip one hundred feet wide and for a side track connecting the main track of the railroad with that of the T railroad a strip sixteen feet wide, and that the commissioners assessed the damages in the following manner, followed by an entry: "Name of owners, Franklin Anderson; description of lot and land, east half section 35, T. 6, N., R. 7, W.; No. of acres, ———; amount of damages, none." It was held that such proceedings constituted neither evidence of title nor color of title sufficient to support a claim to the land by limitation.

[c] **Receipt for money paid in satisfaction.**—A receipt for money paid in satisfaction of a judgment condemning land for a railroad right of way, which does not describe the particular property or purport to convey title, is not color of title in the railroad company, and it cannot acquire title under the seven-year statute of limitations. Illinois Cent. R. Co. v. Noyes, 252 Ill. 178, 96 NE 830.

56. Illinois Cent. R. Co. v. Noyes, 252 Ill. 178, 96 NE 830.

57. Illinois Cent. R. Co. v. Noyes, 252 Ill. 178, 96 NE 830.

58. Knight v. Grim, 110 Va. 400, 404, 66 SE 42, 19 AnnCas 400 (where it was said: "The taking of private property . . . would be facilitated far beyond the inhibitions of the law if the mere filing of a petition to condemn and the entry of an order appointing commissioners to ascertain the damage in a proceeding to which the owners were not parties, stating that the property was needed for public purposes, would give color of title. There would be little protection for property rights under such circumstances").

59. Ryan v. Mississippi Valley, etc., R. Co., 62 Miss. 162.

60. Doe v. Newbern Academy, 9 N. C. 233.

[a] **Statutes assuming to give right of way.**—Acts of the legislature attempting to convey to railroads rights of way across land, all rights of the state in which were afterward conveyed to a city, whether or not within the provisions of the constitution as to appropriation of public property for private purposes, were not utterly void or nugatory but were at least effective to prevent the railroad from being naked trespassers and their tracks nuisances, so that being continued in open possession thereof for more than fifty years, claiming title under such acts, the railroads acquired title. Pryor v. Buffalo, 197 N. Y. 123, 90 NE 423 [aff 134 App. Div. 911 mem, 118 NYS 1136 mem (mod 61 Misc. 162, 113 NYS 249)].

[b] **Charter of railroad company.**—A railroad company authorized by its charter to acquire lands in fee to a certain width for its right of way, which constructs its road across the land of a certain owner and maintains it for nearly twenty years without instituting condemnation proceedings and without any objection or claim for damages ever being made by such owner, thereby acquires title to a strip of the full width defined by its charter, and not merely of the width actually used by it. Prather v. Western Union Tel. Co., 89 Ind. 501.

61. Kron v. Hinson, 53 N. C. 347.

62. Copp v. Neal, 7 N. H. 275. Compare Beaufort v. Duncan, 46 N. C. 234 (where it was held that a town ordinance not under seal of the corporation, not expressing a consideration, and not delivered to the persons claiming under it, does not give color of title).

63. **Civil-law rule.**—An ex parte order of court, recognizing one as heir of another and putting him in possession of his succession, is not such title as will enable him to plead the prescription of ten years, under color of title, against an attack of his creditors. Lampton's Succ., 35 La. Ann. 418.

64. Ill.—Peadro v. Carriker, 168 Ill. 570, 48 NE 102.

Iowa.—Teabout v. Daniels, 38 Iowa 158; Hamilton v. Wright, 30 Iowa 480.

Mich.—Miller v. Davis, 106 Mich. 300, 64 NW 338.

N. C.—Barrett v. Brewer, 153 N. C. 547, 69 SE 614.

Tenn.—King v. Rowan, 10 Heisk. 675; Hubbard v. Wood, 1 Sneed 279.

Tex.—Whitehead v. Foley, 28 Tex. 1; Williamson v. Simpson, 16 Tex. 433; Kennon v. Miller, (Civ. A.) 143 SW 986.

N. S.—Smyth v. McDonald, 5 N. S. 274.

65. Teabout v. Daniels, 38 Iowa 158; Hamilton v. Wright, 30 Iowa 480. Compare Nicklace v. Dickerson, 65 Ark. 422, 46 SW 945.

[a] **Necessity for continued possession by heir.**—Under the mere possessory right, without color of title, of a person in possession under a parol gift of land, there can be no such thing as constructive possession, which is dependent on title, and, on the death of the occupant, his heir takes no interest in the land unless he continues the actual possession. Brown v. Watkins, 98 Tenn. 454, 40 SW 480.

66. Miller v. Davis, 106 Mich. 300, 64 NW 338.

67. Barrett v. Brewer, 153 N. C. 547, 69 SE 614 (where it was said that the entry should be made and claim of title first asserted by the person to whom the colorable instrument was made, and that if he did not see fit to do so in his lifetime no one could do it after his death under his color of title. "Without the possession the colorable instrument is but worthless paper").

68. Comer v. Hart, 79 Ala. 389; Baird v. Evans, 58 Ga. 350; Livingston v. Pendergast, 34 N. H. 544. Compare Hall v. Bowman, 90 SW 1051, 28 KyL 1004.

[a] **Title by two years' adverse possession under a tax sale,** Sandel & H. Dig. § 4819, contemplates possession under a deed, and an answer in ejectment merely alleging such possession under a purchase is insufficient. Harvey v. Douglass, 73 Ark. 221, 83 SW 946; McCann v. Smith, 65 Ark. 305, 45 SW 1057; Helena v. Hornor, 58 Ark. 151, 23 SW 966; Gates v. Kelsey, 57 Ark. 523, 22 SW 162.

[b] **Administrator's sale.**—The sale, by the administrator of a solvent estate, of the land of his intestate under a license from the court of probate is no title or color of title to the purchaser unless accompanied by a deed or conveyance from the administrator. Livingston v. Pendergast, 34 N. H. 544.

69. Cowling v. Nelson, 76 Ark. 146, 88 SW 913.

70. Kendrick v. Latham, 25 Fla. 819, 6 S 871; Buckley v. Taggart, 62 Ind. 236; Dean v. Goddard, 55 Minn. 290, 56 NW 1060; Hawkins v. Richmond Cedar Works, 122 N. C. 87, 30 SE 13.

71. Robbins v. Moore, 129 Ill. 30, 21 NE 934; Cooper v. Ord, 60 Mo. 420.

72. Holden v. Collins, 12 F. Cas. No. 6,599, 5 McLean 189; DeGraw v. Taylor, 37 Mo. 310. See also Langdon v. Templeton, 66 Vt. 173, 28 A 866.

claimant in possession may, by acts on his part or by act of law, lose his color of title. Thus, where a person in possession of land under color of title conveys to a third person, although he remains in possession, he cannot be considered as holding under color of title.[73] So color of title may be as effectually divested by judgment or decree of court,[74] or by sale thereunder,[75] as by a conveyance executed by the party himself, and a sale under a power contained in a mortgage has the same effect.[76] So color of title is divested by adverse possession of another for the statutory period before the person holding color of title goes into possession.[77] It has been held that where the statute of limitations operated in favor of a devisee, and the will under which the devisee held possession was subsequently set aside, it did not divest the devisee of the rights acquired by the statute.[78]

X. GOOD FAITH

[§ 403] **A. As an Element of Color of Title.** There is a conflict of authority as to whether good faith is an element of color of title. According to some decisions, to constitute color of title for the purpose of asserting any right thereunder against the true owner the deed or paper upon which it is sought to be based must have been obtained in good faith.[79] In other decisions the contrary view is maintained.[80]

[§ 404] **B. As an Element of Adverse Possession—1. In General.** Whether or not title by adverse possession can be acquired without good faith on the part of the claimant is a subject on which there is great conflict of authority "of such long standing and in respect to so many phases of the question, that it is useless to try to reconcile the various adjudications."[81] In a number of decisions the courts, without mentioning any statute, apparently lay down the doctrine without qualification that to perfect title by adverse possession such possession must have been held in good faith on the part of the claimant.[82]

[§ 405] **2. Land Actually Occupied.** The weight of authority, however, is that to acquire title to land

73. Ariz.—Goldman v. Sotelo, 8 Ariz. 85, 68 P 558.

Ill.—Hawley v. Hawley, 187 Ill. 351, 58 NE 332; Lightcap v. Bradley, 186 Ill. 510, 58 NE 221; Sholl v. German Coal Co., 139 Ill. 21, 28 NE 748; Heacock v. Lubuke, 107 Ill. 396.

Md.—Hackett v. Webster, 97 Md. 404, 55 A 480.

N. C.—Johnson v. Farlow, 35 N. C. 84. See also Everett v. Smith, 44 N. C. 303.

Tex.—Bullock v. Smith, 72 Tex. 545, 10 SW 687; Voight v. Mackle, 71 Tex. 78, 8 SW 623; Doom v. Taylor, 35 Tex. Civ. A. 251, 79 SW 1086 (tax sale); Mass v. Bromberg, 28 Tex. Civ. A. 145, 66 SW 468. See also Harris v. Hardeman, 27 Tex. 248.

See also Gower v. Quinlan, 40 Mich. 572.

"It is absurd to suppose, that the deed, under which he had originally acquired the land, could serve his purpose as color of title, after he had passed all of his estate, interest, and claim under it." Johnson v. Farlow, 35 N. C. 84, 85.

[a] **Subsequent repurchase of land.**—In McDonald v. McIsaac, 38 N. S. 163, defendant sold to plaintiff's creditor a four-acre lot out of a larger tract of land which he had acquired by devise. Subsequently thereto a creditor of the testator obtained a judgment against his executor, and the land, including the lot in question, was sold to G who conveyed a portion of it to defendant, including the lot. It was held by a divided court that possession by defendant of a portion of the land conveyed to him, not including the lot in question, would not have the effect of establishing a claim by color of title to the lot so as to defeat plaintiff's title.

74. Marsh v. Weir, 21 Tex. 97; Stewart v. Stewart, 83 Wis. 364, 53 NW 686, 35 AmSR 67. See also Lebanon Min. Co. v. Rogers, 8 Colo. 34, 5 P 661.

75. Wilson v. Brown, 134 N. C. 400, 46 SE 762.

[a] **A foreclosure sale under a mortgage** executed by the claimant divests him of any color of title which he may have had (Call v. Dancy, 144 N. C. 494, 57 SE 220), and that too although the decree was erroneous (Sholl v. German Coal Co., 139 Ill. 21, 28 NE 748).

[b] **An execution sale divests defendant of all his title,** (1) and his possession after the sale is without color of title (Wilson v. Brown, 134 N. C. 400, 46 SE 762); (2) therefore, where he remained in possession of a part of the tract sold, he will not be deemed to be constructively in possession of the balance of the tract (Thomasson v. Keaton, 1 Sneed (Tenn.) 155). Compare Gaines v. Saunders, 87 Mo. 557 (holding that where a defendant in an execution denies the validity of the sale of land thereunder and subsequently enters on and holds the premises adversely, the patent and deeds under which he held before the sale are sufficient to give color of title in aid of such adverse possession).

76. Call v. Dancy, 144 N. C. 494, 57 SE 220.

77. Smith v. Bunch, 31 Tex. Civ. A. 541, 73 SW 559.

78. Rogers v. Winton, 2 Humphr. (Tenn.) 177.

79. Iowa.—Lindt v. Uihlein, 116 Iowa 48, 89 NW 214; Smith v. Young, 89 Iowa 338, 56 NW 506.

Md.—Baker v. Swan, 32 Md. 355 (holding that "the paper title to give color of title must be so far prima facie good in appearance as to be consistent with the idea of good faith").

N. J.—Foulke v. Bond, 41 N. J. L. 527, 542 (where it was said: "A party cannot have the advantage of an entry under color of title unless his deed, which gives colorable title, was obtained bona fide. If obtained by fraud or with knowledge that the grantor had no title to convey, the deed will avail the grantee nothing").

N. Y.—Crary v. Goodman, 22 N. Y. 170, 177 (where it is said that "a deed fraudulently obtained is a nullity, and gives to the fraudulent grantee not even a colorable title").

S. D.—West v. Middlesex Banking Co., 33 S. D. 465, 146 NW 598 (holding that color of title cannot be relied on to claim land by adverse possession if claimant knows that the color of title is worthless).

Can.—Meloche v. Simpson, 29 Can. S. C. 375. See McIsaac v. McDonald, 37 Can. S. C. 156, 161 (where it was said by Idington, J.: "In the definition of constructive possession good faith is sometimes included, and in any event is one of the elements it must rest upon").

And see supra § 368.

[a] **Application of rule.**—The rule has been applied in the case of one holding under a deed given in payment for liquors intended to be sold in violation of law. Lindt v. Uihlein, 116 Iowa 48, 80 NW 214.

80. See cases infra this note.

[a] **Thus** an instrument possessing such characteristics as bring it within the definition of color of title as fixed by law is color of title without regard to the good or bad faith of the claimant or without reference to the fact whether or not he knew of the defects. Lee v. O'Quin, 103 Ga. 355, 30 SE 356; Hardin v. Gouveneur, 69 Ill. 140.

[b] **In a number of cases it has been inaccurately said** that a deed purporting to convey title is claim and color of title made in good faith. Such a deed is undoubtedly color of title, and, having been received by the grantee and acted under as though it conveyed title, such action implies claim of title. Hardin v. Gouveneur, 69 Ill. 140.

81. Lampman v. Van Alstyne, 94 Wis. 417, 426, 69 NW 171 (from which case it seems that this conflict is due in a measure, but not altogether, to the difference in the wording of the various statutes of limitation, the court saying: "The rule that good faith in respect to the validity of the claim of title must characterize the entry and possession is still held in some jurisdictions; in others, it is held that good faith only applies to constructive possession; and in still others, while the element is held to be indispensable, it is so limited as to be practically done away with").

82. U. S.—Ochoa v. Hernandez, 230 U. S. 139, 33 SCt 1033, 57 L. ed. 1427 [aff 5 Porto Rico Fed. 463] (holding that good faith is an element of adverse possession under Porto Rico Civ. Code art 1957).

Ind.—Pennington v. Flock, 93 Ind. 378; Moore v. Worley, 24 Ind. 81.

Iowa.—Goulding v. Lhonquist, 141 NW 24; Litchfield v. Sewell, 97 Iowa 247, 66 NW 104; Smith v. Young, 89 Iowa 338, 56 NW 506; Close v. Samm, 27 Iowa 503; Jones v. Hockman, 12 Iowa 101.

N. Y.—Livingston v. Peru Iron Co., 9 Wend. 511.

Philippine.—Santiago v. Cruz, 19 Philippine 145; Arriola v. Gomez, 14 Philippine 627.

Porto Rico.—Dexter v. Arzuaga, 4 Porto Rico Fed. 344 (under statute).

Tex.—Jones v. Weaver, (Civ. A.) 122 SW 619.

See Johns v. Johns, 244 Pa. 48, 90 A 535.

[a] **Decisions under the civil law.**—According to the law in force in Mobile while under the dominion of Spain prescription must rest on "good faith and just title." Kennedy v. Townsley, 16 Ala. 239. See also Salle dit Lajoye v. Primm, 8 Mo. 529 (which is apparently decided under a civil statute to the same effect).

[b] **In Louisiana** good faith is necessary to acquire title by the ten years' statute of prescription. Abshire v. Lege, 123 La. 254, 62 S 667.

actually occupied good faith is not necessary.[83] As was said in a recent decision: "The question of the good or bad faith of the transaction . . . is not material, provided the intention is to take and hold possession adversely."[84]

[§ 406] **3. Where Possession Is Constructive.** There is also much conflict of authority as to whether good faith is necessary where the person is holding under color of title and claims constructive possession to the boundaries named in the deed. In some jurisdictions it is held necessary, under statutes requiring good faith either in totidem verbis or in language which cannot be otherwise construed;[85] and in other jurisdictions it seems to be necessary, although no statutes are mentioned as requiring it.[86] On the other hand there are decisions which hold that in the absence of a statute expressly requiring good faith it is not necessary, even where the person is claiming under color of title and seeking to acquire constructive possession to the extent of the boundaries in his conveyance.[87] These decisions proceed upon the theory that, as good faith is not expressly required by the statutes, the courts cannot impair their purpose by injecting into them, by judicial construction, elements which are not there; that if the legislature has made no exception the courts can make none.[88]

[§ 407] **4. Possession Commenced in Good Faith and Continued in Bad Faith.** By the express provisions of the Louisiana statute good faith when the possession began suffices. Subsequent bad faith does not prevent prescription[89] or in any way impair the

83. U. S.—Alexander v. Pendleton, 8 Cranch 462, 3 L. ed. 624.

Ala.—Vandiveer v. Stickney, 75 Ala. 225; Smith v. Roberts, 62 Ala. 83; Bohannan v. Chapman, 13 Ala. 641.

Ind.—May v. Dobbins, 166 Ind. 331, 77 NE 353.

Mass.—Warren v. Bowdran, 156 Mass. 280, 31 NE 300.

Mo.—Wilkerson v. Eilers, 114 Mo. 245, 21 SW 514; Bradley v. West, 60 Mo. 33.

N. Y.—Humbert v. Trinity Church, 24 Wend. 587 [limiting Livingston v. Peru Iron Co., 9 Wend. 511, to cases in which constructive possession is in question].

S. C.—Strange v. Durham, 3 S. C. L. 83 (where it was held that where the possession is in fact adverse a person is entitled to the protection of the statute of limitations, although he may have tried to deceive the proprietor of the land into the belief that he did not intend to claim adversely).

Tex.—Kinney v. Vinson, 32 Tex. 125.

W. Va.—Jones v. Lemon, 26 W. Va. 629.

Wis.—Pitman v. Hill, 117 Wis. 318, 94 NW 40; Lampman v. Van Alstyne, 94 Wis. 417, 69 NW 171; McMillan v. Wehle, 55 Wis. 685, 13 NW 694. See also Hacker v. Horlemus, 69 Wis. 280, 34 NW 125; North v. Hammer, 34 Wis. 425.

[a] **It is a sufficient claim of title** that the entry of the disseizor is hostile to all the world and that he intends to hold the land as his own and does so hold it for the statutory period of limitation. Chicago, etc., R. Co. v. Groh, 85 Wis. 641, 55 NW 714.

[b] **In Washington** it has been held otherwise. One may not go on the land of another and acquire title by occupancy where he has neither color of title nor claim of right made in good faith. Ramsey v. Wilson, 52 Wash. 111, 100 P 177.

84. Bayles v. Daugherty, 77 Ark. 201, 203, 91 SW 304 (per McCulloch, J.). "The running of the statute may be instituted . . . without reference to the good or bad faith of the adverse claim." May v. Dobbins, 166 Ind. 331, 333, 77 NE 353 (per Montgomery, J.). "Title by adverse possession may be acquired regardless of the good faith of the claimant, if accompanied by even a pretense, commonly known as a claim of title." Gardner v. Wright, 49 Or. 609, 627, 91 P 286 (per King, C.).

85. Colo.—Dussart v. Abdo Mercantile Co., 140 P 806; Silford v. Hayes, 54 Colo. 255, 130 P 330; Silford v. Stratton, 54 Colo. 248, 130 P 327; Warren v. Adams, 19 Colo. 515, 36 P 604; Arnold v. Woodward, 14 Colo. 164, 23 P 444; Lebanon Min. Co. v. Rogers, 8 Colo. 34, 5 P 661 (all under a statute expressly requiring possession under "color of title in good faith").

Ga.—Baxley v. Baxley, 117 Ga. 60, 43 SE 436; Lee v. O'Quin, 103 Ga. 355, 30 SE 356; Carstarphen v. Holt, 96 Ga. 703, 23 SE 904; Lane v. Lane, 87 Ga. 268, 13 SE 335; Lee v. Ogden, 83 Ga. 325, 10 SE 349; Cowart v. Young, 74 Ga. 694; Hunt v. Dunn, 74 Ga. 120; McMullin v. Erwin, 58 Ga. 427; Brown v. Wells, 44 Ga. 573 (all under a statute providing that "the possession must not have originated in fraud").

Ill.—Kirby v. Kirby, 236 Ill. 255, 86 NE 259; Guertin v. Mombleau, 144 Ill. 32, 33 NE 49; Orthwein v. Thomas, 127 Ill. 554, 21 NE 430, 11 AmSR 159, 4 LRA 434; Cooter v. Dearborn, 115 Ill. 509, 4 NE 388; Hardin v. Gouveneur, 69 Ill. 140; Dalton v. Lucas, 63 Ill. 337; Morrison v. Norman, 47 Ill. 477; McCagg v. Heacock, 42 Ill. 153; Stearns v. Gittings, 23 Ill. 387 (all under a statute providing that good faith as well as color of title is necessary to acquire title under the seven-year statute of limitations).

La.—Gary v. Landry, 122 La. 29, 47 S 124; Wells v. Blackman, 121 La. 394, 46 S 437; Bennett v. Calmes, 116 La. 598, 40 S 911; Messi v. Frechede, 113 La. 679, 37 S 600; Green v. Moore, 44 La. Ann. 855, 11 S 223; Clemens v. Meyer, 44 La. Ann. 390, 10 S 797; Guilbeau v. Thibodeau, 30 La. Ann. 1099; Calmes v. Duplantier, 14 La. Ann. 814; Edwards v. Ballard, 14 La. Ann. 362; McCluskey v. Webb, 4 Rob. 201; Eastman v. Beiller, 3 Rob. 220; Verret v. Theriot, 15 La. 106; Morand v. New Orleans, 5 La. 226; Plauche v. Gravier, 7 Mart. N. S. 518; Bonne v. Powers, 3 Mart. N. S. 458; Carrel v. Cabaret, 7 Mart. 375 (all under the five and ten year statutes of Louisiana, which require prescription to be based on a just title and to commence in good faith).

Tex.—Hussey v. Moser, 70 Tex. 42, 7 SW 606; Texas Land Co. v. Williams, 51 Tex. 51; Allen v. Root, 39 Tex. 589; Hicks v. Hicks, (Civ. A.) 26 SW 227; Cuellar v. Dewitt, 5 Tex. Civ. A. 568, 24 SW 671 (all under the three-year statute of limitations providing that the muniment of title shall not be wanting "in intrinsic fairness and honesty").

Wash.—May v. Sutherlin, 41 Wash. 609, 84 P 585 (under statute providing for actual and notorious possession of lands under claim and color of title made in good faith). And see Biggart v. Evans, 36 Wash. 212, 78 P 925.

Can.—Chalifour v. Parent, 31 Can. S. C. 224; Meloche v. Simpson, 29 Can. S. C. 375.

[a] **Deed obtained by fraud.**—The deed relied upon to give color of title must have been obtained bona fide. If procured by fraud, or if the grantee who relies on it to sustain his adverse possession is aware that his grantor had no title to convey, the deed will avail him nothing. Dem v. Hunt, 20 N. J. L. 487.

86. Gregg v. Sayre, 8 Pet. (U. S.) 244, 8 L. ed. 932; Cannon v. Union Lumber Co., 38 Cal. 672; Walsh v. Hill, 38 Cal. 481; Kile v. Tubbs, 23 Cal. 431; Hunter v. Wethington, 205 Mo. 284, 103 SW 543, 12 AnnCas 529; Wilkerson v. Eilers, 114 Mo. 245, 21 SW 514; Gaines v. Saunders, 87 Mo. 557; Mylar v. Hughes, 60 Mo. 105; Foulke v. Bond, 41 N. J. L. 527; Dem v. Hunt, 20 N. J. L. 487. See also Abercrombie v. Baldwin, 15 Ala. 363.

[a] **The rule laid down by these decisions has been well expressed** as follows: "A party, who sets up an adverse possession under color of title, must act bona fide, or in other words he must be honest. He must believe his deed to be valid in law and that it conveys to him a good title to the land, although it may turn out that another person has a better title." Dem. v. Hunt, 20 N. J. L. 487, 493.

87. U. S.—Oliver v. Pullam, 24 Fed. 127.

Mich.—Dawson v. Falls City Boat Club, 136 Mich. 259, 99 NW 17, 112 AmSR 363.

N. C.—Den v. Leggat, 7 N. C. 539.

Tenn.—York v. Bright, 4 Humphr. 312; Love v. Shields, 3 Yerg. 404.

Wis.—Hatch v. Lusignan, 117 Wis. 428, 94 NW 332; Pitman v. Hill, 117 Wis. 318, 94 NW 40; Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 48 LRA 830; McCann v. Welch, 106 Wis. 142, 148, 81 NW 996 (where Dodge, J., said: "The requirement of good faith in the few cases supporting it is in disregard or forgetfulness of the real purpose of statutes of adverse possession"); Lampman v. Van Alstyne, 94 Wis. 417, 69 NW 171 [overr Woodward v. McReynolds, 2 Pinn. 268, 1 Chandl. 244; Whitney v. Powell, 2 Pinn. 115, 1 Chandl. 52; and disappr dictum Watts v. Owens, 62 Wis. 512, 22 NW 720].

The sole test of adverse holding under the statute is whether the true owner is actually disseized for the limitation period. "Actual occupancy of land to the exclusion of the true owner, regardless of whether in good faith or bad faith . . . satisfies the calls of the statute. Such adverse possession of part of a tract under color of title, with intent to claim the whole, in legal effect extends to the boundaries of the tract." Ovig v. Morrison, 142 Wis. 243, 247, 125 NW 449 (per Marshall, J.).

[a] **Notice of outstanding claim subsequently acquired.**—The grantee being at the grantor's death in possession and holding adversely to the remainderman under color of title asserted in good faith, the fact that he afterward received notice of the remainderman's claim of superior title does not interrupt his adverse possession so as to defeat his claim, the evidence not showing that he ever recognized such superior title. Barrett v. Stradl, 73 Wis. 385, 41 NW 439, 9 AmSR 795.

88. See cases supra note 87.

89. Gaines v. Agnelly, 9 F. Cas. No. 5,173, 1 Woods 238; Wilfert v. Duson, 131 La. 21, 58 S 1019; Bennett v. Calmes, 116 La. 598, 40 S 911; Brewster v. Hewes, 113 La. 45, 36 S 883; Boagni v. Pacific Imp. Co., 111 La. 1063, 36 S 129; Barrow v. Wilson, 38 La. Ann. 209; Devall v. Choppin, 15 La. 566; Merrick Civ. Code La. art 3482.

efficacy of such possession as a ground of prescription.[90]

[§ 408] **5. Predecessor's Bad Faith.** As a general rule the rights of an adverse claimant who has held for the statutory period are not in any way affected by the bad faith of his grantor in acquiring title where he had no knowledge or notice of any of the facts from which the bad faith might be implied.[91] Bad faith cannot be imputed to a purchaser of land held under a tax title which may have been acquired in bad faith, where the purchaser was ignorant of the bad faith, if any.[92] He cannot, however, tack to his own possession the possession of a predecessor holding under color of title acquired in bad faith in order to make up the period of prescription.[93]

[§ 409] **C. What Constitutes Good Faith—1. In General.** The faith of the holder of color of title, whether good or bad, depends upon the purpose for which he acquired it and the reliance placed upon it.[94] Good faith is the opposite of bad faith or fraud[95] and means nothing more or less than that the person honestly believes that he has acquired a good title,[96] although upon investigation it proves otherwise.[97] In determining whether a person did or did not so believe, weight is to be given to the particular circumstances of each case.[98]

[§ 410] **2. Knowledge of Defects in Title.** Mere

90. Gaines v. Agnelly, 9 F. Cas. No. 5,173, 1 Woods 238.

91. Hammond v. Crosby, 68 Ga. 767; Ross v. Central R., etc., Co., 59 Ga. 299, 53 Ga. 371; Lewis v. Pleasants, 143 Ill. 271, 30 NE 323, 32 NE 384; Bowman v. Wettig, 39 Ill. 416; Moore v. Hinkle, 151 Ind. 343, 50 NE 822; Munson v. Hallowell, 26 Tex. 475, 84 AmD 582.

[a] **Thus** a deed executed by a tenant on the purchase by him of the landlord's title at an assessment sale cannot be impeached as color of title in the hands of a bona fide purchaser, although the tenant was acting for the owner in the purchase. Hilton v. Bender, 2 Hun 1, 4 Thomps. & C. 270 [rev on other grounds 69 N. Y. 75].

[b] **Rule under the Louisiana statute.**—(1) Merrick Civ. Code art 3482, provides, in regard to the five and ten year statutes of limitations which require good faith, that it is sufficient if the possession has commenced in good faith. If the possession should afterward be held in bad faith, that shall not prevent prescription. Under this statute the ten-year statute cannot prevail where it appears that defendants claim as heirs and widow in the community of one who did not hold in good faith. Kernan v. Baham, 45 La. Ann. 799, 13 S 155. (2) But where the original possessor was in good faith, although an intermediate one held in bad faith, the subsequent possessor in good faith may avail himself of the prescription applicable to such possession. Devall v. Choppin, 15 La. 566.

92. Richards v. Carter, 201 Ill. 165, 66 NE 343.

93. Hammond v. Crosby, 68 Ga. 767; Ross v. Central R., etc., Co., 53 Ga. 371; Munson v. Hallowell, 26 Tex. 475, 84 AmD 582.

94. Hardin v. Gouveneur, 69 Ill. 140.

[a] **As basis for distinguishing adverse possession from trespass.**—The claim of title and possession under bona fide belief of right, and the intention to claim title and possession, however the title may be derived, distinguish adverse possession from that of a mere trespasser. Dorlan v. Westervitch, 140 Ala. 283, 37 S 332, 103 AmSR 35; Dothard v. Denson, 72 Ala. 541.

95. Richards v. Carter, 201 Ill. 165, 66 NE 343; Keppel v. Dreier, 187 Ill. 298, 58 NE 386; McConnel v. Street, 17 Ill. 253. And see Muller v. Mazerat, 109 La. 116, 33 S 104 (where it was said that the good faith necessary to enable a claimant in possession under a tax title to plead the prescription of ten years is simply that he shall not have acquired the property mala fides).

[a] **A person procuring a fraudulent entry of a possessory title** cannot avail himself of Porto Rico Civ. Code art 1957, declaring a prescription by possession for ten years as to persons present, and for twenty years as to those absent, for lack of good faith. Ochoa v. Hernandez, 230 U. S. 139, 33 SCt 1033, 57 L. ed. 1427 [aff 5 Porto Rico Fed. 463].

[b] **A deed procured by fraud or forgery** is not held in good faith. Livingston v. Peru Iron Co., 9 Wend. (N. Y.) 511.

96. U. S.—Gaines v. Hennen, 24 How. 553, 16 L. ed. 770; Stark v. Starr, 22 F. Cas. No. 13,307, 1 Sawy. 15.

Ill.—Keeney v. Glos, 258 Ill. 555, 101 NE 943; Duck Island Club v. Bexstead, 174 Ill. 435, 51 NE 831; Davis v. Hall, 92 Ill. 85; Winters v. Haines, 84 Ill. 585; McCagg v. Heacock, 34 Ill. 476, 85 AmD 327.

La.—Knight v. Berwick Lumber Co., 130 La. 233, 57 S 900, 903.

Philippine.—Santiago v. Cruz, 19 Philippine 145.

Porto Rico.—Dexter v. Arzuaga, 4 Porto Rico Fed. 344.

"By taking possession in good faith is meant taking possession in a belief that such taking is rightful." Seigneuret v. Fahey, 27 Minn. 60, 6 NW 403 (per Berry, J.).

97. Stark v. Starr, 22 F. Cas. No. 13,307, 1 Sawy. 15.

[a] **"Possession originating in fraud."**—(1) The word "fraud," as used in the statute providing that possession, to be the foundation of prescription, cannot originate in fraud, the fraud meant is actual fraud—a moral fraud, a wrongful act, and not a legal act which the law denominates a fraud regardless of the bona fides of the parties. Dixon v. Patterson, 135 Ga. 183, 69 SE 21; Floyd v. Ricketson, 129 Ga. 668, 59 SE 909; Bower v. Cohen, 126 Ga. 35, 54 SE 918; Arnold v. Limeburger, 122 Ga. 72, 49 SE 812; Street v. Collier, 118 Ga. 470, 45 SE 294; Connell v. Culpepper, 111 Ga. 805, 35 SE 667; Lee v. Ogden, 83 Ga. 325, 10 SE 349 [disappr Hunt v. Dunn, 74 Ga. 120]; Ware v. Barlow, 81 Ga. 1, 6 SE 465; Wingfield v. Virgin, 51 Ga. 139. (2) "To defeat prescriptive title the fraud of the party claiming thereunder must be such as to charge his conscience. He must be cognizant of the fraud, not by constructive, but by actual notice." Shingler v. Bailey, 135 Ga. 666, 668, 70 SE 563 (per Atkinson, J.). (3) An honest mistake of law as to the effect of the writing cannot of course, amount to a moral fraud as against the true owner. Bower v. Cohen, supra.

98. Stark v. Starr, 22 F. Cas. No. 13,307, 1 Sawy. 15.

[a] **Good faith, as contemplated by the law of prescription,** has relation to the actual existing state of the mind, whether so from ignorance, skepticism, sophistry, delusion, or imbecility, and without regard to what it should be from good legal standards of law or reason. It is not necessary therefore that the person claiming prescription should have taken the instrument relied on as evidence of his title under such honest belief only as would be entertained by an ordinarily intelligent man that the paper would give him a good title. If such paper was in law color of title and was taken honestly and in good faith, the degree of intelligence with which this was done would be immaterial. It is the bona fides which is important and not the amount of knowledge or mental capacity constituting the basis thereof. Lee v. O'Quin, 103 Ga. 355, 365, 30 SE 356. In Lee v. O'Quin, supra, it is said: "Ordinary intelligence might, upon bare inspection know that an apparent title was worthless; and if the bona fides of the holding were to be tested by that standard, many cases would doubtless occur where a person of a lower order of intelligence, in his ignorance of law, would learn with surprise that he had occupied the land and held his color of title in bad faith, while he believed in fact that it was genuine and sufficient."

[b] **Bad faith cannot be imputed to a claimant** (1) by reason of failure, for several years after execution, to record the deed which is claimed to give color of title, there being no statute requiring it (Rawson v. Fox, 65 Ill. 200); or (2) because the deed described the land conveyed as situated in a disputed territory (Cornelius v. Giberson, 25 N. J. L. 1); or (3) because the claimant, a mortgagee who purchased at foreclosure sale, filed an insufficient affidavit as a basis for service by publication (Reedy v. Camfield, 159 Ill. 254, 42 NE 833); or (4) because the claimant, a purchaser at a tax sale, failed to comply with the statutory requirements as to notice governing the execution of tax deeds (Duck Island Club v. Bexstead, 174 Ill. 435, 51 NE 831; Dalton v. Lucas, 63 Ill. 337. And see also Whitney v. Stevens, 89 Ill. 53); or (5) because the deed under which the claimant holds was the result of a sale by a trustee not made in strict conformity to law (Brady v. Walters, 55 Ga. 25); or (6) because it appeared from the recitals in the deed that the property was sold at a day later than that fixed by statute (Hardin v. Crate, 60 Ill. 215); or (7) because the grantee in a tax deed failed to give notice of his application therefor, rendering the deed ineffectual to establish paramount title (Jackson v. Larson, 24 Colo. A. 548, 136 P 81); or (8) because at the time land was purchased from a widow something was said as to the possibility of her deceased husband's children having some interest in the land (Wenger v. Thompson, 128 Iowa 750, 105 NW 333); or (9) because the contract of purchase under which claimant held was a verbal one, and the decree enforcing it reversible for error, the grantee not being bound to know the legal effect of a verbal contract for land or that a decree enforcing it was erroneous (Sexson v. Barker, 172 Ill. 361, 50 NE 109 [crit and not foll Bowman v. Wettig, 39 Ill. 416]); or (10) because the deed under which claimant holds shows on its face that the grantor is a nonresident alien incapable of inheriting (Hughes v. Wyatt, 146 Iowa 392, 125 NW 334); or (11) where the claimant, being aware of an outstanding tax title, goes to the holder, shows him his deed, and declares his purpose to be perfectly fair with him, and is informed by the latter that he has no knowledge of possessing any interest in the property, and that, if he ascertains that he does, he will inform the purchaser, but never does so (Clark v. Sexton, 122 Iowa 310, 98 NW 127).

knowledge on the part of claimant that the title was defective or was not a perfect title will not impeach the good faith of his purchase.[99] Such knowledge "is not in itself inconsistent with a bona fide claim of right."[1]

[§ 411] **3. Knowledge That Title Was Worthless.** The possession cannot be said to be acquired in good faith where the claimant knew that the title was "absolutely worthless."[2]

[§ 412] **4. Knowledge of Adverse Claim.** Adverse possession under color of title is not possession with bad faith merely because the color of title was acquired and possession was taken thereunder with notice of an outstanding adverse claim.[3] This is true whether the notice be actual[4] or merely con-

(12) So it has been held that knowledge of the rejection of his first timber culture entry of land within the place limits of a railway land grant does not require the imputation of bad faith to the entryman in going into possession on the advice of counsel under a second entry, afterward summarily canceled without his knowledge, so as to prevent his open, notorious, and continuous possession from ripening into full title as against the railway company if the latter fails to assert its rights within the period prescribed by the statute of limitations. Blumer v. Iowa R. Land Co., 129 Iowa 32, 105 NW 342, 113 AmSR 444 [aff 206 U. S. 482, 27 SCt 769, 51 L. ed. 1148]. (13) And where one assumes to sell without title, or without disclosing the defects of his title, a vendee in good faith, although holding a non domino, may plead prescription, but where the vendor sells only his right and shows what it is and declines to plead generally, thus bringing home to the vendee a knowledge of his title, the vendee cannot plead prescription. Avery v. Allain 11 Rob. (La.) 436; Reeves v. Towles, 10 La. 276. See also Templet v. Baker, 12 La. Ann. 658; Thomas v. Kean, 10 Rob. (La.) 80. (14) Bad faith must be imputed to a claimant where the paper title relied on was materially altered and afterward recorded. Kirby v. Kirby, 236 Ill. 255, 86 NE 259. (15) So upon plaintiff's contention that the adverse possession of defendant under color of title for more than the statutory period was founded on fraud practiced in procuring a deed from plaintiff's grantor, the unexplained fact that plaintiff made no claim to the land during the sixteen years defendant had it in possession and paid taxes on it will be taken into account in determining the issue of fraud. Cramer v. Clow, 81 Iowa 255, 47 NW 59, 9 LRA 772. (16) And it has been said that the fact that the vendor refuses to guarantee the title he sells is a circumstance calculated to excite suspicion as to its validity and to put the vendee on his guard and induce him to make inquiries with regard to it. Eastman v. Beiller, 3 Rob. (La.) 220.

99. Ala.—White v. Farris, 124 Ala. 461, 27 S 259; Barron v. Barron, 122 Ala. 194, 25 S 55; Manly v. Turnipseed, 37 Ala. 522.

Cal.—Montgomery, etc., Lumber Co. v. Quimby, 164 Cal. 250, 128 P 402.

Ga.—Stewart v. Jones, 139 Ga. 68, 76 SE 574; Ware v. Barlow, 81 Ga. 1, 6 SE 465; Conyers v. Kenan, 4 Ga. 308, 48 AmD 226.

Ill.—Peters v. Dicus, 254 Ill. 379, 98 NE 560; Richards v. Carter, 201 Ill. 165, 66 NE 343; Keppel v. Dreier, 187 Ill. 298, 58 NE 386; Davis v. Hall, 92 Ill. 85; Smith v. Ferguson, 91 Ill. 304; Russell v. Mandell, 73 Ill. 136.

Iowa.—Severson v. Gremm, 124 Iowa 729, 100 NW 862.

Mo.—Cousins v. White, 246 Mo. 296, 151 SW 737.

N. Y.—Sands v. Hughes, 53 N. Y. 287.

S. C.—Strange v. Durham, 2 S. C. L. 429.

Compare Melancon v. Bringier, 13 La. Ann. 206 (where it was held that a certificate of purchase under unauthorized void surveys would not constitute the basis of prescription as a title translative of property, where the persons whose possession was relied on to make out the plea of prescription had notice of the defects in the title and of the danger of eviction).

"The doctrine of adverse possession presupposes a defect in the legal title. . . . The doctrine is based upon the thought that by reason of possession under claim of title, however defective such title may be in fact, the owner may be presumed to have acquiesced therein if he fail to assert his rights within the limitation period." Severson v. Gremm, 124 Iowa 729, 733, 100 NW 862 (per Bishop, J.).

[a] **Deed executed by part of heirs only.**—A grantee's claim of right under a deed of land from heirs was in good faith, although he knew that there was an heir who had not joined in the deed, he believing, on circumstances sufficient to induce the belief, that such heir, by reason of advancements, had no right to any further interest. McBride v. Caldwell, 142 Iowa 228, 119 NW 741.

[b] **The mere fact that a deed shows on its face that the grantors are nonresident aliens,** not entitled to inherit, does not of itself impeach the good faith of his grantee's claim of right to the premises conveyed. Hughes v. Wyatt, 146 Iowa 392, 125 NW 334.

[c] **Knowledge of defects in tax title.**—The fact that, while defendant was in adverse possession of land under a tax title, plaintiff called his attention to defects in such title does not destroy its effect as color of title or prevent possession thereunder from being adverse. White v. Farris, 124 Ala. 461, 27 S 259.

[d] **Imperfections and irregularities in any part of the chain in which color of title is derived** will not alone be regarded as an evidence of want of good faith. Reedy v. Camfield, 159 Ill. 254, 42 NE 833; Dawley v. Van Court, 21 Ill. 460.

1. Hughes v. Wyatt, 146 Iowa 392, 396, 125 NW 334 (per Evans, J.).

2. U. S.—Center v. Cady, 184 Fed. 605, 106 CCA 609; Stark v. Starr, 22 F. Cas. No. 13,307, 1 Sawy. 15.

Colo.—Arnold v. Woodward, 14 Colo. 164, 23 P 444.

Ga.—Compton v. Newton, 129 Ga. 619, 59 SE 270.

Ill.—Orthwein v. Thomas, 127 Ill. 554, 21 NE 430, 11 AmSR 159, 4 LRA 434; Cooter v. Dearborn, 115 Ill. 509, 4 NE 398; Hardin v. Gouveneur, 69 Ill. 140.

La.—Guillory v. Elms, 126 La. 560, 52 S 767.

N. J.—Dem v. Hunt, 20 N. J. L. 487.

Tex.—Allen v. Root, 39 Tex. 589.

Wash.—Petticrew v. Greenshields, 61 Wash. 614, 112 P 749; May v. Sutherlin, 41 Wash. 609, 84 P 585.

And see Campau v. Lafferty, 43 Mich. 429, 5 NW 648.

[a] **Applications of rule generally.**—(1) Thus a commissioner's deed purporting to convey all the interest of a certain person in lands described is invalid as color of title to the grantee as not obtained in good faith, where to his knowledge, such person had parted with all his interest in the land prior to the commissioner's deed. Orthwein v. Thomas, 127 Ill. 554, 21 NE 430, 11 AmSR 159, 4 LRA 434. (2) Where property not susceptible of identification from the description in the assessment for taxes and advertisement purports to have been adjudicated for taxes and the adjudicatee preparing the acts of sale inserts a description which identifies property of which he subsequently claims possession under such deed, he must be held to be a possessor in bad faith under Civ. Code 1838 art 3452, providing that a possessor in bad faith is he who possesses as master but who assumes such quality when he well knows that he has no title to the thing, or that his title is vicious or defective. Guillory v. Elms, 126 La. 560, 52 S 767. (3) An administrator issuing a fieri facias against property of the succession, on homologation of his account, and purchasing at the sale, would be charged with legal knowledge of the nullity of his title, and he therefore could not claim in good faith so as to acquire title, even by the prescription of ten years. Abshire v. Lege, 133 La. 254, 62 S 667.

[b] **One who knows at the time that he is purchasing a mere squatter's title** stands in no better condition than the original squatter as against the title of the true owner of the land. Such a possession originates in actual fraud within the meaning of a statute providing that possession to be the foundation of a prescription "must not have originated in fraud." Compton v. Newton, 129 Ga. 619, 59 SE 270; Brown v. Wells, 44 Ga. 573.

[c] **Knowledge that patent has issued to another.**—Under a statute requiring claim and color of title made in good faith as ground of adverse possession, one cannot hold adversely to another when he knows that his entry in the land office has been set aside or disregarded, and that a patent has issued to the person against whom he claimed an adverse possession. Arnold v. Woodward, 14 Colo. 164, 23 P 444.

[d] **Holding property in defiance of judgment.**—(1) One who purchases property pending an action to recover possession and quiet title and holds the same in defiance of a judgment rendered in such action against his grantor is not a holder under claim and color of title in good faith, although he was not served with process, and no notice of lis pendens was filed. May v. Sutherlin, 41 Wash. 609, 84 P 585. (2) So bad faith must be imputed to a claimant where he remains in possession after a judgment against him in ejectment, issuance of a writ of possession, and attempt made to execute it, in the absence of an acquired title in some manner other than by merely retaining possession of the premises. Center v. Cady, 184 Fed. 605, 106 CCA 609.

3. Latta v. Clifford, 47 Fed. 614; Godfrey v. Dixon Power, etc., Co., 228 Ill. 487, 81 NE 1089; Keppel v. Dreier, 187 Ill. 298, 58 NE 386; Coleman v. Billings, 89 Ill. 183; Cass Farm Co. v. Detroit, 139 Mich. 318, 102 NW 848.

[a] **Ignorance "of the fact that someone else claims** title to the premises through some other source" is not essential to good faith. Kirby v. Kirby, 236 Ill. 255, 270, 86 NE 259 (per Farmer, J.).

[b] **In applying this rule** (1) it has been held that bad faith will not be implied from notice or knowledge that the outstanding title is better than that of the claimant. McIntyre v. Thompson, 10 Fed. 531, 4 Hughes 562; Manly v. Turnipseed, 37 Ala. 522. (2) But there is authority to the contrary. Brodack v. Morsbach, 38 Wash. 72, 80 P 275.

4. Davila v. Mumford, 24 How. (U. S.) 214, 16 L. ed. 619; Lee v. Ogden, 88 Ga. 825, 10 SE 349; Wood v. Mc-

structive.[5]

[§ 413] **5. Taking Deed Regular on Its Face.** A deed purporting to convey title of itself imports good faith unless facts and circumstances attending its execution show that the party accepting it had no faith or confidence in it.[6]

XI. PAYMENT OF TAXES

[§ 414] **A. Necessity for—1. In Absence of Statute.** Payment of taxes is not an element of adverse possession unless made so by express statutory requirement,[7] and the fact that the owner of land held adversely by another continues to pay the taxes assessed on the land will not preclude the latter from acquiring title thereto by lapse of time.[8]

[§ 415] **2. Under Statutory Provisions—a. In General.** In many jurisdictions the short statutes of limitations relating to adverse possession of land make payment of taxes for the statutory period an element of adverse possession and essential to the acquisition of title by such possession.[9] Under these statutes payment for the entire period, con-

Guire, 17 Ga. 303; Keppel v. Dreier, 187 Ill. 298, 58 NE 386; Simons v. Drake, 179 Ill. 62, 53 NE 574; Coward v. Coward, 148 Ill. 268, 35 NE 759; Burgett v. Taliaferro, 118 Ill. 503, 9 NE 334; Conner v. Goodman, 104 Ill. 365; Piatt County v. Goodell, 97 Ill. 84; Rawson v. Fox, 65 Ill. 200; Cook v. Norton, 43 Ill. 391; Dickenson v. Breeden, 30 Ill. 279; Chickering v. Failes, 26 Ill. 507; Woodward v. Blanchard, 16 Ill. 424; Grigsby v. May, 34 Tex. 240, 19 SW 343.

[a] **Knowledge of lien on property.**—Knowledge by the adverse claimant of a lien upon the property is not evidence of bad faith unless accompanied by some improper means to defeat such lien. Smith v. Ferguson, 91 Ill. 304; McCagg v. Heacock, 34 Ill. 476, 85 AmD 327.

5. Davila v. Mumford, 24 How. (U. S.) 214, 16 L. ed. 619; Wright v. Smith, 43 Ga. 291; Keppel v. Dreier, 187 Ill. 298, 58 NE 386; Davis v. Hall, 92 Ill. 85 [disappr Bowman v. Wettig, 39 Ill. 416]; Rawson v. Fox, 65 Ill. 200; Cook v. Norton, 43 Ill. 391; Sands v. Hughes, 53 N. Y. 287. Contra Hunt v. Dunn, 74 Ga. 120.

[a] **The doctrine of constructive notice of defects** in a title arising out of neglect to investigate on the part of the purchaser is not applicable to a person in adverse possession under such title. Sands v. Hughes, 53 N. Y. 287.

[b] **Existence of registered deeds for the same land.**—(1) It has been held that the fact that at the time the property was sold to the claimant there stood registered on the books of the conveyance office of the parish where the land is situated the registry of a prior sale of the same property to another will not of itself prevent the running of the statute (Jordan v. Richards, 114 La. 329, 38 S 206; Wells v. Goss, 110 La. 347, 34 S 470), (2) and a fortiori the registry of a mere promise to sell will not prevent the running of the statute (Wells v. Goss, supra). (3) But see Meloche v. Simpson, 29 Can. S. C. 375 (holding that registration of a prior conveyance is sufficient to constitute a subsequent purchaser a holder in bad faith).

6. Hardin v. Gouveneur, 69 Ill. 140; Hardin v. Crate, 60 Ill. 215; Morrison v. Norman, 47 Ill. 477; Dickenson v. Breeden, 30 Ill. 279. And see Chevrier v. Reg., 4 Can. S. C. 1.

[a] **Quitclaim deed.**—The fact that the prescriptive title sought to be established was based upon a quitclaim deed as color of title does not of itself negative the presumption of good faith. Hammond v. Crosby, 68 Ga. 767; Castlebery v. Black, 58 Ga. 386; McCamy v. Higdon, 50 Ga. 629.

7. Cal.—Woodward v. Faris, 109 Cal. 12, 41 P 781; Baum v. Reay, 96 Cal. 462, 29 P 117, 31 P 561; Reynolds v. Williard, 80 Cal. 605, 22 P 262; Webber v. Clarke, 74 Cal. 11, 15 P 431; Heilbron v. Heinlen, 72 Cal. 376, 14 P 24.

Ida.—Brose v. Boise City R., etc., Co., 5 Ida. 694, 51 P 753.

Ill.—Illinois Cent. R. Co. v. Moore, 160 Ill. 9, 43 NE 364.

Iowa.—Davidson v. Thomas, 86 NW 291.

Kan.—Anderson v. Canter, 10 Kan. A. 167, 63 P 285.

Mass.—Harrison v. Dolan, 172 Mass. 395, 52 NE 513.

Mich.—Dubois v. Campau, 28 Mich. 304.

Nebr.—Bush v. Griffin, 76 Nebr. 214, 107 NW 247.

N. D.—J. B. Streeter, Jr., Co. v. Fredrickson, 11 N. D. 300, 91 NW 692; Power v. Kitching, 10 N. D. 254, 86 NW 737, 88 AmSR 691.

Pa.—Hole v. Rittenhouse, 37 Pa. 116; Hockenbury v. Snyder, 2 Watts & S. 240.

Tex.—Campbell Real Est. Co. v. Wiley, (Civ. A.) 33 SW 251; Robinson v. McIver, (Civ. A.) 23 SW 915.

Wash.—Silverstone v. Hanley, 55 Wash. 458, 104 P 767.

Wis.—Hamachek v. Duvall, 135 Wis. 108, 115 NW 634.

8. Cook v. Rounds, 60 Mich. 310, 27 NW 517; Johnson v. Knott, 13 Or. 308, 10 P 418.

9. U. S.—Beaver v. Taylor, 1 Wall. 637, 17 L. ed. 601.

Ariz.—Goldman v. Sotelo, 8 Ariz. 85, 68 P 558.

Ark.—Carmichael v. Arkansas Lumber Co., 105 Ark. 662, 152 SW 286; Blakeney v. Ferguson, 20 Ark. 547.

Cal.—Fitzimons v. Atherton, 162 Cal. 630, 124 P 250; Allen v. Allen, 159 Cal. 197, 113 P 160; Nathan v. Dierssen, 146 Cal. 63, 79 P 739; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 P 113; Lucas v. Provines, 130 Cal. 270, 62 P 509; Williams v. Gross, 61 P 934; McDonald v. McCoy, 121 Cal. 55, 53 P 421; Allen v. McKay, 120 Cal. 332, 52 P 828; Carpenter v. Lewis, 119 Cal 18, 50 P 925; Eberhardt v. Coyne, 114 Cal. 283, 46 P 84; Southern Pac. R. Co. v. Whitaker, 109 Cal. 268, 41 P 1083; Woodward v. Faris, 109 Cal. 12, 41 P 781; Tuffree v. Polhemus, 108 Cal. 670, 41 P 806; Shanahan v. Tomlinson, 103 Cal. 89, 36 P 1009; Baldwin v. Temple, 101 Cal. 396, 35 P 1008; Cavanaugh v. Jackson, 99 Cal. 672, 34 P 509; Labory v. Los Angeles Orphan Asylum, 97 Cal. 270, 32 P 231; McDonald v. Drew, 97 Cal. 266, 32 P 173; Christy v. Spring Valley Water Works, 97 Cal. 21, 31 P 1110; Frederick v. Dickey, 91 Cal. 358, 27 P 742; Berniaud v. Beecher, 71 Cal. 38, 11 P 802; McNoble v. Justiniano, 70 Cal. 395, 11 P 742; Martin v. Ward, 69 Cal. 129, 10 P 276; Ross v. Evans, 65 Cal. 439, 4 P 443; Webb v. Clark, 65 Cal. 56, 2 P 747; Unger v. Mooney, 63 Cal. 586, 49 AmR 100; Central Pac. R. Co. v. Shackleford, 63 Cal. 261; O'Connor v. Fogle, 63 Cal. 9; Sharp v. Blankenship, 59 Cal. 288; People's Water Co. v. Lewis, 19 Cal. A. 622, 127 P 506; Steckter v. Ewing, 6 Cal. A. 761, 93 P 286.

Colo.—Webber v. Wannemaker, 39 Colo. 425, 89 P 780; Eberville v. Leadville Tunneling, etc., Co., 28 Colo. 241, 64 P 200; Wood v. Chapman, 24 Colo. 134, 49 P 136.

Ida.—Northern Pac. R. Co. v. Pyle, 20 Ida. 3, 112 P 678; Brown v. Brown, 18 Ida. 345, 110 P 269; Bayhouse v. Urquides, 17 Ida. 286, 105 P 1066; Swank v. Sweetwater Irr., etc., Co., 15 Ida. 353, 98 P 297; Brose v. Boise City R., etc., Co., 5 Ida. 694, 51 P 753; Green v. Christie, 4 Ida. 438, 40 P 54. See also Urquide v. Flanagan, 7 Ida. 163, 61 P 514.

Ill.—Illinois Cent. R. Co. v. Cavins, 238 Ill. 380, 87 NE 371; Glos v. Wheeler, 229 Ill. 272, 82 NE 234; Loewenthal v. Elkins, 175 Ill. 553, 51 NE 592; Neiderer v. Bell, 174 Ill. 325, 51 NE 855; Wright v. Stice, 173 Ill. 571, 51 NE 71; Bell v. Neiderer, 169 Ill. 54, 48 NE 194; Chicago, etc., R. Co. v. Grant, 167 Ill. 489, 47 NE 750; Converse v. Dunn, 166 Ill. 25, 46 NE 747; Donahue v. Illinois Cent. R. Co., 165 Ill. 640, 46 NE 714; Osburn v. Searles, 156 Ill. 88, 40 NE 452; Timmons v. Kidwell, 149 Ill. 507, 36 NE 974; Durfee v. Peoria, etc., R. Co., 140 Ill. 435, 30 NE 686; Wisner v. Chamberlin, 117 Ill. 568, 7 NE 68; Cooter v. Dearborn, 115 Ill. 509, 4 NE 388; Hurlbut v. Bradford, 109 Ill. 397; Bolden v. Sherman, 101 Ill. 483; Wettig v. Bowman, 47 Ill. 17; Jayne v. Gregg, 42 Ill. 413; Shackleford v. Bailey, 35 Ill. 387; Bride v. Watt, 23 Ill. 507; Stearns v. Gittings, 23 Ill. 387; Dawley v. Van Court, 21 Ill. 460; Irving v. Brownell, 11 Ill. 402; Renner v. Kannally, 96 Ill. A. 392 [aff 193 Ill. 212, 61 NE 1026].

S. D.—Bennett v. Moore, 18 S. D. 109, 99 NW 855.

Tex.—Hitchler v. Scanlan, 83 Tex. 569, 19 SW 259; Letney v. Marshall, 79 Tex. 513, 15 SW 586; Murphy v. Welder, 58 Tex. 235; Cook v. Knott, 28 Tex. 85; Watson v. Hopkins, 27 Tex. 637; Kelley v. Medlin, 26 Tex. 48; Mitchell v. Burdett, 22 Tex. 633; Castro v. Wurzbach, 13 Tex. 128; Rodriguez v. Priest, (Civ. A.) 126 SW 1187; Kirby v. Hayden, (Civ. A.) 125 SW 993; Barrera v. Guerra, (Civ. A.) 122 SW 902; Wall v. Club Land, etc., Co., (Civ. A.) 88 SW 534; Watts v. Bruce, 31 Tex. Civ. A. 347, 72 SW 258; Taylor v. Brymer, 17 Tex. Civ. A. 517, 42 SW 999; Brown v. O'Brien, 11 Tex. Civ. A. 459, 33 SW 267; Converse v. Ringer, 6 Tex. Civ. A. 51, 24 SW 705.

Utah.—Crane v. Judge, 30 Utah 50, 83 P 566; Dignan v. Nelson, 26 Utah 186, 72 P 936; Funk v. Anderson, 22 Utah 238, 61 P 1006.

Wash.—McMillan v. Walker, 48 Wash. 342, 93 P 520.

W. Va.—State v. Harman, 57 W. Va. 447, 50 SE 828; Mills v. Henry Oil Co., 57 W. Va. 255, 50 SE 157, 4 AnnCas 427 and note; State v. Jackson, 56 W. Va. 558, 49 SE 465; Simpson v. Edmiston, 23 W. Va. 675.

See Power v. Kitching, 10 N. D. 254, 86 NW 737, 88 AmSR 691 and note.

[a] **Kentucky statute held unconstitutional.**—St. § 2377, providing that no action shall be maintained for the recovery of land, where the claimant relies alone on a patent issued by the commonwealth prior to the year 1820, against any person claiming such land by possession to a well defined boundary under a title of record, unless such claimant has actually paid or caused to be paid to the state the legal tax assessed against the land for at least three years next preceding the bringing of the action, has been held unconstitutional "for the reason, among other things, that it in effect forfeits or destroys the title to real estate simply for the non-payment of taxes; and, not only this, but makes it a forfeiture in effect in all cases unless the party had for the past 20 years paid the taxes." Shaw v. Robinson, 111 Ky. 715, 724, 64 SW 620, 23 KyL 998.

[b] **Arkansas statute held constitutional.**—(1) The statute providing that unimproved and uninclosed lands shall be deemed to be in the posses-

currently with the other elements therein designated, is necessary.[10] A break in the payment for any one or more years of the period is fatal to the claim. And on the other hand payment of this character taken in conjunction with the existence of the other elements prescribed by statute will operate to confer a valid title.[11] Where the statute requires "all taxes" legally assessed against the property to be paid, all taxes irrespective of their nature must of course be paid, and a failure to pay a town tax legally assessed is fatal, although such tax has been dropped from the tax book and never reported as delinquent.[12] The phrase "all taxes" also includes special assessments.[13] The taxes must be paid by the claimant regardless of whom they are assessed to in order to render the statute available.[14] And by parity of reasoning if he has paid the taxes it is immaterial to whom they are assessed; he will nevertheless be entitled to the benefit of the statute.[15]

[§ 416] **b. Where no Taxes Have Been Assessed.** In California,[16] Idaho,[17] and Kentucky[18] the requirement of payment of taxes as an element of adverse possession has been held not to apply where no taxes have been assessed. However, it has been held that where an adverse claimant has paid no taxes he must show in order to establish title by adverse possession that no taxes had been assessed,[19] although there is authority for the contrary view.[20] In Colorado, Illinois, Missouri, and Texas the rule is the reverse of that in the states just mentioned, notwithstanding the similarity of the wording of the statutes and failure to pay taxes, although resulting from failure to assess the land, will be fatal to the claimant's right to acquire title by adverse possession.[21]

[§ 417] **c. Where Land Is Exempt from Taxation.** Under the Texas statute making "payment of taxes, if any," an element of adverse possession payment of taxes is not necessary to complete the bar of the statute where the land is by law exempt

sion of the person who pays the taxes thereon, if he have color of title and shall have paid taxes for at least seven years in succession, not less than three of the payments being made subsequent to the passage of the act, although retroactive, is constitutional and valid. Macrae v. Johnson, 92 SW 1120; Cottonwood Lumber Co. v. Hardin, 78 Ark. 95, 98, 92 SW 1118 [aff 207 U. S. 580, 28 SCt 258, 52 L. ed. 350]; Towson v. Denson, 74 Ark. 302, 86 SW 661. (2) In support of this view it was said in Cottonwood Lumber Co. v. Hardin, supra: "When we consider this provision of the act which requires that at least three of the tax payments must have been made subsequent to the passage of this act, we can not say that the act arbitrarily attempts to divest the title of land from owners who had not paid taxes thereon. . . . This provision of the act brings it within the scope and reason of those decisions that hold that limitation laws and laws regulating the registration of deeds are not unconstitutional when a reasonable time is given within which the effect of such a statute as it applies to rights of action already existing or to existing conveyances may be avoided and rendered harmless in respect to vested rights."

10. Ark.—Osceola Land Co. v. Chicago Mill, etc., Co., 84 Ark. 1, 103 SW 609; Updegraff v. Marked Tree Lumber Co., 83 Ark. 154, 103 SW 606.

Cal.—Mann v. Mann, 152 Cal. 23, 91 P 994; McDonald v. Drew, 97 Cal. 266, 32 P 173; McNoble v. Justiniano, 70 Cal. 395, 11 P 742; Ross v. Evans, 65 Cal. 439, 4 P 443; Webb v. Clark, 65 Cal. 56, 2 P 747; O'Connor v. Fogle, 63 Cal. 9; Glowner v. De Alvarez, 10 Cal. A. 194, 101 P 432.

Colo.—Marks v. Morris, 54 Colo. 186, 129 P 828; Ballard v. Golob, 34 Colo. 417, 83 P 376 (holding that it is not sufficient if the taxes were paid any one of the five years by a person who at the time made no claim to the property); Empire Ranch, etc., Co. v. Howell, 24 Colo. A. 154, 132 P 387; Bloomer v. Cristler, 22 Colo. A. 238, 123 P 966.

Ida.—Swank v. Sweetwater Irr., etc., Co., 15 Ida. 353, 98 P 297; Brose v. Boise City R., etc., Co., 5 Ida. 694, 51 P 753; Green v. Christie, 4 Ida. 438, 40 P 54.

Ill.—Perry v. Burton, 126 Ill. 599, 18 NE 653; Peoria, etc., R. Co. v. Forsyth, 118 Ill. 272, 8 NE 766; McConnel v. Konepel, 46 Ill. 519.

S. D.—Joy v. Midland State Bank, 26 S. D. 244, 128 NW 147.

Tex.—Sorley v. Matlock, 79 Tex. 304, 15 SW 261; Snowden v. Rush, 69 Tex. 593, 6 SW 767; Murphy v. Welder, 58 Tex. 235; Mitchell v. Burdett, 22 Tex. 633; Taylor v. Brymer, 17 Tex. Civ. A. 517, 42 SW 999; Converse v. Ringer, 6 Tex. Civ. A. 51, 24 SW 705.

W. Va.—Mills v. Henry Oil Co., 57 W. Va. 255, 50 SE 157, 4 AnnCas 427.

"The payment of taxes for the period of five years is as much one of the essentials of the statute as possession and registration of the deed under which the defendant prescribes; and in determining the effect of the payment of taxes, or of the failure to pay, we are unable to perceive any reason why a different rule should apply than exists in determining the effect that is given to the matter of registration and possession. The existence of one is as much necessary under the statute as the other, and we believe that the same rule of construction should apply to all." Converse v. Ringer, 6 Tex. Civ. A. 51, 55, 24 SW 705.

[a] **Payment of the taxes for one year by the real owner prevents acquisition of title.**—Webber v. Wannemaker, 39 Colo. 425, 89 P 780.

11. Miller v. Weldon, (Colo. A.) 140 P 930; Hamilton v. Witner, 50 Wash. 689, 97 P 1084, 126 AmSR 921.

12. Peoria, etc., R. Co. v. Forsyth, 118 Ill. 272, 8 NE 766.

13. Chicago v. Middlebrooke, 143 Ill. 265, 32 NE 457 (holding that where the claimant had proved the payment of all the general taxes for the statutory period it devolved on the other party to show, if such was the case, that the property had been specially assessed for some one of the years, and then the claimant would have been compelled to prove the payment of such special assessment).

14. Ross v. Evans, 65 Cal. 439, 4 P 443. See also infra § 429 et seq.

[a] **The fact that the land claimed by the adverse claimant was assessed to the owner in connection with other land** forming together a single tract does not excuse the failure of the claimant to offer to pay the taxes. McDonald v. Drew, 97 Cal. 266, 32 P 173; McNoble v. Justiniano, 70 Cal. 395, 11 P 742.

15. Cantagrel v. Von Lupin, 58 Tex. 570.

16. Dierssen v. Nelson, 138 Cal. 394, 71 P 456; Baldwin v. Temple, 101 Cal. 396, 35 P 1008; Frederick v. Dickey, 91 Cal. 358, 27 P 742; Coonradt v. Hill, 79 Cal. 587, 21 P 1099; Oneto v. Restano, 78 Cal. 374, 20 P 743; Heilbron v. Last Chance Water Ditch Co., 75 Cal. 117, 17 P 65; Ross v. Evans, 65 Cal. 439, 4 P 443. See also Allen v. Allen, 159 Cal. 197, 113 P 160.

[a] **Extent of rule.**—It seems that this is so, even though it may have been the fault of the claimant that the land was not assessed. Conradt v. Hill, 79 Cal. 587, 21 P 1099.

[b] **Evidence to show assessment.**—A finding that the property in controversy was not assessed for taxes for a specified year is against the evidence where it appears that the land assessed by boundaries necessarily included the land in controversy, although there is no evidence that the tract claimed by defendant was assessed by any separate or specified description in that year. Baldwin v. Temple, 101 Cal. 396, 35 P 1008.

17. Urquide v. Flanagan, 7 Ida. 163, 61 P 514. See also Swank v. Sweetwater Irr., etc., Co., 15 Ida. 353, 98 P 297.

18. Shaw v. Robinson, 111 Ky. 715, 64 SW 620, 23 KyL 998.

19. Baldwin v. Temple, 101 Cal. 396, 35 P 1008. See also Baldwin v. Durfee, 116 Cal. 625, 48 P 724.

[a] **Reason for rule.**—In Reynolds v. Willard, 80 Cal. 605, 606, 22 P 262, the court said: "The defendant, in support of his claim of title by adverse possession, was bound to prove every fact necessary to show such possession for the requisite time, including the payment of taxes, if any had been levied and assessed. If taxes had been levied and assessed, he should have proved the fact, and also that he had paid the same. If none had been levied and assessed, he should have proved that fact as a reason for not making payment. Having failed to make such proof, it cannot be presumed in aid of his possession that no taxes had been levied and assessed. . . . The presumption that the assessor had done his duty should be regarded as prima facie evidence that such property had been assessed. In the absence of any evidence from the defendant, the fact should be found against him. This must be the result of the well-established rule that a party who relies upon adverse possession must prove every fact necessary to establish such possession for the requisite length of time."

20. See Oneto v. Restano, 78 Cal. 374, 379, 20 P 743 (where the court said: "That is a negative which he is not required to prove. If there has been an assessment, it is for the other party to show the fact. This is the rule which convenience requires. For it is an easy matter to show that an assessment has been levied, but a difficult one to show that none have been levied for a series of years").

21. Laughlin v. Denver, 24 Colo. 255, 50 P 917; Illinois Cent. R. Co. v. Cavins, 238 Ill. 380, 87 NE 371; Peoria, etc., R. Co. v. Forsyth, 118 Ill. 272, 8 NE 766; Abeles v. Pillman, (Mo.) 168 SW 1180; Ledyard v. Brown, 27 Tex. 393, 405 (where it was said: "It is the duty of a party claiming land, to render it to the officer whose duty it is to assess it").

[a] **Payment by claimant, although not assessed to him.**—If the land is actually assessed for taxes, although not assessed to the claimant,

from taxation.[22] This also seems to be the view taken in Idaho where the statute makes payment of "all taxes" for the designated period essential to acquisition of title by adverse possession.[23] But under a statute of Illinois conferring title by seven years' adverse possession under color of title accompanied by the payment of all taxes legally assessed on the land it has been held that where the land was not assessed for taxation because exempt the benefit of the statute cannot be claimed.[24] In other words, where land is exempt from taxation title thereto can only be acquired under a statute which does not make payment of taxes essential to acquisition of title by adverse possession.[25]

[§ 418] **d. Where Statute Is Suspended on Account of War.** It seems that a claimant is not required to pay taxes during the period that the statute is suspended on account of war.[26]

[§ 419] **e. Where Tax Is Invalid.** Many of the statutes prescribe for the payment of "taxes legally assessed." Under these statutes the claimant is not bound to pay taxes which are void;[27] and on the other hand the payment of taxes based upon a void assessment cannot be relied on to establish title.[28] The fact that the assessment of taxes may have been technically illegal will not deprive the claimant who has paid the taxes so assessed of the benefit of the statute,[29] or excuse the nonpayment of taxes so assessed.[30] And a fortiori the fact that the claimant in good faith believed the tax to be invalid is no excuse for its nonpayment.[31]

[§ 420] **f. Where Taxes for Last Year Were Not Due at Expiration of Statutory Period.** Where the taxes for a year do not become due until after the period necessary to perfect title then payment of the taxes for that year is not necessary in order to perfect title.[32] Nevertheless, where the taxes for the last year of the period of limitation fall due before the expiration of the year such taxes must be paid in order to enable the claimant to take advantage of the statute, although the state could not have enforced payment until after the end of such year.[33]

[§ 421] **g. Taxes Assessed before but Levied after Occupancy.** Under the California statute which requires payment of all taxes "levied and assessed" on the land during the statutory period it has been held unnecessary to pay taxes assessed before the occupancy and levied afterward, and that only such taxes as were both levied and assessed during the occupancy need be paid.[34]

[§ 422] **h. Where Statute Is Enacted after Adverse Occupancy for a Time.** Where the statute of limitations expressly provides that it shall not operate retroactively, and the adverse claimant was in possession prior to its enactment, the failure to pay the taxes during such prior possession does not deprive it of its adverse character, and the claimant may add the time of his prior possession to the time of his possession after the enactment of the statute for the purpose of making out the statutory period of limitation, provided taxes are paid during the latter period.[35] So it has been held that even though the statute by its terms is made retroactive it will not have that effect as to persons under disability at its passage but not under disability when payments began.[36]

[§ 423] **i. Where Statute Is Enacted Subsequently to Completion of Statutory Period.** A statute making payment of taxes a necessary element of adverse possession has no application to a title by adverse possession completed prior thereto, and it is immaterial that taxes were not paid during the period necessary to give title by adverse possession under a statute not requiring payment of taxes, or subsequent to such period.[37]

[§ 424] **j. Necessity of Continued Payment after**

his payment of the taxes will enable him to take advantage of the statute. Swenson v. Mynair, 79 Fed. 608, 25 CCA 126 (decided under Texas statute); Cantagrel v. Von Lupin, 58 Tex. 570.

[b] **Special assessments.**—In Illinois it has been held that where the claimant shows the payment of all general taxes he is not required also to show that there were not outstanding unpaid special assessments which had been levied on the land. Chicago v. Middlebrook, 143 Ill. 265, 32 NE 457.

22. U. S. v. Schwalby, 8 Tex. Civ. A. 679, 685, 29 SW 90 [aff 87 Tex. 604, 30 SW 435 (rev on other grounds 162 U. S. 225, 16 SCt 754, 40 L. ed. 960)] (where it was said: "The very language of the statute, 'paying taxes thereon, if any,' clearly indicates, that when no taxes are payable, proof of payment would not be required").

23. Swank v. Sweetwater Irr., etc., Co., 15 Ida. 353, 98 P 297.

24. Wisner v. Chamberlin, 117 Ill. 568, 7 NE 68.

25. Illinois Cent. R. Co. v. Cavins, 238 Ill. 380, 87 NE 371; Donahue v. Illinois Cent. R. Co., 165 Ill. 640, 46 NE 714.

26. Flanagan v. Boggess, 46 Tex. 330.

27. Harvey v. Meyer, 117 Cal. 60, 48 P 1014; Grant v. Badger, 128 Ill. 386, 21 NE 609 (holding that where a levy is in part for an unlawful purpose, payments of so much as is not for such unlawful purpose is a sufficient payment of "taxes legally assessed").

28. Illinois Cent. R. Co. v. Cavins, 238 Ill. 380, 87 NE 371; Bond v. Garrison, (Tex. Civ. A.) 127 SW 839.

[a] **Application of rule.**—Where a part of a lot was not owned by a railroad and was not a part of its right of way, and was assessed merely as a part of the lot distinct from the assessment of its right of way, so that the state board of equalization had no authority to assess it, and the lot, except that part occupied by it as a right of way, was assessed to the owners thereof by the local assessor for the whole period for which it was assessed to the railroad by the board of equalization the railroad did not pay the taxes thereon so as to entitle it to claim the lot by adverse possession under a statute requiring the claimant to have paid all the taxes levied and assessed on the land according to law during the seven-year period. Rio Grande Western R. Co. v. Salt Lake Inv. Co., 35 Utah 528, 101 P 586.

[b] **What is a legal assessment.**—Mills Annot. St. § 3807, Gen. L. (1877) § 2251, requires the state board of equalization to make assessments upon railways, and include therein their rights of way, etc., and the Revenue Act, L. (1902) c 2, requires such board to assess all property used or controlled by railroad companies with certain exceptions. It was held that a railroad company in possession of and using land as its right of way was "legally assessed" thereon by the state board of equalization, within the meaning of a statute, making every person the legal owner of land who is in the actual possession thereof as stated for seven successive years, and during such time pays all taxes legally assessed thereon. Denver, etc., R. Co. v. Doelz, 49 Colo. 48, 111 P 595.

29. Murphy v. Nelson, 19 S. D. 197, 102 NW 691 (where it was said that the term "legally assessed" meant merely assessed under color of legal authority).

30. Elston v. Kennicott, 46 Ill. 187.

31. Wettig v. Bowman, 47 Ill. 17.

32. Juck v. Fewell, 42 Fed. 517; Murphy v. Nelson, 19 S. D. 197, 102 NW 691; Club Land, etc., Co. v. Wall, 99 Tex. 591, 91 SW 778, 122 AmSR 666; Halbert v. Brown, 9 Tex. Civ. A. 335, 31 SW 535; Mariposa Land, etc., Co. v. Silliman, (Tex. Civ. A.) 27 SW 773.

[a] **"The reason for holding that it is unnecessary to pay the taxes under such circumstances** is, that the claimants could not have paid them before the expiration of the period of limitation." Club Land, etc., Co. v. Wall, 99 Tex. 591, 595, 91 SW 778, 122 AmSR 666 (per Brown, J.).

33. Club Land, etc., Co. v. Wall, 99 Tex. 591, 91 SW 778, 122 AmSR 666 [rev (Civ. A.) 88 SW 534 (disappr dictum Mariposa Land, etc., Co. v. Silliman, (Tex. Civ. A.) 27 SW 773)] (in which it was said that to sustain the defense of limitation by possession and payment of taxes for five years defendant must show payment before suit was brought of the taxes for the last year necessary to complete the bar where it was possible to make the payment before that time). See also Snowden v. Rush, 76 Tex. 197, 13 SW 189.

34. Allen v. McKay, 120 Cal. 332, 52 P 828.

[a] **The taxes to be paid by a claimant** are the taxes assessed and levied on the land during the time of his continuous occupation and claim under adverse right, and do not include any taxes previously assessed and paid by the owner. Brown v. Clark, 89 Cal. 196, 26 P 801.

35. Allen v. McKay, 120 Cal. 332, 52 P 828; Central Pac. R. Co. v. Shackleford, 63 Cal. 261. See also Webber v. Clarke, 74 Cal. 11, 15 P 431.

36. Deane v. Moore, 105 Ark. 309, 151 SW 286.

37. Strong v. Baldwin, 154 Cal. 150,

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Bar of Statute Has Become Complete. When title has once been acquired by compliance with all the terms of the statute the failure of the adverse possessor to pay taxes subsequently assessed on the land does not divest nor in any way affect his title.[38]

[§ 425] **B. On What Land Paid.** The taxes must be paid on the land in respect of which it is sought to gain title by adverse possession.[39] Payment of taxes on other land is of no avail, although the claimant believed that he was paying taxes on the land in controversy.[40] To deprive the true owner of his land in this manner would be without due process of law.[41] So payment must be made upon the whole tract claimed and described in the instrument giving color of title.[42] Where the taxes paid by the claimant were in fact assessed on the land in controversy, a misdescription of the land in assessing it and according to which the claimant was compelled to pay the taxes cannot prejudice his rights.[43] And it has been held where the grantee in a recorded deed pays taxes on the number of acres called for in his deed, actually believing that he is paying for the full quantity in his possession, he is not deprived of the benefit of the five-year statute of limitations merely because his tract is somewhat larger than he supposed.[44]

[§ 426] **C. Time of Making—1. In General.** The taxes must be paid during the statutory period. Payment before such time is of no effect, and evidence thereof is immaterial.[45] On payment of taxes by the claimant before the time within which payment by the owner may be made the latter may prevent the running of the statute by proper application to the collector.[46]

[§ 427] **2. After Acquiring Color of Title.** Any payment of taxes made before acquisition of color of title cannot be availed of by one claiming under either section of the Illinois statute.[47]

[§ 428] **3. Necessity of Paying Taxes Each Year.** Under the sixth section of the Illinois statute,[48] and under a statute of South Dakota similar in its provisions,[49] it has been held that a payment need not be made each year, but that two yearly assessments of taxes may be paid in one year if the party continues in possession; and it has been held that the Colorado statute is fully complied with by the payment of all the taxes assessed against the land for the statutory period.[50] So in Texas it has been held that it is not necessary to show that the taxes for each year were paid during the respective years for which they accrued.[51] But under the sixth section of the Illinois statute payment must be made each year,[52] and this is the rule under the statutes of

97 P 178, 129 AmSR 149; Lucas v. Provines, 130 Cal. 270, 62 P 509; Allen v. McKay, 120 Cal. 332, 52 P 828; Woodward v. Faris, 109 Cal. 12, 41 P 781; Webber v. Clarke, 74 Cal. 11, 15 P 431; Heilbron v. Heinlen, 72 Cal. 376, 14 P 24; Johnson v. Brown, 63 Cal. 391; Sharp v. Blankenship, 59 Cal. 288; Rydalch v. Anderson, 37 Utah 99, 107 P 25.

38. Juck v. Fewell, 42 Fed. 517; Allen v. McKay, 120 Cal. 332, 52 P 828; Southern Pac. R. Co. v. Whitaker, 109 Cal. 268, 41 P 1083; Webber v. Clarke, 74 Cal. 11, 15 P 431; Mariposa Land, etc., Co. v. Silliman, (Tex. Civ. A.) 27 SW 773.

39. Connerly v. Dickinson, 81 Ark. 258, 99 SW 82; Mann v. Mann, 152 Cal. 23, 91 P 994; Eberhardt v. Coyne, 114 Cal. 283, 46 P 84; O'Hara v. O'Brien, 107 Cal. 309, 40 P 423; Neiderer v. Bell, 174 Ill. 325, 51 NE 855; Burns v. Edwards, 163 Ill. 494, 45 NE 113; Cooter v. Dearborn, 115 Ill. 509, 4 NE 388; Stumpf v. Osterhage, 111 Ill. 82; Dutton v. Thompson, 85 Tex. 115, 19 SW 1026; Bassett v. Martin, 83 Tex. 339, 18 SW 587; Harrison v. McMurray, 71 Tex. 122, 8 SW 612; Gaal v. Camp, (Tex. Civ. A.) 164 SW 1070; Schiele v. Kimball, (Tex. Civ. A.) 150 SW 303; Frazer v. Seureau, (Tex. Civ. A.) 128 SW 649; Sharpe v. Kellogg, (Tex. Civ. A.) 116 SW 401; Tarbrough v. Moody, (Tex. Civ. A.) 106 SW 891; Mars v. Morris, 48 Tex. Civ. A. 216, 106 SW 430; Hoehn v. House, (Tex. Civ. A.) 31 SW 83; Spence v. Johnson, 3 Tex. Civ. A. 627, 22 SW 1042. See also Lafiin v. Herrington, 16 Ill. 301.

[a] **Payment of taxes on premises described in a deed** cannot be construed as payment on lands other than those described. Andrews v. Wheeler, 10 Cal. A. 614, 103 P 144.

[b] **Mistake as to location.**—Where according to the assessment the taxes are paid on a particular survey the fact that the claimant was mistaken in regard to the exact location of the land is immaterial. Tarbrough v. Moody, (Tex. Civ. A.) 106 SW 891.

[c] **Payment of taxes on lot with which land in suit inclosed.**—Where a division fence constituted a monument for forty years it established the true boundary line, and controlled the description in a tax assessment made on the land by lot numbers, so that payment of taxes assessed on the lot with which the disputed tract was inclosed constituted a payment of taxes on such disputed strip under Rev. Codes § 4043, requiring that a party seeking to establish title by adverse possession must have paid all taxes on the property. Bayhouse v. Urquides, 17 Ida. 286, 105 P 1066.

[d] **Effect of agreement establishing boundary different from calls in deed.**—Where parties by agreement establish a boundary line between adjoining lands differing from the description found in their deeds, and thereafter pay taxes thereon according to the descriptions in their deeds, such payment is a payment on land in possession of parties, and, if continued for a sufficient time, establishes title by adverse possession. Price v. De Reyes, 161 Cal. 484, 119 P 893.

40. Standard Quicksilver Co. v Habishaw, 132 Cal. 115, 64 P 113; Reynolds v. Willard, 80 Cal. 605, 22 P 262; Schiele v. Kimball, (Tex. Civ. A.) 150 SW 303; Sharpe v. Kellogg, 53 Tex. Civ. A. 543, 116 SW 401.

[a] **Payment of taxes assessed by mistake** against one section or grant of land cannot be referred to another section or grant claimed in part by the taxpayer, if he intended, but failed, to render and pay upon it. Dutton v. Thompson, 85 Tex. 115, 19 SW 1026.

41. Sharpe v. Kellogg, 53 Tex. Civ. A. 543, 116 SW 401.

42. Kelly v. Medlin, 26 Tex. 48. And see Hoencke v. Lomax, 102 Tex. 487, 119 SW 842 [den writ of error (Civ. A.) 118 SW 817].

[a] **Effect of payment on part of tract.**—One who holds color of title to the undivided half of a tract of land but pays taxes on the whole tract may have the benefit of the statute for the part of which he has color of title, but no further. And so of the payment of taxes due on a part of the tract where the payer has color of title to the whole, the payer may have the benefit of the limitation for the part on which he has paid. Dawley v. Van Court, 21 Ill. 460.

[b] **An undivided interest may be acquired** (1) under the five-year statute and the payment of taxes by a party claiming such interest will be ascribed to his interest. Yarbrough v. Whitman, 50 Tex. Civ. A. 391, 110 SW 471. (2) Where one who holds a deed to an undivided half interest in a tract of land, and also holds a deed jointly with others to an undivided third interest of the same tract, has paid taxes for five years and held possession of the land conveyed in the first mentioned deed, his title thereto is not defeated by failure to pay taxes for five years on the land conveyed in the second deed. Club Land, etc., Co. v. Wall, 99 Tex. 591, 91 SW 778, 122 AmSR 666 [rev (Civ. A.) 88 SW 534]. And see Lafiin v. Herrington, 16 Ill. 301.

43. Fagan v. Rosier, 68 Ill. 84; McConnel v. Street, 17 Ill. 253.

44. Henning v. Wren, 32 Tex. Civ. A 538, 75 SW 905.

45. Goldman v. Sotelo, 8 Ariz. 85, 68 P 558.

46. Rachels v. Stecher Cooperage Works, 95 Ark. 61, 128 SW 348.

47. White v. Harris, 206 Ill. 584, 69 NE 519; Duck Island Club v. Bexstead, 174 Ill. 435, 51 NE 831; Stearns v. Gittings, 23 Ill. 387.

[a] **The first payment** of taxes must be made after the acquisition of the claim and color of title. Stearns v. Gittings, 23 Ill. 387.

48. Hinchman v. Whetstone, 23 Ill. 185. See also Beaver v. Taylor, 1 Wall. (U. S.) 637, 17 L. ed. 601; Stearns v. Gittings, 23 Ill. 387.

49. Murphy v. Redeker, 16 S. D. 615, 94 NW 697, 102 AmSR 722 [foll Hinchman v. Whetstone, 23 Ill. 185].

50. Latta v. Clifford, 47 Fed. 614 (holding this to be sufficient, although the taxes may not have been paid when due and the interest thereon remains unpaid, where such interest is not ascertained or adjudged or required to be paid by the collector of taxes).

51. Capps v. Deegan, (Tex. Civ. A.) 50 SW 151. This case is so insufficiently reported that it is not easy to determine what was actually held. See also Snowden v. Rush, 76 Tex. 197, 13 SW 189, which seems to support this doctrine. Compare Hirsch v. Patton, 49 Tex. Civ. A. 499, 505, 108 SW 1015 (where it was said that "in order for the payment of taxes to be concurrent with the possession, use or cultivation under recorded deed, such payment must be made for each year with reasonable promptness, either when due and demandable, or within such reasonable time thereafter as is usual and customary in the payment of taxes. This case criticizes Capps v. Deegan, supra, but the result reached does not seem to be materially different, as it holds that one year's taxes may be paid after its termination or two years after its termination, if it is believed that the party did not intend to abandon his possession and paid the taxes in continuation of his possession).

52. Illinois Cent. R. Co. v. Cavins, 238 Ill. 380, 87 NE 371; Glos v. Hol-

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California[53] and Washington.[54] Under the Arkansas statute if the taxes are paid as prescribed by statute seven years in succession at any time when the taxes are payable the party paying acquires the title whether he made the payments within one year of each other or not.[55]

[§ 429] **D. By Whom Payments Made—1. Holder of Color of Title and Those in Privity with Him.** Within the statutes under consideration payment of taxes must be made by the person holding the color of title.[56] But it is not to be understood from anything here said that payment by an agent or by a third person, in behalf of the person holding color of title, will be insufficient, for such is not the case.[57] But it is of course essential that payment be made in behalf of the claimant and under the color of title asserted.[58] So payment by one in privity with the claimant will be equivalent to payment by him.[59] If the land claimed adversely is held by tenants in common payment of taxes on the joint property by either will operate as payment by all.[60]

[§ 430] **2. Holder of Color of Title and Third Person.** Where tax receipts produced in evidence by one claiming land under color of title show a payment of the taxes for a part of the seven years by the holder of the color of title and another person this will not constitute a bar as to the whole tract, but only as to the undivided half.[61]

[§ 431] **3. Effect of Payment by Both Owner and Claimant.** According to the weight of authority the payment of taxes by any person extinguishes them, and if a voluntary attempt is made to pay

berg, 220 Ill. 167, 77 NE 80; Glos v. Mickow, 211 Ill. 117, 71 NE 830; Glos v. Kingman, 207 Ill. 26, 69 NE 632; Dickenson v. Breeden, 30 Ill. 279 (where it was held that a payment of seven successive years' taxes made in six years did not satisfy the statute).

53. Commercial Nat. Bank v. Schlitz, 6 Cal. A. 174, 91 P 750. And see McDonald v. McCoy, 121 Cal. 55, 53 P 421.

54. Seymour v. Dufur, 53 Wash. 646, 650, 102 P 756 (holding that since the statute provides for a case where there is no possession the person claiming thereunder must show payment continuously for each successive year for the required period. In this case it was said, per Dunbar, J.: "The payment of taxes annually [on vacant and unoccupied land] would be, to a certain extent, notice to the owner of a claim against the land"); Tremmel v. Mess, 46 Wash. 137, 89 P 487.

55. Rachels v. Stecher Cooperage Works, 95 Ark. 6, 128 SW 348; Price v. Greer, 89 Ark. 300, 116 SW 676, 118 SW 1009.

56. Ballard v. Golob, 34 Colo. 417, 83 P 376; Lower Latham Ditch Co. v. Louden Irr. Canal Co., 27 Colo. 267, 60 P 629, 83 AmSR 80; Manternach v. Studt, 230 Ill. 356, 82 NE 829, 120 AmSR 310; Chicago Sanitary Dist. v. Allen, 178 Ill. 330, 53 NE 109; McCauley v. Mahon, 174 Ill. 384, 51 NE 829; Wright v. Stice, 173 Ill. 571, 51 NE 71; Peadro v. Carriker, 168 Ill. 570, 48 NE 102; Timmons v. Kidwell, 149 Ill. 507, 36 NE 974; Timmons v. Kidwell, 138 Ill. 13, 27 NE 756; Hurlbut v. Bradford, 109 Ill. 397; Shackleford v. Baily, 35 Ill. 387; Fell v. Cessford, 26 Ill. 522; Chickering v. Failes, 26 Ill. 507; Baily v. Doolittle, 24 Ill. 577; Bride v. Watt, 23 Ill. 507; Stearns v. Gittings, 23 Ill. 387; Dawley v. Van Court, 21 Ill. 460; Dunlap v. Daugherty, 20 Ill. 397; Cofield v. Furry, 19 Ill. 183; J. B. Streeter, Jr., Co. v. Fredrickson, 11 N. D. 300, 91 NW 692; Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 21 SW 405. See also supra § 415.

[a] **A payment of taxes on land through error and not with any intent to pay taxes on it** is not under claim and color of title, or under color of title made in good faith, as required by statute in order to gain title to vacant land by payment of taxes. Miller v. O'Leary, 44 Wash. 172, 87 P 113.

[b] **Payment by one without title or interest.**—The principle is well settled that benefits arising from payment of taxes upon real estate by a party without title or interest does not inure to the benefit of the party claiming under color of title. Woodward v. Faris, 109 Cal. 12, 41 P 781; Hurlbut v. Bradford, 109 Ill. 397; Jayne v. Gregg, 42 Ill. 413.

[c] **Presumption from payment by one in possession.**—It is presumed that one residing on land under a deed thereto, and paying the taxes, paid them for himself and not for another. Merriman v. Blalack, 57 Tex. Civ. A. 270, 122 SW 403.

[d] **Joint payment of taxes after a division of the land.**—The fact that two persons appear to have paid taxes jointly on a tract after it is divided will not invalidate the payment of either as to his part of the land. Emmons v. Moore, 85 Ill. 304.

57. Rand v. Scofield, 43 Ill. 167; Chamberlain v. Pybas, 81 Tex. 511, 17 SW 50; Mariposa Land, etc., Co. v. Silliman, (Tex. Civ. A.) 27 SW 773.

[a] **The authority of the agent** need not be in writing. Paris v. Lewis, 85 Ill. 597.

[b] **Title not acquired by agent for himself.**—An agent who, by his principal's direction, took the title to land in his own name in settlement of a claim due such principal, has not such color of title that payment of taxes for five successive years will make him the owner by virtue of Gen. St. § 2187. Warren v. Adams, 19 Colo. 515, 36 P 604.

[c] **Person contracting to pay for another.**—A party to a contract for the purchase of land, by which he has agreed to pay all taxes thereon, is not permitted to apply such payment of taxes on the tax title and thereby defeat the title of his vendor. Baily v. Doolittle, 24 Ill. 577.

[d] **Promise of another to pay for claimant.**—A claimant in possession of land cannot rely on the promise of a third person to pay the taxes for his benefit as an excuse for his failure to pay the taxes, although such third person has an interest in the land and the claim of adverse possession is set up against him. Tuffree v. Polhemus, 108 Cal. 670, 41 P 806.

58. See cases infra this note.

[a] **Where payments of taxes were made by the husband of the claimant or the former's father** it is not a sufficient payment by the claimant unless it is further shown that such payments were made on her behalf. Manternach v. Studt, 230 Ill. 356, 82 NE 829, 120 AmSR 310; Timmons v. Kidwell, 149 Ill. 507, 36 NE 974.

[b] **Payment of taxes by a grantor, after conveyance, who was under no liability to pay the same,** is not available as a payment by his grantee. Jayne v. Gregg, 42 Ill. 413; Fell v. Cessford, 26 Ill. 522.

[c] **Payment by agent of opposing claimants.**—Where plaintiff and defendant both claimed land, and their agents agreed that plaintiff's agent should pay all taxes on the land until they adjusted their claims or sold the land, when each party should receive all taxes he had paid thereon, plaintiff's agent, in paying the taxes under such agreement, acted as agent for both parties, so that such payments were not for plaintiff's exclusive benefit. This is not such a payment as the statute contemplates. Chatfield v. Iowa, etc., Land Co., 88 Ark. 395, 114 SW 473.

59. Southern Pac. R. Co. v. Whitaker, 109 Cal. 268, 41 P 1083; Snowden v. Rush, 69 Tex. 593, 6 SW 767; Hodges v. Ross, 6 Tex. Civ. A. 437, 25 SW 975; Jacks v. Dillon, 6 Tex. Civ. A. 192, 25 SW 645. See also Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 21 SW 405; and cases infra this note. But see J. B. Streeter, Jr., Co. v. Fredrickson, 11 N. D. 300, 305, 91 NW 692 (where it was held that the claimant must have been in possession and paid the taxes for the required period, and he cannot tack to the time of his own possession, for the purpose of making up the statutory period, the time during which his grantor was in possession and paid taxes. "There is no doctrine of tacking payment of taxes which can be invoked").

[a] **Applications of rule generally.**—(1) Thus if taxes are paid by a tenant, the payment inures to the benefit of the landlord (Cofield v. Furry, 19 Ill. 183; Chamberlain v. Pybas, 81 Tex. 511, 17 SW 50), and (2) if paid by the trustee or cestui que trust, to the benefit of the combined legal and equitable title claimed (Kuhn v. Glos, 257 Ill. 289, 292, 100 NE 1003; Cofield v. Furry, supra). (3) "The true question is, under what title were the taxes paid?—and deduce the rule that if payment of taxes is made by the cestui que trust the effect is the same as if made by the trustee, as the two interests stand together and not in hostility to each other, and united make the estate or legal and equitable title to the land." Kuhn v. Glos, supra.

[b] **Payment of taxes by the mortgagee** of the adverse claimant is a payment for and by the adverse claimant, and will satisfy the conditions of the statute as to the payment of the taxes for the purpose of adverse possession. Brown v. Clark, 89 Cal. 196, 26 P 801; Chickering v. Failes, 26 Ill. 507.

[c] **Payment of taxes by a vendee** (1) of the claimant holding possession under bond for deed may constitute a sufficient payment for the latter. Peadro v. Carriker, 168 Ill. 570, 48 NE 102. (2) It can make no difference whether the taxes are paid by the vendor or the vendee where the contract of sale remains unexecuted, nor whether paid by the assignee of the vendor or of the vendee. Darst v. Marshall, 20 Ill. 227.

[d] **Grantee without color of title.**—Payment of taxes by the grantor for a part of the period will not avail his grantee as to the entire tract sold where the latter is without color of title because the sale was by parol. Under these circumstances such payment will be available to the grantee only in respect of land actually occupied by him. King v. Campbell, 89 Ark. 450, 116 SW 899.

60. Emmons v. Moore, 85 Ill. 304; McConnel v. Konepel, 46 Ill. 519.

[a] **Payment of taxes by certain coöwners of a mining claim** who have acquired a patent thereto must be regarded as a payment for the other coöwners for whom they hold the title in trust to the extent of the interests of such other coöwners. Ballard v. Golob, 34 Colo. 417, 83 P 376.

61. Coleman v. Billings, 89 Ill. 183 (where it was held to be competent, however, to show that the taxes were in fact paid by the holder of the color of title, and that the name of the

them a second time the last payment will be considered a gratuity to the taxing power.[62] As a consequence thereof payment of taxes by the owner cannot affect the rights of the adverse claimant where the latter has already paid such taxes.[63] On the other hand, where any one or more of the payments of taxes are made by the claimant "after payment" by the owner there can be no acquisition of title by him by adverse possession.[64] And a fortiori an offer by the claimant to pay taxes made after payment by the owner, acceptance of which is refused by the tax collector, will not satisfy the requirements of the statute.[65] There are, however, decisions which clearly are not in accord with the rules heretofore stated in this section, and while the conclusions which these last mentioned reach are not harmonious, they are so far in accord as to attach no importance to the fact that taxes were or were not paid by the claimant prior to payment by the owner. Thus it has been held that one in possession of land, claiming it adversely, has the right to list it for taxes in his own name, and if he pay taxes thereon it makes no difference that another claiming the land also pays taxes on it, and that this is so, although the party out of possession paid the taxes first.[66] Other decisions reach the opposite conclusion.[67] After the claimant's title by adverse possession has been perfected by payment of taxes for the statutory period, and by a concurrence of other elements necessary to give title, a subsequent payment of taxes by the holder of the record title is of course ineffectual to destroy the title acquired by adverse possession.[67½]

[§ 432] **E. Effect of Buying In Land at Tax Sale.** Permitting the land to be sold for taxes and buying it in is not a payment of taxes within the meaning of any of these statutes.[68] But it has been held that a payment of taxes at any time before the land is

other person was by some inadvertence included in the receipts).

62. Clayton v. Feig, 188 Ill. 603, 59 NE 245; Morrison v. Kelly, 22 Ill. 609, 74 AmD 169. And see St. Louis, etc., R. Co. v. Warfel, 163 Ill. 641, 45 NE 169 (where it was said that where the taxes have been paid the burden created by the tax is removed from the land and there is then no tax resting on the land to be paid and an attempt to make a second payment is a nullity); and cases infra notes 63, 64.

"The one who pays first is to be deemed as having paid the taxes for the purpose of acquiring title by adverse possession." Rio Grande Western R. Co. v. Salt Lake Inv. Co., 35 Utah 528, 540, 101 P 586 [cit Cyc].

63. Osburn v. Searles, 156 Ill. 88, 40 NE 452; Bolden v. Sherman, 101 Ill. 483; Morrison v. Kelly, 22 Ill. 609, 74 AmD 169. Compare also dictum in dissenting opinion in Cavanaugh v. Jackson, 99 Cal. 672, 34 P 509.

[a] **Reason of rule.**—"To permit the owner to defeat the occupant's payment, by paying an amount of money to the collector equal to the tax which had been previously paid by the occupant in discharge of all taxes assessed on the land, would render the provisions of this statute inoperative, and would amount virtually to its repeal, as the holder of the better title would surely make such a payment once in seven years." Morrison v. Kelly, 22 Ill. 609, 627, 74 AmD 169.

[b] **Extent and limits of rule.**—(1) This rule applies, although the taxes are paid by the owner within the time allowed by law for the payment thereof. Osburn v. Searles, 156 Ill. 88, 40 NE 452. (2) It has been held, however, that where the claimant paid the taxes to the collector before they were due or the collector was authorized to receive them as payment, and when the collector received his book and warrant and was authorized to receive payment, he collected the first payment of the tax from the owner, and on the same day marked a payment by defendant as the second payment of the same taxes. This was held not a payment of the taxes by defendant within the statute. South Chicago Brewing Co. v. Taylor, 205 Ill. 132, 68 NE 732.

64. Carpenter v. Lewis, 119 Cal. 18, 50 P 925 [overr in effect Cavanaugh v. Jackson, 99 Cal. 672, 34 P 509]; Commercial Nat. Bank v. Schlitz, 6 Cal. A. 174, 91 P 750; Cramer v. Walker, 23 Ida. 495, 130 P 1002; Clayton v. Feig, 188 Ill. 603, 59 NE 245; Ely v. Brown, 183 Ill. 575, 56 NE 181; Bolden v. Sherman, 101 Ill. 483; Ross v. Coat, 58 Ill. 53; Stearns v. Gittings, 23 Ill. 387. And see Turner v. Ladd, 42 Wash. 274, 84 P 866.

[a] **The running of the statute in favor of the adverse claimant** may be interrupted by the true owner by prior payment of taxes during any of the years of the period of limitations. Ross v. Coat, 58 Ill. 53. To same effect Commercial Nat. Bank v. Schlitz, 6 Cal. A. 174, 91 P 750.

[b] **What is not a payment by owner.**—Where in case of a railway right of way across a tract of land the tract is assessed to the owner and the right of way to the railway company, the fact that the owner of the tract pays the tax assessed thereon and receives a receipt for the taxes assessed on the tract does not constitute a payment of the tax on the right of way so as to deprive the railway company of the benefit of its subsequent payment of the tax assessed on the right of way. St. Louis, etc., R. Co. v. Warfel, 163 Ill. 641, 45 NE 169.

[c] **Under the Colorado statute,** the provisions of which are somewhat different from those of other states whose decisions are considered in the text, defendant cannot invoke the benefit of the statute where plaintiff has the better paper title and has paid the taxes on the land for the same period claimed by defendant. Morris v. St. Louis Nat. Bank, 17 Colo. 231, 29 P 802.

65. Glowner v. De Alvarez, 10 Cal. A. 194, 101 P 432.

66. Owsley v. Matson, 156 Cal. 401, 104 P 983; Thomson v. Weisman, 98 Tex. 170, 82 SW 503 [rev (Civ. A.) 78 SW 728]. And see Cavanaugh v. Jackson, 99 Cal. 672, 34 P 509 (in which, it not appearing whether the payment was made by the owner before that by the adverse claimant, the court held that, the claimant having paid the taxes himself, his rights were in no way affected by the fact of payment by the owner, and it was said that it made no difference whether the payment by the owner was before or after payment by the adverse claimant); Bell v. Germain, 12 Cal. 375, 107 P 630 [cit Owsley v. Matson, supra, as authority] (and holding that where defendants, whose buildings encroached on plaintiff's lot, claimed under adverse possession and paid the taxes on the land claimed by them, the payment by plaintiff, who was out of possession, of taxes on the same property did not defeat defendants' rights).

67. Stuart v. Union Pac. R. Co., 227 U. S. 342, 33 SCt 138, 57 L. ed. 535 [aff 178 Fed. 753, 103 CCA 89]; Northern Pac. R. Co. v. Littlejohn, 198 Fed. 700.

67½. Newsom v. De Ford, (Colo. A.) 140 P 207.

68. Greer v. Vaughan, 96 Ark. 524, 132 SW 456; Wyse v. Johnston, 83 Ark. 520, 104 SW 204; McDonald v. McCoy, 121 Cal. 55, 53 P 421; Webber v. Wannemaker, 39 Colo. 425, 89 P 780; Hart v. Randolph, 142 Ill. 521, 32 NE 517; Holbrook v. Dickenson, 56 Ill. 497; Woodruff v. McHarry, 56 Ill. 218; Wettig v. Bowman, 47 Ill. 17; Irving v. Brownell, 11 Ill. 402; Plowman v. Morden, 33 S. D. 593, 146 NW 914; Cain v. Ehrler, 33 S. D. 536, 146 NW 694. See also Holloway v. Clark, 27 Ill. 483.

[a] **In support of this doctrine** (1) it was said in McDonald v. McCoy, 121 Cal. 55, 73, 53 P 421: "If there is anything of benefit to the state contemplated by this anomalous law, it is that it will have a tendency to induce people to pay their taxes, and not compel the state to take the title subject to redemption. If it is an element in the adverse possession tending to show good faith, certainly during those years in which the taxes have not been paid the possession lacks an essential element required in the statute. During all the years in which the delinquency was allowed, the true owner might forbear suit because of his knowledge that the person in possession had not paid taxes, thereby indicating that he was not holding adversely." (2) The reasoning of this case is approved in Wyse v. Johnston, 83 Ark. 520, 104 SW 204.

[b] **Effect of rule.**—If the party seeking to acquire title by adverse possession permits the lands to be sold for taxes during the running of the statute, and afterward redeems from such sale, he will be required to begin de novo and wait the required time for a deed. Wettig v. Bowman, 47 Ill. 17.

[c] **The payment of costs and judgment for costs by purchaser at a tax sale,** by reason of his bid being equal to or in excess of the judgment and costs, is not a "payment of taxes" within the statute. Dunnington v. Hudson, 217 Mo. 98, 116 SW 1083.

[d] **A limitation of the rule** (1) is recognized in Gray v. Walker, 157 Cal. 381, 108 P 278, and Owsley v. Matson, 156 Cal. 401, 405, 104 P 983, which hold that a bona fide redemption from tax sale made by the occupant in undisturbed possession is a payment of the taxes within the statute. (2) In Owsley v. Matson, supra, per Shaw, J., McDonald v. McCoy, supra, is distinguished as follows: "In that case, however, it appeared that the person in possession had failed to pay any taxes during his possession and that the redemption took place after he had ceased to have possession or to claim any right thereto. In such a case there may be good ground for saying that a subsequent payment of the taxes by way of redemption from such sale would not relate back to and aid the previous possession so as to make it adverse from the time of the tax-sale to the time of such redemption. . . . But where, as in the present case, the tax has been allowed to become delinquent and a sale has taken place and, so far as appears, a redemption has been made thereof, while the party or his successor in interest was in undisturbed possession and all this

sold, although after the date when the revenue statutes require it to be returned delinquent, constitutes a payment and not a redemption.[69]

[§ 433] **F. Effect of Misdescription in Tax Receipts.** One who, under color of title acquired in good faith, has paid the taxes actually assessed against land is entitled to the benefit of the statute, notwithstanding the land may have been misdescribed in the tax receipts,[70] provided he is able to remove the uncertainty by extrinsic evidence.[71] On the other hand, the fact that part of the tax receipts held by defendant in ejectment included in their description the tract in controversy does not establish defendant's title thereto under the statute of limitations, where the evidence shows that the tract was not in fact assessed to defendant, or the taxes thereon paid, or intended to be paid, by her.[72]

Misdescription of party paying taxes. Misprision of the collecting officer in describing in the tax receipts the person paying the taxes will not prevent him from acquiring title, where it is obvious from all the evidence that the person claiming title paid the taxes.[73]

[§ 434] **G. Other Elements Necessary in Addition to Payment. Payment of taxes alone insufficient.** Under none of these statutes is payment of taxes alone sufficient.[74]

In Illinois. Under the sixth section of the Illinois statute, in order to create a bar there must be a concurrence of three things for the period therein prescribed—color of title, possession of land, and payment of taxes thereon for the entire statutory period.[75] But when these elements have concurred for the statutory period the claimant acquires a valid title by adverse possession.[76] Possession must be actually taken before the bar created by the seventh section of the Illinois statute will attach in favor of one who has, under color of title,[77] in accordance with its provisions, paid taxes for seven successive years on vacant and unoccupied lands.[78] Where, however, all the taxes legally assessed upon vacant land are paid, under color of title, for seven successive years while the land is vacant and unoccupied, and possession is then taken under such claim and color of title, this will establish a complete title by adverse possession,[79] which may be asserted either as a defense or to regain possession when invaded.[80] It has been held that in order to acquire title under either of these sections there must be complete performance of the provisions of one or the other. "It will not

is done in good faith, we see no reason why the same should not be held to operate as a payment and we think it is sufficient to bring the occupant within the terms of the statute." (3) A similar result was reached in Stiles v. Granger, 17 N. D. 502, 507, 117 NW 777. It was held that where an agent was instructed to pay the taxes and instead purchased the property in his principal's name at a tax sale, there was a sufficient payment of the taxes. (4) In this case it was said, per Spaulding, J.: "The sale of land to the person claiming ownership and in possession, whose duty it is to pay the taxes, is void, and operates as a payment. The purchaser under such circumstances acquires no title by his purchase, and it is deemed to be only one method of paying the taxes."

69. Price v. Greer, 89 Ark. 300, 116 SW 676, 118 SW 1009.

70. Neiderer v. Bell, 174 Ill. 325, 51 NE 855; West Chicago Park Comrs. v. Coleman, 108 Ill. 591. But see Boynton v. Ashabranner, 75 Ark. 415, 88 SW 566, 1011, 91 SW 20 (holding that where certain tax receipts described the land, by mistake, as the west half of the southeast quarter of a certain section, instead of the east half of such section, they were insufficient to support a title by adverse possession, under Kirby Dig. § 5057, providing that unimproved and unenclosed land shall be deemed to be in possession of the person who pays the taxes thereon, if he have color of title thereto, etc. No reason was given for the conclusion reached).

71. Neiderer v. Bell, 174 Ill. 325, 51 NE 855.

72. Neiderer v. Bell, 174 Ill. 325, 51 NE 855.

73. Rachels v. Stecher Cooperage Works, 95 Ark. 6, 128 SW 348.

74. Ark.—Updegraff v. Marked Tree Lumber Co., 83 Ark. 154, 103 SW 606.

Ill.—Chicago, etc., R. Co. v. Abbott, 215 Ill. 416, 74 NE 412; Loewenthal v. Elkins, 175 Ill. 553, 51 NE 592; Johns v McKibben, 156 Ill. 71, 40 NE 449.

N. D.—J. B. Streeter, Jr., Co. v. Fredrickson, 11 N. D. 300, 91 NW 692.

Tex.—Brunner Fire Co. v. Payne, 54 Tex. Civ. A. 501, 118 SW 602.

Wash.—Hesser v. Siepmann, 35 Wash. 14, 76 P 295.

And see generally statutory provisions of the various states; and cases infra this section.

75. See cases infra this note.

[a] **Absence of any one of these elements** will prevent the acquisition of title by adverse possession. Blair v. Johnson, 215 Ill. 552, 74 NE 747; Wright v. Stice, 173 Ill. 571, 51 NE 71; Burton v. Perry, 146 Ill. 71, 34 NE 60; Stoltz v. Doering, 112 Ill. 234; Lyman v. Smillie, 87 Ill. 259; Wettig v. Bowman, 47 Ill. 17; McConnel v. Konepel, 46 Ill. 519; Clark v. Lyon, 45 Ill. 388; Bride v. Watt, 23 Ill. 507; Stearns v. Gittings, 23 Ill. 387; Irving v. Brownell, 11 Ill. 402.

[b] **In the absence of color of title** (1) payment of taxes for the statutory period is unavailable. Beaver v. Taylor, 1 Wall. (U. S.) 637, 17 L. ed. 601; Blair v. Johnson, 215 Ill. 552, 74 NE 747; Chicago, etc., R. Co. v. Abbott, 215 Ill. 416, 74 NE 412; Duck Island Club v. Bexstead, 174 Ill. 435, 51 NE 831; Durfee v. Peoria, etc., R. Co., 140 Ill. 435, 30 NE 686; Stoltz v. Doering, 112 Ill. 234. (2) Thus possession and payment of taxes for seven years by a grantee who has parted with color of title under his deed by subsequently executing a conveyance of the land to another creates no bar. Heacock v. Lubuke, 107 Ill. 396. (3) And taxes paid upon land prior to the issuance of a tax deed, not being made under color of title, are not availing. Duck Island Club v. Bexstead, 174 Ill. 435, 51 NE 831. (4) So where a devisee for life suffered the land to be sold for taxes, and his wife became the purchaser at the tax sale, and she conveyed to a grantee with notice of the facts, who conveyed to a third person without notice and the latter took possession of the land and paid taxes thereon, it was held that the possession and payment of taxes by the wife and her grantee could not operate in favor of the third person, because the payment was not made under color of title, and hence, before he could acquire title by limitation, he must show actual adverse possession for seven successive years under color of title furnished by his deed, and payment of the taxes for the seven years. Blair v. Johnson, 215 Ill. 552, 74 NE 747.

[c] **Possession short of statutory period.**—Payment of taxes for seven years and possession for two years immediately preceding the filing of the bill are insufficient to give title by adverse possession. Loewenthal v. Elkins, 175 Ill. 553, 51 NE 592.

76. Lewis v. Barnhardt, 43 Fed. 854 [aff 145 U. S. 56, 12 SCt 772, 36 L. ed. 621]; Durfee v. Peoria, etc., R. Co., 140 Ill. 435, 30 NE 686; Lake Shore, etc., R. Co. v. Pittsburg, etc., R. Co., 71 Ill. 38; McConnel v. Street, 17 Ill. 253; Woodward v. Blanchard, 16 Ill. 424.

77. Glos v. Miller, 213 Ill. 22, 72 NE 714; White v. Harris, 206 Ill. 584, 69 NE 519; Stalford v. Goldring, 197 Ill. 156, 64 NE 395; Glos v. Kemp, 192 Ill. 72, 61 NE 473; Glos v. Perkins, 188 Ill. 467, 58 NE 971; Travers v. McElvain, 181 Ill. 382, 55 NE 135; McCauley v. Mahon, 174 Ill. 384, 51 NE 829; Gage v. Smith, 142 Ill. 191, 31 NE 430; Glos v. Randolph, 133 Ill. 197, 24 NE 426; Gage v. Hampton, 127 Ill. 87, 20 NE 12, 2 LRA 512 and note; Meacham v. Winstanly, 77 Ill. 269. Contra Newland v. Marsh, 19 Ill. 376.

78. See cases supra note 52.

[a] **"Until the owner of the color of title has united actual possession** to the color and to the payment of taxes, he is in no position to invoke the aid of the second [seventh] section, because that section cannot become constitutionally operative until the person invoking its aid has acquired actual possession. Then, for the first time, it properly becomes a limitation law." Paullin v. Hale, 40 Ill. 274, 277.

[b] **What is "vacant and unoccupied land."**—The phrase "vacant and unoccupied land," as used in the statute, means land not in the actual possession of any one. Temporary entries without claim of right and without the intention to exclude others—camping thereon, leaving a wagon thereon, or building a haystack thereon—do not constitute possession so as to change the character of vacant land to that of land actually possessed or occupied. Walker v. Converse, 148 Ill. 622, 36 NE 202.

79. White v. Harris, 206 Ill. 584, 69 NE 519; Gage v. Hampton, 127 Ill. 87, 20 NE 12, 2 LRA 512 and note; Holbrook v. Gouveneur, 114 Ill. 623, 3 NE 220; Whitney v. Stevens, 77 Ill. 585; Mecham v. Winstanly, 77 Ill. 269; Wilson v. South Park Comrs., 70 Ill. 46; Hale v. Gladfelder, 52 Ill. 91; McCagg v. Heacock, 42 Ill. 153. And see Woods v. Glos, 257 Ill. 125, 100 NE 516; Bellefontaine Imp. Co. v. Niedringhaus, 181 Ill. 426, 55 NE 184, 72 AmSR 269.

80. Gage v. Hampton, 127 Ill. 87, 20 NE 12, 2 LRA 512; Meacham v. Winstanly, 77 Ill. 269; Wilson v. South Park Comrs., 70 Ill. 46.

[a] **Where the benefit of the bar of this statute has once been acquired** the right of possession remains with the occupant, even if he temporarily leaves the possession, and enables him to recover the possession as against all persons as to whom his bar in defense, if set up, would have been available. Paullin v. Hale, 40 Ill. 274.

be permitted to show part performance under one section, and part under another, and thus avail of the provisions of both."[81] In other words performance under the two statutes cannot be tacked.[82]

In Washington where the statutes contain two sections identical with those of Illinois just considered it is held that in order to obtain title by adverse possession and the payment of taxes for seven years the possession must be shown to be actual, open, and notorious under claim and color of right made in good faith, and it is not sufficient to show mere possession at one time, and payment of taxes and color of title for seven years.[83] However, so far as regards the tacking of possession under the two sections the conclusion reached is squarely in conflict with that of the Illinois courts.[84]

In Colorado to establish title by limitations to vacant and unoccupied land, one must obtain, in good faith, color of title, and must pay taxes for the full period of seven years, and the color of title and payment of taxes must exist concurrently, without interruption, and must continue throughout the seven years.[85] However, the concurrence of these elements will give title by adverse possession.[86] And it has further been held that payment of taxes on vacant lands under color of title, for the period therein mentioned, will be sufficient to give title by adverse possession without any possession whatever.[87]

Under the Texas statute payment of taxes and possession under a recorded deed for the period therein mentioned must concur,[88] but when they do, the claimant acquires title by adverse possession.[89]

Under the Idaho statute adverse possession of land cannot be considered established unless it be shown that the land had been occupied and claimed continuously for the period mentioned in the statute, and that the party or persons, their predecessors, and grantors, had paid all the taxes levied and assessed on the land.[90]

Under the statute of South Dakota it is essential that the party paying the taxes and claiming the benefit of the statute should have color of title in good faith during the whole statutory period in which the taxes are being assessed and paid and that the two must exist together.[91] While occupancy is not necessary under this statute, the fact that the claimant has occupied the land for a part of the time does not affect his right to acquire title by adverse possession if he has complied with the other conditions including payment of taxes.[91½]

In North Dakota it is held that the requirement of the statute is satisfied by the payment of all taxes and assessments levied during the prescribed period, and that the concurrence of adverse possession and such payment, although ultimately essential, is not necessary to start the running of the statute.[92]

Under the Arkansas statute,[93] if the land was improved during a part of the period fixed by statute, title by adverse possession cannot be acquired thereto.[94] But it has been held that the possession

81. White v. Harris, 206 Ill. 584, 591, 69 NE 519 (per Magruder, J.); Duck Island Club v. Bexstead, 174 Ill. 435, 51 NE 831; Iberg v. Webb, 96 Ill. 415; Whitney v. Stevens, 89 Ill. 53.

82. White v. Harris, 206 Ill. 584, 69 NE 519; Duck Island Club v. Bexstead, 174 Ill. 435, 51 NE 831.

83. Northern Pac. R. Co. v. Smith, 68 Wash. 269, 122 P 1057.

84. Philadelphia Mortg., etc., Co. v. Palmer, 32 Wash. 455, 73 P 501.

"Clearly the intent of the legislature was to confer the legal title to land upon a person who had claim and color of title thereto made in good faith, and who paid the taxes assessed thereon for seven consecutive years, whether such person was in or out of possession; provided, of course, that the land remained vacant while such person was out of possession, and no one else having a better paper title paid taxes thereon. If this be not so, any interruption of a possession no matter for what cause and for however short a time, would stop the running of the statute. So, likewise, would an entrance on vacant land, if made for the purpose of exercising dominion over it, stop the running of the statute. A party in possession could not quit it for a single instant, and one out of possession could not enter for a single instant, without losing all benefit of the statute. This is not the meaning of the statute. It is enough if the period during which he is in possession, added to the period during which he is out of possession, equals seven years." Philadelphia Mortg., etc., Co. v. Palmer, 32 Wash. 455, 462, 73 P 501 (per Fullerton, J.).

85. King v. Foster, (Colo. A.) 140 P 930; Empire Ranch, etc., Co. v. Howell, 24 Colo. A. 154, 132 P 387.

[a] **In applying this principal** it was held that a decree, entered four years prior to the commencement of the present action, does not constitute sufficient color of title to support a plea under the seven-year statute of limitations, and, if no other color of title is shown, proof of actual possession and payment of taxes is insufficient to support the plea. King v. Foster, (Colo. A.) 140 P 930.

86. Laws v. Newkirk, 39 Colo. 78, 88 P 861.

87. Thatcher v. Gottlieb, 59 Fed. 872, 8 CCA 334 (construing Colorado statute).

88. Sorley v. Matlock, 79 Tex. 304, 15 SW 261; Snowden v. Rush, 69 Tex. 593, 6 SW 767; Wall v. Club Land, etc., Co., (Tex. Civ. A.) 88 SW 534 [rev on other grounds 92 SW 984]; Taylor v. Brymer, 17 Tex. Civ. A. 517, 42 SW 999; Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 21 SW 405.

[a] **Payment of taxes by one who has never been in possession** will not avail under the statute of limitations of five years. Brenner Fire Co. v. Payne, 54 Tex. Civ. A. 501, 118 SW 602.

[b] **Where there is no deed of record** (1) payment of taxes is unavailing. Watts v. Bruce, 31 Tex. Civ. A. 347, 72 SW 258. (2) The statute, to divest title by possession under a tax deed, does not begin to run until the deed is filed. Taylor v. Brymer, 17 Tex. Civ. A. 517, 42 SW 999.

89. Jacks v. Dillon, 6 Tex. Civ. A. 192, 25 SW 645.

90. Green v. Christie, 4 Ida. 438, 40 P 54.

91. Bennett v. Moore, 18 S. D. 109, 99 NW 855. And see Jackson v. Bailey, 19 S. D. 594, 104 NW 268.

91½. Cain v. Ehrler, 33 S. D. 536, 543, 146 NW 694 (under a statute providing that whenever a person having a color of title, made in good faith, to vacant and unoccupied land, shall have paid all taxes legally assessed thereon for ten successive years, he shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his paper title. In this case the court said: "Does occupancy for a portion of the time, together with a compliance with the conditions of sec. 55 for the full time, weaken the right that would accrue from a compliance with the conditions of that section without such occupancy? We know of no reason why it should, and believe if any distinction were to be made because of such occupancy it should strengthen, rather than weaken, the occupant's title"). That the opposite conclusion is reached under the Arkansas statute see infra note 94.

92. Schauble v. Schulz, 137 Fed. 389, 69 CCA 581. And see Power v. Kitching, 10 N. D. 254, 86 NW 737, 88 AmSR 691 and note; J. B. Streeter, Jr., Co. v. Fredrickson, 11 N. D. 350, 91 NW 692, which are said in Schauble v. Schulz, supra, to support this doctrine inferentially.

[a] **Possession and payment of taxes for the statutory period** by one holding under a tax title is a defense to a suit to quiet title by the holder of the record title. Stiles v. Granger, 17 N. D. 502, 117 NW 777.

93. Kirby Dig. § 5057, provides that unimproved and uninclosed land shall be deemed to be in the possession of the person who pays the taxes thereon, if he have color of title, but that no person shall be entitled to invoke the benefit of the act unless he or those under whom he claims shall have paid such taxes for at least seven years in succession, and that not less than three such payments must be made subsequent to the passage of the act.

94. Wells v. Rock Island Impr. Co., (Ark.) 162 SW 572; Fenton v. Collum, 104 Ark. 624, 150 SW 140; King v. Campbell, 89 Ark. 450, 116 SW 899; Connerly v. Dickinson, 81 Ark. 258, 99 SW 82; Wheeler v. Foote, 80 Ark. 435, 97 SW 447. That the opposite conclusion is reached under the South Dakota statute see supra note 91½.

"It was obviously the intention of the Legislature that the statute should relate only to lands in a state of nature—wild—that had not been cleared, improved, or inclosed, and it was not intended that the title to lands cleared, fenced, or in cultivation could be acquired by limitation by the payment of taxes, as specified in said act; such lands not being unimproved and uninclosed within the meaning of it. It may be that, when fields once cleared and cultivated have been abandoned and permitted to go to waste and grow up in briars and brush and the fences become dilapidated and destroyed, the lands will be regarded unimproved and uninclosed, as though they had never been, but we think this condition must be shown before the title to

acquired by the payment of taxes on such land continues, even though the party paying the taxes subsequently takes actual physical possession,[95] and that an invalid forfeiture to the state works no interruption of such possession.[96] Payment for seven years in succession is insufficient where suit is commenced by the true owner before expiration of seven years from the date of the first payment.[97] Under the circumstances the constructive possession created by the payment of taxes is broken.[98] And by the express provisions of the statute it is essential that three of the payments for the seven-year period should be made subsequent to its passage.[99] A full compliance with the provisions of the statute gives a constructive possession which ripens into a perfect title.[1]

In Utah payment of taxes, although for more than seven years, coupled with open and notorious possession for only two or three years, will not give title by adverse possession.[2]

[§ 435] **H. When Statute Commences to Run. In Illinois** under both sections of the statute limitation commences to run, not from the time of taking possession, but from the time of the first payment of taxes.[3] To complete the bar of these provisions there must be a period of full seven years between the day when the first payment of taxes was made and the date of the commencement of suit.[4] It is not necessary, however, that between the first and last payment seven years should intervene in order to complete the statutory bar.[5]

In Colorado also to complete the bar of the provisions there must be a period of full seven years between the date when the first payment was made and the date of the commencement of the suit.[6] And it has been held that it is also essential that seven years must have elapsed between the recording of a tax deed relied on as color of title and the commencement of suit, the date that the deed is recorded fixing the time the holder thereof acquires color of title.[7] While under the seven-year statute of limitations of this state the holder of a tax deed may strengthen his title by subsequently obtaining another title, yet if he pays the tax under the subsequent title and relies entirely upon it and the payments thereunder, limitations run only from the date of the payments thereunder and not from the date relied upon under the fixed tax deed.[7½]

In California the Illinois rule has been disapproved. The commencement of adverse possession is not required to coincide with the beginning or end of a fiscal year, and the payment by the owner of taxes which were levied and assessed and paid during the calendar year preceding the adverse occupation will not postpone the running of the statute until the end of the fiscal year.[8]

In Washington, where the two sections of the statute are identical with those of Illinois, the construction placed by the Illinois court on the section relating to unimproved and unoccupied land is approved and followed, and it is held that the statute commences to run from the date of the first payment of taxes,[9] and that seven years must elapse between the date of the first payment of taxes and the commencement of suit.[10] But the construction placed by the Illinois court on the section relating to payment of taxes by one in possession of the land is disapproved, and it is held that one in possession, who has paid all taxes during the statutory period, acquires title, although seven years have not elapsed between the date of the first payment and commencement of suit.[11]

Under the Arkansas statute limitations commence

lands, once improved and inclosed, can be acquired by the payment of taxes in accordance with said law. In other words, if the lands are shown to have been improved or inclosed during any of the seven years, the successive payment of taxes for which would have conferred title upon the person paying the taxes if they had been unimproved and uninclosed, it would defeat claimant's title thereto." Fenton v. Collum, 104 Ark. 624, 150 SW 140, 141.

[a] **What is unimproved land.**—The term "wild" is used interchangeably with the words "unimproved and uninclosed," relative to lands claimed under Kirby Dig. § 5057, relating to adverse possession, so that a finding that lands were wild was sufficient to show that they were uninclosed and unimproved. Fenton v. Collum, 104 Ark. 624, 150 SW 140.

[b] **Where a tract described in a deed is divided into legal subdivisions, and each is separately assessed,** and one of the tracts is uninclosed and unimproved, payment of taxes thereon continuously for seven years as provided by Kirby Dig. § 5057, gives title as against the owner, who only has constructive possession. Wells v. Rock Island Impr. Co., (Ark.) 162 SW 572.

95. Gaither v. Gage, 82 Ark. 51, 100 SW 80.

96. Hardie v. Bissell, 80 Ark. 74, 94 SW 611.

97. Bradley Lumber Co. v. Langford, 160 SW 866; Sibley v. England, 90 Ark. 420, 119 SW 820; Updegraff v. Marked Tree Lumber Co., 83 Ark. 154, 103 SW 606.

98. Sibly v. England, 90 Ark. 420, 119 SW 820.

99. Kirby Dig. § 5057.

1. Greer v. Vaughan, 96 Ark. 524, 132 SW 456; Taylor v. Leonard, 94 Ark. 122, 126 SW 387; Updegraff v. Marked Tree Lumber Co., 83 Ark. 154, 103 SW 606; Towson v. Denson, 74 Ark. 302, 86 SW 661.

2. Ives v. Grange, (Utah) 134 P 619.

3. White v. Harris, 206 Ill. 584, 69 NE 519; Iberg v. Webb, 96 Ill. 415; Lyman v. Smilie, 87 Ill. 259; Kane v. Footh, 70 Ill. 587; Stearns v. Gittings, 23 Ill. 387; Newland v. Marsh, 19 Ill. 376. But see Beaver v. Taylor, 1 Wall. (U. S.) 637, 17 L. ed. 601 (where it is said that under the sixth section limitation commences to run from the possession under claim and color of title).

4. Blair v. Johnson, 215 Ill. 552, 74 NE 747; Burton v. Perry, 146 Ill. 71, 34 NE 60; Hurlbut v. Bradford, 109 Ill. 397; Holbrooke v. Debo, 99 Ill. 372; Iberg v. Webb, 96 Ill. 415; Lyman v. Smilie, 87 Ill. 259; McConnell v. Konepel, 46 Ill. 519; Clark v. Lyon, 45 Ill. 388.

5. Hurlbut v. Bradford, 109 Ill. 397 [disappr dictum Meacham v. Winstanly, 77 Ill. 269].

6. Cristler v. Beardsley, 25 Colo. A. 369, 138 P 68; Callahan v. Reinhardt, 24 Colo. A. 199, 132 P 387; Empire Ranch, etc., Co. v. Howell, 24 Colo. A. 154, 132 P 387; Evans v. Howell, 23 Colo. A. 219, 128 P 879; Empire Ranch, etc., Co. v. Howell, 22 Colo. A. 584, 26 S 1096.

[a] **Payment of taxes after the filing of the complaint** is not available to invoke the seven-year statute of limitations. Empire Ranch, etc., Co. v. Howell, 23 Colo. A. 348, 129 P 521; Upham v. Weisshaar, 23 Colo. A. 277, 128 P 1129.

7. Empire Ranch, etc., Co. v. Gibson, 22 Colo. A. 617, 126 P 1103; Empire Ranch, etc., Co. v. Howell, 22 Colo. A. 584, 126 P 1096.

[a] **As otherwise expressed.**—For the reason either that less than seven years had elapsed between the issuance and recording of the tax deed, relied on as color of title, and commencement of the suit, or that less than that period had elapsed between the first payment of taxes after the recording of the deed and commencement of the suit, the seven-year statute of limitations does not operate as a bar. Johnson v. Gibson, 24 Colo. A. 392, 133 P 1052.

7½. Gibson v. Huff, (Colo. A.) 141 P 510.

8. Brown v. Clark, 89 Cal. 196, 26 P 801. And see Allen v. McKay, 120 Cal. 332, 52 P 828.

9. Lara v. Sandell, 52 Wash. 53, 56, 109 P 166 (where it was said: "There is nothing else to mark the commencement of the statutory period").

10. Tremmel v. Mess, 46 Wash. 137, 89 P 487.

11. Lara v. Sandell, 52 Wash. 53, 55, 100 P 166 (where the court said, per Rudkin, C. J.: "The appellant contends, however, that the three prerequisites we have mentioned must exist concurrently without interruption, and must continue throughout the entire seven-year period, and that it does not appear that seven years elapsed between the date of the first payment of taxes, under claim and color of title made in good faith, and the commencement of this action. This contention is based largely on decisions of the supreme court of Illinois, and it must be conceded that under the decisions of that court the period of adverse possession does not commence to run until a tax payment has been made. Glos v. Wheeler, 229 Ill. 272, 82 NE 234. This court followed the Illinois cases in Tremmel v. Mess, 46 Wash. 137, 89 P 487, in construing section 5504, Ballinger's Ann. Codes & St. (Pierce's Code 1161), which relates to vacant and unoccupied lands; but under that section it is quite manifest that the statute of limitations or adverse possession cannot commence to run until there has been

to run from the date of the first payment of taxes, and the statutory bar is complete at the end of seven years from that date, provided seven payments have been made in succession, and three of them subsequently to the passage of the act.[12] It is not essential, however, that three years must elapse from the first payment after the passage of the act.[13]

Under the statute of North Dakota it is held that the statute commences to run from the time possession is taken and not on the date of the first payment of taxes.[14]

In Idaho, where the statute requires continuous adverse possession and payment of taxes for five years, it has been held that it is not necessary that the possession should have immediately preceded the action; any continuous five-year possession subsequently to the acquisition of title by the adverse party during which he has complied with the statute in maintaining his open, notorious, continued adverse possession and payment of taxes for such period will suffice.[15]

[§ 436] **I. Disability of Owner as Affecting Operation of Statute.** The Arkansas statute, the provisions of which have been set out in a preceding section,[16] which in itself is declared not to be a statute of limitation, must be construed in connection with the general statute of limitations relating to adverse possession to make it effective, and in becoming thus a part of such statute the provisos relative to those laboring under the disabilities apply.[17]

XII. AGAINST WHOM THE STATUTE RUNS AND PROPERTY SUBJECT THERETO

[§ 437] **A. Rule Exempting the Sovereign from the Operation of the Statute[18]—1. In England and Canada.** Formerly the invariable rule of the English law, resulting from the application of the maxim, Nullum tempus occurrit regi, was that no length of possession would give title to land as against the crown.[19] But the rule has been modified to some extent by statute.[20]

[§ 438] **2. In Hawaii, Porto Rico, and the Philippines. In Hawaii** the maxim, Nullus tempus occurrit regi, applies as regards crown land,[21] but it has no application to lands owned by the sovereign as an individual.[22]

In Porto Rico government lands cannot be acquired by adverse possession, the rule being that the possession of land by the individual for the length of time mentioned in the statute of limitations, with a claim of absolute title of ownership, raises a conclusive presumption of a valid grant against all persons but the sovereign.[23]

In the Philippines land which belongs to the national domain and is reserved for public purposes cannot be acquired by adverse possession. It is not capable of being appropriated by any private person except through express authorization granted in due form by a competent authority.[24]

a payment of taxes, for there is nothing else to mark the commencement of the statutory period. It seems to us that this rule should not apply in construing section 5503. The only requirement of the latter section is that the adverse possession shall be continued for seven years, and that the occupant shall pay all taxes legally assessed during that time. To hold that seven years of adverse possession is not complete until seven years have elapsed after the first payment of taxes under claim and color of title made in good faith, is to add materially to the language of the statute. The supreme court of California has held, under a similar statute, that the occupant need only pay the taxes legally assessed during the statutory period of adverse possession, and we think this construction is in entire harmony with the language of the statute, and should be adopted here. Allen v. McKay, 120 Cal. 332, 52 P 828; Brown v. Clark, 89 Cal. 196, 26 P 801").

12. Greer v. Vaughan, 96 Ark. 524, 132 SW 456; Price v. Greer, 89 Ark. 300, 116 SW 676, 118 SW 1009; Osceola Land Co. v. Chicago Mills, etc., Co., 84 Ark. 1, 103 SW 609; Updegraff v. Marked Tree Lumber Co., 83 Ark. 154, 103 SW 606; Gaither v. Gage, 82 Ark. 51, 100 SW 80; Macrae v. Johnson, 92 SW 1120; Cottonwood Lumber Co. v. Hardin, 78 Ark. 95, 92 SW 1118.

[a] **A limitation of the rule** is that the statute does not begin to run in favor of the holder of a tax deed as against the owner until the expiration of the period for redemption. King v. Booth, 94 Ark. 306, 126 SW 830.

13. Greer v. Vaughan, 96 Ark. 524, 132 SW 456; Price v. Greer, 89 Ark. 300, 116 SW 676, 118 SW 1009.

14. Schauble v. Schulz, 137 Fed. 389, 69 CCA 581 [foll Beaver v. Taylor, 1 Wall. (U. S.) 637, 17 L. ed. 601 (construing a similar provision of the Illinois statute)].

15. Cramer v. Walker, 23 Ida. 495, 130 P 1002.

16. See supra § 434.

17. Taylor v. Leonard, 94 Ark. 122, 126 SW 387.

18. Spanish law.—(1) By the civil law of Spain it has been said that no length of possession will give title to land as against the crown. Harrison v. Ulrichs, 39 Fed. 654; Salle dit Lajoye v. Primm, 3 Mo. 529. (2) And in the United States supreme court it has been said to be doubtful whether under the Mexican laws title to public lands could have been acquired by adverse possession, but that in any case under the decree of the king of Spain, July 16, 1819, nothing less than a possession of forty years could be deemed as creating title by adverse possession. Crespin v. U. S., 168 U. S. 208, 18 SCt 53, 42 L. ed. 438. But see Pepper v. Dunlap, 9 La. Ann. 137 (where it was said that under the Spanish law title could be acquired by prescription against the crown).

19. Lee v. Norris, Cro. Eliz. 331, 78 Reprint 581; Payne's Case, 2 Leon. 205, 74 Reprint 481; Coke Litt. 57, 3 Cruise 558.

[a] **Colonial proprietors.**—(1) In Maryland the colonial lord proprietors have been held not to have had the royal rights and prerogatives of the king of England, and title to land owned by them could have been acquired by adverse possession. Russell v. Baker, 1 Harr. & J. 71. See however Stewart v. Mason, 3 Harr. & J. 507; Cheney v. Ringgold, 2 Harr. & J. 87; Lux v. Pellet, 1 Harr. & J. 83 note; Baltimore v. Evans, 4 Harr. & M. 482; Tasker v. Whittington, 1 Harr. & M. 151. (2) And in New Jersey it has been held that since the surrender by the proprietors of their powers of government, title to land owned by them could be acquired by adverse possession. Newark v. Watson, 56 N. J. L. 667, 29 A 487, 24 LRA 843; Cornelius v. Giberson, 25 N. J. L. 1; Yard v. Ocean Beach Assoc., 49 N. J. Eq. 306, 24 A 729. See also Gardner v. Sharp, 9 F. Cas. No. 5,236, 4 Wash. C. C. 609.

20. Goodtitle v. Baldwin, 11 East 488, 103 Reprint 1092; 21 Jac. I, c. 2; 9 Geo. III, c. 16.

[a] **"By 21 Jac. I, c. 14** (Chitty's stat. 613) it is enacted: 'That whensoever the King, his heirs or successors, and such from or under whom the King claimeth, and all others claiming under the same title, under which the King claimeth, hath been or shall be out of possession for the space of twenty years, or hath not or shall not have taken the profits of any lands, tenements or hereditaments, within the space of twenty years before any information of intrusion brought or to be brought to recover the same; that in every such case the defendant or defendants may plead the general issue, if he or they so think fit, and shall not be pressed to plead specially; and that in such cases the defendant or defendants shall retain the possession he or they had at the time of such information exhibited, until the title be tried, found or adjudged for the King.'" See Murray v. Duff, 33 N. B. 351, 354.

[b] **In Canada** it has been said by the supreme court that "a person entering on the possession of the crown is a mere intruder having a possession which can no more be said to be a disseisin than can that of an overholding tenant." Per Strong, C. J., in Webb v. Marsh, 22 Can. S. C. 437, 441.

[c] **In New Brunswick** (1) in a comparatively recent decision it has been said that the statute 21 Jac. is in force. Murray v. Duff, 33 N. B. 351. (2) In Emmerson v. Maddison, 36 N. B. 260, it was held that the rule that the crown cannot be disseized is not changed by this statute. (3) In Murray v. Duff, supra, it was held that a grant of land, of which possession had been out of the crown for twenty years previous to the issuing thereof, was invalid without the crown's title being first established by an information of intrusion.

[d] **In Upper Canada and Ontario** it has been held that title cannot be acquired to land held by the crown as trustee. Marsh v. Webb, 19 Ont. A. 564; Atty.-Gen. v. Midland R. Co., 3 Ont. 511; Reg. v. Williams, 39 U. C. Q. B. 397; Reg. v. McCormick, 18 U. C. Q. B. 131.

21. Kapiolani v. Cleghorn, 14 Hawaii 330; Thurston v. Bishop, 7 Hawaii 421; Kahoomana v. Moehonua, 3 Hawaii 635.

22. Kapiolani v. Cleghorn, 14 Hawaii 330; Harris v. Carter, 6 Hawaii 195.

23. U. S. v. Benito, 1 Porto Rico Fed. 267.

24. Insular Govt. v. Aldecoa, 19 Philippine 508.

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[§ 439] **3. In the United States—a. General Rule.** The English doctrine is applicable in the United States, so that here as in England no title by adverse possession can be acquired against the sovereign,[25] in the absence of statute so providing.[26]

[§ 440] **b. Lands of the United States—(1) General Rule.** By the application of this principle the only manner in which title to lands owned by the United States can be acquired is under some act of congress directly making the grant or authorizing it to be made by some person or officer.[27] No title can be acquired by adverse possession.[28] Therefore a mere trespasser in possession of government land cannot maintain an action against another person to quiet his possession.[29] It has been held, however, that a location and occupancy of government lands under the laws of the United States, although subordinate to the title of the government, may nevertheless be adverse to another claimant.[30] But, as already shown, this doctrine is not universally accepted.[31] It has been suggested that where the government becomes the owner by purchase of lands within the limits of the state, already private property, for military purposes or otherwise, it might be that an adverse possessor could acquire title to such lands.[32]

[§ 441] **(2) State Legislation as Affecting Rule.**[33] For obvious reasons state governments have no power to subject the federal government to the operation of statutes of limitations for the recovery of lands.[34]

[§ 442] **(3) Lands Ceded to the United States.** Even though title to land situated in a territory ceded to the United States by treaty could have been acquired by prescription as against the ceding sovereign, if the prescription is not complete when the territory is ceded it does not continue to run against the United States.[35]

Confirmation of Mexican and Spanish titles by federal government. The object of some of the federal statutes for the confirmation of Mexican or Spanish titles to lands in the territories ceded by Mexico or Spain to the federal government is merely to relinquish any title which might be in the United States, and the title to such lands will not be regarded as in the United States until the time of the confirmation so as to prevent the acquisition of title as against the confirmee by an adverse possession prior to the confirmation of the title.[36]

[§ 443] **c. Lands of the States—(1) General Rule.**[37] The rule also applies in favor of the states of the Union; in the absence of a provision making the state subject to the statute of limitations no

25. See supra § 437, infra § 440.
26. See infra § 445.
27. See Public Lands.
28. U. S.—Redfield v. Parks, 132 U. S. 239, 10 SCt 83, 33 L. ed. 327; Sparks v. Pierce, 115 U. S. 408, 6 SCt 102, 29 L. ed. 428; Simmons v. Ogle, 105 U. S. 271, 26 L. ed. 1087; Palmer v. Low, 98 U. S. 1, 25 L. ed. 60; Morrow v. Whitney, 95 U. S. 551, 24 L. ed. 456; Oaksmith v. Johnston, 92 U. S. 343, 23 L. ed. 682; Hedrick v. Hughes, 15 Wall. 123, 21 L. ed. 52; Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534; Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; Jourdan v. Barrett, 4 How. 169, 11 L. ed. 924; Lindsey v. Miller, 6 Pet. 666, 8 L. ed. 538; Harvey v. Holles, 160 Fed. 531; Tyee Consol. Min. Co. v. Langstedt, 136 Fed. 124, 69 CCA 548; U. S. v. Dastervignes, 118 Fed. 199, 202 [aff 122 Fed. 30, 58 CCA 346, and dist Buford v. Houtz, 133 U. S. 320, 10 SCt 305, 33 L. ed. 618, where it was said that uninclosed public lands of the government may be used for pasturage by the people when "no act of government forbids their use"] (where it is said: "In the present case the government has forbidden their use. Moreover, as laches cannot be invoked against the government, long use by defendants gave them no title"); Drew v. Valentine, 18 Fed. 712; Union Mill, etc., Co. v. Ferris, 24 F. Cas. No. 14,371, 2 Sawy. 176. See also Burgess v. Gray, 16 How. 48, 14 L. ed. 839; Harrison v. Ulrichs, 39 Fed. 654.

Ala.—Swift v. Doe, 162 Ala. 147, 50 S 123; Price v. Dennis, 159 Ala. 625, 49 S 248; Frick v. Harper, 155 Ala. 231, 46 S 453; Ledbetter v. Borland, 128 Ala. 418, 29 S 579; Stringfellow v. Tennessee Coal, etc., Co., 117 Ala. 250, 22 S 997; Stephens v. Moore, 116 Ala. 397, 22 S 542; Wiggins v. Kirby, 106 Ala. 262, 17 S 354; Wagnon v. Fairbanks, 105 Ala. 527, 17 S 20; Jones v. Walker, 47 Ala. 175; Farley v. Smith, 39 Ala. 38; Dillingham v. Brown, 38 Ala. 311; Iverson v. Dubose, 27 Ala. 418; Kennedy v. Townsley, 16 Ala. 239; Wright v. Swan, 6 Port. 84.

Alaska.—Lewis v. Johnson, 1 Alaska 529.

Ark.—Nichols v. Council, 51 Ark. 26, 9 SW 305, 14 AmSR 20.

Cal.—McTarnahan v. Pike, 91 Cal. 540, 27 P 784; Anzar v. Miller, 90 Cal. 342, 27 P 299; Nessler v. Bigelow, 60 Cal. 98; Gardiner v. Schmaelzle, 47 Cal. 588; Gardiner v. Miller, 47 Cal. 570; Wilkins v. McCue, 46 Cal. 656; Mathews v. Ferrea, 45 Cal. 51; Doran v. Central Pac. R. Co., 24 Cal. 245; Gluckauf v. Reed, 22 Cal. 468.

Ill.—Thompson v. Prince, 67 Ill. 281; Spellman v. Curtenius, 12 Ill. 409; Cook v. Foster, 7 Ill. 652. See also Hughes v. Stevers, 95 Ill. 391.

Iowa.—Carr v. Moore, 119 Iowa 152, 93 NW 52, 97 AmSR 292; Schlosser v. Hemphill, 118 Iowa 452, 90 NW 842; Young v. Charnquist, 114 Iowa 116, 86 NW 205; Durham v. Hussman, 88 Iowa 29, 55 NW 11; Sater v. Meadows, 68 Iowa 507, 27 NW 481; Twining v. Burlington, 68 Iowa 284, 27 NW 243; Iowa R. Land Co. v. Adkins, 38 Iowa 351.

Kan.—McGannon v. Straightlege, 32 Kan. 524, 4 P 1042; Wood v. Missouri, etc., R. Co., 11 Kan. 323; Janes v. Wilkinson, 2 Kan. A. 361, 42 P 735.

La.—Perkins v. Vincent, 47 La. Ann. 579, 17 S 126; Pepper v. Dunlap, 9 Rob. 283; Kittridge v. Dugas, 6 Rob. 482; Sanchez v. Gonzales, 11 Mart. 207.

Me.—U. S. v. Burrill, 107 Me. 382, 386, 78 A 568, AnnCas1912D 512 [cit Cyc].

Mich.—State v. Lake St. Clair Fishing, etc., Club, 127 Mich. 580, 87 NW 117.

Miss.—Rabb v. Washington County, 62 Miss. 589; Bates v. Aven, 60 Miss. 955.

Mo.—State v. Blakely, 135 Mo. 290, 115 SW 483; Smith v. McCorkle, 105 Mo. 135, 16 SW 602; Hammond v. Johnston, 93 Mo. 198, 6 SW 83; Smith v. Madison, 67 Mo. 694; McIlhinney v. Ficke, 61 Mo. 329; Shepley v. Cowan, 52 Mo. 559; State v. Blakely, 135 Mo. A. 290, 115 SW 483.

Mont.—King v. Thomas, 6 Mont. 409, 12 P 865. See also Casey v. Andreson, 17 Mont. 167, 42 P 761.

Nebr.—Topping v. Cohn, 71 Nebr. 559, 99 NW 372.

Nev.—Vansickle v. Haines, 7 Nev. 249.

N. M.—New Mexico, etc., R. Co. v. Crouch, 4 N. M. 141, 13 P 201.

Oh.—Wood v. Ferguson, 7 Oh. St. 288; Duke v. Thompson, 16 Oh. 34; Wallace v. Miner, 6 Oh. 366; State Univ. v. Satterfield, 2 Oh. Cir. Ct. 86, 1 Oh. Cir. Dec. 377.

Or.—Altschul v. Clark, 39 Or. 315, 65 P 991.

Tenn.—Memphis v. Lenore, 6 Coldw. 412.

Tex.—Paschal v. Dangerfield, 37 Tex. 273.

Utah.—Lund v. Wilcox, 34 Utah 205, 97 P 33.

Wash.—Delacey v. Commercial Trust Co., 51 Wash. 542, 99 P 574, 21 LRANS 823.

Wis.—Knight v. Leary, 54 Wis. 459, 11 NW 600; Whitney v. Gunderson, 31 Wis. 359.

[a] **The title to tide lands in Alaska being held in trust by the United States** for the future state, no presumption of a grant to an occupier will be admitted nor title by prescription recognized. Sutter v. Heckman, 1 Alaska 81.

[b] **Where the bed of a dried-up body of water is owned by the federal government** no claim of adverse possession thereof can be made. Carr v. Moore, 119 Iowa 152, 93 NW 52, 97 AmSR 292.

29. Wood v. Missouri, etc., R. Co., 11 Kan. 323.
30. Eastern Oregon Land Co. v. Brosnan, 173 Fed. 67, 97 CCA 382; Harvey v. Holles, 160 Fed. 531; Francoeur v. Newhouse, 43 Fed. 236, 14 Sawy. 600; Fellows v. Evans, 33 Or. 30, 53 P 491. See also supra § 221 et seq.
31. See supra § 219.
32. Pepper v. Dunlap, 9 Rob. (La.) 283.
33. See also infra § 471 et seq.
34. Redfield v. Parks, 132 U. S. 239, 10 SCt 83, 33 L. ed. 327; Gibson v. Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534; Price v. Dennis, 159 Ala. 625, 49 S 248; McIlhinney v. Ficke, 61 Mo. 329; King v. Thomas, 6 Mont. 409, 12 P 865. See also U. S. v. Thompson, 98 U. S. 486, 25 L. ed. 194.
35. Kennedy v. Townsley, 16 Ala. 239.
36. Doe v. Forest, 8 Ala. 264. See also Wilson v. Knight, 48 Fla. 196, 37 S 186; Corkran Oil, etc., Co. v. Arnaudet, 111 La. 563, 35 S 747; Louis v. Giroir, 40 La. Anfi. 710, 4 S 878.

[a] **In California,** (1) as regards lands claimed under Spanish or Mexican grants, the earlier statute expressly provided for the maintenance of actions therefor within a certain time after the confirmation of the title by the federal government (Sabichi v. Aguilar, 43 Cal. 285); (2) but this statute was subsequently amended so that the bar of the statute might arise prior to the confirmation of the title (Burton v. Robinson, 51 Cal. 186; Hayes v. Martin, 45 Cal. 559; Grimm v. Curley, 43 Cal. 250; San Jose v. Trimble, 41 Cal. 536).

37. See also infra § 472 et seq.

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title by adverse possession can be acquired against the state[38] no matter how long continued.[39] As otherwise expressed the statute of limitations does not run against the state except with its consent.[40] And the fact that the claimant holds under color of title does not affect the operation of the rule.[41]

[§ 444] **(2) Statutory Affirmance of General Rule.** Where the statute relating to the acquisition of title by adverse possession expressly excepts from its operation lands owned by the state, title by adverse possession of lands owned by the state cannot be acquired.[42] And on the grounds that title by possession presumes a grant, and that such presumption cannot be entertained against one incapable of granting it, it has been held that title to land covered by navigable waters cannot be acquired by adverse possession, as against the state, in the face of a statute which expressly provides that no patent shall issue for such land.[43]

[§ 445] **(3) Statutes Excepting State from the**

38. U. S.—U. S. v. Thompson, 98 U. S. 486, 25 L. ed. 194; Weber v. State Harbor Comrs., 18 Wall. 57, 21 L. ed. 798; Armstrong v. Morrill, 14 Wall. 120, 20 L. ed. 765; Serrano v. U. S., 5 Wall. 451, 18 L. ed. 494; Rhode Island v. Massachusetts, 15 Pet. 233, 10 L. ed. 721; U. S. v. Spiel, 8 Fed. 143, 3 McCrary 107.

Ala.—Adler v. Prestwood, 122 Ala. 367, 24 S 999; Stringfellow v. Tennessee Coal, etc., Co., 117 Ala. 250, 22 S 997; Wiggins v. Kirby, 106 Ala. 262, 17 S 354; Wagnon v. Fairbanks, 105 Ala. 527, 17 S 20; Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 S 43; Swann v. Gaston, 87 Ala. 569, 6 S 386; Swann v. Lindsey, 70 Ala. 507; Miller v. State, 38 Ala. 600; Kennedy v. Townsley, 16 Ala. 239.

Ark.—Brinneman v. Scholem, 95 Ark. 65, 128 SW 584.

Conn.—Clinton v. Bacon, 56 Conn. 508, 16 A 548.

Del.—Walls v. McGee, 4 Del. 108.

Ga.—State v. Paxson, 119 Ga. 730, 46 SE 872; Norrell v. Augusta R., etc., Co., 116 Ga. 313, 42 SE 466, 59 LRA 101; Dean v. Feely, 69 Ga. 804; Glaze v. Western, etc., R. Co., 67 Ga. 761; Kirschner v. Western, etc., R. Co., 67 Ga. 760; Smead v. Doe, 6 Ga. 158; Moody v. Fleming, 4 Ga. 115, 48 AmD 210; Brinsfield v. Carter, 2 Ga. 143.

Hawaii.—Kapiolani v. Cleghorn, 14 Hawaii 330.

Ill.—Hammond v. Shepard, 186 Ill. 235, 57 NE 867, 78 AmSR 274; Alton v. Illinois Transp. Co., 12 Ill. 38, 52 AmD 479.

Iowa.—Cedar Rapids Gas Light Co. v. Cedar Rapids, 144 Iowa 426, 120 NW 966, 138 AmSR 299, 48 LRANS 1025; Park Comrs. v. Taylor, 133 Iowa 453, 108 NW 927; Carr v. Moore, 119 Iowa 152, 93 NW 52, 97 AmSR 292; State v. Beardsley, 108 Iowa 396, 79 NW 138.

Ky.—Buckner v. Kirkland, 110 SW 399, 33 KyL 603; Taylor v. Combs, 50 SW 64, 20 KyL 1828; Hartley v. Hartley, 3 Metc. 56; Campbell v. Thomas, 9 B. Mon. 82; Robinson v. Neal, 5 T. B. Mon. 212; Chiles v. Calk, 4 Bibb 554.

La.—Bright v. New Orleans R. Co., 114 La. 679, 38 S 494; Slattery v. Heilperin, 110 La. 86, 34 S 139; State v. Buck, 46 La. Ann. 656, 15 S 531; Allard v. Lobau, 3 Mart. N. S. 293.

Me.—U. S. v. Burrill, 107 Me. 382, 386, 78 A 568, AnnCas1912D 512 [cit Cyc, and dist Hinckley v. Haines, 69 Me. 76; Treat v. Lord, 42 Me. 552, 66 AmD 298 (both decided under a statute since repealed)]; Cary v. Whitney, 48 Me. 516; Kinsell v. Daggett, 11 Me. 309. See also Hill v. Dyer, 3 Me. 441.

Md.—Ulman v. Charles St. Ave. Co., 83 Md. 130, 34 A 366; Hall v. Gittings, 2 Harr. & J. 112.

Mass.—Ward v. Bartholomew, 6 Pick. 409.

Minn.—Murtaugh v. Chicago, etc., R. Co., 102 Minn. 52, 112 NW 860, 120 AmSR 609.

Miss.—Clements v. Anderson, 46 Miss. 581.

Mo.—State v. Fleming, 19 Mo. 607.

Nebr.—Topping v. Cohn, 71 Nebr. 559, 99 NW 372.

N. H.—State v. Franklin Falls Co., 49 N. H. 240, 6 AmR 513.

N. J.—Tainter v. Morristown, 19 N. J. Eq. 46.

N. Y.—Fulton Light, etc., Co. v. State, 200 N. Y. 400, 94 NE 199; St. Vincent Female Orphan Asylum v. Troy, 76 N. Y. 108, 32 AmR 286; Burbank v. Fay, 65 N. Y. 57; Peo. v. Van Rensselaer, 8 Barb. 189 [rev on other grounds 9 N. Y. 291]; Jackson v. Frost, 5 Cow. 346.

N. C.—Shelby v. Cleveland Mill, etc., Co., 155 N. C. 196, 71 SE 218.

Oh.—Duke v. Thompson, 16 Oh. 34; Wallace v. Miner, 6 Oh. 366; State Univ. v. Satterfield, 2 Oh. Cir. Ct. 86, 1 Oh. Cir. Dec. 377. See also Clark v. Southard, 16 Oh. St. 408.

Pa.—Pennsylvania R. Co. v. Freeport, 138 Pa. 91, 20 A 940; Zubler v. Schrack, 46 Pa. 67; Troutman v. May, 33 Pa. 455; Johns v. Davidson, 16 Pa. 512; Henry v. Henry, 5 Pa. 247; Hoey v. Furman, 1 Pa. 295, 44 AmD 129; Johnston v. Irwin, 3 Serg. & R. 291; Morris v. Thomas, 5 Binn. 77.

S. C.—Camden Orphan Soc. v. Lockhart, 27 S. C. L. 84; State v. Arledge, 18 S. C. L. 401, 23 AmD 145; Harlock v. Jackson, 5 S. C. L. 254; Owen v. Lucas, 3 S. C. L. 519.

Tenn.—Sharp v. Van Winkle, 12 Lea 15; Wilson v. Hudson, 8 Yerg. 398; Cooke v. Dotson, 1 Overt. 169.

Tex.—Montgomery v. Gunther, 81 Tex. 320, 16 SW 1073; Gunter v. Meade, 78 Tex. 634, 14 SW 562; Truehart v. Babcock, 49 Tex. 249; Austin v. Dungan, 46 Tex. 236; Paschal v. Dangerfield, 37 Tex. 273; Milam County v. Robertson, 33 Tex. 336; Smith v. Power, 23 Tex. 29; Houston Oil Co. v. Gore, (Civ. A.) 159 SW 924; Lawless v. Wright, 39 Tex. Civ. A. 26, 86 SW 1039; Zepeda v. Hoffman, 31 Tex. Civ. A. 312, 72 SW 443; Dooley v. Maywald, 18 Tex. Civ. A. 386, 45 SW 221; Ellis v. State, 3 Tex. Civ. A. 170, 21 SW 66, 24 SW 660.

Va.—Green v. Pennington, 105 Va. 801, 54 SE 877; Reusens v. Lawson, 91 Va. 226, 21 SE 347; Hurst v. Dulany, 84 Va. 701, 5 SE 802; Yates v. Warrenton, 84 Va. 337, 4 SE 818, 10 AmSR 860; Taylor v. Com., 29 Gratt. (70 Va.) 780; Cline v. Catron, 22 Gratt. (63 Va.) 378; Levasser v. Washburn, 11 Gratt. (52 Va.) 572; Koiner v. Rankin, 11 Gratt. (52 Va.) 420; Hale v. Branscum, 10 Gratt. (51 Va.) 418; Wild v. Serpell, 10 Gratt. (51 Va.) 405; Statts v. Board, 10 Gratt. (51 Va.) 400; Shanks v. Lancaster, 5 Gratt. (46 Va.) 110, 50 AmD 108; Gore v. Lawson, 8 Leigh (35 Va.) 458.

Wash.—State v. Seattle, 57 Wash. 602, 612, 107 P 827, 27 LRANS 1188 [cit Cyc]; Brace, etc., Mill Co. v. State, 49 Wash. 326, 95 P 278.

W. Va.—Hall v. Webb, 21 W. Va. 318.

Wis.—Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905.

[a] **Neither actual nor constructive adverse possession of state land** can affect the rights of the commonwealth or its grantee unless such grant confers title on the commonwealth's grantee which necessarily includes seizin as one of its elements. Green v. Pennington, 105 Va. 801, 54 SE 877.

[b] **Beds and banks of navigable rivers.**—There can be no adverse possession of the beds and banks of navigable rivers, the title to which is held by the state for the benefit of the public. Park Comrs. v. Taylor, 133 Iowa 453, 108 NW 927.

[c] **Lots beyond high water mark of meandered river.**—Since limitations do not run against the state one cannot acquire by occupancy title to parts of lots beyond the high water mark of a meandered river. Cedar Rapids Gas Light Co. v. Cedar Rapids, 144 Iowa 426, 120 NW 966, 138 AmSR 299, 48 LRANS 1025.

[d] **The title to the bed of a meandered lake,** which has become dry land, cannot be acquired by prescription, as the bed of such lake belongs to the state and the statute of limitations does not run against the state. Hammond v. Shepard, 186 Ill. 235, 57 NE 867, 78 AmSR 274.

[e] **The title to submerged lands in the Great Lakes** held by the state cannot be divested by adverse possession, for they are held in trust for the public according to the original cession from Virginia and the ordinance of 1787. State v. Venice of America Land Co., 160 Mich. 680, 125 NW 770.

[f] **Where the bed of a dried up body of water** is owned by the state government no claim of adverse possession thereto can be made. Carr v. Moore, 119 Iowa 152, 93 NW 52, 97 AmSR 292.

[g] **Oyster beds.**—On the ground that the statute does not run against the state no title can be acquired by adverse possession to oyster beds the title to which is in the state. Clinton v. Bacon, 56 Conn. 508, 16 A 548; Hurst v. Dulany, 84 Va. 701, 5 SE 802.

[h] **Space between surveys.**—Where a survey calls for an adjoining survey at two corners but the line of one of the surveys is drawn in, leaving a triangular space between the two surveys ungranted, a user of this space by the claimant under the last warrant for any number of years cannot give him a title as against the commonwealth. Henry v. Henry, 5 Pa. 247.

[i] **Where the state holds lands as trustee of an express trust** the statute of limitations will not run against it. State v. Venice of America Land Co., 160 Mich. 680, 702, 125 NW 770 [cit Cyc].

[j] **Estoppel.**—The fact that the state had not interfered with plaintiff's use of certain shore land bordering a navigable lake for several years, but without objection had permitted plaintiff and defendant's predecessors to erect improvements on the property, pay taxes thereon, mortgage the same, and treat it as their own, did not estop the state from claiming title to such land apart from the improvements. Brace, etc., Mill Co. v. State, 49 Wash. 326, 95 P 278.

39. Com. v. Little, (Mass.) 5 Dane Abr. 407; Alexander v. Garcia, (Tex. Civ. A.) 168 SW 376.

40. Brace, etc., Mill Co. v. State, 49 Wash. 326, 95 P 278.

41. Mobile Transp. Co. v. Mobile, 128 Ala. 335, 30 S 645, 86 AmSR 143, 64 LRA 333 [aff 187 U. S. 479, 23 SCt 170, 47 L. ed. 266]; Adler v. Prestwood, 122 Ala. 367, 24 S 999; Love v. Love, 65 Ala. 554; State v. Paxson, 119 Ga. 730, 46 SE 872; Norrell v. Augusta R., etc., Co., 116 Ga. 313, 42 SE 466, 59 LRA 101.

42. Brace, etc., Mill Co. v. State, 49 Wash. 326, 95 P 278.

[a] **In Washington** the statutes expressly provide that one cannot by paying taxes on state land acquire title as against the state. Bryant Lumber, etc., Mill Co. v. Pacific Iron, etc., Works, 48 Wash. 574, 94 P 110.

43. Sollers v. Sollers, 77 Md. 148, 26 A 188, 39 AmSR 404, 20 LRA 94. Compare Galt v. Waianuhea, 16 Hawaii 652, 658 [quot Cyc].

Rule. Where the statute of limitations is expressly made to apply to the state, title by adverse possession may of course be acquired as against the state.[44] According to the construction placed upon some of the statutes only lands held in a private or proprietary character by the state can be acquired by adverse possession.[45] Statutes of this character are not given a retroactive effect so as to perfect title as against the state through a possession prior to the enactment of the statute.[46] A statute which merely provides that all highways used as such for not less than a designated period and worked and kept up as such by public expense shall be public highways does not authorize the acquisition by use of a highway over lands of the state.[47]

[§ 446] **(4) Lands Held by Derivative Title.** The weight of authority is that the principle that the statute does not run against the commonwealth applies not only as to her sovereign right of original dominion, but also as to every secondary or derivative right of property.[48]

[§ 447] **B. Grantees of the State or Federal Gov-**

44. Ala.—Wyatt v. Tisdale, 97 Ala. 594, 12 S 233.
Del.—Records v. Melson, 6 Del. 139.
Ind.—State v. Portsmouth Sav. Bank, 106 Ind. 435, 7 NE 379.
Me.—Hinckley v. Haines, 69 Me. 76.
Mass.—Harrison v. Dolan, 172 Mass. 395, 52 NE 518; Nichols v. Boston, 98 Mass. 39, 93 AmD 132; Piper v. Richardson, 9 Metc. 155.
Minn.—Redwood County v. Winona, etc., Land Co., 40 Minn. 512, 41 NW 465, 42 NW 942.
Mo.—Burch v. Winston, 57 Mo. 62; Wickersham v. Woodbeck, 57 Mo. 59; School Directors v. Goerges, 50 Mo. 194; Abernathy v. Dennis, 49 Mo. 468.
Or.—Hamilton v. Flournoy, 44 Or. 97, 74 P 483; Schneider v. Hutchinson, 35 Or. 253, 57 P 324, 76 AmSR 474 and note; Ambrose v. Huntington, 34 Or. 484, 56 P 513.
S. C.—Busby v. Florida Cent., etc., R. Co., 45 S. C. 312, 23 SE 50.
Wis.—Scheuber v. Held, 47 Wis. 340, 2 NW 779.
See Green v. Irving, 54 Miss. 450, 28 AmR 360.

[a] **In Kentucky,** (1) under a statute providing that the limitations prescribed therein, containing the law of limitations as to real property, shall apply to actions brought by or in the name of the commonwealth in the same manner as to actions by private persons, title to real estate may be acquired against the state by adverse possession. Whitley County Land Co. v. Powers, 146 Ky. 801, 810, 144 SW 2; Richie v. Owsley, 137 Ky. 63, 121 SW 1015; Gray v. Soden, 120 Ky. 277, 86 SW 515, 27 KyL 673 (where it was said that this statute was in effect when Hartley v. Hartley, 3 Metc. 56, holding the contrary, was decided but that the court seems not to have noticed it); Campbell v. Thomas, 9 B. Mon. 82; Chiles v. Calk, 4 Bibb. 554. (2) "However, the acts necessary to start and keep the statute in motion against an individual are necessary to start and keep it in motion against the Commonwealth. No reason can be assigned why any distinction should be made between the Commonwealth and an individual." Whitley County Land Co. v. Powers, supra. See also Keaton v. Sublett, 109 Ky. 106, 58 SW 528, 22 KyL 631 (which sustains this principle).

[b] **By statute in North Carolina** (1) (1 Code [1883] § 139 subd 1) the state will not sue in respect of real property when there has been an adverse possession, ascertained and identified under known and visible lines or boundaries, for thirty years (Bullard v. Hollingsworth, 140 N. C. 634, 53 SE 441; Davidson v. Ariedge, 97 N. C. 172, 2 SE 378; Phipps v. Pierce, 94 N. C. 514; Mallett v. Simpson, 94 N. C. 27, 55 AmR 595; Price v. Jackson, 91 N. C. 11; Melvin v. Waddell, 75 N. C. 361), or (2) for twenty-one years under colorable title (1 Code [1883] § 139 subd 2; Walker v. Moses, 113 N. C. 527, 18 SE 339; Mobley v. Griffin, 104 N. C. 112, 10 SE 142).

[c] **In New York.**—(1) Under the statute of April 8, 1801, providing that actions by the state in respect to land by reason of long right or title which shall not accrue within the space of forty years before the suit is commenced unless the people, or those under whom they claim, shall have received the rents and profits thereof within the space of forty years, a title by adverse possession may be acquired by such a holding for forty years as would constitute a good adverse possession if the land had been owned by an individual instead of the state. Wright v. Phipps, 90 Fed. 556 [aff 98 Fed. 1007, 38 CCA 702]; Peo. v. Trinity Church, 22 N. Y. 44; Peo. v. Van Rensselaer, 9 N. Y. 291 [rev 8 Barb. 189]; Peo. v. Arnold, 4 N. Y. 508; Genesee Valley Canal R. Co. v. Slaight, 49 Hun 35, 1 NYS 554, 14 NYCivProc 420; Peo. v. Clarke, 10 Barb. 120; Peo. v. Livingston, 8 Barb. 253. (2) Title may be acquired to lands under a navigable river as against the state by adverse possession after a period of forty years, and where within that period it has not received rents or profits. Fulton Light, etc., Co. v. State, 62 Misc. 189, 116 NYS 1000. (3) But in an action to establish title to lands against the state by limitations, plaintiffs must prove that the cause of action for the state did not accrue within forty years and that the people have received no rents or profits within that period, and proof must be made of an adverse, hostile, notorious, and continuous possession, limitations not starting to run until some one asserts an adverse title, under Code Civ. Proc. § 362. Hamlin v. Peo., 155 App. Div. 680, 140 NYS 643.

45. State v. Lake St. Clair Fishing, etc., Club, 127 Mich. 580, 87 NW 117; State v. Harman, 57 W. Va. 447, 50 SE 828; Foley v. County Ct., 54 W. Va. 16, 46 SE 246. See also Norrell v. Augusta R., etc., Co., 116 Ga. 313, 42 SE 466, 59 LRA 101; O'Neil v. St. Louis, 8 Mo. A. 416.

[a] **California statutes.**—(1) Under Civ. Code § 1007, the running of limitations operates on the state in respect to any property not dedicated to public use as soon as adverse possession thereof begins without reference to a presumed grant. Peo. v. Banning Co., 140 P 587. (2) A reservation of swamp lands of the state from sale by state statute is a mere restriction on the general power delegated to the officers of the state to sell swamp lands, and the lands may be acquired by adverse possession, unless dedicated to a public use. Peo. v. Banning Co., 140 P 587. (3) Where tidelands of the state have been dedicated to a public use, there can be no adverse possession thereof to start the running of limitations against any action by the state or its authorized agencies to assert the public right or such possession as will give title by prescription to the adverse claimants against the public right. Peo. v. Banning Co., 140 P 587. (4) It has been held by the supreme court of the United States that the statute declares that the people of the state will not sue any person for or in respect of any real property by reason of the right or title of the people to the same, unless certain facts exist, was held to be obviated, as regards land in the bay of San Francisco beyond the established harbor line, by the act creating the board of state harbor commissioners and directing them to take possession of all that portion of the bay lying beyond the established harbor line. Weber v. Harbor Comrs., 18 Wall. 57, 68, 21 L. ed. 798. The court in this case said: "It is contended with much force that the statute only applies to lands which the State holds, as private proprietor, for sale or other disposition, and in respect to which the title may be lost by adverse possession, as defined in the same statute, and not to lands which she holds as sovereign in trust for the public. . . . Where lands are held by the State simply for sale or other disposition, and not as sovereign in trust for the public, there is some reason in requiring the assertion of her rights within a limited period, when any portion of such lands is intruded upon, or occupied without her permission, and the policy of the statute would be carried out by restricting its application to such cases."

[b] **In Minnesota** it is held, however, under the statutory provision that the limitations for the commencement of actions "shall apply to the same actions when brought in the name of the state, or in the name of any officer," etc., that no distinction can be made between actions brought as "sovereign" or in a governmental capacity and those brought as "proprietary" or such as a private person might bring. St. Paul v. Chicago, etc., R. Co., 45 Minn. 387, 48 NW 17.

46. Buckner v. Kirkland, 110 SW 399, 33 KyL 603.

47. State v. Seattle, 57 Wash. 602, 107 P 827, 27 LRANS 1188.

48. Rochester v. Kennedy, 229 Pa. 251, 78 A 133; Bagley v. Wallace, 16 Serg. & R. (Pa.) 245; State v. Arledge, 18 S. C. L. 401, 23 AmD 145. And see cases infra this note. Compare Chamberlain v. Ahrens, 55 Mich. 111, 20 NW 814 (where it was said that before the express statutory enactment title could be acquired to land owned by the state and held in a proprietary right as distinguished from lands held in trust for the public).

[a] **Where lands have been forfeited to the state under the delinquent tax laws or otherwise,** (1) they cannot be the subject of adverse possession while the title thus acquired remains in the state. Bagley v. Wallace, 16 Serg. & R. (Pa.) 245. (2) And if the lands were held adversely to the owner at the time of the forfeiture the adverse character of the occupancy ceases when the state acquires title and cannot be asserted against either the state or its grantee. Armstrong v. Morrill, 14 Wall. (U. S.) 120, 20 L. ed. 765; Hall v. Gittings, 2 Harr. & J. (Md.) 112; Levasser v. Washburn, 11 Gratt. (52 Va.) 572, 578; Hale v. Branscum, 10 Gratt. (51 Va.) 418; Staats v. Board, 10 Gratt. (51 Va.) 400; Hall v. Webb, 21 W. Va. 318. In Levasser v. Washburn, supra, it was said: "It is true, in a certain sense, the commonwealth takes the land on forfeiture in the same plight and condition in which it stood at the time of the forfeiture. The commonwealth takes the estate and title of the former owner, and no other. If at the time of the forfeiture his title were absolutely bound by the adversary possession of another, it may be no title would vest in the commonwealth, unless it were saved by the existence of her lien on the land for arrears of taxes; a point upon which I express no opinion. But if when the forfeiture accrued the right of entry still remained to the owner, though an ad-

ernment—1. General Rule.[49] The operation of the statute is not limited to land held under private grant; title to land held under a federal or state grant may be acquired by adverse possession continued for the statutory period after the grantee acquires the title from the federal or state government,[50] and it is immaterial that the possession was commenced before the title passed.[51] In case of conflicting leases by the government renewable forever the statute of limitations begins to run in favor of the one in possession against the other, and the latter cannot by a surrender of his lease and the procuring of a patent affect the right acquired by the former.[52]

[§ 448] **2. Time When the Statute Commences to Run—a. General Rule.** The statute begins to run against a grantee of the sovereignty only from the time when he acquires title; in view of the rule excluding the government from the operation of the statute an occupancy prior to that time will not be deemed adverse and can have no effect to give title by adverse possession against grantees of the federal[53] or state governments.[54] The applications of this general rule, however, are not uniform, as will hereinafter appear.

[§ 449] **b. Applications of Rule—(1) Introductory Statement.** Since there is a difference of opinion as to just when the title of the federal or state government passes to a grantee[55] the cases do not agree in the application of the above stated general rule.

[§ 450] **(2) Grantees of the Federal Government—(a) Rule That Patent Must Issue—aa. In General.** On the ground that the title of the United States does not pass until the issuance of a patent it is held by one line of cases that the statute runs against a purchaser from the federal government only from the date of his patent.[56]

versary possession had been commenced, the possession as to her must lose its adversary character, and she must take and hold the subject with the same rights, privileges and immunities which pertain to any other lands held by her in her demesne. I can perceive no good reason why any discrimination should be made, or why she should hold forfeited lands upon different principles and with diminished privileges from those applying to other subjects of similar character."

[b] **Escheat.**—Title by adverse possession cannot be acquired in lands which have escheated to the state. Harlock v. Jackson, 5 S. C. L. 254, 6 S. C. L. 135; Ellis v. State, 3 Tex. Civ. A. 170, 21 SW 66, 24 SW 660.

[c] **In Tennessee** it has been held that title to land situate in Tennessee but owned by Kentucky could be acquired as against the latter by adverse possession. Sharp v. Van Winkle, 12 Lea 15.

[d] **In West Virginia** it has been stated that, as regards lands held by the state in a proprietary right for sale or disposition, and not for public use, title thereto may be acquired by adverse possession. Ralston v. Weston, 46 W. Va. 544, 33 SE 326, 76 AmSR 834. See however Hall v. Webb, 21 W. Va. 318.

49. See also infra §§ 471-473.

50. U. S.—Bicknell v. Comstock, 113 U. S. 149, 5 SCt 399, 28 L. ed. 962; Cawley v. Johnson, 21 Fed. 492.

Ala.—Bonner v. Lockhart, 177 Ala. 103, 59 S 51; Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 S 43; Coker v. Ferguson, 70 Ala. 284; Farley v. Smith, 39 Ala. 38.

Ark.—Skipwith v. Martin, 50 Ark. 141, 6 SW 514.

Cal.—Allen v. McKay, 120 Cal. 332, 52 P 828.

Ill.—Hughes v. Stevers, 95 Ill. 391. Compare Cook v. Foster, 7 Ill. 652.

Iowa.—Wilbur v. Cedar Rapids, etc., R. Co., 116 Iowa 65, 89 NW 101.

Ky.—Buckner v. Kirkland, 110 SW 399, 33 KyL 603; Keaton v. Sublett, 109 Ky. 106, 58 SW 528, 22 KyL 631; Dudley v. Frankfort, 12 B. Mon. 610; Campbell v. Thomas, 9 B. Mon. 82; Mills v. Bodley, 4 T. B. Mon. 248; Roberts v. Sanders, 3 A. K. Marsh. 28; Cameron v. Beatty, 6 KyL 594.

Mass.—Township No. 6 v. Jones, 12 Mass. 334.

Mo.—Stevens v. Martin, 168 Mo. 407, 68 SW 347; Peting v. DeLore, 71 Mo. 13; St. Louis Univ. v. McCune, 28 Mo. 481; Aubuchon v. Ames, 27 Mo. 89; Gray v. Givens, 26 Mo. 291.

N. Y.—La Frombois v. Jackson, 8 Cow. 589, 18 AmD 463.

Or.—Fellows v. Evans, 33 Or. 30, 53 P 491.

Pa.—Johnston v. Irwin, 3 Serg. & R. 291.

S. C.—Camden Orphan Soc. v. Lockhart, 27 S. C. L. 84.

Tex.—Moseley v. Lee, 37 Tex. 479.

Va.—Green v. Pennington, 105 Va. 801, 54 SE 877; Cline v. Catron, 22 Gratt. (63 Va.) 378.

W. Va.—Hall v. Webb, 21 W. Va. 318; Adams v. Alkire, 20 W. Va. 480.

[a] **The provisions of the Tennessee code** §§ 2763, 2765, limiting the time for the commencement of actions in regard to lands granted by the state of Tennessee or the state of North Carolina have been held to apply to lands lying within the tract ceded by Kentucky to Tennessee under the fifth section of the convention of 1820 and held under a grant from the state of Kentucky. Sharp v. Van Winkle, 12 Lea 15.

[b] **Grants made by former sovereign.**—Where a state places grants made by a former sovereign on the same footing as those made by the state, rights originating by treaty, or under the constitution or laws of the state, are not thereby violated, and such grants are not protected from the operation of the statute of limitations. Campbell v. Gibbs, (Tex. Civ. A.) 161 SW 430.

51. Taylor v. Breathitt Coal, etc., Co., 185 Fed. 854; Hargis v. Congressional, 29 Ind. 70; Sater v. Meadows, 69 Iowa 507, 27 NW 481; Chicago, etc., R. Co. v. Allfree, 64 Iowa 500, 20 NW 779; Tremaine v. Weatherby, 58 Iowa 615, 12 NW 609; Kinsell v. Daggett, 11 Me. 309.

52. Bentley v. Newlon, 9 Oh. St. 489.

53. U. S.—Sparks v. Pierce, 115 U. S. 408, 6 SCt 102, 29 L. ed. 428; Palmer v. Low, 98 U. S. 1, 25 L. ed. 60; Oaksmith v. Johnston, 92 U. S. 343, 23 L. ed. 682; Burgess v. Gray, 16 How. 48, 14 L. ed. 839; Jourdan v. Barrett, 4 How. 169, 11 L. ed. 924; Lindsey v. Miller, 6 Pet. 666, 8 L. ed. 538; Tyee Consol. Min. Co. v. Langstedt, 136 Fed. 124, 69 CCA 548 [rev 121 Fed. 709, 58 CCA 129]; Shuffleton v. Nelson, 22 F. Cas. No. 12,822, 2 Sawy. 540.

Ala.—Price v. Dennis, 159 Ala. 625, 49 S 248; Stringfellow v. Tennessee Coal, etc., Co., 117 Ala. 250, 22 S 997; Kennedy v. Townsley, 16 Ala. 239.

Ill.—Spellman v. Curtenius, 12 Ill. 409.

Iowa.—Twining v. Burlington, 68 Iowa 284, 27 NW 243; Iowa R. Land Co. v. Adkins, 38 Iowa 351. And see Young v. Charnquist, 114 Iowa 116, 86 NW 205.

Mo.—Smith v. McCorkle, 105 Mo. 135, 16 SW 602; Shepley v. Cowan, 52 Mo. 559. See also Hammond v. Coleman, 4 Mo. A. 307.

S. D.—Hohn v. Bidwell, 27 S. D. 249, 255, 130 NW 837 [cit Cyc].

Tex.—Paschal v. Dangerfield, 37 Tex. 273; Hamman v. Presswood, (Civ. A.) 120 SW 1052.

Wis.—Knight v. Leary, 54 Wis. 459, 11 NW 600; Whitney v. Gunderson, 31 Wis. 359.

Ont.—Dowsett v. Cox, 18 U. C. Q. B. 594; Jamieson v. Harker, 18 U. C. Q. 590.

[a] **Litigation in respect of title.**—A contestant for government land cannot gain any advantage by limitations over his adversary while a contest or litigation in aid of his title is pending in the department. Delacey v. Commercial Trust Co., 51 Wash. 542, 99 P 574, 130 AmSR 1112.

[b] **Act curing void patent.**—Where a patent was issued in the name of a deceased person, and this defect was cured by a subsequent act which provided that the title to the land should "inure to and become vested in the heirs, devisees, or assignees of such deceased patentee, as if the patent had issued to the deceased person during his life," it was held that the patent, being void, passed no title, and that a title acquired through the curative act did not relate back and take effect from the time the patent was issued in such a manner as to subject the land designated in it to the operations of the statute of limitations from the date of the patent and before the passage of the curative act, but that until the passage of the curative act there could be no adverse possession of the land as against a person claiming title under the patent and act of congress. Wood v. Ferguson, 7 Oh. St. 288.

54. Ala.—Williams Inv. Co. v. Pugh, 137 Ala. 346, 34 S 377; Swann v. Gaston, 87 Ala. 569, 6 S 386. And see Sullivan v. Van Kirk Land, etc., Co., 124 Ala. 225, 26 S 925.

Ga.—Smead v. Doe, 6 Ga. 158.

Me.—Cary v. Whithey, 48 Me. 516.

Oh.—State Univ. v. Satterfield, 2 Oh. Cir. Ct. 86, 1 Oh. Cir. Dec. 377.

S. C.—Owen v. Lucas, 3 S. C. L. 519.

Tenn.—Wilson v. Hudson, 8 Yerg. 397.

Tex.—Smith v. Power, 23 Tex. 29; Dooley v. Maywald, 18 Tex. Civ. A. 386, 45 SW 221.

Va.—Gore v. Lawson, 8 Leigh (35 Va.) 458.

[a] **Reservation by state of equitable interest.**—(1) The fact that the state, in parting with its title, reserves an equitable interest in the proceeds of the lands does not prevent the statute from running in favor of an adverse occupant from the time when the state divests itself of the title. Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 S 43. (2) But where land is granted in trust by a state to aid in the construction of a railway, and by the terms of the grant the title to the lands is to remain in the state until the railroad is completed, there is no adverse possession of the land until that time. Swann v. Lindsey, 70 Ala. 507.

55. See generally Public Lands.

56. U. S.—Astiazaran v. Santa Rita Land, etc., Co., 148 U. S. 80, 13

[§ 451] **bb. Where Patent Is Expressly Required by Statute.** Under a statute which expressly declares that the statute shall commence to run from the date of the patent this question cannot of course arise, and there can be no adverse possession against the patentee of public lands except from the date of his patent. The statute does not commence to run from the date of the entry or of final payment for the land embraced in the patent.[57]

[§ 452] **(b) Rule That Issuance of Patent Is Not Necessary—aa. In General.** But on the ground that one who enters upon public lands of the United States is the real owner of the property from the time that he has complied with all the conditions entitling him to a patent some of the courts hold that an adverse possession will begin to run against the entryman from the time he becomes entitled to a patent, and not from the date of the patent.[58] Thus it has been held that the statute begins to run against a purchaser from the government from the date of his final payment and the issuance of a certificate of purchase.[59] But the statute does not commence to run against one who seeks to obtain title to land of the United States until his right to the patent is complete[60] by performance of every act entitling him thereto.[61]

[§ 453] **bb. Lands Granted by Special Acts of Congress.** Where an act of congress relating to public lands amounts to a direct grant of the fee in præsenti the statute will begin to run from the time when the title passes, even though a patent has not been issued.[62] This rule has been frequently applied in the case of grants of land by congress to railroad companies.[63] However, if land is granted on the implied condition of reverter, in the event that the grantee ceases to use it for that purpose, an individual cannot acquire any portion thereof by adverse possession in any event,[64] and a statute

SCt 457, 37 L. ed. 376; Redfield v. Parks, 132 U. S. 239, 10 SCt 83, 33 L. ed. 327; Simmons v. Ogle, 105 U. S. 271, 26 L. ed. 1087; Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534; Lindsey v. Miller, 6 Pet. 666, 8 L. ed. 538; Tyee Cons. Min. Co. v. Langstedt, 136 Fed. 124, 69 CCA 548; Tegarden v. Le Marchel, 129 Fed. 487; Godkin v. Cohn, 80 Fed. 458, 25 CCA 4.

Ala.—Stephens v. Moore, 116 Ala. 397, 22 S 542; Farley v. Smith, 39 Ala. 38; Iverson v. Dubose, 27 Ala. 418; Wright v. Swan, 6 Port. 84. Compare Dillingham v. Brown, 38 Ala. 311.

Ariz.—Crittenden Cattle Co. v. Ainsa, 14 Ariz. 306, 127 P 733.

Cal.—Mathews v. Ferrea, 45 Cal. 51.

Ill.—Schuttler v. Piatt, 12 Ill. 417; Cook v. Foster, 7 Ill. 652.

Iowa.—Churchill v. Sowards, 78 Iowa 472, 43 NW 271.

La.—Riggio v. McNeely, 65 S 552.

Mo.—Marshall v. Hill, 246 Mo. 1, 151 SW 131; Smith v. McCorkle, 105 Mo. 135, 16 SW 602; Cummings v. Powell, 97 Mo. 524, 10 SW 819; McIlhinney v. Ficke, 61 Mo. 329.

Nev.—Treadway v. Wilder, 12 Nev. 108.

Oh.—Clark v. Southard, 16 Oh. St. 408; Wood v. Ferguson, 7 Oh. St. 288; Duke v. Thompson, 16 Oh. 34; Wallace v. Minor, 7 Oh. 249.

Utah.—Steele v. Boley, 7 Utah 64, 24 P 755 [overr Steele v. Boley, 6 Utah 308, 22 P 811].

Wash.—Slaght v. Northern Pac. R. Co., 39 Wash. 576, 81 P 1062 [aff 205 U. S. 122, 27 SCt 442, 51 L. ed. 738].

[a] **Reason of rule.**—The rule does not rest alone on the ground that in the United States courts no action of ejectment can be instituted upon the equitable title evidenced by a certificate of purchase or final receiver's receipt, but on the further ground that until the title passes from the government there is no title adverse to the entryman. Tyee Cons. Min. Co. v. Langstedt, 136 Fed. 124, 69 CCA 548.

[b] **Mining lands.**—It has been held that the statute commences to run in favor of an adverse occupant of mining lands only from the issuance of the patent. Tyee Consol. Min. Co. v. Langstedt, 136 Fed. 124, 69 CCA 548 [rev 121 Fed. 709, 58 CCA 129]; Clark v. Barnard, 15 Mont. 176, 38 P 834; Mayer v. Carothers, 14 Mont. 274, 36 P 182; King v. Thomas, 6 Mont. 409, 12 P 865; South End Min. Co. v. Tinney, 22 Nev. 221, 38 P 401.

[c] **Cancellation of original patent.**—Plaintiff entered public lands under a military land warrant in 1857. By mistake a patent was issued to him to another tract, which was canceled. In 1884 he obtained a patent under the original entry. It was held that since he could not have maintained an action to recover the land without this patent the statute of limitations did not begin to run in favor of one in adverse possession of the land until the patent issued in 1884. Churchill v. Sowards, 78 Iowa 472, 43 NW 271.

[d] **Limitations as to a claim to land under a Mexican grant,** held by parties in adverse possession thereof, did not begin to run till the patent was issued to claimants in confirmation thereof. Adams v. Hopkins, 144 Cal. 19, 77 P 712 [aff reh 69 P 228].

57. Hagan v. Ellis, 39 Fla. 463, 22 S 727, 63 AmSR 167.

58. Cawly v. Johnson, 21 Fed. 492; Baty v. Elrod, 66 Nebr. 735, 92 NW 1032, 97 NW 343; Dolen v. Black, 48 Nebr. 688, 67 NW 760; Carroll v. Patrick, 23 Nebr. 834, 37 NW 671. See also Peting v. De Lore, 71 Mo. 13.

59. Ark.—Nichols v. Council, 51 Ark. 26, 9 SW 305, 14 AmSR 20.

Ind.—Doe v. Hearick, 14 Ind. 242.

Iowa.—Cady v. Eighmey, 54 Iowa 615, 7 NW 102.

La.—Gay v. Ellis, 33 La. Ann. 249.

Nebr.—Dolen v. Black, 48 Nebr. 688, 67 NW 760.

[a] **Homestead entry.**—The statute of limitations does not begin to run in favor of one holding adversely, as against one who makes a homestead entry, until the right to a patent is completed by the performance of every act required by the Homestead Law. Mills v. Traver, 35 Nebr. 292, 53 NW 67.

[b] **Possession prior to entry.**—Since the statute of limitations does not run against the federal government a defendant cannot, as against plaintiffs who claim title by entry and purchase of the land from the United States, set up title in himself by showing that he was in adverse possession prior to such entry by plaintiffs. McTarnahan v. Pike, 91 Cal. 540, 27 P 784.

60. Sparks v. Pierce, 115 U. S. 408, 6 SCt 102, 29 L. ed. 428; Simmons v. Ogle, 105 U. S. 271, 26 L. ed. 1087; Gibson v. Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534; Nichols v. Council, 51 Ark. 26, 9 SW 305, 14 AmSR 20; Carroll v. Patrick, 23 Nebr. 834, 37 NW 671.

61. Kimes v. Libby, 87 Nebr. 113, 126 NW 869.

62. Deseret Salt Co. v. Tarpey, 142 U. S. 241, 12 SCt 158, 35 L. ed. 999; St. Louis Univ. v. McCune, 28 Mo. 481; Aubuchon v. Ames, 27 Mo. 89. See also Chicago, etc., R. Co. v. Allfree, 64 Iowa 500, 20 NW 779.

[a] **Grant to individual.**—Where a party holds lands under a grant confirmed by act of congress, followed by surveys locating the lands of the grant in place and by possession extending back more than seventy years, he will be protected from a claim under a certificate from the receiver of the land office showing an entry of a date subsequent to the original claim, and the party in possession under the confirmed grant may plead prescription. Teddlie v. McNeely, 104 La. 603, 29 S 247.

[b] **Grant to state; at what time title accrues.**—Although a grant to the state under the Federal Swamp Land Act (U. S. Rev. St. § 2479), is recognized as a grant in præsenti, the title of the state for the purpose of ejectment to recover such land does not accrue until the approval of the survey, and the statute of limitations does not begin to run against the state in favor of a person in adverse possession of such land until such approval. State v. Lake St. Clair Fishing, etc., Club, 127 Mich. 580, 87 NW 117; Peo. v. Warner, 116 Mich. 228, 74 NW 705.

63. U. S.—Joplin v. Chachere, 192 U. S. 94, 24 SCt 214, 48 L. ed. 359 [aff 107 La. 522, 32 S 243]; Toltec Ranch Co. v. Babcock, 191 U. S. 542, 24 SCt 169, 48 L. ed. 294 [aff 24 Utah 183, 66 P 876] (grant of land to Central Pacific Railroad Company by act of July 1, 1862 c 120 [12 U. S. St. at L. 489], as amended by act of July 2, 1864 [13 U. S. St. at L. 356]); Toltec Ranch Co. v. Cook, 191 U. S. 532, 24 SCt 166, 48 L. ed. 291; Kindred v. Union Pac. R. Co., 168 Fed. 648, 94 CCA 112 [aff 225 U. S. 582, 32 SCt 780, 56 L. ed. 1216].

Cal.—Jatunn v. Smith, 95 Cal. 154, 30 P 200.

Iowa.—Blumer v. Iowa R. Land Co., 129 Iowa 32, 105 NW 342, 113 AmSR 444 [aff 206 U. S. 482, 27 SCt 769, 51 L. ed. 1148].

Minn.—Sage v. Rudnick, 91 Minn. 325, 98 NW 89, 100 NW 106.

Mont.—Northern Pac. R. Co. v. Lilly, 6 Mont. 65, 9 P 116.

[a] **Thus** where by the terms of acts of congress granting lands to a railroad the title passes before the patent is issued, as, for example, when the lands are identified by a survey and the line of the road is definitely located, so that the grantee can maintain an action for the possession of the lands before the issuance of a patent, there may be an adverse possession of the lands from the time the title passes, and such possession will not be interrupted by the subsequent issuance of the patent. Southern Pac. R. Co. v. Whitaker, 109 Cal. 268, 41 P 1083.

64. Northern Pac. R. Co. v. Hasse, 197 U. S. 9, 25 SCt 305, 49 L. ed. 642; Northern Pac. R. Co. v. Ely, 197 U. S. 1, 25 SCt 302, 49 L. ed. 639; Northern Pac. R. Co. v. Townsend, 190 U. S. 267, 272, 23 SCt 671, 47 L. ed. 1044 (where White, J., said: "Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress as

subsequently enacted[65] permitting state statutes of limitation to apply to adverse possession on portions of land granted on such condition do not operate retroactively.[66] But under this statute or one of similar character[67] title to land so granted might be acquired by adverse possession for the requisite period commenced subsequent to the enactment of the statute.[68]

[§ 454] cc. **New Madrid Locations.** Act of February 17, 1815, authorized the owners of lands in New Madrid county, Mo., injured by an earthquake, to locate a like quantity on any public lands the sale of which was authorized. The statute of limitations does not commence to run against a location under this act until title emanates from the United States.[69] It commences to run when the plat and survey of the land located have been returned to the reader of land titles[70] but not before, since the return consummates the claimant's title.[71]

[§ 455] **(3) Grantees of State Government—(a) Rule That Patent Must Issue.** According to one line of cases an occupancy of state lands prior to the issuance of the patent cannot be taken into account to make out the period of possession which is necessary to give the occupant title by adverse possession as against the patentee.[72] And it has been held that this is true even where the patent is given a retroactive effect.[73] Adverse possession for the full statutory period after issuance of the patent will of course bar the rights of the patentee.[74]

In case of conflicting patents, as where a patent is issued to one person for land to which another was entitled to the patent, the former may acquire title as against the latter by an adverse possession following the receipt of his patent for the statutory period, and the running of the statute is not delayed until the issuance of a patent to the latter.[75] So also, as between a senior and a junior patentee, the statute commences to run in favor of the latter as against the former from the time the possession was taken after the issuance of the senior patent and is not postponed until the issuance of the junior patent.[76]

[§ 456] **(b) Rule That Issuance of Patent Is Not Necessary.** On the other hand the courts of some jurisdictions hold that the actual issuance of a patent is not necessary to start the running of the statute against a purchaser of lands from the state.[77]

[§ 457] **(c) Rule Where Statute by Its Terms Runs against the State.** If the statute by its terms runs against the state, it will run against a grantee of the state, not merely from the date of the grant,

forming the basis of an adverse possession which may ripen into a title good as against the railroad company"); Northern Pac. R. Co. v. Smith, 171 U. S. 260, 18 SCt 794, 43 L. ed. 157.

65. 37 U. S. St. at L. 138 c 181.

66. Union Pac. R. Co. v. Sides, 231 U. S. 213, 34 SCt 107 [rev 55 Colo. 174, 133 P 1040]; Union Pac. R. Co. v. Snow, 231 U. S. 204, 34 SCt 107 [rev 55 Colo. 175, 133 P 1037]; Union Pac. R. Co. v. Larrimer Stock Yards Co., 231 U. S. 190, 34 SCt 101.

67. 33 U. S. St. at L. 538.

68. Northern Pac. R. Co. v. Concannon, 75 Wash. 591, 135 P 652.

69. Cummings v. Powell, 97 Mo. 524, 10 SW 819.

70. Gray v. Givens, 26 Mo. 291.

71. Cabanne v. Lindell, 12 Mo. 184.

72. Ala.—Swift v. Doe, 162 Ala. 147, 50 S 123; Stringfellow v. Tennessee Coal, etc., Co., 117 Ala. 250, 22 S 997; Wiggins v. Kirby, 106 Ala. 262, 17 S 354; Wagnon v. Fairbanks, 105 Ala. 527, 17 S 20; Bonner v. Phillips, 77 Ala. 427; Iverson v. Dubose, 27 Ala. 418.

Cal.—Anzar v. Miller, 90 Cal. 342, 27 P 299; Nessler v. Bigelow, 60 Cal. 98; Manly v. Howlett, 55 Cal. 94; Gardiner v. Miller, 47 Cal. 570.

Colo.—Denver, etc., R. Co. v. Wilson, 28 Colo. 6, 62 P 843.

Ga.—Smead v. Doe, 6 Ga. 158.

Kan.—Janes v. Wilkinson, 2 Kan. A. 361, 42 P 735.

Ky.—Buckner v. Kirkland, 110 SW 399, 33 KyL 603; Taylor v. Combs, 50 SW 64, 20 KyL 1828; Hartley v. Hartley, 3 Metc. 56; Fowke v. Darnall, 5 Litt. 316; Stewart v. Jackson, 1 A. K. Marsh. 59; Chiles v. Calk, 4 Bibb 554.

Mo.—Hammond v. Johnston, 98 Mo. 198, 6 SW 83 [app dism 142 U. S. 73, 12 S. Ct. 141, 35 L. ed. 941]; Widdicombe v. Childers, 84 Mo. 382; Smith v. Madison, 67 Mo. 694; Miller v. Dunn, 62 Mo. 216.

N. C.—Lindsay v. Austin, 139 N. C. 463, 51 SE 990.

Va.—Overton v. Davisson, 1 Gratt. (42 Va.) 211, 42 AmD 544.

73. Jackson v. Vail, 7 Wend. (N. Y.) 125. In this case the patent for a lot of land was granted in 1820 to a revolutionary officer in pursuance of an act of the legislature of that year. Although the act declared that the patent should have like effect, as to the title to the lot, as if it had been issued in 1790, it was held that the possession of defendant prior to 1820, when the state divested itself of the title, could not be taken into the estimate under the plea of the statute of limitations, for it was only from that time the statute began to run.

74. Keaton v. Sublett, 109 Ky. 106, 58 SW 528, 22 KyL 631.

75. Wilson v. Bodley, 2 Litt. (Ky.) 55. See also Webb v. Shackelford, 30 SW 395, 17 KyL 1415.

76. Mills v. Bodley, 4 T. B. Mon. (Ky.) 248; Roberts v. Sanders, 3 A. K. Marsh. (Ky.) 28. Compare Koiner v. Rankin, 11 Gratt. (52 Va.) 420; Shanks v. Lancaster, 5 Gratt. (46 Va.) 110, 50 AmD 108 (holding that thus while a junior grantee may show a possession anterior to the date of his patent, to defend his possession under the statute of limitations against an elder grantee, he cannot base a claim of title by adverse possession upon an occupancy of the land prior to the senior grant).

77. See cases infra this note.

[a] **In Alaska** limitations begin to run in favor of one in adverse possession of a part of a mining claim from the time of the location and not from the date of the patent. Tyee Cons. Min. Co. v. Langstedt, 1 Alaska 439.

[b] **In Arkansas** (1) it is held that the statute of limitations commences to run against a grantee of the state after issuance of a certificate of purchase to him. Hibben v. Malone, 85 Ark. 584, 109 SW 1008. (2) The issuance of a certificate of purchase passes the equitable title. Hibben v. Malone, supra. (3) The relation of the certificate holder is that of a vendee under a contract for a conveyance, the conditions of which were fully performed. Coleman v. Hill, 44 Ark. 452.

[c] **In Oregon** (1) where the vendee has gone into possession of land under a binding contract with the state for its purchase, limitations begin to run against the state from the time of full payment of the price. Ambrose v. Huntington, 34 Or. 484, 56 P 513. (2) Nevertheless the statute does not commence to run in his favor, or in favor of one holding under him, until he is entitled to a deed for such land from the state. Hamilton v. Flournoy, 44 Or. 97, 74 P 483.

[d] **In Pennsylvania** (1) it has been held that, as to land purchased from the state, whatever may be the origin of the title, whether it commenced by settlement, application, or warrant, the statute begins to run in favor of an adverse occupant against such settler, applicant, or warrantee from the day his equitable right by settlement first commenced. Munshower v. Patton, 10 Serg. & R. 334, 13 AmD 678. (2) Thus it is held that the statute runs against lands held by warrant and survey (Patten v. Scott, 118 Pa. 115, 12 A 292, 4 AmSR 576; McCoy v. Dickinson College, 4 Serg. & R. 302), or (3) by a descriptive warrant (Keller v. Powell, 142 Pa. 96, 21 A 796).

[e] **In Texas** (1) it has been held that the statute commences to run after a certificate of purchase has been issued. Udell v. Peak, 70 Tex. 547, 552, 7 SW 786 (where it was said: "The original survey segregated the land from the public domain, and the State was ever afterwards powerless to resume control of it, and it having been appropriated by virtue of a valid certificate the equitable title was in the owner of this certificate, and the statute of limitation would run against such title"); Sulphen v. Norris, 44 Tex. 204. See also Lambert v. Weir, 27 Tex. 359 (holding that where a right of action is given on a location or survey the equitable rights thereunder will be barred by an adverse possession to the same extent as a complete legal title by patent). (2) So it has been held that where an application for the purchase of school land has been made and the obligation for the price given and patent thereafter issued to the purchaser, the land was so far separated from the public domain between the filing of the application and the issue of the patent that adverse possession during such period should be included in computing the ten-year limitation prescribed by statute. Thompson v. Dutton, 96 Tex. 205, 71 SW 544 [aff (Civ. A.) 69 SW 641 (rev reh (Civ. A.) 69 SW 996)]. (3) But the statute does not begin to run until the right to a patent is perfected. Dooley v. Maywald, 18 Tex. Civ. A. 386, 45 SW 221. (4) And in the absence of evidence as to the date of a location or survey, limitation will not run in favor of an adverse possession until the patent therefor is issued. Montgomery v. Gunther, 81 Tex. 320, 16 SW 1073. See also Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 21 SW 405. (5) So where the purchaser could have maintained trespass to try title for the land on his contract with the state the statute of limitations would run against such purchaser in favor of one in adverse possession before the pat-

but from the commencement of the adverse occupancy.[78]

[§ 458] **C. Indians or Their Grantees.** There can be no adverse possession of land prior to the extinguishment of the Indian title,[79] and where land which has been allotted to Indians by the United States is held by an Indian title, that is, where the title is vested in the United States and an Indian, so that there can be no alienation by the latter without the consent of the United States, no title by adverse possession can be acquired in the land.[80] But where the title of the Indian is coupled with the power of unrestricted alienation the land is subject to the operation of the statute.[81] So when a purchaser of land from an Indian reservee obtains such title as will enable him to maintain ejectment the statute runs against him.[82]

[§ 459] **D. Municipal or Quasi Municipal Corporations—1. In General.** While there is a conflict of opinion as to just how far the rule exempting the sovereign from the operation of the statute should be applied to municipal and quasi municipal corporations, the cases are generally agreed that the rule is not to be applied to such corporations to the full extent that it is applied in favor of the state.[82½]

[§ 460] **2. Property Held in Capacity of Private Owner.** Thus almost if not quite all the cases agree in holding that where property is held by a municipal corporation as a private owner it is subject to the operation of the statute and that title thereto may be acquired by adverse possession.[83] It has even been held that the statute runs against land owned by a county in this capacity,[84] and a statutory provision that title cannot be acquired as against the state does not prevent the acquisition of title as against a county to land held by it in a private character.[85] It was said that where a county owns land which it may sell and convey without a breach

ent issued for the land. Dutton v. Thompson, supra.

78. Burch v. Winston, 57 Mo. 62.

79. Thompson v. Gotham, 9 Oh. 170; Cocke v. Dotson, 1 Overt. (Tenn.) 169.

80. O'Brien v. Bugbee, 46 Kan. 1, 26 P 428; Sheldon v. Donohoe, 40 Kan. 346, 19 P 901; McGannon v. Straightlege, 32 Kan. 524, 4 P 1042. And see Kreuger v. Schultz, 6 N. D. 310, 311, 70 NW 269 (holding that lands in the "Indian country" cannot be held adversely until the Indians' right of occupancy thereof has been terminated by the United States. In this case it was said: "The fee was in the United States. The Indians had merely a right of occupancy,—a right to use the land subject to the dominion and control of the government. . . . The right of the Indians . . . could not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government").

[a] **Land sold for benefit of Indians.**—Where, by a treaty with an Indian nation ceding certain lands to the United States, it was provided that particular sections of land should be selected and sold for the benefit of the orphans of the Indians, it was held that since the title to the land so reserved did not vest in the orphans but was held by the United States for their benefit no title to such lands could be acquired by adverse possession. Bates v. Aven, 60 Miss. 955.

81. Schrimpcher v. Stockton, 58 Kan. 758, 51 P 276 [aff 183 U. S. 290, 22 SCt 107, 46 L. ed. 203]; Forbes v. Higginbotham, 44 Kan. 94, 24 P 348; New Orleans, etc., R. Co. v. Moye, 39 Miss. 374.

[a] **Where restrictions on alienation are removed** and the Indian possesses an unencumbered title in fee simple, he is chargeable with the same diligence in beginning an action for the recovery of land to which he has title as other persons having title to lands. Schrimpscher v. Stockton, 183 U. S. 290, 22 SCt 107, 46 L. ed. 203.

82. Dillingham v. Brown, 38 Ala. 311.

82½. See infra §§ 462–464 et seq.

83. U. S.—Simplot v. Chicago, etc., R. Co., 16 Fed. 350, 5 McCrary 158.

Ala.—Miller v. State, 38 Ala. 600.

Ark.—Helena v. Hornor, 58 Ark. 151, 23 SW 966; Ft. Smith v. McKibbin, 41 Ark. 45, 48 AmR 19.

Cal.—Ames v. San Diego, 101 Cal. 390, 35 P 1005; Yolo County v. Barney, 79 Cal. 375, 21 P 833, 12 AmSR 152; Hoadley v. San Francisco, 50 Cal. 265; San Francisco v. Calderwood, 31 Cal. 585, 91 AmD 542; Holladay v. Frisbie, 15 Cal. 630.

Ill.—Chicago v. Middlebrooke, 143 Ill. 265, 32 NE 457; Platt County v. Goodell, 97 Ill. 84.

Ind.—Bedford v. Green, 133 Ind. 700, 33 NE 369; Bedford v. Williard, 133 Ind. 562, 33 NE 368 [dist Sims v. Frankfort, 79 Ind. 446]; Hargis v. Congressional Tp., 29 Ind. 70 (school land held by congressional township).

Iowa.—Pella v. Scholte, 24 Iowa 283, 95 AmD 729. See also Waterloo v. Union Mill Co., 72 Iowa 437, 34 NW 197.

Ky.—Rowan v. Portland, 8 B. Mon. 232.

Md.—Baltimore v. Rowe, 107 Md. 704, 67 A 93.

Mass.—Gifford v. Westport, 190 Mass. 323, 76 NE 1042.

Mich.—Cass Farm Co. v. Detroit, 139 Mich. 318, 102 NW 848 (city lots bid in at tax sale); Schneider v. Detroit, 135 Mich. 570, 98 NW 258 (city lots bid in at tax sale).

Mo.—Himmelberger-Harrison Lumber Co. v. Craig, 248 Mo. 319, 154 SW 73 (county swamp land); Palmer v. Jones, 188 Mo. 163, 85 SW 1113 (county swamp land); Dunklin County v. Chouteau, 120 Mo. 577, 25 SW 553.

N. M.—Pueblo of Nambe v. Romero, 10 N. M. 58, 61 P 122 (pueblo lands).

N. Y.—Timpson v. New York, 5 App. Div. 424, 39 NYS 248.

N. C.—Turner v. Hillsboro Comrs., 127 N. C. 153, 37 SE 191.

Oh.—Oxford Tp. v. Columbia, 38 Oh. St. 87 (township school lands).

Pa.—Evans v. Erie County, 66 Pa. 222.

Tex.—Hardin County v. Nona Mills Co., (Civ. A.) 112 SW 822; Johnson v. Llano County, 15 Tex. Civ. A. 421, 39 SW 995 (county lands).

See Krueger v. Jenkins, 59 Nebr. 641, 81 NW 844; Mowry v. Providence, 10 R. I. 52.

[a] **Property of board of education.**—Comp. L. (1907) § 2856, provides that the state is barred from bringing an action for real property unless commenced within seven years. Section 2866x provides that no person shall be allowed to acquire any right or title in or to any lands held by any town or city "as streets, lanes, avenues, alleys, parks, public squares, or for other purposes, by adverse possession thereof for any length of time whatsoever." Section 2884 provides that limitations which apply to actions generally also apply as against the claims of the state. It was held that the phrase "or for other purposes," in § 2866x must be limited to things ejusdem generis with the property especially named and that the city board of education may lose title to property by adverse possession that is not used for school purposes but held for sale as business property. Pioneer Inv., etc., Co. v. Salt Lake City Bd. Education, 35 Utah 1, 99 P 150, 136 AmSR 1016.

[b] **Lands held by a city under a lease from the state.**—Inasmuch as the California act of March 26, 1851, which grants the use of certain beach and water lots to the city of San Francisco for ninety-nine years, with a proviso that the city shall pay into the state treasury, within twenty days after their receipt, twenty-five per cent of all moneys arising from the sale of the property does not create a trust in the city in favor of the state so far as the land itself is concerned, the city's title to such land is subject to extinguishment by adverse possession under the statute of limitations. San Francisco v. Straut, 84 Cal. 124, 24 P 814; Holladay v. Frisbie, 15 Cal. 631.

[c] **Land of a city between a street and tide line,** being proprietary land not dedicated to public use, is subject to the ordinary rules concerning title by prescription. Santa Cruz v. Southern Pac. R. Co., 163 Cal. 538, 126 P 362.

[d] **Statutes changing character of possession.**—Act Nov. 20, 1759 (33 Geo. II) § 3, incorporating the town of Childsburg, provided that two hundred acres within its boundaries should "be and remain for a common thereto." Acts (1830–31) c 152, empowered the town of Hillsboro, the successor of Childsburg, to sell or dispose of all or any part of the commons of such town, from time to time, as it might think best. It was held that, while an adverse possession to such common land could not ripen as against the town prior to Acts (1830–1831), such act changed the character of its ownership from an inalienable title to one subject to disposition, and therefore one who held a well defined portion of such commons continuously for over twenty years subsequent to such act acquired a title by adverse possession as against the town. Turner v. Hillsboro, 127 N. C. 153, 37 SE 191.

84. Platt County v. Goodell, 97 Ill. 84 (holding that title by adverse possession was acquired to swamp lands owned by a county).

[a] **Swamp lands.**—Gen. St. (1865) c 191 § 7, providing that nothing contained in any statute of limitations shall extend to any lands granted or appropriated to any public, pious, or charitable use, or to any lands belonging to the state, did not prevent § 1, limiting actions to recover lands to ten years, from applying to swamp lands patented by the state to a county while held and owned by the county. Swamp lands are not within the terms of the statute. A distinction is "made between property held for strictly public purposes, as for streets, parks, commons and the like, and property held by the corporation in its private character." Palmer v. Jones, 188 Mo. 163, 166, 85 SW 1113; Dunklin County v. Chouteau, 120 Mo. 577, 25 SW 553.

85. Hammond v. Shepard, 186 Ill.

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of duty, it holds the same as an individual and its title may be defeated by adverse possession.[86] It has also been held that a statute providing that title to any road, street, sidewalk, or "grounds" belonging to a county cannot be acquired by adverse possession is limited to such land as is used for public purposes or has been dedicated to a public use.[87]

[§ 461] **3. Property Held for Public Use—a. In General.** There is a pronounced conflict of opinion as to whether title by adverse possession may be acquired in property which is held by a municipal corporation for a public use.[88]

[§ 462] **b. View That the Statute Runs—(1) In General.** According to one line of cases the rule which exempts the state from the operation of the statute has no application to municipal corporations, and, in the absence of some provision expressly exempting such corporations from the operation of the statute, title by adverse possession may be acquired to lands held by them for a public use.[89] However, in some states where the doctrine obtains that lands held by a municipality for a public use may be acquired by adverse possession, it is held that the rule does not extend to lands held by a county for a public use.[90]

[§ 463] **(2) Streets and Alleys, Public Squares, Markets, and Wharves.** In accordance with the view stated in the preceding section it has been held that title by adverse possession may be acquired to lands dedicated to the public for the purposes of streets, alleys,[91] public squares,[92] public markets,[93] or wharves.[94]

[§ 464] **c. View That Statute Does Not Run—(1) In General.** While the view which has just been

235, 57 NE 867, 78 AmSR 274. And see Johnson v. Llano County, 15 Tex. Civ. A. 421, 39 SW 995 (holding that the right of a county to recover lands not acquired or used for public purposes may be barred by limitations, although the state is exempt from the operation of the statute and the constitution recognizes counties as subdivisions of the state, since it also classifies them as municipal corporations, and such corporations are subject to limitations in such cases, and since Rev. St. [1895] art 3351 [Act March 17, 1887, amending Rev. St. (1879) art 3200], exempting the state generally from the operation of the statute in suits to recover land, exempts counties from its operation only as to the right to recover any "road, street, sidewalk, or grounds").

86. Hammond v. Shepard, 186 Ill. 235, 57 NE 867, 78 AmSR 274.

87. Johnson v. Llano County, 15 Tex. Civ. A. 421, 39 SW 995.

88. Foley v. Doddridge County Ct., 54 W. Va. 16, 31, 46 SE 246 [cit Cyc]. **Estoppel of municipal and quasi municipal corporations in relation to land held for a public use** see Estoppel [16 Cyc 781].

89. Ark.—Ft. Smith v. McKibbin, 41 Ark. 45, 48 AmR 19.

Mich.—Pastorino v. Detroit, 148 NW 231; Schneider v. Detroit, 135 Mich. 570, 98 NW 258.

Mo.—Callaway County v. Nolley, 31 Mo. 393; Funkhouser v. Langkopf, 26 Mo. 453; St. Charles County v. Powell, 22 Mo. 525, 66 AmD 637. Compare St. Louis v. Missouri Pac. R. Co., 114 Mo. 13, 21 SW 202.

Nebr.—Meyer v. Lincoln, 33 Nebr. 566, 50 NW 763, 29 AmSR 500, 18 LRA 146. That the rule has been changed by statute see Wahoo v. Nethaway, 73 Nebr. 54, 102 NW 86.

Oh.—Lane v. Kennedy, 13 Oh. St. 42; Cincinnati v. Evans, 5 Oh. St. 594; Williams v. First Presb. Soc., 1 Oh. St. 478; Cincinnati v. First Presb. Church, 8 Oh. 298, 32 AmD 718.

R. I.—Mowry v. Providence, 10 R. I. 52.

Tex.—Galveston v. Menard, 23 Tex. 349.

Vt.—Knight v. Heaton, 22 Vt. 480.

[a] **In support of this view** it is said that the position and rights of the city are very analogous to those of a cestui que trust while the public occupies the position and assumes the obligation of a trustee, and that, since a trustee is vested with a legal cause of action to recover possession of the trust estate from an intruder, he cannot protect himself from the operation of the statute by showing that he holds the title in trust for another; in other words, that the effect of the statute cannot be avoided by vesting property in one person for the benefit of another. Cincinnati v. First Presb. Church, 8 Oh. 298, 32 AmD 718, 719 note.

[b] **In Kentucky,** (1) before the act of 1873 declaring that no adverse holding should begin against a municipal corporation until the occupant notified the city authorities of his purpose to hold and claim as against the city, a town or city could be barred from recovering real estate in the same manner as an individual claimant. Terrill v. Bloomfield, 21 SW 1041, 14 KyL 614; Covington v. McNickle, 18 B. Mon. 262; Newport v. Taylor, 16 B. Mon. 699; Alves v. Henderson, 16 B. Mon. 131; Dudley v. Frankfort, 12 B. Mon. 610; Rowan v. Portland, 8 B. Mon. 232. (2) But this rule seems to have been changed by the above mentioned act. See Terrill v. Bloomfield, supra.

[c] **In West Virginia** (1) this rule was adopted and applied in the earlier cases. Teass v. St. Albans, 38 W. Va. 1, 17 SE 400, 19 LRA 802; Wheeling v. Campbell, 12 W. Va. 36. (2) But these cases were expressly overruled in Ralston v. Weston, 46 W. Va. 544, 33 SE 326.

90. Taylor v. Austin, 83 Nebr. 581, 119 NW 1123; Lydick v. State, 61 Nebr. 309, 85 NW 70; Krueger v. Jenkins, 59 Nebr. 641, 81 NW 844; Coleman v. Thurmond, 56 Tex. 514; Marsalis v. Garrison, (Tex. Civ. A.) 27 SW 929. See also infra § 471.

[a] **Equitable ownership of land by county.**—Under Sayles Ann. Civ. St. (1897) art 3351, providing that no person shall ever acquire by adverse possession any title to lands belonging to a county, no adverse occupancy or possession of land the equitable title to which was in a county can ever ripen into title in possessor. Bell County v. Felts, (Tex. Civ. A.) 120 SW 1065 [reh den (Civ. A.) 122 SW 269].

91. Ark.—Stuttgart v. John, 85 Ark. 520, 109 SW 541; El Dorado v. Ritchie Grocery Co., 84 Ark. 52, 104 SW 549, 120 AmSR 22; Ft. Smith v. McKibbin, 41 Ark. 45, 48 AmR 19. Compare State v. Kansas City, etc., R. Co., 54 Ark. 608, 16 SW 657.

Conn.—Derby v. Alling, 40 Conn. 410.

Ky.—Hegan v. Pendennis Club, 64 SW 464, 23 KyL 861; Terrill v. Bloomfield, 21 SW 1041, 14 KyL 614; Bosworth v. Mt. Sterling, 13 SW 920, 12 KyL 157; Cornwall v. Louisville, etc., R. Co., 87 Ky. 72, 7 SW 553, 9 KyL 924; Dudley v. Frankfort, 12 B. Mon. 610; Rowan v. Portland, 8 B. Mon. 232.

Mich.—LaBarre v. Bent, 154 Mich. 520, 118 NW 6; Triece v. South Haven, 154 Mich. 129, 117 NW 555; Wesson v. Tolsma, 117 Mich. 384, 75 NW 941; Vier v. Detroit, 111 Mich. 646, 70 NW 139; Vincent v. Kalamazoo, 111 Mich. 230, 69 NW 501; Flynn v. Detroit, 93 Mich. 590, 53 NW 815; Essexville v. Emery, 90 Mich. 183, 51 NW 204; Big Rapids v. Comstock, 65 Mich. 78, 31 NW 811. And see Darrow v. Homer, 122 Mich. 229, 81 NW 262 (holding that, where a platted alley had never been used by the public or the village authorities and was not included in the literal reading of a deed of the abutting lots, possession thereof, by the grantee of such lots and his predecessor, for a time longer than the statute requires to obtain title by adverse possession will give him good title thereto).

Minn.—Wayzata v. Great Northern R. Co., 50 Minn. 438, 52 NW 913; St. Paul, etc., R. Co. v. Minneapolis, 45 Minn. 400 note, 48 NW 22 (both decided under statutes so providing). And see Haramon v. Krause, 93 Minn. 455, 101 NW 791 (where it was said that adverse possession of a highway for a period of fifteen years, prior to L. [1899] c 65, gave title to the person occupying and possessing the same); Hastings v. Gillitt, 85 Minn. 331, 88 NW 987.

Mo.—St. Charles County v. Powell, 22 Mo. 525, 66 AmD 637.

Nebr.—Webster v. Lincoln, 56 Nebr. 502, 76 NW 1076; Lewis v. Baker, 39 Nebr. 636, 58 NW 126; Meyer v. Lincoln, 33 Nebr. 566, 50 NW 763, 29 Am SR 500, 18 LRA 146 and note; Schock v. Falls City, 31 Nebr. 599, 48 NW 468; Weatherford v. Union Pac. R. Co., 5 Nebr. (Unoff.) 464, 98 NW 1089 [rev reh 74 Nebr. 229, 104 NW 183] (street).

Oh.—Cincinnati v. Evans, 5 Oh. St. 594; Evens v. Cincinnati, 2 Handy 236.

Tex.—Ostrom v. San Antonio, 77 Tex. 345, 14 SW 66; Galveston v. Menard, 23 Tex. 349.

"Municipal corporations are bound, as individuals are, by the statute of limitations, and adverse possession of an alley in a city for the statutory period will give title to the occupant." El Dorado v. Ritchie Grocery Co., 84 Ark. 52, 53, 104 SW 549; Ft. Smith v. McKibbin, 41 Ark. 45, 48 AmR 19.

[a] **Under statute giving power to remove encroachments.**—Under the direct provisions of the act of March 10, 1884, Acts (1883–1884) p 494, giving a city council power to remove buildings and other obstructions where they encroach on streets, it has been held that where the encroachment is on a corner lot and has continued for a period of twenty years it constitutes an adverse possession and confers property rights on the persons claiming thereunder as against the city. Carneal v. Lynch, 91 Va. 114, 20 SE 959, 50 AmSR 819.

[b] **Necessity of dedication.**—Limitations could not commence to run against a city in favor of a claimant of land in streets until the streets were laid off or dedicated to public use. Perry v. Ball, 52 Tex. Civ. A. 134, 113 SW 588.

92. Ft. Smith v. McKibbin, 41 Ark. 45, 48 AmR 19; Pella v. Scholte, 24 Iowa 283, 95 AmD 729; Vier v. Detroit, 111 Mich. 646, 70 NW 139; Folsom v. McGregor, 10 Tex. Civ. A. 555, 30 SW 846.

93. Callaway County v. Nolley, 31 Mo. 393.

94. Rowan v. Portland, 8 B. Mon. (Ky.) 232.

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discussed is supported by respectable authority, it is contrary to the clear weight of authority. The preponderance of authority, and perhaps of reason,[95] support the view that the maxim, Nullum tempus occurrit regi, applies not only to the sovereign power of the state, but also to municipal and quasi municipal corporations as trustees of the rights of the public, and that title to lands held by a public corporation for a public use cannot be acquired by adverse possession.[96]

[§ 465] (2) **Streets and Alleys.** In accordance with this principle it is held that title by adverse possession cannot be acquired to land held by municipalities for streets[97] and

95. See Almy v. Church, 18 R. I. 182, 187, 26 A 58 (where the court said: "The grounds upon which the latter class of cases rests are variously stated; as, that an obstruction is a nuisance and no nuisance can ripen into a right; that individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have interest sufficient to make them vigilant; while in public rights of property, each individual feels but a slight interest and will tolerate a manifest encroachment rather than seek a dispute to set it right; that public policy requires the preservation of public rights and that a municipality cannot by permissive neglect invest an intruder with title to a public highway. These reasons are very cogent and in our opinion outweigh the authorities which are opposed to them").

In Norrell v. Augusta R., etc., Co., 116 Ga. 313, 315, 42 SE 466, 59 LRA 101, the court said: "After a careful consideration of the question, we are of opinion that the better view is that prescription does not run against a municipal corporation in regard to land held by it for the benefit of the whole public. While it may be entirely proper to apply the doctrine of adverse possession and prescription to a city in matters in which it is concerned in a capacity which is private rather than governmental in its nature, we think that adverse possession by an individual of property held by a city for the benefit and use of the whole public should not be allowed to ripen into a prescriptive title. The city is in some respects not a division of the State, but it is at least an agent of the State exercising, within certain limits, governmental functions and powers. If prescription does not run against the State, it should not run against a city in respect to rights which are entrusted to the city for the benefit of the public generally and as to which it exercises governmental powers. A municipal corporation is entrusted with the care and control of its streets for the use and benefit, not of its own inhabitants merely, but of the whole public, and prescription, which does not run against the State, should not run against its trustee."

96. U. S.—Snowden v. Loree, 122 Fed. 493 [aff 128 Fed. 419]; London, etc., Bank v. Oakland, 86 Fed. 30 [aff 90 Fed. 691]; Simplot v. Chicago, etc., R. Co., 16 Fed. 350, 5 McCrary 158.

Ala.—Mobile Transp. Co. v. Mobile, 128 Ala. 335, 30 S 645, 86 AmSR 143, 64 LRA 333 [aff 187 U. S. 479, 23 SCt 170, 47 L. ed. 266].

Cal.—Home for Inebriates v. San Francisco, 119 Cal. 534, 51 P 950; Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 P 277; Ames v. San Diego, 101 Cal. 390, 35 P 1005; Peo. v. Pope, 53 Cal. 437.

Conn.—Derby v. Alling, 40 Conn. 410. See however Litchfield v. Wilmot, 2 Root 288.

D. C.—District of Columbia v. Washington, etc., R. Co., 12 D. C. 361.

Ga.—Wade v. Cornelia, 136 Ga. 89, 70 SE 880; Langley v. Augusta, 118 Ga. 590, 45 SE 486, 98 AmSR 133; Norrell v. Augusta R., etc., Co., 116 Ga. 313, 42 SE 466, 59 LRA 101.

Ill.—Close v. Chicago, 257 Ill. 47, 100 NE 215; Owen v Brookport, 208 Ill. 35, 69 NE 952; Shirk v. Chicago, 195 Ill. 298, 63 NE 193; De Kalb v. Luney, 193 Ill. 185, 61 NE 1036; Sullivan v. Tichenor, 179 Ill. 97, 53 NE 561; Chicago v. Middlebrooke, 143 Ill. 265, 32 NE 457; Piatt County v. Goodell, 97 Ill. 84; Quincy v. Jones, 76 Ill. 231, 20 AmR 243; Alton v. Illinois Transp. Co., 12 Ill. 38, 52 AmD 479.

Ind.—Hall v. Breyfogle, 162 Ind. 494, 70 NE 883; Brooks v. Riding, 46 Ind. 15; Kelly v. Pittsburgh, etc., R. Co., 28 Ind. A. 457, 63 NE 233, 91 AmSR 134. See also Collett v. Vanderburgh County, 119 Ind. 27, 21 NE 329, 4 LRA 321; Hamilton v. State, 106 Ind. 361, 7 NE 9; Greene County v. Huff, 91 Ind. 333; State v. Berdetta, 73 Ind. 185, 38 AmR 117.

Iowa.—Bridges v. Grand View, 139 NW 917; Johnson v. Shenandoah, 153 Iowa 493, 133 NW 761; McClenehan v. Jesup, 144 Iowa 352, 120 NW 74; Burroughs v. Cherokee, 134 Iowa 429, 109 NW 876; Markham v. Anamosa, 122 Iowa 689, 98 NW 493; Weber v. Iowa City, 119 Iowa 633, 93 NW 637; Rae v. Miller, 99 Iowa 650, 68 NW 899; Taraldson v. Lime Springs, 92 Iowa 187, 60 NW 658; Waterloo v. Union Mill Co., 72 Iowa 437, 34 NW 197; Twining v. Burlington, 68 Iowa 284, 27 NW 243. See however Pella v. Scholte, 24 Iowa 283, 95 AmD 729 (it will be noted that the holding of Dillon, J., in this case is contrary to his view expressed in his work on Municipal Corporations. See Dillon Mun. Corp. [3d ed] §§ 667–675).

La.—Zagame v. New Orleans, 128 La. 388, 54 S 916; New Basin Canal, etc., Bd. of Control v. H. Weston Lumber Co., 109 La. 925, 33 S 923; Handlin v. H. Weston Lumber Co., 47 La. Ann. 401, 16 S 955; Louisiana Ice Mfg. Co. v. New Orleans, 43 La. Ann. 217, 9 S 21; Sheen v. Stothart, 29 La. Ann. 630; Shreveport v. Walpole, 22 La. Ann. 526; Ingram v. St. Tammany Parish, 20 La. Ann. 226; Thibodeaux v. Maggioli, 4 La. Ann. 73; New Orleans v. Magnon, 4 Mart. 2.

Me.—Charlotte v. Pembroke Iron Works, 82 Me. 391, 19 A 902.

Md.—Cushwa v. Williamsport, 117 Md. 306, 83 A 389; Baldwin v. Trimble, 85 Md. 396, 37 A 176, 36 LRA 489; Ulman v. Charles St. Ave Co., 83 Md. 130, 34 A 366.

Mass.—Com. v. Viall, 2 Allen 512.

Mich.—Pastorino v. Detroit, 148 NW 231 (under express statutory provision).

Miss.—Lexington v. Hoskins, 96 Miss. 163, 50 S 561 (under constitutional provision said to be declaratory of the common law); Bay St. Louis v. Hancock County, 80 Miss. 364, 32 S 54; Vicksburg v. Marshall, 59 Miss. 563. Compare Clements v. Anderson, 46 Miss. 581.

Mo.—Brown v. Carthage, 128 Mo. 10, 30 SW 312 (under statute so providing); State v. De Vall, 157 Mo. A. 587, 138 SW 667.

N. H.—Manchester v. Hodge, 74 N. H. 468, 69 A 527. See however Webber v. Chapman, 42 N. H. 326, 80 AmD 111.

N. J.—Atlantic City v. Snee, 68 N. J. L. 39, 52 A 372; State v. Trenton, 36 N. J. L. 198; Tainter v. Morristown, 19 N. J. Eq. 46; Cross v. Morristown, 18 N. J. Eq. 305; Jersey City v. Morris Canal, etc., Co., 12 N. J. Eq. 547.

N. Y.—Driggs v. Phillips, 103 N. Y. 77, 8 NE 514; Kellogg v. Thompson, 66 N. Y. 88; Timpson v. New York, 5 App. Div. 424, 39 NYS 248; Brookhaven v. Dyett Sand-Lime Brick Co., 75 Misc. 310, 135 NYS 165; Slattery v. McCaw, 44 Misc. 426, 90 NYS 52.

N. C.—Turner v. Hillsboro, 127 N. C. 153, 37 SE 191.

Oh.—Heddleston v. Hendricks, 52 Oh. St. 460, 40 NE 408.

Pa.—Philadelphia v. Philadelphia, etc., R. Co., 58 Pa. 253; Susquehanna County v. Deans, 33 Pa. 131; In re Penny Pot Landing, 16 Pa. 79; Barter v. Com., 3 Penr. & W. 253; Jones v. Girard, 26 Pa. Co. 385; Washington Female Seminary v. Washington, 23 Pa. Co. 545.

R. I.—Almy v. Church, 18 R. I. 182, 26 A 58; Simmons v. Cornell, 1 R. I. 519.

S. C.—Crocker v. Collins, 37 S. C. 327, 15 SE 951, 34 AmSR 752.

Tenn.—Sims v. Chattanooga, 2 Lea 694; Raht v. Southern R. Co., (Ch. A.) 50 SW 72.

Va.—Depriest v. Jones, 21 SE 478.

Wash.—Rapp v. Stratton, 41 Wash. 263, 83 P 182; West Seattle v. West Seattle Land, etc., Co., 38 Wash. 359, 80 P 549; Port Townsend v. Lewis, 34 Wash. 413, 75 P 982 (under express statutory provision to that effect).

W. Va.—Foley v. Doddridge County Ct., 54 W. Va. 16, 46 SE 246; Ralston v. Weston, 46 W. Va. 544, 33 SE 326 [overr Teass v. St. Albans, 38 W. Va. 1, 17 SE 400, 19 LRA 802]; Wheeling v. Campbell, 12 W. Va. 36.

See Nicolai v. Davis, 91 Wis. 370, 64 NW 1001.

97. U. S.—Simplot v. Chicago, etc., R. Co., 16 Fed. 350, 5 McCrary 158; Grogan v. Hayward, 4 Fed. 161, 6 Sawy. 498.

Ala.—Alexander-City Union Warehouse, etc., Co. v. Central of Georgia R. Co., 62 S 745; Harn v. Dadeville, 100 Ala. 199, 14 S 9; Webb v. Demopolis, 95 Ala. 116, 13 S 289, 21 LRA 62; Reed v. Birmingham, 92 Ala. 339, 9 S 161.

Cal.—Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 P 277; Oreña v. Santa Barbara, 91 Cal. 621, 28 P 268; Mills v. Los Angeles, 90 Cal. 522, 27 P 354; Hargro v. Hodgdon, 89 Cal. 623, 26 P 1106; San Leandro v. Le Breton, 72 Cal. 170, 13 P 405; Visalia v. Jacob, 65 Cal. 434, 4 P 433, 52 AmR 303; Peo. v. Pope, 53 Cal. 437.

Del.—Allender v. Wilmington, 76 A 610.

Ga.—Langley v. Augusta, 118 Ga. 590, 45 SE 486, 98 AmSR 133; Norrell v. Augusta R., etc., Co., 116 Ga. 313, 42 SE 466, 59 LRA 101.

Ida.—Hanson v. Proffer, 23 Ida. 705, 132 P 573.

Ill.—De Land v. Dixon Power, etc., Co., 225 Ill. 212, 80 NE 125; Shirk v. Chicago, 195 Ill. 298, 63 NE 193; De Kalb v. Luney, 193 Ill. 185, 61 NE 1036; Sullivan v. Tichenor, 179 Ill. 97, 53 NE 561; Jordan v. Chenoa, 166 Ill. 530, 47 NE 191; Lee v. Mound Station, 118 Ill. 304, 8 NE 759.

Ind.—Hall v. Breyfogle, 162 Ind. 494, 70 NE 883; Schmidt v. Draper, 137 Ind. 249, 36 NE 709; Wolfe v. Sullivan, 133 Ind. 331, 32 NE 1017; Collett v. Vanderburgh County, 119 Ind. 27, 21 NE 329, 4 LRA 321; Cheek v. Aurora, 92 Ind. 107; Sims v. Frankport, 79 Ind. 446; Brooks v. Riding, 46 Ind. 15; Kelly v. Pittsburgh R. Co., 28 Ind. A. 457, 63 NE 233, 91 AmSR 134; Terre Haute, etc., R. Co. v. Zehner, 28 Ind. A. 229, 62 NE 508.

Iowa.—Sutton v. Mentzer, 154 Iowa 1, 134 NW 108; Quinn v. Baage, 138 Iowa 426, 114 NW 205; Markham v. Anamosa, 122 Iowa 689, 98 NW 493; Chicago, etc., R. Co. v. Council Bluffs, 109 Iowa 425, 80 NW 564; Taraldson v. Lime Springs, 92 Iowa 187, 60 NW 658; Waterloo v. Union Mill Co., 72 Iowa 437, 34 NW 197. See also Davies v. Huebner, 45 Iowa 574.

Kan.—Wallace v. Cable, 87 Kan. 835, 127 P 5, 42 LRANS 587; Eble v. State, 77 Kan. 179, 93 P 803, 127 AmSR 412; Webb v. Butler County, 52 Kan. 375, 34 P 973.

La.—New Basin Canal, etc., Bd. of Control v. H. Weston Lumber Co., 109 La. 925, 33 S 923; Lafitte v. New Orleans, 52 La. Ann. 2099, 28 S 327; Louisiana Ice Mfg. Co. v. New Or-

alleys.[98] The title thereto is vested in the city in its governmental capacity to hold for the use of the public,[99] and not in its private right or by reason of its private existence.[1] However, in case of property dedicated to the use of the public for streets, it is essential that the dedication should have been accepted to render the rule operative.[2] Until acceptance the street is not a highway and the municipal authorities can exercise no authority over the land so dedicated.[3] But where the public right has once attached by an acceptance of the dedication, it is not subject to be divested by application of the rules pertaining to adverse possession, and, although the municipality opens up and uses only a part of the land dedicated, adverse possession of the remainder will not ripen into title.[4] It has likewise been held that the dedication being to the public, not to the municipality which holds as a trustee, title by adverse possession cannot be acquired through the negligence[5] or malfeasance[6] of municipal officers. It has been held, however, that where land which has been dedicated to the use of the public for the purpose of a street or alley reverts to the owner of the fee in consequence of an abandonment of the highway by the city, it is of course subject to adverse possession.[7]

[§ 466] **(3) Parks, Squares, Etc.** So also the principle that lands held by a municipality for a public use cannot be acquired by adverse possession has been applied in the case of public squares,[8]

leans, 43 La. Ann. 217, 9 S 21; Sheen v. Stothart, 29 La. Ann. 630; Thibodeaux v. Maggioli, 4 La. Ann. 73; New Orleans v. Magnon, 4 Mart. 2.

Me.—Charlotte v. Pembroke Iron Works, 82 Me. 391, 19 A 902, 8 LRA 828.

Md.—Baldwin v. Trimble, 85 Md. 396, 37 A 176, 36 LRA 489; Ulman v. Charles St. Ave. Co., 83 Md. 130, 34 A 366.

Mass.—Holyoke v. Hadley Water-Power Co., 174 Mass. 424, 54 NE 889.

Mich.—Weber v. Detroit, 159 Mich. 14, 123 NW 540, 36 LRANS 1056.

Miss.—Lexington v. Hoskins, 96 Miss. 163, 50 S 561 (under a constitutional provision declaratory of the common law); Witherspoon v. Meridian, 69 Miss. 288, 13 S 843; Vicksburg v. Marshall, 59 Miss. 563.

Mo.—Columbia v. Bright, 179 Mo. 441, 79 SW 151 (under express provision to that effect).

Mont.—Territory v. Deegan, 3 Mont. 82.

Nebr.—Lydick v. State, 61 Nebr. 309, 85 NW 70; Krueger v. Jenkins, 59 Nebr. 641, 81 NW 844.

N. H.—Harrington v. Manchester, 76 N. H. 347, 82 A 716; Manchester v. Hodge, 74 N. H. 468, 69 A 527.

N. J.—Hoboken Land, etc., Co. v. Hoboken, 36 N. J. L. 540; State v. Trenton, 36 N. J. L. 198; Jersey City v. State, 30 N. J. L. 521; Tainter v. Morristown, 19 N. J. Eq. 46; Cross v. Morristown, 18 N. J. Eq. 305; Jersey City v. Morris Canal, etc., Co., 12 N. J. Eq. 547.

N. Y.—Driggs v. Phillips, 103 N. Y. 77, 8 NE 514; St. Vincent Female Orphan Asylum v. Troy, 76 N. Y. 108, 32 AmR 286 [rev 12 Hun 317]; Walker v. Caywood, 31 N. Y. 51; Milhau v. Sharp, 27 N. Y. 611; Morison v. New York El. R. Co., 74 Hun 398, 26 NYS 641; Matter of Public Parks, 53 Hun 556, 6 NYS 779; Corwin v. Corwin, 24 Hun 147; Hall v. Olean, 82 Misc. 300, 143 NYS 664; Patten v. New York El. R. Co., 3 AbbNCas 306; Morey v. West Troy, 12 NYWklyDig 55; Mills v. Hall, 9 Wend. 315. See also Kellogg v. Thompson, 66 N. Y. 88. See however Peckham v. Henderson, 27 Barb. 207.

N. C.—New Bern v. Wadsworth, 151 N. C. 309, 66 SE 144.

Oh.—Wright v. Oberlin, 23 Oh. Cir. Ct. 509.

Or.—Christian v. Eugene, 49 Or. 170, 89 P 419 (under express provision to that effect).

Pa.—Com. v. Moorehead, 118 Pa. 344, 12 A 424, 4 AmSR 599; Kopf v. Utter, 101 Pa. 27; Kittaning Academy v. Brown, 41 Pa. 269; In re Penny Pot Landing, 16 Pa. 79; Barter v. Com., 3 Penr. & W. 253; Com. v. McDonald, 16 Serg. & R. 390; McGuire v. Wilkes-Barre, 36 Pa. Super. 418; Washington Female Seminary v. Washington, 23 Pa. Co. 545, 30 PittsbLegJNS 401; In re Gay St., 6 Pa. Co. 187; Philadelphia v. Crump, 1 Brewst. 320; Blakely v. Delaware, etc., Canal Co., 2 LackLegN 59; Philadelphia v. Friday, 6 Phila. 275; Pittsburgh v. Eping-Carpenter Co., 29 PittsbLegJNS 255.

R. I.—Horgan v. Jamestown, 32 R. I. 528, 80 A 271; Knowles v. Knowles, 25 R. I. 325, 55 A 755; Almy v. Church, 18 R. I. 182, 26 A 58; Simmons v. Cornell, 1 R. I. 519.

S. C.—Chafee v. Aiken, 57 S. C. 507, 35 SE 800; Crocker v. Collins, 37 S. C. 327, 15 SE 951, 34 AmSR 752.

Tenn.—Sims v. Chattanooga, 2 Lea 694; Memphis v. Lenore, 6 Coldw. 412; Raht v. Southern R. Co., (Ch. A.) 50 SW 72.

Tex.—Perry v. Ball, 52 Tex. Civ. A. 134, 113 SW 588 (under express provision to that effect); San Antonio v. Rowley, 48 Tex. Civ. A. 376, 106 SW 753; Krause v. El Paso, (Civ. A.) 101 SW 828 [rev on other grounds 101 Tex. 211, 106 SW 121, 130 AmSR 831, 14 LRANS 582] (under express provision to that effect).

Va.—Bellenot v. Richmond, 108 Va. 314, 61 SE 785 [disappr Richmond v. Poe, 24 Gratt. (65 Va.) 149, and declaring that it is in conflict with the current of authority in Virginia]; Buntin v. Danville, 93 Va. 200, 24 SE 830; Depriest v. Jones, 21 SE 478; Yates v. Warrenton, 84 Va. 337, 4 SE 818, 10 AmSR 860; Taylor v. Com., 29 Gratt (70 Va.) 780.

Wash.—Rapp v. Stratton, 41 Wash. 263, 83 P 182.

W. Va.—Elkins v. Offhaus, 81 SE 1132; Elkins v. Donohue, 81 SE 1130; Clifton v. Weston, 54 W. Va. 250, 46 SE 360; Ralston v. Weston, 46 W. Va. 544, 33 SE 326, 76 AmSR 834 [overr Teass v. St. Albans, 38 W. Va. 1, 17 SE 400, 19 LRA 802; Forsyth v. Wheeling, 19 W. Va. 318; Wheeling v. Campbell, 12 W. Va. 36].

Wis.—Nicolai v. Davis, 91 Wis. 370, 64 NW 1001; Childs v. Nelson, 69 Wis. 125, 33 NW 587; Reilly v. Racine, 51 Wis. 526, 8 NW 417. See also Taylor v. Chicago, etc., R. Co., 83 Wis. 645, 53 NW 855.

[a] **A city charter** providing that no person shall obtain any title as against the city, by lapse of time, to any streets or public squares by reason of any encroachment on or inclosure of the same is within the power of the legislature. Crawford v. Ross, 126 Mich. 634, 86 NW 132.

[b] **One who has merely an easement in a street** for maintaining a flume for milling purposes can acquire no more than the perpetual right to maintain the flume for milling purposes and cannot claim, by adverse possession, the legal title of that part of the street so as to entitle him to maintain the flume banks at any height. Hague v. Juab County Mill, etc., Co., 37 Utah 290, 107 P 249.

98. Cal.—Koshland v. Cherry, 13 Cal. A. 440, 110 P 143.

Ind.—Hall v. Breyfogle, 162 Ind. 494, 70 NE 883; Schmidt v. Draper, 137 Ind. 249, 36 NE 709.

Iowa.—Taraldson v. Lime Springs, 92 Iowa 187, 60 NW 658.

Or.—Christian v. Eugene, 49 Or. 170, 89 P 419 (under express provision to that effect).

S. C.—Crocker v. Collins, 37 S. C. 327, 15 SE 951, 34 AmSR 752.

Wash.—Rapp v. Stratton, 41 Wash. 263, 83 P 182.

[a] **By express statutory provision in Texas** (1) (Rev. Civ. St. 1911) title by adverse possession may be acquired to an alley in a town or city. Guadalupe County v. Poth, (Civ. A.) 163 SW 1050; Folsom v. McGregor, 10 Tex. Civ. A. 555, 30 SW 846. (2) And this is so, although the town was not incorporated. Guadalupe County v. Poth, (Civ. A.) 163 SW 1050.

99. Russell v. Lincoln, 200 Ill. 511, 65 NE 1088; Augusta v. Tyner, 197 Ill. 242, 64 NE 378; Dekalb v. Luney, 193 Ill. 185, 61 NE 1036; Markham v. Anamosa, 122 Iowa 689, 98 NW 493.

1. Wright v. Oberlin, 23 Oh. Cir. Ct. 509.

2. Uptagraff v. Smith, 106 Iowa 385, 76 NW 733; Corwin v. Corwin, 24 Hun (N. Y.) 147. And see Shirk v. Chicago, 195 Ill. 298, 63 NE 193. Compare South Covington, etc., R. Co. v. Newport, etc., Turnp. Co., 110 Ky. 691, 62 SW 687, 23 KyL 68 (holding that a turnpike road company could not claim title to a street by prescription by reason of adverse possession commenced after the street had been dedicated, although prior to its acceptance by the city, or by reason of the mere use thereof by the public as a highway).

3. Scott v. Donora Southern R. Co., 222 Pa. 634, 72 A 282; McClenehan v. Jesup, 144 Iowa 352, 120 NW 74.

4. Norrell v. Augusta R., etc., Co., 116 Ga. 312, 42 SE 466, 59 LRA 101 (holding further that this is so, although such possession is under a deed from the dedicator subsequent to the dedication). And see Lexington v. Hoskins, 96 Miss. 163, 50 S 561; Indianola Light, etc., Co. v. Montgomery, 85 Miss. 304, 37 S 748 (holding that where property is dedicated for a street occupancy thereof, although adversely and under claim of ownership, cannot affect the right of the municipality to open the street).

5. Hall v. Breyfogle, 162 Ind. 494, 70 NE 883. And see Almy v. Church, 18 R. I. 182, 26 A 58.

6. De Land v. Dixon Power, etc., Co., 225 Ill. 212, 80 NE 125 (holding that the action of the city council in vacating a street to enable private parties to appropriate and enjoy a portion thereof is ultra vires and void and does not aid the title of the adverse claimant).

7. Flick's Est., 6 Kulp (Pa.) 329. And see Red Bluff v. Walbridge, 15 Cal. A. 770, 116 P 77 (where it was said that title to a public street cannot be acquired by adverse possession except where the use has been abandoned by competent authority and the land is held as proprietary property).

8. U. S.—Grogan v. Hayward, 4 Fed. 161, 6 Sawy. 498.

Cal.—San Leandro v. Le Breton, 72 Cal. 170, 13 P 405; Hoadley v. San Francisco, 70 Cal. 320, 12 P 125 [aff 124 U. S. 639, 8 SCt 659, 31 L. ed. 553]; Hoadley v. San Francisco, 50 Cal. 265.

Ill.—Lee v. Mound Station, 118 Ill. 304, 8 NE 759.

Md.—Cushwa v. Williamsport, 117 Md. 306, 83 A 389.

N. J.—Price v. Plainfield, 40 N. J. L. 608.

Pa.—Com. v. Alburger, 1 Whart.

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parks,[9] courthouses,[10] hospitals,[11] or other county buildings,[12] public docks,[13] battures,[14] fire engine lots,[15] and schoolhouse sites.[16]

[§ 467] **(4) Land Granted by Federal Government to Municipality for Public Use.** It has been held in a federal court, under the statute conferring statehood upon Iowa and providing that the state shall agree never to interfere with the disposal of federal lands within the state, that where lands are granted by the federal government to a municipality in trust for public uses title to such lands cannot be acquired as against the municipality under a state law by adverse possession.[17]

[§ 468] **d. Rule Where Statute Runs against State.** Where the statute by express provision runs against the state, the title to lands vested in municipalities is of course subject to the bar of the statute.[18]

[§ 469] **4. Acquisition of Title against Owner Where Municipality Has Easement Only.** Where the interest of the public in the soil of a highway is merely an easement, while the fee is in the adjoining proprietor, title to such fee may be obtained by adverse possession as against such adjoining proprietor, and the latter may also lose his private rights as distinguished from public rights in the street.[19] Even though it is expressly provided by statute that no person shall acquire by adverse possession the title to any street belonging to a city, the owner of the fee is not thereby protected against adverse possession by a third person.[20]

[§ 470] **E. Highways.** Title by adverse possession cannot be acquired to lands constituting a public highway where statutes expressly forbid it.[21-22] And on the ground that there is a distinction between streets and highways which lie outside of and are not subject to the control of municipal corporations[23] it has been held, even in those jurisdictions where streets are considered to be subject to the statute, that title by adverse possession cannot be acquired to land which has been dedicated to the public use for the purpose of a highway.[24] And of course this rule obtains in those jurisdictions where it is held that streets are not subject to the law of adverse possession.[25] There are, however, some few cases in which it is held that highways are subject to the statute,[26] although in one of them this doctrine was

469; Rung v. Shoneberger, 2 Watts 23, 26 AmD 95.

9. Peo. v. Smith, 93 Cal. 490, 29 P 57; Peo. v. Holladay, 93 Cal. 241, 29 P 54, 27 AmSR 186; Archer v. Salinas City, 93 Cal. 43, 28 P 839, 16 LRA 145.

10. Foley v. Doddridge County Ct., 54 W. Va. 16, 46 SE 246.

11. Home for Inebriates v. San Francisco, 119 Cal. 534, 51 P 950; Yolo County v. Barney, 79 Cal. 375, 21 P 833, 12 AmSR 152.

[a] **Thus** land purchased by the board of supervisors of a county and applied for the erection of a county hospital thereon is dedicated to a public use, and there can be no adverse possession of any part thereof which can subject it to the operation of the statute of limitations. The fact that the county has a right to revoke or discontinue the use or sell it in a statutory and limited way cannot affect the dedication or cause the statute of limitations to apply. Yolo County v. Barney, 79 Cal. 375, 21 P 833, 12 AmSR 152.

12. Kittaning Academy v. Brown, 41 Pa. 269. And see Foley v. Doddridge County Ct., 54 W. Va. 16, 81, 46 SE 246 [cit Cyc].

13. San Francisco v. Calderwood, 31 Cal. 585, 91 AmD 542.

14. Minor v. New Orleans, 115 La. 301, 38 S 999.

15. San Francisco v. Bradbury, 92 Cal. 414, 28 P 803.

16. San Francisco Bd. of Education v. Martin, 92 Cal. 209, 28 P 799.

17. Simplot v. Chicago, etc., R. Co., 16 Fed. 350, 5 McCrary 158.

18. O'Neil v. St. Louis, 8 Mo. A. 416.

It has been held that where it is expressly provided that the statute of limitations shall apply to actions "when brought in the name of the state, or in the name of any officer, or otherwise, for the benefit of the state," and it is further provided that the statute "shall apply to municipal and all other corporations with like power and effect as the same applies to natural persons," no distinction can be made between municipal corporations when acting as agencies of the state and when acting in a private proprietary capacity. Title may be acquired to land held by municipal corporations for public purposes. St. Paul, etc., R. Co. v. Hinckley, 58 Minn. 398, 55 NW 560; St. Paul v. Chicago, etc., R. Co., 45 Minn. 387, 48 NW 17.

19. Cady v. Fitzsimmons, 50 Conn. 209; Woodruff v. Paddock, 130 N. Y. 618, 29 NE 1021; Lambert v. Huber, 22 Misc. 462, 50 NYS 793. See also Flick's Est., 6 Kulp (Pa.) 329.

20. Cocke v. Texas, etc., R. Co., 46 Tex. Civ. A. 363, 103 SW 407.

21-22. Robinson v. Korns, 250 Mo. 663, 157 SW 790 (under special statute); Bristol v. Palmer, 83 Vt. 54, 74 A 332, 31 LRANS 881. And see Haramon v. Krause, 93 Minn. 455, 101 NW 791; Hastings v. Gillitt, 85 Minn. 331, 88 NW 987.

23. Ft. Smith v. McKibbin, 41 Ark. 45, 48 AmR 19.

24. Taylor v. Austin, 83 Nebr. 581, 119 NW 1123; Lydick v. State, 61 Nebr. 309, 85 NW 70; Krueger v. Jenkins, 59 Nebr. 641, 81 NW 844; Heddleston v. Hendricks, 52 Oh. St. 460, 40 NE 408; Lawrence R. Co. v. Mahoning County, 35 Oh. St. 1; Little Miami R. Co. v. Greene County, 31 Oh. St. 338; Coleman v. Thurmond, 56 Tex. 514.

25. Cal.—Koshland v. Cherry, 13 Cal. A. 440, 110 P 143.

Ill.—De Land v. Dixon Power, etc., Co., 225 Ill. 212, 80 NE 125; Lewiston v. Proctor, 27 Ill. 414.

Iowa.—Ford v. Doolittle, 138 NW 397; McElroy v. Hite, 154 Iowa 453, 135 NW 20; Quinn v. Baage, 138 Iowa [illegible], 114 NW 205; Biglow v. Ritter, 131 Iowa 213, 108 NW 218; Davies v. Huebner, 45 Iowa 574. Compare Axmear v. Richards, 112 Iowa 657, 84 NW 686.

La.—Thibodeaux v. Maggiolo, 4 La. Ann. 73.

Mo.—State v. De Vall, 157 Mo. A. 587, 138 SW 667.

N. J.—Camden County v. Sharpless, 83 N. J. L. 443, 85 A 222.

N. Y.—Driggs v. Phillips, 103 N. Y. 77, 8 NE 514; Brookhaven v. Dyett Sand-Lime Brick Co., 75 Misc. 310, 13 NYS 165; Parsons v. Rye, 140 NYS 961; Morey v. West Troy, 12 NYWkly Dig. 55.

Pa.—Seminary v. Washington, 23 Pa. Co. 545.

R. I.—Knowles v. Knowles, 25 R. I. 325, 55 A 755; Almy v. Church, 18 R. I. 182, 26 A 58; Simmons v. Cornell, 1 R. I. 519.

Va.—Depriest v. Jones, 21 SE 478.

Wash.—Port Townsend v. Lewis, 34 Wash. 413, 75 P 982.

W. Va.—Foley v. County Ct., 54 W. Va. 16, 31, 46 SE 246 [cit Cyc].

Wis.—Nicolai v. Davis, 91 Wis. 370, 64 NW 1001.

[a] **Applications of rule.**—Under Acts (1831) p 38 No. 18, and Acts (1858) p 50 No. 78, and the grants and proceedings by which the property through which a shell road passes was acquired, such road on the west side of the New Canal is a public highway so that no individual or corporation can acquire title thereto, or to any part thereof, by prescription or otherwise. New Basin Canal, etc., Bd. of Control v. H. Weston Lumber Co., 109 La. 925, 33 S 923.

[b] **The extent to which the land is used by the public is not very material.**—It is the purpose for which the property is held, not the extent of the use, that must determine the character of the title held by the corporation. When property is reasonably adapted to the purpose for which it is set aside and is reasonable in amount, and the public avail themselves to some extent of the opportunity to use such property for a highway, it does not matter whether such highway is not used as much as some other highways are. Its character as a highway is not changed thereby and it cannot be affected by any act of an adjoining landowner that would not affect a more traveled highway. Brookhaven v. Dyett Sand-Lime Brick Co., 75 Misc. 310, 135 NYS 165.

[c] **Highways acquired by prescription.**—Under a statute providing that "nothing contained in any statute of limitations shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this state," it has been held that no title by adverse possession can be acquired to land which forms part of a public highway, although the appropriation of the land for the purpose of a highway was wrongful in the first instance, the easement having been acquired by ten years' occupancy and use of the road by the public. State v. Warner, 51 Mo. A. 174.

26. Conn.—Cady v. Fitzsimmons, 50 Conn. 209.

Ky.—Postal Tel. Co. v. Cofer, 14 KyL 574.

Mich.—La Barre v. Bent, 154 Mich. 520, 118 NW 6; Shue v. Richmond Tp. Highway Comrs., 41 Mich. 638, 2 NW 808.

N. H.—Webber v. Chapman, 42 N. H. 326, 80 AmD 111.

Vt.—Knight v. Heaton, 22 Vt. 480 (that the rule has since been changed by statute in Vermont see first note in this section).

[a] **In Connecticut** it was held that fifteen years of uninterrupted possession of a highway will be a bar to the town's right of recovering it for the use of a highway, but this decision was controlled by a statute limiting the pulling down and removing of encroachments on highways, as well as on common land, to fifteen years. Litchfield v. Wilmot, 2 Root 288.

[b] **Under a statute** in Massachusetts it was held that the maintenance of a fence within the limits of a high-

said to be "of more than doubtful expediency."[27]

[§ 471] **F. School Lands—1. Acquisition of Title as against County.** While title by adverse possession cannot be acquired to school lands against a county where the organic or statutory law of the state, or both, contain express provisions to the contrary,[28] title may be so acquired when there is statutory authorization therefor,[29] and in jurisdictions where the view prevails that all municipalities, including counties, are subject to the operation of the statute of limitations, lands held by counties and towns for school purposes may be acquired by adverse possession.[30] On the other hand title by adverse possession to school lands cannot be acquired in jurisdictions where lands appropriated to a public or charitable use cannot be so acquired.[31]

[§ 472] **2. Acquisition of Title as against State.** By the weight of authority lands granted to the state for school purposes under an act of congress providing that such lands shall be disposed of only at public sale cannot be acquired by adverse possession, notwithstanding state legislation making the state subject to the statute of limitations.[32]

[§ 473] **G. Tide and Swamp Lands.** Tidelands over which the ordinary tides ebb and flow are charged with a public trust for the purposes of navigation and fishery, and no title thereto can be obtained by any private person by prescription.[33] It seems, however, that the statute does not run against the title of a purchaser of swamp and overflowed lands, founded upon his certificate of purchase from the state, until the land has been certified to the state by the federal government.[34] In a jurisdiction where the issuance of a patent is not necessary to start the running of the statute against a purchaser from the state, the statute commences to run against the purchaser from the state holding a certificate of purchase from the date of the confirmation of the grant to the state.[35] Under a state law granting to the counties certain swamp lands which had previously been granted to the state by act of congress providing that scrip should be issued, and, when located, a patent issued for the land, the statute did not begin to run in favor of an adverse occupant of such land until the issuance of the patent.[36] And where the constitution of a state provides that title to swamp lands acquired by the state from the United States cannot be acquired from the state except at public sale, it is of course impossible to acquire title by adverse possession to such lands as against the state;[37] and the fact that the claimant is not seeking to acquire title but merely an easement does not affect the operation of the rule where the easement results in changing meadow or farm land into the bottom of a permanent lake.[38]

[§ 474] **H. Virginia Military District Lands.** While it has been contended that the statute does not run against the right of one who holds a lease for ninety-nine years, renewable forever, to Virginia military district school lands, and who surrenders his lease and takes a conveyance in fee, except from the date of such conveyance, this contention has been

way for a period of forty years gave a right to its continuance. Cutter v. Cambridge, 6 Allen 20.

27. Mt. Clemens v. Mt. Clemens Sanitarium Co., 127 Mich. 115, 86 NW 537.

28. State v. Crumb, 157 Mo. 545, 57 SW 1030 (holding that under Rev. St. [1889] § 6772, providing that the statute of limitations shall not run against any grant for educational purposes, the right of the public school fund of a county to swamp lands was not barred where the county court had granted the same by an illegal patent in 1869; and it is not material that such lands have passed to third persons); Lamar County v. Talley, (Tex. Civ. A.) 127 SW 272; San Augustine County v. Madden, 39 Tex. Civ. A. 257, 87 SW 1056 (both holding that under the express provisions of the constitution and statutes adverse possession is not available against the title of a county to its school lands). See also Houston, etc., R. Co. v. Travis County, 62 Tex. 16; Coleman v. Thurmond, 56 Tex. 514; Marsalis v. Garrison, (Tex. Civ. A.) 27 SW 929.

29. Tennessee Coal, etc., Co. v. Linn, 123 Ala. 112, 26 S 245, 82 AmSR 108 (holding that adverse possession of school lands for ten years prior to the enactment of the statute, Acts [1876–1877] p 102, is sufficient to create a perfect title as against the holder of a patent title to such lands from the township trustees, and that the fact that after the ten years' possession a statute was enacted fixing the limitation against school lands at twenty years does not affect the title so acquired).

30. Oxford Tp. v. Columbia, 38 Oh. St. 87; Williams v. First Presb. Soc., 1 Oh. St. 478. See also McCartney v. Alderson, 54 Mo. 320; St. Charles Tp. v. Goerges, 50 Mo. 194 (which sustain this position but as shown in the first note to this section the rule is now otherwise by statute).

31. Caledonia County Grammar School v. Haight, 86 Vt. 151, 84 A 26. To same effect Howard v. Orville School Dist., 22 Cal. A. 544, 135 P 689 (holding that title to land in controversy, within part of a town site set apart for school purposes, could not be acquired by a private individual by adverse possession while the title was held by the government or by the county judge in trust for the school district).

32. Kinney v. Munch, 107 Minn. 378, 120 NW 374; Scofield v. Scheaffer, 104 Minn. 123, 116 NW 210; Murtaugh v. Chicago, etc., R. Co., 102 Minn. 52, 112 NW 860, 120 AmSR 609 (where it was said that the grant by the federal government was in trust for the explicit purpose of having the lands applied to the use of the schools of the state); O'Brien v. Wilson, 51 Wash. 52, 97 P 1115. For a very similar holding see State v. Seattle, 6 Wash. 602, 107 P 827, 27 LRANS 1188 (holding that where a territory accepted a grant of land from the United States for its university, and thereafter the state, after its admission, accepted from the donor a deed removing the restrictions upon alienation of the tract but containing conditions therein to the effect that the state should by legislative enactment authorize the sale of the land in such parcels and for such prices as might be most advantageous to the interests of the state university, and on the further condition that the funds derived from such sale should be devoted to the upbuilding and maintenance of the university, it thereby accepted the trust and solemnly covenanted with the donor to apply the granted land to the sole use of upbuilding its university, according to the purport and spirit of the grant, and that title to such land could not be acquired by adverse possession against the state, notwithstanding a provision that statutes of limitations should run against the state).

[a] **Unconstitutionality of state legislation.**—(1) State legislation providing that limitations shall run against the state, as far as it authorizes the acquisition of title to school lands so granted, by adverse possession is in conflict with the act of congress (O'Brien v. Mason, 51 Wash. 52, 97 P 1115), (2) and also with a provision of the state constitution that lands granted to the state are held in trust for all the public and shall not be disposed of otherwise than at auction to the highest bidder (O'Brien v. Mason, supra).

[b] **In Alabama** it has been held under the act of March 2, 1819, § 6, admitting Alabama into the Union, whereby certain land in every township was granted to the inhabitants of such township for the use of schools, and which was held to vest the legal title to such lands in the state in trust for the inhabitants of the township, that the fact that the legal title was in the state did not prevent title thereto from being acquired by an individual by adverse possession. Miller v. State, 38 Ala. 600. To same effect State v. Schmidt, 61 S 293 [aff 232 U. S. 168, 34 SCt 301]; Tennessee Coal, etc., Co. v. Linn, 123 Ala. 112, 26 S 245, 82 AmSR 108; Prestwood v. Watson, 111 Ala. 604, 20 S 600; Wyatt v. Tisdale, 97 Ala. 594, 596, 12 S 233 (where it was said: "The authority of the legislature to make the statute apply to suits by the State, or for the recovery of sixteenth section lands, is not doubted").

[c] **In Oregon** it was held that title by adverse possession may be acquired to lands granted by congress to a state for school purposes, the same as to an individual. Schneider v. Hutchinson, 35 Or. 253, 57 P 324, 76 AmSR 474. In this case it does not appear what the terms of the grant by congress were.

33. Peo. v. Southern Pac. R. Co., 166 Cal. 614, 138 P 94; Cimpher v. Oakland, 162 Cal. 87, 121 P 374; Peo. v. Kerber, 152 Cal. 731, 93 P 878, 125 AmSR 93.

34. Packard v. Moss, 68 Cal. 123, 8 P 818.

35. Hibben v. Malone, 85 Ark. 584, 109 SW 1008 (where it was said to be the duty of the state, after confirmation of the grant, to issue a patent to its grantee).

36. Clements v. Anderson, 46 Miss. 581.

37. Scofield v. Scheaffer, 104 Minn. 123, 116 NW 210.

38. Scofield v. Scheaffer, 104 Minn. 123, 116 NW 210.

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denied, and it has been held that the statute runs against such grantee in favor of the possession of a person holding a similar lease, not merely from the time of the conveyance, but while the land was held under the lease.[39]

[§ 475] **I. Lands of Turnpike and Canal Companies.** It has been held that as against a turnpike company title may be acquired by adverse possession to land constituting part of the turnpike, where there is nothing in the language of the acts of incorporation and the grants of the franchise of the company to prevent the running of the statute of limitations;[40] but according to other cases a turnpike is regarded as a highway within the limitations of the rule that title to part of a highway cannot be acquired by adverse possession.[41] Whatever proprietary title the trustees of a canal company assert to property distinct from the public use to which it is dedicated is subject to be extinguished by adverse occupancy during the statutory period.[42] And where they abandon the canal, title to the bed of the canal may be acquired by adverse possession.[43]

[§ 476] **J. Lands of Religious and Charitable Corporations.** Where it is provided by statute that limitations shall not extend to any lands granted to any pious or charitable use, title by adverse possession cannot be acquired to land granted to the trustees of a church for use as a place of worship.[44] But in the absence of some statutory provision to the contrary title by adverse possession may be acquired as against a religious or charitable corporation[45] or educational corporations,[46] and that too although such corporations are expressly prohibited by statute from conveying their lands.[47] And it has been held that a statute providing that limitations shall not extend to any lands granted for any pious or charitable use does not preclude the defense of adverse possession against heirs of church trustees suing in their individual right for possession of church property and not as representatives of the church or its members.[47½]

[§ 477] **K. Lands of Railroad Companies.** It is the general well settled rule that title to the general lands of a railroad company, not including its right of way and similar lands, may be acquired as against the company by adverse possession,[48] and this has been held true as regards lands granted by the federal government to a railroad company to aid in the construction of the road.[49] And while in some jurisdictions the view obtains that lands held by a railroad company for a right of way are held for a public purpose and cannot be acquired by adverse possession,[50] the weight of authority is strongly opposed to this view, it being held in most jurisdictions that,

39. Bentley v. Newlon, 9 Oh. St. 489.

40. District of Columbia v. Krause, 11 App. (D. C.) 398.

41. Ulman v. Charles St. Ave. Co., 83 Md. 130, 34 A 366; Stevenson's App., 2 Pa. Cas. 367, 6 A 266.

42. Collett v. Vanderburgh County, 119 Ind. 27, 21 NE 329, 4 LRA 321 and note.

[a] **Effect of special statutory provision.**—Under the act of Jan. 31, 1825 (Acts [1824] c 79), and Acts (1844) c 287 § 10, a canal company with power to acquire land can acquire a fee simple title to land, which title is not lost by adverse possession by mere length of possession, with or without its permission. Bond v. Murray, 118 Md. 445, 84 A 655.

43. Collett v. Vanderburgh County, 119 Ind. 27, 21 NE 329, 4 LRA 321.

44. Strother v. Barrow, 246 Mo. 241, 151 SW 960.

45. Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134 [rev 5 Lans. 206]; Camden Orphans Soc. v. Lockhart, 27 S. C. L. 84; Magdalen Hospital v. Knotts, 4 App. Cas. 324, 15 ERC 417; St. Mary Magdalen College v. Atty.-Gen., 6 H. L. Cas. 189, 10 Reprint 1267.

46. De Kalb College v. Williams, (Tex. Civ. A.) 143 SW 348, 352 (where it was said: "Without such an express exception, adverse possession would be available against the counties. If available against counties holding lands for public free school purposes, upon what ground could we say it is not available against a corporation less identified with the state, having more distinct personal and private rights, and holding lands granted for building and equipping a college over which the state can exercise no control").

47. Society for Propagation of Gospel v. Sharon, 28 Vt. 603.

[a] **Reason of rule.**—In Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134, 148 [rev 5 Lans. 206] the court said: "Here are two laws, one prohibiting the alienation of real estate by religious corporations, and the other providing that 'no action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appears that the plaintiff, his ancestors, predecessor or grantor was seized or possessed of the premises in question within twenty years before the commencement of such action.' (Code § 78.) Both laws are founded upon public policy. There is no collision between the two. The latter applies to corporations as well as individuals, and why should it not have the effect according to its terms, and the policy upon which it is founded in all cases be upheld? Who shall determine that it is more important to the public that such corporations shall forever retain their lands than it is to uphold the title to lands long in undisputed possession? I can perceive no just reason for engrafting an exception upon the statute which its language clearly does not warrant. The legislature has incorporated in the statute all the exceptions which were deemed important, and the courts should not add to them upon any supposed reason of public policy. If public policy requires that religious corporations should be exempted from the operation of the statute of limitations, the legislature, and not the courts, should provide for the exemption."

47½. Dudley v. Clark, (Mo.) 164 SW 608.

48. Cal.—Southern Pac. R. Co. v. Whitaker, 109 Cal. 268, 41 P 1083.

Iowa.—Chicago, etc., R. Co. v. Hanken, 140 Iowa 372, 118 NW 527, 19 LRANS 216 (depot grounds not used as such); Cole v. Des Moines Valley R. Co., 76 Iowa 185, 40 NW 711.

Mo.—Hannibal, etc., R. Co. v. Totman, 149 Mo. 657, 51 SW 412.

Pa.—Delaware, etc., R. Co. v. Tobyhanna Co., 232 Pa. 76, 81 A 132; Delaware, etc., R. Co. v. Tobyhanna Co., 228 Pa. 487, 77 A 811, 21 AnnCas 161 and note; Lehigh Valley R. Co. v. Frank, 39 Pa. Super. 624.

Ont.—Erie, etc., R. Co. v. Rousseau, 17 Ont. A. 483.

[a] **Lands acquired for facilities in operation** (1) outside of the right of way, however important or necessary they may be, are not impressed with a public use. "It is for the railroad company to say where these conveniences or necessary facilities shall be located, and how many shall be provided, even anticipating possible future wants; and it is equally within its power to abandon any of them, or change their location at any time. . . . No such public use is impressed upon land acquired for these purposes as interferes with the company's absolute authority over it in the matter of use or disposition, extending even to alienation, where the right is not restrained by the grant itself." Delaware, etc., R. Co. v. Tobyhanna Co., 228 Pa. 487, 493, 77 A 811, 21 AnnCas 161 (per Stewart, J.). (2) Land outside of its right of way, purchased by a railroad for general prospective railroad purposes, is subject to limitations, and title to it may be acquired as against the company by adverse possession. Delaware etc., R. Co. v. Tobyhanna Co., 232 Pa. 76, 81 A 132; Delaware, etc., R. Co. v. Tobyhanna Co., 228 Pa. 487, 77 A 811, 21 AnnCas 161.

[b] **To be a part of a railroad right of way** so as to overcome a claim to land by adverse possession it must have been acquired by condemnation proceedings, or, if acquired by purchase, the burden is on the railroad, when its right to hold is challenged, to show such circumstances as would have warranted its condemnation. Delaware, etc., R. Co. v. Tobyhanna Co., 232 Pa. 76, 87, 81 A 132; Robinson v. Pennsylvania R. Co., 161 Pa. 561, 29 A 268; Shamokin Valley R. Co. v. Livermore, 47 Pa. 465, 86 AmD 552. "Nothing is included in right of way except what is the subject of condemnation, and when a railroad company asserts a public use in land it has purchased, to overcome the adverse possession by another, its claim can only be sustained by showing the existence of conditions which would have permitted it to condemn the land in the first instance, or actual dedication to such use." Delaware, etc., R. Co. v. Tobyhanna Co., supra (per Stewart, J.).

49. Iowa R. Land Co. v. Blumer, 206 U. S. 482, 27 SCt 769, 51 L. ed. 1148 [aff 129 Iowa 32, 105 NW 342, 113 AmSR 444]; Toltec Ranch Co. v. Cook, 191 U. S. 532, 24 SCt 166, 48 L. ed. 291; Southern Pac. R. Co. v. Whitaker, 109 Cal. 268, 41 P 1083.

50. Southern Pac. Co. v. Hyatt, 132 Cal. 240, 64 P 272, 54 LRA 522; McLucas v. St. Joseph, etc., R. Co., 67 Nebr. 603, 93 NW 928, 97 NW 312, 2 AnnCas 715 and note; Conwell v. Philadelphia, etc., R. Co., 241 Pa. 172, 88 A 417; Templeton v. Lehigh, etc., Coal Co., 50 Pa. Super. 341; Reading Co. v. Seip, 30 Pa. Super. 330; Louisville, etc., R. Co. v. French, 100 Tenn. 209, 43 SW 771, 66 AmSR 752. See also Nashville, etc., R. Co. v. McReynolds, (Tenn. Ch. A.) 48 SW 258. Com-

in the absence of some statute otherwise providing, title by adverse possession may be acquired to lands acquired by a railroad company for a right of way or depot.[51] Nevertheless where a railroad right of way is only an easement, occupation of a part of it by the owner of the servient estate until it is needed for the railroad is presumptively permissive, and limitations begin to run only from the time the railroad company has notice of the hostile claim.[52] In a number of states statutes have abrogated or materially modified this doctrine.[53] And it has been held that statutes of this character are not within a constitutional provision prohibiting the grant of special privileges.[54] So in the state courts and also in the United States courts, whose decisions are binding on the state courts, it is held, as regards particular rights of way granted by the federal government to western railway companies, that either the title remains in the government or the grant is in trust for the particular use for a right of way, and that therefore title cannot be acquired to any part of the right of way by an individual by adverse possession as against the railway company.[55]

[§ 478] **L. Trust Estates.** While it was at one

pare Roberts v. Sioux City, etc., R. Co., 73 Nebr. 8, 102 NW 60, 2 LRANS 272 and note, 10 AnnCas 992 and note (holding that the possession was not adverse, but assuming that if the possession had been adverse title could have been acquired. No reference is made in this case to McLucas v. St. Joseph, etc., R. Co., supra).

"No reason can be suggested why the principle asserted should be held to apply to streets, turnpikes and canals, and not to railroads, since all are alike impressed with a public use." Conwell v. Philadelphia, etc., R. Co., 241 Pa. 172, 175, 88 A 417.

51. Ala.—Alexander-City Union Warehouse, etc., Co. v. Central of Georgia R. Co., 62 S 745.

Ark.—St. Louis, etc., R. Co. v. Martin, 104 Ark. 274, 149 SW 69; St. Louis R. Co. v. Ruttan, 90 Ark. 178, 118 SW 705.

Ill.—Chicago, etc., R. Co. v. Abbott, 215 Ill. 416, 74 NE 412; Illinois Cent. R. Co. v. Wakefield, 173 Ill. 564, 50 NE 1002; Donahue v. Illinois Cent. R. Co., 165 Ill. 640, 46 NE 714; Illinois Cent. R. Co. v. Moore, 160 Ill. 9, 43 NE 364; Illinois Cent. R. Co. v. O'Connor, 154 Ill. 550, 39 NE 563; Illinois Cent. R. Co. v. Houghton, 126 Ill. 233, 18 NE 301, 9 AmSR 581, 1 LRA 213.

Ind.—Pittsburgh, etc., R. Co. v. Strickley, 155 Ind. 312, 58 NE 192; Pittsburgh, etc., R. Co. v. Jellison, 42 Ind. A. 628, 86 NE 501.

Ky.—Louisville, etc., R. Co. v. Smith, 125 Ky. 336, 101 SW 317, 31 KyL 1, 128 AmSR 254; Pollock v. Maysville, etc., R. Co., 103 Ky. 84, 44 SW 359, 19 KyL 1717; Maysville, etc., R. Co. v. Holton, 100 Ky. 665, 39 SW 27, 19 KyL 1.

Mich.—Matthews v. Lake Shore, etc., R. Co., 110 Mich. 170, 67 NW 1111, 64 AmSR 336.

Minn.—Northern Pac. R. Co. v. Townsend, 84 Minn. 152, 86 NW 1007, 87 AmSR 342 (reversed by the supreme court of the United States on grounds not affecting this principle).

Miss.—Paxton v. Yazoo, etc., R. Co., 76 Miss. 536, 24 S 536.

Mo.—Welsh v. Chicago, etc., R. Co., 19 Mo. A. 127. See infra note 53 for rule under existing statutes.

N. J.—Spottiswoode v. Morris, etc., R. Co., 61 N. J. L. 322, 40 A 506.

Oh.—Smith v. Pittsburgh, etc., R. Co., 26 Oh. Cir. Ct. 44.

S. C.—Southern R. Co. v. Gossett, 79 S. C. 372, 60 SE 956; Harman v. Southern R. Co., 72 S. C. 228, 51 SE 689; Hill v. Southern R. Co., 67 S. C. 548, 46 SE 486; Southern R. Co. v. Beaudrot, 63 S. C. 266, 41 SE 299.

Tex.—Ft. Worth, etc., R. Co. v. Western Stockyards Co., (Civ. A.) 151 SW 1172; Texas, etc., R. Co. v. Maynard, (Civ. A.) 51 SW 255.

Wash.—Northern Pac. R. Co. v. Concannon, 75 Wash. 591, 135 P 652. To same effect Northern Pac. R. Co. v. Spokane, 45 Wash. 229, 88 P 135; Northern Pac. R. Co. v. Hasse, 28 Wash. 353, 68 P 882, 92 AmSR 840; Northern Pac. R. Co. v. Ely, 25 Wash. 384, 65 P 555, 87 AmSR 766 and note, 54 LRA 526 (all of which decisions were reversed by the supreme court of the United States on grounds not affecting this principle).

W. Va.—Dulin v. Ohio River R. Co., 30 SE 145.

Eng.—Bobbett v. South Eastern R. Co., 9 Q. B. D. 424.

Ont.—Erie, etc., R. Co. v. Rousseau, 17 Ont. A. 483.

See Georgia R., etc., Co. v. Gardner, 113 Ga. 897, 39 SE 299.

In Pittsburgh, etc., R. Co. v. Stickley, 155 Ind. 312, 315, 58 NE 192, the court said: "Appellant finally insists that land acquired by a railway company for right of way or station purposes cannot be taken from it by adverse possession, because a railroad is a public highway, and because the statute forbids interference with the company's exclusive use. A railway company owes certain duties to the public, but it holds and uses its property for the profit of its stockholders. The cases holding that the statute of limitations affords no defense to actions for encroachment upon streets and roads, are inapplicable. A railroad is not a public highway in the sense that it belongs to the people."

[a] **Applications of rule.**—(1) One who cultivates and raises crops on the right of way of a railroad may acquire title thereto by adverse possession, although the railroad company runs trains over the track laid thereon. Paxton v. Yazoo, etc., R. Co., 76 Miss. 536, 24 S 536. (2) Where a strip of land condemned for a right of way was left unenclosed and was claimed and used by the former owner and his grantees for more than twenty years, the right of the railroad company therein was barred by limitation. Donahue v. Illinois Cent. R. Co., 165 Ill. 640, 46 NE 714.

52. Dulin v. Ohio River R. Co., (W. Va.) 80 SE 145.

53. See cases infra this note.

[a] **The Massachusetts statute,** (1) St. (1861) c 100, providing that if the owner of land adjoining a railroad incloses any part of the land belonging to said railroad where located and established, or occupies "any land belonging to or included within the location of any such railroad," no continuance of occupancy shall create in the occupant any right to the land belonging to the railroad so occupied applies, it has been held, only to land which has been taken by the road, or which it might have taken, by right of eminent domain, not to adjoining lands which were purchased (Maney v. Providence, etc., R. Co., 161 Mass. 283, 37 NE 164), (2) and it has been held that the statute does not apply to land outside of a located or established railroad (Littlefield v. Boston, etc., R. Co., 146 Mass. 268, 15 NE 648). (3) So it has been held that St. (1906) c 463 pt 2 § 80, providing that no length of possession or occupancy of land which belongs to a railroad company by an owner or occupant of adjoining land shall create in him or a person claiming under him a right to such land against adverse possession of railroad land does not apply where the fee owner, subject to a railroad easement, has occupied the land adversely with the railroad's knowledge and acquiescence. Amee v. Boston, etc., R. Co., 212 Mass. 421, 99 NE 168.

[b] **In Missouri,** (1) where a statute provides that nothing contained in any statute of limitations shall extend to any lands given, granted, or appropriated to any public use, lands devoted by a railroad company to use as a right of way, depot, or station grounds cannot be acquired by adverse possession, such use being considered a public use. Powell v. Atchison, etc., R. Co., 215 Mo. 339, 114 SW 1067; Kansas City, etc., R. Co. v. Baker, 183 Mo. 312, 82 SW 85; St. Joseph, etc., R. Co. v. Smith, 170 Mo. 327, 70 SW 700; Hannibal, etc., R. Co. v. Totman, 149 Mo. 657, 51 SW 412. (2) It makes no difference in the application of the rule whether the land was dedicated by deed or by plat. Kansas City, etc., R. Co. v. Baker, supra.

[c] **In New Hampshire** it has been held under a statute providing that no title can be acquired by prescription, that the right to enjoy the use of a private way across a railroad cannot be acquired by adverse possession. Costello v. Grand Trunk R. Co., 70 N. H. 403, 47 A 265.

[d] **Under the North Carolina statute,** (1) Code § 150, providing that no railroad company shall be barred of any real estate, right of way, etc., by any statute of limitations or by occupancy of the same by any person, it has been held that the title of a railroad company to its right of way cannot be lost by adverse possession. Durham v. Southern R. Co., 121 Fed. 894; Purifoy v. Richmond, etc., R. Co., 108 N. C. 100, 12 SE 741; Carolina Cent. R. Co. v. McCaskill, 94 N. C. 746. (2) Where a railroad company has taken possession of its right of way and operated its road, it is not barred of the right to take any part of its right of way which it has not until then seen fit to call for, by reason of any length of occupation whatever. Seaboard Air Line R. Co. v. Olive, 142 N. C. 257, 55 SE 263. (3) It has been held, however, that where a railroad company delays for over twenty years to enter and locate a right of way under an executory contract therefor adverse possession for twenty years bars the company's right to the land. May v. Atlantic Coast Line R. Co., 151 N. C. 388, 66 SE 310.

[e] **In Vermont** (1) it is provided by statute that no person shall acquire title to lands belonging to a railroad corporation by reason of adverse possession, where such lands lie within the limits of the roadway of such corporation. In construing this statute it was held that "roadway" as used in the statute was synonymous with "right of way" (Bacon v. Boston, etc., R. Co., 83 Vt. 421, 76 A 128) (2) and includes land contiguous to the center line of the recorded location survey of a railroad company and within the boundaries of the land condemned, as shown by the recorded award of the commission, although outside the track and not occupied by the company (Drouin v. Boston, etc., R. Co., 74 Vt. 343, 52 A 957).

54. Drouin v. Boston, etc., R. Co., 74 Vt. 343, 52 A 957.

55. Northern Pac. R. Co. v. Hasse, 197 U. S. 9, 25 SCt 305, 49 L. ed. 642 [rev 28 Wash. 353, 68 P 882, 92 AmSR 840]; Northern Pac. R. Co. v. Ely, 197 U. S. 1, 25 SCt 302, 49 L. ed. 639 [rev 25 Wash. 384, 65 P 555, 87 AmSR 766, 54 LRA 526]; Northern Pac. R. Co. v. Townsend, 190 U. S. 267, 23 SCt 671, 47 L. ed. 1044 [rev 84 Minn. 152, 86 NW 1007, 87 AmSR 342]; Union Pac.

time thought that trust estates were not within the operation of the statute,[56] ever since a decision by Lord Hardwicke to the contrary[57] it has uniformly been held that an adverse possession which is sufficient to bar the legal estate of the trustee also bars the equitable estate of the cestui que trust.[58] This is so even though the cestui que trust is under some disability,[59] such as infancy[60] or coverture.[61]

[§ 479] **M. Building on Land of Another or Room in Building.** For the purpose of adverse possession there may be a cleavage of corporeal real estate horizontally as well as vertically, and where a building is a part of the land, and, with claim of title, its occupant and his predecessor have held undisturbed possession thereof and paid taxes thereon for the statutory period required to bar an action for the recovery of real property, the occupant's title in the building is established, although another may yet have title in the supporting land.[62] It has also been held that title by adverse possession may be acquired to a room in a building not resting directly on the soil but supported entirely by portions of the story beneath, and that the title so acquired carries with it as a necessary incident the right of support from the underlying part of the building.[63]

[§ 480] **N. Surface and Subterranean Rights.** Title by adverse possession can be obtained against the owner of the subsoil without obtaining it against the owner of the surface, or vice versa, the two titles being distinct and divisible.[64]

[§ 481] **O. Accretions.**[65] Where accretions are formed to riparian lands held adversely, the title of the claimant after the bar of the statute has attached carries with it title to the accretions formed during the statutory period.[66] "An accretion becomes a part of the land to which it is built and follows whatever title covers the main land, whether it be title by deed or title by possession."[67] And this is true, however recent the formation. The accretion grows into the land and grows into the title of him who holds the land as the title itself grows.[68]

[§ 482] **P. Property in Custodia Legis.** Property in custodia legis cannot be acquired by adverse possession.[69]

[§ 483] **Q. Property Acquired by Adverse Possession.** Although the title to land has been acquired by adverse possession, it may of course, like any other title, be defeated by a subsequent adverse possession for the statutory period,[70] provided of course that the statute of limitations may run against the holder of the land.[71]

R. Co. v. Karges, 169 Fed. 459; Kindred v. Union Pac. R. Co., 168 Fed. 648, 94 CCA 112 [aff 225 U. S. 582, 32 SCt 780, 56 L. ed. 1216]; Oregon Short Line R. Co. v. Quigley, 10 Ida. 770, 80 P 401; Missouri, etc., R. Co. v. Watson, 74 Kan. 494, 87 P 687, 14 LRANS 592 (act of July 26, 1866 [14 U. S. St. at L. 289], granting right of way to the Union Pacific Railroad Company). And see Kreuger v. Schultz, 6 N. D. 310, 70 NW 269.

In Northern Pac. R. Co. v. Townsend, 190 U. S. 267, 271, 23 SCt 671, 47 L. ed. 1044 [rev 84 Minn. 152, 86 NW 1007, 87 AmSR 342], it was said: "Although there was a present grant, it was yet subject to conditions expressly stated in the act, and also . . . 'to those necessarily implied, such as that the road shall be . . . used for the purposes designed.' Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that to give such efficacy to a statute of limitations of a state as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly."

56. Lechmere v. Carlisle, 3 P. Wms. 211, 24 Reprint 1033, 21 ERC 81.

57. Lewellin v. Mackworth, 2 Eq. Cas. Abr. 579 par 8, 22 Reprint 488; 15 Viner Abr. 125 note.

58. U. S.—Meeks v. Olpherts, 100 U. S. 564, 25 L. ed. 735.

Ala.—Smith v. Gillam, 80 Ala. 296; Love v. Love, 65 Ala. 554; Colburn v. Broughton, 9 Ala. 351.

Ga.—Jones v. Rountree, 138 Ga. 757, 76 SE 55; Knorr v. Raymond, 73 Ga. 749; Ford v. Cook, 73 Ga. 215; Varner v. Gunn, 61 Ga. 54.

Ky.—Maddox v. Allen, 1 Metc. 495; Edwards v. Wolfolk, 17 B. Mon. 376.

Md.—Crook v. Glenn, 30 Md. 55.

N. J.—Snyder v. Snover, 56 N. J. L. 20, 27 A 1013.

N. C.—Cameron v. Hicks, 141 N. C. 21, 53 SE 728, 7 LRANS 407; Clayton v. Cagle, 97 N. C. 300, 1 SE 523; Herndon v. Pratt, 59 N. C. 327.

S. C.—Young v. McNeill, 78 S. C. 143, 59 SE 986; Waring v. Cheraw, etc., R. Co., 16 S. C. 416.

Tenn.—Woodward v. Boro, 16 Lea 678; Watkins v. Specht, 7 Coldw. 585; Goss v. Singleton, 2 Head 67.

Tex.—Wiess v. Goodhue, 98 Tex. 274, 83 SW 178.

59. Walton v. Ketchum, 147 Mo. 209, 48 SW 924 [aff 152 Mo. 489, 24 SW 233].

60. Ga.—Crawley v. Richardson, 78 Ga. 213.

Ky.—Willson v. Louisville Trust Co., 102 Ky. 522, 44 SW 121, 19 KyL 1590; Barclay v. Goodloe, 83 Ky. 493.

Mo.—Walton v. Ketchum, 147 Mo. 209, 48 SW 924; Ewing v. Shannahan, 113 Mo. 188, 20 SW 1065.

N. C.—Blake v. Allman, 58 N. C. 407.

Tenn.—Woolridge v. Planters' Bank, 1 Sneed 296.

Compare Hunter v. Hunter, 63 S. C. 78, 41 SE 33, 90 AmSR 663 (holding that a purchaser of land from an executrix and trustee under a defective power cannot set up adverse possession against the beneficiaries while some of them are minors).

[a] **Thus,** where by a will the legal title to property is vested in trustees, adverse possession barring the trustees will bar the devisees also, although minors. Appel v. Childress, 53 Tex. Civ. A. 607, 116 SW 129.

61. Crook v. Glenn, 30 Md. 55; Collins v. McCarty, 68 Tex. 150, 3 SW 730, 2 AmSR 475.

62. Fairbanks v. San Francisco, etc., R. Co., 115 Cal. 579, 47 P 450.

63. Iredale v. Loudon, 40 Can. S. C. 313 [rev 15 Ont. L. 286, and aff 14 Ont. L. 17].

64. Goldestein v. Allard, 14 Que. Pr. 36.

[a] **Coal and minerals in place,** the title to which has been severed from the title to the surface, is "land," and title thereto may be acquired by adverse possession as well as to the surface. "As such [they] are subject to all the laws of possession and conveyance of real estate, and the owner . . . may invoke every legal right to assert and defend his title that is provided for owners of title in fee to the surface, and no reason is perceived why he should be denied the beneficial operation of our Statute of Limitations." Catlin Coal Co. v. Lloyd, 176 Ill. 275, 284, 52 NE 144.

65. **Acquisition of property generally by accretion** see Navigable Waters [29 Cyc 348]; Waters [40 Cyc 621].

66. Bellefontaine Impr. Co. v. Niedringhaus, 181 Ill. 426, 433, 55 NE 184, 72 AmSR 269 (where it was said: "Where one acquires title by reason of color of title and payment of taxes, accretions to land to which the title is thus held go with the land to which it is such an accretion, to the same extent as to a title obtained directly from one holding the patent title"); Benne v. Miller, 149 Mo. 228, 50 SW 824; Campbell v. Laclede Gas Light Co., 84 Mo. 352. See also English v. Craford, (Iowa) 94 NW 276. See however McKee v. Grand Rapids, 133 Mich. 272, 95 NW 85.

[a] **Applications of rule.**—A disseizor who entered upon land bordering a navigable water and inclosed the same with a fence was entitled to the accretions, and it was not necessary for him continually to extend his boundaries to the water's edge. Chicago, etc., R. Co. v. Groh, 85 Wis. 641, 55 NW 714.

67. Benne v. Miller, 149 Mo. 228, 50 SW 824.

68. Campbell v. Laclede Gas Light Co., 84 Mo. 352.

69. Ewin v. Lindsay, (Tenn. Ch. A.) 58 SW 388 (holding, however, that the property in suit was not in custodia legis).

[a] **Thus,** where plaintiff in a suit for land secured possession of the same under a writ of sequestration and held the same for ten years until plaintiff's suit was dismissed for want of prosecution, that holding did not ripen into a prescriptive right as the land was in custodia legis. McAllen v. Crafts, (Tex. Civ. A.) 139 SW 41.

70. Randolph v. Laysard, 36 La. Ann. 402; Cooper v. Ord, 60 Mo. 420; Galan v. Goliad, 32 Tex. 776; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255.

71. State v. Warner, 51 Mo. A. 174.

[a] **The fact that a municipality**

XIII. WHO MAY ACQUIRE TITLE BY ADVERSE POSSESSION

[§ 484] **A. In General.** As a general rule the statute limiting the time for the commencement of real actions operates in favor of every class and description of persons, natural or artificial, and they may acquire title to land by adverse possession.[72]

[§ 485] **B. The United States.** When the United States holds possession of land through its officers or agents, the latter are subject to an action by the owner for its recovery, and the United States may acquire title to the land through such adverse possession.[73]

[§ 486] **C. States.** Although the statute does not run against the state, an adverse possession by the state for the statutory period will give title by adverse possession.[74] Such right of acquisition belongs to the commonwealth as well as to any municipal corporation or other public body or to the individual members of the general public.[75]

[§ 487] **D. Canada.** In Canada it is held that the crown may acquire title by adverse possession.[76]

[§ 488] **E. Corporations—1. In General.** A private corporation is within the operation of the statute of limitations and may acquire title by adverse possession.[77] It has also been held that, although a corporation is incapable of holding real estate, it may acquire a title by adverse possession which will be valid as against all but the state.[78]

[§ 489] **2. Municipal Corporations.** A municipal corporation may acquire title to land by adverse possession for corporate purposes[79] and even for other than municipal purposes.[80]

[§ 490] **3. Foreign Corporations.** Under a statute of limitations providing in effect that the statute shall not run against a person who is absent from the state, it has been held that title by adverse possession cannot be acquired by a foreign corporation.[81] But what seems to be the better view is that, since a foreign corporation is within the state for all the purposes of acquiring jurisdiction, its theoretical domicile within the state under the laws of which it was created does not make it out of the state within the meaning of this provision, and that therefore a foreign corporation is entitled to avail itself of the benefits of the statute.[82] And it has been held that such a corporation may acquire title by adverse possession under a statute providing that a foreign corporation, on complying with the law relating to the right of such corporations to do business in the state,

acquired its title to land by adverse possession does not of itself subject it to the burdens of the statute of limitations and enable title to such land to be acquired as against it by adverse possession. State v. Warner, 51 Mo. A. 174 (street).

72. Ark.—Memphis, etc., R. Co. v. Organ, 67 Ark. 84, 94, 55 SW 952.

La.—Giddens v. Mobley, 37 La. Ann. 900.

Mass.—Rehoboth v. Rehoboth Catholic Cong. Church, 23 Pick. 139 note; Rehoboth v. Carpenter, 23 Pick. 131.

N. Y.—Roble v. Sedgwick, 35 Barb. 319.

Pa.—Carter v. Ridge Turnp. Co., 22 Pa. Super. 162 [aff 208 Pa. 565, 57 A 988]. See however Scranton v. Delaware, etc., Canal Co., 1 LackJur 149.

W. Va.—Ohio River R. Co. v. Johnson, 50 W. Va. 499, 40 SE 407.

[a] **All persons who have an interest in acquiring an estate by prescription** have a right to intervene and set up the plea, although those from whom they derive title renounce it. Giddens v. Mobley, 37 La. Ann. 900.

73. Maryland v. West Virginia, 217 U. S. 577, 30 SCt 630, 54 L. ed. 888; Stanley v. Schwalby, 147 U. S. 508, 13 SCt 418, 37 L. ed. 259 [rev 85 Tex. 348, 19 SW 264]; El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 SW 21 [rev (Civ. A.) 71 SW 799, and overr Stanley v. Schwalby, 85 Tex. 348, 19 SW 264].

In El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 500, 74 SW 21, the court said: "The decisions of the Supreme Court of the United States hold that the United States, holding possession of property through their officers and agents, are entitled to the benefit of statutes of limitation, and we think the opinion of that court should be followed, as the question is one upon which its authority is final. The fact that another has acquired the title of the United States and is the only party to the litigation, does not alter the question. Such party is as much entitled to the protection of the rule as the United States would be were they before the court."

74. U. S.—Rhode Island v. Massachusetts, 4 How. 591, 11 L. ed. 1116.

Mass.—Atty.-Gen. v. Ellis, 198 Mass. 91, 84 NE 430, 15 LRANS 1120.

N. Y.—Eldridge v. Binghamton, 120 N. Y. 309, 24 NE 462 [aff 42 Hun 202]; Birdsall v. Cary, 66 HowPr 358.

Or.—Stephenson v. Van Blokland, 60 Or. 247, 255, 118 P 1026 [cit Cyc].

Pa.—Parker v. Southwick, 6 Watts 377.

But see Whatley v. Patten, 10 Tex. Civ. A. 77, 31 SW 60.

75. Atty.-Gen. v. Ellis, 198 Mass. 91, 84 NE 430, 15 LRANS 1120 and note.

76. McQueen v. Reg., 16 Can. S. C. 1; Chevrier v. Reg., 4 Can. S. C. 1. See also Thompson v. Canada Cent. R. Co., 3 Ont. 136.

"Before the Code, and also under the Code (art. 2211), the Crown had, under the laws in force in the Province of Quebec, the right to invoke prescription against a subject which the latter could have interrupted by petition of right." Chevrier v. Reg., 4 Can. S. C. 1.

77. Harpending v. Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029; Blair v. St. Louis, etc., R. Co., 24 Fed. 539; Rehoboth v. Carpenter, 23 Pick. (Mass.) 131; Peo. v. Trinity Church, 22 N. Y. 44.

[a] **Religious corporations.**—(1) A religious corporation may acquire title by adverse possession to the same extent as an individual. Harpending v. Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029 (announcing New York doctrine); Humbert v. Trinity Church, 24 Wend. (N. Y.) 587; Bogardus v. Trinity Church, 4 Paige (N. Y.) 178. (2) And it has been held that this is so, although a statute prevents the acquisition of title by adverse possession against such corporation. Dudley v. Clark, (Mo.) 164 SW 608. (3) Where a religious body enters on land conveyed to it for graveyard purposes, and the conveyance is void because in contravention of Md. Bill of Rights § 34, in force in this district, it may nevertheless acquire title by adverse possession for the statutory period. Dangerfield v. Williams, 26 App. (D. C.) 508. (4) Where the trustees of a church building had been in the open, notorious, and undisputed possession of the lot on which it stood for a period of more than sixty years, a title had become vested in them, perfect as against all persons not under legal disabilities. Mills v. Zion Chapel, 119 Md. 510, 87 A 257.

[b] **An aggregate corporation** may acquire a title to land by disseizin and exclusive adverse occupation, although it does not authorize such disseizin and occupation by deed. Rehoboth v. Rehoboth Catholic Cong. Church, 23 Pick. (Mass.) 139 note.

78. Hanlon v. Union Pac. R. Co., 40 Nebr. 52, 58 NW 590; Myers v. McGavock, 39 Nebr. 843, 58 NW 522, 42 AmSR 627; Humbert v. Trinity Church, 24 Wend. (N. Y.) 587. But see Heiskell v. Trout, 31 W. Va. 810, 8 SE 557 (where it was held that where property had been held by trustees under a trust void for uncertainty, not for the use of themselves but for the use of a church which was incapable of taking title, no possession or adverse claim could confer upon the church any title or defeat the claims of the rightful owners).

[a] **Thus,** where a corporation chartered by an act of congress and incompetent by reason of the constitution of the state of Nebraska to acquire title to real estate in that state, has been in open, notorious, exclusive, and adverse possession of real estate under a claim of title for ten years, such corporation has a valid title to such real estate as against all persons except the state of Nebraska. Myers v. McGavock, 39 Nebr. 843, 58 NW 522, 42 AmSR 627.

79. New York v. Carleton, 113 N. Y. 284, 21 NE 55; Sherman v. Kane, 86 N. Y. 57; Raleigh v. Durfey, 163 N. C. 154, 79 SE 434; Victoria v. Victoria County, (Tex. Civ. A.) 94 SW 368 [rev on other grounds 100 Tex. 438, 101 SW 190] (by county against city). And see Price v. Breckenridge, 92 Mo. 378, 5 SW 20.

80. Murphy v. Com., 187 Mass. 361, 73 NE 524; Stephens v. Murray, 132 Mo. 468, 34 SW 56; New Shoreham v. Ball, 14 R. I. 566. See also Boothe v. Coventry, 4 Vt. 295 (where it was held that an adverse possession for the statutory period will give title by adverse possession, whether the occupant holds in his own right or under a town).

81. Union Consol. Silver Min. Co. v. Taylor, 100 U. S. 37, 25 L. ed. 541 (following Nevada rule); Barstow v. Union Consol. Silver Min. Co. 10 Nev. 386; Robinson v. Imperial Silver Min. Co., 5 Nev. 44.

82. St. Paul v. Chicago, etc., R. Co., 45 Minn. 387, 48 NW 17.

[a] **Failure to designate agent.**—A foreign corporation may acquire title to unimproved and uninclosed land by payment of taxes in accordance with the provisions of the statute, although it has neglected to designate an agent upon whom process may be served. It will nevertheless still have the right to pay taxes on

may purchase and hold all kinds of property.[83]

[§ 491] **4. Corporations Having Power of Eminent Domain.** According to the weight of authority the fact that a corporation is endowed with the power to take land under the power of eminent domain on making just compensation therefor does not prevent it from acquiring title by adverse possession.[84] There are, however, a number of well considered decisions which maintains the contrary doctrine.[85]

[§ 492] **F. Aliens.** Although not capable of holding real property, an alien may successfully set up the defense of adverse possession against the true owner.[86]

[§ 493] **G. Nonresidents.** As heretofore shown actual possession may be held through a tenant or agent,[87] and when possession is so held by a nonresident as to enable the owner at any time to maintain an action against the tenant or agent for the possession of the land title thereto may be acquired by the nonresident by adverse possession.[88] In some jurisdictions the statute of limitations does not run in favor of a person during his absence from the state, and therefore a nonresident holding possession through an agent or tenant cannot acquire title by adverse possession.[89]

[§ 494] **H. Infants.** Adverse possession by an infant, either by himself or guardian, will vest a title in the infant.[90]

[§ 495] **I. Married Women.** Where a married woman in her own right takes and holds possession of land adversely to the owner for the statutory period, she acquires title by adverse possession,[91] which cannot be affected by the acts of her husband[92] or by the fact that he is an alien,[93] and, although land is held by both the husband and the wife, if the possession is held openly under a deed conveying the legal title to the wife a title by adverse possession inures to the benefit of the wife.[94]

XIV. EXTENT OF POSSESSION

[§ 496] **A. Introductory Statement.** The decisions on the question as to the extent of the adversary possession for the purpose of determining the amount of land to which the claimant has thereby acquired title are divisible into two classes: (1) Where the claimant is in possession without color of title, and (2) where the possession is under color of title. Where lands are not in the actual possession of anyone the possession by construction of law is deemed to be in the legal owner, or, in other words, the legal owner by virtue of his title is deemed to be in the constructive possession of the land when there is no actual possession in another.[95] This constructive possession is in no way affected by

lands to which it has color of title. Rachels v. Stecher Cooperage Works, 95 Ark. 6, 128 SW 348.

82. Work v. United Globe Mines, 12 Ariz. 339, 100 P 813.

84. U. S.—Louisville, etc., R. Co. v. Smith, 128 Fed. 1, 63 CCA 1. And see Texas, etc., R. Co. v. Scott, 77 Fed. 726, 23 CCA 424, 37 LRA 94.

Cal.—Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 594, 77 P 1113 (where it was said, citing many California decisions: "In this state a corporation's title to water either by appropriation or prescription has been recognized and upheld from the very earliest day").

Colo.—Denver, etc., R. Co. v. Doelz, 49 Colo. 48, 111 P 595.

Mo.—Boyce v. Missouri Pac. R. Co., 168 Mo. 583, 68 SW 920, 58 LRA 442; Turner v. Union Pac. R. Co., 112 Mo. 542, 20 SW 673.

N. Y.—American Bank-Note Co. v. New York El. R. Co., 129 N. Y. 252, 29 NE 302.

Pa.—Carter v. Ridge Turnp. Co., 22 Pa. Super. 162 [aff 208 Pa. 565, 57 A 988]. But see infra note 85.

Tex.—Gulf, etc., R. Co. v. Brandenburg, (Civ. A.) 167 SW 170 (holding that Const. art 1 § 17 does not prevent a railroad corporation from acquiring by adverse possession title to land occupied by it as a right of way); Kingsley v. Kerr, (Civ. A.) 135 SW 161.

W. Va.—Ohio River R. Co. v. Johnson, 50 W. Va. 499, 40 SE 407.

See Midland R. Co. v. Smith, 113 Ind. 233, 15 NE 256.

In American Bank Note Co. v. New York El. R. Co., 129 N. Y. 252, 264, 29 NE 302 (Finch, J., said: "Mere provisions for compensation in a charter have never been regarded as making the entry upon private property necessarily subordinate to the private right, and very numerous cases could be cited in which the entry was deemed adverse and such as could ripen into a prescriptive title, although made under an authority which provided for compensation").

[a] **Right of way.**—Defendant railroad company having been in the adverse possession of a right of way through plaintiff's land for more than twenty years, plaintiff cannot question the validity of its title thereto. Fortune v. Chesapeake, etc., R. Co., 53 SW 711, 22 KyL 749.

[b] **A stock corral** is a necessary adjunct to the transportation business of a railroad corporation and hence may be acquired by the corporation by adverse possession. Hill v. Hoefer, 8 Cal. A. 70, 96 P 116; Hill v. Barner, 8 Cal. A. 58, 96 P 111.

85. Narron v. Wilmington, etc., R. Co., 122 N. C. 856, 29 SE 356, 40 LRA 415; Connellsville Gas Coal Co. v. Baltimore, etc., R. Co., 216 Pa. 309, 65 A 669; Carter v. Ridge Turnp. Co., 208 Pa. 565, 57 A 988; Covert v. Pittsburgh, etc., R. Co., 204 Pa. 341, 54 A 170; Wheeling, etc., R. Co., v. Cleland, 37 LegInt (Pa.) 466. See also Utley v. Wilmington, etc., R. Co., 119 N. C. 720, 25 SE 1021; Land v. Wilmington, etc., R. Co., 107 N. C. 72, 12 SE 125; Jessup v. Loucks, 55 Pa. 350.

[a] **"The reason** that adverse possession cannot be set up in such a case is, that the law presumes, when a railroad company takes land for its corporate purposes, it does so under its high right of eminent domain, and not as a wilful trespasser whose trespass may grow into a title." Covert v. Pittsburgh, etc., R. Co., 204 Pa. 341, 343, 54 A 170. "The owner of the soil has no right to prevent the entry and continuous occupation of the defendant road. This being so, the reason for the rule creating the presumption fails." Narron v. Wilmington, etc., R. Co., 122 N. C. 856, 859, 29 SE 356, 40 LRA 415 (per Furches, J.).

86. Scottish American Mortg. Co. v. Butler, 99 Miss. 56, 68, 54 S 666, AnnCas1913C 1236 and note [quot Cyc]; Overing v. Russell, 32 Barb. (N. Y.) 263.

But in Leary v. Leary, 50 HowPr (N. Y.) 122, it was held that, although a person has been in adverse possession of land for the statutory period, if during five years of that time he was an alien and incapable of holding land the possession did not ripen into a title.

87. See supra § 48 et seq.

88. St. Paul v. Chicago, etc., R. Co., 45 Minn. 387, 48 NW 17; Lindenmayer v. Gunst, 70 Miss. 693, 13 S 252, 35 AmSR 685; Lantry v. Parker, 37 Nebr. 353, 55 NW 962.

89. Ard v. Wilson, 60 Kan. 857, 56 P 80 [aff 8 Kan. A. 471, 54 P 511]; Corby v. Moran, 58 Kan. 278, 49 P 82; Huff v. Crawford, 88 Tex. 368, 30 SW 546, 31 SW 614, 53 AmSR 763; Bateman v. Jackson, (Tex. Civ. A.) 45 SW 224.

90. Woodruff v. Roysden, 105 Tenn. 491, 58 SW 1066, 80 AmSR 905; Davis v. Mitchell, 5 Yerg. (Tenn.) 281; Re Goff, 8 Ont. Pr. 92.

91. Clark v. Gilbert, 39 Conn. 94; Smith v. De la Garza, 15 Tex. 150, 65 AmD 147; Warr v. Honeck, 8 Utah 61, 29 P 1117; Myers v. Ruport, 8 Ont. L. 668.

[a] **Husband acting as agent.**—Where a wife, after purchasing a tax title, receives the rent and profits from the land, makes improvements, and pays the taxes, the fact that her husband who has been the mortgagor acts as her agent in some of the transactions does not prevent her possession from being adverse to the mortgagee. Wood v. Armour, 88 Wis. 488, 60 NW 791, 43 AmSR 918.

92. Steel v. Johnson, 4 Allen (Mass.) 425; Collins v. Lynch, 157 Pa. 246, 27 A 721, 37 AmSR 723.

[a] **Wife living apart from husband.**—Where a married woman is by statute given the same right to acquire property as a feme sole, a wife living apart from her husband and supporting herself may acquire title by adverse possession to a portion of his lands awarded to her by a void decree of divorce. Warr v. Honeck, 8 Utah 61, 29 P 1117.

93. Hogan v. Kurtz, 94 U. S. 773, 24 L. ed. 317.

94. Ramsey v. Quillen, 5 Lea (Tenn.) 184.

95. Ill.—Zingibl v. Calumet, etc., Canal, etc., Co., 157 Ill. 430, 42 NE 431.

Ind.—Wiggins v. Holley, 11 Ind. 2.

Iowa.—American Emigrant Co. v. Fuller, 83 Iowa 599, 50 NW 48; Burke v. Cutler, 78 Iowa 299, 43 NW 204.

Mo.—Priest v. St. Louis, 103 Mo. 657, 15 SW 989; St. Louis v. Priest, 103 Mo. 652, 15 SW 988; Turner v. Baker, 76 Mo. 343 [aff 8 Mo. A. 583], 64 Mo. 218, 27 AmR 226]; Douthitt v. Stinson, 63 Mo. 268; Mylar v. Hughes, 60 Mo. 105.

Nebr.—Troxell v. Johnson, 52 Nebr. 46, 71 NW 968.

N. Y.—Thompson v. Burhans, 79 N. Y. 93; Finlay v. Cook, 54 Barb. 9.

S. C.—Love v. Turner, 78 S. C. 513, 59 SE 529.

Tex.—Whitehead v. Foley, 28 Tex. 268.

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a void execution sale of the land.[96] But of course the rightful owner's constructive possession ceases, as soon as another takes actual possession,[97] to the extent of the dispossession.[98]

[§ 497] **B. Where Claimant Is without Color of Title—1. Statement of Rule.** One claiming title by adverse possession but not holding under color of title acquires no title to any land except what is in his actual possession.[99] There can be no constructive

Vt.—Soule v. Barlow, 49 Vt. 329.

96. Waldron v. Harvey, 54 W. Va. 608, 46 SE 603, 102 AmSR 959.

97. Crouch v. Colbert, 111 Mo. A. 93, 84 SW 992; New York Cent. etc., R. Co. v. Brennan, 24 App. Div. 343, 48 NYS 675 [aff 163 N. Y. 584 mem, 57 NE 1119 mem]; Tredwell v. Reddick, 23 N. C. 56. And see Chicago, etc., R. Co. v. Abbott, 215 Ill. 416, 74 NE 412.

98. Hot Springs Lumber, etc., Co. v. Sterrett, 108 Va. 710, 62 SE 797.

99. U. S.—Barr v. Gratz, 4 Wheat. 213, 4 L. ed. 553; Taylor v. Breathitt Coal, etc., Co., 185 Fed. 854; Van Deventer v. Lott, 172 Fed. 574; Brown v. Leete, 2 Fed. 440, 6 Sawy. 332; Ellicott v. Pearl, 8 F. Cas. No. 4,336, 1 McLean 206 [aff 10 Pet. 412, 9 L. ed. 475]; Fraser v. Hunter, 9 F. Cas. No. 5,063, 5 Cranch C. C. 470; Jackson v. Porter, 13 F. Cas. No. 7,143, 1 Paine 457; Potts v. Gilbert, 19 F. Cas. No. 11,347, 3 Wash. C. C. 475.

Ala.—Bowles v. Lowery, 62 S 107; McDaniel v. Tennessee Coal, etc., Co., 153 Ala. 493, 45 S 159; Powers v. Hatter, 152 Ala. 636, 44 S 859; Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45; Edmondson v. Anniston City Land Co., 128 Ala. 589, 29 S 596; Tennessee Coal, etc., Co. v. Linn, 123 Ala. 112, 26 S 245, 82 AmSR 108; Smith v. Keyser, 115 Ala. 455, 22 S 149; Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 9 S 537; Lucy v. Tennessee, etc., R. Co., 92 Ala. 246, 8 S 806; Woods v. Montevallo Coal, etc., Co., 84 Ala. 560, 3 S 475, 5 AmSR 393; Burks v. Mitchell, 78 Ala. 61; Louisville, etc., R. Co. v. Boykin, 76 Ala. 560; Dothard v. Denson, 72 Ala. 541; Ryan v. Kilpatrick, 66 Ala. 332; Bell v. Denson, 56 Ala. 444; Hawkins v. Hudson, 45 Ala. 482.

Ark.—Poole v. Oliver, 117 SW 747; King v. Campbell, 89 Ark. 450, 116 SW 899; Langhorst v. Rogers, 88 Ark. 318, 114 SW 915; Bradbury v. Dumond, 80 Ark. 82, 96 SW 390, 11 LRANS 772; Nicklace v. Dickerson, 65 Ark. 422, 46 SW 945; Weaver v. Rush, 62 Ark. 51, 34 SW 256; Wheeler v. Ladd, 40 Ark. 108; Ferguson v. Peden, 33 Ark. 150; Mooney v. Cooledge, 30 Ark. 640; Carnall v. Wilson, 21 Ark. 62, 76 AmD 351; Ledbetter v. Fitzgerald, 1 Ark. 448.

Cal.—Los Angeles Inter-Urban R. Co. v. Montijo, 153 Cal. 15, 94 P 97; United Land Assoc. v. Pacific Imp. Co., 139 Cal. 370, 69 P 1064, 72 P 988; Reyburn v. Booker, 32 P 594; Gordon v. Booker, 97 Cal. 586, 32 P 593; Kimball v. Stormer, 65 Cal. 116, 3 P 408; Hayes v. Martin, 45 Cal. 559; Kimball v. Lohmas, 31 Cal. 154; Garrison v. Sampson, 15 Cal. 93; Suñol v. Hepburn, 1 Cal. 254; Mattes v. Hall, 21 Cal. A. 552, 132 P 295.

Colo.—Brinker v. Union Pac., etc., R. Co., 11 Colo. A. 166, 55 P 207.

Conn.—Tracy v. Norwich, etc., R. Co., 39 Conn. 382; French v. Pearce, 8 Conn. 439, 21 AmD 680; Watrous v. Southworth, 5 Conn. 305; Bryan v. Atwater, 5 Day 181, 5 AmD 136.

D. C.—Keefe v. Bramhall, 14 D. C. 551.

Fla.—Doyle v. Wade, 23 Fla. 90, 1 S 516, 11 AmSR 334.

Ga.—Baker v. White, 136 Ga. 541, 71 SE 871; Tillman v. Bomar, 134 Ga. 660, 68 SE 504; Peeples v. Wilson, 134 Ga. 600, 68 SE 322; Strong v. Powell, 92 Ga. 591, 20 SE 6; Ford v. Williams, 78 Ga. 106; Hammond v. Crosby, 68 Ga. 767; Hall v. Gay, 68 Ga. 442; Anderson v. Dodd, 65 Ga. 402; Griffin v. Sketoe, 30 Ga. 300; Denham v. Holeman, 26 Ga. 182, 71 AmD 198; Royall v. Lisle, 15 Ga. 545, 60 AmD 712; Whittington v. Doe, 9 Ga. 23; Conyers v. Kenan, 4 Ga. 308, 48 AmD 226.

Ill.—Ingraham v. Brown, 231 Ill. 256, 83 NE 156; Ely v. Brown, 183 Ill. 575, 56 NE 181; Harms v. Kransz, 167 Ill. 421, 47 NE 746; Zirngibl v. Calumet, etc., Canal, etc., Co., 157 Ill. 430, 42 NE 431; Norris v. Ile, 152 Ill. 190, 38 NE 762, 43 AmSR 233; Fisher v. Bennehoff, 121 Ill. 426, 13 NE 150; Lancey v. Brock, 110 Ill. 609; Bristol v. Carroll County, 95 Ill. 84; James v. Indianapolis, etc., R. Co., 91 Ill. 554; Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508; Schneider v. Botsch, 90 Ill. 577; Chicago, etc., R. Co. v. Hoag, 90 Ill. 339; Coleman v. Billings, 89 Ill. 183; Foster v. Letz, 86 Ill. 412; Illinois Cent. R. Co. v. Indiana, etc., R. Co., 85 Ill. 211; Austin v. Rust, 73 Ill. 491; Weber v. Anderson, 73 Ill. 439; Winkler v. Meister, 40 Ill. 349; Dills v. Hubbard, 21 Ill. 328; Goewey v. Urig, 18 Ill. 238; Turney v. Chamberlain, 15 Ill. 271; Lovett v. Noble, 2 Ill. 185; Webb v. Sturtevant, 2 Ill. 181; Faith v. Yocum, 51 Ill. A. 620; Maloney v. Shattuck, 15 Ill. A. 44.

Ind.—Wilson v. Johnson, 145 Ind. 40, 38 NE 38, 43 NE 930; Silver Creek Cement Corp. v. Union Lime, etc., Co., 138 Ind. 297, 35 NE 125, 37 NE 721; Roots v. Beck, 109 Ind. 472, 9 NE 698; State v. Portsmouth Sav. Bank, 106 Ind. 435, 7 NE 379; State v. Porter, 86 Ind. 404; Jeffersonville, etc., R. Co. v. Oyler, 60 Ind. 383; Bell v. Longworth, 6 Ind. 273; Hoffman v. Zollman, 49 Ind. A. 664, 97 NE 1015. See however Prather v. Western Union Tel. Co., 89 Ind. 501.

Iowa.—Hamilton v. Wright, 30 Iowa 480; Booth v. Small, 25 Iowa 177.

Kan.—Anderson v. Burnham, 52 Kan. 454, 34 P 1056.

Ky.—Meade v. Ratliff, 133 Ky. 411, 118 SW 271, 134 AmSR 467; Goff v. Lowe, 107 SW 794, 32 KyL 1098; Fuller v. Keese, 104 SW 700, 31 KyL 1099; Woodward v. Johnson, 122 Ky. 160, 90 SW 1076, 28 KyL 1091; Phillips v. Beattyville Mineral, etc., Co., 88 SW 1058, 28 KyL 12; Krauth v. Hahn, 65 SW 18, 23 KyL 1261; Mann v. Cavanaugh, 110 Ky. 776, 62 SW 854, 23 KyL 238; Taylor v. Combs, 50 SW 64, 20 KyL 1828; West v. McKinney, 92 Ky. 638, 18 SW 633, 13 KyL 900; Hunter v. Chrisman, 6 B. Mon. 463; Shackleford v. Smith, 5 Dana 232; Griffith v. Huston, 7 J. J. Marsh. 385; Smith v. Morrow, 5 Litt. 210; Brooks v. Clay, 3 A. K. Marsh. 545; McKinny v. Kenny, 1 A. K. Marsh. 460; Henderson v. Howard, 1 A. K. Marsh. 26.

La.—Louisiana Land Co. v. Blakewood, 131 La. 539, 59 S 984; Albert Hanson Lumber Co. v. Riggs Cypress Co., 130 La. 772, 58 S 567; Prevost v. Johnson, 9 Mart. 123.

Me.—Banton v. Herrick, 101 Me. 134, 63 A 671; Richardson v. Watts, 94 Me. 476, 48 A 180; Hitchings v. Morrison, 72 Me. 331; Jewett v. Hussey, 70 Me. 433; Brackett v. Persons Unknown, 53 Me. 228, 87 AmD 548; Abbott v. Abbott, 51 Me. 575; Lincoln v. Edgecomb, 31 Me. 345; Thornton v. Foss, 26 Me. 402; Otis v. Moulton, 20 Me. 205.

Md.—Hackett v. Webster, 97 Md. 404, 55 A 480; Hoye v. Swan, 5 Md. 237; Davidson v. Beatty, 3 Harr. & M. 594; Lee v. Hoye, 1 Gill 188.

Mass.—Melvin v. Merrimack River, 5 Metc. 15, 38 AmD 384; Coburn v. Hollis, 3 Metc. 125; Allen v. Holton, 20 Pick. 458; Bates v. Norcross, 14 Pick. 224; Poignard v. Smith, 8 Pick. 272; Brimmer v. Long Wharf, 5 Pick. 131; Burrell v. Burrell, 11 Mass. 294; Kennebeck Purchase v. Springer, 4 Mass. 416, 3 AmD 227.

Mich.—Marble v. Price, 54 Mich. 466, 20 NW 531; Campau v. Campau, 44 Mich. 31, 5 NW 1062.

Minn.—Markusen v. Mortensen, 105 Minn. 10, 116 NW 1021; Barber v. Robinson, 78 Minn. 193, 80 NW 968; Hall v. Connecticut Mut. L. Ins. Co., 76 Minn. 401, 79 NW 497; Sage v. Larson, 69 Minn. 122, 71 NW 923; Brown v. Kohout, 61 Minn. 113, 63 NW 248; Coleman v. Northern Pac. R. Co., 36 Minn. 525, 32 NW 859; Seymour v. Carli, 31 Minn. 81, 16 NW 495; Washburn v. Cutter, 17 Minn. 361.

Miss.—Connell v. Norment, 102 Miss. 284, 59 S 89 [rev reh 58 S 222]; Ryan v. Mississippi Valley, etc., R. Co., 62 Miss. 162; Huntington v. Allen, 44 Miss. 654; Alexander v. Polk, 39 Miss. 737; Welborn v. Anderson, 37 Miss. 155; Hanna v. Renfro, 32 Miss. 125; Grafton v. Grafton, 16 Miss. 77.

Mo.—Baker v. Thompson, 214 Mo. 500, 114 SW 497; Sweringen v. St. Louis, 151 Mo. 348, 52 SW 346; Benne v. Miller, 149 Mo. 228, 50 SW 824; Wilson v. Purl, 148 Mo. 449, 50 SW 90; Carter v. Hornback, 139 Mo. 238, 40 SW 893; Wilson v. Purl, 133 Mo. 367, 34 SW 884; Nye v. Alfter, 127 Mo. 529, 30 SW 186; Goltermann v. Schiermeyer, 125 Mo. 291, 28 SW 616; Pharis v. Jones, 122 Mo. 125, 26 SW 1032; Wilkerson v. Ellers, 114 Mo. 245, 21 SW 514; Allen v. Mansfield, 108 Mo 343, 18 SW 901; Ozark Plateau Land Co. v. Hays, 105 Mo. 143, 16 SW 957; Avery v. Adams, 69 Mo. 603; Hamilton v. Boggess, 63 Mo. 233; Mylar v. Hughes, 60 Mo. 105; Long v. Higginbotham, 56 Mo. 245; Powell v. Davis, 54 Mo. 315; Chapman v. Templeton, 53 Mo. 463; Rannels v. Rannels, 52 Mo. 108; De Graw v. Taylor, 37 Mo. 310; Schultz v. Lindell, 30 Mo. 310; St. Louis v. Gorman, 29 Mo. 593, 77 AmD 586; St. Louis v. Keitley, 29 Mo. 593 note; Sloane v. Moore, 7 Mo. 170; Kincaid v. Logue, 7 Mo. 166; Campbell v. Brown, 146 Mo. A. 319, 130 SW 50; Kennedy v. Pruiett, 24 Mo. A. 414.

Nebr.—South Omaha v. Meehan, 71 Nebr. 230, 98 NW 691; Omaha, etc., R. Co. v. Rickards, 38 Nebr. 847, 57 NW 739; Lejeune v. Harmon, 29 Nebr. 268, 45 NW 630; Haywood v. Thomas, 17 Nebr. 237, 22 NW 460; Gatling v. Lane, 17 Nebr. 77, 22 NW 227 [reh den 17 Nebr. 80, 22 NW 453]; South Omaha v. Ford, 5 Nebr. (Unoff.) 310, 98 NW 665.

Nev.—Barnes v. Sabron, 10 Nev. 217.

N. H.—Boynton v. Hodgdon, 59 N. H. 247; Wells v. Jackson Iron Mfg. Co., 48 N. H. 491; Hoag v. Wallace, 28 N. H. 547; Bailey v. Carleton, 12 N. H. 9, 37 AmD 190; Hale v. Glidden, 10 N. H. 397; Enfield v. Day, 7 N. H. 457, 28 AmD 360; Smith v. Hosmer, 7 N. H. 436, 28 AmD 354; Lund v. Parker, 3 N. H. 49; Riley v. Jameson, 3 N. H. 23, 14 AmD 325.

N. J.—Pennsylvania R. Co. v. Breckenridge, 60 N. J. L. 583, 38 A 740; Dem v. Hunt, 20 N. J. L. 487; New Jersey Zinc, etc., Co. v. Morris Canal, etc., Co., 44 N. J. Eq. 398, 15 A 227 [aff 47 N. J. Eq. 598, 22 A 1076].

N. Y.—Crary v. Goodman, 22 N. Y. 170; Baldwin v. Brown, 16 N. Y. 359; Fortier v. Delaware, etc., R. Co., 93 App. Div. 24, 86 NYS 896; Silliman v. Paine, 70 Hun 459, 24 NYS 344; Robinson v. Phillips, 65 Barb. 418, 1 Thomps. & C. 151 [aff 56 N. Y. 634 mem]; Becker v. Van Valkenburgh, 29 Barb. 319; Gooding v. Richards, 20 NYWkly Dig 543; Simpson v. Downing, 23 Wend. 316; Jackson v. Warford, 7 Wend. 62; Jackson v. Camp, 1 Cow. 605; Jackson v. Woodruff, 1 Cow. 276, 13 AmD 525; Doe v. Campbell, 10 Johns. 475; Jackson v. Schoonmaker, 2 Johns. 230; Brandt v. Ogden, 1 Johns. 156.

possession without color of title.[1] It cannot be | acquired by mere assertion of claim of title.[2]

N. C.—Anderson v. Meadows, 159 N. C. 404, 74 SE 1019; Rowe v. Cape Fear Lumber Co., 128 N. C. 301, 38 SE 896 [mod reh 129 N. C. 97, 39 SE 748]; Basnight v. Meekins, 121 N. C. 23, 27 SE 992; Asbury v. Fair, 111 N. C. 251, 16 SE 467; Scott v. Elkins, 83 N. C. 424; Parker v. Banks, 79 N. C. 480; Clarke v. Wagner, 74 N. C. 791; Moore v. Thompson, 69 N. C. 120; Loftin v. Cobb, 46 N. C. 406, 62 AmD 173; Berryman v. Kelly, 35 N. C. 269; Bynum v. Thompson, 25 N. C. 578.

Oh.—Humphries v. Huffman, 33 Oh. St. 395; Smith v. Pittsburgh, etc., R. Co., 26 Oh. Cir. Ct. 44.

Or.—Lais v. Smith, 63 Or. 206, 127 P 26; Grant v. Oregon Nav. Co., 49 Or. 324, 90 P 178, 1099; Hamilton v. Flournoy, 44 Or. 97, 74 P 483; Joy v. Stump, 14 Or. 361, 12 P 929; Wilson v. McEwan, 7 Or. 87.

Pa.—Mead v. Leffingwell, 33 Pa. 187; Ege v. Medlar, 82 Pa. 86; Huffman v. McCrea, 56 Pa. 95; Green v. Kellum, 23 Pa. 254, 62 AmD 333; Barnhart v. Pettit, 22 Pa. 135; Bishop v. Lee, 3 Pa. 214; Porter v. McGinnis, 1 Pa. 413; McCaffrey v. Fisher, 4 Watts & S. 181; Brown v. McKinney, 9 Watts 565, 36 AmD 139; Sweeney v. McCulloch, 3 Watts 345; McCall v. Neely, 3 Watts 69; Jones v. Porter, 3 Penr. & W. 132; Munshower v. Patton, 10 Serg. & R. 334, 13 AmD 678; Royer v. Benlow, 10 Serg. & R. 303; Farley v. Lenox, 8 Serg. & R. 392; Overfield v. Christie, 7 Serg. & R. 173; Miller v. Shaw, 7 Serg. & R. 129; Hall v. Powel, 4 Serg. & R. 456, 8 AmD 722; Burns v. Swift, 2 Serg. & R. 436; Cluggage v. Duncan, 1 Serg. & R. 111; Gray v. McCreary, 4 Yeates 494.

S. C.—Golson v. Hook, 35 S. C. L. 23; Gourdin v. Fludd, 16 S. C. L. 232; Drayton v. Marshall, 14 S. C. Eq. 373, 33 AmD 84.

Tenn.—Lieberman v. Clark, 114 Tenn. 117, 85 SW 258, 69 LRA 732; Duke v. Helms, 100 Tenn. 249, 46 SW 761; Brown v. Watkins, 98 Tenn. 454, 40 SW 480; Bleidorn v. Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 15 SW 737; Mayse v. Lafferty, 1 Head 60; Thomasson v. Keaton, 1 Sneed 154; Collins v. Hipshire, 2 Swan 109; Rutherford v. Franklin, 1 Swan 321; Lea v. Netherton, 9 Yerg. 315; Snapp v. Purcell, 2 Tenn. Ch. A. 565.

Tex.—Claiborne v. Elkins, 79 Tex. 230, 15 SW 395; Evans v. Foster, 79 Tex. 48, 15 SW 170; Craig v. Cartwright, 65 Tex. 413; Bracken v. Jones, 63 Tex. 134; Cantagrel v. Von Lupin, 58 Tex. 570; Whitehead v. Foley, 28 Tex. 268; Ragon v. Craver, (Civ. A.) 127 SW 1037; Simpson Bank v. Smith, 52 Tex. Civ. A. 349, 114 SW 445; Doom v. Taylor, 35 Tex. Civ. A. 251, 79 SW 1086; Zapeda v. Hoffman, 31 Tex. Civ. A. 312, 72 SW 443; Hall v. Clountz, 26 Tex. Civ. A. 348, 63 SW 941; Beall v. Evans, 1 Tex. Civ. A. 443, 20 SW 945.

Utah.—Funk v. Anderson, 22 Utah 238, 61 P 1006.

Vt.—Swift v. Gage, 26 Vt. 224.

Va.—Richmond v. Jones, 111 Va. 214, 68 SE 181; Sharp v. Shenandoah Furnace Co., 100 Va. 27, 40 SE 103; Virginia Midland R. Co. v. Barbour, 97 Va. 118, 33 SE 554; Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232; Blakey v. Morris, 89 Va. 717, 17 SE 126; Hollingsworth v. Sherman, 81 Va. 668; Creekmur v. Creekmur, 75 Va. 430; Kincheloe v. Tracewells, 11 Gratt. (52 Va.) 587; Pasley v. English, 5 Gratt. (46 Va.) 141; Taylor v. Burnsides, 1 Gratt. (42 Va.) 165.

Wash.—Miller v. O'Leary, 44 Wash. 172, 87 P 113.

W. Va.—Wade v. McDougle, 59 W. Va. 113, 52 SE 1026; Maxwell v. Cunningham, 50 W. Va. 298, 40 SE 499; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255; Heavner v. Morgan, 41 W. Va. 428, 23 SE 874; Jarrett v. Stevens, 36 W. Va. 445, 15 SE 177; Oney v. Clendenin, 28 W. Va. 24; Core v. Faupel, 24 W. Va. 238.

Wis.—McEvoy v. Loyd, 31 Wis. 142.

Can.—Bentley v. Peppard, 33 Can. S. C. 444; Parks v. Cahoon, 23 Can. S. C. 92.

N. B.—Doe v. Mosher, 15 N. B. 355; Humphreys v. Helmes, 10 N. B. 59; Doe v. White, 3 N. B. 595.

Ont.—Harris v. Mudie, 7 Ont. A. 414; Hartley v. Maycock, 28 Ont. 508; Brooke v. Gibson, 27 Ont. 218; Robertson v. Daley, 11 Ont. 352; McMaster v. Morrison, 14 Grant Ch. (U. C.) 138; Bell v. Howard, 6 U. C. C. P. 292; Young v. Elliott, 25 U. C. Q. B. 330; Dundas v. Johnston, 24 U. C. Q. B. 547; Ferrier v. Moodie, 12 U. C. Q. B. 279; Doe v. Nightingale, 5 U. C. Q. B. 518.

[a] **Applications of rule.**—(1) Where the lessor of a lot had no title to a strip thereof, the construction on the strip by the lessee of a sidewalk leading to a joss house was not an adverse possession of the entire strip under the twelve-year statute of limitations. Miller v. O'Leary, 44 Wash. 172, 87 P 113. (2) Where a husband conveys land by deed in which his wife does not join, and on his death she marries the grantee who lives with her on the premises, his possession cannot be set up by those claiming under him as a possession which will draw to it the possession of an adjoining tract, left in possession of the widow of the first husband, in order to support a title to such adjoining tract by adverse possession. "It was, in contemplation of law, the possession of" the widow in right of dower, not the possession of her husband. Reed v. Hackney, 69 N. J. L. 27, 54 A 229. (3) Where one segregated sixty acres from a larger tract by a purchase thereof and abandoned actual occupancy of the remainder on which he failed to pay taxes, his occupancy of the sixty acres cannot be construed to extend to the remainder so as to give title by adverse possession. Cook v. Southern Pine Lumber Co., (Tex. Civ. A.) 149 SW 716.

[b] **Land appropriated by railroad companies.**—(1) Where without color of title a railroad company appropriates land for a right of way, its possession is limited to the land actually occupied and cannot be extended by construction to land adjoining that which is occupied. St. Louis Southwestern R. Co. v. Davis, 75 Ark. 283, 87 SW 445; Brinker v. Union Pac., etc., R. Co., 11 Colo. A. 166, 55 P 207; James v. Indianapolis, etc., R. Co., 91 Ill. 554; Illinois Cent. R. Co. v. Indiana, etc., R. Co., 85 Ill. 211; Ryan v. Mississippi Val., etc., R. Co., 62 Miss. 162; Omaha, etc., R. Co. v. Rickards, 38 Nebr. 847, 57 NW 739. (2) In Prather v. Western Union Tel. Co., 89 Ind. 501, however, it was held that where the charter of the railway company fixed the width of its right of way to be acquired and the company without color of title entered upon land and appropriated it for its right of way, laying tracks thereon, its possession for the purpose of acquiring title by limitation extended to the full width of the right of way authorized by its charter, not merely to the ground actually occupied by its tracks. See also Hargis v. Kansas City, etc., R. Co., 100 Mo. 210, 13 SW 680. But see Coleman v. Northwestern Pac. R. Co., 36 Minn. 525, 32 NW 859; Omaha, etc., R. Co. v. Rickards, supra.

[c] **One who holds to the shore of a stream** by adverse possession is confined to his actual occupancy on the shore unless by notorious acts of ownership, in so far as he may be able to exercise them, he furnishes evidence of his intention to claim and hold to the middle of the stream. Stanberry v. Mallory, 101 Ky. 49, 39 SW 495, 19 KyL 227, 72 AmSR 389.

[d] **Possession of uplands bordering on tidewater.**—Where one without color of title, in possession of uplands bordering on tidewaters, has no actual possession of the flats between high and low tide, his possession will not be extended beyond the uplands so as to enable him to acquire title to any portion of the flats. Richardson v. Watts, 94 Me. 476, 48 A 180. See also Thornton v. Foss, 26 Me. 402.

[e] **When a person is in actual possession to the outside line of a highway** his possession is not extended by construction to the center of the highway so as to enable him to acquire title to the center of the highway. Hatch v. Vermont Cent. R. Co., 28 Vt. 142.

[f] **Possession of land formed by accretion.**—The building and occupancy of a shanty on the beach on a large tract of sand extending for some miles between a bay and the sea, formed by accretion, or the setting of stakes or planting of small gardens without any inclosures, does not constitute an adverse possession of any more of the tract than is actually occupied. Van Deventer v. Lott, 172 Fed. 574 [aff 180 Fed. 378].

[g] **Occupation after divestiture of title.**—Where one's title to land was divested by a sheriff's sale, his subsequent possession of a portion of the land could not be extended to the boundaries described in the deed under which he claimed prior to the sale. Doom v. Taylor, 35 Tex. Civ. A. 251, 79 SW 1086.

[h] **Spanish and Mexican law.**—The rule limiting the possession of one without color of title to the land actually occupied was fully recognized by the Spanish and Mexican law, as applied in the territory acquired by the United States from Spain or Mexico. Sunol v. Hepburn, 1 Cal. 254.

1. Ark.—Bradbury v. Dumond, 80 Ark. 82, 96 SW 390; Nicklace v. Dickerson, 65 Ark. 422, 46 SW 945.

Cal.—Garrison v. Sampson, 15 Cal. 93.

Ga.—Cook v. Long, 27 Ga. 280.

Ill.—Foster v. Letz, 86 Ill. 412; Lovett v. Noble, 2 Ill. 185; Webb v. Sturtevant, 2 Ill. 181.

Ind.—Silver Creek Cement Corp. v. Union Lime, etc., Co., 138 Ind. 297, 35 NE 125, 37 NE 721.

Ky.—Shackleford v. Smith, 5 Dana 232.

La.—Prevost v. Johnson, 9 Mart. 123.

Md.—Hove v. Swan, 5 Md. 237.

Mass.—Poignaud v. Smith, 8 Pick. 272.

Mo.—Allen v. Mansfield, 108 Mo. 343, 18 SW 901; Mylar v. Hughes, 60 Mo. 105; Fugate v. Pierce, 49 Mo. 441.

N. H.—Wells v. Jackson Iron Mfg. Co., 48 N. H. 491.

N. J.—Dem v. Hunt, 20 N. J. L. 487.

N. Y.—Edwards v. Noyes, 65 N. Y. 125; Simpson v. Downing, 23 Wend. 316; Jackson v. Oltz, 8 Wend. 440; Jackson v. Woodruff, 1 Cow. 276, 13 AmD 525.

Pa.—Ege v. Medlar, 82 Pa. 86; McCall v. Neely, 3 Watts 69; Overfield v. Christie, 7 Serg. & R. 173. But see infra § 502.

Tex.—Bracken v. Jones, 63 Tex. 134; Whitehead v. Foley, 28 Tex. 268. But see infra § 503.

Vt.—Langdon v. Templeton, 66 Vt. 173, 28 A 866.

Va.—Blakey v. Morris, 89 Va. 717, 17 SE 126.

[a] **"The 'squatters' sovereignty** is confined to his dominion." Slaven v. Dority, 142 Ky. 640, 645, 134 SW 1166 (per Miller, J.).

[b] **Effect of special statutory provisions.**—A statute providing that "the possession of a part of a tract or lot of land in the name of the whole tract claimed, and exercising during the time of such possession the usual acts of ownership over the whole tract so claimed, shall be deemed a possession of the whole tract," did not apply where one entered without color of title, but the possession of such a one would still be restricted to his actual possession. Fugate v. Pierce, 49 Mo. 441.

2. U. S.—Fraser v. Hunter, 9 F. Cas. No. 5,063, 5 Cranch C. C. 470.

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[§ 498] **2. Reason for Rule.** The reason on which the rule is based is that when an entry is not under color of title there is no invasion or disseizin which notifies the true owner of a claim asserted by another person, or which gives him a right of action except as to the land actually occupied.[3]

[§ 499] **3. Limitations and Exceptions to Rule—a. In Kentucky.** In Kentucky, while the general rule is recognized,[4] the courts of that state have placed an important limitation on its operation. Briefly stated it is this: One who without color of title enters on land having well defined boundaries marked on it, or which he himself marks thereon, and who occupies and uses a part, claiming the whole, acquires possession coextensive with the boundaries,[5] unless some part is in the actual possession of another,[6] or there is a conflict as to the boundary with another which is older or superior and the owner of the latter has entered on the boundary.[7] This character of possession is obviously constructive in its nature but has been described as "constructive actual possession,"[8] whatever that may mean. It is essential, however, to the operation of this principle that there should be a well marked boundary around the land claimed.[9] And a claim of title by adverse possession based on a marking of boundaries cannot be extended back of the date of such marking.[10] So also it has been held that if the claimant has the right to enter upon a part of the land within the boundary, and not to enter on another part, and his actual entry is only on the part to which he has the right, he acquires no possession beyond such part, although he may intend to take possession of the whole;[10¼] and the same rule applies to the possession of his grantee, although the conveyance is of all the land within the boundary.[10½]

[§ 500] **b. In Kansas and Minnesota.** In Kansas and Minnesota a qualification of the rule similar to that existing in Kentucky is recognized. Here it is held that occupancy of a small portion of a parcel of land, which is marked by plowing around the outside lines, is an occupation of the whole of the tract so marked.[11]

[§ 501] **c. In Vermont.** In Vermont also the general rule has not been accepted without some qualification. In a comparatively recent decision it is

Ill.—Winkler v. Meister, 40 Ill. 349.

Md.—Lee v. Hoye, 1 Gill 188.

Mo.—Mylar v. Hughes, 60 Mo. 105; Fugate v. Pierce, 49 Mo. 441.

Va.—Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232.

[a] **Thus** where there was never any entry on a certain tract of land by the owners after it had been sold on execution, their possession and claim of other parts of the original boundary including such tract did not affect the right of the purchaser of the tract in question nor start the statute of limitations in favor of such original owners against such execution purchaser. Woodward v. Johnson, 122 Ky. 160, 90 SW 1076.

3. Barber v. Robinson, 78 Minn. 193, 80 NW 968; Humphries v. Huffman, 33 Oh. St. 395.

4. See Kentucky decisions supra § 497.

5. Kentucky Coal, etc., Dev. Co. v. Kentucky Union Co., 214 Fed. 590 (stating law of Kentucky); Le Moyne v. Litton, (Ky.) 167 SW 912; Le Moyne v. Meadors, 156 Ky. 832, 162 SW 526; Mounts v. Mounts, 155 Ky. 363, 159 SW 818; Kentucky Coal, etc., Co. v. Carroll Hardwood Lumber Co., 154 Ky. 523, 157 SW 1109; Burt v. Sackett, 147 Ky. 232, 240, 144 SW 34; White v. McNabb, 140 Ky. 828, 131 SW 1021; Richie v. Owsley, 137 Ky. 63, 121 SW 1015; New Domain Oil, etc., Co. v. Gaffney Oil Co., 134 Ky. 792, 121 SW 699; Aikman v. South, 97 SW 4, 29 KyL 1201; Campbell v. Thomas, 9 B. Mon. (Ky.) 82.

"Early in the history of this state, and from the nature of the situation, those who entered upon their preemptions were not able to reduce at once the whole to an inclosed possession. There arose from that fact and the necessities created by the situation in the country, the principle that an entry within the boundary was a reduction of the whole boundary to possession, if such were the entrant's intention. The boundaries were most frequently indicated by marked or blazed trees as monuments, and served to give notice to the world that the occupant's possession was co-extensive with the boundary in which he resided, or upon which he made a physical inclosure. Any one concerned in knowing the extent or nature of the occupant's possession could, by following up the information gained from the latter's actual residence, learn where the exterior lines of the boundary so reduced to possession lay, as well as whether the possession was adverse to every other claimant. Therefore the law deemed that such adverse possession served to oust the true owner's constructive possession. . . . The principle, while denominated actual possession, has been differentiated from that actual possession which is the physical occupancy of a house, or the inclosure of a lot by a fence, by sometimes calling it 'constructive actual possession.'" New Domain Oil, etc., Co. v. Gaffney Oil Co., 134 Ky. 792, 798, 121 SW 699 (per O'Rear, J.).

[a] **The intent of one entering on land in the exercise of ownership** is an element in determining the legal effect of his act, for an entry within a boundary is a reduction of the whole boundary to possession, provided such is the intention. New Domain Oil, etc., Co. v. Gaffney Oil Co., 134 Ky. 792, 121 SW 699.

[b] **Applications of rule.**—(1) A purchaser by parol contract of a tract of land with marked boundaries, who goes into possession of part with intent to claim the whole and occupies it for the statutory period, acquires title coextensive with the boundaries. New Domain Oil, etc., Co. v. Gaffney Oil Co., 134 Ky. 792, 121 SW 699. (2) Where a tract of land was surveyed and the corners were marked and conveyed to a person who with those claiming under her had been in actual posession thereof claiming it as their own to the lines and corners so established without disturbance for more than twenty years, they were entitled to the entire tract, although the length of the lines as given in the deed would inclose only a fraction of the tract. Lee v. Wheat, 111 SW 307, 33 KyL 724 [reh den 112 SW 565, 33 KyL 993].

6. Le Moyne v. Meadors, 156 Ky. 832, 162 SW 526; New Domain Oil, etc., Co. v. Gaffney Oil Co., 134 Ky. 792, 121 SW 699. And see Richie v. Owsley, 137 Ky. 63, 121 SW 1015.

7. New Domain Oil, etc., Co., v. Gaffney Oil Co., 134 Ky. 792, 121 SW 699.

8. See New Domain Oil, etc., Co. v. Gaffney Oil Co., 134 Ky. 792, 121 SW 699.

That it is not actual possession is too well settled to admit of doubt, see supra § 33.

9. Terry v. Loudermilk, 158 Ky. 353, 164 SW 959; Le Moyne v. Meadors, 156 Ky. 832, 162 SW 526; Partin v. American Assoc., 156 Ky. 323, 160 SW 1057; Brown v. White, 153 Ky. 452, 156 SW 96; Burt v. Sackett, 147 Ky. 232, 144 SW 34; Le Moyne v. Hays, 145 Ky. 415, 140 SW 552; Young v. Pace, 145 Ky. 405, 140 SW 555; Arthur v. Humble, 140 Ky. 56, 130 SW 958; Woodward v. Johnson, 122 Ky. 160, 90 SW 1076, 28 KyL 1091; Helton v. Strubbe, 62 SW 12, 22 KyL 1919; Taylor v. Combs, 50 SW 64, 20 KyL 1828.

[a] **Reason of rule.**—"His possession must be such as gives the world, and especially those in interest, notice of the extent of his claim." Le Moyne v. Hays, 145 Ky. 415, 417, 140 SW 552. See also Burt v. Sackett, 147 Ky. 232, 144 SW 34.

[b] **Application of rule.**—(1) Evidence that one owning land gave it to his son-in-law with other conterminous land which he did not own, and that the son-in-law entered on the latter land which was rough, uninclosed, mountain land, inclosed a few acres, and occasionally cut timber and tan bark on the part uninclosed, but did not claim to any well defined boundary, is insufficient on which to base adverse possession of such land other than the inclosed portion, since a trespasser cannot obtain possessory title unless he claims to a well marked boundary. Le Moyne v. Roundtree, 135 Ky. 40, 121 SW 960. (2) So the marking of the boundary of a tract claimed by plaintiff by adverse possession by following the lines of adjoining tracts owned by him is insufficient to show his hostile possession of the particular tract. Le Moyne v. Hays, 145 Ky. 415, 140 SW 552. (3) "And the occasional marking of a tree here and there, or the assertion of a claim to a boundary that begins, for example, 'at the top of a mountain' and runs 'to the top of a ridge,' and thence 'to a big flat rock' and thence 'to a poplar tree on a creek' is not such a boundary as will put the claimant without a deed in possession of the land to the boundary or outside of his settlement or enclosure." Burt v. Sackett, 147 Ky. 232, 240, 144 SW 34.

[c] **What boundaries sufficient.**—(1) Where lines around land claimed by one under adverse possession without color of title were marked on the ground at the time the survey was made and all corners called for were marked, the boundaries of the land were so marked as to enable the occupant to acquire title to the entire tract. Le Moyne v. Litton, (Ky.) 167 SW 912. (2) And it seems that a natural boundary might be sufficient. Arthur v. Humble, 140 Ky. 56, 130 SW 958.

10. Le Moyne v. Hays, 145 Ky. 415, 140 SW 552.

10¼. Kentucky Coal, etc., Dev. Co. v. Kentucky Union Co., 214 Fed. 590.

10½. Kentucky Coal, etc., Dev. Co. v. Kentucky Union Co., 214 Fed. 590.

11. Pratt v. Ard, 63 Kan. 182, 65

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said: "Where a person, without title, or color of title, enters upon a vacant lot, and actually occupies a portion of it, and the lot has a definite boundary marked upon the land, such person, by claiming to be the owner to the boundary lines of the lot, has a constructive possession of the whole, and will acquire a title to the whole by such partial occupation for fifteen years."[12] This principle has been reaffirmed in a decision which further holds that it is not essential to its application that the boundaries should have been erected by the adverse claimant.[13]

[§ 502] **d. In Pennsylvania.** In Pennsylvania a number of decisions appear to hold, without qualification, that one who has no color of title can acquire title only to so much land as he actually occupies.[14] On the other hand there are decisions which seem to place on the rule a qualification very similar to that established in Vermont.[15]

[§ 503] **e. In Texas.** In this state there are three periods of limitation for acquiring title by adverse possession, of three, five,[16] and ten years, respectively. The ten-year statute contains very peculiar provisions and is in some details a model of obscureness which it would tax the ingenuity of the legislature to duplicate. The full text thereof is set out in the notes hereto.[17] There has been considerable difference of opinion as to its proper construction. In a number of decisions in which the statute was not adverted to the court laid down the general rule, in accordance with that which obtains in most states, that, without color of title, title by adverse possession can be acquired only to such land as was actually occupied by the claimant.[18] But according to the weight of authority one without color of title may, by actual occupation of part of a larger tract, title to which is in another, acquire title to one hundred and sixty or six hundred and forty acres thereof, to which he claims title, according as his occupation may have been under the former or present ten-year statute, although he may have had actual possession of a much less number of acres than is designated in the statute.[19] Under the present statute one hundred and sixty acres is the limit of the amount which may be acquired in the absence of a recorded muniment of title fixing larger boundaries.[20] If the period of limitation had not elapsed before the amendment of the statute limiting the amount to be acquired to one hundred and sixty acres, although it had commenced before such time, the claimant would have been entitled to claim only the lesser amount of land;[21] but if the period of limitation had expired before the amendment of the statute, the claimant would have been entitled to hold the larger amount.[22] The statute has no application where the claimant holds under color of title; in such a case he can acquire title only to the land embraced in his color of title;[23] nor does it limit the amount of land to which title may be acquired by actual possession.[24] On the other hand it seems that if the occupant makes no claim beyond defined boundaries he cannot acquire title to more land than was included in such boundaries, although less than the amount designated in the statute.[25] To render the provisions of the statute operative it is not necessary that the one hundred and sixty acres should be inclosed;[26] and the fact that the claimant is the owner of an adjoining tract, or that the tract so occupied is carved out of a larger tract, will not affect the operation of the statute.[27] So the fact that part of a person's fence and improved land lies on another survey adjoining the one on which he has his residence and the remainder of his improvements does not prevent his recovery of one hundred and sixty acres of the section on which he lives.[28] But it is essential that the part actually occupied should be within the tract claimed.[29] In ac-

P 255; Sage v. Morosick, 69 Minn. 167, 71 NW 930.

12. Hodges v. Eddy, 38 Vt. 327, 346. Compare Langdon v. Templeton, 66 Vt. 173, 28 A 866.

13. Lang v. Clark, 85 Vt. 222, 233, 81 A 625 (where per Haselton, J., said: "Actual possession of a part of a lot may give constructive possession of the whole lot, if it has boundaries sufficiently well indicated by whomsoever those boundaries may have been erected or indicated upon the land").

14. Bishop v. Lee, 3 Pa. 214; McCaffrey v. Fischer, 4 Watts & S. (Pa.) 181; Royer v. Benlow, 10 Serg. & R. (Pa.) 303; Miller v. Shaw, 7 Serg. & R. (Pa.) 129; Hall v. Powel, 4 Serg. & R. (Pa.) 456, 8 AmD 722. See also Pennsylvania cases supra § 497.

15. Fitch v. Mann, 8 Pa. 503; Bell v. Hartley, 4 Watts & S. (Pa.) 32; Thompson v. Milford, 7 Watts (Pa.) 442 (all holding that an actual adverse possession for the requisite period gives title not only to that part of it which was cleared and cultivated but also to all that was included within definitely marked boundaries up to which the adverse occupant claimed). See also Barnhart v. Pettit, 22 Pa. 135 (where it was held that if the adverse occupant claims up to the line of the true owner's survey, using it as his own, exercising the usual acts of ownership over and paying taxes upon the whole tract twenty-one years before the suit is brought, the statute will protect him for the whole).

16. See Texas cases supra § 497 note 2.

17. "Any person who has the right of action for the recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward." Tex. Rev. St. (1895) art 3343.

"The peaceable and adverse possession contemplated in the preceding article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually inclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument." Tex. Rev. St. (1895) art 3344.

18. Claiborne v. Elkins, 79 Tex. 380, 15 SW 395; Evans v. Foster, 79 Tex. 48, 15 SW 170; Evitts v. Roth, 61 Tex. 81; Cantagrel v. Von Lupin, 58 Tex. 570; Whitehead v. Foley, 28 Tex. 268.

19. Lewis v. Dillingham, 167 Fed. 779, 93 CCA 267 (construing Texas statute); Giddings v. Fischer, 97 Tex. 184, 77 SW 209; Simpson v. Johnson, 92 Tex. 159, 46 SW 628; Voight v. Mackle, 71 Tex. 78, 8 SW 623; Craig v. Cartwright, 65 Tex. 413; Pearson v. Boyd, 62 Tex. 541; Mooring v. Campbell, 47 Tex. 37; Word v. Drouthett, 44 Tex. 365; Smith v. De la Garza, 15 Tex. 150; Charle v. Saffold, 13 Tex. 94; Carlock v. Willard, (Tex. Civ. A.) 149 SW 363; Lutcher v. Grant, (Tex. Civ. A.) 143 SW 1190; Houston Oil Co. v. McGrew, (Tex. Civ. A.) 143 SW 191; Ridgell v. Atherton, (Tex. Civ. A.) 107 SW 129; Doom v. Taylor, 35 Tex. Civ. A. 220, 120 SW 1020; Rice v. Eardley, 34 Tex. Civ. A. 60, 77 SW 416; Nativel v. Raymond, (Tex. Civ. A.) 59 SW 311; Texas, etc., R. Co. v. Bancroft, (Tex. Civ. A.) 56 SW 606; McCarty v. Johnson, 20 Tex. Civ. A. 184, 49 SW 1098. See also Benavides v. Molino, (Tex. Civ. A.) 60 SW 260 (where this doctrine is fully recognized).

20. Fulshear v. Deadman, (Tex. Civ. A.) 154 SW 616; New Orleans State Nat. Bank v. Roberts, (Tex. Civ. A.) 103 SW 454; Watts v. Bruce, 31 Tex. Civ. A. 347, 72 SW 258.

21. Bullock v. Smith, 72 Tex. 545, 10 SW 687; Snowden v. Rush, 69 Tex. 593, 6 SW 767; Eldridge v. Anderson, 8 Tex. Civ. A. 152, 27 SW 724; Hardy v. Dunlap, 7 Tex. Civ. A. 339, 26 SW 852.

22. Simpson v. Johnson, 92 Tex. 159, 46 SW 628; Johnson v. Simpson, 22 Tex. Civ. A. 290, 54 SW 808.

23. Thompson v. Dutton, 96 Tex. 205, 71 SW 544.

24. Craig v. Cartwright, 65 Tex. 413; Benavides v. Molino, (Tex. Civ. A.) 60 SW 260.

25. McCarty v. Johnson, 20 Tex. Civ. A. 184, 48 SW 1098.

26. Price v. Eardley, 34 Tex. Civ. A. 60, 77 SW 416; Nativel v. Raymond, (Tex. Civ. A.) 59 SW 311.

27. Texas, etc., R. Co. v. Broom, 53 Tex. Civ. A. 78, 114 SW 655.

28. Houston Oil Co. v. McGrew, (Tex. Civ. A.) 143 SW 191 (holding, however, that he may not by his settlement and occupancy recover any portion of the adjoining section after his recovery of the one hundred and sixty acres).

29. Giddings v. Fischer, 97 Tex. 184, 77 SW 209; Vann v. Denson, 56 Tex. Civ. A. 220, 120 SW 1020; Rice v. Goolsbee, 45 Tex. Civ. A. 254, 99 SW 1031. And see Davis v. Houston

cordance with the general rule relating to adverse possession there must of course be a claim of title on the part of the adverse occupant, but there is a conflict of authority as to the nature and extent of the claim which will suffice to give the occupant the benefit of the statute. In view of the obscurity of its wording this seems inevitable, and it would, no doubt, have been better to declare the statute void for uncertainty at the outset. Of course no question as to the sufficiency of the claim can arise when the occupant on entry correctly designates one hundred and sixty acres of the larger tract by lines and corners and thereafter uses, occupies, and claims to such designated lines for the statutory period.[30] And where the occupation is of a tract entirely inclosed by a fence and by natural barriers, and the parties claim the land as bounded by the lines of a survey on the ground, the occupant acquires title by ten years' possession against one having notice of the claim, although the field notes in the patent for the tract place it elsewhere.[31] But there is a sharp conflict of authority as to whether it is necessary to designate the one hundred and sixty acres claimed. According to many decisions it is essential that the occupant should have claimed certain designated land. Merely to claim one hundred and sixty acres in a larger tract, without in any way designating which one hundred and sixty acres was claimed, will not suffice.[32] On the other hand it has been held by some of the decisions of the court of appeals that the occupant may acquire title to one hundred and sixty acres of a larger tract by claiming title to the entire tract, so long as the occupancy and improvements are on the one hundred and sixty acres.[33] This seems to be the view held by the supreme court, although the construction placed on its decisions by the various branches of the courts of appeals is not uniform.[34] If the claimant on entering causes the statutory number of acres to be surveyed and marked off, he may acquire a right to the specific lands thus designated.[35] If no specific one hundred and sixty acres claimed is so designated, the parties would be left to such methods as would apply to any other joint owners of a tract of land, which would be by mutual agreement or judgment, and the occupant after the completion of limitation could not arbitrarily survey and set apart for himself such portion of the land as he might choose, and for him to recover upon such a survey it must appear to be a proper allotment of the land with justice to both parties.[36]

[§ 504] **f. In England.** In England the rule seems to be that "where title is founded on an adverse possession the title will be limited to that area of which actual possession has been enjoyed, and that as a general rule constructive possession of a wider area will only be inferred from actual possession of the limited area, if the inference of such wider possession is necessary in order to give effect to contractual obligations, or to preserve the good faith and honesty of a bargain."[37]

[§ 505] **4. Rule, How Affected by Subsequent Acquisition of Color of Title.** One who without color of title enters upon a tract of unoccupied real property and takes visible, open, and notorious possession of a part thereof cannot extend his possession so as to embrace the whole tract merely by obtaining color of title thereto subsequently to his entry and continuing to occupy only the land of which he originally took actual possession.[38] One having title

Oil Co., 50 Tex. Civ. A. 597, 111 SW 219.

30. Texas, etc., R. Co. v. Broom, 53 Tex. Civ. A. 78, 114 SW 655 (holding further that it was immaterial that the lines were not run out in a very artistic way, so long as the corners were correctly fixed and the lines properly marked); Smith v. Simpson Bank, 52 Tex. Civ. A. 108, 113 SW 568 (holding, however, that the occupant cannot claim to particular boundaries shown by the cutting of timber by his predecessor less than ten years before suit brought). And see Lewis v. Dillingham, 167 Fed. 779 (holding that it was sufficient to establish the right to one hundred and sixty acres of a large tract that claimant had resided thereon continuously for thirty-five years, during which time he had made improvements and fenced and cultivated a portion, where it was shown that he had always claimed one hundred and sixty acres which he had caused to be surveyed some seven or eight years before suit, and that previous to that time he had claimed by practically the same boundaries).

31. Kansas City Oil, etc., Co. v. Ogden, (Tex. Civ. A.) 140 SW 808 (where it was said that under such facts it is wholly immaterial where the field notes in the patent may place the one hundred and sixty acres in controversy).

32. Houston Oil Co. v. Dowden, 202 Fed. 714; Houston Oil Co. v. Farr, 182 Fed. 491; Houston Oil Co. v. Jenkins, 182 Fed. 489; Lewis v. Dillingham, 167 Fed. 779 (all construing Texas statute); Dupont v. Texas, etc., R. Co., (Tex. Civ. A.) 158 SW 195; Williams v. Texas, etc., R. Co., 52 Tex. Civ. A. 217, 114 SW 877; Rice v. Goolsbee, 45 Tex. Civ. A. 254, 256, 99 SW 1031 (where Gill, J., said: "One claiming under the ten year statute by naked possession can not extend that possession by construction unless he has maintained . . . an open claim to a distinct and defined tract less than the entire survey. . . . We understand this to be the doctrine distinctly announced in Giddings v. Fischer, 97 Tex. 184, 77 SW 209, and Titel v. Garland, 13 Tex. Ct. Rep. 335"). And see White v. Eavenson, 46 Tex. Civ. A. 158, 101 SW 1029.

33. Houston Oil Co. v. McGrew, (Tex. Civ. A.) 143 SW 191; Louisiana, etc., Lumber Co. v. Kennedy, (Tex. Civ. A.) 142 SW 989 (holding that where plaintiff in possession of a portion of a larger survey claims one hundred and sixty acres of the survey and also a specific one hundred and sixty acres surveyed by a certain surveyor and establishes his claim to an undivided one hundred and sixty acres, although failing to prove a claim to a specific portion, he is entitled to have one hundred and sixty acres surveyed out of the larger tract by the court); Louisiana, etc., Lumber Co. v. Stewart, (Tex. Civ. A.) 130 SW 199; Vann v. Denson, 56 Tex. Civ. A. 220, 120 SW 1020; Bering v. Ashley, (Tex. Civ. A.) 30 SW 838. And see Davis v. Houston Oil Co., 50 Tex. Civ. A. 597, 111 SW 219 (where it was held immaterial that the one hundred and sixty acres formed part of a larger tract and had never been actually surveyed or in any manner segregated from the balance of the tract where the improvements were made about the center of the one hundred and sixty acre tract, the inclosures embracing about one hundred and sixty acres).

34. Louisiana, etc., Lumber Co. v. Kennedy, (Tex.) 126 SW 1110 [rev (Civ. A.) 119 SW 884]; Giddings v. Fischer, 97 Tex. 184, 77 SW 209.

35. McCarty v. Johnson, 20 Tex. Civ. A. 184, 49 SW 1098.

36. Louisiana, etc., Lumber Co. v. Kennedy, (Tex.) 126 SW 1110 [rev (Civ. A.) 119 SW 884]. And see Smith v. Simpson Bank, 52 Tex. Civ. A. 108, 113 SW 568 (holding that defendant in trespass to try title, who claims one hundred and sixty acres through actual occupancy of a part thereof, cannot claim one hundred and sixty acres to particular boundaries shown by the cutting of timber by his predecessor less than ten years before the suit was brought, although he is entitled to have one hundred and sixty acres set aside to him, including the improvements); Bering v. Ashley, (Tex. Civ. A.) 30 SW 838 (holding that if the statutory number of acres has not been defined by specific metes and bounds for the statutory period, judgment will be given for one hundred and sixty acres to be defined under the instructions of the court so as to include the claimant's improvements).

37. Glyn v. Howell, [1909] 1 Ch. 666, 678.

38. Barber v. Robinson, 78 Minn. 193, 199, 80 NW 968 (where it was said: "The reason for the doctrine that when a man enters upon land claiming a right and title to the same under color of a conveyance, and acquires a seisin by his entry, his seisin will extend to the whole tract, there being no adverse actual possession in the way, is because an entry on part of the land is deemed to be an entry and an ouster as to the whole. The entry and the possession are referred to the claim of title, and are co-extensive with the boundaries stated in the conveyance or other written instrument under which entry has been made. But when an entry is not under color of title there is no invasion or disseisin which notifies the true owner of a claim asserted by another person, or which gives him a right of action, except as to the land actually occupied. As between the owner and the invader, actual occupation of a part divides the possession which has theretofore been constructively in the former, so that as to the occupied land possession is in the latter. The true

to a parcel of land cannot extend his possession by construction to adjoining land merely by obtaining title thereto without taking actual possession of any part of it or doing any other act to give the owner notice of an adverse claim.[39]

[§ 506] **5. Effect of Abandonment of Possession by Claimant.** Where one in actual possession without title abandons the actual possession of lands, the constructive possession of the owner is immediately restored.[40]

[§ 507] **C. Where Claimant Has Color of Title—1. Statement of General Rule as to Effect of Possession of Part.** The general rule is well settled that where a person enters, under color of title, into the actual occupancy of a part of the premises described in the instrument giving color of title, his possession is not considered as confined to that part of the premises in his actual occupancy, but that such occupant acquires possession of all the lands embraced in the instrument under which he claims,[41]

owner is not subsequently dispossessed and disseised by the obtaining of color of title to the whole tract by the adverse claimant. Possession of the whole cannot be drawn to the occupant of a part in that way"); Holland v. Nance, 102 Tex. 177, 183, 114 SW 346 [rev (Civ. A.) 107 SW 102] (where Brown, J., said: "The record of a deed does not constitute possession of the land, and, in fact, is not notice of possession. When a party has actual possession of a portion of a tract of land and has a deed for it upon record, that record is notice to all those who claim in opposition to him as to the character of his claim and the extent of it, but without possession adverse owners are not charged with notice of the fact that the deed is upon record or that any claim is made to the land").

39. Bowling v. Breathitt Coal, etc., Co., 134 Ky. 249, 120 SW 317; Spriggs v. Simpkins, 78 SW 900, 25 KyL 1788; Hill v. Harris, 26 Tex. Civ. A. 408, 64 SW 820. Contra Bon Air Coal, etc., Co. v. Parks, 94 Tenn. 263, 29 SW 130. In this case A entered as a naked trespasser on a large tract of land belonging to B and inclosed and held forty or fifty acres of it for a term of seven years openly, continuously, and adversely, thereby acquiring a possessory title to that portion of the land. After having acquired this possessory right A obtained an entry for a larger portion of B's lands, including the portion previously inclosed. A's possession was continued for seven years after this entry but never extended beyond its original inclosures. It was held that A's possession extended to the boundaries of his entry and invested him with a possessory right to all the land therein embraced.

40. Potts v. Gilbert, 19 F. Cas. No. 11,347, 3 Wash. C. C. 475.

41. U. S.—Montoya v. Gonsales, 232 U. S. 375, 34 SCt 413; Smith v. Gale, 144 U. S. 509, 12 SCt 674, 36 L. ed. 521; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 SCt 239, 35 L. ed. 1063; Hunnicutt v. Peyton, 102 U. S. 333, 26 L. ed. 113; Pike v. Evans, 94 U. S. 6, 24 L. ed. 40; Gregg v. Tesson, 1 Black 150, 17 L. ed. 74; Lea v. Polk County Copper Co., 21 How. 493, 16 L. ed. 203; Clymer v. Dawkins, 3 How. 674, 11 L. ed. 778; Ellicott v. Pearl, 10 Pet. 412, 9 L. ed. 475 [aff 8 F. Cas. No. 4,386, 1 McLean 206]; Clarke v. Courtney, 5 Pet. 354, 8 L. ed. 140; Barr v. Gratz, 4 Wheat. 213, 4 L. ed. 553; McIvers v. Ragan, 2 Wheat. 25, 4 L. ed. 175; Houston Oil Co. v. Goodrich, 213 Fed. 136; Scott v. Mineral Dev. Co., 130 Fed. 497, 64 CCA 659; Treece v. American Assoc., 122 Fed. 598, 58 CCA 266; Scaife v. Western North Carolina Land Co., 90 Fed. 238, 33 CCA 47; Western North Carolina Land Co. v. Scaife, 80 Fed. 352, 25 CCA 461; Kingman v. Holthaus, 59 Fed. 305; Van Gunden v. Virginia Coal, etc., Co., 52 Fed. 838, 3 CCA 294; Santee River Cypress Lumber Co. v. James, 50 Fed. 360; Fussell v. Hughes, 8 Fed. 384 [aff 113 U. S. 565, 5 SCt 639, 28 L. ed. 998]; Fraser v. Hunter, 9 F. Cas. No. 5,063, 5 Cranch C. C. 470; Jackson v. Porter, 13 F. Cas. No. 7,143, 1 Paine 457; Prescott v. Nevers, 19 F. Cas. No. 11,390, 4 Mason 326.

Ala.—Swindall v. Ford, 63 S 651; Montevallo Min. Co. v. Southern Mineral Land Co., 174 Ala. 137, 57 S 377; McMillan v. Aikin, 62 S 519; Marietta Fertilizer Co. v. Blair, 173 Ala. 524, 56 S 131; Alabama State Land Co. v. Matthews, 168 Ala. 200, 53 S 174; Clarke v. Dunn, 161 Ala. 633, 50 S 93; Barry v. Madaris, 156 Ala. 475, 47 S 152; Campbell v. Bates, 143 Ala. 338, 39 S 144; Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45; Barrett v. Kelly, 131 Ala. 378, 30 S 824; Bowling v. Mobile, etc., R. Co., 128 Ala. 550, 29 S 584; Doe v. Edmondson, 127 Ala. 445, 30 S 61; Reddick v. Long, 124 Ala. 260, 27 S 402; Smith v. Keyser, 115 Ala. 455, 22 S 149; Zundel v. Baldwin, 114 Ala. 328, 21 S 420; Augusta Nat. Bank v. Baker Hill Iron Co., 108 Ala. 635, 19 S 47; Carter v. Chevalier, 108 Ala. 563, 19 S 798; Doe v. Beck, 108 Ala. 71, 19 S 802; Gist v. Beaumont, 104 Ala. 347, 16 S 20; Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 9 S 537; Cogsbill v. Mobile, etc., R. Co., 92 Ala. 252, 9 S 512; Lucy v. Tennessee, etc., R. Co., 92 Ala. 246, 8 S 806; Doe v. Anderson, 79 Ala. 209; Burks v. Mitchell, 78 Ala. 61; Beard v. Ryan, 78 Ala. 37; Watson v. Mancill, 76 Ala. 600; Louisville, etc., R. Co. v. Boykin, 76 Ala. 560; Childress v. Calloway, 76 Ala. 128; Gordon v. Tweedy, 74 Ala. 232, 49 AmR 813; Humes v. Bernstein, 72 Ala. 546; Stovall v. Fowler, 72 Ala. 77; Baucum v. George, 65 Ala. 259; Bell v. Denson, 56 Ala. 444; Farley v. Smith, 39 Ala. 38.

Ark.—Snow v. State, 85 Ark. 203, 107 SW 980, 122 AmSR 23; Van Etten v. Daugherty, 83 Ark. 534, 103 SW 737; Connerly v. Dickinson, 81 Ark. 258, 99 SW 82; Wheeler v. Foote, 80 Ark. 435, 97 SW 447; Bradbury v. Dumond, 80 Ark. 82, 96 SW 390, 11 LRANS 772 and note [cit Cyc]; Jones v. Pond, etc., Mfg. Co., 79 Ark. 194, 96 SW 756; Rucker v. Dixon, 78 Ark. 99, 93 SW 750; Boynton v. Ashabranner, 75 Ark. 514, 88 SW 568; Haggart v. Ranney, 73 Ark. 344, 84 SW 703; Crill v. Hudson, 71 Ark. 390, 74 SW 299; Sparks v. Farris, 71 Ark. 117, 71 SW 255, 945; Nicklace v. Dickerson, 65 Ark. 422, 46 SW 945; Wilson v. Spring, 38 Ark. 181; Mooney v. Cooledge, 30 Ark. 640; Ledbetter v. Fitzgerald, 1 Ark. 448.

Cal.—Owsley v. Matson, 156 Cal. 401, 404, 104 P 983 [cit Cyc]; Andrus v. Smith, 133 Cal. 78, 65 P 320; Dougherty v. Miles, 97 Cal. 568, 32 P 597; Wilson v. Atkinson, 77 Cal. 485, 20 P 66, 11 AmSR 299; Goodwin v. McCabe, 75 Cal. 584, 17 P 705; Webber v. Clarke, 74 Cal. 11, 15 P 431; Packard v. Moss, 68 Cal. 123, 8 P 818; Donahue v. Gallavan, 43 Cal. 573; Russell v. Harris, 38 Cal. 426, 99 AmD 421; Bernal v. Gleim, 33 Cal. 668; Ayres v. Bensley, 32 Cal. 620; Davis v. Perley, 30 Cal. 630; Hicks v. Coleman, 25 Cal. 122, 85 AmD 103; Kile v. Tubbs, 23 Cal. 431.

Conn.—New Haven Steamboat Co. v. Sargent, 50 Conn. 199, 49 AmR 632.

Dak.—Gale v. Shillock, 4 Dak. 182, 29 NW 661 [aff 144 U. S. 509, 12 SCt 674, 36 L. ed. 521].

D. C.—Dangerfield v. Williams, 26 App. 508; Mackall v. Mitchell, 18 App. 58; Keefe v. Bramhall, 14 D. C. 551.

Fla.—Kendrick v. Latham, 25 Fla. 819, 6 S 871; Doyle v. Wade, 23 Fla. 90, 1 S 516, 11 AmSR 334.

Ga.—Smith v. Donalson, 137 Ga. 465, 73 SE 577; Dodge v. Cowart, 131 Ga. 549, 62 SE 987; Baxter v. Wetherington, 128 Ga. 801, 58 SE 467; Harriss v. Howard, 126 Ga. 325, 55 SE 59; O'Brien v. Fletcher, 123 Ga. 427, 51 SE 405; Furgerson v. Bagley, 95 Ga. 516, 20 SE 241; Walker v. Hughes, 90 Ga. 52, 15 SE 912; Wood v. Crawford, 75 Ga. 733; Veal v. Robinson, 70 Ga. 809; Hammond v. Crosby, 68 Ga. 767; White v. Rowland, 67 Ga. 546, 44 AmR 731; Anderson v. Dodd, 65 Ga. 402; Tritt v. Roberts, 64 Ga. 156; Weitman v. Thiot, 64 Ga. 11; Janes v. Patterson, 62 Ga. 527; Parker v. Jones, 57 Ga. 204; Clark v. Hulsey, 54 Ga. 608; McCamy v. Higdon, 50 Ga. 629; Field v. Boynton, 33 Ga. 239; Wiley v. Warmock, 30 Ga. 701; Grimes v. Ragland, 28 Ga. 123; Walls v. Smith, 19 Ga. 8; Royall v. Lisle, 15 Ga. 545, 60 AmD 712; Beverly v. Burke, 9 Ga. 440, 54 AmD 351; Tison v. South Georgia R. Co., 8 Ga. A. 91, 68 SE 651.

Ill.—White v. Harris, 206 Ill. 584, 69 NE 519; Bellefontaine Impr. Co. v. Niedringhaus, 181 Ill. 426, 55 NE 134, 72 AmSR 269; Wahl v. Laubersheimer, 174 Ill. 338, 51 NE 860; Chicago, etc., R. Co. v. Grant, 167 Ill. 489, 47 NE 750; Harms v. Kransz, 167 Ill. 421, 47 NE 746; Zirngibl v. Calumet, etc., Canal, etc., Co., 157 Ill. 430, 42 NE 431; Peoria, etc., R. Co. v. Tamplin, 156 Ill. 285, 40 NE 960; Johns v. McKibben, 156 Ill. 71, 40 NE 449; East St. Louis, etc., R. Co. v. Nugent, 147 Ill. 254, 35 NE 464; Sholl v. German Coal Co., 139 Ill. 21, 28 NE 748; Fisher v. Bennehoff, 121 Ill. 426, 13 NE 150; Whitford v. Drexel, 118 Ill. 600, 9 NE 268; Grand Tower Min., etc., Co. v. Gill, 111 Ill. 541; Lancey v. Brock, 110 Ill. 609; Keith v. Keith, 104 Ill. 397; Schneider v. Botsch, 90 Ill. 577; Coleman v. Billings, 89 Ill. 183; Hubbard v. Kiddo, 87 Ill. 578; Scott v. Delany, 87 Ill. 146; Kerr v. Hitt, 75 Ill. 51; Austin v. Rust, 73 Ill. 491; Weber v. Anderson, 73 Ill. 439; Barger v. Hobbs, 67 Ill. 592; Higgins v. Crosby, 40 Ill. 260; Bowman v. Wettig, 39 Ill. 416; Brooks v. Bruyn, 35 Ill. 392; Hardisty v. Glenn, 32 Ill. 62; Welch v. Louis, 31 Ill. 446; Williams v. Ballance, 23 Ill. 193, 74 AmD 187; Hinchman v. Whetstone, 23 Ill. 185; Morrison v. Kelly, 22 Ill. 609, 74 AmD 169; Brooks v. Bruin, 18 Ill. 539; Goewey v. Urig, 18 Ill. 238; Turney v. Chamberlain, 15 Ill. 271; Fairman v. Beal, 14 Ill. 244; Davis v. Easley, 13 Ill. 192; Nauman v. Burch, 91 Ill. A. 48; Faith v. Yocum, 51 Ill. A. 620.

Ind.—Howard v. Twibell, 100 NE 372; Sinclair v. Gunzenhauser, 98 NE 37; Moore v. Hinkle, 151 Ind. 343, 50 NE 822; Worthley v. Burbanks, 146 Ind. 534, 45 NE 779; Wilson v. Johnson, 145 Ind. 40, 38 NE 38, 43 NE 930; Dyer v. Eldridge, 136 Ind. 654, 36 NE 522; Noblesville v. Lake Erie, etc., R. Co., 130 Ind. 1, 29 NE 484; Roots v. Beck, 109 Ind. 472, 9 NE 698; Wright v. Kleyla, 104 Ind. 223, 4 NE 16; Bell v. Longworth, 6 Ind. 273.

Iowa.—Libbey v. Young, 103 Iowa 258, 72 NW 520; Chicago, etc., R. Co. v. Allfree, 64 Iowa 500, 20 NW 779; Watters v. Connelly, 59 Iowa 217, 13 NW 82; Tremaine v. Weatherby, 58 Iowa 615, 12 NW 609; Colvin v. McCune, 39 Iowa 502; Teabout v. Daniels, 38 Iowa 158; Hamilton v. Wright, 30 Iowa 480; Fleming v. Maddox, 30 Iowa 239; Langworthy v. Myers, 4

provided of course there is no other person or per- | sons else who are in the actual occupancy of the

Iowa 18; Kerr v. Leighton, 2 Greene 196.

Kan.—Goodman v. Nichols, 44 Kan. 22, 23 P 957; Gildehaus v. Whiting, 39 Kan. 706, 18 P 916.

Ky.—Duff v. Hagins, 146 Ky. 792, 143 SW 378; Slaven v. Dority, 142 Ky. 640, 134 SW 1166; White v. McNabb, 140 Ky. 828, 131 SW 1021; Dils v. Justice, 137 Ky. 822, 127 SW 472; Richie v. Owsley, 137 Ky. 63, 121 SW 1015; Hillman Land, etc., Co. v. Marshall, 119 SW 180; Taylor v. Burt, etc., Lumber Co., 109 SW 348, 33 KyL 191; King v. See, 87 SW 758, 27 KyL 1011; Cuyler v. Bush, 84 SW 579, 27 KyL 148; Middlesboro Waterworks v. Neal, 105 Ky. 586, 49 SW 428, 20 KyL 1403; Sullivan v. Evans, 29 SW 619, 16 KyL 712; Mullins v. Faulkner, 20 SW 273, 14 KyL 436; Franklin Academy v. Hall, 16 B. Mon. 472; McLawrin v. Salmons, 11 B. Mon. 96, 52 AmD 563; Chiles v. Conley, 9 Dana 385; Harrison v. McDaniel, 2 Dana 348; Moss v. Scott, 2 Dana 271; Smith v. Frost, 2 Dana 144; Moss v. Currie, 1 Dana 266; Taylor v. Buckner, 2 A. K. Marsh. 18, 12 AmD 354; Kendall v. Slaughter, 1 A. K. Marsh. 375; Daniel v. Ellis, 1 A. K. Marsh. 60, 10 AmD 707; Thomas v. Harrow, 4 Bibb 563; Fox v. Hinton, 4 Bibb 559; Cameron v. Beatty, 6 KyL 589.

La.—Louisiana Land Co. v. Blakewood, 131 La. 539, 59 S 984; Leonard v. Garrett, 128 La. 535, 54 S 984; Railsback v. Leonard, 118 La. 916, 43 S 548; Mott v. Hopper, 116 La. 629, 40 S 921; George v. Cole, 109 La. 816, 33 S 784; Green v. Witherspoon, 37 La. Ann. 751; Landry v. Tullier, 9 La. Ann. 100; Winston v. Prevost, 6 La. Ann. 164; Gillard v. Glenn, 1 Rob. 159; Maes v. Gillard, 7 Mart. N. S. 314; Henderson v. St. Charles Church, 7 Mart. N. S. 117; Sanchez v. Gonzales, 11 Mart. 207; Prevost v. Johnson, 9 Mart. 123; Donegan v. Matineau, 9 Mart. 43.

Me.—Kelley v. Jones, 110 Me. 360, 86 A 252; Hornblower v. Banton, 103 Me. 375, 69 A 568, 125 AmSR 300; Banton v. Herrick, 101 Me. 134, 63 A 671; Richardson v. Watts, 94 Me. 476, 48 A 180; Brackett v. Persons Unknown, 53 Me. 228, 87 AmD 548; Gardner v. Gooch, 48 Me. 487; Putnam Free School v. Fisher, 34 Me. 172; Noyes v. Dyer, 25 Me. 468; Treat v. Strickland, 23 Me. 234; French v. Rollins, 21 Me. 372; Kennebec Purchase v. Laboree, 2 Me. 275, 11 AmD 79; Little v. Megquier, 2 Me. 176.

Md.—Schlossnagle v. Kolb, 97 Md. 285, 54 A 1006; Zion Church v. Hilken, 84 Md. 170, 35 A 9; Kopp v. Herrman, 82 Md. 339, 33 A 646; Gump v. Sibley, 79 Md. 165, 28 A 977; Parker v. Wallis, 60 Md. 15, 45 AmR 703; Baker v. Swan, 32 Md. 355; Casey v. Inloes, 1 Gill 430, 39 AmD 658; Hammond v. Ridgely, 5 Harr. & J. 245, 9 AmD 522; Cheney v. Ringgold, 2 Harr. & J. 87.

Mass.—Murphy v. Com., 187 Mass. 361, 73 NE 524; Marcy v. Stone, 8 Cush. 4, 54 AmD 736; Jackson v. Boston, etc., R. Corp., 1 Cush. 575; Sparhawk v. Bullard, 1 Metc. 95; Poignard v. Smith, 8 Pick. 272; Kennebeck Purchase v. Springer, 4 Mass. 416, 3 AmD 227.

Mich.—Kingston v. Guck, 155 Mich. 264, 118 NW 967; Lang v. Osceola Consol. Min. Co., 145 Mich. 370, 108 NW 678; Fuller v. Swensberg, 106 Mich. 305, 64 NW 463, 58 AmSR 481; Clark v. Campau, 92 Mich. 573, 52 NW 1026; Carpenter v. Monks, 81 Mich. 103, 45 NW 477; Greene v. Anglemire, 77 Mich. 168, 43 NW 772; Marble v. Price, 54 Mich. 466, 20 NW 531; Campau v. Campau, 44 Mich. 31, 6 NW 1062; Millerd v. Reeves, 1 Mich. 107.

Minn.—Barber v. Robinson, 82 Minn. 112, 84 NW 732; Miesen v. Canfield, 64 Minn. 513, 67 NW 632; McRoberts v. McArthur, 62 Minn. 310, 64 NW 903; Dean v. Goddard, 55 Minn. 290, 56 NW 1060; Murphy v. Doyle, 37 Minn. 113, 33 NW 220.

Miss.—Davis v. Davis, 68 Miss. 478, 10 S 70; Jones v. Gaddis, 67 Miss. 761, 7 S 489; Ryan v. Mississippi Valley, etc., R. Co., 62 Miss. 162; Green v. Irving, 54 Miss. 450, 28 AmR 360; Wilson v. Williams, 52 Miss. 487; Welborn v. Anderson, 37 Miss. 155; Hanna v. Renfro, 32 Miss. 125; Sessions v. Reynolds, 15 Miss. 130. See Mitchell v. Bond, 84 Miss. 72, 36 S 148.

Mo.—Brown v. Hartford, 173 Mo. 183, 73 SW 140; Stevens v. Martin, 168 Mo. 407, 68 SW 347; Plaster v. Grabeel, 160 Mo. 669, 61 SW 589; Heinemann v. Bennett, 144 Mo. 113, 45 SW 1092; Pharis v. Jones, 122 Mo. 125, 26 SW 1032; Allen v. Mansfield, 108 Mo. 343, 18 SW 901; Ozark Plateau Land Co. v. Hays, 105 Mo. 143, 16 SW 957; Callahan v. Davis, 103 Mo. 444, 15 SW 433; Hargis v. Kansas City, etc., R. Co., 100 Mo. 210, 13 SW 680; Hickman v. Link, 97 Mo. 482, 10 SW 600; Harbison v. School Dist. No. 1, 89 Mo. 184, 1 SW 30; Gaines v. Saunders, 87 Mo. 557; Childs v. Thompson, 81 Mo. 337; Hughes v. Israel, 73 Mo. 538; Lynde v. Williams, 68 Mo. 360; Mylar v. Hughes, 60 Mo. 105; Caldwell v. Stephens, 57 Mo. 589; Long v. Higginbotham, 56 Mo. 245; Ware v. Johnson, 55 Mo. 500; Powell v. Davis, 54 Mo. 315; Chapman v. Templeton, 53 Mo. 463; Crispen v. Hannavan, 50 Mo. 536; Fugate v. Pierce, 49 Mo. 441; De Graw v. Taylor, 37 Mo. 310; Johnson v. Prewitt, 32 Mo. 553; Schultz v. Lindell, 30 Mo. 310; Kincaid v. Logue, 7 Mo. 166; Morgan v. Pott, 124 Mo. A. 371, 101 SW 717; McElhinney v. Kraus, 10 Mo. A. 218.

Nebr.—Draper v. Taylor, 58 Nebr. 787, 79 NW 709; Troxell v. Johnson, 52 Nebr. 46, 71 NW 968; Omaha, etc., R. Co. v. Rickards, 38 Nebr. 847, 57 NW 739.

N. H.—Bellows v. Jewell, 60 N. H. 420; Melcher v. Flanders, 40 N. H. 139; Farrar v. Fessenden, 39 N. H. 268; Little v. Downing, 37 N. H. 355; Tappan v. Tappan, 31 N. H. 41; Hoag v. Wallace, 28 N. H. 547; Bailey v. Carleton, 12 N. H. 9, 37 AmD 190; Waldron v. Tuttle, 4 N. H. 371.

N. J.—Dem v. Hunt, 20 N. J. L. 487.

N. M.—Montoya v. Unknown Heirs, 16 N. M. 349, 120 P 676.

N. Y.—Northport Real Est., etc., Co. v. Hendrickson, 139 N. Y. 440, 34 NE 1057; Donohue v. Whitney, 133 N. Y. 178, 30 NE 848; Edwards v. Noyes, 65 N. Y. 125; Thompson v. Burhans, 61 N. Y. 52; Munro v. Merchant, 28 N. Y. 9; Crary v. Goodman, 22 N. Y. 170; Wright v. Saddler, 20 N. Y. 320; New York Cent., etc., R. Co. v. Brennan, 24 App. Div. 343, 48 NYS 675 [aff 163 N. Y. 584 mem, 57 NE 1119 mem]; Stillman v. Burfeind, 21 App. Div. 13, 47 NYS 280; Weeks v. Martin, 57 Hun 589, 10 NYS 656; Swettenham v. Leary, 18 Hun 284; Frantz v. Ireland, 66 Barb. 386; Finlay v. Cook, 54 Barb. 9; Dominy v. Miller, 33 Barb. 386; Lane v. Gould, 10 Barb. 254; Bennett v. Kovarick, 23 Misc. 73, 51 NYS 752 [aff 44 App. Div. 629 mem, 60 NYS 1133 mem]; Burk v. Spinning, 2 NYSt 221; Jackson v. Oltz, 8 Wend. 440; Jackson v. Warford, 7 Wend. 62; La Frombois v. Jackson, 8 Cow. 589, 18 AmD 463; Jackson v. Vermilyea, 6 Cow. 677; Jackson v. Frost, 5 Cow. 346; Jackson v. Woodruff, 1 Cow. 276, 13 AmD 525; Jackson v. Wheat, 18 Johns. 40; Jackson v. Murray, 7 Johns. 5; Jackson v. Schoonmaker, 2 Johns. 230; Jackson v. Bowen, 1 Cai. 358, 2 AmD 193.

N. C.—Stewart v. McCormick, 164 N. C. 625, 77 SE 761; Ray v. Anders, 164 N. C. 311, 80 SE 403; Simmons v. Defiance Box Co., 153 N. C. 257, 69 SE 146; Haddock v. Leary, 148 N. C. 378, 62 SE 426; Currie v. Gilchrist, 147 N. C. 648, 61 SE 581; Worth v. Simmons, 121 N. C. 357, 28 SE 528; Hamilton v. Icard, 114 N. C. 532, 19 SE 607; Lewis v. John L. Roper Lumber Co., 113 N. C. 55, 18 SE 52; Gilchrist v. Middleton, 107 N. C. 663, 12 SE 85; McLean v. Smith, 106 N. C. 172, 11 SE 184; Ruffin v. Overby, 105 N. C. 78, 11 SE 251; Staton v. Mullis, 92 N. C. 623; Davis v. Higgins, 91 N. C. 382; Ruffin v. Overby, 88 N. C. 369; Christenbury v. King, 85 N. C. 229; Scott v. Elkins, 83 N. C. 424; Johnson v. Parker, 79 N. C. 475; Berryman v. Kelly, 35 N. C. 269; Osborne v. Ballew, 34 N. C. 373; Lenoir v. South, 32 N. C. 237; Bynum v. Thompson, 25 N. C. 578; Hough v. Dumas, 20 N. C. 390; Harris v. Maxwell, 20 N. C. 382; Carson v. Mills, 18 N. C. 546, 30 AmD 143; Fitzrandolph v. Norman, 4 N. C. 564.

Oh.—Humphries v. Huffman, 33 Oh. St. 395; Clark v. Potter, 32 Oh. St. 49; Smith v. McKay, 30 Oh. St. 409; Smith v. Pittsburgh, etc., R. Co., 26 Oh. Cir. Ct. 44.

Or.—Hicklin v. McClear, 18 Or. 126, 22 P 1057; Joy v. Stump, 14 Or. 361, 12 P 929; Swift v. Mulkey, 14 Or. 59, 12 P. 76, 17 Or. 532, 21 P 871.

Pa.—Holloway v. Jones, 143 Pa. 564, 22 A 710; Stroud v. Prager, 130 Pa. 401, 18 A 637; Olewine v. Messmore, 128 Pa. 470, 18 A 495; Ege v. Medlar, 82 Pa. 86; Hollinshead v. Nauman, 45 Pa. 140; Nearhoff v. Addleman, 31 Pa. 279; Green v. Kellum, 23 Pa. 254, 62 AmD 332; Alden v. Grove, 18 Pa. 377; Smith v. Steele, 17 Pa. 30; Waggoner v. Hastings, 5 Pa. 300; Altemus v. Long, 4 Pa. 254, 45 AmD 688; Porter v. McGinnis, 1 Pa. 413; McCall v. Coover, 4 Watts & S. 151; Lawrence v. Hunter, 9 Watts 64; Hopkins v. Robinson, 3 Watts 205; Culler v. Motzer, 13 Serg. & R. 356, 15 AmD 604; Farley v. Lenox, 8 Serg. & R. 392; Cluggage v. Duncan, 1 Serg. & R. 111; Craig v. Craig, 8 Pa. Cas. 357, 11 A 60; Stein v. Green, 6 LackLegN 292.

S. C.—Witcover v. Grant, 93 S. C. 190, 76 SE 274; Kennedy v. Kennedy, 86 S. C. 483, 68 SE 664; Mahoney v. Southern R. Co., 82 S. C. 215, 64 SE 228; Duren v. Kee, 26 S. C. 219, 2 SE 4; Stanley v. Shoolbred, 25 S. C. 181; Congdon v. Morgan, 14 S. C. 587; Evans v. Corley, 43 S. C. L. 143; Golson v. Hook, 35 S. C. L. 23; Gray v. Bates, 34 S. C. L. 498; McColman v. Wilkes, 34 S. C. L. 465, 51 AmD 637; State Bank v. Smyers, 33 S. C. L. 24; Johnson v. McMillan, 32 S. C. L. 143; Mathews v. Horlbeck, 30 S. C. L. 382; Alston v. Collins, 29 S. C. L. 450; Simmons v. Parsons, 20 S. C. L. 492 note; Cabiness v. Mahon, 13 S. C. L. 273; Read v. Eifert, 10 S. C. L. 374 note; Anderson v. Darby, 10 S. C. L. 369; Gourdin v. Theus, 5 S. C. L. 153.

Tenn.—Kittel v. Steger, 121 Tenn. 400, 117 SW 500; Lieberman v. Clark, 114 Tenn. 117, 133, 85 SW 258, 69 LRA 732 [quot Cyc]; Green v. Cumberland Coal, etc., Co., 110 Tenn. 35, 72 SW 459; Elliott v. Cumberland Coal, etc., Co., 109 Tenn. 745, 71 SW 749; Winters v. Hainer, 107 Tenn. 337, 64 SW 44; Turnage v. Kenton, 102 Tenn. 328, 52 SW 174; Duke v. Helms, 100 Tenn. 249, 46 SW 761; Hebard v. Scott, 95 Tenn. 467, 32 SW 390; Cooper v. Great Falls Cotton-Mills Co., 94 Tenn. 588, 30 SW 353; Bon Air Coal, etc., Co. v. Parks, 94 Tenn. 263, 29 SW 130; Bleidorn v. Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 15 SW 737; Cold Creek Min., etc., Co. v. Ross, 12 Lea 1; Peck v. Houston, 5 Lea 227; Marr v. Gilliam, 1 Coldw. 488; Meriwether v. Vaulx, 5 Sneed 300; Rutherford v. Franklin, 1 Swan 321; Brown v. Johnson, 1 Humphr. 261; Jones v. Perry, 10 Yerg. 59, 30 AmD 430; Savage v. Bon Air Coal Land, etc., Co., 2 Tenn. Ch. A. 594; Chandler v. Stockton, 2 Tenn. Ch. A. 488; Clariday v. Reed, (Ch. A.) 53 SW 302; Childers v. Ryan, (Ch. A.) 43 SW 126; Hornsby v. Davis, (Ch. A.) 36 SW 159.

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part of the premises not actually occupied by him.[42] In some jurisdictions this rule has been expressly declared by statute.[43] If the deed or transaction relied on as giving color of title is sufficient for that purpose, its character or validity is of no consequence, and the possession thereunder is coextensive with the boundaries thereby fixed.[44] The rule applies, although the land is not actually inclosed,[45] and even though the tract is divided by imaginary lines,[46] or by a highway.[47]

[§ 508] **2. Origin of and Reason for Rule.** The idea of constructive possession was adopted in reference to the fact that in new countries the inclosure and improvements usually embrace only a portion of what actually belongs to the several farms.[48-50] The ground on which the doctrine of constructive possession rests is not that the deed purporting to convey a fee extends the possession, but that the entry under such a deed explains the intention of the person when he performs the act and removes all doubt which would exist if the entry were not under a deed, where his possession would be limited to his actual occupancy.[51] The entry being under color of title to the whole tract his intention to assert possession to the whole is clearly shown.[52]

[§ 509] **3. Character and Attributes of Possession Acquired.** A number of decisions characterize the possession acquired by occupancy of part under color of title as "actual possession" to the extent of the boundaries contained in the writing,[53] but in the great majority of cases this possession is characterized as "constructive possession."[54] This constructive possession is not only available for acquisition of title against the real owner but will also enable the claimant to recover possession as against a wrongdoer who enters on any part of the tract within the color of title.[55]

[§ 510] **4. Extent and Qualifications of Rule—a. Size, Situation, and Number of Tracts as Affecting**

Tex.—Ellis v. Le Bow, 96 Tex. 532, 74 SW 528 [aff 30 Tex. Civ. A. 449, 71 SW 576]; El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 SW 21 [rev (Civ. A.) 71 SW 799]; Watkins v. Smith, 91 Tex. 589, 45 SW 560; Porter v. Miller, 84 Tex. 204, 19 SW 467; Parker v. Newberry, 83 Tex. 428, 18 SW 815; Taliaferro v. Butler, 77 Tex. 578, 14 SW 191; Porter v. Miller, 76 Tex. 593, 13 SW 555, 14 SW 334; Craig v. Cartwright, 65 Tex. 413; Evitts v. Roth, 61 Tex. 81; Cantagrel v. Von Lupin, 58 Tex. 570; Texas Land Co. v. Williams, 51 Tex. 51; Chandler v. Rushing, 38 Tex. 591; Whitehead v. Foley, 28 Tex. 268; Hays v. Barrera, 26 Tex. 78; Cunningham v. Frandtzen, 26 Tex. 34; Thompson v. Cragg, 24 Tex. 582; Charle v. Saffold, 13 Tex. 94; Cameron v. Cuffie, (Civ. A.) 144 SW 1024; Long v. Thompson, etc., Lumber Co., (Civ. A.) 140 SW 501; Basham v. Stude, (Civ. A.) 128 SW 662; Rodriguez v. Priest, (Civ. A.) 126 SW 1187; Thacker v. Wilson, (Civ. A.) 122 SW 938; Merriman v. Blalack, 57 Tex. Civ. A. 270, 122 SW 403; Harris v. Iglehart, (Civ. A.) 113 SW 170; Hulett v. Platt, 49 Tex. Civ. A. 377, 109 SW 207; State Nat. Bank v. Roberts, (Civ. A.) 103 SW 454; Davidson v. Equitable Securities Co., (Civ. A.) 96 SW 787; Peden v. Crenshaw, (Civ. A.) 81 SW 369 [rev on other grounds 98 Tex. 365, 84 SW 362]; Coleman v. Florey, (Civ. A.) 61 SW 412; Boggess v. Allen, (Civ. A.) 56 SW 195 [aff 94 Tex. 83, 58 SW 833]; Wille v. Ellis, 22 Tex. Civ. A. 462, 54 SW 922; McAdams v. Moody, (Civ. A.) 50 SW 628; Puryear v. Friery, 16 Tex. Civ. A. 316, 40 SW 446; Freedman v. Bonner, (Civ. A.) 40 SW 47; Cook v. Lister, 15 Tex. Civ. A. 31, 38 SW 380; Brown v. O'Brien, 11 Tex. Civ. A. 459, 33 SW 267; Small v. McMurphy, 11 Tex. Civ. A. 409, 32 SW 788; Hodges v. Ross, 6 Tex. Civ. A. 437, 25 SW 975; Meyer v. Kirlicks, (Civ. A.) 25 SW 652; Robinson v. Jones, 2 Tex. Civ. A. 316, 22 SW 15; Tarlton v. Kirkpatrick, 1 Tex. Civ. A. 107, 21 SW 405.

Vt.—Hassam v. Safford Lumber Co., 82 Vt. 444, 74 A 197; Sowles v. Minot, 82 Vt. 344, 73 A 1025, 137 AmSR 1010; Fullam v. Foster, 68 Vt. 590, 35 A 484; Aldrich v. Griffith, 66 Vt. 390, 29 A 376; Webb v. Richardson, 42 Vt. 465; Hodges v. Eddy, 38 Vt. 327; Jakeway v. Barrett, 38 Vt. 316; Shedd v. Powers, 28 Vt. 652; Swift v. Gage, 26 Vt. 224; Spaulding v. Warren, 25 Vt. 316; Hunt v. Taylor, 22 Vt. 556; Brown v. Edson, 22 Vt. 357; Stevens v. Hollister, 18 Vt. 294, 46 AmD 154; Ralph v. Bayley, 11 Vt. 521; Hubbard v. Austin, 11 Vt. 129; Crowell v. Bebee, 10 Vt. 33, 33 AmD 172; Hull v. Fuller, 7 Vt. 100; Beach v. Sutton, 5 Vt. 209; Doe v. Thorp, 1 D. Chipm. 92.

Va.—Richmond v. Jones, 111 Va. 214, 68 SE 181; Green v. Pennington, 105 Va. 801, 54 SE 877; Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232; Stull v. Rich Patch Co., 92 Va. 253, 23 SE 293; Andrews v. Roseland Iron, etc., Co., 89 Va. 393, 16 SE 252; Hollingsworth v. Sherman, 81 Va. 668; Creekmur v. Creekmur, 75 Va. 430; Olinger v. Shepherd, 12 Gratt. (53 Va.) 462; Anderson v. Harvey, 10 Gratt. (51 Va.) 386; Overton v. Davison, 1 Gratt. (42 Va.) 211, 42 AmD 544; Taylor v. Burnsides, 1 Gratt. (42 Va.) 165.

Wash.—Upper v. Lowell, 7 Wash. 460, 35 P 363.

W. Va.—Point Mountain Coal, etc., Co. v. Holly Lumber Co., 71 W. Va. 21, 75 SE 197; Waldron v. Harvey, 54 W. Va. 603, 46 SE 603, 102 AmSR 959; Maxwell v. Cunningham, 50 W. Va. 298, 40 SE 499; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255; Holly River Coal Co. v. Howell, 36 W. Va. 489, 15 SE 214; White v. Ward, 35 W. Va. 418, 14 SE 22; Ketchum v. Spurlock, 34 W. Va. 597, 12 SE 832; Oney v. Clendenin, 28 W. Va. 34; Core v. Faupel, 24 W. Va. 238; Adams v. Alkire, 20 W. Va. 480.

Wis.—Ovig v. Morrison, 142 Wis. 243, 125 NW 449; Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830; Cornell Univ. v. Mead, 80 Wis. 387, 49 NW 815; Hacker v. Horlemus, 74 Wis. 21, 41 NW 965; Furlong v. Garrett, 44 Wis. 111; Pepper v. O'Dowd, 39 Wis. 538; McEvoy v. Loyd, 31 Wis. 142; Edgerton v. Bird, 6 Wis. 527, 70 AmD 473.

Can.—Wood v. Le Blanc, 34 Can. S. C. 627 [quot Cyc]; Bentley v. Peppard, 33 Can. S. C. 444; Parks v. Cahoon, 23 Can. S. C. 92; Swinehammer v. Hart, 5 DomLR 106.

N. B.—Johnson v. Calnan, 38 N. B. 52; Humphreys v. Helmes, 10 N. B. 59; Doe v. Baxter, 9 N. B. 131.

N. S.—Cunard v. Irvine, 2 N. S. 31; Lawson v. Whitman, 1 N. S. 208.

Ont.—Harris v. Mudie, 7 Ont. A. 414; In re Bain, 25 Ont. 136; Robertson v. Daley, 11 Ont. 352 (although it may be nearly all woodland and in a state of nature); McKinnon v. McDonald, 13 Grant Ch. (U. C.) 152; Meyers v. Doyle, 9 U. C. C. P. 371; Beigle v. Dake, 42 U. C. Q. B. 250; Davis v. Henderson, 29 U. C. Q. B. 344; Dundas v. Johnston, 24 U. C. Q. B. 54.

42. Buck v. Louisville, etc., R. Co., 159 Ala. 305, 48 S 699 (holding that where one is in actual possession of a part of a tract of land embraced in his deed his constructive possession does not extend to a portion of the tract in the actual possession of another); Boynton v. Ashabranner, 75 Ark. 514, 88 SW 568; Crill v. Hudson, 71 Ark. 390; Sparks v. Farris, 71 Ark. 117, 71 SW 255, 945; Woolfolk v. Buckner, 67 Ark. 411, 55 SW 168.

For effect of actual possession of part by true owner see infra § 525.

43. Kendrick v. Latham, 25 Fla. 819, 6 S 871; Furgerson v. Bagley, 95 Ga. 516, 20 SE 241; Stevens v. Martin, 168 Mo. 407, 68 SW 347; Benne v. Miller, 149 Mo. 228, 50 SW 824; Harbison v. School Dist. No. 1, 89 Mo. 184, 1 SW 30.

[a] **That such statutes are regarded as merely confirmative of the existing rule** see Munro v. Merchant, 28 N. Y. 9.

[b] **In Missouri** there has been added the requirement that the claimant during the time of his actual partial possession should exercise the usual acts of ownership over the whole tract. Norfleet v. Hutchins, 68 Mo. 597.

44. Brown v. Norvell, 96 Ark. 609, 132 SW 922 (parol gift); Sparks v. Farris, 71 Ark. 117, 71 SW 255, 945 (void deed).

45. Goodwin v. McCabe, 75 Cal. 584, 17 P 705; Webber v. Clarke, 74 Cal. 11, 15 P 431; Miesen v. Canfield, 64 Minn. 513, 67 NW 632; Stillman v. Burfeind, 21 App. Div. 13, 47 NYS 280; Grist v. Hodges, 14 N. C. 178.

46. George v. Cole, 109 La. 816, 33 S 784.

47. Hassett v. Ridgely, 49 Ill. 197.

48-50. Fugate v. Pierce, 49 Mo. 441; Chandler v. Spear, 22 Vt. 388.

51. Hardisty v. Glenn, 32 Ill. 62.

52. Smith v. Gale, 144 U. S. 509, 12 SCt 674, 36 L. ed. 521; Crispen v. Hannavan, 50 Mo. 536; Jackson v. Vermilyea, 6 Cow. (N. Y.) 677.

[a] **One in possession claiming by metes and bounds under a paper title** and openly and notoriously exercising control and dominion over the land is presumed to be doing so to the extent of his claim. Hornblower v. Banton, 103 Me. 375, 377, 69 A 568, 125 AmSR 300 [cit Cyc]; Humphries v. Huffman, 33 Oh. St. 395.

53. Marietta Fertilizer Co. v. Blair, 173 Ala. 524, 56 S 131; Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 9 S 537; Stovall v. Fowler, 72 Ala. 77; Bell v. Longworth, 6 Ind. 273.

54. Davis v. Perley, 30 Cal. 630; Evitts v. Roth, 61 Tex. 81; Cunningham v. Frandtzen, 26 Tex. 34. And see cases supra § 507.

55. Cal.—McKee v. Greene, 31 Cal. 418.

Ga.—Clark v. Hulsey, 54 Ga. 608.

Ill.—Bowman v. Wettig, 39 Ill. 416.

Mich.—Hecock v. Van Dusen, 80 Mich. 359, 45 NW 343.

Mo.—Prewitt v. Burnett, 46 Mo. 372.

N. C.—Osborne v. Ballew, 34 N. C. 373.

Tex.—Watkins v. Smith, 91 Tex. 589, 45 SW 560.

W. Va.—Moore v. Douglass, 14 W. Va. 708.

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Rule. As is shown in a preceding section,[56] possession under color of title is in general deemed to be coextensive with the boundaries designated in the instrument giving color of title. This rule, however, is in a number of jurisdictions subject to a material qualification dependent upon the size of the tract in controversy. The rule deducible from these decisions seems to be that the doctrine of constructive possession has no application where the land claimed is not of a proper size to be managed and used in a body according to the custom and business of the country; that it has no application to a large tract of land which can never be so used.[57] On the other hand there are decisions to the effect that possession of a part of a tract, no matter how small the part occupied is and how large the whole tract may be, gives title to the boundaries included in the deed, no matter what may be the size and character of the tract.[58]

[§ 511] **b. Several Tracts, Contiguous or Not Contiguous—(1) Possession of Part of Each Lot by Claimant.** Where entry is made on several contiguous lots under color of title and actual possession is taken of a part of each, such possession is deemed coextensive with the boundaries of the deed.[59]

[§ 512] **(2) Adjoining Lots under One Inclosure.** Although a tract may be subdivided into a number of smaller lots separated by partitions, possession of one may, nevertheless, be constructive possession of all if inclosed by a common fence.[60] This, it has been held, is true, although the title to the different lots may be derived from different sources.[61]

[§ 513] **(3) Contiguous Tracts Embraced under One General Description.** Subject to a limitation hereinafter considered,[62] where several distinct parcels of land lying contiguous to each other are conveyed by one deed under one general description embracing them all, actual possession of one of them by the grantee will give him constructive possession of the balance;[63] and the fact that the grantor acquired title to the different parcels from different persons does not render them such separate tracts as

56. See supra § 507.

57. Ala.—Lawrence v. Alabama State Land Co., 144 Ala. 524, 41 S 612.

Ill.—Zirngibl v. Calumet, etc., Canal, etc., Co., 157 Ill. 430, 42 NE 431.

Mich.—Turner v. Stephenson, 72 Mich. 409, 40 NW 735, 2 LRA 277.

Minn.—Miesen v. Canfield, 64 Minn. 513, 67 NW 632; Murphy v. Doyle, 37 Minn. 113, 33 NW 220.

Miss.—Louisville, etc., R. Co. v. Gulf of Mexico Land, etc., Co., 82 Miss. 180, 33 S 845, 100 AmSR 627.

N. Y.—Thompson v. Burhans, 61 N. Y. 52; Munro v. Merchant, 28 N. Y. 9; Archibald v. New York Cent., etc., R. Co., 1 App. Div. 251, 37 NYS 336 [aff 157 N. Y. 574, 52 NE 567]; Simpson v. Downing, 23 Wend. 316; Sharp v. Brandow, 15 Wend. 597; Jackson v. Oltz, 8 Wend. 440; Jackson v. Richards, 6 Cow. 617; Jackson v. Woodruff, 1 Cow. 276, 13 AmD 525.

Vt.—Paine v. Hutchins, 49 Vt. 314; Chandler v. Spear, 22 Vt. 388.

And see Bradtl v. Sharkey, 58 Or. 153, 113 P 653 (holding that the general rule that possession of a part of a tract of land under a deed to the whole is constructive possession of the whole does not apply where the part claimed adversely was covered by timber and brush and was not actually occupied or improved by any one, and there was nothing to put the true owner on notice, the person claiming possession not having claimed to a particular line but only to a distance sufficient to include a certain number of acres).

[a] **As otherwise expressed.**—"The doctrine of constructive adverse possession coextensive with the description in the conveyance 'will extend only to such land as is used in connection with the land actually possessed, and to only so much as is reasonable and proper for that purpose according to the custom of the country.'" Louisville, etc., R. Co. v. Gulf of Mexico Land, etc., Co., 82 Miss. 180, 188, 33 S 845, 100 AmSR 627.

[b] **Illustrations.**—(1) The rule relating to constructive possession under color of title has no application to a case where a person takes and maintains possession of a few acres of land in an uncultivated township for the mere purpose of thereby gaining a title to the entire township by possession, to the exclusion of the rightful owners. Lawrence v. Alabama State Land Co., 144 Ala. 524, 41 S 612; Chandler v. Spear, 22 Vt. 388. See also Paine v. Hutchinson, 49 Vt. 314 (where the same doctrine was applied in respect to a gore of land which was a municipal subdivision). (2) It has also been held that the rule has no application where the tract consists of seven hundred and eighty-three acres, of which only two are in the actual possession of the claimant (Jackson v. Woodruff, 1 Cow. (N. Y.) 276, 13 AmD 525), (3) or where the claimant had actual possession of four hundred acres of the tract consisting of four thousand acres (Thompson v. Burhans, 61 N. Y. 52), (4) or where the tract included upward of fifteen hundred acres (Sharp v. Brandow, 15 Wend. (N. Y.) 597). (5) In case of a grant to a railroad company of a series of strips extending a distance of one hundred and forty miles, adverse possession will be confined to the portion actually occupied by the grantee. Archibald v. New York Cent., etc., R. Co., 1 App. Div. 251, 37 NYS 336 [aff 157 NY 574, 52 NE 567].

[c] **Known farm or single lot.**—(1) A statute which provides that where a known farm or single lot has been partly improved the portion of such farm or lot that may have been left uncleared, according to the usual custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved does not introduce a new rule applicable only to future cases, but is simply declaratory of the law as it already existed. Munro v. Merchant, 28 N. Y. 9. (2) But, to establish adverse possession of a known farm outside of the actual possession taken, the known extent of the farm at the time of entry must be established, and adverse possession founded on such entry is limited to that extent. Pepper v. O'Dowd, 39 Wis. 538. See also Hacker v. Horlemus, 74 Wis. 21, 41 NW 965; Wilson v. Henry, 40 Wis. 594. (3) The improvement and adverse possession of part of a forty-acre tract of land on a claim of title to the entire forty founded upon a written instrument purporting to convey the forty will, if continued long enough, convey title to the entire forty, such forty constituting a "known lot" within such statute. Kendrick v. Latham, 25 Fla. 819, 6 S 871. (4) The owner of a farm conveyed the piece in dispute, off the south side thereof, to defendant's predecessor in title and then conveyed the whole farm to plaintiff's predecessor who recorded his deed first. The parcel in dispute, together with a lot adjoining it on the south, known as "No. 10" was afterward conveyed in a single tract by mesne conveyance to defendant, and it was always kept and managed as a single tract. On the south side of the disputed piece and for some distance on the east and west sides was a fence dividing it from the farm. It was held that the whole tract conveyed to defendant constituted "a single lot" within the meaning of such statute. Northport Real Est., etc., Co. v. Hendrickson, 139 N. Y. 440, 34 NE 1057 [aff 65 Hun 621 mem, 19 NYS 942].

58. U. S.—Ellicott v. Pearl, 10 Pet. 412, 9 L. ed. 475; Kentucky Coal, etc., Dev. Co. v. Kentucky Union Co., 214 Fed. 590 (declaring Kentucky rule and citing Kentucky cases infra this note); Houston Oil Co. v. Goodrich, 213 Fed. 136; Scaife v. Western North Carolina Land Co., 90 Fed. 238, 33 CCA 47.

Cal.—Hicks v. Coleman, 25 Cal. 122, 85 AmD 103; Gunn v. Bates, 6 Cal. 263.

Ga.—Furgerson v. Bagley, 95 Ga. 516, 20 SE 241.

N. C.—Lenoir v. South, 82 N. C. 237.

Tenn.—Hornsby v. Davis, (Ch. A.) 36 SW 159.

Tex.—Taliaferro v. Butler, 77 Tex. 578, 14 SW 191; Cunningham v. Mathews, (Civ. A.) 57 SW 1114 (rule applied to tract of five thousand acres); Smith v. Kenney, (Civ. A.) 54 SW 801.

See Frye v. McKinley, 136 Ky. 31, 123 SW 321; Hall v. Roberts, 74 SW 199, 22 KyL 2362; Whitley County Land Co. v. Lawson, 94 Ky. 603, 23 SW 369, 15 KyL 401; Davis v. Young, 2 Dana (Ky.) 299; Summers v. Green, 4 J. J. Marsh. (Ky.) 137; McDowell v. Kenney, 3 J. J. Marsh. (Ky.) 516; Fox v. Hinton, 4 Bibb (Ky.) 559, which seem to support this view inferentially.

"It may seem, at first view, a hardship on the owner of wild land, situate as this is, and perhaps at a distance from him, to lose his title by reason of a possession, of which he, probably, would not, and here, certainly, had not early knowledge. But the law cannot suppose, that an owner will not look to the condition of his property, at least so far as to discover an intruder within the period of seven years, and take the necessary steps to assert his own right; and therefore an omission to do so must amount to the laches, for which the law deprives him of his entry and vests the title in the possessor." Lenoir v. South, 82 N. C. 237, 239.

59. Lyon v. McGowan, 156 Ala. 462, 47 S 342; Hopkins v. Robinson, 3 Watts (Pa.) 205.

60. Kerr v. Nicholas, 88 Ala. 346, 6 S 698. And see Hornblower v. Banton, 103 Me. 375, 377, 69 A 568, 125 AmSR 300 and note [cit Cyc].

61. Braxton v. Rich, 47 Fed. 178 [aff 158 U. S. 375, 15 SCt 1006, 39 L. ed. 1022]; Wharton v. Bunting, 73 Ill. 16.

62. See infra § 516.

63. Ala.—Barry v. Madrias, 156 Ala. 475, 47 S 152.

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to affect this result.[64] "After several tracts of land are consolidated, and a deed to the consolidated tract is executed, and a party holds under it, the previous subdivisions become obliterated or unimportant."[65] So it has been held that the fact that a stranger claims to own a part of the land conveyed but not the whole will not operate to make two tracts of it so as to affect the question of adverse possession.[66]

[§ 514] **(4) Contiguous Tracts Not Embraced under One General Description.** Although there are a few decisions which seem to lay down the doctrine without qualification that where several contiguous tracts are conveyed in one deed, and the grantee takes possession thereunder, such possession draws to it constructive possession of all the lands described in the deed,[67] the weight of authority is to the effect that where several lots are conveyed by one instrument under separate descriptions of each, not under one general description including them all or purporting to convey them as one tract, even though such lots are contiguous to each other, the actual possession of one lot or a part of one lot will not give constructive possession of the balance of the lots.[68] A fortiori is this so where the lots are not contiguous.[69]

[§ 515] **(5) Contiguous Tracts Derived from Different Sources.** Where a claimant has color of title to several tracts derived from different sources, such tracts are to be considered separate and distinct, and his actual possession of a part of one will not be extended by construction over the others.[70]

[§ 516] **(6) Tract of Grantee and Adjoining Tract Embraced in Conveyance to Him.** It has been held that, where a person owns and is in possession of a distinct parcel of land and attempts to extend his dominion over an adjoining piece by taking a deed including in its description his own land and the adjoining tract, he must maintain an actual possession of such tract for the statutory period in order to constitute such an adverse possession as will bar

Ga.—Carstarphen v. Holt, 98 Ga. 703, 23 SE 904; Harrison v. Augusta Factory, 73 Ga. 447; Parker v. Jones, 57 Ga. 204.

Iowa.—Bacon v. Chase, 83 Iowa 521, 50 NW 23 (where it was held that where a forty-acre tract of land is sold together with other lands, the whole constituting one farm, the actual occupation of the other lands is in law the occupation of the whole, although the forty-acre tract, being low and marshy, is not cultivated or separately occupied).

Ky.—Continental Realty Co. v. Harvey, 151 Ky. 703, 152 SW 755. See also Harrison v. McDaniel, 2 Dana 348.

Me.—Richardson v. Watts, 94 Me. 476, 48 A 180. And see Hornblower v. Banton, 103 Me. 375, 377, 69 A 568, 125 AmSR 300 and note [cit Cyc].

Mich.—Kingston v. Guck, 155 Mich. 264, 270, 118 NW 987 [cit Cyc]; Brigham v. Reau, 139 Mich. 256, 102 NW 845.

Tenn.—Elliott v. Cumberland Coal, etc., Co., 109 Tenn. 745, 71 SW 749; Turnage v. Kenton, 102 Tenn. 328, 52 SW 174.

Tex.—Allen v. Boggess, 94 Tex. 83, 58 SW 833 [aff (Civ. A.) 56 SW 195]; Snow v. Letcher, (Civ. A.) 154 SW 355; Robinson v. Jones, 2 Tex. Civ. A. 316, 22 SW 15.

And see State v. Harman, 57 W. Va. 447, 50 SE 828.

[a] **Paper subdivisions made by administrator in making sale.**—Under the rule that actual possession of any part of the land described in a deed gives constructive possession to the whole, on a conflicting claim to an entire tract, embracing four merely paper subdivisions, made by an administrator in making a sale, defendants' actual possession of three of them extended their constructive possession to the fourth, although none of their inclosures or improvements were upon it. Surghenor v. Ducey, (Tex. Civ. A.) 139 SW 22.

64. U. S.—Scaife v. Western North Carolina Land Co., 90 Fed. 238, 33 CCA 47 (announcing rule in Georgia).

Mich.—Kingston v. Guck, 155 Mich. 264, 118 NW 967.

N. Y.—Northport Real Est., etc., Co. v. Hendrickson, 139 N. Y. 440, 34 NE 1057 [aff 19 NYS 942].

Tenn.—Turnage v. Kenton, 102 Tenn. 328, 52 SW 174.

Tex.—Allen v. Boggess, 94 Tex. 83, 58 SW 833 [aff (Civ. A.) 56 SW 195].

Vt.—Webb v. Richardson, 42 Vt. 465.

See also Parker v. Jones, 57 Ga. 204.

65. Elliott v. Cumberland Coal, etc., Co., 109 Tenn. 745, 750, 71 SW 749 (per Wilkes, J.).

66. Crowder v. Doe, 162 Ala. 151, 50 S 230, 136 AmSR 17.

67. Bellefontaine Impr. Co. v. Niedringhaus, 181 Ill. 426, 55 NE 184, 72 AmSR 269; Dills v. Hubbard, 21 Ill. 328; Parsons v. Dills, (Ky.) 167 SW 415, 416 (in which the rule laid down in the following paragraph of text was commented on but not followed, the court saying that "in this state, where because of peculiar conditions the plea of adverse possession is regarded with more favor, that rule does not prevail"); Webb v. Richardson, 42 Vt. 465 (where it was said that the mere fact that an entire undivided tract conveyed was formerly made up of different parcels lying contiguous to each other, with the title or color of title of the several parcels derived from different sources at some former period, does not take it out of the general rule as to constructive possession, although in such deed conveying the entire tract the several parcels of which it is composed are separately described). See also Kerr v. Leighton, 2 Greene (Iowa) 196.

[a] **In applying this rule** it was held that "the owner or the tenant holding under him may also move from one tract to another described in the particular deed, and the different periods of possession, just so they be continuous and aggregate 15 years, will constitute adverse possession of all the tracts described in the deed." Parsons v. Dills, (Ky.) 167 SW 415, 416.

68. U. S.—Scaife v. Western North Carolina Land Co., 90 Fed. 238, 33 CCA 47 (dictum). See also Carter v. Ruddy, 166 U. S. 493, 17 SCt 640, 41 L. ed. 1090 (holding that, where the conveyance is of a block of land divided into lots and so described and these lots are laid off and so marked on the ground, an adverse holding of some of the lots will not be extended by construction so as to include the other lots).

Ga.—Carstarphen v. Holt, 96 Ga. 703, 23 SE 904; Griffin v. Lee, 90 Ga. 224, 15 SE 810; Barber v. Shaffer, 76 Ga. 285; Anderson v. Dodd, 65 Ga. 402; Tritt v. Roberts, 64 Ga. 156; Janes v. Patterson, 62 Ga. 527; Parker v. Jones, 57 Ga. 204; Grimes v. Ragland, 28 Ga. 123; Denham v. Holeman, 26 Ga. 182, 71 AmD 198.

Me.—Hornblower v. Banton, 103 Me. 375, 377, 69 A 568, 125 AmSR 300 [cit Cyc]; Farrar v. Eastman, 10 Me. 191.

Mich.—Turner v Stephenson, 72 Mich. 409, 40 NW 735, 2 LRA 277.

Minn.—Morris v. McClary, 43 Minn. 346, 46 NW 238. See also McRoberts v. McArthur, 62 Minn. 310, 64 NW 903.

N. C.—Basnight v. Meekins, 121 N. C. 23, 27 SE 992; Loftin v. Cobb, 46 N. C. 406, 62 AmD 173; Carson v. Mills, 18 N. C. 546.

Or.—Willamette Real Est. Co. v. Hendrix, 28 Or. 485, 42 P 514. See also Wilson v. McEwan, 7 Or. 87.

S. C.—Massey v. Duren, 3 S. C. 34. Compare Alston v. Collins, 29 S. C. L. 450.

Tex.—Faison v. Primm, (Civ. A.) 34 SW 834; Galveston Land, etc., Co. v. Perkins, (Civ. A.) 26 SW 256.

See Henry v. Brown, 143 Ala. 446, 39 S 325.

[a] **Illustrations.**—(1) Where a deed describes by lot and block several or even the greater number of lots in a platted township or addition, his actual possession of known land for the purpose of adverse possession does not extend to those uninclosed lots of which he is not in actual possession. Morris v. McClary, 43 Minn. 346, 46 NW 238. (2) Actual occupancy of and the making of improvements upon one of two adjoining subdivisions of a grant, both of which are openly claimed under a recorded deed of both, do not give constructive possession to the whole tract. Faison v. Primm, (Tex. Civ. A.) 34 SW 834. See also Turner v. Stephenson, 72 Mich. 409, 40 NW 735, 2 LRA 277. (3) And this is true, although the claimant looked after the whole tract for the purpose of keeping off trespassers, paid taxes thereon, and granted a right of way to a third person. Faison v. Primm, supra.

[b] **Survey of contiguous tracts.**—Where plaintiff made a survey of many contiguous tracts with the intermediate and dividing boundaries distinctly represented on the plat, it was held doubtful whether such possession on only one of the several tracts would raise a presumption of a grant to all. Alston v. McDowall, 16 S. C. Eq. 444.

[c] **In Georgia** this doctrine is qualified to the extent that if a conveyance of the character under consideration is recorded actual possession of one of the lots will operate to give constructive possession of all. Carstarphen v. Holt, 96 Ga. 703, 23 SE 904; Griffin v. Lee, 90 Ga. 224, 15 SE 810; Tritt v. Roberts, 64 Ga. 156; Janes v. Patterson, 62 Ga. 527.

69. Camp v. Riddle, (Tenn.) 160 SW 844, 845 [cit Cyc].

70. Parsons v. Dills, (Ky.) 167 SW 415; Crispen v. Hannavan, 50 Mo. 536; Broom v. Pearson, 98 Tex. 469, 474, 85 SW 790, 86 SW 733 [mod (Civ. A.) 81 SW 753, and cit Cyc]; Breeden v. Haney, 95 Va. 622, 29 SE 328. See also Hornblower v. Banton, 103 Me. 375, 69 A 568, 125 AmSR 300 and note; Morris v. Hayes, 47 N. C. 93. See however Rogers v. Moore, 9 B. Mon. (Ky.) 401; Sharp v. Shenandoah Furnace Co., 100 Va. 27, 40 SE 103.

the owner's rights. He does not acquire any constructive possession thereof by such deed.[71] This decision seems to be based on sound principles, because there is obviously nothing to put the true owner on notice that his rights are invaded. There are decisions, however, which, although differing slightly on the facts, seem to be squarely opposed to this view.[72]

[§ 517] **(7) Tracts Not Adjoining.** Actual possession of one tract of land not contiguous to others is not constructive possession of such other tracts, although conveyed by the same deed;[73] and this is true, although they may be described in the deed as one tract.[74] Constructive possession can apply only to land immediately adjacent to a part of that which is in absolute and uncontrolled possession. An intervening space is fatal.[75]

[§ 518] **(8) Subdivision of Tract by Person Remaining in Possession of Part.** It has been held that where one who has color of title subdivides the land into lots or blocks possession of one or more of the lots or blocks by himself or tenant will give him constructive possession of the whole.[76] There are, however, decisions squarely opposed to this view.[77]

[§ 519] **(9) Sale of Part Actually Occupied by Claimant.** Where one in possession of a tract of land sells the portion actually occupied by him, his constructive possession, which then existed as to the remainder, immediately determines[78] unless he takes actual possession of some part of it.[79] This is analogous to the case of a man who saws off a limb on which he is sitting between himself and the trunk of the tree. The principle does not apply, however, if the claimant sells such portion by executory con-

71. Hicklin v. McClear, 18 Or. 126, 22 P 1057.

72. Northrup v. Sumner, 132 Ky. 156, 116 SW 699 (holding that, where one takes title to unoccupied land adjacent to that on which he lives and in which he claims the fee and it is marked by a well defined boundary, his possession extends to the outside boundary of such land); Overton v. Perry, 129 Ky. 415, 111 SW 369, 33 KyL 931 (to same effect); Boyce v. Blake, 2 Dana (Ky.) 127 (where it was held that if the person holding a tract of land acquires an adjoining tract by a parol contract his possession will be held to include it, notwithstanding he has made no inclosure or improvement thereon); Breckenridge Cannel Coal Co. v. Scott, 121 Tenn. 88, 114 SW 930 (holding that where a person makes a clearing and inclosure on land of another to which he acquires a possessory title by adverse possession and thereafter obtains an entry for a larger portion of such person's lands, but including the part previously inclosed, and his possession is continued for the statutory period after such entry but is never beyond the original inclosures, such possession extends to the boundaries of the entry and invests him with title to all the land therein embraced). See also Weinig v. Holcomb, 73 Iowa 143, 34 NW 787; Bon Air Coal Co. v. Parks, 94 Tenn. 263.

73. Ark.—Brown v. Bocquin, 57 Ark. 97, 20 SW 813.

Ga.—Georgia Pine Inv., etc., Co. v. Holton, 94 Ga. 551.

Ind.—Stephenson v. Doe, 8 Blackf. 508, 46 AmD 489.

Ky.—Louisville Property Co. v. Lawson, 156 Ky. 288, 160 SW 1034; Burt, etc., Lumber Co. v. Sackett, 147 Ky. 232, 144 SW 34; Goff v. Lowe, 107 SW 794, 32 KyL 1098; Whitley County Land Co v Lawson, 94 Ky 603, 23 SW 369, 15 KyL 401; Moses v Gatliff, 12 SW 139, 11 KyL 356.

La.—Leader Realty Co. v. Lakeview Land Co., 133 La. 646, 63 S 258 (where it was said that the rule is confined to property so situated as to be within a common boundary, or, at all events, to property known and recognized as constituting a single estate). See also Gulf Refining Co. v. Jeems Bayou Hunting, etc., Club, 129 La. 1021, 57 S 322 [dist Bernstein v. Leeper, 118 La. 1098, 43 S 889].

Mo.—Herbst v. Merrifield, 133 Mo. 267, 34 SW 571.

Or.—Wilson v. McEwan, 7 Or. 87.

Pa.—Crist v. Boust, 26 Pa. Super. 543.

Tenn.—McSpadden v. Starrs Mountain Iron Co., (Ch. A.) 42 SW 497.

Tex.—Wall v. Lubbock, 52 Tex. Civ. A. 405, 118 SW 886.

And see Banton v. Herrick, 101 Me. 134, 63 A 671.

[a] **Applications of rule.**—(1) Thus a small improvement made by a person on one of two quarter sections of land which were half a mile distant from each other was no authority for such person setting up an adverse possession of the other quarter section, although both were conveyed to him by the same deed. Stephenson v. Doe, 8 Blackf. (Ind.) 508, 46 AmD 489. (2) And where one has a patent to all unappropriated lands within a certain boundary possession of certain detached parcels of unappropriated land, separated from the land in dispute by land already appropriated, is not such possession as will extend over all lands unappropriated when the patent issued. Moses v. Gatliff, 12 SW 139, 11 KyL 356. (3) Complainant, being in actual possession of the N. E. ¼ of a certain section 20 and of the W. ½ of the adjoining section 21, under deeds which included such tracts in the general description of the lands thereby conveyed, filed a bill among other things, to recover possession of the N. E. ¼ of section 29 in the same township, basing his contention on calls, in certain of the deeds constituting his chain of title, for the "county line," being the line between sections 29 and 32, as his southern boundary, although having no title to the intervening S. E. ¼ of section 20. It was held that such intervention of the S. E. ¼ of section 20 presented an absolute barrier to the extension of complainant's possession from the N. E. ¼ of that section down to the N. E. ¼ of section 29. McSpadden v. Starrs Mountain Iron Co., (Tenn. Ch. A.) 42 SW 497.

74. Georgia Pine Inv., etc., Co. v. Holton, 94 Ga. 551, 20 SE 434.

75. Crist v. Boust, 26 Pa. Super. 543.

76. U. S.—Gregg v. Forsyth, 24 How. 179, 16 L. ed. 731. See also Carter v. Ruddy, 56 Fed. 542, 6 CCA 3 [aff 166 U. S. 493, 17 SCt 640, 41 L. ed. 1090].

Cal.—Cohen v. Anderson, 22 Cal. A. 634, 135 P 1096 (under express statutory provision).

Ill.—Hassett v. Ridgely, 49 Ill. 197; Williams v. Ballance, 23 Ill. 193, 74 AmD 187.

Iowa.—Bacon v. Chase, 83 Iowa 521, 50 NW 23.

Mo.—McElhinney v. Kraus, 10 Mo. A. 218.

Tex.—Robinson v. Jones, 2 Tex. Civ. A. 316, 22 SW 15.

77. Gainus v. Bowman, 10 Heisk. (Tenn.) 600. And see Missouri, etc., R. Co. v. Allen, 67 Kan. 838, 73 P 98 (holding that prima facie the platting of lots separates them and makes them distinct tracts of land, so that adverse occupancy of one would not constitute occupancy as to the others); Galveston Land, etc., Co. v. Perkins, (Tex. Civ. A.) 26 SW 256 (holding that when a block is divided into lots inclosure and use of some of the lots do not operate as a possession of the whole block).

[a] **Under the California statute** providing that when the premises included consist of a tract divided into lots the possession of one shall not be deemed a possession of any other lot of the same tract it was held that a block of land in a town or city which was represented on the plan or map of the city as surrounded by public streets and divided in the center by an alley and laid out into lots appropriately numbered was "a tract divided into lots," and that the possession of one lot would not be extended by construction to other lots. Figg v. Mayo, 39 Cal. 262.

78. Ky.—Trotter v. Cassady, 8 A. K. Marsh. 365, 13 AmD 183.

Tenn.—Cunningham v. Robertson, 1 Swan 137.

Tex.—Chandler v. Rushing, 38 Tex. 591; Cunningham v. Frandtzen, 26 Tex. 34; Puryear v. Friery, 16 Tex. Civ. A. 316, 40 SW 446. See also Smith v. Huff, (Civ. A.) 164 SW 429.

Va.—Sharp v. Shenandoah Furnace Co., 100 Va. 27, 37, 40 SE 103 [cit Cyc].

W. Va.—State v. Harman, 57 W. Va. 447, 454, 50 SE 828 [cit Cyc].

And see Taylor v. Breathitt Coal, etc., Co., 185 Fed. 854.

[a] **Reason of rule.**—(1) "The rule of law which makes actual possession of part of a tract extend to its outer boundaries gives such extensive possession only because of actual possession in the place where actual possession is held, and when that goes from the grantor, he loses the foundation on which his constructive-actual possession of the residue rested." State v. Harman, 57 W. Va. 457, 464, 50 SE 828 (per Brannon, J.). (2) "Constructive possession is dependent upon the actual possession, and must continue or fail with it." Sharp v. Shenandoah Furnace Co., 100 Va. 27, 33, 40 SE 103 (per Cardwell, J.).

[b] **Sale of intervening tracts.**—Where a part of a tract of land of which one is in possession claiming to the extent of the boundaries thereof, so as to give him constructive possession of the whole, is separated from another part of the boundary by the sale of intervening portions of the land, his possession ceases to give him constructive possession of that part of the tract from which he is thus separated. Hassett v. Ridgely, 49 Ill. 197; West v. McKinney, 92 Ky. 638, 18 SW 633, 13 KyL 900; Newsom v. Kinnamon, 60 N. C. 99.

[c] **Effect of obtaining reconveyance of part sold.**—It has been held that where a claimant under color of title sells a part of the land and subsequently takes a reconveyance of the part sold, such part by reason of the sale becomes separate and distinct from the balance of the tract, and the claimant's actual possession of a part of such balance will not be extended by construction over the part so sold and repurchased. Hitchler v. Scanlan, 83 Tex. 569, 19 SW 259.

79. Sharp v. Shenandoah Furnace Co., 100 Va. 27, 40 SE 103.

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tract.[80]

[§ 520] **(10) Claim to Whole Tract Previously Subdivided and Sold.** Where a tract of land has been subdivided, and the subdivisions or any of them conveyed by the true owner, the statute of limitations cannot be invoked by a subsequent claimant of the whole tract to subdivisions of which he is not and never has been in possession.[81]

[§ 521] **(11) Land Situate in Two Counties.** Where one enters in one county on a tract of land lying in two counties and keeps possession of the same, claiming to hold the entire tract, his possession extends only to the lands of the county in which the entry is made.[82] But a patentee who actually settles on the land embraced in his patent is in possession to the extent of his boundary and the subsequent creation of a new county, including a part of the land, does not affect the extent of this possession.[83]

[§ 522] **(12) Land Intersected by a Stream.** Where one has color of title to a tract of land divided by a stream, his constructive possession extends to the boundary of the tract on the other side of the stream.[84] Actual possession on one side of the stream will be construed to extend to the boundaries of the tract and not merely up to the stream.[84½]

[§ 523] **c. Effect of Invalidity of Title to Part of Land Conveyed.** While it is generally true that possession under color of title, although only part of the premises is actually occupied, is coextensive with the boundaries in the deed, the rule, it has been held, is subject to the limitation that if the title is void as to part of the land conveyed the occupation of that part to which the grantor has title will not give the grantee constructive possession of the other part to which he has no title, so as to disseize the real owner and to divest him of the whole tract described in the deed.[85] As otherwise expressed, where a grantor embraces land to which he has no title in the same deed with that to which he has title, and the grantee enters upon and occupies that part only to which the

80. State v. Harman, 57 W. Va. 447, 50 SE 828.

81. Stewart v. Harris, 9 Humphr. (Tenn.) 713; Montgomery v. Gunther, 81 Tex. 320, 16 SW 1073; Turner v. Moore, 81 Tex. 206, 16 SW 929; Beaumont Pasture Co. v. Polk, (Tex. Civ. A.) 55 SW 614. And see Mayhan v. McManus, (Tex. Civ. A.) 130 SW 881 (holding that where an original survey had been subdivided previously to commencement of the possession within it, no title by adverse possession could be acquired outside the subdivision to which actual possession was confined).

82. Roberts v. Long, 12 B. Mon. (Ky.) 194 (holding that to acquire possession where land lies in different counties there must be an entry in each county).

83. See Kentucky Union Co. v. Cornett, 112 Ky. 677, 66 SW 728, 23 KyL 1922. And see Simon v. Gouge, 12 B. Mon. (Ky.) 156.

84. Tremaine v. Weatherby, 58 Iowa 616, 12 NW 609; Pheeny v. Hughes, 158 N. C. 463, 74 SE 321; Grimke v. Brandon, 10 S. C. L. 356.

84½. Dodge v. Cowart, 131 Ga. 549, 551, 62 SE 987 (where it was said: "The two portions of the lot on either side of the stream, are not separate lots of land: they are parts of an integral lot, designated in the government survey by a single number, and are not to be regarded as separate and contiguous lots or tracts of land").

85. U. S.—Stockley v. Cissna, 119 Fed. 812, 56 CCA 324. Contra Gregg v. Tesson, 1 Black 150, 17 L. ed. 74 (holding that a person entering on a tract of land to a part of which he has a good title and to the rest a color of title, although he has no actual possession of any part of the latter, has been deemed to be in the constructive possession thereof, so as to enable him to acquire title thereto by limitations).

Ala.—Montevallo Min. Co. v. Southern Mineral Land Co., 174 Ala. 137, 57 S 377; Henry v. Brown, 143 Ala. 446, 456, 39 S 325 [cit Cyc]; Woods v. Montevallo Coal, etc., Co., 84 Ala. 560, 3 S 475, 5 AmSR 393. Compare Crowder v. Doe, 162 Ala. 151, 50 S 230, 136 AmSR 17 (holding that if the grantor had legal title to forty acres only of a tract described, or had color only, possession by the grantee of those forty acres under the deed could not be extended to the other forty acres described). It was said, however, in this case that the fact that legal title to parts of a tract described was in others than grantor would not prevent grantee's possession of a part from extending to the whole so as to give him color of title thereto under the deed, since it is unnecessary that grantor should have title to the whole or a part to give color of title thereto.

Ark.—Arnold v. Abeles, 98 Ark. 367, 135 SW 833; Gates v. Thompson, 104 SW 191; St. Louis, etc., R. Co. v. Moore, 83 Ark. 377, 103 SW 1136; Hardie v. Investment Guaranty, etc., Co., 81 Ark. 141, 98 SW 701; Haggart v. Ranney, 73 Ark. 344, 84 SW 703.

Cal.—Kimball v. Stormer, 65 Cal. 116, 3 P 408. See Kile v. Tubbs, 23 Cal. 431.

Ga.—Wiley v. Warmock, 30 Ga. 701.

Ky.—Burt v. Sackett, 147 Ky. 232, 144 SW 34; Kentucky Land, etc., Co. v. Crabtree, 113 Ky. 922, 70 SW 31, 24 KyL 743. Compare Mullins v. Faulkner, 20 SW 273, 14 KyL 436.

Me.—Proctor v. Maine Cent. R. Co., 100 Me. 27, 60 A 423, 109 AmSR 474; Walsh v. Wheelwright, 96 Me. 174, 52 A 649 [overr Noyes v. Dyer, 25 Me. 468, in so far as it conflicts with this doctrine].

Miss.—Leavenworth v. Reeves, 64 S 660; Mitchell v. Bond, 84 Miss. 72, 36 S 148; Jones v. Gaddis, 67 Miss. 761, 7 S 489.

Mo.—Leeper v. Baker, 68 Mo. 400; McQuiddy v. Ware, 67 Mo. 74; Tayon v. Ladew, 33 Mo. 205; Schultz v. Lindell, 30 Mo. 310; Rothrock v. Cordz-Fisher Lumber Co., 80 Mo. A. 510.

N. H.—Bailey v. Carleton, 12 N. H. 9, 37 AmD 190.

N. J.—Schmitt v. Traphagen, 73 N. J. Eq. 399, 402, 69 A 189, 133 AmSR 739 [aff 72 N. J. Eq. 665, 66 A 937, and cit Cyc].

N. Y.—Roberts v. Baumgarten, 51 N. Y. Super. 482 [aff 110 N. Y. 380, 18 NE 96].

N. C.—Lewis v. Covington, 130 N. C 541, 41 SE 677; Carson v Burnett, 18 N. C. 546, 30 AmD 143.

Pa.—Hole v. Rittenhouse, 25 Pa. 491.

Tenn.—Byrd v. Phillips, 120 Tenn. 14, 111 SW 1109; Gainus v. Bowman, 10 Heisk. 600; Stewart v. Harris, 9 Humphr. 714. See however Sullivan v. Davidson, (Ch. A.) 43 SW 122.

Tex.—Turner v. Moore, 81 Tex. 206, 16 SW 929; Word v. Box, 66 Tex. 596, 3 SW 93; Lowry v. McDaniel, (Civ. A.) 124 SW 710; Payton v. Caplen, 24 Tex. Civ. A. 364, 59 SW 624; Beaumont Pasture Co. v. Polk, (Civ. A.) 55 SW 614; Cook v. Lister, 15 Tex. Civ. A. 31, 38 SW 380; Norton v. Collins, 1 Tex. Civ. A. 272, 20 SW 1113.

W. Va.—McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 SE 508, 62 LRA 562.

See also Tiedeman Real Prop. § 696; 3 Washburne Real Prop. (5th ed) p 498.

Compare Wharton v. Bunting, 73 Ill. 16.

[a] **The reasons for the rule have been variously expressed** as follows: (1) By Riddick, J., in St. Louis, etc., R. Co. v. Moore, 83 Ark. 377, 378, 103 SW 1136. "The reason for this is that in such a case the possession of one tract is no notice to the owner of the other tract that his land is claimed adversely. If the law were otherwise, one by buying a small tract and taking a deed conveying the adjacent unimproved lands with the tracts bought might, by taking possession of the tract bought, become constructively in the possession of the land without any visible act to notify the owners thereof of such adverse claim." (2) By Emery, J., in Walsh v. Wheelwright, 96 Me. 174, 190, 52 A 649. When "the owner finds that no part of his land is being adversely occupied, he has no occasion to assume or investigate anything. Recorded conveyances between other persons, even of his land if not followed by an actual adverse occupation of some part of his land, do not affect him. He is not required to take any notice of such conveyances. He is not required to take any notice from the occupation of adjoining lands that his land is claimed. His title to his own land is not affected by the most complete occupation of the adjoining lands. It is only when some part of his land is being adversely occupied that he is put upon inquiry or is affected with notice of recorded conveyances between other persons." (3) By Swayze, J., in Schmitt v. Traphagen, 73 N. J. Eq. 399, 402, 69 A 189, 133 AmSR 739. "The reason is obvious. His possession, in order to ripen into a right must be adverse and hostile, visible or notorious. An actual possession of land which he owns would give no notice to the real owner of the other tract of a claim upon the latter, and would not even suggest an examination of the records to ascertain what land was included within the bounds of his deed, and that deed might not even be recorded." (4) By Woods, C. J., in Jones v. Gaddis, 67 Miss. 761, 769, 7 S 489. "To divest the rightful owner of the whole tract described in the deed, the partial occupation must be of such a character as to give rise to a reasonable presumption that the rightful owner knows that the entry was made under color of title; and if this presumption be not reasonable, under the circumstances of the case, the disseizin will not extend beyond the actual occupation." (5) By Dowdell, C. J., in Montevallo Min. Co. v. Southern Mineral Land Co., 174 Ala. 137, 141, 57 S 377. "A sufficient reason for this, perhaps, is that such actual possession of the occupant is perfectly consistent with the construc-

grantor has a title, it does not operate as a disseizin of the owner of the other land described in the deed.[86] There must be an actual possession of part of the land to which the title was void,[87] such as would give the owner the right to maintain trespass[88] or a suit in ejectment.[89] The principle under consideration, it has been said, is especially applicable in case of wild and unimproved lands.[90] In view of the reasons on which the rule is based,[91] it is of course immaterial that the deed was recorded.[92]

[§ 524] **d. Effect of Want of Description or Insufficient Description.** Where an entry is under a paper title which is void for want of description of any land, the rule as to constructive possession does not apply and the adverse possession will extend only to that part of the land actually occupied and improved.[93] The doctrine that adverse possession under color of title to a part is adverse possession of the whole applies only to possession under a deed giving definite boundaries.[94] "The first requisite of such color of title as will give constructive possession to the claimant is . . . some definite description showing the extent of the claim, which, as to the part constructively possessed, may be said to perform the same office as acts of ownership upon parts in actual possession."[95]

[§ 525] **e. Effect of Mixed Possession—(1) Where Both Parties Have Color of Title and Actual Possession of Part—(a) Statement of General Rule and Reason on Which It Is Based.** Where the title to land is in conflict, and each claimant is in possession of a part of the tract in controversy, the one having the better title has, by his occupation, constructive possession of the whole tract except that which is actually in the possession of his adversary. The rule that one in possession of land under color of title has constructive possession to the boundaries of his deed does not apply where one holding a better title to the same land is in possession of a part thereof.[96] The legal seizin as to the unoccupied portion of the tract follows the legal title, and the pedis

tive possession of the real owner of the other tract which the law attaches to the true title, and does not therefore per se disturb it. Nor is there anything in one's occupation of his own land to which he has title which would impute notice to another that he claims an unreasonably extended possession constructively asserted under a paper title, which may be either unrecorded, or, if recorded, does not necessarily operate as notice to strangers."

[b] **Applications of rule.**—(1) "Where a large tract embraces several smaller ones, a pedis possessio of a few acres, by one setting up title to the larger tract, claiming the whole, would not be a defence against a superior title in any one of the smaller tracts." Schultz v. Lindell, 80 Mo. 310, 319. (2) Defendant having received a deed of five acres, two of which had previously been sold to plaintiff and segregated from the balance of the five acres long prior to defendant's deed, did not acquire title by adverse possession to the two acres, his actual possession extending only to the three acres, and such possession not being extended by construction to the two acres. Lowry v. McDaniel, (Tex. Civ. A.) 124 SW 710. (3) Where a deed conveyed to A the whole of the W. ½ of section 12, and A went into possession of five or six acres on the western edge of the N. W. ¼, but the title to the E. ½ of the N. W. ¼ was in another, A will not be presumed to have been in possession of the entire half section. Arnold v. Abeles, 98 Ark. 367, 135 SW 833.

[c] **Judicial sales.**—The court in ordering a sale of land of a decedent included in the order the land of a third person. The purchaser at the sale and those claiming under him were in the actual possession of the land of the decedent for over seven years and claimed the land of the third person under the conveyance and occasionally paid the taxes thereon, although the third person paid them most of the time. It was held that the actual possession of the land of the decedent did not amount to constructive possession of the land of the third person so as to enable the purchaser and those claiming under him to acquire title by adverse possession. St. Louis, etc., R. Co. v. Moore, 83 Ark. 377, 103 SW 1136.

86. Turner v. Stephenson, 72 Mich. 409, 40 NW 735, 2 LRA 277.

87. Haggart v. Ranney, 73 Ark. 344, 84 SW 703; Burt, etc., Lumber Co. v. Sackett, 147 Ky. 232, 144 SW 34.

88. McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 SE 508, 62 LRA 562.

89. Lewis v. Covington, 130 N. C. 541, 41 SE 677.

90. Arnold v. Abeles, 98 Ark. 367, 135 SW 833.

91. See supra note [a].

92. Turner v. Stephenson, 72 Mich. 409, 40 NW 735, 2 LRA 277. And see Walsh v. Wheelwright, 96 Me. 174, 52 A 649.

93. N. J.—Pennsylvania R. Co. v. Breckenridge, 60 N. J. L. 583, 38 A 740.

N. Y.—Lane v. Gould, 10 Barb. 254; Jackson v Camp, 1 Cow. 605.

Oh.—Humphries v. Huffman, 33 Oh. St. 395.

Vt.—Sowles v. Minot, 82 Vt. 344, 73 A 1025, 137 AmSR 1010.

Wis.—McEvoy v. Loyd, 31 Wis. 142.

"If no lands are described in it, nothing can pass, the deed is a nullity, and lays no foundation for a claim beyond the actual possession." Slatton v. Tennessee Coal, etc., Co., 109 Tenn. 415, 423, 75 SW 926 (per McAlister, J.).

[a] **Difference in description between deed and record of sale.**—Where the deed to a purchaser of lands sold for taxes and the official record of sales kept by the judge of probate differ from each other as to the quantity sold, the deed must control when offered, not as a muniment of title, but as color of title fixing the boundaries of an adverse possession. Doe v. Clayton, 81 Ala. 391, 2 S 24.

[b] **Vague and uncertain description.**—The rule as to constructive possession has no application where, by reason of vagueness and uncertainty, the description given is such that the land in controversy cannot be identified therefrom. Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 9 S 537; Louisville, etc., R. Co. v. Boykin, 76 Ala. 560; Jackson v. Woodruff, 1 Cow. (N. Y.) 276, 13 AmD 525. See also Gibson v. Chappell, 16 S. C. L. 28.

94. Sowles v. Minot, 82 Vt. 344, 73 A 1025, 137 AmSR 1010.

95. Slatton v. Tennessee Coal., etc., Co., 109 Tenn. 415, 423, 75 SW 926 (per McAlister, J.).

96. U. S.—Montoya v. Gonzales, 232 U. S. 375, 34 SCt 413; Smith v. Gale, 144 U. S. 509, 12 SCt 674, 36 L. ed. 521; Deputron v. Young, 134 U. S. 241, 10 SCt 539, 33 L. ed. 923; Hunnicutt v. Peyton, 102 U. S. 333, 26 L. ed. 113; Brownsville v. Cavazos, 100 U. S. 138, 25 L. ed. 574; Clarke v. Courtney, 5 Pet. 319, 8 L. ed. 140; Hunt v. Wickliffe, 2 Pet. 201, 7 L. ed. 397; Barr v. Gratz, 4 Wheat. 213, 4 L. ed. 553; Green v. Liter, 8 Cranch 229, 3 L. ed. 545; Santee River Cypress Lumber Co. v. James, 50 Fed. 360; Braxton v. Rich, 47 Fed. 178 [aff 158 U. S. 375, 15 SCt 1006, 39 L. ed. 1022]; Cross v. Sabin, 13 Fed. 308; Larwell v. Stevens, 12 Fed. 559, 2 McCrary 311.

Ala.—McMillan v. Aikin, 62 S 519; Wells v. American Mortg. Co., 109 Ala. 430, 20 S 136; Harper v. Rudd, 89 Ala. 371, 7 S 646; Gafford v. Strauss, 89 Ala. 282, 7 S 248, 18 AmSR 111, 7 LRA 568; Scruggs v. Decatur Mineral, etc., Co., 86 Ala. 173, 5 S 440; Pickett v. Doe, 74 Ala. 122; Ryan v. Kilpatrick, 66 Ala. 332; Bragg v. Massie, 38 Ala. 89, 79 AmD 82; Doe v. Eslava, 11 Ala. 1028.

Ark.—Hardie v. Investment Guaranty, etc., Co., 81 Ark. 141, 98 SW 701; Haggart v. Ranney, 73 Ark. 344, 84 SW 703; Sparks v. Farris, 71 Ark. 117, 71 SW 255, 945.

Cal.—McCormick v. Sutton, 97 Cal. 373, 32 P 444; Labory v. Los Angeles Orphan Asylum, 97 Cal. 270, 32 P 231; Langford v. Poppe, 56 Cal. 73; Semple v. Cook, 50 Cal. 26; Davis v. Perley, 30 Cal. 630.

Del.—Truitt v. Osler, 90 A 467; Bartholomew v. Edwards, 6 Del. 17.

Fla.—Wilkins v. Pensacola City Co., 36 Fla. 36, 18 S 20; Seymour v. Creswell, 18 Fla. 29.

Ga.—Harriss v. Howard, 126 Ga. 325, 55 SE 59; Strong v. Powell, 92 Ga. 591, 20 SE 6; Whittington v. Wright, 9 Ga. 23.

Ill.—Zirngibl v. Calumet, etc., Canal, etc., Co., 157 Ill. 430, 42 NE 431; Peoria, etc., R. Co. v. Tamplin, 156 Ill. 285, 40 NE 960; Fisher v. Bennehoff, 121 Ill. 426, 13 NE 150; Whitford v. Drexel, 118 Ill. 600, 9 NE 268; Coleman v. Billings, 89 Ill. 183; Ballance v. Flood, 52 Ill. 49.

Iowa.—Chicago, etc., R. Co. v. Allfree, 64 Iowa 500, 20 NW 779; Langworthy v. Myers, 4 Iowa 18. See also Libbey v. Young, 103 Iowa 258, 72 NW 520.

Ky.—Louisville, etc., R. Co. v. Rayl, 107 SW 298, 32 KyL 870; Courtney v. Ashcraft, 105 SW 106, 31 KyL 1324; Cuyler v. Bush, 84 SW 579, 27 KyL 148; Kentucky Land, etc., Co. v. Sloan, 78 SW 175, 25 KyL 1515; Kentucky Land, etc., Co. v. Crabtree, 113 Ky. 922, 70 SW 31, 24 KyL 743; West v. McKinney, 92 Ky. 638, 18 SW 633, 13 KyL 900; Townsend v. Chenault, 17 SW 185, 13 KyL 319; Wait v. Gover, 12 SW 1068, 11 KyL 750; Jones v. McCauley, 2 Duv. 14; Baird v. Bell, 1 Duv. 384; Simon v. Gouge, 12 B. Mon. 156; McLawrin v. Salmons, 11 B. Mon. 96, 52 AmD 563; Rogers v. Moore, 9 B. Mon. 401; Stith v. Jones, 7 Dana 433; Chiles v. Jones, 4 Dana 479, 7 Dana 528; Griffith v. Huston, 7 J. J. Marsh. 385; Smith v. Lockridge, 3 Litt. 19; Voorhies v. Bridgeford, 3 A. K. Marsh. 26; Layson v. Galloway, 4 Bibb 100; Harlan v. Howard, 7 KyL 92.

La.—John T. Moore Planting Co. v. Morgan's Louisiana, etc., R. etc.,

possessio alone creates an adverse title.[97] The rule is not affected by statutory provisions making the possession of part of a tract of land under mere color of title possession of the whole, the same being merely declaratory of the common-law doctrine in respect of constructive possession under color of title.[98] The reason for the rule is that one person cannot be in the constructive and the other in the actual possession of the same land at the same time.[99] The law therefore adjudges the seizin of all that which is not in the actual occupancy of the adverse claimant to him who has the better title.[1] As was aptly said in a recent decision in respect of actual and constructive possession: "One is a fiction of the law; the other a tangible fact. The fiction is inoperative as against the fact; the unreal as against the real."[2]

[§ 526] **(b) Several Parcels in Tract.** Where the land of the true owner consists of several continuous or contiguous parcels acquired by him under several grants or conveyances they are to be considered as one tract so that if he is in possession of a part of any of such parcels he is to be deemed in the constructive possession of the entire tract, and another, in possession of a part of one parcel under color of title thereto, does not have constructive possession of the whole of such parcel but his possession is limited to his actual possession.[3]

[§ 527] **(c) Subsequent Entry by Owner.** If the claimant enters on land under color of title and, by his actual possession of part and claim of title to the whole, obtains constructive possession of the entire tract, and the owner of the true title afterward, and before the title by adverse possession is perfected, enters upon the same tract in another place, claiming the whole, the prior constructive possession acquired by the former is overcome by that of the latter, so that he can acquire title by adverse possession, as against the true owner, to only that portion of the land which he actually occupies.[4] But

Co., 126 La. 840, 53 S 22; Carey v. Cagney, 109 La. 77, 33 S 89; D'Arby v. Blanchet, 7 La. 256.

Me.—Proctor v. Maine Cent. R. Co., 100 Me. 27, 60 A 423, 109 AmSR 474; Putnam Free School v. Fisher, 34 Me. 172; Robinson v. Brown, 32 Me. 578; Little v. Megquier, 2 Me. 176. And see Banton v. Herrick, 101 Me. 134, 63 A 671.

Md.—Schlossnagle v. Kolb, 97 Md. 285, 54 A 1006; Armstrong v. Risteau, 5 Md. 256, 59 AmD 115; Hoye v. Swan, 5 Md. 237; Cheney v. Ringgold, 2 Harr. & J. 87; Gibson v. Martin, 1 Harr. & J. 545.

Mass.—Bellis v. Bellis, 122 Mass. 414; Brimmer v. Long Wharf, 5 Pick. 131; Codman v. Winslow, 10 Mass. 146; Langdon v. Potter, 3 Mass. 215.

Miss.—Mitchell v. Bond, 84 Miss. 72, 84, 36 S 148 [quot Cyc]; Louisville, etc., R. Co. v. Gulf of Mexico Land, etc., Co., 82 Miss. 180, 33 S 845, 100 AmSR 627; Louisville, etc., R. Co. v. Buford, 73 Miss. 494, 19 S 584; Jones v. Gaddis, 67 Miss. 761, 7 S 489.

Mo.—Benne v. Miller, 149 Mo. 228, 50 SW 824; Hedges v. Pollard, 149 Mo. 216, 50 SW 889; Potter v. Adams, 125 Mo. 118, 28 SW 490, 46 AmSR 478; Goltermann v. Schiermeyer, 111 Mo. 404, 19 SW 484, 20 SW 161; Ozark Pleateau Land Co. v. Hays, 105 Mo. 143, 16 SW 957; Bradley v. West, 60 Mo. 33; Crispen v. Hannavan, 50 Mo. 536; De Graw v. Taylor, 37 Mo. 310; Schultz v. Lindell, 30 Mo. 310; St. Louis v. Gorman, 29 Mo. 593, 77 AmD 586; Griffith v. Schwenderman, 27 Mo. 412; McDonald v. Schneider, 27 Mo. 405; Cottle v. Sydnor, 10 Mo. 763.

N. Y.—Finlay v. Cook, 54 Barb. 9; Livingston v. Peru Iron Co., 9 Wend. 511; Jackson v. Vermilyea, 6 Cow. 677.

N. C.—Staton v. Mullis, 92 N. C. 623; Gaylord v. Respass, 92 N. C. 553; Scott v. Elkins, 83 N. C. 424; Berryman v. Kelly, 35 N. C. 269; Ring v. King, 20 N. C. 301; Fitzrandolph v. Norman, 4 N. C. 564; Larkins v. Miller, 3 N. C. 345; Bryan v. Carleton, 1 N. C. 59.

Oh.—Humphries v. Huffman, 38 Oh. St. 395.

Pa.—Royer v. Benlow, 10 Serg. & R. 303; Miller v. Shaw, 7 Serg. & R. 129; Hall v. Powel, 4 Serg. & R. 456, 8 AmD 722; Mather v. Trinity Church, 3 Serg. & R. 509, 8 AmD 663; Burns v. Swift, 2 Serg. & R. 436; Cluggage v. Duncan, 1 Serg. & R. 111.

Porto Rico.—Santana v. Marquez, 4 Porto Rico Fed. 87.

S. C.—Stanley v. Shoolbred, 25 S. C. 181; Renneker v. Warren, 17 S. C. 139; Hill v. Saunders, 40 S. C. L. 62; Alston v. Collins, 29 S. C. L. 450; McBeth v. Donnelly, 23 S. C. L. 177; Huger v. Cox, 19 S. C. L. 135; Anderson v. Darby, 10 S. C. L. 369.

Tenn.—Hebard v. Scott, 95 Tenn. 467, 32 SW 390; Waddle v. Stuart, 4 Sneed 534; Stewart v. Harris, 9 Humphr. 714; Berry v. Walden, 4 Hayw. 174; Savage v. Bon Air Coal Land, etc., Co., 2 Tenn. Ch. A. 594.

Tex.—Combes v. Stringer, 167 SW 217 [rev (Civ. A.) 142 SW 668]; Peden v. Crenshaw, 98 Tex. 365, 84 SW 362 [rev (Civ. A.) 81 SW 369]; Watkins v. Smith, 91 Tex. 589, 45 SW 560; Turner v. Moore, 81 Tex. 206, 16 SW 929; Claiborne v. Elkins, 79 Tex. 380, 15 SW 395; Anderson v. Jackson, 69 Tex. 346, 6 SW 575; Tucker v. Smith, 68 Tex. 473, 3 SW 671; Parker v. Baines, 65 Tex. 605; Frisby v. Withers, 61 Tex. 134; Evitts v. Roth, 61 Tex. 81; Texas Land Co. v. Williams, 51 Tex. 51; Ballard v. Perry, 28 Tex. 347; Whitehead v. Foley, 28 Tex. 268; Hays v. Barrera, 26 Tex. 78; Cunningham v. Frandtzen, 26 Tex. 84; Horton v. Crawford, 10 Tex. 382; Chicago, etc., R. Co. v. Johnson, (Civ. A.) 156 SW 253; Haynes v. Texas, etc., R. Co., 51 Tex. Civ. A. 49, 111 SW 427; Craver v. Ragon, (Civ. A.) 110 SW 489; Polk v Beaumont Pasture Co., 26 Tex. Civ. A. 242, 64 SW 58; Payton v. Caplen, 24 Tex. Civ. A. 364, 59 SW 624; Beaumont Pasture Co. v. Polk, (Civ. A.) 55 SW 614; Zimmerman v. Kennedy, (Civ. A.) 52 SW 642; Freedman v. Bonner, (Civ. A.) 40 SW 47; Carothers v. Covington, (Civ. A.) 27 SW 1040.

Vt.—Langdon v. Templeton, 66 Vt. 173, 28 A 866; Earl v. Griffith, 52 Vt. 415; Hodges v. Eddy, 38 Vt. 327; Jakeway v. Barrett, 38 Vt. 316; Wood v. Willard, 37 Vt. 377, 86 AmD 716; Stevens v. Hollister, 18 Vt. 294, 46 AmD 154; Ralph v. Bayley, 11 Vt. 521; Hubbard v. Austin, 11 Vt. 129; Crowell v. Bebee, 10 Vt. 33, 33 AmD 172.

Va.—Breeden v. Haney, 95 Va. 622, 29 SE 328; Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232; Creekmur v. Creekmur, 75 Va. 430; Kincheloe v. Tracewells, 11 Gratt. (52 Va.) 587; Overton v. Davisson, 1 Gratt. (42 Va.) 211, 42 AmD 544; Taylor v. Burnsides, 1 Gratt. (42 Va.) 165.

W. Va.—Vintroux v. Simms, 45 W. Va. 548, 31 SE 941; Ilsley v. Wilson, 42 W. Va. 757, 26 SE 551; White v. Ward, 35 W. Va. 418, 14 SE 22; Adams v. Alkire, 20 W. Va. 480.

Eng.—Boehner v. Hirtle, 6 DomLR 548, 11 EastLR 222 [rev 9 EastLR 258].

N. B.—Doe v. Carney, 15 N. B. 233.

N. S.—McInnes v. Stewart, 45 N. S. 435.

Compare Montoya v. Unknown Heirs, 16 N. M. 349, 120 P 676 (holding that the rule that a grantee can have constructive possession of no part of the tract conveyed to him which is in actual possession of another does not apply in the case of title claimed under Comp. L. [1897] § 2937, to land held for over ten years within the Mexican and Spanish land grants under conveyance in fee simple).

[a] **Effect of oral gift by owner to claimant as extending possession.**—Where the true owner is in actual possession of a part of the land, his constructive possession is not restricted, nor the possession of the claimant extended, by the owner's declaration that the claimant might have one hundred and sixty acres instead of the much smaller amount which he was then occupying. In this case it was said: "We do not think that under an oral gift or promise of this kind the donee could acquire title to land not in his actual possession by simply claiming it for 10 years." Sanders v. Thompson Bros. Lumber Co., (Tex. Civ. A.) 139 SW 1004, 1006.

97. Del.—Quillen v. Betts, 17 Del. 53, 39 A 595.

La.—John T. Moore Planting Co. v. Morgan's Louisiana, etc., R., etc., Co., 126 La. 840, 53 S 22.

Miss.—Mitchell v. Bond, 84 Miss. 72, 84, 36 S 148 [quot Cyc].

Mo.—Potter v. Adams, 125 Mo. 118, 28 SW 490, 46 AmSR 478; Cottle v. Sydnor, 10 Mo. 763.

N. J.—Schmitt v. Traphagen, 73 N. J. Eq. 399, 69 A 189, 133 AmSR 739 [aff 72 N. J. Eq. 665, 66 A 937].

Pa.—Miller v. Shaw, 7 Serg. & R. 129.

Porto Rico.—Santana v. Marquez, 4 Porto Rico Fed. 87.

[a] **Statutory provision as to tax deeds.**—The rule is not affected by a statute providing that twelve months' occupation of any tract of land under deeds executed pursuant to a tax sale, or any part thereof, by any such occupant claiming the whole shall forever bar any action at law or in equity to such tract. Louisville, etc., R. Co. v. Buford, 73 Miss. 494, 19 S 584.

98. Bradley v. West, 60 Mo. 33.

99. Clark v. Courtney, 5 Pet. (U. S.) 319, 8 L. ed. 140; Crouch v. Colbert, 111 Mo. A. 93, 84 SW 992; New York Cent, etc., R. Co. v. Brennan, 24 App. Div. 343, 48 NYS 675 [aff 163 N. Y. 584 mem, 57 NE 1119 mem].

1. Hunnicutt v. Peyton, 102 U. S. 333, 26 L. ed. 113.

2. Carey v. Cagney, 109 La. 77, 82, 33 S 89.

3. Rich v. Braxton, 158 U. S. 375, 15 SCt 1006, 39 L. ed. 1022 [aff 47 Fed. 178]; Harrison v. McDaniel, 2 Dana (Ky.) 348; Alston v. Collins, 29 S. C. L. 450; Overton v. Davisson, 1 Gratt. (42 Va.) 211, 42 AmD 544.

4. U. S.—Hunnicutt v. Peyton, 102

it has been held, where a person with color of title to a portion of a large tract of land, the true owner of which is not in actual possession of any part thereof, takes actual possession of a part of the portion to which he has color of title and thereby acquires constructive possession of such portion, that if the true owner enters on a part of the large tract outside of such portion the constructive possession of the other to the limits of such portion is not defeated nor his possession restricted to his actual possession, but the true owner acquires constructive possession only of that part of the large tract outside the limits of such portion, and the other retains constructive possession of that part of such portion outside of his actual possession.[5]

[§ 528] **(d) Owner's Ignorance of Boundaries as Affecting Rule.** The fact that the true owner is ignorant of the actual limits of his boundaries does not prevent his constructive possession from extending to the actual limits.[6]

[§ 529] **(e) Effect of Possession by Tenant.** Where the rightful owner is in possession of part through a tenant, under a demise to the tenant of the whole tract, the claimant under color of title is not deemed to have constructive possession beyond his actual possession;[7] but if the tenant holds under a demise of a particular part such possession will not operate to extend the constructive possession of his landlord as against such claimant, but the latter will be deemed to have the constructive possession of the balance of the tract.[8]

[§ 530] **(f) Actual Possession Not Overcome by Constructive Possession.** The constructive possession of the owner of the true title does not override the actual possession of the holder of the colorable title, and the latter may acquire title by limitation to the land in his actual possession.[9]

[§ 531] **(2) Where Both Parties Have Color of Title and Neither Is in Actual Possession.** Where two persons claim under color of title, but neither is in actual possession, the superior title will prevail.[10] The mere fact that the holder of the junior title claims the land cannot operate to defeat the constructive possession and title of the holder of the senior title.[11]

[§ 532] **(3) Where Only One Has Color of Title.** The constructive possession of land arising from title cannot be extended to that part of it whereof there is an actual adverse possession, although the other claimant has no color of title,[12] Nevertheless, the person holding under color of title has constructive possession of all land not actually occupied by others not having color of title.[13]

[§ 533] **(4) Where Neither Party Has Color of Title.** Where two or more are holding land adversely, with a conflict of boundary, and claiming title by possession alone, the one first entering will be presumed to hold to the extent of his boundary unless that occupancy has been abandoned; and the subsequent entry will not draw to it title while both in possession are claiming to the extent of their respective boundaries.[14]

[§ 534] **(5) In Case of Interlocking Patents, Grants, Surveys, Deeds, Etc.—(a) Where Junior Claimant Is Not in Possession of Interlock—aa. Where Senior Claimant Is in Possession of Part of His Tract.** Where two patents, grants, surveys, deeds, or other conveyances are conflicting, each including land which the other purports to convey, and the senior claimant is in actual possession of some part of the land lying within his grant but not within the interlock, possession by the junior claimant of a part of the tract included in his conveyance outside of the interlock or lap gives him no constructive possession of lands lying therein.[15]

[§ 535] **bb. Where Senior Claimant Is Not in Possession of Any Part of His Tract.** According to a few decisions, if the senior claimant is not in actual possession of any part of the land included within his conveyance, and the junior claimant is in possession of a part of the land included within his conveyance but outside of the interlock, the junior claimant acquires title by constructive possession of all the lands lying within the boundaries of his conveyance, including the interlock.[16] This view, however, is opposed to the weight of authority. Some decisions have directly held that it was immaterial whether the senior claimant had ever been in actual

U. S. 333, 26 L. ed. 113; Green v. Liter, 8 Cranch 229, 3 L. ed. 545.

Cal.—Semple v. Cook, 50 Cal. 26.

Ky.—Wilson v. Stivers, 4 Dana 634. Compare Summers v. Green, 4 J. J. Marsh. 137.

Pa.—Altemus v. Long, 4 Pa. 254, 45 AmD 688. Compare Wolf v. Ament, 1 Grant 150.

Tex.—Parker v. Baines, 65 Tex. 605; Evitts v. Roth, 61 Tex. 81; Hull v. Woods, (Civ. A.) 25 SW 458.

See Carter v. Chevalier, 108 Ala. 563, 19 S 798.

5. Stull v. Rich Patch Iron Co., 92 Va. 253, 23 SE 293 [applying Taylor v. Burnsides, 1 Gratt. (42 Va.) 165].

6. Baird v. Bell, 1 Duv. (Ky.) 384.

7. Hunnicutt v. Peyton, 102 U. S. 333, 26 L. ed. 113.

8. Doe v. Beck, 108 Ala. 71, 19 S 802; Craig v. Cartwright, 65 Tex. 413.

9. Cal.—Davis v. Perley, 30 Cal. 630.

Ill.—East St. Louis, etc., R. Co. v. Nugent, 147 Ill. 254, 35 NE 464; Whitford v. Drexel, 118 Ill. 600, 9 NE 268.

N. C.—Tredwell v. Reddick, 23 N. C. 56.

S. C.—Huger v. Cox, 19 S. C. L. 135; Middleton v. Dupuis, 11 S. C. L. 310.

Tex.—Ballard v. Perry, 28 Tex. 347; Galveston Land, etc., Co. v. Perkins, (Civ. A.) 26 SW 256.

Vt.—Jakeway v. Barrett, 38 Vt. 316; Davis v. White, 27 Vt. 751; Stevens v. Hollister, 18 Vt. 294, 46 AmD 154.

Wis.—Wilson v. Henry, 40 Wis. 594.

10. Whitley County Land Co. v. Powers, 146 Ky. 801, 144 SW 2; Ramsey v. Thomas, 140 Ky. 356, 131 SW 11; Currie v. Gilchrist, 147 N. C. 648, 61 SE 581; Reneker v. Warren, 17 S. C. 139; Sims v. Meacham, 18 S. C. L. 101; Pardee v. Johnston, 70 W. Va. 347, 74 SE 721. See Harriss v. Howard, 126 Ga. 325, 329, 55 SE 59 [quot Cyc.]

11. Ramsey v. Thomas, 140 Ky. 356, 131 SW 11; Hall v. Blanton, 77 SW 1110, 25 KyL 1400.

12. New York Cent., etc., R. Co. v. Brennan, 24 App. Div. 343, 48 NYS 675 [aff 163 N. Y. 584 mem, 57 NE 1119 mem]; Tredwell v. Reddick, 23 N. C. 56; Claiborne v. Elkins, 79 Tex. 380, 15 SW 395; Cook's Hereford Cattle Co. v. Barnhart, (Tex. Civ. A.) 147 SW 662.

13. Santee River Cypress Lumber Co. v. James, 50 Fed. 360; McColman v. Wilkes, 34 S. C. L. 465; Gourdin v. Davis, 31 S. C. L. 481, 45 AmD 745.

14. Santana v. Marquez, 4 Porto Rico Fed. 87, 89.

15. Ky.—Crown Lumber Co. v. McCoy, 124 SW 834; Woodward v. Johnson, 122 Ky. 160, 90 SW 1076, 28 KyL 1091; Grughler v. Wheeler, 12 B. Mon. 183; Bodley v. Logan, 2 J. J. Marsh. 254.

N. C.—Baker v. McDonald, 47 N. C. 244.

Tenn.—Wright v. Hurst, 122 Tenn. 656, 127 SW 701; Elliott v. Cumberland, Coal, etc., Co., 109 Tenn. 745, 71 SW 749.

Tex.—Trisby v. Withers, 61 Tex. 134.

W. Va.—Ilsley v. Wilson, 42 W. Va. 757, 26 SE 551.

[a] **Conflicting deeds.**—A deed, in the absence of fraud or mistake, gives the vendee constructive possession of all the territory within its limits, and a subsequent deed by the vendor, although it may cover all the territory first sold, will not interfere with such possession so as to give the grantees in the latter deed title by adverse possession, where they have not been in actual possession of the territory included in both deeds. White v. Ward, 35 W. Va. 418, 14 SE 22.

[b] **Contiguous lots.**—Where uncleared land has been granted by the state by conflicting patents, the fact that the land granted to the junior patentee was contiguous to his home tract upon which he was living at the time of the grant does not extend his possession of the home tract to the land patented so as to give him, as against the senior patentee, adverse possession of the overlapping lands. Harmon v. Ratliff, 93 Va. 249, 24 SE 1023.

16. Sicard v. Davis, 6 Pet. (U. S.) 124, 8 L. ed. 342; Seigle v. Louderbaugh, 5 Pa. 490; Waggoner v. Hastings, 5 Pa. 300.

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possession of any part of his tract or not; that the junior claimant could not acquire constructive possession of the interlock by occupation of land included in his conveyance but outside of the interlock.[17] It is said that where one grant conflicts with another, occasioning an interlock, the elder patentee under his grant acquires at once constructive possession of all the land embraced within its boundaries, although he has taken no actual possession of any part thereof. The junior grantee under his grant acquires similar constructive seizin of all the land embraced by his boundaries except that portion within the interlock, the seizin of which has already vested in the senior grantee.[18] So in a considerable number of decisions the rule is laid down, without qualification, that the possession by the junior claimant of any part of his tract outside of the interlock will not be extended by construction to the land lying within the interlock.[19] To overcome the constructive seizin of the senior claimant and work an ouster there must be an actual invasion of the boundary of the senior claimant by some act or acts palpable to the senses which would admonish the senior claimant that his rights were invaded.[20]

[§ 536] **(b) Where Senior Claimant Is in Possession of Interlock.** Where the senior claimant has possession of part of the interlock he has constructive possession of the whole if the junior claimant is not in the actual possession of any part thereof.[21]

[§ 537] **(c) Where Junior Claimant Is in Possession of Interlock—aa. The General Rule.** While there are some decisions to the contrary,[22] the weight of authority is to the effect that if the junior claimant is in actual possession of a part of the interlock he will acquire constructive possession of the whole of it, although the senior claimant is in possession of some land lying within the conveyance to him but not within the interlock.[23] The operation of this

17. Curtis v. Warden, 144 Ky. 383, 138 SW 245; Krauth v. Hahn, 65 SW 18, 23 KyL 1261; McCoy v. De Long, 58 SW 704, 22 KyL 719; Smith v. Mitchel, 1 A. K. Marsh. (Ky.) 207; Trimble v. Smith, 4 Bibb (Ky.) 257; Foster v. Grizzle, 1 Coldw. (Tenn.) 529; Roach v. Fletcher, 11 Tex. Civ. A. 225, 32 SW 585.

If entry upon the part of the tract not within the interference were construed to give possession of the land within the interference and divest the senior title holder, "a party having right might be divested of his right without any wrong being in fact done to him, or any possibility of knowing that any was intended to be done." Trimble v. Smith, 4 Bibb (Ky.) 257, 258 (per Boyle, J.).

18. Green v. Pennington, 105 Va. 801, 54 SE 877.

19. U. S.—White v. Burnley, 20 How. 235, 15 L. ed. 886; Kentucky Coal, etc., Dev. Co. v. Kentucky Union Co., 214 Fed. 590 (declaring Kentucky rule); Jarvis v. Johnson, 208 Fed. 353 (declaring rule in West Virginia); Stockley v. Cissna, 119 Fed. 812, 56 CCA 324 (declaring Tennessee rule).

Cal.—McCormick v. Sutton, 97 Cal. 373, 32 P 444; Kimball v. Stormer, 65 Cal. 116, 3 P 408.

Ky.—Collins v. Flynn, 155 Ky. 717, 160 SW 496; Combs v. Stacy, 147 Ky. 222, 144 SW 24; Tennis Coal Co. v. Napier, 142 Ky. 719, 135 SW 295; Bowling v. Breathitt Coal, etc., Co., 134 Ky. 249, 120 SW 317; Hendrickson v. Linville, 104 SW 688, 31 KyL 967; Bates v. Collins, 93 SW 615, 29 KyL 346; Kentucky Land, etc., Co. v. Sloan, 78 SW 175, 25 KyL 1515; Kentucky Land, etc., Co. v. Crabtree, 113 Ky. 922, 70 SW 31, 24 KyL 743; Krauth v. Hahn, 65 SW 18, 23 KyL 1261; Jones v. McCauley, 2 Duv. 14; Gregory v. Ford, 5 B. Mon. 471; McGowan v. Crooks, 5 Dana 65; Wilson v. Stivers, 4 Dana 634; Shrieve v. Summers, 1 Dana 239; Lillard v. McGee, 3 J. J. Marsh. 549; Pogue v. McKee, 3 A. K. Marsh. 127; Voorhies v. White, 2 A. K. Marsh. 26; Lee v. McDaniel, 1 A. K. Marsh. 234; Smith v. Mitchel, 1 A. K. Marsh. 207; Braxdale v. Speed, 1 A. K. Marsh. 105; Layson v. Galloway, 4 Bibb 100.

N. C.—McLean v. Murchison, 53 N. C. 38; McMillan v. Turner, 52 N. C. 435; Brown v. Potter, 44 N. C. 461; Williams v. Buchanan, 23 N. C. 535, 35 AmD 760.

Pa.—McArthur v. Kitchen, 77 Pa. 62; O'Hara v. Richardson, 46 Pa. 385; Ament v. Wolf, 33 Pa. 331; Beaupland v. McKeen, 28 Pa. 124, 70 AmD 115; Hole v. Rittenhouse, 25 Pa. 491.

Tenn.—Byrd v. Phillips, 120 Tann. 14, 111 SW 1109; Elliott v. Cumberland Coal, etc., Co., 109 Tenn. 745, 71 SW 749; Coal Creek Min., etc., Co. v. Heck, 15 Lea 497; Peck v. Houston, 5 Lea 227; Foster v. Grizzle, 1 Coldw. 529; Snoddy v. Kreutch, 3 Head 301; Creech v. Jones, 5 Sneed 631; Smith v. McCall, 2 Humphr. 163; Talbot v. McGavock, 1 Yerg. 262; Napier v. Simpson, 1 Overt. 448; Boles v. Smith, 1 Tenn. Cas. 149.

Tex.—Wright v. Lassiter, 71 Tex. 640, 10 SW 295; Mason v. Stapper, 8 SW 598; Houston v. Brown, 8 SW 318; Word v. Box, 66 Tex. 596, 3 SW 93; Parker v. Baines, 65 Tex. 605 [overr Jones v. Menard, 1 Tex. 771]; Frisby v. Withers, 61 Tex. 134; Bunton v. Cardwell, 53 Tex. 408; Payton v. Barton, 53 Tex. 298; Hulett v. Platt, 49 Tex. Civ. A. 377, 109 SW 207; McLemore v. Lomax, 38 Tex. Civ. A. 589, 86 SW 635; Polk v. Beaumont Pasture Co., 26 Tex. Civ. A. 242, 64 SW 58; Payton v. Caplen, 24 Tex. Civ. A. 364, 59 SW 624; Beaumont Pasture Co. v. Polk, (Civ. A.) 55 SW 614; Cook v. Lister, 15 Tex. Civ. A. 31, 38 SW 380.

Va.—Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232; Koiner v. Rankin, 11 Gratt. (52 Va.) 420; Taylor v. Burnsides, 1 Gratt. (42 Va.) 165.

W. Va.—Chilton v. White, 78 SE 1048; Robinson v. Lowe, 66 W. Va. 665, 66 SE 1001; Camden v. West Branch Lumber Co., 59 W. Va. 148, 53 SE 409; Wilson v. Braden, 48 W. Va. 196, 36 SE 367.

[a] **Reason for rule.**—In Peyton v. Barton, 53 Tex. 298, 303, Bonner, J., after stating the above rule, said: "These decisions are based, in part at least, upon the doctrine that the elder legal title draws with it to the owner the constructive lawful seizin and possession of the land embraced within its boundaries, though actual possession be not in fact taken by him. That possession by the owner of the junior title of that part of the land not within the interference, being lawful within itself, would not by construction extend also to a presumed unlawful trespass upon that part embraced within the elder title, but that an actual trespass must be required for this purpose. That without such actual trespass, the true owner would have no cause of action, unless he elect to consider himself disseized with the view to try the title by proper proceedings for this purpose, or in the nature of an action to remove clouds."

[b] **Interlock common to three grants.**—Where three grants of different dates have a common interlock, and outside of this interlock, and upon an interlock of the elder and younger grants, adverse possession for seven years is held under the younger grant claiming to its boundaries, the title under the elder grant is extinguished but not tolled in favor of the younger grant, and the intermediate grant carries title thereafter to the land within the common interlock of the three grants. Coal Creek Cons. Coal Co. v. East Tennessee Iron, etc., Co., 105 Tenn. 563, 59 SW 634.

20. Ky.—Combs v. Stacy, 147 Ky. 222, 144 SW 24; Kentucky Land, etc., Co. v. Crabtree, 113 Ky. 922, 70 SW 31, 24 KyL 743.

Tex.—Lake v. Earnest, 53 Tex. Civ. A. 555, 116 SW 865; Polk v. Beaumont Pasture Co., 26 Tex. Civ. A. 242, 64 SW 58.

Va.—Green v. Pennington, 105 Va. 801, 54 SE 877.

W. Va.—Camden v. West Branch Lumber Co., 59 W. Va. 148, 53 SE 409.

N. S.—McInnes v. Stewart, 45 N. S. 435.

21. White v. Bates, 7 J. J. Marsh. (Ky.) 538; McCormick v. Munroe, 48 N. C. 332; Williams v. Miller, 29 N. C. 186; Borrets v. Turner, 3 N. C. 273. And see Hall v. Blanton, 77 SW 1110, 25 KyL 1400 (holding that where two patents lap actual possession of part of the lap by the senior patentee is such possession that limitations run as to the whole of it against the junior patentee who also claims by previous adverse possession).

22. Anderson v. Jackson, 69 Tex. 346, 6 SW 575; Frisby v. Withers, 61 Tex. 134; Zapeda v. Hoffman, 31 Tex. Civ. A. 312, 72 SW 443; Zimmerman v. Kennedy, (Tex. Civ. A.) 52 SW 642.

23. U. S.—Hunnicutt v. Peyton, 102 U. S. 333, 26 L. ed. 113.

Mich.—McKee v. Grand Rapids, 133 Mich. 272, 95 NW 85.

Mo.—Hedges v. Pollard, 149 Mo. 216, 50 SW 889; Goltermann v. Schiermeyer, 125 Mo. 291, 28 SW 616.

N. C.—Simmons v. Defiance Box Co., 153 N. C. 257, 69 SE 146; Currie v. Gilchrist, 147 N. C. 648, 61 SE 581; Hamilton v. Icard, 114 N. C. 532, 19 SE 607; Boomer v. Gibbs, 114 N. C. 76, 19 SE 226; McLean v. Smith, 106 N. C. 172, 11 SE 184; Brady v. Maness, 91 N. C. 135; Howell v. McCracken, 87 N. C. 399; Kerr v. Elliott, 61 N. C. 601; McCormick v. Munroe, 48 N. C. 332; Bryson v. Slagle, 44 N. C. 449; Williams v. Miller, 29 N. C. 186; Williams v. Buchanan, 23 N. C. 535, 35 AmD 760; Carson v. Mills, 18 N. C. 546; Dobbins v. Stephens, 18 N. C. 5; Green v. Harman, 15 N. C. 158; Den v. Morrison, 8 N. C. 467; Slade v. Griffin, 3 N. C. 178; Sawyer v. Sexton, 3 N. C. 67; Bryan v. Carleton, 1 N. C. 59.

Pa.—Hole v. Rittenhouse, 2 Phila. 411.

S. C.—Eifert v. Read, 10 S. C. L. 374.

Tenn.—Coal Creek Min., etc., Co. v. Heck, 83 Tenn. 497; Tilghman v. Baird, 2 Sneed 195. See also Snoddy v. Kreutch, 3 Head 301; Stewart v. Harris, 9 Humphr. 713; Talbot v. McGavock, 1 Yerg. 262; Smith v. Gernt, 2 Tenn. Civ. A. 65.

Tex.—Stevens v. Crosby, (Civ. A.) 166 SW 62.

W. Va.—Robinson v. Sheets, 63 W. Va. 394, 61 SE 347; Wilson v. Braden, 48 W. Va. 196, 36 SE 367; Vintroux v. Simms, 45 W. Va. 548, 31 SE 941;

rule, however, is not affected by the casual entry of a mere wrongdoer.[24] It has been said that "the lappage in such a case is regarded as practically a separate and distinct tract, so that the color of title of the defendant [junior claimant] will ripen into a perfect title by a sufficient adverse possession, the same as if he had a separate deed for that part of the land."[25] Nevertheless "the possession so taken, it would seem, should be of as much, in connection with the circumstances of the entry, as will reasonably indicate to the other proprietor and to the jury that the intention is to usurp a possession beyond the admitted boundaries and to make open claim under the junior title to the land covered by both, and that it is not merely a possession taken under a mistake or misapprehension as to the true dividing line."[26]

[§ 538] **bb. Rule in Kentucky.** The rule is similar to that stated in the preceding section but places some limitations on it. Where there are conflicting patents for land, and the junior patentee enters and holds by actual possession a part of the interference, claiming the interference to the extent of his patent boundary, and the owner of the senior patent is not in the actual possession of his land at the time of such entry and occupancy by the junior patentee, then the junior patentee acquires the actual possession of the whole interference, and the subsequent entry of the senior patentee upon and the occupancy of his land outside of the interference do not give him actual or constructive possession of any part of the interference.[27] A fortiori is this so, where the possession has continued for more than the statutory period.[28] But if the elder patentee has possession of his land, although by entry or inclosure outside of the interference, the subsequent entry of the junior patentee within the interference does not divest the prior and existing possession beyond the actual close of the junior patentee, although he may have been first possessed outside of the interference, claiming to the extent of his patent.[29]

[§ 539] **cc. Rule in Virginia.** The rule seems to be practically the same as that in Kentucky. It has been held that, where land is partly covered by an elder patent and partly by a junior patent and there has been no actual possession under the elder patent, possession by the junior patentee of the interlock, accompanied by a claim of title to all the lands within the bounds of the junior patent, is, in the contemplation of law, possession of the whole.[30] And on the other hand, "where a senior patentee settles upon any portion of his land, claiming title to the whole, whether inside or outside of the interlock, before the junior patentee has settled upon any part of the interlock, the senior patentee is in possession to the extent of his grant, and a subsequent entry of the junior patentee upon the interlock only ousts the senior patentee to the extent of the land actually in the occupancy of the junior patentee by residence, improvement, cultivation, or other open, notorious and habitual acts of ownership."[31]

[§ 540] **(d) Where Both Parties Are in Possession of Interlock.** Where both claimants have actual possession of some part of the interlock, the possession of the person having the elder title covers all not actually occupied by the other.[32]

[§ 541] **(e) Effect of Subsequent Entry on Interlock by Senior Claimant.** The constructive possession of an interlock acquired by the holder of the junior title by taking actual possession of part of it is interrupted when the holder of the senior title subsequently takes possession of some part of the land lying within the interlock.[33]

[§ 542] **5. Effect of Possession by Tenant.** Within the rule that actual possession of part of a tract of land under color of title gives constructive possession to the extent of the boundaries designated in the conveyance, the possession of part of a tract of land by a tenant of the holder of color of title, who has been put into possession under a lease which does not restrict the possession to any definite part of the tract, will give the lessor constructive posses-

Congrove v. Burdett, 28 W. Va. 220; Garrett v. Ramsey, 26 W. Va. 345.

"The principles obtaining which allow the one in possession under a deed claimed as color of title to show constructive possession to the outside boundaries of the deed, including a lappage of lands embracing the locus in quo, do not apply where there is adverse occupation of the lands contained in the lappage in the other party to the controversy, and the party claiming under 'color' has never exercised any control over the lands amounting to acts of ownership or possession." Mintz v. Russ, 161 N. C. 538, 539, 77 SE 851.

[a] **What does not amount to interlock.**—Where the calls of a junior patent and of deeds subsequent thereto are for the lines and corners of a senior patent, there can be no interlock claimed under such title papers, the only question to be determined being the true location of such common lines and corners. Mere disputes between conflicting claimants as to where the true lines and corners are do not constitute an interlock. Robinson v. Sheets, 63 W. Va. 394, 61 SE 347.

24. Simmons v. Defiance Box Co., 153 N. C. 257, 69 SE 146.

25. Currie v. Gilchrist, 147 N. C. 648, 652, 61 SE 581 (per Walker, J.).

26. Currie v. Gilchrist, 147 N. C. 648, 654, 61 SE 581 (per Walker, J.). And see King v. Wells, 94 N. C. 344; Green v. Harman, 15 N. C. 158.

27. Bassett v. Lush, 156 Ky. 490, 161 SW 227; Martin v. Hall, 152 Ky. 677, 153 SW 997; Richie v. Owsley, 143 Ky. 1, 135 SW 439 [mod 137 Ky. 63, 121 SW 1015]; Kentucky Land, etc., Co. v. Reynolds, 60 SW 635, 22 KyL 1389; Greer v. Bowling, 55 SW 1081, 21 KyL 1648; Whitley County Land Co. v. Lawson, 94 Ky. 603, 23 SW 369, 15 KyL 401; Ware v. Bryant, 21 SW 873, 14 KyL 852; Simon v. Gouge, 12 B. Mon. (Ky.) 156; Harrison v. McDaniel, 2 Dana (Ky.) 348; Shrieve v. Summers, 1 Dana (Ky.) 239; Bodley v. Logan, 2 J. J. Marsh. (Ky.) 254; Fox v. Hinton, 4 Bibb (Ky.) 559. See also Greer v. Bowling, 55 SW 1081, 21 KyL 1648; Baird v. Bell, 1 Duv. (Ky.) 384; Taylor v. Cox, 2 B. Mon. (Ky.) 429; Doe v. Lively, 1 Dana (Ky.) 60.

[a] **Where the junior patentee did not intend to intrude on the elder patent,** he acquired title to the land covered by both patents only to the extent of his actual inclosure existing for the time necessary to give possessory title. Caudill v. Caudill, 52 SW 957, 21 KyL 713.

28. Daniel v. Middleton, 132 Ky. 172, 116 SW 721.

29. Richie v. Owsley, 137 Ky. 63, 121 SW 1015; Simon v. Gouge, 12 B. Mon. (Ky.) 156.

30. Green v. Pennington, 105 Va. 801, 54 SE 877; Andrews v. Roseland Iron, etc., Co., 89 Va. 393, 16 SE 252. And see Turpin v. Saunders, 32 Gratt. (73 Va.) 27; Cline v. Catron, 22 Gratt. (63 Va.) 378.

31. Fry v. Stowers, 98 Va. 417, 419, 36 SE 482; Stull v. Rich Patch Iron Co., 92 Va. 253, 23 SE 293.

32. U. S.—Hunt v. Wickliffe, 2 Pet. 201, 7 L. ed. 397.

Ky.—Goff v. Lowe, 107 SW 794, 32 KyL 1098; Taylor v. Shields, 5 Litt. 295; Hord v. Bodley, 5 Litt. 88; Millar v. Humphries, 2 A. K. Marsh. 446.

Mo.—McDonald v. Schneider, 27 Mo. 405.

N. C.—Boomer v. Gibbs, 114 N. C. 76, 19 SE 226; Asbury v. Fair, 111 N. C. 251, 16 SE 467; McLean v. Smith, 106 N. C. 172, 11 SE 184; Brady v. Maness, 91 N. C. 135; Howell v. McCracken, 87 N. C. 399; Den v. Morrison, 8 N. C. 467; Borrets v. Turner, 3 N. C. 273; Bryan v. Carleton, 1 N. C. 59. See also Green v. Harman, 15 N. C. 158.

Tenn.—White v. Lavender, 5 Sneed 647; Berry v. Walden, 4 Hayw. 174.

Va.—Overton v. Davisson, 1 Gratt. (42 Va.) 211, 42 AmD 544.

W. Va.—Wilson v. Braden, 48 W. Va. 196, 36 SE 367; Garrett v. Ramsey, 26 W. Va. 345.

33. Hunnicutt v. Peyton, 102 U. S. 333, 26 L. ed. 113; Goff v. Lowe, 107 SW 794, 32 KyL 1098; Howell v. McCracken, 87 N. C. 399. And see Richie v. Owsley, 143 Ky. 1, 135 SW 439 [mod 137 Ky. 63, 121 SW 1015] (which held, contrary to a long line of Kentucky decisions, that such possession would be interrupted where the holder of the senior title subsequently took possession of some part of his land lying outside of the interlock).

[a] **Possession as against mere wrongdoer.**—An entry under a deed into part of a tract of land, as against a mere wrongdoer, shall be considered an entry into the whole, it not appearing that anyone else has possession of any part. Osborne v. Ballew, 34 N. C. 373; Evans v. Corley, 42 S. C. L. 315.

sion coextensive with the boundaries of his deed,[34] since the possession of the tenant inures to the benefit of the lessor;[35] and it is not material that only a small part of the land is actually occupied.[36] It has also been held in a number of decisions that even though the lease restricts the possession of the tenant to a definite portion of the tract, his possession will, by construction, be extended to the boundaries of the deed under which the lessor claims,[37] provided of course no one else is in actual possession of the balance of the tract.[38] And in other decisions, where the opinion does not show definitely whether the lease contained such a restriction, the rule is broadly stated that possession by the tenant is coextensive with the boundaries of the lessor's deed.[39] On the other hand there are numerous decisions to the effect that where the lessee is let into possession of a part of a tract under an instrument describing it by specific metes and bounds, the lessee's possession is coextensive only with those metes and bounds and is not available to establish a possession of his landlord other than within such metes and bounds.[40]

Lessor without color of title. A person who has no color of title to a tract of land cannot, by executing a lease of the whole to a tenant who occupies a part only, extend his possession by construction to the tract from which the part was sold. It seems to me that a tenancy of a part of a large tract is a much stronger case. The limitation of the lease to a specific part of the tract does not prevent the possession under the lease from being possession on behalf of the lessor, under the title of the lessor, nor of a part of the tract of land claimed under that title. It is an open, notorious and exclusive act of dominion on the part of the lessor, as much so as if he were himself the occupant thereof." Camden v. West Branch Lumber Co., 59 W. Va. 148, 163, 53 SE 409 (per Poffenbarger, J.).

34. U. S.—Treece v. American Assoc., 122 Fed. 598, 58 CCA 266; Ellicott v. Pearl, 8 F. Cas. No. 4,386, 1 McLean 206 [aff 10 Pet. 412, 9 L. ed. 475].

Ark.—Wheeler v. Foote, 80 Ark. 435, 97 SW 447.

Ky.—Wickliffe v. Ensor, 9 B. Mon. 253.

Tenn.—Bon Air Coal, etc., Co. v. Parks, 94 Tenn. 268, 29 SW 130; Ross v. Cobb, 9 Yerg. 463; Savage v. Bon Air Coal, etc., Co., 2 Tenn. Ch. A. 594; Cowan v. Hatcher, (Ch. A.) 59 SW 689.

Tex.—Frazier v. Houston Oil Co., (Civ. A.) 161 SW 20; Harris v. Iglehart, 52 Tex. Civ. A. 6, 113 SW 170; Parker v. Cockrell, (Civ. A.) 31 SW 221.

[a] **As otherwise expressed,** if one claiming under an assurance of title defining boundaries places a tenant in possession without limiting him to any definite part, the tenant's possession will extend to the landlord's boundaries, although the land actually occupied is but a small part of the whole. Bell v. North American Coal, etc., Co., 155 Fed. 712, 84 CCA 60.

[b] **Lease held not to restrict to particular boundary.**—S having color of title thereto, authorized B by letter to "take possession of four or five acres of land, part of grant 6,214," and occupy same as his tenant at will. He also orally authorized B to "burn firewood from where you please and make rails where you please and clear land where you please." Under this authority two small parcels of land were cleared on said grant 6,214. For about eighteen years said tenant at will remained so in possession, it being generally known that said possession was claimed under S who surveyed the grant and made improvements and inclosures on it. It was held that the possession of the tenant at will was not restricted as to any particular boundary and therefore extended for the benefit of the landlord, to the limits of his grant and was adverse, open, notorious, continuous, and peaceable, and vested title in said landlord to the whole of grant 6,214. Savage v. Bon Air Coal, etc., Co., 2 Tenn. Ch. A. 594.

[c] **Where part of a tract is leased under an arrangement by which the lessee is to prevent encroachments on the whole tract,** the possession of the tenant by construction embraces the whole tract and will ripen into a valid title thereto for the lessor when maintained for the statutory period. Scaife v. Western North Carolina Land Co., 90 Fed. 238, 33 CCA 47 (applying North Carolina law); Heinemann v. Bennett, 144 Mo. 113, 45 SW 1092.

[d] **Attornment by occupant to holder of color of title.**—Where one in possession of land without color of title attorned to another who had made entry from the state of a definite tract, including his own, and agreed to hold possession of the whole for his landlord, the effect was an abandonment of his own possession, and from that time his possession was that of his landlord and referable to the entry and extended to the whole tract, although there was no extension of his actual inclosure. Bell v. North American Coal, etc., Co., 155 Fed. 712, 84 CCA 60.

[e] **Possession by stranger without license.**—The mere entry of a stranger upon patented lands without license from the patentee will not necessarily give such patentee possession to the extent of the boundary of his patent. Wickliffe v. Ensor, 9 B. Mon. (Ky.) 253. See also Sowder v. McMillan, 4 Dana (Ky.) 456.

35. See supra § 480.

36. Treece v. American Assoc., 122 Fed. 598, 58 CCA 266; Frazier v. Houston Oil Co., (Tex. Civ. A.) 161 SW 20.

37. Cochran v. Linville Impr. Co., 127 N. C. 386, 37 SE 496; Ruffin v. Overby, 105 N. C. 78, 11 SE 251; Scott v. Elkins, 83 N. C. 424; Bowles v. Brice, 66 Tex. 724, 2 SW 729 (holding that the rule applied, although the lessor leased the improved portion of the tract and had no actual possession of that portion not improved); Haynes v. Texas, etc., R. Co., 51 Tex. Civ. A. 49, 53, 111 SW 427 (where earlier Texas decisions are reviewed by Reese, J., as follows: "It was held by the Supreme Court in Read v. Allen, 63 Tex. 154, that 'where one holding a deed to land described by metes and bounds leases a part of it to a tenant by specific metes and bounds, then the possession of the tenant is only coextensive with the bounds specified in the lease and not with the whole tract,' and the same rule is also announced in Craig v. Cartwright, 65 Tex. 413. The later case of Bowles v. Brice, 66 Tex. 724, 2 SW 729, while not in terms overruling the former opinions in the cases referred to, seems to us to hold directly to the contrary. . . . We understand the court to hold in that case that, in such case [lease of only part of the land claimed], the constructive possession of the owner, by virtue of this actual possession of the tenant, extends to the limits of the entire tract and was not limited to the boundaries of the portion leased to the tenants"); Texas, etc., R. Co. v. Haynes, 44 Tex. Civ. A. 272, 97 SW 849; Collier v. Coutts, (Tex. Civ. A.) 45 SW 485; Puryear v. Friery, 16 Tex. Civ. A. 316, 40 SW 446; Parker v. Cockrell, (Tex. Civ. A.) 31 SW 221; Caden v. West Branch Lumber Co., 59 W. Va. 148, 53 SE 409.

[a] **In support of this view** it was said: "What a man may do himself, in the matter of taking and holding possession of real estate, he may do by another. . . . Actual possession of any part of the land is possession of the whole thereof. This results from natural limitations upon the power of occupation. No man can be in the actual physical occupation of all his lands at one time, unless he has them all under fence or in cultivation, a thing very unusual in this country of vast acres of land, far exceeding the requirements of actual occupation and cultivation. . . . Possession by one's tenant is his own possession. State v. Harmon, 57 W. Va. 447, 50 SE 828, holds that the possession of a vendee under an executory contract of sale of a tract of land is the possession of the vendee and extends to the whole of

38. Camden v. West Branch Lumber Co., 59 W. Va. 148, 53 SE 409.

39. Ala.—Zundel v. Baldwin, 114 Ala. 328, 21 S 420. And see Barrett v. Kelly, 131 Ala. 378, 30 S 824.

Ga.—Knorr v. Raymond, 73 Ga. 749.

Ill.—Williams v. Ballance, 23 Ill. 193, 74 AmD 187.

Ky.—Krauth v. Hahn, 65 SW 18, 23 KyL 1261.

Mass.—Murphy v. Com., 187 Mass. 361, 73 NE 524.

Tex.—Thompson v. Texas, etc., R. Co., (Civ. A.) 123 SW 616; Washam v. Harrison, (Civ. A.) 122 SW 52; Hulett v. Platt, 49 Tex. Civ. A. 377, 109 SW 267; Travis v. Hall, 37 Tex. Civ. A. 143, 83 SW 425.

40. U. S.—Bell v. North American Coal, etc., Co., 155 Fed. 712, 84 CCA 60; Treese v. American Assoc., 122 Fed. 598 (both declaring Tennessee law); Ellicott v. Pearl, 8 F. Cas. No. 4,386, 1 McLean 206.

Ark.—Johnson & Burr v. Elder, 92 Ark. 30, 121 SW 1066 [dist Wheeler v. Foote, 80 Ark. 435, 97 SW 447].

Ga.—Walls v. Smith, 19 Ga. 8.

Ill.—Patterson v. Hubbard, 30 Ill. 201.

Ky.—Jones v. Chiles, 2 Dana 25; Bradford v. Southgate, 4 KyL 890.

N. C.—Clinton v. Herring, 5 N. C. 414.

Tenn.—Massengill v. Boyles, 11 Humphr. 112; Ross v. Cobb, 9 Yerg. 463; Hornsby v. Davis, (Ch. A.) 36 SW 159.

Tex.—Houston Oil Co. v. Kimball, 103 Tex. 94, 122 SW 533, 124 SW 85 [aff (Civ. A.) 114 SW 662]; Read v. Allen, 63 Tex. 154; Texas Land Co. v. Williams, 51 Tex. 51; R. W. Wier Lumber Co. v. Conn, (Civ. A.) 156 SW 276; Robinson v. Jones, 2 Tex. Civ. A. 316, 22 SW 15.

"A lease of a piece of land by prescribed boundaries within a larger tract will not, even though entered upon and held, effect a possession of any other part of the tract than such small piece, and will not extend possession by construction to the boundaries of the larger tract of which such smaller piece is a part." Cowan v. Hatcher, (Tenn. Ch. A.) 59 SW 689, 691 (per Neil, J.).

[a] **As otherwise stated:** "If A., being the owner of a defined tract of land, leases to B. a defined and separate portion thereof, B.'s actual possession of the leased portion as A.'s tenant does not give A. constructive possession of the whole tract owned by him." R. W. Wier Lumber Co. v. Conn, (Tex. Civ. A.) 156 SW 276, 278.

the whole, as the lease is not sufficient to confer on the lessor color of title which is a necessary basis for the extension of possession by construction.[41]

[§ 543] **6. Effect of Possession by Agent.** It has been held that where an agent in actual possession of a part of a tract agrees with one in constructive possession of the whole tract to hold such part for him, the principal, claiming by such adverse possession of the agent, will be confined to the portion in the actual possession of the agent.[42] The rule is otherwise, however, as to possession by one who digs and removes sand from the premises under a license from the holder of color of title which does not restrict his operations to any particular part of the premises by metes and bounds or other description. The possession of the licensee is in effect that of agent for the holder of color of title.[42½]

[§ 544] **7. Effect of Possession by Grantee.** Where a person having color of title grants and conveys a part of the tract to which his color of title extends, and his grantee takes possession of such part, the possession of such grantee will not amount to actual possession by the grantor so as to confer on him constructive possession of the whole tract.[43] The possession of a vendee in an executory contract of purchase, holding under a sale of a part of the tract designated by metes and bounds, will not confer on the vendor constructive possession of the entire tract,[44] although it is doubtful if this statement would be held true in jurisdictions in which it is held that the possession of a lessee of a part of the tract designated by metes and bounds will confer on the lessor constructive possession of the entire tract. as a vendee in possession under an executory contract of purchase is a quasi tenant.

[§ 545] **8. Necessity of Actual Possession as a Basis for Constructive Possession.** Since by construction of law the true owner is deemed to be in possession of land not in the adverse possession of another, mere color of title and entry under it, if no actual possession is retained, will not give constructive possession and, in order to entitle a person who claims under color of title to the benefit of the doctrine of constructive possession, there must be an entry on and actual possession of a part of the land covered by the color of title.[45] As has been well said: "Most dangerous results would flow from the permission by courts of titles by limitation to ripen, in favor of those holding mere color of title, without actual occupancy, by acts of ownership so slight in and of themselves as not calculated to attract the attention of the real owner, or to indicate that his

41. Hill v. Harris, 26 Tex. Civ. A. 408, 64 SW 820.

42. Desmuke v. Houston, (Tex. Civ. A.) 31 SW 198.

42½. Houston Oil Co. v. Goodrich, 213 Fed. 136.

43. Ky.—Trotter v. Cassaday, 3 A. K. Marsh. 365, 13 AmD 183; Maury v. Waugh, 1 A. K. Marsh. 452.

N. C.—Cochran v. Linville, Impr. Co., 127 N. C. 386, 37 SE 496.

Or.—Willamette Real Est. Co. v. Hendrix, 28 Or. 485, 42 P 514, 52 AmSR 800.

Tenn.—Cunningham v. Roberson, 1 Swan 138; Hornsby v. Davis, (Ch. A.) 36 SW 159.

Tex.—Chandler v. Rushing, 38 Tex. 591; Cunningham v. Frandtzen, 26 Tex. 34.

Va.—Sharp v. Shenandoah Furnace Co., 100 Va. 27, 40 SE 103.

See McClung v. Ross, 5 Wheat. (U. S.) 116, 5 L. ed. 46.

44. Jones v. Chiles, 2 Dana (Ky.) 25; Hornsby v. Davis, (Tenn. Ch. A.) 36 SW 159.

45. U. S.—Deputron v. Young, 134 U. S. 241, 10 SCt 539, 33 L. ed. 923; Clarke v. Courtney, 5 Pet. 319, 8 L. ed. 140; Reorganized Church of Jesus Christ v. Church of Christ, 60 Fed. 937 [rev 70 Fed. 179, 17 CCA 387]; Ellicott v. Pearl, 8 F. Cas. No. 4,386, 1 McLean 206 [aff 10 Pet. 412, 9 L. ed. 475].

Ala.—Hale v. Tennessee Coal, etc., Co., 62 S 783; Bush v. Thomas, 162 Ala. 168, 50 S 133; Clarke v. Dunn, 161 Ala. 633, 50 S 93; Henry v. Frohlichstein, 149 Ala. 330, 43 S 126; Bailey v. Blacksher Co., 142 Ala. 254, 37 S 827; Doe v. Edmondson, 127 Ala. 445, 30 S 61; Goodson v. Brothers, 111 Ala. 589, 20 S 443; Nashville, etc., R. Co. v. Mathis, 109 Ala. 377, 19 S 384; Doe v. Beck, 108 Ala. 71, 19 S 802; Parks v. Barnett, 104 Ala. 433, 16 S 136; Black v. Tennessee, etc., Co., 93 Ala. 109, 9 S 537; Childress v. Calloway, 76 Ala. 128.

Ark.—Kirker v. Daniels, 73 Ark. 263, 83 SW 912.

Cal.—Christy v. Spring Valley Water Works, 97 Cal. 21, 31 P 1110; Hess v. Winder, 30 Cal. 349.

Colo.—Scott v. Ramsler, 25 Colo. A. 540, 139 P 1121.

Ga.—Turner v. Neisler, 141 Ga. 27, 80 SE 461; Flannery v. Hightower, 97 Ga. 592, 25 SE 371; Furgerson v. Bagley, 95 Ga. 516, 20 SE 241; Anderson v. Dodd, 65 Ga. 402; McGee v. Guthry, 32 Ga. 307; Walls v. Smith, 19 Ga. 8.

Ill.—Turney v. Chamberlain, 15 Ill. 271.

Iowa.—Moingona Coal Co. v. Blair, 51 Iowa 447, 1 NW 768.

Ky.—Chenault v. Quisenberry, 56 SW 410, 21 KyL 1771.

Me.—Putnam Free School v. Fisher, 38 Me. 324; Thayer v. McLellan, 23 Me. 417; Marr v. Boothby, 19 Me. 150.

Md.—Baker v. Swan, 32 Md. 355; Abell v. Harris, 11 Gill & J. 367.

Minn.—Washburn v. Cutter, 17 Minn. 361.

Mo.—Brown v. Hartford, 173 Mo. 183, 73 SW 140; Herbst v. Merrifield, 133 Mo. 267, 34 SW 571; Norfleet v. Hutchins, 68 Mo. 597; Mylar v. Hughes, 60 Mo. 105; Bradley v. West, 60 Mo. 33; Chapman v. Templeton, 53 Mo. 463.

Nebr.—Herbage v. McKee, 82 Nebr. 354, 117 NW 706; Hoffine v. Ewings, 60 Nebr. 729, 84 NW 93; Baldwin v. Merriam, 16 Nebr. 199, 20 NW 250.

N. H.—Cushing v. Miller, 62 N. H. 517; Little v. Downing, 37 N. H. 355; Bailey v. Carleton, 12 N. H. 9, 37 AmD 190.

N. J.—Schmitt v. Traphagen, 73 N. J. Eq. 399, 69 A 189, 133 AmSR 739.

N. Y.—Thompson v. Burhans, 79 N. Y. 93; De Forest v. Huntington, 28 NYS 831 [aff 153 N. Y. 229, 47 NE 294]; McRoberts v. Bergman, 11 NYS 108 [aff 132 N. Y. 73, 30 NE 261].

N. C.—Barrett v. Brewer, 153 N. C. 547, 69 SE 614; Hines v. Moye, 125 N. C. 8, 34 SE 103; Worth v. Simmons, 121 N. C. 357, 28 SE 528; Hamilton v. Icard, 114 N. C. 532, 19 SE 607.

N. D.—Bull v. Beiseker, 16 N. D. 290, 113 NW 870, 14 LRANS 514 and note.

Or.—Willamette Real Est. Co. v. Hendrix, 28 Or. 485, 42 P 514, 52 AmSR 800.

Pa.—Broadtop Coal, etc., Co. v. Riddlesburg Coal, etc., Co., 65 Pa. 435.

S. C.—Stanley v. Shoolbred, 25 S. C. 181; Steedmay v. Hilliard, 37 S. C. L. 101; Slice v. Derrick, 31 S. C. L. 627; Gourdin v. Davis, 31 S. C. L. 481, 45 AmD 745.

Tenn.—Scales v. Cockrill, 3 Head 432.

Tex.—Holland v. Nance, 102 Tex. 177, 114 SW 346 [rev (Civ. A.) 107 SW 102]; Hitchler v. Scanlan, 83 Tex. 569, 19 SW 259; Turner v. Moore, 81 Tex. 206, 16 SW 929; Parker v. Baines, 65 Tex. 605; Peyton v. Barton, 53 Tex. 298; Cunningham v. Frandtzen, 26 Tex. 34; Roach v. Fletcher, 11 Tex. Civ. A. 225, 32 SW 585.

Va.—Sharp v. Shenandoah Furnace Co., 100 Va. 27, 40 SE 103.

W. Va.—Chilton v. White, 78 SE 1048; McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 SE 508, 62 LRA 562.

Wis.—Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905.

Can.—McIsaac v. McDonald, 37 Can. S. C. 156.

Ont.—Kay v. Wilson, 2 Ont. A. 133.

[a] **To constitute a disseisin constructively** by an entry and possession under color of title the actual possession must embrace a portion of the land of the person alleged to be disseized and must be of a nature to indicate that there may be an adverse claim to the residue of the land included in the deed. Bailey v. Carleton, 12 N. H. 9, 37 AmD 190.

[b] **Where a landowner acquires color of title by purchase to land adjoining his own land** on which he lives, his possession is not extended by construction to the limits of his new purchase where he does not take actual possession of any part of his new purchase. Hicklin v. McClear, 18 Or. 126, 22 P 1057; Sanders v. Duval, 39 Tex. 182; Hill v. Harris, 26 Tex. Civ. A. 408, 64 SW 820; Harman v. Ratliff, 93 Va. 249, 24 SE 1023; Waldron v. Harvey, 54 W. Va. 608, 46 SE 603, 102 AmSR 959. See also Holly River Coal Co. v. Howell, 36 W. Va. 489, 15 SE 214. But see Northrup v. Sumner, 132 Ky. 156, 170, 116 SW 699 (where the court said: "In the case of Cates v. Loftus, 4 T. B. Mon. (Ky.) 439, this court declared that, where one takes title to unoccupied land adjacent to that upon which he lives and in which he claims the fee, his possession by operation of law extends to the outside boundary of the newly-acquired land. To same effect are Overton v. Perry, 129 Ky. 415, 111 SW 369, 33 KyL 931; Griffith v. Dicken, 2 B. Mon. (Ky.) 20; Young v. Withers, 8 Dana (Ky.) 165; Smith v. Frost, 2 Dana (Ky.) 144. This [first] case is the latest enunciation of this court upon this question. In that case the title to the land involved was made to rest upon adverse possession alone. In 1883 one William Mynheir purchased a tract of land adjoining his home farm on which he lived. Thereafter Mynheir had the two tracts of land surveyed and the boundary marked so that it included the newly acquired land. From that time on he claimed to the outside boundary of the

seizin (that follows his legal title) was interrupted.'"[46]

[§ 546] **9. Character of Actual Possession, Necessary as a Basis for Constructive Possession.** Even though the entry is under a color of title, the possession required is, in every respect except that of extent, practically the same as that which is required when there is no color of title; an actual, visible, notorious, distinct, and hostile possession, continuous for the prescribed period, must appear in order to form a bar to the assertion of the legal title by the true owner.[47] Color is not of itself evidence, and it does not follow that less is required to prove adverse possession with than without it, unless so provided by statute, and it can draw and impart to the whole tract to which there is color only the same claim and character of possession impressed on the part actually possessed.[48]

[§ 547] **10. Necessity of Claim of Title Coextensive with Boundaries.** Actual possession of a part of the land under color of title will not draw to it constructive possession of the balance unless such color of title is also accompanied by claim of title coextensive with the boundaries of the conveyance.[49] Adverse possession does not extend beyond the claim, although this may fall short of the lines of a deed under which one is in possession.[50] On the contrary constructive possession may be restricted by the acts and declarations of the occupant, indicating that he does not make his claim of title coextensive with the boundaries of his color.[51]

[§ 548] **11. Necessity of Registering Instrument Relied on as Color of Title.** As was shown in a previous chapter, to render an instrument operative as color of title registration is not essential in the absence of some statute requiring it.[52] It necessarily follows that failure to record such instrument in no way affects the operation of the general rule giving the holder of color of title in possession of part of the tract described in the instrument constructive possession coextensive with the boundaries therein designated,[53] except where there is some special statute making registration essential to color of title.[54]

[§ 549] **12. Limitation of Constructive Possession by Boundaries of Deed.** Adverse possession under and by virtue of a deed is limited to the prem-

newly acquired land, and, in passing upon the question as to whether or not Mynheir would have to make a new entry upon this newly acquired land in order to extend his possession to and over it, this court said: 'It was not necessary for him to make a new entry upon the land for the reason that the land being contiguous to his home place, and being surrounded by a well-defined boundary, Mynheir's possession upon acquiring the land immediately extended to the whole boundary thereof.' And in the case of Scott v. Mineral Dev. Co., 130 Fed. 497, 64 CCA 659, appealed from the circuit court for the Eastern District of Kentucky, this principle was fully recognized and upheld. To the same effect is Taylor v. Burt, etc., Lumber Co., 109 SW 348, 33 KyL 191").

46. Brown v. Hartford, 173 Mo. 183, 194, 73 SW 140 (per Marshall, J.).

47. Md.—Baker v. Swan, 32 Md. 355.

Minn.—McRoberts v. McArthur, 62 Minn. 310, 64 NW 903.

N. H.—Little v. Downing, 37 N. H. 355.

N. Y.—McRoberts v. Bergman, 11 NYS 108 [aff 132 N. Y. 73, 30 NE 261].

Or.—Willamette Real Est. Co. v. Hendrix, 28 Or. 485, 42 P 514, 52 AmSR 800.

[a] **Possession by mistake of land not covered by colorable title.**—(1) If a person, by mistake or inadvertence, enters on a tract of land different from that which is described in the instrument under which he claims there will be no constructive possession created; whatever adverse possession such claimant may have is limited to his actual possession (McKinny v. Kenny, 1 A. K. Marsh. (Ky.) 460; Ohio River R. Co. v. Johnson, 50 W. Va. 499, 40 SE 407; McEvoy v. Loyd, 31 Wis. 142); (2) but of course he may have adverse possession to the extent of such actual possession (Johnson v. Thomas, 23 App. (D. C.) 141; Roulston v. Stewart, 40 App. Div. 200, 57 NYS 1061; Sweetenham v. Leary, 18 Hun (N. Y.) 284; Jayne v. Hanna, (Tex. Civ. A.) 51 SW 296).

48. Crowder v. Doe, 162 Ala. 151, 50 S 230, 136 AmSR 17.

49. U. S.—Western North Carolina Land Co. v. Scaife, 80 Fed. 352, 25 CCA 461.

Ala.—Henry v. Frohlichstein, 149 Ala. 330, 43 S 126; Augusta Nat. Bank v. Baker Hill Iron Co., 108 Ala. 635, 19 S 47.

Cal.—Buckley v. Mohr, 58 P 261.

Fla.—Doyle v. Wade, 23 Fla. 90, 1 S 516, 11 AmSR 334.

Ga.—Wade v. Johnson, 94 Ga. 348, 21 SE 569; Walls v. Smith, 19 Ga. 8.

Ind.—Parish v. Kaspare, 109 Ind. 586, 10 NE 109.

Iowa.—Moore v. Antill, 53 Iowa 612, 6 NW 14.

Ky.—Hoskins v. Cox, 2 B. Mon. 306; Bodley v. Coghill, 3 A. K. Marsh. 614; Bowman v. Bartlet, 3 A. K. Marsh. 386. See also Smith v. Morrow, 5 Litt. 210.

Miss.—Jones v. Gaddis, 67 Miss. 761, 7 S 489.

Mo.—Hunnewell v. Williams, 154 Mo. 135, 55 SW 221; Bakewell v. McKee, 101 Mo. 337, 14 SW 119; Gaines v. Saunders, 87 Mo. 557; Crispen v. Hannavan, 50 Mo. 536; McElhinney v. Kraus, 10 Mo. A. 218.

N. J.—Dem v. Hunt, 20 N. J. L. 487.

N. Y.—Bedell v. Shaw, 59 N. Y. 46; De Forest v. Huntington, 28 NYS 831 [aff 153 N. Y. 229, 47 NE 294].

N. C.—Haddock v. Leary, 148 N. C. 378, 62 SE 426.

Pa.—Handley v. Barrett, 176 Pa. 246, 35 A 133; Ege v. Medlar, 82 Pa. 86; Riland v. Eckert, 23 Pa. 215.

Tex.—Ivey v. Petty, 70 Tex. 178, 7 SW 798; Bayne v. Denny, 21 Tex. Civ. A. 435, 52 SW 983; Pope v. Riggs, (Civ. A.) 43 SW 306. See also Noland v. Weems, (Civ. A.) 141 SW 1031; Blaske v. Settegast, (Civ. A.) 123 SW 222 (both holding that where a person's actual possession of land was confined to a specified tract, the lines of which were fixed and continuously known and recognized by adjacent owners, his possession within the lines could not be extended by construction to any other land).

Vt.—Wood v. Willard, 37 Vt. 377, 86 AmD 716; Brown v. Edson, 22 Vt. 357; Crowell v. Bebee, 10 Vt. 33, 33 AmD 172.

Va.—Creekmur v. Creekmur, 75 Va. 430; Kincheloe v. Tracewells, 11 Gratt. (52 Va.) 587.

Can.—Swinehammer v. Hart, 5 DomLR 106, 111, 11 EastLR 260.

"There must be some kind of a claim of title to the whole area involved in the dispute as well as the entry upon and actual occupation or cultivation of part." Swinehammer v. Hart, supra.

[a] **Applications of rule.**—(1) Where plaintiff in ejectment claims the west twenty-five feet of a certain lot on which a building is located, and the land in controversy consists of a certain number of feet off the east side of said strip of twenty-five feet, and the evidence shows that plaintiff and her grantors supposed they had located the building as far east as they claimed possession and made no claim of possession to any land east of the building until after defendant had inclosed the same, plaintiff cannot claim constructive adverse possession to the land east of said building. Buckley v. Mohr, (Cal.) 58 P 261. (2) Actual possession of that part of the land claimed to be covered by an indefinite deed, which all parties admit to be covered by it, does not draw to it constructive possession of that part of the land which is in controversy, where it appears that it was not the grantees' purpose to assert any claim to that part of the land which is in controversy. Pope v. Riggs, (Tex. Civ. A.) 43 SW 306.

[b] **A purchaser, the calls of whose deed through mistake extended over and embraced a part of an adjoining survey** to which his grantor had no title, improved and occupied a part of the land so included by mistake but asserted no claim to any portion of such adjoining survey except to land so occupied and improved by him until after the expiration of ten years and after he had abandoned possession. It was held that his actual and his constructive possession were identical, and that he obtained no title under the ten-year statute to any portion of such adjoining survey except that which was actually occupied by him under his claim of right. Ivey v. Petty, 70 Tex. 178, 7 SW 798.

[c] **Where the claimant is ignorant of the true boundary of his tract,** it has been held that the fact that he builds a fence within the limits will not necessarily restrict his constructive possession to the line of the fence. Hacker v. Horlemus, 74 Wis. 21, 41 NW 965.

50. Anderson v. Meadows, 162 N. C. 400, 78 SE 279.

51. Haddock v. Leary, 148 N. C. 378, 62 SE 426; Brown v. Edson, 22 Vt. 357.

52. See supra § 348.

53. O'Brien v. Fletcher, 123 Ga. 427, 51 SE 405; Roberson v. Downing Co., 120 Ga. 833, 48 SE 429, 102 AmSR 128, 1 AnnCas 757; Carstarphen v. Holt, 96 Ga. 703, 23 SE 904; Anderson v. Dodd, 65 Ga. 402; Wiley v. Warmock, 30 Ga. 701; Griffin v. Sketoe, 30 Ga. 300; Morrison v. Hays, 19 Ga. 294; Winston v. Prevost, 6 La. Ann. 164; Meriwether v. Vaulx, 5 Sneed (Tenn.) 300; Jones v. Perry, 10 Yerg. (Tenn.) 59, 30 AmD 430; Spaulding v. Warren, 25 Vt. 316. But see Swank v. Sweetwater Irr., etc., Co., 15 Ida. 353, 98 P 297.

54. Baxley v. Baxley, 117 Ga. 60, 43 SE 436; Knight v. Isom, 113 Ga. 613, 39 SE 103; Doom v. Taylor, 35 Tex. Civ. A. 251, 79 SW 1086.

ises actually covered thereby[55] and cannot be enlarged by showing what was intended to be conveyed. "It is the color and adverse possession that gives title."[56] Although a boundary may be in doubt, a claimant under a deed cannot prescribe to a line or boundary which under no interpretation of the calls can be included in or justified by them. To hold otherwise "would be to authorize a prescription against the deed, and not under it at all."[57] It has likewise been held that adverse possession under color of title will not be extended to embrace land not included in the land described in the writing set up as color of title merely because such land has been taken possession of under a mistake and occupied for the statutory period, although the person seeking to prescribe acted in good faith in extending his possession beyond the limits of the land actually defined in his conveyance;[58] and one claiming a part of a tract under a registered deed cannot extend his claim by executing to a tenant a lease in which a greater amount of the tract is included.[59] Nevertheless the rule does not affect the right of the claimant to acquire title by actual occupation and claim of title or right to lands outside of the boundaries of the deed under which he occupies. The deed does not preclude such occupancy from being adverse.[60] The occupancy does not refer to the deed but to the fact itself and its hostile character.[61] While "the calls of the deed limit the presumptive possession taken by the grantee under a deed . . . that presumption, like any other presumption of fact, can be overcome by competent proof,"[62] and yields to proof

55. Ala.—Brown v. Powers, 167 Ala. 518, 52 S 647; Smith v. Keyser, 115 Ala. 455, 22 S 149; Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 9 S 537.

Cal.—Buckley v. Mohr, 58 P 261; Gordon v. Booker, 97 Cal. 586, 32 P 593.

Colo.—Davis v. Shepherd, 31 Colo. 141, 72 P 57.

Fla.—Lightfoot v. Head, 64 Fla. 364, 60 S 752.

Ga.—La Roche v. Falligant, 130 Ga. 596, 61 SE 465; McKay v. Kendrick, 44 Ga. 607 (holding that by virtue of occupancy under a deed one can claim only so much of the land as the largest description therein will include). See also Strong v. Powell, 92 Ga. 591, 20 SE 6; Howard v. Reedy, 29 Ga. 152, 74 AmD 58.

Ill.—Dryden v. Newman, 116 Ill. 186, 4 NE 768; Lancey v. Brock, 110 Ill. 609.

Ind.—Silver Creek Cement Corp. v. Union Line, etc., Co., 138 Ind. 297, 35 NE 125, 37 NE 721.

Ky.—Martin v. Hall, 152 Ky. 677, 153 SW 997; Woodward v. Johnson, 122 Ky. 160, 90 SW 1076, 28 KyL 1091; South v. Deaton, 113 Ky. 312, 68 SW 137, 1105, 24 KyL 196, 533; Chenault v. Quisenberry, 56 SW 410, 21 KyL 1771; Hunter v. Chrisman, 6 B. Mon. 463; Jones v. Chiles, 2 Dana 25; Smith v. Morrow, 5 Litt. 210; McKinny v. Kenny, 1 A. K. Marsh. 460. See also Maury v. Waugh, 1 A. K. Marsh. 452.

Me.—Richardson v. Watts, 94 Me. 476, 48 A 180; Thornton v. Foss, 26 Me. 402.

Mo.—Goltermann v. Schiermeyer, 111 Mo. 404, 19 SW 484, 20 SW 161; Ware v. Johnson, 55 Mo. 500; St. Louis v. Gorman, 29 Mo. 593, 77 AmD 586.

N. H.—Hale v. Glidden, 10 N. H. 397 (holding that there can be no constructive possession outside of the limits of the deed); Enfield v. Day, 7 N. H. 457, 28 AmD 360.

N. Y.—Pope v. Hanmer, 74 N. Y. 240; Crary v. Goodman, 22 N. Y. 170; Weeks v. Martin, 57 Hun 589, 10 NYS 656; Patten v. New York El. R. Co., 3 AbbNCas 306 (holding that a grantee obtains no title by adverse possession to a vault under the sidewalk beyond the limits of the deed under which he claims); Jackson v. Camp, 1 Cow. 605.

N. C.—Campbell v. Miller, 165 N. C. 51, 80 SE 974; Ipock v. Gaskins, 161 N. C. 673, 77 SE 843; Roper Lumber Co. v. Swain, 161 N. C. 566, 77 SE 700; Marshall v. Corbett, 137 N. C. 555, 50 SE 210; Johnston v. Case, 131 N. C. 491, 42 SE 957; Rowe v. Cape Fear Lumber Co., 128 N. C. 301, 38 SE 896; Ruffin v. Overby, 105 N. C. 78, 11 SE 251; McRae v. Williams, 52 N. C. 430.

Pa.—Riland v. Eckert, 23 Pa. 215.

S. C.—Connor v. Johnson, 59 S. C. 115, 37 SE 240; Chappell v. Gibson, 16 S. C. L. 28.

Tenn.—Slatton v. Tennessee Coal, etc., Co., 109 Tenn. 415, 75 SW 926; Duke v. Helms, 100 Tenn. 249, 46 SW 761; Rogers v. White, 1 Sneed 68.

Tex.—Broom v. Pearson, 98 Tex. 469, 85 SW 790; Porter v. Miller, 76 Tex. 593, 13 SW 555, 14 SW 334; Carley v. Parton, 75 Tex. 98, 12 SW 950; Acklin v. Paschal, 48 Tex. 147; Chandler v. Rushing, 38 Tex. 591; Cunningham v. Frandtzen, 26 Tex. 34; Thompson v. Cragg, 24 Tex. 582; Merriman v. Blalack, 57 Tex. Civ. A. 270, 122 SW 403; Runkle v. Smith, 52 Tex. Civ. A. 186, 114 SW 865; Giddings v. Winfree, 32 Tex. Civ. A. 99, 73 SW 1066.

Vt.—Fullam v. Foster, 68 Vt. 590, 35 A 484; Shedd v. Powers, 28 Vt. 652; Owen v. Foster, 13 Vt. 263; Hull v. Fuller, 7 Vt. 100.

Va.—Whealton v. Doughty, 112 Va. 649, 72 SE 112; Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232.

W. Va.—Marshall v. Stalnaker, 70 W. Va. 394, 398, 74 SE 48 [cit Cyc].

Wis.—Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830; Lampman v. Van Alstyne, 94 Wis. 417, 69 NW 171; Childs v. Nelson, 69 Wis. 125, 33 NW 587; McEvoy v. Loyd, 31 Wis. 142.

Can.—Hamel v. Ross, 3 DomLR 860.

[a] **Reason of rule.**—"The deed under which the tract possessed was held must determine, by the boundaries therein given, the extent of the constructive possession, for it is under that deed the entry was made and to it other parties had the right to look in determining the extent of the claim asserted by the possession." Broom v. Pearson, 98 Tex. 469, 474, 85 SW 790, 86 SW 733 (per Williams, J.).

[b] **The presumption is** that the occupant intends to claim only what his deed calls for, and that the land to which the occupant has no title he holds consistent with the title of the true owner. Maxwell Land-Grant Co. v. Dawson, 151 U. S. 586, 14 SCt 458, 38 L. ed. 279; Bedell v. Shaw, 59 N. Y. 46; Bowie v. Brahe, 10 N. Y. Super. 35; Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830.

[c] **Application of rule.**—Where the deed of lots adjacent to a railroad right of way did not purport to convey a strip claimed by the railroad as a part of its right of way, the grantee could not avail himself of the constructive possession of the strip arising from the occupation by himself and his predecessors in title of the dwelling house on the front of the lots. Brainin v. New York, etc., R. Co., 136 App. Div. 393, 120 NYS 1093.

[d] **A deed made by a claimant under a patent which interlocks with an older one,** purporting to convey land lying partly beyond the interlock and within the boundaries of the senior patent, is color of title to the extent of the boundary lines therein designated but does not extend the boundary lines of the junior patent beyond their locations as they would be fixed and determined, had such deed never been made, and it remains color of title as to land included in the older grant only to the extent of its boundaries, determined independently of the deed. Lewis v. Yates, 62 W. Va. 575, 59 SE 1078.

56. Johnston v. Case, 131 N. C. 491, 42 SE 957.

57. Runkle v. Smith, 52 Tex. Civ. A. 186, 114 SW 865. See also Goad v. Walker, (W. Va.) 80 SE 873 (holding that an adverse claimant under color of title cannot enlarge his boundary by testimony tending to prove marked timber as corners and lines not called for in any of his colorable deeds upon which he relies in an action of unlawful detainer).

58. La Roche v. Falligant, 130 Ga. 596, 61 SE 465. Compare Bisso v. Casper, 14 Tex. Civ. A. 19, 36 SW 345 (holding that where one incloses land by a fence and claims title to all within the inclosure his possession is adverse as to the entire tract, although he believes he is claiming only to the extent of his deed, which in fact does not embrace all the land so fenced).

59. Hill v. Harris, 26 Tex. Civ. A. 408, 64 SW 820 (where Gill, J., said: "This would not be a holding under the deed to the lands not included in the description, nor would the constructive possession be extended by the description in the lease").

60. U. S.—Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 14 SCt 458, 38 L. ed. 279.

Ky.—South v. Deaton, 113 Ky. 312, 68 SW 137, 1105, 24 KyL 196.

Md.—Hammond v. Ridgely, 5 Harr. & J. 245, 9 AmD 522.

Mich.—Triece v. South Haven, 154 Mich. 129, 117 NW 555.

N. Y.—Swettenham v. Leary, 18 Hun 284; Sherry v. Frecking, 11 N. Y. Super. 452.

Pa.—Stroud v. Prager, 130 Pa. 401, 18 A 637.

Tex.—Bisso v. Casper, 14 Tex. Civ. A. 19, 36 SW 345; Hand v. Swann, 1 Tex. Civ. A. 241, 21 SW 282.

Vt.—Shepherd v. Hayes, 16 Vt. 486.

Va.—Kincheloe v. Tracewells, 11 Gratt. (52 Va.) 587.

Wis.—Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830.

See also Zeringue v. Harang, 17 La. 349.

[a] **As otherwise stated:** "The extent of adverse possession under color of title, is measured by the true boundaries, indicated in the evidence of ownership relied upon, but that does not interfere with actual occupancy beyond such true boundaries, in connection with that within them, being adverse to every other claimant and sufficient, if continued long enough, to make a good title." Ovig v. Morrison, 142 Wis. 243, 247, 125 NW 449 (per Marshall, J.).

61. Rice v. Kelly, 81 Nebr. 92, 115 NW 625; Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830; Bishop v. Bleyer, 105 Wis. 330, 81 NW 413.

62. Rice v. Kelly, 81 Nebr. 92, 97,

of actual facts which negative the same.[63] But it requires a very distinct occupancy to extend the possession beyond the limits described in the deed;[64] and of course the period for which possession must be held is that fixed by statute for a holding without color of title.[65]

XV. TITLE OR RIGHT ACQUIRED[66]

[§ 550] **A. Under Statute 21 Jac 1 c 16 § 1.** According to some of the decisions under this statute possession for the statutory period confers a perfect title upon the claimant;[67] but later decisions either hold or say that title cannot be so acquired; that its effect is not to divest the estate but merely to bar the remedy.[68]

[§ 551] **B. Under 3 & 4 Wm. IV c 27 § 34.** The construction placed upon the statute of James not being satisfactory, the statute of William was enacted which not only barred the remedy in case of adverse possession but also in terms extinguished the estate.[69] Since the enactment of that statute it has been uniformly held that adverse possession for a period sufficient to bar the action divests the estate of the true owner and transfers it to the person holding adversely.[70]

[§ 552] **C. In the United States, Its Colonies, and Canada—1. In General.** While it is true that in one state at least there are special statutes under which possession for the statutory period bars the remedy merely,[71] in the United States and Canada the doctrine is almost universal that possession for the statutory period not only bars the remedy of the holder of the paper title but also extinguishes his title and vests title in fee in the adverse occupant.[72]

115 NW 625 (per Fawcett, J.); Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830; Bishop v. Bleyer, 105 Wis. 330, 81 NW 413.

63. Rice v. Kelly, 81 Nebr. 92, 115 NW 625.

64. Shedd v. Powers, 28 Vt. 652 (the reason being that the deed, while it is notice of claimant's title to the extent of the boundaries therein set forth, is also a distinct disclaimer of any further defense). See also South v. Deaton, 113 Ky. 312, 68 SW 137, 1105, 24 KyL 196, 533.

65. Chalifour v. Parent, 31 Can. S. C. 224.

66. **As bar to partition** see Partition [30 Cyc 204].

As basis for compensation for land taken see Eminent Domain [15 Cyc 800].

As basis for maintaining: Ejectment see Ejectment [15 Cyc 30]. Suit to quiet title see Quieting Title [32 Cyc 1329]. Trespass see Trespass [38 Cyc 1013]. Trespass to try title see Trespass to Try Title [38 Cyc 1196].

As defense to: Ejectment see Ejectment [1 Cyc 1137]. Trespass to try title see Trespass to Try Title [38 Cyc 1202, 1204].

67. Taylor v. Horde, 1 Burr. 60; Stokes v. Berry, 2 Salk. 421.

68. Scott v. Nixon, 3 Dr. & War. 388; incorporated Soc. v. Richards, 1 Dr. & War. 258; Beckford v. Wade, 17 Ves. Jr. 87; Davenport v. Tyrrel, 1 W. Bl. 675.

69. The text of this statute is as follows: "Be it further enacted, That at the Determination of the Period limited by this Act to any Person for making an Entry or Distress, or bringing any Writ of Quare impedit or other Action or Suit, the Right and Title of such Person to the Land, Rent, or Advowson for the Recovery whereof such Entry, Distress, Action, or Suit, respectively might have been made or brought within such Period, shall be extinguished."

70. Haigh v. West, [1893] 2 Q. B. 19; In re Jolly, [1900] 2 Ch. 616; Taylor v. Horde, 1 Burr. 60, 97 Reprint 190; Denn v. Barnard, Cowp. 595, 98 Reprint 1259; Doe v. Prosser, Cowp. 217, 98 Reprint 1052; Scott v. Nixon, 3 Dr. & War. 388; Incorporated Soc. v. Richards, 1 Dr. & War. 258; Brassington v. Llewellyn, 27 L. J. Exch. 297; Dundee Harbor v. Dougall, 1 Macq. 317; Stokes v. Berry, 2 Salk. 421, 91 Reprint 366; Beckford v. Wade, 17 Ves. Jr. 87, 34 Reprint 34; Bryan v. Cowdal, 21 Wkly. Rep. 693.

71. See cases infra this note.

[a] **Tennessee.**—L. (1819) c 28 § 2 (Code [1896] § 4458) provides that no person or persons or their heirs shall have, sue, or maintain any action or suit, either at law or in equity, for any lands, tenements, or hereditaments, except within said seven years next after his, her, or their right to commence, have, or maintain such suit shall have come, fallen, or accrued. This section has been uniformly construed to take away the remedy merely and not to vest title in the possessor. East Tennessee Iron, etc., Co. v. Wiggin, 68 Fed. 446, 15 CCA 510; Bleidorn v. Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 204, 15 SW 737; Tennessee, etc., R. Co. v. Mabry, 85 Tenn. 47, 1 SW 511; Hopkins v. Calloway, 7 Coldw. 37; Marr v. Gilliam, 1 Coldw. 488; Crutsinger v. Catron, 10 Humphr. 23; Norris v. Ellis, 7 Humphr. 462; Wallace v. Hannum, 1 Humphr. 443, 34 AmD 659. And see Bell v. North American Coal Co., 155 Fed. 712. It is to be noted that no such construction is put on statutes of the same or similar language in other jurisdictions. Without going into the reasons which the court gives in support of this holding, which are obviously correct, it is sufficient to say that it was considered that this was the only construction which could give any effect whatever to this section because of its marked similarity to another section of the same statute. Under other sections of the Tennessee statute, as is shown by the cases infra note 72, possession for the period named vests absolute title in the possessor.

72. U. S.—Montoya v. Gonzales, 232 U. S. 375, 34 SCt 413; Northern Pac. R. Co. v. Ely, 197 U. S. 1, 25 SCt 302, 49 L. ed. 639; Teall v. Schroder, 158 U. S. 172, 15 SCt 768, 39 L. ed. 938; Maxwell Land-Grant Co. v. Dawson, 151 U. S. 586, 14 SCt 458, 38 L. ed. 279; Lewis v. Barnhart, 145 U. S. 56, 12 SCt 772, 36 L. ed. 621 [aff 43 Fed. 854]; Stellwagen v. Tucker, 144 U. S. 548, 12 SCt 724, 36 L. ed. 537; Sharon v. Tucker, 144 U. S. 533, 12 SCt 720, 36 L. ed. 532; Probst v. Presbyterian Church Bd. Domestic Missions, 129 U. S. 182, 9 SCt 263, 32 L. ed. 642; Campbell v. Holt, 115 U. S. 620, 6 SCt 209, 29 L. ed. 483; Bicknell v. Comstock, 113 U. S. 149, 5 SCt 399, 28 L. ed. 962; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; Meeks v. Olpherts, 100 U. S. 564, 25 L. ed. 735 [aff 16 F. Cas. No. 9,393, 3 Sawy. 206]; Croxall v. Sherrerd, 5 Wall. 268, 18 L. ed. 572; Leffingwell v. Warren, 2 Black 599, 17 L. ed. 261; Harpending v. Reformed Protestant Dutch Church, 16 Pet. 455, 10 L. ed. 1029; Sicard v. Davis, 6 Pet. 124, 8 L. ed. 342; Jackson v. Huntington, 5 Pet. 402, 8 L. ed. 170; Piles v. Bouldin, 11 Wheat. 325, 6 L. ed. 486; Alexander v. Pendleton, 8 Cranch 462, 3 L. ed. 624; H. B. Claflin Co. v. Middlesex Banking Co., 113 Fed. 958; West v. East Coast Cedar Co., 101 Fed. 621, 41 CCA 528; Buford v. Kerr, 86 Fed. 97; Ward v. Cochran, 71 Fed. 127, 18 CCA 1; Elder v. McClaskey, 70 Fed. 529, 17 CCA 251; East Tennessee Iron, etc., Co. v. Wiggin, 68 Fed. 446, 15 CCA 510; Hackett v. Marmet Co., 52 Fed. 268, 3 CCA 76; Quindaro Tp. v. Squier, 51 Fed. 152, 2 CCA 142; Lafauci v. Kinler, 27 Fed. 442; Cross v. Sabin, 13 Fed. 308; McIntyre v. Thompson, 10 Fed. 531, 4 Hughes 562; Four Hundred and Twenty Min. Co. v. Bullion Min. Co., 9 F. Cas. No. 4,989, 3 Sawy. 634; Griffith v. Bradshaw, 11 F. Cas. No. 5,821, 4 Wash. C. C. 171; Inman v. Barnes, 13 F. Cas. No. 7,048, 2 Gall. 315.

Ala.—Vandegrift v. Southern Mineral Land Co., 166 Ala. 312, 51 S 983; Everett v. Meaher, 165 Ala. 668, 51 S 800; Austin v. Meaher, 165 Ala. 211, 51 S 799; Roe v. Doe, 159 Ala. 614, 48 S 1033; Pittman v. Pittman, 124 Ala. 306, 27 S 242; Inglis v. Webb, 117 Ala. 387, 23 S 125; Doe v. Beck, 108 Ala. 71, 19 S 802; Murray v. Hoyle, 92 Ala. 559, 9 S 368; Lucy v. Tennessee, etc., R. Co., 92 Ala. 246, 8 S 806; Newsome v. Snow, 91 Ala. 641, 8 S 377, 24 AmSR 934; Hoffman v. White, 90 Ala. 354, 7 S 816; Echols v. Hubbard, 90 Ala. 309, 7 S 817; Bozeman v. Bozeman, 82 Ala. 389, 2 S 732; Wilson v. Glenn, 68 Ala. 383; Barclay v. Smith, 66 Ala. 230; Baker v. Chastang, 18 Ala. 417; Doe v. Eslava, 11 Ala. 1028.

Ark.—St. Louis, etc., R. Co. v. Martin, 104 Ark. 274, 149 SW 69; Paragould Abstract, etc., Co. v. Coffman, 100 Ark. 582, 140 SW 730; Langhorst v. Rogers, 88 Ark. 318, 114 SW 915; Doniphan Lumber Co. v. Case, 87 Ark. 168, 112 SW 208; Walker v. Helms, 84 Ark. 614, 106 SW 1170; Hudson v. Stillwell, 80 Ark. 575, 98 SW 356; Finley v. Hogan, 60 Ark. 499, 30 SW 1045; Skipwith v. Martin, 50 Ark. 141, 6 SW 514; Wilson v. Spring, 38 Ark. 181; Jacks v. Chaffin, 34 Ark. 534; Walker v. Towns, 23 Ark. 147.

Cal.—Owsley v. Matson, 156 Cal. 401, 104 P 983; Baker v. Clark, 128 Cal. 181, 60 P 677; Southern Pac. R. Co. v. Whitaker, 109 Cal. 268, 41 P 1083; Woodward v. Faris, 109 Cal. 12, 41 P 781; Ohm v. San Francisco, 92 Cal. 437, 28 P 580; Bennett v. Green, 74 Cal. 425, 16 P 231; Furlong v. Cooney, 72 Cal. 322, 14 P 12; Garabaldi v. Shattuck, 70 Cal. 511, 11 P 778; Johnson v. Brown, 63 Cal. 391; Sharp v. Blankenship, 59 Cal. 288; Langford v. Poppe, 56 Cal. 73; Morris v. De Celis, 51 Cal. 55; Williams v. Sutton, 43 Cal. 65; Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205; Arrington v. Liscom, 34 Cal. 365, 94 AmD 722; Sneed v. Osborn, 25 Cal. 619; Simson v. Eckstein, 22 Cal. 580.

Conn.—New Haven Trust Co. v. Camp, 81 Conn. 539, 71 A 788; Thill v. Bishop, 38 Conn. 494; Sherwood v. Barlow, 19 Conn. 471; South School Dist. v. Blakeslee, 13 Conn. 227; Camp v. Camp, 5 Conn. 291, 13 AmD 60.

Del.—Pepper v. Pepper, 16 Del. 221, 43 A 90.

D. C.—Briel v. Jordan, 27 App. 202; Reeves v. Low, 8 App. 105; Todd v. Kauffman, 19 D. C. 304; Cox v. Cox, 18 D. C. 1.

Fla.—Wilson v. Knight, 48 Fla. 196, 37 S 186; Doe v. Roe, 13 Fla. 602.

Ga.—Johnson v. Girtman, 116 Ga. 794, 42 SE 96; Georgia, R., etc., Co. v. Gardner, 113 Ga. 897, 39 SE 299; Ford

It may be noted in passing that in very few of the | statutes is there any express declaration that the

v. Williams, 73 Ga. 106; Johnston v. Neal, 67 Ga. 528; Doe v. Lancaster, 5 Ga. 39; Moody v. Fleming, 4 Ga. 115, 48 AmD 210.

Hawaii.—Kailianu v. Lumai, 8 Hawaii 256. See however Kaaimanu v. Kauwa, 3 Hawaii 610.

Ill.—O'Laughlin v. Covell, 222 Ill. 162, 78 NE 59; Wilder v. Aurora, etc., El. Tract. Co., 216 Ill. 493, 75 NE 493; Renner v. Kannally, 193 Ill. 212, 61 NE 1026 [aff 96 Ill. A. 392]; Keppel v. Dreier, 187 Ill. 298, 58 NE 386; Kepley v. Scully, 185 Ill. 52, 57 NE 187; Bellefontaine Impr. Co. v. Niedringhaus, 181 Ill. 426, 55 NE 184, 72 AmSR 269; Simons v. Drake, 179 Ill. 62, 53 NE 574; Kotz v. Belz, 178 Ill. 434, 53 NE 367; Illinois Cent. R. Co. v. O'Connor, 154 Ill. 550, 39 NE 563; East St. Louis, etc., R. Co. v. Nugent, 147 Ill. 254, 35 NE 464; Faloon v. Simshauser, 130 Ill. 649, 22 NE 835; Gage v. Hampton, 127 Ill. 87, 20 NE 12, 2 LRA 512; Jaques v. Lester, 118 Ill. 246, 8 NE 795; Johnson v. Filson, 118 Ill. 219, 8 NE 318; Lavelle v. Strobel, 89 Ill. 370; Hubbard v. Stearns, 86 Ill. 35; Kerr v. Hitt, 75 Ill. 51; Weber v. Anderson, 73 Ill. 439; Hale v. Gladfelder, 52 Ill. 91; Jacobs v. Rice, 33 Ill. 370; Watts v. Parker, 27 Ill. 224; Hinchman v. Whetstone, 23 Ill. 185; Turney v. Chamberlain, 15 Ill. 271.

Ind.—Craven v. Craven, 105 NE 41; Craven v. Craven, 103 NE 333; McKinney v. Lanning, 139 Ind. 170, 38 NE 601; Tewksbury v. Howard, 138 Ind. 103, 37 NE 355; Irey v. Mater, 134 Ind. 238, 33 NE 1018; Bales v. Pidgeon, 129 Ind. 548, 29 NE 34; Paxton v. Sterne, 127 Ind. 289, 26 NE 557; McWhorter v. Heltzell, 124 Ind. 129, 24 NE 743; Herff v. Griggs, 121 Ind. 471, 23 NE 279; Bowen v. Swander, 121 Ind. 164, 22 NE 725; L'Hommedieu v. Cincinnati, etc., R. Co., 120 Ind. 435, 22 NE 125; Wilson v. Campbell, 119 Ind. 286, 21 NE 893; English v. Powell, 119 Ind. 93, 21 NE 458; Collett v. Vanderburgh County, 119 Ind. 27, 21 NE 329, 4 LRA 321 and note; Russell v. Senior, 118 Ind. 520, 21 NE 292; O'Donahue v. Creager, 117 Ind. 372, 20 NE 267; Cutsinger v. Ballard, 115 Ind. 93, 17 NE 206; Sherlock v. Louisville, etc., R. Co., 115 Ind. 22, 17 NE 171; Riggs v. Riley, 113 Ind. 208, 15 NE 253; Davidson v. Bates, 111 Ind. 391, 12 NE 687; Walker v. Hill, 111 Ind. 223, 12 NE 387; Roots v. Beck, 109 Ind. 472, 9 NE 698; Souders v. Jeffries, 107 Ind. 552, 8 NE 288; State v. Portsmouth Sav. Bank, 106 Ind. 435, 7 NE 379; Wright v. Wright, 97 Ind. 444; Lafayette Second Nat. Bank v. Corey, 94 Ind. 457; Wingler v. Simpson, 93 Ind. 201; Main v. Killinger, 90 Ind. 165; Brown v. Anderson, 90 Ind. 93; Sims v. Frankfort, 79 Ind. 446; Thacher v. Devol, 50 Ind. 30; Bowen v. Preston, 48 Ind. 367; Vancleave v. Milliken, 13 Ind. 105; Bell v. Longworth, 6 Ind. 273; Soltwedel v. Gartner, (A.) 103 NE 18; Webb v. Rhodes, 28 Ind. A. 393, 61 NE 735; Wood v. Ripley, 27 Ind. A. 356, 61 NE 608.

Ind. T.—Choctaw, etc., R. Co. v. Rice, 7 Ind. T. 514, 104 SW 819.

Iowa.—Roth v. Munzenmaier, 118 Iowa 326, 91 NW 1072; Nauerth v. Duke, 79 NW 271; Oak Dale Independent Dist. v. Fagen, 94 Iowa 676, 63 NW 456; Mendenhall v. Price, 88 Iowa 203, 55 NW 321; Cramer v. Clow, 81 Iowa 255, 47 NW 59, 9 LRA 772; Quinn v. Quinn, 76 Iowa 565, 41 NW 316; Stevenson v. Polk, 71 Iowa 278, 32 NW 340; Williams v. Thomas, 65 Iowa 183, 21 NW 509; Heinrichs v. Terrell, 65 Iowa 25, 21 NW 171; Snell v. Iowa Homestead Co., 59 Iowa 701, 13 NW 848; Tremaine v. Weatherby, 58 Iowa 615, 12 NW 609; De Long v. Mulcher, 47 Iowa 445.

Kan.—Freeman v. Funk, 85 Kan. 473, 481, 117 P 1024, 46 LRANS 487 [quot Cyc]; Goodman v. Nichols, 44 Kan. 22, 23 P 957.

Ky.—Soward v. Ratliff, 152 Ky. 105, 153 SW 29; Ratliff v. Soward, 152 Ky. 97, 153 SW 25; McGuire v. Lovelace, 128 SW 309; Frazier v. Cox, 125 SW 148; Conley v. Breathitt Coal, etc., Co., 113 SW 504; Slusher v. Howard, 88 SW 1109, 28 KyL 122; Logan v. Phenix, 66 SW 1042, 23 KyL 2300; Fain v. Miles, 60 SW 939, 22 KyL 1584; Hornsby v. Davidson, 55 SW 684, 21 KyL 1531; Terry v. Helton, 46 SW 216, 20 KyL 367; Woolley v. McCormick, 45 SW 885, 20 KyL 272; Pollock v. Maysville, etc., R. Co., 103 Ky. 84, 44 SW 353, 19 KyL 1717; Hawes v. Kirk, 35 SW 1032, 18 KyL 215; Sutton v. Pollard, 96 Ky. 640, 29 SW 637, 16 KyL 685; Brown v. Swango, 28 SW 156, 16 KyL 381; Sanders v. Barbee, 3 SW 528; Logan v. Bull, 78 Ky. 607; Marshall v. McDaniel, 12 Bush 378; Holmes v. Gay, 6 Bush 47; Larman v. Huey, 13 B. Mon. 436; Dorch v. Thompson, 12 B. Mon. 379; Price v. Evans, 4 B. Mon. 386; Chiles v. Jones, 4 Dana 479; Deal v. Brooks, 7 J. J. Marsh. 232, 23 AmD 401; Crockett v. Lashbrook, 5 T. B. Mon. 530, 17 AmD 98; Botts v. Shields, 3 Litt. 32; Skyles v. King, 2 A. K. Marsh. 385; Gay v. Moffitt, 2 Bibb 506, 5 AmD 633; Culbertson v. McCullom, 1 KyL 267.

La.—Schultze v. Frost-Johnson Lumber Co., 132 La. 366, 61 S 404; Schultze v. Frost-Johnson Lumber Co., 131 La. 956, 60 S 629; Gilbert v. Mazerat, 121 La. 35, 46 S 47; In re Lockhart, 109 La. 740, 33 S 753; Mortimer v. Hodgson, 105 La. 734, 30 S 104; Goodwin v. McNeely, 104 La. 19, 28 S 893; Dodeman v. Barrow, 11 La. Ann. 87; Wilson v. Marshall, 10 La. Ann. 327.

Me.—Kelley v. Jones, 110 Me. 260, 86 A 252; Brackett v. Persons Unknown, 53 Me. 228, 87 AmD 548; Abbott v. Abbott, 51 Me. 575; Clancey v. Houdlette, 39 Me. 451; Goodwin v. Sawyer, 33 Me. 541; Winthrop v. Auburn, 31 Me. 465; School Dist. No. Four v. Benson, 31 Me. 381, 52 AmD 618.

Md.—Safe Deposit, etc., Co., v. Marburg, 110 Md. 410, 417, 72 A 839 [cit Cyc]; Wickes v. Wickes, 98 Md. 307, 56 A 1017; Erdman v. Corse, 87 Md. 506, 40 A 107; Rutter v. Small, 68 Md. 133, 11 A 698, 6 AmSR 434; Hanson v. Johnson, 62 Md. 25, 50 AmR 199; Hiss v. McCabe, 45 Md. 77; Stump v. Henry, 6 Md. 201, 61 AmD 300; Armstrong v. Risteau, 5 Md. 256, 59 AmD 115.

Mass.—Percival v. Chase, 182 Mass. 371, 65 NE 800; Morse v. Sherman, 155 Mass. 222, 29 NE 523; Peele v. Chever, 8 Allen 89; Steel v. Johnson, 4 Allen 425; Stearns v. Hendersass, 9 Cush. 497, 57 AmD 65.

Mich.—McKay v. Gardner, 120 Mich. 267, 79 NW 135; Barnard v. Brown, 112 Mich. 452, 70 NW 1038, 67 AmSR 432; Vier v. Detroit, 111 Mich. 646, 70 NW 139; Miller v. Miller, 100 Mich. 563, 59 NW 242; Chesebro v. Powers, 70 Mich. 370, 38 NW 283; De Mill v. Moffat, 49 Mich. 125, 13 NW 387; Bunce v. Bidwell, 43 Mich. 542, 5 NW 1023.

Minn.—Dean v. Goddard, 55 Minn. 290, 56 NW 1060; Davis v. Townsend, 45 Minn. 523, 48 NW 405; Brown v. Morgan, 44 Minn. 432, 46 NW 913; Jellison v. Halloran, 44 Minn. 199, 46 NW 332; Seymour v. Carli, 31 Minn. 81, 16 NW 495.

Miss.—Scottish American Mortg. Co. v. Butler, 99 Miss. 56, 54 S 666, AnnCas1913C 1236; Stewart v. Foxworth, 95 Miss. 442, 52 S 354; Davis v. Davis, 68 Miss. 478, 10 S 70; Geohegan v. Marshall, 66 Miss. 676, 6 S 502; Niles v. Davis, 60 Miss. 750; Jones v. Brandon, 59 Miss. 585; Davis v. Bowmar, 55 Miss. 671; Hicks v. Steigleman, 49 Miss. 377; Dixon v. Cook, 47 Miss. 220; Ford v. Wilson, 35 Miss. 490, 72 AmD 137; Shearer v. Winston, 33 Miss. 149; Ellis v. Murray, 28 Miss. 129.

Mo.—Norton v. Reed, 253 Mo. 236, 161 SW 842; Long v. Lackawanna Coal, etc., Co., 233 Mo. 713, 136 SW 673; Franklin v. Cunningham, 187 Mo. 184, 86 SW 79; Kirton v. Bull, 168 Mo. 622, 68 SW 927; Stevens v. Martin, 168 Mo. 407, 68 SW 347; Scannell v. American Soda Fountain Co., 161 Mo. 606, 61 SW 889; Ross v. McCain, 145 Mo. 271, 46 SW 955; Heinemann v. Bennett, 144 Mo. 118, 45 SW 1092; Allen v. Mansfield, 108 Mo. 343, 18 SW 901; Smith v. Johnson, 107 Mo. 494, 18 SW 21; Long v. Kansas City Stock-Yards Co., 107 Mo. 298, 17 SW 656, 28 AmSR 413; Sherwood v. Baker, 105 Mo. 472, 16 SW 938, 24 AmSR 399; Brown v. Chicago, etc., R. Co., 101 Mo. 484, 14 SW 719; Gardner v. Terry, 99 Mo. 523, 12 SW 888, 7 LRA 67; Fairbanks v. Long, 91 Mo. 628, 4 SW 499; Ekey v. Inge, 87 Mo. 493; Farrar v. Heinrich, 86 Mo. 521; Allen v. Mansfield, 82 Mo. 688; Fulkerson v. Mitchell, 82 Mo. 13; Lynde v. Williams, 68 Mo. 360; Key v. Jennings, 66 Mo. 356; Hamilton v. Boggess, 63 Mo. 233; Ridgeway v. Holliday, 59 Mo. 444; Barry v. Otto, 56 Mo. 177; Dalton v. St. Louis Bank, 54 Mo. 105; Bledsoe v. Simms, 53 Mo. 305; Shepley v. Cowan, 52 Mo. 559; Merchants' Bank v. Evans, 51 Mo. 335; Wall v. Shindler, 47 Mo. 282; Nelson v. Brodhack, 44 Mo. 596, 600, 100 AmD 328; Warfield v. Lindell, 38 Mo. 561, 90 AmD 443; Schultz v. Arnot, 33 Mo. 172; Blair v. Smith, 16 Mo. 273; Biddle v. Mellon, 13 Mo. 335; Crockett v. Morrison, 11 Mo. 3; Cummings v. Powell, 16 Mo. A. 559.

Mont.—Casey v. Anderson, 17 Mont. 167, 42 P 761.

Nebr.—Woodcock v. Unknown Heirs, 92 Nebr. 723, 139 NW 646; Schwartz v. Anderson, 92 Nebr. 603, 139 NW 219; Stryker v. Meagher, 76 Nebr. 616, 107 NW 792; Cervena v. Thurston, 59 Nebr. 343, 80 NW 1048; Webster v. Lincoln, 56 Nebr. 502, 76 NW 1076; McAllister v. Beymer, 54 Nebr. 247, 74 NW 586; Oldig v. Fisk, 53 Nebr. 156, 73 NW 661; Fink v. Dawson, 52 Nebr. 647, 72 NW 1037; Florence v. White, 50 Nebr. 516, 70 NW 50; Lantry v. Wolff, 49 Nebr. 374, 68 NW 494; Alexander v. Pitz, 34 Nebr. 361, 51 NW 851; Black v. Leonard, 33 Nebr. 745, 51 NW 126; Alexander v. Meadville, 33 Nebr. 219, 49 NW 1123; Ballou v. Sherwood, 32 Nebr. 666, 49 NW 790, 50 NW 1131; Omaha, etc., Land, etc., Co. v. Hansen, 32 Nebr. 449, 49 NW 456; Malcom v. Hanson, 32 Nebr. 50, 48 NW 883; Omaha, etc., L. & T. Co. v. Barrett, 31 Nebr. 803, 48 NW 967; Alexander v. Wilcox, 30 Nebr. 793, 47 NW 81, 9 LRA 735; Peterson v. Townsend, 30 Nebr. 373, 46 NW 526; D'Gette v. Sheldon, 27 Nebr. 829, 44 NW 30; Tourtelotte v. Pearce, 27 Nebr. 57, 42 NW 915; Gue v. Jones, 25 Nebr. 634, 41 NW 555; Tex v. Pflug, 24 Nebr. 666, 39 NW 839, 8 AmSR 231; Parker v. Starr, 21 Nebr. 680, 33 NW 424; Stettnische v. Lamb, 18 Nebr. 619, 26 NW 374; Haywood v. Thomas, 17 Nebr. 237, 22 NW 460; Gatling v. Lane, 17 Nebr. 77, 80, 22 NW 227, 453; Horbach v. Miller, 4 Nebr. 31; Postal v. Martin, 4 Nebr. (Unoff.) 534, 95 NW 8.

N. H.—First Presb. Soc. v. Bass, 68 N. H. 333, 44 A 485; Farrar v. Fessenden, 39 N. H. 268; Grant v. Fowler, 39 N. H. 101; Gage v. Gage, 30 N. H. 420.

N. J.—Spottiswoode v. Morris, etc., R. Co., 61 N. J. L. 322, 40 A 505; Foulke v. Bond, 41 N. J. L. 527; Paterson v. East Jersey Water Co., 74 N. J. Eq. 49, 70 A 472; Ely v. Wilson, 61 N. J. Eq. 94, 47 A 806; Watson v. Jeffrey, 39 N. J. Eq. 62.

N. M.—Pueblo of Nambe v. Romero, 10 N. M. 58, 61 P 122; Solomon v. Yrisarri, 9 N. M. 480, 54 P 752; Gildersleeve v. New Mexico Min. Co., 6 N. M. 27, 27 P 318; Armijo v. Armijo, 4 N. M. 133, 13 P 93.

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title of the true owner shall be deemed extinguished | by adverse possession for the statutory period and

N. Y.—Greene v. Couse, 127 N. Y. 386, 28 NE 15, 24 AmSR 458, 13 LRA 206; Baker v. Oakwood, 123 N. Y. 16, 25 NE 312, 10 LRA 387 and note [aff 49 Hun 416, 3 NYS 570]; New York v. Carleton, 113 N. Y. 284, 21 NE 55; Paige v. Waring, 103 N. Y. 636, 8 NE 476; Sherman v. Kane, 86 N. Y. 57; Millard v. McMullin, 68 N. Y. 345; Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134; Cahill v. Palmer, 45 N. Y. 478; Baker v. Duff, 136 App. Div. 13, 120 NYS 184 [aff 202 N. Y. 570 mem, 96 NE 1109 mem]; Roulston v. Stewart, 40 App. Div. 200, 57 NYS 1061; Freund v. Ostrander, 66 Hun 326, 21 NYS 344; Abrams v. Rhoner, 44 Hun 507, 9 NYSt 207; Eldridge v. Binghamton, 42 Hun 202 [aff 120 N. Y. 309, 24 NE 462]; Lewine v. Gerardo, 60 Misc. 261, 112 NYS 192; Westchester Mut. Trust Co. v. Polymero, 54 Misc. 379, 105 NYS 1024; Hindley v. Metropolitan El. R. Co., 42 Misc. 56, 85 NYS 561; Hamerschlag v. Duryea, 31 Misc. 678, 66 NYS 87 [aff 58 App. Div. 288, 68 NYS 1061 (aff 172 N. Y. 622 mem, 65 NE 1117 mem)]; Spies v. Rome, etc., R. Co., 15 NYS 348; Rock v. Doerr, 15 NYS 14; Birdsall v. Cary, 66 HowPr 358; La Frombois v. Jackson, 8 Cow. 589, 18 AmD 463; Jackson v. Harder, 4 Johns. 202, 4 AmD 262; Jackson v. Dieffendorf, 3 Johns. 269.

N. C.—Morse v. Freeman, 157 N. C. 385, 72 SE 1056; McFarland v. Cornwell, 151 N. C. 428, 66 SE 454; Woodlief v. Woodlief, 136 N. C. 133, 48 SE 583; Bullock v. Lake Drummond Canal, etc., Co., 132 N. C. 179, 43 SE 593; Taylor v. Smith, 121 N. C. 76, 28 SE 295; King v. Rhew, 108 N. C. 696, 13 SE 174, 23 AmSR 76; Clayton v. Cagle, 97 N. C. 300, 1 SE 523; Osborne v. Anderson, 89 N. C. 261; Christenbury v. King, 85 N. C. 229; Johnson v. Parker, 79 N. C. 475; Covington v. Stewart, 77 N. C. 148; Rodgers v. Wallace, 50 N. C. 181; Lenoir v. South, 32 N. C. 237; Pase v. Staton, 26 N. C. 32; Graham v. Houston, 15 N. C. 232; Doe v. Newbern Academy, 9 N. C. 233.

N. D.—Nash v. Northwest Land Co., 15 N. D. 566, 108 NW 792.

Oh.—McNeely v. Langan, 22 Oh. St. 32; Yetzer v. Thoman, 17 Oh. St. 130, 91 AmD 122; Thompson v. Green, 4 Oh. St. 216; Paine v. Skinner, 8 Oh. 159.

Or.—Spath v. Sales, 141 P 160; Sharpe v. Catron, 67 Or. 368, 136 P 20; Thomas v. Spencer, 66 Or. 359, 133 P 822; Quinn v. Willamette Pulp, etc., Co., 63 Or. 549, 553, 126 P 1 [cit Cyc]; Neal v. Davis, 53 Or. 423, 99 P 69, 101 P 212; Hamilton v. Flournoy, 44 Or. 97, 74 P 483; Beale v. Hite, 35 Or. 176, 57 P 322 [reh den 35 Or. 182, 58 P 102]; Ambrose v. Huntington, 34 Or. 484, 56 P 513; Barrell v. Title Guarantee, etc., Co., 27 Or. 77, 39 P 992; Logue v. Hutson, 24 Or. 528, 34 P 477; Rowland v. Williams, 23 Or. 515, 32 P 402; Mitchell v. Campbell, 19 Or. 198, 24 P 455; Joy v. Stump, 14 Or. 361, 12 P 929; Parker v. Metzger, 12 Or. 407, 7 P 518.

Pa.—Hart v. Williams, 189 Pa. 31, 41 A 983; Bassett v. Hawk, 118 Pa. 94, 11 A 802; O'Hara v. Richardson, 46 Pa. 385; Schall v. Williams Valley R. Co., 35 Pa. 191; Moore v. Luce, 29 Pa. 260, 72 AmD 629; Martin v. Jackson, 27 Pa. 504, 67 AmD 489; Baldridge v. McFarland, 26 Pa. 338; Crow v. Knightlinger, 25 Pa. 343; Green v. Kellum, 23 Pa. 254, 62 AmD 332; Crawford v. Neff, 3 Grant 175; Leeds v. Bender, 6 Watts & S. 315; Brown v. McCoy, 2 Watts & S. 307 note; Graffius v. Tottenham, 1 Watts & S. 488, 37 AmD 472; Yeakle v. Nace, 2 Whart. 123; Watson v. Gregg, 10 Watts 289, 36 AmD 176; Brown v. McKinney, 9 Watts 565, 36 AmD 139; Parker v. Southwick, 6 Watts 377; Piper v. Lodge, 16 Serg. & R. 214; Munshower v. Patton, 10 Serg. & R. 334, 13 AmD 678; Overfield v. Christie, 7 Serg. & R. 173; Pederick v. Searle, 5 Serg. & R. 236; Piper v. Lodge, 4 Serg. & R. 310; Bonnell v. Bonnell, 10 Pa. Cas. 419, 14 A 169; Braden v. Campbell, 1 Pa. Cas. 104, 1 A 580; Patterson v. Wheeler, 13 Montg. Co. 16; Lyster v. Bitner, 7 Phila. 348; London v. Lyman, 1 Phila. 465.

Philippine.—Cruz v. De Leon, 21 Philippine 199; De Castro v. Echarri, 20 Philippine 23; Clemente v. Marasigan, 19 Philippine 120.

R. I.—Radican v. Radican, 22 R. I. 405, 48 A 143; Union Sav. Bank v. Taber, 13 R. I. 683.

S. C.—Love v. Turner, 71 S. C. 322, 51 SE 101; Few v. Keller, 63 S. C. 154, 41 SE 85; Sutton v. Clark, 59 S. C. 440, 38 SE 150, 82 AmSR 848; Duren v. Kee, 50 S. C. 444, 27 SE 875; Cave v. Anderson, 50 S. C. 293, 27 SE 693; Miller v. Cramer, 48 S. C. 282, 26 SE 657; Busby v. Florida Cent., etc., R. Co., 45 S. C. 312, 23 SE 50; Smith v. Pickenpack, 27 S. C. L. 72; Simmons v. Parsons, 20 S. C. L. 492 note; Sumner v. Murphy, 20 S. C. L. 488, 27 AmD 397; Middleton v. Dupuis, 11 S. C. L. 310.

Tenn.—Wright v. Hurst, 122 Tenn. 656, 127 SW 701; Earnest v. Little River Land, etc., Co., 109 Tenn. 427, 75 SW 1122; Coal Creek Cons. Coal Co. v. East Tennessee Iron, etc., Co., 105 Tenn. 563, 59 SW 634; East Tennessee Iron, etc., Co. v. Broyles, 95 Tenn. 612, 32 SW 761; Bon Air Coal, etc., Co. v. Parks, 94 Tenn. 263, 29 SW 130; Shields v. Riverside Impr. Co., 90 Tenn. 633, 18 SW 258; Hanks v. Folsom, 11 Lea 555; Peck v. Houston, 5 Lea 227; Nelson v. Trigg, 4 Lea 701; Hopkins v. Calloway, 7 Coldw. 27; Trim v. McPherson, 7 Coldw. 15; McClung v. Sneed, 3 Head 218; Rutherford v. Franklin, 1 Swan 321; Waterhouse v. Martin, Peck 373; Cowan v. Hatcher, (Ch. A.) 59 SW 689; Buttery v. Brown, (Ch. A.) 52 SW 713; French v. French, (Ch. A.) 52 SW 517. See also Turnage v. Kenton, 102 Tenn. 328, 52 SW 174.

Tex.—Burton v. Carroll, 96 Tex. 320, 72 SW 581; Texas Mexican R. Co. v. Uribe, 85 Tex. 386, 20 SW 153; Von Rosenberg v. Haynes, 85 Tex. 357, 20 SW 143; Bruce v. Washington, 80 Tex. 368, 15 SW 1104; Evans v. Foster, 79 Tex. 48, 15 SW 170; Branch v. Baker, 70 Tex. 190, 7 SW 808; Bridges v. Johnson, 69 Tex. 714, 7 SW 506; Craig v. Cartwright, 65 Tex. 413; Spofford v. Bennett, 55 Tex. 293; Turner v. Rogers, 38 Tex. 582; Moody v. Holcomb, 26 Tex. 714; Pearson v. Burditt, 26 Tex. 157, 80 AmD 649; Robertson v. Wood, 15 Tex. 1, 65 AmD 140; Johnson v. Sullivan, (Civ. A.) 163 SW 1015; Glover v. Pfeuffer, (Civ. A.) 163 SW 984; Unknown Heirs v. Robbins, (Civ. A.) 152 SW 210; Cook's Hereford Cattle Co. v. Barnhart, (Civ. A.) 147 SW 662; Houston Oil Co. v. McGrew, (Civ. A.) 143 SW 191; Mitchell v. Schofield, (Civ. A.) 140 SW 254; Lamberida v. Barnum, (Civ. A.) 90 SW 698; Magerstadt v. Lambert, 39 Tex. Civ. A. 472, 87 SW 1068; Estes v. Turner, 30 Tex. Civ. A. 365, 70 SW 1007; Grayson v. Peyton, (Civ. A.) 67 SW 1074; Vodrie v. Tynan, (Civ. A.) 57 SW 680; Texas, etc., R. Co. v. Bancroft, (Civ. A.) 56 SW 606; Hines v. Lumpkin, 19 Tex. Civ. A. 556, 47 SW 818; Parsons v. Thompson, (Civ. A.) 32 SW 327; Bowyer v. Robertson, (Civ. A.) 29 SW 916; MacGregor v. Thompson, 7 Tex. Civ. A. 32, 26 SW 649; Hardin v. Clark, 1 Tex. Civ. A. 565, 21 SW 977. See also McCarty v. Johnson, 20 Tex. Civ. A. 184, 49 SW 1098; East Texas Land, etc., Co. v. Shelby, 17 Tex. Civ. A. 685, 41 SW 542.

Utah.—Mansfield v. Neff, 134 P 1160.

Vt.—Hodges v. Eddy, 41 Vt. 485, 98 AmD 612; Hughes v. Graves, 39 Vt. 359, 94 AmD 331; Austin v. Bailey, 37 Vt. 219, 86 AmD 703; State Univ. v. Reynolds, 3 Vt. 542, 23 AmD 234; Barlow v. Bowne, Brayt. 135.

Va.—Chesterman v. Bolling, 102 Va. 471, 46 SE 470; Virginia Midland R. Co. v. Barbour, 97 Va. 118, 33 SE 554; Stull v. Rich Patch Iron Co., 92 Va. 253, 23 SE 293; Clay v. Ransome, 1 Munf. (15 Va.) 454; Birch v. Alexander, 1 Wash. (1 Va.) 34.

Wash.—Kline v. Stein, 30 Wash. 189, 70 P 235; Northern Pac. R. Co. v. Ely, 25 Wash. 384, 65 P 555, 87 AmSR 761, 54 LRA 526; Rogers v. Miller, 13 Wash. 82, 42 P 525, 52 AmSR 20.

W. Va.—Calvert v. Murphy, 81 SE 403; Harman v. Alt, 69 W. Va. 287, 71 SE 709; Riffle v. Skinner, 67 W. Va. 75, 67 SE 1075; Summerfield v. White, 54 W. Va. 311, 46 SE 154; Bennett v. Pierce, 50 W. Va. 604, 40 SE 395; Wilson v. Braden, 48 W. Va. 196, 36 SE 367; Adkins v. Spurlock, 46 W. Va. 139, 33 SE 121; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255; Garrett v. Ramsey, 26 W. Va. 345; Core v. Faupel, 24 W. Va. 238.

Wis.—Laffitte v. Superior, 142 Wis. 73, 125 NW 105; Off v. Heinrichs, 124 Wis. 440, 102 NW 904; Hatch v. Lusigman, 117 Wis. 428, 94 NW 332; Gilman v. Brown, 115 Wis. 1, 91 NW 227; Batz v. Woerpel, 113 Wis. 442, 89 NW 516; Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 835, 85 NW 402, 83 AmSR 905; Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830; McCann v. Welch, 106 Wis. 142, 81 NW 996; McMillan v. Wehle, 55 Wis. 685, 13 NW 694.

Can.—Parks v. Cahoon, 23 Can. S. C. 92; Chevrier v. Reg., 4 Can. S. C. 1.

N. S.—Shea v. Burchell, 27 N. S. 235.

Ont.—McKinnon v. Spence, 20 Ont. L. 57, 13 OntWR 186, 14 OntWR 1144; Seale v. Johnston, 13 Ont. A. 349; Thompson v. Canada Cent. R. Co., 3 Ont. 136; Steers v. Shaw, 1 Oht. 26; Cosbey v. Detlor, 2 OntWN 668, 18 OntWR 479; Cushing v. McDonald, 26 U. C. Q. B. 605.

"The statute of limitations does not act merely on the remedy. It extinguishes the right on one side and creates a right on the other which is of as high a dignity as regards judicial remedies as any other; a right entitled to constitutional protection." Laffitte v. Superior, 142 Wis 73, 83, 125 NW 105 (per Marshall, J.).

[a] **Effect of motive or mistake.**—Under Nebr. Comp. St. (1881) p 531 § 6, limiting the time for the recovery of real estate to ten years after the accrual of the action, if a person establishes in himself, or in connection with those under whom he claims, an actual, notorious, continuous, and exclusive possession of land, as owner, for a period of ten years, he thereby acquires a title to the land, and this irrespective of any question of motive or mistake. Omaha, etc., Land, etc., Co. v. Hansen, 32 Nebr. 449, 49 NW 456.

[b] **Defective paper title.**—A title acquired by adverse possession under color of title is good, even though there are serious defects in the paper title. Erdman v. Corse, 87 Md. 506, 40 A 107; Lurman v. Hubner, 75 Md. 268, 23 A 646; Hanson v. Johnson, 62 Md. 25, 50 AmR 199.

[c] **In Alberta** it is held that the Land Titles Act of 1894 of that province and the statute of limitations (3 & 4 Wm. IV c 27 § 34) stand together, and that adverse possession for a statutory period constitutes a good defense. It not being necessary to a decision of the case, the court declined to decide whether there was an extinguishment of the paramount title. Harris v. Keith, 16 WestLR 433.

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title vested in the adverse occupant.[73] The title acquired by adverse possession is a title in fee simple and is as perfect a title as one by deed from the original owners, or by patent or grant from the government,[74] or by descent or devise,[75] and the original owner is absolutely divested of all title.[76] When once acquired it continues until conveyed by the possessor or until lost by another adverse possession.[77]

[§ 553] **2. New and Distinct Title Acquired.** The title acquired by the adverse claimant is not, it seems, that of the original owner, but he is deemed to hold under a new title, the title of the original owner being extinguished,[78] and such title is not founded on any presumption of a grant from the original owner.[79]

[§ 554] **3. Relation Back of Title.** The title relates back to the inception of the possession.[80]

[§ 555] **4. Title Available for Attack or Defense Either at Law or in Equity.** A title acquired by adverse possession is available either for attack or defense, and this is so whether the action is legal[81] or equitable in its nature,[82] and its availability in this respect will not depend upon the occupant con-

73. See the statutes of the various states.

74. U. S.—Harpending v. Reformed Protestant Dutch Church, 16 Pet. 455, 10 L. ed. 1029.
Ark.—Jacks v. Chaffin, 34 Ark. 534.
Cal.—Simson v. Eckstein, 22 Cal. 580.
D. C.—Scott v. Herrell, 31 App. 45.
Ind.—Moore v. Hinkle, 151 Ind. 343, 50 NE 822; Roots v. Becks, 109 Ind. 472, 9 NE 698.
Iowa.—Heinrich v. Terrell, 65 Iowa 25, 21 NW 171.
Kan.—Freeman v. Funk, 85 Kan. 473, 481, 117 P 1024, 46 LRANS 487 [quot Cyc]; Gildehaus v. Whiting, 39 Kan. 706, 18 P 916.
Me.—School Dist. No. Four v. Benson, 31 Me. 381, 52 AmD 618.
Md.—Safe Deposit, etc., Co. v. Marburg, 110 Md. 410, 72 A 839.
Minn.—Dean v. Goddard, 55 Minn. 290, 56 NW 1060.
Mo.—Allen v. Mansfield, 82 Mo. 688; Wall v. Shindler, 47 Mo. 282; Cummings v. Powell, 16 Mo. A. 559.
N. Y.—Sherman v. Kane, 86 N. Y. 57; Spies v. Rome, etc., R. Co., 15 NYS 348.
N. D.—Nash v. Northwest Land Co., 15 N. D. 566, 108 NW 792.
Or.—Neal v. Davis, 53 Or. 423, 99 P 69, 101 P 212; Gardner v. Wright, 49 Or. 609, 91 P 286; Mitchell v. Campbell, 19 Or. 198, 24 P 455; Joy v. Stump, 14 Or. 361, 12 P 929.
Tex.—Moody v. Holcomb, 26 Tex. 714; Clark v. Asbury, (Civ. A.) 134 SW 286.
Vt.—Hughes v. Graves, 39 Vt. 359, 94 AmD 331; Austin v. Bailey, 37 Vt. 219, 86 AmD 703.
Wash.—Thornely v. Andrews, 40 Wash. 580, 585, 82 P 899, 111 AmSR 983, 1 LRANS 1036 [quot Cyc].
W. Va.—Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255.

[a] **Judgment not necessary.**—A judgment at law is not necessary to perfect a title by disseizin any more than one by deed. In either case when the title is in controversy it is to be shown by legal proof, and a continued disseizin for the statutory period is as effectual for that purpose as a deed duly executed. School Dist. No. Four v. Benson, 31 Me. 381, 52 AmD 618.

75. Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255.

76. McCormack v. Silsby, 82 Cal. 72, 22 P 874 (homestead); Young v. Kimberland, 2 Litt. (Ky.) 223; Bedinger v. Rickets, 2 A. K. Marsh. (Ky.) 34; Alexander v. Wilcox, 30 Nebr. 793, 47 NW 81, 9 LRA 735; Court v. Walsh, 1 OntL 167. See also Hughes v. Graves, 39 Vt. 359, 94 AmD 331; Brassington v. Llewellyn, 27 L. J. Exch. 297; Bryan v. Cowdal, 21 Wkly. Rep. 693.

[a] **An equitable as well as a legal title** may be divested by adverse possession. Klatt v. Detroit, 162 Mich. 186, 127 NW 409.

[b] **Outstanding leasehold interest.**—Where a mortgagor and his predecessors in title had been in adverse and exclusive possession of the mortgaged land for more than forty-five years, an outstanding leasehold interest in a part of the land was barred. Cook v. Councilman, 109 Md. 522, 72 A 404.

[c] **Covenants in deed.**—Thus, in the application of the rule that a title after-acquired by a grantor passes to a grantee by virtue of the covenants in his deed only so long as such grantee has some estate or interest in the land, it is held that where a grantor holds adversely to his grantee for the statutory period, the grantee is divested of all estate in the land and the title so acquired by the grantor does not pass to the grantee under the general covenants in the deed. Garabaldi v. Shattuck, 70 Cal. 511, 11 P 778; Sherman v. Kane, 86 N. Y. 57; Johnson v. Farlow, 35 N. C. 84.

[d] **Availability as defense to third person.**—(1) Where the land has been held adversely to the original owner for the statutory period the latter's title is divested, and in ejectment by such owner against a third person this may be shown in defense, although defendant in the ejectment action cannot connect his holding with the title acquired by the adverse claimant. East Tennessee Iron, etc., Co. v. Wiggin, 68 Fed. 446, 15 CCA 510; Scott v. Herrell, 31 App. 45; Reeves v. Low, 8 App. 105; Branch v. Baker, 70 Tex. 190, 7 SW 808. See also Allen v. McKay, 120 Cal. 332, 52 P 828; Smoke v. Smoke, 44 S. C. L. 433; Mazyck v. Birt, 4 S. C. L. 155 (trespass to try title); Spofford v. Bennett, 55 Tex. 293; Erhard v. Hearne, 47 Tex. 469. (2) And where the title of the original owner has been lost by the adverse possession of a third person he is liable in trespass to another upon whose possession he intrudes, although the latter cannot connect himself with the title acquired by the adverse holder and he cannot set up his original title in defense of such an action. Hughes v. Graves, 39 Vt. 359, 94 AmD 331. (3) Similarly the original owner is not entitled to a decree quieting his title, where his title has been lost by an adverse possession, although the person against whom the decree is sought and who is in possession does not connect himself with the title acquired by the adverse possession. Woodward v. Faris, 109 Cal. 12, 41 P 781.

77. Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205; Chiles v. Davis, 58 Ill. 411; Christenbury v. King, 85 N. C. 229.

[a] **A legislative act passed after the bar** of the statute has become complete, with the view of removing the bar, is void as depriving the party of his property without due process of law. Campbell v. Holt, 115 U. S. 620, 6 SCt 209, 29 L. ed. 483; Spottiswoode v. Morris, etc., R. Co., 61 N. J. L. 322, 40 A 505.

78. Price v. Lyon, 14 Conn. 279. See also Coal Creek Cons. Coal Co. v. East Tennessee Iron, etc., Co., 105 Tenn. 563, 59 SW 634.

79. Armijo v. Armijo, 4 N. M. 133, 13 P 92; Gallupville Reformed Church v. Schoolcraft, 65 N. Y. 134.

80. Bellefontaine Impr. Co. v. Niedringhaus, 181 Ill. 426, 55 NE 184, 72 AmSR 269.

81. Craven v. Craven, (Ind.) 105 NE 41. And see cases infra this note.

[a] **As ground for attack in actions at law** see Stellwagen v. Tucker, 144 U. S. 548, 12 SCt 724, 36 L. ed. 537; Doniphan Lumber Co. v. Case, 87 Ark. 168, 112 SW 208; Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205; Bequette v. Caulfield, 4 Cal. 278, 60 AmD 615; Montgomery v. Robinson, 4 Del. Ch. 490; Kepley v. Scully, 185 Ill. 52, 57 NE 187; Ray v. Sweeny, 14 Bush (Ky.) 1, 29 AmR 388; Wickes v. Wickes, 98 Md. 307, 56 A 1017; Jones v. Brandon, 59 Miss. 585; Pederick v. Searle, 5 Serg. & R. (Pa.) 236; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255. The principle that title acquired by adverse possession is available for attack applies to actions against third persons as well as against the original owner. Bishop v. Truett, 85 Ala. 376, 5 S 154; Ryan v. Kilpatrick, 66 Ala. 332; Kepley v. Scully, 185 Ill. 52, 57 NE 187; Chism v. Trent, 10 SW 648, 10 KyL 849; Forman v. Ambler, 2 Dana (Ky.) 108; Bunce v. Bidwell, 43 Mich. 542, 5 NW 1023; Anderson v. Moore, 34 Miss. 400, 36 S 520. See also generally Ejectment; Trespass to Try Title.

[b] **As ground for defense in action at law** see Somerville v. Hamilton, 4 Wheat. (U. S.) 230, 4 L. ed. 558; Newton v. Bateman, 65 Ark. 631, 47 SW 110; Doe v. Roe, 13 Fla. 602; Chenault v. Yates, 156 Ky. 280, 160 SW 925; Woolley v. McCormick, 45 SW 886, 20 KyL 272; Webber v. Gibson, 8 KyL 125; Call v. O'Harrow, 51 Mich. 98, 16 NW 249; Koch v. Gordon, 231 Mo. 645, 133 SW 609; Den v. Wright, 7 N. J. L. 175, 11 AmD 546; Porter v. Lancaster, 91 S. C. 300, 74 SE 374; Meade v. Logan, (Tex. Civ. A.) 110 SW 188.

82. See cases infra this note.

[a] **Title by adverse possession is respected** in a court of equity as well as in a court of law. Hunt v. Wickliffe, 2 Pet. (U. S.) 201, 7 L. ed. 397; Elmendorf v. Taylor, 10 Wheat. (U. S.) 152, 6 L. ed. 289; H. B. Claflin Co. v. Middlesex Banking Co., 113 Fed. 958; Woods v. Glos, 257 Ill. 125, 100 NE 516; Johnson v. Filson, 118 Ill. 219, 8 NE 318; Royse v. Turnbaugh, 117 Ind. 539, 20 NE 485; O'Donahue v. Creager, 117 Ind. 372, 20 NE 267; Wood v. Ripley, 27 Ind. A. 356, 61 NE 608; Gossom v. Donaldson, 18 B. Mon. (Ky.) 230, 68 AmD 723; Rogers v. Moore, 9 B. Mon. (Ky.) 401; Gates v. Jacob, 1 B. Mon. (Ky.) 306; Sawyer v. Oliver, 7 J. J. Marsh. (Ky.) 178; Curts v. Bardstown, 6 J. J. Marsh. (Ky.) 536; Mitchell v. Owings, 3 A. K. Marsh. (Ky.) 312; Sherwood v. Baker, 105 Mo. 472, 16 SW 938, 24 AmSR 399; Clayton v. Cagle, 97 N. C. 300, 1 SE 523; Collins v. McCarty, 68 Tex. 150, 3 SW 730, 2 AmSR 475; Depue v. Miller, 65 W. Va. 120, 64 SE 740; Medlicott v. O'Donel, 1 Ball & B. 156; Plunkett v. Burlington, 1 Jur. 376; Cholmondeley v. Clinton, Turn. & R. 107, 12 EngCh 107, 37 Reprint 1036.

[b] **As ground for attack in suits in equity** see Torrent Fire Engine Co. v. Mobile, 101 Ala. 559, 14 S 557; Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Work v. United Globe Mines, 12 Ariz. 339, 100 P 813; Pacheco v. Wilson, 2 Ariz. 411, 18 P 597; Hardy v. Samuels, 92 Ark. 289, 122 SW 654; Arrington v. Liscom, 34 Cal. 365, 94 AmD 722; Mickey v.

tinuing in the actual possession of the property.[83]

[§ 556] **5. Constitutional Protection of Title as a Vested Right.** As regards actions for the recovery of real estate the bar of the statute is regarded as vesting title in the claimant to the extent that a legislative attempt to remove the bar would be unconstitutional as a deprivation of the claimant's vested rights.[84]

[§ 557] **6. Rights of Holder of Title as against Purchaser from Original Owner.** After the adverse possession has ripened into title, the original owner cannot, by taking possession and conveying the land, or by conveying while the claimant is not in actual possession, to a bona fide purchaser, convey to the latter any title which could be enforced against or affect the title acquired by the adverse possession,[85] and a fortiori a conveyance by the original owner would not affect the rights of the claimant who at the time of the conveyance was in possession.[86]

[§ 558] **7. Title a Good and Marketable One Which Purchaser Is Bound to Accept.** The title of one who has held adverse possession for the statutory period is sufficient to fulfill his contract to convey a good or marketable title and is one which a purchaser of the land is bound to accept;[87] and purchasers have been required to accept such titles even

Barton, 194 Ill. 446, 62 NE 802; Travers v. McElvain, 181 Ill. 382, 55 NE 135; Freeman v. Funk, 85 Kan. 473, 481, 117 P 1024, 46 LRANS 487 and note [quot Cyc]; Jenkins v. Dewey, 49 Kan. 49, 30 P 114; Le Moyne v. Hays, 145 Ky. 415, 140 SW 552; Whipple v. Earick, 93 Ky. 121, 19 SW 237, 14 KyL 85; Ballou v. Sherwood, 32 Nebr. 666, 49 NW 790, 50 NW 1131; Smith v. Pittsburgh, etc, R. Co., 26 Oh. Cir. Ct. 44; Radican v. Radican, 22 R. I. 405, 48 A 143; Basore v. Henkel, 82 Va. 474. See also Georgia R., etc., Co. v. Gardner, 113 Ga. 897, 39 SE 299; and Quieting Title [32 Cyc 1329].

[c] **Injunctive relief.**—A person who has been in the adverse possession of a portion of a town site for a period of time sufficient to bar an action against him to recover possession thereof thereby acquires an absolute title to said land and may protect his possession by injunction against unlawful acts of the city authorities in attempting to open streets through his land. Schock v. Falls City, 31 Nebr. 599, 48 NW 468.

[d] **As ground for defense in equitable action.**—(1) Where an adverse possession is continued for the statutory period it constitutes a complete bar in equity wherever an ejectment would be barred if plaintiff possessed the legal title. Teall v. Schroder, 158 U. S. 172, 15 SCt 768, 39 L. ed. 938; Hall v. Law, 102 U. S. 461, 26 L. ed. 217; Harpending v. Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029; Peyton v. Stith, 5 Pet. (U. S.) 485, 8 L. ed. 200; Hunt v. Wickliffe, 2 Pet. (U. S.) 201, 7 L. ed. 397; Elmendorf v. Taylor, 10 Wheat. (U. S.) 152, 6 L. ed. 289; Elder v. McClaskey, 70 Fed. 529, 17 CCA 251; Fussell v. Hughes, 8 Fed. 384 [aff 113 U. S. 550, 5 SCt 631, 28 L. ed. 993]; Keppel v. Dreier, 187 Ill. 298, 58 NE 386; Davidson v. Thomas, (Iowa) 86 NW 291; Gates v. Jacob, 1 B. Mon. (Ky.) 306; Sawyer v. Oliver, 7 J. J. Marsh. (Ky.) 178; Curts v. Bardstown, 6 J. J. Marsh. (Ky.) 536; Poague v. Allen, 3 J. J. Marsh. (Ky.) 421; Reed v. Bullock, Litt. Sel. Cas. (Ky.) 510, 12 AmD 345; Floyd v. Johnson, 2 Litt. (Ky.) 109, 13 AmD 255; Mitchell v. Owings, 3 A. K. Marsh. (Ky.) 312; Brackett v. Persons Unknown, 53 Me. 228; Haywood v. Thomas, 17 Nebr. 237, 22 NW 460; Humbert v. Trinity Church, 24 Wend. (N. Y.) 587; Clapp v. Bromagham, 9 Cow. (N. Y.) 530. See also Cholmondeley v. Clinton, Turn. & R. 107, 12 EngCh 107, 37 Reprint 1036. (2) It has been said, however, that this doctrine must be understood to apply to those cases only where the person seeking relief was informed of his right and labored under no disability. Mitchell v. Owings, 3 A. K. Marsh. (Ky.) 312.

[e] **In an action to determine a boundary** it was error to strike out of the answer a defense that defendant had acquired title to the land in dispute by adverse possession. Stadin v. Helin, 76 Minn. 496, 79 NW 537, 602.

83. Chicago Sanitary Dist. v. Allen, 178 Ill. 330, 53 NE 109; McDuffee v. Sinnott, 119 Ill. 449, 10 NE 885; Paullin v. Hale, 40 Ill. 274; Brown v. Anderson, 90 Ind. 93; Sutton v. Pollard, 96 Ky. 640, 29 SW 637, 16 KyL 685.

84. U. S.—Campbell v. Holt, 115 U. S. 620, 6 SCt 209, 29 L. ed. 483.

Cal.—Johnson v. Brown, 63 Cal. 391; Sharp v. Blankenship, 59 Cal. 288.

Ind.—Bowen v. Preston, 48 Ind. 367.

Tenn.—Trim v. McPherson, 7 Coldw. 15.

Tex.—Bentinck v. Franklin, 38 Tex. 458.

85. Faloon v. Simshauser, 130 Ill. 649, 22 NE 835; East Texas Land, etc., Co. v. Shelby, 17 Tex. Civ. A. 685, 41 SW 542; MacGregor v. Thompson, 7 Tex. Civ. A. 32, 26 SW 649; Western Canada Loan Co. v. Garrison, 16 Ont. 81.

[a] **In support of this view** it was said (1) in Ridgeway v. Holliday, 59 Mo. 444, 454: "But it is contended by the defendant that he is a purchaser for value from Voteau who appeared from the record to be the owner, and was in possession, without any notice of the prior adverse possession which passed the title to Ridgeway, or of any claim on his part to the premises; and that as against him, the defendant, Ridgeway, cannot assert his title; that to permit him to do so, would be giving to an adverse possession greater force and efficacy than is given to an unrecorded conveyance. These objections, it must be admitted, are very forcible. The registry act, however, cannot, in the nature of things, apply to a transfer of the legal title by adverse possession, and such title does not stand on the footing of one acquired and held by an unrecorded deed, and of such title, the purchaser may not expect to find any evidence in the records." And (2) in Schall v. Williams Valley R. Co., 35 Pa. 191, 204: "Titles matured under the statute of limitations are not within the recording acts. However expedient it might be to require some public record of such titles to be kept, and however inconvenient it may be to purchasers to ascertain what titles of that sort are outstanding, still we have not as yet any legislation on the subject, and it is not competent for judicial decision to force upon them consequences drawn from the recording acts. Those acts relate exclusively to written titles. Possessory titles have always been favourites of Pennsylvania legislation, and it would ill become the judiciary to clog them with conditions and disabilities, which the law-making power has not prescribed, nor even suggested."

86. Wilson v. Campbell, 119 Ind. 286, 21 NE 893.

87. U. S.—Elder v. McClaskey, 70 Fed. 529, 17 CCA 251.

Ala.—Meeks v. Garner, 93 Ala. 17, 8 S 378, 11 LRA 196.

D. C.—Cox v. Cox, 18 D. C. 1.

Ga.—Cherry v. Davis, 59 Davis, 59 Ga. 454.

Ind.—Tewksbury v. Howard, 138 Ind. 103, 37 NE 355.

Iowa.—Hunt v. Gray, 76 Iowa 268, 41 NW 14.

Ky.—Moyers v. Arthur, 25 SW 276, 746, 15 KyL 684; Gaines v. Jones, 86 Ky. 527, 7 SW 25, 9 KyL 710; Thacker v. Booth, 6 SW 460, 9 KyL 745; Wickliffe v. Lee, 6 B. Mon. 543; Allen v. Philips, 2 Litt. 1.

La.—Mortimer v. Hodgson, 105 La. 734, 30 S 104; Melbaum v. Brennan, 49 La. Ann. 530, 21 S 853.

Md.—Cook v. Councilman, 109 Md. 622, 72 A 404; Dickerson v. Kirk, 105 Md. 638, 66 A 494; Maryland Univ. v. Calvary M. E. Church, 104 Md. 685, 65 A 398; Erdman v. Corse, 87 Md. 506, 40 A 107; Rother v. Sharp St. Station of M. E. Church, 85 Md. 528, 37 A 24; Foreman v. Wolf, 29 A 837. And see Baltimore Safe Deposit, etc., Co. v. Marburg, 110 Md. 410, 72 A 839.

Mich.—Barnard v. Brown, 112 Mich. 452, 70 NW 1038, 67 AmSR 432.

Minn.—Austin v. Barnum, 52 Minn. 136, 53 NW 1132; Townshend v. Goodfellow, 40 Minn. 312, 41 NW 1056, 12 AmSR 736, 3 LRA 739 and note.

Nebr.—Ballou v. Sherwood, 32 Nebr. 666, 49 NW 790, 50 NW 1131.

N. Y.—Simis v. McElroy, 160 N. Y. 156, 54 NE 674, 73 AmSR 673 [aff 12 App. Div. 434, 42 NYS 290]; O'Connor v. Huggins, 113 N. Y. 511, 21 NE 184 [aff 1 NYS 377]; Shriver v. Shriver, 86 N. Y. 575; Clarke v. Wollpert, 128 App. Div. 203, 112 NYS 547; Ruff v. Gerhardt, 73 App. Div. 245, 76 NYS 743; Kahn v. Mount, 46 App. Div. 84, 61 NYS 358; Hamershlag v. Duryea, 38 App. Div. 130, 56 NYS 615; Weil v. Radley, 31 App. Div. 25, 52 NYS 398 [aff 163 N. Y. 582, 57 NE 1128]; Faile v. Crawford, 30 App. Div. 536, 52 NYS 353; Wilhelm v. Federgreen, 2 App. Div. 483, 38 NYS 8 [aff 157 N. Y. 713 mem, 53 NE 1133 mem]; Kneller v. Lang, 68 Hun 48, 17 NYS 443 [aff 137 N. Y. 589 mem, 33 NE 555]; Abrams v. Rhoner, 44 Hun 507, 9 NYSt 207; Wormser v. Gehri, 55 Misc. 147, 106 NYS 295; Pope v. Thrall, 33 Misc. 44, 68 NYS 137; Hamerschlag v. Duryea, 31 Misc. 678, 66 NYS 87 [aff 58 App. Div. 288, 68 NYS 1061 (aff 172 N. Y. 672 mem, 63 NE 1117 mem)]; Heller v. Cohen, 15 Misc. 378, 36 NYS 668 [rev on other grounds 9 App. Div. 465, 41 NYS 214]; Ford v. Schlosser, 13 Misc. 205, 34 NYS 12; Bohm v. Fay, 18 AbbNCas 175; Seymour v. De Lancey, Hopk. 436, 14 AmD 552 [aff 5 Cow. 714]. See also Freund v. Ostrander, 66 Hun 326, 21 NYS 344.

Or.—Fellows v. Evans, 33 Or. 30, 53 P 491.

Pa.—Dallmeyer v. Ferguson, 198 Pa. 288, 47 A 962; Pratt v. Eby, 67 Pa. 396; Shober v. Dutton, 6 Phila. 185.

R. I.—Union Sav. Bank v. Taber, 13 R. I. 683.

S. C.—Miller v. Cramer, 48 S. C. 282, 26 SE 657.

Vt.—Hughes v. Graves, 39 Vt. 359, 94 AmD 331.

W. Va.—Bennett v. Pierce, 50 W. Va. 604, 40 SE 395.

Wis.—Nelson v. Jacobs, 99 Wis. 547, 75 NW 406.

Eng.—Cottrell v. Watkins, 1 Beav. 361, 17 EngCh 361, 48 Reprint 980; Scott v. Nixon, 3 Dr. & War. 388; Games v. Bonnor, 54 L. J. Ch. 517.

See Walker v. Towns, 23 Ark. 147.

Contra see McCroskey v. Ladd, 3 Cal. Unrep. Cas. 433, 28 P 216.

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in cases of religious corporations holding in contravention of the constitution.[88] Such a title will support the usual covenants in a conveyance,[89] and although at the time of the conveyance the bar of the statute has not attached, still if the grantee continues the possession until the bar does attach he will acquire a perfect title, and this will relieve the grantor of liability on his covenants of warranty, etc., in the conveyance.[90] Nevertheless, if the contract of sale requires the vendor to furnish a clear abstract of title,[91] or to give a good title of record,[92] a title acquired by adverse possession does not satisfy the requirement.

XVI. LOSS OF RIGHT OR TITLE ACQUIRED BY ADVERSE POSSESSION

[§ 559] **A. Abandonment or Surrender.** The disseizor may abandon the land or surrender his possession by parol to the disseizee at any time before his disseizin has ripened into a title and thus put an end to his claim;[93] but a title which has ripened by adverse possession cannot be divested by a parol abandonment or relinquishment but must be transferred by deed,[94] unless the title to the abandoned property afterward vests in another by reason of adverse possession,[95] and, as a consequence, to constitute a defense to a recovery by the original owner the possession relied on as a defense need not have necessarily been maintained for the statutory period next preceding the institution of the action.[96] Nevertheless, like any other title, a title acquired by adverse possession may be destroyed by adverse possession,[97] or it may be forfeited for nonentry for taxation.[98]

[§ 560] **B. Admissions or Agreements.** Where title has become perfect by adverse possession for the statutory period it is not lost by an admission by the holder that the possession was not adverse,[99]

[a] **A purchaser at a judicial sale** will be required to accept such title. Cox v. Cox, 18 D. C. 1; Lurman v. Hubner, 75 Md. 268, 23 A 646; Rieman v. Wagner, 74 Md. 478, 22 A 72; Scott v. Nixon, 3 Dr. & War. 388.

[b] **Rescission.**—In a contract for exchange of land providing for a rescission "if any defect should be found in the title to either of said properties," one of the parties is not entitled to rescind the contract because the title in the other is based upon adverse possession, as a title acquired by adverse possession is in every respect as good for purpose of attack or defense as a title by deeds running back to the United States government. Scannell v. American Soda Fountain Co., 161 Mo. 606, 61 SW 889.

88. Maryland Univ. v. Calvary M. E. Church, 104 Md. 635, 65 A 398.

89. Watts v. Parker, 27 Ill. 224.

90. Snell v. Iowa Homestead Co., 59 Iowa 701, 13 NW 848.

91. Bruce v. Wolfe, 102 Mo. A. 384, 76 SW 723. See also Thompson v. Dickerson, 68 Mo. A. 535.

92. Zunker v. Kuehn, 113 Wis. 421, 88 NW 605.

93. Bequette v. Caulfield, 4 Cal. 278, 60 AmD 615; School Dist. No. Four v. Benson, 31 Me. 381, 52 AmD 618; Moore v. Moore, 21 Me. 350 (holding that an adverse claimant may, before the bar of the statute has attached, transfer his possessory right without complying with the statute of frauds). And see Bennett v. Atlantic Coast Line R. Co., 126 Ga. 411, 55 SE 177.

94. Ala.—Campbell v. Bates, 143 Ala. 338, 39 S 144; Pittman v. Pittman, 124 Ala. 306, 27 S 242; Hoffman v. White, 90 Ala. 354, 7 S 816; Echols v. Hubbard, 90 Ala. 309, 7 S 817.

Ark.—Parham v. Dudman, 66 Ark. 26, 48 SW 673.

Cal.—Frick v. Sinon, 75 Cal. 337, 17 P 439, 7 AmSR 177; Furlong v. Cooney, 72 Cal. 322, 14 P 12; Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205.

D. C.—Myers v. Mayhew, 32 App. 205.

Ga.—Callaway v. Beauchamp, 140 Ga. 207, 78 SE 846; Walker v. Steffes, 139 Ga. 520, 77 SE 580; Mitchell v. Crummey, 134 Ga. 383, 67 SE 1042; Tarver v. Deppen, 132 Ga. 798, 804, 65 SE 177, 24 LRANS 1161 and note [cit Cyc. and expl Williamson v. Mosley, 110 Ga. 53, 35 SE 301]; Dyson v. Knight, 130 Ga. 573, 61 SE 468, 124 AmSR 179 (at least as long as he continues to perform acts in relation to the land and title thereto inconsistent with abandonment). Compare Vickery v. Benson, 26 Ga. 582; Russell v. Slaton, 25 Ga. 193.

Ill.—McDuffee v. Sinnott, 119 Ill. 449, 10 NE 385; Hinchman v. Whetstone, 23 Ill. 185.

Ind.—Rennert v. Shirk, 163 Ind. 542, 72 NE 546. And see Moore v. Hinkle, 151 Ind. 343, 50 NE 822.

Iowa.—Heinrichs v. Terrell, 65 Iowa 25, 21 NW 171.

Ky.—Sutton v. Pollard, 96 Ky. 640, 29 SW 637, 16 KyL 685. See however Dorch v. Thompson, 12 B. Mon. 379 (act of 1809).

Me.—School Dist. No. Four v. Benson, 31 Me. 381, 52 AmD 618.

Md.—Doe v. Fletcher, 37 Md. 430.

Minn.—Sage v. Rudnick, 67 Minn. 362; Dean v. Goddard, 55 Minn. 290, 56 NW 1060.

Miss.—Geohegan v. Marshall, 66 Miss. 676, 6 S 502.

Mo.—Kirton v. Bull, 168 Mo. 622, 68 SW 927; Allen v. Mansfield, 82 Mo. 688; Lynde v. Williams, 68 Mo. 360.

Nebr.—Towles v. Hamilton, 94 Nebr. 588, 143 NW 935; Cervena v. Thurston, 59 Nebr. 343, 80 NW 1048.

N. J.—Spottiswoode v. Morris, etc., R. Co., 61 N. J. L. 322, 40 A 505.

N. Y.—Sherman v. Kane, 86 N. Y. 57; Greenwich Second M. E. Church v. Humphrey, 21 NYS 89.

N. C.—Christenbury v. King, 85 N. C. 229.

Pa.—Jones v. Hughes, 16 A 849; Byers v. Sheplar, 7 A 182; Bradford v. Guthrie, 3 Pittsb. 214.

Tex.—Erhard v. Hearne, 47 Tex. 469; Cunningham v. Frandtzen, 26 Tex. 34; Tate v. Waggoner, (Civ. A.) 149 SW 737; Carlock v. Willard, (Civ. A.) 149 SW 363; Cannon v. Producers' Oil Co., (Civ. A.) 138 SW 803; Lamberida v. Barnum, (Civ. A.) 90 SW 698; Williams v. Galveston, (Civ. A.) 58 SW 551. See also Lochridge v. Corbett, 31 Tex. Civ. A. 676, 73 SW 96 (where it was said that the rights of one who has acquired a legal or equitable title to lands cannot be barred by lapse of time, unaccompanied by adverse possession).

Vt.—Hodges v. Eddy, 41 Vt. 485, 98 AmD 612; Hughes v. Graves, 39 Vt. 359, 94 AmD 331; Austin v. Bailey, 37 Vt. 219, 86 AmD 703.

W. Va.—Summerfield v. White, 54 W. Va. 311, 46 SE 154; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255; Mitchell v. Carder, 21 W. Va. 277.

Wis.—Off v. Heinrichs, 124 Wis. 440, 102 NW 904.

[a] **Failure to occupy after title has been acquired by adverse possession** "would no more affect such title than a failure to occupy would affect a title of one claiming under a deed duly executed and recorded." Tate v. Waggoner, (Tex. Civ. A.) 149 SW 737.

[b] **The statute of frauds** presents an insuperable bar to a parol abandonment or surrender. Byers v. Sheplar, (Pa.) 7 A 182.

[c] **Right to reclaim after declaration of abandonment.**—It follows therefore that, although one who has acquired title by adverse possession goes out of possession declaring that he abandons it to the former owner and does not intend to make any claim again to the land, he is not precluded from reclaiming what he has thus abandoned. School Dist. No. Four v. Benson, 31 Me. 381, 52 AmD 618.

[d] **Right to reclaim after mere relinquishment.**—So the mere fact that one who has acquired title by adverse possession merely relinquishes possession of the land will not benefit the former owner or prevent such person or his heirs from pleading the statute against such owner. Todd v. Kauffman, 19 D. C. 304. As supporting this doctrine see also Milliken v. Kennedy, 87 Ga. 463, 13 SE 635; Greenwich Second M. E. Church v. Humphrey, 21 NYS 89; Schall v. Williams Valley R. Co., 35 Pa. 191.

[e] **Where the claimant occupies land as a homestead** (1) until the bar of the statute has attached, the title thereto cannot be divested except in the manner prescribed by the statute for conveying a homestead. Bridges v. Johnson, 69 Tex. 714, 7 SW 506. (2) And where the land, title to which is acquired, is used as a homestead, an admission in writing by the husband that his possession during the time relied on as a bar was not adverse will not defeat the title acquired where in fact the possession was adverse. Williams v. Rand, 9 Tex. Civ. A. 631, 30 SW 509.

95. Tarver v. Deppen, 132 Ga. 798, 805, 65 SE 177, 24 LRANS 1161 [cit Cyc]; Summerfield v. White, 54 W. Va. 311, 46 SE 154.

96. Webber v. Clarke, 74 Cal. 11, 15 P 431; Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205; Dean v. Goddard, 55 Minn. 290, 56 NW 1060; Geohegan v. Marshall, 66 Miss. 676, 6 S 502; Allen v. Mansfield, 82 Mo. 688.

97. Ala.—Carter v. Chevalier, 108 Ala. 563, 19 S 798.

Cal.—Allen v. McKay, 120 Cal. 332, 52 P 828.

Iowa.—Heinrichs v. Terrell, 65 Iowa 25, 21 NW 171.

Ky.—Middlesboro Waterworks v. Neal, 105 Ky. 586, 49 SW 428, 20 KyL 1403.

La.—Randolph v. Laysard, 36 La. Ann. 402.

Mo.—Cooper v. Ord, 60 Mo. 420.

W. Va.—Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255.

98. Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255. And see Baltimore v. Rowe, 107 Md. 704, 67 A 93 (holding that, where defendant's predecessors under oath disclaimed all title to a portion of the property in controversy in the return of their property for taxation, such disclaimer operated as a waiver of any claim to such property by adverse possession as against the city).

99. Ala.—Jones v. Williams, 108

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although the admission is in writing;[1] or by confession that the disseizin was committed with a fraudulent intent, and fraudulently concealed until the expiration of the time limited by the statute;[2] or by an admission of defects or infirmities in the title under which the holder held adversely;[3] or by a subsequent recognition of a previous title which, originally rightful, has lost that character by a delay to enforce it;[4] or by an agreement to join in a survey to ascertain boundaries[5] or to readjust the boundary lines;[6] or by taking a lease from the original owner;[7] or by offering to purchase any right which the holder of the paper title may have;[8] or by an agreement of the adverse holder to surrender the land to the former owner provided his cotenant will join therein;[9] or by an offer to buy up an outstanding claim;[10] or by a mere offer to redeem by an execution debtor who has been suffered to remain in possession for more than the statutory period;[11] or by an acceptance of a deed[12] or by an attempt to acquire title from[13] a third person; or by patenting a portion of the land as vacant land;[14] or by negotiations for the purpose of quieting title.[15]

[§ 561] **C. Assertion of Right under Subsequently Acquired Title.** Title by adverse possession for the statutory period is not lost by the owner's assertion of right under some other title subsequently acquired.[16]

[§ 562] **D. Agreement to Waive Benefit of Statute.** It has been held that an agreement made after the bar of the statute to waive the benefit of the statute will not affect the title of the adverse claim-

Ala. 282, 19 S 317; Trufant v. White, 99 Ala. 526, 13 S 88.

Ill.—Carroll v. Rabberman, 240 Ill. 450, 88 NE 995; Illinois Cent. R. Co. v. Wakefield, 173 Ill. 564, 50 NE 1002.

Ind.—Rennert v. Shirk, 163 Ind. 542, 547, 72 NE 546 [cit Cyc].

Minn.—Todd v. Weed, 84 Minn. 4, 86 NW 756; Sage v. Rudnick, 67 Minn. 362, 69 NW 1096.

N. Y.—Bogardus v. Trinity Church, 4 Sandf. Ch. 633.

Tex.—Bruce v. Washington, 80 Tex. 368, 15 SW 1104; Cook's Hereford Cattle Co. v. Barnhart, (Civ. A.) 147 SW 662; Smith v. Guinn, (Civ. A.) 131 SW 635; Barrett v. McKinney, (Civ. A.) 93 SW 240; Williams v. Rand, 9 Tex. Civ. A. 631, 30 SW 509.

Ont.—Doe v. Henderson, 3 U. C. Q. B. 486.

"Where title in land has once matured by adverse possession, mere loose talk subsequently is not sufficient to unsettle such title." Stumpe v. Kopp, 201 Mo. 412, 423, 99 SW 1073 (per Lamm, J.); Lemmons v. McKinney, 162 Mo. 525, 63 SW 92.

[a] **Reason for rule.**—"This is true for the reason that when a title is acquired by adverse possession it is in fee simple, and continues until conveyed by the one holding such title, or until lost by adverse possession." Rennert v. Shirk, 163 Ind. 542, 554, 72 NE 546 (per Monks, J.).

[b] **Declaration of heir.**—The title which one acquires by adverse possession is not defeated by the declaration, after her death, of her heir that she does not claim the land as her own. Smith v. Guinn, (Tex. Civ. A.) 131 SW 635.

1. McIntyre v. Canada Co., 18 Grant Ch. (U. C.) 367; McDonald v. McIntosh, 8 U. C. Q. B. 388; Doe v. Henderson, 3 U. C. Q. B. 486.

2. Humbert v. Trinity Church, 24 Wend. (N. Y.) 587.

3. Hoffman v. White, 90 Ala. 354, 7 S 816; Morgan v. White, 50 Tex. Civ. A. 318, 110 SW 491.

[a] **Thus** (1) where defendant and those under whom he claimed had acquired title by adverse possession, statements made thereafter, either by him or his predecessors, that during such period they did not assert such a claim as was necessary to mature title would not deprive him of the title he had acquired. Tate v. Waggoner, (Tex. Civ. A.) 149 SW 787. (2) And declarations made by the possessor of land after more than twenty years' continuous possession thereof, to the effect that he did not claim to own the land until after the twenty-year period of possession had elapsed, would not operate to divest him of title acquired by such possession. Lyons v. Stroud, 257 Ill. 350, 100 NE 973.

4. Ala.—Lee v. Thompson, 99 Ala. 95, 11 S 672.

Ark.—Butler v. Hines, 101 Ark. 409, 142 SW 509; Russell v. Webb, 96 Ark. 190, 131 SW 456; Hudson v. Stilwell, 80 Ark. 575, 98 SW 356. And see Shirey v. Whitlow, 80 Ark. 444, 97 SW 444.

Cal.—Montgomery, etc., Lumber Co. v. Quimby, 164 Cal. 250, 128 P 402.

Minn.—Sage v. Rudnick, 67 Minn. 362, 69 NW 1096.

Pa.—London v. Lyman, 1 Phila. 465; Bradford v. Guthrie, 3 Pittsb. 213.

"It is only a recognition of the owner's title while the occupant's rights are inchoate, and before the statute has run in his favor, that will break the continuity of an adverse possession." Sage v. Rudnick, 67 Minn. 362, 364, 69 NW 1096 (per Mitchell, J.).

[a] **Application of rule.**—Where one has acquired title by adverse possession, the fact that he subsequently takes a conveyance from the holder of the paper title, by which the latter reserves the mines and minerals does not have the effect of revesting the mines or minerals in the holder of the paper title. Dodge v. Smith, 3 Ont. L. 305, 1 OntWR 46.

5. Brown v. Cockerell, 33 Ala. 380; Fatic v. Myer, 163 Ind. 401, 72 NE 142; Spacy v. Evans, 152 Ind. 431, 52 NE 605; Williams v. Atkinson, 152 Ind. 98, 52 NE 603; Wood v. Kuper, 150 Ind. 622, 50 NE 755; Palmer v. Dosch, 148 Ind. 10, 47 NE 176; Logsdon v. Dingg, 32 Ind. A. 158, 69 NE 409; Fulton v. Borders, 61 SW 1001, 22 KyL 1876; Lamoreaux v. Crevelling, 103 Mich. 501, 61 NW 783; Mann v. Schueling, (Tex. Civ. A.) 68 SW 292. And see Edwards v. Fleming, 83 Kan. 653, 112 P 836, 33 LRANS 923.

[a] **Submission to survey by holder of paper title.**—In Riggs v. Riley, 113 Ind. 208, 15 NE 253, it was held that, where one has gained title in fee by adverse possession payment of rent by him thereafter for two years to the person having the paper title and a subsequent survey procured by the latter without objection on the part of the former will not defeat the title already gained. In this case the court quoted with approval from Cleveland v. Obenchain, 107 Ind. 591, 593, 8 NE 624, as follows: "In submitting to a survey he does not surrender any valid title that he may have, no matter how it may have been acquired. In not objecting to a survey he does not put himself in the position of surrendering his land, or any part of it."

6. Hudson v. Stillwell, 80 Ark. 575, 98 SW 356.

7. Ind.—Riggs v. Riley, 113 Ind. 208, 15 NE 253.

Minn.—Sage v. Rudnick, 67 Minn. 362, 69 NW 1096.

Nebr.—Towles v. Hamilton, 94 Nebr. 588, 143 NW 935; Martin v. Martin, 76 Nebr. 335, 107 NW 580, 124 AmSR 815, 14 AnnCas 511.

Tex.—Louisiana, etc., Lumber Co. v. Stewart, (Civ. A.) 148 SW 1193.

Ont.—Hillock v. Sutton, 2 Ont. 548.

8. Frick v. Sinon, 75 Cal. 337, 17 P 439, 7 AmSR 177; Furlong v. Cooney, 72 Cal. 322, 14 P 12; Pacific Mut. L. Ins. Co. v. Stroup, 63 Cal. 150; Webb v. Thiele, 56 Nebr. 752, 77 NW 56; McLane v. Canales, (Tex. Civ. A.) 25 SW 29; Cuellar v. Dewitt, 5 Tex. Civ. A. 568, 24 SW 671; McGregor v. La Rush, 30 U. C. Q. B. 299.

9. Koch v. Gordon, 231 Mo. 645, 133 SW 609.

10. Barrett v. McKinney, (Tex. Civ. A.) 93 SW 240; Ovig v. Morrison, 142 Wis. 243, 125 NW 449; Beigle v. Dake, 42 U. C. Q. B. 250 (holding that title by adverse possession is not lost by an offer to pay a small sum to a person asserting a claim thereto).

[a] **Thus** where plaintiffs and their predecessors had been in adverse possession for over fifty years, and in 1907 plaintiffs asked for a quitclaim deed from the city to satisfy a doubt as to the title raised by a title company, the application asserting title and denying any right, title, or interest in the city, such act did not in any way destroy the title which had become perfected. "Irrespective of the nature of the paper and its disclaimers, plaintiffs had a perfect right, their title having ripened, to fortify that title in any way they pleased, and such acts could not destroy that which had become perfected." Knapp v. New York, 140 App. Div. 289, 297, 125 NYS 201.

11. Thomasson v. Keaton, 1 Sneed (Tenn.) 155.

12. Levi v. Mathews, 145 Fed. 152, 76 CCA 122.

13. Morgan v. White, 50 Tex. Civ. A. 318, 110 SW 491.

14. Asher v. Howard, 122 Ky. 175, 91 SW 270, 28 KyL 1097.

15. Stiles v. Granger, 17 N. D. 502, 117 NW 777.

16. Missouri Valley Land Co. v. Wiese, 208 U. S. 234, 28 SCt 294, 52 L. ed. 466 [aff 77 Nebr. 40, 108 NW 175]; Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205; Asher v. Howard, 122 Ky. 175, 91 SW 270, 28 KyL 1097.

[a] **Illustrations.**—(1) Thus the fact that in ejectment the claimant sets up an equitable title in defense is not a waiver of his title acquired by adverse possession. International Bank v. Fife, 95 Mo. 118, 8 SW 241; Owens v. Myers, 20 Pa. 134, 57 AmD 693. And see Bose v. Christ, 193 Pa. 13, 44 A 240. (2) So where the claimant entered under a defective deed and held adverse possession thereunder until the statutory bar had attached, his title was not affected by taking a subsequent quitclaim deed from his grantor as against a third person to whom the grantor had conveyed the land between the execution of the first and second deed to the claimant. Wall v. Shindler, 47 Mo. 282.

[b] **Effect of title cast by operation of law.**—Where one bases his title upon adverse possession under color of title he cannot be compelled to abandon it for the title to one half which has since been cast upon him by operation of law. He can elect whether he will hold by his original claim of title or by that since acquired. De Long v. Mulcher, 47 Iowa 445.

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ant,[17] but of course a defendant may in court waive any title he may have acquired by adverse possession and confine himself to such legal rights as he may have apart from his adverse possession.[18]

[§ 563] **E. Temporary Break in or Interruption of Possession.** If title has become perfect by adverse possession it is not lost by a temporary break in[19] or interruption of[20] the occupation thereof.

[§ 564] **F. Payment of Taxes by Original Owner.** Where title in the adverse claimant has been perfected by a compliance with the provisions of the statute relating to acquisition of title by adverse possession, payment of taxes thereafter by the original owner in no way affects the title so perfected.[21]

[§ 565] **G. Recovery in Ejectment by Original Owner.** The fact that the original owner in an action of ejectment instituted after the bar of the statute had attached recovered possession from the adverse claimant does not affect the title of the latter, and he may recover possession from the former in a second action.[22]

[§ 566] **H. Nonresidence of Holder of Title by Adverse Possession.** If title has accrued against the true owner, in favor of one who exercises the only act of ownership over the land, although such act is but slight after title accrues, the true owner is not reinstated simply by the fact of the nonresidence of the adverse claimant.[23]

XVII. PLEADING

[§ 567] **A. Necessity of Pleading Specially—1. In Actions by Claimant—a. For Possession.** To entitle plaintiff to recover in an action of ejectment on the ground of having acquired the title to the demanded property by adverse possession, it is not necessary to allege adverse possession for the statutory period in the absence of some special statutory requirement to that effect. Under an averment of ownership in fee and of right to the possession at the commencement of the action plaintiff may prove any facts which will entitle him to recover at that time.[24] "It is not necessary to plead the evidentiary facts by which the title was obtained."[25]

[§ 568] **b. For Trespass.** In actions for trespass, where the complaint alleges title to the premises in plaintiff, he may show adverse possession without specially pleading it.[26]

[§ 569] **2. In Actions against Claimant—a. In General—(1) For Possession.** In most jurisdictions where adverse possession is relied on as a defense to an action at law to recover the possession of land it need not be specially pleaded but may be shown under the general issue or general denial.[27] In other jurisdictions, however, because of special statutory

17. Hughes v. Graves, 39 Vt. 359, 94 AmD 331. See also Allen v. Mansfield, 82 Mo. 688. Compare Davis v. Moye, (Tex. Civ. A.) 155 SW 962.

18. McEowen v. Lewis, 26 N. J. L. 451.

19. Erhard v. Hearne, 47 Tex. 469. See also Moore v. Hinkle, 151 Ind. 543, 50 NE 822.

20. Sherman v. Kane, 86 N. Y. 57; Summerfield v. White, 54 W. Va. 511, 46 SE 154.

[a] **Entry by the original owner** after the title has become complete does not affect the title or vest any right in him. Le Roy v. Rogers, 30 Cal. 229, 89 AmD 88; Gage v. Hampton, 127 Ill. 87, 20 NE 12, 2 LRA 512; Young v. Kimberland, 2 Litt. (Ky.) 223; Bedinger v. Rickets, 2 A. K. Marsh. (Ky.) 34; Brassington v. Llewellyn, 27 L. J. Exch. 29; Bryan v. Crowdal, 21 Wkly. Rep. 693.

[b] **Removal of fence for claimant's convenience.**—Title does not revest in the adjoining owner by the act of the claimant in removing his fence for his own convenience so as to exclude the land in question. Jones v. Hughes, (Pa.) 16 A 849.

21. Cramer v. Walker, 23 Ida. 495, 500, 130 P 1002 (where it was said: "Where one claims title to real estate by adverse possession, when the five year period is completed he is under no more obligation to pay the taxes thereafter than he would be on any other property. In other words, the subsequent payment of taxes after the adverse title is complete is no longer necessary or essential to successfully defend or prosecute an action in support of such title").

22. Ekey v. Inge, 87 Mo. 493; Jackson v. Dieffendorf, 3 Johns. (N. Y.) 269; Pederick v. Searle, 5 Serg. & R. (Pa.) 236 (where the judgment was by confession); Doe v. Laskey, 23 N. B. 481.

23. Moore v. Hinkle, 151 Ind. 343, 346, 50 NE 822 (per Hackney, J.).

24. Gillespie v. Jones, 47 Cal. 259; Asher v Howard, 122 Ky. 175, 91 SW 270, 28 KyL 1097; Sullivan v. Dunphy, 4 Mont. 499, 2 P 284; Quinn v. Willamette Pulp, etc., Co., 62 Or. 549, 554, 126 P 1 [cit Cyc]. See also McInery v. Irwin, 90 Ala. 275, 7 S 841; Hamilton v. Hamilton, 29 SW 876, 16 KyL 793; Chism v. Trent, 10 SW 648, 10 KyL 849.

[a] **Trespass to try title.**—(1) In a decision of the Texas court of appeals it was held that, as the statute, Sayles Civ. St. art 5250, fully prescribes the requisites of a petition in trespass to try title without providing that the facts establishing title must be pleaded, plaintiff may establish title by limitation, although not set up in the petition, where the petition is in the form prescribed by statute; that art 3377, providing that laws of limitation shall not be available to any person in any suit unless specifically set forth as a defense in his answer, has no application. Benavides v. Molino, (Civ. A.) 60 SW 260. (2) But the supreme court has recently held that because of the provisions of this statute plaintiff in trespass to try title must specially plead title by adverse possession. Erp v. Tillman, 103 Tex. 574, 131 SW 1057 [rev (Civ. A.) 121 SW 547]. (3) For a late decision of the court of civil appeals reaching the same conclusion see Perry v. Ball, 52 Tex. Civ. A. 134, 113 SW 588. And for other decisions of this state in which it was held necessary to specially plead title by adverse possession as a defense see infra § 569 note 28.

25. Nash v. Northwest Land Co., 15 N. D. 566, 577, 108 NW 792.

26. Donahue v. Thompson, 60 Wis. 500, 19 NW 520. To same effect Missouri, etc., R. Co. v. Wickham, (Tex. Civ. A.) 44 SW 1023.

27. Cal.—Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 P 1113. But see Woodward v. Farris, 109 Cal. 12, 41 P 781.

Conn.—Trowbridge v. Royce, 1 Root 50.

Fla.—Weiskoph v. Dibble, 18 Fla. 22; Wade v. Doyle, 17 Fla. 522.

Ill.—Stubblefield v. Borders, 92 Ill. 279.

Ind.—Vail v. Halton, 14 Ind. 344.

Mich.—Miller v. Beck, 68 Mich. 76, 35 NW 899.

Miss.—Bell v. Coats, 56 Miss. 776; Wilson v. Williams, 52 Miss. 487; Hutto v. Thornton, 44 Miss. 166; Ellis v. Murray, 28 Miss. 129.

Mo.—Hedges v. Pollard, 149 Mo. 216, 50 SW 889; Collins v. Pease, 146 Mo. 135, 47 SW 925; Bird v. Sellers, 113 Mo. 580, 21 SW 91; Stocker v. Green, 94 Mo. 280, 7 SW 279, 4 AmSR 382; Holmes v. Kring, 93 Mo. 452, 6 SW 347; Fairbanks v. Long, 91 Mo. 628, 631, 4 SW 499; Fulkerson v. Mitchell, 82 Mo. 13; Nelson v. Brodhack, 44 Mo. 596, 100 AmD 328; Hill v. Bailey, 8 Mo. A. 85 [aff 76 Mo. 454].

Nebr.—Bush v. Griffin, 76 Nebr. 214, 107 NW 247; Murray v. Romine, 60 Nebr. 94, 82 NW 318; Oldig v. Fisk, 53 Nebr. 156, 73 NW 661; Fink v. Dawson, 52 Nebr. 647, 72 NW 1037.

N. C.—Whitaker v. Jenkins, 138 N. C. 476, 51 SE 104; Shelton v. Wilson, 131 N. C. 499, 42 SE 937; Cheatham v. Young, 113 N. C. 161, 18 SE 92, 37 AmSR 617; Miller v. Bumgardner, 109 N. C. 412, 13 SE 935; Falls of Neuse Mfg. Co. v. Brooks, 106 N. C. 107, 11 SE 456; Farrior v. Houston, 95 N. C. 578. Compare Wilson v. Wilson, 117 N. C. 351, 23 SE 272.

Oh.—Rhodes v. Gunn, 35 Oh. St. 387; Kyser v. Cannon, 29 Oh. St. 359. See however McKinney v. McKinney, 8 Oh. St. 423.

Or.—Stephenson v. Van Blokland, 60 Or. 247, 255, 118 P 1026 [cit Cyc]; Zeuske v. Zeuske, 55 Or. 65, 81, 103 P 648, 105 P 249, AnnCas1912A 557 [cit Cyc]; Neal v. Davis, 53 Or. 423, 99 P 69, 101 P 212; Mitchell v. Campbell, 19 Or. 198, 24 P 455.

Pa.—Way v. Hooton, 156 Pa. 8, 26 A 784; Heath v. Page, 48 Pa. 130.

S. C.—Lloyd v. Rawl, 63 S. C. 219, 41 SE 312; Sutton v. Clark, 59 S. C. 440, 38 SE 150, 82 AmSR 848; Duren v. Kee, 50 S. C. 444, 27 SE 875.

Tenn.—Southern Iron, etc., Co. v. Schwoon, 124 Tenn. 176, 135 SW 785; Coleson v. Blanton, 4 Hayw. 152.

Va.—Elam v. Bass, 4 Munf. (18 Va.) 301.

Wash.—Raymond v. Morrison, 9 Wash. 156, 37 P 318.

Eng.—De Beauvoir v. Owen, 5 Exch. 166; Hardman v. Ellames, 2 Myl. & K. 732.

N. S.—Miller v. Wolfe, 30 N. S. 277.

Alta.—Harris v. Keith, 16 WestLR 433 (holding that under Marginal Rule 254 of the English Judicature Acts, which is in force in Alberta, it is not necessary to do anything more than to plead possession to set up the statute of limitation).

[a] **Reason for rule.**—It has been said in a recent decision that, "when the statute is relied on as a bar to the remedy merely, it must be specially pleaded. . . . But where the title to real estate is in question, the operation of the statute is found to have a higher range. It is capable of conferring an absolute title. Hence

provisions adverse possession cannot be relied upon to defeat recovery unless it is specially pleaded.[28]

[§ 570] **(2) For Trespass.** Defendant in an action for trespass, under the general plea of title, without allegations that title is claimed by adverse possession, may introduce evidence to characterize his possession as adverse to any title of plaintiff.[29]

[§ 571] **(3) To Foreclose Tax Lien.** In actions to foreclose tax liens it has been held that adverse possession must be specially pleaded to be available as a defense.[30]

[§ 572] **(4) In Equitable Actions.** In equity, where defendant sets up title in himself by adverse possession, he is not required to plead the limitation law in order to adduce evidence to establish such title in the absence of some statute requiring it.[31] However, in some jurisdictions the statute of limitations in respect of actions relating to land must, because of statutes requiring it, be pleaded in equitable actions in which title to land is involved.[32]

[§ 573] **b. Admissibility under General Issue as Affecting Right to Plead Specially.** While it has been held that the fact that evidence of adverse possession is admissible under the general issue or general denial does not take away the right to plead it specially,[33] yet there are decisions which hold that it is improper to plead both the general issue and adverse possession specially.[34]

[§ 574] **B. Necessary and Sufficient Allegations —1. As to Possession.**[35] Where adverse possession is specially pleaded, the party relying on it must allege that his possession was actual,[36] open, notorious, and visible,[37] exclusive,[38] continuous, and uninter-

it has long been held that a general denial of the plaintiff's title will suffice for the admission of evidence of adverse possession for the statutory period; because this will not merely bar the remedy, but may establish a title in the defendant which will conclusively negative any ownership in the plaintiff. In other words, it sustains and verifies the denial of the plaintiff's title." Hill v. Bailey, 8 Mo. A. 85, 87 [aff 76 Mo. 454]; Sutton v. Clark, 59 S. C. 440, 38 SE 150, 82 AmSR 848 (adopting reasoning in Hill v. Bailey, supra).

28. Ark.—McKewen v. Allen, 80 Ark. 181, 96 SW 392; Strayhorn v. McCall, 78 Ark. 209, 95 SW 455, 8 Ann Cas 377 and note.

Colo.—Webber v. Wannemaker, 39 Colo. 425, 89 P 780; Chivington v. Colorado Springs Co., 9 Colo. 597, 608, 14 P 212; Empire Ranch, etc., Co. v. Howell, 23 Colo. A. 348, 129 P 521; Fleming v. Howell, 22 Colo. A. 382, 125 P 551.

Ky.—Luen v. Wilson, 85 Ky. 503, 3 SW 911, 9 KyL 83.

La.—Rhodes v. Cooper, 113 La. 600, 37 S 527.

Mont.—State v. Quantic, 37 Mont. 32, 56, 94 P 491 [quot Cyc].

N. Y.—Raynor v. Timerson, 46 Barb. 518; Peo. v. Van Rensselaer, 8 Barb. 189 [rev on other grounds 9 N. Y. 291]; Hansee v. Mead, 2 NYCiv Proc 175.

Tex.—Burk v. Turner, 79 Tex. 276, 15 SW 256; Mayers v. Paxton, 78 Tex. 196, 14 SW 568; Curlin v. Hendricks, 35 Tex. 225; Cunningham v. Frandtzen, 26 Tex. 34; Blackwell v. Patton, 23 Tex. 670; Horton v. Crawford, 10 Tex. 382; Perry v. Ball, 52 Tex. Civ. A. 134, 113 SW 588; Stringer v. Singleterry, (Civ. A.) 23 SW 1117; Bailey v. Baker, 4 Tex. Civ. A. 395, 23 SW 454; Texas Land, etc., Co. v. Bridgeman, 1 Tex. Civ. A. 383, 21 SW 141.

Utah.—Coleman v. Hines, 24 Utah 360, 67 P 1122; Larsen v. Onesite, 21 Utah 38, 59 P 234.

See also Zellin v. Rogers, 21 Fed. 103; Seaverns v. Costello, 8 Ariz. 308, 71 P 930.

[a] **The Texas statute,** Act Febr. 5, 1852, which enacts that the statute of limitations shall not be made available to any person in any suit in any of the courts of the state unless it be specially set forth as a defense in the answer, embraces all actions in all courts in which, by the rules of procedure, the answer is required to be in writing. Horton v. Crawford, 10 Tex. 382.

29. Morss v. Salisbury, 48 N. Y. 636.

30. Alexander v. Meyers, 33 Nebr. 773, 51 NW 140.

31. Keppel v. Dreier, 187 Ill. 298, 303, 58 NE 386 (where it was said: "Whether that title was derived under the Limitation act of 1839, or whether she acquired and held title in some other manner, was a matter of no consequence to the complainant,—in other words, it was her right to establish title in any manner she could. In an action at law, where the defendant relies on title acquired and held under the limitation laws of the State, he is not required to plead the limitation laws in order that he may establish, by proof, his title on trial, and we are aware of no well settled rule which requires a defendant to plead the limitation laws to enable him to establish title thereunder in a suit in equity"); Coward v. Coward, 148 Ill. 268, 35 NE 759; Hill v. Bailey, 8 Mo. A. 85 [aff 76 Mo. 454]; Rogers v. Miller, 13 Wash. 82, 42 P 525, 52 AmSR 20.

32. McKewen v. Allen, 80 Ark. 181, 182, 96 SW 392.

[a] **Where bill charges adverse possession.**—In an equity suit involving title to land failure to expressly plead the statute of limitations is immaterial where the facts stated in the answer show adverse possession. Especially is this so where complainant's bill charges adverse possession. Dochterman v. Marshall, 92 Miss. 747, 46 S 542. To same effect Burhans v. Burhans, 2 Barb. Ch. (N. Y.) 398.

33. Vanduyn v. Hepner, 45 Ind. 589; Lloyd v. Rawl, 63 S. C. 219, 41 SE 312. See also Tegarden v. Carpenter, 36 Miss. 404 (which seems to sustain this doctrine).

34. Wade v. Doyle, 17 Fla. 522; Dean v. Tucker, 58 Miss. 487; Wilson v. William, 52 Miss. 487; Hutto v. Thornton, 44 Miss. 166; Farrior v. Houston, 95 N. C. 578.

[a] **Striking out special plea.**—(1) It has been held not improper to strike out such special pleading (Wilson v. William, 52 Miss. 487), (2) and that it should be struck out on motion or by the court of its own motion as tending to embarrass the trial (Weiskoph v. Dibble, 18 Fla. 24 [cit Wade v. Doyle, 17 Fla. 522]). But see Hill v. Atterbury, 88 Mo. 114 (where it was held that a refusal to strike out an answer pleading adverse possession specially was not a ground for reversal inasmuch as by such statements plaintiffs were informed of the specific grounds on which defendants relied, of which they might otherwise have been ignorant until proved on the trial).

35. [a] **Forms of pleading setting up adverse possession** held to be sufficient see Harpending v. Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029; McGrath v. Valentine, 167 Fed. 473, 93 CCA 109; Gaines v. Agnelly, 9 F. Cas. No. 5,173, 1 Woods 238; Jackson v. Snodgrass, 140 Ala. 365, 37 S 246; Love v. Love, 65 Ala. 554; Hill v. Cherokee Constr. Co., 99 Ark. 84, 137 SW 553; McKewen v. Allen, 80 Ark. 181, 96 SW 392; Wiseman v. Williams, 90 Ind. 602; Asher v. Howard, 122 Ky. 175, 91 SW 270, 28 KyL 1097; Keaton v. Sublett, 109 Ky. 106, 58 SW 528, 22 KyL 631; Young v. Cox, 14 SW 348, 12 KyL 347; Bynum v. Stinson, 81 Miss. 25, 32 S 910; Duckworth v. Duckworth, 144 N. C. 620, 57 SE 396; Sutton v. Clark, 59 S. C. 440, 38 SE 150, 82 AmSR 848; Montague County v. Meadows, (Tex. Civ. A.) 42 SW 326; Hesser v. Siepmann, 35 Wash. 14, 76 P 295; Talbott v. Woodford, 48 W. Va. 449, 37 SE 580; Bartlett v. Secor, 56 Wis. 520, 14 NW 714; Handley v. Archibald, 30 Can. S. C. 130.

[b] **Pleadings held sufficient in absence of objections.**—Gray v. Bloom, 151 Iowa 566, 132 NW 42.

[c] **Allegations held insufficient** see Perdue v. Caswell Creek Coal, etc., Co., 40 W. Va. 372, 21 SE 870.

[d] **Plea held insufficient to meet incompetent allegation of defendant's title** see Harvey v. Morgan, 58 Fla. 427, 51 S 140.

[e] **Plea relying on admissions in petition.**—A plea of prescription liberandi causa, filed as an exception in limine, which contains no affirmative allegation to defeat plaintiff's averments but relies on admissions in his petition, should not be sustained if his pleadings, taken as a whole, present for decision on the merits matters of fact affecting the question of prescription. Rhodes v. Cooper, 113 La. 600, 37 S 527.

36. Newcome v. Crews, 98 Ky. 339, 32 SW 947, 17 KyL 899. And see Young v. Cox, 14 SW 348, 12 KyL 347; Page v. Kennan, 38 Wis. 320.

[a] **Insufficient allegation of actual possession.**—An allegation in a complaint that plaintiff "assumed to and did exercise acts of control over and possession of portions" of a tract of land is not equivalent to an averment that plaintiff had actual possession of the tract of land or any part of it. Brennan v. Ford, 46 Cal. 8.

[b] **Allegation of occupation sufficient.**—A petition may plead title by adverse possession without alleging in express terms "actual possession," when it alleges that plaintiff "occupied" the land for the necessary time. Hall v. Roberts, 74 SW 199, 24 KyL 2362.

[c] **If the possession of a predecessor is relied on** it must be alleged. Cunningham v. Frandtzen, 26 Tex. 34; Texas Land, etc., Co. v. Bridgeman, 1 Tex. Civ. A. 383, 21 SW 141.

37. Coleman v. Hines, 24 Utah 360, 67 P 1122; Larsen v. Onesite, 21 Utah 38, 59 P 234.

[a] **When the statute requires express notice to be given** to a municipality to render a possession adverse to it, a pleading setting up adverse possession as against a municipality must allege that such notice was given. Cadiz v. Hillman, 50 SW 49, 20 KyL 1776.

38. Jordan v. Jordan, (Ala.) 39 S. 992; Alexander v. Meyers, 33 Nebr. 773, 51 NW 140; Pettit v. Black, 13 Nebr. 142, 12 NW 841.

[a] **An allegation that the possession of defendants had been "actual, peaceable, quiet, open, notorious, and adverse"** sufficiently alleged that the possession was exclusive and visible.

rupted,[39] and for the statutory period,[40] and that it was hostile or adverse or under claim of right or title by him.[41] If the pleading satisfies these requirements it will, in general, be deemed sufficient.[42]

[§ 575] **2. As to Payment of Taxes.** Payment of taxes, although made an element of adverse possession by statute, need not be alleged, it being a mere matter of proof and not of pleading.[43]

[§ 576] **3. As to Color of Title and Good Faith.** If color of title is an element of adverse possession a party relying upon adverse possession must allege in his pleadings the facts from which it will affirmatively appear that his possession was of an adverse and hostile character. McCloskey v. Barr, 38 Fed. 165; Lick v. Diaz, 30 Cal. 65; Clarke v. Hughes, 13 Barb. (N. Y.) 147; Hardman v. Ellames, 2 Myl. & K. 732, 739, 7 Eng Ch 732, 39 Reprint 1124 (where it was said: "The term 'adverse possession,' though of a known signification, is not used in pleading, and very rarely, I think only once or twice very recently, in the language of the statutes. . . . It is a relative phrase, and it means such possession as is inconsistent with another's right, but it may consist in various things, and nothing can be more vague than an averment in bar of a right claimed by A that the thing over which it is claimed has been in a possession adverse to that right, without setting forth by whom, or how, and in what manner such alleged possession has been adverse. This plea gives no information to the party claiming, no notice of the defence he is to meet, and against which he is to prepare himself; for it may consist in various things, none of which are specified, and he is left to mere conjecture"). (3) In Acton v. Culbertson, 38 Okl. 280, 132 P 812, it was held that, where the entry of defendant was permissive and in privity with the title of the owner, in order to enable defendant to avail himself of the statute of limitations he must plead such specific acts of disloyalty to the title, or acts of dominion giving adverse character to his possession, as will preclude all want of knowledge thereof on the part of the owner. It is not sufficient that defendant set forth his mere mental intention to hold adversely or the conclusions of law that since a certain time his possession has been lawful, hostile under claim of right, actual, exclusive, and continuous.

"If it was actual and open, it was certainly exclusive and visible." Keaton v. Sublett, 109 Ky. 106, 58 SW 528, 22 KyL 631.

[b] **"Adverse" equivalent to "exclusive."**—The averment that complainant has for twenty years been in open, notorious, hostile, and adverse use of the right of way is sufficient, although not using the words "continuous and exclusive," the use of the word "adverse" being sufficient without the other qualifying adjectives. "If the point had been taken by demurrer, it would be untenable since the use of the word 'adverse' is sufficient without the other qualifying adjectives." Jackson v. Snodgrass, 140 Ala. 365, 37 S 246.

[c] **Where complainant's bill alleges that she has been excluded from possession during the whole period,** failure of defendant in pleading adverse possession to allege exclusive possession in himself is not a material defect and does not affect the sufficiency of the plea. Butcher v. Butcher, 137 Mich. 390, 100 NW 604. See also Bellingham Bay Land Co. v. Dibble, 4 Wash. 764, 31 P 30.

[d] **Aider by proof.**—In an action to quiet title based on ten years' adverse possession, the failure to allege in the petition that plaintiff has been in the exclusive adverse possession of the premises for ten years, and of the court to find that fact in the decree, is not a material error after judgment, where the proof shows the possession to have been of that character. Tourtelotte v. Pearce, 27 Nebr. 57, 42 NW 915.

39. Wood v. Chapman, 24 Colo. 134, 49 P 136; Winslow v. Winslow, 52 Ind. 8; McCaslin v. State, 38 Ind. A. 184, 75 NE 844; Colvin v. Burnet, 17 Wend. (N. Y.) 564; Coleman v. Hines, 24 Utah 360, 67 P 1122; Larsen v. Onesite, 21 Utah 38, 59 P 234.

[a] **"Peaceable" possession.**—A plea of adverse user need not specifically aver that such user was peaceable. An averment that the user was uninterrupted includes of necessity an averment that it was peaceable. The words are interchangeable and synonymous in the pleading of a prescriptive right. Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 P 1113.

40. Cal.—Sharp v. Daugney, 33 Cal. 505.

Ind.—Vanduyn v. Hepner, 45 Ind. 589.

Ky.—Kidd v. Bell, 122 SW 232.

La.—New Orleans v. Shakspeare, 39 La. Ann. 1033, 3 S 346.

N. Y.—Peo. v. Van Rensselaer, 8 Barb. 189 [rev on other grounds 9 N. Y. 291].

And see Louisiana, etc., Lumber Co. v. Kennedy, 103 Tex. 297, 126 SW 1110 [rev (Civ. A.) 119 SW 884].

[a] **Allegation in direct terms unnecessary.**—An allegation of ownership and possession during a period sufficient to make the statute of limitations available is sufficient without alleging in direct terms that the party had been in possession for more than three years, the statutory period, prior to the commencement of the action. Sullivan v. Dunphy, 4 Mont. 499, 2 P 284.

[b] **Lapse of period before commencement of action.**—An answer in ejectment alleging seven years' adverse possession but failing to state that the seven years were before the commencement of the action was demurrable. Gates v. Solomon, 73 Ark. 8, 83 SW 348.

[c] **Alleging possession for length of time limited by law.**—A statement that defendant held the land adversely "for the length of time limited by law" is insufficient. Gillis v. Black, 6 Iowa 439.

[d] **Alleging possession for more than statutory period.**—(1) A bill alleging possession of land for fifteen years sufficiently shows a possession of more than ten years. "We cannot hold, according to obsolete learning, that the pleader must actually say ten years, on the idea that, while to say fifteen years is an infallible argument, that it is more than ten years, nevertheless it is not a sufficient averment that it was more than ten years." Bynum v. Stinson, 81 Miss. 25, 31, 32 S 910 (per Calhoun, J.). To same effect Roberts v. Decker, 120 Wis. 102, 107, 97 NW 519 (where it was said: "The claim that the allegation of twenty years' possession, instead of ten, in any way vitiates the plea, if otherwise good and not misleading, is so obviously untenable that it is unnecessary to discuss it. If the defendants have had twenty years' possession, they have certainly had ten"). (2) So it has been held that it is no objection to a pleading that an allegation of possession for a longer period than necessary to sustain the allegation of adverse possession is not sustained by the evidence where it does appear that there was possession for a sufficient length of time to give title. Harpending v. Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029; Bogardus v. Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

[e] **Proof of possession for more than statutory period.**—An allegation of possession for the statutory period prior to the commencement of the action is sustained by proof of a longer possession. Travis v. Hall, 95 Tex. 116, 65 SW 1078 [cert 27 Tex. Civ. A. 95, 65 SW 1077].

[f] **Possession for statutory period next preceding suit.**—Under a plea of possession for more than the statutory period "next preceding" the filing of the suit, the pleader is not restricted to showing a possession for the statutory period immediately preceding the suit. Campbell Real Est. Co. v. Wiley, (Tex. Civ. A.) 83 SW 251.

41. Ala.—Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45.

Cal.—Sharp v. Daugney, 33 Cal. 505.

Ind.—Sanford v. Tucker, 54 Ind. 219; Postlewaite v. Payne, 8 Ind. 104; Doe V. Brown, 4 Ind. 143.

N. Y.—Colvin v. Burnet, 17 Wend. 564.

Tenn.—McKee v. Dail, 1 Tenn. Ch. 689.

Tex.—Horton v. Crawford, 10 Tex. 382; Portis v. Hill, 3 Tex. 273.

Utah.—Coleman v. Hines, 24 Utah 360, 67 P 1122; Larsen v. Onesite, 21 Utah 38, 59 P 234.

See also Young v. Cox, 14 SW 348, 12 KyL 347.

[a] **A holding under claim of ownership** is sufficiently shown by an averment that defendant took sole and exclusive possession and held possession notoriously and adversely for the statutory period. Whitaker v. Jenkins, 138 N. C. 476, 51 SE 104.

[b] **Setting out facts showing character of possession.**—(1) According to some cases it will be sufficient to allege generally that the possession is adverse without stating the facts and circumstances which constitute the evidence of such possession. Portis v. Hill, 3 Tex. 273; Montague County v. Meadows, (Tex. Civ. A.) 42 SW 326; Bartlett v. Secor, 56 Wis. 520, 14 NW 714. And see Larsen v. Onesite, 21 Utah 38, 59 P 234. (2) In others, however, it is held that

[c] **"Peaceful enjoyment and possession" insufficient.**—An allegation that one was living in "the peaceful enjoyment and possession of land" does not show adverse possession thereof. Beatty v. Dozier, 34 SW 524, 17 KyL 1275.

[d] **Use of the language of the statute, "claiming to be the owner,"** is not necessary. It is sufficient that the facts showing such claim are set forth. Bynum v. Stinson, 81 Miss. 25, 32 S 910.

[e] **Knowledge or want of knowledge of outstanding title.**—It is not essential that one claiming title by adverse possession should allege knowledge or want of knowledge of an outstanding claim of title. "Adverse possession, in order to be invoked as a basis of title, must necessarily be exclusive, and hostile as to all claimants, whether known or unknown." Cass Farm Co. v. Detroit, 139 Mich. 318, 319, 102 NW 848.

42. Duckworth v. Duckworth, 144 N. C. 620, 57 SE 396.

43. McGrath v. Valentine, 167 Fed. 473, 93 CCA 109; Ball v. Nichols, 73 Cal. 193, 14 P 831; Partridge v. Shepard, 71 Cal. 470, 12 P 480. Contra Webber v. Wannemaker, 39 Colo. 405, 89 P 780; Eberville v. Leadville Tunneling, etc., Co., 28 Colo. 241, 64 P 200.

[a] **In Texas,** contrary to the general rule, it was held that a plea of the statute of limitations by a city must aver that the city has complied with all the provisions of the statute, including the recording of its deed and the payment of state and county taxes. Moore v. Waco, 85 Tex. 206, 20 SW 61.

it should be pleaded.[44] And if good faith in acquiring color of title is essential this also must be pleaded.[44½]

[§ 577] **4. Negativing Disabilities.** A plea setting up adverse possession which fails to negative an allegation in the bill that certain of the complainants were under disability when their rights or possessions accrued and have so continued is insufficient.[45] So it has been held that the complaint of persons suing as heirs for land having alleged, and the answer having admitted, that defendant had been in adverse possession for more than seven years under color of title, it was necessary for complainants to allege and show a disability.[46]

[§ 578] **5. Description of Property.** Where the defendant claims only a part of the land sued for, the land claimed should be accurately described.[47] However, if the plea describes such part so that it can be readily identified, the description is sufficient.[48] And it has been held that notwithstanding the fact that the plea is insufficient to identify the land, yet if it is sufficiently identified and described by the evidence the issue of limitations should be submitted to the jury.[49]

[§ 579] **6. Reference to Statute Creating Bar.** In pleading the statute to a bill in chancery it has been held unnecessary to refer expressly to the statute of the state in which the proceeding is instituted. The court is judicially bound to take notice of the statute of limitations.[50]

[§ 580] **C. When Available by Demurrer.** Where the declaration, complaint, or bill does not show affirmatively that title is barred by adverse possession on the part of defendant, the defense of adverse possession is not available by demurrer either at law[51] or in equity.[52] If on the other hand it appears on the face of the bill that defendant has had adverse possession for a period long enough to vest title in him, unless some sufficient excuse is shown in the bill defendant may and should demur on that ground.[53] A bill which shows on its face that defendants have held the land adversely for the statutory period is fatally defective.[54]

[§ 581] **D. Reply.** Where, in action of trespass to try title to land, defendant pleads adverse possession as a defense, plaintiff, if he desires to avail himself of the fact that the statute was suspended by defendant's temporary absence from the state, must set up such fact in his reply.[55] If defendant pleads prescription and plaintiff sets up another prescription in his replication, he must traverse defendant's prescription.[56]

[§ 582] **E. Pleading in Conjunction with Other Defenses.** In ejectment a defendant may deny the title of plaintiff and also plead the statute of limitations; such are not inconsistent defenses;[57] he may plead title by deed and also by adverse possession;[58] and he may deny that he was in possession and also plead adverse possession.[59] So also where the statutes provide one period of limitation when the possession is under color of title, and a different period when the possession is not under color of title, defendant may plead both statutes in defense.[60]

[§ 583] **F. Amendments.** It has been held that

44. McGrath v. Valentine, 167 Fed. 473, 93 CCA 109; Seaverns v. Costello, 8 Ariz. 308, 71 P 930; Webber v. Wannemaker, 39 Colo. 425, 89 P 780; Bailey v. Baker, 4 Tex. Civ. A. 395, 23 SW 454.

[a] **Pleadings sufficiently showing color of title.**—(1) A plea sufficiently shows that defendants went into possession under an instrument in writing where it alleges that two of defendants entered into possession under claim of title founded on two deeds and that since that entry these defendants and others as purchasers and grantees from them have been continuously in possession under claim of title founded on said deeds. Roberts v. Decker, 120 Wis. 102, 97 NW 519. (2) And an allegation that defendants held under a warranty deed "from the owner" and had paid taxes, etc., sufficiently alleged that they held under color of title as against a general demurrer. This is equivalent to an allegation that they held under color of title. Jones v. Herrick, 35 Wash. 434, 77 P 798. (3) So where in ejectment defendant alleged title under a quitclaim deed from S, specifically describing the property, and alleged that said parcel "is a part of the identical property which is the subject of controversy in this action" and that, since the original entry on the lot by F, he and his grantees, of whom S was one, had been in quiet, uninterrupted, open, and notorious possession thereof, etc., the answer sufficiently alleged that defendant claimed the land under the deed as color of title. Archer v. Beihl, 136 Fed. 113, 69 CCA 101. (4) But an allegation that one of defendants is in possession of real estate as a trespasser or under some verbal agreement unknown to and not binding on plaintiff does not disclose that such defendant possesses color of title. Richardson v. Posey, 120 La. 223, 45 S 111.

[b] **Sufficiency of instrument relied on.**—(1) Where a tax deed is relied on as color of title it is not necessary to allege that the requirements of the statute in regard to the levying of taxes, advertising of the property, recovery of the judgment, and the conducting of the sale and the execution of the tax deed relied on were complied with. The deed need not be valid to give color of title. Walker v. Converse, 148 Ill. 622, 36 NE 202. (2) So it has been held that a pleading alleging that cross complainant held under a recorded deed from designated grantors conveying the premises in dispute is equivalent to an averment that the deed has been executed by the grantors named. A specific averment that the deed under which the claim is made is not a forgery is not necessary. Work v. United Globe Mines, 12 Ariz. 339, 100 P 813.

44½. Gibson v. Huff, (Colo. A.) 141 P 510.

45. McCloskey v. Barr, 38 Fed. 165.

46. Bodkins v. Phillips, (Tenn. Ch. A.) 42 SW 158 (holding that this was not done by merely showing that deceased was a married woman prior to accrual of the cause of action without showing how long her husband lived).

47. Kidd v. Bell, (Ky.) 122 SW 232 (under express statutory requirement to that effect); Giddings v. Fischer, 97 Tex. 184, 77 SW 209.

[a] **Under the ten-year statute of limitations of Texas** providing that the peaceable and adverse possession of lands shall embrace not more than one hundred and sixty acres or the number of acres inclosed should the same exceed one hundred and sixty acres, if defendant claims one hundred and sixty acres under the statute his plea must sufficiently describe it so as to enable the court to render judgment therefor. Stevens v. Pedregon, (Civ. A.) 140 SW 236; Doom v. Taylor, 35 Tex. Civ. A. 251, 79 SW 1086.

48. Veramendi v. Hutchins, 56 Tex. 414.

[a] **A description giving only the east and south boundary** is insufficient. Giddings v. Fischer, 97 Tex. 184, 77 SW 209.

[b] **Description held sufficient** see Grinnell v. Mayes, 167 Mich. 295, 132 NW 1019.

49. Williams v. Texas, etc., R. Co., 52 Tex. Civ. A. 217, 114 SW 877. And see Thompson v. Dutton, 96 Tex. 205, 71 SW 544.

50. Harpending v. Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455, 10 L. ed. 1029. Compare Ferring v. Fleischman, (Tenn. Ch. A.) 39 SW 19 (where it was held that where the statute bars the remedy and does not extinguish the title one seeking to avail himself of its provisions must make special reference to the statute in his pleading).

51. Pella v. Scholte, 21 Iowa 463; Tushho-Yo-Tubby v. Barr, 41 Miss. 52.

52. Crocker v. Collins, 37 S. C. 327, 15 SE 951, 34 AmSR 752.

53. U. S.—Harpending v. Reformed Protestant Dutch Church, 16 Pet. 455, 10 L. ed. 1029.

Hawaii.—Kalaeokekoi v. Kahele, 4 Hawaii 668.

N. Y.—Humbert v. Trinity Church, 7 Paige 195 [aff 24 Wend. 587].

N. C.—Williams v. Harrell, 43 N. C. 123, 55 AmD 442.

W. Va.—Talbott v. Woodford, 48 W. Va. 449, 37 SE 580.

Eng.—Dawkins v. Penrhyn, 4 App. Cas. 51; Bampton v. Bichall, 5 Beav. 67, 49 Reprint 502; Cuthbert v. Creasy, 4 Bligh 125, 4 Reprint 765.

54. Cameron v. Louisville, etc., R. Co., 69 Miss. 78, 10 S 554.

55. Bateman v. Jackson, (Tex. Civ. A.) 45 SW 224.

56. Spear v. Bicknell, 5 Mass. 125.

57. Willson v. Cleaveland, 30 Cal. 192.

58. Liebheit v. Enright, 77 Kan. 321, 94 P 203 (where it was said that he cannot be required to elect on which right he will rely, as they are not necessarily inconsistent); Gilman v. Brown, 115 Wis. 1, 91 NW 227.

59. Dillon v. Center, 68 Cal. 561, 10 P 176.

60. Roberts v. Decker, 120 Wis. 102, 108, 97 NW 519 (where it was said: "This court has held that an allegation of adverse possession for

where the defense of adverse possession is defectively stated the court may, in furtherance of justice, permit an amendment thereof after verdict, so as to make it conform to the ultimate facts proved.[61] So in ejectment where plaintiff seeks to recover land as being part of an established highway the pleading may be amended to show title by adverse possession in plaintiff. This does not introduce a new cause of action.[62] An amendment of a bill in which adverse possession is set up must fail when repugnant to the bill.[63]

[§ 584] **G. Admissions.** Plaintiff in an action to quiet title, by alleging possession in defendant and asking possessory relief, admits defendant's possession to have been adverse.[64] But it has been held that a formal allegation in a petition in ejectment that on the date it is filed defendants unlawfully keep plaintiff out of possession of the property is not an admission that defendants' possession is adverse, which will support a plea of limitation on proof that they have held in the same right for more than the statutory length of time.[65] Where defendant's allegations of adverse possession are admitted by the failure to reply, it is thereby admitted that the lands are such as to permit possession of the character alleged during the entire period mentioned, and plaintiff cannot ask the court to take judicial notice that they are unsurveyed and not subject to adverse possession.[65½]

XVIII. EVIDENCE

[§ 585] **A. Burden of Proof—1. As to Adverse Possession.** The burden of proving adverse possession is in all cases upon him who sets it up and relies on it.[66] "All presumptions are in favor of the legal

twenty years is not inconsistent with an allegation of actual ownership by deed. . . . Certainly, if these allegations be not inconsistent, claims of title under the ten and twenty-year statute of limitations cannot logically be called inconsistent." They may be pleaded as separate defenses in the same answer).

61. Zeilin v. Rogers, 21 Fed. 103.

[a] **An answer defective for failure to allege that the possession was hostile and under claim of title** may be amended. McGrath v. Valentine, 167 Fed. 473, 93 CCA 109.

[b] **An answer defective for failure to allege color of title,** where this allegation is necessary, may be cured by amendment, and if the findings of fact justify the holding that color of title existed the reviewing court will treat the answer as amended to correspond therewith. Jones v. Herrick, 35 Wash. 434, 77 P 798.

[c] **Where the original complaint was amended so as to claim less than before,** a plea setting up a claim to all of the original tract claimed in the complaint was held sufficient to enable defendant to show title by adverse possession to the part claimed in the amended complaint. Smith v. Abadie, 29 Tex. Civ. A. 60, 67 SW 925.

62. Rochester v. Kennedy, 229 Pa. 251, 78 A 133.

63. Magnetic Ore Co. v. Marbury Lumber Co., 113 Ala. 306, 21 S 36 (holding that an allegation in an amendment to a bill to recover lands that complainant and those under whom it claims have been in possession for over ten years is not a good allegation of title by adverse possession when such claim is at variance with the allegations of the original bill and the exhibits which show that the possession held by those under whom complainant claims, until within ten years, was not adverse to the claim of defendant).

64. Northern Pac. R. Co. v. Spokane, 45 Wash. 229, 88 P 135.

65. Cleveland v. Cleveland, etc., R. Co., 93 Fed. 113 [rev on other grounds 147 Fed. 171, 77 CCA 467].

65½. Anaconda Copper Min. Co. v. Thomas, 48 Mont. 222, 137 P 380.

66. U. S.—Collins v. Riley, 104 U. S. 328, 26 L. ed. 752; Groshols v. Newman, 21 Wall. 481, 22 L. ed. 471; Shuffleton v. Nelson, 22 F. Cas. No. 12,822, 2 Sawy. 540.

Ala.—McLester Bldg. Co. v. Upchurch, 60 S 173; Norsworthy v. Willoughby, 176 Ala. 145, 57 S 717; Walker v. Wyman, 157 Ala. 478, 47 S 1011; Lecroix v. Malone, 157 Ala. 434, 47 S 725; Lawrence v. Alabama State Land Co., 144 Ala. 524, 41 S 612; Wilkinson v. Lehman-Durr Co., 136 Ala. 463, 34 S 216; Bowling v. Mobile, etc., R. Co., 128 Ala. 550, 29 S 584; Scales v. Doe, 127 Ala. 582, 29 S 63; Pittman v. Pittman, 124 Ala. 306, 27 S 242; Beasley v. Howell, 117 Ala. 499, 22 S 989; Newton v. Louisville, etc., R. Co., 110 Ala. 474, 19 S 19; Carter v. Chevalier, 108 Ala. 563, 19 S 798; Eureka Co. v. Norment, 104 Ala. 625, 16 S 579; Nashville, etc., R. Co. v. Hammond, 104 Ala. 191, 15 S 935; Steed v. Knowles, 97 Ala. 573, 12 S 75; Lucy v. Tennessee, etc., R. Co., 92 Ala. 246, 8 S 806; Hancock v. Kelly, 81 Ala. 368, 2 S 281; Dothard v. Denson, 72 Ala. 541; Alexander v. Wheeler, 69 Ala. 332; Potts v. Coleman, 67 Ala. 221; Collins v. Johnson, 57 Ala. 304; Herbert v. Hanrick, 16 Ala. 581.

Ark.—Maney v. Dennison, 163 SW 783; Bradley Lumber Co. v. Miller, 94 Ark. 118, 126 SW 98; Gaither v. Gage, 82 Ark. 51, 100 SW 80; Calhoun v. Moore, 79 Ark. 109, 94 SW 931; Nicklace v. Dickerson, 65 Ark. 422, 46 SW 945; McConnell v. Day, 61 Ark. 464, 33 SW 731.

Cal.—Nathan v. Dierssen, 146 Cal. 63, 79 P 739; Southern Pac. R. Co. v. Whitaker, 109 Cal. 268, 41 P 1083; Tuffree v. Polhemus, 108 Cal. 670, 41 P 806; Ball v. Kehl, 95 Cal. 606, 30 P 780; De Frieze v. Quint, 94 Cal. 653, 30 P 1, 28 AmSR 151 and note.

Colo.—Evans v. Welch, 29 Colo. 355, 68 P 776.

Conn.—Catlin v. Decker, 38 Conn. 262.

Del.—Jones v. Short, 77 A 968; Nevin v. Disharoon, 22 Del. 278, 66 A 362; Doe v. Pepper, 16 Del. 221, 43 A 90; Doe v. Jefferson, 10 Del. 477.

D. C.—Holtzman v. Douglas, 5 App. 397.

Fla.—Adams v. Fryer, 59 Fla. 112, 52 S 611; Avery v. Lock, 55 Fla. 612, 46 S 844; Wilson v. Johnson, 51 Fla. 370, 41 S 395; Wilkins v. Pensacola City Co., 36 Fla. 36, 18 S 20.

Ga.—David v. Tucker, 140 Ga. 240, 78 SE 909; Harris v. Cole, 114 Ga. 295, 40 SE 271; Durham v. Holeman, 30 Ga. 619.

Hawaii.—Albertina v. Kapiolani, 14 Hawaii 321; Keamalu v. Luhau, 7 Hawaii 324; Kaaihue v. Crabbe, 3 Hawaii 768.

Ill.—Rich v. Naffziger, 248 Ill. 455, 94 NE 1; Lambert v. Hemler, 244 Ill. 254, 91 NE 435; Kirby v. Kirby, 236 Ill. 255, 86 NE 259; Donahue v. Illinois Cent. R. Co., 165 Ill. 640, 46 NE 714; Bolden v. Sherman, 101 Ill. 483.

Ind.—Moore v. Hinkle, 151 Ind. 343, 50 NE 822; State v. Vincennes Univ., 5 Ind. 77; Webb v. Rhodes, 28 Ind. A. 393, 61 NE 735.

Iowa.—Kerr v. Yager, 138 NW 905; McClenahan v. Stevenson, 118 Iowa 106, 91 NW 925; Bader v. Dyer, 106 Iowa 715, 77 NW 469, 68 AmSR 332; Sweny v. Bruns, 74 Iowa 701, 39 NW 165; Montgomery v. Chadwick, 7 Iowa 114. But see Klinker v. Schmidt, 114 Iowa 695, 87 NW 661.

Kan.—Ard v. Wilson, 60 Kan. 857, 56 P 80 [aff 8 Kan. A. 471, 54 P 511]; McNeil v. Jordan, 28 Kan. 7.

Ky.—Tippenhauer v. Tippenhauer, 158 Ky. 639, 166 SW 225; Rose v. Stephens, 112 SW 676; Kountze v. Hatfield, 99 SW 262, 30 KyL 589; Spriggs v. Simpkins, 78 SW 900, 25 KyL 1788; Reno v. Blackburn, 72 SW 775, 24 KyL 1976; Chenault v. Quisenberry, 56 SW 410, 21 KyL 1771.

La.—Dowdell v. Orphans' Home Soc., 114 La. 49, 38 S 16; Chapman v. Morris Bldg., etc., Assoc., 108 La. 283, 32 S 371; Landry v. Landry, 105 La. 362, 29 S 900; Laidlaw v. Landry, 12 La. Ann. 151; Malveaux v. Lavergne, 10 La. Ann. 673.

Me.—Batchelder v. Robbins, 95 Me. 59, 49 A 210; Magoon v. Davis, 84 Me. 178, 24 A 809; Pope v. Jackson, 65 Me. 162; Moulton v. Bird, 31 Me. 296.

Md.—Van Bibber v. Frazier, 17 Md. 436.

Mass.—Murphy v. Com., 187 Mass. 361, 73 NE 524; Brown v. King, 5 Metc. 173.

Mich.—Highstone v. Burdette, 54 Mich. 329, 20 NW 64; Jeffery v. Hursh, 45 Mich. 59, 7 NW 221; Dawson v. Danbury Bank, 15 Mich. 489.

Minn.—Bazille v. Murray, 40 Minn. 48, 41 NW 238.

Miss.—Davis v. Davis, 68 Miss. 478, 10 S 70; Hicks v. Steigleman, 49 Miss. 377; Alexander v. Polk, 39 Miss. 737.

Mo.—Norton v. Reed, 253 Mo. 236, 161 SW 842; Brannock v. McHenry, 252 Mo. 1, 158 SW 385; Himmelberger-Harrison Lumber Co. v. Craig, 248 Mo. 319, 154 SW 73; St. Louis v. St. Louis, etc., R. Co., 248 Mo. 10, 154 SW 55; Slicer v. Owens, 241 Mo. 319, 145 SW 428; Otterville v. Bente, 240 Mo. 291, 144 SW 822; Minor v. Burton, 228 Mo. 558, 128 SW 964; Lee v. Conran, 213 Mo. 404, 111 SW 1151; Hendrickson v. Grable, 157 Mo. 42, 57 SW 784; Hunnewell v. Adams, 153 Mo. 440, 55 SW 95; Hunnewell v. Burchett, 152 Mo. 611, 54 SW 487; Smith v. Sedalia, 152 Mo. 283, 53 SW 907, 48 LRA 711; Dameron v. Jamison, 143 Mo. 483, 45 SW 258; Price v. Hallett, 138 Mo. 561, 38 SW 451; Wilkerson v. Thompson, 82 Mo. 317; Lynde v. Williams, 68 Mo. 360; Hulsey v. Wood, 55 Mo. 252.

Nebr.—Baty v. Elrod, 66 Nebr. 735, 92 NW 1032, 97 NW 343; Weeping Water v. Reed, 21 Nebr. 261, 31 NW 797.

N. H.—Lund v. Parker, 8 N. H. 49.

N. J.—Myers v. Folkman, 90 A 1051; Licari v. Carr, 84 N. J. L. 345, 86 A 421; Calatro v. Chabut, 72 N. J. L. 458, 63 A 272; Rowland v. Updike, 28 N. J. L. 101.

N. Y.—Archibald v. New York Cent., etc., R. Co., 157 N. Y. 574, 52 NE 567; Cramp v. Dady, 162 App. Div. 321, 147 NYS 619; Blixt v. Eltoma Realty Co., 138 App. Div. 499, 122 NYS 861; Cutting v. Burns, 57 App. Div. 185, 68 NYS 269; Lewis v. New York.

holder, and the burden of overcoming them rests with him who assails the legal title.'"[67] The claimant must show every element necessary to constitute a title under the statute of limitations,[68] and if he fails to do so it is the duty of the court to instruct the jury that there is not sufficient evidence to entitle him to recover.[69] Thus he must show that the possession was actual,[70] open and notorious,[71] continuous,[72] for the full time required by the statute,[73] exclusive,[74] hostile[75] and under a claim of right.[76] So, if payment of taxes is made an element of title by adverse possession by statute, the burden of proof is upon the party setting up adverse possession to show such payment,[77] and thus bring himself within

etc., R. Co., 40 App. Div. 343, 57 NYS 1053 [aff 162 N. Y. 202, 56 NE 540]; Miner v. Hilton, 15 App. Div. 55, 44 NYS 155; Bissing v. Smith, 85 Hun 564, 33 NYS 123; Howard v. Howard, 17 Barb. 663; Lambert v. Huber, 22 Misc. 462, 50 NYS 793; Doherty v. Matsell, 11 NYCivProc 392; Fadden v. Schwinge, 1 NYLRec 184.

N. C.—Locklear v. Savage, 159 N. C. 236, 74 SE 347; Berry v. McPherson, 153 N. C. 4, 68 SE 892; Monk v. Wilmington, 137 N. C. 322, 49 SE 345; Bradsher v. Hightower, 118 N. C. 399, 24 SE 120; Bryan v. Spivey, 109 N. C. 57, 13 SE 766; Parker v. Banks, 79 N. C. 480; Millsaps v. McCormick, 71 N. C. 531; Edmonston v. Shelton, 49 N. C. 451.

Or.—Altschul v. Casey, 45 Or. 182, 76 P 1083; Altschul v. O'Neill, 35 Or. 202, 58 P 95; Rowland v. Williams, 23 Or. 515, 32 P 402.

Pa.—Johns v. Johns, 244 Pa. 48, 90 A 535; Collins v. Lynch, 167 Pa. 635, 31 A 921; Thompson v. Kauffelt, 110 Pa. 209, 1 A 267; McDermott v. Hoffman, 70 Pa. 31; Armstrong v. Caldwell, 53 Pa. 284; De Haven v. Landell, 31 Pa. 120; Hood v. Hood, 2 Grant 229; Hawk v. Senseman, 6 Serg. & R. 21; Com. v. Bierly, 37 Pa. Super. 496; Crist v. Boust, 26 Pa. Super. 543; Deppen v. Bogar, 7 Pa. Super. 434. See also Barnhart v. Pettit, 23 Pa. 135.

S. C.—Love v. Turner, 71 S. C. 322, 51 SE 101; Hunter v. Hunter, 63 S. C. 78, 41 SE 33, 90 AmSR 663; Love v. Love, 57 S. C. 530, 35 SE 398; Gourdin v. Fludd, 16 S. C. L. 232; Cantey v. Platt, 13 S. C. L. 260.

S. D.—Wallace v. Dunton, 30 S. D. 598, 139 NW 345.

Tenn.—Southern Iron, etc., Co. v. Schwoon, 124 Tenn. 176, 135 SW 785; Elliott v. Holder, 3 Head 698; Tubb v. Williams, 7 Humphr. 367; Stewart v. Cheatham, 3 Yerg. 60; Fuller v. Jackson, (Ch. A.) 62 SW 274.

Tex.—Kirby v. Boaz, 103 Tex. 525, 131 SW 533 [aff (Civ. A.) 121 SW 223]; Dunn v. Taylor, 102 Tex. 80, 113 SW 265; Travis v. Hall, 95 Tex. 116, 65 SW 1078 [cert 27 Tex. Civ. A. 95, 65 SW 1077]; Smith v. Estill, 87 Tex. 264, 28 SW 801; Cook v. Oliver, 83 Tex. 559, 19 SW 161; Haynes v. Texas, etc., R. Co., 51 Tex. Civ. A. 49, 111 SW 427; Sloan v. King, 33 Tex. Civ. A. 537, 77 SW 48; Cochran v. Moerer, 31 Tex. Civ. A. 495, 72 SW 1031; Rountree v. Thompson, 30 Tex. Civ. A. 595, 71 SW 574, 72 SW 69; Lackey v. Bennett, (Civ. A.) 65 SW 651; O'Connor v. Dykes, (Civ. A.) 29 SW 920; Beall v. Evans, 1 Tex. Civ. A. 443, 20 SW 945.

Utah.—Raleigh v. Wells, 29 Utah 217, 81 P 908, 110 AmSR 689; English v. Openshaw, 28 Utah 241, 78 P 476; Dignan v. Nelson, 26 Utah 186, 72 P 936; Funk v. Anderson, 22 Utah 238, 61 P 1006; Centre Creek Water, etc., Co. v. Lindsay, 21 Utah 192, 60 P 559; Smith v. North Canyon Water Co., 16 Utah 194, 52 P 283.

Va.—Harman v. Stearns, 95 Va. 58, 27 SE 601.

Wash.—McInerney v. Beck, 10 Wash. 515, 39 P 130.

W. Va.—Wilson v. Braden, 56 W. Va. 372, 49 SE 409, 107 AmSR 927; Clifton v. Weston, 54 W. Va. 250, 46 SE 360; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255.

Wis.—Zellmer v. Martin, 157 Wis. 341, 147 NW 371; Ryan v. Schwartz, 94 Wis. 403, 69 NW 178; Kurz v. Miller, 89 Wis. 426, 62 NW 182; Allis v. Field, 89 Wis. 327, 62 NW 85; Allen v. Allen, 58 Wis. 202, 16 NW 610; Furlong v. Garrett, 44 Wis. 111.

Can.—McConaghy v. Denmark, 4 Can. S. C. 609.

Man.—Callaway v. Platt, 17 Man. 485.

67. Evans v. Welch, 29 Colo. 355, 364, 68 P 776 [quot with approval Upham v. Weisshaar, 23 Colo. A. 277, 128 P 1129].

68. Ala.—Alexander City Union Warehouse, etc., Co. v. Central of Georgia R. Co., 62 S 745.

Ark.—Gaither v. Gage, 82 Ark. 51, 100 SW 80; Nicklace v. Dickerson, 65 Ark. 422, 46 SW 945.

Cal.—Janke v. McMahon, 21 Cal. A. 781, 133 P 21.

Ga.—Bussey v. Jackson, 104 Ga. 151, 30 SE 646.

Ill.—Lambert v. Hemler, 244 Ill. 254, 91 NE 435.

Ky.—Upchurch v. Sutton Bros., 142 Ky. 420, 134 SW 477.

Nebr.—Weeping Water v. Reed, 21 Nebr. 261, 31 NW 797.

Pa.—Johns v. Johns, 244 Pa. 48, 90 A 535; De Haven v. Landell, 31 Pa. 120.

Tex.—Smith v. Estill, 87 Tex. 264, 28 SW 801; McAllen v. Crafts, (Civ. A.) 139 SW 41.

W. Va.—Clifton v. Weston, 54 W. Va. 250, 46 SE 360.

And see Wilson v. Jernigan, 57 Fla. 277, 49 S 44.

[a] **Effect of admission of possession.**—The burden of proving the other elements of title by adverse possession is on the party asserting it, although the adverse party admits that the party has been in possession for many years. Spicer v. Spicer, 249 Mo. 582, 155 SW 832.

69. De Haven v. Landell, 31 Pa. 120.

70. Ill.—Lambert v. Hemler, 244 Ill. 254, 91 NE 435.

Mass.—Kennebeck Purchase v. Call, 1 Mass. 483.

Miss.—Cohn v. Pearl River Lumber Co., 80 Miss. 649, 32 S 292.

N. Y.—Bissing v. Smith, 85 Hun 564, 33 NYS 123; Howard v. Howard, 17 Barb. 663.

Tex.—Haynes v. Texas, etc., R. Co., 51 Tex. Civ. A. 49, 111 SW 427.

71. U. S.—Rich v. Victoria Copper Min. Co., 147 Fed. 380, 77 CCA 558.

Fla.—Wilson v. Johnson, 51 Fla. 370, 41 S 395.

Ill.—Lambert v. Hemler, 244 Ill. 254, 91 NE 435.

Mass.—Kennebeck Purchase v. Call, 1 Mass. 483.

N. C.—Stewart v. McCormick, 161 N. C. 625, 77 SE 761.

Tenn.—Tubb v. Williams, 7 Humphr. 366.

72. U. S.—Rich v. Victoria Copper Min. Co., 147 Fed. 380, 77 CCA 558.

Ala.—Bolen v. Hoven, 150 Ala. 448, 43 S 736; Henry v. Brown, 143 Ala. 446, 39 S 325.

Fla.—Townsend v. Edwards, 25 Fla. 582, 6 S 212.

Ky.—Upchurch v. Sutton Bros., 142 Ky. 420, 134 SW 477.

Me.—Proctor v. Maine Cent. R. Co., 101 Me. 459, 64 A 839.

Mass.—Kennebeck Purchase v. Call, 1 Mass. 483.

Nebr.—Weeping Water v. Reed, 21 Nebr. 261, 31 NW 797.

N. C.—Stewart v. McCormick, 161 N. C. 625, 77 SE 761; Monk v. Wilmington, 137 N. C. 322, 49 SE 345.

Tenn.—Tubb v. Williams, 7 Humphr. 366.

Tex.—Dunn v. Taylor, 102 Tex. 80, 113 SW 265; Smith v. Estill, 87 Tex. 264, 28 SW 801; Phillipson v. Flynn, 83 Tex. 580, 19 SW 136; Overand v. Menczer, 83 Tex. 122, 18 SW 301.

Wis.—Hemmy v. Dunn, 125 Wis. 275, 103 NW 1095; Sydnor v. Palmer, 29 Wis. 226.

[a] **"In proving continuous adverse possession under color of title, nothing must be left to conjecture.** The testimony, if believed, must show the continuity of the possession for the full statutory period in plain terms, or by necessary implication." Ruffin v. Overby, 105 N. C. 78, 11 SE 251.

73. Gilbert v. Southern Land, etc., Co., 53 Fla. 319, 43 S 754; Stewart v. McCormick, 161 N. C. 625, 77 SE 761; Cantey v. Platt, 13 S. C. L. 260; Stewart v. Cheatham, 3 Yerg. (Tenn.) 59. See also State v. Vincennes Univ., 5 Ind. 77.

[a] **Application of rule.**—(1) Under this rule "the burden is always upon the party claiming by adverse title to show when his adverse holding began, for, without such initial point established, there can be no telling whether, if it existed at all, it continued for the statutory period." Johns v. Johns, (Pa.) 90 A 535, 536. (2) In a suit to redeem from a mortgage, where defendant set up title by adverse possession and the evidence left it doubtful as to when possession was taken, it was held that, defendant having failed to prove this defense, the action was not barred. Montgomery v. Chadwick, 7 Iowa 114.

74. Lambert v. Hemler, 244 Ill. 254, 91 NE 435; Weeping Water v. Reed, 21 Nebr. 261, 31 NW 797; Boudroit v. Sampson, 41 N. S. 490.

75. Ala.—Robinson v. Allison, 97 Ala. 596, 12 S 382, 604.

Nebr.—Weeping Water v. Reed, 21 Nebr. 261, 31 NW 797.

N. Y.—Bissing v. Smith, 85 Hun 564, 33 NYS 123; Howard v. Howard, 17 Barb. 663.

N. C.—Stewart v. McCormick, 161 N. C. 625, 77 SE 761; Monk v. Wilmington, 137 N. C. 322, 49 SE 345.

S. C.—Cantey v. Platt, 13 S. C. L. 260.

Tenn.—Dyche v. Gass, 3 Yerg. 396.

Tex.—Smith v. Estill, 87 Tex. 264, 28 SW 801.

[a] **To show possession only will not suffice.**—The evidence must go further and show that the possession was hostile. Illinois Cent. R. Co. v. Hatter, 207 Ill. 88, 69 NE 751.

[b] **If a possession hostile in its inception is alleged** the burden is on the pleader to show a possession hostile in its inception. Walker v. Wyman, 157 Ala. 478, 47 S 1011; Lecroix v. Malone, 157 Ala. 434, 47 S 725; Evans v. Welch, 29 Colo. 355, 68 P 776; Upchurch v. Sutton Bros., 142 Ky. 420, 134 SW 477; Hoffine v. Ewings, 60 Nebr. 729, 84 NW 93; Bradsher v. Hightower, 118 N. C. 399, 24 SE 120.

76. Smith v. Sedalia, 152 Mo. 288, 53 SW 907, 48 LRA 711.

77. Ark.—Bradley Lumber Co. v. Miller, 94 Ark. 118, 126 SW 98; Gaither v. Gage, 82 Ark. 51, 100 SW 80; Price v. Greer, 76 Ark. 426, 88 SW 985.

Colo.—Wood v. Chapman, 24 Colo. 134, 49 P 136.

Ida.—Swank v. Sweetwater Irr., etc., Co., 15 Ida. 353, 98 P 297.

Ill.—Travers v. McElvain, 181 Ill. 382, 55 NE 135; Sanitary Dist. v. Allen, 178 Ill. 330, 53 NE 109; Bell v. Neiderer, 169 Ill. 54, 48 NE 194; Timmons v. Kidwell, 138 Ill. 13, 27 NE 756; Perry v. Burton, 111 Ill. 138, 126 Ill. 599, 18 NE 653; Hurlbut v. Bradford, 109 Ill. 397; Irwin v. Miller, 23 Ill. 401.

Tex.—Hitchler v. Scanlan, 83 Tex. 569, 19 SW 259; Donlon v. Lyons, 15 SW 578; Murphy v. Welder, 58 Tex.

the terms of the act.[78] The claimant by adverse possession also has the burden of showing the extent of his possession,[79] and he must show an adverse occupancy of a definite area sufficiently described on which to found a verdict.[79½]

[§ 586] **2. As to Facts to Avoid Adverse Possession.** Where facts sufficient to show title by adverse possession have been adduced in evidence, and it is sought to avoid the effect of the statute, the burden of proof is upon him who would do so to show that he is within some exception to the operation of the statute.[80] No exception is to be presumed. It must be shown by affirmative proof.[81] If a disability such as coverture or infancy is relied on, its existence must be shown,[82] and it must be shown that such disability existed at the time the cause of action accrued and that it continued for such a length of time as would prevent the bar by adverse possession.[83]

[§ 587] **B. Presumptions—1. As to Possession by Rightful Owner.** The law presumes that where title is shown the true owner is in possession until adverse possession is proved to begin,[84] and when two persons are in mixed possession of the same land, one by title and the other by wrong, the law considers the one who has the title as in possession to the extent of his right so as to preclude the other from taking advantage of the statute of limitations.[85]

[§ 588] **2. Arising from Possession—a. Naked Possession.** The great weight of authority is to the effect that mere possession will be presumed to be in subordination to the title of the true owner,[86] and no length of time unaccompanied by any change in

235; Kelly v. Medlin, 26 Tex. 48; Castro v. Wurzbach, 13 Tex. 128; Trinity County Lumber Co. v. Pinckard, 4 Tex. Civ. A. 671, 23 SW 720, 1015; Henderson v. Beaton, 1 Tex. Unrep. Cas. 17.

Wash.—McMillan v. Walker, 48 Wash. 342, 93 P 520.

[a] **Showing that land was not assessed.**—Where an assessment for a certain year covered the whole of a certain range, describing it by boundaries, one claiming a part thereof by adverse possession, who did not pay taxes for such year, has the burden of showing that the part claimed by him was not within the assessment. Baldwin v. Temple, 101 Cal. 396, 35 P 1008.

[b] **Taking possession after payment of taxes for requisite time.**—Where one bases his right to vacant and unoccupied land on the payment of taxes thereon for seven years with color of title which, as provided by the Illinois statute, will entitle one to ownership thereof to the extent and according to the purport of his paper title, he must also prove that after the lapse of that time possession was taken under color of title. Travers v. McElvain, 181 Ill. 382, 55 NE 135.

[c] **If the land must be unimproved and unenclosed** in order to bring the payment of taxes within the operation of the statute, the burden is on the claimant to show this fact. Gaither v. Gage, 82 Ark. 51, 100 SW 80; Price v. Greer, 76 Ark. 426, 88 SW 985.

[d] **If payment of taxes was made by a third person,** the burden is on the claimant to show that the payment was made in his behalf. Timmons v. Kidwell, 149 Ill. 507, 36 NE 974.

[e] **Where it appears that the taxes were paid by both the owner and the claimant** (1) the burden is on the latter to show that he made the first payment (Bolden v. Sherman, 101 Ill. 483), (2) but where the claimant shows the time of his payment by tax receipts he makes a prima facie case of first payment, and the owner must, to overcome this, show that he made his payments before those of the claimant (Bolden v. Sherman, 110 Ill. 418).

78. Bradley Lumber Co. v. Miller, 94 Ark. 118, 126 SW 98.

79. Braxton v. Rich, 47 Fed. 178; Cantey v. Platt, 13 S. C. L. 260.

79½. Maney v. Dennison, (Ark.) 163 SW 783.

80. Shropshire v. Shropshire, 7 Yerg. (Tenn.) 164; Travis v. Hall, 95 Tex. 116, 65 SW 1078 [cert 27 Tex. Civ. A. 95, 65 SW 1077]; Romine v. Littlejohn, (Tex. Civ. A.) 106 SW 439 (holding that in order to establish a prima facie case of adverse possession plaintiff is not required to prove in addition to adverse possession for the requisite time that the prior owners were under no disability). See also Fankboner v. Corder, 127 Ind. 164, 26 NE 766; Palmer v. Wright, 58 Ind. 486; and cases infra notes 81–83. Contra, Austin v. Hall, 93 Tex. 591, 57 SW 563 (holding that where a party relies on prescription he must show that the land was owned for the requisite period by persons free from legal disability).

[a] **Where adverse possession is admitted by the pleadings,** one relying on facts which will take the case out of the operation of the statute must prove them. Bodkins v. Phillips, (Tenn. Ch. A.) 42 SW 158.

81. Arnold v. Limeburger, 122 Ga. 72, 49 SE 812.

82. Ga.—Arnold v. Limeburger, 122 Ga. 72, 49 SE 812.

Miss.—Stevenson v. McReary, 20 Miss. 9, 51 AmD 102.

Mo.—Dessaunier v. Murphy, 33 Mo. 184.

N. Y.—Koch v. Ellwood, 138 App. Div. 584, 123 NYS 502.

N. C.—Miller v. Bumgardner, 109 N. C. 412, 13 SE 935.

83. Arnold v. Limeburger, 122 Ga. 72, 49 SE 812; Gross v. Disney, 95 Tenn. 592, 32 SW 632. And see Yell v. Lane, 41 Ark. 53; Vail v. Halton, 14 Ind. 344; Phillips v. Holman, 26 Tex. 276.

84. U. S.—Lamb v. Burbank, 14 F. Cas. No. 8,012, 1 Sawy. 227.

Ark.—Miller v. Fraley, 23 Ark. 735.

Colo.—Evans v. Welch, 29 Colo. 355, 68 P 776.

Fla.—Summerall v. Thoms, 3 Fla. 298.

Ind.—Wiggins v. Holley, 11 Ind. 2.

Mo.—Brannock v. McHenry, 252 Mo. 1, 158 SW 385.

N. Y.—Staples v. Schnackenberg, 148 App. Div. 161, 132 NYS 1092; Miner v. New York, 37 N. Y. Super. 171; Lambert v. Huber, 22 Misc. 462, 50 NYS 793.

N. C.—Alexander v. Gibbon, 118 N. C. 796, 24 SE 748, 54 AmSR 757; Malloy v. Bruden, 86 N. C. 251; Thomas v. Garvan, 15 N. C. 223, 25 AmD 708.

Or.—Altschul v. O'Neill, 35 Or. 202, 58 P 95.

Pa.—Schwab v. Bickel, 11 Pa. Super. 312.

S. C.—Love v. Turner, 71 S. C. 322, 51 SE 101; Brooks v. Penn, 21 S. C. Eq. 113.

Tenn.—Smith v. Cross, 125 Tenn. 159, 140 SW 1060; McLemore v. Durivage, 92 Tenn. 482, 492, 22 SW 207; Welcker v. Staples, 88 Tenn. 49, 12 SW 340, 17 AmSR 869; Foster v. Jordan, 2 Swan 476.

Vt.—Holley v. Hawley, 39 Vt. 525, 94 AmD 350.

Can.—Bentley v. Peppard, 33 Can. S. C. 444.

"The law deems every man to be in the legal seisin and possession of land to which he has a perfect and complete title, and such seisin and possession continue until he is ousted by an actual adverse possession in another." Sommer v. Compton, 52 Or. 173, 180, 96 P 124, 1065 (per Eakin, J.). "Possession, as a presumption of law, is intended only in favor of the true owner, and every presumption is in favor of possession in subordination to his title." Licari v. Carr, 84 N. J. L. 345, 349, 86 A 421.

[a] **Unimproved and unoccupied land** is presumed to be in the possession of the one holding legal title. Butler v. Smith, 84 Nebr. 78, 120 NW 1106, 28 LRANS 436; Herbage v. McKee, 82 Nebr. 354, 117 NW 706; Troxell v. Johnson, 52 Nebr. 46, 71 NW 968; Yorgensen v. Yorgensen, 6 Nebr. 383.

85. Cheney v. Ringgold, 2 Harr. & J. (Md.) 87.

86. U. S.—Maxwell Land-Grant Co. v. Dawson, 151 U. S. 586, 14 SCt 458, 38 L. ed. 279; Harvey v. Tyler, 2 Wall. 328, 17 L. ed. 871; Zeller v. Eckert, 4 How. 289, 11 L. ed. 979; Society for Propagation of Gospel v. Pawlet, 4 Pet. 480, 7 L. ed. 927; Ricard v. Williams, 7 Wheat. 59, 5 L. ed. 398; Heermans v. Schmaltz, 7 Fed. 566, 10 Biss. 323.

Ala.—Lecroix v. Malone, 157 Ala. 434, 47 S 725; Beasley v. Howell, 117 Ala. 499, 22 S 989; Newton v. Louisville, etc., R. Co., 110 Ala. 474, 19 S 19; Davis v. Caldwell, 107 Ala. 526, 18 S 103; Lucy v. Tennessee, etc., R. Co., 92 Ala. 246, 8 S 806; Dothard v. Denson, 72 Ala. 541; Alexander v. Wheeler, 69 Ala. 332; Brown v. Cockerell, 33 Ala. 38; McCall v. Pryor, 17 Ala. 533; Doe v. Eslava, 11 Ala. 1028. See also Croft v. Doe, 125 Ala. 391, 28 S 84; Robinson v. Allison, 97 Ala. 596, 12 S 382, 604; Scruggs v. Decatur Mineral, etc., Co., 86 Ala. 173, 5 S 440.

Ark.—Fox v. Spears, 78 Ark. 71, 93 SW 560; Pulaski County v. State, 42 Ark. 118; Sadler v. Sadler, 16 Ark. 628.

Cal.—Oglesby v. Hollister, 76 Cal. 136, 18 P 146, 9 AmSR 177; Miller v. Myers, 46 Cal. 535; Sharp v. Daugney, 33 Cal. 505; Janke v. McMahon, 21 Cal. A. 781, 133 P 21; Allen v. McKay, 6 Cal. Unrep. Cas. 993, 70 P 8.

Colo.—Evans v. Welch, 29 Colo. 355, 68 P 776.

Conn.—Russell v. Davis, 38 Conn. 562; Averill v. Sanford, 36 Conn. 345; Huntington v. Whaley, 29 Conn. 391.

Fla.—Gilbert v. Southern Land, etc., Co., 53 Fla. 319, 43 S 754; Barrs v. Brace, 38 Fla. 265, 20 S 991; Kendrick v. Latham, 25 Fla. 819, 6 S 871.

Ga.—Harris v. Cole, 114 Ga. 295, 40 SE 271; McCullough v. East Tennessee, etc., R. Co., 97 Ga. 373, 23 SE 838; Durham v. Holeman, 30 Ga. 619; Spalding v. Grigg, 4 Ga. 75.

Ill.—Zirngibl v. Calumet, etc., Co., 157 Ill. 430, 42 NE 431; Bryan v. East St. Louis, 12 Ill. A. 390.

Ind.—Buckley v. Taggart, 62 Ind. 236; Pierson v. Doe, 2 Ind. 123; Carter v. Augusta Gravel-Road Co., Wils. 14.

Iowa.—McClenahan v. Stevenson, 118 Iowa 106, 91 NW 925; Skinner v. Crawford, 54 Iowa 119, 6 NW 144; Grube v. Wells, 34 Iowa 148.

Kan.—Edwards v. Fleming, 83 Kan. 653, 112 P 836, 33 LRANS 923 and note.

Ky.—Russell v. Marks, 3 Metc. 37.

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the character of the possession will render it adverse.[87] According to this view every presumption should be made in favor of a possession in subordination to the title of the true owner.[88] There are, however, decisions which are not in accord with the above views. In at least two states the prevailing doctrine seems to be that mere possession unexplained will be presumed to be adverse.[89]

[§ 589] **b. Permissive Entry.** Where a person enters into possession of land under permission or license from the owner, the presumption is that his possession is in subordination to the true owner, in the absence of any acts amounting to a disseizin,[90] and does not ripen into title however long it may

La.—Dowdell v. Orphans' Home Soc., 114 La. 49, 38 S 16.
Me.—Mowe v. Stevens, 61 Me. 592.
Md.—Campbell v. Shipley, 41 Md. 81.
Mass.—Parker v. Merrimack River Locks, etc., 3 Metc. 91, 37 AmD 121.
Miss.—Dean v. Tucker, 58 Miss. 487; Davis v. Bowmar, 55 Miss. 671; Alexander v. Polk, 39 Miss. 737.
Mo.—McCune v. Goodwillie, 204 Mo. 306, 102 SW 997; Crowl v. Crowl, 195 Mo. 338, 92 SW 890; Hunnewell v. Burchett, 152 Mo. 611, 54 SW 487.
Nebr.—Hoffine v. Ewings, 60 Nebr. 729, 84 NW 93; Weeping Water v. Reed, 21 Nebr. 261, 31 NW 797.
Nev.—McDonald v. Fox, 20 Nev. 364, 22 P 234.
N. H.—Campbell v. Campbell, 13 N. H. 483; Lund v. Parker, 3 N. H. 49; Riley v. Jameson, 3 N. H. 23, 14 AmD 325. See also Blaisdell v. Martin, 9 N. H. 253.
N. J.—Johanson v. Atlantic City R. Co., 73 N. J. L. 767, 64 A 1061.
N. Y.—Archibald v. New York Cent., etc., R. Co., 157 N. Y. 574, 52 NE 567 [aff 1 App. Div. 251, 37 NYS 336]; Arents v. Long Island R. Co., 156 N. Y. 1, 50 NE 422; Heller v. Cohen, 154 N. Y. 299, 48 NE 527 [rev 9 App. Div. 465, 41 NYS 214]; McRoberts v. Bergman, 132 N. Y. 73, 30 NE 261; Doherty v. Matsell, 119 N. Y. 646, 23 NE 994; Smyles v. Hastings, 22 N. Y. 217; Cutting v. Burns, 57 App. Div. 185, 68 NYS 269; Sanders v. Riedinger, 30 App. Div. 277, 51 NYS 937, 19 Misc. 289, 43 NYS 127 [aff 164 N. Y. 564 mem, 58 NE 1092 mem]; Miner v. Hilton, 15 App. Div. 55, 44 NYS 155; Bradt v. Church, 39 Hun 262 [aff 110 N. Y. 537, 18 NE 357]; Howard v. Howard, 17 Barb. 663; Fosgate v. Herkimer Mfg., etc., Co., 9 Barb. 287; Peo. v. Van Rensselaer, 8 Barb. 189 [rev on other grounds 9 N. Y. 291]; Monohan v. New York Cent., etc., R. Co., 31 Misc. 619, 66 NYS 37; Berkowitz v. Brown, 3 Misc. 1, 23 NYS 792; Buttery v. Rome, etc., R. Co., 14 NYSt 131; Simpson v. Downing, 23 Wend. 316; Doe v. Butler, 3 Wend. 149; Jackson v. Leonard, 9 Cow. 653; Jackson v. Phillips, 9 Cow. 94; Jackson v. Rightmyre, 16 Johns. 314; Jackson v. Thomas, 16 Johns. 293; Jackson v. Waters, 12 Johns. 365; Doe v. Campbell, 10 Johns. 475; Smith v. Lorillard, 10 Johns. 338; Jackson v. Sharp, 9 Johns. 163, 6 AmD 267; Smith v. Burtis, 6 Johns. 197, 5 AmD 218; Brandt v. Ogden, 1 Johns. 156; Jackson v. Parker, 3 Johns. Cas. 124. But see Criswell v. Noble, 61 Misc. 483, 113 NYS 954.
Oh.—Happ v. Dayton, etc., R. Co., 14 OhS&CP 172.
Or.—Gardner v. Wright, 49 Or. 609, 91 P 286; Altschul v. O'Neill, 35 Or. 202, 58 P 95.
Pa.—Hood v. Hood, 2 Grant 229; Rung v. Shoneberger, 2 Watts 23, 26 AmD 95. But see Neel v. McElhenny, 69 Pa. 300.
S. C.—Metz v. Metz, 48 S. C. 472, 26 SE 787; Cantey v. Platt, 13 S. C. L. 260.
Tex.—Smith v. Estill, 87 Tex. 264, 28 SW 801; Boone v. Miller, 73 Tex. 557, 11 SW 551. See however Gillespie v. Jones, 26 Tex. 343.
Utah.—Sheppick v. Sheppick, 138 P 1169 (under express statutory provision to that effect); Funk v. Anderson, 22 Utah 238, 61 P 1006.
Vt.—Austin v. Bailey, 37 Vt. 219, 86 AmD 703.
Wash.—Northern Pac. R. Co. v. Devine, 53 Wash. 241, 101 P 841.
Wis.—Jansen v. Huerth, 143 Wis. 363, 127 NW 945; Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019; Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830; Meyer v. Hope, 101 Wis. 123, 77 NW 720; Wollman v. Ruehle, 100 Wis. 31, 75 NW 425; Ryan v. Schwartz, 94 Wis. 403, 69 NW 178; Fuller v. Worth, 91 Wis. 406, 64 NW 995; Kurz v. Miller, 89 Wis. 4426, 62 NW 182; Allis v. Field, 89 Wis. 327, 62 NW 85; Fairfield v. Barrette, 73 Wis. 463, 41 NW 624; Graeven v. Dieves, 68 Wis. 317, 31 NW 914; Wilson v. Henry, 35 Wis. 241; Sydnor v. Palmer, 29 Wis. 226.
And see Logan v. Ward, 58 W. Va. 366, 52 SE 398, 5 LRANS 156 and note.

[a] **Applications of rule.**—(1) Where a cemetery association was formed by lot owners in a cemetery but no property was conveyed to it, money to care for the lots being raised by subscription, it would be presumed that a fence built by such association around the cemetery was in subordination to the rights of the lot owners. Rathbunville Union Cemetery Assoc. v. Betson, 208 N. Y. 364, 101 NE 892. (2) As it cannot be presumed, as a matter of law, from mere possession that defendant and his grantors intended to claim to a certain line, regardless of right, the mere fact that they held up to an old line for many years will not warrant a finding of adverse possession. Hornsby v. Tucker, (Ala.) 61 S 928.

87. Heller v. Cohen, 154 N. Y. 299, 48 NE 527; Cutting v. Burns, 57 App. Div. 185, 68 NYS 269; Jackson v. Thomas, 16 Johns. (N. Y.) 292; Jackson v. Parker, 3 Johns. Cas. (N. Y.) 124.

[a] **Application of rule.**—A entered into possession of land without title and afterward entered into a contract with T who covenanted to give him a deed of the land. A assigned the contract to S who took possession and afterward received his deed from T and subsequently a deed from B, the patentee and true owner. It was held that the original possession of A, being without title, was to be deemed the possession of B, and that the possession of S under the covenant from A to T was not adverse. Jackson v. Sharp, 9 Johns. (N. Y.) 163, 6 AmD 267.

[b] **Joint occupancy.**—Where two are in joint occupancy of land, the one having no title will, in the absence of all proof, be considered as holding in subordination to him who has the title. Whittington v. Doe, 9 Ga. 23.

88. Conn.—Huntington v. Whaley, 29 Conn. 391.
Fla.—Avery v. Lock, 55 Fla. 612, 46 S 844; Gilbert v. Southern Land, etc., Co., 53 Fla. 319, 43 S 754.
Ill.—Towle v. Quante, 246 Ill. 568, 92 NE 967; Bryan v. East St. Louis, 12 Ill. A. 390.
N. J.—Johanson v. Atlantic City R. Co., 73 N. J. L. 767, 64 A 1061.
N. Y.—Jackson v. Sharp, 9 Johns. 163, 6 AmD 267.
Pa.—Rung v. Shoneberger, 2 Watts 23, 26 AmD 95.

89. See Zebriska's Succ., 119 La. 1076, 44 S 893 (holding that in the absence of proof to the contrary every one is presumed to possess for himself as owner); Alexander v. Gibbon, 118 N. C. 796, 24 SE 748, 54 AmSR 757; Bryan v. Spivey, 109 N. C. 57, 13 SE 766; Smith v. Reid, 51 N. C. 494; Norcom v. Leary, 25 N. C. 49; Jackson v. Hillsborough, 18 N. C. 177. But see Monk v. Wilmington, 137 N. C. 822, 49 SE 345 (which seems in conflict with the rule stated in the text); Parker v. Banks, 79 N. C. 480, 485, (where it was said: "The law never presumes a wrong; hence he who alleges an adverse possession against the better title, must show it, as well as allege it").

[a] **Under the statutes of Wisconsin** occupancy for twenty years continuously raises a presumption of adverse possession. Illinois Steel Co. v. Budzisz, 145 NW 212.

90. U. S.—Zeller v. Eckert, 4 How. 289, 11 L. ed. 979.
Ala.—Dothard v. Denson, 72 Ala. 541; Alexander v. Wheeler, 69 Ala. 332.
Del.—Cooper v. McBride, 9 Del. 461.
Ill.—Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088.
Ind.—Chicago, etc., R. Co. v. Wood, 30 Ind. A. 650, 66 NE 923.
Iowa.—McClenahan v. Stevenson, 118 Iowa 106, 91 NW 925.
Ky.—Mullins v. Conger, 22 SW 546, 880, 15 KyL 171.
Md.—Gwynn v. Jones, 2 Gill & J. 173.
Mass.—Hall v. Stevens, 9 Metc. 418.
Mich.—Butler v. Bertrand, 97 Mich. 59, 56 NW 342.
Minn.—Collins v. Colleran, 86 Minn. 199, 90 NW 364.
Miss.—Davis v. Bowmar, 55 Miss. 671.
Mo.—Fleming v. Kemp, 170 Mo. 235, 70 SW 694.
Nebr.—Taylor v. Hover, 77 Nebr. 97, 108 NW 149.
Pa.—Johns v. Johns, 244 Pa. 48, 90 A 535; Hood v. Hood, 2 Grant 229.
S. C.—Sibley v. Sibley, 88 S. C. 184, 70 SE 615, AnnCas1912C 1170 and note.
Tenn.—Porter v. Porter, 3 Humphr. 585.

[a] **Applications of rule.**—(1) A tenant entitled by curtesy sold his improvements on the land to H who took possession under an arrangement with his vendor. H continued in possession a number of years until he made a quitclaim deed to defendant's vendor. The tenant by curtesy gave a release and deed to the land to plaintiffs, his children, who were entitled to the property after his death and they immediately brought suit for the land. It was held that H having entered into possession as a subordinate of the life tenant, would be presumed to have continued in possession as such until he repudiated the release by making a deed to the land. Mullins v. Conger, 22 SW 546, 880, 15 KyL 171. (2) So too one entitled to possession in the right of his wife will be presumed to hold subservient to the title of the wife, although he holds a void deed purporting to give him title in fee. Corwin v. Corwin, 6 N. Y. 342, 57 AmD 453. (3) And possession of a street by a railroad company having been under the license of the city, and not adverse to plaintiff, an abutting lot owner, in its inception, in absence of proof there was no presumption, after twenty years, that the character of the possession was changed. Monohan v. New York Cent., etc., R. Co., 31 Misc. 619, 66 NYS 37.

[b] **Possession under a tax lease being subordinate to the paper title of the true owner,** the continued possession after the expiration of the term of the lease will be regarded as still in subordination to the paper title, unless there is a disclaimer of the paper title or something tantamount to a surrender of the original possession and a retaking under an independent asserted claim of title. Miller v. Warren, 94 App. Div. 192, 87

continue.[91] This presumption, however, may be rebutted.[92]

[§ 590] **c. Accompanied by Other Elements of Adverse Possession.** While the law stated in a preceding section[93] is elementary, there may, nevertheless, be circumstances under which a presumption of adverse holding will arise.' Thus it has been held that one who enters upon land under color of title is presumed to enter and occupy according to his title,[94] and that he claims to the limits of his deed.[95] Where a person enters under a deed land claimed by adverse possession it is unnecessary to show by affirmative evidence independent of the deed that the adverse claimant claims the land.[96] So where one who enters without claim or color of title subsequently acquires a colorable title, from that period an adverse possession will commence.[97] Nevertheless it has been held that mere evidence that one occupying land had a deed therefor is not sufficient to raise a presumption that the possession was adverse without showing that such possession was taken thereunder. "It cannot be assumed that the entry was under the deed."[98] So it has been held that actual occupancy accompanied by acts of ownership inconsistent with ownership in another is presumedly adverse,[99] and that an actual, continuous, and exclusive possession for the statutory period, unexplained, raises a presumption that the possession is hostile[1] and with the knowledge of the owner.[2] Although the facts are sufficient to raise the presumption of adverse possession, this presumption may nevertheless be rebutted by proof to the contrary.[3]

NYS 1011 [aff 182 N. Y. 539 mem, 75 NE 1131 mem].

[c] **When presumption of permissive entry arises.**—D purchased a tract of land in 1853, upon which his son J immediately entered, remaining in possession or exercising control over it for eighteen years, until D's death, and afterward for eight years, until ejectment brought by D's devisees. In 1869 D conveyed to J another place, to which he moved. Until 1867 D paid the taxes on the tract in controversy; afterward J paid them. The tract was at times spoken of by D as his own, and at times as J's. J, after moving from it, received the rents and always made repairs at his own expense. He claimed under a parol gift in the action of ejectment. It was held that the facts failed to show an adverse holding as against D during his lifetime and that the presumption was that J entered under a mere license. Dean v. Tucker, 58 Miss. 487.

91. Kennedy v. Rainey, 145 Ala. 572, 39 S 813; Omodt v. Chicago, etc., R. Co., 106 Minn. 205, 118 NW 798.

92. Davis v. Harrell, 101 Ark. 230, 142 SW 150.

93. See supra § 588.

94. U. S.—Schlawig v. Purslow, 59 Fed. 848, 8 CCA 315.

Iowa.—McBride v. Caldwell, 142 Iowa 228, 119 NW 741; Roth v. Munzenmaier, 118 Iowa 326, 91 NW 1072.

Me.—Brackett v. Persons Unknown, 53 Me. 228.

Mo.—Feller v. Lee, 225 Mo. 319, 124 SW 1129 (holding that where defendant took possession of land under a deed it will be presumed that he continued to hold possession thereunder, the burden of rebutting which was on him, under the rule that he who takes possession of land does so under some form of title. He cannot, by mere change of mental attitude, change his possession into that of a trespasser).

N. H.—Forest v. Jackson, 56 N. H. 357; Tappan v. Tappan, 31 N. H. 41; Gage v. Gage, 30 N. H. 420; Newmarket Mfg. Co. v. Pendergast, 24 N. H. 54; Bailey v. Carleton, 12 N. H. 9, 37 AmD 190; Lund v. Parker, 3 N. H. 49.

N. Y.—Matter of New York, 73 App. Div. 394, 77 NYS 31; Jackson v. Newton, 18 Johns. 355; Jackson v. Wheat, 18 Johns. 40; Jackson v. Ellis, 13 Johns. 118; Jackson v. Todd, 2 Cai. 183.

N. C.—Chatham v. Lansford, 149 N. C. 363, 63 SE 81, 25 LRANS 129; Hawkins v. Richmond Cedar Works, 122 N. C. 87, 30 SE 13; Bryan v. Spivey, 109 N. C. 57, 13 SE 766.

Vt.—Hassam v. J. E. Safford Lumber Co., 82 Vt. 444, 74 A 197; Webb v. Richardson, 42 Vt. 465; McGrady v. Miller, 14 Vt. 128.

See also Comins v. Comins, 21 Conn. 413.

[a] **Limitation of rule; void deed.**—Where the question whether a deed under which a person claimed land was void, because the grantor was disseised when it was given, was in dispute, a charge that his possession under the deed was presumed was properly refused, for if it was void for the reason claimed, there could be no presumption of possession. "If for this reason it had no operation there could be no presumption of possession under it." Murphy v. Com., 187 Mass. 361, 73 NE 524.

95. Hassam v. J. E. Safford Lumber Co., 82 Vt. 444, 74 A 197; Webb v. Richardson, 42 Vt. 465.

96. Hassam v. J. E. Safford Lumber Co., 82 Vt. 444, 74 A 197.

[a] **The reason** is that one in possession under a deed enters in his own right. McGrady v. Miller, 14 Vt. 128.

97. Jackson v. Thomas, 16 Johns. (N. Y.) 293; Com. v. Bierly, 37 Pa. Super. 496.

98. Heller v. Cohen, 154 N. Y. 299, 48 NE 527; Cutting v. Burns, 57 App. Div. 185, 68 NYS 269.

99. Ala.—Alexander v. Wheeler, 69 Ala. 332.

Del.—Willin v. Wright, 25 Del. 197, 78 A 773.

Ky.—Hartford v. Nall, 144 Ky. 259, 137 SW 1090; Buckner v. Kirkland, 110 SW 399, 33 KyL 603.

Nebr.—Ryan v. Lincoln, 85 Nebr. 539, 123 NW 1021.

N. Y.—Barnes v. Light, 116 N. Y. 34, 22 NE 441; Timmermann v. Cohn, 70 Misc. 327, 128 NYS 770 [aff 146 App. Div. 924 mem, 131 NYS 1146 mem (rev on other grounds 97 NE 589)]; Criswell v. Noble, 61 Misc. 483, 113 NYS 954 [aff 134 App. Div. 994 mem, 119 NYS 1122 mem]; Cole v. Lester, 48 Misc. 13, 15, 96 NYS 67 [cit Cyc Annot].

Utah.—Pioneer Inv., etc., Co. v. Salt Lake City Bd. of Education, 35 Utah 1, 99 P 150, 136 AmSR 1016.

And see Shaw v. Smithes, 167 Ill. 269, 47 NE 523; Craven v. Craven, (Ind.) 103 NE 333.

[a] **Application of rule.**—(1) Evidence of erecting, repairing, and occupying buildings, leasing the same, collecting rents, selling and conveying, or offering for sale, authorizes the presumption that a holding is adverse. Rennert v. Shirk, 163 Ind. 542, 72 NE 546. (2) The actual possession and improvement of the premises as owners are accustomed to possess and improve their property, without any payment of rent or recognition of the title in another or a disavowal of a title in himself, will, in the absence of all other evidence, be sufficient to raise a presumption of his entry and holding as absolute owner and, unless rebutted by other evidence, will establish the fact of claim of title. Dyer v. Eldridge, 136 Ind. 654, 36 NE 522.

1. U. S.—Central Coal, etc., Co. v. Penny, 173 Fed. 340, 97 CCA 600; Wilkes v. Elliot, 29 F. Cas. No. 17,660, 5 Cranch C. C. 611.

Ala.—Barker v. Mobile Electric Co., 173 Ala. 28, 55 S 364.

Ga.—Hammond v. Crosby, 68 Ga. 767; Anderson v. Dodd, 65 Ga. 402; Tritt v. Roberts, 64 Ga. 156. But see Spalding v. Grigg, 4 Ga. 75.

Hawaii.—Kapiolani v. Cleghorn, 14 Hawaii 330; Albertina v. Kapiolani, 14 Hawaii 321, 325 [cit Cyc].

Mass.—Atty.-Gen. v. Ellis, 198 Mass. 91, 84 NE 430, 15 LRANS 1120; Bliss v. Ball, 99 Mass. 597.

Mich.—Greene v. Anglemire, 77 Mich. 168, 43 NW 772.

N. Y.—Sherry v. Frecking, 11 N. Y. Super. 452.

Or.—Dunnigan v. Wood, 58 Or. 119, 112 P 531.

Pa.—Neel v. McElhenny, 69 Pa. 300.

S. C.—Satcher v. Grice, 53 S. C. 126, 31 SE 3. Compare Metz v. Metz, 48 S. C. 472, 26 SE 787.

Utah.—Toltec Ranch Co. v. Babcock, 24 Utah 183, 66 P 876 [aff 191 U. S. 542, 24 SCt 169, 48 L. ed. 294].

Vt.—Morse v. Churchill, 41 Vt. 649.

Wis.—Progress Blue Ribbon Farms v. Harter, 147 Wis. 133, 132 NW 895; Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550; Hamachek v. Duvall, 135 Wis. 108, 115 NW 634; Closuit v. John Arpin Lumber Co., 130 Wis. 258, 110 NW 222; Illinois Steel Co. v. Jeka, 119 Wis. 122, 95 NW 97; Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905; Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830; Bishop v. Bleyer, 105 Wis. 330, 81 NW 413; Meyer v. Hope, 101 Wis. 123, 77 NW 720; Wollman v. Ruehle, 100 Wis. 31, 75 NW 425; Bartlett v. Secor, 56 Wis. 520, 14 NW 714. But see Riha v. Pelnar, 86 Wis. 408, 57 NW 51; Ayers v. Reidel, 84 Wis. 276, 54 NW 588.

See also Doe v. Roe, (Del.) 80 A 352; Mounts v. Mounts, 155 Ky. 363, 159 SW 818 (holding that as a general rule the exclusive possession of land by a stranger is presumed adverse where there is no family or other relation to account for it); Myers v. Schuchmann, 182 Mo. 159, 81 SW 618.

"Where one is shown to have been for the statutory period in actual, open, notorious, continuous and exclusive possession, apparently as owner, and such possession is unexplained, either by showing that it was under a lease from, or other contract with or otherwise by permission of the true owner, the presumption is that such possession was hostile." Albertina v. Kapiolani, 14 Hawaii 321, 325 (per Perry, J.).

2. Carney v. Hennessey, 74 Conn. 107, 49 A 910, 92 AmSR 199, 53 LRA 699; Wilson v. Williams, 52 Miss. 487.

3. U. S.—Central Coal, etc., Co. v. Penny, 173 Fed. 340, 97 CCA 600.

Ala.—Alexander v. Wheeler, 69 Ala. 332.

Hawaii.—Kapiolani v. Cleghorn, 14 Hawaii 330.

N. Y.—Hindley v. Metropolitan El. R. Co., 42 Misc. 56, 85 NYS 561 [aff 103 App. Div. 504, 93 NYS 53 (rev on other grounds 185 N. Y. 335, 78 NE 276)].

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[§ 591] **d. By One Cotenant.** It is well settled that where one joint owner is in possession of the whole the presumption is that he is keeping possession not only for himself but also for his cotenant according to their respective rights.[4] But an ouster or disseizin, while not to be presumed from the mere fact of sole possession, may be shown by such possession accompanied with a notorious claim of an exclusive right.[5]

[§ 592] **e. Continued Possession by Grantor.** Where the grantor and the grantee remain in joint possession, the latter being a member of the grantor's family, the possession of the grantor will not be presumed adverse to the possession of the grantee in whom the legal title is vested.[6] So it cannot be inferred that the possession of the former owner after sale for taxes was adverse,[7] although if there is clear and unmistakable evidence to the contrary such possession will ripen into title.[8]

[§ 593] **3. As to Actual Residence.** Where actual residence of land is a prerequisite of title by adverse possession such actual residence cannot be presumed but must be proved.[9]

[§ 594] **4. As to Continuity of Possession.** According to some decisions, adverse possession, when once shown, is presumed to continue until the contrary appears;[10] and this presumption extends to the successors of one whose possession was adverse.[11] This view is based on the general rule of presumptions that where the existence at one time of a certain condition or state of things of a continuing nature is shown the presumption arises that such condition or state continues to exist.[12] In others it is held that there is no such presumption because the claimant is in possession by virtue of a wrong, and that, although adverse possession may be shown to have existed at one time, it must be shown to have existed continuously for the whole period of limitation.[13]

[§ 595] **5. As to Good Faith.** Good faith in acquiring color of title will be presumed until the contrary is shown, and in order to overcome this presumption a design to defraud the person having a better title must be shown.[14] The party who alleges

(where it was held that it may be shown that the possession was in its origin permissive, and that sometimes the condition of the property and the circumstances accompanying the occupancy itself will rebut the presumption that it was adverse or under a claim of right).

And see Hamachek v. Duvall, 135 Wis. 108, 115 NW 634.

[a] **Thus** where on cross-examination the claimant will not state unequivocally that he occupied the land under a claim of right or that he asserted ownership to it during that period, the presumption arising from his overt acts will be overthrown and his claim to title by adverse possession denied. Ryan v. Lincoln, 85 Nebr. 539, 123 NW 1021.

4. Mounts v. Mounts, 155 Ky. 363, 159 SW 818; Gossom v. Donaldson, 18 B. Mon. (Ky.) 230, 68 AmD 723; Holley v. Hawley, 39 Vt. 525, 94 AmD 350; Leach v. Beattie, 33 Vt. 195; Roberts v. Morgan, 30 Vt. 319; Logan v. Ward, 58 W. Va. 366, 52 SE 398, 5 LRANS 156.

5. Parker v. Merrimack River Locks, etc., 3 Metc. (Mass.) 91.

6. Scruggs v. Decatur Mineral, etc., Co., 86 Ala. 173, 5 S 440.

7. Paynter v. U. S., 21 Ct. Cl. 221; Folley v. Thomas, 46 Ind. A. 559, 93 NE 181, 183 [cit Cyc]; Dotson v. Atchison, etc., R. Co., 81 Kan. 816, 106 P 1045; Gardner v. Wright, 49 Or. 609, 91 P 286. But see Zebriska's Succ., 119 La. 1076, 1092, 44 S 893 (where Provosty, J., as an expression of his own individual view on a question which the court was not called on to decide, said: "The decided weight of civil law authority is to the effect that such unexplained continued possession of the vendor is presumed to be for himself . . . and that . . . such a thing as a notarial sale of immovable property without delivery is an impossibility").

[a] **The reason for this is obvious.**—"If the parties are strangers in title, possession and the exercise of acts of ownership are, in themselves, in the absence of explanatory evidence, proof that the holding is adverse; whereas if the vendor, after having executed deed, continues to remain in possession, the natural and reasonable inference, in the absence of evidence to the contrary, would be that he holds in recognition of the rights of the person to whom he has conveyed." Graham v. St. Louis, etc., R. Co., 69 Ark. 562, 567, 65 SW 1048, 66 SW 344.

[b] **In absence of proof of delivery of deed.**—A possession of land by an intestate for forty years after the execution by him of a deed to a third person, made to defraud creditors, is, without proof of delivery, sufficient to raise the presumption either that the grantee never accepted the deed or had relinquished any claim thereunder. Trafford v. Austin, 3 Tenn. Ch. 492.

8. Folley v. Thomas, 46 Ind. A. 559, 93 NE 181.

9. Jayne v. Gregg, 42 Ill. 413.

10. U. S.—Elyton Land Co. v. McElrath, 53 Fed. 763, 3 CCA 649 (announcing the rule in Alabama).

Ala.—Buck v. Louisville, etc., R. Co., 159 Ala. 305, 48 S 699; Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 S 43; Hollingsworth v. Walker, 98 Ala. 543, 13 S 6; Abbett v. Page, 92 Ala. 571, 9 S 332; Marston v. Howe, 43 Ala. 271.

Ark.—Wilson v. Spring, 38 Ark. 181; Clements v. Lampkin, 34 Ark. 598.

Nebr.—Stettnische v. Lamb, 18 Nebr. 619, 26 NW 374.

N. Y.—Peo. v Trinity Church, 22 N. Y. 44; New York Cent., etc., R. Co. v. Moore, 137 App. Div. 461, 121 NYS 884 [aff 97 NE 41]; Bogardus v. Trinity Church, 4 Sandf. Ch. 633. See also Cahill v. Palmer, 45 N. Y. 478.

Wis.—Barrett v. Stradl, 73 Wis. 385, 41 NW 439, 9 AmSR 795.

See also Brien v. Sargent, 13 La. Ann. 198; Rayner v. Lee, 20 Mich. 384.

[a] **Thus,** where one took adverse possession in 1881 and was in possession in 1891 when suit was commenced, the presumption is that his possession was continuous, although there was an absence or uncertainty of proof of possession in the years 1882 and 1883. Hollingsworth v. Walker, 98 Ala. 543, 13 S 6.

11. Miller v. Rosenberger, 144 Mo. 292, 46 SW 167.

12. Hollingsworth v. Walker, 98 Ala. 543, 13 S 6. And see Wilson v. Spring, 38 Ark. 181, 194 (where it was said: "We think the presumption a fair one, that a possession under color of title, once adversely taken, has continued in the grantee, and passed to his grantees in turn, any interruption of it, must be shown by the other party. Otherwise it would be necessary to make some proof of possession each day. If the land had been in fact abandoned, or there had been any interruption of the possession in Spring and his grantees it devolved on defendants to show it").

13. Lynde v. Williams, 68 Mo. 360; Baldwin v. Shannon, 43 N. J. L. 596; Woods v. Hull, 90 Tex. 228, 38 SW 165; Atkinson v. Smith, (Va.) 24 SE 901. See also Jakne v. McMahon, 21 Cal. A. 781, 133 P 21 (holding that in actions to recover real property the holder of the legal title is presumed to have been in possession within the time required by law); Holdfast v. Shepard, 28 N. C. 361. In Lynde v. Williams, 68 Mo. 360, 369, the court said: "It is true that the existence of many things once proven to exist, are presumed to continue; but we do not regard that rule of presumption as applicable to the present instance. The books indeed lay down that a seizin once proven, or admitted, is presumed to continue until a disseizin is proved, 1 Greenl. Ev., § 42; but it certainly cannot be true that if you establish the existence of a disseizin at one period its continuance must therefore, be presumed until the contrary appear. Under such a ruling and theory of the law, the transfer of the title of the true owner to a mere disseizor would, it must be confessed, be greatly facilitated; and the real owner, in consequence of a few months adverse possession at some remote and forgotten period, would frequently be presumed out of his estate."

14. U. S.—Texas, etc., R. Co. v. Smith, 159 U. S. 66, 15 SCt 994, 40 L. ed. 77.

Ga.—Baxley v. Baxley, 117 Ga. 60, 43 SE 436; Hall v. Gay, 68 Ga. 442; Evans v. Baird, 44 Ga. 645; Garrett v. Adrain, 44 Ga. 274.

Ill.—Maring v. Meeker, 263 Ill. 136, 105 NE 31; Godfrey v. Dixon Power, etc., Co., 228 Ill. 487, 81 NE 1089; Dawson v. Edwards, 189 Ill. 60, 59 NE 590; Simons v. Drake, 179 Ill. 62, 53 NE 574; Sexson v. Barker, 172 Ill. 361, 50 NE 109; Coward v. Coward, 148 Ill. 268, 35 NE 867; Lewis v. Pleasants, 143 Ill. 271, 30 NE 323, 32 NE 384; Baldwin v. Ratcliff, 125 Ill. 376, 17 NE 794; Burgett v. Taliaferro, 118 Ill. 503, 9 NE 334; Stubblefield v. Borders, 92 Ill. 279; Davis v. Hall, 92 Ill. 85; Smith v. Ferguson, 91 Ill. 304; Whitney v. Stevens, 89 Ill. 53; Hodgen v. Henrichsen, 85 Ill. 259; Hardin v. Gouveneur, 69 Ill. 140; Billings v. Kankakee Coal Co., 67 Ill. 489; Milliken v. Marlin, 66 Ill. 13; Hardin v. Crate, 60 Ill. 215; Morrison v. Norman, 47 Ill. 477; McCagg v. Heacock, 34 Ill. 476, 85 AmD 327; Dickenson v. Breeden, 30 Ill. 279; Chickering v. Failes, 26 Ill. 507; McConnel v. Street, 17 Ill. 253.

Iowa.—Hughes v. Wyatt, 146 Iowa 392, 125 NW 334; McBride v. Caldwell, 142 Iowa 228, 119 NW 741; Blumer v. Iowa R. Land Co., 129 Iowa 37, 105 NW 342, 113 AmSR 444 [aff 206 U. S. 482, 27 SCt 769, 51 L. ed. 1148]; Clark v. Sexton, 122 Iowa 310, 98 NW 127.

La.—Wilfert v. Duson, 131 La. 21,

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bad faith must prove it.[15]

[§ 596] **6. As to Payment of Taxes.** Where payment of taxes is made an element of adverse possession there is no presumption that the claimant has paid them but he must show this fact;[16] nor does any presumption of payment arise from the fact that the taxes were assessed to the claimant and no default in payment was shown.[17] On the other hand, in the absence of evidence by the claimant either that taxes assessed on the land were paid by him or that none were assessed, it will be presumed that taxes have been assessed and that he has not paid them.[18] Payment of taxes by the true owner excludes any presumption that the taxes were assessed to or paid by the adverse claimant.[19] If taxes are paid by one not claiming title to the land, and the owner subsequently compensates him therefor, it will be presumed that the payment was made in the owner's behalf.[20] So, where the claimant shows that he has paid all the taxes assessed during the statutory period, he is not bound to show that there were no special assessments on the land, the presumption being that there were none.[21]

[§ 597] **7. As to Extent of Possession.** Possession of one claiming under color of title is presumed to be coextensive with the boundaries of the instrument under which he claims,[22] and that claim of title is limited to the premises described in the deed.[23] The presumption, however, like any other presumption of facts is not conclusive but yields to proof of actual facts which negative and overcome it. It is the facts, when established, that govern.[24] Where a lot owner has his lot surveyed and places his building one foot beyond the south line as surveyed, the presumption is that he intends to claim that his lot extended as far south as his building[25]

[§ 597½] **8. As to Owner's Knowledge of Location of Boundaries.** An owner of premises is presumed to know the true location of his boundaries, and is bound to take notice of the nature and extent of possession by a claimant.[25½]

[§ 598] **C. Admissibility—1. In General.** The admissibility of evidence to prove adverse possession is governed of course by the general rules relating to the admission of evidence in civil actions.[26] Title by adverse possession may be shown by proof of claimant's acts, in the exercise of which he assumed to be the owner,[27] and such acts may be shown by parol evidence.[28] The ordinary rule that legal title to real estate cannot be proved by parol does not prevent parol proof of title by adverse possession.[29]

[§ 599] **2. As to Character of Possession—a. Actual Possession.** Payment of taxes is not evidence of actual possession by the adverse claimant,[30] and

58 S 1019; Knight v. Berwick Lumber Co., 139 La. 233, 57 S 900; Leverett v. Loeb, 117 La. 310, 41 S 584 (under express statutory provision); Brewster v. Hewes, 113 La. 45, 36 S 883; Wells v. Wells, 30 La. Ann. 935; Kellar v. Parish, 11 La. Ann. 111; Sides v. Nettles, 4 Rob. 170.

Philippine.—Santiago v. Cruz, 19 Philippine 145; Arriola v. Gomez, 14 Philippine 627.

[a] **A failure to record the deed** which is color of title raises no presumption of bad faith. Rawson v. Fox, 65 Ill. 200.

[b] **The presumption of good faith is not rebutted** by the fact that the deed which is claimed to operate as color of title is a quitclaim deed. Hammond v. Crossby, 68 Ga. 767.

15. Peabody v. Burri, 255 Ill. 592, 99 NE 690; Godfrey v. Dixon Power, etc., Co., 228 Ill. 487, 81 NE 1089; Dawson v. Edwards, 189 Ill. 60, 59 NE 590; Sexson v. Barker, 172 Ill. 361, 50 NE 109; McBride v. Caldwell, 142 Iowa 228, 235, 119 NW 741 [cit Cyc 1147]; Blumer v. Iowa R. Land Co., 129 Iowa 32, 105 NW 342, 113 AmSR 444 [aff 206 U. S. 482, 27 SCt 769, 51 L. ed. 1148]; Clark v. Sexton, 122 Iowa 310, 98 NW 127; Wells v. Wells, 30 La. Ann. 935.

[a] **The presumption of good faith is overcome** by proof that color of title was acquired through the affidavit of the purchaser, misstating a fact which it was his duty to know. Keeney v. Glos, 258 Ill. 555, 101 NE 943.

16. Reynolds v. Willard, 80 Cal. 605, 22 P 262; Trinity County Lumber Co. v. Pinckard, 4 Tex. Civ. A. 671, 23 SW 720, 1015.

[a] **Tax receipts containing no description of any land** are without probative force to show payment of taxes for seven successive years after the recording of a tax deed, void on its face; in the absence of any evidence to connect the receipts with the land involved. Upham v. Weisshaar, 23 Colo. A. 277, 128 P 1129.

17. Trinity County Lumber Co. v. Pinckard, 4 Tex. Civ. A. 671, 23 SW 720, 1015.

18. Reynolds v. Willard, 80 Cal. 605, 22 P 262.

19. Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 P 113; Baldwin v. Temple, 101 Cal. 396, 35 P 1008.

20. Paris v. Lewis, 85 Ill. 597.

21. Chicago v. Middlebrooke, 143 Ill. 265, 32 NE 457.

22. Me.—Hornblower v. Banton, 103 Me. 375, 377, 69 A 568, 125 AmSR 300 and note [cit Cyc].

Mich.—Sheldon v. Michigan Cent. R. Co., 161 Mich. 503, 126 NW 1056.

Minn.—Barber v. Robinson, 78 Minn. 193, 80 NW 968.

Oh.—Humphries v. Huffman, 33 Oh. St. 395.

Tex.—Chicago, etc., R. Co. v. Johnson, (Civ. A.) 156 SW 253.

And see Chiles v. Conley, 9 Dana (Ky.) 385; and supra § 507.

"Generally where a person enters into land under a claim of title thereto by deed, his entry and possession are referred to such title, and he is deemed to have a seizin of the land coextensive with the boundaries stated in his deed, where there is no open adverse possession of any part of the land so described in any other person." Haddock v. Leary, 148 N. C. 378, 380, 62 SE 426 (per Brown, J.).

23. U. S.—Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 14 SCt 458, 38 L. ed. 279.

Ala.—Alabama State Land Co. v. Matthews, 168 Ala. 200, 207, 53 S 174 [cit Cyc].

Kan.—Edwards v. Fleming, 83 Kan. 653, 112 P 836, 33 LRANS 923 and note.

N. Y.—Bowie v. Brahe, 10 N. Y. Super. 35.

Wis.—Bishop v. Bleyer, 105 Wis. 330, 81 NW 413; Wollman v. Ruehle, 104 Wis. 603, 80 NW 919.

24. Rice v. Kelly, 81 Nebr. 92, 115 NW 625; Bowie v. Brahe, 10 N. Y. Super. 35; Illinois Steel Co. v. Budzisz, 106 Wis. 499, 81 NW 1027, 82 NW 534, 80 AmSR 54, 48 LRA 830.

[a] **Thus** the presumption that one entering land under a deed constituting color of title and definitely describing the metes and bounds of the land claims all the land covered by his paper title may be rebutted by proof that, although in actual possession of part of the land, he does not claim possession or ownership beyond a certain line. Haddock v. Leary, 148 N. C. 378, 62 SE 426.

25. Lloyd v. Franck, 248 Mo. 468, 154 SW 744.

25½. Wilson v. Seigel, (Tex. Civ. A.) 167 SW 1090; Sanders v. Moore, (Tex. Civ. A.) 157 SW 441. And see Browson v. Scanlan, 59 Tex. 222, 226 (where it was said that the party holding the superior title "is not in the condition of an ordinary and casual observer, but must diligently look to his own interests, know the boundaries of his own land, and ascertain the extent, meaning and locality of any settlement made within them without his authority").

26. Cal.—Baum v. Roper, 132 Cal. 42, 64 P 128; Allen v. McKay, 6 Cal. Unrep. Cas. 993, 70 P 8.

Conn.—Evans v. Bidwell, 20 Conn. 209.

Mass.—Murphy v. Com., 187 Mass. 361, 73 NE 524.

N. Y.—New York Cent., etc., R. Co. v. Brennan, 24 App. Div. 343, 48 NYS 675 [aff 163 N. Y. 584 mem, 57 NE 1119 mem].

Tex.—Paxton v. Meyer, 67 Tex. 96, 2 SW 817.

27. Ala—Trufant v. White, 99 Ala. 526, 13 S 83 (paying taxes and scheduling lands in bankruptcy proceedings).

Conn.—St. Peter's Church v. Beach, 26 Conn. 355; Comins v. Comins, 21 Conn. 413 (caring for premises with declarations as to what claimant intended to do with them).

Kan.—Stockton v. Geissler, 43 Kan. 612, 23 P 619 (fencing and cultivating land, paying taxes, offering land for sale, and openly and notoriously claiming it).

N. Y.—Howland v. Newark Cemetery Assoc., 66 Barb. 366 (entering under executory contract of purchase afterward consummated by deed).

S. C.—Metz v. Metz, 48 S. C. 472, 26 SE 787 (occupying property, paying taxes, and receiving rents).

28. Zellin v. Rogers, 21 Fed. 103; Durel v. Tennison, 31 La. Ann. 538; Kittridge v. Landrey, 2 Rob. (La.) 72; Broadway v. Pool, 19 La. 258.

29. Clark v. McAtee, 227 Mo. 152, 186, 127 SW 37.

30. Ala.—Reddick v. Long, 124 Ala. 260, 27 S 402.

Me.—Millett v. Mullen, 95 Me. 400, 49 A 871.

N. Y.—Archibald v. New York Cent., etc., R. Co., 157 N. Y. 574, 52 NE 567 [aff 1 App. Div. 251, 37 NYS 336].

Tenn.—Fuller v. Jackson, (Ch. A.) 62 SW 274; Call v. Cozart, (Ch. A.) 48 SW 312.

Tex.—Lutcher v. Allen, 43 Tex. Civ. A. 102, 95 SW 572.

And see supra § 30.

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a deed is not evidence of actual possession according to the boundaries described therein;[31] nor can it be shown by evidence that it was generally known in the vicinity of the land that the claimant's grantor claimed title thereto.[32] So possession cannot be established by declarations of a grantee in a deed of the property that the property was his, such declarations not being admissible except to characterize a possession otherwise proved.[33] The testimony of witnesses who have lived on the premises is competent to show actual possession.[34]

[§ 600] **b. Open and Notorious Possession.** Notoriety of possession by one setting up title by adverse possession may be shown by testimony that in the vicinity of the land he was reputed to be the owner[35] or in possession thereof;[36] and evidence as to who claimed the land at the time the adverse claimant acquired possession is likewise admissible on the question of notoriety of possession.[37]

[§ 601] **c. Continuous Possession.** It is competent to show, as affecting the question of continuous, uninterrupted possession, that one claiming property by adverse possession received rent for the use of the premises and that persons who built thereon obtained his permission to do so,[38] and contracts for deeds by one who was formerly in adverse possession are admissible for this purpose in ejectment against parties claiming under him, where he has recovered the possession and title by forfeiture.[39] So it has been held that evidence as to who claimed the land at the time the adverse claimant acquired possession is admissible on the question of the commencement and continuity of possession,[40] and to rebut a claim that continuity of possession was broken by the entry of others the claimant may introduce the records of unlawful detainer suits brought by him against such parties, showing that such suits were prosecuted to a successful termination.[41] Where land is held adversely by different occupants, the continuity of their possession, in order to show a limitation, need not be proved by written evidence but may be shown by parol.[42] A person merely going on land in the possession of a lessee under a third person claiming title, and informing the lessee that he owned it, and withdrawing on being told by the lessee that he must settle with the third person, cannot testify as to his intention in going on the land for the purpose of showing that his entry interrupted the third person's peaceable possession of the land.[43]

[§ 602] **d. Exclusive Possession.** Where in ejectment evidence is introduced to show exclusive possession of the adverse claimant for the statutory period, plaintiff should be permitted to introduce evidence to the contrary.[44]

[§ 603] **e. Hostile Possession—(1) To Show Hostility—(a) Declarations of Claimant.** Declarations of one in actual possession of land, showing that he claims to be sole owner, are admissible as tending to show hostility of possession.[45] Such declarations

31. Stockley v. Cissna, 119 Fed. 812, 56 CCA 324; Prevatt v. Harrelson, 132 N. C. 250, 43 SE 800; Heffelfinger v. Shutz, 16 Serg. & R. (Pa.) 44; Hudgins v. Simon, 94 Va. 659, 27 SE 606.

32. Goodson v. Brothers, 111 Ala. 589, 20 S 443; Woods v. Montevallo Coal, etc., Co., 84 Ala. 560, 3 S 475, 5 AmSR 393; Doe v. Clayton, 81 Ala. 391, 2 S 24; Walker v. Hughes, 90 Ga. 52, 15 SE 912; Metz v. Metz, 48 S. C. 472, 26 SE 787. See also McInerney v. Beck, 10 Wash. 515, 39 P 130.

33. Ala.—Doe v. Edmondson, 145 Ala. 557, 565, 40 S 505 [cit Cyc].
Ga.—Walker v. Hughes, 90 Ga. 52, 15 SE 912.
Kan.—Broughan v. Broughan, 10 Kan. A. 575, 61 P 874.
Miss.—Goff v. Cole, 71 Miss. 46, 13 S 870.
N. J.—Shields v. Ivey, 52 N. J. L. 280, 19 A 261.
And see Jeffery v. Jeffery, 87 Ark. 496, 113 SW 27; Seawell v. Young, 77 Ark. 309, 91 SW 544.

34. Silvarer v. Hansen, 77 Cal. 579, 20 P 136.

35. U. S.—Maxwell Land-Grant Co. v. Dawson, 151 U. S. 586, 14 SCt 458, 38 L. ed. 279; Eastern Oregon Land Co. v. Cole, 92 Fed. 949, 35 CCA 100. Compare Graydon v. Hurd, 55 Fed. 724, 5 CCA 258.
Ala.—Woods v. Montevallo Coal, etc., Co., 84 Ala. 560, 3 S 475, 5 AmSR 393. Compare Ross v. Goodwin, 88 Ala. 390, 6 S 682.
D. C.—Holtzman v. Douglas, 5 App. 397.
Fla.—Johnson v. Rhodes, 62 Fla. 220, 56 S 439.
Ill.—Knight v. Knight, 178 Ill. 553, 53 NE 306.
Mich.—Sparrow v. Hovey, 44 Mich. 63, 6 NW 93.
Mo.—Spicer v. Spicer, 249 Mo. 582, 595, 155 SW 832 [cit Cyc].
Va.—Lusk v. Pelter, 101 Va. 790, 45 SE 333.
Wash.—McAuliff v. Parker, 10 Wash. 141, 38 P 744.
See Garrett v. Weinberg, 54 S. C. 127, 31 SE 341, 34 SE 70.
Contra Carter v. Clark, 92 Me. 225, 42 A 398.

36. McAuliff v. Parker, 10 Wash. 141, 38 P 744.

37. Rexford v. Martin, 157 N. C. 577, 73 SE 118.

38. Jacob Tome Inst. v. Crothers, 87 Md. 569, 40 A 261.

39. Merritt v. Westerman, 165 Mich. 535, 131 NW 66.

40. Rexford v. Martin, 157 N. C. 577, 73 SE 118.

41. Barron v. Barron, 122 Ala. 194, 25 S 55.

42. Cal.—Cook v. McKinney, 2 Cal. Unrep. Cas. 711, 11 P 799.
Conn.—St. Peter's Church v. Beach, 26 Conn. 355.
Ga.—Shiels v. Roberts, 64 Ga. 370.
Ill.—Weber v. Anderson, 73 Ill. 439; Nauman v. Burch, 91 Ill. A. 48.
Mo.—Menkens v. Blumenthal, 27 Mo. 198.
Or.—Parker v. Wolf, 138 P 463; Vance v. Wood, 22 Or. 77, 29 P 73.

43. Murphy v. Com., 187 Mass. 361, 73 NE 524 (where it was said that his undisclosed intention cannot affect the character of his act or make it any more an interruption of the peaceable possession of the town).

44. Chastang v. Chastang, 141 Ala. 451; 37 S 799, 109 AmSR 45; Jennings v. Gorman, 19 Mont. 545, 48 P 1111.

[a] **That others than claimant used property.**—(1) It is competent to show that persons other than the adverse claimant used the property. Bracken v. Union Pac. R. Co., 56 Fed. 447, 5 CCA 548. (2) Where plaintiff in an action to quiet title to mineral land claimed exclusive adverse possession from the date of his location, and the evidence showed that defendant had purchased an interest from prior locators and had continued in possession with them until they leased it to a third person for a term of years, which expired after plaintiff's entry, the lease was competent evidence to show that defendant was in possession by his lessee when plaintiff was claiming exclusive possession. Simmons v. McCarthy, 128 Cal. 455, 60 P 1037. (3) So, where defendant in ejectment took under her mother, who claimed by adverse possession, and it appeared that she was in possession with the mother during a part of the period of adverse possession, it was proper to admit evidence that, during the joint possession, defendant, in common with plaintiff and others, took a deed of the land from the legal owner, and that defendant accepted a lease from her cotenants under the deed, and joined with them in ejectment against the mother, as bearing on the exclusiveness of the mother's possession. Collins v. Lynch, 167 Pa. 635, 31 A 921.

45. U. S.—Ricard v. Williams, 7 Wheat. 59, 5 L. ed. 398.
Ala.—Cooper v. Slaughter, 175 Ala. 211, 57 S 477; Garrow v. Toxey, 171 Ala. 644, 54 S 556; Hays v. Lemoine, 156 Ala. 465, 47 S 97 (holding that the exclusion of such evidence is reversible error); Driver v. King, 145 Ala. 585, 40 S 315; Beasley v. Clarke, 102 Ala. 254, 14 S 744; Lucy v. Tennessee, etc., R. Co., 92 Ala. 246, 8 S 806; Jones v. Pelham, 84 Ala. 208, 4 S 22; Hancock v. Kelly, 81 Ala. 368, 2 S 281; Eagle, etc., Mfg. Co. v. Gibson, 62 Ala. 369.
Ark.—Jeffery v. Jeffery, 87 Ark. 496, 113 SW 27; Seawell v. Young, 77 Ark. 309, 91 SW 544.
Cal.—Stockton Sav. Bank v. Staples, 98 Cal. 189, 32 P 938; Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205.
Ga.—Knotr v. Raymond, 73 Ga. 749; Clements v. Wheeler, 62 Ga. 53; Wood v. McGuire, 17 Ga. 303.
Hawaii.—Bishop v. Lulia, 16 Hawaii 680.
Ill.—Knight v. Knight, 178 Ill. 553, 53 NE 306.
Iowa.—Litchfield v. Sewell, 97 Iowa 247, 66 NW 104.
Kan.—Rand v. Huff, 59 Kan. 777, 53 P 483. See however Broughan v. Broughan, 10 Kan. A. 575, 61 P 874.
Ky.—Mann v. Cavanaugh, 110 Ky. 776, 62 SW 854, 23 KyL 238.
La.—Davidson v. Matthews, 3 La. Ann. 316.
Md.—Keener v. Kauffman, 16 Md. 296.
Mich.—Youngs v. Cunningham, 57 Mich. 153, 23 NW 626; Jacobs v. Callaghan, 57 Mich. 11, 23 NW 454.
Mo.—Swope v. Ward, 185 Mo. 316, 84 SW 895; Dunlap v. Griffith, 146 Mo. 283, 47 SW 917; Mississippi County v. Vowels, 101 Mo. 225, 14 SW 282.
N. H.—Clark v. Wood, 34 N. H. 447.
N. J.—Miller v. Feenane, 50 N. J. L. 32, 11 A 136. See however Shields v.

are "part of the res gestae of possession"[46] and are not objectionable as being self-serving declarations.[47] Nevertheless, declarations made out of the presence of the grantor by the grantee in a deed of land who has never been in possession are not admissible;[48] and it has been held that declarations made to a stranger to the title, by one who enters under another and who sets up title by disseizin, that he held adversely to the owner, are not admissible.[49] So declarations of one having title to land that it was occupied by his mother and that he lived on it as her property are irrelevant to show a disseizin by her, as they show that she occupied with his consent.[50] Testimony that a person while in possession of land had been heard to say he had lost his deed thereto does not come within the rule allowing proof of statements by one in possession explanatory of his possession.[51]

[§ 604] **(b) Acts of Ownership.** Adverse possession of land may be shown by proof of the acts of the claimant as well as by his oral declarations.[52] Exercise of the usual acts of ownership over the land in dispute is evidence to show that the possession was hostile.[53] The character of the possession cannot always be determined from the declarations of the person in possession because he may not make any, nor are his declarations always conclusive against one claiming under him.[54] Thus it is permissible to show a conveyance of the premises by the claimant,[55] or an offer to convey them,[56] or a mortgage,[57] or a lease,[58] or a devise thereof by him,[59] or that he prevented cattle belonging to others from running at large on the land,[60] or built a residence thereon,[61] or received the rents of the land and paid taxes thereon.[62] Evidence that plaintiff's grantor measured off the property conveyed and put down a stake, and that plaintiff built a fence on the line and held possession, is competent to show that the possession was hostile and not the establishment of an agreed line.[62½] So where an issue is raised as to

Ivey, 52 N. J. L. 280, 19 A 261 (which seems to hold contrary to the rule stated in the text).

N. Y.—Cole v. Lester, 48 Misc. 13, 15, 96 NYS 67 [quot Cyc].

Pa.—Kennedy v. Wible, 8 Pa. Cas. 299, 11 A 98.

S. C.—Levi v. Gardner, 53 S. C. 24, 30 SE 617; Metz v. Metz, 48 S. C. 472, 26 SE 787.

Tex.—Harnage v. Berry, 43 Tex. 567; Campbell v. San Antonio Mach., etc., Co., (Civ. A.) 133 SW 750; Texas, etc., R. Co. v. Broom, 53 Tex. Civ. A. 78, 114 SW 655; Whittaker v. Thayer, 48 Tex. Civ. A. 508, 512, 110 SW 787 [cit Cyc]; Daughtrey v. New York, etc., Co., (Civ. A.) 61 SW 947; Lochausen v. Laughter, 4 Tex. Civ. A. 291, 23 SW 513; Curtis v. Wilson, 2 Tex. Civ. A. 646, 21 SW 787.

Vt.—Goodall v. Drew, 85 Vt. 408, 82 A 680; Webb v. Richardson, 42 Vt. 465.

W. Va.—Parkersburg Industrial Co. v. Shultz, 43 W. Va. 470, 27 SE 255.

Wis.—Lamoreux v. Huntley, 68 Wis. 24, 31 NW 331; Roebke v. Andrews, 26 Wis. 311.

Eng.—Doe v. Pettett, 5 B. & Ald. 223, 7 ECL 129, 106 Reprint 1174.

See Saugatuck Cong. Soc. v. East Saugatuck School Dist., 53 Conn. 478, 2 A 751.

[a] **"Declarations of ownership** coupled with possession are the strongest proof of adverse possession, and are always admissible." Texas, etc., R. Co. v. Broom, 53 Tex. Civ. A. 78, 114 SW 655.

[b] **Application of rule.**—The declarations of one in adverse possession, made on the premises while in occupation, importing a claim of a statutory title in himself are admissible in an action of ejectment against his representatives to support the presumption of title from possession where they are against interest or not and whether made before or after the statutory title accrued. Rundle v. McNeil, 38 N. B. 406.

[c] **Declarations of predecessor.**—(1) Where the person setting up adverse possession is required to tack the possession of his predecessor in title to his own, the declarations and admissions of the former while in possession are admissible in evidence to show that the former's possession was not hostile (Day v. Wilder, 47 Vt. 533), (2) but the former's declarations and admissions made after he has surrendered possession to the latter are not admissible against the latter (Hunter v. Parsons, 18 S. C. L. 59; Coffrin v. Cole, 67 Vt. 226, 31 A 313).

[d] **Declarations by claimant's ancestor who was in possession and control of the property,** as to his ownership thereof, are admissible. Owen v. Moxon, 167 Ala. 615, 52 S 527; Knight v. Knight, 178 Ill. 553, 53 NE 306.

46. Owen v. Moxon, 167 Ala. 615, 52 S 527; Duffey v. Bellefonte Presb. Cong., 48 Pa. 46.

"The declarations in such instances are regarded as part of the act, or a 'verbal act' indicating present purpose or motive." Bishop v. Lulia, 16 Hawaii 630, 631.

47. Whittaker v. Thayer, 48 Tex. Civ. A. 508, 110 SW 787.

48. Parrott v. Baker, 82 Ga. 364, 9 SE 1068.

49. McCrane v. Marshall, 16 Me. 27, 33 AmD 631; Alden v. Gilmore, 13 Me. 178. See also Jones v. Pelham, 84 Ala. 208, 4 S 22.

50. Oakes v. Marcy, 10 Pick. (Mass.) 195.

51. Campbell v. Bates, 143 Ala. 338, 39 S 144; Daffron v. Crump, 69 Ala. 77.

52. Lyons v. Stroud, 257 Ill. 350, 100 NE 973; Vandalia R. Co. v. Clay County Home, etc., Assoc., (Ind.) 103 NE 1071; Vandalia R. Co. v. Wheeler, (Ind.) 103 NE 1069.

"Evidence of the possession of real property 'as owner' is not limited to the declarations or testimony of the claimant under the statute of limitations. The character or quality of the possession and use may be considered as the test." Woodcock v. Unknown Heirs, 92 Nebr. 723, 139 NW 646.

53. Ark.—Stuttgart v. John, 85 Ark. 520, 109 SW 541. And see Morris v. Eagle, 94 Ark. 180, 126 SW 382.

Conn.—Roy v. Moore, 85 Conn. 159, 82 A 233.

Mich.—Whitaker v. Erie Shooting Club, 102 Mich. 454, 60 NW 983.

Minn.—Cool v. Kelly, 78 Minn. 102, 80 NW 861; Dean v. Goddard, 55 Minn. 290, 56 NW 1060.

Miss.—Davis v. Bowmar, 55 Miss. 671; Magee v. Magee, 37 Miss. 138.

Mo.—Benne v. Miller, 149 Mo. 228, 50 SW 824; Pharis v. Jones, 122 Mo. 125, 26 SW 1032.

Nebr.—Towles v. Hamilton, 94 Nebr. 588, 143 NW 935.

N. C.—Bullock v. Lake Drummond Canal, etc., Co., 132 N. C. 179, 43 SE 593.

Or.—Smith v. Badura, 139 P 107; Parker v. Wolf, 138 P 463.

Pa.—Dikeman v. Parrish, 6 Pa. 210, 47 AmD 455.

Tex.—Bradshaw v. Mayfield, 18 Tex. 21; Smith v. Guinn, (Civ. A.) 131 SW 635; Victoria v. Victoria County, (Civ. A.) 94 SW 868 [rev on other grounds 100 Tex. 438, 101 SW 190].

Vt.—Goodall v. Drew, 85 Vt. 408, 82 A 680.

Va.—Brock v. Bear, 100 Va. 562, 42 SE 307.

Wis.—Pioneer Wood-Pulp Co. v. Chandos, 78 Wis. 526, 47 NW 661.

[a] **Land in dispute.**—The acts of ownership must be exercised over the land in dispute to render evidence of such acts admissible. New York Cent., etc., R. Co. v. Brennan, 24 App. Div. 343, 48 NYS 675 [aff 163 N. Y. 584 mem, 57 NE 1119 mem].

54. Pioneer Inv., etc., Co. v. Salt Lake City Bd. of Education, 35 Utah 1, 99 P 150, 136 AmSR 1016.

55. Doe v. Edmondson, 127 Ala. 445, 30 S 61; Dowdell v. Orphans' Home Soc., 114 La. 49, 38 S 16; House v. Williams, 16 Tex. Civ. A. 122, 40 SW 414. And see Carr v. Alexander, (Tex. Civ. A.) 149 SW 218 (holding that deeds whereby the grantors undertook to convey to others at least one half of the entire tract of land sought to be recovered were admissible in evidence as tending to show that grantors intended their possession to be adverse to every one, including their cotenant).

56. Gist v. Beaumont, 104 Ala. 347, 16 S 20.

57. Coley v. Martin, 95 Ark. 623, 129 SW 783; Noyes v. Dyer, 25 Me. 468 (holding that a mortgage deed from the grantee to a third person, made during the continuance of his occupation, describing the land as in his record deed is admissible in evidence on his part, in support of his claim to adverse possession, to show that he then claimed to be the owner and that he proved an act of dominion over the whole tract included in his deed).

58. Vandalia R. Co. v. Clay County Home, etc., Assoc., (Ind.) 103 NE 1071; Vandalia R. Co. v. Wheeler, (Ind.) 103 NE 1069; Murphy v. Com., 187 Mass. 361, 73 NE 524; Staley v. Stone, 41 Tex. Civ. A. 299, 92 SW 1017.

[a] **Lease of land not in controversy.**—Where plaintiffs in ejectment, relying upon a possessory title, claimed that for fifteen years they had been in the adverse possession of a large boundary of land, only a part of which was in controversy, it was admissible for them to prove that they had executed leases of various parts of the boundary not in controversy, as tending to show exercise of ownership over the entire boundary. South v. Deaton, 113 Ky. 312, 68 SW 137, 1105, 24 KyL 196, 533.

59. Green v. Mizelle, 54 Miss. 220.

60. Stevens v. Pedregon, (Tex. Civ. A.) 140 SW 236.

61. Vandalia R. Co. v. Clay County Home, etc., Assoc., (Ind.) 103 NE 1071; Vandalia R. Co. v. Wheeler, (Ind.) 103 NE 1069; Luce v. Parsons, 192 Mass. 8, 77 NE 1032.

62. Metz v. Metz, 48 S. C. 472, 26 SE 787.

62½. Marks v. Madsen, 261 Ill. 51, 103 NE 625.

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whether a person seized during his lifetime asserted title to the land, evidence may be introduced by those claiming under such person that during his lifetime he performed work upon it.[63] And where a wife, during her husband's life, has claimed property in his possession as her own, and on his death becomes administrator, her omission to inventory the property as part of his estate is evidence that her possession after his death was adverse to the estate.[64] On the other hand it may be shown that acts ostensibly those of an owner, committed by the claimant or by others in his behalf, were in fact done with the permission of the title holder.[65]

[§ 605] **(c) Payment of Taxes.** To show character of the possession the assessment rolls are admissible to prove that the land was assessed to the claimant or his grantor for the statutory period,[66] and one who claims that he has paid taxes on the land in dispute as a part of his homestead may show that it was not assessed to anyone else.[67] So in order to show that claimant's possession was hostile he may show that he paid taxes on the land, and for this purpose the tax receipts are competent evidence.[67½] But tax assessments paid by one who has never been in possession are inadmissible to show his adverse possession.[68]

[§ 606] **(d) Record or Pleadings in Other Suits.** The record of a suit by plaintiffs against the adverse holder, in which they recovered possession, is admissible to show adverse occupancy,[69] provided it contains such a description of the land as will identify and locate it,[70] and plaintiff in ejectment may introduce the record of a former ejectment suit against his remote grantor in which a voluntary nonsuit was taken for plaintiffs in that suit.[71] So in ejectment by heirs against parties claiming title by reason of the adverse possession of their grantor who was claimed to have been put in possession by her husband, the administrator, the petition of the latter for an order to sell such lands and the orders and proceedings had thereon were admissible, not only to show that he was the administrator but also that he took and held possession up to the time his wife was alleged to have been put in possession as administrator.[72] But the record of a suit tending to show adverse possession is properly excluded where the evidence shows that possession was not held for the statutory period.[73] Pleadings in a former ejectment suit by plaintiffs against defendant, involving the same property, are admissible in evidence to show that defendant asserted exclusive right to the possession at the former suit.[74] And pleas in a former action of ejectment between the same parties for the same lands, which set up an adverse claim by defendant in that suit, are admissible as tending to show that defendant in the pending suit, who had formerly held the land as plaintiff's tenant, had repudiated plaintiff's title.[75]

[§ 607] **(e) Deed under Which Claimant Holds.** A deed under which the party seeking to establish title by adverse possession claims, although insufficient to convey title, may nevertheless be used to show the hostile character of the possession of the land claimed,[76] and this is so although the deed is void on its face.[77] This principle of course does not apply where it is impossible to locate the land from the description in the deed,[78] and that too, although it be shown that the grantee therein entered into possession of some land under the grantor.[79]

[§ 608] **(f) Declarations or Admissions of True Owner.** Declarations and admissions by the true owner, recognizing title in the claimant, made while the claimant was in possession, are admissible to show the hostile character of the latter's possession.[80]

[§ 609] **(g) Submission to Arbitration.** The submission to arbitration of a boundary line is competent evidence to show the character of the pos-

63. Lick v. Diaz, 44 Cal. 479.
64. Bradshaw v. Mayfield, 18 Tex. 21.
65. Doe v. Edmondson, 127 Ala. 445, 30 S 61.
66. Elwell v. Hinckley, 138 Mass. 225; Sauers v. Giddings, 90 Mich. 50, 51 NW 265. And see Taylor v. McCowen, 154 Cal. 798, 99 P 351; Hughes v. Rutledge, 10 Man. 13.
67. Carter v. Clark, 92 Me. 225, 42 A 398.
67½. Big Sandy Iron, etc., Co. v. Williams, (Ala.) 63 S 1011.
68. Parrott v. Baker, 82 Ga. 364, 9 SE 1068.
69. Faulcon v. Johnston, 102 N. C. 264, 9 SE 394, 11 AmSR 737. See also Unger v. Roper, 53 Cal. 39. Compare Whitaker v. Whitaker, 157 Mo. 342, 58 SW 5.
70. Clark v. Kirby, (Tex. Civ. A.) 25 SW 1096.
71. Barron v. Barron, 122 Ala. 194, 25 S 55.
[a] **On the other hand** in an action of ejectment, where the defense was adverse possession, the record of a suit for specific performance brought three years before the commencement of the ejectment action by defendant against his alleged vendor under whom plaintiff claimed, in which suit the bill was dismissed, was admissible to show that defendant's possession was not adverse at that time. Marbach v. Holmes, 105 Va. 178, 52 SE 828.
72. Ashford v. Ashford, 136 Ala. 631, 34 S 10, 96 AmSR 82.
73. Dean v. Tucker, 58 Miss. 487.
74. Whitaker v. Whitaker, 157 Mo. 342, 58 SW 5.
75. Ponder v. Cheeves, 104 Ala. 307, 16 S 145.
76. U. S.—Probst v. Presbyterian Church Bd. of Domestic Missions, 129 U. S. 182, 9 SCt 263, 32 L. ed. 642; Stockley v. Cissna, 119 Fed. 812, 56 CCA 324; McIntyre v. Thompson, 10 Fed. 531, 4 Hughes 562; Roberts v. Pillow, 19 F. Cas. No. 11,909, Hempst. 624 [rev on other grounds 13 How. 472, 14 L. ed. 228].
Ala.—Carter v. Chevalier, 108 Ala. 563, 19 S 798.
Cal.—Oglesby v. Hollister, 76 Cal. 136, 18 P 146, 9 AmSR 177.
Conn.—New Haven Trust Co. v. Camp, 81 Conn. 539, 71 A 788 (void deed of gift); Taylor v. Danbury Public Hall Co., 35 Conn. 430; Comins v. Comins, 21 Conn. 413; Rogers v. Hillhouse, 3 Conn. 398.
Fla.—Kendrick v. Latham, 25 Fla. 819, 6 S 871.
Ill.—Godfrey v. Dixon Power, etc., Co., 228 Ill. 487, 81 NE 1089; Dawson v. Edwards, 189 Ill. 60, 59 NE 590; Kepley v. Scully, 185 Ill 52, 57 NE 187; Coombs v. Hertig, 162 Ill. 171, 44 NE 392; Burgett v. Taliaferro, 118 Ill. 503, 9 NE 334; Barger v. Hobbs, 67 Ill. 592.
Ky.—Drane v. Gregory, 3 B. Mon. 619.
Me.—Robinson v. Swett, 3 Me. 316.
Md.—Cadwalader v. Price, 111 Md. 310, 73 A 273, 134 AmSR 603, 19 Ann Cas 547.
Mich.—Chabert v. Russell, 109 Mich. 571, 67 NW 902.
Miss.—Bell v. Coats, 56 Miss. 776.
N. H.—Grant v. Fowler, 39 N. H. 101.
N. Y.—Northrop v. Wright, 7 Hill 476; LaFrombois v. Jackson, 8 Cow. 589, 18 AmD 463; Jackson v. Newton, 18 Johns. 355; Jackson v. Thomas, 16 Johns. 292.
Pa.—Sailor v. Hertzogg, 10 Pa. 296; Dikeman v. Parrish, 6 Pa. 210, 47 AmD 455; McCoy v. Dickenson College, 5 Serg. & R. 254.
Tex.—Alford v. Williams, 41 Tex. Civ. A. 436, 91 SW 636; Carr v. Alexander, (Civ. A.) 149 SW 218. And see Crawford v. Arnold, (Civ. A.) 78 SW 244.
Vt.—Lang v. Clark, 85 Vt. 222, 81 A 625; Hassam v. J. E. Safford Lumber Co., 82 Vt. 444, 74 A 197.
Wis.—Watts v. Owens, 62 Wis. 512, 22 NW 720; Furlong v. Garrett, 44 Wis. 111.
[a] **Deed of community property.**—In trespass to try title by a divorced wife against her former husband and his grantee to recover her community interest in land, where defendants pleaded the statute of limitations, the execution and delivery of the deed to such grantee were proper for the consideration of the jury in determining whether the possession of the former husband had been adverse. House v. Williams, 16 Tex. Civ. A. 122, 40 SW 414.
77. Skipwith v. Martin, 50 Ark. 141, 6 SW 514.
78. Whitehead v. Pitts, 127 Ga. 774, 56 SE 1004. Compare Newman v. Virginia, etc., Steel, etc., Co., 80 Fed. 228, 25 CCA 382 (holding that in an action to recover lands under the North Carolina statute a bond for title without sufficient description is admissible in evidence in connection with oral testimony showing occupation thereunder).
79. Whitehead v. Pitts, 127 Ga. 774, 56 SE 1004.
80. Bower v. Earl, 18 Mich. 367; Floyd v. Mintsey, 39 S. C. L. 361.

session of the disputed strip, although no certificate of the arbitrators' award has been made, and when executed by an actual survey is also competent, as bearing on the location of the true boundary.[81]

[§ 610] **(2) To Disprove Hostility—(a) In General.** Evidence of acts of the claimant or his predecessors in title tending to show recognition of title in another is admissible to show that the possession was not hostile,[82] as where he accepted a lease from the record owner,[83] or attempted to purchase the land from him,[84] or accepted payment for repairing the fence on the land.[85] Absence of notoriety of any adverse claim is also competent to disprove hostility.[86] So, where plaintiff claims title by adverse possession, a deed from him to defendant, given more than ten years before the bringing of the action, with oral testimony that about the time of its execution plaintiff became the agent for defendant is competent to show that plaintiff's possession was not adverse.[87] And correspondence between the grantor and the officers of the grantee, a railroad company, occurring before the execution of the conveyance and covenant may be admitted to prove the grantee's permissive occupation and to rebut the idea of adverse possession.[88] It has also been held, on an issue as to whether claimant acquired title to a strip of land by inclosure within his fence, that evidence that a surveyor, acting for claimant, located his line so as not to include the strip was admissible.[89] But where plaintiffs in trespass claimed title to the property by adverse possession an affidavit that the signers recollected that the board of supervisors had granted the use of the property to plaintiffs' father for life only was not admissible against plaintiffs' claim of adverse possession.[90] And where the question was the adverse possession of a wild and uncultivated island, evidence that good reasons existed why there was not a fence placed around the island and that the land would not be good for cultivation, was inadmissible, since it had no bearing on the adversary character of the possession.[91] In ejectment evidence of the value of the respective shares taken under a parol partition by those under whom plaintiff and defendants claimed, and that the houses were on the share of one, was admissible upon the issue whether the possession of defendants' predecessor, claimed through the occupancy of a house upon the strip in controversy, was adverse or was merely permissive, although the parol partition might have been insufficient to vest title.[92]

[§ 611] **(b) Declarations or Admissions of Claimant or Predecessor in Title.** Admissions or declarations made by claimant showing or tending to show that his possession was not hostile are admissible to prove such fact,[93] although not conclusive.[94] Thus it may be shown that he declared that he took possession of the land as the agent of another,[95] or that he disclaimed any title in himself.[96] So while, as already shown, such admissions or declarations made after a title has been acquired by adverse possession cannot operate to defeat it,[97] they are nevertheless admissible as bearing on the question whether the claimant's possession was in fact hostile.[98]

81. Cooper v. Slaughter, 175 Ala. 211, 57 S 477.

82. Southern California R. Co. v. Slauson, 6 Cal. Unrep. Cas. 874, 68 P 107 [rev on other grounds 138 Cal. 342, 71 P 352, 94 AmSR 58]; Wesson v. Tolsma, 117 Mich. 384, 75 NW 941 (holding that a deed to a lot originally one hundred feet deep, describing it as being eighty feet deep and bounded in the rear by an alley, is evidence that such grantee and his subsequent grantees held in recognition of the rights of the adjoining owners in such alley); Hoban v. Cable, 102 Mich. 206, 60 NW 466 (agreement to pay taxes on land in consideration of permission to occupy land in dispute). And see Price v. Greer, 89 Ark. 300, 116 SW 676, 118 SW 1009; Turner v. Neisler, 141 Ga. 27, 80 SE 461.

83. Baldwin v. Temple, 101 Cal. 396, 35 P 1008. And see Hyman v. Grant, (Tex. Civ. A.) 114 SW 853 (holding that where, in trespass to try title, plaintiff claimed that defendant held as tenant of himself or vendor, and defendant claimed by limitation, the testimony of a witness that he had acted as attorney for defendant's predecessor who had held the land by lease, that the predecessor desired to buy the land and had the witness negotiate for its purchase or for a new lease, and that to protect the improvements of the predecessor the witness who owned no interest made him a deed to the land without consideration, which was forwarded for record for the purpose of acquiring title by limitations, was admissible).

[a] **Lease taken by husband of adverse claimant.**—In an action where the wife claimed land by adverse possession, a lease taken by the husband from the other claimant was properly admitted as evidence that the wife had not held adversely, although the evidence was in conflict as to whether the husband had then abandoned the wife. Smith v. Adoue, (Tex. Civ. A.) 154 SW 258.

84. Zweibel v. Myers, 69 Nebr. 294, 95 NW 597.

85. Dryden v. Makey, (Tex. Civ. A.) 160 SW 302.

86. Spicer v. Spicer, 249 Mo. 582, 155 SW 832.

87. Roggencamp v. Converse, 15 Nebr. 105, 17 NW 361.

88. Mobile, etc., R. Co. v. Gilmer, 85 Ala. 422, 5 S 138.

89. Beecher v. Ferris, 110 Mich. 537, 68 NW 269.

90. Catchot v. Ocean Springs, 78 Miss. 509, 29 S 468.

91. Richmond v. Jones, 111 Va. 214, 68 SE 181.

92. Watters v. Brown, 177 Ala. 78, 58 S 291.

93. Ala.—Beasley v. Howell, 117 Ala. 499, 22 S 989; Jones v. Williams, 108 Ala. 282, 19 S 317; Trufant v. White, 99 Ala. 526, 13 S 83; Kirkland v. Trott, 66 Ala. 417.

Ark.—Russell v. Webb, 96 Ark. 190, 131 SW 456; Shirey v. Whitlaw, 80 Ark. 444, 97 SW 444.

Cal.—Dillon v. Center, 68 Cal. 561, 10 P 176; Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205.

Conn.—Turner v. Baldwin, 44 Conn. 121; Williams v. Ensign, 4 Conn. 456.

Ga.—Williamson v. Mosley, 110 Ga. 53, 35 SE 301; Wade v. Johnson, 94 Ga. 348, 21 SE 569; Brown v. Cantrell, 62 Ga. 257; Clements v. Wheeler, 62 Ga. 53; Wiley v. Warmock, 30 Ga. 701.

Ill.—Carroll v. Rabberman, 240 Ill. 450, 88 NE 995.

Iowa.—McNamee v. Moreland, 26 Iowa 96.

Ky.—Crutchlow v. Beatty, 23 SW 960, 15 KyL 464.

Me.—Walsh v. Wheelwright, 96 Me. 174, 52 A 649; Crane v. Marshall, 16 Me. 27, 33 AmD 631; Little v. Libby, 2 Me. 242, 11 AmD 68.

Mass.—Hale v. Silloway, 1 Allen 21; Stearns v. Hendersass, 9 Cush. 497, 57 AmD 65; Church v. Burghardt, 8 Pick. 327.

Miss.—Davis v. Bowmar, 55 Miss. 671.

Nebr.—Risher v. Madsen, 94 Nebr. 72, 142 NW 700.

N. H.—Hoag v. Wallace, 28 N. H. 547.

Pa.—St. Clair v. Shale, 9 Pa. 252; Calhoun v. Cook, 9 Pa. 226; Read v. Thompson, 5 Pa. 327; Sailor v. Hertzogg, 2 Pa. 182; Bradford v. Guthrie, 4 Brewst. 351.

S. C.—Metz v. Metz, 48 S. C. 472, 26 SE 787; Leger v. Doyle, 45 S. C. L. 109, 70 AmD 240; Pell v. Ball, 18 S. C. Eq. 361.

Tex.—Waller v. Leonard, 89 Tex. 507, 35 SW 1045; Hurley v. Lockett, 72 Tex. 262, 12 SW 212; Williams v. Rand, 9 Tex. Civ. A. 631, 30 SW 509.

Utah.—English v. Openshaw, 28 Utah 241, 78 P 476.

Vt.—Coffrin v. Cole, 67 Vt. 226, 31 A 313; Day v. Wilder, 47 Vt. 583.

Eng.—Doe v. Pettett, 5 B. & Ald. 223, 7 E. C. L. 129, 106 Reprint 1174.

[a] **Declarations of agent.**—Where, in an action for forcible entry and detainer, plaintiff claimed title by adverse possession, declarations made by plaintiff's authorized agent for and in its behalf, tending to show that plaintiff did not claim the land, were admissible. Bailey v. Blacksher Co., 142 Ala. 254, 37 S 827.

[b] **Declarations of predecessor in title.**—In an action of ejectment the testimony of a witness that he heard one through whom defendant claims say, while in possession of the land sued for, that the land belonged to plaintiff, is part of the res gestæ, and hence admissible evidence. Beasley v. Clarke, 102 Ala. 254, 14 S 744.

94. Williamson v. Mosley, 110 Ga. 53, 35 SE 301; Carroll v. Rabberman, 240 Ill. 450, 88 NE 995.

95. Kirkland v. Trott, 66 Ala. 417.

96. Dillon v. Center, 68 Cal. 561, 10 P 176; Wade v. Johnson, 94 Ga. 348, 21 SE 569. See also De Lancey v. Hawkins, 163 N. Y. 587, 57 NE 1108.

97. See supra § 560.

98. Ala.—Jones v. Williams, 108 Ala. 282, 19 S 317; Beasley v. Clarke, 102 Ala. 254, 14 S 744; Trufant v. White, 99 Ala. 526, 13 S 83.

Ark.—Russell v. Webb, 96 Ark. 190, 131 SW 456.

Cal.—Baldwin v. Temple, 101 Cal. 396, 35 P 1008; Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205.

D. C.—Dudley v. Brown, 10 D. C. 280. See however Neale v. Lee, 19 D. C. 14.

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[§ 612] **(c) Nonpayment of Taxes.** Although nonpayment of taxes by one in possession of land is insufficient in itself to disprove an adverse holding clearly shown by some other evidence,[99] it is nevertheless competent evidence to show that possession was not of a hostile character,[1] as is also evidence that the land was not assessed to him,[2] or that he did not return the land for taxation,[3] which is said to be strongly persuasive evidence that he did not claim to own the land.[4]

[§ 613] **(d) Abandonment.** Evidence of an abandonment of the possession after the lapse of the period of limitation is admissible to show that the possession was not hostile,[5] but such evidence is not conclusive as to the hostility of the prior possession.[6]

[§ 614] **3. As to Extent of Possession.** Declarations of the occupant at the time of the settlement, as to under whom and how he took possession, are admissible to show extent of possession,[7] as are also his declarations as to the boundaries.[8] Extent of possession may also be shown by a deed under which the claimant entered, although void or in some respects defective,[9] provided of course it includes the land in dispute.[10] Likewise the assessment or payment of taxes on the land against the claimant is competent evidence on the issue of extent of possession,[11] and where a party claims an entire tract by adverse possession evidence that he paid taxes on a part only is admissible on such issue;[12] so where neither claimant is in actual possession of an interlock evidence of the junior claimant's possession within boundaries claimed by him outside of the interlock is, for reasons stated in a previous section,[13] inadmissible against the holder of the older and better title.[14]

[§ 615] **4. As to Title—a. To Show or Disprove Claim of Title.** According to the great weight of authority, declarations of ownership made by one in actual possession of land are part of the res gestæ of possession and are admissible to show claim of title or the absence of it.[15] So declarations of a

Ky.—Walling v. Eggers, 104 SW 360, 31 KyL 1009; Murphy v. Roney, 82 SW 396, 26 KyL 634.

Mass.—Church v. Burghardt, 8 Pick. 327.

Minn.—Todd v. Weed, 84 Minn. 4, 86 NW 756.

Miss.—Bentley v. Callaghan, 79 Miss. 302, 30 S 709.

Mo.—Meier v. Meier, 105 Mo. 411, 16 SW 223.

Nebr.—Baty v. Elrod, 66 Nebr. 735, 92 NW 1032, 97 NW 843.

N. Y.—American Bank-Note Co. v. New York El. R. Co., 129 N. Y. 252, 29 NE 302.

Pa.—Neel v. McElhenny, 69 Pa. 300, 19 PittsbLegJNS 126.

Tex.—Williams v. Rand, 9 Tex. Civ. A. 631, 30 SW 509.

[a] **Written recognition of title.**—If a person in possession of land recognizes in writing the title of one not in possession, such writing is admissible to rebut a claim of adverse possession. Bradford v. Guthrie, 4 Brewst. (Pa.) 351.

99. Peters v. Tackaberry, 117 Minn. 373, 135 NW 805; Johnson v. Conner, 48 Wash. 431, 93 P 914.

1. Houston Oil Co. v. Jones, (Tex. Civ. A.) 161 SW 92; Harris v. Wagnon, (Tex. Civ. A.) 148 SW 606; Webb v. Lyerla, 43 Tex. Civ. A. 124, 94 SW 1095; Hamachek v. Duvall, 135 Wis. 108, 115 NW 634.

2. Carter v. Clark, 92 Me. 225, 42 A 398.

3. Driver v. King, 145 Ala. 585, 40 S 315; Doe v. Edmondson, 127 Ala. 445, 30 S 61; Wing v. Roswald, 74 Ala. 346.

[a] **Permitting lands to be assessed to the former owner and purchasing the tax titles annually** may be shown as throwing light on the character of the occupancy. Merritt v. Westerman, 165 Mich. 535, 131 NW 66.

4. Janke v. McMahon, 21 Cal. A. 781, 133 P 21; Peters v. Tackaberry, 117 Minn. 373, 135 NW 805; Mattson v. Warner, 115 Minn. 520, 132 NW 1127; Todd v. Weed, 84 Minn, 4, 86 NW 756.

5. Todd v. Kauffman, 19 D. C. 304. See also McBeth v. Donnelly, 23 S. C. L. 177.

6. Todd v. Kauffman, 19 D. C. 304.

7. Adams v. Tiernan, 5 Dana (Ky.) 394; Smith v. Morrow, 7 T. B. Mon. (Ky.) 234.

[a] **Declarations of one under whom the occupant claims** are admissible to show extent of possession. Texas, etc., R. Co. v. Broom, 53 Tex. Civ. A. 78, 114 SW 655.

8. Gore v. McPherson, 161 N. C. 638, 77 SE 835.

9. U. S.—Stockley v. Cissna, 119 Fed. 812, 56 CCA 324.

Ala.—McInery v. Irvin, 90 Ala. 275, 7 S 841; Bohannon v. State, 73 Ala. 47.

Ill.—Stumpf v. Osterhage, 111 Ill. 82.

Ky.—New Domain Oil, etc., Co. v. Gaffney Oil Co., 134 Ky. 792, 121 SW 699; Overton v. Perry, 129 Ky. 415, 111 SW 369, 33 KyL 931.

Minn.—Murphy v. Doyle, 37 Minn. 113, 33 NW 220.

[a] **Applications of rule.**—(1) Where plaintiff claimed title to certain land by limitations, a deed to the land executed to her by her husband before marriage was admissible to show the extent of her claim, although no title was shown in the husband at the time the deed was made. Alford v. Williams, 41 Tex. Civ. A. 436, 91 SW 636. (2) Invalid surveys and patents obtained by persons claiming land under them by reason of adverse possession for more than fifteen years are admissible to show the extent of the possession claimed. Anderson v. Proctor Coal Co., (Ky.) 128 SW 85. (3) In ejectment, where defendant set up the adverse possession of his grantor, evidence of the conveyance is admissible to show color of title and extent of possession and improvements, although the grantor did not hold adversely. Lay v. Fuller, 178 Ala. 375, 59 S 609.

[b] **A void testimonio** for land is admissible in evidence for the purpose of showing the extent of a party's adverse possession. Lambert v. Weir, 27 Tex. 359. And see Wofford v. McKinna, 23 Tex. 36, 76 AmD 53; Jones v. Menard, 1 Tex. 771.

[c] **Certificate of entry.**—On an issue as to adverse possession by defendant a certificate of entry is admissible, without proof of its execution, as color of title to fix the boundaries of defendant's possession. Alabama State Land Co. v. Kyle, 99 Ala. 474, 13 S 43.

[d] **A contract of purchase and conveyance** of land, from one who is the presumptive owner thereof, under a decree of partition determining title in his favor is, together with such decree, admissible to show the extent and nature of his claim and to constitute him an adjoining owner, within the meaning of the authorities upon agreed boundary lines. Silvarer v. Hansen, 77 Cal. 579, 20 P 136.

[e] **In Kentucky** if one enters land without a paper title, claiming to a marked boundary, that fact may be shown as indicating the extent of his possession. Richie v. Owsley, 137 Ky. 63, 121 SW 1015.

10. Chenault v. Quisenberry, 56 SW 410, 21 KyL 1771.

[a] **Showing that deed covered land in dispute.**—Where the question whether the deed is good as color of title depends on whether it covered the land in dispute, and its terms in this respect are ambiguous, parol evidence is admissible to show that it did in fact apply to such land. Chauncey v. Brown, 99 Ga. 766, 26 SE 763.

11. Brannan v. Henry, 175 Ala. 454, 57 S 967; White v. Eavenson, 46 Tex. Civ. A. 158, 101 SW 1029.

12. Knight v. Hunter, 155 Ala. 238, 46 S 235. And see Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45.

13. See supra § 531.

14. Pardee v. Johnston, 70 W. Va. 347, 74 SE 721.

15. U. S.—Ricard v. Williams, 7 Wheat. 59, 5 L. ed. 398.

Ala.—Henry v. Brown, 143 Ala. 446, 39 S 325; Beasley v. Clarke, 102 Ala. 264, 14 S 744. See also Jones v. Pelham, 84 Ala. 208, 4 S 22 (which seems to maintain that such declarations are not admissible unless there is evidence that they were brought to the knowledge of the owner).

Cal.—Stockton Sav. Bank v. Staples, 98 Cal. 189, 32 P 936.

Conn.—New Haven Trust Co. v. Camp, 81 Conn. 539, 71 A 788; Turner v. Baldwin, 44 Conn. 121; St. Peter's Church v. Beach, 26 Conn. 355. Contra Seymour v. Over-River School Dist., 53 Conn. 502, 3 A 552.

Ill.—Kirby v. Kirby, 236 Ill. 255, 86 NE 259; Knight v. Knight, 178 Ill. 553, 53 NE 306.

Ind.—Burr v. Smith, 152 Ind. 469, 53 NE 469.

Iowa.—McNamee v. Moreland, 26 Iowa 96.

Ky.—Cottle v. Howerton, 35 SW 552, 18 KyL 121.

Mass.—Snow v. Orleans, 126 Mass. 453; Brown v. King, 5 Metc. 173.

Mich.—Jacobs v. Callaghan, 57 Mich. 11, 23 NW 454.

Minn.—Brown v. Kohout, 61 Minn. 113, 63 NW 248.

N. H.—South Hampton v. Fowler, 54 N. H. 197; Bell v. Woodward, 46 N. H. 315; Tappan v. Tappan, 36 N. H. 98; Hoag v. Wallace, 28 N. H. 547; Downs v. Lyman, 3 N. H. 486.

N. Y.—Cole v. Lester, 48 Misc. 13, 96 NYS 67.

Or.—Westenfelder v. Green, 24 Or. 448, 34 P 23.

Pa.—Duffey v. Bellefonte Presb. Cong., 48 Pa. 46; St. Clair v. Shale, 9 Pa. 252; Calhoun v. Cook, 9 Pa. 226; Sailor v. Hertzogg, 2 Pa. 182; Kennedy v. Wible, 8 Pa. Cas. 299, 11 A 98.

Tex.—Waller v. Leonard, 89 Tex. 507, 35 SW 1045; Texas, etc., R. Co. v. Broom, 53 Tex. Civ. A. 78, 114 SW 655.

Vt.—Toyley v. Baream, 48 Vt. 132.

[a] **Declarations of agent.**—Where the claimant held possession through an agent, the latter's declarations disclaiming any right of possession are admissible against the claimant. Pearson v. Adams, 129 Ala. 157, 29 S 977.

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former occupant under whom the adverse possessor claims, showing that such occupant entered without claim of title, are admissible in evidence against the claimant.[16] Nevertheless, in order to prove or disprove claim of title on the part of the adverse claimant, declarations or admissions by him are not necessary. Acts alone as well as assertion are competent evidence.[17] Acts on the part of the claimant with regard to the land, such as are usually done or performed only by the owner or one asserting ownership, are evidence to go to the jury on the question whether his possession was under claim of title.[18] Thus for the purpose of establishing claim of title it is competent to show that the claimant made permanent and valuable improvements on the land,[19] or cut timber on it,[20] or inclosed it,[21] or brought an action of trespass against others who attempted to use the property,[22] or hired an agent to look after and "shoo" trespassers off the land,[23] or executed a deed[24] or mortgage[25] on the land, or offered to donate part of it,[26] or attempted while in possession to grant easements in the land to third persons,[27] or listed it for taxation,[28] or that the taxes on the land were assessed against him,[29] or that he paid taxes thereon,[30] although payment of taxes is in itself insufficient to establish title by adverse posses-

[b] **Evidence not within rule.**—Where defendants claimed by adverse possession, testimony of a witness that he had a conversation with defendants' predecessor, in which he made no claim to the land in question, may be rejected, although uncontradicted, the predecessor being dead. "We cannot hold that, under the circumstances, the judge was obliged to accept it or to give it weight." Appel v. Childress, 53 Tex. Civ. A. 607, 116 SW 129.

16. Keener v Kauffman, 16 Md. 296.

17. Ala.—Lucy v. Tennessee, etc., R. Co., 92 Ala. 246, 8 S 806.

Cal.—Kockemann v. Bickel, 92 Cal. 665, 28 P 686.

Ga.—Conyers v. Kenan, 4 Ga. 308, 48 AmD 226.

Ill.—Faloon v. Simshauser, 130 Ill. 649, 22 NE 835; Illinois Cent. R. Co. v. Houghton, 126 Ill. 233, 18 NE 301, 9 AmSR 581, 1 LRA 213; James v. Indianapolis, etc., R. Co., 91 Ill. 554; Hill v. Coal Valley Min. Co., 103 Ill. A. 41.

Ind.—Rennert v. Shirk, 163 Ind. 542, 72 NE 546.

Iowa.—Wilbur v. Cedar Rapids, etc., R. Co., 116 Iowa 65, 89 NW 101.

Minn.—Sawbridge v. Fergus Falls, 101 Minn. 378, 112 NW 385; Cool v. Kelly, 78 Minn. 102, 80 NW 861; Dean v. Goddard, 55 Minn. 290, 56 NW 1060.

Miss.—Magee v. Magee, 37 Miss. 138; Kohlheim v. Harrison, 34 Miss. 457.

Nebr.—Florence v. White, 50 Nebr. 516, 70 NW 50.

N. Y.—Barnes v. Light, 116 N. Y. 34, 22 NE 441; Timmermann v. Cohn, 70 Misc. 327, 128 NYS 770 [aff 146 App. Div. 924 mem, 31 NYS 1146 mem (rev on other grounds 97 NE 589)]; Sherry v. Frecking, 11 N. Y. Super. 452.

Va.—Virginia Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232.

And see cases infra note 18 et seq.

"While the intention to claim title must be manifest, it need not be expressed. The intention to hold and claim title is often best shown by the acts of the parties, and their manner of occupancy." Brock v. Bear, 100 Va. 562, 565, 42 SE 307.

18. Ala.—Stiff v. Cobb, 126 Ala. 381, 28 S 402, 85 AmSR 38; Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Lucy v. Tennessee, etc., R. Co., 92 Ala. 246, 8 S 806; Humes v. Bernstein, 72 Ala. 546.

Cal.—Lick v. Diaz, 44 Cal. 479; Knight v. Cohen, 7 Cal. A. 43, 93 P 396.

Ga.—Morrison v. Hays, 19 Ga. 294.

Ill.—Grim v. Murphy, 110 Ill. 271; James v. Indianapolis, etc., R. Co., 91 Ill. 554.

Ind.—Rennert v. Shirk, 163 Ind. 542, 72 NE 546.

Iowa.—Blennerhassett v. Forest City, 117 Iowa 680, 91 NW 1044; Wilbur v. Cedar Rapids, etc., R. Co., 116 Iowa 65, 89 NW 101.

Ky.—Houchin v. Houchin, 20 SW 506, 14 KyL 453.

Me.—Blackington v. Sumner, 69 Me. 136; Chadbourne v. Swan, 40 Me. 260; School Dist. No. 4 v. Benson, 31 Me. 381, 52 AmD 613; Noyes v. Dyer, 25 Me. 468.

Md.—Waltemeyer v. Baughman, 63 Md. 200.

Mass.—Boston v. Richardson, 105 Mass. 351.

Mich.—Shearer v. Middleton, 88 Mich. 621, 50 NW 737.

Minn.—Mattson v. Warner, 115 Minn. 520, 132 NW 1127; Dean v. Goddard, 55 Minn. 290, 56 NW 1060; Glencoe v. Wadsworth, 48 Minn. 402, 51 NW 377.

Nebr.—Webb v. Thiele, 56 Nebr. 752, 77 NW 56.

N. H.—Hodgdon v. Shannon, 44 N. H. 572; Fellows v. Fellows, 37 N. H. 75.

N. Y.—Barnes v. Light, 116 N. Y. 34, 22 NE 441; Buffalo Creek R. Co. v. Collins, 41 App. Div. 8, 58 NYS 65; Dominy v. Miller, 33 Barb. 386; Sherry v. Frecking, 11 N. Y. Super. 452; Cornelius v. Hall, 32 Misc. 663, 66 NYS 451; La Frombois v. Jackson, 8 Cow. 589, 18 AmD 463.

N. C.—McLean v. Smith, 114 N. C. 356, 19 SE 279.

Or.—Rowland v. Williams, 23 Or. 515, 32 P 402.

Tex.—Baldwin v. Roberts, 13 Tex. Civ. A. 563, 36 SW 789.

Vt.—Perrin v. Garfield, 37 Vt. 304.

Wis.—Illinois Steel Co. v. Jeka, 119 Wis. 122, 95 NW 97; Pioneer Wood-Pulp Co. v. Chandos, 78 Wis. 526, 47 NW 661; Allen v. Allen, 55 Wis. 202, 16 NW 610.

19. Luce v. Parsons, 192 Mass. 8, 77 NE 1032; Hamilton v. West, 63 Mo. 93.

20. Stone v. Perkins, 217 Mo. 586, 117 SW 717.

21. Storr v. James, 84 Md. 282, 35 A 965.

22. Hollister v. Young, 42 Vt. 403.

23. Chilton v. Comanianni, 221 Mo. 685, 120 SW 1174.

24. Barron v. Barron, 122 Ala. 194, 25 S 55; Carr v. Mouzon, 86 S. C. 461, 68 SE 661.

25. Carr v. Mouzon, 86 S. C. 461, 68 SE 661.

26. Edmondson v. Anniston City Land Co., 128 Ala. 589, 29 S 596.

27. Doe v. Edmondson, 127 Ala. 445, 30 S 61.

28. Walling v. Eggers, 78 SW 428, 25 KyL 1563; Pasley v. Richardson, 119 N. C. 449, 26 SE 32; Ruffin v. Overby, 105 N. C. 78, 11 SE 251; Faulcon v. Johnston, 102 N. C. 264, 9 SE 394, 11 AmSR 737.

29. Knight v. Hunter, 155 Ala. 238, 46 S 235.

30. U. S.—Holtzman v. Douglas, 168 U. S. 278, 18 SCt 65, 42 L. ed. 466 [aff 5 App. (D. C.) 397]; Fletcher v. Fuller, 120 U. S. 534, 7 SCt 667, 30 L. ed. 759; Ewing v. Burnet, 11 Pet. 41, 9 L. ed. 624.

Ala.—Brannan v. Henry, 175 Ala. 454, 57 S 967; Bass v. Jackson Lumber Co., 169 Ala. 455, 53 S 800; Clarke v. Dunn, 161 Ala. 633, 50 S 93; Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45; Anniston City Land Co. v. Edmondson, 141 Ala. 366, 37 S 424; Gist v. Beaumont, 104 Ala. 347, 16 S 20; Trufant v. White, 99 Ala. 526, 13 S 83; Green v. Jordan, 83 Ala. 220, 3 S 513, 3 AmSR 711; Baucum v. George, 65 Ala. 259; Jay v. Stein, 49 Ala. 514.

Cal.—Frick v. Simon, 75 Cal. 337, 17 P 439, 7 AmSR 177. See Baum v. Reay, 96 Cal. 462, 29 P 117, 31 P 561.

Conn.—Merwin v. Backer, 80 Conn. 338, 68 A 373; Merwin v. Morris, 71 Conn. 555, 42 A 855; Wren v. Parker, 57 Conn. 529, 18 A 790, 14 AmSR 127, 6 LRA 80.

Ill.—Holbrook v. Gouveneur, 114 Ill. 623, 3 NE 220; Walcott v. Gibbs, 97 Ill. 118.

Iowa.—Wilbur v. Cedar Rapids, etc., R. Co., 116 Iowa 65, 89 NW 101.

Ky.—Walling v. Eggers, 78 SW 428, 25 KyL 1563.

Me.—Millett v. Mullen, 95 Me. 400, 49 A 871; Carter v. Clark, 92 Me. 225, 42 A 398.

Md.—Sadtler v. Peabody Heights Co., 66 Md. 1, 10 A 599.

Mass.—Enfield v. Woods, 212 Mass. 547, 99 NE 331; Whitman v. Shaw, 166 Mass. 451, 44 NE 333; Elwell v. Hinckley, 138 Mass. 225.

Mich.—Whitaker v. Erie Shooting Club, 102 Mich. 454, 60 NW 983; Sauers v. Giddings, 90 Mich. 50, 51 NW 265; Murray v. Hudson, 65 Mich. 670, 32 NW 889; Cook v. Rounds, 60 Mich. 310, 27 NW 517; Rayner v. Lee, 20 Mich. 384.

Minn.—Krueger v. Market, 124 Minn. 393, 145 NW 30; Murphy v. Doyle, 37 Minn. 113, 33 NW 220.

Mo.—Himmelberger-Harrison Lumber Co. v. Craig, 248 Mo. 319, 154 SW 73; Chilton v. Comanianni, 221 Mo. 685, 120 SW 1174; Stone v. Perkins, 217 Mo. 586, 117 SW 717; Norfleet v. Hutchins, 68 Mo. 597; Leeper v. Baker, 68 Mo. 400; St. Louis Public Schools v. Risley, 40 Mo. 356; Draper v. Shoot, 25 Mo. 197, 69 AmD 462.

Nebr.—Omaha, etc., L. & T. Co. v. Barrett, 31 Nebr. 803, 48 NW 967; Tourtelotte v. Pearce, 27 Nebr. 57, 42 NW 915.

N. H.—Farrar v. Fessenden, 39 N. H. 268.

N. Y.—Archibald v. New York Cent., etc., R. Co., 157 N. Y. 574, 52 NE 567; Thompson v. Burhans, 79 N. Y. 93; McLain v. Bird, 120 NYS 1032.

N. C.—Pasley v. Richardson, 119 N. C. 449, 26 SE 32; Ruffin v. Overby, 105 N. C. 78, 11 SE 251; Faulcon v. Johnston, 102 N. C. 264, 9 SE 394, 11 AmSR 737.

Pa.—Greenwich Coal, etc., Co. v. Learn, 234 Pa. 180, 83 A 74; McClure v. Jones, 121 Pa. 550, 15 A 659; Murphy v. Springer, 1 Grant 73; Hockenbury v. Snyder, 2 Watts & S. 240; Kelsey v. Murray, 9 Watts 111; Royer v. Benlow, 10 Serg. & R. 303.

S. C.—Metz v. Metz, 48 S. C. 472, 26 SE 787. See however McBeth v. Donnelly, 28 S. C. L. 177.

Tex.—Hunter v. Malone, 49 Tex. Civ. A. 116, 108 SW 709; Staley v. Stone, 41 Tex. Civ. A. 299, 92 SW 1017; Sparks v. Hall, 29 Tex. Civ. A. 177, 67 SW 916; Texas Tram, etc., Co. v. Gwin, 29 Tex. Civ. A. 1, 67 SW 892, 68 SW 721.

Vt.—Paine v. Hutchins, 49 Vt. 314.

[a] **Payment of taxes strong evidence.**—(1) "The payment of taxes by the person asserting title by adverse possession is strong evidence in support of his claim. Mattson v. Warner, 115 Minn. 520, 132 N. W. 1127; Todd v. Weed, 84 Minn. 4, 86 NW 756." Curtis, etc., Co. v. Minneapolis, 123 Minn. 344, 349, 144 NW 150. (2) But the

sion.[31] So as tending to show claim of title it is competent to show that the claimant purchased the land and held color of title,[32] or that he held a bond for title,[33] or that the land in controversy was given in exchange for property bought with claimant's money.[34] As tending to prove the absence of claim of title, failure of claimant to list the land in controversy for taxation,[35] or to pay taxes on it,[36] is competent, although not conclusive evidence. So it may be shown that, although the claimant's deed covered the whole tract in controversy, neither the claimant nor his predecessors ever claimed beyond a certain surveyed line.[37] So where plaintiff in ejectment introduces evidence of claim to and acts of possession of the land, on the part of his grantor, defendant, claiming by adverse possession, may, in rebuttal, show that such grantor disclaimed ownership, and declined to pay taxes on the land about the time defendant acquired a tax deed for the land.[37½]

[§ 616] **b. To Show Notoriety of Claim of Title.** Evidence that it was generally known in the vicinity of the land that the claimant or his grantor claimed title thereto is admissible to show notoriety of claim of title,[38] but not to show title itself[39] or notoriety of occupation.[40]

[§ 617] **c. To Show Color of Title.** Where defendant sets up adverse possession of his grantor in ejectment, evidence of the conveyance is admissible to show color of title, although the grantor did not hold adversely.[41] So a deed to heirs of a certain person, taken in connection with testimony of one of them that he was one of the heirs and took possession under the deed, is admissible to show color of title.[41¼] And where in ejectment defendant claimed under color of title as grantee of a purchaser at a tax sale, the tax records and tax deed to defendant's grantor are admissible as showing color of title.[41½]

[§ 618] **5. As to Payment of Taxes.** Tax receipts, although not conclusive,[42] are prima facie evidence of payment,[43] provided of course the land in controversy is properly described therein.[44] However, payment of taxes may be proved by other

rule applies with less force when the land is assessed under a description which includes land with reference to which such person is under legal duty to pay the taxes as actual owner. Curtiss, etc., Co. v. Minneapolis, supra.

[b] **Tax receipts** are admissible in evidence in support of actual possession by a taxpayer, as tending to show a claim of ownership and the extent of his possession. Green v. Jordan, 83 Ala. 220, 3 S 513, 3 AmSR 711.

31. Whitaker v. Erie Shooting Club, 102 Mich. 454, 60 NW 983; McLain v. Bird, 120 NYS 1032.

32. U. S.—Pillow v. Roberts, 13 How. 472, 14 L. ed. 228.
Ala.—McBride v. Lowe, 175 Ala. 408, 57 S 832; Doe v. Edmondson, 145 Ala. 557, 40 S 505; Brannan v. Henry, 142 Ala. 698, 39 S 92, 110 AmSR 55; Goodson v. Brothers, 111 Ala. 589, 20 S 443.
Ark.—Skipworth v. Martin, 50 Ark. 141, 6 SW 514.
Cal.—Nemo v. Farrington, 7 Cal. A. 443, 94 P 874, 877.
Ga.—Wiggins v. Brewster, 131 Ga. 162, 62 SE 40.
Ill.—Godfrey v. Dixon Power, etc., Co., 228 Ill. 487, 81 NE 1089; Kepley v. Scully, 185 Ill. 52, 57 NE 187.
Iowa.—Roth v. Munsenmaier, 118 Iowa 326, 91 NW 1072.
Ky.—Adams v. Tiernan, 5 Dana 394.
Me.—Ross v. Gould, 5 Me. 204; Gookin v. Whittier, 4 Me. 16; Robison v. Swett, 3 Me. 316.
Mass.—Luce v. Parsons, 192 Mass. 8, 77 NE 1032.
Minn.—Murphy v. Doyle, 37 Minn. 113, 33 NW 220; Washburn v. Cutter, 17 Minn. 361.
Mo.—Hickman v. Link, 97 Mo. 482, 10 SW 600.
N. H.—Forest v. Jackson, 56 N. H. 357; Lund v. Parker, 3 N. H. 49.
N. C.—Haddock v. Leary, 148 N. C. 378, 62 SE 426; Ruffin v. Overby, 105 N. C. 78, 11 SE 251.
N. D.—Power v. Kitching, 10 N. D. 254, 86 NW 737, 88 AmSR 691.
Tex.—Crawford v. Arnold, (Civ. A.) 78 SW 244; Baldwin v. Roberts, 13 Tex. Civ. A. 563, 36 SW 789; Shepard v. Galveston, etc., R. Co., 2 Tex. Civ. A. 535, 22 SW 267.
Vt.—Soule v. Barlow, 48 Vt. 132; Atkinson v. Patterson, 46 Vt. 750; Austin v. Rutland R. Co., 45 Vt. 215.
Wis.—Furlong v. Garrett, 44 Wis. 111.

[a] **That the claimant had in his possession the original patent** may be shown. Doe v. Edmondson, 127 Ala. 445, 30 S 61.

33. Wiggins v. Brewster, 131 Ga. 162, 62 SE 40.

34. Stiff v. Cobb, 126 Ala. 381, 28 S 402, 85 AmSR 38.

35. Driver v. King, 145 Ala. 585, 40 S 315; Anniston City Land Co. v. Edmondson, 141 Ala. 366, 37 S 424. And see Webb v. Lyerla, 43 Tex. Civ. A. 124, 94 SW 1095 (holding that the inventory of property rendered to an assessor, which did not include a tract of land claimed under adverse possession, was in the handwriting of the assessor did not render the inventory inadmissible as showing that the taxpayer did not claim the land, as Sayles Annot. Civ. St. [1897] art 5098, directs that the assessor shall require each person rendering a list of taxable property for taxation to subscribe to an oath attached to the inventory).

36. Holtzman v. Douglas, 168 U. S. 278, 18 SCt 65, 42 L. ed. 466 [aff 5 App. (D. C.) 397]; Todd v. Weed, 84 Minn. 4, 86 NW 756; Bush v. Brown, 76 Nebr. 218, 107 NW 248; Bush v. Griffin, 76 Nebr. 214, 107 NW 247. And see Hamachek v. Duvall, 135 Wis. 108, 115 NW 634.

[a] **Reason of rule.**—"If the payment of taxes tends to show an intention to claim title—and clearly it does,—the failure to pay them would a fortiori tend to show the converse of the proposition." Todd v. Weed, 84 Minn. 4, 7, 86 NW 756 [quot with appr Bush v. Griffin, 76 Nebr. 214, 217, 107 NW 247].

37. Barfield v. Hill, 163 N. C. 262, 79 SE 677.

37½. Big Sandy Iron, etc., Co. v. Williams, (Ala.) 63 S 1011.

38. U. S.—Maxwell Land-Grant Co. v. Dawson, 151 U. S. 586, 14 SCt 458, 38 L. ed. 279.
Ala.—Owen v. Moxon, 167 Ala. 615, 52 S 527 (where it was said that while the existence of a fact cannot be proved by notoriety or reputation, yet in ejectment, where the fact of plaintiff's adverse possession is otherwise established, its notoriety for the purpose of showing notice is admissible, notoriety being an element of adverse possession); Doe v. Edmondson, 145 Ala. 557, 565, 40 S 505 [cit Cyc]; Tennessee Coal, etc., Co. v. Linn, 123 Ala. 112, 26 S 245, 82 AmSR 108; Woods v. Montevallo Coal, etc., Co., 84 Ala. 560, 3 S 475, 5 AmSR 393.
D. C.—Holtzman v. Douglas, 5 App. 397 [aff 168 U. S. 278, 18 SCt 65, 42 L. ed. 466].
Ill.—Knight v. Knight, 178 Ill. 553, 53 NE 306.
Me.—Carter v. Clark, 92 Me. 225, 42 A 398.
Mich.—Sparrow v. Hovey, 44 Mich. 63, 6 NW 93.
Pa.—Kennedy v. Wible, 8 Pa. Cas. 299, 11 A 98.
Va.—Lusk v. Pelter, 101 Va. 790, 45 SE 333.
Compare Metz v. Metz, 48 S. C. 472, 26 SE 787.

[a] **Record evidence.**—Where plaintiffs claimed under an unrecorded land certificate, and defendants claimed under an alleged transfer of such certificate and a subsequent patent from the state, the records of proceedings begun by defendants' predecessor in title, which recited such alleged transfer and which resulted in a decree awarding the title to plaintiff in that action and ordering a patent to issue, were admissible to show open and notorious claim to the land on the part of defendants and their predecessors in title. Baldwin v. Roberts, 13 Tex. Civ. A. 563, 36 SW 789.

39. Doe v. Edmondson, 145 Ala. 557, 565, 40 S 505 [cit Cyc]; Goodson v. Brothers, 111 Ala. 589, 20 S 443; Ross v. Goodwin, 88 Ala. 390, 6 S 682; Howland v. Crocker, 7 Allen (Mass.) 153.

40. Carter v. Clark, 92 Me. 225, 230, 42 A 398 (where Savage, J., said: "There is no such thing as constructive notoriety of occupation to be inferred from notoriety of claim. It is actual, notorious occupation. It is not proved by reputation, no matter how extensive and notorious. It must be proved by the character of the occupation itself").

41. Lay v. Fuller, 178 Ala. 375, 59 S 609.

41¼. Swindall v. Ford, (Ala.) 63 S 651.

41½. Riley v. Fletcher, (Ala.) 64 S 85.

42. Rand v. Scofield, 43 Ill. 167.

43. Green v. Jordan, 83 Ala. 220, 3 S 513, 3 AmSR 711; Boynton v. Ashabranner, 75 Ark. 415, 88 SW 566, 1011, 91 SW 20; Bolden v. Sherman, 110 Ill. 418; Thomson v. Weisman, 98 Tex. 170, 82 SW 503.

44. Boynton v. Ashabranner, 75 Ark. 415, 88 SW 566, 1011, 91 SW 20; Chicago Sanitary Dist. v. Allen, 178 Ill. 330, 53 NE 109; Bell v. Neiderer, 169 Ill. 54, 48 NE 194; Burns v. Edwards, 163 Ill. 494, 45 NE 113; Koch v. Gordon, 231 Mo. 645, 133 SW 609.

[a] **Mistakes not preventing identification of land.**—Where payment of taxes is material, tax receipts in which there is a slight mistake in the spelling of the name, but otherwise identifying the land in controversy, are admissible as bearing on the question of payment of taxes. Seemuller v. Thornton, 77 Tex. 156, 13 SW 846.

[b] **Description held too indefinite.**—"The undivided east frac. Lot 5, Block 57." Koch v. Gordon, 231 Mo. 645, 654, 133 SW 609.

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evidence than tax receipts.[45] Payment may be proved by one who knows the facts or by circumstantial evidence of a legitimate character.[46] It is competent to prove by parol on what land taxes have been in fact paid, and thus supplement or contradict the evidence of the written receipts for taxes.[47] So it has been held that evidence that a person has been in possession of land a number of years and has stipulated to pay the taxes will be allowed to go to the jury with liberty to infer that he has paid them.[48] On the other hand, the mere fact that the land in controversy was assessed to the claimant is no evidence that he paid the taxes so assessed.[49] To rebut proof of payment of taxes the record of a judgment for taxes against certain land assessed as the property of another person is not admissible where the land is not shown to be identical with that in suit.[50] Where defendant relies on adverse possession under the statute making payment of taxes an element of adverse possession, plaintiff may show that the taxes for the last four years of the statutory period were paid under a different tax deed and title than for the first three years.[50½]

[§ 619] **6. As to Good Faith.** The deeds under which plaintiff claims are admissible as evidence of good faith,[51] and that too, although the description therein contained is too indefinite to make them admissible as color of title.[52] However, deeds not connected with the claimant's claim of title are not admissible on the question of good faith.[53] On the question of good faith the claimant may show that he paid the taxes,[54] and on the other hand the non-assessment to and the payment of taxes by him are evidence of a want of good faith on his part.[55] The fact that the claimant holds under a quitclaim deed is evidence to be considered together with the other circumstances as tending to show want of good faith.[56] Fragments of wax and paper, in connection with his testimony that they came into possession of his grantor and that he believed them to be the original grant from the state, are admissible on the question of good faith, although they were so mutilated that their contents could not be determined.[57] And it has been held that evidence of a boundary line agreement relied on by the ancestor, through whom defendant in ejectment claimed by inheritance, is admissible to show the character of the ancestor's possession and claim, and consequently the bona fides of defendant's claim as the basis for title by adverse possession.[57½]

[§ 620] **7. As to Privity of Possession.** Where several parties are in adverse possession of land during certain periods which, added together, make up the statutory period, parol evidence is admissible to establish privity of possession between the parties so holding adversely, in order to establish title by possession for the requisite period.[58]

[§ 621] **D. Weight and Sufficiency.** It is very generally held that to prove title by adverse possession or any single element thereof, the evidence should be clear and convincing.[59] It is also a

45. Beaver v. Taylor, 1 Wall. (U. S.) 637, 17 L. ed. 601; Swenson v. Mynair, 79 Fed. 608, 25 CCA 126; Zeilin v. Rogers, 21 Fed. 103; Wren v. Parker, 57 Conn. 529, 18 A 790, 14 AmSR 127, 6 LRA 80; Stumpf v. Osterhage, 111 Ill. 82; Coleman v. Billings, 89 Ill. 183; Paris v. Lewis, 85 Ill. 597; Wilson v. South Park Comrs., 70 Ill. 46; Elston v. Kennicott, 46 Ill. 187; Irwin v. Miller, 23 Ill. 401; Hinchman v. Whetstone, 23 Ill. 185; Allen v. Woodson, 60 Tex. 651; Jacks v. Dillon, 6 Tex. Civ. A. 192, 25 SW 645.

46. Swenson v. Mynair, 79 Fed. 608, 25 CCA 126; Dutton v. Thompson, 85 Tex. 115, 19 SW 1026; Allen v. Woodson, 60 Tex. 651; Watson v. Hopkins, 27 Tex. 637; Randolph v. Lewis, (Tex. Civ. A.) 163 SW 647.

47. Neiderer v. Bell, 174 Ill. 325, 51 NE 855; Stumpf v. Osterhage, 111 Ill. 82; Milliken v. Marlin, 66 Ill. 13; Rawson v. Fox, 65 Ill. 200; Weir v. Cordz-Fisher Lumber Co., 186 Mo. 388, 85 SW 341; Seemuller v. Thornton, 77 Tex. 156, 13 SW 846.

48. Watson v. Hopkins, 27 Tex. 637.

49. Kennedy v. Sanders, 90 Miss. 524, 43 S 913. See also Zeilin v. Rogers, 21 Fed. 103 (holding that the fact that a parcel of land does not appear on the assessment roll of a county in a given year as the property of defendant in an action for the recovery of the same does not tend to contradict the testimony of such defendant to the effect that he paid the taxes thereon as owner in such year, and that it is not competent evidence in such action, for or against either party, as to the ownership of such land). Compare Carter v. Clark, 92 Me. 225, 42 A 398 (holding that the claimant may show by the tax lists property on which he was assessed, and that the property was not assessed to any one else).

50. Stumpf v. Osterhage, 111 Ill. 82.

50½. Gibson v. Huff, (Colo. A.) 144 P 510.

51. A. G. Garbutt Lumber Co. v. Camp, 137 Ga. 592, 73 SE 841.

52. Noble v. Saffold, (Ala.) 62 S 515.

53. Callaway v. Beauchamp, 140 Ga. 207, 78 SE 846.

54. De Foresta v. Gast, 20 Colo. 307, 38 P 244; Mitchell v. Crummey, 134 Ga. 383, 67 SE 1042.

55. Gaines v. Saunders, 87 Mo. 557.

56. Brewster v. Hewes, 113 La. 45, 36 S 883.

57. Mitchell v. Crummey, 134 Ga. 383, 67 SE 1042.

57½. Jordan v. Smith, (Ala.) 64 S 317.

58. Johnson v. Simpson, 22 Tex. Civ. A. 290, 54 SW 308.

59. U. S.—Zeller v. Eckert, 4 How. 289, 11 L. ed. 979; Schlawig v. Purslow, 59 Fed. 848, 8 CCA 315; Heermans v. Schmaltz, 7 Fed. 566, 10 Biss. 323.

Ala.—Bowles v. Lowery, 62 S 107.

Cal.—Mattes v. Hall, 21 Cal. A. 552, 132 P 295.

Colo.—Evans v. Welch, 29 Colo. 355, 68 P 776.

Conn.—Huntington v. Whaley, 29 Conn. 391.

D. C.—Holtzman v. Douglas, 5 App. 397 [aff. 168 U. S. 278, 18 SCt 65, 42 L. ed. 466].

Fla.—McKinnon v. Johnson, 59 Fla. 332, 52 S 288; Gilbert v. Southern Land, etc., Co., 53 Fla. 319, 43 S 754; Barrs v. Brace, 38 Fla. 265, 20 S 991; Wilkins v. Pensacola City Co., 36 Fla. 36, 18 S 20.

Ga.—Spalding v. Grigg, 4 Ga. 75.

Ida.—Brown v. Brown, 18 Ida. 345, 110 P 269.

Ill.—Kirby v. Kirby, 236 Ill. 255, 86 NE 259; Horn v. Metzger, 234 Ill. 240, 84 NE 893; Roby v. Calumet, etc., Canal, etc., Co., 211 Ill. 173, 71 NE 822; Travers v. McElvain, 181 Ill. 382, 55 NE 135; Clayton v. Feig, 179 Ill. 534, 54 NE 149; Davis v. Howard, 172 Ill. 340, 50 NE 258; Burns v. Edwards, 163 Ill. 494, 45 NE 113; Zirngibl v. Calumet, etc., Canal, etc., Co., 157 Ill. 430, 42 NE 431; Hurlbut v. Bradford, 109 Ill. 397; Jackson v. Berner, 48 Ill. 203; McClellan v. Kellogg, 17 Ill. 498; Bryan v. East St. Louis, 12 Ill. A. 390.

Iowa.—Litchfield v. Sewell, 97 Iowa 247, 66 NW 104; Weinig v. Holcomb, 73 Iowa 143, 34 NW 787; Grube v. Wells, 34 Iowa 148.

Ky.—Wohlwend v. Weingardner, 40 SW 928, 19 KyL 429; Sanders v. Barbee, 3 SW 528, 8 KyL 773.

La.—Prevost v. Ellis, 11 Rob. 56.

Mich.—Parker v. Case, 155 Mich. 497, 119 NW 1081; Judson v. Duffy, 96 Mich. 255, 55 NW 837; Hockmoth v. Des Grand Champs, 71 Mich. 520, 39 NW 737; Marble v. Price, 54 Mich. 466, 20 NW 531; Campau v. Campau, 45 Mich. 367, 8 NW 85; Yelverton v. Steele, 40 Mich. 538.

Nev.—McDonald v. Fox, 20 Nev. 364, 368, 22 P 234.

N. H.—Campbell v. Campbell, 13 N. H. 489; Hale v. Glidden, 10 N. H. 397; Riley v. Jameson, 3 N. H. 23, 14 AmD 325.

N. J.—Cornelius v. Giberson, 25 N. J. L. 1; Munger v. Curley, (Ch.) 57 A 806. See also Rowland v. Updike, 28 N. J. L. 101.

N. Y.—Baldwin v. Buffalo, 35 N. Y. 375; Cutting v. Burns, 57 App. Div. 185, 68 NYS 269; Archibald v. New York Cent., etc., R. Co., 1 App. Div. 251, 37 NYS 336 [aff 157 N. Y. 574, 52 NE 567]; Howard v. Howard, 17 Barb. 663; Fosgate v. Herkimer Mfg., etc., Co., 12 Barb. 352 [aff 12 N. Y. 580]; Sanders v. Riedinger, 19 Misc. 289, 43 NYS 127; Berkowitz v. Brown, 3 Misc. 1, 23 NYS 792; Jackson v. Waters, 12 Johns. 365; Jackson v. Sharp, 9 Johns. 163, 6 AmD 267; Wickham v. Conklin, 8 Johns. 220; Brandt v. Ogden, 1 Johns. 156.

N. C.—Barfield v. Hill, 163 N. C. 262, 79 SE 677.

Oh.—Happ v. Dayton, etc., R. Co., 14 OhS&CP 172.

Okl.—Flesher v. Callahan, 32 Okl. 283, 122 P 489.

Pa.—Hood v. Hood, 2 Grant 229; Rung v. Shoneberger, 2 Watts 23, 26 AmD 95; Kron v. Daugherty, 9 Pa. Super. 163.

R. I.—Draper v. Monroe, 18 R. I. 398, 28 A 340.

S. C.—Stokes v. Murray, 95 S. C. 120, 78 SE 741; Thomas v. Dempsey, 53 S. C. 216, 31 SE 231; Abel v. Hutto, 42 S. C. L. 42; Holmes v. Rochell, 2 S. C. L. 487.

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rule of general application that such possession or | element cannot be established by loose, uncertain

Tenn.—Sequatchie Valley Coal, etc., Co. v. Coppinger, 95 Tenn. 526, 32 SW 465; Elliott v. Holder, 3 Head 698; Fuller v. Jackson, (Ch. A.) 62 SW 274.

Tex.—Smith v. Estill, 87 Tex. 264, 28 SW 801; Rushing v. Lanier, (Civ. A.) 132 SW 528; Blum Land Co. v. Rogers, 11 Tex. Civ. A. 184, 32 SW 713.

W. Va.—Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 SE 255.

Wis.—Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019; Meyer v. Hope, 101 Wis. 123, 77 NW 720; Lampman v. Van Alstyne, 94 Wis. 417, 69 NW 171; Ryan v. Schwartz, 94 Wis. 403, 69 NW 178; Fuller v. Worth, 91 Wis. 406, 64 NW 995; Kurz v. Miller, 89 Wis. 426, 62 NW 182; Allis v. Field, 89 Wis. 327, 62 NW 85; Fairfield v. Barrette, 73 Wis. 463, 41 NW 624; Graeven v. Dieves, 68 Wis. 317, 31 NW 914; Furlong v. Garrett, 44 Wis. 111; Sydnor v. Palmer, 29 Wis. 226.

Ont.—Huffman v. Rush, 7 Ont. L. 346, 3 OntWR 43; McIntyre v. Thompson, 1 Ont. L. 163.

See Coburn v. Hollis, 8 Metc. (Mass.) 125.

[a] **Evidence sufficient to show acquisition of title by adverse possession.**—Byrd v. Hall, 211 Fed. 182; Richmond Cedar Works v. Pinnix, 208 Fed. 785; Houston Oil Co. v. Dowden, 202 Fed. 714, 121 CCA 176; Merrill v. Shea, 30 Fed. 743; Merrill v. Tobin, 30 Fed. 738; Hardie v. Bissell, 80 Ark. 74, 94 SW 611; Brown v. Bocquin, 57 Ark. 97, 20 SW 813; Montgomery, etc., Lumber Co. v. Quimby, 164 Cal. 250, 128 P 402; Lucas v. Provines, 130 Cal. 270, 62 P 509; Dougherty v. Miles, 97 Cal. 568, 32 P 597; Kockemann v. Bickel, 92 Cal. 665, 28 P 686; Van Glahn v. Brennan, 81 Cal. 261, 22 P 596; Thompson v. McKenna, 22 Cal. A. 129, 133 P 512; Blackburn v. Bucksport, etc., R. Co., 7 Cal. A. 649, 95 P 668; Turner v. Neisler, 141 Ga. 27, 80 SE 461; Johnson v. Sowden, 25 Ida. 227, 136 P 1136; Ater v. Smith, 245 Ill. 57, 91 NE 776, 19 Ann Cas 105; Clayton v. Feig, 179 Ill. 534, 54 NE 149; Sullivan v. Eddy, 164 Ill. 391, 45 NE 837; Sullivan v. Eddy, 154 Ill. 199, 40 NE 482; Craven v. Lesh, 22 Ida. 463, 126 P 774; Craven v. Craven, (Ind.) 103 NE 333; Pittsburg, etc., R. Co. v. Jellison, (Ind. A.) 86 NE 501; Wood v. Ripley, 27 Ind. A. 356, 61 NE 608; Garrett v. Olford, 152 Iowa 265, 132 NW 379; Richardson v. Sketchley, 150 Iowa 393, 130 NW 407; McCarthy v. Colton, 134 Iowa 658, 108 NW 217; Colvin v. McCune, 39 Iowa 502; Lawson v. Hatfield, 145 Ky. 779, 141 SW 36; Young v. Pace, 145 Ky. 405, 140 SW 555; Chestnut v. Tracy, 144 Ky. 753, 139 SW 966; Muncy v. Smith, 142 Ky. 201, 133 SW 1152; Mosley v. Morgan, 141 Ky. 557, 133 SW 226; Combs v. Cornett, (Ky.) 114 SW 1193; Robinson v. Huffman, (Ky.) 113 SW 458; Hatfield v. Hatfield, (Ky.) 113 SW 59; Overton v. Perry, 129 Ky. 415, 111 SW 369, 33 KyL 931; Blackburn v. Hall, 97 SW 399, 30 KyL 134; Doty v. Jameson, 93 SW 638, 29 KyL 507; Hall v. Blanton, 77 SW 1110, 25 KyL 1400; Hays v. Earls, 77 SW 706, 25 KyL 1299; Pollit v. Bland, 22 SW 842, 15 KyL 227; Whipple v. Earick, 93 Ky. 121, 19 SW 237, 14 KyL 85; Miller v. McDowell, 17 SW 482, 13 KyL 535; Sanders v. Moore, 7 SW 910, 9 KyL 965; Martin v. Reynolds, 9 Dana (Ky.) 328; Hinton v. Fox, 3 Litt. (Ky.) 380; Miller v. Albert Hanson Lumber Co., 134 La. 225, 63 S 883; Railroad Lands Co. v. Kansas City, etc., R. Co., 131 La. 967, 60 S 632; Louisiana Land Co. v. Blakewood, 131 La. 539, 59 S 984; Michel v. Stream, 48 La. Ann. 341, 19 S 215; Kelley v. Jones, 110 Me. 360, 86 A 252; Wiggin v. Mullen, 96 Me. 375, 52 A 791; Beal v. Gordon, 55 Me. 482; Cadwalader v. Price, 111 Md. 310, 73 A 273, 134 AmSR 603, 19 AnnCas 547; Sadtler v. Peabody Heights Co., 66 Md. 1, 10 A 599; Murphy v. Com., 187 Mass. 361, 73 NE 524; Morse v. Sherman, 155 Mass. 222, 29 NE 523; Tufts v. Charlestown, 117 Mass. 401; Bean v. Bean, 163 Mich. 379, 128 NW 413; Kingston v. Guck, 155 Mich. 264, 118 NW 967; Triece v. South Haven, 154 Mich. 127, 117 NW 555; Dahlem v. Abbott, 153 Mich. 465, 116 NW 1007; Dahlem v. Abbott, 146 Mich. 605, 110 NW 47; McGaw v. Manning, 145 Mich. 378, 108 NW 512; Miskwabik Dev. Assoc. v. Croze, 140 Mich. 194, 103 NW 558; Brigham v. Reau, 139 Mich. 256, 102 NW 845; Fire Proof Storage Co. v. St. Paul Bethel Assoc., 118 Minn. 47, 136 NW 407; Cerveny v. Uherka, 112 Minn. 417, 128 NW 457; Sawbridge v. Fergus Falls, 101 Minn. 378, 112 NW 385; Weeks v. Upton, 99 Minn. 410, 109 NW 828; Malone v. Malone, 88 Minn. 418, 93 NW 605; Southern Pine Co. v. Pigott, 93 Miss. 281, 47 S 381; Moore v. Crump, 84 Miss. 612, 37 S 109; Dunbar v. Aldrich, 79 Miss. 698, 31 S 341; Gathings v. Miller, 76 Miss. 651, 24 S 964; Meridian Land, etc., Co. v. Ball, 68 Miss. 135, 8 S 316; Jones v. Gaddis, 67 Miss. 761, 7 S 489; Grafton v. Grafton, 16 Miss. 77; Troll v. St. Louis, (Mo.) 168 SW 167; Thompson v. Stilwell, 253 Mo. 89, 161 SW 681; Milligan v. Fritts, 226 Mo. 189, 125 SW 1101; Potter v. Long, 217 Mo. 607, 117 SW 724; Iowa R. Land Co. v. Coulthard, (Nebr.) 148 NW 328; Moler v. Castetter, 94 Nebr. 106, 142 NW 301; White v. Musser, 81 Nebr. 628, 127 NW 1058; Mensen v. Kelley, 81 Nebr. 206, 115 NW 769; Dredla v. Patz, 78 Nebr. 506, 111 NW 136; South Omaha v. Meehan, 71 Nebr. 230, 98 NW 691; Flanagan v. Mathiesen, 70 Nebr. 223, 97 NW 287; Crawford v. Galloway, 29 Nebr. 261, 45 NW 628; Dvorsky v. Watkins, 5 Nebr. (Unoff.) 505, 98 NW 1039; Gander v. Simpson, (Nev.) 137 P 514; Argotsinger v. Vines, 82 N. Y. 308; Knapp v. New York, 140 App. Div. 289, 125 NYS 201; Green v. Horn, 128 App. Div. 686, 112 NYS 993; Clarke v. Wollpert, 128 App. Div. 203, 112 NYS 547; Spath v. Sales, (Or.) 141 P 160; Silverton v. Brown, 63 Or. 418, 128 P 45; Dunnigan v. Wood, 58 Or. 119, 112 P 531; Rowland v. Williams, 23 Or. 515, 32 P 402; Miles v. Pennsylvania Coal Co., (Pa.) 91 A 211; Susquehanna, etc., R., etc., Co. v. Quick, 61 Pa. 328; Mason v. Braught, 33 S. D. 559, 146 NW 687; Southern Iron, etc., Co. v. Schwoon, 124 Tenn. 176, 135 SW 785; McBurney v. Glenmary Coal, etc., Co., 121 Tenn. 275, 118 SW 694; McLemore v. Durivage, 92 Tenn. 482, 22 SW 207; Motley v. Corn, (Tex.) 11 SW 850; Mims v. Rafel, 73 Tex. 300, 11 SW 277; Hickman v. Ferguson, (Tex. Civ. A.) 164 SW 1085; Guadalupe County v. Poth, (Tex. Civ. A.) 163 SW 1050; Williams v. McComb, (Tex. Civ. A.) 163 SW 654; Ball v. Filba, (Tex. Civ. A.) 153 SW 685; Louisiana, etc., Lumber Co. v. Stewart, (Tex. Civ. A.) 148 SW 1193; Dunn v. Taylor, (Tex. Civ. A.) 143 SW 311; Wright v. Giles, (Tex. Civ. A.) 129 SW 1163; Rodriguez v. Priest, (Tex. Civ. A.) 126 SW 1187; Kirby v. Hayden, (Tex. Civ. A.) 125 SW 993; Hoencke v. Lomax, 55 Tex. Civ. A. 189, 118 SW 817 [writ of error den 102 Tex. 487, 119 SW 842]; Texas, etc., R. Co. v. Broom, 53 Tex. Civ. A. 78, 114 SW 655; Texas, etc., R. Co. v. Texas Tram, etc., Co., 50 Tex. Civ. A. 182, 110 SW 140; Jones v. Creech, (Tex. Civ. A.) 108 SW 975; Cochran v. Moerer, 47 Tex. Civ. A. 372, 105 SW 1138; Daniels v. Murray, 47 Tex. Civ. A. 19, 103 SW 425; Victoria v. Victoria County, (Tex. Civ. A.) 94 SW 368 [rev on other grounds 100 Tex. 438, 101 SW 190]; Kane v. Sholars, 41 Tex. Civ. A. 154, 90 SW 937; Jacks v. Dillon, 6 Tex. Civ. A. 192, 25 SW 645; Pioneer Inv., etc., Co. v. Salt Lake City Bd. of Education, 35 Utah 1, 99 P 150, 136 AmSR 1016; Lusk v. Pelter, 101 Va. 790, 45 SE 333; Johnson v. Conner, 48 Wash. 431, 93 P 914; Rogers v. Miller, 13 Wash. 82, 42 P 525; Zellmer v. Martin, 157 Wis. 341, 147 NW 371; Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550; Mielke v. Dodge, 135 Wis. 388, 115 NW 1099; Reitler v. Lindstrom, 126 Wis. 562, 106 NW 388; Lampman v. Van Alstyne, 94 Wis. 417, 69 NW 171; Bartlett v. Secor, 56 Wis. 520, 14 NW 714; Borden v. Jackson, 45 N. S. 81; Gray v. Richford, 1 Ont. A. 112; Western Canada Loan Co. v. Garrison, 16 Ont. 81; Fletcher v. Roblin, 3 OntWN 155, 20 OntWR 148; Reynolds v. Trivett, 2 OntWR 486; Mulholland v. Conklin, 22 U. C. C. P. 372.

[b] **Evidence insufficient to show title by adverse possession.**—Houston Oil Co. v. Goodrich, 213 Fed. 136; Betts v. Gahagan, 212 Fed. 120; Brannan v. Henry, 175 Ala. 454, 57 S 967; Lecroix v. Malone, 157 Ala. 434, 47 S 725; Langhorst v. Rogers, 88 Ark. 318, 114 SW 915; Richards v. Howell, 60 Ark. 215, 29 SW 461; Woodworth v. Fulton, 1 Cal. 295; Cohen v. Anderson, 22 Cal. A. 634, 135 P 1096; Drake v. Russian River Land Co., 10 Cal. A. 654, 103 P 167; Wadley v. Le Cato, 139 Ga. 177, 77 SE 47; Jones v. Rountree, 138 Ga. 757, 76 SE 55; Gillespie v. Powell, 132 Ga. 353, 64 SE 80; Wiggins v. Brewster, 131 Ga. 162, 62 SE 40; Waters v. Durrence, 119 Ga. 934, 47 SE 216; Royall v. Lisle, 15 Ga. 545, 60 AmD 712; Illinois Cent. R. Co. v. Hasenwinkle, 232 Ill. 224, 83 NE 815, 15 LRANS 129; Clayton v. Feig, 179 Ill. 534, 54 NE 149; Hayden v. McCloskey, 161 Ill. 351, 43 NE 1091; School Trustees v. Scholl, 120 Ill. 509, 12 NE 243; Ambrose v. Raley, 58 Ill. 506; Jackson v. Berner, 48 Ill. 203; McClellan v. Kellogg, 17 Ill. 498; Pittsburgh, etc., R. Co. v. Beck, 152 Ind. 421, 53 NE 439; Lizer v. Clubine, 140 Iowa 246, 118 NW 409; Sweny v. Bruns, 74 Iowa 701, 39 NW 165; Gildehaus v. Whiting, 39 Kan. 706, 18 P 916; Black v. Terry, 157 Ky. 600, 163 SW 737; McClanahan v. Brown, 157 Ky. 450, 163 SW 467; Hellard v. Rockcastle Min., etc., Co., 153 Ky. 259, 154 SW 401; Northern Coal, etc., Co. v. Vermillion, 140 Ky. 475 131 SW 259; Mahoning Coal Co. v. Dowling, (Ky.) 124 SW 370; Gordon v. Simmons, 136 Ky. 273, 124 SW 306; Jonesville Perpetual Bldg., etc., Assoc. v. Beverly, 107 SW 770, 32 KyL 1102; Courtney v. Ashcraft, 105 SW 106, 31 KyL 1324; Chism v. Trent, 10 SW 648, 10 KyL 849; Dowdell v. Orphans' Home Soc., 114 La. 49, 38 S 16; Proctor v. Libby, 110 Me. 39, 85 A 298; Batchelder v. Robbins, 95 Me. 59, 49 A 210; White v. Shippee, 216 Mass. 23, 102 NE 948; Pantlind v. Grand Rapids, 71 Mich. 514, 39 NW 851; Sheldon v. Grand Rapids, 71 Mich. 508, 39 NW 848; Mitchell v. Green, (Minn.) 145 NW 404; Roy v. Dannehr, 124 Minn. 233, 144 NW 758; Kipp v. Hagan, 108 Minn. 384, 122 NW 317; Hanson v. Sommers, 105 Minn. 434, 117 NW 842; Markusen v. Mortensen, 105 Minn. 10, 116 NW 1021; Young v. Grieb, 95 Minn. 396, 104 NW 131; Leavenworth v. Reeves, (Miss.) 64 S 660; McMahon v. Yazoo Delta Lumber Co., 92 Miss. 459, 43 S 957, 46 S 57; Goff v. Cole, 71 Miss. 46, 13 S 870; Boothe v. Cheek, 253 Mo. 119, 161 SW 791; St. Louis v. St. Louis, etc., R. Co., 248 Mo. 10, 154 SW 55; Reynolds v. Reynolds, 234 Mo. 144, 136 SW 411; Brown v. Hartford, 173 Mo. 183, 73 SW 140; Jenkins Land, etc., Co. v. Attwood, 80 Nebr. 806, 115 NW 305; Bush v. Griffin, 76 Nebr. 214, 107 NW 247; Baty v. Elrod, 66 Nebr. 735, 92 NW 1032, 97 NW 343; Chicago, etc., R. Co. v. Schalkopf, 54 Nebr. 448, 74 NW 826; Ritter v. Myers, 3 Nebr. (Unoff.) 684, 92 NW 638; McDonald v. Fox, 20 Nev. 364, 22 P 234; Munger v. Curley, (N. J. Ch.) 57 A 306; Jacob v. Oyster Bay, 155 App. Div. 913, 140 NYS 1124 [aff 78 Misc. 283, 132 NYS

657]; Staples v. Schnackenberg, 148 App. Div. 161, 132 NYS 1092; Reynolds v. White, 143 App. Div. 595, 128 NYS 529; Buffalo Creek R. Co. v. Collins, 41 App. Div. 8, 58 NYS 65, 29 NYCivProc 258; Erkson v. Johnston, 8 App. Div. 31, 40 NYS 401; Fosgate v. Herkimer Mfg., etc., Co., 12 Barb. 352 [aff 12 N. Y. 580]; Rouse v. Kline, 1 Thomps. & C. addenda 2; Townshend v. Thomson, 60 N. Y. Super. 454, 18 NYS 870; Jacob v. Oyster Bay, 73 Misc. 283, 132 NYS 657; Doe v. Campbell, 10 Johns. (N. Y.) 475; Ruffin v. Overby, 105 N. C. 78, 11 SE 251; Wright v. Jones, 23 N. D. 191, 135 NW 1120; Lais v. Smith, 63 Or. 206, 127 P 26; Jones v. California, etc., Land Co., 52 Or. 311, 97 P 625; McNear v. Guistin, 50 Or. 377, 92 P 1075; Kanne v. Otty, 25 Or. 531, 36 P 537; Johns v. Johns, 244 Pa. 48, 90 A 535; Huss v. Jacobs, 210 Pa. 145, 59 A 991; McDermott v. Hoffman, 70 Pa. 31; Barker v. Deigman, 25 S. C. 252; Southern Iron, etc., Co. v. Schwoon, 124 Tenn. 176, 135 SW 785; Kirkman v. Brown, 93 Tenn. 476, 27 SW 709; Dunn v. Taylor, 102 Tex. 80, 113 SW 265; Woods v. Hull, 90 Tex. 228, 38 SW 165; Hitchler v. Scanlan, 83 Tex. 569, 19 SW 259; Donlon v. Lyons, (Tex.) 15 SW 578; Porter v. Miller, 76 Tex. 593, 13 SW 565, 14 SW 334; Boothe v. Best, 75 Tex. 568, 12 SW 1000; Harnage v. Berry, 43 Tex. 567; Harle v. Harle, (Tex. Civ. A.) 166 SW 674; Snow v. Letcher, (Tex. Civ. A.) 154 SW 355; Pratt v. Townsend, (Tex. Civ. A.) 125 SW 111; Lake v. Earnest, 53 Tex. Civ. A. 555, 116 SW 865; Texas, etc., R. Co. v. Haynes, 44 Tex. Civ. A. 272, 97 SW 849; Carlyle v. Pruett, 37 Tex. Civ. A. 384, 84 SW 372; Logan v. Robertson, (Tex. Civ. A.) 83 SW 395; Buster v. Warren, 35 Tex. Civ. A. 644, 80 SW 1063; Henry v. Thomas, (Tex. Civ. A.) 74 SW 599; Kirkpatrick v. Tarlton, 29 Tex. Civ. A. 276, 69 SW 179; Crumbley v. Busse, 11 Tex. Civ. A. 319, 32 SW 438; Schaubuch v. Dillemuth, 108 Va. 86, 60 SE 745, 15 AnnCas 825; Harman v. Stearns, 95 Va. 58, 27 SE 801; Northern Pac. R. Co. v. Smith, 68 Wash. 269, 122 P 1057; Graves v. Graves, 48 Wash. 664, 94 P 481; Calhoun v. Nelson, 46 Wash. 617, 92 P 448; Lohse v. Burch, 42 Wash. 156, 84 P 722; Wilcox v. Smith, 38 Wash. 585, 80 P 803; Parkersburg Industrial Co. v. Schults, 43 W. Va. 470, 27 SE 255; Jansen v. Huerth, 143 Wis. 363, 127 NW 945; Hemmy v. Dunn, 125 Wis. 275, 103 NW 1095; Heward v. O'Donohoe, 19 Can. S. C. 341; Pearson v. Mulholland, 17 Ont. 502; Walton v. Woodstock Gas. Co., 1 Ont. 630; In re National Trust Co., 2 OntWN 801, 18 OntWR 770; Sims v. Seifert, 3 Ont WR 176; Van Velsor v. Hughson, 45 U. C. Q. B. 252; Young v. Elliott, 23 U. C. Q. B. 420.

[c] **Evidence sufficient to show that title was not acquired by adverse possession.**—Galvin v. White, 159 Cal. 797, 116 P 42; McClanahan v. McClanahan, (Mo.) 167 SW 991; Shaw v. Windham, (Tex. Civ. A.) 155 SW 636.

[d] **Evidence insufficient to show adverse possession of sufficient duration to give title by adverse possession.**—Goytino v. Los Angeles, 150 Cal. 367, 88 P 1091; Upham v. Weisshaar, 23 Colo. A. 277, 128 P 1129; Ferriday v. Grosvenor, 86 Conn. 698, 86 A 569; Williamsburg Boom Co. v. Smith, 84 Ky. 372, 1 SW 765, 8 KyL 369; Proctor v. Maine Cent. R. Co., 101 Me. 459, 64 A 839; Stewart v. Lumpkin, (Miss.) 51 S 801; Dunn v. Taylor, (Tex. Civ. A.) 147 SW 287 [rev reh 143 SW 311]; Spinning v. Pugh, 65 Wash. 490, 118 P 635.

[e] **Evidence sufficient to show actual possession.**—Horner v. Reuter, 152 Ill. 106, 38 NE 747; Giles v. Ortman, 11 Kan. 59; Dominy v. Miller, 33 Barb. (N. Y.) 386; Bryan v. Spivey, 109 N. C. 57, 13 SE 766; Ament v. Wolf, 33 Pa. 331; Beaupland v. McKeen, 28 Pa. 124, 70 AmD 115; Wolf v. Ament, 1 Grant (Pa.) 150; McCarty v. Johnson, 20 Tex. Civ. A. 184, 49 SW 1098; Beigle v. Dake, 42 U. C. Q. B. 250.

[f] **Evidence insufficient to show actual possession.**—Doe v. McCullough, 155 Ala. 246, 46 S 472; Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45; Roman Catholic Archbishop v. Shipman, 79 Cal. 288, 21 P 830; Thompson v. McLaughlin, 66 Ill. 407; Peck v. Louisville, etc., R. Co., 101 Ind. 366; Slater v. Jepherson, 6 Cush. (Mass.) 129; Moore v. Helvy, 235 Mo. 443, 138 SW 481; Bliss v. Johnson, 94 N. Y. 235; McFarlane v. Kerr, 10 Bosw. (N. Y.) 249; Silliman v. Paine, 1 NYS 75; Emery v. Raleigh, etc., R. Co., 102 N. C. 209, 9 SE 139; Brolaskey v. McClain, 61 Pa. 146; Dunn v. Taylor, 102 Tex. 80, 113 SW 265 [rev (Civ. A.) 107 SW 952]; Brymer v. Taylor, 5 Tex. Civ. A. 103, 23 SW 635.

[g] **Evidence sufficient to show open and notorious possession.**—Baxter v. Wetherington, 128 Ga. 801, 58 SE 467; Southworth v. Brownlow, 84 Miss. 405, 36 S 522; McCarty v. Johnson, 20 Tex. Civ. A. 184, 49 SW 1098; Bingham Livery, etc., Co. v. McDonald, 37 Utah 457, 110 P 56.

[h] **Evidence insufficient to show open and notorious possession.**—McBride v. Lowe, 175 Ala. 408, 57 S 832; Furlong v. Garrett, 44 Wis. 111.

[i] **Evidence sufficient to show continuity of possession.**—Thacker v. Guardenier, 7 Metc. (Mass.) 484; Mims v. Rafel, 73 Tex. 300, 11 SW 277; Bingham Livery, etc., Co. v. McDonald, 37 Utah 457, 110 P 56; Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550.

[j] **Evidence insufficient to show continuity of possession.**—Bolen v. Hoven, 150 Ala. 448, 43 S 736; Richards v. Howell, 60 Ark. 215, 29 SW 461; Doe v. Roe, 32 Ga. 572; South Chicago Brewing Co. v. Taylor, 205 Ill. 132, 68 NE 732; Sparks v. Jackson, 142 Ky. 17, 133 SW 953; Ashcraft v. Courtney, (Ky.) 121 SW 625; Thomas v. Spencer, 66 Or. 359, 133 P 822; Hicklin v. McClear, 18 Or. 126, 22 P 1057; Thomas v. Dempsey, 53 S. C. 216, 31 SE 231; Dunn v. Taylor, 102 Tex. 80, 113 SW 265 [rev (Civ. A.) 107 SW 952]; Overand v. Menczer, 33 Tex. 122, 18 SW 301; Hodges v. Robbins, 23 Tex. Civ. A. 57, 56 SW 565.

[k] **Evidence sufficient to show interruption of continuity of possession.**—Phillips v. Beattyville Mineral, etc., Co., 88 SW 1058, 28 KyL 12; Wm. M. Rice Inst. v. Goolsbee, (Tex. Civ. A.) 134 SW 397; Henderson v. Harris, 30 U. C. Q. B. 360.

[l] **Evidence insufficient to show interruption of continuity of possession.**—Closuit v. John Arpin Lumber Co., 130 Wis. 258, 110 NW 222; Ruttan v. Smith, 35 U. C. Q. B. 165.

[m] **Evidence sufficient to show exclusive possession.**—Woodruff v. Langford, (Iowa) 115 NW 1020; Cornett v. Moore, 97 SW 380, 30 KyL 280; Seese v. Maumee, 28 Oh. Cir. Ct. 768.

[n] **Evidence insufficient to show exclusiveness of possession.**—Eckert v. Weilmuenster, 103 Ill. A. 490; Frye v. Gragg, 35 Me. 29; Jenkins v. Grant Co., 15 N. M. 281, 107 P 739; Lins v. Seefeld, 126 Wis. 610, 105 NW 917.

[o] **Evidence sufficient to show hostility of possession.**—Bass v. Jackson Lumber Co., 169 Ala. 455, 53 S 800; Broad v. Beatty, 73 Ark. 106, 83 SW 339; Miller v. Bensinger, 3 Cal. Unrep. Cas. 704, 31 P 578; Dawson v. Edwards, 189 Ill. 60, 59 NE 590; Davis v. Waggoner, 42 Ind. A. 115, 83 NE 381, 84 NE 1105; Edwards v. Fleming, 83 Kan. 653, 112 P 836, 33 LRANS 923; Brashear v. Brashear, (Ky.) 127 SW 760; Abner v. Creech, 79 SW 247, 25 KyL 1981; Houchin v. Houchin, 20 SW 506, 14 KyL 453; Strutton v. Strutton, 9 SW 826, 10 KyL 607; Lecomte v. Smart, 19 La. 484; Soper v. Lawrence Bros. Co., 98 Me. 268, 56 A 908, 99 AmSR 397 [aff 201 U. S. 359, 26 SCt 473, 50 L. ed. 788]; Kelly v. Palmer, 91 Minn. 133, 97 NW 578; McCaughn v. Young, 85 Miss. 277, 37 S 839; Dredla v. Pats, 78 Nebr. 506, 111 NW 136; Baty v. Elrod, 66 Nebr. 735, 92 NW 1032, 97 NW 343; Chavez v. Torlina, 15 N. M. 53, 99 P 690; Cornelius v. Hall, 32 Misc. 663, 66 NYS 451; Berry v. McPherson, 153 N. C. 4, 68 SE 892; Cochran v. Linville Impr. Co., 127 N. C. 386, 37 SE 496; Heiser v. Riehle, 7 Watts (Pa.) 35; Savage v. Bon Air Coal, etc., Co., 2 Tenn. Ch. A. 594; Cameron v. Cuffe, (Tex. Civ. A.) 144 SW 1024; Long v. Thompson, etc., Lumber Co., (Tex. Civ. A.) 140 SW 501; Louisiana, etc., Lumber Co. v. Kennedy, (Tex. Civ. A.) 119 SW 884; Mann v. Schueling, (Tex. Civ. A.) 68 SW 292; Sparks v. Hall, 29 Tex. Civ. A. 177, 67 SW 916; McCormick v. Sorenson, 58 Wash. 107, 107 P 1055, 137 AmSR 1047; Northern Pac. R. Co. v. Spokane, 45 Wash. 229, 88 P 135; Progress Blue Ribbon Farms v. Harter, 147 Wis. 133, 132 NW 895; Clithero v. Fenner, 122 Wis. 356, 99 NW 1027, 106 AmSR 978; Roberts v. Decker, 120 Wis. 102, 97 NW 519.

[p] **Evidence insufficient to show hostility of possession.**—Rich v. Victoria Copper Min. Co., 147 Fed. 380, 77 CCA 558; Davis v. Commonwealth Land, etc., Co., 141 Fed. 711; Walker v. Wyman, 157 Ala. 478, 47 S 1011; Hancock v. Kelly, 81 Ala. 368, 2 S 281; Seaverns v. Costello, 8 Ariz. 308, 71 P. 930; Wagner v. Head, 94 Ark. 490, 127 SW 706; Trenouth v. Gilbert, 63 Cal. 404; Dean v. Dunn, 9 Cal. A. 352, 99 P 380; Steckter v. Ewing, 6 Cal. A. 761, 93 P 286; Rider v. Waters, 70 Ga. 716; Worley v. Crawford, 252 Ill. 378, 96 NE 821; Tippenhauer v. Tippenhauer, 158 Ky. 639, 166 SW 225; Wolford v. Smith, 146 Ky. 341, 142 SW 1055; Bates v. Pigman, 145 Ky. 837, 141 SW 402; Richie v. Owsley, 137 Ky. 63, 121 SW 1015; Lancey v. Parks, 102 Me. 135, 66 A 311; Whitmore v. Brown, 100 Me. 410, 61 A 985; Chandler v. Wilson, 77 Me. 76; Olson v. Burk, 94 Minn. 456, 103 NW 335; Glover v. Sage, 87 Minn. 526, 92 NW 471; Hays v. Pumphrey, 226 Mo. 119, 125 SW 1109; Delatour v. Wendt, 93 Nebr. 175, 139 NW 1023; Chicago, etc., R. Co. v. Erskine, 83 Nebr. 95, 118 NW 1098; Knight v. Denman, 64 Nebr. 814, 90 NW 863; Maxwell v. Odell, 4 Nebr. (Unoff.) 645, 95 NW 840; Jenkins v. Maxwell Land Grant Co., 15 N. M. 281, 107 P 739; Catron v. Laughlin, 11 N. M. 604, 72 P 26; Fortier v. Delaware, etc., R. Co., 93 App. Div. 24, 86 NYS 896; Cutting v. Burns, 57 App. Div. 185, 68 NYS 269; Prevatt v. Harrelson, 132 N. C. 250, 43 SE 800; Seabrook v. Coos Bay Ice Co., 49 Or. 237, 89 P 417; Morelock v. Barnard, (Tenn.) 2 SW 32; Fuller v. Jackson, (Tenn. Ch. A.) 62 SW 274; Cumberland River Est. v. Williams, (Tenn. Ch. A.) 57 SW 396; Dikes v. Miller, 24 Tex. 417; Rushing v. Lanier, (Tex. Civ. A.) 132 SW 528; Ryle v. Davidson, (Civ. A.) 116 SW 823 [cert 102 Tex. 227, 115 SW 28]; Hess v. Webb, (Tex. Civ. A.) 113 SW 618; Mann v. Hossack, (Tex. Civ. A.) 96 SW 767; Sheppick v. Sheppick, (Utah) 138 P 1169; Mitchell v. Prepont, 68 Vt. 613, 35 A 496; Van Velsor v. Hughson, 45 U. C. Q. B. 252.

[q] **Evidence sufficient to show that possession was not hostile.**—Read v. Gilliam, 140 Ky. 824, 131 SW 1034; Lowd v. Brigham, 154 Mass. 107, 26 NE 1004; Mattson v. Warner, 115 Minn. 520, 132 NW 1127; Todd v. Weed, 84 Minn. 4, 86 NW 756; American Bank-Note Co. v. New York El. R. Co., 129 N. Y. 252, 29 NE 302; Henderson v. Louisiana, etc., Lumber Co., (Tex. Civ. A.) 128 SW 671; Cruse v. Richards, (Tex. Civ. A.) 100 SW 205; Johnson v. Ingram, 63 Wash. 554, 115 P 1073; Milbank v. Rowland, 63 Wash.

testimony which necessitates resort to mere conjecture.[60] Title by adverse possession cannot be established by inference or implication.[61] However, although there is some authority to that effect,[62] it is not to be understood that the evidence should show adverse possession beyond a reasonable doubt, for such is not the law, and a finding of adverse possession may be based upon a mere preponderance of the evidence.[63] The action in which the claim is made is always civil and the testimony is to be governed by the rules applicable in civil cases.[64] Nevertheless, as in other civil actions, a preponderance of evidence at least is necessary.[65]

Direct and positive evidence is not necessary to the establishment of adverse possession or any of its elements. It may be shown by circumstantial evidence.[66]

XIX. TRIAL

[§ 622] **A. Province of Court and Jury—1. Statement of General Rule.** Adverse possession is usually a mixed question of law and fact. Whether the facts exist which constitute adverse possession is for the jury to determine,[67] and whether the facts as found by the jury constitute adverse possession

519, 115 P 1053; Morgan v. Northern Pac. R. Co., 50 Wash. 480, 97 P 510.

[r] **Evidence sufficient to show good faith.**—Gottlieb v. Thatcher, 51 Fed. 373, 2 CCA 278; Allen v. Phillips, 87 Ark. 185, 112 SW 403; De Forests v. Gast, 20 Colo. 307, 38 P 344; Severson v. Gremm, 124 Iowa 729, 100 NW 862.

[s] **Evidence sufficient to show absence of good faith.**—Silford v. Hayes, 54 Colo. 255, 130 P 330; Silford v. Stratton, 54 Colo. 248, 130 P 327; Petticrew v. Greenshields, 61 Wash. 614, 113 P 749.

[t] **Evidence insufficient to show absence of good faith.**—Laws v. Newkirk, 39 Colo. 78, 88 P 861.

[u] **Evidence held sufficient to show payment of taxes.**—Gray v. Walker, 157 Cal. 381, 108 P 278; Craven v. Lesh, 22 Ida. 463, 126 P 774; Northern Pac. R. Co. v. Pyle, 19 Ida. 3, 112 P 678.

[v] **Evidence held insufficient to show payment of taxes.**—Boynton v. Ashabranner, 75 Ark. 415, 88 SW 566, 1011, 91 SW 20; Williams v. Gross, (Cal.) 61 P 934; Reynolds v. Willard, 80 Cal. 605, 22 P 262; Upham v. Weisshaar, 23 Colo. A. 277, 128 P 1129; Bellefontaine Imp. Co. v. Niedringhaus, 181 Ill. 426, 55 NE 184, 72 AmSR 269; Sanitary Dist. v. Allen, 178 Ill. 330, 53 NE 109; Bell v. Neiderer, 169 Ill. 54, 48 NE 194; Perry v. Burton, 111 Ill. 138; Irwin v. Miller, 23 Ill. 401; French v. Olive, 67 Tex. 400, 3 SW 568; Spence v. Johnson, 3 Tex. Civ. A. 627, 22 SW 1042.

[w] **Evidence held to show permissive or subordinate possession.**—Lecroix v. Malone, 157 Ala. 434, 47 S 725; Hope v. Shiver, 77 Ark. 177, 90 SW 1003; Allen v. McKay, 6 Cal. Unrep. Cas. 993, 70 P 8.

[x] **Evidence sufficient to show knowledge or notice.**—Cole v. Hebb, 7 Gill & J. (Md.) 20; Lanham v. Bowlby, 86 Nebr. 148, 125 NW 149; Timmermann v. Cohn, 70 Misc. 327, 128 NYS 770 [aff 146 App. Div. 924 mem, 131 NYS 1146 mem (rev on other grounds 97 NE 589)].

[y] **Evidence sufficient to show privity.**—Rushing v. Lanier, (Tex. Civ. A.) 132 SW 528; Bennette v. Collins, 54 Tex. Civ. A. 16, 116 SW 618; Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550.

[z] **Evidence sufficient or insufficient to show abandonment.**—Kelly v. Kelly, (Tenn. Ch. A.) 58 SW 870; Griffin v. Houston Oil Co., (Tex. Civ. A.) 149 SW 567; Piper v. Stevenson, 28 Ont. L. 379.

[aa] **Evidence insufficient to show constructive possession.**—Rice v. Goolsbee, 45 Tex. Civ. A. 254, 99 SW 1031; Carlyle v. Pruett, 37 Tex. Civ. A. 384, 84 SW 372.

[bb] **Evidence insufficient to show disclaimer of title.**—Howison v. Masson, 29 App. (D. C.) 338.

[cc] **Evidence held insufficient to show that there was a well defined boundary around the land claimed by adverse possession.**—Le Moyne v. Neal, 158 Ky. 816, 164 SW 964.

60. U. S.—Bump v. Butler County, 93 Fed. 290.
Ill.—McCauley v. Mahon, 174 Ill. 384, 51 NE 829; Hurlbut v. Bradford, 109 Ill. 397.
Mich.—Dawson v. Falls City Boat Club, 142 Mich. 615, 106 NW 146.
N. C.—Coxe v. Carpenter, 157 N. C. 557, 73 SE 113; Berry v. McPherson, 153 N. C. 4, 68 SE 892.
Tex.—Dupont v. Texas, etc., R. Co., (Civ. A.) 158 SW 195.
Wis.—Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019.

[a] **It is not permissible to find adverse possession from mere general statements of witnesses,** not based on facts clearly warranting them, nor in the face of facts clearly established which are so inconsistent with adverse possession as to render it altogether improbable. Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 NW 1019.

61. Fleming v. Howell, 22 Colo. A. 382, 125 P 551.

62. Rowland v. Updike, 28 N. J. L. 101 (holding that, where one party proves title by documentary evidence and the opposite party rests his claim of title solely upon adverse possession, the burden of proof is upon the latter, and he must prove such adverse possession beyond a reasonable doubt). Compare Durham v. Holeman, 30 Ga. 619 [cit and expl Atlanta Journal v. Mayson, 92 Ga. 640, 641, 18 SE 1010, 144 AmSR 104] (where it was said: "Here the plaintiff's title is indisputable. The defendant, to avoid the force of the title, and to defeat a recovery under this plain title, pleads the Statute of Limitation in bar of that right. The onus is on him to sustain his plea affirmatively. If there be a doubt—a reasonable one—the case is against him; and I am not so certain but that the same rule would apply in criminal cases. There is as much authority for it, and none against it that I know of. But in a civil case, there is no question about the rule, and it stands to reason that it should be so. A party is not to be deprived of a plain right upon a mere doubtful claim of another").

63. Ark.—Rector v. Du Val, 27 Ark. 318.
Conn.—Merwin v. Morris, 71 Conn. 555, 42 A 855.
Ill.—Grim v. Murphy, 110 Ill. 271.
Mass.—Cohasset v. Moors, 204 Mass. 173, 179, 90 NE 978 (where Knowlton, J., said: "If the party in whose favor prima facie evidence is introduced has the burden of proof, the other party is not bound to introduce evidence which outweighs the prima facie evidence; but if he introduces anything in opposition, the question is whether the evidence in favor of the party having the burden of proof, including that which was at first prima facie evidence, outweighs that upon the other side").
Mich.—Greene v. Anglemire, 77 Mich. 168, 43 NW 772.
Pa.—Jones v. Hughes, 16 A 849.

64. Greene v. Anglemire, 77 Mich. 168, 43 NW 772.

65. Morrison v. Bomer, 195 Mo. 535, 94 SW 524; Berry v. McPherson, 153 N. C. 4, 68 SE 892; Kron v. Daugherty, 9 Pa. Super. 163.

66. Swenson v. Mynair, 79 Fed. 608, 25 CCA 126; Grim v. Murphy, 110 Ill. 271; Snowden v. Bell, 159 N. C. 497, 75 SE 721; Allen v. Woodson, 60 Tex. 651; Watson v. Hopkins, 27 Tex. 637.

[a] **An intent to claim title adversely** to the true owner may be established by circumstantial evidence precisely as any other fact may be shown. Sawbridge v. Fergus Falls, 101 Minn. 378, 112 NW 385.

67. U. S.—Anderson v. Bock, 15 How. 323, 14 L. ed. 714; Zeller v. Eckert, 4 How. 289, 11 L. ed. 979; Ewing v. Burnet, 11 Pet. 41, 9 L. ed. 624; Jackson v. Huntington, 5 Pet. 402, 8 L. ed. 170. See also Jackson v. Porter, 13 F. Cas. No. 7,143, 1 Paine 457.
Ala.—Theodore Land Co. v. Lyons, 148 Ala. 668, 41 S 682; McCreary v. Jackson Lumber Co., 148 Ala. 247, 41 S 822; Driver v. King, 145 Ala. 585, 40 S 315; Lawrence v. Alabama State Land Co., 144 Ala. 524, 41 S 612; Campbell v. Bates, 143 Ala. 338, 39 S 144; Dorlan v. Westervitch, 140 Ala. 283, 37 S 382, 103 AmSR 35; Doe v. Edmondson, 127 Ala. 445, 30 S 61; Pittman v. Pittman, 124 Ala. 306, 27 S 242; Zundel v. Baldwin, 114 Ala. 328, 21 S 420; Nashville, etc., R. Co. v. Hammond, 104 Ala. 191, 15 S 935; Trufant v. White, 99 Ala. 526, 13 S 83; Black v. Pratt Coal, etc., Co., 85 Ala. 504, 5 S 89; Woods v. Montevallo Coal, etc., Co., 84 Ala. 560, 3 S 475, 5 AmSR 393; Bernstein v. Humes, 75 Ala. 241; Humes v. Bernstein, 72 Ala. 546; Alexander v. Wheeler, 69 Ala. 332; Collins v. Johnson, 57 Ala. 304; Brown v. Cockerell, 33 Ala. 38; Benje v. Creagh, 21 Ala. 151; Herbert v. Hanrick, 16 Ala. 581.
Ark.—Couch v. Adams, 164 SW 728; Coley v. Martin, 95 Ark. 623, 129 SW 783.
Cal.—Oglesby v. Hollister, 76 Cal. 136, 18 P 146, 9 AmSR 177; Thomas v. England, 71 Cal. 456, 12 P 491; Cannon v. Stockmon, 36 Cal. 535, 95 AmD 205; Carpentier v. Mendenhall, 28 Cal. 484, 87 AmD 135.
Conn.—Layton v. Bailey, 77 Conn. 22, 58 A 355; Merwin v. Morris, 71 Conn. 555, 42 A 855; St. Peter's Church v. Beach, 26 Conn. 355.
D. C.—Reid v. Anderson, 13 App. 30.
Ga.—Moore v. Ensign-Oscamp Co., 131 Ga. 421, 62 SE 229; Georgia Iron, etc., Co. v. Allison, 121 Ga. 483, 49 SE 618; Baxley v. Baxley, 117 Ga. 60, 43 SE 436; Roumillot v. Gardner, 113 Ga. 60, 38 SE 362, 53 LRA 729; Cochran v. Warlick, 111 Ga. 396, 36 SE 762; Flannery v. Hightower, 97 Ga. 592, 25 SE 371; Saterfield v. Randall, 44 Ga. 576; Paxson v. Bailey, 17 Ga. 600; Beverly v. Burke, 9 Ga. 440, 54 AmD 351.
Hawaii.—Paulo v. Malo, 4 Hawaii 536; Kaaihue v. Crabbe, 3 Hawaii 768.
Ill.—McCormick v. Kreinke, 179 Ill. 301, 53 NE 549; Truesdale v. Ford, 37 Ill. 210.
Ind.—Wiggins v. Holley, 11 Ind. 2; Hearick v. Doe, 4 Ind. 164.
Ind. T.—Robinson v. Nail, 2 Ind. T. 509, 55 SW 49.
Kan.—Douglas v. Muse, 61 P 413.
Ky.—Walling v. Eggers, 104 SW 360, 31 KyL 1009; Ball v. Loughridge, 100 SW 275, 30 KyL 1123; Owens v. Meredith, 117 Ky. 402, 78 SW 145, 25

is a question of law for the court.[68] On the other | hand, on admitted or undisputed facts, the court

KyL 1485; Owsley v. Owsley, 117 Ky. 47, 77 SW 397, 25 KyL 1186; Cadiz v. Hillman, 50 SW 49, 20 KyL 1776; Middlesboro Waterworks Co. v. Neal, 105 Ky. 586, 49 SW 428, 20 KyL 1403; Gill v. Fauntleroy, 8 B. Mon. 177; Cardwell v. Sprigg, 7 Dana 36; Adams v. Tiernan, 5 Dana 394; Dubois v. Marshall, 3 Dana 336; Bowles v. Sharp, 4 Bibb 550.

Me.—Eaton v. Jacobs, 52 Me. 445; Gardner v. Gooch, 48 Me. 487; Kinsell v. Daggett, 11 Me. 309. See also Schwartz v. Kuhn, 10 Me. 274, 25 AmD 239.

Md.—Walsh v. McIntire, 68 Md. 402, 13 A 348; Baker v. Swan, 32 Md. 355; Keener v. Kauffman, 16 Md. 296; Armstrong v. Risteau, 5 Md. 256, 59 AmD 115.

Mass.—Beckman v. Davidson, 162 Mass. 347, 39 NE 38; Fitchburg R. Co. v. Page, 131 Mass. 391; Bowen v. Guild, 130 Mass. 121; Morrison v. Chapin, 97 Mass. 72; Cummings v. Wyman, 10 Mass. 464. See also Stevens v. Taft, 11 Gray 33.

Mich.—Tyler v. Wright, 171 Mich. 579, 137 NW 212; Stearns Salt, etc., Co. v. Newberg, 170 Mich. 324, 136 NW 359; Tyler v. Wright, 164 Mich. 606, 130 NW 205; Lamb v. Lamb, 139 Mich. 166, 102 NW 645; McKay v. Gardner, 120 Mich. 267, 79 NW 185; Beecher v. Ferris, 117 Mich. 108, 75 NW 294; Pendill v. Marquette County Agricultural Soc., 95 Mich. 491, 55 NW 384; Harrison v. Spencer, 90 Mich. 586, 51 NW 642; Sauers v. Giddings, 90 Mich. 50, 51 NW 265; Miller v. Beck, 68 Mich. 76, 35 NW 899; McCall v. Wells, 55 Mich. 171, 20 NW 890; Highstone v. Burdette, 54 Mich. 329, 20 NW 64 [rev reh 61 Mich. 54, 27 NW 852]; Demill v. Moffat, 45 Mich. 410, 8 NW 79; Yelverton v. Steele, 40 Mich. 538. Compare Judson v. Duffy, 96 Mich. 255, 55 NW 837.

Minn.—Young v. Grieb, 95 Minn. 396, 104 NW 131; Kelly v. Palmer, 91 Minn. 133, 97 NW 578; Washburn v. Cutter, 17 Minn. 361.

Miss.—Huntington v. Allen, 44 Miss. 654; Magee v. Magee, 37 Miss. 138; Ford v. Wilson, 35 Miss. 490, 72 AmD 137; Grafton v. Grafton, 16 Miss. 77; Harmon v. James, 15 Miss. 111, 45 AmD 296.

Mo.—Abeles v. Pillman, 168 SW 1180; Foard v. McAnnelly, 215 Mo. 371, 114 SW 990; Morrison v. Bomer, 195 Mo. 535, 94 SW 524; Patton v. Fox, 179 Mo. 525, 78 SW 804; Kirton v. Bull, 168 Mo. 622, 68 SW 927; Sell v. McAnaw, 158 Mo. 466, 59 SW 1003; Benne v. Miller, 149 Mo. 228, 50 SW 824; Wilson v. Taylor, 119 Mo. 626, 25 SW 199; Harper v. Morse, 114 Mo. 317, 21 SW 517; Irwin v. Woodmansee, 104 Mo. 403, 16 SW 486; Hamilton v. Boggess, 63 Mo. 233; Bompart v. Stumpff, 40 Mo. 446; Macklot v. Dubreuil, 9 Mo. 477, 43 AmD 550.

Nebr.—Kolterman v. Chilvers, 82 Nebr. 216, 117 NW 405; Webb v. Thiele, 56 Nebr. 752, 77 NW 56; Ritter v. Myers, 3 Nebr. (Unoff.) 684, 92 NW 638.

Nev.—McDonald v. Fox, 20 Nev. 364, 22 P 234.

N. H.—Hopkins v. Deering, 71 N. H. 353, 52 A 75; Atherton v. Johnson, 2 N. H. 31.

N. J.—Johnston v. Fitzgeorge, 50 N. J. L. 470, 14 A 762; North Hudson County R. Co. v. Vanderbeck, 49 N. J. L. 693, 13 A 45; Colgan v. Pellens, 48 N. J. L. 27, 2 A 633; Foulke v. Bond, 41 N. J. L. 527; Penton v. Sinnickson, 9 N. J. L. 149.

N. Y.—Barnes v. Light, 116 N. Y. 34, 22 NE 441; Gross v. Welwood, 90 N. Y. 638; Buffalo Creek R. Co. v. Collins, 41 App. Div. 8, 58 NYS 65; Stillwell v. Boyer, 36 App. Div. 424, 55 NYS 358 [aff 165 N. Y. 621 mem, 59 NE 1131 mem]; Erkson v. Johnston, 8 App. Div. 31, 40 NYS 401; Tindale v. Powell, 88 Hun 193, 34 NYS 659; Silliman v. Paine, 70 Hun 459, 24 NYS 344; Jackson v. Stephens, 13 Johns. 495; Jackson v. Joy, 9 Johns. 102. See also Northrop v. Wright, 24 Wend. 221.

N. C.—Locklear v. Savage, 159 N. C. 236, 74 SE 347; Britton v. Ruffin, 122 N. C. 113, 28 SE 963; Asbury v. Fair, 111 N. C. 251, 16 SE 467; Bryan v. Spivey, 109 N. C. 57, 13 SE 766; Parker v. Banks, 79 N. C. 480; McAllister v. Devane, 76 N. C. 57.

Or.—Quinn v. Willamette Pulp, etc., Co., 62 Or. 549, 126 P 1.

Pa.—Sayers v. Pollock, 219 Pa. 274, 68 A 732; Griffin v. Mulley, 167 Pa. 339, 31 A 664; Thompson v. Philadelphia, etc., Coal, etc., Co., 133 Pa. 46, 19 A 346; Bennett v. Morrison, 120 Pa. 390, 14 A 264, 6 AmSR 711; Mason v. Ammon, 117 Pa. 127, 11 A 449; Thompson v. Kauffelt, 110 Pa. 209, 1 A 267; O'Hara v. Richardson, 46 Pa. 385; Hollinshead v. Nauman, 45 Pa. 140; Groft v. Weakland, 34 Pa. 304; Nearhoff v. Addleman, 31 Pa. 279; Workman v. Guthrie, 29 Pa. 495, 72 AmD 654; Hoopes v. Garver, 15 Pa. 517; Cunningham v. Patton, 6 Pa. 355; Hatch v. Smith, 4 Pa. 109; Craig v. Harbison, 4 Pennyp. 488; Blackmore v. Gregg, 2 Watts & S. 182; Nickle v. McFarlane, 3 Watts 165; Rung v. Shoneberger, 2 Watts 23, 26 AmD 95; Jones v. Porter, 3 Penr. & W. 132; McMasters v. Bell, 2 Penr. & W. 180; Davis v. Robinson, 34 Pa. Super. 371; Schwab v. Bickel, 11 Pa. Super. 312; Deppen v. Bogar, 7 Pa. Super. 434. See also Read v. Goodyear, 17 Serg. & R. 350; Bonnell v. Bonnell, 10 Pa. Cas. 419, 14 A 168.

S. C.—Beaufort Land, etc., Co. v. New River Lumber Co., 86 S. C. 358, 68 SE 637; Wright v. Wiloughby, 79 S. C. 438, 60 SE 971; Lassiter v. Okeetee Club, 70 S. C. 102, 49 SE 224; Hill v. Southern R. Co., 67 S. C. 548, 46 SE 486; Bryce v. Cayce, 62 S. C. 546, 40 SE 948; Burnett v. Crawford, 50 S. C. 161, 27 SE 645; Busby v. Florida Cent., etc., R. Co., 45 S. C. 312, 23 SE 50; Lyles v. Roach, 30 S. C. 291, 9 SE 334; Rogers v. Madden, 18 S. C. L. 321; Harrington v. Wilkins, 13 S. C. L. 289; Roberts v. Roberts, 13 S. C. L. 268, 13 AmD 721.

Tex.—Gulf, etc., R. Co. v. Cusenberry, 86 Tex. 525, 26 SW 43; Thiers v. Holmes, 9 SW 191; Broxson v. McDougal, 70 Tex. 64, 7 SW 591; Word v. Drouthett, 44 Tex. 365; Holliday v. Cromwell, 37 Tex. 437; Griffin v. Houston Oil Co., (Civ. A.) 149 SW 567; Chaison v. McFaddin, (Civ. A.) 132 SW 524; Ragon v. Craver, (Civ. A.) 127 SW 1087; Thacker v. Wilson, (Civ. A.) 122 SW 938; Williams v. Texas, etc., R. Co., 52 Tex. Civ. A. 217, 114 SW 877; Craver v. Ragon, (Civ. A.) 110 SW 489; Holland v. Ferris, (Civ. A.) 107 SW 102; San Antonio v. Rowley, 48 Tex. Civ. A. 376, 106 SW 753; Carlisle v. Gibbs, 44 Tex. Civ. A. 189, 98 SW 192; Barrett v. McKinney, (Civ. A.) 93 SW 240; Logan v. Robertson, (Civ. A.) 83 SW 395; Haigler v. Pope, 34 Tex. Civ. A. 124, 77 SW 1039; Preston v. Hilburn, (Civ. A.) 44 SW 698; Hartman v. Huntington, 11 Tex. Civ. A. 130, 32 SW 562; Cartwright v. Pipes, 9 Tex. Civ. A. 309, 29 SW 690.

Vt.—Jangraw v. Mee, 75 Vt. 211, 54 A 189, 98 AmSR 816; Willey v. Hunter, 57 Vt. 479; Eddy v. St. Mars, 53 Vt. 462, 38 AmR 695; Plimpton v. Converse, 44 Vt. 158; Adam v. Fullam, 43 Vt. 592; Webb v. Richardson, 42 Vt. 465.

Va.—Nowlin v. Reynolds, 25 Gratt. (66 Va.) 137; Purcell v. Wilson, 4 Gratt. (45 Va.) 16. See also Doe v. Hill, 10 Leigh (37 Va.) 457.

Wash.—Johnson v. Brown, 33 Wash. 588, 74 P 677.

Wis.—Illinois Steel Co. v. Jeka, 123 Wis. 419, 101 NW 399; Illinois Steel Co. v. Budzisz, 119 Wis. 580, 97 NW 166; Illinois Steel Co. v. Jeka, 119 Wis. 122, 95 NW 97; Kreckeberg v. Leslie, 111 Wis. 462, 87 NW 450; Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905; Lampman v. Van Alstyne, 94 Wis. 417, 69 NW 171; Kurz v. Miller, 89 Wis. 426, 62 NW 182; Ayers v. Reidel, 84 Wis. 276, 54 NW 588; Hacker v. Horlemus, 69 Wis. 280, 34 NW 125; Allen v. Allen, 58 Wis. 202, 16 NW 610; McPherson v. Featherstone, 37 Wis. 632; Whitney v. Powell, 2 Pinn. 115.

N. S.—Miller v. Wolfe, 30 N. S. 277.

Ont.—Doe v. Bayley, 10 U. C. Q. B. 310.

[a] **Court setting as jury.**—It is the province of the trial court sitting as a jury to weigh the evidence and to determine whether the defense of adverse possession is made out. Slicer v. Owens, 241 Mo. 319, 145 SW 428. And see Dodge v. Lavin, 34 R. I. 514, 84 A 857 [den rearg 34 R. I. 409, 83 A 1009].

[68] U. S.—Chandler v. Von Roeder, 24 How. 224, 16 L. ed. 633; Jackson v. Huntington, 5 Pet. 402, 438, 8 L. ed. 170.

Ala.—Potts v. Coleman, 67 Ala. 221; Collins v. Johnson, 57 Ala. 304; Herbert v. Hanrick, 16 Ala. 581.

Conn.—Merwin v. Morris, 71 Conn. 555, 42 A 855.

D. C.—Reid v. Anderson, 13 App. 30.

Ga.—Verdery v. Savannah, etc., R. Co., 82 Ga. 675, 9 SE 1133; Saterfield v. Randall, 44 Ga. 576; Paxson v. Bailey, 17 Ga. 600; Veverly v. Burke, 9 Ga. 440, 54 AmD 351; Moody v. Fleming, 4 Ga. 115, 48 AmD 210.

Hawaii.—Kaaihue v. Crabbe, 3 Hawaii 768.

Ill.—Shackleford v. Bailey, 35 Ill. 387; Woodward v. Blanchard, 16 Ill. 424.

Ky.—Banks v. Collins, 39 SW 519, 19 KyL 46; Gill v. Fauntleroy, 8 B. Mon. 177.

La.—Zebriska's Succ., 119 La. 1076, 44 S 893.

Md.—Walsh v. McIntire, 68 Md. 402, 13 A 348; Baker v. Swan, 32 Md. 355; Thistle v. Frostburg Coal Co., 10 Md. 129.

Mich.—McKee v. Grand Rapids, 133 Mich. 272, 95 NW 85.

Minn.—Washburn v. Cutter, 17 Minn. 361.

Miss.—Magee v. Magee, 37 Miss. 138.

Mo.—Hendricks v. Musgrove, 183 Mo. 300, 81 SW 1265; Sell v. McAnaw, 158 Mo. 466, 59 SW 1003; Benne v. Miller, 149 Mo. 228, 50 SW 824; Harper v. Morse, 114 Mo. 317, 21 SW 517; Boogher v. Neece, 75 Mo. 383; Harrison v. Cachelin, 35 Mo. 77; Macklot v. Dubreuil, 9 Mo. 477, 43 AmD 550.

N. H.—Newmarket Mfg. Co. v. Pendergast, 24 N. H. 54.

N. J.—Cornelius v. Giberson, 25 N. J. L. 1.

N. Y.—Bowie v. Brahe, 10 N. Y. Super. 35; Jackson v. Walker, 7 Cow. 637.

Pa.—Armstrong v. Caldwell, 53 Pa. 284; Groft v. Weakland, 34 Pa. 304; De Haven v. Landell, 31 Pa. 120; Union Canal Co. v. Young, 1 Whart. 410, 30 AmD 212; Rung v. Shoneberger, 2 Watts 23, 26 AmD 95; Schwab v. Bickel, 11 Pa. Super. 312.

Tex.—Greenlee v. Taylor, 79 Tex. 149, 14 SW 1056; Word v. Drouthett, 44 Tex. 365; Holliday v. Cromwell, 37 Tex. 437; Davenport v. Bearden, 49 Tex. Civ. A. 196, 108 SW 474; Holland v. Ferris, (Civ. A.) 107 SW 102 [rev on other grounds 114 SW 346]; York v. Hutcheson, 37 Tex. Civ. A. 367, 83 SW 895.

Wis.—Kurz v. Miller, 89 Wis. 426, 62 NW 182.

[a] **Another statement of the rule** (1) is that adverse possession is a question of fact for the jury under proper instructions from the court. Kennedy v. Townsley, 16 Ala. 239; Clapp v. Bromagham, 9 Cow. (N. Y.) 530; Jackson v. Joy, 9 Johns. (N. Y.) 102; Broxson v. McDougal, 70 Tex. 64, 7 SW 591. (2) What is meant by this is that the court instructs that if certain facts are found by the jury they are to render a verdict for or against the party relying on adverse possession. It follows from what has been

may decide the question of title as matter of law,[69] and if there is no evidence to show adverse possession the court need not and should not submit the question to the jury.[70]

[§ 623] **2. In Determining Character of Possession—a. Whether Actual.** It is for the jury to decide whether the party relying on adverse possession had actual possession of the premises claimed,[71] provided there is evidence which warrants the submission of the question to the jury.[72]

[§ 624] **b. Whether Open and Notorious.** It is also for the jury to decide whether there has been open and notorious possession,[73] where there is evidence tending to establish that fact.[74]

[§ 625] **c. Whether Exclusive.** Whether claimant's possession has been exclusive is a question for the jury.[75]

[§ 626] **d. Whether Continuous and of Sufficient Duration.** It is for the jury to decide when the possession commenced,[76] and whether it has been continuous[77] and for the requisite

said that if there is any evidence, no matter how slight, tending to show adverse possession the question should be submitted to the jury. Bennett v. Morrison, 120 Pa. 390, 14 A 264, 6 AmSR 711.

69. Ga.—Roberson v. Downing Co., 126 Ga. 175, 54 SE 1020; Verdery v. Savannah, etc., R. Co., 82 Ga. 675, 9 SE 1133.

Ky.—Owens v. Meredith, 117 Ky. 402, 78 SW 145, 25 KyL 1485.

Mich.—McKee v. Grand Rapids, 133 Mich. 272, 95 NW 85.

Mo.—Chilton v. Comanianni, 221 Mo. 685, 120 SW 1174; Brown v. Hartford, 173 Mo. 183, 73 SW 140.

Pa.—Union Canal Co. v. Young, 1 Whart. 410, 30 AmD 212.

70. U. S.—Chandler v. Van Roeder, 24 How. 224, 16 L. ed. 633.

Ala.—Thompson v. Logan, 166 Ala. 45, 51 S 985; Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45.

Nebr.—Baty v. Elrod, 66 Nebr. 735, 92 NW 1032, 97 NW 343.

Pa.—Nearhoff v. Addleman, 31 Pa. 279.

Tex.—Forsod v. Golson, 77 Tex. 666, 14 SW 232; Adams v. Burrell, (Civ. A.) 127 SW 581; Cochran v. Moerer, 31 Tex. Civ. A. 495, 72 SW 1031; Lackey v. Bennett, (Civ. A.) 65 SW 651; Wiley v. Lindley, (Civ. A.) 56 SW 1001.

Wis.—Allen v. Allen, 58 Wis. 202, 16 NW 610.

[a] **If the evidence does not afford any reasonable inference of the existence of facts amounting to adverse possession,** the court should not submit the question to the jury. Montgomery, etc., R. Co. v. Rutland, 165 Ala. 311, 51 S 831.

[b] **Evidence insufficient to make prima facie case.**—It is the duty of courts to protect the rights of landowners from the danger of capricious verdicts by refusing to allow a jury to consider the question of adverse possession until evidence sufficient to make a prima facie case has been introduced. Judson v. Duffy, 96 Mich. 255, 55 NW 837.

[c] **If evidence as to one or more elements** that go to make up title by adverse possession is wanting, the court should charge that the party claiming by virtue of the statute has no title thereunder. De Haven v. Landell, 31 Pa. 120. See also Herbert v. Hanrick, 16 Ala. 581.

[d] **Evidence sufficient to go to jury on question of adverse possession.**—Guinn v. Spillman, 52 Kan. 496, 35 P 13; Mather v. Walsh, 107 Mo. 121, 17 SW 755; De St. Laurent v. Gescheidt, 18 App. Div. 121, 45 NYS 730; Coxe v. Carpenter, 157 N. C. 557, 73 SE 113; Church v. Waggoner, 78 Tex. 200, 14 SW 581; Rushing v. Lanier, 51 Tex. Civ. A. 278, 111 SW 1089; Haigler v. Pope, 34 Tex. Civ. A. 124, 77 SW 1039; Williams v. Galveston, (Tex. Civ. A.) 58 SW 551; Illinois Steel Co. v. Budzisz, 119 Wis. 580, 97 NW 166. But see Judson v. Duffy, 96 Mich. 255, 55 NW 837.

[e] **Evidence insufficient to go to jury on question of adverse possession.**—Padgett v. Decker, 145 Ky. 227, 140 SW 152; Slaven v. Dority, 142 Ky. 640, 134 SW 1166; Hankins v. Flynt, (Tex. Civ. A.) 136 SW 1171; Ryle v. Davidson, (Tex. Civ. A.) 116 SW 823 [cert 102 Tex. 227, 115 SW 28].

71. Ala.—Holt v. Adams, 121 Ala. 664 25 S 716; Nashville, etc., R. Co. v. Hammond, 104 Ala. 191, 15 S 935.

Conn.—Johnson v. Gorham, 38 Conn. 513.

Del.—Doe v. Pepper, 16 Del. 221, 43 A 90.

Ga.—Flannery v. Hightower, 97 Ga. 592, 25 SE 371.

Ill.—White v. Harris, 206 Ill. 584, 69 NE 519; Johns v. McKibben, 156 Ill. 71, 40 NE 449; Truesdale v. Ford, 37 Ill. 210; Morrison v. Kelly, 22 Ill. 609, 74 AmD 169.

Ind.—Wiggins v. Holly, 11 Ind. 2.

Ind. T.—Robinson v. Nail, 2 Ind. T. 509, 52 SW 49.

Kan.—Dickinson v. Bales, 61 P 403.

Md.—Armstrong v. Risteau, 5 Md. 256, 59 AmD 115.

Mass.—Morrison v. Chapin, 97 Mass. 72.

Mich.—Pendill v. Marquette County Agricultural Soc., 95 Mich. 491, 55 NW 384; Sauers v. Giddings, 90 Mich. 50, 51 NW 265.

Minn.—Sage v. Morosick, 69 Minn. 167, 71 NW 930; Butler v. Drake, 62 Minn. 229, 64 NW 559.

Miss.—Davis v. Bowmar, 55 Miss. 671; McClanahan v. Barrow, 27 Miss. 664.

Nebr.—Fink v. Dawson, 52 Nebr. 647, 72 NW 1037.

N. M.—Johnston v. Albuquerque, 12 N. M. 20, 72 P 9.

N. Y.—O'Donohue v. Cronin, 62 App. Div. 379, 70 NYS 737; Stillwell v. Boyer, 36 App. Div. 424, 55 NYS 358 [aff 165 N. Y. 621 mem, 59 NE 1131 mem]; Race v. Stewart, 5 App. Div. 598, 39 NYS 438; Martin v. Rector, 30 Hun 138.

S. C.—Stokes v. Murray, 95 S. C. 120, 78 SE 741.

Tex.—Haigler v. Pope, 34 Tex. Civ. A. 124, 77 SW 1039; Williams v. Galveston, (Civ. A.) 58 SW 551; Beaumont Pasture Co. v. Polk, (Civ. A.) 55 SW 614; McCarty v. Johnson, 20 Tex. Civ. A. 184, 49 SW 1098.

Vt.—Hollister v. Young, 42 Vt. 403.

Wis.—Illinois Steel Co. v. Jeka, 119 Wis. 122, 95 NW 97; Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905; Allen v. Allen, 58 Wis. 202, 16 NW 610.

[a] **Inclosure.**—"Natural barriers may or may not be of such a character as to serve as part of an inclosure by which a party subjects land to his dominion and control, and so acquires possession of it. Whether they are of such a character in any given case is a question for the jury under proper instructions from the court." Goodwin v. McCabe, 75 Cal. 584, 586, 17 P 705.

[b] **Whether a sale of property is possession in law** is a question for the jury. Benne v. Miller, 149 Mo. 228, 50 SW 824.

72. See cases infra this note.

[a] **Evidence sufficient to go to jury on questions of possession.**—Berry v. McPherson, 153 N. C. 4, 68 SE 892; Thornton v. Southern R. Co., 150 N. C. 691, 64 SE 776.

73. Ky.—Kentucky Coal, etc., Co. v. Carroll Hardwood Lumber Co., 154 Ky. 523, 157 SW 1109.

Me.—Gardner v. Gooch, 48 Me. 487.

Mich.—Pendill v. Marquette County Agricultural Soc., 95 Mich. 491, 55 NW 384.

Pa.—Mason v. Ammon, 117 Pa. 127, 11 A 449.

S. C.—Bryce v. Cayce, 62 S. C. 546, 40 SE 948.

Tex.—Houston Oil Co. v. Griffin, (Civ. A.) 166 SW 902; Craver v. Ragon, (Civ. A.) 110 SW 489.

Wash.—Johnson v. Brown, 33 Wash. 588, 74 P 677.

Wis.—Illinois Steel Co. v. Budzisz, 119 Wis. 580, 97 NW 166; Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 NW 855, 85 NW 402, 83 AmSR 905.

Ont.—Doe v. Bayley, 10 U. C. Q. B. 310.

[a] **Illustrations.**—(1) Where an inclosure consisted partly of fences and partly of natural objects, it was for the jury to determine whether such inclosure gave sufficient notoriety of a claim of ownership to such tract, and, where a tract was fenced on three sides and the fourth side abutted on a stream and the entire tract was used as a pasture, it was for the jury to decide whether the inclosure if necessary was sufficient to establish adverse possession under the ten-year limitations. Fraser v. Seureau, (Tex. Civ. A.) 128 SW 649. (2) Where, in a suit to quiet title by one claiming by adverse possession of the owner's widow, there was a question as to whether notice of the widow's repudiation of her husband's title was brought home to the heir, or was so notorious as to raise the presumption that he had notice thereof, the question of adverse possession of the widow was for the jury. Watson v. Hardin, 97 Ark. 33, 132 SW 1002.

74. Jangraw v. Mee, 75 Vt. 211, 54 A 189, 98 AmSR 816.

75. Kan.—Douglas v. Muse, 61 P 413.

Me.—Gardner v. Gooch, 48 Me. 487.

Md.—Armstrong v. Risteau, 5 Md. 256, 59 AmD 115.

Mich.—Pendill v. Marquette County Agricultural Soc., 95 Mich. 491, 55 NW 384; Sauers v. Giddings, 90 Mich. 50, 51 NW 265.

Mo.—Bompart v. Stumpff, 40 Mo. 446.

S. C.—Lyles v. Roach, 30 S. C. 291, 9 SE 334.

Vt.—Adams v. Fullam, 43 Vt. 592.

Wis.—Illinois Steel Co. v. Budzisz, 119 Wis. 580, 97 NW 166.

N. B.—Doe v. Savoy, 28 N. B. 168.

76. Douglas v. Muse, 62 Kan. 865, 61 P 413. See also Johnson v. Ingram, 63 Wash. 554, 115 P 1073.

77. Ala.—Witherington v. White, 165 Ala. 316, 51 S 726; Robinson v. Allison, 124 Ala. 328, 27 S 461; Foy v. Wellborn, 112 Ala. 160, 20 S 604.

Ga.—Walker v. Steffes, 139 Ga. 520, 77 SE 580; Mitchell v. Crummey, 134 Ga. 383, 67 SE 1042.

Ky.—Kentucky Coal, etc., Co. v. Carroll Hardwood Lumber Co., 154 Ky. 523, 157 SW 1109.

Md.—Armstrong v. Risteau, 5 Md. 256, 59 AmD 115.

Mass.—Webster v. Lowell, 142 Mass. 324, 8 NE 54.

Mich.—Merritt v. Westerman, 165 Mich. 535, 131 NW 66; Pendill v. Marquette County Agricultural Soc., 95 Mich. 491, 55 NW 384; Sauers v. Giddings, 90 Mich. 50, 51 NW 265.

N. C.—Barfield v. Hill, 163 N. C. 262, 79 SE 677.

Pa.—Mason v. Ammon, 117 Pa. 127, 11 A 449; Thompson v. Kauffelt, 110 Pa. 209, 1 A 267; Cunningham v. Patton, 6 Pa. 355.

Wash.—Johnson v. Brown, 33 Wash. 588, 74 P 677.

N. B.—Doe v. Savoy, 28 N. B. 168.

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period,[78] if there is evidence which warrants a submission of these issues to the jury.[79]

[§ 627] **e. Whether Hostile.** It is likewise for the jury to determine whether the possession has in fact been hostile or in subordination to the title of another,[80] and under claim of title in the person setting it up,[81] if there is evidence sufficient to warrant the submission of the question to the jury.[82]

[§ 628] **3. In Determining Good Faith.** The good faith of the party claiming title by adverse possession is in all cases a question of fact for the jury.[83]

Ont.—Lewis v. Kelly, 17 U. C. C. P. 250; Doe v. Proudfoot, 9 U. C. Q. B. 508.

[a] **Applications of rule.**—(1) Considering the character of possession involved in the turpentine business, the fact that a brief interval of from two to three months took place between the boxing for turpentine purposes and back-boxing, during which a large amount of timber was cut from the land by one acting by permission or lease from the prescriber, would not as a matter of law amount to a break in the continuity of the prescriber's possession. Mitchell v. Crummey, 134 Ga. 383, 67 SE 1042. (2) On an issue of adverse possession, it was error to take from the jury the consideration of the fact that the adverse claimant had permitted his fence to be down for a short period within fifteen years. Cadiz v. Hillman, 50 SW 49, 20 KyL 1776.

78. Ala.—Hays v. Lemoine, 156 Ala. 465, 47 S 97; Foy v. Welborn, 112 Ala. 160, 20 S 604.

Ga.—Walker v. Steffes, 139 Ga. 520, 77 SE 580.

Ind.—Wiggins v. Holley, 11 Ind. 2.

Kan.—Douglas v. Muse, 62 Kan. 865, 61 P 413.

Ky.—Adams v. Tiernan, 5 Dana 394.

N. C.—Barfield v. Hill, 163 N. C. 262, 79 SE 677; Asbury v. Fair, 111 N. C. 251, 16 SE 467.

Pa.—Cunningham v. Patton, 6 Pa. 355.

S. C.—Dunlap v. Robinson, 87 S. C. 577, 70 SE 313.

Tex.—Williams v. Texas, etc., R. Co., 52 Tex. Civ. A. 217, 114 SW 877; Rushing v. Lanier, 51 Tex. Civ. A. 278, 111 SW 1089.

Wash.—Johnson v. Brown, 33 Wash. 588, 74 P 677.

Wis.—Illinois Steel Co. v. Budzisz, 119 Wis. 580, 97 NW 166.

79. Robertson v. Downing Co., 126 Ga. 175, 54 SE 1020 (holding that where there is no evidence by which a verdict finding a breach in the continuity of possession could have been sustained the question should not be submitted to the jury).

[a] **Evidence held insufficient to go to jury on question of continuous possession.**—Allen v. Clearman, (Tex. Civ. A.) 128 SW 1140.

[b] **Evidence held sufficient** to go to jury on question of continuous possession. Pearce v. Aldrich Min. Co., (Ala.) 64 S 321.

80. U. S.—Hogan v. Kurtz, 94 U. S. 773, 24 L. ed. 317.

Ala.—Pearce v. Aldrich Min. Co., 64 S 321; Mobile, etc., R. Co. v. Rutherford, 63 S 1003; Hornsby v. Tucker, 61 S 928; Montevallo Min. Co. v. Southern Mineral Land Co., 174 Ala. 137, 57 S 377; Knight v. Hunter, 155 Ala. 238, 46 S 235; Theodore Land Co. v. Lyons, 148 Ala. 668, 41 S 682; Nashville, etc., R. Co. v. Hammond, 104 Ala. 191, 15 S 935; Trufant v. White, 99 Ala. 526, 13 S 83; Woods v. Montevallo Coal, etc., Co., 84 Ala. 560, 3 S 475, 5 AmSR 393; Hancock v. Kelly, 81 Ala. 368, 2 S 281; Rivers v. Thompson, 43 Ala. 633; Herbert v. Hanrick, 16 Ala. 581; Kennedy v. Townsley, 16 Ala. 239.

Ark.—Shirey v. Whitlow, 80 Ark. 444, 97 SW 444.

Cal.—Abbott v. Pond, 142 Cal. 393, 76 P 60.

Conn.—St. Peter's Church v. Beach, 26 Conn. 355.

Del.—Pruitt v. Osler, 90 A 467.

Ga.—Shingler v. Bailey, 135 Ga. 666, 70 SE 563; Morrison v. Hays, 19 Ga. 294; Beverly v. Burke, 9 Ga. 440, 54 AmD 351.

Ill.—Carroll v. Rabberman, 240 Ill. 450, 88 NE 995; Shaw v. Smithes, 167 Ill. 269, 47 NE 523; Brooks v. Bruyn, 24 Ill. 372.

Ind.—Wiggins v. Holley, 11 Ind. 2; Logsdon v. Dingg, 32 Ind. A. 158, 69 NE 409; Webb v. Rhodes, 28 Ind. A. 393, 61 NE 735.

Ky.—Le Moyne v. Meadors, 156 Ky. 832, 162 SW 526; Frye v. McKinley, 136 Ky. 31, 123 SW 321; Dubois v. Marshall, 3 Dana 336.

La.—Zebriska's Succ., 119 La. 1076, 44 S 893.

Me.—Moore v. Moore, 61 Me. 417; Eaton v. Jacobs, 52 Me. 445; Kinsell v. Daggett, 11 Me. 309; Paul v. Moody, 7 Me. 455.

Md.—Keener v. Kauffman, 16 Md. 296; Armstrong v. Risteau, 5 Md. 256, 59 AmD 115; Matthews v. Ward, 10 Gill & J. 443.

Mass.—Shattuck v. Stedman, 2 Pick. 468; Hill v. Crosby, 2 Pick. 466, 13 AmD 448.

Mich.—Sauers v. Giddings, 90 Mich. 50, 51 NW 265.

Minn.—Kelly v. Palmer, 91 Minn. 133, 97 NW 578.

Miss.—Magee v. Magee, 37 Miss. 138.

Mo.—Sell v. McAnaw, 158 Mo. 466, 59 SW 1003; Dunlap v. Griffith, 146 Mo. 283, 47 SW 917.

N. H.—Atherton v. Johnson, 2 N. H. 31.

N. J.—Page v. Gaskill, 84 N. J. L. 615, 87 A 460; Penton v. Sinnickson, 9 N. J. L. 149.

N. Y.—Whiting v. Edmunds, 94 N. Y. 309; Gross v. Welwood, 90 N. Y. 638; Jackson v. Joy, 9 Johns. 102.

Or.—Altschul v. O'Neill, 35 Or. 202, 58 P 95.

Pa.—Sayers v. Pollock, 219 Pa. 274, 68 A 732; Collins v. Lynch, 157 Pa. 246, 27 A 721, 37 AmSR 723; Mason v. Ammon, 117 Pa. 127, 11 A 449; Thompson v. Kauffelt, 110 Pa. 209, 1 A 267; Craig v. Harbison, 4 Pennyp. 488; Heiser v. Riehle, 7 Watts 85; Jones v. Porter, 3 Penr. & W. 132; McMasters v. Bell, 2 Penr. & W. 180.

S. C.—Dunlap v. Robinson, 87 S. C. 577, 70 SE 313; Rogers v. Madden, 18 S. C. L. 321; Harrington v. Wilkins, 13 S. C. L. 289.

Tex.—Dryden v. Makey, (Civ. A.) 160 SW 302; Pullman v. Houston, (Civ. A.) 125 SW 69; Crosby v. El Paso First Presb. Church, 45 Tex. Civ. A. 111, 99 SW 584; Mass v. Bromberg, 28 Tex. Civ. A. 145, 66 SW 468; Williams v. Galveston, (Civ. A.) 58 SW 551.

Vt.—Jangraw v. Mee, 75 Vt. 211, 54 A 189, 98 AmSR 816; Hall v. Dewey, 10 Vt. 593; Stevens v. Dewing, 2 Aik. 112.

Wis.—Illinois Steel Co. v. Budzisz, 119 Wis. 580, 97 NW 166; Ayers v. Reidel, 84 Wis. 276, 54 NW 588; Hacker v. Horlemus, 74 Wis. 21, 41 NW 965; McPherson v. Featherstone, 37 Wis. 632; Whitney v. Powell, 2 Pinn. 115, 1 Chandl. 52.

N. B.—Doe v. Welling, 11 N. B. 470.

[a] **Application of rule.**—(1) In an action to quiet title, where the adverse possession of defendants and their grantor is not within the statutory period unless tacked to that of a prior vendor, and there is evidence that he went into possession in 1852 and cultivated the land until he sold it, paid taxes, and scheduled it as assets of his insolvent estate, but in 1868 wrote letters to plaintiff's ancestors tending to show that he held permissively under them, it is for the jury to say whether his title was in fact adverse. Trufant v. White, 99 Ala. 526, 13 S 83. (2) Whether there was such disclaimer as will convert a possession originally taken in subservience to another into a hostile possession is a question for the jury. Hays v. Lemoine, 156 Ala. 465, 47 S 97; Foy v. Wellborn, 112 Ala. 160, 20 S 604. (3) Where the proof tends to show a continuous exclusive possession for the statutory period by acts indicating dominion over the land, the fact that there was proof of declarations of the occupant indicating that he did not at first claim ownership does not conclusively rebut the inference of a claim of right derivable from his acts, the issue being for the jury. Webb v. Thiele, 56 Nebr. 752, 77 NW 56. (4) Defendant's decedent purchased land, taking the title in plaintiff's name without the latter's knowledge. After receiving the deed he took possession of the land, improved, and occupied the same as a homestead, paying taxes and exercising acts of ownership over the property for more than twenty years, until his death, without informing plaintiff that the deed ran to him. It was held that whether decedent claimed the land as his own or intended that his possession should inure to the benefit of plaintiff was a question for the jury. McPherson v. Featherstone, 37 Wis. 632. (5) In trespass to try title, where defendant has gone into possession under a contract of purchase, the question as to whether he had repudiated the contract thereafter and held adversely was for the jury, the evidence being conflicting. McCulloch v. Nicholson, (Tex. Civ. A.) 162 SW 432.

[b] **Rule applicable where court sits as jury.**—The question whether a possession is hostile is for the jury or for the court sitting as such, and in an action to establish a right of way by prescription the finding of the court on that question, in the absence of the testimony from the record will be presumed to be correct. Thomas v. England, 71 Cal. 456, 12 P 491.

81. Ala.—Lawrence v. Alabama State Land Co., 144 Ala. 524, 41 S 612; Normant v. Eureka Co., 98 Ala. 181, 12 S 454, 39 AmSR 45; Herbert v. Hanrick, 16 Ala. 581.

Ill.—Brooks v. Bruyn, 24 Ill. 372.

Md.—Armstrong v. Risteau, 5 Md. 256, 59 AmD 115.

Minn.—Mattson v. Warner, 115 Minn. 520, 132 NW 1127; Sawbridge v. Fergus Falls, 101 Minn. 378, 112 NW 385; Todd v. Weed, 84 Minn. 4, 86 NW 756.

Mo.—Perkins Land, etc., Co. v. Irvin, 200 Mo. 485, 98 SW 580; McElhinney v. Kraus, 10 Mo. A. 218.

Vt.—Brown v. Edson, 22 Vt. 357.

Va.—Haney v. Breeden, 100 Va. 781, 42 SE 916; Nowlin v. Reynolds, 25 Gratt. (66 Va.) 137; Early v. Garland, 13 Gratt. (54 Va.) 1.

82. See cases infra this note.

[a] **Evidence of hostility sufficient to go to jury.**—Zeller v. Eckert, 4 How. (U. S.) 289, 11 L. ed. 979; Butcher v. Burns, (Mich.) 147 NW 450; Dunlap v. Griffith, 146 Mo. 283, 47 SW 917; Green v. Harman, 15 N. C. 158; Houston Oil Co. v. Lambert, (Tex. Civ. A.) 161 SW 6.

83. U. S.—Wright v. Mattison, 18 How. 50, 15 L. ed. 280; Latta v. Clifford, 47 Fed. 614.

Ala.—Jordan v. Smith, 64 S 317; Sledge v. Singley, 139 Ala. 346, 37 S 98; Holt v. Adams, 121 Ala. 664, 25 S 716.

Colo.—Jackson v. Larson, 24 Colo. A. 548, 136 P 81.

Ga.—Lee v. O'Quin, 108 Ga. 355, 30 SE 356; Salter v. Salter, 80 Ga. 178, 4 SE 391, 12 AmSR 249; Virgin v.

[§ 629] **4. In Determining Color of Title.** On the other hand, what is color of title is a question of law,[84] and when the facts exhibiting the title are shown the court will determine whether they amount to color of title.[85] However, it has been held that where the purchaser in a bond for title procured six years later a conveyance from a third person, and the papers did not refer to each other and the descriptions did not correspond in area, the question whether the bond was merged in the conveyance so as not to constitute color of title is for the jury.[85½]

[§ 630] **5. In Determining Whether Adverse Possession Has Been Abandoned.** Whether an adverse holding of land has been abandoned is a question of fact for the jury.[86]

[§ 631] **B. Taking Case from Jury.** The rules applicable to the taking of a case from the jury in civil actions generally[87] apply in actions where the basis of the action or the defense thereto is adverse possession.

Directing verdict. Thus where the undisputed evidence shows continuous adverse possession for the statutory period, the court may direct a verdict in accordance with such evidence.[88] It is otherwise, however, where the evidence as to adverse possession is conflicting,[89] or where there is merely some evidence of adverse possession.[90] On the other hand it has been held that where plaintiff, in an action to recover a part of his lot covered by the building of an adjoining owner, does not discharge the burden of showing that defendant intended only to claim to the true line defendant is entitled to a peremptory instruction as to the part by the line on having been in possession a requisite length of time.[91]

Nonsuit. Where there is some evidence of adverse possession a nonsuit should not be granted.[92]

Demurrer to evidence. It has been held that unless the adverse claimant makes out a prima facie case a demurrer to the evidence should be sustained against him.[93]

[§ 632] **C. Instructions.** The principles governing instructions in civil actions generally[94] apply in respect to instructions in cases where adverse possession is in issue. Thus the instructions should be definite and certain,[95] and not ambiguous,[96] argumentative,[97] contradictory,[98] or otherwise misleading,[99] and should avoid repetition.[1] So the instructions must not invade the province of the jury by charging with respect to matters of fact,[2] or by excluding from the consideration of the jury evidence which should be submitted to them,[3] or by assuming as proved matters which are in issue;[4] and on the other hand should not submit to the jury both the law and the facts.[5] The instructions should be applicable to and limited by the issues raised by the pleadings and evidence;[6] and on the other hand should not ignore any issue which there is

Wingfield, 54 Ga. 451; Walls v. Smith, 19 Ga. 8.

Ill.—Stubblefield v. Borders, 92 Ill. 279; Smith v. Ferguson, 91 Ill. 304; Hardin v. Gouveneur, 69 Ill. 140; Fagan v. Rosier, 68 Ill. 84; Woodward v. Blanchard, 16 Ill. 424.

Minn.—Seigneuret v. Fahey, 27 Minn. 60, 6 NW 403.

Mo.—Perkins Land, etc., Co. v. Irvin, 200 Mo. 485, 98 SW 580; Gaines v. Saunders, 87 Mo. 557; Turner v. Hall, 60 Mo. 271.

84. U. S.—Wright v. Mattison, 18 How. 50, 15 L. ed. 280; Van Gunden v. Virginia Coal, etc., Co., 52 Fed. 838, 3 CCA 294; Latta v. Clifford, 47 Fed. 614; McIntyre v. Thompson, 10 Fed. 531, 4 Hughes 562.

Ala.—Doe v. Edmondson, 127 Ala. 445, 30 S 61; Black v. Tennessee Coal, etc., Co., 93 Ala. 109, 9 S 537.

Cal.—Packard v. Moss, 68 Cal. 123, 8 P 818.

Ga.—Lee v. O'Quin, 103 Ga. 355, 30 SE 256.

Ill.—Hardin v. Gouveneur, 69 Ill. 140; Fagan v. Rosier, 68 Ill. 84; Woodward v. Blanchard, 16 Ill. 424.

Mich.—Miller v. Clark, 56 Mich. 337, 23 NW 35.

Mo.—Boogher v. Neece, 75 Mo. 383.

N. M.—Armijo v. Armijo, 4 N. M. 133, 13 P 92.

S. C.—Polson v. Ingram, 22 S. C. 541.

Tex.—Sullivan v. Fant, (Civ. A.) 160 SW 612.

W. Va.—Core v. Faupel, 24 W. Va. 238.

85. Wright v. Mattison, 18 How. (U. S.) 50, 15 L. ed. 280; Doe v. Edmondson, 127 Ala. 445, 30 S 61; Jackson v. Larson, 24 Colo. A. 548, 136 P 81.

85½. Betts v. Gahagan, 212 Fed. 120.

86. Buck v. Louisville, etc., R. Co., 159 Ala. 305, 48 S 699; Campbell v. Bates, 143 Ala. 338, 39 S 144. And see Gist v. Beaumont, 104 Ala. 347, 16 S 20; Monroe Water Supply Co. v. Starner, 242 Pa. 18, 88 A 782; Patchin v. Stroud, 28 Vt. 394.

[a] **Thus** where one enters upon part of a tract of land under a deed from one having no title and afterward receives a deed from the disseizee of a large part of the same tract, it is a question for the jury whether the disseizor did not intend thereby to yield and to abandon his possessory title to the whole tract on thus obtaining a perfect title to a large part of it. Schwartz v. Kuhn, 10 Me. 274, 25 AmD 239.

87. See Trial [38 Cyc 1532 et seq].

88. Briscoe v. Holder, 111 Ga. 877, 36 SE 960; York v. Hutcheson, 37 Tex. Civ. A. 367, 83 SW 895.

89. Jordan v. Smith, (Ala.) 64 S 817; Cochran v. Warlick, 111 Ga. 396, 36 SE 762; Frye v. McKinley, 136 Ky. 31, 123 SW 321. And see Riley v. Fletcher, (Ala.) 64 S 85.

90. Beecher v. Ferris, 124 Mich. 9, 82 NW 617. And see Baxley v. Baxley, 117 Ga. 60, 43 SE 436; Kreckeberg v. Leslie, 111 Wis. 462, 87 NW 450.

91. Gloyd v. Franck, 248 Mo. 468, 154 SW 744.

92. Henry v. Roberts, 140 Ga. 477, 79 SE 115; Holder v. Scarborough, 119 Ga. 256, 46 SE 93; Stewart v. McCormick, 161 N. C. 625, 77 SE 761; Lassiter v. Okeetee Club, 70 S. C. 102, 49 SE 224; Kolb v. Jones, 62 S. C. 193, 40 SE 168.

93. Wilson v. Braden, 56 W. Va. 372, 49 SE 409, 107 AmSR 927.

94. See Trial [38 Cyc 1594 et seq].

95. Dawson v. Falls City Boat Club, 142 Mich. 615, 106 NW 146.

96. Fox v. Spears, 78 Ark. 71, 93 SW 560 (holding that on an issue as to defendant's adverse possession an instruction that adverse possession was to be taken strictly and not to be made out by inferences, and that every presumption was in favor of possession subject to the title of the true owner, was ambiguous but not ground for reversal where the defect was not specifically pointed out and additional explanatory instructions were asked).

97. Hays v. Lemoine, 156 Ala. 465, 47 S 97; Alabama State Land Co. v. Shuttleworth, 121 Ala. 565, 25 S 808.

98. Campbell Real Est. Co. v. Wiley, (Tex. Civ. A.) 83 SW 251; Taffinder v. Merrell, 18 Tex. Civ. A. 661, 45 SW 477.

99. Cochran v. Kimbrough, 157 Ala. 454, 47 S 709; Hays v. Lemoine, 156 Ala. 465, 47 S 97; White v. Harris, 206 Ill. 584, 69 NE 519; Hoffine v. Ewings, 60 Nebr. 729, 84 NW 93; Dean v. Furrh, (Tex. Civ. A.) 124 SW 431.

[a] **Thus** (1) where both parties claimed title by prescription, plaintiffs asserting a possession for seven years and defendant setting up adverse possession for twenty years, it was error prejudicial to plaintiffs to charge that, if they were in possession for seven years or more, that would give a good prescriptive title, "unless prior to that time there was another good title outstanding against them," as it was calculated to lead the jury to believe that adverse possession for seven years under color of title would not avail against a prior outstanding title. Godley v. Barnes, 132 Ga. 513, 64 SE 546. (2) A reference in different portions of the charge separately to different characteristics of possession necessary to be the foundation of prescription, without a statement that all of such characteristics were necessary, might have led the jury to believe that a union of all was not necessary. Walker v. Steffes, 139 Ga. 520, 77 SE 580.

1. Louisville, etc., R. Co. v. Rayl, 107 SW 298, 32 KyL 870; Hill v. Bean, 150 N. C. 436, 64 SE 212.

2. Lewis v. Pope, 86 S. C. 285, 68 SE 680.

3. Bentley v. Callaghan, 79 Miss. 302, 30 S 709.

[a] **Instruction held not to take matter of fact from jury.**—Merwin v. Morris, 71 Conn. 555, 42 A 855.

4. Burnett v. Crawford, 50 S. C. 161, 27 SE 645.

5. Bryant v. Strunk, 151 Ky. 97, 151 SW 381 (holding that, where the adverse claimant sets up constructive possession of part of the land in suit by virtue of his entry and possession under color of title, it is the duty of the court to define the extent of the possession under the facts shown by the evidence, so that only questions of fact will be submitted to the jury, not both the law and the facts).

6. Ala.—Lecroix v. Malone, 157 Ala. 434, 47 S 725.

Ga.—Shingler v. Bailey, 135 Ga. 666, 70 SE 563; Mitchell v. Crummey, 134 Ga. 383, 67 SE 1042; Greer v. Raney, 120 Ga. 290, 47 SE 939.

Ill.—Stalford v. Goldring, 197 Ill. 156, 64 NE 395; Chicago, etc., R. Co. v. Keegan, 185 Ill. 70, 56 NE 1088.

Ind.—Fuelling v. Fuesse, 43 Ind. A. 441, 87 NE 700.

Ky.—Louisville, etc., R. Co. v. Rayl, 107 SW 298, 32 KyL 870; Chambers

evidence tending to support,[7] especially where a proper request for instructions on that phase of the case is made.[8] In instructing the jury as to what is essential to constitute adverse possession the charge must not include as elements thereof matters which the statutes relating to adverse possession do not require,[9] and on the other hand it is erroneous to ignore elements required by the statutes.[10] In defining adverse possession it is not essential that the language of the statute should be used so long as the elements therein contained are properly set forth.[11] Requests for instructions, although objectionable in themselves, will require the giving of an instruction on the issues to which they are directed, if sufficient to direct the attention of the court to the necessity of charging on such issues;[12] but the court is not bound to give requested instructions on matters covered by other instructions.[13] Error in the admission of evidence may be cured by instruction,[14] and erroneous instructions may be corrected by other instructions.[15] As a preponderance of evidence only is required to defeat or sustain a cause of action or defense based on adverse possession,[16] an instruction should not require a higher degree of proof.[17]

[§ 633] **D. Verdict and Findings.** The rules applicable to verdict[18] and findings[19] in civil actions generally apply in actions where the cause of action or defense is based on adverse possession.[20] A finding that the party claiming title to land by adverse

v. Tharp, 93 SW 627, 29 KyL 271; Ewing v. Alexander, 1 A. K. Marsh. 407.

Mo.—Harrison v. Cachelin, 27 Mo. 26.

N. C.—Weaver v. Love, 146 N. C. 414, 59 SE 1041; Bullock v. Lake Drummond Canal, etc., Co., 132 N. C. 179, 43 SE 593; Pittman v. Weeks, 132 N. C. 81, 43 SE 582.

Tex.—Bennette v. Collins, 54 Tex. Civ. A. 16, 116 SW 618; Sellman v. Daniel, (Civ. A.) 110 SW 81; Whitaker v. Thayer, 38 Tex. Civ. A. 537, 86 SW 364; Cochran v. Moerer, 31 Tex. Civ. A. 495, 72 SW 1081.

[a] **Illustrations.**—(1) Where there is no evidence of adverse possession of the land in controversy for the requisite length of time, an instruction relating to adverse possession should not be given. Fuelling v. Fuesse, 43 Ind. A. 441, 87 NE 700. (2) In an action for the recovery of real property, it was misleading to instruct the jury that there was evidence which they were at liberty to consider in determining whether defendants had brought their case within the statute of limitations, where there was no evidence of the payment of taxes which was essential under the statute. Wood v. Chapman, 24 Colo. 134, 49 P 186.

[b] **Instructions held to be warranted by the evidence.**—Edmondson v. Anniston City Land Co., 128 Ala. 589, 29 S 596; Campbell v. Greer, 209 Mo. 199, 108 SW 54; Honea v. Arledge, 56 Tex. Civ. A. 296, 120 SW 508; Brunner Fire Co. v. Payne, 54 Tex. Civ. A. 501, 118 SW 602; Collier v. Couts, (Tex. Civ. A.) 45 SW 485 [rev on other grounds 92 Tex. 234, 47 SW 525].

[c] **Where not prejudicial** the giving of instructions not warranted by the evidence will not authorize a reversal. Fox v. Spears, 78 Ark. 71, 93 SW 560; Hughes v. Owens, 92 SW 595, 29 KyL 140; Pittman v. Weeks, 132 N. C. 81, 43 SE 582.

7. U. S.—Western North Carolina Land Co. v. Scaife, 80 Fed. 352, 25 CCA 461.

Ga.—Callaway v. Beauchamp, 140 Ga. 207, 78 SE 846 (holding that where, in an action for land, plaintiff relied on prescriptive title, and his evidence tended to show that after he had acquired such title he moved from the state, leaving a tenant in possession, and defendants relied on title based on adverse possession commenced after plaintiff's departure, and it was a material issue whether the tenants were plaintiff's or defendants', it was error to refuse an instruction that a title acquired by seven years' adverse possession cannot be lost by abandonment).

Ky.—Middlesboro Waterworks v. Neal, 105 Ky. 586, 49 SW 428, 20 KyL 1403 (holding that it was error to give an instruction authorizing a verdict for plaintiffs if the jury believed that one under whom plaintiffs claimed and those claiming under them had adverse possession of the land for more than twenty years before April 25, 1853, as the instruction ignored the question of the adverse possession of defendant and those through whom it claimed).

Mich.—Dawson v. Falls City Boat Club, 136 Mich. 259, 99 NW 17, 112 AmSR 363.

Mo.—Fleming v. Kemp, 170 Mo. 235, 70 SW 694.

Nebr.—Link v. Campbell, 72 Nebr. 307, 100 NW 409, 104 NW 939.

Tex.—Barrett v. McKinney, (Civ. A.) 93 SW 240 (holding that where, in trespass to try title, defendant claimed by adverse possession, and the court instructed that peaceable possession meant continuous possession not interrupted by adverse suit to recover the estate, and there was in evidence a judgment obtained against defendant which, owing to lack of jurisdiction, was void, it was reversible error not to instruct the jury); Travis v. Hall, 37 Tex. Civ. A. 143, 83 SW 425; Preston v. Hilburn, (Civ. A.) 44 SW 698.

8. Peeples v. Wilson, 134 Ga. 600, 68 SE 322.

9. Dawson v. Falls City Boat Club, 136 Mich. 259, 99 NW 17, 112 AmSR 363 (holding that an instruction requiring good faith on the part of the claimant, where good faith is not an element of adverse possession, is erroneous); Sherrard v. Cudney, 134 Mich. 200, 96 NW 15; Hess v. Webb, (Tex. Civ. A.) 113 SW 618 (holding that a charge so worded as to make a party's right to recover on his plea of limitation in partition depend on his "cultivation, use, and enjoyment" in connection with his possession is affirmatively erroneous and prejudicial, the law requiring only cultivation, use, or enjoyment).

10. Gay v. Fleming, (Ala.) 62 S 523; Chastang v. Chastang, 141 Ala. 451, 37 S 799, 109 AmSR 45 (holding that where in ejectment plaintiff's claim was founded on adverse possession, and it appeared that defendant who held the legal title during the period of plaintiff's alleged possession manifested possession by acts as notorious as those of plaintiff, an instruction which ignored the necessity of exclusive possession on the part of plaintiff was erroneous); Walker v. Steffes, 139 Ga. 520, 77 SE 580 (holding that a statement that defendants contended that they had held possession for a certain time and with certain characteristics was not equivalent to an instruction that this was necessary to complete a prescriptive title); Brown v. Anderson, 90 Ind. 93 (holding that in ejectment an instruction in effect that the occupancy of land by plaintiff and those under whom he claimed as owners for twenty years or more made his title good was incomplete in not informing the jury that such occupancy to have that effect must have been continuous and uninterrupted); Knight v. Denman, 64 Nebr. 814, 90 NW 863 [aff reh 68 Nebr. 388, 94 NW 622] (holding that an instruction that, if the owner of land does not sue one who wrongfully withholds possession within ten years after his cause of action accrues, he loses his right to maintain such action, without adding that defendant's possession must be open, continuous, notorious, and adverse during the full period, is erroneous).

[a] **Instruction not objectionable as ignoring essential element.**—An instruction on adverse possession requiring plaintiff's possession and his claim of ownership to have been "open, notorious, visible, adverse, and under claim of right" for twenty years was not erroneous for failure to require the possession to have been continuous, since the phrase quoted excluded the idea of an interrupted or intermittent possession. Fatic v. Myer, 163 Ind. 401, 72 NE 142.

11. Stoker v. Fugitt, (Tex. Civ. A.) 113 SW 810; Hunter v. Malone, 49 Tex. Civ. A. 116, 108 SW 709.

12. Sharrock v. Ritter, (Tex. Civ. A.) 45 SW 156.

13. Ragon v. Craver, (Tex. Civ. A.) 127 SW 1087.

14. Smith v. Ford, 82 Conn. 653, 74 A 910 (holding that the admission of evidence of adverse possession is harmless error if the party in whose behalf it is received makes no claim of such title and the jury are so instructed).

15. Lourance v. Goodwin, 170 Ill. 390, 48 NE 903 (holding that where an instruction given in behalf of defendant omitted to state that plaintiff might include the possession of his grantors with his own to constitute the required twenty years, but an instruction given for plaintiff expressly told the jury that the possession of plaintiff's grantor and plaintiff's possession might be considered together in making up the required period of twenty years, the error in the defendant's instruction was corrected by that of plaintiff); Kobs v. New York, etc., Land Co., (Tex. Civ. A.) 63 SW 1087. And see Allen v. McKay, 6 Cal. Unrep. Cas. 993, 70 P 8; Sutton v. Clark, 59 S. C. 440, 38 SE 150, 82 AmSR 848.

16. See supra § 621.

17. See Merwin v. Morris, 71 Conn. 555, 42 A 855 (holding, however, that a charge that adverse possession was not to be made out by inference but by clear and positive proof, and that the jury should determine whether defendant had shown by a preponderance of evidence that he had had such possession, did not imply that a mere preponderance of evidence was insufficient to sustain the claim of adverse possession).

18. See Trial [38 Cyc 1868 et seq].

19. See Trial [38 Cyc 1953 et seq].

20. See cases infra this note and following notes in this section.

[a] **A finding that lands were wild is a finding that the lands were "unimproved and unincloseed"** within Kirby Dig. § 5057, relating to title by limitation to uninclosed and unimproved lands. Rachels v. Stecher Cooperage Works, 95 Ark. 6, 128 SW 348.

[b] **Findings sufficient to show that claimant had been in adverse possession.**—San Francisco, etc., Land Co. v. Hartung, 138 Cal. 228, 71 P 337;

possession occupied it for the statutory period, and that such occupation was accompanied by all the requisites prescribed by statute, will sustain a judgment in his favor;[21] but a judgment for him based on a finding which omits one or more of the elements necessary to constitute adverse possession is erroneous.[22] Where the evidence and answers to interrogatories show that the user was for less than the statutory period, a general verdict for the party setting up adverse possession cannot stand.[23] Where a special verdict stated that plaintiff's grantor was in "actual, open, notorious, exclusive, and continuous possession" of the realty in controversy, but that such possession was "not hostile," the latter finding was an ultimate fact, so that its effect was not overcome by the statements as to the character of the occupancy, which were merely evidentiary.[24]

XX. ADVERSE POSSESSION OF CHATTELS

[§ 634] **A. Introductory Statement.** The law relating to adverse possession of chattels, while differing in some respects from that which relates to adverse possession of lands, bears a close analogy thereto. Under the statutes governing the subject title to chattels may be lost or acquired by adverse possession.[25]

[§ 635] **B. Elements.** To create a bar under the statutes it is essential that the possession relied on should be actual,[26] open and notorious,[27] continuous and uninterrupted for the statutory period,[28] exclusive,[29] hostile,[30] and under claim of right.[31]

[§ 636] **C. Effect of Fraud in Procuring Possession.** It has been held that where chattels have been held adversely for the statutory period it is not material that the possession was acquired by fraud.[32]

[§ 637] **D. Effect of Removal of Chattels from State.** The mere fact that the adverse claimant of chattels removes them from the state without any fraudulent practices or concealment will not prevent the acquisition of title by adverse possession.[33]

[§ 638] **E. Effect of Error or Mistake of Law as Basis for Acquiring Title to Chattels by Adverse Possession.** Under a statute providing that error of law can never be alleged as a means of acquiring, although it may be invoked as a means of preventing, loss, or of recovering what has been paid or given under such error, and that the error under which a possessor may be as to the legality of his title will not give him a right to prescribe under it, error or mistake of law is never a good foundation for acquiring property by prescription.[34]

[§ 639] **F. Character of Possession as Affected by Permission of Owner.** Where possession is permissive in its inception, the character of the possession by intendment of law continues until changed by an assertion of ownership evinced by some tangible act in hostility to the rights of the owner.[35]

[§ 640] **G. Character of Possession as Affected**

Hart v. Doyle, 128 Mich. 257, 87 NW 219; Berry v. W. M. Ritter Lumber Co., 141 N. C. 386, 54 SE 278.

[c] **Findings insufficient to show that claimant had been in adverse possession.**—Mayer v. C. P. Lesh Paper Co., 45 Ind. A. 250, 89 NE 894, 90 NE 651.

21. Cudney v. Sherrard, 153 Mich. 239, 116 NW 1014; Dignan v. Nelson, 26 Utah 186, 72 P 936.

22. Tyee Cons. Min. Co. v. Langstedt, 121 Fed. 709, 58 CCA 129 [rev on other grounds 136 Fed. 124, 69 CCA 548].

23. Terre Haute, etc., R. Co. v. Zehner, 28 Ind. A. 229, 62 NE 508.

24. Webb v. Rhodes, 28 Ind. A. 393, 61 NE 735.

25. Merrill v. Bullard, 59 Vt. 389, 8 A 157; Preston v. Briggs, 16 Vt. 124. And see infra § 647.

26. Eads v. Brazelton, 22 Ark. 499, 79 AmD 88 (holding that a person who has marked trees on the bank of the river extending across the wreck of a steamer and cargo sunk and abandoned by the owners, and who has placed buoys over her to indicate where she lies, has not actually taken the property with the intent to reduce it to possession so as to constitute a good title to the property by occupancy).

27. Sandoz v. Gary, 11 Rob. (La.) 529; Lightfoot v. Davis, 198 N. Y. 261, 91 NE 582, 139 AmSR 817, 29 LRANS 119, 19 AnnCas 747.

[a] **Where such property is acquired by a common-law larceny, and the possession is concealed,** no lapse of time can confer title on the thief. Lightfoot v. Davis, 198 N. Y. 261, 91 NE 582, 139 AmSR 817, 29 LRANS 119, 19 AnnCas 747 [rev 132 App. Div. 452, 116 NYS 904].

[b] **The contrary doctrine.**—Under the statutes of some states open and notorious possession is not an element of adverse possession. Simons v. Cox, 46 S. C. L. 392, 394 (holding that a title acquired by four years' adverse possession of a chattel is good at law, even though the possession was fraudulent and was concealed from the owner. In support of this view Munro, J., said: "The equity doctrine in reference to fraud undoubtedly is, that pending the concealment of the fraud, and until its discovery, the operation of the statute is suspended, and is founded upon the idea, that the act of fraud is a continuing one until discovered. This doctrine, however, has no application to Courts of law; they are barred by the express provisions of the statute; and the rule will be found to obtain, whether the action be founded on contract or tort"); McDonald v. McGuire, 8 Tex. 361; Thomas v. Greer, 6 Tex. 372 (both holding that fraudulent concealment on the part of the holder or those under whom he claims will not prevent the acquisition of title). In McDonald v. McGuire, supra, it was said that the statute makes no exception as to the circumstances under which the property was acquired; that the only essential ingredient is that the possession be adverse.

[c] **Possession of an innocent holder for the statutory period of stolen property** has been held to invest him with a good legal title. Dragoo v. Cooper, 9 Bush (Ky.) 629.

[d] **Notorious possession of innocent purchaser from one acquiring property by fraud.**—Although one obtained possession of personal property by fraud and concealed his possession from the owner, yet if his innocent vendee held open and notorious possession of it during the statutory period his right became perfect. "The remedy . . . against him was open, and in no wise obstructed, during all the period of his possession. His title, therefore, could not be affected by the fraud of [his vendor]." Fears v. Sykes, 35 Miss. 633.

28. Taylor v. Hendrick, 9 B. Mon. (Ky.) 597; Sandoz v. Gary, 11 Rob. (La.) 529.

[a] **Tacking to make up statutory period.**—As in the case of adverse possession of land (see supra § 66 et seq), (1) the possession of successive holders of personal property may be tacked to make up the required period (Gaillard v. Hudson, 81 Ga. 738, 8 SE 534). (2) Thus the possession of vendor and vendee may be tacked to make up the statutory period of adverse possession. Gaillard v. Hudson, supra.

29. Hatch v. Heim, 86 Fed. 436, 30 CCA 171 (holding that the possession required is an exclusive and undivided possession, and does not apply to a case where the possession amounting only to custody, is held for the benefit of the owner, under circumstances which could not be promotive of fraud).

30. Ark.—Spencer v. McDonald, 22 Ark. 466; Harriet v. Swan, 18 Ark. 495; Machin v. Thompson, 17 Ark. 199; Sadler v. Sadler, 16 Ark. 628.

La.—Sandoz v. Gary, 11 Rob. 529.

Mo.—McLain v. Winchester, 17 Mo. 49; Smoot v. Wathen, 8 Mo. 522.

N. H.—Baker v. Chase, 55 N. H. 61 (where it was said that in order that the title to a personal chattel pass by operation of the statute of limitations there must at least be some use or appropriation of it, or some act of dominion over it, inconsistent with an absolute right of property in the owner, and such as will lay the foundation of an action for its recovery).

Va.—Roberts v. King, 10 Gratt. (51 Va.) 184.

31. Lightfoot v. Davis, 198 N. Y. 261, 91 NE 582, 139 AmSR 817, 29 LRANS 119 and note, 19 AnnCas 747 and note [rev 132 App. Div. 452, 116 NYS 904].

32. Robbins v. Sackett, 23 Kan. 301; Simons v. Fox, 46 S. C. L. 392; Gregg v. Bigham, 19 S. C. L. 299, 26 AmD 181. And see McDonald v. McGuire, 8 Tex. 361; Thomas v. Greer, 6 Tex. 372.

33. Southwestern R. Co. v. Atlantic, etc., R. Co., 53 Ga. 401. And see Stanley v. Earl, 5 Litt. (Ky.) 281, 285, 15 AmD 66 (where it was said: "It is perfectly clear, that the adverse possession of slaves being held by a person out of this state, cannot prevent the statute of limitations from running; for the statute contains no saving of the right to maintain an action, because the thing possessed, or the person having the possession, is out of the state").

34. Leury v. Mayer, 122 La. 486, 47 S 839.

35. Grunewald Co. v. Copeland, 131 Ala. 345, 30 S 878; Lucas v. Daniels,

by Relationship or Situation of Parties toward Each Other—1. Bailee against Bailor.[36] In the absence of some special statutory provision to the contrary[37] the possession of a bailee is deemed to be in subordination to the title of the bailor, and cannot ripen into title no matter how long continued the possession may be.[38] In order to give the possession an adverse character the bailor must have actual notice that the bailee is claiming ownership in himself,[39] or the bailee must do some open, unequivocal act evincing an intention to claim ownership, of such a nature that notice to the bailor will be presumed.[40] Even then the statute commences to run only from the time of such notice.[41] However, the statute will commence to run in favor of the bailee from the time he gives notice such as satisfies the requirements of the law.[42]

[§ 641] **2. Donee against Donor.** In one state the rule is well settled that the status of a donee of chattels under a parol gift which is void by express statutory provision is that of a mere bailee, and in accordance with the rule governing that relation[43] the statute of limitations does not commence to run in his favor until she sets up title adverse to the donor,[44] and no length of possession under such gift will vest title in the donee.[45] In other jurisdictions it is held that the possession of a donee under a void parol gift is adverse from the time of the gift and vests title in the possessor if continued for the statutory period.[46] And it has further been held that where chattels held under a void gift are removed from a state where the relation of the donee to the donor is, under such circumstances, held to be merely that of bailee, to a state

34 Ala. 188; Hill v. Hughes, 18 N. C. 336; Porter v. Porter, 3 Humphr. (Tenn.) 586.

36. By trustee against cestui que trust see Trusts [39 Cyc 298].

37. See Garth v. Barksdale, 5 Munf. (19 Va.) 101 (holding that five years' peaceable and uninterrupted possession of slaves under a loan not evidenced by deed duly recorded vests a title in the loanee, which inures in favor of his creditors, and cannot be divested as to them by his returning the same to the lender after the said five years have expired); Gay v. Moseley, 2 Munf. (16 Va.) 543 (holding that proof of notice of a loan of a slave or of a deed of trust from the lender, recorded in the court of a county where neither of the parties lives, is not sufficient to overcome the effect of possession taken under the alleged loan and held for more than five years without demand on the part of the lender).

38. Cal.—In re Rathgeb, 125 Cal. 302, 57 P 1010.

Ky.—Mims v. Mims, 3 J. J. Marsh. 103.

La.—Hinson v. Hinson, 10 La. Ann. 580.

Tenn.—Ingram v. Smith, 1 Head 411; Turner v. Grainger, 5 Humphr. 347.

Va.—McKenzie v. Macon, 5 Gratt. (46 Va.) 379; Cross v. Cross, 9 Leigh (36 Va.) 245; Boatright v. Meggs, 4 Munf. (18 Va.) 145. And see Williams v. Snidow, 4 Leigh (31 Va.) 14.

[a] **Where slaves are loaned to a son-in-law** his possession thereafter, in the absence of evidence to the contrary, is a continuation of the loan, and the statute of limitations does not bar a recovery by the owner. McDonald v. McDonald, 8 Yerg. (Tenn.) 145.

[b] **Purchaser from bailee.**—(1) In Missouri it has been held that where a slave was loaned to and held by the bailee five years without any demand, and was afterward sold by the bailee to one who knew the circumstances of the bailment, the vendee acquired a good title. It was said that the purchaser is not precluded from the benefits of the statute of frauds by having notice of the loan, as the statute makes no such exception. Cook v. Clippard, 12 Mo. 379. (2) In Kentucky a statute provides that where there is an unrecorded loan and possession is held for four years by the loanee the absolute property shall be taken to be with the possession, as to creditors of or purchasers from the person remaining in possession. Under this statute it is held that the purchaser of slaves from a loanee, who has been in possession of them for five years, will be protected against the lender, although he had notice of the lender's title. However, the person claiming the benefit of this statute must be a purchaser. If his contract is conditional and the purchaser is to pay only in case he can hold against the lender, the purchaser is in no better condition than the loanee and will not be protected. Gaines v. Wiggs, 9 B. Mon. 282.

39. Lucas v. Daniels, 34 Ala. 188; Knight v. Bell, 22 Ala. 198; Harrison v. Pool, 16 Ala. 167; In re Rathgeb, 125 Cal. 302, 57 P 1010; Cole v. Hebb, 7 Gill & J. (Md.) 20; Rice v. Connelly, 71 N. H. 382, 52 A 446.

[a] **Application of rule.**—The right of a plaintiff to recover property is not barred by the possession of defendant, accompanied by a claim of title to the property, for more than three years before the institution of the suit, if the possession was originally acquired by loan, and plaintiff has no knowledge of the adversary claim of defendant three years before the suit was brought. Callis v. Tolson, 6 Gill & J. (Md.) 80 (where it was said: "As well might it be said that possession for more than three years before the bringing of the suit under a contract of hiring, would operate as a bar under the Statute of Limitations. The principle is the same").

40. Rice v. Connelly, 71 N. H. 382, 52 A 446; Boatright v. Meggs, 4 Munf. (19 Va.) 145. And see Carter v. Feland, 17 Mo. 383 (holding that possession of a bailee does not become adverse until he assumes the ownership of the property to himself and does some act by which strangers or purchasers may take it for granted that he is such owner).

[a] **Acts insufficient to charge bailor with notice.**—The fact that the possessor told some ten or a dozen persons that he claimed the property as his own would not be sufficient evidence of a hostile possession without notice thereof to the owner. Porter v. Porter, 3 Humphr. (Tenn.) 586.

41. Rice v. Connelly, 71 N. H. 382, 52 A 446; Taylor v. Gerrish, 59 N. H. 569; Baker v. Cohse, 55 N. H. 61.

42. Echols v. Barrett, 6 Ga. 443 (holding that, where a father loans a slave to his son and delivers possession thereof, and the son sets up an absolute claim to the slave and offers to sell him as his own property, of all of which the father has notice, the possession of the son becomes adverse from that time, and the statute of limitations will commence running from the time of such adverse possession in favor of the son against the father); Hallum v. Yourie, 1 Sneed (Tenn.) 369 (holding that a pure parol loan of a slave, although for life, is so changed in character by the subsequent coverture of the borrower that the notorious possession of her husband is adverse to the lender); Cochrane v. Winburn, 13 Tex. 143; Winburn v. Cochran, 9 Tex. 123 (both holding that, where the executors of a bailee assume the absolute ownership of the property and perform acts inconsistent with the acknowledgment of title in the bailor, the statute of limitations commences to run and bars an action by the bailor in two years).

43. See the preceding section.

44. Woods v. Woods, 55 N. C. 420; Weeks v. Weeks, 40 N. C. 111, 47 AmD 358; Baxter v. Henson, 35 N. C. 459; Green v. Harris, 25 N. C. 210; Powell v. Powell, 21 N. C. 379; Martin v. Harbin, 19 N. C. 504; Hill v. Hughes, 18 N. C. 336; Collier v. Poe, 16 N. C. 55; Palmer v. Faucett, 13 N. C. 240; McDonald v. McDonald, 8 Yerg. (Tenn.) 145 (construing North Carolina law).

[a] **Applying doctrine in another state on principles of comity.**—In Mississippi the North Carolina rule was applied on principles of comity, although the court expressed doubts as to its correctness. Hall v. Dickey, 32 Miss. 208.

[b] **A sale** of a slave held by the donee under a parol gift made in North Carolina is an assertion of title adverse to the donor. Hall v. Dickey, 32 Miss. 208.

[c] **Distributees of bailee taking possession of property as their own.**—Although the holder of slaves under a parol gift is merely the bailee of the donor, yet upon his death his distributees or legatees who receive the slaves as their property hold adversely to the donor; hence, after three years of such holding, the donor's recovery is barred by the statute of limitations. Powell v. Powell, 21 N. C. 379.

[d] **By legatee of donee against donor.**—A possession of slaves under the will of a donee, from 1824 to 1838, without interruption or claim by the donor, was held to bar the title of the donor. Richardson v. Pridgen, 43 N. C. 153.

45. Powell v. Powell, 21 N. C. 379; Martin v. Harbin, 19 N. C. 504; Hill v. Hughes, 18 N. C. 336.

46. Wade v. Cantrell, 1 Head (Tenn.) 346; Wheaton v. Weld, 9 Humphr. (Tenn.) 773; Martin v. Youngblood, 8 Humphr. (Tenn.) 581; Knight v. Jordan, 6 Humphr. (Tenn.) 101; McKissick v. McKissick, 6 Humphr. (Tenn.) 75; Turner v. Grainger, 5 Humphr. (Tenn.) 347 (disapproving North Carolina rule to the contrary); McDonald v. McDonald, 8 Yerg. (Tenn.) 145; Hardeson v. Hays, 4 Yerg. (Tenn.) 507; Thompson v. Thompson, 12 Tex. 327. And see Curtis v. Daniel, 23 Ark. 362; Spencer v. McDonald, 22 Ark. 466; Hall v. Dickey, 32 Miss. 208.

[a] **In support of this view** it was said in Turner v. Grainger, 5 Humphr. (Tenn.) 347, 348: "If, in addition to the delivery, there be an express gift of the property, although verbal, the possession of the donee would, from the nature of the transaction, be for himself exclusively, and the statute would commence running; and if the donor did not, by suit or otherwise, reclaim the property, the title, not by operation of the gift and delivery, indeed, but by the adverse possession and the statute, would be vested in the donee as against the donor and

where the rule first enunciated prevails, the possession becomes adverse as soon as they reach the latter state.[47]

[§ 642] **3. Donor against Donee.** The donor's subsequent possession and control of chattels donated are not necessarily adverse to his donee who lived with him as his housekeeper.[48]

[§ 643] **4. Vendor against Vendee and Vice Versa.** The mere retention of possession for the statutory period by the vendor of chattels sold will not vest title in him by adverse possession.[49] This principle is strictly analogous to that which controls in the case of a vendor of land remaining in possession.[50] However, a conditional vendee's holding becomes adverse by continuing after default in paying installments of the price, where such default gave the vendor the right to retake possession.[51] Adverse possession by a vendee under a sale made with design to delay and defraud creditors, continued for the statutory period after the creditors have obtained judgment, will give a valid title as against them.[52] And in at least one decision it has been held that the statute of limitations commences to run from the time the vendee obtains possession of the property, not from the time judgment was obtained by the creditor.[53]

[§ 644] **5. Donee against Legatee under Will of Donor.** Where a slave is placed with a child, upon the marriage of such child, without any written transfer, and the parent wills such slave to a third person, on the death of the parent the possession of the child becomes adverse to the legatee.[54]

[§ 645] **6. Parent against Child.** Where a slave is given to a child by its grandmother, the possession thereof by the child's father is not adverse to the child.[55]

[§ 646] **7. Guardian for Ward.** The bona fide possession of a slave by a guardian, or by the father as natural guardian, for three years will vest the title to the slave in an infant, whether the right was given to him by a stranger or by the father himself.[56]

[§ 647] **H. Title or Right Acquired.** As in the case of adverse possession of realty,[57] adverse possession of chattels for the statutory period operates not merely to bar the remedy but vests absolute title in the possessor,[58] which is equally available for attack[59] or defense.[60] The adoption of a contrary doctrine, it has been said, would result in dangerous consequences to society and in violence and the prostration of good order.[61] In consequence, where title to chattels has become perfect by adverse pos-

others; the verbal gift, in such case, invalid as conferring title, would yet serve to manifest and establish the nature and character of the donee's possession." And in Prince v. Broach, 5 Sneed (Tenn.) 318, 320, Caruthers, J., said: "If a gift, though by parol, be established, the possession of the donee would be taken to be in conformity to it, and consequently under a claim of title, and adverse to the donor."

47. McKissick v. McKissick, 6 Humphr. (Tenn.) 75.

48. Traun v. Keiffer, 31 Ala. 136. Compare Airey v. Holmes, 50 N. C. 142 (holding that where a father made a deed of gift of slaves to his daughter and acknowledged it in open court for the purpose of registration, but retained the slaves in his possession, the holding of the property by the father was adverse to the rights of the donee, preventing the ownership from vesting in her husband during her coverture).

49. Gillespie v. Gillespie, 2 Bibb (Ky.) 89 (holding, however, that such possession is proper for the jury to consider on the question as to whether the bill of sale has been canceled by the parties).

50. See supra § 246 et seq.

51. Barton v. Dickens, 48 Pa. 518.

52. Mercein v. Burton, 17 Tex. 206.

53. Reeves v. Dougherty, 7 Yerg. (Tenn.) 222, 27 AmD 496.

54. Cotten v. Davis, 49 N. C. 416.

55. Graham v. Davidson, 32 N. C. 245.

56. Williams v. Walton, 8 Yerg. (Tenn.) 387, 29 AmD 122; Davis v. Mitchell, 5 Yerg. (Tenn.) 281.

57. See supra § 552.

58. U. S.—Shelby v. Guy, 11 Wheat. 361, 6 L. ed. 495; Brent v. Chapman, 5 Cranch 358, 3 L. ed. 125.

Ala.—Lay v. Lawson, 23 Ala. 377; Newcombe v. Leavitt, 22 Ala. 631; Jones v. Jones, 18 Ala. 248; Harrison v. Pool, 16 Ala. 167; Howell v. Hair, 15 Ala. 194; Sims v. Canfield, 2 Ala. 555. See also Benje v. Creagh, 21 Ala. 151; Goodman v. Munks, 8 Port. 84.

Ark.—Ewell v. Tidwell, 20 Ark. 136; Morine v. Wilson, 19 Ark. 520; Crabtree v. McDaniel, 17 Ark. 222; Machin v. Thompson, 17 Ark. 199; Sadler v. Sadler, 16 Ark. 628.

Ga.—Gaillard v. Hudson, 81 Ga. 738, 8 SE 534; Wynn v. Lee, 5 Ga. 217; Paschal v. Davis, 3 Ga. 256.

Ky.—Birney v. Richardson, 5 Dana 424; Clarke v. Baker, 7 J. J. Marsh. 194; Smart v. Baugh, 3 J. J. Marsh. 368; Orr v. Pickett, 3 J. J. Marsh. 269; Stanley v. Earl, 5 Litt. 281, 15 AmD 66; Thompson v. Caldwell, 3 Litt. 136. See also Middleton v. Carrol, 4 J. J. Marsh. 143; Cook v. Wilson, Litt. Sel. Cas. 437.

La.—Mortimer v. Hodgson, 105 La. 734, 30 S 104; Reynolds v. Batson, 11 La. Ann. 729.

Md.—Kopp v. Herrman, 82 Md. 339, 33 A 646.

Mass.—Chapin v. Freeland, 142 Mass. 383, 8 NE 128, 56 AmR 701.

Miss.—Clark v. Slaughter, 34 Miss. 65.

Mo.—Little v. Chauvin, 1 Mo. 626.

N. H.—Baker v. Chase, 55 N. H. 61.

N. Y.—Lightfoot v. Davis, 198 N. Y. 261, 91 NE 582, 139 AmSR 817, 29 LRANS 119 and note, 19 AnnCas 747 and note [rev 132 App. Div. 452, 116 NYS 904].

N. C.—Jones v. Gordon, 55 N. C. 352; Call v. Ellis, 32 N. C. 250; Simpson v. Boswell, 27 N. C. 49.

S. C.—Simons v. Fox, 46 S. C. L. 392; Gregg v. Bigham, 19 S. C. L. 299, 26 AmD 181; Hutchison v. Noland, 19 S. C. L. 222; McClure v. Hill, 9 S. C. L. 420; Mortimer v. Muse, 4 S. C. L. 189; Cockfield v. Hudson, 2 S. C. L. 425. See also Cholett v. Hart, 2 S. C. L. 156.

Tenn.—Coal Creek Cons. Coal Co. v. East Tennessee Iron, etc., Co., 105 Tenn. 563, 59 SW 634; Morris v. Lowe, 97 Tenn. 243, 36 SW 1098; Garrett v. Vaughan, 1 Baxt. 113; Bradford v. Caldwell, 2 Head 496; Wade v. Cantrell, 1 Head 346; Knight v. Jordan, 6 Humphr. 101; McKissick v. McKissick, 6 Humphr. 75; Williams v. Walton, 8 Yerg. 387, 29 AmD 122; McDonald v. McDonald, 8 Yerg. 145; Davis v. Mitchell, 5 Yerg. 281; Hardeson v. Hays, 4 Yerg. 507; Partee v. Badget, 4 Yerg. 174, 26 AmD 220; Kegler v. Miles, Mart. & Y. 426, 17 AmD 819. See also Elliott v. Holder, 3 Head 698; Prince v. Broach, 5 Sneed 318; Turner v. Turner, 2 Sneed 27; Wheaton v. Weld, 9 Humphr. 773; Martin v. Youngblood, 8 Humphr. 581; Turner v. Grainger, 5 Humphr. 347; Rogers v. Winton, 2 Humphr. 178.

Tex.—Connor v. Hawkins, 71 Tex. 582, 9 SW 684; Thurmond v. Trammell, 28 Tex. 371, 91 AmD 321; Epperson v. Young, 19 Tex. 475; Cochrane v. Winburn, 13 Tex. 143; Winburn v. Cochran, 9 Tex. 123; Bowyer v. Robertson, (Civ. A.) 29 SW 916. And see Turner v. Smith, 11 Tex. 620; Tinnen v. Mebane, 10 Tex. 246, 60 AmD 205.

Vt.—Merrill v. Bullard, 59 Vt. 389, 8 A 157; Preston v. Briggs, 16 Vt. 124.

Va.—Morris v. Lyon, 84 Va. 331, 4 SE 734; Layne v. Norris, 16 Gratt. (57 Va.) 236; Garland v. Enos, 4 Munf. (18 Va.) 504; Elam v. Bass, 4 Munf. (18 Va.) 301; Spotswood v. Dandridge, 4 Hen. & M. (14 Va.) 139; Newby v. Blakey, 3 Hen. & M. (13 Va.) 57. See also Garth v. Barksdale, 5 Munf. (19 Va.) 101.

[a] **Where a family of slaves is held by a common title,** adverse possession as to one is good as to all. Carter v. Buchanan, 9 Ga. 539.

[b] **A life estate in slaves** may be acquired by one claiming such estate as against the real owner by a continued adverse and peaceable possession of them for a term of five years. Burns v. Ray, 18 B. Mon. (Ky.) 392.

[c] **Five years' adverse possession of slaves by the executor** of a person charged to have been a trustee, under open claim that they were the property of the trustee, is a bar to their recovery. Moore v. Green, 3 B. Mon. (Ky.) 407.

[d] **Operation of particular statutory provisions.**—(1) Under the North Carolina act of 1806, three years' adverse possession of a slave barred only the remedy of the legal owner but gave no title to the purchaser. Lynch v. Ashe, 8 N. C. 338. (2) Under Tennessee code §§ 2773–2775, providing that, where personalty has been converted, an action for the property itself, or for damages, will be barred in three years, but an action for the value not until six years, "a wrongdoer may obtain a title to the property by three years adverse possession, and yet be liable for three years after his title is perfected to pay the original owner the value thereof." Kirkman v. Philip, 7 Heisk. 222.

59. Hicks v. Fluit, 21 Ark. 463; Stanley v. Earle, 5 Litt. (Ky.) 281, 15 AmD 66.

60. Kennington v. Williams, 30 Ala. 361; Pryor v. Ryburn, 16 Ark. 671; Southwestern R. Co. v. Atlantic, etc., R. Co., 53 Ga. 401; Vendever v. Vandever, 3 Metc. (Ky.) 137. See Carr v. Barnett, 21 Ill. A. 137.

61. Partee v. Badget, 4 Yerg. (Tenn.) 174, 26 AmD 220.

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session, they are not subject to the execution creditors of the former owner.[62] And one who has thus acquired title may bring suit to recover the property from the former owner who has retaken it after title has vested.[63] So title acquired in one state may be set up in the courts of another state and will be available to the party who has so acquired title and to those claiming under him.[64] It has also been held that a deed of emancipation by a person out of possession cannot avail against the possession of another by an adverse title, continued for five years previous to the execution of such deed.[65]

[§ 648] **f. Pleading.** The defense of adverse possession of chattels is available under the plea of non detinet.[66]

[§ 649] **J. Evidence.** Peaceable possession of a slave for twenty years has been held conclusive evidence of a right to the slave as against one who labored under no disability during that time but afterward obtained possession.[67] The mere fact of the transmission of possession and the use of a chattel raises no presumption of a gift, but the contrary, and the burden of proving a gift is upon the party asserting title against the original owner.[68] Payment of taxes is very slight evidence of adverse possession, as that would probably be done by a bailee as well as by a donee.[69]

XXI. PRESUMPTION OF LOST GRANT[70]

[§ 650] **A. Distinctions.** In dealing with the common-law presumption of a lost grant, certain distinctions are to be borne in mind. In the absence of other evidence of title, a presumption is said to arise that title rests in the person in peaceable possession of the land, and the occupant need introduce no other evidence in his behalf.[71] In case, however, the paper title is shown to be in another than the occupant, it devolves upon the latter to show that he has in some manner acquired that title.[72] To aid him to this end certain presumptions may arise. First, it is frequently said that, although a paper title may be outstanding, yet where one has been in adverse possession of land for the statutory period a presumption arises that he has secured that title by a grant which has been lost.[73] In this sense the term "adverse possession" is used in its technical sense, namely, a possession which has been actual, visible, exclusive, hostile, and uninterrupted.[74] This, however, is not a true presumption. It is a so-called conclusive presumption, and in legal effect amounts to this: That adverse possession for the statutory period operates to confer title on the occupant. It is a statutory rule of law and cannot be rebutted by showing that in fact no grant was ever made to the occupant.[75] A corollary of this so-called presumption is that, where one has remained in adverse possession of land for a sufficient length of time to create an affirmative title under the statute of limitations, the title from the government, in the absence of evidence to the contrary, is presumed to have vested in him.[76] Second, a like rule of law exists in the form of a so-called presumption in reference to incorporeal hereditaments, commonly known as prescription.[77] To distinguish prescription from the common-law presumption of a lost grant, some historical consideration is necessary. There were in England, even in early times, numerous statutes adopted limiting the time within which an action can be brought on account of a disseizin of land, but these statutes differ from the statutes of the present day in that instead of naming a certain number of years before the institution of the action beyond which no disseizin could be alleged they name a certain year back of which the pleader could not go. The last statute which adopted this method of fixing the period of limitation was the Statute of Westminster I c 39, which forbade the disseizin of an ancestor to be alleged in a writ of right prior to the beginning of the reign of Richard I (A. D. 1189), and other writs fixed the year A. D. 1217.[78] Although this statute applied to actions for the recovery of land only, and not to those for the recovery of incorporeal things, the judges applied

62. Knight v. Jordan, 6 Humphr. (Tenn.) 101, 103 (where it was said: "A title which the statute has made good cannot be rendered invalid or ineffectual, because creditors may subsequently obtain judgments, and levy upon the property. This would contravene the long and well-settled principle of our adjudications on the subject of the statute of limitations").

[a] **Levy on goods as property of former owner.**—Such title is good against a sheriff who attempts to levy on the chattels as the property of the former owner, under the pretense that they were bound by a former execution in his office. Cholett v. Hart, 2 S. C. L. 156.

63. Ala.—Howell v. Hair, 15 Ala. 194.
Ark.—Hicks v. Fluit, 21 Ark. 463.
Ky.—Clarke v. Baker, 7 J. J. Marsh. 194; Stanley v. Earl, 5 Litt. 281, 15 AmD 66.
Miss.—Clark v. Slaughter, 34 Miss. 65.
S. C.—Cockfield v. Hudson, 3 S. C. L. 311.
Tex.—Winburn v. Cochran, 9 Tex. 123.
After title had passed by adverse possessior he fact that the property came into the possession of the former owner without claim by him of ownership would have no effect upon the rights of the owner by adverse possession. Connor v. Hawkins, 71 Tex. 582. 9 SW 684.

[a] **The right to the benefit of such a title as can be derived from adverse possession is reciprocal** and will avail either a plaintiff or a defendant. Cockfield v. Hudson, 3 S. C. L. 311.

64. Fears v. Sykes, 35 Miss. 633, 635 (where Handy, J., said: "In such case, it is not the Statute of Limitations of another State that is relied on, or pleaded, but the title acquired by operation of such statute; and, when a title becomes perfect under the laws of one State, it is valid in any other State").

65. Givens v. Manns, 6 Munf. (20 Va.) 191.

66. Traun v. Keiffer, 31 Ala. 136; Lay v. Lawson, 23 Ala. 377. And see Frierson v. Irwin, 5 La. Ann. 531 (holding that the object of pleading is notice to the opposite party, and that when defendant is apprised by the proceedings and evidence that plaintiff relies upon prescription to establish his right to a slave, which he alleges has been feloniously taken from him, defendant cannot object that the plea of prescription has not been specially pleaded).

67. Cook v. Wilson, Litt. Sel. Cas. (Ky.) 437. And see McArthur v. Carrie, 32 Ala. 75, 70 AmD 529 (holding that uninterrupted adverse possession of slave property for twenty years raises a presumption of ownership which can be overturned only by proof showing that such possession is not inconsistent with the true owner's right, or explaining or excusing the long acquiescence on some other ground than original defect of title in the possessor).

68. Prince v. Broach, 5 Sneed (Tenn.) 318. Compare Pate v. Hoyle, 107 N. C. 189, 11 SE 1089 (holding that possession of a chattel is prima facie evidence of ownership, and if adverse and long continued may ripen into a good title).

69. Prince v. Broach, 5 Sneed (Tenn.) 318.

70. **Establishment of lost instrument** see Lost Instruments [25 Cyc 1607].

71. Barry v. Otto, 56 Mo. 177. And see Ejectment [15 Cyc 30]; Entry, Writ of [15 Cyc 1070]; Real Actions [33 Cyc 1547]; Trespass [38 Cyc 1017]; Trespass to Try Title [38 Cyc 1201].

[a] **This presumption does not assume a lost grant;** it merely casts upon the party out of possession the burden of showing title in some one other than the occupant. See cross references supra this note.

72. See Ejectment [15 Cyc 123]; Entry, Writ of [15 Cyc 1082]; Trespass to Try Title [38 Cyc 1216].

73. See Angell Limitations of Actions § 380.

74. See supra § 1.

75. See supra § 552.

76. Barry v. Otto, 56 Mo. 177.

77. See Easements [14 Cyc 1145].

78. Tiffany Real Prop. § 436.

the rule to incorporeal hereditaments, and among others to easements. Subsequently, when, by Statute Henry VIII c 2 and 21 Jac. I c 16, the time for bringing a writ of right or a possessory action to recover land was reduced to sixty and twenty years respectively, it might have been expected that the judges would, as in the case of the earlier act, apply the analogy of these acts to incorporeal things. This, however, they did not do, but they effected the same end by the adoption of the fiction that a grant of the right would be presumed if it had been exercised for a period of twenty years, this doctrine of a lost grant being in reality prescription under another name, shortened in analogy to the period of limitations fixed by the Statute of James. In the case of prescription as it existed by analogy to the earlier statute, the exercise of the right from the date named conferred an unimpeachable title. Whether this presumption of a lost grant, on the other hand, had a like effect, that is, whether it was a so-called conclusive presumption or could be rebutted by evidence that there was no such grant, was formerly a question on which there was great doubt. In this country the courts have usually followed the analogy of the statute of limitations applicable to actions for the recovery of land, with the effect that one who has exercised a right in another's land for such a statutory period, adversely and under claim of right, is regarded as having such right; and while quite frequently it is said that from such usage a grant will be presumed, the presumption is in effect a positive rule of law, and evidence that no grant was made is immaterial.[79] This presumption is therefore distinguishable from the common-law presumption of a lost grant of land. Third and lastly, a presumption may arise from long continued peaceable possession of land, accompanied by the usual acts of ownership, regardless of the period prescribed for acquiring title by adverse possession in its technical sense or by prescription, that the outstanding paper title was in fact conveyed to the occupant by a grant which has been lost.[80] This is the presumption with which the following sections are concerned.

[§ 651] **B. General Rule; Scope and Application.** It is a general rule that long continued peaceable possession of real estate, accompanied by the usual acts of ownership, justifies the presumption of a lost grant of the property to the occupant.[81] Among other circumstances tending to show a conveyance an important one is the fact that the occupant paid taxes on the land as if it were his own.[82] This presumption aids to supply the place of positive proof of an ancient grant.[83] "Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession."[84] This presumption is independent of the statute of limitations and is

79. Tiffany Real Prop. § 445.

80. See infra § 651.

81. U. S.—U. S. v. Chavez, 175 U. S. 509, 20 SCt 159, 44 L. ed. 255; U. S. v. Shaves, 159 U. S. 452, 16 SCt 57, 40 L. ed. 215; Barclay v. Howell, 6 Pet. 498, 8 L. ed. 477; Ricard v. Williams, 7 Wheat. 59, 5 L. ed. 398; Penny v. Central Coal, etc., Co., 138 Fed. 769, 71 CCA 135; U. S. v. Devereux, 90 Fed. 182, 32 CCA 564; Hurst v. McNeil, 12 F. Cas. No. 6,936, 1 Wash. 70.

Ala.—Stodder v. Powell, 1 Stew. 287.

Cal.—Bryan v. Tormey, 21 P 725.

Conn.—Sumner v. Child, 2 Conn. 607.

Ill.—Gage v. Eddy, 179 Ill. 492, 53 NE 1008.

Ind.—Nelson v. Fleming, 56 Ind. 310.

Iowa.—Burdick v. Heivly, 23 Iowa 511.

Ky.—Chiles v. Jones, 7 Dana 528; Lyne v. Commercial Bank, 5 J. J. Marsh. 545.

Me.—Farrar v. Merrill, 1 Me. 17.

Md.—Casey v. Inloes, 1 Gill 430, 39 AmD 658; Bradford v. McComas, 3 Harr. & J. 444; Dale v. Fassett, 3 Harr. & J. 119; Pue v. Pue, 4 Md. Ch. 386.

Mass.—Stevens v. Taft, 11 Gray 33; Greenough v. Welles, 10 Cush. 571; Goff v. Rehoboth, 12 Metc. 26; Brattle Square Church v. Bullard, 2 Metc. 363; Valentine v. Piper, 22 Pick. 85, 33 AmD 715; Ryder v. Hathaway, 21 Pick. 298; Melvin v. Merrimack River, Locks, etc., 17 Pick. 255; Melvin v. Merrimack River Locks, etc., 16 Pick. 137; Clark v. Faunce, 4 Pick. 245; Com. v. Low, 3 Pick. 408.

Mich.—Turner v. Hart, 71 Mich. 128, 38 NW 890, 15 AmSR 243.

Miss.—Nixon v. Carco, 28 Miss. 414.

Mo.—Brown v. Oldham, 123 Mo. 621, 27 SW 409; Brinley v. Forsythe, 69 Mo. 176; Dessaumier v. Murphy, 22 Mo. 95; McNair v. Hunt, 5 Mo. 300; Newman v. Studley, 5 Mo. 291.

Nebr.—Flanagan v. Mathiesen, 70 Nebr. 223, 97 NW 287.

N. H.—Wendell v. Moulton, 26 N. H. 41 (holding that a jury may presume a deed of lands when the conduct of the parties for a long time can be reasonably explained only on the supposition that such a deed did exist and there is nothing in the evidence to contradict such a supposition).

N. Y.—Matter of New York, 73 App. Div. 394, 77 NYS 31; Jackson v. Warford, 7 Wend. 62; Jackson v. McCall, 10 Johns. 377, 6 AmD 343; Vandyck v. Van Beuren, 1 Cai. 13; Ham v. Schuyler, 4 Johns. Ch. 1 (where a lease in fee, or at least an agreement for such a lease, was presumed).

N. C.—Freeman v. Loftis, 51 N. C. 524; Simpson v. Hyatt, 46 N. C. 517; Smith v. Bryan, 44 N. C. 180; Wallace v. Maxwell, 29 N. C. 135; Rogers v. Mabe, 15 N. C. 180; Hanks v. Tucker, 3 N. C. 147.

Oh.—Duke v. Thompson, 16 Oh. 34.

Pa.—Hasson v. Klee, 181 Pa. 117, 37 A 184; Taylor v. Dougherty, 1 Watts & S. 324; Galloway v. Ogle, 2 Binn. 468; Carter v. Ridge Turnp. Co., 22 Pa. Super. 162; Jenkins v. McMichael, 21 Pa. Super. 161.

S. C.—Powers v. Smith, 80 S. C. 110, 61 SE 222; Uzzell v. Horn, 71 S. C. 426, 51 SE 253; Wadsworthville Poor School v. Jennings, 40 S. C. 168, 18 SE 257, 391, 42 AmSR 854; Gray v. Bates, 34 S. C. L. 498; Smith v. Asbell, 33 S. C. L. 141; Simmons v. Parsons, 20 S. C. L. 492 note; Sims v. Meacham, 18 S. C. L. 101; Duncan v. Beard, 11 S. C. L. 400; Arthur v. Arthur, 11 S. C. L. 96.

Tenn.—Cannon v. Phillips, 2 Sneed 211; Brock v. Burchett, 2 Swan 27; Gilchrist v. McGee, 9 Yerg. 455; Hanes v. Peck, Mart. & Y. 228; O'Dell v. Swaggerty, (Ch. A.) 42 SW 175.

Tex.—Texas Mexican R. Co. v. Uribe, 85 Tex. 386, 20 SW 153; Von Rosenberg v. Haynes, 85 Tex. 357, 20 SW 143; McDow v. Rabb, 56 Tex. 154; Paul v. Perez, 7 Tex. 338; Le Blanc v. Jackson, (Civ. A.) 161 SW 60; Arthur v. Ridge, 40 Tex. Civ. A. 137, 89 SW 15.

Vt.—Townsend v. Downer, 32 Vt. 183; Sellick v. Starr, 5 Vt. 255; Vermont Univ. v. Reynolds, 3 Vt. 542, 23 AmD 234; Mitchell v. Walker, 2 Alk. 266, 16 AmD 710.

Va.—McCauley v. Grim, 115 Va. 610, 79 SE 1041 (holding that where the origin of a possession is not accounted for and would be unlawful unless there had been a grant, length of possession is prima facie evidence from which the jury may presume a conveyance); Virginia Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232; Carter v. Robinett, 33 Gratt. (74 Va.) 429; Hale v. Marshall, 14 Gratt. (55 Va.) 489; Boykin v. Smith, 3 Munf. (17 Va.) 102; Archer v. Saddler, 2 Hen. & M. (12 Va.) 370.

W. Va.—Smith v. Cornelius, 41 W. Va. 59, 23 SE 599, 30 LRA 747.

Presumption of partition see Partition [30 Cyc 164].

82. Cal.—Bryan v. Tormey, 3 Cal. Unrep. Cas. 85, 21 P 725.

Md.—Cheney v. Watkins, 1 Harr. & J. 527, 2 AmD 530.

Mich.—State v. Dickinson, 129 Mich. 221, 88 NW 621.

Mo.—Manning v. Kansas, etc., Coal Co., 181 Mo. 359, 81 SW 140; Brown v. Oldham, 123 Mo. 621, 27 SW 409.

Pa.—Hasson v. Klee, 181 Pa. 117, 37 A 184.

S. C.—Busby v. Florida Cent., etc., R. Co., 45 S. C. 312, 23 SE 50.

Tex.—McDow v. Rabb, 56 Tex. 154; Arthur v. Ridge, 40 Tex. Civ. A. 137, 89 SW 15.

Va.—Archer v. Saddler, 2 Hen. & M. (12 Va.) 370.

83. Demeyer v. Legg, 18 Barb. (N. Y.) 14.

84. Ricard v. Williams, 7 Wheat. (U. S.) 59, 109, 5 L. ed. 398 [quot U. S. v. Chavez, 175 U. S. 509, 521, 20 SCt 159, 44 L. ed. 255; Fletcher v. Fuller, 120 U. S. 534, 547, 7 SCt 667, 30 L. ed. 759] (per Story, J.). And see Burdick v. Heivly, 23 Iowa 511; Rogers v. Mabe, 15 N. C. 180; Hanes v. Peck, Mart. & Y. (Tenn.) 228 (where it is said that indulgent to the weakness of our nature, as a matter of public policy, to promote the repose of society, and to put down litigation, courts intend the existence of facts when it is unreasonable to expect evidence of them); Taylor v. Watkins, 26 Tex. 688.

not affected thereby.[85] Accordingly, the presumption applies to subjects not within the operation of the statute or expressly excluded therefrom,[86] and hence applies to incorporeal hereditaments.[87]

Scope of presumption generally. Intermediate conveyances may be presumed to have been made in favor of one in long possession of real estate,[88] but the presumption is not limited to such; the principle upon which the presumption is based requires the presumption of all facts that may be necessary to the repose of a title to the absolute assurance and quietude of the possession.[89] Accordingly it is presumed that a long continued peaceable possession began in right, in the absence of evidence that it began in wrong.[90] So almost every variety of written evidence will be presumed in favor of long possession.[91] Thus a will[92] or devise[93] may be so presumed. The presumption applies alike to corporeal and incorporeal things,[94] and to both real and personal property.[95]

Possession under contract of purchase. The presumption applies with strong reason where the occupant has long held possession under a contract of purchase.[96]

Conveyance by trustees, executors, etc. Long continued possession of a beneficiary justifies the presumption of a conveyance to him by a trustee, executor, or other person acting in a fiduciary or official relation, where the latter was under a duty to convey.[97]

Presumption of grant from sovereign. A grant from the sovereign may be presumed from long continued peaceable possession of real property, accompanied by the usual acts of ownership,[98] even as against the sovereign itself.[99]

The date of the grant cannot be referred to an

85. Wadsworthville Poor School v. Jennings, 40 S. C. 168, 18 SE 257, 891, 42 AmSR 854. But see Crawford v. Neff, 3 Grant (Pa.) 175, 176 (where the court said: "The statute has established twenty-one years' adverse possession as a bar to an action for the recovery of lands. Nothing short of that period is sufficient. Nothing more than that period is required. To substitute a rule of law by which a jury might presume a conveyance after a greater lapse of time is useless. If after a less period, it would be a repeal of the statute. It seems to follow, that in cases where the statute of limitations might apply, the rules for presuming a conveyance cannot be substituted by courts").

[a] **An act suspending the statute of limitations** as to certain lands does not affect the presumption of title from long possession. Wadsworthville Poor School v. McCully, 45 S. C. L. 424.

86. Wadsworthville Poor School v. Jennings, 40 S. C. 168, 18 SE 257, 891, 42 AmSR 854.

87. See infra this section.

88. Md.—Casey v. Inloes, 1 Gill 430, 39 AmD 658 (holding that the jury are not bound to presume a deed from plaintiff to support a title founded on continued possession in defendant in ejectment for twenty years, but may presume a grant from plaintiff's grantors).

Miss.—Nixon v. Carco, 28 Miss. 414.

N. C.—Rhodes v. Chandler, 55 N. C. 1.

Pa.—Hastings v. Wagner, 7 Watts & S. 215. And see Fox v. Thompson, 31 Pa. 172.

S. C.—Gray v. Bates, 34 S. C. L. 498.

89. U. S. v. Chavez, 175 U. S. 509, 20 SCt 159, 44 L. ed. 255; Chiles v. Jones, 7 Dana (Ky.) 528.

[a] **Not only a grant, but also everything else that is necessary to complete the title** (1) will be presumed in favor of long possession. Baker v. McDonald, 47 N. C. 244; Rogers v. Mabe, 15 N. C. 180. (2) In other words, not only a deed, but also all acts necessary to give the deed effect, will be presumed. Brattle Square Church v. Bullard, 2 Metc. (Mass.) 363; Com. v. Low, 3 Pick. (Mass.) 408.

[b] **Authority and right to convey.**—(1) Where one claims and holds lands through an executor, and such lands are coextensive with the grant to the deceased, the authority of the executor to convey will be presumed without the production of the will. McCullough v. Wall, 38 S. C. L. 68, 53 AmD 715. (2) Where a religious society had had uninterrupted possession of land in controversy for thirty years or more, using it as its own, it would be presumed, in the absence of an existing deed to the land, that plaintiff's entry was under a purchase, and that its grantor had lawful right to convey. Penny v. Central Coal, etc., Co., 138 Fed. 769, 71 CCA 135. (3) However, possession for more than thirty years under a survey in the handwriting of an assistant deputy surveyor, indorsed "copied for return," together with a memorandum in the same handwriting that there was an authority to make the survey, the lines of which are marked on the ground, is not sufficient to raise a legal presumption of an authority to make the survey. Wilson v. Stoner, 9 Serg. & R. (Pa.) 39, 11 AmD 664.

90. U. S. v. Chavez, 175 U. S. 509, 20 SCt 159, 44 L. ed. 255.

[a] **As against the state,** however, a grant will not be presumed from forty years' possession and upward alone, without showing that the possession at its commencement was rightful. Doe v. Roe, 20 Ga. 467, 65 AmD 633.

91. Nixon v. Carco, 28 Miss. 414.

92. Maverick v. Austin, 17 S. C. L. 59 (holding that a will may be presumed to have existed in order to confirm the title of one holding land for many years under a deed executed by a person as executor of another, such person being the only heir of the latter).

93. Dale v. Fassett, 3 Harr. & J. (Md.) 119.

94. Ricard v. Williams, 7 Wheat. (U. S.) 59, 5 L. ed. 398; Sumner v. Child, 2 Conn. 607.

95. Sumner v. Child, 2 Conn. 607, 611 (where the court said: "It is a clear principle, that grants can be presumed of every kind of property. The rules are laid down, in the most unqualified manner, without any restriction or limitation; and are equally applicable to real and personal property, to corporeal and incorporeal rights; nor can there be the least reason for such a distinction. Why not presume a grant of a corporeal, as well as of an incorporeal, hereditament? Indeed, the truth is, that every species of title can be presumed. If the law requires it to be by deed or record, these can be presumed, as well as a title by parol. A title to a personal chattel may be presumed. Suppose one should purchase a horse, without any witness to the bargain, and should use him as his own, for a number of years, with the knowledge, and in the neighborhood, of the vendor, without any claim on his part; and then, the vendor should bring an action for the horse; though the purchaser could adduce no manner of proof of the sale, yet from such possession, under such circumstances, a jury would not hesitate to presume a sale of the horse").

96. Craig v. Austin, 1 Dana (Ky.) 517; Woodson v. Scott, 1 Dana (Ky.) 470; Gaines v. Conn, 2 J. J. Marsh. (Ky.) 104; Demeyer v. Legg, 18 Barb. (N. Y.) 14; Maltonner v. Dimmick, 4 Barb. (N. Y.) 566; Jackson v. Murray, Anth. N. P. (N. Y.) 143 [rev on other grounds 7 Johns. 5]; Briggs v. Prosser, 14 Wend. (N. Y.) 227; Kimbrall v. Walker, 41 S. C. L. 422.

97. See cases infra this note.

[a] **Deed by trustee.**—Waggener v. Waggener, 3 T. B. Mon. (Ky.) 542; Reformed Protestant Dutch Church v. Mott, 7 Paige (N. Y.) 77, 32 AmD 613; Harman v. Kelley, 14 Oh. 502, 45 AmD 552; McCullough v. Wall, 38 S. C. L. 68, 53 AmD 715.

[b] **Deed by executor.**—Williams v. Mitchell, 112 Mo. 300, 20 SW 647.

[c] **Deed by sheriff.**—Manning v. Kansas, etc., Coal Co., 181 Mo. 359, 81 SW 140.

[d] **Deed to stranger.**—A presumption is not raised, however, to support the possession of a stranger in opposition to a deed of recent date. Harman v. Kelley, 14 Oh. 502, 45 AmD 552.

98. U. S.—U. S. v. Chavez, 175 U. S. 509, 20 SCt 159, 44 L. ed. 255.

Conn.—Tracy v. Norwich, etc., R. Co., 39 Conn. 382.

Del.—Tubbs v. Lynch, 4 Del. 521; Walls v. McGee, 4 Del. 108.

Ky.—Jarboe v. McAtee, 7 B. Mon. 279.

La.—Landry v. Martin, 15 La. 10.

Pa.—Mather v. Trinity Church, 3 Serg. & R. 509, 8 AmD 663.

S. C.—Busby v. Florida Cent., R. Co., 45 S. C. 312, 23 SE 50.

Tenn.—Scales v. Cockrill, 3 Head 432.

Tex.—Taylor v. Watkins, 26 Tex. 688; Grimes v. Bastrop, 26 Tex. 310; Harmon v. Landers, (Civ. A.) 41 SW 378. See however Yancey v. Norris, 27 Tex. 40 (holding that a grant of land situated within the border league, which requires the consent of the federal executive of Mexico, will not be presumed as against a subsequent grant regularly executed).

Vt.—Victory v. Wells, 39 Vt. 488.

Va.—Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232; Matthews v. Burton, 17 Gratt. (58 Va.) 312.

See however Boston v. Richardson, 105 Mass. 351 (holding that a grant from the colony of Massachusetts to the town of Boston of certain flats at the end of a street will not be presumed from orders of the town at different times from 1643 to 1736, providing for the erection and maintenance of fortifications on such lands, granting rights to abutting owners to use the same, and staking out a portion thereof for use as a street).

99. Carter v. Walker, (Ala.) 65 S 170; Crooker v. Pendleton, 23 Me. 339; State v. Dickinson, 129 Mich. 221, 88 NW 621. See however Stodder v. Powell, 1 Stew. (Ala.) 287; State v. Akers, (Kan.) 140 P 637 (holding that as against the state no title to the bed of a public stream can be acquired through private use or occupancy or by prescription); Crane v. Reeder, 21 Mich. 24, 4 AmR 430; Com. v. Alburger, 1 Whart. (Pa.) 469 (holding that a grant of a part

earlier period than the commencement of the possession in the absence of evidence on that point.[1]

[§ 652] **C. Qualifications of Rule.** If the origin of the title is known and is at variance with the grant sought to be established, the presumption of a lost grant does not arise;[2] nor will it arise where the circumstances are consistent with the nonexistence of a grant.[3] So the presumption cannot arise where the claim is of such a nature as to be at variance with the supposition of a grant,[4] and the presumption must be confined to such a deed as that under which the occupant asserted title.[5] If the supposed grantor could not legally have conveyed, the presumption of a lost grant will not be indulged.[6]

[§ 653] **D. Essentials. Possession accompanied by acts of ownership.** Possession is of course essential to give rise to the presumption.[7] But mere possession is not in itself sufficient;[8] there must be additional circumstances tending to show that a conveyance was made, that is to say, the possession must be accompanied by the usual acts of ownership, which implies that it must be adverse.[9] Ordinarily the possession must be actual,[10] especially where the legal owner is in actual possession of a portion of the tract, part of which is claimed by another;[11] but actual possession is not always necessary.[12] While the grant in scope is presumed to coincide with the extent of the occupant's possession,[13] yet it is not necessarily confined to that area; actual possession of an entire tract claimed is not always necessary.[14]

of a public square will not be presumed from lapse of time so as to bar an indictment for nuisance in obstructing the same).

[a] **In North Carolina** this presumption obtains both at common law and by statute. Bullard v. Hollingsworth, 140 N. C. 634, 53 SE 441; Lewis v. Overby, 126 N. C. 347, 35 SE 623; Walden v. Ray, 121 N. C. 237, 28 SE 293; Hamilton v. Icard, 114 N. C. 532, 19 SE 607; Bryan v. Spivey, 109 N. C. 57, 13 SE 766; Davidson v. Arledge, 97 N. C. 172, 2 SE 378; Phipps v. Pierce, 94 N. C. 514; Mallett v. Simpson, 94 N. C. 37, 55 AmR 595; Dills v. Hampton, 92 N. C. 565; Cowles v. Hall, 90 N. C. 330; Davis v. McArthur, 78 N. C. 357; Melvin v. Waddell, 75 N. C. 361; Bullard v. Barksdale, 33 N. C. 461; Reed v. Earnhart, 32 N. C. 516; Wallace v. Maxwell, 32 N. C. 110, 51 AmD 380; Candler v. Lunsford, 20 N. C. 542; Rogers v. Mabe, 15 N. C. 180; Fitzrandolph v. Norman, 4 N. C. 564.

[b] **The presumption is less readily indulged against the state** than against an individual. Wilson v. Stoner, 9 Serg. & R. (Pa.) 39, 43, 11 AmD 664 (where the court said: "In England, a grant may be presumed against the crown, but less readily than against an individual; in this state from the very nature of our land titles, the reason of this difference holds with additional force. In other countries, holding by permission of the state is a rare circumstance; with us, holding by permission, under an implied contract for a conveyance, to be executed at an indefinite period, subsequently, is a common origin of title. This remark is applicable in a greater or less degree to every part of the state; but it is obvious, that to raise this kind of presumption, a greater length of time will be required, where the population is sparse, and the possession a matter of little notoriety, than where the population is dense, and possession of a nature to arrest the general attention").

1. Sims v. Meacham, 18 S. C. L. 101.

2. Oregon, etc., R. Co. v. Grubissich, 206 Fed. 577, 124 CCA 375; Nieto v. Carpenter, 21 Cal. 455; Farr v. Swan, 2 Pa. 245. And see Callender v. Sherman, 27 N. C. 711. See however McAlpine v. Daniel, 101 N. C. 550, 8 SE 215 (holding that, although a deed for want of words of inheritance conveys but a life estate, yet as against a stranger title in the grantee will be presumed from his occupancy for more than twenty years, in the absence of evidence that his grantor did not convey the whole estate).

[a] **If the origin of the title is consistent with the grant claimed,** however, a grant may be presumed. Bryan v. Tormey, (Cal.) 21 P 725 (where the occupant claimed under an oral contract of purchase); Bierce v. Pierce, 15 Oh. 529 (where the occupant claimed under a defectively executed conveyance).

3. Ricard v. Williams, 7 Wheat. (U. S.) 59, 5 L. ed. 398; Randale v. Grove, 20 F. Cas. No. 11,570, 4 McLean 282; Taylor v. Watkins, 26 Tex. 688; Logan v. Ward, 58 W. Va. 366, 52 SE 398, 5 LRANS 156 and note.

4. Ricard v. Williams, 7 Wheat. (U. S.) 59, 5 L. ed. 398; Randale v. Grove, 20 F. Cas. No. 11,570, 4 McLean 282; Taylor v. Watkins, 26 Tex. 688.

5. Jackson v. Porter, 13 F. Cas. No. 7,143, 1 Paine 457. And see Hammond v. Ridgely, 5 Harr. & J. (Md.) 245, 9 AmD 522. Compare Casey v. Inloes, 1 Gill (Md.) 430, 39 AmD 658. See also infra note 21.

6. Hunt v. Hunt, 3 Metc. (Mass.) 175, 37 AmD 130 (where it is impliedly held that no deed can be presumed against the grantor where he was insane); Spears v. Oakes, 38 S. C. L. 347 (holding that the presumption cannot arise against an infant owner); Habersham v. Hopkins, 35 S. C. L. 238, 53 AmD 676 (holding that the presumption will not be indulged where the alleged grantor could not have given a deed without defrauding beneficiaries to a trust in the land conveyed of which he was trustee); Martin v. State, 10 Humphr. (Tenn.) 157 (holding that the presumption cannot arise against the state where it had no power to issue the grant claimed); Beach v. Beach, 14 Vt. 28, 39 AmD 204 (holding that the jury will not be directed to presume a conveyance, where the trustee could not be authorized to convey, or where it was evidently intended that the legal estate should remain in him).

7. Md.—Casey v. Inloes, 1 Gill 430, 39 AmD 658.

N. Y.—Immaculate Virgin Mission v. Cronin, 143 N. Y. 524, 38 NE 964 [rev 21 NYS 750]; Enders v. Sternbergh, 2 Abb. Dec. 31, 1 Keyes 264, 33 HowPr 464.

Oh.—Blake v. Davis, 20 Oh. 231.

Pa.—Warner v. Henby, 48 Pa. 187.

S. C.—Chappell v. Gibson, 16 S. C. L. 28.

Tenn.—Scales v. Cockrill, 3 Head 432; White v. Lavender, 5 Sneed 648.

Tex.—Boone v. Miller, 73 Tex. 557, 11 SW 551. Compare Le Blanc v. Jackson, (Civ. A.) 161 SW 60.

Vt.—Brown v. Edson, 23 Vt. 435.

[a] **Cessation of possession.**—Where in ejectment it appeared that the locus in quo had been in the actual possession of parties under whom plaintiff claimed for sixty years prior to 1870, but it did not appear that the possession was continued after that time up to the time when that action was brought, in 1885, it was error to charge that the law presumed a grant from twenty years' adverse possession, and that the jury would be at liberty to presume the necessary conveyance to plaintiff. Brittain v. Daniels, 94 N. C. 781.

[b] **In countries where lands are largely unsettled** and actual possession is the exception, the doctrine that possession is indispensable to the presumption of a grant does not apply. Baldwin v. Goldfrank, 88 Tex. 249, 31 SW 1064; Garner v. Lasker, 71 Tex. 431, 9 SW 332; Arthur v. Ridge, 40 Tex. Civ. A. 137, 89 SW 15.

8. Craig v. Austin, 1 Dana (Ky.) 517; Clark v. Faunce, 4 Pick. (Mass.) 245.

9. Kellum v. Corr, 209 N. Y. 486, 103 NE 701. See cases supra § 651 note 81.

Sufficiency of possession see infra this section.

10. May v. Morganton Mfg., etc., Co., 164 N. C. 262, 80 SE 380; Scales v. Cockrill, 3 Head (Tenn.) 432.

11. Casey v. Inloes, 1 Gill. (Md.) 430, 39 AmD 658; Hammond v. Ridgely, 5 Harr. & J. (Md.) 245, 9 AmD 522.

12. Farvar v. Merrill, 1 Me. 17; Kellum v. Corr, 209 N. Y. 486, 103 NE 701 (in which it was said, however, that either actual or constructive possession is necessary); Glass v. Gilbert, 58 Pa. 266.

13. Williams v. Donell, 2 Head (Tenn.) 695. And see Scales v. Cockrill, 3 Head (Tenn.) 432.

14. Jackson v. Murray, Anth. N. P. (N. Y.) 143 [rev on other grounds 7 Johns. 5] (holding that a memorandum of an agreement for the sale of land is evidence of a unity of title in each and every part of such land, as well the part in actual possession as the part not in actual possession; and after a long undisturbed possession of part by the purchaser mentioned in the memorandum the court will presume a deed conformable thereto); Harris v. Maxwell, 20 N. C. 382 (holding that after a person and those under whom he claims have been in possession under color of title for thirty-five years, and the lines and boundaries have been known and visible, and he and they under whom he holds claimed up to those lines and boundaries, a grant up to those boundaries may be presumed to have been made, although the actual possession or inclosure by the occupant might not have extended to those lines); Fitzrandolph v. Norman, 4 N. C. 564; Scales v. Cockrill, 3 Head (Tenn.) 432 (holding that, if land is held under a paper title designating the boundaries claimed to, this possession would be by construction to the limits prescribed by such paper writing). Compare May v. Morganton Mfg., etc., Co., (N. C.) 80 SE 380 (holding that when, under Revisal [1905] § 380, it is sought to extend the adverse occupation beyond an actual inclosure, up to marked boundaries, there must be evidence to connect the occupation with such boundaries, or to show some exclusive control over the unoccupied portion, sufficiently definite to apprise the true owner of the claim); Yount v. Miller, 91 N. C. 331 (holding that where a party relies on thirty years' adverse possession in order to presume a grant, he is not bound to show that he and those under whom he claims held the possession, claiming the land up to visible lines and boundaries).

[a] **As affected by time of possession.**—A partial possession of land with a general claim of title for only fifteen years will not authorize the presumption of a conveyance to the claimant. Lee v. Hoye, 1 Gill (Md.) 188.

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The possession must of course have been adverse in a broad sense of the term,[15] in that it was not held by permission of the holder of the paper title[16] or against his protest.[17] So a joint or mixed possession of the owner of the title and a third person affords no foundation for the presumption of a grant from the owner to such person.[18] And the possession must have been perfectly consistent with unqualified ownership in the occupant;[19] if it is entirely consistent with title in another no presumption arises,[20] nor does it arise where the possession is not under the title in favor of which the presumption is invoked.[21] It has been held that continuous and uninterrupted possession is not always necessary to found the presumption of lost grant.[22]

In regard to tacking possessions the same rules seem to apply as in the case of adverse possession under the statute, so far at least as they favor the occupant.[23] As to whether there must be privity between successive adverse occupants in order to give rise to the presumption of a grant from the legal owner, the cases are not in accord.[24]

Color of title in the occupant is not necessary to give rise to the presumption.[25] Even if it were necessary, an invalid deed would be sufficient to constitute color of title.[26]

Period of possession. Since the presumption of a lost grant exists independently of the statute of limitations,[27] it is not necessary that possession, when accompanied by other circumstances, should be held for the statutory period, in order that the presumption may arise.[28] The period necessary or sufficient to create the presumption is not, in most jurisdictions, governed by any hard and fast rule; it usually depends on the circumstances of the case.[29]

15. Griffith v. Dicken, 2 B. Mon. (Ky.) 20; Casey v. Inloes, 1 Gill (Md.) 430, 39 AmD 658 (holding that a grant would not be presumed from the erection of a fence in navigable waters in front of another's land, where the latter had a right of reclamation under the Maryland act of 1745, and from the maintenance of the fence for thirty years, where it was built in a straight line inclosing no land, since the riparian owner, having neither title to nor possession of, the soil covered by the fence, could maintain no action against the person erecting it); Stockdale v. Lee, 42 S. C. L. 401; Stockdale v. Young, 34 S. C. L. 501 note; Smith v. Asbell, 33 S. C. L. 141; Miller v. Brownson, 50 Tex. 583 (holding that no presumption of a public grant arises out of the possession of public land by a mere squatter).

[a] **There must be a claim of right** under which the possession is held, otherwise the presumption does not arise. Pue v. Pue, 4 Md. Ch. 386; Bolling v. Petersburg, 3 Rand. (24 Va.) 563.

[b] **As between tenants in common,** the possession of one must be open and notoriously hostile and adverse in order to found a presumption of a grant to him from a cotenant. Hunt v. Hunt, 3 Metc. (Mass.) 175, 37 AmD 130; Powers v. Smith, 80 S. C. 110, 61 SE 222.

16. Nieto v. Carpenter, 21 Cal. 455; Pue v. Pue, 4 Md. Ch. 386; Raymond v. Holden, 2 Cush. (Mass.) 264.

[a] **If the possession was permissive in its inception,** the original consistency of relation between the possession and the opposite title must have been clearly dissolved and turned into an adverse possession for many years before suit, in order to make it available as a ground of presumption of title. Callender v. Sherman, 27 N. C. 711. And see Rogers v. Mabe, 15 N. C. 180.

17. Stillman v. White Rock Mfg. Co., 23 F. Cas. No. 13,446, 3 Woodb. & M. 539.

18. Hunt v. Hunt, 3 Metc. (Mass.) 175, 37 AmD 130.

19. Colvin v. Warford, 20 Md. 357 (holding that a grant will not be presumed when the possession is explained by evidence showing that it was taken in virtue of some qualified interest or estate less than that of an absolute title).

20. Watson v. Bissell, 27 Mo. 220 (as where a father, in whose behalf the title is invoked as against his son and the son's heir, was in possession of the land during the minority of the son or after the latter's death, at which time the law devolved the life estate in the land of the son on the father).

21. Dessaunier v. Murphy, 27 Mo. 48. See supra note 5.

22. Oregon, etc., R. Co. v. Grubissich, 206 Fed. 577, 124 CCA 375. Contra Casey v. Inloes, 1 Gill (Md.) 430, 39 AmD 658.

[a] **In North Carolina,** (1) in order to found a presumption of a grant from the state, it is not necessary that the possession should have been continuous. May v. Morganton Mfg., etc., Co., 80 SE 880; Bullard v. Hollingsworth, 140 N. C. 634, 53 SE 441; Lewis v. Overby, 126 N. C. 347, 35 SE 623; Walden v. Ray, 121 N. C. 237, 28 SE 293; Hamilton v. Icard, 114 N. C. 532, 19 SE 607; Bryan v. Spivey, 109 N. C. 57, 13 SE 766; Mallett v. Simpson, 94 N. C. 37, 55 AmR 595; Cowles v. Hall, 90 N. C. 330; Davis v. McArthur, 78 N. C. 357; Reed v. Earnhart, 32 N. C. 516; Candler v. Lunsford, 20 N. C. 542; Fitzrandolph v. Norman, 4 N. C. 564. (2) Even a three years' breach in the continuity of possession does not defeat the presumption of a lost grant. Cowles v. Hall, supra.

[b] **In the case of mixed possession,** however, different possessions and acts cannot be added together, where there are long intervals between them, to raise a presumption of a grant from the rightful owner, since by every discontinuance of the wrongdoer's possession the rightful owner's possession is restored. Casey v. Inloes, 1 Gill (Md.) 430, 39 AmD 658.

[c] **Possession in either of two parties,** where regular paper title from both is shown by plaintiff, is equally available to him for the purpose of presuming a deed from continuous possession. Casey v. Inloes, 1 Gill (Md.) 430, 39 AmD 658.

[d] **What constitutes interruption of possession.**—(1) The fact that an inclosure erected by the claimant was at times down and that persons as well as stock passed over the land claimed by him will not interrupt his possession if he still occupies and uses the land. Scales v. Cockrill, 3 Head (Tenn.) 432. (2) The fact that an occupant was driven away by an incursion of Indians does not interrupt his possession in law. Herndon v. Casiano, 7 Tex. 322.

23. Bardin v. Commercial Ins., etc., Co., 82 S. C. 358, 64 SE 165; Powers v. Smith, 80 S. C. 110, 61 SE 222 (both holding that adverse possession of ancestor and heir may be tacked to make out the period necessary to found the presumption of a deed).

24. See cases infra this note. Compare Miller v. Brownson, 50 Tex. 583 (holding that the mere possession of an intruder will not warrant a presumption of a grant to some one else).

[a] **In Maryland** possession of one defendant does not inure to the benefit of his codefendant in an ejectment suit for the purpose of founding a presumption of a grant, where they claim title under separate and independent leases, there being no privity of any kind between them. Casey v. Inloes, 1 Gill 430, 39 AmD 658.

[b] **In North Carolina** (1) no privity between successive occupants was formerly necessary to raise the presumption of a grant from the state by adverse possession. Hamilton v. Icard, 114 N. C. 532, 19 SE 607; Bryan v. Spivey, 109 N. C. 57, 13 SE 766; Davidson v Arledge, 97 N. C. 172, 2 SE 378; Phipps v. Pierce, 94 N. C. 514; Mallett v. Simpson, 94 N. C. 37, 55 AmR 595; Dills v. Hampton, 92 N. C. 565; Cowles v. Hall, 90 N. C. 330; Davis v. McArthur, 78 N. C. 357; Melvin v. Waddell, 75 N. C. 361; Reed v. Earnhart, 32 N. C. 516; Wallace v. Maxwell, 32 N. C. 110, 51 AmD 380; Candler v. Lunsford, 20 N. C. 542; Fitzrandolph v. Norman, 4 N. C. 564. (2) But privity is now necessary by the provisions of Revisal § 380. May v. Morganton Mfg., etc., Co., 80 SE 880.

[c] **In Tennessee** the presumption may arise, although possession has been held by different persons without any privity of title or occupation between them. Scales v. Cockrill, 3 Head 432.

25. Cannon v. Phillips, 2 Sneed (Tenn.) 185.

26. Bryan v. Donelly, 87 S. C. 388, 69 SE 840.

27. See supra § 651.

28. Barclay v. Howell, 6 Pet. (U. S.) 498, 8 L. ed. 477; Ricard v. Williams, 7 Wheat. (U. S.) 59, 5 L. ed. 398; Courcier v. Graham, 1 Oh. 330. Contra Keilum v. Corr, 209 N. Y. 486, 103 NE 701 [aff 149 App. Div. 200, 133 NYS 784].

[a] **It is the policy of courts of law, however,** to limit the period in analogy to the statutes of limitation, where those statutes do not apply. Ricard v. Williams, 7 Wheat. (U. S.) 59, 5 L. ed. 398 [cit Hunt v. Hunt, 3 Metc. (Mass.) 175, 37 AmD 130].

[b] **If not accompanied by other circumstances, however,** possession for a less period than that prescribed by the statute of limitations is insufficient to found a presumption of lost grant. Griffith v. Dicken, 2 B. Mon. (Ky.) 20 (holding that a deed from an elder patentee to one who has been in possession for twenty years will not be presumed in the absence of proof of an existing obligation to convey); Lyne v. Commonwealth Bank, 5 J. J. Marsh. (Ky.) 545; Waggener v. Waggener, 3 T. B. Mon. (Ky.) 542; Hunt v. Hunt, 3 Metc. (Mass.) 175, 57 AmD 130; Eldridge v. Knott, Cowp. 214, 98 Reprint 1050. And see Crawford v. Neff, 3 Grant (Pa.) 175.

29. See cases infra this note.

In Taylor v. Watkins, 26 Tex. 688, 692, the court said: "Some very strong cases are to be found in the books in which courts of equity, and sometimes courts of law, have indulged presumptions of grants upon possessions comparatively brief; but such cases will be found, for the most part, to be cases in which the possession is aided by very strong equities in

However, twenty years' peaceable possession, accompanied by the usual acts of ownership, is generally held sufficient to create the presumption.[30]

[§ 654] **E. Nature; Province of Court and of Jury.** Whether the presumption of a lost grant is a presumption of law or one of fact is not well settled. In many cases it is regarded as a presumption of fact, and accordingly it is for the jury to determine whether or not, under the circumstances of the case, a grant may be inferred.[31] But where it appears more probable that a deed or other muniment of the title in question had been executed than that it had not been, the jury will be authorized to assume that it had been so executed.[31½] In other cases the presumption is treated as one of law, and accordingly the court is not only justified in instructing the jury to find a grant, but is also required to do so.[32] Hence in order to presume a lost grant, it is not necessary that the jury should believe that a conveyance was in point of fact executed.[33] In yet other cases the question whether a deed is or is not to be presumed from long possession is said to be a mixed question of law and fact[34] to this extent, that, the facts being found, it is for the court to advise the jury whether in their nature and quality they are sufficient to raise a presumption, the weight of the evidence being for the jury.[35] It seems to depend largely upon the extent of the period of possession.[36] In America it has been said by high authority to be the general rule that upon proof of adverse possession for twenty years a presumption of law arises that a grant had been made to the occupant.[37] Whether the presumption is regarded as one of law or merely one of fact, it is in any event rebuttable; and any circumstances going to show the nonexistence of a grant may accordingly be proved.[38]

favor of the party in whose behalf the presumption is indulged."

[a] **As affected by partial possession.**—A partial possession of land with a general claim of title for only fifteen years will not authorize the presumption of a conveyance to the claimant. Lee v. Hoye, 1 Gill (Md.) 188.

[b] **As against the state.**—(1) In order to raise the presumption as against the state the precise period is not determined, but forty years is certainly enough. Rogers v. Mabe, 15 N. C. 180. (2) And so is twenty years sufficient. Scales v. Cockrill, 3 Head (Tenn.) 432. (3) To raise the presumption a greater length of time will be required to raise a grant against the state where the population is sparse and the possession a matter of little notoriety than where the population is dense and possession of a nature to arrest the general attention. Wilson v. Stoner, 9 Serg. & R. (Pa.) 39, 11 AmD 664. (4) Possession for the period specified by the statute of limitations is not necessarily sufficient as against the state. Plummer v. Power, 29 Tex. 6; Walker v. Hanks, 27 Tex. 535.

[c] **Possession for statutory period.**—(1) A grant may be presumed from acts of use and occupation, accompanied by a claim of ownership, for the period prescribed by the statute of limitations (Burdick v. Heivly, 23 Iowa 511; Flanagan v. Mathiesen, 70 Nebr. 223, 97 NW 287. Contra Rogers v. Mabe, 15 N. C. 180, semble), (2) except in Texas as against the state (see supra note 29 [b]).

30. U. S.—U. S. v. Chavez, 175 U. S. 509, 20 SCt 159, 44 L. ed. 255; U. S. v. Chaves, 159 U. S. 452, 16 SCt 57, 40 L. ed. 215.

Ala.—Stodder v. Powell, 1 Stew. 287.

Md.—Casey v. Inloes, 1 Gill 430, 39 AmD 658; Pue v. Pue, 4 Md. Ch. 386.

N. Y.—Maltonner v. Dimmick, 4 Barb. 556 (semble).

N. C.—Rogers v. Mabe, 15 N. C. 180.

S. C.—Powers v. Smith, 80 S. C. 110, 61 SE 222; Uzzell v. Horn, 71 S. C. 426, 51 SE 253; Wadsworthville Poor School v. Jennings, 40 S. C. 168, 18 SE 257, 891, 42 AmSR 854; Stockdale v. Lee, 42 S. C. L. 401; Smith v. Asbell, 33 S. C. L. 141; Sims v. Meacham, 18 S. C. L. 101.

Tenn.—Scales v. Cockrill, 3 Head 432; Cannon v. Phillips, 2 Sneed 211; Brock v. Burchett, 2 Swan 27; Gilchrist v. McGee, 9 Yerg. 455.

31. U. S.—Jackson v. Porter, 13 F. Cas. No. 7,143, 1 Paine 457.

Conn.—Sumner v. Child, 2 Conn. 607, 612.

Mass.—Valentine v. Piper, 22 Pick. 85, 33 AmD 715.

N. C.—Bullard v. Barksdale, 33 N. C. 461; Wallace v. Maxwell, 29 N. C. 135.

Pa.—Carter v. Tinicum Fishing Co., 77 Pa. 310; Jenkins v. McMichael, 21 Pa. Super. 161.

S. C.—Busby v. Florida Cent., etc., R. Co., 45 S. C. 312, 23 SE 50.

Tex.—Herndon v. Vick, 89 Tex. 469, 35 SW 141; Le Blanc v. Jackson, (Civ. A.) 161 SW 60. And see Taylor v. Watkins, 26 Tex. 688.

Vt.—Townsend v. Downer, 32 Vt. 183.

Va.—Archer v. Saddler, 2 Hen. & M. (12 Va.) 370. And see Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 SE 232.

In Sumner v. Child, 2 Conn. 607, 612, the court said: "It is further insisted on, that the court ought to have stated the length of time, and the circumstances of presumption, as matter of law, to the jury, and not to have submitted them as matters of evidence. How can a court state that as matter of law, to the jury, which is really matter of evidence? Though we commonly say, that the jury presume a grant, yet, in truth, they find the grant, on presumptive evidence, in the same manner as they find any other fact, on the evidence. They do not presume a grant, as matter of law, without weighing the evidence. The length of time, and accompanying circumstances, are the evidence on which they may, or may not, find a grant, charter, record or deed, according as they judge them sufficient, or not. Let the evidence be ever so clear, the court cannot tell the jury as matter of law, that they must find the verdict one way, or the other. It is the province of the jury, to decide whether they will believe it, or not; and, of course, it must be left to them: and it may as well be said, in an action of assault and battery, that it is the duty of the court to state to the jury, all the evidence in the case as matter of law, as it would be, in the case in question, to state to them the length of time, and accompanying circumstances, as matter of law."

[a] **It is a question of fact for the jury** (1) when the origin of the possession is shown (Callender v. Sherman, 27 N. C. 711), or (2) when the occupant entered originally not as owner but under the title of another (Rogers v. Mabe, 15 N. C. 180).

31½. Le Blanc v. Jackson, (Tex. Civ. A.) 161 SW 60.

32. U. S.—Fletcher v. Fuller, 120 U. S. 534, 7 SCt 667, 30 L. ed. 759.

Md.—Casey v. Inloes, 1 Gill 430, 39 AmD 658.

N. C.—Davis v. McArthur, 78 N. C. 357; Melvin v. Waddell, 75 N. C. 361; Rogers v. Mabe, 15 N. C. 180.

Pa.—Wilson v. Stoner, 9 Serg. & R. 39, 11 AmD 664.

Tenn.—Williams v. Donell, 2 Head 695.

Vt.—Vermont Univ. v. Reynolds, 3 Vt. 542, 26 AmD 234.

Va.—Matthews v. Burton, 17 Gratt. (58 Va.) 312.

Eng.—Eldridge v. Knott, Cowp. 214, 98 Reprint 1050.

33. U. S.—Fletcher v. Fuller, 120 U. S. 534, 7 SCt 667, 30 L. ed. 759.

Md.—Casey v. Inloes, 1 Gill 430, 39 AmD 658.

N. C.—Davis v. McArthur, 78 N. C. 357.

Pa.—Wilson v. Stoner, 9 Serg. & R. 39, 11 AmD 664.

Tenn.—Williams v. Donell, 2 Head 695.

34. Jackson v. Porter, 13 F. Cas. No. 7,143, 1 Paine 457; Valentine v. Piper, 22 Pick. (Mass.) 85, 33 AmD 715.

35. Valentine v. Piper, 22 Pick. (Mass.) 85, 33 AmD 715.

36. Stockdale v. Young, 84 S. C. L. 501 (holding that in order to raise a presumption of law there must be a continued and uninterrupted possession for at least twenty years); Stockdale v. Lee, 32 S. C. L. 401 (holding that a deed will not be presumed as a matter of law without proof of twenty years' possession, but that long possession short of twenty years, accompanied by possession of the grant and other muniments of title, may create such a presumption). And see cases supra notes 31, 32.

37. U. S. v. Chaves, 159 U. S. 452, 16 SCt 57, 40 L. ed. 215 [cit U. S. v. Chavez, 175 U. S. 509, 522, 20 SCt 159, 44 L. ed. 255] (per Shiras, J.).

38. U. S.—Ricard v. Williams, 7 Wheat. 59, 5 L. ed. 398; Hurst v. McNeil, 12 F. Cas. No. 6,936, 1 Wash. 70; Ransdale v. Grove, 20 F. Cas. No. 11,570, 4 McLean 282.

Ky.—Downing v. Ford, 9 Dana 391 (holding that the presumption that after twenty years' possession under a title bond a deed was made in compliance therewith may be defeated by evidence that the obligee had obtained an insufficient deed, and after having held for more than twenty years filed a bill to perfect his title); Chiles v. Conley, 2 Dana 21.

Md.—Casey v. Inloes, 1 Gill 430, 39 AmD 658 (holding, however, that a presumption of a grant from adverse possession is not rebutted by a prevalent opinion in the neighborhood as to the claimant's legal rights, even though known to and adopted by him).

Mich.—Crane v. Reeder, 21 Mich. 24, 4 AmR 430.

N. J.—Thorpe v. Corwin, 20 N. J. L. 311 (holding that the presumption may be overcome by evidence of intervening disabilities or other circumstances inconsistent with the existence of the grant so presumed).

N. C.—Bullard v. Barksdale, 33 N. C. 461.

Tex.—Miller v. Brownson, 50 Tex. 583 (holding that the possession of an intruder strongly tends to negative the presumption of a grant to anyone else); Sulphen v. Norris, 44 Tex. 204; Taylor v. Watkins, 26 Tex. 688.

[§ 655] **F. Pleading and Evidence.** The pleadings must be so framed as to lay a proper foundation for proof of a grant, otherwise the presumption cannot be indulged.[39]

Evidence. Any circumstances may be proved which tend to give rise to the presumption, on the one hand,[40] or, on the other hand, which tend to rebut it.[41]

ADVERSUS. Literally "Against."[1]

ADVERSUS PERICULUM NATURALIS RATIO PERMITTIT SE DEFENDERE.[2]

ADVERTISE.[3] To give public notice of a thing; to announce publicly,[4] especially by a printed notice;[5] to publish notice of; to publish a written or printed account of.[6]

ADVERTISEMENT. A notice published in handbills or a newspaper.[7] The word also includes notice by posting or display upon signboards.[8] (Cross references.[9])

ADVERTISING. Making public intimation or announcement of anything, whether by publication in newspapers, or by handbills, or by oral proclama-

Va.—Field v. Brown, 24 Gratt. (65 Va.) 74.

[a] **Admissions of the occupant** that there was no grant rebut the presumption. Roxbury v. Huston, 37 Me. 42; Jackson v. Miller, 6 Wend. (N. Y.) 228, 21 AmD 316; Simmons v. Parsons, 20 S. C. L. 492 note.

[b] **Parol evidence.**—When the presumption of a grant is raised by parol evidence, it may be rebutted by the same species of evidence. English v. Register, 7 Ga. 387.

[c] **Sufficiency of rebuttal.**—(1) The mere fact that a grant was taken out within the twenty years by a party not in possession of the land is not per se sufficient to rebut the presumption of a prior grant arising from a continuous possession for twenty years. McLeod v. Rogers, 31 S. C. L. 19. (2) The recent issue of a patent to an adverse claimant does not affect the presumption of an ancient grant which is raised by long possession accompanied by a claim of title. Paul v. Perez, 7 Tex. 338. (3) After the lapse of thirty-seven years the presumption of a deed, where an executory contract can be shown upon which to base the presumption, may be relied on and will not be rebutted by the absence from the state of the vendor. Woodson v. Scott, 1 Dana (Ky.) 470.

39. Taylor v. Watkins, 26 Tex. 688.

40. Herndon v. Casiano, 7 Tex. 322. And see cases infra this note.

[a] **Ancient recovery in ejectment** is evidence of possession in defendant in that action at the institution thereof, and a recital in the declaration that the land was "late in the tenure and occupation" of such defendant's grantor is evidence of the latter's possession. Casey v. Inloes, 1 Gill (Md.) 430, 39 AmD 658.

[b] **Color of title** as to part of the time the occupant was in possession is admissible as tending to show a grant. Fitzrandolph v. Norman, 4 N. C. 564.

[c] **Hearsay evidence of ancient possession** is admissible because proof by living witnesses is impossible, although it is otherwise as to possessions of modern date. Casey v. Inloes, 1 Gill (Md.) 430, 39 AmD 658.

[d] **Notoriety of the occupant's claims** is admissible to strengthen the presumption of a grant. Dailey v. Starr, 26 Tex. 562.

[e] **Production of an incipient title** and of a diagram of a survey accompanying the survey and act of possession affords some evidence as to the particular land claimed. Dangerfield v. Paschal, 11 Tex. 579.

[f] **Recital in an ancient deed** of possession in the grantee and the grantor's father as joint tenants, and of a continuance thereof in the grantee as survivor, is evidence of such possession for the purpose of presuming a conveyance from lapse of time to one under whom the parties claim. Casey v. Inloes, 1 Gill (Md.) 430, 39 AmD 658.

41. See supra § 654 note 38.

1. Burrill L. D. See Versus [40 Cyc 196].

2. A maxim meaning "Natural reason allows one to defend himself against danger." Morgan Leg. Max.

3. See Advertisement post.

4. Montford v. Allen, 111 Ga. 18, 19, 36 SE 305; Darst v. Doom, 38 Ill. A. 397, 401.

[a] **To give publicity.**—"To advertise would mean to give publicity through the medium of newspapers, handbills, circulars, or some similar way, so as to call particular attention to a subject-matter, in order that people may identify it from the description given in the advertisement." 22 Op. Atty.-Gen. 272, 275.

5. Montford v. Allen, 111 Ga. 18, 19, 36 SE 305.

6. Darst v. Doom, 38 Ill. A. 397, 401 [cit Webster D.].

[a] "'**Advertised,**' in common acceptation means notices printed or written or published in a newspaper." Anderson L. D. [quot Lake Erie, etc., R. Co. v. Peo., 42 Ill. A. 387, 389].

7. Lake Erie, etc., R. Co. v. Peo., 42 Ill. A. 387, 389; Darst v. Doom, 38 Ill. A. 397, 401 [cit Bouvier L. D.].

[a] **Advertisement includes notice.**—(1) Construing a statute providing that "no irregularity or informality in the advertisement shall affect in any manner the legality of the sale," the court said: "The terms of this section, its context in the chapter, and the obvious purpose of the provision, all indicate that the word 'advertisement' is synonymous with 'notice,' and that it is meant to include both the publication and the posting." Davis v. Magoun, 109 Iowa 308, 328, 80 NW 423. (2) Construing a statute providing the rates that publishers of newspapers may charge and receive for public advertisements, notices, and proclamations, the court said: "Upon a thorough investigation the court is satisfied that the term 'advertisement' is a generic term, and includes 'notice,' Anderson L. D. confirming this view, so that the legislature, in using the word 'advertisement' here, probably meant to include notice." Murray v. Auglaize County, 13 OhS&CP 723, 726.

8. See Haffner v. Barnard, 123 Ind. 429, 435, 24 NE 152 (as employed in the Estray Law).

[a] **Painted board.**—In Com. v. Hooper, 5 Pick. (Mass.) 42, 44, a painted board sign exhibited at defendant's place of business was held to be an advertisement within the meaning of a statute prohibiting the advertising of a lottery.

[b] **Advertisement of public entertainments.**—"Advertisement," as used in an act prohibiting the tearing down of show bills, poster or other "advertisement," is insufficient to cover a constable's notice of sale. The word is not used to apply to anything and everything set up along the highway which may be designated as an "advertisement," but rather to the bills and posters giving notice of or advertising public entertainments. Com. v. Johnson, 3 Pa. Dist. 222, 13 Pa. Co. 543, 544.

[c] **Distribution of print "by way of advertisement."**—In order that a print may be carried or distributed by way of advertisement within the meaning of the Metropolitan Streets Act (1867) § 9, the print itself must be an advertisement. Therefore where a print which is a publication of news, but is not in itself an advertisement, is without the approval of the commissioner of police, distributed in such a way as to obtain the same consequences as if it were an advertisement, the distributor thereof is not liable to the penalty imposed by the section for distributing a print by way of advertisement except in such form and manner as may be approved by the commissioner of police. Gage v. Brealey, 67 L. J. Q. B. 457, 458.

9. **Advertisement:**
By attorney see Attorney and Client [4 Cyc 911].
By physician see Physicians and Surgeons [30 Cyc 1556].
Calculated to deceive public see Trade-Marks and Trade-Names [38 Cyc 846].
Copyright of see Copyright [9 Cyc 901].
For convict labor see Convicts [9 Cyc 880 note 4].
Liability of sheriff for cost of see Sheriffs and Constables [35 Cyc 1692].
Notice by see Notice [29 Cyc 1116].
Of:
- Assignee's sale see Assignments for Benefit of Creditors [4 Cyc 238].
- Execution sale see Executions [17 Cyc 1245].
- Foreclosure sale of:
  - Personalty see Chattel Mortgages [7 Cyc 104].
  - Realty see Mortgages [27 Cyc 1456].
- Goods for sale, warranty in see Sales [35 Cyc 385].
- Judicial sale see Judicial Sales [24 Cyc 17].
- Lottery see Lotteries [25 Cyc 1645].
- Sale of:
  - Goods distrained for rent see Landlord and Tenant [24 Cyc 1321].
  - Infant's lands see Infants [21 Cyc 133].
  - Municipal bonds see Municipal Corporations [28 Cyc 1596].
  - Property under mechanic's lien see Mechanics' Liens [27 Cyc 446].
  - Swamp lands see Public Lands [32 Cyc 915].
- Tax sale see Taxation [37 Cyc 1363].
- Vacation of private road see Private Roads [32 Cyc 386].

Official newspaper for see Newspapers [29 Cyc 695].
Part of trade-mark see Trade-Marks and Trade-Names [38 Cyc 733].
Photograph as see Injunctions [22 Cyc 899].
Posting or publication of notice as see Notice [29 Cyc 1116].
Proposal of contract by:
- Generally see Contracts [9 Cyc 278, 280].
- County contract see Counties [11 Cyc 481].
- Drainage contract see Drains [14 Cyc 1052].
- Law reports, contract for see Reports [34 Cyc 1615].
- Municipal contract see Municipal Corporations [28 Cyc 660].

Offer of reward see Rewards [34 Cyc 1736].
School district contract see Schools and School Districts [35 Cyc 954].
State contract see States [36 Cyc 875].
United States contract see United States [39 Cyc 737].

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tion;[10] the act or practice of bringing anything, as one's wants or one's business, into public notice, as by paid announcement in periodicals or by handbills, placards, etc.[11]

ADVICE. Counsel given or an opinion expressed as to the wisdom of future conduct;[12] more specifically the counsel given by lawyers to their clients;[13] also, in mercantile usage, direction given by a correspondent.[14] (Cross references.[15])

ADVICE OF COUNSEL. (Cross references.[16])

Public nuisance see Nuisances [29 Cyc 1166].
Regulation of propriety of see Newspapers [29 Cyc 706].
Service of process by see Process [32 Cyc 467].
Trading stamp as see Trading Stamps [38 Cyc 920].
Use of mails for see Post Office [31 Cyc 1004].

10. Cincinnati v. Fenner, 11 Oh S&CP 281, 287, 8 OhNP 342.

[a] **"Originally it [advertising] meant 'noticing'** or 'observing,' but gradually became extended until now it means 'making public intimation or announcement of anything,' whether by publication in newspapers, or by handbills, or by oral proclamation, and the idea underlying it has reference not to the vehicle or instrumentality used for getting the notice before the public, but rather to the diffusion, to the bringing home to the public, of the information or matter contained in the notice." Cincinnati v. Fenner, 11 OhS&CP 281, 287, 8 OhNP 342.

11. Carter v. State, 81 Ark. 37, 38, 98 SW 704.

[a] **Showing and "advertising" land.**—Where a contract by which lands were placed with an agent for sale recited that, if the lands were sold without the instrumentality of the agent, the owner would pay him fifty dollars in full for all trouble in showing and "advertising" the land, the word "advertising" meant the publication of a notice in a newspaper in the usual way that such matters are advertised, and not the showing of the land to prospective buyers, the word being taken in connection with the subject matter and conditions. Darst v. Doom, 38 Ill. A. 397, 400.

[b] **"Soliciting" distinguished.**—In Carter v. State, 81 Ark. 37, 38, 98 SW 704, the court said: "'To solicit' is thus defined: 'To importune, entreat, implore, ask, attempt, try to obtain.' Anderson L. D. See also Cent. D. 'Solicit.' None of the uses of this term embrace advertising, although advertising is a method, in a broad sense, of soliciting the public to purchase the wares advertised. But soliciting is a well known and defined action, and advertising is an equally well known and defined action, and they are not identical. It is true that they are intended to reach the same result, the sale of the wares, but different routes are traveled in reaching that end. . . . It would be a strained and unnatural use of the term 'solicit' to include in it advertisements in newspapers."

[c] **"Advertising purposes."**—(1) A person's picture is not used for "advertising purposes" within the Civil Rights Law, Consol. L. c 6 § 51, prohibiting the use of any person's picture or portrait without his written consent for advertising purposes, unless it is used as part of an advertisement. Jeffries v. New York Evening Journal Pub. Co., 67 Misc. 570, 571, 124 NYS 780. (2) "The next inquiry is whether the exhibition of the picture was for 'advertising purposes.' It would make the statute useful but greatly limit it, to confine the advertising to matters of vocation or even avocation, where there would be pecuniary return or expectation of it. If an advertisement were essentially for unselfish purposes, the portrait of a person not giving the statutory consent could not be displayed. The right of privacy under the statute cannot be invaded for purposes purely informative or redemptive, whether the altruist be entirely a charitable envoy or a railway company. No cause is so exalted that it may allure by exposing the portrait of a person to the public gaze. The statute does not mean that the grocer may not without written consent use another's picture to advertise his goods, but that a reformer may without such consent expose it to call attention to ways and means of reformation." Almind v. Sea Beach R. Co., 157 App. Div. 230, 232, 141 NYS 842.

12. Abbott L. D.

[a] **"Advice is optional** with the giver, that is, he can advise or remain silent; it is optional with him to whom it is directed; that is, he can accept or decline it." Com. v. Mercer, 190 Pa. 134, 137, 42 A 525.

[b] **"By and with the advice."**—(1) In In re Opinion of Justices, 190 Mass. 616, 619, 78 NE 311, the court said: "As to this class of cases, where the Constitution declares that the power to act is in the Governor, or that the act may be done by the Governor, 'by and with the advice of council,' or 'by and with the advice and consent of the council,' we are of opinion that the responsibility rests primarily upon the Governor to determine, as the supreme executive magistrate, whether any action is called for, and what action, if any, is desirable; and that the provision for advice of the Council is a requirement that their approval and concurrence shall accompany the affirmative act and enter into it before it becomes complete and effective. We do not think that these different phrases, used in different parts of the Constitution, namely, 'by and with the advice of council,' 'by and with the advice and consent of the council,' 'with the advice and consent of the council,' 'with advice of council,' and 'with advice of the council,' differ at all in legal effect. They all recognize the fact that the act, first of all, and afterwards for all time, is to be the act of the Governor. The only connection that the council can have with it is advisory. Whether the Governor takes advice or not, his conclusion must rest finally upon his own judgment. Inasmuch as the responsibility for his determination, with or without advice, must rest upon him, both in the beginning and forever after, the natural course of proceeding would seem to be that he should seek such aid as he might desire from any proper source, and not be obliged to ask advice, in the first instance, from an official body whose opinion could never relieve him from the duty of deciding." (2) In construing a similar provision in Com. v. Lane, 13 WklyNC (Pa.) 29, 32, the court said: "It has been contended that the words 'shall be appointed by and with the advice and consent of the Senate' confer upon it co-ordinate power with the Governor to appoint. They do not in themselves confer any power, nor does it arise by necessary implication therefrom. The right to advise and consent, or not consent, to an act does not confer the power to do the act. Nor is that power necessarily to be implied from such a right. Advice and consent, or withholding them, would ordinarily still leave unrestricted the power to do the act, by one otherwise authorized. It may be conceded that the Act of Assembly authorizes the Governor to appoint only by the advice and consent of the Senate. This, however, confers upon the Senate no power of appointment, nor does it take from the Governor the right to appoint. At most it merely restricts him in the exercise of that right so far as his nominees are concerned. A refusal to advise or consent leaves the executive free to exercise the power by other nominations, until, in the faithful discharge of its duties, the Senate is compelled to give advice and consent. The advice and consent of the Senate is only a method by which the power is exercised." (3) In Norcum v. D'Œnch, 17 Mo. 98, power was given by the testator to his widow to sell and dispose of his property with the advice and consent of the executor. It was held that the refusal of the executor to give his consent did not prevent a valid sale; advice meant general advice, and not consent to each act, and therefore a court of equity would on application authorize the sale.

13. Black L. D. See Advice of Counsel post.

14. Burrill L. D.

15. **Advice:**
Civil liability for:
In action involving:
False imprisonment see False Imprisonment [19 Cyc 326].
Tort see Torts [38 Cyc 485].
Trespass see Trespass [38 Cyc 1042].
Wrongful:
Attachment see Attachment [4 Cyc 840].
Execution see Executions [17 Cyc 1572].
Sequestration see Sequestration [35 Cyc 1421].
Criminal liability for:
In commission of crimes:
Generally see Criminal Law [12 Cyc 191].
Forgery see Forgery [19 Cyc 1390].
Homicide see Homicide [21 Cyc 685].
Larceny see Larceny [25 Cyc 58].
Perjury see Perjury [30 Cyc 1423].
Suicide see Suicide [37 Cyc 521].
Family meeting for see Guardian and Ward [21 Cyc 81].
Of senate in:
Appointment of ambassador or consul see Ambassadors and Consuls [2 Cyc 261].
Making treaty see Treaties [38 Cyc 965].
Parental, as defense to action for alienating affections see Husband and Wife [21 Cyc 1619].
See also Advice of Counsel post.

16. **Advice of counsel:**
As affecting liability of:
Creditor for wrongful execution see Executions [17 Cyc 1573].
Trustee for loss from improper investment see Trusts [39 Cyc 418].
As defense in:
Action or prosecution for:
Conversion see Trover and Conversion [38 Cyc 2060].
False imprisonment see False Imprisonment [19 Cyc 371].
Malicious prosecution see Malicious Prosecution [26 Cyc 31].
Perjury see Perjury [30 Cyc 1422].
Violation of injunction see Injunctions [22 Cyc 1020].
Wrongful attachment see Attachment [4 Cyc 861].
Contempt proceedings see Contempt [9 Cyc 25].
Criminal prosecution see Criminal Law [12 Cyc 156].
Issuance of writ of sequestration see Sequestration [35 Cyc 1424].
As evidence of probable cause see Malicious Prosecution [26 Cyc 97].
As justification for seaman leaving vessel see Seamen [35 Cyc 1223].
As privileged communication see Witnesses [40 Cyc 2374].
Liability of attorney for erroneous or improper see Attorney and Client [4 Cyc 964].

AD VIM MAJOREM VEL AD CASUS FORTUITUS NON TENETUR QUIS, NISI SUA CULPA INTERVENERIT.[17]

ADVISABLE. That which is expedient, prudent, and proper to be done, and therefore proper to be advised to be done.[18]

ADVISARE or **ADVISARI.** To be advised; to examine; to deliberate.[19]

ADVISE. To give advice to; to offer an opinion as worthy or expedient to be followed; to counsel;[20] to give counsel to; to recommend as wise and prudent; to suggest as the proper cause of action.[21]

ADVISEDLY. Deliberately; with consideration; intentionally.[22]

ADVISEMENT. Consideration; consultation; deliberation;[23] the act of a judge or justice in taking time to consider his judgment before rendering the same.[24]

ADVOCATE.[25]

ADVOCATE GENERAL.[26]

ADVOUTRER. A word now obsolete that signified the same thing as our word "adulterer."[27]

ADVOUTRY. See Advowtry post.

ADVOWSON. In modern times and in ordinary language, the perpetual right of presentation to a church or ecclesiastical benefice.[28] Lord Coke, however, defines it thus: "Advowson—Advocatio, signifying an avowing or taking into protection, is as much as jus patronatus."[29]

ADVOWTRY or **ADVOUTRY.** In old English

Receiver acting upon see Receivers [34 Cyc 257].
Right of witnesses to see Witnesses [40 Cyc 2409].

17. A maxim meaning "No one is held to answer for the effects of a superior force, or of accidents, unless his own fault has contributed." Black L. D. [cit Fleta lib. 2 c 72 § 16].

18. Barrett v. Bloomfield Sav. Inst., 64 N. J. Eq. 425, 441, 54 A 543 (where the above definition was given in construing a statute authorizing officers to dissolve a corporation, if at a meeting of the managers called to consider the question "a resolution declaring the dissolution of said institution to be advisable be passed by a two-thirds vote of the whole board." The court also said: "Its synonyms, according to Webster, Worcester and the Century Dictionary, are 'expedient,' 'proper,' 'desirable,' 'prudent,' 'wise,' 'best'").

19. Black L. D.

[a] **Frequently used in the old reports** in such expressions as curia advisari vult—the court will advise, commonly abbreviated cur. adv. vult, as in Clement v. Chivis, 9 B. & C. 172, 174, 17 ECL 85, 109 Reprint 64. See also Clark v. Read, 5 N. J. L. 486. "Here is an advisare vult indefinitely." Jeveson v. Moor, 12 Mod. 262, 269, 88 Reprint 1309. "The Court took an advisari." Alvany v. Powell, 55 N. C. 51.

20. State v. Allen, 34 Mont. 403, 416, 87 P 177; Long v. State, 23 Nebr. 33, 45, 36 NW 310 [cit Webster D.].

[a] **Creating precatory trust.**—The word advise in a will has been held sufficient to create a precatory trust. Parker v. Bolton, 5 L. J. Ch. 98.

[b] **Advise in sense of legal adviser.**—In construing an act providing that it shall be the duty of the city attorney to advise in all matters of litigation, etc., the court said: "The word advise is used here in its broad sense. The meaning is, he shall be the legal adviser of the council in all matters of litigation and legal proceedings, and in defining the duties which are required of him in his department the council may properly include attention to litigation as to which it is his duty to advise it." Ludlow v. Richie, 78 SW 199, 200, 25 KyL 1583 [quot Ludlow Bd. of Education v. Ritchie, 149 Ky. 674, 676, 149 SW 985].

21. State v. Allen, 34 Mont. 403, 416, 87 P 177.

[a] **Defining accessory.**—In Long v. State, 23 Nebr. 33, 45, 36 NW 310, it was held that it was not error in a judge, in a charge defining "accessories," to use the words "requested, advised, and incited," instead of the statutory words "aid, abet, or procure."

[b] **In abortion statute.**—In Pen. Code § 294, providing that any person who advises a woman to take medicine with intent to produce a miscarriage shall be guilty of abortion, the term was construed to mean advice which is acted on by the woman, and not that on which she does not act. Peo. v. Phelps, 61 Hun 115, 15 NYS 440.

[c] **"Encourage"** was held to be synonymous in an instruction defining a principal in crime. State v. Allen, 34 Mont. 403, 416, 87 P 177.

[d] **"Counsel, advise or assist"** may be used to describe the offense of a person who, not actually doing the felonious act, by his will contributes to or procures it to be done, and thereby becomes a principal or accessory. Omer v. Com., 95 Ky. 353, 361, 25 SW 594, 15 KyL 694; True v. Com., 90 Ky. 651, 654, 14 SW 684, 12 KyL 594.

[e] **"Procure, advise and assist."**—(1) There are no words in the law that have acquired a more definite and specific meaning than "procure, advise and assist," as contradistinguished from the actual commission of the crime. The latter is the principal offense; the former only accessory. If a person does no more than procure, advise, or assist he is only an accessory; but if he is present, consenting, aiding, procuring, advising, and assisting, he is a principal and must be indicted as such. U. S. v. Wilson, 28 F. Cas. No. 16,730, Baldw. 78, 103. (2) In an indictment charging that one did procure, advise and assist another to secrete and embezzle, "procure, advise and assist" necessarily imply that the act was done. U. S. v. Mills, 7 Pet. (U. S.) 138, 141, 8 L. ed. 636.

[f] **"Direct" and "instruct" distinguished.**—Pen. Code § 1118, providing that, if at any time after the evidence on either side is closed the court deems it insufficient to warrant a conviction, it may "advise" the jury to acquit defendant, does not authorize the court to instruct the jury to acquit, since the court cannot direct but only "advise." Peo. v. Daniels, 105 Cal. 262, 266, 38 P 720; Peo. v. Horn, 70 Cal. 17, 18, 11 P 470.

[g] **"Persuade" distinguished.**—In Wilson v. State, 38 Ala. 411, 414, the court said: "'Advise' has not the same meaning with 'persuade.' . . . 'Persuade' embraces in its meaning more than 'advise'; and we could not treat it as the synonym of 'advise,' without dispensing with what the word used clearly implies is a part of the offense."

[h] **"Plot or consult" distinguished.**—In State v. McDonald, 4 Port. (Ala.) 449, 459, 460, the court said: "It may be further remarked, in reference to the entire statute, that the terms it employs for the purpose of defining the crimes declared, are usually connected by the disjunctive conjunction, or, as to 'advise, plot or consult,' 'for the purpose of encouraging, exciting, aiding or assisting.' To advise, is one offense, to plot another, to consult a third, if done for the purpose of encouraging or exciting or aiding or assisting."

22. Heath v. Burder, 15 Moore P. C. 1, 47, 15 Reprint 394 (construing 13 Eliz. c 12 § 2).

[a] **"The word 'advisedly' may admit of two constructions.**—The first construction is 'deliberately'—something said or done after 'consideration,' and as contrasted with something said or done inadvertently, from which a meaning repugnant to the Articles might be extracted. The second meaning is 'intentionally'—as for the expressed and avowed purpose and design of contravening the Articles. There is great difficulty, as it appears to the Court, in putting on the word 'advisedly' the second construction, for it never could be intended to mean only acts done with the avowed purpose of contravening the Articles, and for these reasons: First, because it is not probable that any Clergyman, having signed the Articles, would, aware of the consequences—namely, deprivation—avow his intention of contradicting them; and, secondly, for the reason which appears entitled to the greatest weight, viz. if this were the only construction, any Clergyman might, in any terms he thought proper, impugn the Articles, preach doctrines contrary and repugnant to them, and if called to account, say, 'I did not advisedly do so.' Such a construction would make the Statute a dead letter. It is true, however, that in another view, intention is of the last importance; but how is the Court to arrive at the conclusion—intention or not? Not by the declarations of the party accused, which would be to make him witness and judge in his own cause, but by examination of the acts complained of. If a Sermon or tract be compared with the Articles, and found clearly repugnant to them, the intention to contravene must be inferred; for, in all the transactions of life, a man must be judged by the evident consequences of his acts, and be taken to intend the effect of what he has deliberately done." Ditcher v. Denison, 11 Moore P. C. 324, 14 Reprint 718 [quot Heath v. Burder, 15 Moore P. C. 1, 47, 15 Reprint 394].

23. Bouvier L. D.

24. See Clark v. Read, 5 N. J. L. 486, 488 (holding that the statute did not require a justice of the peace to enter judgment immediately, but that he might delay for the purpose of examination and advisement. The court said: "Nothing is more frequently seen in our books than curia advisare vult; and this advisement is not less necessary for the judges in our courts for the trial of small causes than for others").

25. See Attorney and Client [4 Cyc 897].

26. See Attorney-General [4 Cyc 1024].

27. Beaty v. Richardson, 56 S. C. 173, 180, 34 SE 73, 46 LRA 517.

28. Atty.-Gen. v. Eweime Almshouse, 17 Beav. 366, 383, 21 EngL&Eq 409, 51 Reprint 1075.

[a] **"The call and induction appear** to be substitutes for what is known in the common law as the right of advowson or presentation to an ecclesiastical benefice and of institution and induction." Humbert v. St. Stephen's Church, 1 Edw. (N. Y.) 308, 315.

29. Atty.-Gen. v. Eweime Alms-

law the crime of adultery between parties, both of whom are married;[30] or the offense by an adulteress of continuing to live with the man with whom she committed the adultery.[31]

ÆDIFICARE IN TUO PROPRIO SOLO NON LICET QUOD ALTERI NOCEAT.[32]

ÆDIFICATUM SOLO, SOLO CEDIT.[33]

ÆDIFICIA SOLO CEDUNT.[34]

ÆQUIOR EST DISPOSITIO LEGIS QUAM HOMINIS.[35]

ÆQUITAS AGIT IN PERSONAM.[36]

ÆQUITAS CASIBUS MEDETUR.[37]

ÆQUITAS CURIÆ CANCELLARIÆ QUASI FILIA CONSCIENTIÆ, OBTEMPERAT SECUNDUM REGULAS CURIÆ.[38]

ÆQUITAS DEFECTUS SUPPLET.[39]

ÆQUITAS ERRORIBUS MEDETUR.[40]

ÆQUITAS EST ÆQUALITAS.[41]

ÆQUITAS EST CORRECTIO LEGIS GENERALITER LATÆ, QUA PARTE DEFICIT.[42]

ÆQUITAS EST CORRECTIO QUÆDAM LEGI ADHIBITA, QUIA AB EA ABEST ALIQUID PROPTER GENERALEM SINE EXCEPTIONE COMPREHENSIONEM.[43]

ÆQUITAS EST PERFECTA QUÆDAM RATIO QUÆ JUS SCRIPTUM INTERPRETATUR ET EMENDAT; NULLA SCRIPTURA COMPREHENSA, SED SOLA RATIONE CONSISTENS.[44]

ÆQUITAS EST QUASI ÆQUALITAS.[45]

ÆQUITAS EST VERBORUM LEGIS SUFFICIENS DIRECTO, QUÆ UNA RES SOLUMMODO, CAVETUR VERBIS, UT OMNIS ALIA IN ÆQUALI GENERE, IISDEM CAVETUR VERBIS.[46]

ÆQUITAS EST VIRTUS VOLUNTATIS, CORRECTRIX EJUS IN QUO LEX PROPTER UNIVERSALITATEM DEFICIT.[47]

ÆQUITAS EX LEGE GENERALITER LATA ALIQUID EXCIPIT.[48]

ÆQUITAS IGNORANTIÆ OPITULATUR, OSCITANTIÆ NON ITEM.[49]

ÆQUITAS IN EUM QUI VULT SUMMO JURE AGERE, SUMMUM JUS INTENDIT.[50]

ÆQUITAS IN PARIBUS CAUSIS PARIA JURA DESIDERAT.[51]

ÆQUITAS JURISDICTIONES NON CONFUNDIT.[52]

ÆQUITAS LIBERATIONI ET SEIZINÆ FAVET.[53]

ÆQUITAS NATURAM REI NON MUTAT.[54]

ÆQUITAS NEMINEM JUVAT CUM INJURIA

house, 17 Beav. 366, 383, 21 EngL&Eq 409, 51 Reprint 1075 (where it was said: "This right of nomination is, in my opinion, exactly analogous to the case of an advowson, if indeed it be not, in the oldest and most extensive meaning of that word, properly an advowson. . . . The patronage or jus patronatus, in this case, was not certainly to present to a church or an ecclesiastical benefice, but in every respect, other than that of having the cure of souls attached to the office, it exactly resembles, if it be not identical with, an ecclesiastical benefice. And, accordingly, in the thirty-first placitum of the eighth year of the Book of Assizes, the right of nomination to the guardianship of a hospital is called an advowson. . . . I am at a loss to conceive any reason or any principle which should apply to the perpetual right of presentation to a church or to a benefice with cure of souls, which renders such a right separable from the manor, which would not apply, with equal or greater force, to a right of nomination to the mastership of a hospital, such as this").

[a] **Classification of advowsons.**—Advowsons are of two kinds: Appendant, and in gross. An advowson appendant means an advowson which is and which from the first has been and ever since continued to be appended or annexed to a manor so that if the manor were granted to anyone the advowson would go with it as incident to the estate. An advowson in gross signifies an advowson that belongs to a person but is not annexed to a manor; so that an advowson appendant may be made an advowson in gross by severing it by deed of grant from the manor to which it was appendant. Advowsons are also either presentative, collative, or donative. An advowson is termed presentative when the patron has the right of presentation to the bishop or ordinary, and also to require of him to institute his clerk if he finds him qualified. An advowson is termed collative when the bishop and patron happen to be one and the same person, so that the bishop, not being able to present to himself, performs by one act, which is termed collation, all that is usually done by the separate acts of presentation and institution. An advowson is termed donative when the king or a subject founds a church or chapel and does by a single donation in writing place the clerk in possession, without presentation, institution, or induction. Cowel; Coke Litt. 17b, 119b. Again, advowsons are either advowsons of rectories or advowsons of vicarages, the former having been created in very early times, almost contemporaneously with the creation of the manor itself, the latter having grown up more gradually, and as a consequence of the monasteries appropriating to themselves the tithes of the churches, and delegating to a locum tenens—vicar, the duties of the rector. The stipend of the vicar, which was at first precarious and inadequate, was settled at an adequate amount, and also secured to him by 15 Rich. II c 6, and 4 Hen. IV c 12, whence at the present day a vicarage is in general as valuable a living as a rectory is. An advowson, being the right of presentation in perpetuum, as often as a vacancy arises, is considered real estate, while a right of presenting once only, or a single presentation, is considered personal property only. Brown L. D.

30. Hunter v. U. S., 1 Pinn. (Wis.) 91, 92, 39 AmD 277.

31. Black L. D.

32. A maxim meaning "It is not lawful to build on your own land what may injure another." Burrill L. D.

33. A maxim meaning "What is built upon the land goes with the land." Abbott L. D.

34. A maxim meaning "Buildings belong to [go with] the soil." Black L. D.

35. A maxim meaning "The disposition of the law is more equitable than that of man." Black L. D. [cit Altham's Case, 8 Coke 150b, 152a, 77 Reprint 701].

36. A maxim meaning "Equity acts upon the person." Adams Gloss. [cit 1 Story Eq. Jur. § 743].

[a] **Applied in:** Atlantic Coast Line R. Co. v. Bailey, 151 Fed. 891, 896; Marco v. Low, 55 Me. 549, 552; Clad v. Paist, 5 Pa. Dist. 657, 658.

37. A maxim meaning "Equity remedies chances or misfortunes." Lofft Max. 499.

38. A maxim meaning "The equity of the Court of Chancery, as if it were the daughter of conscience, conforms to the rules of Court." Adams Gloss. [cit Lofft Max. 496].

39. A maxim meaning "Equity supplies defects." Morgan Leg. Max.

40. A maxim meaning "Equity rectifies errors." Adams Gloss.

41. A maxim meaning "Equality is equity." Morgan Leg. Max.

42. A maxim meaning "Equity is the correction of law, when too general, in the part in which it is defective." Peloubet Leg. Max. [cit Stowel v. Zouch, Plowd. 353, 375, 75 Reprint 536].

[a] **Applied in:** Riggs v. Palmer, 115 N. Y. 506, 510, 22 NE 188, 12 Am SR 819, 5 LRA 340.

43. A maxim meaning "Equity is a certain correction applied to law, because on account of its general comprehensiveness, without an exception something is absent from it." Peloubet Leg. Max. [cit Eyston v. Studd, Plowd. 459, 465, 75 Reprint 688].

44. A maxim meaning "Equity is a kind of perfect reason which interprets and amends the written law; comprehended in no code, but consistent with reason alone." Peloubet Leg. Max. [cit Coke Litt. 24].

45. A maxim meaning "Equity is as it were equality." Rapalje & L. L. D.

46. A maxim meaning "Equity is the proper and efficient application of the words of the law; so that, although only one thing is guarded against by the words of the law, yet everything else, being of the same nature, is also guarded against by the same words." Morgan Leg. Max.

47. A maxim meaning "Equity is a virtue of the will, the corrector of that wherein the law, by reason of its universality, is deficient." Adams Gloss.

48. A maxim meaning "Equity generally excepts something from a widespread or diffuse law." Lofft Max. 362.

49. A maxim meaning "Equity assists ignorance, but not carelessness." Black L. D.

50. A maxim meaning "Equity directs the rigor of the law to him who wishes to move or act upon or according to the rigor of the law." Adams Gloss.

51. A maxim meaning "Equity in like cases requires like laws." Morgan Leg. Max. [cit Lofft Max. 385].

52. A maxim meaning "Equity does not confound jurisdiction." Lofft Max. 393.

53. A maxim meaning "Equity favors deliverance and seisin." Morgan Leg. Max.

54. A maxim meaning "Equity does not change the nature of a thing." Adams Gloss.

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ALTERIUS.[55]

ÆQUITAS NIL STATUIT, NISI IN PARTES.[56]

ÆQUITAS NOMINE PŒNÆ CONSTITUTIS REMIDIUM EX ÆQUO ET BONO PRÆSTAT.[57]

ÆQUITAS NON FACIT JUS, SED JURI AUXILIATUR.[58]

ÆQUITAS NON MEDETUR DEFECTU EORUM QUÆ JURE POSITIVO REQUISITA ALIUM.[59]

ÆQUITAS NON SINIT EUM QUI JUS VERUM TENUIT, EXTREMUM JUS PERSEQUI.[60]

ÆQUITAS NON SINIT UT EANDEM REM DUPLICI VIA SIMUL QUIS PERSEQUATUR.[61]

ÆQUITAS NON SUPPLET EA QUÆ IN MANU ORANTIS ESSE POSSUNT.[62]

ÆQUITAS NON TENETUR ADJUVARE, UBI NON EST NODUS DIGNUS VINDICE.[63]

ÆQUITAS NON VAGA ATQUE INCERT EST, SED TERMINOS HABET ATQUE LIMITES PRÆFINITAS.[64]

ÆQUITAS NON VULT RES NOVAS ATQUE INUSITATAS INDUCERE.[65]

ÆQUITAS NUNQUAM CONTRAVENIT LEGES.[66]

ÆQUITAS NUNQUAM LITI ANCILLATUR UBI REMEDIUM POTEST DARE.[67]

ÆQUITAS OPITULATUR UBI PENSATIONI DAMNI LOCUS EST.[68]

ÆQUITAS PARS LEGIS ANGLIÆ.[69]

ÆQUITAS REI OPPIGNORATÆ REDEMPTIONIBUS FAVET.[70]

ÆQUITAS REM IPSAM INTUETUR DE FORMA ET CIRCUMSTANTIIS MINUS ANXIA.[71]

ÆQUITAS SEQUITUR LEGEM.[72]

ÆQUITAS SUBVENIT VIGILANTIBUS NON DORMIENTIBUS.[73]

ÆQUITAS SUPERVACUA ODIT.[74]

ÆQUITAS UXORIBUS, LIBERIS, CREDITORIBUS MAXIME FAVET.[75]

ÆQUITAS VERITATIS FILIA, BONITATIS ET JUSTITIÆ SOROR.[76]

ÆQUITAS VULT DOMUM QUOD ALTERI OBSIT EX CAUSA ÆQUE FAVORABILI ESSE AC ID QUOD AUFERT.[77]

ÆQUITAS VULT OMNIBUS MODIS, AD VERITATEM PERVENIRE.[78]

ÆQUITAS VULT SPOLIATOS, VEL DECEPTOS, VEL LAPSOS ANTE OMNIA RESTITUI.[79]

ÆQUUM EST NEMINEM CUM ALTERIUS DETRIMENTO FIERI LOCUPLETIOREM.[80]

ÆQUUM ET BONUM EST LEX LEGUM.[81]

ÆQUUS. Equal; even; equitable; just.[82]

AER, LUX, AQUA PROFLUENS, FERÆ NULLI PROPRIA, OMNIBUS COMMUNIA.[83]

55. A maxim meaning "Equity aids no man when another is injured [or to the injury of another]." Adams Gloss.

56. A maxim meaning "Equity determines nothing except toward the parties." Peloubet Leg. Max. [cit Lofft Max. 383].

57. A maxim meaning "Equity constitutes a remedy to things which have been appointed, under the name of punishment, agreeable to what is just and good." Peloubet Leg. Max. [cit Lofft Max. 495].

58. A maxim meaning "Equity does not make law, but assists law." Black L. D.

59. A maxim meaning "Equity does not supply the deficiency of those things which are required by positive law." Morgan Leg. Max.

60. A maxim meaning "Equity does not allow him who hath obtained a true right, to prosecute it to the utmost extremity." Adams Gloss.

61. A maxim meaning "Equity will not suffer a double satisfaction to be taken." Morgan Leg. Max. [cit Francis Max. 11].

62. A maxim meaning "Equity does not supply those things which may be in the hand of an applicant." Lofft Max. 391.

63. A maxim meaning "Equity will not assist unless the occasion renders it necessary." Peloubet Leg. Max. [cit Lofft Max. 392].

64. A maxim meaning "Equity is not vague and uncertain, but has certain determined boundaries and limits." Adams Gloss.

65. A maxim meaning "Equity does not incline to introduce new and unusual things." Peloubet Leg. Max. [cit Lofft Max. 376].

66. A maxim meaning "Equity never counteracts the laws." Rapalje & L. L. D.

67. A maxim meaning "Equity is never the hand-maid to strife where she can give a remedy." Lofft Max. 501.

68. A maxim meaning "Equity assists when there is room for a compensation of a loss." Peloubet Leg. Max. [cit Lofft Max. 503].

69. A maxim meaning "Equity is a part of the English law." Peloubet Leg. Max. [cit Lofft Max. 497].

70. A maxim meaning "Equity favors the redemption of a thing given in pawn." Morgan Leg. Max.

71. A maxim meaning "Equity regards not the form and circumstance, but the substance of the act." Morgan Leg. Max. [cit Francis Max. 13].

72. A maxim meaning "Equity follows law." Burrill L. D.

[a] **Applied in:** Vint v. King, 28 F. Cas. No. 16,950; Upham v. Wyman, 7 Allen (Mass.) 499, 502; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 182, 47 AmD 305 note; Toronto Bank v. Hall, 6 Ont. 653, 659.

73. A maxim meaning "Equity aids the vigilant, not the slothful." 2 A&EEncL&Pr 617.

74. A maxim meaning "Equity abhors superfluous things." Black L. D.

75. A maxim meaning "Equity favors wives and children, creditors most of all." Stimson L. Gloss.

76. A maxim meaning "Equity is the daughter of truth, and the sister of goodness and justice." Peloubet Leg. Max. [cit Lofft Max. 637].

77. A maxim meaning "Equity wishes that the house which may be injurious to another should be in the predicament equally favorable to that other as that wherein it takes from him." Morgan Leg. Max. [cit Lofft Max. 502].

78. A maxim meaning "Equity wishes by every possible means, to attain or arrive at truth." Adams Gloss.

79. A maxim meaning "Equity wishes the plundered, the deceived, and the ruined, above all things to have restitution." Lofft Max. 374.

[a] **Applied in:** Kollock v. Webb, 113 Ga. 762, 771, 39 SE 339 [quot Cyc].

80. A maxim meaning "It is not equitable that one be enriched at the expense of another." 2 A&EEncL&Pr 618.

[a] **Applied in:** Rolland v. La Caisse, 24 Can. S. C. 405, 414.

81. A maxim meaning "What is equitable and good is the law of laws." Burrill L. D.

[a] **Applied in:** Donaldson v. Allen, 213 Mo. 293, 300, 111 SW 1128, 127 AmSR 601.

82. Burrill L. D.

[a] **Such is its meaning in a will** which, after disposing of half of testator's estate, provides that the other half shall be distributed "ex æqus" among the other bequests and legacies. Archer v. Morris, 61 N. J. Eq. 152, 153, 47 A 275.

83. A maxim meaning "Air, light, the running water, and wild beasts are the property of none, but are common to all." Morgan Leg. Max. [cit Lofft Max. 179].

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AERIAL NAVIGATION

By Frank Deane Moore

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I. INTRODUCTORY

[§ 1] The rapid development of actual aërial navigation by aëroplanes and dirigibles seems as yet to have produced no actual decisions upon the novel questions of private right and public regulation which sooner or later will be presented for solution. But already a considerable body of literature exists in which the principles which must govern the judicial and legislative development of the law of this subject are discussed by jurists of authority.[1] In the absence of express statute or international regulation by treaty,[2] the principles and analogies of the common[3] and maritime law[4] must furnish the rule of decision.

II. DEFINITIONS

[§ 2] "**Airship**" has been defined to include every kind of vehicle or structure intended for use as a means of transporting passengers or goods or both in the air.[5]

"**Aëronaut**" is defined to include "every person who, being in or upon an airship or anything attached thereto, undertakes to direct its ascent, course, or descent in the air or the ascent, course, or descent in the air of anything attached to such airship."[6]

An aërodrome is a place reserved for aëronautic trials or evolutions.[7]

III. RIGHT TO NAVIGATE OVER ANOTHER'S LAND

[§ 3] **A. In General.** The right of an aviator to fly over another's land depends upon the true mean-

1. [a] **Bibliography.**—2 Am. J. Int. L. 528; 4 Am. J. Int. L. 96; Annuaire (1902) p 19; 1 Annuaire (1905) p 305; 19 Annuaire 34; 21 Annuaire 327; 26 Bench & Bar 10; 46 CanLJ 480, 728; 47 CanLJ 502; 72 CanLJ 11; 16 Case & Com. 216; 17 Case & Com. 289, 304; 18 Case & Com. 119, 131, 134; 19 Case & Com. 681; 46 CentLJ 480; 71 CentLJ 1; 9 Columbia L. Rev. 567; Davids Motor Vehicles c 19; Docket, May, 1913, p 970; 19 Green Bag 708; 23 Green Bag 398; 22 Jurid. Rev. 85; 45 L. J. 402; 12 Law Notes 108; 14 Law Notes 69, 123, 188; 15 Law Notes 169; 19 Law Students H. 108; 128 L. T. 498; 131 L. T. 403; 9 Mich. L. Rev. 24; 41 Nat. Corp. R. 221; 32 N. J. L. J. 325; 81 N. J. L. J. 1; Pollock Torts (7th ed); 53 Sol. J. 209; 55 Sol. J. 87; 16 Va. L. Reg. 78, 396, 796; 18 Va. L. Reg. 383; 20 Va. L. Reg. 318; Wilson Int. L. pp 87, 88 120, 326.

2. See generally International Law [22 Cyc 1697]; Treaties [38 Cyc 961].

3. 12 Law Notes 108; 32 N. J. L. J. 325 [quot New York Herald (article by R. Floyd Clarke)]. See Common Law [8 Cyc 366].

[a] **Common-law principles sufficient.**—"The beginning and growth of air navigation will call for the application of old legal principles to decidedly novel conditions. The common law of England, as adopted and applied in America, is the reservoir out of which materials will be found to work out the new law of the air, and the leading principles are already at hand; it remains to apply and develop them. The crystallized common sense and practical knowledge so characteristic of the common law will prove as comprehensive and elastic here as it has in so many other new conditions that science and improvement have brought to the English race." 18 Case & Com. 131 [quot 131 L. T. 403].

Flexibility of common law see Common Law [8 Cyc 369]; Actions of first impression see Actions § 67.

4. 1 Nys Le Droit Int. p 524; Wilson Int. L. p 124 [cit Meurer Luftschiffartsrecht p 5]. See also generally Admiralty 1 C. J. 1241; Collision [7 Cyc 299]; Shipping [36 Cyc 1].

[a] "**Nys**, after mentioning that the development of the principles of maritime jurisdiction follows the fundamental principles of land jurisdiction, says that, 'to the extent that "the conquest of the air" is made and "aërial navigation" progresses, the principles of "aërial law" will be derived from the fundamental principles of maritime law.'" Wilson Int. L. p 124.

[b] **In Paris** the courts in an actual case have held that the "rules of the sea" apply. New York Herald June 21, 1913.

5. Conn. Pub. Acts (1911) p 1348 c 86 § 1 [quot 26 Bench & Bar 10].

6. Conn. Pub. Acts (1911) p 1348 c 86.

7. Droit Aérien 108 (approved definition in proposed Pennsylvania statute).

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ing and present application of the ancient maxim, Cujus est solum ejus est usque ad coelum et ad inferos, meaning, whoever owns the soil owns also to the sky and to the depths.[8] Most of the discussion has centered around this maxim. Literally construed and applied, any passage over another's land, at whatever height, is a trespass and therefore unlawful. This is the view taken by many writers, and it finds strong support by analogy in actual decisions which have long been accepted as the law.[9] On the other hand, the view is taken that this maxim is not to be applied literally, that the owner's rights in the air space above his land are appurtenant to the soil and extend only so far as is necessary to the enjoyment of the use of the soil without interference, and that therefore a mere passage across his land at a sufficient height and without other interference is not an actionable wrong.[10] It is everywhere agreed, however, that if navigation over another's premises is conducted so as to constitute a nuisance, or to result in actual damage, an action will lie.[11] Thus if an aviator remains over one's premises longer than is reasonably necessary for passage, as by hovering, swooping, and the like, he is liable as for a trespass or a nuisance.[12] So there is little doubt but what the use of aërovehicles in great numbers or continuously over a person's land may constitute a nuisance, whereas the passage of one or two may be a perfectly legitimate use of such space.[13] The conflict of opinion is as to whether the right of action is limited to cases of actual damage and of nuisance.

[§ 4] **B. View That Passing over Another's Land Is Not Actionable.** The argument in favor of the view that the mere passage in flight over another's land is not, or ought not to be, deemed a trespass is mainly an attack upon the maxim, Cujus est solum ejus est usque ad coelum.[14] It is said that this maxim is the production of some blackletter lawyer, and like every short definition of a complex right, must be taken with limitations.[15] One limitation sug-

8. Black L. D.; Broom Leg. Max. (8th ed) p 309. See 2 Blackstone Comm. (4th ed) § 18; Coke Litt. 4a.

[a] **Rule in continental Europe.**—According to the Roman law the proprietor of the soil has no right in the space above; according to the French law his right is absolute and exclusive upward without limitation. Davids Motor Vehicles § 289. In Germany and Switzerland the right of an owner of land extends to the space above the surface, subject, however, to the restriction that he may not forbid interference at such a height that he has no interest in its prevention. Davids Motor Vehicles § 289 [cit 128 L. T. 498]; Wilson Int. L. p 89 [quot Laws of Germany].

9. See infra § 5.

10. See infra § 4.

[a] **Conflicting theories.**—"'According to one theory,' says Paul Matter in La Revue Bleue, 'ownership rights must remain inviolate. A man is master of his holdings, has his claim to sunlight, and must not have shadows of aëroplanes cast upon him. . . . The other theory assumes that light is common property, and that his legal hold upon the upper regions is to be maintained only when he plants crops and puts up buildings; otherwise it is without force. . . . Between these two extremes lies the theory that will probably be put into practice. The ownership of the soil extends into the air as far as it is of use; the higher we land to build, the higher will ownership reach; but there will always be a point where ownership ceases to have any meaning, and where the owner ceases to have a right to hang out a no trespassing sign unless trespassing does him harm. On the surface, trespassing is legally forbidden only when it injures the owner (Penal Code, art 471). In the sky traffic is permissible whenever it is high enough and well managed enough so as not to do mischief to people or property down below. This is a common-sense view, and has already been taken by the Swiss Civil Code, which declares that property rights extend as far above and below the surface as there is any interest in exercising such right.'" 18 Case & Com. 122, 123.

[b] "**Justice Baldwin** thinks that a landowner's control of the air above his property must be limited to the exclusion only of that which may be a danger to him or an injury to his property. In a word, he cannot stop the flying machines, but if they should damage his trees, inconvenience or sicken his family by the smoke or smell, imperil his safety, or injure him, he would have cause for action and would be able to get redress." 16 Case & Com. 216.

11. See infra notes 12, 13.

[a] **Height of passage.**—(1) It seems that, conceding a right of passage to exist, the passage should be made at such a height in view of all the circumstances as not to inconvenience or damage the owner of the soil. Davids Motor Vehicles p 297. (2) "Clearly it would be a trespass to sail over another man's land in a balloon at a level within the height of ordinary buildings, and it might be a nuisance to keep a balloon hovering over the land even at a greater height." Pollock Torts (7th ed) 341. (3) The most reasonable position seems to be that the landowner's rights extend into the air above his holdings, but only as far as his practical interests demand, as far as he is able and willing to use the air and hence to reserve it for his own use. Higher than this he can lay no claim; his right of possession is at an end. Below this very vague and variable limit the air is his, and strange flyers are dependent on his permission. 23 Green Bag 400.

[b] **Loss of privacy as a nuisance.**—It is believed that the mere fact that passing aviators may observe a person's grounds, and to some extent invade his privacy, does not affect the right of passage. Davids Motor Vehicles p 298; 22 Jurid. Rev. 85; 14 Law Notes 69. But see 46 CanLJ 730 [cit London L. Mag.]; 14 Law Notes 124 [cit Story v. New York El. R. Co., 90 N. Y. 122, 43 AmR 146, 11 AbbNCas 265 [aff 11 AbbNCas 240 (rev 3 AbbNCas 478)], where it was held that a legitimate element of damage to an abutting owner of tenement or flat houses would be the annoyance due to the greedy gaze of passengers in trains running on a level with his windows]. Invasion of privacy as a tort see Torts [38 Cyc 496].

[c] **Right to alight.**—The privilege of free passage through the air seems to carry with it that of landing on suitable places, as the right to use a river involves that of mooring on its banks. 22 Jurid. Rev. 85 (article by G. D. Valentine); 14 Law Notes 72.

12. 12 Law Notes 108; 15 Law Notes 169. "The moment an aviator ceases to be a passerby he risks becoming a wrongdoer. He may occupy another's space temporarily, but he must not do so longer than is reasonably necessary for passage. The presence of aerovehicles above the land is more or less of a menace to life, buildings, crops, etc. The law recognizes the risk and concedes the right of passage nevertheless; but it does not permit any increase in the risk by reason of a stoppage, hovering, or the like. Such acts amount to a nuisance per se." Davids Motor Vehicles pp 296, 297. See also 15 Law Notes 169; Pollock Torts (6th ed) 133.

[a] **Frightening animals.**—Accordingly an aviator who maneuvers around plaintiff's land and frightens his stock is liable for any injury that proximately results therefrom, because such acts amount to a nuisance per se. Davids Motor Vehicles p 298; 15 Law Notes 169.

[b] **Fowling.**—"Thus the public might make an irruption upon the air for the bona fide purpose of traversing it, but could not be allowed to occupy it for the purpose of fowling when the soil underneath is the private property of one who objects to such occupation. Mutatis mutandis, Beatty v. Davis, 20 Ont. 373, is conclusive on that point." 12 Law Notes 108.

13. Davids Motor Vehicles p 298 [cit 16 Case & Com. 216].

14. See maxim [12 Cyc 988], and infra notes 15–26.

15. Am. J. Int. L. [quot 16 Va. L. Reg. 78] (article by Mr. Woolsey). "This maxim was not derived from the nation whose language is used for its statement and is foreign to the conceptions of the Roman law as to what is the common property of all. It is the production of some blackletter lawyer, and, like every short definition of a complex right, must be taken with limitations. It would seem that one of these must be that a proprietor of land cannot be heard to complain of any use of the air above it by which no injury to him can result. In other words, the law will hardly aid him by giving a remedy in court where there has been and could have been no actual damage. His right, if any, is too tenuous for the state to care to protect by its active intervention." 4 Am. J. Int. L. 97 (article by Simeon E. Baldwin).

[a] **Maxim not of universal application.**—"It must be observed, moreover, that the maxim [cujus est solum, ejus est usque ad coelum] is not a presumption of law applicable in all cases and under all circumstances; for example, it does not apply to chambers in the inns of court [per Maule, J., in Fay v. Prentice, 1 C. B. 828, 840, 50 ECL 828, 135 Reprint 769]; for 'a man may have an inheritance in an upper chamber, though the lower buildings and soil be in another' [Co. Litt. 48b]." Broom Leg. Max. 311.

[b] **Purpose of maxim.**—(1) "The maxim appears to have been formulated, first, as a rule of construction, to aid in determining what would pass by a deed of the soil, and, second, as a rule to insure the owner the beneficial use of his land against encroachments of his neighbors, as far up or as far down as he might wish to go. It could not have meant anything more. So the maxim has been invoked, for example, where the question was what passed by a lease of a hotel,—whether the hotel property alone, or the stores beneath it, but not connected with it [Sargent v. Adams, 3 Gray (Mass.) 72, 63 AmD 718], or whether the cellar under leased prem-

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gested is that the landowner cannot be heard to complain of any use of the air spaces above his land, by which no damage to him can result; that his rights above the height necessary to the full enjoyment of his land free from any interference are too unsubstantial to be protected by the law.[16] Common-law analogies, where liability for causing the presence or passage of material substances over another's land has been denied, are cited in support of this view,[17] and it is urged with much cogency that this ancient maxim, of doubtful authenticity, must give way as being a distinct clog to the progress of a science that

ises passed under the lease [Doe v. Burt, 1 T. R. 701, 99 Reprint 1330], or whether a demise of the basement rooms of a building of several stories in height, without any stipulation by lessor or lessee for rebuilding in case of fire or other casualty, gives the lessee any interest in the land, though he pays all the rent in advance [Stockwell v. Hunter, 11 Metc. (Mass.) 448, 45 AmD 220]." 18 Case & Com. 122. (2) "It will be observed that the sources of the maxim, both in the common and the civil law, do not indicate a right of property in the air or airspace as such, even if this were conceivable. The principle is, by reasonable interpretation, one for the better enjoyment of the land and refers to the airspace so far as it is appurtenant to the land." 4 Am. J. Int. L. 123 (article by Arthur K. Kuhn).

[c] **"The popular notion** that the owner of the soil owns everything above and below it has no well-founded support in the law. No exclusive right can be had in either light or air. Legislation cannot create such a right, because man has no exclusive possession of them. They are for all in common." 18 Case & Com. 120 [cit Stein v. Hauck, 56 Ind. 65, 26 AmR 10].

16. 4 Am. J. Int. L. 126, 127 (article by Arthur K. Kuhn); 18 Case & Com. 119; 16 Va. L. Reg. 78 [quot Am. J. Int. L. (article by Mr. Woolsey)].

"At common law, the owner of land was held to own 'from the center of the earth up to the sky,' meaning, presumably, to the limits of the earth's atmosphere. If this expression be given a literal interpretation, every aërial voyage would involve repeated trespasses. It is hardly to be believed that courts will sanction any such literal application of the phrase, and it may be assumed that, in the absence of statutory regulation, they will hold that navigators of the air have the right to travel freely in any direction, so long as they inflict no injury on the property over which they travel or on the residents thereon." 16 Va. L. Reg. 796 [cit 41 Nat. Corp. R. 221]. "It is, to say the least, doubtful if an air-ship invades the rights of private landowners by simply flying over their property at such a height as to cause them no substantial inconvenience." 4 Am. J. Int. L. 103 [cit Pickering v. Rudd, 1 Stark. 56, 2 ECL 32] (article by Simeon E. Baldwin).

[a] **Limiting right to zone of effective possession.**—(1) "It does not seem possible on the principles of the common law to assign any reason why any entry above the surface should not also be a trespass, unless indeed it can be said that the scope of possible trespass is limited by that of effective possession. Clearly it would be a trespass to sail over another man's land in a balloon at a level within the height of ordinary buildings, and it might be a nuisance to keep a balloon hovering over the land even at a greater height. As regards shooting, it would be strange if we could object to shots being fired point-blank across our land only in the event of actual injury being caused, and the passage of the foreign body in the air above our soil being thus a mere incident in a distinct trespass to person or property. But the projectiles of modern artillery, when fired for extreme range, have attained in the course of their trajectory, as is computed, an altitude exceeding that of Mont Blanc or even Elbruz. It may remain in doubt whether the passage of a projectile at such a height could in itself be a trespass." Pollock Torts (7th ed) p 341. (2) "But though this phraseology has already gained currency, it is more spacious than precise, because the scope of effective possession as far as it concerns the air space is indeterminate and will vary with the advance in the art of air navigation. Furthermore it leaves open the airspace for the acquisition of rights not necessarily appurtenant to the right of enjoyment of the soil. Such a result would be inconsistent with and harmful to the state of society among free peoples and is not warranted by the principles of either the common or the civil law." 4 Am. J. Int. L. 126 (article by Arthur K. Kuhn). (3) "Nor, for practical purposes, can it be fairly claimed that property in the soil carries title to the entire and illimitable air space above it. It does, no doubt, carry a title to occupy a part of that air-space with buildings attached to the earth. But the limitations of social conditions, if not of mechanical forces, restrict the height of any structure of such a nature. Nothing seems ever likely to be built that shall exceed in height two or three times that of the Eiffel tower, at Paris." 9 Mich. L. Rev. 20 (article by Simeon E. Baldwin).

[b] **"All of truth there seems to be in the maxim** of ownership to the sky is, that within lines extended through all points of soil ownership to the sky is a space of preferential use to the owner of the soil and such use is interfered with only when enjoyment of the soil is diminished." 46 CanLJ 480, 482; 71 CentLJ 1, 2. See also 4 Am. J. Int. L. 95 (where Simeon E. Baldwin said that the right of subjacent proprietor "is too tenuous for the state to care to protect by its active intervention. Perhaps we may go further and say that he has no right at all over the air above his land, except so far as its occupation by others could be of injury to his estate. This seems to be a view quite in accordance with the spirit of our times. Modern government tends, at all points, to push the public good farther and farther into what was formerly thought the inviolable domain of private right").

[c] **The German civil code provides:** "The right of the owner of a piece of land extends to the space above the surface and to the earth under the surface. However, the owner cannot prohibit interferences which take place at such height or depth that he has no interest in their exclusion." Loewy German Civ. Code No. 905.

17. See Pickering v. Rudd, 1 Stark. 56, 2 ECL 32 (where defendant nailed to his own wall a board so as to overhang plaintiff's close, and it was held by Lord Ellenborough that an action for trespass would not lie against a man for thus interfering with the column of air superincumbent on a close, but that the proper remedy for any damage would be by an action on the case; otherwise, he said, it would follow that an aëronaut would be liable to an action of trespass quare clausum fregit at the suit of the occupier of every field over which his balloon passed in the course of his voyage. Lord Ellenborough's dictum was questioned in Kenyon v. Hart, 6 B. & S. 249, 252, 118 ECL 249, 122 Reprint 1188, by Blackburn, J.); 71 CentLJ 1 (where it is said: "This illustration was intended to demonstrate that to invade a close by an overhanging structure could not be trespass, because this led to an absurdity, to-wit, trespass in fugitive occupancy of the air. But invading a close for an instant by doing anything to the soil or to what is planted in, or built upon it, or grows out of it, is trespass. Running across or stopping within the soil surface of a close is not differentiated in any respect. Therefore, according to Lord Ellenborough, it is not the same thing to invade one's atmospheric plane as his soil possession"); 46 CanLJ 480; 4 Am. J. Int. L. 122 (where Pickering v. Rudd, supra, and Kenyon v. Hart, supra, are reviewed by Arthur K. Kuhn, who said: "The usual remedy under the common law for interference with the possession of land was, of course, the action of trespass quære clausum fregit, and yet it is curious to note that even as late as the early part of the last century, there was considerable doubt as to whether trespass would lie, where there was no tangible interference with the land, but only with the airspace"); Broom Leg. Max. 397.

[a] **Overhanging adjoining land.**—(1) "If a landowner allows the branches of his trees to overhang his boundary, his neighbour has a right of action for actual damage caused thereby; and the neighbour is entitled to cut the branches back, whether or not they cause damage; but it is doubtful whether, in the absence of actual damage, an action lies." Broom Leg. Max. 310 [cit Lemmon v. Webb, [1895] A. C. 1; Smith v. Giddy, [1904] 2 K. B. 448]. (2) "If the trees were innocuous, it might well be held, from grounds of general convenience, that the occupier of the land projected over would have no right of action, but should be left to protect himself by clipping. Such projections are innumerable throughout the country, and no such action has ever been maintained." Per Kelly, C. B., in Crowhurst v. Amersham Burial Bd., 4 Ex. D. 5, 10. But see contra Ackerman v. Ellis, 81 N. J. L. 1, 79 A 883 (holding that any overhanging branches are actionable as a nuisance). (3) Fruit cannot be appropriated by the owner of the soil when taken from the overhanging bough of a tree belonging to the adjacent soil. Skinner v. Wilder, 38 Vt. 115, 88 AmD 645 [cit 71 CentLJ 2]. See generally as to overhanging or encroaching on land Adjoining Landowners §§ 14, 91 et seq.

[b] **Decoying birds across land.**—"All of us are acquainted with the decoy case which assumed, that one had the right to establish a business in attracting ducks flying through the air, from all directions, and it could not be interfered with by another standing even on his own soil and maliciously discharging guns. Keble v. Hickringill, 11 Mod. 73, 131, 88 Reprint 898. It is not an answer to distinguish this case by saying that the flying of birds is one of the things in nature with which no ownership of property was ever expected to interfere except by actual occupancy. The point is that the owner of the decoy was using for his private profit that part of the air which another could exclusively occupy. It would yet be considered something of a fantastic claim for one who held land on the four sides of another to assert, that the latter could not maintain feeding grounds to attract wild fowl, because he was inviting aërial trespass across the objector's soil. And yet the claim would be not without merit, if it could be established that birds came in such clouds as to damage him, by temporarily alighting on his soil, or crops or trees. This would be as if the inner owner of the soil had set lures to attract herds of beasts so that they would trample up the surrounding soil." 46 CanLJ 480, 481; 71 CentLJ

may be of a great value to mankind,[18] and should not be extended to conditions which did not exist and were not conceived of at the time of its origin;[19] in short, that the common law must adapt itself to this change of conditions.[20] Thus the air having become actually navigable, it is suggested that the rules applicable to navigable waters should be applied as a limitation upon private rights.[21] The opinion is also advanced that in so far as the proprietor of the land has not appropriated the air domain it must be deemed subject to a servitude of passage by aviators.[22] Another reason advanced for the view that no action lies for merely flying over another's land is the absence of any actual damage caused thereby,[23] and it is suggested that the maxim, De minimis non curat lex,[24] should be applied. But this reason involves a disregard of legal principle, for if a right is violated the smallness or absence of damage is immaterial.[25] Still another view sometimes expressed is that flight through the air is to be regarded as a public nuisance, for which no private action lies in the absence of special damage.[26]

[§ 5] **C. View That Passing over Another's Land Is Actionable.** As already intimated,[27] ownership of land has generally been considered to include all rights beneath, upon, and above the surface, in accordance with the maxim, Cujus est solum, etc.,[28] and the analogy of decisions applying this rule to cases

1. "It would be far within the principle, that one for his private gain may draw fowl ferse naturæ across the air above another's soil, to hold that science discovering public highways through the same element is within its legal rights. This is a conquest that civilization has far more right to claim than superiority in land title over savage tribes." 46 CanLJ 483; 71 CentLJ 2.

[c] **Popular recognition of the right.**—"No one has ever questioned the right of a person to have his fowls fly over his neighbor's land. Nor has it ever been contended that the passing of the smoke from A's chimney across B's land amounts to a trespass (though it may be a nuisance) upon B's property rights. The use of space appurtenant to land for the passage of wireless messages is a similar case. And in the century and a quarter that man has been able to navigate the air, first by balloons and lately by aëroplanes, there has been no contestation of the right of aëronauts to pass over private land. At many aviation exhibitions the aviators have passed repeatedly over lands of individuals, asserting apparently a right to do so. This continued use of private space demonstrates very clearly a popular understanding and agreement that there exists a right of passage." 15 Law Notes 169 [quot Davids Motor Vehicles 295, 296].

18. 4 Am. J. Int. L. 123 (where Arthur K. Kuhn said that he was unable to trace the maxim, as far as concerns its exact phraseology, to the Corpus Juris and that it seems rather to be the work of some gloss upon a passage in Dig. 42 tit 24 par 22 § 4, justifying the removal of projections from adjoining property over a place of burial, because to the sepulcher belongs, not alone the grounds inclosing the remains, but everything even up to the heavens); Davids Motor Vehicles § 285; Docket May, 1913, p 970 (where it is said that this maxim "must yield in furtherance of progress, for the air must be as free as the ocean"); 15 Law Notes 169.

19. 4 Am. J. Int. L. 126 [cit Wadsworth Dist. v. United Tel. Co., 13 Q. B. D. 904, where Brett, M. R., referred to the phraseology "usque ad coelum" as at best a "fanciful phrase"] (article by Arthur K. Kuhn), "The maxim cujus est colum ejus et usque ad coelum—whose is the soil, his it is even to the sky—did not, when we took our common law from England, carry any thought of human occupation of the superincumbent air, unless by structures attached to the soil. It was intended, as we think the common law, viewed as a system, demonstrates, to indicate that the owner of the soil had the right to forbid the plane above him being used to his detriment. But movement across this plane was not conceived to be injurious actually or technically to any right of the owner of the surface below. The word surface itself in distinguishing an upper from a nether estate in land implies a several sort of enjoyment." 46 CanLJ 480; 71 CentLJ 1.

[a] **Flexibility of common law.**—(1) "Granting the authenticity of the common-law maxim that one owns ab solo usque ad coelum, yet as it is one of the peculiar beauties of the common law that it adapts itself to the rights of the parties under every change of circumstances, so as to keep step with the march of progress and the advance of civilization, there can be little doubt that the claim of the owner of the 'solo' to an unlimited ownership of the 'coelum' will be denied, should the point ever be directly presented for adjudication." 16 Va. L. Reg. 78 [cit Am. J. Int. L.]. See also Common Law [8 Cyc 369].

20. See Common Law [8 Cyc 368].

21. 32 N. J. L. J. 325 [quot New York Herald (article by R. Floyd Clarke)]. See 14 Law Notes 69, 70 (where a want of analogy between the atmosphere and the high seas is pointed out). See also Beatty v. Davis, 20 Ont. 373 (holding that, in the case of navigable water upon private lands, the public may use the water solely for the bona fide purpose of navigation and must not unnecessarily disturb or interfere with the private rights of fishing and shooting; and that, where such waters have become navigable owing to artificial public works, the private rights to fishing and fowling must be exercised by the owner of the soil concurrently with the public servitude for passage).

22. Davids Motor Vehicles § 290 [cit 22 Jurid. Rev. 85, 14 Law Notes 69].

[a] **The according of a right of passage to aviators does not deny the landowner's title** to the space over his land. "The air domain of a proprietor may be utilized by him to any extent, but in so far as he has not appropriated it, it must be deemed to be subject to a servitude of passage by aviators." 15 Law Notes 169 [quot Davids Motor Vehicles p 292].

23. 18 Case & Com. 120 [cit Embrey v. Owen, 6 Exch. 353, 10 ERC 179]; 15 Law Notes 169 [quot Davids Motor Vehicles] (where it is said: "Trespass or any other foundation of legal liability proceeds upon an assumption that an injury has been done. To set foot upon another's land without his license to do so is a trespass, although the damage amounts to practically nothing; yet there is some damage—the soil is trodden down or the grass bruised. The momentary occupation of space above land, suspended upon air which is itself as fugitive as the aeronaut, is quite another matter. The absence of injury is the practical consideration, and should outweigh any others in determining what the rule of law shall be").

24. See Maxim [13 Cyc 779]; 12 Law Notes 108 (where the author suggested that "probably the maxim de minimis non curat lex would defeat even an action of trespass on the case against the casual and vagrant aëronaut").

25. Butler v. Frontier Tel. Co., 109 App. Div. 217, 95 NYS 684 [cit 19 Green Bag 709] (where the owner of land was allowed to recover six cents in damages in an action of ejectment for injury to his land by a wire stretched over it). See also Murphy v. Bodger, 60 Vt. 723, 15 A 365, 1 LRA 309; and Actions §§ 56–64 (where the phrases, "damnum absque injuria," and "injuria sine damno" are explained).

26. 4 Am. J. Int. L. 99 (where Simeon E. Baldwin says: "For the public wrong, if wrong it be, of making such a voyage, or of dropping such a bag, it may at least plausibly be contended that the public only can complain, on the ground that no man who was not hit has any substantial interest calling for the intervention of the law, unless he were put in some special peril"); Davids Motor Vehicles § 294 (where it is said: "The authorities establish that nuisance, not trespass, is the ground upon which a landowner may object to a disturbance of the atmosphere appurtenant to his land. The importance of the distinction rests in this: a trespass imports damage, whereas actual material damage is of the essence of nuisance. If, in testing ordinance, shells are fired across a neck of land, and alight in the water beyond, no trespass is committed and no right of action arises in behalf of the owner of the land. Firing over a vessel is a stronger case against the existence of any right to have the superjacent air space left undisturbed. It will hardly be contended that any rights of the vessel owner have been infringed. But let an occasional projectile plough through the landowner's garden or cut away part of the vessel's rigging, and a different case is presented"); 12 Law Notes 108 (where it is said: "So it seems that an air-line business conducted as far beneath the empyrean as an elevated railroad or the top of a modern sky-scraper might give a right of action to the dweller on the surface. But if plaintiff's counsel were to insist that passage over the land at any elevation however great would be actionable by reason of people being deterred from entering upon the land for fear of falling objects, why not reply that the argument is too strong, since the menace would be common to so many proprietors and the danger imminent over so large an area as to constitute a common nuisance, and thus on familiar principles deprive each of his individual action unless he could show a special injury?").

27. See supra § 3.

28. Markham v. Brown, 37 Ga. 277, 280, 92 AmD 73 (where the court said: "The owner of realty, having title downwards and upwards indefinitely, an unlawful interference with his rights, below or above the surface, alike gives him a right of action. Rev. Code, sections 2962, 2965, 2966 and 2969"); Hannabalson v. Sessions, 116 Iowa 457, 461, 90 NW 93, 93 AmSR 250 (where it is said: "The mere fact that plaintiff did not step across the boundary line does not make her any less a trespasser if she reached her arm across the line as she admits she did. It is one of the oldest rules of property known to the law that the title of the owner of the soil extends not only downward to the center of

involving the firing of guns,[29] the stringing of wires,[30] overhanging trees,[31] projections and encroachments[32] over a plaintiff's land is relied upon to support the view that navigation over another's land without his consent is actionable as an invasion of property rights[33] for which the landowner is entitled to recover at least nominal damages.[34] It is said that if the common-law rule needs to be changed the change

the earth, but upward usque ad coelum"); Interstate Coal, etc., Co. v. Clintwood Coal, etc., Co., 105 Va. 574, 592, 54 SE 593; Crews v. Pendleton, 1 Leigh (Va.) 297, 19 AmD 750; Wadsworth Dist. v. United Tel. Co., 13 Q. B. D. 904, 919, 12 ERC 630 (where Bowen, L. J., said that he would be loath to hold that a single landowner "had not the right to object to anybody putting anything over his land at any height"); Kenyon v. Hart, 6 B. & S. 249, 252, 118 ECL 249, 122 Reprint 1188 [disappr Pickering v. Rudd, 1 Stark. 56, 2 ECL 32] (where Blackburn, J., said: "That case raises the old query of Lord Ellenborough as to a man passing over the land of another in a balloon: he doubted whether an action of trespass would lie for it. I understand the good sense of that doubt, though not the legal reason of it"); 2 Blackstone Comm. 18; 2 Min. Insts. 4; 1 Min. Real Prop. p 21 § 19. See also generally Mines and Minerals [27 Cyc 541 et seq]; Property [32 Cyc 639]; Trespass [38 Cyc 996].

29. [a] **Firing across another's land** (1) affords plaintiff a legal cause of action, as rendering the occupation of the premises less enjoyable than plaintiff is entitled to have it. Clifton v. Bury, 4 T. L. R. 8, 9 [cit 4 Am. J. Int. L. 125] (where plaintiff complained of damage to his land by reason of the shooting over it done from the Wimbledon rifle ranges close by. Although the bullets sped clear across one of his farms situated in a declivity about seventy-five feet below the range, the court found for plaintiff. Mr. Justice Hawkins is reported to have said that he "did not look upon the ground of complaint as constituting a trespass in the strict technical sense of the term; but he did look upon such firing of bullets as grievances which, under the circumstances, afforded the plaintiff a legal cause of action. . . . It was said that no damage was proved to have arisen to the plaintiff. In one sense that was true, for no actual injury had been occasioned to him personally or to his land, and no bullet was proved to have fallen upon it during the use of that range. Probably the fall of a bullet on the land would be a very rare occurrence. Still, though the land dipped in the part of the farm traversed, and though the height of the trajectory above the surface would ordinarily be 75 ft., according to the evidence, the traversing of the land by the bullets in the use of the 1,000 yards range was not unattended with risk, and certainly it would cause a not unreasonable alarm, which rendered the occupation of that part of the farm less enjoyable than the plaintiff was entitled to have it." It seems that there is a similar risk in the transporting of heavy objects across land by airships. But see comments on this case in 4 Am. J. Int. L. 125). See also Pollock Torts (7th ed) 341 (where the learned author says: "As regards shooting, it would be strange if we could object to shots being fired point-blank across our land only in the event of actual injury being caused, and the passage of the foreign body in the air above our soil being thus a mere incident in a distinct trespass to person or property"). But see the celebrated case of Pickering v. Rudd, 1 Stark. 56, 58, 2 ECL 32; 1 Ames Cases on Torts 42 (where Lord Ellenborough said: "I recollect a case, where I held that firing a gun loaded with shot into a field was a breaking of the close. The learned judge on the circuit with me, doubted upon the point, but many with whom I afterwards conversed on the subject, thought I was right; and the judge himself, who at first differed with me, was afterwards of the same opinion; but I never yet heard, that firing in vacuo could be considered as a trespass. No doubt, if you could prove any inconvenience to have been sustained, an action might be maintained; but it may be questionable whether an action on the case would not be the proper form"). (2) Shooting guns over another's land so as to cause considerable damage is an enjoinable wrong. Whittaker v. Stangvick, 100 Minn. 386, 111 NW 295, 117 AmSR 703, 10 LRANS 921, 10 AnnCas 528 (where it appeared that plaintiff owned a narrow duck pass between two navigable lakes, that defendants threatened to erect blinds in front of said pass, three hundred and twenty-five feet away, with the intention of shooting ducks flying over the pass, and that in so doing defendants were liable to shoot over plaintiff's land and to considerably impair the value of plaintiff's shooting privilege).

30. [a] **Stringing wires over another's land.**—The owner of land is entitled to damages for trespass, or to an injunction, or to damages in condemnation proceedings, if a telegraph or telephone company stretches its wires over his land. Butler v. Frontier Tel. Co., 186 N. Y. 486, 491, 79 NE 716, 116 AmSR 563 and note, 11 LRANS 920 and note, 9 AnnCas 858 (where Vann, J., said: "So far as the case before us is concerned, the plaintiff as the owner of the soil owned upward to an indefinite extent. He owned the space occupied by the wire and had the right to the exclusive possession of that space which was not personal property, but a part of his land. According to fundamental principles, and within the limitation mentioned, space above land is real estate, the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly." Ejectment was granted. This decision is criticized in 18 Case & Com. 121); Wadsworth Dist. v. United Tel. Co., 13 Q. B. D. 904, 12 ERC 630.

31. [a] **Overhanging trees.**—The owner of land commits no tort if he cuts off the limbs of trees overhanging his land, although the trees themselves grow upon the land of another, since he is entitled to a free approach to his land from above. Grandona v. Lovdal, 78 Cal. 611, 21 P 366, 12 AmSR 121; Hoffman v. Armstrong, 48 N. Y. 201, 8 AmR 537; Lemmon v. Webb, [1894] 3 Ch. 1. See generally Adjoining Landowners §§ 90–101.

32. [a] **Projections and encroachments.**—In Corbett v. Hill, L. R. 9 Eq. 671 [cit 4 Am. J. Int. L. 124] plaintiff owned a building wherein part of a room, by vested right, protruded over the land of defendant. Defendant sought to build upon his property so that the building would protrude over the projecting part of plaintiff's building. It was held that trespass could not be sustained for the encroachment upon the column of air over this part of the building, because the rights in the column of air were in defendant as owner of the soil beneath, and not in plaintiff. See also Baten's Case, 9 Coke 53b, 54b, 77 Reprint 810 (where plaintiffs brought a quod permittat, alleging that defendant had erected a house at the extremity of his land so as to project or jut over the house of plaintiff in latitudine seventeen inches and in longitudine seventeen feet ad nocumentum liberi tenementi ipsorum, etc., and it was held that plaintiffs need not assign any special nuisance, because "by the overbuilding upon part of the house of the plaintiffs, he has deprived them of the air; also he has prevented them from building their house higher"). Projections and encroachments as constituting trespass or nuisance see Adjoining Landowners § 14 et seq, 90 et seq. See also generally Nuisances [29 Cyc 1143]; Trespass [38 Cyc 985].

33. 47 CanLJ 502; 46 CanLJ 728 [cit London L. Mag.]; 19 Case & Com. 681 (opinion in moot case); 18 Case & Com. 131; 19 Green Bag 708; 14 Law Notes 123 (discussing rights and liabilities of aviators in general); 131 L. T. 403 [quot 18 Case & Com. 131] (where it is said that the foundation principle of the law of aëroplanes is that of trespass, namely, that "every soaring aëroplane and its pilot are trespassers upon the land over which the aviator rides, unless he be there by license, or of right").

[a] **"To constitute trespass,** which may be defined as the wrongful entry upon or the interference with the possession of the land of another person, proof of entry either actual or constructive is necessary. Constructive entry includes every interference or entry other than actual or physical entry, and it is submitted that, on the existing authorities, the flight by an aviator over the land of another without alighting is a constructive entry, and constitutes an act of trespass." 46 CanLJ 728 [cit London L. Mag.]; 72 CentLJ 11.

[b] **"The authorities are discussed in . . . Pollock Torts** (Am. Ed.) page 423, where it is said: 'It has been doubted whether it is a trespass to pass over land without touching the soil, as one may in a balloon, or to cause a material object, as shot fired from a gun, to pass over it. Lord Ellenborough thought it was not in itself a trespass to interfere with the column of air superincumbent on the close and that the remedy would be by an action on the case for any actual damage; though he had no difficulty in holding that a man is a trespasser who fires a gun on his own land so that the shot fall on his neighbor's land. Pickering v. Rudd, 1 Stark. 56, 2 ECL 32. Fifty years later Lord Blackburn inclined to think differently (Kenyon v. Hart, 6 B. S. 249, 252, 118 ECL 249, 122 Reprint 1188), and his opinion seems the better. Clearly there can be a wrongful entry on land below the surface, as by mining, and in fact this kind of trespass is rather prominent in our modern books.'" 19 Green Bag 708.

[c] **Suggested distinction.**—"There is a wide difference in the matter of interfering with the beneficial enjoyment of land between projecting a roof, or an elevated railroad structure or even throwing a wire over another man's land, and between flying across it. Is this a mere difference in degree in the wrong inflicted, and not a difference in pure legal theory?" 18 Case & Com. 124.

34. 19 Case & Com. 681.

[a] **Criticism of opposite view.**—"What little has been said about trespass by passing through the air over land has been mostly in accord with the popular view as to the absolute rights of the landowner in the upper space. 'It has been doubted,' says one learned writer, 'whether it is a trespass to pass over land without touching the soil, as one may in a balloon, or to cause a material object as shot fired from a gun to pass over it. . . . It does not seem possible on the principles of the common law to assign any reason why an entry at any height above the surface should not also be a trespass. The improbability of actual damage may be an excellent practical reason for not suing a man who sails over one's land in a balloon, but this appears irrelevant to the pure legal theory. . . . Then one can hardly doubt that it might be a nuisance apart from any definite damage

should be made by statute.[35] "In pure legal theory it is a trespass to simply place a finger over the land of another,"[36] and as an unauthorized entry below the surface is admittedly a trespass, it is argued that a like entry above the surface is likewise a trespass.[37]

[§ 6] **D. Rule in Continental Countries.** The rule of the civil law, by which territorial sovereignty extends usque ad coelum, has been modified on the continent as well as in England; for instance, in Germany an owner of land is not entitled to prevent the passing of balloons at a great height over his lands.[38] The theory which prevails in Germany is that the state is unrestrained sovereign over the air above, into which buildings, trees, and plants project;[39] in France a statute has been passed relieving the navigator of an airship from liability, provided he causes no actual damage to the landowner over whose property he passes.[40] The French jurists maintain that the air is free from all control of law, except in so far as the state lying beneath is constrained by the necessities of self-preservation, and then it may adopt measures to ward off dangers which may threaten it from aviators.[41] For this reason another group of jurists contend that an airship which is near the earth belongs to the country it floats above, and is amenable to its laws and restrictions, but that when it soars into the upper air it becomes entirely free.[42]

IV. CIVIL LIABILITY OF AVIATORS

[§ 7] **A. In General.** The common-law rules governing liability in tort,[43] particularly those relating to trespass,[44] nuisance,[45] and negligence,[46] should prove sufficient to determine questions of liability for damage caused by the operation of vehicles in the air. As in other cases an aviator will be liable for all the natural and probable consequences of his negligent or willful acts;[47] and in view of the very obvious danger to persons and property from uncontrollable descents, falling objects, and the like, a high degree of care must be exercised to repel a charge of negligence.[48] Indeed, there is much force in the view that flying machines are so inherently dangerous that the aviator ought to be held liable as an insurer against any damage to others upon the familiar principle of absolute liability from the possession or use of dangerous instrumentalities,[49] and this has already been so decided in the case of balloons;[50] but some writers

to keep a balloon hovering over another man's land.'" 18 Case & Com. 123 [quot Webb's Pollock Torts p 423].

35. 19 Case & Com. 682 (where it is said: "If modern necessity requires that air ships should have the right to navigate the air, that is a matter of legislative enactment. We cannot make the law; we apply it as we find it").

[a] **Exemption from liability.**—"No franchise should be granted for aviation which would carry exemption from liability to those injured by its exercise." 9 Mich. L. Rev. 24.

[b] **One strong argument** in favor of the rule stated in the text is that some jurisdictions, notably France, have recognized the necessity of legislation to relieve the airman from liability to the landowner over whose property he passes, provided he causes no actual damage. 19 Case & Com. 681.

36. 18 Case & Com. 131. See generally Trespass [38 Cyc 985].

37. 46 CanLJ 730 [cit London L. Mag.] (where it is said: "Moreover, it is common enough to commit trespass by wrongful entry below the ground as by mining, and there seems no reason why wrongful entry above the surface should not similarly constitute an act of trespass. The improbability of actual damage is irrelevant to the pure legal theory, neither is it necessary that there should be force nor unlawful intention; there seems every reason to support the proposition that the mere flight over a person's land is an act of trespass, and that an action would lie against the offending aviator"). See Mines and Minerals [27 Cyc 516].

38. 53 Sol. J. 209.

[a] **Code of Canton.**—"The solution of the conflict of interests seems to have been accomplished very well on the continent of Europe. Even before the advent of progress in air navigation, the Code of the Canton of Grisons, § 185, provided: Property in land extends to the airspace (above) and the earth beneath, so far as those may be of productive value to the owner." 4 Am. J. Int. L. 127 (article by Arthur K. Kuhn).

[b] **The German civil code § 667** also recognizes the extension of property upward and downward, but in a clause, § 905, for which air navigation was largely responsible, it is declared: "But the owner cannot prohibit such interferences undertaken at such a height or depth that he has no interest in the prevention." 4 Am. J. Int. L. 127.

[c] **The Swiss code** reaches the same result by an affirmative statement that property in land extends in the air space and under the earth as far as there is any material interest in the exercise of ownership. 4 Am. J. Int. L. 127.

39. 23 Green Bag 398.

40. 19 Case & Com. 682.

[a] **In the New York Sun June 28, 1914,** it is said that a landowner in France, who sued three aëroplane firms whose machines continually passed over his property, has been awarded three hundred dollars damages. The court considered that the air can not by its very nature be privately owned and that it is absolutely free, but it awarded damages in respect of the too frequent landings of defendants' airmen on plaintiff's property.

41. 23 Green Bag 398.

[a] **A distinguished French lawyer** says that by the laws of France, Germany, Switzerland, Italy, Belgium, Spain, Portugal, Austria, Japan, Turkey, England, and the United States the owner of the surface is owner above. But he adds that certain commentators understand that the words "ownership upwards" apply only to material objects planted, constructed, or placed upon the soil. Droit Aérien 6.

42. 23 Green Bag 398.

43. See Actions §§ 46–71; Torts [38 Cyc 408].

44. See Trespass [38 Cyc 985].

45. See Nuisances [29 Cyc 1143].

46. See Negligence [29 Cyc 400]; Railroads [33 Cyc 1].

47. Davids Motor Vehicles § 295.

[a] **For example,** to fling heavy articles, such as bottles, overboard is plainly negligent, and it is immaterial whether the person throwing them out sees people below or foresees the possibility of an injury or not. 22 Jurid. Rev. 85 [cit Fletcher v. Rylands, L. R. 1 Exch. 265, 1 ERC 236] (article by G. D. Valentine).

48. 9 Mich. L. Rev. 24 (article by Simeon E. Baldwin).

49. 4 Am. J. Int. L. 95, 99 (article by Simeon E. Baldwin); 12 Law Notes 108; 9 Mich. L. Rev. 20 (article by Simeon E. Baldwin). See 4 Am. J. Int. L. 128.

Liability for damage from dangerous instrumentality see generally Adjoining Landowners §§ 27, 28; Animals § 316; Negligence [29 Cyc 459 et seq].

[a] **Should the airship drop a sandbag** in its course which strikes and wounds any individual, he would have at least a prima facie right to sue for damages whether he is or is not the owner of the land upon which he receives the shock. The proprietor of the ship in whose service it is sailing and his servant, the master of the ship, would be equally liable. 4 Am. J. Int. L. 98 (article by Simeon E. Baldwin).

[b] **In Massachusetts,** by statute, no aviator shall intentionally throw or drop any missile or other article from an aëroplane in flight, except over grounds devoted to flying, or over open water, unless he has previously obtained special permission of the commission. Mass. Acts (1913) c 663 § 5.

50. Guille v. Swan, 19 Johns. (N. Y.) 381, 10 AmD 234 (a pioneer case in which the facts were that Guille ascended in a balloon in the vicinity of Swan's garden, and descended into his garden. When he descended his body was hanging out of the car of the balloon in a very perilous situation, and he called to a person at work in Swan's field to help him, in a voice audible to the pursuing crowd. After the balloon had descended it dragged along over potatoes and radishes, about thirty feet, when Guille was taken out. The balloon was carried to a barn at the farther end of the premises. When the balloon descended more than two hundred persons broke into Swan's garden through the fences and came on his premises, beating down his vegetables and flowers. The damage done by Guille with his balloon was about fifteen dollars, but the crowd did much more. Plaintiff's damages, in all, amounted to ninety dollars. It was contended before the justice that Guille was answerable only for the damage done by himself, and not for the damage done by the crowd. The justice was of the opinion, and so instructed the jury, that defendant was answerable for all the damages done to plaintiff. Spencer, C. J., said: "In Leame v. Bray, 3 East 595, 102 Reprint 724, Lord Ellenborough said, if I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue, I am answerable in trespass; and if one (he says) put an animal or carriage in motion, which causes an immediate injury to another, he is the actor, the causa causans. I will not say that ascending in a balloon is an unlawful act, for it is not so; but, it is certain, that the Æronaut has no control over its motion horizontally; he is at the sport of the winds, and is to descend when and how he can; his reaching the earth is a matter of hazard. He did descend on the prem-

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have taken the view that any liability must be based upon the theory of nuisance or negligence.[51] If merely flying over another's land is to be deemed a trespass imposing liability for at least nominal damages,[52] there is of course an absolute liability for any actual damages caused to persons or property upon such land by reason of such trespass, and the questions of negligence or nuisance would not be material;[53] and even if a right of passage exists, any descending, or allowing objects to fall upon, or drag across, another's land is actionable as a trespass.[54]

The international congress of aërial law resolved that, save in the case of imminent peril, the casting overboard of all things calculated to injure either persons or property is forbidden,[55] and that if damage results this makes a prima facie case for recovery of damages.[56]

As common carrier. The rules governing the business of a common carrier by airship or flying machine may be readily assimilated to those applied to other common carriers.[57]

[§ 8] **B. Statutory Liability.** By statute in some jurisdictions every aëronaut or his principal or employer is made liable for any damage caused by such machine, apparently without regard to whether he was negligent or not;[58] but under the codes of other countries an injury done without fault imposes no liability, although the least fault is sufficient.[59]

V. STATUTORY REGULATIONS

[§ 9] **A. In General.** The necessity or desirability of legislation to meet the new conditions created by the recent conquest of the air and the rapid multiplication of airships engaged in its navigation has been often pointed out,[60] and such statutes have been actually enacted in a few jurisdic-

ises of the plaintiff below, at a short distance from the place where he ascended. Now, if his descent, under such circumstances, would, ordinarily and naturally draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation; all this he ought to have foreseen, and must be responsible for. Whether the crowd heard him call for help or not, is immaterial; he had put himself in a situation to invite help, and they rushed forward, impelled, perhaps, by the double motive of rendering aid, and gratifying a curiosity which he had excited. Can it be doubted, that if the plaintiff in error had beckoned to the crowd to come to his assistance, that he would be liable for their trespass in entering the enclosure? I think not. In that case, they would have been co-trespassers, and we must consider the situation in which he had placed himself, voluntarily and designedly, as equivalent to a direct request to the crowd to follow him. In the present case, he did call for help, and may have been heard by the crowd; he is, therefore, undoubtedly, liable for all the injury sustained"). See comments upon this case in Davids Motor Vehicles § 299; 46 CanLJ 483; 71 CentLJ 2; 14 Law Notes 123; 18 Case & Com. 132. See also 23 Green Bag 398, 400, where two decisions in Germany are stated as follows: "On a meadow near Frankfurt a balloon was forced to land because its gas supply gave out. The inhabitants of the neighboring village swarmed out curiously to the scene of the accident, and in so doing trampled a vegetable garden to ruin. The owner brought suit against the aëronaut for the injury to his vegetables. The aëronaut replied: 'I did no damage; I was a long distance away from your garden.' The court, nevertheless, awarded the vegetable dealer his damages." "A very remarkable case was brought up in the Belgian Chamber of Deputies in June, 1909, by the Minister of Justice, Lantsheere. Near a certain small town a balloon began to collapse from loss of gas. The pilot, seeing himself forced to land, chose for the purpose an open space beyond the town. As he flew just above the roofs of the houses, with his ropes dragging in the streets, the inhabitants, supposing that he wished to be drawn down, seized the ropes. The aëronaut cried to them to release him; his cries were not understood, were assumed to be cries for help, and the townsmen pulled the balloon to the earth. The pilot was forced to open his valve to release the gas. In the second story of a house in the narrow street a man was smoking; his cigarette ignited the escaping gas, and there was an explosion, with dead, wounded and destruction of property. The Court condemned the aëronaut to pay all damages, because he was held responsible for the accident."

51. See Davids Motor Vehicles § 294.

52. See supra § 5.

53. See Actions § 301; Trespass [38 Cyc 985].

54. 14 Law Notes 123.

[a] **A case determined in France** is thus stated in 18 Va. L. Reg. 384; "The case in question involved the right of a landowner to say whether an aëronaut might fly over his land. A number of landed proprietors in the vicinity of the Buc aërodrome brought suit against Maurice Farman, alleging that they had been materially damaged by the frequent flying over their lands, horses being frightened and people annoyed by the noise of the engines, not to speak of damage done to fields in the landing of machines. The attorney for Farman contended that ownership of the land did not carry with it the right to the air above, else a landlord might claim the very stars in the sky. He admitted that under the French law everything above and below the surface belongs to a landlord, but he did not admit that this construction included air. The court awarded $100 damages to one farmer whose land had been damaged in a landing, but declined to pass on the larger question of prohibiting future flights, on the ground that aerial navigation had not yet been regulated by the law courts. The pith of the judgment was that aviators might fly over private property, and if they caused damages the owners of the property might proceed against them, which leaves the matter pretty much where it was in the beginning."

[b] **Letting down a dragrope** of a balloon whereby the trees or crops of plaintiff are damaged is actionable. 4 Am. J. Int. L. 100 (article by Simeon E. Baldwin).

[c] **Under the code of the air** adopted by the congress at Paris, the aëronaut is liable to third persons injured by objects thrown or falling out of an airship, whether the damage is to their persons or property, and whether or not the jettison was voluntary to conserve the safety of the vehicle or the object fell out without the consent of the pilot or of any person in the airship. Droit Aérien 22.

55. 131 L. T. 131 (reporting resolution 13 adopted by International Congress of Aërial Law). As to jettisoning cargo see 19 Law Students H. 108.

56. 131 L. T. 131 (reporting resolution 13 adopted by International Congress of Aërial Law).

57. 12 Law Notes 108. See generally Carriers.

58. Conn. Pub. Acts (1911) p 1348 c 86; 18 Case & Com. 135 [quot and discussing Conn. L. 1911] (article by Ray L. Swift); 23 Green Bag 398 (Germany); 9 Mich. L. Rev. 20.

[a] **For example,** in Massachusetts an aviator is liable for injuries resulting from flying over buildings, persons, or animals unless he can demonstrate that he took every reasonable precaution to prevent such injury. Mass. Acts (1913) c 663 § 6.

[b] **Governor Baldwin** of Connecticut in his first message to the legislature of that state recommended legislation "making the owner, lessee or charterer liable for all damages resulting from any voyage in [a flying machine] without proof of negligence or fault in its management." 16 Va. L. Reg. 778.

[c] **The first German governmental** code of regulations for airmen, published in Germany in 1910, provided that airmen in cross country trials must, before starting, sign an undertaking of responsibility for any damage to property they may occasion during the flight. 16 Va. L. Reg. 398.

59. 9 Mich. L. Rev. 20 [cit Code Napoleon, and the Italian, Japanese, and German codes] (article by Simeon E. Baldwin).

60. [a] **Statement of some necessary regulations.**—"If aviation is to become, as it seems certain to do, a sport with many thousands of followers, other than professional showmen competing for prizes, the safety of the public will call for the adoption of rules calculated to protect the persons and property of others from the result of accidents to the machines while in flight. No doubt the aviators, themselves will, in the first instance, adopt rules for the avoidance of collisions; but ultimately the rules must be given the sanction of law. Probably a licensing system will have to be adopted, to determine the fitness of the aviator to be entrusted with the management of an instrument of such danger, similar to that recently adopted by the government of the United States for motor boats; and signalling devices, utilizing both sight and sound, will be prescribed. In short, the use of the air for purposes of travel will have to be subjected to the same kind of regulation as the use of waterways now is. Under the admiralty regulations, collisions can not occur, where vessels are aware of each other's location and have control of themselves, without disobedience of the law by some one, and there is no reason why similar regulations should not have the same result in aerial navigation. The aerial traveler has one great advantage over the sailor, in that he is not confined to one plane; but he is at a great disadvantage in being compelled to keep in swift motion, and, at the present time, at least, he is much more at the mercy of the element in which he operates." 16 Va. L. Reg. 796, 797 [cit 41 Nat. Corp. R. 221]. See also 14 Law Notes 188 (where suggestions are made for proposed legislation).

[b] **The federal statutes governing the use of waterways** afford a model

tions.[61] Thus under a recent German statute an aviator may not fly over towns, villages, or other places of dense population, but must restrict himself to the open country over the courses of rivers or streams;[62] nor may he fly over places where large quantities of explosives or highly inflammable materials are manufactured or stored, etc.[63] In Massachusetts the statute prescribes rules of the air to be observed in meeting and overtaking an aëroplane; fixes the altitude at which air machines may fly over towns, cities, buildings, persons, and animals; regulates landing in public places; and prohibits flying over massed assemblies of one hundred people or more.[64]

Liability for damages. It is specifically provided by the Connecticut statute that every aëronaut shall be responsible for all damages suffered by any person from injuries caused by any voyage in an airship directed by such aëronaut, and that if he is the agent or employee of another in making such voyage his principal or employer shall be responsible for such damage.[65] The Massachusetts statute provides that an aviator shall be liable for injuries resulting from his flying unless he can demonstrate that he took every reasonable precaution to prevent such injury.[66] The English Aërial Navigation Act merely provides that for the purpose of protecting the public from danger the secretary of state may from time to time prohibit navigation by air craft over prescribed areas, and the violation of such prohibition is made an offense punishable by fine and imprisonment.[67]

Registration and license regulations. It is provided by statute in some jurisdictions that these machines shall be registered as in the case of motor vehicles or vessels,[68] that the registration number shall be displayed in letters of a designated size[69] as a means of identifying the machine,[70] that the certificate of registration shall be a personal privilege and not pass to a succeeding owner,[71] and that it shall always be found upon the vehicle, and may be examined upon request by any person qualified.[72] It is also provided that a license shall be procured, and the operator examined as to his competency, etc.,[73]

for statutory rules and regulations governing the ownership and operation of airships. 16 Va. L. Reg. 796 [cit 41 Nat. Corp. R. 221].

[c] **The Aëro Club of France** has suggested to the minister of public works a measure insuring the privacy of inclosed spaces such as courtyards and gardens, the end being gained by making it a punishable offense for pilots to cross such property at a height of less than a hundred and fifty feet, or to come to rest above it unless at least fifteen hundred feet distant. Moreover, towns are to be avoided altogether. Davids Motor Vehicles p 300 [cit A. J. McK. in 128 L. T. 498].

[d] **The rules of the Aëro Club** of America provide that airships must fly at an altitude of fifteen hundred feet in passing over buildings or structures of any kind, under penalty of a forfeiture of license.

[e] **A maritime lien for repairs to an aëroplane** cannot be enforced in a court of admiralty, in the absence of legislation conferring such jurisdiction; nor may such jurisdiction be assumed under the rules adopted by the international juridic committee on aviation, for its provisions have not yet become law. The Crawford Bros. No. 2, 215 Fed. 269, 270 (where the court said: "It is conceded, by counsel for libelant, that there is no precedent for this proceeding, but it is contended that, as jurisdiction in admiralty has, in the past, been extended to meet the needs of commerce and the questions arising therefrom, in the face of this new need the jurisdiction should grapple with the questions arising out of navigation of the air, and not await legislative action. Familiar instances of the growth or evolution of the admiralty jurisdiction are pointed out: The adoption of navigability as the test of jurisdiction, rather than confining it to the ebb and flow of the tide; its extension to include steam vessels upon their advent, holding floating elevators, dry docks, rafts, and submarine vessels subject to the jurisdiction; the giving of a maritime lien for personal injuries, as well as one to the stevedore. The progress thus shown, it is asserted, warrants the court in assuming jurisdiction of this cause. . . . In view of the novelty and complexity of the questions that must necessarily arise out of this new engine of transportation and commerce, it appears to the court that, in the absence of legislation conferring jurisdiction, none would obtain in this court, and that questions such as those raised by the libelant must be relegated to the common-law courts, courts of general jurisdiction. (The action of the Juridic Committee on Aviation manifests a recognition of the fact that legislation is necessary for the regulation of air craft. They are neither of the land nor sea, and, not being of the sea or restricted in their activities to navigable waters, they are not maritime"). This case is reviewed in 28 Harv. L. Rev. 200, and the opinion expressed that, in the absence of legislation, only courts of general jurisdiction can entertain such a claim.

[f] **Salvage.**—Another interesting question that arises in this connection is whether a claim may be made in admiralty for salvage services rendered in salving a wrecked aëroplane or balloon. In 28 Harv. L. Rev. 200, Fifty Thousand Feet of Timber, 9 F. Cas. No. 4,783, 2 Lowell 64, is referred to in which Judge Lowell said obiter that it would be no defense to a proceeding for salvage that the services were rendered in salving goods that "had been dropped from a balloon," but it is added that this statement is criticized by Lord Esher in The Gas Float Whitton No. 2, [1896] P. 61. See generally Salvage [35 Cyc 734].

61. Conn. Pub. Acts (1911) p 1348 c 86; Mass. Acts (1913) c 663; 9 Mich. L. Rev. 25. See 16 Case & Com. 216; 17 Case & Com. 304 (giving regulations adopted by German government); English Aërial Navigation Act June 2, 1911.

62. 17 Case & Com. 304 (summarizing provisions of the German statute regulating aviators); 9 Mich. L. Rev. 24 (article by Simeon E. Baldwin); D'Hooghe Droit Aérien 94 (setting forth the prohibition under the laws of Prussia).

[a] **In Prussia** flights over fortresses and in a radius of ten kilometers around them is forbidden, unless upon written permission of the competent military authority. D'Hooghe Droit Aérien 94.

63. 18 Case & Com. 135.

[a] **In Prussia** there is a prohibition against flying over factories where explosives are manufactured, over petroleum warehouses, over gas works and other works where there is danger of fire, and even over grounds which are furrowed with a network of electric wires at high tension. D'Hooghe Droit Aérien 94.

64. Mass. Acts (1913) c 663.

[a] **Landing on public property.**—An aviator may not land in highways or public parks or other public grounds without permission from the authorities in charge thereof, except in cases of emergency. Mass. Acts (1913) c 663 § 7.

[b] **Military aviators,** while in the service of the state or nation, are not subject to the general regulations. Mass. Acts (1913) c 663 § 8.

65. Conn. L. (1911) c 86 § 11.

66. Mass. Acts (1913) c 663 § 6.

67. Act of June 2, 1911, St. (1911) c 4. This statute was passed with a view to protect the public from flying machines during the coronation proceedings, and was intended merely as a temporary provision. See 17 Law Notes 37; 131 L. T. 73.

68. Conn. Pub. Acts (1911) p 1348 c 86; Mass. Acts (1913) c 663 § 2; 26 Bench & Bar 10 [cit Conn. Laws (1911) § 2 providing for the annual registration of all airships kept within the state and further that the registration number shall be not less than three feet high]; 23 Green Bag 398. See 14 Law Notes 188; Motor Vehicles [28 Cyc 32 et seq].

[a] **The International Congress of Aërial Law** resolved that every proprietor of an airship before being allowed to make an ascent or circulate beyond private aërodromes must obtain from the public authority the inscription of his airship in the register of matriculation kept by the authority competent for that purpose. Each state shall regulate the registration of airships within the limits of its own territory. Every airship must carry a distinctive mark indicating the place of its registration. The registers shall be published. 131 L. T. 131 (reporting resolutions 6–8 adopted by International Congress of Aërial Law).

[b] **In Germany** even after an aviator has obtained a license he must notify the police authorities three days in advance of his flight, and must submit to police inspection of his equipment before making an ascent. He may be forbidden to ascend at all if, in the judgment of the authorities, conditions make the attempt dangerous. 17 Case & Com. 304.

69. Conn. Pub. Acts (1911) p 1348 c 86; Mass. Acts (1913) c 663 § 2; 26 Bench & Bar 10.

70. 18 Case & Com. 135 [cit Conn. St.] (article by Ray L. Swift).

71. Conn. Pub. Acts (1911) p 1348 c 86.

72. Conn. Pub. Acts (1911) p 1348 c 86.

73. Conn. Pub. Acts (1911) p 1348 c 86; Mass. Acts (1913) c 663 § 1; 18 Case & Com. 135 (article by Ray L. Swift); D'Hooghe Droit Aérien 43 (setting forth the French laws requiring each pilot of an airship to be provided with a certificate of fitness); 9 Mich. L. Rev. 20 (article by Simeon E. Baldwin). See 14 Law Notes 188.

[a] **The Connecticut statute of 1911** permits a person not licensed to fly over land or water owned or leased by him, or over land or water the owner of which has given written permission to him so to fly, but no one is allowed to fly elsewhere in the state without a license. See 26 Bench & Bar 10.

[b] **Laws of Germany.**—"Law-

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and that no person under twenty-one years of age may obtain a license;[74] provision is made for the temporary recognition of licenses granted by sister states.[75] Disobedience of the statutory regulations is ground for forfeiting the license, and may be punished by a fine.[76]

[§ 10] **B. Constitutionality of Statutes.** Under the police power the several states have undoubted power to pass all laws relating to the use and operation of air machines which tend to protect the lives, health, comfort, and property of their citizens;[77] but any state statute which regulates or directly burdens interstate or foreign commerce is unconstitutional.[78] Congress, however, has plenary and exclusive power to regulate interstate and foreign commerce, which power of course extends to such commerce carried on through the air as well as upon water or on land.[79] Other federal regulations may be supported under the treaty and war powers and under the power to lay customs duties.[80] A doubt has been expressed whether any statute would be valid which abrogates liability for trespass by flight across another's land.[81]

VI. LAW OF THE ROAD

[§ 11] "The law of the road" as recognized on highways and in admiralty jurisprudence to prevent collisions affords analogies and may be adopted to regulate the movements of aërial travelers.[82] This course has already been pursued in framing statutes on the subject.[83] Dirigible balloons may be expected

have been promulgated governing the conditions under which aviation may be practised in Germany. According to the new regulations, every aviator must have a license, issued by the provincial or municipal authorities. This license is issued only after a thorough examination into the candidate's mechanical knowledge and a private demonstration of his skill in aviation." 17 Case & Com. 304.

[c] **In Prussia** not only is a license required, but it must also designate the character of vehicle to be operated thereunder, and without an extension of the license the aviator can operate no other. Droit Aérien 95.

[d] **Propriety of license tax.**—It is proper that the state should demand a license tax from aviators to defray expenses incident to the regulation of air traffic. 22 Jurid. Rev. 85 [reprinted in 14 Law Notes 72] (article by G. D. Valentine).

[e] **The International Conference on Aërial Rights,** which met at Paris in 1910, provided that professional airmen shall receive certificates of competence. But this applies only to dirigible balloons, and not to aëroplanes or flying machines. 55 Sol. J. 87.

74. Conn. Pub. Acts (1911) p 1348 c 86.

75. [a] **In Connecticut** a nonresident who has complied with the laws of the state of his residence, relative to airships, may operate an airship not exceeding ten days in any year, without license or registration in Connecticut, provided the state of his residence requires registration and license and he has complied therewith. L. (1911) c 86 § 9.

[b] **In Massachusetts** an aviator duly licensed or registered in another state may operate for a period not exceeding ten consecutive days without obtaining a Massachusetts license or register, if permission is obtained from the highway commission. Acts (1913) c 663 § 9.

76. Conn. Pub. Acts (1911) p 1348 c 86; Mass. Acts (1913) c 663 § 11.

77. See Constitutional Law [28 Cyc 363 et seq]; 14 Law Notes 188. See also 18 Case & Com. 134.

78. See Commerce [7 Cyc 422].

[a] **Section 7 of the laws of Connecticut of 1911,** which requires license and registration as a prerequisite to flying an airship from or to any point within the state, is an unconstitutional interference with interstate commerce, because it operates in effect absolutely to prohibit airships from other states from making interstate flights to or from any point in Connecticut. See Commerce [7 Cyc 422]. See also 26 Bench & Bar 10.

[b] **State statutes authorizing the seizure of offending airships** on in rem process issuing from a state court would be valid if congress has not acted in the matter. 4 Am. J. Int. L. 103 (article by Simeon E. Baldwin).

79. See Commerce [7 Cyc 419]; 26 Bench & Bar 11; 18 Case & Com. 131, 133; 17 Case & Com. 289; Davids Motor Vehicles p 302; 131 L. T. 403.

"The air-ship may be as fully an instrument of such commerce as a ship sailing the sea." 4 Am. J. Int. L. 101.

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop." Per Brewer, J., in In re Debs, 158 U. S. 564, 591, 15 SCt 900, 39 L. ed. 1092.

[a] **Extent of federal control.**—"When it appears that the Federal control over air navigation includes the power to license airships, inspect them, establish the lights, signals, lookouts, and rules of sailing which they must observe, compel their entrance into the country at customhouses, and do all other things which Congress now does or may do with respect to ships on interstate or foreign waters, and that there can be no air navigation in this country which does not come within the scope of Federal power, it seems obvious that the subject is almost exclusively a Federal one, and that the states are restricted to mere police regulations for the public safety." 17 Case & Com. 289.

80. See Constitutional Law [8 Cyc 695]; Customs Duties [12 Cyc 1104]; United States [39 Cyc 689].

[a] **Federal control over air navigation.**—See 17 Case & Com. 288 (article by Burdett A. Rich).

[b] **For a draft of proposed legislation** to regulate interstate and foreign voyages by airships see 9 Mich. L. Rev. 25 (article by Simeon E. Baldwin).

81. 19 Case & Com. 682 (where it was said: "We do not mean to intimate that any statute purporting to relieve from liability the owner or operator of an air ship passing through the air or space over land held in private ownership, at a height of 100 feet above the surface, would be constitutional, but that question is not before us for decision"). "Might not, under our political system, a franchise for aviation set up, as a justification for an unintended injury, be put aside by the courts, on the ground that, if given that effect, whether it came from the state or from Congress, it would deprive the injured party of his life, liberty, or property, without due process of law? That phrase in our Constitution is an elastic one, and there are few wrongs which it has not in principle been construed to reach." 9 Mich. L. Rev. 23 [cit The Courts as Conservators of Social Justice, 9 Columbia L. Rev. 567] (article by Simeon E. Baldwin).

82. Collision [7 Cyc 319]; Streets and Highways [37 Cyc 269].

"It will be a task of no little difficulty to devise a system of regulations which will prevent collisions as effectively as existing regulations prevent collisions between vessels and also prevent, or minimize, the other accidents which are likely to befall the aerial navigator." 16 Va. L. Reg. 796, 797 [cit 41 Nat. Corp. R. 221].

83. [a] **Rules of the air under Massachusetts statute.**—Mass. Acts (1913) c 663 § 3 provide that, when two aëroplanes are in danger of meeting head on, each aviator shall change his course to the right; if they threaten to meet at an angle, that aëroplane which has the other on its left shall have the right of way and shall continue its course with as little deviation as possible. If one aëroplane is overtaking another, it is the duty of the overtaking aviator to keep out of the way of the overtaken aëroplane, and the former must act on the assumption that the latter is ignorant of his approach and may change the course of his machine without warning. It is further provided that an aviator finding another aëroplane approaching him from the right or, in other words, on his starboard hand, shall change his course to avoid a collision, and in doing so he may pass above, below, or on either side of the aëroplane having the right of way, but in any case shall not pass within one hundred feet of such privileged machine. One aëroplane shall be considered as overtaking another when it approaches the other from a position which is in any degree to the rear of the leading aëroplane, whether it approaches from directly astern or obliquely from the right or left, downward or upward.

[b] **"The supreme court of Germany** had occasion recently to make some law on the subject of air navigation. The German Civil Code, which covers terrestrial conditions pretty thoroughly, has not as yet been made applicable to matters celestial, but the court had no trouble in deciding the case before it on principle. Two flying machines ascended from the same station within a short time of each other. The first one chose what was known as the outer course. When the second one ascended, choosing the inner course, the first one changed its course and got in the way of the second. A collision followed and both were thrown to the ground. The first one was badly injured, and its owner sued the owner of the second machine, on the ground that the collision was caused by its peculiar construction, which made it impossible for its operator to look down. Three courts passed on the case, the trial court, and two appellate courts, and all of them held against the plaintiff on the ground that the collision was caused by the changing of the course of his

to give way to nondirigibles, and perhaps aëroplanes to dirigibles,[84] upon the same principles that steam and motor vessels are required to give way to sailing vessels.[85]

VII. INTERNATIONAL LAW

[§ 12] **A. In General.** The international conference on aërial rights which met in Paris in 1910 prepared a draft convention for the international regulations of airships. This proposed convention provides that every airship must have a nationality, and one only,[86] which shall correspond with that of its owner; if the airship is owned by a company the nationality shall be determined by the place of the headquarters of such company; in case of different nationalities of different coöwners of the airship, the nationality shall be that of those who own two thirds of the value of the airship; every airship must carry a distinctive mark of its nationality; aëronauts approaching a frontier must travel on prescribed routes and, after crossing it, descend for customhouse inspection at designated points; aviation over fortifications is inadmissible.[87] It seems, however, that these provisions apply only to dirigible balloons and not to aëroplanes or heavier-than-air machines, except when these latter are engaged in international journeys.[88]

[§ 13] **B. Sovereignty.** While contrary views have been expressed,[89] the better opinion seems to be that every independent state has full and complete sovereignty, jurisdiction, and control over persons and property within the air space above such state, which must be regarded, at every height, as part of its territory.[90] It is inconceivable that the right of foreign aërovehicles to enter a sovereign nation can rest on any firmer foundation than that of comity; therefore such nation may exclude them altogether or permit their passage upon any conditions it may see fit to prescribe.[91]

Above the high seas of course the air will be free; the rights of states in the air above territorial waters will be no greater than are their rights over those waters.[92]

[§ 14] **C. War and Neutrality.** Considering the superincumbent air space as part of the territorial domain of the state beneath,[93] the ordinary rules respecting the rights and duties of belligerents and neutrals apply to acts committed by means of air

machine after the other one had ascended." 20 Va. L. Reg. 318 [cit Nat. Corp. R.].

84. Davids Motor Vehicles § 292; 22 Jurid. Rev. 85 [reprinted in 14 Law Notes 69] (article by G. D. Valentine).

85. See Collision [7 Cyc 353].

86. See D'Hooghe Droit Aérien 11.

[a] **Births and deaths** on board an airship will be regarded as happening upon the territory of that state whose nationality the airship possesses. D'Hooghe Droit Aérien 109.

87. 131 L. T. 131 (reporting resolutions adopted by International Congress of Aërial Law); 9 Mich. L. Rev. 24.

88. 55 Sol. J. 87.

89. 22 Jurid. Rev. 85 [reprinted in 14 Law Notes 69] (article by G. D. Valentine).

[a] **The various theories** advanced with respect to sovereignty over the air are set out in Droit Aérien 1 et seq. "Some [writers] would deny the free use of the air within 5,000 feet of the earth's surface to the public ships of foreign states." Wilson Int. L. p 124 [cit Fauchille 19 Annuaire p 34]. "Others would admit free use in time of peace, subject to police regulations, but extend the restraint in time of war." Wilson Int. L. p 124 [cit Marighnac War on Land p 196].

[b] **Continental writers maintain** that the state has no sovereignty over the air; that it has, at most, certain limited rights of self-protection, and these affect only the lower regions of the atmosphere. This theory proceeds on the doctrine that sovereignty depends on occupation, of which the air is incapable. Fauchille Annuaire (1902) p 19; 22 Jurid. Rev. 85 [reprinted in 14 Law Notes 69] (article by G. D. Valentine); The Institute of International Law has declared for this view in 1 Annuaire (1906) p 305. See Davids Motor Vehicles § 288, in which the doctrine is discussed at length.

[c] **Aërial navigation is free** save for the rights of the states subjacent (sous-jacents) to take measures to insure their proper security and that of the persons and the goods of the inhabitants thereof. 131 L. T. 131 (reporting resolution 1 adopted by International Congress of Aërial Law).

[d] **"The Institute of International Law** in 1906 enunciated the principle, 'The air is free,' and limited the rights of the states in the air to such as were necessary to self-preservation, whether in peace or war." Wilson Int. L. p 123.

[e] **Range of ordnance.**—"Certain writers . . . would limit the qualified jurisdiction of the air to the actual range of projectiles from the surface of the earth." Wilson Int. L. p 124. Arthur K. Kuhn favors sovereignty within a zone controllable by ordnance, subject to the rights of the craft of other states to pass inoffensively. This view, however, was rejected by the Institute of International Law at its Ghent session of 1906, in favor of a negative of sovereignty, saving the right of self-protection. 4 Am. J. Int. L. 113.

[f] **At the Paris conference** it was proposed to establish a limit straight upward, sixteen hundred feet being suggested. 18 Case & Com. 125.

90. 21 Annuaire de l'Institut p 327; Davids Motor Vehicles §§ 288, 292; 23 Green Bag 399; Wilson Int. L. pp 120, 88.

[a] **Simeon E. Baldwin says:** "Every independent nation must have the right to regulate the use of the air above its territory in such manner as best to promote the public interests." 4 Am. J. Int. L. 96.

[b] **Mr. Wilson says:** "It is now recognized that the jurisdiction of a state includes the right to exercise authority in the atmosphere above the state domain." Wilson Int. L. p 120.

[c] **G. D. Valentine** claims that the state's sovereignty over the air is absolute, without delimitation, and that in the nature of things no state will consent to the extraterritoriality of any part of the superincumbent atmosphere. 22 Jurid. Rev. 16–27; 85–104.

[d] **The United States supreme court** has said: "The State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." Georgia v. Tennessee Copper Co., 206 U. S. 230, 237, 27 SCt 618, 51 L. ed. 1038, 11 Ann Cas 488 and note; and again: "It is recognized that the State as quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." Hudson County Water Co. v. McCarter, 209 U. S. 349, 355, 28 SCt 529, 52 L. ed. 828.

[e] **Criticism of contrary rule.**—"The attempt of Holtzendorff, Fauchille and Rolland to restrict absolute sovereignty within a zone of isolation, varying from 330 meters (the altitude of the Eiffel Tower as the highest artificial object) to 1500 meters, would be impractical, both by reason of the topography of the earth, the effect of gravitation and the limitation of atmosphere available for human life. Furthermore, it would radically affect the very concept of national territorial sovereignty by recognizing horizontal as well as vertical boundary planes." 4 Am. J. Int. L. 115.

[f] **Superjacent air an appurtenance.**—"The air space over a given state stands in relation to it, to adopt the phrase of Holtzendorff, as a sort of appurtenance, or to follow the terminology of Grunwald, 'a part of the underlying state.' Even Fauchille would limit the principle of freedom by a right of self-protection (droit de conservation) in the underlying state, the scope of which is not exactly defined in his draft code." 4 Am. J. Int. L. 113.

[g] **"The general drift of opinion** is toward the recognition that the right of aërial dominion is coterminous with the territorial jurisdiction of a state, and that to the extent a state is able to enforce its jurisdiction within such area it must be recognized, provided it is not an infringement of the rights of other states." Wilson Int. L. 90 [cit 2 Holtzendorff Handbuch § 46; 1 Rivier Droit de Gens p 140; 1 Nys Droit Int. p 523; 4 A. J. I. L. Baldwin Air Ship p 95; Kuhn Beginnings of an Aërial Law p 108].

[h] **"The principle on which the provisions relating to the admission of airships** are to be drafted appears to be that each state is entitled to regard the atmosphere up to any practically conceivable height as part of its territory, and it is contemplated that municipal law may have to be amended in order to bring it into harmony with the international obligations of the Convention." 55 Sol. J. 87.

91. 4 Am. J. Int. L. 95 (article by Simeon E. Baldwin); Davids Motor Vehicles § 292; 22 Jurid. Rev. 16 (article by G. D. Valentine); 45 L. J. 402 (article by Norman Bentwich); 128 L. T. 498.

92. 22 Jurid. Rev. 85 [reprinted in 14 Law Notes 70] (article by G. D. Valentine).

[a] **Arthur K. Kuhn says:** "Of course, all are agreed that over the free seas the air is likewise free." 4 Am. J. Int. L. 113.

[b] **Mr. Wilson** is of the opinion that aërial domain includes the atmosphere above the territorial, maritime, and fluvial domain of a state. Wilson Int. L. 87.

93. See supra § 13.

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machines.[94] With respect to the obligations of a neutral nation, regard must be had to the difficulty or impossibility of absolutely preventing all invasion or use, by a belligerent, of the upper air space. It is the general opinion that hostile aviators captured in time of war should be treated as prisoners of war, and that the mere fact of being an aviator will not justify treatment as a spy, although of course attendant circumstances may make an aviator also a spy.[95] Balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines, may be treated as contraband of war.[96] The Hague Peace Conference prohibited for a specified period the discharge of projectiles and explosives from balloons or by other new methods of a similar nature. This prohibition is of course binding only upon the signatory powers and some of the greatest nations of the world have refused to bind themselves thus.[97]

VIII. ACTIONS

[§ 15] **A. Form of Action; Remedies.** At common law, if the mere invasion of the air space above another's land is regarded as a trespass,[98] an action of trespass quare clausum fregit will lie; otherwise the remedy is by action on the case for any actual damage caused.[99] Where repeated trespasses are threatened, or where the facts show conduct amounting to a nuisance, injunction is an available remedy.[1]

[§ 16] **B. Defenses. Unavoidable accident.** Unless the doctrine of absolute liability as an insurer, imposed by the possession and use of dangerous instrumentalities,[2] is to be applied to aircraft,[3] unavoidable accident is a defense to an action for damages caused by an aviator who is lawfully navigating his craft and who is guilty of no negligence or other fault.[4]

Overwhelming necessity may also constitute a defense to a trespass by an airship under the same circumstances as in other actions of trespass.[5]

IX. CONTRACTS

[§ 17] Contracts for instruction in aviation have the same sanctity as others, and upon a breach thereof an action for damages will lie, or if any money has been paid on the contract, an action for money had and received will lie to recover it back.[6] In construing a written contract, the intention of the parties must be ascertained from the words used.[7]

AEROBES. Bacteria that die without air or oxygen; also called the germs of oxidation or of

94. See Army and Navy [3 Cyc 812]; Neutrality Laws [29 Cyc 674]; Treaties [38 Cyc 961]; War [40 Cyc 296].

95. D'Hooghe Droit Aérien 32, 39; 22 Jurid. Rev. 85 [reprinted in 14 Law Notes 71] (article by G. D. Valentine).

[a] **Franco-Prussian and Russo-Japanese wars.**—"Treatment as spies was threatened by Prussian officer to those obtaining information by means of balloons in the Franco-Prussian War in 1870, and by the Russian Admiral Alexeiff in the Russo-Japanese War in 1904 to those 'communicating war news to the enemy by means of improved apparatus for which provision has not yet been made in existing conventions.' While certain balloonists captured in 1870 were severely treated, they were not condemned as spies. The position assumed in the Russian declaration of 1904 was generally opposed, and no one was treated as a spy under its provisions. It may be said that there is lacking in such cases the essential element of clandestine conduct." Wilson Int. L. p 327. See also Wilson Int. L. p 121.

[b] **The articles of the Peace Conference at The Hague** declare that persons sent up in balloons for the purpose of transmitting dispatches and, generally, for maintaining communications between different parts of an army or territory, are not subject to a charge of espionage. Art. 29 The Hague Peace Conferences of 1899 and 1907. Arthur K. Kuhn discusses at length and in all its phases the question of impressing a character of espionage upon belligerent aircraft. 4 Am. J. Int. L. 116. See also D'Hooghe Droit Aérien 39.

96. 4 Am. J. Int. L. 122 [cit Wilson Int. L. p 428 c 24 (8)].

Contrabrand articles see generally War [40 Cyc 356].

[a] **Seizure of aircraft.**—Aircraft, although owned by private persons, are specifically made liable to seizure by an army of occupation, subject to the right of the owner to obtain restoration and compensation after the establishment of peace. 4 Am. J. Int. L. 121 [cit art 53 of The Hague Convention].

97. 4 Am. J. Int. L. 107 [cit The Hague Peace Conference vol 1 pp 652, 653; vol 2 p 527 n, speech of J. B. Scott]; Davids Motor Vehicles 315 [cit 45 L. J. 402] (article by Norman Bentwich); 22 Jurid. Rev. 85 [reprinted in 14 Law Notes 71] (article by G. D. Valentine); Wilson Int. L. 326. See also 2 Am. J. Int. L. 528 (article by G. B. Davis).

[a] **Arthur K. Kuhn** discusses at length the history of the various proposals made at the different peace conferences at The Hague looking to the prohibition against launching projectiles or explosives from the air space. He throws interesting sidelights on the reason why the different powers withheld their ratification. 4 Am. J. Int. L. 117 et seq.

98. See supra §§ 4, 5.

99. Kenyon v. Hart, 6 B. & S. 249, 252, 118 ECL 249, 122 Reprint 1188; Pickering v. Rudd, 1 Stark. 56, 2 ECL 32; 72 CentLJ 11; 12 Law Notes 108.

Trespass or case.—For general principles and applications thereof see Actions §§ 117, 123; Adjoining Landowners p 1200; Case, Action on [6 Cyc 681]; Trespass [38 Cyc 985].

1. See Injunctions [22 Cyc 724]; Nuisances [29 Cyc 1143]. See also 19 Green Bag 711 [cit imaginative case of Pennsylvania R. Co. v. U. S., etc., Airobile Co., 635 U. S. 42]. In Clifton v. Bury, 4 T. L. R. 8, an injunction was granted against firing bullets across plaintiff's land, although the land was not physically touched.

2. Duty to insure safety.—For learned discussions of the principle involved see Pollock Torts (7th ed) c 12 p 475 et seq; Jaggard Torts p 48 et seq. As to liability for keeping dangerous animals see Animals [2 Cyc 367]; for keeping dangerous things on one's premises see Adjoining Landowners §§ 27, 28. See generally Torts.

3. See supra § 8.

4. Unavoidable accident as a defense see generally Actions § 63.

[a] **Simeon E. Baldwin** is of opinion that a governmental license or franchise, within the jurisdiction where granted, will protect the owner of an airship which, while being managed with all due skill and care, accidentally and by some force which cannot be resisted falls and injures persons or property below. 4 Am. J. Int. L. 101 [dist Rylands v. Fletcher, L. R. 3 H. L. 330, 1 ECR 236, and crit Wing v. London Gen. Omnibus Co., 44 L. J. 460].

[b] **Mr. Woolsey suggests** that, following the decision of the English court of appeal in Wing v. London Gen. Omnibus Co., 44 L. J. 460, the case of the skidding motor bus, an aviator would not be responsible for any damage he might cause accidentally while navigating the air. 16 Va. L. Reg. 78.

5. Acts of necessity see generally Actions § 62; Torts [38 Cyc 525]; as justification for trespass see Trespass [38 Cyc 1066].

6. Jansen v. Schneider, 78 Misc. 48, 138 NYS 144 (where plaintiff, wanting to learn how to fly, made an agreement with defendant for instruction in aviation for which defendant was to be paid two hundred and fifty dollars. Plaintiff paid one hundred and fifty dollars in advance, the remaining one hundred dollars to be payable after plaintiff had received the lessons and was able to fly. Plaintiff was first sent to the shop to see the construction of the machine and learn how to assemble the parts. After that he repeatedly called for and requested further instruction, but received only one practical lesson in the biplane. His other demands were treated with indifference and disregard. This was followed by a suit for the return of his payment of one hundred and fifty dollars. It is held on appeal to the supreme court, appellate term, of New York, that the evidence warranted a finding that defendant had broken his contract).

7. Harrington v. Law, (R. I.) 90 A 660. See generally Contracts [9 Cyc 577].

[a] **For example,** where a contract for exhibition flights provided for an advance payment upon the arrival of the machine at the place of exhibition, but also provided that "if no flights are made" the advancement should be returned, such advancement cannot be recovered on the ground of failure of consideration, although the aviator, after his arrival, failed to make the number of flights provided for by the contract. Harrington v. Law, (R. I.) 90 A 660.

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nitrification.[1-84]

AEROLITE. A body falling through the atmosphere to the earth from outer space; a meteorite; a meteoric stone.[85]

ÆS DEBITOREM LEVE; GRAVIOREM INIMICUM FACIT.[86]

ÆSTHETIC. Pertaining to beauty, taste or the fine arts; artistic.[87]

ÆSTIMATIO CAPITIS. Literally "Value of the head." A fine paid for an offense committed against another according to his degree and quality by estimation of his head.[88]

ÆSTIMATIO PRÆTERITI DELICTI, EX POSTREMO FACTO, NUNQUAM CRESCIT.[89]

ÆTATE PROBANDA. Literally "Proving age." A writ that lay to inquire whether the king's tenant, holding in chief by chivalry, was of full age to receive his lands into his own hands.[90]

A FACTO AD JUS NON DATUR CONSEQUENTIA.[91]

AFFAIR or **AFFAIRS.** Business; something to be transacted; matter; concern.[92]

Public affairs are matters relating to government.[93]

Phrases in which the word has been used have received judicial interpretation: "Affairs of cities,"[94]

1-84. Cameron Septic Tank Co. v. Saratoga Springs, 159 Fed. 453, 455, 86 CCA 483. See also Anaërobes.

[a] **Decomposition or fermentation.**—Their action is often called decomposition or fermentation. Cameron Septic Tank Co. v. Saratoga Springs, 159 Fed. 453, 455, 86 CCA 483.

85. Century D.

[a] **Property in aërolites or meteorites.**—(1) In Goddard v. Winchell, 86 Iowa 71, 83, 85, 52 NW 1124, 41 AmSR 481, 17 LRA 788, it was held, where an aërolite weighing sixty-six pounds buried itself in the ground where it fell, to the depth of three feet, that it thereupon became the property of the owner of the soil rather than of one who discovered it the next day after its fall and dug it up out of the ground. The court said: "The subject of the dispute is an aerolite, of about sixty-six pounds' weight, that 'fell from the heavens' on the land of the plaintiff, and was found three feet below the surface. It came to its position in the earth through natural causes. It was one of nature's deposits, with nothing in its material composition to make it foreign or unnatural to the soil. It was not a movable thing 'on the earth.' It was in the earth, and in a very significant sense immovable; that is, it was only movable as parts of earth are made movable by the hand of man. Except for the peculiar manner in which it came, its relation to the soil would be beyond dispute. It was in its substance, as we understand, a stone. It was not of a character to be thought of as 'unclaimed by any owner,' and, because unclaimed, 'supposed to be abandoned by the last proprietor,' as should be the case under the rule invoked by the appellant. . . . No similar question has, to our knowledge, been determined in a court of last resort. In 15 A&EEnc (1st ed) 388, is the following language: 'An aerolite is the property of the owner of the fee upon which it falls. Hence a pedestrian on the highway, who is first to discover such a stone, is not the owner of it; the highway being a mere easement for travel.' It cites the case of Maas v. Amana Soc., 16 AlbLJ 76, and 13 Ir. L. T. 381, each of which periodicals contains an editorial notice of such a case having been decided in Illinois, but no reported case is to be found. Anderson L. D. states the same rule of law, with the same references, under the subject of 'Accretions.' In 20 AlbLJ 299, is a letter to the editor from a correspondent, calling attention to a case determined in France, where an aerolite found by a peasant was held not to be the property of the 'proprietor of the field,' but that of the finder." (2) In Oregon Iron Co. v. Hughes, 47 Or. 313, 81 P 572, 8 AnnCas 556, it was held that a meteorite, although not buried in the soil, was real estate and, in the absence of proof of severance, belonged to the owner of the soil on which it was found as against the finder. In this case the finder removed the meteorite and refused to surrender it, contending that it had been previously severed from the soil by Indians and afterward abandoned and that he was entitled thereto as the next finder. It was held, however, that such an inference of severance and abandonment was not justified by evidence of a tradition that Indians formerly worshiped the meteorite and treated it as a kind of magic or medicine rock, belonging to the medicine men of the tribe.

86. A maxim meaning "A slight debt makes a debtor; a large one an enemy." Morgan Leg. Max. [cit Tayler 4].

87. Standard D.

[a] **Use of word in instruction.**—In Mieghan v. Birmingham Terminal Co., 165 Ala. 591, 599, 51 S 775, the court said: "At the request of the defendant the court charged the jury in this language: 'No æsthetic or unreasonable desire of the plaintiff for convenience of way should be permitted by the jury to expand his right of access to an extent beyond that necessarily essential to a fairly convenient way.' This language was taken from the opinion in Jackson v. Birmingham Fdy., etc., Co., 154 Ala. 464, 45 S 660. Its use illustrates the fact that not every expression used arguendo by courts in the decision of causes is suited to the instruction of juries. The language here used, as an instruction to the jury, was open to verbal criticism in that it seems to speak of æsthetic convenience, whereas convenience is a matter of utility, while the æsthetic relates to the beautiful in its adaptation to the production of pleasurable sensation, with which latter the law of eminent domain has no concern. Certainly, when separated from its context in the case from which it is taken, it is a partial and unsatisfactory statement of the principles of that case, and we are unable to see that there was any occasion for its use in the case at hand."

88. Jacob L. D.

[a] **"Were" synonymous.**—(1) In Wise v. Teerpenning, 8 NYLegObs 153, 156, the court said: "The notion of compensation run through the whole criminal law of the Anglo-Saxons, who allowed a sum of money as a recompense for every kind of crime. Every man's life had its value, called a were or capitis estimatio. This was various, at various times. In the time of King Athelstan, a law was made to settle the were of every order of persons in the state. The king was rated at 30,000 thrymsae; prince or earl at 15,000; an earlderman at 8,000; a thane at 2,000; a common person at 267 thrymsae; the thrimsa (Saxon, thrim, three,) being a piece of money valued at three shillings, or according to some, the one third part of a shilling. When a person was killed, the slayer was to make compensation to the relations of the deceased, according to such valuations. In the case of the king, half the were went to his relations, and half to his people. If the deceased was a stranger, or had no relations, the were was divided; half to go to the king, and half to the most intimate companion of the deceased." (2) "Weregild" is the term employed in Wyatt v. Williams, 43 N. H. 102, 107.

89. A maxim meaning "The estimation [rating of the degree, or nature] of a past offense never increases from, i. e. is never influenced in the way of aggravation by, a subsequent fact or act." Adams Gloss.

90. Jacob L. D. (where it is said that the writ is now disused since wards and liveries are taken away by statute).

91. A maxim meaning "The inference from the fact to the law is not allowed." Halkerston Max. No. 3 [cit Adams Gloss.].

92. Morrison v. Bachert, 112 Pa. 322, 329, 5 A 739; Montgomery v. Com., 91 Pa. 125, 133.

[a] **Origin of word.**—In Morrison v. Bachert, 112 Pa. 322, 329, 5 A 739 [quot Territory v. Gutierres, 12 N. M. 254, 78 P 139] the court said: "The word 'affairs' is one of broad signification, and the convention used it understandingly. Mr. Buckalew, who was a prominent member of that body, thus refers to the subject in his very excellent work on the Constitution, at page 72: 'In the Pennsylvania provision the word "affairs" is the important one to be examined. It was obviously borrowed from the constitutions which were, in 1873, of most recent formation, in which it was made to supply the word "business," found in the earlier constitutions above mentioned. The substitution of a French for a Saxon word "affairs" for "business"—was probably made in consequence of judicial opinions which had assigned a somewhat restricted effect to the word business, as found in the earlier constitutions, and was intended to give to the prohibition upon local legislation a more extended application.'"

[b] **Use of word in will.**—In construing the introductory clause of a will reading, "whereas, owing to the uncertainty of life, it is always best to have our affairs in proper condition, I now proceed to write my will," the court said: "The word 'affairs' in this connection seems to me to refer to the condition and management of property, and not to have the force of property itself. I find in its use here no indication of an intention to dispose of all his property, including land." Bragaw v. Bolles, 51 N. J. Eq. 84, 91, 25 A 947.

93. Montgomery v. Com., 91 Pa. 125, 133.

94. Sample v. Pittsburg, 212 Pa. 533, 542, 62 A 201 (holding that an act providing that where two cities are contiguous in the same county the smaller may be annexed to the larger is an act regulating the "affairs of cities" and within a constitutional inhibition against local acts of such character).

[a] **An act regulating the licensing of undertakers** is not a special act regulating the affairs of cities within the constitution. Com. v. Hanley, 15 Pa. Super. 271.

[b] **The Liquor Tax Law** is not a law relating to the property, affairs, or government of cities, within the meaning of this clause of the constitution classifying cities. Peo. v. Murray, 149 N. Y. 367, 381, 44 NE 146, 32 LRA 344.

[c] **Abolition of commissioners of**

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"county affairs,"[95] "municipal affairs,"[96] "prudential affairs,"[97] "affairs of a railroad,"[98] "affairs of school districts,"[99] and "township affairs."[1]

AFFECT. A term meaning to have an effect upon;[2] to influence;[3] to act upon;[4] to act upon, to produce an effect or change upon;[5] to produce an effect upon;[6] to operate or act on, or concern;[7] to

buildings.—Under the constitutional inhibition against local acts it has also been held that an act of assembly regulated "the affairs of the city," which abolished the commissioners of public buildings and placed all public buildings theretofore under their control in the control of one of the departments of the city government. Sample v. Pittsburg, 212 Pa. 533, 542, 62 A 201; Perkins v. Philadelphia, 156 Pa. 554, 27 A 356.

95. Hankins v. New York, 64 N. Y. 18, 22 (where in construing a statute providing for the designation of newspapers in which to publish the proceedings of the board of supervisors and all proceedings and notices relating to county affairs the court said: "'County affairs' are those relating to the county in its organic and corporate capacity, and included within its governmental or corporate powers").

[a] **Constitutional prohibition against special legislation.**—(1) In Morrison v. Bachert, 112 Pa. 322, 329, 5 A 739, it was held that the words in the constitution prohibiting the passage of any local or special law relating to the "affairs of counties" meant such affairs as affected the people of the county and that therefore a local act which regulated the fees of a county officer, which were paid by the people of the county, was within the prohibition. (2) In Com. v. Patton, 88 Pa. 258, and Scowden's App., 96 Pa. 422, it was held that an act authorizing the holding of special sessions of courts of certain counties was unconstitutional within this clause. (3) And in Frost v. Cherry, 122 Pa. 417, 15 A 782, it was held that an act for the repeal of a section of the Fence Law, to be effective in a county upon the vote of the people, was a special act within the prohibition. (4) So too in Montgomery v. Com., 91 Pa. 125, it was held that an act directing the school directors of a township to levy a tax to reimburse parties money advanced to pay commutation money for drafted men was within the constitutional prohibition. (5) An act authorizing an owner of real estate to appeal from a tax assessment is in conflict with the constitutional provision. Scranton v. Silkman, 113 Pa. 191, 6 A 146 [rev 1 Pa. Co. 329]. (6) An act creating a new county and authorizing an election for county officers is a special law regulating county affairs and within the constitutional provision. Territory v. Gutierrez, 12 N. M. 254, 78 P 139.

96. Fragley v. Phelan, 126 Cal. 383, 387, 58 P 923 (where a constitution that cities and towns should be controlled by general laws, "except as to municipal affairs," was held to refer to the internal business affairs of the municipality, and that the election of a board of freeholders to frame a charter, and the election at which the vote was had to confirm the charter, were not municipal affairs within the meaning of the constitution).

[a] **License tax.**—"A provision in a charter authorizing a municipality to impose and collect a license-tax for purposes of municipal revenue is a 'municipal affair,' and within the proper scope of a municipal charter." Ex p. Jackson, 143 Cal. 564, 572, 77 P 457. To same effect Ex p. Helm, 143 Cal. 553, 77 P 453; Ex p. Lemon, 143 Cal. 558, 77 P 455, 65 LRA 946; Ex p. Braun, 141 Cal. 204, 74 P 780.

97. State v. Boardman, 93 Me. 73, 77, 44 A 118, 46 LRA 750 (where in construing a provision in the statute the court said: "The words 'prudential affairs' are certainly very indefinite and unsatisfactory, and it might be a very difficult matter in many cases to determine just what is or is not included within the meaning of the expression." In this case it was held that a by-law of a town setting apart a certain portion of a street over which vehicles containing heavy loads must travel was valid).

In construing a similar statute it was held that the selectmen of the town were authorized to have necessary repairs made on a town clock. The court, in giving the meaning of prudential affairs, said: "Perhaps no better approximation to an exact description can be made, than to say that it embraces that large class of miscellaneous subjects affecting the accommodation and convenience of the inhabitants, which have been placed under the municipal jurisdiction of towns, by statute or by usage." Willard v. Newburyport, 12 Pick. (Mass.) 227, 231. In Spaulding v. Lowell, 23 Pick. (Mass.) 71, 79, the court said: "In looking to usage and custom as the means of ascertaining what subject of common interest is embraced under the term 'prudentials,' the Court are of opinion, that the erecting of a market-place, in the large towns and populous villages, is embraced."

[a] **Power of selectmen in.**—(1) Under a statute providing in effect that selectmen shall have the ordering and managing of all the prudential affairs of their respective towns, it was held that the act of one of the selectmen in paying the debt of the town was properly a prudential affair. The court said: "Pecuniary matters, as well as other subjects of internal police, may well be embraced under a strict definition of the word 'prudential.'" Sanborn v. Deerfield, 2 N. H. 251, 252. (2) In Rich v. Errol, 51 N. H. 350, it was held that under this statute selectmen have not authority ex officio, without a vote of a town, to borrow money upon the credit of the town. (3) But in Pike v. Middleton, 12 N. H. 278, it was held that selectmen might, under this power, bind the town to indemnify a collector of taxes for expenses incurred in defending suits brought against him for acts done in the performance of his duties.

98. Tompkins v. Little Rock, etc., R. Co., 15 Fed. 6, 13 (where in construing a statute providing that when a railroad company has paid the debt the state treasurer shall withdraw a receiver from the management of its affairs the court said: "'Affairs' is a word of large import, and a receiver having the management of the affairs of a railroad company must necessarily have the control and management of its road").

99. Sugar Notch Div., 7 Pa. Super. 4, 14 (holding that an act providing for the valuation and division of school property is a special act regulating the affairs of school districts within the constitutional provision against special acts regulating affairs of school districts).

1. Pettibone v. West Chicago Park Comrs., 215 Ill. 304, 338, 74 NE 387 (holding that an act providing for a bond issue for the purchase of small parks is a special act for the regulation of township affairs within a constitutional provision against such acts).

[a] **But an act providing for the election of constables** is not a special act regulating the affairs of wards or townships within a like constitutional inhibition. Reading's Constables, 8 Pa. Co. 101, 104.

2. Bouvier L. D.

[a] **Enlarge or diminish.**—The phrase "shall not affect" in Bankr. Act (1898) § 6, which provides that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws," etc., means shall not enlarge or diminish. Richardson v. Woodward, 104 Fed. 873, 874 44 CCA 235.

3. Sacramento Terminal Co. v. McDougall, 19 Cal. A. 562, 565, 126 P 503.

[a] **"Affect pending litigation."**—"Appellant's construction of the word 'affect,' as pointed out by respondent, would attribute to it the meaning, 'to lay down the law for' or 'to establish rules applicable to.' Hence, the clause is interpreted as though it meant: 'Nothing in this section shall be construed as laying down the law for or establishing rules applicable to pending litigation.' But we must assume that the word was used in its ordinary signification: 'to influence'; 'to produce an effect upon'; 'to act upon.' But it is obvious that in this sense of the term the section would 'affect' pending litigation if it operated to change the law of damages in force at the time said amendment went into effect. It is equally clear that the new section would not affect 'pending' litigation if the old law is applied to such litigation. It is apparent, in this connection, that the amended section would affect pending litigation whether it simply repealed the existing law in relation thereto or provided another law for the control of such litigation." Sacramento Terminal Co. v. McDougall, 19 Cal. A. 562, 565, 126 P 503.

4. Sacramento Terminal Co. v. McDougall, 19 Cal. A. 562, 565, 126 P 503.

5. **Clark v. Riddle**, 101 Iowa 270, 279; **Holland v. Dickerson**, 41 Iowa 367, 373; **Canniff v. New York**, 4 E. D. Smith (N. Y.) 436, 439 (where a statute provided that nothing therein contained should be so construed as to affect any appointments made under prior acts, and the court after giving the definition above set forth, said: "The application of this meaning to the word would show the construction to be, that the act should not produce any change in or act upon the appointments theretofore made, or should not apply to them, leaving it to be decided whether such appointments were valid or not; and if valid, not to interfere with the incumbents"); In re Davis, 32 Okl. 209, 220, 122 P 547.

[a] **Affect interests in lands.**—In construing a statute providing that agreements for sale duly acknowledged by the wife "shall be good and effectual to convey or affect the lands, tenements or hereditaments, or other property, or her interest therein, thereby intended to be conveyed or affected" the court said: "Now, a familiar way to 'affect' the interest of a person in land is to contract to convey it, and the only mode in which such a contract can be made 'good and effectual' is to compel its specific performance by a decree of this court." Goldstein v. Curtis, 63 N. J. Eq. 454, 461, 52 A 218 [aff 65 N. J. Eq. 382, 59 A 639].

6. Sacramento Terminal Co. v. McDougall, 19 Cal. A. 562, 565, 126 P 503.

7. Home Bldg., etc., Assoc. v. Nolan, 21 Mont. 205, 211, 53 P 738 (holding this to be the meaning of the word in the proviso of a statute reading "except as to taxation, this section shall not affect any corporation organized," etc.).

[a] **Ordinary signification.**—In construing a statute providing that if a suit in chancery may affect real estate it must be brought in the county where the property is situated the court said: "The meaning of the word 'affect,' as used in the statute, is to act upon, which indeed is its ordinary signification." Munger v.

vary;[8] to promote.[9] The word is sometimes used in the sense of acting injuriously upon persons and things.[10]

Affected, in the past tense, signifies acted upon; influenced; particularly, influenced injuriously; impaired;[11] acted upon;[12] moved or changed.[13] Phrases in which the word has been used have received judicial interpretation, such as "affected with a public interest,"[14] "parties affected,"[15] "substantial right" affected.[16]

Affecting. Phrases in which the word has been used have received judicial interpretation, such as "affecting ambassadors,"[17] "affecting the character,"[18] "affecting the judgment,"[19] "affecting persons,"[20] "affecting public right,"[21] "affecting a substantial right,"[22] "affecting the title to real property or an interest therein."[23]

Crowe, 219 Ill. 12, 15, 76 NE 50 [aff 115 Ill. A. 189]; Enos v. Hunter, 9 Ill. 211.

8. In Davis v. Symonds, 1 Cox Ch. 402, 407, 29 Reprint 1221, the court said: "When it is said that parol evidence shall not affect written instruments, the vice of the argument turns upon the use of the word 'affect,' for if it means to 'vary it,' it is true, and if it is to be carried beyond that meaning, it is not true; there is nothing so clear as the jurisdiction of the court to affect a written instrument by parol testimony."

9. Westbury v. Simmons, 57 S. C. 467, 470, 35 SE 764 (holding that "affect," as used in a statute providing that no person who, previously to his examination, had an interest in the subject matter in litigation, however it may have been transferred to a party to the action, shall be examined as to communication between the witness and a person deceased against a person defending as assignee, when such interest may be "affected" by the judgment, means to promote).

10. Ryan v. Carter, 93 U. S. 78, 84, 23 L. ed. 807; Baird v. St. Louis Hospital Assoc., 116 Mo. 419, 427, 22 SW 726; Tyler v. Wells, 2 Mo. A. 526, 538; In re Davis, 32 Okl. 209, 220, 122 P 547.

[a] **Affect adversely.**—"'Adverse parties upon whom notice of appeal must be served are such parties as a reversal of judgment would affect.' (Titiman v. Alamance Min. Co., 9 Ida. 240, 74 P 529; Aulbach v. Dahler, 4 Ida. 522, 43 P 192.) The words 'would affect,' as used in these two decisions, mean 'adversely affect.'" Nelson Bennett Co. v. Twin Falls Land, etc., Co., 13 Ida. 767, 771, 92 P 980, 13 AnnCas 172.

[b] **Act tending to affect the public.**—In Ex p. Quarg, 149 Cal. 79, 81, 84 P 766, 117 AmSR 115, 5 LRANS 183 [quot Peo. v. Steele, 231 Ill. 340, 350, 83 NE 236, 121 AmSR 321], the court said: "The police power is broad in its scope, but it is subject to the just limitation that it extends only to such measures as are reasonable in their application and which tend in some appreciable degree to promote, protect, or preserve the public health, morals, or safety, or the general welfare. The prohibition of an act which the court can clearly see has no tendency to affect, injure, or endanger the public in any of these particulars, and which is entirely innocent in character, is an act beyond the pale of this limitation, and it is therefore not a legitimate exercise of police power."

11. Century D.

[a] **Property affected.**—(1) In construing the constitution providing in effect that the general assembly may assess property for local improvements upon the consent of the majority in value of the property holders owning property adjoining the locality to be affected the court said: "Property adjoining the locality to be affected is any property adjoining or near the improvement which is physically affected, or the value of which is commercially affected, directly by the improvement, to a degree in excess of the effect upon the property in the city generally." Little Rock v. Katzenstein, 52 Ark. 107, 112, 12 SW 198. (2) In construing a city charter providing that when a grade has already been established and is afterward changed all costs, damages, and charges arising therefrom shall be paid by the city to the owner whose lots are affected the court said: "The word 'affected' has reference to the phrase 'costs and charges' previously mentioned. The property is 'affected' when it is burdened with the expense of grading the street." Stowell v. Milwaukee, 31 Wis. 523, 526. (3) In Northern Pac. R. Co. v. Douglas County, 145 Wis. 288, 293, 130 NW 246, the court said: "Note the language 'any parcel of land . . . affected by said improvement.' That does not mean any parcel of land upon which the board of public works may, whether acting within or without jurisdiction, choose to impose a burden; but any parcel in fact 'affected by said improvement,' in that, barring errors, it might be charged, not parcels which could not, under any circumstances, be burdened on account of the improvement. Otherwise the board in imposing such charges could include parcels of real estate on other streets or in a distant part of the city, or even outside the city, and the owners would have to resort for redress to the special remedy. Such a construction of the statute would be outside its letter and spirit and lead to absurd results."

[b] **Real estate affected.**—A suit for the specific performance of a contract for the sale of land is a suit concerning real estate whereby the same may be affected under the code. Ensworth v. Holly, 33 Mo. 370.

[c] **Affected by judgment.**—A judgment entered upon a warrant of attorney given by a beneficed clergyman to secure payment of an annuity need not be registered, under 8 Geo. II c 6, for, although it may be enforced by sequestration, yet the benefice is not affected by the judgment. Cottle v. Warrington, 5 B. & Ad. 447, 453, 27 ECL 191, 110 Reprint 855.

12. Lyons v. Elston, 211 Mass. 478, 481, 98 NE 93.

13. Lyons v. Elston, 211 Mass. 478, 481, 98 NE 93.

14. Western Turf Assoc. v. Greenberg, 204 U. S. 359, 364, 27 SCt 384, 51 L. ed. 520 [quot Peo. v. Steele, 231 Ill. 340, 350, 83 NE 236, 121 AmSR 321, 14 LRANS 361] (where the court said: "The race-course in question being held out as a place of public entertainment and amusement is, by the act of the defendant, so far affected with a public interest that the State may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public, and recognize its own tickets of admission in the hands of persons entitled to claim the benefits of the statute").

[a] **A business is "affected with a public interest"** where the one engaged in it is acting under a franchise or has a virtual monopoly in it, or where from the nature of the business the one carrying it on is necessarily intrusted with the property or money of his customers, or where the business has been conducted in such manner that the public has adapted their business to the methods used; but "the fact that a license is required does not make the business a public employment." Peo. v. Steele, 231 Ill. 340, 347, 83 NE 236, 121 AmSR 321, 14 LRANS 361.

15. Parker v. McIlwain, 17 Ont. Pr. 84, 85.

[a] **Mortgagees** who had served notice upon tenants of the mortgagor, in occupation of the mortgaged premises, to pay the rents to them, and to whom such tenants had attorned, were, within the meaning of Rule No. 536, "parties affected" by ex parte orders obtained by a judgment creditor of the mortgagor attaching such rents as debts. Parker v. McIlwain, 17 Ont. Pr. 84, 85.

16. Oatman v. Bond, 15 Wis. 20, 23. See Appeal and Error [2 Cyc 586].

17. U. S. v. Ortega, 11 Wheat. (U. S.) 467, 468, 6 L. ed. 521 (holding that an indictment under an act of congress for infracting the law of nations by offering violence to the person of a foreign minister is not a case "affecting ambassadors, other public ministers, and consuls," within the meaning of that clause of Fed. Const. art 3 § 2 giving the supreme court original jurisdiction).

18. Weeks v. Mays, 87 Tenn. 442, 444, 10 SW 771, 3 LRA 212 (holding that an action for breach of promise of marriage is one "affecting the character" of plaintiff, within the meaning of a statute providing that such actions shall abate upon the death of either party).

19. Blakely v. Frazier, 11 S. C. 122, 135 (where the court said: "Whatever can be regarded as affecting the necessary means of obtaining a judgment, must be regarded as affecting the judgment itself").

20. U. S. v. Rhodes, 27 F. Cas. No. 16,151, 1 Abb. 28 (holding that a prosecution for burglary is a "cause affecting" the owner of the building entered, within the meaning of the Civil Rights Bill § 3, giving the federal courts jurisdiction of all causes affecting persons who cannot enforce in the courts of the state any of the rights secured to them by the first section).

21. State v. Mason City, etc., R. Co., 85 Iowa 516, 518, 52 NW 490.

[a] **An order by railroad commissioners** for the construction of a private crossing across a railroad track is a matter affecting public right within the meaning of the statute authorizing the court to enforce such matters. State v. Chicago, etc., R. Co., 86 Iowa 304, 310, 53 NW 253; State v. Mason City, etc., R. Co., 85 Iowa 516, 518, 52 NW 490.

22. Wilt v. Neenah Cold Storage Co., 130 Wis. 398, 401, 110 NW 177 (holding that an order for a compulsory reference is one affecting a substantial right).

[a] **Disregard of errors.**—Within a statute providing that the court may disregard errors not affecting a substantial right, it was held that affecting a substantial right related only to the subject matters of litigation, and not to the mere matters of practice. The matter of having a summons properly attested is not therefore within the statute. Rahn v. Gunnison, 12 Wis. 528.

23. Warren v. Wilder, 23 N. Y. St. 108, 111 (holding that an action brought to set aside a deed and to compel a conveyance is an action "affecting the title to real property or an interest therein").

[a] **Not every action which relates to real property** or in some way affects it is an action "affecting the title to real property or an interest therein," as, for instance, actions for an injury to the property, or to foreclose a lien thereon, although affecting the property do not affect the title thereto. Nichols v. Voorhis, 74 N. Y. 28, 29. In this case an action to declare void an assessment on real property was held not an action "af-

AFFECTION. A settled good will, love, or zealous attachment;[24] a disease or the condition of being diseased; a morbid or abnormal state of body or mind.[25] In another sense, the making over, pawning, or mortgaging of a thing to assure the payment of a sum of money or the discharge of some other duty or service.[26] (Cross references.[27])

AFFECTUS PUNITUR LICET NON SEQUATUR EFFECTUS.[28]

AFFECTUS TUUS NOMEN IMPONIT OPERI TUO.[29]

AFFIANCED WIFE.[30] A person under engagement of marriage.[31]

AFFIANT.[32] One who makes an affidavit.[33]

AFFIDAVIT. See Affidavits post p. 314.

fecting the title to real property or an interest therein" within the meaning of the statute authorizing appeals in such actions.

[b] **Within the recording statutes.**—(1) A deed of release is a deed affecting title to real estate within the statute providing for the recording of such deeds. Delta County Land, etc., Co. v. Talcott, 17 Colo. A. 316, 68 P 985. (2) In McBee v. O'Connell, 16 N. M. 469, 472, 120 P 734, the court said: "It is contended for the appellants that the executory contract on which the plaintiff's claim is based, is not an instrument entitled to record under Section 3953, C. L. 1897, as a 'writing affecting the title to real estate.' Strictly speaking, such a contract does not affect the title to real estate in the sense that it affects a present change in it, and it has sometimes been held that such instruments were not entitled to record unless under express statutory provision. 24 A&EEnc 80. But, while the language of Section 3953, supra, is, as above stated, 'affecting the title to real estate,' yet, further on in the section the words, 'the real estate affected,' are used, and like expressions are found in other sections dealing with the subject. . . . It seems probable therefore that the legislative intention was not to distinguish between 'real estate' and the 'title to real estate,' which are, in fact, quite different things, but to use the expression interchangeably, and give to the latter the broader meaning, which, perhaps, properly attaches to the former only, and thus to include the class of writings to which the contract in question belongs."

[c] **In England.**—(1) Under a statute allowing service of process outside of the jurisdiction in actions affecting land, etc., it has been held that slander of title is not within the statute. Casey v. Arnott, 2 C. P. D. 24. (2) Nor is an action for nonpayment of rent under a lease of land in England against defendants domiciled in Scotland. Agnew v. Usher, 14 Q. B. D. 78.

24. Century D.

[a] **May be expressed by acts or words.**—When expressed by words the force of the expression may depend less upon the words used than upon the connection in which they were used or the manner in which they were uttered. Spencer's App., 77 Conn. 638, 60 A 289.

25. Century D.

[a] **Does not include every accidental disorder or ailment** which lasts only for a brief period and is unattended by substantial injury or inconvenience or prolonged suffering. Metropolitan L. Ins. Co. v. Rutherford, 95 Va. 773, 782, 30 SE 383.

[b] **Affection of liver.**—An applicant for a policy of life insurance was asked if he had ever had "affection of liver," and answered "No." It was held that the answer was a fair one within the meaning of the policy. The court, per Harlan, J., said: "It is difficult to define precisely what was meant by 'affection of liver,' as a disease, and the difficulty is not removed by the evidence of the only physician who testified upon the subject. While he would ordinarily understand affection of the liver to mean some chronic disease of that organ, yet it is not, he says, strictly a medical term, but a general expression, which, by itself, may include acute as well as chronic disease of the liver. . . . It was not contemplated that the insured could recall, with such distinctness as to be able to answer categorically, every instance during his past life, or even during his manhood, of accidental disorder or ailment affecting the liver, which lasted only for a brief period, and was unattended by substantial injury, or inconvenience, or prolonged suffering. Unless he had an affection of the liver that amounted to disease, that is, of a character so well-defined and marked as to materially derange for a time the functions of that organ, the answer that he had never had the disease called affection of the liver was a 'fair and true' one." Connecticut Mut. L. Ins. Co. v. Union Trust Co., 112 U. S. 250, 257, 5 SCt 119, 28 L. ed. 708 [quot Metropolitan L. Ins. Co. v. Rutherford, 95 Va. 773, 782, 30 SE 383].

26. Bouvier L. D.

27. Affection:

Alienation of see Husband and Wife [21 Cyc 1617].

As consideration for:

Contract see Contracts [9 Cyc 309, 319].

Deed see Deeds [13 Cyc 529].

Fraudulent conveyance see Fraudulent Conveyances [20 Cyc 490].

Gift of:

Bond see Bonds [5 Cyc 742].

Note see Bills and Notes [7 Cyc 728].

Natural love and affection see Contracts [9 Cyc 319]; Deeds [13 Cyc 529].

28. A maxim meaning "The intention is punished, although the consequence does not follow." Wharton L. Lex.

[a] **Applied in:** Poulterers' Case, 9 Coke 55b, 57a, 77 Reprint 813.

29. A maxim meaning "Your intention fixes a character upon your service." Woodyer v. Hadden, 5 Taunt. 125, 140, 1 ECL 74, 128 Reprint 634 (where it was held that there was insufficient evidence of an intention on the part of an owner of land to show a dedication of it as a public highway).

30. See Breach of Marriage Promise [5 Cyc 997].

31. Alexander v. Parker, 144 Ill. 355, 366, 33 NE 183, 19 LRA 187 (where it was held that under the circumstances an affianced wife designated in the certificate of a benevolent society as the beneficiary of a member was not a "dependent" within the statute or the laws of the association).

32. See Affidavits post p 314; Oaths and Affirmations [29 Cyc 1143]; Witnesses [40 Cyc 2133].

33. Century D.

[a] **Witness compared and distinguished.**—"The word witness is a most general term, including all persons, from whose lips testimony is extracted to be used in any judicial proceeding. It embraces deponents, as the term is used with us, and affiants equally with persons delivering oral testimony before a jury. The affiant, or deponent, is always a witness, but a witness is not necessarily an affiant or deponent." Per Appleton, J., in Bliss v. Shuman, 47 Me. 248, 252.

[b] **"Deponent" distinguished.**—In strictness "affiant" is the author or subscriber of an affidavit; "deponent," of a deposition. Abbott L. D.

[c] **"Claimant" used instead of "affiant."**—(1) Under Code Civ. Proc. § 1494, requiring the affiant to state that there are no offsets to the knowledge of affiant, where the affidavit is made by the claimant the use of the word "claimant" instead of "affiant" will not render the affidavit insufficient. Davis v. Browning, 91 Cal. 603, 605, 27 P 937. See also Warren v. McGill, 103 Cal. 153, 37 P 144. (2) But where the affidavit is made by the agent of the claimant, and recites that there are no offsets to the knowledge of the "claimant" instead of to the knowledge of the "affiant," it is insufficient. Perkins v. Onyett, 86 Cal. 348, 350, 24 P 1024.

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AFFIDAVITS

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[Matters not in this Title, treated elsewhere in this Work, see Cross References infra page 317].

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I. DEFINITION AND GENERAL NATURE

[§ 1] **A. Definition.** An affidavit is a declaration in writing sworn to or affirmed by the party making it before some person who has authority to administer an oath.[1]

Statutory definition. In several jurisdictions an affidavit has been defined by statute as "a written declaration under oath, made without notice to the adverse party."[2]

1. U. S.—Mitchell v. National Surety Co., 206 Fed. 807, 810 [quot Cyc]; Crenshaw v. Miller, 111 Fed. 450, 451.
Ala.—Wright v. Smith, 66 Ala. 545, 546; Watts v. Womack, 44 Ala. 605, 607.
Ark.—Gill v. Ward, 23 Ark. 16, 17.
Ga.—Miller v. Caraker, 9 Ga. A. 255, 256, 71 SE 9.
Ill.—Hertig v. Peo., 159 Ill. 237, 240, 42 NE 879, 50 AmSR 162; Hays v. Loomis, 84 Ill. 18, 19; Harris v. Lester, 80 Ill. 307, 311.
Ind.—Woods v. State, 134 Ind. 35, 42, 33 NE 901; Williams v. Stevenson, 103 Ind. 243, 248, 2 NE 728.
Ky.—Bishop v. McQuerry, 13 Bush 417, 418.
Mich.—Peo. v. Burns, 161 Mich. 169, 175, 125 NW 740; Smart v. Howe, 3 Mich. 590, 593; Knapp v. Duclo, 1 Mich. N. P. 189.
Miss.—Brooks v. Snead, 50 Miss. 416, 418.
Mo.—Hargadine v. Van Horn, 72 Mo. 370, 371; Barhydt v. Alexander, 59 Mo. A. 188, 192; Sedalia Third Nat. Bank v. Garton, 40 Mo. A. 113, 120; Norman v. Horn, 36 Mo. A. 419, 424.
Mont.—Davidson v. Bordeaux, 15 Mont. 245, 251, 38 P 1075.
Nebr.—Bantley v. Finney, 43 Nebr. 794, 801, 62 NW 213.
N. J.—Hitsman v. Garrard, 16 N. J. L. 124, 125; Partridge v. Mechanics' Nat. Bank, 77 N. J. Eq. 208, 211, 77 A 410 [aff 78 N. J. Eq. 297, 81 A 1134].
N. Y.—Peo. v. Sutherland, 81 N. Y. 1, 6.
N. C.—Alford v. McCormac, 90 N. C. 151, 152.
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S. C.—State v. Williams, 76 S. C. 135, 139, 56 SE 783; Marine Wharf, etc., Co. v. Parsons, 49 S. C. 136, 139, 26 SE 956; State v. Sullivan, 39 S. C. 400, 408, 17 SE 865.
Tenn.—Watt v. Carnes, 4 Heisk. 532, 534; Grove v. Campbell, 9 Yerg. 7, 10.
Tex.—Crist v. Parks, 19 Tex. 234, 235; Shelton v. Berry, 19 Tex. 154, 155, 70 AmD 326.
Va.—Hawkins v. Gibson, 1 Leigh (28 Va.) 476, 480.
Wash.—State v. Peterson, 29 Wash. 571, 576, 70 P 71.
Wyo.—Blyth, etc., Co. v. Swensen, 7 Wyo. 303, 307, 51 P 873.
[a] **Other definitions.**—"A voluntary ex parte statement formally reduced to writing, and sworn to or affirmed before some officer authorised by law to take it." 1 A&EEnc 909; 1 EncPl&Pr 309 [quot In re Shannahan, etc., Hardware Co., 21 Del. 138, 140, 58 A 1023; Cox v. Stern, 170 Ill. 442, 445, 48 NE 906, 62 AmSR 385; Lutz v. Kinney, 23 Nev. 279, 281, 46 P 257; Burns v. Judge, 12 LusLegReg (Pa.) 425, 426, and cit Holman v. State, 144 Ala. 95, 97, 39 S 646; Turner v. St. John, 8 N. D. 245, 260, 78 NW 340; Lawrey v. Sterling, 41 Or. 518, 525, 69 P 460]. Similar definitions see Peo. v. Burns, 161 Mich. 169, 175, 125 NW 740; State v. Headrick, 149 Mo. 396, 403, 51 SW 99; State v. Peterson, 29 Wash. 571, 576, 70 P 71 [cit Cyc]; 3 Blackstone Comm. 304 [quot Gill v. Ward, 23 Ark. 16, 17; Lutz v. Kinney, 23 Nev. 279, 282, 46 P 257; Anderson v. Cochran, 93 Tex. 583, 584, 57 SW 29; Shelton v. Berry, 19 Tex. 154, 155, 70 AmD 326; Morris v. State, 2 Tex. A. 502, 503]; Bouvier L. D. [quot In re Shannahan, etc., Hardware Co., 21 Del. 138, 140, 58 A 1023; Norton v. Hauge, 47 Minn. 405, 406, 50 NW 368; Metcalf v. Prescott, 10 Mont. 283, 293, 25 P 1037; Partridge v. Mechanics' Nat. Bank, 77 N. J. Eq. 208, 211, 77 A 410].
"An oath in writing, signed by the party deposing, sworn before, and attested, by him who has authority to administer the same." Bacon Abr. [cit In re Shannahan, etc., Hardware Co., 21 Del. 138, 140, 58 A 1023]. This definition was criticized in Soule v. Chase, 24 N. Y. Super. 222, 1 AbbPrNS 48.
"A sworn statement in writing." Webster D. [quot U. S. v. Glasener, 81 Fed. 566, 568; Wright v. Smith, 66 Ala. 545, 546; Crenshaw v. Taylor, 70 Iowa 386, 387, 30 NW 647; In re Heath, 40 Kan. 333, 335, 19 P 926; Sedalia Third Nat. Bank v. Garton, 40 Mo. A. 113, 120].
"A written statement sworn to." Per Woods, J., in State v. Williams, 76 S. C. 135, 139, 56 SE 783.
[b] **Affidavit includes oath.**—Under a statute requiring an oath it is sufficient if the matter be reduced to the form of an affidavit, signed and sworn to by the person making it, since the affidavit includes the oath. Edwards v. McKay, 73 Ill. 570; Burns v. Doyle, 28 Wis. 460.
[c] **Findings of fact and conclusions of law.**—In Boyd v. Anderson, 18 Nev. 348, 4 P 497, it was held that the findings of fact and the conclusions of law required to be found and filed by the court were not affidavits, within the statute permitting reference to be made, in an argument for a new trial, to the affidavits in the case.
[d] **Statement of constable not affidavit.**—An entry on the record that a constable "so answers on oath" is not an affidavit. Maines v. Black, 21 Pa. Co. 319.
[e] **A professional statement of an attorney,** on a motion to set aside a default, that, although he appeared in the cause and moved for a continuance, he had no authority to appear, is regarded as an affidavit. Rice v. Griffith, 9 Iowa 539.
2. Kan.—Hanna v. Barrett, 39 Kan. 446, 447, 18 P 497.
Ky.—Harbour-Pitt Shoe Co. v. Dixon, 60 SW 186, 188, 22 KyL 1169; Bishop v. McQuerry, 13 Bush 417, 418.
Mont.—In re Liter, 19 Mont. 474, 479, 48 P 753.
Nebr.—Lanning v. Haases, 89 Nebr. 19, 20, 130 NW 1008; Sebesta v. Supreme Ct. of Honor, 77 Nebr. 249, 251, 109 NW 166; Bantley v. Finney, 43 Nebr. 794, 801, 62 NW 213.
Oh.—Ward v. Ward, 20 Oh. Cir. Ct. 136, 138, 10 Oh. Cir. Dec. 658.
Or.—Lawrey v. Sterling, 41 Or. 518, 524, 69 P 460; State v. Finn, 32 Or. 519, 525, 52 P 756, 67 AmSR 550.
S. D.—Woods v. Pollard, 14 S. D. 44, 51, 84 NW 214; State v. Henning, 3 S. D. 492, 494, 54 NW 536.

[§ 2] **B. Distinctions—1. Distinguished from Depositions.** Although the terms "affidavit" and "deposition" are sometimes used synonymously,[3] and in some jurisdictions a deposition has been treated and used as an affidavit,[4] while in others an affidavit may be used as a deposition,[5] yet affidavits as a general rule are distinguished by being made ex parte,[6] voluntarily,[7] without notice to the party against whom they are to be used,[8] and without any opportunity for the cross-examination of the affiant by the adverse party.[9]

[§ 3] **2. Distinguished from Pleadings—a. In General.** In some jurisdictions it has been held that an affidavit is not a pleading,[10] although the mere fact that an affidavit is in the form of a pleading does not affect its validity.[11] In others, however, affidavits have been held to have the effect of particular pleadings.[12]

[§ 4] **b. Petition.** While it has been said that a distinction exists between an affidavit and a petition,[13] yet in several jurisdictions it has been held that a properly verified petition is equivalent to and can be used as an affidavit.[14]

[§ 5] **c. Complaint.** While a verified complaint

Wyo.—Cheyenne First Nat. Bank v. Swan, 3 Wyo. 356, 363, 23 P 743.

3. U. S.—Stimpson v. Brooks, 23 F. Cas. No. 13,454, 3 Blatchf. 456.

Kan.—Chubbuck v. Beaty, 80 Kan. 789, 104 P 558.

Minn.—State v. Richardson, 34 Minn. 115, 24 NW 354.

N. J.—Hershenstein v. Hahn, 77 N. J. L. 39, 71 A 106; State v. Dayton, 23 N. J. L. 49, 53 AmD 270.

N. Y.—Baker v. Williams, 12 Barb. 527.

[a] **"Deposition is a generic expression,** embracing all written evidence verified by oath, and thus includes affidavits; but, in legal language, a distinction is maintained, in Courts of law and Chancery, between depositions and affidavits. A deposition is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person; while an affidavit is the mere voluntary act of the party making the oath, and may be, and generally is, taken without the cognizance of the one against whom it is to be used. . . . The Supreme Court, in its rules, uses the terms 'affidavits' and 'depositions' as convertible expressions. (Rules 9, 13, 21, 32, at law). In its Equity Rules, it makes the distinction more precisely. (Rule 80)." Stimpson v. Brooks, 23 F. Cas. No. 13,454, 3 Blatchf. 456, 457.

[b] **Used synonymously in statute.**—"The term 'deposition,' it is true is sometimes used both in common parlance and in legislative enactments, as synonymous with 'affidavit' or 'oath.' It is thus defined by Webster. It is obviously so used by the legislature in the act to authorize the president of the Council of Proprietors in West Jersey to administer oaths and affirmations to witnesses in certain cases. Rev. St. 787, § 2." State v. Dayton, 23 N. J. L. 49, 54, 53 AmD 270.

4. Chubbuck v. Beaty, 80 Kan. 789, 104 P 558.

[a] **Compulsory affidavit.**—"In Iowa, and perhaps in other states, there is a statute providing a mode for obtaining affidavits in pending cases by issuing a subpœna for the witness, and, if he fails to make a full affidavit of the facts known to him, his deposition is taken ex parte and used as an affidavit. Dudley v. McCord, 65 Iowa 671, 22 NW 920." Crenshaw v. Miller, 111 Fed. 450, 451. And see infra § 151.

[b] **Defective deposition may be used as affidavit.**—Where the notice of the taking of a deposition was insufficient, it was held that such deposition might be treated and used as an affidavit, since it was a written declaration under oath, made without notice to the adverse party, and hence answered fully the statutory definition of an affidavit. Hanna v. Barrett, 39 Kan. 446, 18 P 497.

5. Darrell v. Com., 88 SW 1060, 28 KyL 27 (holding that in Kentucky the court may, in its discretion, after the first term, allow a defendant's affidavit to be used as the deposition of his absent witnesses, where otherwise the presence of the witness could not be promptly had). See generally Depositions [2 Cyc 4; 13 Cyc 833].

6. Crenshaw v. Miller, 111 Fed. 450; Hershenstein v. Hahn, 77 N. J. L. 39, 71 A 106.

7. Crenshaw v. Miller, 111 Fed. 450; Stimpson v. Brooks, 23 F. Cas. No. 13,454, 3 Blatchf. 456.

[a] **Affidavit a voluntary statement.**—"An affidavit is usually understood to be a voluntary statement." Crenshaw v. Miller, 111 Fed. 450.

8. U. S.—Crenshaw v. Miller, 111 Fed. 450; Stimpson v. Brooks, 23 F. Cas. No. 13,454, 3 Blatchf. 456.

Kan.—Atchison v. Bartholow, 4 Kan. 104.

Mont.—In re Liter, 19 Mont. 474, 48 P 753.

N. J.—Hershenstein v. Hahn, 77 N. J. L. 39, 71 A 105.

Oh.—Ward v. Ward, 20 Oh. Cir. Ct. 136, 10 Oh. Cir. Dec. 656.

Or.—State v. Woolridge, 45 Or. 389, 78 P 333.

S. D.—State v. Henning, 3 S. D. 492, 54 NW 536.

Wyo.—Cheyenne First Nat. Bank v. Swan, 3 Wyo. 356, 23 P 743.

[a] **Distinction marked by notice.**—One difference between a deposition and an affidavit is that in the case of a deposition a notice is given to the adverse party, and in the case of an affidavit no notice is given. Ward v. Ward, 20 Oh. Cir. Ct. 136, 10 Oh. Cir. Dec. 656; Cheyenne First Nat. Bank v. Swan, 3 Wyo. 356, 23 P 743.

9. Woods v. State, 134 Ind. 35, 33 NE 901; In re Liter, 19 Mont. 474, 48 P 753; Ward v. Ward, 20 Oh. Cir. Ct. 136, 10 Oh. Cir. Dec. 659.

An affidavit "is said to differ from a deposition in this, that in the latter the opposite party has an opportunity to cross-examine the witness, whereas an affidavit is always taken ex parte; and that by general practice affidavits are allowed to present evidence upon the hearing of a motion, although the motion may involve the merits of the action, but they are not allowable to present evidence on the trial of an issue raised by the pleadings." Per Walker, V. C., in Patridge v. Mechanics' Nat. Bank, 77 N. J. L. 208, 211, 77 A 410 [cit Bouvier, L. D.]

[a] **As defined in the code.**—The distinction between a deposition and an affidavit is simply for the purpose of preserving the right of cross-examination in taking depositions. In re Liter, 19 Mont. 474, 48 P 753.

[b] **Cross-examination lost to opposite party.**—"An affidavit is the written declaration of a party under oath taken without notice to the other party—without any opportunity to cross-examine—without any opportunity to the opposite party to be present, either in person or by counsel. The person whose affidavit is taken is thus given an opportunity to frame his statements in the most favorable language that he can choose without the great advantage to the other party which a cross examination gives in the case of a deposition." Ward v. Ward, 20 Oh. Cir. Ct. 136, 140, 10 Oh. Cir. Dec. 659.

10. Kellogg v. Sutherland, 38 Ind. 154; Johnson v. Laughlin, 7 Kan. 359; McLaughlin v. McCann, 123 App. Div. 67, 107 NYS 762; State v. Peterson, 29 Wash. 571, 70 P 71.

[a] **Cannot take place of pleading.**—An affidavit is not a pleading and cannot be made to take the place of a pleading required by law. For instance, an affidavit cannot be made to serve the purpose of a plea in abatement or in bar. Kellogg v. Sutherland, 38 Ind. 154; State v. Peterson, 29 Wash. 571, 70 P 71.

[b] **Pleading cannot be used as affidavit.**—It is the general rule that a verified pleading cannot be substituted for an affidavit that the law specially requires. State v. Peterson, 29 Wash. 571, 70 P 71.

11. State v. Peterson, 29 Wash. 571, 576, 70 P 71 (where Anders, J., said: "We think that a written declaration, properly sworn to and certified, may constitute an affidavit, if intended as such, even though it be in the form of an ordinary pleading. The venue is properly prefixed to this alleged affidavit, and the facts therein stated seem to have been sworn to before the proper officer, and it would, therefore, seem that the contention that no affidavit was filed is not available").

12. See infra §§ 4-6.

13. Lawrey v. Sterling, 41 Or. 518, 69 P 460.

14. Colo.—Golden Canal Co. v. Bright, 8 Colo. 144, 6 P 142.

Ga.—Loeb v. Smith, 78 Ga. 504, 3 SE 458.

Kan.—State v. Missouri, etc., Tel. Co., 77 Kan. 774, 95 P 391; Olmstead v. Koester, 14 Kan. 463; Atchison v. Bartholow, 4 Kan. 124.

Ky.—Franklin Sav. Inst. v. Wheeling M. M. Bank, 1 Metc. 156; Scott v. Doneghy, 17 B. Mon. 321.

N. Y.—Clark v. Herbert Booth King, etc., Pub. Co., 40 App. Div. 405, 57 NYS 975.

Or.—Lawrey v. Sterling, 41 Or. 518, 69 P 460.

Tex.—Whitemore v. Wilson, 1 Tex. Unrep. Cas. 213; Chancey v. Allison, 48 Tex. Civ. A. 441, 107 SW 605.

[a] **Verified petition used as affidavit.**—A statute provided that in order to obtain a mandamus a petition and affidavit must be filed. There was no requirement that any other or different matter be alleged in the affidavit from that stated in the petition. It was held that a petition properly verified was a compliance with the statute, and that no additional affidavit was required. Golden Canal Co. v. Bright, 8 Colo. 144, 6 P 142. See generally Mandamus [26 Cyc 431].

[b] **To obtain injunction.**—A properly verified petition may be used as an affidavit in support of an application to obtain an injunction. Atchison v. Bartholow, 4 Kan. 124. See generally Injunctions [22 Cyc 941].

[c] **Petition must contain necessary facts.**—It has been decided that if the petition contains a statement of all the facts which in some proceedings are required to be shown by the affidavit, and is sworn to, it should be regarded as supplying the place of a separate affidavit which, under such circumstances, may be dispensed with altogether. Franklin Sav. Inst. v. Wheeling M. M. Bank, 1 Metc. (Ky.) 156; Scott v. Doneghy, 17 B. Mon. (Ky.) 321.

[d] **In New York** under code § 3343, subd 11, "affidavit" includes a verified petition in a special proceeding. Clark v. Herbert Booth King, etc., Pub. Co., 40 App. Div. 405, 57 NYS 975.

[e] **In Texas** it has been held that

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has been used in place of an affidavit,[15] and an affidavit in the place of a complaint,[16] yet it has been held that the terms are not necessarily so convertible that where one is named in a statute the other may be used in its stead.[17]

[§ 6] **d. Answer.** In some cases the use of an answer as an affidavit has been denied,[18] but such use is generally permitted;[19] and it has also been held that an affidavit may have the effect of an answer.[20]

[§ 7] **3. Distinguished from Oath.** Little or no distinction seems to exist between the terms "oath" and "affidavit" as ordinarily used,[21] as the word "affidavit" imports that an oath has been taken.[22] Affidavits may, however, be distinguished by being written, while an oath may be either oral or written,[23] and by being required to show upon their face that they were taken with the requisite legal formalities.[24]

[§ 8] **4. Distinguished from Testimony.** An affidavit differs from oral testimony in that an affidavit is in writing, while oral testimony is delivered from the lips of the witness.[25] Another distinction is the lack of opportunity to cross-examine the maker of an affidavit which is usually present where a witness gives oral testimony.[26]

II. WHO MAY MAKE[27]

[§ 9] **A. In General.** An affidavit must of course be made by a person who has knowledge of the facts.[28] As a general rule also it must be made by one who is legally competent to testify

a petition in which the necessary facts were sworn to could be used as an affidavit to obtain an attachment. Whitemore v. Wilson, 1 Tex. Unrep. Cas. 213. See generally Attachment [4 Cyc 469].

15. Woods v. Pollard, 14 S. D. 44, 51, 84 NW 214 (where it was said: "A duly-verified complaint has been so long regarded in this state as an affidavit, within the meaning of the statute, for the purpose of showing that a cause of action exists, and used as a part of the proceedings in obtaining an order for the publication of the summons, that we would not be inclined to disturb the practice, even if there were some doubt as to the regularity of the proceeding").

16. McCrary v. Beaudry, 67 Cal. 120, 7 P 264 (holding that the affidavit in a mandamus proceeding may be treated as a complaint and still remain an affidavit to all intents and purposes). See generally Mandamus [26 Cyc 431].

17. State v. Richardson, 34 Minn. 115, 24 NW 354 (holding that under the extradition laws of congress the term "complaint" is not necessarily or presumptively equivalent to "affidavit").

18. Kellogg v. Sutherland, 88 Ind. 154; Gawtry v. Doane, 51 N. Y. 84; Blatchford v. New York, etc., R. Co., 7 AbbPr (N. Y.) 322.

[a] **Not synonymous in ordinary acceptation.**—"The word affidavit in [Code Proc. §] 226 can hardly be construed to mean answer. We find the words answer and affidavit throughout the Code, applied to different objects, and, certainly, in their ordinary acceptation, they are not synonymous. There are some words in the Code which the Legislature intended should have a signification different from that usually assigned them; these have been enumerated, and their arbitrary definition given. The word affidavit is not among the words to which the Legislature have attached a peculiar meaning, and I see nothing in the Code, nor am I aware of any decisions which would justify me in holding that an answer verified in conformity with the Code is an affidavit." Per Edwards, J., in Servoss v. Stannard, 2 CodeRep (N. Y.) 56.

19. Mont.—State v. Second Judicial Dist. Ct., 38 Mont. 415, 100 P 207.

N. Y.—Clark v. Herbert Booth King, etc., Pub. Co., 40 App. Div. 405, 57 NYS 975.

Oh.—Robinson v. Harrison, 9 Oh S&CP 701, 7 OhNP 273.

Va.—Davis v. Morris, 76 Va. 21; Corbin v. Mills, 19 Gratt. (60 Va.) 438.

Eng.—Wightman v. Wheelton, 23 Beav. 397, 53 Reprint 156.

[a] **Answer in injunction proceedings.**—An answer properly sworn to may be treated as an affidavit in an action to obtain an injunction to prevent the infringement of a trade-mark. Robinson v. Harrison, 9 OhS&CP 701, 7 OhNP 273. See generally Injunctions [22 Cyc 941].

[b] **English practice.**—Upon a motion for a decree the answer is to be treated as an affidavit, but if a cause is brought to a hearing in the ordinary way the answer is not an affidavit in favor of defendant, although such parts as plaintiff may think fit to use are evidence in his favor. Wightman v. Wheelton, 23 Beav. 397, 53 Reprint 156.

20. Davis v. Morris, 76 Va. 21, 34 (where Staples, J., said: "According to the settled doctrine of this court, when an account of the transactions of a fiduciary has been ordered upon a proper bill, if additional objections to the settled ex parte accounts are discovered in the progress of the cause, in order to save the expense and delay of an amended bill, the plaintiff is permitted to present the matter before the commissioner, with proper specifications, in writing, and the defendant is allowed to meet it by affidavit, which has the same weight as would be given to an answer in chancery"); Corbin v. Mills, 19 Gratt. (60 Va.) 438.

21. Ill.—Edwards v. McKay, 73 Ill. 570.

Kan.—In re Heath, 40 Kan. 333, 19 P 926.

Mont.—Davidson v. Bordeaux, 15 Mont. 245, 38 P 1075.

N. Y.—Baker v. Williams, 12 Barb. 527.

Pa.—Black v. Cochran, 21 Pa. Co. 326.

Wis.—Burns v. Doyle, 28 Wis. 460.

See generally Oaths and Affirmations [29 Cyc 1296].

[a] **Any form of oath.**—"In common parlance, the word [affidavit] is understood to mean any form of legal oath which may be taken. The words oath, deposition, testimony and affidavit, when used in reference to legal proceedings, convey to the unprofessional ear, the same meaning as do the verbs to swear, to make oath, to depose, to testify, and to make affidavit; and we know as well that each has its own distinctive legal technical meaning." Baker v. Williams, 12 Barb. (N. Y.) 527, 530.

[b] **Affidavit may be used where oath required.**—"The sworn statement would be good as an affidavit, hence the return is properly verified by oath, whether it be considered an oath or an affidavit. Where the statute requires an oath, we presume it would not be vitiated, because the matter should be reduced to the form of an affidavit, signed and sworn to by the officer. We presume none would be so technical as to question its validity. We see no force in the other objections to the return; we regard them so extremely technical as not to require discussion." Edwards v. McKay, 73 Ill. 570, 572.

[c] **Using oath for affidavit in court's order.**—Where a party arrested upon execution moved for his discharge, and the order refusing such discharge recited that the execution had been issued upon the oath of a certain person, instead of upon his affidavit, as the statute required, it was held that this did not vitiate the proceedings, it appearing that in fact the execution had been issued upon an affidavit. In re Heath, 40 Kan. 333, 19 P 926.

22. Burns v. Doyle, 28 Wis. 460, 462 (where it was said: "But it is said that the statute does not authorize the removal of a cause upon an affidavit, and that if it does, the affidavit must be in due form, containing everything essential to its validity, including a venue. This view of the question is founded upon the assumption that the oath and the affidavit are two separate and distinct things, which is not true. The affidavit includes the oath, and may show what facts the affiant swore to, and thus be available as an oath, although it may be entirely unavailable as an affidavit").

23. Black v. Cochran, 21 Pa. Co. 326 (holding that an affidavit signifies a written attestation to, or asseveration of, the truth, in contradistinction to an oath which is a mere oral attestation).

[a] **Making oath not equivalent to making affidavit.**—It has been held that, under a statute which required that an affidavit be made, the making of an oath was not sufficient. Bishop v. McQuerry, 13 Bush (Ky.) 417. And see infra § 50.

24. State v. Green, 15 N. J. L. 88, 90 (where it was said: "Affidavits are very different from official and promissory oaths, which are not at all in the nature of evidence—an affidavit when offered to be read in evidence, must appear on the face of it to be, what an affidavit ought to be, to entitle it to be read. It must appear to have been taken before the proper officer and in compliance with all legal requirements. The court cannot stop to inquire into the competency of the officer, or the place where it was taken").

25. Cheyenne First Nat. Bank v. Swan, 3 Wyo. 356, 23 P 743. See infra § 49.

26. Woods v. State, 134 Ind. 35, 33 NE 901. See also supra § 2.

27. [a] **The phrase "make affidavit"** has been held to mean the executing and filing of an affidavit. Black v. Cochran, 21 Pa. Co. 326.

28. Cheek v. James, 2 Heisk. (Tenn.) 170.

Necessity of showing knowledge or means of information on part of affiant see infra § 85.

[a] **An affidavit cannot be made by proxy;** the affiant must do his own swearing. Shecut v. Trubee, 99 Ga. 637, 26 SE 60.

[b] **Affidavit of one sworn to by another.**—Where the affidavit of a juror is sworn to be correct by another party it may be treated as the original affidavit of the latter. Wilson v. Berryman, 5 Cal. 44, 63 AmD 78.

[c] **Several persons may swear** to and sign the same statement of facts

under oath,[29] as a witness to the facts recited;[30] but for some purposes an affidavit may be made by one who is not competent to testify as a witness in the particular case.[31] In determining this question reference must always be had to the statutes and rules of court governing the particular affidavit. Thus, where a statute specifically points out who may make a certain affidavit, it can be made by no one other than those specified.[32]

[§ 10] **B. Parties—1. In General.** An affidavit may properly be made by the party for whose benefit it is to be used.[33]

[§ 11] **2. Joint Parties—a. In General.** It has been held that an affidavit is valid, although it purports to have been made and is signed by two or more persons.[34]

[§ 12] **b. One for Joint Benefit.** Where several parties are united in interest, an affidavit may be made by one to be used for the benefit of all.[35]

[§ 13] **C. Persons under Disability—1. In General.** One may be incompetent to make an affidavit by reason of disability either natural[36] or imposed by statute.[37]

[§ 14] **2. Infants, Insane Persons, and Married**

in a single affidavit. Tayler v. State, 48 Ala. 180.

[d] **Foreigner sworn through interpreter.**—Where, by the jurat to an affidavit of debt made by a foreigner, it was certified that the affidavit was interpreted by A, professor of languages, he having first sworn that he understood the English and French languages, to deponent who was afterward sworn to the truth thereof, it was held sufficient. Bosc v. Solliers, 4 B. & C. 358, 10 ECL 614, 107 Reprint 1093.

29. Peo. v. Robertson, 26 HowPr (N. Y.) 90 (holding that, under a statute providing that one convicted of felony should be incompetent to testify unless pardoned, one who has served out a sentence for forgery could not make an affidavit to his petition for a discharge under the insolvency laws).

[a] **Insane persons.**—Before the affidavit of an insane person can be received there must first be an inquiry into his mental capacity to make such affidavit. Spittle v. Walton, L. R. 11 Eq. 420. See generally Insane Persons [22 Cyc 1104 et seq].

[b] **Atheist.**—An affidavit cannot be collaterally attacked on the ground that affiant is an atheist. It would be unfair to exclude such affidavit without giving affiant an opportunity for reply or explanation. Leonard v. Manard, 1 N. Y. Super. 223.

[c] **Failure to object to competency.**—An affidavit tendered and received in evidence on the hearing of an application for an injunction, no objection being made on the ground of incompetency of witness and no motion being made to withdraw or rule out the affidavit, may be considered, whether witness was competent or not. Putney v. Kohler, 84 Ga. 528, 11 SE 127. See Witnesses [40 Cyc 2135].

30. Dodson v. State, 35 Tex. Cr. 571, 34 SW 754 (holding that, if the affiant, in an affidavit used as the foundation of a criminal prosecution, is not a competent witness and the affidavit shows that fact, such affidavit should be quashed; if the affidavit fails to show this it can be shown as a fact, and in that event the affidavit will not be good; but it is not an essential element in the information).

31. Ritter v. Stutts, 43 N. C. 240; —— v. Kimborough, 1 N. C. 25; Hall v. Cox, 1 N. C. 24 (all holding that, although a person be infamous, he is still competent to make an affidavit necessary to the furtherance of the cause in which he is engaged).

[a] **Parties who, by reason of interest,** (1) would have been incompetent witnesses have been allowed to make affidavits for some purposes; as on motions (U. S. v. Twenty-Eight Packages Pins, 28 F. Cas. No. 16,561, Gilp. 306); (2) and in proof of a lost paper (Tayloe v. Riggs, 1 Pet. (U. S.) 591, 7 L. ed. 275).

32. Cal.—Steinbach v. Leese, 27 Cal. 295.

Mo.—Hinkle v. Lovelace, 204 Mo. 208, 223, 102 SW 1015 [quot Cyc].

Nev.—State v. Washoe County, 5 Nev. 317.

N. Y.—Brown v. Walker, 8 NYS 59 [aff 121 N. Y. 717 mem, 24 NE 1101 mem].

Va.—Taylor v. Sutherlin-Meade Tobacco Co., 107 Va. 787, 790, 60 SE 132, 14 LRANS 1135 [quot Cyc]; Merriman Co. v. Thomas, 103 Va. 24, 28, 48 SE 490 [quot Cyc].

See also infra §§ 10–29.

[a] **Under a statute providing that on the redemption of land** sold under execution by the holder of a junior judgment the assignment must be verified by the affidavit of the redeeming creditor or by that of a subscribing witness to such assignment, an affidavit made by a person described as the agent of the redeeming creditor was insufficient. Ex p. Aldrich, 1 Den. (N. Y.) 662.

33. U. S.—Tayloe v. Riggs, 1 Pet. 591, 7 L. ed. 275; Erstein v. Rothschild, 22 Fed. 61; Norris v. Newton, 18 F. Cas. No. 10,307, 5 McLean 92; U. S. v. Twenty-Eight Packages Pins, 28 F. Cas. No. 16,561, Gilp. 306.

Ala.—Shield v. Dothard, 59 Ala. 595.

Cal.—Claiborne v. Castle, 98 Cal. 30, 32 P 807.

Ga.—Platt v. Southern Photo Material Co., 4 Ga. A. 159, 60 SE 1068.

Ky.—Com. v. Oldham, 1 Dana 466.

Mass.—Clement v. Bullens, 159 Mass. 193, 34 NE 173.

Mich.—Stever v. Brown, 119 Mich. 196, 77 NW 704; Wells v. Booth, 35 Mich. 424.

N. J.—Simpson v. Anderson, (Ch.) 70 A 696.

N. Y.—Waters v. Goldberg, 124 App. Div. 511, 108 NYS 992; Leonard v. Manard, 1 N. Y. Super. 223; Wilson v. Puritan Steamship Co., 58 Misc. 317, 110 NYS 914; Peo. v. Robertson, 26 HowPr 90; Miller v. Hooker, 2 HowPr 124; Morrison v. Watson, 23 NYWklyDig 286; Milliken v. Selye, 3 Den. 54; Ames v. Merriman, 9 Wend. 498.

Pa.—Hunter v. Reilly, 36 Pa. 509; Fraley v. Steinmetz, 22 Pa. 437; Philadelphia v. Devine, 1 WklyNC 358.

Tenn.—Cheek v. James, 2 Heisk. 170.

Tex.—Gray v. Steedman, 63 Tex. 95.

Va.—De Lacy v. Antoine, 7 Leigh (34 Va.) 438.

[a] **To facilitate cause.**—"Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, which facilitate the preparation for it, often depend on the oath of the party. An affidavit to the materiality of a witness, for the purpose of obtaining a continuance; or a commission to take his deposition, or an affidavit of his inability to attend; is usually made by the party, and received without objection. So, affidavits to support a motion for a new trial are often received." Tayloe v. Riggs, 1 Pet. (U. S.) 591, 596, 7 L. ed. 275.

[b] **Parties in interest not of record.**—An affidavit may be made by a party in interest, although not a party to the record. Miller v. Hooker, 2 HowPr (N. Y.) 124; Hunter v. Reilly, 36 Pa. 509; Fraley v. Steinmetz, 22 Pa. 437; Sleeper v. Dougherty, 2 Whart. (Pa.) 177.

34. Taylor v. State, 48 Ala. 180; State v. Plomondon, 75 Kan. 853, 90 P 254; State v. Dayton, 23 N. J. L. 49, 53 AmD 270; Reg. v. Atkinson, 17 U. C. C. P. 295.

[a] **Affidavits of several on one paper.**—In Taylor v. State, 48 Ala. 180, 189, the court said, per Peters, J.: "As many persons as choose to do so, may swear in the identical same words and verify their oaths by their signatures, and whether the oath is written on one or many pieces of paper, makes no difference."

[b] **On one or two papers.**—In State v. Dayton, 23 N. J. L. 49, 53 AmD 270, it was held that, under a statute requiring certain affidavits to be made and filed by the president and the cashier of a bank, whether the affidavits were made upon one or two papers was immaterial.

[c] **Affidavits of witnesses drawn up by counsel** and sworn to in the same words by different persons are suspicious and objectionable. Moore v. Ewing, 1 N. J. L. 144, 1 AmD 195.

[d] **Signing of wife's affidavit by husband.**—In Gates v. Buckland, 13 Wkly. Rep. 67, it was held that the affidavit of a married woman which was signed by the husband as well as the wife was receivable.

35. Claiborne v. Castle, 98 Cal. 30, 32 P 807; Clement v. Bullens, 159 Mass. 193, 34 NE 173; Waters v. Goldberg, 124 App. Div. 511, 108 NYS 992; Conolly v. Schroeder, 121 App. Div. 634, 106 NYS 303.

Affidavits made by and in behalf of a partnership see infra § 24.

[a] **One of two defendants.**—Under Code Civ. Proc. § 446, which prescribes that pleadings shall be verified by plaintiff or his attorney, it was held that it was sufficient if one of two codefendants alone made the affidavit. Claiborne v. Castle, 98 Cal. 30, 32 P 807.

[b] **Verification of lien.**—"The verification is by the lienor Waters only. But I think it sufficed as he made it as one of the two lienors who gave notice of a joint claim. The purpose of verification is assurance of the validity of the lien and of the good faith of the lienor under the penalty of perjury. This is sufficiently assured by the verification of one of the joint lienors as such." Waters v. Goldberg, 124 App. Div. 511, 512, 108 NYS 992.

[c] **One of two joint administrators** may make an affidavit for attachment to be used for the benefit of both. Scruggs v. Gibson, 40 Ga. 511.

[d] **One of two assignees.**—In Clement v. Bullens, 159 Mass. 193, 34 NE 173, an affidavit was held valid which had been signed and sworn to by one of two assignees.

36. See infra § 14.

37. See infra §§ 14, 15.

[a] **Negroes.**—(1) Although it was formerly the rule in some jurisdictions that persons of African descent were incompetent to testify as witnesses against white persons, yet they were allowed to make affidavits as long as by so doing they did not violate this rule (Norris v. Newton, 18 F. Cas. No. 10,307, 5 McLean 92; Com. v. Oldham, 1 Dana (Ky.) 466; Ritter v. Stutts, 43 N. C. 240; De Lacy v. Antoine, 7 Leigh (34 Va.) 438); (2) as in support of an application for a writ of habeas corpus (Norris v. Newton, supra; De Lacy v. Antoine, supra); (3) or to bind another to keep the peace (Com. v. Oldham, supra).

Women. A person is incompetent to make an affidavit, who, by reason of infancy[38] or insanity,[39] does not possess sufficient mental capacity to understand the nature of his act. A married woman, however, is not under any disability as to the making of an affidavit.[40]

[§ 15] **3. Criminals.** In some jurisdictions conviction of an infamous crime renders a person incompetent to make an affidavit,[41] but in other jurisdictions such conviction does not constitute a disability.[42]

[§ 16] **4. Effect of Affiant's Religious Belief.** A person is not incompetent to make an affidavit by reason of his religious belief or lack of such belief.[43]

[§ 17] **D. Administrator.** An administrator may make any affidavits that are necessary for the performance of his duty.[44]

[§ 18] **E. Guardian or Next Friend.** A guardian may make an affidavit to be used for the benefit of his ward,[45] and where a suit is brought by a next friend for the benefit of an infant, the next friend may make the affidavits necessary for the protection of the infant's rights.[46]

[§ 19] **F. Agent or Attorney—1. In General.** Where it is prescribed by statute or rule of court that an affidavit shall be made by the party in person, no one else can make it.[47] Ordinarily, however, authority to make an affidavit is given to an attorney or agent where, on account of sickness, absence from the jurisdiction, or for other good reason, the party cannot make it himself;[48] and, in the absence of any statute or rule of court to the contrary, it is generally held that an affidavit may

38. Cheek v. James, 2 Heisk. (Tenn.) 170 (holding that the affidavit of the loss and contents of a bond, which by statute is required to be made by one having knowledge of the facts, cannot be made by one who at the time of its execution was only a child between five and eight years old). See Infants [22 Cyc 513, 530]; Witnesses [40 Cyc 2200].

39. Spittle v. Walton, L. R. 11 Eq. 420. See Insane Persons [22 Cyc 1169, 1194]; Witnesses [40 Cyc 2201].

40. Kirby v. Kirby, 1 Paige (N. Y.) 261 (holding that where a married woman is allowed to prosecute a divorce suit as a feme sole an affidavit made by her, in person, for an injunction to restrain the husband from disposing of his property may be received).

41. Peo. v. Robertson, 26 HowPr (N. Y.) 90; Webster v. Mann, 56 Tex. 119, 42 AmR 688.

[a] **Forgery.**—(1) In New York a person convicted of forgery and not pardoned is not competent to make an affidavit and does not become competent by serving out his term. Peo. v. Robertson, 26 HowPr 90. (2) In Texas it has been held that where one was indicted for forgery he was incompetent to make an affidavit both before as well as after conviction, as the incompetency related back to the time of the indictment. Webster v. Mann, 56 Tex. 119, 42 AmR 688.

[b] **Perjury.**—A person convicted of perjury or subornation of perjury could not make an affidavit under St. 9 Geo. IV c 32 § 4. Matter of Sawyer, 2 Q. B. 721, 42 ECL 833, 114 Reprint 281.

42. Ritter v. Stutts, 43 N. C. 240 (where the court said: "The plea alleges, that there has been a conviction and judgment against the plaintiff for mismarking a hog. Two questions are presented. Does the conviction and judgment make the plaintiff infamous? If so, is he incompetent to make the affidavit? Without deciding the first question, and assuming that the offence of mismarking, created by the statute, is infamous, we are of opinion that the plea was properly overruled, on the ground that the plaintiff was not incompetent to make the affidavit. If, in the institution of a suit, or in its progress, the course of the court requires a party to make an affidavit, the fact of his being infamous does not make him incompetent to do so: for, if an affidavit be required, and, at the same time, the party is held to be incompetent to make it, he cannot pursue his right, and there will, in effect, be a denial of justice. This principle is settled, as well upon the reason of the thing, as by authority"). See Witnesses [40 Cyc 2205].

43. Leonard v. Manard, 1 N. Y. Super. 223 (holding that the affidavit of a party to a cause cannot be excluded by virtue of the filing of counteraffidavits alleging that he is an atheist). See Witnesses [40 Cyc 2202].

44. Scruggs v. Gibson, 40 Ga. 511; Eisminger v. Stanton, 129 Mo. A. 403, 107 SW 460.

45. Reese v. Ryals, 112 Ga. 910, 38 SE 345; Wade v. Roberts, 53 Ga. 26; Wilson v. Me-ne-chas, 40 Kan. 648, 20 P 468 (holding that the guardian of a minor, whether natural or specially appointed, may make an affidavit in replevin for him).

[a] **Such affidavit is regarded as the individual affidavit of the guardian,** and if it be false he may be prosecuted for perjury. Wade v. Roberts, 53 Ga. 26.

46. Davis v. Sherrill, 52 Tex. Civ. A. 259, 113 SW 556; Biggins v. Gulf, etc., R. Co., (Tex. Civ. A.) 110 SW 561.

47. Colo.—Davis v. John Mouat Lumber Co., 2 Colo. A. 381, 31 P 187.

Ga.—Hadden v. Larned, 83 Ga. 636, 10 SE 278.

Ind.—Shattuck v. Myers, 13 Ind. 46, 74 AmD 236.

Mo.—Squires v. Chillicothe, 89 Mo. 226, 1 SW 23; Norvell v. Porter, 62 Mo. 309; Huthsing v. Maus, 36 Mo. 101.

N. C.—Sheppard v. Cook, 3 N. C. 426.

Wis.—Western Bank v. Tallman, 15 Wis. 92.

[a] **Where a judgment is rendered by confession** under a power of attorney from the debtor the affidavit required of plaintiff in the judgment must be made by him in person, not by his attorney in fact or agent. Bryant v. Harding, 29 Mo. 347.

[b] **In forma pauperis.**—An affidavit to be allowed to make a claim in forma pauperis cannot be made by an agent. Hadden v. Larned, 83 Ga. 636, 10 SE 278.

[c] **To obtain an execution** under Civ. Code § 507 an affidavit cannot be made by a mere agent. In re Heath, 40 Kan. 333, 19 P 926.

[d] **For change of venue.**—It has been held in some cases that an affidavit in support of the application must be made by the party personally and cannot be made by an agent or attorney. Shattuck v. Myers, 13 Ind. 46, 74 AmD 236; Norvell v. Porter, 62 Mo. 309; Huthsing v. Maus, 36 Mo. 101. See generally Venue [40 Cyc 156 et seq].

[e] **Redemption of land sold under execution.**—It has been held, under a New York statute providing that an affidavit of the assignee of a judgment who seeks to redeem land sold under execution shall be made by the assignee or a subscribing witness, that it could not be made by the agent of the assignee. Ex p. Aldrich, 1 Den. 662.

[f] **Judgment creditor or attorney.**—Under a statute requiring an affidavit to be made by the judgment creditor or his attorney, an affidavit made by a person who is neither the judgment creditor nor his attorney, but who describes himself as the agent of the judgment creditor, is insufficient. Tiffany v. Bullen, 18 U. C. C. P. 91.

48. U. S.—Johnson v. Johnson, 31 Fed. 700; The Harriet, 10 F. Cas. No. 6,096, Olcott 222.

Ark.—Nolen v. Royston, 36 Ark. 561.

Cal.—Rue v. Quinn, 137 Cal. 651, 66 P 216, 70 P 732.

Ill.—Lockhart v. Wolf, 82 Ill. 37.

Iowa.—Widner v. Hunt, 4 Iowa 355.

Ky.—Harbour-Pitt Shoe Co. v. Dixon, 60 SW 186, 22 KyL 1169; Northern Lake Ice Co. v. Orr, 102 Ky. 586, 44 SW 216, 19 KyL 1634; Clark v. Miller, 88 Ky. 112, 10 SW 277, 10 KyL 691; Franklin Sav. Inst. v. Wheeling M. M. Bank, 1 Metc. 156.

La.—Beatty v. Tete, 9 La. Ann. 129; Williams v. Brashear, 16 La. 77.

Mont.—State v. Second Judicial Dist. Ct., 38 Mont. 415, 100 P 207.

N. Y.—Forrest v. Forrest, 9 AbbPr 289; Geib v. Icard, 11 Johns. 82.

[a] **Absence from court not sufficient.**—Act [1839] § 16, allowing an affidavit to be made by the agent or attorney of the party "in the case of the absence of said party," was held not to extend to cases where the party was merely absent from court. Beatty v. Tete, 9 La. Ann. 129.

[b] **Fact, and not knowledge, of client's absence controlling.**—Under a statute providing that an affidavit which a party is required or authorized by law to make may be made by his agent or attorney, if he be absent from the county, an attorney is wholly without authority to make an affidavit for his client when the latter is in the county, and the fact that he does not know of his presence adds nothing. His authority does not depend upon his knowledge of his client's presence but upon the fact. Harbour-Pitt Shoe Co. v. Dixon, 60 SW 186, 22 KyL 1169.

[c] **Absence proved by parol evidence.**—Where the recital of the party's absence was omitted from the affidavit, it was held that it might be shown by the statement of the counsel who made the affidavit, delivered in open court. Deshay v. Persse, 9 AbbPr (N. Y.) 289 note.

[d] **The sufficiency of the cause alleged** for the making of the affidavit by agent or attorney instead of in person is for the court to determine. Philadelphia v. Devine, 1 WklyNC (Pa.) 358.

[e] **Rule in Colorado.**—(1) Formerly an affidavit for service by publication could not be made by the attorney for plaintiff. See Morton v. Morton, 16 Colo. 358, 27 P 718; Davis v. John Mouat Lumber Co., 2 Colo. A. 381, 31 P 187. (2) But this has now been changed by a statute. See Laws (1893) p 78.

[f] **Guardian deemed to be agent.**—In Wilson v. Me-ne-chas, 40 Kan. 648, 20 P 468, it was held that, under a statute requiring an affidavit in replevin to be made by plaintiff, his agent, or attorney, the natural guardian of a minor was to be deemed his agent for the purpose of making such affidavit.

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properly be made by an agent or attorney having knowledge of the facts sworn to.[49] But the absence of authority by the agent or attorney at the time of making the affidavit is not supplied by a

49. U. S.—Silver Peak Mines v. Hanchett, 80 Fed. 990; Johnson v. Johnson, 31 Fed. 700; The Harriet, 11 F. Cas. No. 6,096, Olcott 222.
Ala.—Birmingham Realty Co. v. Barron, 150 Ala. 232, 43 S 346; Guyton v. Terrell, 132 Ala. 66, 31 S 83; Shield v. Dothard, 59 Ala. 595; Murray v. Cone, 8 Port. 250.
Ariz.—Hankins v. Helms, 12 Ariz. 178, 100 P 460.
Ark.—Nolen v. Royston, 36 Ark. 561; Mandel v. Peet, 18 Ark. 236.
Cal.—Rue v. Quinn, 137 Cal. 651, 66 P 216, 70 P 732; Will v. Lytle Creek Water Co., 100 Cal. 344, 34 P 830.
D. C.—Newman v. Goddard, 12 App. 404; Harris v. Leonhardt, 2 App. 318.
Ga.—Boston Mercantile Co. v. Ould-Carter Co., 123 Ga. 458, 51 SE 466; Scruggs v. Gibson, 40 Ga. 511.
Ida.—Wiles v. Northern Star Min. Co., 13 Ida. 326, 89 P 1053.
Ill.—Lockhart v. Wolf, 82 Ill. 37.
Ind.—Abbott v. Zeigler, 9 Ind. 511; Espy v. State Bank, 5 Ind. 274.
Iowa.—Peterson v. Wallace, 140 Iowa 22, 118 NW 37; Yoe v. Nichols, 51 Iowa 330, 1 NW 664; Rausch v. Moore, 48 Iowa 611, 30 AmR 412; Rice v. Griffith, 9 Iowa 539; Widner v. Hunt, 4 Iowa 355.
Kan.—State v. Kindseder, 78 Kan. 679, 97 P 1025; In re Heath, 40 Kan. 333, 19 P 926; Cassidy v. Fleak, 20 Kan. 54.
Ky.—Harbour-Pitt Shoe Co. v. Dixon, 60 SW 186, 22 KyL 1169; Northern Lake Ice Co. v. Orr, 102 Ky. 586, 44 SW 216, 19 KyL 1634; Clark v. Miller, 88 Ky. 108, 10 SW 277, 10 KyL 691; Franklin Sav. Inst. v. Wheeling M. M. Bank, 1 Metc. 156.
La.—Hardie v. Colvin, 43 La. Ann. 851, 9 S 745; Allen v. Champlin, 32 La. Ann. 511; Wallace v. Byrne, 17 La. Ann. 8; Fulton v. Brown, 10 La. Ann. 350; Beatty v. Tete, 9 La. Ann. 129; Williams v. Bashear, 16 La. 77.
Me.—Atwood v. Higgins, 76 Me. 423.
Mass.—Wright v. Coles, 11 Metc. 293.
Mich.—Berkery v. Wayne Cir. Judge, 82 Mich. 160, 46 NW 436; Borland v. Kingsbury, 65 Mich. 59, 31 NW 620; Adams v. Kellogg, 63 Mich. 105, 29 NW 679; Stringer v. Dean, 61 Mich. 196, 27 NW 886; Nicolls v. Lawrence, 30 Mich. 395; Wetherwax v. Paine, 2 Mich. 555.
Minn.—Smith v. Victorin, 54 Minn. 338, 56 NW 47.
Miss.—Coppock v. Smith, 54 Miss. 640.
Mo.—Gilkeson v. Knight, 71 Mo. 403; Norvell v. Porter, 62 Mo. 309; Ring v. Charles Vogel Paint, etc., Co., 46 Mo. A. 374; Mackey v. Hyatt, 42 Mo. A. 443; Remington Sewing Mach. Co. v. Cushen, 8 Mo. A. 528.
Mont.—State v. Second Judicial Dist. Ct., 38 Mont. 415, 100 P 207.
Nebr.—Moline, etc., Co. v. Curtis, 38 Nebr. 520, 57 NW 161; Whipple v. Hill, 36 Nebr. 720, 55 NW 227, 38 AmSR 742, 20 LRA 313; Jeary v. American Exch. Bank, 2 Nebr. (Unoff.) 657, 89 NW 771.
Nev.—Streeter v. Johnson, 23 Nev. 194, 44 P 819.
N. H.—Churchill v. Demeritt, 71 N. H. 110, 51 A 254.
N. J.—Lyons v. Allen, 76 N. J. L. 391, 69 A 642.
N. M.—Robinson v. Hesser, 4 N. M. 145, 13 P 204; Martinez v. Martinez, 2 N. M. 464.
N. Y.—Miller v. Adams, 52 N. Y. 409; Fox v. Peacock, 97 App. Div. 500, 90 NYS 137; Mutual Loan Assoc. v. Lesser, 81 App. Div. 138, 80 NYS 1112; Cohn v. Baldwin, 74 Hun 346, 26 NYS 457; Crowns v. Vail, 51 Hun 204, 4 NYS 324; Lederer v. Adler, 51 Misc. 572, 101 NYS 53; Talbert v. Storum, 21 NYS 719; Pach v. Geoffroy, 19 NYS 583; Van Ingen v. Herold, 19 NYS 456; Pittsburgh Bank v. Murphy, 18 NYS 575; Clark v. Sullivan, 8 NYS 565; Cross v. National F. Ins. Co., 6 NYS 84; Forrest v. Forrest, 9 AbbPr 289; Bolton v. McCullough, 2 HowPr 165; Little v. Bigelow, 2 HowPr 164; Mesick v. Smith, 2 HowPr 7; Peo. v. Perrin, 1 HowPr 74; Morrison v. Watson, 23 NYWklyDig 286; Ex p. Shumway, 4 Den. 258; Cunningham v. Goelet, 4 Den. 71; Ex p. Monroe Bank, 7 Hill 177, 42 AmD 61; Wood v. Crowner, 4 Hill 548.
N. C.—Sheldon v. Kivett, 110 N. C. 408, 14 SE 970; Weaver v. Roberts, 84 N. C. 493; Cowles v. Hardin, 79 N. C. 577.
N. D.—F. Mayer Boot, etc., Co. v. Ferguson, 17 N. D. 102, 114 NW 1091, 14 LRANS 1126.
Okl.—Fritz v. Brown, 20 Okl. 263, 95 P 437.
Pa.—Griel v. Buckius, 114 Pa. 187, 6 A 153; Duffie v. Black, 1 Pa. 388.
S. C.—McWorter v. Reid, 19 S. C. L. 368.
S. D.—Deering, etc., Co. v. Warren, 1 S. D. 35, 44 NW 1068.
Tex.—Doll v. Mundine, 84 Tex. 315, 19 SW 394; Blum v. Bassett, 67 Tex. 194, 3 SW 33 [dist Robinson v. Martel, 11 Tex. 149]; Evans v. Lawson, 64 Tex. 199; Gray v. Steedman, 63 Tex. 95; Lewis v. Stewart, 62 Tex. 352; Willis v. Lyman, 22 Tex. 268; McAlpin v. Finch, 18 Tex. 831; Davis v. Sherrill, 52 Tex. Civ. A. 259, 113 SW 556.
Vt.—Taft v. Taft, 82 Vt. 64, 71 A 831.
Va.—Taylor v. Sutherlin-Meade Tobacco Co., 107 Va. 787, 60 SE 132, 14 LRANS 1135 and note; Merriman Co. v. Thomas, 103 Va. 24, 48 SE 490; Benn v. Hatcher, 81 Va. 25, 59 AmR 645.
Wash.—State v. King County Super. Ct., 17 Wash. 54, 48 P 733.
Wis.—Meyer v. Outagamie County, 134 Wis. 86, 114 NW 94; Anderson v. Wehe, 58 Wis. 615, 17 NW 426; Wiley v. Aultman, 53 Wis. 560, 11 NW 32.
Eng.—Kellett v. Sturgeon, 5 Ir. Eq. 159.
Ont.—Carlisle v. Tait, 7 Ont. A. 10; Sato v. Hubbard, 8 Ont. Pr. 445; Builder v. Kerr, 7 Ont. Pr. 323.

[a] **May be made by counsel.**—(1) An affidavit is not objectionable on the ground solely that it was made by counsel for defendant. Will v. Lytle Creek Water Co., 100 Cal. 344, 34 P 830. (2) In Wetzstein v. Boston, etc., Cons. Copper, etc., Min. Co., 26 Mont. 193, 66 P 943, the affidavit of defendant's attorney, based on his own knowledge, was held to be admissible, giving as it did a succinct history of the controversy and tending to identify the parties and the subject matter of the several suits between them.

[b] **Attorney is agent.**—"It is also objected that one of the affidavits was not made by a plaintiff, and not shown to have been made by a person who was agent of the plaintiffs. But it appears that the party making the affidavit thus objected to, was one of the attorneys of the plaintiffs, and was, therefore, in a legal sense, an agent of the plaintiffs within the meaning of the rule." Harris v. Leonhardt, 2 App. (D. C.) 318, 321.

[c] **A solicitor is an agent** within a statute, requiring an affidavit by "the defendant or his agent." Carr v. Carr, 21 CanLTOccNotes 312; Robinson v. Morris, 15 Ont. L. 649, 11 OntWR 861, 431, 559.

[d] **Any authorized attorney may act.**—"An attorney may act for a party in any judicial proceeding in which he may be employed; and, when a party is entitled to appeal or obtain a transcript from a justice of the peace by filing an affidavit made by himself or his attorney, it is not necessary that the affidavit shall be made by the attorney who appeared in the suit as such, but it may be made by any attorney thereunto duly authorized by the party, and his authority may be proved by the affidavit of the attorney deposed to in the affidavit. In this case, the affidavit for the transcript was made by Thomas J. Corkery, who states in the affidavit that he is the duly authorized attorney of the plaintiff. The affidavit was a sufficient compliance with the statute authorizing it to be made by the attorney of the plaintiff." Berkery v. Wayne Cir. Judge, 82 Mich. 160, 164, 46 NW 436.

[e] **Attorney's affidavit sufficient.**—"The affidavit on the part of the attorney was competent to establish the facts necessary to be shown. It was not necessary that there should have been an affidavit on the part of the plaintiff also. It was shown that the plaintiff was absent from the county wherein the affiant resided, and that all of the facts verified were within the knowledge of the affiant. The statute does not require that the affidavit shall be by the plaintiff, but that the fact necessary to obtain the order must appear 'by affidavit.' It would be unreasonable to hold that where there are several parties plaintiff an affidavit must be made by each of them, or that where the plaintiff is an infant there should be presented an affidavit by him." Rue v. Quinn, 137 Cal. 651, 655, 66 P 216, 70 P 732.

[f] **The affidavits of two attorneys,** swearing to different facts, will be sufficient if taken together they cover all the facts. Lewis v. Stewart, 62 Tex. 352.

[g] **A general agent, specially instructed** by his principal to place the latter's claim against a third person in a lawyer's hands and to take such proceedings as may seem proper, is authorized to make affidavits in the principal's name in an attachment suit. Allen v. Champlin, 32 La. Ann. 511.

[h] **Person authorized by party to collect.**—The affidavit for an attachment may, in the absence of any statutory provisions for the appointment of agents or attorneys for the purpose, be made by any one authorized by plaintiff to collect. Deering v. Warren, 1 S. D. 35, 44 NW 1068.

[i] **Bookkeeper not agent.**—Under Code § 3286 providing for the making of an affidavit by an "agent," it was held that one by a bookkeeper was not sufficient in the absence of evidence on the subject, as the word "bookkeeper" does not ex vi termini import agency. Merriman Co. v. Thomas, 103 Va. 24, 48 SE 490.

[j] **Party or authorized agent.**—Under Prac. Act § 42, an affidavit for a continuance must be sworn to by the party or his authorized agent. School Directors v. Hentz, 57 Ill. A. 648.

[k] **In Georgia Civ. Code (1895) § 4966,** requires that "petitions for a restraining order, injunction, receiver, or other extraordinary equitable relief should be verified positively by the petitioner, or supported by other satisfactory proofs." It was held that this does not mean that only the petitioner may verify the petition, but that whatever verification is had shall be positive in character, and that where the attorney for the petitioner made a positive affidavit that of his own knowledge the recitals of fact in the petition were true, the verification of the petition was sufficient. Boston Mercantile Co. v. Ould-Carter Co., 123 Ga. 458, 464, 51 SE 466.

[l] **Stranger to record.**—Sometimes an affidavit required in the progress of a cause, such as an affidavit of defense, one to open a judgment, or one for a continuance, may be made by a stranger to the record. Hunter v. Reilly, 36 Pa. 509; Sleeper v. Dougherty, 2 Whart. (Pa.) 177; James v. Young, 1 Dall. (Pa.) 248; Guyer v. Cox, 1 Overt. (Tenn.) 183.

[m] **In admiralty courts** the authority of proctors to make affidavits is more extensive than that of attorneys in law courts. The Harriet, 11 F. Cas. No. 6,096, Olcott 222.

subsequent ratification of his act by the principal.[50]

Partner or clerk of attorney. The authority of an attorney of record to make an affidavit on behalf of his client has been extended to include authority to his partner[51] but not to his clerk.[52]

[§ 20] **2. Showing Authority.** Where an affidavit is made by one person in behalf of another the fact of agency must be shown in some way.[53] In some jurisdictions it has been held that the affidavit must contain a direct averment under oath of affiant's authority,[54] and the better practice would seem to require that the authority of the agent or attorney be stated and sworn to in the affidavit;[55] but generally it is deemed sufficient if the fact of agency is stated by way of recital,[56] and there need be no averment that affiant acted in behalf of his principal, such fact being inferred.[57] It has been held in some cases that the fact of agency may be proved by other parts of the record,[58] or even by

50. Johnson v. Johnson, 31 Fed. 700. See Attorney and Client. And see 4 Cyc 937.

[a] **The fact that an attorney had been accustomed to attend to all the litigation** of his brother did not, in the absence of instruction or authority from his brother to institute a particular suit or to sue out the writ of attachment therein, constitute him "the agent or attorney" of the brother, who, under Code Proc. § 550, might make the affidavit in attachment. Johnson v. Johnson, 31 Fed. 700.

51. Sato v. Hubbard, 8 Ont. Pr. 445.

52. Pittsburgh Bank v. Murphy, 18 NYS 575; Ames v. Merriman, 9 Wend. (N. Y.) 498; Chase v. Edwards, 2 Wend. (N. Y.) 283; Builder v. Kerr, 7 Ont. Pr. 323.

53. Birmingham Realty Co. v. Barron, 150 Ala. 232, 235, 43 S 346 [quot Cyc].

[a] **Authority shown by affidavit or otherwise.**—"One of the grounds of the motion is, that the affidavit for sequestration is informal and insufficient. William Pyne, who is no party to this suit, made the affidavit; but in no part thereof does he state that he had authority from plaintiff to make such an oath. There is no allegation in the petition stating such agency; nor any evidence whatever thereof. Such agency must be special (see Civil Code 2966), and there must be evidence thereof produced to the court by affidavit or otherwise, before a writ of sequestration can be sued out by an agent." Wallace v. Byrne, 17 La. Ann. 8.

[b] **Affidavit by plaintiff "or his agent."**—Under a statute requiring a certain affidavit to be made by plaintiff "or his agent," it was held that a bookkeeper of plaintiff would not be regarded as his agent in the absence of an averment in the affidavit that such relation existed. Merriman Co. v. Thomas, 103 Va. 24, 48 SE 490.

54. Miller v. Chicago, etc., R. Co., 58 Wis. 310, 17 NW 130; Sloane v. Anderson, 57 Wis. 123, 13 NW 684, 15 NW 21; Wiley v. Aultman, 53 Wis. 560, 11 NW 32.

[a] **Must appear from face of instrument.**—(1) In Borland v. Kingsbury, 65 Mich. 59, 64, 31 NW 620, the court said: "The statute requires the affidavit to be made by the plaintiff, or by some one in his behalf. In this case the affidavit was not made by the plaintiff, and it does not appear from the affidavit that it was made by any person in his behalf. We consider it essential that it should appear upon the face of the affidavit that it is made either by the plaintiff or by some person in his behalf." (2) So in Lithgow v. Byrne, 17 La. Ann. 8, it was held that an affidavit for a writ of sequestration, purporting to have been made by an agent and which did not contain an express averment of the agent's authority, was bad. But see Simpson v. Lombas, 14 La. Ann. 103.

55. Kan.—Cassidy v. Fleak, 20 Kan. 54.

La.—Wallace v. Byrne, 17 La. Ann. 8.

Mo.—Remington Sewing Mach. Co. v. Cushen, 8 Mo. A. 528.

Nebr.—Jeary v. American Exch. Bank, 2 Nebr. (Unoff.) 657, 89 NW 771.

Pa.—Griel v. Buckius, 114 Pa. 187, 6 A 153.

Wis.—Miller v. Chicago, etc., R. Co., 58 Wis. 310, 17 NW 130; Sloane v. Anderson, 57 Wis. 123, 13 NW 684, 15 NW 21; Wiley v. Aultman, 53 Wis. 560, 11 NW 32.

56. Ala.—Birmingham Realty Co. v. Barron, 150 Ala. 232, 235, 43 S 346 [quot Cyc]; Murray v. Cone, 8 Port. 250.

Ark.—Nolen v. Royston, 36 Ark. 561; Mandel v. Peet, 18 Ark. 236.

Mich.—Wetherwax v. Paine, 2 Mich. 555.

Minn.—Smith v. Victorin, 54 Minn. 338, 56 NW 47.

Mo.—White Sewing Mach. Co. v. Betting, 53 Mo. A. 260.

Nebr.—Tessier v. Crowley, 16 Nebr. 369, 20 NW 264; Jeary v. American Exch. Bank, 2 Nebr. (Unoff.) 657, 89 NW 771.

N. H.—Churchill v. Demeritt, 71 N. H. 110, 51 A 254.

N. M.—Robinson v. Hesser, 4 N. M. 144, 13 P 204; Martinez v. Martinez, 2 N. M. 464.

Okl.—Fritz v. Brown, 20 Okl. 263, 95 P 437.

Pa.—Duffie v. Black, 1 Pa. 388.

S. D.—Deering, etc., Co. v. Warren, 1 S. D. 35, 44 NW 1068.

Tex.—Evans v. Lawson, 64 Tex. 199.

[a] **Sufficiency of showing.**—(1) In Missouri it is held that if the fact of agency appears from the whole record a failure to state it in the affidavit is not fatal. Gilkeson v. Knight, 71 Mo. 403; White Sewing Mach. Co. v. Betting, 53 Mo. A. 260; Ring v. Charles Vogel Paint, etc., Co., 46 Mo. A. 374. (2) But in Texas, under a statute requiring an affidavit to be made by plaintiff, his agent, or attorney, it was held that an affidavit by "B. F. Fly," without any description of him as agent or attorney of plaintiff, was insufficient, although the petition for the writ was signed by "Fly & Fly, attorneys for the plaintiffs." Willis v. Lyman, 22 Tex. 268. (3) Where affiant is the agent of plaintiff, a recital that "she is the agent" of plaintiff is a sufficient averment of such agency. Adams v. Kellogg, 63 Mich. 105, 29 NW 679.

[b] **Need not swear to agency.**—"The person who made the affidavit assumed to act as the agent of the plaintiff. Such is stated to be his relationship in the affidavit which he signed, and his acts are recognized by the plaintiff as his own, and we are of the opinion that these things sufficiently show that he was the agent of the plaintiff. The statute does not require, when an affidavit for an attachment is made by an agent, that he shall swear that he is the agent; being so described in the affidavit, we are of the opinion, is enough." Per Stayton, J., in Evans v. Lawson, 64 Tex. 199, 201.

[c] **In New York** (1) in the earlier cases it was held that the fact of agency must be expressly sworn to, not merely stated by way of recital. Ex p. Shumway, 4 Den. 258; Cunningham v. Goelet, 4 Den. 71; Ex p. Monroe Bank, 7 Hill 177, 42 AmD 61. See also Peo. v. Johnson, 1 Thomps. & C. 578; Peo. v. Perrin, 1 HowPr 75. (2) But this holding was doubted (Peo. v. Ransom, 2 N. Y. 490), (3) and the contrary was directly held (Miller v. Adams, 52 N. Y. 409).

[d] **Direct averment better practice.**—In Remington Sewing Mach. Co. v. Cushen, 8 Mo. A. 528, it was held that while it was undoubtedly more correct that the fact of the agency of affiant should be stated and sworn to yet where the affidavit was "J. L. Jackson, agent for plaintiff, makes oath and says," the absence of a statement as to the fact of agency was not fatal.

57. Ark.—Mandel v. Peet, 18 Ark. 236.

La.—Simpson v. Lombas, 14 La. Ann. 103.

Mass.—Wright v. Coles, 11 Metc. 293.

Mich.—Stringer v. Dean, 61 Mich. 196, 27 NW 886.

Minn.—Smith v. Victorin, 54 Minn. 338, 56 NW 47.

Nev.—Streeter v. Johnson, 23 Nev. 194, 44 P 819.

[a] **Sufficient affidavit.**—Where a statute authorizes an affidavit to be made by plaintiff or some one in his behalf, an affidavit signed "J. M. Spencer, per D. M. Spencer" is sufficient. Spencer v. Bell, 109 N. C. 39, 13 SE 704.

[b] **Authority presumed.**—(1) "It is a matter of formal consequence whether the affidavit does or does not show whether the person who made it, made it for the plaintiffs. Whether it is or is not so stated, it will be so intended, for it is not presumed that one in no wise interested in the suit would make such an affidavit without it was done by him as the agent of the party in interest, or done for him, for accommodation. A literal compliance with the requirements of the statute is not expected or demanded. All that is expected in such case is a substantial compliance with the requirements of the statute." Mandel v. Peet, 18 Ark. 236, 244. (2) "We are of opinion, that when an attorney of this court, known as such by the roll, makes an affidavit on a writ, issued under his direction, for the collection of a debt, it is not necessary that it should appear, by the affidavit itself, but that the court is to infer, that he does the act in behalf of the plaintiff; and that this satisfies the statute." Wright v. Coles, 11 Metc. (Mass.) 293.

[c] **Agent of opposant.**—It is not necessary that the person who swears to the affidavit in support of an opposition should declare that he is authorized to that effect or that he is the agent of the opposant. Drainville v. Savoie, 11 Que. Pr. 437.

58. Gilkeson v. Knight, 71 Mo. 403; Jeary v. American Exch. Bank, 2 Nebr. (Unoff.) 657, 89 NW 771.

[a] **Contra in Texas.**—In Willis v. Lyman, 22 Tex. 268, it was held that where a person makes an affidavit as agent or attorney it is indispensable that the character in which he acts be described in the affidavit, as the court will not take judicial notice that the affiant is one of the attorneys who signed the petition, nor look to other parts of the record to ascertain the affiant's authority.

[b] **Deposition for use in same cause.**—An affidavit for appeal was made by a person not a party to the record, and no recital of his agency appeared in the affidavit. His deposition which was taken, however, showed him to be manager of the company on whose behalf the appeal was taken. It was held that the fact of his agency sufficiently appeared. Melcher v. Scruggs, 72 Mo. 406.

[c] **Reference to complaint.**—"The statute does not require that the affidavit attached to the mortgage, when made by some one in behalf of the parties, shall state that fact. The

evidence aliunde,[59] such as another affidavit.[60]

[§ 21] **3. Showing Why Principal Did Not Act.** Where the authority of the attorney or agent depends upon the inability of the principal, through absence or other cause, to make the affidavit in person, it is necessary for the affidavit to state the reason why the principal did not himself make it.[61] Under some statutes, however, the attorney or agent has the same power to make the affidavit as is given the principal, and where this is the case there is no necessity to give any reason why such affidavit was not made by the principal.[62]

[§ 22] **4. Knowledge or Information of Affiant.** As a general rule an affidavit by one person in behalf of another must be made from facts within the personal knowledge of affiant, independent of mere hearsay of the party or others;[63] and an affidavit so drawn as to raise the inference that it was made on hearsay is insufficient.[64] It is the better practice, and always desirable, that such an affidavit should set forth affiant's means of knowledge,[65] and, where made on information and belief, the sources of information and grounds of belief should be stated.[66] Under some statutes, however, it has been held that where the statements in the affidavit are direct and positive it is not essential that affiant should state his means of knowledge.[67]

[§ 23] **G. Third Persons.** In some jurisdictions an affidavit may be made by a third person or by one having no legal interest in the matters contained in it either as principal or agent.[68] But when so made the affiant, as a rule, must show in

complaint alleges, and the answer does not deny, that the affidavit of G. F. Talbot was made in behalf of the mortgagee. That is all that the law requires." Streeter v. Johnson, 23 Nev. 194, 44 P 819.

[d] **Copy filed with mortgage.**—In Carlisle v. Tait, 7 Ont. A. 10, it was held that where an affidavit to verify the claim upon which a chattel mortgage was based was made by an agent it was sufficient to file a copy of his authority with the instrument.

59. See Melcher v. Scruggs, 72 Mo. 406.

60. Melcher v. Scruggs, 72 Mo. 406; Ring v. Charles Vogel Paint, etc., Co., 46 Mo. A. 374; Sato v. Hubbard, 8 Ont. Pr. 445.

61. Ala.—Guyton v. Terrell, 132 Ala. 66, 31 S 83.

Ark.—Nolen v. Royston, 36 Ark. 561.

Colo.—Morton v. Morton, 16 Colo. 358, 27 P 718.

Ida.—Wiles v. Northern Star Min. Co., 13 Ida. 326, 89 P 1053.

Iowa.—Widner v. Hunt, 4 Iowa 355.

La.—Beatty v. Tete, 9 La. Ann. 129.

N. Y.—Mutual Loan Assoc. v. Lesser, 81 App. Div. 138, 80 NYS 1112; Cohn v. Baldwin, 74 Hun 346, 26 NYS 457; Lederer v. Adler, 51 Misc. 572, 101 NYS 53; Talbert v. Storum, 21 NYS 719; Pach v. Geoffroy, 19 NYS 583; Van Ingen v. Herold, 19 NYS 456; Pittsburgh Bank v. Murphy, 18 NYS 575; Clark v. Sullivan, 8 NYS 565; Cross v. National F. Ins. Co., 6 NYS 84; Forrest v. Forrest, 9 AbbPr 289; Bolton v. McCullough, 2 HowPr 165; Little v. Bigelow, 2 HowPr 164; Ross v. Beecher, 2 HowPr 157; Mesick v. Smith, 2 HowPr 7; Wood v. Crowner, 4 Hill 548.

N. C.—Cowles v. Hardin, 79 N. C. 577. But see Sheldon v. Kivett, 110 N. C. 408, 14 SE 970 (where the court held that the reason why the principal failed to act need not be set out in an affidavit as in the verification of a pleading).

Pa.—Griel v. Buckius, 114 Pa. 187, 6 A 153; Philadelphia v. Devine, 1 WklyNC 358; Gross v. Painter, 1 WklyNC 154.

Wis.—Sloane v. Anderson, 57 Wis. 123, 13 NW 684, 15 NW 21.

Eng.—Holliday v. Lawes, 3 Bing. N. Cas. 541, 32 ECL 252, 132 Reprint 519.

Ont.—Tiffany v. Bullen, 18 U. C. C. P. 91.

[a] **The reason** is that it enables the court to judge of sufficiency of reasons. Griel v. Buckius, 114 Pa. 187, 190, 6 A 153 (where the court said: "It has never been held that no one but the defendant can make the affidavit of defence. Cases may arise where it would be physically impossible for the defendant to make such an affidavit. Under such and similar circumstances we have no doubt that an affidavit of defence may be made on behalf of the defendant by an attorney at law or other person duly authorized, but the reason why it is not made by the defendant should be set forth in the affidavit. The court can then judge of the sufficiency of such reason. It would never do to allow a stranger to the record to intermeddle in this manner. The correct rule would seem to be that when a defendant puts in a stranger's affidavit, it must show upon its face sufficient reason why it was not made by the defendant himself, that a real disability existed which prevented him from making it, and the circumstances giving rise to the disability").

[b] **Counsel must state reasons.**—It has been held that an affidavit made by the counsel of a party is insufficient to base an application to set aside proceedings in chancery because of irregularity, unless reasons are shown why it is not made by the party or his solicitor. Peo. v. Spalding, 2 Paige (N. Y.) 326.

[c] **Reasons should be fully set forth.**—"When an affidavit is made for the purpose of procuring an injunction, the one who knows the facts should make the affidavit if he can be procured to do so, and if he cannot, and the affidavit is made by the attorney, the reasons why he makes the affidavit should be fully set forth, and the affidavit should show why the party who personally knows the facts does not make the affidavit." Wiles v. Northern Star Min. Co., 13 Ida. 326, 330, 89 P 1053.

[d] **Sufficient reason.**—(1) An affidavit which recites that the complainant is a nonresident of the state, and that the affiant is his agent duly authorized to act in the matter and of his own knowledge knows that the facts stated are true, sets forth a sufficient reason why the certificate is not made by the complainant himself, under Code p 1205 rule 15. Guyton v. Terrell, 132 Ala. 66, 31 S 83. (2) An affidavit for attachment which states that it is made by the attorney because plaintiff resides out of the county is sufficient. Cribben v. Schillinger, 30 Hun (N. Y.) 248.

[e] **Omission supplied aliunde.**—In Deshay v. Persse, 9 AbbPr (N. Y.) 289 note, an affidavit was made by counsel for the moving party on account of the latter's absence, but it omitted to allege such fact. On the hearing of the motion counsel stated that his client was absent. This absence being conceded, and no other objection being made to the affidavit, it was held that the defect would be disregarded.

62. Newman v. Goddard, 12 App. (D. C.) 404; Espy v. State Bank, 5 Ind. 274; Doll v. Mundine, 84 Tex. 315, 19 SW 394.

63. Read v. Haynie, 20 F. Cas. No. 11,608, Hempst. 700; Talbert v. Storum, 21 NYS 719; Cross v. National F. Ins. Co., 6 NYS 84, 17 NYCivProc 199.

[a] **Facts solely within knowledge of client.**—It is not competent for an attorney to swear to facts which are solely within the knowledge of his client. Widner v. Hunt, 4 Iowa 355.

64. Cutler v. Rathbone, 1 Hill (N. Y.) 204.

65. Iowa.—Bates v. Robinson, 8 Iowa 318.

N. Y.—Wicker v. Elmira Heights, 42 App. Div. 426, 59 NYS 130; Cribben v. Schillinger, 30 Hun 248; Pittsburgh Bank v. Murphy, 18 NYS 575; Ex p. Monroe Bank, 7 Hill 177, 42 AmD 61.

N. C.—Cowles v. Hardin, 79 N. C. 577.

Wis.—Sloane v. Anderson, 57 Wis. 123, 13 NW 684, 15 NW 21.

Eng.—Sullivan v. Magill, 1 H. Bl. 637, 126 Reprint 364.

Necessity in general for the affidavit to show the means of knowledge or information of affiant see infra § 88.

[a] **Sufficient affidavit.**—An affidavit in attachment made by the attorney, stating that the facts set out in the petition are better known to him than to plaintiff, and that he knows them to be true, is sufficient. Rausch v. Moore, 48 Iowa 611, 30 AmR 412.

66. Dorman v. Crozier, 14 Kan. 224; Crowns v. Vail, 51 Hun 204, 4 NYS 324 (where it was further held that where an affidavit in respect to a transaction of the client was made by one who was simply an attorney of record in an action, and who, as far as the record showed, was only his attorney for that action, the plain inference was that such attorney had no personal knowledge of the facts as to which he affirmed). See also infra §§ 87, 88.

67. Ill.—James E. Pepper Distributing Co. v. Alexander, 137 Ill. A. 369.

Iowa.—Bates v. Robinson, 8 Iowa 318.

Mich.—Nicolls v. Lawrence, 30 Mich. 395.

N. Y.—Wicker v. Elmira Heights, 42 App. Div. 426, 59 NYS 130; Bruen v. Nickels, 30 App. Div. 396, 51 NYS 352; Hanson v. Marcus, 8 App. Div. 318, 40 NYS 951.

Wis.—Anderson v. Wehe, 58 Wis. 615, 17 NW 426 [disappr an intimation to the contrary Wiley v. Aultman, 53 Wis. 560, 11 NW 32].

And see infra § 88.

[a] **Presumption as to affiant's knowledge.**—In Newman v. Goddard, 12 App. (D. C.) 404, it was held that it was not essential to the validity of an affidavit made by an agent that it should expressly appear whether the agent's knowledge was personal or based upon information and belief, as where the deponent positively affirmed a fact or state of facts it was always presumed to be done upon personal knowledge, unless expressly or by necessary implication the contrary appeared.

[b] **In Missouri** an affidavit for attachment made by an agent need not disclose his means of knowledge. Gilkeson v. Knight, 71 Mo. 403 [dist Eldridge v. Steamboat William Campbell, 27 Mo. 595; Bridgeford v. Steamboat Elk, 6 Mo. 356, the rule stated in these cases applying only to the statutory proceeding against boats].

68. Kan.—State v. Kindseder, 78 Kan. 679, 97 P 1025.

N. Y.—Nelson v. Baruch, 60 Misc. 357, 113 NYS 449.

Pa.—Griel v. Buckius, 114 Pa. 187, 6 A 153; Sleeper v. Dougherty, 2 Whart. 177; James v. Young, 1 Dall. 248, 1 L. ed. 121.

whose behalf he is acting,[69] his reason for so doing,[70] and the source of his information.[71]

[§ 24] **H. In Behalf of Partnership.** It has been held that an affidavit cannot be made by a partnership in the firm name, since it would be impossible to convict the individual partners of perjury upon the evidence of such affidavit alone.[72] An affidavit on behalf of a partnership therefore should be sworn to by one of the partners,[73] and where it appears in the body of the affidavit that it was sworn to by one of the partners, it is sufficient, although signed with the firm name.[74] It would seem, however, that a special partner cannot make the affidavit verifying the certificate of a limited partnership.[75]

[§ 25] **I. In Behalf of Corporation—1. Private Corporation—a. In General.** Since a corporation must of necessity act through its agents, it follows that where a statute or rule of court requires an affidavit to be made by the party in person, such affidavit, where the party is a corporation, may be made by an agent or officer authorized by the general provisions of law to make oaths in behalf of the corporation.[76]

Tex.—Shelton v. Berry, 19 Tex. 154, 70 AmD 326; Whitmire v. Powell, (Civ. A.) 117 SW 433 [rev on other grounds 103 Tex. 232, 125 SW 889].

W. Va.—Ruhl v. Rogers, 29 W. Va. 779, 2 SE 798; Hudkins v. Haskins, 22 W. Va. 645.

[a] **Where party is incapable.**—"A third person fully acquainted with the circumstances ought certainly to be admitted to make the affidavit of a defence when the party himself from extreme sickness is incapable of making it; but when he is present, and subject to no disability, it is regularly incumbent upon him to do it. This, however, is a case under very particular circumstances; and the judgment was entered at the first term. We think, therefore, the judgment ought to stand as a security; but that the Defendant must be let into a trial upon an issuable plea." James v. Young, 1 Dall. (Pa.) 248, 1 L. ed. 121.

[b] **The affidavit of a juror, sworn to be true by another person,** may be treated as the original affidavit of the latter. Wilson v. Berryman, 5 Cal. 44, 63 AmD 78.

[c] **Illness or absence of party.**—"As in most cases, which are the subject of investigation in courts of justice, an affidavit made by a disinterested person, is more free from objection than one made by the party in interest, it would require something more positive than anything contained in this act, to induce me to believe, that the legislature intended to prevent it, by the substituting, in all cases, of inferior evidence of the truth of the facts disclosed. Whether the oath of a person totally unconnected with the suit, and particularly when the court had reason to believe the deponent had impertinently interfered with the regular course of justice, would avail, it is unnecessary to decide, as such a case is not likely to arise. But when the affidavit discloses a defence made in good faith, although not by the party on record, or in interest, it is sufficient; as for example, where the party is sick or absent, and his clerk, or any person who has knowledge of the transaction, swears to facts, which, according to the judgment of the court, furnish a good and valid defence." Sleeper v. Dougherty, 2 Whart. (Pa.) 177, 183.

[d] **To prove notice of publication.**—"The statute provides (§ 65, c. 98) that 'the affidavit of the printer, or foreman of such printer, of any public newspaper published in this state, of the publication of any notice or advertisement which by any law of this state shall be required to be published in such newspaper, shall be entitled to be read in evidence in all courts of justice in this state, and in all proceedings before any officer, body or board, and shall be prima facie evidence of such publication, and of the facts stated therein.'" Hill v. Hoover, 5 Wis. 354, 371.

69. Claflin v. Hoover, 20 Mo. A. 314; Marshall v. Witte, 1 Phila. (Pa.) 117.

70. Griel v. Buckius, 114 Pa. 187, 6 A 153.

"**The correct rule** would seem to be that when a defendant puts in a stranger's affidavit, it must show upon its face sufficient reason why it was not made by the defendant himself; that a real disability existed which prevented him from making it, and the circumstances giving rise to the disability." Per Paxson, J., in Griel v. Buckius, 114 Pa. 187, 190, 6 A 153.

71. Bates v. Robinson, 8 Iowa 318; Nelson v. Baruch, 60 Misc. 357, 113 NYS 449; Shelton v. Berry, 19 Tex. 154, 70 AmD 326; Whitmire v. Powell, (Tex. Civ. A.) 117 SW 433 [rev on other grounds 103 Tex. 232, 125 SW 889]; Sloane v. Anderson, 57 Wis. 123, 13 NW 684, 15 NW 21. See infra § 87.

"A statement of the 'grounds of belief' which the verification is to include, when made by a person other than the party (Code Civ. Pro., § 526), must necessarily be such as would show some actual connection between the information acted upon and the issues to which the verification is directed. The disclosure of the grounds of belief in the verification before me actually amounts to nothing more than the affiant's statement of his conclusion that the information possessed by him would justify his belief. He states simply 'That the sources of deponent's belief as to the matters not stated upon his knowledge are facts obtained in investigations made for and in behalf of the said defendant and the statements of witnesses in deponent's possession relating to the matters referred to in the complaint and letters and documents in deponent's possession relating to said matters.' So far as I am advised by this affidavit, the person making the verification may have obtained no information whatever from any individual who had actual knowledge of the accident which is the subject of this litigation, or from letters and documents which really afforded reason to take any definite view of the facts." Per Bischoff, J., in Nelson v. Baruch, 60 Misc. 357, 113 NYS 449.

[a] **Failure to state grounds for rejection of claim.**—"Where the administrator would reject a claim because it is authenticated by the affidavit of a person who does not purport to be the owner thereof, or the agent of the owner, and does not state the means of information of the deponent, he must make that the ground of his objection of the claim." Shelton v. Berry, 19 Tex. 154, 155, 70 AmD 326.

72. Norman v. Horn, 36 Mo. A. 419; Gaddis v. Durashy, 13 N. J. L. 324. But see Randall v. Baker, 20 N. H. 335 (where an affidavit sworn to in the firm name and signed by one of the partners in the firm name was held to be sufficient, there being nothing to show that all the partners did not swear; and the magistrate having certified that the said partnership, using the firm name, took the oath, it was held to be a good certificate that all the members of the firm so designated swore).

[a] **Reason of rule.**—"In the case at bar, the affidavit is signed by the firm Horn & Hughes, and we can not understand how the firm, as such, could take a corporal oath. The affidavit can not be regarded as the oath of the individual members of the firm, or of either of them, because the affidavit is not signed by them. It would be impossible to convict either Horn or Hughes for perjury upon the evidence of this affidavit alone. It would be just as reasonable to hold that a corporation, as such, could make an affidavit, as to hold that a firm could." Norman v. Horn, 36 Mo. A. 419, 424.

73. Walker v. Woodside, 164 Fed. 680, 90 CCA 644; Standard Carbonating, etc., Co. v. Capital City Guards, 99 Ga. 265, 25 SE 670; Bennett v. Gray, 82 Ga. 592, 9 SE 469; Moore v. H. B. Smith Mach. Co., 4 Ga. A. 151, 60 SE 1035; Stever v. Brown, 119 Mich. 196, 77 NW 704; Haight v. Arnold, 48 Mich. 512, 12 NW 680; Bosbyshell v. Emanuel, 20 Miss. 63.

[a] **Verification by one partner.**—A member of a partnership may properly verify a claim made on behalf of a firm of which he is a member. Walker v. Woodside, 164 Fed. 680, 90 CCA 644.

[b] **Member of partnership.**—The affidavit of a partnership is not sufficient, where the affiant does not show that he was a member of the firm or that he was acquainted with the facts sworn to. Lanigan v. North, 69 Ark. 62, 63 SW 62.

[c] **Affidavit in forma pauperis.**—An affidavit made by a member of a partnership for the purpose of obtaining a certiorari, in forma pauperis, averring that the affiant is such a member, that he is advised and believes that defendant partnership has good cause for certiorari, and "that owing to their poverty they are unable to pay the costs and give the security required by law," is sufficient as to the advice and belief under which defendant acted and as to its poverty. A member of a partnership may in such case swear for it as to these matters. Standard Carbonating, etc., Co. v. Capital City Guards, 99 Ga. 265, 25 SE 670.

[d] **Failure to disclose interest.**—The fact that an affidavit which is made by a partner on behalf of a firm does not disclose his interest in the suit will not affect its validity if the other parts of the record show that he was a member of the firm. Bosbyshell v. Emanuel, 20 Miss. 63.

74. Fortenheim v. Claflin, 47 Ark. 49, 14 SW 462 (where the affidavit began, "I, Robert Powell, state," etc., and was signed "Forrester & Powell").

[a] **Affidavit of individual partner.**—In Bennett v. Gray, 82 Ga. 592, 9 SE 469, it was held that an affidavit stating that R. McD. Bennett was a member of the firm of J. F. Bennett & Co., and that he was the duly authorized agent of said firm to make the affidavit, and signed "J. F. Bennett & Co., by R. McD. Bennett," was not the affidavit of the firm but that of R. McD. Bennett, since if it had been false the person signing it could have been indicted for perjury.

[b] **Failure to give full names of partners.**—Where the affidavit fails to give the full names of the individual partners it may be amended. Emerson v. Detroit Steel, etc., Co., 100 Mich. 127, 58 NW 659.

75. White v. Eiseman, 134 N. Y. 101, 31 NE 276.

76. Cal.—Hotaling v. Brogan, 12 Cal. A. 500, 107 P 711.

D. C.—International Seal Co. v. Beyer, 33 App. 172.

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[§ 26] **b. Officers and Agents.** Following this rule affidavits in behalf of corporations should be sworn to by those officers who are usually intrusted with the conduct of their affairs.[77] Among the officers who have such power are the president,[78] vice president,[79] secretary,[80] treasurer,[81] cashier of a

Mo.—St. Louis, etc., R. Co. v. Fowler, 118 Mo. 458, 20 SW 1069.

Wis.—Wheeler, etc., Mfg. Co. v. Lawson, 57 Wis. 400, 15 NW 398; Western Bank v. Tallman, 15 Wis. 92.

Wyo.—Blyth, etc., Co. v. Swensen, 7 Wyo. 303, 51 P 873.

Can.—Ashdown v. Manitoba Free Press Co., 20 Can. S. Ct. 43 [dism app 6 Manitoba 578].

[a] **Where no particular office is designated** by statute to make an affidavit on behalf of a corporation, it may be made by any one of its officers or agents. Old Settlers' Inv. Co. v. White, 158 Cal. 236, 110 P 922.

77. Wheeler, etc., Mfg. Co. v. Lawson, 57 Wis. 400, 15 NW 398; Western Bank v. Tallman, 15 Wis. 92. See generally Corporations [10 Cyc 903 et seq].

[a] **"An affidavit, made by the president, secretary, or other proper officer or agent of a corporation,** where the corporation is a party to the suit, is, in legal contemplation, an affidavit made by the party." New Brunswick Steamboat, etc., Co. v. Baldwin, 14 N. J. L. 440, 441.

[b] **"The rule is established in New York** that the verification of a pleading by any officer of a corporation is the verification of the corporation; that because an officer of the corporation acts in chief and not by delegation in making such verification he is neither an agent nor an attorney, nor within the rule that an agent or attorney must state his authority and the sources of his information and the grounds of his belief. 'Such verification,' says the court, 'is the verification of the corporation and a verification by the party.' American Insulator Co. v. Bankers', etc., Tel. Co., 13 Daly 200, 205; Henry v. Brooklyn Heights R. Co., 43 Misc. 589, 590, 89 NYS 525." American Soda Fountain Co. v. Stolzenbach, 75 N. J. L. 721, 728, 68 A 1078, 127 AmSR 822, 16 LRANS 703 and note.

[c] **Statute prescribing particular officers.**—A statute required that a sworn statement of the property of a railroad be given to an assessor for assessment purposes. The statute prescribed the officers competent to swear to the statement. It was held that the affidavit should show that the officer making it was one of those authorized by the statute. State v. Washoe County, 5 Nev. 317.

78. U. S.—Richmond Cedar Works v. Pinnix, 208 Fed. 785; Walker v. Woodside, 164 Fed. 680, 90 CCA 644; Ex p. Pierce, 155 Fed. 663 [aff 210 U. S. 387, 28 SCt 714, 52 L. ed. 1113].

Ill.—Hertig v. Peo., 159 Ill. 237, 42 NE 879, 50 AmSR 162.

Me.—Lewiston Co-op. Soc. No. 1 v. Thorpe, 91 Me. 64, 39 A 283.

N. J.—American Soda Fountain Co. v. Stolzenbach, 75 N. J. L. 721, 68 A 1078, 127 AmSR 822, 16 LRANS 703; New Brunswick Steamboat, etc., Co. v. Baldwin, 14 N. J. L. 440.

N. M.—Home Sav. Bank v. Woodruff, 14 N. M. 502, 94 P 957.

N. Y.—Pedersen Mfg. Co. v. Walter Auto. Co., 124 App. Div. 321, 108 NYS 856.

Tex.—Cleburne First Nat. Bank v. Graham, (A.) 22 SW 1101.

Vt.—Ex p. Sargeant, 17 Vt. 425.

W. Va.—Quesenberry v. People's Bldg., etc., Assoc., 44 W. Va. 512, 30 SE 73.

Ont.—Universal Skirt Mfg. Co. v. Gormley, 17 Ont. L. 114; Toronto Bank v. McDougall, 15 U. C. C. P. 475.

[a] **President's authority cannot be doubted.**—"It cannot be doubted that, since a corporation must act through some agent, a verification on its behalf may be legally made by its president." Walker v. Woodside, 164 Fed. 680, 681, 90 CCA 644.

[b] **President's act that of corporation.**—"The oath, in this case, was made by the president of the plaintiff corporation. It is objected that this was not a compliance with the statute. A corporation can only act by its officers. If the creditor is a corporation, the oath must be that of some officer, or some other agent or attorney. The act of the president, in the business of the corporation, and within the scope of his authority, is the act of the corporation. For the purpose of the creditor's oath to authorize arrest, we regard the president, in taking the oath, as representing the corporation; and the oath so taken is to be regarded as the oath of the creditor corporation, within the meaning of the statute." Lewiston Co-op. Soc. No. 1 v. Thorpe, 91 Me. 64, 68, 39 A 283.

[c] **Authority presumed.**—"We have, therefore, no hesitation in saying, that, when a corporation is party, the head of the corporation may make the affidavit, required to entitle the plaintiff to an execution against the body; —whether the clerk, or cashier, could make the affidavit, is not before us. As to the argument, that there is no evidence that Mr. Green was President, we have only to say, there is no evidence that he was not. The clerk, who issued the execution, must have been satisfied as to his authority; and it is, at least prima facie, to be taken that he was such officer, and so made it appear to the clerk issuing the execution." Ex p. Sargeant, 17 Vt. 425, 430.

[d] **That it is the affidavit of the president sufficiently appears** where it shows that the affiant is the president of the corporation and that he personally made the affidavit "in its behalf," subscribed, and swore to it, although the corporate name was attached to it and it was subscribed with the corporate name before that of the president. Hotaling v. Brogan, 12 Cal. A. 500, 107 P 711.

[e] **Officer conversant with facts.**—"It seems to be the law that, where a pleading of a corporation is to be sworn to, it must be by the president or some officer conversant with the facts." Quesenberry v. People's Bldg., etc., Assoc., 44 W. Va. 512, 517, 30 SE 73.

[f] **Abbreviation of title affixed to signature.**—It has been held that where an affidavit was made on behalf of a bank the abbreviation "prest." affixed to the affiant's signature, together with what appeared in the body of the instrument, was sufficient to indicate the capacity of the officer by whom it was made. Cleburne First Nat. Bank v. Graham, (Tex. A.) 22 SW 1101.

[g] **Need not file copy of authority.**—Under a statute requiring an affidavit to be made by the principal or his agent and a copy of his authority to be filed also in case it is made by an agent, a president of a corporation making an affidavit does not need to file a copy of his authority, for he is acting as a principal, and not as an agent. He is exercising the corporate powers of the institution in the only way in which they can be exercised at all; he acts directly and in chief, and not by delegation. Toronto Bank v. McDougall, 15 U. C. C. P. 475.

[h] **Where another officer is designated by statute.**—The making of an affidavit by the president of a company is not sufficient under a statute requiring that it be made by the cashier, secretary, or treasurer. Langan v. North, 69 Ark. 62, 63 SW 62.

79. American Soda Fountain Co. v. Stolzenbach, 75 N. J. L. 721, 68 A 1078, 127 AmSR 822, 16 LRANS 703; Yellow Pine Co. v. Atlantic Lumber Co., 21 Misc. 164, 47 NYS 79 [aff 22 App. Div. 629 mem, 50 NYS 1135 mem]; Newlands v. Higgins, 1 Alta. L. 18.

[a] **Failure to state office in direct terms.**—"The defendant moves to set aside the attachment against its property for the insufficiency of the proof upon which the attachment was granted. That proof consisted of an affidavit and verified complaint. In the affidavit the person deposing is described as the vice-president of the plaintiff, but the affidavit does not state in direct terms that he is such vice-president. This defect, however, is remedied by the verification to the complaint." Yellow Pine Co. v. Atlantic Lumber Co., 21 Misc. 164, 47 NYS 79 [aff 22 App. Div. 629 mem, 50 NYS 1135 mem].

80. Del.—Blades Lumber Co. v. Kent, etc., Lumber Co., 16 Del. 302, 43 A 174.

Ill.—Commercial Ins. Co. v. Mehlman, 48 Ill. 313, 95 AmD 543.

Mo.—St. Louis, etc., R. Co. v. Fowler, 113 Mo. 458, 20 SW 1069.

N. J.—New Brunswick Steamboat, etc., Co. v. Baldwin, 14 N. J. L. 440.

N. Y.—Shaft v. Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 23 AmR 138.

Va.—Taylor v. Sutherlin-Meade Tobacco Co., 107 Va. 787, 60 SE 132, 14 LRANS 1135.

[a] **Must be specially authorized.**—It has been held that under 14 U. S. St. at L. 559, providing for the removal of cases from a state to a federal court upon the affidavit of the party seeking it, an affidavit cannot be made on behalf of a corporation by its secretary unless he is specially authorized to make it. Dodge v. Northwestern Union Packet Co., 13 Minn. 458.

81. Cal.—Scott Stamp, etc., Co. v. Leake, 9 Cal. A. 511, 99 P 731.

Del.—St. Joseph Polish Catholic Ben. Soc. v. St. Hedwig's Church, 19 Del. 229, 50 A 535; Blades Lumber Co. v. Kent, etc., Lumber Co., 16 Del. 302, 43 A 174.

Ill.—Commercial Ins. Co. v. Mehlman, 48 Ill. 313, 95 AmD 543.

Mich.—Forbes Lith. Mfg. Co. v. Winter, 107 Mich. 116, 64 NW 1053.

Mo.—Brown Mfg. Co. v. Gilpin, 120 Mo. A. 130, 96 SW 669.

N. Y.—Shaft v. Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 23 AmR 138.

Va.—Taylor v. Sutherlin-Meade Tobacco Co., 107 Va. 787, 60 SE 132, 14 LRANS 1135.

[a] **Treasurer may act for corporation.**—"The affidavit to the claim is made by the treasurer of the claimant. It is alleged in the complaint and found by the court that the claimant was a corporation; hence [Code Civ. Proc. §] 1494, providing that when the affidavit to a claim against an estate is made by a person other than the claimant the reason therefor must be set forth does not apply. This affidavit is not made by a third person; it is made by the corporation itself through one of its authorized officers, which, of course, is the only way a corporation can act." Scott Stamp, etc., Co. v. Leake, 9 Cal. A. 511, 516, 99 P 731.

[b] **Where an affidavit states that the affiant is the treasurer** of the company on whose behalf it is made, it sufficiently shows his authority. Forbes Lith. Mfg. Co. v. Winter, 107 Mich. 116, 64 NW 1053.

[c] **Authority gathered from entire instrument.**—"The affidavit for an appeal, after giving the style of the case, reads as follows: 'James M. Morey, being duly sworn, upon his oath says that his application for an appeal is not made for vexation or delay, but because he believes the appellant to be injured by the judgment of the justice and that this appeal is from the merits. Brown Manufacturing Co., James M. Morey, Treas., Appellant.' . . . One of the objections made to the affidavit is that

bank,[82] and manager.[83]

[§ 27] **c. Attorney.** An attorney may make an affidavit on behalf of a corporation under the same circumstances that would authorize him to make it for a private person.[84]

[§ 28] **d. Showing of Authority.** Some cases hold that the agent or attorney should state the source of his authority,[85] but a recital of the fact of affiant's agency or official position is usually regarded as sufficient to show his authority to make the affidavit.[86]

[§ 29] **2. Municipal Corporation.** With reference to a municipal corporation it has been held that a member of the city council may make an affidavit for the issuance of a subpœna duces tecum in an action in which the city is a party;[87] and that an affidavit for a change of venue should be sworn to by the city attorney rather than by the mayor or other chief officers.[88]

III. WHO MAY TAKE

[§ 30] **A. Domestic Affidavits—1. Where Special Officer Designated.** The statutes requiring affidavits frequently specify the officer or officers before whom they may be made.[89] An affidavit taken under such a statute before an officer not authorized by it has generally been held of no force or validity whatever;[90] but in some cases it has been held that these statutes are merely directory and do not

it states that James M. Morey makes the application for himself and not for the Brown Manufacturing Company. That is true, literally speaking, but it is to be gathered from the entire instrument that he makes the application for said company." Brown Mfg. Co. v. Gilpin, 120 Mo. A. 130, 133, 96 SW 669.

82. Kirksville Sav. Bank v. Spangler, 59 Mo. A. 172.

[a] **Acting cashier.**—If an affidavit sets forth that a person was the acting cashier, he would be the proper officer to make the affidavit. Philadelphia Nat. Bank v. Morgan, 15 Del. 265, 40 A 1113.

83. Melcher v. Scruggs, 72 Mo. 406; Ashdown v. Manitoba Free Press Co., 20 Can. S. C. 43 [dism app 6 Manitoba 578]; Freehold Loan, etc., Co. v. Bank of Commerce, 44 U. C. Q. B. 284; Newlands v. Higgins, 1 Alta. L. 18.

[a] **Managing agent.**—(1) A verification of an affidavit may be made on behalf of a corporation by its managing agent. Shaft v. Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 23 AmR 138. (2) But in Wheeler, etc., Mfg. Co. v. Lawson, 57 Wis. 400, 15 NW 398, it was held that a general or managing agent within the state for a foreign corporation cannot, under Rev. St. § 2625, make an affidavit on behalf of the corporation, as he is not such "officer" as is contemplated by the statute.

84. U. S.—Silver Peak Mines v. Hanchett, 80 Fed. 990.

Ala.—Birmingham Realty Co. v. Barron, 150 Ala. 232, 43 S 346.

Ky.—Northern Lake Ice Co. v. Orr, 102 Ky. 586, 44 SW 216, 19 KyL 1634.

Me.—Lewiston Co-op. Soc. No. 1 v. Thorpe, 91 Me. 64, 39 A 283.

Mo.—Corpenny v. Sedalia, 57 Mo. 88.

Nebr.—Moline, etc., Co. v. Curtis, 38 Nebr. 520, 57 NW 161.

N. J.—American Soda Fountain Co. v. Stolzenbach, 75 N. J. L. 721, 68 A 1078, 127 AmSR 822, 16 LRANS 703.

N. Y.—Field v. New York Cent., etc., R. Co., 35 Misc. 111, 71 NYS 220.

Oh.—Bullock Beersford Mfg. Co. v. Hedges, 29 Oh. Cir. Ct. 388.

W. Va.—Quesenberry v. People's Bldg., etc., Assoc., 44 W. Va. 512, 30 SE 73.

Wis.—Western Bank v. Tallman, 15 Wis. 92.

Alta.—Newlands v. Higgins, 1 Alta. L. 18.

[a] **Showing why not made by proper officer.**—Under Civ. Code § 550, which provides that "the affidavit of an agent or attorney must state the absence from the county of the party or parties for whom it is made, and the fact that the affiant is agent or attorney," an affidavit for an attachment on behalf of a corporation must, when verified by an attorney for the corporation, show the absence from the county of the officer or agent who would be required to verify it if in the county. Northern Lake Ice Co. v. Orr, 102 Ky. 586, 589, 44 SW 216, 19 KyL 1634.

[b] **Must have knowledge of the facts.**—An affidavit in a case required of a defendant under Code (1891) c 125 § 46, made for a corporation by its attorney therein, not importing that he is conversant with the facts but stating that he verily believes, from information given him by the corporation, that nothing is due plaintiff, is not a sufficient affidavit with a plea to set aside an office judgment. Quesenberry v. People's Bldg., etc., Assoc., 44 W. Va. 512, 30 SE 73.

[c] **Subject to same rules as when made for natural persons.**—"Undoubtedly a pleading might be verified by an attorney of a corporation, upon the same state of facts which would allow such a verification by the attorney of an individual. But the law specially prescribes when this may be done; and unless such a state of facts exists as would justify a verification of a pleading by an attorney of any other party, a verification by a mere attorney of a corporation would be insufficient, and it should be made by some officer thereof. R. S. 1858, ch. 125, sec. 19. But the law, while prescribing that upon certain facts, a pleading may be verified by an ordinary agent or attorney, has made no such provision in respect to an application to change the venue on account of the prejudice of the judge. It says, that must be verified by the oath or affidavit of the party. If, therefore, we would say that an attorney could not verify such an application for an individual who was a party, I think we must say the same in respect to an application by a corporation. When the party himself is required to verify, the law has, in the case of corporations, provided that the officers must do it. And I do not think the courts can, in the case of either an individual or a corporation, say that the affidavit of the attorney is sufficient, where the law says it must be the affidavit of the party." Western Bank v. Tallman, 15 Wis. 92, 94.

85. Birmingham Realty Co. v. Barron, 150 Ala. 232, 43 S 346; American Soda Fountain Co. v. Stolzenbach, 75 N. J. L. 721, 68 A 1078, 127 AmSR 822, 16 LRANS 703; American Insulator Co. v. Bankers, etc., Tel. Co., 13 Daly (N. Y.) 200; Henry v. Brooklyn Heights R. Co., 43 Misc. 589, 89 NYS 525 [aff 97 App. Div. 631 mem, 89 NYS 1106 mem].

[a] **Manager of a loan and savings company** is an agent within the meaning of a statute requiring written authority to be filed when the affidavit is made by an agent. Freehold Loan, etc., Co. v. Bank of Commerce, 44 U. C. Q. B. 284.

[b] **A person who is secretary and treasurer of a corporation, besides being a shareholder,** is an agent within the meaning of a statute providing that when an agent makes an affidavit his written authority shall be filed with the affidavit. Greene, etc., Co. v. Castleman, 25 Ont. 113.

86. U. S.—Silver Peak Mines v. Hanchett, 80 Fed. 990.

Ala.—Birmingham Realty Co. v. Barron, 120 Ala. 232, 235, 43 S 346 [cit Cyc].

D. C.—International Seal Co. v. Beyer, 33 App. 172.

Mich.—Forbes Lith. Mfg. Co. v. Winter, 107 Mich. 116, 64 NW 1053.

Mo.—White Sewing Mach. Co. v. Betting, 53 Mo. A. 260.

Nebr.—Moline, etc., Co. v. Curtis, 38 Nebr. 520, 57 NW 161.

Tex.—Cleburne First Nat. Bank v. Graham, (A.) 23 SW 1101.

Description of affiant in general see infra § 32.

87. Wheeling v. Black, 25 W. Va. 266.

88. Corpenny v. Sedalia, 57 Mo. 88.

89. See statutory provisions, and cases infra note 90.

90. U. S.—U. S. v. Hall, 131 U. S. 50, 9 SCt 663, 33 L. ed. 97; U. S. v. Curtis, 107 U. S. 671, 2 SCt 507, 27 L. ed. 534; Stationary Engineer Pub. Co. v. Comerford, 155 Fed. 667; Buerk v. Imhaeuser, 4 F. Cas. No. 2,107a [aff 101 U. S. 647, 25 L. ed. 945]; Haight v. Morris Aqueduct, 11 F. Cas. No. 5,902, 4 Wash. 601.

Ark.—Edmondson v. Carnall, 17 Ark. 284.

Cal.—Fairbanks, etc., Co. v. Getchell, 13 Cal. A. 458, 110 P 331.

Fla.—Chattanooga First Nat. Bank v. Willingham, 36 Fla. 32, 18 S 58.

Ga.—Griswold v. Rutherford, 109 Ga. 398, 34 SE 602.

Mich.—Greenvault v. Farmers, etc., Bank, 2 Dougl. 498.

Nebr.—Lanning v. Haases, 89 Nebr. 19, 130 NW 1008.

N. Y.—Stanton v. Ellis, 16 Barb. 319 [aff 12 N. Y. 575]; Winnington's Est., 1 NYCivProc 267; Berrien v. Westervelt, 12 Wend. 194; Christman v. Floyd, 9 Wend. 340; Griffith v. Miller, 7 Wend. 514.

Tenn.—Baker v. Grigsby, 7 Heisk. 627.

Eng.—Reg. v. Bloxham, 6 Q. B. 528, 51 ECL 528, 115 Reprint 197; Blakeley v. Abeles, 11 Jur. N. S. 325.

[a] **Before person without authority to administer oath.**—"Nevertheless, the document which purports to be sworn to is not an affidavit unless the person before whom his assent to the solemn obligation is assumed had authority at the time to administer the oath." Per Shaw, J., in Fairbanks v. Getchell, 13 Cal. A. 458, 461, 110 P 331.

[b] **Under acts of congress.**—(1) For use in the courts of the United States, affidavits must be made before some person authorized by act of congress. Gray v. Tunstall, 10 F. Cas. No. 5,730, Hempst. 558; Haight v. Morris Aqueduct, 11 F. Cas. No. 5,902, 4 Wash. 601. (2) An act of congress may authorize a state magistrate to take affidavits in support of claims against the United States. U. S. v. Bailey, 9 Pet. (U. S.) 238, 9 L. ed. 113.

[c] **Statute must be followed.**—(1) "Where a legislative act provides that a prosecution in a certain city court shall be begun by affidavit

prohibit the taking of affidavits before other officers.[91] So an affidavit may be taken by an officer who, by one statute, is given the powers and jurisdiction of an officer expressly authorized by another statute to take an affidavit.[92] Where it appears on the face of the affidavit that the person who administered the oath had no authority to do so, it will be treated as a nullity.[93] It has been held that an officer upon whom the power was conferred was bound to take an affidavit when requested, and that his refusal so to do was a misdemeanor.[94]

[§ 31] **2. Where No Special Officer Designated—a. Courts and Judges.** Courts of record and the judges thereof have an implied power to take affidavits for use in proceedings before them.[95]

[§ 32] **b. Other Officers.** Where an affidavit is required to be made and the statute does not designate any particular officer or officers before whom the act shall be performed, it may be done before any officer having general authority under the statutes to administer and certify oaths,[96] and, in some cases, before an officer authorized by rules of

made by the prosecutor, which shall be made before the judge of that court, the constitutional provision referred to does not of itself authorize the judge of the superior court of the circuit to take and attest such an affidavit on the ground that the judge of the city court is disqualified from acting, by reason of relationship to the defendant. This is not presiding in a case in the city court, within the meaning of the constitution. Ivey v. State, 112 Ga. 175, 37 SE 398; Northwestern Mut. L. Ins. Co. v. Wilcoxon, 64 Ga. 556. The affidavit made before the judge of the superior court and attested by him, and the accusation based thereon, being without authority of law, the judgment should have been arrested on motion." Edmondson v. State, 123 Ga. 194, 196, 51 SE 301. (2) Where, in a special proceeding, the statute authorizes only a judge of the superior court or a justice of the peace to administer the oath to the affidavit, it cannot be lawfully done by a judge of a county court. Griswold v. Rutherford, 109 Ga. 398, 34 SE 602. (3) An affidavit sworn to before a notary is insufficient under a statute requiring it to be sworn to before a judge or clerk of court or justice of the peace. Chattanooga First Nat. Bank v. Willingham, 36 Fla. 32, 18 S 58; Sherwood v. Iona Cir. Judge, 107 Mich. 136, 64 NW 1045; Williams, etc., Co. v. Raitze, 8 OhS&CP 695, 7 OhNP 614. (4) Where a statute provided that an affidavit accompanying a petition should be sworn to before a particular officer, it was held that it could not be sworn to before another officer, and one sworn to before a commissioner of deeds who was not the officer specified in the statute was a nullity. Small v. Wheaton, 4 E. D. Smith (N. Y.) 306.

[d] **Limited to power conferred.**—The fact that the power to take affidavits to answers in chancery is conferred by statute upon justices of the peace and notaries public does not authorize them to take affidavits in other matters. Graham v. Caldwell, 8 Baxt. (Tenn.) 69.

[e] **Estoppel to deny authority.**—Where all the parties interested in contempt proceedings pending in the court of chancery acquiesced in the taking of affidavits by a county judge, and some of them attended before the judge for that purpose, they could not contend that the judge had no authority to take the affidavits, although certain of those who attended before the judge were not at the time directly accused of improper conduct. Seastream v. New Jersey Exhibition Co., (N. J. Ch.) 61 A 1041.

[f] **Plea in abatement** is the proper mode of raising an objection that an affidavit for attachment was taken before an officer who had no authority. Lowry v. Stowe, 7 Port. (Ala.) 483.

[g] **Exception à la forme.**—(1) In Quebec the invalidity may be set up by way of exception to the form. Lavoie v. Jeffrey, 16 Que. Super. 363. (2) If the description of the qualification of a commissioner who receives an affidavit is really insufficient, the seizing party should raise the point by an exception to the form, and not by motion to reject the opposition. Drainville v. Savoie, 11 Que. Pr. 437.

91. Hunter v. State, 102 Ind. 428, 1 NE 361.

Necessity for jurat to show the officer's official character see infra § 110.

[a] **Statute directing oath before clerk.**—In Brown v. Brown, 138 Ind. 257, 37 NE 142 [foll Eastes v. Eastes, 79 Ind. 363], it was held that a statutory provision that affidavits of a certain nature should be sworn to before the clerk of the court in which the complaint is filed is merely directory, and that such affidavits may be sworn to before any officer of the state authorized to administer oaths.

92. Robinson v. Benton County, 49 Ark. 49, 4 SW 195.

93. Davis v. Rich, 2 HowPr (N. Y.) 86; Shaw v. Perkin, 1 Dowl. P. C. N. S. 306.

[a] **In order to convict an affiant of perjury** it must appear that the officer who administered the oath had competent and legal authority to do so. Van Dusen v. Peo., 78 Ill. 645.

[b] **Insufficient interest to disqualify officer.**—In Peck v. Peo., 153 Ill. 454, 39 NE 117, it was held that the fact that the affidavit as to the mailing of notices to the owners of property assessed was sworn to by one of the commissioners appointed to make the assessment before another one of said commissioners as notary public did not invalidate the affidavit, especially on collateral attack, since the commissioners had no personal interest in the assessment proceeding.

[c] **In Quebec.**—(1) Where the affidavit for an opposition was sworn before a person describing himself as "C. C. S. D. pour le district de Montréal," no such official being known to the court or entitled by law to receive affidavits, the affidavit was held null, and the opposition, not being supported by affidavit as required by law, was dismissed. Lachance v. Lachance, 17 Que. Super. 395. (2) An affidavit accompanying a petition for a writ of quo warranto is void if it is received by an unauthorized person, in this case a deputy clerk of the circuit court, and renders the writ itself void. Lavoie v. Jeffrey, 16 Que. Super. 363.

94. Peo. v. Brooks, 1 Den. (N. Y.) 457, 43 AmD 704 (construing L. (1838) p 232 § 1; 2 Rev. St. p 284 § 49; p 696 § 38).

95. U. S.—Gray v. Tunstall, 10 F. Cas. No. 5,730, Hempst. 558; Haight v. Morris Aqueduct, 11 F. Cas. No. 5,902, 4 Wash. 601.

Ala.—Fox v. Lawson, 44 Ala. 319.

Ark.—Edmondson v. Carnall, 17 Ark. 284; Lafferty v. Lafferty, 10 Ark. 268.

Ga.—Edmondson v. State, 123 Ga. 194, 51 SE 301; Griswold v. Rutherford, 109 Ga. 398, 34 SE 602; Veal v. Perkerson, 47 Ga. 92.

Ky.—Green v. Breckinridge, 4 T. B. Mon. 541.

Mo.—Glasgow v. Switzer, 12 Mo. 395.

N. J.—Smith v. Abbott, 17 N. J. L. 358; Scull v. Alter, 16 N. J. L. 147; English v. Bonham, 15 N. J. L. 431; Anonymous, 8 N. J. L. 176.

N. Y.—Ross v. Wigg, 34 Hun 192; Wood v. Williams, 1 NYLegObs 154; Hopkins v. Menderback, 5 Johns. 234; Craig v. Briggs, 4 Paige 548.

Oh.—Williams, etc., Co. v. Raitze, 8 OhS&CP 695, 7 OhNP 614.

Tenn.—Baker v. Grigsby, 7 Heisk. 627.

Tex.—Nevell v. Terrell, 99 Tex. 355, 87 SW 659, 89 SW 971; Stepp v. State, 53 Tex. Cr. 158, 109 SW 1093.

Eng.—Driffill v. Taylor, 4 Bing. N. Cas. 369, 33 ECL 757, 132 Reprint 829.

See generally Courts [11 Cyc 661 et seq]; Judges [23 Cyc 534 et seq].

[a] **Judges of the courts of common pleas** were by statute ex officio commissioners for taking affidavits to be read in the supreme court and could take affidavits in any county. Hopkins v. Menderback, 5 Johns. (N. Y.) 234.

[b] **A county judge** has authority to take affidavits to be used in the court of chancery. Seastream v. New Jersey Exhibition Co., (N. J. Ch.) 61 A 1041.

[c] **Police magistrate.**—It has been held that U. S. Rev. St. § 5278, designating a magistrate as a person before whom an affidavit may be taken, includes an assistant police magistrate of a city. Kurtz v. State, 22 Fla. 36, 1 AmSR 173.

[d] **An assistant justice of a ward court,** not being a judge of a court of record, is incompetent to take an affidavit. Wood v. Williams, 1 NYLeg Obs 154.

[e] **Single judge.**—Swearing an affidavit, whether before the court or a commissioner, is a business depending in court. It is not, strictly speaking, part of the suit; but it is such business as relates to matter over which the courts have a common jurisdiction, and as may, according to the course and practice of the courts, be transacted by a single judge. Driffill v. Taylor, 4 Bing. N. Cas. 369, 33 ECL 757, 132 Reprint 829.

[f] **Ex officio judge.**—In Craig v. Briggs, 4 Paige (N. Y.) 548, it was held that an affidavit might be sworn to before a state senator, since he was an ex officio judge of the court for correction of errors, which the senate was at that time.

[g] **In open court.**—In a very urgent and pressing case an affidavit may be sworn in open court. Mercers' Co. v. Great Northern R. Co., 14 Beav. 20, 51 Reprint 194.

96. U. S.—U. S. v. Manion, 44 Fed. 800.

Ala.—Wright v. Smith, 66 Ala. 545.

Ark.—Love v. McAlister, 42 Ark. 183; Lafferty v. Lafferty, 10 Ark. 268.

Cal.—Dunn v. Ketchum, 38 Cal. 93.

Colo.—Walker v. Peo., 22 Colo. 415, 45 P 388.

Ga.—Rigell v. Sirmans, 123 Ga. 455, 51 SE 381.

Ill.—Rowley v. Berrian, 12 Ill. 198.

Ind.—Brown v. Brown, 138 Ind. 257, 37 NE 142; Hawkins v. State, 136 Ind. 630, 36 NE 419; Eastes v. Eastes, 79 Ind. 363; Brooster v. State, 15 Ind. 190.

Mo.—State v. Boland, 12 Mo. A. 74.

Nebr.—Horkey v. Kendall, 53 Nebr. 522, 73 NW 953, 68 AmSR 623.

N. J.—McKernan v. McDonald, 27 N. J. L. 541; Seidel v. Peschkaw, 27 N. J. L. 427; Munn v. Merry, 14 N. J. L. 183.

N. Y.—Christman v. Floyd, 9 Wend. 340; Wood v. Jefferson County Bank, 9 Cow. 194.

court,[97] or by the regulation or custom of an executive department of the federal government.[98] Among officers commonly having such power are notaries public,[99] justices of the peace,[1] clerks of courts,[2] deputy clerks,[3] and, for some purposes, masters in chancery,[4] collectors of customs,[5] United States commissioners,[6] commissioners of courts,[7] state senators,[8] mayors,[9] aldermen,[10] city clerks,[11] recorders of municipalities,[12] commissioners of deeds,[13] registers of deeds,[14] and registers of United States land office.[15] But the power to take an affidavit has been held not to be one of the general powers of coroners,[16] or of sheriffs.[17]

[§ 33] **3. When Officer Disqualified—a. In General.** Officers who are otherwise qualified to take affidavits may be rendered incompetent by reason of the interest they have in the cause,[18] or the relation they bear to the affiant.[19] It has been held, for example, that an affidavit may not be taken before a partner,[20] an agent,[21] or a deputy[22] of the affiant; and also that an affidavit in the interest of a corporation may not be taken before one who is an officer and stockholder of the corporation.[23] But business relations in regard to matters not in any

S. C.—Marine Wharf, etc., Co. v. Parsons, 49 S. C. 136, 26 SE 956.

Tex.—Anderson v. Cochran, 93 Tex. 583, 57 SW 29.

See generally Oaths and Affirmations [29 Cyc 1299 et seq].

[a] **For the purpose of a prosecution for perjury** it is enough that the affidavit was made before an officer having general authority to administer oaths, without showing that such officer had authority to administer this especial oath. State v. Boland, 12 Mo. A. 74.

[b] **Foundation of a proceeding to evict an intruder.**—(1) An affidavit under Civ. Code (1895) § 4808 may be made before any officer authorized to administer an oath. Rigell v. Sirmans, 123 Ga. 455, 51 SE 381. (2) "The affidavit which is the foundation of the proceeding to evict an intruder may be made before any officer authorized to administer an oath. Civil Code, § 4808. It differs in this respect from the affidavit which is the foundation of a proceeding against a tenant, which is required to be taken before a judge of the superior court or a justice of the peace. Civil Code, § 4813; Griswold v. Rutherford, 109 Ga. 398, 34 SE 602. The county judge therefore had authority to administer the oath." Rigell v. Sirmans, 123 Ga. 455, 456, 51 SE 381.

[c] **Officer before whom affidavit is to be used.**—By 2 Rev. St. (2d ed) § 11 whenever it shall become necessary to prove any matters before any public officer, in order to his decision upon the propriety of his doing any official act, such officer may require proof by affidavit and in such cases may administer an oath. Lucas v. Ensign, 4 NYLegObs 142.

97. Gray v. Tunstall, 10 F. Cas. No. 5,730, Hempst. 558.

[a] **United States district court** for the district of Arkansas was empowered by statute "to appoint such and so many discreet persons, in different parts of the district, as it shall deem necessary, to take acknowledgments of bail and affidavits, which shall have the like force and effect as if taken before a judge of this court." Under a rule made by the district court in pursuance of such statute it was held that justices of the peace and masters in chancery of the state of Arkansas were authorized to take affidavits to be used in the circuit court of the United States in civil causes, and that affidavits so taken were as valid and effectual as if subscribed in open court. Gray v. Tunstall, 10 F. Cas. No. 5,730, Hempst. 558.

98. U. S. v. Curtis, 107 U. S. 671, 2 SCt 507, 27 L. ed. 534; U. S. v. Winchester, 28 F. Cas. No. 16,739, 2 McLean 135.

[a] **To prove claims against United States.**—In the absence of a federal statute prescribing who shall take affidavits of claims against the United States, it has been held that the secretary of the treasury could make a regulation admitting claims verified before state magistrates. U. S. v. Bailey, 9 Pet. (U. S.) 238, 9 L. ed. 113.

99. See Notaries [2 Cyc 10; 29 Cyc 1083].

1. See Justices of the Peace [2 Cyc 11].

2. See Clerks of Courts [2 Cyc 11; 7 Cyc 224].

3. See Clerks of Courts [2 Cyc 12; 7 Cyc 248].

4. Trabue v. Holt, 2 Bibb (Ky.) 393; Dickerson v. Stoll, 24 N. J. L. 550. But see Stanton v. Ellis, 16 Barb. (N. Y.) 319 (holding that where there was no statute conferring upon masters in chancery the power to take affidavits it was held that an affidavit sworn to before a master was of no force).

[a] **"With respect to the course of practice in chancery,** it seems that in England a subpœna was not required to be executed by the sheriff, but might be served by any private individual, and the service of it proved by affidavit; but this affidavit could not be made before a justice of the peace, but was required to be sworn to before a master in chancery, who was an officer of the court." Trabue v. Holt, 2 Bibb (Ky.) 393, 394.

5. U. S. v. Barton, 24 F. Cas. No. 14,534, Gilp. 439.

6. See United States Commissioners [39 Cyc 793].

7. See Court Commissioners [11 Cyc 623].

8. Craig v. Briggs, 4 Paige (N. Y.) 548 (holding that under 2 Rev. St. 276, 284, a state senator, as an ex officio judge, was authorized to take an affidavit).

9. Robinson v. Benton County, 49 Ark. 49, 4 SW 195; Edmondson v. Carnall, 17 Ark. 284; State v. Bayonne, 35 N. J. L. 335; Den v. Geiger, 9 N. J. L. 225. See Municipal Corporations [28 Cyc 464].

10. Noble v. U. S., Dev. Ct. Cl. (U. S.) 83; Duffie v. Black, 1 Pa. 388; Com. v. Frank, 7 Pa. Dist. 143.

[a] **Authority presumed.**—Where an affidavit which purported to have been sworn to before "Thom. Williamson, Alderman, Bo. of Norfolk," was objected to because it did not appear that it had been taken before anyone authorized by law to administer an oath, the court held that, although they might not judicially know that an alderman of Norfolk had the power to administer an oath, yet, in the absence of any evidence to the contrary, it was sufficient. Noble v. U. S., Dev. Ct. Cl. (U. S.) 83.

[b] **Verifying criminal information.**—An alderman of a city has the power to take the affidavit of an informant to a criminal information. Com. v. Frank, 7 Pa. Dist. 143.

11. State v. Bayonne, 35 N. J. L. 335.

12. Camp v. Murphy, 68 Minn. 378, 71 NW 1; Election Cases, 65 Pa. 20; Schumann v. Schumann, 6 Phila. (Pa.) 318.

[a] **For renewal mortgage.**—An affidavit to obtain the renewal of a chattel mortgage was properly verified before the recorder of a village. Camp v. Murphy, 68 Minn. 378, 71 NW 1.

[b] **Libel for divorce.**—The recorder of the city of Philadelphia had the power to administer the oath to an affiant verifying the affidavit to a libel for divorce, under the original charter of the city and the act of 1796 giving him the powers of a justice of the peace. Schumann v. Schumann, 6 Phila. (Pa.) 318.

13. Peo. v. Cady, 105 N. Y. 299, 11 NE 810; Jones v. Smith, 16 Johns. (N. Y.) 232; Hopkins v. Menderback, 5 Johns. (N. Y.) 234; Parker v. Baker, 8 Paige (N. Y.) 428.

14. Thompson v. Higginbotham, 18 Kan. 42; Colman v. Goodnow, 36 Minn. 9, 29 NW 338, 1 AmSR 632. See Registers of Deeds [34 Cyc 1020].

15. Peters v. U. S., 2 Okl. 138, 37 P 1081.

16. Berrien v. Westervelt, 12 Wend. (N. Y.) 194. See Coroners [2 Cyc 10, 34; 9 Cyc 981].

"The coroner had no right to administer the oath to the plaintiff. He is not of the number of those officers to whom general power is given to administer oaths or take affidavits, 2 R. S. 284, § 49; and no special authority is given to him to take an affidavit in any cause depending in court. The section referred to in 2 R. S. 552 § 11, does not contemplate a proceeding in an action depending in court; and although the sureties to a replevin bond may be sworn and examined by the coroner, he is not authorized to take an affidavit to be used in a cause." Per Sutherland, J., in Berrien v. Westervelt, 12 Wend. (N. Y.) 194.

17. Heard v. State, 121 Ga. 138, 48 SE 905. See Sheriffs and Constables [35 Cyc 1527 et seq].

18. Ga.—Wilkowski v. Halle, 87 Ga. 678, 95 AmD 374; Tillinghast v. Walton, 5 Ga. 335.

Ill.—Peck v. Peo., 153 Ill. 454, 39 NE 117.

Iowa.—Empire Real Est., etc., Co. v. Beechley, 137 Iowa 7, 114 NW 556, 126 AmSR 248.

Kan.—Swearingen v. Howser, 37 Kan. 126, 14 P 436.

Nebr.—Collins v. Stewart, 16 Nebr. 52, 20 NW 11.

[a] **Plaintiff in an action commenced by publication** is disqualified to take the affidavit of the publisher by which proof of the publication must be made, as required by Code § 3536. Empire Real Est., etc., Co. v. Beechley, 137 Iowa 7, 10, 114 NW 556, 126 AmSR 248 (where the court said: "In New York and some other States, as well as in England, it has frequently been held that one who is interested in a proceeding, either directly or as an attorney, is disqualified to take an affidavit or administer an oath to be used therein. . . . It is to be admitted that authorities to the contrary may be found; but the rule stated is a safe one, and we are disposed to hold it applicable to the case at bar. It is in harmony with the principles affirmed by us in the decisions already cited, and it imposes no hardship upon any party seeking the aid of the courts for the enforcement of an alleged right").

19. Rex v. Wallace, 3 T. R. 403, 100 Reprint 644.

20. Dunn v. McLean, 6 Ont. Pr. 95.

21. Rex v. Wallace, 3 T. R. 403, 100 Reprint 644.

22. Owens v. Johns, 59 Mo. 39.

23. Fair v. Citizens' State Bank, 70 Kan. 612, 614, 79 P 144, 67 LRA 851 (where the court said: "The first and most difficult question presented is, Was the renewal affidavit void by reason of the fact that the notary public who administered the oath was at the time an officer and stockholder

way connected with the affidavit will not disqualify.[24]

[§ 34] **b. Attorney.** The decisions are not in entire uniformity as to whether an affidavit can be taken before an officer who, although otherwise qualified, is the attorney of the party for whose benefit it is to be used. In many jurisdictions the general rule is that he is disqualified.[25] The application of this rule has been limited to affidavits taken by one who was attorney for the affiant at the time they were taken,[26] and in some cases it has been held not to apply to affidavits taken by the attorney before the commencement of the cause in which they were sought to be used.[27] And it has been held that an officer is not disqualified merely

of the mortgagee? . . . Some, by analogy at least, hold it void; others that it is voidable only. Some reason that such act of an officer interested would be void or voidable accordingly as the transaction is or is not tainted with fraud or undue advantage taken. That one who is of counsel, or is related to either party, or is otherwise interested in the event of an action, should be barred, even in the absence of our statutory provision, is too evident for discussion. . . . The weight of authority seems to be that it is not void, but only voidable").

Acknowledgments taken by a stockholder see Acknowledgments § 113.

24. Peck v. People, 153 Ill. 454, 39 NE 117; Fair v. Citizens' State Bank, 70 Kan. 612, 79 P 144, 67 LRA 851.

25. U. S.—Allis v. Stowell, 85 Fed. 481.

Ark.—Coleman v. Frauenthal, 46 Ark. 302; Hammond v. Freeman, 9 Ark. 62.

Colo.—Fryberger v. McMillen, 15 Colo. 349, 25 P 713; Martin v. Skehan, 2 Colo. 614; Anderson v. Sloan, 1 Colo. 33.

Ga.—Moultrie Lumber Co. v. Jenkins, 121 Ga. 721, 49 SE 678 (construing Civ. Code [1895] § 4417, which states that "attorneys cannot take affidavits required of their clients, unless specially permitted by law"); Nichols v. Hampton, 46 Ga. 253; Wilkowski v. Halle, 37 Ga. 678, 95 AmD 374.

Kan.—Fair v. Citizens' State Bank, 70 Kan. 612, 79 P 144, 67 LRA 851; Carr v. Hooper, 48 Kan. 253, 29 P 398; Schoen v. Sunderland, 39 Kan. 758, 18 P 913; Swearingen v. Howser, 37 Kan. 126, 14 P 436; Tootle v. Smith, 34 Kan. 27, 7 P 577; Warner v. Warner, 11 Kan. 121.

Mich.—Thos. E. Lynch Co. v. Wayne Cir. Judge, 129 Mich. 110, 88 NW 387.

Nebr.—Malcom Sav. Bank v. Cronin, 80 Nebr. 228, 114 NW 158; Horkey v. Kendall, 53 Nebr. 522, 73 NW 953, 68 AmSR 623; Collins v. Stewart, 16 Nebr. 52, 20 NW 11.

N. J.—Pullen v. Pullen, (1899) 17 A 310; Den v. Geiger, 9 N. J. L. 225.

N. Y.—Kuh v. Barnett, 57 N. Y. Super. 234, 6 NYS 881; Bliss v. Molter, 58 HowPr 112; Anonymous, 4 HowPr 290; Gilmore v. Hempstead, 4 HowPr 153; Vary v. Godfrey, 6 Cow. 587; Taylor v. Hatch, 12 Johns. 340; Murray v. Hefferan, 2 NYLBul 67.

Oh.—Ward v. Ward, 10 Oh. Cir. Dec. 656.

Okl.—Shanheltzer v. Thompson, 24 Okl. 198, 103 P 595, 138 AmSR 877.

Tex.—Burnett v. State, (Cr. A.) 165 SW 581; Gordon v. State, (Cr. A.) 162 SW 622; Luttrell v. State, (Cr. A.) 157 SW 157; Pullen v. State, (Cr. A.) 156 SW 935; Peters v. State, (Cr. A.) 155 SW 212; Cuellar v. State, (Cr. A.) 154 SW 228; Horton v. State, (Cr. A.) 154 SW 227 Horgan v. State, (Cr. A.) 147 SW 871; Garza v. State, (Cr. A.) 145 SW 590; Staff v. State, (Cr. A.) 144 SW 941; Williams v. State, (Cr. A.) 144 SW 622; McGinsey v. State, (Cr. A.) 144 SW 268; Scott v. State, (Cr. A.) 143 SW 610; Maples v. State, (Cr. A.) 131 SW 567, 568 [cit Cyc]. But see Power v. First State Bank, (Civ. A.) 162 SW 416.

Eng.—Turner v. Bates, 10 Q. B. 292, 59 ECL 292, 116 Reprint 113; Bourke v. Davis, 44 Ch. D. 110; Northumberland v. Todd, 7 Ch. D. 777; In re Gregg, L. R. 9 Eq. 137; Matter of Hogan, 3 Atk. 813, 26 Reprint 1264; Haward v. Nalder, Barnes Notes 60, 94 Reprint 806; Wood v. Harpur, 3 Beav. 290, 43 EngCh 290, 49 Reprint 113; Foster v. Harvey, 4 De G. J. & S. 59, 69 EngCh 46, 46 Reprint 837; Doe v. Roe, 8 Dowl. P. C. 340; Beaumont v. Dean, 4 Dowl. P. C. 354; Burt v. Owen, 1 Dowl. P. C. 691; Hopkin v. Hopkin, 10 Hare appendix ii, 44 EngCh 710, 68 Reprint 1113; Jenkins v. Mason, 3 Moore C. P. 325, 4 ECL 549; Rex v. Howard, 1 M. & Rob. 187; Horsfall v. Matthewman, 3 M. & S. 154, 105 Reprint 568; Cooper v. Archer, 12 Price 149; Hopkinson v. Buckley, 8 Taunt. 74, 4 ECL 46, 129 Reprint 310; Rex v. Wallace, 3 T. R. 403, 100 Reprint 644; Kilby v. Stanton, 2 Y. & J. 75.

B. C.—McLellan v. Harris, 6 B. C. 257; Dunsmuir v. Klondike, etc., Gold Fields, 6 B. C. 200.

Ont.—Wilde v. Crow, 10 U. C. C. P. 406; Burger v. Beamer, 3 U. C. Q. B. 179; Hadley v. Hearns, 1 U. C. Q. B. 405.

Que.—Gosselin v. Bergevin, 11 Que. Super. 288. See In re Haddey v. Shields, 8 Que. Pr. 30.

See Sobrinos de Armas, 1 Porto Rico Fed. 256.

[a] **Reason of rule.**—"The rule is that a solicitor who is in the employ of the party and acquainted with the facts of the case must not administer the oath as the interests of justice require that the officer be indifferent." Dunsmuir v. Klondike, etc., Gold Fields, 6 B. C. 200.

[b] **Contrary to public policy.**—"We think it would be contrary to the policy of the law and to public policy to hold that affidavits might be taken to be used before a justice of the peace or in any court, before attorneys and parties interested in the result of causes." Ward v. Ward, 20 Oh. Cir. Ct. 136, 141, 10 Oh. Cir. Dec. 656.

[c] **To prevent fraud.**—"As this matter has not been passed upon by this court before, we will not do more now than say that the authorities all denounce this practice. If it is permitted, the door is opened to all kinds of impositions and frauds. Such conduct must not be repeated. In the future such affidavits will not be received or considered, except as the basis of proceedings against the offending attorney." Crawford v. Ferguson, 5 Okl. Cr. 377, 379, 115 P 278, 45 LRANS 519.

[d] **History of rule.**—"In England it has long been considered irregular to take an affidavit before the attorney in the cause. And, even in a proceeding by habeas corpus, the court of king's bench, out of respect to personal liberty, would have disregarded this circumstance, but they said 'the rule was invariable, and was founded on the wisest and most obvious principles,' and adhered to it. Rex v. Wallace, 3 T. R. 403, 100 Reprint 644. And in Taylor v. Hatch, 12 Johns. (N. Y.) 340, our supreme court said it was 'a fit and proper rule, which we shall therefore adopt as the practice here.' The same practice prevailed in our court of chancery (Peo. v. Spalding, 2 Paige (N. Y.) 326), as well as in England, though for a time fluctuating there (3 Dan. Pr. 1771, and cases there cited)." Gilmore v. Hempstead, 4 HowPr (N. Y.) 153.

[e] **An attorney is anyone who appears for another,** it not being necessary that he should be an "attorney at law." Ward v. Ward, 20 Oh. Cir. Ct. 136, 10 Oh. Cir. Dec. 656.

[f] **Agent and correspondent of solicitor.**—In McLellan v. Harris, 6 B. C. 257, several affidavits were sworn to before a notary public of Manitoba, who was the agent or correspondent of the solicitor of defendants, although not a solicitor in the court in which the action was brought. It was held by McColl, C. J., that Rule No. 417 applies to agents or correspondents without as well as within the province.

[g] **To be used in equity.**—In Smith v. Woodroffe, 6 Price 230, it was held that an affidavit sworn to before one of the solicitors in the cause was not irregular on the ground that it was not contrary to the practice on the equity side of the court. However, the Lord Chief Baron desired that it might be understood as a rule that in the future affidavits were not to be made before the attorneys in the cause.

[h] **In accordance with practice of state where taken.**—It has been held that where an affidavit to obtain an attachment was taken in Iowa before a notary public who was also an attorney in the cause it would not be valid in Nebraska, although an affidavit so taken was in accordance with the Iowa practice. Malcom Sav. Bank v. Cronin, 80 Nebr. 228, 114 NW 158.

[i] **Leave to amend.**—Where an affidavit was sworn to before plaintiff's attorney a motion to set it aside was granted, but leave was given plaintiff to file a new affidavit nunc pro tunc. Anonymous, 4 HowPr (N. Y.) 290. See also Swearingen v. Howser, 37 Kan. 126, 14 P 436 (where it was held that leave to file an amended affidavit should be granted).

[j] **In Quebec** an affidavit sworn to by plaintiff before an attorney in the cause to prove damages in an action in ejectment by default is irregular, and the délibéré will be discharged. Haddey v. Shields, 8 Que. Pr. 30.

26. Thomas E. Lynch Co. v. Wayne Cir. Judge, 129 Mich. 110, 88 NW 387; Kidd v. Davis, 5 Dowl. P. C. 568; Beaumont v. Dean, 4 Dowl. P. C. 354.

[a] **Commissioner** who was appellant's attorney in the court below may receive an affidavit on review from a magistrate's court. Northrup v. Perkins, 37 CanLJ 706. See also Gougeon v. Thompkins, 1 WestLR 114.

27. U. S.—In re Kindt, 98 Fed. 403, 3 AmBankr 443.

Kan.—Carr v. Hooper, 48 Kan. 253, 29 P 398.

Mich.—Sullivan v. Hall, 86 Mich. 7, 48 NW 646, 13 LRA 556.

Mo.—Smith v. Ponath, 17 Mo. A. 262.

N. Y.—Post v. Coleman, 9 HowPr 64; Gilmore v. Hempstead, 4 HowPr 152; Adams v. Mills, 3 HowPr 219; Griffin v. Borst, 4 Wend. 195; Vary v. Godfrey, 6 Cow. 587; Hallenback v. Whitaker, 17 Johns. 2; Williard v. Judd, 15 Johns. 531.

Eng.—Haward v. Nadler, Barnes Notes 60, 94 Reprint 806; Foster v. Harvey, 4 De G. J. & S. 59, 69 EngCh 46, 46 Reprint 837.

But see Dunsmuir v. Klondike, etc., Gold Fields, 6 B. C. 200 (holding that the affidavit of a party to a suit, which was sworn to be before a solicitor who was not the solicitor of record in the suit but had been employed by the party prior to its commencement, could not be received).

[a] **An affidavit on review from a justice's court** may be sworn to before a commissioner who acted as attorney for the appellant in the court below. Northrup v. Perkins, 37 CanLJ 706.

[b] **Attorney in justice's court.**—1 Comp. Laws § 2640 provides: "It shall not be lawful for notaries public who are attorneys and counselors

because he is a counsel of the party,[28] or clerk of the attorney of record,[29] or is employed in the attorney's office,[30] or had been requested by affiant's attorney to take the affidavit.[31] Affidavits taken by a partner of the attorney of record have in some cases been held valid,[32] but the contrary has also been held.[33] In some jurisdictions while the practice has been disapproved[34] some cases have held that the mere fact of the officer being an attorney for the affiant will not disqualify him from taking the affidavit,[35] or at least will not render it absolutely void.[36]

Statutory authorization. In some states the taking of affidavits of a client by an attorney has been expressly authorized by statute, at least for some purposes.[37]

Idem sonans. The fact that the name of the officer before whom the affidavit was taken and that of an attorney in the cause are similar will not establish their identity to an extent sufficient to affect the regularity of the affidavit.[38]

Raising objection to use of affidavit. In jurisdictions where an affidavit taken before an attorney is not void, but only voidable,[39] objection to its use must be made at the earliest opportunity or it will be considered waived.[40]

[§ 35] **4. Deputies of Authorized Officers.** As a general rule whenever an affidavit may be taken

at law or solicitors in chancery to administer oaths in causes in which they may be professionally engaged." It has been held that this statute did not apply to an attorney who conducted a case in a justice's court and then took an affidavit, made by the attorney who employed him, which was the basis of a transcript from the judgment, since his authority as an attorney extended no further than the proceedings before the justice. Thomas E. Lynch Co. v. Wayne Cir. Judge, 129 Mich. 110, 111, 88 NW 387.

28. Atkinson v. Glenn, 2 F. Cas. No. 610, 4 Cranch C. C. 134; Dickerson v. Stoll, 24 N. J. L. 550; Griffin v. Borst, 4 Wend. (N. Y.) 195; Willard v. Judd, 15 Johns. (N. Y.) 531; Peo. v. Spalding, 2 Paige (N. Y.) 326. But see Den v. Geiger, 9 N. J. L. 225 (where the court refused to receive an affidavit taken before a counsel).

29. MacKenzie v. MacKenzie, 238 Ill. 616, 87 NE 848 [aff 141 Ill. A. 126]; Schuyler Nat. Bank v. Bollong, 24 Nebr. 821, 40 NW 411; Cocksedge v. Rickwood, Barnes Notes 45, 94 Reprint 798; Foster v. Harvey, 4 De G. J. & S. 59, 69 EngCh 46, 46 Reprint 837; Doe v. Roe, 5 Dowl. P. C. 409; Goodtitle v. Badtitle, 8 T. R. 638, 101 Reprint 1590. But see Bourke v. Davis, 44 Ch. D. 110.

30. Goodrich v. Williams, 50 Ga. 425 [foll Georgia Ice Co. v. Porter, 70 Ga. 637]; Foster v. Harvey, 4 De G. J. & S. 59, 69 EngCh 46, 46 Reprint 837.

31. In re Gregg, L. R. 9 Eq. 137.

32. Hallenback v. Whitaker, 17 Johns. (N. Y.) 2; Peo. v. Spalding, 2 Paige (N. Y.) 326; Turner v. Bates, 10 Q. B. 292, 59 ECL 292, 116 Reprint 113.

33. Northumberland v. Todd, 7 Ch. D. 777; Batt v. Vaisey, 1 Price 116; White v. Petch, 6 U. C. Q. B. 13; Hadley v. Hearns, 1 U. C. Q. B. 405.

34. Savage v. Parker, 53 Fla. 1002, 1013, 43 S 507 [cit Cyc]; Phillips v. Phillips, 185 Ill. 629, 57 NE 796; Hollenbeck v. Detrick, 162 Ill. 388, 44 NE 732; Linck v. Litchfield, 141 Ill. 469, 31 NE 123.

35. Ariz.—Hankins v. Helms, 12 Ariz. 178, 100 P 460.

Cal.—Reavis v. Cowell, 56 Cal. 588; Kuhland v. Sedgwick, 17 Cal. 123.

Ill.—Evans v. Schriver Laundry Co., 57 Ill. A. 150; Richardson v. Sheehan, 46 Ill. A. 528 [rev on other grounds 147 Ill. 366, 35 NE 619].

Ind.—Yeagley v. Webb, 86 Ind. 424.

Iowa.—Hueston v. Preferred Acc. Ins. Co., 143 NW 566.

Mass.—McDonald v. Willis, 143 Mass. 452, 9 NE 835.

Minn.—Young v. Young, 18 Minn. 90.

Mo.—Smith v. Ponath, 17 Mo. A. 262.

N. M.—Genest v. Las Vegas Masonic Bldg. Assoc., 11 N. M. 251, 67 P 743.

Tex.—Ryburn v. Moore, 72 Tex. 85, 10 SW 393; Kosminsky v. Raymond, 20 Tex. Civ. A. 702, 51 SW 51. But see cases supra note 25.

[a] **Reason for this view.**—(1) In Reavis v. Cowell, 56 Cal. 588, 591, Morrison, J., said: "We are of the opinion, that an attorney who is a notary may take the affidavit of his client. It is now, and has been for many years, the practice in this state; and however improper or reprehensible the practice may be, there is nothing in the law which prohibits it." (2) In McDonald v. Willis, 143 Mass. 452, 9 NE 835, Mason, J., said: "It is true that a man cannot be a judge and attorney for one of the parties in the same cause. But it has always been the uniform usage for attorneys for either party to administer oaths, as justices of the peace, to their clients or others, when the necessity for voluntary affidavits arises in a case; and there is no sound objection to this where the oaths are voluntary, and the act of the justice is substantially ministerial, and not judicial."

[b] **Prosecuting attorney.**—A notary is not disqualified by the fact of being the prosecuting attorney from taking affidavits to be used by the state. State v. Noland, 111 Mo. 473, 19 SW 715.

36. U. S.—Atkinson v. Glenn, 2 F. Cas. No. 610, 4 Cranch C. C. 134.

Cal.—Reavis v. Cowell, 56 Cal. 588; Kuhland v. Sedgwick, 17 Cal. 123.

Ill.—Phillips v. Phillips, 185 Ill. 629, 57 NE 796; Hollenbeck v. Detrick, 162 Ill. 388, 44 NE 732; Linck v. Litchfield, 141 Ill. 469, 31 NE 123. See also Evans v. Schriver Laundry Co., 57 Ill. A. 150; Richardson v. Sheehan, 46 Ill. A. 528 [rev on other grounds 147 Ill. 366, 35 NE 619].

Ind.—Yeagley v. Webb, 86 Ind. 424.

Kan.—Harris v. Burbery, 85 Kan. 201, 116 P 206; Morris v. Robbins, 83 Kan. 335, 111 P 470; Fair v. Citizens' State Bank, 70 Kan. 612, 79 P 144, 67 LRA 851; Swearingen v. Howser, 37 Kan. 126, 14 P 436; Foreman v. Carter, 9 Kan. 674. See cases supra note 25.

Mass.—McDonald v. Willis, 143 Mass. 452, 9 NE 835.

Mich.—Snyder v. Hemmingway, 47 Mich. 549, 11 NW 381; McCaslin v. Camp, 26 Mich. 390. But they are now prohibited by statute. See Comp. Laws § 2640; Thos. E. Lynch Co. v. Wayne Cir. Judge, 129 Mich. 110, 88 NW 387.

Minn.—Young v. Young, 18 Minn. 90.

Mo.—State v. Noland, 111 Mo. 473, 19 SW 715; Smith v. Ponath, 17 Mo. A. 262.

Nebr.—Dobry v. Western Mfg. Co., 57 Nebr. 228, 77 NW 656; Horkey v. Kendall, 53 Nebr. 522, 73 NW 953, 68 AmSR 623. See cases supra note 25.

N. M.—Genest v. Las Vegas Masonic Bldg. Assoc., 11 N. M. 251, 67 P 743.

N. Y.—Vreeland v. Pennsylvania Tanning Co., 130 App. Div. 405, 114 NYS 1002; Gilmore v. Hempstead, 4 HowPr 153. See cases supra note 25.

Pa.—Wilhelmi v. Wilhelmi, 9 Pa. Dist. 685.

Tex.—Ryburn v. Moore, 72 Tex. 85, 10 SW 393; Bradberry v. State, 7 Tex. A. 375. See cases supra note 25.

Wis.—Dawes v. Glasgow, 1 Pinn. 171, Burn. 8.

[a] **No grounds for dismissing appeal.**—In Bradley v. Andrews, 51 Mich. 100, 16 NW 250, it was held that an appeal from a justice's court should not be dismissed on the ground that the notary public taking the affidavit was an attorney in the cause, but the proper course would be to enter a rule nisi.

[b] **Plea is not nullity.**—Where the affidavit to a plea is sworn to before an attorney in the cause, plaintiff cannot treat the plea as a nullity and sign judgment, although he may be warranted in applying to the court to set aside the plea. Horsfall v. Matthewman, 3 M. & S. 154, 105 Reprint 568.

37. Malcolm Sav. Bank v. Cronin, 80 Nebr. 228, 229, 114 NW 158 [reh den 80 Nebr. 231, 116 NW 150 (where the court, per Duffie, J., said: "It was a rule of common law that affidavits taken before an attorney in the case could not be used in evidence, if objected to. Collins v. Stewart, 16 Nebr. 52, 20 NW 285. In 1887 our legislature made an attempt to change this rule of the common law by an amendment to section 118 of the code, the amendment being to the following effect: 'And nothing herein shall be construed to prohibit an attorney at law, who is a notary public from swearing a client to any pleading or other paper or affidavit in any proceeding in any of the courts of this state.' Laws 1887, ch. 93. The effect of this amendment was before the court in Horkey v. Kendall, 53 Nebr. 522, 73 NW 953, 68 AmSR 623, and it was there held: 'The amendment of 1887 to section 118 of the code notwithstanding its general language, cannot be held to apply to affidavits, other than those verifying pleadings, without giving the amending act a construction which would render it violative of section 11, art. III, constitution'"); Horkey v. Kendall, 53 Nebr. 522, 73 NW 953, 68 AmSR 623.

38. Linck v. Litchfield, 141 Ill. 469, 31 NE 123; Bradley v. Claudon, 45 Ill. A. 326.

39. Cheyenne County v. Walter, 83 Kan. 743, 112 P 599; Swearingen v. Howser, 37 Kan. 126, 14 P 436; Horkey v. Kendall, 53 Nebr. 522, 73 NW 953, 68 AmSR 623 (holding that such an affidavit could not be collaterally attacked). See Shanholtzer v. Thompson, 24 Okl. 198, 103 P 595, 138 AmSR 877. See cases supra note 36.

40. Linck v. Litchfield, 141 Ill. 469, 31 NE 123; Germaine v. Muskegon, 105 Mich. 213, 63 NW 78; Gilmore v. Hempstead, 4 HowPr (N. Y.) 153.

[a] **As to necessity of acting promptly,** the court, in Smith v. Ponath, 17 Mo. A. 262, 263, said: "An examination of the numerous authorities cited for the appellant leads easily to the conclusion that, while the courts have in many cases declared that the administering of an oath to his client by an attorney, in a course of procedure, was improper, as an abuse of the relations existing between them, and that an affidavit so taken would not be heard, if objected to by the adverse party when offered, yet it has never been supposed that the objection could be entertained, when made for the first

before an officer, it may also be taken before his deputy.[41]

[§ 36] **5. De Facto Officers.** In accordance with the rule that the acts of an officer de facto are valid as respects the public and third persons,[42] affidavits taken before such officers have the same force and effect as though there was no defect in their title.[43] But an affidavit cannot be taken before an officer who has no legal existence and is unknown to the law.[44]

[§ 37] **6. Territorial Limitation of Officer's Power.** The territorial limits within which an officer may exercise his authority to take affidavits is determined by the laws of the jurisdiction from which his authority is derived.[45] Some officers may act anywhere in the state for which they are appointed.[46] But where an affidavit is taken before a notary public,[47] or a justice of the peace,[48] it must usually be in the county for which the officer is appointed; and in some jurisdictions it has been held that the same rule applies to commissioners[49] and clerks of court.[50]

[§ 38] **B. Foreign Affidavits—1. What Law Governs.** Where an affidavit is made in one jurisdiction for use in another, it must be taken before an officer whose authority is recognized where it is to be used.[51]

[§ 39] **2. Where Special Officer Designated—a. In General.** In most jurisdictions the officers before whom affidavits may be taken in a foreign state or country are designated by statute,[52] and where this is the case an affidavit, to be receivable, must be taken before one of the persons specified in the statute.[53]

time on appeal or error; unless, possibly, in one of those rare instances where the making of an affidavit in the mode referred to is expressly prohibited by statute."

41. U. S.—U. S. v. Barton, 24 F. Cas. No. 14,534, Gilp. 439.
Iowa.—Finn v. Rose, 12 Iowa 565.
Kan.—Ferguson v. Smith, 10 Kan. 394.
Ky.—Stamper v. Com., 100 SW 286, 30 KyL 992.
Mich.—Tower v. Welker, 93 Mich. 332, 53 NW 527; Torrans v. Hicks, 82 Mich. 307; Dorr v. Clark, 7 Mich. 310; Malonny v. Mahar, 1 Mich. 26.
Minn.—Crombie v. Little, 47 Minn. 581, 50 NW 823.
Mo.—Owens v. Johns, 59 Mo. 89.
Nebr.—Merriam v. Coffee, 16 Nebr. 450, 20 NW 389.
N. Y.—Peo. v. Powers, 19 AbbPr 99; Lucas v. Ensign, 4 NYLegObs 142. But in Norton v. Colt, 2 Wend. 250, an affidavit sworn to before a deputy clerk was held defective.
Pa.—In re Contested Elections, 2 Brewst. 1.
Tenn.—Campbell v. Boulton, 3 Baxt. 354.
Tex.—Harkreader v. State, 35 Tex. Cr. 243, 33 SW 117, 60 AmSR 40.
Wash.—State v. Rosener, 8 Wash. 42, 35 P 357; State v. Devine, 6 Wash. 587, 34 P 154.

[a] **Deputy who is minor.**—It has been held that an affidavit could be sworn to before a deputy county clerk, although a minor, on the ground that there is no objection to a minor holding a ministerial office, and that the deputy could perform all the duties of the clerk, one of which was to take affidavits. Harkreader v. State, 35 Tex. Cr. 243, 33 SW 117, 60 AmSR 40.

[b] **Deputy clerk.**—In Stamper v. Com., 100 SW 286, 288, 30 KyL 992, where it appeared that the deputy clerk of the circuit court had required a surety on a replevin bond to make affidavit as to the property he owned and its value, the court, per Settle, J., said: "There can be no question as to the authority of the deputy clerk to require the affidavit, or to administer to the affiant the oath by which he verified the truth of its contents. Section 547, Civ. Code Prac." See Clerks of Courts [7 Cyc 247].

[c] **Deputy collector of customs.**—An oath required to be administered by a collector of customs may also be administered by his legal deputy. U. S. v. Barton, 24 F. Cas. No. 14,534, Gilp. 439.

[d] **Absence or disability of principal.**—(1) In Dorr v. Clark, 7 Mich. 310, it was objected that a deputy clerk had no right, except in the absence of the clerk, to administer oaths. The court held that, however this may have been before the statute of 1850, p 54, since the passage of that act the deputy has had general authority to perform the duties of his principal, and that an affidavit taken before the deputy need not show that the clerk was absent. To same effect Finn v. Rose, 12 Iowa 565. (2) Under a statute allowing a deputy clerk to administer oaths whenever the clerk shall be "absent from his office," the latter must be absent not only from the office but also from the neighborhood as well. Lucas v. Ensign, 4 NYLeg Obs 142.

42. See Officers [29 Cyc 1389].

43. Kaufman v. Stone, 25 Ark. 336; Van Buren v. McKinley, 8 Ida. 93, 66 P 936; Tower v. Welker, 93 Mich. 332, 53 NW 527; Schiff v. Leipziger Bank, 65 App. Div. 33, 72 NYS 513; Crosier v. Cornell Steamboat Co., 27 Hun (N. Y.) 215; Parker v. Baker, 8 Paige (N. Y.) 428.

[a] **De facto commissioner of deeds.**—An affidavit which was taken before a de facto commissioner of deeds is a valid instrument. Kaufman v. Stone, 25 Ark. 336; Parker v. Baker, 8 Paige (N. Y.) 428.

[b] **Not subject to collateral attack.**—In McNulty v. State, 37 Ind. A. 612, 76 NE 547, 548, 117 AmSR 344, it was held that, while a notary had no lawful authority to take an affidavit by reason of his having become deputy prosecuting attorney, yet the affidavit taken by him was not subject to collateral attack, and the court, per Black, P. J., said: "In administering and in certifying the oath, Carey was performing an act pertaining to the office of notary public under color of office by virtue of his appointment and qualification as a notary public. Though his right to do so was subject to be questioned, he was not a mere usurper without any color of authority. His official act could not be questioned collaterally because of his having no legal right to continue to act as such officer, as it might if he were not such an officer either de facto or de jure."

44. Van Buren v. McKinley, 8 Ida. 93, 66 P 936 (holding that where there is no such officer as "deputy district recorder" an affidavit sworn to before a person alleged to be such an officer is invalid and the administration of the oath is not authorized on the ground that he is a de facto officer, for there is no office for a de facto officer to fill).

45. See statutory provisions.

[a] **Action presumed to be within jurisdiction.**—An affidavit commencing, "State of Indiana, Marion County—ss.," and certified as having been sworn to before a notary public in Ohio, is presumed to have been made in Ohio, as the court will presume that the notary acted within his jurisdiction. Teutonia Loan, etc., Co. v. Turrell, 19 Ind. A. 469, 49 NE 852, 65 AmSR 419.

46. Duffie v. Black, 1 Pa. 388. See also Mosher v. Heydrick, 45 Barb. (N. Y.) 549 (where it was said that it was not clear that a notary public could not act in every part of the state).

47. Ill.—Hertig v. Peo., 159 Ill. 237, 42 NE 879, 50 AmSR 162.
Mo.—Grayson v. Weddle, 80 Mo. 39.
N. Y.—Schiff v. Leipziger Bank, 65 App. Div. 33, 72 NYS 513; Mosher v. Heydrick, 45 Barb. 549; Cook v. Staats, 18 Barb. 407; Peo. v. Murphy, 1 Daly 462.
Pa.—Com. v. Frank, 7 Pa. Dist. 143.
W. Va.—Kesler v. Lapham, 46 W. Va. 293, 33 SE 289.
See generally Notaries [29 Cyc 1090].

48. Grayson v. Weddle, 80 Mo. 39; Reg. v. Atkinson, 17 U. C. C. P. 295.

[a] **In Arkansas** justices of the peace may administer oaths anywhere within the limits of their respective counties, although they are not authorized to act judicially in civil proceedings beyond their respective townships. Humphries v. McCraw, 5 Ark. 61. See generally Justices of the Peace [24 Cyc 440 et seq].

49. Vincent v. Peo., 5 Park. Cr. (N. Y.) 88.

[a] **Division of district.**—Where a commissioner has authority to take affidavits within a certain district, and part of that district is disunited and made into a new district, his authority continues over that portion of the district in which he continues to reside. McWhirter v. Corbett, 4 U. C. C. P. 203; Fleming v. McNaughten, 16 U. C. Q. B 194; Glick v. Davidson, 15 U. C. Q. B. 591.

[b] **Commissioner in two courts.**—Where the commissioner before whom an affidavit was sworn was appointed by a joint commission from two courts, and that fact is recited in the jurat, the affidavit may be used in either of the two courts. White v. Irving, 5 Dowl. P. C. 289.

[c] **Need not be sworn at place of business.**—Affidavits sworn anywhere before commissioners empowered to take affidavits within the limits of their jurisdiction are good, although they are not sworn at their own places of business. Matter of Clerks of Records, etc., 3 De G. M. & G. 723, 52 EngCh 564, 43 Reprint 284; In re Clerks of Records, etc., 18 Jur. 499.

50. Tanner, etc., Engine Co. v. Hall, 22 Fla. 391.

51. Ramy v. Kirk, 9 Dana (Ky.) 267. And see cases infra notes 53–65.

52. See statutory provisions.

53. Ark.—Love v. McAlister, 42 Ark. 183.
Mo.—Murdock v. Hillyer, 45 Mo. A. 287.
N. J.—Scull v. Alter, 16 N. J. L. 147.
N. C.—Benedict v. Hall, 76 N. C. 113.
Eng.—Griffin v. Smythe, 8 Dowl. P. C. 490.

[a] **When authority of foreign officer recognized.**—"Upon principle, and the uniform decisions of this Court, affidavits when required by law, must be taken before the officer prescribed, or if none is indicated by the statute, before a Judge of the Court that has jurisdiction of the subject matter,

[§ 40] **b. Commissioners.** In some jurisdictions commissioners are appointed who reside in other jurisdictions and who are qualified to take affidavits for use in the jurisdiction conferring upon them the authority to take affidavits.[54]

[§ 41] **c. Other Officers.** Among the officers whose verification of affidavits has been held valid in other jurisdictions are judges,[55] clerks of courts,[56] justices of the peace,[57] notaries public,[58] consuls of the country where the affidavits are to be used,[59]

and is to pass upon its sufficiency and effect. We cannot take notice of the acts of a foreign officer, unless required so to do by statute, or some settled rule of law, and this affidavit must therefore be treated as a nullity." Per Hornblower, J., in Scull v. Alter, 16 N. J. L. 147, 151.

[b] **Notary public.**—In North Carolina it has been held that a notary public resident out of the state, had no authority to take affidavits to be used in the courts of that state. Benedict v. Hall, 76 N. C. 113.

[c] **Magistrate of sister state.**—In a case decided by the constitutional court of South Carolina in 1796, an affidavit to hold to bail was set aside because it was taken before a magistrate of North Carolina. Reid v. Brummitt, 3 S. C. L. 16.

[d] **Officer not authorized by statute.**—In Fitch v. Campan, 31 Oh. St. 646, it was held that an affidavit verifying the return of a summons could not be taken before a clerk of court under a statute providing that affidavits could be taken out of the state before officers authorized to take depositions, a clerk of court not being so authorized.

[e] **Before commissioner of Irish court.**—It has been held that an affidavit which from its jurat appeared to have been sworn before a commissioner of the Irish court of queen's bench could not be read in the court of queen's bench in England. Griffin v. Smythe, 3 Dowl. P. C. 490.

[f] **Before officer not empowered in state where used.**—An affidavit in the nature of a pauper's oath was taken before a notary public of Missouri for use in a cause pending in the courts of Tennessee. It was held that the affidavit was not admissible, as by the laws of Tennessee a notary public in the state had no such power and it could not be permitted to be exercised by notaries of other states. Graham v. Caldwell, 8 Baxt. (Tenn.) 69.

[g] **For use in Quebec.**—(1) An affidavit sworn before a foreign notary public, other than an English notary cannot be used in the Quebec courts. Amero v. Gifford, 9 Que. Pr. 16. (2) Affidavits taken by a "notary public for the province of Ontario," have no validity before the courts of Quebec. McNee v. Marchesseault, 8 Que. Pr. 102.

54. Ark.—Love v. McAlister, 42 Ark. 183; Stone v. Kaufman, 25 Ark. 186; Grider v. Williams, 25 Ark. 1.

Ga.—Baker v. Magrath, 106 Ga. 419, 32 SE 370; Sugar v. Sackett, 13 Ga. 462.

Ind.—Andrews v. Ohio, etc., R. Co., 14 Ind. 169.

La.—Irving v. Edrington, 41 La. Ann. 671, 6 S 177.

Mich.—Holmes v. Heywood, 1 Mich. N. P. 292.

N. C.—Young v. Rollins, 85 N. C. 485.

W. Va.—Lockhead v. Berkeley Springs Waterworks, etc., Co., 40 W. Va. 553, 21 SE 1031.

[a] **Commissioner residing out of province.**—Where one statute provides for the making of certain affidavits before a commissioner for taking affidavits in the supreme court, and another provides for the appointment of commissioners within British Columbia, as well as without British Columbia, for the taking of affidavits for use in the supreme court and in other courts of the province, an affidavit may be made outside the province before one of the commissioners. In re Provincial Elections Act, 10 B. C. 114.

55. Ga.—Ballew v. Broach, 121 Ga. 421, 49 SE 297.

Ill.—Rowley v. Berrian, 12 Ill. 198.

Mo.—Hays v. Bouthalier, 1 Mo. 346.

Mont.—In re Liter, 19 Mont. 474, 48 P 753.

Eng.—Dalmer v. Barnard, 7 T. R. 248, 101 Reprint 957.

[a] **Baron of exchequer.**—An affidavit sworn to before a baron of the exchequer in Scotland was held to be receivable in the English law and equity courts. Braham v. Bowes, 1 Jac. & W. 296, 37 Reprint 388.

56. In re Liter, 19 Mont. 474, 48 P 753; Genest v. Las Vegas Masonic Bldg. Assoc., 11 N. M. 251, 67 P 743.

57. Posey v. Buckner, 3 Mo. 604; Walker v. Bamber, 8 Serg. & R. (Pa.) 61; Burandon v. Flindt, 5 HasReg (Pa.) 382; Turnbull v. Moreton, 1 Chit. 721, 18 ECL 393; Watson v. Williamson, 1 Dowl. P. C. 607.

[a] **English justice of peace.**—For use in Pennsylvania an affidavit of debt might be made before a justice of the peace in England. Walker v. Bamber, 8 Serg. & R. 61; Burandon v. Flindt, 5 HasReg 382.

[b] **Scotch justice.**—(1) In Hyde v. Whitfield, 19 Ves. Jr. 342, 34 Reprint 544, the lord chancellor said that he did not recollect an instance of the chancery court taking notice of an affidavit sworn to before a justice of the peace in Scotland, although the judges of late have acted upon affidavits sworn to before judges of the superior courts of that country. (2) An affidavit sworn to before a justice of the peace in Scotland, and not before a lord of session, will be admitted in the English courts. Watson v. Williamson, 1 Dowl. P. C. 607. (3) In Ellis v. Sinclair, 3 Y. & J. 273, affidavits sworn to before a magistrate in Scotland were allowed to be read, being accompanied by a certificate from a notary, resident of Scotland, that the affiants had sworn to the truth of the affidavits before a magistrate in Scotland, authorized to administer oaths, and attesting the signature of the affiants and of the magistrate to the jurat, and also by an affidavit by a person resident in London, who deposed to his knowledge of the Scotch magistrate, identified his handwriting, and stated that he was competent by the laws of Scotland to take affidavits.

[c] **New Jersey.**—In Scull v. Alter, 16 N. J. L. 147, it was held that an affidavit of indebtedness in insolvency proceedings, taken before a justice of the peace in Pennsylvania, could not be received in a New Jersey court in which such proceedings were pending.

58. U. S.—Harris v. Barber, 129 U. S. 366, 9 SCt 314, 32 L. ed. 697.

D. C.—Howard v. Citizens' Bank, etc., Co., 12 App. 222.

Ga.—Singletary v. Watson, 136 Ga. 241, 71 SE 162; Ballew v. Broach, 121 Ga. 421, 49 SE 297; Simpson v. Wicker, 120 Ga. 418, 47 SE 965, 1 AnnCas 542 and note.

Ill.—Mineral Point R. Co. v. Keep, 22 Ill. 9, 74 AmD 124; Rowley v. Berrian, 12 Ill. 198.

Minn.—Wood v. St. Paul City R. Co., 42 Minn. 411, 44 NW 308, 7 LRA 149.

Mont.—In re Liter, 19 Mont. 474, 48 P 753.

Nebr.—Browne v. Palmer, 66 Nebr. 287, 92 NW 315.

N. J.—Magowan v. Baird, 53 N. J. Eq. 656, 33 A 1054.

N. M.—Genest v. Las Vegas Masonic Bldg. Assoc., 11 N. M. 251, 67 P 743.

N. Y.—Levy v. Levy, 29 Misc. 374, 60 NYS 485.

Pa.—Walker v. Bamber, 8 Serg. & R. 61.

Tex.—Latimer v. St. Louis Southwestern R. Co., 40 Tex. Civ. A. 136, 88 SW 444 (holding that under the express provision of Rev. St. [1895] art 7 subd 2, an affidavit may be made before a notary public in another state, and that the case of Jenks v. Jenks, 47 Tex. 220, should not be followed because the law has been changed by the statute since it was decided).

Eng.—Cooke v. Wilby, 25 Ch. D. 769; Haggitt v. Iniff, 5 De G. M. & G. 910, 54 EngCh 714, 43 Reprint 1124; Walrond v. Van Moses, 8 Mod. 323, 88 Reprint 230.

B. C.—McLellan v. Harris, 6 B. C. 257.

N. B.—Lunt v. Kennedy, 37 N. B. 639.

[a] **Rule in New York.**—(1) It was formerly held that an affidavit taken outside the state for use in New York could not be taken before a notary public. Turtle v. Turtle, 31 App. Div. 49, 52 NYS 857. (2) But the statute under which this decision was rendered was subsequently amended, and since the amendment it has been held that an affidavit could be taken before a notary public if he was authorized by the laws of his own state and his authority was duly authenticated, the court in the latter case holding that the case of Turtle v. Turtle, supra, no longer controlled. Isman v. Wayburn, 54 Misc. 86, 104 NYS 491.

[b] **Rule in Texas.**—(1) It was held in a case decided in 1877 that under the law as it then existed an affidavit taken before a notary public of another state could not be used. Jenks v. Jenks, 47 Tex. 220. (2) But in a later case it has been held that by a change in the law affidavits were authorized to be made before these officers in another state. Latimer v. St. Louis Southwestern R. Co., 40 Tex. Civ. A. 136, 88 SW 444.

[c] **Rule in England.**—In Chicot v. Lequesne, Dick. 150, 21 Reprint 226, it appearing that the intended affiant resided in Amsterdam, it was ordered that the affidavit should be sworn to before a notary public at Amsterdam, with the intervention of a proper magistrate, if necessary by the laws of Holland, to the administration of the oath.

[d] **Upper Canada.**—A notary public of the province of Quebec has no authority to take an affidavit to be used in the courts of Upper Canada. Reynolds v. Williamson, 25 U. C. C. P. 49.

59. Mass.—Savage v. Birckhead, 20 Pick. 167.

Nebr.—Browne v. Palmer, 66 Nebr. 287, 92 NW 315.

N. J.—Seidel v. Peschkaw, 27 N. J. L. 427.

N. Y.—City Bank v. Lumley, 28 HowPr 397.

Oh.—Bruce v. Gibson, 8 Oh. Dec. (Reprint) 31, 5 CincLBul 101.

S. C.—Marine Wharf, etc., Co. v. Parsons, 49 S. C. 136, 26 SE 956.

Tex.—Houston Oil Co. v. Kimball, (Civ. A.) 114 SW 662.

W. Va.—Lockhead v. Berkeley Springs Waterworks, etc., Co., 40 W. Va. 553, 21 SE 1031.

Eng.—Cooke v. Wilby, 25 Ch. D. 769; Matter of Barber, 2 Bing. N. Cas. 268, 29 ECL 531, 132 Reprint 105.

[a] **Authority not derived from foreign country.**—Where an agreement was made between solicitors that an answer to be given in France might be taken and sworn to before any person authorized to administer oaths by the laws of France, and the answer was sworn to before the American consul, it was held that the consul was not one of the officers included in the agreement. Herman v Herman, 12 F. Cas. No. 6,407, 4 Wash. C. C. 555.

[b] **Authorized by federal statute.**

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commercial and naval agents,[60] mayors,[61] masters in chancery,[62] and in some states any officers authorized to take depositions[63] or acknowledgments to deeds.[64]

[§ 42] **3. Where No Special Officer Designated.** In the absence of a statutory provision an affidavit for use in a foreign jurisdiction may generally be taken before any officer competent to administer an oath in the jurisdiction where taken.[65]

[§ 43] **4. Showing Official Character and Authority—a. In General.** Affidavits are not records within the meaning of the act of congress prescribing the way in which judicial records shall be authenticated; and the way in which the authority of an officer of another jurisdiction to take affidavits shall be shown is within the control of the jurisdiction where it is to be used.[66] Where the mode of authentication is specified by local statute, the authentication must be in the prescribed manner.[67] Usually, however, a literal adherence to the statute is not required, a substantial compliance therewith being regarded as sufficient.[68]

—"The affidavit contains all the requisites of an affidavit properly authenticated if Ernesto Canut, conceded to have been at the time a United States consul at Majorca, Spain, was qualified to administer such oath. That he was so qualified under the laws of the United States is shown in U. S. Rev. St. § 1750, wherein every consular agent is 'authorized to administer to or take from any person any oath, affirmation, affidavit or deposition, and to perform any notarial act which any notary public is required or authorized by law to do within the United States. Every such oath, affirmation, affidavit, deposition, and notarial act, administered, sworn, affirmed, taken out or done by or before any such officer, when certified under his hand and seal of office, shall be as valid and of like force and effect within the United States, to all intents and purposes, as if administered, sworn, affirmed, taken out or done by or before any other person within the United States duly authorized and competent thereto.'" Marine Wharf, etc., Co. v. Parsons, 49 S. C. 136, 157, 26 SE 956.

[c] **Consul a magistrate.**—An American consul who resides in a foreign country and has been duly accredited there is a magistrate authorized to take affidavits and depositions in such country. Savage v. Birckhead, 20 Pick. (Mass.) 167; Browne v. Palmer, 66 Nebr. 287, 92 NW 315.

[d] **English rule.**—"Rule 6 of Order XXXVIII. of the Rules of the Supreme Court, upon which the question principally turns, is almost a copy of sec. 22 of the Act 15 & 16 Vict. c. 86, and is, so far as it is necessary to read it, in these terms: 'All affidavits in causes or matters depending in the High Court may be sworn in any colony under the dominion of Her Majesty in foreign parts, before a notary public, or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions.'" Per Chitty, J., in Cooke v. Wilby, 25 Ch. D. 769, 770.

[e] **Rule in Canada.**—Several affidavits were made in a city of the United States and were sworn to before a British consul. They were offered as evidence in a court of Upper Canada, but their admissibility was doubted. The judge in delivering the opinion said: "We have no statutes here making affidavits so sworn admissible, as they have in England, and it is to be regretted that we have not. In the absence of any statute the authority is not clearly in favor of admitting them." Bird v. Folger, 17 U. C. Q. B. 536, 539.

[f] **But not consul of another country.**—Goods of De Salazar, 21 WklyRep 776 (holding that an affidavit taken before a United States consul, at a place where there was no English consul or diplomatic agent, would not be received in the English courts).

60. Browne v. Palmer, 66 Nebr. 287, 92 NW 315; Welsh v. Hill, 2 Johns. (N. Y.) 373; Lockhead v. Berkeley Springs Waterworks, etc., Co., 40 W. Va. 553, 21 SE 1031.

[a] **Naval agent in Havana.**—The affidavit of a plaintiff residing in Havana, taken before the commercial and naval agent of the United States resident there, may be read on a motion for a commission to take the examination of witnesses abroad. Welsh v. Hill, 2 Johns. (N. Y.) 373.

61. Woods v. Watkins, 40 Pa. 458 (holding that an affidavit which is taken before the mayor of a city in another state and to which the corporate seal of the city is affixed is valid).

[a] **Lord mayor of London.**—In Pennsylvania, in 1785, an affidavit of debt sworn to before the lord mayor of London was held to be sufficient. Taylor v. Knox, 1 Dall. 158, 1 L. ed. 80. See also Rogers v. Spalden, Jeff. (Va.) 58.

[b] **Burgomaster of German town.**—In Bell v. Turner, L. R. 17 Eq. 439, it was held that an affidavit sworn to before the burgomaster of a German town, and not before a British consul or vice consul as the statute provided, was valid.

[c] **Mayor of town in United Kingdom.**—Affidavits sworn to before the mayor of an incorporated city or town in the United Kingdom may be received in Ontario in support of or in opposition to an application for a new trial. Tetley v. Knowlson, 2 Ont. Pr. 275.

62. Hunton v. Palmer, 67 N. J. L. 94, 50 A 599.

[a] **English rule.**—An affidavit sworn to before a master extraordinary in Ireland may be read in the English court of chancery, but an affidavit from the plantations cannot be so read, unless under seal of the island. Annesley v. Anglesy, Dick. 90, 21 Reprint 202.

63. Sebesta v. Supreme Ct. of Honor, 77 Nebr. 249, 109 NW 166; Fitch v. Campan, 31 Oh. St. 646.

64. Rowley v. Berrian, 12 Ill. 198; Hunton v. Palmer, 67 N. J. L. 94, 50 A 599; Turtle v. Turtle, 31 App. Div. 49, 52 NYS 857; Stanton v. U. S. Pipe Line Co., 90 Hun 35, 35 NYS 629; Hyatt v. Swivel, 52 N. Y. Super. 1; Isman v. Wayburn, 54 Misc. 86, 104 NYS 491; Levy v. Levy, 29 Misc. 374, 60 NYS 485; Bowen v. Stilwell, 9 NYCiv Proc 277; Phelps v. Phelps, 6 NY CivProc 117; Harris v. Durkee, 5 NYCivProc 376; Williams v. Waddell, 5 NYCivProc 191.

65. Ala.—Fox v. Lawson, 44 Ala. 319.

Ga.—Ballew v. Broach, 121 Ga. 421, 49 SE 297; Simpson v. Wicker, 120 Ga. 418, 47 SE 965, 1 AnnCas 542 and note; Brunswick Hardware Co. v. Bingham, 107 Ga. 270, 33 SE 56.

Ill.—Trevor v. Colgate, 181 Ill. 129, 54 NE 909; Mineral Point R. Co. v. Keep, 22 Ill. 9, 74 AmD 124.

Minn.—Wood v. St. Paul City R. Co., 42 Minn. 411, 44 NW 308, 7 LRA 149.

Mo.—Hays v. Bouthalier, 1 Mo. 346.

Mont.—In re Liter, 19 Mont. 474, 48 P 753.

Nebr.—Browne v. Palmer, 66 Nebr. 287, 92 NW 315; Holmes v. Crooks, 56 Nebr. 466, 76 NW 1073.

N. J.—Hunton v. Palmer, 67 N. J. L. 94, 50 A 599.

N. M.—Genest v. Las Vegas Masonic Bldg. Assoc., 11 N. M. 251, 67 P 743.

N. Y.—Ross v. Wigg, 34 Hun 192; Marshall v. Mott, 13 Johns. 423.

Tex.—Latimer v. St. Louis Southwestern R. Co., 40 Tex. Civ. A. 136, 88 SW 444.

Eng.—Bell v. Turner, L. R. 17 Eq. 439; Lyle v. Ellwood, L. R. 15 Eq. 67; Haggitt v. Iniff, 5 De G. M. & G. 910, 54 EngCh 714, 43 Reprint 1124; In re Eady, 6 Dowl. P. C. 615; O'Neill v. Doran, Ir. R. 10 Eq. 187; Kevan v. Crawford, 45 L. J. Ch. 658; In re Bernard, 31 L. J. P. & M. 89; Dalmer v. Barnard, 7 T. R. 248, 101 Reprint 957; Lane's Trusts, 22 Wkly. Rep. 39.

[a] **Magistrates or other public officers.**—It is usual to allow affidavits in support of collateral matters arising during the progress of a suit, as on a motion for a commission to examine witnesses abroad, to be taken before magistrates or public officers out of the state. Marshall v. Mott, 13 Johns. (N. Y.) 423.

[b] **Void where no statutory authority.**—"There is not so far as we know any statute of this State, or principle of common law, or rule of practice, which gives any authority to an oath administered in a foreign state, to a party to a suit in this State, excepting only the case of answers in chancery provided for by special enactment of 1825, (1 Stat. Law, 302;) or which, with the exception just stated, entitles any foreign certificate, of such foreign oath, to judicial credence here." Per Marshall, J., in Ramy v. Kirk, 9 Dana (Ky.) 267.

66. Dillon v. Rand, 15 Colo. 372, 25 P 185; Crane, etc., Mfg. Co. v. Stagg, 135 Ky. 428, 122 SW 225; Gibson v. Tilton, 1 Bland (Md.) 352, 17 AmD 306; Hays v. Bouthalier, 1 Mo. 346.

67. Draper v. Williams, 8 Blackf. (Ind.) 574; Sloane v. Anderson, 57 Wis. 123, 13 NW 684, 15 NW 21; U. S. v. Burr, 25 F. Cas. No. 14,692. See also Bowen v. Stilwell, 9 NYCivProc 277.

[a] **Under Real Property Law** § 249, an affidavit, taken before a notary public in another state and authenticated as prescribed in § 260, may be used upon a motion in the courts of this state. Isman v. Wayburn, 54 Misc. 86, 104 NYS 491.

[b] **Seal not showing name of state.**—Where the seal to an affidavit taken by a commissioner of Iowa in another state gave only the name of the commissioner, and the name of the state was written with a pen, it was held to be insufficient under a statute requiring such seal to show the name of the state. Gage v. Dubuque, etc., R. Co., 11 Iowa 310, 77 AmD 145.

68. Ross v. Wigg, 34 Hun (N. Y.) 192; Manufacturers', etc., Bank v. Cowden, 3 Hill (N. Y.) 461.

[a] **Affidavit not purporting to be made outside state.**—Where an affidavit, purporting to be taken by a notary public, did not show that it was made outside the state, it was held to be admissible over an objection that it bore no certificate of such notary's official character. Richardson v. Comer, 112 Ga. 103, 37 SE 116.

[b] **Authentication by clerk's certificate.**—Where an affidavit is taken before a justice of the peace of another state the official character of such justice sufficiently appears where the clerk of the county court of the county in which he resides certifies that he was then an acting justice

The courts have taken judicial notice, in some instances, of the powers of officers in other jurisdictions to take affidavits;[69] but as a general rule an affidavit taken outside the state will not be received until it is shown that the person before whom it was taken was one of those authorized to perform such acts.[70]

[§ 44] **b. Certificate of Another Officer.** In many jurisdictions the statutes require that the affidavit shall be accompanied by the certificate of another officer, usually that of the clerk of a court, stating that the officer is empowered to take affidavits at the place where it was taken.[71] But in some jurisdictions no such certificate by another officer is

duly commissioned, etc., and two of the commissioners of the same court certify that the person giving the certificate is clerk and that his official acts are entitled to due faith and credit. Posey v. Buckner, 3 Mo. 604.

[c] **An affidavit taken in Ohio** before a notary whose authority was authenticated by the certificate of the clerk of a court of record, reciting that such notary was authorized by the laws of Ohio to take affidavits and acknowledgments in that state, was held to be sufficiently authenticated to render it admissible in the courts of New York. Levy v. Levy, 29 Misc. 374, 60 NYS 485.

[d] **Signature "believed to be genuine."**—The clerk's certificate under Code c 130 § 31, verifying a notary's signature to an affidavit taken in another state, is sufficient where it states that the signature "is believed to be genuine," this being a sufficient compliance with the statute requiring a certificate "verifying the genuineness of the signature." Heffernan v. Harvey, 41 W. Va. 766, 24 SE 592.

[e] **Objections without merit.**—Objections to the form of certificates authenticating affidavits taken abroad, on the ground that they did not state that the affidavit was subscribed before the judge who made the certificate and did not specify the place where the affidavit was taken, were held to be without merit. Belden v. Devoe, 12 Wend. (N. Y.) 223.

69. Denmead v. Maack, 2 MacArthur (D. C.) 475. See infra § 47.

[a] **In Maryland and the District of Columbia** the courts of one jurisdiction take judicial notice of the powers of officers in the other and, in the absence of a showing to the contrary, presume that they acted within their jurisdiction. Matthai v. Conway, 2 App. Cas. (D. C.) 45. See also Conolly v. Riley, 25 Md. 402

[b] **Need not prove commissioner's signature.**—Affidavits taken in the English colonies are receivable in the English courts without proof of the commissioner's signature. Bateman v. Cook, 3 De G. M. & G. 39, 52 EngCh 32, 42 Reprint 16.

70. Ga.—Castellaw v. Blanchard, 106 Ga. 97, 31 SE 801; Behn v. Young, 21 Ga. 207.

Ill.—Trevor v. Colgate, 181 Ill. 129, 54 NE 909.

Ind.—Teutonia Loan, etc., Co. v. Turrell, 19 Ind. A. 469, 49 NE 852, 65 AmSR 419. See also Midland Steel Co. v. Citizens' Nat. Bank, 34 Ind. A. 107, 72 NE 290.

Md.—Bartlett v. Wilbur, 53 Md. 485.

N. Y.—Cream City Furniture Co. v. Squier, 2 Misc. 438, 21 NYS 972.

N. C.—Miazza v. Calloway, 74 N. C. 31.

S. C.—Spragella v. Monte Bruno, 8 S. C. L. 279.

W. Va.—Bohn v. Zeigler, 44 W. Va. 402, 29 SE 983.

Pr. Edw. Isl.— —— v. Irving, 1 Pr. Edw. Isl. 38.

Necessity for showing officer's authority in case of domestic affidavits see infra § 110.

[a] **Before judge.**—Where a statute provides that affidavits may be taken outside the state before a judge of a court of record, an affidavit certified by a judge cannot be received unless it is shown that the court over which he presided was a court of record. Coward v. Dillinger, 56 Md. 59; Evesson v. Selby, 32 Md. 340.

[b] **Authenticated like acknowledgment.**—Where an affidavit for use in Illinois is taken in another state the authority of the person administering the oath must be authenticated in the same manner as in the case of an acknowledgment taken in another state. Rowley v. Berrian, 12 Ill. 198.

71. Ga.—Ballew v. Broach, 121 Ga. 421, 49 SE 297 [foll Howell v. Simpson Grocery Co., 121 Ga. 461, 49 SE 299]; Brunswick Hardware Co. v. Bingham, 107 Ga. 270, 33 SE 56; Castellaw v. Blanchard, 106 Ga. 97, 31 SE 801.

Ill.—Ferris v. Commercial Nat. Bank, 158 Ill. 237, 41 NE 1118; Smith v. Lyons, 80 Ill. 600; Keefer v. Mason, 36 Ill. 406; Henning v. Libke, 104 Ill. A. 303.

Ind.—Jackson v. State, 161 Ind. 36, 67 NE 690; Draper v. Williams, 8 Blackf. 574; First Nat. Bank v. Mulford, 48 Ind. A. 84, 95 NE 432; Teutonia Loan, etc., Co. v. Turrell, 19 Ind. A. 469, 49 NE 852, 65 AmSR 419.

Md.—Coward v. Dillinger, 56 Md. 59; Evesson v. Selby, 32 Md. 340.

Mich.—Metcalfe v. Carr, 133 Mich. 123, 94 NW 734; Berkery v. Reilly, 82 Mich. 160, 46 NW 436.

Minn.—Hickey v. Collom, 47 Minn. 565, 50 NW 918.

Mo.—Posey v. Buckner, 3 Mo. 604; Hays v. Bouthalier, 1 Mo. 346; Murdock v. Hillyer, 45 Mo. A. 287.

Nebr.—Sebesta v. Supreme Ct. of Honor, 77 Nebr. 249, 109 NW 166.

N. Y.—Peo. v. Martin, 175 N. Y. 315, 67 NE 589, 96 AmSR 628; Sunswick Land Co. v. Murdock, 129 App. Div. 579, 114 NYS 436 [aff 199 N. Y. 517 mem, 92 NE 1103 mem]; Sage v. Stafford, 42 App. Div. 449, 59 NYS 545; Stanton v. U. S. Pipe Line Co., 90 Hun 35, 35 NYS 629; Ross v. Wigg, 34 Hun 192; Hyatt v. Swivel, 52 N. Y. Super. 1; Harris v. Durkee, 50 N. Y. Super. 202; Marks v. Goetchius, 60 Misc. 143, 112 NYS 1009; Manheimer v. Dosh, 36 Misc. 857, 74 NYS 922; Cream City Furniture Co. v. Squier, 2 Misc. 438, 21 NYS 972 [overr on this point Lawton v. Kiel, 51 Barb. 30]; Parke, etc., Co. v. Rouden, 117 NYS 945; Williams v. Culhone, 3 NYS 241; Smith v. Collier, 3 NYSt 172; Bowen v. Stilwell, 9 NYCivProc 277; Phelps v. Phelps, 6 NYCivProc 117 [aff 32 Hun 642].

W. Va.—Hill Clutch Co. v. Independent Steel Co., (W. Va.) 82 SE 223; Connalley v. Wallace Co., 51 W. Va. 181, 41 SE 167; Bohn v. Zeigler, 44 W. Va. 402, 29 SE 983.

Wis.—Sloane v. Anderson, 57 Wis. 123, 13 NW 684, 15 NW 21.

Eng.—In re Davis, 8 L. R. Eq. 98; Sharp v. Johnston, 2 Bing. N. Cas. 246, 29 ECL 522, 132 Reprint 97; Warren v. Swinburne, 9 Jur, 510.

[a] **Rule in New York.**—(1) Code Civ. Proc. § 844 provides that affidavits may be taken without the state "before an officer authorized by the laws of the State" to take acknowledgments. Under this it has been held that such an affidavit is insufficient unless there is a certificate that the officer who took it was authorized by the laws of his own state to take acknowledgments therein. Turtle v. Turtle, 31 App. Div. 49, 52 NYS 857, 27 NYCivProc 289, 5 NYAnnCas 372; Stanton v. U. S. Pipe Line Co., 90 Hun 35, 35 NYS 629; Hyatt v. Swivel, 52 N. Y. Super. 1; Bowen v. Stilwell, 9 NYCivProc 277; Phelps v. Phelps, 6 NYCivProc 117 [aff 32 Hun 642]; Harris v. Durkee, 5 NYCivProc 376; Williams v. Waddell, 5 NYCivProc 191. But see Ross v. Wigg, 34 Hun 192, 6 NYCivProc 263 (where it was held, Follett, J., dissenting, that the words "the state" as used in the statute referred to the state of New York, not to the state in which the affidavit was taken, and that an affidavit was sufficient if taken before a person authorized by the laws of New York to take acknowledgments, regardless of whether he had that power under the laws of his own state). (2) A foreign certificate stating "that M. J. Tobin is a duly elected and qualified notary public in and for the said county and State aforesaid" is insufficient. Manheimer v. Dosh, 36 Misc. 857, 74 NYS 922.

[b] **Taken in Canada.**—An affidavit to be used in Illinois, if made in Canada, must contain a certificate of the authority of the notary to administer oaths in Canada. Ferris v. Commercial Nat. Bank, 158 Ill. 237, 41 NE 1118.

[c] **Taken before judge of court.**—Under the Maryland Attachment Law, when the affidavit is made outside the state and before a judge of a court of record it must be accompanied by a certificate of the clerk of the court, under its seal, stating that the court is a court of record. It will not be presumed from the seal that the court is a court of record. Coward v. Dillinger, 56 Md. 59; Evesson v. Selby, 32 Md. 340.

[d] **Certificate of clerk under seal.**—The official character of the officer taking an affidavit in another state is sufficiently proved by the certificate of the clerk, under the seal of the court. Hays v. Bouthalier, 1 Mo. 346.

[e] **Character of county clerk must be shown.**—The official character of a county clerk of a foreign state must be authenticated before an affidavit made before him will be received in the courts of Georgia. Shockley v. Turnell, 114 Ga. 878, 40 SE 279; Castellaw v. Blanchard, 106 Ga. 97, 31 SE 801.

[f] **Certificate of governor.**—A person was arrested in the state of Minnesota charged with being a fugitive from justice from California. The complaint or affidavit upon which the warrant was based was sworn to before a justice of the peace of California and was certified by the governor of the latter state to be correct. It was held that objection could not be made to the affidavit upon the ground that the power of a justice of the peace to administer the oath was not properly authenticated, the court saying, "It will be implied from the executive authentication that the officer certifying to the jurat of the affidavit was such magistrate as he is therein represented to be." State v. Bates, 101 Minn. 303, 305, 112 NW 260.

[g] **Seal of probate court** attached to certificate is not sufficient to show that the affidavit was taken by an officer of that court or that he was authorized to administer an oath. Howell v. Simpson Grocery Co., 121 Ga. 461, 49 SE 299.

[h] **Official character of justice of the peace** must be authenticated. Ballew v. Broach, 121 Ga. 421, 49 SE 297.

[i] **Must establish identity and authority.**—(1) When taken by the clerk of a court of another state, the affidavit must be accompanied by a certificate of the judge concerning the identity and authority of the clerk. Miazza v. Calloway, 74 N. C. 31. (2) A certificate of a governor stating that a person of the same name is a magistrate is insufficient to show the authority of an officer before whom an affidavit was taken, as it should have shown that the per-

necessary.[72] It has been held for example that commissioners who reside in other jurisdictions need no authentication of their powers in the state for which they are appointed.[73]

[§ 45] **c. Officer's Own Certificate.** Some cases hold that the officer's certificate must show that he has the necessary authority to take affidavits,[74] although in others the omission has been held not to invalidate the instrument.[75]

[§ 46] **d. Other Evidence.** Where the manner in which the officer's authority is to be proved is not pointed out by the statute, some cases have held that it may be proved by any competent evidence.[76]

[§ 47] **e. Sufficiency of Notary's Certificate and Seal.**[77] In some jurisdictions an affidavit taken before a notary public does not require any further authentication than the notary's own certificate and seal,[78] and it is said that, the notary being an

son who administered the oath was a magistrate. U. S. v. Burr, 25 F. Cas. No. 14,692, Brunn. Coll. Cas. 493.

[j] **Powers must be properly and sufficiently described.**—Where an affidavit is taken in a foreign state to be used in New York, a certificate of authentication must properly and sufficiently describe the powers and duties of the notary public before whom the affidavit was executed. Stanton v. U. S. Pipe Line Co., 90 Hun 35, 35 NYS 629.

[k] **Genuineness of signature.**—(1) A certificate of the clerk verifying a notary's signature may set out that the signature is believed to be "genuine." Heffernan v. Harvey, 41 W. Va. 766, 24 SE 592. (2) Where an affidavit is taken before an officer in another state to be used in New York it must be accompanied by a certificate that he is authorized to take affidavits or acknowledgments of deeds, and that the officer certifying is familiar with his handwriting and believes his signature to be genuine. Hyatt v. Swivel, 52 N. Y. Super. 1.

[l] **Knowledge of officer's handwriting.**—A certificate to an affidavit taken in another state must state, in compliance with the statutes, that the person making the certificate has knowledge of the handwriting of the officer before whom the affidavit was sworn to. Bowen v. Stilwell, 9 NY CivProc 277.

[m] **Substantial compliance with statute.**—Where an affidavit is made in another state the certificate authenticating the officer's authority need not be in the exact language of the statute, but is sufficient if in substantial compliance with its terms. Northern Liberties Manufacturers, etc., Bank v. Cowden, 3 Hill (N. Y.) 461.

[n] **Certificate of consul.**—Under 6 Geo. IV c 87 § 20, a British consul has the same power as a notary public to certify that the affidavit in support of the certificate of a married woman's acknowledgment was sworn to before a commissioner duly appointed. Matter of Barber, 2 Bing. N. Cas. 268, 29 ECL 531, 132 Reprint 105.

[o] **Failure to state officer's power.**—An affidavit made by a person resident in Germany, and sworn to before a notary public, was allowed to be used in England. The notary's signature was attested by the seal of the British consul, although no statement was made that the German law gave notaries public authority to take affidavits. In re London Asphalt Co., 23 T. L. R. 406.

[p] **Rule in Georgia.**—"An affidavit made in a foreign State before an officer of such State is insufficient unless it is made to appear in some legal way that the person attesting the affidavit was in fact authorized to administer the oath. Thus, in Behn v. Young, 21 Ga. 207, it was held that an affidavit verifying a bill can not be recognized in courts of this State when the official character of the person administering the oath is not authenticated. The official character of a county clerk of a foreign State must be authenticated before an affidavit made before him will be received in courts of this State. Shockley v. Turnell, 114 Ga. 378, 40 SE 279; Castellaw v. Blanchard, 106 Ga. 97, 31 SE 801. The rule was also applied to notaries public. Brunswick Hardware Co. v. Bingham, 107 Ga. 270, 33 SE 56; Charles v. Foster, 56 Ga. 612. But since the act approved December 20, 1899 (Acts of 1899, p 79), an affidavit before a foreign notary, with his seal attached, is receivable in courts of this State. Simpson v. Wicker, 120 Ga. 418, 47 SE 965, 1 AnnCas 542. The seal of the notary public being evidence of the genuineness of his signature and of his official character, no further authentication is required." Ballew v. Broach, 121 Ga. 421, 49 SE 297.

[q] **Affidavit may be amended** by leave of court by appending to it the certificate of authentication required by statute. Goldie v. McDonald, 78 Ill. 605; Bohn v. Zeigler, 44 W. Va. 402, 29 SE 983.

[r] **Waiver of defect.**—(1) Affidavits sworn to abroad at a place distant from the residence of a British consul, and lacking his certificate, may be filed by consent of the parties. Lyle v. Ellwood, L. R. 15 Eq. 67. (2) The objection that the verification of an affidavit taken in another state and read on a motion was not certified by the secretary of state is waived where such objection was not made to the reading of the affidavit on the motion. Plympton v. Bigelow, 11 AbbNC (N. Y.) 180, 63 HowPr 484.

72. See cases infra this note, and notes 73–81.

[a] **The officer's signature and seal** are a sufficient authentication unless some statute or rule of court requires further authentication. Marine Wharf, etc., Co. v. Parsons, 49 S. C. 136, 26 SE 956.

[b] **Jurat and seal.**—Where no particular form of authentication was required under a statute providing before whom affidavits should be made in foreign countries, it was held that an affidavit taken before a vice consul in Canada which had a regular jurat and his official seal affixed thereto was sufficiently authenticated. City Bank v. Lumley, 28 How Pr (N. Y.) 397.

[c] **Certificate without seal.**—In Nebraska an affidavit verifying a pleading needs no authentication further than the certificate of the officer taking the same, which is sufficient proof, whether he have a seal or not, that the affidavit was duly made, that the name of the officer was written by himself, and that he was in fact such officer. Sebesta v. Supreme Ct. of Honor, 77 Nebr. 249, 109 NW 166.

[d] **Jurat in usual form under seal.**—Where a statute conferring authority upon certain persons to take affidavits in foreign countries prescribed no particular mode of authentication, it has been held that a jurat in the usual form, under the seal of the officer, is sufficient. City Bank v. Lumley, 28 HowPr (N. Y.) 397.

73. Love v. McAlister, 42 Ark. 183.

Evidence of notary's official character see infra § 47.

[a] **An affidavit made before a commissioner of North Carolina,** resident outside the state, is sufficiently verified when authenticated by his official signature and seal. Young v. Rollins, 85 N. C. 485.

74. Bell v. Farwell, 189 Ill. 414, 59 NE 955; Figge v. Rowlen, 185 Ill. 234, 57 NE 195; Ferris v. Commercial Nat. Bank, 158 Ill. 237, 41 NE 1118; Smith v. Lyons, 80 Ill. 600.

[a] **Compliance with statute.**—Under a statute providing that, where an oath is administered out of the state by an officer authorized by the laws of the state in which it is so administered, if such officer have a seal his certificate under his official seal shall be received as prima facie evidence, a certificate of the clerk of a circuit court of a foreign state reciting that the notary who took the affidavit was authorized to administer oaths is insufficient and unavailing. Henning v. Libke, 104 Ill. A. 303.

[b] **Sufficient showing.**—Where the certificate showed that the court in which the judge presided had a clerk and seal, it was sufficient evidence that such court was a court of record; and an attestation by the clerk "by his official seal" was held to be sufficient, since the clerk of a court of record is ordinarily the official keeper of its seal, and the seal of the court is his official seal." Moore v. Carson, 12 Tex. 66.

75. Magowan v. Baird, 53 N. J. Eq. 656, 33 A 1054 [aff 53 N. J. Eq. 454, 32 A 377, and disappr Sutherland v. Jersey City, etc., R. Co., 8 N. J. L. J. 45]; Minford v. Taylor, 12 N. J. L. J. 282.

Notary's certificate see infra § 47.

[a] **Omission of officer's title.**—In Feuchtwanger v. McCool, 29 N. J. Eq. 151, it was held that where an affidavit was taken in New York the omission of the officer to affix his official title to his signature would not render it invalid.

76. Figge v. Rowlen, 84 Ill. A. 238 [aff 185 Ill. 234, 57 NE 195]; Andrews v. Ohio, etc., R. Co., 14 Ind. 169; Haggitt v. Iniff, 5 De G. M. & G. 910, 54 EngCh 714, 43 Reprint 1124.

[a] **Parol evidence is admissible.**—Winter v. Simonton, 30 F. Cas. No. 17,892, 2 Cranch C. C. 585.

[b] **That court before which affidavit was taken was a court of record** may be shown by evidence aliunde. Levy v. Wilson, 43 Iowa 605.

77. **Sufficiency of notary's certificate and seal in general** see Notaries [29 Cyc 1076 et seq].

78. Ala.—Alabama Nat. Bank v. Chattanooga Door, etc., Co., 106 Ala. 663, 18 S 74; Goree v. Wadsworth, 91 Ala. 416, 8 S 712.

Ark.—Love v. McAlister, 42 Ark. 183.

D. C.—Hutchins v. Maneely, 11 App. 88; Denmead v. Maack, 9 D.C. 475.

Ga.—Singletary v. Watson, 136 Ga. 241, 71 SE 162; Ballew v. Broach, 121 Ga. 421, 49 SE 297; Simpson v. Wicker, 120 Ga. 418, 47 SE 965, 1 AnnCas 542; Brunswick Hardware Co. v. Bingham, 107 Ga. 270, 33 SE 56.

Ill.—Bell v. Farwell, 189 Ill. 414, 59 NE 955; Desnoyers Shoe Co. v. Litchfield First Nat. Bank, 188 Ill. 312, 58 NE 994; Figge v. Rowlen, 185 Ill. 234, 57 NE 195; Trevor v. Colgate, 181 Ill. 129, 54 NE 909; Smith v. Lyons, 80 Ill. 600; Mineral Point R. Co. v. Keep, 22 Ill. 9, 74 AmD 124; Rowley v. Berrian, 12 Ill. 198; Henning v. Libke, 104 Ill. A. 303.

Md.—Connolly v. Riley, 25 Md. 402.

Minn.—Wood v. St. Paul City R. Co., 42 Minn. 411, 44 NW 308, 7 LRA 149.

Mo.—Brown Mfg. Co. v. Gilpin, 120 Mo. A. 130, 96 SW 669.

N. J.—Feuchtwanger v. McCool, 29 N. J. Eq. 151.

N. Y.—Tucker v. Ladd, 4 Cow 47.

Pa.—Browne v. Philadelphia Bank, 6 Serg. & R. 484, 9 AmD 463; Stroheim v. Pack, etc., Mfg. Co., 10 Pa. Dist. 668.

Eng.—Cole v. Sherard, 11 Exch. 482; Walrond v. Van Moses, 8 Mod. 321, 88 Reprint 230.

Ont.—Merchants Express Co. v. Morton, 15 Grant Ch. (U. C.) 274.

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officer recognized by the commercial law of the world, the courts will take judicial notice of his authority from the mere presence of his seal.[79] In other jurisdictions the notary's own statement that he has authority to take the affidavit is necessary[80] and sufficient.[81] In still other cases, however, it has been held that the power to administer oaths does not pertain to the office of notary by custom or usage, except so far as is required in the transaction of commercial affairs, and that the authority of a notary to take affidavits must be proved in the same manner required in the case of other officers.[82]

IV. OATH OR AFFIRMATION

[§ 48] **A. Necessity for.** In order for an affidavit to be valid for any purpose, it must of course be sworn to or affirmed by affiant.[83]

[§ 49] **B. Requisites of.** Either oath or affirma-

[a] **Seal necessary.**—In Brunswick Hardware Co. v. Bingham, 107 Ga. 270, 33 SE 56, it was held that an affidavit taken before a notary public in another state with no seal attached and nothing to authenticate his official character was insufficient.

79. See cases infra this note. See also infra § 43.

[a] **"The Oaths act** seems to be conclusive that all a notary of another State need do is to affix his seal. . . . The seal of a notary public is judicially taken notice of by courts, he being an officer recognized by the whole commercial world." Desnoyers Shoe Co. v. Litchfield First Nat. Bank, 188 Ill. 312, 313, 58 NE 994.

[b] **"Courts will take judicial notice** of the seals of notaries public [of other states], for they are officers recognized by the commercial law of the world." Brown Mfg. Co. v. Gilpin, 120 Mo. A. 130, 134, 96 SW 669.

[c] **Origin of rule.**—In Wood v. St. Paul City R. Co, 42 Minn. 411, 44 NW 308, it was held that whether the authority of notaries public to administer oaths be of statutory origin or founded on customary law, it is now universal and should be judicially recognized as one of their general powers, and that affidavits authenticated by the official seals of notaries of other states should be placed on the same footing as their authentications of commercial documents.

[d] **That the officer is a notary** need not be stated in the certificate. Dilts v. Jersey City Excise Comrs., 80 N. J. L. 475, 79 A 315.

[e] **Prima facie evidence of authority.**—An affidavit signed, "Richard T. Greene, Notary Public, N. Y. Co.," sufficiently showed prima facie that it was executed before a notary public. Earle v. National Metallurgic Co., 77 N. J. Eq. 17, 76 A 555.

80. Bell v. Farwell, 189 Ill. 414, 59 NE 955 [aff 89 Ill. A. 638]; Trevor v. Colgate, 181 Ill. 129, 54 NE 909; Henning v. Libke, 104 Ill. A. 303; Desnoyers Shoe Co. v. Litchfield First Nat. Bank, 89 Ill. A. 579 [aff 188 Ill. 312, 58 NE 994]; Figge v. Rowlen, 84 Ill. A. 238 [aff 185 Ill. 234, 57 NE 195].

[a] **Certificate of another officer** that notary has power to take the affidavit is not sufficient in Illinois in the absence of a statement by the notary himself that he has such authority. Desnoyers Shoe Co. v. Litchfield First Nat. Bank, 188 Ill. 312, 58 NE 994 [aff 89 Ill. A. 579]; Peo. v. Nelson, 150 Ill. A. 595.

81. Trevor v. Colgate, 181 Ill. 129, 54 NE 909; Ferris v. Commercial Nat. Bank, 158 Ill. 237, 41 NE 1118; Smith v. Lyons, 80 Ill. 600; Keefer v. Mason, 26 Ill. 406; Desnoyers Shoe Co. v. Litchfield First Nat. Bank, 89 Ill. A. 579 [aff 188 Ill. 312, 58 NE 994]; Figge v. Rowlen, 84 Ill. A. 238 [aff 185 Ill. 234, 57 NE 195]; Teutonia Loan, etc., Co. v. Turrell, 19 Ind. A. 469, 49 NE 852, 65 AmSR 419; Barhydt v. Alexander, 59 Mo. A. 188.

[a] **Prima facie evidence only.**—"It is insisted by appellant that the jurat and seal of the notary public attached to said affidavit established prima facie the fact that said notary public had authority, under the laws of the State of Missouri, to administer oaths. This contention cannot be sustained. In the case of Trevor v. Colgate, 181 Ill. 129 (on p 131), 54 NE 909, the court say: 'The position of counsel for appellees is, the certificate of the notary, under his official seal, that he has administered the oath, is made by said section 6 prima facie proof that the notary had authority to administer oaths. That construction cannot be accepted. The meaning of the section is, if the notary shall certify, under his official seal, that he has authority to administer oaths under the statute of the state under which he holds his commission, such certificate shall be prima facie evidence that he has such statutory authority.'" Desnoyers Shoe Co. v. Litchfield First Nat. Bank, 188 Ill. 312, 318, 58 NE 994.

[b] **In New Jersey.**—(1) Seal of notary is not necessary under 1 Gen. St. (1895) p 2333. Earle v. National Metallurgic Co., 77 N. J. Eq. 17, 76 A 555. (2) Nor is it necessary that his certificate shall state that he is a notary. Dilts v. State Excise Comrs., (Sup.) 79 A 315; Magowan v. Baird, 53 N. J. Eq. 656, 33 A 1054 [disappr Whitehead v. Hamilton Rubber Co., 53 N. J. Eq. 454, 32 A 377; Minford v. Taylor, 12 N. J. L. J. 282; Sutherland v. Jersey City, etc., R. Co., 8 N. J. L. J. 45]. (3) And where the notary's official designation is contained in the jurat, a failure to annex it to the signature is not material. Feuchtenwanger v. McCool, 29 N. J. Eq. 151.

82. Figge v. Rowlen, 84 Ill. A. 238 [aff 185 Ill. 234, 57 NE 195]. See Notaries [2 Cyc 15; 29 Cyc 1078].

"This power to administer oaths does not pertain to the office of notary public by usage or custom, except so far as is required in the transaction of commercial affairs. Wherever such powers exist, it is by virtue of a statute." Beard, J., in Fawcett v. Chicago, etc., R. Co., 113 Tenn. 246, 250, 81 SW 839. "Authority to take and certify affidavits does not belong to the office of notary public at common law, but whether it does or not is immaterial, since a legislative enactment is paramount to the common law, and the above statute specifically prescribes how an affidavit taken in a foreign state must come authenticated to receive faith and credit in our courts. It is provided that an affidavit shall be subscribed and certified by the officer, or justice of the peace, under his hand and seal of office, if he have one, and attested by the clerk, who shall also certify that such officer, or justice of the peace, is by the laws of said state empowered to administer oaths and take affidavits. The fixing of the specific mode of authentication must be held to exclude all other modes, and hence the courts have no authority to heed an affidavit that is not vouched in the manner provided by law." Hadley, J., in Jackson v. State, 161 Ind. 36, 38, 67 NE 690 [quot with appr Bank v. Mulford, 47 Ind. A. 84, 95 NE 432].

[a] **"It has been strenuously argued that a notary public is an officer of international authority,** and that, in addition to the functions which he may admittedly exercise under the law merchant, he is possessed of power to take affidavits to be used in foreign countries and in other states. There are authorities justifying such contention, which, however, does not commend itself to my judgment." Per Magie, J., in Magowan v. Baird, 53 N. J. Eq. 656, 658, 33 A 1054. And see supra note 78.

[b] **Notary of foreign country.**—In In re Earl, 4 Kay & J. 301, 70 Reprint 126, it was held that the official seal of a notary public of a foreign country, not under the dominion of the queen, was not one of which the court could take judicial cognizance.

83. U. S.—U. S. v. Mallard, 40 Fed. 151, 5 LRA 816.

Ga.—Britt v. Davis, 130 Ga. 74, 60 SE 180; McCain v. Bonner, 122 Ga. 842, 51 SE 36; Shecut v. Trubee, 99 Ga. 637, 26 SE 60; Matthews v. Reid, 94 Ga. 461, 19 SE 247. See also Redwine Bros. v. Jarrell, (A.) 80 SE 728.

Ill.—Kehoe v. Rounds, 69 Ill. 351; McDermaid v. Russell, 41 Ill. 489.

Ind.—Cantwell v. State, 27 Ind. 505.

Kan.—Atchison v. Bartholow, 4 Kan. 124.

Miss.—Carlisle v. Gunn, 68 Miss. 243, 8 S 743; Dunlap v. Clay, 65 Miss. 454, 4 S 118.

N. J.—State v. Shreve, 4 N. J. L. 297.

N. Y.—O'Reilly v. Peo., 86 N. Y. 154, 40 AmR 525.

N. C.—Alford v. McCormac, 90 N. C. 151.

Or.—Ex p. Finn, 32 Or. 519, 52 P 756, 67 AmSR 550.

S. C.—State v. Williams, 76 S. C. 135, 56 SE 783; Doty v. Boyd, 46 S. C. 39, 24 SE 59.

Tex.—Hardy v. Beaty, 84 Tex. 562, 19 SW 778, 31 AmSR 80.

Wash.—Tacoma Grocery Co. v. Draham, 8 Wash. 263, 36 P 31, 40 AmSR. 907.

W. Va.—Cosner v. Smith, 36 W. Va. 788, 15 SE 977.

Eng.—Bourke v. Davis, 44 Ch. D. 110; Allen v. Taylor, L. R. 10 Eq. 52; Reg. v. Turner, 2 C. & K. 732, 61 ECL 732; Oliver v. Price, 3 Dowl. P. C. 261; Phillips v. Prentice, 2 Hare 542, 24 EngCh 542, 67 Reprint 224; Jacobs v. Magnay, 7 Jur. 326.

Ont.—Mann v. Western Assur. Co., 17 U. C. Q. B. 190.

And see supra § 1.

Necessity for jurat showing that the affidavit was sworn to see infra § 105.

Oaths and affirmations in general see Oaths and Affirmations [29 Cyc 1297].

[a] **"Without a direct administration of the oath,** there can be no affidavit, under the statute. And, while a nonobservance of the exact formula in its administration may not relieve the affiant of legal responsibility under it (Dunlap v. Clay, 65 Miss. 454, 4 S 118), yet it is plain that there must be some actual and bona fide attempt at a due observance of the law's requirements, to give validity to the document as an affidavit." Ex p. Finn, 32 Or. 519, 525, 52 P 756, 67 AmSR 550.

[b] **Refusal to take oath.**—A paper prepared to be sworn to by one who afterward refused to swear to it will not be given any weight, although an affidavit is made stating that the intended affiant said that the paper was true. Thompson v. Fuller, 5 Silv. Sup. 41, 8 NYS 62.

[c] **An affidavit cannot be made by proxy** but affiant must do his own swearing. Shecut v. Trubee, 99 Ga. 637, 26 SE 60.

[d] **Service of copy before oath taken.**—It is irregular to serve a copy of an affidavit on which a motion is to be founded previously to its being

tion is sufficient.[84] In fact no particular ceremony is necessary, and it is only required that something be done in the presence of the officer which is understood by both the officer and the affiant to constitute the act of swearing.[85] It has been held that where the affiant is not a believer in Christianity the oath may be administered according to the ceremonies of his own religion.[86] It seems not to be essential that the oath should be administered the day the affidavit is filed, but that it may be administered previously.[87] In some jurisdictions it has been held that where the affidavit of an illiterate person is taken, its contents should be read over to the affiant by the officer at the time he administers the oath.[88]

V. FORM AND CONTENTS

[§ 50] **A. In General—1. Whether Writing Necessary.** Properly speaking, it is essential to the nature of an affidavit that it be in writing;[89] but in some cases it has been held that where the term "affidavit" is used in the statute as synonymous with "oath" it may be made orally.[90]

[§ 51] **2. Affected by Statutes.** As a general rule an affidavit is not required to be in any particular form,[91] but in some cases it has been held that it must be in the form prescribed by the stat-

sworn to. Wilson v. Tiffany, 3 Wend. (N. Y.) 310.

[e] **Objection not considered on appeal.**—A motion to quash an attachment on the ground of the omission of the word "sworn" in the affidavit will not be considered on appeal when raised there for the first time. Merrielles v. State Bank, 5 Tex. Civ. A. 483, 24 SW 564.

[f] **Procuring certificate of officer not sufficient.**—Where a person wrote out and signed a paper in the form of an affidavit for the purpose of obtaining the issuance of a distress warrant, and then procured a justice of the peace to attest it by signing the jurat, but in fact no oath was taken or administered, and nothing was said about an oath or as to the truth of the statements contained in the paper, this constituted no lawful affidavit and furnished no basis for the issuing of a distress warrant. Britt v. Davis, 130 Ga. 74, 60 SE 180.

[g] **Acts not amounting to oath.**—Where an attorney at law prepared an affidavit for the purpose of foreclosing a chattel mortgage, signed his name to it, and then laid it on the desk of the clerk of the superior court at which the latter was sitting, the attorney at the same time remarking: "Here is an affidavit I want to swear to; I have already signed it; the facts stated in it are true," and it does not appear that the clerk heard what the attorney said, but it does appear that no oath was formally administered and that the clerk did not then nor until long afterward sign the jurat, the affidavit was not duly made, and the clerk had no authority to issue an execution thereon. Matthews v. Reid, 94 Ga. 461, 462, 19 SE 247.

[h] **Intention not sufficient.**—The agent of a creditor went to a justice of the peace and asked him to prepare papers for the issuance of an attachment, in favor of his principal, against the estate of a debtor. The justice prepared the affidavit and other papers and, handing them to the agent, asked, "if it was all right," to which the agent replied that it was. The agent did not sign the affidavit, no oath was administered, and no attempt to make an oath was made. It was held that there was no affidavit. Carlisle v. Gunn, 68 Miss. 243, 8 S 743.

[i] **Evidence of oath.**—In Mitchum v. State, 56 Fla. 71, 47 S 815, the affidavit was shown to be the original filed fourteen years before in the handwriting of defendant's then attorney, purported to be signed by defendant and to be sworn to before the clerk of the court who testified that he took defendant's oath to the affidavit and that he always asked the question before receiving the oath whether the affiant had read the affidavit but did not remember the particular instance after the lapse of fourteen years. As against this defendant testified that he remembered taking several oaths before the clerk but did not remember taking this one. The affidavit was held to be sufficiently proved to be admissible.

84. Ashdown v. Manitoba Free Press Co., 20 Can. S. C. 43 (holding that the right to affirm is not restricted to certain religious bodies or persons having religious scruples).

85. U. S. v. Mallard, 40 Fed. 151, 5 LRA 816; Britt v. Davis, 130 Ga. 74, 60 SE 180; McCain v. Bonner, 122 Ga. 842, 51 SE 36; Matthews v. Reid, 94 Ga. 461, 19 SE 247; Dunlap v. Clay, 65 Miss. 454, 4 S 118; O'Reilly v. Peo., 86 N. Y. 154, 40 AmR 525.

[a] **What sufficient.**—"If, however, the affiant, at the time of tendering the affidavit to the officer, uses language signifying that he consciously takes upon himself the obligation of an oath, and the officer so understands and immediately signs the jurat, this will amount to such concurrence of act and intention as will constitute a legal swearing. The acts of the officer and of the affiant must be concurrent and must conclusively indicate that it was the purpose of the one to administer and the other to take the oath, in order to make a valid affidavit." Evans, J., in McCain v. Bonner, 122 Ga. 842, 846, 51 SE 36 [quot Cyc].

[b] **An instruction in the following language** was sustained and approved in Mitchell v. Masury, 132 Ga. 360, 366, 64 SE 275: "There is no special form of words necessary to constitute an oath, but it is necessary for enough to be said by affiant to indicate to the officer that he wanted to swear to it, and did swear to it, and the officer so understood it and accepted it as such and signed it accordingly."

[c] **Informal oath.**—Where, in the presence of a justice of the peace, an affidavit was read over to the affiant and then handed to the justice who asked the latter if he would swear to it, and he replied that he would, but "did not hold up his hand and swear," and by mistake neither affidavit nor jurat was signed, although both parties testified that they thought that they were doing everything to make the oath binding, it was held that what was done was sufficiently formal. Dunlap v. Clay, 65 Miss. 454, 4 S 118.

86. Newman v. Newman, 7 N. J. Eq. 26; Fryatt v. Lindo, 3 Edw. (N. Y.) 239. See generally Oaths and Affirmations [2 Cyc 16; 29 Cyc 1298].

[a] **Jewish oath.**—The oath of a Hebrew to a bill must be according to the oath of the Jewish religion. Newman v. Newman, 7 N. J. Eq. 26.

87. Harris v. Leonhardt, 2 App. (D. C.) 318.

88. Rex v. Middlesex, 4 Dowl. P. C. 765.

[a] **Officer must be satisfied by affiant.**—In administering the oath to an affiant the commissioner before he administers the oath should satisfy himself that the witness thoroughly understands what he is going to swear to, and he should not be satisfied on this point by anyone but the witness himself. The court requires the security of an independent commissioner, and it is obvious that he ought not to take only the statement of a solicitor in the cause that the witness knows what is in the affidavit. Bourke v. Davis, 44 Ch. D. 110.

89. Minn.—State v. Richardson, 34 Minn. 115, 24 NW 354.

N. J.—Garrard v. Hitsman, 16 N. J. L. 124.

N. C.—Alford v. McCormac, 90 N. C. 151; Windley v. Bradway, 77 N. C. 333.

Pa.—Kessler v. Hoffman, 9 Pa. Dist. 365; Black v. Cochran, 21 Pa. Co. 326.

S. C.—State v. Williams, 76 S. C. 135, 56 SE 783.

Tex.—Shelton v. Berry, 19 Tex. 154, 70 AmD 326; Morris v. State, 2 Tex. A. 502.

Wyo.—Blyth, etc., Co. v. Swensen, 7 Wyo. 303, 51 P 873.

See also supra § 1.

[a] **Written attestation of truth.**—"Affidavit" is not an ambiguous word; it signifies a written attestation to, or asseveration of, the truth. Black v. Cochran, 21 Pa. Co. 326.

[b] **No unwritten affidavit.**—"Again, the plaintiff says that there might have been an unwritten affidavit which warranted the aforesaid recitals. If that were so, still, an unwritten affidavit would not support the attachment; or rather it is more proper to say, that there is no such thing as an unwritten affidavit." Windley v. Bradway, 77 N. C. 333, 334.

[c] **Oath reduced to writing.**—The word "affidavit," ex vi termini, means an oath reduced to writing. State v. Headrick, 149 Mo. 396, 51 SW 99; Grove v. Campbell, 9 Yerg. (Tenn.) 7; Hawkins v. Gibson, 1 Leigh (28 Va.) 476.

90. Baker v. Williams, 12 Barb. (N. Y.) 527.

[a] **Statute not to be interpreted technically.**—"We know that in common parlance, the word is understood to mean any form of legal oath which may be taken. The words oath, deposition, testimony and affidavit, when used in reference to legal proceedings, convey to the unprofessional ear, the same meaning as do the verbs to swear, to make oath, to depose, to testify, and to make affidavit; and we know as well that each has its own distinctive legal technical meaning. The statute in which the word in question is found, was passed for the people at large, and the language, I think, should be understood and interpreted as it would be received by ordinary intelligent persons, who are not supposed to be acquainted with technical legal distinctions." Welles, P. J., in Baker v. Williams, 12 Barb. (N. Y.) 527, 530.

[b] **In Pennsylvania.**—"The Act of Assembly does not require, on appeals from awards, that the affidavit shall be in writing; and without such a requirement by Act of Assembly or rule of Court, we cannot declare an unwritten affidavit to be erroneous, and we must presume that the officers administered it in the form prescribed by law." Lowrie, J., in Ross v. Dysart, 24 Pa. 395, 396 [foll Wilson v. Kelly, 81 Pa. 411].

91. Harris v. Lester, 80 Ill. 307; Chancey v. Allison, (Tex. Civ A.) 107 SW 605.

[a] **Jurat containing proper recitals.**—A petition which contained a

ute under which it is drawn.[92] In fact the formal and substantial requisites of an affidavit are matters depending for the most part upon the purposes for which such affidavit is to be used and the statutes under which it is drawn, and therefore the statutes governing the particular affidavit should always be consulted.[93] Objections to the sufficiency of an affidavit must be raised at the earliest opportunity, else they will be waived.[94]

[§ 52] **B. Title—1. Meaning of Term.** The title of an affidavit embraces its entire heading, the name or style of the court as well as the names of the parties.[95]

[§ 53] **2. Necessity—a. Where Cause Pending—(1) In General.** The general rule is that an affidavit to be used in a judicial proceeding should be entitled in the court and cause in which it is to be used,[96] the purpose of the rule being that the affidavit may be identified as being connected with the cause to which it relates so that a prosecution

jurat showing that the statements made in the petition were properly sworn to by the deponent has been held a sufficient verification of the pleading, although the court said that it might be formally defective as an affidavit. Loeb v. Smith, 78 Ga. 504, 3 SE 458.

[b] **Where form cannot be followed.**—Where it is impossible to follow the form prescribed by statute, and a departure therefrom is made, the affidavit is not irregular merely because it does not follow the form. It is for the judge to whom the affidavit is presented to decide whether or not it is sufficient. Neven v. Butchart, 6 U. C. Q. B. 196.

[c] **Liberal construction of foreign affidavits.**—In respect to an affidavit sworn to in a foreign country persons are not supposed to be cognizant of the rules of practice of the country in which the affidavit is to be used, which regard, not the substance of the contents of the affidavit, but a mere requisite of a formal kind, certainly not essential for subjecting the deponent to a prosecution for perjury in case of the affidavit being false. A mistake due to such ignorance is not fatal. Ewing v. Lockhart, 8 U. C. Q. B. 248 See also infra note 94 [g].

92. Bruce v. Schofield, 1 U. C. Q. B. 2 (holding that a defendant may not be arrested since the passage of the act 7 Vict. c 31, on a writ issued before that time on an affidavit in the form used before that act was passed).

93. U. S.—In re Keller, 36 Fed. 681.

Me.—Atwood v. Higgins, 76 Me. 423.

Nebr.—Bantley v. Finney, 43 Nebr. 794, 62 NW 213; Whipple v. Hill, 36 Nebr. 720, 55 NW 227, 38 AmSR 742, 20 LRA 313.

N. H.—Randall v. Baker, 20 N. H. 335.

N. Y.—Peo. v. Sutherland, 81 N. Y. 1.

Affidavits to be used for a particular purpose or in a particular proceeding see cross references supra p 317.

[a] **Affidavits written in foreign language.**—(1) In Spencer v. Doane, 23 Cal. 418, it was held that affidavits which were written in a foreign language and filed on a motion for a new trial were properly excluded. (2) But in In re Eady, 6 Dowl. P. C. 615, an affidavit originally written in a foreign language, but translated and the translation verified, was held to be sufficient.

[b] **The formal requisites of an affidavit** are title, venue, signature, jurat, and authentication. Beebe v. Morrell, 76 Mich. 114, 42 NW 1119, 15 AmSR 288. See infra §§ 52–65, 90–120.

[c] **Component parts.**—"Accepting this more full definition, we have as the component parts of an affidavit: First, the written oath; Second, the signature of the deponent; Third, the attestation of the administering of the oath by the officer who did administer it." Dis op Sherwood, J., in Hargadine v. Van Horn, 72 Mo. 370, 371.

[d] **Affidavit complete instrument.**—"An affidavit is a complete thing. Like a deed, it speaks for itself, and shows by its caption, its signature, and jurat, that the commencement and the close are there; and an admission that it is correct, is an admission that the entire affidavit is preserved." Dewey v. Linscott, 20 Kan. 684, 687.

[e] **An order of court** is not essential to nor a part of an affidavit, within the meaning of a statute allowing appeal without giving bond where the appellant makes affidavit that he is unable to pay or secure costs. Smith v. Buffalo Oil Co., 99 Tex. 77, 87 SW 659.

[f] **Sufficient forms** of affidavits see Cheadle v. Riddle, 6 Ark. 480; Ede v. Johnson, 15 Cal. 53; McCormick v. Wells, 83 Ill. 289; Rowley v. Berrian, 12 Ill. 198; Turpin v. Eagle Creek, etc., Gravel Road Co., 48 Ind. 45; Hosea v. State, 47 Ind. 180; Kieber v. Block, 17 Ind. 294; Kirby v. Gates, 71 Iowa 100, 32 NW 191; Stone v. Miller, 60 Iowa 243, 14 NW 781; Rausch v. Moore, 48 Iowa 611, 30 AmR 412; Levy v. Wilson, 43 Iowa 605.

94. Conn.—McGinnis v. Grant, 42 Conn. 77.

Ill.—Linck v. Litchfield, 141 Ill. 469, 31 NE 123.

Ind.—Rosenstein v. State, 9 Ind. A. 290, 36 NE 652.

Iowa.—Snell v. Eckerson, 8 Iowa 284.

Miss.—Yeizer v. Burke, 11 Miss. 439.

Mo.—Squires v. Chillicothe, 89 Mo. 226, 1 SW 23; Smith v. Ponath, 17 Mo. A. 262.

N. Y.—City Bank v. Lumley, 28 HowPr 397; Gilmore v. Hempstead, 4 HowPr 153.

Tex.—Etter v. Dugan, 1 Tex. Unrep. Cas. 175; Merrielles v. State Bank, 5 Tex. Civ. A. 483, 24 SW 564.

95. Bowman v. Sheldon, 7 N. Y. Super. 657.

96. U. S.—Goldstein v. Whelan, 62 Fed. 124; Buerk v. Imhaeuser, 4 F. Cas. No. 2,107a [aff 101 U. S. 647, 25 L. ed. 945].

Ga.—Falls City Mfg. Co. v. Athens Coca-Cola Bottling Co., 130 Ga. 559, 61 SE 230; Horton v. Fulton, 130 Ga. 466, 60 SE 1059; Britt v. Davis, 130 Ga. 74, 60 SE 180; Hicks v. Portwood, 129 Ga. 307, 58 SE 837; Johnson v. Tanner, 126 Ga. 718, 56 SE 80; Brucker v. O'Connor, 115 Ga. 95, 41 SE 245; Franklin v. Kriegshaber, 114 Ga. 947, 41 SE 47; Hill v. McBurney Oil, etc., Co., 112 Ga. 788, 38 SE 42, 52 LRA 398; Parks v. State, 110 Ga. 760, 36 SE 73; Whitley v. Berry, 105 Ga. 251, 31 SE 171; Warren v. Monnish, 97 Ga. 399, 23 SE 823.

Hawaii.—Rex v. Yok Lan, 7 Hawaii 584.

Ill.—Watson v. Reissig, 24 Ill. 281, 76 AmD 746.

Mich.—Beebe v. Morrell, 76 Mich. 114, 42 NW 1119, 15 AmSR 288; Whipple v. Williams, 1 Mich. 115.

Miss.—Saunders v. Erwin, 3 Miss. 732.

Mont.—Herbst Importing Co. v. Hogan, 16 Mont. 384, 41 P 135.

N. Y.—Irroy v. Nathan, 4 E. D. Smith 68; Burgess v. Stitt, 12 HowPr 401; Higham v. Hayes, 2 HowPr 27; Stacy v. Farnham, 2 HowPr 26; Baxter v. Seaman, 1 HowPr 51; Dickenson v. Gilliland, 1 Cow. 481.

W. Va.—Vinson v. Norfolk, etc., R. Co., 37 W. Va. 598, 16 SE 802.

Eng.—Osborn v. Tatum, 1 B. & P. 271, 126 Reprint 900; Joll v. Curzon, 5 C. B. 205, 57 ECL 205, 136 Reprint 855; Doe v. Roe, 8 Dowl. P. C. 340; Reg. v. Jones, 8 Dowl. P. C. 80; Thompson v. Vaux, 5 Dowl. P. C. 691; Shrimpton v. Carter, 3 Dowl. P. C. 648; Thorpe v. Hook, 1 Dowl. P. C. 494; Breedon v. Capp, 9 Jur. 781; Johnson v. Simpson, 1 L. T. Rep. N. S. 60; In re Keane, Sau. & Sc. 81; Pariente v. Pennell, 7 Scott N. R. 834; Owen v. Hurd, 2 T. R. 643, 100 Reprint 346.

B. C.—McKay v. Clarke, 2 B. C. 213.

Ont.—Vansickle v. Boyd, 14 Ont. Pr. 469; Wakefield v. Bruce, 5 Ont. Pr. 77; Allman v. Kensel, 3 Ont. Pr. 110; Ellerby v. Walton, 2 Ont. Pr. 147; Hart v. Ruttan, 23 U. C. C. P. 613.

Curing of the failure to entitle an affidavit by amendment see infra § 125.

[a] **Affidavits for injunctions.**—"It is now well settled by many adjudications of this court that at an interlocutory hearing for injunction, affidavits not 'intituled in the cause,' or which do not refer to the case and to the court, are inadmissible in evidence, and should not be considered by the judge in making up his judgment granting or refusing an injunction." Evans, J., in Horton v. Fulton, 130 Ga. 466, 468, 60 SE 1059.

[b] **Invalid if without title.**—Humphrey v. Cande, 2 Cow. (N. Y.) 509; Hawley v. Donnelly, 8 Paige (N. Y.) 415.

[c] **Not surplusage.**—The title is not surplusage, as without it the body of the affidavit would be, in many cases, rendered meaningless. Blake Crusher Co. v. Ward, 3 F. Cas. No. 1,505; In re Bronson, 12 Johns. (N Y.) 460.

[d] **Filing of unentitled affidavit irregular.**—An affidavit was made after the taking of an appeal in a police court. It was not entitled in any court. It was held that it was irregularly filed in the police court and could not be considered. Rex v. Yok Lan, 7 Hawaii 584.

[e] **In cause as well as court.**—An affidavit to be used in support of an application to quash a writ of certiorari should be entitled in the cause as well as in the court. Reg. v. Jones, 8 Dowl. P. C. 80.

[f] **Either from commencement or body.**—"Every affidavit, taken in the progress of any suit, must bear upon its face, either at the commencement of it or in its body, the title of the suit in which it is taken, and to the proceedings of which it is intended to apply." Saunders v. Erwin, 3 Miss. 732.

[g] **Liberal construction of foreign affidavits.**—In Comstock v. Burrowes, 13 U. C. Q. B. 439, an affidavit taken in the state of New York was entitled in the common pleas court, whereas the cause was in the queen's bench, but the mistake was held not to be fatal, Robinson, J., saying: "We must be careful not to exact the same scrupulous regularity in regard to affidavits sworn abroad, as this was, for the purpose of verifying the due taking of evidence abroad, as is required in respect to affidavits made within our jurisdiction for ordinary purposes; for otherwise a grievous loss might sometimes be thrown upon a party, and evidence obtained in a remote country, after much delay and expense, might be shut out by a technical objection, in which there might be no merit, and which it might be impossible to remedy in time, if at all." See also supra note 91 [c].

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for perjury may be based upon it if it is false.[97] In a few cases, however, it has been held that a title is not essential to the validity or use of an affidavit, even when taken for use in a cause then pending.[98]

[§ 54] **(2) Cause Otherwise Identified.** But since the object of entitling is merely to show in what suit the affidavit is to be used, an affidavit will not be disregarded because lacking a title where the cause to which it is intended to apply is otherwise clearly identified.[99] Thus an affidavit referring or attached to another paper, properly entitled in the cause, is good by relation thereto, although not itself entitled.[1]

[§ 55] **b. When No Cause Pending.** An affidavit which is to be used in an action that is not pending at the time the affidavit is made, but is to be commenced in the future, need not be entitled, since there is no cause with which it can be identified.[2]

97. Ga.—Hicks v. Portwood, 129 Ga. 307, 58 SE 837; Franklin v. Kriegshaber, 114 Ga. 947, 41 SE 47; Reese v. Ryals, 112 Ga. 910, 38 SE 345; Hill v. McBurney Oil, etc., Co., 112 Ga. 788, 38 SE 42, 52 LRA 398; Parks v. State, 110 Ga. 760, 36 SE 73; Warren v. Monnish, 97 Ga. 399, 23 SE 823.

Mich.—Beebe v. Morrell, 76 Mich. 114, 42 NW 1119, 15 AmSR 288; Whipple v. Williams, 1 Mich. 115.

N. Y.—Irroy v. Nathan, 4 E. D. Smith 68.

Wis.—Kearney v. Andrews, 5 Wis. 23.

Eng.—Baldwin v. Bauerman, 12 C. B. 152, 74 ECL 152, 138 Reprint 859.

[a] **Unentitled affidavit no basis of perjury.**—(1) "If the affidavit is not entitled in the cause, or if the name of the case does not appear in some part of the affidavit, or the statements made therein be not sufficient to indicate to what case the affidavit relates, it could not be used as a foundation for a prosecution for perjury, and for this reason should not be received as evidence in any court in any proceeding whatsoever. Parks v. State, 110 Ga. 760, 36 SE 73." Hill v. McBurney Oil, etc., Co., 112 Ga. 788, 792, 38 SE 42, 52 LRA 398. (2) But in Vansickle v. Boyd, 14 Ont. Pr. 469, 471, it was said: "The Courts are quite right in not receiving affidavits which are not properly entitled; but I do not think the question whether there be perjury or not depends on the rule as to entitling being strictly complied with."

98. Watson v. Reissig, 24 Ill. 281, 76 AmD 746. And see Lunt v. Kennedy, 37 N. B. 639.

[a] **In Illinois** (1) it would seem that neither a defective title nor a failure to entitle an affidavit will render it invalid (Hertig v. Peo., 159 Ill. 237, 42 NE 879, 50 AmSR 162; Bowen v. Wilcox, etc., Sewing Mach. Co., 86 Ill. 11; Hays v. Loomis, 84 Ill. 18; Harris v. Lester, 80 Ill. 307, 311; Seymour v. Bailey, 66 Ill. 288; Wilborn v. Blackstone, 41 Ill. 264), (2) although in an early case the court refused to consider an affidavit not properly entitled (Watson v. Reissig, 24 Ill. 281, 76 AmD 746). (3) "It does not depend on the fact whether it is entitled in any cause or in any particular way. Without any caption whatever, it is nevertheless an affidavit." Scott, J., in Harris v. Lester, supra [quot with appr Hertig v. Peo., supra].

[b] **Informality of title** is not fatal under New Brunswick Comp. St. (1903) c 62 § 5. Lunt v. Kennedy, 37 N. B. 639.

99. Shook v. Rankin, 21 F. Cas. No. 12,804, 8 Biss. 477; Hays v. Loomis, 84 Ill 18; McCormick v. Wells, 83 Ill. 239; Harris v. Lester, 80 Ill. 307; Doane v. Allen, 172 Mich. 686, 138 NW 228; Beebe v. Morrell, 76 Mich. 114, 42 NW 1119, 15 AmSR 288; Kearney v. Andrews, 5 Wis. 23.

[a] **Purpose of title.**—In Beebe v. Morrell, 76 Mich. 114, 119, 42 NW 1119, 15 AmSR 288, the court said: "Our attention has not been called to any authorities, in our own State or elsewhere, where it has been held that an affidavit filed in a pending suit not entitled is a nullity. The inquiry in such cases is, has the affidavit been fully identified as having been filed in that cause? If it has, then the want of the formality of a title is of no consequence, since the title is for the purpose of identifying the suit in which the affidavit is designed to be used."

[b] **Included in record on appeal.**—In Yard v. Bodine, 18 N. J. L. 490, it was held that if the justice certifies on his docket that an affidavit has been filed with him and sends it up with the other appeal papers, it is sufficient evidence to the court that the affidavit, thus sent up, was made in that cause; and it is not necessary that the affidavit should be entitled in the cause, or even show upon its face who are the appellees, or the style of the action, unless it appears by its caption, or on the face of it, to have been made in a different cause or is otherwise shown to have been so made.

[c] **Identity appearing on face of affidavit.**—It is not necessary to entitle an affidavit if it shows upon its face that it is an affidavit in the proper suit. Dunham v. Rappleyea, 16 N. J. L. 75. And see Saunders v. Erwin, 3 Miss. 732 (to the effect that every affidavit taken in the progress of any suit must have upon its face, either at the commencement of it or in its body, the title of the suit in which it is taken and to the proceedings of which it is intended to apply).

[d] **A memorandum on the back of an affidavit** stating the court, term, and name of the case, together with a statement of the name of the affiant, will not be sufficient to take the place of a proper title. Warren v Monnish, 97 Ga. 399, 23 SE 823.

[e] **Certificate of clerk insufficient.**—A defect in the title of an affidavit cannot be cured by a certificate from the clerk of the superior court that, after the affidavit has been filed in his court he indorsed upon the back thereof the title of the case, as he has no authority to do this. Parks v. State, 110 Ga. 760, 36 SE 73.

[f] **On opposite side of same piece of paper.**—In Dilkes v. Browning, 15 N. J. L. 471, a bond was properly entitled, but the affidavit, written on the opposite side of the same piece of paper, was not. It was held that reference could not be had to the bond to determine the title, as each of these documents, whether written one on the back of the other, or on distinct pieces of paper, should be perfect in itself, not depending for its meaning on a reference to the other.

1. Ark.—Powers v. Swigart, 8 Ark. 363.

Cal.—Watt v. Bradley, 95 Cal. 415, 30 P 557.

D. C.—Harris v. Leonhardt, 2 App. 318.

Ga.—Hill v. McBurney Oil, etc., Co., 112 Ga. 788, 38 SE 42, 52 LRA 398.

Iowa.—Levy v. Wilson, 43 Iowa 605.

Mich.—Beebe v. Morrell, 76 Mich. 114, 42 NW 1119, 15 AmSR 288; King v. Harrington, 14 Mich. 532.

N. J.—Lyons v. Allen, 76 N. J. L. 391, 69 A 642; Yard v. Bodine, 18 N. J. L. 490; Blair v. Stewart, 18 N. J. L. 123; Dunham v. Rappleyea, 16 N. J. L. 75.

N. Y.—Bowman v. Sheldon, 7 N. Y. Super. 657; Peo. v. Oneida County, 25 Misc. 444, 55 NYS 712; Anonymous, 4 Hill 597; Ex p. Metzler, 5 Cow. 287.

Tex.—Gray v. Steedman, 63 Tex. 95.

Wis.—Wattawa v. Jahnke, 116 Wis. 491, 93 NW 547; Kearney v. Andrews, 5 Wis. 23.

Eng.—Prince v. Nicholson, 5 Taunt. 333, 1 ECL 176, 128 Reprint 718.

Ont.—McDonald v. Cleland, 6 Ont. Pr. 289.

[a] **Filed with declaration.**—"It is first objected, that the affidavits filed with the declaration were without the titling of the case, and that they appear to have been sworn to the day before the declaration was filed and the suit instituted. Certainly this can form no substantial objection to the affidavits. The affidavits were filed with the declaration, and referred to the causes of action therein stated, and there could be no danger of mistaking these papers as belonging to some other case." Harris v. Leonhardt, 2 App. (D. C.) 318, 320.

[b] **Indorsed on another paper.**—An affidavit of service immediately following or indorsed on papers for a motion, properly entitled, need not itself be entitled. Anonymous, 4 Hill (N. Y.) 597.

[c] **Adoption of title of writ.**—In some English cases it has been held that where the title of an affidavit is the same as the title of the writ of summons of the cause in which it is to be used it is sufficient. White v. Feltham, 3 C. B. 658, 54 ECL 658, 136 Reprint 263; Bland v. Dax, 10 Jur. 8; Marshal v. Adams, 2 Jur. 944.

[d] **In Michigan.**—Under Circuit Court Rule No. 37 (b), made applicable by Chancery Rule No. 15 to chancery cases, an affidavit which, although not entitled in the cause, is attached to a cover properly entitled therein is sufficient. Doane v. Allen, 172 Mich. 686, 138 NW 228.

2. U. S.—Modox Co. v. Moxie Nerve Food Co., 162 Fed. 649, 89 CCA 441; Baldwin v. Bernard, 2 F. Cas. No. 797, 9 Blatchf. 509 note; Baldwin v. Schultz, 2 F. Cas. No. 804, 9 Blatchf. 494, 5 Fish. Pat. Cas. 75; Blake Crusher Co. v. Ward, 3 F. Cas. No. 1,505; Hall v. Union Pac. R. Co., 11 F. Cas. No. 5,950, 3 Dill. 515 [aff 91 U. S. 343, 23 L. ed. 428]; Sterrick v. Pugsley, 22 F. Cas. No. 13,379, 1 Flipp. 350.

Ark.—Kinney v. Heald, 17 Ark. 397.

Cal.—McCrary v. Beaudry, 67 Cal. 120, 7 P 264.

Fla.—West v. Woolfolk, 21 Fla. 189.

Ind.—Hawkins v. State, 136 Ind. 630, 36 NE 419.

Iowa.—Chance v. Temple, 1 Iowa 179.

Mich.—Beebe v. Morrell, 76 Mich. 114, 42 NW 1119, 15 AmSR 288.

Minn.—Crombie v. Little, 47 Minn. 581, 50 NW 823.

Nebr.—Becker v. Linton, 80 Nebr. 655, 114 NW 928, 127 AmSR 795.

N. Y.—Peo. v. Dikeman, 7 HowPr 124; Stacy v. Farnham, 2 HowPr 26; Milliken v. Selye, 3 Den. 54; Peo. v. Tioga C. Pl., 1 Wend. 291; Whitney v. Warner, 2 Cow. 499; Haight v. Turner, 2 Johns. 371.

Wis.—Quarles v. Robinson, 2 Pinn. 97.

Eng.—Young v. Brassey, 1 Ch. D. 277; Matter of Imesom, 8 Dowl. P. C. 651; Thompson v. Vaux, 5 Dowl. P. C. 691; Ex p. Evans, 2 Dowl. P. C. N. S. 410; Hargreaves v. Hayes, 5 E. & B. 272, 85 ECL 272, 119 Reprint 483; Breedon v. Capp, 9 Jur. 781; Schletter v. Cohen, 7 M. & W. 388; Reg. v. Jones, Str. 704, 93 Reprint 796; Clarke v. Cawthorne, 7 T. R. 321, 101 Reprint 997.

Ont.—In re Burrowes, 18 U. C. C. P. 493; Fraser v. Municipal Council, 10 U. C. Q. B. 286.

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Some cases hold that when such an affidavit is entitled it may not be read;[3] but others hold that it is mere harmless surplusage which does not invalidate the affidavit.[4] According to some authorities an affidavit should be entitled in the court in which the action is to be brought, although not in any cause, for none is then pending.[5]

[§ 56] **3. Sufficiency—a. In General.** A wrongly entitled affidavit cannot be received, since affiant could not be punished for perjury in case he swore falsely,[6] but it has been held that a mistake in the title is immaterial after judgment.[7]

[§ 57] **b. In What Cause.** The affidavit should be entitled in the cause in which it is to be used.[8] Thus, on a motion to set aside proceedings on a bail bond, the affidavit is properly entitled in that

[a] **Affidavit as basis of information.**—In Hawkins v. State, 136 Ind. 630, 632, 36 NE 419, it was held that an affidavit to be used as the basis of a criminal information need not be entitled. In this case the court said: "Under some circumstances, it would be improper. . . . It is usually made before there is a suit pending, so that there is no title to give and no court to name. It is only necessary that it should appear that the affidavit was made for the purposes of the suit in which it is afterwards filed."

[b] **To obtain rule on information.**—"Affidavits on which an information was moved for had no title (which was agreed to be right) but the affidavits pro def. on shewing cause were intitled. . . . And upon objection to the reading them, the Court said, that there being a rule in B. R. to shew cause why there should not be an information, that was a proceeding in Court between The King and Jones, and warranted the intitling the affidavits in that manner." Reg. v. Jones, Str. 704, 93 Reprint 796.

[c] **An affidavit for a certiorari** to a justice's court may be entitled in the cause below, but not in the appellate court. Whitney v. Warner, 2 Cow. (N. Y.) 499.

[d] **In a replevin suit** the affidavit of ownership of property should not be entitled. Stacy v. Farnham, 2 HowPr (N. Y.) 26.

[e] **Mandamus and bail.**—Affidavits for mandamus and to hold to bail must not be entitled. The reason is that there is no suit pending, and that a conviction for perjury could not be had on the affidavit if false, because it could not be shown that such a cause existed in the court. Peo. v. Tioga C. Pl., 1 Wend. (N. Y.) 291; Ex p. La Farge, 6 Cow. (N. Y.) 61; Humphrey v. Cande, 2 Cow. (N. Y.) 509; Haight v. Turner, 2 Johns. (N. Y.) 371.

3. Baldwin v. Schultz, 2 F. Cas. No. 804, 9 Blatchf. 494, 5 Fish. Pat. Cas. 75; Blake Crusher Co. v. Ward, 3 F. Cas. No. 1,505; Hall v. Union Pac. R. Co., 11 F. Cas. No. 5,950, 3 Dill. 515 [aff 91 U. S. 343, 23 L. ed. 428]; Sterrick v. Pugsley, 22 F. Cas. No. 13,379, 1 Flipp. 350; Beebe v. Morrell, 76 Mich. 114, 42 NW 1119, 15 AmSR 288; Peo. v. Dikeman, 7 HowPr (N. Y.) 124; Stacy v. Farnham, 2 HowPr (N. Y.) 26; Milliken v. Selye 3 Den. (N. Y.) 54; King v. Cole, 6 T. R. 640, 101 Reprint 747.

[a] **Reason for rule.**—In Haight v. Turner, 2 Johns. (N. Y.) 371, 372, the court said: "It is a settled rule of practice in the English courts, that on a motion for an information, or in an affidavit to hold to bail, the affidavit must not be entitled, and if it be entitled, it cannot be read. The reason assigned is that there is, at the time, no cause pending in the court, and an indictment for perjury, in making such an affidavit, must fail, as it could not be shown that such a cause existed in the court in which the affidavit was made."

[b] **Entitled previously to filing of bill.**—In Baldwin v. Schultz, 2 F. Cas. No. 804, 9 Blatchf. 494, 5 Fish. Pat. Cas. 75, it was held that an affidavit entitled in the suit before the bill has been filed and the suit commenced is irregular and should be excluded. However, the court in this case permitted the affidavit to be resworn.

[c] **Right to reject title as surplusage.**—(1) If an affidavit is entitled in a case where it should not be, the title cannot be rejected as surplusage (Milliken v. Selye, 3 Den. (N. Y.) 54), (2) at least if such rejection will render material portions of the affidavit meaningless (Blake Crusher Co. v. Ward, 3 F. Cas. No. 1,505).

4. State v. Bates, 100 Minn. 104, 112 NW 1026, 12 AnnCas 105; Crombie v. Little, 47 Minn. 581, 50 NW 823; Becker v. Linton, 30 Nebr. 655, 114 NW 928, 127 AmSR 795; Peo. v. Oneida County, 25 Misc. 444, 55 NYS 712; City Bank v. Lumley, 28 HowPr (N. Y.) 397; Pindar v. Black, 4 How Pr (N. Y.) 95; Matter of Imesom, 8 Dowl. P. C. 651; Clarke v. Cawthorne, 7 T. R. 321, 101 Reprint 997.

[a] **Objection "frivolous technicality."**—In Crombie v. Little, 47 Minn. 581, 587, 50 NW 823, the court said: "Another objection to the affidavit is that it was void because entitled in a cause not yet commenced. There are undoubtedly decisions which go to this length, but they are, in our judgment, devoid of reason, and based upon a frivolous technicality."

[b] **Designation of parties may be erased.**—It was "objected that the affidavits, on which it was proposed to show cause, were wrongly entitled. They were entitled, 'In the matter of arbitration between Matthias Imesom, plaintiff, and George Horner, defendant.' There was no cause in Court, and, therefore, it was a misdescription to call the parties 'plaintiff' and 'defendant.' It was true, that the commissioner, before whom the affidavits were sworn, had struck out the words plaintiff and defendant; or, at least they had been struck out by some person. The commissioner had not put his initials opposite the alteration, and, therefore, it appeared that the affidavits had been altered after they had been sworn. . . . The words 'plaintiff' and 'defendant' may be treated as surplusage, as there was no cause in Court." Matter of Imesom, 8 Dowl. P. C. 651.

[c] **Mandamus.**—It has been held that where an affidavit in support of a motion for mandamus was entitled "Sup. Court. In the matter of John La Farge against the judges of the court of common pleas of Jefferson county," the affidavit was not entitled in a cause not pending in such a way as to render it void. Ex. p. La Farge, 6 Cow. (N. Y.) 61.

[d] **To secure delivery up of warrant of attorney.**—Affidavits in support of an application for the delivery up of a warrant of attorney will not be rejected because entitled in the cause. Thompson v. Vaux, 5 Dowl. P. C. 691.

[e] **In New York it is provided by statute** that the entitling of an affidavit in a suit which is not commenced may be disregarded as not affecting the rights of the adverse party. Pindar v. Black, 4 HowPr 95.

[f] **Waiver of objection.**—Where an affidavit for an order of arrest was entitled in the cause it was held that the objection was waived by defendant predicating his motion to discharge the order on such affidavit, and presenting a response thereto. City Bank v. Lumley, 28 HowPr (N. Y.) 397.

[g] **English rule of court.**—Prior to the case of Clarke v. Cawthorne, 7 T. R. 321, 101 Reprint 997, decided in 1797, the practice as to entitling affidavits to hold to bail had varied, but the practice was settled by the opinion of the court in the case reported as follows: "The Court thought that as the practice had obtained so long of adding a title to affidavits of this kind, it would be too much now to determine that such practice had been erroneous, particularly as this was a mere question of form and did not interfere with the justice of the case; and that the consequences of such a determination would be that it might occasion an affinity of actions for improperly holding to bail in those cases in which the affidavits had been entitled: but that for the regulation of future practice, they would make a rule of Court ordering that affidavits to hold to bail should not be entitled after this term."

5. Reg. v. Jones, 8 Dowl. P. C. 80; Ex p. Evans, 2 Dowl. P. C. N. S. 410; Hargreaves v. Hayes, 5 E. & B. 272, 85 ECL 272, 119 Reprint 483; Breedon v. Capp, 9 Jur. 781; In re Burrowes, 18 U. C. C. P. 493; Frazer v. Municipal Council, 10 U. C. Q. B. 286. But see Young v. Brassey, 1 Ch. D. 277 (where it was said that an affidavit should be entitled in the matter of the judicature acts as well as in the action about to be commenced).

6. Humphrey v. Cande, 2 Cow. (N. Y.) 509; Hawley v. Donnelly, 8 Paige (N. Y.) 415.

[a] **Form of affidavit defective as to title** see Vinson v. Norfolk, etc., R. Co., 37 W. Va. 598, 16 SE 802.

[b] **Should follow title of writ.**—The title of affidavits in a cause should pursue the writ of summons. Marshal v. Adams, 2 Jur. 944.

7. Majors v. Edwards, 36 Nebr. 56, 53 NW 1041.

[a] **Where a rule has been substantially disposed of** it cannot afterward be objected that the affidavits upon which the rule was drawn up are not correctly entitled. Viner v. Langton, 5 Dowl. P. C. 92.

8. Franklin v. Kriegshaber, 114 Ga. 947, 41 SE 47; Parks v. State, 110 Ga. 760, 36 SE 73; Whipple v. Williams, 1 Mich. 115; Baxter v. Seaman, 1 HowPr (N. Y.) 51; Humphrey v. Cande, 2 Cow. (N. Y.) 509; Dickenson v. Gilliland, 1 Cow. (N. Y.) 481.

[a] **In cause where privilege is claimed.**—An affidavit in support of an application to discharge a solicitor from custody should be entitled in the cause in respect of which the privilege is claimed. In re Keane, Sau. & Sc. 81.

[b] **Action on case; affidavit entitled in debt.**—In Dunham v. Rappleyea, 16 N. J. L. 75, it was held that where an affidavit on appeal, in an action of trespass on the case, was entitled as in an action of debt the defect was fatal.

[c] **To secure interplea.**—Affidavits in support of a motion for an interpleader should be entitled in the original cause. Pariente v. Pennell, 7 Scott N. R. 834.

[d] **To obtain continuance on interplea.**—An affidavit was filed to obtain a continuance between plaintiff in a proceeding in garnishment and a person who came into the suit by way of interplea. The affidavit was entitled as in the original action. It was held that it was wrongly entitled, as the issues joined on the interplea constituted a wholly separate cause and there was nothing to show that the affidavit was made with reference to the latter proceedings. Adams Express Co. v. Reno, 48 Mo. 264.

[e] **To secure attachment for contempt.**—Where an attachment in contempt was sought because of statements made respecting litigants in a civil proceeding, it was held that the

suit, and not in the original cause.[9] Where an affidavit was entitled as of two causes, but it appeared that both titles referred to the same suit, it was held that one of the titles being correct the other might be rejected as surplusage.[10] In several instances where the same affidavit was to be used in two or more causes, it has been held that the same affidavit should be entitled in each cause.[11] It is not, however, necessary to give the number of the cause.[12]

[§ 58] **c. Name and Style of Court.** It has been held that the title embraces the entire heading, including the name and style of the court as well as the names of the parties,[13] and that an affidavit entitled in the wrong court is fatally defective;[14] but generally an affidavit which identifies clearly the cause to which it belongs will be sufficient, although entitled in the wrong court,[15] or omitting the title of the court altogether;[16] and while it is the better practice that the proper term of court be designated,[17] it is generally held not essential.[18]

[§ 59] **d. Names of Parties—(1) In General.** In an affidavit to be used in a pending cause the title should give the name of the parties in the same manner as in the other papers in the cause,[19] and ordinarily it is proper to follow the writ in this

affidavit on which to base the attachment should be entitled in the civil suit, as until the attachment was issued there were no contempt proceedings. In re Bronson, 12 Johns. (N. Y.) 460.

[f] **Immaterial variation.**—In In re Harris, 8 Jur. N. S. 166, one affidavit was entitled "In the matter of the trusts of the settlement," etc., and a later affidavit was entitled, "In the matter of the trusts of an indenture of settlement," etc., but the variation was held not material and the affidavit was received.

[g] **Title of cause altered.**—If an affidavit is correctly entitled when sworn it will be sufficient, although the title of the cause may have been altered by subsequent amendment. Hawes v. Bamford, 9 Sim. 653, 16 EngCh 653, 59 Reprint 511.

[h] **Where the title to a petition has been changed,** and hence differs from the title of the affidavits originally made under it, the same affidavits may still be used, provided a short affidavit is made referring to them. Matter of Varteg Iron Works Wesleyan Chapel, 10 Hare Appendix xxxvii, 44 EngCh 754, 68 Reprint 1136.

9. Phelps v. Hall, 5 Johns. (N. Y.) 367; Pell v. Jadwin, 3 Johns. (N. Y.) 448.

[a] **Where wrong title immaterial.**—On a motion to set aside the proceedings on a bail bond it was held that affidavits made in support of the motion and entitled in the original cause, attached to an order to stay proceedings, which was entitled in the bail bond suit, with a notice of motion showing the real object of the application, might be read. Ex p. Metzler, 5 Cow. (N. Y.) 287.

10. Roosevelt v. Dale, 2 Cow. (N. Y.) 581.

11. See cases infra this note.

[a] **Where there are several causes** containing the same grounds, it is usual to have but one affidavit and to entitle the same in all the causes. Pitt v. Evans, 2 Dowl. P. C. 226; Corry v. Wharton, 2 Scott 436, 30 ECL 648.

[b] **Separate affidavits.**—But in Harper v. Mount, 2 Jur. 990, it was held that an affidavit should not be entitled in two causes, but that there should be a separate affidavit in each cause.

12. Bridges v. Center First Nat. Bank, 47 Tex. Civ. A. 454, 455, 105 SW 1018 (where the court said: "Both affidavit and bond give correctly the style of the suit, the court in which the same is pending, and the term of the court to which the suit is brought, omitting the number of the case only. We do not think that the number of the case is essential to be stated in the affidavit or bond where they contain other matter which clearly shows the case in which the attachment is sought").

13. Bowman v. Sheldon, 7 N. Y. Super. 657.

[a] **Court where affidavit is to be used.**—Clickman v. Clickman, 1 N. Y. 611, 3 HowPr 365, 1 CodeRep 98; Rolfe v. Burke, 4 Bing. 101, 13 ECL 419, 130 Reprint 707; Reg. v. Jones, 8 Dowl. P. C. 80; Pariente v. Pennell, 7 Scott N. R. 834; Smyth v. Nicholls, 1 Ont. Pr. 356. An affidavit was filed in the queen's bench to remove a cause from the division court. The affidavit was entitled in the division court. It was held that this was irregular as it should have been entitled in the court where it was to be used. Smyth v. Nicholls, supra.

14. Clickman v. Clickman, 1 N. Y. 611, 3 HowPr 365, 1 CodeRep 98.

[a] **Affidavit on appeal.**—In Clickman v. Clickman, 1 N. Y. 611, 3 How Pr 365, 1 CodeRep 98, it was held that an affidavit on appeal to the court of appeals should not be entitled in the supreme court, although it was provided by statute that the title of an action should not be changed in consequence of an appeal, since such statute referred only to the title of the action and not to the name or the style of court.

15. Barnard v. Heydrick, 49 Barb. (N. Y.) 62; Bowman v. Sheldon, 7 N. Y. Super. 657; Blake v. Locy, 6 HowPr (N. Y.) 108.

[a] **Mistake in description of court.**—In Rolfe v. Burke, 4 Bing. 101, 13 ECL 419, 130 Reprint 707, an affidavit was entitled "in the Common Place," but the title was held sufficient, the court of common pleas having been fixed in communi loco, while the court of king's bench was ambulatory.

[b] **Affidavit to support motion.**—An affidavit in support of a motion in a county court was entitled in the supreme court, but it contained proper reference to the action and proceeding in which the affidavit was to be used. It was held that the affidavit was not objectionable. Blake v. Locy, 6 HowPr (N. Y.) 108. See generally Motions [28 Cyc 11].

[c] **Taken before commissioner of proper court.**—(1) An objection was made to an affidavit because it was entitled "In the Exchequer" instead of "In the Exchequer of Pleas." It was held that the title was sufficient where it appeared that it was taken before a commissioner of the proper court. Hands v. Clements, 1 D. & L. 379. (2) And in Kennet, etc., Canal Co. v. Jones, 7 T. R. 451, 101 Reprint 1071, it was held that it was no objection to an affidavit to hold to bail that it was not entitled in the king's bench, where it was shown that it was taken before a commissioner of that court.

[d] **Omission of division.**—(1) Where the affidavit is entitled in the only court in which it can be entitled, viz., in the high court of justice, the only omission being that of the division to which the cause is assigned, the defect is clearly amendable. Robertson v. Coulton, 9 Ont. Pr. 16. (2) An affidavit which was entitled in the queen's bench before the Judicature Act came into operation may afterward be made the foundation of an order in the queen's bench division of the high court. Elliot v. Capell, 9 Ont. Pr. 35.

[e] **In common pleas instead of queen's bench.**—An action was brought for a small quantity of drugs sent from New York by plaintiff to defendant who had ordered them, but who, when they arrived, refused to receive them. To prove what the boxes contained it was necessary to take evidence in New York under a commission. An objection, however, was taken to the affidavit of the due taking of the evidence, which was returned with the commission; namely, that it was entitled in the common pleas, whereas the cause was in the queen's bench. The learned chief justice thought that there was nothing fatal in the objection but reserved leave to move on that ground. Comstock v. Burrowes, 13 U. C. Q. B. 439.

16. Wilborn v. Backstone, 41 Ill. 264.

[a] **Motion to quash by-law; Canadian practice.**—Where a motion was made under the Canadian practice by a register of a county to quash a by-law removing the county register's office, it was held that an affidavit in support of such motion was not invalid if not entitled in any court. Scott v. Mitchell, 8 Ont. Pr. 518; Molloy v. Shaw, 5 Ont. Pr. 250; Wakefield v. Bruce, 5 Ont. Pr. 85; Smyth v. Nicholls, 1 Ont. Pr. 355; In re Kinghorn, 26 U. C. Q. B. 130; Frazer v. Municipal Council, 10 U. C. Q. B. 286.

17. Quarles v. Robinson, 2 Pinn. (Wis.) 97 (holding that an affidavit is irregular and defective where the description in the title is of the October term of court, whereas it should have been of the preceding April term).

18. Wilborn v. Blackstone, 41 Ill. 264 (holding that an affidavit which is properly entitled in the cause is not invalid because it is not entitled in the court or term).

19. Arnold v. Nye, 11 Mich. 456; Whipple v. Williams, 1 Mich. 115; Cunningham v. Van Pustan, 9 NYS 255; Maury v. Van Arnum, 1 Hill (N. Y.) 370; White v. Hess, 8 Paige (N. Y.) 544; Baldwin v. Bauerman, 12 C. B. 152, 74 ECL 152, 138 Reprint 859; Gray v. Coombes, 10 C. B. 72, 70 ECL 72, 14 EngL&Eq 252, 138 Reprint 30; Joll v. Curzon, 5 C. B. 205, 57 ECL 205, 136 Reprint 855; Belcher v. Goodered, 4 C. B. 472, 56 ECL 472, 136 Reprint 591; White v. Feltham, 3 C. B. 658, 54 ECL 658, 136 Reprint 263; Bullman v. Callow, 1 Chit. 727, 18 ECL 397; Reg. v. Christian, C. & M. 388, 41 ECL 214; Finch v. Cocker, 2 Dowl. P. C. 383; Thorpe v. Hook, 1 Dowl. P. C. 494; Jones v. Eldridge, 1 Dowl. P. C. N. S. 710; Bland v. Dax, 10 Jur. 8; Cooper v. Tilly, 7 Jur. 679; Vansickle v. Boyd, 14 Ont. Pr. 469; Beauchamp v. Cass, 1 Ont. Pr. 291.

[a] **"A B v. C D"** is ordinarily the proper mode of stating the title of the suit. Richard v. Issac, 1 C. M. & R. 136.

[b] **In person or by attorney.**—In White v. Feltham, 3 C. B. 658, 660, 54 ECL 658, 136 Reprint 263, the affidavit upon which the motion was founded was entitled as follows: "In the Common Pleas. Between William White, carrying on business under the name or style of William Turner & Co., plaintiff, and Charles Feltham, defendant." The plaintiff had been similarly described in the writ of summons. The court said: "The language of the rule and the form is perfectly clear and distinct; and, in some instances, it may be important that it should be strictly adhered to. The defendant ought to be duly informed as to who is the person to whom he

regard.[20] While it has been held that the names of all the parties should be given,[21] yet where there are several plaintiffs or defendants it is usually sufficient to set out the names of one of the parties and indicate the rest by the use of the words "and another" or "others" or the abbreviation "et als."[22] It is the better practice not to include the names of parties who have withdrawn from the cause,[23] nor can an affidavit entitled in a cause against two defendants be used in a cause against one of them only;[24] but some cases hold that where more parties are named in the caption of the affidavit than the proof shows to be connected with the cause, this will not invalidate the affidavit.[25]

Change of party's name by marriage. Where an unmarried woman marries during the pendency of a suit to which she is a party, it has been held that the change in name need not be noted in the title of an affidavit filed previously to her marriage.[26]

Change of name of corporation. Where the name of an English corporation was changed by an act of parliament, it was held that an affidavit could be entitled in either the old name or the new, but not in both.[27]

[§ 60] **(2) Position of Parties.** The name of plaintiff should come first, separated from that of defendant by the word "versus" or its abbreviation.[28]

[§ 61] **(3) Designation of Parties.** The title of an affidavit should show which party is plaintiff and which defendant;[29] and this should be done by adding the words "plaintiff" and "defendant" or their abbreviations after the names of the respective parties.[30] But it has been held that the mere

is to deliver his plea. The declaration is therefore irregular, in omitting to show whether the plaintiff sues in person or by attorney; and the rule must be made absolute for setting it aside; but, inasmuch as the defendant has unnecessarily come to the court, when the matter might have been set right, at much less expense, by a judge at chambers, the rule must be made absolute without costs."

20. White v. Feltham, 3 C. B. 658, 54 ECL 658, 136 Reprint 263; Bland v. Dax, 10 Jur. 8.

[a] **Variance between affidavit and writ.**—A defendant who was described in the writ as H. W. Bauerman entered an appearance as Henry William Bauerman, sued as H. W. Bauerman, and in an affidavit in support of a motion described himself as Hillary John Bauerman, his true name. It was held that the affidavit was irregularly entitled. Baldwin v. Bauerman, 12 C. B. 152, 74 ECL 152, 138 Reprint 859.

[b] **Defendant sued by wrong name.**—Where a defendant sued by a wrong name enters his appearance under his right name it is proper to entitle an affidavit "A B v. C D, sued as E F." Baldwin v. Bauerman, 12 C. B. 152, 74 ECL 152, 138 Reprint 859; Belcher v. Goodered, 4 C. B. 472, 56 ECL 472, 136 Reprint 591; Hodgson v. May, 7 D & L. 4; Dunn v. Hodson, 1 D. & L. 204; Jones v. Eldridge, 4 M. & G. 266, 43 ECL 144, 134 Reprint 109. See also Tagg v. Simmonds, 4 D. & L. 582; Lomax v. Kilpin, 16 L. J. Exch. 23.

[c] **Change of name pending suit.**—Where, pending an action against a company, the name of the company is changed by act of parliament, and a motion is afterward made in such action, a suggestion should be entered of the change of name and the affidavits entitled in the new name. Hibblethwaite v. Leeds, etc., R. Co., 15 Jur. 1015.

21. Arnold v. Nye, 11 Mich. 456; Bullman v. Callow, Chit. 727, 18 ECL 397; Doe v. Roe, 8 Dowl. P. C. 340; Tomkins v. Geach, 5 Dowl. P. C. 509; Masters v. Carter, 4 Dowl. P. C. 577; Doe v. Want, 8 Taunt. 647, 4 ECL 317, 129 Reprint 536; Fores v. Diemar, 7 T. R. 661, 101 Reprint 1186; Theobald v. Brame, W. W. & D. 219; Vansickle v. Boyd, 14 Ont. Pr. 469. But see Reg. v. Christian, C. & M. 388, 41 ECL 214 (to the effect, it seems, that a person may be convicted of perjury contained in an affidavit entitled "A. B. against C. D. and others," although, by the rules of the courts, all parties should be named).

[a] **Names must be set out.**—When the affidavits were entitled A B and others, against C D, without setting out the names of all plaintiffs in the cause, it was held that they could not be read in showing cause against a rule, but the court refused to make the rule absolute with costs upon such an objection. Bullman v. Callow, 1 Chit. 727, 18 ECL 397.

22. Seymour v. Bailey, 66 Ill. 288; Maury v. Van Arnum, 1 Hill (N. Y.) 370; White v. Hess, 8 Paige (N. Y.) 544. See also Hubby v. Harris, 63 Tex. 456 (where an affidavit was held valid which omitted the name of one of two defendants).

[a] **Sufficient to convict of perjury.**—A person may be convicted of perjury contained in an affidavit entitled in a cause "A. B. against C. D. and others," although by the rules of the courts all affidavits should in their title name all plaintiffs and all defendants. Reg. v. Christian, C. & M. 388, 41 ECL 214; Vansickle v. Boyd, 14 Ont. Pr. 469.

23. Whipple v. Williams, 1 Mich. 115 (holding that on a writ of error, an affidavit entitled "Gardner v. Williams, ads. Charles W. Whipple and Theodore Romeyn," after Williams had been allowed to sever from Romeyn in the prosecution of the writ, was held insufficient).

24. Graham v. Elmore, Harr. (Mich.) 265.

25. See cases infra this note.

[a] **Additional names may be disregarded.**—"But there is some embarrassment occasioned by the appearance of the seven names in the caption of the affidavit on which the attachment was issued. There is no allegation that all these persons were liable on the claim urged. Indeed, the proof relates to the five only who are named for that purpose, and it must be assumed that the two additional were not jointly connected with the transaction out of which the demand urged arose, and who are therefore disregarded as unconnected therewith. A multitude of defendants will not authorize a demurrer, however too numerous." Per Brady, J., in Cunningham v. Von Pustan, 9 NYS 255, 256.

[b] **Bill amended by striking out one of defendants.**—A motion was made to discharge an order for an injunction on the ground that the affidavit on which it was obtained was entitled in a cause in which there were three defendants; whereas, at the time when the injunction was obtained, the names of two only of those defendants appeared upon the record. The facts of the case were these: At the time when the affidavit was filed there were three defendants to the suit. Afterward plaintiff amended his bill by striking out the name of one of defendants and then moved for and obtained the injunction on the affidavit as it was originally entitled. In support of the motion it was contended that an indictment for perjury would not lie on the affidavit. It was held that the perjury if any was committed at the moment when the affidavit was filed, and the motion was refused. Hawes v. Bamford, 9 Sim. 653, 16 EngCh 653, 59 Reprint 511.

26. See cases infra this note.

[a] **Variance not fatal.**—In Henderson v. Drace, 30 Mo. 358, it appeared that one of the female plaintiffs married during the pendency of the suit, and that the clerk made a corresponding change in the title of the suit but not in an affidavit filed and to be used in the suit. The court held that the variance was not fatal, as no one was or could have been misled by it.

[b] **Notation of change may be rejected.**—In the title of an affidavit defendant was described as "Harriet Fulton (now Harriet Dale)." It was held that it was properly entitled, as the words "now Harriet Dale" were a mere matter of description and could be rejected as surplusage. Roosevelt v. Dale, 2 Cow. (N. Y.) 581.

27. Hibblethwaite v. Leeds, etc., R. Co., 15 Jur. 1015.

28. Hawley v. Donnelly, 8 Paige (N. Y.) 415; Munzesheimer v. Heinze, 74 Tex. 254, 11 SW 1094.

[a] **"Ad sectam" instead of "versus."**—Where an affidavit was entitled "Frank A. Bowen ads. Wilcox & Gibbs Sewing Machine Company instead of "Frank A. Bowen v. Wilcox and Gibbs Sewing Machine Company," it was held sufficient, being clearly applicable to only one cause. Bowen v. Wilcox, etc., Sewing Mach. Co., 86 Ill. 11.

[b] **All papers in cause wrongly entitled.**—Where the affidavit and all the other papers in the cause were wrongly entitled, the parties being reversed and entitled "versus" instead of "ad sectam," it was held to be fatal. Parkman v. Sherman, 1 Cai. (N. Y.) 344 [dist Ryers v. Hillyer, 1 Cai. (N. Y.) 112, in which case some of the papers were properly entitled].

[c] **Use of term "at the suit of."**—(1) The usual and proper mode of entitling an affidavit is in the cause "A. B. v. C. D." An affidavit entitled "Thomas David Isaac, at the suit of John Richard" is insufficient. Richard v. Isaac, 1 C. M. & R. 136. See also Wright v. Jennings, 7 U. C. C. P. 26. (2) In Winter v. Mixer, 10 U. C. Q. B. 110, affidavits, some of which were entitled "Horace Mixer, William Matthews, Alfred Reid, and Philip Cady Van Brocklin, defendants, at suit of (and) Thomas B. Winter, plaintiff," and the rest of which were commenced in like manner with the names of defendants, and after the word "defendants" continued thus, "and Thomas B. Winter, plaintiff," were held insufficient, on the authority of Richard v. Isaac, supra.

29. Harris v. Griffith, 4 Dowl. P. C. 289; Frank v. Carson, 15 U. C. C. P. 135.

30. Bowen v. Wilcox, etc., Sewing Mach. Co., 86 Ill. 11; Harris v. Griffith, 4 Dowl. P. C. 289; Frank v. Carson, 15 U. C. C. P. 135; Chafe v. Parr, 2 U. C. Q. B. 98; Brown v. Simmonds, 1 U. C. Q. B. 280.

[a] **Failure to indicate defendants.**—Where it was objected that the names of plaintiff and defendants were properly stated, but, although plaintiff was described in the title of the affidavit as "plaintiff," yet defendants were not described as

omission to describe the parties in the title of an affidavit is no objection if they are sufficiently described in the body of the instrument.[31] No further description of a party is necessary,[32] except where he is suing in a representative capacity, in which case the affidavits in the cause should be entitled accordingly.[33]

Erroneous description. In some cases it has been held that the addition of a wrong description of a party is not ground for rejecting an affidavit,[34] although other cases indicate the contrary.[35]

Necessity for giving christian name. In some jurisdictions it seems to be required that the christian names of the parties should be set out in the title,[36] and that a material variance in this respect will render the affidavit defective,[37] although some cases hold that a name may be indicated by the initial letter.[38]

Misspelling the name of a party in the title by the omission or addition of a letter will not affect the validity of the affidavit.[39]

[§ 62] **C. Venue—1. Purpose of Venue.** The purpose of a venue is to show that the officer before whom it was taken has authority to act at the place named.[40]

[§ 63] **2. Necessity.** In a number of cases it has been held that no presumption can be entertained as to where an affidavit was made if no place is mentioned therein, and that consequently the omission of the venue is fatal to the affidavit.[41] But

"defendants," Littledale, J., said: "The preliminary objection taken in this case, it appears to me, ought to prevail. It has been said, that the parties cannot be misled by the omission, because the defendant Griffith is described as 'sued by the name of Griffiths;' and also that a copy of the writ is attached to the affidavit, and that the deponent therein describes himself as 'defendant.' I think that is not sufficient. The affidavit must speak for itself. If that were sufficient, then the word 'plaintiff' might be omitted. Then it would be said, that the position of the names would be sufficient one over the other; and, ultimately, that they might be placed consecutively in the same line. I think, therefore, that the objection is fatal, and the present rule must consequently be discharged, but without costs." Harris v. Griffith, 4 Dowl. P. C. 289, 290.

[b] **Contraction of designation.**—It is proper to use the contractions "plff." and "deft." in the title of an affidavit to obtain an execution. Frank v. Carson, 15 U. C. C. P. 135.

31. McDonald v. Cleland, 6 Ont. Pr. 289.

[a] **Parties designated in body of instrument.**—An affidavit, the titling of which was simply "Otto Heinze & Co. v. Munzesheimer & Klein," but the body of which gave the individual as well as the firm names of defendants and described them as partners and defendants in the suit, sufficiently showed who were plaintiffs. Munzesheimer v. Heinze, 74 Tex. 254, 11 SW 1094.

32. Miller v. Miller, 2 Bing. N. Cas. 76, 29 ECL 445, 132 Reprint 30; Marshal v. Adams, 2 Jur. 944; Reeves v. Crisp, 6 M. & S. 274, 105 Reprint 1245.

[a] **Where there are two persons of the same name,** if no addition is given to the surname of one of them in the title of an affidavit it will be presumed to be the name of the elder. Young v. Young, 1 Dowl. P. C. N. S. 865; Singleton v. Johnson, 1 Dowl. P. C. N. S. 856. And see Shrimpton v. Carter, 3 Dowl. P. C. 648. See generally Names [29 Cyc 268].

33. Engler v. Twysden, 1 Arn. 269; Casley v. Smyth, 4 Dowl. P. C. 477; Clark v. Martin, 3 Dowl. P. C. 222; Phillips v. Hutchinson, 3 Dowl. P. C. 20; Wright v. Hunt, 1 Dowl. P. C. 457; Fletcher v. Lechmere, 5 M. & G. 265, 44 ECL 146, 134 Reprint 564; Steyner v. Cottrell, 3 Taunt. 377, 128 Reprint 149.

[a] **Immaterial variance.**—Where an affidavit in a cause in which A, suing by his next friend, was plaintiff was entitled "A, suing by her next friend," it was held to be an immaterial variance. Abrahams v. Taunton, 1 D. & L. 319.

[b] **Assignee.**—Where an affidavit is made for use in a cause in which one of the parties is an assignee, the title of the affidavit should show for whom he is acting. Phillips v. Hutchinson, 3 Dowl. P. C. 20; Wright v. Hunt, 1 Dowl. P. C. 457; Steyner v. Cottrell, 3 Taunt. 377, 128 Reprint 149.

[c] **Executor or administrator.**—An affidavit filed in a cause which is brought by or against an administrator should show by its title whose estate he represents. Clark v. Martin, 3 Dowl. P. C. 222; Fletcher v. Lechmere, 5 M. & G. 265, 44 ECL 146, 134 Reprint 564; Drew v. Prior, 5 M. & G. 264, 44 ECL 146, 134 Reprint 564.

34. Reeves v. Crisp, 6 M. & S. 274, 105 Reprint 1245.

35. Shrimpton v. Carter, 3 Dowl. P. C. 648.

[a] **Use of word "deceased."**—In Bland v. Dex, 10 Jur. 8, it was held that the use of the word "deceased" after the name of plaintiff in the title of an affidavit rendered it inadmissible.

36. Hodgson v. May, 7 D. & L. 4; Symes v. Prosser, 3 D. & L. 491; Reg. v. Surrey, 8 Dowl. P. C. 510; Doe v. Roe, 8 Dowl. P. C. 340; Masters v. Carter, 4 Dowl. P. C. 577; Shrimpton v. Carter, 3 Dowl. P. C. 648; Lomax v. Kilpin, 16 L. J. Exch. 23; Barham v. Lee, 4 Moore & S. 327, 30 ECL 553; Clothier v. Ess, 3 Moore & S. 216, 30 ECL 508; Fores v. Diemar, 7 T. R. 661, 101 Reprint 1186; Beauchamp v. Cass, 1 Ont. Pr. 291.

37. Watson v. Reissig, 24 Ill. 281, 76 AmD 746; Joll v. Curzon, 5 C. B. 205, 57 ECL 205, 136 Reprint 855; Symes v. Prosser, 3 D. & L. 491; Reg. v. Surrey, 8 Dowl. P. C. 510.

[a] **Omission of letter; idem sonans.**—An omission of a letter in the name of a party in the title of an affidavit, the word being idem sonans, is no ground for discharging a rule obtained upon such affidavit. Gray v. Coombes, 10 C. B. 72, 70 ECL 72, 14 EngL&Eq 252, 138 Reprint 30; Cooper v. Tilly, 7 Jur. 679. See generally Names [29 Cyc 272].

[b] **Initial not sufficient.**—"I have no doubt that the affidavit on which this rule for the attachment was granted, is inadmissible. The cause is that of 'Robert Smith v. W. Neely.' The affidavit is entitled in a cause of 'Robert Smith v. William Neely.' Now, if the initial 'W.' could be nothing else than William, then it might be argued that the affidavit was good; but as it may mean a great variety of names, I am satisfied that it is not an affidavit so entitled, as that perjury could be assigned upon it." Reg. v. Surrey, 8 Dowl. P. C. 510, 511.

[c] **Wrong christian name.**—In Rose v. Cook, 1 U. C. Q. B. 5, it was held that designating a person by the wrong christian name in the title of an affidavit rendered the instrument void.

[d] **Transposition of christian name.**—In Poole v. Pembrey, 1 Dowl. P. C. 693, it was held that the transposition of one of the christian names of a wife in the title of an affidavit rendered it invalid and insufficient for use in an action brought against the husband and wife.

[e] **Middle name.**—It has been held that affidavits which designate plaintiff as Davis H. Cass and Davis Hawley Cass cannot be used in a cause where he was called "Davids Case." Beauchamp v. Cass, 1 Ont. Pr. 291.

38. Howell v. Coleman, 2 B. & P. 466, 126 Reprint 1387; Hodgson v. May, 7 D. & L. 4.

39. See cases infra this note.

[a] **Addition of letter.**—In Cooper v. Tilly, 7 Jur. 679, defendant was sued by the name of "John Tilly, otherwise John Tillay," and the affidavit described the action as being between plaintiff and John Tilly. It was held that the affidavit was not improperly entitled, as it might be that, since the commencement of the action, plaintiff had found out defendant's real name.

[b] **Omission of letter.**—The omission of an e mute in the name of a party in the title does not vitiate an affidavit. Gray v. Coombes, 10 C. B. 72, 70 ECL 72, 14 EngL&Eq 252, 138 Reprint 30.

40. Avery v. Good, 114 Mo. 290, 21 SW 815; Byrd v. Cochran, 39 Nebr. 109, 58 NW 127; Blair v. West Point Mfg. Co., 7 Nebr. 146; Sarll v. Payne, 1 NYS 15.

41. U. S.—U. S. v. Burr, 25 F. Cas. No. 14,692c.

Mo.—Barhydt v. Alexander, 59 Mo. A. 188.

Utah.—Smith v. Richardson, 1 Utah 194.

Wis.—Wood v. Blythe, 46 Wis. 650, 1 NW 341; Burns v. Doyle, 28 Wis. 460.

Eng.—Withers v. Spooner, 5 M. & G. 268, 44 ECL 148, 134 Reprint 566.

[a] **"The venue is an essential part of every affidavit,** designed to be used as evidence in Courts of this Territory, and is prima facie evidence of the place where it was taken." Smith v. Richardson, 1 Utah 194, 196.

[b] **Officer of local jurisdiction.**—(1) It was held in an early Mississippi case that where an affidavit was taken before an officer who could take affidavits only in a certain district or county it must show upon its face that it was taken in his territory. Saunders v. Erwin, 3 Miss. 732. (2) In Barhydt v. Alexander, 59 Mo. A. 188, it was held that where an affidavit appeared to have been taken in Iowa before a notary public, but the county in which it was taken did not appear, since the jurisdiction of the officer was local the venue could not be supplied by presumption.

[c] **In Michigan.**—In Sullivan v. Hall, 86 Mich. 7, 13, 48 NW 646, 13 LRA 556, it was held that the omission of venue from an affidavit taken before a notary public was not fatal, since the notary was a state officer, the record of whose appointment was required to be kept in the office of the secretary of state. Continuing, the court, per Long, J., said: "The necessity of stating a venue at all is reluctantly confessed by the authorities. . . . In process or pleading, the objection under the strict rules of the common law, and perhaps under our statute, to the want of venue might be taken advantage of by demurrer. It may also be true that a certificate made by a justice of the peace would be void if it omitted the venue, were no venue stated at all in the instrument. But the question here involved

in most jurisdictions the courts indulge the presumption that the officer who took the affidavit acted within his jurisdiction and therefore, while it is always the proper practice to prefix a venue to an affidavit, an omission in this respect is not regarded as fatal.[42]

Extrinsic evidence. In some cases extrinsic evidence has been held admissible to prove the place at which an affidavit was taken.[43]

[§ 64] **3. Sufficiency.** It is not essential that the venue be contained in the caption of the affidavit; it is sufficient if the place of administering the oath appear either there,[44]

is not to be governed by the reasons which would be applicable in such cases."

[d] **In Nebraska.**—(1) In several cases it has been held that a venue is not essential to the validity of an affidavit, and that in its absence it will be presumed that the officer acted within his jurisdiction. Merriam v. Coffee, 16 Nebr. 450, 20 NW 389; Miller v. Hurford, 13 Nebr. 13, 12 NW 832; Crowell v. Johnson, 2 Nebr. 146. (2) And there are other cases which hold that the want of a venue may be cured by amendment. Rudolf v. McDonald, 6 Nebr. 163; Struthers v. McDowell, 5 Nebr. 491. (3) But there are also authorities to the effect that the affidavit is void unless the venue appears on its face. Byrd v. Cochran, 39 Nebr. 109, 58 NW 127; Blair v. West Point Mfg. Co., 7 Nebr. 146.

[e] **In New York** (1) there are many cases holding that an affidavit lacking a venue is a nullity. Thompson v. Burhans, 61 N. Y. 52; Frees v. Blyth, 99 App. Div. 541, 91 NYS 103; Peo. v. De Camp, 12 Hun 378, 5 NY WklyDig 462; Cook v. Staats, 18 Barb. 407; Robinson v. Cooper, 62 Misc. 517, 115 NYS 599; American Book Co. v. Watson, 24 Misc. 524, 53 NYS 974; Saril v. Payne, 4 NYS 897, 898 [rev 1 NYS 15]; Lane v. Morse, 6 HowPr 394; Clement v. Ferenback, 1 NYCity Ct 57; Brooks v. Hunt, 3 Cal. 128; Vincent v. Peo., 5 Park. Cr. 88. In Saril v. Payne, supra, for example, the court says: "The affidavit upon which the order of arrest was granted was the basis of the judge's action. If defective, the proceeding must fall. The lack of venue has been decided to make an affidavit a nullity. . . . The case of Cook v. Whipple, 55 N. Y. 150, 14 AmR 202, allowed an amendment to a confession of judgment where the venue was omitted, but we do not think this rule should be extended, in the absence of any authority upon the subject, in cases where personal liberty is involved. We think, upon the authority of the court of appeals already expressed, that leave to make a further appeal to them upon this subject is entirely unnecessary, as the decisions cited clearly show what would be the ultimate result of such application." (2) In other cases, however, it has been held that in the absence of venue it will be presumed that the officer acted within his jurisdiction. Barnard v. Darling, 1 Barb. Ch. 219; Parker v. Baker, 8 Paige 428. See Fisher v. Bloomberg, 74 App. Div. 368, 77 NYS 541 (where it was held that the venue is only prima facie evidence of the place where an affidavit is sworn, that its omission at most makes the affidavit prima facie a nullity, and that when the affidavit was in fact sworn to within the jurisdiction, as appears from the affidavit used to procure an amendment, of the notary who administered the oath, the omission of the venue does not invalidate the oath nor render the affidavit a nullity); Smith v. Collier, 3 NYSt 172 (where the court used similar language). See also Reedy El. Co. v. American Grocery Co., 23 Misc. 520, 51 NYS 874 [rev 48 NYS 619, and rev on other grounds 24 Misc. 678, 53 NYS 989, 6 NYAnnCas 153] (holding that the omission of venue is an irregularity of which advantage may be taken only when it is specified in the notice of motion).

42. U. S.—Meldrum v. U. S., 151 Fed. 177, 80 CCA 545, 10 AnnCas 324; Ormsby v. Ottman, 85 Fed. 492, 29 CCA 295.

Ark.—St. Louis, etc., R. Co. v. Deane, 60 Ark. 524, 31 SW 42.

Cal.—Reavis v. Cowell, 56 Cal. 588.

Colo.—Gibson v. Austin, 23 Colo. A. 220, 128 P 859.

Del.—Albright v. United Clay Production Co., 21 Del. 198, 62 A 726.

D. C.—Matthai v. Conway, 2 App. 45.

Ill.—Cox v. Stern, 170 Ill. 442, 48 NE 906, 62 AmSR 385; Hertig v. Peo., 159 Ill. 237, 42 NE 879, 50 AmSR 162; Stone v. Williamson, 17 Ill. A. 175.

Ind.—Teutonia Loan, etc., Co. v. Turrell, 19 Ind. A. 469, 49 NE 852, 65 AmSR 419.

Iowa.—Snell v. Eckerson, 8 Iowa 284.

Kan.—Baker v. Agricultural Land Co., 62 Kan. 79, 61 P 412.

Minn.—Young v, Young, 18 Minn. 90.

Mo.—Avery v. Good, 114 Mo. 290, 21 SW 815.

N. J.—Bennett v. Benson, 25 N. J. L. 166; Smith v. Abbott, 17 N. J. L. 358; Perkins v. Collins, 3 N. J. Eq. 482.

N. D.—Lee v. Crawford, 10 N. D. 482, 88 NW 97.

Or.—Dennison v. Story, 1 Or. 272.

S. D.—State v. Henning, 3 S. D. 492, 54 NW 536.

W. Va.—Hansford v. Snyder, 63 W. Va. 198, 59 SE 975; Kesler v. Lapham, 46 W. Va. 293, 33 SE 289; Quesenberry v. People's Bldg., etc., Assoc., 44 W. Va. 512, 30 SE 73; Bensimer v. Fell, 35 W. Va. 15, 12 SE 1078, 29 AmSR 774.

B. C.—Brown v. Jowett, 4 B. C. 44.

Ont.—Reg. v. Atkinson, 17 U. C. C. P. 295; De Forrest v. Bunnell, 15 U. C. Q. B. 370.

"The general rule is that the omission of a venue is not a fatal defect, since the presumption will be indulged that the officer who took the affidavit acted within his authority." Gilbert, C. J., in Meldrum v. U. S., 151 Fed. 177, 181, 80 CCA 545, 10 AnnCas 324 [cit Cyc].

[a] **Presumed to be taken within jurisdiction.**—"We have examined the affidavit, and while it does not show venue, it does not show in any way that it was taken without the jurisdiction of the Notary, and the presumption of law would be therefore that it was taken within his jurisdiction, and it would not be void from the mere absence of venue." Lore, C. J., in Albright v. United Clay Production Co., 21 Del. 198, 200, 62 A 726.

[b] **Absence of venue not fatal.**—In Young v. Young, 18 Minn. 90, 94, the court said: "But, while it is proper and usual to prefix a venue to an affidavit, and particularly desirable where the officer administering the oath has jurisdiction in more than one county, since the venue stated is prima facie, the real venue . . . we are of opinion that the absence of a venue is not fatal to an affidavit. . . . The important thing is that it shall appear that the oath was administered by a person authorized to administer the same."

[c] **Desirable and convenient, but not essential.**—"It was not material to the character of the instrument as an affidavit that it show in what county the oath was so administered. It doubtless is desirable and convenient for many purposes that an affidavit so show, but we do not think it is indispensable. The important fact is that an oath was administered, by an authorized officer, and within his jurisdiction." State v. Henning, 3 S. D. 492, 494, 54 NW 536.

[d] **Sufficient if authority of officer be indicated.**—"If the affidavit in any way tells the authority of the officer, and indicates of what county he is an officer, as this one does, it is, and ought to be, good, though it have not that formal part usually found in pleadings and other papers called the 'venue.' This is the final result, after elaborate consideration, reached by the courts." Kesler v. Lapham, 46 W. Va. 293, 295, 33 SE 289.

[e] **Not ground for collateral attack.**—A judgment is not subject to collateral attack because the affidavit which is the foundation of the proceeding has no venue. Avery v. Good, 114 Mo. 290, 21 SW 815.

[f] **Failure to state town.**—Where the affidavit annexed to a tax assessor's return shows by its venue that the oath was taken within a certain state and county, but fails to show the town in which it was administered, or that it was administered within any town, and where there is no testimony that the town clerk who administered the oath acted outside of his town, the presumption will be indulged in that he acted within his jurisdiction. Lee v. Crawford, 10 N. D. 482, 88 NW 97.

[g] **Before justice of Irish court.**—Where an affidavit purports to be sworn to before the chief justice of the king's bench of Ireland and is signed by him, but no place is mentioned in the jurat, it will be presumed that he acted within his jurisdiction in taking the affidavit and subscribing his name to it. French v. Bellew, 1 M. & S. 302, 105 Reprint 113.

[h] **Taken in foreign jurisdiction.**—In Meek v. Ward, 10 Hare appendix lv, 44 EngCh 776, 68 Reprint 1147, it appeared that the place of swearing was omitted from the jurat of an affidavit taken in a foreign jurisdiction, but the vice chancellor said that he thought that the court must assume that the notary was acting in pursuance of his duty, and that he would not perform a notarial act out of the jurisdiction in which alone he had authority to do so.

43. Young v. Young, 18 Minn. 90; Smith v. Abbott, 17 N. J. L. 358; State v. Green, 15 N. J. L. 88; Perkins v. Collins, 3 N. J. Eq. 482; State v. Henning, 3 S. D. 492, 54 NW 536; Reg. v. Atkinson, 17 U. C. C. P. 295.

[a] **The place of taking an affidavit is a matter in pais** and if legally questioned may be proved aliunde. Perkins v. Collins, 3 N. J. Eq. 482.

[b] **In a prosecution for perjury** for making a false affidavit, if the venue of the affidavit was omitted, extrinsic evidence might be given to show where the affidavit was sworn. Rex v. Emden, 9 East 437, 103 Reprint 640.

44. U. S.—Tooker v. Thompson, 24 F. Cas. No. 14,097, 3 McLean 92.

Ind.—Hawkins v. State, 136 Ind. 630, 36 NE 419.

Minn.—State v. Bates, 101 Minn. 303, 112 NW 260; Young v. Young, 18 Minn. 90; Rahilly v. Lane, 15 Minn. 447.

N. J.—Perkins v. Collins, 3 N. J. Eq. 482.

Tex.—Whitemore v. Wilson, 1 Tex. Unrep. Cas. 213.

W. Va.—Hansford v. Snyder, 63 W. Va. 198, 59 SE 975; Kesler v. Lapham, 46 W. Va. 293, 33 SE 289; Quesenberry v. People's Bldg., etc., Assoc., 44 W. Va. 512, 30 SE 73; Bensimer v. Fell, 35 W. Va. 15, 12 SE 1078, 29 AmSR 774.

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on the face of the affidavit,[45] in the jurat,[46] or on the margin,[47] or be shown by reference to another paper,[48] or be affixed to the signature of the officer,[49] or appear from his seal.[50] The omission of the letters "ss." is not a material defect;[51] nor will obvious errors in spelling render a statement of venue defective.[52] Where the officer's authority to administer oaths is coextensive with the limits of the state it is not necessary for the affidavit to show at what place in the state it was taken.[53] In some cases it has been held that where an affidavit appears upon its face to have been taken in one jurisdiction before an officer whose powers are limited to another it will be defective;[54] but other authorities hold that a variance between the caption and other portions of the affidavit is not fatal if it clearly appears from a consideration of all the parts that it was taken by the officer within his jurisdiction.[55]

[§ 65] **4. Prima Facie Force.** The venue stated in an affidavit is prima facie evidence of the place where it was taken;[56] and where the caption shows the state and county in which the affidavit was made, it will be presumed that the officer before whom it was taken was authorized to act in the county stated.[57]

[§ 66] **D. Date.** It is usual and proper to give

Ont.—DeForrest v. Bunnell, 15 U. C. Q. B. 370.

[a] **Affidavit taken by United States commissioner.**—Where an affidavit is taken before a United States commissioner the venue should be given thus: "United States of America, District of ———," not "State of ———, County of ———." Sterrick v. Pugsley, 22 F. Cas. No. 13,379, 1 Flipp. 350.

45. State v. Central Pac. R. Co., 17 Nev. 259, 30 P 887 (holding that notwithstanding the fact that the venue of an affidavit to the statement required of a railroad company for assessment purposes of its property was stated as of a county in the state of California, and referred to such property as being "within this state," yet, where it plainly appeared from the face of the affidavit that it related to property in Lander county, Nevada, the affidavit was sufficient).

46. Teutonia Loan, etc., Co. v. Turrell, 19 Ind. A. 469, 49 NE 852, 65 AmSR 419; Smith v. Abbott, 17 N. J. L. 358; Perkins v. Collins, 3 N. J. Eq. 482; Quesenberry v. People's Bldg., etc., Assoc., 44 W. Va. 512, 30 SE 73; Wood v. Blythe, 46 Wis. 650, 1 NW 341.

Jurat showing place of administering the oath see infra §§ 107, 108.

[a] **Statement of officer's residence.**—In Cook v. Staats, 18 Barb. (N. Y.) 407, the affidavit contained no venue. The jurat was: "Sworn before me, this 7th day of Nov. 1853, Geo. B. Ketchum, Com'r of Deeds for the city of Buffalo." It was held that this affidavit was insufficient.

47. Dyer v. Flint, 21 Ill. 80, 74 AmD 73.

[a] **In Ontario** the venue is sufficiently indicated where the margin of the affidavit at the top contains these words: "Canada, county of Grey, to wit." Reg. v. Atkinson, 17 U. C. C. P. 295.

48. Snell v. Eckerson, 8 Iowa 284.

[a] **Indorsed on other paper.**—The venue of an affidavit to prove the service of a notice is sufficiently shown where it is indorsed on the back of the notice which is properly entitled. Persinger v. Jubb, 52 Mich. 304, 17 NW 851.

49. Wood v. Blythe, 46 Wis. 650, 1 NW 341 (holding that where the venue was omitted from an affidavit the defect would be supplied by the officer stating after his name his official character and the territory for which he was empowered to act).

50. Ormsby v. Ottman, 85 Fed. 492, 29 CCA 295 (holding that where an affidavit in an action, although not containing a formal venue, was entitled in the court in which the action was pending, and was sworn to before the clerk thereof who affixed his seal, the presumption was that in the discharge of his duty he administered the oath within the jurisdiction in which he was authorized to act); Reavis v. Cowell, 56 Cal. 588; Cox v. Stern, 170 Ill. 442, 48 NE 906, 62 AmSR 385; Levy v. Wilson, 43 Iowa 605.

[a] **The naming of a nonexisting county** in the venue is not fatal where the name of an existing county appears in the seal, as it will be presumed that the notary has complied with the law and that the inscription on the seal speaks the truth. Cox v. Stern, 170 Ill. 442, 48 NE 906, 62 AmSR 385 [aff 71 Ill. A. 194].

51. Babcock v. Kuntzsch, 85 Hun 33, 32 NYS 587, 1 NYAnnCas 300; McCord, etc., Mercantile Co. v. Glenn, 6 Utah 139, 21 P 500; Smith v. Richardson, 1 Utah 194.

52. De Forrest v. Bunnell, 15 U. C. Q. B. 370.

[a] **Misspelling of county.**—Where an affidavit was sworn in the county of Brent, but by a mistake of the commissioner before whom it was taken it appeared to have been sworn in the county of Brantford, it was held that such error in spelling would not affect its validity. DeForrest v. Bunnell, 15 U. C. Q. B. 370.

53. Sullivan v. Hall, 86 Mich. 7, 48 NW 646, 13 LRA 556; Perkins v. Collins, 3 N. J. Eq. 482 (where the venue was "State of New Jersey, ss.").

54. See cases infra this note.

[a] **Variance between venue and seal.**—Where the venue of an affidavit was laid in Webster county, Nebraska, and the notarial seal used was that of Douglass county, Nebraska, it was held that the affidavit was invalid for failing to show that it was taken within the limits of the officer's jurisdiction. Byrd v. Cochran, 39 Nebr. 109, 58 NW 127.

[b] **Variance between venue and signature.**—Where the affidavit shows by its venue that it was taken in one county, while it was signed by an officer appointed for another county, it cannot be read. Cook v. Staats, 18 Barb. (N. Y.) 407; Peo. v. Murphy, 1 Daly (N. Y.) 467; Snyder v. Olmsted, 2 HowPr (N. Y.) 181; Sandland v. Adams, 2 HowPr (N. Y.) 127; Davis v. Rich, 2 HowPr (N. Y.) 86.

[c] **"A justice of the peace** has no authority to perform any of the functions of his office elsewhere than within the limits of his own county. If the place of execution is not disclosed, it will be presumed that the officer acted within the sphere of his jurisdiction; but where the caption of the instrument names a place, that will be presumed to be the place where the instrument was executed. . . . As it appears, according to the record in this case, that the pauper's affidavit was executed in Miller county before a justice of the peace of Early county, it is insufficient." Powell, J., in Hutchins v. State, 8 Ga. A. 409, 410, 69 SE 309.

[d] **City and county.**—An affidavit before a commissioner of deeds for a city is defective when the venue is laid only in the county in which the city is situated. Peo. v. Dutchess County, 20 NYS 329.

55. See cases infra this note.

[a] **Variance between caption and body.**—The caption of an affidavit contained the following statement of venue: "State of Iowa, County of Webster." Other parts of the affidavit showed that it was taken before a notary public in Dubuque county of the same state. It was held that it would be presumed that the officer acted within his own county. Goodnow v. Litchfield, 67 Iowa 691, 25 NW 882 [aff 123 U. S. 527, 8 SCt 210, 31 L. ed. 199].

[b] **Venue shown by jurat controls.**—Where the caption of an affidavit showed that it was sworn to in one state and county while the jurat indicated another, it was held that the court should be guided by the venue as shown by the jurat, as it should not be presumed that the officer acted outside of his jurisdiction. Teutonia Loan, etc., Co. v. Turrell, 19 Ind. A. 469, 49 NE 852, 65 AmSR 419.

[c] **Clerical error.**—In Murphy v. Hall, 38 Hun (N. Y.) 528, an affidavit appeared to have been sworn to in one county before a notary public of another county, but it was held that this was a mere clerical error which did not prejudice defendant nor affect a substantial right, and that, under the provisions of Code Civ. Proc. § 723, an amendment should be allowed.

[d] **Officer presumed to act within jurisdiction.**—Where the venue was, "State of North Dakota, County of Stutsman: ss.," and the jurat attached read, "Subscribed and sworn to before me this 12th day of January, 1905. C. M. Porter, Auditor Foster County," the discrepancy between the venue and the jurat was held not to invalidate the affidavit. Salzer Lumber Co. v. Claflin, 16 N. D. 601, 607, 113 NW 1036 [cit Cyc] (where it was said, per Morgan, C. J.: "The presumption that an officer acts within his jurisdiction, and that his acts are lawfully performed, will prevail over the prima facie presumption that the venue of the affidavit is the place where the oath is administered").

56. Ill.—Van Dusen v. Peo., 78 Ill. 645.

Mo.—Barhydt v. Alexander, 59 Mo. A. 188.

N. Y.—Mosher v. Heydrick, 45 Barb. 549; Cook v. Staats, 18 Barb. 407; Lane v. Morse, 6 HowPr 394; Smith v. Collier, 3 NYSt 172; Parker v. Baker, 8 Paige 428.

W. Va.—Hansford v. Snyder, 63 W. Va. 198, 59 SE 975.

Ont.—Reg. v. Atkinson, 17 U. C. C. P 295.

57. U. S.—In re Keller, 36 Fed. 681.

Ill.—Dyer v. Flint, 21 Ill. 80, 74 AmD 73.

Iowa.—Stone v. Miller, 60 Iowa 243, 14 NW 781; Levy v. Wilson, 43 Iowa 605; Snell v. Eckerson, 8 Iowa 284.

Mich.—Smith v. Runnells, 94 Mich. 617, 54 NW 375.

N. J.—Scudder v. Scudder, 10 N. J. L. 340.

N. Y.—Fisher v. Bloomberg, 74 App. Div. 368, 77 NYS 541; Babcock v. Kuntzsch, 85 Hun 33, 32 NYS 587; Crosier v. Cornell Steamboat Co., 27 Hun 215 mem; Smith v. Collier, 3 NYSt 172; Peo. v. Stowell, 9 AbbNCas 456; Matter of Sheepshead, etc., R. Co., 5 NYWklyDig 488; Parker v. Baker, 8 Paige 428.

W. Va.—Hansford v. Snyder, 63 W. Va. 198, 59 SE 975.

Ont.—Reg. v. Atkinson, 17 U. C. C. P. 295; DeForrest v. Bunnell, 15 U. C. Q. B. 370.

[a] **An affidavit upon which a requisition was sought,** the venue of which reads, "State of Wisconsin,

the year, month, and day upon which the affidavit is taken,[58] and some cases seem to regard this as indispensable.[59] It has also been held that a false date invalidates an affidavit.[60] According to some authorities, however, a date is not an essential part of an affidavit;[61] when given it is not conclusive,[62] and a mistake therein may be corrected by parol evidence.[63]

Alteration of the date after an affidavit has been sworn, although done without any fraudulent intent, will, it has been held, render the affidavit invalid.[64]

Statement in jurat cures omission from body of instrument. Where the date is stated in the jurat its omission in other parts of the affidavit is not fatal.[65]

[§ 67] **E. Body of Instrument.—1. Whether English Language Necessary.** As a general rule it would seem that an affidavit may be made in the language of any nation, provided the affiant understands the statements to which he is swearing.[66] Where the affiant does not understand the English language, the method approved by some authorities is that of taking the affidavit in his own language and having a sworn translation made for use in court,[67] while other authorities approve the method of writing the affidavit in the English language and certifying in the jurat that it has been read over and explained to the affiant in his own language.[68]

[§ 68] **2. Sufficiency in General—a. Form.** Under the English practice great strictness has been required as to the forms of affidavits, and even slight departures from the prescribed form have been held

Municipal Court, City and County of Milwaukee," and the jurat of which is signed, "Julius Meizelwich, clerk of the Municipal Court," sufficiently conforms to the act of congress providing that the affidavit shall be sworn to before "a magistrate." In re Keller, 36 Fed. 681.

[b] **Need not show act was performed in township.**—"The statement of the venue at the top of the verification should be read as a part of the official certificate, and this shows the justice acted in his county. It was not necessary that the certificate should show he acted in his township. If he did not do so the appellant should have proved the fact." State v. Walker, 78 Kan. 680, 681, 97 P 862.

[c] **Presumed to be notary for city.**—Where the caption of an affidavit was "City of St. Louis," it was held that as the instrument purported to have been taken before a notary public it was to be presumed that he was a notary public for that city. Remington Sewing Mach. Co. v. Cushen, 3 Mo. A. 528.

[d] **Venue and official title stated.**—Where the venue is given and the officer states his official title, it will be presumed that he acted within his jurisdiction, although he does not so state. Peo. v. Cady, 105 N. Y. 299, 11 NE 810; Crosier v. Cornell Steamboat Co., 27 Hun 215 mem, 15 NYWklyDig 34.

58. Ill.—Cook County Brick Co. v. William Bach, etc., Co., 93 Ill. A. 88.
Kan.—Arkansas City Lumber Co. v. Scott, 5 Kan. A. 636, 47 P 545.
Minn.—Cunningham v. Water-Power Sandstone Co., 74 Minn. 282, 77 NW 137.
Mo.—Henderson v. Drace, 30 Mo. 358.
Mont.—Berg v. Koegel, 16 Mont. 266, 40 P 605.
N. J.—Freas v. Jones, 15 N. J. L. 20; Scudder v. Scudder, 10 N. J. L. 340.
N. D.—Lee v. Crawford, 10 N. D. 482, 88 NW 97.
Eng.—Brunswick v. Slowman, 8 C. B. 617, 65 ECL 617, 137 Reprint 649; Blackwell v. Allen, 10 L. J. Exch. 65.
Ont.—In re Robertson, 5 Ont. Pr. 132; Reg. v. Tomb, 4 U. C. Q. B. 177.

[a] **May be made on Sunday.**—Bilby v. Hancock, (Tex. Civ. A.) 125 SW 370.

59. Lee v. Crawford, 10 N. D. 482, 88 NW 97.

[a] **Omission of month fatal.**—It has been held that the omission of the month from the jurat renders the affidavit defective and that it cannot be amended. Brunswick v. Slowman, 8 C. B. 617, 65 ECL 617, 137 Reprint 649; Wood v. Stephens, 3 Moore C. P. 236, 4 ECL 547.

[b] **Day upon which sworn.**—An affidavit must state in the jurat the day upon which it is sworn. Doe v. Roe, 1 Chit. 228, 18 ECL 133; Archibald v. Hubley, 18 Can. S. C. 116.

60. Berg v. Koegel, 16 Mont. 266, 40 P 605; Lee v. Crawford, 10 N. D. 482, 88 NW 97; In re Robertson, 5 Ont. Pr. 132.

[a] **Antedated one year.**—It has been held that a mistake in the date of an affidavit, by which the instrument seemed to have been executed one year before the occurrence of the event which it sought to prove, was, in the absence of parol evidence to explain it, fatal to its validity. Berg v. Koegel, 16 Mont. 266, 40 P 605.

[b] **Day not in existence.**—If an affidavit purports to have been sworn on a day which has not yet arrived it will be rejected. In re Robertson, 5 Ont. Pr. 132.

61. Freas v. Jones, 15 N. J. L. 20; Schoolcraft v. Thompson, 7 HowPr (N. Y.) 446 [rev on other grounds 9 HowPr 61]; Bell v. Spokane, 30 Wash. 508, 71 P 31.

[a] **Omission of day.**—The omission of the day from the jurat of an affidavit where year and month are given will not render the instrument defective. Scudder v. Scudder, 10 N. J. L. 340.

[b] **Omission of year.**—The omission of the year from the date of the jurat where the day and month are given will not render an affidavit void. Reg. v. Tomb, 4 U. C. Q. B. 177.

62. Lacy v. Cox, 15 N. J. L. 469.

63. Cook County Brick Co. v. William Bach, etc., Co., 93 Ill. A. 88; Arkansas City Lumber Co. v. Scott, 5 Kan. A. 636, 47 P 545; Walker v. Goldsmith, 14 Or. 125, 12 P 537; Anderson v. Kanawha Coal Co., 12 W. Va. 526. And see Crombie v. Little, 47 Minn. 581, 50 NW 823 (where it was intimated, although not expressly decided, that a mistake in the date of an affidavit might be corrected by parol evidence).

[a] **Date not essential.**—In Bell v. Spokane, 30 Wash. 508, 511, 71 P 31, the court said: "A date is not essential to an affidavit, and, if a mistake has been made in the date, it is competent to show it by parol testimony."

[b] **Amendment.**—Where the wrong month is given in the jurat to an affidavit, an amendment will be allowed to remedy the defect. Cook County Brick Co. v. William Bach, etc., Co., 93 Ill. A. 88.

[c] **Perjury assignable upon falsely dated affidavit.**—If an affidavit is untrue, "perjury may be assigned upon it, though it may have no date, or a wrong or impossible one, and the true time of making it, may be averred and proved." Freas v. Jones, 15 N. J. L. 20.

64. Finnerty v. Smith, 1 Bing N. Cas. 649, 27 ECL 803, 131 Reprint 1267.
In Jacob v. Hungate, 3 Dowl. P. C. 456, it was held that the writing of a figure 3 over a 2 in the date of the jurat was not such an erasure or interlineation as would vitiate the affidavit.

65. Holmes v. London, etc., R. Co. 13 Q. B. 211, 66 ECL 211, 116 Reprint 1243; Craig v. Lloyd, 3 Exch. 232; Reg. v. Tomb, 4 U. C. Q. B. 177.

66. Bosc v. Solliers, 4 B. & C. 358, 10 ECL 614, 107 Reprint 1093. But see Spencer v. Doane, 23 Cal. 418, 420 (where the court sustained the exclusion of affidavits in a foreign language tendered on a motion for a new trial, and the court, per Crocker, J., used the following language: "If they had been admitted, they would have been of no benefit to the plaintiff on his motion; and he has therefore suffered no injury by their exclusion").

[a] **Presumption as to affiant's knowledge.**—Where the signature of the affiant is not in English characters and is not a mark, but purports, from its position, to be the signature of the person making the affidavit, it will be presumed that the person who made those letters was able to read the affidavit, although the language in which it was written was different from his own. Nathan v. Cohen, 3 Dowl. P. C. 870.

67. In re Eady, 6 Dowl. P. C. 615 (holding that it is no objection to an affidavit sworn to in Germany that it was originally in the German language if it is translated and the translation is verified; and the oath may be administered in German if it is translated by an interpreter to the affiant); In re Ah Gway, 2 B. C. 343 (where it was held that where the affiant was a Chinese girl and unacquainted with the English language the affidavit should have been written in Chinese and read to or by her and sworn to in the original, and then a translation made to be used in the courts, and that an affidavit drawn up in English and translated or explained to the affiant was insufficient, as by this method the deponent might be made to swear to matter she had never intended, and it would be very difficult to maintain an indictment for perjury in case of false statements). But see infra note 68.

[a] **Use of original by consent of parties.**—The affidavit of persons who were natives of Bohemia was taken in that country in the Bohemian language, and a copy of this affidavit, translated into the English language, was by agreement of the parties used in a Nebraska court. Sebesta v. Supreme Ct. of Honor, 77 Nebr. 249, 109 NW 166.

68. In re Fong Yuk, 8 B. C. 118 (where Walkem, J., refused to follow In re Ah Gway, 2 B. C. 343, and allowed to be read affidavits of Chinamen which were in the English language, but which, as was stated in the jurat, had been read over and explained to the deponents in the Chinese language). Compare supra note 67.

[a] **Statements interpreted to affiant.**—Where the jurat to an affidavit made by a foreigner certified that the "affidavit was interpreted by F. C., professor of languages (he having first sworn that he understood the English and French languages), to the deponent, who was afterwards sworn to the truth thereof," it was held sufficient although it did not appear thereby that the deponent understood the language in which the affidavit was interpreted or that the interpreter was sworn truly to interpret.

to vitiate the affidavit.[69] In the United States, however, the general rule is that no particular form is necessary if only the affidavit contains a statement of all essential matters.[70]

[§ 69] **b. Arrangement.** It has been held that it is not necessary that the contents of the body of an affidavit be divided into paragraphs and numbered.[71]

[§ 70] **c. Ability to Sustain Charge of Perjury.** The chief test of the sufficiency of an affidavit is whether it is so clear and certain that an indictment for perjury may be sustained on it if false.[72] To meet this test it has been held that the affidavit must be sufficient both in form and in substance,[73] although according to other decisions it need not be formally correct.[74]

[§ 71] **d. Necessity for Stating All Material Facts.** Where an affidavit is made for use under a particular statute all the essential facts required by the statute should be stated.[75]

[§ 72] **e. Substantial Compliance with Statute.** As a general rule it is sufficient to adopt the language of the statute under which an affidavit is made,[76] but this will not suffice in all cases.[77] While there is some authority for the proposition that the

Bosc v. Solliers, 4 B. & C. 358, 10 ECL 614, 107 Reprint 1093. See also Marzetti v. Comte du Jouffroy, 1 Dowl. P. C. 41.

69. Oliver v. Price, 3 Dowl. P. C. 261; Phillips v. Prentice, 2 Hare 542, 24 EngCh 542, 67 Reprint 224.

70. Miller v. Caraker, 9 Ga. A. 255, 257, 71 SE 9 (where Powell, J., said: "Under the practice in the British courts, great strictness was formerly required as to the forms of affidavits, and any departure from the prescribed form would vitiate the affidavit. But none of the American courts, so far as our investigation goes, has ever given any great weight to mere form in these matters, and it is well recognized in this State that no particular form is required, provided the facts sworn to are committed to writing and signed by the affiant, if, as a matter of fact, the oath was administered").

71. Ellerby v. Walton, 2 Ont. Pr. 147. But in In re Park, 24 U. C. Q. B. 459, it was held that affidavits which were not divided into paragraphs, as required by rule of court No. 112, would not be received.

72. U. S.—Woods v. Bailey, 111 Fed. 121; U. S. v. Mallard, 40 Fed. 151, 5 LRA 816; Blake Crusher Co. v. Ward, 3 F. Cas. No. 1,505.

Ala.—Sellers v. State, 162 Ala. 35, 39, 50 S 340 [cit Cyc]; Hyde v. Adams, 80 Ala. 111.

Ariz.—Hankins v. Helms, 12 Ariz. 178, 100 P 460; Eytinge v. Territory, 12 Ariz. 131, 100 P 443.

Cal.—Reavis v. Cowell, 56 Cal. 588.

Del.—In re Shannahan, etc., Hardware Co., 21 Del. 138, 58 A 1023.

Ga.—Loeb v. Smith, 78 Ga. 504, 3 SE 458; Neal v. Gordon, 60 Ga. 112.

Ill.—Peo. v. Healy, 230 Ill. 280, 82 NE 599, 15 LRANS 603; Grace v. Oakland Bldg. Assoc., 166 Ill. 637, 46 NE 1102 [rev on other grounds 63 Ill. A. 339].

Ky.—Peers v. Carter, 4 Litt. 268.

La.—English v. Wall, 12 Rob. 132.

Md.—Gibson v. Tilton, 1 Bland 352, 17 AmD 306.

Miss.—Harris v. Heberton, 6 Miss. 575.

Mo.—State v. Boland, 12 Mo. A. 74.

Nebr.—Jeary v. American Exch. Bank, 2 Nebr. (Unoff.) 657, 89 NW 771.

N. J.—Gaddis v. Durashy, 13 N. J. L. 324.

N. Y.—Peo. v. Sutherland, 81 N. Y. 1; Mojarrieta v. Saens, 80 N. Y. 553; Peo. v. Becker, 20 N. Y. 354; Matter of Owsley, 153 App. Div. 90, 137 NYS 1040; Van Wyck v. Reid, 10 HowPr 366; Humphrey v. Cande, 2 Cow. 509.

S. C.—Bacot v. Deas, 67 S. C. 245, 249, 45 SE 171 [quot Cyc].

Tex.—City Nat. Bank v. Flippen, 66 Tex. 610, 1 SW 897; Harris v. Williams, 4 Tex. 339; Mays v. Lewis, 4 Tex. 38; Chevallier v. Williams, 2 Tex. 239; Godfrey v. Newby, (Civ. A.) 39 SW 594.

Wis.—Mairet v. Marriner, 34 Wis. 582; Miller v. Munson, 34 Wis. 579, 17 AmR 461; Oliver v. Town, 28 Wis. 328; Lathrop v. Snyder, 16 Wis. 293; Quarles v. Robinson, 2 Pinn. 97, 1 Chandl. 29.

Eng.—Hands v. Clements, 1 D. & L. 379; Bill v. Bament, 9 Dowl. P. C. 810; Pickford v. Ewington, 4 Dowl. P. C. 453; Poole v. Pembrey, 1 Dowl. P. C. 693; Watson v. Walker, 1 Moore & S. 437; Langston v. Wetherell, 14 M. & W. 104; Kennet, etc., Canal Co. v. Jones, 7 T. R. 451, 101 Reprint 1071.

N. S.—Gladwin v. Guildford, 40 N. S. 479.

Ont.—Vansickle v. Boyd, 14 Ont. Pr. 469; Pawson v. Hall, 1 Ont. Pr. 294; Beauchamp v. Cass, 1 Ont. Pr. 291; Reg. v. Atkinson, 17 U. C. C. P. 295.

See generally Perjury [2 Cyc 22; 30 Cyc 1399].

[a] **Where in words of statute.**—An affidavit is not sufficient unless perjury can be assigned upon it, even though it be in the very words of the statute. Miller v. Munson, 34 Wis. 579, 17 AmR 461.

[b] **Preparation of false affidavit.**—When the magistrate avows that he prepared an affidavit in a form which he scarcely could have used without thinking that the intending deponent was prepared to swear to something untrue, the practice is utterly indefensible. McIlroy v. Hall, 25 U. C. Q. B. 303.

[c] **Statement of place of offense.**—The caption of an affidavit showed the venue to be in Perry county in the state of Indiana, while in the body of the affidavit it was charged that the offense was committed "at said county." This was held to be a sufficient statement of the place where the offense was committed. Hawkins v. State, 136 Ind. 630, 36 NE 419.

73. State v. Henning, 3 S. D. 492, 54 NW 536.

74. Bill v. Bament, 9 Dowl. P. C. 810; Reg. v. Atkinson, 17 U. C. C. P. 295.

[a] **In some instances** perjury may be assigned, although the affidavit is so formally defective as to preclude its being read in evidence. Reg. v. Christian, C. & M. 388, 41 EGL 214; Rex v. Hailey, 1 C. & P. 258, 12 ECL 155; Bill v. Bament, 9 Dowl. P. C. 810; Vansickle v. Boyd, 14 Ont. Pr. 469; Reg. v. Atkinson, 17 U. C. C. P. 295.

75. Ark.—Burriss v. Wise, 2 Ark. 33.

Cal.—Peo. v. Findley, 132 Cal. 301, 64 P 472; Coffee v. Haynes, 124 Cal. 561, 57 P 482, 71 AmSR 99; Fisk v. French, 114 Cal. 400, 46 P 161.

Colo.—Frybarger v. McMillen, 15 Colo. 349, 25 P 713.

Del.—Philadelphia Nat. Bank v. Morgan, 15 Del. 265, 40 A 1113.

Fla.—Tanner, etc., Engine Co. v. Hall, 22 Fla. 391.

Ga.—National Lumber Co. v. Turner, 2 Ga. A. 750, 59 SE 15.

Ill.—Anderson v. Anderson, 229 Ill. 538, 82 NE 311; Evans v. Schriver Laundry Co., 57 Ill. A. 150.

N. J.—Tingley v. International Dynelectron Co., 74 N. J. Eq. 538, 70 A 919.

Okl.—Greeley v. Greeley, 12 Okl. 659, 73 P 295.

Pa.—Cusick's Election, 136 Pa. 459, 20 A 574, 10 LRA 228.

W. Va.—Sommers v. Allen, 44 W. Va. 120, 28 SE 787.

N. B.—McDonald v. Thompson, 31 N. B. 574.

Ont.—Robinson v. Mills, 19 Ont. L. 162, 13 OntWR 606, 763, 853; Robinson v. Morris, 15 Ont. L. 649, 11 Ont WR 361, 431, 559; Boynton v. Boyd, 12 U. C. C. P 334; Fraser v. Toronto Bank, 19 U. C. Q. B. 381; Boulton v. Smith, 17 U. C. Q. B. 400 [aff 18 U. C. Q. B. 458].

Que.—Kidd v. McKinnon, 20 Que. Super. 300.

[a] **What agent must state.**—It is not sufficient for the agent of a party taking an appeal to state in an affidavit that he considers himself aggrieved by the judgment and decision of the court. It is the appellant that must be aggrieved, not the agent. Thomas v. Missouri Town Mut. F. Ins. Co., 89 Mo. A. 12.

[b] **Facts requisite to establish principal fact.**—Proof by affidavit can be made only by a statement and verification of such facts as are requisite to establish the principal facts sought to be maintained. Duanesburgh v. Jenkins, 40 Barb. (N. Y.) 574.

[c] **The absence of usual allegations** from an affidavit has been held to be not fatal, where their absence is satisfactorily explained and the inferences are unquestionable. Cranstoun v. Bird, 5 B. C. 140.

[d] **Statement that the affiant is familiar with the facts** is not required by a statute providing that "any person familiar with the facts may make an affidavit as to the publication required," since the very act of his swearing to the facts is evidence of his ability to do so. Muirhead v. Sands, 111 Mich. 487, 69 NW 826.

76. U. S.—Nevada Co. v. Farnsworth, 89 Fed. 164.

Ark.—Burrow v. Hot Springs, 85 Ark. 396, 108 SW 823.

Ill.—Iroquois Furnace Co. v. Wilkin Mfg. Co., 181 Ill. 582, 54 NE 987 [rev 77 Ill. A. 59]; Zeigler v. Cox, 63 Ill. 48; Burton v. Curyea, 40 Ill. 320, 89 AmD 350; Whisler v. Roberts, 19 Ill. 274; Ryan v. Schutt, 135 Ill. A. 554; Keith v. McDonald, 31 Ill. A. 17.

Ind.—Clark v. State, 171 Ind. 104, 84 NE 984, 16 AnnCas 1229; Hawkins v. State, 136 Ind. 630, 36 NE 419.

Mich.—Nicolls v. Lawrence, 30 Mich. 395.

Mo.—Thomas v. Missouri Town Mut. F. Ins. Co., 89 Mo. A. 12.

N. J.—Brant v. Brant, 71 N. J. Eq. 66, 71 A 350.

N. M.—Robinson v. Hesser, 4 N. M. 144, 13 P 204.

Pa.—Rubinsky v. Ullman, 4 Pa. Dist. 126.

Tex.—Whitemore v. Wilson, 1 Tex. Unrep. Cas. 213; Godfrey v. Newby, (Civ. A.) 39 SW 594.

Wis.—Mairet v. Marriner, 34 Wis. 582; Miller v. Munson, 34 Wis. 579, 17 AmR 461.

Can.—Ashdown v. Manitoba Free Press Co., 20 Can S. C. 43.

Ont.—Carlisle v. Tait, 7 Ont. A. 10; Fraser v. Toronto Bank, 19 U. C. Q. B. 381.

[a] **Sufficient to follow statutory caption.**—The fact that an indictment in the language of the affidavit would not be good against demurrer does not render the affidavit void where it designates the offense as per the statutory caption. McDaniel v. Cain, 159 Ala. 344, 48 S 52.

77. Miller v. Munson, 34 Wis. 579, 17 AmR 461.

[a] **Supplementary proceedings.**—To entitle a judgment creditor to an order for the examination of his debtor in supplementary proceedings under N. Y. Code Civ. Proc. § 2436, he must show by affidavit, or other com-

statutory language must be strictly followed,[78] the great weight of authority is to the effect that a substantial compliance is sufficient.[79] Where the language of the statute is departed from, in order that there may be a substantial compliance therewith the substituted language should of course be equivalent in meaning to the statutory form.[80]

[§ 73] **f. Construction of Language.** Following

petent evidence, "that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment." Where the affidavit followed the very language of the statute it was nevertheless held insufficient because it did not "set forth facts and circumstances so that it may be determined whether there has been an unjust refusal," etc. Carbonating Apparatus Co. v. Bennett, 56 Misc. 47, 48, 105 NYS 1052 (the court saying further: "It is true that the averment in the language of the statute is enough to give jurisdiction, and that the omission to state the facts and circumstances is a defect and irregularity which may be waived or amended. The defect in this case, however, is not cured by the affidavits submitted on the motion to vacate the order of examination").

[b] **An affidavit for an attachment,** although in the very words of the statute, is not sufficient unless perjury can be assigned upon it. Mairet v. Marriner, 34 Wis. 582; Miller v. Munson, 34 Wis. 579, 17 AmR 461.

78. Fla.—Tanner, etc., Engine Co. v. Hall, 22 Fla. 391.

Mich.—Butcher v. Cappon, etc., Leather Co., 148 Mich. 552, 112 NW 110, 12 AnnCas 169.

N. Y.—Utica Bank v. Root, 4 Hill 535.

W. Va.—Boggess v. Scott, 48 W. Va. 316, 37 SE 661; Phillips v. Minear, 40 W. Va. 58, 20 SE 924.

B. C.—Smith v. McIntosh, 3 B. C. 26.

Ont.—Boynton v. Boyd, 12 U. C. C. P. 334.

Que.—Kidd v. McKinnon, 20 Que. Super. 300.

[a] **Otherwise affidavit jurisdictionally defective.**—"The statute . . . requires that the affidavit shall contain a statement 'that the defendant therein is indebted to the plaintiff,' etc. The affidavit in question does not contain such an allegation, but contains an allegation that defendant 'is indebted to deponent,' one of the plaintiffs. The affidavit was therefore jurisdictionally defective, and was not subject to amendment." Butcher v. Cappon, etc., Leather Co., 148 Mich. 552, 554, 112 NW 110, 12 AnnCas 169.

[b] **Omission of essential word.**—(1) "In Evans v. Tucker, 59 Tex. 249, we held that the omission of the word 'justly' before indebted, vitiated the affidavit; we then said, 'The statute is not literally or even substantially complied with when important words required to be contained in the affidavit are omitted. . . . The act requires the use of the word "justly," and we have no authority to dispense with it.' This language applies with double force to the present affidavit. The word here left out is of far more importance than the word 'justly,' for the affidavit without the word 'is' has no meaning. We think it better to require a compliance with the important allegations of the affidavit as prescribed by statute. Hence, we think, the court did not err in dissolving the attachment, and the judgment is affirmed." City Nat. Bank v. Flippen, 66 Tex. 610, 612, 1 SW 897. (2) Where the language of an act is plain and peremptory, the omission of a prescribed word from the affidavit is fatal. Thus, where the statute prescribes that the affidavit shall state that defendant "is really the father," the omission of the word "really" renders the affidavit insufficient. Jackson v. Kassel, 26 U. C. Q. B. 341.

79. Ark.—Mandel v. Peet, 18 Ark. 236.

Cal.—Coffee v. Haynes, 124 Cal. 561, 57 P 482, 71 AmSR 99; Rhoda v. Alameda County, 69 Cal. 523, 11 P 57; Fleming v. Wells, 65 Cal. 336, 4 P 197.

Ga.—Scruggs v. Gibson, 40 Ga. 511; Selman v. Shackelford, 17 Ga. 615.

Ill.—Cox v. Stern, 170 Ill. 442, 48 NE 906, 62 AmSR 385.

Ind.—State v. Bailey, 157 Ind. 324, 61 NE 730, 59 LRA 435; Story v. Story, 32 Ind. 137; Large v. Keen's Creek Drain. Co., 30 Ind. 263, 95 AmD 696.

Kan.—Clayton v. Clark, 76 Kan. 832, 92 P 1117, 123 AmSR 169.

Md.—Stanhope v. Dodge, 52 Md. 483; Cross v. Tome, 14 Md. 247.

Mich.—Dummer v. Nungesser, 107 Mich. 481, 65 NW 564; Nicolls v. Lawrence, 30 Mich. 395; Wells v. Parker, 26 Mich. 102.

Minn.—Mille Lacs County v. Morrison, 22 Minn. 178.

Mo.—State v. Broaddus, 210 Mo. 1, 108 SW 544; Thomas v. Missouri Town Mut. F. Ins. Co., 89 Mo. A. 12.

Mont.—Dorais v. Doll, 33 Mont. 314, 83 P 884.

N. J.—Lyons v. Allen, 76 N. J. L. 391, 69 A 642; American Soda Fountain Co. v. Stolzenbach, 75 N. J. L. 721, 68 A 1078, 127 AmSR 822, 16 LRANS 703; Brant v. Brant, 71 N. J. Eq. 66, 71 A 350.

N. Y.—Staples v. Fairchild, 3 N. Y. 41; Schwartz v. Allen, 7 NYS 5; Porter v. Mann, 4 Hill 540.

N. D.—Emmons County v. Bismarck First Nat. Bank, 9 N. D. 583, 84 NW 379.

Oh.—Creasser v. Young, 31 Oh. St. 57; American Mfg. Co. v. National Supply Co., 29 Oh. Cir. Ct. 433.

Okl.—Dunn v. Drummond, 4 Okl. 461, 51 P 656.

Pa.—Election Cases, 65 Pa. 20; Thompson v. White, 4 Serg. & R. 135; Rubinsky v. Ullman, 4 Pa. Dist. 126; In re Contested Elections, 2 Brewst. 1.

Tex.—Doty v. Moore, 102 Tex. 48, 112 SW 1038; Smith v. Dye, (Civ. A.) 51 SW 858; Dodson v. State, 35 Tex. Cr. 571, 34 SW 754.

Wash.—Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 P 396.

W. Va.—Ruhl v. Rogers, 29 W. Va. 779, 2 SE 798.

Wis.—Russell v. Ralph, 53 Wis. 328, 10 NW 518.

Man.—Roper v. Scott, 16 Man. 594.

Ont.—Rogers v. Carroll, 30 Ont. 328; Mason v. Thomas, 23 U. C. Q. B. 305.

[a] **"Verily believes"; "has good reason to believe."**—An affidavit stating that affiant "verily believes," instead of using the statutory form "has good reason to believe," is not bad on that account, the form used being the stronger of the two, and perjury being assignable thereon. Russell v. Ralph, 53 Wis. 328, 10 NW 518.

[b] **"Address" for "residence."**—"Where the plaintiff has by affidavit stated the 'address' of the defendant out of the state, and the court has accepted this statement as evidence of the residence, it is sufficient compliance with the statute." San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 427, 70 P 299.

[c] **Participial form.**—In Gundersheimer v. Earnshaw, 13 App. (D. C.) 178, it was held that the fact that certain allegations in an affidavit were in the participial form, instead of being formulated in the indicative mood, did not render it insufficient, on the ground that ever since the case of Posterne v. Hanson, 2 Saund. 51, 85 Reprint 652, over two hundred years ago, the participial form of averment in affidavits has been deemed sufficient.

[d] **Pronouns may be used** where they do not render the meaning obscure or equivocal. Angus v. Sullivan, 166 Ill. 461, 46 NE 1079.

[e] **Verbal inaccuracy.**—Where the requirements of the statute are fulfilled the affidavit will not be defeated because of verbal inaccuracy. Fairbank v. Lorig, 4 Ind. A. 451, 29 NE 452, 30 NE 930.

[f] **Verbal transposition; identical in meaning.**—"Nor is the objection well founded, that the language of the affidavit is not sanctioned by law. The legislature did not design to prescribe the precise form of an oath, the slightest deviation from the phraseology of which should prove fatal. The affidavit filed appears to us identical in meaning with that prescribed by the statute. An averment that a bank has bona fide a cash capital, or a bona fide cash capital, or a cash capital bona fide, seems to us to vary rather in sound than in sense. We must presume that the defendant so understood it, and that the affidavit was filed in good faith to comply with the law, and not with a design to escape the penalty of perjury by a mere verbal transposition." State v. Dayton, 23 N. J. L. 49, 60, 53 AmD 270.

[g] **In present tense.**—In Coyle Mercantile Co. v. Nix, 7 Okl. 267, 54 P 469, it was held that it was no objection to the affidavit that its language is in the present tense.

[h] **The words "of said county"** have been held to have the same import as the words "in said county" prescribed by a statute. Emmons County v. Bismarck First Nat. Bank, 9 N. D. 583, 84 NW 379.

[i] **Singular includes plural.**—In the construction of affidavits it has been held that the singular includes the plural. Doty v. Moore, 102 Tex. 48, 112 SW 1038.

[j] **Substantial compliance with rule of court.**—The language of an affidavit which is substantially that required by a rule of court is sufficient. Cunningham v. Water-Power Sandstone Co., 74 Minn. 282, 77 NW 137.

[k] **Failure to comply with rule of court.**—Where an affidavit is made under a statute, a full and plain compliance with what the statute substantially requires is all that is necessary, and where that is present, noncompliance with certain rules of court will not vitiate the affidavit. Moyer v. Davidson, 7 U. C. C. P. 521.

[l] **Statement that words "are innocent and harmless"** is equivalent to swearing that the "grounds of action are trivial or frivolous." Robinson v. Mills, 19 Ont. L. 162, 13 OntWR 606, 763, 853.

80. U. S.—Welch v. Farmers' L. & T. Co., 165 Fed. 561, 91 CCA 399.

Ala.—Birmingham Union R. Co. v. Alexander, 93 Ala. 133, 9 S 525.

Cal.—San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 P 299; Fleming v. Wells, 65 Cal. 336, 4 P 197.

Fla.—Tanner, etc., Engine Co. v. Hall, 22 Fla. 391.

Ill.—East St. Louis R. Co. v. Gray, 135 Ill. A. 642.

Mo.—Thomas v. Missouri Town Mut. F. Ins. Co., 89 Mo. A. 12.

N. J.—State v. Dayton, 23 N. J. L. 49, 53 AmD 270; Brant v. Brant, 71 N. J. Eq. 66, 71 A 350.

N. D.—Hemmi v. Grover, 120 NW 561; Emmons County v. Bismarck First Nat. Bank, 9 N. D. 583, 84 NW 379.

Okl.—Greeley v. Greeley, 12 Okl. 659, 73 P 295.

Pa.—Thompson v. White, 4 Serg. & R. 135.

Tex.—City Nat. Bank v. Flippen, 66 Tex. 610, 1 SW 897; Moody v. Levy, 58 Tex. 532.

Wash.—Bardon v. Hughes, 45 Wash. 627, 88 P 1040.

W. Va.—Rittenhouse v. Harman, 7 W. Va. 380.

Wis.—Smith v. Clarke, 70 Wis. 137, 35 NW 318; Sloane v. Anderson, 67 Wis. 123, 13 NW 684, 15 NW 21; Russell v. Ralph, 53 Wis. 328, 10 NW 518.

the general rule of construction of instruments, it seems that general words in an affidavit are strengthened by exceptions and weakened by enumeration.[81] An affidavit should be construed strictly against the affiant.[82] Where there is a conflict between the printed and the written parts of an affidavit, that which appears in writing will control.[83]

[§ 74] **g. Statements Should Be Positive and Definite.** Facts should be stated positively and with legal definiteness and certainty.[84]

[§ 75] **h. Alleging Grounds in Alternative.** An affidavit is insufficient which states in the alternative the grounds on which relief is sought,[85] except when permissible by the language of the statute under which the affidavit is made.[86]

[§ 76] **i. Legal Conclusions.** The statement in an affidavit of mere matters of opinion or of legal conclusions is not sufficient.[87] The facts on which

Ont.—Boldrick v. Ryan, 17 Ont. A. 253; Pawson v. Hall, 1 Ont. Pr. 294.

[a] **County in place of state.**—An affidavit in which the word "county" is used instead of "state" as required by statute is defective. Stillman v. Rosenberg, 111 Iowa 369, 82 NW 768.

[b] **Substituting "and" for "or."**—It has been held that the use of the word "and" in an affidavit, instead of the word "or" as prescribed by the statute, rendered the affidavit defective, as the word substituted was not a substantial compliance with the statutory requirement. Hale v. Sweet, 40 N. Y. 97; Moody v. Levy, 58 Tex. 532.

[c] **Said for saith.**—It is insufficient to use the word "said" instead of "saith," for what the affiant "said" might be some time ago, and not what he now swears in his affidavit. Howarth v. Hubbersty, 5 Tyrw. 391; Addy v. Brouse, 1 Ont. Pr. 234.

81. Russell v. Ralph, 53 Wis. 328, 10 NW 518.

82. Howard v. Citizens' Bank, etc., Co., 12 App. (D. C.) 222; Duddleston v. Eckhart, 134 Ill. A. 656; Nebraska Moline Plow Co. v. Fuehring, 52 Nebr. 541, 72 NW 1003.

83. White v. Chicago, 188 Ill. 392, 58 NE 917. See also Contracts [9 Cyc 584] where a like rule prevails.

84. Del.—Philadelphia Nat. Bank v. Morgan, 15 Del. 265, 40 A 1113.

Ga.—Brown v. Driggers, 60 Ga. 114.

Ill.—Angus v. Sullivan, 166 Ill. 461, 46 NE 1079; Dammann v. Connolly, 135 Ill. A. 504.

N. J.—Den v. Fen, 10 N. J. L. 237; Charles R. DeBevoise Co. v. H. & W. Co., 69 N. J. Eq. 114, 60 A 407.

N. Y.—Peo. v. Becker, 20 N. Y. 354; Feuchtwanger v. Dessar, 1 Silv. Sup. 1, 5 NYS 129, 17 NYCivProc 119; Brooks v. Hunt, 3 Cal. 128; Powell v. Kane, 5 Paige 265.

Tex.—Whitemore v. Wilson, 1 Tex. Unrep. Cas. 213.

W. Va.—Kesler v. Lapham, 46 W. Va. 293, 33 SE 289; Sommers v. Allen, 44 W. Va. 120, 28 SE 787; Goodman v. Henry, 42 W. Va. 526, 26 SE 528, 35 LRA 847.

Eng.—Hyde v. Whitfield, 19 Ves. Jr. 342, 34 Reprint 544.

B. C.—Tate v. Hennessey, 7 B. C. 262.

Ont.—Pawson v. Hall, 1 Ont. Pr. 294.

[a] **Must be true when made.**—An affidavit must be true when it is made or it can never be true at all. The subsequent occurrence of the events therein stated to have happened cannot make the statement true that they had already happened at the time the affiant swore to it. White v. Eiseman, 58 Hun 484, 12 NYS 885 [rev on other grounds 134 N. Y. 101, 31 NE 276, 28 AbbNCas 363]; Durant v. Abendroth, 41 N. Y. Super. 53 [aff 69 N. Y. 148, 25 AmR 158].

[b] **Sufficient statements not affected by insufficient statements.**—Where an affidavit contains several distinct and independent causes of action, some of which are stated positively and definitely, while others are stated defectively, it has been held that the independent and sufficient statements will not be vitiated by those which are insufficient. Pawson v. Hall, 1 Ont. Pr. 294.

[c] **Where affidavits are disingenuously drawn,** with a view of preventing inference and giving color to the transactions they refer to, inconsistent with the whole truth, they should be given little weight. Reg. v. Allen, 5 Ont. Pr. 453.

[d] **A statutory requirement that affiant shall show that she was entitled** to purchase real estate in her own name is sufficiently complied with by a statement that she was entitled to purchase and hold real estate in her own name. Henshall v. Marsh, 151 Cal. 289, 90 P 693.

[e] **No presumption will be indulged** to supply a defect in an affidavit for attachment which, if not supplied, would prevent the affidavit from coming up to the requirements of the statute. City Nat. Bank v. Flippen, 66 Tex. 610, 1 SW 897.

[f] **Ambiguous language.**—In affidavits drawn by counsel for the parties litigant language which is ambiguous in its nature will be construed most strongly against the party in whose behalf such affidavits were prepared. Nebraska Moline Plow Co. v. Fuehring, 52 Nebr. 541, 72 NW 1003.

[g] **Too indefinite.**—In a suit to enjoin the alleged illegal use of a trade name, an affidavit that complainant has used the name "for a long time" is too indefinite for judicial action. Charles R. DeBevoise Co. v. H. & W. Co., 69 N. J. Eq. 114, 60 A 407.

[h] **Reference to other papers.**—(1) A reference in an affidavit to a petition and affidavits on file, to be read as a part of such affidavit, was not a reaffirmation of the allegations of such petition and prior affidavits as of the knowledge of the affiant. Matter of Owsley, 153 App. Div. 90, 137 NYS 1040. (2) Where an affidavit for a garnishee summons purported to verify a statement of claim said to be marked as an exhibit to the affidavit, a statement of claim not in fact marked as an exhibit cannot be read as part of the affidavit. Clokey v. Huffman, 1 DomLR 679.

85. Cal.—Winters v. Pearson, 72 Cal. 553, 14 P 304; Wilke v. Cohn, 54 Cal. 212; Hawley v. Delmas, 4 Cal. 195.

Mo.—Hinkle v. Lovelace, 204 Mo. 208, 220, 102 SW 1015, 11 AnnCas 794 [quot Cyc].

N. Y.—Collins v. Beebe, 54 Hun 318, 7 NYS 442; Leonard v. Bowman, 15 NYS 822, 21 NYCivProc 237; Lee v. Heirberger, 1 Code Rep. 38.

Tex.—Blum v. Davis, 56 Tex. 423.

Wis.—Billings v. Noble, 75 Wis. 325, 43 NW 1131; Goodyear Rubber Co. v. Knapp, 61 Wis. 103, 20 NW 651.

[a] **"His property or any part thereof."**—In Goodyear Rubber Co. v. Knapp, 61 Wis. 103, 104, 20 NW 651, Lyon, J., said: "In Miller v. Munson, 34 Wis. 579, 17 AmR 461, an affidavit charging the debtor with a fraudulent disposition of 'any of his property' was held insufficient. We think this case is within the rule of Miller v. Munson, although there is a slight difference in the language employed in the two cases. 'His property, or any part thereof,' is, however, substantially the same as 'any part of his property.' The statement is in the disjunctive—'his property or any part thereof.'"

[b] **"Prejudice or other cause."**—An affidavit for removal of examination which states "that from prejudice or other cause" the person charged believed that the justice would not decide impartially is defective because in the alternative. Billings v. Noble, 75 Wis. 325, 43 NW 1131.

86. Emerson v. Detroit Steel, etc., Co., 100 Mich. 127, 58 NW 659; Cunningham v. Doyle, 5 Misc. 219, 25 NYS 476; Staubsandt v. Lennon, 3 Misc. 90, 22 NYS 544 [aff 142 N. Y. 666, 37 NE 570]; Schwartz v. Allen, 7 NYS 5; McCarthy Bros. Co. v. McLean County Farmers' El. Co., 18 N. D. 176, 118 NW 1049, 138 AmSR 757, 20 AnnCas 574; Russell v. Ralph, 53 Wis. 328, 10 NW 518; Miller v. Munson, 34 Wis. 579, 17 AmR 461.

87. U. S.—Summerfield v. Phœnix Assur. Co., 65 Fed. 292.

Ark.—Richie v. State, 85 Ark. 413, 108 SW 511.

Cal.—Forbes v. Hyde, 31 Cal. 342.

Ga.—Baker v. Akerman, 77 Ga. 89.

Ill.—Duddleston v. Eckhart, 134 Ill. A. 656; De Witt v. Flint, etc., Mfg. Co., 132 Ill. A. 356; Brewer, etc., Brewing Co. v. Lonergan, 63 Ill. A. 28; Carpenter v. White, 43 Ill. A. 448.

Ind.—State v. Bridgewater, 171 Ind. 1, 85 NE 715; Pence v. Christman, 15 Ind. 257.

Kan.—Pemberton v. Hoosier, 1 Kan. 108.

Nebr.—Todd v. Crete, 79 Nebr. 677, 115 NW 307.

N. Y.—Warth v. Moore Blind Stitcher, etc., Co., 125 App. Div. 211, 109 NYS 116; McLaughlin v. McCann, 123 App. Div. 67, 107 NYS 762; Price v. Levy, 93 App. Div. 274, 87 NYS 740; Moore v. Monumental Mut. L. Ins. Co., 77 App. Div. 209, 78 NYS 1009; Burns v. Boland, 70 App. Div. 555, 75 NYS 700; Knope v. Nunn, 75 Hun 287, 26 NYS 1074; Hodgman v. Barker, 60 Hun 156, 14 NYS 574, 20 NYCivProc 341 [aff 128 N. Y. 601 mem, 27 NE 1029, 3 Silv. A. 518, 21 NYCivProc 121]; Westervelt v. Agrumaria Sicula Societa, etc., 58 Hun 147, 11 NYS 340; Mechanics', etc., Bank v. Loucheim, 55 Hun 396, 8 NYS 520; Duanesburgh v. Jenkins, 40 Barb. 574; Feuchewanger v. Dessar, 1 Silv. Sup. 1, 5 NYS 129, 17 NYCivProc 119; Mole v. New York, etc., R. Co., 53 Misc. 22, 102 NYS 308; Wolter v. Liebmann, 52 Misc. 517, 102 NYS 487; Ammon v. Kellar, 21 Misc. 442, 47 NYS 595; Lowther v. Sullivan, 107 NYS 198; Markey v. Diamond, 19 NYS 181 [aff 20 NYS 847]; Brown v. Keogh, 14 NYS 915; Cattaraugus Cutlery Co. v. Case, 9 NYS 862; Labalt v. Schuloff, 4 NYS 819; Thompson v. Best, 4 NYS 229; Moore v. Becker, 13 NYSt 567; Perry v. Smith, 9 NYSt 728; Kain v. Delano, 11 AbbPrNS 29; Jamison v. Beecher, 4 AbbPr 230; Depew v. Leal, 2 AbbPr 131; Wilmerding v. Cunningham, 65 HowPr 344; Dreyfus v. Otis, 54 HowPr 405; Lord v. Connor, 48 HowPr 95; Evans v. Holmes, 46 HowPr 515.

Oh.—Garner v. White, 23 Oh. St. 192; Dunlevy v. Schwartz, 17 Oh. St. 640; Brennen v. Cist, 9 OhS&CP 18, 6 OhNP 1; Sauer v. Cincinnati St. R. Co., 7 OhS&CP 19, 4 OhNP 252.

Okl.—Cordray v. Cordray, 19 Okl. 36, 91 P 781.

Pa.—Noble v. Kreuskamp, 111 Pa. 68, 2 A 419.

Tex.—Mays v. Lewis, 4 Tex. 38; Baggett v. Sheppard, (Civ. A.) 110 SW 952.

W. Va.—Goodman v. Henry, 42 W. Va. 526, 26 SE 528, 35 LRA 847; State v. Douglass, 41 W. Va. 537, 23 SE 724; Sandheger v. Hosey, 26 W. Va. 221; Delaplain v. Armstrong, 21 W. Va. 211.

Wis.—Phillips v. Portage Transit Co., 137 Wis. 189, 118 NW 539.

N. S.—Gladwin v. Guilford, 40 N. S. 479.

such conclusions are based should be set forth so that the court may draw its own inferences.[88] Thus, where a remedy is given by statute in certain specified cases, an affidavit is not sufficient which merely alleges that the case is one of those mentioned in the statute, without stating the facts from which such conclusion may be drawn.[89]

[§ 77] **j. Scandalous and Impertinent Matter.** An affidavit should be free from scandalous or impertinent matter.[90] When it is introduced into an affidavit, the court has power to order the paper stricken from the files,[91] or, in its discretion, may order the objectionable matter stricken out;[92] and in either case the costs of such proceeding should be assessed against the offending party.[93]

[§ 78] **k. Grammatical and Clerical Errors.** Where the meaning clearly appears from the context an affidavit will not be vitiated by mere grammatical[94]

Ont.—Davidson v. Grange, 5 Ont. Pr. 258.

[a] **Showing "due diligence."**—A statement in an affidavit that the affiant has "used due diligence to obtain the evidence" is insufficient under a statute requiring the affidavit to show that due diligence has been used. A statement to that effect is not a showing. State v. Johnson, 70 Kan. 861, 79 P 732.

[b] **Statement of nonresidence.**—A mere statement of the debtor, in his affidavit, that he does not reside, and has not within five years last past resided, in New York, without a statement of the facts upon which his conclusion is based, is a mere expression of his opinion as to his nonresidence, and is insufficient. Delsalse v. Cassidy, 56 NYS 382.

[c] **The affidavit should state only facts pertinent to the application** and upon which the party relies; it is for the court to draw the inferences and judge of their value. Davidson v. Grange, 5 Ont. Pr. 258.

[d] **An allegation in an affidavit that one is a creditor** is but a statement of a conclusion. Wallace v. Chicago, etc., Stove Co., 46 Ill. A. 571.

[e] **Inference, conjectures, and suspicions.**—In Boreing v. Wilson, 128 Ky. 570, 593, 108 SW 914, 33 KyL 14, the court said: "A careful reading of the whole affidavit leads to the conclusion that it does not come up to the requirements of the law. In German Ins. Co. v. Landram, 88 Ky. 433, 11 SW 867, 592, 10 KyL 1039, the rule is thus stated: 'While the Legislature has said that, if an affidavit "is made by the litigant that the judge will not afford him a fair trial, he shall not preside, the facts upon which this general averment is made must appear, and they must be such as brings the case within the legislative meaning." In this case no such facts are stated. The affidavit is made up of mere inferences, suspicions, and conjectures, and does not comply with the provisions of the Code as interpreted by this court. We are therefore of the opinion that the special judge did not err in refusing to vacate the bench.'"

[f] **Allegation of conclusion held sufficient.**—In Lumley v. Anatron Chemical Co., 56 App. Div. 174, 67 NYS 663, an allegation in an affidavit that a certain corporation was "duly authorized to transact business within the state of New York" was held sufficient on the ground that it is not necessary under the New York system of pleading to set up the evidence which supports the conclusion. It is sufficient to allege the conclusion.

88. Ga.—Baker v. Akerman, 77 Ga. 89.
Kan.—Pemberton v. Hoosier, 1 Kan. 108.
Nev.—Roy v. Whitford, 9 Nev. 370.
N. Y.—Hodgman v. Barker, 60 Hun 156, 14 NYS 574, 20 NYCivProc 341 [aff 128 N. Y. 601 mem, 27 NE 1029, 3 Silv. A. 518, 21 NYCivProc 121]; Westervelt v. Agrumaria Sicula Societa, etc., 58 Hun 147, 11 NYS 340; Mechanics', etc., Bank v. Loucheim, 55 Hun 396, 8 NYS 520; Markey v. Diamond, 19 NYS 181 [aff 20 NYS 847]; Brown v. Keogh, 14 NYS 915; Cattaraugus Cutlery Co. v. Case, 9 NYS 862; Moore v. Becker, 13 NYSt 567; Hinman v. Wilson, 2 HowPr 27; Miller v. Oppenheimer, 2 NYCityCt 408.
Tenn.—Perkins v. Gibbs, 1 Baxt. 171.
W. Va.—Dalaplain v. Armstrong, 21 W. Va. 211.

[a] **Must not allege facts argumentatively.**—An affidavit under N. Y. Code Civ. Proc. § 872, to obtain an order for the examination of plaintiffs before trial, must allege positively and not argumentatively and inferentially the facts going to show the necessity for such examination. Feuchtwanger v. Dessar, 5 NYS 129.

[b] **Formal adjournment of court** is not sufficiently shown by the statement in an affidavit "that thereupon his Honor left the court, which thereupon adjourned." Chichester v. Winton Motor Carriage Co., 110 App. Div. 78, 96 NYS 1006.

[c] **"When a verified petition is used as an affidavit,** its allegations must be construed as those of an affidavit, and must be such statements of fact as would be proper in the oral testimony of a witness. Allegations which are simply conclusions of law, whether sufficient or not as matter of pleading, are incompetent as testimony." Per Brewer, J., in Olmstead v. Koester, 14 Kan. 463 [quot State v. Missouri, etc., Tel. Co., 77 Kan. 774, 776, 95 P 391].

[d] **Affidavit describing managing agent.**—Affidavits used on the hearing of a motion to set aside a service of summons on one claimed to be the managing agent of a fraternal insurance company, which allege that such agent transacted the business of the company, that the deponents knew, of their own knowledge, that she devoted herself solely as an agent of the company, to the transaction of its business for a period of twelve years, and that she is the agent and representative of the company, state mere conclusions. Moore v. Monumental Mut. L. Ins. Co., 77 App. Div. 209, 78 NYS 1009.

[e] **Statement that claim is "due."**—To use the word "due" in an affidavit alleging a claim against an estate is not stating a conclusion of law, as generally in that connection its meaning is simply "owing." Crocker-Woolworth Nat. Bank v. Carle, 133 Cal. 409, 65 P 951.

[f] **That garnishee has property of judgment debtor.**—In a garnishment proceeding the statement in plaintiff's affidavit that the garnishee "has property of said judgment debtor" is not a mere conclusion of law and is a substantial compliance with Cal. Code Civ. Proc. § 717. Coffee v. Haynes, 124 Cal. 561, 57 P 482, 71 AmSR 99.

[g] **The use of the word "agreed" instead of "promised"** in an affidavit stating the terms of a writing is not open to the objection that it states legal conclusions drawn from the agreement, instead of the purport thereof. Merchants' Nat. Bank v. Columbia Spinning Co., 21 App. Div. 383, 47 NYS 442.

89. Grabarski v. Stankowicz, 179 Ill. A. 45 (preliminary injunction without notice); Pepper Distributing Co. v. McLeod, 121 Ill. A. 592; Pindar v. Black, 4 HowPr (N. Y.) 95.

90. Gay v. Torrance, 145 Cal. 144, 78 P 540; Opdyke v. Marble, 18 AbbPr (N. Y.) 375; Powell v. Kane, 5 Paige (N. Y.) 265; Lewis v. Woolrych, 3 Dowl. P. C. 692; Balls v. Smythe, 2 M. & G. 350, 40 ECL 636, 133 Reprint 781; Cassen v. Bond, 2 Y. & J. 531. And see Allen v. Murray, 22 NYS 1051, 23 NYCivProc 53.

91. Gay v. Torrance, 145 Cal. 144, 78 P 540; Allen v. Murray, 22 NYS 1051, 23 NYCivProc 53; Opdyke v. Marble, 18 AbbPr (N. Y.) 375; Cantillon v. Cincinnati, 15 OhS&CP 387; Hamilton v. Perry, 24 Ont. L. 38, 19 OntWR 370, 2 OntWN 1181; Sadleir v. Smith, 7 Ont. Pr. 409.

[a] **Better practice to suppress or take from files.**—"We entertain much doubt as to the propriety of striking out part of an affidavit at any time. Such does not appear to have been the usual practice even in courts of equity, and, before the Code, was never resorted to in courts of law. The decision of the chancellor in Powell v. Kane, 5 Paige (N. Y.) 265, seems, however, to sanction striking out parts of an affidavit as scandalous. The better practice, however, is to suppress the affidavit, and, if it has been filed, to take it from the file." Opdyke v. Marble, 18 AbbPr (N. Y.) 375, 376.

[b] **Matter privileged from disclosure.**—In A. v. B., 14 Man. 729, an affidavit of defendant stating facts which went to show that plaintiff was not legally married to her alleged husband, but was living with him, was ordered to be taken off the files of the court as containing matter which plaintiff was entitled to have treated as privileged from disclosure, the use of which was scandalous and irrelevant.

92. Zimmerer v. Fremont Nat. Bank, 59 Nebr. 661, 81 NW 849 (where it was held that where an affidavit contained objectionable matter a motion to strike out should be confined to such matter, and not directed against the whole affidavit).

93. Cracknall v. Janson, 11 Ch. D. 1, 18 ERC 68; Dufaur v. Sigel, 4 De G. M. & G. 520, 53 EngCh 406, 43 Reprint 610.

[a] **Solicitor and counsel both liable.**—"It is the settled law of the court, that the solicitor who draws a scandalous or impertinent pleading or proceeding, and the counsel who sanctions it with his name, are both personally liable to the adverse party, for the costs of expunging the scandalous or impertinent matter. And, as a general rule, also, such costs should be charged upon them instead of their client, in the first instance, although the client is also liable therefor. (See Robertson v. Graham, 3 Dowl. 273, 279, 3 Reprint 1064.)" Powell v. Kane, 5 Paige (N. Y.) 265, 266.

[b] **Denial of costs.**—In England a party incorporating scandalous and impertinent matter in his affidavit will be deprived of his costs. Thompson v. Dicas, 2 Dowl. P. C. 93; Balls v. Smythe, 2 M. & G. 350, 40 ECL 636, 133 Reprint 781; Cassen v. Bond, 2 Y. & J. 531.

94. Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 P 396.

[a] **Singular instead of plural.**—Where an affidavit filed by one of several appellants used the words "affiant is aggrieved" instead of "affiants are aggrieved," it was held to be a mere clerical error not vitiating the affidavit. Ross v. Davis, 13 Ark. 293.

[b] **Past tense instead of present.**—The use of the past tense instead of the present in an affidavit, as "was" instead of "is," will not ordinarily vitiate it. Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 P 396. But see Howorth v. Hubbersty, 3 Dowl. P. C. 455 (where "said" was used instead of "saith").

[c] **Ungrammatical words** in an affidavit do not vitiate it, provided the meaning is so apparent that an

or clerical[95] errors, nor by the omission of words not material to the sense.[96]

[§ 79] **l. Surplusage.** Mere surplusage will not vitiate an affidavit which is otherwise complete and sufficient.[97]

[§ 80] **m. Prolixity.** In England the court has power to strike affidavits from the files for undue prolixity,[98] or to disallow the costs of so much as shall appear to be of unnecessary length.[99]

[§ 81] **n. Interlineations and erasures.** Affidavits should be free from interlineations and erasures, as they may render it impossible to ascertain with exact certainty what portion of the affidavit was sworn to.[1] Some cases hold that where made they must be noted by the officer before whom the affidavit was taken,[2] although other cases hold this to be unnecessary.[3]

[§ 82] **3. Names and Description of Parties—a. In General.** While the better practice seems to require that the names of all the interested parties be set out in the body of the affidavit,[4] yet according to many authorities this is not indispensable in ordinary cases, and it will suffice if they appear from other parts of the instrument.[5] Where, however, an affidavit is required to be made by a person acting in a representative or other special capacity, the name of affiant and the capacity in which he acts should be stated.[6]

A mistake in the christian name of deponent will

indictment for perjury would lie. Anonymous, Lofft 274, 98 Reprint 648.

95. U. S.—Shook v. Rankin, 21 F. Cas. No. 12,804, 6 Biss. 477.

Ark.—Ross v. Davis, 13 Ark. 293.

Ga.—Buchanan v. Sterling, 63 Ga. 227.

Nebr.—Whipple v. Hill, 36 Nebr. 720, 55 NW 227, 38 AmSR 742, 20 LRA 313.

Okl.—Dunn v. Drummond, 4 Okl. 461, 51 P 656.

Tex.—Huffman v. Hardeman, 1 SW 575; Pierpont v. Pierpont, 19 Tex. 227 ("known" instead of "unknown"); Corrigan v. Nichols, 6 Tex. Civ. A. 26, 24 SW 952; Weis v. Chipman, 3 Tex. Civ. A. 106, 22 SW 225.

Wash.—Graham v. Smart, 42 Wash. 205, 84 P 824; Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 P 396.

Wis.—Ruthe v. Green Bay, etc., R. Co., 37 Wis. 344.

Eng.—Bromley v. Foster, 1 Chit. 562, 18 ECL 307; Anonymous, 1 Chit. 562 note, 18 ECL 307; Hands v. Clements, 1 D. & L. 379; Anonymous, Lofft. 274, 98 Reprint 648.

Ont.—Fisher v. Bradshaw, 2 Ont. L. 128 [aff 4 Ont. L. 162]; Boldrick v. Ryan, 17 Ont. A. 253; Tyas v. Macmaster, 8 U. C. C. P. 446.

[a] **An illiterate deponent** is not answerable for a careless blunder in the wording of the affidavit. McIlroy v. Hall, 25 U. C. Q. B. 303.

96. Huffman v. Hardeman, (Tex.) 1 SW 575; Rex v. Stafford, 5 Dowl. P. C. 238.

[a] **Omission of draftsman.**—In Clark v. Miller, 88 Ky. 108, 113, 10 SW 277, 10 KyL 691, it was said: "It is also contended that the verification is defective upon the ground that the word 'the' is omitted in the statement: 'He says that statements in the foregoing petition are true.' It is manifest it was a mere omission of the draftsman, and as it is, it is substantially sufficient."

[b] **Where the word "dollars" was omitted** from an affidavit, but an account annexed thereto showed the sum intended, it was held that the omission in the affidavit was not material. Jean v. Spurrier, 35 Md. 110.

97. Tanner, etc., Engine Co. v. Hall, 22 Fla. 391; State v. Goodwin, 169 Ind. 265, 82 NE 459; Le Blanc v. Dashiell, 14 La. 274; New Brunswick Steamboat, etc., Co. v. Baldwin, 14 N. J. L. 440; Ladd v. Witte, 116 Wis. 35, 92 NW 365.

98. Hill v. Hart-Davis, 26 Ch. D. 470.

99. Hill v. Hart-Davis, 26 Ch. D. 470; Cracknall v. Janson, 11 Ch. D. 1, 18 ERC 68; In re Skidmore, 1 Jur. N. S. 696.

1. Didier v. Warner, 1 Code Rep. (N. Y.) 42, 2 Edm. Sel. Cas. 41; Williams v. Clough, 1 A. & E. 376, 28 ECL 187, 110 Reprint 1247; Matter of Fagan, 5 C. B. 436, 57 ECL 436, 136 Reprint 948; Chambers v. Barnard, 9 Dowl. P. C. 557. And see Savage v. Hutchinson, 24 L. J. Ch. 232.

[a] **A line drawn through two words in the jurat** of an affidavit, leaving them perfectly legible, is nevertheless an erasure, although the omission or retention of the words will not vary the sense. Williams v. Clough, 1 A. & E. 376, 28 ECL 187, 110 Reprint 1247.

[b] **Alteration previous to swearing.**—An affidavit which has been altered cannot be filed without proof that the alteration was made before the affidavit was sworn. Gill v. Gilbard, 9 Hare appendix xvi, 41 EngCh xvi, 68 Reprint 764.

[c] **Alteration subsequent to swearing.**—An affidavit cannot be used if it is altered after it is sworn. Wright v. Skinner, 5 Dowl. P. C. 92.

[d] **Joint affidavit; erasure in one.**—In Gill v. Gilbard, 9 Hare appendix xvi, 41 EngCh xvi, 681 Reprint 764, a paper was presented containing the affidavits of two persons, but there were certain erasures and alterations in the affidavit of one of them. The vice chancellor rejected that one and allowed the affidavit of the other party to be filed.

2. Doe v. ——, 5 Jur. 531; Boyd v. McNutt, 9 Ont. Pr. 493.

3. Leeming v. Marshall, 5 Ont. Pr. 276; Lyster v. Boulton, 5 U. C. Q. B. 632.

[a] **Where the alteration in an affidavit is an immaterial one,** it is not necessary that the commissioner put his initials opposite the alteration. Matter of Imesom, 8 Dowl. P. C. 651.

4. Ga.—De Leon v. Heller, 77 Ga. 740.

Mich.—Churchill v. Rea, 126 Mich. 175, 85 NW 465; Barber v. Smith, 41 Mich. 138, 1 NW 992.

N. Y.—Irroy v. Nathan, 4 E. D. Smith 68; Burgess v. Stitt, 12 HowPr 401.

Pa.—Hunt v. Lesh, 6 Pa. Dist. 290; Smith v. Bible, 1 Phila. 91.

Wyo.—Blyth, etc., Co. v. Swensen, 7 Wyo. 303, 51 P 873.

[a] **Representative character.**—An affidavit in which the deponent describes herself as "guardian," without showing for what minors or for what estate she is guardian, is insufficient. Reese v. Ryals, 112 Ga. 910, 38 SE 345. See infra text and note 6.

[b] **Plaintiffs should be indicated.**—An affidavit to obtain an attachment is insufficient which does not indicate who were plaintiffs in the action, although made by one of them. Burnside v. Davis, 65 Mich. 74, 31 NW 619.

[c] **Defendant should be named.**—In Hunt v. Lesh, 6 Pa. Dist. 290, the court said: "The affidavit to hold to bail is defective in not naming the defendant in the body of it. It is not sufficient to refer to him as 'the defendant,' for at the time the affidavit was sworn to and filed, there was no defendant."

[d] **Omission of christian name.**—In Barber v. Smith, 41 Mich. 138, 1 NW 992, an affidavit was held insufficient in which the christian names of the parties were omitted and the deponent stated that they were unknown to him.

[e] **Initial letter insufficient.**—In McGrew v. Steiner, 77 N. J. L. 377, 71 A 1122, it was held that it was insufficient to indicate the christian name of one of the parties by the initial letter, but that it must be written in full.

5. Mass.—Clement v. Bullens, 159 Mass. 193, 34 NE 173.

Mont.—Davidson v. Bordeaux, 15 Mont. 245, 38 P 1075.

Nebr.—Rudolf v. McDonald, 6 Nebr. 163.

N. Y.—Peo. v. Sutherland, 81 N. Y. 1; Cunningham v. Doyle, 5 Misc. 219, 25 NYS 476; Morrison v. Watson, 23 NYWklyDig 286.

Ont.—Vansickle v. Boyd, 14 Ont. Pr. 469.

[a] **May appear from signature.**—It has been held that where an affidavit was properly signed the fact that the affiant's name was omitted in the body of the instrument would not affect its validity. Rudolf v. McDonald, 6 Nebr. 163.

[b] **Reference to other parts of instrument.**—It is not a valid objection to an affidavit that in one part of it the parties were referred to merely as defendants if their names were set out in full in other parts of the instrument. Becker v. Linton, 80 Nebr. 655, 114 NW 928, 127 AmSR 795.

[c] **Initial of second name.**—The fact that the second christian name of the deponent in the body of the affidavit is not written out in full, but only the initial letter is given, is not fatal. Folger v. McCallum, 1 Ont. Pr. 352; DeForrest v. Bunnell, 15 U. C. Q. B. 370.

[d] **Misrecital treated as clerical error.**—Where an affidavit was signed and sworn to by Charles H. Lee, but began by the recital, "Fred B. Lee, of said county, being duly sworn," etc., it was held that the legal effect of the affidavit was the same as if the name of affiant had not been recited at all in the body thereof, and such misrecital was treated as a clerical error. Torrans v. Hicks, 32 Mich. 307.

[e] **Affidavit signed by another** when purporting to be made by plaintiff is void. Maniscalco v. Slamowitz, 123 App. Div. 690, 108 NYS 65.

6. Peo. v. Sutherland, 81 N. Y. 1.

[a] **Where statute prescribes who may make.**—Where a statute specifically prescribes what persons may make an affidavit, and requires it to be shown that affiant is one of the specified persons, a failure to show this renders the affidavit defective. Steinbach v. Leese, 27 Cal. 295; State v. Washoe County, 5 Nev. 317.

[b] **An affidavit in supplementary proceedings** is insufficient if it fails to show that it was made by the judgment creditor, or his attorney, or someone authorized to make it in his behalf. Brown v. Walker, 8 NYS 59 [aff 121 N. Y. 717, 24 NE 1101].

[c] **Affidavit by agent; immaterial mistake.**—An affidavit of attachment signed by plaintiff's agent, which, in describing the nature of the claim, inadvertently stated that "plaintiff" makes oath, instead of using the word "affiant," is not defective. Whipple v. Hill, 36 Nebr. 720, 55 NW 227, 38 AmSR 742, 20 LRA 313.

[d] **Description of agent.**—Affidavit to put case on short-cause calendar: "William C. Malley, being first duly sworn . . . says that he is . . . agent in this behalf of the plaintiff . . . and that he verily believes the trial . . . will not occupy more than one hour's time," states affiant's belief, the second "he" therein necessarily referring to him and not to plaintiff. Angus v. Sullivan, 166 Ill. 461, 462, 46 NE 1079 [aff 68 Ill. A. 423].

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not invalidate an affidavit.[7]

Misplacement of names of the parties will not necessarily affect the validity of an affidavit.[8]

"Credible person." Where a statute required that an affidavit be made by a "credible person" it has been held that this fact need not be alleged in the body of the instrument.[9]

Addition. In England and Canada a rule of court required that a description, termed an "addition," of every person making an affidavit should be inserted therein.[10]

The residence of the deponent, it has been held in some cases, should be given;[11] in other cases this has not been required.[12]

[§ 83] **b. Description of Partnership.** Where an affidavit is made for use in an action by or against a partnership it is usually sufficient to describe the partnership by its firm name.[13]

[§ 84] **c. Affidavit of Corporation.** Where an affidavit is made in behalf of a corporation, the affidavit should describe affiant sufficiently to show that he is a person authorized to perform such act.[14]

7. See cases infra this note.

[a] **Mistake of name in nonessential part.**—An error in the christian name of a person, in a part of the affidavit which may be treated as surplusage, will not vitiate the affidavit. Selman v. Shackelford, 17 Ga. 615.

[b] **Clerical error.**—A mistake in the christian name of defendant in an affidavit is merely clerical and will not vitiate the proceedings. Davidson v. Martin, 33 Miss. 530.

8. Churchill v. Rea, 126 Mich. 175, 85 NW 465.

[a] **Naming defendants for plaintiffs.**—Where a clerical error in an affidavit, such as substituting in one place the names of defendants for those of plaintiffs, is manifest upon its face, it will not vitiate the affidavit. Churchill v. Rea, 126 Mich. 175, 85 NW 465.

9. Dodson v. State, 35 Tex. Cr. 571, 34 SW 754; Ruhl v. Rogers, 29 W. Va. 779, 2 SE 798.

10. Sharp v. Johnston, 2 Bing. N. Cas. 246, 29 ECL 522, 132 Reprint 97; Brown's Bail, 5 Dowl. P. C. 220; Daniels v. May, 5 Dowl. P. C. 83; Nathan v. Cohen, 3 Dowl. P. C. 370; Lawson v. Case, 2 Dowl. P. C. 40; Babcock v. Bedford Municipal Council, 8 U. C. C. P. 530.

[a] **Word "elder" need not be added.**—An affidavit need not specify that the affiant is "the elder," for where no addition is used it will be presumed that he is so. Young v. Young, 6 Jur. 916.

[b] **Prisoner needs no description.**—The affidavit of a prisoner in the fleet has been held sufficient where it appears that he was a prisoner. Sharp v. Johnston, 2 Bing. N. Cas. 246, 29 ECL 522, 132 Reprint 97.

[c] **Misdescription of one affiant.**—Where an affidavit is joint, the misdescription of one deponent renders only his part of the affidavit objectionable, the statements of the other deponents being still admissible. Ex p. Edmonds, 5 Dowl. P. C. 702; Nathan v. Cohen, 3 Dowl. P. C. 370.

[d] **It has been held that the word "assessors"** is not a sufficient description of an affiant. Nathan v. Cohen, 3 Dowl. P. C. 370.

[e] **Where the affiant's place of abode is stated,** together with the fact that he is the "assignee and agent of the above plaintiffs," the affidavit is not insufficient for want of a sufficient statement of the addition of the affiant. Ewing v. Lockhart, 3 U. C. Q. B. 248.

[f] **Persons excepted from operation of rule.**—"It is now an established rule that affidavits sworn by the plaintiff or defendant in the cause, are excepted from the operation of Rule 5, of H. T., 2 Wm. 4, and that the addition and degree of such persons need not be inserted in the description of the deponent, but they may describe themselves as such plaintiff or defendant respectively." Shirer v. Walker, 9 Dowl. P. C. 667.

[g] **A defendant in a cause** need not give his addition when making an affidavit. Brooks v. Farlar, 5 Dowl. P. C. 361; Poole v. Pembrey, 1 Dowl. P. C. 693.

[h] **Mortgagee.**—"The want of any addition given to the mortgagee in his affidavit made for the purpose of registering this chattel mortgage, cannot be treated by us as making void the registration. The Chattel Mortgage Act does not direct that the deponent's addition shall be inserted. He is sufficiently identified as being the mortgagee. Our rule of court requiring the addition of the deponent to be inserted has no application to an affidavit made for such a purpose as this." Brodie v. Ruttan, 16 U. C. Q. B. 207, 209.

11. Daniels v. May, 5 Dowl. P. C. 83; Babcock v. Bedford Municipal Council, 8 U. C. C. P. 527.

[a] **Omission of state.**—An affidavit is not fatally defective in stating the residence of a person to be in the city of New York, as the court will take judicial notice of the fact that the said city is in the state of New York. Boardman v. Ewing, 3 Stew. & P. (Ala.) 293.

[b] **Recital insufficient.**—Where a statute requires that the residence of the deponent should be given, it will not be sufficient to give it merely by way of recital. Payne v. Young, 8 N. Y. 158; Staples v. Fairchild, 3 N. Y. 41.

[c] **Residence should be alleged positively.**—"An affidavit in supplementary proceedings which follows the alternative wording of the statute—that the defendant is a resident or has a place of business within the county, is not sufficient (Lee v. Heirberger, 1 CodeRep (N. Y.) 38). It should allege either 'that the defendant is a resident,' or 'that he has a place of business [within] the county,' for either will suffice. If it be true that the defendant is a resident and also has a place of business within the county, the fact ought to be alleged in the conjunctive, in order to satisfy the rules of practice." Kellogg v. Freeman, 2 NYCityCt 147, 148.

[d] **City and county.**—"With respect to the third objection, it appears to us that the statement in the affidavit that the applicant is a resident of Kingston, coupled with the previous statement that he is of the City of Kingston, in the County of Frontenac, is quite sufficient." In re Kinghorn, 26 U. C. Q. B. 130, 133.

12. Temperance, etc., Assur. Co. v. Ingraham, 35 N. B. 510.

[a] **Residence of corporation.**—It has been held that the omission of the words "of California" after the name of a defendant corporation in an affidavit was not fatal, as they were words describing the situs of the corporation and not its name. Nickerson v. Leader Mercantile Co., 90 Mo. A. 336.

[b] **Affidavit by attorney's clerk.**—Where an affidavit is made by an attorney's clerk, it is unnecessary to state his residence, that of the attorney being sufficient. Strike v. Blanchard, 5 Dowl. P. C. 216.

13. Mandel v. Peet, 18 Ark. 236; De Leon v. Heller, 77 Ga. 740.

[a] **Contrary holding disapproved.**—In Bennett v. Zabriski, 2 N. M. 7, it was held that where an affidavit is made by a partnership it must set out the names of the individuals who compose the firm. This case was disapproved, however, in Robinson v. Hesser, 4 N. M. 144, 13 P 204, where it was said that the court in the earlier case had based its decision upon a statute which did not apply to the facts in that case.

[b] **Not necessary to give names of partners.**—Where it appeared from an affidavit made for a company that it was located at a certain place, that V was its agent, and that it was the concern with which defendants had the dealings which were the basis of the suit, it was held that the affidavit sufficiently described who was the real plaintiff, although the names of the copartners of the company were not given. Emerson v. Detroit Steel, etc., Co., 100 Mich. 127, 58 NW 659.

[c] **Better practice to give names of partners.**—In Johnston v. Smith, 83 Ga. 779, 10 SE 854, it was held that while it was the better practice that the names of the persons who compose the partnership should be set out in the affidavit, yet a failure to do so would not render it void.

[d] **Description sufficient.**—In Bridges v. Center First Nat. Bank, 47 Tex. Civ. A. 454, 455, 105 SW 1018, it was said: "It is further objected to the affidavit that it charges only that the firm of B. F. Bridges & Son and the members of that firm are about to dispose of their property, and does not charge that either or both of said individual members composing the firm are about to dispose of their property. The affidavit sets out that the defendants B. F. Bridges & Son, composed of B. F. Bridges and W. A. Bridges, a private partnership, are justly indebted to the plaintiff, and that 'said defendants named in the affidavit are about to dispose of their property,' etc. It was not necessary to charge that each of said defendants composing the firm was about to dispose of his property. The objection was properly overruled."

[e] **Statement of names in body sufficient.**—It has been held that where an affidavit was made by one of the members of a partnership for the benefit of the firm it was sufficient if the members of the firm were indicated in the body of the instrument by their individual names. Stever v. Brown, 119 Mich. 196, 77 NW 704.

14. Del.—St. Joseph's Polish Catholic Ben. Soc. v. St. Hedwig's Church, 19 Del. 229, 50 A 535; Blades Lumber Co. v. Kent, etc., Lumber Co., 16 Del. 302, 43 A 174. Compare Wilmington Sash, etc., Co. v. Taylor, 25 Del. 528, 82 A 86 (holding that the facts showing authority must be sworn to).

Mich.—Forbes Lith. Mfg. Co. v. Winter, 107 Mich. 116, 64 NW 1053.

Mo.—White Sewing Mach. Co. v. Betting, 53 Mo. A. 260.

Tex.—Cleburne First Nat. Bank v. Graham, (A.) 22 SW 1101.

Wyo.—Blyth, etc., Co. v. Swensen, 7 Wyo. 303, 51 P 873.

Who may make affidavits in behalf of corporations see supra §§ 25–29.

[a] **Need not state that plaintiff is corporation.**—There is no necessity that an affidavit should state that which appears conclusively of record, as the fact that plaintiff is a corporation. D. M. V. Live Stock Ins. Co. v. Henderson, 38 Iowa 446.

[b] **May appear from jurat.**—Where the statute under which an affidavit is made does not require that when an affidavit is made by an officer of a corporation it shall be stated that he is such officer, but such recital is necessary only for the satisfaction of the court, such recital need not appear in the body of the affidavit, and it is sufficient if it is contained in the jurat.

[§ 85] **4. Showing Oath or Affirmation.** It has been held that it must appear from the body of the instrument that the affiant swears to the statements which it contains;[15] and several English cases hold that this must be shown by the use of the word "oath."[16] But other authorities hold that it is not necessary to state in the body of the instrument that the affiant had been sworn to or was under oath.[17]

[§ 86] **5. Knowledge or Information of Affiant—a. Positive Allegation.** Material facts within the personal knowledge of affiant must be alleged directly and positively, not on information and belief.[18]

New Brunswick Steamboat, etc., Co. v. Baldwin, 14 N. J. L. 440.

[c] **Agent of corporation.**—In Moline, etc., Co. v. Curtis, 38 Nebr. 520, 57 NW 161, it was held that an affidavit for attachment was not void, although it purported in its opening clause to be that of a corporation, where it appeared in connection with what followed to be that of an agent of the corporation and that he made the oath thereto and signed it.

[d] **Managing agent.**—An affidavit was made on behalf of a corporation and was signed with the corporate name by the name of an individual with the addendum "managing agent." There was nothing in the body of the instrument to indicate whether it was the oath of the corporation or of the individual. It was held that it should appear from the body of the instrument who the affiant was and in whose behalf he was acting. Blyth, etc., Co. v. Swensen, 7 Wyo. 303, 51 P 873.

[e] **Where an affidavit is made by the treasurer of a corporation** his official character should be stated in the body of the affidavit. St. Joseph's Polish Catholic Ben. Soc. v. St. Hedwig's Church, 19 Del. 229, 50 A 535.

[f] **Attorney of corporation.**—An affidavit which begins by reciting: "Silver Peak Mines, a corporation, the plaintiff above named, by M. A. Murphy, its attorney, being duly sworn," etc., although irregular in form, is not a nullity, the true interpretation thereof being that it is the affidavit of M. A. Murphy who is the attorney of the corporation. Silver Peak Mines v. Hanchett, 80 Fed. 990.

15. Kehoe v. Rounds, 69 Ill. 351; Cosner v. Smith, 36 W. Va. 788, 15 SE 977.

[a] **Objection must be taken in trial court.**—In Merrielles v. Keokuk Bank, 5 Tex. Civ. A. 483, 24 SW 564, it was held that the omission of the word "sworn" in an affidavit must be taken advantage of in the trial court and could not be considered where an objection was taken for the first time on appeal.

[b] **Sufficiency of averments.**—Where an affidavit taken before an election board expressly states that the affidavit was "duly sworn," and the jurat signed by the judge of the election is to the same effect, it will be presumed that the affidavit was in fact sworn. Com. v. McCue, 46 Pa. Super. 416.

16. Allen v. Taylor, L. R. 10 Eq. 52; Oliver v. Price, 3 Dowl. P. C. 261; Doe v. Clark, 2 Dowl. P. C. N. S. 393; Phillips v. Prentice, 2 Hare 542, 24 EngCh 542, 66 Reprint 224.

[a] **Not cured by statement in jurat.**—An affidavit in which the word "oath" is accidentally omitted in its proper place is insufficient and informal, and will not be received by the court, even though in the jurat it purports to have been duly sworn. Oliver v. Price, 3 Dowl. P. C. 261; Phillips v. Prentice, 2 Hare 542, 24 EngCh 542, 66 Reprint 224; Jacobs v. Magnay, 7 Jur. 326. Necessity for jurat to show that the affidavit was sworn to see infra § 105.

17. Loeb v. Smith, 78 Ga. 504, 3 SE 458; Veal v. Perkerson, 47 Ga. 92; Miller v. Caraker, 9 Ga. A. 255, 71 SE 9.

[a] **English rule rejected.**—"Now, on account of the requirement in England that in the body of the affidavit itself the words 'upon oath,' or 'being sworn,' should be used, it has been held in a number of English cases that the omission of these words is fatal, even though the jurat attests the fact that the statements of the affidavit were made under oath or were sworn to. This strictness of the British courts was noticed and commented on in the case of Veal v. Perkerson, 47 Ga. 92, and the fact was also stated in that case that such formality was not observed in Georgia. It may be safely said that if one should have before him all of the affidavits which have ever been made in connection with judicial proceedings in this State, from its organization down to the present time, he would hardly find in 10 per cent. of them the statement of the affiant himself that he was sworn or that he was under oath; for, while affidavits occasionally begin, 'I, the affiant, do swear,' or, 'I, the affiant, on oath, do say,' still the most common form of introducing an affidavit is, 'Personally appeared before me, the undersigned, an officer authorized to administer oaths, the affiant [naming him], who, on oath [or, who being duly sworn], deposes and says.'" Powell, J., in Miller v. Caraker, 9 Ga. A. 255, 257, 71 SE 9. And see Rex v. McKimm, 2 OntWR 162, 163 (where it is said: "It is true that in the cases cited by Mr. Watson affidavits without the words 'make oath and say' were not admitted until resworn after being altered. In the first mentioned case James, V.-C., held that the affidavit must be altered and resworn unless the other side waived the objection. It was, however, held in In re Torkington, L. R. 9 Ch. 298, that an affidavit, omitting by mistake the words 'severally make oath and say,' having been filed, it was too late to object to it. . . . It is clear from the above cases that the affidavit in question is only irregular, and not invalid, as was contended. It was the duty of the respondent . . . to move to set aside the proceedings in consequence of such irregularity, and that within a reasonable time, under Rule 311").

18. Ark.—Waggoner v. Fogleman, 53 Ark. 181, 13 SW 729; Hellman v. Fowler, 24 Ark. 235.

Cal.—Gay v. Torrance, 145 Cal. 144, 78 P 540; Moore v. Thompson, 138 Cal. 23, 70 P 930; Peo. v. Findley, 132 Cal. 301, 64 P 472; Forbes v. Hyde, 31 Cal. 342; Pelegrinelli v. McCloud River Lumber Co., 1 Cal. A. 593, 82 P 695.

Ga.—Early v. Oliver, 63 Ga. 11; Brown v. Driggers, 60 Ga. 114.

Ill.—Groves, etc., R. Co. v. Herman, 206 Ill. 34, 69 NE 36; Booth v. Rees, 26 Ill. 45; Frink v. Flanagan, 6 Ill. 35; Ætna Indemn. Co. v. Spencer, 135 Ill. A. 54; DeWitt v. Flint, etc., Mfg. Co., 132 Ill. A. 356.

Ind.—Marshall v. Matson, 171 Ind. 238, 86 NE 339.

Kan.—Ft. Scott v. Elliott, 68 Kan. 805, 74 P 609; Thompson v. Higginbotham, 18 Kan. 42; Atchison v. Bartholow, 4 Kan. 124; Aiken v. Franz, 2 Kan. A. 75, 43 P 306.

Mich.—Gardiner v. Wayne Cir. Judge, 155 Mich. 414, 119 NW 432.

Mont.—Wetzstein v. Boston, etc., Cons. Copper, etc., Min. Co., 26 Mont. 193, 66 P 943.

Nebr.—Clarke v. Nebraska Nat. Bank, 57 Nebr. 314, 77 NW 805, 73 AmSR 507.

N. J.—Den v. Fen, 10 N. J. L. 237.

N. Y.—Elder v. Bingham, 118 App. Div. 25, 103 NYS 617 [aff 189 N. Y. 509, 81 NE 1163]; Whitlock v. Roth, 10 Barb. 78; Kuh v. Barnett, 57 N. Y. Super. 234, 6 NYS 881; Carbonating Apparatus Co. v. Bennett, 56 Misc. 47, 105 NYS 1052; Mole v. New York, etc., R. Co., 53 Misc. 22, 102 NYS 308; Wolter v. Liebmann, 52 Misc. 517, 102 NYS 487; Claflin v. Baere, 57 How Pr 78.

N. D.—Kaeppler v. Red River Valley Nat. Bank, 8 N. D. 406, 79 NW 869.

Oh.—Garner v. White, 23 Oh. St. 192; Dunlevy v. Schartz, 17 Oh. St. 640.

Okl.—Shanholtzer v. Thompson, 24 Okl. 198, 103 P 595, 138 AmSR 877; Cordray v. Cordray, 19 Okl. 36, 91 P 781.

Or.—State v. Conn, 37 Or. 596, 62 P 289.

Pa.—Winsor v. Farmers', etc., Nat. Bank, 81* Pa. 304.

R. I.—Greene v. Tripp, 11 R. I. 424.

Tex.—Justice v. State, 45 Tex. Cr. 462, 76 SW 437; Smith v. State, 45 Tex. Cr. 411, 76 SW 436.

W. Va.—Quesenberry v. People's Bldg., etc., Assoc., 44 W. Va. 512, 30 SE 73.

Wis.—Phillips v. Portage Transit Co., 137 Wis. 189, 118 NW 539.

Eng.—Bidder v. Bridges, 26 Ch. D. 1; Willes v. James, 1 Dowl. P. C. 498; Reg. v. Manchester, etc., R. Co., 2 Jur. 857.

Ont.—Barr v. McMillan, 7 Ont. L. 70, 3 OntWR 189, 297 [aff 7 Ont. L. 672]; Baley v. Brown, 2 U. C. Q. B. 99.

[a] **Showing want of personal knowledge.**—"This affidavit is hearsay on its face, as the affiant says: 'I verily believe from the information given me by said association that there is not any sum due from it to the plaintiff upon the demands stated in the plaintiff's declaration, by reason the plaintiff did not have a right of action at the time of the institution of this suit.' So it is not only not on his personal knowledge, but positively discloses that it is not, and is therefore incompetent and insufficient." Quesenberry v. People's Bldg., etc., Assoc., 44 W. Va. 512, 517, 30 SE 73.

[b] **Refusal of party having knowledge to make affidavit.**—It is no excuse for making an affidavit on information and belief that the persons who knew the facts had refused to make affidavit. Gay v. Torrance, 145 Cal. 144, 78 P 540; In re Pearce, [1899] 2 Ch. 50.

[c] **Sufficient allegations.**—An affidavit that defendant had left the country to avoid the service of summons, "as shown by the return of the constable," is not on information and belief, the reference to the return being made as evidence. Webster v. Daniel, 47 Ark. 131, 14 SW 550.

[d] **Proper allegation not affected by preliminary statement.**—If the facts are alleged in an affidavit upon the knowledge of affiant, a preliminary statement that the facts stated upon affiant's knowledge are true, and that as far as they are stated upon information he believes them to be true, does not affect the validity of the affidavit. Wheat v. Ragsdale, 27 Ind. 191.

[e] **"As deponent has since learned."**—In Cummings v. Woolley, 16 AbbPr (N. Y.) 297 note, it was held that an averment of a fact, "as deponent has since learned," amounted to a positive allegation, not an allegation on information and belief.

[f] **An affidavit by an attorney or agent** should be as positive as if made by the party himself. Boston Mercantile Co. v. Ould-Carter Co., 123 Ga. 458, 51 SE 466; Frink v. Flanagan, 6 Ill. 35; Dummer v. Nungesser, 107 Mich. 481, 65 NW 564; Wicker v. Elmira Heights, 42 App. Div. 426, 59 NYS 130; Pallady v. Beatty, 15 Okl. 626, 83 P 428. Affidavits made by agents or attorneys see supra §§ 19–22.

[g] **"The true criterion would seem to lie** in the willingness of the witness to make a positive statement. If his information and knowledge are such that he will make a positive statement of the fact in question upon

Sometimes, moreover, a statute providing for the making of an affidavit requires the facts to be positively stated, and where this is the case an affidavit on information and belief cannot be received.[19] Where statements are made positively they are generally presumed to be based upon the affiant's personal knowledge;[20] and it has been held that the affidavit will be presumed to have been made on his personal knowledge if the facts are of such a character that he may have known them, and it does not appear that he did not;[21] but where it appears that affiant could have had no personal knowledge as to material allegations the affidavit is defective.[22] Where the essential facts have been stated positively, an additional statement of information and belief is harmless.[23]

[§ 87] **b. Information and Belief—(1) In General.** Oftentimes affiant's knowledge of matters stated in his affidavit must of necessity rest upon information derived from others, and where this is the case it is generally sufficient if he aver that such matters are true to the best of his knowledge and belief.[24] Belief is to be considered an absolute term in this connection; hence, to swear that one believes

oath, his evidence is to be received, though the weight to be given it might be small by reason of the nature and extent of the information and knowledge from which he testifies. On the other hand, if he has a belief or opinion, but is not so completely satisfied of the fact that he will testify to it directly, but merely states his belief, then the bare statement of what he believes, but will not state positively upon his oath, is not to be received, unless the case is one where an affidavit as to his belief only is required." Per Pound, C., in Leigh v. Green, 64 Nebr. 533, 537, 90 NW 255, 101 AmSR 592 [aff reh 62 Nebr. 344, 86 NW 1093, 89 AmSR 751, and aff 193 U. S. 79, 24 SCt 390, 48 L. ed. 623].

19. Kan.—Thompson v. Higginbotham, 18 Kan. 42; Atchison v. Bartholow, 4 Kan. 124; Campbell v. Hall, McC. 53.
Nebr.—Lewis v. Connolly, 29 Nebr. 222, 45 NW 622.
N. Y.—Gawtry v. Doane, 51 N. Y. 84.
Man.—Canada Supply Co. v. Robb, 20 Man. 33.
Ont.—Re McLeod, 5 OntWN 145 (mining act).

[a] **Positively and unequivocally allege.**—In Dyer v. Flint, 21 Ill. 80, 74 AmD 73, it was held that an affidavit for attachment must positively and unequivocally allege the statutory requirement, and that allegations made on information and belief were not sufficient. For a similar holding under the Georgia statute see Neal v. Gordon, 60 Ga. 112.

20. Pierson v. Freeman, 77 N. Y. 589; Hayden v. Mullins, 76 App. Div. 69, 78 NYS 553; Wicker v. Elmira Heights, 42 App. Div. 426, 59 NYS 130; Bruen v. Nickels, 30 App. Div. 396, 51 NYS 352; Hanson v. Marcus, 8 App. Div. 318, 40 NYS 951; Ladenburg v. Commercial Bank, 5 App. Div. 219, 39 NYS 119; Evans v. Holmes, 46 How Pr (N. Y.) 515.
"The true rule seems to be that statements in affidavits will be presumed to have been made on personal knowledge, unless stated to have been on information and belief, and unless it appears affirmatively and by fair inference that they could not have been and were not on such knowledge." Crowns v. Vail, 51 Hun 204, 206, 4 NYS 324. But see U. S. v. Moore, 26 F. Cas. No. 15,803, 2 Lowell 232 (where it was held that an affidavit to the existence of a fact does not import that affiant has personal knowledge thereof unless so stated, or the fact is of such a character that he must have personal knowledge).

[a] **"Any person familiar with the facts."**—Under a statutory provision allowing a certain affidavit to be made by "any person familiar with the facts," it was held that such affidavit need not recite that affiant was familiar with the facts. Muirhead v. Sands, 111 Mich. 487, 69 NW 826.

21. James E. Pepper Distributing Co. v. Alexander, 137 Ill. A. 369, 372 [quot Cyc]; Crowns v. Vail, 51 Hun 204, 4 NYS 324; Hartley v. Weideman, 28 Pa. Super. 50.

[a] **Facts taken as true on appeal.**—Where an affidavit for an arrest states the facts positively, and such facts may possibly have been within affiant's knowledge and are not disputed or denied by defendant, the court on appeal may take such facts as true. Pierson v. Freeman, 77 N. Y. 589.

22. Ferris v. Commercial Nat. Bank, 158 Ill. 237, 41 NE 1118; Hodgman v. Barker, 60 Hun 156, 14 NYS 574, 20 NYCivProc 341 [aff 27 NE 1029, 3 Silv. A. 518, 21 NYCivProc 121]; Re McLeod, 5 OntWN 145 (affidavit made on guesswork turning out to be true held insufficient).

[a] **Where an affidavit was couched in such general terms** as to include facts which affiant could not know of his own personal knowledge, it was held that it might be entirely discredited. Cook v. De la Garza, 13 Tex. 431.

23. U. S.—In re Keller, 36 Fed. 681.
Ga.—Howard v. Munford, 80 Ga. 166, 4 SE 907.
Ill.—Grace v. Oakland Bldg. Assoc., 166 Ill. 637, 46 NE 1102 [rev as to other points 63 Ill. A. 339].
Nebr.—Leigh v. Green, 64 Nebr. 533, 90 NW 255, 101 AmSR 592 [aff 193 U. S. 79, 24 SCt 390, 48 L. ed. 623].
N. Y.—Pratt v. Stevens, 94 N. Y. 387; Blatchford v. Paine, 24 App. Div. 140, 48 NYS 783.
Tex.—Webb v. Texas Christian Univ., 48 Tex. Civ. A. 264, 107 SW 86.

[a] **Essential facts stated positively.**—In Crane Co. v. Epworth Hotel Constr., etc., Co., 121 Mo. A. 209, 98 SW 795, the affidavit was positive in regard to every statement required by the statute to entitle the affiant to a mechanic's lien, except as to the name of the owner of the property sought to be charged with the lien. This only was stated on information and belief. It was held sufficient, as all the essential facts were sworn to positively, and it would be a harsh rule to require the lienor to swear positively in every instance to the name of the true owner of the freehold, a fact that may be difficult to ascertain, especially where there are rival claimants.

24. U. S.—Casey v. Cincinnati Typographical Union No. 3, 45 Fed. 135, 12 LRA 193; In re Keller, 36 Fed. 681 ("as said deponent verily believes").
Cal.—Gay v. Torrance, 145 Cal. 144, 78 P 540; Rue v. Quinn, 137 Cal. 651, 66 P 216, 70 P 732; Fleming v. Wells, 65 Cal. 336, 4 P 197.
Ill.—Grace v. Oakland Bldg. Assoc., 166 Ill. 637, 46 NE 1102; Hays v. Loomis, 84 Ill. 18.
Ind.—Champ v. Kendrick, 130 Ind. 549, 30 NE 787; Curry v. Baker, 31 Ind. 151 ("as he is informed and verily believes").
Iowa.—Jordan v. Wapello County Cir. Ct., 69 Iowa 177, 28 NW 548, 58 AmR 218.
Mass.—Clement v. Bullens, 159 Mass. 193, 34 NE 173.
Mo.—Steamboat Osprey v. Jenkins, 9 Mo. 643 ("true to the best of his knowledge").
Nebr.—Leigh v. Green, 62 Nebr. 344, 86 NW 1093, 89 AmSR 751 [aff reh 64 Nebr. 533, 90 NW 255, 101 AmSR 592 (aff 193 U. S. 79, 24 SCt 390, 48 L. ed. 623)].
N. Y.—Pratt v. Stevens, 94 N. Y. 387 ("to deponent's best knowledge, information and belief"); Miller v. Adams, 52 N. Y. 409; Meade v. Southern Tier Masonic Relief Assoc., 119 App. Div. 761, 104 NYS 523; Hart v. Ogdensburg, etc., R. Co., 67 Hun 556, 22 NYS 401; Whitlock v. Roth, 10 Barb. 78; Tefft v. Epstein, 7 NYS 897, 17 NYCivProc 168 [foll Grinnel v. Sherman, 11 NYS 682, 19 NYCivProc 139]; City Bank v. Lumley, 28 HowPr 397.
N. C.—Paige v. Price, 78 N. C. 10.
Oh.—Sauer v. Cincinnati St. R. Co., 7 OhS&CP 19, 4 OhNP 252, 8 OhS&CP 473, 5 OhNP 66 dis. op.
Pa.—Election Cases, 65 Pa. 20 ("to the best of affiant's knowledge and belief").
Tenn.—Phipps v. Burnett, 96 Tenn. 175, 33 SW 925.
Tex.—Ex p. Dupree, 101 Tex. 150, 105 SW 493; Paine v. Carpenter, 51 Tex. Civ. A. 191, 111 SW 430; Young v. Jackson, 50 Tex. Civ. A. 351, 110 SW 74; Bracht v. Bracht, (Civ. A.) 107 SW 895.
Va.—Jackson v. Webster, 6 Munf. (20 Va.) 462.
W. Va.—Kesler v. Lapham, 46 W. Va. 293, 33 SE 289.
Eng.—In re Young Mfg. Co., [1900] 2 Ch. 753; Bidder v. Bridges, 26 Ch. D. 1; Bird v. Lake, 1 Hem. & M. 111, 71 Reprint 49, 6 ERC 545.
B. C.—Chong v. McMorran, 8 B. C. 261.

[a] **Following language of statute.**—An affidavit that the statements contained in a notice of lien are true to the knowledge or information and belief of affiant is good, such being the language of the statute. Cunningham v. Doyle, 5 Misc. 219, 25 NYS 476.

[b] **Sufficient compliance with statute.**—An affidavit, appended to an appraisement by appraisers, that "the foregoing appraisement is correct to the best of our judgment" is sufficient under a statute requiring an affidavit that "the same is in all respects a true assessment to the best of their judgment and belief." Large v. Keens Creek Drain. Co., 30 Ind. 263, 95 AmD 696.

[c] **Common sense construction of statute.**—"Where a showing by affidavit is required as to facts which are necessarily matters of information and belief, an affidavit on information and belief ought to suffice. The statute should receive a construction in accordance with common sense. It was not intended to require perjury, and, as it requires affidavit to matters involving legal opinion and conclusions of law and fact, it must contemplate that such affidavit will be made upon the only basis on which such opinions and conclusions can be reached." Pound, C., in Leigh v. Green, 64 Nebr. 533, 537, 90 NW 255, 101 AmSR 592 [aff reh 62 Nebr. 344, 86 NW 1093, 89 AmSR 751, aff 193 U. S. 79, 24 SCt 390, 48 L. ed. 623, and quot with appr Smith v. Collis, 42 Mont. 350, 112 P 1070, AnnCas1912A 1158].

[d] **Statute must have reasonable construction.**—"Whenever the statute, either in express terms or by implication, requires a person to make a statement which from the very nature of things can only be made on information and belief, an affidavit in that form meets the demands of the statute. It is impossible for anyone to swear positively that a particular person is a nonresident of this state, or to say that a nonresident resides

a thing to be true is equivalent to swearing that it is true,[25] and perjury may be assigned on such affidavit if false.[26]

[§ 88] **(2) Showing Sources of Information.** Where the affiant speaks from personal knowledge the source of his knowledge or his means of information need not be stated.[27] When it is permissible, however, to make an affidavit on information and belief, the sources of the information and the grounds of belief must be stated.[28] Thus, if the conclusions

at a particular place. In requiring these facts to be stated, the statute does not demand the impossible, and certainly does not contemplate that a false statement shall be made. It does intend that the person making the affidavit for publication shall state these facts upon information and belief—the only possible ground upon which they can be made." Holloway, J., in Smith v. Collis, 42 Mont. 350, 363, 112 P 1070, AnnCas1912A 1158.

[e] **"Good reason to believe" facts stated.**—An affidavit stating that defendant, "as this deponent has good reason to believe, has disposed of his property," etc., was held to be sufficiently positive in its allegation that affiant had good reason to believe the facts stated. Nicolls v. Lawrence, 30 Mich. 395.

[f] **Where an affidavit is made by the attorney of an absent party,** it is sufficient if the statements are based upon information and belief. State v. Second Judicial Dist. Ct., 38 Mont. 415, 100 P 207.

[g] **Affidavit made by agent of party.**—Where an affidavit recited that affiant says "that he is the duly authorized agent in this behalf of the plaintiff, and that he verily believes," etc., it was held that such affidavit was not defective on account of uncertainty as to whether the statement was made on the belief of affiant or that of plaintiff. Angus v. Sullivan, 166 Ill. 461, 46 NE 1079.

[h] **So the affidavit of an agent** upon information and belief is sufficient to authorize the issuance of an attachment under Ky. Civ. Code §§ 222, 223, where plaintiff is absent from the county. Civ. Code § 611; Franklin Sav. Inst. v. Wheeling M. M. Bank, 1 Metc. (Ky.) 156.

[i] **Agent not expected to swear to what is in principal's mind.**—Where the agent of a nonresident plaintiff makes an affidavit in behalf of his principal, in which he recites his agency and states that he fears that the property will be removed, etc., it is not insufficient because it is not stated that plaintiff fears the removal of the property, the statute contemplating that such fear shall exist in the mind of the person making the affidavit. It is not intended that an agent should swear what is in the mind of his principal who is a great distance away and perhaps ignorant of the facts. Cahn v. Jaffray, 12 Tex. Civ. A. 324, 34 SW 372.

[j] **Statute containing no express provision.**—The Code § 3497 provides that "unless the contempt is committed in the immediate view and presence of the court, or comes officially to its knowledge, an affidavit showing the nature of the transaction is necessary as a basis for further action in the premises." It was objected that the affidavit filed was insufficient, "because it merely shows the facts constituting the violation of the injunctions, and does not show that the affiant had personal knowledge of the facts." But the court held that the affidavit complied with the statute, saying: "It is not expressly provided that the affiant shall show that he had personal knowledge of the facts, and the only action of the court which can be based upon the affidavit is of a formal character; the evidence upon which the defendant is to be adjudged guilty, if at all, being still to be adduced." Jordan v. Wapello County Cir. Ct., 69 Iowa 177, 179, 28 NW 548.

[k] **Full and able discussion** of validity of affidavits on information and belief see Leigh v. Green, 64 Nebr. 533, 90 NW 255, 101 AmSR 592 [aff reh 62 Nebr. 344, 86 NW 1093, 89 AmSR 751, and aff 193 U. S. 79, 24 SCt 390, 48 L. ed. 623].

25. Champ v. Kendrick, 130 Ind. 549, 30 NE 787; Simpkins v. Malatt, 9 Ind. 543.

26. Harris v. Heberton, 6 Miss. 575; Mairet v. Marriner, 34 Wis. 582.

27. James E. Pepper Distributing Co. v. Alexander, 137 Ill. A. 369; Pierson v. Freeman, 77 N. Y. 589.

[a] **Where an affidavit was in conformity with the statutory requirements,** it was held that it could not be attacked upon the ground of the affiant's want of personal knowledge. Wickham v. Peo., 41 Colo. 345, 93 P 478.

28. Ill.—East St. Louis R. Co. v. Gray, 135 Ill. A. 642.

Nev.—Morgan v. Eureka County, 9 Nev. 360.

N. Y.—Penn Oil, etc., Co. v. Cohn, 131 App. Div. 929, 116 NYS 124; Cole v. Core, 121 App. Div. 632, 106 NYS 306; Meade v. Southern Tier Masonic Relief Assoc., 119 App. Div. 761, 104 NYS 523; Gumbes v. Hicks, 116 App. Div. 120, 101 NYS 741 [aff 190 N. Y. 532 mem, 83 NE 1125 mem]; Fox v. Peacock, 97 App. Div. 500, 90 NYS 137; Price v. Levy, 93 App. Div. 274, 87 NYS 740; Harris v. Taylor, 35 App. Div. 462, 54 NYS 864; Pierce v. Parrish, 28 App. Div. 22, 50 NYS 735; Hoormann v. Climax Cycle Co., 9 App. Div. 579, 41 NYS 710; Bassett v. Pitts, 15 Hun 464; Whitlock v. Roth, 10 Barb. 78; Peo. v. Lauer, 80 Misc. 436, 141 NYS 299; Peo. v. City Prison Warden, 60 Misc. 525, 112 NYS 492; Garcia v. Morris, 51 Misc. 592, 101 NYS 253; Ammon v. Kellar, 21 Misc. 442, 47 NYS 595; Becker v. Bevins, 102 NYS 144; Markey v. Diamond, 19 NYS 181 [aff 1 Misc. 97, 20 NYS 847]; Thompson v. Best, 4 NYS 229; De Weerth v. Feldner, 16 AbbPr 295; Manken v. Pape, 65 HowPr 453; Claflin v. Baere, 57 HowPr 78; City Bank v. Lumley, 28 HowPr 397; Miller v. Oppenheimer, 2 NYCityCt 408.

Eng.—In re Young Mfg. Co., [1900] 2 Ch. 753; In re Pearce, [1899] 2 Ch. 50; Bidder v. Bridges, 26 Ch. D. 1.

B. C.—Chong v. McMorran, 8 B. C. 261; Tate v. Hennessey, 8 B. C. 220.

Ont.—Gilbert v. Stiles, 13 Ont. Pr. 121.

Que.—Duclos v. Beaumier, 20 Que. Super. 237.

[a] **Reason for rule.**—"When courts and judicial officers are asked to act upon affidavits founded on information and belief, they must be furnished with the sources of the information in order that they may draw their own conclusions." Scott, J., in Penn Oil, etc., Co. v. Cohn, 131 App. Div. 929, 931, 116 NYS 124.

[b] **Information from reliable source.**—"When courts and judicial officers are asked to act upon affidavits made on information and belief, they require, as a matter of safety, that the source of the information and the means by which it was communicated be disclosed. If the source of information be a person, it must be one who the court can see probably had personal knowledge of the facts communicated, and the means by which the communication is made must be one which experience has shown to be usually reliable, and one which a prudent man would employ in a matter of importance to himself." Murphy v. Jack, 76 Hun 356, 27 NYS 802 [rev on the facts 142 N. Y. 215, 36 NE 882, 40 AmSR 590, 31 AbbNCas 201]. See infra this note [e].

[c] **Affidavit by son of party.**—"An affidavit made by a son of plaintiff, alleging facts of his own knowledge, but which did not show that the affiant, as agent or otherwise, personally conducted the business, and disclosed no facts or circumstances tending to show that he had any knowledge, was insufficient." Hoormann v. Climax Cycle Co., 9 App. Div. 579, 581, 41 NYS 710.

[d] **Where writings sources of information.**—"Where a party alleges upon information and belief, and states that the sources of his information are certain writings, the court is entitled to know what the writings are in order to see whether the affiant is justified in his belief or not." Ladenburg v. Commercial Bank, 87 Hun 269, 275, 33 NYS 821 [aff 146 N. Y. 406 mem, 42 NE 543, and quot Gumbes v. Hicks, 116 App. Div. 120, 101 NYS 741 (aff 190 N. Y. 532 mem, 83 NE 1125 mem); Barrell v. Todd, 65 App. Div. 22, 72 NYS 527].

[e] **Information from telephone conversation.**—In Gumbes v. Hicks, 116 App. Div. 120, 101 NYS 741 [aff 190 N. Y. 532 mem, 83 NE 1125 mem], it was held that an affidavit based upon information and belief, the information being derived from a conversation over the telephone and a letter stating the substance of the matter sworn to, was insufficient to warrant the issuing of an attachment. But see Murphy v. Jack, 76 Hun 356, 27 NYS 802 (holding that an affidavit in attachment made by an attorney upon information received over the long distance telephone conformed to the above requirements and was sufficient). On appeal this was reversed upon the ground that the attorney did not recognize the voice and the person communicating with him was in no way identified. Murphy v. Jack, 142 N. Y. 215, 36 NE 882, 40 AmSR 590, 31 AbbNCas 201 (where Gray, J., said: "There would be no objection to the information having been conveyed through the medium of a telephone, if it had been made to appear that the affiant was acquainted with the plaintiff and recognized his voice; or if it had appeared in some satisfactory way that he knew it was the plaintiff who was speaking with him. . . . Judicial action upon such a source of information as was here disclosed was justified below by analogy with telegraphic communications. The analogy is incomplete. If the information comes through the telephone it is quite possible to identify the speaker. Then, too, there is not in the case of a telephonic communication any record; like the message which in the case of the use of the telegraph remains for reference and verification").

[f] **Derived from commercial agency.**—In New York it has been held that the information furnished by a commercial agency to one of its subscribers is not sufficient knowledge upon which the latter may base an affidavit of attachment. Price v. Levy, 93 App. Div. 274, 87 NYS 740; Becker v. Bevins, 102 NYS 144.

[g] **When disclosure would defeat justice.**—The court ought not to discard an affidavit in which the affiant's source of information is not stated, where the deponent swears that disclosure of his sources of information would tend to defeat the ends of justice, but should attach such value to the statements it contains as in its judgment they may be worth. Merchants Express Co. v. Morton, 15 Grant Ch. (U. C.) 274.

[h] **Reference to other affidavits.**—An affiant need not state his sources of information and belief, when he accompanies his affidavit with others in which the sources of information and grounds of belief are disclosed. Watson v. Charlton, 40 U. C. Q. B. 142. See also infra § 89.

[i] **Sufficient facts from personal**

of affiant are drawn from the contents of documents, such contents should be set out or exhibited, so that the court may judge whether affiant's deductions are well founded.[29] In some circumstances the nonproduction of the affidavits of persons whose knowledge of the facts is relied upon should be satisfactorily explained.[30]

[§ 89] **6. Curing Defects by Reference to Another Instrument.** Some cases hold that the statements in an affidavit must be complete in themselves, and when incomplete cannot be cured by reference to other papers of record;[31] but in other cases reference has been permitted to other papers in the record to complete the statements in the affidavit.[32]

[§ 90] **F. Signature of Affiant—1. Necessity.** It is generally held that, in the absence of any statute or rule of court requiring a signature, if it clearly appears who made the affidavit, and the fact of his swearing is certified by a proper officer, the affidavit is sufficient, although not subscribed by the affiant.[33]

knowledge.—An objection was made to an affidavit made by the attorney for a bank that there was no showing in it that he had personal knowledge of the transaction between the parties or the amount due. The court in disposing of the objection said: "While many statements are made which could not have been with the knowledge of the affiant, yet we think there was a sufficient statement of facts within his knowledge to give the court jurisdiction to issue the warrant. These facts are not stated on information and belief, but are positive statements of facts within his knowledge. He states that no consideration was given for any of the chattel mortgages or the real estate mortgage, but that they are held in trust for the Dummers, and with the intent to defraud creditors. The affidavit states all that is required by the several provisions of the statute." Dummer v. Nungesser, 107 Mich. 481, 486, 65 NW 564.

[j] **Degree of conviction should be expressed.**—"It is desirable that the draft of an affidavit should suggest to the party to swear, not only the fact which he is about to verify, but, if not the evidence, at least the degree of conviction he is to assert. It is important that an affidavit to obtain an attachment, state, exactly, the belief of the fact required to be verified, or what is fully and plainly equivalent to it. The existence of evidence, the consideration of its credit and force, and the conviction of its sufficiency, are not implied in a statement that an affiant 'thinks' a thing is true, to the same extent and in like degree that they are implied, in whole or in part, in a statement that he 'believes' it is true. In this case the affiant merely swears that he thinks the plaintiffs ought to recover an amount specified; but, he does not state any amount which he believes either of the plaintiffs ought to recover. And, therefore, there was no sufficient ground for the attachment." Rittenhouse v. Harman, 7 W. Va. 380, 387.

29. Thompson v. Best, 4 NYS 229; Moore v. Becker, 13 NYSt 567.

[a] **Custody of documents.**—Documents referred to in affidavits and exhibited must be handed in with the affidavits and remain in court until the matter in respect of which the affidavits are sworn has been disposed of. Attenborough v. Clark, 2 H. & N. 588.

[b] **Certifying exhibit.**—A commissioner before whom an affidavit is sworn ought to certify that any exhibit annexed is the document referred to in the affidavit. In re Allison, 10 Exch. 561.

[c] **Statement that, according to certain records** which affiant has examined, certain things appear is sufficient where copies of the records are also filed. Robinson v. Branch Cir. Judge, 142 Mich. 70, 105 NW 25.

30. Steuben County Bank v. Alberger, 78 N. Y. 252; Peo. v. Snaith, 57 Hun 332, 10 NYS 589; Whitlock v. Roth, 10 Barb. (N. Y.) 78; Markey v. Diamond, 19 NYS 181; De Weerth v. Feldner, 16 AbbPr (N. Y.) 295.

[a] **A statement by an attorney** in an affidavit that his clients have informed him, etc., will not be considered where the parties themselves can make the affidavit. Pach v. Geoffroy, 19 NYS 582.

[b] **Sufficient showing.**—An affidavit for an order of arrest which states immaterial facts upon information and belief is not insufficient on that account where it states the sources from which the information is obtained and shows that the places of residence of the informants are at such distance that it would be impracticable to procure their sworn statements in season to make a successful arrest. City Bank v. Lumley, 28 HowPr (N. Y.) 397.

31. Gilmore v. Lampman, 86 Minn. 493, 90 NW 1113, 91 AmSR 376; Fleming v. Byrd, 78 S. C. 20, 58 SE 965; Brunswick v. Slowman, 8 C. B. 617, 65 ECL 617, 137 Reprint 649.

[a] **Must be complete to confer jurisdiction.**—"Whatever may have been the holdings in some jurisdictions, we know of no case where, under a similar statute, it has been held that the affidavit may be aided by reference to other papers of record. It has become the well recognized and settled rule in this state that the affidavit must be complete in itself as to all material matters, and we hold that the affidavits in question are insufficient, and did not confer jurisdiction." Lewis, J., in Gilmore v. Lampman, 86 Minn. 493, 496, 90 NW 1113, 91 AmSR 376.

[b] **Swearing to truth of another affidavit.**—In Matter of Campbell, 2 Ont. Pr. 291, 297, Richards, J., said: "As a general rule, each deponent ought to state the facts within his own knowledge by his own affidavit, and not in a general manner swear that the facts stated in the affidavit of another person are correct and true, because some of those facts may be peculiarly within the knowledge of the party making the first affidavit, whilst others may of course be within the knowledge of both deponents."

32. See cases infra this note.

[a] **Must be necessary or proper exhibit to affidavit.**—"The mere fact that an affidavit may be attached to another paper in which the case is stated would not, in all cases, make the affidavit admissible, unless the paper was of such character as that it would necessarily be inferred that the attention of the witness was called to the paper, or it was a necessary or proper exhibit to the affidavit." Hicks v. Portwood, 129 Ga. 307, 309, 58 SE 837.

[b] **Reference to petition.**—(1) Where an affidavit accompanying a petition does not contain as full statements as is desirable, reference may be had to the petition. Hart v. Barnes, 24 Nebr. 782, 40 NW 322. (2) "It was intimated, however, that resort might have been had to the petition in the original suit to aid the affidavit for garnishment, had there been anything therein that would have aided the affidavit. We do not doubt, as has been held in regard to attachments, that the petition in the main suit can be used in making certain the amount of the debt. Willis v. Mooring, 63 Tex. 340; Cleveland v. Boden, 63 Tex. 103; La Force v. Wear, etc., Dry Goods Co., 8 Tex. Civ. A. 572, 29 SW 75." Modern Dairy, etc., Co. v. Blanke, etc., Supply Co., (Tex. Civ. A.) 116 SW 154, 155.

[c] **Minor defects may be cured.**—Where an affidavit complies in statement substantially with the statutory requirements, minor defects may be aided by reference to other parts of the record. Miller v. Eastman, 27 Nebr. 408, 43 NW 179.

33. U. S.—Noble v. U. S., Dev. Ct. Cl. 33.

Ala.—Holman v. State, 144 Ala. 95, 39 S 646; Locklayer v. Locklayer, 139 Ala. 354, 35 S 1008; Albritton v. Williams, 132 Ala. 647, 649, 32 S 636 [cit Cyc]; Culver v. Guyer, 129 Ala. 602, 29 S 779; Savage v. Atkins, 124 Ala. 378, 27 S 514; Lavretta v. Holcombe, 98 Ala. 503, 12 S 789; Watts v. Womack, 44 Ala. 605.

Ark.—Mahan v. Owen, 23 Ark. 347; Gill v. Ward, 23 Ark. 16. See also Fortenheim v. Claflin, 47 Ark. 49, 14 SW 462.

Cal.—Petaluma v. White, 152 Cal. 190, 92 P 177; Ede v. Johnson, 15 Cal. 53; Fairbanks, etc., Co. v. Getchell, 13 Cal. A. 458, 110 P 331; Hotaling v. Brogan, 12 Cal. A. 500, 107 P 711.

Del.—In re Shannahan-Wrightson Hardware Co., 21 Del. 138, 58 A 1023.

Ida.—Simmons Hardware Co. v. Alturas Commercial Co., 4 Ida. 334, 39 P 550, 95 AmSR 66. And see State v. Burtenshaw, 138 P 1105 (holding that affiant may authorize some one else to sign for him, or may approve and adopt the unauthorized signing of his name by another).

Ind.—Turpin v. Eagle Creek, etc., Gravel Road Co., 48 Ind. 45.

Mass.—Farrar v. Parker, 7 Metc. 43.

Mich.—Rameau v. Valley, 168 Mich. 569, 134 NW 987; Wynkoop v. Grand Traverse Cir. Judge, 113 Mich. 381, 71 NW 640; Bloomingdale v. Chittenden, 75 Mich. 305, 42 NW 836; Merrick v. Mahue, 40 Mich. 196; Peo. v. Simondson, 25 Mich. 113. But see Knapp v. Duclo, 1 Mich. N. P. 189.

Minn.—Norton v. Hauge, 47 Minn. 405, 50 NW 368.

Miss.—Coppock v. Smith, 54 Miss. 640; Brooks v. Snead, 50 Miss. 416; Redus v. Wofford, 12 Miss. 579.

Nebr.—Bantley v. Finney, 43 Nebr. 794, 62 NW 213.

Nev.—Lutz v. Kinney, 23 Nev. 279, 46 P 257.

N. J.—Hitsman v. Garrard, 16 N. J. L. 124; Gaddis v. Durashy, 13 N. J. L. 324.

N. C.—Spencer v. Bell, 109 N. C. 39, 13 SE 704; Alford v. McCormac, 90 N. C. 151.

Oh.—Gambrinus Stock Co. v. Weber, 41 Oh. St. 689.

Pa.—Burns v. Judge, 12 LuzLegReg 425.

S. C.—Armstrong v. Austin, 45 S. C. 69, 22 SE 763, 29 LRA 772; State v. Sullivan, 39 S. C. 400, 17 SE 865.

Tenn.—West Tennessee Agricultural, etc., Assoc. v. Madison, 9 Lea 407. Compare Watt v. Carnes, 4 Heisk. 532 (neither signature nor jurat).

Tex.—Crist v. Parks, 19 Tex. 234; Shelton v. Berry, 19 Tex. 154, 70 AmD 326; Alford v. Cochrane, 7 Tex. 485.

N. B.—Kenen v. Hill, 38 N. B. 342.

"When it clearly appears as here, that the claimant made the affidavit, and the fact of his swearing to it is also properly certified by the officer before whom it was made; it is sufficient, although not subscribed by the party making it." Haralson, J., in Albritton v. Williams, 132 Ala. 647, 649, 32 S 636 [cit Cyc].

[a] **Not void but amendable.**—"The affidavit upon which the attachment was issued was not void for want of subscription by the affiant.

But in some jurisdictions affiant's signature is deemed essential even though not expressly required by statute,[34] and in those states where signing is prescribed by statute its omission constitutes a fatal defect.[35]

[§ 91] **2. Where Placed.** The signature should be placed at the foot of the body of the affidavit,[36] but the affidavit will not be invalid if it is placed below the jurat,[37] or incorporated in it.[38]

[§ 92] **3. Form—a. Whether English Language Necessary.** It seems that it is not essential that the signature should be in the English language.[39]

[§ 93] **b. By Mark.** Where a person is unable to write he may sign an affidavit by making his mark.[40]

[§ 94] **c. Of Partnership.** It has been held that the subscription of the firm name to an affidavit made on behalf of a partnership is proper,[41] but the better rule is to the effect that where a signature is required at all it must be the name of the individual affiant.[42]

[§ 95] **d. Of Agent.** It is sufficient if it appears from the signature of an agent that he acts in a representative capacity.[43]

[§ 96] **e. Contraction of Name or Title.** An affidavit may be signed with a contraction of the

Watts v. Womack, 44 Ala. 605. It was however irregular and insufficient in that respect because of the requirement of section 527 of the Code that the affidavit in such cases be subscribed by the party making it. Section 564 of the Code provides that 'the plaintiff before or during the trial must be permitted to amend any defect of form or of substance in the affidavit bond or attachment; and no attachment must be dismissed for any defect in the affidavit if the plaintiff, his agent or attorney will make a sufficient affidavit,' etc. Under this provision the amendment to the affidavit was properly allowed." Sharpe, J., in Savage v. Atkins, 124 Ala. 378, 27 S 514. And see infra § 129.

[b] **"Some of the chancery courts of this country,** following a rule laid down by the chancery courts of England, have insisted upon the presence of the signature of the affiant to give validity to the affidavit, but a contrary rule has obtained in the courts of law from a very early period." Houston, J., in Simmons Hardware Co. v. Alturas Commercial Co., 4 Ida. 334, 339, 39 P 550, 95 AmSR 66.

[c] **Does not authenticate oath.**—While the signature of the affiant to an affidavit may be useful for the purpose of identification, as where there may be two persons of the same name, it does not, as does the signature of the officer, authenticate the act or show that the oath was taken. Norton v. Hauge, 47 Minn. 405, 50 NW 368.

[d] **"Persons incapable of making either a signature or mark** by disease or natural infirmities or defects, are not debarred from making an affidavit, which is but written testimony." Soule v. Chase, 24 N. Y. Super. 222, 234, 1 AbbPrNS 48 [rev on other grounds 39 N. Y. 342, 7 Transcr. A. 161].

[e] **In New York** (1) some cases hold that the signature of the affiant is not essential to the validity of an affidavit, where his name appears in another part of the instrument. Soule v. Chase, 24 N. Y. Super. 222, 1 AbbPrNS 48 [rev on other grounds 39 N. Y. 342, 7 Transcr. A. 161]; Millius v. Shafer, 3 Den. 60; Jackson v. Virgil, 3 Johns. 540; Haff v. Spicer, 3 Cai. 190. (2) But others hold that where the verification of a pleading is in the form of an affidavit it must be signed. Laimbeer v. Allen, 4 N. Y. Super. 648; Hathaway v. Scott, 11 Paige 173.

[f] **After reswearing.**—It has been held in an English case that where an affidavit was reworn it did not need to be resigned. Liffin v. Pitcher, 1 Dowl. P. C. N. S. 767.

34. Colo.—Palmer v. McCarthy, 2 Colo. A. 422, 31 P 241.

Ga.—Raley v. Warrenton, 120 Ga. 365, 47 SE 972; Hathaway v. Smith, 117 Ga. 946, 43 SE 984; Beach v. Averett, 106 Ga. 73, 31 SE 806, 71 AmSR 239; McCandless v. Rodgers, 99 Ga. 686, 25 SE 822; Cohen v. Manco, 28 Ga. 27; Meadows v. Alexander, 1 Ga. A. 40, 57 SE 901.

Ill.—Theobald v. Chicago, etc., R. Co., 75 Ill. A. 208.

Iowa.—Blair v. Hemphill, 111 Iowa 226, 82 NW 501; Lynn v. Morse, 76 Iowa 665, 39 NW 203; Crenshaw v. Taylor, 70 Iowa 386, 30 NW 647. In an earlier case it was said that "it is not essential that the affiant sign the oath." Bates v. Robinson, 8 Iowa 318, 320.

Mo.—Hargadine v. Van Horn, 72 Mo. 370; Sedalia Third Nat. Bank v. Garton, 40 Mo. A. 113. And see Norman v. Horn, 36 Mo. A. 419.

Tenn.—Watt v. Carnes, 4 Heisk. 532.

Wis.—Schuster v. Haight, 53 Wis. 290, 10 NW 511; Wright v. Fallon, 47 Wis. 488, 2 NW 1120.

Eng.—Anderson v. Stather, 9 Jur. 1085.

[a] **In Georgia.**—"But while there is elsewhere a conflict of decisions, in Georgia an affidavit is required to be signed by the affiant." Lamar, J., in Hathaway v. Smith, 117 Ga. 946, 947, 43 SE 984 [quot Meadows v. Alexander, 1 Ga. A. 40, 42, 57 SE 901].

[b] **After a case has been disposed of on the merits,** it is too late, on appeal, to object to affidavits to answers in chancery that they were insufficient because not signed by the affiants. Yeizer v. Burke, 11 Miss. 439.

[c] **The practice of the New Jersey chancery court** requires that, "where the verification of an answer is in the form of an affidavit, the name of the deponent be subscribed at the foot of the affidavit; and where the verification is in the form of a certificate of the officer who administered the oath, the name of the deponent should be subscribed to the answer. The object is to facilitate identification of the affiant in case of prosecution for perjury." Pincers v. Robertson, 24 N. J. Eq. 348, 349.

[d] **Signature to verified pleading.**—Where a pleading is signed at the bottom by defendant and a magistrate appends a proper jurat, it is not necessary for defendant to sign such jurat as an affidavit separate from the pleading. Laswell v. Jefferson City Presb. Church, 46 Mo. 279; Smith v. Benton, 15 Mo. 371.

[e] **Plea in abatement** is the proper method of raising an objection that an affidavit for attachment has not been signed. Lowry v. Stowe, 7 Port. (Ala.) 483.

35. State v. Washoe County, 5 Nev. 317; Anderson v. Cochran, 93 Tex. 583, 57 SW 29; Davis v. Sherrill, 52 Tex. Civ. A. 259, 113 SW 556; Lanier v. Taylor, (Tex. Civ. A.) 41 SW 516; Gordon v. State, 29 Tex. A. 410, 16 SW 337. Some of the early cases held that it was not necessary that an affidavit be signed by the affiant. Crist v. Parks, 19 Tex. 234; Shelton v. Berry, 19 Tex. 154, 70 AmD 326.

36. Pincers v. Robertson, 24 N. J. Eq. 348.

37. Launius v. Cole, 51 Mo. 147; Kohn v. Washer, 69 Tex. 67, 6 SW 551, 5 AmSR 28.

38. Blair v. Hemphill, 111 Iowa 226, 82 NW 501 (where there was apparently no signature of the affidavit by the affiant, but his name appeared in the jurat in a different handwriting from that of the jurat and he swore that he signed the affidavit, and this was held sufficient).

39. Nathan v. Cohen, 3 Dowl. P. C. 370.

[a] **Need not state that foreign character is signature.**—Where the affidavit purports to be signed by a defendant, it is no valid objection to it that it is signed in a foreign character and that there is no statement in the jurat to show defendant to be a foreigner and that it is his signature. Nathan v. Cohen, 3 Dowl. P. C. 370.

40. Peo. v. McDaniels, 141 Cal. 113, 74 P 773; Wilson v. Blakey, 9 Dowl. P. C. 352.

[a] **Signature by mark as basis of perjury.**—It has been held that perjury may be predicated upon a false affidavit which was signed with a mark. U. S. v. Mallard, 40 Fed. 151, 5 LRA 816.

[b] **Subscription of name by marksman.**—In —— v. Christopher, 11 Sim. 409, 34 EngCh 409, 59 Reprint 931, it appeared that the affiant, who was a marksman, had subscribed his name to the affidavit, his hand having been guided on the occasion, and that the jurat was in the form applicable to the signature of a name at length. The affidavit was ordered stricken off the files.

41. See cases infra this note.

[a] **Illustrations.**—(1) An affidavit that "I, Robert Powell, state," etc., and signed "Forrester & Powell," is sufficient. Fortenheim v. Claflin, 47 Ark. 49, 14 SW 462. (2) Where a mortgage of chattels was made by a firm, one of whom signed the affidavit prescribed, by the name by which the firm was known and designated, it was held to have been well signed by that member. Randall v. Baker, 20 N. H. 335. And see infra § 120.

42. Norman v. Horn, 36 Mo. A. 419.

[a] **No affidavit by partnership.**—In Gaddis v. Durashy, 13 N. J. L. 324, it was held that, where an affidavit was signed in the firm name of a partnership, as the partnership could not make an affidavit the whole matter was rendered ambiguous and uncertain.

43. See cases infra this note.

[a] **Signature by attorney.**—An affidavit which recites that the litigant appeared and swore is not vitiated because signed "W. H. Coppock, by H. R. Ware, Att'y." No signature at all was necessary so long as the affidavit was the personal oath of the party making it. Coppock v. Smith, 54 Miss. 640.

[b] **Form of agent's signature.**—An affidavit signed "J. M. Spencer, per D. M. Spencer" sufficiently showed that it was made for plaintiff, although it should have been signed "D. M. Spencer, agent for or on behalf of J. M. Spencer." Spencer v. Bell, 109 N. C. 39, 13 SE 704.

[c] **Representative capacity must be indicated.**—In Blyth, etc., Co. v. Swensen, 7 Wyo. 303, 51 P 873, it was held that an affidavit signed, "The Blyth & Fargo Co., by Sherman Fargo, Managing Agent," was insufficient to indicate that the affidavit was made on behalf of a corporation, where no reference was made in the body of the instrument by which it could be

affiant's real name[44] or title.[45]

[§ 97] **4. Variance between Signature and Name in Body.** It has been held that a variance between the name of the affiant which appears in the body of the affidavit and that signed to the instrument will not necessarily render it invalid.[46]

[§ 98] **G. Jurat—1. Definition.** The jurat of an affidavit is that part of it, or addition to it, in which the officer certifies that it was sworn to before him.[47] While some authorities hold that the jurat is not, strictly speaking, a part of the affidavit proper,[48] it has been held to be so closely connected with it that where the venue is stated in the caption it need not be repeated in the jurat.[49]

[§ 99] **2. Necessity.** It has been held in some cases that the jurat is essential to the validity of an affidavit,[50] but the generally accepted doctrine seems to be that the jurat is not such a part of the affidavit proper that its omission will render the affidavit a nullity.[51] According to the latter view it

ascertained that the agent was acting in a representative capacity.

44. Vansickle v. Boyd, 14 Ont. Pr. 469.

[a] **Initial of middle name.**—"As to the use of an initial letter in the name of a party making an affidavit, it has already been held that if the first name be given in full, with an initial letter indicating that the party has another christian name, it is sufficient; and for this reason, that in very many instances the use of an initial letter is assumed merely as a designation of a particular person, and is not the initial of any name." DeForrest v. Bunnell, 15 U. C. Q. B. 370, 379.

45. Cleburne First Nat. Bank v. Graham, (Tex. A.) 22 SW 1101.

[a] **The president of a corporation** may use the abbreviation "Pres." or "Prest." in signing an affidavit which he makes on behalf of the corporation. West Tennessee Agricultural, etc., Assoc. v. Madison, 9 Lea (Tenn.) 407; Cleburne First Nat. Bank v. Graham, (Tex. A.) 22 SW 1101.

46. See cases infra this note.

[a] **Illustrations.**—(1) In Torrans v. Hicks, 32 Mich. 307, it appeared that an affidavit signed by Charles H. Lee began with the recital that "Fred B. Lee, of said county, being duly sworn," but this recital was held to be a mere clerical error and to be overlooked as such, the court saying that since Charles H. Lee made the oath, and had his name been omitted in the beginning there would have been no difficulty in holding that the affiant was applying the facts recited to himself, the affidavit was in legal effect the same as if, in the body of it, there had been no recital of any name as that of an affiant. (2) In the body of an affidavit the name of the affiant was given as Alberta Jane Boyd. Her name was Alberta Jane Vansickle, and it was signed Berta J. Vansickle. It was held that the affidavit was not rendered invalid by the mistake in the affiant's name. Vansickle v. Boyd, 14 Ont. Pr. 469. (3) Where an affidavit described affiant as "Edward Charles Pownall," but the signature at the end was "Charles E. Pownall," the affidavit was held sufficient. Hands v. Clements, 1 D. & L. 379.

[b] **Defect cured by jurat.**—(1) In Raley v. Warrenton, 120 Ga. 365, 47 SE 972, the affidavit read: "Personally comes Mrs. Joseph Raley," and was signed "M. N. Raley." Plaintiff in error was Mrs. Joseph Raley. It was held that the jurat of the officer who administered the oath was in effect a certificate that Mrs. Joseph Raley appeared before him and subscribed the affidavit, and the affiant, M. N. Raley, was thus identified as the person referred to in the body of the affidavit as Mrs. Joseph Raley, and that the affidavit was sufficient. (2) In Maniscalco v. Slamowitz, 123 App. Div. 690, 691, 108 NYS 65, it was said: "One of the affidavits on which the order of arrest was granted purported to be by the plaintiff, but was in fact signed by another, and the jurat attested that he swore to it. It was thus a nullity. It was corrected after the notice of motion to vacate the order of arrest was given, and it and a new affidavit by the plaintiff explaining the error are the two affidavits which the order of resettlement directed to be recited as having been read in opposition. They could not be read any more than any other affidavits."

47. U. S.—U. S. v. Glasener, 81 Fed. 566.

Ga.—Britt v. Davis, 130 Ga. 74, 60 SE 180.

Ill.—Cox v. Stern, 170 Ill. 442, 48 NE 906, 62 AmSR 385; Theobald v. Chicago, etc., R. Co., 75 Ill. A. 208.

Ind.—Williams v. Stevenson, 103 Ind. 243, 2 NE 728.

N. J.—Garrard v. Hitsman, 16 N. J. L. 124.

N. C.—Alford v. McCormac, 90 N. C. 151.

[a] **A jurat is not the affidavit.**—Theobald v. Chicago, etc., R. Co., 75 Ill. A. 208. A jurat alone, unaccompanied with a statement of facts, sworn to by affiant cannot be considered as an affidavit. McGuire v. Iowa County, 133 Iowa 636, 111 NW 34.

48. Ga.—Veal v. Perkerson, 47 Ga. 92.

Ill.—Cox v. Stern, 170 Ill. 442, 48 NE 906, 62 AmSR 385.

Ind.—Williams v. Stevenson, 103 Ind. 243, 2 NE 728.

Nebr.—Bantley v. Finney, 43 Nebr. 794, 62 NW 213.

N. J.—Garrard v. Hitsman, 16 N. J. L. 124.

N. C.—Alford v. McCormac, 90 N. C. 151.

N. D.—Turner v. St. John, 8 N. D. 245, 78 NW 340.

Eng.—Hughes v. Browne, 6 M. & G. 751, 46 ECL 751, 134 Reprint 1095.

Ont.—Reg. v. Atkinson, 17 U. C. C. P. 295.

[a] **Limited to affiant's statements.**—In U. S. v. Glasener, 81 Fed. 566, the court said: "Technically considered, the word [affidavit] is, doubtless, broad enough to include the jurat or certificate of the officer before whom the oath is taken. In common acceptation, however, as indicated by the above definition, it has a more restricted meaning, and refers to those statements sworn to and subscribed by the affiant, but does not include the notarial certificate."

49. Rahilly v. Lane, 15 Minn. 367.

[a] **Jurat part of affidavit.**—In State v. Board of Equalization, 10 Iowa 157, 74 AmD 381 [expl Chance v. Temple, 1 Iowa 179], it was held that a jurat attached to an information for a writ of madamus formed a part of the paper and constituted it an affidavit.

50. Iowa.—McGillivray v. Barton Dist. Tp., 96 Iowa 629, 65 NW 974.

Mo.—Peters v. Edge, 87 Mo. A. 283; Sedalia Third Nat. Bank v. Garton, 40 Mo. A. 113.

Mont.—Metcalf v. Prescott, 10 Mont. 283, 25 P 1037.

N. Y.—Ladow v. Groom, 1 Den. 429; Chase v. Edwards, 2 Wend. 283.

N. C.—Alford v. McCormac, 90 N. C. 151.

Tex.—Gordon v. State, 29 Tex. A. 410, 16 SW 337. See also Morris v. State, 2 Tex. A. 502.

W. Va.—Cosner v. Smith, 36 W. Va. 788, 15 SE 977.

Eng.—Haynes v. Powell, 8 Dowl. P. C. 599.

See also Knapp v. Duclo, 1 Mich. N. P. 189.

[a] **Neither signed nor certified.**—In Watt v. Carnes, 4 Heisk. (Tenn.) 532, it was held that an affidavit neither signed nor certified was invalid.

[b] **Constable's return.**—In Maines v. Black, 21 Pa. Co. 319, it was held that the omission of the magistrate's jurat to the return of the constable on the back of the summons was a fatal defect and invalidated a judgment taken by default, although the transcript stated that the constable "so answers on oath."

[c] **Mere name not sufficient.**—A paper which does not purport on its face to have been a statement made on oath, and to which there is no jurat subscribed, is not an affidavit. The mere naming it an affidavit does not make it so. There must be something in the paper itself to denote that it is an affidavit. Shaw v. St. Lawrence County Mut. Ins. Co., 11 U. C. Q. B. 73.

[d] **In Missouri** a signed statement without a jurat is not an affidavit within the meaning of Rev. St. (1899) § 808. Peters v. Edge, 87 Mo. A. 283.

[e] **Under Nebraska statute.**—"We are clearly of the opinion that under the provisions of our statute an affidavit must bear upon its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same." Duffie, C., in Sebesta v. Supreme Ct. of Honor, 77 Nebr. 249, 253, 109 NW 166.

[f] **Montana; absence of jurat not cured by evidence aliunde.**—An affidavit made by a locator of a mining claim, to which there is no jurat showing it to have been subscribed and verified as prescribed by statute, cannot be cured by evidence aliunde to show that the affidavit was in fact sworn to. Metcalf v. Prescott, 10 Mont. 283, 25 P 1037.

[g] **A paper stating grounds of an attachment,** but which does not show on its face that plaintiff signed it before an officer authorized to take oaths, and which was not signed by such officer, is not an "affidavit," within Rev. St. § 2517, requiring an affidavit before a warrant of attachment can issue. Doty v. Boyd, 46 S. C. 39, 24 SE 59.

[h] **Plea in abatement** is the proper mode of raising an objection that an affidavit for attachment has not been verified. Lowry v. Stowe, 7 Port. (Ala.) 483.

51. Ala.—Hyde v. Adams, 80 Ala. 111; McCartney v. Huntsville Branch Bank, 3 Ala. 709.

Ark.—Fortenheim v. Claflin, 47 Ark. 49, 14 SW 462.

Ga.—Beach v. Averett, 106 Ga. 73, 31 SE 806, 71 AmSR 239; Smith v. Walker, 93 Ga. 252, 18 SE 830; Veal v. Perkerson, 47 Ga. 92; Green v. Rhodes, 8 Ga. A. 301, 68 SE 1090.

Ill.—Cox v. Stern, 170 Ill. 442, 48 NE 906, 62 AmSR 385; Cook County Brick Co. v. William Bach, etc., Co., 93 Ill. A. 88.

Ind.—Cleveland v. Stanley, 13 Ind. 549.

Miss.—Rootes v. Thomas, 85 Miss. 493, 38 S 502.

Nebr.—Sebesta v. Supreme Ct. of Honor, 77 Nebr. 249, 109 NW 166; Bantley v. Finney, 43 Nebr. 794, 62 NW 213.

N. J.—Hitsman v. Garrard, 16 N. J. L. 124.

N. D.—Turner v. St. John, 8 N. D. 245, 78 NW 340.

Tenn.—Wiley v. Bennett, 9 Baxt. 581, 582 [dist Watt v. Carnes, 4 Heisk. 532, "where the affidavit was not sworn to until some weeks after the

may be shown by extrinsic evidence that the affidavit was in fact sworn to at the proper time and before the proper officer;[52] or a jurat may be added at a subsequent time.[53]

[§ 100] **3. Place of Jurat.** The jurat is properly placed at the foot of the affidavit; but its position is not essential, and it may be written on the back[54] or may be incorporated into the body of the instrument.[55]

[§ 101] **4. Sufficiency—a. In General.** The jurat should show clearly and specifically that the affiant made oath to the truth of the affidavit.[56] Where a particular form is required by statute[57] or by a rule of court[58] this must be followed, and failure to do so may not be waived by the parties. A proper showing may generally be made by using the exact language of the prescribed forms or by a substantial compliance with them.[59] The object of the jurat, however, being merely to evidence the fact that affiant took oath to his affidavit before a duly authorized officer, but little formality is usually required of it;[60] and a jurat is generally sufficient

issuance of the process, the clerk then doing it himself, and no amendment of the affidavit being directed by the court"].

[a] **Affidavit made before clerk who issues attachment.**—In Alabama an affidavit for an attachment, made before the clerk who issues the writ, need not be certified by him. Hyde v. Adams, 80 Ala. 111.

[b] **Not conclusive evidence.**—In Cox v. Stern, 170 Ill. 442, 448, 48 NE 906, 62 AmSR 385, it was said: "Of course, common prudence would dictate that a properly executed jurat, or certificate of the officer showing the oath, should be attached; but when attached it is not conclusive, but may be shown to be false, and if shown to be false, and that no oath was in fact administered, the instrument would not be an affidavit."

[c] **Sworn in open court.**—A paper purporting to be an affidavit and so treated by the court below will not be held defective by the superior court because it does not appear to have the jurat of the clerk, for it may have been sworn to in open court; if so, it needs no jurat as evidence that it had been duly sworn to by the affiant. Cleveland v. Stanley, 13 Ind. 549.

[d] **Jurat need not be affixed to copy.**—"Where a law requires a copy of an affidavit to be served upon the adverse party, it is not necessary to serve a copy of the jurat: Livingston v. Cheetham, 2 Johns. (N. Y.) 479; unless, without it, facts stated may be unintelligible. Union Furnace Co. v. Shepherd, 2 Hill (N. Y.) 413. And even then the magistrate's name may be omitted. Chase v. Edwards, 2 Wend. (N. Y.) 283." Veal v. Perkerson, 47 Ga. 92, 95.

[e] **Where an affidavit is amended as to its title** a new jurat is not necessary. In re Grantham, 10 Jur. 1038.

[f] **"The important consideration** is, whether the complaint was actually sworn to before a proper officer. The mere fact that an officer fails to couple his official title with his name in signing a jurat, or to attach a jurat at all, to the affidavit at the time the oath is administered, will not invalidate it." Kingman v. Berry, 40 Kan. 625, 628, 20 P 527 [quot James v. Logan, 82 Kan. 285, 288, 108 P 81, 136 AmSR 105, and cit Cyc].

[g] **Presumption on appeal.**—Where on appeal it was objected that an affidavit was not sworn to, but it purported to be an affidavit and was so treated in the lower court, it was presumed to have been sworn to, although not bearing a jurat. The court held that it might have been sworn to in open court, and if so needed no jurat as evidence that it had been duly sworn to by affiant. Cleveland v. Stanley, 13 Ind. 549.

52. Ga.—Beach v. Averett, 106 Ga. 73, 31 SE 806, 71 AmSR 239.

Ill.—Cox v. Stern, 170 Ill. 442, 48 NE 906, 62 AmSR 385; Cohen v. Bernstein, 170 Ill. A. 113; Cook County Brick Co. v. William Bach, etc., Co., 93 Ill. A. 88.

Ind.—Williams v. Stevenson, 103 Ind. 243, 2 NE 728.

Iowa.—Cook v. Jenkins, 30 Iowa 452.

Kan.—James v. Logan, 82 Kan. 285, 108 P 81, 136 AmSR 105 [cit Cyc].

Mo.—Cooley v. Kansas City, etc., R. Co., 149 Mo. 487, 51 SW 101.

Nebr.—Bantley v. Finney, 43 Nebr. 794, 62 NW 213. But see Sebesta v. Supreme Ct. of Honor, 77 Nebr. 249, 109 NW 166 (where it was said to be admissible only in the absence of a prescribed form).

N. D.—Turner v. St. John, 8 N. D. 245, 78 NW 340.

Omission supplied by amendment see infra § 130.

[a] **Affiant not prejudiced by officer's neglect.**—"If, therefore, the jurat be missing from an affidavit, if there be no proof on the face of the paper that an oath was duly administered the fact may be established by evidence aliunde. This rule is clearly just, because after a party has in fact made or procured to be made the necessary declaration under oath he ought not to be prejudiced and the proceeding ought not to fail in consequence of the officer's neglect to affix a jurat." Burch, J., in James v. Logan, 82 Kan. 285, 288, 108 P 81, 136 AmSR 105.

[b] **Where written evidence not required by statute.**—"It is undoubtedly true that the courts are nearly unanimous in holding that the jurat is no part of an affidavit, and that where no jurat is attached parol evidence may be used to show that it was in fact sworn to, when the statute does not require written evidence of that fact, but they all agree that it must in some manner appear that the oath was in fact administered. As suggested in Cox v. Stern, 170 Ill. 442, 48 NE 906, 62 AmSR 385, and in Turner v. St. John, 8 N. D. 245, 78 NW 340, it is only when no form is prescribed for the affidavit, or for preserving the evidence of the oath, that parol proof may take the place of the official certificate. It is, we believe, fundamental law that parol testimony will not be received to establish any fact of which the statute requires written evidence." Duffie, C., in Sebesta v. Supreme Ct. of Honor, 77 Nebr. 249, 252, 109 NW 166.

[c] **Appearing from the record.**—The failure of the officer to attest the jurat will not vitiate the affidavit where the record shows that it was in fact properly taken and sworn to. Pottsville v. Curry, 32 Pa. 443.

53. Schattler v. Heisman, 85 Ark. 73, 107 SW 196; Cooley v. Kansas City, etc., R. Co., 149 Mo. 487, 51 SW 101.

[a] **Jurat not immediately annexed.**—An affidavit sufficient in all other respects will not be rendered fatally defective because the clerk before whom it was made failed for a few days to annex the jurat. Buckland v. Goit, 23 Kan. 327.

[b] **On leave of trial or appellate court.**—It has been held that where no jurat had been appended to an affidavit for an appeal, the defect might be remedied by the officer on leave of either the trial court or the appellate court. Cooley v. Kansas City, etc., R. Co., 149 Mo. 487, 51 SW 101.

54. Noble v. U. S., Dev. Ct. Cl. 83.

[a] **No objection that jurat might have been written first.**—To affidavits produced in evidence on a hearing it was objected that the jurat was on the back and that the affidavits might have been written after the jurats; but the court held that in the absence of evidence of fraud there was no weight in the objection. Noble v. U. S., Dev. Ct. Cl. 83.

[b] **Jurat partly on each side of paper.**—Part of the jurat was written on one side of the paper, and below it the words, "a commissioner for taking affidavits in this Court," were erased; the remainder of the jurat was written on the other side of the paper. It was held that the affidavit was not vitiated thereby. Wills v. Dawson, 2 Dowl. P. C. N. S. 465.

55. Hanson v. Cochran, 14 Del. 184, 31 A 880.

[a] **Part above and part below signature.**—In Kleber v. Block, 17 Ind. 294, 295, an affidavit "Personally came before the undersigned, a notary public of said county, Christopher Kleber, who upon his oath saith," etc., which was signed by the said Christopher Kleber, below which signature came the words, "Witness my hand and seal, February 19, 1859," signed and sealed by the notary, was held to be sufficient.

56. Blake Crusher Co. v. Ward, 3 F. Cas. No. 1,505; Cosner v. Smith, 36 W. Va. 788, 15 SE 977.

57. Northern Liberties Mfrs., etc., Bank v. Cowden, 3 Hill (N. Y.) 461.

[a] **Substantial compliance with statute sufficient.**—In New York, in general, a substantial compliance with the requisites of the jurat, prescribed by statute, will be sufficient. Northern Liberties Mfrs., etc., Bank v. Cowden, 3 Hill 461; Belden v. Devoe, 12 Wend. 223; McKinstry v. Thurston, 12 Wend. 222.

[b] **Statute governs over form.**—Where the jurat to the form of an affidavit prescribed by statute indicates that the oath is to be taken within the province of British Columbia, but the statute itself authorizes affidavits to be taken before commissioners whose authority to take affidavits exists outside the province as well as within, the statute, and not the form, will govern, and the latter may be varied to conform to the actual fact. In re Provincial Elections Act, 10 B. C. 114.

58. Pilkington v. Himsworth, 5 L. J. Exch. Eq. 47; Archibald v. Hubley, 18 Can. S. C. 116.

59. Colvin v. Peo., 166 Ill. 82, 46 NE 737; Randall v. Baker, 20 N. H. 335; Pallady v. Beatty, 15 Okl. 626, 83 P 428.

[a] **The statutory certificate for the authentication of depositions,** Code Civ. Proc. § 357, cannot be used on an ordinary affidavit, and no form of jurat to be appended to such affidavits is prescribed by the code. James v. Logan, 82 Kan. 285, 108 P 81, 136 AmSR 105.

60. See James v. Logan, 82 Kan. 285, 108 P 81, 136 AmSR 105; Torrans v. Hicks, 32 Mich. 307; Barhydt v. Alexander, 59 Mo. A. 188; Reg. v. Silkstone, 2 Q. B. 520, 42 ECL 788, 114 Reprint 204.

Necessity of naming affiant see infra § 103.

[a] **Need not certify as to affiant's identity.**—The officer who takes an affidavit need not allege that he knew or had satisfactory evidence that the person making the oath was the individual described in, and who executed, the instrument, as in the case of a certificate of acknowledgment. Ross v. Wigg, 34 Hun (N. Y.) 192.

[b] **Clerical error; "national" seal.**—Where in a jurat the officer stated that he had thereto affixed his "na-

which shows in any way that affiant swore to the affidavit[61] before the officer,[62] giving the date[63] and place of administering the oath,[64] and that it is signed by the officer[65] with a statement of his official character.[66]

[§ 102] **b. In Case of Illiterate or Insane Affiant.** Under the English practice where the affidavit of an illiterate person is taken, it is necessary for the jurat to show that the statements contained in the affidavit were read to the affiant and that he seemed to understand them;[67] and, where the affidavit of a person in an insane asylum was taken, it was said that the jurat should show the place and circumstances under which it was taken and the effort made, if any, to ascertain the affiant's capacity.[68]

[§ 103] **c. Name of Affiant.** While it is always the better practice to state in the jurat the name of affiant,[69] yet, where there is no statute requiring this, and there is only one affiant, the omission of his name from the jurat is not a material defect if his name and signature appear in the affidavit proper.[70] By rule of court in England, where there are several affiants, the names of all must be written in the jurat,[71] but elsewhere this is not required.[72]

[§ 104] **d. Appearance of Affiant.** In some cases it has been held that a jurat omitting the words "before me" is a nullity on account of such omission;[73] but usually these words are not regarded as essential, and any form is sufficient from which the inference may fairly be drawn that affiant personally appeared before the officer who administered the oath.[74]

tional" seal, it was held to be an evident clerical error, the word "notarial" being clearly intended. Schwartz v. Baird, 100 Ala. 154, 13 S 947.

[c] **Omission of word "dollars."**—Where, in the jurat of an affidavit for attachment, the word "dollars" was omitted in stating the amount claimed, but the omission was supplied by the warrant of attachment, it was held that the affidavit was not invalidated thereby. De Bebian v. Gola, 64 Md. 262, 21 A 275.

[d] **Approved forms of jurats.**—(1) In Hosea v. State, 47 Ind. 180, the following jurat was held sufficient: "Subscribed and sworn to this 3d day of September, 1872. A. S. Burr, J. P." (2) "Subscribed and sworn to before me" is substantially equivalent to the statutory requirement "sworn to or affirmed before me, and signed in my presence." Sargent v. Townsend, 2 Disn. (Oh.) 472; Pallady v. Beatty, 15 Okl. 626, 83 P 428. (3) A jurat which recites that "on this day personally appeared Gebhard Gahwiler, and, having been duly sworn by me, subscribed to the foregoing affidavit, and stated that the facts alleged in the said affidavit are true," and which is signed by the district clerk, is sufficient. Steinam v. Gahwiler, (Tex. Civ. A.) 30 SW 472, 474. (4) The usual form is: "Subscribed and sworn to before me, on the —— day of ——, 18—. ———, J. P." Where no special form is prescribed by statute this will be sufficient. Parker v. Clark, 7 W. Va. 467.

[e] **Other sufficient forms of jurats** see Barhydt v. Alexander, 59 Mo. A. 188; Sargent v. Townsend, 2 Disn. (Oh.) 472.

61. See infra § 105.
62. See infra § 104.
63. See infra § 106.
64. See infra §§ 107, 108.
65. See infra § 109.
66. See infra §§ 110–113.

67. Spittle v. Walton, L. R. 11 Eq. 420; Bosc v. Soilliers, 4 B. & C. 358, 10 ECL 614, 107 Reprint 1093; Rex v. Hailey, 1 C. & P. 258, 12 ECL 155; Wilson v. Blakey, 9 Dowl. P. C. 352; Haynes v. Powell, 3 Dowl. P. C. 599; Savage v. Hutchinson, 24 L. J. Ch. 232; Fernyhough v. Naylor, 23 Wkly. Rep. 228.

[a] **Explanation of contents to affiant.**—Under a statute providing that the whole affidavit be read over and explained to the person making the same, and that it be stated in words at full length, in the jurat, that the same affidavit was "duly" read over and explained to the deponent by the commissioner or party before whom it was sworn, antecedent to the swearing thereof, the omission from the jurat of the word "duly" is fatal, as the legislature evidently attached some importance to the form of expression, and any omission in any report varying the sense must therefore be fatal. Thayer v. Hensley, 1 U. C. Q. B. 335.

[b] **Slight variation from prescribed form.**—(1) In Ex p. Allain, 35 N. B. 107, 20 CanLTOccNotes 87, an affidavit was held sufficient, although in the jurat the word "he" or "who" was omitted before the word "seemed" and the deponent was said "fully to understand the same" instead of "perfectly to understand the same." (2) The affidavit on which a rule nisi for a certiorari was granted was made by a marksman. Objection was taken on showing cause that the certificate of the commissioner before whom the affidavit was sworn was not a compliance with Rule 1 of Hilary Term 11 V., in that the word "fully" was used instead of "perfectly" in the clause "who seemed perfectly to understand the same." It was held a sufficient compliance with the rule. Ex p. Allain, 35 N. B. 107, 20 CanLT OccNotes 87.

68. Spittle v. Walton, L. R. 11 Eq. 420.

69. Blake Crusher Co. v. Ward, 3 F. Cas. No. 1,505.

[a] **Should show identity of affiant.**—The jurat of a verification to a bill for a preliminary injunction, which is made by an officer or agent of a corporation, should show that the person who signed the bill and the person taking the oath are the same. Blake Crusher Co. v. Ward, 3 F. Cas. No. 1,505.

70. Stoddard v. Sloan, 65 Iowa 680, 22 NW 924.

Necessity for naming affiant in body of the instrument see supra § 82.

[a] **Name of affiant blank.**—In Kirby v. Gates, 71 Iowa 100, 32 NW 191, where an affidavit began: "I, Frank Pierce, do on oath say," etc., and was signed "Frank Pierce," it was held that a jurat, "Subscribed and sworn to by ——, before me," etc., was sufficient to show that the affidavit was sworn to by Frank Pierce.

[b] **Name written in body.**—Where the affiant subscribed the affidavit and stated that he swore to it, and his name was written in the body of it, the affidavit, construed with what preceded, sufficiently showed by whom it was made. Kirby v. Gates, 71 Iowa 100, 32 NW 191; Stoddard v. Sloan, 65 Iowa 680, 22 NW 924.

71. Cobbett v. Oldfield, 4 D. & L. 492; Ex p. Smith, 2 Dowl. P. C. 607; Pardoe v. Territt, 5 M. & G. 291, 44 ECL 159, 134 Reprint 575.

[a] **Extent of rule.**—In Lackington v. Atherton, 6 Scott N. R. 240, it was held that the terms of a rule of court, providing that upon every affidavit sworn to in court or before any commissioner thereof, and made by two or more deponents, the names of the several deponents making the affidavit should be written in the jurat, were large enough to embrace all affidavits sworn to either in court or before a judge elsewhere, or before a commissioner for taking affidavits.

[b] **Allowing new jurat.**—Where the names of the deponents were omitted from the jurat of an affidavit, and it seemed to the court that they were omitted through the negligence of the clerk before whom it was taken, it was held that a new jurat could be made. Ex p. Smith, 2 Dowl. P. C. 607.

72. Black v. Minneapolis, etc., R. Co., 122 Iowa 32, 96 NW 984; Blair v. Hemphill, 111 Iowa 226, 82 NW 501; Kirby v. Gates, 71 Iowa 100, 32 NW 191; Stone v. Miller, 60 Iowa 243, 14 NW 781; Davidson v. Bordeaux, 15 Mont. 245, 38 P 1075.

[a] **Sufficient form.**—Where an affidavit was signed by several persons the following jurat was held to be sufficient: "I do hereby certify that the persons whose names are signed above were duly sworn to it before me," etc. Taylor v. State, 48 Ala. 180, 183; Cobbett v. Oldfield, 4 D. & L. 492.

73. Smart v. Howe, 3 Mich. 590; Reg. v. Bloxham, 6 Q. B. 528, 51 ECL 528, 115 Reprint 197; Graham v. Ingleby, 5 D. & L. 737; Reg. v. Norbury, 15 L. J. Q. B. 264; Archibald v. Hubley, 18 Can. S. C. 116; Hayden v. Goodstein, 34 CanLJ 639.

[a] **Signature in presence of officer.**—In Nova Scotia where the affidavit is apparently signed by an illiterate person, the jurat must state that it was signed in the presence of the officer. Kassop v. Day, 36 N. S. 430.

74. Clement v. Bullens, 159 Mass. 193, 34 NE 173 ("then personally appeared"); Com. v. Keefe, 7 Gray (Mass.) 332 ("received and sworn to"); Trice v. Jones, 52 Miss. 138 ("given under my hand and seal").

[a] **No express averment of appearance.**—An affidavit of sale under the New York statute concerning mortgages is sufficient if certified thus: "Sworn before me this 1st day of November, 1821," etc., without expressly certifying that deponent appeared before the officer. Jackson v. Gumaer, 2 Cow. 552.

[b] **"Subscribed and sworn to before me"** is sufficient under Wilson St. § 4317, requiring that the officer's certificate shall show "that it was sworn to or affirmed before him and signed in his presence." Pallady v. Beatty, 15 Okl. 626, 83 P 428.

[c] **Omission of word "me."**—"The first objection is that the jurat to the affidavit of service is as follows: 'Sworn before at the,' &c., concluding in the usual form, and signed by the commissioner. The want of the word 'me' is objected. We think that we may read the whole jurat as one continuous sentence, when its sense and meaning is that the affidavit was sworn before the commissioner who subscribes the jurat." Martin v. McCharles, 25 U. C. Q. B. 279, 280.

[d] **Where a complaint shows** that it was taken on oath before the proper justice the omission from the jurat of the words "before me" is not ground for reversal. Cross v. People, 10 Mich. 24.

[e] **Personal appearance is presumed** from the statement that the

[§ 105] **e. Oath.** The jurat must show that the affidavit was sworn to by affiant in the officer's presence.[75] But a literal statement to this effect is usually not required if it appears from the entire instrument that the oath was taken.[76] So a mere statement that affiant was sworn is sufficient without stating the language in which the oath was administered,[77] and where affiant is allowed to affirm instead of taking an oath in the usual form this need not appear in the jurat,[78] or if it does it need not be stated that affiant was conscientiously scrupulous as to swearing.[79] Where a joint affidavit is made, it is better for the jurat to show that the affiants were severally sworn,[80] although it has been held where this showing was not made that the affidavit was not invalid.[81]

[§ 106] **f. Date.** Under the English practice the jurat must state the day on which the oath was administered,[82] and it has been held that an affidavit is bad which purports to be sworn to on a day not yet arrived;[83] but the general rule in the United States is that the omission of the date is not fatal where it is shown that the oath was taken in due season.[84]

affidavit was sworn to. Black v. Minneapolis, etc., R. Co., 122 Iowa 32, 96 NW 984.

[f] **Reading and explaining to affiant.**—In In re Ausebrook, 4 Grant Ch. (U. C.) 109, objection was raised to the form of the jurat of certain affidavits in that it omitted to state that the affidavits had been read over and explained to the deponent, but the court intimated that the jurat in the form generally used was sufficient.

[g] **Where an affidavit is used before the officer who took it** the omission from the jurat of the words "before me" will not vitiate it. Matter of Teachout, 15 Mich. 346.

[h] **Sworn to in open court.**—(1) In Smith v. Buffalo Oil Co., 99 Tex. 77, 87 SW 659, it was held that where an affidavit is made before a judge in open court, such fact may be made to appear by the paper itself or by a separate order on the records; however, where no particular kind of evidence is required by statute, these methods are not exclusive, and affidavits or other evidence may be received to prove such fact. (2) In Reg. v. Turner, 2 C. & K. 732, 61 ECL 732, it was held that where the handwriting of the party sworn and that of the officer who is authorized to administer the oath are proved, and the officer thus authorized writes under a proper jurat the words "By the Court," that is sufficient evidence that the affidavit was sworn to before him, and properly sworn to in court. (3) In Thorne v. Jackson, 3 C. B. 661, 54 ECL 661, 136 Reprint 264, it was said that the proper form of jurat is "Sworn in court, this," etc., without stating before whom.

[i] **Insertion of words "by the Court."**—Where an affidavit is sworn to before an officer of a court the fact that the words "before me" were struck out and the words "by the Court" inserted will not render it objectionable. Austin v. Grange, 4 Dowl. P. C. 576.

[j] **Where taken before judge.**—Where an affidavit is sworn to before a judge it is not necessary that his certificate show that the affiant personally appeared and was sworn in his presence. Empey v. King, 2 D. & L. 375.

[k] **In Iowa** (1) at least one case holds that it is not essential that the jurat state that the affidavit was sworn to in the presence of or before the officer who verifies the fact by his certificate, but the fact is presumed from the official statement that the affidavit was sworn. Black v. Minneapolis, etc., R. Co., 122 Iowa 32, 96 NW 984. (2) In an earlier case, however, it was held that under the requirements of Revision (1860) § 2913 the officer should certify that the affidavit was not only signed in his presence but that it was also sworn to before him. Way v. Lamb, 15 Iowa 79.

[l] **In Michigan** (1) some cases seem to hold that the omission of the words "before me" in the officer's certificate would not affect the validity of an affidavit. In re Teachout, 15 Mich. 346; Cross v. Peo., 10 Mich. 24. (2) But in one case it was held that the omission of these words rendered an affidavit void. Smart v. Howe, 3 Mich. 590.

75. Colo.—Palmer v. McCarthy, 2 Colo. A. 422, 31 P 241.

Ill.—Colvin v. Peo., 166 Ill. 82, 46 NE 737.

Nebr.—Sebesta v. Supreme Ct. of Honor, 77 Nebr. 249, 109 NW 166.

N. J.—Hitsman v. Garrard, 16 N. J. L. 124.

Tex.—Gordon v. State, 29 Tex. A. 410, 16 SW 337.

Necessity for statement in body of the affidavit that it was made on oath see supra § 85.

[a] **Insufficient jurat.**—A jurat, "Subscribed in my presence and sworn to by Freedom Way," was held to be insufficient for not showing that the affidavit was sworn to before the officer. Way v. Lamb, 15 Iowa 79.

[b] **"Sworn and affirmed."**—(1) A jurat set out that the deponents were sworn and affirmed. It was held that this was more than a compliance with the statute and that the affidavit was sufficient. In re Contested Elections of 1868, 2 Brewst. (Pa.) 1. (2) But in State v. Browning, 27 N. J. L. 527, it was held that a jurat stating that affiants were "sworn and affirmed" and upon their "oaths or affirmations say," etc., is too indefinite to sustain a charge of perjury, and is therefore insufficient. See infra note 80 [a].

76. Ill.—Bickerdike v. Allen, 157 Ill. 95, 41 NE 740, 29 LRA 782.

Ind.—Hosea v. State, 47 Ind. 180.

Mass.—Clement v. Bullens, 159 Mass. 193, 34 NE 173; Com. v. Keefe, 7 Gray 332.

N. H.—Randall v. Baker, 20 N. H. 335.

Pa.—In re Contested Elections, 2 Brewst. 1.

W. Va.—Parker v. Clark, 7 W. Va. 467.

[a] **Subscribed but not sworn.**—In Bickerdike v. Allen, 157 Ill. 95, 41 NE 740, 29 LRA 782, the notary recited in the jurat that the affidavit was subscribed before him, but did not state that it was sworn to before him. However, it was held that it would be presumed that the affidavit was sworn to, as the affiant in the body of the affidavit averred that what he stated he stated "on oath," and as the name of the notary public with his seal appeared below the notarial certificate attached to the affidavit.

[b] **"Given under my hand and seal"** will suffice for the stereotyped formula, "sworn to and subscribed before me." Trice v. Jones, 52 Miss. 138.

[c] **Proof of signature.**—In Reg. v. Atkinson, 17 U. C. C. P. 295, it was held that if an affidavit was sworn in a certain county the proof of the swearing by the justice of the peace and the taking of the oath by the affiant were made out by proving their signatures to it.

77. Colvin v. Peo., 166 Ill. 82, 46 NE 737.

[a] **Where no statute prescribes the form** of the attestation any form which shows that affiant took the oath will be deemed sufficient. Thus an attestation, "Sworn to and subscribed before me," etc., was held sufficient under Act (1840) p 89 § 9. Chevallier v. Williams, 2 Tex. 239.

[b] **Presumption that oath properly taken.**—A bill in chancery prayed that defendants, being Jews, should swear to their answer according to their creed, setting forth the oath and ceremony which alone were supposed to bind their conscience. The jurat to their answer was in the ordinary form, the officer certifying therein that defendants had been "duly sworn." A motion to strike the answer off the files was refused, there being no proof to show that defendants were not sworn according to their creed where the officer certified they had been "duly" sworn. Fryatt v. Lindo, 3 Edw. (N. Y.) 239. See also Wolseley v. Worthington, 14 Ir. Ch. 369.

[c] **Surplusage rejected.**—An affidavit reciting that affiant does "swear (or affirm)," and containing at the bottom the words, "Affirmed before me, one of the justices," etc., is sufficient as an affirmation, and the word "swear" may be rejected as surplusage. State v. Shreve, 4 N. J. L. 297.

78. Dyck v. Graening, 17 Man. 158.

79. Loney v. Bailey, 43 Md. 10 (holding that it is presumed that the officer was satisfied on that point).

80. State v. Browning, 27 N. J. L. 527; Pardoe v. Territt, 5 M. & G. 291, 44 ECL 159, 134 Reprint 575.

[a] **The words "sworn and affirmed before me,"** at the end of a paper purporting to be a joint affidavit, are insufficient, as it does not appear which of the two swore and which of the two affirmed, or whether both of them were in some way, either by oath or affirmation, bound to the truth of the statement. Mann v. Western Assur. Co., 17 U. C. Q. B. 190. See supra note 75 [b].

81. Randall v. Baker, 20 N. H. 335; Moyer v. Davidson, 7 U. C. C. P. 521.

[a] **Inference that affiants were severally sworn.**—"It is plainly stated that Andrew Hawley and Alex. Gibb were sworn to the affidavit, and though it would have been more correct to have stated that they were severally sworn, inasmuch as each swears for himself to a particular part of the affidavit, yet if each were sworn to the whole I do not know that any objection would lie on the score of swearing to too much. I think the statement in the jurat is a sufficient compliance with the rule of court, and that no inference can be drawn from it that only one of the parties may have been sworn, as might be the case if it had stated in general terms 'sworn before me,' etc." Keefer v. Hawley, 1 Ont. Pr. 1, 2.

82. Re Lloyd, 15 Q. B. 682, 69 ECL 682, 117 Reprint 617; Doe v. Roe, 1 Chit. 228, 18 ECL 133; Brunswick v. Harmer, 14 Jur. 620; Frost v. Heywood, 6 Jur. 1045; Blackwell v. Allen, 10 L. J. Exch. 65; Wood v. Stephens, 3 Moore C. P. 236, 4 ECL 547.

[a] **Not cured by reference in another affidavit.**—The want of a date in the jurat of an affidavit is not cured by a reference to it in another affidavit as "an affidavit of A. B. sworn on such a day." Brunswick v. Slowman, 8 C. B. 617, 65 ECL 617, 137 Reprint 649.

83. Ex p. Emmerson, 33 N. B. 340.

84. Naudain v. Naudain, 24 Del. 248, 75 A 609; Schoolcraft v. Thomp-

[§ 107] **g. Place of Administering Oath—(1) Necessity of Showing.** It has been held in some cases that an affidavit containing no evidence that it was sworn to within the jurisdiction of the officer who administered the oath is fatally defective, no presumption arising as to where it was taken if no place is mentioned;[85] but, under the modern practice in most jurisdictions, where it appears that the oath was administered by an officer authorized to perform such acts, it is presumed that he acted within his jurisdictional limits, in the absence of any showing to the contrary.[86] If, however, the affidavit shows on its face that it was taken outside the jurisdiction of the officer who certified it, it is insufficient.[87]

[§ 108] **(2) Where Venue Appears Otherwise.** Where a venue is given in the caption of an affidavit it is not a material defect if the jurat fails to state the county or state in which the officer is commissioned to act, it being presumed that he is authorized to act in the county named.[88] So the absence of any direct statement of the venue is not material where the affidavit bears the officer's seal containing the name of his county,[89] or where the venue is given in another paper to which the affidavit is attached.[90]

[§ 109] **h. Signature of Officer.** It is the better practice for the jurat to be authenticated by the signature of the officer before whom the affidavit was made, and many cases hold this to be indispensable to the validity of the instrument.[91] But

son, 7 HowPr (N. Y.) 446 [rev on other grounds 9 HowPr 61].

[a] **Correct date may be shown.**—In Freas v. Jones, 15 N. J. L. 20, 21, it was held that a jurat was not invalidated by an obvious mistake in the date. Hornblower, C. J., said: "But I consider the date unimportant, provided the affidavit was sufficient. A date is not essential to an affidavit. If untrue, perjury may be assigned upon it, though it may have no date, or a wrong or impossible one, and the true time of making it, may be averred and proved."

85. U. S. v. Burr, 25 F. Cas. No. 14,692c; Barhydt v. Alexander, 59 Mo. A. 188; Peo. v. De Camp, 12 Hun (N. Y.) 378; Smith v. Collier, 3 NYSt 172; Lane v. Morse, 6 HowPr (N. Y.) 394; Clement v. Ferenback, 1 NYCity Ct. 57; Smith v. Richardson, 1 Utah 194.

[a] **In England** affidavits sworn to before a commissioner in answer to a rule must contain in the jurat the place where sworn; otherwise they cannot be read. Cass v. Cass, 1 D. & L. 698.

86. Ga.—Abrams v. State, 121 Ga. 170, 48 SE 965.

Iowa.—Turner v. Loomis, 146 Iowa 655, 125 NW 662.

Minn.—Young v. Young, 18 Minn. 90.

N. Y.—Crosier v. Cornell Steamboat Co., 27 Hun 215; Barnard v. Darling, 1 Barb. Ch. 218; Parker v. Baker, 8 Paige 428.

N. D.—Salzer Lumber Co. v. Claflin, 16 N. D. 601, 607, 113 NW 1036 [cit Cyc].

S. D.—State v. Henning, 3 S. D. 492, 54 NW 536.

B. C.—Brown v. Jowett, 4 B. C. 44.

N. B.—Doe v. Kennedy, 26 N. B. 83.

In Dennison v. Story, 1 Or. 272, 273, it was said: "It has been a rule of practice in this country for the courts to take official knowledge of the existence and qualifications of the officers having authority to administer oaths within the particular judicial district in which such officer resided and had authority; and the court are of opinion that when a verification to a pleading is taken by a known and recognized officer, having authority within the district, in a cause pending in such district, it is to be presumed that such verification was taken within the local jurisdiction of such officer; for otherwise we must presume that such officer has violated his official obligations by exercising his functions without his jurisdiction."

[a] **Entitled in court in which action pending.**—Where an affidavit in an action, although not containing a formal venue, was entitled in the court in which the action was pending and was sworn to before the clerk thereof who affixed his seal, it was held that the presumption was that, in the discharge of his duty, he administered the oath within the jurisdiction in which he was authorized to act. Ormsby v. Ottman, 85 Fed. 492, 29 CCA 295.

[b] **Valid, although irregular.**—"To dispense with those forms is only to get into uncertainty and mischief and by a strain of jurisdiction to help parties through that which they ought to look to themselves. Notwithstanding all this, I think the omission of place in the jurat did not render the affidavit inadmissible." Andover v. Kennedy, 26 N. B. 83, 96.

[c] **Collateral attack.**—The question whether an officer acted within his jurisdiction cannot be raised collaterally after the affidavit has been received by the court and acted on. Hart v. Grigsby, 14 Bush (Ky.) 542.

87. Hutchins v. State, 8 Ga. A. 409, 69 SE 309; Peo. v. Nelson, 150 Ill. A. 595; Byrd v. Cochran, 39 Nebr. 109, 58 NW 127; Robinson v. Cooper, 62 Misc. 517, 115 NYS 599; Snyder v. Olmsted, 2 HowPr (N. Y.) 181; Sandland v. Adams, 2 HowPr (N. Y.) 127; Davis v. Rich, 2 HowPr (N. Y.) 86.

[a] **Variance between caption and jurat.**—(1) An affidavit commencing, "State of Indiana, Marion County ss.," and certified as having been sworn to before a notary public in Ohio, is presumed to have been made in Ohio, as the court will presume that the notary acted within his jurisdiction. Teutonia Loan, etc., Co. v. Turrell, 19 Ind. A. 469, 49 NE 852, 65 AmSR 419. (2) Where an affidavit was entitled, "State of Iowa, County of Webster," but appeared to have been sworn to before a notary public in Dubuque county, it was held that in the absence of evidence to the contrary it would be presumed that the notary took the affidavit in his own county. Goodnow v. Litchfield, 67 Iowa 691, 25 NW 882 [foll Goodnow v. Oakley, 68 Iowa 25, 25 NW 912].

88. Ill.—Palmer v. Nassau Bank, 78 Ill. 380; Dyer v. Flint, 21 Ill. 80, 74 AmD 73.

Iowa.—Stoddard v. Sloan, 65 Iowa 680, 22 NW 924; Stone v. Miller, 60 Iowa 243, 14 NW 781.

Mich.—Smith v. Runnells, 94 Mich. 617, 54 NW 375.

Minn.—Rahilly v. Lane, 15 Minn. 447.

N. J.—Perkins v. Collins, 3 N. J. Eq. 482.

N. Y.—Peo. v. Cady, 105 N. Y. 299, 11 NE 810.

Eng.—Grant v. Fry, 8 Dowl. P. C. 234.

See State v. Walker, 78 Kan. 680, 97 P 862.

Statement of venue in caption of the affidavit see supra §§ 62-65.

[a] **Illustrations.**—(1) An affidavit containing the usual venue, the signature of the notary, and his official designation, and the seal of the notary showing the city of his residence, sufficiently shows that the affidavit was taken in the county of the notary's residence. Mackie v. Central R. Co., 54 Iowa 540, 6 NW 723. (2) In Barnard v. Darling, 1 Barb. Ch. (N. Y.) 218, the jurat was as follows: "State of New York, —— county, ss." The oath was signed "O O, comm'r of deeds," without specifying the county or city for which the person signing it was a commissioner. It appeared, however, that he was in fact a commissioner of deeds for the city of Albany. It was held that the affidavit was not invalid, since affiants could be convicted of perjury thereon if they had sworn falsely.

[b] **Need not state officer's place of residence.**—It is presumed that the notary who takes an affidavit performs that act where the venue of the affidavit is laid, and that he resides there. Consequently it is unnecessary to add to his signature his place of residence. Mosher v. Heydrick, 45 Barb. (N. Y.) 549, 1 AbbPr NS 258, 30 HowPr 161. But see Peo. v. Dutchess County, 20 NYS 329.

[c] **Where the caption was "City of St. Louis,"** it was presumed that the notary before whom the affidavit was made was a notary for that city. Remington Sewing Mach. Co. v. Cushen, 8 Mo. A. 528.

[d] **Sufficient showing of place.**—A jurat to an affidavit bearing the caption, "State of West Virginia, County of Summers, to wit," and concluding, "Taken, subscribed, and sworn to before me this 22d day of December, 1896, in Summers county. T. N. Read, Notary Public," sufficiently shows that such person is a notary of Summers county. Quesenberry v. People's Bldg., etc., Assoc., 44 W. Va. 512, 30 SE 73.

89. Reavis v. Cowell, 56 Cal. 588; Cox v. Stern, 170 Ill. 442, 48 NE 906, 62 AmSR 385; Englehart-Davison Mercantile Co. v. Burrell, 2 Mo. A. 1324; Bilby v. Hancock, (Tex. Civ. A.) 125 SW 370.

90. Snell v. Eckerson, 8 Iowa 284.

[a] **Venue appearing from other proceedings.**—An affidavit was signed "S. Fee, J. P." It appeared from other proceedings that such affidavit was sworn to in a certain county. It was held that it would be presumed that the affidavit was taken before the person named, and that such person was justice of the peace of the county where it was sworn to. Larimer v. Knoyle, 43 Kan. 338, 23 P 487.

91. U. S.—U. S. v. Law, 50 Fed. 915.

Ark.—Guy v. Walker, 35 Ark. 212; State Bank v. Hinchcliffe, 4 Ark. 444.

Fla.—Rumell v. Tampa, 48 Fla. 112, 37 S 563.

Ga.—Birdsong v. McLaren, 8 Ga. 521.

Ind.—Deputy v. Dollarhide, 42 Ind. A. 554, 86 NE 344.

Iowa.—Tunis v. Withrow, 10 Iowa 305, 77 AmD 117.

Mich.—Calvert v. McNaughton, 2 Mich. N. P. 8; Knapp v. Duclo, 1 Mich. N. P. 189.

Mo.—Sedalia Third Nat. Bank v. Garton, 40 Mo. A. 113.

Nebr.—Holmes v. Crooks, 56 Nebr. 466, 76 NW 1073.

N. J.—Hitsman v. Garrard, 16 N. J. L. 124; Westerfield v. Bried, 26 N. J. Eq. 357.

N. Y.—Ladow v. Groom, 1 Den. 429.

Oh.—Benedict v. Peters, 58 Oh. St. 527, 51 NE 37.

S. C.—Marine Wharf, etc., Co. v. Parsons, 49 S. C. 136, 26 SE 956; Doty v. Boyd, 46 S. C. 39, 24 SE 59.

Tex.—Morris v. State, 2 Tex. A. 502.

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where it is otherwise shown that affiant in fact swore to the affidavit the failure of the officer to affix his signature will usually not be allowed to vitiate the proceedings based thereon.[92] Some cases hold that where the officer's signature is omitted it may be affixed nunc pro tunc;[93] and that if the officer fails to appear voluntarily and attach his signature he may be compelled to do so by rule of court.[94] It is unnecessary for the officer to add to his signature the name of the county or other district for which he is appointed where it is shown by reference to other parts of the affidavit that he acted within his

Wis.—Kidder v. Fay, 60 Wis. 218, 18 NW 839.

Eng.—Bill v. Bament, 9 Dowl. P. C. 810.

Man.—Inman v. Rae, 10 Man. 411.

[a] **In New York** (1) some cases hold that the signature of the officer to the jurat is indispensable to the validity of an affidavit. Ladow v. Groom, 1 Den. 429; Jackson v. Stiles, 3 Cai. 128. (2) But in at least one case it has been held that the omission was not fatal but that the signature could be subsequently affixed by the officer. Sage v. Stafford, 42 App. Div. 449, 59 NYS 545.

[b] **In Michigan** (1) it has been held that the officer's signature to an affidavit is essential. Calvert v. McNaughton, 2 Mich. N. P. 8; Knapp v. Duclo, 1 Mich. N. P. 189. (2) Another case, while conceding the signature to be essential, held that where omitted the officer could be compelled to sign it nunc pro tunc. Peo. v. Simondson, 25 Mich. 113. (3) In still another case it was held that the failure of the officer to sign the jurat to a complaint did not render it so invalid that no warrant could be issued upon it. Peo. v. Lane, 124 Mich. 271, 82 NW 896.

[c] **An affidavit lacking the signature of an officer** can be regarded only as a blank form, although the jurat contains the words "sworn to and subscribed in open Court. Dec. 22d, 1841." State Bank v. Hinchcliffe, 4 Ark. 444.

[d] **Seal without signature insufficient.**—"That the impression of the seal appeared to the jurat in question in the case at bar was not alone sufficient. Further proof that the oath was before the officer to whom the seal belonged was requisite. The jurat without the signature of the officer was incomplete and no authentication of the document on which it appeared." Holmes v. Crooks, 56 Nebr. 466, 469, 76 NW 1073.

[e-f] **Presumption that no oath administered.**—It has been held that where a magistrate before whom an affidavit had been taken neglected to sign the jurat, the presumption was that no oath had been administered, and where the officer was dead that there was no way in which the defect could be supplied. Kidder v. Fay, 60 Wis. 218, 18 NW 839.

[g] **Signature of deputy.**—(1) In Minnesota a jurat signed "F. W. Ely, Clerk of District Court, St. Louis County, per J. R. Carey, Deputy," was held sufficient, although not in the most approved form. Crombie v. Little, 47 Minn. 581, 50 NW 823. (2) And in Washington it has been held that, although it may be an irregularity for the deputy to sign the jurat in the name of his principal by himself as deputy, it is not sufficient to destroy the force of the jurat. State v. Rosener, 8 Wash. 42, 35 P 357. (3) In Colorado an affidavit which read, "D. C. Bowne, who personally appeared before me, J. S. Stewart, county clerk, deposes and says: . . . In witness whereof, I have hereunto set my hand and seal, this third day of August, 1889. J. S. Stewart, County Clerk. By Thomas Thompson, Deputy," was held insufficient because it showed that the deponent appeared before the clerk, while the certificate was made by the deputy. Palmer v. McCarthy, 2 Colo. A. 422, 31 P 241.

[h] **Defective affidavit.**—The following paper purporting to be an affidavit for publication was held insufficient because it did not appear to have been sworn to by anyone or before any officer: "The state of Texas, County of McLennan. This day personally came and appeared before A. J. Evans, clerk of the District Court of said county, and says the names of the heirs of Joseph Wilson, deceased, are unknown to affiant. J. R. Harris, D. C. McL. Co., T." Hardy v. Beaty, 84 Tex. 562, 566, 19 SW 778, 31 AmSR 80.

[i] **The copy of an affidavit served on the opposite attorney** need not contain the name of the magistrate before whom it was sworn. Livingston v. Cheetham, 2 Johns. (N. Y.) 479.

[j] **Several instruments on same sheet.**—Where a statement of appeal, affidavit, and recognizance were all on the same sheet of paper, and the officer subscribed his name at the foot of the recognizance, it was held that such signature could not be referred to the affidavit. Shortle v. Stockton, 7 Watts (Pa.) 526.

[k] **Signature presumed genuine.**—The signature of the county clerk or his deputy to the jurat to an oath lawfully filed in his office is presumed to be genuine, and no proof on that point prima facie is required. Merriam v. Coffee, 16 Nebr. 450, 20 NW 389.

[l] **Offer to prove signature not in officer's handwriting.**—It is not error to exclude evidence offered to prove that the signature of the clerk to a jurat is not in his handwriting, that not being the equivalent to an offer to prove the signature a forgery. Etter v. Dugan, 1 Tex. Unrep. Cas. 175.

[m] **The name of the officer taking affidavit must be disclosed** either by the recitals in the body thereof or by his signature to the jurat. Sellers v. State, 162 Ala. 35, 50 S 340.

[n] **Using initial of christian name.**—Where the officer in signing the jurat used only the initial of his christian name it was held that the signature was sufficient. Rice v. Peo., 15 Mich. 9.

92. Ala.—Hyde v. Adams, 80 Ala. 111; McCartney v. Huntsville Branch Bank, 3 Ala. 709; Lowry v. Stowe, 7 Port. 483.

Ark.—Bittick v. State, 67 Ark. 131, 53 SW 571. But see supra note 91 [c].

Ga.—Beach v. Averett, 106 Ga. 73, 31 SE 806, 71 AmSR 239.

Ill.—Larson v. Peo., 170 Ill. 93, 48 NE 443; Kruse v. Wilson, 79 Ill. 233.

Ind.—Williams v. Stevenson, 103 Ind. 243, 2 NE 728.

Iowa.—Stout v. Folger, 34 Iowa 71, 11 AmR 138; Cook v. Jenkins, 30 Iowa 452.

La.—English v. Wall, 12 Rob. 132.

Md.—Farrow v. Hayes, 51 Md. 498.

Mo.—Finley v. West, 51 Mo. A. 569.

N. J.—Capner v. Flemington Min. Co., 3 N. J. Eq. 467.

Pa.—Pottsville v. Curry, 32 Pa. 443; Maples v. Hicks, Brightly 56.

Wash.—Tacoma Grocery Co. v. Draham, 8 Wash. 263, 36 P 31, 40 AmSR 907.

W. Va.—Farmer's Bank v. Gettinger, 4 W. Va. 305.

Wis.—Lederer v. Chicago, etc., R. Co., 38 Wis. 244.

Wyo.—Redman v. Union Pac. R. Co., 3 Wyo. 678, 29 P 88.

[a] **Where the jurat was in the judge's handwriting** and, although not signed by him, was immediately followed by an order for an attachment, reciting that the judge had read the petition, affidavit, etc., and signed by him, it was held that from the circumstances there arose the strongest implication that the affidavit had been sworn to before him and that it would be sufficient to sustain an assignment for perjury. English v. Wall, 12 Rob. (La.) 132.

[b] **Where the court bases its order on an affidavit** the jurat of which is unsigned the defect in the affidavit is cured. State v. Downing, 48 La. Ann. 1420, 20 S 907.

[c] **Name of officer must appear in some way.**—"While this court has several times held that it is not essential that the officer's name should be attached to the jurat, in legal proceedings (Hyde v. Adams, 80 Ala. 111; Watts v. Womack, 44 Ala. 605, and cases there cited), yet it has never decided that it is not necessary to the validity of the affidavit that the name of the officer should be disclosed by it in some way. And we now hold that it is essential to the validity of the affidavit that the name of the officer be disclosed either by the recitals in the body of the affidavit or by his signature to the jurat." Denson, J., in Sellers v. State, 162 Ala. 35, 39, 50 S 340 [cit Cyc].

[d] **In Pennsylvania** a clerical omission of a prothonotary to attest an affidavit sworn to before him was held not to be fatal. Pottsville v. Curry, 32 Pa. 443; Maples v. Hicks, Brightly 56. But see Shortle v. Stockton, 7 Watts 526, where an affidavit lacking the signature of the officer was held invalid. In commenting on this latter case it was said in Pottsville v. Curry, 32 Pa. 443, that the amendment was there refused because there was nothing upon record to show that an oath had been taken.

[e] **Not ground for collateral attack.**—Where an affidavit for attachment was sufficient in every respect except that the jurat was not signed by the officer, but affiant testified on the trial that he signed and swore to the affidavit before the deputy clerk, and an attachment writ, issued on the same day that the affidavit was filed, recited that the affiant named in the affidavit had complained on oath to the clerk issuing the writ, etc., it was held that the affidavit could not be assailed by defendant in attachment, in a subsequent action of ejectment brought by him to recover the land sold under the attachment proceedings. Kruse v. Wilson, 79 Ill. 233.

[f] **Not ground for dismissing injunction.**—Where an injunction bill had been actually sworn to it was held that the injunction would not be dismissed because the master who took the affidavit had omitted to sign the jurat. Capner v. Flemington Min. Co., 3 N. J. Eq. 467.

93. Ga.—Veal v. Perkerson, 47 Ga. 92.

La.—State v. Downing, 48 La. Ann. 1420, 20 S 907.

Md.—Farrow v. Hayes, 51 Md. 498.

Mich.—Peterson v. Fowler, 76 Mich. 258, 43 NW 10; Peo. v. Simondson, 25 Mich. 113.

N. Y.—Sage v. Stafford, 42 App. Div. 449, 59 NYS 545.

Pa.—Hart, etc., Co. v. Jones, 6 Kulp 326.

Wis.—State v. Cordes, 87 Wis. 373, 58 NW 771.

Wyo.—Redman v. Union Pac. R. Co., 3 Wyo. 678, 29 P 88.

Eng.—Bill v. Bament, 9 Dowl. P. C. 810.

And see infra § 130.

[a] **Amendment on due proof.**—Where the affidavit was properly taken but the officer neglected to subscribe the jurat, it was held that the defect could be cured and the affidavit amended upon due proof. Cusick's Election, 136 Pa. 459, 20 A 574, 10 LRA 228. But see Shortle v. Stockton, 7 Watts (Pa.) 526.

94. Guy v. Walker, 35 Ark. 212;

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jurisdiction,[95] or where this fact is presumed.[96]

[§ 110] **i. Showing Officer's Authority—(1) In General.** The courts in some jurisdictions have taken judicial notice that the person who signed the jurat held an office which authorized him to take affidavits.[97] And as a general rule it is not necessary for the jurat to contain a recital of the official character of the officer before whom the affidavit was taken.[98] In some jurisdictions, however, the courts have refused to take judicial notice of the officer's authority,[99] and have held that unless his official character is shown in some way the instrument is defective.[1] Where the affidavit is made in the county in which the cause is tried it will be presumed on appeal that the lower court was satisfied that the person who took the affidavit was authorized to do so.[2]

[§ 111] **(2) Manner of Showing.** The officer's authority may be indicated by adding his official designation after his signature,[3] or it may appear from the officer's seal,[4] from other parts of the in-

Peo. v. Simondson, 25 Mich. 113; State v. Cordes, 87 Wis. 373, 58 NW 771; Lederer v. Chicago, etc., R. Co., 38 Wis. 244.

95. Mosher v. Heydrick, 45 Barb. (N. Y.) 549; Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 P 396.

[a] **Omission of name of county from signature.**—(1) "While it is very proper that a notary public should sign himself as a notary public in and for the county from which he is appointed, yet his certificate would not be fatally defective if the designation of the county is omitted. He may act in any part of the State, and his official acts are not confined to the county where he resides." Sullivan v. Hall, 86 Mich. 7, 12, 48 NW 646, 13 LRA 556. (2) And in Smith v. Runnells, 94 Mich. 617, 618, 54 NW 375, the court said: "That action was begun by attachment, and the affidavit is said to be defective, in that the notary before whom it was sworn did not append to his signature to the jurat the name of the county for which he was appointed, and it did not appear in the body of the affidavit. The caption of the affidavit contains the name of the county, and leads to the plain inference that the notary was an officer in and for such county."

96. See supra § 107.

97. Cal.—Ede v. Johnson, 15 Cal. 53.

Ill.—Hertig v. Peo., 159 Ill. 237, 42 NE 879, 50 AmSR 162; Dyer v. Flint, 21 Ill. 80, 74 AmD 73; Rowley v. Berrian, 12 Ill. 198; Singleton v. Wofford, 4 Ill. 576.

Ind.—Mountjoy v. State, 78 Ind. 172; Hipes v. State, 73 Ind. 39; Buell v. State, 72 Ind. 523; Brooster v. State, 15 Ind. 190.

Kan.—Simon v. Stetter, 25 Kan. 155.

Tex.—Etter v. Dugan, 1 Tex. Unrep. Cas. 175.

[a] **Statement of title not necessary.**—In Henderson v. Harper, 2 U. C. Q. B. 97, Jones, J., said: "The insufficiency alleged arises from the contractions 'Mid. Dist.' and 'B. R. M. D.' in the jurat of the affidavit. The letters 'Mid. Dist.' are no doubt intended to represent 'Midland District,' and they either mean that, or they mean nothing. . . . The person before whom the affidavit was sworn is known to this court as a commissioner for taking affidavits in the midland district; Kingston is known to be in the Midland District, and therefore the signature of the commissioner is sufficient, without prefixing the word 'commissioner,' or any other word."

[b] **In California** judicial notice will be taken of the official character of a justice of the peace, and an affidavit is valid, although such official character does not appear therein. Ede v. Johnson, 15 Cal. 53.

[c] **In Illinois** (1) the circuit court takes judicial notice of the officers authorized to take affidavits in the county in which it sits. Schaefer v. Kienzel, 123 Ill. 430, 15 NE 164; Dyer v. Flint, 21 Ill. 80, 74 AmD 73; Rowley v. Berrian, 12 Ill. 198; Shattuck v. Peo., 5 Ill. 477. (2) But if the oath is taken in a county other than that in which the suit is brought the authority of the person administering it must be established by competent evidence. Rowley v. Berrian, 12 Ill. 198.

98. Goodyear v. Hullihen, 10 F. Cas. No. 5,573, 2 Hughes 492, 3 Fish. Pat. Cas. 251; Smith v. State, 24 Ind. A. 417, 56 NE 924; Jackman v. Gloucester, 143 Mass. 380, 9 NE 740.

[a] **In New York** (1) in one instance it seems that it was considered necessary that the official title of the officer should be annexed to his signature. Jackson v. Stiles, 3 Cai. 128. (2) In others, however, it seems to have been regarded as not essential. Peo. v. Rensselaer C. Pl., 6 Wend. 543; Hunter v. Le Conte, 6 Cow. 728. (3) And it has been held that where the title of the officer was omitted from the jurat the reception and filing of the affidavit by the clerk of the court rendered it prima facie sufficient. Hunter v. Le Conte, 6 Cow. 728.

[b] **According to several English and Canadian cases** (1) the official title of the officer must be annexed to his signature. Griffin v. Smythe, 8 Dowl. P. C. 490; Rex v. Hare, 13 East 189, 104 Reprint 341; Frost v. Heywood, 6 Jur. 1045; Babcock v. Bedford Municipal Council, 8 U. C. C. P. 527. (2) Others, however, hold that its omission is not fatal. Ex p. Johnson, 26 Ch. D. 338; Cheney v. Courtois, 13 C. B. N. S. 634, 106 ECL 634, 143 Reprint 252; Murphy v. Boulton, 3 U. C. Q. B. 177.

[c] **Omission cannot be reached by demurrer.**—It seems that the omission to state the official title may not be taken advantage of by a general demurrer to the sufficiency of the affidavit, for the jurat is no part of the affidavit. Smith v. Walker, 93 Ga. 252, 18 SE 830.

[d] **Where taken before consul.**—Where an affidavit was taken before a United States consul in a foreign country, it has been held that it was not signed officially unless the officer affixed to his name the words "notary public," or else wrote after the word "consul" the words "and ex officio notary public." Bruce v. Gibson, 8 Oh. Dec. (Reprint) 31, 5 CincLBul 101.

[e] **When commissioner is in court.**—An objection to an affidavit that the jurat does not show the capacity of the person who took the oath cannot be allowed to prevail, when the person is in court and admits that he is a commissioner. Hamilton v. Harrison, 46 U. C. Q. B. 127.

99. Frost v. Heywood, 6 Jur. 1045; Babcock v. Bedford Municipal Council, 8 U. C. C. P. 527.

1. Fla.—Rumeli v. Tampa, 48 Fla. 112, 37 S 563.

Ill.—Peo. v. Nelson, 150 Ill. A. 595.

Minn.—Knight v. Elliott, 22 Minn. 551.

Or.—Blanchard v. Bennett, 1 Or. 328.

Eng.—Reg. v. Bloxham, 6 Q. B. 528, 51 ECL 528, 115 Reprint 197; Howard v. Brown, 4 Bing. 393, 13 ECL 556, 130 Reprint 819.

[a] **Must appear in some way.**—Where a certain affidavit was required by statute to be taken by a justice of the peace, it was held that unless it appeared, either upon the face of the affidavit or in some other way, that the person before whom the oath was taken was a justice of the peace the proceedings would be set aside. State v. Hutchinson, 10 N. J. L. 242.

[b] **Insufficient affidavit.**—Where an affidavit was entitled "State of Arkansas, County of Sebastian, ss.," and was certified by "John F. Wheeler, Mayor," it was held to be insufficient as not purporting to be taken before an officer authorized by law to take it. Edmondson v. Carnall, 17 Ark. 284.

[c] **In New Jersey,** where neither the body of the affidavit nor the jurat, either by words at length or by the accustomed abbreviation, states the official character of the attesting officer, the affidavit is defective. State v. Hutchinson, 10 N. J. L. 242.

2. Buell v. State, 72 Ind. 523; Brooster v. State, 15 Ind. 190; Ashdown v. Manitoba Free Press Co., 20 Can. S. C. 43.

[a] **Clerk of court in which cause tried.**—(1) A court may take judicial notice of the names and signatures of its own officers. Therefore, where the officer's signature is followed merely by the word "clerk," it will be presumed on appeal that he was clerk of the court in which the cause was tried. Mountjoy v. State, 78 Ind. 172; Hipes v. State, 73 Ind. 39; Buell v. State, 72 Ind. 523; Allen v. Gillum, 16 Ind. 234; Simon v. Stetter, 25 Kan. 155; Etter v. Dugan, 1 Tex. Unrep. Cas. 175. (2) In Russell v. Oliver, 78 Tex. 11, 14 SW 264, it was held that an affidavit purporting to be taken in a proceeding in the probate court of Montgomery county, and sworn to before one who added to his signature "Clk. P. C. M. C.," without affixing any seal, was sufficient. To same effect Hymer v. Holyfield, (Tex. Civ. A.) 87 SW 722.

[b] **Objection not available on appeal.**—An objection that the affidavit does not show that the officer was one authorized to take the affidavit will not be considered for the first time on appeal. Snell v. Eckerson, 8 Iowa 284.

3. U. S.—Goodyear v. Hullihen, 10 F. Cas. No. 5,573, 2 Hughes 492, 3 Fish. Pat. Cas. 147.

Fla.—Branch v. Branch, 6 Fla. 314.

Ill.—Dyer v. Flint, 21 Ill. 80, 74 AmD 73; Rowley v. Berrian, 12 Ill. 198.

Kan.—Simon v. Stetter, 25 Kan. 155.

Mo.—Sieckman v. Arwein, 10 Mo. A. 259.

N. Y.—Jackson v. Stiles, 3 Cai. 128, Col. & C. Cas. 468. But see Peo. v. Rensselaer County, 6 Wend. 543; Hunter v. Le Conte, 6 Cow. 728 (in which cases affidavits were held sufficient, although the title of office was not appended to the signature).

[a] **Illustration.**—The official qualification of a person who has witnessed the signature of a person to an affidavit, couched in the following words: "Commissioner, Superior Court, district of Joliette," is on its face apparently sufficient. Drainville v. Savoie, 11 Que. Pr. 437.

4. Goodyear v. Hullihen, 10 F. Cas. No. 5,573, 2 Hughes 492, 3 Fish. Pat. Cas. 147; Richardson v. Comer, 112 Ga. 103, 37 SE 116.

[a] **Seal stating official title.**—"The certificate in this case is signed by N. Austin Parks, who appends to his name the words 'notary public;' there is therefore no doubt as to the capacity in which he acted. There is a seal affixed, and this seal bearing the name of the officer who signs the certificate, it is clearly his seal. It also has on it the words 'notary

strument,[5] and in some cases from other papers in the cause.[6] Furthermore, it has been held in some cases that the omission to affix such official description is not material where it is shown by extrinsic evidence that in fact the oath was taken before a duly authorized person.[7] It is sufficient if the official character of the officer is substantially shown, an exact description not being required.[8]

[§ 112] **(3) Use of Abbreviations.** Abbreviations in general use and commonly understood may be used to indicate the officer's official character,[9] as, for example, "J. P." for justice of the peace[10] and "N. P." for notary public.[11]

[§ 113] **(4) Effect of Recital.** Where the jurat contains the title of the officer the presumption is that his official character is that stated.[12]

[§ 114] **j. Seal—(1) In General.**[13] Under some statutes the officer's official seal must be attached to affidavits taken by him;[14] but, in the absence of any

public,' and therefore sufficiently sets forth his official character. Whether an ordinary notarial seal, not bearing the officer's name, would have sufficed, it is not necessary here to decide, as the seal affixed to these bills relieves the question of any doubt as to the person whose seal it is, and his official character. I am, therefore, clearly of opinion that the certificate is sufficient." Goodyear v. Hullihen, 10 F. Cas. No. 5,573, 2 Hughes 492, 496, 3 Fish. Pat. Cas. 147.

[b] **The fact that the seal of a probate court is affixed** to the affidavit is not sufficient to show that the person attesting the affidavit was an officer of that court or that he was a person authorized to administer an oath. Howell v. Simpson Grocery Co., 121 Ga. 461, 49 SE 299.

[c] **County of notary's appointment** may be shown by seal. Bilby v. Hancock, (Tex. Civ. A.) 125 SW 370.

5. Ede v. Johnson, 15 Cal. 53; Heffernan v. Harvey, 41 W. Va. 766, 24 SE 592.

[a] **Appearing in title.**—An affidavit for an appeal from a justice of the peace contained in its title the name of the justice before whom the cause was tried. The jurat was subscribed with the same name but without any official designation. It was held that from the identity of names it would be presumed that the person before whom it was sworn was the justice and that the affidavit sufficiently showed his official character. Bandy v. Chicago, etc., R. Co., 33 Minn. 380, 23 NW 547.

[b] **May appear on any part of instrument.**—In Bandy v. Chicago, etc., R. Co., 33 Minn. 380, 381, 23 NW 547 [dist Knight v. Elliott, 22 Minn. 551, on the ground that "it did not appear from any part of the affidavit that the person who subscribed the jurat was an officer"], Gilfillan, J., said: "But if the proper official character appears upon the face of the affidavit, it is immaterial in what part of it. It may, and usually does, appear by the official designation being affixed to the signature subscribed to the jurat; but it may also be stated elsewhere in the affidavit, and if it appears anywhere on the face of the paper that the person before whom it was sworn was an officer authorized to take affidavits, it is sufficient." Thus it may appear in the titling as, "State of Minnesota, County of Scott. In Justice's Court, before M. M. Shields, Esq. Justice," the jurat being signed "M. M. Shields."

[c] **Need not be repeated in jurat.**—Where it appears in the affidavit that the officer taking it was a justice of the peace in and for a certain county and state, it is not necessary for that fact to appear again in the jurat to the affidavit. Smith v. State, 24 Ind. A. 417, 56 NE 924.

[d] **County of notary's appointment** may be shown by caption. Quesenberry v. People's Bldg., etc., Assoc., 44 W. Va. 512, 30 SE 73.

6. Branch v. Branch, 6 Fla. 314; Singleton v. Wofford, 4 Ill. 576.

[a] **Misdescription.**—When the affidavit by mortgagees that the debt secured is bona fide and justly due is made at the same time as the acknowledgment and before "Henry Reaver" who takes the acknowledgment as a commissioner of deeds for the state of Maryland, the fact that "Henry Reaver" designates himself in his signature to the affidavit as a justice of the peace by affixing the letters "J. P.," instead of describing himself as commissioner of deeds, does not invalidate the affidavit. Stanhope v. Dodge, 52 Md. 483.

7. Jackman v. Gloucester, 143 Mass. 380, 9 NE 740.

Failure of jurat to contain the official designation may be cured by amendment. See infra § 130.

[a] **Evidence of attorney.**—Where an affidavit purported to be sworn to and subscribed before S as deputy clerk, it was properly admitted in evidence over the objection that it did not appear what S was deputy clerk of, where counsel for the party offering it without objection stated that S was deputy clerk of the superior court of a certain county and that he had seen S attest the affidavit. Ellis v. Ellis, 134 Ga. 287, 67 SE 819.

8. See cases infra this note.

[a] **Clerk.**—The word "clerk" has been held a sufficient designation of the officer where an affidavit was taken for use in the court of which he was clerk. Branch v. Branch, 6 Fla. 314; Singleton v. Wofford, 4 Ill. 576; Simon v. Stetter, 25 Kan. 155.

[b] **Clerk of county court.**—Where by statute the clerk of the county court acted also as clerk of the probate court, and the clerk of the county court alone could take the affidavits of subscribing witnesses to wills, an affidavit purporting to be made in the probate court of Montgomery county, the jurat of which was signed "W. H. Fowler, Clk., P. C. M. C.," although no seal of office was added, was held sufficient. Russell v. Oliver, 78 Tex. 11, 14 SW 264.

[c] **Recorder.**—In Camp v. Murphy, 68 Minn. 378, 71 NW 1, it was held that the word "recorder," written after the signature of the officer before whom an affidavit was taken, was sufficient to indicate his official character where it was shown by other parts of the record that it was taken within a village in which the officer held the position of recorder with power to take affidavits.

[d] **Commissioner.**—If an affidavit is entitled in the court, the description in the jurat of the person before whom it is sworn as "a commissioner, etc.," is sufficient. His official title need not be given in full. Munden v. Brunswick, 4 C. B. 321, 56 ECL 321, 136 Reprint 530; Burdekin v. Potter, 1 Dowl. P. C. N. S. 134; Canada Permanent Loan, etc., Co. v. Todd, 22 Ont. A. 515; Murphy v. Boulton, 3 U. C. Q. B. 177 [foll Brett v. Smith, 1 Ont. Pr. 309]; Brown v. Parr, 2 U. C. Q. B. 98.

[e] **By commission.**—A jurat read as follows: "Sworn before me, J. E. Solley, by commission." It was held that this was sufficient, since it imported that the party administering the oath acted under a commission which entitled him to take affidavits. Fairbrass v. Pettit, 1 D. & L. 622.

[f] **"National" for "notarial."**—Thus the use of the word "national" instead of "notarial" in the phrase "I hereunto set my hand and national seal," in the attestation of a notary, is only a clerical misprision of no importance. Schwartz v. Baird, 100 Ala. 154, 13 S 947.

9. Shattuck v. Peo., 5 Ill. 478; Livingston v. Kettelle, 6 Ill. 116, 41 AmD 166; Larimer v. Knoyle, 43 Kan. 338, 23 P 487; Munden v. Brunswick, 4 C. B. 321, 324, 56 ECL 321, 136 Reprint 530 (Wilde, C. J., commenting on Hill v. Royston, 7 Jur. 930, where affidavits sworn before a commissioner and signed by him, "A. B., comr.," were held to be insufficient, said: "As the case of Hill v. Royston, supra, is nowhere reported but in the Jurist, there must have been something peculiar in it. If it had been understood as a decision to the effect there stated, the reporters we are accustomed to rely on would not have failed to notice it"); Canada Permanent Loan, etc., Co. v. Todd, 22 Ont. A. 515; Murphy v. Boulton, 3 U. C. Q. B. 177; Brown v. Parr, 2 U. C. Q. B. 98.

10. Cal.—Ede v. Johnson, 15 Cal. 53.

Ga.—Abrams v. State, 121 Ga. 170, 48 SE 965.

Ind.—Hawkins v. State, 136 Ind. 630, 36 NE 419.

Mich.—Green v. Kindy, 1 Mich. N. P. 41.

Mo.—Sieckman v. Arwein, 10 Mo. A. 259.

N. J.—Scudder v. Scudder, 10 N. J. L. 340.

[a] **Name partly written over title.**—An affidavit is not defective because the justice in attesting the jurat has so written his name that some of the letters extend over the printed letters "J. P." Sieckman v Arwein, 10 Mo. A. 259.

11. Rowley v. Berrian, 12 Ill. 198. See also supra note 8.

12. Matter of Sheepshead, etc., R. Co., 5 NYWklyDig 488.

Effect of jurat as evidence in general see infra § 149.

13. **Necessity of notary's seal in general** see Notaries [29 Cyc 1096].

14. U. S.—U. S. v. Law, 50 Fed. 915.

Ala.—Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 18 S 175; Alabama Nat. Bank v. Chattanooga Door, etc., Co., 106 Ala. 663, 18 S 74.

Fla.—Rumeli v. Tampa, 48 Fla. 112, 37 S 563.

Ind.—Miller v. State, 122 Ind. 355, 24 NE 156; Knox v. Golding, 46 Ind. A 634, 91 NE 857, 92 NE 986 (affidavit for change of judges); Deputy v. Dollarhide, 42 Ind. A. 554, 86 NE 344.

Iowa.—Chase v. Street, 10 Iowa 593; Tunis v. Withrow, 10 Iowa 305, 77 AmD 117.

Minn.—Colman v. Goodnow, 36 Minn. 9, 29 NW 338, 1 AmSR 632.

Nebr.—Byrd v. Cochran, 39 Nebr. 109, 58 NW 127.

Wash.—Stetson, etc., Mill Co. v. McDonald, 5 Wash. 496, 32 P 108; Gates v. Brown, 1 Wash. 470, 25 P 914.

B. C.—First Nat. Bank v. Raynes, 3 B. C. 87.

Ont.—Boyd v. Spriggins, 17 Ont. Pr. 331.

[a] **Required by statute.**—Where an affidavit is taken by a register of deeds, it must be authenticated by his official seal at the time the oath is administered. The statute requiring it cannot be regarded as merely directory. Colman v. Goodnow, 36 Minn. 9, 29 NW 338, 1 AmSR 632.

[b] **Form of seal.**—A notarial seal with the words inscribed therein "A. J. Hungerford, Iowa," authenticating a jurat, was held by the Kansas City

statute requiring it, the jurat need not be sealed.[15]

[§ 115] **(2) Clerk of Court.** Usually an affidavit sworn to before the clerk of the court in which it is to be used need not bear the clerk's seal;[16] but it has been held that all certificates of a clerk to be used elsewhere than in the court of which he is clerk should be authenticated by his official seal.[17]

[§ 116] **(3) Foreign Affidavit.**[18] Foreign affidavits are usually required to be authenticated by the officer's seal,[19] although even this requirement is sometimes dispensed with.[20]

[§ 117] **(4) Affidavits to Be Used in Another County.** So a seal to affidavits to be used in another county in the same state is required by some statutes[21] but not by others.[22]

[§ 118] **(5) To Be Used in Same County.** If the affidavit is to be used in the county where taken a seal is usually not required.[23]

[§ 119] **k. Statement of Expiration of Commission.** The failure of the officer to state in the jurat the date of the expiration of his commission does not invalidate the affidavit.[24]

[§ 120] **5. Effect of Jurat as Evidence.** The jurat of the officer is prima facie evidence of all matters properly stated therein;[25] but it is not con-

court of appeals to conform to the requirement of the statute of Iowa, Code (1873) §§ 258, 259. Barhydt v. Alexander, 59 Mo. A. 188.

[c] **Faint impression of seal.**—"To the left of the signature of the notary upon the same paper, appears a faint impression of the form of a seal, but so faint and indistinct that it cannot with positiveness be said to be the seal of a notary public. The trial judge, however, in reaching the conclusion stated, in effect found that it was the impression of a notarial seal, and we are satisfied with that finding. The document is twenty years old, and the lapse of time may to some extent have effaced the impression originally made." Cassidy v. Souster, 115 Minn. 191, 194, 132 NW 292.

15. U. S.—Meldrum v. U. S., 151 Fed. 177, 80 CCA 545, 10 AnnCas 324 [aff 146 Fed. 390, and cit Cyc].

Cal.—Reclamation Dist. No. 730 v. Snowball, 160 Cal. 695, 117 P 905, 118 P 514.

Ga.—Jowers v. Blandy, 58 Ga. 379; Nichols v. Hampton, 46 Ga. 253.

Ill.—Schaefer v. Kienzel, 123 Ill. 430, 15 NE 164; Dyer v. Flint, 21 Ill. 80, 74 AmD 73; Stout v. Slattery, 12 Ill. 162.

Ind.—Qualter v. State, 120 Ind. 92, 22 NE 100; Rosenstein v. State, 9 Ind. A. 290, 36 NE 652.

Iowa.—Finn v. Rose, 12 Iowa 565; Tunis v. Withrow, 10 Iowa 305, 77 AmD 117.

Mass.—Clement v. Bullens, 159 Mass. 193, 34 NE 173.

Mich.—Miller v. Keen, 1 Mich. N. P. 238.

Minn.—State v. Day, 108 Minn. 121, 121 NW 611.

Mo.—State v. Fogg, 106 Mo. 696, 105 SW 618; State v. Forsha, 190 Mo. 296, 88 SW 746, 4 LRANS 576; State v. Pfenninger, 76 Mo. A. 313.

S. D.—Wiley v. Carson, 15 S. D. 298, 89 NW 475.

Tex.—Young v. Jackson, 50 Tex. Civ. A. 351, 110 SW 74.

[a] **Where an affidavit was sworn to before a mayor** who omitted to attach his seal to the jurat, it was held that the omission was 'not of such materiality as to avoid a conviction upon a prosecution based upon the affidavit, if it was material at all. Qualter v. State, 120 Ind. 92, 22 NE 100.

[b] **"While the proper practice,** undoubtedly, would be for the notary to affix his notarial seal to all of his official acts, and his failure to do so might result in great injury to parties, we are of the opinion that his failure to so affix his seal to the verification of the complaint in this case does not vitiate the proceedings, and that the complaint must be held to be a verified complaint." Corson, J., in Wiley v. Carson, 15 S. D. 298, 302, 89 NW 475.

16. Ind.—Mountjoy v. State, 78 Ind. 172.

Iowa.—Finn v. Rose, 12 Iowa 565.

Minn.—Crombie v. Little, 47 Minn. 581, 50 NW 823.

Nebr.—Merriam v. Coffee, 16 Nebr. 450, 20 NW 389.

Tex.—Etter v. Dugan, 1 Tex. Unrep. Cas. 175.

[a] **Custom.**—"Clerks of courts are in the constant habit of taking affidavits, without attaching the seal of the court to their jurats, and the validity of their acts and the propriety of the practice, have never been questioned." Stout v. Slattery, 12 Ill. 162, 164 (per Treat, C. J.).

[b] **Taken in open court.**—In Hymer v. Holyfield, (Tex. Civ. A.) 87 SW 722, it was held that the fact that the clerk's certificate to the affidavit of a subscribing witness to a will, indorsed on the will and purporting to have been taken in open court in 1854, was not authenticated by his seal did not render the affidavit inadmissible. "The action having been taken in open court, it was not required to be authenticated by the clerk's seal."

[c] **Clerk's signature known to clerk and judge.**—"The affidavit was not a process intended to be taken beyond the custody of the clerk and judge, and there served; nor was it a process at all; nor was it intended to be used at all, except in the presence of the clerk or judge. It was a mere court paper. And certainly the clerk could know his own signature, and could know the office which he held, without writing it out in full, or without placing the seal of the court to the paper. And the judge should know the same judicially." Valentine, J., in Simon v. Stetter, 25 Kan. 155, 157.

17. Missouri Pac. R. Co. v. Brown, (Tex.) 53 SW 1019 (where Gaines, J., said: "The jurat to the affidavit upon which this motion is based is signed officially by the clerk of the district court, but is not attested by the seal of the court. All certificates of the clerk to be used elsewhere than in the court of which he is clerk should be authenticated by his official seal").

[a] **Where a clerk insufficiently stated his authority and the venue,** it was held that the seal of the court attached should be taken into consideration to supplement the deficiency. Levy v. Wilson, 43 Iowa 605.

18. See generally supra §§ 38–47.

19. Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 18 S 175, 54 AmSR 114; Alabama Nat. Bank v. Chattanooga Door, etc., Co., 106 Ala. 663, 18 S 74; Stephens v. Williams, 46 Iowa 540; First Nat. Bank v. Raynes, 3 B. C. 87.

[a] **Omission of seal from one affidavit, signature from another.**—In Hill v. Alliance Bldg. Co., 6 S. D. 160, 60 NW 752, 55 AmSR 819, it was held that the omission of the signature of the officer from one affidavit, and the omission of the seal or certificate of authority from another affidavit, although bearing the signature of a person purporting to be a notary public residing in the state of Nebraska, were fatal defects, and that the admission at the time of trial of extrinsic evidence to supply the omission was improper.

[b] **Name of state not on seal.**—In Goodnow v. Litchfield, 67 Iowa 691, 25 NW 882, objection was made to an affidavit taken in New York because the name of that state was not impressed upon the seal. It was held that unless the contrary was shown it would be presumed that it was not required by the laws of New York.

20. Earle v. National Metallurgic Co., 77 N. J. Eq. 17, 76 A 555.

[a] **In New Jersey.**—"And in reference to the necessity of using a notarial seal on a jurat or certificate made by a notary in the State of New York, in order to make it valid in this state, my conclusion is that it is not now necessary. The requirement of an official seal for certifying affidavits taken by notaries public in this state, is expressly abolished by section 2 of the act. This is an express statutory declaration of the rule or policy of this state in reference to the necessity of certification of documents of this character under the official seal of a notary, and as the only basis for the previous requirement of a seal was the recognition by this state of the general rule, that a notary public, an official recognized by all states and nations of the commercial world, in certifying his acts, whether in this state or elsewhere, affixed an official seal, the withdrawal of this requirement in this state, as to a particular act or document, changes, so far as this state is concerned, and so far as such documents are concerned, wherever executed, the operation of the general rule recognizing the seal as essential." Emery, V. C., in Earle v. National Metallurgic Co., 77 N. J. Eq. 17, 22, 76 A 555.

21. Missouri Pac. R. Co. v. Brown, (Tex.) 53 SW 1019.

22. Earle v. Metallurgic Co., 77 N. J. Eq. 17, 76 A 555. And see cases supra notes 15, 20.

23. Cox v. Stern, 170 Ill. 442, 48 NE 906, 62 AmSR 385; Hertig v. Peo., 159 Ill. 237, 42 NE 879, 50 AmSR 162; Schaefer v. Kienzel, 123 Ill. 430, 15 NE 164; Dyer v. Flint, 21 Ill. 80, 74 AmD 73; Rowley v. Berrian, 12 Ill. 198; Stout v. Slattery, 12 Ill. 162; Wiley v. Carson, 15 S. D. 298, 89 NW 475. See cases supra notes 14, 15.

24. Harbour-Pitt Shoe Co. v. Dixon, 60 SW 186, 22 KyL 1169; Brown Mfg. Co. v. Gilpin, 120 Mo. A. 130, 96 SW 669; Baskowitz v. Guthrie, 99 Mo. A. 304, 73 SW 227. And see generally Notaries.

[a] **Merely subjects officer to penalty.**—Where a statute required that the notary public before whom an affidavit verifying a lien was made should annex to his subscription to the jurat the date of the expiration of his commission, and he failed to do so, it did not invalidate the affidavit but merely subjected him to a penalty. Phelps, etc., Windmill Co. v. Baker, 49 Kan. 434, 30 P 472.

25. Miller v. Caraker, 9 Ga. A. 255, 71 SE 9 (holding the jurat prima facie evidence as to whether the oath was or was not administered); State v. Day, 108 Minn. 121, 121 NW 611.

[a] **Evidence of genuineness of affiant's signature.**—The jurat of the officer is presumptive evidence of the genuineness of the affiant's signature. State v. Burtenshaw, 25 Ida. 607, 138 P 1105; Smith v. Johnson, 43 Nebr. 754, 62 NW 217.

[b] **Sufficient to witness mark.**—In Peo. v. McDaniels, 141 Cal. 113, 74 P 773, it was held that the signa-

clusive, and extrinsic evidence is admissible to prove that such statements are in fact false.[26]

VI. AMENDMENTS

[§ 121] **A. In General.** An affidavit, to be the subject of amendment, must be voidable only, as this power cannot be exercised where the instrument is absolutely void;[27] and in some cases the practice of amendment in general has been strongly disapproved.[28] The right of amendment is one that depends in large measure upon the statutes,[29] and under the practice in most jurisdictions amendments are very freely allowed,[30] except in cases where the opposite party would be prejudiced thereby.[31]

[§ 122] **B. Formal Defects.** The general rule is that formal defects in an affidavit may be cured by amendment.[32]

ture of the officer to the jurat was sufficient to witness the signature of the affiant which had been made by mark.

[c] **Identity of affiant.**—"The signature of the affiant would usually be sufficient to identify him as the person taking the oath, but as to this and all other matters relating to the affidavit, the certificate of the officer under his hand and official seal is conclusive in the absence of sufficient evidence to the contrary." In re Shannahan Hardware Co., 21 Del. 138, 141, 58 A 1023.

[d] **Sufficient evidence of swearing.**—Under Ga. Code § 3297, providing that a petitioner shall support "his petition by affidavit or testimony, if he can control the same," it was held that the signature of the petitioner or witness and the jurat of the magistrate, annexed to the petition, were sufficient evidence that the oath was taken by the one and administered by the other. Loeb v. Smith, 78 Ga. 504, 507, 3 SE 438.

26. Ga.—Britt v. Davis, 130 Ga. 74, 60 SE 180; Green v. Rhodes, 8 Ga. A. 301, 68 SE 1090.

Ill.—Cox v. Stern, 170 Ill. 442, 48 NE 906, 62 AmSR 385.

Nebr.—Bantley v. Finney, 43 Nebr. 794, 62 NW 213; Smith v. Johnson, 43 Nebr. 754, 62 NW 217.

N. J.—Hitsman v. Garrard, 16 N. J. L. 124.

N. Y.—Crozier v. Cornell Steamboat Co., 27 Hun 215, 15 NYWklyDig 34.

[a] **The officer who signed the jurat** to an alleged affidavit is competent to testify that the affidavit was not sworn to. Green v. Rhodes, 8 Ga. A. 301, 68 SE 1090.

27. Ga.—Meadows v. Alexander, 1 Ga. A. 40, 57 SE 901.

Miss.—Carlisle v. Gunn, 68 Miss. 243, 8 S 743.

Mo.—Kirksville Sav. Bank v. Spangler, 59 Mo. A. 172.

Tenn.—Graham v. Caldwell, 8 Baxt. 69.

Tex.—Davis v. Sherrill, 52 Tex. Civ. A. 259, 113 SW 556.

Wyo.—Blyth, etc., Co. v. Swensen, 7 Wyo. 303, 51 P 873.

[a] **Invalid affidavit not subject to amendment.**—"While an affidavit to foreclose a mortgage is amendable, this creature of the law must have become a real affidavit, must have been born into life through the oath and signature of the affiant, before it can be subject to sickness or to treatment by the doctor in the form of amendment. In law, that which is dead can not be brought to life, that which is void can not be filled. An invalid affidavit can not be amended, because it is no more within the power of the law than of nature to give life to the dead." Meadows v. Alexander, 1 Ga. A. 40, 42, 57 SE 901.

28. Valley Paper Co. v. Smalley, 16 Del. 289, 43 A 176; Widner v. Hunt, 4 Iowa 355.

[a] **Affidavit for attachment.**—In an early Wisconsin case the court said that an affidavit for attachment was not amendable under any circumstances. Slaughter v. Bevans, 1 Pinn. 348. See generally Attachment [4 Cyc 521].

[b] **An affidavit for a continuance** cannot be amended after the court has passed judgment on it and held it to be insufficient. Smalley v. Anderson, 4 T. B. Mon. (Ky.) 367; Singleton v. Carr, 1 Bibb (Ky.) 554.

29. Robinson v. Burton, 5 Kan. 293; Sommers v. Allen, 44 W. Va. 120, 124, 28 SE 787. See statutory provisions.

[a] **Accident or mistake.**—Under Civ Code (1895) § 5124, an affidavit is amendable only when it is shown that the omission in the affidavit as originally filed was by accident or mistake. Josey v. Sheorn, 106 Ga. 204, 32 SE 118; Simpkins v. Johnson, 3 Ga. A. 437, 60 SE 202.

[b] **Cannot strike out a defendant.**—Under Code art 75, §§ 23, 27, the circuit court cannot amend an affidavit in attachment by striking out the name of one of defendants named therein. Halley v. Jackson, 48 Md. 254.

30. U. S.—Fitzpatrick v. Flannagan, 106 U. S. 648, 1 SCt 369, 27 L. ed. 211.

Ark.—Cook v. Franklin, 73 Ark. 23, 26, 83 SW 325 [cit Cyc].

Ga.—Redwine Bros. v. Jarrell, (A.) 80 SE 728; Reese v. Walker, 89 Ga. 72, 14 SE 888; Bryant v. Mercier, 82 Ga. 409, 9 SE 166.

Kan.—Cheyenne County v. Walter, 83 Kan. 743, 112 P 599.

Mich.—Emerson v. Detroit Steel, etc., Co., 100 Mich. 127, 58 NW 659.

Mo.—Stewart v. Cabanne, 16 Mo. A. 517.

N. J.—Den v. Fen, 12 N. J. L. 321.

N. Y.—Cutler v. Rathbone, 1 Hill 204.

N. C.—State v. Giles, 103 N. C. 391, 9 SE 433; Weaver v. Roberts, 84 N. C. 493.

Tenn.—Lucas v. Sevier, 1 Overt. 105.

W. Va.—Bohn v. Zeigler, 44 W. Va. 402, 29 SE 983; Anderson v. Kanawha Coal Co., 12 W. Va. 526.

Eng.—Rex v. Warwickshire, 5 Dowl. P. C. 382; Anderson v. Ell, 3 Dowl. P. C. 73; Cooper v. Talbot, 7 Scott 345; Larken v. Bovill, 2 Tyrw. 746; Boskay v. Lister, W. W. & D. 216; Marriott v. Chapman, 1 W. W. & H. 309. But see Saunderson v. Westley, 8 Dowl. P. C. 652; Robinson v. Gardner, 7 Dowl. P. C. 716; Rowbotham v. Dupree, W. W. & D. 215.

Ont.—McGregor-Gourlay Co. v. Labelle, 2 Ont. Pr. 93.

[a] **Supplying omitted words.**—In Stewart v. Cabanne, 16 Mo. A. 517, an affidavit in attachment, as follows: "The defendant —— about fraudulently to convey and assign —— property and effects so as to hinder and delay —— creditors," was allowed to be amended by inserting the word "is" in the first blank and the word "his" in the other two, it not appearing that defendant would be prejudiced thereby.

[b] **Showing authority of officer in another state.**—An affidavit taken in another state may be amended by adding a certificate showing the authority of the officer to take the affidavit. Goldie v. McDonald, 78 Ill. 605; Bohn v. Ziegler, 44 W. Va. 402, 29 SE 983.

[c] **Defect supplied by reference to another affidavit.**—A defect in an affidavit for publication may be supplied by reference to an affidavit for attachment. Miller v. Eastman, 27 Nebr. 408, 43 NW 179.

[d] **Admission of defect.**—Where a party conceded that his affidavit was defective by obtaining time to amend the same, it was held that he could not on appeal assert that the affidavit was sufficient. McKichan v. Follett, 87 Ill. 103.

[e] **In Georgia.**—(1) "The Civil Code, § 5122, expressly provides that all affidavits which are the foundation of legal proceedings shall be amendable. It has been said by this court that this statute is remedial in its nature, and is therefore to be liberally construed and applied. Collins v. Taylor, 128 Ga. 789, 790, 58 SE 446. It was contended that, under the rule in Moore, etc., Co. v. Neill, 86 Ga. 186, 12 SE 222, the attachment was void, and could not be amended. The attachment was not void. The property on which it was sought to have the levy made was mentioned and alleged to be in the possession of the defendant. The amendment merely made the description more definite. In the case last cited there was no effort to amend the petition by making an additional description or affidavit in connection with it, but to attach to the petition certified copies of certain documents connected with other attachment cases, but which had never been part or parcel of the papers appertaining to the case before the court." Levin v. American Furniture Co., 133 Ga. 670, 671, 66 SE 888. (2) Under the Georgia Amendment Act of 1854, affidavits of the parties, to protect landowners against intruders, etc., were not amendable as pleadings. Perry v. Martin, 26 Ga. 436.

31. Foreman v. Carter, 9 Kan. 674.

32. Ala.—Cobb v. State, 153 Ala. 66, 45 S 223; Hamilton v. State, 153 Ala. 63, 44 S 968; Simpson v. State, 111 Ala. 6, 20 S 572; Rosenberg v. H. B. Claflin Co., 95 Ala. 249, 10 S 521; Flexner v. Dickerson, 65 Ala. 129; Sims v. Jacobson, 51 Ala. 186; Hall v. Brazelton, 46 Ala. 359; Watts v. Womack, 44 Ala. 605; Hall v. Brazleton, 40 Ala. 406.

Ark.—Cook v. Franklin, 73 Ark. 23, 83 SW 325; Young v. King, 33 Ark. 745.

Ill.—Doty v. Colton, 90 Ill. 453.

Kan.—Tracy v. Gunn, 29 Kan. 508; Cassidy v. Fleak, 20 Kan. 54; Foreman v. Carter, 9 Kan. 674; Robinson v. Burton, 5 Kan. 293.

Md.—Blair v. Winston, 84 Md. 356, 35 A 1101.

Mich.—Taylor v. Buck, 100 Mich. 181, 58 NW 835; Emerson v. Detroit Steel, etc., Co., 100 Mich. 127, 58 NW 659; Barber v. Smith, 41 Mich. 138, 1 NW 992.

N. Y.—Fawcett v. Vary, 59 N. Y. 597; Yellow Pine Co. v. Atlantic Lumber Co., 21 Misc. 164, 47 NYS 79 [aff 22 App. Div. 629 mem, 50 NYS 1135 mem]; Stacy v. Farnham, 2 HowPr 26; Cutler v. Rathbone, 1 Hill 204.

Okl.—Coyle Mercantile Co. v. Nix, 7 Okl. 267, 54 P 469; Churchill v. Choctaw R. Co., 4 Okl. 462, 46 P 503.

W. Va.—Bohn v. Zeigler, 44 W. Va. 402, 29 SE 983.

Wis.—Lederer v. Chicago, etc., R. Co., 38 Wis. 244; Ruthe v. Green Bay, etc., R. Co., 37 Wis. 344.

B. C.—British Columbia Bank v. Oppenheimer, 7 B. C. 104.

[a] **Affidavit as basis of prosecution.**—Where a person was prosecuted for an offense upon an affidavit which merely designated the offense by name, it was held that it could be amended by setting out the offense in detail. Campbell v. State, 150 Ala. 70, 43 S 743.

[b] **Amendable before decision on**

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[§ 123] **C. Substantial Defects.** While some cases hold that substantial defects cannot be reached by amendment,[33] yet in some jurisdictions the rules are very liberal and allow affidavits to be amended as to matters which seem to be substantial rather than formal.[34]

[§ 124] **D. Jurisdictional Defects.** As a general rule, where an affidavit which is to be used as the basis of a proceeding in court shows upon its face that the court has no jurisdiction, it cannot be amended.[35]

[§ 125] **E. Particular Defects—1. Title.** The absence of a title to an affidavit may usually be supplied by amendment,[36] and errors in the title may usually be corrected in the same manner,[37] as, for example, the omission of the name of a party,[38] or an error in the style of the court[39] or in the form of action;[40] but it has been held that a variance between the name of a party as stated in the style of the cause and in the title of the affidavit[41] may not be cured by amendment, and also that an affidavit with a defective title may not be amended after the action of the court.[42] A mistake in the title as to the name of a party may usually be rectified by amendment,[43] although permission to do this has been refused[44] as a matter of discretion because the case was not plain.[45]

[§ 126] **2. Venue.** Defects in the venue,[46] or even

plea in abatement.—Under the Alabama code it has been held that the court may allow an affidavit to be amended before passing upon a plea in abatement in which objections are raised to the very defects in the affidavit which were remedied by the amendment, as the purpose of the amendment is to meet the objections raised by the plea in abatement. Simpson v. East, 124 Ala. 293, 27 S 436.

[c] **Filling up of blanks.**—Where blanks were left where the words "his" and "is" should have appeared, they were allowed to be filled, it not appearing that defendant was thereby prejudiced. Stewart v. Cabanne, 16 Mo. A. 517.

[d] **Affidavit not required to secure amendment.**—Where the defect in an affidavit of attachment, which is to be corrected by amendment, is not one which affects the merits of the demand or defense thereto, it does not need an affidavit to lay a foundation for such amendment. Muth v. Erwin, 14 Mont. 227, 36 P 43.

[e] **Difference between matters of substance and form.**—"There is a difference between amending an attachment affidavit in matters of substance and matters of mere formality; between amending an affidavit in the substantial matter of the statement of cause of action, grounds of attachment, and material facts to sustain such grounds, and amending the certificate of jurat, or the certificate authenticating it. The amendment in the former case touches the essential rights of the defendant, whereas amendment of form does not, unless we say he has a vested and indisputable right to have a merely clerical or formal error or omission stand incurable." Bohn v. Zeigler, 44 W. Va. 402, 403, 29 SE 983.

33. Shield v. Dothard, 59 Ala. 595; Hall v. Brazelton, 46 Ala. 359; Hall v. Brazleton, 40 Ala. 406; Tanner, etc., Engine Co. v. Hall, 22 Fla. 391; Watt v. Carnes, 4 Heisk. (Tenn.) 532; Lucas v. Sevier, 1 Overt. (Tenn.) 105; Sommers v. Allen, 44 W. Va. 120, 28 SE 787.

[a] **Parol testimony inadmissible.**—It has been held that where an affidavit failed to state certain essential facts required by the statute under which they were made the defects could not be remedied by parol testimony. Esker v. Heffernan, 159 Ill. 38, 41 NE 1113; Boggess v. Scott, 43 W. Va. 316, 37 SE 661.

34. U. S.—Fitzpatrick v. Flannagan, 106 U. S. 648, 1 SCt 369, 27 L. ed. 211.

Ark.—Nolen v. Royston, 36 Ark. 561; Rogers v. Cooper, 33 Ark. 406.

Ga.—Collins v. Taylor, 128 Ga. 789, 58 SE 446; Reese v. Walker, 89 Ga. 72, 14 SE 888; Higgs v. Huson, 8 Ga. 317; Boyce v. Day, 3 Ga. 275, 59 SE 930.

Ill.—Keith v. Ray, 231 Ill. 213, 83 NE 152 [aff 134 Ill. A. 119]; Booth v. Rees, 26 Ill. 45.

Iowa.—Hallett v. Chicago, etc., R. Co., 22 Iowa 259, 92 AmD 393; Langworthy v. Waters, 11 Iowa 432; Bunn v. Pritchard, 6 Iowa 56.

Kan.—Swearingen v. Howser, 37 Kan. 126, 14 P 436; Burton v. Robinson, 5 Kan. 287.

Mich.—Barber v. Smith, 41 Mich. 138, 1 NW 992.

Mo.—Lowry v. Phillips, 57 Mo. A. 232; Claflin v. Hoover, 20 Mo. A. 314.

Nebr.—Dobry v. Western Mfg. Co., 57 Nebr. 228, 77 NW 656; Horkey v. Kendall, 53 Nebr. 522, 73 NW 953, 68 AmSR 623; Struthers v. McDowell, 5 Nebr. 491.

N. M.—Martinez v. Martinez, 2 N. M. 464.

N. Y.—Brandley v. American Butter Co., 60 Misc. 547, 112 NYS 1030; Sulzbacher v. Cawthra, 14 Misc. 544, 35 NYS 1118.

N. C.—Moore v. Moore, 130 N. C. 333, 41 SE 943; Sheldon v. Kivett, 110 N. C. 408, 14 SE 970; Cushing v. Styron, 104 N. C. 338, 10 SE 258; State v. Giles, 103 N. C. 391, 9 SE 433; Penniman v. Daniel, 93 N. C. 332; New Hanover Bank v. Blossom, 92 N. C. 695; Branch v. Frank, 81 N. C. 180; Brown v. Hawkins, 65 N. C. 645.

Okl.—Coyle Mercantile Co. v. Nix, 7 Okl. 267, 54 P 469.

Eng.—Davis v. Barrett, 7 Beav. 171, 29 EngCh 171, 49 Reprint 1029; Reg. v. Christian, C. & M. 388, 41 ECL 214; Ex p. Bridgman, 3 Dowl. P. C. 371; Anderson v. Ell, 3 Dowl. P. C. 73; Pearson v. Wilcox, 10 Hare appendix xxxv, 44 EngCh 752, 68 Reprint 1134; Ex p. Burton, 13 Jur. 297.

[a] **After judgment.**—In Nolen v. Royston, 36 Ark. 561, it was held that an affidavit could be amended by allowing the affiant to state an omitted fact even after judgment had been rendered dismissing the action because of the insufficiency of the affidavit.

[b] **Power doubted.**—In Palmer v. Bosher, 71 N. C. 291, the court expressed a doubt as to whether an affidavit defective in substance could be amended. The question was not before the court, however, as the court held that the defect which was sought to be amended related to a matter of form only, and the amendment was allowed.

35. Ala.—Hall v. Brazelton, 46 Ala. 359; Hall v. Brazleton, 40 Ala. 406; Saunders v. Cavett, 38 Ala. 51.

Colo.—Mentzer v. Ellison, 7 Colo. A. 315, 43 P 464.

Fla.—Roulhac v. Rigby, 7 Fla. 336.

Mich.—Freer v. White, 91 Mich. 74, 51 NW 807.

N. Y.—Brandley v. American Butter Co., 60 Misc. 547, 112 NYS 1030.

[a] **Where affidavit foundation of legal proceeding.**—An affidavit to foreclose a mortgage is not amendable by inserting the words "of said county" after the name of defendant so as to show the jurisdiction of the court, as § 3488 of the code does not apply to an affidavit which is the foundation of a legal proceeding. Lewis v. Frost, 69 Ga. 755.

[b] **Distinction between substantial and jurisdictional defects.**—In Brandley v. American Butter Co., 60 Misc. 547, 112 NYS 1030, the court held that under the authority of Sulzbacher v. Cawthra, 14 Misc. 544, 35 NYS 1118, where the defect in an affidavit related to the substance of a claim as distinguished from the jurisdiction of the court, it could be supplied by amendment, but where it was jurisdictional in its character it was incurably defective and could not be amended.

36. S. C. Herbst Importing Co. v. Hogan, 16 Mont. 334, 41 P 135; Stacy v. Farnham, 2 HowPr (N. Y.) 26.

37. Rosenberg v. H. B. Claflin Co., 95 Ala. 249, 10 S 521; Pearson v. Wilcox, 10 Hare appendix xxxv, 44 Eng Ch 752, 68 Reprint 1134; Ex p. Burton, 13 Jur. 297; Pariente v. Pennell, 7 Scott N. R. 834.

38. McKissack v. Witz, 120 Ala. 412, 25 S 21; Shaw v. Brown, 42 Miss. 309; Davis v. Barrett, 7 Beav. 171, 29 EngCh 171, 49 Reprint 1029; Anderson v. Ell, 3 Dowl. P. C. 73.

39. Robertson v. Coulton, 9 Ont. Pr. 16; Smyth v. Nicholls, 1 Ont. Pr. 355.

40. Toronto Public Library Bd. v. Toronto, 19 Ont. Pr. 329.

41. Beauchamp v. Cass, 1 Ont. Pr. 291.

42. Phillips v. Hutchison, 3 Dowl. P. C. 20.

43. Keith v. Ray, 231 Ill. 213, 83 NE 152; Glover, etc., Comm. Co. v. Abilene Milling Co., 136 Mo. A. 365, 116 SW 1112.

[a] **Name of person bringing suit.**—Affidavits to foreclose mortgages being amendable as ordinary declarations since the act of Oct. 5, 1837 (pamphlet p 59), and § 3486 of the code declaring that when it becomes necessary for the purpose of enforcing the rights of a plaintiff he may amend by substituting the name of another person in his stead suing for his use, proceedings to foreclose a mortgage on personalty instituted by the real owner of the mortgage are amendable by inserting as party plaintiff the name of the mortgagee for the use of such owner. Nicholson v. Whaley, 90 Ga. 257, 16 SE 84.

44. Rose v. Cook, 1 U. C. Q. B. 5.

45. Rose v. Cook, 1 U. C. Q. B. 5.

46. See cases infra this note.

[a] **Omission of city and county.**—Where the words "city and county" were omitted from the venue of an affidavit, it was proper for the court to permit them to be supplied by amendment. Yellow Pine Co. v. Atlantic Lumber Co., 21 Misc. 164, 47 NYS 79 [aff 22 App. Div. 629 mem, 50 NYS 1135 mem].

[b] **Omission of county.**—In Sarll v. Payne, 1 NYS 15, the court said: "This proceeding is entitled in the city court of New York, and the affidavit is sworn to before a notary public, New York county, the county in which the said court is held and exercises its jurisdiction. Section 723, Code Civ. Proc., provides that, 'in any stage of the action, the court must disregard an error or defect in the pleadings, or other proceedings, which does not affect the substantial rights of the adverse party.' The substantial rights of the defendant cannot be affected by allowing the amendment as it will not, and cannot, affect any defense he may have to the proceeding. The irregularity complained of is amendable, and an

the total omission of a venue from the affidavit,[47] may usually be cured by amendment.

[§ 127] **3. Date.** An error in date, either in the affidavit proper[48] or in the jurat,[49] is a mere formal defect which may be cured by amendment.

[§ 128] **4. Body of Instrument.** Defective or insufficient averments in the body of an affidavit may usually be cured by amendment.[50] In some cases, however, it has been held that only explanatory statements may be introduced in this way, not any new substantive matter.[51]

Where statements were made upon information and belief, it has been held that the affidavit could be amended and made to state the facts positively.[52]

Recitals in affidavits made by agents or attorneys may be amended so as to conform to the facts.[53]

Failure to recite the name of affiant,[54] or a mistake in the name or description of a party in the body of the affidavit,[55] may usually be cured by amendment, although in a few cases it has been held otherwise.[56]

[§ 129] **5. Signature of Affiant.** Where affiant has sworn to his affidavit, but through inadvertence has failed to sign it, he is usually allowed to affix his signature by way of amendment;[57] but in some cases permission to do this has been refused on the ground that an affidavit which lacks the signature of the affiant is a nullity and the defect cannot be cured by amendment.[58]

[§ 130] **6. Jurat.** Where an affidavit has been

amendment is fully authorized by sections 721–724, 728, Code Civ. Proc."

47. St. Louis, etc., R. Co. v. Deane, 60 Ark. 524, 31 SW 42; Avery v. Good, 114 Mo. 290, 21 SW 815; Rudolf v. McDonald, 6 Nebr. 163; Struthers v. McDowell, 5 Nebr. 491; Fisher v. Bloomberg, 74 App. Div. 368, 77 NYS 541; Babcock v. Kuntzsch, 85 Hun 33, 32 NYS 587, 1 NYAnnCas 300; Lawton v. Kiel, 51 Barb. 30; Saril v. Payne, 1 NYS 15; Smith v. Collier, 3 NYSt 172; Clement v. Ferenback, 1 NYCityCt 57.

Necessity for venue see supra § 63.

[a] **"An affidavit in which the venue is not stated** is defective, but can be amended. The court may require it to be done, according to the facts, in the most practical manner, and tax the party filing it with the cost of the amendment." St. Louis, etc., R. Co. v. Deane, 60 Ark. 524, 525, 31 SW 42.

48. Wattles v. Wayne Cir. Judge, 117 Mich. 662, 76 NW 115, 72 AmSR 590; Weddell v. Seal, 45 Miss. 726.

[a] **Affidavit in proof of publication.**—An affidavit by a printer of the publication of a summons may be amended so that it will show the date on which the publication began. Weaver v. Roberts, 84 N. C. 493.

49. Sanders v. State, 52 Tex. Cr. 156, 105 SW 803.

[a] **Wrong year.**—A palpable mistake in an affidavit, as the wrong year in the jurat, used in support of an application to the court, is not an insurmountable objection to the motion, as the court will permit the error to be amended by a supplemental affidavit. Cooper v. Archer, 12 Price 149.

50. Booth v. Denike, 65 Fed. 43; Frink v. Flanagan, 6 Ill. 35; Thorn v. Lazarus, 39 App. Div. 508, 57 NYS 279.

[a] **Insufficient statutory language.**—An affidavit which follows the language of the statute under which it is made, but to which objection is raised upon the ground that the facts are not sufficiently stated, may be amended. Herbst Importing Co. v. Hogan, 16 Mont. 384, 41 P 135; Josephi v. Mady Clothing Co., 13 Mont. 195, 33 P 1.

[b] **Supplying of vital and necessary averments.**—An affidavit for a distress warrant is amendable to the same extent and with the same consequences as in case of ordinary declarations, and this right of amendment includes the supplying of vital and necessary averments omitted from the original affidavit. Collins v. Taylor, 128 Ga. 789, 58 SE 446; Westbrook v. Harrison, 99 Ga. 660, 26 SE 68; Reese v. Walker, 89 Ga. 72, 14 SE 888.

[c] **In an early Georgia case** (1) the language of an affidavit upon which it was sought to base an attachment was insufficient, and the court held that an affidavit for this purpose could not be amended. Brown v. McCluskey, 26 Ga. 577. (2) But by a provision of the code passed subsequently to this decision it was provided that "all affidavits for the foreclosure of liens, including mortgages, and all affidavits that are the foundation of legal proceedings, and all counter-affidavits, shall be amendable to the same extent as ordinary declarations." Since the passage of this act it has been held that where the language of an affidavit is not sufficient to conform to the statutory requirements, it can be amended. Collins v. Taylor, 128 Ga. 789, 58 SE 446; Brumby v. Rickoff, 94 Ga. 429, 21 SE 232.

[d] **Allegation of additional grounds.**—An affidavit in support of an application for an attachment failed to allege all the grounds which were in existence at the time it was filed. It was held that this was a matter which was curable by amendment. Keith v. Ray, 231 Ill. 213, 83 NE 152 [aff 134 Ill. A. 119]. See generally Attachment [4 Cyc 521].

[e] **Allegation of ownership in wrong person.**—Where an affidavit upon which a prosecution for arson was to be based alleged the ownership of the property to be in the wrong person, it was held that it could be amended in this particular. Simpson v. State, 111 Ala. 6, 20 S 572.

[f] **Defect cured by judgment.**—The failure of an attachment affidavit to state the amount of the indebtedness due, for which the action was brought, does not render the proceedings void. Such affidavit is defective merely and may be amended; and, if not amended, the defect is cured by judgment, except as to direct proceedings in the cause. Coyle Mercantile Co. v. Nix, 7 Okl. 267, 54 P 469.

51. Campbell v. Johnson, 129 Mo. A. 201, 107 SW 1020; Depew v. Leal, 2 AbbPr (N. Y.) 131.

52. Westbrook v. Harrison, 99 Ga. 660, 26 SE 68 [foll Reese v. Walker, 89 Ga. 72, 14 SE 888]; Frink v. Flanagan, 6 Ill. 35; Cook v. Whipple, 55 N. Y. 150, 14 AmR 202; Cutler v. Rathbone, 1 Hill (N. Y.) 204.

53. Jansen v. Mundt, 20 Nebr. 320, 30 NW 53 (holding an affidavit amendable where the attorney for plaintiff swore in his affidavit "that he is the authorized attorney for the plaintiff in the above entitled action; that he has commenced an action," etc., when he should have stated that plaintiffs had commenced an action).

54. Barber v. Smith, 41 Mich. 138, 1 NW 992; Johnson v. Tuggle, 27 Miss. 836; Rudolf v. McDonald, 6 Nebr. 163.

[a] **Clerical error.**—"The first objection taken to the proceedings below is, that the justices, on the trial before them, overruled the motion made by the defendants to quash the proceedings, on the ground that the affidavit attached to the complaint did not show the name of any person taking the oath. When this motion was made, the justices allowed an amendment supplying the name of the plaintiffs' attorney who really made the affidavit, but whose name was omitted through mistake. The denial of the motion to quash and the allowance of the amendment are alleged to be erroneous, but we do not consider the objection well founded. The omission of the affiant's name was shown to be a mere clerical error, which it was entirely competent to correct, and which was fully within the powers of the court in relation to amendments." Johnson v. Tuggle, 27 Miss. 836, 845.

55. Ala.—Rosenberg v. H. B. Claflin Co., 95 Ala. 249, 10 S 521; Sims v. Jacobson, 51 Ala. 186.

Mo.—Middleton v. Frame, 21 Mo. 412.

N. C.—State v. Giles, 103 N. C. 391, 9 SE 433.

Okl.—Coyle Mercantile Co. v. Nix, 7 Okl. 267, 54 P 469.

Ont.—Re Lake, 42 U. C. Q. B. 206.

[a] **Addition of partners' names.**—Where an affidavit which was filed to obtain an attachment on behalf of a partnership omitted to set out the names of the partners, it was held that the omitted names could be added by way of amendment. Emerson v. Detroit Steel, etc., Co., 100 Mich. 127, 58 NW 659 [foll Barber v. Smith, 41 Mich. 138, 1 NW 992].

[b] **Mistake in middle name.**—A mistake in the middle name of the affiant may be amended. Stout v. Folger, 34 Iowa 71, 11 AmR 138; State v. Giles, 103 N. C. 391, 9 SE 433; Redman v. Union Pac. R. Co., 3 Wyo. 678, 29 P 88.

56. See cases infra this note.

[a] **Mistake in christian name.**—In Rose v. Cook, 1 U. C. Q. B. 5, there was a misnomer in the affidavit as to the christian name of one of plaintiffs, and the court refused to allow amended affidavits to be filed.

[b] **Use of initial letter.**—In an affidavit to obtain an attachment the christian name of defendant was indicated by the initial letter only. It was held that this was insufficient, as the christian name of the party should have been written in full, and the affidavit could not be amended to cure this defect. McGrew v. Steiner, 77 N. J. L. 377, 71 A 1122.

57. Ala.—Savage v. Atkins, 124 Ala. 378, 27 S 514; Watts v. Womack, 44 Ala. 605.

Ark.—Fortenheim v. Claflin, 47 Ark. 49, 14 SW 462.

Iowa.—Stout v. Folger, 34 Iowa 71, 11 AmR 138.

Miss.—Johnson v. Tuggle, 27 Miss. 836.

Pa.—Schumann v. Schumann, 6 Phila. 318.

Tenn.—West Tennessee Agricultural, etc., Assoc. v. Madison, 9 Lea 407.

Wyo.—Redman v. Union Pac. R. Co., 3 Wyo. 678, 29 P 88.

58. Cohen v. Manco, 28 Ga. 27; Meadows v. Alexander, 1 Ga. A. 40, 57 SE 901; Davis v. Sherrill, (Tex. Civ. A.) 113 SW 556; Schuster v. Haight, 53 Wis. 290, 10 NW 511.

Necessity for affiant's signature see supra § 90.

[a] **Void without signature.**—"It has been decided, therefore, that without such signature no paper can be called or treated as an affidavit. And while an affidavit to foreclose a mortgage is amendable, this creature of the law must have become a real affidavit, must have been born into life through the oath and signature of

properly made and sworn to, and is correct in every respect except that a proper jurat is not annexed, an amendment may be allowed for the purpose of supplying the omission[59] or for the purpose of supplying necessary recitals in the body of the jurat,[60] or of affixing the signature of the officer,[61] adding his official title,[62] or attaching his seal.[63] Permission to file in this way the officer's own certificate of his authority to administer an oath has been granted[64] and refused.[65]

[§ 131] **7. Certification of Officer's Authority.** Where an affidavit taken in a foreign jurisdiction lacks the proper certification of the officer's authority the omission may usually be supplied by amendment;[66] but permission to do this has sometimes been denied.[67]

[§ 132] **8. Taken before Disqualified Officer.** In several instances it has been held that where an affidavit is sworn to before an officer who is disqualified because he is an attorney in the cause it may be amended.[68]

[§ 133] **F. Procedure to Obtain Amendment—1. Application.** The application to amend an affidavit should be made to the court in which the affidavit is filed.[69]

[§ 134] **2. Discretion of Court as to Allowance.** The power to grant or refuse an amendment is very generally discretionary with the court,[70] and amend-

the affiant, before it can be subject to sickness or to treatment by the doctor in the form of amendment. In law, that which is dead can not be brought to life, that which is void can not be filled. An invalid affidavit can not be amended, because it is no more within the power of the law than of nature to give life to the dead." Meadows v. Alexander, 1 Ga. A. 40, 42, 57 SE 901.

59. Ark.—Fortenheim v. Claflin, 47 Ark. 49, 14 SW 462.
Ga.—Beach v. Averett, 106 Ga. 73, 31 SE 806, 71 AmSR 239.
Ill.—Pierson v. Hendrix, 88 Ill. 34.
Ind.—Williams v. Stevenson, 103 Ind. 243, 2 NE 728.
Kan.—Buckland v. Goit, 23 Kan. 327.
Mass.—Jackman v. Gloucester, 143 Mass. 380, 9 NE 740.
Miss.—Rootes v. Thomas, 85 Miss. 493, 38 S 502.
Mo.—Laswell v. Presbyterian Church, 46 Mo. 279; Bergesch v. Keevil, 19 Mo. 127.
N. Y.—Hees v. Snell, 8 HowPr 185.
Pa.—Cusick's Election, 136 Pa. 459, 20 A 574, 10 LRA 228; Pottsville v. Curry, 32 Pa. 443.
Tenn.—Wiley v. Bennett, 9 Baxt. 531 [dist Watt v. Carnes, 4 Heisk. 532, where it was held that a clerk had no authority to attach his attestation to an affidavit after the issuing of an attachment].
Tex.—May v. Ferrell, 22 Tex. 340.
[a] **In Missouri.**—Under Rev. St. § 2114, providing for amendments to pleadings, it has been held that where a jurat is omitted from an affidavit the court in which such an affidavit is filed may permit it to be amended by supplying the omission. Cooley v. Kansas City, etc., R. Co., 149 Mo. 487, 51 SW 101.

60. See cases infra this note.
[a] **Where the deponents' names are omitted from the jurat** they may be incorporated therein by way of amendment. Ex p. Smith, 2 Dowl. P. C. 607.
[b] **Omission to refer to notarial seal.**—An omission of the jurat to refer to the notarial seal of the notary before whom the affidavit was made may be cured by amendment, the affidavit in fact bearing the seal. Hallett v. Chicago, etc., R. Co., 22 Iowa 259, 92 AmD 393.
[c] **Omission to state manner of signing.**—The omission of the officer to state in the jurat that the deponent who was a markswoman had made her mark was held to be a defect curable by amendment. Wilson v. Blakey, 9 Dowl. P. C. 352.

61. Ark.—Bittick v. State, 67 Ark. 131, 53 SW 571; Coleman v. Frauenthal, 46 Ark. 302; Guy v. Walker, 35 Ark. 212.
Ga.—Mize v. Brewer, 99 Ga. 322, 25 SE 700; Veal v. Perkerson, 47 Ga. 92.
Iowa.—Stout v. Folger, 34 Iowa 71, 11 AmR 138.
Mich.—Peterson v. Fowler, 76 Mich. 258, 43 NW 10; Peo. v. Simondson, 25 Mich. 113.
Miss.—Green v. Boon, 57 Miss. 617.
N. Y.—Fawcett v. Vary, 59 N. Y. 597; Smith v. Collier, 3 NYSt 172; Hees v. Snell, 8 HowPr 187.
Pa.—Cusick's Election, 136 Pa. 459, 20 A 574, 10 LRA 228; Pottsville v. Curry, 32 Pa. 443; Hart v. Jones, 6 Kulp 326.
Tenn.—West Tennessee Agricultural, etc., Assoc. v. Madison, 9 Lea 407.
Tex.—White v. Casey, 25 Tex. 552; Sims v. Redding, 20 Tex. 386 [overr as to other points Love v. Powell, 67 Tex. 15, 2 SW 456].
Wis.—State v. Cordes, 87 Wis. 373, 58 NW 771; Lederer v. Chicago, etc., R. Co., 38 Wis. 244.
Wyo.—Redman v. Union Pac. R. Co., 3 Wyo. 678, 29 P 88.
Necessity for officer to sign the jurat see supra § 109.
[a] **Failure of judge to sign jurat.**—An affidavit to appeal in forma pauperis from a judgment rendered by a county court, upon which affidavit was an entry of filing duly signed by the county judge and which was in all respects complete except that it lacked the signature of the county judge to the jurat, was amendable by supplying the deficiency; and it was therefore error not to allow the appellant to show by that judge that the failure to sign was a clerical omission, and also error to refuse to allow him to sign the jurat instanter. Mize v. Brewer, 99 Ga. 322, 25 SE 700.
[b] **Preliminary proof as basis of amendment.**—"Plaintiff offered to prove that the affidavit was in fact properly sworn to. This he was not permitted to do. It was proper preliminary proof to an offer to attach the officer's signature, and it was error to exclude it. Without showing that the paper was in fact sworn to, the officer could not, of course, be permitted to sign the jurat. The action of the court prevented plaintiff from showing that which entitled him to perfect the affidavit." Finley v. West, 51 Mo. A. 569, 572.

62. Smith v. Walker, 93 Ga. 252, 18 SE 830; Dickson v. Thurmond, 57 Ga. 153; Stone v. Miller, 60 Iowa 243, 14 NW 781; Hudson v. Fishel, 17 R. I. 69, 20 A 100.

63. Doty v. Colton, 90 Ill. 453.

64. Goldie v. McDonald, 78 Ill. 605.

65. Desnoyers Shoe Co. v. Litchfield First Nat. Bank, 188 Ill. 312, 58 NE 994.

66. Fidelity Ins., etc., Co. v. Roanoke Iron Co., 81 Fed. 439; Bohn v. Zeigler, 44 W. Va. 402, 29 SE 983.
[a] **Authentication.**—In Bohn v. Zeigler, 44 W. Va. 402, 29 SE 983, it was held that the omission to append a clerk's certificate to verify the notary's official authority and the genuineness of his signature may be supplied by amendment.

67. Harris v. Durkee, 50 N. Y. Super. 202 (holding that the defect was jurisdictional and could not be cured by amendment).

68. Cheyenne County v. Walter, 83 Kan. 743, 112 P 599; Swearingen v. Howser, 37 Kan. 126, 14 P 436; Foreman v. Carter, 9 Kan. 674; Dobry v. Western Mfg. Co., 57 Nebr. 228, 77 NW 656.
[a] **In appellate court.**—Where an affidavit was made by one member of a partnership before an officer who was their attorney in a cause in which the affidavit was to be used, it was held that it could be amended in the appellate court. Coleman v. Frauenthal, 46 Ark. 302.

69. White v. Casey, 25 Tex. 552.

70. Ga.—Hicks v. Portwood, 129 Ga. 307, 58 SE 837.
Mich.—Taylor v. Buck, 100 Mich. 181, 58 NW 835.
N. Y.—Fawcett v. Vary, 59 N. Y. 597.
N. C.—Moore v. Moore, 130 N. C. 333, 41 SE 943.
Tenn.—Lucas v. Sevier, 1 Overt. 105.
Tex.—Sims v. Redding, 20 Tex. 386.
[a] **May be exercised by judge at chambers.**—It has been held that the power to allow an amendment to an affidavit is one which is not vested alone in the court but it may be exercised by a judge at chambers. Baker Mfg. Co. v. Knotts, 30 Kan. 356, 2 P 510; Wells, etc., Co. v. Danford, 28 Kan. 487.
[b] **In the absence of leave to amend** a defective affidavit, or of a motion for such leave, it is not competent for the party offering it to cure or supplement the original by additional affidavits. Garner v. White, 23 Oh. St. 192.
[c] **Court may impose conditions.**—A court allowing an amendment to an affidavit may impose reasonable conditions precedent, as that the amendment be made within a certain number of days. Bayless v. McFarland, 10 Okl. 747, 63 P 859.
[d] **At hearing; no statute authorizing amendment.**—In Bacot v. Deas, 67 S. C. 245, 250, 45 SE 171, which was a case of an affidavit for change of venue, after the magistrate had ruled that the affidavit was insufficient defendant moved for leave to amend but his motion was refused. The court said: "The statute makes no provision for allowing amendment to the affidavit, and we think the motion was properly refused."
[e] **After passing upon motion.**—Where a defective affidavit was filed in support of a motion for a continuance, it was held that the court did not err in refusing leave to amend the affidavit after it had passed upon the motion. Pence v. Christman, 15 Ind. 257.
[f] **Discretion of trial court absolute.**—In Valley Paper Co. v. Smalley, 16 Del. 289, 43 A 176, where an affidavit of merits was involved, Lore, C. J., said that the court did not think that leave to amend an affidavit ought to be granted. He further remarked that the courts in that state have uniformly refused to permit an affidavit to be amended, that a party binds himself by his affidavit, and that attorneys must be very careful how they file them. It was held, per curiam, that this is a matter controlled by the discretion of the court, and to that decision a writ of error will not lie.
[g] **Power exercised with caution.**—"The practice of suffering affidavits to be amended, or a new affidavit to be filed, when the first has not made out the case desired to be shown by the party, is one which may be productive of much evil, and which the courts should permit with great cau-

ment should not be granted where it will prejudice rights which have intervened since the affidavit was filed.[71] The court may in its discretion refuse permission to amend an affidavit a second time, where opportunity had already been given of which the party failed to take advantage.[72]

[§ 135] **3. Manner of Making Amendment.** The most approved form of amending an affidavit is not by erasure or interlineation[73] but by filing a new affidavit in the amended form.[74]

[§ 136] **4. Reswearing of Affidavit.** After a material amendment the affidavit must be resworn, since otherwise affiant may not be convicted of perjury if the affidavit, as amended, is false.[75] But reswearing may be dispensed with where the original affidavit is sufficient[76] or where the amendment is merely formal.[77]

VII. USE OF AFFIDAVITS

[§ 137] **A. In General.** In some states it is provided by statute that an affidavit may be used to verify a pleading, to prove the service of the summons, notice, or other process in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law.[78]

[§ 138] **B. Use as Evidence—1. Admissibility—a. As to Interlocutory or Preliminary Matters.** The chief service as evidence performed by ex parte affidavits is as the basis of some interlocutory or preliminary action[79] or of a provisional

tion, if permitted at all. The party making the application has the ready means of knowing what the statute requires he should show in order to obtain a continuance; and where the facts are at the time within the knowledge of the party, there is no reason why he should not be required to make out his case at once." Widner v. Hunt, 4 Iowa 355, 357.

71. Northern Lake Ice Co. v. Orr, 102 Ky. 586, 44 SW 216, 19 KyL 1634.

72. Burton v. Robinson, 5 Kan. 287.

73. Moorehead v. Briggs, 152 Ill. A. 361.

74. Moorehead v. Briggs, 152 Ill. A. 361.

[a] **Reason for rule.**—"No trial court should allow erasures or interlineations in an affidavit. The purpose of the law, in requiring an affidavit instead of an unsworn statement, is practically nullified when, as in this instance, an affidavit is allowed to be amended without being again sworn to before an officer authorized to administer oaths. It is the duty of the courts, generally, to permit amendments of pleadings and the filing of new or additional affidavits. But the interests of parties and the public should be safeguarded by requiring that court records and court documents should, when amended, be amended in a proper manner. An affidavit should be amended only by the filing of an amended affidavit, sworn to. An affidavit merely altered is, in the true sense, neither an amended affidavit nor an affidavit amended." Chytraus, P. J., in Moorehead v. Briggs, 152 Ill. A. 361, 362.

75. Ark.—Baker v. York, 65 Ark. 142, 45 SW 57 (holding that, where material statements are added by amendment and precede the words "do solemnly swear," the affidavit is insufficient, as the part added consists of mere general statements without the sanction of an oath).

Ill.—Moorehead v. Briggs, 152 Ill. A. 361.

N. C.—Atlantic Bank v. Frankford, 61 N. C. 199.

Or.—State v. Lavery, 31 Or. 77, 49 P 852.

Eng.—Pearson v. Wilcox, 10 Hare appendix xxxv, 44 EngCh 752, 68 Reprint 1134; Ex p. Burton, 13 Jur. 297; Hughes v. Browne, 6 M. & G. 751, 46 ECL 751, 134 Reprint 1095; Plant v. Butterworth, 5 Tyrw. 183.

Ont.—Toronto Public Library Bd. v. Toronto, 19 Ont. Pr. 329; Smyth v. Nicholls, 1 Ont. Pr. 355.

76. D. M. V. Live Stock Ins. Co. v. Henderson, 38 Iowa 446, 448 (where the court said: "It is claimed that the court erred in permitting an amendment of the affidavit, in allowing it to be amended by erasure, interlineation, and addition, and in considering the amended affidavit, inasmuch as it was not sworn to after the changes were made. We deem it unnecessary to consider any of these objections. We regard the original affidavit a sufficient compliance with the statute, and that if there was error in allowing and considering the amendment, it was error without prejudice").

77. In re Grantham, 10 Jur. 1038 (where the court said: "As these affidavits were sent back in order that they should be properly intitled, I do not think fresh jurats were necessary. It is quite clear the affidavits may be read").

78. Ward v. Ward, 20 Oh. Cir. Ct. 136, 10 Oh. Cir. Dec. 656; Watkins v. Grieser, 11 Okl. 302, 66 P 332. See statutory provisions.

[a] **Use in code practice.**—In Blatchford v. New York, etc., R. Co., 7 AbbPr (N. Y.) 322, the court, in speaking of the use of affidavits in code practice, said: "Affidavits are used to bring to the knowledge of the court facts not appearing by the pleadings, or, if appearing, in pleadings not verified, that such facts may be stated under the sanction of an oath."

[b] **Under statutory provisions.**—(1) "An affidavit may be used in any case expressly provided by this code or other statute: Hill's Ann. Laws, § 808." Lawrey v. Sterling, 41 Or. 518, 524, 69 P 460. (2) "Where a statute provides that the evidence upon a certain question must be presented by affidavit it simply means that the competent and material testimony must be presented by the affidavits of the witnesses." Gay v. Torrance, 145 Cal. 144, 152, 78 P 540 (per Angellotti, J.).

[c] **Under Iowa code** § 2957, "affidavits explaining any defect in the chain of title to any real estate may be recorded as instruments affecting real property." Fagan v. Hook, 134 Iowa 381, 388, 105 NW 155, 111 NW 981 [cit Cyc].

79. Wetzstein v. Boston, etc., Cons. Copper, etc., Min. Co., 26 Mont. 193, 203, 66 P 943 [cit Cyc]; Baldwin v. Flagg, 43 N. J. L. 495; Cooper v. Galbraith, 24 N. J. L. 219; Hoar v. Mulvey, 1 Binn. (Pa.) 145; Grindle v. Gillman, 4 Terr. L. 180.

Use of affidavits on argument of motions see Motions [28 Cyc 11].

[a] **Motion to set aside verdict.**—In New Jersey an ex parte affidavit has been allowed to be read on a motion to set aside a verdict. Harwood v. Smethurst, 30 N. J. L. 230.

[b] **Motion for production of books and writings.**—The affidavit of an interested party, taken without cross-examination, is competent evidence on a motion for an order to the opposite party to produce books and writings, under the act of congress of Sept. 24, 1789. U. S. v. Twenty-eight Packages of Pins, 28 F. Cas. No. 16,561, Gilp. 306.

[c] **Motion to dissolve injunction.**—In Ohio, on appeal from an interlocutory order dissolving an injunction, affidavits are competent testimony in the district court on a motion to dissolve the injunction. Keys v. Williamson, 31 Oh. St. 561.

[d] **On motion to enter satisfaction of judgment** affidavits of the parties are admissible. Faulkner v. Chandler, 11 Ala. 725.

[e] **Petition for review.**—The affidavit of a petitioner for a review may be used on the hearing of the petition to prove facts known only to himself. Coffin v. Abbot, 7 Mass. 252.

[f] **Objection to entering award.**—Ex parte affidavits may be read against or in support of objections to the entering of an award as the judgment of the court, especially where they are not objected to in such court, but they should be given much less weight than testimony taken in court or on notice, subject to cross-examination. Tennant v. Divine, 24 W. Va. 387.

[g] **Should be filed on entering rule.**—The affidavit upon which a rule to show cause is had should be filed upon entering the rule; if not filed, or lost by the fault of the party or his attorney, its contents cannot be shown and the rule will be discharged as improvidently granted. Cooper v. Galbraith, 24 N. J. L. 219.

[h] **Affidavits not applicable to any proceeding in case.**—The court will not consider affidavits read and filed in the case upon which nothing is asked, and which are not applicable to any motion, issue, or proceeding in the case. State v. Allen, 5 Kan. 213.

[i] **Application for injunction.**—(1) An affidavit admitted in evidence at the hearing of an application for an injunction, no objection being made on the ground of the incompetency of the affiant and no motion being made to rule it out, may be considered, whether the affiant was competent or not. Putney v. Kohler, 84 Ga. 528, 11 SE 127. (2) Ex parte affidavits may be used by plaintiff as evidence in support of an application for an injunction. Likewise they may be used by defendant in resisting the application. Wetzstein v. Boston, etc., Cons. Copper, etc., Min. Co., 26 Mont. 193, 66 P 943. (3) In Munro v. Wivenhoe, etc., R. Co., 4 De G. J. & S. 723, 69 EngCh 553, 46 Reprint 1100, it was held that on a hearing to obtain an interlocutory injunction counsel were entitled to use any affidavit which was in existence at the time when they were called upon to address the court. See Injunctions [22 Cyc 941].

[j] **In a proceeding before a board of election** to determine whether or not the names of certain persons should be placed upon a ticket as the candidates of a particular party, it was held that the affidavits of the officers of an independent political body were competent evidence as to whether or not particular candidates were the legitimate candidates of such body or mere intruders. Matter of Quimby, 116 App. Div. 142, 102 NYS 201.

[k] **Partake of nature of parol testimony.**—Under Burns Rev. St. (1901) § 399, providing for the granting of relief from a judgment because of mistake, inadvertence, surprise, or excusable neglect, affidavits

remedy.[80] Where an affidavit is required to be made as a preliminary step in a proceeding, it is admissible merely for the purpose of showing the fact that it was made.[81]

[§ 139] **b. As to Collateral or Ancillary Matters.** Affidavits as a general rule are admissible in evidence regarding matters that are ancillary or incidental to the main proceedings,[82] as, for instance, to establish the loss or destruction of a document in order to prepare the way for secondary evidence.[83]

[§ 140] **c. As to Facts Material to Issue—(1) In General.** In the absence of any statute or rule of court expressly authorizing it,[84] affidavits are not admissible as to controverted facts material to the issue,[85] unless received by consent, or without opposition, where such opposition might have been

in support of a motion for such relief partake of the nature of depositions and parol testimony, not of documentary evidence, and are governed by the rules applicable to parol testimony. Casto v. Shew, 32 Ind. A. 338, 68 NE 1041.

[l] **How objection made.**—Nebr. Code Civ. Proc. § 371, providing that an affidavit may be made before any person authorized to take depositions, does not require that objections to affidavits as evidence shall be made as provided by statute for the filing of objections to depositions. Malcom Sav. Bank v. Cronin, 80 Nebr. 231, 116 NW 150 [den reh 80 Nebr. 228, 114 NW 158].

80. Munro v. Wivenhoe, etc., R. Co., 4 De G. J. & S. 723, 69 EngCh 553, 46 Reprint 1100. See Attachment [4 Cyc 469]; Injunctions [22 Cyc 941]; Replevin [34 Cyc 1428]; and other specific titles. See also cases supra note 79.

81. Pickering v. Townsend, 118 Ala. 351, 23 S 703; Plume, etc., Mfg. Co. v. Caldwell, 35 Ill. A. 492 [aff 136 Ill. 163, 26 NE 599]; Turner v. Gonzales, 3 Ind. T. 649, 64 SW 565.

[a] **To show compliance with condition.**—Where a condition of an insurance policy sued on required the insured to deliver an account of their loss, with their oath or affirmation declaring the account to be true, etc., it was held that the affidavit of the insured was admissible to prove a compliance with such condition but for no other purpose, and that the court should so inform the jury. Phœnix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 AmD 521.

[b] **Affidavits filed in support of an application to obtain a rehearing** cannot be considered as evidence for the purpose of the hearing. Anse La Butte Oil, etc., Co. v. Babb, 122 La. 415, 47 S 754.

[c] **An affidavit made for use in support of an application for a change of venue** is not admissible as evidence to prove any facts in controversy in the main proceeding. Ohio, etc., R. Co. v. Levy, 134 Ind. 343, 32 NE 815, 34 NE 20.

[d] **Affidavit to obtain order of arrest.**—In Johnston v. Johnson, 44 Kan. 666, 669, 24 P 1098, it was said: "The second important error complained of was, the refusal to admit in evidence, as a part of the plaintiff's case, the affidavit of one of the plaintiffs, made for the purpose of obtaining an order of arrest in the case. We do not think such refusal error. The affidavit in question was no more evidence in the trial of the case than any other ex parte affidavit of the plaintiff made in reference to the subject-matter of the case."

[e] **An affidavit for a continuance** cannot be read in evidence unless the record shows that a continuance has been denied upon the condition that the affidavit should be treated as the deposition of a witness. Dempster Mill Mfg. Co. v. Fitzwater, 6 Kan. A. 24, 49 P 624.

[f] **Affidavits filed in support of a bill, there being no proof of notice,** ought not to be considered as testimony in the cause, unless it appears in the record that they were read either by consent of parties or without opposition when such opposition might have been made. Braxton v. Lee, 4 Hen. & M. (14 Va.) 376.

82. U. S.—Tayloe v. Riggs, 1 Pet. 591, 7 L. ed. 275.

Ill.—Taylor v. McIrvin, 94 Ill. 488; Murphy v. Schoch, 135 Ill. A. 550; Austin State Bank v. Morrison, 133 Ill. A. 339.

Ky.—May v. Williams, 109 Ky. 682, 60 SW 525, 22 KyL 1328; Talbot v. Pierce, 14 B. Mon. 195.

Mont.—Wetzstein v. Boston, etc., Cons. Copper, etc., Min. Co., 26 Mont. 193, 66 P 943; In re Liter, 19 Mont. 474, 48 P 753.

N. J.—Baldwin v. Flagg, 43 N. J. L. 495.

N. Y.—In re Eldridge, 82 N. Y. 161, 37 AmR 558; Boskowitz v. Sulzbacher, 121 App. Div. 878, 106 NYS 865; St. John v. Sweeney, 59 HowPr 175.

Oh.—Ward v. Ward, 20 Oh. Cir. Ct. 136, 10 Oh. Cir. Dec. 656.

Okl.—Watkins v. Grieser, 11 Okl. 302, 66 P 332.

Or.—Tobin v. Portland Mills Co., 41 Or. 269, 68 P 743, 1108.

W. Va.—Tennant v. Divine, 24 W. Va. 387.

Eng.—Stamps v. Birmingham, etc., R. Co., 7 Hare 251, 27 EngCh 251, 68 Reprint 103.

Ont.—Creelman v. Clefford, 2 Grant Ch. (U. C.) 213; Smith v. Ask, 5 U. C. Q. B. 497.

[a] **To establish boundary.**—In Sturgeon v. Waugh, 2 Yeates (Pa.) 476, it was said that affidavits might be read to establish a boundary or by way of corroboration of other testimony.

[b] **Affidavits to show the amount involved in the controversy** will be received in the appellate court when there is nothing in the record to show that such amount was large enough to give the court jurisdiction to hear and determine the cause. McLaughlin v. Darlington, 6 Kan. A. 212, 50 P 507.

[c] **To prove compliance with requirements of insurance policy.**—Where an insurance policy requires the insured to give, in case of loss, an account thereof under oath in a suit on a policy, the affidavit of the insured is admissible to prove a compliance with the requirement, but for no other purpose. Phœnix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 AmD 521.

[d] **Proof of publication.**—An affidavit of publication by the printer or publisher of a newspaper is a mere matter of preliminary proof and accomplishes its functions as soon as it is filed and passed upon by the court. Freeman v. Thompson, 53 Mo. 183.

[e] **Publications of notice for taking depositions.**—It has been held that the affidavits of persons who would have been competent witnesses and might have been called are not admissible to prove that proper notice had been given by publication under a statute requiring such notice previous to the taking of depositions for the perpetuation of testimony. Patterson v. Fagan, 38 Mo. 70.

[f] **Use regarding motions.**—(1) In New Jersey the practice of taking affidavits ex parte to be used on the argument of a motion is peculiar to the court of chancery (Peer v. Bloxham, 82 N. J. L. 288, 81 A 659; Baldwin v. Flagg, 43 N. J. L. 495); (2) and has never been adopted in courts of law (Baldwin v. Flagg, supra).

[g] **Must be applicable to some motion or proceeding.**—The courts will not consider affidavits read and filed in a case upon which nothing is asked and which are not applicable to any motion, issue, or proceeding in the case. State v. Allen, 5 Kan. 213.

[h] **Partiality of arbitrators.**—In an early Virginia case it was held that affidavits may be introduced tending to prove partiality or misbehavior of arbitrators, but not mistake in law or fact. Plesants v. Ross, 1 Wash. (1 Va.) 156, 1 AmD 449. See Arbitration and Award [3 Cyc 736].

[i] **Motion to hold to bail.**—It is no objection to the admissibility of an affidavit to hold a defendant to bail in a civil case that the facts stated therein, although true when sworn, may not be true at the time it is used in court. Langston v. Wetherell, 14 M. & W. 104.

[j] **To prove incompetency of evidence.**—In New Jersey it has been held that an affidavit may properly be used to bring before the supreme court the evidence which a particular witness gave before a justice, where such evidence can be correctly had for the purpose of showing that such evidence was incompetent or that the justice erred in admitting it. Goldsmith v. Bane, 8 N. J. L. 87.

[k] **Place where made as objection.**—In Smith v. Peo., 39 Colo. 202, 88 P 1072, it was held that the trial court properly refused to consider an affidavit in support of a motion for a new trial "because it was made at a point suspiciously near the boundary of the United States."

[l] **Affidavits filed by order of court** are admissible to show compliance with the order. Pickering v. Townsend, 118 Ala. 351, 23 S 703.

83. Tayloe v. Riggs, 1 Pet. (U. S.) 591, 7 L. ed. 275 (where it was said that if the court refused to receive an affidavit of the loss of a written contract, the contents of which were known to others or a copy of which could be proved, a party might be completely deprived of his rights, at least in a court of law); Taylor v. McIrvin, 94 Ill. 488.

[a] **To let in other evidence.**—The affidavit of a party to the cause may be received to prove the death of one of the subscribing witnesses to a writing and that the other cannot be found, so as to let in other evidence of the execution of such writing. McDowell v. Hall, 2 Bibb (Ky.) 610.

[b] **Loss of document.**—"As to matter directly in issue, the testimony of witnesses must be so taken as to subject the witness to cross-examination, but as to some collateral or ancillary matters, and among such as to the loss of a document, affidavits taken ex parte are competent." Taylor v. McIrvin, 94 Ill. 488, 493.

84. Pittsburgh's App., 79 Pa. 317, 323 (where the court said: "Ex parte affidavits are, at best, but a very weak kind of evidence, and generally form but the ground of some preliminary or interlocutory action, but are never, unless it be especially so provided by Act of Assembly or rule of court, the foundation for final judgment or decree").

85. Ala.—Pickering v. Townsend, 118 Ala. 351, 23 S 703.

Ark.—Western Union Tel. Co. v. Gillis, 89 Ark. 483, 117 SW 749, 131 AmSR 115.

Ga.—Maples v. Hoggard, 58 Ga. 315.

Ill.—Murphy v. Schoch, 135 Ill. A. 550; Finkelstein v. Schilling, 135 Ill. A. 543; Austin State Bank v. Morrison, 133 Ill. A. 339; Plume, etc., Mfg. Co. v. Caldwell, 35 Ill. A. 492 [aff 136 Ill. 163, 26 NE 599]; Quinn v. Rawson, 5 Ill. A. 130.

Ind.—Ohio, etc., R. Co. v. Levy, 134 Ind. 343, 32 NE 815, 34 NE 20.

Kan.—Johnston v. Johnson, 44 Kan. 666, 24 P 1098.

Ky.—May v. Williams, 109 Ky. 682,

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made.[86] As to such matters the testimony of witnesses must be taken in open court or upon deposition, so as to afford an opportunity for cross-examination.[87]

[§ 141] (2) **As Admissions.** Affidavits signed by a party may be introduced in evidence by the opposite party as admissions,[88] and, where the proper foundation is laid, may be used to impeach the testi-

60 SW 525, 22 KyL 1328; Phœnix Ins. Co. v. Lawrence, 4 Metc. 9, 81 AmD 521; Newton v. West, 3 Metc. 24; Talbot v. Pierce, 14 B. Mon. 158; Morton v. Sanders, 2 J. J. Marsh. 192, 19 AmD 128.

Mo.—Patterson v. Fagan, 38 Mo. 70.

N. J.—Staley v. South Jersey Realty Co., (Sup.) 90 A 1042; Peer v. Bloxham, 82 N. J. L. 288, 81 A 659; Baldwin v. Flagg, 43 N. J. L. 495; Cooper v. Galbraith, 24 N. J. L. 219; Lummis v. Strattan, 2 N. J. L. 245; Layton v. Cooper, 2 N. J. L. 62; Pullen v. Pullen, 46 N. J. Eq. 318, 20 A 393; Clutch v. Clutch, 1 N. J. Eq. 474.

N. Y.—In re Eldridge, 82 N. Y. 161, 37 AmR 558.

Okl.—Watkins v. Grieser, 11 Okl. 302, 66 P 332.

Pa.—Hoar v. Mulvey, 1 Binn. 145; Sturgeon v. Waugh, 2 Yeates 476; Plankinson v. Cave, 2 Yeates 370; Lilly v. Kitzmiller, 1 Yeates 28.

S. C.—McBride v. Floyd, 18 S. C. L. 209.

Tex.—Henke v. Keller, 50 Tex. Civ. A. 533, 110 SW 783.

Wash.—Graham v. Smart, 42 Wash. 205, 84 P 824.

W. Va.—Herold v. Craig, 59 W. Va. 353, 53 SE 466; Peterson v. Ankrom, 25 W. Va. 56; Tennant v. Divine, 24 W. Va. 387.

[a] **Reason for rule.**—"The question here presented does not involve the right to have an ex parte affidavit considered upon a motion to grant or dissolve an injunction, or in support of or opposition to any interlocutory application, but the right to have this ex parte affidavit considered by the court upon the merits of the cause, in the determination of the issues raised by the pleadings. Our statute, section 85, chapter 130, Code, is conclusive as to this question. It provides that reasonable notice shall be given to the adverse party of the time and place of taking every deposition. As said by Dr. Minor, concerning the like Virginia statute, it leaves nothing to inference as to the necessity for notice. 4 Minor's Inst. 844. . . . It is clear that the affidavit could not properly have been considered by the court in the determination of the issues raised by the pleadings, under the circumstances appearing." Cox, J., in Herold v. Craig, 59 W. Va. 353, 356, 53 SE 466.

[b] **The records of courts** cannot be proved by affidavit. Kellogg v. Sutherland, 38 Ind. 154.

[c] **Affidavit part of files in case.**—In Quinn v. Rawson, 5 Ill. A. 130, it was said that the fact that an affidavit was part of the files in the case did not change its character nor make it competent evidence.

[d] **A paper purporting to be the survey of a tract of land** was offered in evidence in an action to obtain the purchase price. Objection was made to its admission upon the ground that the mere affidavit of the two persons who made it was not competent evidence in the case. It was held that, as the correctness of the survey went to a vital point in the case and the persons who made it were not officers of the court or county, the affidavit could not be received. Maples v. Hoggard, 58 Ga. 315.

[e] **Where a matter is referred to a master to take proofs,** (1) he is not authorized to take ex parte affidavits, as proofs before him, unless there is a special clause in the order of reference to that effect. Cumming v. Waggoner, 7 Paige (N. Y.) 603. (2) In Stag v. Grey, 4 Jur. 1007, Lord Langdale, M. R., said that he did not think that he could try by affidavit a fact respecting which an inquiry was pending before the master to report upon.

[f] **On a proceeding before a justice of the peace** affidavits cannot be used to oust his jurisdiction. Montgomery v. Snowhill, 2 N. J. L. 361; Essler v. Johnson, 25 Pa. 350.

[g] **In an action to enjoin the use of a trade-mark** affidavits are not admissible to determine the question of jurisdiction. Robinson v. Harrison, 9 OhS&CP 701, 7 OhNP 273.

[h] **To correct record.**—If there are any facts material to appear in a transcript or record of the justice which are untruthfully stated therein, they cannot be corrected or disposed of in the district court in a summary manner upon affidavits. Struber v. Rohlfs, 36 Kan. 202, 12 P 830.

[i] **To supplement record.**—On appeal matters which should have been of record cannot be supplied by affidavits. Stannard v. Graves, 2 Call (6 Va.) 369.

[j] **Dispute as to notice of trial.**—The court will not try matters of fact on affidavits. Where therefore the defendant moved to set aside a verdict for irregularity, because the notice of trial had not been served eight days before the assizes, and plaintiff's attorney swore that defendant's attorney had agreed to take short notice of trial, which defendant's attorney denied, it was held that the verdict must be set aside. Smith v. Ask, 5 U. C. Q. B. 497.

[k] **Priority of assignments.**—In a suit involving the priority of two assignments of a fund, an affidavit of the assignor that he had not given one of the assignments was not admissible in evidence. Henke v. Keller, 50 Tex. Civ. A. 533, 110 SW 783.

[l] **A general motion to strike** certain affidavits from the files is rightly overruled if such affidavits contain material and pertinent matters regarding the subject under consideration, as well as statements which are objectionable, and the motion is not made specific and confined to the objectionable matter. Zimmerer v. Fremont Nat. Bank, 59 Nebr. 661, 81 NW 849.

[m] **Where affidavits were admitted erroneously,** it has been held that affidavits might be used in opposition. Savage v. Luther, 165 Ill. A. 1.

86. Quinn v. Rawson, 5 Ill. A. 130; Traer v. State Bd. of Medical Examiners, 106 Iowa 559, 76 NW 833; Geyer v. Douglass, 85 Iowa 93, 52 NW 111; Braxton v. Lee, 4 Hen. & M. (14 Va.) 376.

[a] **Consent must be formal.**—In New Westminster Brewery Co. v. Hannah, 1 Ch. D. 278, Hall, V. C., said that "the consent to take evidence by affidavit, referred to in the Rules of Court, 1875, Order xxxviii., rule 1, must be a formal written consent, and not one to be gathered from correspondence between the parties."

[b] **A guardian ad litem has power to consent** to the evidence being taken by affidavit, as he is competent to give his consent to any matter relating to the conduct of the cause. Knatchbull v. Fowle, 1 Ch. D. 604.

87. Cal.—Etchemende v. Stearns, 44 Cal. 582.

Ill.—Taylor v. McIrvin, 94 Ill. 488.

Mo.—Patterson v. Fagan, 38 Mo. 70.

N. J.—Baldwin v. Flagg, 43 N. J. L. 495; Cooper v. Galbraith, 24 N. J. L. 219; Layton v. Cooper, 2 N. J. L. 62.

Oh.—Kettemann v. Metzger, 23 Oh. Cir. Ct. 61.

Pa.—Keller v. Neetz, 5 Serg. & R. 246; Smith v. Weaver, 41 Pa. Super. 253.

W. Va.—Herold v. Craig, 59 W. Va. 353, 357, 53 SE 466 [cit Cyc].

[a] **Reason for rule; not best evidence.**—"The plaintiff attempted to show that the bonds tendered by him to Weaver were of such a character that they ought to have been satisfactory, and for this purpose offered the ex parte affidavit of the surety upon the bonds, which was, upon objection, rejected by the court. This was merely an ex parte affidavit, clearly not evidence. The surety could have been called and would have thereby subjected himself to a cross-examination by the defendant. The offer was properly rejected for the reason that it was not the best evidence of the facts which the plaintiff endeavored to establish thereby." Beaver, J., in Smith v. Weaver, 41 Pa. Super. 253, 256.

[b] **Affidavits taken on notice admissible.**—On a petition to vacate the levy of an execution, the testimony being taken simply in the form of affidavits, with notice to the adverse party who was present at the taking of such affidavits, it was held that the affidavits were admissible. Briggs v. Green, 33 Vt. 565.

[c] **In England, and in Manitoba, Ontario, and British Columbia,** an affiant may be compelled to submit to viva voce cross-examination. Ward v. Dominion Steamboat Line Co., 9 B. C. 231; Long v. Winnipeg Jewelry Co., 9 Man. 159.

[d] **Upon contest of will.**—"There would seem to be no reason why such a piece of testimony as this should be admitted upon the contest of a will in a trial before a jury. If the witnesses were living and competent, they should have been brought into court and subjected to cross-examination like other witnesses." Hull, J., in Kettemann v. Metzger, 23 Oh. Cir. Ct. 61, 67.

[e] **But affidavits submitted to committees of congress** in proof of claims against the United States are admissible upon the prosecution of the case in the court of claims. "Ex parte affidavits have always been used before the Committees, from necessity, for there was no person to whom to give notice, or, if any one had been notified, no one was bound to attend and cross-examine the witness. . . . Cases are often pending before Congress for a whole generation. The tattered and discolored papers transmitted to us, and which, thirty years ago, were laid before Congress, are often the sole evidence of the facts on which the weary claimant relies. During the pendency of his claim his witnesses fade from manhood into old age; they die, and the memory of the facts perishes with them. It would be unjust in the extreme if we should hold that affidavits, under these circumstances, were incompetent to be used as evidence, and we shall therefore give to them that weight to which we think them entitled." Noble v. U. S., 1 Dev. Ct. Cl. 83.

88. U. S.—Chicago, etc., R. Co. v. Ohle, 117 U. S. 123, 6 SCt 632, 29 L. ed. 837.

Ala.—Hallett v. O'Brien, 1 Ala. 585.

Del.—Hall v. Cannon, 4 Del. 360.

Iowa.—Traer v. State Bd. of Medical Examiners, 106 Iowa 559, 76 NW 833; Asbach v. Chicago, etc., R. Co., 86 Iowa 101, 53 NW 90.

N. Y.—Forrest v. Forrest, 13 N. Y. Super. 102; Morrell v. Cawley, 17 AbbPr 76.

Tex.—Wyser v. Calhoun, 11 Tex. 323.

Eng.—Brickell v. Hulse, 7 A. & E. 454; 34 ECL 144, 112 Reprint 541.

See Evidence [16 Cyc 974].

[a] **Self-serving declaration.**—In Samuel and Jessie Kenney Presb. Home v. Kenney, 45 Wash. 106, 88 P 108, it was held that, in an action brought to quiet title to land by a party claiming under a will, the affidavit of the opposite party was not admissible as to transactions between the affiant and the person through whom plaintiff claimed to de-

mony of affiant.[89] Where an affidavit is used for such a purpose it is proper to allow affiant to explain the circumstances under which it was made.[90]

[§ 142] **(3) Corroboration of Witness.** So, where a witness has been impeached, affidavits made by him in a preliminary proceeding may, under some circumstances, be introduced to corroborate his testimony on the trial by showing his consistency.[91]

[§ 143] **d. Containing Hearsay.** The rules of evidence in regard to hearsay in general apply to evidence in the form of affidavits.[92] The general rule is that in order to be admissible in evidence an affidavit must contain positive and direct statements of matters of fact;[93] and that an affidavit made upon information and belief or otherwise embodying only hearsay statements is inadmissible.[94] Affidavits containing hearsay may be read, however, as to matters in regard to which hearsay evidence in general is admissible,[95] as to prove marriage or pedigree,[96] although the admission of affidavits to prove pedigree has been refused in some cases where the affiants could readily be called as witnesses,[97] or the affidavits were stale,[98] or were not sufficiently authenticated.[99]

[§ 144] **e. Where Made in Other Proceedings.** According to some authorities, affidavits may not be used in a proceeding other than that in which they were made;[1] but in other cases it has been held that an affidavit may be used more than once in the same action, as it necessarily remains part of the proceedings;[2] and under some circumstances use has been allowed in one suit of an affidavit made in another.[3]

rive title, the affidavit being a self-serving declaration and not admissible under 2 Ballinger Annot. Codes & St. § 5991.

[b] **Where one cannot object to use by opposite party.**—Where an affidavit is used in evidence by a party, he cannot object to the attorney of the opposite party reading it and commenting upon it. Asbach v. Chicago, etc., R. Co., 86 Iowa 101, 53 NW 90.

[c] **On trial of another issue.**—Where an affidavit was filed by defendant for the purpose of obtaining an order requiring plaintiff to give security for costs on the ground of non residence, it was held that such affidavit was competent evidence against defendant on the trial of another issue; and the fact that it was sworn to on information and belief affected only its weight, not its competency. Chicago, etc., R. Co. v. Ohle, 117 U. S. 123, 6 SCt 632, 29 L. ed. 837.

[d] **Facts stated different from those proved.**—Where a party put in an affidavit, required to be filed by law, for the purpose of showing that such affidavit was in compliance with the statute, it was held that the adverse party might read such affidavit in argument to show that the facts stated therein were different from those proved, it being essential that they should be the same. Hasler v. Schumacher, 10 Wis. 419.

[e] **Affidavit of third person read by party.**—(1) An ex parte affidavit of a person who was present as a witness at the trial was held not to be evidence against plaintiff, although contained in a record read by said plaintiff on the trial. Hargis v. Price, 4 Dana (Ky.) 79. (2) So where suit is brought to recover possession of land, ex parte affidavits attached to a bill for injunction filed by defendant, made by parties who are strangers to the suit for possession, are not admissible in evidence, since they are in no way binding on plaintiff. Turner v. Gonzales, 3 Ind. T. 649, 64 SW 565.

[f] **Against codefendant.**—An ex parte affidavit of one defendant is not admissible in evidence against his codefendant where the latter had no opportunity to file cross-interrogatories and the failure of the court to so restrict such an affidavit constitutes reversible error. Veck v. Culbertson, (Tex. Civ. A.) 57 SW 1114.

[g] **Affidavit taken by opposite party.**—An affidavit taken by a party may be read in the cause, although the party taking it may wish to suppress it because it operates against him. McMahon v. Spangler, 4 Rand. (25 Va.) 51.

89. Ark.—Western Union Tel. Co. v. Gillis, 89 Ark. 483, 117 SW 749, 131 AmSR 115.
Ga.—Gardner v. Granniss, 57 Ga. 539.
Wash.—Graham v. Smart, 42 Wash. 205, 84 P 824.
Eng.—Barnes v. Parker, 15 L. T. Rep. N. S. 218 N. W. Terr.—Livingstone v. Colpitts, 4 Terr. L. 441.

[a] **Waiver of objection.**—Where an affidavit made by a witness out of court, after his examination had been taken, had been offered to impeach such testimony, it was held that a failure to object in the lower court that the affidavit was not proper evidence of the facts it purported to state waived the objection, and that it came too late when taken for the first time on appeal. McGinnis v. Grant, 42 Conn. 77.

[b] **To contradict affiant.**—It is true that as a general rule of law upon the trial of an issue of fact an ex parte affidavit cannot be admitted in evidence for any other purpose than the contradiction of the affiant. In re Liter, 19 Mont. 474, 48 P 753.

90. Snydacker v. Brosse, 51 Ill. 357, 99 AmD 551; Yale v. Edgerton, 14 Minn. 194.

[a] **Denial of affidavit.**—On the trial of an action for the recovery of the amount of a life insurance policy, an affidavit of the beneficiary having been introduced, which tended to show that, contrary to the representation of the assured in his application, said insured had been subject to epileptic fits, it was proper to permit such affiant to show that she had never knowingly subscribed to or made the statements contained in the affidavit. Bankers L. Assoc. v. Lisco, 47 Nebr. 340, 66 NW 412.

91. State v. Lazarus, 8 S. C. L. 33. See Witnesses [40 Cyc 2789].

92. See Evidence [16 Cyc 1192].

93. Pelegrinelli v. McCloud River Lumber Co., 1 Cal. A. 593, 597, 82 P 695 (where the court said: "The Code authorizes allegations of a pleader to be made upon information and belief; but an affidavit which is to be used as evidence must be positive and direct. The action of the court is to be based upon facts which may be presented to it, and not upon the belief of the affiant").

94. Menke v. Lyndon, 124 Cal. 160, 56 P 883; Pelegrinelli v. McCloud River Lumber Co., 1 Cal. A. 593, 82 P 695.

[a] **General rule applies.**—"A witness sworn to testify orally would not be permitted to depose to mere hearsay statements, neither may an affidavit embodying only hearsay statements be considered of any evidentiary value." Brantly, C. J., in Wetzstein v. Boston, etc., Cons. Copper, etc., Min. Co., 26 Mont. 193, 203, 66 P 943 [cit Cyc].

95. See Evidence [16 Cyc 1192].

96. Winder v. Little, 1 Yeates (Pa.) 152. See Evidence [16 Cyc 1223].

[a] **Leaf from family Bible.**—In Douglass v. Sanderson, 2 Dall. (Pa.) 116, 1 L. ed. 312, 1 Yeates 15, a leaf cut from a family Bible certified by a notary of another state was admitted for this purpose.

97. Keller v. Nutz, 5 Serg. & R. (Pa.) 246. And see infra § 149.

98. Peterson v. Ankrom, 25 W. Va. 56 (where the court refused to admit an affidavit which had been taken in another state nearly fifty years before as proof of pedigree). And see infra § 146.

99. Locklayer v. Locklayer, 139 Ala. 354, 35 S 1008.

1. Thompson v. San Francisco Super. Ct., 119 Cal. 538, 51 P 863; Hunt v. Langstroth, 9 N. J. L. 223; Anonymous, 8 N. J. L. 176; Matter of Owsley, 153 App. Div. 90, 137 NYS 1040; Black v. Nease, 37 Pa. 433.

[a] **Not available for other purpose.**—An affidavit of merits made and used for one purpose in a cause cannot be used for another. Thus an affidavit for a change of venue will not be received as the foundation of a motion to set aside a default for want of a plea. Cutler v. Biggs, 2 Hill (N. Y.) 409.

[b] **In ejectment** an ex parte affidavit made in an equity suit between the immediate predecessors in title of plaintiff and defendant in the ejectment was held not admissible in evidence. Shaffer v. Lauria, 50 Pa. Super. 135.

[c] **Affidavits on which a rule to show cause was founded** cannot be used, after the rule is made, to support a motion not of course, or be read on hearing of a rule to show cause depending on extrinsic facts, proof by depositions taken on notice to interested parties being necessary after the granting of the rule to show cause. Practice Act (P. L. [1903] p 537) §§ 196, 197, provides that upon four days' notice both parties may take affidavits or the opposing party may give separate notice for taking depositions, and provides for the examination and cross-examination of the witnesses and the taking of stenographic testimony. Peer v. Bloxham, 82 N. J. L. 288, 81 A 659.

2. Scholes v. Murray Iron Works, 44 Iowa 190; Mojarrieta v. Saenz, 80 N. Y. 547 [dist McCoy v. Hyde, 8 Cow. (N. Y.) 68]; Pickford v. Ewington, 4 Dowl. P. C. 453; Ryan v. Smith, 11 L. J. Exch. 77.

[a] **Affidavit in support of continuance.**—It has been held that, in an action against a railroad for killing a horse, it is not error to allow to be read in evidence an affidavit made at a previous term by an employee of defendant in support of a continuance and describing the circumstances of the death of the horse. Asbach v. Chicago, etc., R. Co., 86 Iowa 101, 53 NW 90.

[b] **An affidavit used before a judge at chambers** may be again used in open court, where the judge at chambers has expressly directed the application to be made to the court. Worthington v. ——, 2 C. M. & R. 315; Pickford v. Ewington, 4 Dowl. P. C. 453.

[c] **The test** of whether an affidavit used in one proceeding can be used in a second proceeding is whether or not the affiant can be prosecuted for perjury if the allegations prove to be false. Matter of Owsley, 153 App. Div. 90, 137 NYS 1040.

3. Collinsville Granite Co. v. Phil-

[§ 145] **f. Copies.** Where it has been impossible to obtain the original affidavit, copies of the same and extracts therefrom have been admitted in evidence[4] when properly authenticated.[5]

[§ 146] **g. Effect of Staleness.** It has been held that affidavits to be used for certain purposes, which were not used within a reasonable time after they had been made, became stale and could not be received in evidence.[6]

[§ 147] **h. Counter affidavits.** In many cases where affidavits are admissible, it is competent to meet them by counter affidavits,[7] but in other proceedings counter affidavits are not admissible.[8]

[§ 148] **i. Supplementary Affidavits.** So in some jurisdictions supplementary affidavits may be offered in reply to such counter affidavits,[9] but not in others.[10]

[§ 149] **2. Weight and Sufficiency.** Affidavits when admissible as a general rule are only prima facie evidence,[11] and it has been said that they should not be used where better evidence is obtainable.[12]

[§ 150] **3. Cross-examination of Affiant.** In England and Canada cross-examination of the affiant is permissible,[13] and little weight will be given to

lips, 123 Ga. 830, 51 SE 666; Montgomery v. Palmer, 100 Mich. 436, 59 NW 148; Barnard v. Heydrick, 49 Barb. (N. Y.) 62; Levy v. Goldstein, 18 Misc. 639, 43 NYS 774; Colver v. Van Valen, 6 HowPr (N. Y.) 102; Brickell v. Hulse, 7 A. & E. 454, 34 ECL 144, 112 Reprint 541; Langston v. Wetherell, 14 M. & W. 104.

[a] **Between same parties; same question involved.**—In Scholes v. Murray Iron Works Co., 44 Iowa 190, 191, the court said: "It is claimed that the court erred in allowing affidavits which had been filed in court at a previous term in support of a different motion and under a different garnishment, to be used in support of the motion made in the present case. The parties, however, were the same and the point to which they were filed, to-wit, the residence of Howard, was the same, and we are unable to see that the plaintiff was prejudiced in any respect."

[b] **On a claim to property levied on** in proceedings to foreclose a lien plaintiff may offer in evidence the affidavit of foreclosure. Dixon v. Williams, 82 Ga. 105, 9 SE 468.

4. Ex p. Simpson, 7 Ala. 842; Whitney v. Hirsch, 39 Hun (N. Y.) 325; Levy v. Goldstein, 18 Misc. 639, 43 NYS 774.

[a] **Office copies.**—When the court is sitting, only office copies of affidavits can be used. Atty.-Gen. v. Lewis, 8 Beav. 179, 50 Reprint 71.

5. Kurtz v. State, 22 Fla. 36, 1 AmSR 173 (holding that when a requisition certifies that the affidavit "is duly authenticated according to the laws of said State," it is sufficient and it is immaterial whether the affidavit is the original or a copy).

6. See cases infra this note.

[a] **Within one year.**—(1) It has been held in some cases that affidavits should be used within one year after they were made. Ramsden v. Maugham, 4 Dowl. P. C. 403; Burt v. Owen, 1 Dowl. P. C. 691. (2) In Doe v. Stillwell, 8 A. & E. 645, 35 ECL 773, 112 Reprint 983, it was held that the rule that an affidavit more than a year old is not to be used applies only in the case of affidavits to hold a bail.

[b] **Affidavit two years old.**—In Wynne v. Wynne, 9 Dowl. P. C. 396, it was held that an affidavit two years old would not be rejected because of staleness.

[c] **Where taken fifty years before** in another state it is inadmissible as to pedigree. Peterson v. Ankrom, 25 W. Va. 56.

7. Ala.—Planters, etc., Bank v. Smith, 14 Ala. 416.

Ill.—Austin State Bank v. Morrison, 133 Ill. A. 339.

Ind.—Casto v. Shew, 32 Ind. A. 338, 68 NE 1041.

Minn.—Finch v. Green, 16 Minn. 355.

N. Y.—Boskowitz v. Sulzbacher, 121 App. Div. 878, 106 NYS 865; Campbell v. Grove, 2 Johns. Cas. 105.

Pr. Edw. Isl.—Reg. v. Whelan, 1 Pr. Edw. Isl. 220.

[a] **Including in motion papers.**—On a motion by commissioners in a proceeding to open a street for a final order confirming their report it is within the discretion of the court to include in the motion papers on which the order is granted an affidavit presented in opposition to the granting of the order. In re Bd. of St. Opening, etc., 20 NYS 563.

[b] **Newly discovered evidence.**—"Counter affidavits upon the hearing of a motion and petition for leave to file a bill of review, upon the ground of newly discovered evidence, are admissible to show whether the evidence claimed to be new was in fact new, or to state circumstances or explain the nature of the evidence claimed to be new, to enable the court the better to judge of its relevancy and materiality. But the statements of the petition and affidavit filed in support thereof as to such newly discovered evidence must, upon such hearing, be taken as true. The truth of such statements is not to be decided upon affidavits, but upon the new hearing if leave to file a bill of review be granted." Austin State Bank v. Morrison, 133 Ill. A. 339, 344.

[c] **Service of copy on party's counsel.**—"Complaint is also made of the ruling of the court in admitting certain affidavits offered in rebuttal by defendants, because copies of the same had not been served upon complainant's counsel. The affidavits were merely in rebuttal, and were filed in court on November 1 and the cause was not heard until November 8. No authority is cited by complainant for requiring such affidavits to be served on him, and we know of none. No error was committed by the court in this regard." Crane v. Roselle, 236 Ill. 97, 103, 86 NE 181.

[d] **Attachment of debts.**—It was agreed that the issue should be determined in a summary way upon affidavits. It was held that the claimant, being really plaintiff in an issue, was entitled to file affidavits in reply to those filed by plaintiff in the action. Bryson v. Rosser, 18 Man. 658, 10 West LR 317.

8. Eslinger v. East, 100 Ind. 434.

[a] **In Indiana an application for a continuance** must be determined upon the facts stated in the supporting affidavit. Counter affidavits cannot be received. Eslinger v. East, 100 Ind. 434; Cutler v. State, 42 Ind. 244.

9. Casto v. Shew, 32 Ind. A. 338, 68 NE 1041; Young v. Rollins, 85 N. C. 485.

10. Campbell v. Grove, 2 Johns. Cas. (N. Y.) 105.

11. Finkelstein v. Schilling, 135 Ill. A. 543; Richardson v. Gilbert, 135 Ill. A. 363; Lane v. Schomp, 20 N. J. Eq. 82; Pittsburg's App., 79 Pa. 317; Hill v. Hoover, 5 Wis. 354 (affidavit of publication).

[a] **An affidavit made by a ministerial officer,** in pursuance of a statute requiring certain facts to be sworn to by him, does not amount to an adjudication of such facts. It is merely prima facie evidence thereof and may be rebutted by competent evidence. Lane v. Schomp, 20 N. J. Eq. 82.

[b] **Other evidence not excluded.**—Mich. Comp. Laws § 5927, providing that an affidavit by the printer of a newspaper that a specified notice was published therein shall be prima facie evidence of the fact does not exclude other proof, such as the affidavit of some other person who knows the fact. Matthews v. Otsego County, 48 Mich. 587, 12 NW 863.

[c] **An affidavit on information and belief,** the sources and grounds of which are not given, can have no weight as against a positive affidavit to the contrary. Harris v. Taylor, 35 App. Div. 462, 54 NYS 864.

12. Fagan v. Hook, 134 Iowa 381, 388, 105 NW 155, 111 NW 981 [cit Cyc]; Kettemann v. Metzger, 23 Oh. Cir. Ct. 61.

[a] **"A voluntary affidavit ranks in equal grade with hearsay testimony in the scale of evidence,** and in no case is received where better testimony can, from the nature of the case, be had." Patterson v. Maryland Ins. Co., 3 Harr. & J. (Md.) 71, 74, 5 AmD 419. To same effect Manny v. Stockton, 34 Ill. 306; Clutch v. Clutch, 1 N. J. Eq. 474. See Evidence [16 Cyc 1214].

[b] **Not equal to oral testimony.**—Ex parte affidavits may be read in opposition to and in support of awards in cases at law, but they will be given much less weight than testimony taken in court or on notice and subject to cross-examination. Adams v. Hubbard, 25 Gratt. (66 Va.) 129; Plesants v. Ross, 1 Wash. (1 Va.) 156, 1 AmD 449; Tennant v. Divine, 24 W. Va. 387.

13. In re Quartz Hill, etc., Co., 21 Ch. D. 642; Braithwaite v. Kearns, 34 Beav. 202, 55 Reprint 612; Wightman v. Wheelton, 23 Beav. 397, 53 Reprint 156; Spittle v. Hughes, 11 Jur. N. S. 151; Clarke v. Law, 2 Kay. & J. 28, 69 Reprint 680; Westphalen v. Edmonds, 7 B. C. 175; Russell v. Saunders, 7 B. C. 173; Emerson v. Irving, 4 B. C. 56.

[a] **A party is entitled to object to be cross-examined on his affidavit** until he has determined whether he means it to be read or not. Ex p. Child, 20 Ch. D. 126.

[b] **Cross-examination prevented by unavoidable circumstance.**—(1) The affidavit of a person who died four days after the making of the same, and before there was any opportunity for cross-examination, is admissible, as there was no wrongdoing or keeping out of the way to prevent a cross-examination. Davies v. Otty, 35 Beav. 208, 55 Reprint 875. (2) In Ridley v. Ridley, 34 Beav. 329, 55 Reprint 662, two affidavits, one of a deponent who had died and the other of a person who had become insane since the making of the affidavits, were allowed to be read.

[c] **Leaving country to escape cross-examination.**—But the affidavit of a person who has deprived the opposite side of an opportunity for cross-examination by leaving the country is inadmissible. Dunne v. English, L. R. 18 Eq. 524.

[d] **Questions to be tried in the action.**—It was held in Abrahams v. Dunlop Pneumatic Tyre Co., [1905] 1 K. B. 46, 48, that Order XXXVIII Rule 1, providing that "upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making the affidavit," applied only to a question of fact which the court or a judge has at the time ju-

the affidavit of a person who has not, when required, submitted to a cross-examination.[14]

VIII. COMPELLING MAKING OF AFFIDAVIT

[§ 151] Properly speaking, affidavits are voluntary statements, and therefore in the absence of statute authorizing such procedure a person cannot be compelled to make an affidavit.[15] In some jurisdictions, however, it is provided by statute that on proper application a refractory person may be compelled to make his affidavit as to facts within his knowledge;[16] and a refusal to obey a subpœna for this purpose is a contempt for which such person may be committed.[17]

AFFILIATED. Connected.[1]

AFFILIATION.[2] The assignment of a child to a parent by legal authority.[3]

AFFINIS MEI AFFINIS NON EST MIHI AFFINIS.[4]

AFFINITAS AFFINITATIS. The connection between parties arising from marriage which is neither consanguinity nor affinity.[5]

AFFINITY. Both in the civil law,[6] and in

risdiction to decide, not to a question to be tried in the action.

[e] **Compelling production of affiant for cross-examination.**—In Russell v. Saunders, 7 B. C. 173, it was held, upon the authority of Mansel v. Clanricarde, 54 L. J. Ch. 982 [appr Emerson v. Irving, 4 B. C. 56], that Rule No. 429 applies to the cross-examination of a witness on affidavit before trial, that the cross-examination of the deponent is not a matter of judicial discretion but a right derived from the rule which provides a penalty for failure to produce, and even that penalty does not relieve from the obligation to attend, and that unless the deponent is produced for cross-examination his affidavit may not be used. To same effect Westphalen v. Edmonds, 7 B. C. 175.

[f] **British Columbia and Ontario rules different.**—The British Columbia rule (Rule No. 401) confers a discretionary power upon the court or a judge to order cross-examination in general, differing in that respect from the Ontario rule (Rule No. 490), which provides: "A person who has made an affidavit to be used in any action or proceeding, other than on production of documents, may be cross-examined thereon." Ward v. Dominion Steamboat Line Co., 9 B. C. 231, 232. Here it was held that on a summons for judgment under Order XIV, cross-examination of plaintiff on his affidavit is permissible only in exceptional cases, and then only after defendant has filed an affidavit setting up his defense.

[g] **It is not competent for a party under a reference in the master's office** to initiate proceedings for the examination of another party on his affidavit or otherwise before a special examiner without the direction of the master to that effect. Rule No. 490, providing that a person who has made an affidavit to be used in any action or proceeding other than on the production of documents may be cross-examined thereon, has no application to proceedings in the office of the master of chancery. Plenderleith v. Parsons, 10 Ont. L. 436.

14. Braithwaite v. Kearns, 34 Beav. 202, 55 Reprint 612; Wightman v. Wheelton, 23 Beav. 397, 53 Reprint 156.

15. Crenshaw v. Miller, 111 Fed. 450, 451 (in which the court said: "An affidavit is usually understood to be a voluntary statement. Ordinarily, when witnesses are compelled to testify, the proceeding is not ex parte; both parties to the suit are permitted to propound questions. No authority is submitted to me by counsel where the court or a judge has delegated authority to a commissioner or officer to require persons to make affidavits. There is no statute of the United States authorizing such procedure. A commissioner appointed for such purpose could only proceed by propounding questions or permitting counsel to propound them. This would be in effect taking a deposition, and, of course, to make it legal, the notice required by law should be given"); Bacon v. Magee, 7 Cow. (N. Y.) 515. And see supra §§ 1, 2. But see Huston v. Vail, 51 Ind. 299 (where it was said that the court had the same power to compel a person to make an affidavit that it had to compel a witness to appear in a suit and testify orally).

16. Huston v. Vail, 51 Ind. 299; Rater v. State, 49 Ind. 507; State v. Seaton, 61 Iowa 563, 16 NW 736; Robb v. McDonald, 29 Iowa 330, 4 AmR 211; Hodgman v. Barker, 60 Hun 156, 14 NYS 574, 20 NYCivProc 341 [aff 27 NE 1029, 3 Silv. A. 518, 21 NYCivProc 121].

[a] **When application not allowable.**—An affidavit by the claim agent of a railroad, filed with the justice of the peace, stating that the company had a claim whereby it was necessary to have papers served on the fourth day of July in order to get service on defendant in an action named, is not sufficient to authorize the justice to issue a subpœna for a witness where no action is pending, under Iowa Code (1873) § 3692, providing that when a person desires to obtain the affidavit of another who is unwilling to make the same he may apply by petition to any officer authorized to take depositions, stating the object for which he desires such affidavit. Chambers v. Oehler, 107 Iowa 155, 77 NW 853.

[b] **Affidavit on which to base civil action.**—Under Code §§ 3962, 3963, a person is not bound to make an affidavit which is sought only as information on which to base a civil action. Therefore, where a person was committed by a justice of the peace for refusing to obey a subpœna commanding him to appear before the justice to make an affidavit for such a purpose, it was held that he should be discharged on habeas corpus. Dudley v. McCord, 65 Iowa 671, 22 NW 920 [dist State v. Seaton, 61 Iowa 563, 16 NW 736; Robb v. McDonald, 29 Iowa 330, 4 AmR 211].

[c] **Witness who has made one affidavit** at the instance of a party cannot be compelled to make a second affidavit. Carey v. Wood, 2 Man. 32.

17. Robb v. McDonald, 29 Iowa 330, 4 AmR 211.

[a] **It is no excuse for refusing to make an affidavit,** when required under a statute, that the affidavit when made will not be admissible in the proceeding in which it is intended to be used. Robb v. McDonald, 29 Iowa 330, 4 AmR 211.

1. Webster D. [quot Allison v. Smith, 16 Mich. 405, 433].

[a] **"Affiliated societies"** are local societies connected with a central society, or with each other. Allison v. Smith, 16 Mich. 405, 433 (where the court said that the word "connected," in a statute regulating devises to religious societies "connected with" a church, was synonymous with the word "affiliated").

2. Burrill L. D.

3. **Affiliation:**

Of bastard see Bastards [5 Cyc 622]. Of child see Parent and Child [29 Cyc 1585].

4. A maxim meaning "A person related by affinity to one who is related to me by affinity is not related to me by affinity." See 6 Bacon Abr. 460 [cit Oxhenham v. Gayre].

[a] **Applied in:** State v. Wall, 41 Fla. 463, 466, 20 S 1020, 79 AmSR 195, 197 and note, 49 LRA 548; Hume v. Commercial Bank, 10 Lea (Tenn.) 1, 8, 43 AmR 290; Waterhouse v. Martin, Peck (Tenn.) 374, 389.

5. Bouvier L. D. See also Tegarden v. Phillips, 14 Ind. A. 27, 42 NE 549, 551; Chinn v. State, 47 Oh. St. 575, 580, 26 NE 986, 11 LRA 630 and note.

[a] **This term intends** the connection between the kinsmen of the two persons married, as, for example, the husband's brother and the wife's sister. Erskine Inst. bk 1 tit 6 § 8.

6. Justinian Dig. xxxviii, x, iv, iii.

[a] **Under the Roman law** the only kind of affinity known is that which exists between one of the parties joined by marriage and the relations of the other; and this alone, properly speaking, is affinity. Poydras v. Livingston, 5 Mart. (La.) 292, 295.

[b] **Civil law terms of affinity.**—The following terms of affinity, collected in one view, may assist the reader's recollection: Socer: a wife's father: Beau père. Socrus: a wife's mother: Belle mère. Noverca: a stepmother: a father's second wife: Belle mère. Vitricus: a stepfather: a mother's second husband: Beau père. Nurus: a son's wife: a daughter-in-law: Bru. Gener: a son-in-law: a daughter's husband: Gendre. Camprivigni: children by a former marriage. Privignus: son of a husband or wife by a former marriage: Beau fils. Privigna: daughter of my wife by a former marriage: Belle fille. Uxoris fratri: wife's brother: brother-in-law: Beau frère. Uxoris soror: sister-in-law: wife's sister: Belle sœur. Fratria: brother's wife: sister-in-law: Belle sœur. Levir: brother-in-law to the wife: Beau frère. Glos: sister-in-law to the wife: Belle sœur.

[c] **Linea ascendens.**—Pater: Mater: father: mother. Avus: Avia: grandfather: grandmother. Proavus: Proavia: great-grandfather: great-grandmother: Abavus: Abavia: great-grandfather's father: great-grandfather's mother. Atavus: Atavia: great-grandfather's grandfather: great-grandfather's grandmother. Tritavus: Tritavia: great-grandfather's great-grandfather: great-grandfather's great-grandmother.

[d] **Linea descendens.**—Filius: Filia: son: daughter. Nepos: Neptis: linealis: grandson: granddaughter. Pronepos: Proneptis: linealis: great-grandson: great-granddaughter. Abnepos: Abneptis: linealis: son or daughter of the above. Atnepos: Atneptis: linealis: son or daughter of the above. Trinepos: Trineptis: linealis: son or daughter of the above.

[e] **Agnati.**—Patruus: uncle by the father's side: father's brother. Amita: father's sister: aunt by the father's side. Patruus magnus: Amita magna: great-uncle: great aunt by the father's side. Propatruus magnus: Proamita magna: father and mother of the above. Abpatruus magnus: Abamita magna: grandfather and grandmother of the great-uncle and great-aunt on the father's side. Patrueles: (a patruo) sons and

the canon law[7] whence the common law[8] of the subject is derived, the legal relationship which arises as a result of marriage, or a state resembling it,[9] between each spouse and the consanguineal relatives of the other.[10] The term has been variously defined as the connection existing in consequence of marriage between each of the married persons and the kindred of the other;[11] the connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife as that in which she herself stands toward them, and gives to the wife the same reciprocal connection with the relations of the husband;[12] the relation contracted by marriage between a husband and his wife's kindred, and between a wife and her husband's kindred, in contradistinction from consanguinity, or relation by blood;[13] the relationship which arises by marriage between one of the parties and the blood relations of the other;[14] the tie which arises from the marriage between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband;[15] the tie which exists between one of the spouses with the kindred of the other.[16]

Nonexistence of relationship. A husband and wife are not related to each other by affinity but are regarded in law as one person.[17] Blood relations of the husband and the blood relations of the wife are not related to each other by affinity.[18] Nor does the term "affinity" ordinarily include

daughters, cousin-germans on the father's side. Amitini: (ab amita) the same descended of the father's sister.

[f] **Cognati.**—Avunculus: Materera: mother's brother: mother's sister: maternal uncle and aunt. Avunculus magnus: maternal great-uncle. Matertera magna: maternal great-aunt. Proavunculus magnus: great-uncle's father on the mother's side. Promatertera magna: great-uncle's mother on the mother's side. Ab avunculus magnus: granduncle's grandfather on the mother's side. Ab matertera magna; granduncle's grandmother on the mother's side. Avunculini: Materterini: cousin-germans on the mother's side. Cooper notes to Institutes of Justinian 428, 429.

[g] **Classes.**—Affinity has been distinguished as (1) direct, between one spouse and the blood relatives of the other, (2) secondary, where the relatives are such by marriage only, and (3) collateral, with the collateral relatives of the other spouse. Cooper Notes to Justinian Dig. 422; Black L. D.; Wharton L. D. In the Spanish law the first class is known as afinidad natural; the others are grouped as afinidad legitima. Spanish Commerce Code art 84.

7. Escriche Diccionario.

8. 1 Blackstone Comm. 434; Erskine Inst. bk 1.

9. According to the Spanish law afinidad arises from illicit relations. Escriche Diccionario; Partidas iv tit vi ley 5.

10. See cases infra notes 11-16.

11. Bouvier L. D. [quot Tegarden v. Phillips, 14 Ind. A. 27, 42 NE 549, 551].

[a] **The blood relations of each party** to a marriage are held as related by affinity to one spouse as by consanguinity to the other. Kelly v. Neely, 12 Ark. 657, 659, 56 AmD 288; State v. Wall, 41 Fla. 463, 466, 26 S 1020, 79 AmSR 195 and note, 49 LRA 548; Spear v. Robinson, 29 Me. 531, 545.

[b] **By marriage** one party thereto holds by affinity the same relation to the kindred of the other that the latter holds by consanguinity. Chase v. Jennings, 38 Me. 44, 45; Spear v. Robinson, 29 Me. 531, 545; Bevan v. McLeod, 1 Pr. Edw. Isl. 297, 298. See also remark in State v. Wall, 41 Fla. 463, 466, 26 S 1020, 79 AmSR 195, 49 LRA 548.

[c] **"A husband is related by affinity** to all the consanguinei of his wife, and vice versa, the wife to the husband's consanguinei for the husband and wife being considered one flesh, those who are related to the one by blood, are related to the other by affinity." Higbe v. Leonard, 1 Den. (N. Y.) 186, 187; Chinn v. State, 47 Oh. St. 575, 579. See also Kelly v. Neely, 12 Ark. 657, 659, 56 AmD 288; Tegarden v. Phillips, 14 Ind. A. 27, 42 NE 549, 551.

[d] **Parents of spouse.**—In Cooper Justinian 422 [quot Waterhouse v. Martin, Peck (Tenn.) 374, 389] (where it is said that affinity is "the connection between the husband and his wife's parents, and the wife and her husband's parents").

12. Kelly v. Neely, 12 Ark. 657, 659, 56 AmD 288.

13. Webster D. [quot Spear v. Robinson, 29 Me. 531, 545; Carman v. Newell, 1 Den. (N. Y.) 25, 26].

[a] **"Consanguinity" distinguished.**—The term is used in contradistinction to "consanguinity," which signifies a relation by blood. Kelly v. Neely, 12 Ark. 657, 659, 56 AmD 288; Tegarden v. Phillips, 14 Ind. A. 27, 42 NE 549, 551; Spear v. Robinson, 29 Me. 531, 545 [cit Webster D.]; Carman v. Newell, 1 Den. (N. Y.) 25, 26; Hume v. Commercial Bank, 10 Lea (Tenn.) 1, 2, 43 AmR 290; Doyle v. Com., 100 Va. 808, 810, 40 SE 925; Bevan v. McLeod, 1 Pr. Edw. Isl. 297, 298.

14. Chinn v. State, 47 Oh. St. 575, 579, 26 NE 986, 11 LRA 630 and note.

15. Farmers' L. & T. Co. v. Iowa Water Co., 80 Fed. 467, 468; Louisville, etc., R. Co. v. Holland, 173 Ala. 675, 692, 55 S 1001; Kirby v. State, 89 Ala. 63, 69, 8 S 110; Holt v. Watson, 71 Ark. 87, 90, 71 SW 262; North Arkansas, etc., R. Co. v. Cole, 71 Ark. 38, 40, 70 SW 312; Kelly v. Neely, 12 Ark. 657, 659, 56 AmD 288; Layton v. Jacobs, 21 Del. 71, 75, 62 A 691; State v. Wall, 41 Fla. 463, 466, 26 S 1020, 79 AmSR 195 and note, 49 LRA 548; Ex p. Harris, 26 Fla. 77, 7 S 1, 23 AmSR 548, 6 LRA 713; Blalock v. Waldrup, 84 Ga. 145, 10 SE 622, 20 AmSR 350; Oneal v. State, 47 Ga. 229, 248; Deupree v. Deupree, 45 Ga. 414; Tegarden v. Phillips, 14 Ind. A. 27, 42 NE 549, 550; Poydras v. Livingston, 5 Mart. (La.) 292, 296; Spear v. Robinson, 29 Me. 531, 545 [cit Webster D.]; Bliss v. Caille Bros. Co., 149 Mich. 601, 608, 113 NW 317, 12 Ann Cas 513 [cit Cyc]; Pemiscot Land, etc., Co. v. Davis, 147 Mo. A. 194, 201, 126 SW 218; Solinger v. Earle, 45 N. Y. Super. 80, 84 [aff 82 N. Y. 393, 60 HowPr 116]; Higbe v. Leonard, 1 Den. (N. Y.) 186, 187; Carman v. Newell, 1 Den. (N. Y.) 25, 26; Paddock v. Wells, 2 Barb. Ch. (N. Y.) 331, 333; Chinn v. State, 47 Oh. St. 575, 579 [quot Erskine Inst. bk 1 tit 6 § 81]; Hume v. Commercial Bank, 10 Lea (Tenn.) 1, 4, 43 AmR 290; Blodget v. Brinsmaid, 9 Vt. 27, 30; Doyle v. Com., 100 Va. 808, 810, 40 SE 925; Bevan v. McLeod, 1 Pr. Edw. Isl. 297, 298.

16. Tegarden v. Phillips, 14 Ind. A. 27, 42 NE 549, 551.

17. State v. Wall, 41 Fla. 463, 466, 26 S 1020, 79 AmSR 195 and note, 49 LRA 548. But see Jacobs v. Most Excellent Assembly, etc., 9 Pa. Dist. 54, 55 (infra this note [c]).

[a] **"The wife is no relation to the husband** . . . no relation by blood, nor by affinity." Worseley v. Johnson, 3 Atk. 758, 761, 26 Reprint 1235 (per Lord Chancellor Hardwicke).

[b] **Non affinis est, sed causa affinitatis,** she is not his relation by affinity, but the cause of affinity [between him and her blood relations]. Per Lord Chancellor Hardwicke in Worseley v. Johnson, 3 Atk. 758, 761, 26 Reprint 1235.

[c] **Affinity and fiancée.**—In Jacobs v. Most Excellent Assembly, etc., 9 Pa. Dist. 54, 55, the by-laws of a beneficial association provided among other things that no certificate could be made payable to "other than those related by the ties of consanguinity or affinity." An applicant for membership declared in his petition that all benefits should be paid to his fiancée. The court said: "We are further of opinion that the words 'affinity' and 'fiancee' are sufficiently broad to include the relationship of betrothal or engagement of marriage. The word 'affinity' had a legal significance in the English law several centuries ago, and it was held by the earlier law-writers to mean relationship by espousals or marriage, and espousals included, the agreement to marry as well as the marriage ceremony. The words 'fiancé' and 'fiancée' are borrowed from the French language. The verb 'fiancer' has a meaning in the French to promise to marry in the presence of a priest. The proper English synonyms are "affianced wife' and 'affianced husband.' These words have a broader significance than the French, including all who are engaged to be married, whether the declaration has been made in the presence of a priest or not, and are sufficiently comprehensive in their meaning to bring them within the classification of those related by affinity."

18. Louisville, etc., R. Co. v. Holland, 173 Ala. 675, 692, 55 S 1001; Lowman v. State, 161 Ala. 47, 49, 50 S 43; Kirby v. State, 89 Ala. 63, 69, 8 S 110; North Arkansas, etc., R. Co. v. Cole, 71 Ark. 38, 40, 70 SW 312; Ex p. Harris, 26 Fla. 77, 83, 7 S 1, 23 AmSR 548, 6 LRA 713; Oneal v. State, 47 Ga. 229, 248; Tegarden v. Phillips, 14 Ind. A. 27, 42 NE 549, 551; Smith v. Supreme Tent K. M. W., 127 Iowa 115, 117, 102 NW 830, 69 LRA 174; Chase v. Jennings, 38 Me. 44, 45; Spear v. Robinson, 29 Me. 531, 545; Higbe v. Leonard, 1 Den. (N. Y.) 186, 187; Carman v. Newell, 1 Den. (N. Y.) 25, 26; Paddock v. Wells, 2 Barb. Ch. (N. Y.) 331, 333; Chinn v. State, 47 Oh. St. 575, 579, 26 NE 986, 11 LRA 630 and note; Rank v. Shewey, 4 Watts (Pa.) 218; Hume v. Commercial Bank, 10 Lea (Tenn.) 1, 2, 43 AmR 290; Waterhouse v. Martin, Peck (Tenn.) 374, 389; Johnson v. Richardson, 52 Tex. 481; Blodget v. Brinsmaid, 9 Vt. 27, 30; Doyle v. Com., 100 Va. 808, 811, 40 SE 925. See also Danzey v. State, 126 Ala. 15, 19, 28 S 697.

[a] **Mamque conjungendæ affinitatis causa fit ex nuptiis** "affinity, therefore, can only affect the man and woman contracting [marriage]." Digest 38, 10, 4 [quot Waterhouse v. Martin, Peck (Tenn.) 374, 389].

[b] **Respective consanguinei** do not become related by affinity to each other. In this respect modes of relationship are dissimilar. Kelly v. Neely, 12 Ark. 657, 660, 56 AmD 288.

[c] **Affinitas affinitatis** is the name given by the doctors to this connec-

persons related to the spouse simply by affinity,[19] although it has been held in some cases, against the weight of authority, that relationship by affinity may exist between the husband and the spouse of a blood relation of the wife,[20] as where two marry sisters,[21] first cousins,[22] or aunt and niece of the full blood.[23]

Death of the spouse terminates the relationship by affinity;[24] if, however, the marriage has resulted in issue who are still living, the relationship by affinity continues.[25]

The degrees of affinity are computed in the same way as those of consanguinity.[26]

(Cross references.[27])

tion. Chinn v. State, 47 Oh. St. 575, 580, 26 NE 986, 11 LRA 630. See ante.

[d] **Illustrations.**—(1) "Thus, say the books, the husband's brother and the wife's sister have no affinity. The same must be true of the husband's brother and the wife's brother. See title 'Affinity' in the law dictionaries of Tomlin, Bouvier, Abbott, Rapalje and Lawrence." Ex p. Harris, 26 Fla. 77, 83, 7 S 1, 23 AmSR 548, 6 LRA 713. (2) Because then the connection is formed, not between one of the spouses and the kinsman of the other, but between the kinsmen of both. Chinn v. State, 47 Oh. St. 575, 26 NE 986, 11 LRA 630. (3) In Central R., etc., Co. v. Roberts, 91 Ga. 513, 517, 18 SE 315, Bleckley, C. J., said:

"The groom and bride each comes within
The circle of the other's kin;
But kin and kin are still no more
Related than they were before."

(4) In Higbe v. Leonard, 1 Den. (N. Y.) 186, 187, it is said: "'But the consanguinei of the husband are not at all related to the consanguinei of the wife.' If this rule be correct, and I think it is, although the justice was related by affinity to the two sisters of Higbe the plaintiff, there was no such relation between him and Higbe." (5) "The father of a son, whose wife is the aunt of the plaintiff, is not connected by affinity with the plaintiff; nor vice versa; for the son only has formed the connection, with which the father is not affected." Waterhouse v. Martin, Peck (Tenn.) 374, 390.

19. See supra text and notes.

[a] **Affinis mei, affinis, non est mihi affinis**—"the relation of my relation is not related to me." Bacon Abr. 529 [quot Waterhouse v. Martin, Peck (Tenn.) 374, 389]. See ante p 377.

[b] **As sometimes stated** the affines of the wife are not those of the husband, nor are the affines of the husband those of the wife. 2 Stephen Comm. 285.

[c] **Statutory offense of incest.**—A statute, making fornication between persons related by affinity or consanguinity nearer than cousins criminal construed not to include a husband and the wife of the brother of his wife. Chinn v. State, 47 Oh. St. 575, 579, 26 NE 986, 11 LRA 630.

20. [a] **Reason for this view.**—"We admit that a decided majority of the American courts, as shown by cases cited, in applying the rule of affinity have announced conclusions that would not disqualify a judge to sit in a case where the husband of his wife's niece was an interested party (Kirby v. State, 89 Ala. 63, 8 S 110; Oneal v. State, 47 Ga. 229; Deupree v. Deupree, 45 Ga. 415; Tegarden v. Phillips, 14 Ind. A. 27, 42 NE 549; Chase v. Jennings, 38 Me. 44; Bigelow v. Sprague, 140 Mass. 425, 5 NE 144; Higbe v. Leonard, 1 Den. (N. Y.) 186; Eggleston v. Smiley, 17 Johns. (N. Y.) 133; Chinn v. State, 47 Oh. St. 575, 26 NE 986, 11 LRA 630; Rank v. Shewey, 4 Watts (Pa.) 218; Moses v. State, 11 Humphr. (Tenn.) 232; Johnson v. Richardson, 52 Tex. 481; Rector v. Drury, 4 Chandl. (Wis.) 24), but they proceed upon the theory, it seems to us, that the relation of husband and wife is one of affinity, and the rule as to such relation is applied. We are of opinion that they should be regarded as one person in law, so far as the question under consideration is concerned, and this will disqualify a judge where any blood relative of his wife, within the ninth degree, or the husband or wife of such relative is an interested party." State v. Wall, 41 Fla. 463, 466, 26 S 1020, 79 AmSR 195, 49 LRA 548.

[b] **Criticism of this view.**—"An examination of authorities has led to the conclusion that the doctrine of affinity relationship should be limited by the following rule: Affinity is the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all the blood relatives of the husband. See Bouvier L. D.; 2 Cyc 38; 23 Cyc 583; 24 Cyc 274; 1 Words & Phr. Jud. Def. 245. It is true our statute was adopted from the State of New York, and that when adopted here it had received judicial interpretation by the courts of that State (Foot v. Morgan, 1 Hill (N. Y.) 654; Paddock v. Wells, 2 Barb. Ch. (N. Y.) 331), and that in the last-mentioned case, at least, a different rule was stated obiter. But the judicial interpretation which can be said to be binding upon the courts of this State extended only to the point of determining that the statute must be aided by the common law. The particular rule of common law adopted and in force in this State is not to be determined authoritatively by courts of another State. The rule above stated is the rule of decision in both of the New York cases above cited, as well as in Higbe v. Leonard, 1 Den. (N. Y.) 186, decided in 1845. The other and further rule stated, obiter, in Paddock v. Wells, supra, to the effect that 'relationship, by affinity may also exist between the husband and one who is connected by marriage with a blood relative of the wife,' is based upon very remote, and is opposed to the weight of modern, authority. We must decline to hold that the fact that two men, unrelated, marry wives who are second cousins, establishes between them a relation by affinity." Bliss v. Caille Bros. Co., 149 Mich. 601, 608, 113 NW 317, 12 AnnCas 513.

21. Foot v. Morgan, 1 Hill (N. Y.) 654; Paddock v. Wells, 2 Barb. Ch. (N. Y.) 331; Bevan v. McLeod, 1 Pr. Edw. Isl. 297, 298; Markham v. Lee [cit Mounson v. West, 1 Leon. 88, 74 Reprint 82]; Charles v. John, Y. B. 41 Edw. III 9. And see Cain v. Ingham, 7 Cow. (N. Y.) 478.

22. See Stringfellow v. State, 42 Tex. Cr. 588, 61 SW 719 (for doctrine in Texas).

23. Kelly v. Neely, 12 Ark. 657, 56 AmD 288; State v. Wall, 41 Fla. 463, 26 S 1020, 79 AmSR 195, 49 LRA 548 and note.

24. Kelly v. Neely, 12 Ark. 657, 659, 56 AmD 288; Chase v. Jennings, 38 Me. 44, 45; Bigelow v. Sprague, 140 Mass. 425, 5 NE 144; Carman v. Newell, 1 Den. (N. Y.) 25, 26; Foot v. Morgan, 1 Hill (N. Y.) 654; Cain v. Ingham, 7 Cow. (N. Y.) 478; State v. Shaw, 25 N. C. 532; State v. Brown, 47 Oh. St. 102, 23 NE 747, 21 AmSR 790; Noble v. State, 22 Oh. St. 541; Wilson v. State, 100 Tenn. 596, 46 SW 451, 66 AmSR 789; Goodall v. Thurman, 1 Head (Tenn.) 209; Johnson v. State, 20 Tex. A. 609, 54 AmR 535; Blodget v. Brinsmaid, 9 Vt. 27, 30. But see Spear v. Robinson, 29 Me. 531, 545 (holding that the relation by affinity is not lost on the dissolution of the marriage any more than a blood relation is lost by the death of those from whom it is derived. The dissolution of the marriage, once lawful, by death or divorce has no effect on the issue and can have no greater effect to annul the relation by affinity). And see Hartford Bank v. Hart, 3 Day (Conn.) 491, 3 AmD 274 (where a juror who had married the sister of a party in another case depending on the same principles as the one on trial was excused from sitting, although his wife was then dead).

[a] **"Consanguinity" distinguished.**—(1) "Relationship by consanguinity is in its nature incapable of dissolution, but the relationship by affinity ceases with the dissolution of the marriage which produced it." Kelly v. Neely, 12 Ark. 657, 660, 56 AmD 288; Blodget v. Brinsmaid, 9 Vt. 27, 30. (2) Hence, although a man is by affinity brother to his wife's sister, on the death of the wife he may lawfully marry the sister. Kelly v. Neely, supra.

25. Dearmond v. Dearmond, 10 Ind. 191; Bigelow v. Sprague, 140 Mass. 425, 5 NE 144; Paddock v. Wells, 2 Barb. Ch. (N. Y.) 331; Stringfellow v. State, 42 Tex. Cr. 588, 61 SW 719; Jaques v. Com., 10 Gratt. (51 Va.) 690; Mounson v. West, 1 Leon. 88, 74 Reprint 82.

26. Kelly v. Neely, 12 Ark. 657, 56 AmD 288; Paddock v. Wells, 2 Barb. Ch. (N. Y.) 331, 333. Compare Waterhouse v. Martin, Peck (Tenn.) 374, 389 (where it was said: "'There are no degrees strictly speaking in affinity, as there are in parentage or consanguinity; but I am considered as related to the parents of my wife in the same degree as she is'").

[a] **The rule of computing** the degrees of affinity is that the relations of the husband stand in the same degree of affinity to the wife in which they are related to the husband by consanguinity; which rule holds also, eo converso, in the case of the wife's relations. (1) Thus where one is brother by blood to the wife, he is brother-in-law, or by affinity, to the husband. Chinn v. State, 47 Oh. St. 575, 580, 26 NE 986, 11 LRA 630 [quot Erskine Inst. bk 1 6 t § 8]. (2) The father of the wife stands in the first degree of affinity to his son-in-law and in the first degree of consanguinity to his daughter. Paddock v. Wells, 2 Barb. Ch. (N. Y.) 331, 333.

27. **Affinity:**

Affecting:
- Capacity to marry see Marriage [26 Cyc 845].
- Credibility of witness see Witnesses [40 Cyc 2657].
- Right to inherit see Descent and Distribution [14 Cyc 31, 62].

As creating insurable interest:
- Generally see Life Insurance [25 Cyc 704].
- Mutual benefit insurance see Mutual Benefit Insurance [29 Cyc 114].

As element of incest see Incest [22 Cyc 46].

By marriage as consideration for contract see Contracts [9 Cyc 320].

Causing disqualification of:
- Fence viewer see Fences [19 Cyc 475].
- Judge see Judges [23 Cyc 583].
- Juror see Criminal Law [12 Cyc 714]; Juries [24 Cyc 274].

See also Consanguinity [8 Cyc 582]; Relationship [34 Cyc 1036].

AFFIRM.[28] To make firm, establish;[29] to make firm or certain;[30] to make free from doubt;[31] to ratify or confirm.[32]

In pleading to allege or aver a matter of fact; to state affirmatively.[33]

In practice to make affirmation; to make solemn and formal declaration or asseveration that an affidavit is true, that the witness will tell the truth, etc.; to give testimony on affirmation;[34] to confirm a judgment, decree, or order, brought before an appellate court for review.[35]

AFFIRMANCE. The confirmation of a voidable act by the party acting who is to be bound thereby.[36]

In practice the confirming or ratifying of a former law or judgment;[37] the upholding of a judgment of a lower court by an appellate court.[38]

(Cross references.[39])

AFFIRMANT.[40] A person who affirms in place of making oath.[41]

AFFIRMANTI, NON NEGANTI, INCUMBIT PROBATIO.[42]

AFFIRMANTIS EST PROBARE.[43]

AFFIRMATION.[44]

28. See Affirmance post this page.

29. Century D. [quot Best Brewing Co. v. Klassen, 85 Ill. A. 464, 468 (rev on another point 185 Ill. 37, 57 NE 20, 76 AmSR 26, 50 LRA 765)];

30. Hughes v. Boyle, 5 Ont. 395, 398.

31. Per Rose, J., in Hughes v. Boyle, 5 Ont. 395, 398.

32. Century D. [quot Best Brewing Co. v. Klassen, 85 Ill. A. 464, 468 (rev on another point 185 Ill. 37, 57 NE 20, 76 AmSR 26, 50 LRA 765)]; Planters' Bank v. Calvit, 11 Miss. 143, 194, 41 AmD 616.

[a] **Synonyms** are "confirm" and "establish." Per Rose, J., in Hughes v. Boyle, 5 Ont. 395, 398.

33. Black L. D.

34. Black L. D. See Affirmation post this page.

[a] **"Affirmed to"** in the jurat of a notary public is sufficient. It need not set out the language of the affirmation, the presumption being that it was in the form prescribed by statute. Colvin v. Peo., 166 Ill. 82, 83, 46 NE 737.

35. Abbott L. D.

[a] **Taking affirmed in its ordinary natural meaning,** it is clear that the judgment appealed from has been by the discontinuance and ending of the appeal confirmed, established, made certain, and free from doubt. Per Rose, J., in Hughes v. Boyle, 5 Ont. 395, 398.

[b] **"We think . . . 'affirmed' as used in the statute** and in the bond, must be given a broader meaning [than the dictionary gives it], and that the condition was satisfied by the judgment rendered in the County Court, which was in effect an affirmance of the judgment appealed from." Per Freeman, J., in Best Brewing Co. v. Klassen, 85 Ill. A. 464, 469 [rev on another point 185 Ill. 37, 57 NE 20, 76 AmSR 26, 50 LRA 765].

[c] **"Order affirmed."**—In Victor Talking Mach. Co. v. Hoschke, 188 Fed. 326, 328, 110 CCA 304, the court said: "As to this court, when an order is 'affirmed on the opinion of the court below,' it approves the reasoning, adopts the findings, and concurs in the conclusions of the court below. When, itself writing nothing, making no record of its findings as a court of appeals, it merely announces, 'Order affirmed,' it is to be understood that for some reason it prefers not to adopt the opinion of the court below, either that it has reached the conclusion by a totally different process of reasoning, or that, while in the main approving the opinion, there is something in it which the appellate court does not wish to approve."

[d] **Dismissal.**—An appeal bond conditioned that appellant shall pay, etc., if judgment "be affirmed," does not authorize a forfeiture of the bond in case of dismissal of the appeal for want of prosecution. Drummond v. Husson, 14 N. Y. 60, 61.

36. Morgan v. Soisson, 21 Pa. Super. 141, 143.

[a] **An affirmance by an infant** of his contract is in its nature a mental assent and necessarily implies the action of a free mind exempt from all constraint and disability. Sayles v. Christie, 187 Ill. 420, 445, 58 NE 480 [quot Sims v. Everhardt, 102 U. S. 300, 312, 26 L. ed. 87].

[b] **May be a ratification.**—St. John v. Hendrickson, 81 Ind. 350, 352 [quot Polts v. Lambie, 121 NYS 384, 385].

[c] **"Confirmation" and "ratification" distinguished.**—Black L. D. (2d ed.).

37. Black L. D.

[a] **"The terms 'affirmance' or 'reversal,'** used in section 84 of the Small Cause Act (Rev., p. 554,) are employed to indicate the successful or unsuccessful party on the appeal." Per Scudder, J., in Housel v. Higgins, 47 N. J. L. 72, 73.

[b] **What amounts to affirmance of judgment.**—(1) If an appeal is entered, from a judgment rendered by a county court, to the supreme court, and the appellee recovers judgment in the supreme court, although for a less sum than he recovered in the county court, it is an affirmance of the judgment of the county court within the meaning of the condition of the recognizance for the prosecution of such appeal. Page v. Johnson, 1 D. Chipm. (Vt.) 338. (2) In construing a statute providing that upon appeal by a corporation "the bail requisite in that case shall be taken absolute for the payment of debt, interest and costs on the affirmance of the judgment," the court said: "The appellant contends that, the judgment never having been affirmed, he is not liable upon his recognizance and that the judgment of the justice of the peace against him in the suit on the recognizance was, therefore, void and the appeal therefrom should have been sustained by the court. This contention is based upon the meaning given by the appellant to the word 'affirmance,' as used in the act of assembly. He confines its application to the ratification or upholding of a judgment of a lower court by an appellate court, but it has a much broader meaning than this. An affirmance may be 'the confirmation of a voidable act by the party acting, who is to be bound thereby or by a court in the manner contended for by the appellant and it may be either express or implied.' See 1 Bouvier L. D. 112. . . . The appeal was taken; the judgment could be affirmed either by the act of the appellant in failing to enter the appeal or by the formal action of the court." Morgan v. Soisson, 21 Pa. Super. 141, 142.

38. Morgan v. Soisson, 21 Pa. Super. 141, 143 [cit Bouvier L. D.].

[a] **Simple affirmance.**—Where a justice's judgment for less than fifteen dollars is affirmed, a readjudication by the appellate court that the respondent recover the amount of such judgment together with interest thereon from the time of its rendition will not be deemed a new judgment or anything more than a simple affirmance. Wold v. Ordway, 68 Wis. 176, 31 NW 759.

[b] **Continuance of lien of judgment.**—In Planters' Bank v. Calvit, 11 Miss. 143, 194, 41 AmD 616, it was held that the affirmance by the court of appeals of a judgment of an inferior court did not extinguish the lien of that judgment. The court said: "To me it seems a contradiction that the judgment of affirmance, the act which declares that the judgment was regular, and constituted a perfect lien from the time it was rendered in the Circuit Court, should be considered as the act which destroys the validity of the lien."

[c] **Appeals from judgment of affirmance.**—A judgment entered upon an order of the appellate division of the supreme court overruling exceptions directed to be heard by it in the first instance, denying the motion for a new trial based thereon, and ordering judgment upon the verdict, is a judgment of affirmance, within the meaning of the code of civil proceedure prohibiting appeals as of right to the court of appeals from a judgment of affirmance in an action for a personal injury when the decision of the appellate division is unanimous. Huda v. American Glucose Co., 151 N. Y. 549, 45 NE 942.

39. **Affirmance:**

Of contract by:
- Husband see Husband and Wife [21 Cyc 1326].
- Infant see Infants [22 Cyc 600].
- Insane person see Insane Persons [22 Cyc 1209].
- Married woman see Husband and Wife [21 Cyc 1326, 1442].

Of conveyance by:
- Husband see Husband and Wife [21 Cyc 1509].
- Infant see Infants [22 Cyc 538].
- Insane person see Insane Persons [22 Cyc 1174].
- Married woman see Husband and Wife [21 Cyc 1332, 1509].

Of judgment, decree, or order:
- In partition, see Partition [30 Cyc 333].
- On appeal:
  - As breach of appeal bond see Appeal and Error [2 Cyc 933].
  - Costs on:
    - Generally see Costs [11 Cyc 205].
    - Certiorari see Certiorari [6 Cyc 838].
  - From justice see Justices of the Peace [24 Cyc 754].
  - In:
    - Civil case see Appeal and Error [3 Cyc 412].
    - Criminal prosecution see Criminal Law [12 Cyc 936].
    - Partition see Partition [30 Cyc 333].

On certiorari see Certiorari [6 Cyc 833].

See also Confirmation [8 Cyc 566]; Ratification [33 Cyc 1528].

40. See Oaths and Affirmations [29 Cyc 1296]; Witnesses [40 Cyc 2133].

41. Burrill L. D.

42. A maxim meaning "Upon the party affirming, not on the party denying, rests the burden of proof." Abbott L. D.

43. A maxim meaning "He who affirms must prove." Black L. D.

[a] **Applied in:** Porter v. Stevens, 9 Cush. (Mass.) 530, 535.

44. **Affirmation:**

By:
- Affiant see Affidavits § 9 et seq.
- Appraiser of property seized on execution see Executions [17 Cyc 1108].
- Bankrupt see Bankruptcy [5 Cyc 298].
- Juror see Juries [24 Cyc 471].
- Witness see Witnesses [40 Cyc 2133, 2410].

AFFIRMATIO UNIUS EXCLUSIO EST ALTERIUS.[45]

AFFIRMATIVE. Asserting as true; positive.[46] The antithesis of negative.[47] Phrases in which the word has been used have received judicial interpretation, such as "affirmative damages,"[48] "affirmative defense,"[49] "affirmative easement,"[50] "affirmative evidence,"[51] "affirmative plea,"[52] "affirmative proof,"[53] "affirmative relief,"[54] "affirmative representation."[55]

Affirmative Pregnant. An affirmative allegation implying some negative in favor of the adverse party.[58]

Affirmative Statute.[57] A statute in affirmative language; a statute directing some act to be done or declaring what shall be done.[58]

(Cross references.[59])

AFFIRMATIVELY. In an affirmative manner.[60]

In accordance with religious belief see Affidavits § 49.
See also Oaths and Affirmations [29 Cyc 1298].

45. A maxim meaning "The affirmance of one thing is the exclusion of the other." 2 A&EEncL&Pr 752.

[a] **Applied in:** State v. Sommerville, 110 La. 734, 34 S 757.

46. Anderson L. D.

47. Hubbard v. Fort, 188 Fed. 987, 996.

48. Ebert v. The Reuben Doud, 3 Fed. 520, 524, 9 Biss. 458 (in admiralty damages which may be in excess of any amount which the libelant would be entitled to claim).

49. F. V. Smith Contracting Co. v. New York, 128 NYS 351, 353 (a plea interposed as a basis for proving some new fact).

In Carter v. Eighth Ward Bank, 33 Misc. 128, 130, 67 NYS 300, the court said: "After making a general denial, the answer pleads nine separate defences; or as we sometimes say, 'affirmative defences'; but that is only tautological, for every 'defence' (i. e., that which is called a 'defence' in pleading) can only consist of new affirmative matter, and the burden of proof is on the defendant to affirmatively establish such defence of new matter." See also Pleading [31 Cyc 100, 215].

50. Bernero v. McFarland Real Est. Co., 134 Mo. A. 290, 296, 114 SW 531 (one which entitles the owner of the dominant estate to make active use of the servient tenement, or to do some act, which, in the absence of the easement, would be a nuisance or a trespass).

51. Anderson v. Horlick's Malted Milk Co., 137 Wis. 569, 575, 119 NW 342 (holding that when evidence upon the negative takes the form of recollection and positive denial based thereon it is affirmative, in effect, rather than negative, under the rule for the comparative weight of the two classes of evidence, notwithstanding its negative form).

[a] **Affirmative in essence and effect.**—In Alft v. Clintonville, 126 Wis. 334, 338, 105 NW 561 [quot Anderson v. Horlick's Malted Milk Co., 137 Wis. 569, 575, 119 NW 342], the court said: "The mere form of the question put to the witness does not always determine whether his answer shall be regarded as positive or negative testimony. . . . It often happens that testimony which is negative in form may be really affirmative in essence and effect, within the real meaning and purpose of the rule."

52. Potts v. Potts, (N. J. Ch.) 42 A. 1055, 1056 (where the court said: "The usual kind [of plea] is known as an 'affirmative plea.' It sets up a single fact not appearing in the bill, or sets up a number of circumstances all tending to establish a single fact, which fact, if existing, destroys the complainant's case." These are often called pure pleas). See also Pleading [31 Cyc 215].

53. Jenkins v. Hawkeye Commercial Men's Assoc., 147 Iowa 113, 119, 124 NW 199, 30 LRANS 1181 (such evidence of the truth of the matters asserted as tends to establish them, and this regardless of the character of the evidence offered).

In Gates v. Hughes, 44 Wis. 332, 337, the court said: "The other branch of this instruction, that the proposition 'must be established by affirmative proof,' is strictly meaningless; for it is equivalent to saying that the jury must find affirmatively, if there is sufficient proof in favor of the affirmative side of the proposition. If it means anything, it means that the proposition must be established by direct or positive proof, and is consistent with, and in effect a repetition of, the first branch of the instruction above considered, and misled the jury in the same direction and to the same extent; and in this view this branch of the instruction was also erroneous."

54. Koerper v. St. Paul, etc., R. Co., 40 Minn. 132, 134, 41 NW 656 (where in construing a statute providing that a plaintiff may dismiss his action at any time before trial, unless affirmative relief is demanded in the answer, the court said: "It seems to us that the relief to which the statute refers as affirmative is only that for which the defendant might maintain an action entirely independent of plaintiff's claim, and which he might proceed to establish and recover even if plaintiff abandoned his cause of action, or failed to establish it. In other words, the answer must be in the nature of a cross-action, thereby rendering the action defendant's as well as plaintiff's. The relief demanded in the answer in this case is clearly not of this kind. It is entirely conditioned and dependent upon plaintiffs establishing their right of recovery").

[a] **New York statute.**—"The 'affirmative relief' to which the defendant may be entitled, under this section of the Code, means, I think, such relief as may properly be given within the issues made by the pleadings, or according to the legal or equitable rights of the parties, as established by the evidence, not to that redress which is equally applicable after as before judgment, and may be obtained on motion or by action." Garner v. Hannah, 13 N. Y. Super. 262, 273. See also Equity [16 Cyc 481].

55. New Jersey Rubber Co. v. Commercial Union Assur. Co., 64 N. J. L. 580, 584, 585, 46 A 777 (holding that in the law of insurance representations are of two classes, affirmative and promissory. The former are those which affirm the existence of a particular state of things at the time the contract of insurance is made and becomes operative; the latter are those which are made by the insured concerning what is to happen during the term of the insurance, stated as matters of expectation, or, it may be, of contract. The one is an affirmation of a fact existing when the contract begins; the other is a promise to be performed after the contract has come into existence).

[a] **"Promissory representations" distinguished.**—Kimball v. Ætna Ins. Co., 9 Allen (Mass.) 540, 543, 85 AmD 786; New Jersey Rubber Co. v. Commercial Union Assur. Co., 64 N. J. L. 580, 584, 46 A 777.

56. Fields v. State, 134 Ind. 46, 53, 32 NE 780.

[a] **Confined to civil actions.**—In Fields v. State, 134 Ind. 46, 53, 32 NE 780, the court said: "The law relating to affirmatives and negatives pregnant, so far as we are aware, has been confined to the rules of pleading in civil actions, and has no place in criminal law; but a proposition of law in an instruction to a jury stated in the form of an affirmative pregnant is subject to all the objections against it as a rule of pleading, and is likely to be much more misleading and harmful."

57. See Statutes [36 Cyc 929].

58. Burrill L. D.

[a] **Affirmative acts of parliament** are those "wherein justice is directed to be done according to the law of the land." 1 Blackstone Comm. 142.

59. **Affirmative:**
Allegation see Pleading [31 Cyc 100].
Contract, injunction to compel performance see Injunctions [22 Cyc 845].
Defense:
Generally see Pleading [31 Cyc 206].
As admitting plaintiff's allegations see Pleading [31 Cyc 206].
In criminal proceeding as question for jury see Criminal Law [12 Cyc 591].
Evidence:
Generally see Evidence [17 Cyc 800].
As denoting positive evidence see Evidence [16 Cyc 848].
Duty of court to define see Trial [38 Cyc 1687].
Instructions relating to see Criminal Law [12 Cyc 599, 649].
Legislation see Statutes [36 Cyc 1031].
Plea:
Generally see Pleading [31 Cyc 215].
In equity see Equity [16 Cyc 291].
Relief to defendant:
Generally see Set-Off and Counterclaim [34 Cyc 618].
In:
Equity:
As against other defendants see Equity [16 Cyc 481].
By imposing conditions see Equity [16 Cyc 483].
On cross bill see Equity [16 Cyc 482].
Error on appeal see Appeal and Error [3 Cyc 424].
Suit or action:
For:
Cancellation of instrument see Cancellation of Instruments [6 Cyc 342].
Injunction see Injunctions [22 Cyc 970].
Reformation of instruments see Reformation of Instruments [34 Cyc 996].
Specific performance see Specific Performance [36 Cyc 755].
Of:
Ejectment see Ejectment [15 Cyc 78, 232].
Trespass to try title see Trespass to Try Title [38 Cyc 1204, 1234].
To quiet title see Quieting Title [32 Cyc 1382].
Judgment for generally see Judgments [23 Cyc 802].
Representations see Promissory Representations [32 Cyc 635].
Warranty in insurance see Fire Insurance [19 Cyc 708].
See also Positive.

60. Century D.

[a] **Affirmatively authorized.**—(1) "When congress, in 1890, passed the river and harbor bill, we think the expression contained in section 10 [26 U. S. St. at L. 454] in regard to obstructions, 'not affirmatively authorized by law,' meant not only a law of congress, but a law of the state in

AFFIRMATIVUM NEGATIVUM IMPLICAT.[61]

AFFIX. To fix or fasten upon, to attach to, inscribe, or impress upon, as a signature, a seal, a trade-mark;[62] to attach, add to, or fasten upon, permanently, as in the case of fixtures annexed to real estate.[63] (Cross references.[64])

AFFLICTED. Distressed in body or mind; filled with or suffering affliction.[65]

AFFORRADOR. In old Spanish law one who manumitted a slave.[66]

which the river was situated which had been passed before congress had itself legislated upon the subject. An obstruction created under the authority of a state statute under such circumstances we cannot doubt was an obstruction 'affirmatively authorized by law.'" Kansas City, etc., R. Co. v. Wiygul, 82 Miss. 223, 228, 33 S 965, 61 LRA 578. (2) In Hubbard v. Fort, 188 Fed. 987, 996, the court said: "What is affirmative authorization? Affirmative is the antithesis of negative. The use of the word 'affirmatively' with 'authorized' would be difficult to understand except for the use of the word 'authorize' in the latter part of this section where the building of certain structures and the performing of certain works are forbidden without the authority of the Secretary of War. As pointed out by V. C. Walker in the New Jersey case, this section 'does not provide that it shall be lawful for the Secretary of War to authorize the excavation of land in the channel of any navigable water of the United States, but only that it shall not be lawful to do the work without the authorization of the Secretary and before beginning the work.' In view of the context, the word 'affirmatively' was legislatively used to distinguish the two kinds of authority referred to, and to make it plain that the initial authorization to create an obstruction was not to rest on implied, but express—affirmative—congressional authority."

61. A maxim meaning "An affirmative implies a negative." Morgan Leg. Max.

62. Black L. D.

63. Black L. D. See also Conde v. Sweeney, 16 Cal. A. 157, 159, 116 P 319; Western Nat. Bank v. Gerson, 27 Okl. 280, 284, 117 P 205.

[a] **For example** (1) under a statute providing that a thing is deemed to be affixed to realty when it is attached to it by roots, as in case of trees, or imbedded in it, as in the case of walls, or permanently resting on it, as in the case of buildings, or permanently attached to a building by means of cement, plaster, nails, bolts, or screws, an engine or boiler erected in a wooden building adjoining a brick structure, for the purpose of connecting power to the machinery in the brick building by means of shafts extending into and through the walls, will be held to be affixed. McNally v. Connolly, 70 Cal. 3, 11 P 320. (2) So, under the same section, a house of a permanent nature, but which is erected without disturbing the soil, will be deemed to be affixed to the land. Miller v. Waddingham, 3 Cal. Unrep. Cas. 375, 25 P 688, 689, 11 LRA 510.

64. **Affix:**
Mark on goods see Trade-Marks and Trade-Names [38 Cyc 755].
Personalty to realty see Fixtures [19 Cyc 1036].
Revenue stamp to:
Deed see Deeds [18 Cyc 559].
Instrument generally see Internal Revenue [22 Cyc 1619].
Mortgage see Mortgages [27 Cyc 1107].
Seal see Seals [35 Cyc 1164].
Trade-Mark to goods see Trade-Marks and Trade-Names [38 Cyc 693].

65. Standard D.

[a] **In insurance law.**—A person proposing to insure his life was asked, "Have you ever been afflicted with gout?" and answered, "No." It appeared that before the proposal he had had a slight attack of suppressed gout. It was held that this answer was not untrue if he had not been sensibly afflicted with gout, but merely had some symptoms which a medical man could detect as denoting the presence of gout in the system. Fowkes v. Manchester, etc., L. Ins. Co., 3 F. & F. 440, 443.

66. Escriche Diccionario.

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AFFRAY

By Henry H. Skyles*

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra page 384]

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CROSS REFERENCES

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Criminal law and procedure in general see **Criminal Law** [12 Cyc 70]; **Indictments and Informations** [22 Cyc 472].
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False imprisonment see **False Imprisonment** [19 Cyc 316].
Former jeopardy see **Criminal Law** [12 Cyc 284].
Homicide in:
Affray see **Homicide** [21 Cyc 763].
Suppression of affray see **Homicide** [21 Cyc 798].
Prize fighting see **Prize Fighting** [32 Cyc 395].
Riot see **Riot** [34 Cyc 1770].
Unlawful assembly see **Unlawful Assembly** [39 Cyc 831].

I. DEFINITIONS AND DISTINCTIONS

[§ 1] **A. At Common Law.**[1] An affray at common law is the fighting of two or more persons in a public place to the terror of the people.[2] In a legal sense it signifies a public offense to the terror of the people.[3]

[§ 2] **B. Statutory Provisions.** In some jurisdictions the offense is defined by statute, and commonly the statutory offense consists of the same elements as those which constitute the offense at common law, the statutory language being in substantial conformity to the common-law definition;[4] although under some statutes an agreement or mutual consent of the parties is added as an element.[5]

[§ 3] **C. Derivation.** "Affray" is said to be derived from the French word "effrayer"[6] or "effraier,"[7] to affright[8] or terrify;[9] but Lord Coke says that the word is English, and that the offense is so called because it "affrighteth and maketh men afraid."[10]

[§ 4] **D. Distinctions from Other Offenses—1. Assault and Battery.** Although an affray, by reason of the fighting, includes the elements of an assault,[11] it is distinguished from that offense by the

1. **Commission of affray by going about armed** see infra §§ 18-20.

2. Ala.—Thompson v. State, 70 Ala. 26, 28; McClellan v. State, 53 Ala. 640, 641; O'Neil v. State, 16 Ala. 65, 66.
Ark.—State v. Brewer, 33 Ark. 176, 178; Childs v. State, 15 Ark. 204.
Ga.—Hawkins v. State, 13 Ga. 322, 324, 58 AmD 517.
Ill.—Thomas v. Riley, 114 Ill. A. 520, 522 (civil action for assault).
Ind.—Supreme Council O. C. F. v. Garrigus, 104 Ind. 133, 139, 3 NE 818, 54 AmR 298.
Ky.—Com. v. Simmons, 6 J. J. Marsh. 614, 615.
N. C.—State v. Davis, 65 N. C. 298, 299; State v. Perry, 50 N. C. 9, 10, 69 AmD 768; State v. Stanly, 49 N. C. 290, 292; State v. Woody, 47 N. C. 335, 336; State v. Allen, 11 N. C. 356.
S. C.—State v. Parish, 42 S. C. L. 322, 323; State v. Sumner, 36 S. C. L. 53, 56.
Tenn.—State v. Priddy, 4 Humphr. 429; Simpson v. State, 5 Yerg. 356, 357.
Tex.—Saddler v. Republic, Dall. 610.
Va.—Wilkes v. Jackson, 2 Hen. & M. (12 Va.) 355, 359.
See also 4 Blackstone Comm. 144; 1 Russell Cr. (9th ed.) c 26 p 406.
[a] **Similar definitions.**—(1) The fighting of two or more persons in some public place. O'Neill v. State, 16 Ala. 65, 67; State v. Priddy, 4 Humphr. (Tenn.) 429; Simpson v. State, 5 Yerg. (Tenn.) 356, 357; Wilkes v. Jackson, 2 Hen. & M. (12 Va.) 355, 360 (where, in a civil action for assault, Roane, J., said: "An affray therefore is nothing more than a public fight"). (2) "A mutual combat voluntarily engaged in by two or more persons in a public place." Strutton v. Com., 62 SW 875, 877, 23 KyL 307; State v. Fritz, 133 N. C. 725, 728, 45 SE 957; State v. Gladden, 73 N. C. 150, 155. (3) "A disturbance of the public peace, by a fighting with the mutual consent of the combatants." Duncan v. Com., 6 Dana (Ky.) 295. (4) "Some disturbance of the public peace to the terror of the people." State v. Davis, 65 N. C. 298, 299. (5) "An affray is when persons come together without a premeditated design to disturb the peace, and suddenly break out into a quarrel among themselves." Peo. v. Judson, 11 Daly (N. Y.) 1, 83.
[b] **"Webster defines 'affray'** to be 'the act of suddenly disturbing any one; an assault or attack . . . the fighting of two or more persons, in a public place, to the terror of others.' He also says: 'A fighting in private is not, in a legal sense, an affray.' He also gives the synonyms: 'Quarrel; brawl; scuffle; encounter; fight; contest; feud; tumult; disturbance.' The word 'affray,' as used in the manslaughter instruction, does not mean that two persons must engage in a fight on a public road or be guilty of the common-law offense of an affray. . . . If A. halts B. on a public highway, and attempts to draw a gun on him, and B. fires four shots at him, after which A. fires one at him, it certainly would constitute an affray. If it did not, it would be difficult to imagine an occurrence which could be called an 'affray.'" Per Paynter, C. J., in Burton v. Com., 60 SW 526, 528, 22 KyL 1315.

3. 1 Hawkins P. C. c 63 § 1.

4. See statutory provisions.
[a] **In Georgia** an affray has been defined by the code to be "the fighting of two or more persons in some public place, to the terror of the citizens, and disturbance of the public tranquility." Hawkins v. State, 13 Ga. 322, 324, 58 AmD 517.
[b] **In Texas** under Pen. Code art 313, in order to constitute an affray there must be fighting between two or more persons and it must occur in a public place. Pollock v. State, 32 Tex. Cr. 29, 22 SW 19.

5. Fritz v. State, 40 Ind. 18; State v. Weekly, 29 Ind. 206; Klum v. State, 1 Blackf. (Ind.) 377; State v. Foy, Tapp. Oh. 71.
[a] **In Indiana,** under Rev. St. (1881) § 1980, both persons must be guilty of an agreement to violate the law and engage in fighting by such agreement. Supreme Council O. C. F. v. Garrigus, 104 Ind. 133, 3 NE 818, 54 AmR 298.

6. Burn sub. verb. "Affray" [cit State v. Huntly, 25 N. C. 418, 40 AmD 416]; Jacob L. D.; 1 Russell Cr. (9th ed) c 26 p 406; Simpson v. State, 5 Yerg. (Tenn.) 356; Hickey v. Fitzgerald, 41 U. C. Q. B. 303.

7. 1 Hawkins P. C. c 63 § 1; Com. v. Simmons, 6 J. J. Marsh. (Ky.) 614 (where the word is spelled "affraier").

8. State v. Huntly, 25 N. C. 418, 40 AmD 416; Jacob L. D.

9. 1 Hawkins P. C. c 63 § 1; Com. v. Simmons, 6 J. J. Marsh. (Ky.) 614; Simpson v. State, 5 Yerg. (Tenn.) 356.

10. 3 Coke Inst. 158; State v. Huntly, 25 N. C. 418, 40 AmD 416; Hickey v. Fitzgerald, 41 U. C. Q. B. 303.

11. McClellan v. State, 53 Ala. 640; State v. Brewer, 33 Ark. 176; State v. Stanly, 49 N. C. 290; State v. Allen, 11 N. C. 356, 357 (where Taylor, C. J., said that an affray is "an assault aggravated by the circumstances

fact that it must be committed in a public place,[12] and to the terror of the people,[13] whereas an assault or an assault and battery may be committed in a private place, away from every one except the parties concerned;[14] and also by the fact that two or more persons must be engaged in combat, whereas an assault may be committed by one person on another who does not resist.[15]

[§ 5] **2. Prize Fighting.** An affray is broadly distinguished from a prize fight by the element of publicity necessary in the former offense, whereas a prize fight may take place in private;[16] but a prize fight in a public place may be indictable as an affray.[17]

[§ 6] **3. Riot and Unlawful Assembly.** An affray is distinguished from a riot, a rout, or an unlawful assembly by the fact that to constitute any of these offenses there must be at least three persons, and they must have assembled with an intent to commit violence, whereas two may commit an affray, and their meeting may have been innocent and lawful.[18] An affray has been described as "more of a private nature" than a riot.[19]

II. ELEMENTS OF THE OFFENSE

[§ 7] **A. Commission by Fighting—1. In General.** Speaking generally three elements are necessary to constitute the offense of affray by fighting: (1) There must be fighting;[20] (2) this fighting must be by or between two or more persons;[21] and (3) it must be in a public place to cause terror to the people.[22] If any of these elements is wanting the offense is not committed.[23]

[§ 8] **2. Number Who May Commit the Offense.** The commission of the offense requires the participation of two or more persons.[24] But, although two are engaged in the affray, unless consent is an element[25] the offense may be committed by one,[26] as where the other offers no resistance,[27] or acts in self-defense,[28] or, not being the aggressor, employs only sufficient force to defend himself.[29] However, it seems that in such a case the offense would be assault and battery and not affray.[30]

[§ 9] **3. Fighting—a. Necessity for and Extent of.** To constitute this form of the offense it is essential that there be actual fighting.[31] It is not necessary, however, that there should be an interchange of blows; one blow will be sufficient;[32] or all the injury may be inflicted by one party,[33] as where the other attempts to use a weapon.[34] Nor is it important who strikes the first blow,[35] or that deadly weapons are used.[36]

[§ 10] **b. Provoking Words.** The mere use of abusive, quarrelsome, or threatening words will not of itself amount to an affray, because of its insufficiency to create terror to the public, which the law regards as the obnoxious feature of the offense,[37] even though the person to whom such language is used is provoked thereby to attack the other, if the latter offers no resistance to the attack.[38]

Where, however, one person uses abusive or offensive language which is calculated and intended to provoke and bring on a fight, whereby the other is induced to strike or injure him, the former may be guilty of an affray whether he does or does not return the blow.[39] So also the use of language which

under which it is committed"). See also Assault and Battery [3 Cyc 1014].

Conviction for assault under indictment for affray see infra § 49.

12. Thompson v. State, 70 Ala. 26; State v. Heflin, 8 Humphr. (Tenn.) 84; Wilkes v. Jackson, 2 Hen. & M. (12 Va.) 355.

[a] **"It is distinguished from an assault,** or an assault and battery, because of the place at which it is committed, and the number engaged in it." Brickell, C. J., in McClellan v. State, 53 Ala. 640.

13. Cash v. State, 2 Overt. (Tenn.) 198, 199 [quot Sadler v. Republic, Dall. (Tex.) 610] (where it is said: "It is because the violence is committed in a public place, and to the terror of the people, that the crime is called an affray, instead of assault and battery").

14. Ark.—State v. Brewer, 33 Ark. 176.

N. C.—State v. Woody, 47 N. C. 335; State v. Allen, 11 N. C. 356.

S. C.—State v. Sumner, 36 S. C. L. 53.

Tenn.—Simpson v. State, 5 Yerg. 356.

Eng.—Timothy v. Simpson, 1 C. M. & R. 757; Reg. v. Hunt, 1 Cox C. C. 177.

[a] **If the fighting is in private** it is no affray, but an assault, because if it is neither heard nor seen by any but the parties concerned it cannot be said to be to the terror of the people. Childs v. State, 15 Ark. 204; State v. Brewer, 33 Ark. 176; Com. v. Simmons, 6 J. J. Marsh. (Ky.) 614; State v. Sumner, 36 S. C. L. 53; 1 Hawkins P. C. c 63 § 1 [quot Hickey v. Fitzgerald, 41 U. C. Q. B. 303, 308].

15. Thompson v. State, 70 Ala. 26; McClellan v. State, 53 Ala. 640; Duncan v. Com., 6 Dana (Ky.) 295.

[a] **Evidence that the parties fought by mutual agreement** shows an affray not an assault and battery. Champer v. State, 14 Oh. St. 437.

16. See generally Prize Fighting [32 Cyc 398].

17. State v. Sumner, 36 S. C. L. 53.

18. Supreme Council O. C. F. v. Garrigus, 104 Ind. 133, 3 NE 818, 54 AmR 298; Peo. v. Judson, 11 Daly (N. Y.) 1; State v. Allen, 11 N. C. 356; 1 Hawkins P. C. c 65 § 3. See generally Riot [34 Cyc 1770]; Unlawful Assembly [39 Cyc 831].

19. Peo. v. Judson, 11 Daly (N. Y.) 1, 83.

20. Simpson v. State, 5 Yerg. (Tenn.) 356. See also infra § 9.

21. Simpson v. State, 5 Yerg. (Tenn.) 356. See also infra § 8.

22. Simpson v. State, 5 Yerg. (Tenn.) 356. See also infra §§ 11, 12, 13, 15.

23. Simpson v. State, 5 Yerg. (Tenn.) 356.

[a] **Where there is no evidence to support one of the essential elements** of the offense a verdict of guilty is contrary to law. Gamble v. State, 113 Ga. 701, 39 SE 301.

24. Thompson v. State, 70 Ala. 26; Simpson v. State, 5 Yerg. (Tenn.) 356; Pollock v. State, 32 Tex. Cr. 29, 22 SW 19. See also supra §§ 1, 2.

[a] **Fighting on same side.**—It is immaterial whether the two or more persons accused fight on opposing sides or on the same side; and a rescue, or attempted rescue, by violence of a person legally arrested and in the custody of an officer of the law, if perpetrated by two or more acting together in a public place, is an affray. Thompson v. State, 70 Ala. 26.

25. Fritz v. State, 40 Ind. 18.

26. Cash v. State, 2 Overt. (Tenn.) 198.

27. O'Neill v. State, 16 Ala. 65; Pollock v. State, 32 Tex. Cr. 29, 22 SW 19.

28. State v. Sumner, 36 S. C. L. 53. See also Peo. v. Moore, 3 Wheel. Cr. (N. Y.) 82.

29. State v. Wilson, 61 N. C. 237.

30. State v. Wilson, 61 N. C. 237 (holding that, where the grand jury returned a true bill for affray against one defendant, it was in legal effect an indictment for assault and battery). See generally Assault and Battery [3 Cyc 1014].

31. State v. Freeman, 127 N. C. 544, 37 SE 206; State v. Foy, Tapp. (Oh.) 71; Simpson v. State, 5 Yerg. (Tenn.) 356; Pollock v. State, 32 Tex. Cr. 29, 22 SW 19.

[a] **A mere friendly scuffle** is not sufficient. State v. Freeman, 127 N. C. 544, 37 SE 206.

32. State v. Gladden, 73 N. C. 150; Piper v. State, (Tex. Cr. A.) 51 SW 1118 (holding that, where two travelers on a public road become engaged in a quarrel, and one challenges the other to fight, and they then engage in a personal encounter in the presence of a third person, and one inflicts a blow that draws blood, it constitutes an affray).

33. State v. Downing, 74 N. C. 184.

34. State v. Davis, 80 N. C. 351, 30 AmR 86.

35. State v. Sumner, 36 S. C. L. 53; Pollock v. State, 32 Tex. Cr. 29, 22 SW 19.

36. State v. Glenn, 119 N. C. 804, 25 SE 789.

37. O'Neill v. State, 16 Ala. 65; Blackwell v. State, 119 Ga. 314, 46 SE 432; Hawkins v. State, 13 Ga. 322, 58 AmD 517; State v. Sumner, 36 S. C. L. 53; Pollock v. State, 32 Tex. Cr. 29, 22 SW 19; 1 Hawkins P. C. c 63 § 4; 1 Russell Cr. (9th ed) c 26 p 407.

[a] **The mere use of profane language** by two persons to each other, although in a public place, does not constitute an affray. Blackwell v. State, 119 Ga. 314, 46 SE 432.

38. O'Neill v. State, 16 Ala. 65; Pollock v. State, 32 Tex. Cr. 29, 22 SW 19.

39. State v. Fanning, 94 N. C. 940, 55 AmR 653; State v. Davis, 80 N. C. 351, 30 AmR 86; State v. Downing, 74 N. C. 184; State v. Gladden, 73 N. C. 150; State v. Perry, 50 N. C. 9, 69

evinces a design to precipitate trouble, accompanied by the drawing of weapons or other acts indicating an intent to fight in public, will constitute the offense,[40] although actual fighting is prevented by bystanders.[41] And one who by his language provokes another to violence and thereupon engages in a fight is guilty of the offense,[42] although he does not strike the first blow.[43]

[§ 11] **c. In Public Place—(1) In General.** Since an affray is regarded as an aggravated disturbance of the public peace,[44] it is essential to the commission of the offense that the fighting shall occur in a public place.[45]

[§ 12] **(2) What Constitutes.** What will constitute a public place in this connection seems to have been fairly well settled. Thus a public highway[46] or a public street[47] will ordinarily be regarded as a public place so that fighting therein will make the offense of affray; but it has been held that, since the injury to the public is the terror produced and the evil example,[48] a highway is not necessarily a public place so as to make a fighting therein an affray, as where no witnesses are present.[49]

Private premises in close proximity to a public highway or street, open and visible to passersby, may also constitute a public place within the definition of affray.[50] But it has been held that a place out of the sight or hearing of the general public, and considerably distant from a highway, will not lose its private character by the casual presence of persons other than the combatants,[51] although a place ordinarily private may become public within the law of affray by being thrown open to the public on a particular occasion.[52]

[§ 13] **(3) Commencement in Private Place.** It is not material that the fighting commences in a private place, if it is continued in a public place,[53] or is carried thereto by flight and pursuit,[54] or the commencement and continuation of the fighting are so intimately blended as to constitute but one transaction.[55]

[§ 14] **4. Consent.** It is not essential to the common-law offense of affray that the fighting should be by consent or agreement of both or all parties concerned,[56] although such consent or agreement is made an element by statute in some jurisdictions,[57] and where it is so made an element its existence is necessary to complete the offense.[58] Where consent or agreement is necessary it may be indicated by words or gestures and need not be in any particular form or in writing.[59] A party at first unwilling, who is forced into a quarrel, cannot be said to have consented;[60] nor can a person be presumed to have consented from the mere fact that he engaged in a fight.[61]

[§ 15] **5. Incitement of Terror.** The object of denouncing the offense of affray is to prevent the disturbance of the public peace and quiet,[62] as the injury to the people is the terror and alarm produced and the evil example.[63] Hence the fighting in a public place must be to the terror of the people;[64] but where the fighting is in such place, terror is conclusively presumed and need not exist as a mat-

AmD 768; State v. Sumner, 36 S. C. L. 53. Compare O'Neill v. State, 16 Ala. 65.

[a] **Where, after an angry altercation, one of the parties produces a pistol** and, on being challenged by the other to use it, wounds the other with it, both are properly convicted of an affray. State v. Downing, 74 N. C. 184.

40. Blackwell v. State, 119 Ga. 314, 46 SE 432 (holding that the offense is made out by proof of the use of profane language indulged in by both parties, accompanied by such acts as drawing a razor, making a threatening gesture with a plank, and taking hold of each other); Hawkins v. State, 13 Ga. 322, 58 AmD 517.

41. Hawkins v. State, 13 Ga. 322, 58 AmD 517.

42. State v. King, 86 N. C. 603; State v. Davis, 80 N. C. 351, 30 AmR 86; State v. Robbins, 78 N. C. 431.

43. State v. Sumner, 36 S. C. L. 53; Pollock v. State, 32 Tex. Cr. 29, 22 SW 19.

44. Childs v. State, 15 Ark. 204.

45. Ala.—Thompson v. State, 70 Ala. 26; McClellan v. State, 53 Ala. 640.

Ark.—Childs v. State, 15 Ark. 204. But in Gantt Dig. § 1508, the words "public place" were omitted. State v. Brewer, 33 Ark. 176.

Ga.—Gamble v. State, 113 Ga. 701, 39 SE 301.

Ind.—State v. Weekly, 29 Ind. 206.

Mo.—State v. Warren, 57 Mo. A. 502.

N. C.—State v. Woody, 47 N. C. 335.

S. C.—State v. Sumner, 36 S. C. L. 53.

Tenn.—Simpson v. State, 5 Yerg. 356; State v. Heflin, 8 Humphr. 84; Cash v. State, 2 Overt. 198.

Tex.—Shelton v. State, 30 Tex. 431; Saddler v. Republic, Dall. 610; Pollock v. State, 32 Tex. Cr. 29, 22 SW 19.

Va.—Wilkes v. Jackson, 2 Hen. & M. (12 Va.) 355 (civil action for an assault).

Eng.—Reg. v. Hunt, 1 Cox C. C. 177; 4 Blackstone Comm. 146.

[a] **"The gist of the offense** at common law was its publicity." Brickell, C. J., in McClellan v. State, 53 Ala. 640.

[b] **An assault which happens in a private place** out of the hearing and sight of everyone except the parties immediately concerned does not constitute an affray. Hickey v. Fitzgerald, 41 U. C. Q. B. 303.

46. State v. Davis, 80 N. C. 351, 30 AmR 86; Piper v. State, (Tex. Cr. A.) 51 SW 1113 (public highway in the presence of one witness).

47. Carwile v. State, 35 Ala. 392.

48. See infra § 15.

49. State v. Weekly, 29 Ind. 206, 207 (where it is said: "The offense consists not in fighting by agreement, but in fighting by agreement in a 'public place.' There may be a legal highway not a public place within the meaning of the statute. There may be, by the growth of timber or underbrush, a part of a highway perfectly concealed from public view, and as private as any place").

50. Carwile v. State, 35 Ala. 392, 393 (where the fight took place in a lot ninety feet distant from the street but visible from the street, and where Walker, C. J., said: "The street being, per se, public, a place ninety feet from the street, and at the time visible from it, must, we think, be also public. At the distance of ninety feet, in the absence of any intervening obstacle, the tumult of the fight could be heard, and its exciting scenes witnessed; and persons passing by would be within reach of missiles thrown by the combatants. . . . What difference can it make, so far as the terror to the public is concerned, whether the fight actually occurs in the street, or hard by the street, and within full view of it? The distinguishing element of terror to the people is as much present in the latter, as in the former case").

51. Taylor v. State, 22 Ala. 15 (a field surrounded by a forest, and one mile from any highway or other public place); Gamble v. State, 113 Ga. 701, 39 SE 301; Wilson v. State, 3 Heisk. (Tenn.) 278; Reg. v. Hunt, 1 Cox C. C. 177; 1 Hawkins P. C. c 63 § 1; 1 Russell Cr. (9th ed) c 26 p 406.

[a] **But the presence of seven other persons** has been held sufficient to make the place a "public place." State v. Fritz, 133 N. C. 725, 45 SE 957.

52. Gamble v. State, 113 Ga. 701, 39 SE 301.

[a] **A private house** (1) may become a public place within the meaning of such law where for the time being it is thrown open to the public for purposes of recreation or amusement. Austin v. State, 57 Tex. Cr. 611, 124 SW 639. (2) But it does not become such by being used for a social gathering which no one is permitted to attend except by express invitation or previous engagement. Gamble v. State, 113 Ga. 701, 39 SE 301.

53. State v. Billings, 72 Mo. 662.

54. Wilson v. State, 3 Heisk. (Tenn.) 278.

55. State v. Billings, 72 Mo. 662.

56. Supreme Council O. C. F. v. Garrigus, 104 Ind. 133, 3 NE 818, 54 AmR 298; Cash v. State, 2 Overt. (Tenn.) 198; Saddler v. Republic, Dall. (Tex.) 610; Pollock v. State, 32 Tex. Cr. 29, 22 SW 19.

57. See supra § 2.

58. Duncan v. Com., 6 Dana (Ky.) 295; State v. Foy, Tapp. (Oh.) 71.

59. State v. Foy, Tapp. (Oh.) 71.

60. State v. Foy, Tapp. (Oh.) 71.

61. Klum v. State, 1 Blackf. (Ind.) 377; Duncan v. Com., 6 Dana (Ky.) 295.

62. State v. Sumner, 36 S. C. L. 53.

63. State v. Huntly, 25 N. C. 418, 40 AmD 416; 3 Coke Inst. 158, 160; 1 Hawkins P. C. c 28 § 1.

64. Ala.—Thompson v. State, 70 Ala. 26.

Ark.—Childs v. State, 15 Ark. 204.

Ga.—Gamble v. State, 113 Ga. 701, 39 SE 301.

N. C.—State v. Allen, 11 N. C. 356.

S. C.—State v. Sumner, 36 S. C. L. 53.

Tenn.—Simpson v. State, 5 Yerg. 356; Cash v. State, 2 Overt. 198.

Tex.—Saddler v. Republic, Dall. 610.

[a] **"The distinguishing** character

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ter of fact,[65] as it is sufficient that it might have resulted,[66] and it is for this reason that fighting in a private place does not constitute an affray.[67]

[§ 16] **6. Intention.** It is not necessary that there should be an actual intention on the part of either of the parties to bring on a combat,[68] as such an intention may be indicated by conduct as well as by words,[69] and if either party commits acts which are calculated to bring on an affray he must be deemed in law to have intended the actual result of such acts.[70]

Willful injury done by the parties to each other is an element of the statutory offense in at least one jurisdiction.[71]

[§ 17] **7. Aiders and Abettors.** Persons aiding, abetting, and assisting those engaged in an affray become affrayers themselves, and are punishable as principals,[72] and it has been held that one who intermingles with persons about to commence an affray becomes a party thereto unless his object is to suppress it,[73] or at least he may be deemed in some way guilty if he looks on without attempting to suppress the affray.[74]

[§ 18] **B. Commission by Going About Armed—1. In General.** In a number of cases it has been declared that, although there is no actual violence or fighting, the common-law offense may be committed by one or more persons armed with dangerous and unusual weapons, riding or going about offensively and in such a manner as naturally to cause terror to the people.[75] This doctrine, however, has been held to be erroneous and not supported by authority;[76] and it has been held that, where the mere carrying and wearing of dangerous arms and weapons is not unlawful, such carrying and wearing in a public street will not constitute an offense.[77]

[§ 19] **2. Number Who May Commit.** One may be guilty of this offense, since the terror is not predicated on the number of persons, but on the carrying of weapons and the demeanor of the offender or offenders.[78]

[§ 20] **3. Possession of Arms Necessary.** The possession of arms is a necessary ingredient of this form of the offense.[79]

III. DEFENSES

[§ 21] **A. In General.**[80] Guilt or innocence cannot be determined by the existence of matters of difference between the parties, which culminate in an altercation but which are not directly connected with the offense charged. Thus one defendant cannot justify by showing that his codefendant had persuaded his wife to separate from him;[81] or had threatened him at a time prior to the affray;[82] or had previously attempted to assault him with a dangerous weapon and had threatened his life;[83] nor can one who engages in an affray willingly defend on the ground that he had a reasonable belief that his adversary intended to do him grievous bodily harm.[84]

Unwillingness to fight. Where consent or agreement is by statute an element of the offense, the fact that one defendant was forced into the fight against his will is a good defense to him.[85]

[§ 22] **B. Self-defense.**[86] Self-defense, when established, is a complete justification under a prosecution for an affray.[87] But this defense applies only where the party setting it up is without fault, and hence he cannot avail himself of such defense where, by the use of abusive or improper language

teristic of an affray is the terror to the people actually resulting, or presumed to result, from the fighting in a public place." Per Walker, C. J., in Carwile v. State, 35 Ala. 392, 394.

65. Carwile v. State, 35 Ala. 392; Childs v. State, 15 Ark. 204; State v. Warren, 57 Mo. A. 502; State v. Sumner, 36 S. C. L. 53.

66. Carwile v. State, 35 Ala. 392, 394 (where the fighting took place at a point near but not on the highway, and where Walker, C. J., said: "It is not so much the terror actually produced, as the liability of fighting in a public place to produce it, which the law regards"); State v. Sumner, 36 S. C. L. 53.

67. State v. Sumner, 36 S. C. L. 53. See also supra § 12.

68. State v. King, 86 N. C. 603.

69. State v. Fanning, 94 N. C. 940, 15 AmR 653. See also supra § 10.

70. State v. King, 86 N. C. 603.

71. State v. Warren, 57 Mo. A. 502.

72. Hawkins v. State, 13 Ga. 322, 58 AmD 517; Curlin v. State, 4 Yerg. (Tenn.) 143.

73. Peo. v. Moore, 3 Wheel. Cr. (N. Y.) 32. But in State v. Harrell, 107 N. C. 944, 12 SE 439, it was held that mere presence at an affray, without saying or doing anything or intending to aid or encourage the fighters, does not render a person liable as an aider or abettor. In Rex v. Murphy, 6 C. & P. 103, 25 ECL 343, it was held that if death occurs from the fight itself all persons encouraging it by their presence are guilty of manslaughter, although if death is caused by violence unconnected with the fight, as by an assault on one of the affrayers by a bystander, others who were merely present encouraging the original affray are not for that reason guilty of manslaughter.

74. Peo. v. Moore, 3 Wheel. Cr. (N. Y.) 32.

75. O'Neill v. State, 16 Ala. 65; State v. Griffin, 125 N. C. 692, 34 SE 513; State v. Lanier, 71 N. C. 288; State v. Woody, 47 N. C. 335; State v. Huntly, 25 N. C. 418, 421, 40 AmD 416; State v. Washington, 19 Tex. 128, 70 AmD 323; Hickey v. Fitzgerald, 41 U. C. Q. B. 303, 308 [cit 1 Hawkins P. C. c 487 § 4]; 1 Russell Cr. (9th ed) 407.

In State v. Huntly, supra, Gaston, J., said: "Burns and Tomlyns inform us, that, this term 'Affray,' is derived from the French word 'effrayer' to affright, and that anciently it meant no more, 'as where persons appeared with armour or weapons not usually worn, to the terror of others.' It was declared by the Chief Justice in Sir John Knight's Case, 3 Mod. 117, 87 Reprint 75, that the statute of Northampton was made in affirmance of the common law. And this is manifestly the doctrine of Coke, as will be found on comparing his observations on the word 'Affray,' which he defines (3d Just. 158) 'a public offence to the terror of the King's subjects, and so called because it affrighteth and maketh men afraid.'"

[a] **Riding unarmed through a courthouse,** when the court is not in session and most of the people have gone home, is not necessarily an affray of this character. State v. Lanier, 71 N. C. 288.

76. Simpson v. State, 5 Yerg. (Tenn.) 356, 358 (where Whyte, J., referring to a quotation of this doctrine from Sergeant Hawkins bk. 1 c 28 § 4, said that it did not support the doctrine contended for, and that "if the whole of the section, and the following ones of the chapter, are looked into, it will be found that the doctrine of the citation depends upon ancient English statutes, enacted in favor of the king, his ministers and other servants," not applicable in, nor forming part of, the common law of the United States, and inconsistent with a constitutional declaration of the right to bear arms).

77. Simpson v. State, 5 Yerg. (Tenn.) 356.

78. State v. Woody, 47 N. C. 335; State v. Huntly, 25 N. C. 418, 40 AmD 416; 1 Hawkins P. C. c 63 § 4.

79. State v. Lanier, 71 N. C. 288.

[a] **A gun is an unusual weapon** when carried in such a manner as to alarm or terrify the people. State v. Huntly, 25 N. C. 418, 40 AmD 416.

80. **Former jeopardy** as a defense see Criminal Law [12 Cyc 284].

81. State v. Weathers, 98 N. C. 685, 4 SE 512.

82. State v. Goff, 117 N. C. 756, 23 SE 355.

83. Skains v. State, 21 Ala. 218.

84. State v. Harrell, 107 N. C. 944, 12 SE 439.

[a] **Removing trespasser.**—One who trespasses by remaining upon and creating a disturbance in a highway in front of a dwelling cannot defend on the ground that the occupant, his codefendant, used unnecessary force. State v. Davis, 80 N. C. 351, 30 AmR 86.

85. State v. Foy, Tapp. (Oh.) 71.

86. **Self-defense** generally see Homicide [21 Cyc 800].

87. Hawkins v. State, 13 Ga. 322, 58 AmD 517; Bracewell v. State, 10 Ga. A. 830, 74 SE 440 (holding that, where on trial for an affray one defense was that defendants were repelling an unlawful assault, defendants would have a right to protect themselves, although it occurred at a Sunday school meeting, and even to resent the use of abusive language, if they did not exceed a proper measure of resistance); Coyle v. State, (Tex. Cr. A.) 72 SW 847. See also State v. Downing, 74 N. C. 184.

[a] **Statutory offense.**—Self-de-

calculated and intended to bring on a fight, he himself provoked the affray,[88] especially where he was ready and willing to fight.[89]

IV. JURISDICTION

[§ 23] **A. In General.** Jurisdiction of particular courts over prosecutions for affrays is generally regulated by statute.[90] Under these statutes justices of the peace are generally given jurisdiction,[91] and it has been held that a statute providing for summary punishment by a justice of the peace in such cases is not repugnant to a constitutional provision that all criminal prosecutions shall be on presentment or indictment, and that the accused shall be entitled to a jury trial.[92]

[§ 24] **B. In What Cases.** Under some statutes a justice of the peace has final jurisdiction only on complaint of the injured party, and the only case which can be entertained by him under such provision is where an affray by fighting is charged;[93] and where the offense involves the use of a deadly weapon, as where it consists merely of a display of weapons, with violent or threatening words or similar acts, without actual fighting, as no one in particular is injured so as to be entitled to complain, a superior court, and not a justice of the peace, has jurisdiction.[94]

V. INDICTMENT OR INFORMATION

[§ 25] **A. Number Who May Be Indicted.** It is not necessary that all the participants in the affray should be indicted, even though a fighting by mutual consent is charged; an indictment of one alone will warrant a conviction of assault.[95]

[§ 26] **B. Charging the Offense—1. In General.** Every fact and circumstance necessary to establish the common-law offense of affray must be charged in the indictment with that degree of certainty and precision which is required by the common-law rules of criminal pleading,[96] and it is insufficient to state a mere conclusion, as that defendant "made an affray," without specifying the act and circumstances relied on to establish the offense.[97] If the prosecution is on information, that accusation must contain all the substantial requisites of an indictment at common law.[98]

Where the offense is defined by statute the indictment must be framed in reference to the statute and conform to either its letter or its substance,[99] although it is sufficient in general to follow the language of the statute,[1] and it need not be in the form

fense is a justification for fighting with a deadly weapon in a public place. Hunter v. State, 62 Miss. 540.

[b] **An opportunity to retreat** must be embraced. State v. Downing, 74 N. C. 184.

88. State v. Sumner, 36 S. C. L. 53; Habel v. State, 28 Tex. A. 588, 13 SW 1001.

89. State v. Sumner, 36 S. C. L. 53; Pollock v. State, 32 Tex. Cr. 29, 22 SW 19.

[a] **Where defendant engaged willfully in the affray,** it is immaterial that he fought under a reasonable apprehension that his antagonist intended to make a violent assault upon him; nor is it any defense that in the course of the conflict he fired a shot, believing that he and his sons were in danger of great bodily harm. State v. Harrell, 107 N. C. 944, 12 SE 439.

90. See statutory provisions.

[a] **In North Carolina** under Act (1879) c 92, the superior, inferior, and criminal courts have concurrent jurisdiction with justices of the peace of affrays not involving the use of deadly weapons, where a justice of the peace has not taken jurisdiction within six months after the commission of the offense. State v. Hooper, 82 N. C. 663; State v. Moore, 82 N. C. 659.

91. Fritz v. State, 40 Ind. 18; State v. Ledford, 3 Mo. 102.

Jurisdiction of justices of the peace in criminal cases generally see Criminal Law [12 Cyc 201].

92. State v. Ledford, 3 Mo. 102.

93. State v. Davis, 65 N. C. 298 (holding that where two or more fight by mutual consent one may complain against either or all of the others, and a case is presented in which a justice's court has jurisdiction).

94. State v. Weaver, 93 N. C. 595 (holding that a justice's judgment is a nullity where the use of a deadly weapon is shown); State v. Davis, 65 N. C. 298.

[a] **Deadly weapon used by one defendant only.**—(1) Where jurisdiction of the superior court depends on the use of a deadly weapon in the affray, that court has jurisdiction of both parties, although it appears that a deadly weapon was used by one of them only. State v. Coppersmith, 88 N. C. 614. (2) The reason for this is that it is the charge of using a deadly weapon, not the actual use, that confers jurisdiction, and hence a court of general jurisdiction will not dismiss the prosecution upon its appearing that only a simple assault was committed, but will proceed to judgment, although in such case it cannot impose a sentence beyond the limit for a simple affray tried before a justice of the peace. State v. Albertson, 113 N. C. 633, 18 SE 321.

95. State v. Wilson, 61 N. C. 237.

96. State v. Heflin, 8 Humphr. (Tenn.) 84.

[a] **Judicial statement of and reason for rule.**—"This is a common-law offence, and must [be] charged in the indictment with that degree of certainty and precision required by the common-law rules of criminal pleading; one of those rules, almost without an exception, is that every fact and circumstance necessary to constitute the offence must be specifically set forth in the indictment, with precision and certainty, that it may appear on the face of the indictment whether or not they constitute an indictable offence; that the defendant may know how to make his defence; and that he may be enabled to plead a conviction or acquittal on such indictment, in bar of another prosecution for the same offence; and that the court may know what judgment should be given if the defendant be convicted. And if any material fact or circumstance which is a necessary ingredient in the offence be omitted, it will vitiate the indictment, and the defendant may avail himself of it by demurrer, arrest of judgment, or writ of error." State v. Heflin, 8 Humphr. (Tenn.) 84, 85.

[b] **Forms of indictment for affray** see Childs v. State, 15 Ark. 204; State v. Warner, 4 Ind. 604; State v. Allen, 11 N. C. 356; Wilson v. State, 3 Heisk. (Tenn.) 278; State v. Benthal, 5 Humphr. (Tenn.) 519; Precedent of Indictments, 10 Cox C. C. appendix 1. A charge that defendants, being unlawfully assembled together in a public place, to the great terror, etc., "did quarrel and fight and make an affray," is sufficient without the averments of fighting and quarreling, which eo nomine were not offenses at common law and might be rejected as surplusage. Saddler v. Republic, Dall. (Tex.) 610. See also State v. Washington, 19 Tex. 128, 70 AmD 323 (sustaining an indictment charging that defendants, "being so unlawfully assembled together, and arrayed in a warlike manner, then and there did make an affray," etc.).

97. State v. Woody, 47 N. C. 335; State v. Priddy, 4 Humphr. (Tenn.) 429; Simpson v. State, 5 Yerg. (Tenn.) 356. See also Supreme Council O. C. F. v. Garrigus, 104 Ind. 133, 3 NE 818, 54 AmR 298 (holding that in an answer an allegation that insured "was engaged in an affray" was the statement of a conclusion, and not sufficient to meet the averments in the complaint that insured received a wound without any agency, fault, or negligence on his part).

[a] **The material facts** assumed to constitute the affray must be specified; it is not sufficient merely to allege that defendants made an affray. Simpson v. State, 5 Yerg. (Tenn.) 356.

98. State v. Vanloan, 8 Ind. 182.

99. Skains v. State, 21 Ala. 218; State v. Dunn, 73 Mo. 586.

[a] **Under the Alabama statutes** "the form . . . is that the accused 'did fight together in a public place,' specifying with more certainty the particulars of the offense than did a common indictment, in which the weight of the charge rested on the averment 'did make an affray.'" Per Brickell, C. J., in McClellan v. State, 53 Ala. 640, 641.

[b] **Sufficient indictment.**—An indictment alleging that defendant, at a specified time and place, did in a public place unlawfully assault a person named, and beat, strike, kick, and bruise him, "in an angry and quarrelsome manner, to the disturbance of others, the citizens of said town and county, against the peace and dignity of the state," was held to allege all that was necessary to constitute an affray under the Missouri statute in force in 1881. State v. Dunn, 73 Mo. 586.

[c] **Not sufficient to charge assault.**—Where an affray and an assault and battery are distinct offenses under the statute, punishable by different penalties, an indictment for an affray must distinctly charge that offense, and it is not sufficient to charge an assault and battery. Champer v. State, 14 Oh. St. 437.

1. Shelton v. State, 30 Tex. 431.

of the common-law precedents.[2]

[§ 27] **2. Particular Averments—a. As to Jurisdiction.** The indictment need not contain averments of the existence of conditions which are precedent to the jurisdiction of the court and which are matters of defense going to the jurisdiction.[3]

[§ 28] **b. As to Fighting.** The fact of fighting must be averred where fighting is an ingredient of the offense sought to be charged,[4] and a plurality of participants should be alleged.[5] And generally it will be sufficient to state that defendants fought together;[6] unlawfully and willingly fought together,[7] or did make an affray by fighting;[8] or to use other similar expressions of an actual conflict. It has been held that a specific allegation that defendants fought with each other, or showing with whom they fought, is necessary;[9] but on the other hand it has been held that such an allegation is not essential except to support a conviction of assault.[10]

[§ 29] **c. As to Consent.** If consent is an ingredient of the offense, the fact that the fighting was by consent should be averred directly or by such language as will warrant a fair inference of that fact; and an allegation which will bear the construction that but one of defendants agreed to fight fails to charge the offense.[11]

[§ 30] **d. As to Place of Fighting.** It is essential that an indictment or information for a common-law affray allege that the fighting was in a public place,[12] and it is not enough to allege merely that an affray was made.[13] However, a direct statement that the offense was committed in a public place will be sufficient, as a particular description of the place is unnecessary;[14] and it has been held that, as an indictment for such an affray is merely one for the several assaults and batteries involved, it may be good, although the publicity of the place is not specified.[15] A designation of the place of conflict as a street,[16] public road, or highway[17] sufficiently characterizes it as a public place, although it has been held that an allegation of the commission of the offense in a highway is not necessarily equivalent to a charge that it was committed in a public place, inasmuch as a highway which has been laid out but not opened is not a public place.[18] It has also been held sufficient to allege that the fighting took place in a certain county without specifying the particular locality within the county wherein it occurred;[19] but that a statement that the fighting was in a designated town would not necessarily imply that it was at a public place therein.[20]

But where the statute defining the offense does not require that the place be public an indictment for a statutory affray need not allege publicity.[21]

[§ 31] **e. As to Going About Armed.** Alleging that defendants were unlawfully assembled at a certain time and place, and, being so unlawfully assembled together and arrayed in a warlike manner, then and there did make an affray is sufficient to charge an affray by going about armed.[22]

[§ 32] **f. As to Terror.** While there is no direct adjudication as to the necessity of an averment as to terror, it is said to be the better form to include such averment,[23] and in most precedents an allegation that the offense was "to the great terror and disturbance of divers good citizens" is included.[24]

[§ 33] **g. As to Assault and Battery.** Affray by fighting, as defined by the common law and by statutes which substantially denounce the common-law offense, necessarily includes assault and battery.[25] An indictment for the former offense is, in effect, merely for the several assaults and batteries, one bill being used to avoid several trials for the same offense.[26] It may, in addition to charging the affray, charge each defendant in separate counts with an assault and battery,[27] or when charging affray it may be so drawn as to allege the specific elements of assault and battery.[28] But where there

2. State v. Billingsley, 43 Tex. 93 (holding that an indictment charging that defendants, at a certain time and place, "being then and there a public place, did then and there unlawfully and willingly fight together," etc., was sufficient).

3. State v. Hooper, 82 N. C. 663; State v. Moore, 82 N. C. 659.

4. State v. Woody, 47 N. C. 335; State v. Priddy, 4 Humphr. (Tenn.) 429 (holding that an indictment charging that defendants "did make an affray," without alleging as a fact that they fought, is insufficient on a motion to quash as charging a mere legal conclusion).

5. Simpson v. State, 5 Yerg. (Tenn.) 356.

6. Thompson v. State, 70 Ala. 26.

7. State v. Billingsley, 43 Tex. 93.

8. State v. Benthal, 5 Humphr. (Tenn.) 519.

9. State v. Vanloan, 8 Ind. 182; State v. Woody, 47 N. C. 335.

[a] **An indictment of one person alone** for an affray must name the person with whom defendant fought or allege that his name is unknown to the grand jurors. Simpson v. State, 5 Yerg. (Tenn.) 356.

10. Childs v. State, 15 Ark. 204 ("an affray may be well charged as a promiscuous fighting, the offence consisting in the public disturbance"). See also State v. Brewer, 33 Ark. 176.

11. Fritz v. State, 40 Ind. 18.

12. State v. Woody, 47 N. C. 335; State v. Sumner, 36 S. C. L. 53; State v. Heflin, 8 Humphr. (Tenn.) 84; State v. Priddy, 4 Humphr. (Tenn.) 429.

[a] **Form of indictment held defective** for want of this averment see State v. Woody, 47 N. C. 335.

[b] **Plea of guilty may constitute a waiver of defect.**—Shelton v. State, 30 Tex. 431.

13. State v. Woody, 47 N. C. 335; State v. Priddy, 4 Humphr. (Tenn.) 429.

14. State v. Warner, 4 Ind. 604; State v. Baker, 83 N. C. 649; Wilson v. State, 3 Heisk. (Tenn.) 278; Shelton v. State, 30 Tex. 431.

[a] **Statutory language.**—The allegation that the place where the offense was committed was a public place may be set out in the language of the statute, or the facts necessary to show that it was a public place may be set out. State v. Warren, 57 Mo. A. 502.

15. State v. Griffin, 125 N. C. 692, 693, 34 SE 513; State v. Woody, 47 N. C. 335. "When the affray charged is the fighting of two or more persons on a public highway or street, or simply in a public place, the indictment is in effect merely for the several assaults and batteries, one bill being used simply to avoid several trials for the same offense. This is recognized in State v. Baker, 83 N. C. 649, in which it is said the public place need not be specified, and, of course, therefore, it need not be proved. . . . This disposes also of the exception that the Court charged the law as to mutual assaults and batteries, without charging the specific law as to affrays. This was for the very sufficient reason that when the affray is charged to have been by fighting of two or more, there is no distinction between the law of affray, and that of assault and battery, by which it is committed. State v. Perry, 50 N. C. 9, 69 AmD 768." State v. Griffin, supra.

16. Carwile v. State, 35 Ala. 392.

17. State v. Warren, 57 Mo. A. 502.

[a] **In "a certain public road and highway"** is a sufficient allegation of the place. State v. Warren, 57 Mo. A. 502.

18. State v. Weekly, 29 Ind. 206. And see Williams v. State, 64 Ind. 553, 31 AmR 135 (where an indictment was for notorious lewdness in a public place and the principal case was followed).

19. State v. Warner, 4 Ind. 604.

20. State v. Heflin, 8 Humphr. (Tenn.) 84.

21. State v. Brewer, 33 Ark. 176.

22. State v. Washington, 19 Tex. 128, 70 AmD 323; Saddler v. Republic, Dall. (Tex.) 610.

[a] **Forms of indictments** for this form of the offense see State v. Huntly, 25 N. C. 418, 40 AmD 416; State v. Washington, 19 Tex. 128, 70 AmD 323.

23. Bishop Cr. Proc. § 23.

24. Childs v. State, 15 Ark. 204; State v. Benthal, 5 Humphr. (Tenn.) 519; State v. Washington, 19 Tex. 128, 70 AmD 323; Archbold Cr. Pl. (18th ed) 886; Bishop Cr. Proc. § 23; Bishop Directions & F. § 925; Wharton Prec. Indictm. 847.

25. Thompson v. State, 70 Ala. 26; State v. Brewer, 33 Ark. 176; State v. Baker, 83 N. C. 649; State v. Brown, 82 N. C. 585; State v. Wilson, 61 N. C. 237; State v. Stanly, 49 N. C. 290; State v. Allen, 11 N. C. 356.

26. Thompson v. State, 70 Ala. 26; State v. Griffin, 125 N. C. 692, 34 SE 513; State v. Wilson, 61 N. C. 237.

27. Childs v. State, 15 Ark. 204; Com. v. Perdue, 2 Va. Cas. (4 Va.) 227.

28. Thompson v. State, 70 Ala. 26.

is a statutory requirement that an indictment shall charge but one offense, except as to offenses committed in different modes and by different means, counts for affray and for assault and battery cannot be joined.[29]

VI. EVIDENCE

[§ 34] **A. Presumptions and Burden of Proof.** As in criminal cases generally,[30] the burden of proving the offense of affray is on the prosecution,[31] unless the accused pleads guilty;[32] but where the affray is admitted or shown by the evidence, as where one of the accused admits the use of a deadly weapon,[33] the burden of evidence is thrown upon anyone of the accused engaged in the affray to justify or excuse himself from guilt.[34] An admission, however, by defendants that they were engaged in a friendly scuffle which they deny to have been an affray does not cast the burden of proof upon them.[35]

Presumption. All persons engaging in an affray, whether it ensue on a sudden quarrel or otherwise, are presumed to engage in it with the design of fighting and disturbing the peace.[36]

[§ 35] **B. Admissibility.** The admissibility of the evidence is governed by the rules regulating the competency, materiality, and relevancy of the evidence in criminal prosecutions generally.[37] Thus to sustain a charge of going about armed, the state may introduce evidence of threats to kill, because a constituent part of the affray, and to explain and characterize the acts charged.[38] Likewise the prosecution, in order to show a willingness to fight and to prolong the combat, may prove that after the termination of the fighting defendants pursued their adversaries and urged them to renew the conflict;[39] and proof of the use of a deadly weapon and the infliction of a serious injury is competent to sustain an indictment in the usual form in which neither fact is charged.[40] But where it is shown that defendants fought willingly, testimony of one of them that he had apprehensions that his adversary intended injury to himself and sons is irrelevant as having no tendency to show self-defense.[41]

Evidence as to a prior affray between the same joint defendants not connected with the affray for which the parties are on trial is not admissible for the purpose of aggravating the punishment of the one who may be deemed to have been the aggressor on the former occasion.[42]

[§ 36] **C. Weight and Sufficiency.** The weight and sufficiency of the evidence to support a conviction of affray is determined by the rules governing the weight and sufficiency of the evidence in criminal prosecutions generally.[43]

An agreement or consent to fight, where necessary to constitute the offense, need not be directly proved but may be inferred from the conduct of the parties;[44] but evidence merely that defendants were seen fighting together is not sufficient to raise a presumption that they fought by agreement.[45]

A charge that defendants fought together is sustained by proof that they fought in common against a person not indicted, and it is not necessary to show that they fought against each other.[46]

An averment that the fighting was in a public place must be established by proof of the character of the locality.[47]

VII. TRIAL[48]

[§ 37] **A. Rights of Joint Defendants.** Where defendants are tried together, as the offense requires their joint action or concurrence, for the purposes of the trial and in making their defense, they are to be considered as having one common interest.[49] They may be required to join in their challenges of jurors, and each will not be allowed, as is ordinarily the case,[50] the full number of peremptory challenges.[51]

Furthermore the counsel for one may be refused the right to conclude the argument to the jury, where the other defendant has introduced evidence in his behalf.[52]

[§ 38] **B. Questions of Law and Fact.**[53] Where

29. State v. Brewer, 33 Ark. 176.
[a] **Form of indictment held bad** for joinder of counts for affray and assault and battery see State v. Brewer, 33 Ark. 176.
30. See Criminal Law [12 Cyc 379 et seq].
31. State v. Freeman, 127 N. C. 544, 37 SE 206 (although the scuffle was admitted to be friendly).
32. Shelton v. State, 30 Tex. 431.
33. State v. Barringer, 114 N. C. 840, 19 SE 275.
34. State v. Freeman, 127 N. C. 544, 37 SE 206; State v. Weathers, 98 N. C. 685, 4 SE 512.
35. State v. Freeman, 127 N. C. 544, 37 SE 206.
36. Childs v. State, 15 Ark. 204.
Presumption of terror to people see supra § 15.
37. See Criminal Law [12 Cyc 390 et seq].
38. State v. Huntly, 25 N. C. 418, 40 AmD 416.
39. State v. Harrell, 107 N. C. 944, 12 SE 439 (holding that evidence that on the flight of part of the fighters the others called out to them to "stop and shoot it out like men" is competent to show a willingness to fight and prolong the conflict).
40. State v. Moore, 82 N. C. 659.
41. State v. Harrell, 107 N. C. 944, 12 SE 439.
42. Skains v. State, 21 Ala. 218.
43. See Criminal Law [12 Cyc 584 et seq].
[a] **Evidence held sufficient.**—Evidence that one defendant was on the street walking up and down, cursing, and using violent language, that he struck the second defendant with his fist, whereupon the second defendant returned the blow with a pair of iron pliers, and that the first defendant thereupon put his hand in his pocket as if to draw a knife but was prevented by the other defendant from withdrawing it, has been held to be sufficient to support a conviction of the aggressor of an affray and assault with a deadly weapon, the other defendant having pleaded guilty. State v. Glenn, 119 N. C. 804, 25 SE 789.
[b] **Evidence of aiding and encouraging.**—Proof of presence at an affray merely is not sufficient evidence of aiding and encouraging the affray. State v. Harrell, 107 N. C. 944, 12 SE 439.
[c] **A charge of assault and battery** is not sustained by proof of facts showing the commission of an affray, as that defendant indicted fought by agreement. Champer v. State, 14 Oh. St. 437.
44. State v. Foy, Tapp. (Oh.) 71.
45. Klum v. State, 1 Blackf. (Ind.) 377.
46. Thompson v. State, 70 Ala. 26.
47. Shelton v. State, 30 Tex. 431.
[a] **Evidence held insufficient.**—Evidence that a private house where the fighting took place was "near" a public road, without showing how near or how far, or that defendants could have been seen or heard from the road, is not sufficient to establish the publicity of the place. Gamble v. State, 113 Ga. 701, 39 SE 301.
48. See also generally Criminal Law [12 Cyc 504].
49. Hawkins v. State, 13 Ga. 322, 58 AmD 517.
50. As a general rule where several defendants are jointly tried each may challenge peremptorily the full number of jurors to which he would be entitled if tried alone. See generally Juries [24 Cyc 359].
51. Hawkins v. State, 13 Ga. 322, 58 AmD 517. In Cruce v. State, 59 Ga. 83, 88, which, however, was an indictment for robbery, Bleckley, J., said: "When two persons are tried together, for an offense that requires their joint action or concurrence, such as an affray, the acquittal of either will operate as an acquittal of both; hence, in such a case it has been held, in effect, that they may be required to join in their challenges."
52. Hawkins v. State, 13 Ga. 322, 58 AmD 517.
53. **Province of judge and jury in criminal cases generally** see Criminal Law [12 Cyc 587].

the evidence does not make out the offense as a matter of law, the jury are to determine the guilt or innocence of defendant under the circumstances.[54] Thus, it is ordinarily a question of fact for the jury as to whether the accused was justified in the part he took, as whether he acted in self-defense.[55]

[§ 39] **C. Instructions—1. As to Elements of Offense—a. In General.**[56] The jury must be informed as to what constitutes the offense, and should be instructed that they cannot convict unless the existence of all the elements of the offense has been proved;[57] and it is error for the court to refuse to instruct on an issue which there is evidence tending to support.[58]

[§ 40] **b. Statutory Elements.** The jury should not be instructed, however, as to a statutory element which the indictment does not aver.[59]

[§ 41] **2. As to Justification.** It is not necessary to instruct as to the justification of defendant when the evidence does not warrant such an instruction;[60] but it is error to refuse such an instruction where there is evidence tending to support such an issue.[61]

[§ 42] **3. As to Mutual Assaults.** Where an affray is charged to have been the fighting of two or more, it is sufficient to instruct as to the law of mutual assaults and batteries.[62]

[§ 43] **4. As to Self-Defense.** In charging as to self-defense it is sufficient to inform the jury as to the rights of defendant to fight in his own defense, without explaining when he should retreat and when not, or when justified in taking life.[63]

[§ 44] **5. As to Punishment.** It is improper on trial of an indictment drawn in the common-law form, and with no intent to conform to a statute creating a new and cognate offense, to instruct the jury as to their right to inflict the statutory punishment.[64]

[§ 45] **6. Giving Undue Prominence to Testimony of Witness.** An instruction will not be deemed erroneous because giving undue prominence to the testimony of one witness, where it appears that the court told the jury the effect of the testimony, including that of defendants, and said that if they accepted as true the evidence of the witness in question they might convict, and further that all the evidence must be considered.[65]

[§ 46] **D. Verdict.**[66] A verdict that an affray was committed as charged and that defendant aided and assisted in its commission is sufficient as a verdict of conviction.[67]

[§ 47] **E. Effect of Acquittal of One Defendant—1. In General.**[68] One defendant may be convicted and the others acquitted,[69] although it has been held that the successful defense of one of two will operate as an acquittal of both.[70]

[§ 48] **2. Where Agreement to Fight Is Essential.** Where an agreement to fight is an essential ingredient of the offense, if one is acquitted the other must also be acquitted, even though he pleaded guilty.[71]

[§ 49] **F. Conviction of Assault and Battery.** Where an indictment for an affray is so framed as to include a charge of assault and battery or simple assault,[72] either as a separate offense[73] or as involved and included in the charge of affray,[74] or if

54. State v. Lanier, 71 N. C. 288.

55. Blackwell v. State, 119 Ga. 814, 46 SE 422; Coyle v. State, (Tex. Cr. A.) 72 SW 847.

56. **Instructions in criminal cases generally** see Criminal Law [12 Cyc 611].

57. State v. Warren, 57 Mo. A. 502 (holding that an instruction omitting the essential element of terror and disturbance of others, and in effect therefore authorizing the jury to find defendant guilty without regard to this element, is erroneous).

[a] **In prosecutions for other offenses.**—(1) Under the Kentucky statutes reducing the punishment for various forms of assault, wounding, and killing, where the act is done "in sudden affray," a definition of affray as "a mutual combat, voluntarily engaged in by two or more persons in a public place," while technically accurate, is misleading in a prosecution for homicide as possibly implying the necessity of willing participation by both actors. Reynolds v. Com., 82 SW 978, 26 KyL 949 [rev reh 82 SW 233, 26 KyL 540]. But in Strutton v. Com., 62 SW 875, 23 KyL 307, a definition in exactly the same words in a prosecution for homicide was approved. (2) "The word 'affray,' as used in the manslaughter instruction, does not mean that two persons must engage in a fight on a public road or be guilty of the common-law offense of an affray. . . . If A halts B on a public highway and attempts to draw a gun on him, and B fires four shots at him, after which A fires one at him, it certainly would constitute an affray." Per Paynter, C. J., in Burton v. Com., 119 Ky. 664, 669, 60 SW 526, 22 KyL 1315.

58. Coyle v. State, (Tex. Cr. A.) 72 SW 847.

59. State v. Warren, 57 Mo. A. 502 (holding that an instruction submitting to the jury the hypothesis of the parties having done willful mischief to each other by violence is erroneous, although this element is found in the statute, where it is not a part of the charge going to make up the offense as set out in the indictment).

60. State v. Weathers, 98 N. C. 685, 4 SE 512.

61. Coyle v. State, (Tex. Cr. A.) 72 SW 847.

62. State v. Griffin, 125 N. C. 692, 34 SE 513 [cit State v. Perry, 50 N. C. 9].

63. State v. Harrell, 107 N. C. 944, 12 SE 439.

Instructions as to self-defense generally see Homicide [21 Cyc 1050].

64. Skains v. State, 21 Ala. 218.

65. State v. Weathers, 98 N. C. 685, 4 SE 512.

66. **Verdict in criminal cases generally** see Criminal Law [12 Cyc 686].

67. Curlin v. State, 4 Yerg. (Tenn.) 143.

[a] **A special verdict** to the effect that an affray was committed by certain of defendants and that another of defendants "aided and abetted in the commission of the affray" is substantially good and warrants a judgment against the last named defendant as a principal. Curlin v. State, 4 Yerg. (Tenn.) 143.

68. See generally Criminal Law [12 Cyc 692].

Conviction of assault of one or more and acquittal of others see infra § 49.

69. McClellan v. State, 53 Ala. 640, 641; State v. Baker, 83 N. C. 649; State v. Allen, 11 N. C. 356; Cash v. State, 2 Overt. (Tenn.) 198; Saddler v. Republic, Dall. (Tex.) 610.

"There may be a fighting in a public place, in which the one party was the aggressor and the other only employed the force necessary to defend himself. This may not be developed until all the evidence is submitted to the jury, and we can see no good reason why, if the one is shown innocent and the other guilty, there should not be the verdict and judgment the evidence requires." Per Brickell, C. J., in McClellan v. State, supra.

70. Hawkins v. State, 13 Ga. 322, 58 AmD 517 (holding that, where the evidence shows that one of defendants acted entirely in self-defense, neither of them is guilty of an affray).

71. State v. Foy, Tapp. (Oh.) 71.

[a] **Reason of rule** is that such an acquittal operates as a finding that there was no agreement. State v. Foy, Tapp. (Oh.) 71.

72. McClellan v. State, 53 Ala. 640.

[a] **"As a general rule,** when an accusation includes an offense of inferior degree, there may be an acquittal of the higher and a conviction of the less offense. The rule may well be applied when the evidence shows an offense committed by one, included in the offense with which he is charged, each of the same degree. Thereby the defendant is not oppressed, nor misled as to the evidence which may be introduced against him, nor deprived of any advantage to which the law entitles him." Per Brickell, C. J., in McClellan v. State, 53 Ala. 640, 641.

73. State v. Brewer, 33 Ark. 176; Childs v. State, 15 Ark. 204; Com. v. Perdue, 2 Va. Cas. (4 Va.) 227.

74. Thompson v. State, 70 Ala. 26.

[a] **In North Carolina** (1) it is held that an indictment in form for an affray is in legal effect merely one for assault and battery and may be legally so described, and hence that one or more of the affrayers may be convicted of assault while the others are acquitted (State v. Griffin, 125 N. C. 692, 34 SE 513; State v. Albertson, 113 N. C. 633, 18 SE 821; State v. Baker, 83 N. C. 649; State v. Brown, 82 N. C. 585; State v. Davis, 80 N. C. 351, 30 AmR 86; State v. Davis, 65 N. C. 298; State v. Wilson, 61 N. C. 237; State v. Allen, 11 N. C. 356, holding that, on an indictment against two for an affray in "mutually assaulting and fighting with each other," one defendant could be convicted for an assault and battery on the other defendant); (2) or one may be convicted of assault with a deadly weapon and the other of simple assault (State v. Albertson, supra); (3) or one may be indicted and tried and

the indictment is insufficient as a charge of affray but is good as charging assault and battery,[75] if warranted by the evidence one or all of defendants may be convicted of the latter offense.[76] But it has been held that, if assault and battery is not charged expressly or by implication, one cannot be convicted of this offense where both are acquitted of the affray,[77] as where the indictment fails to disclose the name or a description of the person assaulted.[78]

But where by statute an assault and battery and an affray are distinct offenses, punishable by different penalties, a conviction for an affray cannot be had under an indictment for assault and battery.[79]

VIII. APPEAL AND ERROR

[§ 50] The principles of appellate review of prosecutions for affray are the same as in criminal cases generally.[80] Thus a verdict or finding of the lower court will not be disturbed on appeal where there is some evidence to sustain it;[81] nor is an error in the charge of the court below, which has no application to the facts proved, a ground for reversal.[82]

IX. PUNISHMENT[83]

[§ 51] The punishment of common affrays at common law was by both fine and imprisonment,[84] and the measurement of the punishment was regulated, in the discretion of the court, by the presence or absence of circumstances of aggravation;[85] and where the matter has not been made the subject of statutory regulation the common-law punishment will still be imposed.[86] But in some states the punishment to be imposed is now regulated by statute[87] and is usually fixed at fine or imprisonment or both.[88]

X. SUPPRESSION OF AFFRAY

[§ 52] **A. In General.** A private person or a peace officer[89] without a warrant may arrest persons guilty of an affray while the fighting continues or is about to be renewed in his presence; but not as a general rule after the affray is concluded, unless upon a fresh pursuit, or unless a dangerous wound has been given amounting to a felony,[90] and it has been said that any private person may stop those whom he sees going to participate in an affray in progress.[91]

[§ 53] **B. Degree of Force.** If either party to an affray sustains a dangerous wound, a bystander who, in endeavoring to arrest the party who inflicted the injury, necessarily hurts or wounds him will not be liable.[92] But a person interfering to suppress an affray is not justified in taking the life of a combatant,[93] or in inflicting a serious injury on him,[94] unless perhaps when made absolutely necessary in self-defense or to preserve the life of the other combatant.[95]

XI. CIVIL LIABILITY FOR AFFRAY[96]

[§ 54] Participants in an affray are jointly and severally liable in a civil action to nonparticipants injured by either of the fighters;[97] and it has been held that one participant may recover from the other for injuries inflicted.[98]

convicted alone (State v. Fritz, 133 N. C. 725, 45 SE 957; State v. Baker, supra; State v. Brown, supra; State v. Davis, supra; State v. Wilson, supra).

75. State v. Woody, 47 N. C. 335.
76. State v. Brown, 82 N. C. 585.
77. Com. v. Perdue, 2 Va. Cas. (4 Va.) 227.
78. Childs v. State, 15 Ark. 204.
79. Champer v. State, 14 Oh. St. 437 [expl Barholt v. Wright, 45 Oh. St. 177, 181, 12 NE 185, 4 AmSR 535].
80. See Criminal Law [12 Cyc 792].

[a] **In Kentucky** (1) the act of 1841 gave defendant in a prosecution for an affray a right to appeal or prosecute a writ of error, but the right was not extended to the commonwealth. Com. v. Jefferson, 6 B. Mon. 313. (2) Prior to this statute the court of appeals had no revisory jurisdiction over a prosecution for an affray, on the ground that part of the punishment for the offense was imprisonment. Duncan v. Com., 6 Dana 295. See also Com. v. Simmons, 6 J. J. Marsh. 614.

81. Blackwell v. State, 119 Ga. 314, 46 SE 432 (some evidence of self-defense).
82. Wilson v. State, 3 Heisk. (Tenn.) 278 (unnecessary instructions upon an abstract question).
83. **Punishment in criminal cases generally** see Criminal Law [12 Cyc 953].
84. Duncan v. Com., 6 Dana (Ky.) 295; Com. v. Simmons, 6 J. J. Marsh. (Ky.) 614; 1 Russell Cr. (9th ed) 411; 4 Blackstone Comm. 145; 1 Hawkins P. C. c 63 § 20.

[a] **Imprisonment indispensable.**—"The common-law . . . prescribed imprisonment as a part of the punishment." Duncan v. Com., 6 Dana (Ky.) 295.

85. 1 Hawkins P. C. c 63 § 20.

[a] **The aggravation** might result, under the early common-law doctrine, from the dangerous tendency of the affray, as where there was especial danger of homicide; from the persons against whom it was committed, as where officers of justice were disturbed in the execution of the duties of their office; or from the place where it was committed, as in case of affrays in the king's court, in a church or in a churchyard. 1 Hawkins P. C. c 63 §§ 21–23; 4 Blackstone Comm. 145.

86. Childs v. State, 15 Ark. 204.
87. See statutory provisions. See also Fritz v. State, 40 Ind. 18 (either a fine of twenty dollars or imprisonment not exceeding five days); Shelton v. State, 30 Tex. 431 (fine).
88. State v. Brewer, 33 Ark. 176; Com. v. Jefferson, 6 B. Mon. (Ky.) 313 (where Breck, J., in referring to the offense of affray prior to the act of 1841, said: "The punishment, at that time, both at common law and by statute, was fine and imprisonment. Since that time the Legislature has placed it in the discretion of the jury to award either fine or imprisonment, or both, as the punishment for an affray").
89. All persons present when an affray is in progress are bound to use their best endeavors to suppress it and to apprehend the offenders; peace officers because specially charged with that duty, and private persons because of the legal obligation to do so. See cases infra note 90.
90. U. S. v. Pignel, 27 F. Cas. No. 16,049, 1 Cranch C. C. 310; Taylor v. Strong, 3 Wend. (N. Y.) 384; Phillips v. Trull, 11 Johns. (N. Y.) 486; City Council v. Payne, 11 S. C. L. 475; Timothy v. Simpson, 1 C. M. & R. 757; Cook v. Nethercote, 6 C. & P. 741, 25 ECL 666. See also State v. Clary, 84 Vt. 110, 78 A 717, AnnCas 1912D 64.

Arrest without a warrant by an officer or private person for affray see generally Arrest [3 Cyc 877 et seq].

91. Hickey v. Fitzgerald, 41 U. C. Q. B. 303; 1 Hawkins P. C. c 63 § 11; 1 Russell Cr. (9th ed.) 408.
92. 3 Coke Inst. 158; 1 Hawkins P. C. c 63 § 12; 1 Russell Cr. (9th ed.) 410.
93. Johnston's Case, 5 Gratt. (46 Va.) 660 holding that, if a mere volunteer who is neither threatened nor in danger interferes in an affray between others and kills one of the parties, he is guilty of murder); Peo. v. Cole, 4 Park. Cr. (N. Y.) 35, 40 (where Emott, J., said: "It cannot be said that to keep the peace in a mere affray, a fist fight, it can be necessary to resort to firearms or to take life in any case. It would not be justifiable for a person assailed with the mere naked fists to use deadly weapons himself, much less can a third person excuse such an act").
94. Conner v. State, 4 Yerg. (Tenn.) 137, 26 AmD 217.
95. **Justifiable or excusable homicide** in suppression of an affray see Homicide [21 Cyc 798].
96. **Civil liability for assault or assault and battery generally** see Assault and Battery [3 Cyc 1066].
97. Murphy v. Wilson, 44 Mo. 313, 100 AmD 290; Hickey v. Fitzgerald, 41 U. C. Q. B. 303 (holding that a person endeavoring to preserve the peace by stopping an affray may recover for injuries received by him from either of the fighters).
98. Thomas v. Riley, 114 Ill. A.

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AFFREIGHTMENT. The contract by which a vessel, or the use of it, is let out to hire.[1] (Cross references.[2])

AFIANZAMIENTO. In the Spanish law the act of giving security or guaranty;[3] hence analogous to the common-law contract of suretyship.[4]

AFINIDAD. In Spanish law affinity.[5]

AFLOAT. Borne on the water; in a floating condition.[6]

AFORE. Before; formerly; previously.[7]

AFORESAID. Before mentioned, recited, or said;[8] said before, or in a preceding part; already described or identified.[9] While the word generally means next before,[10] yet a different signification will be given to it if required by the context and

520 (a civil action for assault, where the court disapproved an instruction, assuming that the parties were engaged in an affray, but declared that if they were fighting by mutual consent that fact might be shown in mitigation of damages, although not as a bar to the action).

1. Bouvier L. D.

[a] **"Affreightment contracts are of two kinds,** and they differ from each other very widely in their nature as well as in their terms and legal effect. (1) Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. [See cases infra this note]. (2) But where the general owner retains the possession, command, and navigation of the ship and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding in contract and not a demise of the vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership." Reed v. U. S., 11 Wall. (U. S.) 591, 600, 20 L. ed. 220 [quot U. S. v. Shea, 152 U. S. 178, 186, 14 SCt 519, 38 L. ed. 403; Auten v. Bennett, 88 App. Div. 15, 20, 84 NYS 689]. (3) Where a shipowner agrees to carry goods by water, or to furnish a ship for the purpose of carrying goods in return for a sum of money to be paid, by some such contract is called a "contract of affreightment." The charterer thereby acquires right to the temporary use of the vessel for the carrying of his goods, but the control and possession of the vessel remain in the owner through the master and crew who continue to be his servants. Bramble v. Culmer, 78 Fed. 497, 501, 24 CCA 182.

2. **Affreightment:**

Charter party as see Shipping [36 Cyc 78].

Contract of:

Action on see Admiralty § 75; Carriers [6 Cyc 510].

Authority of master to make see Shipping [36 Cyc 128].

Damages in libel on see Shipping [36 Cyc 274].

Law governing see Admiralty § 17 et seq; Shipping [36 Cyc 205].

Nature, construction, and effect see Shipping [36 Cyc 206].

Performance and breach see Shipping [36 Cyc 208].

3. Escriche Diccionario; Commerce Code arts 439–442.

4. See Principal and Surety [32 Cyc 1].

5. Escriche Diccionario. See Affinity ante p 377.

6. Century D.

[a] **"Always afloat."**—The provision in a charter party that a ship should "load in the customary manner, always afloat," was held, according to the natural meaning of the words, to go no further than to impose a qualification of the charterer's right to load by negativing his right to put cargo on board except at times when the ship was afloat. Carlton Steamship Co. v. Castle Mail Packets Co., [1898] A. C. 486, 495.

7. Anderson L. D.

[a] **"Afore execution had."**—The statute, 3 Hen. VII c 10, enables a defendant in error to "recover his costs and damage for his delay" if a writ of error be sued out "afore execution had." It was held that the writ is sued out "afore execution had" if an execution has issued before the writ but has been rendered ineffectual by proceedings taken adversely to plaintiff below. Newlands v. Holmes, 4 Q. B. 858, 866, 45 ECL 858, 114 Reprint 1120.

8. Burrill L. D. [cit Dive v. Manningham, Plowd. 60, 67, 75 Reprint 96].

[a] **"As aforesaid" equivalent.**—Where an indictment charged the commission of larceny in the county "aforesaid," which was in the exact language of the statute except that the statute uses the words "as aforesaid" it was held that "aforesaid" and "as aforesaid" were equivalent terms, and hence that there was no variance. State v. Lillard, 59 Iowa 479, 13 NW 637.

9. Webster D. [quot Bryan v. Jones, 34 Ind. A. 701, 73 NE 1135]. To same effect Walker v. Petchell, 1 C. B. 652, 50 ECL 652, 135 Reprint 697.

10. Simpson v. Robert, 35 Ga. 180. To same effect Morley v. Greenhalgh, 3 B. & S. 374, 113 ECL 374, 122 Reprint 142; Rex v. Richards, 1 M. & Rob. 177.

[a] **Use of word in indictments.**—(1) In Bell v. Com., 8 Gratt. (49 Va.) 600, 605, it is said: "So that two counties had been previously mentioned before the county in which the larceny was committed is stated, and then the county where the larceny was committed is stated by the words 'in the county aforesaid,' without stating to which of the previously named counties the word 'aforesaid' had reference. This manner of stating the county where the theft was committed, is insufficient. 1 Chitty Cr. L. 160; Archbold Pl. & Ev. Cr. Cas. 49; 2 Gabbett Cr. L. 205; 1 Williams Saund. 308, note 1. According to some of these authorities, the word 'aforesaid' refers to the county last before named. If this be the correct construction, the word 'aforesaid' referred to the county of Roanoke, and then the Circuit Court of Campbell had no jurisdiction; and according to a part of these authorities, it is uncertain to which of the counties before named the word referred; and the Court cannot say in which county the offence was committed. But whichever of these may be the true construction, all the authorities agree that the indictment is bad." To same effect State v. McCracken, 20 Mo. 411. (2) Where but one county has been named reference to the county aforesaid is sufficient, aforesaid being synonymous with "named" and "before named." Reeves v. State, 20 Ala. 33, 35. (3) The words "articles aforesaid" in the second count in an indictment for larceny, with a reference to the goods mentioned in the prior count, do not operate to make an allegation of the value of the property in the first count and part of the second count. State v. Wagner, 118 Mo. 626, 629, 24 SW 219. (4) In Reg. v. Albert, 5 Q. B. 37, 42, 48 ECL 37, 114 Reprint 1161, Denman, C. J., said: "The objection, as now presented to us, brings the question to this: whether the parish of St. Stephen Coleman Street sufficiently appears by the indictment to be in the city of London. The Act 22 Car. 2, c. 11, shews that it is within the city; and, where an indictment mentions a parish in a county, and afterwards an act is alleged to have been done in the 'county aforesaid,' that averment as to place is sufficient." (5) In Reg. v. Hunt, 10 Q. B. 925, 927, 59 ECL 925, 116 Reprint 351, the first count of the indictment charged a conspiracy to defraud the prosecutor of his money by bringing an unfounded action on promises against him, which came on to be tried at the assizes for "the county of Surrey." The second count charged another conspiracy "at the parish aforesaid in the county aforesaid;" and the objection was, that as the county last named was Surrey, it appeared that the Middlesex jury could have had no jurisdiction to try the indictment. The court pointed out that the only "parish aforesaid" was alleged to be in the county of Middlesex. (6) The words "the aforesaid" preceding the words "neat cattle" could not transfer to the second count the allegations of number, sex, age, color, and brands characterizing the cattle described in the first count in an information for larceny and receiving stolen cattle. State v. Fields, 70 Kan. 391, 394, 78 P 833.

[b] **Use of word in pleading.**—In declarations the county aforesaid, where more than one is named, always refers to the margin. Sutton v. Fenn, W. Bl. 847, 96 Reprint 499.

[c] **Use of word in deed.**—(1) In a deed by the overseers of a certain county witnessed by the justices of the peace of "said county," describing themselves as "justices of the peace for the said county," the words "county aforesaid" have the same meaning as the words "said county" in the body of the deed. Rex v. Countesthorpe, 2 B. & Ad. 487, 490, 22 ECL 206, 109 Reprint 1224. (2) "Aforesaid," as used in a deed conveying all the right in equity which A has of redeeming certain mortgaged real estate at the time "aforesaid," refers not to the day of sale, which was the date last mentioned in the deed, but to a day previously named therein as being the time when the same was attached on mesne process. Sanborn v. Chamberlin, 101 Mass. 409, 418.

[d] **Use of word in wills.**—(1) Testator devised as follows: "I give and bequeath to my daughter Mary Gell, all the houses, outhouses, garden and other property which I now hold under the trustees of the poor of the township of Almondbury for the term of 999 years. And I also give one half part of my books to my daughter Mary Gell aforesaid. The other half to my widow Sarah Gell, to be equally divided by T. S. If my daughter Mary should happen to die unmarried, it is my will then that her part aforesaid shall be equally divided," etc. Abbott, C. J., said: "I think that the expression, 'her part aforesaid,' applies to the whole, which, by the former part of the will, had been given to the daughter." Doe v. Gell, 2 B. & C. 680, 681, 9 ECL 296, 107 Reprint 535. (2) Where a prior clause in the will prescribes the manner in which property of testator is to pass, and a subsequent clause devising certain property states that it shall pass in the manner "aforesaid," the property under the last devise will pass in the same manner as that specified in the first. Doe v. Woodall, 3 C. B. 349, 376, 54 ECL 349, 136 Reprint 140.

[e] **"Places aforesaid"** in the Pilot Act, allowing a master or mate of a vessel residing at Dover, Deal, or the Isle of Thanet to pilot his own ship from any of the places aforesaid,

the facts of the case.[11]

AFORETHOUGHT. Premeditated; prepense;[12] thought of beforehand.[13] In the phrase "malice aforethought," the term means thought of beforehand; premeditated; prepense;[14] premeditated and deliberate;[15] with malice after thinking;[16] malice preconceived.[17] When used in defining murder the term means a predetermination to kill, however

means the places mentioned in this section, namely, Dover, Deal, and the Isle of Thanet, not others previously mentioned in the act. Williams v. Newton, 14 M. & W. 747, 752; Peake v. Screech, 7 Q. B. 603, 53 ECL 603, 115 Reprint 616.

[f] **"Purposes aforesaid"** in Railways Clauses Consolidation Act (1845) § 32, refer to the purposes mentioned in the former part of the same section only, not to purposes mentioned in other sections of the act of a different character. Fenwick v. East London R. Co., L. R. 20 Eq. 544, 548, 22 ERC 281.

[g] **"Voyage or voyages aforesaid."**—The United States chartered a vessel to go to N and return. It was further stipulated that the charter should continue as long as the vessel was required by the United States. The United States also agreed to employ the vessel "on the voyage or voyages aforesaid." It was held that the contract embraced the employment of the vessel only when on such voyage or voyages and did not extend to demurrage. Mitchell v. U. S., 96 U. S. 162, 163, 24 L. ed. 702.

11. Simpson v. Robert, 35 Ga. 180, 181. See also Welker v. Appleman, 44 Ind. A. 699, 90 NE 35, 36.

In Reg. v. Eastern Counties R. Co., 2 Q. B. 347, 362, 42 ECL 706, 114 Reprint 136, it was held that the words "as aforesaid" used in a certain section of a statute did not necessarily apply to the preceding section alone but might refer to others also. To same effect Rex v. Bellamy, 1 B. & C. 500, 8 ECL 212, 107 Reprint 185.

[a] **Illustrations.**—(1) National Bank Act provided in effect that national banks may charge "interest at the rate allowed by the laws of the state or territory where the bank is located. . . . And when no rate is fixed by the laws of the state or territory, the bank may . . . charge a rate not exceeding seven per centum. . . . And the knowingly . . . . charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture," etc. The question before the court was whether aforesaid applied only to the immediately preceding clause, "when no rate is fixed by the laws of the state or territory," or to the whole section. It was held that there was no rule of grammatical construction which limited its reference to the paragraph immediately preceding. Central Nat. Bank v. Pratt, 115 Mass. 539, 543, 544, 15 AmR 138; Hintermister v. Chittenango First Nat. Bank, 64 N. Y. 212, 214 [overr Whitehall First Nat. Bank v. Lamb, 50 N. Y. 95, 10 AmR 438]. (2) In construing a railroad mortgage requiring in one article a six months' delay after default before foreclosure proceedings, and in another article providing for sale by advertisement after a similar term but concluding with a clause reading, "this provision is cumulative to the ordinary remedies by foreclosure in the courts; and the trustee herein, or its successor or successors in this trust, upon default being made as aforesaid, may," etc., it was held that the words "as aforesaid" did not refer back to the six months' provision in regard to default, and that a bill of foreclosure was authorized upon default of less than six months. The court in this case said: "We all know in the preparation of instruments how common the expressions 'said' or 'as aforesaid' are used without any clear or definite intent. They are words which we use, not thoughtlessly, but carelessly; and although they are used here, yet as it is also found that the continuance of the default is not mentioned, it seems to me it is giving to those words an enlarged and unnecessary force to hold that they broaden the expression 'making default' into 'making and continuing default,' as expressed in the first part of the article." Mercantile Trust Co. v. Missouri, etc., R. Co., 36 Fed. 221, 222, 223, 1 LRA 397. (3) In an indictment which avers that certain acts essential to the crime of libel charged occurred at the city of N in the county of E, wherein the venue is laid in the margin, and then sets out the libelous publication, in the body of which the city of H in H county is mentioned, and then proceeds to aver that other acts essential to the crime occurred "at the city and county aforesaid," the words "city and county aforesaid" refer to the city of N in the county of E, not to the city and county mentioned thereafter in the setting out of the publication. Haase v. State, 53 N. J. L. 34, 35, 36, 20 A 751.

[b] **"County aforesaid."**—By a parish indenture which purported to be made between the church warden, etc., of D parish in the county of N of the one part, and A B of C in the county of L of the other part, it was witnessed that the said church warden, etc., of D parish, with the consent of two of his majesty's justices of the peace for the said county, dwelling in or near said parish, had bound, etc. The justices in their written consent on the margin of the indenture described themselves as justices "for the said county." It was held that the words "county aforesaid" had the same meaning as the words "said county," and that it sufficiently appeared by reference to the latter words that the consenting justices were justices of the county of N and not of the county of L which was last named. Rex v. Countesthorpe, 2 B. & Ad. 487, 490, 22 ECL 206, 109 Reprint 1224.

[c] **"So as aforesaid."**—In Reg. v. Craddock, T. & M. 361, 365, Williams, J., was of the opinion that the words "so as aforesaid" meant "as I said before," but Pollock, C. B., doubted whether they were intended to refer to the matter immediately preceding.

[d] **"Time aforesaid."**—A sheriff's deed recited that the grantor, having taken on execution the equity of redemption which J. S. had at 9 A. M. on Jan. 27, 1865, "being the time when the same was attached on mesne process," in certain land, having given specified notices, and "having for sufficient cause duly adjourned the sale once, not exceeding seven days," sold the said equity on Dec. 23, 1865. The grant in the deed was of all the right to redeem which J. S. had at the "time aforesaid." It was held that the "time aforesaid" referred to the time of attachment, not to the day of sale, the date last mentioned. Sanborn v. Chamberlin, 101 Mass. 409, 414, 418.

12. Edwards v. State, 25 Ark. 444, 446; State v. Fiske, 63 Conn. 388, 391, 28 A 572; Peo. v. Ah Choy, 1 Ida. 317, 319 [cit Webster D.]; State v. Curtis, 70 Mo. 594, 598; Brannigan v. Peo., 3 Utah 488, 493, 24 P 767.

[a] **Terms compared.**—(1) "The words premeditated, aforesaid and prepense, possess etymologically the same meaning; they are, in truth, the Latin and Saxon synonymes, expressing a single idea, and possess in law precisely the same force." Peo. v. Clark, 7 N. Y. 385, 393, 2 Edm. Sel. Cas. 294, 11 NYLegObs 4 [quot Cook v. State, 46 Fla. 20, 35 S 665]. (2) "Premeditated and aforethought are synonymous; and premeditated malice and malice aforethought are in sense and meaning the same." Edwards v. State, 25 Ark. 444, 446. To same effect Peo. v. Ah Choy, 1 Ida. 317, 319; State v. Curtis, 70 Mo. 594, 598; Brannigan v. Peo., 3 Utah 488, 493, 24 P 767 (where the court said: "Webster says: 'To premeditate is to think, consider, resolve in the mind beforehand; to have formed in the mind by previous thought or meditation; previously contrived, designed, or intended; deliberate; willful.' That is, 'premeditated' includes within its meaning meditation and deliberation. He says that 'aforethought is premeditated; prepense; as malice aforethought.' That is, aforethought includes premeditated; malice aforethought is malice premeditated; and that malice premeditated is malice aforethought. He uses them interchangeably. Bouvier says 'premeditation' is 'a design formed to commit a crime, or to do some other thing before it is done. A deliberation and a continual persistence which indicates more perversity than will.' That is, premeditation is more than will, and includes deliberation. He says: 'Aforethought is premeditated, prepense; that is, aforethought includes premeditation.' Both of these standard authors give substantially the same or equal force and effect to the meaning of the word 'aforethought' that they do to the word 'premeditated' ").

13. State v. Fiske, 63 Conn. 388, 391, 28 A 572; State v. Tetrick, 199 Mo. 100, 103, 97 SW 564; State v. Forsha, 190 Mo. 296, 315, 88 SW 746, 4 LRANS 576; State v. Tate, 156 Mo. 119, 124, 56 SW 1099; State v. Musick, 101 Mo. 260, 267, 14 SW 212; State v. Dickson, 78 Mo. 438, 441.

[a] **Length of time immaterial.**—(1) "Aforethought" means thought of beforehand for any length of time, however short. State v. Heidelberg, 120 La. 300, 305, 45 S 256; State v. Tetrick, 199 Mo. 100, 103, 97 SW 564; State v. Forsha, 190 Mo. 296, 315, 88 SW 746, 4 LRANS 576; State v. Tate, 156 Mo. 119, 124, 56 SW 1099; State v. Musick, 101 Mo. 260, 267, 14 SW 212; State v. Dickson, 78 Mo. 438, 441. (2) In passing upon an instruction using the phrase "malice aforethought" in a murder trial, the court said: "'Aforethought' means a predetermination to do the act, however sudden or recently formed in the mind the resolution to do it has been made." Hathaway v. Com., 82 SW 400, 402, 26 KyL 630.

14. State v. Fiske, 63 Conn. 388, 391, 28 A 572 (where the court, after having given the definition above laid down, said: "Thus it appears that the adjective 'aforethought' describes, not the intent to take life, but the malice; and that malice must exist, must be previously and deliberately entertained, when the purpose to take life is formed, and must co-operate with the blow in producing death to constitute murder. In understanding malice aforethought malice must not be confounded with the intent to take life"). See also U. S. v. Cornell, 25 F. Cas. No. 14,868, 2 Mason 60; Peo. v. Ah Choy, 1 Ida. 317, 319; Com. v. Webster, 5 Cush. (Mass.) 295, 306, 52 AmD 711.

[a] **Malice to be aforethought** must be related to the unlawful act in the nature of cause and effect. Etheridge v. State, 141 Ala. 29, 37 S 337.

[b] **"Spite" or "malevolence" distinguished.**—So malice aforethought is not so properly spite or malevolence to the deceased in particular as any evil design in general; the dictate of a wicked, depraved, and malignant heart. Jones v. State, 29 Ga. 594; State v. Pike, 49 N. H. 399, 404, 6 AmR 533; Com. v. Drum, 58 Pa. 9.

15. Peo. v. Ah Choy, 1 Ida. 317, 319.

16. State v. Heidelberg, 120 La. 300, 305, 45 S 256.

17. State v. Peo., 6 Del. 488, 492, 33 A 257.

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recently formed in the mind before the killing.[18]

AFRAID. Impressed with fear or apprehension; fearful.[19]

AFRICAN. Of or belonging to the black race of Africa; characteristic of or peculiar to negroes.[20] (Cross references.[21])

AFTER.[22] Later in point of time;[23] thereafter;[24] at the end of;[25] as soon as;[26] at or immediately after;[27] on;[28] simultaneously;[29] upon;[30] subject to;[31] of;[32] within.[33]

In computation of time the word "after" is generally understood in the sense of excluding the day of the date mentioned.[34] But this is not necessarily the construction of the word under all circumstances; it has no absolute and invariable sense, but is to be taken to be exclusive or inclusive according as it will, in the particular case, effectuate the intention of the parties, and for the purpose of ascertaining that intention the context and subject matter are to be looked at and the instrument so construed if possible as to uphold the rights depending upon it.[35]

Order of right of enjoyment. The term does not always designate the time at which one thing is to

18. Freeman v. Com., (Ky.) 118 SW 917. See Homicide [21 Cyc 646, 706]; and supra notes 13, 14.

19. Century D.

[a] **"Apprehensive" synonymous.**—An affidavit under an attachment act stating that plaintiff was afraid that he would lose his demand unless an attachment should issue is sufficient, although the act reads: "That plaintiff is apprehensive that unless an attachment issued," etc. The court said: "I think the words are synonymous. To be 'apprehensive,' means that a person is suspicious, or fearful of something. I do not think the Act requires the word 'apprehensive' to be used in the affidavit. It is sufficient if any other word is used which expresses the same idea." Golding v. Waterhouse, 16 N. B. 313, 319.

20. Century D.

[a] **African descent.**—"They mention persons of African descent. If this expression means anything, it includes, necessarily, the South African Boers, more remotely of Dutch descent, and many Algerians, more remotely of French descent." Corin v. Glenwood Cemetery, (N. J. Ch.) 69 A 1083, 1084.

21. **African:**

As witness:
- Competency see Witnesses [40 Cyc 2200].
- Credibility see Witnesses [40 Cyc 2583].

Civil rights:
- Generally see Civil Rights [7 Cyc 158].
- Constitutional and statutory provisions see Constitutional Law [7 Cyc 160].
- Discrimination against see Constitutional Law [7 Cyc 167].
- In school see Schools and School Districts [35 Cyc 819, 1111].
- Right to become citizen see Aliens [2 Cyc 111].

See also Chinese [7 Cyc 128]; Citizens [7 Cyc 135]; Colored Persons [7 Cyc 400]; Creole [12 Cyc 66]; Indians [22 Cyc 109]; Japanese [23 Cyc 373]; Mulatto [28 Cyc 51]; Mustizo [28 Cyc 1780]; Negro [29 Cyc 661]; Quadroon [see 32 Cyc 1276]; Slaves [36 Cyc 465]; White Person [40 Cyc 928].

22. See Before [5 Cyc 679]; Time [38 Cyc 306].

23. Century D. See In re Stark, 149 Wis. 631, 653, 134 NW 389 (where the court said: "Now, the word 'after' does not always denote subordination in time, but may indicate merely subordination in right. Ordinarily, however, it is used to denote subordination in time, and we see no sign here of an intention to use it otherwise than in its usual sense. Furthermore, the fact that in both places the residue seems to be referred to as one constant, continuing fund, out of which the taxes and repairs are to be defrayed, strengthens the idea that the word 'after' is used here in its ordinary meaning").

24. Com. v. Pattison, 109 Pa. 165, 170.

[a] **Not meaning "upon."**—In construing provision 16 of the schedule to the constitution, providing that "after the expiration of the term of any president judge of any Court of Common Pleas, in commission at the adoption of this Constitution, the judge of such court, learned in the law and oldest in commission, shall be the president judge thereof," the court said: "It is a mistake to suppose the word 'after,' with which the sixteenth section commences, is employed in the sense of 'upon,' thereby limiting the application of the rule of succession to the single event of the expiration of each commission in force at the adoption of the Constitution. It was evidently used in the sense of 'thereafter' referring not only to the expiration of the respective commissions then in force but to the expiration of every subsequent commission." Com. v. Pattison, 109 Pa. 165, 171.

25. Hammond v. Thompson, 168 Mass. 531, 532, 47 NE 137.

26. Downing v. Wherrin, 19 N. H. 9, 86, 49 AmD 139.

27. Atwell v. Barney, Dudl. (Ga.) 207, 208; Downing v. Wherrin, 19 N. H. 9, 86, 49 AmD 139; Swinburne's Pet., 16 R. I. 208, 210, 14 A 850. See also Pennsylvania L. Ins., etc., Co.'s App., 6 P. Cas. 173, 10 A 130.

28. Auburn Theological Seminary v. Kellogg, 16 N. Y. 83, 87.

29. Hawley v. Kenoyer, 1 Wash. T. 609, 611.

30. Downing v. Wherrin, 19 N. H. 9, 86, 49 AmD 139; Hawley v. Kenoyer, 1 Wash. T. 609, 611.

[a] **"Upon" compared.**—Com. v. Pattison, 109 Pa. 165, 171 (supra note 24 [a]).

31. Hooper v. Hooper, 9 Cush. (Mass.) 122, 123; Lamb v. Lamb, 11 Pick. (Mass.) 371, 378. See also King v. King, 14 R. I. 143, 146.

32. Williams v. Burgess, 12 A. & E. 635, 636, 40 ECL 317, 113 Reprint 955.

[a] **When dealing with time subsequent to a given event** "of" and "after" mean the same thing. Re Lake Winnipeg Transp., etc., Co., 7 Man. 255, 261. To same effect Williams v. Burgess, 12 A. & E. 635, 40 ECL 317, 113 Reprint 955; Ex p. Fallon, 5 T. R. 283, 101 Reprint 159.

33. Gore v. Hedges, 7 T. B. Mon. (Ky.) 520, 521.

34. Vorwerk v. Nolte, 3 Cal. Unrep. Cas. 285, 24 P 840, 841; Holt v. Richardson, 134 Ga. 287, 67 SE 798; Fenlason v. Shedd, 109 Me. 326, 325, 84 A 409; Page v. Weymouth, 47 Me. 238, 244; Moore v. Bond, 18 Me. 142, 143; Windsor v. China, 4 Me. 298, 302; Bigelow v. Willson, 1 Pick. (Mass.) 485, 495; State v. Brown, 22 Minn. 482, 483; Judd v. Fulton, 10 Barb. (N. Y.) 117, 118, 4 HowPr 298; Butts v. Edwards, 2 Den. (N. Y.) 164, 167; Oswego Commercial Bank v. Ives, 2 Hill (N. Y.) 355, 356; Peo. v. Broome, 19 Wend. (N. Y.) 87; Menges v. Frick, 73 Pa. 137, 140, 13 AmR 731; Duffy v. Ogden, 64 Pa. 240, 241; Brisben v. Wilson, 60 Pa. 452, 457; Mark v. Russell, 40 Pa. 372, 373; Cromelien v. Brink, 29 Pa. 522, 524; Taylor v. Jacoby, 2 Pa. 495, 497, 45 AmD 615; Green's App., 6 Watts & S. (Pa.) 327, 328; Blunt v. Heslop, 8 A. & E. 577, 35 ECL 739, 112 Reprint 957; Watson v. Pears, 2 Campb. 294, 296.

[a] **Illustrations.**—(1) Under a statute authorizing an appeal from an award of arbitrators to be taken within twenty days after the entry of the award on the docket of the prothonotary, the party has a right of appeal for twenty days after the day on which the rule is so entered, and, where the award was entered on the second day of the month, an appeal taken on the twenty-second day of the same month was held within time. Sims v. Hampton, 1 Serg. & R. (Pa.) 411, 412. (2) Where the time for redemption is fixed at one day after the sale, that day cannot be the day of the sale, for the sale might be made at the last moment of the day and the owner thus be prevented from tendering on that day, and therefore the time mentioned must be the following day; the same is true of one or two years after. Edmundson v. Wragg, 104 Pa. 500, 502, 49 AmR 590. See also Cromelien v. Brink, 29 Pa. 522, 524. (3) Under a statute providing that where a debtor has assigned his property for the benefit of creditors his estate shall be distributed among his creditors "after" three months' notice has been given to his creditors to become parties to the proceedings, "after" means that the creditors must be allowed three months to become parties to the assignment, not that the distribution shall be made three months from the date of the assignment, but three months after notice was given, and, in computing the three months, the day on which the notice was given must be excluded. Page v. Weymouth, 47 Me. 238, 243. (4) A constitutional provision declaring that, in case the office of any judge shall become vacant before the expiration of the regular term for which he is elected, the vacancy shall be filled by appointment by the governor until a successor is elected and qualified, and that such successor shall be elected at the first annual election that occurs more than thirty days "after" the vacancy shall happen, means more than thirty days excluding the day on which the vacancy happens and the day on which the election occurs. State v. Brown, 22 Minn. 482, 483.

[b] **Exclusion of term.**—A statute declaring that a person held in custody from criminal prosecution shall be discharged unless he is brought to trial before the end of the third term "after" the indictment must be construed as excluding the term at which the indictment is found. Hammond v. State, 39 Nebr. 252, 255, 58 NW 92.

[c] **No distinction is made** in this connection between the words "after," "from or after" or "within" as to the question as to the exclusion of the last day. Menges v. Frick, 73 Pa. 137, 140, 13 AmR 731.

35. Sands v. Lyon, 18 Conn. 18, 27. To same effect Arnold v. U. S., 9 Cranch (U. S.) 104, 119, 3 L. ed. 671; State v. Mounts, 36 W. Va. 179, 190, 14 SE 407, 15 LRA 243.

"All the best authorities hold that the words 'from' and 'after' may be construed to include or exclude the day of the act, as will best serve to carry out the intention of the legislature, subserve public policy, avoid forfeiture, and validate a proceeding, rather than to annul the same," and, when the statute provided that the term of office of a jury commissioner should commence on the 1st day of June after his appointment, an appointment made by the judge on the

be done in reference to something else, but it may express the relative priority and subordination of one claim to another in matter of right.[36]

Phrases in which the word has been used have received judicial interpretation,[37] such as "after the cause of action accrued,"[38] "after the of the charges herein made thereon,"[39] "after the completion of the contract,"[40] "after the completion of said road,"[41] "after conviction,"[42] "after date,"[43] "after her death,"[44] "after his death,"[45] "after my death,"[46] "after the death of,"[47]

1st day of June conferred on the appointee the office of jury commissioner, and his term commenced on the said 1st day of June. State v. Mounts, 36 W. Va. 179, 190, 14 SE 407, 15 LRA 243.

[a] **Like the words "from," "succeeding," "subsequent,"** and other similar words, "after" in a devise of property to a beneficiary on condition that he shall pay to another a certain sum within one year after the testator's decease, or from, succeeding, or subsequent to his decease, where it is not expressly declared to be exclusive or inclusive, is susceptible of different significations, and is used in different senses, and with an exclusive or inclusive meaning, according to the subject to which it is applied; and, as it would deprive it of some of its proper significations to affix one invariable meaning to it in all cases, it would of course in many of them pervert it from the sense of the writer or speaker. Its true meaning therefore in any particular case must be collected from its context and subject matter, which are the only means by which the intention is ascertained. Sands v. Lyon, 18 Conn. 18, 27.

[b] **First or last day excluded.**—In construing the New York statute providing that writs of fieri facias may be issued, etc., "after the expiration of thirty days from the entry of such judgment," the court said: "According to the rule of construing statutes adopted by this court, the computation of the 30 days excludes the day of entering the judgment; in other words, as to the first and last days, one is to be counted exclusively and the other inclusively." Oswego Commercial Bank v. Ives, 2 Hill 355, 356. Compare Levy v. Acklen, 2 Tenn. Ch. A. 201, 219.

36. Treadwell v. Cordis, 5 Gray (Mass.) 341, 353; Minot v. Amory, 2 Cush. (Mass.) 377, 387; Lamb v. Lamb, 11 Pick. (Mass.) 371, 378; In re Kings County Trust Co., 141 App. Div. 43, 46, 125 NYS 713; In re Stark, 149 Wis. 631, 653, 134 NW 389. See also West v. Wright, 115 Ga. 277, 41 SE 602; Nolan v. Otney, 75 Kan. 311, 89 P 690, 9 LRANS 317.

[a] **In the devise of a remainder limited upon a life estate** this adverb of time is to be construed merely as relating to the time of the enjoyment of the estate, not to the time of its vesting in interest. Doe v. Considine, 6 Wall. (U. S.) 458, 18 L. ed. 869; O'Brien v. Dougherty, 1 App. (D. C.) 148; Burke v. Barrett, 31 Ind. A. 635, 67 NE 552; Lamb v. Lamb, 11 Pick. (Mass.) 371, 379; Hopper v. Demarest, 21 N. J. L. 525, 539; Haug v. Schumacher, 166 N. Y. 506, 514, 60 NE 245; Connelly v. O'Brien, 166 N. Y. 406, 408, 60 NE 20 [quot Clark v. Peters, 68 Misc. 252, 124 NYS 961]; Matter of Kings County Trust Co., 141 App. Div. 43, 125 NYS 713 [aff 68 Misc. 278, 125 NYS 159]; Trowbridge v. Coss, 126 App. Div. 679, 110 NYS 1108; Davidson v. Jones, 112 App. Div. 254, 256, 98 NYS 265; Ackerman v. Ackerman, 63 App. Div. 370, 372, 71 NYS 780; Canfield v. Fallon, 43 App. Div. 561, 57 NYS 149 [aff 161 N. Y. 623 mem, 55 NE 1093 mem]; Matter of Tienken, 60 Hun 417, 419, 15 NYS 470, 27 AbbNC 151; Vanderheyden v. Crandall, 2 Den. (N. Y.) 9, 19; Allen's Est., 109 Pa. 489, 496, 1 A 82; Chew's App., 37 Pa. 23, 29.

37. See infra notes 38–78.

38. Davis v. Pohlman, 128 Ill. A. 206, 208.

39. King v. King, 14 R. I. 143, 145, 146 (holding these words as equivalent to "subject to" the charges).

40. Delany v. Carpenter, 62 Misc. 416, 418, 114 NYS 990 (holding that the Mechanics' Lien Law providing that the notice of lien may be filed within ninety days after the completion of the contract means within ninety days after a substantial completion of the contract). See also Coffey v. Smith, 52 Or. 538, 541, 97 P 1079.

41. Vicksburg, etc., R. Co. v. Dennis, 116 U. S. 665, 669, 6 SCt 625, 29 L. ed. 770 (holding that a railroad charter which provided that road, fixtures, etc., should be exempt from taxation for ten years after the completion of the road did not exempt the road, fixtures, etc., from taxation before the completion of the road).

42. Blair v. Com., 25 Gratt. (66 Va.) 850, 852, 853 (holding that under the governor's power to grant a pardon conferred by the constitution which declares that he may "grant reprieves and pardons after conviction," the governor had authority to pardon a person "convicted" of a felony by a verdict of the jury before sentence was passed upon him by the court).

[a] **In North Carolina** under a similar provision it was held that a pardon may be granted pending an appeal, and that when the case is called for argument upon the merits the pardon may be pleaded in bar, since the words "after conviction" denote a verdict of guilty rendered by a jury. State v. Alexander, 76 N. C. 231, 233, 22 AmR 675.

[b] **In Arkansas** it has been held that the power to pardon "after conviction," vested in the governor by the constitution of 1864, is not prohibitory of the exercise of that power by the legislature before conviction. State v. Nichols, 26 Ark. 74, 78, 7 AmR 600.

43. Williams v. Jarrett, 5 B. & Ad. 32, 33, 27 ECL 24, 110 Reprint 703 (holding that the words in the Stamp Act, 55 Geo. III c 184, schedule pt 1 tit "Bill of Exchange," which imposed a certain duty on bills "exceeding two months after date," meant the time expressed on the face of the bill, not the time when it actually issued); Watson v. Pears, 2 Campb. 294, 295, 296 (holding that a patent providing that a specification should be enrolled within one calendar month next and immediately "after the date" thereof meant that the month did not begin to run until the day after the date of the patent, and a specification filed on June 10 for a patent dated May 10 was in sufficient time).

[a] **"From the day of the date" synonymous.**—The words "after date" and the words "from the day of the date" bear the same legal signification, as the law rejects fractions of a day. It views it for most purposes as an indivisible point, and consequently, "after date" or the "day of the date" being coextensive with the entire day, excludes it when it occurs in a bill, note, or bond, and to say that the day of payment in a note payable one day after date is not the day after the date but the day of the date itself would be contrary to the plain meaning of the words and the obvious design of the parties who evidently intended that the note should be payable on the second day. Taylor v. Jacoby, 2 Pa. 495, 496, 45 AmD 615.

[b] **"After date of appointment,"** and "from such date," which occurs in Rev. St. § 1556, fixing the annual pay of passed assistant surgeons of the navy, refer not to the original entry of the officer into the service as an assistant surgeon but to the notification by the secretary of the navy that he has passed his examination for promotion to the grade of surgeons, and will thereafter, until such promotion, be considered a passed assistant surgeon. U. S. v. Moore, 95 U. S. 760, 762, 24 L. ed. 588.

[c] **"After the date of the commencement of the term"** in a lease were construed to mean after the day of the date. Montreal Bank v. Woodcock, 9 Grant Ch. (U. C.) 141.

44. Theological Seminary v. Kellogg, 16 N. Y. 83, 87 (holding that these words in a bequest of all of testator's estate to her daughter for life with a remainder over, if the daughter die without issue, of a certain sum to a certain seminary, to be paid after the death of the daughter, indicate that the legacy is to take effect on the death of the daughter or not at all, and therefore the legacy is not void because limited on the happening of a contingency which is too remote).

45. Downing v. Wherrin, 19 N. H. 9, 86, 49 AmD 139 (holding that these words occurring in a devise, "my will is that if my son, J. should not marry and have lawful issue of his own body, after his death all the real estate that I have given him shall be equally divided between his three brothers," mean "upon his death," "as soon as he is dead," and therefore fix a definite time for the failure of issue upon which the limitation over should take effect, and so render it valid). See also Gernet v. Lynn, 31 Pa. 94, 97.

46. West v. Wright, 115 Ga. 277, 278, 41 SE 602 [quot Nolan v. Otney, 75 Kan. 311, 89 P 690, 9 LRANS 317] (where it was said: "Where the form of a deed is actually employed, such phrases as, 'after my death,' 'vest at my death,' 'take effect at my death,' and the like, may well be construed as merely designed to postpone possession or enjoyment by the grantee till after the death of the grantor").

47. In re Springfield, [1894] 3 Ch. 603, 606 (holding that, under a bequest after the death of A to the testator's next of kin according to the statute, A takes a life estate by implication upon the reasoning of Cotton, L. J., in Ralph v. Carrick, 11 Ch. D. 873, 25 ERC 669, as applied to a devise after the death of A to the testator's heirs; but not so where the bequest is, after the death of A, to persons who happen to be some members of the class of the testator's next of kin).

[a] **"Generally a bequest after the death** of a particular person, to whom an antecedent interest is given in the same will, is held not to denote a condition that the legatee shall survive such a person, not to define when the interest shall vest, but only to mark the time when the gift shall take effect in possession, that possession being deferred merely on account of the life interest limited to the person on whose death the gift is to take full effect: see note to Malim v. Keighley, 2 Ves. Jr. 333, 335, 30 Reprint 659, and cases there collected; King v. King, 1 Watts & S. (Pa.) 205, 37 AmD 459." Chew's App., 37 Pa. 23, 29.

[b] **"After the death of my said two daughters,"** as used in a will in which testator directed that "from and immediately after the death of my said two daughters, I give, devise, and bequeath all my said residuary estate, both real and personal, unto the child or children respectively of my said two daughters . . . share and share alike," means at the death of the two respectively, not the death of the survivor of the two. Pennsyl-

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"after their death,"[48] "after the entry,"[50] "after committed,"[51] "after the fire,"[52] "after an indefinite time,"[54] "after my decease,"[49] "after the fact committed,"[53] "after him,"[55] "after inventory and appraisement,"[56] "after judgment,"[57] "after judgment recovered,"[58] "after loss,"[59] "after an order has been made,"[60] "after the passage,"[61] "after passing,"[62] "after payvania L. Ins., etc., Co.'s App., 6 Pa. Cas. 173, 174, 10 A 130.

48. Swinburne's Pet., 16 R. I. 208, 210, 14 A 850 [cit Trotter v. Oswald, 1 Cox. Ch. 317, 29 Reprint 1183; Pinbury v. Elkin, 1 P. Wms. 563, 24 Reprint 518; Wilkinson v. South, 7 R. 555, 558, 101 Reprint 1129].

[a] **In construing a will** providing that, "should either of my above named children die leaving no legal heirs born of their own body, then I give their shares after their death to my then living heirs," the court said: "It seems to us that 'after their death' obviously means immediately after their death, not an indefinite length of time afterwards, the words being introduced to fix definitely the time at which the bequest over is to take effect." Swinburne's Pet., 16 R. I. 208, 210, 14 A 850. To same effect Atwell v. Barney, Dudl. (Ga.) 207; Downing v. Wherrin, 19 N. H. 9, 49 AmD 139.

[b] **"After their respective deaths."**—Where a will provided for the payment of an income from a certain fund to two brothers and after their death directed the distribution of the fund, the words "after their death," in the above clause of the will, were construed to mean "after their respective deaths." Collins v. Wardell, 65 N. J. Eq. 366, 370, 371, 54 A 417.

49. Wilson v. Carrico, 140 Ind. 533, 537, 40 NE 50, 49 AmSR 213 (where it was said: "In the case of Owen v. Williams, 114 Ind. 179, 15 NE 678, the instrument in contest was in the form of a deed and in the granting clause, by its terms, 'did convey and warrant to Williams after my decease and not before.' This court held that the phrase 'after my decease and not before' did not make the deed testamentary, but was meant and operated to show that the grantee's use and enjoyment of the realty would not begin under the deed until after the death of the grantor").

50. Smith v. Pegg, 111 Mich. 232, 233, 69 NW 488 (holding that under a statute providing that an action on a decree shall be brought within ten years "after the entry" thereof the time begins to run against the right to recover a deficiency after a sale under foreclosure from the date of the decree of sale, not from the filing of the report of sale or the order affirming the same).

51. Collins v. Rose, 5 M. & W. 194, 201, 202 (holding that under 53 Geo. III c 127 § 12, which requires that an action for anything done in pursuance of the act shall be commenced within three calendar months after the fact committed, an action of trespass for seizing, taking, and carrying away, and distraining and selling plaintiff's goods, under a warrant of distress for arrears of a church rate, may be brought within three calendar months after the sale. For, said the court: "'The fact committed' under colour or in pursuance of the statute, is not merely the seizure, but the sale also. The seizure of the goods is made not absolutely, but with a view to their detention only until the amount should be paid, and their subsequent sale if it should not: and the seizure, when a sale has taken place, is but part of the entire act complained of, and which forms the real grievance to the plaintiff").

52. National Wall Paper Co. v. Associated Mfg. Mut. F. Ins. Corp., 175 N. Y. 226, 228, 67 NE 440 [aff 73 App. Div. 627 mem, 77 NYS 1133 mem] (holding that the phrase after the fire, in the provision of a fire insurance policy requiring proofs of loss in case of fire to be served within sixty days after the fire, means that the proofs of loss should be served within sixty days after the fire has terminated, or abated to such an extent that an inspection of the property damaged may be had).

[a] **"After loss" synonymous.**—Hogl v. Aachen Ins. Co., 65 W. Va. 437, 438, 64 SE 441, 131 AmSR 972. See infra note 58.

53. See cases infra this note.

[a] **In wills.**—(1) In construing a will reading: "I give and bequeath to my son, William E. Nesbit, and his heirs after him, all my real estate," the court said: "There is no distinction, legal or grammatical, between the words 'after him,' or 'after his death,' or 'after his decease.' The use of the words 'after him' must be construed to mean the same as if the provisions of the will read 'after his death' or 'after his decease.' In a legal sense the devisee could have no heirs while he lived, they became his heirs 'after him,' that is, 'after his decease.'" Nesbit v. Skelding, 213 Pa. 487, 488, 489, 62 A 1062. (2) In Whitford v. Armstrong, 9 R. I. 394, 395, the devise was "to my nephew, Amos Whitford . . . if he leaves any lawful issue, to his heirs and assigns forever, and if he has no lawful issue after him, to my three children," and it was held that the estate given to the nephew was an estate tail, despite the words "after him." Compare In re Wood, 28 R. I. 290, 67 A 8, 125 AmSR 738; Bullock v. Waterman St. Baptist Soc., 5 R. I. 273. (3) In Donn v. Penny, 19 Ves. Jr. 545, 547, 34 Reprint 618, the gift was of all the testator's real and personal estate in the following words: "For want of male issue after him I give the same to my cousin William Donn," etc. It was held that the words "after him" did not vary the legal construction of the words of the devise "for want of male issue."

54. Knecht v. Boshold, 188 Ill. A. 430, 431 (holding that a note payable "after an indefinite time" is in contemplation of law a note payable on demand).

55. Nichols v. Lee, 16 Colo. 147, 156, 26 P 157 (where in construing the statute providing that after inventory and appraisement resort may be had to the real estate, if it appears that the personal estate of the decedent is insufficient to discharge debts, the court said: "The words 'after inventory and appraisement' can properly be taken only as a designation of the time at which, or before which, the administrator may not make his application. It is simply a statutory method of fixing the order of the proceedings, and in no sense can be so held to be a condition precedent as to make a failure to observe that statutory provision necessarily fatal to the proceedings").

56. Owston v. Coates, 10 A. & E. 193, 197, 37 ECL 123, 113 Reprint 74 (where under a motion by persons who had given bond, under 1 & 2 Vict. c 110 § 8, for abolition of arrest on mesne process, to be allowed to render their principal after verdict against him and before judgment, said section reading as follows: "If a creditor of a trader . . . shall file an affidavit in the Court of Bankruptcy, that his debt is justly due . . . 'and if such trader shall not within twenty-one days . . . enter into a bond . . . to pay . . . or to render himself . . . according to the practice of such Court . . . after judgment shall have been recovered,'" in such action such trader shall be deemed to have committed an act of bankruptcy, etc., the court said: "Some doubt existed as to the words 'after judgment' in the eighth section, namely, whether they apply to the whole preceding matter or not: as to which we think that, at all events, they do not apply to a render 'according to the practice of such Court;' and as bail would, by that practice, have been at liberty to render a defendant after verdict and before judgment, we think that the obligors in this bond must be at liberty to do the same").

[a] **Terms compared.**—The phrases "next after judgment," "next after the rendering of judgment," "from the rendition of judgment," "from the time of rendering judgment," "after entering up final judgment," and "after judgment entered of record," occurring in various statutes providing that certain proceedings may be had within fixed times after the event designated by such phrase, all refer to the same time. And this, according to an intendment of law and the practice of the New Hampshire courts, is the last day of the term in which the record shows the judgment to have been rendered, unless the true time of entering the judgment appears upon the record. New Hampshire Strafford Bank v. Cornell, 2 N. H. 324, 331.

57. Whitehead v. Bishop, 28 N. B. 311, 317 (holding that the statute which provides that "when the defendant is arrested on mesne process, and is not admitted to bail, or is rendered by his bail, he shall be held in custody for seven days after judgment recovered" does not apply to a case where the judgment was recovered against defendant before he was rendered by his bail).

58. Hogl v. Aachen Ins. Co., 65 W. Va. 437, 438, 64 SE 441, 131 AmSR 972 (holding that there is no difference in policies prescribing a time limit "after loss" and those fixing it "after the fire").

59. Kansas City Southern R. Co. v. Boles, 88 Ark. 533, 541, 115 SW 375 (where, in construing a statute providing that limitations shall not bar proceedings by a municipality to remove or abate a street encroachment or to punish for its continuance after an order has been made for its removal, it was held that the clause "after an order has been made" limits the clause "or punish for its continuance" and does not postpone the time at which limitations cease to run against the city until the order has been made for the removal or abatement of the encroachment).

60. Scales v. Marshall, 96 Tex. 140, 143, 70 SW 945 [quot Shook v. Laufer, (Tex. Civ. A.) 100 SW 1042, 1046] (holding that the words "after the passage" used in an act of the legislature do not "so plainly show an intention to fix a date differing from that of the taking effect of the statute as to control").

[a] **"After the passage of this act"** means after the act took effect. Shook v. Laufer, (Tex. Civ. A.) 100 SW 1042, 1046.

61. Tomlinson v. Bullock, 4 Q. B. D. 230, 233 (holding that an act in contemplation of law comes into effect from the commencement of the day on which it received the royal assent; and, inasmuch as the law takes no notice of the fractions of a day, where the right of a single woman who is delivered of a bastard child to apply for an order of affiliation depends on the birth of her child "after the passing of the Act" it is sufficient if the child is born on the day the act receives the royal assent).

[a] **Whole day included.**—"From the impracticability of deciding at what particular moment of time the president gives his seal to a bill, we have never heard of such inquiry being made, and the least which courts have ever said on such occasions, is, that where an act is to take place from the day of its passing . . . it must embrace the whole of that

ing,"[62] "after peace,"[63] "after the posting,"[64] "after proof of loss,"[65] "after providing for the bequest to,"[66] "after reflection,"[67] "after repairs,"[68] "after settling my estate,"[69] "after shipment to the state,"[70] "after sight,"[71] "after the taking effect of this act,"[72] "after the termination of each month,"[73] "after the time,"[74] "after the trial,"[75] "after the verdict,"[76] "after work,"[77] "for the space of one month after."[78]

After payment. The phrase "after payment of debts," when used in a will devising real estate after the payment of debts and legacies, is sufficient to charge testator's real estate with the payment of such debts and legacies.[79] "After the principal and interest aforesaid shall be paid" may be regarded as if it read "upon" such payment.[80]

"**After that**" may mean "thereafter."[81]

"**After which,**" "whereupon," and "upon

day." U. S. v. Williams, 28 F. Cas. No. 16,723, 1 Paine 261.

62. Paul v. Philbrick, 73 N. H. 237, 241, 60 A 682 (holding that the phrase "after paying the above bequests" naturally signifies "after paying them according to the terms of payment prescribed by the provisions making the bequests").

"After payment" see infra text and notes 79, 80.

63. Chapman v. Wacaser, 64 N. C. 532, 533 (holding that the words "ten days after peace is made between the United States and the Confederate States," used in a bond to specify the time at which the money is payable, means "ten days after peace," and does not render the ratification of a treaty of peace between the powers mentioned a condition precedent to the payment).

64. Oakland Bank v. Sullivan, 107 Cal. 428, 430, 40 P 546 (holding, under a statute requiring fifteen days to expire "after the posting" of notice before a municipal council can order street car work to be undertaken, that the council may make such order after fifteen days from the first posting of the notice).

65. Hogl v. Aachen Ins. Co., 65 Va. 437, 438, 64 SE 441, 131 AmSR 972 (holding that, under a policy providing that no suit shall be brought before sixty days after proof of loss and within twelve months from the fire, the twelve months do not begin until the end of the sixty days).

66. Hooper v. Hooper, 9 Cush. (Mass.) 122, 128 (where, in construing a clause of a will reading, "I give to my sons . . . each one ninth part of my estate, real and personal, after providing for the bequest to my wife," it was said that the word "after" used in such a connection is often and properly construed to mean "subject to," "after taking out, deducting, or appropriating").

67. Lang v. State, 84 Ala. 1, 5, 4 S 193, 5 AmSR 324 (holding that, in an instruction that if defendant purposely killed deceased after reflection, with wickedness or depravity of heart, etc., defendant was guilty of murder in the first degree, "after reflection" was equivalent to a statement of deliberation).

68. Mattocks v. Cullum, 6 Pa. 454, 457 (where, in construing a lease providing that all after repairs were to be at the expense of the lessee, the court said: "To what does the word after refer? It is very clear, to all the expenses which may be necessary after the property is thoroughly repaired. Thus the contract is, that the lessor shall put it in complete order, and the lessee shall keep it so until the termination of the lease").

69. Lamb v. Lamb, 11 Pick. (Mass.) 371, 377, 378 (where, in construing a clause in a will reading, "It is my will, that after settling my estate, my wife have the interest of the remainder of my personal estate," the court said: "'After settling my estate,' seem equivalent to 'subject to the settlement.' The word 'after,' does not always or necessarily refer to time, but to order in point of right and enjoyment").

70. Bacon v. Locke, 42 Wash. 215, 220, 83 P 721, 7 AnnCas 589 (where, in construing a statute providing that every person, firm, or corporation that should peddle out, or, after shipment to the state, canvass and sell by sample to users or consumers certain named articles should pay a license tax, the court said: "He [the respondent] contends that the phrase 'after shipment to the state' refers to persons and not to property; and also that it is susceptible of the construction that would express an intention that nonresidents who send their agents into this state simply to canvass and take orders for their principals are excepted from the requirements of the statute, and that no others are excepted. We are unable to recognize force in these contentions. . . . The effect of the usual and ordinary meaning of the language employed in the statute being to require of a canvasser a license when selling goods shipped from a sister state to this, but not imposing a like obligation upon one canvassing for goods manufactured in this state, we are constrained to hold the statute inhibited by the Federal constitution").

71. Mitchell v. Degrand, 17 F. Cas. No. 9,661, 1 Mason 176 (holding that "a bill, payable in so many days after sight, means after so many days legal sight"). See Bills and Notes [7 Cyc 601].

72. Eddy v. Morgan, 216 Ill. 437, 446, 75 NE 174 (holding that this phrase has reference only to consequences of the act or things that shall follow its passage, not to things that have already taken place, to rights that have already accrued and been lost for want of a provision covering them).

73. Hammond v. Thompson, 168 Mass. 531, 532, 47 NE 137 (holding that a lease providing that rent is payable "after the termination of each month" means the end of the last day of the monthly term, and, although rent accrues on the last day of the term, it does not accrue until the end of that day, and hence a conveyance in the afternoon of the last day of the monthly term is a conveyance before rent accrues, within the rule that a lessor conveying the premises before rent accrues cannot recover the appropriated amount due to the time of the conveyance, although there is no eviction by him or attornment to him).

74. Kelley v. Bell, 172 Ind. 590, 594, 88 NE 58 (holding that, in an action by a judgment creditor to set aside the debtor's transfers of property as fraudulent, an allegation in the complaint that "after the time" of the transfer the judgment creditor did not have sufficient property to pay his debts, instead of "at the time" of the transfer, was sufficient, as the words "after the time" had relation to and commenced the moment the transfer was made, and in that connection meant "from the time" of the transfer).

75. Palmo v. Slayden, 100 Tex. 13, 15, 92 SW 796 (holding that the phrase "after the trial" as used in a statute providing for making out a written statement of facts of the evidence on the trial was broad enough to embrace the entry of a judgment, nunc pro tunc, as part of the trial and justified the court in making and certifying the statement of facts after judgment had been actually entered).

76. Wood v. Grimwood, 10 B. & C. 689, 701, 21 ECL 291, 109 Reprint 606 (where, in construing Geo. IV c 50, enacting that the party who shall apply for a special jury shall pay the costs occasioned thereby unless the judge before whom the cause is tried shall immediately after the verdict certify that the cause was proper to be tried by a special jury, it was held that a defendant who had applied for a special jury was not entitled to the costs of that jury, where the judge who tried the cause nonsuited plaintiff on his opening, even though the judge had certified as above).

77. Houghton v. Manufacturers' Mut. F. Ins. Co., 8 Metc. (Mass.) 114, 125, 41 AmD 489 (where, under a fire insurance policy which required an examination of the mill "thirty minutes after work," it was held that the assured were bound, by their representation that the mill was examined thirty minutes after work, to make such examination thirty minutes after the extra work as well as after regular work, and also that the question what is a cessation of work at the factory, from which the thirty minutes are to be computed, is a question for the jury, under all the circumstances of each particular case).

78. Gore v. Hedges, 7 T. B. Mon. (Ky.) 520, 521 (holding that the phrases, "for the space of one month after the return day," and "within one month from the return day," are equivalent expressions).

79. Fenwick v. Chapman, 9 Pet. (U. S.) 461, 470, 9 L. ed. 193; Wright v. West, 30 F. Cas. No. 18,102, 1 Cranch C. C. 303; In re Fox, 52 N. Y. 530, 536, 11 AmR 751; Reynolds v. Reynolds, 16 N. Y. 257, 259; Smith v. Coup, 6 Dem. Surr. (N. Y.) 45, 48; In re Rosenfield, 5 Dem. Surr. (N. Y.) 251, 255; Lupton v. Lupton, 2 Johns. Ch. (N. Y.) 614, 623; In re Hesdra, 20 NYS 79, 80, 2 Conn. Surr. 514; Hoff's App., 24 Pa. 200, 203; King v. King, 14 R. I. 143, 146; Tompkins v. Tompkins, Prec. Ch. 397, 24 Reprint 178; Shallcross v. Finden, 3 Ves. Jr. 738, 739, 30 Reprint 1247; Kidney v. Coussmaker, 1 Ves. Jr. 436, 440, 30 Reprint 424.

80. Hawley v. Kenoyer, 1 Wash. T. 609, 611 (holding that a contract providing that the title shall remain in plaintiff until "after" the purchase price and interest aforesaid shall be paid is equivalent in law to a sale simultaneously with payment; in other words, it amounts to a sale on payment).

81. Wright v. Georgia R., etc., Co., 216 U. S. 420, 422, 423, 30 SCt 242, 54 L. ed. 544 (where, in construing the charter of a railroad which contained a provision of exemption from taxation as follows: "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads, or any of them; and after that, shall be subject to a tax," etc., it was held that the words "after that" were equivalent to the word "thereafter" and related to the entire period of time after the expiration of the seven years of total exemption and were not to be construed as limited by another provision in the charter for a definite period during which the corporation should exercise exclusive rights).

which'' are interchangeable.[82]

AFTER-ACQUIRED TITLE or PROPERTY.[83]

AFTER-BORN CHILD. A child actually born after the execution of a will and of whose existence the father is supposed to be ignorant at the time of making his will.[84] (Cross references.[85])

AFTERNOON. The word has two senses. It may mean the whole time from noon to midnight,[86] or it may mean the early part of that time as distinguished from the evening.[87] It has been held that an adjournment to the afternoon of a certain day is too indefinite.[88]

AFTERWARD or AFTERWARDS.[89] In later or subsequent time;[90] thereafter.[91]

82. Lee v. Cook, 1 Wyo. 413, 419.

83. After-acquired title or property:
Application to, of restraining order in supplementary proceedings see Executions [17 Cyc 1433].
As defense in suit or action:
For trespass on public lands see Public Lands [32 Cyc 787].
Of:
Ejectment see Ejectment [15 Cyc 62].
Trover see Trover and Conversion [38 Cyc 2061].
To quiet title see Quieting Title [32 Cyc 1343].
Assignment of see Assignments [4 Cyc 68].
As subject to chattel mortgage:
Generally see Chattel Mortgages [6 Cyc 1041, 1042, 1043].
Where in renewal or substitution of property already on hand see Chattel Mortgages [6 Cyc 1044].
Burden of proof as to see Chattel Mortgages [6 Cyc 1045]; Landlord and Tenant [24 Cyc 1247].
Conclusiveness of judgment as to see Judgments [23 Cyc 1331–1336].
Contract to sell or convey see Husband and Wife [21 Cyc 1261]; Vendor and Purchaser [39 Cyc 1213].
Conveyance of:
Generally see Deeds [13 Cyc 637].
By agent see Principal and Agent [31 Cyc 1363].
Description of in will see Wills [40 Cyc 1556].
Effect of:
Assignment for benefit of creditors on see Assignment for Benefit of Creditors [4 Cyc 214].
Marriage agreement as to see Husband and Wife [21 Cyc 1261].
Supplementary proceedings on see Executions [17 Cyc 1417].
Estoppel to assert, created by:
Deed see Estoppel [16 Cyc 689].
Simple contract see Estoppel [16 Cyc 783].
Examination as to, in supplementary proceedings see Executions [17 Cyc 1406, 1441].
Indefinite description of see Landlord and Tenant [24 Cyc 1247].
In equity see Estoppel [16 Cyc 691]; Sales [35 Cyc 46].
Intention of parties as to see Husband and Wife [21 Cyc 1261].
Lien on:
Generally see Liens [25 Cyc 670].
Judgment see Judgments [23 Cyc 1376].
Landlord's see Landlord and Tenant [24 Cyc 1246].
Mechanic's see Mechanics' Liens [27 Cyc 229].
Tax see Taxation [37 Cyc 1140].
Mortgage of:
By:
Corporation see Corporations [10 Cyc 117].
Electrical company see Electricity [15 Cyc 469].
Railroad see Railroads [33 Cyc 487, 499].
Street railroad see Street Railroads [36 Cyc 1440].
Estoppel by:
Generally see Estoppel [16 Cyc 692].
Personalty see Chattel Mortgages [6 Cyc 1041].
Realty see Mortgages [27 Cyc 1141].
Necessity of pleading see Estoppel [16 Cyc 809].
Of bankrupt after adjudication see Bankruptcy [5 Cyc 343].
Operation of will upon see Wills [40 Cyc 1042–1045].
Receiver's rights to:
Generally see Receivers [34 Cyc 44, 188].
In supplementary proceedings see Executions [17 Cyc 1466].
Right of:
Defendant to show, in action for breach of covenant see Estoppel [6 Cyc 809].
Holder to recover for nuisance see Nuisances [29 Cyc 1258].
Purchaser at execution sale see Executions [17 Cyc 1293].
Second examination as to, in supplementary proceedings see Executions [17 Cyc 429].
Trustee in bankruptcy to see Bankruptcy [5 Cyc 343].
Sale of see Sales [35 Cyc 45, 46].
Settlement of, upon husband or wife see Husband and Wife [21 Cyc 1261].
Sufficiency of, to support:
Action of:
Ejectment see Ejectment [15 Cyc 29].
Trespass to try title see Trespass to Try Title [38 Cyc 1196].
Contract for sale of realty see Vendor and Purchaser [39 Cyc 1529].
Under the Spanish law see Estoppel [16 Cyc 691].

84. McCulloch's App., 113 Pa. 247, 255, 6 A 253 (where the court said: "The learned Auditor, as we think, rightly held that the Act of 1833, in providing for after-born children, means a physical birth, and not a mere legislative legitimation, after making the will; that it was intended to provide for children, actually born after the execution of a will, and of whose existence their father is supposed to be ignorant at the time of making his will, and not for those previously born and then in full life").

[a] **Confined to legitimate children.**—See Dover v. Alexander, 2 Hare 275, 24 EngCh 275, 67 Reprint 114.

85. After-born child:
Abeyance of estate of see Descent and Distribution [14 Cyc 40].
As beneficiary in action for death of parent see Death [13 Cyc 366].
As heir or distributee see Descent and Distribution [14 Cyc 39].
Conclusiveness of:
Judgment on see Judgments [23 Cyc 1245, 1246, 1278].
Partition proceedings on heir born pendente lite see Partition [30 Cyc 212].
Death caused by injuries inflicted before birth see Homicide [21 Cyc 663].
Divestiture of inheritance of see Descent and Distribution [14 Cyc 40].
Effect upon will see Wills [40 Cyc 1052].
Inheritance by see Descent and Distribution [14 Cyc 39].
Pauper settlement of see Paupers [30 Cyc 1102].
Posthumous Child [31 Cyc 966]; Pretermitted Children [14 Cyc 55].

86. Peo. v. Husted, 52 Mich. 624, 625, 626, 18 NW 388 (where it was held that a complaint for not closing a saloon "at the hour of nine o'clock" on a specified day, and for keeping it open "until twenty minutes past eleven o'clock in the afternoon of said day," was not bad for failing to show that nine o'clock at night was meant and for using the word "afternoon," and the court said: "Counsel for defendant insists that the complaint names an impossible time, and he cites Webster's and Worcester's unabridged dictionaries to prove that the word 'afternoon' signifies from 'noon' until 'evening,' and that 'night' is the time from sunset until sunrise. Accurately and properly speaking the definitions are correct. But we think the distinction as applied to the complaint in this case is too critical. The pleader was not referring to the period of time between 'noon' and 'evening,' but to the hours that had elapsed since the hour of noon, and when that is stated to be until twenty minutes past eleven o'clock it is pretty certain that in this latitude it was after the hour of nine o'clock at night").

87. In Reg. v. Knapp, 2 E. & B. 447, 450, 75 ECL 447, 118 Reprint 834, under an act of parliament prohibiting the keeping open of a place for the sale of liquor "during the usual hours of . . . Afternoon Divine Service" in the parish church, where the evening service was read in the church at six p. m., but there was an afternoon service at two P. M. in the parish workhouse, and the innkeeper had his place open for the reception of customers at half past six o'clock P. M., Lord Campbell, C. J., said: "The legislature has not said that it shall be penal to keep open an inn during evening service, but during afternoon Divine service. . . . Was then this evening service, performed at six o'clock, afternoon service? No: it certainly was evening service. In the parish of Newport Pagnell since 1836 there is no afternoon service in the church; it is in the workhouse; and the hours at which the evening service is performed in the church are no more the usual hours of afternoon Divine service than they would be if the afternoon Divine service, instead of being performed in the workhouse, was performed in the church." The conviction was quashed.

88. In Edwards v. Hance, 12 N. J. L. 108, it was held that if a justice after hearing a cause takes time to consider the same he must either make an adjournment to a regular day and hour or give notice to the parties of the day and hour when judgment will be rendered, and it is not sufficient that the justice should say that he will render judgment on Monday afternoon.

89. See After ante; Thereafter [38 Cyc 280]; Time [38 Cyc 306].

90. Century D.

[a] **Continuance without intermission.**—In a count in a declaration, after stating an assault by defendant alleging "and there afterwards the said Benjamin, continuing his assault," "afterwards" may be understood to imply nothing more than a continuance of the trespass without intermission of time. Benson v. Swift, 2 Mass. 50, 53, 54.

[b] **Property acquired afterward.**—"Afterward," as used in a statute defining separate property as that owned before marriage and that acquired by certain means "afterward," means after the marriage but during the existence of community rights in property. In re Spencer, 82 Cal. 110, 113, 23 P 37.

[c] **After the trial has been reached.**—The Queen's Bench Act (1895) Rule No. 983, provides as to pending business in the court of queen's bench that "in all cases the action, suit, matter or proceeding shall be continued up to the trial or hearing, according to the previous practice of the said Court, and afterward according to the provisions of this Act." The court said: "The word 'afterward' should be construed as meaning 'after the trial has been reached.'" Robertson v. Brandes, 11 Man. 264, 270, 271.

91. Sleigh v. Strider, 5 Call (9 Va.)

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AGAINST.[92] In opposition to; adverse or hostile to;[93] toward;[94] without.[95] While the word not infrequently presents the idea of physical contact or collision,[96] it does not always import physical contact;[97] and, the particular meaning of the word depends to a considerable extent on the connection in which and the purpose for which it is used.[98]

As applied to motion, in an opposite direction to, so as to meet; (a) toward; (b) upon; as to strike against a rock; the rain beats against the window; to ride against the wind.[99]

Phrases in which the word has been used have received judicial interpretation, such as "against all casualties,"[1] "against bankruptcy law,"[2] "against the bonds,"[3] "against evidence,"[4]

439, 442 (where, in construing a statute providing that "where a man, having, by a woman, one or more children, shall afterwards intermarry with such woman, such child, or children, if recognized by him, shall thereby be legitimated," the court said: "The word 'afterwards' can never be applied but to a thing spoken of before. . . . If the sense contended for, by Mr. Call, were the proper sense of the law, the word 'afterwards' would be construed as the word 'hereafter:' But I am confident, that there is not a lexicon in the English language, in which it will be found in that sense. Its synonyme is 'thereafter' ").

[a] **Intention in use of word.**—In Peavey v. Brown, 22 Me. 100, 104, a witness testified, "But he afterwards got some one to look at or over the note and then refused to give the new note, &c." It was contended that, as the word "afterwards" would apply alike to a subsequent part of the same conversation at another subsequent time, the language was ambiguous, equivocal, and insufficient. The court said: "The term 'afterwards' is certainly susceptible of both these meetings, and we must look at the whole sentence in which it stands, to ascertain the intention of the witness."

[b] **"Afterwards die, leaving no issue,"** in a bequest of property by a testator to his wife for life, and if his daughter M should be dead at the death of the wife without issue, or should "afterwards die, leaving no issue," then to the beneficiaries, is to be construed as importing the failure of issue at the death, not an indefinite failure of issue. Griswold v. Greer, 18 Ga. 545, 550.

92. See also Versus [40 Cyc 196].

93. Century D.

[a] **Competency of witnesses.**—(1) A statute providing that no party as to certain transactions shall be examined against certain other persons does not mean, by against, on opposite sides of a suit, but having opposing interests in the suit, whether on the same side as coplaintiffs or codefendants or on opposite sides as plaintiffs and defendants. Coffman v. Hedrick, 32 W. Va. 119, 124, 9 SE 65, 67; Seabright v. Seabright, 28 W. Va. 412, 465. (2) The exception, in the statute removing the disqualification of parties as witnesses, that neither party shall be allowed to testify against the other as to transactions with a deceased person does not prevent a party from being called to testify for the other. Dudley v. Steele, 71 Ala. 423. (3) As adultery is a crime "against" the husband or wife, they are competent witnesses against each other upon the trial. State v. Bennett, 31 Iowa 24, 25 [quot State v. Chambers, 87 Iowa 1, 4, 53 NW 1090, 1091, 43 AmSR 349]. (4) Within the statute making husband and wife competent witnesses in all cases, except that in divorce on account of adultery neither shall be competent or compellable to give evidence for or "against" the other, a wife, when accused of adultery in divorce proceedings against her, by denying her guilt does not give evidence against the husband merely because it tends to defeat his action. Broom v. Broom, 130 N. C. 562, 564, 41 SE 673. (5) Bigamy is an offense "against" the marital relation within the meaning of the rule. State v. Sloan, 55 Iowa 217, 220, 7 NW 516 [quot State v. Chambers, 87 Iowa 1, 53 NW 1090, 1091, 43 AmSR 349]. Compare Peo. v. Quanstrom, 93 Mich. 254, 53 NW 165, 17 LRA 723. (6) Under a statute providing that neither the husband nor wife shall be a witness against the other except in a criminal proceeding for a crime committed by one against the other, it was held that incest by a husband with his stepdaughter was a crime against the wife within the statute. State v. Chambers, 87 Iowa 1, 53 NW 1090, 1091, 43 AmSR 349. Compare Compton v. State, 13 Tex. A. 271, 275, 44 AmR 703.

94. In Lobsitz v. Leffler, etc., Co., 140 App. Div. 14, 15, 124 NYS 533, a contract with a salesman provided that he was to receive a certain sum monthly and commissions on his sales and "against" such amount fifty dollars were to be paid each week. The word in this connection was construed as "towards," and the fifty dollars were for paying the salary and the commissions already earned and without intention that any of it should be paid back.

95. Whittaker v. State, 50 Wis. 518, 7 NW 431, 36 AmR 856; Long v. Ricketts, 2 Sim. & St. 179, 183, 1 EngCh 179, 57 Reprint 313; Creagh v. Wilson, 2 Vern. Ch. 572, 573, 23 Reprint 972.

[a] **Marry against consent.**—A will providing that, if the testator's daughter should marry "against" the consent of the testator's executors and her mother, she should receive but five thousand dollars does not mean that the condition in the will could be broken only where there was an affirmative prohibition of the marriage before it took place, since such a construction would permit a clandestine or secret marriage to be contracted without involving a forfeiture, and the word must be read in the sense of "without," and a marriage without the consent of either the executor or the devisee's mother was a breach of the condition. Hogan v. Curtin, 88 N. Y. 162, 169, 42 AmR 244. See also Long v. Ricketts, 2 Sim. & St. 179, 183, 1 EngCh 179, 57 Reprint 313; Creagh v. Wilson, 2 Vern. Ch. 572, 23 Reprint 972.

96. State v. Prather, 54 Ind. 63, 64 (holding that "against," as used in an indictment charging that defendant did make an assault at and "against" the said B, and did shoot a certain pistol, with intent, etc., was to be construed in its usual acceptation, in which it means to push or run against and to come in contact or collision, and the indictment was sufficient to charge an assault and battery).

[a] **For example,** "to push or run against a person implies, in common parlance, a coming in contact or in collision with the person so pushed or run against. To say that a stone was hurled at and against a person would, very naturally, make the impression that such person was hit by the stone." State v. Prather, 54 Ind. 63, 64.

97. Beyel v. Newport News, etc., R. Co., 34 W. Va. 538, 546, 12 SE 532.

[a] **"Against . . . plaintiff, and his horse," etc.**—The word as used in a declaration alleging that defendant negligently drove its locomotive upon and "against" plaintiff and his horse and wagon in which he was then driving does not necessarily import a physical contact, and therefore there is no variance between the declaration and the proof showing that the train ran at a high rate of speed very close to the horse and wagon, thereby frightening the horse, although not actually striking either the horse or the wagon. Beyel v. Newport News, etc., R. Co., 34 W. Va. 538, 545, 546, 12 SE 532.

98. State v. Prather, 54 Ind. 63, 64.

99. Palmer v. Superior Mfg. Co., 203 Fed. 1003, 1005.

1. Dixon v. Richelieu Nav. Co., 15 Ont. A. 647, 655 [aff 18 Can. S. C. 704] (where, in construing an agreement with a carrier company by which members of an association were entitled to receive tickets at a reduced rate upon the condition that baggage must be at the owner's risk against all casualties, the court held that the words "against all casualties" were merely intended to extend the meaning of the term "owner's risk" to all possible contingencies other than willful misconduct on the part of the carrier).

2. Ex p. Terraz, 4 Ex. D. 63, 66, 71. In this case an act of 1873 authorized that indictable offenses under the laws for the time being in force in relation to bankruptcy might be made the subject of extradition treaties. By such a treaty, among other crimes for which extradition was to be granted, were "crimes against bankruptcy law." A warrant for the apprehension of a fugitive criminal by virtue of such a treaty, which described the offense as "the commission of crimes against bankruptcy law" within the jurisdiction of the foreign power demanding the extradition, was held good.

[a] **Accessories to crime.**—In the Extradition Act of 1870, 33 & 34 Vict. c 52, which enumerated as extraditable crimes "crimes by bankrupts against bankruptcy law," no mention was made of accessories; and in 1873 it was held that this could not be extended to complicity, by a person not himself a bankrupt, in a fraudulent bankruptcy. In re Counhaye, L. R. 8 Q. B. 410, 416.

3. State v. Metzger, 26 Kan. 395, 396 (holding that the phrase as used on ballots in an election to determine the question of the issuance of bonds is equivalent to the phrase "against the bonds," as used in the order authorizing the election, which required that those voting against the bonds should deposit ballots "against the bonds"). Under a similar provision it appeared that on some of the ballots cast there were printed the words, "For the bonds." A pencil mark had been drawn through these words and immediately underneath was written in pencil the word "against." It was held, under the facts in the case, that the will of the electors in casting these ballots was fairly apparent, and that they should be counted as votes against the proposition. Clark v. Montgomery County, 33 Kan. 202, 204, 6 P 311, 52 AmR 526.

4. Silvey v. Neary, 59 Cal. 97, 98.

[a] **A finding against evidence** (1) is one which cannot be supported by the evidence approved or admitted; in other words, a finding that is so palpably in conflict with the proof that the conclusion stated in the finding could not have been arrived at by properly construing the evidence in any light in which it might be viewed. Harris v. Harris, 59 Cal. 620, 621. (2) "A finding which negatives the existence of a fact admitted by the pleadings is a finding against evidence, and the judgment rendered thereon is erroneous." Silvey v. Neary, 59 Cal. 97, 98.

"against the guardian,"[5] "against him,"[6] "against law,"[7] "against the peace,"[8] "against public policy,"[9] "against the statute,"[10] "against a total loss,"[11] "against us,"[12] "against the will,"[13] "against her will."[14]

AGE. The length of time during which a person has lived;[15] the time at which one attains full personal rights and capacities.[16]

In law the term "age" signifies those periods in the lives of persons of both sexes which enable them to do certain acts which, before they had arrived at those periods, they were prohibited from doing. As, for example, a male at the age of twelve years may take the oath of allegiance; at fourteen, which is his age of discretion, he may consent to marriage or choose his guardian; and at twenty-one he may alien his lands, goods, and chattels. A female at nine years of age is dowable;

[b] **A ruling that a verdict is "against the evidence"** (1) amounts to a decision that the verdict is against the weight of evidence. Parker v. Cassingham, 130 Mo. 348, 350, 32 SW 487 [foll Laclede Power Co. v. Nash Smith Tea Co., 95 Mo. A. 412, 69 SW 27, 28]. To same effect Coolidge v. Taylor, 79 Vt. 528, 65 A 582. (2) In the statement by a trial judge in setting aside a verdict as "against the evidence," where the verdict was in favor of the party who sought to have it set aside, the phrase "against the evidence" can have no other meaning than that the verdict was not sufficiently large in the opinion of the court. Jenkins v. Hankins, 98 Tenn. 545, 550, 41 SW 1028.

[c] **"Against and contrary to the weight of the evidence,"** as used in a motion for a new trial, are adequate to challenge the sufficiency of the evidence to sustain the decision. Adams v. Smith, 11 Wyo. 200, 212, 70 P 1043.

5. Willard v. Fairbanks, 8 R. I. 1, 7.

6. See cases infra this note.

[a] **Proceedings "against him."**—(1) Under a statute providing that conveyances made by an insolvent debtor within sixty days of the commencement of proceedings against him are fraudulent, it was held that an assignment was not a proceeding against the debtor within such act. The court said: "The assignment is a proceeding by and not against the debtor. The debtor makes it himself of his own accord, and therefore it cannot, without doing violence to the language, be held to be a proceeding against him. The language is appropriate only to the commencement of some legal proceeding against the debtor under the act." James v. Mechanics' Nat. Bank, 12 R. I. 460, 461. (2) In construing a statute providing in effect that pending proceedings in habeas corpus or appeal thereupon any proceeding against the person so imprisoned in a state court shall be deemed null and void, the court said: "But the action taken was not one 'against' him, in the sense of the statute. He moved for it himself; no objection was made by the other side, and the act of settling the statement was performed solely for his benefit; and no possible result of the action can make his condition worse than it was before. The same is true of the transmission of the record by the clerk, and the filing of appellant's brief in this court." State v. Humason, 4 Wash. 413, 415, 30 P 718.

7. In re Keating, 162 Cal. 406, 410, 122 P 1079; Declez v. Save, 71 Cal. 552, 553, 12 P 722; Froman v. Patterson, 10 Mont. 107, 113, 24 P 692, Drexel v. Daniels, 49 Nebr. 99, 101, 68 NW 399; Gagnier v. Fargo, 12 N. D. 219, 227, 96 NW 841.

[a] **Error of law committed.**—Within the provisions of a statute that a verdict or other decision of facts may be set aside and a new trial granted if such verdict or decision of fact is "against law," "against law" means if error of law is committed resulting from an erroneous decision of fact. While a verdict may be set aside as against law, a new trial will not be granted on the ground that a judgment is against law. Froman v. Patterson, 10 Mont. 107, 114, 24 P 692.

[b] **Finding wholly contrary to evidence.**—Where it appears that the jury must either have disregarded the law as given in the instructions or else must have found a fact wholly contrary to the evidence, the verdict was "against law." Sweeney v. Central Pac. R. Co., 57 Cal. 15, 18.

[c] **Disregard of instructions.**—(1) "Before a specification that the verdict is 'against law' can be relied on for a new trial based on a consideration of the evidence, it must appear that the verdict was rendered in disregard of the instructions." Gagnier v. Fargo, 12 N. D. 219, 227, 96 NW 841. (2) But in a late case it was said: "It would be a narrow construction of the language of such a motion under our system to hold that the words 'against the law' include nothing but a disregard by the jury of the instruction of the judge. The construction to be given to the language in such a motion, appealing only to discretion, ought to be less strict than it would be if the language were used to present to an appellate tribunal for final decision a question of strict legal right. The party opposing the motion should understand that a statement of reasons would bring up, for the exercise of discretion, everything fairly included in its meaning under a broad and liberal interpretation. If in doubt as to the specific matters intended to be relied upon, he should file a motion for further specifications, upon which the court would make any necessary order for his protection." Loveland v. Rand, 200 Mass. 142, 145, 85 NE 948. (3) A verdict in disobedience to the instructions of the court upon a point at law is a verdict "against law." Declez v. Save, 71 Cal. 552, 553, 12 P 722; Emerson v. Santa Clara County, 40 Cal. 543, 545.

[d] **Vague use of phrase.**—The words "against law," as used in a notice of a motion to set aside a judgment and verdict as "against law," are too vague to mean anything more than that they were erroneous. Carpenter v. San Joaquin County, 75 Cal. 596, 598, 19 P 174.

[e] **Against laws of China.**—The words, "any crime or offence against the laws of China," in the provision of the Hong Kong Ordinance No. 2 of 1850, must be limited to those ordinary crimes and offenses which are punished by the laws of all nations and which are not peculiar to the laws of China. Atty.-Gen. v. Kwok-a-Sing, L. R. 5 P. C. 179, 198.

8. State v. Tibbetts, 86 Me. 189, 191, 29 A 979 (holding that an allegation in a criminal complaint that the acts are against the peace and contrary to the statute is equivalent to an allegation that the act was unlawfully or maliciously done).

Against the peace of the state see Indictments and Informations [22 Cyc 243].

9. Enid Right of Way, etc., Co. v. Lile, 15 Okl. 328, 329, 82 P 810 (where Burwell, J., in his dissenting opinion, said: "A contract is against 'public policy' when it tends to interfere with the public safety or welfare; when it is against good morals, or where its object is to influence public officers in the discharge of a duty enjoined by law, etc."). See Contracts [9 Cyc 481].

10. State v. Murphy, 15 R. I. 543, 548, 10 A 585 (holding that the office of the words "against the statute," as used in indictments, is to show that the offense is statutory, and will be read as a part of the charge, if the charge without them would not set forth the offense with completeness). See also State v. Wilbor, 1 R. I. 199, 36 AmD 245.

Against the form of the statute, etc. see Indictments and Informations [22 Cyc 245].

11. O'Leary v. Stymest, 11 N. B. 289, 291 (where an insurance on goods was declared in a policy to be against a "total loss," and it was held that a constructive total loss was within the terms of the policy).

12. Hunt v. Chamberlin, 8 N. J. L. 336, 338, 14 AmD 427 (holding that a warrant of attorney given by two persons authorizing an attorney to appear "to an action to be brought against us, and confess judgment against us," will not authorize the confession and entry of a judgment against one of them, even though the other is dead at the time judgment is entered).

13. State v. Peyton, 93 Ark. 406, 408, 125 SW 416, 137 AmSR 93; State v. Gaul, 50 Conn. 578, 579; Gore v. State, 119 Ga. 418, 419, 46 SE 671, 100 AmSR 182; Whittaker v. State, 50 Wis. 518, 521, 7 NW 431, 36 AmR 856.

[a] **An act is against the will** where it is not approved by the will or the will did not concur with the act. In all cases where there is no sensibility, consciousness, or freedom of the will, the act is said to be against the will. Whittaker v. State, 50 Wis. 518, 521, 7 NW 431, 36 AmR 856.

14. Brown v. State, 138 Ga. 814, 76 SE 379. See Abduction § 8; Rape [33 Cyc 1423].

[a] **"Without her consent" synonymous.**—In the law, and in defining the crime of rape, the terms 'against her will' and 'without her consent,' are used convertibly. State v. Peyton, 93 Ark. 406, 408, 125 SW 416, 137 AmSR 93; State v. Gaul, 50 Conn. 578, 579; Gore v. State, 119 Ga. 418, 419, 46 SE 671, 100 AmSR 182; Malone v. Com., 91 Ky. 307, 15 SW 856, 12 KyL 895; Whittaker v. State, 50 Wis. 518, 522, 7 NW 431, 36 AmR 856. In Com. v. Burke, 105 Mass. 376, 377, 7 AmR 531 [quot Beard v. State, 79 Ark. 293, 95 SW 995, 97 SW 667, 9 AnnCas 409] the court said: "The earlier and more weighty authorities show that the words 'against her will,' in the standard definitions, mean exactly the same thing as 'without her consent;' and that the distinction between these phrases, as applied to this crime, which has been suggested in some modern books, is unfounded." Mr. Bishop, in giving what he calls the "corrected definition," follows Lord Campbell's idea, and of course makes the same mistake. Bishop Cr. L. § 1115 note. Other American authors on criminal law and some of the state statutes have likewise followed the statute of Westminster in giving the definition, using the words "without her consent" or "without her conscious permission." 1 Wharton Cr. L. 556; Clark Cr. L. § 79; Tex. Pen. Code 1895 art 528; Walton v. State, 29 Tex. A. 163, 15 SW 646. See Abduction § 8; Rape [33 Cyc 1433].

15. Jacob L. D.

16. Abbott L. D.

[a] **"Legal school age"** means all scholars who were of the age which entitled them to attend school, and for whom the town was compelled to keep its schools open. Needham v. Wellesley, 139 Mass. 372, 374, 31 NE 732.

at twelve may consent to marriage; at fourteen is at years of discretion, and may choose a guardian; and at twenty-one may alien her lands, etc. But the full age of either male or female is twenty-one, until which time they are considered as infants.[17]

(Cross references.[18])

AGED.[19] Old; having lived long; having lived almost the usual time allotted to that species of being.[20] The term as applied to human beings, is not, for all purposes, susceptible of precise definition, nor is it practicable arbitrarily to fix a period of life at which the condition of being aged may be said to have certainly begun.[21]

17. Blackstone Comm. 463; Coke Litt. 78; Bouvier L. D.; Brown L. D.

[a] **"The phrases 'arrive at twenty-one years' and 'arrive at full age' are synonymous,** and would convey to the mind identically the same idea in any question in which our tribunal were acting on our own citizens; and they must always be so considered, at least prima facie, when found in such an instrument as the present, executed by one of our own citizens, within our own territory and operating on property exclusively within our own jurisdiction." Kohne's Est., Pars. Eq. Cas. (Pa.) 399, 408.

[b] **"Age of legal consent,"** (1) within the meaning of the statute providing for the annulment of a marriage when either party had not at the time of the marriage attained the age of legal consent, was construed to mean the age of legal consent according to the common-law definition of the term, not the age of consent established by a statute increasing the age of consent, in cases of unlawful carnal knowledge, to fourteen years, there being no difficulty in believing that the legislature intended to guard a female child from carnal knowledge for a time after she was capable of contracting a marriage. Fisher v. Bernard, 65 Vt. 663, 664, 27 A 316. (2) In construing a statute requiring a petition for divorce to be signed by the petitioner, if of sound mind and of legal age to consent to marriage, the court said: "Our opinion is that the words 'legal age to consent to marriage' mean the age of consent to marriage at common law, to wit, fourteen years in case of males and twelve years in case of females." Capwell v. Capwell, 21 R. I. 101, 102, 41 A 1005.

[c] **Legal age.**—In Antonio v. Miller, 7 N. M. 289, 291, 34 P 40, 21 LRA 699, the court said: "The only question presented for determination on this appeal is, did the appellee upon her marriage become of legal age, so as to be entitled to receive, by the terms of the will, her portion of the estate? It is not claimed that other parts of the will throw any light upon the clause cited, or indicate any special meaning to be given to the phrase, 'legal age,' as employed by the testator. Do the words as here used mean full or partial legal age? If the former, the common law fixes the beginning of such period on the day preceding the twenty-first anniversary of birth, and the same has not been changed by any statute of this territory; if the latter, a person may be of legal age for certain purposes before arriving at the age of twenty-one years, both at the common law and under the statutes." See also Howe v. Fuller, 19 Oh. 51; Brooke v. Craxton, 2 Gratt. (43 Va.) 506.

[d] **"Lawful age."**—In McKim v. Handy, 4 Md. Ch. 228, 236 [quot Antonio v. Miller, 7 N. M. 289, 293, 34 P 40, 21 LRA 699] the chancellor, in delivering the opinion of the court, said: "It is insisted by certain of the parties having an interest in the question, that the terms 'lawful age,' as used in the will, mean the full age of twenty-one years, and as the bequest was contingent upon the legatee attaining that age, it never vested, but sunk in the residuum for the benefit of those entitled thereto. That the minority of females, as well as males, continues until twenty-one, at common law, is too clear for dispute, and I do not understand that there is any thing in our legislation which abridges the period to every intent and purpose, though we have several Acts of Assembly which confer capacities upon females under twenty-one, which they would otherwise be incompetent to exert."

[e] **"The common expressions 'under age' and 'over age'** are not ambiguous, and always refer to the period of twenty-one years, unless in states where women, by statutory enactment, reach majority before that period." Antonio v. Miller, 7 N. M. 289, 292, 34 P 40, 21 LRA 699.

18. **Age:**
- Affecting:
  - Capacity to marry see Marriage [26 Cyc 842].
  - Competency of witness see Witnesses [40 Cyc 2200].
  - Crime of seduction see Seduction [35 Cyc 1330].
  - Criminal responsibility:
    - Generally see Infants [22 Cyc 622].
    - For rape see Rape [33 Cyc 1419].
  - Custody of child see Parent and Child [29 Cyc 1595].
  - Eligibility to membership in mutual benefit society see Mutual Benefit Insurance [29 Cyc 28].
  - Measure of damages for personal injury see Damages [13 Cyc 142].
  - Punishment for crime see Criminal Law [12 Cyc 961].
  - Qualification of:
    - Grand juror see Grand Juries [20 Cyc 1300].
    - Officer see Officers [29 Cyc 1378].
    - Person serving process see Process [32 Cyc 412, 453].
    - Petit juror see Jurors [24 Cyc 197].
    - Pupil see Schools and School Districts [35 Cyc 1111].
    - Voter see Elections [15 Cyc 290].
  - Responsibility of child for contributory negligence see Negligence [29 Cyc 535, 537, 540].
  - Right:
    - Of self-defense see Assault and Battery [3 Cyc 1046].
    - To:
      - Discharge from reformatory see Reformatories [34 Cyc 1010].
      - Hold office see Officers [29 Cyc 1378].
  - Testamentary capacity see Wills [40 Cyc 999, 1008].
  - Validity of consent in:
    - Assault with intent to rape see Rape [33 Cyc 1434].
    - Kidnapping see Kidnapping [24 Cyc 799].
    - Rape see Rape [33 Cyc 1324, 1424].
- As element of crime against child:
  - Abduction see Abduction § 18.
  - Aggravated assault see Assault and Battery [3 Cyc 1026].
  - Carnal abuse see Assault and Battery [3 Cyc 1026]; Rape [33 Cyc 1424].
  - Kidnapping see Kidnapping [24 Cyc 799].
  - Rape see Rape [33 Cyc 1424].
- Averment as to, in indictment for:
  - Abduction see Abduction § 30.
  - Kidnapping see Kidnapping [24 Cyc 801].
  - Rape see Rape [33 Cyc 1441].
  - Unlawful sale:
    - Of intoxicating liquor see Intoxicating Liquors [23 Cyc 234].
    - Or loan of weapon see Weapons [40 Cyc 872].
- Belief as to, as defense to rape see Rape [33 Cyc 1426].
- Burden of proof in prosecutions for crime, see Criminal Law [12 Cyc 494].
- Effect of false representation as to, in policy of life insurance see Life Insurance [25 Cyc 808].
- Evidence of:
  - Generally see Evidence [16 Cyc 1123].
  - In action or prosecution for:
    - Abduction see Abduction § 39.
    - Illegal sales of intoxicating liquor, see Intoxicating Liquors [23 Cyc 272].
    - Rape, age of:
      - Accused see Rape [33 Cyc 1472, 1514].
      - Prosecutrix see Rape [33 Cyc 1475].
    - Seduction:
      - Civil suit for damages see Seduction [35 Cyc 1316].
      - Criminal prosecution see Seduction [35 Cyc 1351].
- False statements concerning, as affecting liability under policy of:
  - Accident insurance see Accident Insurance § 61.
  - Life insurance see Life Insurance [25 Cyc 808].
  - Mutual benefit insurance see Mutual Benefit Insurance [29 Cyc 89].
- For admission to reformatory see Reformatories [34 Cyc 1002, 1005].
- Of:
  - Consent to sexual intercourse see Rape [33 Cyc 1424].
  - Document as affecting admissibility in evidence see Evidence [17 Cyc 449].
  - Juror as ground for new trial in: Civil case see New Trial [29 Cyc 765]. Criminal prosecution see Criminal Law [12 Cyc 714].
  - Majority see Infants [22 Cyc 511]; Majority [25 Cyc 1665].
  - Person accused of incest see Incest [22 Cyc 48].
  - Vessel:
    - Materiality of representations concerning see Marine Insurance [26 Cyc 616].
    - Statement in application for registry see Shipping [36 Cyc 14].
- Opinion evidence as to see Evidence [17 Cyc 98].
- Time of attaining majority see Infants [22 Cyc 511].

See also Adult 1 C. J. 1403; Assault and Battery [3 Cyc 1041]; Infants [22 Cyc 503]; Majority [25 Cyc 1665]; Minor [27 Cyc 795]; Minority [27 Cyc 795].

19. **Aged:**

As affecting capacity to make a will see Wills [40 Cyc 1008].

See also Senile Dementia [35 Cyc 1337]; Wills [40 Cyc 1008].

20. Webster D. [quot Hall v. State, 16 Tex. A. 6, 11, 49 AmR 824].

21. Allen v. Pearce, 101 Ga. 316, 317, 28 SE 859, 65 AmSR 306, 39 LRA 710 (where it was held that a man sixty-six years old, although hale and hearty, was entitled to homestead and exemption under a constitutional provision allowing this right to "every aged or infirm person").

[a] **Meaning of term in charitable bequests.**—(1) A testator directed that the interest of a fund should forever "be divided into annuities of ten pounds each, and to be paid half-yearly to an equal number of men and women not under fifty years of age, Unitarians, and who attend Lewin's Mead Unitarian Chapel or chapels in Bristol." It was held that persons not under fifty years of age were aged persons, within the meaning of the statute of charitable uses, 43 Eliz. c 4, providing for gifts "for the relief of aged and impotent and poor people

AGENCIA. In Spanish law agency, although the | more common term is mandato.[22]

ple," and that the bequest was good as a charitable gift. In re Wall, 42 Ch. D. 510. (2) Aged as used in a statute permitting bequests in trust "for the relief or benefit of aged, or impotent and poor people," will be construed to mean "such aged people as are properly objects of charity." Coleman v. O'Leary, 114 Ky. 888, 414, 415, 70 SW 1068, 24 KyL 1248.

[b] **Meaning of term in aggravated assault.**—(1) In construing a statute making an assault aggravated when committed by a person of robust health or strength upon one who is aged or decrepit, the court said: "The injured party was 57 years old, 6 feet and 2 inches high, and weighed 175 pounds. This would not make him an aged person, within contemplation of the statute. We understand the word 'aged' as used in said statute means that the party has reached that degree of weakness which characterizes declining years. One might be quite old, and yet not aged, within the meaning of the statute." Black v. State, (Tex. Cr. A) 67 SW 113. (2) Under the same statute it was held that a person only thirty-seven years old was not aged. Hall v. State, 16 Tex. A. 6, 11, 49 AmR 824.

22. **Escriche Diccionario.** See Agency post p 404.

[a] **Agencia de empeños** means pawnshop.

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AGENCY

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I. DEFINITIONS, NATURE, AND CLASSES OF AGENTS

[§ 1] **A. Definitions and Nature in General—1. Agency—a. In General.** "Agency" in its broadest sense includes every relation in which one person acts for or represents another by his authority.[1] In the more restricted sense in which the term is used in the law of principal and agent, agency may be defined as the relation which results where one person, called the principal, authorizes another, called the agent, to act for him, with more or less discretionary power, in business dealings with third persons.[2]

It is a representative relation,[3] its fundamental maxim being, Qui facit per alium facit per se. The agent represents, acts for, and derives his authority from, another, his principal; he is an attorney, standing in the place of his employer.[4] It is also a fiduciary relation which is one of trust and confidence.[5]

The relation of agency is normally contractual, since it generally arises from a contract, either express or implied in fact, previously entered into between the principal and the agent.[6] In exceptional cases, however, the elements of a contract are wanting. Thus the agent may undertake to act for the principal without compensation and enter upon the undertaking; and in this event, although even as between the parties the relation of agency exists, the contractual element of consideration is wanting.[7] So the relation may arise in certain cases by operation of law, as where an abandoned wife is invested by law with a limited power to bind her husband in contract to third persons; and in these cases none of the elements of a contract appear.[8] And finally, even as between the parties, the legal effects and consequences of agency may attach where one person acts for another without authority or in excess of his authority, and the latter subsequently ratifies the act.[9]

[§ 2] **b. "Agency" Used in Other Senses.** The term "agency," however, is sometimes used in senses other than to denote the legal relation between a principal and his agent.[10] Thus it is sometimes used

1. State v. Hubbard, 58 Kan. 797, 801, 51 P 290, 39 LRA 860; International Harvester Co. v. Com., 147 Ky. 655, 664, 145 SW 393 [quot Cyc].

2. Parker v. Wilson, 99 Ark. 344, 346, 137 SW 926, AnnCas1913B 84 and note.

[a] **Similar definitions.**—(1) "The legal relation which arises when one party, called the agent, is authorized to represent and act for another party, called the principal, in bringing or to aid in bringing such principal in contractual relation with a third person, however, such authority may be conferred." Keyser v. Hinkle, 127 Mo. A. 62, 72, 106 SW 98 [quot 1 Clark & S. Agency p 3]. (2) "The relation, created either by express or implied contract, or by law, whereby one party sui juris, called the principal, constituent, or employer, delegates the transaction of some lawful business, with more or less discretionary power, to another party, called the agent, attorney, proxy, or delegate, who undertakes to manage the affair and render to him an account thereof." State v. Hubbard, 58 Kan. 797, 801, 51 P 290, 39 LRA 860. (3) "A legal relation, founded upon the express or implied contract of the parties, or created by law, by virtue of which one party—the agent—is employed and authorized to represent and act for the other—the principal—in business dealings with third persons." Mechem Agency § 1 [quot Harkins v. Murphy, (Tex. Civ. A.) 112 SW 136, 137; Steele v. Lawyer, 47 Wash. 266, 275, 91 P 958, and cit Sternaman v. Metropolitan L. Ins. Co., 170 N. Y. 13, 21, 62 NE 763, 88 AmSR 625, 57 LRA 318].

[b] **Statutory definitions.**—Cal. Civ. Code (1903) § 2295; Mont. Civ. Code (1895) § 3070; N. D. Rev. Code (1899) § 4303; S. D. Civ. Code (1903) § 1656. And see statutory provisions generally.

3. International Harvester Co. v. Com., 147 Ky. 655, 664, 145 SW 393 [cit Cyc]; Fulton v. Walters, 216 Pa. 56, 64 A 860.

4. Sternaman v. Metropolitan L. Ins. Co., 170 N. Y. 13, 62 NE 763, 88 AmSR 625, 57 LRA 318.

5. Kroll v. Coach, 45 Or. 459, 78 P 397, 80 P 900.

[a] **"Agency means delegated authority,** and always implies some trust or confidence in the exercise of that authority." Fulton v. Walters, 216 Pa. 56, 58, 64 A 860.

[b] **Illustrations.**—(1) An agency to manage, lease, and sell property, to pay expenses upon it, to collect debts, and to pay over the moneys received to the principal is of a fiduciary character. Zetelle v. Myers, 19 Gratt. (60 Va.) 62. (2) So where one party represents to another party that he knows where he can buy one thousand shares of a corporation's stock at two dollars a share, and they agree between them to jointly buy it, the first party being intrusted with the buying, a fiduciary relation between them thereby arises. Smith v. Elderton, 16 Cal. A. 424, 117 P 563. (3) A power of attorney to act in all matters relating to the settlement of the principal's interest in the estate of another as heir creates a fiduciary relation between the attorney and client. Ainsworth v. Harding, 22 Ida. 645, 128 P 92.

6. Leonard v. Omstead, 141 Iowa 485, 119 NW 973; Harkins v. Murphy, (Tex. Civ. A.) 112 SW 136. And see infra § 26.

[a] **"An agency is defined to be 'a contract,** either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name, or on his account, by which that other assumes to do the business, and to render an account of it." 2 Kent Comm. 612 [quot Parker v. Wilson, 99 Ark. 344, 345, 137 SW 926, AnnCas1913B 84; Ish v. Crane, 13 Oh. St. 574, 584].

[b] **The popular idea of the term "agency"** is a relation created by an agreement, express or implied, made between the parties before the performance of the act in question and with reference to it. Pells v. Snell, 31 Ill. A. 158, 164.

[c] **There must be a contract of employment,** express or implied, to create the relation of agency. Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 69 SE 845, AnnCas1912B 148.

7. See infra § 27.

Consideration see generally Contracts [9 Cyc 308 et seq].

Duties of gratuitous agent to principal see infra §§ 372, 384.

8. See infra § 67. See also Husband and Wife [21 Cyc 1235].

9. See infra §§ 77-146.

10. See New Orleans v. Rhenish Westphalian Lloyds, 31 La. Ann. 781 (holding that the term "agency," in an ordinance imposing a license tax on every insurance agency doing business in the state for any insurance company or companies not therein located for each and every company represented by the agent, is to be construed as fixing the license tax on the agent, not the companies represented by him, and they enter into the question only as an element of

to denote the place at which the business of a principal is transacted by the agent,[11] and when thus used the word does not necessarily imply the relation of agency.[12] The term is also used in the sense of the "instrumentality" by which a certain act is done.[13]

[§ 3] **2. Principal.** The principal is the person whom the agent represents and from whom he derives his authority; he is the one primarily and originally concerned in the contract of agency.[14]

[§ 4] **3. Agent—a. In General.** An agent is defined to be one who acts for or in the place of another by authority from him;[15] one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it.[16] He is a substitute, a deputy, appointed by the principal, with power to do the things which the principal may or can do.[17]

The term "agent" is one of wide signification,[18] and in a general sense may therefore be said to apply to anyone who by authority performs an act for another,[19] and includes a great many classes of persons to which distinctive appellations are given, as

calculation, and measure the license to be paid by the agency).

11. Tuggle v. Enterprise Lumber Co., 123 Ga. 480, 51 SE 433 (as used in a statute relative to the place where a corporation may be sued); Morgan v. Com., 128 Ky. 812, 109 SW 907, 33 KyL 281 (holding that under a statute imposing a license tax on "each agency for sewing machines," the employment by one who maintained stores wherein sewing machines were kept for sale of a person to drive about over the country from house to house to sell sewing machines which he carried with him for immediate delivery was the establishment of an "agency for sewing machines").

[a] **The word "agency" in a statute authorizing suit against a company** in any county where such company may have an "agency" or place of business is intended to designate a place at which the company's business is transacted by an agent. Western Union Tel. Co. v. Bailey, 115 Ga. 725, 42 SE 89, 61 LRA 933 (holding that an allegation that defendant had an office in the county, and also had an agent in the county, and was doing business therein, is a sufficient allegation that it had an agency in the county); Atlanta Acc. Assoc. v. Bragg, 102 Ga. 748, 749, 29 SE 706 (where it was held that an averment that the company "had an agent and transacted business" in the county where the suit was brought was not a sufficient averment that it had an "agency" there, and where it was said: "The word 'agency,' according to its strict legal significance, refers to the relation existing between the principal and agent, and which is created by the contract entered into between them. In this sense it applies rather to the person occupying the position of agent than to the place at which the business of the company is transacted by the agent. There is another sense, however, in which the word 'agency' is employed colloquially, and so universal has been its employment in this sense as that it may well serve to designate the place at which the business of the company is to be transacted by the agent").

12. Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396, 400 (where it was said: "The plaintiff, a brewing company, established what it describes as 'agencies' for the sale of its products. As thus employed, however, the words 'agency' and 'agent' must be regarded as in the nature of trade names. The person conducting the so-called agency was in no sense an agent. He was in fact a purchaser at wholesale, buying at a stipulated price, and selling not for the manufacturer but for himself. In the conduct of his business he was wholly independent of the manufacturer, was without authority to bind him in any manner, and without responsibility to him except for the price of the goods received").

13. Saunders v. Adams Express Co., 78 N. J. L. 441, 74 A 670.

[a] **Drug, medicine, or other agency.**—Under statutes defining the practice of medicine as the prescribing of any drug, medicine, or other agency for the cure of disease, the meaning of "agency" is held to be limited by its association with the words "drug" and "medicine" under the maxim, Noscitur a sociis. Bennett v. Ware, 4 Ga. A. 293, 61 SE 546; State v. Liffring, 61 Oh. St. 39, 55 NE 168, 76 AmSR 358, 46 LRA 334. See also Physicians and Surgeons [30 Cyc 1561].

14. Adams v. Whittlesey, 3 Conn. 560.

[a] **Similar definitions.**—(1) "One primarily and originally concerned, and who is not an accessory, or auxiliary." Adams v. Whittlesey, 3 Conn. 560, 567. (2) "One who, being competent sui juris to do any act for his own benefit or on his own account, confides it to another person to do for him." Cyclopedic L. D. [cit 1 Domat bk 1 tit 15; Story Agency § 3].

[b] **Agent connotes principal.**—"The very definition of the term 'agent' implies the doing of business for a principal." McCullough v. Railway Mail Assoc., 33 Pa. Co. 529, 535.

15. Peters v. St. Louis, etc., R. Co., 150 Mo. A. 721, 736, 131 SW 917 [adopt 160 Mo. A. 629, 140 SW 1197]; Webster D. [quot Wynegar v. State, 157 Ind. 577, 579, 62 NE 38; State v. Hubbard, 58 Kan. 797, 801, 51 P 290, 39 LRA 860].

[a] **Similar definitions.**—(1) "A person employed by another to act for him." Anderson L. D. [quot Crowley v. Sumner, 97 Ill. A. 301, 304; Nichols v. State, 28 Ind. A. 674, 676, 63 NE 783]; Barr v. Rader, 31 Or. 225, 228, 49 P 962; Norfolk, etc., R. Co. v. Cottrell, 83 Va. 512, 517, 3 SE 123. (2) "A person appointed to act for another in the transaction of some lawful business." Williams v. Moore, 24 Tex. Civ. A. 402, 404, 58 SW 953. (3) "One who is either expressly or impliedly invested with authority from his principal to act in his place and in his behalf." International Bldg., etc., Assoc. v. Watson, 158 Ind. 508, 514, 64 NE 23. (4) "One who undertakes to manage some affair to be transacted for another by his authority on account of the latter who is called the principal, and to render an account of it." Bouvier L. D. [foll Equitable Produce, etc., Exch. v. Keyes, 67 Ill. A. 460, 462]. (5) "A person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified." Evans Agency (Ewell ed) § 1 [quot Metzger v. Huntington, 139 Ind. 501, 520, 37 NE 1084, 39 NE 235; Flesh v. Lindsay, 115 Mo. 1, 18, 21 SW 907, 37 AmSR 374]. (6) "A representative vested with authority, real or ostensible, to create voluntary primary obligations for his principal, by making contracts with third persons, or by making promises or representations to third persons calculated to induce them to change their legal relations." Huffcut Agency (2d ed) § 6 [quot Clark & S. Agency p 3]. (7) "One who acts for, or in place of, another, denominated the principal, in virtue of power or authority conferred by the latter, to whom an account must be rendered." Rowe v. Rand, 111 Ind. 206, 209, 12 NE 377. (8) "One who acts for or in the place of another, by authority from him; or who is entrusted with the business of another." Pouppirt v. Greenwood, 48 Colo. 405, 407, 110 P 195; Wilson v. Me-ne-chas, 40 Kan. 648, 651, 20 P 468. (9) "One who is employed by another to do some act or transact some business on his account." Katzenstein v. Raleigh, etc., R. Co., 84 N. C. 688, 692. (10) "One who derives authority from another to do a certain act." Walton v. Dore, 113 Iowa 1, 3, 84 NW 928. (11) "A substitute, or a person employed to manage the affairs of another." Adams v. Whittlesey, 3 Conn. 560, 567.

[b] **Statutory definition.**—"One who represents another, called the principal, in dealings with third persons." Cal. Civ. Code (1901) § 2295; Mont. Code (1895) § 3070; N. D. Rev. Code (1899) § 4303. See also Wisp v. Hazard, 66 Cal. 459, 461, 6 P 91; Sumner v. Nevin, 4 Cal. A. 347, 87 P 1105; Nicholls v. Mapes, 1 Cal. A. 349, 82 P 265.

[c] **Officer of court.**—When a party to an action has the power to command an officer of the court to compel obedience to his orders, the latter is for many purposes the agent of the former. Young v. Edwards, 64 W. Va. 67, 60 SE 992.

[d] **A bartender** is the agent of the saloon keeper. Ziegler v. Com., 10 Pa. Cas. 404, 14 A 237.

16. Echols v. State, 158 Ala. 48, 50, 48 S 347; Peters v. St. Louis, etc., R. Co., 150 Mo. A. 721, 737, 131 SW 917 [adopt 160 Mo. A. 629, 140 SW 1197]; Norfolk, etc., R. Co. v. Cottrell, 83 Va. 512, 517, 3 SE 123.

[a] **No immediate control of superior.**—The term "agent" in general "designates those employments where the persons exercising them are not under the immediate control of the superior." State v. Sarlls, 135 Ind. 195, 200, 34 NE 1129.

17. Parker v. Wilson, 99 Ark. 344, 346, 137 SW 926, AnnCas1913B 84 and note; Board v. Cronk, 6 N. J. L. 119, 122.

[a] **"An agent is a substitute or deputy;** and the relation of principal and agent takes place whenever one person authorizes another to do acts, or make engagements in his name." Bouchette v. Anderson, Man. t. Wood 64, 68.

[b] **The agent is the representative** of the principal in the transaction of business embraced within his agency. Whatever he does lawfully in a transaction of that business is the act of the principal. Portland First Nat. Bank v. Linn County Bank, 30 Or. 296, 47 P 614; Ziegler v. Com., 10 Pa. Cas. 404, 14 A 237.

18. Queen of Arkansas Ins. Co. v. Malone, (Ark.) 163 SW 771; Parker v. Wilson, 99 Ark. 344, 346, 137 SW 926, AnnCas1913B 84; Wynegar v. State, 157 Ind. 577, 579, 62 NE 38; Peters v. St. Louis, etc., R. Co., 150 Mo. A. 721, 737, 131 SW 917; Norfolk, etc., R. Co. v. Cottrell, 83 Va. 512, 517, 3 SE 123. See also infra § 5.

19. Wynegar v. State, 157 Ind. 577, 579, 62 NE 38; Metzger v. Huntington, 139 Ind. 501, 531, 37 NE 1084, 39 NE 235; Nichols v. State, 28 Ind. A. 674, 63 NE 783, 784; Peters v. St. Louis, etc., R. Co., 150 Mo. A. 721, 737, 131 SW 917.

[a] **"The word 'agent' is a very extensive term** and may be fairly applied to almost any one who performs the office of another." Clement v. Canfield, 28 Vt. 302, 304.

[b] **The term "agents" is a gen-**

factors, brokers, attorneys, cashiers of banks, clerks, consignees, etc.[20]

The most characteristic feature of an agent's employment, in a legal sense, is that he is employed primarily to bring about business relations between his principal and third persons, and this power is perhaps the most distinctive mark of the agent as contrasted with others, not agents, who act in representative capacities.[21]

[§ 5] **b. Enlarged or Restricted Meaning.** The meaning of the term "agent" is susceptible of being greatly broadened in order to carry out the obvious intention of its use;[22] and it is competent to show that it has acquired a peculiar meaning in a certain connection and to construe it accordingly when it is used in that connection.[23] The term is also often used, in statutes, in a more restricted sense than that commonly given it,[24] and consequently, where it is used in a statute, its significance must generally be determined by a study of the context.[25] Thus, where the word is found in association with others which indicate an intent to give it a limited or particular meaning, the maxim, Noscitur a sociis, will be applied.[26] But where there is nothing to indicate an intent to employ the term in a limited sense it will be taken in the common and usual sense.[27]

[§ 6] **4. Subagent.** When an agent employs a person as his agent to assist him in transacting the affairs of his principal, the person so employed is called a "subagent."[28]

[§ 7] **5. Attorney in Fact.** The term "attorney in fact" is frequently used in a loose way to include agents of all kinds, but in its strict legal sense it means an agent acting under a special power created by deed.[29]

As distinguished from an attorney at law, an attorney in fact is appointed either for some particular purpose or to do a particular act not of a legal character.[30]

[§ 8] **B. Other Relations Distinguished—1. In**

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eral sense applies to persons in the service of another, but in a legal sense an agent is one who stands in the place of his principal and is his representative. Turner v. Cross, 83 Tex. 218, 228, 18 SW 578, 15 LRA 262.

[c] **But the mere fact that one transacts business for another** does not constitute him the latter's agent. Equitable Produce, etc., Exch. v. Keyes, 67 Ill. A. 460.

20. Porter v. Hermann, 8 Cal. 619, 624; Norfolk, etc., R. Co. v. Cottrell, 83 Va. 512, 517, 3 SE 123. See also infra § 14.

21. Central Georgia Land, etc., Co. v. Exchange Bank, 101 Ga. 345, 28 SE 863; Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413 (both holding that the relation of principal and agent cannot exist where neither party has authority to bind or represent the other in any transaction with third persons).

[a] **"The distinguishing features** of an agent are his representative character and his derivative authority." Mechem Agency § 1 [cit Sternaman v. Metropolitan L. Ins. Co., 170 N. Y. 13, 21, 62 NE 763, 88 AmSR 625, 57 LRA 318].

Other relations distinguished see infra §§ 8–13.

22. Parker v. Wilson, 99 Ark. 344, 137 SW 926, AnnCas1913B 84 (dis. op.).

23. Whittemore v. Weiss, 33 Mich. 348.

[a] **As indicating an exclusive right to sell.**—"The word 'agent' is employed in more than one sense, and it is frequently used to indicate that a merchant or dealer has the exclusive right to sell a specified article in certain territory, when in fact no agency exists. The dealer in no sense represents the manufacturer, but simply buys from him in the regular course of trade, and sells the specified article to the public. The public in such case, and sometimes the dealer himself, frequently refers to this as an 'agency' for the article. Almost anyone can call to mind instances of this nature in everyday experience, and in every village and city." Poirier Mfg. Co. v. Kitts, 18 N. D. 556, 558, 120 NW 558.

24. See statutory provisions.

[a] **As used in statutes:** (1) Requiring an affidavit to be made by plaintiff "or his agent" see Affidavits § 19. (2) Making embezzlement by agents a criminal offense see Embezzlement [15 Cyc 497]. (3) Authorizing notice of claim of mechanic's lien to be served on owner's agent see Mechanics' Liens [27 Cyc 116]. (4) Prohibiting sales of intoxicating liquors by an "agent," etc. see Intoxicating Liquors [23 Cyc 203 et seq]. (5) Disallowing a stay of judgment against any collecting officer or attorney at law or agent for delinquency, etc. see Parker v. Wilson, 99 Ark. 344, 137 SW 926, AnnCas1913B 84.

[b] **Statutes authorizing notice to agents.**—As used in an ordinance requiring notice to the "owner, occupant, or agent of any lot, building, or premises," the term "agent" means one who in all respects represents the owner as far as the control and regulation of the property under his agency is concerned, and has no reference to an agent whose authority is limited and who has no general supervision of the property. St. Paul v. Clark, 84 Minn. 138, 86 NW 893.

[c] **Statute requiring notice by owner or his agent.**—As used in a statute requiring notice of proposed changes in plumbing, etc., to be given by the "owner or his agent," the term "agent" means a person acting as trustee for the owner, or in some such capacity, and does not include a mere plumber employed by the owner to do the work. Reg. v. Watson, 19 Ont. 646.

[d] **Agent of public institution.**—Under a statute prohibiting any officer or agent of a public institution to be interested in any contract for furnishing supplies, etc., to such institution, a roadmaster is not an "agent" of a township within the meaning of the act. Andrus v. Shippen Tp., 34 Pa. Co. 312.

[e] **Synonymous with attorney at law.**—(1) The word "agent" as employed in a constitutional provision authorizing every suitor "to prosecute or defend his suit, either in his own proper person, or by an attorney or agent of his choice," has been held to be used as a synonym of attorney at law. Cobb v. Grand Rapids Super. Ct., 43 Mich. 289, 5 NW 309. (2) In In re Bowman, 7 Mo. A. 569, an attorney at law who was paid a salary by an insurance company was held to be an "agent" within the meaning of a statute forbidding the superintendent of insurance to employ in any capacity any agent or employee of an insurance company.

[f] **Tax laws; property in hands of agents.**—As to who is an agent within the meaning of a statute relating to taxation of property in the hands of agents see German Trust Co. v. Davenport, 121 Iowa 325, 96 NW 878; Peo. v. New York, 100 N. Y. 215, 3 NE 85; Boardman v. Tompkins County, 85 N. Y. 359; Merrill v. P. B. Champagne Lumber Co., 75 Wis. 142, 43 NW 653. See also Taxation [37 Cyc 796].

[g] **One in control or management of property.**—The term "agent," as used in a statute providing that any person may contract with any "agent" or factor intrusted with any goods for the purchase thereof and may receive from and pay for the same to such agent, and that such contract and payment shall be good against the owner notwithstanding such person shall have notice that the person making the contract is an agent or factor, does not mean a mere servant or caretaker, or one who has possession of goods for carriage, safe custody, or otherwise, but one whose employment corresponds to that of some known kind of commercial agent, such as a factor. Levi v. Booth, 58 Md. 305, 42 AmR 332.

25. Monk v. Whittenbury, 2 B. & Ad. 484, 22 ECL 205, 109 Reprint 1222 (holding that under the act of 6 Geo. IV c 90 § 4, protecting purchases made innocently and in the ordinary course of business from an "agent intrusted with goods," a wharfinger was not an "agent" within the meaning of the act); Moshier v. Keenan, 31 Ont. 658 (holding that, under an act "respecting contracts in relation to goods entrusted to agents," "agent" meant one who was intrusted with the possession as agent in a mercantile transaction for the sale, or for an object connected with the sale, of the property).

26. Childs v. The Brunette, 19 Mo. 518 (holding that under a statute relating to liens on vessels for debts contracted by the "master, owner, agent, or consignee," the term "agent" was limited in meaning by the company in which it was found and did not include a ship carpenter under contract to repair a vessel and furnish materials).

27. Equitable L. Assur. Soc. v. Fowler, 125 Fed. 88; Crowley v. Sumner, 97 Ill. A. 301.

28. Rapalje & L. L. D.

Authority of agent to appoint subagent see infra §§ 342–352.

Liability of agent for torts of subagent see infra § 503.

29. Porter v. Hermann, 8 Cal. 619, 624 (where Field, J., said: "All attorneys in fact are agents, but all agents are not necessarily attorneys in fact. Agent, is the general term which includes brokers, factors, consignees, shipmasters, and all other classes of agents. By attorneys in fact, are meant persons who are acting under a special power, created by deed. It is true, in loose language, the terms are applied to denote all agents employed in any kind of business, except attorneys at law, but in legal language they denote persons having a special authority by deed").

30. Treat v. Tolman, 113 Fed. 892, 51 CCA 522; Hall v. Sawyer, 47 Barb. (N. Y.) 116.

[a] **"An attorney in fact is defined** as a private or special attorney appointed for some particular or definite purpose not connected with a proceeding at law . . . the very definition of attorney in fact excludes the idea that he is authorized to represent his principal in proceedings in

General.[31] It sometimes happens that contracts are so ambiguously drawn or the facts are such as to throw doubt on the nature of the relation existing between parties alleged to be principal and agent,[32] such as whether the relation is that of agency or of lender and borrower.[33]

court." Harkins v. Murphy, 51 Tex. Civ. A. 568, 570, 112 SW 136.

[b] **"The word 'attorney'** originally meant merely—agent, or attorney in fact. Its secondary or restricted, meaning relates to the representation of others in legal actions or demands. An agent may, or may not, be an attorney at law—or such an attorney as can represent another in the prosecution of a legal action, but an attorney at law always, and necessarily, is one who acts for, and in behalf of another." Dick v. State, 107 Md. 11, 22, 68 A 286, 576.

31. **Agency distinguished from buyer and seller** see Sales [35 Cyc 27 et seq].

Agency distinguished from vendor and purchaser see Vendor and Purchaser [39 Cyc 1177].

32. See Forrest Photographic Co. v. Hutchinson Grocery Co., (Tex. Civ. A.) 103 SW 768 (holding that where a grocery company and a photographic company agreed that the latter should furnish the former with trading tickets, each entitling its holder to a photo art calendar at the photographic company's studio when countersigned by the grocery company, and the grocery company agreed to pay a certain amount for each ticket three months from date, or as soon as the tickets should be disposed of, if before that time, and to dispose of the tickets as soon as possible, and it was further agreed that from the date of the contract the photographic company should not, without the consent of the grocery company, or until the disposal of the tickets furnished, sell any other local grocery company any of such tickets, the grocery company did not in legal effect become the agent of the photographic company). See also infra § 28.

[a] **Agent or joint owner.**—(1) An agreement by which one party agrees to ship to another for sale his entire output during a season establishes between them the relation of principal and agent, not that of joint ownership. Elwell v. Coon, (N. J. Ch.) 46 A 580. (2) A contract whereby the owner of an addition to a town gives another the exclusive sale of the same for ten years, and agrees to pay him twenty-five per cent of the proceeds of the sale, after deducting current expenses, and that if any part of the addition remains unsold at the end of that time it shall be appraised, and the owner shall have three fourths thereof and the other party one fourth, constitutes the relation of principal and agent, and does not vest the agent with any interest in the real estate. Kimmel v. Powers, 19 Okl. 339, 91 P 687. See also Detroit, etc., Stone Works v. White, 35 Mich. 77.

[b] **Agent or licensee.**—(1) In some cases permission is granted by one person to another which under the conditions may amount to a mere license to do some act or acts on his own responsibility. Murphy v. Emigration Comrs., 28 N. Y. 134 (holding that the licensing by the commissioners of emigration of the owners or captains of steamboats, etc., to receive and land passengers and their baggage, and of persons to solicit emigrant passengers and baggage for boarding houses and transportation lines, does not make the licensed persons the agents of the commissioners, for whose acts the commissioners can be held liable). (2) Under other conditions it may amount to a commission to the second party to act as agent of the first on the responsibility of his principal. Bingaman v. Hickman, 115 Pa. 420, 8 A 644 [foll Hickman v. Bingaman, (Pa.) 117 A 207 (holding that where lien creditors by written agreement selected three men as a committee to represent them, authorized them to take possession of kaolin mines on land bound by the liens, employ men, purchase horses, etc., prepare for market and sell the kaolin, and appropriate the proceeds in accordance with a scheme of distribution adopted by the creditors and made part of the agreement, which also fixed the committee's compensation and reserved a right to revoke their powers, this was not a mere license to work the mines but was a contract of agency). License generally see Licenses [25 Cyc 593].

[c] **Agent or obligor.**—An agreement, whereby a physician was induced to locate at defendant's sawmill as a physician, that defendant would collect for him specified sums from its employees monthly was an original obligation to pay such sums, not merely an agreement to collect and pay over as an agent. Texarkana Lumber Co. v. Lennard, 47 Tex. Civ. A. 116, 104 SW 506.

[d] **Agent or particeps criminis.**—One who managed what he termed a "board of trade," where he received money from plaintiff on representations that defendant, a firm of brokers, whose correspondent he was, would purchase options on the Chicago board of trade, a commission being taken and shared by him and defendant, and he not pretending to bargain either with plaintiff or defendant, was not merely an agent of either party but a particeps criminis in the gambling enterprise. Munns v. Donovan Commn. Co., 117 Iowa 516, 91 NW 789. See also Contracts [9 Cyc 465 et seq]; Gaming [20 Cyc 897].

[e] **Agency and not shipment on joint account** see Rice v. Longfellow Co., 78 Minn. 394, 81 NW 207.

[f] **Letting and hiring.**—An agency for a fixed period, where it is stipulated that the agent shall receive commissions for his services, is in the nature of a contract of letting and hiring. Spinks v. Georgia Quincy Granite Co., 114 La. 1044, 38 S 824.

[g] **Right to purchase at discount and not agency.**—Where one person writes another that he will furnish engines on the latter's orders at specified discounts and terms for one year and agrees to refer to the latter all inquiries for engines from certain states, such document does not constitute the latter the former's sales agent, but merely gives him the right to purchase at such discount within the specified localities. Russell v. McSwegan, 84 NYS 614.

Municipal agents distinguished from municipal officers see Municipal Corporations [28 Cyc 585].

33. Cal.—Krohn v. Lambeth, 114 Cal. 302, 46 P 164 (holding that where defendant agreed to furnish to a broker a certain amount of money to be used in a purchase of a mine which was to be conveyed to a corporation to be formed and in which defendant was to have a certain share of the stock, the money advanced to be repaid him from the profits, and the broker purchased the mine in accordance with the agreement, making a cash payment thereon, which was furnished by defendant, and executing his own note for a deferred payment, defendant not being known in the transaction with the seller, this was a loan by defendant to the broker to enable him to buy the mine, and it was to be repaid, and did not make the broker defendant's agent, on whose note defendant could be held liable as an undisclosed principal).

Ga.—Central Georgia Land, etc., Co. v. Exchange Bank, 101 Ga. 345, 28 SE 863 (holding that where a bank advanced money to a cotton buyer with which to pay for cotton as he bought it, but neither party contemplated that he should assume to act as agent of the bank, or that the bank should have any interest in his business or share any losses, it was a loan, not an agency).

Ill.—Spencer v. Mall, 87 Ill. A. 680 [aff 186 Ill. 363, 57 NE 1033] (holding that, where a single woman who has no knowledge of business affairs appoints her brother-in-law as her agent, who is skilled, capable, and experienced, to conduct her business, and leaves to him its sole management and control, and large profits are made, such profits cannot be subjected to the payment of his debts on the theory that as the property was placed in the agent's hands with absolute control of it the original capital should be considered as a loan to him, and that the increase caused by his skill should be subjected to the payment of his debts).

Iowa.—Van Sandt v. Dows, 63 Iowa 594, 19 NW 669, 50 AmR 759 [foll Dows v. Morse, 62 Iowa 231, 17 NW 495] (holding that, where a contract was made whereby one party was to furnish money to be used by the other in the purchase of corn, which was to be the property of the former, marked with his name, and sold by him, he to receive out of the sales his original investment with eight per cent interest and one cent a bushel on the corn besides, the second party to receive the balance and to guarantee the first against loss in the transaction, the second party did not receive this money as a borrower, but as an agent, and he did not cease to be an agent and become a borrower on investing it).

Kan.—Burton v. Larkin, 36 Kan. 246, 13 P 398, 59 AmR 541 (holding that, where B contracts to furnish C such money as may be necessary to pay the current expenses of C, and C is to render a monthly account of such expenses to B, the contract does not constitute C the agent of B so as to render the latter liable to a third person for goods furnished to C); Atchison, etc., R. Co. v. Maher, 23 Kan. 163 (holding that, where in an action for money had and received it appeared that defendant received the money claimed to be loaned out by him to cattle dealers pursuant to a letter to him by plaintiff's agent, which stated the terms to be that defendant should "draw upon me as you need the funds for this purpose, becoming responsible to me for the funds lent you on your drafts," etc., defendant was liable to plaintiff as a borrower, and a finding by the jury that defendant was to be responsible to plaintiff only as its agent and that the transaction was not a loan was not supported by the evidence, although defendant testified that he sent a letter to such agent at the same time in which he stated that he was to guarantee the payment of the loans to the cattle man).

N. J.—Hartshorne v. Thomas, 43 N. J. Eq. 419, 10 A 843 (where a person was held to be an agent rather than a borrower).

Tex.—Davis, etc., Commn. Co. v. Mt. Vernon Bank, (Civ. A.) 133 SW 448 (holding that, where a live stock commission company agreed with a buyer to receive all cattle bought by him and shipped to it and to sell them on commission; and also agreed that the buyer might draw checks on it for the price of cattle he might buy and refund the money so advanced when the cattle were sold, and that the buyer should buy the cattle on his own account, at his own risk, and should be credited with the entire proceeds of the sale less the company's commission and expenses, and there was no definite time stated for the continuance of the arrangement as to payment of checks nor as to the number of cattle to be bought, the relation of principal and agent did not exist, but merely the relation of

Intention of parties. In determining whether a contract or the conduct of the parties constitutes an agency or some other relation, the court will as a rule give effect to the intention of the parties; and the question is not governed by the name the parties themselves give to the relation.[34] But if the facts establish the relation of principal and agent as a matter of law, the intention of the parties is immaterial, and the character of the relation is not affected by any agreement of the parties that an agency between them does not exist or that some other relation does exist.[35]

[§ 9] **2. Master and Servant.**[36] The relations of principal and agent and master and servant are frequently confused. In general the principles governing the rights, duties, and liabilities growing out of the two relations are the same, and to determine whether a given relation is one of agency or one of service is of no consequence. This results from the fact that the law of principal and agent is an outgrowth and expansion of the law of master and servant.[37] Occasionally, however, and especially in the application of statutes using the word "agent" or "servant," the distinction may be controlling.[38] The distinction between principal and agent and master and servant is very difficult to define; the two relations are essentially similar and the real difference between them may be said to be one of degree only.[39]

Several tests of agency have been suggested. Thus the agent has been said to be employed in a capacity superior to that of the servant.[40] Again he is said to be clothed with greater discretion than the servant. The agent is to accomplish a certain end, in general using his own discretion as to the means adopted, while the servant is bound to perform his service in the manner commanded by the master.[41] But such distinctions are of doubtful utility and must at most be applied with reference to the facts of each case, for manifestly some servants have large discretion, some agents little or none. Again the two relations are so closely associated that the same person may act at one time or in one part of his employment as an agent, and at another time or in another part of his employment as a servant. The only essential distinction is that the agent is employed to establish contractual relations between his principal and third persons, while the servant is not. Rather the servant deals with things; if he deals with persons it is not to bring about contractual relations and if he con-

lender and borrower, and the indorsee of a draft drawn by the buyer on the company could not recover thereon against the company on the ground that the buyer was acting as its agent in making the draft).

34. Bendix v. Staver Carriage Co., 174 Ill. A. 589 (holding that a contract does not create an agency, although it is entitled "Agency Agreement" and purports to grant to plaintiff an exclusive right to sell defendant's motor cars in a specified territory for a certain time, where plaintiff is prohibited from making contracts or sales in defendant's name or behalf or for its account, and must pay cash for cars on delivery, and that defendant may collect from plaintiff's customers only on request and must immediately turn over the difference); Pray, etc., Co. v. Appledore Land, etc., Co., 76 N. H. 167, 80 A 337. See also infra §§ 11–13, 28.

35. Minto v. Moore, 1 Ala. A. 556, 563, 55 S 542 [quot Cyc]. See also infra § 11–12; 28.

Similar questions arise in respect to partnership see Partnership [30 Cyc 360 et seq]; and as to agreements for liquidated damages see Damages [13 Cyc 89 et seq].

36. **Servant defined** see Master and Servant [26 Cyc 965].

37. Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413.

[a] **"In legal essence there is no difference** between the relation of master and servant and that of principal and agent, the terms 'servant' and 'agent' being fundamentally interchangeable, and the distinction between them evidential only." Brown v. German-American Title, etc., Co., 174 Pa. 443, 451, 34 A 335 [cit 28 AmLRev 9 (article by C. C. Allen); 4 Harvard L. Rev. 345, and 5 Harvard L. Rev. 1 (articles by O. W. Holmes Jr.)].

38. See cases infra this note.

[a] **Penal statutes referring to servants** (1) will not be so construed as to apply to agents. Reg. v. Walker, 8 Cox C. C. 1; Reg. v. Goodbody, 8 C. & P. 665, 34 ECL 951; Rex v. Carr, R. & R. 148. (2) However, a statute defining embezzlement by an agent has been held to apply to any kind of officer, agent, attorney, clerk, servant, or employee, if the employment is of a character necessarily to involve confidence and to afford the opportunity to commit the offense complained of. Wynegar v. State, 157 Ind. 577, 62 NE 38. See Embezzlement [15 Cyc 496 et seq]. Compare Peo. v. Treadwell, 69 Cal. 226, 235, 10 P 502; Territory v. Maxwell, 2 N. M. 250, 262.

[b] **Statutes making stockholders of corporations personally liable for wages due a laborer or servant** will not be construed so as to include an agent. See Corporations [10 Cyc 690].

39. Merritt v. Huber, 137 Iowa 135, 114 NW 627 (where it is said that the true distinction is to be found in the nature of the service to be performed and the manner of its performance).

[a] **Statement of and reason for distinction.**—"In the primitive conditions of society the things which were the subjects of sale and trade were few in number. There was little occasion for any one to engage in commercial transactions, and when it did become necessary the business was generally transacted by the parties thereto in person. But the strong and powerful had many servants, who were usually slaves. The servants performed menial and manual services for the master. As civilization advanced, the things which are the subjects of commerce increased, and it became necessary to perform commercial transactions through the medium of other persons. The relation of principal and agent is but an outgrowth or expansion of the relation of master and servant. The same rules that apply to the one generally apply to the other. There is a marked similarity in the legal consequences flowing from the two relations. It is often difficult to distinguish the difference between an agent and a servant. This difficulty is increased by the fact that the same individual often combines in his own person the functions of both agent and servant. Agents are often denominated servants, and servants are often called agents. The word 'servant' in its broadest meaning, includes an agent. There is, however, in legal contemplation, a difference between an agent and a servant. The Romans, to whom we are indebted for many of the principles of agency, in the early stages of their laws used the terms 'mandatum' (to put into one's hand, or confide to the discretion of another) and 'negotium' (to transact business, or to treat concerning purchases) in describing this relation. Story, Agency, § 4. Agency, properly speaking, relates to commercial or business transactions, while service has reference to actions upon or concerning things. Service deals with matters of manual or mechanical execution. An agent is the more direct representative of the master, and clothed with higher powers and broader discretion than a servant. Mechem, Agency, §§ 1, 2. The terms 'agent' and 'servant' are so frequently used interchangeably in the adjudications that the reader is apt to conclude they mean the same thing. We think, however, that the history of the law bearing on this subject shows that there is a difference between them. Agency, in its legal sense, always imports commercial dealings between two parties by and through the medium of another. An agent negotiates or treats with third parties in commercial matters for another." Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413. 416.

[b] **The words "agents" and "servants"** (1) in a general sense both apply to persons in the service of another. Turner v. Cross, 83 Tex. 218, 228, 18 SW 578, 15 LRA 262. (2) "The words 'agent and servant' are not wholly synonymal; both, however, relate to voluntary action under employment, and each expresses the idea of service. The service performable by a servant for his employer may be inferior in degree to work done by an agent for his principal. A servant is a worker for another under an express or implied employment; so also is an agent, only he works, not only for, but in the place of, his principal. In the sense of service, an agent is the servant of his principal." Peo. v. Treadwell, 69 Cal. 226, 236, 10 P 502. (3) In McKenna v. Stayman Mfg. Co., 112 NYS 1099, 1100, it was said that while every servant was an agent not every agent was a servant.

40. Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413; Flesch v. Lindsay, 115 Mo. 1, 21 SW 907, 37 AmSR 374; Wakefield v. Fargo, 90 N. Y. 213; 1 Blackstone Comm. 427. And see Peo. v. Treadwell, 69 Cal. 226, 10 P 502.

41. Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 SCt 175, 33 L. ed. 440; Gibson v. Snow Hardware Co., 94 Ala. 346, 10 S 304; McCroskey v. Hamilton, 108 Ga. 640, 34 SE 111, 75 AmSR 79; Reg. v. Walker, 8 Cox C. C. 1. See Territory v. Maxwell, 2 N. M. 250; Foster v. Charles Betcher Lumber Co., 5 S. D. 57, 58 NW 9, 49 AmSR 859, 23 LRA 490.

[a] **In California,** under Civ. Code § 2295, which defines an agent as one who represents another in dealings with third persons, and § 2009, which defines a servant as one employed to render personal services to his employer and who remains entirely under the direction and control of the latter,

tracts for his employer with third persons he is in so far an agent; otherwise not.[42]

[§ 10] **3. Employer and Independent Contractor.**[43] The liability of an employer for the acts and contracts of one employed to work for his interests often turns on the distinction between agent or servant on the one hand and independent contractor on the other. For the acts of the agent[44] or servant[45] within the scope of his employment the employer is in general liable; for the acts of the independent contractor in general he is not.[46] In so far as the employer retains the right of general control and management of the work, he makes the employee his agent or servant;[47] but in so far as the employer leaves the choice of means and methods to the employee, he makes him an independent contractor.[48] The independent contractor, like the agent, undertakes to accomplish a certain end. In the work to be done and the means to be adopted to attain the end he is, even more than the agent, free from the control and direction of the employer. As a rule his acts are his own, his contracts are his own, and for them he, not the employer, is responsible.[49] So far as the employer is concerned, the independent contractor, like the servant, deals with things; but, unlike the agent, he deals with persons and makes contracts on his own account.[50] One may be an agent and not an independent contractor, although he is

where one party agrees to devote his entire time and attention to the interests and business of another, his compensation to be a specified percentage of commissions, the relation between the parties is that of master and servant, not that of principal and agent. Sumner v. Nevin, 4 Cal. A. 347, 87 P 1105.

42. Cal.—Peo. v. Treadwell, 69 Cal. 226, 10 P 502.

Ind.—Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413.

La.—Lochte v. Gélé, McG. 52.

Me.—Gardner v. Boston, etc., R. Co., 70 Me. 181.

N. C.—Moore v. Tickle, 14 N. C. 244 (holding that the relation of agency cannot be inferred from the relation of master and servant, and that a groom is a mere servant, not the general agent, of the owner of a horse).

Pa.—Morrow v. Tunkhannock Ice Co., 211 Pa. 445, 60 A 1004 (holding that, where plaintiff was employed to sell ice for defendant for five years at a commission of one dollar per car, and had performed some service but had effected no sales the employment was one of agency, not of service, and that as he had contracted no business relations with third persons he had entirely failed to perform as agent, and hence was entitled to no compensation); The Portland v. Lewis, 2 Serg. & R. 197.

Tex.—Turner v. Cross, 83 Tex. 218, 18 SW 578, 15 LRA 262.

Va.—Merriman Co. v. Thomas, 103 Va. 24, 48 SE 490 (the court, in holding that the word "bookkeeper" did not ex vi termini import the relation of agency but rather indicated that of master and servant, said: "He has no representative capacity. He acts under the direction and control of his employer, and his occupation has no relation to the transaction of business with third persons").

Que.—Violett v. Sexton, 14 Que. K. B. 360.

[a] **"The only substantial distinction** in law between servants and agents is that the main function of the agent is to alter his principal's relations to third persons, while that of the servant is to execute his master's orders. 'An agent represents his principal in an act intended, or calculated, to result in the creation of a voluntary primary obligation or undertaking. A servant represents his master in the performance of an operative or mechanical act of service not resulting in the creation of a voluntary primary obligation, but which may result, intentionally or inadvertently, in the breach of an existing one.' Huffcutt on Agency, §4. An agent, in other words, is to perform acts primarily intended or adapted to cause a change in the legal relations of third persons to his principal. A servant is to perform acts not primarily intended or adapted to cause a change in the legal relations of third persons to his master. The agent creates new relations: the servant acts upon existing relations. Ibid. § 6." State v. Levine, 79 Conn. 714, 720, 66 A 529.

43. Independent contractor defined see Master and Servant [26 Cyc 970, 1546].

44. See infra §§ 513–541.

45. See Master and Servant [26 Cyc 1518 et seq].

46. See Master and Servant [26 Cyc 970, 1552 et seq.].

47. See Master and Servant [26 Cyc 1547].

[a] **Where one who performs work for another represents the will of that other,** (1) not only as to the result, but also as to the means by which that result is accomplished, he is not an independent contractor but the agent of that other. Barg v. Bousfield, 65 Minn. 355, 68 NW 45. (2) A contract for the promotion of an aëronautical exhibition has been held to be a contract of agency. Sims v. Frew, (Cal. A.) 142 P 106.

[b] **Where a consignee of goods employed a transfer company** to receive the goods from the carrier, the transfer company was the consignee's agent with reference to receiving the property, although it might be treated as an independent contractor in some circumstances. Rothchild Bros. v. Northern Pac. R. Co., 68 Wash. 527, 123 P 1011, 40 LRANS 773 and note.

[c] **Right of supervision.**—The fact that the employer retains the right to make daily supervision and approval of the work does not necessarily render the employee an agent or servant. Casement v. Brown, 148 U. S. 615, 13 SCt 672, 37 L. ed. 582. See also Master and Servant [26 Cyc 1549].

[d] **An architect** who continually does business for the owner of a building, and who prepares plans for a particular building, superintends the construction of the building by the different contractors to whom he has let the contracts, issues vouchers for payment when various parts of the work are completed, and receives the usual compensation for that work, is not an independent contractor in charge but only the owner's agent. Claffy v. Chicago Dock, etc., Co., 249 Ill. 210, 94 NE 551.

48. Lawrence v. Shipman, 39 Conn. 586 (holding that, where by the terms of the contract the employee was to accomplish a certain specified result, the choice of means and methods and details being left to him, he was an independent contractor, not an agent or servant); United Painting, etc., Co. v. Dunn, 137 Ga. 307, 73 SE 492; Kirby v. Lackawanna Steel Co., 109 App. Div. 334, 95 NYS 833 (holding that, where the owner of a manufacturing plant agreed to keep up and operate the plant and to run it entirely to manufacture defendant's work as directed by defendant, and defendant was to direct as to the number of men employed, the work they should do, and the wages they should receive, and was to pay all wages and expenses of running the plant but not to hire or discharge employees, the relation was not one of principal and agent, but the owner of the works was an independent contractor); Simonds v. Wrightman, 36 Or. 120, 58 P 1100 (holding that a contract made by the acceptance of the terms of a letter, wherein the writer proposes to ship hops to another obtained by the former from the growers, and to draw sight drafts therefor on the latter, and states that his "offers and your orders are good for 24 hours, unless otherwise stipulated," shows that the former is an independent dealer, not the latter's agent to purchase hops); State v. State Journal Co., 75 Nebr. 275, 106 NW 434, 9 LRANS 174, 13 AnnCas 254 (holding that a contract of the state with another to manufacture for the state certain volumes of the supreme court reports, the "plates" on which such printing is done to be delivered to, and become the property of, the state, does not constitute such other the agent of the state in the "publishing business").

49. U. S.—Casement v. Brown, 148 U. S. 615, 13 SCt 672, 37 L. ed. 582; New Orleans, etc., R. Co. v. Hanning, 15 Wall. 649, 21 L. ed. 220; Robbins v. Chicago, 4 Wall. 657, 18 L. ed. 427; Central Trust Co. v. Bridges, 57 Fed. 753, 6 CCA 539.

Cal.—Kuhlman v. Burns, 117 Cal. 469, 49 P 585.

Colo.—Atlas Lumber Co. v. Schenck, 2 Colo. A. 246, 29 P 1137.

Conn.—Lawrence v. Shipman, 39 Conn. 586.

Ga.—United Painting, etc., Co. v. Dunn, 137 Ga. 307, 73 SE 492; Atlanta, etc., R. Co. v. Kimberly, 87 Ga. 161, 13 SE 277, 27 AmSR 231.

La.—Camp v. St. Louis Church, 7 La. Ann. 321.

Mass.—Pearl v. West End St. R. Co., 176 Mass. 177, 57 NE 339, 49 LRA 826 and note.

Mo.—Crosno v. Bowser Milling Co., 106 Mo. A. 236, 80 SW 275; Dellecella v. Harmonie Club, 34 Mo. A. 179.

N. Y.—Higgins v. Watervliet Turnp., etc., Co., 46 N. Y. 23, 7 AmR 293; Storrs v. Utica, 17 N. Y. 104, 72 AmD 437; Kelly v. New York, 11 N. Y. 432; Pack v. New York, 8 N. Y. 222; Kirby v. Lackawanna Steel Co., 109 App. Div. 334, 95 NYS 833.

Or.—Simmonds v. Wrightman, 36 Or. 120, 58 P 1100.

Pa.—Painter v. Pittsburgh, 46 Pa. 213; Wayne v. Johnson, 1 Phila. 503 (holding that the employment of a contractor to do a piece of work does not render him an agent nor authorize him to pledge the credit of the employer even for purchases necessary to complete the job).

Tenn.—Powell v. Virginia Constr. Co., 88 Tenn. 692, 13 SW 691, 17 AmSR 925.

Vt.—Ladd v. Grand Isle, 67 Vt. 172, 31 A 34.

Eng.—Steel v. South-Eastern R. Co., 16 C. B. 550, 81 ECL 550, 139 Reprint 875; Knight v. Fox, 5 Exch. 721, 1 EngL&Eq 477.

[a] **A teacher employed in a school by an independent contractor** to whom the proprietor of the school has let a department of the school has no claim against the proprietor for her services. Coltrane v. Peacock, (Tex. Civ. A.) 91 SW 841.

50. Atlas Lumber Co. v. Schenck, 2 Colo. A. 246, 29 P 1137 (where it was said that, while the independent contractor, like the agent, enters into con-

paid according to the amount of work accomplished;[51] and on the other hand one may not be an agent, although he is advanced money to make purchases for his alleged principal.[52]

[§ 11] **4. Trusteeship.**[53] While agency is a trust or fiduciary relation demanding of the agent undivided loyalty and fidelity to the interests of the principal confided to his charge,[54] it differs in many respects from any recognized class of trusts,[55] although it may be difficult to define strictly, at all times, the line between a trustee and an agent.[56] In the ordinary agency the title to any property involved, and usually to all the proceeds of the agency, remains in the principal, and the agent acts in the name of the principal;[57] in a trust the legal title is in the trustee, and he acts in his own name.[58] Agency may in general be revoked at any time;[59] a trust can ordinarily be terminated only by the fulfillment of the purposes of the trust.[60] It is the business of the agent to make contracts binding his principal to third persons;[61] a mere trustee cannot render either the creator of the trust or the beneficiary liable to third persons.[62] In this, as in the case of other relations that are sometimes difficult to distinguish from agency, the courts will construe the contract so as to give effect to the true intent of the parties, notwithstanding the name they may have given to their relation in the contract.[63]

[§ 12] **5. Partnership.**[64] Partnership is a branch of the law of agency, each partner having authority in partnership affairs to act as principal for himself and as agent for the other partners, and this has been said to be the most certain test of partnership as distinguished from mere agency or employment.[65] An agent, on the other hand, does not act for himself but for his principal alone.[66] An agreement to share

tractual relations with third persons, it is entirely on his own account; he is not, like the agent, authorized to make any contracts for the employer, or in his name; if he does this, and in so far as he does, he becomes an agent); Johnston v. Dahlgren, 48 App. Div. 537, 62 NYS 1115 [aff 166 N. Y. 354, 59 NE 987].

51. Crosno v. Bowser Milling Co., 106 Mo. A. 236, 80 SW 275 (holding that one may be running a sawmill as agent and not necessarily as an independent contractor, although he is paid a certain amount per thousand feet sawed).

52. St. Louis, etc., R. Co. v. Blocker, (Tex. Civ. A.) 138 SW 156 (holding that one with whom plaintiffs agreed that they would pay him certain prices for certain classes of timber when loaded on cars, he to buy from whom he would and at such prices as he could, was not their agent, although they agreed to, and did, advance him money to enable him to make purchases).

53. See generally Trusts [39 Cyc 1].

54. See supra § 1; infra § 353.

55. Weer v. Gand, 88 Ill. 490 (where it was held that from the fact that one person reposes confidence in another, and that that other acts as a confidential adviser and agent and finally becomes a debtor, it by no means follows that the relation of trustee and cestui que trust exists. Thus where one person employs another as agent, loans money, or sells property on credit, a trust is imposed, but such transactions have never been considered by the courts as falling within any recognized class of trusts. If one puts property into the hands of another to manage for him, the relation is that of principal and agent, although had one person conveyed property to another for the benefit of a third a trust would have been created); Hartley v. Phillips, 198 Pa. 9, 47 A 929.

[a] **"A trustee is not an agent.**—An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another." Taylor v. Davis, 110 U. S. 330, 334, 4 SCt 147, 28 L. ed. 163.

[b] **"A guardian** is not in the condition of an ordinary agent or factor, and therefore, the same legal relations, in all respects, do not subsist between them and those whom they respectively represent. The former represents one who has no legal capacity to contract for himself; the latter, one, who is fully able to contract and bind, were he present. The former is substituted by the law, and stands in loco parentis. The latter is the appointee of his principal, and that principal can, at any moment, abrogate or modify his powers." Fessenden v. Jones, 52 N. C. 14, 16, 75 AmD 445. See generally Guardian and Ward [21 Cyc 1].

56. Hartley v. Phillips, 198 Pa. 9, 47 A 929.

57. Taylor v. Davis, 110 U. S. 330, 2 SCt 147, 28 L. ed. 163; Rowe v. Rand, 111 Ind. 206, 12 NE 377 (holding that one who is employed by the purchasers at a sheriff's sale to dispose of the goods for them, and who deposits the proceeds of sales made from time to time in bank to his account as "trustee," using the word "trustee" because he has another account with the bank as "agent," is nevertheless only an agent, and not a trustee, as to the fund so deposited); Simon v. Burgess, 71 Misc. 300, 127 NYS 147. See also infra §§ 356, 357, 401.

58. Taylor v. Davis, 110 U. S. 330, 4 SCt 147, 28 L. ed. 163; Rowe v. Rand, 111 Ind. 206, 12 NE 377.

59. Flaherty v. O'Connor, 24 R. I. 587, 54 A 376 (where this power of revocation was made a test to determine whether the relation was one of agency or trust). And see infra § 151.

60. Lyle v. Burke, 40 Mich. 499 (holding that an instrument placing in the hands of defendant a fund to be used and expended for the support of the maker of the instrument and his sister during their lives, and to be thereafter divided by defendant among the maker's heirs then in being, created a trust and not a mere agency revocable by the maker's death). See also Kraft v. Neuffer, 202 Pa. 558, 52 A 100.

Termination of trusts generally see Trusts [39 Cyc 92 et seq].

61. Taylor v. Davis, 110 U. S. 330, 4 SCt 147, 28 L. ed. 163. See supra §§ 1, 2.

62. Taylor v. Davis, 110 U. S. 330, 4 SCt 147, 28 L. ed. 163; Shepard v. Abbott, 179 Mass. 300, 60 NE 782 (holding that where a mortgagee placed the money for which the mortgage was given in the hands of the broker through whom the loan was negotiated, to be paid out for building material on the order of the mortgagor, the broker was not an agent of the mortgagee so as to bind him by accepting a bill of exchange drawn by the mortgagor on the broker as trustee of the fund).

63. Viser v. Bertrand, 16 Ark. 296 (holding that an instrument appointing, for a valuable consideration, one B "a trustee, to perform all the duties I ought to perform in the premises, and to hire out and appropriate the proceeds of said negroes, when hired, to the benefit of said Mary E. B. Viser, and her daughter . . . as it appropriately belongs, and hereby investing him [B] with all the power I possess, by virtue of my marriage," is merely a power founded on a valuable consideration, not a deed of trust); Coggeshall v. Coggeshall, 33 S. C. L. 51 (holding that where a son, by an unsealed instrument, promised for a valuable consideration to pay his mother a certain sum of money in annual installments, with a proviso in case of her death, etc., and constituted a third person holder of the agreement during her life to perform the trusts therein contained, such third person was an agent, and not a trustee). See also Cleghorn v. Castle, 13 Hawaii 186; Weer v. Gand, 88 Ill. 490; Kraft v. Neuffer, 202 Pa. 558, 52 A 100; Hartley v. Phillips, 198 Pa. 9, 47 A 929; Flaherty v. O'Connor, 24 R. I. 587, 54 A 376; Rich v. Austin, 40 Vt. 416.

[a] **Active trust and not agency.**—An instrument construed and held to show an active trust, and not an agency, although the trustee in his dealings had sometimes described himself as "agent." Hartley v. Phillips, 198 Pa. 9, 47 A 929.

64. See generally Partnership [30 Cyc 334].

65. Person v. Carter, 7 N. C. 321; Com. v. Rovnianek, 12 Pa. Super. 86. See also Beecher v. Bush, 45 Mich. 188, 7 NW 785, 40 AmR 465; Vosbeck v. Kellogg, 78 Minn. 176, 80 NW 957; Parchen v. Anderson, 5 Mont. 438, 6 P 588, 51 AmR 65; Eastman v. Clark, 53 N. H. 276, 16 AmR 192; Holme v. Hammond, L. R. 7 Exch. 218; Cox v. Hickman, 9 C. B. N. S. 47, 99 ECL 47, 142 Reprint 19, 8 H. L. Cas. 268, 11 Reprint 431, 19 ERC 323. See generally Partnership [30 Cyc 477].

[a] **Agency as test of partnership.**—Mutual agency is the result of partnership, not partnership the result of mutual agency. Meehan v. Valentine, 145 U. S. 611, 622, 12 SCt 972, 36 L. ed. 835 (where the court said: "As has been pointed out in later English cases, the reference to agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership rather than partnership from agency. . . . Such a test seems to give a synonym, rather than a definition; another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner, who stands in the relation of principal to those by whom the business is actually carried on, adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent"); Pooley v. Driver, 5 Ch. D. 458 (where Sir George Jessel said: "You do not help yourself in the slightest degree in arriving at a conclusion by stating that he must be an agent for the others. It is only stating in other words that he must be a partner, inasmuch as every partnership involves this kind of agency; or if he state that he is agent for the others, you state that he is a partner"). See also opinion of Cleasby, B., in Holme v. Hammond, L. R. 7 Exch. 218.

66. Person v. Carter, 7 N. C. 321. And see infra § 353.

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profits always raises a close and difficult question as to whether the relation between the parties is that of partnership or of agency, and the decisions upon contracts involving this feature show much confusion and conflict, and many subtle distinctions are drawn. This confusion is due to the fact that the capacity in which the profits are shared is often uncertain. If, when earned, the profits belong to all the parties as common proprietors in the agreed proportions, the relation is one of partnership; but if the alleged agent or partner takes his agreed share of profits, not as owner, but as an agreed measure of compensation for services, or the like, the relation is one of agency.[67] Whether or not a contract creates a partnership or an agency depends upon the real intention of the parties, as determined by the legal effect of the contract which they have made. According to the early decisions, a sharing in the profits of a business was usually held to create a partnership at least as to third persons. But this doctrine has been now very generally repudiated, and persons are not partners, even as to third persons, unless they are really such as between themselves. There are, however, discordant cases, and the effect of the early doctrine is still apparent in the decisions of some jurisdictions.[68]

[§ 13] **6. Landlord and Tenant.**[69] While the ordinary lease bears no resemblance to a contract of agency, yet in some cases contracts have been so drawn as to raise a doubt whether they created the relation of landlord and tenant or that of principal and agent. If the intention of the parties, collected from the whole contract and the surrounding circumstances, was to create a lease, it will be so regarded,[70] and the landlord will not be liable for the acts of the tenant,[71] nor can the tenant escape liability by claiming that he is a mere agent;[72] and where the contract on its face appears to be one of lease, and it has been so treated by the parties, third persons cannot insist on a different construction to establish their rights.[73] But if it appears that it was the purpose to conduct an enterprise through an agent, although under an agreement called a "lease," then the relation will be treated as one of agency with its resulting liabilities;[74] and especially will this be so where it appears that the so-called lease is a mere sham to conceal the real relationship of the parties or to secure for them exemptions from liability.[75] Thus an agent placed in possession of the premises by the owner for the management thereof is not a tenant;[76] but where the control is parted with, the tenant will not be regarded as occupying as agent, although other circumstances may point to such a relation.[77]

67. See Partnership [30 Cyc 371 et seq].

68. See Partnership [30 Cyc 384 et seq].

69. See generally Landlord and Tenant [24 Cyc 845].

70. State v. Page, 28 S. C. L. 408, 40 AmD 608; Colcord v. Hall, 3 Head (Tenn.) 625.

[a] **Illustrations.**—(1) Where a father gives his son the use of certain real estate, the son to pay for improvements and retain the profits, the relation created is that of landlord and tenant, not that of principal and agent, and in the absence of an agreement to that effect the father is not liable for the value of materials purchased by the son to be used in improving the land. Hawley v. Curry, 74 Ill. A. 309. (2) Defendants, owners of a manufactory and of a pond above it, having purchased of plaintiff the right of drawing off the water from the pond through his land, had made a written contract with B by which he was to run defendant's mill for one year, and to manufacture for them, at a specified price, cotton furnished by them, and to keep the mill in good running order at his own expense, except the main gearing which was to be repaired by defendants if necessary, and no rent was to be charged by defendants, and they were not to be called on for any expense unless the main gearing should fail or some injury should arise to the dam, and six or seven acres where the factory stood, with the factory houses, blacksmith's shop, etc., were to be used by B. In an action against defendants for an injury sustained by plaintiff in consequence of B's letting off the water from the pond so rapidly as to overflow plaintiff's land, it was held that B was the lessee, not the agent, of defendants, and consequently that they were not liable for the injury. Fiske v. Framingham Mfg. Co., 14 Pick. (Mass.) 491. (3) So, on an issue whether S was the agent of W who had leased a certain compress for a term of years, or the holder of the lease, it appeared that, although S took possession of the compress under a power of attorney authorizing him to represent W, S never kept any accounts or dealt with W as principal; that S used printed letterheads in connection with the compress business in which his name appeared as lessee; that a written contract with a third person was made by S, in which S and W were referred to as the lessees; and that in the directory of the city where the compress was located S was advertised as proprietor and lessee of the compress. It was held that S was the real lessee, or the assignee of the lease, and was liable for the rent. Ragsdale v. Meridian Land, etc., Co., 71 Miss. 284, 14 S 193.

71. Freiberg v. Beach Hotel, etc., Impr. Co., 63 Tex. 449. And see cases supra note 70.

72. Ragsdale v. Meridian Land, etc., Co., 71 Miss. 284, 14 S 193. And see cases supra note 70.

73. Pray, etc., Co. v. Appledore Land, etc., Co., 76 N. H. 167, 80 A 337; Freiberg v. Beach Hotel, etc., Impr. Co., 63 Tex. 449.

74. Williams v. McKinley, 65 Fed. 4; Hine v. Cushing, 53 Hun (N. Y.) 519, 6 NYS 850.

[a] **Illustrations.**—(1) A lumber company and B entered into an agreement called a "lease," reciting that the company was the owner of a mill and timber rights and options, and that B was desirous of manufacturing the timber and operating the mill, and also that B had contracted with one person to operate the mill and manufacture the timber, and contracted with another person to sell the manufactured lumber. The company leased the premises to B for about three years at a yearly rental of one dollar and the net proceeds of the operations which B agreed to account for; and the company agreed to pay B for his services one thousand five hundred dollars a year, payable monthly, and a percentage of the net proceeds of the business at the close of each year. The company assigned the agreement to a creditor. The creditor and B entered into a contract reciting the making of the foregoing agreement, and providing that the creditor would perform the conditions set forth in the company's lease to B and that B would perform the conditions therein required of him, and also providing that in case of B's death the agreement should not lapse but should inure to the benefit of the person B designated; and B designated the creditor. It was held that B was a mere agent, rendering the creditor liable for the expenses of the operation of the mill incurred pursuant to a contract made by B. Petteway v. McIntyre, 131 N. C. 432, 42 SE 851. (2) An agreement was made between A and a hotel company "for the keeping of the hotel for the term of seven continuous years." A, as the landlord, was to provide for the hotel; to contract no debts on account of the concern without the consent of the directors; to reside with his family in the hotel but free of all charge for board or rent; to keep constantly in his employment a bookkeeper who should keep the accounts and be liable to discharge by A if the directors should disapprove of him; and the books were to be opened for the examination of any of the directors. Then followed provisions for the compensation of A, varying according to the profits, but at last securing him in any event a certain compensation of four thousand dollars per annum. Another provision in the agreement was that A's interest was personal merely, not transferable to anyone, nor liable for his debts; and if A should die that compensation should be made to his representatives. It was held that this agreement was not a lease, and that A, being in possession as agent of the owners to manage for them, had no legal interest in the possession which could be set up against an execution for the debt of the company. State v. Page, 28 S. C. L. 408, 40 AmD 608.

75. Oriental Inv. Co. v. Barclay, 25 Tex. Civ. A. 543, 64 SW 80.

76. Todhunter v. Armstrong, 6 Cal. Unrep. Cas. 27, 53 P 446; Zinnell v. Bergdoll, 9 Pa. Super. 522, 44 WklyNC 54, 7 Del. Co. 369; State v. Page, 28 S. C. L. 408, 40 AmD 608 (where a contract for the management of a hotel was construed not to operate as a lease); Letang v. Donohue, 6 Que. Q. B. 160 [aff decision of court of review which reversed 8 Que. Super. 496]. See also Mayhew v. Suttle, 4 E. & B. 347, 82 ECL 347, 119 Reprint 133. But see Page v. Street, 17 S. C. Eq. 159.

[a] **The principles governing the relation of landlord and tenant** are, however, applicable. Farrow v. Edmundson, 4 B. Mon. (Ky.) 605, 41 AmD 250. See also Miller v. Vaughan, 73 Ala. 312.

77. Fiske v. Framingham Mfg. Co., 14 Pick. (Mass.) 491; Colcord v. Hall, 3 Head (Tenn.) 625.

[a] **Illustration.**—Where, under an instrument in the form of a lease, a party named as lessee was to have control of a factory and was to return to the company owning the plant the profits of the business over a fixed amount, and the lessee was to

[§ 14] **C. Classes or Kinds of Agents—1. In General. Express or implied.** With reference to the manner of their appointment agents are either express or implied. If they are appointed in terms, whether verbally or by writing, the agency is express; if they are not appointed in terms, but the appointment is implied as a matter of fact from the conduct of the parties and the circumstances of the case, the agency is implied.[78]

Actual or ostensible. With reference to their authority in fact agents are said to be either (a) actual or (b) apparent or ostensible. An actual agent is one who has either expressly or by implication in fact been authorized by the principal to act in his behalf.[79] An apparent or ostensible agent is one whom the principal, either intentionally or by want of ordinary care, induces third persons to believe to be his agent, although he has not, either expressly or by implication, conferred authority upon him.[80]

Agent or subagent. With reference to the person from whom he immediately derives his authority to act in behalf of a principal a person is said to be either an agent or a subagent. The agent derives his authority directly from the principal, or from one whom the principal has authorized, not to do the act in question, but merely to appoint an agent to do it. The subagent derives his authority to do the act in question immediately from the agent who has been appointed to do the act.[81]

Nature of employment. Agents are also classed according to the nature of their employment as, inter alia, attorneys at law,[82] auctioneers,[83] brokers,[84] factors,[85] mercantile agents,[86] etc.; or according to the nature of the obligations of selling agents as del credere agents.[87]

[§ 15] **2. General Agents.** With reference to the scope of their authority agents are frequently classified as general and special or particular,[88] and in this connection there has also been mentioned a class termed universal agents.[89]

A general agent is defined to be one who is employed to transact generally all the business of the principal in regard to which he is employed, or in other words to do all acts connected with a particular trade, business, or employment,[90] or to transact all the business of his principal of a particular kind or in a particular place,[91] and hence a general agency exists when there is a delegation of authority

have authority to employ and discharge servants to work in the factory, and no restrictions as to the management of the business were reserved by the lessor, the relation of landlord and tenant, not that of partnership or agency, was created by such instrument. Ault Woodenware Co. v. Baker, 26 Ind. 374, 58 NE 265.

78. See infra § 29.

Express or implied authority see infra §§ 216–220.

79. Fargo First Nat. Bank v. Minneapolis, etc., El. Co., 11 N. D. 280, 284, 91 NW 436 (by statute).

80. Cal.—Dover v. Pittsburg Oil Co., 143 Cal. 501, 77 P 405; Heald v. Hendy, 89 Cal. 632, 27 P 67; Harris v. San Diego Flume Co., 87 Cal. 526, 25 P 758; Quay v. Presidio, etc., R. Co., 82 Cal. 1, 22 P 925; Robinson v. Nevada Bank, 81 Cal. 106, 22 P 478; Quinn v. Dresbach, 75 Cal. 159, 16 P 762, 7 AmSR 138; Wisp v. Hazard, 66 Cal. 459, 6 P 91; Bibb v. Bancroft, 3 Cal. Unrep. Cas. 151, 22 P 484.

Ill.—Pardridge v. La Pries, 84 Ill. 51; World's Columbian Exposition v. Richards, 57 Ill. A. 601; Hurd v. Marple, 10 Ill. A. 418.

Iowa.—Green v. Hinkley, 52 Iowa 633, 3 NW 688.

Minn.—Wilcox v. Chicago, etc., R. Co., 24 Minn. 269.

Mont.—Weidenaar v. New York L. Ins. Co., 36 Mont. 592, 94 P 1.

N. Y.—Farmers', etc., Bank v. Butchers', etc., Bank, 16 N. Y. 125, 69 AmD 678.

N. D.—Fargo First Nat. Bank v. Minneapolis, etc., El. Co., 11 N. D. 280, 91 NW 436.

S. D.—Reid v. Kellogg, 8 S. D. 596, 67 NW 687.

Wis.—Kasson v. Noltner, 43 Wis. 646.

Apparent or ostensible authority see infra §§ 70, 71, 212.

81. See infra §§ 342–352.

82. See Attorney and Client [4 Cyc 392].

83. See Auctions and Auctioneers [4 Cyc 1040].

84. See Brokers [19 Cyc 186].

85. See Factors [19 Cyc 109].

86. See Mercantile Agencies [27 Cyc 473].

87. See Factors [19 Cyc 133].

88. **General authority** see infra §§ 221, 222.

Special authority see infra § 223.

89. See infra § 17.

90. U. S.—Ætna Indemnity Co. v. Ladd, 135 Fed. 636, 68 CCA 274.

Ala.—Gibson v. Snow Hardware Co., 94 Ala. 346, 10 S 304; Witcher v. Brewer, 49 Ala. 119; Dearing v. Lightfoot, 16 Ala. 28.

Ark.—Keith v. Herschberg Optical Co., 48 Ark. 138, 2 SW 777.

Colo.—Manhattan L. Ins. Co. v. Denver First Nat. Bank, 20 Colo. A. 529, 80 P 467.

Ga.—Columbus Show-Case Co. v. Brinson, 128 Ga. 487, 57 SE 871.

Ill.—Gregg v. Woolliscroft, 52 Ill. A. 214.

Ind.—Manning v. Gasharie, 27 Ind. 399.

Iowa.—Conneautsville First Nat. Bank v. Robinson, 105 Iowa 463, 75 NW 334.

Ky.—Godshaw v. Struck, 109 Ky. 285, 58 SW 781, 22 KyL 820, 51 LRA 668; Bell v. Offutt, 10 Bush 632.

Mass.—Lobdell v. Baker, 1 Metc. 193, 35 AmD 358.

Minn.—Kilborn v. Prudential Ins. Co., 99 Minn. 176, 108 NW 861.

Mo.—Edwards v. Home Ins. Co., 100 Mo. A. 695, 73 SW 881 [cit Butler v. Maples, 9 Wall. (U. S.) 766, 19 L. ed. 822].

S. C.—Robert Buist Co. v. Lancaster Mercantile Co., 73 S. C. 48, 52 SE 789.

Tex.—McAlpin v. Cassidy, 17 Tex. 449.

[a] **By "a general agent" is understood,** not merely a person substituted in the place of another for transacting all manner of business, but a person whom a man puts in his place to transact all his business of a particular kind, as to buy and sell certain kinds of wares, to negotiate certain contracts, and the like., Jaques v. Todd, 3 Wend. (N. Y.) 83, 90; De Turck v. Matz, 180 Pa. 347, 36 A 861; Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 AmD 390.

[b] **General manager synonymous.**—The terms "general manager" and "general agent," when applied to a railroad company, are synonymous. The general agent of such a company is virtually the corporation itself, and therefore has authority to bind the company for the expenses of board and attendance for an injured brakeman. Atlantic, etc., R. Co. v. Reisner, 18 Kan. 458, 460.

[c] **Statutory definitions.**—(1) In some jurisdictions general and special agents are expressly defined by statute. See statutory provisions. And see Quay v. Presidio, etc., R. Co., 82 Cal. 1, 22 P 925; Moore v. Skyles, 33 Mont. 135, 82 P 799, 114 AmSR 801, 3 LRA 136. (2) By Comp. L. § 3980, a general agent is defined as one who is intrusted by the principal with the possession of the thing sold and who has authority to receive the price. Shull v. New Birdsall Co., 15 S. D. 8, 14, 86 NW 654.

[d] **Several instances of special agency or of employment** do not prove a general agency. Angle v. Mississippi, etc., R. Co., 9 Iowa 487.

[e] **The fact that a person received rents** of land belonging to another and performed certain acts relating to such land for such other is insufficient to establish a general agency. Fortescue v. Makeley, 92 N. C. 56.

91. U. S.—U. S. v. Williams, 28 F. Cas. No. 16,724, 1 Ware 173.

Ala.—British, etc., Mortg. Co. v. Cody, 135 Ala. 622, 33 S 832; Robinson v. Ætna Ins. Co., 128 Ala. 477, 30 S 665; Birmingham Mineral R. Co. v. Tennessee Coal, etc., Co., 127 Ala. 137, 28 S 679.

Del.—Lattomus v. Farmers' Mut. F. Ins. Co., 8 Del. 404.

Ga.—Vardeman v. Penn Mut. L. Ins. Co., 125 Ga. 117, 54 SE 66, 5 AnnCas 221; Armour v. Ross, 110 Ga. 403, 35 SE 787; Macon First Nat. Bank v. Nelson, 38 Ga. 391, 95 AmD 400.

Ill.—Union Stockyard, etc., Co. v. Mallory, etc., Co., 157 Ill. 554, 41 NE 888, 48 AmSR 341; National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427; Noble v. Nugent, 89 Ill. 522; Home L. Ins. Co. v. Pierce, 75 Ill. 426; Halladay v. Underwood, 90 Ill. A. 130; Lawther v. Thornton, 67 Ill. A. 214 [rev on other grounds 169 Ill. 228, 48 NE 412].

Ind.—Toledo, etc., R. Co. v. Owen, 43 Ind. 405; Fatman v. Leet, 41 Ind. 133.

Iowa.—Little v. Minneapolis Threshing Mach. Co., 147 NW 872; Sawin v. Union Bldg., etc., Assoc., 95 Iowa 477, 64 NW 401.

Ky.—Baldwin v. Tucker, 112 Ky. 282, 65 SW 841, 23 KyL 1538, 57 LRA 451.

Miss.—Wilcox v. Routh, 17 Miss. 476; Planters' Bank v. Cameron, 11 Miss. 609.

Mo.—Cross v. Atchison, etc., R. Co., 71 Mo. A. 585.

N. J.—Belcher v. Manchester Bldg., etc., Assoc., 74 N. J. L. 833, 67 A 399.

N. M.—Ruby v. Talbott, 5 N. M. 251, 21 P 72, 3 LRA 724.

N. Y.—Scott v. McGrath, 7 Barb. 53; Johnson v. Jones, 4 Barb. 369; Jeffrey v. Bigelow, 13 Wend. 518, 28 AmD 476.

N. C.—Ruffin v. Mebane, 41 N. C. 507.

Or.—Pacific Biscuit Co. v. Dugger, 40 Or. 362, 67 P 32.

Pa.—Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 AmD 390; Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. 285; Rice v. Jackson, 16 Pa. Co. 15 [aff 171 Pa.

to do all acts connected with a particular trade, business, or employment,[92] for the fact that the authority of an agent is limited to a particular business does not make it special, as it may be as general in regard to that business as though its range were unlimited.[93]

Local agents. With reference to the geographical extent of their authority some agents are said to be either general or local, a local agent being an agent at a given place or within a definite district.[94]

[§ 16] **3. Special Agents.** A special or particular agent has been variously defined as one who is employed to act only in a special or specific transaction, or to do a specific act,[95] or to do one or more specific acts,[96] or for a particular purpose only,[97] or

89, 32 A 1036]; Ely v. Lamb, 10 Pa. Co. 209.

S. D.—South Bend Toy Mfg. Co. v. Dakota F., etc., Co., 3 S. D. 205, 52 NW 866.

Tenn.—Walker v. Skipwith, Meigs 502, 33 AmD 161.

Man.—Bouchette v. Anderson, Man. t. Wood 64.

[a] **Other definitions.**—(1) "One who is authorized to transact all the business of his principal, or all his business of some particular kind, or at some particular place. . . . The authority of an agent being limited to a particular business does not make it special; it may be as general in regard to that, as though its range were unlimited." Cruzan v. Smith, 41 Ind. 288, 297 [quot 1 Wait L. & Pr. p 215]. (2) "If the plaintiff company clothed its district manager with the general power to superintend the manufacture and sale of these materials, together with the right to enter into contracts in the name of the company, fixing prices and terms of payment, including the authority to employ sales agents to transact business generally throughout the state or elsewhere under his direction, he would be a general agent within the meaning of the law in that branch of the business over which he exercised supervision." American Car, etc., Co. v. Alexandria Water Co., 218 Pa. 542, 549, 67 A 861. (3) "A person whom a man puts in his place, to transact all his business of a particular kind." Liddell v. Sahline, 55 Ark. 627, 629, 17 SW 705. To same effect Williamson v. Richardson, 30 F. Cas. No. 17,754. (4) "Not merely a person substituted in the place of another, for transacting all manner of business, but a person whom a man puts in his place to transact all his business of a particular kind." Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 503, 78 AmD 390 [quot Paley Agency p 199, and appr De Turck v. Matz, 180 Pa. 347, 36 A 861]. (5) "To be a 'general' agent, or to be clothed with 'general' authority, as that word is used in law, means no more than to have general authority in reference to a particular business or employment." Fishbaugh v. Spunaugle, 118 Iowa 337, 341, 92 NW 58. (6) A person authorized to transact all the business of another at a particular place, and impliedly invested with discretion to determine the proper construction of the contract under which work is being done by a third person for the principal, is a general agent. Cleveland, etc., R. Co. v. Moore, 170 Ind. 328, 82 NE 52, 84 NE 540.

[b] **Locality or extent of territory** is not the test of general or special agency. Butler v. Maples, 9 Wall. (U. S.) 766, 19 L. ed. 822; Continental Ins. Co. v. Ruckman, 127 Ill. 364, 20 NE 77, 11 AmSR 121; Kilborn v. Prudential Ins. Co., 99 Minn. 176, 108 NW 861.

[c] **Illustrations of general agents.**—(1) Where the agent transacts the principal's business in reference to his farm, renting it, collecting rents, superintending and directing repairs, and in other ways indicating the very general scope of his duties, he is a general agent. Fishbaugh v. Spunaugle, 118 Iowa 337, 92 NW 58. (2) Authority given to an agent by a milling company to sell its flour to all persons wishing to purchase constitutes him its general agent in that business. Potter v. Springfield Milling Co., 75 Miss. 532, 23 S 259. (3) A local freight agent of a railroad company is a general agent. Toledo, etc., R. Co. v. Owen, 43 Ind. 405. (4) An agent in charge of the legal business of the principal in certain states, with authority to employ local attorneys, is a general agent of the principal. Cross v. Atchison, etc., R. Co., 71 Mo. A. 585.

[d] **Authority to act in certain territory.**—Where the agent is authorized to make successive purchases of certain articles in a certain locality from any persons who may care to sell he is a general agent. Butler v. Maples, 9 Wall. (U. S.) 766, 19 L. ed. 822; Cruzan v. Smith, 41 Ind. 288.

92. Ark.—Keith v. Herschberg Optical Co., 48 Ark. 138, 2 SW 777.

Colo.—Great Western Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46, 20 P 771, 13 AmSR 204.

Iowa.—Fishbaugh v. Spunaugle, 118 Iowa 337, 92 NW 58.

Me.—Trundy v. Farrar, 32 Me. 225.

N. M.—Western Homestead, etc., Co. v. Albuquerque First Nat. Bank, 9 N. M. 1, 47 P 721.

[a] **"Power to act generally in a particular business,** or a particular course of trade in a business however limited, would constitute a general agency,—if the agent is so held out to the world, however so restricted his private instructions may be." Crain v. Jacksonville First Nat. Bank, 114 Ill. 516, 2 NE 486; Doan v. Duncan, 17 Ill. 272, 274; St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 74 Ill. A. 619 [aff 175 Ill. 557, 51 NE 911, 67 AmSR 238].

93. Crain v. Jacksonville First Nat. Bank, 114 Ill. 516, 2 NE 486; Magnus v. Platt, 62 Misc. 499, 115 NYS 824; Anderson v. Coonley, 21 Wend. (N. Y.) 279; Thomas Gibson Co. v. John Carlisle, 3 OhS&CP 27, 1 OhNP 398; Rountree v. Denson, 59 Wis. 522, 18 NW 518. See also cases supra notes 90–92.

[a] **An agent authorized to conduct a single transaction** is as to such transaction a general agent invested with authority to perform all acts necessary to fully consummate the same. Cleveland, etc., R. Co. v. Closser, 126 Ind. 348, 26 NE 159, 22 AmSR 593, 9 LRA 754.

94. Western Cottage Piano, etc., Co. v. Anderson, 97 Tex. 432, 435, 79 SW 516 (where the court said: "An agent for the State, is not a 'local agent within this State' ").

[a] **Other definitions.**—(1) "An agent residing [in a place] either permanently or temporarily for the purpose of his agency." Moore v. Freeman's Nat. Bank, 92 N. C. 590, 596. (2) As applied to insurance the term means any person or firm soliciting, contracting for, or receiving premiums for any insurance company, or who delivers policies, and includes a railroad agent or employee who solicits or receives premiums for accident insurance. Eichlitz v. State, 39 Tex. Cr. 486, 487, 46 SW 643. See generally Insurance [22 Cyc 1429]. (3) As applied to corporations it means a person who represents it in the business for which it was incorporated. Bay City Iron Works v. Reeves, 43 Tex. Civ. A. 254, 257, 95 SW 739.

95. Ala.—Gibson v. Snow Hardware Co., 94 Ala. 346, 10 S 304.

Ark.—Keith v. Herschberg Optical Co., 48 Ark. 138, 2 SW 777.

Colo.—Great West. Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46, 20 P 771, 13 AmSR 204.

Ill.—Union Stockyard, etc., Co. v. Mallory, etc., Co., 157 Ill. 554, 41 NE 888, 48 AmSR 341.

Ky.—Baldwin v. Tucker, 112 Ky. 282, 65 SW 841, 23 KyL 1538, 57 LRA 451.

S. D.—South Bend Toy Mfg. Co. v. Dakota F., etc., Ins. Co., 3 S. D. 205, 52 NW 866.

And see cases infra note 96.

[a] **Similar definitions.**—(1) "A special agent . . . is one constituted for a specific act and under an express power." Cooley v. Perrine, 41 N. J. L. 322, 324, 32 AmR 210. (2) "A special agency exists when there is a delegation of authority to do a single act." Keith v. Herschberg Optical Co., 48 Ark. 138, 145, 2 SW 777; Harber v. Hutson, 13 KyL 333.

[b] **In legal phrases the word "special"** is more frequently used as denoting something particular or limited in contradistinction to general or permanent, as for instance a "special agent," whom Blackstone defines as one "whose authority is confined to a particular or individual instance." In re Senate Bill, 12 Colo. 188, 192, 21 P 481.

[c] **Statutory definition.**—In Montana, under Civ. Code § 3072, a special agent is an agent for a particular act or transaction. Moore v. Skyles, 33 Mont. 135, 137, 82 P 799, 114 AmSR 801, 3 LRANS 136 (holding that one to whom a money order is given by another with instructions to see if it is all right, and if so to get it cashed, is a special agent of the latter within the meaning of such statutory provision).

96. Ala.—Gibson v. Snow Hardware Co., 94 Ala. 346, 10 S 304.

Ga.—Macon First Nat. Bank v. Nelson, 38 Ga. 391, 95 AmD 400.

Ind.—Cruzan v. Smith, 41 Ind. 288.

N. H.—Towle v. Leavitt, 23 N. H. 360, 55 AmD 195.

N. Y.—Scott v. McGrath, 7 Barb. 53; Anderson v. Coonley, 21 Wend. 279.

[a] **A particular agent** is an agent authorized to do one or two particular things. Ruby v. Talbott, 5 N. M. 251, 21 P 72, 3 LRA 724.

[b] **Illustrations.**—(1) A power of attorney, authorizing an agent to exchange the principal's old issues of stock for new issues without giving the agent power to sell or mortgage the principal's property, and which concluded with the words, "and generally to manage and control to my best interest and advantage all my property, real and personal, to transact all business . . . which may be requisite or proper to effectuate all or any of the premises," created a special agency. Quay v. Presidio, etc., R. Co., 82 Cal. 1, 4, 22 P 925. (2) Where a country merchant sends his produce to a city merchant to sell, and transmits to the city merchant his orders for such goods as he may require, expecting that the articles on his order which the city merchant to whom it is directed does not keep will be purchased by such city merchant on his own account with the funds of the country merchant in his possession, a special agency is established, without the power to pledge the credit of the country merchant. Jaques v. Todd, 3 Wend. (N. Y.) 83.

97. Bryant v. Moore, 26 Me. 84, 45 AmD 96.

[a] **Similar definitions.**—(1) A person employed by another for a particular purpose and acting under limited and circumscribed powers is a special agent. Jaques v. Todd, 3 Wend. (N. Y.) 83, 91. (2) "A special agent is one invested with limited specified powers which he is authorized to exercise only for a particular

to act within limited and circumscribed powers, under restrictions imposed by the principal or implied from the nature of the act to be done;[98] or as one who is not given entire control over the particular business but only the right to do specific acts.[99] The terms "general" and "special" or "particular" in this connection are used relatively.[1]

[§ 17] **4. Universal Agents.** A universal agent has been said to be one who is appointed to do all the acts that the principal may personally do, and which he may lawfully delegate to another the power of doing.[2] But this kind of agency is of very rare occurrence, the great majority of cases being those which involve some form of general or special agency,[3] and it can be created only by clear and unequivocal language, and will not be inferred from any general expressions, however broad.[4]

[§ 18] **5. Joint or Several Agents.** A principal may appoint a number of agents to act for him in regard to the same matter, and in this event it becomes a question whether any one of the number may execute the authority separately or whether all must join in the act. With reference to this question agents are said to be either joint or several, according to whether all must join in executing the authority or whether one may act alone.[5]

II. PARTIES TO THE RELATION

[§ 19] **A. Capacity to Be Principal[6]—1. In General.** Inasmuch as one who acts through an agent in law does the act himself, qui facit per alium facit per se, it follows that capacity to act by agent depends in general on capacity in the principal to do the act himself if he were present.[7] It is a general rule therefore that one who has capacity to act for himself may be a principal and do the act by an

purpose." Gregg v. Wooliscroft, 52 Ill. A. 214, 221.

[b] **An agency is special when both the end and the means** are specific. Robinson v. Winslow Bank, 42 Ind. A. 350, 85 NE 793.

98. U. S.—Butler v. Maples, 9 Wall. 766, 19 L. ed. 822; U. S. v. Williams, 28 F. Cas. No. 16,724, 1 Ware 173.

Ala.—Robinson v. Ætna Ins. Co., 128 Ala. 477, 30 S 665; Witcher v. Brewer, 49 Ala. 119; Golding v. Merchant, 43 Ala. 705; Dearing v. Lightfoot, 16 Ala. 28.

Colo.—Manhattan L. Ins. Co. v. Denver First Nat. Bank, 20 Colo. A. 529, 80 P 467.

Conn.—Ladd v. Franklin, 37 Conn. 53; Willard v. Buckingham, 36 Conn. 395; Thompson v. Stewart, 3 Conn. 171, 8 AmD 168.

Del.—Lattomus v. Farmers' Mut. F. Ins. Co., 8 Del. 404.

Ga.—Columbus Show-Case Co. v. Brinson, 128 Ga. 487, 57 SE 871.

Ill.—U. S. L. Ins. Co. v. Advance Co., 80 Ill. 549; Baxter v. Lamont, 60 Ill. 237; Gregg v. Wooliscroft, 52 Ill. A 214.

Ind.—Davis v. Talbot, 137 Ind. 235, 36 NE 1098; Blackwell v. Ketcham, 53 Ind. 184; Cruzan v. Smith, 41 Ind. 288; Berry v. Anderson, 22 Ind. 36; Reitz v. Martin, 12 Ind. 306, 74 AmD 215; Pursley v. Morrison, 7 Ind. 356, 63 AmD 424.

Iowa.—Palmer v. Cheney, 35 Iowa 281.

Kan.—Atlantic, etc., R. Co. v. Reisner, 18 Kan. 458.

Ky.—Godshaw v. Struck, 109 Ky. 285, 58 SW 781, 22 KyL 820, 51 LRA 668.

La.—Crescent City Bank v. Hernandez, 25 La. Ann. 43.

Mass.—Wood v. Goodridge, 6 Cush. 117, 52 AmD 771.

Minn.—Kilborn v. Prudential Ins. Co., 99 Minn. 176, 108 NW 861.

Miss.—Goodloe v. Godley, 21 Miss. 233, 51 AmD 150; Brown v. Johnson, 20 Miss. 398, 51 AmD 118; Planters' Bank v. Cameron, 11 Miss. 609.

Mo.—Kinealy v. Burd, 9 Mo. A. 359.

N. J.—Belcher v. Manchester Bldg., etc., Assoc., 74 N. J. L. 833, 67 A 399; Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728.

N. Y.—Jaques v. Todd, 3 Wend. 83.

Or.—Pacific Biscuit Co. v. Dugger, 40 Or. 362, 67 P 32.

Pa.—Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 AmD 390; Baring v. Peirce, 5 Watts. & S. 548, 40 AmD 534; Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. 285.

S. C.—Robert Buist Co. v. Lancaster Mercantile Co., 73 S. C. 48, 52 SE 789.

Tenn.—Walker v. Skipwith, Meigs 502, 33 AmD 161.

Tex.—Donnan v. Adams, 30 Tex. Civ. A. 615, 71 SW 530.

Va.—Bowles v. Rice, 107 Va. 51, 57 SE 575.

W. Va.—Merchants', etc., Nat. Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 SE 880, 70 LRA 312.

Wis.—Bryant v. Bank of Commerce, 95 Wis. 476, 70 NW 480.

[a] **Illustrations.**—(1) A chattel mortgagor in possession of a stock of goods as agent of the mortgagee is a special agent. Kelly v. Tracy, etc., Co., 71 Oh. St. 220, 73 NE 455. (2) An authority to sign a guaranty to last during the minority of a minor is a special agency, and does not authorize the agent to sign a guaranty "good until canceled." Lovett, etc., Co. v. Sullivan, 189 Mass. 535, 75 NE 738. (3) A local agent for the sale of threshing machines has been held to be a special agent. J. I. Case Threshing Mach. Co. v. Eichinger, 15 S. D. 530, 91 NW 82. (4) A steward of a club who agreed to conduct a restaurant for the club and to take all the responsibility for supplies furnished has been held to be at most only a special agent. Reis v. Drug, etc., Club, 55 Misc. 276, 105 NYS 285. (5) The depository of an escrow is a special and not a general agent. Chicago, etc., R. Land Co. v. Peck, 112 Ill. 408.

99. St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737.

1. Springfield Engine, etc., Co. v. Kennedy, 7 Ind. A. 502, 34 NE 856, 859 (where it was said: "The terms 'general agent' and 'special agent' are relative. An agent may have power to act for his principal in all matters. He is then strictly a general agent. He may have power to act for him in particular matters. He is then a special agent. But within the scope of such particular matters his powers may be general, and with reference thereto he is a general agent").

Extent of special authority see infra § 223.

General and special authority distinguished see infra § 221.

2. Wood v. McCain, 7 Ala. 800, 803, 42 AmD 612; Gulick v. Grover, 33 N. J. L. 463, 469, 97 AmD 728 [quot Story Agency § 21]. See also Barr v. Schroeder, 32 Cal. 609.

[a] **Other definition.**—"One authorized to transact all of the business of his principal of every kind." Mechem Agency § 6 [quot Gibson v. Snow Hardware Co., 94 Ala. 346, 352, 10 S 304; Baldwin v. Tucker, 112 Ky. 282, 285, 65 SW 841, 23 KyL 1538, 57 LRA 451].

3. Mechem Agency [quot Baldwin v. Tucker, 112 Ky. 282, 286, 65 SW 841, 23 KyL 1538, 57 LRA 451]; Belcher v. Manchester Bldg., etc., Assoc., 74 N. J. L. 833, 837, 67 A 399.

4. Gulick v. Grover, 33 N. J. L. 463, 469, 97 AmD 728.

[a] **"An universal agency may potentially exist;** but it must be of the very rarest occurrence. And indeed it is difficult to conceive of the existence of such an agent practically, inasmuch as it would be to make such an agent the complete master, not merely dux facti, but dominus rerum, the complete disposer of all the rights and property of the principal. It is very certain that the law will not, from any general expressions, however broad, infer the existence of any such unusual agency; but it will rather construe them as restrained to the principal business of the party in respect to which it is presumed his intention to delegate the authority was principally directed." Story Agency § 21 [quot Gulick v. Grover, 33 N. J. L. 463, 469, 97 AmD 728, and cit Wood v. McCain, 7 Ala. 800, 803, 42 AmD 612].

[b] **Implied limitation of general terms.**—"If a merchant in view of his temporary absence, should delegate to an agent his full and entire authority to sell his personal property, to buy any property for him, or on his account, or to make any contracts, or to do any other acts whatsoever, which he could do if personally present—these general terms would be limited to buying or selling, connected with his ordinary business as a merchant; and without some more specific designation, would not be construed, to apply to a sale of his household furniture, or library, or the utensils, provisions, and other necessaries used in his family." Wood v. McCain, 7 Ala. 800, 803, 42 AmD 612.

[c] **"A general authority to do an indefinite number of acts** of a particular kind by no means constitutes a universal agency." Per Comstock, J., in Farmers', etc., Bank v. Butchers', etc., Bank, 16 N. Y. 125, 149, 69 AmD 678 (dis. op.).

5. See infra §§ 317–319.

6. **Capacity of infant** as principal see Infants [22 Cyc 514; 31 Cyc 1208].

Capacity of insane person as principal see Insane Persons [31 Cyc 1206].

Capacity of married woman as principal see Husband and Wife [21 Cyc 1238, 1304].

Capacity of municipal corporation as principal see Municipal Corporations [28 Cyc 588].

Capacity of partnership as principal see Partnership [30 Cyc 491].

Capacity of private corporation as principal see Corporations [10 Cyc 1140].

Capacity of state as principal see States [36 Cyc 877].

Purpose of relation as affecting capacity to act by agent see infra §§ 24, 25.

7. Davis v. Lane, 10 N. H. 156.

[a] **Unincorporated association as principal** see Willcox v. Arnold, 162 Mass. 577, 39 NE 414 (where all members of a college class who voted to publish a book and elected a business manager of the publication were held

agent;[8] and that incapacity to appoint an agent is a necessary consequence of personal disability to do the act for which the agent is employed.[9] Presumptively then every person sui juris is capable of being a principal, while persons non sui juris are wholly or partially incapable of acting as principals.[10]

Alien enemy. No agent can be appointed by a citizen of one government or state to act in the territory of the other during the existence of war between such governments or states.[11]

[§ 20] **2. Drunken Person.** A drunken person may make a valid appointment of an agent, unless his drunkenness is so excessive and absolute as to suspend the reason and create impotence of mind at the time of entering into the contract.[12]

[§ 21] **B. Capacity to Be Agent[13]—1. In General.** Anyone who has capacity to act for himself is ordinarily capable of acting as agent for another.[14] But agents are not required to possess the same qualifications as are principals. It is by no means necessary for a person to be sui juris, or capable of acting in his or her own right, in order to qualify himself or herself to act for others; and it is generally held that anyone, except a lunatic, imbecile, or infant of tender years, may be capable of acting as agent for another, although he is not capable of acting for himself.[15]

[§ 22] **2. Persons Defective in Mental Capacity.**[16] Although less capacity is required to act as agent than to act in one's own right,[17] still in the very nature of things some mental capacity is necessary in an agent, and it has been said that infants of tender years, lunatics, and imbeciles are therefore generally incompetent to act as such.[18] However, a person lacking in ordinary intelligence may so act in some cases at least;[19] and an intoxicated person, it seems, is not necessarily incapable of acting as agent.[20] Generally speaking the principal will not be heard to complain of the lack of mental capacity of one whom he has chosen to represent him.[21]

However, an agent lacking contractual capacity, although he may bind his principal, will not of course himself be bound by an agency contract more than by any other, and hence incurs none of the agent's contractual liabilities.[22]

[§ 23] **3. Persons Having or Representing Interests Adverse to Those of Principal.** If, at the time of his appointment as agent, a person has or represents interests adverse to those of the principal, and the principal has no notice of that fact, he is disqualified in law to undertake the agency.[23]

liable as principals for the expense thereof).

8. Ferguson v. Morris, 67 Ala. 389; Iowa L. & T. Co. v. McMurray, 129 Iowa 65, 105 NW 361; MacFarland v. Heim, 127 Mo. 327, 334, 29 SW 1030, 48 AmSR 629 [cit Story Agency § 6]; Singleton v. Mann, 3 Mo. 464; Greenwood v. Spring, 54 Barb. (N. Y.) 375.

[a] **"Any person capable of transacting his own business** may appoint an agent to act in his behalf in all the ordinary affairs of life." Caley v. Morgan, 114 Ind. 350, 356, 16 NE 790.

9. Davis v. Lane, 10 N. H. 156. And see Ferguson v. Morris, 67 Ala. 389.

10. MacFarland v. Heim, 127 Mo. 327, 29 SW 1030, 48 AmSR 629; Snyder v. Sponable, 1 Hill (N. Y.) 567 [aff 7 Hill 427].

11. New York L. Ins. Co. v. Davis, 95 U. S. 425, 24 L. ed. 453; U. S. v. Grossmayer, 9 Wall. (U. S.) 72, 19 L. ed. 627; Douglas' Case, 14 Ct. Cl. 1; Cramer v. U. S., 6 Ct. Cl. 381; Buford v. Speed, 11 Bush (Ky.) 338; Hubbard v. Matthews, 54 N. Y. 43, 13 AmR 562; Small v. Lumpkin, 28 Gratt. (69 Va.) 832.

[a] **Statement of and reason for rule.**—"A resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it, but in such a case the agency must have been created before the war began, for there is no power to appoint an agent for any purpose after hostilities have actually commenced, and to this effect are all the authorities. The reason why this cannot be done is obvious, for while the war lasts nothing which depends on commercial intercourse is permitted." U. S. v. Grossmayer, 9 Wall. (U. S.) 72, 75, 19 L. ed. 627.

Effect of war on commercial relations see War [40 Cyc 320].

12. Cavender v. Waddingham, 5 Mo. A. 457. See also generally Drunkards [14 Cyc 1103 et seq].

13. **Capacity of corporation** to act as agent see Corporations [10 Cyc 1140].

Capacity of infant to act as agent see Infants [22 Cyc 515; 31 Cyc 1312].

Capacity of married woman to act as agent see Husband and Wife [21 Cyc 1215 et seq, 1234 et seq, 1305].

Capacity of partnership to act as agent see Partnership [30 Cyc 424].

Citizen of belligerent state as agent see supra § 19.

Purpose of relation as affecting capacity to act as agent see infra §§ 24, 25.

14. Lea v. Bringier, 19 La. Ann. 197.

15. U. S.—Conn v. Penn, 6 F. Cas. No. 3,104, Pet. C. C. 496.

Ala.—Lang v. Waters, 47 Ala. 624; Lyon v. Kent, 45 Ala. 656 [cit Stanley v. Nelson, 28 Ala. 514; Powell v. State, 27 Ala. 51]; Governor v. Daily, 14 Ala. 469.

La.—Lea v. Bringier, 19 La. Ann. 197.

Mass.—Com. v. Holmes, 119 Mass. 195; Brown v. Hartford F. Ins. Co., 117 Mass. 479.

Mich.—Cobb v. Judge Grand Rapids Super. Ct., 43 Mich. 289, 5 NW 309; Reeves v. Kelly, 30 Mich. 132.

N. H.—Pickering v. Pickering, 6 N. H. 120.

Pa.—Stall v. Meek, 70 Pa. 181; Mackinley v. McGregor, 3 Whart. 369, 31 AmD 522.

S. C.—Chastain v. Bowman, 19 S. C. L. 270.

Tenn.—Cantrell v. Colwell, 3 Head 471.

Vt.—Chase v. Snow, 52 Vt. 525; Felker v. Emerson, 16 Vt. 653, 42 AmD 532.

Eng.—King v. Bellord, 1 Hem. & M. 343, 71 Reprint 149.

"It is by no means necessary for a person to be sui juris, or capable of acting in his or her own right, in order to qualify himself or herself to act for others. Thus, for example, monks, infants, femes covert, persons attainted, outlawed or excommunicated, villains and aliens, may be agents for others." Story Agency §§ 6, 7, 9 [quot Lyon v. Kent, 45 Ala. 656, 663].

[a] **Slaves.**—(1) It was uniformly held, during the existence of slavery in the United States, that a master might constitute his slave his agent. Stanley v. Nelson, 28 Ala. 514; Powell v. State, 27 Ala. 51; Governor v. Daily, 14 Ala. 469; Chastain v. Bowman, 19 S. C. L. 270, 271. (2) "A slave, who is homo non civilis, a person who is but little above a mere brute in legal rights, may act as the agent of his owner or his hirer." Lyon v. Kent, 45 Ala. 656, 663. (3) "It is not questioned, that a master may constitute his slave his agent, and I cannot conceive of any distinction between the circumstances which constitute a slave and a freeman an agent—they are both the creatures of the principal, and act upon his authority. There is no condition, however degraded, which deprives one of the right to act as a private agent." Chastain v. Bowman, supra.

16. See generally Insane Persons [22 Cyc 1104].

17. See supra § 21.

18. Lyon v. Kent, 45 Ala. 656; Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 SE 679, 110 AmSR 170, 4 LRANS 898, 4 AnnCas 128.

19. Cobb v. Judge Grand Rapids Super. Ct., 43 Mich. 289, 5 NW 309.

20. Cameron v. Ward, 22 Ga. 168 (holding that in any event third persons cannot object to his incapacity).

21. Central of Georgia R. Co. v. Hall, 124 Ga. 322, 336, 52 SE 679, 110 AmSR 170, 4 LRANS 898, 4 AnnCas 128 (where it was said: "If the principal knowingly appoints an insane person as his agent, or permits such a one to act for him after knowledge of the insanity, he will not be excused by reason of it"); King v. Bellord, 1 Hem. & M. 343, 71 Reprint 149; Foreman v. Great Western R. Co., 38 L. T. Rep. N. S. 851.

22. Smally v. Smally, 1 Eq. Cas. Abr. 6, 21 Reprint 831.

23. Sunderland v. Kilbourn, 3 Mackey (D. C.) 506 [mod 130 U. S. 505, 9 SCt 594, 32 L. ed. 1005]; Guthrie v. Huntington Chair Co., 71 W. Va. 383, 76 SE 795.

Adverse interest:

As affecting liability of agent to principal see infra § 354.

As affecting liability of principal to agent see infra §§ 430–433, 464.

As affecting liability of principal to third person see infra §§ 519–521.

As affecting liability of third person to principal see infra § 563.

As authorizing revocation of agency see infra § 160.

As terminating agency see infra § 176.

Adverse interest of: Auctioneer see Auctions and Auctioneers [4 Cyc 1047]. Broker see Brokers [19 Cyc 206, 207, 226–228, 234]. Insurance agent see Insurance [22 Cyc 1435, 1442, 1445].

Creation and existence of double agency see infra § 47.

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III. PURPOSES OF THE RELATION

[§ 24] **A. In General.**[24] From the fundamental maxim of agency, Qui facit per alium facit per se, it follows that, as a general rule of law, whatever a man may do himself he may do through an agent.[25] This rule, however, is subject to certain exceptions, as there are acts of so peculiarly personal a nature that their performance cannot be delegated,[26] such as making a will or contracting a marriage;[27] and another instance is that an agent cannot perform by a subagent the acts which he has been appointed to perform in person.[28] So also there are many acts regulated by statute which, because of their nature or the requirements of the statute, must be done personally, and cannot be delegated;[29] but it has been held that unless the intention is plainly apparent from the statute the authority may be delegated, the courts applying the maxim, Qui facit per alium facit per se.[30]

If a person cannot lawfully do an act himself, he cannot of course confer authority upon another as his agent to do such act in his behalf.[31]

[§ 25] **B. Illegal Acts.** An act which, if done by the principal, would be illegal as in violation of common law or of some statutory provision cannot be done through the agency of another; and any agreement that authorizes or requires an agent to do an illegal act or tends to induce the commission thereof is consequently void.[32] There can be no such thing as agency in the perpetration of a crime, and therefore all persons actively participating are principals.[33]

For example a contract of agency is void and

24. Agency for purpose of:
Acceptance of assignment for benefit of creditors in behalf of creditor see Assignments for Benefit of Creditors [4 Cyc 140].
Acceptance of assignment in behalf of assignee see Assignments [4 Cyc 29 note 56].
Acknowledging debt barred by limitations see Limitations of Actions [25 Cyc 1353].
Answering or making disclosure in garnishment proceeding see Garnishment [20 Cyc 1081].
Asserting claim in admiralty proceedings see Admiralty § 215.
Committing act of bankruptcy see Bankruptcy [5 Cyc 286 note 92].
Effecting accord and satisfaction see Accord and Satisfaction § 36.
Entering appearance see Appearances [3 Cyc 513].
Entering on land to interrupt adverse possession see Adverse Possession § 125.
Executing administrator's bond see Executors and Administrators [18 Cyc 134 note 95].
Executing appeal bond see Appeal and Error [2 Cyc 840].
Executing assignment for benefit of creditors see Assignments for Benefit of Creditors [4 Cyc 150].
Executing attachment bond see Attachment [4 Cyc 534].
Executing bonds in general see Bonds [5 Cyc 735].
Executing redelivery bond in attachment see Attachment [4 Cyc 681].
Locating mining claim see Mines and Minerals [27 Cyc 552].
Making affidavit in attachment see Attachment [4 Cyc 471].
Making affidavit in general see Affidavits § 19.
Making affidavit on appeal see Appeal and Error [2 Cyc 809].
Taking acknowledgment see Acknowledgments § 90.
Voting at meeting of creditors of bankrupt see Bankruptcy [5 Cyc 321].

25. Ala.—Lyon v. Kent, 45 Ala. 656.
Ill.—Freeland v. Hughes, 120 Ill. A. 109.
Ind.—Caley v. Morgan, 114 Ind. 350, 16 NE 790.
Md.—Silverwood v. Latrobe, 68 Md. 620, 13 A 161.
Oh.—Brisbane v. Stoughton, 17 Ch. 482.
Tenn.—Electric Light, etc., Co. v. Bristol Gas, etc., Co., 99 Tenn. 371, 42 SW 19.
Tex.—McKee v. Coffin, 66 Tex. 304, 1 SW 276; Coffee v. Silvan, 15 Tex. 354, 65 AmD 169.
Vt.—Sumner v. Conant, 10 Vt. 9.
Wis.—Gibbs v. Holcomb, 1 Wis. 23.
Eng.—Furnivall v. Hudson, [1893] 1 Ch. 335; Combes' Case, 9 Coke 75a, 77 Reprint 843.

26. Farrar v. Bell, 73 Vt. 342, 50 A 1107.

27. Com. v. Farmers', etc., Leaf Tobacco Warehouse Co., 107 Ky. 1, 52 SW 799, 21 KyL 573.

28. See infra § 342.

Assignment of contracts involving personal services or relation of personal confidence see Assignments [4 Cyc 22, 23].

Delegation by executor of testamentary power to sell land see Executors and Administrators [18 Cyc 323].

29. U. S. v. Bartlett, 24 F. Cas. No. 14,532, 2 Ware 17 (holding that the enrollment of a vessel under oath of the owner by agent is ineffectual); Dickson v. Morgan, 7 La. Ann. 490 (holding that the power of answering interrogatories on oath cannot be conferred by one person on another); Lytle v. Smith, 3 Humphr. (Tenn.) 327 (holding that a constable cannot constitute an agent to receive the moneys due on an execution); In re London, etc., Bank, L. R. 6 Ch. 206; Hirst v. West Riding Union Banking Co., [1901] 2 K. B. 560; Swift v. Jewsbury, L. R. 9 Q. B. 301; Fricker v. Van Grutten, [1896] 2 Ch. 649; Toms v. Cuming, 7 M. & G. 88, 49 ECL 88, 135 Reprint 38. See also Finnegan v. Lucy, 157 Mass. 439, 32 NE 656. In Hyde v. Johnson, 2 Bing. N. Cas. 776, 29 ECL 757, 132 Reprint 299, it was held that where a statute required a writing to be "signed by the party chargeable thereby" it was not complied with by signing through an agent. But see Frauds, Statute of, [20 Cyc 275].

30. Finnegan v. Lucy, 157 Mass. 439, 32 NE 656; France v. Dutton, [1891] 2 Q. B. 208; In re African Farms, [1906] 1 Ch. 640.

[a] **Personal performance held not required by statute.**—(1) Claim to property seized upon execution. Webber v. Brown, 38 Ill. 87. (2) Signature of surety on sheriff's bond. Basham v. Com., 13 Bush (Ky.) 36. (3) Notice by wife not to sell liquor to husband. Finnegen v. Lucy, 157 Mass. 439, 32 NE 656. (4) Taking out execution. Lytle v. Smith, 3 Humphr. (Tenn.) 327. (5) Procuring grant of public lands. White v. Holliday, 11 Tex. 606. (6) Signature to memorandum of association by company. In re Whitley, 32 Ch. D. 337, 2 ERC 276. (7) Notice of appeal from order for removal of pauper. Reg. v. Middlesex, 1 L. M. & P. 621. (8) Signature to petition in bankruptcy. Matter of Boldero, 1 Rose 231.

31. Ferguson v. Morris, 67 Ala. 389 (holding that a foreign administrator who has no power to collect money himself cannot appoint an agent with authority to collect the money for him).

32. U. S.—Meguire v. Corwine, 101 U. S. 108, 25 L. ed. 899; American Banana Co. v. United Fruit Co., 166 Fed. 261, 92 CCA 325 [aff 213 U. S. 347, 29 SCt 511, 53 L. ed. 826, 16 AnnCas 1047]; Lanahan v. Pattison, 14 F. Cas. No. 8,036, 1 Flipp. 410.
Ala.—Dudley v. Collier, 87 Ala. 431, 6 S 304, 13 AmSR 55.
Cal.—Moore v. Moore, 130 Cal. 110, 62 P 294, 80 AmSR 78.
Colo.—Hoyt v. Macon, 2 Colo. 502.
Conn.—Bollman v. Loomis, 41 Conn. 581; Nichols v. Ruggles, 3 Day 145, 3 AmD 262.
Ill.—Pearce v. Foote, 113 Ill. 228, 55 AmR 414 [cit Jamieson v. Wallace, 167 Ill. 388, 47 NE 762, 59 AmSR 302]; Skeels v. Phillips, 54 Ill. 309.
Ind.—Coquillard v. Bearss, 21 Ind. 479, 83 AmD 362.
Kan.—Bowman v. Phillips, 41 Kan. 364, 21 P 230, 13 AmSR 292, 3 LRA 631.
Ky.—McGill v. Burnett, 7 J. J. Marsh. 640.
La.—Irwin v. Levy, 24 La. Ann. 302; Haney v. Manning, 21 La. Ann. 166; Faurie v. Morin, 4 Mart. 39, 6 AmD 701.
Mass.—Parsons v. Trask, 7 Gray 473, 66 AmD 502.
Mich.—McCurdy v. Dillon, 135 Mich. 678, 98 NW 746; McDonnell v. Rigney, 108 Mich. 276, 66 NW 52; Thomas v. Caulkett, 57 Mich. 392, 24 NW 154, 58 AmR 369; Sturgis First Nat. Bank v. Watkins, 21 Mich. 483.
Miss.—Wooten v. Miller, 15 Miss. 380.
Mo.—Atlee v. Fink, 75 Mo. 100, 43 AmR 385; Maguire v. State Sav. Assoc., 62 Mo. 344; Nash v. Kerr Murray Mfg. Co., 19 Mo. A. 1.
N. H.—Bixby v. Moor, 51 N. H. 402.
N. Y.—Sedgwick v. Stanton, 14 N. Y. 289; Devlin v. Brady, 32 Barb. 518 [aff 36 N. Y. 531, 2 Transcr. A. 271]; Rolfe v. Delmar, 30 N. Y. Super. 80; Satterlee v. Jones, 10 N. Y. Super 102; Lowey v. Granite State Provident Assoc., 8 Misc. 319, 28 NYS 560; Parks v. Jacob Dodd Packing Co., 6 Misc. 570, 27 NYS 289; Tappan v. Brown, 9 Wend. 175.
Oh.—Pape v. Standard Oil Co., 27 Oh. Cir. Ct. 111.
Pa.—Johnson v. Hulings, 103 Pa. 498, 49 AmR 131; Ormerod v. Dearman, 100 Pa. 561, 45 AmR 391; Holt v. Green, 73 Pa. 198, 13 AmR 737; Hatzfield v. Gulden, 7 Watts 152, 31 AmD 750; Badgley v. Beale, 3 Watts 263.
Tenn.—Rhodes v. Summerhill, 4 Heisk. 204.
Utah.—Mexican International Banking Co. v. Lichtenstein, 10 Utah 338, 37 P 574.
Eng.—Waymell v. Reed, 5 T. R. 599, 101 Reprint 335; Debenham v. Ox, 1 Ves. 276, 27 Reprint 1029.
See also generally Contracts [9 Cyc 465-577].

Adverse interest of agent as affecting validity of contract see supra § 23.

Agency agreements involving: Gambling transactions see Gaming [20 Cyc 921 et seq]. Monopolies see Monopolies [27 Cyc 900].

Stipulation for contingent compensation as affecting legality of contract in general see Champerty and Maintenance [6 Cyc 858 et seq]. See also Attorney and Client [4 Cyc 989 et seq].

33. Pearce v. Foote, 113 Ill. 228, 55

cannot be enforced where the purpose of the parties is to procure contracts from the government by improper means,[34] or to trade with a public enemy,[35] or to promote marriages;[36] or to influence wrongly the trial of an action;[37] or to influence improperly an election;[38] or to conduct gambling operations,[39] such as the sale of lottery tickets;[40] or to procure the passage of legislation by sinister means, or the use of personal influence;[41] or improperly to influence a public officer.[42]

IV. CREATION AND EXISTENCE OF THE RELATION IN GENERAL

[§ 26] **A. By Act of Parties—1. Necessity of Mutual Assent.** It is a fundamental principle that the relation of agency can exist only by the will of the principal and with the consent of the agent.[43] In other words, as agency ordinarily results from one form of contract,[44] there must, in general, be a contract of employment, express or implied,[45] which must possess the essential elements of every contract.[46]

Appointment and acceptance. It is therefore essential to the formation of the relation that the principal shall in some manner, either expressly or by implication from conduct for which he is responsible, appoint the agent,[47] and that the agent shall

AmR 414 [cit Jamieson v. Wallace, 167 Ill. 388, 47 NE 762, 59 AmSR 302]; Leonard v. Poole, 114 N. Y. 371, 21 NE 707, 11 AmSR 667, 4 LRA 728; State v. Matthis, 19 S. C. L. 37; Mexican International Banking Co. v. Lichtenstein, 10 Utah 338, 37 P 574. See also Criminal Law [12 Cyc 70].

34. Hazelton v. Sheckells, 202 U. S. 71, 26 SCt 567, 50 L. ed. 939, 6 Ann Cas 217; Hayward v. Nordberg Mfg. Co., 85 Fed. 4, 29 CCA 438; Bermudez Asphalt Pav. Co. v. Crichfield, 62 Ill. A. 221 [aff 174 Ill. 466, 51 NE 552, 42 LRA 347]; Drake v. Lauer, 93 App. Div. 86, 86 NYS 986 [aff 182 N. Y. 533, 75 NE 1129]; Wilbur v. New York Electric Constr. Co., 58 N. Y. Super. 539, 12 NYS 456; Pease v. Walsh, 39 N. Y. Super. 517, 49 HowPr 269. See also Contracts [9 Cyc 490].

35. Irwin v. Levy, 24 La. Ann. 302; Haney v. Manning, 21 La. Ann. 166; Williams v. Gay, 21 La. Ann. 110; Rhodes v. Summerhill, 4 Heisk. (Tenn.) 204.

36. See Contracts [9 Cyc 518].

37. Valentine v. Stewart, 15 Cal. 387; Patterson v. Donner, 48 Cal. 369; Hoyt v. Macon, 2 Colo. 502. See also Contracts [9 Cyc 500].

38. Stout v. Ennis, 28 Kan. 706; Keating v. Hyde, 23 Mo. A. 555; Nichols v. Mudgett, 32 Vt. 546. See also Contracts [9 Cyc 499].

39. Ark.—Phelps v. Holderness, 56 Ark. 300, 19 SW 921; Fortenbury v. State, 47 Ark. 188, 1 SW 58.

Ga.—Dancy v. Phelan, 82 Ga. 243, 10 SE 205; Walters v. Comer, 79 Ga. 798, 5 SE 292; Cunningham v. Augusta Nat. Bank, 71 Ga. 400, 51 AmR 266, 75 Ga. 366; Thompson v. Cummings, 68 Ga. 124.

Ill.—Jamieson v. Wallace, 167 Ill. 388, 47 NE 762, 59 AmSR 302 [aff 60 Ill. A. 618]; Pearce v. Foote, 113 Ill. 228, 55 AmR 414; Carroll v. Holmes, 24 Ill. A. 453.

Iowa.—Munns v. Donovan Commn. Co., 117 Iowa 516, 19 NW 789.

Me.—Nolan v. Clark, 91 Me. 38, 39 A 344.

Oh.—Lester v. Buel, 49 Oh. St. 240, 30 NE 821, 34 AmSR 556.

Pa.—Ruchizky v. De Haven, 97 Pa. 202.

See also Gaming [20 Cyc 921 et seq].

40. Rolfe v. Delmar, 30 N. Y. Super. 80; Mexican International Banking Co. v. Lichtenstein, 10 Utah 338, 37 P 574. See also Lotteries [25 Cyc 1564].

41. See Contracts [9 Cyc 486].

42. See Contracts [9 Cyc 490].

43. U. S.—In re Carpenter, 125 Fed. 831; New York Cent. Trust Co v. Bridges, 57 Fed. 753, 764, 6 CCA 539 (where Taft, J., said: "An agency is created—authority is actually conferred—very much as a contract is made, i. e. by an agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him, and the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them").

Ala.—Western Union Tel. Co. v. Northcutt, 158 Ala. 539, 562, 48 S 553, 132 AmSR 38 (where it was said: "In order to constitute an agency, it requires the concurrence of the minds of both the principal and the agent").

Del.—State v. Foster, 17 Del. 289, 40 A 939 [aff 18 Del. 111, 43 A 265].

Ill.—Booker v. Booker, 208 Ill. 529, 70 NE 709, 100 AmSR 250; Schmidt v. Shaver, 196 Ill. 108, 63 NE 655, 89 Am SR 250.

Iowa.—Storm Lake Bank v. Missouri Valley L. Ins. Co., 66 Iowa 617, 24 SW 239. And see Walton v. Dore, 113 Iowa 1, 84 NW 928.

Kan.—State v. Hubbard, 58 Kan. 797, 51 P 290, 39 LRA 860.

Ky.—Bartley v. Redmon, 115 SW 831.

Mich.—McDonald v. Boeing, 43 Mich. 394, 396, 5 NW 439, 38 AmR 199 (where it was said: "The contract of employment must always be a voluntary act on the part of the employer and of the employed, coinciding in a common understanding").

Mo.—Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019.

N. Y.—Sternaman v. Metropolitan L. Ins. Co., 170 N. Y. 13, 62 NE 763, 88 AmSR 625, 57 LRA 318; Raney v. Weed, 5 N. Y. Super. 577.

Oh.—Anderson v. State, 22 Oh. St. 305 (holding that the fact of agency is to be determined by the real understanding between the principal and agent); Ish v. Crane, 13 Oh. St. 574.

S. D.—Fish, etc., Co. v. New England Homestake Co., 27 S. D. 221, 130 NW 841.

Eng.—Markwick v. Hardingham, 15 Ch. D. 339; Love v. Mack, 93 L. T. Rep. N. S. 352.

[a] **A contract of agency is not void for lack of mutuality** (1) where an agent is employed to obtain the benefit of his expert knowledge in any particular business and is clothed with discretion as to the quantity and nature of service to be rendered. Fitzgerald Citizens' Bank v. Benton, 10 Ga. A. 308, 73 SE 417. (2) A contract signed by the obligors and obligees, by which the obligors appoint the obligees their exclusive agents for a certain territory and agree to sell them stone of certain kinds at certain prices, to quote no prices, and to make no sales to others in that territory without the obligees' consent, is not void for lack of mutuality, although the obligees do not expressly thereby bind themselves to purchase any stone or do any other thing. W. G. Taylor Co. v. Bannerman, 120 Wis. 189, 97 NW 918.

44. Lewis v. Amorous, 3 Ga. A. 50, 59 SE 338; Walton v. Dore, 113 Iowa 1, 84 NW 928.

"Agency is a contract, and like other contracts, it is essential that the minds of the parties should meet in making it." Cullinan v. Garfinkle, 114 App. Div. 509, 512, 99 NYS 1119.

[a] **Contract of agency.**—"The contract which exists between the principal and agent is called a contract of agency." Frink v. Roe, 70 Cal. 296, 307, 11 P 820.

45. Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 69 SE 845, AnnCas 1912B 148. And see cases supra note 43.

46. In re Carpenter, 125 Fed. 831; Central Trust Co. v. Bridges, 57 Fed. 753, 6 CCA 539; Walton v. Dore, 113 Iowa 1, 84 NW 928.

[a] **Contract held to constitute, as a matter of law, the relation of agency** see Petteway v. McIntyre, 131 N. C. 432, 42 SE 851.

[b] **A contract of agency between parties, all of whom are sui juris** and capable of contracting, where there is no fiduciary relation between the parties and no fraud or mistake, however speculative, or even unequal, it may be, is legal and valid. Neilson v. Bowman, 29 Gratt. ((70 Va.) 732.

[c] **An appointment induced by fraud** will not constitute a valid agency. Nugent v. Wade, (Tex. Civ. A.) 132 SW 883 (holding that a statement by a joint claimant of land to defendant that whatever arrangement defendant made with C as to buying would be satisfactory to him, based upon a statement to him by defendant that C had informed defendant that the other joint claimant had employed him to sell the land, did not authorize the sale of the land by C to defendant, where C's statement as to his authority to sell from the other joint claimant was not true).

47. U. S.—In re Carpenter, 125 Fed. 831; Rust v. Eaton, 24 Fed. 830.

Ala.—Hill v. Helton, 80 Ala. 528, 1 S 340; Holman v. Norfolk Bank, 13 Ala. 869.

Ark.—St. Louis, etc., R. Co. v. Bennett, 53 Ark. 208, 13 SW 742, 22 AmSR 187.

Colo.—Thatcher v. Kaucher, 2 Colo. 698; Western Inv., etc., Co. v. Denver First Nat. Bank, 23 Colo. A. 143, 128 P 476.

Del.—State v. Foster, 17 Del. 289, 40 A 939.

Ill.—Toledo Bridge, etc., Co. v. Oil Belt Tract. Co., 173 Ill. A. 298; Halladay v. Underwood, 90 Ill. A. 130; Peoria Grape Sugar Co. v. Turney, 70 Ill. A. 589 [aff 175 Ill. 631, 51 NE 587]; Equitable Produce, etc., Exch. v. Keyes, 67 Ill. A. 460.

Ind.—Lucas v. Rader, 29 Ind. A. 281, 64 NE 488.

Iowa.—Albia First Nat. Bank v. Free, 67 Iowa 11, 24 NW 566; Collar v. Ford, 45 Iowa 331.

Kan.—Goodyear v. Williams, 73 Kan. 192, 85 P 300; State v. Hubbard, 58 Kan. 797, 51 P 290, 39 LRA 860; Hall v. Smith, 3 Kan. A. 685, 44 P 908, 909 (where the court said: "In no case can agency be established without showing some connection between the principal and the claimed agent, from which may be reasonably inferred authority from the principal to do the act for which it is sought to hold him responsible").

Mass.—Hyde v. Boston, etc., Co., 21 Pick. 90 (holding that an agreement by a purchaser that a third person shall have a lien by mortgage or otherwise, after a certain time, for a debt due him from the vendor does not constitute the vendor the agent of the purchaser to execute such mortgage); Long v. Colburn, 11 Mass. 97, 6 AmD 160.

Mich.—Grover, etc., Sewing Mach. Co. v. Polhemus, 34 Mich. 247 (holding that a principal is not liable for

in some way accept the appointment, as the appointment will not go into effect until such acceptance.[48]

[§ 27] **2. Necessity of Consideration.** An executory agreement to act as agent for another is ordinarily not binding on either party unless it is based on a sufficient consideration.[49] Where, however, one who gratuitously promises to act for another enters upon performance of the undertaking, he is bound to complete performance according to his promise, notwithstanding the lack of consideration;[50] and if the promise has been executed in pursuance of the authority conferred, it is immaterial whether or not there was any consideration for the agent's undertaking,[51] since the rule making consideration an essential element of a simple contract does not apply to executed agreements.[52]

[§ 28] **3. Intention in General.** As an appointment presupposes an intelligent act on the part of the principal, there must be either an actual intention on his part to appoint[53] or an apparent intention naturally inferable from his words or actions,[54] and also an intention on the part of the agent to accept the appointment;[55] otherwise there is in general no agency.[56] Thus mere correspondence between

an indebtedness incurred in his name without authority by an agent, where he has never held the agent out as having such authority or done anything to ratify the unauthorized act, much less where the credit was originally given to the agent and not to the principal, and that an agent can never invest himself with authority, so as to bind his principal, by mere false statements to others with whom he deals as to the extent of his authority).

Minn.—Graves v. Horton, 38 Minn. 66, 35 NW 568; Rochester First Nat. Bank v. Bentley, 27 Minn. 87, 6 NW 422; Lawrence v. Winona, etc., R. Co., 15 Minn. 390, 2 AmR 130.

Mo.—Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019 (holding that no one can become the agent of another except by consent of the principal, either express or implied from the particular circumstances); Greenville Lumber Co. v. National Pressed Brick Co., 133 Mo. A. 217, 113 SW 236; Alt v. Grosclose, 61 Mo. A. 409.

Nebr.—Funk v. Latta, 43 Nebr. 739, 62 NW 65; Starring v. Mason, 4 Nebr. 367.

Nev.—Jos. Schlitz Brewing Co. v. Grimmon, 28 Nev. 235, 81 P 43.

N. J.—Dugan v. Lyman, (Ch.) 23 A 657.

N. Y.—Sternaman v. Metropolitan L. Ins. Co., 170 N. Y. 13, 62 NE 763, 88 AmSR 625, 57 LRA 318; Hermann v. Niagara F. Ins. Co., 100 N. Y. 411, 3 NE 341, 53 AmR 197; McGoldrick v. Willits, 52 N. Y. 612; Smith v. Duchardt, 45 N. Y. 597; Falihee v. John Simmons Co., 121 App. Div. 339, 106 NYS 764; Howard v. Norton, 65 Barb. 161; Raney v. Weed, 5 N. Y. Super. 577, 8 NYLegObs 182; Roberge v. Monheimer, 21 Misc. 491, 47 NYS 655; Spielberg v. Goldstein, 128 NYS 82; Tallmadge v. Lounsbury, 21 NYS 908 [aff 148 N. Y. 746 mem, 43 NE 990 mem]; Dobson v. Kuhnla, 20 NYS 771.

N. D.—Harris v. Reynolds, 17 N. D. 16, 114 NW 369.

Oh.—Ish v. Crane, 13 Oh. St. 574.

Pa.—Frailey v. Waters, 7 Pa. 221; Creighton v. Keith, 16 Phila. 130.

Tenn.—Farmers', etc., Bank v. Chester, 6 Humphr. 458, 44 AmD 318.

Utah.—Marks v. Sullivan, 8 Utah 406, 32 P 668, 20 LRA 590.

Vt.—Follett v. Stanton, 16 Vt. 35.

Wash.—Opie v. Pacific Inv. Co., 26 Wash. 505, 67 P 231, 56 LRA 778.

Eng.—Markwick v. Hardingham, 15 Ch. D. 339; Pole v. Leask, 9 Jur. N. S. 829.

Ont.—Maybury v. O'Brien, 26 Ont. L. 628, 3 OntWN 1546, 22 OntWR 677, 6 DomLR 268 [rev 25 Ont. L. 229, 20 OntWR 683]; Macklem v. Thorne, 30 U. C. Q. B. 464.

[a] **Authority to act essential.**—Proof of one's "acting" for another, without proof of his authority so to act, does not show the relation of principal and agent. Walsh v. St. Paul Trust Co., 39 Minn. 23, 38 NW 631.

[b] **Acting for self.**—"The relation of principal and agent cannot exist, where the person acting acts for himself, and not for another, and is without authority to act for him." Palmer v. Grand Lodge K. of P., (Ky.) 121 SW 678, 679.

[c] **Personal mandate** is a mandate whereby one person appoints another his special agent, or whereby one person gives "power to another to transact for him and in his name one or several affairs." State v. Michel, 113 La. 4, 8, 36 S 869.

48. Ala.—Western Union Tel. Co. v. Northcutt, 158 Ala. 539, 48 S 553, 132 AmSR 38.

Ark.—Beebe v. De Baun, 8 Ark. 510.

Del.—State v. Foster, 17 Del. 289, 294, 40 A 939 [aff 18 Del. 111, 43 A 265] (where the court said: "No one can make an agent of another without the consent of the person who is to be the agent").

Ky.—Vickery v. Lanier, 1 Metc. 133.

La.—McCoy v. Weber, 38 La. Ann. 418.

Mich.—McDonald v. Boeing, 43 Mich. 394, 5 NW 439, 38 AmR 199.

N. Y.—Cameron v. Seaman, 69 N. Y. 396, 25 AmR 212.

See Barr v. Lapsley, 1 Wheat. (U. S.) 151, 4 L. ed. 58.

See also cases supra note 43.

Mode of acceptance see infra § 31.

[a] **Although one of the parties understands that his offer to employ an agent is accepted,** this is not sufficient to create the agency, where the other party does not accept the offer, although his subsequent conduct may apparently contradict his intention not to become an agent. Amber Petroleum Co. v. Breech, (Tex. Civ. A.) 111 SW 668.

49. Ga.—Phares v. Stover, 136 Ga. 843, 72 SE 344; Fitzgerald Citizens' Bank v. Benton, 10 Ga. A. 308, 73 SE 417.

Iowa.—Cravens v. Cravens, Morr. 285. And see Walton v. Dore, 113 Iowa 1, 84 NW 928.

Mich.—Spencer v. Towles, 18 Mich. 9.

N. H.—Low v. Connecticut, etc., Rivers R. Co., 46 N. H. 284.

N. Y.—Jenkins v. Bishop, 136 App. Div. 104, 120 NYS 825 [aff 207 N. Y. 697 mem, 101 NE 1106 mem]; Thorne v. Deas, 4 Johns. 84.

Eng.—Balfe v. West, 13 C. B. 466, 76 ECL 466, 138 Reprint 1281; Coggs v. Bernard, 2 Ld. Raym. 909, 92 Reprint 107, 5 ERC 247; Elsee v. Gatward, 5 T. R. 143, 101 Reprint 82.

Agent's right to compensation see infra §§ 413–452.

[a] **Consideration held sufficient.**—Merrill v. Sax, 141 Iowa 386, 118 NW 434 (holding that, where one of two parties having a common interest in a sale of property held by them authorizes the other party to consummate the sale of the property and agrees to share the expense incurred in the transaction, his agreement is sufficient to support the other's express or implied agreement to faithfully represent their interests); Oberfelder v. Mattingly Co., (Ky.) 120 SW 352; Tuers v. Tuers, 100 N. Y. 196, 2 NE 922.

[b] **Contract for exclusive agency** supported by a sufficient consideration see Phares v. Stover, 136 Ga. 843, 72 SE 344.

50. U. S.—Short v. Skipwith, 22 F. Cas. No. 12,809, 1 Brock. 103; Walker v. Smith, 29 F. Cas. No. 17,086, 1 Wash. 152, 4 Dall. 389, 1 L. ed. 878.

Colo.—Fisher v. Seymour, 23 Colo. 542, 49 P 30.

Ky.—Vickery v. Lanier, 1 Metc. 133.

La.—Passano v. Acosta, 4 La. 26, 23 AmD 470.

Md.—Williams v. Higgins, 30 Md. 404.

Mich.—Spencer v. Towles, 18 Mich. 9.

N. Y.—Thorne v. Deas, 4 Johns. 84.

Pa.—Bergner v. Bergner, 219 Pa. 113, 67 A 999.

S. C.—Nixon v. Bogin, 26 S. C. 611, 2 SE 302.

W. Va.—Pardee v. Crane, 82 SE 340; State v. Fraley, 71 W. Va. 100, 103, 76 SE 134, 42 LRANS 498 [cit Cyc].

Eng.—Balfe v. West, 13 C. B. 466, 76 ECL 466, 138 Reprint 1281; Wilkinson v. Coverdale, 1 Esp. 75; Elsee v. Gatward, 5 T. R. 143, 101 Reprint 82.

See Dull v. Dumbauld, 7 Kan. A. 376, 51 P 936.

Liability for failure to perform gratuitous promise to act for another and for misfeasance see infra §§ 372, 384.

[a] **If one intrusts property to another** who agrees to perform services in reference thereto, the latter, although he is to receive no compensation, is bound to use reasonable care in respect to the safe custody of the property, and is also bound to perform the services as agreed, since the bailment affords a sufficient consideration for his promise. Robinson v. Threadgill, 35 N. C. 39; Coggs v. Bernard, 2 Ld. Raym. 909, 92 Reprint 107, 5 ERC 247. See also generally Bailments [5 Cyc 157].

51. See Haluptzok v. Great Northern R. Co., 55 Minn. 446, 57 NW 144, 26 LRA 739.

52. Maxwell v. Graves, 59 Iowa 613, 13 NW 758; Matthews v. Smith, 67 N. C. 374. See also generally Contracts [9 Cyc 321].

53. Halladay v. Underwood, 90 Ill. A. 130; Felton v. McClave, 46 N. Y. Super. 53; Connell v. McLoughlin, 28 Or. 230, 42 P 218.

54. Halladay v. Underwood, 90 Ill. A. 130.

[a] **Liability by holding out.**—In Central Trust Co. v. Bridges, 57 Fed. 753, 763, 6 CCA 539, Taft, J., said: "One may be liable for the acts of . . . his agent on one of two grounds: first, because by his conduct . . . he has held the other out as his agent; or, second, because he has actually conferred authority on the other to act as such." See infra § 36.

55. New York Cent. Trust Co. v. Bridges, 57 Fed. 753, 6 CCA 539. See also supra § 26.

56. Security Co. v. Graybeal, 85 Iowa 543, 52 NW 497, 39 AmSR 311; Hardin v. Chenault, 77 SW 192, 25 KyL 1083; Matteson v. Gillett, 86 Hun 386, 33 NYS 471. See also infra § 32.

[a] **Illustration.**—Where parties who are interested in having a railroad put through certain territory go to the owner of a piece of real estate through which it is proposed to run the road, and the owner makes certain statements to them which they, without the knowledge of the owner, communicate to the railroad company, this does not show that the owner made such parties her agent to make a tender of the right of way. Chicago, etc., R. Co. v. Estes, 71 Iowa 603, 33 NW 124.

[b] **A contractor** is not the agent of the one with whom he contracts. Hughes v. Cincinnati, etc., R. Co., 39 Oh. St. 461.

a property owner and a real estate agent, mentioning prices and terms, but evincing no intention on the part of the former to make the latter his agent, will not constitute an appointment.[57] So one who merely solicits orders for sales for a commission to be allowed upon the sales to be effected through such solicitation is not thereby constituted an agent with authority to make an absolute sale.[58]

Intention deducible from all the facts. The agency is to be established or disproved by the facts taken as a whole, and elements apparently characterizing the transaction as of a different nature must often be disregarded where the general intention to create an agency appears;[59] for while a mutual intention to create the relation of principal and agent is generally an essential element of agency, if the facts are such as to create an agency as a matter of law the actual intention of the parties and the name they give to their relation are immaterial; they cannot agree that facts which in law establish the relation of agency shall not establish that relation or shall establish a different relation;[60] but if such general intention to create an agency does not appear, the relation will not be created, although there exist some elements of agency.[61]

[§ 29] 4. **Mode of Creation—a. In General.** There is in general no particular mode in which an agency must be created,[62] and it is immaterial what terms are used or by what name the transaction is called if the requisites of an appointment are pres-

57. U. S.—Bosseau v. O'Brien, 3 F. Cas. No. 1,667, 4 Biss. 395.
Cal.—Lambert v. Gerner, 142 Cal. 399, 76 P 53.
Colo.—Castner v. Richardson, 18 Colo. 496, 33 P 163.
Ill.—Albertson v. Ashton, 102 Ill. 50.
Iowa.—Stewart v. Pickering, 73 Iowa 652, 35 NW 690.
N. D.—Harris v. Reynolds, 17 N. D. 16, 114 NW 369.
S. D.—Riley v. Grant, 16 S. D. 553, 94 NW 427.
Que.—Mainwaring v. Crane, 22 Que. Super. 67.
[a] **A mere inquiry** by an owner of realty, addressed to a real estate agent, as to whether a certain price could be obtained for a city lot is not sufficient to create the latter an agent of the owner and to empower him to make a sale of the premises at the given price after the lapse of four months from the date of the letter. Fay v. Sullens, 15 Okl. 171, 81 P 426.
[b] **The sending of a price list of lands** by the owner in response to an inquiry does not establish an agency in the inquirer. Stewart v. Pickering, 73 Iowa 652, 35 NW 690; Opie v. Pacific Inv. Co., 26 Wash. 505, 67 P 231, 56 LRA 718.

58. Daniel v. Maddox-Rucker Banking Co., 124 Ga. 1063, 53 SE 573 (holding that, where one engaged in the cotton business submits a proposition to a cotton buyer by letter, which is accepted, agreeing to pay twenty-five cents a bale commission, and giving the cotton buyer a basis on which to buy and on which the purchaser will take the cotton bought, subject to change as the market fluctuates, the cotton to be received by the purchaser and returns sent for it as soon as possible after receipt, this does not create the relation of principal and agent as to the business transacted under the contract); Illinois Moulding Co. v. Page, etc., Mfg. Co., 104 Ill. A. 1; Clough v. Whitcomb, 105 Mass. 482. See also Yates v. Killman, (Tenn. Ch. A.) 57 SW 221. And see supra § 8.
[a] **Independent dealer.**—One who on his own account engages in the business of purchasing goods for the purpose of filling orders received by him from others, and who in fact fills the same at prices therein specified, looking for his profits to the difference between what he pays and what he receives in these transactions, is not, although in each instance the order is received before a purchase is made, the agent of the persons by whom the orders are given, but an independent dealer buying and selling in his own behalf. Central Georgia Land, etc., Co. v. Exchange Bank, 101 Ga. 345, 28 SE 863.

59. U. S.—Davis v. Patrick, 122 U. S. 138, 7 SCt 1102, 30 L. ed. 1090; In re Carpenter, 125 Fed. 831.
Ala.—American Mortg. Co. v. King, 105 Ala. 358, 16 S 889; Miller v. Louisville, etc., R. Co., 83 Ala. 274, 4 S 842, 3 AmSR 722.
Ark.—Gist v. Harkrider, 15 SW 187.
Iowa.—Van Sandt v. Dows, 63 Iowa 594, 19 NW 669, 50 AmR 759; Bayliss v. Davis, 47 Iowa 340.
Mich.—Ayer v. Devlin, 146 NW 257.
Or.—Connell v. McLoughlin, 28 Or. 230, 42 P 218.
Tex.—Mason v. Ward, (Civ. A.) 166 SW 456.
Vt.—Noyes v. Landon, 59 Vt. 569, 10 A 342.

60. U. S.—Ex p. Flannagans, 9 F. Cas. No. 4,855, 2 Hughes 264.
Iowa.—Trotter v. Grand Lodge I. L. H., 132 Iowa 513, 109 NW 1099, 7 LRANS 569.
La.—Tete v. Lanaux, 45 La. Ann. 1343, 14 S 241.
N. Y.—Sternaman v. Metropolitan L. Ins. Co., 170 N. Y. 13, 19, 62 NE 763, 88 AmSR 625, 57 LRA 318 (where it was said: "Parties cannot . . . in the same instrument . . . provide that one is the agent of the other and at the same time and with reference to the same subject, that there is no relation of agency between them").
Tenn.—Arbuckle v. Kirkpatrick, 98 Tenn. 221, 39 SW 3, 60 AmSR 854, 36 LRA 285.
Tex.—Bradstreet Co. v. Gill, 72 Tex. 115, 9 SW 753, 13 AmSR 768, 2 LRA 405; Wright v. Calhoun, 19 Tex. 412.
Wash.—Boston Tow Boat Co. v. John J. Sesnon Co., 64 Wash. 375, 116 P 1083; Anderson v. Globe Nav. Co., 57 Wash. 502, 107 P 376 (holding that the facts that a foreign corporation owned a vessel, directed its operation, took the freights earned by it, and paid the expenses of operation were sufficient to support a finding that a domestic corporation, although styled in a lease of the vessel an independent lessee, was really a mere agent of the foreign corporation which was the real principal and liable for injuries to a servant engaged in loading the vessel); Hart v. Niagara F. Ins. Co., 9 Wash. 620, 38 P 213, 27 LRA 86.
Eng.—Ex p. White, L. R. 6 Ch. 397.
See also supra § 8.
[a] **The same principle applies** to partnership contracts see Partnership [30 Cyc 360 et seq]. It is also applied in determining whether a contract provides for liquidated damages or a penalty see Damages [13 Cyc 90 et seq].

61. U. S.—In re Carpenter, 125 Fed. 831.
Ala.—Ex p. Robinson, 86 Ala. 622, 5 S 827; Evans v. Cincinnati, etc., R. Co., 78 Ala. 341.
Ark.—Gulf Cooperage Co. v. Poindexter, 163 SW 1145.
Colo.—Leonard v. Hallett, 141 P 481.
Ga.—Merck v. American Freehold Land Mortg. Co., 79 Ga. 213, 7 SE 265.
Iowa.—Storm Lake Bank v. Missouri Valley L. Ins. Co., 66 Iowa 617, 24 NW 239.
Mich.—Willis v. Toledo, etc., R. Co., 72 Mich. 160, 40 NW 205.
Mo.—Paramore v. Campbell, 245 Mo. 287, 149 SW 6; Eads v. St. Louis, etc., R. Co. (A.) 167 SW 577 (holding that one who burned down an old mill, standing partly on the railroad right of way and partly on his own ground, in consequence of which a shipper's ties were burned, did not act as agent of the railroad company merely because, being anxious to get it away, he wrote the company that he would do so, and he was told to do it).
N. C.—Fortescue v. Makeley, 92 N. C. 56.
Tex.—Evans-Snider-Buel Co. v. Holder, 16 Tex. Civ. A. 300, 41 SW 404.
Wis.—Ross v. Northrup, etc., Co., 156 Wis. 327, 144 NW 1124 (holding that, where a seed company issues advertisements containing a blank coupon to be used in ordering its catalogue, in which there is a blank space for the insertion of the name of the local dealer of the prospective customer, that does not render the customer's local dealer the agent of the seed company).
Eng.—Ex p. White, L. R. 6 Ch. 397.

62. Del.—Geylin v. De Villeroi, 7 Del. 311.
Iowa.—Schneider v. Schneider, 125 Iowa 1, 98 NW 159 (holding that, where an administrator, in correspondence with a sister of decedent, dissuaded her from employing counsel and told her that he would look after her interests, and she permitted him to do so, he was her agent, and as such should be held to the strictest accountability, in the purchase of her share of the estate for the truth of his representations concerning it).
Mass.—Colt v. Clapp, 127 Mass. 476 (holding that an agreement between A, B, and C that A shall buy stock in his own name, the others to contribute their shares of the purchase money, and the matter to be afterward adjusted between them, is valid).
Minn.—State v. Fellows, 98 Minn. 179, 107 NW 542, 108 NW 825 (holding that a contract providing for the employment of F for the purpose of selling coal, the sales to be made in the name of F as long as he gives security against loss, and containing a contract by F to sell coal in his own name for not over thirty days' time and to pay the proceeds over to the other party to the contract as soon as received, and agreeing from time to time on demand to report the number of sales made and outstanding, the amount of cash received, and the amount of coal on hand, and providing for a payment of a certain sum on every ton of coal sold, creates the relation of principal and agent between the parties thereto); Haluptzok v. Great Northern R. Co., 55 Minn. 446, 57 NW 144, 26 LRA 739.
N. J.—Thomas v. Spencer, (Ch.) 42 A 275 (holding that, where a person nodded his head in response to an inquiry whether the inquirer should sign a contract for him, and the inquirer then signed in his presence, he was bound).
N. Y.—Tuers v. Tuers, 100 N. Y. 196, 2 NE 922.
Wash.—Huston v. Harrington, 56 Wash. 51, 107 P 874 (holding that a contract binding a party to sell to the adverse party or to whom he may direct his entire stock in a corporation on the payment of not less than thirty thousand, and as much more as the stock may be sold for to any per-

ent,[63] particularly where the act to be performed is essentially one of agency, [64] although, as will later appear, in a few special instances the law requires a particular form of appointment.[65] The relation may be formed either by express contract between the parties,[66] or by a contract implied in fact.[67] The appointment may be made by instrument under seal,[68] and generally by simple writing,[69] or by mere word of mouth.[70]

[§ 30] **b. Indirect Appointment.** It is not essential that an agent should be appointed directly by the principal, but the appointment may be made through another, as by referring an applicant to that other with the information that such other will make all arrangements and give directions as to work;[71] or the relation may arise out of an agreement to employ the agent of another, such person then becoming the agent of the first party;[72] but, in order to have the effect of an appointment, a contract between other persons must be clearly made with that intention.[73]

[§ 31] **c. Communication of Appointment and Acceptance.** The appointment must be communicated to the agent,[74] and in some instances it may be necessary that the agent's acceptance of the undertaking should be communicated to the principal;[75] but as a rule if the agent proceeds to act under the appointment it is unnecessary to give the principal express notice of acceptance,[76] as in such a case acceptance will ordinarily be presumed.[77]

[§ 32] **d. Implied Agency[78]—(1) In General.** The relation of agency does not depend upon an express appointment and acceptance thereof, but it may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the

son other than the adverse party, is a contract of agency).

[a] **The authority is complete where permission** to do a thing is given; there need be no direction or request on the part of the principal. Fay v. Richmond, 43 Vt. 25.

[b] **Contract of employment held sufficiently definite** to be enforced see Oberfelder v. J. G. Mattingly Co., (Ky.) 120 SW 352.

63. U. S.—Willcox, etc., Sewing Mach. Co. v. Ewing, 141 U. S. 627, 12 SCt 94, 35 L. ed. 882 (holding that an agreement whereby a machine company appoints a certain person "its exclusive vendor" for its machines in a defined territory, and agrees to sell the machines to him at a discount and not to knowingly supply its goods at a discount to another within that territory, and such person accepts the appointment and agrees to pay for the machines at the discount rate and not to sell them below the retail rate and not to solicit orders within the territory of other agents, constitutes such person an agent within the defined territory); Joslyn v. Cadillac Auto. Co., 177 Fed. 863, 101 CCA 77.

Ala.—Southern R. Co. v. W. T. Adams Mach. Co., 165 Ala. 436, 51 S 779 (holding that a contract binding a carrier to deliver freight at a particular place to the shipper's order, and to notify third persons at its destination of its arrival, made the latter the agents of the shipper to receive notice).

Ark.—Meadows v. Hudson, 90 Ark. 294, 119 SW 269 (holding that where a tenant on an owner's farm, whose crop has become grassy, is told by the owner to employ some one to work it, and the tenant does so, and the owner is interested in the crop, it is sufficient to constitute the tenant the owner's agent to hire some one to work the crop); Banks v. Flint, 54 Ark. 40, 14 SW 769, 16 SW 477, 10 LRA 459.

Ind.—Indiana Ins. Co. v. Hartwell, 100 Ind. 566.

Iowa.—Trotter v. Grand Lodge I. L. H., 132 Iowa 513, 109 NW 1099, 7 LRANS 569, 11 AnnCas 533; Van Sandt v. Dows, 63 Iowa 594, 19 NW 669, 50 AmR 759.

Mont.—Lindsley v. McGrath, 34 Mont. 564, 87 P 961.

S. D.—Parker v. Randolph, 10 S. D. 402, 73 NW 906.

See also supra § 28.

[a] **Where a party to an action refers another to a third person** for information in regard to a matter under dispute, agreeing to abide by such third person's decision, he thereby makes such third person his agent in regard to such matter. Armstrong, etc., Co. v. Crump, 25 Okl. 452, 106 P 856.

64. Trotter v. Grand Lodge I. L. M., 132 Iowa 513, 520, 109 NW 1099, 7 LRANS 569, 11 AnnCas 533 (where it was said: "There is no magic in the mere name of a thing, and if an act done or performed by one person or party for or in behalf of another is in its essential nature one of agency, then the former is the agent of the latter).

65. See infra §§ 53–66.

66. Del.—State v. Foster, 17 Del. 289, 40 A 939 [aff 18 Del. 111, 43 A 265]; Geylin v. De Villeroi, 7 Del. 311.

Iowa.—Storm Lake Bank v. Missouri Valley L. Ins. Co., 66 Iowa 617, 24 NW 239.

Mass.—Long v. Colburn, 11 Mass. 97, 6 AmD 160.

Minn.—Rice v. Longfellow Bros. Co., 78 Minn. 394, 81 NW 207.

Mo.—Staroske v. Pulitzer Pub. Co., 235 Mo. 67, 138 SW 36; Bonner v. Lisenby, 86 Mo. A. 666.

N. Y.—Sternaman v. Metropolitan L. Ins. Co., 170 N. Y. 13, 62 NE 763, 88 AmSR 625, 57 LRA 318; Drake v. White Sewing Mach. Co., 133 App. Div. 446, 118 NYS 178 [aff 199 N. Y. 595 mem, 93 NE 1120 mem].

N. C.—Trollinger v. Fleer, 157 N. C. 81, 72 SE 795 (holding that an agency may be conferred by express authority given by the principal).

W. Va.—Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 69 SE 845, AnnCas1912B 148.

B. C.—Sayward v. Dunsmuir, 11 B. C. 375.

Ont.—Ingersoll, etc., Gravel Road Co. v. McCarthy, 16 U. C. Q. B. 162.

[a] **Agency may be directly proved by express words of appointment,** whether orally uttered or contained in some writing. Mabley v. Irwin, 16 Ill. A. 362.

[b] **Agency for sale of newspapers.**—A contract between a newspaper publisher and a carrier whereby the latter is given a route for the delivery of the newspaper to subscribers, with the privilege of purchasing copies of the newspaper for a specific price and selling the same at the subscription price, creates the relation of principal and agent. Staroske v. Pulitzer Pub. Co., 235 Mo. 67, 138 SW 36.

67. See infra §§ 32–41.

68. See infra §§ 61–66.

69. See infra §§ 53–60.

70. See infra §§ 48–52.

71. Lyman v. Otley, 47 Ill. A. 82; Morse v. Thurber, 7 Misc. 707, 28 NYS 35; Pennsylvania R. Co. v. Flanigan, 112 Pa. 558, 4 A 364.

[a] **Illustrations.**—(1) Where the manager of a company refers one applying for employment to another whom he represents as having charge of the salesmen, he is estopped afterward to deny that the person referred to had authority to employ the applicant as a drummer. Mook v. Parke, 9 Misc. 90, 29 NYS 32. (2) Where a shipper tells a railroad agent that certain parties are his agents to receive and remove the goods, and that on arrival the agent may notify a third person who will notify the shipper's agents, such third person is the shipper's agent to receive notice. Hearn v. Louisville, etc., R. Co., 6 Ala. A. 483, 60 S 600. (3) One who, on going to another's place of business in response to an invitation in writing, finds a person assuming to employ hands, who gives him employment for several weeks for which he is paid from time to time, has a right to assume that the person employing him had authority, notwithstanding private instructions from the owner to the employer, of which he had no knowledge, and the owner is liable for the amount of his wages. Cox v. Albany Brewing Co., 56 Hun 489, 10 NYS 213. See also infra § 306.

72. Ball v. State Bank, 8 Ala. 590, 42 AmD 649; Kidd v. New Hampshire Tract. Co., 74 N. H. 160, 66 A 127.

73. Haynes v. Crutchfield, 7 Ala. 189.

74. Barr v. Lapsley, 1 Wheat. (U. S.) 151, 4 L. ed. 58. See also Contracts [9 Cyc 270].

75. McDonald v. Boeing, 43 Mich. 394, 396, 5 NW 439, 38 AmR 199 (where it was said: "No offer to employ another binds the person making it to pay for services unless he is given to understand that the offer is accepted"); In re Consort Deep Level Gold Mines, [1897] 1 Ch. 575.

76. George v. Sandel, 18 La. Ann. 535 (where it was held that when a person appointed as agent of another acts under the appointment there is a tacit acceptance, although he writes to his principal declining the agency); Parkhill v. Imlay, 15 Wend. (N. Y.) 431; Roberts v. Ogilby, 9 Price 269. See also Garvey v. Scott, 9 Ill. A. 19 (where plaintiff, having left a horse in defendant's charge, asked a third person if he would take the horse from defendant and sell it for him if he should write to him to do so, and was told by such third person that he would, and he afterward wrote such third person to sell the horse, and without making any response to such letter the horse was sold, and it was held that the contract of agency was complete); Wright v. Rankin, 18 Grant Ch. (U. C.) 625; Contracts [9 Cyc 270].

[a] **Time for acceptance.**—The agent must proceed to act under the appointment within a reasonable time. Parkhill v. Imlay, 15 Wend. (N. Y.) 431.

77. Delano v. Smith Charities, 138 Mass. 63.

[a] **If an agent acts under an authority conferred** upon him, this amounts to a tacit acceptance of the agency, although he writes to his principal refusing the agency and requesting him to appoint another agent. George v. Sandel, 18 La. Ann. 535.

[b] **Unless he declines** the agent is presumed to have accepted. Lockwood v. Mechanics' Nat. Bank, 9 R. I. 308, 11 AmR 253.

78. Admissibility of circumstantial evidence to show implied agency see infra §§ 708–719.

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particular case.[79] It may be implied from a single transaction,[80] but if is more readily inferable from a series of transactions.[81] An implied agency must be based upon facts, and facts for which the principal is responsible;[82] and upon a natural and reasonable, but not a strained, construction of those facts,[83] as the facts must be such as naturally to lead another to believe in and to rely on the agency.[84] It is often difficult to determine upon general principles whether any agency exists; rather it must be determined from the facts and circumstances of the particular case, and if it appears from such facts and circumstances that there was at least an implied intention to create the relation, it will by implica-

79. U. S.—Martin v. Webb, 110 U. S. 7, 3 SCt 428, 28 L. ed. 49.
Ala.—Republic Iron, etc., Co. v. Passafume, 61 S 327; Hill v. Helton, 80 Ala. 528, 1 S 340.
Cal.—Anglo-Californian Bank v. Cerf, 147 Cal. 393, 81 P 1081; Ballard v. Nye, 138 Cal. 588, 72 P 156; Kuhlman v. Burns, 117 Cal. 469, 49 P 585.
Colo.—Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248 [aff 96 U. S. 640, 24 L. ed. 648]; Daniels v. Stock, 23 Colo. A. 529, 130 P 1031 (holding that, where, in an action for injuries sustained by a projection in a bathtub in a public bathhouse, plaintiff pays the charge to a boy, who receives the money and waits upon customers, agency is sufficiently shown to establish the liability of defendant).
Del.—State v. Foster, 17 Del. 289, 40 A 939 [aff 18 Del. 111, 43 A 265]; Geylin v. De Villeroi, 7 Del. 311.
Ill.—Hawley v. Curry, 74 Ill. A. 309; Mabley v. Irwin, 16 Ill. A. 362.
Ind.—Stockwell v. Whitehead, 47 Ind. A. 423, 94 NE 736; Broadstreet v. McKamey, 41 Ind. A. 272, 83 NE 773.
Iowa.—Leonard v. Omstead, 141 Iowa 485, 119 NW 973 (holding that the contract of agency may be inferred from circumstances); McCormick Harvesting Mach. Co. v. Lambert, 120 Iowa 181, 94 NW 497; Storm Lake Bank v. Missouri Valley L. Ins. Co., 66 Iowa 617, 24 NW 239.
Kan.—Linscott v. Conner, 85 Kan. 865, 118 P 693; Caldwell v. Bigger, 76 Kan. 49, 90 P 1095; Goodyear v. Williams, 73 Kan. 192, 85 P 300; Dull v. Dumbauld, 7 Kan. A. 376, 51 P 936; Hall v. Smith, 3 Kan. A. 685, 44 P 908.
Ky.—Hall v. Ayer, etc., Tie Co., 102 SW 867, 31 KyL 508; Peyton v. Old Woolen Mills Co., 122 Ky. 361, 91 SW 719, 28 KyL 1303.
La.—Ball v. Bender, 22 La. Ann. 493.
Me.—Trundy v. Farrar, 32 Me. 225.
Md.—Darrin v. Whittingham, 107 Md. 46, 68 A 269; Swindell v. Gilbert, 100 Md. 399, 60 A 102; Santa Clara Min. Assoc. v. Meredith, 49 Md. 389, 33 AmR 264 (agency for corporation); Northern Cent. R. Co. v. Bastian, 15 Md. 494.
Mass.—Lash v. Ames, 171 Mass. 487, 50 NE 996; Long v. Colburn, 11 Mass. 97, 6 AmD 160.
Minn.—Lindquist v. Dickson, 98 Minn. 369, 107 NW 958, 6 LRANS 729, 8 AnnCas 1024; Haluptzok v. Great Northern R. Co., 55 Minn. 446, 57 NW 144, 26 LRA 739.
Mo.—Johnson v. Hurley, 115 Mo. 513, 22 SW 492; Southgate v. Atlantic, etc., R. Co., 61 Mo. 89; Kiley v. Forsee, 57 Mo. 390; Christian Univ. v. Jordan, 29 Mo. 68; Phillips v. Geiser Mfg. Co., 129 Mo. A. 396, 107 SW 471; Roberson v. Clevenger, 111 Mo. A. 622, 86 SW 512; Mosby v. McKee, etc., Commn. Co., 91 Mo. A. 500.
Nebr.—Martin v. Hutton, 90 Nebr. 34, 132 NW 727, 36 LRANS 602.
N. J.—Keim v. O'Reilly, 54 N. J. Eq. 418, 34 A 1073.
N. M.—Ilfeld v. Stover, 4 N. M. 54, 12 P 714.
N. Y.—McGoldrick v. Whillits, 52 N. Y. 612; Phillips v. Campbell, 43 N. Y. 271; Valentine v. Applebee, 87 Hun 1, 33 NYS 762; Laughlin v. Manson, 65 Misc. 492, 120 NYS 110.
N. C.—Trollinger v. Fleer, 157 N. C. 81, 72 SE 795.
Okl.—Armstrong v. Crump, 25 Okl. 452, 106 P 855; Jack v. Wichita Nat. Bank, 17 Okl. 430, 89 P 219.
Pa.—Dougherty v. Hunter, 54 Pa. 380; Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 AmD 390.
Philippine.—De la Pena v. Hidalgo, 16 Philippine 450.
S. C.—Fail v. Western Union Tel. Co., 80 S. C. 207, 60 SE 697, 61 SE 258; Blackwell v. British-American Mortg. Co., 65 S. C. 105, 43 SE 395.
Tex.—Missouri, etc., R. Co. v. Luster, (Civ. A.) 162 SW 11; Pullman Palace Car Co. v. Nelson, 22 Tex. Civ. A. 223, 54 SW 624.
Vt.—Keyes v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201.
Wash.—Staats v. Pioneer Ins. Assoc., 55 Wash. 51, 104 P 185; Ankeney v. Young Bros., 52 Wash. 235, 100 P 736.
W. Va.—Cassiday Fork Boom, etc., Co. v. Terry, 69 W. Va. 572, 73 SE 278; Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 69 SW 845, AnnCas1912B 148; Siers v. Wiseman, 58 W. Va. 340, 52 SE 460; Ruffner v. Hewitt, 7 W. Va. 585.
Wis.—Bouck v. Enos, 61 Wis. 660, 21 NW 825.
Can.—Henderson v. Thompson, 41 Can. S. C. 445.
B. C.—Sayward v. Dunsmuir, 11 B. C. 375.
Ont.—Wright v. Rankin, 18 Grant Ch. (U. C.) 625; Ingersoll, etc., Gravel Road Co. v. McCarthy, 16 U. C. Q. B. 162.

[a] **Where the existence of an alleged agency depends upon a large number of facts,** it is proper for the court to refuse an instruction to the effect that the relation of principal and agent can arise only out of an express agreement, supported by a good and valuable consideration. Dull v. Dumbauld, 7 Kan. A. 376, 51 P 936.

[b] **Manager of football team.**—Where the manager of a local football team makes arrangements with a hotel for the entertainment and accommodation of the members of the visiting team, in the absence of any evidence to the contrary he must be considered as agent of the different members of the visiting team. Fruchey v. Eagleson, 15 Ind. A. 88, 43 NE 146.

[c] **A person soliciting passengers** for a mutual enterprise, furnishing information as to the passenger's fare, collecting money and notes for such fare, showing receipts therefor in the nature of passenger tickets, and assuming to act with authority in providing such vessel for the purpose, may be regarded as holding himself out to be an agent of such vessel and consequently of those controlling it. Imada v. The Steamship, 2 Hawaii Fed. 337.

[d] **One who agreed to pay an interpreter** for his services in carrying on negotiations with another who spoke a different language made the interpreter his agent in the negotiations so as to be liable for material misrepresentations by him. Bonelli v. Burton, 61 Or. 429, 123 P 37.

80. Shoninger v. Peabody, 57 Conn. 42, 17 A 278, 14 AmSR 88; Aga v. Harbach, 127 Iowa 144, 102 NW 833, 109 AmSR 377, 4 AnnCas 441; Grant v. Humerick, 123 Iowa 571, 94 NW 510; Harrison v. Legore, 109 Iowa 618, 80 NW 670; Graves v. Horton, 38 Minn. 66, 35 NW 568; Wilcox v. Chicago, etc., R. Co., 24 Minn. 269; Haubelt Bros. v. Rea, etc., Mill Co., 77 Mo. A. 672.

81. Conn.—Bryan v. Jackson, 4 Conn. 288.
D. C.—Brooke v. Barnes, 12 D. C. 5.
Ind.—Isbell v. Brinkman, 70 Ind. 118.
Minn.—Hare v. Bailey, 73 Minn. 409, 76 NW 213; Wheeler v. Benton, 71 Minn. 456, 74 NW 154; Wheeler v. Benton, 67 Minn. 293, 69 NW 927; Neibles v. Minneapolis, etc., R. Co., 37 Minn. 151, 33 NW 332.
Mo.—Haubelt v. Rea, etc., Mill Co., 77 Mo. A. 672; Summerville v. Hannibal, etc., R. Co., 62 Mo. 391.
N. Y.—Hermann v. Niagara F. Ins. Co., 100 N. Y. 411, 3 NE 341, 53 AmR 197; Fenner v. Lewis, 10 Johns. 38.
Or.—Marks v. Herren, 47 Or. 603, 83 P 385.
Eng.—Dodsley v. Varley, 12 A. & E. 632, 40 ECL 316, 113 Reprint 954; Hazard v. Treadwell, Str. 506, 93 Reprint 665.

82. See supra § 26.

[a] **The principal cannot be bound by a false agent's conduct alone,** even though the third person believes from such conduct that he has authority, on which belief he acts. Leu v. Mayer, 52 Kan. 419, 34 P 969.

[b] **Where a principal has not given an agent authority,** he is bound by his appearance of authority only so far as he has caused that appearance. Figueira v. Lerner, 52 App. Div. 216, 65 NYS 293.

[c] **The superintendent of a coal mine** which furnishes coal to a wholesale dealer is not the agent of such dealer in trying to induce a third person to purchase coal from the dealer by making false representations as to the quality of the coal. Peoria Grape Sugar Co. v. Turney, 70 Ill. A. 589 [aff 175 Ill. 631, 51 NE 587].

83. Plant v. McEwen, 4 Conn. 544; Kansas, etc., Coal Co. v. Millett, 50 Mo. A. 382 (holding that the fact that a junior mortgagee assented to the appointment of an agent by the mortgagor to collect the rents and apply them in payment of running expenses and the interest on the first mortgage did not make such agent the agent of the junior mortgagee so as to bind the latter by his contracts for heating and lighting the mortgaged property); Associate Alumni Gen. Theological Seminary v. General Theological Seminary, 26 App. Div. 144, 49 NYS 745 [mod on other grounds 163 N. Y. 417, 57 NE 626] (holding that the fact that the alumni association of a college, which had passed resolutions to raise a fund to establish a professorship, applied to such college for its sanction, which was granted by resolution of the board of trustees that "this board . . . hereby recognizes them as agents accordingly, and earnestly commends their agency to the confidence and liberality of the church," did not entitle the college to the fund as principal); Gregory v. Loose, 19 Wash. 599, 54 P 33.

84. Ga.—Campbell v. Murray, 62 Ga. 86.
Ind.—Helms v. Wayne Agricultural Co., 73 Ind. 325, 38 AmR 147.
N. Y.—Joseph v. Platt, 130 App. Div. 478, 114 NYS 1065 (holding that, in order to infer authority to act as agent where no actual authority is given, some act of the principal must be shown which gives the agent apparent authority to act, under which one dealing with the agent is entitled to assume authority).
N. C.—Munroe v. Stutts, 31 N. C. 49.
Pa.—Shenk v. Philadelphia Steam Propeller Co., 60 Pa. 109, 100 AmD 541.
Tenn.—Jackson v. McMinnville Nat. Bank, 92 Tenn. 154, 20 SW 820, 36 AmSR 81, 18 LRA 663 and note.
Eng.—Prescott v. Flinn, 9 Bing. 19, 23 ECL 467, 131 Reprint 521.

tion be held to exist.[85] Where, however, it is not apparent from the facts and circumstances that there was an express or implied intention to create the relation of agency, it will not be held to exist,[86]

85. U. S.—Foster v. Murphy, 135 Fed. 47, 67 CCA 521 (holding that where a witness who was a member of defendant firm testified that he called on plaintiff, and told him defendant was dissatisfied with the business and wanted a distinct understanding, and thereupon the contract between the parties was modified, such proof was sufficient to show that the witness had authority to act for defendant); Hough v. Richardson, 12 F. Cas. No. 6,722, 3 Story 659.

Cal.—Wilson v. Hehderson, 128 Cal. 258, 55 P 986.

Ill.—Malburn v. Schreiner, 49 Ill. 69.

Mass.—Nowell v. Chipman, 170 Mass. 340, 49 NE 631.

Minn.—State v. Fellows, 98 Minn. 179, 107 NW 542, 108 NW 825.

Mo.—Sandifer v. Lynn, 52 Mo. A. 553.

N. Y.—New York Cent., etc., R. Co. v. Davis, 86 Hun 86, 34 NYS 206 [aff 158 N. Y. 674 mem, 52 NE 1125 mem]; Benedict v. Rockwell, 25 Misc. 325, 54 NYS 581; Trankla v. McLean, 18 Misc. 221, 41 NYS 385.

Pa.—McReynolds' App., 66 Pa. 102 (holding that an assignment of a part interest of a railroad contract, the assignor reserving "the same control over the execution of the work . . . as he would have had had these presents never been executed," constitutes the assignor the attorney in fact of the assignee so far as his interest is concerned).

Tenn.—Hussey v. Crass, (Ch. A.) 53 SW 986.

Wis.—Sheanon v. Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 NW 878.

Ont.—Wright v. Rankin, 18 Grant Ch. (U. C.) 625.

See also supra § 28.

86. Ala.—Mills v. Abbeville Southern R. Co., 137 Ala. 505, 34 S 815; Haynes v. Crutchfield, 7 Ala. 189.

Ariz.—Thorne v. Bowers, 1 Ariz. 239, 25 P 476.

Cal.—Mabb v. Stewart, 133 Cal. 556, 65 P 1085; Green v. Grider, 65 P 975; Jones v. Waterman, (A.) 87 P 469.

Colo.—Burson v. Bogart, 18 Colo. A. 449, 72 P 605 (holding that, where plaintiff sold goods to defendant's tenant who was holding under a lease providing for payment of rent in a share of the crops, and the account was kept on plaintiff's books in the name of the tenant and his wife, and, on failure of the tenant to pay, plaintiff sought to hold defendant liable as the tenant's principal, and it appeared that plaintiff had asked the tenant, in defendant's presence, if the latter was not to pay the bill and received an affirmative answer, that the tenant had taken wheat from defendant's granary and used it as seed on the latter's land, and that he had driven some of defendant's cattle from one pasture to another, these facts were insufficient to prove the agency).

Ill.—Leonard v. Heavner, 171 Ill. A. 188.

Iowa.—Gadmer v. Lent, 102 Iowa 741, 70 NW 732; Steele v. Watson, 86 Iowa 629, 53 NW 420; Storm Lake Bank v. Missouri Valley L. Ins. Co., 66 Iowa 617, 24 NW 239; Cravens v. Cravens, Morr. 285.

Kan.—Maloney v. Clark, 6 Kan. 82.

Ky.—Fidelity Trust, etc., Co. v. Carr, 66 SW 990, 24 KyL 156.

Md.—Smith v. Edwards, 2 Harr. & G. 411.

Mass.—Blaney v. Rogers, 174 Mass. 277, 54 NE 561 (holding that, where the agent of a surety company, on receiving an application for the company to act as surety for a building contractor, told the contractor to have the owner's attorney "draw the bond and bring it back to the company, and that it would execute the same as surety," and such instructions were carried out, and the contractor paid the attorney for his services, and the company executed the bond, supposing that certain recitals in the bond were true, the contractor did not act as the company's agent in employing the attorney at the request of the company); Savage v. Merle, 5 Pick. 83.

Mich.—Sanford v. Pettit, 83 Mich. 499, 47 NW 357; Wisconsin Mar., etc., Ins. Co.'s Bank v. Filer, 83 Mich. 496, 47 NW 321 (holding that an agency is not sufficiently shown by evidence of the mere fact that the purchaser of standing timber was the president of a lumber company and gave the seller a draft of the company in part payment, in order to bind the company, where the authority is denied).

Minn.—Dispatch Printing Co. v. National Bank of Commerce, 115 Minn. 157, 132 NW 2; Pepard v. Lewis, 37 Minn. 280, 33 NW 790.

Mo.—Padley v. Catterlin, 64 Mo. A. 629.

Nebr.—State v. State Journal Co., 77 Nebr. 752, 110 NW 763, 9 LRANS 174.

N. H.—Woodward v. Bixby, 68 N. H. 219, 44 A 298.

N. Y.—Holman v. Goslin, 103 App. Div. 606, 93 NYS 126; Patten v. Climax Quick Tanning Co., 40 App. Div. 607, 57 NYS 758.

Pa.—Elkinton v. White, 5 Pa. Dist. 199.

Tex.—Snyder v. Baker, (Civ. A.) 34 SW 981.

Wash.—Townsend v. Dilsheimer, 50 Wash. 294, 97 P 53; O'Connell v. Marvin, 47 Wash. 8, 91 P 254.

N. B.—Sutherland v. Gilmour, 5 N. B. 165.

See also supra § 28.

[a] **Illustrations.**—(1) Where a receiver of a corporation sought to charge plaintiff for the proceeds of a promissory note alleged to have been transferred to defendant's father as her agent, it was held that the agency was not sufficiently proved. The court said: "The only evidence given in support of an agency in the transferee, for his daughter, shows that at one time this individual was intrusted with a savings bank book belonging to her for the purpose of pledging it as security for a loan to the corporation, and the further proof, from which a ratification of the transaction in suit is sought to be inferred, goes no further than to support the daughter's acquiescence in the fact that he had subsequently used the moneys on deposit in the bank, when she was informed of this circumstance. All this was totally disconnected from the matter of the transfer of the promissory note, and there was no proof of an agency in that matter, nor of ratification of the transferee's act of acceptance, since the defendant sought to be charged was in total ignorance of the circumstances as to which she is alleged to have given her approval." Stiefel v. New York Novelty Co., 25 Misc. 221, 222, 55 NYS 90. (2) The fact that a surety made several payments to a maker of a note, who turned them over to, and received the coupons from, the payee, does not show that there was a relation of agency between the payee and the maker. Judkins v. Burr, 1 Nebr. (Unoff.) 267, 95 NW 475. (3) Where a bank in the course of its business negotiated loans and had the notes made payable to defendant bank after being indorsed by the officers of the first bank, and defendant bank received a certain rate of interest, and the officers received all the interest above that rate as compensation for their indorsement, the transaction did not authorize a finding that the officers were acting as agents of defendant bank. Sanborn v. Buchanan First Nat. Bank, 115 Mo. A. 50, 90 SW 1033.

[b] **An agreement to become a surety** does not make the principal obligor an agent to negotiate the loan. Hayes v. Burkam, 94 Ind. 311.

[c] **A creditor of a partnership** asking one partner to consult with his copartner does not thereby make such partner his agent so as to be bound or estopped by his statements to his copartner. Cerny v. Paxton, etc., Co., 82 Nebr. 88, 119 NW 14.

[d] **Advancing money to carry on business** (1) does not make the person to whom the money is advanced an agent. Perkins v. Huntington, 19 NYS 71 [aff 139 N. Y. 630 mem, 35 NE 206 mem]. (2) One conveying his property to a trustee as collateral security for moneys advanced to him, agreeing in the instrument of conveyance to conduct the business in an orderly manner, subject to the direction of the trustee, covenanting with the trustee and his successor that he will give the business his whole time and best efforts and will account to the trustee at least once a week for all moneys less a stipulated salary, and authorizing the trustee or his successor to sell the goodwill, stock in trade, etc., on becoming satisfied that he is losing money in the business and on the breach of any of his covenants is not thereby constituted the agent of the trustee or his successor so as to render the latter liable for debts contracted by him in the conduct of his business. Massachusetts Breweries Co. v. Hills, 185 Mass. 526, 70 NE 1013.

[e] **Permitting use of automobile.**—Where the owner of an automobile merely permits another to use it, the latter does not thereby become the owner's agent or servant so as to charge the owner with the borrower's negligence resulting in the death or injury of a third person. Lewis v. Amorous, 3 Ga. A. 50, 59 SE 338; Goodrich v. Musgrave Fence, etc., Co., 154 Iowa 637, 135 NW 58.

[f] **The selection of the office of a notary as the place of payment** of a hypothecary claim and interest does not establish the relation of principal and agent between the notary and the person making the selection. Latulippe v. Grenier, 13 Que. Super. 157.

[g] **Delivery of check.**—An agency is not to be inferred from the mere delivery of a check to another, payable to the order of a third person, to be given to that person. Hunt v. Poole, 139 Mass. 224, 30 NE 90.

[h] **That one addressed an envelope** is not sufficient proof that he is bound by the letter contained therein, purporting to authorize the addressee to act as his agent, especially where he denies knowledge of the letter's contents. Darr v. Darrow, 120 Iowa, 29, 94 NW 245.

[i] **Taking paper payable to third party.**—The mere fact that the alleged agent took in notes from plaintiffs payable to a third party is not conclusive evidence that he was the agent of such third party. Hewitt v. Huffman, 55 Or. 57, 59, 105 P 98 (where it was said: "It is not unusual for a person dealing on his own account to take paper payable to a third party").

[j] **That the officers of two mining corporations are the same** is not of itself proof that one corporation was made the agent of the other by a mining lease executed between them. Philadelphia Union Trust Co. v. Branch Mint Operating Co., 28 S. D. 549, 134 NW 65.

[k] **Cloakroom attendant.**—That the person who attended the "cloakroom" at an entertainment given by persons who hired defendant's hall acted under an understanding with defendant that such person should receive a part of the tips taken in the cloakroom did not make him defendant's agent so as to make defendant liable for a shawl deposited there by plaintiff who purchased a ticket for the entertainment, in the absence of circumstances estopping defendant from denying that such person was his agent. Spielberg v. Goldstein, 128 NYS 82.

as where it is apparent that the alleged agent was acting for himself.[87] So the relation will not be inferred from the mere fact that third persons thought or assumed that the agency existed,[88] nor because the alleged agent assumed to act as such,[89] nor because the conditions and circumstances were such as to make such an agency seem natural and probable and to the advantage of the supposed principal;[90] nor will it be implied from facts which show that the alleged agent was a mere instrumentality.[91] So also the mere fact that a third person is present during the negotiations between the parties does not make him the agent of the party at whose instance he is present.[92]

[§ 33] **(2) Extent of Implied Agency.** If, in view of the facts, an implied agency is apparent, its extent is limited to acts of a like kind with those from which it is implied, and is to be restricted to the purpose for which the facts show that it was granted.[93]

[§ 34] **(3) Instances of Implied Agency in General.** The inference of an agency may be drawn from the facts, together with other circumstances, that one is put in possession of real property,[94] given the custody or possession of instruments[95] or other

[1] **"The relation of a government acting in its political capacity** to a person who furnishes the information upon which it acts cannot, from the very nature of things, be that of principal and agent." American Banana Co. v. United Fruit Co., 166 Fed. 261, 266, 92 CCA 325 [aff 160 Fed. 184, and aff 213 U. S. 347, 29 SCt 511, 53 L. ed. 826, 16 AnnCas 1047] (holding that where plaintiff's plantation in Panama, over which the Costa Rican government exercised de facto sovereignty, was injured by the acts of the Costa Rican officers and soldiers acting pursuant to an alleged conspiracy between the officers and defendant, plaintiff's competitor in business, defendant could not be charged with the acts of such Costa Rican officials on the theory that the Costa Rican government merely acted as defendant's agent in carrying out its desires, where there was nothing to show that the Costa Rican government was not acting on its own responsibility and in its governmental capacity).

87. Stuart v. Asher, 15 Colo. A. 403, 62 P 1051; Hyatt v. Zion, 102 Va. 909, 48 SE 1 (holding that, where complainant's husband, in order to secure a debt which he owed to a bank, induced complainant to sign a deed of trust on certain land owned by them jointly, the husband in such transaction did not act as agent of the bank so as to charge it with his false representations made to induce her to sign the deed). See also cases supra note 86.

[a] **A person who leases a plant** for a year on condition that the business shall be conducted without liability to him, the lessor, and afterward, during the term, takes possession of such plant on account of the inability of the lessee to manage the business, is not liable for articles furnished to said lessee by persons having notice of the condition. Kellogg Newspaper Co. v. East St. Louis Journal Pub. Co., 66 Ill. A. 445.

[b] **Agency of debtor for creditor in procuring security for debt.**—The debtor is not as a rule regarded as the creditor's agent in procuring security for the debt. Campbell v. Murray, 62 Ga. 86; Helms v. Wayne Agricultural Co., 73 Ind. 325, 38 AmR 147 [appr Hunter v. Fitzmaurice, 102 Ind. 449, 2 NE 127; Wheeler v. Barr, 7 Ind. A. 381, 34 NE 591]; Carter v. Goff, 141 Mass. 123, 5 NE 471; Harris v. Bradley, 7 Yerg. (Tenn.) 310; Hyatt v. Zion, 102 Va. 909, 48 SE 1. And see Woodward v. Bixby, 68 N. H. 219, 44 A 298. But see Haskit v. Elliott, 58 Ind. 493 (holding on the facts that a debtor in procuring his wife's signature to a note and mortgage to secure the debt acted as agent of the creditor who was bound by the misrepresentations of the debtor); Newlin v. Beard, 6 W. Va. 110 (holding that where, after a bond has been executed and delivered by the obligor to the obligee, the latter hands the bond back to the obligor and requests him to procure the signatures of certain other persons, the obligee constitutes the obligor his agent for the purpose of obtaining the signatures).

[c] **The mere fact that one person procures a loan of money for another** does not create the relation of agency. Grady v. O'Reilly, 116 Mo. 346, 22 SW 798 (holding that where debtors, desiring to borrow money, went to another, and his undertaking was to furnish them the money on certain conditions, that undertaking did not create confidential relations between them, although the conditions might have required them to pay the expense of an examination of the title).

[d] **Permission to purchase judgment.**—Mere permission from a judgment debtor to a third party to purchase the judgment against him, without furnishing any money therefor, or agreeing to take the judgment after the purchase or to pay anything for the services, and such party's promise to do so, do not constitute such third party an agent for the purchase, obligating him to transfer the judgment to the debtor on being reimbursed the amount paid. Walton v. Dore, 113 Iowa 1, 84 NW 928.

88. Artley v. Morrison, 73 Iowa 132, 34 NW 779; Ward v. New England Southern Conference M. E. Church, 27 R. I. 262, 61 A 651; Caldwell v. Bryan, 20 Tex. Civ. A. 168, 49 SW 240; Winkelman v. Brickert, 102 Wis. 50, 78 NW 164.

[a] **Payment to one as agent.**—In a suit for goods sold evidence by defendant that he paid the price to plaintiff's collector is insufficient to establish the agency of the one to whom the money was paid. Howard, etc., Co. v. Conaty, 116 NYS 614.

89. In re Thomas, 199 Fed. 214, 223 [quot Cyc]; Leary v. Albany Brewing Co., 77 App. Div. 6, 79 NYS 130; Roberge v. Monheimer, 21 Misc. 491, 47 NYS 655 (holding that the agency is not to be implied from the assumed agent's own statement of his authority); Deverell v. Bolton, 18 Ves. Jr. 505, 34 Reprint 409; Maybury v. O'Brien, 26 Ont. L. 628, 3 OntWN 1546, 22 OntWR 677, 6 DomLR 268 [rev 25 Ont. L. 229, 20 OntWR 683]. See also supra § 26.

[a] **The fact that one assumes to act as agent** of another is not sufficient to show such agency; but, if the acts are so open and notorious that they must have been known to the principal, they are evidence of agency. Black Lick Lumber Co. v. Camp Constr. Co., 63 W. Va. 477, 60 SE 409.

90. In re Thomas, 199 Fed. 214, 223 [quot Cyc]; Bickford v. Menier, 107 N. Y. 490, 14 NE 438; Gregory v. Loose, 19 Wash. 599, 54 P 33.

91. Southern R. Co. v. W. T. Adams Mach. Co., 165 Ala. 436, 51 S 779 (holding that, where an agent for a shipper of goods making an inquiry over the telephone as to the arrival of goods directed what other persons should say, while he stood at their elbow, and an operator at a telephone connection repeated the inquiry to the carrier's agent, the persons who spoke for the agent and such operator were mere instrumentalities or parts of the telephone connection between him and the carrier); Carothers v. McChord, 13 KyL 238.

[a] **Using another's private wire.**—The direction given plaintiff by defendant brokers that he could send any messages to them from another city over the private wire of a certain firm in that city did not make the telegraph operator of such firm, in sending messages from plaintiff to defendants, the agent of defendants, so as to make them liable for any negligence of his in transmission. Smith v. Hutton, 138 App. Div. 859, 123 NYS 656 [aff 203 N. Y. 594 mem, 96 NE 1130 mem].

92. Grewing v. Minneapolis Threshing-Mach. Co., 12 S. D. 127, 80 NW 176 (holding that where plaintiffs were present and acting for themselves when they gave the mortgages which they seek to rescind for fraud, the fact that M was also present, because plaintiffs wished him there to see that everything was done right, does not make him their agent so as to prevent their disputing him as to what was then said and done).

93. U. S.—In re Thomas, 199 Fed. 214, 223 [quot Cyc].

Ga.—Wikle v. Louisville, etc., R. Co., 116 Ga. 309, 42 SE 525 (holding that, where agency is shown by proof of the relative situation of the parties, it is established no further than is necessary for the discharge of ordinary duties belonging to it).

Minn.—Humphrey v. Havens, 12 Minn. 298 (holding that authority to do a certain act cannot be implied from authority to do an entirely different act).

Wash.—Gregory v. Loose, 19 Wash. 599, 54 P 33.

Wis.—Sheanon v. Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 NW 878.

Nature and extent of agent's authority generally see infra §§ 202–223.

[a] **Mere possession of a deed** between other parties is no evidence of an agency for any other purpose than to deliver the deed. Pease v. Fink, 3 Cal. A. 371, 85 P 657.

[b] **Making a note payable at a certain bank** does not make the bank, except in a limited sense, an agent. Pease v. Warren, 29 Mich. 9, 18 AmR 58. See also Bills and Notes [7 Cyc 1019, 1035].

94. Goss v. Helbing, 77 Cal. 190, 19 P 277; Johnson v. Johnson, 80 Ga. 260, 5 SE 629; Beach v. Huntsman, (Ind. A.) 83 NE 1033 (implied agency to make contracts for the improvement of the property).

[a] **Possession of joint owner.**—The fact that a person purchases real estate jointly with another and the other is left in possession is not of itself sufficient to show that the owner in possession is the agent for the other. Marson v. Martin, 28 Que. Super. 539.

[b] **Possession of mortgaged property with power to collect rents, etc.**—A person is not constituted the agent of a junior mortgagee by the fact that the latter consents to the placing of such person in possession of the mortgaged property, with authority to collect rents and pay expenses and interest on the first mortgage loan. Kansas, etc., Coal Co. v. Millett, 50 Mo. A. 382.

95. People's Sav. Bank v. Smith, 114 Ga. 185, 39 SE 920 (holding that, where the holder of a note surrenders to the maker collaterals given to secure its payment, in order that the latter may sell them and apply the

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personal property,[96] given a note to collect,[97] put in charge of a business,[98] given money to invest or pay over to another,[99] given an account against another to secure,[1] intrusted with a deed and the authority to close a real estate transaction,[2] or given the title to property.[3]

The facts and circumstances sufficient to give rise to inferences of agencies for particular purposes manifestly cannot be set out in detail; but in the appended notes will be found cases in which the facts and circumstances were held sufficient to constitute implied agencies,[4] such as an implied agency to buy personalty[5] or realty,[6] to collect money,[7] to contract for work and labor,[8] to manage a business,[9] to sell

proceeds to the payment of his indebtedness the relation of principal and agent exists between them, in so far as third persons are concerned).

[a] **A delivery of a bond and mortgage** with an assignment thereof is evidence that the holder of the mortgage intends to make the other party his agent for the purpose of making a sale or loan. Morris v. Joyce, 63 N. J. Eq. 549, 53 A 139.

[b] **The possession of an unindorsed bill of lading** is not proof that the possessor is the agent of the consignor. Stewart v. Gregory, etc., Co., 9 N. D. 618, 84 NW 553.

[c] **Mere possession by the president and manager of an adjustment company** of an assignment of a judgment recovered by an infant, executed by the latter's guardian, is not sufficient to prove his agency to deliver it to the assignee. Schmidt v. Shaver, 196 Ill. 108, 63 NE 655, 89 AmSR 250.

96. Pittsburgh Plate Glass Co. v. Kerlin Bros. Co., 122 Fed. 414, 58 CCA 648; Hansell v. Levy, 10 Del. 407; Elgin First Nat. Bank v. Schween, 127 Ill. 573, 20 NE 681, 11 AmSR 174; Black Lick Lumber Co. v. Camp Constr. Co., 63 W. Va. 477, 60 SE 409.

[a] **A mortgagee accepting a mortgage deed** on a stock of goods of another, and any other goods he may buy to replenish the stock, is equivalent to an assent that the mortgagor shall continue the business as his agent. Bynum v. Miller, 89 N. C. 393.

[b] **Possession of stock.**—One is not made the agent of the purchaser simply by having been placed in possession of stock sold until such time as the agent of the purchaser should arrive. Lowenstein v. Goodbar, 69 Miss. 808, 13 S 860.

97. Ga.—Adams v. Humphreys, 54 Ga. 496.

Ill.—Schmidt v. Shaver, 196 Ill. 108, 63 NE 655, 89 AmSR 250 and note; Stiger v. Bent, 111 Ill. 328.

Kan.—Goodyear v. Williams, 73 Kan. 192, 85 P 300.

N. J.—Haines v. Pohlmann, 25 N. J. Eq. 179.

N. Y.—Smith v. Kidd, 68 N. Y. 130, 23 AmR 157.

[a] **Illustration.**—Where a person desirous of raising money made his promissory note payable to one M, and M immediately transferred it to plaintiffs by assignment and received a draft therefor which he turned over to defendant who collected the amount thereof, M was an agent of defendant. Allen v. Henry, 81 Hun 241, 30 NYS 773.

[b] **The fact that a note is left with a person for the convenience** of the people who are to sign it does not make such person the agent of the payee. Warburton v. Ralph, 9 Wash. 537, 38 P 140.

98. Cal.—Thomas v. Moody, 57 Cal. 215.

Ill.—Illinois Cent. R. Co. v. Morrison, 19 Ill. 136.

Nebr.—White v. Leighton, 15 Nebr. 424, 19 NW 478.

Va.—Hardin v. Alexandria Ins. Co., 90 Va. 413, 18 SE 911.

Man.—Hutchings v. Adams, 12 Man. 118.

[a] **Illustrations.**—(1) Where one party furnishes all the funds for the conduct of a business but trusts the management of the business to the other party who negotiates a contract with plaintiff for the release of a lease, the one so placed in charge is the other's agent. Wallace v. Arkell, 27 Misc. 819, 57 NYS 655 [aff 28 Misc. 502, 59 NYS 597]. (2) A young man standing behind the counter of his father and dealing with his customers may be considered as his clerk or agent, and his acts in the line of his duty are binding on his father. Elsner v. State, 30 Tex. 524. (3) One employed in a broker's office apparently as a clerk or attaché and doing business with the broker's customers, is an agent of the broker. Timpson v. Allen, 7 Misc. 323, 27 NYS 915.

[b] **Branch store.**—One who establishes a retail store in a place distant from his residence, placing an agent or clerk in sole charge, and visiting the store about once a month, is presumed to hold out such clerk as authorized to sell goods at retail and also to keep the stock replenished by purchases, according to the usual course of business. White v. Leighton, 15 Nebr. 424, 19 NW 478; Gilbraith v. Lineberger, 69 N. C. 145; Darst v. Slevins, 2 Disn. (Oh.) 473.

99. Peak v. Ellicott, 30 Kan. 156, 1 P 499, 46 AmR 90; Friesenhahn v. Bushnell, 47 Minn. 443, 50 NW 597; Reformed Presb. Church v. Livingston, 210 Pa. 536, 60 A 154.

[a] **Money deposited to pay note.**—In Albia First Nat. Bank v. Free, 67 Iowa 11, 24 NW 566, it was held that where a debtor left money to pay a note with another and notified the creditor who wrote for the money, which in the meantime had been stolen from the house of the person with whom it had been deposited, the loss should fall upon the debtor.

1. Emerson v. Miller, 27 Pa. 278.

2. McDonald v. Cool, 134 Cal. 502, 66 P 727; Pope v. Chaffee, 35 S. C. Eq. 69.

3. Griffith v. Alcocke, 113 La. 514, 37 S 47 (holding that one of the objects most frequently had in view in placing the legal title in the name of another is to confer on such other the widest powers of agency, clothing him with all the rights which result from the indicia of absolute ownership).

4. See infra this note.

[a] **Facts and circumstances held sufficient to show an agency:** (1) To act as custodian of funds. Lipman v. Noblit, 194 Pa. 416, 45 A 377. (2) To distribute goods. Lindt v. Uihlein, 109 Iowa 591, 79 NW 73. (3) To forward money. Fair v. Bowen, 127 Mich. 411, 86 NW 991. (4) To make a contract. Thomas v. Wells, 140 Mass. 517, 5 NE 485; Allsman v. Richmond, 55 Nebr. 540, 75 NW 1094. (5) To make a trust agreement. Sullivan v. Fant, 51 Tex. Civ. A. 6, 110 SW 507. (6) To operate a hotel. Oriental Inv. Co. v. Barclay, 25 Tex. Civ. A. 543, 64 SW 80. (7) To secure a loan. Booth v. Kessler, 62 Nebr. 704, 87 NW 532. (8) To send a telegram. Western Union Tel. Co. v. Millsap, 135 Ala. 415, 33 S 160 (holding that, where plaintiff requested his two brothers, who lived in another city, to find employment for him, and one brother found the desired employment and told the other brother to telegraph plaintiff to come, there was evidence of an agency to send the telegram, although plaintiff did not pay for or expressly instruct the sending, sufficient to sustain an averment thereof in a complaint in an action for failure to deliver the telegram). (9) To deliver papers. Murphy v. Mechanics', etc., Town Mut. F. Ins. Co., 83 Mo. A. 481. (10) To cancel mortgage. Parker v. Randolph, 10 S. D. 402, 73 NW 906. (11) To settle with creditors. Cobb v. Fogg, 166 Mass. 466, 44 NE 534; Lininger v. Latshaw, 169 Pa. 398, 32 A 440; Hussey v. Crass, (Tenn. Ch. A.) 53 SW 986. (12) To sign papers. Thomas v. Spencer, (N. J. Ch.) 42 A 275.

[b] **To pay taxes.**—(1) An agency to pay taxes on land is proved by evidence that the party paid the taxes for a long time without claiming any title or right in himself, and that he allowed the taxes to go unpaid and purchased the property at the tax sale but did not take a deed, and still continued to pay the taxes in the name of the owner and never took possession of the property. Siers v. Wiseman, 58 W. Va. 340, 52 SE 460. (2) Testimony that witness represented one who he stated was defendant's agent for the payment of taxes, but that defendant had once sent the money direct to witness for such purpose, taken in connection with evidence tending to show that such payment of taxes had never been repudiated by defendant, is sufficient to show such person's agency for defendant. Cunningham v. Mathews, (Tex. Civ. A.) 57 SW 1114.

5. Colo.—Clamp v. Cutler, 39 Colo. 117, 88 P 854.

Kan.—Gregg v. Berkshire, (A.) 62 P 550.

Ky.—Hall v. Ayer, etc., Tie Co., 102 SW 867, 31 KyL 508.

Mich.—Cleveland Co-Operative Stove Co. v. Mallery, 111 Mich. 43, 69 NW 75.

Mo.—Crosno v. Bowser Milling Co., 106 Mo. A. 236, 80 SW 275.

N. Y.—Droste v. Metropolitan Hotel Supply Co., 69 App. Div. 611, 74 NYS 613.

Ont.—Murphy v. Thompson, 28 U. C. C. P. 233.

Authority to buy see infra §§ 224–228.

6. Boyle v. Staten Island, etc., Land Co., 17 App. Div. 624, 45 NYS 496 [aff 163 N. Y. 586 mem, 57 NE 1104 mem].

7. Colo.—Frost v. Fisher, 13 Colo. A. 322, 58 P 872 (holding that, where defendant purchased a note given by plaintiff to an investment company, and plaintiff, without notice of the transfer, made payment of interest from time to time, and finally of the principal, to the company, an agency for the collection of the note by the company is established when the testimony of the officers of the company shows that it was always their custom to collect, without charge, loans sold by them, and to have such an agreement with the purchaser at the time of the sale, and the records of their office show that defendant had from time to time forwarded the interest coupons to the company for collection).

Iowa.—Frankel v. Hites, 112 Iowa 631, 84 NW 706.

Minn.—Dexter v. Berge, 76 Minn. 216, 78 NW 1111.

Nebr.—Gathercole v. Peck, 3 Nebr. (Unoff.) 226, 91 NW 513; Boyd v. Pape, 2 Nebr. (Unoff.) 859, 90 NW 646.

Or.—McLeod v. Despain, 49 Or. 536, 555, 90 P 492, 92 P 1088, 124 AmSR 1066, 19 LRANS 276.

Ont.—Rosenberger v. Thomas, 4 Grant Ch. (U. C.) 473.

Authority to collect and receive payment see infra §§ 256–279.

[a] **An agent's authority to receive payment of notes** may be inferred from the mutual conduct and relation of the parties or from the general nature of the transactions in which they are concerned and the circumstances surrounding them. Bull v. Duncan, (A.) 59 P 42.

8. McCabe v. Farrell, 34 Tex. Civ. A. 36, 77 SW 1049.

Authority to make contracts of employment see infra §§ 306–309.

9. Suddarth v. Empire Lime Co., 79 Mo. A. 585.

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personalty[10] or realty;[11] or in which the facts and circumstances were held insufficient to constitute implied agencies,[12] such as an implied agency to buy land,[13] to collect money,[14] to sell personalty[15] or realty.[16]

[§ 35] **(4) From Relationship of Parties.** The relation of agency cannot be inferred from mere relationship or family ties unattended by conditions, acts, or conduct clearly implying an agency.[17] But proof of certain close relationships, such as those of husband and wife, parent and child, or brother and sister, is usually entitled to considerable weight, when taken in connection with other circumstances, as tending to establish the fact of agency.[18]

[§ 36] **(5) From Active Holding Out.** An agency may be implied where one person by his conduct

business or property see infra §§ 287, 288.

10. Ga.—People's Sav. Bank v. Smith, 114 Ga. 185, 39 SE 920.

Mo.—Mosby v. McKee, etc., Commn. Co., 91 Mo. A. 500; Haubelt v. Rea, etc., Mill Co., 77 Mo. A. 672.

Nebr.—Howard v. Omaha Wholesale Grocery Co., 77 Nebr. 116, 108 NW 158.

Tex.—Bowman v. Texas Brewing Co., 17 Tex. Civ. A. 446, 43 SW 808.

Vt.—Grout v. Moulton, 79 Vt. 122, 64 A 453.

Wash.—Seattle Brewing, etc., Co. v. Donofrio, 34 Wash. 18, 74 P 823 (holding that, where, after the abandonment of an agreement for the purchase of a debtor's stock of goods, the purchaser promptly returned the property to the seller's nephew, who had charge of his business, immediately prior to the transfer, and who was the person from whom the purchaser had received the property, such facts warranted a finding that the nephew was the seller's agent, so that a redelivery to him constituted a delivery to the seller).

Wis.—Hein v. Mildebrandt, 134 Wis. 582, 115 NW 121.

Authority to sell personalty see infra §§ 229–243.

[a] **To sell stock.**—Merrill v. Sax, 141 Iowa 386, 118 NW 434; Barber v. Martin, 67 Nebr. 445, 93 NW 722.

11. Callaway v. Wilson, 141 Cal. 421, 74 P 1035; Curry v. King, 6 Cal. A. 568, 92 P 683; Fisher v. Seymour, 23 Colo. 542, 49 P 30 (holding that where one undertook to sell a mineral claim for another, at an agreed price, the relation of agency was thereby established); Rathke v. Tyler, 136 Iowa 284, 111 NW 435; Jenkins v. Dewey, 122 Iowa 530, 98 NW 313; Bird v. Phillips, 115 Iowa 703, 87 NW 414; Reddell v. Watkins Land Mortg. Co., (Tex. Civ. A.) 37 SW 608.

Authority to sell realty see infra §§ 244–255.

12. See cases infra this note.

[a] **Facts and circumstances held insufficient to show an implied agency:** (1) To act for an insurance company. Dickerman v. Quincy Mut. F. Ins. Co., 67 Vt. 609, 32 A 489. (2) To extend a mortgage. New England L. & T. Co. v. Browne, 157 Mo. 116, 57 SW 760. (3) To receive payment on account of mortgage. Ward v. New England Southern Conference M. E. Church, 27 R. I. 262, 61 A 651. (4) To make representations. Hensley v. McDonald, 108 SW 362, 32 KyL 1333; Gulf, etc., R. Co. v. Huyett, 99 Tex. 630, 92 SW 454, 5 LRANS 669. (5) To pay taxes. Day v. Fay, 59 W. Va. 65, 52 SE 1013. (6) To purchase a mine. Krohn v. Lambeth, 114 Cal. 302, 46 P 164. (7) To sell a patent. Yates v. Killman, (Tenn. Ch. A.) 57 SW 221.

[b] **Acceptance of money from debtor's agent.**—(1) The acceptance by a creditor from the debtor's agent of money due does not make such agent the agent of the creditor. Fisher v. Schiller Lodge I. O. O. F., 50 Iowa 459. (2) A creditor does not render another his agent by sending for money left with such other by the debtor to pay the debt. Albia First Nat. Bank v. Free, 67 Iowa 11, 24 NW 566.

[c] **Sending telegram.**—(1) Evidence held insufficient to go to the jury see Howard v. Western Union Tel. Co., 161 Ala. 213, 49 S 1036. (2) Where plaintiff agreed with the chairman of the street committee that he would do certain work for the city for a certain price, and the latter agreed to submit the matter to the street committee, and, if they agreed to employ plaintiff, to send him a telegram, the chairman, in sending the telegram, was not acting as plaintiff's agent. Ford v. Postal Tel. Cable Co., 124 Ala. 400, 27 S 409.

13. Garrett v. Slavens, 129 Iowa 107, 105 NW 369; Elkinton v. White, 5 Pa. Dist. 199; Tinsley v. Anderson, (Tex. Civ. A.) 33 SW 266.

14. Stuart v. Asher, 15 Colo. A. 403, 62 P 1051.

Authority to collect and receive payment see infra §§ 256–279.

[a] **Delivery of a subscription paper** does not make the one to whom it is given an agent to collect. Antram v. Thorndell, 74 Pa. 442.

[b] **Person to whose care letter is addressed.**—Where an attorney collects money for a client and deposits the same in his own bank, and thereafter indorses a check to the order of his client, and incloses it in an envelope addressed to his client in care of a person to whose address he has been instructed by his client to send the money, the person to whose care the envelope has been addressed is not the agent of the client with authority to open the envelope and collect the check, and the client is not bound by any action of such person. Falconi v. Magee, 47 Pa. Super. 560.

15. Illinois Moulding Co. v. Page, etc., Mfg. Co., 104 Ill. A. 1 (holding that one who obtains stock lists from several lumber companies and sends in orders for acceptance or rejection, receiving no salary, expenses, or compensation, except a commission on such of his orders as are accepted, is not an agent of such companies either to sell lumber or to guarantee its quality); Snyder v. Baker, (Tex. Civ. A.) 34 SW 981.

Authority to sell personalty see infra §§ 229–243.

[a] **To sell cattle.**—The facts that a person prepared a catalogue of cattle to be sold at administrator's sale, that he answered a letter addressed to deceased's estate and sent a catalogue, and that he received from purchasers at the sale money for cattle there sold are insufficient to prove him the agent of the administrator. Newell v. Clapp, 97 Wis. 104, 72 NW 366.

16. Alger v. Keith, 105 Fed. 105, 44 CCA 371 (holding that the execution by the owner of land of an option contract thereon or title bond does not per se constitute the holder his agent, and that he will not be bound by fraud or misrepresentations inducing a sale to a second purchaser, where such contract is only what it purports to be on its face, and is not intended merely as a form of agency; and the rule is the same, although it is expected that the contract may be assigned before its expiration, in case the holder of the option should sell the property); Boyden v. Hill, 198 Mass. 477, 85 NE 413 (holding that, where defendant gave plaintiff an option to buy certain land, plaintiff explaining that he was taking the option on that and other land so as to be able to offer a manufacturing company a location in order to induce it to build its shops there, and that he did not expect or intend to receive any personal benefit from the option, which recited that it was given merely to enable plaintiff to offer the land to the company, and to be void unless the company decided to build its plant at that place, the parties dealt with each other as principals, and plaintiff did not thereby become an agent for defendant for selling the land); Opie v. Pacific Inv. Co., 26 Wash. 505, 67 P 231, 56 LRA 778.

Authority to sell realty see infra §§ 244–255.

17. Ga.—McNamara v. McNamara, 62 Ga. 200.

Mass.—Greenfield Bank v. Crafts, 2 Allen 269.

N. H.—Hovey v. Brown, 59 N. H. 114; Johnson v. Stone, 40 N. H. 197, 77 AmD 706.

N. Y.—Ritch v. Smith, 82 N. Y. 627; Mott v. Scholes, 147 App. Div. 82, 131 NYS 811; Gieger v. Levin, 110 NYS 203 (holding that the fact that one purporting to act as defendant's agent in agreeing to pay a commission to procure a contract for defendant was defendant's brother and salesman is insufficient to show his authority as defendant's agent); Le Count v. Greenley, 6 N. Y. St. 91.

S. D.—Hickox v. Bacon, 17 S. D. 563, 97 NW 847.

Eng.—Bassett v. Dodgin, 10 Bing. 40, 25 ECL 28, 131 Reprint 820 (holding that there is no presumption, in the absence of evidence, that a man's father-in-law is his agent).

Agency involved in family relation: Of child for parent see Parent and Child [29 Cyc 1664]. Of husband for wife see Husband and Wife [21 Cyc 1238]. Of wife for husband see Husband and Wife [21 Cyc 1234].

Cotenant as agent see Tenancy in Common [38 Cyc 101].

Joint tenant as agent see Joint Tenancy [23 Cyc 494].

Partner as agent see Partnership [30 Cyc 477].

18. U. S.—Hunt v. Mercantile Ins. Co., 22 Fed. 503.

Ala.—Gibson v. Snow Hardware Co., 94 Ala. 346, 10 S 304; Krebs v. O'Grady, 23 Ala. 726, 58 AmD 312; Roland v. Logan, 18 Ala. 307.

Conn.—Brown v. Woodward, 75 Conn. 254, 53 A 112.

Del.—State v. Foster, 17 Del. 289, 40 A 939 [aff 18 Del. 111, 43 A 265].

Ind.—Barnett v. Gluting, 3 Ind. A. 415, 29 NE 154, 927.

Mass.—Ford v. Linehan, 146 Mass. 283, 15 NE 591.

Mich.—Foster v. Fleishans, 69 Mich. 543, 37 NW 549.

Minn.—Lindquist v. Dickson, 98 Minn. 369, 107 NW 958, 6 LRANS 729, 8 AnnCas 1024.

Mo.—Norton v. Bull, 43 Mo. 113.

N. Y.—Abeel v. Seymour, 6 Hun 656; Kirchner v. Schmid, 7 Misc. 455, 25 NYS 85; Carroll v. O'Shea, 19 NYS 374 [aff 2 Misc 437, 21 NYS 956].

[a] **Father.**—The relationship between the principal and the agent may be considered as one of the circumstances, and hence the authority of a father to sign his son's name to a note as surety may be shown by a business custom, whereby the father was in the habit of signing both their names to notes which the son would honor. Broadstreet v. McKamey, 41 Ind. A. 272, 83 NE 773.

[b] **Brother.**—In Sheanon v. Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 NW 878, the insured being helpless in a distant country on account of injuries sustained, with no friend or relative at hand except his brother, and it being important to wind up the business relating to the insurance before he was removed to his home, it was held that the agency of the brother to act for him in the matter might be implied from the circumstances.

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holds out another as his agent, or thereby invests him with apparent or ostensible authority as agent; and he thereby becomes liable for such agent's acts,[19] whether the liability is based upon an implied agency or an agency by estoppel,[20] and whether he actually intends to be bound or not.[21]

[§ 37] (6) **From Habit and Course of Dealing—(a) In General.** It is usually held that an agency may be implied from prior habit or course of dealing of a similar nature between the parties,[22] or from a

19. U. S.—Merchants Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; U. S. Bank v. Dandridge, 12 Wheat. 64, 6 L. ed. 552.
Ala.—Birmingham Mineral R. Co. v. Tennessee Coal, etc., Co., 127 Ala. 137, 28 S 679; Tennessee River Transp. Co. v. Kavanaugh, 101 Ala. 1, 13 S 283.
Ark.—Leake v. Sutherland, 25 Ark. 219.
Cal.—Barrell v. Lake View Land Co., 122 Cal. 129, 54 P 594.
Conn.—Eagle Bank v. Smith, 5 Conn. 71, 13 AmD 37.
Ga.—Johnson v. Waxelbaum Co., 1 Ga. A. 511, 58 SE 56.
Ill.—Union Mut. L. Ins. Co. v. Slee, 110 Ill. 35; Morris v. Preston, 93 Ill. 215; Noble v. Nugent, 89 Ill. 522; St. Louis, etc., Packet Co. v. Parker, 59 Ill. 23; Hardcastle v. Ryder, 175 Ill. A. 430; Young v. Witteamyre, 22 Ill. A. 496 [rev on other grounds 123 Ill. 303, 14 NE 869].
Ind.—Croy v. Busenbark, 72 Ind. 48; Foss-Schneider Brewing Co. v. McLaughlin, 5 Ind. A. 415, 31 NE 838 (holding that, where defendant corporation authorized H to erect a house for it with its money, and he, having done so for the purpose of selling its beer or keeping the same, thereafter printed in large letters on the side of the house the name of defendant with the words "Louis Heyden, Agent," and such fact came to defendant's knowledge, but it did nothing to prevent him from keeping the sign where the public would see it, such facts constituted a holding out of H as its agent).
Kan.—Atlantic, etc., R. Co. v. Reisner, 18 Kan. 458.
La.—Meyer v. King, 29 La. Ann. 567.
Md.—Carrington v. Turner, 101 Md. 437, 61 A 324.
Mass.—Com. v. Holmes, 119 Mass. 195.
Mich.—Cronk v. Mulvaney, 168 Mich. 346, 349, 134 NW 9 [cit Cyc]; Columbus Sewer Pipe Co. v. Ganser, 58 Mich. 385, 25 NW 377, 55 AmR 697; Adams Min. Co. v. Senter, 26 Mich. 73; Lyell v. Sanbourn, 2 Mich. 109.
Minn.—Graves v. Horton, 38 Minn. 66, 35 NW 568.
Mo.—Whelan v. Reilly, 61 Mo. 565; Kiley v. Forsee, 57 Mo. 390; Rice v. Groffmann, 56 Mo. 434; Brooks v. Jameson, 55 Mo. 505; Dawson v. Wombles, 111 Mo. A. 532, 86 SW 271; Peninsular Stove Co. v. Adams Hardware, etc., Co., 93 Mo. A. 237.
Nebr.—Starring v. Mason, 4 Nebr. 367; C. F. Blanke Tea, etc., Co. v. Trade Exhibit Co., 5 Nebr. (Unoff.) 358, 98 NW 714.
N. J.—Smith v. Delaware, etc., Tel., etc., Co., 64 N. J. Eq. 770, 53 A 818.
N. Y.—Ring v. Long Island Real Est., etc., Inv. Co., 93 App. Div. 442, 87 NYS 682 [aff 184 N. Y. 553 mem, 76 NE 1107 mem]; Matter of Zinke, 90 Hun 127, 35 NYS 645; Craig Medicine Co. v. Merchants' Bank, 59 Hun 561, 14 NYS 16; Alexander v. Brown, 9 Hun 641; Lovett v. German Reformed Church, 12 Barb. 67; Gallup v. Lederer, 3 Thomps. & C. 710; Laughlin v. Manson, 65 Misc. 492, 120 NYS 110.
N. C.—Trollinger v. Fleer, 157 N. C. 81, 72 SE 795; Francis v. Reeves, 137 N. C. 269, 49 SE 213.
Okl.—Jack v. Wichita Nat. Bank, 17 Okl. 430, 89 P 219.
Or.—Connell v. McLoughlin, 28 Or. 230, 42 P 218.
Pa.—Empire Impl. Mfg. Co. v. Hench, 219 Pa. 135, 67 A 995; Culver v. Pocono Spring Water Ice Co., 206 Pa. 481, 56 A 29; Hill v. Nation Trust Co., 108 Pa. 1, 56 AmR 189; Kelsey v. Crawford County Nat. Bank, 69 Pa. 426; Reel v. Adams Express Co., 27 Pa. Super. 77.
Tex.—McAlpin v. Cassidy, 17 Tex. 449.
Vt.—Fay v. Richmond, 43 Vt. 25; Walsh v. Pierce, 12 Vt. 130.
Va.—McIntyre v. Smyth, 108 Va. 736, 62 SE 930.
Wis.—Heinze v. South Green Bay Land, etc., Co., 109 Wis. 99, 85 NW 145; Bouck v. Enos, 61 Wis. 660, 21 NW 825.
Eng.—The Great Eastern, L. R. 2 A. & E. 88; King v. Smith, [1900] 2 Ch. 425; Riley v. Packington, L. R. 2 C. P. 536; Wilson v. West Hartlepool Harbour, etc., Co., 34 Beav. 187, 55 Reprint 606; Brockelbank v. Sugrue, 5 C. & P. 21, 24 ECL 433; Thompson v. Bell, 10 Exch. 10; Brazier v. Camp, 63 L. J. Q. B. 257; Barrett v. Deere, M. & M. 200, 22 ECL 291.
Que.—Bisaillon v. Elliott, 13 Que. Super. 289.
Estoppel to deny agency of one who is held out as agent see infra §§ 69–74.

20. Ala.—Burke v. Taylor, 94 Ala. 530, 10 S 129; Reynolds v. Collins, 78 Ala. 94.
Cal.—Barrell v. Lake View Land Co., 122 Cal. 129, 54 P 594; Goetz v. Goldbaum, 37 P 646.
Colo.—Gauthier Decorating Co. v. Ham, 3 Colo. A. 559, 34 P 484.
Ill.—Richards v. John Spry Lumber Co., 169 Ill. 238, 48 NE 63; Anderson v. Armstead, 69 Ill. 452.
Ky.—Peyton v. Old Woolen Mills Co., 122 Ky. 361, 91 SW 719, 28 KyL 1303.
Md.—Santa Clara Min. Assoc. v. Meredith, 49 Md. 389, 33 AmR 264.
Mo.—Baker v. Kansas City, etc., R. Co., 91 Mo. 152, 3 SW 486; Cupples v. Whelan, 61 Mo. 583; Rice v. Groffmann, 56 Mo. 434; Mosby v. McKee, etc., Commn. Co., 91 Mo. A. 500; Hoppe v. Saylor, 53 Mo. A. 4; Fanning v. Cobb, 20 Mo. A. 577.
Nebr.—C. F. Blanke Tea, etc., Co. v. Trade Exhibit Co., 5 Nebr. (Unoff.) 358, 98 NW 714.
N. J.—Gulick v. Grover, 31 N. J. L. 182.
N. Y.—Cosmopolitan Range Co. v. Midland R. Terminal Co., 44 App. Div. 467, 60 NYS 973; Jaeger v. Koenig, 30 Misc. 580, 62 NYS 803.
N. C.—Morganton Bank v. Hay, 143 N. C. 326, 55 SE 811.
Okl.—Jack v. Wichita Nat. Bank, 17 Okl. 430, 89 P 219.
S. D.—Barry v. Stover, 20 S. D. 459, 107 NW 672, 129 AmSR 941.
Tex.—Collins v. Cooper, 65 Tex. 460; Tres Palacios Rice, etc., Co. v. Eidman, 41 Tex. Civ. A. 542, 93 SW 698.
Eng.—Union Credit Bank v. Mersey Docks, etc., Bd., [1899] 2 Q. B. 205; Smith v. Hull Glass Co., 11 C. B. 897, 73 ECL 897, 138 Reprint 729; Reynell v. Lewis, 16 L. J. Exch. 25.
See also infra §§ 69–74.
[a] **Illustrations.**—(1) Where certain persons who took goods from plaintiff claimed that they came from defendants, and defendants when shown a receipt signed by one of them did not deny their authority and returned some of the goods the men had taken, and one of the men testified that he had theretofore acted as defendants' agent, there was sufficient evidence to establish the agency. Behm v. Parker, (Md.) 32 A 199. (2) Where the alleged principals owned several warehouses and kept in their firm name a bank account at the county seat and paid with their checks for grain purchased, the presumption was that the person in charge of the warehouse was their agent to buy grain. Nash v. Classen, 55 Ill. A. 356 [aff 163 Ill. 409, 45 NE 276].

21. Johnson v. Christian, 128 U. S. 374, 9 SCt 87, 32 L. ed. 412; Morgan v. Darragh, 39 Tex. 171. See also infra §§ 69–74.

22. Ala.—Republic Iron, etc., Co. v. Passafume, 61 S 327; Gibson v. Snow Hardware Co., 94 Ala. 346, 10 S 304 (where the relation was implied from the facts that previous dealings had been had by defendant with plaintiff through the alleged agent, that the alleged agent was connected with the building of a house, where defendant was frequently present during transactions between plaintiff and the alleged agent, and that payments were made by defendant on plaintiff's account for the materials furnished, with full knowledge that the account was made out against her and without any objection).
Cal.—Durfee v. Seale, 139 Cal. 603, 73 P 435; Kelly v. Ning Yung Benev. Assoc., 2 Cal. A. 460, 84 P 321.
Colo.—Breed v. Central City First Nat. Bank, 4 Colo. 481; Gambrill v. Brown Hotel Co., 11 Colo. A. 529, 54 P 1025.
Conn.—Eagle Bank v. Smith, 5 Conn. 71, 13 AmD 37.
Ga.—Cable Co. v. Walker, 127 Ga. 65, 56 SE 108; Noble v. Burney, 124 Ga. 960, 53 SE 463; Fitzgerald Cotton Oil Co. v. Farmers Supply Co., 3 Ga. A. 212, 59 SE 713 (holding that, where defendant frequently left one H in charge of its business with authority to sign orders for the delivery of meal and to collect money and to keep a general charge of the business in the absence of the manager, this was sufficient evidence of an agency).
Ill.—St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 74 Ill. A. 619 [aff 175 Ill. 557, 51 NE 911, 67 AmSR 238]; Mabley v. Irwin, 16 Ill. A. 362.
Ind.—Pittsburg, etc., R. Co. v. Berryman, 11 Ind. A. 640, 36 NE 728; Barnett v. Gluting, 3 Ind. A. 415, 29 NE 154, 927.
Iowa.—Aga v. Harbach, 127 Iowa 144, 102 NW 833, 109 AmSR 377, 4 AnnCas 441; Grant v. Humerick, 123 Iowa 571, 94 NW 510; Whiting v. Western Stage Co., 20 Iowa 554.
Kan.—Hawkins v. Windhorst, 77 Kan. 674, 96 P 48, 127 AmSR 445, 17 LRANS 219 and note; Bull v. Duncan, 9 Kan. A. 887, 59 P 42.
Ky.—Continental Tobacco Co. v. Campbell, 76 SW 125, 25 KyL 569.
Me.—Trundy v. Farrar, 32 Me. 225.
Md.—Swindell v. Gilbert, 100 Md. 399, 60 A 102.
Mass.—Lovell v. Williams, 125 Mass. 439.
Minn.—Lindquist v. Dickson, 98 Minn. 369, 107 NW 958, 6 LRANS 729, 8 AnnCas 1024; Eisenberg v. Matthews, 84 Minn. 76, 86 NW 870; Haluptzok v. Great Northern R. Co., 55 Minn. 446, 57 NW 144, 26 LRA 739 (holding that agency may be implied from the nature of the work to be performed, and also from the general course of conducting the business of the principal for so long a time that knowledge and consent on the part of the principal may be inferred); Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224, 53 NW 1061; Graves v. Horton, 38 Minn. 66, 35 NW 568; Lawrence v. Winona, etc., R. Co., 15 Minn. 390, 2 AmR 130.
Mo.—Summerville v. Hannibal, etc., R. Co., 62 Mo. 391; Brooks v. Jameson, 55 Mo. 505; Franklin v. Globe Mut. L. Ins. Co., 52 Mo. 461; Phillips v. Geiser Mfg. Co., 129 Mo. A. 396, 107 SW 471; Bonner v. Lisenby, 86 Mo. A. 666; Haubelt v. Rea, etc., Mill Co., 77 Mo. A. 672; Farley v. Stroeh, 68 Mo. A. 85; Cummings v. Hurd, 49 Mo. A. 139; Sharp v. Knox, 48 Mo. A. 169.

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previous agency,[23] as where the alleged principal has previously employed the alleged agent as such in transactions similar to the one in question.[24]

Prior agency must be of similar nature. But in order that an agency may be implied from previous transactions it must appear that the previous agency was of the same nature,[25] although not necessarily with the same third person;[26] and an agency to do a certain act cannot be implied from the agent having previously done acts of a different nature.[27]

Single or occasional acts. It has been held that a general agency to do certain acts cannot be implied from the alleged agent having occasionally done acts of a similar nature,[28] or from a single isolated transaction.[29] But on the other hand it has been held that a single act of an assumed agent and a single recogni-

Nebr.—Standley v. Clay, 68 Nebr. 332, 94 NW 140.
N. H.—Smith v. New England Bank, 72 N. H. 4, 54 A 385; Kent v. Tyson, 20 N. H. 121.
N. J.—Keim v. Lindley, (Ch.) 80 A 1063.
N. Y.—Anderson v. Supreme Council O. C. F., 135 N. Y. 107, 31 NE 1092; Nutting v. Kings County El. R. Co., 21 App. Div. 72, 47 NYS 327; Matter of Zinke, 90 Hun 127, 35 NYS 645; New York Nat. Park Bank v. American Exch. Nat. Bank, 40 Misc. 672, 83 NYS 249; Wilson v. Wyandance Springs Impr. Co., 4 Misc. 605, 24 NYS 557.
N. C.—Gilbraith v. Lineberger, 69 N. C. 145.
Or.—Baker County v. Huntington, 47 Or. 328, 83 P 532; Minard v. Stillman, 35 Or. 259, 57 P 1022.
Wash.—Lough v. Davis, 35 Wash. 449, 77 P 732.
W. Va.—Fielder v. Camp Constr. Co., 63 W. Va. 459, 60 SE 402; Siers v. Wiseman, 58 W. Va. 340, 52 SE 460; Merchants', etc., Nat. Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 SE 880, 70 LRA 312.
See Blair v. Carpenter, 75 Mich. 167, 42 NW 790.
[a] **Facts held insufficient to show an agency** from habit or course of dealing see Reynolds v. Crawford, 143 Ill. A. 146; Starr v. Royal Electric Co., 33 N. S. 156 [aff 30 Can. S. C. 384].
[b] **Circumstances overcome by direct statements.**—The effect of a course of dealing from which an agency might be implied will be nullified by a direct statement of the alleged principal regarding the future relations of the parties. Norton v. Richmond, 93 Ill. 367.

23. Ala.—McDonnell v. Montgomery Branch Bank, 20 Ala. 313.
Ill.—Marsh v. French, 82 Ill. A. 76.
Kan.—Goodyear v. Williams, 73 Kan. 192, 85 P 300.
Ky.—Smith v. White, 5 Dana 376.
Me.—Warren v. Ocean Ins. Co., 16 Me. 439, 33 AmD 674.
Mo.—Mosby v. McKee, etc., Commn. Co., 91 Mo. A. 500.
Nebr.—Standley v. Clay, 68 Nebr. 332, 94 NW 140.
N. J.—Clement v. Young-McShea Amusement Co., 69 N. J. Eq. 347, 60 A 419 [rev on other grounds 70 N. J. Eq. 677, 61 A 82].
N. C.—Cox v. Hoffman, 20 N. C. 319.
Pa.—Valentine v. Packer, 5 Pa. 333.
Vt.—Keyes v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201; Gilman v. Andrus, 28 Vt. 241, 67 AmD 713.
[a] **Presumption rebuttable.**—(1) The fact that the alleged agent has acted as agent of defendant in other transactions does not authorize the inference that he was defendant's agent in the present transaction where there is evidence to show that he was acting for plaintiff. Williamson v. Tyson, 105 Ala. 644, 17 S 336. (2) "Previous agency justifies the other party in accepting as true representations express or implied of present agency, but does not supply the place of these when none is given, and the only intimation given is that the act is unauthorized, but may be ratified." Edwards v. Law, 46 Fla. 203, 36 S 569.

24. U. S.—Stockton v. Watson, 101 Fed. 490, 42 CCA 211.
Ala.—Hill v. Helton, 80 Ala. 528, 1 S 340.
Me.—Hix v. Eastern Steamship Co., 107 Me. 357, 78 A 379; Hazeltine v. Miller, 44 Me. 177.
N. Y.—Dickinson v. Salmon, 36 Misc. 169, 73 NYS 196. See however Bickford v. Menier, 107 N. Y. 490, 14 NE 438.
Tex.—Pullman Palace Car Co. v. Nelson, 22 Tex. Civ. A. 223, 54 SW 624.
[a] **The agency of a railroad ticket agent** in contracting in behalf of a sleeping car company to reserve a berth in one of its cars may be established by his prior acts, and circumstances attending the same, showing that the company recognized similar contracts made under like circumstances. Pullman Palace Car Co. v. Nelson, 22 Tex. Civ. A. 223, 54 SW 624.

25. Murphy v. Gumaer, 12 Colo. A. 472, 55 P 951; Green v. Hinkley, 52 Iowa 633, 3 NW 688; Humphrey v. Havens, 12 Minn. 298; Stiefel v. New York Novelty Co., 25 Misc. 221, 55 NYS 90.
[a] **Illustration.**—The fact that a person once acted for a mortgagor in placing a loan does not prove that he was an agent for the mortgagor in collecting insurance money on the mortgaged property in the absence of any other evidence that he acted for the mortgagor in the matter. Ballard v. Nye, 138 Cal. 588, 72 P 156.

26. Thompson v. Clay, 60 Mich. 627, 27 NW 699 (holding that a third person is justified in dealing with one person as the agent of another where the latter has intimated to him that the former was his agent, and it is known that such person had at or about that time transacted similar business with others as agent for the same principal).
[a] **Evidence of transactions with third person.**—It has been held where it was sought to show that defendant's husband was her agent in transactions with plaintiff, that evidence of transactions with other persons, in which he, with her subsequent ratification, acted as her agent, was not admissible to establish the agency in the transactions with plaintiff. Conyers v. Ford, 111 Ga. 754, 36 SE 947; Ham v. Brown, 2 Ga. A. 71, 58 SE 316.

27. Collins v. Crews, 3 Ga. A. 238, 59 SE 727; Trent v. Sherlock, 26 Mont. 85, 66 P 700.
[a] **Dissimilar transactions.**—(1) Where it was not shown that shingle mill owners had authorized or known of the construction of a logging road to their timber, or had constructed logging roads at any time, the authority of their agent, who had limited powers, to contract for the construction of such a road will not be implied from the fact that contracts negotiated by him for acts of an entirely different kind were entered into by them. Gregory v. Loose, 19 Wash. 599, 54 P 33. (2) A general authority to an agent to collect debts, and to pay and receive money, does not authorize him to bind his principal by negotiable instruments; nor can an agent having authority to collect money for his principal, arising from the use or proceeds of the sale of his property, bind him by entering into contracts for which money is to be paid out. Hazeltine v. Miller, 44 Me. 177. (3) As the business of selling logs after their arrival at the market is distinct from that of operating in the woods, or the driving of logs, an agency for the two kinds of business is so different that proof of an agency for the one will have no tendency to prove its existence for the other. To establish an agency by inference it must be shown that the acts sought to be proved are of the same general character and effect as those under a recognized agency. Stratton v. Todd, 82 Me. 149, 19 A 111. (4) The fact that one had had at various times business dealings with another, and had stated that he wanted to buy more land, did not make the latter an agent to purchase a particular tract. Sanguinetti v. Rossen, 12 Cal. A. 623, 107 P 560.

28. Walton Guano Co. v. McCall, 111 Ga. 114, 36 SE 469 (which holds that an agent's general authority to collect is not shown by proving occasional instances of his receiving partial payments on a note); Fadner v. Hibler, 26 Ill. A. 639 (holding that no inference of an agent's authority to sign a contract for his principal can be drawn from evidence that the agent had twice in the presence of the principal drawn up and signed contracts embodying terms made by the principal); Rice v. James, 193 Mass. 458, 79 NE 807 (holding that, on an issue as to whether one who purchased lumber from plaintiff had acted in so doing as defendant's agent, it was proper to refuse a requested instruction that if the alleged agent claimed to plaintiff to be the agent of defendant, and bought goods in his behalf prior to the date of the sale in question for which defendant had paid, it made no difference what limits defendant might have placed on such agent's authority to buy, unless he notified plaintiff of such limitations prior to the sale in question, as the instruction failed to recognize any difference as to the effect of purchases made at different times under a special authority for each time and purchases made as a general agent, in reference to inferring authority to make like purchases afterward); Smith v. Roe, 1 Can. L. J. N. S. 154 (holding that the fact that a man employs another to do a specified act for him at a particular time raises no presumption whatever that the person so employed has authority to do a similar act at a different time).
[a] **General agency not inferred from previous acts of special agency.**—In Barrett v. Irvine, [1907] 2 Ir. 462, an attempt was made to show that a minor was the agent of his mother in the purchase of a race horse. It was shown that on previous occasions the son had purchased horses for which the mother afterward paid, that she allowed him to keep a pack of hounds at her residence, and that she paid for his equipment as master. It further appeared that she attended races to see him ride and that during the interval between the two trials of the cause the mother entered into negotiations for the return of the horse. It was held that the evidence was insufficient to show a general agency and that no multiplication of acts as special agent could convert a special agent into a general agent.

29. Trimble v. Thorson, 80 Iowa 246, 45 NW 742; Green v. Hinkley, 52 Iowa 633, 3 NW 688 (holding that where the alleged agent who was a carpenter purchased lumber from plaintiff, fraudulently representing that he was defendant's agent, it was not sufficient proof of agency to show that a year before he had purchased other lumber as agent of defendant); Three Rivers Nat. Bank v. Gilchrist, 83 Mich. 253, 47 NW 104; Ravenna Bank v. Dobbins, 96 Mo. A. 693, 70 SW

tion of his authority by the principal, if sufficiently unequivocal, positive, and comprehensive in their character, may be sufficient to prove an agency to do other similar acts.[30]

[§ 38] **(b) Subsequent Acts.**[31] Agency to do a particular act may also be implied from similar acts done a short time afterward;[32] but not where the subsequent act is of a different nature or done some length of time afterward.[33]

[§ 39] **(c) Dealings with Another Principal.** An agency for an alleged principal cannot be inferred from a course of dealing with another principal.[34]

[§ 40] **(7) From Acquiescence and Ratification—(a) In General.** An agency may also be implied from the recognition or acquiescence of the alleged principal as to acts done in his behalf by the alleged agent, especially if the agent has repeatedly been permitted to perform acts like the one in question.[35]

Silence with knowledge. Where one, with full knowledge, allows another to represent him as his agent and remains silent when occasion arises for him to speak, his silence may give rise to a presumption of acquiescence from which an agency may be implied,[36] as where another, with his knowledge and acquiescence, carries on a business in his name or as his agent.[37] But while silence under certain circumstances may be shown as evidence of acquiescence, yet the mere fact of silence alone does not constitute acquiescence,[38] unless the delay has been so long continued as to raise the presumption of some affirma-

1089; Ainsley v. Mead, 3 Lans. (N. Y.) 116.

[a] **Presumption from special agency.**—The law raises no inference, in the case of a special agency, limited to one transaction, that the agency continues or extends to other matters occurring years after. Reed v. Baggott, 5 Ill. A. 257.

30. Anderson v. Johnson, 74 Minn. 171, 77 NW 26; Wilcox v. Chicago, etc., R. Co., 24 Minn. 269. See also supra § 32.

31. **Acquiescence and ratification** see infra § 40.

32. Domasek v. Kluck, 113 Wis. 336, 89 NW 139 (holding that, where the question was as to the agency of one W to buy merchandise for defendant, it was proper to allow a third person to testify to a similar transaction with the alleged agent, occurring but a few days subsequently to the transaction in question, which showed that defendant recognized W as his agent, it appearing that there had been no change in the relations of defendant and W in the meantime).

33. Graves v. Horton, 38 Minn. 66, 35 NW 568 (holding that the fact that in a particular instance a person was authorized by the owner of property to negotiate a sale of it to one person on certain terms, the actual transfer to be made by the owner personally, is not sufficient to prove authority in such person to sell and transfer the same property at a prior time and on different terms to another and different person); Bartley v. Rhodes, (Tex. Civ. A.) 33 SW 604 (holding that an isolated transaction occurring considerably more than a year subsequently to the one in controversy, unaccompanied with any evidence of similar acts in the meantime, was too remote as evidence of present agency).

34. Kelly v. Tracy, etc., Co., 71 Oh. St. 220, 73 NE 455 (holding that, where a chattel mortgagee takes possession of the goods mortgaged and places the mortgagor in charge thereof as his agent with right to sell the goods, accounting for the proceeds, and thereafter the mortgagee sells two of the notes to a third person, such purchaser is not as a matter of law placed in the position of the original mortgagee, so as to render the mortgagor his agent and make him liable for goods thereafter purchased by the mortgagor and placed in the stock).

[a] **The fact that the agent performed similar acts for other persons** in the neighborhood in and about the same business does not authorize the inference that he was authorized to perform such acts as agent for plaintiff. Hill v. Helton, 80 Ala. 528, 1 S 340.

35. U. S.—Law v. Cross, 1 Black 533, 17 L. ed. 185.

Ala.—Huntsville Belt Line, etc., R. Co. v. Corpening, 97 Ala. 681, 12 S 295; Fisher v. Campbell, 9 Port. 210 (holding that authority to purchase supplies may be implied from previous employment in similar acts, and from subsequent acquiescence).

Colo.—Gambrill v. Brown Hotel Co., 11 Colo. A. 529, 54 P 1025.

Iowa.—Wilson v. Fones, 99 Iowa 132, 68 NW 588.

Ky.—Wortham v. Illinois L. Ins. Co., 107 SW 276, 32 KyL 827; Columbia Land, etc., Co. v. Tinsley, 60 SW 10, 22 KyL 1082 (holding that the authority of an agent to make a sale may be inferred from the principal's acquiescence and his receipt from the agent of the proceeds of sale where he had no reason to suppose that the agent could have received the money from any other source); Thompson v. Elam, 12 SW 1134, 11 KyL 455; McConnell v. Bowdry, 4 T. B. Mon. 392 (holding that long acquiescence in the alleged agent's act is evidence of prior authority).

Mass.—Scribner v. Flagg Mfg. Co., 175 Mass. 536, 56 NE 603. See also Pratt v. Putnam, 13 Mass. 361.

Minn.—Jackson v. Mutual Ben. L. Ins. Co., 79 Minn. 43, 81 NW 545, 82 NW 366; Wheeler v. Benton, 67 Minn. 293, 69 NW 927.

Mo.—Haubelt v. Rea, etc., Mill Co., 77 Mo. A. 672.

Nebr.—Cheshire Provident Inst. v. Vandegrift, 1 Nebr. (Unoff.) 339, 95 NW 615 (holding that, where an undisclosed principal is informed that an agent has collected a note and acquiesces in such act for three years, it tends to show that the act was fully authorized).

N. J.—Murphy v. Cane, 82 N. J. L. 557, 82 A 854, AnnCas1913D 643 and note; Strauss v. American Talcum Co., 63 N. J. L. 613, 44 A 631; Smith v. Delaware, etc., Tel., etc., Co., 64 N. J. Eq. 770, 53 A 818.

N. Y.—Dickinson v. Salmon, 36 Misc. 169, 73 NYS 196 [aff 35 Misc. 838, 72 NYS 1099].

N. C.—Katzenstein v. Raleigh, etc., R. Co., 84 N. C. 688.

Oh.—Hoffmaster v. Black, 78 Oh. St. 1, 84 NE 423, 125 AmSR 679, 21 LRANS 52 and note, 14 AnnCas 877 and note.

Pa.—Culver v. Pocono Spring Water Ice Co., 206 Pa. 481, 56 A 29.

Philippine.—De la Peña v. Hidalgo, 16 Philippine 450.

S. D.—Ottumwa Nat. Bank v. Sherman, 17 S. D. 396, 97 NW 12, 106 AmSR 778.

Tex.—Shinn v. Hicks, 68 Tex. 277, 4 SW 486; Sargent v. Barnes, (Civ. A.) 159 SW 366; Griffin v. Zuber, 52 Tex. Civ. A. 288, 113 SW 961.

Utah.—Moyle v. Salt Lake City Cong. Soc., 16 Utah 69, 50 P 806.

Vt.—Valiquette v. Clark Bros. Coal Min. Co., 83 Vt. 538, 77 A 869, 138 AmSR 1104, 34 LRANS 440 and note.

Wash.—Haner v. Furuya, 39 Wash. 122, 81 P 98.

Eng.—Woodhouse v. Meredith, 1 Jac. & W. 204, 37 Reprint 353; Filmer v. Lynn, 4 N. & M. 559, 30 ECL 597; Sanderson v. Walker, 13 Ves. Jr. 601, 33 Reprint 419; Lowther v. Lowther, 13 Ves. Jr. 95, 33 Reprint 230; Morse v. Royal, 12 Ves. Jr. 355, 33 Reprint 134.

[a] **A glue broker who has been permitted to purchase and sell** glue on plaintiff's credit, to fix the price, and to collect the proceeds, should be regarded as plaintiff's agent. Deane v. American Glue Co., 200 Mass. 459, 86 NE 890.

36. U. S.—Long v. Thayer, 150 U. S. 520, 14 SCt 189, 37 L. ed. 1167.

Cal.—Goetz v. Goldbaum, 4 Cal. Unrep. Cas. 749, 37 P 646.

Colo.—Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 1 Colo. 531; Farrer v. Caster, 17 Colo. A. 41, 67 P 171.

Ill.—De Land v. Dixon Nat. Bank, 111 Ill. 323; Thurber v. Anderson, 88 Ill. 167; Fraternal Army of America v. Evans, 114 Ill. A. 578 [aff 215 Ill. 629, 74 NE 689].

Iowa.—Sax v. Drake, 69 Iowa 760, 28 NW 423.

Ky.—Peyton v. Old Woolen Mills Co., 122 Ky. 361, 91 SW 719, 28 KyL 1303.

Mich.—McPherson v. Pinch, 119 Mich. 36, 77 NW 321; Cooper v. Mulder, 74 Mich. 374, 41 NW 1084; Simon v. Brown, 38 Mich. 552 (holding that, where a vendor of lands permitted the purchase price to be paid to P without objection and allowed the latter to keep the money as a loan, P thereby became his agent for the purpose of collecting the same).

N. Y.—McCready v. Thorn, 51 N. Y. 454; Olcott v. Tioga R. Co., 27 N. Y. 546, 84 AmD 298; Buffalo Third Nat. Bank v. Butler Colliery Co., 14 NYS 21.

Pa.—Winton v. Little, 94 Pa. 64; Woodwell v. Brown, 44 Pa. 121.

Tex.—Sargent v. Barnes, (Civ. A.) 159 SW 366 (holding that, where the owners of land knew that an agent was endeavoring to sell it and were present on the property while the negotiation was being carried on, they will be held to have acquiesced in the agency if they made no objection thereto).

Vt.—Bradish v. Belknap, 41 Vt. 172.

37. McKinney v. Stephens, 17 Pa. Super. 125; Garner v. A. Fisher Brewing Co., 6 Utah 332, 23 P 755.

[a] **Allowing name on sign.**—(1) The fact that one allows his name to stand over the door of another who sells goods of his manufacture and buys in his name is a circumstance which, taken with others, may be considered as tending to show agency. Gilbraith v. Lineberger, 69 N. C. 145. (2) Where a railroad company allows a person without objection to rent an office on its right of way, and to display a sign styling it the office of the company, although he is in fact the agent of a foreign corporation of the same name, the company is bound by the purchase of goods by him in its name. Florida Midland, etc., R. Co. v. Varnedoe, 81 Ga. 175, 7 SE 129.

[b] **Taking liquor license in creditor's name.**—It has been held that an agency is not implied, so as to create a liability for the agent's debts, by permitting a debtor from whom a creditor has taken a store in satisfaction of a debt to take out a license in the creditor's name, in order to sell off a stock of liquors which remains in the building. Ilfield v. Stover, 4 N. M. 54, 12 P 714.

38. Dugan v. Lyman, (N. J. Ch.) 23 A 657; Kersey Oil Co. v. Oil Creek,

tive act.[39]

The subsequent adoption and ratification by the principal of similar acts done by the agent may justify the inference that the agent has authority to do acts of that kind.[40]

[§ 41] **(b) Limitations and Qualifications of Rule.** The mere fact that the principal has acquiesced in the doing of similar acts by the alleged agent is not conclusive of his general agency to do such acts.[41] Nor is authority to be inferred from the fact that the principal has previously ratified an act of the agent of a different character,[42] or an act done under substantially different conditions,[43] or from the fact that on one or two previous occasions the principal has approved similar acts,[44] although it has been held that the implication of authority rests not so much on the number as on the character of the acts approved, and that the adoption of a single act by the principal may be so unequivocal and comprehensive as to establish an agency to do similar acts.[45] The ratification of an act that the principal was bound to perform, or of an act that could inure only to his benefit, will not establish an agency to act generally concerning the matter for such principal.[46]

[§ 42] **(8) Agency by Estoppel Distinguished.** Implied agency does not include, and is, technically speaking, distinguishable from, agency by estoppel,[47] although the two are usually confused, and the courts as a rule do not attempt to make any distinction, but use the two terms synonymously.[48] An implied agency is an actual agency and is a fact to be proved by deductions or inferences from other facts,[49] while in a strict sense agency by estoppel should be restricted to cases in which the authority is not real but apparent.[50]

As to third persons the principal is equally liable in the case of implied agency and agency by estoppel, although this distinction is to be noted, that agency by estoppel can be invoked only when the third person knew and relied on the conduct of the principal,[51] while in cases of true implied agency he need have had no knowledge of the principal's acts, nor have relied on the same; the agent by implied authority being an actual agent, the principal is

etc., R. Co., 12 Phila. (Pa.) 374; Saville v. Welch, 58 Vt. 683, 5 A 491.

[a] **Where a prima facie case of agency is established** and defendant remains silent and does not contradict the evidence, his silence will be taken as a corroboration of the agency. Frost v. Fisher, 13 Colo. A. 322, 58 P 872.

39. Mallory v. Mallory Wheeler Co., 61 Conn. 131, 23 A 708; Russell v. Palentine Ins. Co., (Miss.) 63 S 644.

[a] **"From the natural improbability that one should voluntarily, without authority, assume to act for another,** settling his obligations for a considerable length of time, and from the fact that such conduct would naturally come to be known by the assumed principal, the fact of agency may be presumed." Neibles v. Minneapolis, etc., R. Co., 37 Minn. 151, 33 NW 332 [quot Russell v. Palentine Ins. Co., (Miss.) 63 S 644].

40. U. S.—Townsend v. Chappell, 12 Wall. 681, 20 L. ed. 436; Bicknell v. Austin Min. Co., 62 Fed. 432; Miller v. Moore, 17 F. Cas. No. 9,584, 1 Cranch C. C. 471.

Ala.—Fisher v. Campbell, 9 Port. 210.

Del.—Robinson v. Green, 5 Del. 115.

Ill.—Abrahams v. Weiller, 87 Ill. 179; Rawson v. Curtiss, 19 Ill. 456; St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 74 Ill. A. 619 [aff 175 Ill. 557, 51 NE 911, 67 AmSR 238]; Mabley v. Irwin, 16 Ill. A. 362.

Ind.—Jewett v. Lawrenceburgh, etc., R. Co., 10 Ind. 539.

Iowa.—Aga v. Harbach, 127 Iowa 144, 102 NW 833, 109 AmSR 377, 4 AnnCas 441 and note; Grant v. Humerick, 123 Iowa 571, 94 NW 510; Whiting v. Western Stage Co., 20 Iowa 554.

Kan.—Steelsmith v. Union Pac. R. Co., 1 Kan. A. 10, 40 P 992.

Me.—Stratton v. Todd, 82 Me. 149, 19 A 111; Lee v. Oppenheimer, 34 Me. 181; Trundy v. Farrar, 32 Me. 225; Emerson v. Coggswell, 16 Me. 77.

Md.—Philadelphia, etc., R. Co. v. Weaver, 34 Md. 431.

Mass.—Odiorne v. Maxcy, 15 Mass. 39.

Minn.—Wilcox v. Chicago, etc., R. Co., 24 Minn. 269.

Mo.—Stothard v. Aull, 7 Mo. 318; Sharp v. Knox, 48 Mo. A. 169; White v. Missouri Pac. R. Co., 19 Mo. A. 400.

Nebr.—Harrison Nat. Bank v. Austin, 65 Nebr. 632, 91 NW 540, 101 AmSR 639, 59 LRA 294; Wilber First Nat. Bank v. Ridpath, 47 Nebr. 96, 66 NW 37.

N. H.—Ames v. Drew, 31 N. H. 475; Gillis v. Bailey, 17 N. H. 18.

N. M.—Ilfeld v. Stover, 4 N. M. 54, 12 P 714.

N. Y.—Olcott v. Tioga R. Co., 27 N. Y. 546, 84 AmD 298; Wood v. Auburn, etc., R. Co., 8 N. Y. 160; Engh v. Greenbaum, 4 Thomps. & C. 426; Jackson Architectural Iron Works v. Rouss, 59 N. Y. Super. 512, 15 NYS 137 [aff 133 N. Y. 538 mem, 30 NE 1148 mem]; Kirkpatrick v. Livingston, 7 Misc. 571, 28 NYS 93; Hartley v. Cataract Steam Engine Co., 19 NYS 121; Weed v. Carpenter, 4 Wend. 219.

Pa.—Brig Odorilla v. Baizley, 128 Pa. 283, 18 A 511.

Tex.—Friedlander v. Cornell, 45 Tex. 585; Osborne v. Gatewood, (Civ. A.) 74 SW 72; Pullman Palace Car Co. v. Nelson, 22 Tex. Civ. A. 223, 54 SW 624; History Co. v. Flint, (A.) 15 SW 912.

Vt.—Dickerman v. Quincy Mut. F. Ins. Co., 67 Vt. 609, 32 A 489; Walsh v. Pierce, 12 Vt. 130.

Va.—Downer v. Morrison, 2 Gratt. (43 Va.) 237.

W. Va.—Fielder v. Camp Constr. Co., 63 W. Va. 459, 60 SE 402; Lee v. Virginia, etc., Bridge Co., 18 W. Va. 299 (holding that where, at a foreclosure sale of the real estate of a corporation, G represented himself as president of the company and acting for it, and at his instance the trustee, instead of keeping the property before the public for the usual time, knocked it down to G for the amount of the mortgage with interest and costs, and the trustee reported these facts to the court, and the court confirmed the report without exception by the corporation which was the only defendant in the suit, and part of the payment required by the sale was paid out of the funds of the company, it was sufficient to warrant a finding that G was the agent of the company and authorized to act for it in the premises).

Wis.—Phillips v. McGrath, 62 Wis. 124, 22 NW 169.

Essentials of ratification see infra §§ 82–102.

41. Toledo, etc., R. Co. v. McCormick, 40 Ill. A. 51.

42. Smith v. Georgia, etc., R. Co., 113 Ga. 625, 38 SE 956; Humphrey v. Havens, 12 Minn. 298; White Sewing-Mach. Co. v. Hill, 136 N. C. 128, 48 SE 575.

43. Smith v. Georgia, etc., R. Co., 113 Ga. 625, 38 SE 956.

44. Temple v. Pomroy, 4 Gray (Mass.) 128; Paige v. Stone, 10 Metc. (Mass.) 160, 43 AmD 420; Danaher v. Garlock, 33 Mich. 295; Wills v. International, etc., R. Co., 41 Tex. Civ. A. 58, 92 SW 273.

45. Anderson v. Johnson, 74 Minn. 171, 77 NW 26; Wilcox v. Chicago, etc., R. Co., 24 Minn. 269; Briggs v. Kennett, 8 Misc. 264, 28 NYS 540.

46. Gordon v. Vermont L. & T. Co., 6 N. D. 454, 71 NW 556.

47. Hefferman v. Boteler, 87 Mo. A. 316; Morris v. Joyce, 63 N. J. Eq. 549, 555, 53 A 139 (where it was said: "The distinction between cases of authority under the rules of law applicable to agency admitted to exist to some extent and estoppels to deny the existence of an agency which, in fact, did not exist for any purpose, is clearly stated by the text-writers").

Agency by estoppel see infra §§ 69–74.

48. Pole v. Leask, 9 Jur. N. S. 829 [aff 28 Beav. 562, 54 Reprint 481]. See also supra §§ 32–42.

49. Gibson v. Zeibig, 24 Mo. A. 65. See also supra §§ 32–39.

50. Pettinger v. Alpena Cedar Co., 175 Mich. 162, 166, 141 NW 535 [cit Cyc]; Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224, 229, 53 NW 1061 (where it was said: "For the sake of convenience, we make a distinction between implied authority—that is, such as the principal in fact intends the agent to have, though the intention is implied from the acts and conduct of the principal—and apparent authority,—that is, such as, though not actually intended by the principal, he permits the agent to appear to have. The rule as to apparent authority rests essentially on the doctrine of estoppel. The rule is that, where one has reasonably and in good faith been led to believe from the appearance of authority which a principal permits his agent to have, and because of such belief has in good faith dealt with the agent, the principal will not be allowed to deny the agency, to the prejudice of the one so dealing"); Morris v. Joyce, 63 N. J. Eq. 549, 53 A 139; Pole v. Leask, 9 Jur. N. S. 829.

51. Hackett v. Van Frank, 105 Mo. A. 384, 399, 79 SW 1013 (where it is said: "While the circumstances relied on to create an agency by estoppel must be proven to have been known to and relied on by the party asserting the estoppel, this is not the rule when they are counted on to establish actual authority or ratification; for then the essence of the matter is the intention of the party to be charged, to authorize or abide by what was done; not that the third party believed, on sufficient grounds, that it had been authorized"); Hefferman v. Boteler, 87 Mo. A. 316; Bickford v. Menier, 107 N. Y. 490, 14 NE 438 (holding that the rule that a principal is liable for the acts of his agent within the apparent scope of his authority applies only where a third person has acted, believing and having a right to believe that the agent was acting within his authority, and where such person would sustain loss if the act of the agent were not considered that of the principal). See also infra §§ 71–74.

liable for his acts the same as though the authority had been express.[52]

As between the principal and agent the distinction between implied agency and agency by estoppel is vital. An agent by implied appointment is a real agent with all his rights and liabilities; an apparent agent, an agent by estoppel, is no agent at all, and as against the principal has none of the rights of an agent.[53]

[§ 43] **5. Identity of Principal—a. In General.** When agency is shown, it is often difficult to determine, as between two or more parties involved, whose agent the representative has been in the given transaction. The question in such cases is, as between two parties who sustain relations to the agent, which of them under all the circumstances and conditions of the case it is fair to conclude appointed him and controlled his acts and the tenure of his employment,[54]

52. Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013; Hefferman v. Boteler, 87 Mo. A. 316; Hamm v. Drew, 33 Tex. 77, 18 SW 434 (holding that in an action by the assignee of a corporation for conversion of its property, where defendant alleges that he purchased it from the corporation, evidence that the person from whom defendant purchased was the general manager of the corporation is admissible, although defendant had no knowledge thereof at the time of the sale).

[a] **In an action for the price of goods sold to an alleged agent,** where plaintiff seeks to prove agency as an inference from certain facts, it is not necessary for him to show his knowledge of those facts at the time of the sale. Doan v. Duncan, 17 Ill. 272.

53. Cadwell v. Dullaghan, 74 Iowa 239, 37 NW 178; Dispatch Printing Co. v. National Bank of Commerce, 115 Minn. 157, 162, 132 NW 2 [quot Cyc]. And see infra §§ 413, 414, 461.

54. U. S.—Davis v. Patrick, 122 U. S. 138, 7 SCt 1102, 30 L. ed. 1090 (holding that, where it appeared that a mining company, being indebted to D and desiring to obtain further advances from him to work its mines, executed a writing by which it was agreed that D should advance a certain amount of money, that P was appointed manager of its property and business until out of the profits he should repay D, D to have the power to remove P if not satisfied with his management, that the company also executed a power of attorney to P, authorizing him to work and manage the mine, that P employed his brother to haul ore, sued D for his services, claiming that P was D's agent, P was not the agent of D but of the company, and that the agreement was intended only as security for the repayment of the advances made by D to the company); American Bonding, etc., Co. v. Takahashi, 111 Fed. 125, 49 CCA 267 (where it appeared that plaintiffs applied to the general agent, who was also local manager and secretary, of defendant to furnish a bond to a railway company to whom plaintiffs had contracted to supply laborers to be paid by them, the company requiring the bond to protect it from claims which the laborers might make against it for wages; that the agent, as a condition to the furnishing of the bond and for the protection of defendant, required the money to become due from the railroad company under the contract to be paid to him as trustee, to be disbursed by him to the laborers, and the contract and bond accordingly provided that such money should be paid to the agent, designating him merely as trustee, and that he should pay the laborers therefrom, and pay over the remainder to plaintiffs; that they also reserved the right to defendant to designate a new trustee at any time on notice to the other parties; and that these requirements were within the general authority of the agent and were also expressly approved by defendant, which subsequently exercised the power given it to change the trustee, and the court held that the agent in his capacity as trustee represented defendant which was responsible for the faithful execution of his trust, and liable to plaintiffs for the sum due them from the trustee on an accounting); Jones v. U. S., 1 Ct. Cl. 383 (holding that an astronomer who assists contracting engineers in a government survey and is paid with their money, but who is not appointed by them and cannot be discharged by them, and who is not responsible to them, is not their agent, but the agent of the government).

Ala.—Ford v. Postal Tel. Cable Co., 124 Ala. 400, 27 S 409 (holding that where plaintiff agreed with the chairman of the street committee of a city council that he would do certain work for the city for a certain price, and the latter agreed to submit the matter to the committee, and, if they agreed to employ plaintiff, to send him a telegram, the chairman, in sending the telegram, was not acting as plaintiff's agent, but as agent of the city).

Cal.—Murdock v. Clarke, 3 Cal. Unrep. Cas. 265, 24 P 272 (where it appeared that by an agreement between a mortgagor and mortgagees the latter were to have the sole right to the possession of the land, accounting for the rents and profits, and were to select a person to manage the property; that at an accounting against the mortgagees they testified that they were to send a man to take possession in order to take care of the personal property security, and that everything was to be run in their name; and that they also spoke of the man selected, both in their testimony and in the pleadings, as their agent, and it was held that for the purposes of possession and accounting such person must be considered as the agent of the mortgagees only, although his selection was approved by the mortgagor, and his salary was paid as a part of the running expenses).

Ga.—Western Union Tel. Co. v. Ford, 10 Ga. A. 606, 74 SE 70.

Ill.—Evans v. Pierce, 70 Ill. A. 457 (holding that where the treasurer of a university delivered the checks for the salaries of the employees thereof, as shown by the pay roll, to the registrar to deliver to the employees as they signed the pay roll, the registrar was the agent of the treasurer, not of the employees); Brainard v. Turner, 4 Ill. A. 61.

Ind.—Hockett v. Jones, 70 Ind. 227 (holding that, where a son consented to and did receive an instrument evidencing an obligation from his father, and agreed to deliver it to the obligee, who had no notice thereof, on the father's death, the son became the trustee or agent to accept delivery for the third person).

Ky.—Martin v. Kennedy, 90 SW 975, 28 KyL 966.

Me.—Doylestown Agricultural Co. v. Brackett, etc., Co., 109 Me. 301, 84 A 146 (salesman held agent of wholesaler in making sales, although paid by manufacturer).

Mass.—Maynard v. Weeks, 181 Mass. 368, 64 NE 78 (holding that a written contract for the sale of lemons by plaintiff, as agent of a foreign house, which does not recite that plaintiff is agent for such principal, but recites that the latter has been cabled that the quality must be first class, and provides that plaintiff is simply acting as agent, and that all risks of importation are assumed by the purchaser, cannot be construed as showing that plaintiff is agent for the purchaser); Blaney v. Rogers, 174 Mass. 277, 54 NE 561.

Mich.—Fair v. Bowen, 127 Mich. 411, 86 NW 991 (where it appeared that B executed a mortgage on certain land to plaintiff and then conveyed it to defendant; that subsequently H wrote plaintiff's agent that defendant wished to sell eighty acres and would pay four hundred dollars and interest for a release of that eighty; that plaintiff's agent forwarded the release to H to whom defendant delivered certificates of deposit for four hundred dollars and interest; that H embezzled the certificates, and that defendant, on discovering H's failure to remit, refrained at H's request from notifying plaintiff of the embezzlement, and the court held that H was the agent of defendant, the evidence showing that H acted at defendant's request and in his behalf).

Minn.—McMullen v. People's Sav., etc., Assoc., 57 Minn. 33, 58 NW 820.

Mo.—Gottschalk v. Kircher, 109 Mo. 170, 17 SW 905; Camren v. Squires, 174 Mo. A. 272, 156 SW 773; Sanborn v. Buchanan County First Nat. Bank, 115 Mo. A. 50, 90 SW 1033 (holding that, where according to a course of business a bank on making loans occasionally took notes running to defendant bank, and then two of the officers of the former bank indorsed the notes and sent them to defendant bank, which gave the other bank credit as a deposit, defendant bank obtaining a certain percentage of interest, and the officers as consideration for their indorsement retaining the difference between that interest and that called for by the notes, in such transactions the bank officers in question did not act as agents for defendant bank, nor did they act as agents of defendant bank in foreclosing a mortgage given to secure the notes, it appearing that defendant bank had sent the notes to the officers for collection, with directions to protest and return if they were not paid, but instead the officers, to save themselves on their indorsement, foreclosed the mortgage); White City State Bank v. St. Joseph Stockyards Bank, 90 Mo. A. 395.

N. J.—Polhemus v. Holland Trust Co., 59 N. J. Eq. 93, 45 A 534 [rev on other grounds 61 N. J. Eq. 654, 47 A 417] (holding that, where defendant held bonds of a gas corporation as security for a loan, under an agreement that they should be surrendered as the corporation might sell them and that the proceeds of the sale should be applied in liquidation of the debt, and plaintiff was induced to purchase some of the bonds by defendant's clerk by false representations that they were first mortgage bonds, defendant was not liable for the loss sustained, since the clerk in such transaction acted in the interest of the gas corporation, and not as defendant's agent).

N. Y.—Cooper v. Hong Kong, etc., Banking Corp., 107 N. Y. 282, 14 NE 277 [rev 13 Daly 183]; Graves v. Mumford, 26 Barb. 94 (where it appeared that the owner of a farm procured a loan for three thousand dollars from an agent of V, who had sent money for investment; that at the time there was a mortgage on the farm given by a former owner to a third person for two thousand dollars; that the owner gave his mortgage to V to secure the three thousand dollars which he received from the agent, less the amount of the former owner's mortgage, which sum the agent retained to pay the latter mortgage; that the money secured by the mortgage to such third person was not due, and he refused to receive it, and the agent paid him interest on the mortgage until 1849,

and, this being determined, the agent is the agent of the party appointing him, although he was furnished or recommended by the other party.[55] This question often arises relative to whether, in an insurance case, a certain person was the agent of the insured or of the insurer,[56] or, in a real estate case, whether he was the agent of the vendor or of the purchaser.[57]

Joint principals. Two or more persons may become joint principals by employing a common agent to represent them.[58]

[§ 44] **b. Agency to Negotiate Loans—(1) In General.** In the negotiation of loans it is often difficult to determine whether an intermediary is the agent of the borrower or of the lender. Each case must be decided upon its own particular circumstances,[59] and, although certain facts have been held

when he paid him the balance of the principal and interest with money belonging to M, in his hands to be invested for her; that such third person at the request of the agent executed an assignment of the mortgage in blank, the agent stating that he wanted the mortgage to raise the money again temporarily, and afterward filled up the blank with the name of M as assignee; that the agent died without having applied the money of V, retained by him for that purpose out of the loan made to the owner, to the payment of the former owner's mortgage; and that V had no actual notice of the existence of the other mortgage, and it was held that the legal effect of the transactions between the agent and such third person was not a payment and satisfaction of the former mortgage, as the agent was then acting as the agent of M and paid the money out of her funds); Ulster County Sav. Inst. v. New York Fourth Nat. Bank, 5 Silv. Sup. 144, 8 NYS 162 (holding that where the treasurer of a savings bank sent certificates of stock to a correspondent of the bank with instructions to have the stock sold, inclosing a power of attorney of the owner to transfer it, and the letter was of the usual form used by the bank in its business transactions with the correspondent, and was signed by the treasurer as such, and the correspondent had previously sold stock for the bank, the correspondent, having acted upon the letter, could look to the bank as the principal, and that the treasurer did not act as agent of the stock owner); Dodge v. Wilbur, 7 N. Y. Super. 397 [aff 10 N. Y. 579] (where commission merchants in London authorized D, one of plaintiffs, to procure for them certain consignments of cotton and to draw on them or on defendants in New York for the necessary advances, and requested defendants to pay such bills as might be drawn, and promised to honor such bills as defendants for their reimbursement should draw on them, and it was held that defendants in accepting and paying the bills acted solely as disbursing agents of such commission merchants, not as agents of D or of the shippers of the cotton); Rosaler v. Mandeville, 92 NYS 341.

N. C.—Hanover Nat. Bank v. Cocke, 127 N. C. 467, 37 SE 507 (holding that where stockholders of an insolvent bank authorize the trustees of the bank to bind them individually for money borrowed to pay liabilities of the bank, an action may be maintained by the person making the loan against the stockholders, since such authorization was in effect a power of attorney, which bound them as principals for the act of the trustee).

Okl.—Union Cent. L. Ins. Co. v. Pappan, 36 Okl. 344, 128 P 716.

R. I.—Smith v. Hurley, 29 R. I. 489, 72 A 705 (holding that where at an auction held by order of a receiver lots of lumber were sold, and plaintiff purchased a number but refused to take one because of variance with the prospectus furnished bidders, and the sale was without condition, and delivery orders for each lot were given the purchaser, entitling him to the lumber on presentation thereof, and on the day of sale, after the auction, the purchaser was prevented by an employee of the receiver from taking lumber bought and paid for, for which he presented the order, unless he should pay for lot rejected, and the employee had orders to deliver all lumber on presentation of such orders as plaintiff furnished him, but acted on the representation of the auctioneer that the terms had not been complied with and that the purchaser was not entitled to the lumber, the employee was acting as agent of the auctioneer, not of the receiver, in preventing plaintiff from taking the goods).

Wash.—Sibson v. Hamilton, etc., Co., 22 Wash. 449, 61 P 162 (holding that where the absolute control of the business and property of a debtor corporation passes by agreement into the hands of a mortgagee, and an officer and stockholder in the corporation is made manager under the direction of the mortgagee for the purpose of continuing the business and paying off the indebtedness, such stockholder becomes the agent of the mortgagee, and for any mismanagement of the business on his part, resulting in loss, the mortgagee, and not the corporation, is liable).

Eng.—Gosling v. Gaskell, [1897] A. C. 575; Gibbons v. Proctor, 64 L. T. Rep. N. S. 594. And see Roberts v. Ogilby, 9 Price 269; Waterlow v. Cotton, 2 Wkly. Rep. 562.

Ont.—Armstrong v. Johnston, 32 Ont. 15 (holding that one to whom the accommodation indorser of a note transferred other notes indorsed to him by the makers of the former note for the purpose of procuring its payment acts for such indorser instead of the makers).

Que.—Berube v. Great North Western Tel. Co., 14 Que. Super. 178 (holding that the operator of a telegraph company who receives and transmits the message is not the agent of the sender, but of the telegraph company).

[a] **One who buys exchange for a principal** is the agent of that principal, not of the seller of the exchange. Horstmann v. Baltzer, 38 Hun (N. Y.) 367.

[b] **Receiving money for another.**—(1) "Where a debtor delivers money to a third person for the purpose of paying a note which is not due, and of which such person is not in the possession, the presumption is that the person receiving the money does so not as the agent of the creditor but as the agent of the debtor." Goodyear v. Williams, 73 Kan. 192, 195, 85 P 300. (2) Where a purchaser makes payment to a person other than the seller or his authorized agent, he makes such person his own agent. Stromberg-Carlson Tel. Mfg. Co. v. Derrickson, (Del.) 84 A 1029.

[c] **The person acting as agent for the owners of a vessel,** and also acting ostensibly as the agent for the charterers in carrying out the work of one soliciting passengers by inspecting them for the purpose of accepting or rejecting them as well or fit for the voyage, is, where the character of the enterprise is a mutual one, acting for the owners as well as for the charterers. Imata v. The Steamship, 2 Hawaii Fed. 337.

55. John Slaughter Co. v. Standard Mach. Co., 148 N. C. 471, 62 SE 599 (holding that where plaintiff bought goods from defendant for resale, and defendant recommended the employment by plaintiff of an agent to sell, the agent employed was the agent of plaintiff).

56. See Insurance [22 Cyc 1444 et seq].

57. See cases infra this note.

[a] **Agent of vendor or purchaser.**—(1) Where at the time for delivery of a deed by L and payment of purchase money by N, there being an unsatisfied mortgage which it was the duty of L to satisfy, it was agreed that a part of the purchase money equal to the mortgage should be left with S, to be paid by him to L on the mortgage being paid, and an agreement showing this was signed by L and N, reciting "Cash retained by G. R. Schaefer for use of L. W. Lipman until mortgage . . . is satisfied," and S gave L a receipt reciting receipt from L of said sum to be paid him on satisfaction of the mortgage, L consented to S acting as his agent for custody of the money, so that he must bear the loss of S's embezzlement thereof. Lipman v. Noblit, 194 Pa. 416, 45 A 377. Compare Vandaleur v. Blagrave, 11 Jur. 935 [aff 6 Beav. 565, 49 Reprint 944]. (2) One who, on behalf of defendant, entered into a contract in his own name for the purchase of a tract of land from plaintiff, making part payment thereon with money furnished by defendant, which contract he assigned to defendant in whom the title finally vested on account of the contract, was the agent of defendant who was liable to plaintiff for the balance of the purchase price with interest and damages. Moore v. Granby Min., etc., Co., 80 Mo. 86. (3) A land agent procured an option to purchase plaintiff's land for twenty thousand dollars. He then organized a syndicate, composed of himself and nine others, to purchase the land from plaintiff for twenty-two thousand dollars, but there was a secret understanding between him and plaintiff that they should share between them the advance of two thousand dollars. When the contract between plaintiff and the members of the syndicate came to be executed one of them refused to sign it, and the agent procured another person to sign it, the other members of the syndicate not consenting to such change in its membership, and being ignorant of the arrangement between plaintiff and the agent for sharing the profits of the transaction. It was held that the land agent, in procuring the additional signature, was the agent of plaintiff, not of his associates in the syndicate, and that the latter were not bound by his act, while plaintiff was, and that the act was a fraud on the other members of the syndicate, and avoided the contract. Crittenden v. Armour, 80 Iowa 221, 45 NW 888. See also Curtis v. Innerarity, 6 How. (U. S.) 146, 12 L. ed. 380.

Identity of principal of real estate broker see Brokers [19 Cyc 191].

58. Wilson v. Henderson, 123 Cal. 258, 55 P 986 (holding that, where creditors employ a common agent to conduct the business of their insolvent debtor, and to employ labor and purchase material therefor, they become liable as joint principals for such labor and material, and that this liability is not changed by the mere fact that the agent is the assignee, and is authorized by order of court, made subsequently to the agreement, to carry on the business, and to pay the costs thereof out of the assets of the estate, unless the order is intended to supplant the agreement).

59. Merriam v. Haas, 154 U. S. 542, 14 SCt 1159, 18 L. ed. 29 (where the court said that to determine in a given case whether a person is the agent of the lender or of the borrower is a question of the weight of testi-

to constitute the intermediary the agent of the borrower,[60] or lender,[61] as the case may be, these facts are not necessarily conclusive on the question of agency, and will not preclude the alleged principal from showing that the intermediary was actually acting as the agent of the other party,[62] or as the agent of each, but for different purposes.[63] Thus the fact that the application for the loan recites that the intermediary is the agent of the borrower is not controlling, if the facts and circumstances are such as to create an agency in behalf of the lender as a matter of law.[64]

[§ 45] **(2) Agent of Borrower.** If a person desiring a loan makes known that desire to one who applies to a money lender and consummates the loan, the intermediary prima facie is the agent of the borrower, not of the lender, and justifies the lender in paying him the amount of the loan.[65] So if the borrower in a written application or otherwise expressly makes the intermediary his agent,[66] if he pays the agent's commission for negotiating the loan,[67] or if he employs the intermediary to examine the title to the property offered as security,[68] or to discharge prior

mony rather than of the application of legal principles).

[a] **Deposit subject to check of agent.**—That the lender deposits in bank a fund subject to the check of a loan broker for the amount of a loan, if the lender after examination should approve the same, does not render the broker the agent of the lender for the purpose of making loans. Barksdale v. Security Inv. Co., 120 Ga. 388, 47 SE 943.

[b] **Loans by insurance agent.**—The fact that a loan agent, who is in the habit of sending applications to, and obtaining loans from, an insurance company as well as from other parties, is the agent of said company for the purpose of procuring insurance does not constitute him its agent in respect to loans obtained by him from it. Massachusetts Mut. L. Ins. Co. v. Boggs, 121 Ill. 119, 13 NE 550.

[c] **Where the maker of a note payable to the order of another applies to a broker** to negotiate a loan on the note, and the broker applies to one who agrees to lend the money if the security is all right but requests the broker to make inquiries and report particulars, and the broker procures the payee's indorsement on the note, the broker is not the agent of the lender in procuring the indorsement. Burlingame v. Foster, 128 Mass. 125.

60. See infra § 45.

61. See infra § 46.

62. State v. Bristol Sav. Bank, 108 Ala. 3, 18 S 533, 54 AmSR 141 (holding that, although there is a contract in evidence by which a borrower formally constitutes another his agent to negotiate a loan, it is nevertheless open to the borrower to show that such agent really acted as the agent of the lender); Larson v. Butler, 26 N. D. 426, 144 NW 1077.

63. Ala.—Land Mortg. Inv. Agency Co. v. Preston, 119 Ala. 290, 24 S 707.

Ind.—International Bldg., etc., Assoc. v. Watson, 158 Ind. 508, 64 NE 23 (holding that, where an attorney, who was at times employed by a loan company to collect dues, fines, etc., and at times secured loans from the association, he filling out the blank application and being paid by the applicants, secured a loan for defendant, filling out the blank application, he did not act as agent for the company, so as to render it chargeable with his knowledge that the mortgage given to secure the loan was given by defendant as a surety).

Mo.—May v. Mutual Ben. L. Ins. Co., 72 Mo. A. 286 (holding that where a borrower directed the lender in writing to pay the money to C, and that the writing should be as a receipt, C, although he had been the agent of the lender in negotiating the loan, was the agent of the borrower to receive and apply the money, and any loss from his misapplication thereof must fall on the borrower).

N. Y.—Lantry v. Sutton, 5 NYS 14.

Pa.—Pepper v. Cairns, 133 Pa. 114, 19 A 336, 19 AmSR 625, 7 LRA 750.

S. C.—Blackwell v. British-American Mortg. Co., 65 S. C. 105, 43 SE 395 (holding that where an attorney sent an application for a loan to a broker who negotiated for a loan with a corporation, and the broker asked the attorney to prepare an abstract of title, which he thereafter forwarded to the broker, whereupon the papers for the borrower to execute were prepared and forwarded to the attorney, such attorney was the agent both of the borrower and the corporation making the loan, so that notice to him of anything appearing in the abstract of title was notice to the corporation).

Agency for adverse party generally see infra § 47.

64. McLean v. Ficke, 94 Iowa 283, 62 NW 753; Larson v. Lombard Inv. Co., 51 Minn. 141, 53 NW 179; Jensen v. Lewis Inv. Co., 39 Nebr. 871, 58 NW 100; New England Mortg. Security Co. v. Addison, 15 Nebr. 335, 18 NW 76; Bates v. American Mortg. Co., 37 S. C. 88, 16 SE 883, 21 LRA 340 and note. See however cases cited infra note 66.

Authority to lend or borrow money see infra §§ 304, 305.

65. Ala.—Ginn v. New England Mortg. Security Co., 92 Ala. 135, 8 S 388.

Ark.—Johnson v. Shattuck, 67 Ark. 159, 53 SW 888.

Colo.—Goodale v. Middaugh, 8 Colo. 223, 46 P 11 (holding that the fact that one who by false representations induces another to make a loan to a third person is at the time the custodian of the money to be loaned, and that the note and security therefor are to be taken by him and delivered to the lender, do not constitute him the agent of the lender, if it appears that he acted for the borrower in requesting the loan).

Kan.—National Mortg., etc., Co. v. Lash, 5 Kan. A. 633, 47 P 548.

Mich.—Englemann v. Reuse, 61 Mich. 395, 28 NW 149; Clark v. McGraw, 14 Mich. 139.

Minn.—Murphy v. Becker, 101 Minn. 329, 112 NW 264 (holding that where plaintiffs applied to a loan agent for a loan on real estate on which a mortgage then existed, and the agent secured the loan from defendant, and defendant paid over the money to the agent who turned over a portion to plaintiff, stating that he had paid the balance to satisfy the first mortgage, which in point of fact was never satisfied, defendant was justified in delivering the entire amount of the loan to plaintiff's agent without himself seeing to the payment of the first mortgage).

N. Y.—Fatta v. Edgerton, 157 App. Div. 852, 143 NYS 225 [aff 137 NYS 226]; Henken v. Schwicker, 67 App. Div. 196, 73 NYS 656 [aff 174 N. Y. 298, 66 NE 971].

Okl.—Owings v. Howington, 31 Okl. 651, 124 P 1058.

66. Land Mortg. Inv. Agency Co. v. Preston, 119 Ala. 290, 24 S 707; Land Mortg., etc., Co. v. Vinson, 105 Ala. 389, 17 S 23; American Mortg. Co. v. King, 105 Ala. 358, 16 S 889; Edinburgh American Land Mortg. Co. v. Peoples, 102 Ala. 241, 14 S 656 (all holding that where, in an application for a loan of money, the borrower agrees to pay a third person as his attorney "a reasonable fee for taking the application, conducting the correspondence, making ample abstract of title to his lands, and securing and paying over the money" borrowed, he thereby constitutes such person his agent with authority to receive the money from the lender, and the embezzlement of the money by such agent after it comes into his hands from the lender for the purpose of being paid over to the borrower is the loss of the latter); Detwilder v. Heckenlaible, 63 Kan. 627, 66 P 653 (holding that, where a borrower by express stipulation makes the agent through whom a loan is obtained his agent to pay the principal of such loan and interest thereon, evidence which is as reconcilable with the theory that the agent is acting as the agent of the borrower in receiving and forwarding such principal and interest as with the theory that such agent is acting as the agent of the lender must be held to show agency under such stipulation and not to show agency for the lender); Knox County v. Goggin, 105 Mo. 182, 16 SW 684 (where defendant sought a loan from a local loan agent by an application in which he appointed the local agent his agent for the purpose of negotiating the loan and discharging prior encumbrances, and the local agent received no compensation from the loan company, and the court held that the local agent was the agent of the borrower, not of the lender); Cooper v. Headley, 12 N. J. Eq. 48. See also Owings v. Howington, 31 Okl. 651, 657, 124 P 1058 [cit Cyc]. See however supra text and note 64.

67. Ala.—Hamil v. American Freehold Land Mortg. Co., 127 Ala. 90, 28 S 558; Land Mortg. Inv. Agency Co. v. Preston, 119 Ala. 290, 24 S 707 (holding that a person to whom an application is made for a loan, with the understanding that he shall procure it through a certain broker and shall receive a specified compensation for his services from the borrower, is the agent of the borrower in procuring the loan, although he is acting as the general agent of the broker, but receives no compensation from him); Land Mortg., etc., Co. v. Vinson, 105 Ala. 389, 17 S 23; American Mortg. Co. v. King, 105 Ala. 358, 16 S 889; Edinburgh American Land Mortg. Co. v. Peoples, 102 Ala. 241, 14 S 656.

Ark.—Johnson v. Shattuck, 67 Ark. 159, 53 SW 888.

Iowa.—Thomas v. Desney, 57 Iowa 58, 10 NW 315 (holding that where parties sign an application for a loan, agreeing to pay all expenses, the person employed to negotiate the loan is the agent of the borrower).

Mo.—Knox County v. Goggin, 105 Mo. 182, 16 SW 684.

N. J.—Cooper v. Headley, 12 N. J. Eq. 48.

N. Y.—Lantry v. Sutton, 5 NYS 14. See however infra text and note 78.

68. Farmer v. American Mortg. Co., 116 Ala. 410, 22 S 426 (holding that an agent employed, by appointment in writing by one representing himself to be the owner of certain land, to negotiate for him a loan on mortgage, who in the line of such employment examined the title to the land for the purpose of inducing the making of such loan by means of his representations that the mortgagor had a perfect title, was in no sense the agent of the mortgagee); Boyd v. Boyd, 128 Iowa 699, 104 NW 798, 111 AmSR 215 (holding that an agent for a borrower in procuring a loan is not the agent of the lender because the latter consents to rely on the agent's representation as to the condition of the borrower's title, and the lender is not chargeable with the knowledge possessed by the agent). Compare Love v. Mack, 93 L. T. Rep. N. S. 352.

encumbrances thereon,[69] these facts, taken collectively or in various lesser combinations, are generally held to justify an inference that the intermediary is the agent of the borrower. So also if the lender has given the agent no authority to receive payment for him, and the borrower pays such agent, the debt is not satisfied until the money reaches the lender, for the intermediary is in such case acting as agent of the borrower to receive and transmit the payment.[70]

[§ 46] **(3) Agent of Lender.** If a money lender employs the intermediary to negotiate loans,[71] to examine the title to property offered as security,[72] to see that the property is discharged from prior encumbrances,[73] to prepare the papers and see to the execution thereof,[74] to pay over the money to the borrower,[75] or to perform other services in regard to the loan,[76] these facts, taken collectively or in various lesser combinations, justify an inference that the intermediary is the agent of the lender. If the lender pays the intermediary's commission, it tends to establish an agency in the lender's behalf;[77] and if the service is performed at the request and by the direction of the lender, presumptively the agent is his agent, even though the borrower is required to pay for the service.[78]

[§ 47] **c. Agency for Adverse Party.** It is a general rule, to which there are certain exceptions, that a person may not be the agent for both the contracting parties at the same time.[79] But often the agent of one party to a transaction is appointed by the adverse party as his agent for certain purposes, and each party will then stand in the relation of principal to the agent as to the matters by him intrusted to the agent, and as to those alone.[80]

69. Englemann v. Reuse, 61 Mich. 395, 28 NW 149; Knox County v. Goggin, 105 Mo. 182, 16 SW 684; Lipman v. Noblit, 194 Pa. 416, 45 A 377; Pepper v. Cairns, 133 Pa. 114, 19 A 336, 19 AmSR 625, 7 LRA 750. But see infra note 73.

70. Ark.—Bagnell v. Walker, 65 Ark. 325, 46 SW 126, 53 SW 570.

Cal.—Ballard v. Nye, 138 Cal. 588, 72 P 156 [rev 69 P 481].

Iowa.—Klindt v. Higgins, 95 Iowa 529, 64 NW 414; U. S. Bank v. Burson, 90 Iowa 191, 57 NW 705; Security Co. v. Graybeal, 85 Iowa 543, 52 NW 497, 39 AmSR 311; Artley v. Morrison, 73 Iowa 132, 34 NW 779.

Kan.—Goodyear v. Williams, 73 Kan. 192, 85 P 300; Thomas v. Arthurs, 8 Kan. A. 126, 54 P 694.

Mich.—Peo. v. Gould, 118 Mich. 75, 76 NW 117; Bissell v. Dowling, 117 Mich. 646, 76 NW 100; Michigan Church Assoc. v. Walton, 114 Mich. 667, 72 NW 998; Wilson v. Campbell, 110 Mich. 580, 68 NW 278, 35 LRA 544; Van Deusen v. Ingraham, 110 Mich. 38, 67 NW 914; Clark v. McGraw, 14 Mich. 139.

[a] **Paying back part of loan.**—Where defendants, through T as their agent, secured a loan from plaintiff on mortgage, and afterward applied to plaintiff, through T, to pay off a part of the loan before maturity, and plaintiff consented on certain terms, and defendants paid the money to T, plaintiff giving no release and knowing nothing of the matter until T afterward absconded, the payment was not made to plaintiff's agent. Mutual Ben. L. Ins. Co. v. Miles, 81 Fed. 32.

71. U. S.—Stockton v. Watson, 101 Fed. 490, 42 CCA 211.

Iowa.—McLean v. Ficke, 94 Iowa 283, 62 NW 753.

Mich.—Matteson v. Blackmer, 46 Mich. 393, 9 NW 445.

Minn.—Gerdes v. Burnham, 78 Minn. 511, 81 NW 516.

Nebr.—Jensen v. Lewis Inv. Co., 39 Nebr. 371, 58 NW 100; New England Mortg. Security Co. v. Addison, 15 Nebr. 335, 18 NW 76.

N. Y.—Yeoman v. McClenahan, 190 N. Y. 121, 82 NE 1086.

S. C.—Bates v. American Mortg. Co., 37 S. C. 88, 16 SE 883, 21 LRA 340 and note.

[a] **Illustration.**—Where a banking company prepared all the papers when a mortgage loan was made, sent the money to be disbursed, collected all interest for the lender, sent the coupons to the borrower when they were paid, and required all the money to be paid to it, and all communications to be addressed to it, and it also made other loans for the lender, it was the lender's agent. Land Mortg. Inv., etc., Co. v. Gillam, 49 S. C. 345, 26 SE 990, 29 SE 203.

72. Stockton v. Watson, 101 Fed. 490, 42 CCA 211; Matteson v. Blackmer, 46 Mich. 393, 9 NW 445; Jensen v. Lewis Inv. Co., 39 Nebr. 371, 58 NW 100; Blackwell v. British-American Mortg. Co., 65 S. C. 105, 43 SE 395; Bates v. American Mortg. Co., 37 S. C. 88, 16 SE 883, 21 LRA 340. Compare Love v. Mack, 93 L. T. Rep. N. S. 352.

73. See cases infra this note.

[a] **Whether a loan agent who retains part of the money loaned until prior encumbrances are discharged** acts in so doing as agent of the lender or of the borrower is in dispute. Certainly he may be so employed by the borrower. (1) But when the agent is directed to retain a portion of the loan until the prior encumbrance is discharged, it would seem that he does so for the lender who alone is interested in having the discharge before he parts with his money. Otherwise the retention of the money seems without meaning, for if the agent acts for the borrower then his possession is the possession of his principal, and the latter may demand that the money be paid him without discharging prior claims against the property, and such is the holding of many cases. Stockton v. Watson, 101 Fed. 490, 42 CCA 211; Travelers' Ins. Co. v. Jones, 16 Colo. 515, 27 P 807; Day v. Dages, 17 Ind. A. 228, 46 NE 589; McLean v. Ficke, 94 Iowa 283, 62 NW 753; Larson v. Lombard Inv. Co., 51 Minn. 141, 53 NW 179; Jensen v. Lewis Inv. Co., 39 Nebr. 371, 58 NW 100; Gibson v. Davenport, 29 Oh. St. 309 [aff 7 Oh. Dec. (Reprint) 83, 1 CincLBul 102]. (2) But there are other cases that hold that the discharging of the prior encumbrance is the duty of the owner of the property, and hence in attending to such discharge the agent acts for him. Englemann v. Reuse, 61 Mich. 395, 28 NW 149; Knox County v. Goggin, 105 Mo. 182, 16 SW 684; Lipman v. Noblit, 194 Pa. 416, 45 A 377; Pepper v. Cairns, 133 Pa. 114, 19 A 336, 19 AmSR 625, 7 LRA 750.

74. Matteson v. Blackmer, 46 Mich. 393, 9 NW 445; Bates v. American Mortg. Co., 37 S. C. 88, 16 SE 883, 21 LRA 340. See Land Mortg. Inv., etc., Co. v. Gillam, 49 S. C. 345, 26 SE 990, 29 SE 203.

75. U. S.—Stockton v. Watson, 101 Fed. 490, 42 CCA 211.

Ala.—Land Mortg. Inv. Agency Co. v. Preston, 119 Ala. 290, 24 S 707 (holding that an agent to procure a loan, who obtained it from a company which sent the money to him to be sent to the borrower, is the agent of the lender in paying over the money to the borrower).

Iowa.—McLean v. Ficke, 94 Iowa 283, 62 NW 753.

Mich.—Matteson v. Blackmer, 46 Mich. 393, 9 NW 445.

Nebr.—Jensen v. Lewis Inv. Co., 39 Nebr. 371, 58 NW 100.

76. Stockton v. Watson, 101 Fed. 490, 42 CCA 211. See also Land Mortg. Inv., etc., Co. v. Gillam, 49 S. C. 345, 26 SE 990, 29 SE 203.

77. Jensen v. Lewis Inv. Co., 39 Nebr. 371, 58 NW 100.

78. See cases infra this note. But see supra text and note 67.

[a] **An attorney employed by a person to examine the title** to real estate upon which he contemplates loaning money is his agent, although he is paid by the person seeking the loan. Wittenbrock v. Parker, 102 Cal. 93, 36 P 374, 41 AmSR 172, 24 LRA 197; Gibson v. Davenport, 29 Oh. St. 309 [aff 7 Oh. Dec. (Reprint) 83, 1 CincLBul 102]; Antioch College v. Carroll, 11 Oh. Dec. (Reprint) 220, 25 CincLBul 289; West v. Gibson, 6 Oh. Dec. (Reprint) 1034, 9 AmLRec 689.

[b] **Extortion of a bonus from the borrower** of money is too common a procedure on the part of the lender's agent to be very significant for the purpose of showing that he was the borrower's agent rather than the lender's. Mateson v. Blackmer, 46 Mich. 393, 9 NW 445.

79. See infra § 367.

80. U. S.—Curtis v. Innerarity, 6 How. 146, 12 L. ed. 380 (holding that where an agent of a vendor gave a receipt in full for certain balances by way of adjustment and compromise, and the vendor disapproved thereof, the purchasers, by making such payment, which was not within the power of the agent to receive, constituted him their agent and, having for two years afterward insisted on the binding force of the payments to the extent to which the agent had given releases, could not claim the payment to be only on account after the agent had become insolvent).

Ala.—Ball v. State Bank, 8 Ala. 590, 42 AmD 649.

Cal.—Murdock v. Clarke, 90 Cal. 427, 27 P 275.

Kan.—Schick v. Warren Mortg. Co., 86 Kan. 812, 818, 122 P 872, AnnCas-1913C 466 [quot Cyc] (holding that, where two are about equally interested in the application of money in the possession of one, and neither has any right thereto, except to have it so applied, and they appoint an agent to receive the money and apply it, such person is equally the agent of each of the parties; and if he embezzles the money the loss falls equally on both).

La.—O'Conner v. Bernard, 6 Mart. N. S. 303 (holding that where one receives notes from a debtor against whom he has claims for collection, as collateral security, with authority to collect such collateral notes, he acts as agent of the debtor in the collection). And see O'Keefe's Succession, 12 La. Ann. 246.

Mass.—Cropper v. Adams, 8 Pick. 40 (holding that where one as agent for A sold, but did not transfer, stock to C, and promised C to be accountable for such dividends as he or his agent should receive before transfer, he thereby became C's agent to receive such dividends).

Mich.—Colwell v. Keystone Iron Co., 36 Mich. 51 (holding that an employee of a seller may, by consent of all the parties, accept as the vendee's agent a delivery of property sold, in which case he holds it throughout singly as the vendee's agent).

N. C.—Sumner v. Charlotte, etc.,

But such appointment of the agent of the adverse party must, from the acts of the parties or the circumstances of the case, be clear; it is not to be inferred from words or conduct not inconsistent with an intention to deal with the agent as representing the adverse party only,[81] and both parties must know of the double employment.[82]

[§ 48] **6. Form of Appointment—a. Oral Authority—(1) In General.** As a general rule no written instrument or particular form of words is necessary to constitute the relation of agency,[83] and for most purposes the agent's authority need not even be express.[84] If it is express, it is sufficent if it is conferred by parol,[85] or partly in writing and partly

R. Co., 78 N. C. 289 (holding that, where, in an action for damages against a railroad company, the proof showed that plaintiff had employed C, a depot agent of defendant, to purchase cotton for him and hold it for forwarding over defendant's road according to plaintiff's directions, C in so dealing acted solely as plaintiff's agent, and that there was no liability on defendant from any loss resulting from the failure of C to perform his duty as such agent).

Or.—Bonelli v. Burton, 61 Or. 429, 123 P 37.

Pa.—Western R. Co. v. Roberts, 4 Phila. 110 (holding that, if a purchaser who has bought from an agent for cash pays the agent in notes to be by him turned into cash for the account of the principal, the purchaser thereby makes such agent his agent in the process of conversion, and assumes responsibility for any loss that may happen for want of fidelity).

Tenn.—Williams v. Williams, 11 Heisk. 95.

Tex.—Trammell v. Turner, (Civ. A.) 82 SW 325.

Eng.—Hewitt v. Loosemore, 9 Hare 449, 41 EngCh 449, 68 Reprint 586 (holding that a mortgagor who is himself a solicitor and prepares the mortgage papers, in so doing may be considered the agent of the mortgagee.)

Double agency in negotiation of loan see supra § 44.

[a] **Agent for buyer and seller.**—Where defendants brought plaintiff, the buyer, and M, representing the seller, together, and agreed, for a money consideration to be paid by plaintiff when the goods arrived, to become primarily liable to the seller for the purchase price of the goods, to permit them to be shipped or consigned to them, and to receive them on arrival and deliver them to plaintiff, they were, in a sense, the agents of both the buyer and the seller. Haines v. Neece, 116 Mo. A. 499, 92 SW 919.

[b] **An attorney** employed by one liable on a covenant of warranty to represent her in an ejectment suit brought by a tenant may be also the agent of the tenant, where it is shown that under his instructions the tenant settled the suit. Freeman v. Brehm, (Ind. A.) 30 NE 712 [reh den (A.) 31 NE 545].

[c] **The agent of a grantee** is made the agent of the grantor where the grantor consents to an arrangement whereby the lands are sold to a third person with instructions to such agent to receive payments therefor and apply them to the indebtedness due the original grantor, and such grantor is bound by payments made to the agent. Miller v. Wilson, 126 Mo. 48, 28 SW 640.

81. U. S.—Holt v. Dorsey, 12 F. Cas. No. 6,647, 1 Wash. 396.

Ala.—Kidd v. Cromwell, 17 Ala. 648, 13 Ala. 576 (holding that where A & Co., being indebted by note to B & Co. of New York, wrote to them to "return the note to [C & Co.], our agents in Mobile, who will pay it on presentation," and the note was accordingly remitted to C & Co. who in return sent their receipt to B & Co. in which they promised "to account" to them for the note, C & Co. did not thereby become the agents of B & Co., and could not discharge A & Co. from the debt without a payment to B & Co.).

Colo.—Fisher v. Denver Nat. Bank, 22 Colo. 373, 45 P 440 (holding that where an agent is authorized only to offer security to the payee of a note for the release of a surety, the payee, by rejecting the offer and proposing to the agent to submit to his principal a proposition to accept the security as collateral security for the note without releasing the surety, does not make the agent his own).

Ill.—Tufts v. Johnson, 46 Ill. A. 191 (holding that the mere fact that a purchaser of a stock of goods asks the manager of the seller his opinion of its value does not make the manager the purchaser's agent so as to charge her with his knowledge of a vendor's lien retained on a portion of the goods).

Ind.—Murray v. W. W. Kimball Co., 10 Ind. A. 141, 37 NE 736. See also Worley v. Moore, 77 Ind. 567.

Iowa.—McLean v. Ficke, 94 Iowa 283, 62 NW 753; Fisher v. Schiller Lodge, 50 Iowa 459 (holding that, if a debtor employs an agent to carry money to his creditor, the creditor by accepting the money does not make the messenger his agent, so that if at another time the messenger should appropriate the money the loss would be that of the creditor, and not that of the debtor).

Kan.—Schick v. Warren Mortg. Co., 86 Kan. 812, 818, 122 P 872, AnnCas-1913C 466 [quot Cyc].

Mich.—Sullivan v. Ross, 39 Mich. 511.

Miss.—Lowenstein v. Goodbar, 69 Miss. 808, 13 S 860 (holding that, where it appeared that certain creditors effected a purchase of their debtor's stock of goods, assuming to pay certain debts, as to which the debtor was discharged, that a creditor whose debt was assumed was the regular retained attorney of the debtor in his business, and that after the terms of the sale were agreed on he, being requested by telegram, prepared the bill of sale, and took temporary possession of the goods until the purchaser's agent could arrive, this did not constitute him the agent of the purchasers in making their purchase).

Mo.—Hill v. Morris, 15 Mo. A. 322.

Nebr.—New England Mortg. Security Co. v. Addison, 15 Nebr. 335, 18 NW 76.

N. Y.—Kelly v. Lehigh Valley Coal Co., 8 Daly 291.

Pa.—Ulmer v. Ryan, 137 Pa. 309, 20 A 705.

Tenn.—Tennessee Bank v. Moore, 3 Sneed 544 (holding that, where a defendant in a suit on a bill of exchange had consigned cotton to a firm of merchants with instructions to sell and apply the proceeds to the payment of the bill, the active member of which firm was the agent of plaintiff and as such the holder of the bill for collection, and the proceeds of said cotton came into the hands of said agent, the law presumes that it was so received as the agent of defendant, not of plaintiff).

Utah.—Thompson v. Avery, 11 Utah 214, 39 P 829.

Vt.—Strong v. Dodds, 47 Vt. 348.

W. Va.—Deitz v. Providence-Washington Ins. Co., 31 W. Va. 851, 8 SE 616, 13 AmSR 909.

Eng.—Graham v. Musson, 5 Bing. N. Cas. 603, 35 ECL 324, 132 Reprint 1232.

[a] **A direction by a surety on a note** to the party's agent not to deliver it until time for investigation had elapsed does not constitute such agent the agent of the surety. Murray v. W. W. Kimball Co., 10 Ind. A. 141, 37 NE 736.

82. Bonelli v. Burton, 61 Or. 429, 123 P 37 (holding that an agent may represent adverse parties to a transaction if each party knows of his employment by the other).

83. Geylin v. De Villeroi, 7 Del. 311; Hirsch v. Beverly, 125 Ga. 657, 54 SE 678; Trundy v. Farrar, 32 Me. 225. See also supra § 29.

84. Miller v. New Orleans Canal, etc., Co., 8 Rob. (La.) 236; Jones v. Lewis, 8 Oh. Dec. (Reprint) 368, 7 CincLBul 211. See also supra § 32; infra §§ 216-220.

85. U. S.—Central Trust Co. v. Bridges, 57 Fed. 753, 6 CCA 539; Allis v. Jones, 45 Fed. 148.

Ala.—Lamar v. Smith, 129 Ala. 418, 29 S 576; Cocke v. Campbell, 13 Ala. 286 (authority to sell a chattel).

Cal.—Dingley v. McDonald, 124 Cal. 90, 56 P 790; Bergtholdt v. Porter Co., 114 Cal. 681, 46 P 738.

Del.—State v. Foster, 17 Del. 289, 40 A 939.

Ga.—Hirsh v. Beverly, 125 Ga. 657, 54 SE 678 (authority to sell mules and apply the proceeds); Kirklin v. Atlas Sav., etc., Assoc., 107 Ga. 313, 33 SE 83 (holding that no written authority is necessary to authorize an agent to bid off money offered by a building association in his principal's name and to sign the principal's name to the list of members of the association).

Ill.—Paris v. Lewis, 85 Ill. 597; Schneider v. Seely, 40 Ill. 257; Cook v. Harrison, 19 Ill. A. 402.

Ind.—Caley v. Morgan, 114 Ind. 350, 16 NE 790; Stockwell v. Whitehead, 47 Ind. A. 423, 94 NE 736.

Kan.—Goodyear v. Williams, 73 Kan. 192, 85 P 300.

Ky.—Shadwick v. Smith, 147 Ky. 159, 143 SW 1027; Kirkpatrick v. Cisna, 3 Bibb 244.

Me.—Trundy v. Farrar, 32 Me. 225.

Md.—Anderson v. Stewart, 108 Md. 340, 70 A 228; Swindell v. Gilbert, 100 Md. 399, 60 A 102.

Mass.—Phelps v. Sullivan, 140 Mass. 36, 2 NE 121, 54 AmR 488; Com. v. Griffith, 2 Pick. 11; Shed v. Brett, 1 Pick. 401, 11 AmD 209 (authority to present and demand payment of a note); Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 AmD 66; Stackpole v. Arnold, 11 Mass. 27, 6 AmD 150.

Mich.—Hannan v. Prentis, 124 Mich. 417, 83 NW 102; Moreland v. Houghton, 94 Mich. 548, 54 NW 285; Cahill v. Kalamazoo Mut. Ins. Co., 2 Dougl. 124, 43 AmD 457.

Minn.—Allis v. Goldsmith, 22 Minn. 123.

Miss.—Taylor v. Conner, 41 Miss. 722, 97 AmD 419.

Mo.—Rice v. Groffmann, 56 Mo. 434; Brooks v. Jameson, 55 Mo. 505; Preston v. Missouri, etc., Lead Co., 51 Mo. 43; Johnson v. McGruder, 15 Mo. 365.

Mont.—Case v. Kramer, 34 Mont. 142, 85 P 878.

N. J.—Rodman v. Weinberger, 81 N. J. 441, 79 A 338 (to sell shares of stock); Crossley v. St. Philip Neri's Catholic Church, 74 N. J. L. 653, 67 A 27.

N. Y.—Farmers', etc., Bank v. Butchers', etc., Bank, 16 N. Y. 125, 69 AmD 678; Wood v. Wise, 153 App. Div. 223, 137 NYS 1017 [aff 208 N. Y. 586 mem, 102 NE 1117 mem]; Morrill v. C. T. Segar Mfg. Co., 32 Hun 543.

N. C.—Harper v. Dail, 92 N. C. 394; Brookshire v. Brookshire, 30 N. C. 74, 47 AmD 341; Pickard v. Brewer, 22 N. C. 428.

Or.—Hughes v. Lansing, 34 Or. 118, 55 P 95, 75 AmSR 574; Columbia

oral,[86] except where it is required by statute to be in writing,[87] or where the exercise of the authority must be under seal.[88]

It is a general rule that the authority of the agent must be of equal dignity to the power to be executed by him;[89] but this does not require an agent to have written authority in order to make a simple written contract for his principal.[90]

[§ 49] **(2) Applications of Rule—(a) In General.** Parol appointment has been held sufficient to authorize an agent to assign a patent,[91] mortgage,[92] or cause of action;[93] to execute a chattel mortgage,[94] or to seize chattels under such a mortgage;[95] to sign a bond[96] or bill of sale of a mining claim;[97] to bind his principal by an account stated;[98] to demand dower;[99] to make a payment necessary to suspend the operation of the statute of limitations;[1] to settle a controversy;[2] to subscribe for shares of stock;[3] or to fill blanks in negotiable and other unsealed instruments.[4]

Sale of personal property; statute of frauds. It is generally held that oral authority is sufficient to enable an agent to execute a written contract or memorandum, as required by the statute of frauds, for the sale or purchase of personal property.[5]

Suretyship. The authority of an agent to execute a contract of suretyship, or to sign his principal's name as surety, may be conferred by parol,[6] except where it is required by statute to be in writing.[7]

[§ 50] **(b) In Respect to Real Estate.** Authority to make a contract with respect to real estate, even though it is a contract which is required by the statute of frauds to be in writing, may be conferred by parol,[8] unless written authority is required by statute,[9] or unless the contract is one that is required to be under seal.[10] Thus parol appointment has been held sufficient to authorize an agent to sell or find a purchaser for real estate;[11] to redeem land sold for taxes;[12] to make an entry on lands for the purpose of tolling the statute of limitations;[13] to sell stand-

River, etc., Nav. Co. v. Vancouver Transp. Co., 32 Or. 532, 52 P 513.

Pa.—London Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 AmD 390.

S. C.—Kean v. Landrum, 72 S. C. 556, 52 SE 421; McGowan v. Reid, 27 S. C. 262, 3 SE 337.

Tex.—Bannister v. Wallace, 14 Tex. Civ. A. 452, 37 SW 250; Cohen v. Oliver, 9 Tex. Civ. A. 35, 29 SW 81.

Vt.—Pickett v. Pearsons, 17 Vt. 470.

Wash.—Ankeny v. Young, 52 Wash. 235, 100 P 736; Lough v. Davis, 35 Wash. 449, 77 P 732.

Wyo.—Marshall v. Rugg, 6 Wyo. 270, 44 P 700, 45 P 486, 33 LRA 679.

Eng.—Coles v. Trecothick, 9 Ves. Jr. 234, 32 Reprint 592.

Ont.—Ingersoll, etc., Gravel Road Co. v. McCarthy, 16 U. C. Q. B. 162, 165 (where the court said: "We do not find a distinction drawn in any such case, nor, indeed, we believe we may almost say in any case between an authority in writing not under seal, where that will suffice, and a verbal authority merely"); Reg. v. Sneider, (Trin. T. 3 & 4 Vict.) R. & J. Dig. 2991 (authority to receive moneys under bond).

86. McLaughlin v. Wheeler, 1 S. D. 497, 47 NW 816.

87. See infra § 53.

Requirements of statute of frauds generally see Frauds, Statute of [20 Cyc 147].

88. See infra § 61.

89. Johnson v. Dodge, 17 Ill. 433; New England Mar. Ins. Co. v. De Wolf, 8 Pick. (Mass.) 56; Worrall v. Munn, 5 N. Y. 229, 55 AmD 330; Lawrence v. Taylor, 5 Hill (N. Y.) 107; Cribben v. Deal, 21 Or. 211, 27 P 1046, 28 AmSR 746 [quot Sheppard Touchst. 54]. See also infra § 61.

90. U. S.—Welch v. Hoover, 29 F. Cas. No. 17,368, 5 Cranch C. C. 444.

Md.—Small v. Owings, 1 Md. Ch. 363.

Mo.—Webb v. Browning, 14 Mo. 354 (to employ attorney by written agreement).

N. Y.—Sariol v. James P. McDonald Co., 127 App. Div. 648, 111 NYS 796.

Pa.—Gordon v. Bulkeley, 14 Serg. & R. 331.

W. Va.—Piercy v. Hedrick, 2 W. Va. 458, 98 AmD 774.

Eng.—James v. Smith, [1891] 1 Ch. 384 [aff 65 L. T. Rep. N. S. 544]; Deverell v. Bolton, 18 Ves. Jr. 505, 34 Reprint 409.

Ont.—Standard Realty Co. v. Nicholson, 24 Ont. L. 46, 19 OntWR 373, 2 OntWN 1189.

See also cases supra note 85.

91. Machesney v. Brown, 29 Fed. 145; Van Ostrand v. Reed, 1 Wend. (N. Y.) 424, 19 AmD 529.

92. Moreland v. Houghton, 94 Mich. 548, 54 NW 285.

93. Dingley v. McDonald, 124 Cal. 90, 56 P 790 (holding that, since the assignment of a claim against an insolvent need not be in writing, a parol power authorizing another to make such assignment is valid).

94. Cook v. Harrison, 19 Ill. A. 402; Cohen v. Oliver, 9 Tex. Civ. A. 35, 29 SW 81 (holding that an agency may be created by verbal authority to make a deed of trust of personal property).

95. McGowan v. Reid, 27 S. C. 262, 3 SE 337.

[a] **To entitle attorneys in fact to orders of seizure and sale,** authentic evidence of their authority must be produced. Fowler v. Beatty, 10 La. Ann. 275.

96. U. S. v. Turner, 28 F. Cas. No. 16,547, 2 Bond 379; Bannister v. Wallace, 14 Tex. Civ. A. 452, 37 SW 250. But see infra § 66.

97. Patterson v. Keystone Min. Co., 30 Cal. 360.

98. Sariol v. James P. McDonald Co., 127 App. Div. 648, 111 NYS 796. See generally Accounts and Accounting [1 Cyc 374].

99. See Dower [14 Cyc 978].

1. Utica First Nat. Bank v. Ballou, 49 N. Y. 155. See also Limitations of Actions [25 Cyc 1584].

2. Piercy v. Hedrick, 2 W. Va. 458, 98 AmD 774 (holding that, the contrary not appearing, the presumption arises that an agent can properly be appointed by parol to settle a controversy).

3. Ingersoll, etc., Gravel Road Co. v. McCarthy, 16 U. C. Q. B. 162.

4. See Alteration of Instruments §§ 32–57 [2 Cyc 159 et seq]; Bills and Notes [7 Cyc 619].

5. Ark.—Fordyce v. Seaver, 74 Ark. 395, 85 SW 1126, 4 AnnCas 892 and note.

Ga.—Kaigler v. Brannon, 137 Ga. 36, 72 SE 400; Hirsh v. Beverly, 125 Ga. 657, 54 SE 678.

Mass.—Hawkins v. Chase, 19 Pick. 502; Shaw v. Nudd, 8 Pick. 9.

Mo.—Darnell v. Lafferty, 113 Mo. A. 282, 88 SW 784; Haubelt v. Rea, etc., Mill Co., 77 Mo. A. 672.

N. Y.—Dykers v. Townsend, 24 N. Y. 57; Merritt v. Clason, 12 Johns. 102, 7 AmD 286 [aff 14 Johns. 484].

Wis.—Tufts v. Brace, 103 Wis. 341, 79 NW 414.

Eng.—Rucker v. Cammeyer, 1 Esp. 105; Wilson v. Hart, 7 Taunt. 295, 2 ECL 370, 129 Reprint 118.

Man.—Gilmour v. Simon, 15 Man. 205.

See also Frauds, Statute of [20 Cyc 276].

6. Tebbetts v. Levy, 11 NYS 684 (holding that authority to execute a guaranty of payment as the guarantor's agent need not be in writing).

7. Bullard v. Johns, 50 Ala. 382 (holding that an indorsement on a complaint, "E. Brooks, security for costs," written by plaintiff's attorney without authority in writing, in the presence of said Brooks, and by his direction, is void under the statute of frauds). And see statutory provisions. See also generally Principal and Surety [32 Cyc 50].

[a] **In Kentucky** under Gen. St. c 22 § 20 (1) authority to sign another's name as surety must be conferred by writing and a mere verbal authority is not sufficient (Com. v. Campbell, 45 SW 89, 20 KyL 54; Wilson v. Linville, 96 Ky. 50, 27 SW 857, 16 KyL 340; Com. v. Magoffin, 25 SW 599, 15 KyL 775; Dickson v. Luman, 93 Ky. 614, 20 SW 1038, 14 KyL 884; Simpson v. Com., 89 Ky. 412, 12 SW 630, 11 KyL 619; Covington First Nat. Bank v. Gaines, 87 Ky. 597, 9 SW 396, 10 KyL 451; English v. Dycus, 5 SW 44, 9 KyL 188; Dawson v. Lee, 83 Ky. 49; Billington v. Com., 79 Ky. 400; Ragan v. Chenault, 78 Ky. 545; Goodpaster v. Burbridge, 13 KyL 638), (2) even though the signing is done in the presence and at the request of the principal (See infra § 52 note 25 [a]), and (3) where one's name has been signed as surety for another upon his verbal authority, his mere acknowledgment that he is bound will not bind him (Marion v. Brewer, 13 KyL 831). (4) This statutory provision applies to bail bonds (Com. v. Belt, 51 SW 431, 21 KyL 339), and (5) as well to private as to official obligations (Covington First Nat. Bank v. Gaines, supra; Ragan v. Chenault, supra).

8. U. S.—Sheets v. Selden, 2 Wall. 177, 17 L. ed. 822 (authority to act as agent for a lessor in collection of rent or in demanding its payment).

Ark.—Gracie v. White, 18 Ark. 17.

Cal.—Brown v. Spencer, 163 Cal. 589, 126 P 493.

Ga.—Goode v. Rawlins, 44 Ga. 593 (authority to consent in behalf of a mortgagor to a sale on execution of the entire fee in the land).

Mass.—Pratt v. Putnam, 13 Mass. 361 (authority to receive seizin).

Mich.—Antrim Iron Co. v. Anderson, 140 Mich. 702, 104 NW 319, 112 AmSR 434; Hammond v. Hannin, 21 Mich. 374, 4 AmR 490.

Pa.—Miles v. Cook, 1 Grant 58 (authority to make an entry on land). And see Frailey v. Waters, 7 Pa. 221.

[a] **In Newfoundland** an authority by parol to an agent to let or dispose of property is as effectual as the most formal deed. Wadden v. Wadden, 5 Newfoundl. 795.

9. See statutory provisions. See also infra § 53.

10. See infra §§ 61–66.

11. Hannan v. Prentis, 124 Mich. 417, 83 NW 102; McLaughlin v. Wheeler, 1 S. D. 497, 47 NW 816. See also Frauds, Statute of [20 Cyc 234].

12. Gracie v. White, 18 Ark. 17. See also Taxation [37 Cyc 1386].

13. Miles v. Cook, 1 Grant (Pa.)

ing timber,[14] or to grant a license to cut such timber;[15] or to receive a conveyance of the equity of redemption in mortgaged premises.[16]

Contracts of sale or purchase; statute of frauds. In the absence of a statutory provision to the contrary, it is generally held that oral authority is sufficient to enable an agent to execute a written contract or memorandum, as required by the statute of frauds, for the sale or purchase of real estate,[17] or to execute a lease within the statute.[18]

Agency must be clear. However, a parol agency to sell or charge real estate must be express and clearly established;[19] it must be such as to permit the making of the identical contract in question, and not a contract differing from the one actually authorized.[20]

[§ 51] **(c) In Respect to Negotiable Instruments.** Authority to execute, indorse, or transfer negotiable instruments, such as a bill of exchange or promissory note, need not be in writing, but may be conferred by parol,[21] although the authority is not to be lightly inferred but must be clearly shown.[22]

[§ 52] **(3) Execution in Presence of Principal.** Even where an authority in writing is expressly required by statute to give validity to certain instruments, one acting under an oral appointment only may bind the principal by executing such instrument in his presence and at his request,[23] on the

58. See also Adverse Possession § 125.

14. Columbia Land, etc., Co. v. Tinsley, 60 SW 10, 22 KyL 1082.

15. Antrim Iron Co. v. Anderson, 140 Mich. 702, 104 NW 319, 112 AmSR 434.

16. Reed v. Marble, 10 Paige (N. Y.) 409.

17. Ariz.—Murphey v. Brown, 12 Ariz. 268, 100 P 801; Friedman v. Suttle, 10 Ariz. 57, 85 P 726, 9 LRANS 933 and note [overr Czarnowski v. Holland, 5 Ariz. 119, 78 P 390].

Conn.—Jacobson v. Hendricks, 83 Conn. 120, 75 A 85 (holding that an agency to sell land, including the power to execute a sufficient contract of sale within the statute of frauds, may be created by parol).

Del.—Edwards v. Johnson, 8 Del. 435.

Ga.—Brandon v. Pritchett, 126 Ga. 286, 56 SE 241, 7 AnnCas 1093 and note.

Ind.—Tewksbury v. Howard, 138 Ind. 103, 37 NE 355; Roehl v. Haumesser, 114 Ind. 311, 15 NE 345.

Ky.—Monroe v. Bailey, 145 Ky. 794, 798, 141 SW 412 ("the law is well settled in this State that parol authority to sell land is sufficient"); Lawson v. Williams, 115 SW 730; Godsey v. Standifer, 101 SW 921, 31 KyL 44; Whitworth v. Pool, 96 SW 880, 29 KyL 1104; Columbia Land, etc., Co. v. Tinsley, 60 SW 10, 22 KyL 1082; Isaacs v. Gearheart, 12 B. Mon. 231; Jackson v. Murray, 5 T. B. Mon. 184, 17 AmD 53; Talbot v. Bowen, 1 A. K. Marsh. 436, 10 AmD 747.

Me.—Blood v. Hardy, 15 Me. 61.

Md.—Moore v. Taylor, 81 Md. 644, 32 A 320, 33 A 886; Small v. Owins, 1 Md. Ch. 363.

Miss.—Hopper v. McAllum, 87 Miss. 441, 40 S 2 (executory contract for sale of lands); Lodell v. Mason, 71 Miss. 937, 15 S 44; Curtis v. Blair, 26 Miss. 309, 59 AmD 257.

N. J.—Brown v. Honiss, 74 N. J. L. 501, 68 A 150; Long v. Hartwell, 34 N. J. L. 116; Campbell v. Hough, 73 N. J. Eq. 601, 68 A 759; Tyrrell v. O'Connor, 56 N. J. Eq. 448, 41 A 674; Keim v. O'Reilly, 54 N. J. Eq. 418, 34 A 1073; Keim v. Lindley, (Ch.) 30 A 1063; Doughaday v. Crowell, 11 N. J. Eq. 201.

N. Y.—Moody v. Smith, 70 N. Y. 598; Henry v. Root, 33 N. Y. 526; Newton v. Bronson, 13 N. Y. 587, 67 AmD 39; Worrall v. Munn, 5 N. Y. 229, 55 AmD 330; Pringle v. Spaulding, 53 Barb. 17; Coleman v. Garrigues, 18 Barb. 60; Lawrence v. Taylor, 5 Hill 107; Champlin v. Parish, 11 Paige 405; McWhorter v. McMahan, 10 Paige 386; Mortimer v. Cornwell, Hoffm. 351.

N. C.—Wellman v. Horn, 157 N. C. 170, 72 SE 1010; Smith v. Browne, 132 N. C. 365, 43 SE 915; Hargrove v. Adcock, 111 N. C. 166, 16 SE 16; Neaves v. North State Min. Co., 90 N. C. 412, 47 AmR 529 (authority to purchase mining interest); Blacknall v. Parish, 59 N. C. 70, 78 AmD 239.

Oh.—Thayer v. Luce, 22 Oh. St. 62; Jones v. Lewis, 8 Oh. Dec. (Reprint) 368, 7 CincLBul 211.

Tex.—Huffman v. Cartwright, 44 Tex. 296; Houston Oil Co. v. Payne, (Civ. A.) 164 SW 886; Marlin v. Kosmyroski, (Civ. A.) 27 SW 1042; Tynan v. Dullnig, (Civ. A.) 25 SW 465; Fisher v. Bowser, 1 Tex. Unrep. Cas. 346.

Va.—Yerby v. Grigsby, 9 Leigh (36 Va.) 387.

Wash.—Degginger v. Martin, 48 Wash. 1, 92 P 674; Peirce v. Wheeler, 44 Wash. 326, 87 P 361; Monfort v. McDonough, 20 Wash. 710, 54 P 1121; Horr v. Hollis, 20 Wash. 424, 55 P 565; Carstens v. McReavy, 1 Wash. 359, 25 P 471.

W. Va.—Mustard v. Big Creek Dev. Co., 69 W. Va. 713, 72 SE 1021; Armstrong v. Maryland Coal Co., 67 W. Va. 589, 69 SE 195; Ober v. Stephens, 54 W. Va. 354, 46 SE 195 (contract of purchase); Kennedy v. Ehlen, 31 W. Va. 540, 8 SE 398; Conaway v. Sweeney, 24 W. Va. 643; Campbell v. Fetterman, 20 W. Va. 398.

Wis.—Kreutzer v. Lynch, 122 Wis. 474, 100 NW 887; Brown v. Griswold, 109 Wis. 275, 85 NW 363; Smith v. Armstrong, 24 Wis. 446; Dodge v. Hopkins, 14 Wis. 630.

Eng.—James v. Smith, [1891] 1 Ch. 384 [aff 65 L. T. Rep. N. S. 544]; Heard v. Pilley, L. R. 4 Ch. 548 (authority to make contract for purchase of land); Cave v. Mackenzie, 46 L. J. Ch. 564; Clinan v. Cooke, 1 Sch. & Lef. 31; Deverell v. Bolton, 18 Ves. Jr. 505, 34 Reprint 409; Mortlock v. Buller, 10 Ves. Jr. 292, 32 Reprint 857; Coles v. Trecothick, 9 Ves. Jr. 234, 32 Reprint 592.

Man.—McIlvride v. Mills, 16 Man. 276.

See also Frauds, Statute of [20 Cyc 234].

Necessity for written authority see infra § 53.

[a] **"The general rule in England as well as in America** was and is, that, although a contract for the sale of land must be in writing, an agent may be appointed by parol to make the contract, the general rule being that, unless the statute expressly require the authority to be in writing, an agent may be authorized by parol to make a contract for the sale of land." Brandon v. Pritchett, 126 Ga. 286, 288, 55 SE 241, 7 AnnCas 1093.

18. Johnson v. Somers, 1 Humphr. (Tenn.) 268; Mustard v. Big Creek Dev. Co., 69 W. Va. 713, 72 SE 1021; Marshall v. Rugg, 6 Wyo. 270, 44 P 700, 45 P 486, 33 LRA 679.

Necessity for written authority see infra § 53.

[a] **An agent's authority to accept a lease** for the principal may be proved by parol. Ehrmanntraut v. Robinson, 52 Minn. 333, 54 NW 188.

19. Union Mut. L. Ins. Co. v. Masten, 3 Fed. 881; Bosseau v. O'Brien, 3 F. Cas. No. 1,667, 4 Biss. 395; Proudfoot v. Wightman, 78 Ill. 553; Challoner v. Bouck, 56 Wis. 652, 14 NW 810; Lauer v. Bandow, 43 Wis. 556, 28 AmR 571; Gilmour v. Simon, 37 Can. S. C. 422 [aff 15 Man. 205] (agent held not to have the clear and express authority necessary to confer the power of entering into a contract for sale binding upon his principal).

[a] **Clear proof required.**—(1) "Such oral authority should in all cases be sustained by clear and convincing proof, and the manifest preponderance of the evidence, especially where the alleged authority is denied by the vendor or party to be charged. A less strict requirement might tend to promote the particular frauds which the statute was intended to prevent." Degginger v. Martin, 48 Wash. 1, 3, 92 P 674 (holding that proof of oral authority to a real estate broker to make a binding contract of sale, within the requirements of the statute of frauds, is sufficiently clear and convincing, within the rule which requires such degree of proof, when liberally construed on motion for a nonsuit, where the broker testified that the owner had listed the property with him, and on departing for a short absence instructed him "to sell quick, take the money and close the deal" before the owner's return, if he could do so). (2) The proof must be clear and decisive, and this, not only as to proof of such authority generally, but also that the agent had authority to make all of the terms for his principal which he incorporated into the instrument. Campbell v. Hough, 73 N. J. Eq. 601, 68 A 759.

20. Campbell v. Hough, 73 N. J. Eq. 601, 68 A 759.

21. Cal.—Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 P 749.

Ga.—Connor v. Hodges, 7 Ga. A. 153, 66 SE 546.

Ill.—Fountain v. Bookstaver, 141 Ill. 461, 31 NE 17.

La.—Nalle v. Higginbotham, 21 La. Ann. 477.

Me.—Trundy v. Farrar, 32 Me. 225.

Mass.—Rice v. Gove, 22 Pick. 158, 33 AmD 724; Long v. Colburn, 11 Mass. 97, 6 AmD 160.

Mo.—People's Bank v. Scalso, 127 Mo. 164, 29 SW 1032.

N. J.—Crossley v. St. Philip Neri's Catholic Church, 74 N. J. L. 653, 67 A 27.

N. Y.—Bank of North America v. Embury, 21 HowPr 14.

Va.—Harrison v. Tiernans, 4 Rand. (25 Va.) 177 (holding that bills of exchange and promissory notes are not deeds, and authority to execute them may be given by parol).

W. Va.—Piercy v. Hedrick, 2 W. Va. 458, 98 AmD 774.

Eng.—Anonymous, 12 Mod. 564, 88 Reprint 1522.

See also Bills and Notes [7 Cyc 784].

[a] **A note signed by one having parol authority** for that purpose is as much the principal's note as though it had been signed with his own hand by writing his name in full or by placing his cross or other mark thereon; and this is true whether the principal can sign his name or not. Handyside v. Cameron, 21 Ill. 588, 74 AmD 119.

Authority to fill blanks in negotiable instruments see Alteration of Instruments §§ 32-37 [2 Cyc 159 et seq]; Bills and Notes [7 Cyc 619].

22. See infra §§ 280, 281.

23. Ill.—Morton v. Murray, 176 Ill. 54, 51 NE 767, 43 LRA 529; Rockford, etc., R. Co. v. Shunick, 65 Ill. 223.

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ground that the act of execution in such a case must be regarded as the personal act of the principal, and not as that of the agent, requiring written authority.[24] The validity of this rule, however, has been denied.[25]

[§ 53] **b. Written Authority; Power of Attorney—(1) In General.**[26] An agent for any purpose may be, and often is, appointed by a writing, called his power or letter of attorney,[27] which is defined as an instrument authorizing a person to act as the agent or attorney of the person granting it.[28]

Necessity of writing; statute of frauds. It is sometimes required by law that an agent's authority to do certain acts, such as to enter into a contract required to be in writing, shall be in writing;[29] and where written authority is required by law the same provision that requires the writing forbids that a power previously given shall subsequently be extended or altered by parol.[30] Thus under the statutes in some jurisdictions written authority is required to enable an agent to execute a written contract or memorandum as required by the statute of frauds for the sale or purchase of real property,[31] or to execute a lease of real property required by the

Ky.—Irvin v. Thompson, 4 Bibb 295.
La.—Meyer v. King, 29 La. Ann. 567.
Nebr.—Bigler v. Baker, 40 Nebr. 325, 58 NW 1026, 24 LRA 255.
N. Y.—Price v. Durin, 56 Barb. 647.
Vt.—Harvey v. Stevens, 43 Vt. 653.
Eng.—Durrell v. Evans, 1 H. & C. 174.

Execution of sealed instrument in presence of principal see infra § 62.

Signature by hand of another in general see Signatures [36 Cyc 451]. Signature of contract by third person in promisor's presence and by his direction see Contracts [9 Cyc 301].

Statute of frauds.—Signature by agent in presence and by direction of principal as dispensing with written authority required by statute of frauds see Frauds, Statute of [20 Cyc 275].

24. Morton v. Murray, 176 Ill. 54, 51 NE 767, 43 LRA 529; Bigler v. Baker, 40 Nebr. 325, 333, 58 NW 1026, 25 LRA 255 (where it was said: "Where an instrument is executed in the name of the maker in his presence and at his request, it will be regarded as the personal act of the latter"). And see cases supra note 23.

25. Billington v. Com., 79 Ky. 400, 402 [quot 96 Ky. 50, 53, 27 SW 857, 16 KyL 340] (where the court said: "Why a thing done in the presence of the one directing it is any the less an act of an agent for his principal than if the act was done in the absence of the principal, and by his previous direction, is difficult to conceive. In either case the thing done is but the performance of a physical act which is in conformity to the will of the principal, and in all such cases the law seems to contemplate that the will of the principal shall not be made binding upon him unless it be expressed in writing").

[a] **In Kentucky** under Gen. St. c 22 § 20, providing that "no person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing," it has been held that where one subscribes the name of another to an obligation as security, although done under his direction and in his presence, unless done by written authority it does not make him liable on such obligation, on the ground that the party who writes the name is acting in the absence of written authority which the statute requires. Bramel v. Byron, 43 SW 695, 19 KyL 1440; Wilson v. Linville, 96 Ky. 50, 27 SW 857, 16 KyL 340; Dickson v. Luman, 93 Ky. 614, 20 SW 1038, 14 KyL 884; Simpson v. Com., 89 Ky. 412, 12 SW 630, 11 KyL 619; Billington v. Com., 79 Ky. 400.

26. Construction of powers or letters of attorney see infra §§ 199–201.

27. Stockwell v. Whitehead, 47 Ind. A. 423, 94 NE 736; Ankeny v. Young, 52 Wash. 235, 100 P 736.

"The right of the agent to act in the name or on behalf of another is termed his authority or power, and this, if conferred by a formal instrument in writing, is said to be conferred by letter of attorney or power of attorney." Frink v. Re, 70 Cal. 296, 307, 11 P 820.

28. Black L. D.

[a] **Other definitions.**—(1) An instrument by which the authority of one person to act in the place and stead of another as attorney in fact is set out. White v. Ferguson, 29 Ind. A. 144, 64 NE 49, 51. (2) "An instrument by which the authority of an attorney in fact or private attorney is set forth." Treat v. Tolman, 113 Fed. 892, 51 CCA 522 [aff 106 Fed. 679].

[b] **Power of attorney and warrant of attorney distinguished.**—"The distinction between powers of attorney and warrants of attorney is clearly set forth in text-books and the decisions of the courts. A power of attorney is an instrument by which the authority of an attorney in fact or private attorney is set forth. By attorney in fact is meant one who is given authority by his principal to do a particular act not of a legal character. A warrant of attorney is an instrument authorizing an attorney at law to appear in an action on behalf of the maker or to confess judgment against him." Treat v. Tolman, 113 Fed. 892, 893, 51 CCA 522 [aff 106 Fed. 679].

29. Paris v. Johnson, 155 Ala. 403, 46 S 642; Seymour v. Oelrichs, 156 Cal. 782, 106 P 88, 134 AmSR 154 (holding that the authority of an agent to enter into a contract for his principal, which is required by law to be in writing, can be given only by an instrument in writing). See also statutory provisions.

Written authority to sign another's name as surety see supra § 49.

[a] **The mere fact that an agent has authority to bind his principal** by some sort of contract does not, in the absence of proof of written authority, justify the inference that he has authority to bind him by a contract required to be in writing. Seymour v. Oelrichs, 156 Cal. 782, 106 P 88, 134 AmSR 154.

30. Spofford v. Hobbs, 29 Me. 148, 48 AmD 521; Allis v. Goldsmith, 22 Minn. 123; Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316, 85 NW 1019, 84 AmSR 927 (holding that, where a power of attorney authorizes the agent to sell and convey lands, the power cannot be extended orally so as to authorize the agent to mortgage the land).

31. Ala.—Elliott v. Bankston, 45 S 178; Thompson v. New South Coal Co., 135 Ala. 630, 34 S 31, 93 AmSR 49; White v. Breen, 106 Ala. 159, 19 S 59, 32 LRA 127; Linn v. McLean, 85 Ala. 250, 4 S 777. Compare Ledbetter v. Walker, 81 Ala. 176; Andrews v. Jones, 10 Ala. 400.

Ark.—Daniel v. Garner, 71 Ark. 484, 76 SW 1063.

Cal.—Nason v. Lingle, 143 Cal. 363, 77 P 71; Lambert v. Gerner, 142 Cal. 399, 76 P 53; Martin v. Ede, 103 Cal. 157, 37 P 199; Salfield v. Sutter County Land Impr., etc., Co., 94 Cal. 546, 29 P 1105; Meux v. Hogue, 91 Cal. 442, 27 P 744; Hall v. Wallace, 88 Cal. 434, 26 P 360. Compare Rutenberg v. Main, 47 Cal. 213.

Colo.—Castner v. Richardson, 18 Colo. 496, 33 P 163; People's Min., etc., Co. v. Central Cons. Mines Corp., 20 Colo. A. 561, 80 P 479.

Ill.—Koenig v. Dohm, 209 Ill. 468, 70 NE 1061; Kesner v. Miesch, 204 Ill. 320, 68 NE 405; Kopp v. Reiter, 146 Ill. 437, 34 NE 942, 37 AmSR 156, 22 LRA 273; Kozel v. Dearlove, 144 Ill. 23, 32 NE 542, 36 AmSR 416; Lasher v. Gardner, 124 Ill. 441, 16 NE 919; Chappell v. McKnight, 108 Ill. 570; Albertson v. Ashton, 102 Ill. 50; Watson v. Sherman, 84 Ill. 263; Fox v. Starr, 106 Ill. A. 273. Compare Cossitt v. Hobbs, 56 Ill. 231; Taylor v. Merrill, 55 Ill. 52; Johnson v. Dodge, 17 Ill. 433; McConnell v. Brillhart, 17 Ill. 354, 65 AmD 661.

Kan.—Adams v. Carlton, 77 Kan. 546, 95 P 390; Brown v. Gilpin, 75 Kan. 773, 90 P 267. Compare Rose v. Hayden, 35 Kan. 106, 10 P 554, 57 AmR 145; Rottman v. Wasson, 5 Kan. 552.

La.—Telle v. Taylor, 42 La. Ann. 1165, 8 S 399 (authority to purchase); Seaton v. Sharkey, 3 La. Ann. 332 (authority to purchase); Macarty v. New Orleans Canal, etc., Co., 8 Rob. 102 (authority to sell slaves); Muggah v. Greig, 2 La. 593 (agency to purchase a slave).

Mich.—Detroit, etc., R. Co. v. Hartz, 147 Mich. 354, 110 NW 1089; Baldwin v. Schiappacasse, 109 Mich. 170, 66 NW 1091; Muffatt v. Gott, 74 Mich. 672, 42 NW 149 (authority of auctioneer); Dickinson v. Wright, 56 Mich. 42, 22 NW 312; Colgrove v. Solomon, 34 Mich. 494 (holding that an agent whose authority rests in parol cannot bind his principal by an oral contract for the purchase of land); Hammond v. Hannin, 21 Mich. 374, 4 AmR 490; Holland v. Hoyt, 14 Mich. 238. Compare Hannan v. Prentis, 124 Mich. 417, 83 NW 102 (holding that a contract of employment of a broker to sell real estate is not within the statute of frauds).

Minn.—Matteson v. U. S., etc., Land Co., 112 Minn. 190, 127 NW 629, 997; Thomas v. Rogers, 108 Minn. 132, 121 NW 630, 133 AmSR 421; Power v. Immigration Land Co., 93 Minn. 247, 101 NW 161; Newlin v. Hoyt, 91 Minn. 409, 98 NW 323. Compare Allis v. Goldsmith, 22 Minn. 123; Dickerman v. Ashton, 21 Minn. 538; Brown v. Eaton, 21 Minn. 409; Groff v. Ramsey, 19 Minn. 44; Minor v. Willoughby, 3 Minn. 225.

Mo.—Kirkpatrick v. Pease, 202 Mo. 471, 101 SW 651; Johnson v. Fecht, 185 Mo. 335, 83 SW 1077 [aff 94 Mo. A. 605, 68 SW 615]; Greening v. Steele, 122 Mo. 287, 26 SW 971; Roth v. Goerger, 118 Mo. 556, 24 SW 176 [aff 51 Mo. A. 586]. Compare Riley v. Minor, 29 Mo. 439; Johnson v. McGruder, 15 Mo. 365; Young v. Ruhwedel, 119 Mo. A. 231, 96 SW 228; Mine la Motte Lead, etc., Co., v. White, 106 Mo. A. 222, 80 SW 356.

Mont.—Schaeffer v. Mutual Ben. L. Ins. Co., 38 Mont. 459, 100 P 225; Marshall v. Trerise, 33 Mont. 28, 81 P 400.

Nebr.—Ross v. Craven, 84 Nebr. 520, 121 NW 451; Frahm v. Metcalf, 75 Nebr. 241, 106 NW 227, 13 AnnCas 312; Soward v. Moss, 59 Nebr. 71, 80 NW 268; O'Shea v. Rice, 49 Nebr. 893, 69 NW 308; Stadleman v. Fitzgerald, 14 Nebr. 290, 15 NW 234; Morgan v. Bergen, 3 Nebr. 209.

N. H.—Rafferty v. Lougee, 63 N. H. 54.

N. D.—Brandrup v. Britten, 11 N. D. 376, 92 NW 453; Ballou v. Bergsvendsen, 9 N. D. 285, 83 NW 10.

Okl.—Halsell v. Renfrow, 14 Okl. 674, 78 P 118, 2 AnnCas 286.

statute to be in writing.[32] Under some statutes a distinction is made between the authority to convey and the authority to contract to convey, the former being required to be written and the latter being sufficient when resting on an oral agreement.[33] The apparent conflict between the line of decisions which hold that oral authority is sufficient to enable an agent to execute a written contract or a memorandum for the sale or purchase of real property[34] and those which require written authority in such cases is usually traceable to the differences in the provisions of the statutes, those under which the former line of cases are decided requiring only that the agent shall be duly or lawfully authorized, while those under which the latter line of cases are decided expressly require that the authority shall be in writing.[35]

Right to possession of written power. Once exe-

Pa.—Twitchell v. Philadelphia, 33 Pa. 212 (authority to purchase); Parrish v. Koons, 1 Pars. Eq. Cas. 79 (authority to purchase); Ott v. Heineman, 31 PittsbLegJNS 161; Knerr's App., 16 WklyNC 74; Heinicke v. Krouse, 14 WklyNC 106.

S. C.—Wharton v. Tolbert, 84 S. C. 197, 65 SE 1056.

S. D.—Shumway v. Kitzman, 28 S. D. 577, 134 NW 325; Purkey v. Harding, 23 S. D. 632, 123 NW 69; Lichty v. Daggett, 23 S. D. 380, 121 NW 862; Dal v. Fischer, 20 S. D. 426, 107 NW 534; Hickox v. Bacon, 17 S. D. 563, 97 NW 847; Reagan v. McKibben, 11 S. D. 270, 76 NW 943 (authority to convey an interest in a mining claim). Compare McLaughlin v. Wheeler, 1 S. D. 497, 47 NW 816 (holding that authority to find a purchaser for real estate need not be in writing).

Oral authority sufficient to make such contract or memorandum see supra § 50.

[a] **The word "thereunto"** as used in a provision of the statute of frauds "thereunto authorized in writing," has the ordinary meaning of "to that," which is an elliptical expression for the phrase "to do that," and so far as the agent is concerned the language imports that he must be authorized in writing "to do that"; viz., to execute an agreement of sale which shall bind the owner. Bacon v. Davis, 9 Cal. A. 88, 98 P 71.

[b] **An officer of a corporation** is not within the above rule. Thus a treasurer of a corporation, the business of which is dealing in real estate and taking options, authorized by the corporation to take an option in his own name to purchase real estate, is authorized without written authority to sell the property to an intending purchaser. Henry v. Black, 210 Pa. 245, 252, 59 A 1070, 105 AmSR 802 (where it was said: "That a corporation which can only conduct its business by and through its officers and employees, must show, whenever called upon, a written authority to that officer to do that particular act; and when that officer acting for the company executes a written contract by which the corporation is to receive the benefit of the first act performed by its officer before it can be held up to that contract must show a written authority, would be to stretch the inhibition of the statute far beyond anything contemplated by its framer").

[c] **A contract assuming a pecuniary obligation** on the purchase of land and agreeing to execute a note and trust deed upon property securing the same, when made by an agent who has no written authority from his principal, is within the statute of frauds and does not bind the principal. Cowan v. Curran, 216 Ill. 598, 75 NE 322.

[d] **Authority to partition lands.**—Parol authority to an agent to make a partition of land is void. Snively v. Luce, 1 Watts (Pa.) 290.

[e] **That the principal verbally authorized the agent to accept by telegram** an offer of purchase does not, in the absence of facts or circumstances creating an estoppel, obviate the lack of written authority in the agent, where the acceptance is in the agent's name. Thomas v. Rogers, 108 Minn. 132, 121 NW 630, 133 AmSR 421.

[f] **In Nebraska** it is held that the statute does not require an agent's authority to purchase real estate to be in writing. Morrow v. Jones, 41 Nebr. 867, 30 NW 369.

32. Ala.—Prestwood v. Carlton, 162 Ala. 327, 50 S 254; Elliott v. Bankston, 45 S 173 (for more than a year).

Cal.—Folsom v. Perrin, 2 Cal. 603 (lease for two years); Goldstein v. Webster, 7 Cal. A. 705, 95 P 677 (contract for lease to commence in the future and continue for one year).

Ill.—Rogan v. Arnold, 233 Ill. 19, 84 NE 58; Sigmund v. Newspaper Co., 82 Ill. A. 178. Compare Lake v. Campbell, 18 Ill. 106.

Kan.—Samuels v. Greenspan, 9 Kan. A. 140, 58 P 482 (agreement to make a lease).

Mich.—McIntosh v. Hodges, 110 Mich. 319, 68 NW 158, 70 NW 550.

Minn.—Judd v. Arnold, 31 Minn. 430, 18 NW 151 (lease for one year or more).

Mo.—Donovan v. P. Schoenhofen Brewing Co., 92 Mo. A. 341 (lease for more than one year); Shea v. Seelig, 89 Mo. A. 146; Hoover v. Pacific Oil Co., 41 Mo. A. 317 (lease for one year).

Mont.—Landt v. Schneider, 31 Mont. 15, 77 P 307 (more than one year).

N. J.—Clement v. Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 A 82, 118 AmSR 747 [rev 69 N. J. Eq. 347, 60 A 419] (holding that a lease of real property for more than three years, signed by an agent whose authority is not in writing, has against the principal no other force or effect either at law or in equity than a lease at will, because of the first section of the statute of frauds, 2 Gen. St. p 1602). In this state, however, an agent's authority to execute a contract to convey may be by parol. See supra § 50.

N. Y.—Larkin v. Radosta, 119 App. Div. 515, 104 NYS 165 (lease for more than one year); Porter v. Bleiler, 17 Barb. 149; Post v. Martens, 25 N. Y. Super. 437; Long v. Poth, 16 Misc. 85, 37 NYS 670; Finkelstein v. Fabyik, 107 NYS 67; Fougera v. Cohn, 2 NYCityCt 253; Smith v. Genet, 2 NYCityCt 88.

R. I.—Bourne v. Campbell, 21 R. I. 490, 44 A 806 (holding that, under Gen. L. c 202 § 2, a lease of land for a longer period than one year cannot be made by an attorney in fact without written authority).

Oral authority sufficient see supra § 50.

[a] **Rule not applicable to officer or agent of corporation.**—Donovan v. P. Schoenhofen Brewing Co., 92 Mo. A. 341.

[b] **Authority to surrender lease.**—In Ramsay v. Wilkie, 13 NYS 554, it was held that an agent's authority to surrender a lease must be written.

[c] **A covenant for a renewal contained in a lease** for a term of three years, executed by a third person in the lessor's name, without written authority to make a lease, is not binding under the statute of frauds upon the lessor. Rogan v. Arnold, 233 Ill. 19, 84 NE 58.

33. Ariz.—Murphey v. Brown, 12 Ariz. 268, 100 P 801.

Ga.—Brandon v. Pritchett, 126 Ga. 286, 55 SE 241, 7 AnnCas 1093 and note.

Ill.—Watson v. Sherman, 84 Ill. 263.

Kan.—Ayres v. Probasco, 14 Kan. 175.

Ky.—Isaacs v. Gearheart, 12 B. Mon. 231.

N. Y.—Hanford v. McNair, 9 Wend. 54 (holding that an agent cannot bind his principal by deed, unless he has authority by deed so to do); Lawrence v. Taylor, 5 Hill 107.

Oh.—Robinson v. Hathaway, 2 Oh. Dec. (Reprint) 581, 4 CincLBul 105.

Pa.—Ewing v. Tees, 1 Binn. 450, 2 AmD 455.

Tex.—Texas Moline Plow Co. v. Klappröth, (Civ. A.) 164 SW 399 (holding that under Rev. St. [1911] art 1103, an agent cannot execute a valid deed of trust, on land belonging to his principal, without written authority).

Wis.—Dodge v. Hopkins, 14 Wis. 630.

[a] **"Lawfully authorized,"** as used in a provision requiring that a memorandum or contract for the sale of land shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto "lawfully authorized," does not mean an authorization in writing, but is distinguished from the phrase "authorized in writing" used in other connections and requiring such authorization in order to execute a conveyance. Murphey v. Brown, 12 Ariz. 268, 276, 100 P 801 [cit Cyc]. See also infra note 35.

34. See supra § 50.

35. Brandon v. Pritchett, 126 Ga. 286, 288, 55 SE 241, 7 AnnCas 1093 (where the court said: "In some States statutes have been passed which require the authority of an agent to make a sale of land, or other contracts within the purview of the statute of frauds, to be in writing. In the absence of such a statute the common law prevails; and while the contract for the sale of land, to be enforceable, must be in writing signed by the party to be charged, or by some one duly authorized by him, the authority of the agent to sign the writing may be created by parol"); Lobdell v. Mason, 71 Miss. 937, 939, 15 S 44 (where the court said: "Our statute of frauds does not contain the first and third sections of the English acts of 29 Car. II., by which the instruments therein referred to are required to be signed by the parties or by 'their agents thereunto lawfully authorized in writing;' it is framed after the fourth section of the English act, and denies action upon the contracts it enumerates 'unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him or her thereunto lawfully authorized' "); Shumway v. Kitzman, 28 S. D. 577, 582, 134 NW 325 (where the court said: "We would also call attention to the fact that the apparent conflict in authorities upon the question of the admissibility of writings, signed by one who is the agent of a party to the contract, comes also from a difference in the wording of the statutes of the different states. Many of the states have the original English statute, or one similar, which merely provides that the agent must be duly authorized; while our statute, like that of many other states, provides . . . that the party signing, if not the real party to the contract, must be by him lawfully authorized in writing. The uniform holdings of the courts are that, under the English statute, it is not necessary to show the authority to be in writing, but that, under statutes such as ours, no writing is admissible, for the purpose of evidencing the con-

cuted, the power of attorney becomes the property of the agent to whom it is issued, and he has a right to keep it as evidence of the authority under which he acts, until it is recalled by the principal.[36]

What law governs. The validity of a power of attorney affecting real estate is to be determined by the law of the place where the property is situated, and not by the law of the place where the contract was made.[37]

[§ 54] **(2) Requisites and Sufficiency in General.** It has been held that the term "power of attorney" imports a sealed instrument unless the contrary is shown;[38] but that is not necessary, and is now much less common than formerly, except where the power authorizes the execution of a sealed instrument;[39] and in order to constitute an ordinary power of attorney no special form is requisite, even to satisfy the statute of frauds, but it may consist of any kind of a private writing;[40] or of several writings or letters properly connected.[41] It is sufficient if the principal in the writing makes a clear expression of his intention relative to the appointment;[42] and if the written power is insufficient it cannot be validated by oral instructions.[43]

Definiteness and certainty. The writing need not be so detailed as to specify each act the agent is empowered to do,[44] or particularly to describe the property with which he is to deal, provided it is specific enough to enable him reasonably to understand his principal's will and to identify the property intended.[45] The description of the property need not be more specific than would be required in

tract, unless such writing is signed by party to be charged, or the authority of party signing is shown to be in writing"). And see cases supra § 50 notes 8, 11; § 53 notes 32, 33.

36. Pridmore v. Harrison, 1 C. & K. 613, 47 ECL 613; Hibberd v. Knight, 2 Exch. 11.

37. Bissell v. Terry, 69 Ill. 184; Morris v. Linton, 61 Nebr. 537, 85 NW 565 (holding that the validity of a power of attorney executed in England for the conveyance of realty in Nebraska is to be determined by the law of Nebraska); Linton v. Moorehead, 209 Pa. 646, 59 A 264.

Law governing execution of authority see infra § 316.

38. Williams v. Conger, 125 U. S. 397, 8 SCt 933, 31 L. ed. 778; Cutler v. Haven, 8 Pick. (Mass.) 490; Berkeley v. Hardy, 5 B. & C. 355, 11 ECL 495, 108 Reprint 132, 2 ERC 274.

39. See infra § 61.

40. White v. Breen, 106 Ala. 159, 19 S 59, 32 LRA 127 (holding that no particular form or method of execution of the power of attorney is required to satisfy the statute of frauds).

[a] **A telegram** sent by the owner of land to his agent authorizing the latter to sell is a sufficient authority, in writing, to the agent under the statute. Chappell v. McKnight, 108 Ill. 570.

[b] **A letter containing an offer of employment** which specifies all of the terms thereof, upon acceptance becomes a complete contract, even though it may refer to the authority pursuant to which it is written. Kennedy v. Supreme Lodge K. P., 124 Ill. A. 55.

41. Paris v. Johnson, 155 Ala. 403, 408, 46 S 642 (where the court said: "The contract may be evidenced by one or more writings, or may be shown entirely by correspondence; and upon principle, the authority to the agent may in like manner be shown"); Peabody v. Hoard, 46 Ill. 242; Whelage v. Lotz, 44 La. Ann. 600, 10 S 933 (holding that the right of a party to conceive a power of attorney in any kind of a private writing, even by letter, is expressly sanctioned by La. Rev. Civ. Code art 2992); Harrison v. Rice, 78 Nebr. 654, 111 NW 594 [aff reh 78 Nebr. 659, 114 NW 151]; Peycke v. Shinn, 76 Nebr. 364, 107 NW 386; Spurck v. Lincoln, etc., R. Co., 14 Nebr. 293, 15 NW 701. See also Drake v. White Sewing Mach. Co., 133 App. Div. 446, 118 NYS 178 [aff 199 N. Y. 595 mem, 93 NE 1120 mem].

[a] **Letters authorizing a landlord's agent to execute a lease** of certain land for three years are inadmissible to show that the agent had written authority required by the statute of frauds to execute a subsequent lease for six years. Elliott v. Bankston, (Ala.) 45 S 173.

[b] **Letter from owner's husband.**—A letter by the husband of the owner of land to her agent to sell, although she advises with him about the letter, reads its contents, and it goes with her approval, is not sufficient under the statute of frauds to authorize the agent to sell the land, although he acts in good faith under a misapprehension of his power. Kirkpatrick v. Pease, 202 Mo. 471, 101 SW 651.

[c] **Instructions in letter.**—Where an agency is created by power of attorney, and the principal in transmitting the power of attorney incloses therewith a letter of instructions, the two papers must be construed together in defining the conditions of the agency. Mexican Nat. Coal, etc., Co. v. Frank, 154 Fed. 217.

42. U. S.—Williams v. Conger, 125 U. S. 397, 8 SCt 933, 31 L. ed. 778.

Ala.—Phillips v. Hornsby, 70 Ala. 414.

Ind.—Stockwell v. Whitehead, 47 Ind. A. 423, 94 NE 736.

La.—Steer v. Ward, 10 Mart. 679.

Nebr.—Furse v. Lambert, 85 Nebr. 739, 124 NW 146 (holding that where a landowner, in corresponding with a broker concerning a sale of the principal's real estate, describes the land, the price for which it may be sold, and instructs his agent: "You may go ahead and close the deal with the man," the principal thereby satisfies the statute of frauds so as to furnish proof of the broker's agency); Weaver v. Snively, 73 Nebr. 35, 102 NW 77.

N. J.—Tyrrell v. O'Connor, 56 N. J. Eq. 448, 41 A 674.

Va.—Newman v. Chapman, 2 Rand. (23 Va.) 93, 14 AmD 766.

W. Va.—Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 69 SE 845, AnnCas1912B 148 (holding that, if a written instrument is relied upon to create the relation of principal and agent, it must show on its face, or when read in the light of surrounding circumstances, that such was the intent).

[a] **A letter of attorney written without the authority of the principal,** and his name signed without authority, is invalid. Campbell v. Galloway, 148 Ind. 440, 47 NE 818.

[b] **Letter to the president of a bank** by a debtor inclosing a draft payable to him followed by the abbreviation "Pt" held not to constitute him the debtor's agent. See Griffin v. Erskine, 131 Iowa 444, 109 NW 13, 9 AnnCas 1193.

43. Allis v. Goldsmith, 22 Minn. 123.

44. New Orleans Commercial Bank v. Routh, 7 La. Ann. 128; Reynolds v. Rowley, 2 La. Ann. 890.

[a] **Express and special power.**—A power of attorney to bind the constituent "upon any bond whatsoever, either as principal or surety, and to sign the same for her and in her name, either as principal or surety," is such an express and special power as is required by La. Civ. Code art 2997, as the term "special" as therein used does not require a designation of the particular act to be done. State v. Powell, 40 La. Ann. 234, 4 S 46, 8 AmSR 522.

[b] **Prima facie proof.**—A power of attorney purporting to be executed by a person acknowledged before a notary public, and ample in its terms to authorize the person appointed to perform the acts mentioned, is prima facie proof of such authority. Springer v. Orr, 82 Ill. A. 558.

45. Cal.—Seymour v. Oelrichs, 162 Cal. 318, 122 P 847 (sustaining power to employ superintendent of buildings); Roper v. McFadden, 48 Cal. 346 (upholding a power authorizing the agent to sell and convey all the real estate of the principal in San Francisco, but not describing the land more particularly).

Ga.—Lanier, etc., Co. v. Hebard, 123 Ga. 626, 51 SE 632 (holding that a power to sell and convey all the lands, situated in the state of Georgia, belonging to the donors of the power, or in which they have any interest, or any part of such lands, is not inadmissible in evidence because it fails to describe the lands "by county, number or district").

Kan.—Munger v. Baldridge, 41 Kan. 236, 21 P 159, 13 AmSR 273 (holding that a detailed description of the property was not necessary to the validity of a power of attorney granted by a wife to her husband for the sale and conveyance of her lands); Marshall v. Shibley, 11 Kan. 114.

La.—Rownd v. Davidson, 113 La. 1047, 37 S 965 (holding that a power of attorney to sell and convey all the real estate of the principal in a certain parish sufficiently describes the property); State v. Powell, 40 La. Ann. 234, 4 S 46, 8 AmSR 522.

Minn.—Finnegan v. Brown, 90 Minn. 396, 97 NW 144 (holding that where a power of attorney described the land authorized to be conveyed in accordance with the government survey, and recited that it came into the possession of the principals in the power, husband and wife, as an additional homestead entry, granted by act congr. June 8, 1872, as amended by act March 3 [1873] c 274, granting additional homesteads to soldiers, the identity of the land is sufficiently shown and the authority of the agent to convey the same properly established); Bradley v. Whitesides, 55 Minn. 455, 57 NW 148; Carson v. Smith, 5 Minn. 78, 77 AmD 539.

N. C.—Janney v. Robbins, 141 N. C. 400, 53 SE 863 [cit Perry v. Scott, 109 N. C. 374, 14 SE 294; Farmer v. Batts, 83 N. C. 387; Carson v. Ray, 52 N. C. 609, 78 AmD 267] (where the court held a power of attorney authorizing the appointee to sell and convey "all our land in the State of North Carolina" to be sufficiently definite in its description of the land to be admissible, together with a deed executed pursuant to the power, as evidence of title).

Tex.—Kane v. Sholars, 41 Tex. Civ. A. 154, 90 SW 937 (holding that a power of attorney to sell land, describing the land as being situated in a certain county and state and adjoining a certain town, and showing with reasonable certainty of what survey

an absolute conveyance of the property by the principal;[46] and, if the description can be made complete by an examination of the public records and the records of judicial proceedings clearly indicated in such description, it is a sufficient identification of the subject matter of the power.[47] But on the other hand a pretended power of attorney is worthless unless it contains a sufficient description of the agent, and of the property or subject with which he is to deal, and of the acts he is to do.[48]

[§ 55] **(3) Execution—(a) In General.** A power of attorney, like other instruments, must be executed and delivered in accordance with the various formalities required by law;[49] and it has been held that it must be executed with the same solemnities required for the execution of the instrument made by the agent acting under it.[50] However, a power, when attached to judicial proceedings, thereby becomes duly authenticated, and cannot thereafter be questioned by parties to the proceedings.[51]

[§ 56] **(b) Execution in Blank.** A power of attorney executed in blank, although under seal, may be filled up in accordance with the agreement of the parties, in which event it takes effect as from its date.[52] But a power does not become effective when filled in without the knowledge or authority of the principal and where the elements of estoppel are not present.[53]

[§ 57] **(c) Proof of Execution.** Like other instruments the execution of a power of attorney must be duly acknowledged or proved before it can be recorded,[54] or be admitted in evidence,[55] except that where the power is an ancient one it may be admitted without direct proof of its execution,[56] under the exception as to proof of ancient documents.[57] The execution of a power of attorney will be presumed where the deed or other instrument executed under it is an ancient one;[58] and where an unrecorded power of attorney is not objected to it must be presumed to have been proved, or the objection waived.[59]

[§ 58] **(4) Acknowledgment and Recordation—**

the land is a part, containing full descriptive field notes giving the boundaries, and further stating that the tract includes all the land contained in the designated survey not previously sold by the patentee or his heirs, is not patently ambiguous in its description of the land subject thereto); Pool v. Foster, (Civ. A.) 49 SW 923 (holding that a power of attorney authorizing one to sell "my headright, 640 acres of land," contains a sufficient description of the land, as one can have but one headright of six hundred and forty acres); Crimp v. Yokeley, 20 Tex. Civ. A. 231, 48 SW 1116. But in Teagarden v. Patten, 48 Tex. Civ. A. 571, 107 SW 909, it was held that in trespass to try title a power of attorney to sell land "situated in —— county, Texas," will not be assumed to cover the land in controversy, where it appeared that the grantor owned other lands in the state.

[a] **Indefinite description cured.**—Indefiniteness in the description of property in a power of attorney is cured by definiteness of description in the deed executed by virtue of the power. Valentine v. Hawley, 37 La. Ann. 303.

46. McClure v. Herring, 70 Mo. 18, 35 AmR 404.

[a] **The description, however, should be as certain as it is necessary for the deed to be** which is to be executed under the power. Lumbard v. Aldrich, 8 N. H. 31, 28 AmD 381.

47. Connell v. Gallagher, 36 Nebr. 749, 55 NW 229 (holding it to be a sufficient description if therefrom the property is capable of identification); McDonald v. Hanks, 52 Tex. Civ. A. 140, 113 SW 604 (holding that, where a power of attorney described the land as part of a larger tract situated in L county and a part of the F headright, the grantor's interest being about two thousand acres, as would more fully appear by reference to the county records of L county, and it was shown by the record that such interest was seventeen hundred acres off the north side of the league, the description being sufficient with the aid of extrinsic evidence to identify the land, the power was not void for uncertainty).

48. Stafford v. Lick, 13 Cal. 240 (holding that a power of attorney to sell land must contain some description of the property to be sold, unless it is shown that the land in controversy is the only land owned at the time by the principal); Grancik v. Rajcany, (Ind. A.) 101 NE 745; Ashley v. Bird, 1 Mo. 640, 14 AmD 313; Johnson v. Fecht, 94 Mo. A. 605, 68 SW 615 [aff 185 Mo. 335, 83 SW 1077] (description held insufficient).

[a] **Powers held insufficient.**—(1) A letter by a principal to his agent only stating, "I am glad you have sold the eighty-eight acres; now sell the forty," is not an authorization in writing for the sale of the forty acres so as to comply with the statute of frauds. Johnson v. Fecht, 185 Mo. 335, 83 SW 1077. (2) Letters by a person constituting one his agent to find a purchaser for his land and merely giving him the ordinary authority of a broker do not authorize him to make a contract for the sale thereof within the statutory provision that an agreement for the sale of real estate, if made by an agent, is invalid, unless the agent's authority is in writing, as the ordinary authority of a real estate broker with whom land is listed for sale does not extend to or does not confer any authority upon the agent to sign a contract for and in the name of the landowner. Purkey v. Harding, 23 S. D. 632, 123 NW 69. To same effect Lichty v. Daggett, 23 S. D. 380, 121 NW 862.

[b] **An act of procuration,** under private signature, which is attached, by the agent named therein, to an authentic act purporting to have been executed under its authority is not thereby proved or made authentic. Denegre v. Fairex, 52 La. Ann. 1760, 28 S 316.

49. See cases infra this note, and notes 50, 51.

[a] **Signing.**—(1) A letter of attorney, authorizing the sale of lands subscribed with the name of the party, by another person at her request and in her presence is good. Irvin v. Thompson, 4 Bibb (Ky.) 295. (2) A power of attorney by a person describing herself as executrix and sole legatee under a given will, and signing it singly in her own name, is a sufficient description to show that it is executed by her as executrix, and the failure to add her official character to the signature does not impair its effect. Myers v. Mutual L. Ins. Co., 99 N. Y. 1, 1 NE 33 [aff 32 Hun 321].

[b] **Delivery.**—A power of attorney to convey land which is never delivered by the grantor but is obtained from her possession without her knowledge or consent is void, and a deed from the donee conveys no title, although the purchaser buys in good faith. Cobban v. Conklin, 208 Fed. 231, 125 CCA 431 [aff 198 Fed. 881].

50. Clark v. Graham, 6 Wheat. (U. S.) 577, 5 L. ed. 334; Gage v. Gage, 30 N. H. 420. See also infra § 61.

[a] **The Georgia civil code** § 3002 provides that an act creating an agency must be executed with the same formality as the law prescribes for the execution of the act for which the agency was created. Overman v. Atkinson, 102 Ga. 750, 29 SE 758.

[b] **Attestation.**—A power of attorney executed by "Julia A. Bird" and "William J. Bird" was attested as follows: "Signed . . . in presence of James Bayne as to J. A. B., M. Michaelson as to W. J. B." It was held that the attestation was sufficient as against an objection to the use of initials to designate the signatures attested. Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 188, 92 P 624, 93 P 661.

51. Lehmann's Succ., 41 La. Ann. 987, 7 S 33.

52. Bridgeport Bank v. New York, etc., R. Co., 30 Conn. 231 (where a power of attorney to transfer corporate stock was executed in blank as to the names of the attorney and the transferee); Eagleton v. Gutteridge, 2 Dowl. P. C. N. S. 1053 (where a power of attorney executed abroad, appointing B the attorney, was delivered to Henry B, who was the party meant to be authorized by it, and he filled up the blank with his christian name, and the court held that the power was not invalidated thereby).

Acknowledgment of power after filling in blanks see infra § 58.

Authority to fill blanks in instruments generally see Alteration of Instruments §§ 32–49.

[a] **A power of attorney to convey land,** executed in blank, like a deed with the name of the grantee left blank, is wholly inoperative until the name of a donee is inserted by some one having authority from the donor. U. S. v. Payette Lumber, etc., Mfg. Co., 198 Fed. 881 [aff 208 Fed. 231, 125 CCA 431].

53. Cox v. Manvel, 50 Minn. 87, 52 NW 273.

54. Johnson v. Bush, 3 Barb. Ch. (N. Y.) 207. See also Acknowledgments § 17.

55. Chiles v. Bridges, Litt. Sel. Cas. (Ky.) 420; Spurr v. Trimble, 1 A. K. Marsh. (Ky.) 278; Jackson v. Hopkins, 18 Johns. (N. Y.) 487; Watson v. Hopkins, 27 Tex. 637. See also Acknowledgments § 20; Evidence [17 Cyc 425]. And see infra §§ 58, 59.

56. Winn v. Patterson, 9 Pet. (U. S.) 663, 9 L. ed. 266; Voorhies v. Gore, 3 B. Mon. (Ky.) 529; Nowlin v. Burwell, 75 Va. 551.

57. See Evidence [17 Cyc 443].

58. Doe v. Campbell, 10 Johns. (N. Y.) 475; Doe v. Phelps, 9 Johns. (N. Y.) 169; Garner v. Lasker, 71 Tex. 431, 9 SW 332; Harrison v. McMurray, 71 Tex. 122, 8 SW 612; Johnson v. Shaw, 41 Tex. 428; Folts v. Ferguson, (Tex. Civ. A.) 24 SW 657.

"Execution of a valid power of attorney will be presumed in favor of an ancient deed purporting to be executed by attorney." Goodhue v. Cameron, 142 App. Div. 470, 475, 127 NYS 120.

59. Spurr v. Trimble, 1 A. K. Marsh. (Ky.) 278.

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(a) Necessity for. In the absence of a statute requiring it, a power of attorney need not be acknowledged,[60] or recorded,[61] although as matter of proof of authority the power may be and usually is recorded with any recorded instrument which has been executed under it.[62] When, however, an instrument required by law to be duly recorded, such as a conveyance or mortgage of land, is to be executed by an agent, the same reason that calls for recording the original instrument demands that the power of the agent be likewise recorded in order to prove the validity of the instrument he has assumed to have authority to execute;[63] and hence in some jurisdictions there are statutes requiring in such cases that the power of attorney of the agent shall be acknowledged and recorded with the instrument executed by him.[64] Other statutes permit, but do not require, that powers of attorney shall be recorded, and make such record competent evidence of the agent's authority.[65]

[§ 59] **(b) Sufficiency of.** Where acknowledgment and recordation are required they should be done in the manner prescribed by law for the acknowledgment,[66] and recordation[67] of written instruments generally, and the record so made has the usual effect as notice.[68]

In another state or country. An acknowledgment of a power of attorney taken in another state or

60. U. S.—In re Powell, 19 F. Cas. No. 11,354.
Cal.—Roper v. McFadden, 48 Cal. 346.
Ind.—Moore v. Pendleton, 16 Ind. 481.
Mass.—Valentine v. Piper, 22 Pick. 85, 33 AmD 715 (letter of attorney by force of which a deed of real estate is executed). But it is now provided by Rev. L. (1902) c 127 § 17, that a power of attorney to convey real estate shall be acknowledged.
Nebr.—Morris v. Linton, 61 Nebr. 537, 85 NW 565 (holding that a power of attorney, properly executed, is valid, although not acknowledged, except to the extent that it may authorize the conveyance of a family homestead).
N. H.—Society for Propagating Gospel v. Young, 2 N. H. 310.
N. J.—Tyrrell v. O'Connor, 56 N. J. Eq. 448, 41 A 674.
N. Y.—King v. Post, 12 NYSt 575.

61. Cal.—Adams v. Hopkins, 144 Cal. 19, 77 P 712 (holding that there is no statute requiring a power of attorney to release a mortgage to be recorded); Roper v. McFadden, 48 Cal. 346.
Ga.—Anderson v. Dugas, 29 Ga. 440.
Ind.—Boos v. Morgan, 130 Ind. 305, 30 NE 141, 30 AmSR 237 (power to assign judgments); Caley v. Morgan, 114 Ind. 350, 16 NE 790; Moore v. Pendleton, 16 Ind. 481.
La.—Rownd v. Davidson, 113 La. 1047, 37 S 965 (holding that there is no provision in that state requiring a power of attorney to sell land to be recorded).
Mass.—Valentine v. Piper, 22 Pick. 85, 33 AmD 715.
Mo.—Beheret v. Myers, 240 Mo. 58, 144 SW 824 (holding that, while an agent's authority to enter into contracts for the sale of land must, under Rev. St. (1909) § 2783, be in writing, such a contract is not a contract to convey lands which must be recorded within § 2816).
N. H.—Society for Propagating Gospel v. Young, 2 N. H. 310 (unless to convey real estate).
N. J.—Tyrrell v. O'Connor, 56 N. J. Eq. 448, 41 A 674.
N. Y.—Wilson v. Troup, 2 Cow. 195, 14 AmD 458 (holding that it is not necessary to the validity of a mortgage, or a purchase under a power of sale therein, even as against subsequent purchasers, that the power to execute it should be registered according to the statute). Compare Jackson v. Bowen, 6 Cow. 141.

62. Anderson v. Dugas, 29 Ga. 440; Rownd v. Davidson, 113 La. 1047, 37 S 965.

63. Stewart v. Hall, 3 B. Mon. (Ky.) 218 (holding that, whenever it is necessary to record a mortgage or deed of trust, it is necessary to record a power of attorney if it be made under a power); Moore v. Farrow, 3 A. K. Marsh. (Ky.) 41; Taylor v. McDonald, 2 Bibb (Ky.) 420. See Spurr v. Trimble, 1 A. K. Marsh. (Ky.) 278 (holding that a notary who attests a power is not required to record it, and therefore that a copy certified by such notary is not admissible in evidence).

64. U. S.—Gibbons v. Sloane, 10 F. Cas. No. 5,382, 6 McLean 273.
Ark.—Carnall v. Duval, 22 Ark. 136 (holding that a power of attorney to execute a deed must, to give it legal effect, be recorded with the deed).
Ind.—Boos v. Morgan, 130 Ind. 305, 30 NE 141, 30 AmSR 237 (holding, however, that the statute requiring a power of attorney to be recorded does not apply to a power to assign judgments).
Ky.—Graves v. Ward, 2 Duv. 301; Hardin v. Taylor, 4 T. B. Mon. 516.
Md.—Citizens' F. Ins., etc., Co. v. Doll, 35 Md. 89, 6 AmSR 360.
Nebr.—Morris v. Linton, 61 Nebr. 537, 85 NW 565 (as to conveyance of a family homestead).
N. H.—Society for Propagating Gospel v. Young, 2 N. H. 310 (as to conveyance of real estate).
R. I.—Bourne v. Campbell, 21 R. I. 490, 44 A 806.
Vt.—Oatman v. Fowler, 43 Vt. 462; Bush v. Van Ness, 12 Vt. 83.
Compare Johnson v. Bush, 3 Barb. Ch. (N. Y.) 207, 240 (where it was said: "The acknowledgment or proof of the execution of the deed by the attorney is all that is necessary to be established, by the recording acts, to entitle it to be recorded. The power of attorney under which the attorney acts is a separate and distinct instrument, which must not only be under the seal of his principal, but must itself be duly proved by the subscribing witness thereto, or acknowledged by the person executing the same, to entitle it to be recorded").

65. See statutory provisions. See also Lobdell v. Mason, 71 Miss. 937, 15 S 44.
[a] **A power of attorney and conveyance relating to a devisee's interest in fee,** and professing to treat it as real estate, may be recorded under the acts of assembly for recording deeds. Costen's App., 13 Pa. 292.

66. See generally Acknowledgments 1 C. J. 815 et seq.
[a] **Form of acknowledgment** see Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 P 624, 93 P 661.
[b] **The certificate of acknowledgment** (1) must describe the donor and the subject matter on which the power is to operate. See Crutchfield v. Stewart, 10 Yerg. (Tenn.) 237. (2) A certificate of acknowledgment to a power of attorney given by a married woman to her husband, in which the officer certifies that at a certain time "Came Julia P. Munger, who is personally known to me to be the identical person whose name is affixed to the foregoing instrument in writing as grantor, and duly acknowledged that she executed the same, for the purposes therein set forth," substantially complies with the requirements of the statute. Munger v. Baldridge, 41 Kan. 236, 238, 21 P 159, 13 AmSR 273.
[c] **Acknowledgment of power executed in blank** see Gibbons v. Sloane, 10 F. Cas. No. 5,382, 6 McLean 273 (where a power was held invalid because when it was filled up acknowledgment was not made as required by statute).
[d] **Time of acknowledgment.**—It is not necessary that a power of attorney should be acknowledged on the day it is executed. It may be acknowledged at a later date, even at a date subsequent to the contract made by the agent, for the acknowledgment is of importance only as showing that the power was executed by the principal whose name is signed to it. Springer v. Orr, 82 Ill. A. 558.
[e] **Defective acknowledgment** of power of attorney (1) may be cured by subsequent statute see Collins v. Valleau, 79 Iowa 626, 43 NW 284, 44 NW 904. (2) In Alabama under code (1896) § 982, providing that the execution of a conveyance for the alienation of land must be attested by one witness, etc., a deed under a power of attorney to convey land, both attested by a witness, is valid, although both are defectively acknowledged. Ryder v. Johnson, 153 Ala. 482, 45 S 181. (3) A power of attorney to make a conveyance of realty, defective because of improper acknowledgment, nevertheless confers valid authority on the agent to make an executory contract of sale and receive the purchase price, the purchaser taking an equitable title to the land. Joseph v. Fisher, 122 Ind. 399, 23 NE 856. (4) Where a sale and conveyance of land have been made by an agent under a genuine power of attorney, the acknowledgment of which was defective, the chancellor should compel the proper conveyance unless there should be other sufficient preventing causes. Colsten v. Chaudet, 4 Bush (Ky.) 666.

67. Mix v. Hotchkiss, 14 Conn. 32 (holding that the power was recorded "with" the deed, although they were written in the book eighty pages apart, both being properly indexed); Taylor v. McDonald, 2 Bibb (Ky.) 420 (holding a deed unavailing because the deed and the power were not recorded in the office required by law); Drake v. Brander, 8 Tex. 351 (where objection to a power because it was not filed was held to be sufficiently answered by filing it); Oatman v. Fowler, 43 Vt. 462 (where the court held that the power must accompany the grant upon the records, and that record of a copy of the power is unavailing). See generally Records [34 Cyc 577].
[a] **Time of recordation.**—The power of attorney relating to a conveyance of land need not be recorded at the same time as the deed, but it is sufficient if it is recorded prior to the deed, as the term "with the deed" employed in the statute means upon the proper records of the city or county where the deed is recorded. Rosenthal v. Ruffin, 60 Md. 324.
[b] **Place of recordation.**—A power of attorney with reference to a sale of land is not entitled to record in a county in which none of the land is situated. Wren v. Howland, 33 Tex. Civ. A. 87, 75 SW 894.
[c] **Book of record.**—A power of attorney to sell lands may be recorded in the registry of deeds, under some statutes. Morse v. Hewett, 28 Mich. 481 (so construing Comp. L. § 4238).

68. See Records [34 Cyc 614].
[a] **Effect of record as notice.**—(1) The record of a power of attorney

country will be effective where the subject matter of the power is situated, if taken in accordance with the laws of the latter place.[69]

[§ 60] **(c) Effect of Failure to Acknowledge or Record.** As the purpose of requiring acknowledgment and record is thereby to give notice to third persons, failure to record the power of attorney, even when recording is required by law, will not invalidate the agent's acts thereunder as between the parties to such acts but only as to creditors and subsequent purchasers without notice,[70] unless the statute makes recording a prerequisite to authority to act, or provides that unrecorded instruments shall be absolutely void.[71]

[§ 61] **c. Sealed Authority—(1) In General.**[72] It is a general rule of the common law that authority to execute a sealed instrument must be conferred by an instrument of equal solemnity, that is, by an instrument under seal,[73] otherwise the instrument purporting to confer the authority will be a mere nul-

imparts notice to third persons dealing with the subject matter thereof. Landers v. Bolton, 26 Cal. 393, 419. (2) But it has been held that it is not notice that the person is acting as agent for an undisclosed principal in making the contract. Walton v. Davis, 22 Cal. A. 456, 134 P 795.

69. See generally Acknowledgments 1 C. J. §§ 71, 77, 140. See also Nye v. Macdonald, L. R. 3 P. C. 331; 7 Moore P. C. N. S. 134, 17 Reprint 52; Ex p. Wilkinson, 2 Deac. & C. 585; Ex p. Myers, 2 Deac. & C. 406; Re Goss, 12 Jur. N. S. 595; Hayward v. Stephens, 36 L. J. Ch. 135; Marston v. Pelletier, 29 L. C. Jur. 335 [aff 14 Rev. Leg. 251].

[a] **In Alabama,** under code §§ 1800, 1801, a power of attorney executed in another state, and certified in proper form, to have been there acknowledged before an officer who styles himself "J. P., and ex officio notary public," and affixes his seal of officer in the same character, is admissible in evidence. Goree v. Wadsworth, 91 Ala. 416, 8 S 712.

[b] **In Kentucky,** (1) by § 2 of the act of 1818, powers of attorney, executed in other states, shall be received and recorded in the clerks' offices of the court of appeals, general court, and of the county courts of this state, provided they shall be authenticated in the same manner as foreign deeds are required to be authenticated by existing laws. Harris v. Price, 14 B. Mon. 383. (2) A power of attorney acknowledged in the county court of another state and ordered to be certified is good if the acknowledgment is regularly recorded, attested, and certified agreeable to the act of congress, although the power itself does not appear to have been admitted to record. Rochester v. Toler, 4 Bibb 106. (3) But a power of attorney proved and admitted to record in another state but attested by a clerk without the certificate of the judge, chief justice, or presiding magistrate, is inadmissible in evidence unless its execution is proved, and the execution may be proved by one of the subscribing witnesses. Johnson v. Fowler, 4 Bibb 521. (4) A power of attorney acknowledged and recorded in a county court in another state, and admitted to record in this state upon the certificate of the clerk, without the seal of the state or county being affixed thereto, is not a sufficient authentication, and a copy of such record is not good evidence. Garrant v. Woods, 4 Bibb 526. (5) A power of attorney purporting to have been acknowledged before two justices of the peace in another state and recorded here on that proof alone is an inadequate authentication to pass land. Skeene v. Fishback, 1 A. K. Marsh. 356. (6) A power of attorney acknowledged before a justice of the peace in another state and certified by him and the clerk of the county court under the seal of the court is not properly authenticated to be admitted for record in this state. Fowke v. Darnall, 5 Litt. 316. (7) A letter of attorney acknowledged before, and certified by, the mayor of a corporation of a sister state, and recorded in the office of the court of appeals, derives no authenticity therefrom, as there is no law authorizing the admission to record in that court of such papers on such proof; but, on proving that the subscribing witnesses are dead or out of the state, the party claiming under such letter may prove the handwriting of the witnesses, and use the letter as an unrecorded deed. Bowman v. Bartlet, 3 A. K. Marsh. 86. (8) A power of attorney acknowledged before a mayor is not sufficient authentication to admit it as evidence in this state, without other evidence, of its due execution. Coleman v. Casey, 4 Bibb 516.

70. Conn.—Mix v. Hotchkiss, 14 Conn. 32.

Ky.—Godsey v. Standifer, 101 SW 921, 31 KyL 44 (holding that, although St. (1903) § 499, readopted from the revised and general statutes provides that a power of attorney to convey real estate must be recorded in the same manner as the conveyance made under it "to make the same valid against creditors and purchasers," yet a deed made by an attorney in fact, in pursuance of an unrecorded power of attorney, is good as between the grantor and those claiming under the grantee); Voorhies v. Gore, 3 B. Mon. 529; Flannery v. O'Brien, 6 KyL 667 (holding that, while a deed executed by an attorney in fact is not effectual as a recorded instrument against creditors and purchasers unless the power is also properly acknowledged and recorded, it cannot be avoided by the grantor, although the power is not recorded).

Mont.—McAdow v. Black, 4 Mont. 475, 1 P 751.

N. H.—Montgomery v. Dorion, 6 N. H. 250.

N. Y.—Wilson v. Troup, 2 Cow. 195, 14 AmD 458.

Oh.—Diehl v. Stine, 1 Oh. Cir. Ct. 515, 1 Oh. Cir. Dec. 287.

Que.—Cox v. Lecavalier, 15 Que. Super. 350.

[a] **A mortgage executed under a power of attorney** (1) is void as to subsequent purchasers of the mortgaged estate unless the power of attorney is recorded with the mortgage, but as between the parties to it the mortgage is good. Duval v. Johnson, 39 Ark. 182. (2) The clerk and recorder before whom a mortgage was acknowledged under a power of attorney, and to whom it was exhibited when the acknowledgment was made, but not filed for record with the mortgage, is no more affected with notice of the mortgage than a stranger would be. Carnall v. Duval, 22 Ark. 136.

[b] **The registration of a power of sale contained in a mortgage** is not necessary as against the mortgagor, as the provision that a power of sale shall be recorded before a conveyance under it shall be executed is for the benefit of the purchaser and is intended to protect him against subsequent purchasers, and hence it does not lie with the mortgagor to object that a sale and conveyance have been made under the power without its having been recorded. Wilson v. Troup, 2 Cow. (N. Y.) 195, 14 AmD 458.

71. See Johnson v. Sukeley, 13 F. Cas. No. 7,414, 2 McLean 562; Joseph v. Fisher, 122 Ind. 399, 23 NE 856.

[a] **An unrecorded power of attorney for the transfer of real estate** is not valid or binding to the detriment of third parties even though the latter have actual knowledge of it. Holmes v. Serrao, 18 Hawaii 25.

72. **Authority to fill in blanks in sealed instrument** executed by principal see Alteration of Instruments §§ 38–49.

73. U. S.—Platt v. McCullough, 19 F. Cas. No. 11,113, 1 McLean 69. See also Williams v. Conger, 125 U. S. 397, 8 SCt 938, 31 L. ed. 778.

Ala.—Cocke v. Campbell, 13 Ala. 286. And see Elliott v. Stocks, 67 Ala. 336.

Ark.—Daniel v. Garner, 71 Ark. 484, 76 SW 1063.

Cal.—Dutton v. Warschauer, 21 Cal. 609, 82 AmD 765. But see Dolbeer v. Livingston, 100 Cal. 617, 35 P 328.

Del.—Hartnett v. Baker, 20 Del. 431, 56 A 672.

Ga.—Neely v. Stevens, 138 Ga. 305, 75 SE 159; Brandon v. Pritchett, 126 Ga. 286, 55 SE 241, 7 AnnCas 1093; Overman v. Atkinson, 102 Ga. 750, 29 SE 758; McCalla v. American Freehold Land Mortg. Co., 90 Ga. 113, 15 SE 687; Pollard v. Gibbs, 55 Ga. 45; Rowe v. Ware, 30 Ga. 278; Drumright v. Philpot, 16 Ga. 424, 60 AmD 738; Ingram v. Little, 14 Ga. 173, 58 AmD 549; Hayes v. Atlanta, 1 Ga. A. 25, 57 SE 1087.

Ill.—Johnson v. Dodge, 17 Ill. 433; Bragg v. Fessenden, 11 Ill. 544; Maus v. Worthing, 4 Ill. 26; Sigmund v. Newspaper Co., 82 Ill. A. 178.

Ind.—Rhode v. Louthain, 8 Blackf. 413.

Ky.—Cummins v. Cassily, 5 B. Mon. 74; Mitchell v. Sproul, 5 J. J. Marsh. 264; Jackson v. Murray, 5 T. B. Mon. 184, 17 AmD 53; McMurtry v. Frank, 4 T. B. Mon. 39. But since seals have been abolished by statute in this state this rule no longer prevails. See infra note 77.

Me.—South Berwick v. Huntress, 53 Me. 89, 87 AmD 535; Heath v. Nutter, 50 Me. 378; Baker v. Freeman, 35 Me. 485; Wheeler v. Nevins, 34 Me. 54; Spofford v. Hobbs, 29 Me. 148, 48 AmD 521.

Mass.—Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 AmD 66; Banorgee v. Hovey, 5 Mass. 11, 4 AmD 17.

Minn.—Dayton v. Nell, 43 Minn. 246, 45 NW 231.

Miss.—Adams v. Power, 52 Miss. 828; Williams v. Crutcher, 6 Miss. 71, 35 AmD 422.

Mo.—Shuetze v. Bailey, 40 Mo. 69; St. Louis Dairy Co. v. Sauer, 16 Mo. A. 1.

Nebr.—McMurtry v. Brown, 6 Nebr. 368.

N. H.—Haydock v. Duncan, 40 N. H. 45; Gage v. Gage, 30 N. H. 420.

N. J.—Wagoner v. Watts, 44 N. J. L. 126; Long v. Hartwell, 34 N. J. L. 116; Perry v. Smith, 29 N. J. L. 74; Tappan v. Redfield, 5 N. J. Eq. 339.

N. Y.—Peterson v. New York, 194 N. Y. 437, 87 NE 772 [rev 127 App. Div. 942, 111 NYS 1140]; Worrall v. Munn, 5 N. Y. 229, 55 AmD 330; Purcell v. Potter, Anth. N. P. 310; Wells v. Evans, 20 Wend. 251 [rev on other grounds 22 Wend. 324]; Van Ostrand v. Reed, 1 Wend. 424, 19 AmD 529.

N. C.—Cadell v. Allen, 99 N. C. 542, 544, 6 SE 399 (where it was said: "The ancient rule of law, in this respect, has not been modified or trenched upon by this Court, and we are not at liberty or inclined to do so now. If the hurry and convenience of business transactions, in the present state of society, require easier and less solemn methods of conveyance of land than formerly, it is the province of the Legislature, and not

lity.[74] Even a written authority, in such cases, will be insufficient,[75] nor can a power of attorney previously given under seal be enlarged by a parol authority.[76]

The rule is a technical one and has been changed in some of the states by statutes abolishing all distinctions between sealed and unsealed instruments, to the extent that even parol authority may be sufficient to execute a sealed instrument,[77] while some of the American courts, without awaiting legislative action, have shown a disposition to relax its strictness.[78]

Submission to arbitration. Where the submission is not under seal the appointment of the agent to make the same may be by parol;[79] but where the submission by the agent is under seal his authority to submit must also be under seal.[80] But if a submission is made by an agent under seal, and is such that it would be valid without a seal, it will be binding on the principal as an unsealed submission, although the agent was not properly authorized to submit under seal.[81]

[§ 62] **(2) Execution in Presence of Principal.** Where the instrument is executed in the presence and by the direction of the principal, it is generally held, even under the common-law doctrine, that the acts of signing and sealing may be done by an agent having merely a parol authority, as such execution is treated in law as the act, not of the agent, but of the principal himself, the agent being regarded as a mere instrument.[82]

[§ 63] **(3) Seal as Surplusage.** In most jurisdictions it is held that where an agent, authorized to execute a simple contract only, unnecessarily attaches a seal to the instrument executed by him, and which would be good as a simple contract, the seal may

that of Courts, to modify and change settled rules of law to that end"); Humphreys v. Finch, 97 N. C. 303, 1 SE 870, 2 AmSR 293; Harshaw v. McKesson, 65 N. C. 688; Kime v. Brooks, 31 N. C. 218; Dellus v. Cawthorn, 13 N. C. 90.

Oh.—McNaughten v. Partridge, 11 Oh. 223, 38 AmD 731.

Okl.—Wilson v. Wood, 10 Okl. 279, 61 P 1045.

Pa.—Gordon v. Bulkeley, 14 Serg. & R. 331; Vanhorne v. Frick, 6 Serg. & R. 90.

S. C.—State v. Spartanburg, etc., R. Co., 8 S. C. 129.

Tenn.—Cain v. Heard, 1 Coldw. 163; McNutt v. McMahan, 1 Head 98; Mosby v. Arkansas, 4 Sneed 324; Smith v. Dickinson, 6 Humphr. 261, 44 AmD 306; Boyd v. Dodson, 5 Humphr. 37; Turbeville v. Ryan, 1 Humphr. 113, 34 AmD 622.

Va.—Preston v. Hull, 23 Gratt. (64 Va.) 600, 14 AmR 153.

W. Va.—Campbell v. Fetterman, 20 W. Va. 398.

Wis.—Dodge v. Hopkins, 14 Wis. 630.

Eng.—Berkeley v. Hardy, 5 B. & C. 355, 11 ECL 495, 108 Reprint 132, 2 ERC 274; Elliot v. Davis, 2 B. & P. 338, 126 Reprint 1314; Combes' Case, 9 Coke 75a, 77 Reprint 843; Steiglitz v. Egginton, Holt N. P. 141, 3 ECL 63, 3 ERC 622.

Ont.—Doe v. Armstrong, Taylor (U. C.) 352; Ingersoll, etc., Gravel Road Co. v. McCarthy, 16 U. C. Q. B. 162.

[a] **The Spanish or Mexican** law did not require a power of attorney under seal to execute a sealed instrument. See Williams v. Conger, 125 U. S. 397, 423, 8 SCt 933, 31 L. ed. 778 (where the court in ruling upon an objection to a power of attorney to authorize an act of sale, that it was not sufficient because the power was not executed under the same solemnities as the act of sale itself, said: "We know of no such rule in the Spanish or Mexican law. The English rule as to the requisites of a power to execute sealed instruments has no application to the case"); Posten v. Rassette, 5 Cal. 467, 470 (where it was said: "The Mexican system of jurisprudence knew not the common law doctrine of seals").

[b] **Authority to sign principal's name to articles of association.**—It is not necessary that an agent be authorized by deed in order to sign his principal's name to a memorandum of association of a company. In re Whitley, 32 Ch. D. 337, 2 ERC 276.

74. Peterson v. New York, 194 N. Y. 437, 440, 87 NE 772 (where it was said: "An instrument not under seal purporting to authorize an agent to execute an agreement under seal would be a mere nullity"); British North America Min. Co. v. Pigeon River Lumber Co., 2 DomLR 609, 3 OntWN 701, 21 OntWR 291. And see cases supra note 73.

[a] **Effect of seal.**—"Though in many respects the effect of a seal has by recent statutes and decisions been very much impaired, nevertheless a sealed instrument still retains in law certain characteristics peculiar to itself. It binds the parties, and only the parties. It is not permitted to show by parol that the apparent parties to it acted merely as agents for other parties." Peterson v. New York, 194 N. Y. 437, 441, 87 NE 772.

75. Dutton v. Warschauer, 21 Cal. 609, 82 AmD 765; Berkeley v. Hardy, 5 B. & C. 355, 11 ECL 495, 108 Reprint 132, 2 ERC 274. And see cases supra note 73.

76. Paine v. Tucker, 21 Me. 138, 38 AmD 255; Stetson v. Patten, 2 Me. 358, 11 AmD 111.

77. Dolbeer v. Livingston, 100 Cal. 617, 35 P 328; Swartz v. Ballou, 47 Iowa 188, 194, 29 AmR 470 (where the court in effect said that, since seals have been abolished by statute in this state and therefore are not necessary to the validity of a conveyance of real estate, it would seem that the reason for the common-law rule that authority to execute or fill blanks in a sealed instrument should only be conferred by an instrument under seal has ceased, and that the rule itself should not be further recognized); Bates v. Best, 13 B. Mon. (Ky.) 215, 216 (where the court said: "It was the settled law, at the time the writing sued on was executed, that the agent could not, without authority under seal, bind his principal by a sealed instrument (Cummins v. Cassily, 5 B. Mon. (Ky.) 74; U. S. Bank v. Carroll, 4 B. Mon. (Ky.) 40). Every sealed instrument was in legal estimation a deed, and the authority to execute it had to be conferred by a writing possessing the solemnities and dignity of a deed. No mere parol authority, either written or verbal, was sufficient, and consequently the agent in this case had no power to execute a note under seal, in the name of his principal. This rule of law was to some extent modified by the act of January, 1843. (Sess. Acts, 1842–3, 11.) By that act every instrument of writing thereafter executed was made as effectual and had the same dignity in law without a seal or scroll as with one. The same provision has been incorporated into the Revised Statutes (chap. 23, sec. 2). So that, as the law now stands, an authority by a private individual, conferred by a writing not under seal, is equal in every respect to one that is conferred by a sealed instrument, imparts the same powers, enables the agent to perform the same acts, and to execute the same kind of written instrument in the name of the principal"); J. B. Streeter Co. v. Janu, 90 Minn. 393, 96 NW 1128. See also statutory provisions.

78. See cases infra note 83 et seq. See also generally Seals [35 Cyc 1165].

[a] **Deed as equitable contract for sale.**—Still other cases hold that even where the instrument is required by law to be under seal an instrument, ineffective because executed by an agent wanting authority under seal, will still be treated in equity as a simple contract which may be specifically enforced against the principal. The effect of this view is a practical abrogation of all requirements for sealed authority. See infra § 65.

79. Detroit v. Jackson, 1 Dougl. (Mich.) 106 (agent of corporation).

80. Steiglitz v. Egginton, Holt. N. P. 141, 3 ECL 63, 3 ERC 622.

81. White v. Fox, 29 Conn. 570; Wood v. Auburn, etc., R. Co., 8 N. Y. 160.

82. Cal.—Videau v. Griffin, 21 Cal. 389.

Ga.—Brown v. Colquitt, 73 Ga. 59, 54 AmR 867.

Ill.—Handyside v. Cameron, 21 Ill. 588, 74 AmD 119.

Ind.—Bruker v. Kelsey, 72 Ind. 51; Croy v. Busenbark, 72 Ind. 48 (holding that, where one's name was signed by another to a recognizance of bail for a stay of execution, in the presence of the former but without authority under seal, it was binding).

La.—Meyer v. King, 29 La. Ann. 567, 570 (where it was said: "Authority was delegated for only one object, was not to be exercised out of the interested parties' presence, lasted the space of time required to write a name, and expired when the last letter of the principal's name fell from the agent's pen. In such a case, the act itself is the act of the principal, not of the agent").

Me.—South Berwick v. Huntress, 53 Me. 89, 87 AmD 535; Paine v. Tucker, 21 Me. 138, 38 AmD 255.

Mass.—Gardner v. Gardner, 5 Cush. 483, 52 AmD 740.

Mich.—Johnson v. Van Velsor, 43 Mich. 208, 5 NW 265; Just v. Wise Tp., 42 Mich. 573, 4 NW 298.

Nebr.—McMurtry v. Brown, 6 Nebr. 368.

N. H.—Lord v. Lord, 58 N. H. 7, 42 AmR 565.

N. J.—Mutual Ben. L. Ins. Co. v. Brown, 30 N. J. Eq. 193 [aff 32 N. J. Eq. 809].

N. Y.—Hanford v. McNair, 9 Wend. 54.

Eng.—Rex. v. Longnor, 4 B. & Ad. 647, 24 ECL 284, 110 Reprint 599; Hibblewhite v. McMorine, 4 Jur. 769; Ball v. Dunsterville, 4 T. R. 314, 100 Reprint 1038; Lovelace's Case, W. Jones 268, 82 Reprint 140.

Signature of deed by third person in grantor's presence and by his direction see Deeds [13 Cyc 554].

[a] **Not in immediate presence of principal.**—In Mackay v. Bloodgood, 9 Johns. (N. Y.) 285, it appeared that one of defendants sealed the bond, with one seal, for himself and his partner, with the consent of his partner, and after the partner had seen and approved of the bond, and while he was about the store, but not im-

be treated as surplusage, and the validity of the contract be in no way affected by it, although his authority was not under seal, but was conferred merely by parol;[83] but the principal will not be bound by such an instrument as a sealed instrument.[84] In some jurisdictions, however, a contrary doctrine is sustained, it being held that even though the instrument is not required to be under seal, yet if as a matter of fact it is executed under seal by an agent, then the agent's authority to execute it must be under seal or the instrument will not be effective.[85]

[§ 64] **(4) Deeds of Conveyance and Contracts Therefor—(a) In General.** Conveyances of land, except when the necessity of a seal has been abrogated by statute, must be made by instrument under seal,[86] and accordingly in most jurisdictions an agent must have sealed authority to execute a conveyance of land,[87] although not to sell or make a contract to convey, since such a contract does not require a seal.[88]

[§ 65] **(b) Ineffectual Deed as Equitable Contract to Convey.** In many jurisdictions the common-law rule requiring sealed authority is practically nullified by the fact that a deed which is ineffectual as such because executed by an agent without sealed

mediately present. The court held that the evidence was sufficient to carry the cause to the jury, and to justify them in finding it the deed of both.

83. U. S.—Nichols v. Haines, 98 Fed. 692, 39 CCA 235 (holding that, in an action in assumpsit based on a written contract which was not required to be under seal, the authority of the agent who signed defendant's name to such contract need not be shown to have been under seal, although he affixed a seal to the signature of his principal).

Ala.—Cocke v. Campbell, 13 Ala. 286.

Cal.—Love v. Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 AmD 602.

Conn.—White v. Fox, 29 Conn. 570.

Del.—Hartnett v. Baker, 20 Del. 431, 56 A 672.

Ill.—Ingraham v. Edwards, 64 Ill. 526 (semble); Truett v. Wainwright, 9 Ill. 411; Cook v. Harrison, 19 Ill. A. 402; Beidler v. Fish, 14 Ill. A. 29. A contrary view was expressed in the early case of Maus v. Worthing, 4 Ill. 26, although the point was not involved.

Md.—Horner v. Beasley, 105 Md. 193, 65 A 820 (holding that, where an agent authorized to make a simple contract on behalf of his principal, but not one under seal, affixes his seal to the contract, such seal may be rejected as surplusage, and an action of assumpsit may be brought on the contract as one made by parol).

Mass.—Tapley v. Butterfield, 1 Metc. 515, 35 AmD 374; Stockbridge v. West Stockbridge, 14 Mass. 257. But see Kimball v. Tucker, 10 Mass. 192; Banorgee v. Hovey, 5 Mass. 11, 4 AmD 17.

Mich.—McIntosh v. Hodges, 110 Mich. 319, 68 NW 158, 70 NW 550.

Minn.—Thomas v. Joslin, 30 Minn. 388, 15 NW 675; Dickerman v. Ashton, 21 Minn. 538; Minor v. Willoughby, 3 Minn. 225.

Miss.—Adams v. Power, 52 Miss. 828.

Mo.—Klostermann v. Loos, 58 Mo. 290; Musser v. Johnson, 42 Mo. 74, 97 AmD 316; Shuetze v. Bailey, 40 Mo. 69; Riley v. Minor, 29 Mo. 439; Lehman v. Nolting, 56 Mo. A. 549.

N. H.—Despatch Line of Packets Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203.

N. J.—Calhoon v. Buhre, 75 N. J. L. 439, 67 A 1068; Wagoner v. Watts, 44 N. J. L. 126; Long v. Hartwell, 34 N. J. L. 116.

N. Y.—Henry v. Root, 33 N. Y. 526; Ford v. Williams, 13 N. Y. 577, 67 AmD 83; Wood v. Auburn, etc., R. Co., 8 N. Y. 160; Worrall v. Munn, 5 N. Y. 229, 55 AmD 330; Wood v. Wise, 153 App. Div. 223, 918 mem, 137 NYS 1017, 1150 mem [aff 208 N. Y. 586 mem, 102 NE 1117 mem]; Lawrence v. Taylor, 5 Hill 107. Earlier New York cases (Blood v. Goodrich, 9 Wend. 68, 24 AmD 121, and Hanford v. McNair, 9 Wend. 54) stand for the opposite doctrine, although in the former case the fact that the form of the action was covenant was fatal to a claim that the instrument might be treated as a simple contract.

Pa.—Barnes v. Du Bois, 43 Pa. 260; Cooper v. Rankin, 5 Binn. 613.

S. C.—State v. Spartanburg, etc., R. Co., 8 S. C. 129.

Tenn.—Farris v. Martin, 10 Humphr. 495.

Tex.—Crozier v. Carr, 11 Tex. 376.

Wis.—Stowell v. Eldred, 39 Wis. 614.

Wyo.—Marshall v. Rugg, 6 Wyo. 270, 44 P 700, 45 P 486, 33 LRA 679.

Eng.—Hunter v. Parker, 10 L. J. Exch. 281. Compare Berkeley v. Hardy, 5 B. C. 355, 11 ECL 495, 108 Reprint 132, 2 ERC 274.

"If a contract which need not be under seal is executed by an agent having authority to execute simple contracts, but not sealed contracts, and has a seal affixed to it, it will be valid as a simple contract." Calhoon v. Buhre, 75 N. J. L. 439, 441, 67 A 1068.

Unnecessary use of seal by partner see Partnership [30 Cyc 487].

84. Warring v. Williams, 8 Pick. (Mass.) 326 (holding that where an agent having his principal's signature in blank, with a parol authority to write a certain agreement over it, does so, and also annexes a seal to the signature, the principal is not bound by it as a sealed instrument). See also supra § 61.

85. Rhode v. Louthain, 8 Blackf. (Ind.) 413 (where, however, the court held that the previous lack of authority to make the bond in question was cured by a later oral ratification); Cummins v. Cassily, 5 B. Mon. (Ky.) 74 (where the court recognized that possibly there was little reason for the rule); Mitchell v. Sproul, 5 J. J. Marsh. (Ky.) 264; McMurty v. Frank, 4 T. B. Mon. (Ky.) 39 (both of which cases, however, might have been decided on the ground that the agent had no authority by seal or otherwise to make the bond sued on); Baker v. Freeman, 35 Me. 485 (holding that, if an agent affix to an instrument the name and seal of his principal when authorized to affix the name only, the seal cannot be treated as surplusage, even though the instrument would have been effectual by the signing without the sealing); Wheeler v. Nevins, 34 Me. 54.

[a] **In Georgia** in Rowe v. Ware, 30 Ga. 278, 281, the contention was made that, as the instrument in question was not required to be under seal, the fact that it was sealed by an agent having only parol authority would not make it invalid. The court said: "But it was said that the bond need not have been under seal, though in point of fact it was so, and therefore the seal might be disregarded. Not so. The question was, whether Taylor had authority to sign the names of Hooks and Herndon to this bond as it is — sealed as it is. Whether a bond without a seal (to use for convenience, a short but inaccurate phrase,) would be valid, has nothing to do with the case, for there was no such paper in the case." The ruling in this case has been approved or followed in the following cases: Van Dyke v. Van Dyke, 123 Ga. 686, 51 SE 582, 3 AnnCas 978; Overman v. Atkinson, 102 Ga. 750, 29 SE 758; Pollard v. Gibbs, 55 Ga. 45; Dalton Buggy Co. v. Wood, 7 Ga. A. 477, 67 SE 121; Hayes v. Atlanta, 1 Ga. A. 25, 57 SE 1087. Compare Drumright v. Philpot, 16 Ga. 424, 60 AmD 738.

86. See Deeds [13 Cyc 555].

87. U. S.—Platt v. McCullough, 19 F. Cas. No. 11,113, 1 McLean 69.

Colo.—Tilton v. Cofield, 2 Colo. 392.

Ill.—Watson v. Sherman, 84 Ill. 263; Peabody v. Hoard, 46 Ill. 242.

Ky.—Spurr v. Trimble, 1 A. K. Marsh. 278; Plummer v. Russell, 2 Bibb 174.

N. J.—Tappan v. Redfield, 5 N. J. Eq. 339 (holding that authority to execute a deed for a freehold interest in land must be by deed).

N. Y.—Worrall v. Munn, 5 N. Y. 229, 55 AmD 330; Hanford v. McNair, 9 Wend. 54.

N. C.—Cadell v. Allen, 99 N. C. 542, 6 SE 399.

Tenn.—Smith v. Dickinson, 6 Humphr. 261, 44 AmD 306.

W. Va.—Mustard v. Big Creek Dev. Co., 69 W. Va. 713, 72 SE 1021.

"Authority to convey land must be conferred by an instrument of equal dignity with the instrument of conveyance." Davis v. Spann, 92 Ark. 213, 215, 122 SW 495.

[a] **Seal not the only requisite.**— It has sometimes been said that a power to convey lands must possess the same requisites, witnesses as well as seal, and observe the same solemnities, as are necessary in a deed directly conveying the lands. Clark v. Graham, 6 Wheat. (U. S.) 577, 5 L. ed. 334. To same effect Murphy v. McVicker, 17 F. Cas. No. 9,951, 4 McLean 252; Butterfield v. Beall, 8 Ind. 203; Heath v. Nutter, 50 Me. 378; Gage v. Gage, 30 N. H. 420.

[b] **Under a modern statute** it has been said that since a lease for more than one year must be by deed the agent's appointment to make it must also be by deed. Lobdell v. Mason, 71 Miss. 937, 15 S 44.

[c] **Where a seal is not necessary to a lease** the principal will be bound if the agent, although not authorized under seal, executes it, and even though the agent attaches a seal the seal will have no effect. Methodist Church Conference v. Goodall, 5 Newfoundl. 367.

88. Ala.—Ledbetter v. Walker, 31 Ala. 175.

Ark.—Davis v. Spann, 92 Ark. 213, 122 SW 495 (holding that authority to make a binding contract of sale may be conferred verbally).

Ill.—Watson v. Sherman, 84 Ill. 263 [cit Peabody v. Hoard, 46 Ill. 242; Johnson v. Dodge, 17 Ill. 433].

Minn.—Dickerman v. Ashton, 21 Minn. 538; Groff v. Ramsey, 19 Minn. 44; Minor v. Willoughby, 3 Minn. 225.

N. J.—Force v. Dutcher, 18 N. J. Eq. 401; Doughaday v. Crowell, 11 N. J. Eq. 201.

N. Y.—Lawrence v. Taylor, 5 Hill. 107.

Pa.—Baum v. Dubois, 43 Pa. 260.

Wash.—Littlefield v. Dawson, 47 Wash. 644, 92 P 428.

Wis.—Dodge v. Hopkins, 14 Wis. 630.

See also supra § 50; infra § 250.

[a] **Contract for lease.**—An agent having verbal authority may execute a written contract binding his principal to make a lease of land for more than one year. Lobdell v. Mason, 71 Miss. 937, 15 S 44.

authority is treated in equity as a contract for a deed which the courts will specifically enforce by requiring the principal to execute a deed.[89]

[§ 66] **(5) Bonds.** The term "bond" imports a sealed instrument, and ordinarily there cannot be a perfect bond without a seal.[90] Hence, as a general rule, an agent's authority to execute a bond must be under seal.[91]

[§ 67] **B. By Operation of Law.** Agency is in a few instances implied by law without the consent of the principal, and even against his express dissent.[92]

[§ 68] **C. Estoppel to Assert or Deny Agency—1. Estoppel to Assert.** If a person has acted in his own name, holding himself out as principal, he cannot afterward, as against persons interested in the transaction, set up that he was acting as agent only.[93] So if a principal in a transaction represents to the other party that his agent is jointly interested as principal, he is estopped, as against the other party, to assert the agency.[94] If the owner of property represents that his agent is the owner thereof,[95] or actively, or by acquiescence, or by want

89. U. S.—Lyon v. Pollock, 99 U. S. 668, 25 L. ed. 265; Pratt v. McCullough, 19 F. Cas. No. 11,113, 1 McLean 69.

Ala.—Ledbetter v. Walker, 31 Ala. 175; Morrow v. Higgins, 29 Ala. 448.

Ark.—Daniel v. Garner, 71 Ark. 484, 76 SW 1063.

Cal.—Heinlein v. Martin, 53 Cal. 321; Jones v. Marks, 47 Cal. 242; Love v. Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 AmR 602; Dutton v. Warschauer, 21 Cal. 609, 82 AmD 765 (holding that a power to sell and convey land not under seal, and therefore insufficient to authorize the execution of a conveyance of the fee, is nevertheless sufficient authority for the execution of a contract of sale; and a deed made by the donee, reciting the sale, and purporting, in pursuance of the power, to convey the fee, is good as an agreement to convey).

Colo.—Tilton v. Cofield, 2 Colo. 392.

Ill.—Peabody v. Hoard, 46 Ill. 242 [cit Johnson v. Dodge, 17 Ill. 433; Doty v. Wilder, 15 Ill. 407, 60 AmD 756].

Ind.—Joseph v. Fisher, 122 Ind. 399, 23 NE 856.

Ky.—Jackson v. Murray, 5 T. B. Mon. 184, 17 AmD 53.

Minn.—Dickerman v. Ashton, 21 Minn. 538; Minor v. Willoughby, 3 Minn. 225.

Miss.—Lobdell v. Mason, 71 Miss. 937, 15 S 44.

N. H.—Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203.

N. Y.—Sherman v. New York Cent. R. Co., 22 Barb. 239; Hanford v. McNair, 9 Wend. 54.

N. C.—Osborne v. Horner, 33 N. C. 359; Pickard v. Brewer, 22 N. C. 428. See Cadell v. Allen, 99 N. C. 542, 6 SE 399 (where the court denied equitable relief on the ground that the action was simply one at law, viz., ejectment).

Oh.—McNaughten v. Partridge, 11 Oh. 223, 38 AmD 731.

Pa.—Baum v. Dubois, 43 Pa. 260.

W. Va.—Mustard v. Big Creek Dev. Co., 69 W. Va. 713, 717, 72 SE 1021 (where it was said: "True, power can not be conferred on an agent to execute a deed conveying land, except by a writing of the same dignity; but there is high authority for holding, as we do, that where an agent, though verbally empowered to sell, attempts to convey land by deed, such deed will be treated as a good memorandum or contract, binding the vendor to convey the land").

Eng.—Berkeley v. Hardy, 5 B. & C. 355, 11 ECL 496, 108 Reprint 132, 2 ERC 274; Williams v. Walsby, 4 Esp. 220; Harrison v. Jackson, 7 T. R. 207, 101 Reprint 935.

"It is well settled that when an agent having power to make a contract for the sale of land, but no power to make a deed, makes a deed, though the instrument be void as a deed, it is good in equity as a contract to convey, and that a party entering upon lands under such an instrument is, in equity, entitled to retain possession." Lobdell v. Mason, 71 Miss. 937, 942, 15 S 44.

[a] **Illustrations.**—(1) Where a trust deed authorizes the trustee, his legal representatives, or attorney, to sell the land conveyed on default of payment, and a sale is fairly made under a power of attorney not under seal, and the purchase money paid and a conveyance executed by the attorney, the sale will be good in equity, and the purchaser will acquire the equitable title to the premises, and may set up such title in bar of a suit in equity to have the sale set aside. Watson v. Sherman, 84 Ill. 263. (2) So a conveyance for a valuable consideration, made by one authorized only by a letter of attorney not under seal, is good as a contract to convey, and the equitable right of the purchaser thereunder is superior to the title of a subsequent grantee with notice. Groff v. Ramsey, 19 Minn. 44.

[b] **Contract for lease.**—Although an instrument executed by an agent who is only verbally authorized, purporting to rent land for more than one year, is invalid as a lease for the time over one year, it is good in equity as a contract binding the principal to execute a lease. Lobdell v. Mason, 71 Miss. 937, 15 S 44; Mustard v. Big Creek Dev. Co., 69 W. Va. 713, 72 SE 1021. Compare Clement v. Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 A 82, 118 AmSR 747 [rev 69 N. J. Eq. 347, 60 A 419] (holding that a lease of real property for more than three years, signed by an agent whose authority is not in writing, has, against the principal, no other force or effect either in law or in equity than a lease at will, because of the first section of the statute of frauds, 2 Gen. St. p 1602).

90. See Bonds [5 Cyc 736].

91. U. S.—Harman v. Harman, 11 F. Cas. No. 6,071, Baldw. 129 (holding that bonds executed here, under a power of attorney executed in France before a notary according to the law of that country, but not under the seal of the complainants, were not such as were required by the law of Pennsylvania). But see U. S. v. Turner, 28 F. Cas. No. 16,547, 2 Bond 379 (where the court held that where a bond is executed in the name of the firm by a manager of the business, who is so in the habit of using the firm name, authority to sign by a written instrument, sealed or otherwise, need not be shown).

Ga.—Overman v. Atkinson, 102 Ga. 750, 29 SE 758; Whelan v. Sherron, Ga. Dec. Pt II 43. But see U. S. Fidelity, etc., Co. v. Murphy, 4 Ga. A. 13, 60 SE 831 (holding that, under Civ. Code [1895] § 3035, providing that any act authorized or required to be done by any person in the prosecution of his legal remedies may be done by his agent, and that an agent is authorized to make an affidavit and execute any bond required, although his agency be created by parol, authorizes an agent to execute a forthcoming bond without written authority).

Ill.—Maus v. Worthing, 4 Ill. 26.

Mass.—Banorgee v. Hovey, 5 Mass. 11, 4 AmD 17.

Mo.—St. Louis Dairy Co. v. Sauer, 16 Mo. A. 1 (holding that an instrument purporting to be under seal, but which is signed by an agent whose authority is not under seal, is not a good statutory or common-law bond).

N. Y.—Blood v. Goodrich, 9 Wend. 68, 24 AmD 121; Hanford v. McNair, 9 Wend. 54.

N. C.—Kime v. Brooks, 31 N. C. 218; Delius v. Cawthorn, 13 N. C. 90.

Pa.—Gordon v. Bulkeley, 14 Serg. & R. 331 (holding that one who has only a parol authority for the purpose cannot bind his principal by affixing, in his absence, his name and seal to a bond); Cooper v. Rankin, 5 Binn. 613.

S. C.—Boyd v. Boyd, 11 S. C. L. 125.

But see Bannister v. Wallace, 14 Tex. Civ. A. 452, 37 SW 250 (holding that a surety may by parol authorize an agent to sign his name to the bond).

[a] **Assignment of bond.**—Where a sealed bond is transferable by an assignment not under seal, a power of attorney to assign it need not be under seal. Prioleau v. South Western R. Bank, 16 Ga. 582.

92. See Sheanon v. Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 NW 878.

[a] **"To constitute agency in its broader sense,** it is not essential that it should be created by agreement or contract; it may arise under the law, and any one who represents another or undertakes to do something for him and on his authority is properly designated as an agent." State v. Hubbard, 58 Kan. 797, 801, 51 P 290, 39 LRA 860.

Implied agency of:

Child for parent see Parent and Child [29 Cyc 1608 et seq].

Husband for wife see Husband and Wife [21 Cyc 1238 et seq].

Master of vessel for owner see Shipping [36 Cyc 120 et seq].

Parent for child see Parent and Child [29 Cyc 1619].

Partner for copartner see Partnership [30 Cyc 477 et seq].

Seller to sell goods for account of buyer see Sales [35 Cyc 519].

Servant to pledge master's credit for medical or surgical aid see Corporations [10 Cyc 926]; Master and Servant [26 Cyc 1050].

Wife for husband see Husband and Wife [21 Cyc 1215 et seq, 1234 et seq]; Parent and Child [29 Cyc 1607].

Agency by estoppel see infra § 69–76.

93. Baltes v. Ripp, 1 Abb. Dec. (N. Y.) 78, 3 Keyes 210 (holding that one who purchases as for himself at a wrongful sale on execution cannot, when sued for conversion, assert that he purchased for another); Jones v. Parker, 81 S. C. 214, 62 SE 261. See also Stanton v. Granger, 125 App. Div. 174, 109 NYS 134 [aff 193 N. Y. 656 mem, 87 NE 1127 mem]. And see generally infra §§ 491–494.

94. East Haddam Bank v. Shailor, 20 Conn. 18 (in which case D sued A, B, and C as indorsers on notes given as security for moneys loaned by D to them with the understanding that all were interested in the transaction for which the money was needed, while in fact C was only the agent of A and B in the business, and the court held that B, having united in the representations on the faith of which D advanced the money, was estopped from denying C's interest in the transaction).

95. Simar v. Shea, 89 App. Div. 84, 85 NYS 457 [aff 180 N. Y. 558 mem, 73 NE 1132 mem] (holding that if a consignor of goods represents that he has sold them to the consignee, he is

of due care holds out his agent as owner,[96] he is estopped to assert the agency as against third persons who deal with the agent in reliance on his ownership. However, a principal who merely intrusts an agent with possession and control of property necessary to the transaction of the business of the agency is not thereby estopped from asserting his title to the same,[97] as where the agent holds himself out as owner, without the principal's knowledge,[98] or without any act on the part of the principal to superinduce the agent's conduct or show acquiescence therein.[99]

[§ 69] **2. Estoppel to Deny—a. Estoppel of Principal—(1) As against Agent.** The agent may sometimes invoke estoppel against his principal when the latter seeks to hold him responsible for unauthorized acts. If the principal upon being informed of them does not promptly repudiate them he will be estopped to deny the agent's authority.[1]

[§ 70] **(2) As against Third Person[2]—(a) Preliminary Distinctions.** Under the doctrine of equitable estoppel,[3] two persons may find themselves charged with all the consequences of agency as to third persons, when as between themselves there exists as a matter of fact no agency at all, or no agency for the particular purpose in question.[4] Strictly speaking agency by estoppel should be limited to cases in which there is no real, but only an apparent, agency, for when an actual agency is shown, whether by express or implied appointment, it is quite unnecessary to invoke the aid of estoppel.[5] Practically, however, this distinction is not clearly made, and it is often impossible from the facts brought out by the evidence to determine whether the agency was actual or only ostensible.[6] In most cases the distinction would not affect the rights of the parties, but, as elsewhere pointed out, occasionally a case may turn on whether the agency is implied or is one by estoppel.[7] The doctrine of estoppel involves only apparent or ostensible agency, which exists where the principal intentionally, or by want of ordinary care, induces third persons to believe another to be his agent, although he did not in fact employ him.[8] As to third persons the distinction between actual and apparent or ostensible agency is unimportant, as the liability of principal and agent is the same in either case, but as between the parties themselves of course the ostensible agent is no agent at all.[9] Apparent or ostensible agency is really agency by estoppel, and it is more strictly accurate to say that liability arises for the acts of such a so-called agent, not because there is any agency, but because the principal will not be permitted to deny it.[10]

[§ 71] **(b) General Rule.** The same acts and conduct on the part of a principal that, when so intended, work an implied appointment often estop the principal to deny an appointment when no actual agency was intended. Accordingly, it is a general rule that when a principal by any such acts or conduct has knowingly caused or permitted another to appear to be his agent either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances,[11] although no consideration moved to

estopped, as against one who has bought the goods from the consignee in reliance on the representation, to assert that the consignee was merely his selling agent).

96. Ind.—Rathbone v. Sanders, 9 Ind. 217.

Iowa.—White v. Morgan, 42 Iowa 113 (holding that where the owner of property has permitted his agent in possession to represent himself as the owner, whereby he has obtained credit and incurred a debt for an improvement on the property, the owner is estopped to deny his liability therefor).

Mo.—De Baun v. Atchison, 14 Mo. 543.

N. J.—Reed v. Vancleve, 27 N. J. L. 352, 72 AmD 369.

Oh.—Gordon v. Kearney, 17 Oh. 572 (applying the principle that as between two innocent persons he shall suffer who incautiously gives a third person the means of obtaining false credit).

Can.—Young v. MacNider, 25 Can. S. C. 272.

See Munroe v. Whitehouse, 90 Me. 139, 37 A 866 (holding that where a person intrusted with goods as agent sells them to one who has no knowledge that he is agent, but is led to believe from the manner in which he has been allowed to deal with the goods that they are his, the other party may offset against the principal a debt of the agent); Clement v. Leverett, 12 N. H. 317 (holding that where a principal accepted bills of exchange drawn on him by his agent, payable to the order of the agent who agreed to get them discounted for the benefit of the principal, and the agent, assuming to be the owner of the bills, pledged them to a bona fide holder to secure money borrowed for his own use, the principal, having enabled the agent to hold himself out as owner of the bills of exchange, was bound by the pledge).

And see infra §§ 230, 568. See also Fraudulent Conveyances [20 Cyc 323].

97. Greene v. Dockendorf, 13 Minn. 70; McGoldrick v. Willits, 52 N. Y. 612; McNeil v. New York Tenth Nat. Bank, 46 N. Y. 325, 7 AmR 341; Gussner v. Hawks, 13 N. D. 453, 101 NW 898. And see Rogers v. Holden, 142 Mass. 196, 7 NE 768; Cupples v. Whelan, 61 Mo. 583; Weaver v. Barden, 49 N. Y. 286.

98. White v. Morgan, 42 Iowa 113 (holding that the principal is not estopped unless he knew that the agent was acting as owner and failed to repudiate his acts).

99. Curl v. Bond, 52 La. Ann. 1052, 27 S 577 (holding that the fact that an agent in possession and use of the property of his principal held himself out to the public as the owner of the same in such manner as to induce credit to be given him cannot prevail against the principal, where he did nothing to superinduce the agent's conduct and did not acquiesce therein).

1. St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737. See generally infra § 409.

2. **Estoppel:**
By acceptance of benefits of act of person assuming authority see infra §§ 114–123.
By ratification see infra §§ 77–146.
To deny continuance of agency see infra §§ 165, 166.
To deny validity of deed executed in blank where blanks are filled in by agent see Alteration of Instruments §§ 143, 144.

3. See Estoppel [16 Cyc 722 et seq].

4. See infra §§ 71–75.
Partnership as to third persons is a familiar illustration. See Partnership [30 Cyc 390].

5. See supra § 42.

6. See supra §§ 32–42; infra § 71.

7. See supra § 42. See also Cadwell v. Dullaghan, 74 Iowa 239, 37 NW 178; Morris v. Joyce, 63 N. J. Eq. 549, 53 A 139; and infra § 71.

8. See cases infra this note.
[a] **Ostensible agency** (1) exists in law where one either intentionally, or from want of ordinary care, induces another to believe that a third person is his agent, although he never in fact employed him. In other words, one may actually create another his agent, and one may, on the other hand, induce a third person to believe another his agent, and to act with him as such, in which event the principal would be liable for the acts of the agent. Bibb v. Bancroft, 3 Cal. Unrep. Cas. 151, 22 P 484. (2) An agency is ostensible when the principal, intentionally or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him. Fargo First Nat. Bank v. Minneapolis, etc., El. Co., 11 N. D. 280, 91 NW 436; Reid v. Kellogg, 8 S. D. 596, 67 NW 687.
[b] **Ostensible authority to act as agent** may arise if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, allows third persons to act on such apparent agency. Trifler v. Sadle, 92 Nebr. 579, 138 NW 728; Cooper v. Cooper, 90 Nebr. 209, 133 NW 243; Faulkner v. Simms, 68 Nebr. 295, 89 NW 171, 94 NW 115; Holt v. Schneider, 57 Nebr. 523, 77 NW 1086; Blanke Tea, etc., Co. v. Trade Exch. Co., 5 Nebr. (Unoff.) 358, 98 NW 714; Lebanon Sav. Bank v. Blanke, 2 Nebr. (Unoff.) 403, 89 NW 169; Harrison Nat. Bank v. Williams, 2 Nebr. (Unoff.) 400, 89 NW 245. See also infra §§ 211, 212.

9. Bibb v. Bancroft, 3 Cal. Unrep. Cas. 151, 22 P 484; Fargo First Nat. Bank v. Minneapolis, etc., El. Co., 11 N. D. 280, 91 NW 436. And see infra §§ 211, 212.

10. St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737; Griggs v. Selden, 58 Vt. 561, 5 A 504; Pole v. Leask, 9 Jur. N. S. 829.

11. U. S.—Townsend v. Chappell, 12 Wall. 681, 20 L. ed. 436; U. S. v. Coxe, 18 How. 100, 15 L. ed. 299; Baldwin v. Reynolds, 189 Fed. 852, 111 CCA 114; In re Lewis F. Perry, etc.,

the alleged principal,[12] and although there was no actual fraud on the part of such principal,[13] as the estoppel may be allowed on the ground of negligent fault on his part, on the principle that where one of

Co., 172 Fed. 745 [aff 175 Fed. 52, 99 CCA 68]; Burritt v. Rench, 4 F. Cas. No. 2,201, 4 McLean 325.

Ala.—Gibson v. Snow Hardware Co., 94 Ala. 346, 10 S 304. And see Nicholson v. Moog, 65 Ala. 471 (holding that where a merchant abandons his business and allows it to be carried on in his name by a relative, under the authority of the same revenue licenses, the same rule of liability applies for debts afterward contracted in his name as in the case of a retiring partner).

Ark.—Graff v. Lena Lumber Co., 96 Ark. 350, 131 SW 697; Jenkins v. Shinn, 55 Ark. 347, 18 SW 240; Hynson v. Noland, 14 Ark. 710.

Cal.—Gosliner v. Grangers' Bank, 124 Cal. 225, 56 P 1029; Buckley v. Silverberg, 113 Cal. 673, 45 P 804; Allin v. Williams, 97 Cal. 403, 32 P 441; Karns v. Olney, 80 Cal. 90, 22 P 57, 13 AmSR 101; Quinn v. Dresbach, 75 Cal. 159, 16 P 762, 7 AmSR 138. See also Seymour v. Oelrichs, 156 Cal. 782, 106 P 88, 134 AmSR 154.

Colo.—Farrer v. Caster, 17 Colo. A. 41, 67 P 171.

Del.—Excelsior Refining Co. v. Murphey, 22 Del. 24, 73 A 1040.

D. C.—Dye v. Virginia Midland R. Co., 20 D. C. 63.

Fla.—T. G. Bush Grocery Co. v. Conely, 61 Fla. 131, 55 S 867.

Ga.—Germain Co. v. Camden County Bank, (A.) 80 SE 302; Davis v. Preston, 12 Ga. A. 65, 76 SE 766; Burch v. Schulz Co., 8 Ga. A. 555, 69 SE 1087; Fitzgerald Cotton Oil Co. v. Farmers' Supply Co., 3 Ga. A. 212, 59 SE 713.

Ida.—Morgan v. Neal, 7 Ida. 629, 65 P 66, 97 AmSR 264.

Ill.—Union Stockyard, etc., Co. v. Mallory, etc., Co., 157 Ill. 554, 41 NE 888, 48 AmSR 341; Twick v. Peterson, 170 Ill. A. 291; Philadelphia, etc., Coal, etc., Co. v. Capps, etc., Co., 167 Ill. A. 299; Brown v. Shubert Theatrical Co., 166 Ill. A. 322; Swannell v. Byers, 123 Ill. A. 545; Williams v. Pelley, 96 Ill. A. 346; St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 74 Ill. A. 619 [aff 175 Ill. 557, 51 NE 911, 67 AmSR 238]. See also James v. Conklin, 158 Ill. A. 640.

Ind.—Kiefer v. Klinsick, 144 Ind. 46, 42 NE 447; Over v. Schiffling, 102 Ind. 191, 26 NE 91; Growcock v. Hall, 82 Ind. 202; Pursley v. Morrison, 7 Ind. 356, 63 AmD 424; Wagner v. McCool, 52 Ind. A. 124, 100 NE 395; German-American Bldg. Assoc. v. Droge, (A.) 41 NE 397; Burnett v. Gluting, 3 Ind. A. 415, 29 NE 154, 927.

Iowa.—Ney v. Eastern Iowa Tel. Co., 144 NW 383; Porter v. Farmers', etc., Sav. Bank, 148 Iowa 629, 120 NW 633; Beebe v. Equitable Mut. L., etc., Assoc., 76 Iowa 129, 40 NW 122; Whiting v. Western Stage Co., 20 Iowa 554; Tappan v. Morseman, 18 Iowa 499.

Ky.—Jones v. Commercial Bank, 78 Ky. 413.

La.—Airey v. Okolona Sav. Inst., 33 La. Ann. 1346; Rankin v. Stewart, 5 La. Ann. 357; Lochte v. Gélé, McG. 52.

Me.—Breckenridge v. Lewis, 84 Me. 349, 24 A 864, 30 AmSR 353; Trundy v. Farrar, 32 Me. 225.

Mass.—Holden v. Phelps, 141 Mass. 456, 5 NE 815.

Mich.—Pettinger v. Alpena Cedar Co., 175 Mich. 162, 166, 141 NW 535 [quot Cyc]; Clark v. Dillman, 108 Mich. 625, 66 NW 570.

Minn.—Sinclair v. Investors' Syndicate, 146 NW 1109; Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 NW 236; Columbia Mill Co. v. National Bank of Commerce, 53 Minn. 224, 53 NW 1061; Tice v. Russell, 43 Minn. 66, 44 NW 886.

Mo.—Carthage First Nat. Bank v. Newark Mut. Ben. L. Ins. Co., 145 Mo. 127, 46 SW 615; Summerville v. Hannibal, etc., R. Co., 62 Mo. 391; Brooks v. Jameson, 55 Mo. 505; De Baun v. Atchison, 14 Mo. 543; Law Reporting Co. v. Elwood Grain Co., 135 Mo. A. 10, 115 SW 475; St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737; Hefferman v. Boteler, 87 Mo. A. 316; Suddarth v. Empire Lime Co., 79 Mo. A. 585; Haubelt v. Rea, etc., Mill Co., 77 Mo. A. 672; Morse v. Diebold, 2 Mo. A. 163.

Nebr.—Triller v. Sadle, 92 Nebr. 579, 138 NW 728; Faulkner v. Simms, 68 Nebr. 295, 89 NW 171, 94 NW 113; Holt v. Schneider, 57 Nebr. 523, 77 NW 1086; Johnston v. Milwaukee, etc., Inv. Co., 46 Nebr. 480, 64 NW 1100; Lebanon Sav. Bank v. Blanke, 2 Nebr. (Unoff.) 403, 89 NW 169; Harrison Nat. Bank v. Williams, 2 Nebr. (Unoff.) 400, 89 NW 245.

N. H.—Knapp v. U. S., etc., Exp. Co., 55 N. H. 348.

N. J.—Putnam v. Clark, 29 N. J. Eq. 412 [aff 33 N. J. Eq. 238]. See also Lambert v. Metropolitan Sav., etc., Assoc., 65 N. J. L. 79, 46 A 766.

N. M.—Western Homestead, etc., Co. v. Albuquerque First Nat. Bank, 9 N. M. 1, 47 P 721.

N. Y.—Poel v. Brunswick-Balke-Collender Co., 159 App. Div. 365, 144 NYS 725; Talcott v. Standard Oil Co., 149 App. Div. 694, 134 NYS 617; Kilmer v. Hutton, 131 App. Div. 625, 116 NYS 127; Page v. Methfessel, 71 Hun 442, 25 NYS 11 [aff 145 N. Y. 602 mem, 40 NE 164 mem]; Johnson v. Jones, 4 Barb. 369 (where the court said that where a person is sought to be charged for the act of another, and there is evidence of an apparent authority, the question to be determined is, not what power was intended to be given to the agent, but what power a third person dealing with him had a right to infer, from his own acts and those of his principal, that he possessed); Trankla v. McLean, 18 Misc. 221, 4 NYS 385; Maher v. Willson, 3 NYS 80 [aff. 123 N. Y. 655 mem, 25 NE 954 mem].

N. C.—Trollinger v. Fleer, 157 N. C. 81, 72 SE 795; Williams v. Southern R. Co., 155 N. C. 260, 71 SE 346; James v. Russell, 92 N. C. 194.

Oh.—Harbison v. Iliff, 10 OhS&CP 58, 8 OhNP 392.

Okl.—Midland Sav., etc., Co. v. Sutton, 30 Okl. 448, 120 P 1007.

Or.—Leonard v. Howard, 67 Or. 203, 135 P 549; Neppach v. Oregon, etc., R. Co., 46 Or. 374, 80 P 482.

Pa.—De Witt v. De Witt, 202 Pa. 255, 51 A 987; Hubbard v. Ten Brook, 124 Pa. 291, 16 A 817, 10 AmSR 585, 2 LRA 823 note; Gobey v. Wallace, 48 Pa. Super. 61; Mecough v. Loughery, 12 Phila. 416 [aff 37 LegInt 341].

Philippine.—Macke v. Camps, 7 Philippine 553.

S. C.—Jenkins v. Hogg, 7 S. C. L. 321.

Tex.—Cannel Coal Co. v. Luna, (Civ. A.) 144 SW 721; Brennan v. Dansby, 43 Tex. Civ. A. 7, 95 SW 700; Colorado Canal Co. v. McFarland, (Civ. A.) 94 SW 400; Baker, etc., Co. v. Kellett-Chatham Mach. Co., (Civ. A.) 84 SW 661; Bay City Irr. Co. v. Sweeney, (Civ. A.) 81 SW 545; Eastern Mfg. Co. v. Brenk, 32 Tex. Civ. A. 97, 73 SW 538; Barnes v. Downes, 2 Tex. A. Civ. Cas. § 524. See also Merrill v. Bradley, (Civ. A.) 121 SW 561; Cadenhead v. Rogers, (Civ. A.) 96 SW 952.

Utah.—Campbell v. Gowans, 35 Utah 268, 100 P 397, 23 LRANS 414 and note, 19 AnnCas 660.

Vt.—Valiquette v. Clark Bros. Coal Min. Co., 83 Vt. 538, 77 A 869, 138 AmSR 1104, 34 LRANS 440 and note; Landon v. Proctor, 39 Vt. 78; Tier v. Lampson, 35 Vt. 179, 82 AmD 634; Hawkins v. Barney, 27 Vt. 392.

Va.—Hooe v. Oxley, 1 Wash. (1 Va.) 19, 1 AmD 425.

Wash.—Haner v. Furuya, 39 Wash. 122, 81 P 98.

W. Va.—Dewing v. Hutton, 48 W. Va. 576, 37 SE 670.

Eng.—Pickard v. Sears, 6 A. & E. 469, 33 ECL 257, 112 Reprint 179, 11 ERC 78; Freeman v. Cooke, 2 Exch. 654, 11 ERC 82; Pole v. Leask, 9 Jur. N. S. 829.

Ont.—Commercial Bank v. Merritt, 21 U. C. Q. B. 358.

Que.—Bisaillon v. Elliott, 13 Que. Super. 289.

"If a person holds out another as his agent, by placing him in control of his business or property, and a third person acts upon the faith of such appearances, the principal may be bound by the acts of the agent, if within the scope of such ostensible authority, although, as between the agent and employer, no such authority in fact existed." Barnett v. Glutting, 3 Ind. A. 415, 421, 29 NE 154, 927 [cit Over v. Schiffling, 102 Ind. 191, 26 NE 91].

"Where a person, by words or conduct, represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency, as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact." Tiffany Agency p 34 [quot Trollinger v. Fleer, 157 N. C. 81, 86, 72 SE 795].

[a] **An instruction** that, if a person knowingly and voluntarily permits another to hold himself out to the world as his agent, he will be held to adopt his acts and be bound as principal to the person who gives credit to the one acting as such agent is proper. Swannell v. Byers, 123 Ill. A. 545.

[b] **The various methods by which a person may so hold out another as his agent** as to be estopped to deny the existence of the agency were enumerated by the court in Hackett v. Van Frank, 105 Mo. A. 384, 394, 79 SW 1013, where it was said: "By the law of estoppel, a man may be bound by an unauthorized and unratified act. This consequence ensues when the conduct of the represented party induced some one to trust the pretending agent's assumed authority in matters which would entail a loss on the trusting party, if the one represented were permitted to deny responsibility. An estoppel may be raised because the supposed principal intentionally held the actor out to the public as an agent possessed of the authority he assumed; or permitted the actor to hold himself out in that way; or, by negligent conduct, created a false impression respecting the actor's authority; or negligently failed to correct such an impression created by the actor himself, when the principal ought, in reason, to have known it was likely to entrap some one."

[c] **Estoppel as to acts done in excess or in abuse of actual authority.**—The doctrine stated in the text applies equally to cases in which there is an entire want of authority to act as agent and to those in which an agent with certain authority is permitted to appear to have larger authority. See infra §§ 211–215.

[d] **Estoppel to assert revocation of agency.**—Where a person, after long being the agent of defendants in selling stoves, continued, after the termination of the agency, with their knowledge and acquiescence, to hold himself out to the world as their agent, and plaintiff in buying a stove of him was thereby led to regard him as their agent, defendants were estopped from denying its continuation. Bradish v. Belknap, 41 Vt. 172. See also infra §§ 165, 166.

12. Booth v. Wiley, 102 Ill. 84.

13. Hackett v. Van Frank, 105 Mo. A. 384, 394, 79 SW 1013 (where it was said: "Though fraud may be an ingredient of the case, it is not essential").

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two innocent persons must suffer loss the loss will fall on him whose conduct brought about the situation.[14] This rule is particularly applicable where the principal has knowingly by such acts and conduct recognized the agency through a long course of dealing or in many transactions,[15] and the rule has accordingly been very frequently applied in a great number and variety of transactions.[16]

14. U. S.—Stowe v. U. S., 19 Wall. 13, 22 L. ed. 144; Whiting v. Wellington, 10 Fed. 810.

Cal.—Shirey v. All Night and Day Bank, 166 Cal. 50, 134 P 1001 (holding that, in accordance with Civ. Code § 3543, providing that, when one of two innocent parties must suffer for the act of a third, he whose negligence permitted it must be the sufferer, where the owner of real estate deeded it to his agent to sell, the owner will be estopped from denying the authority of the agent as against purchasers for value, without notice that the agent was not owner).

Ida.—Morgan v. Neal, 7 Ida. 629, 65 P 66, 97 AmSR 264.

Ill.—Bartlett v. Chicago First Nat. Bank, 247 Ill. 490, 93 NE 337.

Ind.—Larue v. American Diesel Engine Co., 176 Ind. 609, 96 NE 772.

Minn.—Dispatch Printing Co. v. Nat. Bank of Commerce, 109 Minn. 440, 124 NW 236.

Mo.—Law Reporting Co. v. Elwood Grain Co., 135 Mo. A. 10, 115 SW 475; Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013; Hutting Sash, etc., Co. v. Gitchell, 69 Mo. A. 115.

Oh.—Harbison v. Iliff, 10 OhS&CP 58, 8 OhNP 392.

Okl.—Midland Sav., etc., Co. v. Sutton, 30 Okl. 448, 120 P 1007 (holding that one who leads an innocent party to rely on the appearance of another's authority to act for him will not be heard to deny the agency to that party's prejudice).

Tex.—Birge-Forbes Co. v. St. Louis, etc., R. Co., 53 Tex. Civ. A. 55, 115 SW 333.

Utah.—Campbell v. Gowans, 35 Utah 268, 100 P 397, 23 LRANS 414, 19 AnnCas 660.

W. Va.—Dewing v. Hutton, 48 W. Va. 576, 37 SE 670.

"Though fraud may be an ingredient of the case, it is not essential. The estoppel may be allowed on the score of negligent fault, on the principal that where one of two innocent persons must suffer loss, the loss will be visited on him whose conduct brought about the situation. Of course, if a man presents some one to the public as his agent, whom he in fact has not appointed, and on that score afterwards denies responsibility for the pretended agent's acts, the defense is highly fraudulent; as it is, too, if a man denies responsibility after advisedly permitting another to represent him, when no appointment had been made, or beyond the scope of the appointment. That a man knew what was done in his name by another may be established by direct evidence, or by proof that it was done in a manner to warrant the inference that the party represented knew of it." Hackett v. Van Frank, 105 Mo. A. 384, 394, 79 SW 1013.

[a] **Narrower statement of rule.**—There is no general rule of law that where one of two innocent persons must suffer for the acts of a third, that innocent person who has enabled such third person to occasion the loss must himself sustain the loss; but there is a general rule of law that in such a case an innocent person who has enabled the third person to occasion the loss by his neglect of some duty owing from him to the other innocent person must himself sustain the loss. Rimmer v. Webster, [1902] 2 Ch. 163 (holding, accordingly, that where an owner of property invests another person with his indicia of title, neither intending, nor giving grounds for a legitimate presumption that he intends, that such person should deal with the property with some third person, the owner is not primarily liable, as between himself and an innocent third person, for any loss occasioned by a dealing with the property, unauthorized by him, between the innocent third person and the person so invested with the indicia of title, for no duty on the part of the owner can be inferred toward the third person, and there cannot accordingly be any neglect of such duty; but that where an owner of property invests another person with his indicia of title, intending or giving grounds for a legitimate presumption that he intends, that such person should deal with the property with some third person in a limited manner, the owner in such a case is primarily liable, as between himself and an innocent third person whom he has neglected to inform of the existence and extent of the limitation, for any loss occasioned by a dealing with the property between the innocent third person and the person so invested with the indicia of title in excess of the limit imposed, for a duty is inferred on the part of the owner to inform the third person, whom he invites to deal with the property, of the existence and extent of the limitation).

15. Ala.—Gibson v. Snow Hardware Co., 94 Ala. 346, 10 S 304.

Cal.—Ukiah Bank v. Mohr, 130 Cal. 268, 62 P 511 (where plaintiff's sued on drafts drawn on defendants by an alleged agent of the latter and cashed by plaintiffs for him, many precisely similar drafts having been cashed by them and paid by defendants).

Iowa.—Wilson v. Fones, 99 Iowa 132, 68 NW 588 (holding that a purchaser of land subject to a lease, who permitted the former owner to collect the rents, which he paid over to her from time to time, thereby recognized him as her agent, and was bound by an authority given by him to the tenant to sell grain); Whiting v. Western Stage Co., 20 Iowa 554.

Me.—Stratton v. Todd, 82 Me. 149, 19 A 111.

Mich.—Pettinger v. Alpena Cedar Co., 175 Mich. 162, 166, 141 NW 535 [quot Cyc]; Hirschmann v. Iron Range, etc., R. Co., 97 Mich. 384, 56 NW 842.

Nebr.—Cheshire Provident Inst. v. Pensner, 63 Nebr. 682, 88 NW 849 (holding that where an agent has been in the habit of investing money for his principal, paying the taxes where foreclosures were necessary, and making all collections of interest and frequently of the principal, the principal is estopped to deny the authority of the agent to collect a note in his hands).

N. H.—Knapp v. U. S., etc., Express Co., 55 N. H. 348 (holding that an express company whose agents have been accustomed to receive and to send notes for collection to points beyond its own line, delivering them to a connecting express company, is estopped to deny that such agents were authorized to make contracts on its behalf to transact such business beyond the terminus of its own line).

N. Y.—Hannon v. Siegel-Cooper Co., 167 N. Y. 244, 60 NE 597, 52 LRA 429 (holding that where defendant corporation, conducting a department store, advertised itself as carrying on the practice of dentistry in one of its departments, and plaintiff employed defendant to treat her teeth, and the work was unskillfully done, for which she claimed damages, defendant was estopped from denying the agency of the persons doing the work, although in fact they were carrying on the practice on their own account); Ferris v. Kilmer, 48 N. Y. 300 [rev 47 Barb. 411] (holding that, where one authorizes another to use his name in conducting and carrying on a business, he is liable for the debts incurred in such business, although he has no beneficial interest therein); Durst v. Burton, 47 N. Y. 167, 7 AmR 428 [aff 2 Lans. 137] (holding that where defendants owned a cheese factory which they leased to C to run, they having no supervision or control, and they furnished the materials, took the products, and sold them in the market as manufactured by themselves, while as between themselves C was an independent contractor, as to the public defendants assumed the character of principals); Sloss Iron, etc., Co. v. Jackson Architectural Iron Works, 103 App. Div. 316, 92 NYS 1056 (holding that where plaintiff through its agent had been accustomed for a long time, in selling iron to defendant, to make deliveries on the order of a particular representative of defendant, and when any iron was wanted such representative gave direction to have deliveries made, and they could not be made except on his order, plaintiff was justified in dealing with him as defendant's authorized agent); Tucker v. Woolsey, 6 Lans. 482, 64 Barb. 142; Marine Bank v. Butler Colliery Co., 1 Silv. Sup. 155, 5 NYS 291 [aff 125 N. Y. 695 mem, 26 NE 751 mem].

Or.—Neppach v. Oregon, etc., R. Co., 46 Or. 374, 80 P 482 (holding that one who is held out by a railroad company as its authorized land agent, and who transacts its entire business in relation to the acquisition and disposal of lands, may bind the company by a contract extending the time for payment by a purchaser of lands from it, or waiving a strict compliance by him with the provisions of his contract in that regard).

Pa.—Ruane v. Murray, 26 Pa. Super. 187 (holding that where defendant permitted a saloon to be conducted in her name, and actively aided a third person in holding himself out to the public as the responsible proprietor by annually applying for a license in his name, she clothed him with apparent authority to bind her by contracts within the scope of that particular business, and if he, when he employed plaintiff, represented himself to be acting as the agent of defendant she was bound by the contract).

Tex.—Elsner v. State, 30 Tex. 524.

Vt.—Landon v. Procter, 39 Vt. 78.

Va.—Hooe v. Oxley, 1 Wash. 19, 1 AmD 425 (holding that, if, in consequence of a notorious agency, the agent is in the habit of drawing bills which the principal has regularly paid, this is such an affirmance of his power to draw that the principal will be bound to pay other bills, although the agent misapplies the money raised thereby).

Eng.—Willis v. Joyce, 11 Aspin. 601; Summers v. Solomon, 7 E. & B. 879, 90 ECL 879, 119 Reprint 1474 (where it appeared that defendant owned a jeweler's shop at Lewes, living himself at London and visiting the shop monthly; that the shop was managed by a shopman from whom plaintiff had for some years received orders at Lewes in defendant's name for goods which were sent to the shop and afterward paid for by defendant; that the shopman absconded and came to London and ordered jewelry there of plaintiff in defendant's name, which he carried away with him; and the court held that the previous course of dealing justified plaintiff in assuming that the shopman had general authority to order goods for the shop on defendant's credit, and that defendant was therefore liable for the goods obtained by the shopman in London).

16. U. S.—Jefferson Hotel Co. v. Brumbaugh, 168 Fed. 867, 94 CCA 279 (holding that where the owners of a building in process of erection permitted the architects, who were the owners' supervising agents, to contract for extras without protest, and

Persons estopped or protected. Estoppel to deny the agency in such cases applies as against one who, with notice of the facts, succeeds to the alleged principal's rights in the subject matter of the apparent agency,[17] or who acquires his rights without consideration,[18] and applies in favor of one who deals with the person with whom the alleged agent dealt, if he has relied on the apparent agency to his injury.[19]

[§ 72] **(c) Elements of the Rule—aa. Representation by Principal.** The general rule, it will be observed, embraces three primary elements.[20] These are: (1) A representation by the principal;[21] (2) a reliance upon such representation by a third person;[22] and (3) a change of position by such third person in reliance upon such representation.[23] All three elements must be present to bring a case within the rule.[24] The person sought to be bound must, by his words or conduct, have represented that the person assuming to act for him had authority so to do.[25] Accordingly an estoppel does not arise from the mere fact that the agent has

after the extras had been inserted continued in possession and enjoyment thereof, the owners could not thereafter deny the general authority of the superintendent to order the extras); Burton v. Burley, 13 Fed. 811, 9 Biss. 253 (holding that where the president of a national bank instructed its correspondent bank to charge up against the bank of which he was president the amount of a note given by him, in payment of such note, and an account was rendered showing the transaction, the bank was estopped from denying the correctness of the charge in an action by a receiver, subsequently appointed, to set aside the transaction).

Cal.—Dover v. Pittsburg Oil Co., 143 Cal. 501, 77 P 405 (holding that, where plaintiff's brother indorsed plaintiff's name without authority to a power of attorney for the transfer of stock, and plaintiff made no objection when his attention was directed to the matter by the secretary of the corporation, plaintiff was estopped to deny the authority of his brother to make the indorsement).

Colo.—Jordan v. Greig, 33 Colo. 360, 80 P 1045 (holding that, in an action to cancel a lease of mining property on the ground that the father of the lessor had, with the latter's knowledge and consent, executed a prior lease to plaintiff's assignor, evidence that the father had, for some time before the execution of the alleged prior lease, corresponded with the then lessee with regard to the taxes, made inquiries as to the condition of the property, and answered all letters addressed to the son, was sufficient to support a finding that the son was estopped to repudiate the action of his father in making the lease to plaintiff's assignor).

D. C.—Dye v. Virginia Midland R. Co., 20 D. C. 63 (holding that the question of agency of one railroad company for another depends, as tc the public, not on the actual contract between the two, but on what the principal company, by its holding out, invited the public to believe).

Ga.—People's Sav. Bank v. Smith, 114 Ga. 185, 39 SE 920 (holding that, where the holder of a note surrenders to the maker collaterals given to secure its payment in order that the latter may sell them and apply the proceeds to the payment of his indebtedness, the relation of principal and agent exists between them in so far as third persons are concerned); Florida, etc., R. Co. v. Varnedoe, 81 Ga. 175, 7 SE 129 (holding that a railroad company which, with knowledge and without objection, allows a person to rent an office on its right of way and put up a sign styling it the office of the company is liable for ties purchased by such person in its name).

Ida.—Morgan v. Neal, 7 Ida. 629, 65 P 66, 97 AmSR 264 (holding that where a party purchases a promissory note, and permits the payee thereof to collect all interest as well as the principal, and fails to notify the maker of such note of his ownership, he is estopped from denying the agency after the note has been fully paid).

Ill.—Booth v. Wiley, 102 Ill. 84 (holding that if the holder of a judgment which is a lien on land allows it to be believed that one assuming to act as his agent in postponing the judgment lien to a trust deed about to be made to secure a loan has authority to do so, and the lender of the money secured by the deed and a surety on the note given act in that belief in taking the deed and signing the note, he is bound by the act of the apparent agent).

Ind.—Foss-Schneider Brewing Co. v. McLaughlin, 5 Ind. A. 415, 31 NE 838 (holding that, where defendant company gave to another the "sole right" to control the sale of its goods in a certain city, furnished him with a delivery wagon, and built him an ice house, and on the ice house and wagon defendant either had painted its corporate name and that of the other as agent, or, after the same had been painted, permitted it to remain, there was a holding out of such person as agent of defendant, and one acting in good faith had a right to deal with him as such).

Mass.—Holden v. Phelps, 141 Mass. 456, 5 NE 815 (holding that, where the records of a bank purported to give an authority to its treasurer to assign mortgages, the bank was bound by the authority appearing on its records, although the authority had never been given to the treasurer by the trustees, the word "assign" being an unauthorized interpolation in the record).

Mich.—Jewett v. Bryant, 159 Mich. 345, 123 NW 1097 (holding that one who holds out another as his agent to borrow money is estopped to deny the authority as against another who knows of and relies on the apparent authority).

Mo.—Johnson v. Hurley, 115 Mo. 513, 22 SW 492 (holding that where the conduct of a landowner was such as to have reasonably induced defendant to believe that one with whom he dealt as agent had authority to make sale of the land, and defendant, acting on such belief, paid the price and expended large sums in improvements, the owner will be estopped to dispute the agent's authority).

N. J.—Morris v. Joyce, 63 N. J. Eq. 549, 53 A 139 (holding that, by leaving all her papers in possession of her agent, plaintiff was estopped to deny the agent's authority to deliver a mortgage and assignment to the indorser, either absolutely or as collateral).

Tex.—Birge-Forbes Co. v. St. Louis, etc., R. Co., 53 Tex. Civ. A. 55, 115 SW 333.

Va.—Marrow v. Brinkley, 85 Va. 55, 6 SE 605 (holding that where the agent of plaintiffs' intestate was authorized by the latter to represent him in suits to sell his land for debt, which fact was known to plaintiffs who were claimants of the land, and they did not, after intestate's death, revoke or question the agent's authority during the pendency of the suits, they were estopped after a sale to set up the agent's want of authority).

Wash.—Haner v. Furuya, 39 Wash. 122, 81 P 98 (holding that where plaintiff was referred to room 7, upstairs, and was there told by the person in charge of the office that his account was all right and would be paid by defendant, if room 7 was in fact one of the departments of defendant's business defendant was estopped to deny the authority of the alleged agent).

17. Booth v. Wiley, 102 Ill. 84.

18. Philadelphia Trust, etc., Ins. Co. v. Philadelphia Seventh Nat. Bank, 6 Fed. 114.

19. McCalla v. American Freehold Land Mortg. Co., 90 Ga. 113, 15 SE 687; Gore v. Royse, 56 Kan. 771, 44 P 1053.

[a] **Although authority to do an act with reference to another's land must be in writing,** and there is no such authority, yet the principal may be estopped, as against a bona fide purchaser from one who dealt with the agent, to question the validity of the agent's act. McCalla v American Freehold Land Mortg. Co., 90 Ga. 113, 15 SE 687; Gore v. Royse,, 56 Kan. 771, 44 P 1053.

20. **Elements of estoppel** generally see Estoppel [16 Cyc 726 et seq].

21. See infra this section.

22. See infra § 73.

23. See infra § 74.

24. Pettinger v. Alpena Cedar Co., 175 Mich. 162, 141 NW 535; Clark v. Dillman, 108 Mich. 625, 66 NW 570.

25. Ark.—Jenkins v. Shinn, 55 Ark. 347, 18 SW 240.

Conn.—Fellows v. Hartford, etc., Steamboat Co., 38 Conn. 197.

Ill.—Pease v. French, 197 Ill 101, 64 NE 368 [aff 98 Ill. A. 24]; Schmidt v. Shaver, 196 Ill. 108, 63 NE 655, 89 AmSR 250 (holding that where a guardian of an infant left an assignment of a judgment recovered by the latter in the vault of a corporation for safe-keeping, and the corporation's manager delivered it to the assignee without the guardian's knowledge or authority, appropriating the proceeds himself, it was insufficient to show that the guardian had so held out the manager as his agent to deliver the assignment as to estop him or his ward from denying the agency); Hawley v. Curry, 74 Ill. A. 309.

Ind.—Robinson v. Nipp, 20 Ind. A. 156, 50 NE 408.

Iowa.—Gilman Linseed Oil Co. v. Norton, 89 Iowa 434, 56 NW 663, 48 AmSR 400 (holding that an owner of flaxseed whose buyer had sold some of it without his knowledge was not estopped to reclaim his seed from the purchaser because it was in possession and control of the buyer while he was doing a business in other grains on his own account).

Me.—Munroe v. Whitehouse, 90 Me. 139, 37 A 866.

Mass.—Nourse v. Jennings, 180 Mass. 592, 62 NE 974; Kingman v. Pierce, 17 Mass. 247.

Mich.—Wilson v. Campbell, 110 Mich. 580, 68 NW 278, 35 LRA 544 (holding that the fact that a mortgagee was a stockholder in a company to which the mortgage debt was paid does not estop him to deny the company's authority to accept payment).

Mo.—Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013.

N. M.—Ilfeld v. Stover, 4 N. M. 54, 12 P 714 (holding that where it appeared that a creditor took a conveyance of a store from his debtor in satisfaction of the debt, and that the debtor had a stock of liquor in the store and requested permission to take out a license in the creditor's

acted for the principal on one or more previous occasions, but not under appearance of a general authority so to act,[26] nor does the rule in question apply to acts of the agent outside the scope of the authority which the principal has caused him to seem to possess.[27] Furthermore no estoppel arises unless the representations, by words or by conduct, were made either with the intention that they should be acted upon, or under such circumstances as to induce a reasonable and prudent man to believe that they were intended to be acted upon.[28] If the claim of estoppel is based on the alleged principal's acquiescence in or recognition of another's assumption of authority, it must appear that he had knowledge thereof else no estoppel arises.[29]

[§ 73] **bb. Reliance on Representation by Third Person.** It is essential, in order to estop a man to deny the authority of another to act for him, that his representation of authority, whether by word or by conduct, should have been believed and relied upon in good faith by the person asserting the estoppel; that such person should have been misled by the representation; and that his change of position should have been induced thereby.[30] No

name to retail the same, which permission the creditor gratuitously gave him, and the license was conspicuously posted on the premises, in the absence of evidence of the creditor's assent to or knowledge of the debtor's acts as his agent, the creditor was not chargeable with payment of goods delivered the debtor on his representation that he was the creditor's agent).

N. Y.—Rowan v. Kemp, 103 NYS 775 (holding that the fact that defendant's brother was a guest in defendant's family apartment, having no home of his own in the city, and transacted the business in question largely from such residence, did not constitute a holding out of the brother by defendant as his agent).

Oh.—Chicago Cottage Organ Co. v. Rishforth, 24 Oh. Cir. Ct. 660.

Or.—Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 44 P 390.

Pa.—Harvey v. Schuylkill Trust Co., 199 Pa. 421, 49 A 277 (holding that defendant was not estopped to deny that its solicitor, who had an office with it, where he also, to plaintiff's knowledge, attended to law business other than defendant's, had authority to make contracts or receive money for it, although in communicating with plaintiff he used its letterheads, and sent his receipts and forged instruments drawn on forms in use by it, and in one case sent her a mortgage, money for the purchase of which from defendant she had sent him); Mecouch v. Loughery, 12 Phila. 416 [aff 37 LegInt 341].

Tex.—Freiberg v. Beach Hotel, etc., Impr. Co., 63 Tex. 449; Fred W. Wolf Co. v. Galbraith, 39 Tex. Civ. A. 351, 87 SW 390; Lenoir v. Rosenthall, 1 Tex. A. Civ. Cas. § 209.

See Thurber v. Cecil Nat. Bank, 52 Fed. 513 [rev on other grounds 59 Fed. 913, 8 CCA 365]; Rimmer v. Webster, [1902] 2 Ch. 163.

26. Cal.—Ruddock Co. v. Johnson, 67 P 680.

Mass.—Nourse v. Jennings, 180 Mass. 592, 62 NE 974 (where it appeared that plaintiff's son-in-law, being indebted to defendant for two thousand dollars on a note to which he had forged plaintiff's name, applied to defendant for a further loan of two thousand five hundred dollars, offering as security a mortgage on plaintiff's property, and agreeing that the mortgage should also secure the prior indebtedness; that plaintiff, in ignorance of the debt of two thousand dollars, executed to defendant a mortgage for the two thousand five hundred dollars, "together with any sums that I now owe" defendant; and it was held that the facts that plaintiff had mortgaged her property on two previous occasions to raise money to assist her son-in-law, and that the former negotiations were conducted by him, did not show that he had apparent authority to make the agreement that the mortgage should cover the prior indebtedness).

Mo.—Bank of Commerce v. Bernero, 17 Mo. A. 313 (holding that the mere fact that notes previously executed by an agent without authority had been purchased by a third person and paid at maturity by some one does not of itself estop the person in whose name they were executed from denying the agent's authority to execute a particular note, unless there has been a course of dealing between the parties which would justify belief in authority in the particular instance).

Tex.—Owens v. Hughes, (Civ. A.) 71 SW 783 (holding that the mere fact that lumber was purchased on a certain occasion by one who represented himself as agent of another, and was so recognized by his principal who paid the bill thus contracted, would not estop the principal from denying the agent's authority to obtain lumber a short time afterward from the same seller by representing himself to be acting in the same capacity); Lenoir v. Rosenthall, 1 Tex. A. Civ. Cas. § 209.

Eng.—Pole v. Leask, 9 Jur. N. S. 829; Margetts v. Perks, 34 L. J. Ch. 109.

See Burlington, etc., R. Co. v. Sherwood, 62 Iowa 309, 17 NW 564 (holding that the fact that the principal had been in the habit of ratifying unauthorized sales made by the agent did not bind him to ratify the unauthorized sale in suit).

27. Ill.—Elgin First Nat. Bank v. Kilbourne, 127 Ill. 573, 20 NE 681, 11 AmSR 174.

Ind.—Robinson v. Nipp, 20 Ind. A. 156, 50 NE 408.

Me.—Spofford v. Hobbs, 29 Me. 148, 48 AmD 521.

Mass.—Mt. Morris Bank v. Gorham, 169 Mass. 519, 48 NE 341.

Mo.—Walker v. Hannibal, etc., R. Co., 121 Mo. 575, 26 SW 360, 42 AmSR 547, 24 LRA 363 (holding that where a station agent caused drills of a lime company to be put on a baggage car, and they were carried gratuitously, and thrown off by the baggageman near the lime company's quarry, the railroad company is not estopped to deny that the station agent acted without authority, it not being shown that he sent the drills as freight or that he had authority to send them on a passenger train); Fougue v. Burgess, 71 Mo. 389; Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013 (holding that apparent authority to deal in beer as the agent of another gives no apparent authority to deal in whisky).

Nebr.—Nichols v. Hall, 4 Nebr. 210.

Oh.—Harbison v. Iliff, 10 OhS&CP 58, 8 OhNP 392.

Vt.—Adams v. Flanagan, 36 Vt. 400.

[a] **Illustration.**—Where the agent of an assignee of a mortgage, employed to collect the debt secured thereby, obtained a conveyance of the premises to her in satisfaction of her claim, but the assignee does not claim any superior rights because of the conveyance, she is not as a matter of law estopped to deny that the agent was acting for her in procuring the conveyance. Warren v. Hayes, 74 N. H. 355, 68 A 193.

28. Clark v. Dillman, 108 Mich. 625, 66 NW 570. See also Estoppel [16 Cyc 726 et seq].

[a] **The test** is whether under the circumstances of the case a reasonably prudent man would be justified in believing that one was acting for another. Harbison v Iliff, 10 OhS&CP 58, 8 OhNP 392.

[b] **Communication of representation.**—Statements by plaintiff to a third person, not made to be communicated to defendant, to the effect that a certain person was authorized to act as his agent do not, in a controversy with defendant, estop plaintiff from denying the authority of such alleged agent, even though the person to whom the statements were made afterward came into defendant's employ. Maguire v. Selden, 103 N. Y. 642, 8 NE 517. And see Mecouch v. Loughery, 12 Phila. (Pa.) 416 [aff 37 LegInt 341] (holding that a declaration to be effective as an estoppel must be made to him who acts upon it). See also infra § 73.

29. Cal.—Rodgers v. Peckham, 120 Cal. 238, 52 P 483.

Ill.—Doran v. Miller, 124 Ill. A. 551.

Iowa.—Montreal Bank v. Ingerson, 105 Iowa 349, 75 NW 351; Beebe v. Equitable Mut. L., etc., Assoc., 76 Iowa 129, 40 NW 122 (holding that the fact that an insurance agent advertised his agency as a branch office does not estop the company from denying its liability on his purchase of furniture for his office, where it does not appear that it knew before the contract was made that the agent was holding himself out as having authority to make it).

Mass.—Manning v. Leland, 153 Mass. 510, 27 NE 519 (holding that defendant is not estopped from denying that plaintiff was his agent in procuring money for him, where he did not authorize the employment of plaintiff and did not know when he received the money that plaintiff had claimed to act as his agent in procuring it).

Mo.—Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013.

N. J.—Schlessinger v. Forest Products Co., 78 N. J. L. 637, 76 A 1024, 138 AmSR 627, 30 LRANS 347.

Tex.—Stratton-White Co. v. Castleberry, 15 Tex. Civ. A. 149, 38 SW 835; Lenoir v. Rosenthall, 1 Tex. A. Civ. Cas. § 209.

Va.—Rowland Lumber Co. v. Ross, 100 Va. 275, 40 SE 922.

30. U. S.—Schimmelpennich v. Bayard, 1 Pet. 264, 7 L. ed. 138 (holding that if they are not misled by the principal, but depend on their own knowledge of the supposed agent, third persons cannot invoke estoppel against the principal).

Ala.—Patterson v. Neal, 135 Ala. 477, 33 S 39; Wheeler v. McGuire, 86 Ala. 398, 5 S 190, 2 LRA 808 and note (holding that the neglect of the principal to inform himself as to the manner in which the agent conducts his business, and to see that his instructions are obeyed, does not constitute ground of liability, unless it induces those dealing with the agent to believe that he has authority); St. John v. Redmond, 9 Port. 428 (holding that where it is sought to bind a principal for acts performed by an agent acting without authority on the ground of a previous recognition of similar acts, it is necessary to show that the instrument in question was taken on the faith of such previous recognition).

Cal.—Gosliner v. Grangers' Bank, 124 Cal. 225, 56 P 1029; Harris v. San Diego Flume Co., 87 Cal. 526, 25 P 758.

Ill.—Vail v. Northwestern Mut. L. Ins. Co., 192 Ill. 567, 61 NW 651 [aff 92 Ill. A. 655]; Norton v. Richmond,

estoppel arises therefore, if, at the time he changed his position, the person asserting the estoppel knew that no authority in fact existed,[31] or should, as a reasonably prudent man, have known that fact, as where he was acquainted with facts that should have suggested an inquiry which, if pursued, would have led to a discovery of the alleged agent's want of authority;[32] or if at the time he had no knowledge of the alleged principal's representations of authority,[33] as where the representations of authority were not made until after he had dealt with the alleged agent.[34] So an estoppel cannot be invoked in favor of one who has relied upon the alleged agent's declaration of his authority, and made no further inquiry.[35]

[§ 74] **cc. Change of Position by Third Person.** In reliance upon the representation of authority made by the person sought to be bound, the person asserting the estoppel must have changed his position as otherwise he would not have done, so that if the authority is not admitted to exist he will suffer injury which otherwise he would not have suffered.[36]

[§ 75] **b. Estoppel of Agent.** One who professes to act as agent for another in a particular transaction may be estopped as against both the supposed principal,[37] and third persons interested in the transaction,[38] to deny the agency.

93 Ill. 367; Maxey v. Heckethorn, 44 Ill. 437; Rawson v. Curtiss, 19 Ill. 456; Schoenhofen Brewing Co. v. Wengler, 57 Ill. A. 184.

Ind.—Kiefer v. Klinsick, 144 Ind. 46, 42 NE 447.

Md.—Hartlove v. William Falt Co., 89 Md. 254, 43 A 62.

Mich.—Clark v. Dillman, 108 Mich. 625, 66 NW 570.

Mo.—Plummer v. Knight, 156 Mo. A. 321, 335, 137 SW 1019 [cit Cyc] (holding that where a general agent for the collection of rents and notes and for the management of property foreclosed a mortgage by authority of the power of sale in the trust deed, without representations to the purchasers which would lead them to believe that he was acting as an agent or which would induce them to rely upon his acts as agent, there was no estoppel against the principal to deny the agency); St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737 (holding that where an agent, in excess of his authority, contracted in the name of his principal for billboard advertising at a certain monthly rental, and after some rental had accrued the lessor wrote the principal in regard to payment, the principal's subsequent silence did not estop him from denying liability for the accrued installments); Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013.

Nebr.—Hastings First Nat. Bank v. Omaha Nat. Bank, 59 Nebr. 192, 80 NW 810; Hastings First Nat. Bank v. Farmers', etc., Bank, 56 Nebr. 149, 76 NW 430.

N. J.—Dugan v. Lyman, 23 A 657.

N. D.—Hollinshead v. Stuart, 8 N. D. 35, 77 NW 89, 42 LRA 659.

Or.—Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 44 P 390.

Pa.—Mecouch v. Loughery, 12 Phila. 416 [aff 35 LegInt 341].

Tex.—Cleveland v. Houston Sporting Goods Store, (Civ. A.) 166 SW 912; Fred W. Wolf Co. v. Galbraith, 39 Tex. Civ. A. 351, 87 SW 390; Lewis v. Brown, 39 Tex. Civ. A. 139, 87 SW 704; Merchants', etc., Cotton Oil Co. v. Lufkin Nat. Bank, 34 Tex. Civ. A. 551, 79 SW 651.

Vt.—Ladd v. Grand Isle, 67 Vt. 172, 31 A 34.

Wash.—National Lumber, etc., Co. v. Grays Harbor Commercial Co., 71 Wash. 31, 37, 127 P 577 [cit Cyc].

See Nourse v. Jennings, 180 Mass. 592, 62 NE 974.

[a] **"Where one has reasonably and in good faith been led to believe** from the appearance of authority which a principal permits his agent to have, and because of such belief has in good faith dealt with the agent, the principal will not be allowed to deny the agency, to the prejudice of the one so dealing." Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224, 229, 53 NW 1061 [quot Sinclair v. Investors' Syndicate, (Minn.) 146 NW 1109, 1110].

31. Kiefer v. Klinsick, 144 Ind. 46, 42 NE 447.

32. Ill.—Hawley v. Curry, 74 Ill. A. 309 (where it was said that third persons who are misled as to the agency through their own fault or carelessness cannot invoke the aid of estoppel).

Ind.—Kiefer v. Klinsick, 144 Ind. 46, 42 NE 447 (where it was said that one who relies upon the doctrine of estoppel must not have been guilty of contributory negligence, but must have used reasonable care to inform himself as to whether the agent had authority). See also Robinson v. Nipp, 20 Ind. A. 156, 50 NE 408.

Iowa.—Tappan v. Morseman, 18 Iowa 499 (holding that the fact that the alleged principal had previously expressed a future intention to invest the alleged agent with the authority in question did not justify the third person in afterward dealing with the alleged agent as being one who was invested with such authority).

Mo.—St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737.

Or.—Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 44 P 390.

Pa.—Mecouch v. Loughery, 12 Phila. 416 [aff 37 LegInt 341].

Tex.—Merrill v. Bradley, (Civ. A.) 121 SW 561.

Wash.—National Lumber, etc., Co. v. Grays Harbor Commercial Co., 71 Wash. 31, 37, 127 P 577 [cit Cyc].

Wis.—McDermott v. Jackson, 102 Wis. 419, 78 NW 598.

Eng.—Pole v. Leask, 9 Jur. N. S. 829 (where it was pointed out that anyone dealing with a person assuming to act as agent for another can always save himself from loss or difficulty by applying to the alleged principal to learn whether the agency does exist and to what extent, while the alleged principal has no similar mode of protecting his interests).

33. Cal.—Nofsinger v. Goldman, 122 Cal. 609, 55 P 425; Harris v. San Diego Flume Co., 87 Cal. 526, 25 P 758.

Mich.—Joy v. Vance, 104 Mich. 97, 62 NW 140 (holding that the owner of property cannot be held estopped from denying the authority of an assumed agent to act with reference thereto where the person dealing with such agent is ignorant of the owner's claim to such property).

Mo.—Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013; Hefferman v. Boteler, 87 Mo. A. 316.

Nebr.—Hastings First Nat. Bank v. Farmers', etc., Bank, 56 Nebr. 149, 76 NW 430.

N. Y.—Buskirk v. Talcott, 96 NYS 714.

Tex.—Cleveland v. Houston Sporting Goods Store, (Civ. A.) 166 SW 912.

[a] **Knowledge of previous acts necessary.**—Even though similar previous acts of the agent, done with the knowledge and approval of the principal, are shown, a recovery cannot be sustained if such evidence is alone relied upon. It is further necessary to show that the person dealing with the agent had knowledge, at the time of such dealing, of such previous acts, and relied upon them. Pease v. Fink, 3 Cal. A. 371, 85 P 657; Schoenhofen Brewing Co. v. Wengler, 57 Ill. A. 184.

34. Watertown Steam-Engine Co. v. Palmer, 84 Ga. 368, 10 SE 969, 20 AmSR 368; Taliaferro v. Baltimore First Nat. Bank, 71 Md. 200, 17 A 1036.

35. U. S.—In re Thomas, 199 Fed. 214, 224 [quot Cyc].

Ark.—Jenkins v. Shinn, 55 Ark. 347, 18 SW 240.

Cal.—Seymour v. Oelrichs, 156 Cal. 782, 106 P 88, 134 AmSR 154 (holding that, where a husband had no authority to bind his wife's sister by a contract employing an overseer of the wife's and sister's real estate, the fact that the overseer, on the faith of the husband's representations that he would be given a ten-year contract, resigned and irrevocably lost his former position did not estop the sister from denying the contract unless she took some action with notice that such representation had been made); Harris v. San Diego Flume Co., 87 Cal. 526, 25 P 758.

Ill.—St. Mary's African M. E. Church v. German Lutheran Church, 167 Ill. A. 307.

N. J.—Morris v. Joyce, 63 N. J. Eq. 549, 53 A 139.

N. Y.—Buskirk v. Talcott, 96 NYS 714.

Pa.—Mecouch v. Loughery, 12 Phila. 416 [aff 37 LegInt 341].

N. S.—Hart v. Pryor, 10 N. S. 53.

See Robinson v. Nipp, 20 Ind. A. 156, 50 NE 408.

Declarations of agent as evidence of agency see infra §§ 692–698.

36. Ill.—Equitable Produce, etc., Exch. v. Keyes, 67 Ill. A. 460.

Mich.—Clark v. Dillman, 108 Mich. 625, 66 NW 570.

Or.—Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 44 P 390.

Pa.—Mecouch v. Loughery, 12 Phila. 416 [aff 37 LegInt 341].

Tex.—Fred W. Wolf Co. v. Galbraith, 39 Tex. Civ. A. 351, 87 SW 390; Lewis v. Brown, 39 Tex. Civ. A. 139, 87 SW 704.

37. Ill.—Reigard v. McNeil, 38 Ill. 400; Dennis v. McCagg, 32 Ill. 429 (both holding that where a person obtains a conveyance of land in his own name, paying his own money for it but professing to act as agent for another, he will be estopped from denying the agency).

Iowa.—International Harvester Co. v. Walker, 138 Iowa 638, 116 NW 706.

Mich.—Spencer v. Towles, 18 Mich. 9.

Tex.—Satterthwaite v. Loomis, 81 Tex. 64, 16 SW 616. See also Hereford v. Southern Pac. R. Co., 7 SW 218.

Wash.—Dimmick v. Sprinkel, 59 Wash. 329, 109 P 1018.

W. Va.—Siers v. Wiseman, 58 W. Va. 340, 52 SE 460 (holding that one who, assuming to act for another in respect to his property, performs an act detrimental to himself and beneficial to such other person, and not such as, under the law, can confer any right upon himself, is estopped to deny that, in performing such service, he acted for such other person).

Eng.—Roberts v. Ogilby, 9 Price 269; Moore v. Peachy, 7 T. L. R. 748.

See also Smith v. Kemper, 4 Mart. (La.) 409, 6 AmD 708; Gilbert v. Nantucket Bank, 5 Mass. 97; and generally infra §§ 409, 410.

38. Yetter v. Van Patten, 103 Ill

[§ 76] **c. Estoppel of Third Person.** One who deals with a person professing to act as agent for another is generally estopped, as against the supposed principal, to deny the agency.[39] Similarly one who enters into a particular transaction with the agent of another may be estopped, both as against the principal,[40] and third persons in interest,[41] to say that the agent had no authority to enter into the transaction.

V. RATIFICATION[42]

[§ 77] **A. Definition and Nature—1. Definition.**[43] Ratification as it relates to the law of agency may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent in doing the act or making the contract, without authority to do so.[44] The substance of a ratification is confirmation after conduct;[45] it confirms; it neither changes the contract nor makes a new one

A. 59; Walters v. Bray, (Tex. Civ. A.) 70 SW 443 (holding that a party conveying land as agent and attorney in fact of the grantor under an instrument purporting to confer such authority was estopped from thereafter denying that he was such agent and attorney in fact). See also Gilbert v. Nantucket Bank, 5 Mass. 97; Hereford v. Southern Pac. R. Co., (Tex.) 7 SW 218.

39. Colo.—Brown v. Holloway, 47 Colo. 461, 108 P 25 (holding that one who accepts, acts upon, and has the benefit of, a contract entered into with another as agent for a third person is estopped to question the authority assumed by the agent).

Ind.—Palmer v. Egbert, 4 Ind. 65.

Iowa.—Baker v. The Milwaukee, 14 Iowa 214 (holding that a carrier who has contracted with a person as agent of a consignor cannot deny the agency).

La.—Squier v. Stockton, 5 La. Ann. 120, 52 AmD 583 (holding that one who buys land from a person professing to act as agent, and executes notes payable to the supposed principal, cannot deny the agency when sued on the notes by the latter).

Miss.—Mayer v. McLure, 36 Miss. 389, 72 AmD 190.

Mo.—German Sav. Inst. v. Jacoby, 97 Mo. 617, 11 SW 256 (holding that in the absence of fraud an estoppel between parties may be based on the representations of an agent of both of them, where one of them, in reliance thereon, has been induced to enter into a contract, and his rights have become fixed thereunder).

Oh.—Davis v. Harness, 38 Oh. St. 397.

S. C.—McGowan v. Reid, 27 S. C. 262, 3 SE 337 (holding that one who sues the principal for the acts of the agent cannot deny the agency).

Tex.—Cameron v. Blackwell, 53 Tex. Civ. A. 414, 115 SW 856.

Wash.—Dimmick v. Sprinkel, 59 Wash. 329, 109 P 1018.

See also Warrick v. Smith, 137 Ill. 504, 27 NE 709; and infra § 145.

40. Union Gold Min. Co. v. Rocky Mountain Nat Bank, 2 Colo. 248 (holding that one who borrows money from a person assuming to act as agent of another is estopped to deny the agency); Benton v. Stokes, 109 Md. 117, 71 A 532 (holding that, where a tenant signed and occupied premises under a lease reciting that R and F were the landlord's agents to rent the property, the tenant was estopped to deny such authority); Connor v. Uvalde Nat. Bank, (Tex. Civ. A.) 156 SW 1092. And see American Bonding Co. v. Loeb, 47 Wash. 447, 92 P 282 (holding that where one accepts the benefit of a bond issued through the agent of a bonding company he is estopped from questioning its authorization). See also infra § 145.

[a] **Estoppel by recitals.**—A bond reciting a contract between the principal and a municipality through a municipal board will estop the obligors to deny the authority of the board to make and perform the contract. Chester v. Leonard, 68 Conn. 495, 37 A 397.

41. Waco Bridge Co. v. Waco, 85 Tex. 320, 20 SW 137 (holding that, as against a third person in whose favor the reservation was made, one holding under a deed made by an attorney in fact cannot object to a reservation therein on the ground that the attorney had no power to make it).

42. **Ratification of:** Acts of broker see Brokers [19 Cyc 202]. Acts of factors see Factors [19 Cyc 142]. Acts of insurance agent see Insurance [22 Cyc 1434]. Agency of husband for wife see Husband and Wife [21 Cyc 1239]. Agency of wife for husband see Husband and Wife [21 Cyc 1237]. Attorney's act by client see Attorney and Client [4 Cyc 951]. Representation of bank by agent see Banks and Banking [5 Cyc 463].

43. **Adoption distinguished** see infra § 80.

Estoppel distinguished see infra § 81.

44. 31 Cyc 1245; 2 A&EEncL&Pr 848. See also Schouten v. Alpine, 77 Misc. 19, 137 NYS 380.

[a] **Other definitions.**—(1) "The express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority." 1 A&EEncL 1181 [quot Larsen v. Thuringia American Ins. Co., 208 Ill. 166, 171, 70 NE 31; Stanton v. Granger, 125 App. Div. 174, 179, 109 NYS 134 (aff 193 N. Y. 656 mem, 87 NE 1127 mem)]. (2) "An agreement to adopt an act performed by another for the one who agrees to adopt it." Haggerty v. Juday, 58 Ind. 154, 158 [cit Bouvier L. D.]; Hatton v. Stewart, 2 Lea (Tenn.) 233, 235. (3) "The adoption of an unauthorized act." Allen v. Corn Exch. Bank, 87 App. Div. 335, 340, 84 NYS 1001. (4) "The confirmation of a voidable act." Haggerty v. Juday, supra [cit Burrill L. D.]. (5) "The adoption of a previously formed contract, notwithstanding a vice which rendered it relatively void; and, by the very nature of the act of ratification, confirmation, or affirmance, the party confirming becomes a party to the contract." Kraft v. Wilson, 4 Cal. Unrep. Cas. 794, 37 P 790, 792; Negley v. Lindsay, 67 Pa. 217, 228, 5 AmR 427; Pearsoll v. Chapin, 44 Pa. 9, 17. (6) "An adoption of an unauthorized transaction by the party beneficially interested." Schwartz v. Weber, 6 NYSt 688, 689. (7) "The adoption by a person, as binding upon himself, of an act done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him except for his subsequent assent; as where an act was done by a stranger having at the time no authority to act as his agent, or by an agent not having adequate authority." Ansonia v. Cooper, 64 Conn. 536, 544, 30 A 760 [quot Curnane v. Scheidel, 70 Conn. 13, 17, 38 A 875; Ansonia v. Cooper, 66 Conn. 184, 191, 33 A 905]. See also Oregon R. Co. v. Oregon R., etc., Co., 28 Fed. 505, 507. (8) "The acceptance by a principal of the acts of one who, without original authority, acted with third parties, in the name of such principal." Ft. Scott First Nat. Bank v. Drake, 29 Kan. 311, 323, 44 AmR 646. (9) "The act of giving sanction and validity to something done by another." Brook v. Hook, L. R. 6 Exch. 89, 95 (per Martin, B.). (10) "The voluntary assumption, on full information, of an unauthorized act or agreement by the party in whose behalf it was done or made." St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 280, 90 SW 737.

[b] **"It is the election by a person,** and the expression of such election by words or conduct, to accept an act or contract previously done or entered into in his behalf by another who had at the time no authority to do the act or make the contract on his behalf. If certain acts have been performed or contracts made on behalf of another without his authority, he has, when he obtains knowledge thereof, an election either to accept or repudiate such acts or contracts. If he accepts them his acceptance is a ratification of the previously unauthorized acts or contracts, and makes them as binding upon him from the time they were performed as if they had been authorized in the first place." Gallup v. Liberty County, 57 Tex. Civ. A. 175, 186, 122 SW 291 [quot Clark & Skyles Agency §98].

[c] **"Ratification cannot be accurately defined, as a legal term.** Generically, the word always expresses the same idea, and in legal effect is always the adoption of the act of one who has assumed to be an agent without the grant of an antecedent authority. In its application to different conditions, legal accuracy requires the observance of very wide differences in the significance of the term." Smyth v. Lynch, 7 Colo. A. 383, 43 P 670, 675 [rev on other grounds 25 Colo. 103, 54 P 634].

[d] **Ratify.**—(1) "The word 'ratify' means to make valid, to confirm, to sanction. In legal phrase it usually means to approve or confirm by a principal what has been done by an agent or one assuming to act for another." Lexington v. Lafayette County Bank, 165 Mo. 671, 683, 65 SW 943. (2) "To ratify is to give sanction and validity to something done without authority by one individual on behalf of another." Heyn v. O'Hagen, 60 Mich. 150, 156, 26 NW 861 [quot Evans Agency 48].

[e] **"Confirmation" and "ratification."**—In its primary use the word "confirmation" applies to that by which what was before voidable is made valid, as where one makes valid a voidable contract of his own which he might have repudiated, while ratification applies to the act of another in the nature of an act of agency; but these words are often used interchangeably as synonyms. Seiffert, etc., Lumber Co. v. Hartwell, 94 Iowa 576, 63 NW 333, 58 AmSR 413. "Confirmation is . . . a ratification of a previous transaction known to be voidable." Hereu v. Hereu, 6 Ariz. 270, 283, 56 P 871.

[f] **Distinguished from waiver.**—"Ratification is an adoption of a contract made on our behalf by some one whom we did not authorize, which relates back to the execution of the contract and renders it obligatory from the outset. Waiver is a renunciation of some rule which invalidates the contract, but which, having been introduced for the benefit of the contracting party, may be dispensed with at his pleasure." Reid v. Field, 83 Va. 26, 32, 1 SE 395 [cit Hare Contr. 272].

45. Steffens v. Nelson, 94 Minn. 365, 102 NW 871.

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with different terms.[46]

[§ 78] **2. Nature and Necessity in General.** A ratification is necessary only where an agent acts as such without authority[47] under particular conditions;[48] for if the agent acts within his authority, real or apparent, no ratification need be shown.[49] It has been held that, until ratification, an unauthorized contract made by one person for another is utterly void;[50] but it is more accurate to say that such contract is voidable and without effect on the person in whose behalf it was made, and that in order to make it binding on him he must subsequently ratify it.[51]

[§ 79] **3. Election to Repudiate or Ratify.** Ordinarily the principal has an election either to repudiate or to ratify the unauthorized transaction,[52] and the mere fact that the principal at first disapproves of the unauthorized transaction does not prevent him from subsequently ratifying it,[53] although it has been held that he cannot, after effective repudiation, change his election and ratify so as to save himself from the wrongdoing of his agent.[54]

[§ 80] **4. Adoption Distinguished.** The term "adopt" or "adoption" is often used in its broader sense in defining ratification, but in its legal sense there is a distinction between "adoption" and "ratification," and accurately speaking a ratification is an adoption and more. It is the acceptance of a previously unauthorized contract and takes effect from the making of such contract, whereas an adoption is in legal effect the making of a contract as of the date of the adoption.[55] A ratification implies an existing person on whose behalf the contract might have been made at the time.[56] An adoption, however, may be made by a person who had no legal existence at the time the contract was made on his behalf,[57] and is peculiarly applicable to the law of corporations, where a corporation, after its organization, adopts contracts made by its promoters or agents before the corporation is organized.[58] One may, if he will, adopt for his own use the terms of any contract that suits his purpose; he may ratify a contract only when it was originally made for him without authority.[59]

As applied to deeds. This distinction also applies where one acknowledges and delivers a deed which has been signed and sealed in his name by another without proper authority.[60]

[§ 81] **5. Estoppel Distinguished.** In the liter-

46. Atlanta Buggy Co. v. Hess Springs, etc., Co., 124 Ga. 338, 52 SE 613, 4 LRANS 431 and note.

47. Henderhen v. Cook, 66 Barb. (N. Y.) 21; Studebaker Bros. Co. v. R. M. Rose Co., 65 Misc. 322, 119 NYS 970; Sparkman v. Supreme Council A. L. H., 57 S. C. 16, 34, 35 SE 391 (where the court said: "Ratification only applies where the act was beyond the scope of the agency"). And see supra § 77.

48. See infra § 91.

49. Allard v. Allard, 6 Rob. (La.) 320; Story v. Maclay, 6 Mont. 492, 13 P 198; Henderhen v. Cook, 66 Barb. (N. Y.) 21; Studebaker Bros. Co. v. R. M. Rose Co., 65 Misc. 322, 326, 119 NYS 970 (where it was said: "It is only where the original authority cannot be proven that ratification would be necessary to bind the parties to a contract"); Graham v. Edwards, (Tex. Civ. A.) 99 SW 436.

50. Henderhen v. Cook, 66 Barb. (N. Y.) 21.

51. U. S.—Hartshorn v. Wright, 11 F. Cas. No. 6,169, Pet. C. C. 64.

Md.—Bannon v. Warfield, 42 Md. 22.

Mo.—Bronson v. Weber Impl. Co., 135 Mo. A. 483, 116 SW 20.

N. Y.—Wade v. Wolfson, 90 NYS 1078.

Pa.—Pearsoll v. Chapin, 44 Pa. 9.

Tex.—Galveston, etc., R. Co. v. Allen, 42 Tex. Civ. A. 576, 94 SW 417.

52. Hutchings v. Ladd, 16 Mich. 493; Stanley v. Chamberlain, 39 N. J. L. 565 (holding that where an agent rents premises knowing that the tenant intends to use them for gaming purposes, the principal, having no knowledge of such intended use, may repudiate the agent's contract and recover on a quantum valebat for the use of the premises); Andrews v. Ætna L. Ins. Co., 92 N. Y. 596; Riley v. Wheeler, 44 Vt. 189.

[a] **Repudiation of an unauthorized contract for a reason without foundation** is not equivalent to an adoption of it. Brown v. Henry, 172 Mass. 559, 52 NE 1073.

[b] **Where a trust company authorized to sell** makes a sale to itself, or to one of its officers, the principal, upon learning the facts, is entitled to repudiate the transaction. Fidelity Trust Co. v. Poole, 136 Ill. A. 266.

53. Andrews v. Ætna L. Ins. Co., 92 N. Y. 596; Woodward v. Harlow, 28 Vt. 338; Soames v. Spencer, 1 D. & R. 32, 16 ECL 14; Simpson v. Eggington, 10 Exch. 845; Pickles v. Western Assur. Co., 40 N. S. 327.

[a] **Bringing suit against the agent** is not such a repudiation as to prevent a subsequent ratification, where it appears that the suit did not proceed to judgment but was settled out of court by an agreement to take advantage of the agent's acts. Sheldon v. Sheldon, 3 Wis. 699.

54. Holden v. Metropolitan Nat. Bank, 138 Mass. 48, 151 Mass. 112, 23 NE 733 (holding that, where the treasurer of a bank, without authority, pledges certain stock of the bank as security for advances and converts the advances, and the pledgee sells the stock, the bank, after repudiating the acts of the treasurer, cannot recover the proceeds of the sale from the pledgee as money had and received).

Time for ratification generally see infra § 137.

55. McArthur v. Times Printing Co., 48 Minn. 319, 51 NW 216, 31 AmSR 653; Garrett v. Gonter, 42 Pa. 143 (holding that adoption does not relate back and validate prior acts).

[a] **Statement of distinction.**—"In their primary significance, there is a manifest distinction between 'adoption' and 'ratification.' The one signifies to take and receive as one's own that with reference to which there existed no prior relation either colorable or otherwise; while the other is a confirmation, approval, or sanctioning of a previous act, or an act done in the name or on behalf of the party ratifying, without sufficient or legal authority,—that is to say, the confirmation of a voidable act. But, as relating to contracts, some lexicographers treat them as synonymous." Schreyer v. Turner Flouring Mills Co., 29 Or. 1, 6, 43 P 719.

56. See infra § 92.

57. McArthur v. Times Printing Co., 48 Minn. 319, 51 NW 216, 31 AmSR 653.

58. McArthur v. Times Printing Co., 48 Minn. 319, 322, 51 NW 216, 31 AmSR 653 (where the court said: "Although the acts of a corporation with reference to the contracts made by promoters in its behalf before its organization are frequently loosely termed 'ratification,' yet a 'ratification' properly so called, implies an existing person, on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. . . . What is called 'adoption,' in such cases, is, in legal effect, the making of a contract of the date of the adoption, and not as of some former date"); Schreyer v. Turner Flouring Mills Co., 29 Or. 1, 6, 43 P 719 (where it was said: "As regards a contract made or an obligation incurred by the promoters of a corporation in the name of or for and in behalf of a contemplated corporation, it would seem that an adoption or a ratification thereof by the corporation after it had developed into a legal entity would mean one and the same thing, and would be accomplished by one and the same process. True, the promoters cannot be the agents of an unborn corporation; but, where they have assumed to act for it and to contract in its name, the approval and confirmation of such acts by the corporation when organization has been duly accomplished is but the ratification of the acts of an unauthorized agent. And the result is the same whether we call it 'adoption' or 'ratification' "). See also Corporations [10 Cyc 262].

59. See infra § 91.

60. Clough v. Clough, 73 Me. 487, 488, 40 AmR 386 (where the court said: "By taking the instrument in this incomplete condition and completing it, the grantor makes it his deed in all its particulars. He adopts the signature and the seal the same as he does the habendum and the covenants which were inserted by the printer of the blank. The deed is not sustained on the ground of ratification, but adoption. Ratification applies to agency. No question of agency arises in this class of cases. The validity of the deed cannot rest upon the ground of agency or ratification. If such were the case the authority or the ratification would have to be by instrument under seal. . . . We therefore repeat that the validity of the instrument in this class of cases does not rest on agency or ratification, but on adoption. . . . By completing the instrument, he adopts what had previously been done to it, and makes it his in all its particulars. It is not often important to notice this distinction; but it is important in this case in order to avoid the apparent absurdity of holding that an agent can contract with himself, can be both grantor and grantee. An agent cannot contract with himself. He cannot as agent for the grantor execute a deed to himself. But he can prepare a deed running to himself, even to the signing and sealing, and if the grantor then

ature of the law there has often been little inclination displayed to distinguish between ratification and estoppel in pais;[61] but the distinction between the two is nevertheless well defined, and where as in some states the mode of ratification is governed by statute, it becomes important and necessary to distinguish them.[62] The substance of ratification is confirmation of the unauthorized act or contract after it has been done or made, whereas the substance of estoppel is the principal's inducement to another to act to his prejudice.[63] Acts and conduct amounting to an estoppel in pais may in some instances amount to a ratification, but on the other hand ratification may be complete without any of the elements of an estoppel,[64] and if the act or contract in question has in fact been ratified and the ratification is sufficient, there is no need of invoking the doctrine of estoppel.[65]

[§ 82] **B. Essentials of Ratification—1. The Act Ratified—a. In General.** Subject to the conditions hereafter considered,[66] any act which is done by one person on behalf of another without prior authority, and which would in law be such other's act if done in pursuance of authority, is as a general rule capable of ratification by him on whose behalf it was done.[67] This is true where the person who did the act was a subagent appointed by the agent without the authority of the principal.[68]

Submission to arbitration. Where a submission to arbitration is made by an assumed agent the principal may by ratification render the submission binding on himself,[69] and also on the other party.[70]

adopts the deed by personally acknowledging and delivering it, it will be a legal and valid instrument. But its validity rests upon the ground of adoption, not agency or ratification. And when the word 'ratified' or 'ratification' is used in this class of cases, as it often is, it will be found on careful examination that it is used in the sense of 'adopted' or 'adoption,' and not in the technical sense in which it is used in the law of agency"). See generally Deeds [13 Cyc 554].

61. Blood v. La Serena Land, etc., Co., 113 Cal. 221, 226, 41 P 1017, 45 P 252; Stiebel v. Haighney, 134 App. Div. 516, 520, 119 NYS 455 [quot Cyc].

[a] **"The facts are usually set forth at length, and the conclusion is reached** and expressed that such conduct amounts to ratification; and indeed, where the form which the ratification must take is not governed by statutory rules, it may and usually does matter little whether the acts of a principal are said to be such as to constitute a ratification, or to be such as to constitute an estoppel. By either name he is held equally bound." Blood v. La Serena Land, etc., Co., 113 Cal. 221, 41 P 1017, 45 P 252.

62. Blood v. La Serena Land, etc., Co., 113 Cal. 221, 227, 41 P 1017, 45 P 252 (where the court said: "Ratification is thus a question of legal cognizance, while estoppel in pais addresses itself to equity").

[a] **Within the meaning of Cal. Civ. Code** § 2310, ratification is a technical legal term having a well defined and specific meaning, and to use "ratification" interchangeably with "estoppel" or with the word "adopt" or "confirm" must result and has resulted in unfortunate confusion. Blood v. La Serena Land, etc., Co., 113 Cal. 221, 41 P 1017, 45 P 252.

63. Forsyth v. Day, 46 Me. 176, 196 (where the court said: "The distinction between a contract intentionally assented to, or ratified in fact, and an estoppel to deny the validity of the contract, is very wide. In the former case, the party is bound, because he intended to be; in the latter, he is bound notwithstanding there was no such intention, because the other party will be prejudiced and defrauded by his conduct, unless the law treat him as legally bound. In the one case, the party is bound because this contract contains the necessary ingredients to bind him, including a consideration. In the other, he is not bound for these reasons, but because he has permitted the other party to act to his prejudice under such circumstances, that he must have known, or be presumed to have known, that such party was acting on the faith of his conduct and acts being what they purported to be, without apprising him to the contrary"); Steffens v. Nelson, 94 Minn. 365, 368, 102 NW 871 (where the court said: "The proper decision of the question thus presented depends upon consideration of a neglected distinction between ratification and estoppel. Lord Coke said, 'The name "estoppel" or "conclusion" was given because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.' However much this definition may have been criticised as vicious . . . it is a brief statement of the effect of the essential principle of estoppel. . . . Ratification, on the other hand, means confirmation. . . . The underlying principle upon which liability for ratification attaches is that he who has commanded is legally responsible for the direct results and for the natural and probable consequences of his conduct, and that it is immaterial whether that command was given before or after the conduct. The substance of estoppel is the inducement to another to act to his prejudice. The substance of ratification is confirmation after conduct. . . . An unauthorized act may be made to operate by ratification as an estoppel upon the person in whose behalf it was done. That ratification presupposes knowledge on the part of such person ratifying. If he intentionally ratify what another has done for him without authority, and actually or constructively knows also of the circumstances connected with the unauthorized acts which are the basis of the estoppel, he should clearly be held bound thereby"); Stiebel v. Haighney, 134 App. Div. 516, 520, 119 NYS 455 [quot Cyc]. And see supra §§ 70–74.

64. Blood v. La Serena Land, etc., Co., 113 Cal. 221, 41 P 1017, 45 P 252; Stiebel v. Haighney, 134 App. Div. 516, 520, 119 NYS 455 [quot Cyc].

[a] **Ratification, strictly speaking, means adoption,** but it is sometimes said to result from acts or conduct which constitute an estoppel. Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953.

65. Blood v. La Serena Land, etc., Co., 113 Cal. 221, 41 P 1017, 45 P 252; Stiebel v. Haighney, 134 App. Div. 516, 520, 119 NYS 455 [quot Cyc].

66. See infra §§ 84–88, 91, 92.

67. Ala.—Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140 and note.

Ill.—Larsen v. Thuringia American Ins. Co., 208 Ill. 166, 70 NE 31; Hickox v. Fels, 86 Ill. A. 216 (holding that it is immaterial whether a contract was authorized prior to its execution or subsequently ratified; if a contracting party could authorize it in the first instance, he could ratify it subsequently).

Ind.—Minnich v. Darling, 8 Ind. A. 539, 36 NE 173, 175 (where it was said: "The contract ratified must be one that the parties might have lawfully made in the first instance").

Mass.—Sutton First Parish v. Cole, 3 Pick. 232 (holding that where two agents are appointed by a parish to make entry of land, an entry made by one may be ratified by the parish).

Mo.—Platt v. Francis, 247 Mo. 296, 152 SW 332 (pledge of stock); Daugherty v. Burgess, 118 Mo. A. 557, 94 SW 594; Alexander v. Wade, 106 Mo. A. 141, 80 SW 19.

N. H.—Saltmarsh v. Candia, 51 N. H. 71.

N. Y.—Goodhue v. Cameron, 142 App. Div. 470, 127 NYS 120 (holding that an owner may ratify the execution of a building restriction agreement by his attorney, and convey the property subject to the restriction).

Pa.—McCully v. Pittsburgh, etc., R. Co., 32 Pa. 25.

Tex.—Horst v. Lightfoot, 103 Tex. 643, 132 SW 761 [rev (Civ. A.) 122 SW 606].

Wis.—Garlick v. Morley, 147 Wis. 397, 132 NW 601.

Eng.—Athy v. Murphy, [1896] 1 Ir. 65 (holding that, although subsequent ratification may supply the want of authority in an agent at the time of his acceptance of an offer, it must be shown in such a case that there was a contract purporting to be made by and with the agent, which, if the agent had authority, would be a valid, binding contract).

See also infra § 89.

[a] **Whatever one may lawfully do,** the act being done, he may lawfully ratify. Hollingsworth v. Hill, 116 Ala. 184, 22 S 460.

68. Mayer v. McLure, 36 Miss. 389, 72 AmD 190 (holding that an agent, held out as such, binds his principal by his own acts and those of his subagent, or at least the principal has a right to ratify and adopt them as against a person who has dealt with the subagent as duly authorized and with relation to the principal's affairs); Blantin v. Whitaker, 11 Humphr. (Tenn.) 313; Garlick v. Morley, 147 Wis. 397, 132 NW 601.

[a] **A principal who gives an agent verbal authority to sell land** may ratify a sale, although made by a subagent who was appointed without the knowledge of the principal. Tynan v. Dulnig, (Tex. Civ. A.) 25 SW 465.

69. Ga.—Perry v. Mulligan, 58 Ga. 479.

Me.—Fryeburg Canal v. Frye, 5 Me. 38; Milliken v. Coombs, 1 Me. 343, 10 AmD 70.

Mich.—Detroit v. Jackson, 1 Dougl. 106.

Miss.—Memphis, etc., R. Co. v. Scruggs, 50 Miss. 284.

N. H.—Furber v. Chamberlain, 29 N. H. 405.

N. Y.—Lowenstein v. McIntosh, 37 Barb. 251; Isaacs v. Beth Hamedash Soc., 1 Hilt. 469 [aff 19 N. Y. 584]; Diedrick v. Richley, 2 Hill 271.

Tex.—Snow v. Walker, 42 Tex. 154.

See also infra §§ 123, 124, 137.

[a] **Where the agents of a private corporation** have entered into a submission without authority, such submission may be subsequently ratified by the acts of the corporation. Isaacs v. Beth Hamedash Soc., 1 Hilt. (N. Y.) 469 [aff 19 N. Y. 584].

[b] **Submission under seal.**—Where the submission by an agent is under seal, the principal may, by a subsequent instrument under seal, ratify the submission so as to render it binding on him. Milliken v. Coombs, 1 Me. 343, 10 AmD 70. See also infra § 107.

70. Smith v. Morse, 9 Wall. (U.

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[§ 83] **b. Act of Stranger or Unauthorized Act of Agent.** A principal may either ratify unauthorized acts or contracts made on his behalf by a mere stranger or volunteer who has never been his agent but who has assumed to act as such in the particular transaction,[71] or he may ratify the act of one who is his agent for certain purposes, but who in the particular transaction acted outside the scope of his authority or after the termination of his agency,[72] whereupon the relation of principal and agent is created in respect to matters concerning which none before existed, and the act or contract thereby becomes as effectual as to the principal as though it had been previously authorized.[73]

[§ 84] **c. Void and Voidable Acts.** Where an act done or a contract entered into by one person in behalf of another without authority is by positive law or public policy illegal and void, it cannot be ratified by such other, for the ratification would be affected with the original taint and necessarily illegal;[74] but unauthorized acts or contracts which are merely voidable may be ratified by the person in whose behalf they were done or entered into.[75]

[§ 85] **d. Torts in General.** The doctrine of ratification applies as well to torts as to contracts. A principal may ratify a tort committed by another on his behalf, so as to make himself liable therefor.[76] Thus the principal may ratify a willful

S.) 76, 19 L. ed. 597; Terre Haute, etc., R. Co. v. Harris, 126 Ind. 7, 25 NE 831; Smith v. Sweeny, 35 N. Y. 291.

71. Ill.—Hefner v. Vandolah, 62 Ill. 483, 14 AmR 106 (holding that an unauthorized act may be ratified, although there was no previous agency for any purpose); Pells v. Snell, 31 Ill. A. 158 [rev on other grounds 130 Ill. 379, 23 NE 117].

Mich.—Heyn v. O'Hagen, 60 Mich. 150, 21 NW 861.

Mo.—Ruggles v. Washington County, 3 Mo. 496.

N. Y.—Ramsay v. Miller, 202 N. Y. 72, 75, 95 NE 35 [rev 135 App. Div. 503, 120 NYS 523] (where the court said: "One may ratify the acts of another purporting to be made on his behalf whether that other is an agent exceeding his authority or no agent at all").

Okl.—Fant v. Campbell, 8 Okl. 586, 58 P 741.

Tex.—Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953.

"One may make another his agent by ratifying such other's assumption in the matter, and thereby become liable both to such other and to the third party with whom he deals, as well as by an original contract of employment. Such ratification may occur as well when a person without authority in fact from the principal assumes to have it, under another falsely pretending to represent the principal and to employ a subagent, as where there is no intermediary in the matter." Garlick v. Morley, 147 Wis. 397, 399, 132 NW 601.

72. Fla.—Florida Cent., etc., R. Co. v. Ashmore, 43 Fla. 272, 32 S 832 (after revocation).

Nev.—Lowman v. Nye, etc., Bank, 31 Nev. 306, 102 P 967 (holding that, conceding that an agent was without authority to justify a bank, under his directions, in surrendering a deed executed by the principal and deposited in escrow, the principal could ratify the action of the unauthorized agent and be bound thereby).

N. J.—Keim v. Lindley, Ch. 30 A 1063.

N. Y.—Ramsey v. Miller, 202 N. Y. 72, 95 NE 35 [rev 135 App. Div. 503, 120 NYS 523].

S. C.—State v. Waldrop, 73 S. C. 60, 52 SE 793.

Tenn.—Bement v. Armstrong, (Ch. A.) 39 SW 899.

Vt.—Middlebury College v. Williamson, 1 Vt. 212.

73. See infra § 138.

74. U. S.—U. S. v. Grossmayer, 9 Wall. 72, 19 L. ed. 627; Westerlund v. Black Bear Min. Co., 203 Fed. 599, 121 CCA 627.

Ala.—Kelly v. Burke, 132 Ala. 235, 31 S 512.

Ariz.—Hereu v. Hereu, 6 Ariz. 270, 56 P 871.

Colo.—Weston v. Estey, 22 Colo. 334, 45 P 367 (holding that a bank cannot ratify an act of its cashier which involves an agreement that the bank shall work mines, since it is unlawful for a bank to engage in mining).

Ga.—Grant v. Miller, 107 Ga. 804, 33 SE 671; Harrison v. McHenry, 9 Ga. 164, 52 AmD 435.

Ill.—Hinsey v. Supreme Lodge K. P., 138 Ill. A. 248 [aff 241 Ill. 384, 89 NE 728].

Ind.—Shepardson v. Gillette, 133 Ind. 125, 31 NE 788; State v. State Bank, 5 Ind. 353.

Iowa.—Lewis v. Kerr, 17 Iowa 73.

La.—Decuir v. Lejeune, 15 La. Ann. 569.

Minn.—Sanford v. Johnson, 24 Minn. 172 (attempted lease which was absolutely void).

Miss.—Jefferson County v. Arrighi, 54 Miss. 668; Memphis, etc., R. Co. v. Scruggs, 50 Miss. 284.

Mo.—Macfarland v. Heim, 127 Mo. 327, 29 SW 1030, 48 AmSR 629.

N. H.—Boutelle v. Melendy, 19 N. H. 196, 49 AmD 152.

N. C.—Rawlings v. Neal, 126 N. C. 271, 35 SE 597; Woodcock v. Merrimon, 122 N. C. 731, 30 SE 321; Spence v. Wilmington Cotton Mills, 115 N. C. 210, 20 SE 372.

Or.—Pacific Mill Co. v. Inman, etc., Co., 50 Or. 22, 90 P 1099.

Pa.—Daughters of American Revolution v. Schenley, 204 Pa. 572, 54 A 366; Negley v. Lindsay, 67 Pa. 217, 5 AmR 427.

S. D.—Dobbs v. Atlas El. Co., 22 S. D. 226, 117 NW 128.

Tenn.—Carnes v. Polk, 4 Coldw. 87.

Tex.—Shelton v. Marshall, 16 Tex. 344.

Eng.—Banque Jacques-Cartier v. Banque d'Epargne, etc., 13 App. Cas. 111.

See also infra §§ 85–88; 139.

[a] **"Contracts which are forbidden by statute, or are inconsistent with public policy,** are absolutely void, and the ratification of such a contract, in any form, carries with it the taint of the original." Lyon v. Phillips, 106 Pa. 57, 66.

[b] **A writing by an agent insufficient to pass an interest in land** or as a memorandum of a contract of sale thereof cannot be ratified as a conveyance or memorandum by the party sought to be charged thereby. Woodcock v. Merrimon, 122 N. C. 731, 30 SE 321.

[c] **Where the contract is without an object** there can be no valid ratification, as where the person assuming to act as agent bought a cargo of salt which did not belong to the seller. Mummy v. Haggerty, 15 La. Ann. 268.

[d] **Want of mutuality.**—A party to an executory contract cannot by a ratification of a void act, create a liability in its favor against the other party to the contract, since before the ratification the contract was not mutual. Pacific Mill Co. v. Inman, etc., Co., 50 Or. 22, 90 P 1099.

75. U. S.—Westerlund v. Black Bear Min. Co., 203 Fed. 599, 121 CCA 627 (holding that an act which is neither wrong in itself nor against public policy, but which has been declared void by statute for the benefit of a certain person, or class of persons, is voidable only, and capable of ratification); Findlay v. Pertz, 66 Fed. 427, 13 CCA 559 [aff 74 Fed. 681, 20 CCA 662].

Ariz.—Hereu v. Hereu, 6 Ariz. 270, 56 P 871.

Ga.—Whitley v. James, 121 Ga. 521, 49 SE 600 (holding that, where the agent had an actual power to sell, a sale to a corporation of which he is president and stockholder was not absolutely void, but could be ratified by his principal).

Ill.—Paul v. Berry, 78 Ill. 158.

La.—Harper v. Devene, 10 La. Ann. 724.

Miss.—Memphis, etc., R. Co. v. Scruggs, 50 Miss. 284.

N. J.—Keim v. O'Reilly, 54 N. J. Eq. 418, 34 A 1073.

N. Y.—Commercial Bank v. Warren, 15 N. Y. 577.

Pa.—Henry Christian Bldg., etc., Assoc. v. Walton, 181 Pa. 201, 37 A 261, 59 AmSR 636 and note.

Tenn.—Nashville First Nat. Bank v. Shook, 100 Tenn. 436, 45 SW 338; Carnes v. Polk, 4 Coldw. 87.

Eng.—Spackman v. Evans, L. R. 3 H. L. 171; Simpson v. Eggington, 10 Exch. 845.

[a] **Where an act performed by an agent of the state is forbidden by statute,** the statute as a whole must be examined to determine whether it was the intention of the legislature to make the forbidden act totally void. If the intention was to make the act unlawful in any case, whether performed by the state itself or by its agents, such an act performed by an agent cannot be ratified. If on the other hand the act is merely forbidden to the agents of the state, the state can lawfully ratify the act when performed in its name by those who assumed to act as its agents. State v. Buttles, 3 Oh. St. 309 (holding that where a statute made it illegal for a public agent to lend state funds, the state might nevertheless ratify an unauthorized loan of such funds, since it might have authorized the loan in the first instance).

[b] **An agent's purchase of the principal's property** may be adopted and acquiesced in by the principal. Post v. Thomas, 153 App. Div. 865, 139 NYS 6.

76. U. S.—Kilpatrick v. Haley, 66 Fed. 133, 13 CCA 480.

Cal.—Avakian v. Noble, 121 Cal. 216, 53 P 559; Wilder v. Beede, 119 Cal. 646, 51 P 1083.

Conn.—Morehouse v. Northrop, 33 Conn. 380, 89 AmD 211.

Ga.—Lee v. West, 47 Ga. 311.

Kan.—Swofford Bros. Dry Goods Co. v. Berkowitz, 7 Kan. A. 24, 51 P 796.

Ky.—Pennsylvania Iron Works Co. v. Voght Mach. Co., 96 SW 551, 29 KyL 861, 8 LRANS 1023.

Me.—Tucker v. Jerris, 75 Me. 184.

Mass.—Dempsey v. Chambers, 154 Mass. 330, 28 NE 279, 26 AmSR 249, 13 LRA 219.

Mich.—Krolik v. Curry, 148 Mich. 214, 111 NW 761.

Miss.—Exum v. Brister, 35 Miss. 391.

N. Y.—Vogel v. New York, 92 N. Y. 10, 44 AmR 349.

Va.—Forbes v. Hagman, 75 Va. 178.

Eng.—Hull v. Pickersgill, 1 B. & B. 282, 5 ECL 636, 129 Reprint 731; Eastern Counties R. Co. v. Broom, 6

trespass[77] or conversion.[78]

Torts amounting to crimes. The distinction has been made that if the transaction is contrary to good faith, and the fraud or wrong affects individual interests only, it may be ratified;[79] but if the fraud or wrong is of such a character as to involve a crime, the adjustment of which is forbidden by public policy, the act from which it springs cannot be ratified.[80]

[§ 86] **e. Forgery—(1) Rule Prohibiting Ratification.** Whether a principal can by ratification make himself liable on a contract which is a forgery is in dispute. In some jurisdictions it is held that he cannot, because of public policy which forbids that by consenting to be bound by the forged contract the principal should induce or encourage the exemption from prosecution of the forger,[81] and also on the technical grounds that the forged contract does not purport to be executed by an agent but by the principal himself, and hence there is no assumption of agency and nothing to ratify,[82] and that in the absence of any new consideration or element of estoppel a subsequent promise or ratification of the forged instrument is a mere nudum pactum.[83] In these jurisdictions the ratification which the law interdicts relates only to such acts as clearly appear to have been done in violation of a criminal statute, and it has been said that it is impossible in such a case to attribute any motive to the ratifying party but that of concealing the crime and suppressing the prosecution.[84] But where the signature or act of forgery is of an ambiguous character and may as well be attributed to a mistaken assumption of authority as to a criminal purpose, public policy does not forbid its ratification.[85]

[§ 87] **(2) Rule Permitting Ratification.** In some jurisdictions the courts take the view that so far as considerations of public policy are concerned the ratification of forgery, provided it is not made conditional upon the immunity of the forger, should

Exch. 314 (assault); Bird v. Brown, 4 Exch. 786, 23 ERC 422; Hilbery v. Hatton, 2 H. & C. 822; Wilson v. Tumman, 6 M. & G. 236, 46 ECL 236, 134 Reprint 879.

Can.—Scott v. New Brunswick Bank, 23 Can. S. C. 277.

[a] **The qualification of good faith** is "unnecessary in the person who assumes, without authority, to act as agent. If the person with whom he deals as agent acts in good faith, and with reasonable care, the act is capable of being ratified by the person on whose behalf such pretended agent assumes to act, whether the agent himself acts bona fide or mala fide." Heyn v. O'Hagen, 60 Mich. 150, 157, 26 NW 861.

[b] **Unauthorized fraudulent representations** by an agent may be ratified by the principal, thereby making him liable in an action for fraud and deceit. Judd v. Walker, 114 Mo. A. 128, 89 SW 558.

[c] **False pretenses.**—Where the payment of money is obtained from a debtor by one falsely representing to the debtor that he is the agent of his creditor, from whom he in fact has no authority, and thereby a fraud upon the debtor is committed, if the creditor afterward ratifies and confirms the payment so made, he thereby adopts the agency of the party who has received the money and this becomes equivalent to a payment made by the debtor to a person having proper authority to receive it. It makes no difference in the application of this principle that by his false pretenses the party receiving the money has committed an indictable offense. Scott v. New Brunswick Bank, 23 Can. S. C. 277.

77. Avakian v. Noble, 121 Cal. 216, 53 P 559; Byne v. Hatcher, 75 Ga. 289; Brown v. Webster City, 115 Iowa 511, 88 NW 1070.

[a] **In Georgia** under Civ. Code (1895) §§ 3031, 3820, providing that by ratification of a tort committed for one's benefit the ratifier becomes liable as if he had commanded it, a principal is liable for the willful trespass of his agent where he ratifies it. Crockett v. Sibley, 3 Ga. A. 554, 60 SE 326.

78. Creson v. Ward, 66 Ark. 209, 49 SW 827; Byne v. Hatcher, 75 Ga. 289; Motley v. Motley, 42 N. C. 211 (holding that a conversion of property by an agent may be ratified by the principal, and he may claim whatever profit is made by the conversion); Hilbery v. Hatton, 2 H. & C. 822.

79. Henry Christian Bldg., etc., Assoc. v. Walton, 181 Pa. 201, 37 A 261, 59 AmSR 636; Lyon v. Phillips, 106 Pa. 57; Shroyer v. Smeltzer, 38 Pa. Super. 400; Shisler v. Vandike, 8 WklyNC (Pa.) 234.

80. Daughters of American Revolution v. Schenley, 204 Pa. 572, 54 A 366; Shroyer v. Smeltzer, 38 Pa. Super. 400. And see supra § 84; infra § 86.

[a] **"The distinction** between the power to ratify acts void because of a fraud affecting individual interests only and the power to ratify acts which involve a public wrong has been carefully defined and preserved in our decisions. The right to avoid a contract on the ground of fraud is a privilege given to the injured party for his own protection, and it may be waived; but he cannot give validity to an illegal contract. The earlier cases which held that all contracts vitiated by fraud are insusceptible of confirmation are in effect overruled by Pearsoll v. Chapin, 44 Pa. 9, and Negley v. Lindsay, 67 Pa. 217, 5 AmR 427. The distinction between the cases pointed out in the opinions in Shisler v. Vandike, 92 Pa. 447, 37 AmR 702, and Lyon v. Phillips, 106 Pa. 57, is this: where the transaction is contrary to good faith and the fraud affects individual interests only, ratification is allowed; but where the fraud is of such a character as to involve a crime the adjustment of which is forbidden by public policy, the ratification of the act from which it springs is not permitted." Henry Christian Bldg., etc., Assoc. v. Walton, 181 Pa. 201, 206, 37 A 261, 59 AmSR 636 and note.

81. Henry Christian Bldg., etc., Assoc. v. Walton, 181 Pa. 201, 37 A 261, 59 AmSR 636; Shisler v. Vandike, 92 Pa. 447, 37 AmR 702; McHugh v. Schuykill County, 67 Pa. 391, 5 AmR 445 [dist Garrett v. Gonter, 42 Pa. 143]; Shroyer v. Smeltzer, 38 Pa. Super. 400. See generally supra § 84.

82. Ind.—Henry v. Heeb, 114 Ind. 275, 16 NE 606, 5 AmSR 613 and note.

Ky.—Owsley v. Philips, 78 Ky. 517, 39 AmR 258.

Mo.—Kelchner v. Morris, 75 Mo. A. 588. See also Dow v. Spenny, 29 Mo. 386. Compare Trenton First Nat. Bank v. Gay, 63 Mo. 33, 21 AmR 430; Cravens v. Gillilan, 63 Mo. 28 (in both of which cases the court indicates, although the question was not involved, that a forgery can be ratified).

Oh.—Workman v. Wright, 33 Oh. St. 405, 31 AmR 546. Compare Dodge v. National Exch. Bank, 20 Oh. St. 234, 5 AmR 648.

Pa.—Henry Christian Bldg., etc., Assoc. v. Walton, 181 Pa. 201, 37 A 261, 59 AmSR 36, 636 and note; Negley v. Lindsay, 67 Pa. 217, 5 AmR 427.

"A forger does not act on behalf of, nor profess to represent, the person whose handwriting he counterfeits, and the subsequent adoption of the instrument cannot supply the authority which the forger did not profess to have." Henry Christian Bldg., etc., Assoc. v. Walton, 181 Pa. 201, 206, 37 A 261, 59 AmSR 636.

[a] **Discussion of doctrine.**—(1) In Henry v. Heeb, 114 Ind. 275, 279, 16 NE 606, 5 AmSR 613, the court said: "One who commits the crime of forgery by signing the name of another to a promissory note does not assume to act as the agent of the person whose name is forged. Upon principle, there would seem to be no room to apply the doctrine of ratification or adoption of the act in such a case. Where the act done constitutes a crime, and is committed without any pretense of authority, it is difficult to understand how one who is in a sense the victim of the criminal act may adopt or ratify it, so as to become bound by a contract to which he is to all intents and purposes a stranger, and which as to him was conceived in a crime and is totally without consideration. As has been well said, it is impossible in such a case to attribute any motive to the ratifying party but that of concealing the crime and suppressing the prosecution; 'for why should a man pay money without consideration when he himself had been wronged, unless constrained by a desire to shield the guilty party.'" (2) In Owsley v. Philips, 78 Ky. 517, 522, 39 AmR 258, the court said: "The doctrine that one may ratify a forged instrument by a subsequent promise to pay we are not disposed to adopt, although cases may be found sustaining that view of the question. To say that one who is neither the recognized agent of, or doing business for, another can sign the latter's name to an obligation for money, in which he is in nowise interested, and without any authority whatever, and then make him responsible upon what is designated a ratification, and for no other reason, is, we think, a principle fraught with too much danger, even to those who engage in the ordinary business transactions of life, to be sanctioned by this court."

83. Henry v. Heeb, 114 Ind. 275, 280, 16 NE 606, 5 AmSR 613 (where it was held that the question of the ratification of a forged instrument was not involved but where the court said: "In case of a known or conceded forgery, we are unable to discover any principle upon which a subsequent promise by the person whose name was forged can be held binding in the absence of an estoppel in pais, or without a new consideration"); Workman v. Wright, 33 Oh. St. 405, 31 AmR 546.

84. Henry v. Heeb, 114 Ind. 275, 16 NE 606, 5 AmSR 613 and note.

85. Henry v. Heeb, 114 Ind. 275, 16 NE 606, 5 AmSR 613. See also Reg. v. Beardsall, 1 F. & F. 529 (where the failure to answer a letter was

stand on the same footing as other contracts, and that as to the want of authority it can make no difference whether the unauthorized act was or was not a forgery, since his want of authority is the very thing which the ratification cures; hence it is held in such jurisdictions that the principal whose name has been forged may ratify the signature so as to make himself civilly liable on the contract,[86] but not so as to excuse the forger from prosecution.[87]

[§ 88] **(3) Rule as to Estoppel.** Probably all authorities agree that the principal will be liable on the forged instrument if his promise to assume the contract induces the other party to change his position to his prejudice, but in such a case the liability rests on the doctrine of estoppel and not on that of ratification.[88] On the same ground ratification of one act of forgery may estop the principal to deny the genuineness of his signature in subsequent similar forgeries.[89] In any event a forgery cannot be ratified so as to enable the forger to take advantage of the contract.[90]

held to justify the prisoner in the belief that he had implied authority to sign the name).

86. Conn.—Union Bank v. Middlebrook, 33 Conn. 95.

D. C.—Ofenstein v. Bryan, 20 App. 1.

Ill.—Fay v. Slaughter, 194 Ill. 157, 62 NE 592, 88 AmSR 148, 56 LRA 564 [rev 94 Ill. A. 111]; Chicago Edison Co. v. Fay, 164 Ill. 323, 45 NE 534 (both holding, however, that such ratification cannot be implied from a doubtful state of facts); Hefner v. Vandolah, 62 Ill. 483, 14 AmR 106; Livings v. Wiler, 32 Ill. 387; Bulger v. Gleason, 123 Ill. A. 42.

La.—De Feriet v. Bank of America, 23 La. Ann. 310, 8 AmR 597; Harper v. Devene, 10 La. Ann. 724.

Me.—Casco Bank v. Keene, 53 Me. 103; Forsyth v. Day, 46 Me. 176.

Mass.—Wellington v. Jackson, 121 Mass. 157; Bartlett v. Tucker, 104 Mass. 336, 6 AmR 240; Greenfield Bank v. Crafts, 4 Allen 447, 454 (holding that by ratifying a forged signature on commercial paper the person whose signature has been forged becomes liable thereon, although no words of agency appear on the paper and no facts are shown sufficient to constitute an estoppel in pais. In this case the court said: "The only question upon this part of the case is, whether a signature made by an unauthorized person under such circumstances as show that the party placing the name on the note was thereby committing the crime of forgery, can be adopted and ratified by any acts and admissions of the party whose name appears on the note, however full, and intentionally made and designed to signify an adoption of the signature. The defendants insist that it cannot, by such evidence as would in other cases warrant the jury in finding an adoption; and that nothing short of an estoppel, having the element of actual damage from delay or postponement, occasioned by the acts of the person whose name is borne upon the note, misleading the holder of it, will have this effect. As to the person himself whose name is so signed, it is difficult to perceive any sound reason for the proposed distinction as to the effects of ratifying an unauthorized act in the two supposed cases. In the first case the actor has no authority any more than in the last. The contract receives its whole validity from the ratification. It may be ratified where there was no pretense of agency. In the other case the individual who presents the note thus signed passes the same as a note signed by the promisor either by his own proper hand or written by some one by his authority. . . . It is, as it seems to us, equally competent for the party, he knowing all the circumstances as to the signature and intending to adopt the note, to ratify the same and thus confirm what was originally an unauthorized and illegal act. . . . It is, however, urged that public policy forbids sanctioning a ratification of a forged note, as it may have a tendency to stifle a prosecution for the criminal offence. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted the guilty party was not to be prosecuted for the criminal offence").

N. Y.—Commercial Bank v. Warren, 15 N. Y. 577; Howard v. Duncan, 3 Lans. 174.

R. I.—Crout v. De Wolf, 1 R. I. 393.

Tenn.—Jones v. Hamlet, 2 Sneed 256; Fitzpatrick v. Caperton Cove School Dist., 7 Humphr. 224, 46 AmD 76 (holding that, where a person whose name is forged as surety to a note subsequently takes a deed of trust upon property of the principal to indemnify himself, he thereby ratifies the execution of the note, and becomes liable as surety).

Eng.—Brook v. Hook, L. R. 6 Exch. 89, 97 (where Martin, B., dissenting, said: "In one sense, perhaps, the forgery cannot be ratified or condoned as regards the forger, but there is no authority whatever to distinguish the ratification of a parol contract and of a written one made by one person in the name of another without authority").

Can.—Scott v. New Brunswick Bank, 23 Can. S. C. 277.

See Corser v. Paul, 41 N. H. 24, 77 AmD 753.

87. Greenfield Bank v. Crafts, 4 Allen (Mass.) 447; Williams v. Bayley, L. R. 1 H. L. 200, 6 ERC 455; Brook v. Hook, L. R. 6 Exch. 89; Scott v. New Brunswick Bank, 23 Can. S. C. 277. But see Reg. v. Smith, 3 F. & F. 504.

[a] **Where a father made a mortgage to secure the amount of bills forged by his son,** which were then given up to him with a view to stopping the prosecution, it was invalid. Williams v. Bayley, L. R. 1 H. L. 200, 6 ERC 455.

88. Cal.—Campbell v. Campbell, 133 Cal. 33, 65 P 134.

Ill.—Hefner v. Dawson, 63 Ill. 403, 14 AmR 123.

Iowa.—Smith v. Tramel, 68 Iowa 488, 27 NW 471.

Ky.—Rudd v. Matthews, 79 Ky. 479, 42 AmR 231.

Me.—Casco Bank v. Keene, 53 Me. 103.

Md.—Woodruff v. Munroe, 33 Md. 146.

N. Y.—Thorn v. Bell, Lalor 430; Weed v. Carpenter, 4 Wend. 219.

Oh.—Workman v. Wright, 33 Oh. St. 405, 31 AmR 546.

R. I.—Crout v. De Wolf, 1 R. I. 393.

Eng.—McKenzie v. British Linen Co., 6 App. Cas. 82; Ashpitel v. Bryan, 3 B. & S. 474, 113 ECL 474, 122 Reprint 179; Freeman v. Cooke, 2 Exch. 654, 11 ERC 82.

See Union Bank v. Middlebrook, 33 Conn. 95; Lancaster v. Smith, 67 Pa. 427.

See generally supra § 71.

[a] **The acceptance of a forged bill of exchange** has been held to be binding on the acceptor, not, however, from the force of the doctrine of ratification, but upon the theory of estoppel. State v. Benoist, 37 Mo. 500; Van Duzer v. Howe, 21 N. Y. 531; Dodge v. National Exch. Bank, 20 Oh. St. 234, 5 AmR 648; Hall v. Fuller, 5 B. & C. 750, 11 ECL 665, 108 Reprint 279; Mather v. Maidstone, 18 C. B. 273, 86 ECL 273, 139 Reprint 1374. See also Bills and Notes [8 Cyc 64].

[b] **Estoppel may arise from a failure to repudiate** or from silence on the part of him whose signature is forged. Corser v. Paul, 41 N. H. 24, 77 AmD 753; Weed v. Carpenter, 4 Wend. (N. Y.) 219; Reg v. Smith, 3 F. & F. 504; Reg. v. Beardsall, 1 F. & F. 529.

[c] **Refraining from obtaining security.**—In Casco Bank v. Keene, 53 Me. 103, where, on account of defendant's admission of the genuineness of the signature, the bank refrained from proceeding against the person from whom they had received it, an instruction that "if the plaintiffs, relying on the defendant's admission, were induced to refrain from obtaining security . . . and they thereby sustained an injury, then the defendant would be estopped from denying his signature," was held correct.

[d] **Sanction after maturity and negotiation.**—In Woodruff v. Munroe, 33 Md. 146, it was held that if, in an action against an indorser of a promissory note by the bona fide holders thereof, it is shown that the indorsement was not genuine, and that defendant did not ratify or sanction it prior to the maturity of the note and its transfer to plaintiff, he is not liable; but if he adopted the note prior to its maturity, and by such adoption assisted in its negotiation, he will be estopped from setting up the forgery in a suit by a bona fide holder.

89. De Feriet v. Bank of America, 23 La. Ann. 310, 8 AmR 597. See also Crout v. De Wolf, 1 R. I. 393. See generally supra § 71.

90. Wilson v. Hayes, 40 Minn. 531, 540, 42 NW 467, 12 AmSR 754, 4 LRA 196 (where the court said: "We have found no case where it has been held that a forged instrument can be ratified so as to give the forger himself a right of action upon it. It is legally impossible in such a case that the relation of principal and agent could exist between the parties, for one man cannot be the agent of another to make a contract with himself. Hence it would seem that the doctrine of ratification can have no application to such a case. If the entire instrument was a forgery, in the popular sense, it would require no argument to prove that a mere assent to or ratification of it in the hands of the forger would be a mere nudum pactum. But in law there is no distinction between a forgery in making and a forgery by altering. The altered instrument is not the contract of the maker, and in legal contemplation is as entirely a forgery as the other. If the alteration was not fraudulent, so that it did not destroy the instrument, or at least did not extinguish the debt, we can see how a subsequent assent to it would create a liability on the instrument as altered. Parties can alter their contract by mutual consent, and this requires no new consideration, for it is merely the substitution of a new contract for the old one, and this is of itself a sufficient consideration for the new. And what a party may assent to when done he may assent to afterwards, so as to bind himself, if there be a consideration to support it. But where there has been a fraudulent alteration of a written contract, which not only destroys the instrument but extinguishes the debt, it seems to us clear on principle that a subsequent assent to the alteration, given to the party who made it, without any new consideration, is, in any

[§ 89] **2. Who May Ratify[91]—a. In General.** As a general rule the ratification of a particular act or contract may be made by anyone in whose behalf such act or contract has been done or made, if he could have given authority to do the act or enter into the contract in the first instance, and if he still has power to do so at the time of the ratification; otherwise not;[92] and in some jurisdictions it is expressly provided by statute that a ratification is not valid unless, at the time of ratifying the act done, the principal has power to confer authority for such an act.[93] A principal therefore is incapable of ratifying an act if his own status has so changed that he is no longer capable of doing the act,[94] as where before the attempted ratification he has disposed of the property or interest which was the subject matter of the agent's unauthorized contract.[95]

[§ 90] **b. Ratification by Agent.** As a general rule an agent cannot ratify an unauthorized act or contract performed or entered into by himself so as to make his principal liable thereon;[96] nor can an agent ratify an unauthorized act or contract performed or entered into by a third person on behalf of his principal,[97] unless he has authority to ratify

view of the case, a mere naked promise").

91. **Ratification by:**
Corporation generally see Corporations [10 Cyc 1069 et seq].
Infant see Infants [22 Cyc 539 et seq, 600 et seq].
Lunatic on restoration to reason see Insane Persons [22 Cyc 1209]
Municipal corporation see Municipal Corporations [28 Cyc 592, 675 et seq].
Partnership see Partnership [30 Cyc 528 et seq].
State see States [36 Cyc 879].

92. U. S.—Western Nat. Bank v. Armstrong, 152 U. S. 346, 14 SCt 572, 38 L. ed. 470; Norton v. Shelby County, 118 U. S. 485, 6 SCt 1121, 30 L. ed. 178; Marsh v. Fulton County, 10 Wall. 676, 19 L. ed. 1040; Hughes County v. Ward, 81 Fed. 314.
Ala.—Watkins v. Durand, 1 Port. 251.
Cal.—San Diego, etc., R. Co. v. Pacific Beach Co., 112 Cal. 53, 44 P 333, 33 LRA 788 and note; Krumdick v. White, 107 Cal. 37, 39 P 1066 (holding that the acceptance by an executrix, testator's widow, of the proceeds of a sale of property belonging to the estate by one claiming to act as testator's agent is not a ratification of such sale, for she could not have authorized such a sale); Zottman v. San Francisco, 20 Cal. 96, 81 AmD 963.
Ill.—Hickox v. Fels, 86 Ill. A. 216.
Ind.—Shepardson v. Gillette, 133 Ind. 125, 31 NE 788.
Mich.—Taymouth Tp. v. Koehler, 35 Mich. 22.
Mo.—In re Soulard, 141 Mo. 642, 43 SW 617; Lingenfelder v. Leschen, 134 Mo. 55, 34 SW 1089; Ellerbe v. National Exch. Bank, 109 Mo. 445, 19 SW 241; Trenton First Nat. Bank v. Gay, 63 Mo. 33, 21 AmR 430.
Nebr.—Bullard v. De Groff, 59 Nebr. 783, 82 NW 4.
Pa.—Bell v. Waynesboro Borough, 195 Pa. 299, 45 A 930; Sword v. Keneseth Israel Reformed Cong., 29 Pa. Super. 626; Tarentum v. Moorehead, 26 Pa. Super. 273.
Philippine.—Acuna v. Ilollo, 2 Philippine 217.
Vt.—New Haven v. Weston, 87 Vt. 7, 86 A 996, 46 LRANS 921 and note.
Eng.—Irvine v. Union Bank, 2 App. Cas. 366; Dibbins v. Dibbins, [1896] 2 Ch. 348; Purcell v. Henderson, L. R. 16 Ir. 213 [aff L. R. 16 Ir. 466].
See also supra § 82.
"A ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able, at the time, to make the contract to which by his ratification he gives validity. The ratification is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction, unless in a position to enter directly upon a similar transaction himself." McCracken v. San Francisco, 16 Cal. 591, 624.
[a] **Mere weakness of mind** will not prevent ratification of an unauthorized act, but the principal must be capable of exercising deliberate judgment on facts essential to constitute a ratification. Welke v. Wackershauser, 143 Iowa 107, 120 NW 77 (holding that in that particular case the principal was unable, by reason of severe illness and the administration of narcotics, to give an intelligent assent to the unauthorized sale and transfer of her land by an attorney in fact so as to amount to a ratification).
[b] **Heirs of insane person.**—Where a person takes a tax sale certificate and tax deed as agent for the insane owner, his agency may be proved against his heirs by his conduct and by circumstances, and it is not necessary that he should have been formally appointed as agent, but, if he intervenes voluntarily and uses his own funds, the heirs of the owner, who was incapable of recognizing the agency because of insanity, can accept and adopt the service rendered. Hudson v. Herman, 81 Kan. 627, 107 P 35.

93. See statutory provisions.
[a] **Such a provision "exemplifies an elementary principle** of the common law." Dobbs v. Atlas El. Co., 22 S. D. 226, 228, 117 NW 128 (construing Rev. Civ. Code § 1670).

94. Upton v. Dennis, 133 Mich. 238, 94 NW 728 (holding that where, after an administratrix had indorsed a claim belonging to the estate to an agent for collection, the administratrix was discharged, and the agent subsequently made a settlement for less than the amount due, a letter written afterward by the administratrix, purporting to authorize such settlement, could not confirm the agent's act, as the power of the administratrix to bind the estate and the agent's power to act terminated with her discharge).

95. McDonald v. McCoy, 121 Cal. 55, 53 P 421.
[a] **Illustrations.**—(1) "If an individual, pretending to be the agent of another, should enter into a contract for the sale of land of his assumed principal, it would be impossible for the latter to ratify the contract, if between its date and the attempted ratification he had himself disposed of the property. He could not defeat the intermediate sale made by himself, and impart validity to the sale made by the pretended agent, for his power over the property or to contract for its sale would be gone." McCracken v. San Francisco, 16 Cal. 591, 624. (2) A lease executed by one who purported to act as the agent of the owner of land, but without written authority, is not rendered valid by a ratification made by one who owned the land at the time the lease was executed but who had parted with title before the ratification. Dobbs v. Atlas El. Co., 22 S. D. 226, 117 NW 128. (3) A lease by the owner of land, made after a lease of the same land by an unauthorized agent, takes from him the power to ratify the lease made by the agent. Bordeere v. Den, 106 Cal. 594, 39 P 946.

96. Ill.—Fay v. Slaughter, 194 Ill. 157, 62 NE 592, 56 LRA 564 [rev 94 Ill. A. 111] (holding that an agent having authority to do lawful things cannot, by virtue of such authority, ratify his own unauthorized or illegal acts so as to bind his principal).
Iowa.—Young v. Inman, 146 Iowa 492, 125 NW 177; Britt v. Gordon, 132 Iowa 431, 108 NW 319; Hartman Steel Co. v. Hoag, 104 Iowa 269, 73 NW 611. But see Palmer v. Cheney, 35 Iowa 281.
Mich.—Deffenbaugh v. Jackson Paper Mfg. Co., 120 Mich. 242, 79 NW 197; Trudo v. Anderson, 10 Mich. 357, 81 AmD 795; Hotchin v. Kent, 8 Mich. 526.
Nebr.—Driscoll v. Modern Brotherhood of America, 77 Nebr. 282, 109 NW 158; Bullard v. De Groff, 59 Nebr. 783, 82 NW 4.
Pa.—Henry v. Milne, 43 Pa. 418 (holding that if one assuming to act as agent for another purchases goods, but has in fact no authority, and the goods are attached as his property, the employment by the pretended agent of counsel to bring suit claiming the goods for the principal does not effect a ratification by the latter).
S. D.—Fargo v. Cravens, 9 S. D. 646, 70 NW 1053.
[a] **Reason for rule.**—"If this were not so, an agent would have unlimited authority, and it would be useless to attempt to guard it. Moreover, it would allow an agent to perpetrate the most outrageous frauds upon his principal." Britt v. Gordon, 132 Iowa 431, 438, 108 NW 319, 11 AnnCas 4075.

97. Ala.—Patterson v. Neal, 135 Ala. 477, 33 S 39; Singer Mfg. Co. v. McLean, 105 Ala. 316, 16 S 912 (holding that, where an agent is authorized solely to take an inventory and report the business of a salesman, he cannot ratify a disposition of his principal's property, nor by accepting property of his principal relieve the salesman from liability for it).
Mich.—Ironwood Store Co. v. Harrison, 75 Mich. 197, 42 NW 808; Trudo v. Anderson, 10 Mich. 357, 81 AmD 795.
Nebr.—Bullard v. De Gro, 59 Nebr. 783, 82 NW 4.
N. H.—Bohanan v. Boston, etc., R. Co., 70 N. H. 526, 49 A 103.
Tex.—Gulf, etc., R. Co. v. Reed, 80 Tex. 362, 15 SW 1105, 26 AmSR 749.
W. Va.—Cumberland Third Nat. Bank v. Laboringman's Mercantile, etc., Co., 56 W. Va. 446, 49 SE 544.
See Fowler v. Hooker, 4 U. C. Q. B. 18.
[a] **A general agent** has no authority to ratify the acts of a stranger done in the name of his principal, unless the power of appointing agents has been delegated to him by the principal. Ironwood Store Co. v. Harrison, 75 Mich. 197, 42 NW 808.
[b] **Where the agent has no power to delegate** performance of a certain act, although he has power to do it himself, he cannot bind his principal by ratifying it when done by another. O'Connor v. Arnold, 53 Ind. 203 (it appearing that an account had been placed in the hands of an attorney for collection and that the debtor had paid a part of the claim to a person who occupied the same office with the attorney, but who had no connection with him, and who gave a receipt for the money so paid, signed by him as for said attorney, it was held that the attorney could not ratify his act on the ground that the agency involved in its duties especial

it,[98] or had authority to perform the act in person or to authorize the act to be performed by another,[99] and a ratification in such a case, in order to bind the principal, must be made on behalf of the principal and not on the agent's own behalf.[1]

[§ 91] **3. Actor Must Have Acted in Behalf of Ratifier.** As a general rule in order that an unauthorized act or contract may be capable of ratification it is necessary that the person who assumes to act as agent therein must purport to be the agent of the alleged principal, and that the act or contract must purport to be done or entered into in the name of or on behalf of such principal.[2] Hence if an alleged agent does not pretend or assume to be acting for another, but acts solely on his own account, then as to such other the transaction is inter alios acta, and he cannot make himself a party to it by his ratification of the act,[3] and therefore there

learning and professional skill, and could not be delegated except by the consent of the principal); Thompson v. Michigan Mut. L. Ins. Co., (Ind. A.) 105 NE 780.

98. Whitehead v. Wells, 29 Ark. 99; Young v. Inman, 146 Iowa 492, 125 NW 177; New Haven v. Weston, 87 Vt. 7, 86 A 996, 46 LRANS 921.

[a] **A special agent** to look into the dealings of his principal's son's unauthorized disposal of stock can ratify such acts and bind his principal, especially where the principal received the money growing out of such unauthorized transactions. Platt v. Francis, 247 Mo. 296, 152 SW 332.

99. Ala.—Singer Mfg. Co. v. Belgart, 84 Ala. 519, 4 S 400; Mound City Mut. L. Ins. Co. v Huth, 49 Ala. 529.

Ark.—Whitehead v. Wells, 29 Ark. 99.

Ida.—Linn v. Alameda Min., etc., Co., 17 Ida. 45, 104 P 668.

Ind.—U. S. Express Co. v. Rawson, 106 Ind. 215, 6 NE 337.

Iowa.—Palmer v. Cheney, 35 Iowa 281.

Mich.—Ironwood Store Co. v. Harrison, 75 Mich. 197, 42 NW 808 (holding that an agent, to ratify the unauthorized act of another agent, must have general power to perform the act which he ratifies, and both must be agents of the same principal, and the agent whose act is in question must have professed to act as the agent of such common principal).

N. H.—Bohanan v. Boston, etc., R. Co., 70 N. H. 526, 49 A 103 (semble).

Can.—Rogers v. Hewer, 1 DomLR 747, 19 WestLR 868.

"An agent with actual authority may ratify an act done by another if within the scope of his authority; but the ratification must be for and on behalf of his principal, and not for himself." Young v. Inman, 146 Iowa 492, 498, 125 NW 177.

[a] **Agent held to have ratified the unauthorized act of his subagent** see Cowley v. Fabien, 204 N. Y. 566, 97 N. E. 458.

1. Young v. Inman, 146 Iowa 492, 125 NW 177.

2. U. S.—In re Roanoke Furnace Co., 166 Fed. 944 [aff 174 Fed. 584, 98 CCA 430].

Cal.—McDonald v. McCoy, 121 Cal. 55, 53 P 421; Goetz v. Goldbaum, 37 P 646; Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 26 P 902; Ellison v. Jackson Water Co., 12 Cal. 542.

Conn.—Shoninger v. Peabody, 57 Conn. 42, 17 A 278, 14 AmSR 88.

D. C.—Balloch v. Hooper, 17 D. C. 421.

Ida.—Linn v. Alameda Min., etc., Co., 17 Ida. 45, 104 P 668.

Iowa.—Brown v. Webster City, 115 Iowa 511, 88 NW 1070.

Me.—Steward v. Church, 108 Me. 83, 79 A 11; Mattocks v. Young, 66 Me. 459 (holding that ratification arises only when one assuming an agency performs some act which purports to impose an obligation or liability upon another).

Minn.—Mitchell v. Minnesota Fire Assoc., 48 Minn. 278, 51 NW 608.

Mo.—Herd v. Buffalo Bank, 66 Mo. A. 643; Bank of Commerce v. Bernero, 17 Mo. A. 313 (holding it to be essential that the party whose act is to be ratified should have assumed to act as agent for the party ratifying at the date of the act sought to be ratified).

N. Y.—Hamlin v. Sears, 82 N. Y. 327, 330 (where the court said: "The general doctrine that one may, by affirmative acts, and even by silence, ratify the acts of another who has assumed to act as his agent, is not disputed. It is illustrated by many cases to be found in the books, and set forth by all the text writers upon the law of agency. . . . But the doctrine properly applies only to cases where one has assumed to act as agent for another"); Thompson v. Craig, 16 AbbPrNS 29.

N. C.—Moore v. Rogers, 51 N. C. 297.

Oh.—Williams v. Stearns, 59 Oh. St. 28, 51 NE 439.

Or.—Backhaus v. Buells, 43 Or. 558, 72 P 976, 73 P 342.

Pa.—Pittsburg, etc., R. Co. v. Gazzam, 32 Pa. 340.

S. D.—Minder, etc., Land Co. v. Brustuen, 24 S. D. 537, 124 NW 723.

Tex.—O'Connor v. Camp, (Civ. A.) 158 SW 203.

Wis.—Fisher v. Luts, 146 Wis. 664, 666, 132 NW 592 [quot Cyc].

Eng.—Marsh v. Joseph, [1897] 1 Ch. 213; Vere v. Ashby, 10 B. & C. 288, 21 ECL 127, 109 Reprint 457; Ancona v. Marks, 7 H. & N. 686.

[a] **Antiquity of rule.**—This rule of law was stated in the Year Book 7 Hen. IV fol 35, where it was declared that if a bailiff take a heriot, claiming property in it himself, the subsequent assent of the lord will not amount to a ratification, but if he take it as bailiff of the lord, the subsequent assent amounts to a ratification of the bailiff's act.

[b] **The term "ratification" necessarily implies** the relation of principal and agent. Pittsburgh, etc., R. Co. v. Gazzam, 32 Pa. 340.

[c] **"The terms 'adopted' and 'ratified'** are properly applied only to contracts made by a party assuming to act for another. . . . It is not a correct expression to say that a person adopts or ratifies his own act. That which is his own is already so, and needs no adoption. The terms 'ratify' and 'adopt,' of themselves, imply that some other person has acted, other than the person who ratifies or adopts." Minnich v. Darling, 8 Ind. A. 539, 36 NE 173, 175.

[d] **The subsequent approval of a trespass** by a third person does not render another liable therefor unless the act was originally done in such other's name or for his use. Grund v. Van Vleck, 69 Ill. 478.

3. U. S.—In re Roanoke Furnace Co., 166 Fed. 944 [aff 174 Fed. 584, 98 CCA 430]; Johnson v. Johnson, 31 Fed. 700.

Cal.—McDonald v. McCoy, 121 Cal. 55, 53 P 421 (holding that a contract to procure a deed to land from its owner or pay damages is not such a contract as can be ratified by such owner, so as to make it his contract, and thereby pass title to the party of the second part to the contract, who goes into possession thereunder, as it does not purport to bind him); Goetz v. Goldbaum, 37 P 646.

Colo.—Ilfeld v. Ziegler, 40 Colo. 401, 91 P 825 (holding that, where one in selling goods did not purport to act as agent of a third person but in his own right as owner, the third person could not be bound thereby on the theory of ratification).

D. C.—Balloch v. Hooper, 17 D. C. 421.

Ga.—Thompson v. Brown, 121 Ga. 814, 49 SE 740.

Ida.—Linn v. Alameda Min., etc., Co., 17 Ida. 45, 104 P 668.

Ind.—Meiners v. Munson, 53 Ind. 138.

Iowa.—Wyckoff v. Davis, 127 Iowa 399, 103 NW 349.

Mass.—New England Dredging Co. v. Rockport Granite Co., 149 Mass. 381, 21 NE 947; Richardson v. Payne, 114 Mass. 429. But see Greenfield Bank v. Crafts, 4 Allen 447.

Mich.—Ferris v. Snow, 130 Mich. 254, 90 NW 850; Crane v. Partland, 9 Mich. 493.

Mo.—Hammerslough v. Cheatham, 84 Mo. 13; Herd v. Buffalo Bank, 66 Mo. A. 643.

Nebr.—Tecumseh Nat. Bank v. Chamberlain Banking House, 63 Nebr. 163, 88 NW 186.

N. J.—Schlessinger v. Forest Products Co., 78 N. J. L. 637, 76 A 1024, 138 AmSR 627, 30 LRANS 347 (holding that the doctrine of ratification does not apply where one making a contract was not at the time, and did not profess or assume to be, acting on behalf of a principal).

N. Y.—Hamlin v. Sears, 82 N. Y. 327; Condit v. Baldwin, 21 N. Y. 219, 78 AmD 137 [aff 21 Barb. 181]; Garrett v. McComb, 58 App. Div. 419, 68 NYS 996; Dumois v. Hill, 2 App. Div. 525, 37 NYS 1093 [aff 157 N. Y. 718 mem, 53 NE 1124 mem]; Squier v. Norris, 1 Lans. 282; Collins v. Suau, 30 N. Y. Super. 623; Kirchner v. Schmid, 7 Misc. 455, 25 NYS 85.

N. C.—Rawlings v. Neal, 126 N. C. 271, 35 SE 597.

Oh.—Williams v. Stearns, 59 Oh. St. 28, 35, 51 NE 439 (where the court said: "There can be no ratification by an alleged principal unless authority to represent him has been assumed by the alleged agent. It is of the essence of ratification that the principal confirms and adopts as his own an act done without his previous authority").

Or.—Backhaus v. Buells, 43 Or. 558, 72 P 976, 73 P 342 (holding that, where an agent of the buyer of certain hops, to be grown and delivered by the seller, advanced to the seller a certain sum in his individual capacity, and not as agent, the buyer could not ratify such advancement so as to entitle him to possession of the hops under the contract, which included a mortgage for advancements made by the buyer, on the seller's failure to repay the advancement to the agent).

S. D.—Fish, etc., Co. v. New England Homestake Co., 27 S. D. 221, 130 NW 841 (holding that where plaintiff, employed by a company to do work, never understood that he was being employed by it as agent for defendant, there is no chance for the application of the doctrine of ratification, so as to make defendant liable for plaintiff's compensation, on the ground of ratification of the company's act of employment).

Tex.—Lavernia Lumber Co. v. Pikos, (Civ. A.) 135 SW 607; Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953.

Eng.—Wilson v. Tumman, 6 M. & G. 236, 46 ECL 236, 134 Reprint 879. See Watson v. Swann, 11 C. B. N. S. 756, 103 ECL 756, 142 Reprint 993, 2 ERC 346; Woolen v. Wright, 1 H. & C. 554.

N. S.—Craig v. Matheson, 32 N. S. 452.

[a] **Acts of third person.**—Where a principal is represented by a duly

can be no ratification of a tort by one in whose interest it was not committed.[4] Even where one falsely professes to act as agent but is actually contracting for himself and in his own name, the alleged principal cannot make himself a party to the contract by ratification;[5] but, on the other hand, although he intends to act for his own benefit, if his act purports to be done in behalf of a principal, it may be ratified by such principal.[6] Nor can one person ratify an act done by one assuming to act as agent for another person.[7]

Necessity of acting avowedly for principal. In some cases it is held that it is not sufficient that the act or contract may inure to the benefit of the alleged principal;[8] but, in order that there may be a ratification, the unauthorized act must have been done avowedly for the person sought to be charged as principal, and if the agent did not profess to be acting for the person sought to be held as having ratified the act, the subsequent assent of such person is of no effect,[9] unless the person with whom the agent was dealing knew of the principal's rights in the subject matter of the act or contract.[10] In other cases, however, it is said that while it is necessary that the act should have been done by one who was in fact assuming to act as an agent, it is not necessary that he should have been understood to be such by the person with whom he was dealing, and that the principal may ratify if the agent reasonably intended, although without open avowal, to act as agent.[11]

[§ 92] **4. Existence of Principal.** It is necessary for a valid ratification that the person in whose behalf the unauthorized act was done should have been in existence and identified or capable of being identified at the time of the performance of the act,[12] as a person cannot be brought into life as a principal after the act sought to be ratified by him has been done, if there was no recognition of the existence of a principal at the time of the doing of the act.[13] The principal need not be named, but he must be capable of being ascertained;[14] nor

authorized agent, and some third person who may also be benefited by the transaction assumes, without the knowledge or consent of the principal or his agent, to make representations and statements to promote the transaction, the principal will not be bound thereby, although he accepts the benefits of the transaction negotiated by his agent. Tecumseh Nat. Bank v. Chamberlain Banking House, 63 Nebr. 163, 88 NW 186, 57 LRA 811.

[b] **Where a contract under seal purports to be that of the person executing it,** ratification of it by another does not make it his contract. Stanton v. Granger, 125 App. Div. 174, 109 NYS 134 [aff 193 N. Y. 656 mem, 87 NE 1127 mem].

[c] **Where an agent wrongfully pledges property** of his principal to secure his own personal debt, the transaction cannot be ratified by the principal, as nothing was done in his behalf. Wycoff v. Davis, 127 Iowa 399, 103 NW 349.

[d] **Where one buys property in his own name** for himself another cannot adopt the transaction as principal. Balloch v. Hooper, 17 D. C. 421; Wycoff v. Davis, 127 Iowa 399, 103 NW 349; Fellows v. Oneida County Comrs., 36 Barb. (N. Y.) 655; Virginia Pocahontas Coal Co. v. Lambert, 107 Va. 368, 58 SE 561, 122 AmSR 860, 13 AnnCas 277 and note.

4. Wilson v. Barker, 4 B. & Ad. 614, 24 ECL 271, 110 Reprint 587.

[a] **Where suit was brought against the general agent** of a sewing machine company for a forcible trespass committed by employees while removing a machine by his direction and in compliance with the orders of the company from the premises of one who held it under a sewing machine lease which had been forfeited, defendant was not liable on the ground of ratification, inasmuch as the act complained of was not done in his interest or for his benefit, and the only interest involved was that of his principals. Smith v. Lozo, 42 Mich. 6, 3 NW 227.

5. Virginia Pocahontas Coal Co. v. Lambert, 107 Va. 368, 58 SE 561, 422 AmSR 860, 13 AnnCas 277 and note (holding that, where a grantee obtained a conveyance by falsely representing to the grantor that he was the agent of a third person, but the conveyance was made to the grantee in his own name, for his own benefit, and the purchase price was paid by his own money, the third person was not entitled to the benefit of the conveyance on the ground that he had the right to, and did, ratify the purchase).

6. In re Tiedemann, [1899] 2 Q. B. 66 (holding that where an agent makes a contract purporting to sell goods in the name of a principal, but with the fraudulent intention of selling them on his own account and for his own benefit, it is competent for the principal to ratify and take the benefit of the contract as against the buyers).

7. Ida.—Linn v. Alameda Min., etc., Co., 17 Ida. 45, 104 P 668.
Iowa.—Lewis v. Kerr, 17 Iowa 73.
N. Y.—Ramsay v. Miller, 135 App. Div. 503, 120 NYS 523 [rev on other grounds 202 N. Y. 72, 95 NE 35].
Tex.—American Nat. Bank v. Cruger, 91 Tex. 446, 44 SW 278; Commercial, etc., Bank v. Jones, 18 Tex. 811. Compare Goldschmidt v. Wagner, (Civ. A.) 99 SW 737.
Eng.—Wilson v. Tumman, 6 M. & G. 236, 46 ECL 236, 134 Reprint 879 (holding that a third person cannot, by adopting an act done by B as agent for A, make B his agent and thereby incur any liability or take any benefit under the act).
N. S.—Craig v. Matheson, 32 N. S. 452.

[a] **If a servant, having his master's money for a specific purpose,** makes use of it in performing a service which he, without his master's privity, has undertaken for another, the master cannot, by afterward adopting the servant's act as his own, charge that other party upon the contract made by him with the servant. Webb v. Cole, 20 N. H. 490.

8. Minnich v. Darling, 8 Ind. A. 539, 36 NE 173.

9. Crowder v. Reed, 80 Ind. 1, 10; Commercial, etc., Bank v. Jones, 18 Tex. 811.
"A ratification can only be effectual between the parties, when the act is done by the agent avowedly for or on account of the principal, but not when it is done for or on account of the agent himself, or of some third person." Crowder v. Reed, supra [quot Story Agency § 251a].

[a] **A contract made by a man professing to act on his own behalf alone,** and not on behalf of a principal, but having an undisclosed intention to give the benefit of the contract to a third person, cannot be ratified by that third person so as to render him able to sue or liable to be sued on the contract. Keighley v. Durant, [1901] A. C. 240, 1 BRC 351 [rev [1900] 1 Q. B. 629]. To same effect Boston Fruit Co. v. British, etc., Mar. Ins. Co., [1906] A. C. 336, 4 AnnCas 498.

10. Robinson v. Lincoln Sav. Bank, 85 Tenn. 363, 3 SW 656 (holding that a principal may ratify and enforce a contract made for his benefit by one acting as his agent with a person having notice of the principal's rights in the subject matter of the contract, although the agent contracted in his own name and without express authority of his principal); Goldschmidt v. Wagner, (Tex. Civ. A.) 99 SW 737 (holding that, where a contract for the sale of a machine recited that the agent procuring the sale was representing a person named, while in fact he was representing a third person who accepted and retained the price, as the buyer knew whom the agent was representing the third person taking the benefit of the contract was bound by its terms).

11. Brooks v. Cook, 141 Ala. 499, 38 S 641; Hayward v. Langmaid, 181 Mass. 426, 429, 63 NE 912 (where it was said: "It is necessary in order to a ratification that the act should have been done by one who was in fact acting as an agent but it is not necessary that he should have been understood to be such by the party with whom he was dealing"); Foster v. Bates, 1 D. & L. 400, 2 ERC 129.

12. Natal Land, etc., Co. v. Pauline Colliery, etc., Syndicate, [1904] A. C. 120; North Sydney Inv., etc., Co. v. Higgins, [1899] A. C. 263; In re Northumberland Ave. Hotel Co., 33 Ch. D. 16, 2 ERC 351; In re Empress Engineering Co., 16 Ch. D. 125, 1 ERC 699; Melhado v. Porto Alegre, etc., R. Co., L. R. 9 C. P. 503; Gunn v. London, etc., F. Ins. Co., 12 C. B. N. S. 694, 104 ECL 694, 142 Reprint 1315; Watson v. Swann, 11 C. B. N. S. 756, 103 ECL 756, 142 Reprint 993, 2 ERC 346.

[a] **A contract entered into in anticipation of the formation of an association** by one who subsequently becomes its agent cannot be ratified by the association after its formation, since the existence of a principal when the act is done is one of the essential elements of a ratification. Stainsby v. Frazer's Metallic Life Boat Co., 3 Daly (N. Y.) 98.

13. Keighley v. Durant, [1901] A. C. 240, 251, 1 BRC 351 (where Lord James of Hereford said: "Doubtless a person can confirm and ratify a contract which was in fact made on his behalf. But an undisclosed principal must exist at the time of the contract. He cannot be brought into life as a principal after the contract has been made without any recognition of his existence").

14. Watson v. Swann, 11 C. B. N. S. 756, 771, 103 ECL 756, 142 Reprint 993, 2 ERC 346 (holding that, where an insurance broker who had been instructed to effect an open policy for plaintiff against jettison only, "subject to declaration thereafter," had been unable to do so, and declared certain deck cargo shipped for Ostend on board one of plaintiff's vessels on the back of a general policy which he had previously effected for himself "upon any kind of goods and merchandise, . . . to be valued and

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is it necessary that the principal be present at the time of the agent's acts in order for him to ratify them.[15]

Promoter's contracts. This rule is especially applicable to the acts of promoters of a corporation before its organization. In such case there can be no ratification by the corporation after its organization. Although it may become liable on the promoter's contracts by adopting them, this liability does not relate to the time the contracts were made but only to the time of adoption.[16]

Executors and administrators. An apparent exception to the above rule exists in the case of executors and administrators. In such case the executor's or administrator's power when he is appointed relates back to the death of decedent, and since before he is appointed he is capable of being identified by the appointment, he may ratify an act done since the death of decedent and before his appointment.[17]

[§ 93] **5. Knowledge of Facts—a. General Rule.** As a general rule, in order that a ratification of an unauthorized act or transaction of an agent may be valid and binding, it is essential that the principal have full knowledge, at the time of the ratification, of all material facts and circumstances relative to the unauthorized act or transaction,[18] or that some one authorized to represent the princi-

declared as interest might appear," and got it initialed by the underwriters, a loss having occurred, it was not competent for plaintiff to maintain an action against the underwriters upon the policy, the contract not having been by him or on his behalf at the time, Willes, J., saying: "The law obviously requires that the person for whom the agent professes to act must be a person capable of being ascertained at the time. It is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract. In the present case, the policy was effected on goods 'to be valued and declared as interest might appear.' No person was pointed out at the time the policy was effected as the person who was to be the owner of the goods insured. . . . A stranger who had given him no orders to effect a policy for him clearly cannot by any supposed ratification assume the benefit of the contract").

15. State v. Waldrop, 73 S. C. 60, 52 SE 793.

16. See Corporations [10 Cyc 1071 et seq]. See also supra § 80. And see Kelner v. Baxter, L. R. 2 C. P. 174, 183 (where it was held that when a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it, and a stranger cannot by a subsequent ratification relieve him from that liability. Plaintiff in this case had sold goods to the directors of a projected corporation. Erle, C. J., after showing that if the company had been in existence at the time the contract was entered into there would be no doubt that defendants would have signed as agent, said: "It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed: but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made").

17. Foster v. Bates, 1 D. & L. 400, 2 ERC 129 (holding that, where the act ratified was done in behalf of the intestate's estate prior to the appointment of an administrator, as the act of the agent was ratified by plaintiff after he had become administrator it was no objection that the intended principal was unknown at the time to the person who intended to be the agent). See also Executors and Administrators [18 Cyc 213, 214].

18. U. S.—Schutz v. Jordan, 141 U. S. 213, 11 SCt 906, 35 L. ed. 705 [aff 32 Fed. 55]; Bell v. Cunningham, 3 Pet. 69, 7 L. ed. 606; Guaranty Trust Co. v. Koehler, 195 Fed. 669, 115 CCA 475 [rev 187 Fed. 192]; Pennsylvania Taximeter Cab. Co. v. Cressey, 191 Fed. 337, 112 CCA 81; Chicago, etc., R. Co. v. Chickasha Nat. Bank, 174 Fed. 923, 98 CCA 535; Henry v. Lane, 128 Fed. 243, 62 CCA 625; Chauche v. Pare, 75 Fed. 283, 21 CCA 329; Wheeler v. Northwestern Sleigh Co., 39 Fed. 347; Bosseau v. O'Brien, 3 F. Cas. No. 1,667, 4 Biss. 395.

Ala.—Brooks v. Greil Bros. Co., 179 Ala. 459, 464, 60 S 387 [cit Cyc]; Moore v. Ensley, 112 Ala. 228, 20 S 744; Brown v. Bamberger, 110 Ala. 342, 20 S 114; Birmingham First Nat. Bank v. Allen, 100 Ala. 476, 14 S 335, 46 AmSR 80, 27 LRA 426; Baldwin v. Walker, 91 Ala. 428, 8 S 364, 94 Ala. 514, 10 S 391; Wheeler v. McGuire, etc., Co., 86 Ala. 398, 5 S 190, 2 LRA 808; Herring v. Skaggs, 73 Ala. 446; Howe Mach. Co. v. Ashley, 60 Ala. 496; Blevins v. Pope, 7 Ala. 371.

Ark.—Martin v. Hickman, 64 Ark. 217, 41 SW 852.

Cal.—Wagoner v. Silva, 139 Cal. 559, 73 P 433; Golinsky v. Allison, 114 Cal. 458, 46 P 295; Brown v. Rouse, 104 Cal. 672, 38 P 507; Kraft v. Wilson, 37 P 790; Dean v. Bassett, 57 Cal. 640; McCracken v. San Francisco, 16 Cal. 591; Dupont v. Wertheman, 10 Cal. 354; Billings v. Morrow, 7 Cal. 171, 68 AmD 235; Hall v. Wells, (A.) 141 P 53; Munroe v. Fette, 1 Cal. A. 333, 82 P 206.

Colo.—Hale v. Goodell, 49 Colo. 95, 111 P 708; Servant v. McCampbell, 46 Colo. 292, 104 P 394; Extension Gold Min., etc., Co. v. Skinner, 28 Colo. 237, 64 P 198; Field v. Small, 17 Colo. 386, 30 P 1034; Schollay v. Moffit-West Drug Co., 17 Colo. A. 126, 67 P 182; Smyth v. Lynch, 7 Colo. A. 383, 43 P 670 [rev on other grounds 25 Colo. 103, 54 P 634].

Conn.—Goodwin v. East Hartford, 70 Conn. 18, 38 A 876; Mallory v. Mallory Wheeler Co., 61 Conn. 131, 23 A 708.

D. C.—Ofenstein v. Bryan, 20 App. 1.

Fla.—Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349, 24 S 480; Madison v. Newsome, 39 Fla. 149, 22 S 270; Croom v. Swann, 1 Fla. 211.

Ga.—Foddrill v. Dooley, 131 Ga. 790, 63 SE 350; Dolvin v. American Harrow Co., 125 Ga. 699, 54 SE 706, 28 LRANS 785; Ludden, etc., Music House v. McDonald, 117 Ga. 60, 43 SE 425; Holland v. Van Bell, 89 Ga. 223, 15 SE 302; New Ebenezer Assoc. v. Gress Lumber Co., 89 Ga. 125, 14 SE 892; De Vaughn v. McLeroy, 82 Ga. 687, 10 SE 211; Mapp v. Phillips, 32 Ga. 72; Owsley v. Woolhopter, 14 Ga. 124.

Ida.—Findlay v. Hildenbrand, 17 Ida. 403, 413, 105 P 790, 29 LRANS 400 [cit Cyc].

Ill.—Sill v. Pate, 230 Ill. 39, 82 NE 356; International Bank v. Ferris, 118 Ill. 465, 8 NE 825; Reynolds v. Ferree, 86 Ill. 570; Kerr v. Sharp, 83 Ill. 199; Mathews v. Hamilton, 23 Ill. 470; Cadwell v. Meek, 17 Ill. 220; Strawn Farmers' El. Co. v. Bennett, 168 Ill. A. 428; Stein v. Kendall, 1 Ill. A. 103. See also Elevator Supply, etc., Co. v. Biddle-Murray Mfg. Co., 156 Ill. A. 461.

Ind.—Metzger v. Huntington, 139 Ind. 501, 37 NE 1084, 39 NE 235; Davis v. Talbot, 137 Ind. 235, 36 NE 1098; Crowder v. Reed, 80 Ind. 1; Manning v. Gasharie, 27 Ind. 399; Richmond Trading, etc., Co. v. Farquar, 8 Blackf. 89; Gage v. Pike, Smith 145; Reeves v. Miller, 48 Ind. A. 339, 95 NE 677.

Iowa.—Haswell v. Standring, 152 Iowa 291, 132 NW 417, AnnCas1913B 1326; Young v. Inman, 146 Iowa 492, 125 NW 177; Welke v. Wackershauser, 143 Iowa 107, 120 NW 77; Eggleston v. Mason, 84 Iowa 630, 51 NW 1; Hakes v. Myrick, 69 Iowa 189, 28 NW 575; Tidrick v. Rice, 13 Iowa 214. But see Moyers v. Fogarty, 140 Iowa 701, 119 NW 159; Brown v. Webster City, 115 Iowa 511, 88 NW 1070.

Kan.—St. John, etc., Co. v. Cornwell, 52 Kan. 712, 35 P 785; Stout v. McLachlin, 38 Kan. 120, 15 P 902; Bohart v. Oberne, 36 Kan. 284, 13 P 388; Ft. Scott First Nat. Bank v. Drake, 29 Kan. 311, 44 AmR 646.

Ky.—Elk Valley Coal Co. v. Thompson, 150 Ky. 614, 150 SW 817; Kenyon Realty Co. v. National Deposit Bank, 140 Ky. 133, 130 SW 965, 31 LRANS 169 and note; Gaskill v. Huffaker, 49 SW 770, 20 KyL 1555; Fletcher v. Dysart, 9 B. Mon. 413.

Me.—Tucker v. Jerris, 75 Me. 184; Forsyth v. Day, 41 Me. 382; Barnard v. Wheeler, 24 Me. 412; Thorndike v. Godfrey, 3 Me. 429.

Md.—Steinman v. Baltimore Antiseptic Steam Laundry Co., 109 Md. 62, 71 A 517, 21 LRANS 884; Groscup v. Downey, 105 Md. 273, 65 A 930; Bannon v. Warfield, 42 Md. 22; Howard v. Carpenter, 11 Md. 259.

Mass.—Foote v. Cotting, 195 Mass. 55, 80 NE 600; Beacon Trust Co. v. Souther, 183 Mass. 413, 67 NE 345; Shepard, etc., Lumber Co. v. Eldridge, 171 Mass. 516, 51 NE 9, 68 AmSR 446, 41 LRA 617; Combs v. Scott, 12 Allen 493; Lincoln v. Whittenton Mills, 12 Metc. 131; Peters v. Ballistier, 3 Pick. 495.

Mich.—Upton v. Dennis, 133 Mich. 238, 94 NW 728; Deffenbaugh v. Jackson Paper Mfg. Co., 120 Mich. 242, 79 NW 197; Blakley v. Cochran, 117 Mich. 394, 75 NW 940; Hurley v. Watson, 68 Mich. 531, 36 NW 726.

Minn.—Johnson v. Ogren, 102 Minn. 8, 112 NW 894; Jackson v. Badger, 35 Minn. 52, 26 NW 908; Humphrey v. Havens, 12 Minn. 298; Woodbury v. Larned, 5 Minn. 339.

Miss.—Meyer v. Baldwin, 52 Miss. 263; Baker v. Byrne, 10 Miss. 193.

Mo.—Butts v. Ajax-Grieb Rubber Co., 169 Mo. A. 657, 155 SW 837; Winkleblack v. National Exch. Bank, 155 Mo. A. 1, 13, 136 SW 712 [cit Cyc]; Craver v. House, 138 Mo. A. 251, 120 SW 686; Case v. Hammond Packing Co., 105 Mo. A. 168, 79 SW 732; Steunkle v. Chicago, etc., R. Co., 42 Mo. A. 73.

Mont.—Carlson v. Stone-Ordean-Wells Co., 40 Mont. 434, 107 P 419; Nord v. Boston, etc., Cons. Copper, etc., Min. Co., 33 Mont. 464, 94 P 1116, 89 P 647.

Nebr.—Fitzgerald v. Kimball Bros. Co., 76 Nebr. 236, 107 NW 227; Bullard v. De Groff, 59 Nebr. 783, 82 NW 4; Henry, etc., Co. v. Halter, 58 Nebr. 685, 79 NW 616; O'Shea v. Rice, 49 Nebr. 893, 69 NW 308; Columbia Nat. Bank v. Rice, 48 Nebr. 428, 67 NW

pal, except the agent, have such knowledge,[19] unless the principal is willfully ignorant or purposely refrains from seeking information.[20] In some jurisdictions this rule is expressly prescribed by statute.[21] In order to make this rule operative the principal must know the actual facts and not merely what the

165; Holm v. Bennett, 43 Nebr. 808, 62 NW 194.

Nev.—Clarke v. Lyon County, 7 Nev. 75.

N. H.—Gould v. Blodgett, 61 N. H. 115; Hovey v. Brown, 59 N. H. 114; Hazelton v. Batchelder, 44 N. H. 40; Tebbetts v. Moore, 19 N. H. 369.

N. J.—Belcher v. Manchester Bldg., etc., Assoc., 74 N. J. L. 833, 67 A 399; Dowden v. Cryder, 55 N. J. L. 329, 26 A 941; Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728; Clement v. Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 A 82 [rev 69 N. J. Eq. 347, 60 A 419]; Dugan v. Lyman, (Ch.) 23 A 657.

N. Y.—Weber v. Bridgman, 113 N. Y. 600, 21 NE 985 [rev 12 NYS 622]; Whitney v. Martine, 88 N. Y. 535 [rev 47 N. Y. Super. 396]; Ritch v. Smith, 82 N. Y. 627, 60 HowPr 157; Risley v. Indianapolis, etc., R. Co., 62 N. Y. 240; Utica First Nat. Bank v. Ballou, 49 N. Y. 155; Henry v. Wilkes, 37 N. Y. 562; Smith v. Tracy, 36 N. Y. 79; Seymour v. Wyckoff, 10 N. Y. 213; Nixon v. Palmer, 8 N. Y. 398; Prichard v. Signfus, 103 App. Div. 535, 93 NYS 152; Hogue v. Simonson, 94 App. Div. 139, 87 NYS 1065; Barnett v. Daw, 55 App. Div. 202, 66 NYS 880; Price v. Keyes, 1 Hun 177, 3 Thomps. & C. 720 [rev on other grounds 62 N. Y. 378]; Howell v. Christy, 3 Lans. 238; Henderhen v. Cook, 66 Barb. 21; Brass v. Worth, 40 Barb. 648; Roach v. Coe, 1 E. D. Smith 175; Long v. Poth, 16 Misc. 85, 37 NYS 670; Beck v. Freund, 117 NYS 193; Cornelius v. Reiser, 11 NYS 904 [aff 118 NYS 113]; Schwartz v. Weber, 6 NYS 688. See also Matter of Di Marti, 72 Misc. 148, 129 NYS 81.

N. C.—Wynn v. Grant, 81 SE 949; Thompson v. Green River Power Co., 154 N. C. 13, 69 SE 756; Brittain v. Westall, 137 N. C. 30, 49 SE 54.

Okl.—Cargile v. Union State Bank, 40 Okl. 506, 139 P 701; Stock Exch. Bank v. Williamson, 6 Okl. 348, 50 P 93.

Or.—Turnham v. Calumet, etc., Min. Co., 58 Or. 453, 113 P 711, 115 P 157.

Pa.—Zoebisch v. Rauch, 133 Pa. 532, 19 A 415; Merrick Thread Co. v. Philadelphia Shoe Mfg. Co., 115 Pa. 314, 8 A 794; Pittsburgh, etc., R. Co. v. Gazzam, 32 Pa. 340; Johann v. Inman, 17 LegInt 190.

S. C.—Reeves v. Brayton, 36 S. C. 384, 15 SE 658; Hull v. Young, 30 S. C. 121, 8 SE 695, 3 LRA 521; Fraser v. McPherson, 3 S. C. Eq. 393.

S. D.—Quale v. Hazel, 19 S. D. 483, 104 NW 215; Shull v. New Birdsall Co., 15 S. D. 8, 86 NW 654; Fargo v. Cravens, 9 S. D. 646, 70 NW 1053; Jewell Nursery Co. v. State, 5 S. D. 623, 59 NW 1025.

Tenn.—Williams v. Storm, 6 Coldw. 203; Carnes v. Polk, 4 Coldw. 87; Bement v. Armstrong, (Ch. A.) 39 SW 899.

Tex.—Tynburg v. Cohen, 67 Tex. 220, 2 SW 734; Moss v. Berry, 53 Tex. 632; Laredo v. Macdonnell, 52 Tex. 511; Vincent v. Rather, 31 Tex. 77, 98 AmD 516; Commercial, etc., Bank v. Jones, 18 Tex. 811; Rotan Grocery Co. v. Jackson, (Civ. A.) 153 SW 687; Holt v. Texas Moline Plow Co., (Civ. A.) 150 SW 215; Weathersby v. Texas, etc., Lumber Co., (Civ. A.) 146 SW 248; Clark, etc., Lumber Co. v. Duncan, (Civ. A.) 143 SW 644; Griffin v. Allison, (Civ. A.) 138 SW 1068; St. Louis, etc., R. Co. v. Blocker, (Civ. A.) 138 SW 156; Lightfoot v. Horst, (Civ. A.) 122 SW 606; Swayne v. Union Mut. L. Ins. Co., (Civ. A.) 49 SW 518; Iron City Nat. Bank v. San Antonio Fifth Nat. Bank, (Civ. A.) 47 SW 523 [mod on other grounds 92 Tex. 436, 49 SW 368]; Gimbel v. Gomprecht, (Civ. A.) 36 SW 781; Chaison v. Beauchamp, 12 Tex. Civ. A. 109, 34 SW 303; Collins v. Durward, 4 Tex. Civ. A. 339, 23 SW 561; Rhine v. Blake, 1 Tex. A. Civ. Cas. § 1066; Gunter v. Austin College, 1 Tex. A. Civ. Cas. § 248.

Utah.—Moyle v. Salt Lake City Cong. Soc., 16 Utah 69, 50 P 806; Nephi First Nat. Bank v. Foote, 12 Utah 157, 42 P 205.

Vt.—Livingston Mfg. Co. v. Rizzi Bros., 86 Vt. 419, 85 A 912; Spooner v. Thompson, 48 Vt. 259.

Va.—Rowland Lumber Co. v. Ross, 100 Va. 275, 40 SE 922; Day v. National Mut. Bldg., etc., Assoc., 96 Va. 484, 31 SE 902; Anderson v. Creston Land Co., 96 Va. 257, 31 SE 82.

Wash.—Heinzerling v. Agen, 46 Wash. 390, 90 P 262; Armstrong v. Oakley, 23 Wash. 122, 62 P 499; Haynes v. Tacoma, etc., R. Co., 7 Wash. 211, 34 P 922.

W. Va.—Thompson v. Laboringman's Mercantile, etc., Co., 60 W. Va. 42, 53 SE 908.

Wis.—Pluto Powder Co. v. Cuba City State Bank, 153 Wis. 324, 141 NW 220; Garlick v. Morley, 147 Wis. 397, 132 NW 601; Knapp v. Smith, 97 Wis. 111, 72 NW 349; Hall v. Chicago, etc., R. Co., 48 Wis. 317, 4 NW 325; Ladd v. Hildebrant, 27 Wis. 135, 9 AmR 445; Dodge v. McDonnell, 14 Wis. 553.

Eng.—Banque Jacques-Cartier v. Banque d'Epargne, etc., 13 App. Cas. 111; Marsh v. Joseph, [1897] 1 Ch. 213; Falcke v. Scottish Imperial Ins. Co., 34 Ch. D. 234; Bartram v. Lloyd, 90 L. T. Rep. N. S. 357; Bush v. Buckingam, 2 Vent. 83, 86 Reprint 322.

See Cameron v. Paxton, 15 Can. S. C. 622.

[a] **"The general rule is perfectly well settled,** (1) that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent." Combs v. Scott, 12 Allen (Mass.) 493, 496. (2) "No doctrine is better settled, both upon principle and authority, than this—that the ratification of an act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud." Owings v. Hull, 9 Pet. (U. S.) 607, 629, 9 L. ed. 246.

[b] **In the absence of circumstances creating an equitable estoppel,** in order to constitute a ratification of an unauthorized act the act relied on as such ratification must be performed with knowledge of the material facts. Columbia Nat. Bank v. Rice, 43 Nebr. 428, 67 NW 165.

[c] **In order to estop a principal because of his ratification** of the unauthorized act of his agent, (1) it is not enough to show that he has in some manner approved of such act, but it must also appear that the principal made the approval with knowledge of what his agent had done and promised in the premises in his behalf. Cram v. Sickel, 51 Nebr. 828, 71 NW 724, 66 AmSR 478. (2) Thus in order that a principal may be held to have ratified the acts of his agent in making promissory notes, he must have had knowledge of such acts of the agent, and assented thereto by the payment of such notes or some other form of recognition. Stock Exch. Bank v. Williamson, 6 Okl. 348, 50 P 93.

[d] **Effect of records as notice.**—(1) A general ratification of all acts does not extend to those the principal was ignorant of, although they are deeds on record. Billings v. Morrow, 7 Cal. 171, 68 AmD 235. (2) Assent by the principal to an unauthorized act of the agent may be presumed from acquiescence after notice, but the record of a deed from the agent is not constructive notice to the principal of its contents; much less will it give him notice that his agent has exceeded the limit of his authority when an inspection of the deed will not inform him of this fact. Reese v. Medlock, 27 Tex. 120, 84 AmD 611.

[e] **Books of account as notice.**—A person is presumed to be cognizant of the contents of his books of account, but the probative force of such presumption may be strong or weak as the circumstances may show that the party made the original entries, or that they were made by a clerk or bookkeeper, and may be entirely overcome and disproved by the positive uncontradicted testimony of the party that the accounts were kept and entries made by such agents, and had never been examined by him, and that he had no knowledge thereof. Hurley v. Watson, 68 Mich. 531, 36 NW 726.

[f] **Employment of subagent.**—Where a husband merely has charge of his wife's property with authority to sell the same, a sale by her to a purchaser procured by a subagent of her husband does not ratify the employment of the subagent, or make her liable to him for compensation, unless she knows at the time of the sale that the purchaser has been procured by him. Groscup v. Downey, 105 Md. 273, 65 A 930.

[g] **Payment of notes.**—Facts showing that the maker of certain notes, and after his death his executrix, paid to another, with the consent and knowledge of the indorsee, one of such notes, and also paid two others to the same person, which neither the indorsee nor his executrix ever afterward claimed, but treated, to all intents and purposes, as paid, and that his executrix, on receiving payment of interest on the remaining notes, gave a receipt in full to date, are sufficient to show such knowledge of and acquiescence in the payment of the two notes as to constitute a ratification of the act of the person receiving payment thereof, binding on the indorsee and his successors in interest. Platt v. Schmitt, 117 Wis. 489, 94 NW 345.

19. Patterson v. Neal, 135 Ala. 477, 33 S 39 (holding that, where a driver in a coal mine changed places with a coal digger, which fact was known to the boss of the mine who had no authority to employ diggers, there was no ratification of the employment of the driver as a digger, if neither the owner nor the superintendent had knowledge thereof); Union Gold Min. Co. v. Rocky Mt. Nat. Bank, 2 Colo. 565 (holding that knowledge of the facts by another agent where the matter is within the scope of his agency is sufficient knowledge to the principal); Cowan v. Sargent Mfg. Co., 141 Mich. 87, 104 NW 377 (holding that there is no ratification of the unauthorized act of an agent where it is not shown that anyone acting for the principal knew of the act, except the agent). See also St. Louis v. Ruecking, 232 Mo. 325, 124 SW 657.

20. See infra § 98.

21. See statutory provisions.

[a] **In California** under the express provisions of Civ. Code § 2310, there can be no ratification of the acts of an agent by a principal, unless the principal has full knowledge of the facts. Lambert v. Gerner, 42 Cal. 399, 76 P 53; Lindow v. Cohn, 5 Cal. A. 388, 90 P 485.

[b] **In South Dakota** under Comp. Laws § 2972, providing that a ratification can be made only by accepting

agent, who is himself deceived, supposed were the facts.[22]

If the material facts have been suppressed or are unknown, although the principal has approved the agent's acts, there is no valid ratification, because of its being founded in fraud or mistake, and the principal is at liberty to repudiate his assent and assert his rights in other ways;[23] and it matters not whether the principal's want of knowledge is due to designed or undesigned concealment or willful misrepresentation on the part of the agent or his mere inadvertence, or whether the question arises between the principal and the agent or as to third persons.[24] This rule is particularly true where, after obtaining knowledge, the principal persistently repudiates the agent's acts.[25]

or retaining the benefit of the act, with notice thereof, where the owner of a note authorizes another to make a proposition to the maker to accept hay thereon at a certain price, delivered, the acceptance by him of a quantity of hay, which is delivered, is not a ratification of an agreement made with the debtor in his behalf, by one without authority, to accept a certain quantity of hay in the stack in full payment, where it is not shown that he knew of such agreement. Fargo v. Cravens, 9 S. D. 646, 70 NW 1053.

22. Owensboro Bank v. Western Bank, 13 Bush (Ky.) 526, 26 AmR 211.

[a] **Where an agent is deceived about the real facts,** and makes representations to his principal based upon his mistaken apprehension of the facts, the acts of the principal will not be held to ratify a contract. Owensboro Bank v. Western Bank, 13 Bush (Ky.) 526, 26 AmR 211; Mummy v. Haggerty, 15 La. Ann. 268.

23. U. S.—Owins v. Hull, 9 Pet. 607, 9 L. ed. 246; Oshkosh Nat. Bank v. Munger, 95 Fed. 87, 36 CCA 659; Union Switch, etc., Co. v. Johnson R. Signal Co., 61 Fed. 940, 10 CCA 176; Wheeler v. Northwestern Sleigh Co., 39 Fed. 347; Rust v. Eaton, 24 Fed. 330; McClelland v. Whiteley, 15 Fed. 322, 11 Biss. 444.

Ala.—Brown v. Bamberger, 110 Ala. 342, 20 S 114; Burns v. Campbell, 71 Ala. 271; Blevins v. Pope, 7 Ala. 371.

Ariz.—McGlassen v. Tyrrell, 5 Ariz. 51, 44 P 1088.

Ark.—Chicago Cottage Organ Co. v. Stone, 71 Ark. 643, 78 SW 392; Nicklase v. Griffith, 59 Ark. 641, 26 SW 381; Lyon v. Tams, 11 Ark. 189.

Cal.—Wagoner v. Silva, 139 Cal. 559, 73 P 433; Dean v. Bassett, 57 Cal. 640; Pease v. Fink, 3 Cal. A. 371, 85 P 657.

Colo.—Jerman v. Neef Bros. Brewing Co., 46 Colo. 33, 102 P 743 (holding that there was no ratification of an alleged agent's act in executing a lease where there was no proof that the principal had knowledge of the existence of the lease); Smyth v. Lynch, 7 Colo. A. 383, 43 P 670 [rev on other grounds 25 Colo. 103, 54 P 634]; Gauthier Decorating Co. v. Ham, 3 Colo. A. 559, 34 P 484.

Conn.—Shoninger v. Peabody, 57 Conn. 42, 17 A 278, 14 AmSR 88, 59 Conn. 588, 22 A 437; Lester v. Kinne, 37 Conn. 9.

Fla.—Augustine First Nat. Bank v. Kirkby, 43 Fla. 376, 32 S 881; Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349, 24 S 480.

Ill.—Bank of Commerce v. Miller, 105 Ill. A. 224.

Ind.—Crowder v. Reed, 80 Ind. 1; Carter v. Pomeroy, 30 Ind. 438; Willison v. McKain, 12 Ind. A. 78, 39 NE 886.

Iowa.—Ver Veer v. Malone, 134 Iowa 653, 112 NW 82; Britt v. Gordon, 132 Iowa 431, 108 NW 319, 11 AnnCas 407 (holding that where an owner, executing a power of attorney authorizing the grantee therein to convey his land, had no knowledge that the grantee had previously executed a title bond in his own name for the conveyance thereof, the owner by executing the power of attorney did not ratify the unauthorized act of the grantee therein); Eggleston v. Mason, 84 Iowa 630, 51 NW 1; Beebe v. Equitable Mut. Life, etc., Assoc., 76 Iowa 129, 40 NW 122; Roberts v. Rumley, 58 Iowa 301, 12 NW 323.

Kan.—Ft. Scott First Nat. Bank v. Drake, 29 Kan. 311, 44 AmR 646.

Ky.—Gaskill v. Huffaker, 49 SW 770, 20 KyL 1555 (holding that a creditor did not ratify the transfer of a note by his agent, "for collection," by accepting and retaining the money, where he had no notice thereof, or of the fact that the payment had not been made by the obligor); McDoel v. Ohio Valley Impr., etc., Co., 36 SW 175, 18 KyL 294.

Me.—Morrell v. Dixfield, 30 Me. 157.

Md.—Taliaferro v. Baltimore First Nat. Bank, 71 Md. 200, 17 A 1036; Bannon v. Warfield, 42 Md. 22.

Mass.—Tulane Univ. v. O'Connor, 192 Mass. 428, 78 NE 494; Pierce Co. v. Beers, 190 Mass. 199, 76 NE 603; Shepard, etc., Lumber Co. v. Eldridge, 171 Mass. 516, 51 NE 9, 68 AmSR 446, 41 LRA 617; Manning v. Leland, 153 Mass. 510, 27 NE 519; Thacher v. Pray, 113 Mass. 291, 18 AmR 480; Combs v. Scott, 12 Allen 493; Adams v. Bourne, 9 Gray 100.

Mich.—Wood v. Palmer, 151 Mich. 30, 115 NW 242; Thiel Detective Service v. Seavey, 145 Mich. 674, 108 NW 1080; Leonardson v. Troy Tp. School Dist. No. 3, 125 Mich. 209, 84 NW 63.

Minn.—Gund Brewing Co. v. Tourtelotte, 108 Minn. 71, 131 NW 417; Prentiss v. Nelson, 69 Minn. 496, 72 NW 831; Jackson v. Badger, 35 Minn. 52, 26 NW 908.

Miss.—Grouch v. Hazlehurst Lumber Co., 16 S 496.

Mo.—Cedar Falls Citizens' Sav. Bank v. Marr, 129 Mo. A. 26, 107 SW 1009; Case v. Hammond Packing Co., 105 Mo. A. 168, 79 SW 732; Gaskill v. Dodson Lead, etc., Co., 84 Mo. A. 521.

Nebr.—Nebraska Wesleyan Univ. v. Parker, 52 Nebr. 453, 72 NW 470.

N. J.—Ryle v. Manchester Bldg., etc., Assoc., 74 N. J. L. 840, 67 A 87; Lindley v. Keim, 54 N. J. Eq. 418, 34 A 1073 [rev (Ch.) 30 A 1063].

N. M.—Kirchner v. Laughlin, 6 N. M. 300, 28 P 505.

N. Y.—Smith v. Savin, 141 N. Y. 315, 36 NE 338; King v. Mackellar, 109 N. Y. 215, 16 NE 201; Phillips v. Mackellar, 92 N. Y. 34; Smith v. Tracy, 36 N. Y. 79; Condit v. Baldwin, 21 N. Y. 219, 78 AmD 137; Seymour v. Wyckoff, 10 N. Y. 213; Ramsay v. Miller, 135 App. Div. 503, 120 NYS 523 [rev on other grounds 202 N. Y. 72, 95 NE 35] (holding that there can be no ratification of an agent's acts where the principal is ignorant of the whole extent and nature thereof); Larkin v. Radosta, 119 App. Div. 515, 104 NYS 165; Hogue v. Simonson, 94 App. Div. 139, 87 NYS 1065; Henderhen v. Cook, 66 Barb. 21; Taylor v. Hoey, 36 N. Y. Super. 402 [aff 58 N. Y. 677]; Stidham v. Sanford, 36 N. Y. Super. 341; Meserole v. Archer, 16 N. Y. Super. 376; Herman v. Leland, 80 Misc. 598, 142 NYS 664; Tallmadge v. Lounsbury, 21 NYS 908 [aff 148 N. Y. 746 mem, 43 NE 990 mem].

N. C.—Swindell v. Latham, 145 N. C. 144, 58 SE 1010; Johnson v. Royster, 88 N. C. 194.

Pa.—Keefe v. Sholl, 181 Pa. 90, 37 A. 116; Copeland v. Stoneham Tannery Co., 142 Pa. 446, 21 A 825.

S. C.—Butler v. Haskell, 4 S. C. Eq. 651.

S. D.—Shull v. New Birdsall Co., 15 S. D. 8, 86 NW 654.

Tenn.—Cason v. Cason, 116 Tenn. 173, 93 SW 89; Walker v. Walker, 5 Heisk. 425.

Tex.—Commercial, etc., Bank v. Jones, 18 Tex. 811; Griffin v. Allison, (Civ. A.) 138 SW 1068; Boyd v. Jacobs, 6 Tex. Civ. A. 442, 25 SW 681.

Vt.—Saville, etc., Co. v. Welch, 58 Vt. 683, 5 A 491; Town v. Hendee, 27 Vt. 258; Brown v. Billings, 22 Vt. 9.

Va.—Hotchkiss v. Middlekauf, 96 Va. 649, 32 SE 36, 43 LRA 806; Day v. National Mut. Bldg., etc., Assoc., 96 Va. 484, 31 SE 902.

Wis.—Omro First Nat. Bank v. Bean, 141 Wis. 476, 124 NW 656, 135 AmSR 50; Roberts v. Francis, 123 Wis. 78, 100 NW 1076.

Eng.—De Bussche v. Alt, 8 Ch. D. 286, 2 ERC 289; Lewis v. Read, 14 L. J. Exch. 295.

[a] **Illustrations.**—(1) Where an agent in charge of a store purchases goods, which he is prohibited to do, and the seller is so advised, the principal is not liable on the contract of sale, although the goods are mixed with the rest of the stock, and sold, in the absence of evidence showing that the principal had actual knowledge of the purchase or delivery of the goods, or their sale by his agent, when she received their proceeds. Schollay v. Moffitt-West Drug Co., 17 Colo. A. 126, 67 P 182. (2) Where an administratrix indorses a claim belonging to the estate to an agent for collection, his act in settling for less than the amount due is not ratified by a letter by the administratrix, purporting to authorize such settlement, written without knowledge of the facts. Upton v. Dennis, 133 Mich. 238, 94 NW 728. (3) Where the agent of a landowner contracted to sell land for two thousand one hundred dollars, and afterward without knowledge of such contract, the owner wrote the agent stating that he would sell for fifteen hundred dollars, giving the agent full particulars as to commissions, etc., such letter was not a ratification of the sale. Armstrong v. Oakley, 23 Wash. 122, 62 P 499.

24. Lyon v. Tams, 11 Ark. 189; Vincent v. Rather, 31 Tex. 77, 98 AmD 516; Butterworth v. Shannon, 5 CanLTOccNotes 282.

[a] **Ignorance, mistake, or misapprehension** of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent. Starr v. Galgate Ship Co., 68 Fed. 234, 15 CCA 366.

[b] **Illustration.**—Where a principal's right to impeach a voidable transaction with his agent is concealed from him, or a free disclosure is not made to him of every circumstance which it is material for him to know, or if the act takes place under pressure or constraint or by the exercise of undue influence or under the delusive opinion that the original transaction is binding on him, or if it is merely a continuation of the original transaction, the confirmation operates as nothing. Francis v. Cline, 96 Va. 201, 31 SE 10.

25. Roberts v. Francis, 123 Wis. 78, 100 NW 1076 (holding that where a principal whose property was in the hands of an agent did not know of the transfer of the property until after the exchange had been made, and from the time of obtaining knowledge thereof persistently re-

[§ 94] **b. Applications of General Rule.** Where a principal approves or accepts a contract made on his behalf by an agent, but without full knowledge, at the time, of the representations, terms, or conditions which the agent made as a part of the transaction, there is ordinarily no ratification binding on the principal.[26] So also to hold one responsible for the tortious act of another not committed by his order, the ratification must be explicit and made with a full knowledge of the facts;[27] but it has been held that where a tortious act is merely in excess of authority mere approval of the wrong

pudiated the trade made by the agent, there was no ratification by the principal). And see cases supra notes 23, 24.

26. Cal.—Lindow v. Cohn, 5 Cal. A. 388, 90 P 485 (holding that, where a traveling salesman, engaged in soliciting orders for merchandise, transmits an order which the employer accepts and fills, and which was procured by the salesman agreeing with the customer to settle for a breach of warranty of the quality of goods previously sold, but the employer had no knowledge of the settlement prior to the shipment of the goods pursuant to the order, and he subsequently repudiates the settlement and returns to the customer the check sent by him, he did not ratify the unauthorized act of the salesman in making the settlement).

Colo.—Servant v. McCampbell, 46 Colo. 292, 104 P 394 (holding that where an attorney in fact for certain stockholders without authority attempts to bind his principals jointly to an agreement to pay a broker certain commissions for selling the corporation's property and stock, and defendants have no knowledge of the broker's claim for commissions until shortly before suit is brought, there is no ratification of the agent's act because from time to time the attorney told the stockholders in a general way what he was doing); Dean v. Hipp, 16 Colo. A. 537, 66 P 804 (holding that where, in a suit to recover money collected for plaintiff, the defense was that defendant had loaned the money collected, without authority, but that the loan had been ratified by plaintiff, and it was shown that plaintiff had never been informed to whom defendant claimed to have made the loan, for what time, at what interest, or on what security, and that, in reply to all inquiries, defendant stated merely that the money was loaned on some ditch stock, the defense was not established).

La.—Mouton v. Oerlein, 2 McG. 95 (holding that where plaintiff, of full age, entered the service of defendant without agreement between them as to rate of salary, in order to hold plaintiff bound as ratifying an understanding between defendant and plaintiff's father it must be shown that proper knowledge of all the facts was brought home to such plaintiff so as to place him in full possession of all the terms and conditions of such engagement and enable him to act intelligently and knowingly with reference to them).

Mich.—Pittsburgh, etc., Min. Co. v. Scully, 145 Mich. 229, 108 NW 503.

Minn.—Hunt v. Pitts Agricultural Works, 69 Minn. 539, 72 NW 813 (holding that where agents of a threshing machine company, without authority, sold a threshing engine of their own, warranting it and representing it as belonging to the company, and took in payment a note payable to the company, and the company, which had no knowledge of the representations under which the engine was sold, refused to accept the note in part payment of the agents' indebtedness, but for the purpose of transferring the legal title indorsed it to the agents, there was no ratification of the agents' act).

Mo.—Morris v. Butler, 138 Mo. A. 378, 122 SW 377 (holding that where an agent has no authority to loan money except on real estate security, and his principal does not know at the time he demands possession of notes evidencing loans made by the agent to others without authority that they are not notes of third persons secured by real estate, his demand for delivery does not constitute a ratification of the agent's act in making such loans and accepting the notes); Johnson v. Fecht, 94 Mo. A. 605, 68 SW 615 [aff 185 Mo. 335, 83 SW 1077] (holding that the principal could not ratify a contract of sale of land by an agent without knowledge of its full terms).

Nebr.—Watt v. Davidson, 82 Nebr. 712, 118 NW 562 (holding that where an agent authorized to accept the unconditional delivery of notes receives them on conditions that he was not authorized to make, the principal does not ratify such conditions by accepting the notes without knowledge that they were received by the agent on condition).

N. H.—Bohanan v. Boston, etc., R. Co., 70 N. H. 526, 49 A 103 (holding that where a claim agent for defendant railroad company promised plaintiff a certain sum and employment for life in settlement of plaintiff's claim for injuries, evidence that the company paid the money promised by the agent and furnished employment for a limited time was not sufficient to show a ratification of the promise of employment for life, in the absence of evidence that the company knew that such promise constituted a part of the consideration for the settlement).

Pa.—Daley v. Iselin, 218 Pa. 515, 67 A 837 (holding that where a principal orally authorized his agent to purchase land, and the agent contracted in writing to purchase the land and in addition to purchase two options, and the principal, without knowledge of the written agreement or the options mentioned therein, accepted a deed for the land and paid the purchase money, he was not thereby estopped to repudiate the agent's agreement, made without the principal's knowledge or authority, and was therefore not liable for the price of the options).

Tex.—Suderman-Dolson Co. v. Rodgers, 47 Tex. Civ. A. 67, 104 SW 193 (holding that where defendant did not know that its agent had agreed, as part of the consideration for the use of plaintiff's premises, to employ him as a physician until after the lease had expired and the premises had been abandoned, it cannot be held to have ratified his act in making the agreement).

[a] **Where an agent assumes to make a contract not within his authority,** before his principal may be said to have ratified it, it must be shown that he knew or was charged with knowledge of the facts of the transaction and the terms of the contract. Sterling v. De Laune, 47 Tex. Civ. A. 470, 105 SW 1169.

[b] **A willingness to ratify a conditional contract** will not operate as a ratification of an unconditional contract of which the principal is ignorant. Henry, etc., Co. v. Halter, 58 Nebr. 685, 79 NW 616.

[c] **Where an agent accepts part of the sum due on a bill** in full payment thereof, but there is no evidence that the agent was more than a mere collection agent, or that the principal knew of such agreement when he accepted the money from the agent, it is not error, in an action on a bill in which an accord and satisfaction is pleaded, to instruct that there was no evidence that the payment was accepted or made with the assent of the principal. Saunders v. Whitcomb, 177 Mass. 457, 59 NE 192.

27. Dak.—Nichols v. Bruns, 5 Dak. 28, 37 NW 752 (holding that where a special agent used fraudulent misrepresentations in making an unauthorized purchase, the principal, not knowing of such misrepresentations, would not be liable in an action for deceit, even though he accepted the benefits of the purchase).

Me.—Tucker v. Jerris, 75 Me. 184.

Mass.—Foote v. Cotting, 195 Mass. 55, 80 NE 600 (holding that where the money of another is appropriated by an agent having the management of real estate to pay the taxes thereon, and the owners of the real estate refuse to repay the same, without a knowledge of such unauthorized act of the agent, the refusal does not amount to a ratification); Shepard, etc., Lumber Co. v. Eldridge, 171 Mass. 516, 51 NE 9, 68 AmSR 446, 41 LRA 617.

Mo.—Sanborn v. Buchanan First Nat. Bank, 115 Mo. A. 50, 90 SW 1033 (holding that, where the payee of a note, which he had indorsed to defendant, received the note from defendant for collection, and on foreclosing the chattel mortgage securing the same took property not covered by the mortgage, and the proceeds of the sale were sent to defendant, who had no notice of the wrong, to reimburse him, defendant could not be held liable by the owner of the property wrongfully taken, on the theory that defendant's retention of the money made him by ratification the payee's agent in taking the property).

Mont.—Weidenaar v. New York L. Ins. Co., 36 Mont. 592, 94 P 1 (holding that the fraudulent acts of an alleged insurance agent in procuring an application and note for insurance are not ratified by the conduct of the insurance company, where it had no knowledge of the fraud until long after the application had been rejected).

N. Y.—L. D. Garrett Co. v. McComb, 58 App. Div. 419, 68 NYS 998 (not bound by fraudulent representations).

Pa.—Keefe v. Sholl, 181 Pa. 90, 37 A 116 (false representations).

[a] **A person cannot be guilty of a fraud committed by his agent** unless he in some way participated in it, and his ratification of a trade fraudulently made by his agent does not become an adoption of the fraud by him if he were ignorant of it. Colvin v. Peck, 62 Conn. 155, 25 A 355.

[b] **Malicious attachment.**—In Oberne v. O'Donnell, 35 Ill. A. 180, it was held that a principal does not render himself liable for the tort of his agent in maliciously suing out an attachment, by receiving and appropriating the fruits thereof, unless he is shown to have full knowledge of all the material facts and circumstances of the tort. See also Gimbel v. Gomprecht, (Tex. Civ. A.) 36 SW 781 (where it was held that the ratification of an agent's malice in suing out an attachment was not shown where it appeared merely that the principal ratified the suing out of the attachment, without knowledge of the existence of malice, or of facts and circumstances from which it could be inferred).

[c] **The embezzlement of funds** by an agent is not ratified by the fact that the money received from such transaction came into the principal's bank account without his knowledge. Fay v. Slaughter, 194 Ill. 157, 62 NE 592, 88 AmSR 148, 56 LRA 564 [rev 94 Ill. A. 111].

[d] **Usurious transactions.**—If an agent in loaning money exacts with-

without full knowledge is generally sufficient to render the principal liable.[28]

[§ 95] **c. Knowledge of Legal Effect.** It is not essential that the principal, in order to bind himself by a ratification, should have knowledge of the effect from a legal standpoint of the facts; it is sufficient that he has full knowledge of the facts.[29]

[§ 96] **d. Partial Knowledge.** A principal is bound by his ratification only to the extent that he has knowledge of the facts,[30] and it has been held that if the principal's misapprehension of the facts is partial, and the contract can be so severed as to enable him to avoid it to the extent of the mistake, the balance of the contract ratified can be enforced against him.[31]

[§ 97] **e. Constructive Notice; Failure to Inquire.** The doctrine of constructive knowledge of material facts or imputation of knowledge of such facts does not generally obtain in the case of ratification, as ordinarily it is what the principal knows, and not what he has mere legal notice of, that is to be considered in determining whether there has been a ratification.[32] In the absence of circumstances sufficient to put a man of reasonable prudence on inquiry, no duty rests upon a principal to make any effort to discover whether another is doing unauthorized acts in his name, and he may assume, until otherwise advised, that his agent will act within the scope of his authority; hence a principal's failure to use diligence to make such discovery is not such negligence as will charge him with constructive knowledge of what he might have discovered by such inquiry, and therefore will not render him liable under a ratification made without such knowledge.[33] Although ratification generally implies knowledge of the material facts,[34] and although the circumstances may be such as to give rise to an inference that the principal acted with full knowledge,[35] knowledge is not to be imputed to him by reason of the mere fact that he had a reason-

out authority a bonus or sum in excess of the legal rate of interest, the acceptance by the principal of the security taken or the sum paid without knowledge of the nature of the transaction is not a ratification of the act and will not prevent a recovery of the amount lent with legal interest. Nye v. Swan, 49 Minn. 431, 52 NW 39; Philips v. Mackellar, 92 N. Y. 34; Esteves v. Purdy, 66 N. Y. 446 [rev 6 Hun 46]; Condit v. Baldwin, 21 N. Y. 219, 78 AmD 137; Elmer v. Oakley, 3 Lans. (N. Y.) 34.

[e] **Remedy of party injured by agent's fraudulent conduct.**—If the agent fraudulently misrepresented his authority, and the principal received the avails of the fraud without knowledge of the agent's fraudulent conduct, the remedy of the party injured, against the principal, is not upon the contract in damages but by rescission of the contract and suit for the consideration paid. Titus v. Cairo, etc., R. Co., 46 N. J. L. 393.

28. Brown v. Webster City, 115 Iowa 511, 88 NW 1070; Sage v. Sherman, Lalor (N. Y.) 147 [aff 2 N. Y. 417].

29. Kelley v. Newburyport, etc., R. Co., 141 Mass. 490, 6 NE 745; Hyatt v. Clark, 118 N. Y. 563, 23 NE 891; Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43; Powell v. Smith, L. R. 14 Eq. 85; Fitzmaurice v. Bayley, 6 E. & B. 868, 88 ECL 868, 119 Reprint 1087. Compare Brown v. Rouse, 104 Cal. 672, 38 P 507 (holding that the fact that a wife, under the mistaken belief that a note and mortgage executed by her husband as her agent for money borrowed by him were binding on her, acquiesced in the payment of installments of interest on the note, did not constitute a ratification of his act); Dugan v. Lyman, (N. J. Ch.) 23 A 657.

30. Willison v. McKain, 12 Ind. A. 78, 39 NE 886.

31. Miller v. Sacramento Bd. of Education, 44 Cal. 166 (holding that, if a ratification by a party of an act done in his behalf by another without authority is made under a misapprehension of the full scope of the act, it is voidable to the extent of the mistake, and the party can be relieved pro tanto); Brong v. Spence, 56 Nebr. 638, 77 NW 54.

[a] **An agent authorized to negotiate for the sale of certain lands,** and to sell on consent of the principal, agreed to sell all the lands without the principal's consent, but the principal accepted the money received, without knowledge, however, that a certain parcel was included in the agreement of sale. It was held that the acceptance of the money did not amount to a ratification of that part of the agreement which related to said parcel. Lester v. Kinne, 37 Conn. 9.

[b] **A special provision in a mortgage not known to the principal** at the time of the ratification of the mortgage has been held not to be included in the ratification where the circumstances connected with the transaction were not such as to put upon the principal the duty of discovering the provision. Pacific Rolling Mill Co. v. Dayton, etc., R. Co., 5 Fed. 852, 7 Sawy. 61.

32. Brown v. Bamberger, 110 Ala. 342, 20 S 114; Heinzerling v. Agen, 46 Wash. 390, 90 P 262.

33. U. S.—Drainage Commn. Co. v. National Contracting Co., 136 Fed. 780.

Ala.—Brooks v. Griel Bros., Co., 179 Ala. 459, 464, 60 S 387, [cit Cyc]; Brown v. Bamberger, 110 Ala. 342, 20 S 114.

Ariz.—Phœnix Valley Bank v. Brown, 9 Ariz. 311, 83 P 362.

Cal.—Ballard v. Nye, 138 Cal. 588, 72 P 156 [rev reh 6 Cal. Unrep. Cas. 947, 69 P 481].

Colo.—Smyth v. Lynch, 7 Colo. A. 383, 43 P 670 [rev on other grounds 25 Colo. 103, 54 P 634].

Fla.—Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349, 24 S 480.

Iowa.—Haswell v. Standring, 152 Iowa 291, 132 NW 417, AnnCas1913B 1326 (holding that the mere fact that the principal had misapprehended or mistaken material facts, although he had entirely omitted to make inquiry concerning them, was not sufficient to bind him).

Mass.—Combs v. Scott, 12 Allen 493.

Minn.—Johnson v. Ogren, 102 Minn. 8, 112 NW 894 (holding that a principal cannot be charged with knowledge of the wrongful act of his agent by his failure to inquire of others concerning the acts of his agent, as he may assume that his agent will obey his instructions).

Tex.—Vincent v. Rather, 31 Tex. 77, 98 AmD 516; Lightfoot v. Horst, (Civ. A.) 122 SW 606.

Vt.—White v. Langdon, 30 Vt. 599.

Va.—Raven Red Ash Coal Co. v. Herron, 114 Va. 103, 114, 75 SE 752 [cit Cyc].

Eng.—Freeman v. Rosher, 13 Q. B. 780, 66 ECL 780, 116 Reprint 1462; Lewis v. Read, 14 L. J. Exch. 295.

"Generally speaking it does not devolve upon the principal to make inquiries as to the facts. He has a right to presume that his agent has followed instructions, and has not exceeded his authority." Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349, 359, 24 S 480.

"Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of a principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make inquiries concerning it. Where there is no legal obligation or duty to do an act, there can be no negligence in an omission to perform it." Combs v. Scott, 12 Allen (Mass.) 493, 497 [quot Phœnix Valley Bank v. Brown, 9 Ariz. 311, 314, 315, 83 P 362].

"The burden of making inquiries and of ascertaining the truth is not cast on him who is under no legal obligation to assume a responsibility, but rests on the party who is endeavoring to obtain a benefit or advantage for himself. This is not only just, but it is practicable. The needful information or knowledge is always within the reach of him who is either party or privy to a transaction which he seeks to have ratified, rather than of him who did not authorize it, and to the details of which he may be a stranger. We do not mean to say that a person can be wilfully ignorant or purposely shut his eyes to means of information within his own possession and control, and thereby escape the consequences of a ratification of unauthorized acts into which he has deliberately entered; but our opinion is that ratification of an antecedent act of an agent which was unauthorized cannot be held valid and binding, where the person sought to be charged has misapprehended or mistaken material facts, although he may have wholly omitted to make inquiries of other persons concerning them, and his ignorance and misapprehension might have been enlightened and corrected by the use of diligence on his part to ascertain them." Combs v. Scott, supra [quot Phœnix Valley Bank v. Brown, supra].

Duty to inquire see infra § 93.

[a] **An agent's checks, signed in his own name** and received by the principal, could not give the principal notice that the agent had a bank account in the principal's name. Case v. Hammond Packing Co., 105 Mo. A. 168, 79 SW 732.

34. Sword v. Keneseth Israel Reformed Cong., 29 Pa. Super. 626.

35. Blakley v. Cochran, 117 Mich. 394, 75 NW 940 (holding that where decedent for three years prior to her death lived at the home of her business manager who previously in her absence had borrowed money to pay for repairs upon her house, and had given her note therefor without authority, the jury in determining the validity of a claim upon the note were justified in drawing the inference that decedent, before making statements to the manager's wife, relied upon to show ratification, informed herself fully as to the transaction); Grabfield v. Haralson County Bank, 155 App. Div. 156, 140 NYS 4.

[a] **A principal who has constructive notice** of his assumed agent's acts is presumed to ratify them by

able opportunity to acquire such knowledge.[36]

[§ 98] **f. Deliberate Ratification.** The lack of full knowledge does not protect a principal who is willfully ignorant, and deliberately chooses to act without such knowledge, as where, knowing that he is ignorant of some of the facts, he has such confidence in his agent that he is willing to assume the risk and to ratify the act without making inquiry for further information than he at the time possesses,[37] or where he intentionally and deliberately ratifies without full knowledge under circumstances which are sufficient to put a reasonable man upon inquiry.[38]

[§ 99] **6. Ratification in Part—a. In General.** Although a principal has an election either to repudiate or to ratify an unauthorized act of an agent on his behalf,[39] he cannot, without the consent of the other party to the transaction,[40] ratify in part or repudiate in part, but must either repudiate or ratify the whole transaction.[41] He cannot ratify

acting under them. Phillips v. Phillips, 163 Cal. 530, 127 P 346.

36. Phœnix Valley Bank v. Brown, 9 Ariz. 311, 83 P 362; Sehrt-Patterson Milling Co. v. Hughes, 8 Kan. A. 514, 56 P 143 (holding that knowledge by the principal of the terms and conditions of an unauthorized contract entered into by an agent is not to be presumed from the fact that the principal had a reasonable opportunity to have acquired such knowledge); Lightfoot v. Horst, (Tex. Civ. A.) 122 SW 606; Raven Red Ash Coal Co. v. Herron, 114 Va. 103, 114, 75 SE 752.

"Knowledge of the terms and conditions of an unauthorized contract, entered into by an agent, is not to be presumed from the fact that the principal had a reasonable opportunity to acquire such knowledge." Haswell v. Standring, 152 Iowa 291, 296, 132 NW 417, AnnCas1913B 1326.

[a] **Where an agent having unwritten authority to make leases** of real property executes a lease for more than three years, the knowledge of his principal of the facts that the tenant is in possession and paying rent and making trade improvements, unless they were such as indicated possession under a lease beyond the agent's authority, is not sufficient knowledge to work either ratification or estoppel. Clement v. Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 A 82 [rev 69 N. J. Eq. 347, 60 A 419].

[b] **Covenant of renewal in lease.** —Where, after execution of a lease by a lessor, a covenant of renewal is inserted therein by one assuming to act as her agent, and who has not written authority to make the alteration, the lessor will not be presumed to have knowledge of the change from the mere fact that the lease is returned to her possession thereafter for a time. Rogan v. Arnold, 233 Ill. 19, 84 NE 58 [aff 135 Ill. A. 281].

37. Ark.—Niemeyer Lumber Co. v. Moore, 55 Ark. 240, 17 SW 1028.

Cal.—Ballard v. Nye, 138 Cal. 588, 72 P 156 [rev reh 6 Cal. Unrep. Cas. 947, 69 P 481]; Pope v. J. K. Armsby Co., 111 Cal. 159, 43 P 589.

Colo.—Lynch v. Smith, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670]; Higgins v. Armstrong, 9 Colo. 38, 10 P 232.

Fla.—Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349, 359, 24 S 480 (where the court said: "It must be shown that he ratified upon full knowledge of all material facts, or that he was willfully ignorant; or purposely refrained from seeking information, or that he intended to adopt the unauthorized act at all events, under whatever circumstances").

Ill.—Campbell v. Millar, 84 Ill. A. 208.

Ind.—Metzger v. Huntington, 139 Ind. 501, 37 NE 1084, 39 NE 235.

Iowa.—Brown v. Webster City, 115 Iowa 511, 88 NW 1070.

Mass.—Metcalf v. Williams, 144 Mass. 452, 11 NE 700.

Mich.—Liska v. Lodge, 112 Mich. 635, 71 NW 171 (holding that, where a principal signs a contract for a sale of land brought to him by his agent without reading it, he is bound by the provisions therein).

Minn.—Ehrmanntraut v. Robinson, 52 Minn. 333, 335, 54 NW 188 (where the court said: "It is sometimes said that, to constitute a ratification of an unauthorized act of an agent, the principal must have had knowledge of all the material facts. As to a past and completed transaction, this would be generally true, but there are many cases where the conduct of the principal may amount to a ratification, although he may not know all the facts as to the unauthorized act of the agent in his behalf. He may ratify by voluntarily assuming the risk without inquiry, or he may deliberately ratify upon such knowledge as he possesses, without caring for more").

Mont.—Carlson v. Stone-Ordean-Wells Co., 40 Mont. 434, 107 P 419.

Nebr.—Rank v. Garvey, 66 Nebr. 767, 92 NW 1025, 99 NW 666.

N. Y.—Hyatt v. Clark, 118 N. Y. 563, 23 NE 891; Bliss v. Sherrill, 24 App. Div. 280, 49 NYS 561; Stokes v. Mackey, 19 NYS 918 [rev on other grounds 35 NE 786] (where it was said that a principal may, if he chooses, adopt or ratify his agent's acts without full information, if his intent to do so is clearly manifest; that, if he has such confidence in his agent's judgment and fidelity that he is willing to abide by any reasonable liability which the agent has honestly and in good faith assumed to impose on him, he may take the risk of the agent's act without inquiry and adopt the whole act).

N. D.—Russell v. Waterloo Threshing Mach. Co., 17 N. D. 248, 116 NW 611.

S. D.—Shull v. New Birdsall Co., 15 S. D. 8, 86 NW 654; Jewell Nursery Co. v. State, 5 S. D. 623, 59 NW 1025.

Va.—Anderson v. Creston Land Co., 96 Va. 257, 31 SE 82; Forbes v. Hagman, 75 Va. 168.

Wash.—Heinzerling v. Agen, 46 Wash. 390, 90 P 262.

Eng.—Marsh v. Joseph, [1897] 1 Ch. 213, Fitzmaurice v. Bayley, 6 E. & B. 868, 88 ECL 868, 119 Reprint 1087 [rev on other grounds 8 E. & B. 664, 92 ECL 664, 120 Reprint 247 (aff 9 H. L. Cas. 78, 11 Reprint 657)]; Lewis v. Read, 14 L. J. Exch. 295.

38. Ark.—Lee v. Kirby, 80 Ark. 366, 97 SW 298; Niemeyer Lumber Co. v. Moore, 55 Ark. 240, 17 SW 1028.

Cal.—Ballard v. Nye, 138 Cal. 588, 72 P 156 [rev reh 6 Cal. Unrep. Cas. 947, 69 P 481]; Wilder v. Beede, 119 Cal. 646, 51 P 1083; Pope v. J. K. Armsby Co., 111 Cal. 159, 43 P 589.

Fla.—Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349, 24 S 480.

Ga.—New Ebenezer Assoc. v. Gress Lumber Co., 89 Ga. 125, 14 SE 892.

Ill.—Swisher v. Palmer, 106 Ill. A. 432 (holding that where the principal ratifies the act of his agent, knowing that he is ignorant of essential facts, he assumes the risk with knowledge of his ignorance).

Iowa.—Tabor State Bank v. Kelly, 109 Iowa 544, 80 NW 520.

Mass.—Kelley v. Newburyport, etc., R. Co., 141 Mass. 496, 498, 6 NE 745 (where the court said: "It is sufficient if a ratification is made with a full knowledge of all the material facts. Indeed, a rule somewhat less stringent than this may properly be laid down, when one purposely shuts his eyes to means of information within his own possession and control, and ratifies an act deliberately, having all the knowledge in respect to it which he cares to have"); Combs v. Scott, 12 Allen 493.

Mich.—Busch v. Wilcox, 82 Mich. 336, 342, 47 NW 328, 21 AmSR 563 (where the court said: "When a principal adopts the contract of a self-constituted agent, who has assumed to act for such principal without authority, he is bound to inquire and ascertain the extent the self-constituted agent assumed to act in his behalf, and the principal, when he becomes such by adopting his acts, is bound by all acts within the scope of the assumed authority").

Mont.—Trent v. Sherlock, 26 Mont. 85, 66 P 700.

N. Y.—Meehan v. Forrester, 52 N. Y. 277; Glor v. Kelly, 49 App. Div. 617, 63 NYS 339 [aff 166 N. Y. 589 mem, 59 NE 1123 mem] (holding that where a principal ratifies an unauthorized act of his agent, he cannot afterward avoid the effect of such ratification by showing that he was not acquainted with all the facts of the transaction ratified, where he was in possession of means of learning them); Lowenstein v. McIntosh, 37 Barb. 251; Rogers v. Kneeland, 10 Wend. 218 [aff 13 Wend. 114].

N. D.—Russell v. Waterloo Threshing Mach. Co., 17 N. D. 248, 116 NW 611.

[a] **Where the situation naturally and reasonably suggests that some inquiry or investigation should be made,** and none is made, the person failing to make it will be deemed in law possessed of such facts as the inquiry would have disclosed. Where, therefore, the agent's whole conduct toward his principal is suggestive of unfair dealing, he is held by his ratification, although he was ignorant of important facts. Ballard v. Nye, 138 Cal. 588, 72 P 156 [rev reh 6 Cal. Unrep. Cas. 947, 69 P 481].

[b] **Illustrations.**—(1) A principal who is informed of a written contract of purchase made in his name by one assuming to act as his agent, and who is requested by the vendor to state whether the agent had authority to make it and whether the contract is correct, is put upon inquiry as to the terms of the contract; and it is negligence for him not to take the precaution to obtain a copy of it from the vendor before giving him assurance that it could be carried out, and in such case he cannot plead want of knowledge of the details of the contract to prevent the effect of a ratification implied from such assurance. Pope v. J. K. Armsby Co., 111 Cal. 159, 43 P 589. (2) So where a principal receives from his agent the proceeds of an unauthorized act with his report or account of the transaction, he cannot ignorantly or purposely shut his eyes to means of information within his possession and control, and thereby avail himself of the benefits of the transaction, and then repudiate it. Johnson v. Ogren, 102 Minn. 8, 112 NW 894.

39. See supra § 79.

40. Hutchings v. Ladd, 16 Mich. 493.

41. U. S.—Mason v. Crosby, 16 F. Cas. No. 9,234, 1 Woodb. & M. 342; Wilcocks v. Phillips, 29 F. Cas. No. 17,639, 1 Wall. Jr. 47.

Ala.—Crawford v. Barkley, 18 Ala. 270.

Ark.—Froug, etc., Co. v. Outcault Adv. Co., 168 SW 1075; Niemeyer Lumber Co. v. Moore, 55 Ark. 240, 17 SW 1028; Kelly v. Carter, 55 Ark. 112, 17 SW 706; Daniels v. Brodie, 54 Ark. 216, 15 SW 467, 11 LRA 81.

that part which is beneficial to himself and reject the remainder, but with the benefits he must take the burden;[42] nor can he make the ratification conditional upon his suffering no loss.[43]

Applications. Thus a principal cannot ratify a contract made for him by an agent without also ratifying and becoming bound by the terms and conditions, although unauthorized, upon which it was made,[44] or without ratifying the representations

Cal.—Patterson v. Crowell, 15 Cal. A. 105, 113 P 700.

Colo.—Mulford v. Torrey Exploration Co., 45 Colo. 81, 100 P 596; Fishback v. Vining, 22 Colo. A. 419, 125 P 559.

Ga.—Dolvin v. American Harrow Co., 125 Ga. 699, 54 SE 706; Byne v. Hatcher, 75 Ga. 289; Mercier v. Copelan, 73 Ga. 636; Southern Express Co. v. Palmer, 48 Ga. 85; Hodnett v. Tatum, 9 Ga. 70.

Ida.—Burke Land, etc., Co. v. Wells, 7 Ida. 42, 60 P 87.

Ill.—Fay v. Slaughter, 194 Ill. 157, 62 NE 592, 88 AmSR 148, 56 LRA 564 [rev 94 Ill. A. 111]; Swisher v. Palmer, 106 Ill. A. 432; Nicholson v. Doney, 37 Ill. A. 531.

Ind.—Adams Express Co. v. Carnahan, 29 Ind. A. 606, 63 NE 245, 64 NE 647, 94 AmSR 279.

Iowa.—Key v. National L. Ins. Co., 107 Iowa 446, 78 NW 68; National Imp., etc., Co. v. Maiken, 103 Iowa 118, 72 NW 431; Eadie v. Ashbaugh, 44 Iowa 519; Krider v. Western College, 31 Iowa 547.

Ky.—Atkinson v. Howlett, 11 KyL 364.

La.—Boudreaux v. Feibleman, 105 La. 401, 29 S 881; E. O. Standard Milling Co. v. Flower, 46 La. Ann. 315, 15 S 16; Elam v. Carruth, 2 La. Ann. 275.

Mich.—Hutchings v. Ladd, 16 Mich. 493.

Minn.—Nye v. Swan, 49 Minn. 431, 52 NW 39.

Mo.—Watson v. Bigelow, 47 Mo. 413 (holding that where an agent borrows money on the credit of the principal without the latter's knowledge or authority, and invests it in property which the principal afterward appropriates, the measure of the principal's liability is the amount borrowed, and not merely the proceeds of the sale of the property purchased with the loan); Clydesdale Horse Co. v. Bennett, 52 Mo. A. 333; Nichols v. Kern, 32 Mo. A. 1.

Nebr.—Citizens' State Bank v. Pence, 59 Nebr. 579, 81 NW 623; German Nat. Bank v. Hastings First Nat. Bank, 59 Nebr. 7, 80 NW 48; Martin v. Humphrey, 58 Nebr. 414, 78 NW 715.

N. J.—Bodine v. Berg, 82 N. J. L. 662, 669, 82 A 901, 40 LRANS 65, Ann Cas1913D 721 [cit Cyc]; Canadian Impr. Co. v. Lea, 74 N. J. Eq. 234, 69 A 455.

N. Y.—Elwell v. Chamberlin, 31 N. Y. 611; Slocum v. Gilman, 84 Hun 405, 32 NYS 297; Tallman v. Kimball, 74 Hun 279, 26 NYS 311; Henderhen v. Cook, 66 Barb. 21.

N. C.—Patton v. Brittain, 32 N. C. 8.

N. D.—Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 NW 717.

Or.—McLeod v. Despain, 49 Or. 536, 90 P 492, 92 P 1088; Coleman v. Stark, 1 Or. 115.

Pa.—Mundorff v. Wickersham, 63 Pa. 87, 3 AmR 531; Melcher v. United Tel., etc., Co., 20 LancLRev 401.

Tenn.—Fort v. Coker, 11 Heisk. 579.

Tex.—Conley v. Columbus Tap R. Co., 44 Tex. 579; Henderson v. San Antonio, etc., R. Co., 17 Tex. 560, 67 AmD 675; Sargent v. Barnes, (Civ. A.) 159 SW 366, 373 [quot Cyc]; History Co. v. Flint, (Civ. A.) 15 SW 912.

Vt.—McClure v. Briggs, 58 Vt. 82, 2 A 533, 56 AmR 557; Woodward v. Harlow, 28 Vt. 338.

Va.—Anderson v. Creston Land Co., 96 Va. 257, 31 SE 82.

W. Va.—Ruffner v. Hewitt, 7 W. Va. 585.

Eng.—Smith v. Hodson, 4 T. R. 211, 100 Reprint 979.

N. B.—Dalton v. Hamilton, 12 N. B. 423.

[a] **The principal cannot reject only the unauthorized part of a contract and enforce the rest.** Key v. National L. Ins. Co., 107 Iowa 446, 78 NW 68.

[b] **One suing on a verbal lease** made through an agent is bound to adopt the whole contract, without regard to the authority of the agent to enter into any particular part of it. Shinn v. Guyton, etc., Mule Co., 109 Mo. A. 557, 83 SW 1015.

[c] **Where an oral contract has been entered** into between plaintiffs and one representing himself to be defendant's agent, a writing subsequently signed by defendant, which is not coextensive with, but modifies, the previous oral contract, is not a ratification of the oral contract. Taplin v. Harris, (Vt.) 90 A 956.

42. U. S.—Rader v. Maddox, 150 U. S. 128, 14 SCt 46, 37 L. ed. 1025; Stark v. Starr, 94 U. S. 477, 24 L. ed. 276 [aff 22 F. Cas. No. 13,317, 2 Sawy. 603, 642]; Sutherland v. Illinois Cent. R. Co., 152 Fed. 694, 81 CCA 620; Egbert v. Sun Co., 126 Fed. 568; Foster v. Swasey, 9 F. Cas. No. 4,984, 2 Woodb. & M. 217.

Colo.—Moffitt-West Drug Co. v. Lyneman, 10 Colo. A. 249, 50 P 736.

Conn.—Shoninger v. Peabody, 57 Conn. 42, 17 A 278, 14 AmSR 88.

Ga.—Hunter v. Stembridge, 17 Ga. 243; Hardeman v. Ford, 12 Ga. 205.

Ill.—Henderson v. Cummings, 44 Ill. 325; Swisher v. Palmer, 106 Ill. A. 432.

Ind.—Wayne International Bldg., etc., Assoc. v. Moats, 149 Ind. 128, 48 NE 793; Travellers Ins. Co. v. Patten, 119 Ind. 416, 20 NE 790; Johnson v. Hoover, 72 Ind. 395; Judah v. Vincennes Univ., 16 Ind. 56.

Iowa.—Wisconsin Lumber Co. v. Greene, etc., Tel. Co., 127 Iowa 350, 101 NW 742, 109 AmSR 387, 69 LRA 968; Harrison v. Schoff, 101 Iowa 463, 70 NW 689; White v. Marquardt, 70 NW 193; Deering v. Grundy County Nat. Bank, 81 Iowa 222, 46 NW 1117; Roberts v. Rumley, 58 Iowa 301, 12 NW 323; Warder v. Pattee, 57 Iowa 515, 10 NW 881; Beidman v. Goodell, 56 Iowa 592, 9 NW 900.

Kan.—Aultman Thrashing, etc., Co. v. Knoll, 71 Kan. 109, 79 P 1074; McKinstry v. Citizens' Bank, 57 Kan. 279, 46 P 302; Wells v. Hickox, 1 Kan. A. 485, 40 P 821.

Ky.—Elizabethtown Milling, etc., Co. v. Elizabethtown Milling Co., 13 KyL 96.

La.—St. Landry State Bank v. Meyers, 52 La. Ann. 1769, 28 S 136; Dupre v. Splane, 16 La. 51.

Mass.—Henderson v. Raymond Syndicate, 183 Mass. 443, 67 NE 427; Brown v. Henry, 172 Mass. 559, 52 NE 1073; Sartwell v. Frost, 122 Mass. 184; New England Mar. Ins. Co. v. De Wolf, 8 Pick. 56.

Mich.—Dodge v. Tullock, 110 Mich. 480, 68 NW 239; Bacon v. Johnson, 56 Mich. 182, 22 NW 276; Eberts v. Selover, 44 Mich. 519, 7 NW 225, 38 AmR 278.

Miss.—Watts v. Bonner, 66 Miss. 629, 6 S 187.

Mo.—U. S. Mortgage, etc., Co. v. Crutcher, 169 Mo. 444, 69 SW 380; Porter v. Woods, 138 Mo. 539, 39 SW 794; State v. Harrington, 100 Mo. 170, 13 SW 398; Shook v. Retail Hardware Mut. F. Ins. Co., 154 Mo. A. 394, 134 SW 589; Bohlmann v. Rossi, 78 Mo. A. 312; Trenton First Nat. Bank v. Badger Lumber Co., 54 Mo. A. 327.

Nebr.—Warder, etc., Co. v. Myers, 70 Nebr. 15, 96 NW 992; Hinman v. F. C. Austin Mfg. Co., 65 Nebr. 187, 90 NW 934; Hall v. Hopper, 64 Nebr. 633, 90 NW 549; Piano Mfg. Co. v. Nordstrom, 63 Nebr. 123, 88 NW 164; Citizens' State Bank v. Pence, 59 Nebr. 579, 81 NW 623; Martin v. Humphrey, 58 Nebr. 414, 78 NW 715; U. S. School-Furniture Co. v. Lancaster County School Dist. No. 87, 56 Nebr. 645, 77 NW 62; Rogers v. Empkie Hardware Co., 24 Nebr. 653, 39 NW 844.

N. H.—Warren v. Hayes, 74 N. H. 355, 68 A 193; Tasker v. Kenton Ins. Co., 59 N. H. 438; Grant v. Beard, 50 N. H. 129; Hovey v. Blanchard, 13 N. H. 145.

N. Y.—Farmers' L. & T. Co. v. Walworth, 1 N. Y. 433; Reynolds v. Leyden, 24 App. Div. 395, 48 NYS 1078; Nutting v. Kings County El. R. Co., 21 App. Div. 72, 47 NYS 327; Sultan v. Bailey, 85 NYS 332; Moss v. Rossie Lead Min. Co., 5 Hill 137; Corning v. Southland, 3 Hill 552; Benedict v. Smith, 10 Paige 126.

N. C.—Foy v. Blades Lumber Co., 152 N. C. 595, 68 SE 6; Rudasill v. Falls, 92 N. C. 222.

Okl.—U. S. Fidelity, etc., Co. v. Shirk, 20 Okl. 576, 95 P 218.

Or.—Hillyard v. Hewitt, 61 Or. 58, 120 P 750; McLeod v. Despain, 49 Or. 536, 90 P 492, 92 P 1088; La Grande Nat. Bank v. Blum, 27 Or. 215, 41 P 659; Coleman v. Stark, 1 Or. 115.

Pa.—Schultheis v. Sellers, 223 Pa. 513, 72 A 887; Singer Mfg. Co. v. Christian, 211 Pa. 534, 60 A 1087; Wheeler, etc., Mfg. Co. v. Aughey, 144 Pa. 398, 22 A 667, 27 AmSR 638; Pennsylvania Natural Gas Co. v. Cook, 123 Pa. 170, 16 A 762; Mundorff v. Wickersham, 63 Pa. 87, 3 AmR 531; Benjamin v. Holgate, 51 Pa. Super. 104.

Tenn.—Gaudelpo, etc., Min. Co. v. Beatty, 1 SW 348; Seago v. Martin, 6 Heisk. 308; Bement v. Armstrong, (Ch. A.) 39 SW 899.

Tex.—Haldeman v. Chambers, 19 Tex. 1; Taber v. Eyler, (Civ. A.) 162 SW 490; Sargent v. Barnes, (Civ. A.) 159 SW 366, 373 [quot Cyc]; Smith v. Olivarri, (Civ. A.) 127 SW 235; Anderson v. Walker, (Civ. A.) 49 SW 937; Rutherford v. Montgomery, 14 Tex. Civ. A. 319, 37 SW 625; Williams v. Chambers, etc., (Civ. A.) 26 SW 270.

Utah.—Shafer v. Russell, 28 Utah 444, 79 P 559; Genter v. Conglomerate Min. Co., 23 Utah 165, 64 P 362.

Va.—New York L. Ins. Co. v. Taliaferro, 95 Va. 522, 28 SE 879.

Wash.—Peterson v. Hicks, 43 Wash. 412, 86 P 634.

W. Va.—Cumberland Third Nat. Bank v. Laboringman's Mercantile, etc., Co., 56 W. Va. 446, 49 SE 544; Dewing v. Hutton, 48 W. Va. 576, 37 SE 670.

Wis.—Strasser v. Conklin, 54 Wis. 102, 11 NW 254; Saveland v. Green, 40 Wis. 431.

Eng.—Billon v. Hyde, 1 Atk. 128, 26 Reprint 82; Hovil v. Pack, 7 East 164, 103 Reprint 63; Cornwal v. Wilson, 1 Ves. 509, 27 Reprint 1173.

N. B.—Dalton v. Hamilton, 12 N. B. 423.

See also infra §§ 114–123; 132–135.

[a] **Where an attorney compromises a debt** of his principal, who, after a full knowledge of all the facts attending it, retains the money paid on such compromise, the principal will be held bound by it, and will not be permitted to ratify it only so far as it is for his interest and to repudiate the residue. Henderson v. Cummings, 44 Ill. 325.

[b] **A sale of a piano to be paid for in a certain way** cannot be ratified as to the sale and repudiated as to the mode of payment. Shoninger v. Peabody, 57 Conn. 42, 17 A 278, 14 AmSR 88.

43. Fort v. Coker, 11 Heisk. (Tenn.) 579.

44. Ill.—Baldwin Co. v. Paley, 161 Ill. A. 300.

Iowa.—Casady v. Manchester F. Ins. Co., 109 Iowa 539, 80 NW 521.

Kan.—Babcock v. Deford, 14 Kan. 408; Wells v. Hickox, 1 Kan. A. 485, 40 P 821.

and warranties,[45] and all other instrumentalities employed by the agent as an inducement to bring about the contract.[46]

Representations of third person. But where a principal is represented by a duly authorized agent, and some third person who may also be benefited by the transaction assumes without the knowledge or consent of the principal or his agent to make representations and statements to promote the transaction, the principal will not be bound thereby, although he accepts the benefits of the transaction negotiated by his agent.[47]

[§ 100] **b. Ratification of Part as Ratification of Whole.** It follows from the above general rule that a ratification, with full knowledge, of part of a transaction in general operates as a ratification of the whole transaction.[48] Thus where a principal accepts the benefits of a contract made without au-

La.—Boudreaux v. Feibleman, 105 La. 401, 29 S 881 (holding that a principal, who through his clerk obtains a policy of insurance and collects the policy, cannot recognize the acts of his clerk in part and repudiate them in another, but is bound by all the conditions by which the clerk obtained possession of the policy).

Me.—Wood v. Finson, 89 Me. 459, 36 A 911; Billings v. Mason, 80 Me. 496, 15 A 59.

Mich.—Eberts v. Selover, 44 Mich. 519, 7 NW 225, 38 AmR 278.

Mo.—Morgan County Coal Co. v. Halderman, 254 Mo. 596, 163 SW 828; Nichols v. Kern, 32 Mo. A. 1.

N. Y.—Crigler v. Bedell, 4 NYS 653; Gates v. Green, 4 Paige 355, 27 AmD 68.

Pa.—Mundorff v. Wickersham, 63 Pa. 87, 3 AmR 531.

Tex.—Meyer v. Smith, 3 Tex. Civ. A. 37, 21 SW 995.

Vt.—Newell v. Hurlburt, 2 Vt. 351.

Wis.—Kickland v. Menasha Wooden-Ware Co., 68 Wis. 34, 31 NW 471, 60 AmR 831; Paine v. Wilcox, 16 Wis. 202.

Ont.—Creighton v. Janes, 40 U. C. Q. B. 372.

45. U. S.—Clark v. Reeder, 158 U. S. 505, 15 SCt 849, 39 L. ed. 1070; Alger v. Keith, 105 Fed. 105, 44 CCA 371; Alger v. Anderson, 78 Fed. 729; Doggett v. Emerson, 7 F. Cas. No. 3,960, 3 Story 700.

Ala.—Holman v. Calhoun, 146 Ala. 690, 40 S 356; Philips, etc., Mfg. Co. v. Wild, 144 Ala. 545, 39 S 359; Williamson v. Tyson, 105 Ala. 644, 17 S 336; Herring v. Skaggs, 73 Ala. 446.

Cal.—Wilder v. Beede, 119 Cal. 646, 51 P 1083; Mitchell v. Finnell, 101 Cal. 614, 36 P 123; Riser v. Walton, 78 Cal. 490, 21 P 362.

Fla.—Croom v. Swann, 1 Fla. 246.

Ga.—Dolvin v. American Harrow Co., 125 Ga. 699, 54 SE 706.

Ill.—Cochran v. Chitwood, 59 Ill. 53.

Ind.—Du Souchet v. Dutcher, 113 Ind. 249, 15 NE 459; Aultman v. Richardson, 21 Ind. A. 211, 52 NE 86.

Iowa.—Kurtz v. Payne Inv. Co., 156 Iowa 376, 135 NW 1075; Blaess v. Nichols, etc., Co., 115 Iowa 373, 88 NW 829; Higbee v. Trumbauer, 112 Iowa 74, 83 NW 812; Key v. National L. Ins. Co., 107 Iowa 446, 78 NW 68.

Kan.—Loomis Milling Co. v. Vawter, 8 Kan. A. 437, 57 P 43 (holding that a principal cannot enforce a contract made by his agent, and at the same time repudiate the agent's warranty, although the warranty was contrary to the agent's instructions).

Ky.—Warren Deposit Bank v. Fidelity, etc., Co., 116 Ky. 38, 74 SW 1111, 25 KyL 289.

Md.—Swatara R. Co. v. Brune, 6 Gill 41.

Mass.—Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 17 NE 496, 9 AmSR 698. But see Black River Sav. Bank v. Edwards, 10 Gray 387 (where it was held that the adoption of a note obtained by an agent within his authority does not include the adoption of a fraudulent agreement or understanding between the agent and the other party, beyond the line of the agent's authority).

Mich.—Sokup v. Letellier, 123 Mich. 640, 82 NW 523; Dodge v. Tullock, 110 Mich. 480, 68 NW 239; Busch v. Wilcox, 82 Mich. 315, 46 NW 940, 47 NW 328, 21 AmSR 563.

Minn.—Albitz v. Minneapolis, etc., R. Co., 40 Minn. 476, 42 NW 394.

Mo.—Meinershagen v. Taylor, 169 Mo. A. 12, 154 SW 886; Laumeier v. Dolph, (A.) 130 SW 360.

Nebr.—Leavitt v. Sizer, 35 Nebr. 80, 52 NW 832; Esterly Harvesting Mach. Co. v. Frolkey, 34 Nebr. 110, 51 NW 594; McKeighan v. Hopkins, 19 Nebr. 33, 26 NW 614.

N. Y.—Taylor v. Commercial Bank, 174 N. Y. 181, 66 NE 726, 95 AmSR 564, 62 LRA 783; Mayer v. Dean, 115 N. Y. 556, 22 NE 261, 5 LRA 540; Crans v. Hunter, 28 N. Y. 389; Ettlinger v. Weil, 94 App. Div. 291, 87 NYS 1049 [rev on other grounds 184 N. Y. 179, 77 NE 81]; Murray v. Sweasy, 69 App. Div. 45, 74 NYS 543.

N. D.—Emerada Farmers' El. Co. v. Farmers' Bank, 20 N. D. 270, 127 NW 522, 29 LRANS 567.

Oh.—State v. Perry, Wright 663 (holding that, where one acting without authority obtains a contract for another by fraud, if the other takes the contract he adopts the agency and is chargeable with the fraud as to the contract).

Or.—Owen v. Jones, 136 P 332; Wilson v. McCarthy, 66 Or. 498, 134 P 1189.

Pa.—Meyerhoff v. Daniels, 173 Pa. 555, 34 A 298, 51 AmSR 782; American Buttonhole Overseaming, etc., Mach. Co. v. Maurer, 10 A 782; Jones v. National Bldg. Assoc., 94 Pa. 215; Rheinstrom v. Elk Brewing Co., 28 Pa. Super. 519; Chicago Cottage Organ Co. v. McManigal, 8 Pa. Super. 632.

S. D.—Union Trust Co. v. Phillips, 7 S. D. 225, 63 NW 903.

Tenn.—Stephens v. Ozbourne, 107 Tenn. 572, 64 SW 902, 89 AmSR 957; Barnard v. Roane Iron Co., 85 Tenn. 139, 2 SW 21.

Tex.—Allen v. Garrison, 92 Tex. 546, 50 SW 335; American Nat. Bank v. Cruger, 91 Tex. 446, 44 SW 278 (holding that a principal who retains a note obtained by its agent's fraudulent representations is bound thereby, although unauthorized and unknown); Foix v. Moeller, (Civ. A.) 159 SW 1048; Pioneer Sav., etc., Assoc. v. Baumann, (Civ. A.) 58 SW 49; Jones v. Chapman, (Civ. A.) 41 SW 527; Texas El., etc., Co. v. Mitchell, 7 Tex. Civ. A. 222, 28 SW 45; Gulf, etc., R. Co. v. Pittman, 4 Tex. Civ. A. 167, 23 SW 318.

Va.—Rowland Lumber Co. v. Ross, 100 Va. 275, 40 SE 922; Owens v. Boyd Land Co., 95 Va. 560, 28 SE 950.

W. Va.—Honaker v. Pocatalico Dist. Bd. of Education, 42 W. Va. 170, 24 SE 544, 57 AmSR 847, 32 LRA 413.

Wis.—Aultman Co. v. McDonough, 110 Wis. 263, 85 NW 980; Gunther v. Ullrich, 82 Wis. 220, 52 NW 88, 33 AmSR 32; Morse v. Ryan, 26 Wis. 356.

Can.—Milburn v. Wilson, 31 Can. S. C. 481.

See also infra §§ 144, 554.

[a] **Statement of and reason for rule.**—"The general rule unquestionably is that one, whether an individual or a corporation, who seeks to enforce and derive a benefit from a contract undertaken to be made in his or its behalf by another, must adopt not only the entire contract, but the means by which the contract was procured. . . . Doubtless there might be cases to which this rule could not properly be applied, and to which the thought of appellant's proposition would be pertinent, but we think they would be cases where the evidence showed collusion between the agent and the party with whom he dealt. The third party thus participating with the agent in an attempted fraud upon the principal ought not to be allowed to take advantage of his own wrong by basing a defense upon it, but it would be a dangerous doctrine to promulgate that a principal might take and enjoy the benefit of a contract made for him, and at the same time disown and repudiate the very representations the making of which induced and procured the contract, because the party making such representations was known to be interested in having it made. The agent would be so interested in every case where his compensation depended upon securing the contract, as in case of commission, and so in every such case the contract procured through the fraudulent misrepresentations of the agent would be enforceable by the principal, because the party with whom the agent contracted knew that he had 'a direct personal interest in the result of the transaction, separate from the interest of his principal.'" Union Trust Co. v. Phillips, 7 S. D. 225, 228, 63 NW 903.

[b] **A mortgagee who accepts a mortgage procured by the fraudulent representation** of his agent is bound by such representations, even though innocent himself. Fairchild v. McMahon, 139 N. Y. 290, 34 NE 779, 36 AmSR 701.

[c] **Where an agent buys a claim for his principal,** and in order to induce the seller to part with it makes false and fraudulent representations in reference thereto, and the principal accepts the purchase and takes the benefit thereof, he cannot, while claiming the benefit of the purchase and retaining the claim, repudiate such representations of his agent on the ground that they were not authorized by him and were not within the scope of his authority. Lane v. Black, 21 W. Va. 617.

[d] **A seller is bound by a warranty** made by the agent who made the sale, where he ratifies the sale, although the agent had no actual authority to make the warranty and the seller had no knowledge of the warranty as made. Holman v. Calhoun, 146 Ala. 690, 40 S 356.

46. D. M. Osborn Co. v. Jordan, 52 Nebr. 465, 72 NW 479; Rogers v. Empkie Hardware Co., 24 Nebr. 653, 39 NW 844; McKeighan v. Hopkins, 19 Nebr. 33, 26 NW 614; New England Mortg. Security Co. v. Henderson, 13 Nebr. 574, 14 NW 519; Smith v. Barnard, 148 N. Y. 420, 42 NE 1054; Elwell v. Chamberlin, 31 N. Y. 611.

[a] **The principal cannot separate the legal from the illegal elements** of the contract and appropriate the advantages it secures, while he rejects the corrupt instrumentalities by which they were obtained. Smith v. Tracy, 36 N. Y. 79.

47. Tecumseh Nat. Bank v. Chamberlain Banking House, 63 Nebr. 163, 88 NW 186, 57 LRA 811.

48. U. S.—Gaines v. Miller, 111 U. S. 395, 4 SCt 426, 28 L. ed. 466.

Ark.—Daniels v. Brodie, 54 Ark. 216, 15 SW 467, 11 LRA 81.

Ga.—Ingraham v. Barber, 72 Ga. 158.

Hawaii.—Imada v. Stanley Dollar, 2 Hawaii Fed. 337.

Iowa.—Des Moines Nat. Bank v. Meredith, 114 Iowa 9, 86 NW 46; Krider v. Western College, 71 Iowa 547.

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thority in his behalf, after being fully informed of all its terms, he must be held to have accepted the burdens imposed on him by the contract;[49] and it has been held that it is not necessary to the application of this rule that the principal should have had knowledge of all the terms and conditions of the transaction when he took advantage of the contract.[50]

Separable and independent transactions. This rule does not apply to different and independent transactions, and in the absence of other evidence of ratification the mere ratification by a principal of previous acts of an agent is not conclusive of the ratification of later similar acts, and will not prevent the principal from rejecting them if he so elects.[51] So also the acceptance of part of an agent's acts in which he followed directions is no ratification of other separable acts in which he was disobedient to his principal's orders,[52] or negligent in the performance of his duties.[53]

The rule does not apply as between joint tort-feasors who are jointly and severally liable whether they acted in concert or independently, as there is no contractual or confidential relation between them.[54]

[§ 101] **7. Necessity of New Consideration.** Since ratification is equivalent to prior authority,[55] the original contract after ratification and by force of the ratification alone becomes the contract of the parties as though it had in the first instance been made by the agent with authority; hence no consideration other than that inuring to the principal from the original contract is necessary to support a ratification.[56] But there must be an original consideration and, if the contract lacks it, a mere ratification will not validate the contract.[57]

Where the contract is that of a mere stranger, made on his own account and in his own name, there can be no ratification, as the term is ordinarily used;[58] but the person in whose behalf the contract was really made may confirm it, provided the confirmation rests upon a consideration.[59]

[§ 102] **8. Necessity of Intention to Ratify.** A ratification of the unauthorized act of an agent or of a stranger who assumes to act as such must be found in the intention of the principal, either express or implied, to ratify.[60] If that intention can-

Minn.—King v. Franklin Lumber Co., 80 Minn. 274, 83 NW 170.

Mo.—Plummer v. Knight, 156 Mo. A. 321, 325, 137 SW 1019 [cit Cyc].

Nebr.—German Nat. Bank v. Hastings First Nat. Bank, 59 Nebr. 7, 80 NW 48.

N. Y.—Heermans v. Clarkson, 64 N. Y. 171; Commercial Bank v. Warren, 15 N. Y. 577; Farmers' L. & T. Co. v. Walworth, 1 N. Y. 433; Hayes v. Kedzie, 11 Hun 577; Corning v. Southland, 3 Hill 552.

N. D.—Fleming v. Sherwood, 24 N. D. 144, 139 NW 101, 43 LRANS 945.

Or.—Wilson v. McCarthy, 66 Or. 498, 134 P 1189.

Pa.—Anderson v. National Surety Co., 196 Pa. 288, 46 A 306.

Tex.—Sullivan v. Ramsey, (Civ. A.) 155 SW 580; Meyer v. Smith, 3 Tex. Civ. A. 37, 21 SW 995.

Vt.—McClure v. Briggs, 58 Vt. 82, 2 A 583, 56 AmR 557.

Wis.—Strasser v. Conklin, 54 Wis. 102, 11 NW 254.

Eng.—Ferguson v. Carrington, 9 B. & C. 59, 17 ECL 36, 109 Reprint 22; Rodmell v. Eden, 1 F. & F. 542.

See also infra § 108.

49. U. S.—Crabtree v. St. Paul Opera-House Co., 39 Fed. 746.

Ala.—Crawford v. Barkley, 18 Ala. 270.

Ark.—Daniels v. Brodie, 54 Ark. 216, 15 SW 467, 11 LRA 81.

Ga.—Southern Express Co. v. Palmer, 48 Ga. 85; Hodnett v. Tatum, 9 Ga. 70.

Ill.—Delaware, etc., R. Co. v. Thayer, 41 Ill. A. 192; Barhydt v. Clark, 12 Ill. A. 646.

Iowa.—Moyers v. Fogarty, 140 Iowa 701, 119 NW 159; Deering v. Grundy County Nat. Bank, 81 Iowa 222, 46 NW 1117; Roberts v. Rumley, 58 Iowa 301, 12 NW 323; Beidman v. Goodell, 56 Iowa 592, 9 NW 900; Davenport Sav. Fund, etc., Assoc. v. North American F. Ins. Co., 16 Iowa 74.

La.—Elam v. Carruth, 2 La. Ann. 275.

Mich.—Peninsula Bank v. Hanmer, 14 Mich. 208; Widner v. Olmstead, 14 Mich. 124.

Nebr.—Fremont Carriage Mfg. Co. v. Thomsen, 65 Nebr. 370, 91 NW 376.

N. Y.—Rollins v. Sidney B. Bowman Cycle Co., 84 App. Div. 287, 82 NYS 781.

N. D.—Fleming v. Sherwood, 24 N. D. 144, 139 NW 101, 43 LRANS 945.

Or.—Kyle v. Rippey, 20 Or. 446, 26 P 308; Coleman v. Stark, 1 Or. 115.

Wash.—Hart v. Maney, 12 Wash. 266, 40 P 987.

[a] **Where an agent contracts a debt and executes a mortgage** on the property of the principal to secure the same, a ratification of the debt operates as a ratification of the mortgage where the principal has knowledge of the whole transaction. Krider v. Western College, 31 Iowa 547; McKinstry v. Citizens' Bank, 57 Kan. 279, 46 P 302.

[b] **An owner of a building who adopts some of the acts of a mechanic making repairs thereon,** and pays for the labor performed and some of the material furnished upon the building, ratifies all the acts of such mechanic in the purchase of materials, and becomes liable for all the materials used in the building. Tallman v. Kimball, 74 Hun 279, 26 NYS 811.

50. Moyers v. Fogarty, 140 Iowa 701, 119 NW 159.

51. Burlington, etc., R. Co. v. Sherwood, 62 Iowa 309, 17 NW 564 (holding that, where the owner of lands reserves the right to pass upon sales thereof made by his agent, his adoption of a number of sales will not prevent him from rejecting others); Forsyth v. Day, 41 Me. 382; Todd v. Bishop, 136 Mass. 386 (holding that one for whom an agent buys or sells stock does not necessarily, by receiving the profits of one transaction, ratify another which resulted in loss).

52. Courcier v. Ritter, 6 F. Cas. No. 3,282, 4 Wash. 549; Knowlton v. Logansport School City, 75 Ind. 103.

53. Owensboro Bank v. Western Bank, 13 Bush (Ky.) 526, 26 AmR 211.

54. Laughlin v. Excelsior Powder Mfg. Co., 153 Mo. A. 508, 134 SW 116.

55. See infra § 138.

56. U. S.—Drakeley v. Gregg, 8 Wall. 242, 19 L. ed. 409.

Ala.—Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140.

Colo.—Smyth v. Lynch, 7 Colo. A. 383, 43 P 670 [rev on other grounds 25 Colo. 103, 54 P 634].

Conn.—Plumb v. Curtis, 66 Conn. 154, 33 A 998.

Ind.—Schneck v. Jeffersonville, 152 Ind. 204, 52 NE 212.

Mo.—Trenton First Nat. Bank v. Gay, 63 Mo. 33, 21 AmR 430.

N. H.—Grant v. Beard, 50 N. H. 129 (holding that a suit to enforce the obligation of a party ratifying an act of one assuming to be an agent is, to all intents and purposes, a suit founded upon the original contract, and not upon the act of ratification, and no new consideration in support thereof is necessary).

N. Y.—Commercial Bank v. Warren, 15 N. Y. 577.

N. C.—Osborne v. Durham, 157 N. C. 262, 72 SE 849.

Pa.—Pearsoll v. Chapin, 44 Pa. 9; Garrett v. Gonter, 42 Pa. 143.

Tenn.—Fitzpatrick v. Caperton Cove School Tract Comrs, 7 Humphr. 224, 46 AmD 76.

Wash.—McLeod v. Morrison, 66 Wash. 683, 690, 120 P 528, 38 LRANS 783 and note [cit Cyc].

Eng.—Brook v. Hook, L. R. 6 Exch. 89.

"The party confirming becomes a party to the contract, he that was not bound becomes bound by it, and entitled to all the proper benefits of it, he accepts the consideration of the contract as a sufficient consideration for adopting it, and usually this is quite enough to support the ratification." Pearsoll v. Chapin, 44 Pa. 9, 17.

[a] **The release of a company's property from a writ of attachment** by the giving of a bond is of itself a sufficient consideration to bind the sureties thereon, and hence, where an agent exceeds his authority in the signing of his principal's name as a surety thereto, the latter's ratification, in order to be binding, need not be based on any new consideration. Lynch v. Smyth, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670].

57. Pearsoll v. Chapin, 44 Pa. 9, 17 (where the court said: "A mere ratification cannot of course correct any defect in the terms of the contract. If it is in its very terms invalid for want of consideration, or for any other defect, a mere ratification can add nothing to its binding force").

58. See supra § 91.

59. Plumb v. Curtis, 66 Conn. 154, 33 A 998; Hamlin v. Sears, 82 N. Y. 327.

60. Conn.—Goodwin v. East Hartford, 70 Conn. 18, 38 A 876.

Md.—Carroll v. Manganese Steel Safe Co., 111 Md. 252, 257, 73 A 665 [cit Cyc].

Mass.—Brown v. Henry, 172 Mass. 559, 52 NE 1073.

Mo.—St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737.

Mont.—Carlson v. Stone-Ordean-Wells Co., 40 Mont. 434, 107 P 419.

N. Y.—Merritt v. Bissell, 155 N. Y. 396, 50 NE 280 [rev 84 Hun 194, 32 NYS 559]; Mott v. Scholes, 147 App. Div. 82, 131 NYS 811 (holding that intention to ratify, based upon full knowledge of the facts, is essential to the ratification of an unauthorized act); Stiebel v. Haigney, 134 App. Div. 516, 119 NYS 455; Peo. v. Brooklyn Cooperage Co., 74 Misc. 277, 132 NYS 996 [aff 147 App. Div. 267, 131 NYS 952 (aff 205 N. Y. 531, 98 NE 1110)].

See also infra §§ 104, 108.

"A ratification of the unauthorized act of an agent or of a stranger who

not be shown no ratification can be held to have been established.[61] But in most cases it is this intention as manifested by the principal's acts and statements, rather than by his professions as to ratification, that must determine whether the principal had a legal intent to ratify,[62] and the circumstances may be such that the law will recognize a constructive intention to ratify where none was actually intended.[63]

[§ 103] **C. Manner of Ratification—1. In General.** Ratification proceeds upon the theory that there was no previous authority,[64] and acts as a substitute for such authority.[65] Accordingly the general rule is that whatever form of authorization would have been sufficient to clothe the agent with original authority to do an act will be sufficient to constitute a ratification of such act when done without previous authority;[66] and conversely that wherever the law requires a particular mode of authorization there can be no valid ratification except in the same manner.[67] So except where a particular form of authorization would have been necessary, no particular formality is essential to constitute a ratification;[68] it may be either express or implied,[69] or in writing, or by parol.[70] In any case it is the nature of the authorization necessary, and not that of the act done by the agent, which determines the necessary form of ratification.[71] If written authority was not necessary a contract in writing may be ratified impliedly by subsequent recognition or acquiescence,[72] although it is one which necessarily must have been in writing.[73]

Estoppel. The principal may be estopped by his acts and conduct to deny the authority of an agent, although there is no valid ratification by reason of the fact that in the particular case a particular form of ratification is necessary;[74] but unless the facts are sufficient to constitute an estoppel the general rule applies that the ratification must be in such a form as would have been good as a prior authorization.[75]

Communication. It has been held that the validity of a ratification, where no act of another is founded upon it, does not depend upon its being communicated.[76]

[§ 104] **2. Express Ratification—a. In General.** A ratification in express terms and with knowledge of the facts of what an agent has done is of course equivalent to a prior authority.[77] When therefore the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can, by the weight of authority, be no

claims to act as such, if it exists, must be found in the intention of the principal, either express or implied. If that intention cannot be shown, no ratification can be held to have been established." Merritt v. Bissell, 155 N. Y. 396, 400, 50 NE 280 [rev 84 Hun 194, 32 NYS 559].

[a] **Ratification act of mind.**—In Bayley v. Bryant, 24 Pick. (Mass.) 198, 203, the court said: "Ratification, though it must be evidenced by external demonstrations, is merely an act of the mind."

[b] **"The act from which the ratification of a contract is sought to be deduced,** must evince such intention clearly and unequivocally. None will be inferred where these acts can be otherwise explained." Breaux v. Sarvole, 39 La. Ann. 243, 246, 1 S 614.

61. Iowa.—Welke v. Wackershauser, 143 Iowa 107, 120 NW 77.
La.—Moncheux v. Mistrot, 22 La. Ann. 421.
Md.—Carroll v. Manganese Steel Safe Co., 111 Md. 252, 257, 73 A 665 [cit Cyc].
Mo.—Cannon v. Gibson, 162 Mo. A. 386, 142 SW 730.
N. Y.—Merritt v. Bissell, 155 N. Y. 396, 50 NE 280 [rev 84 Hun 194, 32 NYS 559]; Mott v. Scholes, 147 App. Div. 82, 131 NYS 811.

62. Oregon R. Co. v. Oregon, R., etc., Co., 28 Fed. 505; Forsyth v. Day, 46 Me. 176; St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737.

63. Smith v. Fletcher, 75 Minn. 189, 77 NW 800 (where it was said that ratification, like authorization, is generally the creature of intent, but that that intent may often be presumed by the law from the conduct of the party, and that presumption may be conclusive, even against the actual intention of the party, where his conduct has been such that it would be inequitable to others to permit him to assert that he had not ratified the unauthorized act of his agent); St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737; Hazard v. Spears, 2 Abb. Dec. (N. Y.) 353, 4 Keyes 469 (holding that, to constitute the conversation and acts of the principal with a knowledge of the facts a ratification, it is not material whether a ratification was contemplated or not); Bement v. Armstrong, (Tenn. Ch. A.) 39 SW 899.

64. Ballard v. Nye, 138 Cal. 588, 72 P 156. See also supra §§ 77, 78.

65. Ballard v. Nye, 138 Cal. 588, 72 P 156; Ralphs v. Hensler, 97 Cal. 296, 32 P 243; Kraft v. Wilson, 4 Cal. Unrep. Cas. 794, 37 P 790; Grant v. Beard, 50 N. H. 129; Daughters of American Revolution v. Schenley, 204 Pa. 584, 54 A 370. See also supra §§ 77, 78; infra § 138.

66. Lynch v. Smyth, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670]; Goode v. Rawlins, 44 Ga. 593.

[a] **"The methods by which a contract may be ratified** are as numerous and various as the methods by which a contract may be made without the intervention of an agent." Minnich v. Darling, 8 Ind. A. 539, 36 NE 173, 175.

67. Edwards v. Laird, 22 Cal. A. 398, 402, 134 P 365, 367 [quot Cyc]; Neely v. Stevens, 138 Ga. 305, 75 SE 159. See also infra §§ 104–107.

[a] **The ratification of a contract requires** the observance of the same formalities as the making of a valid contract. Acuna v. Iloilo, 2 Philippine 217.

68. Lynch v. Smyth, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670]; Garrett v. Gonter, 42 Pa. 143.

[a] **"No more formality** relative to the ratification of an unauthorized act is required than what would have been necessary to have originally granted authority to perform the act which it is claimed the principal has subsequently ratified." Lynch v. Smyth, 25 Colo. 103, 109, 54 P 634 [rev 7 Colo. A. 383, 43 P 670].

[b] **The ratification of a contract by an indorsement of approval upon it** does not bind the party making it or give the adverse party rights so long as it is not delivered or the indorsement is not made on the latter's duplicate, and the ratification, until then, may be withdrawn, or the indorsement erased. Dickinson v. Wright, 56 Mich. 42, 22 NW 312.

69. Ala.—Taylor v. Agricultural, etc., Assoc., 68 Ala. 229.
Cal.—Ballard v. Nye, 138 Cal. 588, 72 P 156.
Ga.—Byrne v. Doughty, 13 Ga. 46.
Nebr.—Johnston v. Milwaukee, etc., Inv. Co., 49 Nebr. 68, 68 NW 383.
N. Y.—Merritt v. Bissell, 155 N. Y. 396, 50 NE 280.
N. C.—Osborne v. Durham, 157 N. C. 262, 72 SE 849.
Tenn.—Evans v. Buckner, 1 Heisk. 291; Bement v. Armstrong, (Ch. A.) 39 SW 899.
See also infra §§ 104, 108.

[a] **"The intention to ratify may be manifested** by express words or by conduct. Either may establish that the principal elected to adopt the act or agreement as his own." St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 281, 90 SW 737.

[b] **A parol contract** may be ratified by an express parol recognition of the act, by conduct implying acquiescence, or by silence when the party in good faith ought to speak. Grant v. Beard, 50 N. H. 129.

[c] **A distinction** has been made in this connection to the effect that the act of an agent done without authority may be considered as ratified if the principal having full knowledge of the facts fails to dissent from it, but that the unauthorized act of a stranger will not be binding unless expressly ratified. Ward v. Williams, 26 Ill. 447, 79 AmD 385. See also infra § 129.

70. Goldring v. Reid, 61 Fla. 250, 54 S 718; Goode v. Rawlins, 44 Ga. 593; Newton v. Bronson, 13 N. Y. 587, 67 AmD 89; Murphy v. Renkert, 12 Heisk. (Tenn.) 397. See also infra §§ 105–107.

71. Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203; Newton v. Bronson, 13 N. Y. 587, 67 AmD 89.

72. Emerson v. Coggswell, 16 Me. 77; Goss v. Stevens, 32 Minn. 472, 21 NW 549. See also infra §§ 108, 124.

73. Newton v. Bronson, 13 N. Y. 587, 67 AmD 89.

74. Borel v. Rollins, 30 Cal. 408. And see Judd v. Arnold, 31 Minn. 430, 18 NW 151; Hawkins v. McGroarty, 110 Mo. 546, 19 SW 830. See also infra §§ 106, 107.

Estoppel to deny agency see generally supra §§ 69–74.

75. Ga.—McCalla v. American Freehold Land Mortg. Co., 90 Ga. 113, 15 SE 687.
Mich.—Palmer v. Williams, 24 Mich. 328.
Minn.—Judd v. Arnold, 31 Minn. 430, 18 NW 151.
Mo.—Hawkins v. McGroarty, 110 Mo. 546, 19 SW 830.
N. D.—Morris v. Ewing, 8 N. D. 99, 76 NW 1047.
Tex.—Zimpelman v. Keating, 72 Tex. 318, 12 SW 177.

76. Bayley v. Bryant, 24 Pick. (Mass.) 198; Sheffield v. Ladue, 16 Minn. 388, 10 AmR 145; Hibbard v. Edw. Thompson Co., 5 Que. Pr. 372.

77. Dunbar v. Springer, 168 Ill. A. 9 [aff 256 Ill. 53, 99 NE 889]; Riggan v. Crain, 86 Ky. 249, 5 SW 561, 9 KyLR

valid ratification except in the same manner.[78] In some jurisdictions this rule is expressly prescribed by statute.[79] Whether such express ratification must be in writing or under seal depends upon the principles above stated.[80] There may be a ratification by means of an express authority given subsequently to the act but dated so as to appear to be prior thereto,[81] or by the admissions in an answer in a suit involving the transaction in question,[82] or the property affected thereby.[83]

Language used. It is not necessary that the principal should state in express terms that he ratifies the act, but it is sufficient if what he has stated or written shows that such was his intention,[84] as where with a knowledge of the facts he states, on being informed of what has been done, that it is "all right,"[85] or where goods have been purchased by an agent in his name and he states, on being presented with the bill or informed of the transaction, that he will pay for them.[86]

Extent of ratification. An express ratification of what an agent has done under a power of attorney is held to be no broader than the power,[87] and a writing alleged to be a ratification will be strictly limited to the purposes therein expressed, both in determining whether it amounts to a ratification,[88] and in deciding whether it is broad enough to cover the acts claimed to be therein ratified;[89] but a qualification or condition in an express ratification should not be so construed as to defeat the necessary legal effect of what has been expressly ratified.[90]

[§ 105] **b. Parol Ratification.**[91] Unless a different mode of authorization would have been necessary, an express ratification may be by parol.[92] Thus the ratification of an unauthorized act, the authority for which might have been by parol, may be by parol,[93] and if written authority was not necessary even a contract in writing may be ratified by parol.[94] But where the authority can be conferred only by writing, the act done cannot be ratified orally.[95]

528; Utica First Nat. Bank v. Ballou, 49 N. Y. 155; Heinrich v. Pittsburg R. Co., 36 Pa. Super. 612. See also infra § 138.

78. Borel v. Rollins, 30 Cal. 408; McCracken v. San Francisco, 16 Cal. 591; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 232, 37 AmD 203; Long v. Poth, 16 Misc. 85, 37 NYS 670; Morris v. Ewing, 8 N. D. 99, 76 NW 1047. Compare Holbrook v. Chamberlin, 116 Mass. 155, 161, 17 AmR 146 (where Gray, C. J., said: "The law is settled in this Commonwealth, that the unauthorized execution of a deed in the name either of a partnership or of an individual may be ratified by parol"). See also generally supra § 103.

"When, therefore, the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification except in the same manner." Despatch Line of Packets v. Bellamy Mfg. Co., supra.

79. See statutory provisions.

[a] **The statutes** in some jurisdictions provide that a ratification can be made only in the manner that would have been necessary to confer original authority for the act ratified, or, where an oral authorization would suffice by accepting or retaining the benefit of the act, with notice thereof. Blood v. La Serena Land, etc., Co., 113 Cal. 221, 41 P 1017, 45 P 252; Borderre v. Den, 106 Cal. 594, 39 P 946; Goetz v. Goldbaum, 4 Cal. Unrep. Cas. 746, 37 P 646; Morris v. Ewing, 8 N. D. 99, 76 NW 1047.

80. See supra § 103; infra §§ 106, 107.

81. Milliken v. Coombs, 1 Me. 343, 10 AmD 70. See also infra § 136.

82. Stoney v. Shultz, 10 S. C. Eq. 465, 27 AmD 429; Texas Moline Plow Co. v. Klapproth, (Tex. Civ. A.) 164 SW 399 (holding that, where a deed of trust was invalid for lack of written authority of the attorney executing it, the grantor's answer in a suit to foreclose that the deed was in all things ratified constituted a valid ratification, not only as against her, but also as against the holder of a subsequent deed of trust, with notice).

[a] **Authority in support of this view seems to be meager,** but upon principle it would seem that an unauthorized act of this nature could be ratified by formal pleading averring that the same had been ratified." Texas Moline Plow Co. v. Klapproth, (Tex. Civ. A.) 164 SW 399, 402.

83. Donason v. Barbero, 230 Ill. 138, 82 NE 620 (holding that, where, after the execution of a deed with a blank for the name of the grantee, the grantor's agent inserted the name of a grantee without authority, such act was ratified by the grantor's appearance in a subsequent suit for partition of the land and disclaiming any interest therein, the complaint having alleged a conveyance of the land to the grantee by such deed).

84. Ida.—Strong v. Western Union Tel. Co., 18 Ida. 389, 109 P 910, 30 LRANS 409, AnnCas1912A 55 (holding that where the owners of cattle began negotiations for the sale thereof with an agent but would not sell the cattle until they had telegraphed the agent's principal asking if the principal would honor the agent's draft for a stated amount for the cattle, and the principal replied that it would honor the draft if the cattle were billed to it, the contract of sale was made with the principal).

Iowa.—Chamberlain v. Robertson, 31 Iowa 408.

Mich.—Wannebo v. Stone, 148 NW 184.

N. Y.—Tummonds v. Moody, 3 NYS 714.

R. I.—Thurston v. James, 6 R. I. 103.

Tex.—Garrett v. Josey, 44 Tex. Civ. A. 1, 97 SW 139.

Vt.—Burgess v. Harris, 47 Vt. 322.

[a] **Where one promises to pay a note** to which his name has been signed as principal without his authority he is estopped to deny that he signed the note. Northcutt v. Howard, 13 KyL 969.

[b] **An agent's unauthorized agreement for the sale of land** can be ratified by his principal only by his unequivocal and definite assent to the transaction. Margolis v. Birnie, 5 DomLR 534, 21 WestLR 462.

85. Dover v. Pittsburg Oil Co., 143 Cal. 501, 77 P 405; Tummonds v. Moody, 3 NYS 714; Brown v. Wilson, 45 S. C. 519, 23 SE 630, 55 AmSR 779.

86. Taylor v. Bailey, 169 Ill. 181, 48 NE 200 [aff 68 Ill. A. 622] (holding that where one instructs another to buy for him certain stock, it is immaterial where the purchase is made, if afterward, with knowledge of the purchase and of the circumstances connected with it, he agrees to pay for it); Watson v. Gray, 4 Abb. Dec. (N. Y.) 540, 4 Keyes 385; Burgess v. Harris, 47 Vt. 322.

87. Hunter v. Sacramento Valley Beet Sugar Co., 11 Fed. 15, 7 Sawy. 498.

88. Landt v. Schneider, 31 Mont. 15, 77 P 307; Riley v. Grant, 16 S. D. 553, 94 NW 427.

89. Hunter v. Sacramento Valley Beet Sugar Co., 11 Fed. 15, 7 Sawy. 498.

90. Scranton v. Demere, 6 Ga. 92 (holding that where a warrant of attorney was executed under a rule of court to confirm an appeal entered by an agent of the party to the suit, reciting that it was "hereby ratifying and confirming all that my said attorney has done, or may hereafter do, in my name, in the premises, without incurring costs to me," the condition as to costs should be construed as relating only to another or greater amount of costs than was legally incident to entering the appeal, and that, such entry being expressly ratified, the principal would be bound for all costs necessarily incident thereto, notwithstanding the qualification in the warrant of attorney).

91. **Ratification of sealed instrument by parol** see infra § 107.

92. Goode v. Rawlins, 44 Ga. 593; Grant v. Beard, 50 N. H. 129; Utica First Nat. Bank v. Ballou, 49 N. Y. 155.

[a] **A parol ratification of an unauthorized purchase** of goods on one's credit is sufficient to render him liable therefor. Murphy v. Renkert, 12 Heisk. (Tenn.) 397.

93. Ky.—Powell v. Gossom, 18 B. Mon. 179.

Mich.—Hammond v. Hannin, 21 Mich. 374, 4 AmR 490.

Minn.—Goss v. Stevens, 32 Minn. 472, 21 NW 549; Dickerman v. Ashton, 21 Minn. 538; Brown v. Eaton, 21 Minn. 409.

N. Y.—Applebaum v. Galewski, 34 Misc. 281, 69 NYS 636.

S. C.—Breithaupt v. Thurmond, 37 S. C. L. 216.

94. U. S.—Jenkins v. Mayer, 13 F. Cas. No. 7,272, 2 Biss. 303, 3 Nat BankrReg 776.

Cal.—Goetz v. Goldbaum, 37 P 646 (holding that a promissory note, such as, under Civ. Code § 2309, must be in writing, is a commercial note, not a mere nonnegotiable promise to pay, and the latter may be ratified orally); Sims v. Frew, (A.) 142 P 106.

Mo.—Bless v. Jenkins, 129 Mo. 647, 31 SW 938.

N. Y.—Newton v. Bronson, 13 N. Y. 587, 67 AmD 89 (holding that, although the statute requires a contract for the sale of land to be in writing subscribed by the party or his agent lawfully authorized, it is not necessary that the agent should have written authority, and hence where a party without authority executes such a contract in the name of the owner a ratification by the latter, although by parol, makes the contract valid within the statute).

Eng.—Fitzmaurice v. Bayley, 6 E. & B. 868, 88 ECL 868, 119 Reprint 1087.

[a] **A parol ratification of a contract for the sale of land,** made by one assuming without authority to act for the owner, is valid and binding upon the owner, provided the person assuming to act as agent in behalf of such owner signed a memorandum which in its terms complied with the provisions of the statute of frauds, and which showed upon its face that it was executed in behalf of the owner. Brandon v. Pritchett, 126 Ga. 286, 55 SE 241, 7 AnnCas 1093 and note.

95. English v. Dycus, 8 KyL 331. See also infra § 106.

[§ 106] **c. Ratification in Writing.** Where the original authority to an agent to execute an act must be in writing, the ratification of the act done without authority must, in the absence of some element of equitable estoppel, be in writing,[96] and the same principle applies to acts which could be authorized by a municipality only by ordinance,[97] or by a corporation only by resolution or vote.[98]

[§ 107] **d. Ratification under Seal.** By the weight of authority, where an instrument required to be under seal is executed by an agent having no original authority to execute the same, or no authority under seal, it cannot be ratified except by a writing under seal,[99] unless of course the element of estoppel exists.[1] But an exception to this rule has been made in the case of a ratification by one partner of a deed executed by another partner for the partnership, it being now well established in some states that a sealed contract relating to the partnership business, executed by one of the several partners, is binding on all, although without authority under seal, if they subsequently ratify it by giving their assent, which may be proved by the acts of the parties and the circumstances of the case, or by their verbal declarations or admissions,[2] and in at least one jurisdiction it has been held that a ratification under seal is not necessary irrespective of the question of partnership.[3]

When no seal is required, the mere fact that the instrument has been so executed will not necessitate a ratification under seal,[4] and the ratification

[a] **A contract of suretyship** executed by an agent, without authority in writing, where such authority is required by statute, cannot be ratified by parol. Ragan v. Chenault, 78 Ky. 545.

96. Cal.—Borderre v. Den, 106 Cal. 594, 39 P 946; Edwards v. Laird, 22 Cal. A. 398, 402, 134 P 365 [quot Cyc].

Ga.—McMichen v. Brown, 10 Ga. A. 506, 73 SE 691.

Ky.—Riggan v. Crain, 86 Ky. 249, 5 SW 561, 9 KyL 528; Ragan v. Chenault, 78 Ky. 545; English v. Dycus, 8 KyL 331.

Mich.—Palmer v. Williams, 24 Mich. 328.

Minn.—Hunter v. Cobe, 84 Minn. 187, 87 NW 612; Judd v. Arnold, 31 Minn. 430, 18 NW 151.

Mo.—Hawkins v. McGroarty, 110 Mo. 546, 19 SW 830; Short v. Stephens, 92 Mo. A. 151.

N. Y.—Long v. Poth, 16 Misc. 85, 87, 37 NYS 670 (where the court said: "Ratification is equivalent to original authority, and nothing more. And where the statute requires the original authority to be in writing, it would on principle require the ratification to be made with equal ceremony").

N. D.—Morris v. Ewing, 8 N. D. 99, 76 NW 1047.

Or.—Slotboom v. Simpson Lumber Co., 67 Or. 516, 524, 135 P 889, 136 P 641 [cit Cyc].

Pa.—McDowell v. Simpson, 3 Watts 129, 27 AmD 338 (holding that the ratification of a lease of land in writing for seven years, in order to avoid the effects of the statute of frauds, must be in writing, and that a parol ratification gives to the tenant an estate at will, and if it continues more than one year an estate from year to year).

Tenn.—Smith v. Dickinson, 6 Humphr. 261, 44 AmD 306.

Tex.—Zimpelman v. Keating, 72 Tex. 318, 12 SW 177; Texas Moline Plow Co. v. Klapproth, (Civ. A.) 164 SW 399.

[a] **Authority in writing is indispensable to an agency to mortgage land,** and where a mortgage upon the land is executed by one who without authority assumed to act as an agent of the owner, any act of ratification on the part of the owner, to be valid, must be evidenced by some writing. Morris v. Ewing, 8 N. D. 99, 76 NW 1047.

[b] **Where the principal could not delegate authority to the agent to make the contract,** the ratification must be in writing subscribed by the principal and in such form as to render the contract valid within the statute as one originally made by him. Newton v. Bronson, 13 N. Y. 587, 67 AmD 89.

[c] **Whatever documents are relied on to establish a ratification** by the principal must be complete enough to have constituted authority to his agent to make the agreement, if the documents had been written beforehand. Johnson v. Fecht, 94 Mo. A. 605, 68 SW 615 [aff 185 Mo. 335, 83 SW 1077].

[d] **Oral assent or acquiescence.**—Where a deed of trust executed by the agent of the owner of land is invalid for want of written authority, it cannot be ratified by the owner's oral assent or acquiescence, but only by an instrument in writing. Texas Moline Plow Co. v. Klapproth, (Tex. Civ. A.) 164 SW 399.

97. McCracken v. San Francisco, 16 Cal. 591. See also Municipal Corporations [28 Cyc 676].

98. Blood v. La Serena Land, etc., Co., 113 Cal. 221, 41 P 1017, 45 P 252; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203. See also Corporations [10 Cyc 1069 et seq].

99. Cal.—Borel v. Rollins, 30 Cal. 408.

Ga.—Neely v. Stevens, 138 Ga. 305, 75 SE 159; McCalla v. American Freehold Land Mortg. Co., 90 Ga. 113, 15 SE 687 (holding that where a deed is executed by a person without authority, written or verbal, no ratification of the same save one in writing under seal will be effectual in behalf of any person who has not acted upon the ratification in a way to make the law of estoppel applicable for his protection); Pollard v. Gibbs, 55 Ga. 45; Dalton Buggy Co. v. Wood, 7 Ga. A. 477, 67 SE 121; Hayes v. Atlanta, 1 Ga. A. 25, 57 SE 1087.

Ill.—Ingraham v. Edwards, 64 Ill. 526 (holding that only by a writing under seal can a principal ratify a bond executed by an agent without competent authority); Bragg v. Fessenden, 11 Ill. 544.

Me.—Heath v. Nutter, 50 Me. 378; Spofford v. Hobbs, 29 Me. 148, 48 AmD 521 (holding that the ratification of an unauthorized conveyance of land under seal must, in order to be effectual, be by an instrument also under seal); Paine v. Tucker, 21 Me. 138, 38 AmD 255; Stetson v. Patten, 2 Me. 358, 11 AmD 111 (holding that a deed executed by an agent without authority under seal cannot be ratified by parol).

N. H.—Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203.

N. Y.—Wells v. Evans, 20 Wend. 251 [rev on other grounds 22 Wend. 324]; Blood v. Goodrich, 9 Wend. 68, 24 AmD 121, 12 Wend. 525, 27 AmD 152; Hanford v. McNair, 9 Wend. 54.

N. C.—Davenport v. Sleight, 19 N. C. 381, 31 AmD 420.

Pa.—Grove v. Hodges, 55 Pa. 504; Bellas v. Hays, 5 Serg. & R. 427, 9 AmD 385 (holding that, if an agent signs and seals a deed in his own name, it does not bind his principal, although in the body of the deed it is stated to be made by the agent in behalf of his principal, and that no confirmation of the principal short of sealing will ratify the deed).

Tenn.—Cain v. Heard, 1 Coldw. 163; Smith v. Dickinson, 6 Humphr. 261, 44 AmD 306.

Tex.—Skirvin v. O'Brien, 43 Tex. Civ. A. 1, 95 SW 696.

Eng.—Oxford v. Crow, [1893] 3 Ch. 535; Tupper v. Foulkes, 9 C. B. N. S. 797, 99 ECL 797, 142 Reprint 314, 8 ERC 624.

[a] **Where a crop lien** for fertilizers is executed by an agent who acts without authority from the principal, and in his absence, and the lien is under seal, proof of the ratification by the principal must be in writing and under seal. Pollard v. Gibbs, 55 Ga. 45.

1. Cal.—Blood v. La Serena Land, etc., Co., 113 Cal. 221, 41 P 1017, 45 P 252; Borel v. Rollins, 30 Cal. 408.

Ind.—Fouch v. Wilson, 59 Ind. 93.

Mich.—Palmer v. Williams, 24 Mich. 328.

N. Y.—Hyatt v. Clark, 118 N. Y. 563, 23 NE 891.

Pa.—Grove v. Hodges, 55 Pa. 504.

[a] **Where a person enters into possession of land** under a sealed lease executed by an agent without authority under seal, and pays an installment of rent in pursuance of the contract, he cannot subsequently deny the agent's authority. Vanderbilt v. Persse, 3 E. D. Smith (N. Y.) 428.

[b] **Where an agent makes a deed to land** of his principal without authority to do so, the ratification must generally be by deed of the principal. A mere assent, or such acquiescence as will amount only to evidence of assent, will not be a ratification. The acquiescence by parol to bind the principal must be by such acts as will operate as an estoppel in pais. Zimpelman v. Keating, 72 Tex. 318, 12 SW 177. See also Clark, etc., Lumber Co. v. Duncan, (Tex. Civ. A.) 143 SW 644.

2. Haynes v. Seachrest, 13 Iowa 455; Swan v. Stedman, 4 Metc. (Mass.) 548; Cady v. Shepherd, 11 Pick. (Mass.) 400, 22 AmD 379. See also Partnership [30 Cyc 486].

3. Holbrook v. Chamberlin, 116 Mass. 155, 161, 17 AmR 146; McIntyre v. Park, 11 Gray (Mass.) 102, 106, 71 AmD 690 (where the court said: "However this may be elsewhere, by the law of Massachusetts such instrument may be ratified by parol. . . . The cases in which this doctrine has been adjudged were those in which one partner, without the previous authority of his copartners, executed a deed in the name of the firm. But we do not perceive any reason for confining the doctrine to that class of cases").

4. U. S.—Jenkins v. Mayer, 13 F. Cas. No. 7,272, 2 Biss. 303, 3 Nat BankrReg 776 (holding that, where an instrument made by an agent is under seal, the ratification of such act by the principal need not be under seal, where it was not necessary that such instrument should have been sealed).

Colo.—Lynch v. Smyth, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670].

Mich.—Hammond v. Hannin, 21 Mich. 374, 4 AmR 490.

Minn.—Dickerman v. Ashton, 21 Minn. 538; Minor v. Willoughby, 3 Minn. 225.

in some cases may be made by parol.[5]

Effect of ratification not under seal. A ratification not under seal of an instrument to which a seal has been unnecessarily attached does not render it effective as a sealed instrument,[6] but does make it effective as a simple contract not under seal.[7]

A parol acknowledgment by a principal, where sealed authority is required, that an agent had authority under seal to enter into a sealed contract obligatory upon his principal is competent evidence of such authority; but if, at the time of entering into it, the agent had in fact no authority under seal the subsequent parol acknowledgment and ratification will not bind the principal.[8]

[§ 108] **3. Implied Ratification—a. General Principles—(1) In General.** In a great majority of the cases the ratification of unauthorized acts of an agent need not be, and is not, made expressly, but is implied from the acts and words of the principal,[9] except where the ratification is required to be in a particular form;[10] and in some jurisdictions this rule is provided for by statute.[11] In reference to

Miss.—Adams v. Power, 52 Miss. 828.

Mo.—Bless v. Jenkins, 129 Mo. 647, 31 SW 938; Shuetze v. Bailey, 40 Mo. 69.

N. H.—Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203.

N. Y.—Worrall v. Munn, 5 N. Y. 229, 55 AmD 330; Lawrence v. Taylor, 5 Hill 107; Evans v. Wells, 22 Wend. 324.

S. C.—State v. Spartanburg, etc., R. Co., 8 S. C. 129.

Tex.—Rutherford v. Montgomery, 14 Tex. Civ. A. 319, 37 SW 625.

Wash.—McLeod v. Morrison, 66 Wash. 683, 690, 120 P 528, 38 LRANS 783 and note [cit Cyc].

[a] **In Georgia** it has been held that where an instrument is executed under seal by an agent, without authority to do so, although the instrument was not required to be under seal, the ratification thereof by the principal must be in writing and under seal, and cannot be made by parol. Pollard v. Gibbs, 55 Ga. 45; Hayes v. Atlanta, 1 Ga. A. 25, 28, 57 SE 1087 (where the court said: "An agent without written authority under seal can not bind his principal by a written contract under seal, and that such a contract, so executed, can not be ratified by the principal by any act less solemn than a writing under seal. In the light of the uniform decisions of our Supreme Court to this effect, there is no question of law which seems to be more conclusively settled. It is also absolutely immaterial, in the application of the rule, that the contract was of such a nature as not to require a seal, to be valid").

[b] **In Texas** it is held (1) that a seal is not essential to the validity of a deed, and therefore that the unauthorized execution of a deed need not be ratified under seal (Rutherford v. Montgomery, 14 Tex. Civ. A. 319, 37 SW 625), but (2) that the ratification must be in writing (Zimpelman v. Keating, 72 Tex. 318, 12 SW 177).

5. Goldring v. Reid, 61 Fla. 250, 54 S 718 (holding that a lease of real estate for more than two years is not required to be by writing and that therefore such a lease, although under seal when made by an agent, may be ratified by parol); Palmer v. Seligman, 77 Mich. 305, 43 NW 974 (holding that the execution by a traveling salesman of a nonresident firm of a bond of indemnity under seal in the name of the firm in an attachment suit brought to collect a debt due the firm and contracted in the ordinary course of their business, although without express authority under seal, may be ratified by parol); State v. Spartanburg, etc., R. Co., 8 S. C. 129 (holding that, although a contract made by an agent was under seal, yet, if it would have been valid if made by parol, it may be ratified by parol declarations or acts of the principal).

6. Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203 (holding that a parol ratification of a mortgage executed by an agent under seal, covering both real and personal property, is ineffective as to the realty, but makes the mortgage effective as to the personalty, since a seal is not essential to the validity of a mortgage of personal property). See also Ingraham v. Edwards, 64 Ill. 526 (holding that if the instrument is accepted as a sealed instrument, and action is brought upon it as such instead of in assumpsit where it might have been offered and regarded as a simple contract, parol ratification is not sufficient, although the seal was unnecessary).

7. Bless v. Jenkins, 129 Mo. 647, 31 SW 938; Shuetze v. Bailey, 40 Mo. 69; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203.

8. Videau v. Griffin, 21 Cal. 389; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203; Blood v. Goodrich, 12 Wend. (N. Y.) 525, 27 AmD 152; Steiglitz v. Eggington, Holt N. P. 141, 142, 3 ECL 63, 8 ERC 622 (where the court said: "One man cannot authorize another to execute a deed for him but by deed. No subsequent acknowledgment will do").

9. U. S.—In re Berkebile, 144 Fed. 577, 75 CCA 333; Ætna Indemn. Co. v. Ladd, 135 Fed. 636, 68 CCA 274; Owyhee Land, etc., Co. v. Tautphas, 121 Fed. 343, 57 CCA 557 (payment for work done); Farmers' L. & T. Co. v. Toledo, etc., R. Co., 67 Fed. 49; U. S. v. Turner, 28 F. Cas. No. 16,547, 2 Bond 379.

Ala.—Taylor v. West Alabama Agricultural, etc., Assoc., 68 Ala. 229.

Ark.—Whitehead v. Wells, 29 Ark. 99.

Cal.—Alcorn v. Gieseke, 158 Cal. 396, 111 P 98; Ballard v. Nye, 138 Cal. 588, 72 P 156 [rev reh 6 Cal. Unrep. Cas. 947, 69 P 481]; Pope v. J. K. Armsby Co., 111 Cal. 159, 43 P 589; Kraft v. Wilson, 37 P 790; Fraser v. San Francisco Bridge Co., 103 Cal. 79, 36 P 1037.

Colo.—Jenet v. Albers, 7 Colo. A. 271, 43 P 452.

Conn.—Duncan v. Kearney, 72 Conn. 585, 45 A 358; Curnane v. Scheidel, 70 Conn. 13, 38 A 875; Church v. Sterling, 16 Conn. 388.

Ga.—Cook v. Buchanan, 86 Ga. 760, 13 SE 83; Byrne v. Doughty, 13 Ga. 46; Bush v. Fourcher, 3 Ga. A. 43, 59 SE 459.

Ill.—Connett v. Chicago, 114 Ill. 233, 29 NE 280; Searing v. Butler, 69 Ill. 575; Joseph Wolf Co. v. Bank of Commerce, 107 Ill. A. 58; Hickox v. Fels, 86 Ill. A. 216; Campbell v. Millar, 84 Ill. A. 208.

Ind. T.—Denison, etc., R. Co. v. Ranney-Alton Mercantile Co., 3 Ind. T. 104, 53 SW 496.

Iowa.—Burlington, etc., R. Co. v. Columbus Junction, 104 Iowa 110, 73 NW 501; Wright v. Farmers' Mut. Live-Stock Ins. Assoc., 96 Iowa 360, 65 NW 308.

Ky.—Gay v. McDonald, 143 Ky. 462, 136 SW 881; Luttrell v. East Tennessee Tel. Co., 86 SW 1124, 27 KyL 872; Southern R. Co. v. Marshall, 111 Ky. 560, 64 SW 418, 23 KyL 813 (acting on contract).

La.—Bogel v. Teutonia Nat. Bank, 28 La. Ann. 953; Szymanski v. Plassan, 20 La. Ann. 90, 96 AmD 382; Merritt v. Wright, 19 La. Ann. 91; Warneken v. Marchand, 18 La. Ann. 147; Flower v. Jones, 7 Mart, N. S. 140.

Md.—Maddux v. Bevan, 39 Md. 485.

Mass.—Barnes v. Boardman, 149 Mass. 106, 21 NE 308, 3 LRA 785; Boynton v. Turner, 13 Mass. 391; Clement v. Jones, 12 Mass. 60.

Mo.—Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019; Christopher v. National Brewery Co., 72 Mo. A. 121.

Mont.—Carlson v. Stone-Ordean-Wells Co., 40 Mont. 434, 107 P 419.

Nebr.—Oberne v. Burke, 50 Nebr. 764, 70 NW 387.

N. H.—Hoit v. Cooper, 41 N. H. 111; Hatch v. Taylor, 10 N. H. 538.

N. Y.—Van Campen v. Bruns, 54 App. Div. 86, 66 NYS 344; Bliss v. Sherrill, 24 App. Div. 280, 49 NYS 561; Harnett v. Garvey, 36 N. Y. Super. 326; Wilmot v. Richardson, 13 N. Y. Super. 328; Dupignac v. Bernstrom, 37 Misc. 677, 76 NYS 381 [aff 76 App. Div. 105, 78 NYS 705]; Appelbaum v. Galewski, 34 Misc. 281, 69 NYS 636; Codwise v. Hacker, 1 Cai. 526; Day v. Perkins, 2 Sandf. Ch. 359.

Okl.—Fant v. Campbell, 8 Okl. 586, 58 P 741 (holding that, in order to ratify the act of an agent in signing defendant's name to a note, it is not necessary for defendant to expressly agree with the payee that the act should be ratified).

Or.—Schreyer v. Turner Flouring Mills Co., 29 Or. 1, 43 P 719.

Pa.—Fenn v. Dickey, 178 Pa. 258, 35 A 1108; Cake's App., 110 Pa. 65, 20 A 415.

S. C.—Brown v. Wilson, 45 S. C. 519, 23 SE 630, 55 AmSR 779.

Tenn.—Evans v. Buckner, 1 Heisk. 291.

Tex.—Ransom v. Alexander, 31 Tex. 443.

Va.—Richmond Union Pass. R. Co. v. Richmond, etc., R. Co., 96 Va. 670, 32 SE 787.

Wash.—McLeod v. Morrison, 66 Wash. 683, 690, 120 P 528, 38 LRANS 783 [quot Cyc].

W. Va.—Curry v. Hale, 15 W. Va. 867 (holding that where an agent exceeds his authority it is not necessary that there should be any positive or direct confirmation).

Wis.—Plumer v. Wausau Boom Co., 49 Wis. 449, 5 NW 232.

Eng.—Carter v. St. Mary Abbott's Vestry, 64 J. P. 548.

Ont.—Pettigrew v. Doyle, 17 U. C. C. P. 34.

[a] **Ratification a fact rather than a conclusion.**—"In its technical sense, ratification is itself a fact, and not a conclusion to be drawn from other facts or circumstances. . . . The acts, words, and silence of the principal are sometimes spoken of as in themselves constituting a ratification, but this is not strictly accurate. They are rather the evidence of a ratification than the ratification itself." Minnich v. Darling, 8 Ind. A. 539, 36 NE 173, 175.

[b] **Ratification by corporation.**—A ratification of acts of an agent of a corporation may be implied from an adoption or recognition of such acts by the corporation. Detroit v. Jackson, 1 Dougl. (Mich.) 106; Holmes v. Kansas City Bd. of Trade, 81 Mo. 137. See also Corporations [10 Cyc 1076 et seq].

10. Salfield v. Sutter County Land Impr., etc., Co., 94 Cal. 546, 29 P 1105 (holding that acceptance of part of the purchase money paid for the land and bringing suit for the balance was not a ratification of the sale which was made by an agent without written authority as required). See also supra §§ 104–107.

11. See statutory provisions.

[a] **In Georgia,** under Civ Code

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what acts or conduct will constitute an implied ratification a distinction should be made between cases where the person assuming to act as agent did so without authority and cases where there was an actual agency but the agent exceeded the authority conferred,[12] as conduct which in the latter case might be sufficient will not always amount to a ratification in the former.[13] As between the principal and third persons dealing with an agent less is required to constitute a ratification than is required between the principal and the agent.[14]

[§ 109] **(2) Acts Constituting Ratification in General.** Generally speaking a ratification may be implied from any acts, words, or conduct on the part of the principal which reasonably tend to show an intention on the part of the principal to ratify the unauthorized acts or transactions of the alleged agent,[15] provided the principal in doing the acts relied on as a ratification acted with knowledge of the material facts.[16] This rule is particularly applicable where it appears that the principal has repeatedly recognized and approved similar acts done by the agent,[17] or where his conduct is in-

§ 3019, "a ratification may be express, or implied from the acts or silence of the principal." Bush v. Fourcher, 3 Ga. A. 43, 50, 59 SE 459.

12. Ralphs v. Hensler, 97 Cal. 296, 32 P 243; Merritt v. Bissell, 155 N. Y. 396, 50 NE 280 [rev 84 Hun 194, 32 NYS 559]. See also infra § 129.

13. Merritt v. Bissell, 155 N. Y. 396, 50 NE 280 [rev 84 Hun 194, 32 NYS 559]; Hatton v. Stewart, 2 Lea (Tenn.) 233.

14. Triggs v. Jones, 46 Minn. 277, 48 NW 1113; Bennett v. Armstrong, (Tenn. Ch. A.) 39 SW 899; Lemcke v. Funk, 78 Wash. 460, 139 P 234.

"It requires much less positive action to ratify as to third persons than in favor of the agent himself." McLeod v. Morrison, 66 Wash. 683, 688, 120 P 528, 38 LRANS 783.

15. U. S.—American China Dev. Co. v. Boyd, 148 Fed. 258.

Cal.—Union Trust, etc., Co. v. Best, 160 Cal. 263, 267, 116 P 737 [quot Cyc]; Kraft v. Wilson, 4 Cal. Unrep. Cas. 794, 37 P 790.

Ga.—Byrne v. Doughty, 13 Ga. 46.

Mass.—Athol Sav. Bank v. Bennett, 203 Mass. 480, 89 NE 632; Beacon Trust Co. v. Souther, 183 Mass. 413, 67 NE 345.

Mich.—Blakley v. Cochran, 117 Mich. 394, 75 NW 940.

Minn.—Dana v. Turlay, 38 Minn. 106, 35 NW 860; Goss v. Stevens, 32 Minn. 472, 21 NW 549; Minor v. Willoughby, 3 Minn. 225.

Mo.—Ilgenfritz v. Missouri Pac. R. Co., 169 Mo. A. 652, 155 SW 854.

Nebr.—Prine v. Syverson, 37 Nebr. 860, 56 NW 714.

N. Y.—Small v. Housman, 208 N. Y. 115, 101 NE 700 [rev 142 App. Div. 760, 127 NYS 500]; Keeler v. Salisbury, 33 N. Y. 648; Brown v. Reiman, 48 App. Div. 295, 62 NYS 663 (holding that, where defendant told his daughters that if they would select sealskin coats he would give his check for their cost, and they bought coats of plaintiffs in their own name, and, after indelibly affixing their names thereto and wearing them on several occasions, they became dissatisfied and offered to return them, and, when it became probable that they were likely to lose in actions for the price, they sold them by the procurement and advice of defendant, and with the money obtained began proceedings in bankruptcy to relieve themselves of the judgments obtained against them, which constituted their entire indebtedness, and during the bankruptcy proceedings defendant swore that he told them that they might have their coats made by plaintiffs, and one daughter testified that after she and her sister had ordered the coats defendant gave her a blank check with which to pay for them, these facts were sufficient to show that defendant had both authorized and ratified the purchase); In re Di Marti, 72 Misc. 148, 129 NYS 81; Codwise v. Hacker, 1 Cai. 526.

N. C.—Osborne v. Durham, 157 N. C. 262, 72 SE 849.

Pa.—Taylor v. Adams Express Co., 52 Pa. Super. 449.

Tenn.—Evans v. Buckner, 1 Heisk. 291.

Tex.—Dockery v. Maple, (Civ. A.) 125 SW 631 (holding that, where an owner's agent listed property with a real estate broker for sale, and the owner knew that the agent was trying to find a purchaser, and when he obtained a purchaser agreed to pay him for his services, he ratified the agent's act in employing the broker).

Vt.—Burgess v. Harris, 47 Vt. 322 (holding that, where an agent of A guaranteed the payment of goods that B might order, A agreed to the guaranty provided he had sufficient funds belonging to B to meet the bill, which he had, and A delivered a statement of the goods purchased by B to his agent, who paid the account, A ratified his agent's act).

Wash.—McLeod v. Morrison, 66 Wash. 683, 689, 120 P 528, 38 LRANS 783 and note [quot Cyc].

Eng.—Carter v. St. Marys Abbott's Vestry, 64 J. P. 548.

Ont.—Thomson v. Playfair, 26 Ont. L. 624, 6 DomLR 263, 3 OntWN 1539, 22 OntWR 866.

Sask.—Taylor v. Helgeson, 3 Sask. 461, 15 WestLR 273.

"All that the law requires is such a manifestation of the intent of the principal to adopt the act of the agent as would lead the ordinarily prudent man to conclude that the principal has assented." Carlson v. Stone-Ordean-Wells Co., 40 Mont. 434, 440, 107 P 419 [quot 1 Clark & Skyles Agency § 128].

"An act may be ratified by any words or conduct indicating an intention on the part of the person in question to adopt the act as his own." Osborne v. Durham, 157 N. C. 262, 269, 72 SE 849.

[a] **"Ratification is a question of fact,** and in the great majority of instances, turns on the conduct of the principal in relation to the alleged contract or the subject of it, from which his purpose and intention thereabout may be reasonably inferred. . . . And, generally, deliberate and repeated acts of the principal, with a knowledge of the facts, that are consistent with an intention to adopt the contract, or inconsistent with a contrary intention, are sufficient evidence of ratification." Oregon R. Co. v. Oregon R., etc., Co., 28 Fed. 505, 507.

[b] **Protesting draft.**—The act of a principal in protesting its general agent's draft for funds to be used on contracts undertaken by the agent does not constitute a repudiation of the action of the agent in assuming the contract, but is a ratification thereof, where the only reason assigned for dishonoring the draft is that the funds are not needed. Ætna Indemn. Co. v. Ladd, 135 Fed. 636, 68 CCA 274.

[c] **The subsequent disposal by the principal of property returned** by the purchaser to an agent who sold the property is a ratification of the agent's acts in receiving it. Clydesdale Horse Co. v. Bennett, 52 Mo. A. 333.

[d] **Dealing with purchaser as owner.**—An unauthorized sale is ratified by the act of the principal in dealing with the purchaser as the owner of the property. German Nat. Bank v. Hastings First Nat. Bank, 59 Nebr. 7, 80 NW 48.

[e] **Executing a contract** which the agent has made in excess of his authority constitutes a ratification thereof. Short v. Stephens, 92 Mo. A. 151.

16. Metzger v. Huntington, 139 Ind. 501, 37 NE 1084, 39 NE 235; Barnett v. Daw, 55 App. Div. 202, 66 NYS 880 (holding that where a purchaser, having assumed a note secured by mortgage, conveyed the premises to a third party who assumed it, and an agent of the owner of the note and mortgage without authority assigned them to such third party in discharge of his own debt, and conveyed to the owner an interest in his own realty, which conveyance was recorded, although the owner had no knowledge of it, and the note and mortgage were assigned to a bank which went into insolvency, after which, and pending suit to foreclose the mortgage, the owner transferred the realty conveyed to him by his agent to the receiver of the bank and obtained the note and mortgage, these facts were insufficient to show ratification of the agent's unauthorized transfer, since such owner was not chargeable with notice of such conveyance, and a return of the realty conveyed by the agent was necessary to a disaffirmance of his attempted transfer); Griffin v. Allison, (Tex. Civ. A.) 138 SW 1068 (holding that where defendant's son had no authority from him to sell a horse to plaintiff which subsequently turned out to be glandered, and at the time defendant cashed a check given for the horse he did not know that the horse was diseased, or that his son had made any representations to plaintiff concerning the horse's health, defendant did not by cashing the check ratify his son's acts and representations as a matter of law, under the rule that to constitute a ratification of an agent's unauthorized act the principal must have acted with full knowledge of all the material facts); Vallentine v. Carter, 49 Wash. 141, 94 P 932 (holding that where defendant's agent made an unauthorized contract for the sale of defendant's land to plaintiffs, and accepted earnest money, and after the negotiations for the sale had been broken off and plaintiffs had sued for specific performance, defendant, who had not received the earnest money, for the first time learned of the terms of the contract, defendant's failure to then request the agent to return the money did not constitute a ratification of the contract). See also supra §§ 93–98.

[a] **Must be based on knowledge.**—An implied ratification of the acts and declarations of one assuming to act as the agent of another must be based upon a full knowledge of all the facts. Proctor v. Tows, 115 Ill. 138, 3 NE 569.

[b] **Payments by an agent** on a note collateral to a prior note purporting to be indorsed by his principal are not a ratification of such indorsement where neither the agent nor his principal had knowledge of its existence at the time of the payments. Omro First Nat. Bank v. Bean, 141 Wis. 476, 124 NW 656, 135 AmSR 50.

17. Ala.—Tabler v. Sheffield Land, etc., Co., 87 Ala. 305, 6 S 196.

Cal.—Quinn v. Dresbach, 75 Cal. 159, 16 P 762, 7 AmSR 138.

Colo.—Robert E. Lee Silver Min. Co. v. Englebach, 18 Colo. 106, 31 P

consistent with any other intention.[18]

Applications. A ratification may be implied where the principal has carried out or offered to perform a part of an unauthorized agreement with knowledge of the whole,[19] as where he executed an instrument conveying property which an agent without authority agreed to sell;[20] or accepted without objection a performance[21] or a part payment or performance,[22] or consented to an extension of time for performance[23] on the part of the other party to the agreement, or entered into a settlement with the agent of the account between them upon the basis that the transaction was valid,[24] or voluntarily treated the agent as his debtor in the transaction,[25] or agreed to look to the agent for money which the agent had collected without authority.[26]

[§ 110] **(3) Acts Not Constituting Ratification in General.** It is not necessary, in order to prevent a principal from being bound by the unauthorized act of an agent, that he should expressly repudiate it,[27] since a repudiation or intention not to ratify as well as a ratification may be implied from the acts and conduct of the principal.[28] This is so not only where the principal by his conduct utterly repudiates the agent's acts,[29] but also where to avoid loss he seeks a friendly settlement of the differences caused by such unauthorized acts by yielding something of his own right to totally avoid the agent's agreements,[30] or requests the other party to the agreement not to insist upon its being

771; Witcher v. Gibson, 15 Colo. A. 163, 61 P 192.

Iowa.—Whiting v. Western Stage Co., 20 Iowa 554.

Mass.—Ely v. James, 123 Mass. 36.

Mo.—White v. Missouri Pac. R. Co., 19 Mo. A. 400.

Pa.—Himes v. Herr, 3 Pa. Super. 124, 39 WklyNC 568.

Wash.—McLeod v. Morrison, 66 Wash. 683, 689, 120 P 528, 38 LRANS 783 [quot Cyc].

Wis.—Gallinger v. Lake Shore Traffic Co., 67 Wis. 529, 30 NW 790.

See also infra § 113.

Agency implied from previous recognition or ratification of similar acts see supra §§ 37–41.

18. U. S.—Star v. Stark, 22 F. Cas. No. 13,317, 2 Sawy. 603 [aff 94 U. S. 477, 24 L. ed. 276].

Ala.—Taylor v. West Alabama Agricultural, etc., Assoc., 68 Ala. 229.

Cal.—Kraft v. Wilson, 4 Cal. Unrep. Cas. 794, 37 P 790.

Iowa.—Mathews v. Gilliss, 1 Iowa 242.

Tenn.—Hatton v. Stewart, 2 Lea 233.

Wash.—McLeod v. Morrison, 66 Wash. 683, 120 P 528, 38 LRANS 783.

W. Va.—Ruffner v. Hewitt, 7 W. Va. 585.

19. U. S.—The Henrietta, 91 Fed. 675.

Cal.—Mowry v. Mowry, 103 Cal. 314, 37 P 398.

Ill.—Hale El. Co. v. Hale, 201 Ill. 131, 66 NE 249 [aff 98 Ill. A. 430]; Kennedy v. Supreme Lodge K. P., 124 Ill. A. 55.

Ind.—American Quarries Co. v. Lay, 37 Ind. A. 386, 73 NE 608; Nichols, etc., Co. v. Berning, 37 Ind. A. 109, 76 NE 776.

Iowa.—Kurtz v. Payne Inv. Co., 156 Iowa 376, 135 NW 1075; Iowa State Nat. Bank v. Taylor, 98 Iowa 631, 67 NW 677.

Kan.—Culver v. Warren, 36 Kan. 391, 13 P 577.

Ky.—Newton v. Bayless Fruit Co., 155 Ky. 440, 159 SW 968.

Md.—Curtis v. Gibney, 59 Md. 131.

Mo.—Welsh v. Ferd Heim Brewing Co., 47 Mo. A. 608 (holding that, although the secretary of a corporation had no authority to execute a lease on its behalf, where he did so and the corporation for ten months paid the rent by its check and entered the payments on its books, the execution of the lease was ratified by and binding on the corporation).

Nev.—Clarke v. Lyon County, 8 Nev. 181.

N. J.—Lyons v. Wait, 51 N. J. Eq. 60, 26 A 334 [rev on other grounds 51 N. J. Eq. 808, 27 A 934].

N. Y.—Tallman v. Kimball, 74 Hun 279, 26 NYS 811; Murray v. New York, etc., R. Co., 50 Misc. 573, 99 NYS 477; Hill v. Coates, 34 Misc. 535, 69 NYS 964; Boyden v. Baldwin, 12 Misc. 549, 34 NYS 19 [aff 15 Misc. 103, 36 NYS 478]; Skinner v. Dayton, 19 Johns. 513, 10 AmD 286 [rev 5 Johns Ch. 351].

N. C.—Williams v. Crosby Lumber Co., 118 N. C. 928, 24 SE 800 (holding that, where an agent without authority purchases goods for his principal, the fact that the principal accepts and pays for part of the goods according to the contract constitutes a ratification thereof).

Pa.—Anderson v. National Surety Co., 196 Pa. 288, 46 A 306; Haworth v. Truby, 138 Pa. 222, 20 A 942.

S. D.—Townsend v. Kennedy, 6 S. D. 47, 60 NW 164.

Wash.—McLeod v. Morrison, 66 Wash. 683, 689, 120 P 528, 38 LRANS 783 [quot Cyc].

N. S.—Ryan v. Terminal City Co., 25 N. S. 131.

See also supra §§ 99–100.

[a] **Although the principal objects** to a contract made by an agent without authority, if the objection is merely as to its terms and not to the agent's lack of authority, and the principal offers to pay a certain amount different from that stipulated in discharge of the contract, it will be deemed a ratification of the agent's act. Hill v. Coates, 34 Misc. 535, 69 NYS 964.

[b] **Payment by the principal** of part of the contract price is a ratification of the agent's act in making the contract. Anderson v. National Surety Co., 196 Pa. 288, 46 A 306.

[c] **When part performance is not ratification.**—Ratification is a matter of intention, express or implied, and if the principal expressly repudiates the unauthorized contract of one assuming to act as his agent and refuses to be bound thereby, the fact that he makes a payment for some goods which have been delivered under the unauthorized contract, which payment is made with the distinct understanding that it shall not affect the relations of the parties, will not amount to a ratification. Merritt v. Bissell, 155 N. Y. 396, 50 NE 280 [rev 84 Hun 194, 32 NYS 559]. See also Stiteler v. Ditzenberger, 45 Pa. Super. 266.

20. Mahony v. Ungrich, 59 N. Y. Super. 377, 14 NYS 375 [aff 129 N. Y. 632 mem, 29 NE 1030 mem]; McClintock v. South Penn Oil Co., 146 Pa. 144, 23 A 211, 28 AmSR 785; Townsend v. Kennedy, 6 S. D. 47, 60 NW 164.

21. McKay v. Fleming, 24 Colo. A. 380, 134 P 159; Lengsfield v. Richardson, 52 Miss. 443 (holding that where a purchaser of land employs an agent to procure a deed of general warranty, and the agent takes a deed of limited warranty, the acceptance by the principal of such deed without objection and with knowledge of its character is a ratification of the agent's act).

22. Very v. Levy, 13 How. (U. S.) 345, 14 L. ed. 173; Sokup v. Letellier, 123 Mich. 640, 82 NW 523; Senger v. Malloy, 153 Wis. 245, 249, 141 NW 6 [cit Cyc].

23. Allen v. Corn Exch. Bank, 87 App. Div. 335, 84 NYS 1001 [aff 181 N. Y. 278, 73 NE 1026] (holding that, where a vendor of realty, knowing that his covendor received a part payment of the purchase price, consents to an extension of time to the purchaser, he thereby ratifies the act of the covendor in indorsing in the names of both and cashing the drafts received for the purchase price and made payable to both, even though he was ignorant of the mode of payment).

24. Sanders v. Peck, 87 Fed. 61, 30 CCA 530.

25. Ogden v. Marchand, 29 La. Ann. 61; Cushman v. Loker, 2 Mass. 106; Goldstein v. Tank, 149 App. Div. 341, 134 NYS 262.

[a] **But an ineffectual attempt** to obtain redress from the agent before resorting to the other party, which has not prejudiced the other party by the delay, will not amount to a ratification. Gilmore Linseed Oil Co. v. Norton, 89 Iowa 434, 56 NW 663, 48 AmSR 400.

26. Glor v. Kelly, 49 App. Div. 617, 63 NYS 339 [aff 166 N. Y. 589 mem, 59 NE 1123 mem] (holding that where goods were sold by an agent who also without authority collected the payment therefor, and the purchaser on being asked for payment by the principal informed the latter that he had settled with the agent, and the principal agreed with the agent to look to him for the money and made no other effort to collect from the purchaser or denial of the agent's authority to collect the money, this was a ratification, although the agreement between the principal and agent was not communicated to the purchaser).

27. Powell v. Henry, 27 Ala. 612.

28. Henry v. Lane, 128 Fed. 243, 62 CCA 625; Blevins v. Pope, 7 Ala. 371; Slocum v. Gilman, 84 Hun 405, 32 NYS 297; O'Connor v. O'Connor, 45 W. Va. 354, 32 SE 276.

[a] **Illustration.**—Where a foreign sewing machine company had paid a license tax authorizing it to sell machines anywhere within the state and to employ an unlimited number of agents for that purpose, the fact that the company sent to a firm a duplicate license authorizing it to sell machines in F county as the company's agent, after an unauthorized parol agreement had been made between such firm and the company's agent that the firm should be the company's sole agent in such county, did not constitute a ratification of the agent's agreement. White Sewing Mach. Co. v. Hill, 136 N. C. 128, 48 SE 575.

29. Ticonic Water Power, etc., Co. v. Lang, 63 Me. 460; Crooker v. Appleton, 25 Me. 131; Brown v. Henry, 172 Mass. 559, 52 NE 1073; O'Connor v. O'Connor, 45 W. Va. 354, 32 SE 276.

30. Gilmore Linseed Oil Co. v. Norton, 89 Iowa 434, 56 NW 663, 48 AmSR 400; Brown v. Foster, 137 Mich. 35, 100 NW 167; Triggs v. Jones, 46 Minn. 277, 48 NW 1113.

[a] **Effort to avoid loss.**—A mere effort on the part of the principal, after knowledge of the unauthorized act, to avoid loss thereby will not amount to a ratification so as to relieve the agent from liability. Triggs v. Jones, 46 Minn. 277, 48 NW 1113.

[b] **Willingness to let sale stand.**—Conduct of the owner of property indicating willingness to let a sale thereof, wrongfully made by one empowered to sell on commission, stand, if the latter will pay the value thereof less the commission, is not a

carried out;[31] and where the principal's acts and conduct are equally consistent with an intention not to ratify, a ratification will not ordinarily be implied,[32] particularly where the principal, as soon as informed of the facts, repudiates the transaction,[33] or where the principal has refused, to the knowledge of the

ratification of the sale. Brown v. Foster, 137 Mich. 35, 100 NW 167.

[c] **Offer to settle claim.**—Where defendant did not authorize his agent to employ another to procure a purchaser for property, but merely authorized him to sell it on certain terms, the fact that defendant, after his agent had employed plaintiff to find a purchaser and had contracted to sell to the purchaser procured, offered to pay a part of the amount claimed by plaintiff as commissions did not, of itself, show ratification by defendant of his agent's unauthorized act in employing plaintiff, it being only an offer to settle a disputed claim. Craver v. House, 138 Mo. A. 251, 120 SW 686.

[d] **Paying claim for personal injuries.**—Where defendant's claim agent promised that defendant would employ plaintiff for life in settlement of a claim for injuries, evidence that M, who was hiring help and running trains on the same division on which plaintiff worked, had promised that plaintiff should have what belonged to him, and that defendant paid the claim and furnished work for a limited time, was not sufficient to show a ratification of the settlement by defendant, unless it is chargeable with knowledge that the unauthorized promise constituted a part of the consideration for the settlement. Bohanan v. Boston, etc., R. Co., 70 N. H. 526, 49 A 103.

[e] **The mere receipt of a portion of money** realized from property improperly sold by the sheriff will not be construed as a ratification of the sale. Harris v. Miner, 28 Ill. 135.

31. Johnson v. Craig, 21 Ark. 533 (holding that where an agent made an unauthorized contract of sale, and the principal informed the agent that he would not ratify, and in order to avoid any misunderstanding or difficulty with the other party wrote him in the form of a request not to insist upon the transaction being carried out as he did not desire to sell, there was no ratification).

32. Ala.—Blevins v. Pope, 7 Ala. 371.

Ind.—Robinson v. Nipp, 20 Ind. A. 156, 50 NE 408, 410 (where the court said: "If, as here, the subsequent conduct may be explained and understood in a sense consistent with a previously existing limitation upon the agent's authority, such subsequent conduct cannot furnish, as against the principal, a foundation for an implication of extended authority by way of ratification of an unauthorized act of the agent").

Me.—Hastings v. Bangor House, 18 Me. 436 (holding that where goods are purchased by one unauthorizedly acting as agent of another, if the latter denies the authority on having knowledge of the acts, and afterward, in pursuance of a prior agreement with the pretended agent to receive goods of that description in payment of a debt due from him, receives the goods so purchased, such receipt does not amount to a ratification of the agency, making him liable to the seller, but being a purchase from the person assuming to act as agent is rather a denial that the original purchase was made by him as agent).

Mass.—Kupfer v. South Parish, 12 Mass. 185.

Mich.—Holmes v. McAllister, 123 Mich. 493, 82 NW 220, 48 LRA 396.

Mont.—Nord v. Boston, etc., Copper, etc., Min. Co., 33 Mont. 464, 84 P 1116, 89 P 647 (holding that where a former stenographer of an attorney without authority accepted service of a statement in support of a motion for a new trial and entered into a stipulation as to an extension of time for filing objections thereto, and the attorney afterward, without relying on the stipulation, secured an order granting time for filing amendments but reciting that objections to the time of the filing of the statement were not waived, and reserving the right to object on all grounds to the statement and granting of a new trial, the obtaining of the order was not a ratification of the stenographer's acceptance of service).

N. Y.—Herman v. Leland, 80 Misc. 598, 142 NYS 664; Finkelstein v. Fabyik, 107 NYS 67; Wade v. Wolfson, 90 NYS 1078 (holding that, where defendant's acts in relation to goods alleged to have been purchased by him through the agency of his wife, who had no apparent authority to bind him, were in no way inconsistent with the actual oral contract made by defendant with the salesman whereby he was to sell the goods on commission, defendant could not be held as a purchaser on the theory of a ratification of his wife's unauthorized act); McGowan v. Treacy, 84 NYS 497 (holding that, where a subagent of a lessor received from a tenant a deposit to be applied on rent, the fact that the lessor subsequently accepted the tenant did not import a ratification of the subagent's act in receiving the deposit).

Or.—Rumble v. Cummings, 52 Or. 203, 95 P 1111 (holding that, where an agent had no authority to enter into an agreement for the erection of a dam, a declaration by the principal that he did not intend to put any money into the dam was not sufficient to show a ratification of the agreement of the agent, where the principal asserted that he was furnishing goods and loaning money to conduct his business to the person with whom the agent contracted).

Va.—Hortons v. Townes, 6 Leigh (33 Va.) 47.

Wis.—Pluto Powder Co. v. Cuba City State Bank, 153 Wis. 324, 141 NW 220.

Eng.—Forman v. The Liddesdale, [1900] A. C. 190.

Can.—British North American Min. Co. v. Pigeon River Lumber Co., 2 DomLR 609, 3 OntWN 701, 21 OntWR 291.

[a] **Acts and conduct in no way inconsistent with a denial** of ratification do not estop a party from denying the ratification of an unauthorized act of an agent. Holderness v. Baker, 44 N. H. 414.

[b] **Claiming check.**—Where an agent empowered to collect a note, received a check therefor payable to her principal, on which she indorsed the principal's name and obtained the money from the payee bank, which she converted, the principal's act in claiming the check did not constitute a ratification of the agent's act in indorsing the check and receiving the money but was rather a repudiation than a ratification. Robinson v. Winslow Bank, 42 Ind. A. 350, 85 NE 793.

[c] **Giving a bond to release property from a writ of attachment** can have no force as a ratification of an unauthorized purchase by a person claimed to have been an agent of defendants. Woods v. Robertson, 81 Mich. 64.

[d] **A mere declaration by the alleged principal, of the ownership of stock** bought in his name by the alleged agent, is not a sufficient ratification. Rutland, etc., R. Co. v. Lincoln, 29 Vt. 206.

[e] **Discharge of employee.**—Where an employee suing for slander uttered by an agent of his employer, alleged and proved that immediately after the slander he was discharged from his employment, the employer alleging that he was discharged solely because of insubordination to those in authority over him, could prove the employee's incivility to show a cause for his discharge, and therefore that the employer did not ratify the slander. Lindsey v. St. Louis, etc., R. Co., 95 Ark. 534, 129 SW 807.

[f] **Payment of a claim by a check of the principal** drawn to the agent's order does not of itself show a ratification of such claim, which was incurred by the agent without authority. Piper v. Herrick, 26 Misc. 649, 56 NYS 386.

[g] **Where an agent makes a contract which is unauthorized in one particular,** the mere fact that the principal in repudiating it gives as a reason that it is unauthorized in another particular in which, however, it is authorized does not constitute a ratification where the third party is in no way injured by the form of the principal's objection so as to raise an estoppel. Peterson v. Church, 16 Hawaii 739; Hawaiian Agricultural Co. v. Morris, 12 Hawaii 229.

33. Ark.—Johnson v. Craig, 21 Ark. 533.

Ind.—Metzger v. Huntington, 139 Ind. 501, 37 NE 1084, 39 NE 235.

Mo.—Cannon v. Gibson, 162 Mo. A. 386, 142 SW 780.

N. J.—Phœnix Pottery Co. v. Arthur L. Perkins, 79 N. J. L. 78, 74 A 258 (holding that the fact that the agent of a pottery company, who had agreed that his company would receive and allow deductions for imperfect goods purchased by the customer from other companies was sent to collect the bill for wares sold by him, and that he received a check in part payment and with it a claim for such defective goods, and the fact that the company used the check with knowledge of such claim, were not a ratification of the agreement to allow deductions, where the agent's right to so contract was at once repudiated by the company).

N. Y.—Brooklyn Daily Eagle v. Delimar, 30 Misc. 747, 62 NYS 1041.

Or.—Reid v. Alaska Packing Co., 47 Or. 215, 83 P 139 (holding that, where a corporation promptly disaffirmed the unauthorized act of its selling agent in warranting goods sold, its act in shipping the buyer samples of its goods did not constitute a ratification of the unauthorized warranty).

Porto Rico.—Gutierrez del Arroyo v. White, 5 Porto Rico Fed. 569.

S. D.—Riley v. Grant, 16 S. D. 553, 94 NW 427 (holding that where, after the receipt of a letter authorizing the addressee to find a purchaser for land, but not giving him power to execute a contract of sale, and informing him that a third party had control of the sale of the land, the one addressed executed a contract for the sale of the land, and, on being informed of such contract, the owner wrote him that he thought that he had left the matter in the hands of the third party, and that he had written such third party about the sale, and that the one addressed had better see such third party and have him make out a deed for the owner to sign, and subsequently a deed was forwarded to the owner, no consultation having been had with the third party, to which the owner replied that he had received from such third party a request not to sign any deed, and that, if the third party's consent could be obtained, he would execute the deed, there was no ratification of the contract by the owner).

Wis.—Roberts v. Francis, 123 Wis. 78, 100 NW 1076.

[a] **The principal need not reiterate** his repudiation, and if the other party continues to act under the unauthorized agreement made by the agent after an express repudiation by the principal, he will do so at his

other contracting party, to authorize or be bound by the agent's acts.[34] So also ratification cannot be inferred from acts which the principal had a right to do independently of the unauthorized transaction.[35]

Contracts subject to approval. If the contract of an agent is not to become binding until it is submitted to and approved by the principal, a ratification of the agent's acts is not to be implied where the contract has not been so submitted and the principal refuses to ratify it after learning of its terms;[36] but if the contract was submitted to the principal a ratification may be implied from his subsequent conduct in relation thereto.[37]

The fact that the principal is compelled to carry out a contract made with third persons by an agent acting contrary to his secret instructions cannot be urged by the agent against the principal as a ratification of such unauthorized acts.[38]

[§ 111] **(4) Facts Liberally Construed.** Where an agency has been shown to exist the facts will be liberally construed in favor of a ratification by the principal of the acts of the agent,[39] and very slight circumstances and small matters will sometimes suffice to raise the presumption of ratification,[40] particularly where the act is for the benefit of the principal.[41] However, ratification of a forgery, where permitted, will not be implied from a doubtful state of facts.[42]

[§ 112] **(5) Question of Intention.** Ratification is a matter of intention, express or implied, on the part of the principal,[43] and in order to establish an implied ratification there must be some acts or conduct on his part which reasonably tend to show such intention.[44] It has been held that the principal's acts or conduct must be such as are inconsistent with any other hypothesis than that he approved and intended to adopt what had been done in his name.[45] But an intention to ratify may often be presumed by the law from the conduct of

peril. Brooklyn Daily Eagle v. Dellman, 30 Misc. 747, 62 NYS 1041.

[b] **Paying for services.**—Where a person assumes to act as an agent in making a contract, and the person with whom it is made performs the same under protest of the principal, and under notice from the principal that such person is not in his employ and that no one has authority to employ him, the fact that after cessation of such labor the principal pays to such person an amount which he deems his services worth is not a ratification of the contract of employment. Findlay v. Hildenbrand, 17 Ida. 403, 414, 105 P 790, 29 LRANS 400 (where the court said: "The fact that a person assumes to act as agent in making a contract, and the person with whom such contract is made proceeds to a performance of the same, under protest from the principal, and during such performance is advised and notified by the principal that such person is not in his employ, that no one had any authority to employ him, and that he does not desire or need his services in connection with the mere fact that after the cessation of such labor the principal pays to such person an amount which he deems such service is worth, will not amount to a ratification of the contract made by the person assuming to act as such agent, and will not support an action based upon such contract, upon the ground that the contract was ratified").

[c] **Where a term lease** made by an agent without authority to make such lease is repudiated by the principal who notifies the tenant thereof, both orally and in writing, but authorizes the latter to remain as tenant from month to month, the acceptance of rent at the rate specified in the lease is not a ratification thereof. Owens v. Swanton, 25 Wash. 112, 64 P 921.

34. Herrick Impr. Co. v. Kelly, 65 Wash. 16, 117 P 705.

[a] **A simple denial of liability** is not evidence of a ratification. Rice v. New York Cent., etc., R. Co., 195 Mass. 507, 81 NE 285.

35. Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953. See also Crute v. Burch, 154 Mo. A. 480, 135 SW 1004 (holding that, where an agent, authorized to sell a mare, at the same time, but unknown to the principal, sold a mule colt, the foal of the mare, to the same person, the principal, by accepting from his agent the purchase price of the mare, did not confirm the sale of the mule, because in ratifying the authorized act of his agent he did not thereby ratify the agent's unauthorized act).

[a] **Where the principal receives the proceeds of an unauthorized sale** of his goods there will not necessarily be a ratification if he would have the right to receive them without ratifying. White v. Sanders, 32 Me. 188.

36. Abbe v. Rood, 1 F. Cas. No. 6, 6 McLean 106; Colt v. Rood, 6 F. Cas. No. 3,031, 6 McLean 106; Bissell v. Terry, 69 Ill. 184; Merrick Thread Co. v. Philadelphia Shoe Mfg. Co., 115 Pa. 314, 8 A 794; Sumner v. Stewart, 69 Pa. 321.

[a] **The neglect of the agent to notify the other party** of his principal's disapproval of the contract, where the principal was without knowledge of the facts, does not amount to a ratification by the principal. Merrick Thread Co. v. Philadelphia Shoe Mfg. Co., 115 Pa. 314, 8 A 794.

37. In re Wheeler, 29 F. Cas. No. 17,488, 2 Lowell 252 (holding that a contract by an agent made subject to the principal's ratification will be held ratified by the principal entering it on his books and corresponding with the other party in regard thereto as a subsisting contract); Sims v. Frew, (Cal. A.) 142 P 106.

38. Chaffe v. Barataria Canning Co., 113 La. 215, 36 S 943 (holding that where defendant's agent, as its manager, was bound not to make purchases on its behalf beyond a certain limit, which limitation was not made known to others, and the agent went beyond the limit and defendant was forced to take the goods and pay the price, defendant's acceptance of the situation was forced upon it and was not a ratification of its agent's acts).

39. Ga.—Byrne v. Doughty, 13 Ga. 46.

Ill.—Cairo, etc., R. Co. v. Mahoney, 82 Ill. 73, 25 AmR 299.

Iowa.—Hopwood v. Corbin, 63 Iowa 218, 18 NW 911.

La.—Szymanski v. Plassan, 20 La. Ann. 90, 96 AmD 382; Flower v. Jones, 7 Mart. N. S. 140; Terril v. Flower, 6 Mart. 583.

Md.—Hartlove v. William Fait Co., 89 Md. 254, 43 A 62.

Mont.—Carlson v. Stone-Ordean-Wells Co., 40 Mont. 434, 107 P 419.

N. Y.—Codwise v. Hacker, 1 Cai. 526.

Tenn.—Bement v. Armstrong, (Ch. A.) 39 SW 899.

40. Lee v. Fontaine, 10 Ala. 755, 44 AmD 505; Strong v. West, 110 Ga. 882, 35 SE 693; Byrne v. Doughty, 13 Ga. 46; Bush v. Fourcher, 3 Ga. A. 43, 59 SE 459; Carlson v. Stone-Ordean-Wells Co., 40 Mont. 434, 107 P 419; Hill v. Coates, 34 Misc. 535, 69 NYS 964; Fatta v. Edgerton, 137 NYS 226.

41. Davis v. Nueces Valley Irr. Co., 103 Tex. 243, 126 SW 4 [rev (Civ. A.) 116 SW 633] (holding that the presumption of ratification will arise on slight evidence when the act is plainly for the benefit of the principal).

"Where the unauthorized act is apparently for the benefit of the principal, a very slight matter will serve to make out a ratification; where the act is not apparently for his benefit, clearer evidence of ratification should be required." Buffalo Commercial Bank v. Warren, 15 N. Y. 577, 579.

42. Fay v. Slaughter, 194 Ill. 157, 62 NE 592, 88 AmSR 148, 56 LRA 564 [rev 94 Ill. A. 111]; Chicago Edison Co. v. Fay, 164 Ill. 323, 45 NE 534 [aff 62 Ill. A. 55].

Ratification of forgery generally see supra §§ 86–88.

43. Brown v. Henry, 172 Mass. 559, 52 NE 1073; Merritt v. Bissell, 155 N. Y. 396, 50 NE 280 [rev 84 Hun 194, 32 NYS 559]. See also supra § 102.

[a] **Mistake as to grounds of repudiation.**—Where an agent makes a contract which is unauthorized in several particulars, the mere fact that the principal, in repudiating it, gives as his reason that it is unauthorized in a certain particular, in which, however, it is authorized, does not constitute a ratification, where the third party is in no way injured by the form of the principal's objection, so as to raise an estoppel. Brown v. Henry, 172 Mass. 559, 52 NE 1073.

44. Ark.—Bromley v. Aday, 70 Ark. 351, 68 SW 32; Johnson v. Craig, 21 Ark. 533.

Ga.—Walker v. Vale Royal Mfg. Co., 75 Ga. 29.

Ill.—Torrence v. Shedd, 112 Ill. 466; Brillhart v. McConnell, 25 Ill. 476; National L. Ins. Co. v. Mather, 118 Ill. A. 491.

Kan.—Swofford Bros. Dry Goods Co. v. Berkowitz, 7 Kan. A. 24, 51 P 796 (holding that the fact that defendant bought the goods in controversy at a sale made by a constable, whose deputy took the goods at the instance of a person claimed to have been acting as agent of defendant, did not establish a ratification of any tortious acts of such person).

Mass.—Rice v. New York Cent., etc., R. Co., 195 Mass. 507, 81 NE 285; Kupfer v. South Parish, 12 Mass. 185.

Minn.—Rice v. Tavernier, 8 Minn. 214, 83 AmD 778.

Mo.—Oglesby v. Smith, 38 Mo. A. 67.

N. Y.—Merritt v. Bissell, 155 N. Y. 396, 50 NE 280 [rev 84 Hun 194, 32 NYS 559]; Offerman v. Reich, 88 NYS 936; Le Count v. Greenley, 6 NYSt 91.

Vt.—Rutland, etc., R. Co. v. Lincoln, 29 Vt. 206.

45. Heyn v. O'Hagen, 60 Mich. 150, 26 NW 861. See Marshall County v. Schenck, 5 Wall. (U. S.) 772, 782, 18 L. ed. 556 (where the court said: "Ratification may be by express consent, or by acts and conduct of the principal inconsistent wtih any other hypothesis than that he approved, and intended to adopt what had been done in his name").

"Ratification, it is true, may be shown by proof of facts from which it may be lawfully presumed, but the facts must be such as are inconsistent with another hypothesis than that

the principal, and that presumption may be conclusive, even against the actual intention of the principal, where his conduct has been such that it would be inequitable to others to permit him to assert that he had not ratified the unauthorized act of his agent.[46]

[§ 113] **b. Similar Transactions.[47] Previous acts.** Ratification may be implied from the previous acts of the principal under similar circumstances,[48] although it has been held that ratification will not be implied from the fact that the principal has ratified other similar transactions, not connected with the transaction in question.[49]

Subsequent acts. The ratification of subsequent acts of the same nature, with full knowledge of previous unauthorized acts, is evidence from which a ratification of the previous acts may be inferred,[50] but it is not evidence from which a ratification must be inferred.[51] Ratification of subsequent acts of a different nature does not, of course, give rise to any inference of a ratification of previous acts.[52]

Services for third person. Payment for services by one who has received the benefit thereof, but which were performed for a third person, does not amount to a ratification of claims of others for services performed for such third person under similar circumstances.[53]

[§ 114] **c. Accepting Benefits—(1) General rule.** In accordance with the rule that the principal must ratify the whole of the agent's unauthorized act or not at all, and cannot accept its beneficial results and at the same time avoid its burdens,[54] it is well settled that, as a general rule, if a principal with full knowledge of all the material facts takes and retains the benefits of the unauthorized act of an agent he thereby ratifies such act,[55]

the person whose ratification is sought to be established approved and intended to adopt what had been done in his name." Sword v. Keneseth Israel Reformed Cong., 29 Pa. Super. 626, 630.

46. Campbell v. Millar, 84 Ill. A. 208; Smith v. Fletcher, 75 Minn. 189, 77 NW 800; Bement v. Armstrong, (Tenn. Ch. A.) 39 SW 899.

[a] **If the facts show a ratification,** the intention of the parties is immaterial, so that to constitute the conversations and acts of the principals, with knowledge of the facts, a ratification it is not material whether a ratification was contemplated or not. Hazard v. Spears, 2 Abb. Dec. (N. Y.) 353.

47. **Agency implied from previous recognition or ratification** of similar acts see supra §§ 37–41.

48. Ala.—Gibson v. Snow Hardware Co., 94 Ala. 346, 10 S 304.

Mich.—Austin v. Burroughs, 62 Mich. 181, 28 NW 862.

N. H.—Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203.

Utah.—Moyle v. Salt Lake City Cong. Soc., 16 Utah 69, 50 P 806.

Vt.—Keyes v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201.

Wis.—Gallinger v. Lake Shore Traffic Co., 67 Wis. 529, 30 NW 790; Chicago, etc., R. Co. v. James, 24 Wis. 388.

49. Schollay v. Moffitt-West Drug Co., 17 Colo. A. 126, 67 P 182 (holding that where an agent in charge of a store purchased goods, which he was prohibited to do, and the seller was so advised, the principal's appropriation and sale of other goods purchased at another time is not a ratification of the purchase of these goods made under a separate contract); Wills v. International, etc., R. Co., 41 Tex. Civ. A. 58, 92 SW 273 (holding that, where a conductor, without authority to do so, employed a physician to care for a person injured by a train, the fact that the conductor had employed the same physician to care for a person injured a short time before and that the railroad paid the physician's bill did not entitle the physician to be paid for the second service).

[a] **Omitted items from report.**— Where in his final report to the board of commissioners, made after the completion of a building, the architect made a statement of extra work done by plaintiff, reporting some of the items as done on the authority of the architect and others without his objection, and the board ordered the payment of specified items, and rejected others, it was not error to exclude evidence to prove that by mistake the architect omitted from such report certain items of extra work, as the action of the board amounted to a ratification of the architect's action only as to the specific cases approved. Eigemann v. Posey County, 32 Ind. 413, 417 (where the court said: "Assuming, without conceding, that the board lawfully allowed what it did allow, and might lawfully have allowed for the omitted items, if they had been included in the report, the inference is not warranted either in law or logic that they would have allowed the omitted items because they did allow some of those which were reported. There is perhaps better reason for the opposite inference. There is certainly no ground for saying that, by accepting some of the items of the report and rejecting others, they thereby ratified things not mentioned in the report. If by doing the work, under the direction of the architect, with the knowledge and acquiescence of the individual commissioners, the appellant did not acquire a right to compensation from the county, as we have already decided he did not, his claim could not be made better by proving the failure of the architect by mistake to make mention of it in a particular report in which other like items were embraced").

50. Hall v. Chicago, etc., R. Co., 48 Wis. 317, 4 NW 325.

51. Oglesby v. Smith, 38 Mo. A. 67 (holding that the fact that the principal accepted a second vehicle brought by his agent from a stable to which he was not sent did not ratify his previous act in bringing the first one therefrom).

52. Gordon v. Vermont L. & T. Co., 6 N. D. 454, 71 NW 556.

53. Linn v. Alameda Min., etc., Co., 17 Ida. 45, 104 P 668 (holding that payment by a mining company for labor performed on or in connection with its property under employment of a third person did not amount to a ratification of claims of other laborers for services performed for such third person under similar circumstances, where the services had all been performed prior to such payment).

54. See supra § 99.

55. U. S.—Union Gold Min. Co. v. Rocky Mt. Nat. Bank, 96 U. S. 640, 24 L. ed. 648; Bentley v. Young, 210 Fed. 202; Edison Phonograph Works v. Goodwin Mfg. Co., 191 Fed. 560, 112 CCA 170; Sutherland v. Illinois Cent. R. Co., 152 Fed. 694, 81 CCA 620; Owyhee Land, etc., Co. v. Tautphas, 121 Fed. 343, 57 CCA 557; Hartford, etc., Transp. Co. v. Plymer, 120 Fed. 624, 57 CCA 288; Domenico v. Alaska Packers Assoc., 112 Fed. 554 [rev on other grounds 117 Fed. 99]; Alger v. Keith, 105 Fed. 105, 44 CCA 371; G. V. B. Min. Co. v. Hailey First Nat. Bank, 95 Fed. 23, 36 CCA 633; American Exch. Nat. Bank v. Spokane Falls First Nat. Bank, 82 Fed. 961, 27 CCA 274; Bacon v. The Poconoket, 67 Fed. 262 [aff 70 Fed. 640, 17 CCA 309]; Cotting v. Grant St. Electric R. Co., 65 Fed. 545; Merrill v. Rokes, 54 Fed. 450, 4 CCA 433; Robinson v. Mutual Ben. L. Ins. Co., 20 F. Cas. No. 11,961, 16 Blatchf. 194.

Ala.—Hoene v. Pollak, 118 Ala. 617, 24 S 349, 72 AmSR 189; Jones v. Atkinson, 68 Ala. 167.

Ark.—Froug, etc., Co. v. Outcault Adv. Co., 168 SW 1075; Ladenburg, etc., Co. v. Beal-Doyle Dry Goods Co., 83 Ark. 440, 104 SW 145; Daniels v. Brodie, 54 Ark. 216, 15 SW 467, 11 LRA 81.

Cal.—Mills v. Boyle Min. Co., 132 Cal. 95, 64 P 122; Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 P 749; Goodwin v. Central Broadway Bldg. Co., 21 Cal. A. 376, 131 P 896; Newhall v. Joseph Levy Bag Co., 19 Cal. A. 9, 124 P 875; Patterson v. Crowell, 15 Cal. A. 105, 113 P 700; Spencer v. McCament, 7 Cal. A. 84, 93 P 682.

Colo.—Breed v. Central City First Nat. Bank, 4 Colo. 481; Witcher v. Gibson, 15 Colo. A. 163, 61 P 192.

Conn.—Duncan v. Kearney, 72 Conn. 585, 45 A 358; Ansonia v. Cooper, 66 Conn. 184, 33 A 905; Disbrow v. Secor, 58 Conn. 35, 18 A 981; Morehouse v. Northrop, 33 Conn. 380, 89 AmD 211.

Ga.—Stanley v. Glennville, 140 Ga. 306, 78 SE 1064; Haney School Furniture Co. v. Hightower Baptist Inst., 113 Ga. 289, 38 SE 761; Hodnett v. Tatum, 9 Ga. 70; Seaboard Air Line R. Co. v. McRae, (A.) 80 SE 211.

Hawaii.—Harrison v. Magoon, 14 Hawaii 418; Caplan v. Hoffschlaeger, 2 Hawaii 691.

Ill.—Connett v. Chicago, 114 Ill. 233, 29 NE 280; Harris v. Simmerman, 81 Ill. 413; Searing v. Butler, 69 Ill. 575; Cochran v. Chitwood, 59 Ill. 53; Henderson v. Cummings, 44 Ill. 325; Ward v. Williams, 26 Ill. 447, 79 AmD 385; Hall v. Harper, 17 Ill. 82; Cobb v. Sparr, 153 Ill. A. 92; Hartford Deposit Co. v. Calkins, 109 Ill. A. 579; Pope v. Lowitz, 14 Ill. A. 96. See also Smith v. Hopping, 158 Ill. A. 439.

Ind.—Albany Land Co. v. Rickel, 162 Ind. 222, 70 NE 158; Allen v. Studebaker Bros. Mfg. Co., 152 Ind. 406, 53 NE 422; Hauss v. Niblack, 80 Ind. 407; Fouch v. Wilson, 59 Ind. 93; Indianapolis v. Skeen, 17 Ind. 628; Hunt v. Listenberger, 14 Ind. A. 320, 42 NE 240, 964.

Ind. T.—Denison, etc., R. Co. v. Ranney-Alton Mercantile Co., 3 Ind. T. 104, 53 SW 496.

Iowa.—Darner v. Brown, 137 NW 461; Worsley v. Ayers, 144 Iowa 676, 123 NW 353; Moyers v. Fogarty, 140 Iowa 701, 119 NW 159; Des Moines Nat. Bank v. Meredith, 114 Iowa 9, 86 NW 46; Lull v. Anamosa Nat. Bank, 110 Iowa 537, 81 NW 784; Tabor State Bank v. Kelly, 109 Iowa 544, 80 NW 520; Wilson v. Fones, 99 Iowa 132, 68 NW 588; Hakes v. Myrick, 69 Iowa 189, 28 NW 575; Eikenberry v. Edwards, 67 Iowa 14, 24 NW 570; Warder v. Pattee, 57 Iowa 515, 10 NW 881; Beidman v. Goodell, 56 Iowa 592, 9 NW 900; White v. Morgan, 42 Iowa 113; Mathews v. Gilliss, 1 Iowa 242.

Kan.—Watt v. Missouri, etc., R. Co., 82 Kan. 458, 108 P 811; Lakin Bank v. National Bank of Commerce, 57 Kan. 183, 45 P 587; Durham v. Carbon Coal, etc., Co., 22 Kan. 232; Waterman v. Rogers, 21 Kan. 529; Babcock v. De-

and that with the benefits he accepts also the | liabilities and burdens resulting therefrom.[56]

ford, 14 Kan. 408; German Ins. Co. v. Emporia Mut. L., etc., Assoc., 9 Kan. A. 803, 59 P 1092; Westerman v. Evans, 1 Kan. A. 1, 41 P 675.

Ky.—Elk Valley Coal Co. v. Thompson, 150 Ky. 614, 150 SW 817; Wren v. Cooksey, 147 Ky. 825, 145 SW 1116; Gay v. McDonald, 143 Ky. 462, 136 SW 881; Southern Lumber Co. v. Wireman, 41 SW 297, 19 KyL 585; Forman v. Crutcher, 2 A. K. Marsh. 69; Northcutt v. Howard, 13 KyL 969.

La.—Hornbeck v. Gilmer, 110 La. 500, 34 S 651; Woods v. Rocchi, 32 La. Ann. 210; Massieu's Succ., 24 La. Ann. 237; Szymanski v. Plassan, 20 La. Ann. 90, 96 AmD 382; Elam v. Carruth, 2 La. Ann. 275.

Me.—Leavitt v. Fairbanks, 92 Me. 521, 43 A 115.

Md.—Swindell v. Gilbert, 100 Md. 399, 60 A 102; Judik v. Crane, 81 Md. 610, 32 A 276; Maddux v. Bevan, 39 Md. 485; Reynolds v. Davison, 34 Md. 662.

Mass.—Drake v. Metropolitan Mfg. Co., 105 NE 634; Johnson v. New York, etc., R. Co., 104 NE 445; Brown v. Henry, 172 Mass. 559, 52 NE 1073; Arnold v. Spurr, 130 Mass. 347; Harrod v. McDaniels, 126 Mass. 413; Churchill v. Palmer, 115 Mass. 310; Bassett v. Brown, 105 Mass. 551; Narragansett Bank v. Atlantic Silk Co., 3 Metc. 282; Cushman v. Loker, 2 Mass. 106.

Mich.—Bertha v. Regal Motor Car Co., 146 NW 389; Payn v. Gidley, 122 Mich. 605, 81 NW 558; Bissell v. Dowling, 117 Mich. 646, 76 NW 100; Hitchcock v. Griffin, etc., Co., 99 Mich. 447, 58 NW 373, 41 AmSR 624; Nichols, etc., Co. v. Shaffer, 63 Mich. 599, 30 NW 383; Bacon v. Johnson, 56 Mich. 182, 22 NW 276; Gardner v. Warren, 52 Mich. 309, 17 NW 853; Filer v. Jenks, 38 Mich. 585; Hutchings v. Ladd, 16 Mich. 493; Jennison v. Parker, 7 Mich. 355; Pratt v. Campbell, Harr. 236.

Minn.—Johnson v. Ogren, 102 Minn. 8, 112 NW 894; Payne v. Hackney, 84 Minn. 195, 87 NW 608; Coggins v. Higbie, 83 Minn. 83, 85 NW 930; Landin v. Moorhead Nat. Bank, 74 Minn. 222, 77 NW 35; Wright v. Vineyard M. E. Church, 72 Minn. 78, 74 NW 1015.

Miss.—Thurmond v. Carter, 59 Miss. 127; Meyer v. Morgan, 51 Miss. 21, 24 AmR 617.

Mo.—Matthews v. French, 194 Mo. 553, 92 SW 634; Porter v. Woods, 138 Mo. 539, 39 SW 794; Barrett v. Davis, 104 Mo. 549, 16 SW 377; Ruggles v. Washington County, 3 Mo. 496; Mathes v. Switzer Lumber Co., 173 Mo. A. 239, 158 SW 729; Stotts City Bank v. Miller Lumber Co., 102 Mo. A. 75, 74 SW 472; Short v. Stephens, 92 Mo. A. 151; J. T. Donovan Real Es. Co. v. Clark, 84 Mo. A. 163; Bohlmann v. Rossi, 73 Mo. A. 312; Huttig Sash, etc., Co. v. Gitchell, 69 Mo. A. 115; Davis v. Krum, 12 Mo. A. 279.

Mont.—Case v. Kramer, 34 Mont. 142, 85 P 878.

Nebr.—Warder, etc., Co. v. Myers, 70 Nebr. 15, 96 NW 992; McCormick Harvesting Mach. Co. v. Hiatt, 95 NW 627; Plano Mfg. Co. v. Nordstrom, 63 Nebr. 123, 88 NW 164; U. S. School-Furniture Co. v. Lancaster County School Dist. No. 87, 56 Nebr. 645, 77 NW 62; Brong v. Spence, 56 Nebr. 638, 77 NW 54 (holding that a principal who accepts the fruits of a contract made by an agent in excess of his authority is liable to the person with whom such contract was made, although misinformed as to some of its provisions); People's Nat. Bank v. Geisthardt, 55 Nebr. 232, 75 NW 582; Cram v. Sickel, 51 Nebr. 828, 71 NW 724, 66 AmSR 478; Swartz v. Duncan, 38 Nebr. 782, 57 NW 543.

N. H.—Warren v. Hayes, 74 N. H. 355, 68 A 193; Low v. Connecticut, etc., Rivers R. Co., 46 N. H. 284; Hatch v. Taylor, 10 N. H. 538.

N. J.—Bodine v. Berg, 82 N. J. L. 662, 665, 82 A 901, 40 LRANS 65, AnnCas1913D 721 [cit Cyc]; Looschen Piano Case Co. v. Steinberg, 76 N. J. L. 130, 68 A 1072; Cooley v. Perrine, 41 N. J. L. 322, 32 AmR 210; Straus v. Norris, 78 N. J. Eq. 488, 79 A 611; Keim v. Lindley, (Ch.) 30 A 1068; Tooker v. Sloan, 30 N. J. Eq. 394.

N. M.—Western Homestead, etc., Co. v. Albuquerque First Nat. Bank, 9 N. M. 1, 47 P 721.

N. Y.—Bliven v. Lydecker, 130 N. Y. 102, 28 NE 625; Kane v. Cortesy, 100 N. Y. 132, 2 NE 874; Smith v. Tracy, 36 N. Y. 79; Commercial Bank v. Warren, 15 N. Y. 577; Hazard v. Spears, 2 Abb. Dec. 353; McVity v. E. D. Albro Co., 90 App. Div. 109, 86 NYS 144 [aff 180 N. Y. 554 mem, 73 NE 1126 mem]; Curtis v. Natalie Anthracite Coal Co., 89 App. Div. 61, 85 NYS 413 [aff 181 N. Y. 543 mem, 73 NE 1122 mem]; Rollins v. Bowman Cycle Co., 84 App. Div. 287, 82 NYS 781; West v. Banigan, 51 App. Div. 328, 64 NYS 884 [aff 172 N. Y. 622 mem, 65 NE 1123 mem]; Merritt v. Bissell, 84 Hun 194, 32 NYS 559 [rev on other grounds 155 N. Y. 396, 50 NE 280 (where it was held that the facts did not show a ratification)]; Myers v. Mutual L. Ins. Co., 32 Hun 321 [aff 99 N. Y. 1, 1 NE 33]; Krumm v. Beach, 25 Hun [aff 96 N. Y. 398]; Harnett v. Garvey, 36 N. Y. Super. 326; Farmers', etc., Bank v. Sherman, 19 N. Y. Super. 181 [aff 33 N. Y. 69]; Quantmeyer v. J. H. Mohlman Co., 29 Misc. 746, 60 NYS 220; Number 121 Madison Ave. v. Osgood, 18 NYS 126, 19 NYS 911; James v. Schmidt, 2 NYS 649; Palmerton v. Huxford, 4 Den. 166; Moss v. Rossie Lead Min. Co., 5 Hill 137; Randall v. Van Vechten, 19 Johns. 60, 10 AmD 193; Codwise v. Hacker, 1 Cai. 526. See also In re Di Marti, 72 Misc. 148, 129 NYS 81.

N. C.—Southwest Nat. Bank v. Justice, 157 N. C. 373, 72 SE 1016; Osborne v. Durham, 157 N. C. 262, 72 SE 849; Foy v. Blades Lumber Co., 152 N. C. 595, 68 SE 6; Johnson v. East Carolina Land, etc., Co., 116 N. C. 926, 21 SE 28; Rudasill v. Falls, 92 N. C. 222; Miller v. State Land, etc., Co., 66 N. C. 503.

N. D.—Westby v. J. I. Case Threshing Mach. Co., 21 N. D. 575, 132 NW 137; Morris v. Ewing, 8 N. D. 99, 76 NW 1047; Gordon v. Vermont L. & T. Co., 6 N. D. 454, 71 NW 556; Anderson v. Grand Forks First Nat. Bank, 5 N. D. 451, 67 NW 821. See also Emerado Farmers' El. Co. v. Farmers' Bank, 20 N. D. 522, 127 NW 522, 29 LRANS 567.

Oh.—Frank v. Jenkins, 22 Oh. St. 597; State v. Perry, Wright 662.

Okl.—Whitcomb v. Oller, 41 Okl. 331, 137 P 709; Cargile v. Union State Bank, 40 Okl. 506, 139 P 701; J. I. Case Threshing Mach. Co. v. Lyons, 40 Okl. 356, 138 P 167; Chicago, etc., R. Co. v. Newburn, 39 Okl. 704, 136 P 174; U. S. Fidelity, etc., Co. v. Shirk, 20 Okl. 576, 95 P 218; Fant v. Campbell, 8 Okl. 586, 58 P 741.

Or.—Schreyer v. Turner Flouring Mills Co., 29 Or. 1, 43 P 719; Coleman v. Stark, 1 Or. 115.

Pa.—Singer Mfg. Co. v. Christian, 211 Pa. 534, 60 A 1087; Anderson v. National Surety Co., 196 Pa. 288, 46 A 306; Auge v. Darlington, 185 Pa. 111, 39 A 845; Kramer v. Dinsmore, 152 Pa. 264, 25 A 789; Wheeler, etc., Mfg. Co. v. Aughey, 144 Pa. 398, 22 A 667, 27 AmSR 638; Wright v. Burbank, 64 Pa. 247; Benjamin v. Holgate, 51 Pa. Super. 104; Massey v. The Ins. Co., 3 Phila. 200.

Philippine.—Pastor v. Nicasio, 6 Philippine 152.

R. I.—Robinson v. Bailey, 19 R. I. 464, 36 A 1126.

S. C.—Wall v. Chelsea Plantation Club, 70 SE 434; Welch v. Clifton Mfg. Co., 55 S. C. 568, 33 SE 739.

S. D.—Ormsby v. Johnson, 24 S. D. 494, 124 NW 436; Dedrick v. Ormsby Land, etc., Co., 12 S. D. 59, 80 NW 153.

Tenn.—Hart v. Dixon, 5 Lea 336; Walker v. Walker, 7 Baxt. 260; Evans v. Buckner, 1 Heisk. 291.

Tex.—Hicks v. Ross, 71 Tex. 358, 9 SW 315; Carter v. Roland, 53 Tex. 540; Sessums v. Henry, 38 Tex. 37; Henderson v. San Antonio, etc., R. Co., 17 Tex. 560, 67 AmD 675; Evans-Snider-Buel Co. v. Hilje, (Civ. A.) 83 SW 208; Clark v. Elmendorf, (Civ. A.) 78 SW 538; Greenville First Nat. Bank v. Greenville Oil, etc., Co., 24 Tex. Civ. A. 645, 60 SW 828; Angel v. Miller, 16 Tex. Civ. A. 679, 39 SW 1092; Merchants' Nat. Bank v. McAnulty, (Civ. A.) 31 SW 1091.

Utah.—Shafer v. Russell, 28 Utah 444, 79 P 559; Smith v. Droubay, 20 Utah 443, 58 P 1112.

Vt.—French v. Barre, 58 Vt. 567, 5 A 568; Fitzsimmons v. Joslin, 21 Vt. 129, 52 AmD 46.

Va.—Day v. National Mut. Bldg., etc., Assoc., 96 Va. 484, 31 SE 902.

Wash.—Lemcke v. Funk, 78 Wash. 460, 139 P 234; McCoy v. Simon, 64 Wash. 574, 117 P 400; Konnerup v. Frandsen, 8 Wash. 551, 36 P 493.

W. Va.—Mustard v. Big Creek Dev. Co., 69 W. Va. 713, 72 SE 1021; Black Lick Lumber Co. v. Camp Constr. Co., 68 W. Va. 477, 60 SE 409; Cumberland Third Nat. Bank v. Laboringman's Mercantile, etc., Co., 56 W. Va. 446, 49 SE 544; Dewing v. Hutton, 48 W. Va. 576, 37 SE 670.

Wis.—Garlick v. Morley, 147 Wis. 397, 132 NW 601; Twentieth Century Co. v. Quilling, 136 Wis. 481, 117 NW 1007; Kriz v. Peege, 119 Wis. 105, 95 NW 108; Platt v. Schmitt, 117 Wis. 489, 94 NW 345; Bullen v. Milwaukee Trading Co., 109 Wis. 41, 85 NW 115; Kickland v. Menasha Wooden-Ware Co., 68 Wis. 34, 31 NW 471, 60 AmR 831; Saveland v. Green, 40 Wis. 431; Pierce v. O'Keefe, 11 Wis. 180.

Wyo.—Knight v. Beckwith Commercial Co., 6 Wyo. 500, 46 P 1094.

Sask.—Willoughby v. Saskatchewan Valley Land Co., 3 Sask. L. 130, 13 WestLR 526.

"It is the settled rule that one who voluntarily accepts the proceeds of an act done by one assuming, even though without authority, to be his agent, ratifies the act, and takes it as his own, with all the burdens as well as all the benefits." Sanger v. Warren, (Tex. Civ. A.) 40 SW 840, 841.

"One cannot accept the benefit of the act of an assumed agent and remain silent without binding himself by those acts." Ladenberg, etc., Co. v. Beal-Doyle Dry Goods Co., 88 Ark. 440, 444, 104 SW 145.

[a] **Where the principal receives from his agent the proceeds** of an unauthorized act with a report of the transaction, he cannot shut his eyes to means of information within his possession and avail himself of the benefits of the transaction and then repudiate it; if he so receives and retains the benefits of the transaction, he ratifies it. Johnson v. Ogren, 102 Minn. 8, 112 NW 894.

[b] **Where a party in the first instance is a mere volunteer,** but the person for whom he acts subsequently avails himself of the acts and methods pursued by such volunteer, an estoppel to deny the agency arises. Fraternal Army of America v. Evans, 114 Ill. A. 578 [aff 215 Ill. 629, 74 NE 689].

[c] **Receiving and retaining the consideration** of the transaction sought to be repudiated is a ratification of the acts of the agent who effected such transaction. Cobb v. Sparr, 153 Ill. A. 92.

[d] **The acceptance by the obligee of an instrument** from one to whom the same is delivered by the obligor for the obligee constitutes a ratification by the obligee of such person's agency for the delivery of the instrument. Hockett v. Jones, 70 Ind. 227.

[e] **A shipper ratifies his agent's act** in making a contract limiting the carrier's liability by accepting the contract and availing himself of its provisions without objection. Johnson v. New York, etc., R. Co., (Mass.) 104 NE 445.

56. Cal.—Patterson v. Crowell, 15 Cal. A. 105, 113 P 700.

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[§ 115] **(2) When Rule Not Applicable.** The above general rule of course has no application where the principal receives no benefit from the agent's act,[57] or where the benefit received is doubtful and trifling;[58] nor does the general rule apply where the principal is legally entitled to what he has received without assenting to the act of the agent, and he does not otherwise give his approval to such act,[59] or where the benefit received by the principal is merely incidental and arises out of a credit extended by a third person to the agent individually,[60] or where the other party to the transaction did not deal with the agent as such but in his individual capacity.[61]

Ignorance of facts. The mere fact that the principal has received or enjoyed the benefits of the unauthorized act will not amount to a ratification if he did so in ignorance of the facts.[62] Thus the acceptance of profits or the use of lands or goods will not amount to a ratification of the agent's acts, if done in ignorance of the circumstances connected with such acts,[63] unless the principal intentionally accepts the benefits without inquiry,[64] or perhaps after years of acquiescence;[65] nor will the retention of the benefits of one transaction constitute a ratification of another separate and dis-

Colo.—Witcher v. Gibson, 15 Colo. A. 163, 61 P 192.

Kan.—Waterson v. Rogers, 21 Kan. 529.

Mo.—Laumeier v. Dolph, 145 Mo. A. 78, 130 SW 360.

Nebr.—Dresher v. Becker, 88 Nebr. 619, 130 NW 275 (holding that a principal who retains benefits derived from the fraudulent conduct of his agent is chargeable with the instrumentalities employed by the agent in carrying out the fraudulent purpose); U. S. School-Furniture Co. v. Lancaster County School Dist. No. 87, 56 Nebr. 645, 77 NW 62; D. M. Osborn Co. v. Jordan, 52 Nebr. 465, 72 NW 479.

N. Y.—Rollins v. Sidney B. Bowman Cycle Co., 84 App. Div. 287, 82 NYS 781; Lozier Motor Co. v. Ziegler, 115 NYS 134.

N. D.—Fleming v. Sherwood, 24 N. D. 144, 139 NW 101, 43 LRANS 945.

Okl.—J. I. Case Threshing Mach. Co. v. Lyons, 40 Okl. 356, 138 P 167.

Tex.—Henderson v. San Antonio, etc., R. Co., 17 Tex. 560, 67 AmD 675; Sullivan v. Ramsey, (Civ. A.) 155 SW 580.

W. Va.—Dewing v. Hutton, 48 W. Va. 576, 37 SE 670 (holding that if a person receives the benefits of the dealings of an unauthorized agent he must also discharge all responsibilities occasioned thereby).

See also supra §§ 99, 100.

57. Quay v. Presidio, etc., R. Co., 82 Cal. 1, 22 P 925; Fay v. Slaughter, 194 Ill. 157, 62 NE 592, 88 AmSR 148, 56 LRA 564 [rev 94 Ill. A. 111]; Elk Valley Coal Co. v. Thompson, 150 Ky. 614, 150 SW 817.

58. Saul v. Lapidus, 46 Colo. 538, 105 P 863 (holding that a principal will not be held liable on a purchase by the general manager of his store, for the latter's benefit, of a stock of goods, merely because two or three articles included in the stock were found in the principal's store, on the theory that the principal cannot keep the goods and refuse to pay, the supposed benefit being too doubtful and trifling in amount).

59. Colo.—Union Gold Min. Co. v. Rocky Mt. Nat. Bank, 1 Colo. 531.

Ga.—Baldwin Fertilizer Co. v. Thompson, 106 Ga. 480, 32 SE 591.

Iowa.—Forcheimer v. Stewart, 73 Iowa 216, 32 NW 665, 35 NW 148.

La.—Kilgour v. Ratcliff, 2 Mart. N. S. 292.

Me.—White v. Sanders, 32 Me. 188; Crooker v. Appleton, 25 Me. 131.

Mich.—Somerville v. Wabash R. Co., 109 Mich. 294, 67 NW 320.

[a] **Applications of rule.**—(1) If the principal merely receives back his own property, which was in the custody of another and to which he was unconditionally entitled, he does not thereby ratify an unauthorized agreement made by his agent under which the possession was restored, in the absence of any other evidence of a ratification of such act. Baldwin Fertilizer Co. v. Thompson, 106 Ga. 480, 32 SE 591. (2) So the fact that a mining company retains ore taken from a mine by means of funds loaned to it without its knowledge by a third person through an agent who had no authority to borrow is not a ratification of the unauthorized act, since the ore belonged to the company both before and after it was taken from the mine. Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 1 Colo. 531. (3) Where an agent makes an unauthorized contract for a sale of land to a tenant of his principal, the fact that the principal after knowledge of the contract collects a small sum of money from the tenant, who at the time of the contract was in arrears for rent under his lease, is not a ratification of the contract of sale. Torrence v. Shedd, 112 Ill. 466.

60. Grover, etc., Mach. Co. v. Polhemus, 34 Mich. 247 (holding that, where a principal furnishes his agent with a horse which the agent is to feed and take care of, the fact that the employment of the horse by the agent in the prosecution of the principal's business afforded a profit to the principal does not make the latter liable for the board and keeping of the horse procured by the agent on credit without authority and charged directly to the agent); Lippincott v. East River Mill, etc., Co., 79 Misc. 559, 141 NYS 220.

61. Wyckoff v. Davis, 127 Iowa 399, 103 NW 349; Thompson v. Craig, 16 AbbPrNS (N. Y.) 29.

62. Reeves v. Miller, 48 Ind. A. 339, 95 NE 677 [rev reh (A.) 91 NE 812 (holding that where a seller, retaining title until the payment of the price with the right to take possession on default, received possession from an agent who took the property from the buyer under an unauthorized agreement to accept it in satisfaction of the debt, and held the property without knowledge of the contract, the agent's act was not ratified); Foote v. Cotting, 195 Mass. 55, 80 NE 600, 15 LRANS 693 and note (holding that where the money of another is appropriated by an agent having the management of real estate to pay the taxes thereon, it not appearing that the taxes constituted a statutory lien, with notice of which the owners of the real estate are to be charged, the fact of their not having declined the benefit thereby received, of itself, is insufficient to raise an implied obligation to make reimbursement); Kimball v. Ranney, 122 Mich. 160, 80 NW 992, 80 AmSR 548 and note, 46 LRA 403; Winkleblack v. Springfield Nat. Exch. Bank, 155 Mo. A. 1, 136 SW 712; Craver v. House, 138 Mo. A. 251, 120 SW 686; Citizens' Sav. Bank v. Marr, 129 Mo. A. 26, 107 SW 1009. See also supra §§ 93–96.

[a] **Where the acceptance is in ignorance of the essential circumstances** relating to the transaction, this will absolve the principal from all liability by reason of any supposed assent to the previously unauthorized act of the agent. Harrison v. Magoon, 14 Hawaii 418.

63. U. S.—Bell v. Cunningham, 3 Pet. 69, 7 L. ed. 606; Wheeler v. Northwestern Sleigh Co., 39 Fed. 347; Lindroth v. Litchfield, 27 Fed. 894.

Ala.—Herring v. Skaggs, 73 Ala. 446; Howe Mach. Co. v. Ashley, 60 Ala. 496; Bott v. McCoy, 20 Ala. 578, 56 AmD 223.

Ark.—Martin v. Hickman, 64 Ark. 217, 41 SW 852; Niemeyer Lumber Co. v. Moore, 55 Ark. 240, 17 SW 1028.

Colo.—Markell v. Matthews, 3 Colo. A. 49, 32 P 176.

Ill.—Booth v. Wiley, 102 Ill. 84; Grund v. Van Vleck, 69 Ill. 478; Henderson v. Cummings, 44 Ill. 325; Evans v. Chicago, etc., R. Co., 26 Ill. 189; Goodell v. Woodruff, 20 Ill. 191; Fisher v. Stevens, 16 Ill. 397; Baer v. Lichten, 24 Ill. A. 311.

Ind.—Manning v. Gasharie, 27 Ind. 399; Willison v. McKain, 12 Ind. A. 78, 39 NE 886.

Iowa.—Roberts v. Rumley, 58 Iowa 301, 12 NW 323; Milligan v. Davis, 49 Iowa 126.

Kan.—Bohart v. Oberne, 36 Kan. 284, 13 P 388.

Ky.—Gaskill v. Huffaker, 49 SW 770.

Md.—Pennsylvania, etc., Steam Nav. Co. v. Dandridge, 8 Gill & J. 248, 29 AmD 543.

Mass.—Manning v. Leland, 153 Mass. 510, 27 NE 519; Thacher v. Pray, 113 Mass. 291, 18 AmR 480.

Mich.—Leonardson v. School Dist. No. 3, 125 Mich. 209, 84 NW 63.

Mo.—Clark v. Clark, 59 Mo. A. 532.

Nebr.—Holm v. Bennett, 43 Nebr. 808, 62 NW 194.

Oh.—Boehm v. Yanquell, 15 Oh. Cir. Ct. 454, 8 Oh. Cir. Dec. 184.

Vt.—Kingsley v. Fitts, 51 Vt. 414.

Wis.—Ætna Ins. Co. v. North Western Iron Co., 21 Wis. 458.

64. Aultman Thrashing, etc., Co. v. Knoll, 71 Kan. 109, 79 P 1074; Jewell Nursery Co. v. State, 5 S. D. 623, 59 NW 1025; American Nat. Bank v. Cruger, 91 Tex. 446, 44 SW 278; Heinzerling v. Agen, 46 Wash. 390, 90 P 262. See also supra § 98.

[a] **Enjoyment of premises under unauthorized lease.**—Where a principal, knowing that an unauthorized contract had been made by an agent in his behalf for the use and occupation of certain premises, enters into possession and enjoys their use without knowing or ascertaining what the terms of the lease were, he must be held to have deliberately intended to ratify the contract whatever it may be. Ehrmanntraut v. Robinson, 52 Minn. 333, 54 NW 188.

[b] **Where bailiffs sent by the landlord to distrain for rent** upon a certain farm exceeded their authority in taking beyond the limits of the farm cattle belonging to another person than the tenant, and the cattle were sold and the landlord received the proceeds, the landlord was held not liable in trover unless the jury should find that he ratified the acts of the bailiffs with knowledge of the facts, or that he chose without inquiry to take the risk upon himself and adopted the whole of their acts. Lewis v. Read, 14 L. J. Exch. 295.

65. Hyatt v. Clark, 118 N. Y. 563, 570, 23 NE 891 (where the court said: "Having received the benefits of the contract, she [the plaintiff] could not, after years of acquiescence, suddenly invoke the aid of the courts to relieve her of any further obligation, because she had but recently discovered a fact that she should have ascertained, and which the law pre-

tinct transaction between the agent and the same third party of which the principal had no knowledge.[66] A principal also has a right to receive money from an agent in payment of a debt due from the latter without inquiry as to the source from which it came,[67] and if it is in good faith so received and applied by the principal, its subsequent retention after he learns that it was procured through an unauthorized transaction entered into by the agent in his name will not amount to a ratification of such transaction.[68]

[§ 116] **(3) Duty to Restore.** The rule of ratification by the acceptance of benefits implies the power of election to accept or reject what has been received,[69] and where the principal has suffered no prejudice and can make restitution, he should, when he is apprised of the facts, make his election, and if he decides not to ratify he should return the fruits of the unauthorized act,[70] and if he does not do so within a reasonable time,[71] but retains, uses, or disposes of what he has received, he will be held to have ratified the act of the agent,[72] unless such restoration would be of no practical value to the other party.[73] This rule applies notwithstanding a previous denial, upon learning the facts, of the agent's authority, or expressions of disapproval or repudiation of his act.[74]

Limitations of rule. There is no ratification if, at the time it becomes known that the agent exceeded his authority, the principal has put it beyond his power to return or restore the benefits received,[75] or if without his fault conditions are such that he cannot be placed in statu quo or repudiate the entire transaction without loss,[76] or if the continued

sumes that she did ascertain, long before").

[a] **If a principal acquiesces for a number of years and receives the benefits** of an unauthorized contract, he cannot escape its obligations because he has but recently discovered a fact which he should have ascertained, and which the law presumed he did ascertain, long before. Carlson v. Stone-Ordean-Wells Co., 40 Mont. 434, 107 P 419.

66. Schollay v. Moffit-West Drug Co., 17 Colo. A. 126, 67 P 182; Crute v. Burch, 154 Mo. A. 480, 135 SW 1004; Lippincot v. East River Mill, etc., Co., 79 Misc. 559, 141 NYS 220.

67. Case v. Hammond Packing Co., 105 Mo. A. 168, 79 SW 732 (holding that the fact that a principal received and kept money procured by an agent by an overdraft on a bank account which the agent kept in the principal's name does not constitute a ratification of the agent's act, where the principal had no knowledge of the account when he received the money); Clark, etc., Lumber Co. v. Duncan, (Tex. Civ. A.) 143 SW 644.

68. Cal.—Dupont v. Wertheman, 10 Cal. 354.

Ill.—Pope v. Lowitz, 14 Ill. A. 96.

Kan.—Bohart v. Oberne, 36 Kan. 284, 13 P 388.

Mass.—Thatcher v. Pray, 113 Mass. 291, 18 AmR 480. See also Collateral Loan Co. v. Sallinger, 195 Mass. 135, 80 NE 811.

Mo.—Sanborn v. Buchanan First Nat. Bank, 115 Mo. A. 50, 90 SW 1033 [overr Trenton First Nat. Bank v. Badger Lumber Co., 54 Mo. A. 327, 60 Mo. A. 255]; Case v. Hammond Packing Co., 105 Mo. A. 168, 79 SW 732.

Wis.—Tripp v. Foster, 156 Wis. 534, 146 NW 891 (holding that a pledgee of stock who assigned it at the request of the pledgor's agent, on being notified that such agent had sold it, and receiving from the pledgor the consideration, did not, on refusing to return the consideration to the buyer on being informed of the fraud of the pledgor's agent in selling it, make the pledgor's agent his agent by ratification, and so become liable for the fraud).

69. King v. Livingston Mfg. Co., (Ala.) 60 S 143, 145 [cit Cyc]; Swayne v. Union Mut. L. Ins. Co., (Tex. Civ. A.) 49 SW 518.

Election to repudiate or ratify see generally supra § 79.

70. Ark.—Pike v. Douglass, 28 Ark. 59.

Conn.—Disbrow v. Secor, 58 Conn. 35, 18 A 981.

Ill.—Hilton v. Meier, 257 Ill. 500, 100 NE 962.

Iowa.—Russ v. Hansen, 119 Iowa 375, 93 NW 502; National Impr., etc., Co. v. Maiken, 103 Iowa 118, 72 NW 431; Deering v. Grundy County Nat. Bank, 81 Iowa 222, 46 NW 1117.

Md.—Dentzel v. City, etc., R. Co., 90 Md. 484, 45 A 201.

Minn.—Anderson v. Johnson, 74 Minn. 171, 77 NW 26.

Nebr.—U. S. School-Furniture Co. v. Lancaster County School Dist. No. 87, 56 Nebr. 645, 77 NW 62.

N. Y.—Coykendall v. Constable, 99 N. Y. 309, 1 NE 884; Elwell v. Chamberlin, 31 N. Y. 611.

Pa.—Benjamin v. Holgate, 51 Pa. Super. 104; Koch v. Oil City, 47 Pa. Super. 248 (holding that where a person, without authority previously delegated, purchases goods for another, and the latter receives the goods, although in ignorance of the assumed agency, he must either disaffirm the act of the agent and return the goods or pay the seller their market value); Carlisle, etc., Co. v. Iron City Sand Co., 20 Pa. Super. 378.

W. Va.—Union Bank, etc., Co. v. Long Pole Lumber Co., 70 W. Va. 558, 74 SE 674, 41 LRANS 663.

Eng.—Bannatyne v. MacIver, [1906] 1 K. B. 103, 2 BRC 735, 3 AnnCas 1143 and note.

Can.—Margolis v. Birnie, 5 DomLR 534, 21 WestLR 462.

[a] **Tender of certified check.**—Where a principal on hearing of an unauthorized compromise made by his agent repudiates it, the fact that the money which he tendered back was in the form of a certified bank check instead of legal tender money does not affect the repudiation. Harper v. National L. Ins. Co., 56 Fed. 281, 5 CCA 505.

71. Smith v. Holbrook, 99 Ga. 256, 25 SE 627; McDermott v. Jackson, 97 Wis. 64, 72 NW 375 (holding that the principal is entitled to a reasonable time after notice of facts sufficient to put him upon inquiry in which to ascertain the true state of facts and return what he has received).

72. Cal.—B. & W. Engineering Co. v. Beam, 23 Cal. A. 164, 137 P 624.

Conn.—Disbrow v. Secor, 58 Conn. 35, 18 A 981.

Ga.—Haney School Furniture Co. v. Hightower Baptist Inst., 113 Ga. 289, 38 SE 761; Smith v. Holbrook, 99 Ga. 256, 25 SE 627; McDowell v. McKenzie, 65 Ga. 630.

Ill.—Campbell v. Millar, 84 Ill. A. 208.

Ind.—Wallace v. Lawyer, 90 Ind. 499.

Iowa.—Fleishman v. Ver Does, 111 Iowa 322, 82 NW 757; Casaday v. Manchester F. Ins. Co., 109 Iowa 539, 80 NW 521; National Impr., etc., Co. v. Maiken, 103 Iowa 118, 72 NW 431.

Ky.—Kenny Co. v. Anderson, 81 SW 663, 26 KyL 367 [aff 83 SW 581, 26 KyL 1217]; Henry Vogt Mach. Co. v. Lingenfelser, 62 SW 499, 23 KyL 38; Givens v. Cord, 44 SW 665; Howe v. Combs, 38 SW 1052, 18 KyL 1002.

La.—Chambers v. Haney, 45 La. Ann. 447, 12 S 621.

Minn.—Payne v. Hackney, 84 Minn. 195, 87 NW 608; Anderson v. Johnson, 74 Minn. 171, 77 NW 26; Wright v. Vineyard M. E. Church, 72 Minn. 78, 74 NW 1015.

Nebr.—Farmers', etc., Bank v. Farmers', etc., Bank, 49 Nebr. 379, 68 NW 488 (holding that where a principal, sued on an unauthorized contract made by his agent in his name, learns on the trial that he has accepted and retained the benefits of the contract, but fails to return or tender a return thereof to the other contracting party, he ratifies the contract); Johnston v. Milwaukee, etc., Inv. Co., 49 Nebr. 68, 68 NW 383.

N. Y.—Coykendall v. Constable, 99 N. Y. 309, 1 NE 884; Smith v. Tracy, 36 N. Y. 79.

Vt.—Beecher v. Grand Trunk R. Co., 43 Vt. 133.

Wash.—Peterson v. Hicks, 43 Wash. 412, 86 P 634.

W. Va.—Truslow v. Parkersburg Bridge, etc., R. Co., 61 W. Va. 628, 57 SE 51.

Wis.—Andrews v. Robertson, 111 Wis. 334, 87 NW 190, 87 AmSR 870, 54 LRA 673; McDermott v. Jackson, 97 Wis. 64, 72 NW 375.

73. Crooker v. Appleton, 25 Me. 131; Humphrey v. Havens, 12 Minn. 298.

74. Ga.—Haney School Furniture Co. v. Hightower-Baptist Inst., 113 Ga. 289, 38 SE 761.

Ill.—Campbell v. Millar, 84 Ill. A. 208.

Iowa.—Fleishman v. Ver Does, 111 Iowa 322, 82 NW 757; National Impr., etc., Co. v. Maiken, 103 Iowa 118, 72 NW 431.

Minn.—Wright v. Vineyard M. E. Church, 72 Minn. 78, 74 NW 1015.

Nebr.—Plano Mfg. Co. v. Nordstrom, 63 Nebr. 123, 88 NW 164.

N. H.—Hatch v. Taylor, 10 N. H. 538.

Pa.—Sloan v. Johnson, 20 Pa. Super. 643.

Tex.—Stetson-Preston Co. v. Dodson, (Civ. A.) 103 SW 685 (holding that where defendant sent plaintiffs a check, accompanied by the statement that it was sent in full payment of a settlement made with their representative, M, of certain matters, plaintiffs, by retaining and using the check, ratify the act of M, although they write defendant that they will not be bound by the settlement, but would credit and have credited the amount received on defendant's indebtedness).

Wash.—Peterson v. Hicks, 43 Wash. 412, 86 P 634.

[a] **Although the principal expressly repudiates** the act of an agent in the purchase of property, he will be held to have ratified the purchase if he does not return but retains and uses the property purchased. Wright v. Vineyard M. E. Church, 72 Minn. 78, 74 NW 1015.

75. Swayne v. Union Mut. L. Ins. Co., (Tex. Civ. A.) 49 SW 518; Moyle v. Salt Lake City Cong. Soc., 16 Utah 69, 50 P 806.

76. U. S.—Schutz v. Jordan, 141 U. S. 213, 11 SCt 906, 35 L. ed. 705 [aff 32 Fed. 55].

Ark.—Martin v. Hickman, 64 Ark. 217, 41 SW 852.

Iowa.—Claflin v. Wilson, 51 Iowa 15, 50 NW 573.

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enjoyment of the benefits by the principal is unavoidable,[77] as where in taking, using, or disposing of a building or other thing he unavoidably enjoys the benefit of work or materials furnished or repairs or improvements made thereon.[78]

[§ 117] **(4) Particular Benefits and Transactions—(a) In General.** Subject to the general rules and qualifications stated above,[79] the benefit received may be anything of value to the principal, which is accepted by him after being fully advised of the facts,[80] such as services rendered the principal by a third person under a contract of hiring by the agent,[81] or materials furnished, or work completed and accepted, by the principal.[82] The benefits accepted and received by the principal within the rule may also be those resulting from a mortgage,[83]

Ky.—Gaskill v. Huffaker, 49 SW 770, 20 KyL 1555 (holding that where a note was sent to a bank indorsed "for collection," and the bank without authority sold the note, and the principal without knowledge of the transaction received the proceeds, a subsequent retention of the money after knowledge thereof is not a ratification, if the maker of the note has become insolvent so that the principal cannot be restored to his former condition).

Me.—Bryant v. Moore, 26 Me. 84, 45 AmD 96; Davis v. Bradford School Dist. No. 2, 24 Me. 349 (holding that the inhabitants of a school district could not be considered as promising to pay for unauthorized repairs on their schoolhouse by using it afterward, as they could restore what they had received only by abandoning their property, and that they were not obliged to do).

Minn.—Humphrey v. Havens, 12 Minn. 298.

Mo.—Winkleblack v. National Exch. Bank, 155 Mo. A. 1, 13, 136 SW 712 [cit Cyc]; Craver v. House, 138 Mo. A. 251, 120 SW 686; Clark v. Clark, 59 Mo. A. 532.

N. C.—Wynn v. Grant, 81 SE 949.

Pa.—Thrall v. Wilson, 17 Pa. Super. 376.

[a] **There is no ratification** (1) if, at the time the principal acquires knowledge of the facts, that which he received has been sold or disposed of (Martin v. Hickman, 64 Ark. 217, 41 SW 852; Humphrey v. Havens, 12 Minn. 298; Thrall v. Wilson, 17 Pa. Super. 376), or (2) so commingled with his other property that it cannot be identified and restored to the person entitled thereto (Thrall v. Wilson, supra).

77. Mills v. Berla, (Tex. Civ. A.) 23 SW 910.

[a] **A skidway constructed for a mill,** being necessary for use in logging, its use by the principal is not a ratification of the agent's act in contracting for it. Ayer, etc., Tie Co. v. Young, 90 Ark. 104, 117 SW 1080.

78. Mo.—Wilson v. King's Lake Drain., etc., Dist., 176 Mo. A. 470, 522, 158 SW 931 [quot Cyc].

N. Y.—Woodruff v. Rochester, etc., R. Co., 108 N. Y. 39, 14 NE 832.

Tex.—Mills v. Berla, (Civ. A.) 23 SW 910.

Utah.—Moyle v. Salt Lake City Cong. Soc., 16 Utah 69, 50 P 806.

Eng.—Forman v. The Liddesdale, [1900] App. Cas. 190.

79. See supra §§ 114–116.

80. Watt v. Missouri, etc., R. Co., 82 Kan. 458, 108 P 811 (holding that, where plaintiff used the contract under which defendants claimed that stock was shipped to secure a return pass from the point of destination, and thereby obtained from defendants, carriers, something of value which he would not otherwise have obtained, he ratified the execution of the contract, although he might not have expressly authorized anyone to sign it for him).

81. U. S.—American China Dev. Co. v. Boyd, 148 Fed. 258.

Ark.—Spencer Lumber Co. v. Marsh, 99 Ark. 358, 138 SW 479 (holding that, where a lumber manufacturer knew that an employee in charge of its mill employed plaintiff to cut and haul timber for the mill, and it received the benefits of his labor and paid others employed in the same way, and at first proposed to issue a check to plaintiff, and afterward, on the demand of plaintiff by letter for the amount due, it waited an unreasonable time to repudiate his claim, the employment of plaintiff was ratified).

Ill.—Eggleston v. Fair, 167 Ill. A. 518.

Kan.—Ehrsam v. Mahan, 52 Kan. 245, 34 P 800 (holding that the acceptance of the services of attorneys and the receipt of the avails thereof operate as a ratification).

Minn.—Coggins v. Higbie, 83 Minn. 83, 85 NW 930 (holding that where one of the several owners of grain authorizes another owner to employ a person operating a thresher to thresh the grain, and the party so authorized employs another than the person designated to do the work, the party employed, after the work is accepted, can recover his pay for the work or the share due from each of the respective owners).

N. J.—Lyle v. Addicks, 62 N. J. Eq. 123, 49 A 1121.

N. Y.—Woodruff v. Rochester, etc., R. Co., 108 N. Y. 39, 14 NE 832; Budd v. Howard Thomas Co., 40 Misc. 52, 81 NYS 152 (holding that where plaintiff performed certain labor for defendant at the request of and under an agreement with the agent of defendant, and defendant accepted the benefit of the work and labor, he is bound by the contract of his agent); Sultan v. Bailey, 85 NYS 332.

Tenn.—Gaudelupo Y. Calvo Min. Co. v. Beatty, 1 SW 348.

[a] **Services rendered agent individually.**—(1) By accepting the benefits of services of a person employed by an agent without authority, the principal does not ratify the employment, where he supposes that the servant was engaged by the agent in his individual interest, and he settles with the agent on that theory. Swayne v. Union Mut. L. Ins. Co., (Tex. Civ. A.) 49 SW 518. See also Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953. (2) The fact that defendant made use of a report submitted by plaintiff could not be considered as a ratification of the acts of a third person as defendant's agent in contracting with plaintiff to perform certain services as a chemist, where there was nothing to show that the third person ever had authority from defendant to act as his agent. Woodman v. Wicker, 88 NYS 411.

82. U. S.—Jefferson Hotel Co. v. Brumbaugh, 168 Fed. 867, 94 CCA 279 (holding that where owners of a building in process of erection permitted architects, who were the owners' supervising agents, to contract for extras without protest, and, after the extras had been inserted, continued in possession and enjoyment thereof, the owners could not thereafter deny the general authority of the superintendents to order them).

Ill.—Carlin v. Brown, 80 Ill. A. 541.

Ky.—Luttrell v. East Tennessee Tel. Co., 86 SW 1124, 27 KyL 872 (holding that, where telephone poles were bought from plaintiff by a certain person for defendant, and were delivered to it accordingly, and defendant sent the money to pay for them to the person who bought them, the agency of the latter was thereby ratified, and defendant was liable to plaintiff for the purchase price of the poles in case the agent failed to pay over the money to plaintiff and wrongfully appropriated it upon a debt owing by plaintiff to himself).

Mo.—Brown v. Wright, 25 Mo. A. 54.

N. Y.—Fischer v. Jordan, 54 App. Div. 621, 66 NYS 286 [aff 169 N. Y. 615 mem, 62 NE 1095 mem].

[a] **Materials used in repairs to building.**—Where a contractor had agreed to remodel defendant's building, the fact that lumber furnished the contractor was used in repairing the building was not evidence of a ratification of the contractor's representations as to authority to purchase the lumber for the owner. Parker v. Brown, 131 N. C. 264, 42 SE 605.

[b] **Extra work.**—Where a building contract contains a condition that no payment for extra work shall be enforced by the contractor unless a written order is obtained from the architect before such work is commenced, and no such order is given, but the contractor performs the work on the parol request of an authorized agent, the acceptance of the work done pursuant to such verbal order is a ratification of the agent's act in giving the order. W. H. Stubbings Co. v. World's Columbian Exposition Co., 110 Ill. A. 210.

[c] **Where provisions and material for construction of a railroad** are sold to the contractor through one assuming to be the agent for the contractor and are used in his work to his benefit, the contractor is liable, although no proof of agency appears. Black Lick Lumber Co. v. Camp Constr. Co., 63 W. Va. 477, 60 SE 409.

[d] **The contract of a minister for repair of a church** is ratified by the trustees, who, knowing thereof and of the progress of the work, make no objection, but make part payments, and accept and use the building with full knowledge of the facts. Moody, etc., Co. v. Port Washington M. E. Church, 99 Wis. 49, 74 NW 572.

[e] **An objection to a bill for plumbing as too high** has been held to amount to a ratification of the unauthorized act of an agent in employing the plumber. Hill v. Coates, 34 Misc. 535, 69 NYS 964.

[f] **That bread was delivered to defendant's servant** and came to the use of the master is prima facie sufficient to charge the master for the value. Weisiger v. Graham, 3 Bibb (Ky.) 313.

83. Ga.—Lampkin v. Cartersville First Nat. Bank, 96 Ga. 48, 23 SE 390.

Ill.—Union Mut. L. Ins. Co. v. Kirchoff, 133 Ill. 368, 27 NE 91.

Ind.—Fouch v. Wilson, 59 Ind. 93.

Iowa.—Brown v. Kiene, 72 Iowa 342, 33 NW 651.

Mich.—Connecticut Mut. L. Ins. Co., v. Bulte, 45 Mich. 113, 7 NW 707.

Philippine.—Tuason v. Domingo Lim, 10 Philippine 50.

[a] **The negotiation of a mortgage note and the mortgage** by the mortgagor with knowledge of the fact that the mortgage was given by his agent and covered his own property is a ratification of the unauthorized act of the agent in mortgaging the property. Iowa State Nat. Bank v. Taylor, 98 Iowa 631, 67 NW 577.

[b] **The acceptance and foreclosure of a new mortgage** by the mortgagee is a ratification of the unauthorized act of his agent in taking the new mortgage and releasing the old. Hartley State Bank v. McCorkell, 91 Iowa 660, 60 NW 197.

unauthorized collection,[84] trespasses or other torts,[85] contracts made on behalf of corporations by agents or officers acting in excess of their authority,[86] including municipal as well as private corporations,[87] and contracts and transactions generally for a principal by an agent acting beyond the authority conferred,[88] including any warranties or representations, fraudulent or otherwise, made by the agent as an inducement to the third person setting up the ratification.[89]

The acceptance of security or indemnity for an unauthorized act of an agent will amount to a ratification of the act where the security or indemnity is taken with full knowledge of the unauthorized act,[90] but not where the security or indemnity is not taken with full knowledge of such act,[91] or where the act is promptly repudiated when known.[92]

Payments made by the principal on account of

84. Moody v. Eastern Oregon Land Co., 180 Fed. 532 (holding that, where an agent of the vendor under a contract to convey exceeds his authority in accepting a payment after the purchaser's default, the act is ratified by the vendor's retention of the payment); Murray v. Walker, 44 Ga. 58 (holding that where an agent for the collection of a note received Confederate money in payment without authority, but the principal accepted the same from him and used it, he thereby ratified the act of the agent); McCarty v. Pruett, 4 Ind. 226; State Bank v. Kelly, 109 Iowa 544, 80 NW 520 (holding that where a bank's debtor transferred a third person's note to the bank's agent in part payment of his indebtedness to the bank, when such agent was authorized only to receive cash, it will be presumed, in the absence of proof to the contrary, that the agent reported the transaction to the bank, and hence, where it retained such note for eighteen months thereafter, it will be held to have ratified the transaction and cannot then claim that the note was taken as collateral security merely). See also Spencer v. McCament, 7 Cal. A. 84, 93 P 682; U. S. Express Co. v. Rawson, 106 Ind. 215, 6 NE 337.

Acceptance of agent's notes in full settlement as a ratification of the collection see infra § 123.

[a] **Where an agent for collection takes notes in his own name** in settlement, their subsequent acceptance by his principal amounts to a ratification of his unauthorized act, and the maker of the notes cannot complain. Billingsley v. Benefield, 87 Ark. 128, 112 SW 188.

[b] **Payment to an agent not authorized to receive the same** becomes effectual as a payment to the principal on the appropriation by him, with full knowledge of all the facts, of the money paid to the agent. Payne v. Hackney, 84 Minn. 195, 87 NW 608.

[c] **Part payment in full settlement.**—Where plaintiff bank sent a note to another bank for collection, and the latter received less than the face of the note, to be tendered plaintiff in full settlement, plaintiff could not accept and retain the money so paid to his agent and repudiate the condition on which it was paid in full settlement of the claim. Southwest Nat. Bank v. Justice, 157 N. C. 373, 72 SE 1016.

[d] **Accepting property to apply on balance due from the agent** as ratification of payment to agent see Bissell v. Dowling, 117 Mich. 646, 74 NW 100.

85. Wagoner v. Silva, 139 Cal. 559, 73 P 433 (holding that, where an owner of land accepts in satisfaction of a trespass money paid to a third person, it is immaterial whether at the time of the payment such person was his agent); Avakian v. Noble, 121 Cal. 216, 53 P 559 (holding that, where defendant's agent seized by force a quantity of raisins belonging to plaintiff, under a mortgage which did not cover them, and he represented one of his draymen to be an officer, and during the loading held and assaulted plaintiff, and defendant, with knowledge of these facts, kept the raisins, he thereby ratified the agent's acts and was liable therefor); Singer Mfg. Co. v. Stephens, 53 SW 525, 21 KyL 946 (holding that a principal is liable for the acts of one who, in the presence of his agent and by his coöperation, took from another's house, by force, a sewing machine which the principal had sold to such other, where the principal retains the fruits of such acts); Exum v. Brister, 35 Miss. 391 (holding that if a principal appropriates the proceeds of a trespass ratification is properly implied).

86. See Corporations [10 Cyc 1078].

87. U. S.—Clark v. Washington, 12 Wheat. 40, 6 L. ed. 544; Bank of Columbia v. Patterson, 7 Cranch 299, 3 L. ed. 351.

Cal.—San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

Ind.—Ross v. Madison, 1 Ind. 281, 48 AmD 361.

Me.—Abbott v. Hermon Third School Dist., 7 Me. 118.

Mo.—Ruggles v. Washington County, 3 Mo. 496.

Pa.—Allegheny City v. McClurkan, 14 Pa. 81; North Whitehall Tp. v. South Whitehall Tp., 3 Serg. & R. 117.

See also Municipal Corporations [28 Cyc 677].

88. U. S.—Connecticut Ins. Co. v. Pennsylvania Ins. Co., 51 Fed. 884, 2 CCA 535; Belleville Sav. Bank v. Winslow, 35 Fed. 471.

Cal.—Market St. R. Co. v. Hellman, 109 Cal. 571, 42 P 225; Wyman v. Moore, 103 Cal. 213, 37 P 230.

Ind.—Terry v. New York Provident Fund Soc., 13 Ind. A. 1, 41 NE 18, 55 AmSR 217.

Iowa.—Milligan v. Davis, 49 Iowa 126.

Mich.—Clement, etc., Co. v. Michigan Clothing Co., 110 Mich. 458, 68 NW 224.

Nebr.—Hughes v. Insurance Co. of North America, 40 Nebr. 626, 59 NW 112.

N. Y.—Smith v. Barnard, 148 N. Y. 420, 42 NE 1054; Sturgis v. New Jersey Steamboat Co., 62 N. Y. 625 [aff 35 N. Y. Super. 251]; Whitestown v. Title Guaranty, etc., Co., 72 Misc. 498, 131 NYS 390 [aff 148 App. Div. 900 mem, 132 NYS 1149 mem].

Pa.—Massey v. Insurance Co., 3 Phila. 200.

S. C.—Wall v. Chelsea Plantation Club, 88 S. C. 61, 70 SE 434.

Utah.—Brown v. Parsons, 10 Utah 223, 37 P 346.

Va.—Higginbotham v. May, 90 Va. 233, 17 SE 941.

[a] **The acceptance of an application for insurance** is a ratification of the agent's unauthorized act in soliciting it. Terry v. Provident Fund Soc., 13 Ind. A. 1, 41 NE 18, 55 AmSR 217. See also Insurance [22 Cyc 1434].

[b] **Acceptance of advertising.**—Where a principal, after presentation of a bill for advertising which his agent had ordered inserted without authority, permits such advertisement to appear in subsequent issues of the periodical without notifying the publisher to discontinue or of the want of authority in the agent, he is liable for the advertisement. Bryce v. Clark, 42 N. Y. 471, 16 NYS 854.

89. U. S.—Clark v. Reeder, 158 U. S. 505, 15 SCt 849, 39 L. ed. 1070 [aff 40 Fed. 513]; Alger v. Keith, 105 Fed. 105, 44 CCA 371; Continental Ins. Co. v. Pennsylvania Ins. Co., 51 Fed. 884, 2 CCA 535; Foster v. Swasey, 9 F. Cas. No. 4,984, 2 Woodb. & M. 217.

Dak.—Nichols v. Bruns, 5 Dak. 28, 37 NW 752.

Fla.—Croom v. Swann, 1 Fla. 211.

Ill.—Hopkins v. Snedaker, 71 Ill. 449; Woodford v. McClenahan, 9 Ill. 85.

Ind.—Du Souchet v. Dutcher, 113 Ind. 249, 15 NE 459.

Iowa.—Eadie v. Ashbaugh, 44 Iowa 519.

Ky.—Western Mfg. Co. v. Cotton, 104 SW 758, 31 KyL 1130, 12 LRANS 427.

Md.—Swindell v. Gilbert, 100 Md. 399, 60 A 102.

Mich.—Krolik v. Curry, 148 Mich. 214, 111 NW 761; Ripley v. Case, 86 Mich. 261, 49 NW 46; Busch v. Wilcox, 82 Mich. 315, 336, 46 NW 940, 47 NW 328, 21 AmSR 563.

Minn.—Albitz v. Minneapolis, etc., R. Co., 40 Minn. 476, 42 NW 394.

Nebr.—Leavitt v. Siser, 35 Nebr. 80, 52 NW 832; Sycamore Marsh Harvester Co. v. Sturm, 13 Nebr. 210, 13 NW 202.

N. H.—Presby v. Parker, 56 N. H. 409.

N. Y.—Krumm v. Beach, 96 N. Y. 398 [aff 25 Hun 293]; Akberg v. John Kress Brewing Co., 65 Hun 182, 19 NYS 956 [aff 138 N. Y. 648, 34 NE 513].

N. C.—Lane v. Dudley, 6 N. C. 119, 5 AmD 523.

Pa.—Meyerhoff v. Daniels, 173 Pa. 555, 34 A 298, 51 AmSR 782.

Tex.—Henderson v. San Antonio, etc., R. Co., 17 Tex. 560, 67 AmD 675; Texas El. etc., Co. v. Mitchell, 7 Tex. Civ. A. 222, 28 SW 45; Gulf, etc., R. Co. v. Pittman, 4 Tex. Civ. A. 167, 23 SW 318.

Wis.—Burke v. Milwaukee, etc., R. Co., 83 Wis. 410, 53 NW 692; Morse v. Ryan, 26 Wis. 356.

See also supra §§ 99, 100.

[a] **Retaining note.**—Where a payee of a note, which is procured on his agent's false representations made in his presence, refuses to surrender such note on notice of the falsity of such representations, such refusal will amount to such a ratification of the agent's acts and statements as to make evidence of such acts and statements admissible in an action to enforce payment. Higbee v. Trumbauer, 112 Iowa 74, 83 NW 812.

90. Fitzpatrick v. Caperton Cove School Comrs., 7 Humphr. (Tenn.) 224, 46 AmD 76; Jones v. Hamlet, 2 Sneed (Tenn.) 256; McCoy v. Simon, 64 Wash. 574, 117 P 400 (holding that, although the power of attorney executed by plaintiff did not authorize his agent to assign a mortgage taken for the property sold thereunder by the agent, plaintiff ratified the sale of the property and the assignment of the mortgage by taking property from the agent to cover the proceeds of the sale of the mortgage with knowledge that he had assigned it, and hence could not recover against the assignee or innocent purchasers therefor).

91. Smith v. Kidd, 68 N. Y. 130, 23 AmR 157 (holding that, where a principal took security from an agent for the payment of moneys which he had previously and without authority collected from debtors of the principal and wrongfully appropriated to his own use, this would not amount to a ratification of payments made to the agent where the principal had not full knowledge of all the material facts when the security was taken).

92. Lazard v. Merchants', etc.,

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benefits received amount to a ratification of the agent's unauthorized act in procuring the benefits, where, at the time of the payments, the principal has full knowledge of the transaction.[93]

[§ 118] **(b) Negotiable Instruments.** A principal impliedly ratifies unauthorized contracts and transactions with reference to negotiable instruments, where with full knowledge of all the facts he accepts and retains the benefits resulting therefrom,[94] as where, with such knowledge, he accepts and retains the proceeds from the execution, collection, or sale of such an instrument,[95] but not where he had no knowledge of the unauthorized transaction at the time of such acceptance.[96]

Dealing with agent's notes. Ratification will be implied where the principal pays the notes of his agent or otherwise deals with them as his own.[97]

[§ 119] **(c) Loans.** The acceptance and retention of the proceeds of a loan or of the benefits thereof, although made without authority, amount to an implied ratification of the loan,[98] as where the principal appropriates and uses or disposes of

Transp. Co., 78 Md. 1, 26 A 897 (holding that an acceptance by a principal of a transfer of his agent's property, voluntarily offered to cover any loss that the former might sustain by the agent's unauthorized act, does not constitute a ratification or acquiescence in such act, where the latter is at once repudiated and liability therefor denied).

93. Wright v. Farmers' Mut. Live-Stock Ins. Assoc., 96 Iowa 360, 65 NW 308; Manne v. Siegel-Cooper Co., 20 Misc. 592, 46 NYS 352; Hess v. Baar, 14 Misc. 286, 35 NYS 687 [aff 11 Misc. 619, 32 NYS 918]; Williams v. Crosby Lumber Co., 118 N. C. 928, 24 SE 800; Moody, etc., Co. v. Ft. Washington M. E. Church, 99 Wis. 49, 74 NW 572.

94. Cal.—Mitchell v. Finnell, 101 Cal. 614, 36 P 123 (holding that an indorsement with full knowledge of the circumstances under which a note was procured ratifies whatever an agent did in procuring it).

Ga.—Turner v. Wilcox, 54 Ga. 593; Gilbert v. Dent, 46 Ga. 238 (holding that, where, in an action on a note signed by one as agent of defendant, there was evidence that defendant had accepted knowingly the consideration for which the note was given, it was error to exclude the note from the evidence).

Ill.—Nicholson v. Doney, 37 Ill. A. 531.

Ind.—Moore v. Pendleton, 16 Ind. 481.

Ky.—German Nat. Bank v. Louisville Butchers' Hide, etc., Co., 97 Ky. 34, 29 SW 882, 16 KyL 881.

Mass.—Ely v. James, 123 Mass. 36; Hayden v. Middlesex Turnpike Corp., 10 Mass. 397, 6 AmD 143.

Minn.—Woodbury v. Larned, 5 Minn. 339.

Mo.—Mayer v. Old, 57 Mo. A. 639.

N. Y.—Continental Nat. Bank v. Koehler, 1 NYS 870 [aff 117 N. Y. 657 mem, 22 NE 1133 mem]; West v. Banigan, 51 App. Div. 328, 64 NYS 884 [aff 172 N. Y. 622, 65 NE 1123] (holding that where an agent delivered notes made by his principal to renew other notes, without recovering all the old notes, and he was told that one of the notes was lost and would be delivered when found, and by the terms of the agreement for renewal the old notes were to be turned over, and the principal accepted the old notes received by the agent and took his explanation as to the other note, he ratified the acts of the agent).

Pa.—Wheeler, etc., Mfg. Co. v. Aughey, 144 Pa. 398, 22 A 667, 27 AmSR 638; Horter v. Silliman, 3 WklyNC 405.

Tex.—Campbell v. Jenkins, (Civ. A.) 34 SW 673.

[a] **Waiving protest.**—In Allin v. Williams, 97 Cal. 403, 32 P 441, it was held that an indorsement on a note by a principal, whose name had been indorsed thereon by his attorney, of a waiver of payment, presentment, protest, and notice was sufficient ratification of the prior indorsement by the attorney.

[b] **Checks.**—The law forbids an agent to convert the funds of his principal to his own use, and a person who cashes checks drawn by an agent in his principal's name on the latter's funds, knowing that the agent intends to fraudulently misappropriate the funds, cannot recover the amount of the checks, but where the amount so drawn has been used for the benefit of the principal, and retained by him, it may be recovered, although the agent in other transactions has been guilty of embezzlement. Stotts City Bank v. Miller Lumber Co., 102 Mo. A. 75, 74 SW 472.

[c] **Where the obligee in a note and mortgage** obtained by an agent claims the benefits thereof, he is also bound by the acts of the agent in the course of the transaction by which they were procured. Corbett v. Clute, 137 N. C. 546, 50 SE 216.

[d] **The authority of an agent to transfer and indorse a draft** cannot be questioned by the principal who received the proceeds, in an action to recover the same of him. Wells v. Simpson Nat. Bank, 19 Tex. Civ. A. 636, 47 SW 1024.

[e] **Attempt to collect.**—Where plaintiff was a member of a firm, and the firm's attorney by threats of a criminal prosecution induced defendants to execute a note and mortgage, plaintiff's attempt to collect the note and mortgage is a ratification of the attorney's act. Hartsell v. Roberts, (Ala.) 64 S 90.

95. Baldwin v. Reynolds, 189 Fed. 852, 111 CCA 114; Hunt v. Listenbeger, 14 Ind. A. 320, 42 NE 240, 964 (holding that where the agent of the payee of a note sold it and indorsed it, and the proceeds of the sale were transmitted to the payee who retained it without disputing in any way the right of the agent to make the transfer, the payee was bound); Rosenthal v. Hasberg, 84 NYS 290 (holding that where one purporting to act as an attorney for a partnership made a note in its name, and the proceeds of the note were placed to the credit of the firm in the bank, the partnership ratified the agent's acts by accepting the benefits, and could not afterward question his authority).

96. Webber v. Williams College, 23 Pick. (Mass.) 302; Singer Sewing Mach. Co. v. Barger, 92 Nebr. 539, 138 NW 741, AnnCas1914A 57 and note (unauthorized alteration of note); Sloan v. Gilmore, (Tex. Civ. A.) 167 SW 1089 (holding that, where the owner of a note directed its delivery to her brother-in-law who transferred it without authority, the fact that she received a portion of the proceeds, not knowing that the money was from such source, did not estop her to deny the brother's authority).

[a] **A creditor does not ratify the transfer of a note by his agent, "for collection,"** by accepting and retaining the money, where he had no notice thereof, or of the fact that the payment had not been made by the obligor. Gaskill v. Huffaker, 49 SW 770, 20 KyL 1555.

97. Baer v. Lichten, 24 Ill. A. 311; Harrod v. McDaniels, 126 Mass. 413; Dow v. Spenny, 29 Mo. 386; Commercial Bank v. Warren, 15 N. Y. 577.

98. U. S.—Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648; Prentiss Tool, etc., Co. v. Godchaux, 66 Fed. 234, 13 CCA 420.

Ala.—Taylor v. West Alabama Agricultural, etc., Assoc., 68 Ala. 229.

Ga.—Kirklin v. Atlas Sav., etc., Assoc., 107 Ga. 313, 33 SE 83.

Ill.—Alton Mfg. Co. v. Garrett Biblical Institute, 243 Ill. 298, 90 NE 704; LasVegas First Nat. Bank v. Oberne, 121 Ill. 25, 7 NE 85; Ottawa Northern Plank Road Co. v. Murray, 15 Ill. 336.

Ind.—Fouch v. Wilson, 59 Ind. 93.

Iowa.—McLean v. Ficke, 94 Iowa 283, 62 NW 753; Warder v. Pattee, 57 Iowa 515, 10 NW 881.

Me.—Perkins v. Boothby, 71 Me. 91 (holding that where an agent borrows money and applies it to the payment and discharge of the legal liabilities of his principal, and the principal knowingly retains the benefit of such payment, the lender may recover therefor in an action against the principal for money had and received).

Mass.—Episcopal Charitable Soc. v. Episcopal Church, 1 Pick. 372.

Minn.—Willis v. St. Paul Sanitation Co., 53 Minn. 370, 55 NW 550.

Mont.—McAdow v. Black, 4 Mont. 475, 1 P 751.

N. H.—Connecticut River Sav. Bank v. Fiske, 60 N. H. 363; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205.

N. Y.—Whitney v. Union Trust Co., 65 N. Y. 576; Hazard v. Spears, 2 Abb. Dec. 353, 4 Keyes 469; Shiras v. Morris, 8 Cow. 60; Vianna v. Barclay, 3 Cow. 281.

Pa.—Wright v. Burbank, 64 Pa. 247; Mundorff v. Wickersham, 63 Pa. 87, 3 AmR 531.

R. I.—Thurston v. James, 6 R. I. 103.

Vt.—Spooner v. Thompson, 48 Vt. 259; Lyman v. Norwich University, 28 Vt. 560.

Wash.—Allen v. Olympia Light, etc., Co., 13 Wash. 307, 43 P 55.

Wis.—Ballston Spa Bank v. Marine Bank, 16 Wis. 120.

[a] **Where a third person conducted the negotiations,** procured the loan, and drew the note and mortgage, on which suit was based, for defendants, although not authorized directly to do so for them, and they accepted the loan and executed the note and mortgage, they thereby ratified the acts of such third person, and were bound thereby as effectually as if they had expressly authorized him to act as their agent. Marks v. Taylor, 23 Utah 152, 63 P 897 [mod reh on other grounds 23 Utah 470, 65 P 203].

[b] **Loan on note.**—(1) Where money is loaned to an agent for his principal on a note to which the name of the principal is forged, and the latter knows the facts and receives the proceeds, he is estopped from denying his liability on the note. Campbell v. Campbell, 133 Cal. 33, 65 P 134. See also as to ratification of forgery supra §§ 86-88. (2) So one who, after his agent has borrowed money on his note, collects the lenders' draft and refuses to return it or the proceeds upon being informed of the manner in which it was procured by the agent is liable on such note to the lender who believed that the agent had authority to execute it. Trenton First Nat. Bank v. Badger Lumber Co., 54 Mo. A. 327, 60 Mo. A. 255.

[c] **Where the money loaned is used by the agent** in the principal's business, a refusal of the latter to return the money with knowledge of

the property in which the proceeds of such loan were invested,[99] but not where his acceptance was without knowledge of the circumstances,[1] or where he had a right to accept the benefits without ratifying or repudiating the loan.[2]

[§ 120] **(d) Leases.**[3] The acceptance and retention by the principal of the benefits accruing under an unauthorized lease may constitute a ratification thereof,[4] as where he enters into possession and enjoys the use of the property under such lease.[5]

The acceptance of rents under an unauthorized lease, with full knowledge of the facts, may constitute a ratification;[6] but no ratification results from the acceptance of rents where the principal repudiates the unauthorized lease but allows the lessee to remain as tenant from month to month,[7] or where the principal had no knowledge at the time that the agent had exceeded his authority in making the lease.[8]

[§ 121] **(e) Purchase or Acquisition of Property.** A purchase or acquisition of property by an agent without authority, or in excess of his authority, including all the terms and conditions, is ordinarily ratified by the principal accepting and retaining the benefits of such purchase or acquisition,[9] unless, at the time of his acceptance, he

such facts constitutes a ratification of the loan, although it was unauthorized. McDermott v. Jackson, 97 Wis. 64, 72 NW 375.

[d] **The borrowing of money by the executive committee of a political party** is not ratified by reason of the party's receiving the benefit of the money borrowed, and by reason of such loan being reported to and approved by its national convention, where the party's constitution gives no direct power to such a convention to incur debts binding on it. Siff v. Fordes, 135 App. Div. 39, 119 NYS 773 [rev 63 Misc. 319, 117 NYS 143].

[e] **Loan by clerk.**—Where all the negotiations respecting a loan made by a building and loan association are conducted by a clerk in the office of the agents of the association, and the papers are executed by the mortgagor under his direction, the association cannot repudiate his agency after accepting the benefits of the instruments procured by him. Pioneer Sav., etc., Co. v. Baumann, (Tex. Civ. A.) 58 SW 49.

99. Calnan Constr. Co. v. Brown, 110 Iowa 37, 81 NW 163 (holding that one who loans money to a son for the purpose of completing a house which the latter is constructing for his parents on land owned by his father, where the son is acting as the agent of his father in such construction, and the latter on its completion takes possession thereof, is entitled to recover the amount of such loan from the father); Watson v. Bigelow, 47 Mo. 413.

1. Henry v. Wilkes, 37 N. Y. 562; Swindell v. Latham, 145 N. C. 144, 58 SE 1010, 122 AmSR 430; Spooner v. Thompson, 48 Vt. 259 (holding that if money borrowed by the agent on the credit of the principal, without authority, went into the principal's business without the latter's knowledge, although he had the benefit thereof, he was not liable therefor to the person of whom it was borrowed, in the absence of a promise to pay). See generally supra §§ 93, 94.

[a] **Usurious loans.**—Where an agent intrusted with money to loan at legal interest exacts as a condition of making the loan a bonus for himself, without the knowledge or authority of the principal, such act on his part does not constitute usury in the principal or affect the security in his name. Phillips v. Mackellar, 92 N. Y. 34; Estevez v. Purdy, 66 N. Y. 446 [rev 6 Hun 46].

2. Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 1 Colo. 531 (holding that a mining corporation, the agent of which without authority borrowed money on its behalf and used it in operating the mine, does not ratify the agent's act by retaining the ore taken from the mine with the use of the money borrowed by the agent, as it has a right to its own ore without ratifying or repudiating such loan).

As to duty to restore benefits see supra § 116.

3. Ratification of defective or invalid lease see generally Landlord and Tenant [24 Cyc 911].

4. Bicknell v. Austin Min. Co., 62 Fed. 432; Oregon R. Co. v. Oregon R., etc., Co., 28 Fed. 505; Franklin v. Pollard Mill Co., 88 Ala. 318, 6 S 685; Chamberlain v. Collinson, 45 Iowa 429; Triller v. Sadle, 92 Nebr. 579, 138 NW 728.

[a] **The acceptance of and action upon a release by a tenant** of a right to a renewal of the lease constitute a ratification by a landlord of the arrangement by which such release was procured by his agent. Number 121 Madison Ave. v. Osgood, 18 NYS 126.

5. Ehrmanntraut v. Robinson, 52 Minn. 333, 54 NW 188 (holding that where a principal, knowing that an unauthorized contract has been made by an agent in his behalf for the use and occupation of certain premises, enters into possession and enjoys their use without knowing or ascertaining what the terms of the lease are, he will be held to have intended to ratify the contract, whatever it may be).

6. U. S.—Lindroth v. Litchfield, 27 Fed. 894.

Colo.—Burkhard v. Mitchell, 16 Colo. 376, 26 P 657 (holding that where the owner claims that the agent had no authority to execute a lease for more than a year, but notwithstanding accepts rent from the tenants for four months after the end of the first year, he thereby ratifies the lease for the entire term, and cannot demand a higher rent for the balance of the term and oust the tenant for refusal to pay it).

Md.—Judik v. Crane, 81 Md. 610, 32 A 276; Reynolds v. Davidson, 34 Md. 662.

N. Y.—Hyatt v. Clark, 118 N. Y. 563, 23 NE 891 [aff 55 N. Y. Super. 98, 8 NYSt 134]; Anderson v. Conner, 43 Misc. 384, 87 NYS 449; Fleming v. Ryan, 10 Misc. 420, 31 NYS 129.

Wis.— Kriz v. Peege, 119 Wis. 105, 95 NW 108.

[a] **An extension under seal of a lease** by agents of the lessor without authority under seal may become valid and binding by ratification arising from the acceptance of rent by the lessor. Hamilton v. De Long, 147 Ill. A. 364.

[b] **Estoppel.**—(1) Where the owner of certain property authorized plaintiff to lease the same, and such owner received rent therefor, she was estopped to deny the execution of the lease on her own behalf. Niles v. Gonzales, 1 Cal. A. 324, 82 P 212. (2) So where the owner of the equitable title to land by an executory contract or title bond authorizes his vendor to renew a prior lease for oil and gas covering the larger tract, of which his land is a part, he thereby constitutes his vendor his agent to contract for such lease, and, by accepting through his agent his share of rental or commutation money accruing under such lease, he thereby ratifies the same, estopping him from thereafter setting up title to his land in hostility to that of such lessee. Mustard v. Big Creek Dev. Co., 69 W. Va. 713, 72 SE 1021.

7. Owens v. Swanton, 25 Wash. 112, 64 P 921.

8. Clement v Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 A 82, 118 AmSR 747 [rev 69 N. J. Eq. 347, 60 A 419]; Larkin v. Radosta, 119 App. Div. 515, 104 NYS 165 (holding that a landlord, who did not know that his agent, restricted to the making of monthly leases, had made a lease for three years, did not ratify the agent's act by receiving the monthly rent stipulated for).

9. U. S.—Pope v. Meadow Spring Distilling Co., 20 Fed. 35.

Ark.—Niemeyer Lumber Co. v. Moore, 55 Ark. 240, 17 SW 1028.

Colo.—Higgins v. Armstrong, 9 Colo. 38, 10 P 232.

Ill.—Sterling Bridge Co. v. Baker, 75 Ill. 139.

Ind.—Washburn-Crosby Milling Co. v. Brown, (A.) 104 NE 997 (holding that, where a buyer accepted a car of wheat after having received a letter from the seller stating that it was sold to the buyer's agent, it cannot afterward be heard to say that its agent acted without authority).

Iowa.—Palmer v. Cheney, 35 Iowa 281.

Ky.—Lathrop v. Commercial Bank, 8 Dana 114, 33 AmD 481 (holding that resistance by a corporation to an attempt to recover property which it had acquired by its agent is a sufficient recognition of the agency); Weisiger v. Graham, 3 Bibb 313; Weisiger v. Samuel, Litt. Sel. Cas. 185; Logan County Nat. Bank v. Townsend, 3 SW 122, 8 KyL 694; Georgetown Water Co. v. Central Thompson-Huston Co., 16 KyL 125.

La.—Cook v. State Bank, 2 La. Ann. 324.

Me.—Hastings v. Bangor House Proprietors, 18 Me. 436; Newhall v. Dunlap, 14 Me. 180, 31 AmD 45 (holding that where a principal claims goods purchased for him by his agent he cannot deny the authority of the agent to purchase them).

Mass.—Moody v. Blake, 117 Mass. 23, 19 AmR 394; Bearce v. Bowker, 115 Mass. 129.

Mo.—Carson v. Cummings, 69 Mo. 325; Brant v. Glove, 172 Mo. A. 420, 158 SW 453; Fahy v. Springfield Grocer Co., 67 Mo. A. 73; Ten Broek v. Winn Boiler Compound Co., 20 Mo. A. 19.

N. Y.—Smith v. Tracy, 36 N. Y. 79; Wheeler, etc., Mfg. Co. v. Elberson, 84 Hun 501, 32 NYS 303; Hess v. Baar, 14 Misc. 286, 35 NYS 687 [aff 11 Misc. 619, 32 NYS 918]; Moss v. Rossie Lead Min. Co., 5 Hill 137.

N. C.—Patton v. Brittain, 32 N. C. 8.

Or.—Duzan v. Meserve, 24 Or. 523, 34 P 548.

Pa.—Relf v. Mobile Bank, 20 Pa. 435.

Tex.—Conley v. Columbus Tap R. Co., 44 Tex. 579; Sanger v. Warren, (Civ. A.) 40 SW 840.

Vt.—Brooks v. Fletcher, 56 Vt. 624.

Va.—Downer v. Morrison, 2 Gratt. (43 Va.) 237.

Wash.—Higgins v. Produce Distributors Co., 78 Wash. 551, 139 P 500.

Wis.—Fintel v. Cook, 88 Wis. 485, 60 NW 788; Spaulding Lumber Co. v. Stout, 86 Wis. 89, 56 NW 189.

[a] **Where ranges alleged to have been sold conditionally** are accepted by the buyer and installed in his

had no knowledge of the agent's unauthorized acts,[10] or unless the acceptance is legally forced upon him;[11] and such a ratification also includes the fraud or representations of the agent in the course of the transaction as inducements to the purchase or acquisition.[12]

Receiving and using or disposing of property. If an agent purchases goods or materials without authority, or contrary to his instructions, but the principal receives the goods, sells them, or otherwise uses or disposes of them on his own account, he will be held to have ratified the purchase.[13] So

buildings as contemplated, it is immaterial to the validity of such contract that the seller's offer was accepted by the buyer's alleged agent whose authority was not proved. In re Cohen, 163 Fed. 444.

[b] **Machinery.**—Where the owner of a manufacturing plant permits his agent in charge of the property to put into the plant valuable machinery which is necessary in the operation of the plant, and thus appropriates the machinery to his own use, he is liable to the seller for the price, although he may have supposed that the agent bought the machinery on his own credit, and although the seller may have been ignorant of the fact that defendant constitutes the firm in the name of which the agent bought the property. Henry Voght Mach. Co. v. Lingenfelser, 62 SW 499, 23 KyL 38.

[c] **A principal who receives notes and machinery** as part of a transaction negotiated by an agent cannot retain such property and repudiate a condition in the agreement by which they were obtained. Aultman Co. v. McDonough, 110 Wis. 263, 85 NW 980.

[d] **Restoring goods.**—Where after an assignment of a stock of goods for creditors the assignor purchased other goods of plaintiff on credit, pretending to act as the assignee's agent, and placed them with the stock in the hands of the assignee who subsequently, when the assignor had settled with his creditors, turned back to the assignor said stock and the proceeds of all sales, before plaintiff made any claim upon the assignee, the assignee did not ratify the purchase. Knapp v. Smith, 97 Wis. 111, 72 NW 349.

10. Manning v. Gasharie, 27 Ind. 399 (holding that, where an agent, authorized to buy goods for cash, without the knowledge of his principal made an unauthorized purchase on credit, the acceptance and use of the goods by the principal did not operate as a ratification). See generally supra §§ 93–97.

[a] **Misunderstanding.**—The acceptance of a deed and of benefits thereunder by the principal is not a ratification of the unauthorized contract of the agent, where the agent and principal did not understand the contract as to consideration as it was understood by the other party. Boehm v. Yanquell, 15 Oh. Cir. Ct. 454, 8 Oh. Cir. Dec. 184.

[b] **Fraud of notary public.**—The mere acceptance of a deed by the grantees is not a ratification of fraudulent acts of a notary public in procuring the execution of the deed, where it is not shown that the grantees had any knowledge of the fraud. Cason v. Cason, 116 Tenn. 173, 93 SW 89.

11. Chaffe v. Barataria Canning Co., 113 La. 215, 36 S 943 (holding that, where defendant's agent, as its manager, was bound not to make purchases on its behalf beyond a certain limit, which limitation was not made known to others, and plaintiff went beyond the limit, and defendant was forced to take the goods and pay the price, defendant's acceptance of the situation was forced upon it, and was not a ratification of its agent's acts).

12. Walling v. Poulsen, 160 Mich. 392, 125 NW 373 (holding that, where a real estate broker sent M to plaintiffs to procure an option on a lot, the broker acting on the option secured was bound by any statements made by M to plaintiffs in the course of the transaction). See also supra § 117.

[a] **Smallness of consideration no defense.**—Where a principal is bound by the fraud of her agent by having accepted the fruits of his fraud, she cannot avoid its effect on the theory that a shockingly small consideration was given for the purchase of a title doubtful because of the uncertainty as to whether her conveyor was the real holder of the title, where her agent has in his possession the evidence on which the court has held that the identity of her conveyor as the holder of the title was established. Stevens v. Ozburn, 1 Tenn. Ch. A. 213.

13. U. S.—Bell v. Cunningham, 3 Pet. 69, 7 L. ed. 606; Willinks v. Hollingsworth, 6 Wheat. 240, 5 L. ed. 251; Clark v. Van Riemsdyk, 9 Cranch 153, 3 L. ed. 688; Loraine v. Cartwright, 15 F. Cas. No. 8,500, 3 Wash. C. C. 151.

Ala.—Thompson v. Stringfellow, 119 Ala. 317, 24 S 849.

Ark.—Pike v. Douglass, 28 Ark. 59.

Colo.—Witcher v. Gibson, 15 Colo. A. 163, 61 P 192 (holding that where an agent purchased lumber of plaintiff on credit, and his principal included the lumber so received in a mortgage made to a third person to secure certain indebtedness, and the lumber was sold under the mortgage, and the surplus over the indebtedness was received by the principal, he cannot defeat the claim of plaintiff on the ground that the agent was not authorized to purchase the lumber).

Ga.—Haney School Furniture Co. v. Hightower Baptist Inst., 113 Ga. 289, 38 SE 761 (holding that where a principal, after knowledge that an agent, without authority, has purchased for him certain property, retains possession and uses the same for a considerable period of time, and obtains the benefit thereof, such acts constitute a ratification of the unauthorized act of the agent, and render the principal liable for the payment of the purchase money); McDowell v. McKenzie, 65 Ga. 630; Ketchum v. Verdell, 42 Ga. 534; Byrne v. Doughty, 13 Ga. 46.

Ill.—Evans v. Chicago, etc., R. Co., 26 Ill. 189; Campbell v. Millar, 84 Ill. A. 208 (holding that where a person claiming to be an agent purchases on behalf of his principal a lot of mules, and the principal on receiving the mules by consignment protests that they were bought and consigned to him without authority, but afterward sells them, he will be held to have ratified the purchase).

Ky.—Luttrell v. East Tennessee Tel. Co., 86 SW 1124, 27 KyL 872; Southern Lumber Co. v. Wireman, 41 SW 297, 19 KyL 585.

La.—Slocomb v. Cage, 22 La. Ann. 165.

Mass.—French v. Price, 24 Pick. 13; Odiorne v. Maxcy, 13 Mass. 178.

N. Y.—Scott v. Middletown, etc., R. Co., 86 N. Y. 200; Lestershire Lumber, etc., Co. v. Minter, 158 App. Div. 849, 144 NYS 269; Kraus v. Mohlman Co., 18 Misc. 430, 42 NYS 23 [aff 17 Misc. 288, 40 NYS 367] (holding that evidence that defendant retained for forty days, without complaint, goods delivered to it by order of its employee, and that its catalogue listed as for sale that particular brand of goods, which brand was made only by plaintiff, will support a finding of ratification of the employee's act); Snyder v. Gardner, 13 Misc. 626, 34 NYS 936.

N. C.—Brittain v. Westhall, 135 N. C. 492, 47 SE 616; Williams v. Crosby Lumber Co., 118 N. C. 928, 24 SE 800.

N. D.—Russell v. Waterloo Threshing Mach. Co., 17 N. D. 248, 116 NW 611 (holding that retaining possession of property purchased by an agent, not authorized to do so, after knowledge of the unauthorized act and acquiescence in the sale of such property to another, is an implied ratification of the unauthorized purchase thereof).

Pa.—Haworth v. Truby, 138 Pa. 222, 20 A 942.

S. C.—Welch v. Clifton Mfg. Co., 55 S. C. 568, 33 SE 739.

Wis.—Roundy v. Erspamer, 112 Wis. 181, 87 NW 1087.

Eng.—Cornwal v. Wilson, 1 Ves. 509, 27 Reprint 1173.

See also supra § 117.

"If one purchase goods for another without authority, and the person for whom they are purchased receives them and uses or sells them on his own account, after being informed that they were purchased for him, this is an implied ratification of the act of the person making the purchase in his name. . . . And if, on receiving the goods, and being informed that they were purchased in his name, he merely informs the seller that the purchase was unauthorized, this is not enough, but he should restore the goods to the seller, or pay for them if he converts them to his own purposes." Pike v. Douglass, 28 Ark. 59, 61.

[a] **Illustrations.**—(1) Where goods are sold to one claiming to be a principal of a firm, but, in fact, to him as agent of the firm, the vendor is entitled to judgment against the firm, if it takes the goods and sells them. Howe v. Combs, 38 SW 1052, 18 KyL 1002. (2) Where a third person made a contract with plaintiff for the purchase of building materials, and defendant, with knowledge of the facts, accepted the benefits of the third person's acts, received the materials, and disposed of the same to his own use, and made payments according to the contract, a finding that the third person was defendant's agent was warranted. Swindell v. Gilbert, 100 Md. 399, 60 A 102. (3) Where, after being fully apprised of all the acts of an alleged agent in accepting plaintiff's proposition to furnish an engine and fittings for pumping water into his house, defendant permitted the attachments connecting his premises to remain and continued to derive the benefits resulting therefrom until he sold his premises together with his interest in said engine and fittings, the sum to be paid therefor being reserved in the hands of the purchaser, the acts of the agent were impliedly ratified. Hobkirk v. Green, 26 Misc. 18, 55 NYS 605. (4) Where the pastor of a church, who was chairman of the building committee, ordered an organ for the church, and the trustees voted three different times not to accept the organ but it was put up, and the seller was not notified of the trustees' decision until it had been used three years, the purchase was ratified, whether the pastor had authority to order the organ or not. Wright v. Vineyard M. E. Church, 72 Minn. 78, 74 NW 1015.

[b] **A principal's appropriation and sale of part of the goods** purchased by his agent without authority is a ratification of the entire transaction. Moffitt-West Drug Co. v. Lyneman, 10 Colo. A. 249, 50 P 736.

[c] **Where an agent purchases goods on credit** without authority

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also an agent's unauthorized purchase or acquisition of real estate is ratified where the principal, with knowledge of the facts, accepts and uses or disposes of the same,[14] as where he enters and makes improvements thereon.[15]

[§ 122] **(f) Sale or Transfer of Property.** Where a principal accepts the proceeds of a sale or transfer made in his behalf by an agent without authority, or in excess of his authority, as where he accepts the purchase-money notes given therefor,[16] or an installment of the price from the purchaser,[17] it will amount to a ratification of the unauthorized sale or transfer,[18] including agreements, representations, and warranties made by the agent as induce-

(1) the principal ratifies the purchase by accepting and retaining or selling the goods. Sartwell v. Frost, 122 Mass. 184; Welch v. Clifton Mfg. Co., 55 S. C. 568, 33 SE 739; Evans-Snider-Buel Co. v. Hilje, (Tex. Civ. A.) 83 SW 208. (2) Especially is this so where the principal has paid other bills for purchases on credit made by the same agent. McDowell v. McKenzie, 65 Ga. 630.

[d] **Where an agent in charge of a store** (1) purchases goods which are mingled with the rest of the stock and sold, the principal cannot keep the proceeds and repudiate the purchase on the ground that it was unauthorized. Moffitt-West Drug Co. v. Lyneman, 10 Colo. A. 249, 50 P 736. (2) Where a clerk left in general charge of a mercantile establishment during the absence of the proprietor orders goods appropriate to the conduct of the business, which are received and placed in stock, and the proprietor, upon ascertaining the facts, does not, within a reasonable time, countermand the order and offer to return the goods, he is bound to pay for the same, although the clerk transcended his authority in ordering the goods, it appearing that his want of authority was unknown to the seller. Smith v. Holbrook, 99 Ga. 256, 25 SE 627.

[e] **False representation of price.**— Where a party buys certain merchandise through the agency of a broker who falsely represents the price to be less than the vendor agreed to sell for, and before the delivery of the whole of the merchandise a notice of the real price is brought home to the buyer, he will be held to have ratified the contract made by the broker if he received the balance of the merchandise without repudiating the contract. Woods v. Rocchi, 32 La. Ann. 210.

14. Cal.—Blood v. La Serena Land, etc., Co., 113 Cal. 221, 41 P 1017, 45 P 252 (holding that, where land was purchased for a corporation by its officers without authority, and a mortgage was executed for the purchase price, and the corporation after learning of the transaction took possession of the land, surveyed and platted it, took its rents and profits, sold some of it, and exercised ownership over it subject to the mortgage, the corporation was bound by the purchase and mortgage).

Conn.—Duncan v. Kearney, 72 Conn. 585, 45 A 358 (holding that, where a purchaser had authorized an agent to negotiate for the purchase of certain premises, and the agent took a bond for a deed in his own name, his principal's payment of the purchase money and acceptance of the deed to himself, in pursuance of such bond, were a sufficient ratification of the agent's acts, although the original authority given the agent was not broad enough to cover the actual negotiation, and constituted a sale from the vendor to the principal, and not from vendor to the agent).

Kan.—McKinstry v. Citizens' Bank, 57 Kan. 279, 46 P 302 (holding that where C, without authority, purchased land and had it conveyed to M, and part of the price was paid in cash and a mortgage executed for the balance in the name of M by C, as attorney in fact, and M accepted the deed and retained the land, he was liable on the mortgage).

La.—Chambers v. Haney, 45 La. Ann. 447, 12 S 621.

N. Y.—Murray v. Sweasy, 69 App. Div. 45, 74 NYS 543 (holding that, an attorney having been held out to plaintiff and his wife by a mortgagee's representative as authorized to conduct the transaction, they were justified in relying on his apparent authority, and, by accepting the deed and the benefits accruing thereunder, his acts and the agreement as made by him were ratified and became binding on the representative).

Wash.—Peterson v. Hicks, 43 Wash. 412, 86 P 634.

[a] **The acceptance of a deed** (1) by one for another without authority is ratified by the other in subsequently accepting it himself. Ward v. Small, 90 Ky. 198, 13 SW 1070, 12 KyL 58; Miles v. Ogden, 54 Wis. 573, 12 NW 81. (2) But where an agent, in trading for certain lots for his principal, takes deeds thereto in the name of a third person, without the principal's consent, the mere receipt and retention of such deeds and the abstracts of title to the lots is not such a receipt and retention of benefits as will constitute a ratification of the transaction. Cole v. Baker, 16 S. D. 1, 91 NW 324.

15. Jenet v. Albers, 7 Colo. A. 271, 43 P 452; Vanderbilt v. Persse, 3 E. D. Smith (N. Y.) 428; William Wicke Co. v. Kaldenberg Mfg. Co., 21 Misc. 79, 46 NYS 937; Hall v. White, 123 Pa. 95, 16 A 521.

16. Wilder v. Beede, 119 Cal. 646, 51 P 1083; Des Moines Nat. Bank v. Meredith, 114 Iowa 9, 86 NW 46 (holding that where an agent authorized to sell and assign the interest of his principal in a certain business exceeds his authority in executing an assignment thereof which requires the principal to account for a certain note, but the principal receives the purchase-money notes taken by the agent from the assignee and retains and collects a portion thereof, with knowledge of the action of the agent, it is a ratification of his acts, which will require the principal to account to the assignee for such note).

17. Creson v. Ward, 66 Ark. 209, 49 SW 827 (holding that where a warehouseman's son, in charge of the warehouse, sold goods stored therein, believing them to have been abandoned, and when the father learned of the sale he made no objection, but accepted an installment of the price from the purchaser, it constituted a ratification making him liable for the conversion by his son).

18. U. S.—Schiffer v. Anderson, 146 Fed. 457, 76 CCA 667; Lindroth v. Litchfield, 27 Fed. 894; Forrestier v. Bordman, 9 F. Cas. No. 4,945, 1 Story 43.

Ark.—Kelly v. Carter, 55 Ark. 112, 17 SW 706.

Colo.—Brown v. Holloway, 47 Colo. 461, 108 P 25; Farrer v. Caster, 17 Colo. A. 41, 67 P 171.

Conn.—Ansonia v. Cooper, 64 Conn. 536, 30 A 760; Dunn v. Hartford, etc., R. Co., 43 Conn. 434.

Ga.—Stanley v. Glennville, 140 Ga. 306, 78 SE 1064.

Ill.—Prettyman v. Wilkey, 19 Ill. 235; Nicholson v. Doney, 37 Ill. A. 531; Baer v. Lichten, 24 Ill. A. 311.

Ind.—Wallace v. Lawyer, 90 Ind. 499; Barnett v. Gluting, 3 Ind. A. 415, 419, 29 NE 154, 927.

Iowa.—German Sav. Bank v. Des Moines Nat. Bank, 122 Iowa 737, 98 NW 606; Deering v. Grundy County Nat. Bank, 81 Iowa 222, 46 NW 1117; Palmer v. Cheney, 35 Iowa 281.

Ky.—Powell v. Gossom, 18 B. Mon. 179; Columbia Land, etc., Co. v. Tinsley, 60 SW 10, 22 KyL 1082; Graves v. Cord, 44 SW 665, 19 KyL 1893 (holding that where defendants sold plaintiff's tobacco without his consent, and he, after knowledge of the sale, accepted and retained his share of the proceeds thereof, without notifying defendants of his objection to the sale within a reasonable time, and until after a rise in the market, he was bound by the sale).

La.—Chambers v. Haney, 45 La. Ann. 447, 12 S 621; Thomas v. Scott, 3 Rob. 256; McDonald v. Catlett, 11 La. 503.

Me.—Leavitt v. Fairbanks, 92 Me. 521, 43 A 115; White v. Sanders, 32 Me. 188.

Mich.—Schmid v. Frankfort, 141 Mich. 291, 104 NW 668; Ripley v. Case, 86 Mich. 261, 49 NW 46; Vaughn v. Sheridan, 50 Mich. 155, 15 NW 62.

Minn.—Payne v. Hackney, 84 Minn. 195, 87 NW 608; Landin v. Moorhead Nat. Bank, 74 Minn. 222, 77 NW 35; Tilleny v. Wolverton, 54 Minn. 75, 55 NW 822.

Miss.—Meyer v. Morgan 51 Miss. 21, 24 AmR 617; Bias v. Cockrum, 37 Miss. 509, 75 AmD 76.

Mo.—Norton v. Bull, 43 Mo. 113; Short v. Stephens, 92 Mo. A. 151; Akers v. Ray County Sav. Bank, 63 Mo. A. 316; Clark v. Clark, 59 Mo. A. 532.

Nebr.—Rogers v. Empkie Hardware Co., 24 Nebr. 653, 39 NW 814; Sandwich Mfg. Co. v. Shiley, 15 Nebr. 109, 17 NW 267.

N. Y.—Smith v. Barnard, 148 N. Y. 420, 42 NE 1054; Coykendall v. Constable, 99 N. Y. 309, 1 NE 884; White v. Sheppard, 41 App. Div. 113, 58 NYS 563; Krumm v. Beach, 25 Hun 293 [aff 96 N. Y. 398]; Johnson v. Jones, 4 Barb. 369; Hess v. Baar, 11 Misc. 619, 32 NYS 918 [aff 14 Misc. 286, 35 NYS 687]; James v. Schmidt, 2 NYS 649.

N. C.—Osborne v. Durham, 157 N. C. 262, 72 SE 849 (holding that where agents to sell stock received notes and orders in payment therefor instead of cash, without express authority from their principal, and after the nonpayment of a draft on the corporation, which they had instructed their principal to draw, one of them gave his individual note for the amount, which was accepted, and proved the principal's claim under the draft against the insolvent estate of the corporation, with the knowledge and expressed satisfaction of the principal who also requested the maker of the note for advances to be credited thereon, there was a complete ratification of the sale).

N. D.—Westby v. J. I. Case Threshing Mach. Co., 21 N. D. 575, 132 NW 137 (holding that, where machinery is delivered under a contract of sale under which the company receives the price made by an agent in excess of his authority, the company must disaffirm the sale, or it will be held to ratify the agent's acts).

Pa.—Hetfield v. Addicks, 154 Pa. 1, 26 A 215; Central School Supply House v. Middleton Tp., 9 Pa. Super. 110; Warden v. Eichbaum, 3 Grant 42; Siemens Regenerative Gas Lamp Co. v. Horstmann, 24 WklyNC 396; Horter v. Silliman, 3 WklyNC 405.

R. I.—Robinson v. Bailey, 19 R. I. 464, 36 A 1126.

S. D. Hormann v. Sherin, 6 S. D. 82, 60 NW 145.

Tenn.—Seago v. Martin, 6 Heisk. 308.

Tex.—Goldschmidt v. Wagner, (Civ. A.) 99 SW 737 (retaining purchase price).

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ments to or part of the sale,[19] unless, at the time of such acceptance, he did not have knowledge of all the facts.[20]

Filling order procured by agent. If the principal receives from the agent an order for goods and accepts the order and ships the goods,[21] and accepts and retains notes given the agent for the purchase price,[22] it amounts to a ratification of the contract. So also where a principal with knowledge of the facts accepts and retains the proceeds or benefits of an unauthorized sale of, or contract to convey, land, he thereby ratifies the same,[23] including any warranties or representation made by the agent as an inducement to the sale.[24] But it has been

Wash.—Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 P 849.

W. Va.—Norman v. Bennett, 32 W. Va. 614, 9 SE 914.

Wis.—Fintel v. Cook, 88 Wis. 485, 60 NW 788; Parish v. Reeve, 63 Wis. 315, 23 NW 568; Pierce v. O'Keefe, 11 Wis. 180.

Ont.—Hendry v. Wismer, 2 Ont WN 560, 18 OntWR 350.

Sask.—Taylor v. Helgeson, 3 Sask. L. 461, 15 WestLR 273.

[a] **A failure to return or tender a return** of such portion of the purchase price as the principal has received, after he learns of the unauthorized sale, constitutes a ratification of the sale. Johnston v. Milwaukee, etc., Inv. Co., 49 Nebr. 68, 68 NW 383.

[b] **By retaining a check** given in payment of corporate stock, after being informed of the facts, plaintiff ratified her agent's act in delivering the stock, even if he previously misrepresented and withheld facts from her. Wann v. Scullin, 235 Mo. 629, 139 SW 425.

19. Ind.—Aultman v. Richardson, 21 Ind. A. 211, 52 NE 86.

Iowa.—Day v. Merrick, 138 NW 400 [mod reh on other grounds 139 NW 1076]; Blaess v. Nichols, etc., Co., 115 Iowa 373, 88 NW 829 (holding that, where the seller of machinery receives the consideration, it will not be heard, in an action on a warranty thereof, to deny that its agent had authority to make the sale and warranty).

Ky.—E. T. Kenney Co. v. Anderson, 81 SW 663, 26 KyL 367 [aff reh 83 SW 581, 26 KyL 1217].

Minn.—Freeman v. F. P. Harbaugh Co., 114 Minn. 283, 130 NW 1110.

Mo.—Meinershagen v. Taylor, 169 Mo. A. 12, 154 SW 886.

N. J.—O'Brien v. Paterson Brewing, etc., Co., 69 N. J. Eq. 117, 61 A 437 (holding that where defendant's agent, as a part of a sale of a saloon to complainant, agreed that complainant would not be called on to pay a note and mortgage given for prior indebtedness of the former occupant of the saloon to defendant so long as complainant bought his beer of defendant, and the latter accepted the benefits of such contract, it was not thereafter entitled to deny its agent's authority to make such collateral agreement).

N. Y.—Washburn v. Ranier Co., 130 App. Div. 42, 114 NYS 424 (sale of automobile).

Or.—Owen v. Jones, 136 P 332; Wilson v. McCarthy, 66 Or. 498, 134 P 1139.

Pa.—Fraser v. Stratford, 49 Pa. Super. 72; Rheinstrom v. Elk Brewing Co., 28 Pa. Super. 519.

See also supra § 117.

[a] **Misconduct.**—A seller who accepts a note from a self-constituted agent, knowing that it had been executed in advance of the delivery of the article sold, and for a sum largely in excess of its value, without inquiring as to the way in which such agent had procured the paper, adopts any misconduct of his agent therein. Wilder v. Beede, 119 Cal. 646, 51 P 1083.

20. Haswell v. Standring, 152 Iowa 291, 132 NW 417, AnnCas1913B 1326; Hogue v. Simonson, 94 App. Div. 139, 87 NYS 1065; Herman v. Leland, 80 Misc. (N. Y.) 598, 142 NYS 664 (holding that where defendant received the purchase money realized upon a sale of mortgaged personal property made by plaintiff at its request, and, on discovering that plaintiff was negligent and did not act as agent in making such sale, immediately returned the money to the purchaser, he thereby relieved himself from all responsibility for any act of plaintiff). See also supra § 115.

21. Ky.—Newton v. Bayless Fruit Co., 155 Ky. 440, 159 SW 968 (holding that the seller's acceptance of a contract of sale of five carloads of oranges made by a broker was shown by his shipment of two of the cars, assuming that such contract required acceptance or confirmation to make it a binding contract); Western Mfg. Co. v. Cotton, 104 SW 758, 31 KyL 1130, 12 LRANS 427 (holding that where a principal accepts an order for goods obtained by an agent it is bound by the agent's acts in obtaining it, although he violated the principal's instructions).

Me.—Billings v. Mason, 80 Me. 496, 15 A 59.

Mich.—Hassen v. Rolison, 156 Mich. 83, 120 NW 574 (holding that a principal retaining an order for goods procured by an agent and the notes for the price thereby ratifies the contract of sale); Hitchcock v. Griffin, etc., Co., 99 Mich. 447, 58 NW 373, 41 AmSR 624).

N. Y.—Canda v. Casey, 14 Misc. 322, 35 NYS 1054; Boyden v. Baldwin, 12 Misc. 549, 34 NYS 19 [aff 15 Misc. 103, 36 NYS 478].

Utah.—Smith v. Droubay, 20 Utah 443, 58 P 1112.

[a] **An offer by the principal to deliver goods** sold by an agent without authority is a ratification. Nichols v. Berning, 37 Ind. A. 109, 76 NE 776.

22. Aultman v. Richardson, 21 Ind. A. 211, 52 NE 86 (holding that acceptance by a seller of notes given his agent by the buyer, on the agent's promise to remedy defects in the property sold, is a ratification of such promise); Hartlove v. William Fait Co., 89 Md. 254, 43 A 62 (holding that where a sale of goods was made by an agent whose principal, on the presentation of the "sold note," objected to the time of payment but received and retained the note, and when called on to perform the contract did not repudiate it but defended his noncompliance by stating that he had suffered losses which prevented performance, it was sufficient, in an action for the breach, to show a ratification and an agreement to supply the goods on the terms stipulated); Hansen v. Rolison, 156 Mich. 83, 120 NW 574.

23. U. S.—Moody v. Eastern Oregon Land Co., 180 Fed. 532.

Ky.—Powell v. Gossom, 18 B. Mon. 179.

Mass.—Murray v. Mayo, 157 Mass. 248, 31 NE 1063.

Mo.—Kirkpatrick v. Pease, 202 Mo. 471, 101 SW 651 (holding that, although one gave an agent no written authority to sell her land, where she and her husband corresponded with him relative to a sale to plaintiff, and she knew that he was acting for her in selling the land and that he had made a deed therefor in her name, she having a copy thereof, and she accepted the full purchase price, there was an irrevocable ratification of the agent's acts).

Nebr.—Reed v. Morton, 24 Nebr. 760, 40 NW 282, 8 AmSR 247, 1 LRA 736 (holding that where a wife executed a deed in blank as to the name of the grantee and in other respects, and delivered such deed to her husband to sell and convey her real estate therein described, and the husband thereafter sold said real estate and filled the blanks in the deed and delivered it, and the wife with full knowledge received the proceeds, she by so doing ratified the sale and conveyance).

N. Y.—Finch v. Gillespie, 122 App. Div. 858, 107 NYS 418.

Tex.—Houston, etc., R. Co. v. Wright, 15 Tex. Civ. A. 151, 38 SW 836 (holding that a person who receives the price of land paid to another as his agent, knowing that it was paid to secure a deed to property owned by him, ratifies the agency, and is obligated to convey the land according to the agent's agreement); Rutherford v. Montgomery, 14 Tex. Civ. A. 319, 37 SW 625 (holding that a person who, knowing that another has purchased land as his agent, and has conveyed the same, in like capacity, by general warranty deed, accepts the benefits of the transaction by collecting the purchase notes will be liable to the grantee, although the latter had no knowledge of any agency when he purchased).

[a] **The absence of proof of written authority** to an agent to execute a land contract is unimportant in a case where there is full proof of ratification by both parties by demand and receipt of payment, and by possession and improvement. Hanchett v. McQueen, 32 Mich. 22.

[b] **Notwithstanding written authority is required** to insert the grantee's name in a deed left blank when executed, the grantors, accepting the consideration therefor, are estopped to question the validity of the deed as against the grantee. Ormsby v. Johnson, 24 S. D. 494, 124 NW 436.

[c] **Sale on credit.**—Where a landowner authorizes an attorney in fact to sell the land for cash, and after its sale, partly upon credit, receives and retains the cash proceeds, that is a ratification of the sale. Horst v. Lightfoot, (Tex.) 132 SW 761 [rev (Civ. A.) 122 SW 606].

[d] **Fraudulent sale; duty to return money.**—Where an agent authorized to invest and collect moneys and to sell lands, after having forged and recorded deeds which placed the apparent title to certain lands belonging to his principal in the agent's name, fraudulently sold the lands as his own, and remitted money received as the purchase price, without informing his principal of the sale, or from what source the money was received, but under circumstances such as to advise the principal that it was received in the course of the business, the principal must, on learning the facts, return the money to the purchaser, or by retaining it he will ratify the sale. Russ v. Hansen, 119 Iowa 375, 93 NW 502.

24. Shopbell v. Boyd, 9 Cal. A. 136, 98 P 69; Krolik v. Curry, 148 Mich. 214, 111 NW 761 (holding that, where an agent for the sale of land, while acting within the scope of his authority, is guilty of deceit and the principal accepts the benefits derived from the agent's misrepresentations, the principal is liable therefor); Judd v. Walker, 114 Mo. A. 128, 89 SW 558 (holding that where a real estate agent fraudulently misrepresented to a purchaser the acreage of a tract of land sold by the acre, and induced the vendor to permit an overstatement of the acreage of the land to be inserted in the deed, giving him an obligation to protect him in case the fraud was discovered, and the vendor also accepted compensation

held that where one assuming to act as agent for the owner of real estate enters into an oral contract of sale thereof and afterward tenders back the cash received, and no deed is signed or delivered, the purchaser cannot claim a ratification by the owner merely because the latter retains the purchase-money notes.[25]

[§ 123] **(g) Compromise or Settlement.** The acceptance and retention by the principal of money, property, or other benefits as the result of a compromise or settlement by the agent of claims in favor of or against the principal,[26] or of agreements by the agent to submit to arbitration matters in dispute,[27] constitute a ratification of the compromise, settlement, or arbitration, unless of course he is without knowledge of the facts.[28]

A settlement with an agent with full knowledge of his unauthorized acts, and payment or receipt of a balance due, have been held to amount to a ratification,[29] and if the principal receives the agent's notes in full settlement, he thereby ratifies the acts of his agent in making the collections so remitted.[30]

[§ 124] **d. Acquiescence or Silence—(1) General Rules.** Mere silence or delay on the part of a principal in repudiating the unauthorized act of an agent does not necessarily amount to a ratifica-

for more land than he owned, and the agent retained for himself the price paid for a number of acres which were supposed to be, but which were not, conveyed, the vendor, by knowingly accepting a benefit from the false and fraudulent representations of the agent, ratified and adopted the same, and was jointly liable with the agent therefor, although he was originally no party thereto); Morse v. Whitcomb, 54 Or. 412, 102 P 788, 103 P 775, 135 AmSR 832 (holding that where defendants' agent sold lots for them, receiving an increased price because of representations that an adjacent tract would be opened as a street, defendants, having received the proceeds, could not assert that their agent had exceeded his authority in making such representations). See also supra § 117.

[a] **Where a joint owner of real estate consents to the listing thereof** by his coöwner with real estate agents for sale, receives part of the consideration, and never repudiates the sale made by the agents after discovering that they were guilty of fraud, he is estopped to deny connection with the fraud, but will be held liable only to the extent of the benefit actually received. Alger v. Anderson, 78 Fed. 729.

[b] **If the principal has no knowledge** of an unauthorized warranty made by an agent in the sale of property not usually sold with warranty, his receipt of the proceeds of the sale does not constitute a ratification of the unauthorized warranty. Smith v. Tracy, 36 N. Y. 79.

25. Bromley v. Aday, 70 Ark. 351, 68 SW 32.

26. Colo.—Hagerman v. Bates, 24 Colo. 71, 49 P 139. Compare Beach v. Schroeder, 47 Colo. 312, 107 P 271.

Ill.—Marshall v. Moore, 36 Ill. 321.

Ind.—Wallace v. Lawyer, 90 Ind. 499; Hauss v. Niblack, 80 Ind. 407 (holding that, where some of a number of bondsmen employed an attorney at a certain fee to settle suits pending against all, and the others, with knowledge of the contract, enjoyed the fruits of the compromise, they thereby ratified the contract); American Quarries Co. v. Lay, 37 Ind. A. 886, 73 NE 608.

Iowa.—Zelenka v. Port Huron Mach. Co., 144 Iowa 592, 123 NW 332 (holding that a seller, having accepted and retained notes and a mortgage received by its agent as the proceeds of a settlement with a buyer, and having collected and retained the same, ratified the settlement, and could not thereafter repudiate the allowance of certain credits therein); Fleishman v. Ver Does, 111 Iowa 322, 82 NW 757 (holding that where an indebtedness was settled and receipted for in full by plaintiff's agent on acceptance of notes for a lesser amount and a mortgage securing the same, which notes and mortgage were turned over to plaintiff who kept the same and never tendered their return, although advised by defendant's answer, filed within three months thereafter, of the cancellation of the indebtedness, and their procurement by means thereof, no recovery could be had for the balance of such indebtedness nine months thereafter, although such cancellation was without authority, since the principal's acts constituted a ratification).

Kan.—Leavenworth County v. Hamlin, 31 Kan. 105, 1 P 237.

La.—Culverhouse v. Marx, 39 La. Ann. 809, 2 S 607; Ogden v. Marchand, 29 La. Ann. 61; Delaney v. Levi, 19 La. Ann. 251.

Md.—Maddux v. Bevan, 39 Md. 485.

Mass.—Kelley v. Newburyport, etc., R. Co., 141 Mass. 496, 6 NE 745.

Minn.—Jackson v. Badger, 35 Minn. 52, 26 NW 908.

Nev.—Adams v. Smith, 19 Nev. 259, 9 P 337, 10 P 353.

N. H.—Hoit v. Cooper, 41 N. H. 111.

N. Y.—Continental Nat. Bank v. Koehler, 117 N. Y. 657, 22 NE 1133; Keeler v. Salisbury, 33 N. Y. 648; West v. Banigan, 51 App. Div. 328, 64 NYS 884 [aff. 172 N. Y. 622 mem, 65 NE 1123 mem]; Ives v. Ives, 80 Hun 136, 29 NYS 1053; Haar v. Industrial Ben. Assoc., 71 Hun 554, 24 NYS 1035; Bridenbecker v. Lowell, 32 Barb. 9; Farmers', etc., Bank v. Sherman, 6 Bosw. 181 [aff 33 N. Y. 69]; Houghton v. Dodge, 5 Bosw. 326; Palmerton v. Huxford, 4 Den. 166.

N. C.—Southwest Nat. Bank v. Justice, 157 N. C. 373, 72 SE 1016.

N. D.—Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 NW 717.

S. C.—Tate v. Marco, 27 S. C. 493, 4 SE 71.

Tex.—Mayfield Woolen Mills Co. v. Long, (Civ. A.) 119 SW 908; Stetson-Preston Co. v. Dodson, (Civ. A.) 103 SW 685; Smith v. Cantrel, (Civ. A.) 50 SW 1081; Campbell v. Jenkins, (Civ. A.) 34 SW 673.

Vt.—Vermont State Baptist Convention v. Ladd, 58 Vt. 95, 4 A 634.

Va.—Higginbotham v. May, 90 Va. 233, 17 SE 941.

Wis.—Burke v. Milwaukee, etc., R. Co., 83 Wis. 410, 53 NW 692; Miles v. Ogden, 54 Wis. 573, 12 NW 81; Strasser v. Conklin, 54 Wis. 102, 11 NW 254; Reid v. Hibbard, 6 Wis. 175.

[a] **Where a principal retains money paid on a settlement,** with knowledge of all the facts pertaining to such settlement, it is a ratification thereof, although made by an agent without authority to make final settlements. Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 NW 717.

[b] **Where an agent with written power merely to receipt for money due** his principal, settles a claim with one who knows the terms of such power, but, relying on the agent's representations that he has authority to make the settlement, pays money thereon in good faith, the principal, by accepting and retaining the money, with full knowledge of what has been done, ratifies the settlement. National Imp., etc., Co. v. Malken, 103 Iowa 118, 72 NW 431.

[c] **Where a judgment creditor** placed his claim, then in judgment, in the hands of a collection agency, which compromised it by an agreement which the judgment debtor fully performed, and about five years later the creditor, learning of the settlement, demanded of and received from the agency the sum in its hands derived solely from the settlement, and not otherwise accounted for by it, conceding the want of authority to compromise the claim, the judgment creditor ratified its act. Cobb v. Edson, 84 NYS 916.

27. U. S.—Orvis v. Wells, 73 Fed. 110, 19 CCA 382.

Conn.—White v. Fox, 29 Conn. 570.

Ga.—Johnson v. Cochran, 81 Ga. 39, 6 SE 809, 12 AmSR 294; Perry v. Mulligan, 58 Ga. 479 (holding that after a person has taken and enjoyed large benefits from an award it is too late for him to object thereto on the ground that his agent had no written or other legal authority to bind him by the submission).

La.—Cobb v. Parham, 4 La. Ann. 148.

Mich.—Detroit v. Jackson, 1 Dougl. 106.

Miss.—Memphis, etc., R. Co. v. Scruggs, 50 Miss. 284.

N. H.—Furber v. Chamberlain, 29 N. H. 405.

N. Y.—Lowenstein v. McIntosh, 37 Barb. 251.

[a] **A submission to arbitration** by an agent without authority of controversies existing between the principal and another is ratified by the principal's acceptance of the award and an assignment of it to a stranger. Lowenstein v. McIntosh, 37 Barb. (N. Y.) 251.

28. Carter v. Roland, 53 Tex. 540.

29. Sanders v. Peck, 87 Fed. 61, 30 CCA 530 (holding that where the owner of property sold without authority by one assuming to act as his agent enters into negotiations with such assumed agent, without reservation, for a settlement, on the basis that the latter is accountable for the price, he thereby ratifies the sale, and cannot afterward withdraw such ratification and claim the property from the purchasers); Turner v. Wilcox, 54 Ga. 593; Sentell v. Kennedy, 29 La. Ann. 679; Warneken v. Marchand, 18 La. Ann. 147; Reed v. Ritchey, 2 La. Ann. 796.

[a] **Illustrations.**—(1) In Richmond Mfg. Co. v. Starks, 20 F. Cas. No. 11,802, 4 Mason 296, where it appeared that a factor was authorized to sell goods at a limited price, and that he afterward sold them below that price and sent an account to his principal of the sales and prices and authorized him to draw for the balance of the account, and that the principal received the account and drew for the balance and made no objection, in his letters or otherwise, to the conduct of the factor in the sales, it was held that there was sufficient evidence of a ratification. (2) Where the owner of stocks received information of a sale thereof by his agents in May and remained silent until September, when he demanded an account of sales, which was sent to him with a check for the balance due him, which he indorsed and collected, it was held that this amounted to a full ratification of the sale, and that it was too late for him afterward to seek to set it aside. Hanks v. Drake, 49 Barb. (N. Y.) 186.

30. Luckie v. Johnston, 89 Ga. 321, 15 SE 459; Lafitte v. Godchaux, 35 La. Ann. 1161; Cushman v. Loker, 2 Mass. 106.

tion,[31] but while it is not necessarily conclusive evidence of a ratification,[32] unless it cannot be explained on any other theory,[33] it is always an element to be considered in connection with other evidence tending to show a ratification,[34] and may alone be sufficient to justify a finding of ratification,[35] particularly where the circumstances impose a special duty upon the principal to speak,[36] as where the other party is liable to be misled or injured by his failure to do so.[37] As a general rule, however, if the principal on being informed of the unauthorized act of the agent does not then repudiate it or do so within a reasonable time thereafter, but without any objection acquiesces in what the agent has done, he will be held to have ratified the act,[38] and this is particularly true where the delay

31. U. S.—Salmon v. Austro-American Stave, etc., Co., 187 Fed. 564, 109 CCA 254.
Ala.—Mobile, etc., R. Co. v. Jay, 65 Ala. 113; Powell v. Henry, 27 Ala. 612.
Cal.—Deane v. Gray Bros. Artificial Stone Paving Co., 109 Cal. 433, 42 P 443; California Bank v. Sayre, 85 Cal. 102, 24 P 713.
Iowa.—Burlington Gaslight Co. v. Green, 22 Iowa 508.
La.—Guimbillot v. Abat, 6 Rob. 284.
N. J.—Dugan v. Lyman, (Ch.) 23 A 657.
Tenn.—Hatton v. Stewart, 2 Lea 233.
Tex.—Meyer v. Smith, 3 Tex. Civ. A. 37, 21 SW 995.
Vt.—White v. Langdon, 30 Vt. 599.
Va.—Hortons v. Towens, 6 Leigh 47.

[a] **Limited authority.**—In White v. Langdon, 30 Vt. 599, 603, the court said: "It is the duty of one trading with an agent who has only a limited and special authority, to make inquiry as to the extent of the agent's authority; if he omits inquiry, he does so at his peril. It is not the duty of the principal, upon hearing of the sale by the agent, to seek the purchaser and give him notice of his claim, and his omission to do so, and his mere silence, are not ordinarily to be construed as a ratification of the sale."

32. Colo.—Union Gold Min. Co. v. Rocky Mt. Nat. Bank, 2 Colo. 248.
Minn.—Smith v. Fletcher, 75 Minn. 189, 77 NW 800.
N. J.—Dugan v. Lyman, (Ch.) 23 A 657.
Tex.—Meyer v. Smith, 3 Tex. Civ. A. 37, 21 SW 995.
W. Va.—Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 69 SE 845, AnnCas1912B 148 and note.

33. St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 279, 90 SW 737 (where the court said: "It will be conclusive evidence of ratification if not explicable on any other theory").

34. Kraft v. Wilson, (Cal.) 37 P 790; Fischer v. Jordan, 54 App. Div. 621, 66 NYS 286 [aff 169 N. Y. 615 mem, 62 NE 1095 mem] (holding that, where a principal resisted payment on a contract on the ground that the agent making the contract had expended more money than he was authorized to do, the fact that he did not make such objection when the claim was first presented is strong evidence that the principal acquiesced in the contract of the agent); Thompson v. Laboringman's Mercantile, etc., Co., 60 W. Va. 42, 53 SE 908, 6 LRANS 311.

[a] **"The silence of a principal,** after receiving notice that his agent has assumed to bind him by an unauthorized act, may be a fact to be weighed on the issue of whether the principal ratified the act, or may raise a presumption that he ratified it, according to circumstances." St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 278, 90 SW 737.

[b] **"Acquiescence,** although it may not in itself be ratification, is nevertheless evidence of it." Allen v. Corn Exch. Bank, 87 App. Div. 335, 340, 84 NYS 1001.

35. Lee v. Fontaine, 10 Ala. 755, 44 AmD 505; Lynch v. Smyth, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670]; Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 565; Toledo, etc., R. Co. v. Prince, 50 Ill. 26; Lemcke v. Funk, 78 Wash. 460, 139 P 234.

36. Lepman v. Woods, 79 Ill. A. 269; Metcalf v. Williams, 144 Mass. 452, 11 NE 700.

37. Lee v. Fontaine, 10 Ala. 755, 44 AmD 505; Lepman v. Woods, 79 Ill. A. 269; Metcalf v. Williams, 144 Mass. 452, 11 NE 700. See also infra § 127.

[a] **Mere silence or nonaction, after knowledge,** is evidence of ratification, but is not conclusive, except where the facts are such that the law will presume that the agent or a third party would be prejudiced by the delay to speak or act if the principal should thereafter be permitted to assert that he had not authorized or ratified the act. Smith v. Fletcher, 75 Minn. 189, 77 NW 800.

38. U. S.—Union Gold Min. Co. v. Rocky Mt. Nat. Bank, 96 U. S. 640, 24 L. ed. 648; Bell v. Cunningham, 3 Pet. 69, 7 L. ed. 606; Smith v. Collins, 165 Fed. 148, 91 CCA 182; American China Development Co. v. Boyd, 148 Fed. 258; Central Trust Co. v. Ashville Land Co., 72 Fed. 361, 18 CCA 590; Rice v. Ege, 42 Fed. 661; Lorie v. North Chicago City R. Co., 32 Fed. 270; Colt v. Rood, 6 F. Cas. No. 3,031, 6 McLean 106; Wilcox v. Phillips, 29 F. Cas. No. 17,639, 1 Wall. Jr. 47.
Ala.—Pollock v. Gantt, 69 Ala. 373, 44 AmR 519; Lee v. Fontaine, 10 Ala. 755, 44 AmD 505.
Ark.—Dierks Lumber, etc., Co. v. Coffman, 96 Ark. 505, 132 SW 654; Ladenberg v. Beal-Doyle Dry Goods Co., 83 Ark. 440, 104 SW 145; Lyon v. Tams, 11 Ark. 189.
Cal.—Alcorn v. Gieseke, 158 Cal. 396, 111 P 98; B. & W. Engineering Co. v. Beam, 23 Cal. A. 164, 137 P 624.
Colo.—Lynch v. Smyth, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670]; King v. Rea, 13 Colo. 69, 21 P 1084; Higgins v. Armstrong, 9 Colo. 38, 10 P 232; Breed v. Central City First Nat. Bank, 6 Colo. 235; Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 565; Tennis v. Barnes, 11 Colo. A. 196, 52 P 1038 (holding that silence and apparent acquiescence of one whose property has been conveyed by one having authority, by power of attorney, to convey to a creditor of the owner in satisfaction of his claim amount to an affirmance of the conveyance).
Del.—Massey v. Greenbaum, 21 Del. 20, 58 A 804 (holding that where plaintiffs agreed to buy tomatoes for defendants, and defendants failed to repudiate the contract on the ground that plaintiffs bought for others, in violation of their contract, until after plaintiffs had purchased and shipped certain tomatoes to defendants, which were refused, defendants thereby waived the right to object to such purchases and shipments on such ground).
Ga.—Augusta Land Co. v. Augusta R., etc., Co., 140 Ga. 519, 526, 79 SE 138 [cit Cyc]; Whitley v. James, 121 Ga. 521, 49 SE 600; Crockett v. Chattahoochee Brick Co., 95 Ga. 540, 21 SE 42; Bray v. Gunn, 53 Ga. 144; Byrne v. Doughty, 13 Ga. 46.
Ill.—Ernst v. McChesney, 186 Ill. 617, 58 NE 399 [aff 89 Ill. A. 164]; Booth v. Wiley, 102 Ill. 84; Darst v. Gale, 83 Ill. 136; Indianapolis, etc., R. Co. v. Morris, 67 Ill. 295; Ward v. Williams, 26 Ill. 447, 79 AmD 385; Hall v. Harper, 17 Ill. 82; Elevator Supply, etc., Co. v. Biddle-Murray Mfg. Co., 156 Ill. A. 461; Joseph Wolf Co. v. Bank of Commerce, 107 Ill. A. 58; Lepman v. Woods, 79 Ill. A. 269; McCord v. Manson, 17 Ill. A. 118.
Ind.—Terre Haute, etc., R. Co. v. Stockwell, 118 Ind. 98, 20 NE 650; Welker v. Appleman, 44 Ind. A. 699, 90 NE 35.
Iowa.—Henderson v. Beatty, 124 Iowa 163, 99 NW 716; Bellinger v. Collins, 117 Iowa 173, 90 NW 609; Wright v. Farmers' Mut. Live-Stock Ins. Assoc., 96 Iowa 360, 65 NW 308; Bray v. Smith, 87 Iowa 339, 54 NW 222; Minnesota Linseed Oil Co. v. Montague, 65 Iowa 67, 21 NW 184; Farwell v. Howard, 26 Iowa 381.
Kan.—Halloway v. Arkansas City Milling Co., 77 Kan. 76, 93 P 577; Kaffer v. Walters, 9 Kan. A. 291, 61 P 323.
Ky.—Wheeler v. Citizens' Nat. Bank, 107 SW 316, 32 KyL 939; Pennsylvania Iron Works Co. v. Henry Veght Mach. Co., 96 SW 551, 29 KyL 861, 8 LRANS 1023 (holding that a corporation's failure to disapprove or repudiate a letter written by its agent which was libelous per se after obtaining knowledge of its publication operated as a ratification and approval of the libel).
La.—Johnson v. Carrere, 45 La. Ann. 847, 13 S 195; Kehlor v. Kemble, 26 La. Ann. 713; Dunklin v. Horrell, 23 La. Ann. 394; Mangum v. Bell, 20 La. Ann. 215; Delaney v. Levi, 19 La. Ann. 251; Starr v. Zacharie, 18 La. 517; Dupre v. Splane, 16 La. 51; Segond v. Thomas, 10 La. 295.
Mass.—Brigham v. Peters, 1 Gray 139; Shaw v. Nudd, 8 Pick. 9; Pratt v. Putnam, 13 Mass. 361.
Mich.—Cooper v. Mulder, 74 Mich. 374, 41 NW 1084.
Minn.—Lowe v. Benz, 107 Minn. 562, 119 NW 249; Johnson v. Ogren, 102 Minn. 8, 112 NW 894; Smith v. Fletcher, 75 Minn. 189, 77 NW 800; Stearns v. Johnson, 19 Minn. 540.
Miss.—Meyer v. Morgan, 51 Miss. 21, 24 AmR 617 (holding that the principal when informed of the unauthorized acts of his agent with respect to property must, within a reasonable time, elect to approve or disaffirm them; and if he does not disaffirm them, and so inform the agent, the latter may presume that his conduct has been affirmed).
Mo.—Schmidt v. Rankin, 193 Mo. 254, 91 SW 78; Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019; Mayer v. Old, 57 Mo. A. 639.
Nebr.—German Nat. Bank v. Hastings First Nat. Bank, 59 Nebr. 7, 80 NW 48; Oberne v. Burke, 50 Nebr. 764, 70 NW 387; Day v. Miller, 1 Nebr. (Unoff.) 107, 95 NW 359.
Nev.—Martin v. Victor Mill, etc., Co., 19 Nev. 180, 8 P 161.
N. H.—Wright v. Boynton, 37 N. H. 9, 72 AmD 319.
N. Y.—Hyatt v. Clark, 118 N. Y. 563, 23 NE 891; Andrews v. Ætna L. Ins. Co., 92 N. Y. 596; Olcott v. Tioga R. Co., 27 N. Y. 546, 84 AmD 298; Hazard v. Spears, 4 Keyes 469; Bliss v. Sherrill, 24 App. Div. 280, 49 NYS 561; Myers v. Mutual L. Ins. Co., 32 Hun 321 [aff 99 N. Y. 1, 1 NE 33]; Wardrop v. Dunlop, 1 Hun 325 [aff 59 N. Y. 634 mem]; Bridenbecker v. Lowell, 32 Barb. 9; Johnson v. Jones, 4 Barb. 369; Benedict v. Rockwell, 25 Misc. 325, 54 NYS 581; Maltz v. Westchester County Brewing Co., 140 NYS 521; Mitchell v. Gennis, 124 NYS 996; Bryce v. Clark, 16 NYS 854; Austin v. Wilson, 11 NYS 565.
N. C.—Osborne v. Durham, 157 N.

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has been for a long period,[39] or where the principal's | silence or failure to disavow is accompanied by

C. 262, 72 SE 849; Brown v. Smith, 67 N. C. 245.

N. D.—Russell v. Waterloo Threshing Mach. Co., 17 N. D. 248, 116 NW 611.

Or.—Curtze v. Iron Dyke Copper Min. Co., 46 Or. 601, 81 P 815.

Pa.—Knauer v. McKoon, 19 Pa. Super. 539; Himes v. Herr, 3 Pa. Super. 124, 39 WklyNC 568; Massey v. Insurance Co., 3 Phila. 200; Brown v. Weinmann, 34 PittsbLegJNS 400.

Tenn.—Hart v. Dixon, 5 Lea 336; Walker v. Walker, 7 Baxt. 260; Fort v. Coker, 11 Heisk. 579; Bement v. Armstrong, (Ch. A.) 39 SW 899.

Tex.—Yellow Pine Lumber Co. v. Carroll, 76 Tex. 135, 13 SW 261; Miller v. Hobdy, (Civ. A.) 159 SW 96; Brennon v. Dansby, 43 Tex. Civ. A. 7, 95 SW 700; Pillman v. Freidberg, 2 Tex. A. Civ. Cas. § 582.

Vt.—Keyes v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201.

Va.—Forbes v. Hagman, 75 Va. 168.

Wash.—Ankeny v. Young, 52 Wash. 235, 100 P 736.

W. Va.—Mann v. Peck, 45 W. Va. 18, 30 SE 206; Curry v. Hale, 15 W. Va. 867.

Wis.—Platt v. Schmitt, 117 Wis. 489, 94 NW 345; Roundy v. Erspamer, 112 Wis. 181, 87 NW 1087; McWhinne v. Martin, 77 Wis. 182, 46 NW 118; Saveland v. Green, 40 Wis. 431.

Eng.—Loring v. Davis, 32 Ch. D. 625; Sentance v. Hawley, 13 C. B. N. S. 458, 106 ECL 458, 143 Reprint 182.

N. S.—McDonald v. Morrison, 27 N. S. 347.

Ont.—Thompson v. Playfair, 26 Ont. L. 624, 6 DomLR 268, 3 OntWN 1539, 22 OntWR 866 [aff 25 Ont. L. 365, 2 DomLR 37, 20 OntWR 867]; Conant v. Miall, 17 Grant Ch. (U. C.) 574; McLean v. Hime, 27 U. C. C. P. 195.

Newfoundl.—Gallop v. New York, etc., Tel. Co., 3 Newfoundl. 195.

[a] **Illustrations.**—(1) Knowledge that salary is being paid and services performed under a contract for a specified term operates as a ratification of the execution of such contract by one who may have been insufficiently authorized. Kennedy v. Supreme Lodge K. P., 124 Ill. A. 55. (2) Where changes are made in a contract of sale signed by a purchaser for submission to the vendor by his broker, the purchaser making the broker his agent in procuring the contract is bound thereby, unless he refuses to ratify the alterations after being informed thereof. Heinemann v. Sullivan, 57 Wash. 346, 106 P 911. (3) Where an agent having express or implied authority, or by special directions of a superior officer of his corporation principal, makes an agreement for services at a stipulated price, which is acted on by the principal, the latter is liable for such stipulated price, in the absence of fraud on the part of the contractor. Glucose Sugar Refining Co. v. Flinn, 184 Ill. 123, 56 NE 400 [aff 85 Ill. A. 131]. (4) Although the person representing a railroad company has no authority to agree with a landowner that part of the right of way shall be given for street purposes, the company, by leaving the land unfenced as part of the street, and knowing that it is so used and that improvements are made with a view to its continued use as a street, adopts the agreement. Burlington, etc., R. Co. v. Columbus Junction, 104 Iowa 110, 73 NW 501. (5) If an agent to sell goods reports to his principal that he has made a sale for a price less than that authorized, his principal should disaffirm the same within a reasonable time, or he will be held to have ratified it. Halloway v. Arkansas City Milling Co., 77 Kan. 76, 93 P 577. (6) The facts that the principal does not give notice of his repudiation of an alleged unauthorized guaranty contract, executed by the agent, until after default of the debtor, that the principal holds a mortgage on the debtor's property, and that the agent, before maturity of the mortgage debt, induces the debtor to turn over the property to be sold in satisfaction of the principal's claims, including the debt guaranteed, his authority to do so not being questioned, are sufficient to show a ratification of the guaranty contract. Oberne v. Burke, 50 Nebr. 764, 70 NW 387. (7) Where an innkeeper notifies the principal that the salesman's hotel bill is unpaid, and thereafter the principal continues to furnish the salesman money to pay his hotel bills, the principal becomes liable for such unpaid bills. Grand Ave. Hotel Co. v. Friedman, 83 Mo. A. 491.

[b] **A written consent to the construction of a street railway,** signed by the daughter of the owner in his name, is binding on him where it appears that such owner is properly informed of what she has done and makes no objection thereto. Day v. Forest City R. Co., 27 Oh. Cir. Ct. 60.

[c] **Where a person leaves the operation of his store** entirely to the management of a minor son, and is aware that others continue shipping goods, which are used therein, although he has told their agent that he would buy no more of their goods and instructed his son not to buy of them, it is sufficient to show ratification of the son's purchases. Roundy v. Erspamer, 112 Wis. 181, 87 NW 1087.

[d] **Selling on credit.**—(1) Where an employee managing a business fails to comply with an agreement requiring him to sell for cash only, if the employer frequently visits the store, carefully examines into the management and books, and thereby knows that the employee is selling goods on credit, and does not express dissatisfaction, the selling of the goods on credit is ratified by the employer, and he is estopped from claiming that the employee was not authorized to sell goods on credit. Kaffer v. Walters, 9 Kan. A. 291, 61 P 323. (2) So where a principal sends to his agent warehouse receipts, with instructions to sell them for cash, and the agent takes notes instead of cash and sends the notes to his principal who holds them until maturity, the principal is estopped from repudiating the act of the agent in taking notes instead of cash for the receipts. Sloan v. Johnson, 20 Pa. Super. 643.

[e] **Misappropriation.**—Where a principal sends money to a bank by a nephew for credit on a note, and the nephew fraudulently credits it on his own note, the principal cannot recover from the bank if upon learning of the misappropriation he makes no claim against the bank but without its request takes a note from the nephew for the amount, with attempted security, and makes no demand upon the bank until the nephew has absconded. Wheeler v. Citizens' Nat. Bank, 107 SW 316, 32 KyL 939.

[f] **Acceptance of counterpart of contract.**—Where an agent executes an agreement, required to be in writing by the statute of frauds, and takes back a counterpart signed by the other party, an acceptance of this counterpart by the principal, without objection, is a ratification of the agent's acts, and the principal is bound by the contract. Shaw v. Nudd, 8 Pick. (Mass.) 9.

39. Colo.—Hoosac Min., etc., Co. v. Donat, 10 Colo. 529, 16 P 157 (over one hundred days).

Conn.—J. B. Owens Pottery Co. v. Turnbull Co., 75 Conn. 628, 54 A 1122.

Ga.—Whitley v. James, 121 Ga. 521, 49 SE 600 (holding that acquiescence in a sale by an agent of land to a corporation of which he was president and director will be implied, where the purchaser entered under a recorded deed in 1889 and remained in possession until 1903, when suit was brought).

Ill.—Swartwout v. Evans, 37 Ill. 442 (two years); Williams v. Merritt, 23 Ill. 623 (eighteen years); Warren Dist. Dev. Co. v. Miners, etc., Bank, 166 Ill. A. 540.

Ind.—Wakeman v. Jones, Smith 308 (several years).

Iowa.—Henderson v. Beatty, 124 Iowa 163, 99 NW 716 (holding that where an agent who had contracted for the purchase of land signified to the vendors, who did not know that the principal had any interest in the transaction, that he was willing to withdraw from the contract, and the purchase money was neither paid nor tendered, the silence of the principal for over two years will be presumed to be an acquiescence in the act of the agent).

Mich.—Hurley v. Watson, 68 Mich. 531, 36 NW 726 (holding that knowledge on the part of a firm of coal dealers that a clerk had for more than seven years been in the habit of applying his rent and other claims due from him to his landlord on account of coal purchased of said firm by the landlord, during which time no objection was made by said firm, amounts to a ratification of such unauthorized course of dealing).

Miss.—Bias v. Cockrum, 37 Miss. 509, 75 AmD 76 (twenty years).

Mo.—Chouteau v. Allen, 70 Mo. 290.

Nebr.—Day v. Miller, 1 Nebr. (Unoff.) 107, 95 NW 359 (holding that where one who loaned money on negotiable securities sold the same before due, and on maturity received payment therefor from the mortgagor, and subsequently executed his own obligation to the holder for the amount so received, who, after having learned of the payment, retained such obligations for more than two years without objection, he will be held to have ratified the receipt of the money as done by his agent, and will be estopped from enforcing the securities against the borrower).

N. J.—Baldwin v. Howell, (Ch.) 30 A 423.

N. Y.—Grabfield v. Haralson County Bank, 155 App. Div. 156, 140 NYS 4; Manning v. Heidelbach, 153 App. Div. 790, 138 NYS 750; Vosbury v. Mallory, 70 App. Div. 247, 75 NYS 480 (over two years); Goldstein v. Tank, 73 Misc. 300, 132 NYS 466 [aff 149 App. Div. 941, 134 NYS 262] (more than two months); Ketchem v. Marsland, 18 Misc. 450, 42 NYS 7 (holding that a principal is bound by his agent's unauthorized act, where he neglects to disavow it for over three years after notice of a claim founded thereon).

Pa.—DeWitt v. DeWitt, 202 Pa. 255, 51 A 987 (holding that where a widow does not formally constitute her son her agent but treats him as such, and, on the sale of her husband's real estate to pay debts, allows him to act for her in the collection of the rents and income due her on her dower interest for nineteen years, she cannot thereafter, on his failure to turn over such amount, seek either an allotment of dower or an accounting from the purchaser as to such rents and profits); Auge v. Darlington, 185 Pa. 111, 39 A 845 (holding that the unauthorized act of an agent in selling certain bonds and investing the proceeds in other bonds for his principal was ratified by the principal, where she made no objection until four years after she had received the new bonds and had been advised of the transaction, although both parties lived in the same town, and she had ample means of knowing the exact situation); Hotchkiss v. Roehm, 181 Pa. 65, 37 A 119 (over a month); Andersen Coal Min. Co. v. Sloan, 46 Pa. Super. 320 (two months).

Tenn.—Bement v. Armstrong, (Ch. A.) 39 SW 899 (delay for a month).

Tex.—Shinn v. Hicks, 68 Tex. 277,

acts on his part indicating an approval or recognition of the agent's acts,[40] as where he receives and retains possession of, or exercises acts of dominion over, the subject matter of the unauthorized act;[41] or where the circumstances are such as to impose upon the principal a duty to act promptly,[42] as where loss or injury to the other party is likely to result from a failure to do so.[43] But if the principal has promptly expressed his disapproval of the act a delay in asserting his rights will not be deemed a ratification,[44] if his subsequent conduct is not inconsistent with his original repudiation.[45]

Not replying to letter. It has been held that a ratification may be inferred where the agent has informed his principal of his acts by letter but received no reply,[46] unless the letter does not contain

4 SW 486; Angel v. Miller, 16 Tex. Civ. A. 679, 39 SW 1092 (holding that where an agent representing a nonresident in making loans and receiving interest thereon extends the time of payment of a loan, and the principal receives the interest paid on the granting of the extension, and at no time repudiates such extension, his executor cannot, six years later, question the agent's authority to give the extension).

Wash.—Matzger v. Arcade Bldg., etc., Co., 141 P 900 (holding that where a lessor, knowing that its agent had executed a lease in his own name, permitted the lessee to remain in possession for almost the entire term, and assured the lessee that he could remain out the remainder of his term, the lessor ratified the lease).

W. Va.—Ruffner v. Hewitt, 7 W. Va. 585.

Wis.—Leggett v. West Salem Canning Co., 155 Wis. 462, 144 NW 969 (over a month after knowledge).

[a] **"Ratification of an unauthorized act of an agent may be presumed** from long continued silence of a principal who has knowledge of the facts constituting such ratification." Minneapolis Threshing Mach. Co. v. Humphrey, 27 Okl. 694, 698, 117 P 203.

[b] **Delay must be long continued.**—"In order that acquiescence alone should become ratification the delay must be so long continued that it can be accounted for only on the theory that there has been some affirmative act." Mallory v. Mallory Wheeler Co., 61 Conn. 131, 142, 23 A 708.

Time for disavowal see generally infra § 126.

40. Columbia Mfg. Co. v. Hastings, 121 Fed. 328, 57 CCA 504 (holding that the fact that an agent through whom orders were sent to defendant for its acceptance was interested in a firm for which he sent in an order, if unknown to defendant at the time it accepted such order, might entitle it to rescind the contract within a reasonable time after obtaining knowledge of the connection, but, where it afterward filled a portion of the order without any objection, it waived the right to object on that ground, and the contract became binding upon it); Curnane v. Scheidel, 70 Conn. 13, 38 A 875 (holding that it is enough to show ratification by plaintiff of a trade by S, plaintiff's father-in-law, with defendant, of a horse belonging to plaintiff, but which he had for years permitted S to keep and use, that when, on the day following, S informed plaintiff of the circumstances thereof plaintiff, although dissatisfied with the results thereof, expressed no disapproval of his assumption of authority to make it but told him to "fix it up," and, in conversation with defendant, neither disaffirmed the trade nor denied the ownership of S, but told defendant that it would be all right if he would pay the "boot" money, and afterward permitted, if he did not authorize, action, in which S was plaintiff and alleged to be owner of the horse, against defendant, for fraud in the trade); Christopher v. National Brewery Co., 72 Mo. A. 121 (holding that the owner of land, by excepting from the general warranty in a deed from him a certain lease to the land, thereby ratified the unauthorized act of his agent in making the lease); Rollins v. Bowman Cycle Co., 84 App. Div. 287, 82 NYS 781 (holding that where plaintiff called at the place of business of defendant, a repairer of bicycles, and left his bicycle for repairs with one whom he found in charge, it being agreed between them that the machine should be repaired and shipped to plaintiff and the amount of the repairs charged to him, the subsequent act of defendant in accepting the machine and repairing it was a ratification of the contract of its agent to whom the machine was delivered, and hence defendant was bound to ship the bicycle, and was liable in damages for holding it for the repair charges). See also cases supra note 38. And see supra § 109.

[a] **Where a shipper accepts and acts on a paper given to his agent** as a bill of lading, and which contains a provision limiting the carrier's liability in case of loss, he cannot deny that such was the contract, on the ground that his agent was unable to read it. Missouri, etc., R. Co. v. Patrick, 144 Fed. 632, 75 CCA 434 [mod 5 Ind. T. 742, 88 SW 330].

[b] **Where an agent of certain real estate, without written authority, leased the premises** for a term of five years, and the principal, with knowledge of the fact, and that subsequent assignments of the lease had been made with the consent of the agent, conveyed the premises by a deed recognizing the existence of the lease, there was a ratification of the act of the agent which would prevent the grantee of the premises with notice from evicting the tenant or setting up an adverse title whether or not the lease was void because executed by an agent not "thereunto authorized by writing," as required by statute. Applebaum v. Galewski, 34 Misc. 281, 69 NYS 636.

[c] **Where an agent, holding a note, makes a contract for its extension** without the consent of a surety, and his principal, knowing of it, accepts certain additional interest notes without objection, he ratifies his agent's act in extending the note and is bound thereby. J. T. Donovan Real Estate Co. v. Clark, 84 Mo. A. 163.

[d] **Where a seller recognizes a verbal contract** by its agent for the sale of fuel oil, and ships a part of the oil pursuant thereto, it is bound by the contract, whether the agent had authority to make the contract or not. Texas Co. v. Alamo Cement Co., (Tex. Civ. A.) 168 SW 62.

41. Whitley v. James, 121 Ga. 521, 49 SE 600; Hix v. Eastern Steamship Co., 107 Me. 357, 78 A 379 (holding that where the employee of shippers of horses signed a bill of lading limiting the carrier's liability without express instructions, and one of his employers received a duplicate bill so signed, and did not repudiate it but retained it in his possession, he ratified the agent's act and was bound thereby); Day v. Miller, 1 Nebr. (Unoff.) 107, 95 NW 359; Mitchell v. Gennis, 124 NYS 996 (holding that while a principal cannot be deemed to have ratified the act of an assumed agent, unless he has full knowledge of the facts, yet where he received, retained, and exercised dominion over goods shipped to him on the assumed agent's order, and promptly received statements of account without making a seasonable objection, he is liable). See also cases supra notes 38, 40.

[a] **Where with full knowledge the principal holds notes for an unreasonable time,** this failure to repudiate his agent's act in receiving them will be held a ratification. State Bank v. Kelly, 109 Iowa 544, 80 NW 520; Jennison v. Parker, 7 Mich. 355; Plano Mfg. Co. v. Buxton, 36 Minn. 203, 30 NW 668; Hotchkiss v. Roehm, 181 Pa. 65, 37 A 119 (holding that, where an agent without authority sold his principal's notes for part cash and the residue in notes of other persons, an effort of the principal to rescind, made after he had received the notes and over a month after one of them had matured, came too late); Southern Oil Works v. Jefferson, 2 Lea (Tenn.) 581.

[b] **Where a defendant retains possession of personal property stored with it** under an unauthorized agreement by its agent that there will be no storage charge, but does not notify the owner of the property that it repudiates such unauthorized agreement, or that compensation must be made for storage, it cannot claim the lien given by statute to warehousemen for storage of goods. Knight v. Beckwith Commercial Co., 6 Wyo. 500, 46 P 1094.

42. Harrod v. McDaniels, 126 Mass. 413; Curry v. Hale, 15 W. Va. 867.

43. Lepman v. Woods, 79 Ill. A. 269; Metcalf v. Williams, 144 Mass. 452, 11 NE 700; Russell v. Waterloo Threshing Mach. Co., 17 N. D. 248, 116 NW 611. See also infra § 127.

[a] **"The rule is elementary** that when an agent, in contracting for his principal, exceeds his authority, the principal, upon being fully informed of the facts, must, within a reasonable time, disavow or disaffirm the act of his agent, especially in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified and affirmed such unauthorized act." Reid v. Alaska Packing Co., 47 Or. 215, 220, 83 P 139.

44. Mass.—Brown v. Henry, 172 Mass. 559, 52 NE 1073.

N. Y.—Brooklyn Daily Eagle v. Dellmar, 30 Misc. 747, 62 NYS 1041.

Tenn.—McClure v. Evartson, 14 Lea 495 (holding that a delay in suing after the principal has given notice of his refusal to approve the agent's act raises no presumption of ratification).

Tex.—Texas Produce Exch. v. Sorrel, (Civ. A.) 168 SW 74 (holding that there was no ratification by E of the unauthorized act of S in signing for both of them a contract with T, where, as soon as he knew what the contract was, although not as soon as he knew one had been signed, he repudiated it, and informed T thereof).

W. Va.—O'Connor v. O'Connor, 45 W. Va. 354, 32 SE 276.

45. Brown v. Henry, 172 Mass. 559, 52 NE 1073.

46. Francis v. Kerker, 85 Ill. 190; Teasdale v. McPike, 25 Mo. A. 341; Lindsley v. Malone, 23 Pa. 24; Dewing v. Hutton, 48 W. Va. 576, 37 SE 670.

[a] **Illustrations.**—(1) Where it is shown that on the 21st of October a letter was mailed by the agents giving definite notice of their acts in the purchase and shipment of goods, that no reply was made to this letter, and that the first expression of disapprobation on the part of the principal was in a letter dated the 29th of October in reply to one of the 26th stating that the property had probably been lost, there is sufficient evidence of ratification. Foster v. Rockwell, 104 Mass. 167. (2) So where it is shown that the agent informed his principal by letter on the 18th of July of his action, but that the principal did not answer the letter until the 29th of October following, the delay

full knowledge of the agent's acts;[47] but a failure to reply does not, as a matter of law, constitute a ratification.[48]

Communication of repudiation. It has been held that the repudiation must be communicated to the other party to the transaction and not merely to the agent.[49]

Acquiescence or silence may be invoked by the agent against the principal to protect him from the consequences of his failure to act according to his original agreement with the principal.[50]

Submission to arbitration. Where an agent makes an unauthorized submission to arbitration, and the principal appears before the arbitrators and takes part in the proceedings without objection to the submission by the agent, it amounts to a ratification of the agent's act in making the submission.[51] So also where the principal is duly in court on motion for entry of judgment on the award, his failure to object to the award on the ground of want of authority on the part of the agent to make the submission is a ratification.[52]

[§ 125] **(2) Knowledge of Facts and Opportunity to Repudiate.** In order that the above general rules may apply the principal must have full knowledge of the act of his agent and an opportunity to repudiate it, as a delay in repudiating an unauthorized act of an agent cannot constitute a ratification if the principal, during such time, was ignorant of the facts,[53] and if he repudiates it with reasonable promptness after learning the facts there is no ratification.[54]

But if an act is done by the agent in the principal's presence the latter's silence or failure to repudiate will amount to a ratification.[55]

Agent's failure to give notice. An agent may forfeit his right of construing the silence of his principal as an implied acquiescence by delay in the giving of notice to his principal until an elec-

amounts to a ratification of the agent's conduct. Cairnes v. Bleecker, 12 Johns. (N. Y.) 300.

[b] **Conflicting evidence.**—In Hawkins v. McGroarty, 110 Mo. 546, 19 SW 830, it was held that the testimony of the agent that he immediately notified the principal of an unauthorized sale and that the latter expressed no disapprobation did not justify finding a ratification, where the principal denied that he had seen the agent or heard from him until he sold to a third party.

47. Bosseau v. O'Brien, 3 F. Cas. No. 1,667, 4 Biss. 395.

48. Hansen v. Boyd, 161 U. S. 397, 16 SCt 571, 40 L. ed. 746.

49. Goldstein v. Tank, 73 Misc. 300, 132 NYS 466 [aff 149 App. Div. 341, 134 NYS 262]; Bement v. Armstrong, (Tenn. Ch. A.) 39 SW 899; Knight v. Beckwith Commercial Co., 6 Wyo. 500, 46 P 1094. But see Cannon v. Gibson, 162 Mo. A. 386, 142 SW 730.

50. Massey v. Greenabaum, (Del.) 58 A 804; Searing v. Butler, 69 Ill. 575; Frothingham v. Haley, 3 Mass. 68. See also Owsley v. Woolhopter, 14 Ga. 124.

51. Ga.—Johnson v. Cochran, 81 Ga. 39, 6 SE 809, 12 AmSR 294.

Me.—Fryeburg Canal v. Frye, 5 Me. 38.

Mass.—Blakely v. Graham, 111 Mass. 8.

Mich.—Detroit v. Jackson, 1 Dougl. 106.

N. Y.—Isaacs v. Beth Hamedash Soc., 1 Hilt. 469 [app dism 19 N. Y. 584]; Diedrick v. Richley, 2 Hill 271.

52. Detroit v. Jackson, 1 Dougl. (Mich.) 106.

53. Ky.—Elk Valley Coal Co. v. Thompson, 150 Ky. 614, 150 SW 817.

Md.—Walters v. Munroe, 17 Md. 154, 77 AmD 328.

Mich.—Deffenbaugh v. Jackson Paper Mfg. Co., 120 Mich. 242, 79 NW 197 (holding that a principal does not ratify the agent's contract to compensate an employee with a share of the profits, in addition to his salary, by permitting the salary to be overdrawn without knowledge that the excess was paid as commissions).

Miss.—Riverside Dev. Co. v. Hartford F. Ins. Co., 62 S 169.

Mo.—Platt v. Francis, 247 Mo. 296, 324, 152 SW 332 [quot Cyc].

Mont.—Nord v. Boston, etc., Copper, etc., Min. Co., 33 Mont. 464, 84 P 1116, 86 P 647.

Nebr.—Farmers', etc., Bank v. Farmers', etc., Bank, 49 Nebr. 379, 68 NW 488.

N. J.—Ryle v. Manchester Bldg., etc., Assoc., 74 N. J. L. 840, 67 A 87 (holding that the failure of a creditor to demand and collect with promptness the money due her on certain matured shares in a building association does not warrant an inference of ratification of the act of another in drawing and using the money, while she is without full knowledge of the facts and circumstances of the case); Belcher v. Manchester Bldg., etc., Assoc., 74 N. J. L. 833, 67 A 399.

N. Y.—Hopkins v. Clark, 7 App. Div. 207, 40 NYS 130 [aff 158 N. Y. 299, 53 NE 27]; McIntosh v. Battel, 68 Hun 216, 22 NYS 805.

Or.—Reid v. Alaska Packing Co., 47 Or. 215, 83 P 139.

Tenn.—Williams v. Storm, 6 Coldw. 203.

Tex.—Reese v. Medlock, 27 Tex. 120, 84 AmD 611.

Vt.—Saville, etc., Co. v. Welch, 58 Vt. 683, 5 A 491.

W. Va.—Thompson v. Laboringman's Mercantile, etc., Co., 60 W. Va. 42, 53 SE 908, 6 LRANS 311 and note (holding that ignorance on the part of the principal of any of the material facts connected with the unauthorized act of his agent, done on his behalf, will prevent the silence of the principal or his failure to repudiate the act from amounting to a ratification thereof).

Wis.—Ladd v. Hildebrant, 27 Wis. 135, 9 AmR 445.

See also supra §§ 93–98.

[a] **Negligence of a principal in failing to discover** and prevent an agent's unauthorized fraudulent acts does not estop him from disavowing such acts. McIntosh v. Battel, 68 Hun 216, 22 NYS 805; Schmidt v. Garfield Nat. Bank, 64 Hun 298, 19 NYS 252 [aff 138 N. Y. 631 mem, 33 NE 1084 mem].

[b] **Intentional ignorance.**—Where a principal knows that his name has been signed to a certain bond by one assuming to act as his agent, although not knowing the exact terms of the bond or the extent of his liability thereon, he cannot escape the consequence of his silence by purposely closing his eyes to means of information within his control regarding the details. Lynch v. Smyth, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670].

[c] **The retention by a principal for a number of years of the accounts rendered** by an agent, without objection thereto, when the accounts contained statements of facts peculiarly within the knowledge of the agent, and not known by principal until shortly before action brought, does not constitute an acquiescence which will prevent the principal from maintaining an action for a difference in his favor. Gale v. New York Hay Co., 54 App. Div. 72, 66 NYS 291.

[d] **Disaffirmance at trial.**—A principal sued upon an unauthorized contract made by his agent may on the trial of the case disaffirm the agent's acts, if at that time such act is first brought to his knowledge. Farmers', etc., Bank v. Farmers', etc., Bank, 49 Nebr. 379, 68 NW 488.

[e] **Mere forbearance to bring suit on a note** for a length of time short of the period of limitations is not evidence of an implied ratification of the unauthorized receipt by an agent of a less amount than the face of the note, in full payment of the same, where it does not appear that the principal had any knowledge of the agent's act. Holland v. Van Beil, 89 Ga. 223, 15 SE 302.

[f] **The mere fact that a principal permits an attorney to represent him** in a suit in conjunction with its own counsel does not render him liable as a matter of law for the value of the attorney's services, where the attorney is employed by an agent without authority, and the principal understands that another interested in the employment will pay the fee and it settles with the agent on that theory. Swayne v. Union Mut. L. Ins. Co., 92 Tex. 575, 50 SW 566.

[g] **In California,** under the provision of Civ. Code § 2310, that a ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, the fact that principals made no objection to the execution of a mortgage by an agent in their names, to secure a prior indebtedness contracted by the agent, will not constitute a ratification of the act, where it does not appear that they had knowledge of the fact until action to foreclose was brought. Golinsky v. Allison, 114 Cal. 458, 46 P 295.

54. Iowa.—Hakes v. Myrick, 69 Iowa 189, 28 NW 575.

Miss.—Burns v. Kelley, 41 Miss. 339.

N. Y.—McIntosh v. Battel, 68 Hun 216, 22 NYS 805.

Or.—Reid v. Alaska Packing Co., 47 Or. 215, 83 P 139.

Pa.—Deacon v. Greenfield, 141 Pa. 467, 21 A 650.

[a] **The principal may wait,** after learning that a contract has been made different in its terms from that authorized, until he can ascertain its nature and how it will affect his interests before deciding whether he will repudiate it. Barnard v. Wheeler, 24 Me. 412.

[b] **Where the principal at once repudiates** the agent's act, the mere fact that he accepts a transfer of the agent's property voluntarily offered by him to cover any loss that the principal may sustain cannot be considered as a ratification of or acquiescence in the unauthorized act. Lazard v. Merchants', etc., Transp. Co., 78 Md. 1, 26 A 897.

55. Owsley v. Woolhopter, 14 Ga. 124; Price v. Breckenridge, 92 Mo. 378, 5 SW 20 (holding that, where one of the owners of land by a deed of trust was fully empowered to execute a deed to the streets and alleys

tion to approve or disapprove would be attended with no benefit to the latter.[56]

[§ 126] **(3) Time for Disavowal.** It has been variously stated that the principal should repudiate the act promptly,[57] immediately,[58] at once,[59] or as soon as informed or notified of the act;[60] but the more prevailing rule is that the principal, upon learning of the unauthorized act of his agent, if he does not intend to be bound thereby must repudiate it within a reasonable time,[61] what is a reasonable

and public grounds of a town situated on the land, he was not restricted to that mode, and could bind himself to the extent of his own interest, and as trustee and agent of the other owners, by representations made in their presence to which they made no dissent); James v. Russell, 92 N. C. 194.

56. Williams v. Merritt, 23 Ill. 623; Amory v. Hamilton, 17 Mass. 103.

57. Ga.—Bray v. Gunn, 53 Ga. 144.
Ill.—Booth v. Wiley, 102 Ill. 84.
Iowa.—Argus v. Ware, 155 Iowa 583, 136 NW 774.
Ky.—Clay v. Spratt, 7 Bush 334.
N. Y.—Hazard v. Spears, 2 Abb. Dec. 353, 4 Keyes 469; Goldstein v. Tank, 73 Misc. 300, 132 NYS 466 [aff 149 App. Div. 341, 134 NYS 262] (holding that where a payment is made to a solicitor of orders, who is in possession of the goods sold, and the principal knows thereof, he is bound to promptly repudiate the payment and notify the purchaser, and if he endeavors to obtain payment from the agent, and makes no demand on the purchaser for more than two months, he ratifies the act of the agent, and cannot maintain an action against the purchaser for the price).
Pa.—Standard Leather Co. v. Allemania F. Ins. Co., 224 Pa. 186, 73 A 192; Bredin v. Dubarry, 14 Serg. & R. 27.
Va.—Winston v. Gordon, 80 SE 756.
Ont.—Conant v. Miall, 17 Grant Ch. (U. C.) 574.

[a] **The term "promptly"** has been explained (1) as implying merely that the principal "should not have been dilatory; should have been guilty of no unnecessary delay" (Clay v. Spratt, 7 Bush (Ky.) 334), (2) but in other cases where the term "promptly" was used it was used in connection with the expressions "on the spot, or certainly within a few days" (Hazard v. Spears, 2 Abb. Dec. (N. Y.) 353, 4 Keyes 469), (3) and "the first moment the facts comes to his knowledge" (Bredin v. Dubarry, 14 Serg. & R. (Pa.) 27).

58. Bonneau v. Poydras, 2 Rob. (La.) 1; Pitts v. Shubert, 11 La. 286, 30 AmD 718; Ilgenfritz v. Missouri Pac. R. Co., 169 Mo. A. 652, 155 SW 854 (in regard to a return of money, four or five days' delay being unreasonable).

59. Eddy v. American Amusement Co., 21 Cal. A. 487, 132 P 83; Hilton v. Meier, 257 Ill. 500, 100 NE 962; Johnson v. Jones, 4 Barb. (N. Y.) 369.

60. The Henrietta, 91 Fed. 675; Barrière v. Peychaud, 14 La. Ann. 370; Crane v. Bedwell, 25 Miss. 507; Bredin v. Dubarry, 14 Serg. & R. (Pa.) 27. See also Robbins v. Blanding, 87 Minn. 246, 91 NW 844.

61. U. S.—Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648; Smith v. Sheeley, 12 Wall. 358, 20 L. ed. 430; Law v. Cross, 1 Black 533, 17 L. ed. 185; Jefferson Hotel Co. v. Brumbaugh, 168 Fed. 867, 94 CCA 279; Smith v. Collins, 165 Fed. 148, 91 CCA 182; Central Trust Co. v. Ashville Land Co., 72 Fed. 361, 18 CCA 590; Lorie v. North Chicago City R. Co., 52 Fed. 270; Benedict v. Maynard, 3 F. Cas. No. 1,294, 4 McLean 569.
Ala.—Mobile, etc., R. Co. v. Jay, 65 Ala. 113; Whilden v. Merchants', etc., Nat. Bank, 64 Ala. 1, 38 AmR 1; Clealand v. Walker, 11 Ala. 1058, 46 AmD 238; Lee v. Fontaine, 10 Ala. 755, 44 AmD 505.
Ark.—American Mortg. Co. v. Williams, 103 Ark. 484, 145 SW 234; Spencer Lumber Co. v. Marsh, 99 Ark. 358, 360, 138 SW 479 [cit Cyc]; Lyon v. Tams, 11 Ark. 189.
Cal.—Illinois Trust, etc., Bank v. Pacific R. Co., 117 Cal. 332, 49 P 197; Kendall v. Earl, 44 P 791.
Colo.—Lynch v. Smyth, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670]; King v. Rea, 13 Colo. 69, 21 P 1084; Breed v. Central City First Nat. Bank, 6 Colo. 235.
Conn.—J. B. Owens Pottery Co. v. Turnbull Co., 75 Conn. 628, 54 A 1122.
Ga.—Whitley v. James, 121 Ga. 521, 49 SE 600; Smith v. Holbrook, 99 Ga. 256, 25 SE 627; Bray v. Gunn, 53 Ga. 144; Mapp v. Phillips, 32 Ga. 72; Owsley v. Woolhopter, 14 Ga. 124.
Ill.—Sammis v. Poole, 188 Ill. 396, 58 NE 934 [aff 89 Ill. A. 118]; Peo. v. Frost, 46 Ill. A. 197; Pope v. Lowitz, 14 Ill. A. 96; McGeoch v. Hooker, 11 Ill. A. 649; Johnston v. Berry, 3 Ill. A. 256; Hurd v. Marple, 2 Ill. A. 402.
Ind. T.—Denison, etc., R. Co. v. Ranney-Alton Mercantile Co., 3 Ind. T. 104, 53 SW 496.
Iowa.—National Imp., etc., Co. v. Maiken, 103 Iowa 118, 72 NW 431; Hayes v. Steele, 32 Iowa 44; Burlington Gaslight Co. v. Greene, 22 Iowa 508.
Kan.—Hartwell v. Equitable Mfg. Co., 78 Kan. 259, 97 P 432.
Ky.—McConnell v. Bowdry, 4 T. B. Mon. 392; Tarvin v. Walker's Creek Coal, etc., Co., 80 SW 504, 25 KyL 2246.
La.—Raymond v. Palmer, 41 La. Ann. 425, 6 S 692, 17 AmSR 398; Lafitte v. Godchaux, 35 La. Ann. 1161; Woods v. Rocchi, 32 La. Ann. 210; Mangum v. Bell, 20 La. Ann. 215; Starr v. Zacharie, 18 La. 517; Dupre v. Splane, 16 La. 51.
Me.—Perkins v. Boothby, 71 Me. 91; Johnson v. Wingate, 29 Me. 404; Blanchard v. Waite, 28 Me. 51, 48 AmD 474.
Md.—Hartlove v. William Fait Co., 89 Md. 254, 43 A 62.
Mass.—Bassett v. Brown, 105 Mass. 551; Brigham v. Peters, 1 Gray 139; Odiorne v. Maxcy, 13 Mass. 178; Lent v. Padelford, 10 Mass. 230, 6 AmD 119.
Mich.—Cooper v. Mulder, 74 Mich. 374, 41 NW 1084.
Minn.—Jansen v. Jacobson, 112 Minn. 520, 128 NW 824; Lowe v. Benz, 107 Minn. 562, 119 NW 249; Anderson v. Johnson, 74 Minn. 171, 77 NW 26; Singer Mfg. Co. v. Flynn, 63 Minn. 475, 65 NW 923; Wisconsin v. Torinus, 26 Minn. 1, 49 NW 259, 37 AmR 395; Hawkins v. Lange, 22 Minn. 557; Stearns v. Johnson, 19 Minn. 540.
Miss.—Thurmond v. Carter, 59 Miss. 127; Meyer v. Morgan, 51 Miss. 21, 24 AmR 617; Crane v. Bedwell, 25 Miss. 507.
Mo.—Peck v. Ritchey, 66 Mo. 114; St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737.
Mont.—Carlson v. Stone-Ordean-Wells Co., 40 Mont. 434, 107 P 419.
Nebr.—Singer Sewing Mach. Co. v. Barger, 92 Nebr. 539, 138 NW 741, AnnCas1914A 57; Farmers', etc., Bank v. Farmers', etc., Bank, 49 Nebr. 379, 68 NW 488; Johnston v. Milwaukee, etc., Inv. Co., 49 Nebr. 68, 68 NW 383; Swartz v. Duncan, 38 Nebr. 782, 57 NW 543.
Nev.—Abernathie v. Consolidated Virginia Min. Co., 16 Nev. 260.
N. H.—Dixon v. Guay, 70 N. H. 161, 46 A 456; Nixon v. Brown, 57 N. H. 34.
N. J.—Chetwood v. Berrian, 39 N. J. Eq. 203 [aff 39 N. J. Eq. 517]; Keim v. Lindley, (Ch.) 30 A 1063.
N. Y.—Merritt v. Bissell, 155 N. Y. 396, 50 NE 280 [rev 84 Hun 194, 32 NYS 559]; Crans v. Hunter, 28 N. Y. 389; Sage v. Sherman, 2 N. Y. 417; Watson v. Gray, 4 Abb. Dec. 540; Murray v. Bininger, 3 Keyes 107; Manning v. Heidelbach, 153 App. Div. 790, 138 NYS 750; Glor v. Kelly, 49 App. Div. 617, 63 NYS 339 [aff 166 N. Y. 589 mem, 59 SE 1123 mem]; Grannis v. Hobby, 17 NYS 618 [aff 33 NE 486]; Hope v. Lawrence, 50 Barb. 258; Snyder v. Gardner, 13 Misc. 626, 34 NYS 936; Fatta v. Edgerton, 137 NYS 226; Thompson v. Craig, 16 Abb-PrNS 29; Rogers v. Kneeland, 10 Wend. 218 [aff 13 Wend. 114]; Cairnes v. Bleecker, 12 Johns. 300; Vianna v. Barclay, 3 Cow. 281; Benedict v. Smith, 10 Paige 126.
N. C.—Brown v. Smith, 67 N. C. 245.
N. D.—Russell v. Waterloo Threshing Mach. Co., 17 N. D. 248, 116 NW 611.
Or.—Reid v. Alaska Packing Co., 47 Or. 215, 83 P 139.
Pa.—Graff v. Callahan, 158 Pa. 380, 27 A 1009; Kelsey v. Crawford County Nat. Bank, 69 Pa. 426; Lindsley v. Malone, 23 Pa. 24; Gordon v. Preston, 1 Watts 385, 26 AmD 75; Birkle v. Coleman, 50 Pa. Super. 105; Carlisle, etc., Co. v. Iron City Sand Co., 20 Pa. Super. 378; Himes v. Herr, 8 Pa. Super. 124, 39 WklyNC 568; Massey v. Ins. Co., 3 Phila. 200.
Tenn.—Southern Oil Works v. Jefferson, 2 Lea 581; Western, etc., R. Co. v. McElwee, 6 Heisk. 208.
Tex.—Hammond v. Hough, 52 Tex. 68; Bean v. Bennett, 35 Tex. Civ. A. 398, 80 SW 662; Northwestern L. Assoc. v. Findley, 29 Tex. Civ. A. 494, 68 SW 695.
Vt.—Keyes v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201; Judevine v. Hardwick, 49 Vt. 180; Beecher v. Grand Trunk R. Co., 43 Vt. 133; Orleans National Bank v. Fassett, 42 Vt. 432; Bigelow v. Denison, 23 Vt. 564.
Wash.—Lynch v. Richter, 10 Wash. 486, 39 P 125.
W. Va.—Curry v. Hale, 15 W. Va. 867.
Wis.—Senger v. Malloy, 153 Wis. 245, 141 NW 6; Andrews v. Robertson, 111 Wis. 334, 87 NW 190, 87 AmSR 870, 54 LRA 673; Kelly v. Phelps, 57 Wis. 425, 15 NW 385; Hall v. Chicago, etc., R. Co., 48 Wis. 317, 4 NW 325; Cooper v. Schwartz, 40 Wis. 54; Walworth County Bank v. Farmers' L. & T. Co., 16 Wis. 629.
Wyo.—Knight v. Beckwith Commercial Co., 6 Wyo. 500, 46 P 1094.
See also supra § 124.

[a] **"The cases abound in such remarks** as that a principal must disavow the conduct of an agent done in excess of authority, in a reasonable time after getting notice of it, on pain of being deemed to have assented to the conduct." St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 279, 90 SW 737.

[b] **Where a person in good faith assumes to act as the agent of another,** although without authority in fact, the latter, on being fully informed thereof, must, where his silence might prejudice the assumed agent or innocent third persons, disavow the act within a reasonable time, or his silence will be construed as a ratification. Robbins v. Blanding, 87 Minn. 246, 91 NW 844.

[c] **Instant repudiation.**—A failure to repudiate instantly the unauthorized act is not ordinarily a ratification. Kendall v. Earl, 5 Cal. Unrep. Cas. 351, 44 P 791; Theile v. Chicago Brick Co., 60 Ill. A. 559; Edwards v. Barnes, 55 Ill. A. 38; Miller v. Excelsior Stone Co., 1 Ill. A. 273; Oliver v. Johnson, 24 La. Ann. 460 (holding that an agent who exceeds his authority in the collection and investment of the proceeds of notes is not liable therefor if the principal, on being advised of the collection and investment by the agent himself, fails to notify him promptly that he repu-

time being a question of fact,[62] dependent upon the circumstances of the particular case,[63] which may be on the one hand such as to require prompt or immediate action, or on the other hand such as to make some delay excusable or immaterial.[64] Where the unauthorized act of the agent is done in the execution of a power conferred, in a mode not sanctioned by its terms, and in excess or misuse of the authority given, there is a strong reason for disaffirming at once, on knowledge of the act, because the confidence of the principal in the fitness and fidelity of the person he has selected as an agent is shown by the relation established between them.[65] So where the usage of trade requires it, or when a delay might mislead the agent or other parties, upon notice from the agent informing his principal of his transaction it is the duty of the latter to repudiate the act promptly if he wishes to avoid liability.[66]

In the case of governmental bodies it seems to be reasonable not to require as prompt a disavowal as in the case of an individual, the operations of such bodies being more complex.[67]

[§ 127] **(4) Prejudice to Third Person or Agent.** The silence of an alleged principal when fully informed of the facts may be sufficient from which to infer a ratification of an unauthorized act, although a third person has not been misled or prejudiced thereby;[68] but as a general rule mere silence or delay will not be conclusive of ratification unless the rights of innocent third persons have been prejudiced thereby,[69] or in other words unless the case contains this element of equitable estoppel.[70] Hence where the transaction between the agent and a third person is complete before the principal is notified thereof so that no injury can result to such person from a failure to repudiate the transaction within a reasonable time, the principal's failure to do so

diates his acts); Caswell v. Cross, 120 Mass. 545; Clarke v. Meigs, 23 N. Y. Super. 337.

[d] **It is stating the rule too broadly** to say that the principal will be bound unless he repudiates the act instantly or as soon as it comes to his knowledge, particularly in the case of a mere intruder. Miller v. Excelsior Stone Co., 1 Ill. A. 273.

[e] **Next term of court.**—A principal who receives the note of a third person from his agent in the belief that it belongs to him as his property is not, upon a subsequent discovery of the facts and a repudiation of the act of the agent, to be charged with the amount of the note because he did not bring suit upon it to the first terms of court held thereafter. Scott v. Turley, 9 Lea (Tenn.) 631.

62. Halloway v. Arkansas City Milling Co., 77 Kan. 76, 93 P 577. See also infra § 736.

63. Ark.—Lyon v. Tams, 11 Ark. 189.

Ga.—Whitley v. James, 121 Ga. 521, 49 SE 600; Mapp v. Phillips, 32 Ga. 72.

Kan.—Halloway v. Arkansas City Milling Co., 77 Kan. 76, 93 P 577 (holding that the question of what is a reasonable time to disaffirm an unauthorized sale by an agent of a carload of flour is one of fact, and that a delay of five months is unreasonable).

Miss.—Burns v. Kelley, 41 Miss. 339.

Mo.—Peck v. Ritchey, 66 Mo. 114.

Pa.—Birkle v. Coleman, 50 Pa. Super. 105.

[a] **No strict rule can be laid down as to what is a reasonable time,** or what is a sufficient delay to amount to a ratification, but this must be determined by a consideration of all the circumstances. The rule is well stated as follows: (1) "Where, with a knowledge of the facts, the principal acquiesces in the act of the agent, under such circumstances as would make it his duty to repudiate such acts if he would avoid them, such acquiescence is a confirmation of the acts of the agent." Curry v. Hale, 15 W. Va. 867, 875. (2) In Meyer v. Morgan, 51 Miss. 21, 24 AmR 617, where an agent sold without authority cotton of his principal, it was held that the principal was entitled to no more time than was needful to examine the tendency of the cotton market, and to bring his mind to the conclusion whether he had better accept the price for which his factor had sold or take the chance of a rise, and that he could not keep that subject open for nearly three months and then repudiate the sale.

[b] **It is error to instruct** that the principal must repudiate the act "within a few days." Each case is governed by its peculiar circumstances, and the words "within a reasonable time" or their equivalent should be used. Peck v. Ritchey, 66 Mo. 114.

64. Salmon v. Austro-American Stave, etc., Co., 187 Fed. 564, 109 CCA 254 (holding that where a so-called agreement was in the form of a letter from plaintiff to defendants, and was signed by the agent individually, and provided for a formal contract to be drawn by defendants, a delay of five days after its receipt before answering it did not amount to a ratification); Lyon v. Tams, 11 Ark. 189; Peck v. Ritchey, 66 Mo. 114; Birkle v. Coleman, 50 Pa. Super. 105 (holding that where the rights of third parties are involved the repudiation should be prompt).

65. Harrod v. McDaniels, 126 Mass. 413; Myers v. Mutual L. Ins. Co., 32 Hun (N. Y.) 321.

66. Ala.—Comer v. Way, 107 Ala. 300, 19 S 966, 54 AmSR 93.

Cal.—Kendall v. Earl, 5 Cal. Unrep. Cas. 351, 44 P 791.

Ill.—Meister v. Cleveland Dryer Co., 11 Ill. A. 227.

Iowa.—Farwell v. Howard, 26 Iowa 381.

Kan.—Halloway v. Arkansas City Milling Co., 77 Kan. 76, 93 P 577.

La.—Oliver v. Johnson, 24 La. Ann. 460; Ball v. Bender, 22 La. Ann. 493.

Md.—Maddux v. Bevan, 39 Md. 485.

Minn.—Robbins v. Blanding, 87 Minn. 246, 91 NW 844.

Pa.—Bredin v. Dubarry, 14 Serg. & R. 27.

W. Va.—Roberts v. Tavenner, 48 W. Va. 632, 37 SE 576; Dewing v. Hutton, 48 W. Va. 576, 37 SE 670.

[a] **Exchange of securities.**—Where an agent, having possession of securities, exchanges them for others, without authority so to do from his principal, and the principal does not, upon full information, promptly repudiate the transaction and assert his rights, it will be presumed that he acquiesced in and ratified what had been done by his agent. Baldwin v. Howell, (N. J. Ch.) 30 A 423.

67. Dresden School Dist. No. 6 v. Ætna Ins. Co., 62 Me. 330, 339 (where the court said: "A presumption from the nonaction of a corporation like a school district, would be less readily inferrible than in the case of individuals who can more readily act. A district can be bound only by some recorded vote, or some act, or an acquiescence upon their part as a corporation, equivalent thereto"); Delafield v. Illinois, 2 Hill (N. Y.) 159, 26 Wend. 192 (where the court said: "Under particular circumstances, the silence of the principal for a very few days after he is advised of an act done by his agent, may amount to strong presumptive evidence of ratification; especially where such silence has a tendency to mislead the opposite party. But it will never do to apply so rigorous a rule where a state is the principal"). See also Schools and School Districts [35 Cyc 962]; States [36 Cyc 879].

68. Lynch v. Smyth, 25 Colo. 103, 111, 54 P 634 [rev 7 Colo. A. 383, 43 P 670] (where the court said: "It does not necessarily follow that one seeking to enforce a liability by ratification, arising from silence, or a failure to repudiate an unauthorized act after knowledge thereof, must also show that by such silence he has been misled to his prejudice, although it is proper to do so, as silence of the alleged principal under such circumstances may, of itself, be sufficient to establish a ratification of such act"). See also supra § 124.

69. Ark.—Atlanta Nat. Bldg., etc., Assoc. v. Bollinger, 63 Ark. 212, 37 SW 1049.

Colo.—Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248; Smyth v. Lynch, 7 Colo. A. 383, 43 P 670.

La.—Guimbillot v. Abat, 6 Rob. 284.

Mo.—Cannon v. Gibson, 162 Mo. A. 386, 142 SW 730; St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737.

N. J.—Doughaday v. Crowell, 11 N. J. Eq. 201.

N. Y.—Mott v. Scholes, 147 App. Div. 82, 131 NYS 811 (holding that defendant's failure to disavow her mother's unauthorized contract to convey defendant's land in her first conversation with the purchaser's assignee did not estop her to make subsequent disavowal, the assignee not having been prejudiced by defendant's silence); Norden v. Duke, 120 App. Div. 1, 104 NYS 854 [rev 113 App. Div. 99, 99 NYS 30].

Tex.—Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953.

[a] **"The true doctrine** is that a conclusive presumption of acquiescence is raised from a principal's silence, only when otherwise loss would fall on an innocent party. The contrary doctrine would be arbitrary and irrational; and such rules of law should be avoided." St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 280, 90 SW 737.

70. Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248; Norden v. Duke, 120 App. Div. 1, 104 NYS 854; Williams v. Moore, 24 Tex. A. 402, 58 SW 953. See also infra § 128.

[a] **"The real ground on which the principal is held liable** under such circumstances is that of estoppel." St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 280, 90 SW 737.

[b] **"Liability upon the theory of ratification is based upon principles of estoppel** or the intention of the principal to adopt the unauthorized act or contract, and there must be, with full knowledge of the material facts, failure to act, by which the

is merely evidence of a ratification and is not conclusive, and does not amount to an estoppel.[71] But where the transaction is still in progress and the silence of the principal after notice induces the person dealing with the agent to pursue a course which would be detrimental to him if the principal were not bound, the ratification will be conclusively presumed or the principal will be held estopped by his silence and delay;[72] and this result will obtain when the person dealt with is induced to alter in any way his position to his detriment,[73] as by parting with money or property on the assumption that the agent's act was valid,[74] or omitting to take steps against the agent, or otherwise to improve his position.[75]

Prejudice to agent. The above rule is also held to apply where the principal's acquiescence has a tendency to mislead or prejudice the agent,[76] but ratification will not be so readily implied from silence tending to mislead the agent as from silence

party dealing with the agent has been prejudiced before there can be any estoppel which precludes the principal from denying the authority of the agent, or facts or circumstances warranting the inference that he intended to adopt the act or contract." Norden v. Duke, 120 App. Div. 1, 6, 104 NYS 854.

71. Breed v. Central City First Nat. Bank, 4 Colo. 481; Smith v. Fletcher, 75 Minn. 189, 77 NW 800 (holding that where a mortgagor paid a part of the principal to an agent of the mortgagee, and the agent never transmitted the money, and shortly afterward became insolvent, and made a general assignment, and subsequently the mortgagor wrote to the mortgagee asking if the money paid to the agent had been credited on the mortgage debt, and requested the mortgagee to put in his claim against the agent's estate to save the mortgagor the trouble of proving payment, and the mortgagee did not answer the letter but wrote to an attorney to look the matter up, and the mortgagee did nothing by way of an express disavowal of the agent's act in accepting the part payment until he commenced a foreclosure action for the full amount of the mortgage debt, these facts, as a matter of law, did not constitute a ratification of the agent's act in accepting a part of the principal); Cheshire Provident Inst. v. Vandegrift, 1 Nebr. (Unoff.) 339, 95 NW 615.

"If the controversy between the agent and the third party is completed before the principal is notified, so that no detriment can result to the third party from the silence of the principal, his failure to repudiate the act is evidence to be considered with other facts in the case, that he adopted it as his own, or ratified it." St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 279, 90 SW 737.

[a] **If the liabilities have become fixed** before the principal acquires knowledge of the act, so that an election to approve or disapprove could be attended with no advantage to him, his silence should not be construed as a ratification. Amory v. Hamilton, 17 Mass. 103.

[b] **Executed contract.**—Where the unauthorized contract made by an agent in the name of his principal has been fully executed before the principal learns of the transaction, his failure to notify the parties who contracted with his agent that the transaction was unauthorized does not render him liable upon the theory of ratification, since they have not been prejudiced by his silence. Norden v. Duke, 120 App. Div. 1, 104 NYS 854 [rev 113 App. Div. 99, 99 NYS 30].

[c] **Where a sale is completed** before knowledge of it reaches the principal, and no change in the condition of the parties can occur from his delay to approve or disapprove it, mere silence does not work an estoppel, although it may be evidence of ratification. Ilfeld v. Ziegler, 40 Colo. 401, 91 P 825.

[d] **Rule not applicable.**—But the rule that no estoppel is created if an unauthorized transaction is complete before the principal knows thereof and the status of the parties is unchanged by his failure to approve or disapprove within a reasonable time does not apply where the principal executed a deed for the purpose for which it was used, knowing it and consenting to it. Welch v. Brown, 46 Colo. 129, 103 P 296.

72. U. S.—Marshall v. Williams, 16 F. Cas. No. 9,186, 2 Biss. 255

Ala.—Thompson v. Stringfellow, 119 Ala. 317, 24 S 849; Mobile, etc., R. Co. v. Jay, 65 Ala. 113.

Cal.—Union Trust, etc., Co. v. Best, 160 Cal. 263, 116 P 737; Dover v. Pittsburg Oil Co., 143 Cal. 501, 77 P 405.

Colo.—Lynch v. Smyth, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670]; Tennis v. Barnes, 11 Colo. A. 196, 52 P 1038.

Conn.—J. B. Owens Pottery Co. v. Turnbull Co., 75 Conn. 628, 54 A 1122.

Ga.—Weaver v. Ogletree, 39 Ga. 586; Owsley v. Woolhopter, 14 Ga. 124.

Ill.—Sammis v. Poole, 188 Ill. 396, 58 NE 934 [aff 89 Ill. A. 118]; Booth v. Wiley, 102 Ill. 84; Johnston v. Berry, 3 Ill. A. 256.

Ind. T.—Denison, etc., R. Co. v. Ranney-Alton Mercantile Co., 3 Ind. T. 104, 53 SW 496.

Iowa.—Henderson v. Beatty, 124 Iowa 163, 99 NW 716; Alexander v. Jones, 64 Iowa 207, 19 NW 913; Farwell v. Howard, 26 Iowa 381.

Kan.—Latham v. Hutchinson First Nat. Bank, 40 Kan. 9, 18 P 824.

Ky.—Pittsburgh, etc., R. Co. v. Woolley, 12 Bush 451.

Mass.—Foster v. Rockwell, 104 Mass. 167; Merrifield v. Parritt, 11 Cush. 590.

Mich.—Heyn v. O'Hagen, 60 Mich. 150, 26 NW 861.

Minn.—Triggs v. Jones, 46 Minn. 277, 48 NW 1113; Hawkins v. Lange, 22 Minn. 557.

Mo.—Schmidt v. Rankin, 193 Mo. 254, 91 SW 78; Peck v. Ritchey, 66 Mo. 114; Teasdale v. McPike, 25 Mo. A. 341.

Nebr.—Garland v. Wells, 15 Nebr. 298, 18 NW 132; Day v. Miller, 1 Nebr. (Unoff.) 107, 95 NW 359.

N. J.—Lyle v. Addicks, 62 N. J. Eq. 123, 49 A 1121 (holding that where defendant, on learning of the execution of an agreement by another in his name as attorney in fact, failed to notify complainant of his repudiation thereof, and did not object to the agreement on the score of lack of authority, while action on his offer was pending, and while complainant was, to his knowledge acting on the belief of the agreement's validity, such conduct amounted to such a ratification of the authority to sign the agreement as to make defendant liable for a breach thereof); Keim v. Lindley, (Ch.) 30 A 1063; Doughaday v. Crowell, 11 N. J. Eq. 201.

N. Y.—Hanks v. Drake, 49 Barb. 186.

N. D.—Russell v. Waterloo Threshing Mach. Co., 17 N. D. 248, 116 NW 611.

Oh.—Woodward v. Suydam, 11 Oh. 360.

Or.—Reid v. Alaska Packing Co., 47 Or. 215, 83 P 139.

Pa.—Himes v. Herr, 3 Pa. Super. 124, 39 WklyNC 568.

Tenn.—Bement v. Armstrong, (Ch. A.) 39 SW 899.

Wash.—Ankeny v. Young, 52 Wash. 235, 100 P 736; Lynch v. Richter, 10 Wash. 486, 39 P 125.

W. Va.—Dewing v. Hutton, 48 W. Va. 576, 37 SE 670; Curry v. Hale, 15 W. Va. 867; Ruffner v. Hewitt, 7 W. Va. 585.

Wis.—Saveland v. Green, 40 Wis. 431; Cooper v. Schwartz, 40 Wis. 54.

"If the transaction is still in progress, and the silence of the principal, after notice, induces the party dealing with the agent to pursue a course which would be detrimental to him if the principal was not held bound, a ratification of the unauthorized act will be presumed." St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 279, 280, 90 SW 737 (where the court also said: "An examination of numerous cases has shown that in every instance wherein the presumption of ratification was raised because of a principal's silence, some change in the position of the parties concerned occurred subsequent to notice to the principal, which would have resulted in injustice to the party dealt with by the agent if the principal had been excused on the score of want of authority in the agent").

[a] **Signing principal's name as surety.**—Where a company gave a bond to release its property from an attachment, and the name of a stockholder was signed as a surety thereto by his agent, who acted in excess of his authority, and, before the attachment case was finally disposed of, the stockholder obtained knowledge that his name was signed to the bond as a surety, but took no steps to notify the obligee that he repudiated the acts of his agent, and the obligee could have taken steps, if promptly notified of the agent's want of authority, to obtain additional security in aid of his attachment, the obligee was prejudiced by defendant's silence, so as to make such silence of itself a ratification, although he "might" not have taken any steps toward obtaining other security, or, if he had, such steps might have been unavailing. Lynch v. Smyth, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670].

73. St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737.

74. St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737.

75. St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737.

[a] **Opportunity to improve position.**—Where after knowledge of the unauthorized act the third person affected thereby has an opportunity to improve his position, the failure of the principal to repudiate the act within a reasonable time after notice will amount to a ratification. Lynch v. Smyth, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670].

76. Meyer v. Morgan, 51 Miss. 21, 24 AmR 617; San Antonio Fifth Nat. Bank v. Iron City Nat. Bank, 92 Tex. 436, 49 SW 368.

[a] **"The question often arises directly between an agent and his principal,** in cases where the latter tries to hold the former responsible for acting without authority. In such litigation, if the principal does not promptly repudiate the transaction, but waits until doing so will cause loss to the agent, or until it appears that the transaction will cause loss instead of profit to himself, he will be estopped to deny responsibility." St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 281, 90 SW 737.

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tending to mislead a party dealing with the agent.[77]

[§ 128] **(5) Existence of Element of Estoppel.** It has been held that ratification from silence, particularly in cases where the third person is misled by such silence, rests upon the doctrine of estoppel,[78] and it has been stated that, since implied ratification by mere silence or failure to disaffirm is founded upon the doctrine of equitable estoppel,[79] it cannot be set up by the principal as a ratification in his own favor;[80] but as elsewhere shown there is a clear distinction between ratification and estoppel,[81] and silence may be evidence from which a ratification may be inferred, although no element of estoppel is involved.[82]

[§ 129] **(6) Distinction between Unauthorized Acts of Agents and of Strangers.** In applying the doctrine of ratification by silence or acquiescence the decisions make a distinction between cases where a stranger or volunteer assumes to act for another without any authority and cases where a recognized agent merely exceeds his authority,[83] and a further distinction has been made between acts of a mere obtrusive volunteer and one who, although without authority, assumes in good faith to act as an agent,[84] or who may reasonably be presumed to have the authority to act as such from the fact of having had such authority at a previous time,[85] or on account of his family relations with the alleged principal.[86] While the authorities are not uniform as to the extent of the effect of these distinctions,[87] they are agreed that the question as to the relations between the principal and agent or person acting as such is important in determining whether there has been a ratification.[88] It has been said that in the case of an unauthorized act by a mere stranger the principal need take no notice of it, and can be bound only by an affirmative ratification;[89] but on the contrary it has been held that,

77. Triggs v. Jones, 46 Minn. 277, 283, 48 NW 1113 (where the court said: "If the principal, after knowledge, remains entirely passive, it is but just, when the protection of third parties requires it, to presume that what, upon knowledge, he has failed to repudiate, he has tacitly confirmed. But it is apparent that the reasons for such a rule do not apply with equal force in favor of the agent himself, who has wrongfully committed the unauthorized act. Consequently mere passive inaction or silence, which would amount to an implied ratification in favor of third parties, might not amount to that in favor of the agent, so as to absolve him from liability to his principal for loss or damage resulting from the unauthorized act, especially if such inaction or failure to immediately disaffirm was induced by the assurances or persuasion of the agent himself").

78. U. S.—Bailey v. U. S., 15 Ct. Cl. 490 (holding that, although fraud is ordinarily an element of estoppel, nevertheless where a payment is made to an agent without due authority of the principal his gross carelessness in not disavowing the payment, and long continued neglect to put the payers on their guard, and silence which operated to mislead or prevent them from pursuing their remedy against the agent, will constitute an estoppel).

Cal.—Dover v. Pittsburg Oil Co., 143 Cal. 501, 77 P 405; Pope v. J. K. Armsby Co., 111 Cal. 159, 43 P 589.

Ill.—Reese v. Wallace, 113 Ill. 589; Prettyman v. Wilkey, 19 Ill. 235.

Me.—Leavitt v. Fairbanks, 92 Me. 521, 43 A 115.

Miss.—Vicksburg, etc., R. Co. v. Ragsdale, 54 Miss. 200.

Mo.—St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737.

Nebr.—Garland v. Wells, 15 Nebr. 298, 18 NW 132; Day v. Miller, 1 Nebr. (Unoff.) 107, 95 NW 359.

N. J.—Lyle v. Addicks, 62 N. J. Eq. 123, 49 A 1121; Baldwin v. Howell, (Ch.) 30 A 423.

N. Y.—Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co., 90 N. Y. 607, 64 HowPr 467.

Tex.—Texas Moline Plow Co. v. Klapproth, (Civ. A.) 164 SW 399 (holding that an owner may be bound by a deed of trust executed by an agent without written authority, by acts sufficient to create an estoppel in pais, with full knowledge of the facts).

Wash.—Lynch v. Richter, 10 Wash. 486, 39 P 125.

[a] **Statements of and reason for rule.**—(1) "Implied ratification, by mere silence or failure to expressly disaffirm, has its foundation in the doctrine of equitable estoppel, and proceeds upon the maximum of the law that he who remains silent when in conscience he ought to speak will be debarred from speaking when in conscience he ought to remain silent. Where the rights and obligations of third parties may depend on his election to ratify or disaffirm, a party is bound to act, or suffer the consequences of inaction; and if, after knowledge, he remains entirely silent and impassive, it is but just, when the protection of third parties require it, to presume that what, upon knowledge, he has failed to repudiate, he has tacitly ratified. To render the evidence conclusive of implied ratification by silence or mere nonaction, the facts must be such that the law will presume that third parties would be prejudiced by the delay in speaking or acting, if the party should be thereafter permitted to say that he had not authorized or ratified the act of his assumed agent. This principle has not always been distinctly or expressly announced by the courts, but we think that it will be found that in almost every well-considered case in which it has been held that there was an implied ratification by silent and merely passive acquiescence, the facts brought the case within the rule substantially as we have stated it." Smith v. Fletcher, 75 Minn. 189, 77 NW 800. (2) "This rule has its foundation in the doctrine of equitable estoppel. It proceeds upon the maxim that, if one remains silent when in conscience he ought to speak, he will be debarred from speaking when in conscience he ought to remain silent." Reid v. Alaska Packing Co., 47 Or. 215, 220, 47 P 139; (3) The rule has been stated that if the principal remains silent when it is his duty to speak he will not be permitted to speak when in justice he should remain silent. Williams v. Merritt, 23 Ill. 623.

[b] **"The estoppel may arise from the fact that the principal was silent when he ought to have declared his intention** not to be bound by the agent's act; provided, as said above, his silence leads the party dealt with to alter his position for the worse. This is identical with the principles governing estoppel by acquiescence in other instances not involving the relation of principal and agent." St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 281, 90 SW 737.

[c] **The doctrine applies to corporations** as well as to individuals. Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co., 90 N. Y. 607, 64 HowPr 467. See also Corporations [10 Cyc 1076 et seq].

79. Smith v. Fletcher, 75 Minn. 189, 77 NW 800. And see cases supra note 78.

80. Turner v. Kennedy, 57 Minn. 104, 58 NW 823.

81. See supra § 81.

82. Thompson v. Laboringman's Mercantile, etc., Co., 60 W. Va. 42, 53 SE 908.

83. Ark.—Dierks Lumber, etc., Co. v. Coffman, 96 Ark. 505, 132 SW 654.

Ill.—Ward v. Williams, 26 Ill. 447, 79 AmD 358.

Mass.—Foster v. Rockwell, 104 Mass. 167.

Mich.—Heyn v. O'Hagen, 60 Mich. 150, 26 NW 861.

N. Y.—Merritt v. Bissell, 155 N. Y. 396, 50 NE 280 [rev 84 Hun 194, 32 NYS 559]; Ketchem v. Marsland, 18 Misc. 450, 42 NYS 7; Woodman v. Wicker, 88 NYS 411.

Wash.—Lynch v. Richter, 10 Wash. 486, 39 P 125.

Wis.—Ladd v. Hildebrant, 27 Wis. 135, 9 AmR 445.

Ont.—Conant v. Miall, 17 Grant Ch. (U. C.) 574.

84. Robbins v. Blanding, 87 Minn. 246, 91 NW 844.

85. Lynch v. Richter, 10 Wash. 486, 39 P 125.

86. Lynch v. Richter, 10 Wash. 486, 39 P 125. See also Ladd v. Hildebrant, 27 Wis. 135, 9 AmR 445. Compare Mott v. Scholes, 147 App. Div. 82, 131 NYS 811.

87. See Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248; Ladd v. Hildebrant, 27 Wis. 135, 9 AmR 445.

88. Ralphs v. Hensler, 97 Cal. 296, 32 P 243; Lynch v. Smyth, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670]; Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248; Philadelphia, etc., R. Co. v. Cowell, 28 Pa. 329, 70 AmD 128; Ladd v. Hildebrant, 27 Wis. 135, 9 AmR 445.

[a] **The duty to repudiate promptly** is more imperative where an agency actually exists than in the case of one acting without any authority. Ralphs v. Hensler, 97 Cal. 296, 32 P 243; Foster v. Rockwell, 104 Mass. 167.

89. Dierks Lumber, etc., Co. v. Coffman, 96 Ark. 505, 132 SW 654 (holding that the intention to ratify an unauthorized act of an agent is presumed from the silence of the principal after being informed of what has been done on his account by his agent, but that mere silence does not show a ratification of an act of a mere volunteer); Searing v. Butler, 69 Ill. 575; Ward v. Williams, 26 Ill. 447, 79 AmD 385. See also Deane v. Gray Bros. Artificial Stone Paving Co., 109 Cal. 433, 42 P 443; Mott v. Scholes, 147 App. Div. 82, 131 NYS 811.

[a] **"A failure to disavow the acts of a mere volunteer,** who meddlingly assumes to act without authority, as the agent of another, will not constitute a ratification." Robbins v. Blanding, 87 Minn. 246, 249, 91 NW 844.

[b] **As between the principal and an agent** whose authority has been expressly revoked the principal is under no duty to repudiate an act done by the agent subsequently to such re-

while mere silence in such cases is not conclusive,[90] it is evidence of ratification,[91] although of less weight than in the case of an agent merely exceeding his authority;[92] and that whether an inference of ratification should be drawn therefrom depends upon the circumstances of the case;[93] and that if the circumstances are such that silence on the part of the principal, when fully informed of the unauthorized act, would be calculated to mislead the other party, a failure to repudiate the act may justify a finding of ratification.[94]

[§ 130] **(7) Silence of One of Two Joint Agents.** Ratification by acquiescence is a doctrine that applies to principals, the parties to be bound, and one of two joint agents who can only act jointly does not, by failure to repudiate the separate act of his coagent, thereby ratify the act so as to make it valid and binding as against the principal.[95]

[§ 131] **(8) Retaining Agent in Employ.** The mere retention of the agent in the principal's employ after he has learned of the agent's unauthorized act does not amount to a ratification of such act.[96]

[§ 132] **c. Suing, Defending, or Otherwise Attempting to Enforce Contract—(1) Against Third Person—(a) In General.** Where a principal with knowledge of the facts claims and seeks to enforce by suit rights based upon the unauthorized acts or contract of an agent or other person acting in behalf of the principal,[97] as where he attempts by

vocation. Kelly v. Phelps, 57 Wis. 425, 15 NW 385.

90. Cal.—Deane v. Gray Bros. Artificial Stone Paving Co., 109 Cal. 433, 42 P 443.

Ill.—Miller v. Excelsior Stone Co., 1 Ill. A. 273.

Iowa.—Britt v. Gordon, 132 Iowa 431, 108 NW 319.

N. Y.—Merritt v. Bissell, 155 N. Y. 396, 50 NE 280 [rev 84 Hun 194, 32 NYS 559].

Tenn.—Hatton v. Stewart, 2 Lea 233.

"While it is the duty of a principal to disavow the unauthorized act of his agent within a reasonable time after it comes to his knowledge, or otherwise, in some cases, he makes the act his own, still, where one who has assumed to act as an agent for another has no authority to do so, but is a mere volunteer, a failure to disavow his acts will not amount to a ratification, unless under such circumstances as indicate an intention to do so." Merritt v. Bissell, 155 N. Y. 396, 401, 50 NE 280 [rev 84 Hun 194, 32 NYS 559].

91. Philadelphia, etc., R. Co. v. Cowell, 28 Pa. 329, 70 AmD 128.

[a] **"If a man, without right, assumes to act for another,** the act will be attributed to and affect the person represented if he acquiesces in and adopts it; and this whether the actor was devoid of any authority, or went beyond an authority he had." Hackett v. Van Frank, 105 Mo. A. 384, 394, 79 SW 1013.

92. Colo.—Lynch v. Smyth, 25 Colo. 103, 54 P 634; Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248.

Mass.—Harrod v. McDaniels, 126 Mass. 413; Foster v. Rockwell, 104 Mass. 167.

N. Y.—Myers v. New York Mut. L. Ins. Co., 32 Hun 321 [aff 99 N. Y. 1, 1 NE 33]; Ketchem v. Marsland, 18 Misc. 450, 42 NYS 7.

Pa.—Philadelphia, etc., R. Co. v. Cowell, 28 Pa. 329, 70 AmD 128.

Wis.—Ladd v. Hildebrant, 27 Wis. 135, 9 AmR 445.

93. Heyn v. O'Hagen, 60 Mich. 150, 26 NW 861.

94. Heyn v. O'Hagen, 60 Mich. 150, 26 NW 861; Robbins v. Blanding, 87 Minn. 246, 91 NW 844; Lynch v. Richter, 10 Wash. 486, 39 P 125; Saveland v. Green, 40 Wis. 431. See also supra §§ 124, 127.

[a] **"Whether silence operates as presumptive proof of ratification** of the act of a mere volunteer, must depend upon the particular circumstances of the case. If those circumstances are such that the inaction or silence of the party sought to be charged as principal would be likely to cause injury to the person giving credit to, and relying upon, such assumed agency, or to induce him to believe such agency did in fact exist, and to act upon such belief to his detriment, then such silence or inaction may be considered as a ratification of the agency" Heyn v. O'Hagen, 60 Mich. 150, 157, 26 NW 861.

[b] **"Where a person in good faith assumes to act as the agent of another,** but without authority in fact, in any particular transaction, the latter, upon being fully informed thereof, must, in cases where his silence might prejudice the assumed agent or innocent third parties, disavow the act within a reasonable time, or he will be held to have ratified it. . . . As to such third parties it would seem that the element of good faith of the assumed agent is not essential." Robbins v. Blanding, 87 Minn. 246, 249, 91 NW 844.

95. Penn v. Evans, 28 La. Ann. 576. Ratification by agent generally see supra § 90.

96. Deacon v. Greenfield, 141 Pa. 467, 476, 21 A 650 (where the court said: "It is not every business man who discharges an employee for a single mistake, or even a single offence. Retaining him in such case does not furnish any evidence of a ratification of the unauthorized act"). See also George N. Pierce Co. v. Beers, 190 Mass. 199, 76 NE 603; Robinson v. Superior Rapid Transit R. Co., 94 Wis. 345, 68 NW 961, 59 AmSR 897, 34 LRA 205.

[a] **Failure of a principal to discharge his agent on account of charges** made against him, which in no way related to the act in question, does not make the principal responsible for the act, when he neither authorized nor gave any person reason to believe that he had authorized it. Fortune v. Stockton, 182 Ill. 454, 55 NE 367 [aff 82 Ill. A. 272].

[b] **Where a confidential clerk forged a check** which the employer ratified, the continuance of the clerk in his employ was held to make him liable for a subsequent forgery. De Feriet v. Bank of America, 23 La. Ann. 310, 8 AmR 597.

97. U. S.—Finley v. Ins. Co., 193 Fed. 195; Wilson v. Pauly, 72 Fed. 129, 18 CCA 475; Benedict v. Maynard, 3 F. Cas. No. 1,294, 4 McLean 569. See also U. S. v. Payette Lumber, etc., Co., 198 Fed. 881 [aff 208 Fed. 231, 125 CCA 431].

Ala.—Williamson v. Tyson, 105 Ala. 644, 17 S 336; Gaines v. Acre, Minor 141.

Cal.—Argenti v. Brannan, 5 Cal. 351.

Colo.—Lyon v. Washburn, 3 Colo. 201.

Conn.—Curnane v. Scheidel, 70 Conn. 13, 38 A 875; Shoninger v. Peabody, 57 Conn. 42, 17 A 278, 14 AmSR 88; New Milford First Nat. Bank v. New Milford, 36 Conn. 93.

Ga.—Central of Georgia R. Co. v. James, 117 Ga. 832, 45 SE 223; Singleton v. Monticello Bank, 113 Ga. 527, 38 SE 947; J. F. Bailey Co. v. West Lumber Co., 1 Ga. A. 398, 58 SE 120 (holding that a suit to enforce rights based on unauthorized acts of an agent shows ratification of such acts and dispenses with the necessity of any further proof).

Hawaii.—Haskins v. Shillaber, 1 Hawaii 47 (holding that where a principal seeks to recover under a contract of sale made by his agent he thereby affirms the sale).

Ill.—Bailey v. Pardridge, 134 Ill. 188, 27 NE 89; Connett v. Chicago, 114 Ill. 233, 29 NE 280.

Ind.—Moore v. Butler University, 83 Ind. 376; Knowlton v. School City, 75 Ind. 103; Johnson v. Hoover, 72 Ind. 395; Kyser v. Wells, 60 Ind. 261.

Ind. T.—American Express Co. v. Lankford, 2 Ind. T. 18, 46 SW 183.

Iowa.—Farrar v. Peterson, 52 Iowa 420, 3 NW 457; Eadie v. Ashbaugh, 44 Iowa 519.

Kan.—Owensboro Wagon Co. v. Wilson, 79 Kan. 633, 101 P 4.

Ky.—Owensboro Bank v. Western Bank, 13 Bush 526, 26 AmR 211; Kentucky Lumber Co. v. Middleton, 41 SW 48, 19 KyL 471.

La.—Zino v. Verdelle, 9 La. 51; Surgat v. Potter, 12 Mart. 365 (holding that, where an agent to sell for cash sells on credit, his act is ratified by the principal if the latter sues the vendee for the price).

Me.—Medomak Bank v. Curtis, 24 Me. 36.

Mass.—North Brookfield Sav. Bank v. Flanders, 161 Mass. 335, 37 NE 307; Fiedler v. Smith, 6 Cush. 336; Folger v. Mitchell, 3 Pick. 396; Sutton First Parish v. Cole, 3 Pick. 232; Hampshire County v. Franklin County, 16 Mass. 76; Pratt v. Putnam, 13 Mass. 361; Odiorne v. Maxcy, 13 Mass. 178.

Mich.—Bissell v. Dowling, 117 Mich. 646, 76 NW 100; Merrill v. Wilson, 66 Mich. 232, 33 NW 716; Eaton v. Knowles, 61 Mich. 625, 28 NW 740.

Miss.—Watson v. Southern Ins. Co., 31 S 904; Meyer v. Morgan, 51 Miss. 21, 24 AmR 617; Walker v. Mobile, etc., R. Co., 34 Miss. 245; Planters' Bank v. Sharp, 12 Miss. 75, 43 AmD 470.

Mo.—Shinn v. Guyton, etc., Mule Co., 109 Mo. A. 557, 83 SW 1015; Alexander v. Wade, 106 Mo. A. 141, 80 SW 19.

Nebr.—Singer Sewing Mach. Co. v. Barger, 92 Nebr. 539, 138 NW 741, AnnCas1914A 57; Esterly Harvesting Mach. Co. v. Frolkey, 34 Nebr. 116, 51 NW 594.

N. H.—Ham v. Boody, 20 N. H. 411, 51 AmD 235; Payne v. Smith, 12 N. H. 34.

N. Y.—Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 21 NE 172, 10 AmSR 479 and note, 4 LRA 145, and note, 2 Silv. A. 280, 23 AbbNCas 133; Beloit Bank v. Beale, 34 N. Y. 473; Wilmot v. Richardson, 4 Abb. Dec. 614; German-American Bank v. Schwinger, 75 App. Div. 393, 78 NYS 38 [aff 178 N. Y. 569 mem, 70 NE 1099 mem]; Terry v. Buek, 40 App. Div. 419, 57 NYS 980; Henderhen v. Cook, 66 Barb. 21; Elwell v. Chamberlin, 17 N. Y. Super. 320 [aff 31 N. Y. 611]; Dodge v. Lambert, 15 N. Y. Super. 570; Crigler v. Bedell, 4 NYS 653; Lloyd v. Brewster, 4 Paige 537, 27 AmD 88.

N. C.—Sprunt v. May, 156 N. C. 388, 72 SE 821.

Oh.—Woodward v. Suydam, 11 Oh. 360.

Or.—La Grande Nat. Bank v. Blum, 27 Or. 215, 41 P 659.

Pa.—Cake's App., 110 Pa. 65, 20 A 415; Pearsoll v. Chapin, 44 Pa. 9.

S. D.—Plano Mfg. Co. v. Millage, 14 S. D. 331, 85 NW 594 (holding that

suit to enforce the payment of notes received by the agent without authority,[98] he thereby impliedly ratifies such act or contract. The same rule applies if he attempts in any other way to enforce or take advantage of such contract,[99] or if he sets it up in a cross action,[1] or by way of defense to a suit brought against him,[2] or by way of interpleader in a suit between other parties.[3] In such a case the principal must abide by the entire contract as it was made by the agent,[4] and cannot avail himself

a vendor ratifies an unauthorized parol contract of sale made by his agent by suing the purchaser for the value of the property); Union Trust Co. v. Phillips, 7 S. D. 225, 63 NW 903.

Tenn.—Arnold v. St. Paul F., etc., Ins. Co., 106 Tenn. 529, 61 SW 1032; Gracy v. Potts, 4 Baxt. 395; Franklin v. Ezell, 1 Sneed 497.

Tex.—Sargent v. Barnes, (Civ. A.) 159 SW 366, 373 [quot Cyc]; Campbell v. Jenkins, (Civ. A.) 34 SW 673; Bouvet v. Woodward, 2 Tex. Unrep. Cas. 449.

Wash.—Hart v. Maney, 12 Wash. 266, 40 P 987; Tingley v. Bellingham Bay Boom Co., 5 Wash. 644, 32 P 737, 33 P 1055.

Wis.—Twentieth Century Co. v. Quilling, 136 Wis. 481, 117 NW 1007; Germantown Farmers' Mut. Ins. Co. v. Dhein, 43 Wis. 420, 28 AmR 549.

Eng.—Ferguson v. Carrington, 9 B. & C. 59, 17 ECL 36, 109 Reprint 22; Smith v. Hodson, 4 T. R. 211, 100 Reprint 979.

[a] **An action for the conversion of certain notes** collusively transferred to defendant by plaintiff's agent who, contrary to his agreement, had taken the notes in his own name sufficiently ratifies the act of the agent in taking the notes in his own name to entitle plaintiff to recover for their conversion. Warder, etc., Co. v. Cuthbert, 99 Iowa 681, 68 NW 917.

[b] **Action for breach of warranty.**—Where one of several persons, who had associated themselves together for the purchase of a horse, concluded the transaction and accepted a verbal warranty, the act of the other purchasers in joining in a suit for breach of the warranty was a ratification of the act of the person who concluded the sale. Daugherty v. Burgess, 118 Mo. A. 557, 94 SW 594.

[c] **Unauthorized attachment bond.**—Where a principal appeared in court and prosecuted an attachment which had been sued out in his name by a person assuming to act as his agent, it was held that this was a full recognition of the authority to execute the bond. Augusta Bank v. Conrey, 28 Miss. 667; Dove v. Martin, 23 Miss. 588.

[d] **Lease.**—Where a landlord declares in a petition to a justice of the peace that he made the lease and gave a notice to quit, he thereby ratifies the act of his agent in making the lease and giving such notice. Benton v. Stokes, 109 Md. 117, 71 A 532.

[e] **Unauthorized disposition of replevied goods.**—Where an officer, having served a writ of replevin, allowed, as the special agent of plaintiff, the property replevied to remain in the possession of a third person who made an agreement in writing, not under seal, with the officer to redeliver the property to him on demand, and to guarantee to him, as the agent to plaintiff, a reasonable rent for the use thereof in the meantime, and plaintiff brought an action on the contract in his own name, it was held that the contract was made with the officer as the agent of plaintiff, and that the bringing of the action thereon was a ratification of the agency. Fiedler v. Smith, 6 Cush. (Mass.) 336.

[f] **Bringing suit at law upon a contract cannot affirm it if void,** for there must be a right of action to sue on. Dickinson v. Wright, 56 Mich. 42, 22 NW 312.

98. Ga.—Ingraham v. Barber, 72 Ga. 158.

Iowa.—Beidman v. Goodell, 56 Iowa 592, 9 NW 900; Eadie v. Ashbaugh, 44 Iowa 519.

Mass.—West Boylston Mfg. Co. v. Searle, 15 Pick. 225 (holding that, where an agent took a note for goods of his principal, payable to himself, and indorsed the same to his principal who brought an action upon it, declaring as indorsee, it was an affirmance of the act of the agent in taking the note in that form).

Mich.—Sherrod v. Duffy, 160 Mich. 488, 125 NW 366, 136 AmSR 451 (holding that one taking notes obtained by another as agent and suing thereon may not thereafter question the agency).

Nebr.—Osborn Co. v. Jordan, 52 Nebr. 465, 72 NW 479 (holding that a principal, by suing on a note given to his agent for goods sold, ratifies an unauthorized warranty given by the agent on the sale).

N. H.—Corser v. Paul, 41 N. H. 24, 77 AmD 753.

N. Y.—Chamberlain v. Woodward, 22 Hun 440 (holding that where a deed by a wife to certain premises was delivered by her husband without authority from her, her act in bringing an action upon one of the notes given as a part of the purchase price of the premises was a ratification of the unauthorized delivery by the husband rendering the deed valid).

Or.—La Grande Nat. Bank v. Blum, 27 Or. 215, 41 P 659.

Wis.—Twentieth Century Co. v. Quilling, 136 Wis. 481, 117 NW 1007 (holding that where plaintiff corporation kept the fruits of an illegal transaction consummated by its agent, and thereafter sued defendant on a note given as a part thereof, after being informed of the nature of the transaction, such acts constituted a ratification of the agent's conduct as a matter of law).

Man.—Taylor v. Gardiner, 8 Man. 310.

[a] **Putting a note in the hands of an attorney for collection** tends to show a ratification of the unauthorized act of the agent in accepting the note. Campbell v. Jenkins, (Tex. Civ. A.) 34 SW 673.

[b] **Bankruptcy proceedings.**—Where an agent has taken a third person's note in payment of another's debt to the principal, evidence of the proof of the note in bankruptcy against the estate of the maker is competent as tending to show that the principal treated the note as his own and accepted it as payment. Ely v. James, 123 Mass. 36.

[c] **Although plaintiff suing on a note learns for the first time at trial** that defendant claims a special contract with the agent who procured it, which formed part of the consideration, if plaintiff enforces it he cannot defeat the effect of such contract by denying the authority to make it. Owensboro Wagon Co. v. Wilson, 79 Kan. 633, 101 P 4.

99. U. S.—Mason v. Crosby, 16 F. Cas. No. 9,234, 1 Woodb. & M. 342.

Ala.—Atkinson v. Jones, 72 Ala. 248 (holding that, where an agent exchanged a mule for a horse, without authority, an assertion by his principal, with knowledge of the facts, of title to the horse was a ratification of the exchange); Jones v. Atkinson, 68 Ala. 167.

D. C.—Averell v. Second Nat. Bank, 17 D. C. 358 (holding that a bank, by protesting a check, ratifies its receipt for collection by the paying teller).

Ill.—Fraternal Army of America v. Evans, 215 Ill. 629, 74 NE 689 [aff 114 Ill. A. 578].

Iowa.—Hartley State Bank v. McCorkell, 91 Iowa 660, 60 NW 197; Mathews v. Gilliss, 1 Iowa 242.

La.—Stanfield v. Tucker, 4 La. Ann. 413.

Me.—Partridge v. White, 59 Me. 564.

Mich.—Nichols v. Shaffer, 63 Mich. 599, 30 NW 383 (holding that a principal who chooses to keep and enforce a mortgage obtained by his agent in return for his release of another mortgage thereby ratifies the act of the agent, and is responsible for the manner in which the second mortgage was obtained, although the agent acted without authority).

Mo.—Ellerbe v. National Exch. Bank, 109 Mo. 445, 19 SW 241.

Tex.—Jones v. Gilchrist, (Civ. A.) 27 SW 890; Pillman v. Freiberg, 2 Tex. A. Civ. Cas. § 582.

Ont.—Halpenny v. Pennock, 33 U. C. Q. B. 229.

1. Amicable L. Ins. Co. v. Kenner, (Tex. Civ. A.) 166 SW 462 (holding that one who authorized another to make contracts as agent for the sale of corporate stock cannot deny the agent's authority to make the particular contract entered into, where it ratified the form of the contract and sought to recover on it in a cross action, when sued for payments made under it).

2. Fraternal Army of America v. Evans, 215 Ill. 629, 74 NE 689 [aff 114 Ill. A. 578]; American Car, etc., Co. v. Smock, 48 Ind. A. 359, 91 NE 749, 93 NE 78; Gibson v. Norway Sav. Bank, 69 Me. 579.

[a] **Set-off pleaded.**—A vendor sued for breach of a warranty made by his agent affirms the sale and the warranty by declaring in set-off for the price of the goods. Edgar v. Joseph Breck, etc., Corp., 172 Mass. 581, 52 NE 1083.

3. Donason v. Barbero, 230 Ill. 138, 82 NE 620 (holding that where, after execution of a deed with a blank for the name of the grantee, the grantor's agent inserted the name of a grantee, without authority, such act was ratified by the grantor's appearance in a subsequent suit for partition of the land and disclaiming any interest therein, the complainant having alleged a conveyance of the land to the grantee by such deed); Alexander v. Wade, 106 Mo. A. 141, 80 SW 19 (holding that, where the purchasers of a stock of goods insisted, as a condition precedent to their purchase, that the seller deposit in a bank a sum of money sufficient to pay his commercial creditors, which was done, and thereafter a creditor who was not a commercial creditor sued the seller and garnished the deposit, whereupon the commercial creditors interpleaded, claiming the fund, the proceeding in interpleader was a ratification of the conduct of the purchasers, and brought the interpleaders into the same situation as if the contract had originally been made for their benefit between the seller and an authorized agent of the interpleaders).

4. Ark.—Drennen v. Walker, 21 Ark. 539.

Conn.—Shoninger v. Peabody, 57 Conn. 42, 17 A 278, 14 AmSR 88.

Ida.—Burke Land, etc., Co. v. Wells, 7 Ida. 42, 60 P 87.

Iowa.—Key v. National L. Ins. Co., 107 Iowa 446, 78 NW 68; Beidman v. Goodell, 56 Iowa 592, 9 NW 900.

Kan.—Loomis Milling Co. v. Vawter, 8 Kan. A. 437, 57 P 43.

La.—Allerin v. Dungan, 2 La. Ann. 383.

Mass.—Edgar v. Joseph Breck, etc., Corp., 172 Mass. 581, 52 NE 1083.

Mich.—Eberts v. Selover, 44 Mich. 519, 7 NW 225, 38 AmR 278.

Minn.—Nye v. Swan, 49 Minn. 431, 52 NW 39.

Mo.—Kelly v. Thuey, 143 Mo. 422, 45 SW 300 (holding that plaintiff cannot claim that, if there had been an alteration of the contract sued on,

of its benefits without also accepting its burdens,[5] nor reject that part of the contract which was unauthorized and enforce the rest,[6] for the contract as made is the only one assented to by the third person against whom he seeks to enforce it.[7]

[§ 133] **(b) Knowledge of Facts.**[8] Where a suit by the principal based upon the contract is instituted without knowledge of the material facts, it does not amount to an implied ratification,[9] but upon discovery of the facts plaintiff should abandon his suit on the contract and repudiate the act of his agent, and assert such rights as he may have arising from the unauthorized act. As long as he insists and relies upon the contract, he cannot escape the consequences of a ratification by showing that he was not fully informed of its terms and conditions.[10] Where, however, when the principal first acquires knowledge of the facts, conditions are such that he cannot in justice to himself repudiate the whole of the agent's acts he may stand upon what he has authorized, and the third person must bear the loss resulting from his dealing with an agent without learning the extent of his authority.[11]

A suit brought by the agent without the knowledge of the principal upon an unauthorized transaction entered into by the former is not a ratification by the principal.[12]

[§ 134] **(c) Action Not Based on Contract.** Where the action is not based upon the contract made by the agent, the principal may, without ratifying it, maintain an action to protect his rights,[13] as in the case of goods wrongfully sold and delivered, by tendering back what may have been received and bringing an action of replevin,[14] or an action of trover to recover their value.[15] It has been held that an action of assumpsit against a purchaser for goods sold and delivered without authority by an agent is not a ratification of the sale if the action was not relied on but discontinued before trial,[16] or if the complaint was amended so as to contain a count in trover;[17] but on the other hand

it was done by his agent before delivery to him, and hence was only a spoliation by an unauthorized hand, since by suing on the contract in its altered state he ratifies the alteration).

N. Y.—Henderhen v. Cook, 66 Barb. 21.

Eng.—Smith v. Hodson, 4 T. R. 211, 100 Reprint 979.

See also supra §§ 99, 100.

5. Aultman Thrashing, etc., Co. v. Knoll, 71 Kan. 109, 79 P 1074 (holding that, where a principal adopts the unauthorized act of his agent and sues to secure its benefits, he cannot escape liability by claiming ignorance of some of the facts); Loomis Milling Co. v. Vawter, 8 Kan. A. 437, 57 P 43; Edgar v. Joseph Breck, etc., Corp., 172 Mass. 581, 52 NE 1083; Sprunt v. May, 156 N. C. 388, 72 SE 521 (holding that a bona fide wholesale dealer in cotton for actual delivery cannot recover for breach of defendant's contract for future delivery, if it was understood between the dealer's agent and defendant that actual delivery should not be made, and that the transaction should be a speculation in futures, although the agent was authorized to make a contract only for actual delivery, since the dealer adopts the contract by suing on it).

"A person can not take the benefit of a contract made by another, who purports to act as his agent . . . sue upon it, and then deny the agency of him who made the contract." Burch v. M. Schulz Co., 8 Ga. A. 555, 556, 69 SE 1087.

[a] **In a suit by a buyer on a warranty** given by an agent of the seller, the burden is on the buyer to show that the agent had authority to make the warranty, either by direct proof or by proof of a general custom to that effect, but where the agent in selling the goods makes a warranty of quality, and suit is brought by the seller for the price, the buyer may rely on the agent's ostensible authority to make such warranties, the seller not being entitled to ratify the sale in part and repudiate it in part. Philips, etc., Mfg. Co. v. Wild, 144 Ala. 545, 39 S 359.

[b] **Unauthorized compromise and settlement.**—But where plaintiff sues to enforce a contract in which defendant's claim agent agreed to employ plaintiff for life in settlement of a claim for injuries, and defendant denies the agent's authority to make such contract, plaintiff is not entitled to recover on the ground that a party cannot accept the benefits of a contract and escape its burdens, since defendant is not setting up the settlement as a bar to an action for injuries, but plaintiff is seeking its enforcement. Bohanan v. Boston, etc., R. Co., 70 N. H. 526, 49 A 103.

[c] **Unauthorized security.**—So where an agent's right to lend money is clear, a recognition of the loan, in a suit between the principal and the borrower, has no necessary tendency, in an inquiry between the agent and the principal, to show the principal's approval of the security. St. Mary's Bank v. Calder, 34 S. C. L. 403.

6. Key v. National L. Ins. Co., 107 Iowa 446, 78 NW 68.

7. Shoninger v. Peabody, 57 Conn. 42, 17 A 278, 14 AmSR 88; Eberts v. Selover, 44 Mich. 519, 7 NW 225, 38 AmR 278.

8. See generally supra §§ 93–98.

9. Shoninger v. Peabody, 59 Conn. 588, 22 A 437; Terry v. International Cotton Co., 138 Ga. 656, 75 SE 1044; Bank of Commerce v. Miller, 105 Ill. A. 224 (holding that where a drawer of a draft, on being notified of its nonpayment by the bank to which it was sent for collection, began an attachment suit against the drawee for his claim, including the amount of the draft, without knowledge of the facts pertaining to the presentation of the draft, the institution of such suit was not a ratification of the bank's conduct in the presentation of the draft). See also Day v. National Mut. Bldg., etc., Assoc., 96 Va. 484, 31 SE 902.

[a] **Where a principal had no knowledge of the alteration of a guaranty** by its agent, so as to change the same from a simple contract to a sealed instrument, until after suit had been brought thereon, its acts in bringing such suit did not amount to a ratification of the alteration. Tulane Univ. v. O'Connor, 192 Mass. 428, 78 NE 494.

10. Henderhen v. Cook, 66 Barb. (N. Y.) 21.

11. Cooley v. Perrine, 41 N. J. L. 322, 32 AmR 210. See also Bryant v. Moore, 26 Me. 84, 45 AmD 107; Tulane Univ. v. O'Connor, 192 Mass. 428, 78 NE 494.

12. Ver Veer v. Malone, 134 Iowa 653, 112 NW 82 (holding that where B, who sometimes acted as agent for a mortgagee in making loans, refused to accept insurance provided by the mortgagors under a mortgage authorizing foreclosure on failure of the mortgagors to provide insurance satisfactory to the mortgagee, it cannot be contended that B's act in so doing was ratified by the commencement of a suit to foreclose, B having testified that he himself commenced the suit, and there being no showing that the mortgagee had any knowledge of the pendency thereof); St. Mary's Bank v. Calder, 34 S. C. L. 403.

Ratification by agent generally see supra § 90.

13. Brown v. Foster, 137 Mich. 35, 100 NW 167; Brown v. Johnson, 12 Sm. & M. (Miss.) 398, 51 AmD 118; Holland Coffee Co. v. Johnson, 38 Misc. 187, 77 NYS 247.

[a] **Unauthorized lease.**—In Gillis v. Bailey, 17 N. H. 18, it was held that a suit prosecuted by a corporation in the lessee's name was not a ratification of a lease made by its agent, the suit being brought merely to try the title.

[b] **Action of account.**—Where a salesman in a store sells goods, and at the same time agrees to take back damaged goods previously sold by him to the purchaser, and his principal, denying his authority to make such a promise, repudiates the agreement, and notifies the purchaser that he will not take back the former goods, the bringing of an action by the principal to recover the price of the goods last sold does not necessarily ratify the agent's unauthorized agreement, so as to prevent plaintiff from recovering without performing that agreement, but in such case the authority of the agent to make the promise, and the ratification of his promise by the principal, are both questions of fact for the determination of the jury, and a charge which assumes that he had authority, or that there was a sufficient ratification to bind the principal, is properly refused. Carew v. Lilienthall, 50 Ala. 44.

14. See Shoninger v. Peabody, 57 Conn. 42, 17 A 278, 14 AmSR 88.

[a] **Where an administrator brings replevin** to recover personal property, it is not equivalent to a ratification of the recording of a mortgage on such property without the knowledge of the intestate so as to affect one who purchased at a sale under execution against the mortgagor prior to such replevin suit. McFadden v. Ross, 14 Ind. A. 312, 41 NE 607.

15. Smith v. Hodson, 4 T. R. 211, 100 Reprint 979 (holding that, if a bankrupt on the eve of his bankruptcy fraudulently delivers goods to one of his creditors, the assignees may disaffirm the contract and recover the value of the goods in trover).

16. Peters v. Ballistier, 3 Pick. (Mass.) 495 [dist Butler v. Hildreth, 5 Metc. (Mass.) 49].

17. Gould v. Blodgett, 61 N. H. 115 (holding that the bringing of assumpsit by a principal to recover from a third person for property delivered to him by an agent, without authority and in payment of his own debt, is neither a ratification of the unauthorized delivery nor a conclusive election of remedies, and that an amendment

it has been held that if such a suit is instituted with full knowledge of the facts it operates as a conclusive ratification,[18] and that plaintiff cannot thereafter discontinue the action and repudiate the transaction and sue in trover for the value of the property sold.[19]

[§ 135] **(2) Against Agent.** Where an agent makes an unauthorized sale of his principal's property, a ratification of the sale may be implied from the act of the principal in bringing a suit against the agent to recover the proceeds of the sale;[20] but a suit against the agent for moneys wrongfully received is not necessarily a ratification, as to third persons, of the agent's unauthorized contract.[21] Where an agent makes an unauthorized sale and delivery of property amounting to a conversion, the owner may, without ratifying the sale as made, waive the tort and sue the agent on the common counts in assumpsit to recover the value of the property;[22] and where an agent has made an unauthorized lease of property, an action by an heir of the owner to require the agent to account for rents received since the owner's death but not to hold him accountable as his own agent is not a ratification of the lease.[23] So also a suit against an agent by a principal for the price of goods sold and collected for in an unauthorized manner does not constitute a ratification of such collection;[24] but it has been held that a suit against an agent for moneys unauthorizedly collected by him amounts to a ratification of such collection, but not of the agent's retention of the money.[25]

[§ 136] **f. Subsequent Grant of Authority.** The doing of an unauthorized act by an agent may be ratified by the principal subsequently giving him authority to do the particular act and antedating it prior to the doing of such act,[26] and the receipt of authority by the agent to do the particular act after the act is done will amount to a ratification of the act;[27] but authority to do future acts does not amount to a ratification of similar acts already done.[28]

[§ 137] **D. Time for Ratification.** Ordinarily an unauthorized act or contract of an agent may be ratified within a reasonable time,[29] even after it has been repudiated;[30] but of course it cannot be ratified before it is done or made.[31] Where, however, the contract is limited as to time, it must be ratified before the expiration of the time limited.[32] So also mutuality may affect the question as to when the ratification must be made.[33]

Submission to arbitration. The decisions are in conflict on the question whether the principal may ratify the act of his agent in making the submission after the award has been made and thereby render it binding on the other party. Some cases hold that the ratification must be before the award is made.[34] Other cases hold that the principal may, even after the award has been made, ratify the act of the agent in making the submission, and thereby render the award binding on the other party.[35] The principal may of course ratify the submission by his agent after the award is made so as to render it binding on himself,[36] as where he accepts benefits under the award.[37]

[§ 138] **E. Operation and Effect—1. Retroactiveness—a. General Rule.** In accordance with the maxim, Omnis ratihabitio retrotrahitur et mandato priori æquiparatur—every ratification relates back and is equivalent to prior authority—it is a well

by filing a count in trover was properly allowed).

18. Butler v. Hildreth, 5 Metc. (Mass.) 49.

19. Butler v. Hildreth, 5 Metc. (Mass.) 49.

20. Meyer v. Morgan, 51 Miss. 21, 24 AmR 617; Frank v. Jenkins, 22 Oh. St. 597; Union Trust Co. v. Phillips, 7 S. D. 225, 63 NW 903; Billon v. Hyde, 1 Atk. 126, 26 Reprint 82; Wilson v. Poulter, Str. 859, 93 Reprint 898.

[a] **A sale by an agent to himself** under a general authority to sell is voidable only, and may be ratified by the principal suing him for and recovering the price. Gaines v. Acre, Minor (Ala.) 141.

[b] **Unauthorized receipt and loan of money.**—In Benson v. Liggett, 78 Ind. 452, where an agent without authority received money for his principal and subsequently loaned the money, it was held that an action by the principal against the administrators of the agent ratified the receipt but not the loan made by him.

21. Barnsdall v. O'Day, 134 Fed. 828, 67 CCA 278 (holding that the bringing of an action by a principal against his agent in the purchase of lands for the amount of a commission secretly paid him by the vendor does not operate to ratify the contract so as to discharge the vendor from liability for the fraud and deceit by which, with the assistance of the agent, the sale was induced).

22. Brown v. Foster, 137 Mich. 35, 100 NW 167.

23. Moffatt v. Nicholl, 9 Grant Ch. (U. C.) 446.

24. Holland Coffee Co. v. Johnson, 38 Misc. 187, 77 NYS 247 (holding that an action against an agent to recover the price of goods sold did not constitute a ratification of the act of the agent in accepting a suit of clothes in payment).

25. Schanz v. Martin, 37 Misc. 492, 75 NYS 997 (holding that where a salesman collected, without authority from his employers, from a customer of theirs, and they sued the customer, but upon a discovery upon the trial of the action that their salesman had collected the bill, discontinued the action and brought one for conversion against the agent, their suing him ratified his collection of the money, but not his retention of it thereafter).

[a] **A vendor obtaining a judgment against the agent** negotiating the sale for the price paid to him thereby ratifies such payment by the vendee. Terry v. Buek, 40 App. Div. 419, 57 NYS 980.

26. Milliken v. Coombs, 1 Me. 343, 10 AmD 70. See also Detroit v. Jackson, 1 Dougl. (Mich.) 106.

[a] **By dating back a power of attorney** to legalize a prior act the principal is estopped from showing that it was executed subsequently. Milliken v. Coombs, 1 Me. 343, 10 AmD 70.

27. New Orleans Exch., etc., Co. v. Boyce, 3 Rob. (La.) 307; Rice v. McLarren, 42 Me. 157 (holding that a letter from a principal to his agent authorizing certain acts, received subsequently to their performance, is a ratification thereof). See also U. S. Express Co. v. Rawson, 106 Ind. 215, 6 NE 337.

28. Britt v. Gordon, 132 Iowa 431, 108 NW 319; Moore v. Lockett, 2 Bibb (Ky.) 67, 4 AmD 683 (holding that a letter, subsequent to an unauthorized sale, giving an agent power to sell did not legalize the previous sale not ratified under the power). See also Stillman v. Fitzgerald, 37 Minn. 186, 33 NW 564.

[a] **Collections made by an agent on a note after the death of his principal** and before directions of the executors to proceed to collect the note are not ratified by the executors by such directions. Hill v. Best, (Tex. Civ. A.) 40 SW 202.

29. In re Portuguese Cons. Copper Mines, 45 Ch. D. 16; Bolton v. Lambert, 41 Ch. D. 295; Metropolitan Asylums Bd. v. Kingham, 6 T. L. R. 217. See also supra §§ 124, 126.

30. See supra § 79.

31. Atlanta Nat. Bldg., etc., Assoc. v. Bollinger, 63 Ark. 212, 37 SW 1049.

32. Dibbins v. Dibbins, [1896] 2 Ch. 348.

[a] **Time of acts relied on.**—Where an agent makes an unauthorized contract which is to be performed on a certain date, and the principal is not informed of it until after the date of the performance is past, his subsequent conduct cannot be relied on as a ratification of the agent's agreement. Slocum v. Gilman, 84 Hun 405, 32 NYS 297.

33. See infra § 146.

34. Eastman v. Burleigh, 2 N. H. 484; Tillinghast v. Gilmore, 17 R. I. 413, 22 A 942.

35. Smith v. Morse, 9 Wall. (U. S.) 76, 19 L. ed. 597; Hall v. Norwalk F. Ins. Co., 57 Conn. 105, 17 A 356. See also Terre Haute, etc., R. Co. v. Harris, 126 Ind. 7, 25 NE 831.

36. Lowenstein v. McIntosh, 37 Barb. (N. Y.) 251 (holding that where an agent, without authority from his principal, submits to arbitration, in his own name, controversies existing between the principal and another, and after an award is made in favor of the agent the principal takes an assignment of it, and then assigns it to a stranger, this is an adoption and ratification by the principal of the unauthorized act of the agent in making the submission; and that the accepting and assignment of the award, and then assigning it to another, are emphatic acts of adoption and ratification, and are as conclusive upon the principal as if he had himself been personally a party to the submission and had subscribed the same).

37. See supra § 123.

settled rule, subject to certain exceptions,[38] that a ratification relates back to the time when the unauthorized act was done and makes it as effective from that time as though it had been originally authorized, and that therefore upon ratification the parties to all intents and purposes stand in the same position, in respect to rights and liabilities arising out of such act, as though the person assuming to act as agent had acted under authority previously conferred,[39] and in some jurisdictions

38. See infra § 139.

39. U. S.—Norton v. Shelby County, 118 U. S. 425, 6 SCt 1121, 30 L. ed. 178; Marsh v. Fulton County, 10 Wall. 676, 19 L. ed. 1040; Drakely v. Gregg, 8 Wall. 242, 19 L. ed. 409; Fleckner v. U. S. Bank, 8 Wheat. 338, 5 L. ed. 631; Wehner v. Bauer, 160 Fed. 240 (equivalent to express antecedent authority); Shuenfeldt v. Junkermann, 20 Fed. 357; Conn v. Penn, 6 F. Cas. No. 3,104, Pet. C. C. 496 [rev on other grounds 5 Wheat. 424, 5 L. ed. 125].

Ala.—Cleland v. Walker, 11 Ala. 1058, 46 AmD 238; Reynolds v. Dothard, 11 Ala. 531; Wood v. McCain, 7 Ala. 800, 42 AmD 612; Cox v. Robinson, 2 Stew. & P. 91.

Ark.—Baltimore Second Nat. Bank v. Alma Bank, 99 Ark. 386, 138 SW 472; Gist v. Harkrider, 15 SW 187; Drennen v. Walker, 21 Ark. 539; Irons v. Reyburn, 11 Ark. 378.

Cal.—Ballard v. Nye, 138 Cal. 588, 72 P 156; Kraft v. Wilson, 37 P 790; Peo. v. Eel River, etc., R. Co., 98 Cal. 665, 33 P 728; Cowan v. Abbott, 92 Cal. 100, 28 P 213; McCracken v. San Francisco, 16 Cal. 591.

Colo.—Lynch v. Smyth, 25 Colo. 103, 54 P 634; Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248.

Conn.—Goodwin v. East Hartford, 70 Conn. 18, 38 A 876; Ansonia v. Cooper, 64 Conn. 536, 30 A 760; Johnson v. Smith, 21 Conn. 627; Church v. Sterling, 16 Conn. 388; Bulkley v. Derby Fishing Co., 2 Conn. 252, 7 AmD 271.

Del.—Bancroft v. Wilmington Conference Academy, 5 Houst. 577.

Ga.—Haney School Furniture Co. v. Hightower Baptist Inst., 113 Ga. 289, 38 SE 761; Kirklin v. Atlas Sav., etc., Assoc., 107 Ga. 313, 33 SE 83; Bray v. Gunn, 53 Ga. 144; Southern Express Co. v. Palmer, 48 Ga. 85; Lee v. West, 47 Ga. 311; Weaver v. Ogletree, 39 Ga. 586; Perry v. Hudson, 10 Ga. 362; McMichen v. Brown, 10 Ga. A. 506, 73 SE 691; Dalton Buggy Co. v. Wood, 7 Ga. A. 447, 67 SE 121.

Ill.—Connett v. Chicago, 114 Ill. 233, 29 NE 280; Booth v. Wiley, 102 Ill. 84; St. Louis Nat. Stock Yards v. O'Reilly, 85 Ill. 546; Roby v. Cossitt, 78 Ill. 638; Hefner v. Vandolah, 62 Ill. 483, 14 AmR 106; Henry County v. Winnebago Swamp Drainage Co., 52 Ill. 454; Williams v. Butler, 35 Ill. 544; Ohio, etc., R. Co. v. Middleton, 20 Ill. 629; Goodell v. Woodruff, 20 Ill. 191; Mason v. Caldwell, 10 Ill. 196, 48 AmD 330.

Ind.—Henry v. Heeb, 114 Ind. 275, 16 NE 606, 5 AmSR 613 and note; U. S. Express Co. v. Rawson, 106 Ind. 215, 6 NE 337; Persons v. McKibben, 5 Ind. 261, 61 AmD 85; Elliott v. Armstrong, 2 Blackf. 198; Welker v. Appleman, 44 Ind. A. 699, 90 NE 35.

Iowa.—Long v. Osborn, 91 Iowa 160, 59 NW 14; Smith v. Tramel, 68 Iowa 488, 27 NW 471; Lampson v. Arnold, 19 Iowa 479; Coffin v. Gephart, 18 Iowa 256.

Kan.—Meador v. O'Dowd, 85 Kan. 878, 118 P 695; Girard Trust Co. v. Owen, 83 Kan. 692, 695, 112 P 619 [cit Cyc]; Garten v. Trobridge, 80 Kan. 720, 104 P 1067; Aultman Thrashing, etc., Co. v. Knoll, 71 Kan. 109, 79 P 1074; Ft. Scott First Nat. Bank v. Drake, 29 Kan. 311, 44 AmR 646.

Ky.—Barbour v. Craig, Litt. Sel. Cas. 213; Hewling v. Wilshire, 61 SW 264, 22 KyL 1702.

La.—Dord v. Bonnaffee, 6 La. Ann. 563, 54 AmD 573; Dunbar v. Bullard, 2 La. Ann. 810; Bloodworth v. Jacobs, 2 La. Ann. 25; Kehlor v. Kemble, 26 La. Ann. 713; Culliver v. Berge, 1 Rob. 427.

Me.—Forsyth v. Day, 46 Me. 176; Cowan v. Wheeler, 31 Me. 439; Blanchard v. Waite, 28 Me. 51, 48 AmD 474.

Mass.—Cohen v. Jackson, 210 Mass. 328, 96 NE 669; Beacon Trust Co. v. Souther, 183 Mass. 413, 67 NE 345; Eaton v. Littlefield, 147 Mass. 122, 16 NE 771; McIntyre v. Park, 11 Gray 102, 71 AmD 690; Brigham v. Peters, 1 Gray 139; Emerson v. Newbury, 13 Pick. 377; Salem Bank v. Gloucester Bank, 17 Mass. 1, 9 AmD 111; Odiorne v. Maxcy, 15 Mass. 39; Fisher v. Willard, 13 Mass. 379; Pratt v. Putnam, 13 Mass. 361; Clement v. Jones, 12 Mass. 60; Lent v. Padelford, 10 Mass. 230, 6 AmD 119; Frothingham v. Haley, 3 Mass. 68.

Mich.—Hammond v. Hannin, 21 Mich. 374, 4 AmR 490; Detroit v. Jackson, 1 Dougl. 106.

Minn.—Wilson v. Hayes, 40 Minn. 531, 42 NW 467, 471, 12 AmSR 754, 4 LRA 196; Goss v. Stevens, 32 Minn. 472, 21 NW 549; Wisconsin v. Torinus, 26 Minn. 1, 49 NW 259, 37 AmR 395; Lowry v. Harris, 12 Minn. 255.

Miss.—Kountz v. Price, 40 Miss. 341; Baker v. Byrne, 10 Miss. 193.

Mo.—Kirkpatrick v. Pease, 202 Mo. 471, 101 SW 651; Roe v. Versailles Bank, 167 Mo. 406, 67 SW 303; Bless v. Jenkins, 129 Mo. 647, 31 SW 938; Summerville v. Hannibal, etc., R. Co., 62 Mo. 391; Golson v. Ebert, 52 Mo. 260; Nesbitt v. Helser, 49 Mo. 383; Little v. Stettheimer, 13 Mo. 572; Ruggles v. Washington County, 3 Mo. 496; Beagles v. Robertson, 135 Mo. A. 306, 115 SW 1042; Law Reporting Co. v. Elwood Grain Co., 135 Mo. A. 10, 115 SW 475; Alexander v. Wade, 106 Mo. A. 141, 80 SW 19.

Mont.—Story v. Maclay, 6 Mont. 492, 13 P 198.

Nebr.—Schneider v. Modern Woodmen of America, 148 NW 334; Johnston v. Milwaukee, etc., Inv. Co., 49 Nebr. 68, 68 NW 383; Holm v. Bennett, 43 Nebr. 808, 62 NW 194; Rich v. State Nat. Bank, 7 Nebr. 201, 29 AmR 382.

N. H.—Smith v. New England Bank, 72 N. H. 4, 54 A 385; Grant v. Beard, 50 N. H. 129; Low v. Connecticut, etc., R. Co., 46 N. H. 284; Davis v. Haverhill School Dist., 44 N. H. 398; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203.

N. J.—Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728; McAlpin v. Universal Tobacco Co., (Ch.) 57 A 802.

N. Y.—Cowley v. Fabien, 204 N. Y. 566, 97 NE 458; Heermans v. Clarkson, 64 N. Y. 171; Hankins v. Baker, 46 N. Y. 666; Smith v. Tracy, 36 N. Y. 79; Buffalo Commercial Bank v. Warren, 15 N. Y. 577; Watson v. Gray, 4 Abb. Dec. 540; Goodhue v. Cameron, 142 App. Div. 470, 127 NYS 120; Merritt v. Bissell, 84 Hun 194, 32 NYS 559 [aff on other grounds 155 N. Y. 396, 50 NE 280]; Brower v. Lewis, 19 Barb. 574; Conro v. Port Henry Iron Co., 12 Barb. 27; Dupignac v. Bernstrom, 37 Misc. 677, 76 NYS 381 [aff 76 App. Div. 105, 78 NYS 705]; Long v. Poth, 16 Misc. 85, 37 NYS 670; Hess v. Baar, 14 Misc. 286, 35 NYS 687; Lawrence v. Taylor, 5 Hill 107; Weed v. Carpenter, 4 Wend. 219.

Oh.—Pollock v. Cohen, 32 Oh. St. 514; Woodward v. Suydam, 11 Oh. 360.

Or.—Van Dusen Inv. Co. v. Western Fishing Co., 63 Or. 7, 12, 124 P 677, 126 P 604 [cit Cyc]; Municipal Security Co. v. Baker County, 33 Or. 338, 54 P 174.

Pa.—Daughters of American Revolution v. Schenley, 204 Pa. 572, 54 A 366; Bell v. Waynesboro Borough, 195 Pa. 299, 45 A 930; Kelsey v. Crawford County Nat. Bank, 69 Pa. 426; Negley v. Lindsay, 67 Pa. 217, 5 AmR 427; Pearsoll v. Chapin, 44 Pa. 9; Workman v. Guthrie, 29 Pa. 495, 72 AmD 654; Pennsylvania Bank v. Reed, 1 Watts & S. 101; Himes v. Herr, 3 Pa. Super. 124, 39 WklyNC 568.

S. D.—Dobbs v. Atlas El. Co., 25 S. D. 177, 183, 126 NW 250 [cit Cyc]; Townsend v. Kennedy, 6 S. D. 47, 60 NW 164.

Tex.—Vincent v. Rather, 31 Tex. 77, 98 AmD 516; Commercial, etc., Bank v. Jones, 18 Tex. 811; Sargent v. Barnes, (Civ. A.) 159 SW 366, 374 [quot Cyc].

Utah.—Campbell v. Gowans, 35 Utah 268, 100 P 397, 23 LRANS 414, 19 AnnCas 660; Murray v. Beal, 23 Utah 548, 65 P 726; Genter v. Conglomerate Min. Co., 23 Utah 165, 64 P 362.

Vt.—Brooks v. Fletcher, 56 Vt. 624; Bigelow v. Denison, 23 Vt. 564; Whitwell v. Warner, 20 Vt. 425.

Va.—Richmond Union Pass. R. Co. v. New York, etc., R. Co., 95 Va. 386, 28 SE 573; Downer v. Morrison, 2 Gratt. (43 Va.) 237.

Wash.—Keenan v. Lauritzen Malt Co., 57 Wash. 367, 106 P 1122; Ankeny v. Young, 52 Wash. 235, 100 P 736.

W. Va.—Ruffner v. Hewitt, 7 W. Va. 585.

Wis.—Platt v. Schmitt, 117 Wis. 489, 94 NW 345; Stewart v. Mather, 32 Wis. 344; Brown v. La Crosse City Gas Light, etc., Co., 21 Wis. 51; Weisgeer v. Wheeler, 14 Wis. 101.

Eng.—Williams v. North China Ins. Co., 1 C. P. D. 757; Brice v. Wilson, 8 A. & E. 349 note, 35 ECL 626, 112 Reprint 870; Goodtitle v. Woodward, 3 B. & Ald. 689, 5 ECL 396, 106 Reprint 813; Maclean v. Dunn, 4 Bing. 722, 13 ECL 710, 130 Reprint 947; Lucy v. Walrond, 3 Bing. N. Cas. 841, 32 ECL 386, 132 Reprint 634; Wolff v. Horncastle, 1 B. & P. 316, 126 Reprint 924, 13 ERC 265; Foster v. Bates, 1 D. & L. 400, 2 ERC 129; Soames v. Spencer, 1 D. & R. 32, 16 ECL 14; Heslop v. Baker, 8 Exch. 411; Bird v. Brown, 4 Exch. 786, 23 ERC 422; Ancona v. Marks, 7 H. & N. 686; Cornwal v. Wilson, 1 Ves. 510, 27 Reprint 1173.

Can.—Scott v. New Brunswick Bank, 23 Can. S. C. 277.

N. B.—Dalton v. Hamilton, 12 N. B. 423.

"Ratification makes the contract in all respects what it would have been if the requisite power had existed when it was entered into. It relates back to the execution of the contract, and renders it obligatory from the outset. The party ratifying becomes a party to the contract, and is, on the one hand entitled to all its benefits, and on the other is bound by its terms." Ansonia v. Cooper, 64 Conn. 536, 544, 30 A 760.

"It invests the principal and agent, as a rule, with the same rights and duties as if the transaction had been previously authorized." Osborne v. Durham, 157 N. C. 262, 269, 72 SE 849.

[a] **"When one contracts as agent without naming a principal,** his acts inure to the benefit of the party, although at the time uncertain and unknown, for whom it shall turn out that he intended to act, provided the party thus entitled to be principal ratify the contract." Waddill v. Sebree, 88 Va. 1012, 1015, 14 SE 849, 29 AmSR 766.

[b] **Lack of authority in an agent to bind his principal is immaterial** where the principal, with full knowledge, has subsequently ratified the agent's acts. Meador v. O'Dowd, 85 Kan. 878, 118 P 695.

[c] **Where a letter assuming a**

this rule is expressly prescribed by statute.[40] A valid ratification creates or establishes the relation of agency in respect to a matter as to which none before existed,[41] and renders valid and binding the unauthorized act or contract which before was invalid.[42] It operates not merely as presumptive evidence of previous authority, but per se as a confirmation of the act of the agent.[43]

[§ 139] **b. Exceptions and Limitations.** The rule stated in the preceding section is subject to many exceptions.[44] Thus it is a well settled rule that a ratification will not relate back so as to impair or defeat the rights of third persons which have intervened between the time of the doing of the unauthorized act and its ratification by the principal,[45] particularly where, when knowledge of the unauthorized act was first acquired by the principal, he disaffirmed and repudiated it.[46] Accordingly a ratification will not relate back so as to defeat an attachment or execution levied in the meantime.[47] So if a third person has a complete cause of action or defense when a suit is commenced, he cannot be deprived thereof by a subsequent ratification of an act which is without binding force except for such ratification.[48] Nor can ratification subject a third person to loss or damage for

liability is unauthorized when written by an agent, a subsequent ratification of such letter by the principal supplies the want of initial authority. Elevator Supply, etc., Co. v. Biddle-Murray Mfg. Co., 156 Ill. A. 461.

40. See statutory provisions.

[a] **In Georgia,** under Civ. Code § 3019, "a ratification by the principal relates back to the act ratified, and takes effect as if originally authorized." Haney School Furniture Co. v. Hightower Baptist Inst., 113 Ga. 289, 294, 38 SE 761.

41. Hunter v. Cobe, 84 Minn. 187, 87 NW 612; Wade v. Goldsberry, 17 Mo. 270; Looschen Piano Case Co. v. Steinberg, 76 N. J. L. 130, 68 A 1072 (holding that a subsequent ratification of an act done by another, assuming to act in the capacity of an agent, although without any precedent authority, creates the relation of principal and agent); Gulick v. Grover, 33 N. J. L. 463, 97 AmD 428. See also cases supra note 39.

42. Schmidt v. Rankin, 193 Mo. 254, 91 SW 78 (holding that, where a mortgagor of cattle employed an agent to dispose of the cattle in such a manner as to pay the mortgage and net the mortgagor two dollars per head, and the agent, instead of selling, remortgaged the cattle and with the proceeds of the mortgage paid the prior mortgage and the mortgagor's stipulated profit, acquiescence of the mortgagor after learning what the agent had done rendered the agent's act legal and the mortgage executed by him valid). See also cases supra note 39; infra § 144.

[a] **"It validates what would otherwise be an invalid act,** and attaches to it those incidents and consequences it would have had if previously authorized." Beagles v. Robertson, 135 Mo. A. 306, 327, 115 SW 1042.

[b] **An unauthorized indorsement** of a promissory note becomes binding on a subsequent ratification. Commercial L. & T. Co. v. Mallers, 141 Ill. A. 460 [aff 237 Ill. 119, 86 NE 728].

[c] **Where an agent, authorized to sign notes, delegates his power,** a ratification by the principal of such note will make it valid, but not a ratification by the agent. Brewster v. Hobart, 15 Pick. (Mass.) 302.

[d] **Lease.**—(1) A written ratification of a lease executed by an agent without authority in writing not only validates the same from the date of the ratification, but from its inception under the doctrine of relation back. Dobbs v. Atlas El. Co., 25 S. D. 177, 126 NW 250 [rev reh 22 S. D. 226, 117 NW 128]. (2) Where a lease is signed by an agent not authorized so to do, and the lessee takes possession and pays rent, the owner receiving the same with knowledge of the facts, it creates a property right to a lease, good at law, in conformity to the terms of the agreement. Kris v. Peege, 119 Wis. 105, 95 NW 108.

43. Commercial Bank v. Warren, 15 N. Y. 577, 580 (where the court said: "It is a part of the established doctrine of the law of agency, that a subsequent ratification by the principal of the previous unauthorized act of an agent, or of one assuming to be such, is in all respects equivalent to an original authority. . . . It is, however, contended by the defendant's counsel, that the ratification in such cases operates not directly, but merely as presumptive evidence that the act was originally done by the authority of the principal. Were this position established, it would inevitably follow that the judgment in this case must be reversed; as the evidence of a want of authority is so conclusive, as effectually to repel any contrary inference to be drawn from the subsequent assent of the defendant. But this view of the modus operandi of a ratification, is not sustained by the authorities. On the contrary, they all proceed upon the assumption that a ratification is, per se, a confirmation of the act of the agent. In none of the cases do I find it intimated that it operates merely as evidence of an original authority; nor have I met with any case in which the usual effect of a ratification was prevented, by proof of an actual want of authority on the part of the agent. Whether or not, therefore, the doctrine that a ratification is not merely evidence of, but equivalent to, an original authority, can be made to harmonize with the general principles and analogies of the law, it appears to be too firmly established to be shaken").

44. Clealand v. Walker, 11 Ala. 1058, 46 AmD 238.

45. U. S.—Cook v. Tullis, 18 Wall. 332, 21 L. ed. 933; Farmers' L. & T. Co. v. Memphis, etc., R. Co., 83 Fed. 870; Johnson v. Johnson, 31 Fed. 700; Strain v. Gourdin, 23 F. Cas. No. 13,521, 2 Woods 380, 11 NatBankrReg 156; Stoddard v. U. S., 4 Ct. Cl. 511.

Ala.—Wood v. McCain, 7 Ala. 800, 42 AmD 612 (holding that the subsequent ratification of an assignment by the principal did not defeat the lien of a creditor who had caused a garnishment to be served).

Ark.—Lowenstein v. Caruth, 59 Ark. 588, 28 SW 421.

Cal.—Wittenbrock v. Bellmer, 57 Cal. 12; McCracken v. San Francisco, 16 Cal. 591.

D. C.—Chesapeake, etc., R. Co. v. Howard, 14 App. 262 [aff 178 U. S. 153, 20 SCt 880, 44 L. ed. 1015].

Ga.—Graham v. Williams, 114 Ga. 716, 40 SE 790 (holding that where a deed was made by an attorney in fact without a sufficiently comprehensive power of attorney, a subsequent ratification of it relates back to the time of the execution, but not so as to affect the intervening rights of third parties); Dalton Buggy Co. v. Wood, 7 Ga. A. 477, 67 SE 121.

Iowa.—Stickley v. Widle, 122 Iowa 400, 98 NW 135; Lampson v. Arnold, 19 Iowa 479.

La.—Smith v. McMicken, 12 Rob. 653; Grove v. Harvey, 12 Rob. 221; Burroughs v. Jayne, 7 Mart. N. S. 374.

Me.—Fiske v. Holmes, 41 Me. 441.

Mass.—Baird v. Williams, 19 Pick. 381; Sturtevant v. Robinson, 18 Pick. 175.

Minn.—Allis v. Goldsmith, 22 Minn. 123.

Miss.—Planters Bank v. Sharp, 4 Sm. & M. 75, 43 AmD 470.

N. D.—Clendenning v. Hawk, 10 N. D. 90, 86 NW 114.

Oh.—Pollock v. Cohen, 32 Oh. St. 514.

Pa.—McMahan v. McMahan, 13 Pa. 376, 53 AmD 481.

Utah.—Murray v. Beal, 23 Utah 548, 65 P 726.

Wis.—Platt v. Schmitt, 117 Wis. 489, 94 NW 345.

Ont.—Taylor v. Ainslie, 19 U. C. C. P. 78.

[a] **Intervening mortgage.**—A ratification of an unauthorized delivery of a deed cannot relate back so as to cut out an intervening mortgage. Parmelee v. Simpson, 5 Wall. (U. S.) 81, 18 L. ed. 542.

46. Wilkinson v. Harwell, 13 Ala. 660; Fiske v. Holmes, 41 Me. 441.

47. Ala.—Norton v. Alabama Nat. Bank, 102 Ala. 420, 14 S 872 (holding that where the president of a corporation makes an unauthorized assignment of the corporate property for the benefit of creditors the subsequent ratification thereof by the board of directors is insufficient as against creditors levying an attachment in the meantime).

Cal.—Taylor v. Robinson, 14 Cal. 396.

Oh.—Pollock v. Cohen, 32 Oh. St. 514.

Tex.—Kempner v. Rosenthal, 81 Tex. 12, 16 SW 639 (holding that the ratification of the receipt by an agent to collect a debt of a conveyance of property in satisfaction of the debt will not relate back to the time of the receipt of such conveyance, so as to defeat the lien of an attachment levied in the meanwhile upon the property, although the deed was recorded before the levy); Conner v. Littlefield, 79 Tex. 76, 15 SW 217 (holding that where on an issue as to the authority of an agent to make a sale, arising between the purchaser and attaching creditors of the principal, the latter testified that he had not authorized the sale, but admitted that after the levy he signed a written ratification in which the agent's authority was acknowledged, the ratification could not take effect by relation so as to defeat the levy).

Wis.—Galloway v. Hamilton, 68 Wis. 651, 32 NW 636 (holding that a subsequent ratification by a corporation of a deed made without authority by its officers cannot bar the claims of a creditor of the corporation who has levied an execution upon the lands).

48. Dingley v. McDonald, 124 Cal. 682, 57 P 574 (holding that, where an agent for the collection of a claim, without any authority to delegate his power, assigns it to another to sue thereon, a ratification by his principal of such act after the commencement of the suit is not equivalent to a precedent authorization as to defendant, since the principal could not by his act take away from defendant a defense he had at the commencement of the action); Graham v. Williams, 114 Ga. 716, 40 SE 790 (holding that, where in an action for

nonperformance of an obligation or duty which he would not be obliged to perform in the absence of ratification.[49] Neither can a ratification relate back so as to make valid an act which was utterly void and against the law,[50] or so as to give effect to the act of one who was incapacitated to receive an original appointment as agent,[51] or so as to make void a contract that was valid at the time and place of ratification.[52] But the doctrine of relation may be applied for the protection of a clearly superior equity, even though it interferes with the claims of third persons resting upon an inferior equity.[53]

[§ 140] **2. Revocability.** Although a principal may disaffirm a transaction which he has ratified without having full knowledge of all the facts, and which he has not intentionally ratified regardless of knowledge,[54] if once he elects to ratify and does so with full knowledge of all the facts, his ratification becomes irrevocable, and he cannot afterward repudiate the agent's acts or set up his want of authority,[55] even though the approval was but for a short time,[56] and in some jurisdictions this rule is expressly prescribed by statute;[57] nor can the principal afterward pursue a remedy, or offer a defense, inconsistent with the ratification or based upon a repudiation of the agent's acts.[58]

[§ 141] **3. As against Agent—a. In Contract—(1) Between Agent and Third Person.** A valid ratification, being equivalent to prior authority, relieves the agent from any liability to third persons for having acted without authority,[59] provided the ratification places the third person in no worse

trespass defendant has a defense at the time the suit is brought, he cannot be deprived thereof by a third person ratifying a deed which at the time of the commencement of the suit was without binding force for want of such ratification); Fiske v. Holmes, 41 Me. 41.

49. Grove v. Harvey, 12 Rob. (La.) 221 (holding that a ratification by a principal cannot relate back so as to enable the principal to maintain an action of trover for refusal to deliver goods upon an unauthorized demand by an agent).

50. Chapman v. Lee, 47 Ala. 143; Harrison v. McHenry, 9 Ga. 164, 52 AmD 435 (holding that, although a subsequent ratification by the principal will confirm an assumed agency, it will not do so if the agency is in itself illegal); Bird v. Brown, 4 Exch. 786, 23 ERC 422. See also supra § 84.

51. Harrison v. McHenry, 9 Ga. 164, 52 AmD 435 (holding that a ratification does not have the effect to confirm the act of a sheriff in purchasing at his own sale in the capacity of agent for a third person). See generally supra §§ 21–23.

52. Shuenfeldt v. Junkermann, 20 Fed. 357 (so as to invalidate a sale of liquor which was ratified at a place where such sale was not illegal).

53. Williams v. Butler, 35 Ill. 544, 552 (where the court said: "It is urged, however, that a ratification cannot relate back so as to cut off the intervening rights of third persons. That is doubtless true as a general rule, but if the doctrine of relation is applied merely for the protection of a clearly superior equity, such application would be consistent with recognized legal principles, even though it interferes with the claims of third persons resting upon an inferior equity." It was held in this case, therefore, that where an execution creditor levied upon the assets of a partnership, entered into by an agent with another in the name of his principal, without authority, for a debt due from such other partner before the creation of the partnership, and the principal subsequently ratified such partnership, he was entitled to have the firm assets first applied to the payment of the firm debts, and that the lien of the execution creditor so levied attached only to whatever interest the other partner had in the assets of the firm after the payment of the firm debts).

54. See Blood v. La Serena Land, etc., Co., 113 Cal. 221, 41 P 1017, 45 P 252; Starbird v. Curtis, 43 Me. 352. See also supra §§ 79, 93–98.

55. U. S.—Clark v. Van Riemsdyk, 9 Cranch 153, 3 L. ed. 688; Sanders v. Peck, 87 Fed. 61, 30 CCA 530; Russ v. Telfener, 57 Fed. 973.

Ala.—Whitfield v. Riddle, 78 Ala. 99.

Cal.—Blood v. La Serena Land, etc., Co., 113 Cal. 221, 41 P 1017, 45 P 252; Goetz v. Goldbaum, 87 P 646; Blen v. Bear River, etc., Water, etc., Co., 20 Cal. 602, 81 AmD 132.

Ill.—Silverman v. Bush, 16 Ill. A. 437; McGeoch v. Hooker, 11 Ill. A. 649.

Iowa.—Harmon v. Clayton, 51 Iowa 36, 50 NW 541; Bell v. Byerson, 11 Iowa 233, 77 AmD 142.

La.—Meyers v. Simmons, 19 La. Ann. 370; Breedlove v. Wamack, 2 Mart. N. S. 181.

Mich.—Vaughn v. Sheridan, 50 Mich. 155, 15 NW 62.

Minn.—Hunter v. Cobe, 84 Minn. 187, 87 NW 612 (holding that a principal is not at liberty to disaffirm, if he has assented to the act of an agent, after being informed of all the material facts of a transaction in which the agent has exceeded his authority).

Miss.—Memphis, etc., R. Co. v. Scruggs, 50 Miss. 284.

Mo.—Morgan County Coal Co. v. Halderman, 254 Mo. 596, 163 SW 828; Kirkpatrick v. Pease, 202 Mo. 471, 101 SW 651; Beall v. January, 62 Mo. 434; Beagles v. Robertson, 135 Mo. A. 306, 115 SW 1042.

N. Y.—Andrews v. Ætna L. Ins. Co., 92 N. Y. 596 (holding that a principal upon being informed of an unauthorized act of an agent has a right to elect whether he will adopt it or not, and so long as the condition of the parties is unchanged cannot be prevented from such adoption by the fact that the other party prefers to treat the contract as invalid, but his election to ratify, once made, is irrevocable); Glor v. Kelly, 49 App. Div. 617, 63 NYS 339 [aff 166 N. Y. 589 mem, 59 NE 1123 mem].

N. C.—Rowland v. Barnes, 81 N. C. 234.

Pa.—Andersen Coal Min. Co. v. Sloan, etc., Co., 46 Pa. Super. 320.

Vt.—French v. Barre, 58 Vt. 567, 5 A 568.

Va.—Richmond Union Pass. R. Co. v. Richmond, etc., R. Co., 96 Va. 670, 32 SE 787 (holding that, where a voidable contract made by an agent is ratified by the principal, the ratification is final and cannot be retracted).

Eng.—Smith v. Cologan, 2 T. R. 189 note, 100 Reprint 102.

N. B.—Lucy v. Donovan, 16 N. B. 128.

[a] **Illustrations.**—(1) Where a principal has ratified the act of his general agent in foreclosing a deed of trust securing a note running to the principal, the agent's subsequent misconduct in embezzling the proceeds of the sale and himself continuing the payment of interest on the note for several years does not impair or revoke the ratification, since, when once made, a ratification is irrevocable. Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019. (2) A vendor, who ratifies a contract to sell and to repurchase from the purchaser at a fixed price after expiration of a year at the purchaser's election, by conveying the property and receiving the purchaser's money, and also delivering an agreement to repurchase, cannot repudiate the agency of the person making the contract. Van Name v. Queens Land, etc., Co., 130 App. Div. 857, 115 NYS 905. (3) Where a principal ratifies the acts of one purporting to act as his agent in buying goods, no subsequent repudiation of such acts can affect his liability to the seller. Mutual Auto Accessories Co. v. Beard, 59 Misc. 174, 110 NYS 416.

[b] **Knowledge of facts.**—Where a principal ratifies an unauthorized act of his agent, he cannot afterward avoid the effect of such ratification by showing that he was not acquainted with all the facts of the transaction ratified, where he was in possession of means of learning them: Glor v. Kelly, 49 App. Div. 617, 63 NYS 339 [aff 166 N. Y. 589 mem, 59 NE 1123 mem]; Russell v. Waterloo Threshing Mach. Co., 17 N. D. 248, 116 NW 611. See also supra § 98.

56. Russ v. Telfener, 57 Fed. 973 [aff 60 Fed. 228 rev on other grounds 162 U. S. 170, 16 SCt 695, 40 L. ed. 930]; Silverman v. Bush, 16 Ill. A. 437; Coffin v. Gephart, 18 Iowa 256; Brock v. Jones, 16 Tex. 461.

[a] **Ratification for any length of time** is final. Fatta v. Edgerton, 137 NYS 226.

57. See statutory provisions.

[a] **In Georgia** under Civ. Code § 3019 "a ratification once made can not be revoked." See Haney School Furniture Co. v. Hightower Baptist Inst., 113 Ga. 289, 294, 38 SE 761; Bush v. Fourcher, 3 Ga. A. 43, 59 SE 459.

58. Ga.—Perry v. Hudson, 10 Ga. 362.

Ind.—Johnson v. Hoover, 72 Ind. 395 (holding that a principal who ratifies an unauthorized sale of his property by his agent by bringing assumpsit to recover the agreed price cannot afterward reclaim the property).

Iowa.—Beidman v. Goodell, 56 Iowa 592, 9 NW 900.

N. Y.—Avila v. Manhattan Chemical Co., 32 Hun 1.

N. B.—Dalton v. Hamilton, 12 N. B. 423.

59. La.—Walters v. Cruikshank, 24 La. Ann. 341.

Minn.—Sheffield v. Ladue, 16 Minn. 388, 10 AmR 145.

Mo.—Lingenfelder v. Leschen, 134 Mo. 55, 34 SW 1089.

N. Y.—Haight v. Sahler, 30 Barb. 218. Compare Palmer v. Stephens, 1 Den. 471; Rossiter v. Rossiter, 8 Wend. 494, 24 AmD 62 (both holding that where a person assuming to be the agent of another executes a note in his name, having in truth no authority for that purpose, the assumed agent is himself bound by the signature, and will not be allowed to show a subsequent ratification by his principal).

N. C.—Osborne v. Durham, 157 N. C. 262, 72 SE 849.

Pa.—Berger's App., 96 Pa. 443.

Compare Lazarus v. Shearer, 2 Ala. 718 (holding that, although the principal becomes liable by the adoption of a contract made on his behalf, the agent is not discharged unless he shows that the act was done in the exercise and within the limits of the

position than he would have occupied had the agent acted under prior authority.[60] And in the absence of facts showing a duty to do so, the agent is not bound to give the third person notice of the ratification.[61]

[§ 142] **(2) Between Agent and Principal.** A valid ratification by the principal relieves the agent from any liability to the principal which would otherwise result from the fact that the agent acted in an unauthorized way or without authority.[62] After ratification the agent can look to the principal for his commissions and reimbursement in the unauthorized transaction,[63] and the principal can hold the agent accountable for the act as done the same as though the latter had acted under authority previously conferred to do the act in that way;[64] but he cannot hold him accountable for not having done the act in the manner in which he would have been bound to perform it if authorized.[65] The ratification must of course be made with knowledge of the material facts, and hence is not effective to relieve the agent if the principal in ratifying acted in ignorance or under a misrepresentation by the agent of the facts.[66] If, however, the agent fully imforms the principal of his failure to obey instructions, and the principal approves either expressly, by silent acquiescence, or by availing himself of the fruits of the agent's disobedient acts, the agent will be excused for his disobedience,[67] although it has been held that mere inaction or silence after knowledge of the agent's unauthorized acts, which in favor of third persons might amount to a ratification, is not necessarily as to the agent such a ratification as to relieve him from liability.[68] A principal is not bound, in order to avoid ratification, to give the agent immediate notice of his dissent,[69] although he may be held to have ratified the acts, so as to relieve the agent, if he does not with rea-

powers delegated, or, in other words, under a sufficient authority existing at the time the contract was made).

"The agent is absolved from all responsibility on account of the unauthorized act or conduct, whether he exceeded or departed from his instructions, or was a mere volunteer." Osborne v. Durham, 157 N. C. 262, 269, 72 SE 849.

Liability of agent to third person for acting without authority see generally infra § 484.

60. Sheffield v. Ladue, 16 Minn. 388, 10 AmR 145.

61. Sheffield v. Ladue, 16 Minn. 388, 10 AmR 145 (holding that the failure of the agent to give notice of the ratification of his unauthorized act will not make him liable unless facts are shown imposing on him a duty to give such notice and damage resulting from his neglect so to do).

62. U. S.—Ætna Ins. Co. v. Sabine, 1 F. Cas. No. 97, 6 McLean 393.

Ala.—Van Dyke v. State, 24 Ala. 81 (holding that, where an agent pays his principal's money to a person who is not authorized to receive it, the bringing of an action by the principal against such person is a ratification of the payment, and discharges the agent from all further responsibility); Gaines v. Acre, Minor 141.

Ark.—Whitehead v. Wells, 29 Ark. 99.

Ga.—Bray v. Gunn, 53 Ga. 144.

Iowa.—Argus v. Ware, 155 Iowa 583, 585, 136 NW 774 [cit Cyc].

Kan.—Halloway v. Arkansas City Milling Co., 77 Kan. 76, 93 P 577; Lowry v. Stewart, 5 Kan. 663.

La.—Breedlove v. Wamack, 2 Mart. N. S. 181; Baldwin v. Preston, 11 Mart. 32.

Mich.—Antiseptic Fiber Package Co. v. Klein, 119 Mich. 225, 77 NW 931.

Minn.—Triggs v. Jones, 46 Minn. 277, 48 NW 1113.

Mo.—Beall v. January, 62 Mo. 434; Title Guaranty, etc., Co. v. Drennon, (A.) 167 SW 1181; Beagles v. Robertson, 135 Mo. A. 306, 115 SW 1042.

N. Y.—Washburn v. Rainier, 149 App. Div. 800, 134 NYS 301; Towle v. Stevenson, 1 Johns. Cas. 110.

N. C.—Osborne v. Durham, 157 N. C. 262, 72 SE 849.

Vt.—Pickett v. Pearsons, 17 Vt. 470.

N. S.—Pickles v. Western Assur. Co., 40 N. S. 327.

See also infra §§ 378, 399.

63. Heywood v. Doernbecher Mfg. Co., 48 Or. 359, 86 P 357, 87 P 550 (holding that where plaintiff was authorized as defendant's agent to sell furniture delivered by defendant at stipulated prices only, the contract providing that list prices should be low enough at all times to enable plaintiff to meet competition in the territory named, the fact that on notice that plaintiff, in order to meet such competition, was forced to allow certain discounts and deductions, charging the same to defendant, the latter acquiesced therein constituted a ratification by defendant, rendering it liable to repay the sums so expended by plaintiff, without an averment of an agreement to pay the same in the complaint in an action by plaintiff to recover the amount paid); Hovil v. Pack, 7 East 164, 103 Reprint 63; Frixione v. Tagliaferro, 10 Moore P. C. 175, 14 Reprint 459. See also infra §§ 414, 461.

64. Ala.—Gaines v. Acre, Minor 141.

Cal.—Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 29 P 640, 28 AmSR 122.

Ill.—Pells v. Snell, 31 Ill. A. 158 [rev on other grounds 130 Ill. 379, 23 NE 117].

La.—Stanfield v. Tucker, 4 La. Ann. 413.

Me.—McNear v. Atwood, 17 Me. 434.

Mich.—Rath v. Vanderlyn, 44 Mich. 597, 7 NW 196 (holding that, although the ratification is good, still the agent must fully account to his principal for the fruits of the act as ratified).

Miss.—Strickland v. Hudson, 55 Miss. 235.

N. Y.—Schanz v. Martin, 37 Misc. 492, 75 NYS 997.

S. D.—Hormann v. Sherin, 6 S. D. 82, 60 NW 145.

See Edminster v. Sturges, 67 Wis. 438, 30 NW 621.

See also infra §§ 353-412.

[a] **Recovery of money received.**—After ratifying an agent's act the principal may recover money received by the agent for the use of the principal, if the agent has no lien on it, or a right to retain it, for a debt due to him. Beagles v. Robertson, 135 Mo. A. 306, 115 SW 1042.

65. Gay v. McDonald, 143 Ky. 462, 136 SW 881 (holding that, where defendant accepted and paid for nearly all the grass seed purchased for him by plaintiff, defendant could not thereafter complain that plaintiff purchased more seed than he was authorized to do); Menkens v. Watson, 27 Mo. 163 (holding that, where the act of one done in the name of another without authority is adopted by such other, it is adopted as done, and the assumed agent cannot be treated as an authorized agent so as to make him responsible for not doing as he would have been bound to do if authorized).

66. U. S.—McKinley v. Williams, 74 Fed. 94, 20 CCA 312.

Ill.—Bank of Commerce v. Miller, 105 Ill. A. 224.

Ind.—Gage v. Pike, Smith 145.

Iowa.—Robinson Mach. Works v. Vorse, 52 Iowa 207, 2 NW 1108.

Mass.—Todd v. Bishop, 136 Mass. 386.

Minn.—Chase v. Baskerville, 93 Minn. 402, 101 NW 950.

N. C.—Hines v. Butler, 38 N. C. 307.

S. C.—Butler v. Haskell, 4 S. C. Eq. 651.

Tenn.—Walker v. Walker, 5 Heisk. 425.

Tex.—Smith v. Mosley, 74 Tex. 631, 12 SW 748; Boyd v. Jacobs, 6 Tex. Civ. A. 442, 25 SW 681.

Va.—Howatt v. Davis, 5 Munf. 34, 7 AmD 681.

Eng.—De Bussche v. Alt, 8 Ch. D. 286, 2 ERC 289.

Can.—Butterworth v. Shannon, 5 CanLTOccNotes 282.

See also supra §§ 93-98.

67. U. S.—Courcier v. Ritter, 6 F. Cas. No. 3,282, 4 Wash. 549 (holding that if the agent disobeys his orders and makes a full and candid statement to his principal of all the facts on which his judgment was exercised, and the latter makes no objection to his conduct or is silent respecting it, this amounts to a recognition of it and will excuse the agent); Richmond Mfg. Co. v. Starks, 18 F. Cas. No. 11,802, 4 Mason 296.

Ga.—Ingraham v. Barber, 72 Ga. 158.

Ind.—Judah v. Vincennes Univ., 16 Ind. 56.

La.—Raymond v. Palmer, 41 La. Ann. 425, 6 S 692, 17 AmSR 398; Featherstone v. Graham, 17 La. Ann. 42; Beau v. Drew, 15 La. Ann. 461; Flower v. Downs, 6 La. Ann. 538; Reed v. Ritchey, 2 La. Ann. 796; Starr v. Zacharie, 18 La. 517; Dupre v. Splane, 16 La. 51.

Mass.—Metcalf v. Williams, 144 Mass. 452, 11 NE 700.

Mich.—Antiseptic Fiber Package Co. v. Klein, 119 Mich. 225, 77 NW 931; Rath v. Vanderlyn, 44 Mich. 597, 7 NW 196; Filer v. Jenks, 38 Mich. 585.

Minn.—Piano Mfg. Co. v. Buxton, 36 Minn. 203, 30 NW 668.

Mo.—Lewin v. Dille, 17 Mo. 64.

N. Y.—New York, etc., R. Co. v. Dixon, 114 N. Y. 80, 21 NE 110; Hazard v. Spears, 2 Abb. Dec. 353, 4 Keyes 469; Seymour v. Marvin, 11 Barb. 80; Darling v. Albert, 17 NYS 358; Russell v. Wetmore, 3 NYLeg Obs 318; Cairns v. Bleecker, 12 Johns. 300; Armstrong v. Gilchrist, 2 Johns. Cas. 424.

Pa.—Philadelphia, etc., R. Co. v. O'Donnell, 12 Phila. 213.

Vt.—Pickett v. Pearsons, 17 Vt. 470.

68. Triggs v. Jones, 46 Minn. 277, 48 NW 1113.

69. Clarke v. Meigs, 23 N. Y. Super. 337 (holding that a principal is not necessarily to be deemed to have ratified a wrongful act of his agent so as to exempt the agent from liability to him merely because he does not notify the agent of his dissent at the earliest possible oppor-

sonable promptness after knowledge notify the agent of his repudiation so that the agent may take proper steps to protect himself.[70]

[§ 143] **b. In Tort.**[71] The ratification of an agent's tort will fix liability therefor to the third person upon the principal,[72] and will relieve the agent from liability to his principal on account of the tort,[73] as the principal may elect to waive the agent's tort by ratifying his act, and thereby relieve him from tort liability to himself and hold him accountable for the agency.[74] But such ratification will not relieve the agent from liability to the third person injured thereby,[75] except where the act of the agent is a trespass or other tort merely because he acted without authority, as in such a case a subsequent ratification relates back and relieves his act of its tortious nature and him from liability therefor.[76]

[§ 144] **4. As against Principal.** As against the principal the maxim, Omnis ratihabitio, etc., is operative in all cases, and upon ratification with full knowledge of the facts, or upon an intentional ratification regardless of knowledge, of an act done or contract made by an agent without authority, the principal is bound as fully as if the agent had acted under original authority,[77] irrespective of any

tunity after being informed of the wrongful act).

70. Oliver v. Johnson, 24 La. Ann. 460; Cairnes v. Bleecker, 12 Johns. (N. Y.) 300; Prince v. Clark, 1 B. & C. 186, 8 ECL 80, 107 Reprint 70. Compare Lewin v. Dille, 17 Mo. 64 (holding that, where the instructions of the principal are disobeyed by the agent, the former, in a suit between them, will not be held to have ratified the acts to which he has failed to signify his dissent).

71. Liability of agent in tort see generally infra §§ 498–503.

72. See infra §§ 144, 532–539.

73. Bayntun v. Cattle, 1 M. & Rob. 265 (holding that money deposited with an agent and expended by him in illegal disbursements cannot be recovered from him by the principal, if the principal was at the time aware of the illegal disbursements or if he subsequently assented to them). See also infra § 378.

[a] **Knowledge necessary.**—There can be no ratification of an agent's wrongful act so as to excuse the agent if the principal had no knowledge that the agent was guilty of wrong. George N. Pierce Co. v. Beers, 190 Mass. 199, 76 NE 603. See also supra §§ 93–98.

[b] **A mere failure to repudiate the transaction** entirely is not necessarily to be construed as a ratification that will relieve the agent of his liability. Bell v. Cunningham, 3 Pet. (U. S.) 69, 7 L. ed. 606.

74. Judah v. Vincennes University, 16 Ind. 56; Motley v. Motley, 42 N. C. 211 (holding it to be a well settled principle that if an agent convert the property confided to him the principal may at his election ratify the transaction and claim whatever profit is made by it).

[a] **Waiver of tort and suit in assumpsit.**—Where, however, an agent, without the consent of his principal, sells to himself at the price he was authorized to sell to a third person, the waiver by the principal of his right to proceed as for tort founded on the conversion by the agent of his property in purchasing the same himself, and his electing to sue the agent on an implied contract of purchase by the agent, do not constitute a ratification of the original act of the agent in purchasing himself so as to limit the recovery to the price specified, but it is merely a waiver of the element of tort in the transaction. Anderson v. Grand Forks First Nat. Bank, 5 N. D. 451, 67 NW 821.

75. Perminter v. Kelly, 18 Ala. 716, 54 AmD 177; Richardson v. Kimball, 28 Me. 463; Bird v. Brown, 4 Exch. 786, 23 ERC 422 (holding that ratification of a conversion of goods could not make the taking lawful, where third persons had before the ratification secured a valid lien on the goods); Stephens v. Elwall, 4 M. & S. 259, 105 Reprint 830; Featherstonhaugh v. Johnston, 8 Taunt. 237, 4 ECL 125, 129 Reprint 374. See also infra §§ 498–503.

76. Bird v. Brown, 4 Exch. 786, 23 ERC 422; Buron v. Denman, 2 Exch. 167; Grant v. McMillan, 10 U. C. C. P. 536 (holding that a distress made by an agent for the benefit of his principal in his own name instead of his principal's and subsequently ratified by the principal is thereby made legal).

77. U. S.—Townsend v. Chappell, 12 Wall. 681, 20 L. ed. 436; Clark v. Van Riemsdyk, 9 Cranch 153, 3 L. ed. 688; Washington, etc., R. Co. v. Real Est. Trust Co., 177 Fed. 306; Farmers' L. & T. Co. v. Memphis, etc., R. Co., 83 Fed. 870; Russ v. Telfener, 57 Fed. 973 [aff 60 Fed. 228, 8 CCA 585]; In re Pennsylvania Ins. Co., 22 Fed. 109.

Ala.—Chapman v. Lee, 47 Ala. 143; Clealand v. Walker, 11 Ala. 1058, 46 AmD 238; Lee v. Fontaine, 10 Ala. 755, 44 AmD 505; Blevins v. Pope, 7 Ala. 371.

Ark.—Froug, etc., Co. v. Outcault Adv. Co., 168 SW 1075.

Cal.—Dover v. Pittsburg Oil Co., 143 Cal. 501, 77 P 405; Ballard v. Nye, 138 Cal. 588, 72 P 156; Market St. R. Co. v. Hellman, 109 Cal. 571, 42 P 225; Kraft v. Wilson, (1894) 37 P 790; Newhall v. Joseph Levy Bag Co., 19 Cal. A. 9, 124 P 875; Tate v. Aitken, 5 Cal. A. 505, 90 P 836 (holding that, although a contract authorizing real estate brokers to sell plaintiff's land was not signed by plaintiff, it was none the less his act, where his wife signed it with his approval and he subsequently ratified her act).

Colo.—McKay v. Fleming, 24 Colo. A. 380, 134 P 159.

Conn.—Ansonia v. Cooper, 64 Conn. 536, 30 A 760.

Del.—Bancroft v. Wilmington Conference Academy, 10 Del. 577.

Ga.—Haney School Furniture Co. v. Hightower Baptist Inst., 113 Ga. 289, 38 SE 761; Baldwin Fertilizer Co. v. Thompson, 106 Ga. 450, 32 SE 591; Byrne v. Doughty, 13 Ga. 46; Perry v. Hudson, 10 Ga. 362.

Ida.—Heath v. Potlatch Lumber Co., 1 Ida. 42, 108 P 343, 27 LRANS 707.

Ill.—Taylor v. Bailey, 169 Ill. 181, 48 NE 200 [aff 68 Ill. A. 622]; Francis v. Kerker, 85 Ill. 190; Paul v. Berry, 78 Ill. 158; Burns v. Lane, 23 Ill. A. 504.

Ind.—Louisville, etc., R. Co. v. McVay, 98 Ind. 391, 49 AmR 770 (holding that the unauthorized employment of medical assistance by a yardmaster was binding on the railroad corporation when subsequently ratified by it); Moore v. Butler Univ., 83 Ind. 376; Moore v. Pendleton, 16 Ind. 481; Jones v. Milton, etc., Turnpike Co., 7 Ind. 547.

Iowa.—Young v. Inman, 146 Iowa 492, 125 NW 177; Zelenka v. Port Huron Mach. Co., 144 Iowa 592, 123 NW 332; Bradford v. Smith, 123 Iowa 41, 98 NW 377.

Kan.—Meador v. O'Dowd, 85 Kan. 878, 118 P 695; Aultman Thrashing, etc., Co. v. Knoll, 71 Kan. 109, 79 P 1074.

Ky.—Weist v. Yoder, 4 Bibb 529; Barbour v. Craig, Litt. Sel. Cas. 213 (holding that a subsequent confirmation of the sale of land made by an agent binds the principal, although he is no party to the contract); Hewling v. Wiltshire, 61 SW 264, 22 KyL 1702; Bruen v. Grahn, 5 KyL 312.

La.—Sentell v. Kennedy, 29 La. Ann. 679; Szymanski v. Plassan, 20 La. Ann. 90, 96 AmD 382; Overby v. Overby, 18 La. Ann. 546; Baines v. Burbridge, 15 La. Ann. 628; Perrotin v. Cucullu, 6 La. 587.

Mass.—Kostopolos v. Pezzetti, 207 Mass. 277, 93 NE 571, AnnCas1912A 859; Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 NE 776, 39 AmSR 467, 22 LRA 364. See also Clarke v. Warwick Cycle Mfg. Co., 174 Mass. 434, 54 NE 887.

Minn.—Hunter v. Cobe, 34 Minn. 187, 87 NW 612; Sheffield v. Ladue, 16 Minn. 388, 10 AmR 145; Woodbury v. Larned, 5 Minn. 339.

Miss.—Kountz v. Price, 40 Miss. 341; Planters' Bank v. Sharp, 12 Miss. 75, 43 AmD 470; Baker v. Byrne, 10 Miss. 193.

Mo.—Matthews v. French, 194 Mo. 553, 92 SW 634; Jefferson City Sav. Assoc. v. Morrison, 48 Mo. 273; Little v. Stettheimer, 13 Mo. 573; Matthews v. McGuffin, (A.) 165 SW 874; Beagles v. Robertson, 135 Mo. A. 306, 115 SW 1042; Short v. Stephens, 92 Mo. A. 151; Bank of Commerce v. Bernero, 17 Mo. A. 313.

Nev.—Adams v. Smith, 19 Nev. 259, 9 P 337, 10 P 353; Clarke v. Lyon County, 8 Nev. 181.

N. H.—Grant v. Beard, 50 N. H. 129.

N. J.—Looschen Piano Case Co. v. Steinburg, 76 N. J. L. 130, 68 A 1072; Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728; Lindley v. Keim, 54 N. J. Eq. 413, 34 A 1073 [rev (Ch.) 30 A 1063].

N. Y.—Utica First Nat. Bank v. Ballou, 49 N. Y. 155; Newton v. Bronson, 13 N. Y. 587, 67 AmD 89; Watson v. Gray, 4 Abb. Dec. 540; Merritt v. Bissell, 84 Hun 194, 32 NYS 559 [rev on other grounds 155 N. Y. 396, 50 NE 280]; Mull v. Ingalls, 30 Misc. 80, 62 NYS 830 (holding that, where defendants' agent made a contract which they ratified, they are chargeable with the knowledge of their agent that the party contracted with was an agent and not a principal); Hess, etc., Co. v. Baar, 14 Misc. 286, 35 NYS 687 [aff 11 Misc. 619, 32 NYS 918].

N. C.—Wynn v. Grant, 81 SE 949.

Oh.—Pollock v. Cohen, 32 Oh. St. 514; State v. Buttles, 3 Oh. St. 309.

Pa.—McCulloch v. McKee, 16 Pa. 289; Pennsylvania Bank v. Reed, 1 Watts & S. 101; Vanhorne v. Frick, 6 Serg. & R. 90; Papajian v. Scott, 47 Pa. Super. 126; Straub Brewing Co. v. Bonistalli, 5 Pa. Super. 415; Straub Brewing Co. v. Bisl, 5 Pa. Super. 422.

S. C.—Morgan v. Moorhead, 90 S. C. 278, 73 SE 189.

Tex.—Brock v. Jones, 16 Tex. 461; Dockery v. Maple, (Civ. A.) 125 SW 631; Sanger v. Warren, (Civ. A.) 40 SW 840.

Vt.—Fay v. Richmond, 43 Vt. 25.

Va.—Richmond Union Pass. R. Co. v. New York, etc., R. Co., 95 Va. 386, 28 SE 573; Forbes v. Hagman, 75 Va. 168.

Wash.—Lemcke v. Funk, 78 Wash. 460, 139 P 234; Keenan v. Lauritzen Malt Co., 57 Wash. 367, 106 P 1122.

Wis.—Browne v. La Crosse City Gas Light, etc., Co., 21 Wis. 51.

Eng.—Spittle v. Lavender, 2 B. & B. 452, 6 ECL 224, 129 Reprint 1041; Maclean v. Dunn, 4 Bing. 722, 13 ECL 710, 130 Reprint 947; Belshaw v.

limitation on the agent's authority,[78] especially where the third person to be affected by the unauthorized act was not privy to the act of the agent.[79] This rule applies to contracts made in the name of the agent and approved by the principal as well as those made in the name of the principal.[80] By a valid ratification the principal waives the agent's want of authority and rights based thereon,[81] and assumes responsibility for the act or transaction of the agent, not as it was authorized, but as it was done by the agent,[82] with the burdens as well as the benefits resulting;[83] and hence thereby becomes bound by all the instrumentalities used by the agent within the scope of the assumed authority,[84] including his frauds, misrepre-

Bush, 11 C. B. 191, 73 ECL 191, 138 Reprint 444; Ancona v. Marks, 7 H. & N. 686; Wilson v. Tumman, 6 M. & G. 236, 46 ECL 236, 134 Reprint 879; Secretary of State of India v. Kamachee Boye Sahaba, 7 Moore Indian App. 476, 19 Reprint 388, 13 Moore P. C. 22, 15 Reprint 9.

Can.—Scott v. New Brunswick Bank, 23 Can. S. C. 277; Thien v. Bank of British North America, 4 DomLR 388, 21 WestLR 192.

Ont.—Patterson v. Fuller, 32 U. C. Q. B. 240.

See also infra §§ 515, 535, 536.

"He who ratifies and adopts a contract made in his name, although without his knowledge or authority, will be bound by it, through all of its legitimate consequences, the same as if he had authorized it in the first instance." Minnich v. Darling, 8 Ind. A. 539, 36 NE 173, 175.

[a] **The putting of the principal's name to a note** by an agent without authority will, if the principal ratifies the act, make the principal liable to the same extent as if he had made the note originally. Walter v. School Trustees, 12 Ill. 63; Human v. Cuniffe, 32 Mo. 316; Bigelow v. Denison, 23 Vt. 364.

[b] **A lease executed by an agent in his own name,** not within his authority as agent of the conservator of the owner of the property, is invalid in the first instance; but where the conservator ratifies it, it becomes an ordinary agreement concerning real estate, binding on the conservator, and the tenant may not be ejected during the term of the lease, either by the conservator or one claiming under him. Kostopolos v. Pezzetti, 207 Mass. 277, 93 NE 571, AnnCas 1912A 859.

[c] **Sale of leasehold.**—Where, in an action for damages for breach of a contract to sell and assign a leasehold interest in realty, there was evidence that defendants, with full knowledge of all the facts, ratified the sale made by their agents, it was error to dismiss the case on the ground that plaintiff failed to show a valid contract to sell and assign such interest. Hunter v. Cobe, 84 Minn. 137, 87 NW 612.

[d] **Where the bid at a sheriff's sale is made by another at the time unauthorized,** but the party in whose name the bid was made afterward adopts it as his own, this ratification of the bid will bind him, and he will be compelled to comply with it. Bernheim v. Kelly, Mann. Unrep. Cas. 146.

[e] **The ratification by the owner of land, by a separate instrument in writing,** of a contract for its sale made by his attorney has the same binding effect against the owner as his signature to the contract itself would have had, although the power of attorney, given by him to his attorney to sell, provided for his signing the contract itself, especially where neither the owner nor his representative has made any effort to evade the contract but seeks to enforce it. Griffith v. Stewart, 31 App. (D. C.) 29.

[f] **Settlement.**—Where a settlement was originally made by an agent, under color of a power of attorney, although not strictly within the authority expressly conferred, the entire transaction became the personal act of the principal on his ratification thereof. In re Soulard, 141 Mo. 642, 43 SW 617.

[g] **Effect as notice of matters within knowledge of agent.**—Where a mortgage in favor of an absent person is executed and delivered to an unauthorized agent, if such absentee afterward accepts the mortgage he thereby ratifies the act of the agent in receiving it, and in so doing becomes chargeable with notice of all such matters as appeared to be within the knowledge of the agent at the time of the transaction. Lampkin v. Cartersville First Nat. Bank, 96 Ga. 487, 23 SE 390.

[h] **Damage to third party not necessary.**—Where one is liable on a bond on the theory that he has, by his acts, ratified the act of an agent in signing his name thereto as a surety, the obligee need not show, as a condition precedent to his recovery, that he has suffered damages by reason of the failure of said surety to notify him of the want of authority of such agent, since the ratification made the bond defendant's from its inception. Lynch v. Smyth, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670].

78. Bradford v. Smith, 123 Iowa 41, 98 NW 377. See also cases supra note 77.

79. Reynolds v. Dothard, 11 Ala. 531.

80. Stansell v. Leavitt, 51 Mich. 536, 16 NW 892; Little v. Stettheimer, 13 Mo. 572 (holding that where an agent for the sale of goods purchased other goods in his own name to facilitate the sale, and his principal afterward sanctioned such purchase, he was liable for the price of the additional goods).

81. School Township No. 40 v. McCormick, 41 Ill. 323 (holding that by ratification the principal waives any right of action based on the agent's wrongful act); Ohio, etc., R. Co. v. Middleton, 20 Ill. 629; Lutjeharms v. Smith, 76 Nebr. 260, 107 NW 256; Stephens v. Ozbourne, 107 Tenn. 572, 64 SW 902, 89 AmSR 957; Wells v. Simpson Nat. Bank, 19 Tex. Civ. A. 636, 47 SW 1024.

[a] **Estoppel.**—A principal who ratifies a contract of his agent is thereafter, in the absence of fraud, estopped to deny the authority of the agent to enter into the contract. Lutjeharms v. Smith, 76 Nebr. 260, 107 NW 256; Townsend v. Kennedy, 6 S. D. 47, 60 NW 164.

82. Ga.—Fruit Dispatch Co. v. Roughton-Halliburton Co., 9 Ga. A. 108, 70 SE 356.

Iowa.—St. Louis Refrigerator, etc., Co. v. Vinton Washing Mach. Co., 79 Iowa 239, 44 NW 370, 18 AmSR 366.

Md.—Swatara R. Co. v. Brune, 6 Gill 41.

Minn.—Singer Mfg. Co. v. Flynn, 63 Minn. 475, 65 NW 923.

Mo.—Donovan Real Est. Co. v. Clark, 84 Mo. A. 163; Menkens v. Watson, 27 Mo. 163.

N. Y.—Rollins v. Sidney B. Bowman Cycle Co., 84 App. Div. 287, 82 NYS 781.

Pa.—Tapper v. Sunlight Oil, etc., Co. 192 Pa. 620, 44 A 286.

S. D.—Nelson v. National Drill Mfg. Co., 20 S. D. 299, 105 NW 630.

Tex.—Houston, etc., R. Co. v. Wright, 15 Tex. Civ. A. 151, 38 SW 836.

Wis.—Saveland v. Green, 40 Wis. 431.

Wyo.—Knight v. Beckwith Commercial Co., 6 Wyo. 500, 46 P 1094.

See also supra §§ 99, 100; infra § 515.

[a] **Reason for rule.**—Where one elects to stand upon a contract made by an agent in his behalf, he must be deemed to have adopted the contract as made, and not to claim the benefit of a contract which should have been made, if the agent had not exceeded his authority, or violated instructions and limitations, although the other party to the contract knew of the limitations upon the agent's authority, since, unless the principal adopts the contract as made, there will be no contract. Fruit Dispatch Co. v. Roughton-Halliburton Co., 9 Ga. A. 108, 70 SE 356.

[b] **Where an agent executed a contract in duplicate,** but signed one by his own name alone and the other by the name of the principal, it was held that the ratification of one instrument could not operate as a ratification of the duplicate. To have such effect both instruments must be capable of ratification by the same act and in the same way. Crane v. Partland, 9 Mich. 493.

[c] **A contract showing the original authority of an agent is not material evidence** in an action by a third person against the principal founded on an unauthorized act of the agent which has been ratified by the principal. Nelson v National Drill Mfg. Co., 20 S. D. 299, 105 NW 630.

83. Cal.—Taylor v. Robinson, 14 Cal. 396.

Conn.—Ansonia v. Cooper, 64 Conn. 536, 30 A 760.

Mo.—Norton v. Brill, 43 Mo. 113; Laughlin v. Excelsior Powder Mfg. Co., 53 Mo. A. 508, 134 SW 116; Bruen v. Kansas City Agricultural, etc., Assoc., 40 Mo. A. 425.

N. Y.—Lozier Motor Co. v. Ziegler, 115 NYS 134 (holding that where recognized dealings between plaintiff and defendant showed the authority of defendant's chauffeur to contract for materials and work on defendant's automobile, which contracts were ratified by defendant who accepted the benefits, plaintiff was entitled to recover the reasonable value of the materials furnished and the work done).

N. B.—Dalton v. Hamilton, 12 N. B. 423.

See also supra §§ 99, 100.

[a] **Accounting.**—Where the cashier of defendant ships for plaintiff, in the name of the bank, a carload of wheat to be sold on account of plaintiff, and the wheat is sold, and the proceeds remitted to and received by defendant bank, although the cashier, in shipping and selling the wheat for plaintiff in the name of the bank, acts beyond the scope of his authority, yet the bank, having received the proceeds, is bound to account for them to plaintiff, and the fact that it has, through the mistake of its cashier, paid over the money to another party is no defense. Landin v. Moorehead Nat. Bank, 74 Minn. 222, 77 NW 35.

[b] **If a husband ratifies the act of his wife in signing a receipt in his name without authority,** the ratification extends to the natural use of that receipt, including its production to the debtor as evidence of payment, although the check given in payment of the debt, indorsed by the principal after such use of the receipt, is not in fact paid. Steffens v. Nelson, 94 Minn. 365, 102 NW 871.

84. Sokup v. Letellier, 123 Mich. 640, 82 NW 523; Busch v. Wilcox, 82 Mich. 315, 336, 46 NW 940, 47 NW 328, 21 AmSR 563; Brong v. Spence,

sentations, and other torts,[85] except that ratification does not render the principal liable in an action for deceit on account of fraudulent representations made by the agent without his knowledge.[86] A ratification does not bind a principal for subsequent acts of the agent which were no part of the act ratified,[87] nor for acts outside the authority approved by the principal's ratification.[88]

[§ 145] **5. As against Third Persons—a. In General.** As a general rule if a principal does not deny the power of an agent to act for him, but on the other hand ratifies his unauthorized acts, it does not lie in the mouth of any third person to call in question the agent's authority.[89] Accordingly, as a general rule, a contract or transaction that has been ratified by a principal will bind the other party thereto the same as though it had been previously authorized.[90] But where the third person colludes with the agent to defraud or deceive his principal, the principal does not, by suing to hold the agent accountable for his wrong, release the third person from his liability, or ratify the contract so as to

56 Nebr. 638, 77 NW 54; Budd v. Howard Thomas Co., 40 Misc. 52, 81 NYS 152; Halpenny v. Pennock, 33 U. C. Q. B. 229.

85. U. S.—Doggett v. Emerson, 7 F. Cas. No. 3,960, 3 Story 700.

Ala.—Street v. Sinclair, 71 Ala. 110 (holding that, where a principal with full knowledge of an indictable trespass committed by his agent ratifies and adopts the same, he is personally liable therefor); McGowen v. Garrard, 2 Stew. 479 (holding that, where a principal affirms a contract made by his agent with the full knowledge of circumstances alleged as fraudulent, he cannot afterward avoid the same on the ground of fraud or want of authority in the agent).

Ark.—Creson v. Ward, 66 Ark. 209, 49 SW 827.

Cal.—Avakian v. Noble, 121 Cal. 216, 53 P 559 (holding that by accepting the benfits of the agent's torts defendant ratified and adopted them and was liable therefor). See also Wilder v. Beede, 119 Cal. 646, 51 P 1083.

Ga.—Crockett v. Sibley, 3 Ga. A. 554, 60 SE 326 (holding that, under Civ. Code [1895] §§ 3031, 3320, providing that by ratification of a tort committed for one's benefit the ratifier becomes liable as if he had commanded it, a principal is also liable for the willful trespass of his agent where he ratifies the same).

Ill.—Dewar v. Montreal Bank, 115 Ill. 22, 3 NE 746 [aff 6 Ill. A. 294].

Ind.—Shearer v. Evans, 89 Ind. 400 (holding that both the principal and the agent are liable for conversion where the principal ratifies his agent's act in purchasing wheat from a farm hand who wrongfully took it from his employer, and in selling the wheat after mixing it with other wheat).

Iowa.—Darner v. Brown, 137 NW 441; Clark v. Ralls, 24 NW 567.

Ky.—Singer Mfg. Co. v. Stephens, 53 SW 525, 21 KyL 946.

Mass.—Drake v. Metropolitan Mfg. Co., 105 NE 634 (assault committed by agent); Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 NE 776, 39 AmSR 467, 22 LRA 364 (holding that ratification of an unauthorized act will make the principal liable for an injury resulting from the negligence of the agent in doing the act); Williams v. Mitchell, 17 Mass. 98.

Mich.—Johnston Harvester Co. v. Miller, 72 Mich. 265, 40 NW 429, 16 AmSR 536 (holding that a principal cannot ratify the fraud of an agent by accepting a note which is the fruit of such fraud, and suing upon it, and at the same time claim to be a good faith holder of the note because the agent failed to acquaint him with the circumstances under which he procured it when he sent it to plaintiff who was led to suppose that he had taken it in the ordinary course of his agency).

Miss.—Exum v. Brister, 35 Miss. 391.

Mo.—Judd v. Walker, 114 Mo. A. 128, 89 SW 558.

Pa.—Schultheis v. Sellers, 223 Pa. 513, 72 A 887, 22 LRANS 1210 and note; Meyerhoff v. Daniels, 173 Pa. 555, 34 A 298, 51 AmSR 782.

Tenn.—Stephens v. Ozbourne, 107 Tenn. 572, 64 SW 902, 89 AmSR 957; Stevens v. Osburn, 1 Tenn. Ch. A. 218.

Tex.—American Nat. Bank v. Crugger, 91 Tex. 446, 44 SW 278; Foix v. Moeller, (Civ A.) 159 SW 1048.

Va.—Forbes v. Hagman, 75 Va. 162.

Eng.—Haseler v. Lemoyne, 5 C. B. N. S. 530, 94 ECL 530, 141 Reprint 214; Bird v. Brown, 4 Exch. 786, 23 ERC 422; Hilbery v. Hatton, 2 H. & C. 822 (holding that, if a principal ratifies the purchase by his agent of a chattel which the seller had no right to sell, he is guilty of a conversion, although at the time of the ratification he had no knowledge that the sale was unlawful); Carter v. St. Mary Abbott's Vestry, 64 J. P. 548; Lewis v. Read, 14 L. J. Exch. 295; Wilson v. Tumman, 6 M. & G. 236, 46 ECL 236, 134 Reprint 879.

Can.—Scott v. New Brunswick Bank, 23 Can. S. C. 277.

See Moore v. Rogers, 51 N. C. 297.

[a] **Punitive damages** have been awarded against the principal where the act of the agent which was ratified was performed in a reckless, wanton, and unlawful manner. Kilpatrick v. Haley, 66 Fed. 133, 13 CCA 480. Compare Pollock v. Gantt, 69 Ala. 374, 44 AmR 519 (in which a principal was held subject to actual damages for the suing out by his agent without authority of a wrongful attachment where he did not repudiate the suit but prosecuted it to judgment; but it was said that he would not be responsible for the malice, vexatious conduct, or wantonness of the agent, unless he caused or participated in the evil motive).

86. Keefe v. Sholl, 181 Pa. 90, 37 A 116.

87. Manning v. Keenan, 73 N. Y. 45.

[a] **Subsequent loan.**—Although a principal by his failure to repudiate the act of his agent in making a loan ratifies the same, it does not follow that this is notice that the agent has general authority to borrow money for his principal, where at the time a second loan is made sufficient time has not elapsed between the loans to permit an exchange of letters between the one making the loan and the principal, containing either a ratification or a repudiation of the first loan by the principal. Schramm v. Liebenberg, 42 Colo. 516, 94 P 345.

88. Todd v. Bishop, 136 Mass. 386; Humphrey v. Havens, 12 Minn. 298; Henry, etc., Co. v. Halter, 58 Nebr. 685, 79 NW 616; Baldwin v. Burrows, 47 N. Y. 199 (holding that a ratification by a principal of specific unauthorized acts of his agent, although equivalent, as to the act ratified, to a previous authority, is not retroactive to the extent of binding the principal for other acts in excess of the authority of the agent for which the principal might have been bound if they had been done under color of a previous authority actually given). See also Hodges v. Holderby, 49 N. C. 500.

89. Cal.—Cassin v. Marshall, 18 Cal. 689.

Iowa.—Bellinger v. Collins, 117 Iowa 173, 90 NW 609.

Mont.—Lindsley v. McGrath, 34 Mont. 564, 87 P 961 (holding that where one holds possession of property on which there is a chattel mortgage, and, acting under a writing which, in general terms, makes him the agent of the holder of the mortgage, he transfers the mortgage for value and the original holder makes no objection to his authority, the holder of a subsequent mortgage cannot complain of his want of authority).

N. Y.—Rogers v. Kneeland, 14 Wend. 218 [aff 13 Wend. 114] (holding that, although a sale is contrary to instructions, if it is afterward ratified by the principal, it is valid, and third persons cannot set up the agent's want of authority).

Pa.—Daughters of American Revolution v. Schenley, 204 Pa. 572, 54 A 366.

Tenn.—Leonard v. Mason, 1 Lea 384 (holding that third persons cannot attack the execution of a power of attorney on the ground that the one who executed it was not the person to whom the power was given and therefore had no authority to execute it, where the principal himself does not seek to avoid, but acquiesces in, such execution).

See also supra § 76.

[a] **Stranger cannot deny ratification.**—If the principal recognizes and affirms the existence and acts of an agent, a mere stranger will not be permitted to controvert either. Scott v. Detroit Young Men's Soc., 1 Dougl. (Mich.) 119.

90. Conn.—Hall v. Norwalk F. Ins. Co., 57 Conn. 105, 17 A 356; Johnson v. Smith, 21 Conn. 627.

Ill.—Hills v. McMunn, 232 Ill. 488, 83 NE 963 (holding that where an agent acts on a power of attorney, and by virtue of that power enters into a contract with a person to sell him corporate stock, and thereafter modifies such contract which is ratified and confirmed by the principal, the purchaser is estopped to raise the question that the power is not broad enough to authorize the agent to modify the contract); Henry County v. Winnebago Swamp Drainage Co., 52 Ill. 454.

Ind.—Nichols, etc., Co. v. Berning, 37 Ind. A. 109, 76 NE 776.

Iowa.—Warder, etc., Co. v. Cuthbert, 99 Iowa 681, 68 NW 917.

Ky.—Liggett v. Ashley, 5 Litt. 178.

Mass.—Gilmore v. Wilbur, 12 Pick. 120, 22 AmD 410.

N. Y.—Smith v. Savin, 69 Hun 311, 23 NYS 568, 30 AbbNCas 192 [aff 141 N. Y. 315, 36 NE 338]; Universal Beer Keg Co. v. Brown, 9 NYSt 91 (holding that where a contract was entered into by a representative of a corporation for its benefit but without its knowledge, and it was subsequently adopted by it, the corporation may sue to recover damages for the breach thereof).

Tex.—Waco Bridge Co. v. Waco, 85 Tex. 329, 20 SW 137.

Wis.—Weiseger v. Wheeler, 14 Wis. 101. Compare Dodge v. Hopkins, 14 Wis. 630 (holding that, where a contract for the sale of land is not binding upon the owner because made by one assuming, without authority, to act as his agent, it is not binding upon the purchaser, and cannot be made so without his consent by a subsequent ratification by the owner by acceptance of purchase money).

And see infra § 146 note 96. See also infra §§ 553, 555.

be liable to the third person thereon.[91] After ratification the property of the principal in the hands of an agent cannot be reached by a creditor of the agent.[92]

[§ 146] **b. Right of Withdrawal by Other Party.** As to whether or not an unauthorized contract entered into by an agent on behalf of his principal is binding on the third person by the mere fact of ratification without any further action on his part, or whether he has a right to withdraw therefrom, the authorities are conflicting. According to one view, the third person has no right to withdraw his offer made to the agent, and a ratification by the principal, at least if made within a reasonable time, relates back to the time the contract was entered into so as to make it binding on the third person as from that moment, notwithstanding that on learning of the agent's want of authority he repudiated the contract before it had been ratified by the principal,[93] although it has been held that the agent and the third person may by mutual assent release the latter from the unauthorized contract at any time before ratification.[94] According to another view, where a contract sought to be ratified is partly executory, and the party seeking to ratify does so to avail himself of the unauthorized act in order to enforce a claim against a third person, such ratification is, on the ground of want of mutuality, of no effect unless assented to by such third person.[95] Between these two extremes the better rule, and that supported by the weight of authority, is that until ratification the third person is free to withdraw from the contract, and if he does not do so the principal's ratification cures the defect in authority and the third person becomes thereafter bound as though the authority had been previously conferred,[96] and he cannot thereafter withdraw except on grounds entitling him to a rescission;[97] but if before the principal elects whether he will ratify, the other party signifies his intention not to be bound, there can be no ratification.[98]

91. Bransdall v. O'Day, 134 Fed. 828, 67 CCA 278.

92. Rogers v. Hendsley, 2 La. 597 (holding that if an agent in collecting a debt takes an obligation payable to himself and gives up the old one for the benefit of the principal, who ratifies the transaction, a creditor of the agent cannot attach the obligation as the property of the latter).

93. Andrews v. Ætna L. Ins. Co., 92 N. Y. 596; In re Tiedemann, [1899] 2 Q. B. 66 (holding that where an agent makes a contract purporting to sell goods in the name of the principal, but with the fraudulent intention to sell them on his own account and for his own benefit, it is competent for the principal to ratify and take the benefit of the contract as against the buyers, notwithstanding the latter have in the meantime repudiated the contract); In re Portuguese Cons. Copper Mines, 45 Ch. D. 16; Bolton v. Lambert, 41 Ch. D. 295; Brown v. Street, 3 DomLR 291, 21 WestLR 46 (holding that the fact that an owner of land in agreeing to sell the same dealt with the purchaser's agent and not directly with the purchaser himself gives the owner no right to withdraw from the contract until the purchaser signifies his approval of his agent's act, in the absence of a stipulation to that effect in the contract). See also Kline, etc., Co. v. Royal Ins. Co., 192 Fed. 378, 387 [rev on other grounds 198 Fed. 468, and cit Cyc].

"The principal, upon being informed of an act of an agent in excess of his authority, has the right to elect whether he will adopt the unauthorized act, or not, and so long as the condition of the parties is unchanged, he cannot be prevented from such adoption because the other party to the contract may for any reason prefer to treat the contract as invalid." Andrews v. Ætna L. Ins. Co., 92 N. Y. 596, 604.

94. Walter v. James, L. R. 6 Exch. 124.

95. Cowan v. Curran, 216 Ill. 598, 75 NE 322 (holding that a contract to purchase land, made by an agent who has no authority to act for the purchaser in the premises, lacks mutuality and is not binding upon the vendor, and cannot be made binding on him without his consent by the act of the purchaser in instituting suit for specific performance and attempting to ratify the contract); Townsend v. Corning, 23 Wend. (N. Y.) 435; Atlee v. Bartholomew, 69 Wis. 43, 49, 33 NW 110, 5 AmSR 103 and note (where the court said: "In Lowber v. Connit, 36 Wis. 176, 183, this court again say, speaking of a vendee in a contract for the purchase of land who has not signed the written contract: 'He ought not to be in a position where he can hold the other party to the contract, and compel its performance if advantageous to him, and at the same time be at liberty to avoid the contract on his part if disadvantageous. Both parties ought to be bound by the contract, or neither should be bound.' This seems to be a most just rule; and where the plaintiffs were not bound by the contract when it was entered into by one claiming to be their agent, but who in fact was not such agent and had no power to bind them, they cannot afterwards, when they find the contract is advantageous to them, affirm the contract made on their behalf by such unauthorized person, and compel the other party to perform it on his part"); Dodge v. Hopkins, 14 Wis. 630 (the leading case for this view, holding that where a contract for the sale of land was made by a person who assumed to act as the agent of the owner, and part of the purchase money was paid to the agent, the owner of the land was at liberty to reject it, and his subsequent acceptance being an act with which the other party was in no way connected imposed no obligation on the latter until he actually assented to it). See also Union Garment Co. v. Newburger, 124 La. 820, 50 S 740 (holding that, where property has been sold by an unauthorized agent at an auction sale, the sellers may refuse to recognize the sale even after being notified of its ratification by the purchaser). Compare Mason v. Caldwell, 10 Ill. 196, 48 AmD 330 (holding that if a person professing to act on behalf of another, but without authority, enters into a contract which for want of such authority would render the professed agent personally liable, such contract may be adopted by the principal at any time before it is repudiated by the other party).

[a] **Explanation of rule.**—"The inaccuracy consists in not properly distinguishing between those cases where the subsequent act of ratification is put forth as the foundation of a right in favor of the party who has ratified, and those where it is made the basis of a demand against him. There is a broad and manifest difference between a case in which a party seeks to avail himself, by subsequent assent, of the unauthorized act of his own agent, in order to enforce a claim against a third person, and the case of a party acquiring an inchoate right against a principal, by an unauthorized act of his agent, to which validity is afterwards given by the assent or recognition of the principal. . . . The principal in such case may, by his subsequent assent, bind himself, but if the contract be executory, he cannot bind the other party. The latter may, if he choose, avail himself of such assent against the principal, which, if he does, the contract by virtue of such mutual ratification, becomes mutually obligatory. There are many cases where the acts of parties, though unavailable for their own benefit, may be used against them." Dodge v. Hopkins, 14 Wis. 630, 638.

96. U. S.—Farmers' L. & T. Co. v. Memphis, etc., R. Co., 83 Fed. 870.

Ala.—Wilkinson v. Harwell, 13 Ala. 660 (holding that where the principal, on being informed of the unauthorized act, refuses to ratify and confirm, and the other party withdraws, the principal cannot afterward enforce the transaction by confirming it).

Iowa.—Owens v. National Hatchet Co., 121 NW 1076.

Pa.—McClintock v. South Penn Oil Co., 146 Pa. 144, 23 A 211, 28 AmSR 785.

S. C.—Breithaupt v. Thurmond, 37 S. C. L. 216 (holding that where one assuming to be the agent of another, although not so in fact, sells land as such agent the contract will be binding upon the purchaser after the confirmation by the owner of the land, if he does not recede from it before).

Tex.—Haldeman v. Chambers, 19 Tex. 1 (holding that where an agent makes an assignment, without any authority, of the property of his principal as consideration for a purchase of land for himself, covenanting that he is authorized to make the assignment and engaging to perfect it by delivery of the property within a specified time, the assignee, on discovering the agent's want of authority, may either rescind the contract at once or allow the principal to assume it, but if the assignee rescinds it he cannot afterward hold the principal liable on it).

See also infra § 553.

97. Owens v. National Hatchet Co., (Iowa) 121 NW 1076 (holding that, where the second party to a contract made with an agent failed to repudiate the same until after notice of ratification by the principal, he cannot then withdraw therefrom except on grounds entitling him to a rescission).

98. Salfield v. Sutter County Land Impr., etc., Co., 94 Cal. 546, 29 P 1105.

[a] **Contract subject to approval.**—A contract between two parties, executed by an agent on behalf of one of the parties, which stipulates that it shall not become effective without the approval of the principal, lacks

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VI. DURATION AND TERMINATION[99] OF THE RELATION

[§ 147] **A. Duration in General.** The duration of the term of an agency may be expressly stated in the power, or, in the absence of such statement, the provisions of the contract of employment or the surrounding circumstances may be such as to imply a definite term.[1] The mere fact, however, of an agent's employment does not give rise to an implied agreement that the business in which the agent is employed shall be carried on for any particular period;[2] nor is the mere fact that the agent is employed at a salary, computed upon a definite period, sufficient to show that the agency is for a definite period,[3] as it is but a stipulation of the rate at which the agent is to be compensated for services performed,[4] and where the contract of employment does not expressly or impliedly specify the time during which the agency shall continue, the law presumes that it shall last as long as both parties desire, and terminate at the will of either party.[5] Where the agency is for the accomplishment of a particular transaction or specific purpose, the law implies its continuance for at least a reasonable time,[6] and ordinarily, as long as the purpose of the agency has not been fulfilled, the agent's power continues.[7] Where a person is appointed sole agent for specific articles his agency

mutuality until so approved, and, if not approved by such principal before rescission by the other party, is void. Vaughn v. Slater, 147 Ill. A. 441.

[b] **Contract within statute of frauds.**—Where an agent makes a contract which is within the statute of frauds because his authority was in parol, the contract cannot be ratified after it has been disavowed by the other party to the contract. Baldwin v. Schiappacasse, 109 Mich. 170, 66 NW 1091.

[c] **Question undecided in Georgia.**—In Atlanta Buggy Co. v. Hess Springs, etc., Co., 124 Ga. 338, 342, 52 SE 613, 4 LRANS 431 and note, the court said: "We are not . . . required to decide whether in this case the seller could retain the right to ratify or reject until it developed which would be the more advantageous, and then ratify if for its own interest, and thus by relation back make the contract mutual instead of unilateral."

99. Termination of relation as affecting: Agent's duty not to act in opposition to principal's interest see infra § 368. Agent's right to compensation see infra §§ 419–426. Agent's right to reimbursement and indemnity see infra § 462.

Termination of subagency: By death of primary agent see infra §187. By expiration of term of primary agent see infra § 150.

Termination of relation of master and servant see Master and Servant [26 Cyc 980 et seq].

1. Ill.—Gundlach v. Fischer, 59 Ill. 172 (where a person was constituted agent to sell machines, and the only provision in the agreement for his appointment relating to the duration of the agency was an agreement by the principal to furnish the agent such number of machines as he could sell prior to a certain date, and it was held that the agency continued only to that date).

Ky.—Smith v. Theobald, 86 Ky. 141, 5 SW 394, 9 KyL 449.

Me.—Hartford v. McGillicuddy, 103 Me. 224, 68 A 860, 16 LRANS 431 and note, 12 AnnCas 1083 and note.

Md.—Norton v. Cowell, 65 Md. 359, 4 A 408, 57 AmR 331.

Mass.—Heard v. March, 12 Cush. 580.

Mo.—Beheret v. Myers, 240 Mo. 58, 144 SW 824.

Pa.—Kirk v. Hartman, 63 Pa. 97.

Eng.—Turner v. Goldsmith, [1891] 1 Q. B. 544; Danby v. Coutts, 29 Ch. D. 500; Fawcett v. Cash, 5 B. & Ad. 904, 27 ECL 381, 110 Reprint 1026; Emmens v. Elderton, 13 C. B. 495, 76 ECL 495, 138 Reprint 1292, 4 H. L. Cas. 624, 10 Reprint 606; Rex v. Birdbrooke, 4 T. R. 245, 100 Reprint 998.

[a] **Where an agent is employed by the year** at a given salary and for one year renders the services stipulated without complaint and at the end of the year is not discharged but continues to attend to the business as before with the knowledge and the apparent sanction of the employer, the contract is a continuing contract by the year subject to be terminated at the end of each year by the wish of one or both parties thereto. Alba v. Moriarty, 36 La. Ann. 680.

[b] **Implied limitation to term of principal's absence.**—(1) A power of attorney contained a recital that the donor was about to return to South Australia, and was "desirous of appointing an attorney or attorneys to act for [him] during his absence from England." The operative part of the deed, which gave the attorney large powers of mortgaging the donor's property, contained no mention of the duration of those powers. It was held that the operative part of the deed was controlled by the recital, and consequently that charges effected by the attorney upon the property of the donor while he was in England were invalid as against him. Danby v. Coutts, 29 Ch. D. 500. (2) So letters of attorney reciting the principal's intended departure from the country, "to remain absent in Europe and elsewhere, for some length of time," are limited by the recital of absence, and cannot be renewed by redelivery without change of terms or date upon the departure of the principal for Europe the second time. Heard v. March, 12 Cush. (Mass.) 580. To the contrary Forbes v. Wooderson, 49 Me. 14 (holding that, where one is constituted an agent for the purchase and sale of goods in the name of the principal, a recital in the power of attorney that the principal "is about to leave upon a voyage to sea" does not limit the duration of the agency to the time when the voyage is completed).

2. Brooke v. Barnes, 12 D. C. 5; Reed v. Baggott, 5 Ill. A. 257; Rhodes v. Forwood, 1 App. Cas. 256 (holding that, where two parties agree, for a fixed period, the one that he will employ the other as his sole agent in a certain business at a certain place, the other that he will act in that business for no other principal in that place, there is no implied contract that the business itself shall continue to be carried on during the term named); Northey v. Trevillion, 18 T. L. R. 648.

3. McCullough Iron Co. v. Carpenter, 67 Md. 554, 11 A 176; Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (holding that the hiring of personal services for which payment is made quarterly is not necessarily a hiring by the quarter); Palmer v. Marquette, etc., Rolling Mill Co., 32 Mich. 274.

4. Haney v. Caldwell, 35 Ark. 156 (holding that a contract for service, "at a salary of two thousand five hundred dollars per annum," is not a contract for any definite time, and at a fixed price, the complete performance of which is a condition precedent to a right to compensation, as it is but a stipulation of the rates at which the employee is to be compensated for the services performed).

5. Brennan v. Purington Pav. Brick Co., 171 Ill. A. 276 (holding that, where a paving company gives an agent exclusive sales rights, the parties may terminate the contract even though the principal has knowledge that the agent had formed a partnership for the purpose of making sales); Union Sewing Mach. Co. v. Lockwood, 110 Ill. A. 387 (holding that, where the owner of certain patented inventions submitted to another a written proposition to act as his agent to sell the machines and the proposition was accepted but the contract was silent as to how long the agency should last, the law supplied the missing term by conclusively presuming that the relation should last as long as both parties desired and should terminate at the will of either upon notice to that effect to the other); Staroske v. Pulitzer Pub. Co., 235 Mo. 67, 138 SW 36. See also Goodman v. Haynes Auto. Co., 205 Fed. 352, 123 CCA 480. And see infra §§ 157, 169, 170.

"In this country, the rule is, an indefinite hiring is prima facie a hiring at will. It is also well settled that a hiring at so much a week, month or year, no time being specified does not, of itself, make more than an indefinite hiring. It is competent for the parties to show what the mutual understanding was, but unless there was a mutual understanding, it is only an indefinite hiring." McCullough Iron Co. v. Carpenter, 67 Md. 554, 557, 11 A 176.

"When, indeed, a person is employed as an agent, traveler, or salesman, for no definite time, the law does not imply a hiring by the year, but at the will of both parties." Kirk v. Hartman, 63 Pa. 97, 105.

6. Ewart Lumber Co. v. American Cement Plaster Co., 9 Ala. A. 152, 62 S 560; Marquam v. Ray, 65 Or. 41, 131 P 523 (must be exercised within reasonable time); Adamson v. Yaeger, 10 Ont. A. 477.

7. U. S.—Alger v. Keith, 105 Fed. 105, 44 CCA 371. And see Farmers', etc., Bank v. Stickney, 8 F. Cas. No. 4,657, Brunn. Coll. Cas. 543.

Ala.—Merchants' Bank v. Acme Lumber, etc., Co., 170 Ala. 443, 54 S 58.

Kan.—Brockmeyer v. Washington Nat. Bank, 40 Kan. 376, 19 P 855 [reh. den 40 Kan. 744, 21 P 300].

La.—Boykin v. Wright, 11 La. Ann. 531 (holding that where an agent to sell all the principal's lands in a certain parish sells part of them, and it is afterward discovered that the portion intended had not been conveyed, he may remove the obstacle to a perfect sale and correct the description of the land by agreeing to a different location so as to carry out the original intention of the purchaser and himself, since until this is done the sale is not complete and his power is not terminated).

Minn.—Hillis v. Stout, 42 Minn. 410, 44 NW 982.

N. Y.—Matter of Chambers, 17 App. Div. 340, 45 NYS 264. And see Grapel v. Hodges, 112 N. Y. 419, 20 NE 542.

R. I.—Sweeny v. Brow, 35 R. I. 227, 86 A 115.

Wash.—Ross v. Kenwood Inv. Co., 73 Wash. 131, 131 P 649.

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begins and ends with such exclusive privilege.[8]

Where an agent resigns but is afterward permitted to act as agent, he will be deemed to be agent as long as he is held out as such by the principal.[9]

[§ 148] **B. Extension or Renewal.** A contract of agency which has expired by force of its terms[10] may be extended or renewed by virtue of an express agreement between the parties, or the circumstances may be such that such extension or renewal may be implied,[11] as where the agent is given, by the original contract, an election or option to continue the agency for another similar period.[12] Thus a contract of agency for one year is tacitly renewed from year to year by having been expressly renewed for the second year, and continued several successive years in conformity to the contract without express renewal.[13] But no implication of extension at the expiration of the term arises from the mere fact that the principal continues in the business to which the agency related.[14] So also, although the contract of agency gives the agent an election to extend the time of his employment, if it is terminated by the principal in accordance with its terms by reason of a default of the agent, the latter cannot revive the contract by giving notice of his election to extend the time.[15]

[§ 149] **C. Termination by Act of Parties—1. By Force of Original Agreement—a. Fulfillment of Purpose.** An agency is of course created by the principal for a purpose, or for the doing of certain specific acts, and when this purpose is fully accomplished, or these acts are done, the agency ipso facto ends, and the authority of the agent to bind the principal by further action thereupon ceases.[16] Thus an agency to find a purchaser for the princi-

See also Hynson v. Noland, 14 Ark. 710 (holding that, where an officer having charge of public moneys gave authority to one of his securities to act as agent in the receipt, control, and disbursement of the public moneys for the protection of himself and cosecurities, the authority so given is in the nature of a power coupled with an interest and irrevocable so long as there remains any money of the office to be disbursed or accounted for, and, although the officer is removed from office, if after such removal he permits the agent to act as such in closing up the business of the office, he is bound by such agent's acts until a revocation without reference to any previous appointment).

8. Henry Bill Pub. Co. v. Durgin, 101 Mich. 458, 59 NW 812 (holding that, where a person becomes sole agent for the sale of specific articles which he obtains only by purchase, the agency begins and ends with the exclusive privilege of handling the goods in the allotted territory).

9. Winston v. Louisiana Cent. Constr. Co., 127 La. 10, 53 S 367 (holding that, although a chief engineer of a construction company had resigned, yet where he was afterward permitted to act as such, receiving payment only for such time as he was serving, he will be deemed to have held the position as long as he was held out as occupying such by the company).

10. See infra § 150.

11. Hillis v. Stout, 42 Minn. 410, 44 NW 982 (holding that where plaintiffs appointed defendant their agent for three days to sell land at a named price, and on the last day of the agency defendant represented that he could not sell the land for the sum specified but that he could sell it for a less sum, and plaintiffs authorized defendant to make the sale at the smaller price which he said that he could obtain, there was an extension of the agency of defendant).

[a] **Conditional extension.**—Where sales agents continued to represent their employer under a letter stating that they should continue on the conditions of the original contract as long as they conducted the business in a manner satisfactory to the employer, they must be held to have assented to the condition, not expressed in the original contract, that they should continue as long as they conducted the business in a manner satisfactory to the employer. Brown v. Retsof Min. Co., 127 App. Div. 868, 111 NYS 594.

[b] **A power of attorney to represent a principal during his absence** may be considered as continued or renewed after his return if he acquiesces in acts of the attorney. Lavergneau v. Janel, 1 Canal Zone 80.

12. Olympia Bottling Works v. Olympia Brewing Co., 56 Or. 87, 107 P 969.

[a] **Construction of option agreement.**—Where the right of an agent, for the exclusive sale of an article within a specified territory for a fixed period, to continue the agency for another period formed an important part of the consideration for the fixed period, and the contract was executed, and the consideration thereby paid for the fixed period, more latitude should be allowed in determining whether the optional provision was sufficient than where the option was merely executory, or partly executory. Olympia Bottling Works v. Olympia Brewing Co., 56 Or. 87, 107 P 969.

[b] **A contract, making one the sole agent of a brewery** for the sale of its beer in specified territory for five years, which stipulates that the agent shall have the option of continuing the agency for another five years, subject to the revision of the prices of beer, not to exceed the prices ruling at that time, is a sufficiently specific option and is enforceable, and the brewery must agree on a revision of the prices, on the agent electing to continue the agency; where it refuses to do so, the matter must then be determined by the proof of the price ruling at the time; and where the brewery refused to consent to a revision of the prices, on the agent giving notice of his election to continue the agreement under the option, and refused to recognize the rights of the agent, the agent, if unable to make such a showing as would entitle him to equitable relief, may sue for damages for breach of the option agreement. Olympia Bottling Works v. Olympia Brewing Co., 56 Or. 87, 107 P 969.

13. Standard Oil Co. v. Gilbert, 84 Ga. 714, 11 SE 491, 8 LRA 410; Sines v. Wayne County Superintendents of Poor, 58 Mich. 503, 506, 25 NW 485 (where the court said: "The contract had been previously made for a year's service, and under that contract defendant had gone on from year to year, and in such cases, if nothing is said or done by either party at the end of the year to terminate it, but on the contrary, the person performing service is allowed to continue on without objection, the facts raise the presumption from which the jury have found that both parties have assented to the contract continuing in force for another year").

[a] **Payment by way of salary,** after the lapse of the extended period, tends to establish the fact of a renewal for a further year. Fish v. Marzluff, 128 Ill. A. 549.

14. Moore v. Stone, 40 Iowa 259; Marbury v. Barnet, 17 Misc. 386, 40 NYS 76.

15. Rouse, etc., Co. v. Western Wheel Works, 169 Ill. 536, 539, 48 NE 495 [aff 66 Ill. A. 647] (holding that, where a contract of agency for the sale of goods provided that it should last a certain time; that such time might be extended at the option of the agent; and that it might be terminated by the principal if the agent broke its terms, after the agent had violated the contract and the principal had thereupon notified him that the contract was terminated, the agent could not revive the contract by giving notice of his election to extend the time. The court said: "It cannot reasonably be contended that appellant could continue in force for the period of another year or years a contract which the other party had, in accordance with its terms, terminated, or that it could, while it was itself in default so that appellee had the right to terminate the contract, prevent such termination by giving notice of its election to continue it for a longer period. The right to elect to extend the duration of the contract depended, of course, upon such compliance by appellant with its terms that it would not be rescinded by the election of appellee for appellant's alleged default. If extended it would still have been subject to rescission by appellee for failure to pay according to its terms").

16. U. S.—Farmers', etc., Bank v. Stickney, 8 F. Cas. No. 4,657, Brunn. Coll. Cas. 543; Walker v. Derby, 29 F. Cas. No. 17,068, 5 Biss. 134.

Cal.—Tuite v. Wakelee, 19 Cal. 692.

Ga.—Atlanta Sav. Bank v. Spencer, 107 Ga. 629, 33 SE 878.

Ill.—Lowden v. Wilson, 238 Ill. 340, 84 NE 245 (holding that a depository who holds a check to be delivered to the payee on the performance of a contract also held by him ceases to be the agent of the maker when the contract is performed); Short v. Millard, 68 Ill. 292.

Ind.—Bragg v. Bamberger, 23 Ind. 198; Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413. And see Rowe v. Rand, 111 Ind. 206, 12 NE 377.

Iowa.—Moore v. Stone, 40 Iowa 259; Tod v. Benedict, 15 Iowa 591. Compare Briggs v. Yetzer, 103 Iowa 342, 72 NW 647 (holding that the authority of an agent, intrusted with a certificate of deposit for collection to procure a confession of judgment thereon is not terminated by the fact that in anticipation of the payment of the certificate he remits to his principal the amount thereof in stock of a loan association of which he, the agent, is secretary, where he has no authority as secretary to issue the stock without payment in cash, although the association ratifies the issue of the stock after a certificate of sale under the judgment by confession has been assigned to it, since the certificate of deposit never belonged to the association).

Ky.—Bemiss v. Robertson, 124 Ky. 397, 99 SW 291, 30 KyL 521.

Mich.—Peo. v. Manistee County, 40 Mich. 585 (holding that the power delegated to an agent to "fix and determine" a matter in which he has

pal's property terminates as soon as a purchaser is found,[17] and an agency to obtain a loan terminates, at any event, when the money is received by the borrower and all the papers which the transaction calls for are executed and delivered to the respective parties.[18] But ordinarily, as long as the purpose of the agency has not been fulfilled as originally contemplated, the agent's power continues,[19] unless the agent has definitely and finally failed in his attempt to accomplish that purpose.[20]

Acceptance or rejection by principal. Under some circumstances it may be necessary, in order to work a termination of the agency, that the principal should either accept or reject what the agent has done. In this event the agency generally terminates when the principal accepts the agent's acts,[21] and not before acceptance or rejection thereof.[22]

Authority to transact business which requires continuous negotiations, or a series of acts, to complete it according to the intentions of the parties and commercial usages does not expire with the performance of one act in the course of the negotiations, however important that act may be.[23]

[§ 150] **b. Expiration of Term.**[24] An agent may be appointed for a fixed term, in which case, whether the purpose of the agency has been accomplished or not, the expiration of the term puts an end to the agency, and unless the term is extended the rights and liabilities of the parties are limited to acts done within the term, and no later acts of the agent have any binding force on the principal,[25] although if the terms of the authority are such as to imply a power of the agent to bring to completion matters undertaken before the expiration of the time limit, he will be bound by acts of the agent as to such matters.[26]

The term of authority of a subagent who becomes the agent of the principal, and not the agent of the agent who employed him, is not affected by the termination of the authority of the latter.[27]

[§ 151] **2. By Revocation or Repudiation by Principal—a. Power of Revocation—(1) General Rule.** Subject only to the exceptions that where the agent's authority is coupled with an interest,[28] or where the authority is given as part of a security or is necessary to effectuate a security, the agency is irrevocable,[29] the principal has absolute power to revoke an agency at any time, at his mere option, either with or without reason, and thereby

no power of his own outside of the agency is expended when he has once acted).

Mo.—Greening v. Steele, 122 Mo. 287, 26 SW 971; Herd v. Buffalo Bank, 66 Mo. A. 648.

N. Y.—Hermann v. Niagara F. Ins. Co., 100 N. Y. 411, 3 NE 341, 53 AmR 197.

Okl.—Federal Trust Co. v. Coyle, 34 Okl. 635, 126 P 800.

Or.—Marquam v. Ray, 65 Or. 41, 131 P 523 (holding that a power of attorney to sell and convey, or, if unable to do so, to mortgage the property to raise money for the grantor, is exhausted by the mortgage of the property).

Pa.—Philadelphia v. Johnson, 208 Pa. 645, 57 A 1114; Denny v. Lyon, 38 Pa. 98, 80 AmD 463; Yingling v. West End Impr. Co., 5 Pa. Dist. 607.

Eng.—Butler v. Knight, L. R. 2 Exch. 109; Macbeath v. Ellis, 4 Bing. 578, 13 ECL 644, 130 Reprint 891; Blackburn v. Scholes, 2 Campb. 341; Seton v. Slade, 7 Ves. Jr. 265, 32 Reprint 108.

See Sweeney v. Brow, 35 R. I. 227, 86 A 115, 117 [quot Cyc]; Soule v. Dougherty, 24 Vt. 92.

Accomplishment of purpose of agency by principal: In general see infra § 173. Disposal of subject matter of agency see infra § 174.

[a] **The authority of an agent employed to procure insurance,** who is not a general agent to place and manage insurance on his principal's property, terminates with the procurement of the policy, and hence he has no further power to discharge it. Hermann v. Niagara F. Ins. Co., 100 N. Y. 411, 3 NE 341, 53 AmR 197.

[b] **The authority of an agent specially authorized to draw a bill of exchange** for a particular purpose ceases on the acceptance, and if the drawer is discharged by want of notice of dishonor the agent cannot, without further express authority, revive the liability by agreeing to waive the legal discharge. McGhie v. Gilbert, 6 N. B. 235.

17. U. S.—Walker v. Derby, 29 F. Cas. No. 17,068, 5 Biss. 134.

Ill.—Short v. Millard, 68 Ill. 292.

Iowa.—Moore v. Stone, 40 Iowa 259.

S. C.—Foster v. Calhoun, 23 S. C. L. 75.

Wash.—Armstrong v. Oakley, 23 Wash. 122, 62 P 499.

18. Atlanta Sav. Bank v. Spencer, 107 Ga. 629, 33 SE 878.

19. See supra § 147.

20. Keegan v. Rock, 128 Iowa 39, 102 NW 805 (holding that, where an agent was authorized to effect a loan from a certain person, upon his failure to accomplish this his agency terminated, and he had no further authority to make other loans); Patton v. Cook, 83 Iowa 71, 48 NW 994.

21. Bemiss v. Robertson, 124 Ky. 397, 99 SW 291, 30 KyL 521; Ganseford v. Dutillet, 1 Mart. N. S. (La.) 284; Obregon v. De Mier, 58 HowPr (N. Y.) 301.

22. Wallace v Goold, 91 Ill. 15 (holding that if an agent is employed to secure a debt of his principal, which he does by obtaining from the debtor notes payable to the debtor with his indorsement on them, his agency does not cease while he still holds the notes and his acts have not been approved by his principal).

23. Cleveland, etc., R. Co. v. Closser, 126 Ind. 348, 365, 26 NE 159, 22 AmSR 593, 9 LRA 754 (where the court said: "Where authority is delegated to an agent to transact business, and that business requires continuous negotiations, or is a business not fully ended by a single act, but requires a series of acts to complete it according to the intention of the parties and commercial usages, the authority of the agent does not expire with the performance of one act, although that act may be of prime importance"); Wolcott v. Hayes, 43 Ind. A. 578, 88 NE 111.

[a] **Authority to approve bills.**—Where a contractor is made the agent of the owner to approve the bills for material so that the amounts can be paid, the finishing of the building and the conclusion of the building contract at the time of approving the bills do not terminate the agency of the contractor for the purpose of approving the bills, if material was furnished for and used by him in accordance with his agreement. Merchants' Bank v. Acme Lumber, etc., Co., 170 Ala. 443, 54 S 58.

24. **Agency at will** see infra § 157.

25. U. S.—Smith v. Collins, 165 Fed. 148, 91 CCA 182.

Colo.—Rundle v. Cutting, 18 Colo. 337, 32 P 994 (holding that, where an agency to sell land has expired by express limitation, a subsequent execution thereof is invalid).

Ga.—Irby v. Lawshe, 62 Ga. 216.

Ill.—Gundlach v. Fischer, 59 Ill. 172 (holding that, where by a written agreement a person was constituted agent to sell machines, and the only provision therein in regard to the duration of the agency was an agreement by the principal to furnish the agent such number of machines as he could sell prior to a certain date, as the agency continued only to that date the sureties on a bond given to secure the faithful performance of his duties by the agent and the payment of all moneys received by him were bound only for a failure by the agent to account for machines received by him prior to that date).

Ind.—Longworth v. Conwell, 2 Blackf. 469.

N. Y.—Marbury v. Barnet, 17 Misc. 386, 40 NYS 76.

N. D.—Fargo First Nat. Bank v. Minneapolis, etc., El. Co., 11 N. D. 280, 91 NW 436.

Pa.—Yingling v. West End Impr. Co., 5 Pa. Dist. 607.

Eng.—Danby v. Coutts, 29 Ch. D. 500; Dickinson v. Lilwall, 4 Campb. 279; Arlington v. Merricke, 2 Saund. 403, 85 Reprint 1215; Lawford v. Harris, 12 T. L. R. 275.

26. Clements v. Macheboeuf, 92 U. S. 418, 23 L. ed. 504 (holding that where a person holding a patent from the United States for certain lands authorizes his agent "to act upon the application and demand of any person or persons actually owning" town lots within the limits of the lands, and to execute and deliver deeds to such persons who "may apply for the same within three months from" a certain date, the "application and demand" must be made within that time, but the authority of the agent to adjudicate the claims is not so limited); Brockmeyer v. Washington Nat. Bank, 40 Kan. 376, 19 P 855 [reh den 40 Kan. 744, 21 P 300]; Matter of Chambers, 17 App. Div. 340, 45 NYS 264 (holding that an agency to sell goods on commission continues as to the proceeds of the sale). See also Parker v. Advance Thresher Co., 75 Wash. 505, 135 P 229 (holding that where defendant iron works had been agent of a thresher company, and as such had sold to plaintiff and his partner a separator, and prior to a redelivery of the separator to plaintiff in a defective condition the agency contract had expired, such expiration was not binding on plaintiff, in the absence of notice).

27. Northampton Bank v. Pepoon, 11 Mass. 288 (holding that a power of attorney from a bank will not be invalidated by the expiration of the term of office of the directors who executed it).

28. See infra § 154.

29. See infra § 153.

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terminate the agent's power and authority to bind the principal by any further acts.[30] This power to revoke an agent's authority at any time is not at all affected by the fact that there is an express or implied contract between the agent and the principal that such agency is irrevocable,[31] or

30. U. S.—Willcox, etc., Sewing-Mach. Co. v. Ewing, 141 U. S. 627, 12 SCt 94, 35 L. ed. 882; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [rev 12 F. Cas. No. 6,898, 2 Mason 342]; Moore v. Security Trust, etc., Ins. Co., 168 Fed. 496, 93 CCA 652; Hall v. Gambrill, 92 Fed. 32, 34 CCA 190 [aff 88 Fed. 709]; Sheahan v. National Steamship Co., 87 Fed. 167, 30 CCA 593; Stier v. Imperial L. Ins. Co., 58 Fed. 843; Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co., 35 Fed. 22, 13 Sawy. 260; Glover v. Ames, 8 Fed. 351; U. S. v. Jarvis, 26 F. Cas. No. 15,468, 2 Ware 274, 4 NY LegObs 298.

Ala.—Owensboro Wagon Co. v. Hall, 143 Ala. 177, 42 S 113; Chambers v. Seavy, 73 Ala. 372; Evans v. Fearne, 16 Ala. 689, 50 AmD 197.

Ariz.—Taylor v. Burns, 8 Ariz. 463, 76 P 623 [aff 203 U. S. 120, 27 SCt 40, 51 L. ed. 116]; Trickey v. Crowe, 8 Ariz. 176, 71 P 965 [aff 204 U. S. 228, 27 SCt 275, 51 L. ed. 454].

Ark.—Nicks v. Rector, 4 Ark. 251.

Cal.—Parke v. Frank, 75 Cal. 364, 17 P 427; Frink v. Roe, 70 Cal. 296, 11 P 820; Brown v. Pforr, 38 Cal. 550; Chase v. Holmes, 19 Cal. A. 670, 127 P 652.

Colo.—Briggs v. Chamberlain, 47 Colo. 382, 107 P 1082, 135 AmSR 223; Lowell v. Hessey, 46 Colo. 517, 105 P 870; Darrow v. St. George, 8 Colo. 592, 9 P 791.

Conn.—Mansfield v. Mansfield, 6 Conn. 559, 16 AmD 76.

Del.—Gibbons v. Gibbons, 4 Del. 105.

Ga.—Linder v. Adams, 95 Ga. 668, 22 SE 687; Phillips v. Howell, 60 Ga. 411; Wimberly v. Bryan, 55 Ga. 198; Howard College v. Pace, 15 Ga. 486.

Ill.—Davis v. Fidelity F. Ins. Co., 208 Ill. 375, 70 NE 359; Walker v. Denison, 86 Ill. 142; Gilbert v. Holmes, 64 Ill. 548; Bonney v. Smith, 17 Ill. 531; Nevitt v. Woodburn, 82 Ill. A. 649.

Ind.—Rowe v. Rand, 111 Ind. 206, 12 NE 377; Pickler v. State, 18 Ind. 266; Kindig v. March, 15 Ind. 248.

Iowa.—Milligan v. Owen, 123 Iowa 285, 98 NW 792; MacGregor v. Gardner, 14 Iowa 326.

Kan.—Black v. Harsha, 7 Kan. A. 794, 54 P 21.

Ky.—Frazier v. Cox, 125 SW 148; Andrews v. Travelers' Ins. Co., 70 SW 43, 24 KyL 844; Parry Mfg. Co. v. Lyon, 111 Ky. 613, 64 SW 436, 23 KyL 884.

La.—Holmes v. Murdock, 125 La. 916, 51 S 1035; Babin's Succ., 27 La. Ann. 114; Jacobs v. Warfield, 23 La. Ann. 395; Spear v. Gardner, 16 La. Ann. 383.

Md.—Smith v. Dare, 89 Md. 47, 42 A 909; Attrill v. Patterson, 58 Md. 226; Creager v. Link, 7 Md. 259.

Mass.—Flynn v. Butler, 189 Mass. 377, 75 NE 730; Langdon v. Langdon, 4 Gray 186.

Minn.—Buffalo Land, etc., Co. v. Strong, 91 Minn. 84, 97 NW 575 [aff 203 U. S. 582, 27 SCt 780, 51 L. ed. 327]; Alworth v. Seymour, 42 Minn. 526, 44 NW 1030; Hoover v. Perkins Windmill, etc., Co., 41 Minn. 143, 42 NW 866.

Miss.—Kolb v. Bennett Land Co., 74 Miss. 567, 21 S 233.

Mo.—Beheret v. Myers, 240 Mo. 58, 144 SW 824; Staroske v. Pulitzer Pub. Co., 235 Mo. 67, 138 SW 36; Kilpatrick v. Wiley, 197 Mo. 123, 95 SW 213; State v. Walker, 88 Mo. 279 [aff 125 U. S. 339, 8 SCt 929, 31 L. ed. 769] (holding that a state has the same right as any other principal in this respect); Royal Remedy, etc., Co. v. Gregory Grocer Co., 90 Mo. A. 53; Boogher v. Maryland L. Ins. Co., 8 Mo. A. 533.

Mont.—Laux v. Hogl, 45 Mont. 445, 123 P 949; Billings First Nat. Bank v. Hall, 8 Mont. 341, 20 P 638.

Nebr.—Hallstead v. Perrigo, 87 Nebr. 128, 126 NW 1078; Woods v. Hart, 50 Nebr. 497, 70 NW 53.

N. H.—Rochester v. Whitehouse, 15 N. H. 468.

N. J.—Elwell v. Coon, (Ch. 46 A 580; Hartshorne v. Thomas, 43 N. J. Eq. 419, 10 A 843.

N. Y.—Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 43 NE 432; Winslow v. Mayo, 123 App. Div. 758, 108 NYS 640 [aff 195 N. Y. 551 mem, 88 NE 1135 mem]; Byrne v. Fremont Realty Co., 120 App. Div. 692, 105 NYS 838; Clover Condensed Milk Co. v. Cushman Bros. Co., 31 App. Div. 108, 52 NYS 769; Marbury v. Barnet, 17 Misc. 386, 40 NYS 76; Jackson v. Davenport, 18 Johns. 295 [aff 20 Johns. 537].

N. C.—Raleigh Real Est., etc., Co. v. Adams, 145 N. C. 161, 58 SE 1008; Wilmington v. Bryan, 141 N. C. 666, 54 SE 543; Ballard v. Travellers' Ins. Co., 119 N. C. 187, 25 SE 956; North Carolina State L. Ins. Co. v. Williams, 91 N. C. 69, 49 AmR 637; Brookshire v. Brookshire, 30 N. C. 74, 47 AmD 341; Brookshire v. Voncannon, 28 N. C. 231.

Oh.—Hitchcock v. Kelley, 18 Oh. Cir. Ct. 808, 4 Oh. Cir. Dec. 180.

Okl.—McKellop v. Dewitz, 140 P 1161; Glockner v. Jacobs, 140 P 142; Cloe v. Rogers, 31 Okl. 255, 121 P 201, 38 LRANS 366; Kimmell v. Powers, 19 Okl. 339, 91 P 687.

Or.—Simpson v. Carson, 11 Or. 361, 8 P 325.

Pa.—McMahan v. Burns, 216 Pa. 448, 65 A 806; Blackstone v. Buttermore, 53 Pa. 266; Hartley's App., 53 Pa. 212, 91 AmD 207; Coffin v. Landis, 46 Pa. 426; Provident Life, etc., Co. v. Spring Garden Ins. Co., 53 Pa. Super. 66; Yingling v. West End Impr. Co., 5 Pa. Dist. 607.

R. I.—Flaherty v. O'Connor, 24 R. I. 587, 54 A 376; Providence Gas Burner Co. v. Barney, 14 R. I. 18.

S. C.—State v. Brownlee, 29 S. C. L. 519.

Tenn.—Aiken v. Taylor, (Ch. A.) 62 SW 200.

Tex.—Daugherty v. Moon, 59 Tex. 397; Mason v. Ward, (Civ. A.) 166 SW 456; Hollingsworth v. Young County, 40 Tex. Civ. A. 590, 91 SW 1094.

Utah.—Montague v. McCarroll, 15 Utah 318, 49 P 418.

Eng.—Read v. Rann, 10 B. & C. 438, 21 ECL 189, 109 Reprint 513; Gibson v. Minet, 2 Bing. 7, 9 ECL 457, 130 Reprint 206, 1 C. & P. 247, 12 ECL 148, R & M. 68, 21 ECL 703; Venning v. Bray, 2 B. & S. 502, 110 ECL 502, 121 Reprint 1159; Smart v. Sandars, 5 C. B. 895, 57 ECL 895, 136 Reprint 1132; Bromley v. Holland, Coop. 9, 10 EngCh 9, 35 Reprint 458, 7 Ves. Jr. 3, 28, 32 Reprint 2; Dalton v. Irvin, 4 C. & P. 189, 19 ECL 519; Raleigh v. Atkinson, 9 L. J. Exch. 206; De Comas v. Prost, 3 Moore P. C. N. S. 158, 16 Reprint 59; Bristow v. Taylor, 2 Stark. 50, 3 ECL 312; Mestaer v. Atkins, 5 Taunt. 381, 1 ECL 199, 128 Reprint 737.

Que.—Gailbert v. Atteaux, 23 Que. Super. 427.

"As the power of one man to act for another, depends on the will and license of that other, the power ceases, when the will, or this permission, is withdrawn. The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it; and is revoked by his death." Per Marshall, C. J., in Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 201, 5 L. ed. 589 [quot Mansfield v. Mansfield, 6 Conn. 559, 562, 16 AmD 76]. "By the general rule an authority once given, if revoked before execution, except where an element of estoppel intervenes, is the same as to third persons as though it had never existed." Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 91, 43 NE 432.

[a] **Reason for rule.**—"The authority of the agent to represent the principal depends upon the will and license of the principal. It is the act of the principal which creates the authority; it is for his benefit and to subserve his purposes that it is called into being; and, unless the agent has acquired with the authority an interest in the subject-matter, it is in the principal's interest alone that the authority is to be exercised. The agent has no right to insist upon a further execution of the authority if the principal desires it to terminate." Burke v. Priest, 50 Mo. A. 310, 312. To same effect Rochester v. Whitehouse, 15 N. H. 468 (holding that since authority is conferred by the mere will of the principal, and is to be executed for his benefit and for his own purposes, the agent cannot insist upon acting when the principal has withdrawn his confidence and no longer desires his aid).

[b] **Where several tenants in common appoint one of their number their common agent,** any one of them may at any time revoke such agency as to his own interests, and third persons having notice of the revocation are bound to account to the principal thereafter. Barrett v. Bemelmans, 163 Pa. 122, 29 A 756. See generally Tenancy in Common [38 Cyc 101].

31. Cal.—Frink v. Roe, 70 Cal. 296, 11 P 820 (holding that the power was nevertheless revoked by the principal's death).

Ill.—Walker v. Denison, 86 Ill. 142 (holding that a sale by the principal took priority over a subsequent sale made by an agent under a power of attorney expressly declared to be irrevocable within two years from date).

Iowa.—MacGregor v. Gardner, 14 Iowa 326.

Minn.—Buffalo Land, etc., Co. v. Strong, 91 Minn. 84, 97 NW 575 [aff 203 U. S. 582, 27 SCt 780, 51 L. ed. 327].

S. C.—McCallum v. Grier, 86 S. C. 162, 68 SE 466, 138 AmSR 1037 (holding that the authority of an agent to represent his principal is revocable at any time unless coupled with an interest, even where the authority of the agent is declared to be irrevocable, although the principal may subject himself to a claim for damages, by revocation contrary to agreement, express or implied).

Utah.—Montague v. McCarroll, 15 Utah 318, 324, 49 P 418 (where the court said: "While a power of attorney, by its terms, may be expressly declared to be irrevocable, yet if the agent has no interest in its execution, and there is no valid consideration for it, it is treated as a mere nude pact, and is deemed in law to be revocable, upon the general principle that he alone who has an interest in the execution of an act is also entitled to control it. But, where the power is coupled with an interest, or where it is given for a valuable consideration, unless there is an express stipulation that it shall be revocable, it is from its character, in contemplation of law, irrevocable, whether terms expressly making it so are expressed in it or not").

[a] **There is a distinction between the authority and the contract of employment.**—(1) "The authority may be withdrawn at any moment, but the contract of employment cannot be terminated in violation of its terms without making the principal liable in damages." Mechem Agency (2d ed) § 568. See also Turner v. Sawdon, [1901] 2 K. B. 653, 2 BRC 751 [appr Midland Counties Dist. Bank v. Attwood, [1905] 1 Ch. 357] (where defendants had agreed to engage and

that the employment of the agent shall continue for a specified time,[32] or by the fact that the authority was conferred for a consideration,[33] or that the agent has incurred expense in or about the business of the agency.[34] The authority of the agent to represent and bind the principal may nevertheless be terminated.[35] The only effect of such stipulations is to give the agent a cause of action against the principal for a wrongful revocation in breach of such contract.[36] Whether or not the revocation is wrongful as to the agent depends upon a construction of the contract of agency.[37] A revocation of course is not retroactive, and does not affect acts already done by the agent.[38]

An authority to appropriate funds for a purchase or the payment of debts may, as a rule, be revoked before its exercise;[39] but in the case of money or property delivered by a debtor to an agent to be paid to a creditor in discharge of a debt, it is well settled that if the creditor becomes a party to the transaction by assenting to it he acquires irrevocable rights with respect to the money and the agent's authority cannot be withdrawn.[40]

[§ 152] **(2) Exceptions to General Rule—(a) In General.** The rule that a principal has power to revoke at any time the authority of his agent is subject to the two real exceptions mentioned in the following sections.[41] It is also frequently stated that the principal may not revoke a power given for a valuable consideration;[42] but these cases mean no more than that as between the principal and the agent there is no right to terminate the

employ plaintiff in the capacity of representative salesman for a period of four years. Before that period had expired they notified him that he would not thereafter be required to perform any duties, but they offered and were ready and willing to continue to pay him his agreed compensation. They then notified the trade that plaintiff was no longer authorized to transact any business on their behalf. It was held, in an action by the salesman for breach of contract, that there was no breach so long as they continued to pay him his salary, and that they were under no obligation to provide him with work); Toppin v. Healey, 11 Wkly. Rep. 466 (where Erle, C. J., said: "I hold it to be clear that where an agent is employed, that employment may be revoked before performance. This was decided so early as the time of James I, in Vynior's case, 8 Coke 80a, 77 Reprint 595. It might have been a revocation absolutely." Williams, J., said: "The law, I apprehend, is clear that where there is an agreement that one shall do a thing for another and the thing to be done is to be done under that authority, although the person giving the authority cannot revoke the agreement, he may revoke the authority at any time before performance; and where there is a revocation, the performance becomes impossible." Willes, J., said: "You may revoke an authority, although you cannot revoke a contract"). (2) "A distinction must be made, however, between the principal's power to terminate the authority of the agent to act for him and bind him to third persons, and the right of the principal to terminate the relation without liability to the agent. As between the principal and agent the right depends on the terms of the contract, and if the agent is discharged in violation of those terms, he has a right of action for the wrongful discharge. In this respect the contract and the rights thereunder are analogous to the ordinary contract between master and servant." Walker v. Hancock Mut. L. Ins. Co., 80 N. J. L. 342, 344, 79 A 354, 35 LRANS 153 and note, AnnCas1912A 526 and note. See also Master and Servant [26 Cyc 997].

32. Mitchel v. Gray, 8 Cal. A. 423, 97 P 160; Kilpatrick v. Wiley, 197 Mo. 123, 95 SW 213; McMahan v. Burns, 216 Pa. 448, 65 A 806.

As between principal and agent see infra § 157.

33. See infra § 159.

34. McMahan v. Burns, 216 Pa. 448, 451, 65 A 806 (where the court said: "The fact that the defendants have been at considerable expense in laying out the lands of the plaintiffs in lots, advertising the same and endeavoring to sell the same, does not deprive the plaintiff of his power of withdrawing his lots from sale, or employing another agent for the purpose if he so desires, but does, of course, make the plaintiff liable to the defendants for all damages they may have sustained").

Agent's right to reimbursement see infra § 462.

35. See cases supra this section notes 30–34.

[a] **This is so even though the power is expressed in the broadest possible terms,** giving the agent the fullest possible authority to act for the principal. Barr v. Schroeder, 32 Cal. 609.

[b] **As to third persons and as to agent.**—"The donor of a power not coupled with an interest in the very subject-matter itself may revoke the same, he may recall his appointment. [State v. Walker, 88 Mo. 279, c. 284.] His right or power to revoke an unexecuted power can not be questioned by third parties. As to the agent, the principal's power to revoke is one thing and his right to revoke, in breach of the terms of the contract, is another, and such revocation may subject the principal to damages at the suit of the agent." Kilpatrick v. Wiley, 197 Mo. 123, 167, 95 SW 213.

[c] **A custom** that an agency to act for a ship in distress is irrevocable is invalid as being unreasonable. Minis v. Nelson, 43 Fed. 777.

[d] **A contract giving a broker an exclusive agency for a definite time** for the sale of certain patent rights is but a unilateral promise, revocable by the owner notwithstanding part performance, whether the owner commits a breach of contract in so doing or not. Auerbach v. Internationale Wolfram Lampen Aktien Gesellschaft, 177 Fed. 458.

36. Walker v. Denison, 86 Ill. 142; Milligan v. Owen, 123 Iowa 285, 98 NW 792. See also infra §§ 157–159.

Dissolution of partnership is a familiar illustration of the application of these principles see Partnership [30 Cyc 659 et seq].

37. See infra §§ 157–159.

38. Briggs v. Chamberlain, 47 Colo. 382, 107 P 1082, 135 AmSR 223 (holding that an agency at will may be terminated by the principal at any time before the acts which the agent is to perform under the contract of employment have been performed); Meister v. Cleveland Dryer Co., 11 Ill. A. 227 (holding that, where goods to be sold had been offered to a customer at an authorized price and the agent had agreed to sell at the stated price, the principal was bound by the agent's acts); Peo. v. North River Sugar Refining Co., 121 N. Y. 582, 24 NE 834, 18 AmSR 843, 9 LRA 33 [aff 54 Hun 354, 7 NYS 406, 5 LRA 386] (holding that the revocation of an authority, after it had been executed, could not avail to annul a contract made in conformity thereto).

39. Ga.—Howard College v. Pace, 15 Ga. 486.

Ill.—Solomon v. Nicholas, 113 Ill. 351, 1 NE 901; Swartz v. Earls, 53 Ill. 237.

Me.—Lewis v. Sawyer, 44 Me. 332.

Mass.—Dole v. Bodman, 3 Metc. 139.

N. Y.—Kelly v. Roberts, 40 N. Y. 432.

Va.—Beers v. Spooner, 9 Leigh (36 Va.) 153.

Eng.—Gibson v. Minet, 2 Bing. 7, 9 ECL 457, 130 Reprint 206, 1 C. & P. 247, 12 ECL 148, R. & M. 68, 21 ECL 703; Taylor v. Lendey, 9 East 49, 103 Reprint 492.

[a] **Money intrusted to agent to settle suit.**—Where one without consideration intrusts an agent with a sum of money to settle a lawsuit, he has the power of revocation until the settlement is complete. Phillips v. Howell, 60 Ga. 411.

[b] **An indorsee** who holds a bill merely as the payee's agent has no interest therein, and his agency may be revoked. Barker v. Prentiss, 6 Mass. 430.

40. Me.—Goodwin v. Bowden, 54 Me. 424.

Md.—Creager v. Link, 7 Md. 259.

Minn.—Simonton v. Minneapolis First Nat. Bank, 24 Minn. 216.

N. Y.—De Forest v. Bates, 1 Edw. 394 (holding that where A, being indebted to B, directs the proceeds of a cargo to be sent to B in order to go in satisfaction of the debt, and this direction is carried out by C who has promised in writing to facilitate the measure, C becomes B's agent in receiving the property, and A cannot revoke the authority, nor by subsequent assignment deprive B of the benefit of it).

Eng.—Fisher v. Miller, 1 Bing. 150, 8 ECL 447, 130 Reprint 61 (holding that where advances were made by the third person under an agreement amounting to an appropriation of the proceeds of a specified cargo by a particular ship, which the agent remitted accordingly, he was not responsible for such payment, although his principal had countermanded the order subsequently to the agreement under which the advances were made).

[a] **Where a party has directed another to execute and deliver a mortgage** on his own property to a third person, such party cannot revoke his act after others have acquired vested rights under it. Mallett v. Page, 8 Ind. 364.

41. See infra §§ 153–156.

42. U. S.—Hunt v. Rousmanier, 8 Wheat. 174, 201, 5 L. ed. 589 (where Marshall, C. J., said: "Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will; yet, if he binds himself, for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it"); Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co., 35 Fed. 22, 13 Sawy. 260 (which was an action by agent against principal for compensation).

Ill.—Walker v. Denison, 86 Ill. 142.

Md.—Attrill v. Patterson, 58 Md. 226 (action by agent for compensation).

Minn.—Buffalo Land, etc., Co. v. Strong, 91 Minn. 84, 89, 97 NW 575

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contract, and that such termination gives the agent a cause of action against the principal,[43] or else such statements are made with reference to a state of facts showing that the power was coupled with an interest or was given to effectuate a security, which circumstances are referred to as the consideration for the power.[44]

[§ 153] **(b) Authority Constituting Part of a Security or Necessary to Effectuate a Security.** An authority or power cannot be revoked by act of the principal alone, in the absence of a stipulation of revocability, where it constitutes part of a security for the payment of money or the performance of some other obligation, or is necessary to give effect to such a security,[45] as where the power to collect a debt is given as a security for the purpose of reimbursing the agent,[46] and this rule is especially true where the power of attorney expressly stipulates that it is irrevocable,[47] although such a stipulation is not necessary to render the power irrevocable.[48] Thus a power of attorney given to secure a debt due from principal to agent is irrevocable by act of the principal alone,[49] where it precedes, accompanies, or follows a transfer of an interest in the subject matter thereof, as by assignment, deed, mortgage, pledge, etc.,[50] but not otherwise.[51] A power to sell, where the property is delivered to the agent to dispose of it for the protection of himself and other creditors, is an authority coupled with an interest, and therefore irrevocable.[52] So also where, in order to induce a person to become a surety, a power is conferred on him as part of a means of indemnifying him against loss, the power is irrevocable.[53]

A power of attorney running to one person for the better security of a third person to whom an obligation is due from the principal may be given under such circumstances as to render it irrevocable

[aff 203 U. S. 582, 27 SCt 780, 51 L. ed. 327] (where the court said: "The power to sell was therefore irrevocable, because it was executed for a valuable consideration." But in this case, in addition to the element of consideration, the principal for the same consideration had in the same instrument released to the agent all interest in the proceeds of the subject matter, and had covenanted that the power should be irrevocable).

Utah.—Montague v. McCarroll, 15 Utah 318, 49 P 418 (where an interest was given for the consideration).

Eng.—Smart v. Sanders, 5 C. B. 895, 916, 57 ECL 895, 136 Reprint 1132 (where it was said: "An authority, is, in its nature, revocable by the donor of it. Vynior's Case, 8 Coke 82a, 77 Reprint 595: it is only when it is sought to make it irrevocable, that a consideration is required to give it that effect"); Bromley v. Holland, Coop. 9, 10 EngCh 9, 35 Reprint 458, 7 Ves. Jr. 3, 32 Reprint 2 (where Lord Eldon said that a power of attorney is a revocable instrument, but that where it is executed for a valuable consideration a court of equity will not permit it to be revoked. This case, however, was one where the power was given in connection with a security).

43. See supra § 151; infra § 159.

44. See cases supra this section note 42.

[a] **Powers coupled with an interest or given as security.**—"These are irrevocable by the act of the principal for they are founded upon sufficient consideration, and created to subserve purposes in which another has an interest." Bonney v. Smith, 17 Ill. 531, 533.

45. U. S.—Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [rev 12 F. Cas. No. 6,898, 2 Mason 342] (so holding where a letter of attorney forms a part of a contract, and is a security for money or for the performance of any act which is deemed valuable); Skinner v. Ft. Wayne, etc., R. Co., 58 Fed. 55; Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co., 35 Fed. 22, 13 Sawy. 260.

Ala.—Evans v. Fearne, 16 Ala. 689, 50 AmD 197.

Cal.—Frink v. Roe, 70 Cal. 296, 11 P 820.

Ga.—Ray v. Hemphill, 97 Ga. 563, 25 SE 485.

Ill.—Gilbert v. Holmes, 64 Ill. 548.

Minn.—Citizens' State Bank v. Tessman, 121 Minn. 34, 40, 140 NW 178 [cit Cyc]; Buffalo Land, etc., Co. v. Strong, 91 Minn. 84, 97 NW 575 [aff 203 U. S. 582, 27 SCt 780, 51 L. ed. 327].

N. J.—Miller v. Home Ins. Co., 71 N. J. L. 175, 58 A 98; Durbrow v. Eppens, 65 N. J. L. 16, 46 A 582.

N. Y.—Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 43 NE 432.

Pa.—Wood v. Kerkeslager, 225 Pa. 296, 74 A 174; Blackstone v. Buttermore, 53 Pa. 226.

S. C.—Dunbar v. Foreman, 40 S. C. 490, 19 SE 186.

Eng.—Frith v. Frith, [1906] A. C. 254; Walsh v. Whitcomb, 2 Esp. 565. And see In re Hannan's Empress Gold Min., etc., Co., [1896] 2 Ch. 643, 16 ERC 799.

"Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable, in terms, or if not so, is deemed irrevocable in law." Per Marshall, C. J., in Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 201, 5 L. ed. 589 [quot Mansfield v. Mansfield, 6 Conn. 559, 562, 16 AmD 76]. To same effect Wood v. Kerkeslager, 225 Pa. 296, 74 A 174.

[a] **Power coupled with interest distinguished.**—(1) A power given as security is frequently treated as an illustration of a power coupled with an interest. See Blackstone v. Buttermore, 53 Pa. 266; and cases passim §§ 155–156. (2) However, the two powers are sometimes referred to as different and distinct conceptions. See Barr v. Schroeder, 32 Cal. 609, 617 (where the court said: "But a power of attorney may be irrevocable, though it is not a 'power coupled with an interest.' This is often the case where the power of attorney is given as a security for the payment of money. Where the constituent expressly agrees that the power of attorney shall be irrevocable, or the nature of the contract shows that such was the intention of the parties, he will be held to the contract, and not be permitted to revoke it, either directly or indirectly, except upon the payment of the money intended to be secured").

46. Miller v. Home Ins. Co., 71 N. J. L. 175, 58 A 98; Stephens v. Sessa, 50 App. Div. 547, 64 NYS 28.

[a] **A delivery of books of account to an agent,** to whom is given authority to collect the accounts and apply his collections in the payment of a debt which the principal owes the agent, is pro tanto an equitable assignment of the account to the agent and gives him such an interest in the accounts themselves as to make his authority irrevocable until the collections are sufficient to discharge the debt. Shepard v. McNail, 122 Mo. A. 418, 99 SW 494.

47. Barr v. Schroeder, 32 Cal. 609.

48. Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589 [rev. 12 F. Cas. No. 6,898, 2 Mason 342]; Walker v. Denison, 86 Ill. 142.

49. Marziou v. Pioche, 8 Cal. 522; Posten v. Rassette, 5 Cal. 467; James v. Lane, 33 N. J. Eq. 30; Gaussen v. Morton, 10 B. & C. 731, 21 ECL 309, 109 Reprint 622, 16 ERC 797. And see McGriff v. Porter, 5 Fla. 373.

[a] **A power of attorney to collect and receive money** to secure previous advances (1) is not revocable (Farrell v. Amberg, 8 Misc. 220, 28 NYS 564, 23 NYCivProc 434 [aff 151 N. Y. 670 mem, 46 NE 1146 mem]); (2) but, as far as the agent is concerned, only to the amount of the advances (Marziou v. Pioche, 8 Cal. 522, 536, where the court said: "It makes no difference whether the advances be made before or after the power is given, so they are approved by the principal. And when the principal, as in this case, expressly gives the power, for the very purpose of providing the means to return the advances made by the agent, there would seem to be no doubt as to the irrevocable character of the power").

Revocation of warrant of attorney to confess judgment see Judgments [23 Cyc 707].

50. Ark.—Allen v. Davis, 13 Ark. 28.

Cal.—Norton v. Whitehead, 84 Cal. 263, 24 P 154, 18 AmSR 172.

Mass.—Dickinson v. Central Nat. Bank, 129 Mass. 279, 37 AmR 351.

Mich.—Kelly v. Bowerman, 111 Mich. 446, 71 NW 836.

N. J.—Miller v. Home Ins. Co., 71 N. J. L. 175, 58 A 98.

N. Y.—Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 43 NE 432; Stephens v. Sessa, 50 App. Div. 547, 64 NYS 28; Knapp v. Alvord, 10 Paige 205, 40 AmD 241. And see Raymond v. Squire, 11 Johns. 47. Compare Comley v. Dasian, 114 N. Y. 161, 21 NE 135.

Tex.—Threadgill v. Butler, 60 Tex. 599; Wells v. Littlefield, 59 Tex. 556.

Eng.—Walsh v. Whitcomb, 2 Esp. 565; Abbott v. Stratton, 9 Ir. Eq. 233. And see McDowell v. Reede, 14 Ir. Ch. 190; Lawless v. Shaw, Ll. & G. t. S. 154, 11 EngCh 154; Re Parkinson, 13 L. T. Rep. N. S. 26.

See Big Four Wilmington Coal Co. v. Wren, 115 Ill. A. 331.

51. Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589 [rev 12 F. Cas. No. 6,898, 2 Mason 342]; Norton v. Tuttle, 60 Ill. 180; Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 43 NE 432; State v. Brownlee, 29 S. C. L. 519.

52. Marfield v. Douglass, 3 N. Y. Super. 360; Bergen v. Bennet, 1 Cal. Cas. (N. Y.) 1, 2 AmD 281; Knapp v. Alvord, 10 Paige (N. Y.) 205, 40 AmD 241; Smyth v. Craig, 3 Watts & S. (Pa.) 14; Gaussen v. Morton, 10 B. & C. 731, 21 ECL 309, 109 Reprint 622, 16 ERC 797; Hodgson v. Anderson, 3 B. & C. 842, 10 ECL 379, 107 Reprint 945; Watson v. King, 1 Stark. 121, 2 ECL 54.

Power to sell on condition as equitable mortgage see Mortgages [27 Cyc 987 note 44].

Revocability of power of sale accompanying mortgage see Mortgages [27 Cyc 1452 et seq].

53. Hynson v. Noland, 14 Ark. 710;

without the beneficiary's consent,[54] particularly after such third person has accepted the security;[55] but it has been held that such a power may be revoked before such acceptance.[56]

[§ 154] **(c) Authority Coupled with Interest in Subject Matter—aa. In General.** The most important exception to the general rule above stated that an agency is revocable at the pleasure of the principal exists in the case of a power of attorney coupled with an interest in the subject matter thereof, and as a general rule such a power is from its nature irrevocable by act of the principal without the agent's consent,[57] whether so expressed or not,[58] unless the power expressly provides that it is revocable.[59] It has been held, however, that a stipulation that the agency is irrevocable is some evidence that the parties understood that the agent had an interest in the subject matter of the agency.[60]

[§ 155] **bb. What Constitutes Authority Coupled with an Interest—(aa) In General.** To constitute a power coupled with an interest, a property in the thing which is the subject of the agency or power must be vested in the person to whom the agency or power is given, so that he may deal with it in his own name;[61] such that in the event of the principal's death the authority could be exer-

Hutchins v. Hebbard, 34 N. Y. 24. And see Big Four Wilmington Coal Co. v. Wren, 115 Ill. A. 331.

54. Stewart v. Hilton, 7 Fed. 562, 19 Blatchf. 290 (holding that, where a power is conferred on one person to secure compensation to become due to a third person for services to be rendered, the principal cannot revoke it without satisfying the obligation secured thereby); Walsh v. Whitcomb, 2 Esp. 565. And see Goodwin v. Bowden, 54 Me. 424; In re Frederick, 52 Pa. 338, 91 AmD 159; Pooley v. Goodwin, 4 A. & E. 94, 31 ECL 60, 111 Reprint 722. See however Wimberly v. Bryan, 55 Ga. 198; Fisher v. Miller, 1 Bing. 150, 8 ECL 447, 130 Reprint 61 (both holding that a naked authority to pay money to a third person may be revoked by the principal).

[a] **Power to collect for third person.**—A power of attorney to collect money not only for the principal but also for others to whom the principal therein assigned portions of the fund is irrevocable. Philadelphia Third Nat. Bank v. Kerkeslager, 225 Pa. 305, 74 A 176; Wood v. Kerkeslager, 225 Pa. 296, 74 A 174.

55. American L. & T. Co. v. Billings, 58 Minn. 187, 59 NW 998.

Revocation of warrant of attorney to confess judgment see Judgments [23 Cyc 707].

56. Comley v. Dazian, 114 N. Y. 161, 21 NE 135.

57. U. S.—Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [rev 12 F. Cas. No. 6,898, 2 Mason 342]; Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co., 35 Fed. 22, 13 Sawy. 260; Day v. Candee, 7 F. Cas. No. 3,676, 3 Fish. Pat. Cas. 9.

Ala.—Chambers v. Seay, 73 Ala. 372; Evans v. Fearne, 16 Ala. 689, 50 AmD 197.

Ark.—Viser v. Bertrand, 16 Ark. 296; Rapley v. Price, 11 Ark. 713; Wassell v. Reardon, 11 Ark. 705, 44 AmD 245.

Cal.—Norton v. Whitehead, 84 Cal. 263, 24 P 154, 18 AmSR 172; Frink v. Roe, 70 Cal. 296, 11 P 820; Posten v. Rassette, 5 Cal. 467.

Colo.—Darrow v. St. George, 8 Colo. 592, 9 P 791.

Ill.—Walker v. Denison, 86 Ill. 142; Gilbert v. Holmes, 64 Ill. 548; Strother v. Law, 54 Ill. 413; Bonney v. Smith, 17 Ill. 531; Crowley v. McCambridge, 154 Ill. A. 135; Big Four Wilmington Coal Co. v. Wren, 115 Ill. A. 331.

Ky.—Hancock v. Byrne, 5 Dana 513.

La.—Union Garment Co. v. Newburger, 124 La. 820, 50 S 740.

Md.—Smith v. Dare, 89 Md. 47, 42 A 909; Attrill v. Patterson, 58 Md. 226.

Mass.—Dickinson v. Central Nat. Bank, 129 Mass. 279, 37 AmR 351.

Mich.—Baker v. Baird, 79 Mich. 255, 44 NW 604 (holding that a power of attorney coupled with an interest cannot be revoked without payment of the compensation agreed upon).

Minn.—Citizens' State Bank v. Tessman, 121 Minn. 34, 40, 140 NW 178, 45 LRANS 606 [cit Cyc]; Buffalo Land, etc., Co. v. Strong, 91 Minn. 84, 97 NW 575 [aff 203 U. S. 582, 27 SCt 780, 51 L. ed. 327]; American L. & T. Co. v. Billings, 58 Minn. 187, 59 NW 998.

Mo.—Burke v. Priest, 50 Mo. A. 310.

N. J.—Miller v. Home Ins. Co., 71 N. J. L. 175, 58 A 98.

N. Y.—Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 43 NE 432; Hutchins v. Hebbard, 34 N. Y. 24; Jackson v. Davenport, 18 Johns. 295 [aff 20 Johns. 537].

N. C.—North Carolina State L. Ins. Co. v. Williams, 91 N. C. 69, 49 AmR 637.

Oh.—Wheeler v. Knaggs, 8 Oh. 169 (holding that a power of attorney coupled with an interest cannot be revoked after an agreement is made for its execution).

Okl.—McKellop v. Dewitz, 140 P 1161; Cloe v. Rogers, 31 Okl. 255, 121 P 201, 38 LRANS 366 and note.

Pa.—Lightner's App., 82 Pa. 301; Blackstone v. Buttermore, 53 Pa. 266; Fisher v. New York, etc., R., etc., Co., 31 WklyNCas 502.

S. C.—McCallum v. Grier, 86 S. C. 162, 68 SE 466, 138 AmSR 1037.

Tex.—Wells v. Littlefield, 59 Tex. 556; Merrill v. Bradley, 52 Tex. Civ. A. 527, 121 SW 561; Hennessee v. Johnson, 13 Tex. Civ. A. 530, 36 SW 774.

Utah.—Montague v. McCarroll, 15 Utah 318, 49 P 418 (holding that a particular power of attorney made for a consideration and declared to be irrevocable conferred a power coupled with an interest, and was therefore irrevocable, and accordingly a deed made pursuant to the power passed the title to land; and a prior deed made by the grantor of the power was held invalid to pass any interest).

Eng.—In re Hannan's Empress Gold Min., etc., Co., [1896] 2 Ch. 643, 16 ERC 799; Gaussen v. Morton, 10 B. & C. 731, 21 ECL 309, 109 Reprint 622, 16 ERC 797.

See also infra §§ 182, 185, 191, 193.

Compare Milligan v. Owen, 123 Iowa 285, 98 NW 792 (holding that a principal may revoke an agency coupled with an interest at any time, subject, however, to the resulting liability of paying the agent any damage he may sustain on account of such revocation).

[a] **An oral authority is irrevocable** (1) if coupled with an interest (Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 43 NE 432 [cit Hutchins v. Hebbard, 34 N. Y. 24]), (2) unless it is given for the performance of some act which by statute or by the common law the agent cannot perform in the name of his principal unless thereunto authorized in writing (Terwilliger v. Ontario, etc., R. Co., supra).

[b] **A power of attorney authorizing another to assign future earnings** from an existing employment, which declares that the power is coupled with an interest and is irrevocable, cannot be revoked while the employment continues until the debt is discharged, but can be revoked as to earnings from a future employment. Cox v. Hughes, 10 Cal. A. 553, 102 P 956.

58. Frink v. Roe, 70 Cal. 296, 11 P 820; Walker v. Denison, 86 Ill. 142; Buffalo Land, etc., Co. v. Strong, 91 Minn. 84, 97 NW 575 [aff 203 U. S. 582, 27 SCt 780, 51 L. ed. 327]. And see cases supra note 57.

59. Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co., 35 Fed. 22, 13 Sawy. 260; Montague v. McCarroll, 15 Utah 318, 49 P 418.

60. Norton v. Whitehead, 84 Cal. 263, 24 P 154, 18 AmSR 172. See also Buffalo Land, etc., Co. v. Strong, 91 Minn. 84, 97 NW 575 [aff 203 U. S. 582, 27 SCt 780, 51 L. ed. 327] (where power was given for a substantial consideration, and for the same consideration the principal released all interest to the agent and declared the power irrevocable); Montague v. McCarroll, 15 Utah 318, 49 P 418 (where the power was given for a consideration and declared to be irrevocable, and it was held to show a power coupled with an interest, and therefore irrevocable).

61. U. S.—Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [rev 12 F. Cas. No. 6,898, 2 Mason 342] (holding that, if the interest or estate passes with the power and vests in the person by whom the power is to be exercised, such person acts in his own name; that the estate being in him passes from him by a conveyance in his own name; and that he is no longer a substitute acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate); Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co., 35 Fed. 22, 13 Sawy. 260.

Ark.—Yeates v. Pryor, 11 Ark. 58.

Cal.—Norton v. Whitehead, 84 Cal. 263, 24 P 154, 18 AmSR 172 (holding that, where an assignment is followed by an irrevocable power of attorney, a provision in the power authorizing action in the name of the principal detracts nothing from the right of the assignee to act in his own name as assignee in receiving moneys accruing either before or after the death of the principal).

Ky.—Andrews v. Travelers' Ins. Co., 70 SW 43, 24 KyL 844.

Miss.—Kolb v. J. E. Bennett Land Co., 74 Miss. 567, 21 S 233.

N. C.—Brookshire v. Voncannon, 28 N. C. 231.

N. D.—Brown v. Skotland, 12 N. D. 445, 97 NW 543.

[a] **"When the power is given to a person who derives, under the instrument creating the power,** or otherwise, a present or future interest in the property, the subject on which the power is to act, it is then a power coupled with an interest." McGriff v. Porter, 5 Fla. 378, 379.

[b] **A power of attorney which gives to the agent a veto upon the acts of his principal** is equivalent to a power coupled with an interest. Day v. Candee, 7 F. Cas. No. 3,676, 3 Fish. Pat. Cas. 9.

[c] **Where back taxes are placed in the hands of the city attorney** for collection under an ordinance ordering their collection, and that when collected "it shall be the duty of the city attorney to return the books and take a receipt therefor," there is nothing in the resolution carrying a property right or power coupled with an interest, or creating a perpetual and irrevocable contract, either with such

cised in the name of the agent,[62] and hence if the interest of the agent is not such as to enable him to execute the power in his own name, it is not such an interest as precludes termination of the relation by revocation.[63]

Essential elements. To bring a case within this exception it is necessary: (1) That the power and the interest should be coupled or united in point of time; that they should coexist. Hence the interest must exist in the subject matter of the power, and not merely in that which is produced by an exercise of the power, for if the agent's interest exists only in the proceeds arising from an execution of the power, the power and the interest are not coupled in point of time, since the power, in order to produce the interest, must be exercised, and by its exercise it is extinguished; the interest does not come into being until the power is gone.[64] (2) That the power and the interest should be coupled with reference to their subject matter. They must exist with reference to the same thing.[65] For this reason also it is necessary that the agent's interest should exist in the subject matter of the power, and not merely in that which is produced by an exercise of the power.[66] (3) That the power and the interest should be coupled with reference to the person in whom they are vested. They must be united in the same person.[67] (4) That the power and the interest should be coupled with reference to their source. They must be derived by the agent from the same person,[68] although it is not necessary that they should be conferred by the same writing if they are conferred contemporaneously as one entire transaction.[69]

[§ 156] **(bb) Particular Interests.** A power has been held not to be coupled with an interest within the meaning of the above rule where the interest arises from commissions or out of the proceeds of a transaction,[70] as where the agent's interest is merely his right to receive, by way of compensa-

city attorney or with one of his subagents. Wilmington v. Bryan, 141 N. C. 666, 54 SE 543.

[d] **A power of attorney given by joint owners of land to another joint owner** of the same land to sell and convey it, which conveys to the attorney no interest in the land to be sold, is not a "power coupled with an interest." Gilmer v. Veatch, 56 Tex. Civ. A. 511, 121 SW 545.

[e] **The partnership of the parties** does not of itself constitute a power coupled with an interest. Travers v. Crane, 15 Cal. 12.

62. Mansfield v. Mansfield, 6 Conn. 559, 16 AmD 76; Bonney v. Smith, 17 Ill. 531; Knapp v. Alvord, 10 Paige (N. Y.) 205, 40 AmD 241 (holding that the power was coupled with an interest and survived the death of the principal). See also infra § 182.

63. U. S.—Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [rev 12 F. Cas. No. 6,898, 2 Mason 342].

Cal.—Frink v. Roe, 70 Cal. 296, 11 P 820.

Ill.—Gilbert v. Holmes, 64 Ill. 548.

Ky.—Andrews v. Travelers' Ins. Co., 70 SW 43, 24 KyL 844.

Eng.—Watson v. King, 1 Stark. 121, 2 ECL 54.

[a] **"A power is simply collateral and without interest, or a naked power,** when, to a mere stranger, authority is given to dispose of an interest, in which he had not before, nor has by the instrument creating the power, any estate whatsoever." McGriff v. Porter, 5 Fla. 373, 379.

64. U. S.—Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [rev 12 F. Cas. No. 6,898, 2 Mason 342]; Stier v. Imperial L. Ins. Co., 58 Fed. 843 [dist Newcomb v. Imperial L. Ins. Co. 51 Fed. 725]; Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co., 35 Fed. 22, 13 Sawy. 260.

Ala.—Chambers v. Seay, 73 Ala. 372.

Ariz.—Taylor v. Burns, 8 Ariz. 463, 76 P 623 [aff 203 U. S. 120, 27 SCt 40, 51 L. ed. 116]; Trickey v. Crowe, 8 Ariz. 176, 71 P 965 [aff 204 U. S. 228, 27 SCt 275, 51 L. ed. 454].

Ark.—Yeates v. Pryor, 11 Ark. 58; Nicks v. Rector, 4 Ark. 251.

Cal.—Barr v. Schroeder, 32 Cal. 609.

Conn.—Mansfield v. Mansfield, 6 Conn. 559, 16 AmD 76.

Dak.—Wambole v. Foote, 2 Dak. 1, 2 NW 239.

Del.—Gibbons v. Gibbons, 4 Del. 105.

Fla.—Jacksonville Terminal Co. v. Smith, 64 S 354; McGriff v. Porter, 5 Fla. 373.

Ga.—Miller v. McDonald, 72 Ga. 20; Lathrop v. Brown, 65 Ga. 312; Coney v. Sanders, 28 Ga. 511.

Ill.—Walker v. Denison, 86 Ill. 142; Gilbert v. Holmes, 64 Ill. 548; Norton v. Tuttle, 60 Ill. 130; Nevitt v. Woodburn, 82 Ill. A. 649.

Ky.—Andrews v. Travelers' Ins. Co., 70 SW 43, 24 KyL 844.

Md.—Smith v. Dare, 89 Md. 47, 42 A 909; Attrill v. Patterson, 58 Md. 226.

Mass.—Langdon v. Langdon, 4 Gray 186.

Miss.—Kolb v. Bennett Land Co., 74 Miss. 567, 21 S 233.

Mo.—Meyer v. Pulitzer Pub. Co., 156 Mo. A. 170, 136 SW 5; Burke v. Priest, 50 Mo. A. 310.

N. Y.—Farmers' L. & T. Co. v. Wilson, 139 N. Y. 284, 34 NE 784, 36 AmSR 696 [aff 64 Hun 194, 19 NYS 142]; Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 NYS 1045; Marbury v. Barnet, 17 Misc. 386, 40 NYS 76.

N. C.—Wilmington v. Bryan, 141 N. C. 666, 54 SE 543; Wainwright v. Massenburg, 129 N. C. 46, 39 SE 725; Ballard v. Travelers' Ins. Co., 119 N. C. 187, 25 SE 956; North Carolina State L. Ins. Co. v. Williams, 91 N. C. 69, 49 AmR 637.

Okl.—McKellop v. Dewitz, 140 P 1161; Schilling v. Moore, 34 Okl. 155, 125 P 487; Kimmell v. Powers, 91 P 687.

Pa.—Blackstone v. Buttermore, 53 Pa. 266; Hartley's App., 53 Pa. 212, 91 AmD 207.

S. C.—State v. Brownlee, 29 S. C. L. 519.

Tex.—Daugherty v. Moon, 59 Tex. 397; Baker v. Heney, (Civ. A.) 166 SW 19; Gilmer v. Veatch, (Civ. A.) 121 SW 545.

Vt.—Michigan Ins. Co v. Leavenworth, 30 Vt. 11.

Eng.—Frith v. Frith, [1906] A. C. 254; Smart v. Sandars, 5 C. B. 895, 57 ECL 895, 136 Reprint 1132.

"The power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore, cannot, in accurate law language, be said to be 'coupled' with it." Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 203, 5 L. ed. 589 [rev 12 F Cas. No. 6,898, 2 Mason 342, and quot Andrews v. Travelers' Ins. Co., 70 SW 43, 47, 24 KyL 844; Brown v. Skotland, 12 N. D. 445, 450, 97 NW 543].

"By the phrase 'coupled with an interest,' is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate." Taylor v. Burns, 203 U. S. 120, 126, 27 SCt 40, 51 L. ed. 116 [quot Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589].

"The interest which the party to whom the power is given must have, in order to render the power irrevocable, must be an interest in the property on which the power is to be exercised. It is not enough that the donee of the power is interested in that which is produced by the exercise of the power. If his interest is thus limited, the power and the interest cannot be coupled, for the proceeds do not arise until after the power has been exercised, and when it is exercised, it is extinguished." Barr v. Schroeder, 32 Cal. 609, 617.

"To constitute a power coupled with an interest, there must be an interest in the thing itself, and not merely in the execution of the power." Mansfield v. Mansfield, 6 Conn. 559, 563, 16 AmD 76.

[a] **Responsibility for losses.**—A managing agent's agreement to be responsible to the principal for all general losses in the conduct of the business does not make him an agent with a power coupled with an interest precluding revocation of the agency. Chase v. Chapman, 89 Kan. 196, 131 P 615.

65. See cases supra note 64.

66. See cases supra note 64.

67. Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589 [rev 12 F. Cas. No. 6,898, 2 Mason 342]; Nicks v. Rector, 4 Ark. 251; North Carolina State L. Ins. Co. v. Williams, 91 N. C. 69, 49 AmR 637.

Power conferred as security for benefit of third person see supra § 153.

68. Black v. Harsha, 7 Kan. A. 794, 54 P 21 (holding that, where an agent to sell goods derived his power from a first mortgage and his interest, as second mortagee, from the owner, it was not a power coupled with an interest; and where the court said: "An examination of a large number of decisions has led us to the conclusion that both the agency and the interest must flow from the same source in order to create an agency coupled with an interest").

69. Sanborn v. Rodgers, 33 Fed. 851 (holding that the interest in the subject matter may be one conferred by a contract contemporaneous with the act creating the agency).

70. U. S.—Missouri v. Walker, 125 U. S. 339, 8 SCt 929, 31 L. ed. 769; Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co., 35 Fed. 22, 13 Sawy. 260.

Cal.—Flanagan v. Brown, 70 Cal. 254, 11 P 706; Barr v. Schroeder, 32 Cal. 609.

Fla.—McGriff v. Porter, 5 Fla. 373.

Ill.—Gilbert v. Holmes, 64 Ill. 548.

Ky.—Andrews v. Travelers' Ins. Co., 70 SW 43, 24 KyL 844.

tion or commissions, a certain per cent of the proceeds of a collection[71] or sale[72] effected by him, notwithstanding the commission is a large one;[73] or where he is to sue for property and receive part of the property in case of recovery.[74] But on the other hand it has been held that a power to make a collection or sale and out of the proceeds to pay a debt due to the agent from the principal is a power coupled with an interest,[75] as is also an authority to the agent to reimburse himself from such proceeds for advances made to the principal.[76] So also it has been held that authority to loan money and to collect the same and account for all over a given per cent, which the agent is to retain as his compensation, constitutes authority coupled with an interest.[77]

Power given for consideration or as part of security. It has been held that an authority is coupled with an interest when it is given to the agent for a valuable consideration,[78] or as part of a security.[79] That the agent has a special property in or lien upon the subject matter does not make the power one coupled with an interest where it was not given for the purpose of securing the claim of the agent.[80]

[§ 157] **b. Right of Revocation—(1) General Rule.** As between principal and agent the right to terminate the agency depends upon the ordinary principles of contract,[81] and is governed by the same rules as apply to any other contract of employment.[82] Although, as has been stated, a principal has the undoubted power, so far as the agency is executory, to revoke the agent's authority, it by no means follows that he has always a right to do so, since the contract of agency may provide otherwise. Accordingly, if he revokes the agency in violation

Me.—Merry v. Lynch, 68 Me. 94.
Md.—Smith v. Dare, 89 Md. 47, 42 A 909.
Mich.—Hamilton v Frothingham, 59 Mich. 253, 26 NW 486.
Minn.—Alworth v. Seymour, 42 Minn. 526, 44 NW 1030.
Mo.—Burke v. Priest, 50 Mo. A. 310.
N. J.—Elwell v. Coon, (Ch.) 46 A 580.
N. Y.—Farmers' L. & T. Co. v. Wilson, 139 N. Y. 284, 34 NE 784, 36 AmSR 696.
N. C.—North Carolina State L. Ins. Co. v. Williams, 91 N. C. 69, 49 AmR 637.
Or.—Simpson v. Carson, 11 Or. 361, 8 P 325.
Pa.—Blackstone v. Buttermore, 53 Pa. 266; Coffin v. Landis, 46 Pa. 426; Shisler's Est., 2 Pa. Dist. 588.

[a] **A newspaper carrier** having a commission contract to deliver newspapers and take subscriptions does not have an agency coupled with interest. Meyer v. Pulitzer Pub. Co., 156 Mo. A. 170, 136 SW 5.

[b] **An agency to solicit insurance on commission** is not coupled with an interest. Stier v. Imperial L. Ins. Co., 58 Fed. 843; Andrews v. Travelers' Ins. Co., 70 SW 43, 24 KyL 844; Ballard v. Travellers' Ins. Co., 119 N. C. 182, 25 SE 867.

71. Lowell v. Hessey, 46 Colo. 517, 105 P 870 (holding that plaintiff's agency under a contract, whereby he was authorized by judgment creditors to collect the judgment for fifty per cent thereof as compensation, was not coupled with an interest, and hence was revocable at the will of the judgment creditors); Hartley's App., 53 Pa. 212, 91 AmD 207.

72. U. S.—Hall v. Gambrill, 92 Fed. 32, 34 CCA 190 [aff 88 Fed. 709].
Ala.—Chambers v. Seay, 73 Ala. 372.
Ariz.—Taylor v. Burns, 8 Ariz. 463, 76 P 623 [aff 203 U. S. 120, 27 SCt 40, 51 L. ed. 116]; Trickey v. Crowe, 8 Ariz. 176, 71 P 965 [aff 204 U. S. 228, 27 SCt 275, 51 L. ed. 454].
Ark.—Yeates v. Pryor, 11 Ark. 58.
Cal.—Frink v. Roe, 70 Cal. 296, 11 P 820; Mitchel v. Gray, 8 Cal. A. 423, 97 P 160.
Conn.—Mansfield v. Mansfield, 6 Conn. 559, 16 AmD 76.
Ill.—Bonney v. Smith, 17 Ill. 531.
Ind.—Rowe v. Rand, 111 Ind. 206, 12 NE 377.
Miss.—Kolb v. Bennett Land Co., 74 Miss. 567, 21 S 233.
Mo.—Green v. Cole, 103 Mo. 70, 15 SW 317.
N. Y.—Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 43 NE 432.
Okl.—Kimmell v. Powers, 19 Okl. 339, 91 P 687.
Pa.—McMahan v. Burns, 216 Pa. 448, 65 A 806; Yingling v. West End Impr. Co., 5 Pa. Dist. 607.
Tex.—Hollingsworth v. Young County, 40 Tex. Civ. A. 590, 91 SW 1094.
Utah.—Butterfield v. Consolidated Fuel Co., 42 Utah 499, 132 P 559.
Eng.—Raleigh v. Atkinson, 9 L. J. Exch. 206; De Comas v. Prost, 3 Moore P. C. N. S. 158, 16 Reprint 59.

Power of sale accompanied by transfer of interest see supra § 153.

[a] **Power of attorney to operate a patent.**—An instrument by which a patentee appoints another his "sole agent" for the purpose of working and developing the business of the patent, in consideration of a payment to be made by the latter to the former as royalty of a specified sum for each article, with power to negotiate the sale of the patent, gives the agent no interest in the patent. Johnson R. Signal Co. v. Union Switch, etc., Co., 59 Fed. 20 [rev on other grounds 61 Fed. 940, 10 CCA 176].

[b] **Compensation from subject matter.**—But an instrument appointing one attorney in fact, with authority to take possession of certain lands and to sell, with consent, any land in which they may have an interest, and conveying to such attorney, in consideration of his services, an undivided half of all such lands, is in effect a power of attorney coupled with an interest in the subject matter. Merrill v. Bradley, 52 Tex. Civ. A. 527, 121 SW 561 [cert 102 Tex. 481, 119 SW 297].

73. McMahan v. Burns, 216 Pa. 448, 65 A 806 (holding that where an agent for the sale of land is given a commission amounting to more than one half of the purchase money, a very large sum, it does not give him such an interest as to make the agency irrevocable).

74. Wainwright v. Massenburg, 129 N. C. 46, 39 SE 725 (holding that a power of attorney to sue for property, the attorney to receive part of the property in case of recovery, is not a power coupled with an interest).

75. Denson v. Thurmond, 11 Ark. 586; Big Four Wilmington Coal Co. v. Wren, 115 Ill. A. 331.

76. Posten v. Rassette, 5 Cal. 467.

77. Perkins v. Hershey, 77 Mich. 504, 43 NW 1021.

78. Boone v. Clarke, 3 F. Cas. No. 1,641, 3 Cranch C. C. 389; Marziou v. Pioche, 8 Cal. 522; Creager v. Link, 7 Md. 259; Hill v. Day, 34 N. J. Eq. 150. In Smart v. Sandars, 5 C. B. 895, 917, 57 ECL 895, 136 Reprint 1132, Wilde, C. J., said: "The result appears to be, that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest." But see Coney v. Sanders, 28 Ga. 511, 513 (where the court said: "In order that a power may be a power coupled with an interest, the agent must have an interest derived from the power, or, from something else, in the property or thing in reference to which the power was given; that he paid a valuable consideration for the power, will not be enough"). See also infra § 159 note 98.

[a] **In England** (1) it is said that an authority which is given for a consideration and by which the agent is to secure a benefit creates an interest precluding revocation. In re Hannan's Empress Gold Min., etc., Co., [1896] 2 Ch. 643, 16 ERC 799; Smart v. Sandars, 5 C. B. 895, 57 ECL 895, 136 Reprint 1132. (2) While this language is not in terms in strict accord with that used by the American courts, yet the distinction between the English and the American cases is rather in words than in substance. See Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 94, 43 NE 432.

[b] **Where plaintiff was employed to negotiate a trade of lands** for defendant and afterward employed to sell the lands received by her in such trade, the services rendered by him in making such trade being in part the consideration for the second employment, such employment was coupled with an interest and could not be revoked at the mere pleasure of defendant. Bird v. Phillips, 115 Iowa 703, 87 NW 414.

79. Hynson v. Noland, 14 Ark. 710 (holding that the authority to act as agent in the receipt, control, and disbursement of the public moneys, given by an officer having charge of public moneys to one of his securities, for the protection of himself and cosecurities, is in the nature of a power coupled with an interest and is irrevocable); Blackstone v. Buttermore, 53 Pa. 266. See also supra § 153.

[a] **Assignment of suit.**—Where plaintiff, pending an action for damages, assigned his suit to a debtor by writings under seal, and empowered his assignee to settle such suit "for such sum as he shall think reasonable" and apply the proceeds on the debt, and stipulated that, unless he should pay a specified sum by a certain day, such assignee should have full authority to settle such suit, "without any notice and according to his own discretion," the power thereby conferred, being coupled with an interest, was irrevocable by the grantor, and survived to the representatives of the deceased grantee. Hilliard v. Beattie, 67 N. H. 571, 39 A 897.

80. Taplin v. Florence, 10 C. B. 744, 70 ECL 744, 138 Reprint 294; Chinnock v. Sainsbury, 6 Jur. N. S. 1318.

81. See Contracts [9 Cyc 213].

82. See Brokers [19 Cyc 192]; Factors [19 Cyc 117]; Master and Servant [26 Cyc 980 et seq]; Partnership [30 Cyc 650].

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of the contract, he becomes liable to the agent for the damages caused thereby,[83] although it should be observed in this connection that the agent is limited to his action for damages; the courts will not specifically enforce the contract against the principal.[84] But if the contract of agency contains no terms indicating the creation of an agency for a definite period,[85] or if the contract is not supported by a sufficient consideration,[86] it is terminable at will, and the principal by revoking the authority incurs no liability to the agent, unless the agent has entered upon performance of the contract so that a revocation of his authority will work him legal injury.[87]

[§ 158] **(2) Applications of Rule.** Within the rules just stated an agency may be revoked at any time, even though it is expressed to be sole and exclusive,[88] except that where it is expressed to be exclusive as long as the agent faithfully and impartially conducts the business, it may not be revoked without a good and sufficient reason therefor.[89] So a principal may, at any time before its execution, revoke an authority to sell goods[90] or lands,[91] unless the power is coupled with an interest or given as a security within the rules already explained.[92] The mere fact that the agent advances money to the principal in the course of his em-

83. U. S.—Brush-Swan Electric Light Co. v. Brush Electric Co., 41 Fed. 163.

Ala.—Ewart Lumber Co. v. American Cement Plaster Co., 9 Ala. A. 152, 62 S 560.

Cal.—Parke v. Frank, 75 Cal. 364, 17 P 427.

Ill.—Richmond v. Brandt, 118 Ill. A. 624.

Iowa.—Milligan v. Owen, 123 Iowa 285, 98 NW 792.

Ky.—Frazier v. Cox, 125 SW 148; Oberfelder v. Mattingly Co., 120 SW 352.

Mich.—Stone v. Fox Mach. Co., 145 Mich. 689, 109 NW 659.

Mo.—Kilpatrick v. Wiley, 197 Mo. 123, 95 SW 213 (holding that the donor of a power not coupled with an interest in the subject matter itself may revoke the same within the time during which the power provided that it was irrevocable, the donor being only subject to a suit for damages by the donee).

N. J.—Walker v. Hancock Mut. L. Ins. Co., 80 N. J. L. 342, 79 A 354, 35 LRANS 153 and note, AnnCas1912A 526 and note (holding that the right of a principal to terminate the relation between himself and his agent without liability to the agent depends on the contract, and that if the agent is discharged in violation thereof, he may recover for such wrongful discharge).

Okl.—McKellop v. Dewitz, 140 P 1161.

Pa.—Blackstone v. Buttermore, 53 Pa. 266; Press Pub. Co. v. Reading News Agency, 44 Pa. Super. 428.

Philippine.—Reyes v. Compañia Maritima, 3 Philippine 519.

Wis.—W. G. Taylor Co. v. Bannerman, 120 Wis. 189, 97 NW 918.

Eng.—Turner v. Goldsmith, [1891] 1 Q. B. 544.

Que.—Gailbert v. Atteaux, 23 Que. Super. 427.

See also infra §§ 454, 456, 457.

84. Elwell v. Coon, (N. J. Ch.) 46 A 580; Mair v. Himalaya Tea Co., L. R. 1 Eq. 411; Chinnock v. Sainsbury, 6 Jur. N. S. 1318; Pickering v. Ely, 2 Y. & Coll. 249, 21 EngCh 249, 63 Reprint 109. And see generally Specific Performance [36 Cyc 572].

85. U. S.—Sheahan v. National Steamship Co., 87 Fed. 167, 30 CCA 593; Stier v. Imperial L. Ins. Co., 58 Fed. 843.

Ala.—Chambers v. Seay, 73 Ala. 372.

Ark.—Greenspan v. Miller, 163 SW 776.

Cal.—Brown v. Pforr, 38 Cal. 550.

Ill.—Union Special Sewing Mach. Co. v. Lockwood, 110 Ill. A. 387; Orient Ins. Co. v. Kemp, 29 Ill. A. 232.

Iowa.—Milligan v. Owen, 123 Iowa 285, 98 NW 792.

La.—Jacobs v. Warfield, 23 La. Ann. 295. And see Spear v. Gardner, 16 La. Ann. 383.

Mass.—Bradlee v. Southern Coast Lumber Co., 193 Mass. 378, 79 NE 777.

Mich.—Dodge v. Reynolds, 135 Mich. 692, 98 NW 737.

Minn.—Newhall v. Journal Printing Co., 105 Minn. 44, 117 NW 228, 20 LRANS 899 and note; Hoover v. Perkins Windmill, etc., Co., 41 Minn. 148, 42 NW 866.

Mo.—Meyer v. Pulitzer Pub. Co., 156 Mo. A. 170, 136 SW 5 (holding that where a principal and agent make a contract of agency which is indefinite, no time being fixed for its termination, it may be terminated by either party, and hence one having an agency to deliver newspapers under such an indefinite contract cannot complain if the newspaper company terminates it); Royal Remedy, etc., Co. v. Gregory Grocery Co., 90 Mo. A. 53; Burke v. Priest, 50 Mo. A. 310.

N. Y.—Winslow v. Mayo, 123 App. Div. 758, 108 NYS 640 [aff 195 N. Y. 551 mem, 88 NE 1135 mem]; Jackson v. Stephens, 83 Misc. 232, 145 NYS 827.

N. C.—Thomas v. Gwyn, 131 N. C. 460, 42 SE 904.

Pa.—Kelly v. Marshall, 172 Pa. 396, 33 A 690; Coffin v. Landis, 46 Pa. 426; Rice v. Fidelity, etc., Co., 1 LackLegN 111; Fay Gas Fixture Co. v. Welsbach Light Co., 41 WklyNC 478.

Tex.—Hollingsworth v. Young County, 40 Tex. Civ. A. 590, 91 SW 1094.

Can.—Morris v. Dinnick, 14 CanLT OccNotes 394, 25 Ont. 291.

See Rowe v. Rand, 111 Ind. 206, 12 NE 377; Northey v. Trevillion, 18 T. L. R. 648 [foll Rhodes v. Forwood, 1 App. Cas. 256].

[a] **Agency construed to be one at will** see Willcox, etc., Sewing-Mach. Co. v. Ewing, 141 U. S. 627, 12 SCt 94, 35 L ed. 882; Brown v. Pforr, 38 Cal. 550; Milligan v. Owen, 123 Iowa 285, 98 NW 792; Winslow v. Mayo, 123 App. Div. 758, 108 NYS 640 [aff 195 N. Y. 551 mem, 88 NE 1135 mem]; Fay Gas Fixture Co. v. Welsbach Light Co., 41 WklyNC (Pa.) 478.

[b] **The employment of an agent to sell personal property,** graduated by the price obtained from a third party, may be revoked, and the revocation may not be complained of, unless colorable and unfair, and unless a new bargain made by the principal comes within the same substantial terms which would have entitled the agent to compensation under the old agreement. Even then the remedy would not be on a quantum meruit for services, whatever it might be as to expenditures made in the service. Hamilton v. Frothingham, 59 Mich. 253, 26 NW 486.

Revocation in bad faith or before lapse of reasonable time as affecting right of agent to compensation see infra §§ 422–424.

86. See infra § 159.

87. See infra §§ 195, 422–424, 456, 457, 462.

88. U. S.—Sanborn v. Rodgers, 33 Fed. 851.

Ala.—Chambers v. Seay, 73 Ala. 372.

Miss.—Kolb v. Bennett Land Co., 74 Miss. 567, 21 S 233.

Nebr.—Woods v. Hart, 50 Nebr. 497, 70 NW 53 (holding that an exclusive power to sell may be revoked by the principal at any time before the sale).

Pa.—Press Pub. Co. v. Reading News Agency, 44 Pa. Super. 428, 433 (where the court said: "When a contract provides that one party shall render service to another, or act as his agent, or have the exclusive right to sell the product of a factory within certain territory and does not specify a definite time or prescribe conditions which shall determine the duration of the relation, it is within the power of either party to terminate it at any time").

Compare Alf Bennett Lumber Co. v. Walnut Lake Cypress Co., 104 Ark. 421, 151 SW 275.

[a] **At end of reasonable time.**—Where a person agrees to appoint another his sole agent in a certain place for the sale of his products and no time for the agency is fixed, the principal may revoke the agency at the end of a reasonable time, even though the agent has expended money in advertising the product. Ewart Lumber Co. v. American Cement Plaster Co., 9 Ala. A. 152, 62 S 560.

89. Press Pub. Co. v. Reading News Agency, 44 Pa. Super. 428. See also infra §§ 160, 161.

90. Winslow v. Mayo, 123 App. Div. 758, 108 NYS 640 [aff 195 N. Y. 551 mem, 88 NE 1135 mem] (holding that, where defendant agreed to give plaintiff the right to sell "any or all" of a stock of goods on a commission on all sales made by him, and plaintiff agreed to devote his entire time to the sale of the goods and if defendant should receive an offer for the goods he agreed to give plaintiff the opportunity to place them at the same or a higher price, and in the event of plaintiff's failing to dispose of them defendant had the right to accept the offer and agreed to acquaint plaintiff with the name of the party making it, the contract, as to its consideration, related entirely to the services to be performed by plaintiff, any sale by him being a consideration for the commission promised, and as he was not bound to sell "any or all" of the goods, or to devote any definite time to the sale of them, defendant was not bound to hold them until plaintiff should sell "any or all" of them, and the contract created merely an agency, revocable at the will of the principal on performance of the obligations up to such termination); Jackson v. Stephens, 83 Misc. 232, 145 NYS 827; Laciar v. Jackson Motor Co., 147 NYS 584.

91. Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589 [rev 12 F. Cas. No. 6,898, 2 Mason 342]; Mansfield v. Mansfield, 6 Conn. 559, 16 AmD 76 (power to sell and convey held a naked power and revocable); Green v. Cole, 103 Mo. 70, 15 SW 317 (holding that, where an agent to sell land acquires no interest in the land by the verbal agreement which he makes with the owner, the agency resulting from such an agreement is revocable).

[a] **A unilateral agreement** of a landowner constituting an exclusive agent for the sale of the land within a specified time, which agent is to receive a commission, regardless of who effects the sale, and is to be aided by the owner in making a sale, lacks mutuality, and hence is revocable at any time before the agent procures a purchaser. Kolb v. Bennett Land Co., 74 Miss. 567, 21 S 233.

92. See supra §§ 153–156.

ployment does not render the power irrevocable.[93] But where the principal revokes in violation of a stipulation, based on a sufficient consideration, that the agency shall continue for a definite period,[94] or where the power is expressly declared to be irrevocable and the agent is given an interest in its execution,[95] or where the power is granted as an incident to a complete contract for services to be rendered by the agent on the one side and for compensation to be paid by the principal on the other,[96] the revocation is wrongful and gives the agent a cause of action.

Stipulation against revocation. In the absence of a sufficient consideration for the stipulation, or a power coupled with an interest, a principal's right of revocation exists even though it is expressly stipulated that the agency shall be irrevocable.[97]

[§ 159] **(3) Authority Conferred for a Consideration.** Where an authority or power is given for a valuable consideration, it may not lawfully be revoked by act of the principal alone, in the absence of a stipulation that it shall be revocable,[98] and this is true, although the authority is not expressed to be irrevocable.[99] In the absence of any consideration,[1] or if the consideration for which

93. Smith v. Dare, 89 Md. 47, 42 A 909 (holding that a power of attorney to attend to a farm, collect the rents, apply them to the necessary expenses, and turn the balance over to the principal, and providing that the agent is "not to advance any rents before due except when absolutely convenient," does not impose any obligation on the agent to make advances to his principal, and hence the latter may revoke the power at will, although such advances have in fact been made).

[a] **Mere advances made by a factor,** whether at the time employed as such or subsequently, do not alter the revocable nature of his authority to sell, unless the advances are accompanied by and made the consideration for an agreement that the authority shall not be revocable. Smart v. Sandars, 5 C. B. 895, 57 ECL 895, 136 Reprint 1132; Raleigh v. Atkinson, 2 L. J. Exch. 206; De Comas v. Prost, 3 Moore P. C. N. S. 158, 16 Reprint 59.

94. Alf Bennett Lumber Co. v. Walnut Lake Cypress Co., 105 Ark. 421, 151 SW 275; Parke v. Frank, 75 Cal. 364, 17 P 427; Moran v. Standard Oil Co., 211 N. Y. 187, 105 NE 217. See also Turner v. Goldsmith, [1891] 1 Q. B. 544; supra § 151.

"Where there is an employment for a definite period of time, expressed or implied, and the agent is discharged without cause before the expiration of that period, the principal will be liable to the agent the same as in case of a breach of any other contract; and in such cases the agent may elect to treat the contract as rescinded and bring an action to recover the value of his services and money expended." Glover v. Henderson, 120 Mo. 367, 377, 25 SW 175, 41 AmSR 695.

Revocation as affecting right of agent: To compensation see infra §§ 422–424. To reimbursement see infra § 462.

95. Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co., 35 Fed. 22, 13 Sawy. 260 (holding, however, that both these circumstances must concur, for if the agent has no interest in the execution of the power it may be revoked, although it contains a stipulation to the contrary); Bonney v Smith, 17 Ill. 531, 533 (where the court said: "Another class is where the attorney has an interest only arising out of the execution of the power, as in the proceeds, as a compensation for the business of its execution. . . . This power is of the latter class, and revocable by the principal, although the principal might perhaps be liable to the agent or attorney for any damages sustained. It is a naked power, with an interest in the proceeds, based only upon its execution, which execution is dependent upon the continuing will of the principal").

96. Morgan v. Gibson, 42 Mo. A. 234; Grapel v. Hodges, 112 N. Y. 419, 20 NE 542 (both holding that a contract for services in the collection of a claim for a contingent compensation by a share of the proceeds is not terminated by the death of the claimant).

97. Chambers v. Seay, 73 Ala. 372; Walker v. Denison, 86 Ill. 142.

"While a power of attorney, by its terms, may be expressly declared to be irrevocable, yet if the agent has no interest in its execution, and there is no valid consideration for it, it is treated as a mere nude pact, and is deemed in law to be revocable, upon the general principle that he alone who has an interest in the execution of an act is also entitled to control it" Montague v. McCarroll, 15 Utah 318, 324, 49 P 418.

[a] **"It is elementary** that a principal has the power to revoke his agent's authority at any time except where it is expressly made irrevocable, or where it is coupled with an interest, or given for a valuable consideration or as part of a security." Walker v. Hancock Mut. L. Ins. Co., 80 N. J. L. 342, 344, 79 A 354, 35 LRANS 153, AnnCas1912A 526.

98. U. S.—Pacific Coast Co. v. Anderson, 107 Fed. 973, 47 CCA 106 [aff 99 Fed. 109]; Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co., 35 Fed. 22, 13 Sawy. 260; Stewart v. Hilton, 7 Fed. 562, 19 Blatchf. 290.

Ark.—Viser v. Bertrand, 16 Ark. 296 (as where a husband appoints an agent to take charge of property and hire it out and appropriate the proceeds to the use of the principal's wife and child).

Cal.—Frink v. Roe, 70 Cal. 296, 11 P 820.

Ill.—Walker v. Denison, 86 Ill. 142; Guthrie v. Wabash R. Co., 40 Ill. 109 (holding that, where a party to a suit buys out his adversary's right and takes from him a power to control the cause, which, for a valuable consideration, is made irrevocable, the power cannot be revoked); Bonney v. Smith, 17 Ill. 531; Rider v. Rider, 114 Ill. A. 202.

Md.—Smith v. Dare, 89 Md. 47, 42 A 909; Attrill v. Patterson, 58 Md. 226.

Minn.—Citizens' State Bank v. Tessman, 121 Minn. 34, 40, 140 NW 178, 45 LRANS 606 [cit Cyc]; Buffalo Land, etc., Co. v. Strong, 91 Minn. 84, 97 NW 575 [aff 203 U. S. 582, 27 SCt 780, 51 L. ed. 327].

N. J.—Miller v. Home Ins. Co., 71 N. J. L. 175, 58 A 98.

N. Y.—Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 43 NE 432. And see Marbury v. Barnet, 17 Misc. 386, 40 NYS 76.

Tex.—Byers v. Chatfield, (Civ. A.) 164 SW 415.

Utah.—Montague v. McCarroll, 15 Utah 318, 49 P 418.

Eng.—Metcalfe v. Clough, 2 M. & R. 178, 17 ECL 707 (holding that a direction to an agent to pay over the proceeds of a sale is not revocable if founded upon a valuable consideration). And see In re Hannan's Empress Gold Min., etc., Co., [1896] 2 Ch. 643, 16 ERC 799; Bromley v. Holland, Coop. 9, 10 EngCh 9, 35 Reprint 458, 7 Ves. Jr. 3, 28, 32 Reprint 2.

Man.—Richardson v. McClary, 16 Man. 74.

See McGrift v. Porter, 5 Fla. 373.

[a] **Power coupled with interest distinguished.**—(1) A power conferred for a consideration is in some cases regarded as one form of a power coupled with an interest. See Bonney v. Smith, 17 Ill. 531; and supra § 156. (2) But in other cases the two are regarded as separate and distinct conceptions. See Coney v. Sanders, 28 Ga. 511; Guthrie v. Wabash R. Co., 40 Ill. 109; and cases passim this section.

[b] **Oral authority to sell personal property** and receive the pay therefor given by the owner to another person may be irrevocable if it is given for a valid consideration within the law applicable to executory contracts. Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 43 NE 432 [rev 73 Hun 335, 26 NYS 268].

[c] **A consideration given for the purchase of a newspaper route,** together with the list of subscribers of the paper on the route, etc., does not show a consideration introducing an element of estoppel of the right of the publisher to terminate the contract at will, but the consideration merely induces the execution of an agreement terminable at the will of either party. Staroske v. Pulitzer Pub. Co., 235 Mo. 67, 78, 138 SW 36 (where the court said: "The consideration in this case, so far as the petition discloses, introduced no element of estoppel, added nothing to the contract between the parties, but merely induced the execution of an agreement terminable at will. In a case in which a consideration is paid to induce the execution of a contract which fixes its own duration, or which, from its nature, is terminated by performance of its conditions, or when such consideration is paid to procure the inclusion of an express covenant against revocation, then the exception applies. But an agency such as this is alleged to have been . . . is not rendered immortal by the passing of a consideration for its creation. The parties might have provided that the contract should be irrevocable . . . but the petition discloses that they, in legal effect, did the opposite").

99. Walker v. Denison, 86 Ill. 142.

1. McMahan v. Burns, 216 Pa. 448, 65 A 806 (holding that where an agreement of agency provides that it shall not be revoked for five years, and the only consideration for it is the compensation to be rendered for the services to be performed, the provision is invalid).

[a] **Independent consideration necessary.**—"In order to make an agreement for irrevocability contained in a power to transact business for the benefit of the principal binding on him, there must be a consideration for it independent of the compensation to be rendered for the services to be performed." Blackstone v. Buttermore, 53 Pa. 266, 267 [quot McMahan v. Burns, 216 Pa. 448, 451, 65 A 806].

[b] **A contract without consideration by a landowner,** merely giving one the exclusive agency for a year to sell the land on commission, may be revoked prior to a sale, being without mutuality. Jayne v. Drake, (Miss.) 41 S 372 [foll Kolb v. Bennett Land Co., 74 Miss. 567, 21 S 233].

the agency was conferred fails, the agency is revocable.[2]

A consideration given for the assignment of an agent's contract with the approval of the principal is not such a consideration as will make the agency irrevocable.[3]

[§ 160] **(4) Revocation for Cause.** Even where the agency is for a definite term, the principal has a right to revoke it before the expiration of such term, without incurring liability for damages, because of the agent's failure faithfully to perform his express or implied undertakings as agent,[4] as where the agent violates his instructions,[5] or without his principal's consent engages in an employment or business for himself or another which tends to injure his principal's interests, even though he so conducts such other business that it does not interfere with the time and attention due to his principal's business.[6]

Indulgence in intoxicants or narcotics. The use of intoxicating liquors by an agent may justify the

2. Flynn v. Butler, 189 Mass. 377, 75 NE 730; Drake v. White Sewing Mach. Co., 133 App. Div. 446, 118 NYS 178 [aff 199 N. Y. 595 mem, 93 NE 1120 mem]; Dunbar v. Foreman, 40 S. C. 490, 19 SE 186; Ex p. Smither, Deac. 413, 38 ECL 700.

3. Myer v. Pulitzer Pub. Co., 156 Mo. A. 170, 136 SW 5 (holding that where plaintiff, to have the carrier on a newspaper route assign it to him, paid a debt which the carrier owed the newspaper company, and the newspaper company approved the assignment, it did not confer the agency for consideration).

4. Colo.—Bilz v. Powell, 50 Colo. 482, 117 P 344, 38 LRANS 847.

Ill.—Gould v. Magnolia Metal Co., 207 Ill. 172, 69 NE 896 [aff 108 Ill. A. 203] (holding that an agent's illicit association with a woman may be ground for revocation); Marden v. Southard, 175 Ill. A. 590 (holding that where an agent agrees, in a contract appointing him an exclusive sales agent, to secure the best price obtainable for the products of the principal, and does not make known that he has made agency contracts with competitors, agreeing with one to give his products a preference in selling and with another that he will not give preference of advantageous price offers to other like products, the principal may abrogate and repudiate the contract).

Kan.—Irwin v. Thomas, 12 Kan. 93 (holding that one who on assigning a contract executes to the assignee a power of attorney to draw and receipt for all moneys becoming due under the assigned contract is authorized to revoke the power where the assignee under color of the authority conferred thereby indorses his name without consent on vouchers other than those therein authorized issued, under an independent contract in which the assignor has no interest).

Mich.—Dodge v. Reynolds, 135 Mich. 692, 98 NW 737 (holding that a contract whereby plaintiff was to sell goods for defendants on commission was violated by his selling them at a less price than that agreed upon, justifying a refusal by defendants to furnish him further goods, where it was understood that defendants would continue to sell in the same locality, and plaintiff by such underselling induced their customers to buy of him).

N. J.—Walker v. Hancock Mut. L. Ins. Co., 80 N. J. L. 342, 344, 79 A 354, 35 LRANS 153, AnnCas1912A 526 [cit Cyc].

N. Y.—Getty v. Roger Williams Silver Co., 162 App. Div. 513, 147 NYS 1083; Gilbert v. Quinlan, 13 NYS 671.

Pa.—Macfarren v. Gallinger, 210 Pa. 74, 59 A 435 [aff 33 PittsbLeg JNS 273]; Henderson v. Hydraulic Works, 9 Phila. 100 (holding that the principal may revoke the agency where the agent wrongfully uses the principal's funds or is guilty of other infidelity).

See Alf Bennett Lumber Co. v. Walnut Lake Cypress Co., 105 Ark. 421, 151 SW 275; Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 NE 221.

[a] **Ordinarily any breach of duty** undertaken by an agent is good cause for terminating the agency, and as between the principal and agent the principal may discharge the agent for a breach of any duty he has contracted, either expressly or impliedly, to perform. Armstrong v. National L. Ins. Co., (Tex. Civ. A.) 112 SW 327.

[b] **Failure to deposit or remit funds.**—(1) Where a contract of agency stipulates that the agent shall deposit daily all moneys received, a continuous violation of the stipulation affords the principal just grounds for terminating the agency. Macfarren v. Gallinger, 210 Pa. 74, 59 A 435 [aff 33 PittsbLegJNS 273]. (2) And the same is true where a selling agent fails to remit the proceeds of the sale at the time when they become due under the contract of agency. Contractors', etc., Supply Co. v. Alta Portland Cement Co., 26 Oh. Cir. Ct. 49.

[c] **Where the agent so executes a sealed contract as not to bind his principal,** the principal may revoke his authority and prevent performance without incurring any liability. Fullam v. West Brookfield, 9 Allen (Mass.) 1.

[d] **Dissolution of partnership agent.**—Where a contract between a corporation and a partnership made the latter selling agents for the former, it being understood that one of the partners, who was known to the corporation, would use his personal efforts, and as incidental to the agency the corporation contracted to sell machines to the partnership, a dissolution of the partnership authorized the corporation to abandon the contract both as to the agency and as to the sales. Wheaton v. Cadillac Auto. Co., 143 Mich. 21, 106 NW 399.

[e] **Stipulation for consideration before giving up agency;** no evidence of misconduct justifying a dismissal without notice see McCarthy v. McCarthy, 18 OntWR 423, 2 OntWN 842 [rev 15 OntWR 408, 1 OntWN 500, and aff 12 OntWR 1123].

[f] **A failure to perform the terms of a subsidiary and collateral agreement** does not justify the principal in repudiating the main contract of agency. Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 NE 221.

[g] **Breach of a provision of the contract mutually waived** is no grounds for revocation. French v. Pullman Motor Car Co., 242 Pa. 136, 88 A 876.

[h] **Where an agent's negligence is a sufficient reason for his discharge,** the fact that his refusal to consent to a reduction of compensation is the controlling reason for his discharge is immaterial, even though that is not the reason actuating or assigned for his discharge, or even if his negligence is not known to the principal when he is discharged. Getty v. Roger Williams Silver Co., 162 App. Div. 513, 147 NYS 1083.

Stipulation as to termination for cause see infra § 161.

Grounds for discharge of servant see Master and Servant [26 Cyc 987 et seq].

5. Highland Buggy Co. v. Parker, 27 Oh. Cir. Ct. 115 (holding that where a contract with an agent to represent a manufacturing company in a certain territory provided that sales should be made at prices furnished him, if the company in good faith fixed reasonable prices the salesman was bound to conform thereto, and if he sold below such prices it was a breach of his contract, warranting his discharge). See also Dodge v. Reynolds, 135 Mich. 692, 98 NW 737.

[a] **Selling below price authorized.**—Where a contract of a manufacturing company with an agent provided for the allowance of commissions on sales in excess of a certain amount, and that all sales were subject to the approval and acceptance of the company, and further provided that he was to sell at the prices furnished him from time to time, the company was not precluded from discharging him for selling at prices below those furnished, because all sales were subject to approval and acceptance of the company and the orders were so taken and transmitted, as such provision as to the approval and acceptance did not relate to the price, as that was especially provided for in the contract. Highland Buggy Co. v. Parker, 27 Oh. Cir. Ct. 115.

[b] **But it is not a breach of a traveling salesman's contract** justifying his discharge for him to go to a place off of his route to spend Sunday with his family, where it does not seriously interfere with his compliance with his contract. Milligan v. Sligh Furniture Co., 111 Mich. 629, 70 NW 133.

6. Bilz v. Powell, 50 Colo. 482, 117 P 344, 38 LRANS 847 (holding that where plaintiff who had entered into a contract of agency to sell automobiles and automobile equipment for defendant, and to give his whole time to defendant's business, negotiated with other automobile manufacturers and attempted to set up a rival business of his own before the expiration of his contract, defendant might discharge him, for an agent cannot place himself in a situation where he may be tempted to disregard the interests of his principal); Morrison v. Ogdensburgh, etc., R. Co., 52 Barb. (N. Y.) 173; Dieringer v. Meyer, 42 Wis. 311, 24 AmR 415; Boston Deep Sea Fishing, etc., Co. v. Ansell, 39 Ch. D. 339. And see In re Watkins, 121 Cal. 327, 53 P 702; Stoddart v. Key, 62 HowPr (N. Y.) 137; Cotton v. Rand, 93 Tex. 7, 51 SW 838, 53 SW 343 [rev (Civ. A.) 51 SW 55]; Case v. Jennings, 17 Tex. 661.

[a] **"A principal need not keep in his employ an agent who is working against him,** and using the confidential information obtained by reason of the relation to undermine the business of such principal." Bilz v. Powell, 50 Colo. 482, 495, 117 P 344, 38 LRANS 847.

[b] **The fact that an agent has contracted to represent adverse interests** may be set up as a justification for terminating a contract of agency, although not known to the principal at the time of the termination. Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 NE 221.

[c] **The mere fact, however,** that a corporation which acts as agent is controlled by another company which in turn is controlled by stockholders in a rival company of the principal will not justify revocation of the agency if no hostile acts appear. Brush Electric Co. v. Brush-Swan Electric Light Co., 49 Fed. 8 [rev on other grounds 52 Fed. 37, 2 CCA 669].

principal in discharging him.[7] But to justify a discharge for the use of narcotics the agent's habits must be such as are not only injurious to the agent himself, but such as also have a tendency to interfere with his usefulness or effectiveness as an agent.[8]

Where one of two joint agents becomes incapacitated the principal has a right to discontinue the agency.[9]

Time of discharge; waiver. The principal is not bound to dismiss the agent instantaneously upon his misconduct, and the fact that he lets a short space of time pass before discharging him does not waive his right to revoke the agency because of the misconduct.[10]

[§ 161] **(5) Revocation in Accordance with Contract.** If the contract of agency is expressly made revocable at any time by the principal,[11] the principal may revoke the agency at will in accordance with the agreement, although it is coupled with an interest in the subject matter.[12] But a provision that an agency may be terminated on certain specified grounds does not mean that the principal shall not terminate the agency so long as the agent does none of the specified acts, where the effect of such construction would be to prolong the existence of the agency indefinitely.[13]

On giving notice. Thus the contract of agency may, in accordance with its provisions, be terminated by the principal on the giving of notice to that effect,[14] although it also contains a provision that a violation of the spirit of the agreement shall be a cause for its abrogation;[15] and a contract which gives to the agent the power to terminate the agency on giving reasonable notice will be construed to give to the principal the same power, where the contract contains nothing inconsistent with such a construction.[16]

Agent unsatisfactory. So also the contract may provide for its termination if the agent proves unsatisfactory to the principal,[17] in which case it has been held that the principal is the sole judge of whether the agent's conduct of the business is satisfactory,[18] and that the test is not whether such conduct would have been satisfactory to a rea-

7. Bass Furnace Co. v. Glasscock, 82 Ala. 452, 2 S 315, 60 AmR 748 (holding that a single act of drunkenness may be sufficient); Huntington v. Claflin, 23 N. Y. Super. 262 [aff 38 N. Y. 182].

8. Jakowenko v. Des Moines Life Assoc., 21 Oh. Cir. Ct. 199, 11 Oh. Cir. Dec. 576.

9. Salisbury v. Brisbane, 61 N. Y. 617 [cit Robson v. Drummond, 2 B. & Ad. 303, 22 ECL 132, 109 Reprint 1156]. And see Rowe v. Rand, 111 Ind. 206, 12 NE 377.

10. Huntington v. Claflin, 23 N. Y. Super. 262 [aff 38 N. Y. 182].

[a] **Waiver.**—A principal who borrows money from his agent, and who, after requesting the cancellation of the agency, procures a further loan, waives previous breaches in the contract of agency. Alf Bennett Lumber Co. v. Walnut Lake Cypress Co., 105 Ark. 421, 115 SW 275.

11. Deering v. Beatty, 107 Iowa 701, 77 NW 325; Parry Mfg. Co. v. Lyon, 64 SW 436, 23 KyL 844; Bradlee v. Southern Coast Lumber Co., 193 Mass. 378, 79 NE 777 (holding that a contract by which defendant appoints plaintiff its agent for the sale of "all the lumber" that will or may be sawed on a specified tract of land, and which refers to certain by-laws of defendant by which contracts are revocable at the pleasure of defendant's directors, may be revoked by defendant's directors at any time, the reference to "all the lumber" being descriptive of his agency while it existed); Security Trust, etc., Co. v. Ellsworth, 129 Wis. 349, 109 NW 125. Compare Deering Harvester Co. v. Hamilton, 80 Minn. 162, 83 NW 44 (holding that where a contract employing certain persons as sole agents in selling machinery in certain territory, the machines and fixtures to be cared for and stored by such agents, contains a provision that it may be terminated at any time by the principal, the latter cannot terminate the contract without reasonable cause).

[a] **Right of revocation reserved.**—A power of attorney to receive the proceeds of a paid-up life policy when the same shall mature, and in the meantime to satisfy creditors to a specified amount to be deducted from the proceeds when received, and a subsequent agreement between the principal and the attorney authorizing the latter to pay a further amount to creditors, should be construed together, so that a right of revocation reserved in the original power applies also to the subsequent agreement. Graves v. Von Below, 160 Mich. 408, 125 NW 379.

12. Oregon, etc., Mortg. Sav. Bank v. American Mortg. Co., 35 Fed. 22, 13 Sawy. 260. See also supra § 154.

13. Stier v. Imperial L. Ins. Co., 58 Fed. 843, 846 (where the court said: "It seems to me that the proper meaning . . . is that, for any of the designated derelicts, the right arose absolutely to the principal to terminate the contract without any liability, leaving the right untouched to exercise the power of discontinuance subject to a liability under a quantum meruit action"). Compare Newcomb v. Imperial L. Ins. Co., 51 Fed. 725 [aff 62 Fed. 97, 10 CCA 288].

[a] **Effect of specifying grounds for revocation.**—A provision in a contract, otherwise terminable upon reasonable notice, that a violation of the spirit of the agreement shall be a sufficient cause for its abrogation does not imply that it can be abrogated only for sufficient cause. Willcox, etc., Sewing-Mach. Co. v. Ewing, 141 U. S. 627, 12 SCt 94, 35 L. ed. 882 [appl Stier v. Imperial L. Ins. Co., 58 Fed. 843].

14. Bates v. Sierra Nevada Lake Water, etc., Co., 18 Cal. 171; Clover Condensed Milk Co. v. Cushman Bros. Co., 31 App. Div. 108, 52 NYS 769; Dolye v. Phœnix Ins. Co., 25 N. S. 436.

Notice of revocation see generally infra §§ 164–166.

[a] **Construction of provisions.**—(1) A provision in an agreement between the owner of certain real estate and a broker authorized to sell it upon certain terms, that the principal might withdraw the authority by giving the broker thirty days' notice and by paying him the agreed commissions if the property was sold within thirty days after the withdrawal, was held to be equivalent to a stipulation that it should not be withdrawn otherwise. Witherell v. Murphy, 147 Mass. 417, 18 NE 215. (2) Where an agent is appointed to loan money and take securities for the payment of the loans, a stipulation in the contract of agency that it may be revoked at his request in writing is not complied with by a written demand for the securities signed, not by the principal, but by a party claiming to be an attorney of the principal, without an order in writing or proof of his authority. Tingley v. Parshall, 11 Nebr. 443, 9 NW 571.

[b] **Equitable estoppel.**—Where the agent is guilty of acts which induce the principal to refrain from giving notice of the termination of the relation, he may be estopped from claiming that the agency was not revoked for want of a notice as provided for in the contract. Belgian Glass Co. v. Pabst, (N. Y.) 4 NE 519.

15. Willcox, etc., Sewing-Mach. Co. v. Ewing, 141 U. S. 627, 12 SCt 94, 35 L. ed. 882 (holding that the fact that a contract of agency containing a provision that it may be terminated upon reasonable notice also contains a provision that a violation of the spirit of the agreement shall be a sufficient cause for its abrogation does not prevent the principal from terminating the agency upon giving reasonable notice, although no sufficient cause is shown).

16. Willcox, etc., Sewing-Mach. Co. v. Ewing, 141 U. S. 627, 12 SCt 94, 35 L. ed. 882; Newhall v. Journal Printing Co., 105 Minn. 44, 117 NW 228, 20 LRANS 899 and note (holding that a contract of agency which leaves the agent free to terminate his relations with the principal on specified notice confers the same right on the principal unless provisions to the contrary are stipulated).

17. Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 NW 457 (holding that, where an automobile agency contract authorized cancellation in case the agents were unsatisfactory to the manufacturer, the manufacturer was authorized to cancel the contract if its dissatisfaction was sincere and in good faith, and not a mere subterfuge); Wolfsheimer v. Frankel, 130 App. Div. 853, 115 NYS 958 (holding that, where the contract of a traveling salesman can be terminated on his failure to make sales aggregating a specified amount during the fall and spring seasons, the meaning of the word "season" is to be determined by its meaning in the territory in which the sales are to be made); Brown v. Retsof Min. Co., 127 App. Div. 368, 111 NYS 594; Tyler v. Ames, 6 Lans. (N. Y.) 280 (holding that a contract to employ an agent for a year, if he "could fill the place satisfactorily," may be terminated by the employer when, in his judgment, the agent fails to meet that requirement of the contract); Highland Buggy Co. v. Parker, 27 Oh. Cir. Ct. 115; Karsner v. Union Cent. L. Ins. Co., 12 Oh. Cir. Ct. 394, 6 Oh. Cir. Dec. 335.

Performance to satisfaction of promisor see generally Contracts [9 Cyc 618 et seq].

18. Brown v. Retsof Min. Co., 127 App. Div. 368, 111 NYS 594; Karsner v. Union Cent. L. Ins. Co., 12 Oh. Cir. Ct. 394, 6 Oh. Cir. Dec. 335 (holding that, where a contract of agency for a fixed period provides that it may be canceled by the principal whenever, in his opinion, the business done by the agent is unremunerative or unsatisfactory, the principal alone has the right to decide when the circumstances warrant its cancellation).

[a] **"The word 'satisfactorily'** refers to the mental condition of the employer, and not the mental condi-

sonable employer,[19] and that it is not important to consider whether the principal was actuated by some ulterior motive, such as a desire to make another his agent.[20]

[§ 162] **c. Manner of Revocation—(1) In General.** To constitute a revocation no particular act is required, it is only necessary that it be made clear that the principal has withdrawn from the agent his power.[21] Although the authority was conferred by written instrument, yet it may be revoked by parol,[22] and a parol revocation may be effectual, although the authority was conferred under seal.[23]

[§ 163] **(2) Express or Implied.** The authority may be revoked in express terms,[24] as by a demand by the principal for the return of the written power and its surrender, without any further instructions,[25] or by the withdrawal of the territory of an exclusive agent;[26] but the notice or instrument of revocation should clearly show an avowed intention to revoke the agency and should be in language that cannot be charged with equivocation.[27] The revocation may also be implied from the words and conduct of the principal inconsistent with the continuation of the authority,[28] as by a demand for property sent to the agent.[29] However, revocation will not be inferred if the principal's conduct is not necessarily inconsistent with a continuance of the agency.[30]

By bringing suit. Bringing a suit by the principal, inconsistent with the existence of the power, may operate as a revocation of such power;[31] but it has been held that the bringing of an action on a book account does not effect per se the revocation of a power previously given by plaintiff to an agent to pay to a third person certain items contained in the account.[32]

By grant of inconsistent power. An agent's au-

tion of a court or jury. The right of determining whether the plaintiff filled the place of agent satisfactorily must, from the nature and necessity of the case, belong to the person whose interests are directly affected by the plaintiff's action. To require the employer, under such a contract, to prove that plaintiff did not fill the place satisfactorily, would be to require of him an impossibility, unless his own oath was taken as to his mental status on the subject. If he is required to prove facts and circumstances that would justify him in feeling dissatisfied with the manner plaintiff filled his office, it would be annulling this clause of the contract, as, without such a clause, he would have the right to dismiss the plaintiff if he did not properly perform his duties." Tyler v. Ames, 6 Lans. (N. Y.) 280.

19. Brown v. Retsof Min. Co., 127 App. Div. 368, 111 NYS 594. But see Highland Buggy Co. v. Parker, 27 Oh. Cir. Ct. 115 (holding that, where a manufacturing company employs an agent to sell its product in a certain territory at the prices furnished him from time to time and to promote the interest of the company all to its satisfaction, dissatisfaction which will warrant the company in terminating the contract must depend on such facts as would warrant a reasonable person in the conclusion that the services of the agent were not promoting the interest of the company, provided always the latter acted in good faith and performed its part of the contract).

20. Brown v. Retsof Min. Co., 127 App. Div. 368, 111 NYS 594.

21. Frazier v. Cox, (Ky.) 125 SW 148; Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 NE 221.

22. Jacksonville Terminal Co. v. Smith, (Fla.) 64 S 354; Rochester v. Whitehouse, 15 N. H. 468 (holding that, where appraisers are appointed under an agreement by a creditor to accept property at an appraised value from his debtor in payment of the debt, their authority may be revoked as in the case of a submission to arbitration, and such revocation may be made orally, although the appointment was in writing).

23. Glover v. Ames, 8 Fed. 351; Jacksonville Terminal Co. v. Smith, (Fla.) 64 S 354 (holding that a power of attorney not coupled with an interest, although under seal, may be revoked by parol); Copeland v. Mercantile Ins. Co., 6 Pick. (Mass.) 194; Brookshire v. Brookshire, 30 N. C. 74, 47 AmD 341.

24. Kilpatrick v. Wiley, 197 Mo. 123, 95 SW 213; Clover Condensed Milk Co. v. Cushman Bros. Co., 31 App. Div. 108, 52 NYS 769; Perrine v. Jermyn, 163 Pa. 497, 30 A 202.

25. Kelly v. Brennan, 55 N. J. Eq. 423, 37 A 137.

[a] **Recall of power of attorney.**— If the authority is in writing, the writing should be recalled so as to avoid liability to third persons subsequently dealing with the agent on the faith of the writing. Beard v. Kirk, 11 N. H. 397.

26. White Sewing Mach. Co. v. Shaddock, 79 Ark. 220, 95 SW 143 (partial withdrawal of the territory of an exclusive agent is held to work a dissolution in toto of the contract of agency).

27. Lanusse v. Barker, 3 Wheat. (U. S.) 101, 143, 4 L. ed. 343 (where the court said: "Nothing could be more inconsistent with that candor and good faith which ought to mark the transactions of mercantile men, than to favor the revocation of an explicit contract, on the construction of a correspondence nowhere avowing that object"); Iglehart, etc., Co. v. Bartlett State Bank, (Tex. Civ. A.) 140 SW 799 (holding that where a firm of cotton packers, who had employed an agent at a stated salary for the whole cotton season, wrote him that they had checked up his purchases and did not wish him to buy any more cotton, having notice that the cotton he bought was graded too high, and that they wished him to resell all the cotton he had on hand, which was an act within the terms of his agency, such letter was not a termination of the agency, and a purchase of cotton by the agent bound his principals).

28. Mass.—Langdon v. Langdon, 4 Gray 186 (where the payee of a note, after having authorized an agent to collect it, accepted payment from the maker).

Mich.—Keith v. Sands, etc., Lumber Co., 88 Mich. 172, 50 NW 133 (holding that, where, pending negotiations by wire and mail for the purchase of cedar posts, the seller wrote to the vendee that if certain posts were not sold he could have them at a stated price and that he would know by a certain date if the posts were sold, such letter amounted in law to a withdrawal of said posts from sale until the date named).

Mo.—Kilpatrick v. Wiley, 197 Mo. 123, 95 SW 213; Royal Remedy, etc., Co. v. Gregory Grocery Co., 90 Mo. A. 53 (where a principal sold goods within an exclusive agent's territory).

Mont.—Billings First Nat. Bank v. Hall, 8 Mont. 341, 20 P 638 (holding that, where an agent for defendants in the purchase of wool telegraphed them with regard to the purchase of a certain lot, a reply that he had better not take it revoked any authority to buy it).

Pa.—Perrine v. Jermyn, 163 Pa. 497, 30 A 202; Troxell v. Lehigh Crane Iron Co., 42 Pa. 513 (where a principal notified third persons to deal directly with himself in the future and not as before with the agent).

Tex.—Hollingsworth v. Young County, 40 Tex. Civ. A. 590, 91 SW 1094.

Ont.—Anderson v. McBean, 12 Grant Ch. (U. C.) 463.

[a] **An assignment by a judgment creditor of a certificate of sale** of the judgment debtor's property upon execution revoked an agent's authority under a contract with the judgment creditor to collect the judgment. Lowell v. Hessey, 46 Colo. 517, 105 P 870.

[b] **Payment for services rendered** under the agency, and thereby virtually giving him to understand that his agency in the matter is at an end, may operate as a revocation. Reed v. Latham, 40 Conn. 452.

29. Comley v. Dazian, 114 N. Y. 161, 21 NE 135; Potter v. Albany Merchants' Bank, 28 N. Y. 641, 86 AmD 273.

[a] **Where one delivers money to another** with which to pay the funeral expenses of a deceased child, and to apply the balance to the benefit of others, and, before such application is made, the principal demands a return of the money, such demand revokes such other's authority as agent to further apply the fund to the purposes of the gift, and renders him liable for the return of the fund. Flaherty v. O'Connor, 24 R. I. 587, 54 A 376.

30. Ill.—Forbes Co. v. Leonard, 119 Ill. A. 629 (holding that, where plaintiff sought to recover of defendant for materials furnished to it through a certain purchasing agent, a letter from defendant to plaintiff acknowledging receipt of a statement for merchandise shipped to such purchasing agent, and asserting that it did not pay any of such bills, unless so directed, and that defendant did not assume anything belonging to them, and directing plaintiff not to send any more statements for its account, did not operate to terminate the agency to purchase shown to have been created by contract); Fuller v. Brady, 22 Ill. A. 174.

La.—Jackson v. Porter, 8 Mart. N. S. 200.

Md.—Rawlings v. Nash, 117 Md. 393, 83 A 646.

Tex.—Iglehart, etc., Co. v. Bartlett State Bank, (Civ. A.) 140 SW 799.

Eng.—Clerk v. Laurie, 2 H. & N. 199.

Ont.—Vardon v. Vardon, 6 Ont. 719.

31. Hatch v. Ferguson, 66 Fed. 668, 14 CCA 41 (holding that, where a principal sues to set aside a conveyance by the agent on the ground that the power of attorney was obtained by fraud, it constitutes a revocation of the power).

[a] **A power to release a claim** is revoked by the principal subsequently suing on the claim. Flynn v. Butler, 189 Mass. 377, 75 NE 730.

32. Walker v. Barrington, 28 Vt. 781.

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thority may also be revoked by the principal subsequently granting an inconsistent power to him[33] or to another agent,[34] or by subsequently granting the same power to the agent and another jointly.[35] But the appointment of another agent to execute the purpose of the first agency will not operate as a revocation of the first appointment where not incompatible therewith.[36]

[§ 164] (3) **Necessity and Sufficiency of Notice—(a) As between Principal and Agent.** As between the principal and the agent a revocation of authority does not become effective until it is in some way communicated to the agent. To give it effect the agent must have notice thereof, express or implied, actual or constructive.[37] This rule applies between the agent and a third person claiming under the principal,[38] and to special agents as well as to general agents.[39] Accordingly an uncommunicated revocation does not defeat any rights against the principal which may arise in favor of the agent out of subsequent acts done by him in pursuance of his original authority,[40] or subject the agent to any liability as for having done those acts without authority.[41]

Formal notice of revocation need not be given,[42] unless the contract requires it.[43]

A revocation by letter takes effect from the time of its receipt, and not from the date of the mailing,[44] and the agent's authority cannot be affected by a letter never received by him.[45]

Subsequent disavowal. After a revocation and notice there is no further necessity for the principal to disavow subsequent acts, as between himself and the agent.[46]

[§ 165] **(b) As between Principal and Third Persons—aa. In General.** As a general rule a revocation of authority does not become effective as between the principal and third persons subsequently dealing with the agent as such until they receive notice thereof. By conferring the authority the principal gives third persons who are aware of it the right to deal with the agent according to its

33. Hamilton v. Peace, 2 S. C. Eq. 79.

[a] **Where a special agent is made a general agent** by the same principal the later appointment operates as a revocation of the earlier. Rapier v. Louisiana Equitable L. Ins. Co., 57 Ala. 100.

34. Williamson v. Richardson, 30 F. Cas. No. 17,754; Clark v. Mullenix, 11 Ind. 532; Converse v. Dillaye, 62 N. Y. 621; Brookshire v. Brookshire, 30 N. C. 74, 47 AmD 341.

[a] **Authority to dismiss a suit** is revoked by the subsequent execution of a power of attorney to another, before dismissal, empowering him to continue and prosecute the same to termination. Aiken v. Taylor, (Tenn. Ch. A.) 62 SW 200.

35. Copeland v. Mercantile Ins. Co., 6 Pick. (Mass.) 198.

[a] **A power to two persons jointly and severally** is revoked by a subsequent power to such two and one other jointly but not severally. Morgan v. Stell, 5 Binn. (Pa.) 305.

36. Jones v. Commercial Bank, 78 Ky. 413; Enright v. Beaumond, 68 Vt. 249, 35 A 57 (holding that an authority given by the first indorsee of a note to continue to deal with the maker as if the payee were still the owner and holder of the note, and to take payments as they become due thereon, is not revoked by the fact that the note was subsequently placed in a bank for collection, since it is not necessary to the exercise of the authority that possession of the note be held); French v. Townes, 10 Gratt. (51 Va.) 513 (holding that a certain deed of trust to an agent did not revoke a power of attorney to him).

[a] **An authority to sell certain land** is not revoked by a like authority granted to another. Ahern v. Baker, 34 Minn. 98, 24 NW 341.

[b] **An authority to collect certain moneys** is not necessarily revoked by a like authority conferred on another. Davol v. Quimby, 11 Allen (Mass.) 208.

[c] **A power to negotiate bonds,** if silent as to a like power previously given, does not operate as a revocation of the earlier power. Hatch v. Coddington, 95 U. S. 48, 24 L. ed. 339.

37. U. S.—U. S. v. Jarvis, 26 F. Cas. No. 15,468, 2 Ware 278, 4 NYLeg Obs 298; Weile's Case, 7 Ct. Cl. 535.

Cal.—Chase v. Holmes, 19 Cal. A. 670, 127 P 652 (under Civ. Code § 2356).

Colo.—Lowell v. Hessey, 46 Colo. 517, 105 P 870.

Fla.—Jacksonville Terminal Co. v. Smith, 64 S 354.

Ill.—Union Special Sewing Mach. Co. v. Lockwood, 110 Ill. A. 387.

Ind.—Honey v. Guillaume, 172 Ind. 552, 88 NE 937; Miller v. Miller, 4 Ind. A. 128, 30 NE 535 (holding that the revocation of an agency becomes operative as to the agent from the time it is actually made known to him).

Iowa.—Mosnat v. Berkheimer, 139 NW 469.

La.—Spinks v. Georgia Quincy Granite Co., 114 La. 1044, 38 S 824 (holding that the revocation of an agency for a fixed period, if permissible, can have no legal effect until notice is given to the agent).

Me.—Jones v. Hodgkins, 61 Me. 480.

Miss.—Robertson v. Cloud, 47 Miss. 208.

N. Y.—Drake v. White Sewing Mach. Co., 133 App. Div. 446, 118 NYS 178 [aff 199 N. Y. 595 mem, 93 NE 1120 mem] (notice to partner as notice to firm); Williams v. Birbeck, Hoffm. 359. And see Gilbert v. Quinlan, 59 Hun 508, 13 NYS 671.

N. C.—Reams v. Wilson, 147 N. C. 304, 60 SE 1124.

Wash.—Brittain v. Pioneer State Bank, 45 Wash. 41, 87 P 1051.

Eng.—Salton v. New Beeston Cycle Co., [1900] 1 Ch. 43; Salte v. Field, 5 T. R. 211, 101 Reprint 119. But see Joynson v. Hunt, 93 L. T. Rep. N. S. 470.

See Kilpatrick v. Wiley, 197 Mo. 123, 95 SW 213.

[a] **Notice to a third party** without notice to the agent leaves the authority in force. Weile's Case, 7 Ct. Cl. 535.

[b] **Time of taking effect.**—Where a contract of agency is for a term of three years and from year to year thereafter until terminated by six months' written notice, and more than six months' notice is given, the contract terminates on the first anniversary of its making and not before. Stone v. Fox Mach. Co., 145 Mich. 689, 109 NW 659.

38. Jones v. Hodgkins, 61 Me. 480.

39. Donnan v. Adams, 30 Tex. Civ. A. 615, 71 SW 580.

40. See cases supra note 37. See also infra §§ 422–424, 462.

41. See cases supra note 37. See also infra § 368.

42. Sheahan v. National Steamship Co., 87 Fed. 167, 30 CCA 593; Nelles v. MacFarland, 9 Cal. A. 534, 99 P 980 (holding that a principal's letter to his agent, stating that it is necessary to terminate the contract of agency, "notice of which is hereby given," is a sufficient exercise of the principal's right to terminate the agency by giving written notice); Coffin v. Landis, 46 Pa. 426. See also Winslow v. Mayo, 123 App. Div. 758, 108 NYS 640.

[a] **The words, "I am very sorry to have to ask you to resign your position,"** in a letter from a principal to his agent are properly construed as a peremptory discharge. Jones v. Graham, etc., Transp. Co., 51 Mich. 539, 16 NW 893.

[b] **Record notice.**—(1) In Texas under Sayles Civ. St. art 4652, providing that the record of a deed shall be notice to all persons of its existence, the record of a deed executed by the owner of a tract of land is notice to an agent and all persons dealing with him of the revocation of the authority of the agent to sell the land. Donnan v. Adams, 30 Tex. Civ. A. 615, 71 SW 580. (2) In Nevada, under act Nov. 5, 1861, § 25, by depositing for record a revocation of a power of attorney in the proper office, the revocation becomes absolute without actual notice to the attorney. Arnold v. Stevenson, 2 Nev. 234. (3) But in Wisconsin it has been held that, under Rev. St. (1898) §§ 2237, 2242, 2246, a power to convey real estate not being a conveyance, is not within such statutory provisions declaring the effect of recording conveyances of real estate, and the fact that after the power had been recorded the revocation thereof was recorded did not terminate the power in the absence of actual notice to the agent. Best v. Gunther, 125 Wis. 518, 104 NW 82, 918, 110 AmSR 851 and note, 1 LRANS 577 and note. See also infra § 166.

43. Bates v. Sierra Nevada Lake Water, etc., Co., 18 Cal. 171 (holding that, where plaintiff was employed by a corporation in California under an agreement for notice of any termination of such contract from the corporation, such agreement was not complied with by the giving of a notice by a committee of the London agency of the company).

[a] **Estoppel.**—Where an agent was entitled under a contract to commissions on all orders taken, whether actual sales were made or not, and also to a year's notice of the termination of the contract, and by his conduct he led the seller to believe that he intended to charge commissions on actual shipments only, and thus prevented the seller giving the notice earlier or within the year, the agent was not entitled to any commission on deficient shipments, nor to a year's notice. Belgian Glass Co. v. Pabst, 101 N. Y. 621 mem, 4 NE 519.

44. Robertson v. Cloud, 47 Miss. 208.

45. Sayre v. Wilson, 86 Ala. 151, 5 S 157.

46. Kelly v. Phelps, 57 Wis. 425, 15 NW 385 (holding that after revocation of an agent's authority the principal is not bound, as between himself and the agent, to notify the latter of his dissent from acts done by such agent in pursuance of the original authority).

terms on the principal's account, and they have a right to assume, until they are otherwise informed, that the authority continues as it was originally conferred. Accordingly, in the absence of notice of revocation, third persons subsequently dealing with the agent may hold the principal responsible for acts done by the agent within the apparent scope of his previous authority;[47] but the principal is not bound by acts beyond the previous authority.[48]

This rule, however, does not apply in favor of third persons who were unaware that an agency existed and have not dealt with the agent in reliance on an apparent agency;[49] nor does it apply where the agent was originally constituted a special agent to do a particular thing, and not a general agent with continuing authority.[50]

47. U. S.—Johnson v. Christian, 128 U. S. 374, 9 SCt 87, 32 L. ed. 412; Southern L. Ins. Co. v. McCain, 96 U. S. 84, 24 L. ed. 653; Hatch v. Coddington, 95 U. S. 48, 24 L. ed. 339; Alger v. Keith, 105 Fed. 105, 44 CCA 371.

Ala.—Continental F. Ins. Co. v. Brooks, 131 Ala. 614, 30 S 876.

Cal.—Stockton Ice Co. v. Argonaut Land, etc., Co., 56 P 885; Swinnerton v. Argonaut Land, etc., Co., 112 Cal. 375, 44 P 719; Quinn v. Dresbach, 75 Cal. 159, 16 P 762, 7 AmSR 138.

Conn.—Fellows v. Hartford, etc., Steamboat Co., 38 Conn. 197.

Ga.—Burch v. Americus Grocery Co., 125 Ga. 153, 53 SE 1008; Bazemore v. A. B. Small Co., 8 Ga. A. 29, 70 SE 261.

Ida.—Feldman v. Shea, 6 Ida. 717, 59 P 537.

Ill.—Meeker v. Mannia, 162 Ill. 203, 44 NE 397; Murphy v. Ottenheimer, 84 Ill. 39, 25 AmR 424; Diversy. v. Kellogg, 44 Ill. 114, 92 AmD 154; Clark v. National Union F. Ins. Co., 159 Ill. A. 256.

Ind.—Bell v. Corbin, 136 Ind. 269, 36 NE 23; Foellinger v. Leh, 110 Ind. 238, 11 NE 289; Longworth v. Connell, 2 Blackf. 469; Springfield Engine, etc., Co. v. Kennedy, 7 Ind. A. 502, 34 NE 856; Miller v. Miller, 4 Ind. A. 128, 30 NE 535 (holding that third parties dealing bona fide with one who has been accredited to them as an agent are not affected by the revocation of his agency unless notified of such revocation).

Iowa.—Mosnat v. Berkheimer, 139 NW 469; Baudouine v. Grimes, 64 Iowa 370, 20 NW 476.

Ky.—Hancock v. Byrne, 5 Dana 513.

La.—Harris v. Cuddy, 21 La. Ann. 388; Caldwell v. Neil, 21 La. Ann. 342, 99 AmD 738 (where it was said that the rule that the one whose acts have contributed to enable another to do an act causing loss should suffer the loss rather than an innocent third person applies where an agent continued to draw bills after his power had been revoked but no public notice of the revocation was given); Girard v. Hirsch, 6 La. Ann. 651; Bergerot v. Farish, 9 Rob. 346.

Me.—Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 36 A 1003, 56 AmSR 436; Jones v. Farley, 6 Me. 226.

Md.—Andrews v. Clark, 72 Md. 396, 20 A 429; Baltimore v. Eschbach, 18 Md. 276; Bernard v. Torrance, 5 Gill & J. 383.

Mass.—Rice v. Barnard, 127 Mass. 241; Com. v. Barnstable Sav. Bank, 126 Mass. 526.

Mich.—Keith v. Sands, etc., Lumber Co., 88 Mich. 172, 50 NW 133.

Miss.—Planters' Bank v. Cameron, 11 Miss. 609.

Mo.—Lamothe v. St. Louis Mar., etc., R. Co., 17 Mo. 204; Waters-Pierce Oil Co. v. Jackson Junior Zinc Co., 98 Mo. A. 324, 73 SW 272; Fanning v. Cobb, 20 Mo. A. 577. And see Kilpatrick v. Wiley, 197 Mo. 123, 95 SW 213.

Nebr.—Cheshire Provident Inst. v. Feusner, 63 Nebr. 682, 88 NW 849; Webster v. Wray, 17 Nebr. 579, 24 NW 207.

N. H.—Davis v. Lane, 10 N. H. 156.

N. J.—Capen v. Pacific Mut. Ins. Co., 25 N. J. L. 67, 64 AmD 412.

N. Y.—Barkley v. Rensselaer, etc., R. Co., 71 N. Y. 205; Claflin v. Lenheim, 66 N. Y. 301; McNeilly v. Continental L. Ins. Co., 66 N. Y. 23; Walrath v. Hanover F. Ins. Co., 139 App. Div. 407, 411, 124 NYS 54 [cit Cyc]; 153 App. Div. 921, 138 NYS 101; Bennett Piano Co. v. Scace, 130 App. Div. 281, 114 NYS 324; Cosmopolitan Range Co. v. Midland R. Terminal Co., 44 App. Div. 467, 60 NYS 973; Stevens v. Schroeder, 40 App. Div. 590, 58 NYS 52; Edwards v. Schaffer, 49 Barb. 291; New York Cent. Ins. Co. v. National Protection Ins. Co., 20 Barb. 468 [rev on other grounds 14 N. Y. 85]; Buffalo Mar. Bank v. Butler Colliery Co., 1 Silv. Sup. 155, 5 NYS 291 [aff 125 N. Y. 695 mem, 26 NE 751 mem]; Marsh v. Gilbert, 4 Thomps. & C. 259; Doctor v. Gilmartin, 14 Daly 206, 6 NYSt 296; Lynch v. Rabe, 28 Misc. 215, 59 NYS 109; Vogel v. Weissmann, 23 Misc. 256, 51 NYS 173; Oakland Mfg. Co. v. F. C. Linde Co., 147 NYS 1045; New York Tel. Co. v. Barnes, 85 NYS 327; Knox v. Schoenthal, 13 NYS 7; Riggs v. Warner, 12 NYSt 753; Vernon v. Manhattan Co., 22 Wend. 183; —— v. Loomis, 19 Wend. 641 (holding that where, after the commencement of a suit and service of papers on the law agent of defendant, the latter appoints another person as agent without notice to the first agent, and plaintiff subsequently serves papers on the first agent, it is binding on defendant); Williams v. Birbeck, Hoffm. 359.

N. C.—Sibley v. Gilmer, 124 N. C. 635, 32 SE 964.

Oh.—Ætna Ins. Co. v. Stambaugh-Thompson Co., 76 Oh. St. 138, 81 NE 173, 118 AmSR 834.

Pa.—Troxell v. Lehigh Crane Iron Co., 42 Pa. 513; Grasselli Chemical Co. v. Biddle Purchasing Co., 22 Pa. Super. 426.

Philippine.—La Compania Gen. de Tabacos v. Diaba, 20 Philippine 321; Rallos v. Yangco, 20 Philippine 269.

R. I.—Anthony v. Phillips, 17 R. I. 188, 20 A 933, 11 LRA 182.

S. C.—Montgomery v. Eveleigh, 6 S. C. Eq. 267.

S. D.—Edinburgh-American Land Mortg. Co. v. Noonan, 11 S. D. 141, 76 NW 298.

Tenn.—Murdock v. Leath, 10 Heisk. 166.

Tex.—Ætna L. Ins. Co. v. Hanna, 81 Tex. 487, 17 SW 35; Houston, etc., R. Co. v. Hill, 63 Tex. 381, 51 AmR 642; State v. Palacios, (Civ. A.) 150 SW 229.

Vt.—Tier v. Lampson, 35 Vt. 179, 82 AmD 634.

Va.—White v. American Nat. L. Ins. Co., 115 Va. 305, 309, 78 SE 582 [cit Cyc]; Smith v. Watson, 82 Va. 712, 1 SE 96.

W. Va.—Union Bank, etc., Co. v. Long Pole Lumber Co., 70 W. Va. 558, 561, 74 SE 674, 41 LRANS 663 and note [cit Cyc].

Wis.—Johnson v. Youngs, 82 Wis. 107, 51 NW 1095; Kelly v. Phelps, 57 Wis. 425, 15 NW 385.

Eng.—Dodsley v. Varley, 12 A. & E. 632, 40 ECL 316, 113 Reprint 954; Ex p. Bright, 2 Deac. & C. 8; Curlewis v. Birkbeck, 3 F. & F. 894; Pole v. Leask, 9 Jur. N. S. 829; —— v. Harrison, 12 Mod. 346, 88 Reprint 1369.

Can.—Anglo-American Ins. Co. v. LeBaron, 2 DomLR 877.

Ont.—Kerr v. Lefferty, 7 Grant Ch. (U. C.) 412.

[a] **Where an agent is appointed "in a particular business,"** parties dealing with him in that business have a right to rely upon the continuance of his authority, until in some way informed of its revocation." Southern L. Ins. Co. v. McCain, 96 U. S. 84, 86, 24 L. ed. 653.

[b] **Rule as to notice substantially same as on dissolution of partnership.**—"It is well settled that where a general authority has once been conferred, its revocation takes effect as to third persons only after it becomes known to them, unless indeed the principal has done his full duty in making it known; and where an authority is revoked, it is in general the duty of the principal to notify those persons who have had dealings with the agent as such, the rules on this subject being substantially the same as those relating to the dissolution of a copartnership, and the power of a partner after dissolution to bind the firm." Fellows v. Hartford, etc., Steamboat Co., 38 Conn. 197, 201. See Partnership [30 Cyc 670 et seq].

[c] **If the principal is guilty of great negligence** in failing to give notice of revocation, he is bound to third persons subsequently dealing with the agent as such in good faith. Morgan v. Stell, 5 Binn. (Pa.) 305. And see Williams v. Birbeck, Hoffm. (N. Y.) 359.

[d] **Payments without notice.**—Where without notice of revocation one makes a payment to an agent he cannot be held liable by the principal. Meyer v. Hehner, 96 Ill. 400; Ulrich v. McCormick, 66 Ind. 243; Howe Mach. Co. v. Simler, 59 Ind. 307; Packer v. Hinckley Locomotive Works, 122 Mass. 484; Braswell v. American L. Ins. Co., 75 N. C. 8.

[e] **Failure to recall instrument evidencing authority.**—Where an agency constituted by writing is revoked, but the written authority is left in the hands of the agent, and he subsequently exhibits it to a third person who deals with him as agent on the faith of it without notice of the revocation, the act of the agent within the scope of the authority will bind the principal. Beard v. Kirk, 11 N. H. 397. And see Williams v. Birbeck, Hoffm. (N. Y.) 359.

[f] **Corporation succeeding company of same name.**—Where a person carrying on business under a corporate name authorized an agent to draw bills on his factor, and subsequently transferred the business to a company organized under the same name, he was liable to the factor for money paid or bills drawn by the agent after the transfer, and paid without notice of the transfer. Rice v. Isham, 4 Abb. Dec. (N. Y.) 37, 1 Keyes 41.

48. Groneweg v. Kusworm, 75 Iowa 237, 39 NW 288; Baudouine v. Grimes, 64 Iowa 370, 20 NW 476.

49. Illston v. Evans, 27 App. Div. 447, 50 NYS 82 (as where the agent of an undisclosed principal afterward embarks in a new enterprise in his own name, the fact that he ever was an agent being unknown to the party with whom he had dealt); Fabian Mfg. Co. v. Newman, (Tenn. Ch. A.) 62 SW 218 (as where a debtor is induced to make a payment to a discharged agent of a creditor in reliance on a forged letter and telegram purporting to come from the creditor, and not in reliance on the agent's authority). See also Equitable Produce, etc., Exch. v. Keyes, 67 Ill. A. 460 (where it was held that notice of termination of the agency is unnecessary so far as a matter of service of process is concerned).

50. Florida Cent., etc., R. Co. v.

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After revocation and due notice the principal cannot be held liable for acts of his agent subsequent thereto.[51]

[§ 166] **bb. Sufficiency of Notice.** Ordinarily no particular form of notice to third persons is necessary to give effect to a revocation of authority.[52] It is immaterial from what source the notice comes; it may be given by the agent as well as by the principal,[53] and may be actual or express, or implied or constructive,[54] and generally it will be sufficient notice if the third person with whom the agent has done business for the principal in any way learns that the agent will not in future be allowed so to act,[55] or if he has knowledge of facts concerning the revocation which would put a reasonable man on inquiry,[56] although dubious or equivocal circumstances will not be sufficient.[57]

Recordation. Under some statutes requiring the revocation of a power to be deposited for record in the proper office, such deposit of the revocation is notice to all persons of the contents thereof,[58] although it has been held that the mere fact that a revocation of a power must be recorded does not imply that such recordation is notice to all persons who deal with the agent that his authority is revoked.[59] However, the recording of a revocation, if unnecessary, does not amount to notice of the fact that the agent's authority is revoked,[60] although it has been held that if the power is recorded, although unnecessarily, and a third person knows of the record, he is guilty of negligence in failing to search the record office for a subsequent revocation.[61]

[§ 167] **d. Retraction or Waiver of Revocation.** A retraction or waiver of revocation by the principal, so as to continue the agency in force, will not be lightly inferred;[62] and it has been held that a power of attorney when revoked by a writing of equal solemnity, cannot be reinstated by a mere oral declaration;[63] but the parties may of course, upon revocation, enter into a new contract of agency.[64]

[§ 168] **e. Revocation of Subagency.** The revocation of the authority of an agent operates as a revocation of the authority of a subagent,[65] unless the authority of the subagent emanates from the

Ashmore, 43 Fla. 272, 32 S 832; Donnan v. Adams, 30 Tex. Civ. A. 615, 71 SW 580; Watts v. Kavanagh, 35 Vt. 34. And see Gragg v. Home Ins. Co., 107 SW 321, 32 KyL 988.

51. Ala.—Gunter v. Stuart, 87 Ala. 196, 6 S 266, 13 AmSR 21.
Fla.—Florida Cent., etc., R. Co. v. Ashmore, 43 Fla. 272, 32 S 832.
Iowa.—Groneweg v. Kusworm, 75 Iowa 237, 39 NW 288.
Tex.—Satterthwaite v. Loomis, 81 Tex. 64, 16 SW 616.
Va.—Blair v. Sheridan, 86 Va. 527, 10 SE 414.

52. Johnson v. Youngs, 82 Wis. 107, 51 NW 1095.
[a] **As affected by dealings with agent before revocation.**—A distinction is made, as to the character of the notice, between persons who dealt with the agent before the revocation and persons dealing with him after the revocation but without sufficient notice thereof. Gragg v. Home Ins. Co., 107 SW 321, 323, 32 KyL 988 [quot Mechem Agency § 22] (where the court said: "To all persons who have had actual dealings with the agent, actual notice must be given, or such knowledge of the fact must be brought home to them as would be sufficient to put an ordinarily prudent man upon inquiry. To persons who have had no actual dealings, notice may be given by publication in some newspaper of general circulation. Notice by publication is sufficient, even to those who have had dealings with the agent, if it can be shown that they saw it; otherwise not").
[b] **Analogy to dissolution of partnership.**—"It is generally recognized that the principles applicable to the revocation of a general agent's authority, so far as notice to the public is concerned, apply to the dissolution of a partnership—that the same character of notice is required to inform the public of the revocation of an agency as is necessary to give information of the dissolution of a partnership." Gragg v. Home Ins. Co., 107 SW 321, 324, 32 KyL 988; Claflin v. Lenheim, 66 N. Y. 301. See also Partnership [30 Cyc 670 et seq].

53. Vail v. Judson, 4 E. D. Smith (N. Y.) 165.

54. Van Dusen v. Star Quartz Min. Co., 36 Cal. 571, 95 AmD 209 (holding that notice of the contents of a written agreement which terminates the agency is sufficient notice of such termination); Keith v. Sands, etc., Lumber Co., 88 Mich. 172, 50 NW 133.
[a] **Notice of the creation of a second agency** which is inconsistent with the continuance of the first is sufficient notice of the revocation of the first agency. Williamson v. Richardson, 30 F. Cas. No. 17,754; Clark v. Mullenix, 11 Ind. 532; Johnson v. Youngs, 82 Wis. 107, 51 NW 1095.
[b] **Notice that land is sold.**—Where a third person is informed that the land which he desires to buy from an agent has been sold by the principal this is sufficient notice to him of the inability of the agent to contract. Donnan v. Adams, 30 Tex. Civ. A. 615, 71 SW 580.

55. Johnson v. Youngs, 82 Wis. 107, 51 NW 1095.

56. Jacksonville Terminal Co. v. Smith, (Fla.) 64 S 354; Hoppock v. Moses, 43 HowPr (N. Y.) 201 (holding that where an agent has been in the habit of purchasing goods of a firm for and in the name of an individual, and subsequently purchases a bill of goods for, and has them shipped in the name of, a partnership, of which he asserts, at the time, that the same individual for whom he formerly purchased is a member, the selling firm is bound to take notice of the termination of the purchaser's agency); Williams v. Birbeck, Hoffm. (N. Y.) 359 (holding that, if in the exercise of ordinary caution the third person would have been led to knowledge of the revocation, he is chargeable with notice thereof; that whatever is sufficient to put a man on inquiry is equivalent to actual notice).

57. Claflin v. Lenheim, 66 N. Y. 301; McNeilly v. Continental L. Ins. Co., 66 N. Y. 23; Riggs v. Warner, 12 NYSt 753 (holding that notice is not to be inferred from proof of knowledge of facts not inconsistent with a continuation of the agency).
[a] **Letter from principal to third person held not to give sufficient notice** of revocation see Daniel Forbes Co. v. Leonard, 119 Ill. A. 629.

58. Arnold v. Stevenson, 2 Nev. 234 (holding that under the act of Nov. 5, 1861, § 25, the deposit for record of a revocation of a power of attorney in the proper office operates as a notice to all parties dealing with the attorney); Bush v. Van Ness, 12 Vt. 33 (holding that, if the revocation of a power of attorney is required by statute to be recorded, the record thereof constitutes notice of the revocation).

59. Best v. Gunther, 125 Wis. 518, 522, 104 NW 82, 918, 110 AmSR 851, 1 LRANS 577 (where the court said: "The case of Arnold v. Stevenson, 2 Nev. 234, is relied on as authority to the effect that the recording of the instrument of revocation operates, under the statute, as a notice to the agent and all persons dealing with him that the authority is terminated. The decision cannot serve as an authority for the construction of our statute, for the reason that the Nevada statute on the subject expressly provides that the recording of the instrument shall 'import notice to all persons of the contents thereof,' and, as above stated, our statute contains no such provision. It is manifest that, since the statute does not operate to give such notice, it is necessary to comply with all the requirements of the common law for revoking the authority granted by a letter of attorney or other instrument containing a power to convey land; but, when such instrument has been recorded, a common-law revocation shall be ineffectual unless the instrument of revocation shall also be recorded in the same office").

60. James v. Morey, 2 Cow. (N. Y.) 246, 14 AmD 475; Williams v. Birbeck, Hoffm. (N. Y.) 359.

61. Williams v. Birbeck, Hoffm. (N. Y.) 359.

62. Clark v. Mullenix, 11 Ind. 532 (holding that where a principal repudiated a sale made by an agent, and so notified the purchaser, he did not, by leaving the purchase-money notes in the agent's possession, impliedly authorize him to collect them); Clover Condensed Milk Co. v. Cushman Bros. Co., 31 App. Div. 108, 52 NYS 769 (holding that, where a contract creating a sales agency provides for its termination by either party upon a specified notice, an explicit and unequivocal notice duly given by the principal is not waived or withdrawn by the mere fact that after the specified period has expired he continues to sell through the agent without any new express arrangement); Friederick v. Perkinson, 17 NYS 501 (holding that the mere fact that a former principal personally orders work or goods is not a waiver of a prior notice not to do work or furnish goods for him except on his written order, because such notice contemplates orders made by third persons and not by him).

63. Peo. v. Tufts, 167 Cal. 266, 139 P 78.

64. White Sewing Mach. Co. v. Shaddock, 79 Ark. 220, 95 SW 143 (holding that where a salesman employed under a contract which gave him exclusive territory and which stipulated that it might be discontinued on notice by either party received a notice of the withdrawal of a part of the territory, but he continued to act as salesman, the notice was in effect a dissolution of the old contract, and that, when accepted by the salesman, a new contract was created).

65. Union Casualty, etc., Co. v.

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principal, in which case such authority is not revoked by the revocation of the authority of the agent.[66]

[§ 169] **3. By Renunciation or Abandonment by Agent—a. Power of Renunciation.** As the principal may in most cases revoke the agency at any time, even in cases when it is wrongful for him so to do,[67] so the agent has the power to put an end to the agency, and may at his will and pleasure, upon reasonable notice, renounce the power conferred upon him by his principal.[68]

[§ 170] **b. Right of Renunciation.** Although he has the power, it by no means follows that the agent has the right, to renounce the agency at his pleasure.[69] Where the agency is one at will, as where no time is fixed for its duration, so far as it is executory the agent may abandon or renounce it at any time without committing any breach of the contract and without incurring any liability for damages,[70] and unless he has entered upon performance of his undertaking, in which event he cannot withdraw therefrom wantonly and without cause without rendering himself responsible to the principal for any loss that he may sustain therefrom; to avoid this liability the agent must act in good faith, and give the principal reasonable notice of the intended abandonment, so that the latter may attend to the business himself, or appoint a new agent to attend to it, or otherwise avoid loss from the renunciation of the agency,[71] and furthermore if the agent fails to notify the principal of his objection to a matter relied on as cause for renunciation he may thereby waive his right to renounce for that cause.[72] Where on the other hand, an agency is not one at will but is for a definite time, and the agent renounces it without sufficient cause before the expiration of such time, he is liable to the principal for any loss thereby sustained,[73] unless the contract, although for a specified time, leaves the agent free to act or not as he will.[74] So also, if the agency is founded upon a valuable consideration it cannot be terminated by the agent without subjecting him to a liability for any damages the principal may sustain thereby.[75]

Renunciation for cause. Whether the agency is one at will or otherwise, however, the agent may

Gray, 114 Fed. 422, 52 CCA 224; Watt v. Watt, 2 Barb. Ch. (N. Y.) 371; Lehigh Coal, etc., Co. v. Mohr, 83 Pa. 228, 24 AmR 161; Peries v. Aycinena, 3 Watts & S. (Pa.) 64; Jackson Ins. Co. v. Partee, 9 Heisk. (Tenn.) 296.

66. Smith v. White, 5 Dana (Ky.) 376.

67. See supra § 151.

68. U. S.—Duffield v. Michaels, 97 Fed. 825 [rev on other grounds 102 Fed. 820, 42 CCA 649].

Ind.—Rowe v. Rand, 111 Ind. 206, 12 NE 377.

Iowa.—Holbert v. Keller, 142 NW 962.

Mich.—Barrows v. Cushway, 37 Mich. 481.

Oh.—Hitchcock v. Kelley, 18 Oh. Cir. Ct. 808, 4 Oh. Cir. Dec. 180 (holding that the agent may repudiate the agency and refuse the exercise of its powers conferred).

Compelling specific performance of contract of agency see Specific Performance [36 Cyc 579].

69. See cases infra notes 73–75.

70. U. S.—Moore v. Security Trust, etc., Ins. Co., 168 Fed. 496, 93 CCA 652 (holding that an agent may renounce his appointment in the absence of an agreement that it shall continue for a specific term); U. S. v. Jarvis, 26 F. Cas. No. 15,468, 2 Ware 278, 4 NYLegObs 298 (semble).

Ala.—Owensboro Wagon Co. v. Hall, 143 Ala. 177, 42 S 113 (holding that where a contract whereby a manufacturer employed an agent for the sale of its goods gave the manufacturer the right to treat the agent as the purchaser of the unsold goods after the expiration of twelve months, or in the event that the agent went out of the mercantile business, but did not specify a time for the termination of the employment, the agent had the right to terminate the agency at any time before twelve months or before going out of business, without giving the manufacturer the right to treat him as a purchaser).

Colo.—Cannon Coal Co. v. Taggart, 1 Colo. A. 60, 27 P 238 (semble).

Ga.—White Co. v. American Motor-Car Co., 11 Ga. A. 285, 75 SE 345.

Ind.—Rowe v. Rand, 111 Ind. 206, 12 NE 377 (semble).

Iowa.—Holbert v. Keller, 142 NW 962.

Mich.—Barrows v. Cushway, 37 Mich. 481.

Minn.—Forbes v. Bushnell, 47 Minn. 402, 50 NW 368 (where plaintiff and defendants agreed that the former should devote his time and energy to selling real estate for the latter at specified rates of compensation "for such time as may be mutually agreeable").

N. Y.—Winslow v. Mayo, 123 App. Div. 758, 108 NYS 640 [aff 195 N. Y. 551 mem, 88 NE 1135 mem] (where defendant agreed to give plaintiff the right to sell "any or all" of a stock of goods on a commission on all sales made by him, and plaintiff agreed to devote his entire time to the sale of the goods).

Wis.—Security Trust, etc., Ins. Co. v. Ellsworth, 129 Wis. 349, 109 NW 125 (holding that where an agency agreement with an insurance company, executed contemporaneously with a mortgage to secure advances to be paid from renewal commissions, contained no stipulation as to its duration, but provided that in case of resignation the company was authorized to pay subordinate agents, such agent, having made a reasonable effort to conduct the business, had a right to resign on his failure to make it successful).

71. U. S. v. Jarvis, 26 F. Cas. No. 15,468, 2 Ware 278, 4 NYLegObs 298 (semble); Cannon Coal Co. v. Taggart, 1 Colo. A. 60, 27 P 238; Rowe v. Rand, 111 Ind. 206, 12 NE 377 (semble); Berthoud v. Gordon, 6 La. 579 (holding that where a mercantile firm is part owner of a steamboat and acts as the agent of a coproprietor at a distance to insure his interest therein, and afterward discontinues such insurance without any instructions from him, and the boat is lost, the firm is liable for the amount of such interest uninsured, and that the circumstances that the firm renders an account current to the coproprietor before the loss of the boat in which the charge of the premium for insurance is omitted, and that no objection is made, will not be considered as notice of a discontinuance of the agency to insure so as to excuse the agent from his liability). See also Witte v. Storm, 236 Mo. 470, 139 SW 384.

[a] **A traveling salesman** is not justified in abandoning his contract because another salesman makes sales in his territory, where the sales are without authority, the employer offers to pay him the commission, and the salesman continues to work for some time without complaint and does not set up the incident until at the trial of a suit for compensation and where it further appears that he has given as his only reason for leaving a desire to make more money. Parker v. Brown, 173 Ill. A. 48.

72. Cedar Rapids Auto, etc., Co. v. Jeffrey, 139 Iowa 9, 116 NW 1054 (holding that even if it were a legal justification for a refusal to receive and pay for automobiles of existing types and patterns, ordered under a contract granting plaintiff the right to sell defendant's automobiles in a designated territory, or for demanding a return of the advance payment on such order, that the contract was obtained under a promise to put on the market automobiles of new and improved types and patterns, it was plaintiff's duty to make its objection known promptly on notice that the promise would not be fulfilled, and where it did not do so, but for some time thereafter continued its business relations with defendant, recognizing the existence of the contract, and giving no intimation of a purpose to make such failure a ground for putting an end to the contract, the objection was waived).

73. U. S. v. Jarvis, 26 F. Cas. No. 15,468, 2 Ware 278, 4 NYLegObs 298; Cannon Coal Co. v. Taggart, 1 Colo. A. 60, 27 P 238 (holding that this is especially true where the agent, before renunciation, had entered on his undertaking). And see Rowe v. Rand, 111 Ind. 206, 12 NE 377.

[a] **Where a contract provides that the agents shall pay a certain royalty per annum** "for the first three years of this license" but that they may terminate the agreement at the end of the first year by giving three months' notice, and further provides for its termination by the principal at the end of three years, the agents cannot terminate the contract before the expiration of the third year, if they fail to terminate it at the end of the first. Gibb v. McCoy, 19 NYS 755.

[b] **Damages.**—Where the agent of a coal company abandons the sale of the latter's coal, and the company procures another agent at some cost, and, so far as may be, themselves endeavor to sell the coal at an added expense, this is the principal damage which they are entitled to recover in an action for such breach, and, although they may be injured in the matter of the price at which, after the renunciation of the agent's engagement, they are compelled to dispose of their product, such difference does not furnish the true basis of recovery. Cannon Coal Co. v. Taggart, 1 Colo. A. 60, 27 P 238.

74. Cannon Coal Co. v. Taggart, 1 Colo. A. 60, 27 P 238 (holding that the fact that the agency is specified to be for a definite time is not, it seems, conclusive that it cannot rightfully be terminated at will, and that if an agency for a certain period leaves the agent free to act or not as he will, the agency is in effect one at will and may ordinarily be terminated at any time by the agent).

75. White v. Smith, 6 Lans. (N. Y.) 5.

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renounce it at any time for good cause, with a full reservation of his rights,[76] as where the principal's conduct is calculated to interrupt the relation,[77] or where the principal has broken the contract of agency.[78]

Specific performance. Even though an agent may have no right to abandon the contract of agency, yet the courts ordinarily will not decree specific performance thereof, on the ground that it calls for personal services, the performance of which no court has power to compel.[79] But while the courts will not compel an agent to perform his undertaking, they will in a proper case reach out a restraining arm to prevent him, and third persons in collusion with him, from taking advantage of his wrongful repudiation of the agency in such a way as to work injury to the principal.[80]

[§ 171] **c. Manner of Renunciation.**[81] No particular form is required for the abandonment or renunciation of an agency; it may be effected either expressly or by implication, and where the agent by his words or acts shows a clear intention to renounce or give up his agency, the principal may treat it as abandoned,[82] as where the agent puts himself in a position antagonistic to his principal,[83] or takes upon himself inconsistent duties.[84]

Communication of renunciation. But in order to relieve the agent from the duties and obligations which he has assumed as such, his renunciation must be made known to the principal, as an undisclosed purpose to renounce is without effect.[85]

[§ 172] **D. By Operation of Law—1. In General.**[86] An agency is terminated in many cases by operation of law, regardless of the consent or intention of the parties, and generally this may be effected in one of three ways: (1) By a change affecting the subject matter of the agency;[87] (2) by a change affecting the condition of the parties to the relation;[88] or (3) by a change in the law which would render performance of the contract illegal.[89]

76. Freet v. American Electrical Supply Co., 171 Ill. A. 512 [aff 257 Ill. 248, 100 NE 933] (employment contract obtained by fraud of principal); De la Pena v. Hidalgo, 16 Philippine 450 (ill health requiring departure from country as sufficient ground for renunciation).

[a] **Liability for acts of new agent.**—Where an agent renounces his agency in good faith and appoints a new agent who acts for a number of years with the principal's tacit acquiescence, the latter cannot claim damages against the renouncing agent for the acts of the second agent. De la Pena v. Hidalgo, 16 Philippine 450.

77. Conrey v. Brandegee, 2 La. Ann. 132 (holding that, where the conduct of the principal is calculated to interrupt the friendly relations existing between him and his agent, the latter may terminate his agency, under a full reservation of all his rights).

[a] **Abusive conduct** by the principal toward the agent is good cause for renunciation. Cody v. Raynaud, 1 Colo. 272; Bishop v. Ranney, 59 Vt. 316, 7 A 820.

78. Duffield v. Michaels, 97 Fed. 825 [rev on other grounds 102 Fed. 820, 42 CCA 649]; Newcomb v. Imperial L. Ins. Co., 51 Fed. 725 [aff 62 Fed. 97].

[a] **However,** a contract obligating one of the parties to push the sale of the other's coal for one year, and to pay for all he may order at an agreed price, but not requiring him to take any definite amount, is not a contract of purchase and sale, carrying with it an implied warranty of quality, but an agency, and, although the principal is bound to furnish merchantable coal, a single failure to do so will not warrant a rescission of the contract, but for this purpose it must appear that the coal was generally unsalable. Cannon Coal Co. v. Taggart, 1 Colo. A. 60, 27 P 238.

79. See Specific Performance [36 Cyc 579].

80. See Injunctions [22 Cyc 857 et seq].

81. **Necessity of notice** of abandonment of agency at will see supra § 170.

82. Stoddart v. Key, 62 HowPr (N. Y.) 137 (holding that, where an agent under a contract as a book canvasser wrote to his principal that he had determined to sell out and give up the business and that if the principal wanted it, to come or send, the principal, after having made a fair attempt to settle, and having reason to suspect the agent's good faith, was justified in treating the agency as abandoned and in appointing another agent, and that a sale of the list of subscribers afterward by the former agent, or an attempt on his part to release them, was invalid); Safford v. Kinsley, 40 Vt. 506. Compare Goodman v. Haynes Auto. Co., 205 Fed. 352, 123 CCA 480 (facts not constituting abandonment).

[a] **The renunciation must be positive** and unequivocal. Bergner v. Bergner, 219 Pa. 113, 67 A 999.

[b] **Where an agent informs his principal by letter** that for reasons of health and medical treatment he is about to depart from the place where he is executing his trust, and on abandoning the property turns it over to a third person and renders accounts of its revenue, and asks the principal to execute a power of attorney in favor of another, it is an express and definite renunciation of his agency. De la Pena v. Hidalgo, 16 Philippine 450.

[c] **Instances of agency not abandoned.**—(1) Where, however, the agent of an insurance company resigned his agency and asked the appointment of his son in his place, saying that the work of the latter would be under his immediate supervision, and another agent through whom this was communicated to the company added that the business would run the same as before, but that the agent resigning "desires his son to learn the business, and have some responsibility, and takes this method," etc., and the son was thereupon appointed, the court held that the evidence justified a finding that the agent thus resigning still had authority to act for the company. Ganser v. Fireman's Fund Ins. Co., 38 Minn. 74, 35 NW 584. (2) And where an agent for the care and sale of real estate wrote to the owners complaining that the owners had been acting with other agents, and that he would not so act any longer, but he continued to act thereafter, receiving propositions from the owners as to price and terms of sale, the contract of agency was not terminated by such letter. Stringfellow v. Elsea, (Tex. Civ. A.) 45 SW 418.

[d] **Right to treat agent as purchaser.**—Where a contract whereby a manufacturer employed an agent for the sale of its goods provided that the manufacturer could treat the agent as the purchaser of the unsold stock of goods by making demand at the expiration of twelve months, or in case the agent abandoned the mercantile business, the facts that the agent sold out his mercantile business and notified the manufacturer thereof, and that it then failed to elect to treat the agent as a purchaser, did not preclude the manufacturer from thereafter treating him as such, in the absence of a waiver on its part to so treat him; but where, after such notice, the manufacturer instructed the agent to sell the goods and settle monthly, or after he had collected for the same, and the agent did so, the manufacturer waived its rights to treat the agent as purchaser, notwithstanding the provision that a failure of the manufacturer to exercise the option should in no wise impair the right to enforce the same. Owensboro Wagon Co. v. Hall, 143 Ala. 177, 42 S 113.

83. Cotton v. Rand, 93 Tex. 7, 51 SW 838, 53 SW 34 [rev (Civ. A.) 51 SW 55] (holding that where an agent, acting for the several owners of a suburban addition, conspired with some of them to sue the others for an alleged indebtedness to him, agreeing to divide with them all recovered over a certain amount, this was a termination of the agency, although nothing was done pursuant to the conspiracy).

[a] **Adverse employment or interest.**—(1) Where an attorney in fact having power from a creditor of the estate of a deceased person is afterward appointed the administrator of the estate, the operation of the power becomes suspended, if indeed the agency is not thereby entirely renounced. In re Watkins, 121 Cal. 327, 53 P 702. (2) So where an agent had authority to sell a slave, and tried to sell but failed, and then attempted to run off, dispose of, and conceal the slave, his conduct was held to be an absolute abandonment and renunciation of his agency. Case v. Jennings, 17 Tex. 661. See also infra § 176.

[b] **An assertion by the agent of ownership in the subject matter of the agency** is, it seems, a repudiation of the continuance of the agency. Hitchcock v. Kelley, 18 Oh. Cir. Ct. 808, 4 Oh. Cir. Dec. 180; Hill v. Conrad, 91 Tex. 341, 43 SW 789; Case v. Jennings, 17 Tex. 661.

[c] **Where an agent abandons the object of his agency** and acts for himself by committing a fraud for his own exclusive benefit, he ceases to act within the scope of his employment and to that extent ceases to act as agent. Bienenstok v. Ammidown, 155 N. Y. 60, 49 NE 321; Henry v. Allen, 151 N. Y. 1, 45 NE 355, 36 LRA 658; Sternback v. Friedman, 23 Misc. 173, 50 NYS 1025.

84. In re Watkins, 121 Cal. 327, 53 P 702.

85. Bergner v. Bergner, 219 Pa. 113, 67 A 999 (holding also that as the intelligent assent of the parties is necessary to establish the relation so its dissolution must rest upon the knowledge of both).

86. **Termination of agency:** By expiration of term of employment see supra § 150. By fulfillment of purpose of agency see supra § 149.

87. See infra §§ 173, 174.

88. See infra §§ 175–194.

89. Wood v. Iowa Bldg., etc., Assoc., 126 Iowa 464, 102 NW 410; Hartford v. McGillicuddy, 103 Me. 224, 68 A 860, 16 LRANS 431, 12 AnnCas

If, before the agent acts, the principal himself completes the transaction which the agent was employed to negotiate, the agency likewise ceases.[90] However, the loss or accidental destruction of the instrument evidencing the agent's authority does not work a termination thereof.[91]

War terminates or suspends an agency existing between residents of hostile states or countries to the extent that further discharge of the duties involves communication between the lines, and is contrary to the policy or interests of one or both of the belligerents; but not where the agency does not require forbidden acts, and the assent of the principal or his subsequent ratification actually appears, or may justly be inferred.[92]

The repeal of a statute under which an appointment of a public agent is made terminates the agency.[93]

[§ 173] **2. Changes Affecting Subject Matter of Agency—a. In General.** The agency may terminate by operation of law because of a change in the subject matter thereof,[94] as where, in some instances, the subject matter is destroyed,[95] or the principal loses control over it by reason of a legal attachment against it.[96]

[§ 174] **b. Disposal of Subject Matter.** An agency is effectually revoked when the principal disposes of his interest in the subject matter of the agency in a manner inconsistent with the authority conferred, as by assignment, conveyance, contract for sale, or otherwise.[97] Thus the authority of an agent to sell is terminated by a conveyance of the property to the agent as trustee,[98] or by a lease of the property by the principal,[99] or by a sale of the property by the principal;[1] and where the principal has appointed several agents a sale of the property by one is a revocation of the authority of the others.[2] Accordingly no later act of the agent can have any efficacy in favor of persons having proper notice of the termination.[3] If, however, third persons subsequently dealing with the agent have no notice of the termination of the agency, they will be protected as against the principal, and, in some instances, against those claiming under him.[4]

1083; Peo. v. Globe Mut. L. Ins. Co., 91 N. Y. 174. See also Contracts [9 Cyc 629 et seq].

90. Vardon v. Vardon, 6 Ont. 719 (holding that were each of two adverse principals who desire to enter into a mutual contract appoints an agent to settle the terms of the contract, and subsequently the principals either perfect the contract or put an end to proposals for one before the delegated power to their agents has been fully exercised, the acts of the principals are the binding acts, and the subsequent acts of the agents are of no avail as against their principals; but that if the principals had, between themselves, entered into an agreement, and the agents, in ignorance of what the principals were doing, had previously concluded a different agreement, the agreement made by the agents would bind, because prior in time). And see Rowe v. Rand, 111 Ind. 206, 12 NE 377.

Disposal of subject matter of agency by principal as terminating relation see infra § 174.

91. Posten v. Rassette, 5 Cal. 467. See also Lost Instruments [25 Cyc 1608].

92. See War [40 Cyc 321].

93. Dudley v. Greene, 35 Me. 14; State v. Walker, 88 Mo. 279.

94. Hartford v. McGillicuddy, 103 Me. 224, 68 A 860, 26 LRANS 431.

[a] **Failure of consideration.**—Where an assignment of a claim for personal injuries contained a power to release, the power, being a mere naked authority, became inoperative on the failure of the consideration for the assignment. Flynn v. Butler, 189 Mass. 377, 75 NE 730.

95. Hartford v. McGillicuddy, 103 Me. 224, 68 A 860, 26 LRANS 431; Ahern v. Baker, 34 Minn. 98, 24 NW 341. And see Rowe v. Rand, 111 Ind. 206, 12 NE 377. See also Contracts [9 Cyc 627–631].

Extinguishment of warrant of attorney to confess judgment by running of statute of limitations against debt see Judgments [23 Cyc 707].

96. Stevens v. Wellington, 1 La. Ann. 72 (holding that where property has been put into the hands of an agent for sale, and the principal is subsequently made a garnishee in an action against one of his creditors, and the facts warrant the presumption that the agent must have been aware that his principal had been made a garnishee, his authority to sell must be considered as suspended from the time of the service of notice on the garnishee). And see Rowe v. Rand, 111 Ind. 206, 12 NE 377.

Loss of control by bankruptcy or insolvency proceedings see infra § 177.

97. U. S.—Hatch v. Coddington, 95 U. S. 48, 24 L. ed. 339; Labaree v. Peoria, etc., R. Co., 14 F. Cas. No. 7,959, 3 Bann. & A. 180.

Ala.—Chambers v. Seay, 73 Ala. 372.

Colo.—Lowell v. Hessey, 46 Colo. 517, 105 P 870.

Ill.—Bissell v. Terry, 69 Ill. 184; Gilbert v. Holmes, 64 Ill. 548 (holding that, as the power of constituting an agent is founded on the right of the principal to do the business himself, it follows that when that right ceases the right of creating an appointment, or continuing an appointment already made, must cease also, and so, where the principal parts with his right in the subject matter of the agency before the attorney in fact exercises the power, it will be a revocation in law of the power conferred).

Ky.—Frazier v. Cox, 125 SW 148, 150 [quot Cyc]; Chenault v .Quisenberry, 56 SW 410, 21 KyL 1771, 57 SW 234, 22 KyL 79.

La.—Reynolds v. Rowley, 3 Rob. 201, 38 AmD 233.

Minn.—Ahern v. Baker, 34 Minn. 98, 24 NW 341; Simonton v. Minneapolis First Nat. Bank, 24 Minn. 216.

Miss.—Kolb v. Bennett Land Co., 74 Miss. 567, 21 S 233.

Mo.—Kilpatrick v. Wiley, 197 Mo. 123, 95 SW 213.

N. J.—Kelly v. Brennan, 55 N. J. Eq. 423, 37 A 137.

N. Y.—Foster v. Bookwalter, 152 N. Y. 166, 46 NE 299; Allen v. Clark, 65 Barb. 563; Callanan v. Van Vleck, 36 Barb. 324 [aff 41 N. Y. 619 mem].

S. C.—Chandler v. Franklin, 65 S. C. 544, 44 SE 70.

Tex.—Donnan v. Adams, 30 Tex. Civ. A. 615, 71 SW 580.

Eng.—Rhodes v. Forwood, 1 App. Cas. 256.

See North Carolina State L. Ins. Co. v. Williams, 91 N. C. 69, 49 AmR 637.

[a] **A sale to the agent** operates as a termination of the relation of agency. Alger v. Keith, 105 Feb. 105, 44 CCA 371.

[b] **Lease of property.**—Where a power of attorney is given to conduct all the business of the principal at a particular place, and subsequently most of his property there is leased to the attorney for twenty years, this does not revoke the power, but modifies and limits it to the property and interest and business still retained by the principal. Perkins v. Currier, 19 F. Cas. No. 10,985, 3 Woodb. & M. 69.

[c] **Severance of interests of joint principals.**—(1) Where two principals jointly appoint an agent to take charge of some matter in which they are jointly interested, a severance of their interest works a termination of the agency. Rowe v. Rand, 111 Ind. 206, 12 NE 377. But see Cotton v. Rand, (Tex. Civ. A.) 51 SW 55 [rev on other grounds 93 Tex. 7, 51 SW 838, 53 SW 343]. (2) Where a land company employs one of its members to sell land, and subsequently the members transfer all the unsold land to themselves in severalty, such transaction has the effect of revoking the agency. Yingling v. West End Impr. Co., 5 Pa. Dist. 607. (3) But where A and his wife executed a power of attorney to B, authorizing him to sell any part or the whole of her undivided interest in lands, a subsequent division of the lands did not revoke the power. Bransom v. Thompson, 5 KyL 359.

[d] **If the principal disposes of part of the subject matter** of the agency, the agency is terminated as to that part, and that part only. Perkins v. Currier, 19 F. Cas. No. 10,985, 3 Woodb. & M. 69. And see Copelin v. Shuler, (Tex.) 6 SW 668.

[e] **An assignment of a judgment** is held to be a revocation of the authority of plaintiff's attorney to control the same. Trumbull v. Nicholson, 27 Ill. 149.

Assignment for benefit of creditors see infra § 177.

98. Chenault v. Quisenberry, 56 SW 410, 21 KyL 1771, 57 SW 234, 22 KyL 79.

99. Hollingsworth v. Young County, 40 Tex. Civ. A. 590, 91 SW 1094.

1. U. S.—Labaree v. Peoria, etc., R. Co., 14 F. Cas. No. 7,959, 3 Bann. & A. 180.

Ill.—Walker v. Denison, 86 Ill. 142.

La.—Torre v. Thiele, 25 La. Ann. 418.

Mass.—Elliot v. Barrett, 144 Mass. 256, 10 NE 820.

Miss.—Kolb v. Bennett Land Co., 74 Miss. 567, 21 S 233.

N. J.—Kelly v. Brennan, 55 N. J. Eq. 423, 37 A 137.

Tex.—Donnan v. Adams, 30 Tex. Civ. A. 615, 71 SW 580.

2. Hatch v. Coddington, 95 U. S. 48, 24 L. ed. 339; Ahern v. Baker, 34 Minn. 98, 24 NW 341; Kilpatrick v. Wiley, 197 Mo. 123, 95 SW 213.

3. See cases supra note 97.

4. Alger v. Keith, 105 Fed. 105, 44 CCA 371; Gratz v. Land, etc., Impr. Co., 82 Fed. 381, 27 CCA 305, 40 LRA 393 (holding that a recorded power of attorney to convey certain lands remains in force, as to purchasers in good faith, without notice, from the attorney, although the grantor himself in the meantime conveys the same lands by a deed which remains unrecorded); Labaree v. Peoria, etc., R. Co., 14 F. Cas. No. 7,959, 3 Bann. & A. 180 (holding that, while a sale of

Where an agent's power is coupled with an interest in the subject matter of the agency, it is not terminated by a sale of the property by the principal.[5]

[§ 175] **3. Changes Affecting Parties to Relation—a. In General.** An agency may terminate by operation of law by reason of a change in the condition or status of either of the parties to the relation before execution of the agency.[6]

A joint agency is terminated where one of the agents becomes incapacitated before the term is completed or the purpose is accomplished.[7]

[§ 176] **b. Adverse Interest or Employment.**[8] It has been held that an agency is terminated by operation of law where the agent, without the principal's consent, becomes adversely interested in the subject matter of the agency or accepts adverse employment,[9] although he does not in fact act to the injury of the principal.[10]

[§ 177] **c. Bankruptcy or Insolvency—(1) Of Principal.** As by an act of bankruptcy the principal loses control of the subject matter of the agency, the authority of an agent to act for his principal generally ceases by operation of law upon an adjudication of the principal's bankruptcy or insolvency,[11] or upon the making of a general assignment by the principal for the benefit of his creditors;[12] and hence the agent does not become the agent of the assignee in bankruptcy or insolvency.[13] However, the agent may in such case do such acts as the bankrupt or insolvent himself may do, such as mere formal and ministerial acts to complete a transaction entered into before the bankruptcy or insolvency;[14] and if the agent has a power coupled with an interest the bankruptcy or insolvency of the principal cannot deprive him of his authority.[15] So if there has been a part performance under the contract of agency the bankruptcy of the principal does not

a patent annuls an existing power of attorney relating thereto, yet if the power is allowed to remain outstanding without objection persons dealing with the attorney on the faith thereof will be protected as against the principal).

[a] **Record of deed as notice.**— Under a statute providing that the record of a deed shall be notice to all persons of its existence, the registry of a deed executed by the principal is constructive notice to the agent and persons subsequently dealing with him of the revocation of a previous power of attorney to sell the land conveyed. Donnan v. Adams, 30 Tex. Civ. A. 615, 71 SW 580. And see Gratz v. Land, etc., Imp. Co., 82 Fed. 381, 27 CCA 305, 40 LRA 393. But see Loehde v. Halsey, 88 Ill. A. 452 (where the court held that the record affected creditors and subsequent purchasers only, and would not defeat the right of a subagent against the agent employing him to commissions earned after the principal had sold the property).

5. Wells v. Littlefield, 59 Tex. 556.

[a] **A verbal authority given to a purchaser of land to fill in the grantee's name** in a deed that is otherwise complete confers a power coupled with an interest, and is not revoked by his subsequent sale to another without having supplied the omission. Threadgill v. Butler, 60 Tex. 599.

6. Rowe v. Rand, 111 Ind. 206, 12 NE 377; Hartford v. McGillicuddy, 103 Me. 224, 68 A 860.

[a] **Formation of partnership.**— An agency to transact business for an individual is terminated by the formation of a copartnership for the same business. Hoppock v. Moses, 43 HowPr (N. Y.) 201.

7. Rowe v. Rand, 111 Ind. 206, 12 NE 377 (holding that where two persons are jointly appointed agents to take charge of a particular business for a specified term or purpose, and one of them becomes incapacitated before the term is completed or the purpose is accomplished, the other cannot proceed alone without the consent of the principal, and hence the agency is thereby in effect revoked). See also Salisbury v. Brisbane, 61 N. Y. 617 [cit Robson v. Drummond, 2 B. & Ad. 303, 22 ECL 132, 109 Reprint 1156].

8. **Having or representing adverse interests** as affecting a person's capacity to act as agent see supra § 23.

9. Sturdivant Bank v. Schade, 195 Fed. 188, 115 CCA 140; Cotton v. Rand, 93 Tex. 7, 22, 51 SW 838, 53 SW 343 [rev (Civ. A.) 51 SW 55] (where the court said: "We are clearly of the opinion that such a breach of duty on the part of an agent, unless condoned by the principal with a full knowledge of the facts, puts an end, ipso facto, to the agency"). See also supra § 171.

[a] **Appointed as administrator.**— (1) Where an agent having power from a creditor of the estate of a deceased person afterward is appointed the administrator of the estate, the operation of the power becomes suspended. Watkin's Est., 121 Cal. 327, 53 P 702. (2) But a power of attorney executed by heirs empowering the agent to complete a contract made by the intestate is not, it seems, revoked by a subsequent grant of administration to one of the heirs. Jones v. Commercial Bank, 78 Ky. 413.

[b] **Where materials are left with an agent to be sold,** the fact that he thereafter takes a contract as manager of a shipbuilding company to construct a vessel then in frame does not release him as agent of the owner of the materials for the purpose of selling them. Callahan v. Ætna Indemn. Co., 33 Wash. 583, 74 P 693.

10. Cotton v. Rand, 93 Tex. 7, 51 SW 838, 53 SW 343 [rev (Civ. A.) 51 SW 55].

[a] **Reason for rule.**—"The law requires fidelity of agents and holds them no longer capable of representing their principals when, without the knowledge of the latter, they acquire an interest in the matter of the agency adverse to that of their employers. It will not do to say, as has been insisted in this case, that the plaintiff did nothing under the contract. A clerk who had conspired to rob his master's till might as well urge, in order to defeat the consequences of his misconduct, that, for the lack of opportunity, he had been unable to execute his design." Cotton v. Rand, 93 Tex. 7, 22, 51 SW 838, 53 SW 343 [rev (Civ. A.) 51 SW 55].

11. U. S.—In re Daniels, 6 F. Cas. No. 3,566, 6 Biss. 405.

Ind.—Rowe v. Rand, 111 Ind. 206, 12 NE 377).

Mass.—Fuller v. Emerson, 7 Cush. 203.

N. Y.—Franzen v. Zimmer, 90 Hun 103, 35 NYS 612.

Oh.—Dye v. Bertram, 5 Oh. Dec. (Reprint) 508, 6 AmLRec 355.

Tenn.—Doyle v. Fly, 1 Tenn. Civ. A. 263.

Eng.—Markdick v. Hardingham, 15 Ch. D. 339; Parker v. Smith, 16 East 382, 104 Reprint 1133; Dawson v. Sexton, 1 L. J. Ch. O. S. 185.

N. S.—Roper v. Shannon, 2 N. S. Dec. 146.

[a] **Statutes sometimes provide** that certain transactions before notice of the act of bankruptcy shall be protected, and under such provisions the acts of an agent have sometimes been upheld where they were done after the petition in bankruptcy but before vesting of title in the assignee. Elliott v. Turquand, 7 App. Cas. 79 [cit Naoroji v. Chartered Bank of India, L. R. 3 C. P. 444; Rose v. Hart, 8 Taunt. 499, 4 ECL 248, 129 Reprint 477, 2 Smith Lead. Cas. 1565]; Ex p. Snowball, L. R. 7 Ch. 534, 548 (where the court said: "We are of opinion that though, no doubt, as a general rule, a power of attorney must be treated as revoked by an act of bankruptcy committed by the giver of the power as against the trustee under a subsequent bankruptcy, still if after the act of bankruptcy but before the adjudication property is conveyed under the power to a bona fide purchaser, who has no notice of the act of bankruptcy, the purchaser may hold the property as against the trustee. It is obvious that a power of attorney is not revoked for all purposes by an act of bankruptcy committed by the giver of the power, because, if no adjudication follows, a sale under the power is binding on the giver himself; and whenever a sale would be binding on a bankrupt, if no adjudication follows, it is binding on the trustee under a subsequent adjudication if the purchaser had no notice of an act of bankruptcy having been committed by the seller at the time of the sale").

[b] **The bankruptcy of a principal in England** will not affect the validity of a bill drawn by his duly authorized agent in New York without notice of the bankruptcy of the principal, inasmuch as the operation of the English assignment of bankruptcy is not extraterritorial, and does not operate as a legal transfer of property in the United States. Ogden v. Gillingham, 18 F. Cas. No. 10,456, Baldw. 38.

12. Barrett v. His Creditors, 12 Rob. (La.) 474; Wilson v. Harris, 21 Mont. 374, 54 P 46; Elwell v. Coon, (N. J. Ch.) 46 A 580 (holding that, where a principal agrees to ship to his agent for sale the entire output of his canning operations during a certain season, and subsequently assigns for the benefit of creditors, the agent cannot enforce specific performance of this contract against the assignee, where it appears that the agent's authority was not coupled with an interest).

13. Elwell v. Coon, (N. J. Ch.) 46 A 580; Markwick v. Hardingham, 15 Ch. D. 339. And see Leupold v. Weeks, 96 Md. 280, 53 A 937.

14. Dixon v. Ewart, 3 Meriv. 322, 36 Reprint 123 (holding that a power of attorney to execute the indorsement of sale upon the register of a ship when she returns home is not revoked by the bankruptcy of the principal).

15. Dickinson v. Central Nat. Bank, 129 Mass. 279, 37 AmR 351; Wilson v. Harris, 21 Mont. 374, 54 P 46; Elwell v. Coon, (N. J. Ch.) 46 A 580; Alley v. Hotson, 4 Camp. 335. But compare Dye v. Bertram, 5 Oh. Dec. (Reprint) 508, 6 AmLRec 355 (where it is said that a discharge in bankruptcy terminates an agency to confess judgment, although the latter is a power coupled with an interest).

entitle the agent to terminate the agency, put an end to the service partly performed, and become the agent of a third person to the contract between him and the principal.[16]

A power of attorney to confess a judgment is not revived after bankruptcy by a new promise which revives the debt, as such a power is not an incident of the debt, but a separate matter creating an agency.[17]

Appointment of receiver. The rights of an agent under a contract of employment are not destroyed by the appointment of receivers for the principal, where the receivers affirm the contract and receive the benefits from it, although they might have discarded the contract which at the time of their appointment was merely an executory one.[18]

[§ 178] **(2) Of Agent.** The insolvency of the agent will ordinarily put an end to the agency, at least if it is in any way connected with the agent's business which has caused his failure.[19] But the bankruptcy of the agent will not destroy any right he may have under a power coupled with interest.[20]

[§ 179] **d. Death—(1) Of Principal—(a) General Rule.** It is a well established rule of the common law that, since an agent can and does act only in the name of his principal and executes his will, the death of the principal ordinarily works an immediate termination of the authority of the agent by operation of law,[21] unless the agent's authority

16. Means v. Ross, 106 La. 175, 30 S 300.

17. Dye v. Bertram, 5 Oh. Dec. (Reprint) 508, 6 AmLRec 355.

18. Leupold v. Weeks, 96 Md. 280, 53 A 937.

19. Cushman v. Snow, 186 Mass. 169, 71 NE 529; Audenried v. Betteley, 8 Allen (Mass.) 302 (holding that an agency to sell merchandise for another is terminated by the agent's insolvency); Hudson v. Granger, 5 B. & Ald. 27, 7 ECL 27, 106 Reprint 1103; Godfrey v. Furzo, 3 P Wms. 185, 24 Reprint 1022; Scott v. Surman, Willes 400, 125 Reprint 1235.

[a] **In Louisiana,** however, one who has failed may act as agent of another, although under the code the agency expires if he has failed, on a showing that the whole of his property and credits are not equal in amount to his debts. Lea v. Bringier, 12 La. Ann. 197.

[b] **The mere fact that a factor is insolvent** in the sense that he is unable to meet his obligations as they mature has been held not to effect a revocation of his authority, where he has made no assignment and no bankruptcy or insolvency proceedings have been instituted by or against him. Interstate Nat. Bank v. Claxton, 97 Tex. 569, 80 SW 604, 104 AmSR 885, 65 LRA 820. See also Factors [19 Cyc 118].

20. Hudson v. Granger, 5 B. & Ald. 27, 7 ECL 27, 106 Reprint 1103.

21. U. S.—Long v. Thayer, 150 U. S. 520, 14 SCt 189, 37 L. ed. 1167; Hanrick v. Patrick, 119 U. S. 156, 7 SCt 147, 30 L. ed. 396; Galt v. Galloway, 4 Pet. 332, 7 L. ed. 876; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589; Pacific Bank v. Hannah, 90 Fed. 72, 32 CCA 522; McDonald v. Hannah, 51 Fed. 73; McClaskey v. Barr, 50 Fed. 712; Boone v. Clarke, 3 F. Cas. No. 1,641, 3 Cranch CC 389.

Ala.—Garrett v. Trabue, 82 Ala. 227, 3 S 149; Saltmarsh v. Smith, 32 Ala. 404; Scruggs v. Driver, 31 Ala. 274.

Ariz.—Trickey v. Crowe, 8 Ariz. 176, 71 P 965 [aff 204 U. S. 228, 27 SCt 275, 51 L. ed. 454]; Green v. Tuttle, 5 Ariz. 179, 48 P 1009.

Ark.—Moore v. Maxwell, 18 Ark. 469; Yeates v. Pryor, 11 Ark. 58.

Cal.—Krumdick v. White, 92 Cal. 148, 28 P 219, 107 Cal. 37, 39 P 1066; Lowrie v. Salz, 75 Cal. 349, 17 P 232; Frink v. Roe, 70 Cal. 296, 11 P 820; Ferris v. Irving, 28 Cal. 645; Travers v. Crane, 15 Cal. 12; In re Kilborn, 5 Cal. A. 161, 89 P 985.

Fla.—Dallam v. Sanches, 56 Fla. 779, 47 S 871; McGriff v. Porter, 5 Fla. 373.

Ga.—Anderson v. Goodwin, 125 Ga. 663, 54 SE 679; Griggs v. Swift, 82 Ga. 392, 9 SE 1062, 14 AmSR 176, 5 LRA 405; Miller v. McDonald, 72 Ga. 20; Lathrop v. Brown, 65 Ga. 312; Jones v. Beall, 19 Ga. 171; Wellborn v. Weaver, 17 Ga. 273, 63 AmD 235.

Ill.—Lancaster v. Springer, 239 Ill. 472, 88 NE 272; Wallace v. Bozarth, 223 Ill. 389, 79 NE 57 [aff 123 Ill. A. 624]; Home Nat. Bank v. Waterman, 134 Ill. 461, 29 NE 503 [aff 30 Ill. A. 535]; Citizen's Nat. Bank v. Dayton, 116 Ill. 257, 4 NE 492; Mecartney v. Carbine, 103 Ill. A. 282; Garber v. Myers, 32 Ill. A. 175.

Ind.—Johnson v. Wilcox, 25 Ind. 182.

Iowa.—Condon v. Barnum, 106 NW 514; Darr v. Darr, 59 Iowa 81, 12 NW 765; Vance v. Anderson, 39 Iowa 426; Lewis v. Kerr, 17 Iowa 73.

Kan.—Farmer v. Marvin, 63 Kan. 250, 65 P 221.

Ky.—Smith v. White, 5 Dana 376.

La.—Holmes v. Murdock, 125 La. 916, 51 S 1035; Lanaux's Succ., 46 La. Ann. 1036, 15 S 708, 25 LRA 577; Shiff v. Lesseps, 22 La. Ann. 185; Laporte v. Landry, 4 Mart. N. S. 125; Copelle v. Dalton, 4 Mart. N. S. 123; Musson v. U. S. Bank, 6 Mart. 707.

Me.—Hartford v. McGillicuddy, 103 Me. 224, 68 A 860, 16 LRANS 431; Jones v. Jones, 101 Me. 447, 64 A 815, 115 AmSR 328; Merry v. Lynch, 68 Me. 94; Staples v. Bradbury, 8 Me. 181, 23 AmD 494; Harper v. Little, 2 Me. 14, 11 AmD 25.

Mass.—Mills v. Smith, 193 Mass. 11, 78 NE 765, 6 LRANS 865; Brown v. Cushman, 173 Mass. 368, 53 NE 860; Williams Mfg. Co. v. Standard Brass Co., 173 Mass. 356, 53 NE 862; Farnum v. Boutelle, 13 Metc. 159; Burrill v. Smith, 7 Pick. 291.

Mich.—Weaver v. Richards, 144 Mich. 395, 108 NW 882, 6 LRANS 855.

Miss.—Clayton v. Merrett, 52 Miss. 353.

Mo.—Kilpatrick v. Wiley, 197 Mo. 123, 95 SW 213; Lockhart v. Forsythe, 49 Mo. A. 654; Keyl v. Westerhaus, 42 Mo. A. 49.

Mont.—Gardner v. Billings First Nat. Bank, 10 Mont. 149, 25 P 29, 10 LRA 45.

Nebr.—Deweese v. Muff, 57 Nebr. 17, 77 NW 361, 73 AmSR 488, 42 LRA 789.

N. H.—Wilson v. Edmons, 24 N. H. 517; Gale v. Tappan, 12 N. H. 145, 37 AmD 194.

N. J.—Durbrow v. Eppens, 65 N. J. L. 10, 46 A 582.

N. Y.—Glennan v. Rochester Trust, etc., Co., 209 N. Y. 12, 102 NE 537 [aff 152 App. Div. 316, 136 NYS 747]; Farmers' L. & T. Co. v. Wilson, 139 N. Y. 284, 34 NE 784, 36 AmSR 696 [aff 64 Hun 194, 19 NYS 142]; Weber v. Bridgman, 113 N. Y. 600, 21 NE 985; Peo. v. Bellando, 137 App. Div. 777, 122 NYS 543 [aff 199 N. Y. 533 mem, 92 NE 1095 mem]; Oatman v. Watrous, 120 App. Div. 66, 105 NYS 174 (holding that, where a husband, who had authorized his wife to order certain furs of plaintiff who was to procure them abroad, died before plaintiff ordered the furs, the agency was terminated); Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 NYS 1045; Van Campen v. Bruns, 54 App. Div. 86, 66 NYS 344; Matter of Mitchell, 36 App. Div. 542, 55 NYS 725 [aff 161 N. Y. 654 mem, 57 NE 1117 mem]; Helmer v. St. John, 8 Hun 166; Houghtaling v. Marvin, 7 Barb. 412; Matter of Bensel, 68 Misc. 70, 124 NYS 726; Tusch v. German Sav. Bank, 20 Misc. 571, 46 NYS 422 [rev on other grounds 23 App. Div. 279, 48 NYS 221]; Soltau v. Goodyear Vulcanite Co., 12 Misc. 131, 33 NYS 77; Thompson v. Gruber, 21 HowPr 433; Jackson v. Henderson, 18 Johns. 294; Bergen v. Bennett, 1 Cai. Cas. 1.

N. C.—Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592; Wainwright v. Massenburg, 129 N. C. 46, 39 SE 725; Duckworth v. Orr, 126 N. C. 674, 36 SE 150; Forsyth v. Lash, 89 N. C. 159; McNaughton v. Moore, 2 N. C. 189.

N. D.—Moore v. Weston, 13 N. D. 574, 102 NW 163; Brown v. Skotland, 12 N. D. 445, 97 NW 543.

Oh.—Ish v. Crane, 8 Oh. St. 520, 13 Oh. St. 574; McDonald v. Black, 20 Oh. 185, 55 AmD 448; Wallace v. Saunders, 7 Oh. 173; Easton v. Ellis, 1 Handy 70, 12 Oh. Dec. (Reprint) 32 [cit Anderson v. Brown, 9 Oh. 151]; Johnson v. Johnson, Wright 594.

Okl.—Kimmell v. Powers, 19 Okl. 339, 91 P 687.

Or.—Crane v. Oregon R., etc., Co., 66 Or. 317, 133 P 810.

Pa.—Kern's Est., 176 Pa. 378, 33 A 231; Yerkes' App., 99 Pa. 401; Lehigh Coal, etc., Co. v. Mohr, 83 Pa. 228, 24 AmR 161; Frederick's App., 52 Pa. 338, 91 AmD 159; Peries v. Aycinena, 3 Watts & S. 64; Provident Life, etc., Co. v. Spring Garden Ins. Co., 53 Pa. Super. 66; Byrod v. Sweigert, 12 Pa. Dist. 565, 20 LancLRev 271, 17 York LegRec 45; Shisler's Est., 2 Pa. Dist. 588.

S. C.—Brown v. Brown, 38 S. C. 173, 17 SE 452; Sullivan v. Latimer, 38 S. C. 158, 17 SE 701.

Tenn.—Murdock v. Leath, 10 Heisk. 166; Rigs v. Cage, 2 Humphr. 350, 37 AmD 559; Jenkins v. Atkins, 1 Humphr. 294, 34 AmD 648.

Tex.—Cleveland v. Williams, 29 Tex. 204, 94 AmD 274; Primm v. Stewart, 7 Tex. 178; Surghenor v. Talaferro, (Civ. A.) 98 SW 648; Nehring v. McMurrain, (Civ. A.) 45 SW 1032; Renfro v. Waco, (Civ. A.) 33 SW 766; Connor v. Parsons, (Civ. A.) 30 SW 83.

Vt.—Gifford v. Thomas, 62 Vt. 34, 19 A 1088; Davis v. Windsor Sav. Bank, 46 Vt. 728; Michigan Ins. Co. v. Leavenworth, 30 Vt. 11; Michigan State Bank v. Leavenworth, 28 Vt. 209.

Va.—Triplett v. Woodward, 98 Va. 187, 35 SE 455; Huston v. Cantril, 11 Leigh (38 Va.) 136.

Wash.—Gilmore v. Continental Casualty Co., 58 Wash. 203, 108 P 447; Maxwell v. Harper, 51 Wash. 351, 98 P 756.

Wis.—Lenz v. Brown, 41 Wis. 172.

Eng.—Graham v. Jackson, 6 Q. B. 811, 51 ECL 811, 115 Reprint 306; In re Overweg, [1900] 1 Ch. 209; Blades v. Free, 9 B. & C. 167, 17 ECL 83, 109 Reprint 63; Bailey v. Collett, 18 Beav. 179, 52 Reprint 71; Campanari v. Woodburn, 15 C. B. 400, 80 ECL 400, 139 Reprint 480; Wallace v. Cook, 5 Esp. 117; Goodson v. Alexander, 1 Jur. 37; Mitchell v. Eades, Prec. Ch. 125, 24 Reprint 60, 2 Vern. Ch. 391, 23 Reprint 851; Watson v. King, 1 Stark. 121, 2 ECL 54; Phillips v. Jones, 4 T. L. R. 401; Lepard

is coupled with an interest in the subject matter.[22] This rule applies even though the power of attorney provides that it shall be irrevocable,[23] and shall survive the death of the principal,[24] and be binding on the principal's heirs and personal representatives,[25] and even though the agency is for a specified period.[26] Accordingly any acts subsequently done or transactions entered into by the agent as such are not binding on those claiming under or through the principal,[27] and afford the agent no basis for a claim against the principal's estate;[28] but on the contrary they expose the agent to liability to the representatives of the deceased principal,[29] and to the third persons with whom the subsequent dealings are had,[30] for acting without authority.

Applications of general rule. Thus in the absence of an authority coupled with an interest, the death of the principal ordinarily terminates the authority of an agent to sell or transfer the principal's property,[31] or make a deed or conveyance thereof;[32] to occupy land;[33] to deliver a lease;[34] to make collections;[35] to make a delivery of a gift;[36] to make a

v. Vernon, 2 Ves. & B. 51, 35 Reprint 237; Wynne v. Thomas, Willes 563, 125 Reprint 1322. And see Tasker v. Shepherd, 6 H. & N. 575.

N. B.—Ex p. Welch, 2 N. B. Eq. 129.

Ont.—Jacques v. Worthington, 7 Grant Ch. (U. C.) 192; McQuesten v. Thompson, 2 Grant Err. & App. (U. C.) 167.

"We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death." Per Marshall, C. J., in Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 201, 5 L. ed. 589.

[a] **"It is the almost universal rule** that the death of the principal puts an end to the agency, the only exception thereto being the case where the agency is coupled with an interest." Gilmore v. Continental Casualty Co., 58 Wash. 208, 210, 108 P 447.

[b] **"The legal reason of the rule** is a plain one. It seems founded on the presumption, that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed; and on the manner in which he must execute his authority, as stated in Combes' Case, 9 Coke 766, 77 Reprint 843. . . . A conveyance in the name of a person, who was dead at the time, would be a manifest absurdity." Per Marshall, C. J., in Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 202, 5 L. ed. 589. And see Weaver v. Richards, 144 Mich. 395, 108 NW 382, 6 LRANS 855 and note.

[c] **Power to recover damages.**— An instrument whereby in terms P requests, authorizes, and empowers a company for her and in her name to take what proceedings it may deem advisable toward obtaining compensation for any damage to her from land being taken or injuriously affected by certain condemnation proceedings, and whereby she agrees to pay certain compensation for its services, is at most a power of attorney, and therefore is revoked by the death of P prior to the company acting under it. Matter of Bensel, 68 Misc. 70, 124 NYS 726.

[d] **The authority of one to represent the insured in an accident policy** and pay installments of the premium terminates on the death of the insured. Gilmore v. Continental Casualty Co., 58 Wash. 203, 108 P 447.

[e] **The authority of an agent transacting real estate business** on behalf of a landowner terminates with the death of the principal, and thereafter the agent has no authority to receive and record a deed to the principal. Condon v. Barnum, (Iowa) 106 NW 514.

Death as effecting revocation of warrant of attorney to confess judgment see Judgments [23 Cyc 707].

Termination of contract by death of party see generally Contracts [9 Cyc 387]; Executors and Administrators [18 Cyc 239 et seq].

22. See infra § 182.

23. Ark.—Yeates v. Pryor, 11 Ark. 58.

Cal.—Frink v. Roe, 2 Cal. Unrep. Cas. 491, 7 P 481, 70 Cal. 296, 11 P 820.

Mich.—Weaver v. Richards, 144 Mich. 395, 108 NW 382, 6 LRANS 855 and note.

N. C.—Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592.

Eng.—Mitchell v. Eades, Prec. Ch. 125, 24 Reprint 60, 2 Vern. Ch. 391, 23 Reprint 851.

Compare Durbrow v. Eppens, 65 N. J. L. 10, 46 A 582.

24. Weaver v. Richards, 144 Mich. 395, 108 NW 382, 6 LRANS 855 and note; Ex p. Welch, 2 N. B. Eq. 129.

[a] **An attempt to create an agency to become effective at the death of the principal** is nugatory, since by that death the authority is terminated. Moore v. Weston, 13 N. D. 574, 102 NW 163 (holding that, where a memorandum on the back of a note provided that if it should not be paid before the payee's death the maker should expend the balance due for funeral expenses and a monument for the payee, the maker was the agent of the payee to carry out the provisions of the memorandum after his death, but the agency never became operative as the death terminated the authority which purported to create it). Compare Ross v. Hardin, 79 N. Y. 84.

25. Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592; Ex p. Welch, 2 N. B. Eq. 129.

Necessity of testamentary instrument to affect disposition of property after death see Executors and Administrators [18 Cyc 317].

26. Yerrington v. Greene, 7 R. I. 589, 84 AmD 578 (holding that a contract to employ one as agent and clerk for a specified term at a named salary to conduct a branch business was terminated by the death of the principal, although occurring before the expiration of the time specified). But see Fereira v. Sayres, 5 Watts & S. (Pa.) 210, 40 AmD 496 (holding that the death of one partner did not discharge the firm from subsisting contracts with an agent of the firm for a period of time not then expired).

27. See cases supra note 21.

[a] **A transfer of stock under a power of attorney after the death of the principal,** which was known by the transferee, is invalid. Kern's Est., 176 Pa. 373, 35 A 231.

28. See infra §§ 426, 462.

29. Wallace v. Bozarth, 223 Ill. 389, 79 NE 57 [aff 123 Ill. A. 624]; In re Mitchell, 36 App. Div. 542, 55 NYS 725 [aff 161 N. Y. 654 mem, 57 NE 1117 mem].

30. See infra § 481.

31. Fla.—Dallam v. Sanchez, 56 Fla. 779, 47 S 871.

Kan.—Seibert v. True, 8 Kan. 52 (holding that the agency of one intrusted by another with cattle for the purpose of selling them is terminated by the death of the principal, although he was surety on the note given by the principal in payment therefor and mortgagee of a portion of the cattle).

Mass.—Brown v. Cushman, 173 Mass. 368, 53 NE 860.

N. C.—Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592.

Tex.—Gilmer v. Veatch, 56 Tex. Civ. A. 511, 121 SW 545; Surghenor v. Taliaferro, (Civ. A.) 98 SW 648.

[a] **A mere power to enter upon certain premises and carry away and sell property thereon** upon default in payment of a certain debt is revoked upon the death of the debtor. McGriff v. Porter, 5 Fla. 373.

[b] **A mere power of attorney to transfer stock** is revoked by the death of the principal. Given's App., (Pa.) 16 A 75.

32. Lalor v. Tooker, 130 App. Div. 11, 114 NYS 403 (holding that the death of the grantor defeats a power of attorney to convey land, title descending to his heirs at his death); Nehring v. McMurrain, (Tex. Civ. A.) 45 SW 1032.

[a] **Deeds.**—(1) A deed executed by an agent after his principal's death is void (Pacific Bank v. Hannah, 90 Fed. 72, 32 CCA 522; Green v. Tuttle, 5 Ariz. 179, 48 P 1009; Dallam v. Sanchez, 56 Fla. 779, 47 S 871; Harper v. Little, 2 Me. 14, 11 AmD 25; Wall v. Lubbock, (Tex. Civ. A.) 118 SW 886), (2) whether it is executed with knowledge of the principal's death or not (Dallam v. Sanchez, supra). (3) A deed executed by an agent before but delivered after the principal's death is inoperative. Kent v. Cecil, (Tex. Civ. A.) 25 SW 715.

33. Lincoln v. Emerson, 108 Mass. 87.

34. Streit v. Wilkerson, (Ala.) 65 S 164 (holding that where, although a lease was signed by the lessor before her death, it was not delivered to or signed by the lessee during the lessor's lifetime, it being in the hands of her agent at her death for that purpose, it could not be delivered by the agent after her death, since her death revoked the agency).

35. Triplett v. Woodward, 98 Va. 187, 35 SE 455 (holding that the powers of an agent of a testator cease on the death of the latter, and he must surrender to the personal representatives all evidences of debts due the estate).

[a] **An authority to collect notes** is revoked by the death of the principal. Darr v. Darr, 59 Iowa 81, 12 NW 765.

[b] **A power to a creditor to receive a debt** expressly for the purpose of liquidating the claim of the creditor, but unaccompanied by an assignment of the debt or by any security to which the power might have been ancillary, is revoked by the death of the principal. Houghtaling v. Marvin, 7 Barb. (N. Y.) 412.

[c] **A power of attorney to collect certain rents** and apply them to the payment of a note when due was only a naked power of attorney revoked by the death of the principal. Garber v. Myers, 32 Ill. A. 175.

36. Duckworth v. Orr, 126 N. C. 674, 36 SE 150 (holding that where money is delivered to one's agent, with directions to deliver the same to a third party as a gift, and the agent fails to make the delivery before his principal's death, the agency and power to deliver are thereby revoked).

[a] **A delivery of personal property** by the owner to an agent to deliver the same to the persons whom the owner intends to have the property does not constitute a present gift, and if the owner dies before the agent has delivered the property the agency is thereby revoked. Trubey v. Pease, 240 Ill. 513, 88 NE 1005, 16 AnnCas 370.

loan;[37] or to make payments.[38]

[§ 180] **(b) Exceptions and Limitations—aa. In General.** Where a principal assigns property in possession of his agent to a third person and authorizes the agent to turn it over to the assignee, the death of the principal before delivery to the assignee does not defeat the latter's right and title to the property;[39] and where the power of attorney forms part of a contract, and is security for money or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, and, if not so, is deemed irrevocable in law, and the power may be exercised at any time, and is not affected by the death of the person who created it.[40] It has been held that if the authority has been in part actually executed by the agent, the death of the principal does not revoke the unexecuted part as to the other contracting party.[41] The conduct of the administrator of the deceased principal's estate may be such as to estop him from denying the validity of the agent's acts as against persons who have dealt with the agent without notice of the principal's death.[42]

[§ 181] **bb. Where Death Is Unknown.** Although, as has been seen, notice of the revocation of an agency is generally necessary,[43] yet, where it is revoked by death, the weight of authority supports the doctrine of the common law that the death of the principal operates as an immediate revocation, and that acts of agency done after the death of the principal are void, even though the death is unknown to the agent.[44] In accordance with this doctrine a payment made to an agent after the death of the principal will not operate as a discharge even though made in actual ignorance of the principal's death,[45] and a purchase by an agent for his principal, made after the latter's death, but before the agent has notice thereof, is not binding upon the estate of the principal.[46]

As to third persons acting in good faith and in ignorance of the death of the principal the civil law makes an exception, and many of the cases and text writers have regarded the common-law rule as harsh and unjust,[47] and in view of this apparent hardship the common-law doctrine has been modified by stat-

37. Brown v. Skotland, 12 N. D. 445, 97 NW 543 (holding that, where a principal, after making application for a loan and appointing the lender's agent his attorney in fact to execute a note and mortgage, dies before the loan is completed, the power of the agent is thereby terminated and a note and mortgage executed by him thereafter are invalid).

38. Johnson v. Johnson, Wright (Oh.) 594; Davis v. Windsor Sav. Bank, 46 Vt. 728 (holding that authority to pay out bank deposits is revoked by the death of the principal, and that subsequent payments are at the expense of the bank).

[a] **Where a power of attorney to draw money on deposit** is not coupled with an interest, the attorney's authority ceases upon the death of his principal. Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 NYS 1045.

39. Nicolet v. Pillot, 24 Wend. (N. Y.) 240.

40. Durbrow v. Eppens, 65 N. J. L. 10, 46 A 582.

[a] **A contract by which a claimant employs an attorney to prosecute the claim,** and the attorney undertakes to prosecute the same, for a contingent fee, is more than a mere contract of agency, and is not terminated by the employer's death. Wylie v. Coxe, 15 How. (U. S.) 415, 14 L. ed. 753; Mecartney v. Carbine, 108 Ill. A. 282; Price v. Haeberle, 25 Mo. A. 201; Grapel v. Hodges, 112 N. Y. 419, 20 NE 542 [aff 49 Hun 107, 1 NYS 823]. But see Wainwright v. Massenburg, 129 N. C. 46, 39 SE 725.

[b] **If a contract for the operation of a stock farm is more than a mere contract of agency,** it is not terminated by the death of the employer; and where the contract does not involve the exercise of such a degree of discretion by the employer as to render personal performance by him essential, his personal representatives may carry it out; in this event the estate is liable to third persons on obligations incurred by the agent in pursuance of the contract. Lockart v. Forsythe, 49 Mo. A. 654.

41. Garrett v. Trabue, 82 Ala. 227, 3 S 149, 93 Ala. 173, 9 S 736 (holding that, where an agent sent an order by mail on the day before the death of the principal to a nonresident merchant with whom he had a general arrangement for goods to be supplied on orders during the year, and the merchant filled the order within a reasonable time in ignorance of the principal's death, the principal's estate was liable for the price, notwithstanding the order was not received by the merchant until after the principal's death, since the acceptance of the order related back to the time when the order was deposited in the mail by the agent).

42. Meinhardt v. Newman, 71 Nebr. 532, 99 NW 261 (holding that, where the administrator of a mortgagee accepted payments made by the mortgagor to the mortgagee's agent after the mortgagee's death and remitted receipts therefor to the agent who gave them to the mortgagor, the administrator was estopped to assert that a subsequent payment thus made to the agent and converted by him was not a good payment). And see Ish v. Crane, 8 Oh. St. 520, 13 Oh. St. 574. See also infra § 181.

43. See supra §§ 164, 165.

44. U. S.—Long v. Thayer, 150 U. S. 520, 14 SCt 189, 37 L. ed. 1167; Galt v. Galloway, 4 Pet. 332, 344, 7 L. ed. 876 (where the court said: "No principle is better settled, than that the powers of an agent cease, on the death of his principal. If an act of agency be done, subsequent to the decease of the principal, though his death be unknown to the agent, the act is void"); McClaskey v. Barr, 50 Fed. 712; Washington Bank v. Pierson, 2 F. Cas. No. 953, 2 Cranch C. C. 685.

Ala.—Moore v. Wallis, 18 Ala. 458.

Cal.—Ferris v. Irving, 28 Cal. 645; Travers v. Crane, 15 Cal. 12.

Fla.—Dallam v. Sanchez, 56 Fla. 779, 47 S 871.

Ill.—Rapp v. Phoenix Ins. Co., 118 Ill. 390, 55 AmR 427.

Iowa.—Royal Ins. Co. v. Davies, 40 Iowa 469, 20 AmR 581; Vance v. Anderson, 39 Iowa 426; Lewis v. Kerr, 17 Iowa 73.

Me.—Green v. Young, 8 Me. 14, 22 AmD 218; Harper v. Little, 2 Me. 14, 11 AmD 25.

Mass.—Burrill v. Smith, 7 Pick. 291.

Miss.—Clayton v. Merrett, 52 Miss. 353.

N. Y.—Farmers' L. & T. Co. v. Wilson, 139 N. Y. 284, 34 NE 784, 36 AmSR 696 [aff 64 Hun 194, 19 NYS 142]; Weber v. Bridgman, 113 N. Y. 600, 21 NE 985; Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 NYS 1045; Soltau v. Goodyear Vulcanite Co., 12 Misc. 131, 33 NYS 77. See however New York Bank v. Vanderhorst, 32 N. Y. 553.

Tenn.—Rigs v. Cage, 2 Humphr. 350, 37 AmD 559; Jenkins v. Atkins, 1 Humphr. 294, 34 AmD 648.

Tex.—Cleveland v. Williams, 29 Tex. 204, 94 AmD 274.

Vt.—Davis v. Windsor Sav. Bank, 46 Vt. 728; Michigan Ins. Co. v. Leavenworth, 30 Vt. 11; Michigan State Bank v. Leavenworth, 28 Vt. 209.

Eng.—Farrow v. Wilson, L. R. 4 C. P. 744; Blades v. Free, 9 B. & C. 167, 17 ECL 83, 109 Reprint 63; Campanari v. Woodburn, 15 C. B. 400, 80 ECL 400, 139 Reprint 480; Wallace v. Cook, 5 Esp. 117; Smout v. Ilbery, 12 L. J. Exch. 357; Houstoun v. Robertson, 6 Taunt. 448, 1 ECL 699, 128 Reprint 1109; Phillips v. Jones, 4 T. L. R. 401.

Ont.—Jacques v. Worthington, 7 Grant Ch. (U. C.) 192; McQuesten v. Thompson, 2 Grant Err. & App. (U. C.) 167.

[a] **"There is this well settled distinction** between a revocation of a power by act of the principal and a dissolution thereof by operation of law, as by the death of the principal, that in the former the power continues good until notice of revocation is given, but the instant the principal dies his estate vests in his heirs or devisees or creditors, and their rights cannot be divested or impaired by an act performed by the agent after the death of his principal. . . . Again, in a case where the act to be done by the agent must be done in the name of the principal, it must be done in his lifetime, and cannot be done after his death, for as the principal could himself do the act only in his lifetime, so must the agent be likewise limited." Vance v. Anderson, 39 Iowa 426, 431.

Liability of agent to third person for having acted without authority after unknown death of principal see infra § 481.

45. Long v. Thayer, 150 U. S. 520, 14 SCt 189, 37 L. ed. 1167; Clayton v. Merrett, 52 Miss. 353; Michigan Ins. Co. v. Leavenworth, 30 Vt. 11. Compare Glennan v. Rochester Trust, etc., Deposit Co., 209 N. Y. 12, 102 NE 527 [aff 152 App. Div. 316, 136 NYS 747] (payment of check by bank).

46. Rigs v. Cage, 2 Humphr. (Tenn.) 350, 37 AmD 559.

47. Cal.—Travers v. Crane, 15 Cal. 12.

Iowa.—Lewis v. Kerr, 17 Iowa 73.

Miss.—Clayton v. Merrett, 52 Miss. 353.

N. Y.—Farmers' L. & T. Co. v. Wilson, 139 N. Y. 284, 34 NE 784, 36 AmSR 696 [aff 64 Hun 194, 19 NYS 142, and foll Weber v. Bridgman, 113 N. Y. 600, 21 NE 985]; Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 NYS 1045.

Oh.—Ish v. Crane, 8 Oh. St. 520, 13 Oh. St. 574.

Tex.—Cleveland v. Williams, 29 Tex. 204, 94 AmD 274.

[a] **"By the civil law,** the acts of an agent done in good faith, in ignorance of the death of his principal, are binding upon his representatives. . . . In other words, by the civil law, death does not necessarily, and ipso facto, operate as a revocation of

ute in some jurisdictions in conformity to the civil-law rule.[48] In other jurisdictions it has been held that where the death of the principal is unknown acts of the agent are valid, if they need not have been done in the name of the principal.[49] But this distinction is a strained one, since, unless the power is coupled with an interest, the agent, whether he uses the principal's name or not, has no right to act except in that name. Accordingly it is a sounder position to justify an exception in favor of parties acting in ignorance of the principal's death on equitable grounds. Why should the principal's distributees, who receive property only by grace of the law, be given by that law a better position as to the property than would have been occupied by their principal himself, and for a purely technical and often inequitable reason? On this principle some courts lay down the broad rule that while the death of the principal works a technical revocation of the agency, yet as to third persons dealing with the agent in ignorance of such death the distributees take the estate with the same burdens that would have rested upon it in the principal's hands, and as to such persons the agency is not terminated by the death of the principal when such result would be inequitable.[50]

[§ 182] **cc. Where Authority Is Coupled with Interest.** As the principal if alive could not revoke the authority, so the death of the principal does not terminate the authority of the agent when he has a power coupled with an interest; an agent having such a power has an interest of his own in the subject matter and can act in his own name, even after the death of the principal;[51] unless the power is ex-

the agency, but the agency, like an express revocation, determines only from the time of notice." Lewis v. Kerr, 17 Iowa 73, 77 [reviewing and dist Cassiday v. McKenzie, 4 Watts & S. (Pa.) 282, 39 AmD 76].

[b] **Quasi guarantor of agent's acts.**—In Burrill v. Smith, 7 Pick. (Mass.) 291, 295, the court said: "The principle of the civil law, that acts done by an agent after the death of the principal, until his death is known, shall be valid, though not recognised by the common law, may at least furnish ground for the liability of any one who by his own act becomes quasi a guarantor of that contract."

48. See statutory provisions. See also Coney v. Sanders, 28 Ga. 511 (holding, however, that the statute declaring that sales of land made under powers shall be good if made before the agent has notice of the death of the constituent applies only to powers made outside of the state); Clayton v. Merrett, 52 Miss. 353.

[a] **In Maryland** it is provided that the dealings of an agent within the scope of his authority, subsequent to the principal's death, are valid in favor of parties having no notice. See Eichelberger v. Sifford, 27 Md. 320.

49. Dick v. Page, 17 Mo. 234, 57 AmD 267; Deweese v. Muff, 57 Nebr. 17, 20, 77 NW 361, 73 AmSR 488, 42 LRA 789 [appr Meinhardt v. Newman, 71 Nebr. 532, 99 NW 261] (where the court said: "Undoubtedly the rule is that the death of a principal instantly terminates the agency; but it by no means follows that all dealings with the agent thereafter are absolutely void. Where in good faith one deals with an agent within his apparent authority, in ignorance of the death of the principal, the heirs and representatives of the latter may be bound, in case the act to be done is not required to be performed in the name of the principal. There is a sharp conflict in the authorities on the question, but it is believed that the better reasoned cases sustain the proposition stated"); Ish v. Crane, 8 Oh. St. 520, 13 Oh. St. 574 [overr Easton v. Ellis, 1 Handy 70, 12 Ohio Dec. (Reprint) 32]; Lenz v. Brown, 41 Wis. 172. See also Moore v. Hall, 48 Mich. 143, 11 NW 844; Murdock v. Leath, 10 Heisk. (Tenn.) 166. Compare Vance v. Anderson, 39 Iowa 426; Lewis v. Kerr, 17 Iowa 73 and note page 78; Keyl v. Westerhaus, 42 Mo. A. 49.

[a] **Where a negotiable note, indorsed by the payee in blank,** is delivered to an agent for collection, the payment thereof by the maker in good faith to the agent while the note is in the possession of the latter, after the death of the principal, and without notice of his death, will discharge the debt. 57 Nebr. 17, 77 NW 361, 73 AmSR 488, 42 LRA 789.

50. Carriger v. Whittington, 26 Mo. 311, 72 AmD 212; Cassiday v. McKenzie, 4 Watts & S. (Pa.) 282, 39 AmD 76. And see Murdock v. Leath, 10 Heisk. (Tenn.) 166.

[a] **Doctrine criticized.**—In Clayton v. Merrett, 52 Misc. 353, 357, the court said: "There are several cases which seem to hold that although, as a general principle, death revokes an agency and renders null every act of the agent thereafter performed, yet that where a payment has been made in ignorance of the death, such payment will be good. The leading case so holding is that of Cassiday v. McKenzie, 4 Watts & S. (Pa.) 282, 39 AmD 76, where, in an elaborate opinion, this view is broadly announced. It is referred to, and seems to have been followed, in the case of Dick v. Page, 17 Mo. 234, 57 AmD 267; but in this latter case it appeared that the estate of the deceased principal had received the benefit of the money paid, and therefore the representative of the estate might well have been held to be estopped from suing for it again. . . . These cases, in so far, at least, as they announce the doctrine under discussion, are exceptional. The Pennsylvania Case, supra [Cassiday v. McKenzie, 4 Watts & S. 282, 39 AmD 76], is believed to stand almost, if not quite, alone in announcing the principle in its broadest scope." In Travers v. Crane, 15 Cal. 12, 17, speaking of Cassiday v. McKenzie, supra, and pointing out that the opinion, except so far as it related to the particular facts, was a mere dictum, Baldwin, J., said: "The opinion, therefore, of the learned Judge may be regarded more as an extrajudicial indication of his views on the general subject, than as the adjudication of the Court upon the point in question. But according all proper weight to this opinion, as the judgment of a Court of great respectability, it stands alone among common law authorities, and is opposed by an array too formidable to permit us to follow it."

51. U. S.—Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [rev 12 F. Cas. No. 6,898, 2 Mason 342]; Boone v. Clarke, 3 F. Cas. No. 1,641, 3 Cranch C. C. 389.

Ala.—Saltmarsh v. Smith, 32 Ala. 404.

Ark.—Moore v. Maxwell, 13 Ark. 469; Yeates v. Pryor, 11 Ark. 58.

Cal.—Norton v. Whitehead, 84 Cal. 263, 24 P 154, 18 AmSR 172; Frink v. Roe, 70 Cal. 296, 11 P 820; Travers v. Crane, 15 Cal. 12.

Conn.—Kellogg v. Williams, Kirby 316.

Ga.—Anderson v. Goodwin, 125 Ga. 663, 54 SE 679; Roland v. Coleman, 76 Ga. 652 [dist Miller v. McDonald, 72 Ga. 20; Lathrop v. Brown, 65 Ga. 312].

Ill.—Benneson v. Savage, 130 Ill. 352, 22 NE 838; Gilbert v. Holmes, 64 Ill. 548; Mecartney v. Carbine, 108 Ill. A. 282.

Ind.—Hawley v. Smith, 45 Ind. 183.

Me.—Merry v. Lynch, 68 Me. 94; Staples v. Bradbury, 8 Me. 181, 23 AmD 494.

Mass.—Middlesex Bank v. Minot, 4 Metc. 325.

Mich.—Weaver v. Richards, 144 Mich. 395, 108 NW 382, 6 LRANS 855; Kelly v. Bowerman, 113 Mich. 446, 71 NW 836; Moore v. Hall, 48 Mich. 143, 11 NW 844.

Miss.—Clayton v. Merrett, 52 Miss. 353.

Mo.—Shepard v. McNail, 122 Mo. A. 418, 99 SW 494; Lockhart v. Forsythe, 49 Mo. A. 654; Morgan v. Gibson, 42 Mo. A. 234.

Mont.—Muth v. Goddard, 28 Mont. 237, 72 P 621, 98 AmSR 553.

N. J.—Durbrow v. Eppens, 65 N. J. L. 10, 46 A 582.

N. Y.—Farmers' L. & T. Co. v. Wilson, 139 N. Y. 284, 34 NE 784, 36 AmSR 696 [aff 64 Hun 194, 19 NYS 142]; Grapel v. Hodges, 112 N. Y. 419, 20 NE 542; Glendening v. Western Union Tel. Co., 163 App. Div. 489, 148 NYS 552; Stephens v. Sessa, 50 App. Div. 547, 64 NYS 28; Hess v. Rau, 49 N. Y. Super. 324 [aff 95 N. Y. 359]; Bergen v. Bennett, 1 Cai. Cas. 1, 2 AmD 281; Knapp v. Alvord, 10 Paige 205, 40 AmD 241.

Okl.—Kimmell v. Powers, 19 Okl. 339, 91 P 687.

Pa.—Keys' Est., 137 Pa. 565, 20 A 710, 21 AmSR 896; Fisher v. New York, etc., R., etc., Co., 31 WklyNC 502; Droste's Est., 9 WklyNC 224. And see Wilson v. Stewart, 3 Phila. 51. See however Frederick's App., 52 Pa. 338, 91 AmD 159 (a case in terms to the contrary, but in which the power was not coupled with an interest).

Tex.—Cleveland v. Williams, 29 Tex. 204, 94 AmD 274; Carleton v. Hausler, 20 Tex. Civ. A. 275, 49 SW 118; Hennessee v. Johnson, 13 Tex. Civ. A. 530, 36 SW 774.

Eng.—Spooner v. Sandilands, 1 Y. & Coll. 390, 20 EngCh 390, 62 Reprint 939. See however Watson v. King, 1 Stark. 121, 2 ECL 54 (a case in terms to the contrary, but in which the power was not coupled with an interest in the subject matter of the agency).

See Rogers v. Clark Iron Co., 104 Minn. 198, 116 NW 739.

What constitutes agency coupled with an interest see generally supra §§ 155, 156.

[a] **Authority of an agent to collect** (1) the amount due on a benefit certificate and repay himself sums expended for the beneficiary is a power coupled with an interest, and therefore not revoked by the principal's death. Babrowsky v. U. S. Grand Lodge O. B. A., 129 App. Div. 695, 113 NYS 1080. (2) So also where one gives an agent authority to collect certain accounts and to retain from the amount collected a sum previously due the agent, the agency is coupled with an interest, and the agent is entitled to retain amounts collected after the death of the principal, although he also receives au-

pressly conditioned that the authority is to be executed within the principal's lifetime.[52] To preclude termination of the agency by the principal's death the agent's interest must be engrafted on an estate in the subject matter of the agency itself. An interest less than this, such as an agency made irrevocable for a consideration or an agency created as part of a security, although it might prevent the principal from revoking the authority during his lifetime, will not enable it to survive his death.[53]

Upon an indorsement and delivery of paper for the purpose of collection, as the legal title is passed to the agent, he may continue his authority notwithstanding the death of the principal.[54]

[§ 183] **(c) Death of Joint Principal.** The death of one of two or more joint principals generally terminates the agency,[55] but if they are joint and several principals the death of one does not revoke

thority to make the collections from the administrator of the principal. Shepard v. McNail, 122 Mo. A. 418, 99 SW 494.

[b] **Authority to collect the rents of certain properties devised,** and apply them in payment of the testator's indebtedness to the agent, couples to the agency an interest which prevents its revocation by the testator's death. Stephens v. Sessa, 50 App. Div. 547, 64 NYS 28.

[c] **An agreement contemporaneous with a contract of suretyship,** by which a surety authorizes renewals, is a power coupled with an interest which the death of the surety does not terminate. Lancaster v. Prussing, 139 Ill. A. 33 [aff 234 Ill. 462, 84 NE 1062].

[d] **Where a vendor places a deed for the land in the hands of the purchaser** to be delivered to the purchaser's assignee with directions to collect the purchase price of the assignee and expend it as directed, the right to make delivery of the deed is more than a naked power, and is not revoked by the death of the principal. Crowley v. McCambridge, 154 Ill. A. 135.

[e] **Power to sell collateral.**—Where a broker sells stock short for a customer, and in accordance with the usual custom borrows the stock for delivery, becoming himself obligated to return the borrowed stock, and borrowing from time to time as required to replace the stock previously borrowed, and while the transaction is so kept alive the customer dies, the broker has authority, acting in good faith, to continue it in the same manner until the appointment and qualification of a legal representative of the estate of the deceased, upon whom the proper notice can be served in order to close it. Hess v. Rau, 95 N. Y. 359.

52. Staples v. Bradbury, 8 Me. 181, 23 AmD 494.

53. U. S.—Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589 [rev 12 F. Cas. No. 6,898, 2 Mason 342]; Day v. Candee, 7 F. Cas. No. 3,676, 3 Fish. Pat. Cas. 9.

Ark.—Yeates v. Pryor, 11 Ark. 58.

Cal.—Parke v. Frank, 75 Cal. 364, 17 P 427; Frink v. Roe, 6 Cal. Unrep. Cas. 491, 7 P 481, 70 Cal. 296, 11 P 820. And see Travers v. Crane, 15 Cal. 12.

Fla.—McGriff v. Porter, 5 Fla. 373.

Ga.—Turman v. Winecoff, 138 Ga. 726, 75 SE 1131; Miller v. McDonald, 72 Ga. 20; Lathrop v. Brown, 65 Ga. 312.

Ind.—Hawley v. Smith, 45 Ind. 183 (holding that the death of the principal revokes an agency for the purchase of lands with the principal's money to be cared for by the agent who is to be compensated from any surplus from sales over the amount invested and interest thereon).

La.—Gordon v. Stubbs, 36 La. Ann. 625.

Mont.—Gardner v. Billings First Nat. Bank, 10 Mont. 149, 25 P 29, 10 LRA 45.

N. Y.—Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 43 NE 432; Farmers' L. & T. Co. v. Wilson, 139 N. Y. 284, 34 NE 784, 36 AmSR 696 [aff 64 Hun 194, 19 NYS 142]; Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 NYS 1045; Houghtaling v. Marvin, 7 Barb. 412.

N. C.—Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592 (holding that a power of attorney, not coupled with an interest, is revoked by the death of the donor, and that the interest which can protect it after the death of the donor must be an interest in the thing itself with respect to which the power is created; it is not enough that it be an interest in the proceeds of that thing, or that it be irrevocable during the life of the donor); Wainwright v. Massenburg, 129 N. C. 46, 39 SE 725 (holding that one claiming under a power of attorney to recover land whereby he is to have one half of what he recovers has not an interest coupled with the power which prevents death from terminating the agency).

Pa.—Shisler's Est., 2 Pa. Dist. 588; Fisher v. New York, etc., R. etc., Co., 31 WklyNC 502. And see Frederick's App., 52 Pa. 338, 91 AmD 159.

Vt.—Michigan Ins. Co. v. Leavenworth, 30 Vt. 11.

Eng.—Lepard v. Vernon, 2 Ves. & B. 51, 35 Reprint 237. And see Watson v. King, 1 Stark. 121, 2 ECL 54.

Compare Durbrow v. Eppens, 65 N. J. L. 10, 46 A 582 (holding that where a power of attorney forms part of a contract, and is security for money or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, and, if not so, is deemed irrevocable in law, and the power may be exercised at any time, and is not affected by the death of the person who created it).

[a] **Discussion of rule.**—"This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest,' it survives the person giving it, and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire, what is meant by the expression, 'a power coupled with an interest?' It is an interest in the subject on which the power is to be exercised? or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest,' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore, cannot, in accurate law language, be said to be 'coupled' with it. But the substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid, if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest, or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him, by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but he is a principal, acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle." Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 203, 5 L. ed. 589 [rev 12 F. Cas. No. 6,898, 2 Mason 342].

[b] **In order that a power of attorney shall survive the death of the principal** it must be given on consideration, and there must be vested in the donee some estate, right, or interest in its subject matter. Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 NYS 1045.

[c] **A power to sell all the property** of the estate of a deceased person belonging to the signers of the power, and to receive and distribute the proceeds, containing an express provision that it shall be irrevocable and survive them if any of the parties shall die, does not constitute a power coupled with an interest, and is therefore revoked by the death of certain of the grantors prior to the exercise of the power. Weaver v. Richards, 144 Mich. 395, 108 NW 382, 6 LRANS 855 and note.

[d] **Improvement and sale of property; reimbursement.**—A contract by which the owner of land empowers a corporation to expend money on the improvement of the property, to sell the property at prices satisfactory to the owner, and to reimburse itself out of the proceeds of the sale, and agrees, on behalf of himself, his heirs, executors, and assigns, to execute good and sufficient warranty deeds to the purchasers, and to pay the corporation commissions for the sales, but which is not joined in by the owner's wife, does not create a power coupled with an interest, such as to survive the death of the owner, or bind his representatives after his death. Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592.

54. Moore v. Hall, 48 Mich. 143, 11 NW 844; Boyd v. Corbitt, 37 Mich. 52.

55. Travers v. Crane, 15 Cal. 12; Johnson v. Wilcox, 25 Ind. 182; Marlett v. Jackman, 3 Allen (Mass.) 287; Weaver v. Richards, 144 Mich. 395, 108 NW 382, 6 LRANS 855. See also Long v. Thayer, 150 U. S. 520, 14 SCt 189, 37 L. ed. 1167. See however Martin v. Hunt, 1 Allen (Mass.) 418; Grapel v. Hodges, 112 N. Y. 419, 20 NE 542 [aff 49 Hun 107, 1 NYS 823] (both holding that a contract whereby an agent was to be employed was not terminated by the death of one of the joint employers).

[a] **Husband and wife as principals.**—(1) It has been held that a power by husband and wife as to the wife's separate estate is not a joint power so as to be affected by the

the agent's authority.[56]

An agency for a partnership, unless it is an agency coupled with an interest, has been held to be terminated by the death of one of the partners.[57]

[§ 184] **(2) Of Agent—(a) General Rule.** As an agency calls for personal services, ordinarily the agent's duties cannot be performed by his personal representatives, and in case of his death the agency is generally thereby terminated,[58] although the agency is for a specified time which has not yet expired.[59] Furthermore property of the agency, in the agent's hands at the time of his death, belongs, not to his personal representative, but to the principal,[60] and the latter may take possession of the same and replevy it from the agent's administrator.[61]

[§ 185] **(b) Exceptions and Limitations.** An agency is not terminated by the agent's death where the power is coupled with an interest; such a power may subsequently be exercised by his personal representative, at least so far as may be necessary to protect the interests of the estate of the agent.[62]

[§ 186] **(c) Death of Joint Agent.** A principal who appoints joint agents is presumed to do so because he desires their joint discretion.[63] The death therefore of one of several joint agents puts an end to the agency of all,[64] unless a prior or subsequent intention of the principal to the contrary appears.[65] However, a joint and several agency is not terminated by the death of one of the agents.[66]

[§ 187] **(d) Effect of Primary Agent's Death on Subagency.** If the authority of a subagent proceeds from the principal, it is not affected by the death of the agent who appointed him;[67] but where the subagent is a substitute for the agent and acts under authority from him the death of the agent in whose right he acts and to whom he is accountable terminates his authority, even though the power of substitution is given in the original power,[68] and where the subagent acts under joint agents the

husband's death, and that accordingly a power of attorney duly executed by husband and wife authorizing an attorney to convey the wife's separate estate is not revoked by the death of the husband. Skirvin v. O'Brien, 43 Tex. Civ. A. 1, 95 SW 696. (2) On the contrary it has been held that a power of attorney by husband and wife severally and respectively appointing an attorney to surrender the wife's customary tenement into the lord's hands is revoked by the death of the wife, and that a surrender subsequently made by the attorney is inoperative. Graham v. Jackson, 6 Q. B. 811, 51 ECL 811, 115 Reprint 306. See generally Husband and Wife [21 Cyc 1119].

Death of joint agent as terminating subagency see infra § 187.

56. Barton v. Barton, 52 Ind. A. 537, 100 NE 870; Wilson v. Stewart, 3 Phila. (Pa.) 51.

57. Griggs v. Swift, 82 Ga. 392, 9 SE 1062, 14 AmSR 176, 5 LRA 405; McNaughton v. Moore, 2 N. C. 189; Tasker v. Shepherd, 6 H. & N. 575. But see Clunas v. Gallagher, 6 La. Ann. 757 (where it was held that an action may be brought in his own name by an agent to whom as such a note is payable, although a member of the partnership whose agent he is has since died, where the partnership is still continued); New York Bank v. Vanderhorst, 32 N. Y. 553 (holding that the death of a partner does not absolutely put an end to the firm; hence where an agent of a firm duly authorized to draw checks on the bank deposits of the firm continued so to draw after the death of one of the partners, both bank and agent being ignorant of such death, the agent's authority continued in a qualified form, and as the surviving partner took no exception to the acts of the agent no one else could object). See generally Partnership [30 Cyc 334].

58. U. S.—Howe Sewing-Mach. Co. v. Rosensteel, 24 Fed. 583.

Ala.—Ryder v. Johnston, 45 S 181 (holding that, in the absence of proof of the special provisions of a power of attorney to convey land, it will be held a mere power which cannot be executed by the representative or heir of the attorney in fact).

Conn.—Bristol Sav. Bank v. Holley, 77 Conn. 225, 58 A 691.

Kan.—Hayner v. Trott, 4 Kan. A. 679, 46 P 37.

La.—Shiff v. Lesseps, 22 La. Ann. 185; Musson v. U. S. Bank, 6 Mart. 707.

Md.—Tyson v. George's Creek Coal, etc., Co., 115 Md. 564, 81 A 41 (holding that, where a decedent held property as agent of another, the agency was revoked upon his death, and hence the property would not pass to his administrator).

Mass.—Brown v. Cushman, 173 Mass. 368, 53 NE 860.

Mich.—Adriance v. Rutherford, 57 Mich. 170, 23 NW 718.

Miss.—Mills v. Union Cent. L. Ins. Co., 77 Miss. 327, 28 S 954, 78 AmSR 522.

Oh.—Johnson v. Johnson, Wright 594; Carll v. Little Miami R. Co., 32 Oh. Cir. Ct. 667.

Okl.—Kimmell v. Powers, 91 P 687.

Pa.—Merricks' Est., 8 Watts & S. 402.

S. C.—Bacon v. Sondley, 34 S. C. L. 542, 51 AmD 646; Charleston v. Duncan, 5 S. C. L. 386; Gage v. Allison, 3 S. C. L. 495, 2 AmD 682.

Tenn.—Jackson Ins. Co. v. Partee, 9 Heisk. 296.

See Hartford v. McGillicuddy, 103 Me. 224, 68 A 860, 16 LRANS 431; Tasker v. Shepherd, 6 H. & N. 575.

Termination of contracts by death of party see generally Contracts [9 Cyc 387]; Executors and Administrators [18 Cyc 239 et seq].

Death of agent as rendering principal absentee see Absentees [1 Cyc 203 note 2].

59. Mills v. Union Cent. L. Ins. Co., 77 Miss. 327, 28 S 954, 78 AmSR 522.

60. Adriance v. Rutherford, 57 Mich. 170, 23 NW 718. See also Executors and Administrators [18 Cyc 193].

[a] **The price of goods sold by an agent** (1) since deceased is payable, not to his administrator, but to the principal who consigned them to him. Merrick's Est., 8 Watts & S. (Pa.) 402; Whitecomb v. Jacob, 1 Salk. 160, 91 Reprint 149; Burdett v. Willett, 2 Vern. Ch. 638, 23 Reprint 1017. (2) If the administrator of the agent receives the fund, he receives it as the agent of the principal. Jackson Ins. Co. v. Partee, 9 Heisk. (Tenn.) 296.

61. Adriance v. Rutherford, 57 Mich. 170, 23 NW 718 (holding that, where a contract constituting a certain person an agent to sell machines manufactured by the other party provided that all machines not sold by a certain date might be returned, and that if not returned by a specified date they were to be treated as sold to the agent, and also provided that the contract might be canceled by the manufacturer whenever he should become dissatisfied with the agent, and that the manufacturer might then retake possession of machines remaining in the agent's possession, this meant dissatisfaction with the agent's services as agent; and that the agent's death meanwhile terminated the contract and the services, and gave the manufacturer the right to resume possession of such machines as were left undisposed of; and that he could replevy them from the agent's administrator).

62. Todd v. Guffin, (Ind. A.) 104 NE 519; Collins v. Hopkins, 7 Iowa 463; Kimmell v. Powers, (Okl.) 91 P 687; Lightner's App., 82 Pa. 301.

What constitutes power coupled with interest see supra §§ 155–156.

63. See infra §§ 317–319.

64. Ill.—Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180.

Ind.—Rowe v. Rand, 111 Ind. 206, 12 NE 377; Johnson v. Wilcox, 25 Ind. 182.

La.—Sample v. Lamb, 2 La. 275; Pechaud v. Peytavin, 4 Mart. 73.

N. Y.—Salisbury v. Brisbane, 61 N. Y. 617.

Tenn.—Gilman v. Kibler, 5 Humphr. 19.

[a] **Where a firm is appointed to an agency,** such agency ceases upon the death of one of the members of the firm, and the principal is not bound by the subsequent acts of a surviving member. Martine v. International L. Ins. Soc., 53 N. Y. 339, 13 AmR 529.

65. Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180; Davidson v. Provost, 35 Ill. A. 126 (holding that, where the owner of a building and the contractor recognize the surviving member of a firm of architects as superintendent and architect, the case is taken out of the rule that the death of one joint agent terminates the agency). See also Wilson v. Stewart, 3 Phila. (Pa.) 51.

[a] **Under the rule of the common law** that an act, done under authority given to two or more persons to do it, is valid to bind the principal only when all of them concur in doing it, where a commission vests power in two without words of survivorship, and one of them dies, unless there is a subsequent recognition by the principal of the survivor as agent, his acts will not bind the principal. Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180.

66. Davidson v. Provost, 35 Ill. A. 126.

[a] **Thus** it has been held that, where a power of attorney to convey, given to a firm of lawyers, authorizes either of them to act, a conveyance by one of them, after the other's death, to a purchaser who is put in possession and who pays the purchase money and makes improvements is valid, notwithstanding the attorney may have erroneously supposed that he was acting under a subsequent power, which in reality had not been given. Douglas v. Baker, 79 Tex. 499, 15 SW 801.

67. Smith v. White, 5 Dana (Ky.) 376.

68. Lehigh Coal, etc., Co. v. Mohr, 83 Pa. 228, 231, 24 AmR 161 (holding that, where an agent acted under a letter of attorney giving him general power to buy and sell stocks, etc., with a power of substitution under

death of one of them ordinarily terminates the authority of the subagent.[69]

[§ 188] **e. Dissolution of Partnership—(1) Partnership Principal.**[70] The dissolution of a partnership ordinarily works a revocation of the authority of an agent of the firm,[71] even though the agency is expressed to be for a fixed term, which has not expired when the partnership is dissolved;[72] but the successor to the firm may by its conduct justify the agent in relying on a continuance of the agency relation.[73]

[§ 189] **(2) Partnership Agent.**[74] Where a partnership is acting as agent its dissolution generally terminates the agency;[75] but a mere change in the firm name does not terminate an agency conferred upon the same persons under another name.[76]

[§ 190] **f. Insanity—(1) Of Principal—(a) In General.** As a general rule if the principal becomes insane or otherwise mentally incapacitated before the agent has performed his undertaking the agency is terminated or suspended by operation of law.[77] This rule applies where there has been an adjudication of insanity,[78] and according to some decisions such an adjudication is necessary to an application of the rule;[79] but by the weight of authority, if the insanity is known and is of such a character as to affect the principal's exercise of his will, no such adjudication is necessary.[80]

Extent of insanity. However, it is not every type of insanity that will terminate the agency; the insanity must be sufficient to disqualify the principal from making a valid contract, in order to effect a

which he substituted his son to act for him, the son's authority to act was revoked by the death of the father; and where it was said: "As we learn from the case of Peries v. Aycinena, 3 Watts & S. (Pa.) 64, where an attorney has created a substitute, the power of such substitute is necessarily withdrawn by the death of his principal; for the attorney being accountable for the acts of his substitute, since he appoints him, on his own responsibility, to do those things which he was authorized to do, it follows that, when his death occurs, the source of the substitutes power is cut off and fails. . . . That the substitution was provided for in the original delegation does not alter the rule; the only exception thereto being where, from the express terms, or from the nature of the power, an inference may arise that the principal intends the substitute shall act for him, notwithstanding the revocation of the authority of the original agent"); Jackson Ins. Co. v. Partee, 9 Heisk. (Tenn.) 296 (holding that, where the principal's goods are shipped by a factor to another market to be sold by a subagent, the death of the factor is a revocation of his authority).

69. Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180. Compare Wilson v. Stewart, 3 Phila. (Pa.) 51 (where one of three trustees died after having executed power to sell lands).

Death of joint agent as terminating agency see supra § 186.

Death of joint principal as terminating agency see supra § 183.

70. **Dissolution by death of partner** see supra § 183.

Effect of dissolution on power of partner as agent for firm see Partnership [30 Cyc 659].

71. Callanan v. Van Vleck, 36 Barb. (N. Y.) 624 [aff 41 N. Y. 619] (holding that authority given by a firm to an agent to advance money for the purchase of bills and notes will not, under ordinary circumstances, justify the agent in continuing those appropriations after a change in the firm by the admission of new partners); Schlater v. Winpenny, 75 Pa. 321; Salton v. New Beeston Cycle Co., [1900] 1 Ch. 43.

72. Tasker v. Shepherd, 6 H. & N. 575; Bovine v. Dent, 21 T. L. R. 82.

73. Caldwell v. Neil, 21 La. Ann. 342, 99 AmD 738; Callanan v. Van Vleck, 36 Barb. 324 [aff 41 N. Y. 619]; Pariente v. Lubbock, 8 De G. M. & G. 5, 57 EngCh 4, 44 Reprint 290 [aff 20 Beav. 588, 52 Reprint 731]. And see Schlater v. Winpenny, 75 Pa. 321.

74. **Dissolution as ground for revocation** of agency see supra § 160 note 4.

75. Angle v. Mississippi, etc., R. Co., 9 Iowa 487 (holding that authority to a firm to receive goods is not extended to a new firm formed after dissolution of the original one from a part of the members thereof); Wheaton v. Cadillac Auto. Co., 143 Mich. 21, 106 NW 399; Thomas v. Gwyn, 131 N. C. 460, 42 SE 904.

76. Billingsley v. Dawson, 27 Iowa 210 (holding that the confidence had been reposed in the individuals and was not presumed to be withdrawn by the change in the firm name); Larson v. Newman, 19 N. D. 153, 121 NW 202, 23 LRANS 849 and note.

77. U. S.—Bunce v. Gallagher, 4 F. Cas. No. 2,133, 5 Blatchf. 481.

Ind.—Chase v. Chase, 163 Ind. 178, 71 NE 485; Rowe v. Rand, 111 Ind. 206, 12 NE 377 (semble).

Me.—Hartford v. McGillicuddy, 103 Me. 224, 68 A 860, 16 LRANS 431 (semble).

Md.—Berry v. Skinner, 30 Md. 567.

N. H.—Davis v. Lane, 10 N. H. 156.

N. J.—Matthiessen, etc., Refining Co. v. McMahon, 38 N. J. L. 536; Blake v. Garwood, 42 N. J. Eq. 276, 10 A 874; Hill v. Day, 34 N. J. Eq. 150.

N. Y.—Merritt v. Merritt, 27 App. Div. 208, 50 NYS 604 [overr Wallis v. Manhattan Co., 2 Hall 532].

Tex.—Renfro v. Waco, (Civ. A.) 33 SW 766.

Vt.—Motley v. Head, 43 Vt. 633.

Eng.—Drew v. Nunn, 4 Q. B. D. 661.

[a] **Statement of and reason for rule.**—"Upon the constitution of an agent or attorney to act for another, where the authority is not coupled with an interest, and not irrevocable, there exists, at all times, a right of supervision in the principal, and power to terminate the authority of the agent at the pleasure of the principal. The law secures to the principal the right of judging how long he will be represented by the agent, and suffer him to act in his name. So long as, having the power, he does not exercise the will to revoke, the authority continues. When, then, an act of Providence deprives the principal of the power to exercise any judgment or will on the subject, the authority of the agent to act should thereby be suspended for the time being; otherwise the right of the agent would be continued beyond the period when all evidence that the principal chose to continue the authority had ceased; for after the principal was deprived of the power to exercise any will upon the subject, there could be no assent, or acquiescence, or evidence of any kind to show that he consented that the agency should continue to exist. And, moreover, a confirmed insanity would render wholly irrevocable an authority, which, by the original nature of its constitution, it was to be in the power of the principal at any time to revoke. . . . If, on the recovery of the principal, he manifests no will to terminate the authority, it may be considered as a mere suspension. And his assent to acts done during the suspension may be inferred from his forbearing to express dissent when they came to his knowledge." Davis v. Lane, 10 N. H. 156, 159.

[b] **Warrant of attorney to confess judgment not revoked.**—In Spencer v. Reynolds, 9 Pa. Co. 249, 250, it was held that the insanity of a principal did not revoke a warrant of attorney to confess judgment. The court said: "Lunacy will revoke any power of attorney that the principal might have revoked had he remained sane. It will not revoke what a sane principal could not revoke. A warrant of attorney to confess a judgment, as used in connection with notes in Pennsylvania, is not revocable. It is not a power coupled with an interest, but it is a power which has grown up under our common and statute law, which the defendant cannot, by any act of his, revoke. Here is a power conferred by a man in the full possession of his faculties. It is placed in the hands of the creditor, to be used by him at his pleasure. Why should the debtor's insanity do for him what he had no power to do if in the full possession of his mind? We can see no good reason for this, and the research of counsel has furnished no authority to sustain such a position." See also Judgments [23 Cyc 707].

Insanity of wife as terminating husband's agency for her see Husband and Wife [21 Cyc 1424].

78. Joost v. Racher, 148 Ill. A. 548. See also cases supra note 77.

79. Phelps v. Reinach, 38 La. Ann. 547. In Wallis v. Manhattan Co., 2 N. Y. Super. 495, it was held that the lunacy of a person who has executed a power of attorney does not operate to revoke it before the fact of his lunacy has been properly established by inquisition. This case, however, was overruled in Merritt v. Merritt, 27 App. Div. 208, 211, 50 NYS 604 (where the court said: "In spite of the decision in that case and the undoubted eminence of the judges by whom it was made, we are not satisfied that it is a correct statement of the law").

[a] **In Louisiana** (1) a power of attorney is revoked by the interdiction of the principal but continues in force until a judgment to that effect. The mandate does not expire by the principal's seclusion or voluntary retirement from social life, or by his confinement for treatment in an insane asylum. Phelps v. Reinach, 38 La. Ann. 547. (2) A mere application to have a principal adjudged insane does not revoke or in any way affect his power of attorney to an agent. Gernon v. Dubois, 23 La. Ann. 26.

80. Bunce v. Gallagher, 4 F. Cas. No. 2,133, 5 Blatchf. 481, 489 (where the court said: "Though it has been intimated that, before the authority of an agent can be suspended by the insanity of the principal, occurring after the execution of the power, the fact of lunacy must be established under an inquisition. Still, I apprehend that, whether the fact were formally established or not, the agent could not justify or support an act under the authority originally given, done after the agent had knowledge of the incapacity of his principal"); Merritt v. Merritt, 27 App. Div. 208, 50 NYS 604 (holding that, where the

revocation,[81] even though he has been adjudged insane and put under guardianship therefor.[82]

Revival of agency. The same reason that operates to suspend an agency during insanity effects its revival upon the restoration to sanity of the principal if he manifests no will to terminate the authority, and he may then, if he will, even assent to acts done by the agent during the suspension of the agency.[83]

[§ 191] **(b) Exceptions.** An exception to the above general rule that the insanity of the principal revokes or suspends the agency exists in favor of third persons to whom the agent has been held out as having authority, and who have dealt with him in reliance thereon without notice of the principal's insanity, where their rights would be prejudiced by a denial of the agent's continuing authority,[84] unless there has been a legal adjudication of insanity, upon which all are charged with notice of such incompetency.[85]

Power coupled with interest. Another exception to the general rule exists in the case of an agency in which the power is coupled with an interest in the subject matter thereof so that it can be exercised in the name of the agent himself. Such a power is not terminated by the principal's insanity.[86]

[§ 192] **(2) Of Agent.** Since a person who is insane or otherwise mentally incompetent is generally incapable in the first instance of becoming an agent,[87] it would seem to follow that the agency of one who was sane when appointed agent would ordinarily terminate or become suspended upon his subsequently becoming insane or otherwise mentally incapacitated.[88]

[§ 193] **g. Marriage[89]—(1) Of Principal.** The subsequent marriage of a man who has given a power of attorney terminates the agency so far as it may concern homestead interests acquired by the wife.[90] By the common law a married woman can have no agent, and accordingly the marriage of a feme sole instantly terminates the authority of her agents.[91] This rule applies even now where the execution of the agency would dispose of property or rights in which her husband acquires an interest.[92] This rule, however, no longer applies as to matters with ref-

fact of the principal's insanity is known both to the agent and to the party dealing with him, the contract entered into by the agent on behalf of his principal is not binding on the latter). See also cases supra note 77.

81. Motley v. Head, 43 Vt. 633; Drew v. Nunn, 4 Q. B. D. 661, 669 (where Brett, L. J., said: "I may remark that from the mere fact of mental derangement it ought not to be assumed that a person is incompetent to contract").

82. Motley v. Head, 43 Vt. 633, 639 (where the court said: "We are of the opinion that from adjudication that a person is insane it does not follow that the insanity is necessarily of that character which disqualifies that person from entering into a valid contract. Insanity is of almost every conceivable kind and type, from that which attaches itself to the mind when considering some particular subject, and at no other time, to that which drives a person headlong to self-destruction. From the adjudication we are unable to determine with which one of these various types of insanity the defendant was afflicted. . . . Because he was overmastered by a depraved appetite, it does not follow that his faculties of mind and his judgment were so far impaired that he was incapable of making a valid contract").

[a] **An inquisition or adjudication** simply makes a prima facie case. Hill v. Day, 34 N. J. Eq. 150.

[b] **"Where there is no reason to suspect fraud,** the test in this class of cases is, Did the person whose act is challenged possess sufficient mind to understand, in a reasonable manner, the nature and effect of the act he was doing, or the business he was transacting? He may be old, or enfeebled by disease, or irrational upon some topics, and yet possess sufficient mind to make a valid disposition of his property. In the absence of fraud or imposition, the only question the court is required to consider is, Did the person whose act is challenged clearly understand and comprehend what he was doing when he did it?" Hill v. Day, 34 N. J. Eq. 150, 153.

83. Davis v. Lane, 10 N. H. 156.

84. La.—Phelps v. Reinach, 38 La. Ann. 547.

N. H.—Davis v. Lane, 10 N. H. 156.

N. J.—Matthiessen, etc., Refining Co. v. McMahon, 38 N. J. L. 536; Hill v. Day, 34 N. J. Eq. 150.

N. Y.—Merritt v. Merritt, 43 App. Div. 68, 59 NYS 357.

Tex.—Renfro v. Waco, (Civ. A.) 33 SW 766 (holding, however, that this rule would not protect those to whom the principal had never held the representative out as agent).

Eng.—Drew v. Nunn, 4 Q. B. D. 661. And see Ex p. Bradbury, 4 Deac. 202; Beaufort v. Glynn, 1 Jur. N. S. 888 [aff 3 Wkly. Rep. 502].

[a] **"If the principal has enabled the agent to hold himself out as having authority,** by a written letter of attorney, or by a previous employment, and the incapacity of the principal is not known to those who deal with the agent, within the scope of the authority he appears to possess, the transactions may be held valid, and binding upon the principal. Such case forms an exception to the rule, and the principal and those claiming under him may be precluded from setting up his insanity as a revocation, because he had given the agent power to hold himself out as having authority, and because the other party had acted upon the faith of it, and in ignorance of any termination of it." Davis v. Lane, 10 N. H. 156, 160.

85. Bunce v. Gallagher, 4 F. Cas. No. 2,133, 5 Blatchf. 481; Phelps v. Reinach, 38 La. Ann. 547.

86. Davis v. Lane, 10 N. H. 156; Matthiessen, etc., Refining Co. v. McMahon, 38 N. J. L. 536; Hill v. Day, 34 N. J. Eq. 150.

[a] **Reason of rule.**—"The principle that insanity operates as a revocation cannot apply where the power is coupled with an interest, so that it can be exercised in the name of the agent; for such case does not presuppose any volition of the principal at the time, or require any act to be done in his name, and is not revoked by his death. Whether it is applicable to the case of a power which is part of a security, or executed for a valuable consideration, and thus is by its terms or nature irrevocable; and which seems to be regarded in England as a power coupled with an interest, (Gaussen v. Morton, 10 B. & C. 731, 21 ECL 309, 109 Reprint 622, 16 ERC 797; Watson v. King, 4 Campb. 272) may be a question of more doubt. Hunt v. Ennis, 12 F. Cas. No. 6,889, 2 Mason 244. Such a power could not be revoked by the principal, if his sanity was continued, (2 Livermore Agency 308) and any volition of his could not alter the case. Some of the reasons, therefore, which have been adverted to, would not exist in a case of that character. But a power of that kind is to be executed in the name of the principal; and it was held, in Hunt v. Ennis . . . that the death of the principal operates as a revocation of it, for the reason that after that event no act can be done in his name, as if he himself performed it. This reason would not exist where he was still living; and perhaps he and others might in such case be precluded from setting up his insanity in avoidance of the act, on the ground that he would have had no right to interfere, if sane, and had therefore no right to insist on his insanity as an objection." Davis v. Lane, 10 N. H. 156, 160.

87. See supra § 22.

88. Rowe v. Rand, 111 Ind. 206, 12 NE 377; Hartford v. McGillicuddy, 103 Me. 224, 68 A 860, 16 LRANS 431; Story Agency § 487.

[a] **Where one of two joint agents becomes incapacitated,** the business cannot be performed by the other alone without the consent of the principal, and the latter has the right to discontinue the agency. Salisbury v. Brisbane, 61 N. Y. 617.

89. See generally Husband and Wife [21 Cyc 1119].

Marriage as effecting revocation of warrant of attorney to confess judgment see Husband and Wife [21 Cyc 1575].

90. Henderson v. Ford, 46 Tex. 627. But see Joseph v. Fisher, 122 Ind. 399, 23 NE 856 (holding that, in the case of an agent appointed by a single man for the sale of land, the principal's marriage does not revoke the agent's authority to make a valid executory contract for the sale of the land).

91. McCan v. O'Ferrall, 8 Cl. & F. 30, 8 Reprint 12, West 593, 9 Reprint 611; Charnley v. Winstanley, 5 East 266, 102 Reprint 1072; Anonymus, W. Jones 388, 82 Reprint 203.

92. Dak.—Wambole v. Foot, 2 Dak. 1, 2 NW 239 (holding that if a woman gives a power of attorney to convey her land, and then marries, the marriage operates as a revocation of the power, at least as to all persons having knowledge of the marriage).

Ky.—Montague v. Carneal, 1 A. K. Marsh. 351.

La.—Reynolds v. Rowley, 4 La. Ann. 396 (holding that a power of attorney executed by a single woman, so far as it confers powers beyond the administration of a plantation belonging to her, with the management of which the agent was charged, will be revoked by her subsequent marriage); Reynolds v. Rowley, 3 Rob. 201, 38 AmD 233 (holding, however, that, although the power of an agent to manage an estate be revoked by the death of one joint owner and the marriage of another, yet if he continue to act for the joint owners without any express disavowal of his authority, or if it be subsequently recognized tacitly or expressly, they are bound by his acts).

Mo.—Brown v. Miller, 46 Mo. A. 1 (holding that the marriage of a woman revokes a prior agency of another to lease her lands).

Tex.—Judson v. Sierra, 22 Tex. 365;

erence to which a married woman's disability to act for herself has been removed by statute.[93]

Power coupled with interest. It has been held that when the agency is coupled with an interest the marriage of a feme sole will not revoke it.[94]

[§ 194] **(2) Of Agent.** Where a woman has been appointed as agent, her subsequent marriage does not of itself necessarily terminate the agency,[95] and in no event is her agency thus terminated where her power is coupled with an interest in the subject matter of the agency.[96]

[§ 195] **E. Operation and Effect—1. Before Execution of Agency, Total or Partial[97]—a. As between Principal and Agent.**[98] If, before the execution of the agent's undertaking either wholly or in part, the principal, acting within his power and right, revokes the authority,[99] or it expires by the terms of the contract of agency,[1] or terminates by operation of law,[2] the agent is deprived of power to act in behalf of the principal or his representatives. Accordingly by acting as such after the termination of his authority the agent acquires no rights against the principal or his representatives for compensation or reimbusement.[3] On the contrary by thus acting he subjects himself to liability to the principal or his representatives as for acting without authority,[4] and on termination of the agent's authority he may be required to return any money or property received by him from his principal for the purposes of the agency.[5] If, however, the agency is such that the principal has no power to revoke it,[6] or of such a nature that it does not cease by reason of the various changes affecting the subject matter or the parties which ordinarily terminate an agency by operation of law,[7] an attempted revocation by the principal, or the occurrence of such changes, is ordinarily without effect on the rights and liabilities of the parties.[8]

Where an agent is obliged to abandon his agency for a legitimate cause and he duly informs his principal, he is thenceforth released from the results and consequences of the management of the person who is substituted with the consent of the principal.[9]

[§ 196] **b. As between Principal and Third Persons.** Where, before the execution of an agency either wholly or in part, the principal, acting within his power and right, revokes the agent's authority,[10] or it expires by the terms of the contract of agency,[11] or terminates by operation of law,[12] the agent is deprived of power to act in behalf of the principal or his representatives. Accordingly subsequent acts of the agent are not as a rule binding on the principal or his representatives, and third persons who subsequently deal with the agent with notice of the cessation of his authority,[13] neither acquire any rights against the principal or his representatives, nor subject themselves to contractual liability by reason of such dealings.[14] If, however, the agency is such that the principal has no power to revoke it,[15] or of such a nature that it does not cease by reason of the various changes affecting the subject matter or the parties which ordinarily terminate an agency by operation of law,[16] an attempted revocation by the principal, or the occurrence of such changes, is ordinarily without effect on the rights and liabilities of the parties.[17]

Gilmer v. Veatch, 56 Tex. Civ. A. 511, 121 SW 545 (holding that, where a woman, after having executed a power of attorney to sell her interest in land and before a sale was made by the agent, married, the marriage revoked the power).

[a] **"The reason** that, as a general rule, marriage revokes powers of attorney previously given by the wife is, that the power of constituting an agent is founded on the right of the principal to do the business himself, and, when that right ceases, the right of constituting an agent must cease also." Reynolds v. Rowley, 2 La. Ann. 890, 893 [cit Story Agency 501].

93. Wambole v. Foot, 2 Dak. 1, 2 NW 239; Reynolds v. Rowley, 2 La. Ann. 890 (holding that, when marriage does not affect the right of the woman to deal with her property, it cannot have the effect to revoke an agency to deal with such property).

[a] **Where a married woman retains the right** to administer personally her paraphernal property without the assistance of her husband, her marriage will not revoke the powers of an agent who had been previously intrusted with its administration. Reynolds v. Rowley, 2 La. Ann. 890.

94. Eneu v. Clark, 2 Pa. 234, 44 AmD 191.

95. Story Agency § 485. See also Edgecomb v. Buckhout, 146 N. Y. 332, 40 NE 991, 28 LRA 816 (marriage of housekeeper).

96. Marder v. Lee, 3 Burr. 1469, 97 Reprint 932; Reignolds v. Davis, 12 Mod. 383, 88 Reprint 1395; Anonymous, 1 Salk. 117, 91 Reprint 109; Story Agency § 485.

97. **Liability of agent to third person** for acting after termination of agency see infra § 481.

98. **Liability of agent for wrongful renunciation** or abandonment of agency see supra § 170.

Liability of principal for wrongful revocation or repudiation of agency see supra §§ 157–161.

99. See supra §§ 151, 152; 157–161.

1. See supra § 150.

2. See supra §§ 172–194.

3. See infra §§ 419–426, 462.

4. McEwen v. Kerfoot, 87 Ill. 530. And see Bush v. Van Ness, 12 Vt. 83.

Liability of agent to principal's representatives for acting after principal's death see supra § 179.

5. Phillips v. Howell, 60 Ga. 411; Hartshorne v. Thomas, 43 N. J. Eq. 419, 10 A 843; Flaherty v. O'Connor, 24 R. I. 587, 54 A 376; Johnson v. Birkett, 21 Ont. L. 319, 16 OntWR 445.

6. See supra §§ 152–156.

7. See supra §§ 172–194.

8. See supra §§ 152–156; 172–194.

9. De la Pena v. Hidalgo, 16 Philippine 450.

10. See supra §§ 151, 152; 157–161.

11. See supra § 150.

12. See supra §§ 172–194.

13. **Notice:** Of revocation of agency as affecting rights and liabilities of third persons see supra §§ 165, 166. Of termination of agency by operation of law as affecting rights and liabilities of third persons see supra §§ 172–194.

14. U. S.—Glover v. Ames, 8 Fed. 351. See however Chapter Calvary Cathedral v. U. S., 29 Ct. Cl. 269; Weile v. U. S., 7 Ct. Cl. 535.

Ala.—Gunter v. Stuart, 87 Ala. 196, 6 S 266, 13 AmSR 21 (holding that after the relation of principal and agent has terminated the agent has no authority to do any act, state any account, or make any admission that would bind the principal).

Cal.—Alden v. Mayfield, 164 Cal. 6, 127 P 45; Van Dusen v. Star Quartz Min. Co., 36 Cal. 571, 95 AmD 209.

Colo.—Rundle v. Cutting, 18 Colo. 337, 32 P 994.

Fla.—Florida Cent., etc., R. Co. v. Ashmore, 43 Fla. 272, 32 S 832.

Ind.—Clark v. Mullenix, 11 Ind. 532; Taylor v. Jones, Smith 5 (holding that a direction by the maker of a note to the collecting agent to apply a payment to the note, after he has ceased to be agent, is not a payment of the note, although the money remains in the agent's hands unapplied).

Ky.—Chenault v. Quisenberry, 56 SW 410, 21 KyL 1771, 57 SW 234, 22 KyL 79 (holding that, where a power of attorney to convey land was revoked by a conveyance of the land by the principal to the agent as trustee and guardian of his son, a subsequent conveyance of the land by the agent under the power of attorney was void).

La.—Johnson v. Martin, 11 La. Ann. 27, 66 AmD 193; Reynolds v. Rowley, 4 La. Ann. 396 (holding that advances for the principal, made to one who had acted as an agent, but subsequently to the termination of his agency, cannot be recovered from the principal, unless shown to have inured to his benefit).

Me.—Jones v. Jones, 101 Me. 447, 64 A 815, 115 AmSR 328.

Mo.—Hill v. Seneca Bank, 100 Mo. A. 230, 73 SW 307.

N. Y.—Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 43 NE 432 (holding that an authority once given, if revoked before execution, is as a general rule, except where an element of estoppel intervenes, the same as to third persons as though it had never existed); Vail v. Judson, 4 E. D. Smith 165; Leiman v. Seely, 136 NYS 35.

Pa.—Barrett v. Bemelmans, 163 Pa. 122, 29 A 756; Schlater v. Winpenny, 75 Pa. 321.

Philippine.—Tin-Congco v. Trillana, 13 Philippine 194.

Vt.—Tucker v. Lawrence, 56 Vt. 467.

Eng.—Bell v. Balls, [1897] 1 Ch. 663; Venning v. Bray, 2 B. & S. 502, 110 ECL 502, 121 Reprint 1159; Wallace v. Cook, 5 Esp. 117.

Ont.—Vardon v. Vardon, 6 Ont. 719.

[a] **Partial revocation** relieves the principal pro tanto from liability for acts subsequently done under the previous authority. Glover v. Ames, 8 Fed. 351.

15. See supra §§ 152–156.

16. See supra §§ 172–194.

17. See supra §§ 152–156, 172–194.

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[§ 197] **2. After Execution of Agency, Total or Partial.**[18] Although the agency may otherwise be revocable, yet, if the agent has entered upon performance of his undertaking, the principal cannot revoke his authority without cause without compensating the agent for services rendered,[19] and reimbursing him for expenses or losses sustained,[20] and indemnifying him against liabilities incurred to third persons,[21] in thus partially executing his authority, as in such cases the absolute right of revocation does not exist.[22] As between the principal or his representatives and third persons who have dealt with the agent, the termination of the agent's authority does not affect the rights and liabilities of the parties as to authorized transactions already concluded.[23]

VII. AUTHORITY OF AGENT IN GENERAL

[§ 198] **A. Construction of Authority—1. In General.** The general rules for the interpretation and construction of contracts are applicable to contracts of agency.[24] In accordance with these rules, and as the relation of agency is founded on the intention of the principal, it is a cardinal rule of agency that every grant of authority should, if possible, be so construed as to give effect to the intention of the principal in creating the agency.[25] This rule is to be applied, however, subject to two considerations, namely: (1) This intention is to be determined from the legal effect, and not necessarily from the effect really supposed by the principal, of the language, conduct, or circumstances constituting the appointment.[26] (2) As a corollary of this, the authority will be so construed as to protect third persons dealing with the agent, provided the latter acted within the real or apparent scope of his authority, although contrary to the intention and privately expressed desires of the principal.[27] However, in the absence of proof to the contrary the power is to be exercised for the benefit of the principal about his private business, and presumably is limited to acts of the kind indicated by the appointment.[28] Within these limits the authority is to be fairly and liberally construed so as to effectuate

18. **Implied authority to complete transaction** undertaken before expiration of term of agency see supra § 150.

Liability of agent to principal for wrongful abandonment or renunciation see supra § 170.

Liability of principal to agent for wrongful revocation or repudiation see supra § 157.

19. See infra §§ 422–424.

20. See infra § 462.

21. See infra § 462.

22. U. S.—Sanborn v. Rodgers, 33 Fed. 851.

Ark.—White Sewing Mach. Co. v. Shaddock, 79 Ark. 220, 95 SW 143.

Colo.—Briggs v. Chamberlain, 47 Colo. 382, 107 P 1082, 135 AmSR 223.

Ky.—Shadwick v. Smith, 147 Ky. 159, 143 SW 1027.

Minn.—Deering Harvester Co. v. Hamilton, 80 Minn. 162, 83 NW 44.

N. Y.—Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 92, 43 NE 432 (where the court said: "In case of a naked power, the authority of the agent, derivative and not original, ceases when the principal, for whatever reason, withdraws the delegation and terminates the agency. There is a qualification of the rule where the agent has entered upon the execution of the authority before revocation, and has so bound himself that a retraction of the authority would subject him to liability. In such cases the principal cannot revoke the authority as to the part of the transaction remaining unexecuted, at least not without indemnifying the agent").

Eng.—Pooley v. Goodwin, 4 A. & E. 94, 31 ECL 60, 111 Reprint 722.

23. U. S.—Smith v. Sheeley, 12 Wall. 358, 20 L. ed. 430.

Ind.—Clark v. Mullenix, 11 Ind. 532.

N. Y.—Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 43 NE 432; Gelpcke v. Quentell, 74 N. Y. 599; Poel v. Brunswick-Balke-Collender Co., 159 App. Div. 365, 144 NYS 725 (holding that a letter by the principal, written after the contract is made, repudiating the agent's authority, is ineffectual).

Oh.—Wheeler v. Knaggs, 8 Oh. 169.

Wash.—Service v. Deming Inv. Co., 20 Wash. 668, 56 P 837 (holding that, where an agent received authority from defendant to find a purchaser for a farm at a fixed sum, plaintiffs agreed with him for the purchase of the farm at such sum, the principal was notified of the fact that purchasers had been found and informed who they were, and one hundred dollars was paid, under the express direction of defendant to the agent, to bind the bargain, which sum the agent was directed to remit to defendant, which he did, and the price was agreed upon and the action of the agent was fully ratified by subsequent letters between defendant and the agent, the authority given to the agent to make the sale could not be subsequently revoked, to the injury of the purchasers).

Eng.—Hodgson v. Anderson, 3 B. & C. 842, 10 ECL 379, 107 Reprint 945; Blasco v. Fletcher, 14 C. B. N. S. 147, 108 ECL 147, 143 Reprint 401.

Ont.—Williams v. Cobourg Town Trust, 23 U. C. Q. B. 330.

Partial execution of authority as precluding termination of agency by death of principal see supra § 180.

24. See generally Contracts [9 Cyc 577 et seq].

25. Halladay v. Underwood, 90 Ill. A. 130 (holding that every authority of an agent must find its ultimate source in some act or word of the principal indicative of his intention, and that where the authority is sought to be implied from the words or conduct of the principal its extent cannot exceed the necessary and legitimate effect of the words and conduct relied upon); Edwards v. Thomas, 66 Mo. 468; Muth v. Goddard, 28 Mont. 237, 72 P 621. See also supra §§ 1, 28.

26. Heath v. Stoddard, 91 Me. 499, 40 A 547. See also Toohey v. Comstock, 45 Mich. 603, 8 NW 564. And see supra §§ 8, 28.

27. Ind.—New Albany, etc., R. Co. v. Haskell, 11 Ind. 301; German-American Bldg. Assoc. v. Droge, 14 Ind. A. 691, 43 NE 475.

Iowa.—Elder v. Stuart, 85 Iowa 690, 52 NW 660.

Kan.—Ludlow-Saylor Wire Co. v. Fribley Hardware, etc., Co., 67 Kan. 710, 74 P 237.

La.—Mackey v. DeBlanc, 12 La. Ann. 377.

Md.—Gardner v. Lewis, 7 Gill 377.

Mass.—McNeil v. Boston Chamber of Commerce, 154 Mass. 277, 28 NE 245, 13 LRA 559.

Mich.—Havens v. Church, 104 Mich. 135, 62 NW 149; Hutchings v. Ladd, 16 Mich. 493.

Minn.—American Graphic Co. v. Minneapolis, etc., R. Co., 44 Minn. 93, 46 NW 143.

Mo.—Porter v. Woods, 138 Mo. 539, 39 SW 794; May v. Jarvis-Conklin Mortg. Trust Co., 138 Mo. 275, 39 SW 782; Wilson v. Missouri Pac. R. Co., 66 Mo. A. 388.

Nebr.—Harrison Nat. Bank v. Austin, 65 Nebr. 632, 91 NW 540; Faulkner v. Simms, 89 NW 171; Cheshire Provident Inst. v. Feusner, 63 Nebr. 682, 88 NW 849; Holt v. Schneider, 57 Nebr. 523, 77 NW 1086; Lebanon Sav. Bank v. Blanke, 2 Nebr. (Unoff.) 403, 89 NW 169; Harrison Nat. Bank v. Williams, 2 Nebr. (Unoff.) 400, 89 NW 245.

N. Y.—West Side Sav. Bank v. Newton, 76 N. Y. 616; Goodrich v. Thompson, 4 Rob. 75 [aff 44 N. Y. 324]; Mullin v Sire, 34 Misc. 540, 69 NYS 953; Standard Fertilizer Co v. Van Valkenburgh, 21 Misc. 559, 47 NYS 703.

Or.—Connell v. McLoughlin, 28 Or. 230, 42 P 218.

Tenn.—Nunnelly v. Goodwin, (Ch. A.) 39 SW 855.

Tex.—Patton-Worsham Drug Co. v. Stark, (Civ. A.) 89 SW 799; Porter v. Heath, 2 Tex. A. Civ. Cas. § 124.

Vt.—Keyes v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201.

Eng.—Davy v. Waller, 81 L. T. Rep. N. S. 107.

See also infra § 209.

28. U. S.—Thiel Detective Service Co. v. McClure, 142 Fed. 952, 74 CCA 122, 4 LRANS 843 and note.

Ala.—Birmingham Mineral R. Co. v. Tennessee Coal, etc., Co., 127 Ala. 137, 28 S 679.

Ark.—Welch v. McKenzie, 66 Ark. 251, 50 SW 505.

Colo.—Gates Iron Works v. Denver Engineering Works, 17 Colo. A. 15, 67 P 173.

Conn.—Chesebro v. Lockwood, 88 Conn. 219, 91 A 188.

Ill.—McClun v. McClun, 176 Ill. 376, 52 NE 928.

Iowa.—Drake v. Chicago, etc., R. Co., 70 Iowa 59, 29 NW 804.

Kan.—Union Pac. Town-Site Co. v. Page, 54 Kan. 363, 36 P 992.

Me.—Millay v. Whitney, 63 Me. 522.

Mass.—Fletcher v. Sibley, 124 Mass. 220.

Mo.—Grand Ave. Hotel Co. v. Friedman, 83 Mo. A. 491.

Nev.—Schlitz Brewing Co. v. Grimmon, 28 Nev. 235, 81 P 43.

N. Y.—Mechanics', etc., Bank v. Farmers', etc., Nat. Bank, 60 N. Y. 40; Gehl v. Bachmann-Bechtel Brewing Co., 156 App. Div. 51, 141 NYS 133.

Okl.—Wilson v. Wood, 10 Okl. 279, 61 P 1045.

Pa.—Thompson v. Sproul, 179 Pa. 266, 36 A 290; Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396; John C. Cochran Co. v. International Cream Separator Co., 20 LancLRev 12.

S. C.—Providence Mach. Co. v. Browning, 72 S. C. 424, 52 SE 117; State v. Isaacs, 28 S. C. L. 223.

Utah.—Moyle v. Salt Lake City Cong. Soc., 16 Utah 69, 50 P 806.

Va.—Engleby v. Harvey, 93 Va. 440, 25 SE 225.

Wash.—Gregory v. Loose, 19 Wash. 599, 54 P 33.

Eng.—Ex p. Snowball, L. R. 7 Ch. 534.

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and not defeat its design and object,[29] and if some of the powers conferred seem conflicting or repugnant, a construction should be found to give as nearly as possible full effect to every part of the authority granted.[30] The language, oral or written, used in clothing an agent with his authority should be given its ordinary and natural meaning in view of the principal's purpose, and not an unreasonable or strained construction, either to enlarge or restrict the agency;[31] and the authority is never to be extended by mere construction beyond that which is expressly given or which is necessary and proper to carry the authority so given into effect.[32]

[§ 199] **2. Construction of Letters or Powers of Attorney—a. In General.** In construing powers of attorney the usual rules of construction of written instruments apply,[33] in accordance with which a power of attorney, being a formal instrument, must be strictly construed according to the natural import of its language, and the authority conferred is not to be extended beyond that which is given in express terms, or which is necessary and proper to carry into effect that which is expressly given.[34] Powers of attorney are not subject to that liberal interpretation[35] which is given to less formal instruments, as letters of instruction, etc., in commercial

N. S.—McDonald v. Royal Ins. Co., 15 N. S. 428.

Ont.—King v. Rogers, 1 Ont. L. 69.

See also infra §§ 199, 216–223.

[a] **A general power** to buy property for the principal, or to make any contracts and do any other acts whatever which he could if personally present, by the common law, as well as by our law, must be construed to apply only to buying or contracting in connection with his ordinary business, and will not authorize the making of any contracts of an extraordinary character. Reynolds v. Rowley, 4 La. Ann. 396.

29. National Bank of Republic v. Old Town Bank, 112 Fed. 726, 50 CCA 443; Long v. Jennings, 137 Ala. 190, 33 S 857; Huntington v. Finch, 3 Oh. St. 445. See also infra § 199.

30. Cal.—Alcorn v. Buschke, 133 Cal. 655, 66 P 15; Golinsky v. Allison, 114 Cal. 458, 46 P 295.

Ind.—Robinson v. Nipp, 20 Ind. A. 156, 50 NE 408.

Kan.—Philadelphia Mortg., etc., Co. v. Hardesty, 68 Kan. 683, 75 P 1115.

Md.—Hawley Down-Draft Furnace Co. v. Hooper, 90 Md. 390, 45 A 456.

Mass.—Lewis v. Moore, 14 Gray 184.

Mich.—Stevenson v. Michigan Log Towing Co., 103 Mich. 412, 61 NW 536.

Minn.—Snell v. Weyerhauser, 71 Minn. 57, 73 NW 633.

N. Y.—Doubleday v. Kress, 50 N. Y. 410, 10 AmR 502; Wight v. Wood, 57 Barb. 471; Paris Hill Mfg. Co. v. Lyman, 13 NYSt 370 [aff 122 N. Y. 650 mem, 26 NE 753 mem].

Pa.—Dusar v. Perit, 4 Binn. 361.

S. C.—Peay v. Seigler, 48 S. C. 496, 26 SE 885, 59 AmSR 731.

Tex.—Halff v. O'Connor, 14 Tex. Civ. A. 191, 37 SW 238; Miller v. Sullivan, 14 Tex. Civ. A. 112, 33 SW 695, 35 SW 1084, 37 SW 778.

Eng.—Entwisle v. Dent, 1 Exch. 812.

31. Geiger v. Bolles, 1 Thomps. & C. (N. Y.) 129; Guarantee Title, etc., Co. v. Gillespie, 223 Pa. 377, 72 A 703; Sturt v. Mellish, 2 Atk. 610, 26 Reprint 765. See also infra § 199.

32. U. S.—Union Sulphur Co. v. Percy, 180 Fed. 1, 103 CCA 355 [rev 173 Fed. 534].

Ala.—Scarborough v. Reynolds, 12 Ala. 252.

Cal.—Blum v. Robertson, 24 Cal. 127; Johnston v. Wright, 6 Cal. 373.

Mass.—Wood v. Goodridge, 6 Cush. 117, 52 AmD 771.

Mich.—Penfold v. Warner, 96 Mich. 179, 55 NW 680, 35 AmSR 591 and note; Hammond v. Michigan State Bank, Walk. 214.

Minn.—Harris v. Johnston, 54 Minn. 177, 55 NW 970, 40 AmSR 312.

Pa.—Campbell v. Foster Home Assoc., 163 Pa. 609, 30 A 222, 43 AmSR 818, 26 LRA 117; MacDonald v. O'Neil, 21 Pa. Super. 364; Stokes v. Dewees, 11 Kulp 140 [aff 24 Pa. Super. 471].

Tex.—Gouldy v. Metcalf, 75 Tex. 455, 12 SW 830, 16 AmSR 912; Halff v. O'Connor, 14 Tex. Civ. A. 191, 37 SW 238; Rhine v. Blake, 1 Tex. A. Civ. Cas. § 1066.

Eng.—Bryant v. La Banque du Peuple, [1893] A. C. 170; Jacobs v. Morris, [1902] 1 Ch. 816 [aff [1901] 1 Ch. 261]; Howard v. Baillie, 2 H. Bl. 618, 126 Reprint 787.

33. Bissell v. Terry, 69 Ill. 184; White v. Furgeson, 29 Ind. A. 144, 64 NE 49. See generally Contracts [9 Cyc 577 et seq].

34. U. S.—Thiel Detective Service Co. v. McClure, 142 Fed. 952, 74 CCA 122, 4 LRANS 843 and note; Chauche v. Pare, 75 Fed. 283, 21 CCA 329; Bosseau v. O'Brien, 3 F. Cas. No. 1,667, 4 Biss. 395.

Ala.—Shackleford v. Kiser Co., 131 Ala. 224, 31 S 77; Cummins v. Beaumont, 68 Ala. 204.

Cal.—Alcorn v. Gieseke, 158 Cal. 396, 111 P 98; Golinsky v. Allison, 114 Cal. 458, 46 P 295; Blum v. Robertson, 24 Cal. 127; Dupont v. Wertheman, 10 Cal. 354; Davidson v. Dallas, 8 Cal. 227; Johnston v. Wright, 6 Cal. 373; Davis v. Trachsler, 3 Cal. A. 554, 86 P 610.

Ga.—White v. Young, 122 Ga. 830, 51 SE 28; Claflin v. Continental Jersey Works, 85 Ga. 27, 11 SE 721; Neal v. Patten, 40 Ga. 363.

Ida.—Spotswood v. Morris, 12 Ida. 360, 85 P 1094, 6 LRANS 665.

Ill.—Weber v. Powers, 213 Ill. 370, 72 NE 1070, 68 LRA 610 [rev 114 Ill. A. 411]; McClun v. McClun, 176 Ill. 376, 52 NE 928; Chase v. Dana, 44 Ill. 262; Simmons Hardware Co. v. Hargate, 122 Ill. A. 287; La Favorite Rubber Mfg. Co. v. Channon Co., 113 Ill. A. 491; Mayer v. Pick, 92 Ill. A. 189 [aff 192 Ill. 561, 61 NE 416, 85 AmSR 352].

Ind.—McClanahan v. Breeding, 172 Ind. 457, 88 NE 695.

Kan.—Philadelphia Mortg., etc., Co. v. Hardesty, 68 Kan. 683, 75 P 1115.

Ky.—U. S. Fidelity, etc., Co. v. McGinnis, 147 Ky. 781, 145 SW 1112; Dehart v. Wilson, 6 T. B. Mon. 577.

La.—Reynolds v. Rowley, 4 La. Ann. 396.

Md.—American Bonding Co. v. Ensey, 105 Md. 211, 65 A 921, 11 AnnCas 883.

Mass.—Wood v. Goodridge, 6 Cush. 117, 52 AmD 771.

Mich.—Kuite v. Lage, 152 Mich. 638, 116 NW 467, 125 AmSR 421.

Minn.—Tuman v. Pillsbury, 60 Minn. 520, 63 NW 104; Harris v. Johnston, 54 Minn. 177, 55 NW 970, 40 AmSR 312; Gilbert v. How, 45 Minn. 121, 47 NW 643, 22 AmSR 724 and note.

Mo.—Mechanics' Bank v. Schaumburg, 38 Mo. 228; Ashley v. Bird, 1 Mo. 640, 14 AmD 313.

N. Y.—Murr v. Western Assur. Co., 50 App. Div. 4, 64 NYS 12; Filley v. Gilman, 34 N. Y. Super. 339; Unterberg v. Elder, 72 Misc. 363, 130 NYS 166 [rev on other grounds 149 App. Div. 647, 134 NYS 242]; Ferreira v. Depew, 17 HowPr 418; Delafield v. Illinois, 2 Hill 159, 26 Wend. 192.

Or.—Marquam v. Ray, 65 Or. 41, 131 P 523; Security Sav. Bank v. Smith, 38 Or. 72, 62 P 794, 84 AmSR 756 and note; Coulter v. Portland Trust Co., 20 Or. 469, 26 P 565, 27 P 266.

Pa.—Union Trust Co. v. Means, 201 Pa. 374, 50 A 974; Wilson v. Wilson-Rogers Co., 181 Pa. 80, 37 A 117; Sweigart v. Frey, 8 Serg. & R. 299; Califf v. Towanda First Nat. Bank, 37 Pa. Super. 412; Stokes v. Dewees, 24 Pa. Super. 471 [aff 11 Kulp 140]; MacDonald v. O'Neil, 21 Pa. Super. 364; Needle's Est., 4 Pa. Dist. 762, 17 Pa. Co. 289.

Tenn.—Lumpkin v. Wilson, 5 Heisk. 555.

Tex.—Colvin v. Blanchard, 101 Tex. 231, 106 SW 323; Frost v. Erath Cattle Co., 81 Tex. 505, 17 SW 52, 26 AmSR 831; Skaggs v. Murchison, 63 Tex. 348; Williamson v. Davey, 52 Tex. Civ. A. 353, 114 SW 195; Teagarden v. Patten, 48 Tex. Civ. A. 571, 107 SW 909; Skirvin v. O'Brien, 43 Tex. Civ. A. 1, 95 SW 696; Morton v. Morris, 27 Tex. Civ. A. 262, 34 SW 94; Wells v. Heddenberg, 11 Tex. Civ. A. 3, 30 SW 702; Connor v. Parsons, (Civ. A.) 30 SW 83; Rhine v. Blake, 1 Tex. A. Civ. Cas. § 1066.

Va.—Bowles v. Rice, 107 Va. 51, 57 SE 575; Hotchkiss v. Middlekauf, 96 Va. 649, 32 SE 36, 43 LRA 806.

Wash.—Ross v. Kenwood Inv. Co., 73 Wash. 131, 131 P 649.

Wis.—Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316, 85 NW 1019, 84 AmSR 927; Long v. Fuller, 21 Wis. 121.

Eng.—In re Dowson, [1904] 2 Ch. 219; Coondoo v. Watson, 9 App. Cas. 561; Jenkins v. Gould, 3 Russ. 385, 3 EngCh 385, 38 Reprint 620.

Can.—Churchill v. McKay, 20 Can. S. C. 472; Taylor v. Wallbridge, 2 Can. S. C. 616.

Ont.—Rex v. Rogers, 1 Ont. L. 69.

Que.—La Banque du Peuple v. Bryant, 17 Que. L. 103; La Granda Hermanos y Ca. v. American Electrical, etc., Mfg. Co., 29 Que. Super. 444; Serré dit St. Jean v. Metropolitan Bank, 21 LCJur 207.

[a] **"Powers of attorney receive a strict interpretation,** and the authority is never extended by intendment, or construction, beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect, and that authority must be strictly pursued." Hackworth v. Hastings Industrial Co., 146 Ky. 387, 389, 142 SW 681 [quot Gilbert v. How, 45 Minn. 121, 122, 47 NW 643, 22 AmSR 724].

[b] **A power of attorney authorizing a person to represent a widow** and her interest in her late husband's estate, "with full power to do and perform all acts necessary to promote and protect her interest therein," delegates no authority to relinquish her rights of dower, or to estop her from claiming the same. Welch v. McKenzie, 66 Ark. 251, 50 SW 505.

[c] **Power giving interest.**—A power of attorney to clear the title and recover and take possession of land, and conveying to the holder of such power an interest in the land in consideration of such services, does not require the obligor to pay taxes or any other debt due by the obligee for which a lien on the land might exist, as a condition to the vesting of his interest. Garner v. Boyle, 34 Tex. Civ. A. 42, 77 SW 987 [aff 97 Tex. 460, 79 SW 1066].

35. U. S.—Hodge v. Combs, 1 Black 192, 17 L. ed. 157.

Mass.—Wood v. Goodridge, 6 Cush. 117, 52 AmD 771.

N. Y.—Craighead v. Peterson, 72 N. Y. 279, 28 AmR 150; Hubbard v. Elmer, 7 Wend. 446, 22 AmD 590.

transactions,[36] which are interpreted most strongly against the writer,[37] especially where they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations.[38]

Natural import of terms. The instrument must be construed according to the natural import of its terms, and where the meaning of the terms is obvious, such meaning is not by implication to be enlarged or restrained beyond what is expressed as indicated by the natural and ordinary meaning of the language used.[39] Thus a power to act with reference to the interests of the principal will not extend to interests of the principal jointly with others, and vice versa a power from joint principals confers on the agent no authority to deal with their separate interests.[40] So also alternative powers convey authority to do one or the other, but not both of the acts specified; and when one of the acts has been done the power is exhausted and the agent cannot then do the other.[41]

Purpose of parties. It is also important, in the construction of a power of attorney, that the design and object of the parties be kept in view, and the power should be read not only with reference to the language used, but also in the light of all the surrounding circumstances in order as nearly as possible to give effect to the evident intention of the principal, and so as to carry out rather than to defeat the purpose of the appointment;[42] and where

Pa.—Stokes v. Dewees, 11 Kulp 140 [aff 24 Pa. Super. 471].

Eng.—Attwood v. Munnings, 7 B. & C. 278, 14 ECL 130, 108 Reprint 727, 4 ERC 864.

36. La.—Miller v. New Orleans Canal, etc., Co., 8 Rob. 236.

Md.—American Bonding Co. v. Ensey, 105 Md. 211, 65 A 921.

N. Y.—Craighead v. Peterson, 72 N. Y. 279, 28 AmR 150.

Tex.—Merriman v. Fulton, 29 Tex. 97; Halff v. O'Connor, 14 Tex. Civ. A. 191, 37 SW 238.

Eng.—Pole v. Leask, 28 Beav. 562, 54 Reprint 481; Pariente v. Lubbock, 20 Beav. 588, 52 Reprint 731 [aff 8 De G. M. & G. 5, 57 EngCh 4, 44 Reprint 290]; Entwisle v. Dent, 1 Exch. 812; Ex p. Howell, 12 L. T. Rep. N. S. 785; Gillow v. Aberdare, 9 T. L. R. 12; Tallentire v. Ayre, 1 T. L. R. 143.

[a] **A power of attorney, and a letter written contemporaneously** by the principal to the agent inclosing the same, are to be considered as constituent parts of the same instrument, and are to receive the same construction as though embodied with one and the same paper; and, where in such case the agent was authorized by the letter to use the power of attorney to make a transfer of property only on certain terms, the power of the agent was strictly limited by such instructions, and he could not convey his principal's interest on other or different terms to one who had knowledge of such limitation. Mexican Nat. Coal, etc., Co. v. Frank, 154 Fed. 217.

37. Craighead v. Peterson, 72 N. Y. 279, 284, 28 AmR 150 (where the court, in speaking of the construction of powers of attorney, said: "[Such instruments] are not subject to that liberal interpretation which is given to less formal instruments, as letters of instruction, etc., in commercial transactions, which are interpreted most strongly against the writer, especially when they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations").

38. Fla.—Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349, 24 S 430.

Ind.—McClanahan v. Breeding, 172 Ind. 457, 88 NE 695.

Iowa.—Osborne v. Ringland, 122 Iowa 329, 98 NW 116; Minnesota Linseed Oil Co. v. Montague, 65 Iowa 67, 21 NW 184 (holding, that where instructions as to the manner in which money is to be disbursed by an agent are ambiguous, or fairly admit of more than one construction, that meaning is to be given them in which they were understood by the agent receiving them, and the principal must bear a loss caused by acting on that construction); Hopwood v. Corbin, 63 Iowa 218, 18 NW 911.

Mich.—Berry v. Haldeman, 111 Mich. 667, 70 NW 325.

N. Y.—Craighead v. Peterson, 72 N. Y. 279, 28 AmR 150.

See also infra § 201.

39. U. S.—Wright v. Ellison, 1 Wall. 16, 17 L. ed. 555; Very v. Levy, 13 How. 345, 14 L. ed. 173; Peckham v. Lyon, 19 F. Cas. No. 10,889, 4 McLean 45.

Ala.—Scarborough v. Reynolds, 12 Ala. 252.

Cal.—Johnston v. Wright, 6 Cal. 373.

Ill.—Wabash R. Co. v. Papin, 119 Ill. A. 99.

Ind.—McClanahan v. Breeding, 172 Ind. 457, 88 NE 695; White v. Furgeson, 29 Ind. A. 144, 64 NE 49.

Ky.—Hackworth v. Hastings Industrial Co., 146 Ky. 387, 142 SW 681; Indiana Road Mach. Co. v. Lebanon Carriage, etc., Co., 78 SW 861, 25 KyL 1763; Dugan v. Champion Coal, etc., Co., 105 Ky. 821, 49 SW 958, 20 KyL 1641.

Mass.—Butterick Pub. Co. v. Boynton, 191 Mass. 175, 77 NE 705; Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 NE 695.

Mich.—Penfold v. Warner, 96 Mich. 179, 55 NW 680, 35 AmSR 591 and note; Baker v. Baird, 79 Mich. 255, 44 NW 604; Post v. Springstead, 49 Mich. 90, 13 NW 370 (holding that a power of attorney which purports to specify the power conferred does not give the attorney the right to assign a mortgage held by his principal unless it expressly states that he may do so, and he certainly cannot assign it to himself).

Minn.—Finnegan v. Brown, 90 Minn. 396, 97 NW 144.

Mont.—Muth v. Goddard, 28 Mont. 237, 72 P 621, 98 AmSR 553.

N. Y.—Thompson v. Erie R. Co., 207 N. Y. 171, 100 NE 791 [rev 147 App. Div. 8, 131 NYS 627]; Porges v. U. S. Mortgage, etc., Co., 203 N. Y. 181, 96 NE 424; Hutchinson v. Root, 2 App. Div. 584, 38 NYS 16 [aff 158 N. Y. 681 mem, 52 NE 1124 mem].

Tex.—Wynne v. Parke, 89 Tex. 413, 34 SW 907.

Wis.—Omro First Nat. Bank v. Bean, 141 Wis. 476, 124 NW 656, 135 AmSR 50.

Eng.—Bryant v. La Banque du Peuple, [1893] A. C. 170; Hawksley v. Outram, [1892] 3 Ch. 359; Spain v. Machado, 4 Russ. 225, 4 EngCh 225, 38 Reprint 790.

"A power of attorney, like any other instrument, is to be construed according to the natural import of its language; and the authority which the principal has conferred upon his agent is not to be extended by implication beyond the natural and ordinary significance of the terms in which that authority has been given." Golinsky v. Allison, 114 Cal. 458, 459, 46 P 295.

[a] **The natural import of the language used is not to be restricted** by ambiguous or uncertain expressions in other parts of the power. Pariente v. Lubbock, 8 De G. M. & G. 5, 57 EngCh 4, 44 Reprint 290 [aff 20 Beav. 588, 52 Reprint 731].

[b] **Authority to act for the principal with reference to his own property** can carry no power to deal with property held by the principal in a representative capacity. Pipes' Succ., 26 La. Ann. 203.

40. Johnston v. Wright, 6 Cal. 373; Gilbert v. How, 45 Minn. 121, 47 NW 643, 22 AmSR 724 and note; Stainback v. Read, 11 Gratt. (52 Va.) 281, 62 AmD 648; Dodge v. Hopkins, 14 Wis. 630.

[a] **A more liberal rule has sometimes been applied** in cases where the power does not forbid a sale of the separate interests and the circumstances are such as reasonably to justify the inference that the principal intended the power to apply to his separate property. Holladay v. Daily, 19 Wall. (U. S.) 606, 22 L. ed. 187; Dolton v. Cain, 14 Wall. (U. S.) 472, 20 L. ed. 830.

41. Mitchell v. McLaren, (Tex. Civ. A.) 51 SW 269 (holding that a power of attorney reciting among other things, "and my said attorney is hereby empowered to locate any such certificate in my name, or sell and assign the same," does not authorize the agent to locate a government pension certificate and also to sell the land after such location).

42. U. S.—Runkle v. Burnham, 153 U. S. 216, 14 SCt 837, 38 L. ed. 694 [aff 40 Fed. 408]; Lyon v. Pollock, 99 U. S. 668, 25 L. ed. 265; Holladay v. Daily, 19 Wall. 606, 22 L. ed. 187; Le Roy v. Beard, 8 How. 451, 12 L. ed. 1151; Gratz v. Land, etc., Imp. Co., 82 Fed. 381, 27 CCA 305, 40 LRA 393; Peckham v. Lyon, 19 F. Cas. No. 10,889, 4 McLean 45.

Ala.—Brantley v. Southern L. Ins. Co., 53 Ala. 554.

Cal.—Adams v. Hopkins, 144 Cal. 19, 77 P 712; De Rutte v. Muldrow, 16 Cal. 505.

Colo.—Servant v. McCampbell, 46 Colo. 292, 104 P 394; Hagerman v. Bates, 24 Colo. 71, 49 P 139.

Conn.—Galvano Type Engraving Co. v. Jackson, 77 Conn. 564, 60 A 127.

Ill.—Hemstreet v. Burdick, 90 Ill. 444; Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180; Daniel Forbes Co. v. Leonard, 119 Ill. A. 629; Wabash R. Co. v. Papin, 119 Ill. A. 99.

Ind.—Atkinson v. Disher, 177 Ind. 665, 98 NE 807; McClanahan v. Breeding, 172 Ind. 457, 460, 88 NE 695 (where the court, in speaking of the construction of powers of attorney, said: "Their construction will be controlled by the language used, taken in connection with the intention of the donor and the object to be accomplished under the general doctrines of agency. The intention, not the letter, should control"); White v. Furgeson, 29 Ind. A. 144, 64 NE 49.

Iowa.—Gould v. Bowen, 26 Iowa 77.

Kan.—National Fence-Mach. Co. v. Highleyman, 71 Kan. 347, 80 P 568.

Ky.—Vanada v. Hopkins, 1 J. J. Marsh. 285, 19 AmD 92.

La.—De Gentile v. White Castle Lumber, etc., Co., 130 La. 705, 58 S 517; Gernon v. Dubois, 23 La. Ann. 26; Reynolds v. Rowley, 2 La. Ann. 890.

Me.—Mattocks v. Young, 66 Me. 459; Marr v. Given, 23 Me. 55, 39 AmD 600.

Md.—Posner v. Bayless, 59 Md. 56 (holding that the rule that the authority conferred by a power of attorney must be strictly pursued does not affect or supersede the general rule

the power relates to the subject matter of a statute or law, the statute or law enters into and becomes a part of it.[43]

The written power and the authority of the agent are not always coextensive, and the agent may have authority resting on the acts and dealings of the principal, but not contained in the written power, even under the most liberal rule of construction. In such case the power of attorney will not be construed as restricting the power of the agent to the matters therein specified, provided it is not exclusive and not inconsistent with the larger powers exercised by the agent.[44]

Restricted to individual business and use of principal. A power of attorney to act generally in the name and on behalf of the principal must, in the absence of anything showing a different intention, be construed as giving authority to act only in the separate individual business of the principal, and for his use.[45]

[§ 200] **b. General Terms or Words.** General terms or words in a power of attorney are to be construed consistently with the purpose or object to be accomplished,[46] and are restricted to the acts necessary to accomplish such purpose or object,[47] and in furtherance of the principal's business or interests.[48] Thus general words or terms in a power will not authorize the agent to make a contract of a different kind, or for a different purpose, or as to different property or business, from that specifically

that the intention of the party creating the power must prevail in its construction, and that such intention is to be ascertained from the language employed and the object to be accomplished).

Mich.—Graves v. Von Below, 160 Mich. 408, 125 NW 379.

Minn.—Sutton v. Baker, 91 Minn. 12, 97 NW 420; Carson v. Smith, 5 Minn. 78, 77 AmD 539. See also Michaud v. MacGregor, 61 Minn. 198, 63 NW 479.

Miss.—Routh v. Agricultural Bank, 20 Miss. 161.

Mo.—Lamy v. Burr, 36 Mo. 85, 88 AmD 135; Leavenworth First Nat. Bank v. Wright, 104 Mo. A. 242, 78 SW 686.

Mont.—Muth v. Goddard, 28 Mont. 237, 72 P 621, 98 AmSR 553.

Nev.—Maynard v. Mercer, 10 Nev. 33.

N. Y.—Porges v. U. S. Mortgage, etc., Co., 203 N. Y 181, 96 NE 424 [rev 135 App. Div. 484, 120 NYS 487]; Unterberg v. Elder, 149 App. Div. 647, 134 NYS 242; Taylor v. Harlow, 11 Barb. 232.

Or.—Curtze v. Iron Dyke Copper Min. Co., 46 Or. 601, 81 P 815; Security Sav. Bank v. Smith, 38 Or. 72, 62 P 794, 84 AmSR 756.

S. C.—Bryce v. Massey, 35 S. C. 127, 14 SE 768.

Tex.—Texas Loan Agency v. Miller, 94 Tex. 464, 61 SW 477; Wynne v. Parke, 89 Tex. 413, 34 SW 907; Smith v. Cantrel, 50 SW 1081; Donnan v. Adams, 30 Tex. Civ. A. 615, 617, 71 SW 580 (where it was said: "The authority conferred by [a written power] must be determined by the circumstances under which the power is given, the person to whom it is given, and all facts surrounding the parties at the time of the execution of the writing"); Miller v. Sullivan, 14 Tex. Civ. A. 112, 33 SW 695, 35 SW 1084, 37 SW 778.

Wash.—Ross v. Kenwood Inv. Co., 73 Wash. 131, 131 P 649.

W. Va.—Townshend v. Shaffer, 30 W. Va. 176, 3 SE 586 (holding that a power of attorney by the owner of land appointing the attorney to "protect all his interests in and title to the land" is sufficient authority for the attorney to redeem the land for the owner from the purchaser thereof at a sale for delinquent taxes).

Eng.—Jacobs v. Morris, [1902] 1 Ch. 816; Henley v. Soper, 8 B. & C. 16, 15 ECL 18, 108 Reprint 949; Perry v. Holl, 2 De G. F. & J. 38, 63 Eng Ch 30, 45 Reprint 536; Howard v. Baillie, 2 H. Bl. 618, 126 Reprint 737; Esdaile v. Lanoge, 4 L. J. Exch. Eq. 46.

Ont.—Auldjo v. McDougall, 3 U. C. Q. B. O. S. 199.

"The power of attorney, like any other contract, is to be construed according to the natural meaning of the words in view of the purpose of the agency and the needs to its fulfillment." Porges v. U. S. Mortgage, etc., Co., 203 N. Y. 181, 188, 96 NE 424.

"The instrument should be so construed as to effectuate the object, if it can be ascertained." McClanahan v. Breeding, 172 Ind. 457, 460, 461, 88 NE 695.

"They are to be restricted in their construction to the purposes they are intended to accomplish, according to their import and language, but not to the extent of defeating those purposes, and in case of doubt, are to be construed against the donor when third persons are interested; but strained construction should not be employed to defeat or embrace authority not intended." McClanahan v. Breeding, supra.

[a] **Where the language of a power of attorney means nothing if interpreted literally,** the intention of the parties is to be sought and effectuated, if possible, rather than allow the power to fail entirely. Com. v. Hawkins, 83 Ky. 246, 7 KyL 238.

[b] **Violating law.**—Where the agency is capable of being executed in a lawful manner, it is never to be extended by construction to acts prohibited by law, so as to render an innocent principal liable in a criminal action or prosecution. Clark v. Metropolitan Bank, 10 N. Y. Super. 241.

[c] **Evidence of intention.**—In order to arrive at the intention of the parties and to interpret the scope and meaning of the power, the court may receive evidence as to the relative positions of the parties, their obvious design as to the objects to be accomplished, and the nature of the business or transaction in which the principal was engaged, when the power of attorney relates to that. Brantley v. Southern L. Ins. Co., 53 Ala. 554; Maynard v. Mercer, 10 Nev. 33; Jasper v. Wilson, 14 N. M. 482, 490, 94 P 951, 23 LRANS 982 (where the court said: "The power conferred upon the agent in this case was an enlarged power and a power sufficient to enable him to make a binding contract of sale. This clearly appears from the circumstances in which the parties were situated, the terms employed in the letters and all the facts surrounding the transaction. The owner was a resident of Mexico, a long distance from the city of Albuquerque; she entrusted the subject matter of the amount to be paid for the property to the discretion of her agent; she requested him to do the best he could for her, to receive the money and to apply it to the payment of her debts. At the time she conferred the power, she intended to surrender all further dominion over the property and believed that she had clothed the agent with ample power, not only to contract for the sale of the property, but even to pass the title to the purchaser. Under such circumstances, the power conferred is an enlarged power and much beyond that ordinarily conferred upon a real estate broker, and is sufficient to authorize the agent to contract for the sale of the land").

[d] **Obvious mistake.**—A power of attorney authorizing an agent to sign a bail bond for the appearance of an accused at the "January term, 1894," which was dated Sept. 23, 1894, was held to authorize the execution of a bond for an appearance at the January term, 1895. Com. v. Perkins, 32 SW 134, 17 KyL 542.

43. McClanahan v. Breeding, 172 Ind. 457, 88 NE 695.

44. Philadelphia Trust, etc., Co. v. Philadelphia Seventh Nat. Bank, 6 Fed. 114 (holding that the course of dealing of the principal may justify a bank in taking from an agent negotiable paper as a pledge, although it has in its possession a written power of attorney not conferring upon the agent such authority if the power does not deny it). See also Howard v. Baillie, 2 H. Bl. 618, 126 Reprint 737.

45. Md.—Adams Express Co. v. Trego, 35 Md. 47.

Minn.—Harris v. Johnston, 54 Minn. 177, 55 NW 970, 40 AmSR 312.

Mo.—Mechanics' Bank v. Schaumburg, 38 Mo. 228.

N. Y.—Stainer v. Tysen, 3 Hill 279; North River Bank v. Aymar, 3 Hill 262.

Va.—Stainback v. Read, 11 Gratt. (52 Va.) 281, 62 AmD 648; Hewes v. Doddridge, 1 Rob. (40 Va.) 143.

See also supra § 198.

46. U. S.—Very v. Levy, 13 How. 345, 14 L. ed. 173.

Ala.—Brantley v. Southern L. Ins. Co., 53 Ala. 554.

Cal.—Blum v. Robertson, 24 Cal. 128.

Ga.—White v. Young, 122 Ga. 830, 51 SE 28.

Mass.—Wood v. Goodridge, 6 Cush. 117, 52 AmD 771.

Mont.—Muth v. Goddard, 28 Mont. 237, 72 P 621, 98 AmSR 553.

Wis.—Omro First Nat. Bank v. Bean, 141 Wis. 476, 124 NW 656, 135 AmSR 50.

[a] **Language, however general,** when used in connection with a particular subject matter, is presumed to be used in relation to that matter, and must be construed and limited accordingly. Reynolds v. Rowley, 4 La. Ann. 396.

47. Miller v. Sullivan, 14 Tex. Civ. A. 112, 33 SW 695, 35 SW 1084, 37 SW 778 (holding that a power authorizing an attorney to contract for grading a railway between stated points does not authorize a contract for the clearing of timber fifty feet on each side of the center line of the roadbed). See also Bryant v. La Banque du Peuple, [1893] A. C. 170; Jacobs v. Morris, [1902] 1 Ch. 816; Gardner v. Baillie, 6 T. R. 591, 101 Reprint 720.

48. U. S.—Hodge v. Combs, 1 Black 192, 17 L. ed. 157.

Ala.—Brantley v. Southern L. Ins. Co., 53 Ala. 554.

Mont.—Muth v. Goddard, 28 Mont. 237, 72 P 621, 98 AmSR 553.

N. C.—Williams v. Whiting, 92 N. C. 683 (holding that a power to act for another, however general its terms or wide its scope, cannot be enlarged into a power to pervert funds coming into the agent's hands).

Pa.—Kern's Est., 176 Pa. 373, 35 A 231.

Eng.—Hambro v. Burnand, [1903] 2 K. B. 399 [rev on other grounds [1904] 2 K. B. 10]; Attwood v. Munnings, 7 B. & C. 278, 14 ECL 130, 108

mentioned.[49]

Where particulars or special acts are authorized, and general words are also employed, such general words are limited in their application to the particular acts mentioned, and are not to be extended beyond what is necessary for accomplishing the particular acts for which the power is given;[50] and if the general and particular or special clauses seem to be inconsistent, the latter are not to be rejected as repugnant to the general grant of power, but are to be regarded as limitations on such general grant.[51] A principal may, however, make the power as broad as he will, and when he has used general language giving wide authority and not restricted by special terms, there is no reason why the courts should limit the authority more than the language and the general situation indicate that the principal himself has done.[52]

[§ 201] **c. Ambiguous Language.** Where the language granting the authority is ambiguous and capable of two constructions, it should be construed according to the usual course of dealing in such matters,[53] and that construction should be preferred if possible which would be most favorable to a third person dealing with the agent,[54] and which would uphold the agent's acts;[55] and if the language of the

Reprint 727, 4 ERC 364; Hogg v. Snaith, 1 Taunt. 347, 127 Reprint 867.

49. U. S.—Hennessy v. Bond, 77 Fed. 403, 23 CCA 203; Johnson v. Sukeley, 13 F. Cas. No. 7,414, 2 McLean 562.

Cal.—Treat v. De Celis, 41 Cal. 202.

Ill.—Torrence v. Shedd, 112 Ill. 466 (holding that a power of attorney giving the attorney full power and control over lands for the purpose of making leases and collecting rents, particularly the rent already due from a tenant in possession, does not empower the attorney to execute a contract to such tenant in the name of the principal, binding him to convey the premises to the tenant by deed or further assurances).

Ky.—Mitchell v. Sproul, 5 J. J. Marsh. 264.

La.—Dickson v. Morgan, 7 La. Ann. 490.

Me.—Calef v. Foster, 32 Me. 92 (holding that a power to execute contracts as to lands already sold does not authorize the attorney to make new contracts for the sale of other lands).

N. J.—Perry v. Smith, 29 N. J. L. 74.

N. Y.—Miller v. Magee, 2 NYS 156.

Or.—Williamson v. North Pac. Lumber Co., 42 Or. 153, 70 P 387, 532.

S. D.—Kirby v. Western Wheeled Scraper Co., 9 S. D. 623, 70 NW 1052.

Tex.—Brown v. Orange County, (Civ. A.) 88 SW 247.

[a] **Not authorized to engage in new business.**—(1) A general power of attorney authorizing an agent to represent the principal in all his interests in a given locality does not empower him to embark the principal in a new and different business. Campbell v. Hastings, 29 Ark. 512. (2) So a power of attorney given by a member of a firm engaged in real estate transactions to his partner to sign any instrument pertaining to the business will be construed as given to enable the latter to manage the affairs of the partnership, and does not authorize him to admit a new partner or to vary the terms of the partnership; nor can he bind the principal by an agreement that another shall have a share in transactions negotiated by him, the money for which should be furnished by the principal. Horne v. Ingraham, 125 Ill. 198, 16 NE 868. (3) And it has been held that a power of attorney "to buy and sell real estate and personal property, and to collect rents, money, and debts, and to do every act and thing necessarily pertaining thereto," and giving full power to do everything "necessary to be done in and about the premises" as fully as the principal, will not justify the attorney in taking possession of a tailoring establishment for a debt due his principal, and continuing to prosecute the business of a merchant tailor in the name of his principal. Mills v. Carnly, 14 N. Y. Super. 159.

50. U. S.—Hodge v. Combs, 1 Black 192, 17 L. ed. 157 (holding that a power of attorney making A, of Texas, the constituent's "general and special agent to do and transact all manner of business in which I may be interested there" does not, as between the principal and agent, authorize the latter to sell public stock and use the proceeds); Renwick v. Wheeler, 48 Fed. 431.

Ala.—Whelan v. McCreary, 64 Ala. 319; Brantley v. Southern L. Ins. Co., 53 Ala. 554; Scarborough v. Reynolds, 12 Ala. 252; Wood v. McCain, 7 Ala. 800, 42 AmD 612.

Cal.—Moore v. Gould, 151 Cal. 723, 91 P 616; Quay v. Presidio, etc., R. Co., 82 Cal. 1, 22 P 925; De Rutte v. Muldrow, 16 Cal. 505; Billings v. Morrow, 7 Cal. 171, 68 AmD 235; Washburn v. Alden, 5 Cal. 468.

Colo.—Smyth v. Lynch, 7 Colo. A. 383, 43 P 670 [rev on other grounds 25 Colo. 103, 54 P 634].

Dak.—Luke v. Griggs, 4 Dak. 287, 30 NW 170.

Fla.—St Augustine First Nat. Bank v. Kirby, 43 Fla. 376, 32 S 881.

Ga.—White v. Young, 122 Ga. 830, 51 SE 28 (holding, that a formal power of attorney is subject to strict construction, and that general terms therein will not be construed to extend the authority so as to add new and distinct powers different from the special powers expressly delegated); Born v. Simmons, 111 Ga. 869, 36 SE 956; Claflin v. Continental Jersey Works, 85 Ga. 27, 11 SE 721.

Ind.—Coquillard v. French, 19 Ind. 274.

Me.—Hazeltine v. Miller, 44 Me. 177.

Mass.—Wood v. Goodridge, 6 Cush. 117, 52 AmD 771.

Minn.—Rice v. Tavernier, 8 Minn. 214, 83 AmD 778.

Mo.—Ashley v. Bird, 1 Mo. 640, 14 AmD 313; Haynes v. Carpenter, 86 Mo. A. 30.

N. Y.—Craighead v. Peterson, 72 N. Y. 279, 28 AmR 150; Lahn v. Sullivan, 116 App. Div. 669, 101 NYS 920 [aff 192 N. Y. 591 mem, 85 NE 1111 mem]; Jacoby v. Payson, 91 Hun 480, 36 NYS 240; Lawrence v. Gebhard, 41 Barb. 575; Taylor v. Harlow, 11 Barb. 232; Geiger v. Bolles, 1 Thomps. & C. 129; Rossiter v. Rossiter, 8 Wend. 494, 24 AmD 62.

Oh.—Pollock v. Cohen, 32 Oh. St. 514.

Pa.—Califf v. Towanda First Nat. Bank, 37 Pa. Super. 412.

Tex.—Frost v. Erath Cattle Co., 81 Tex. 505, 17 SW 52, 26 AmSR 831; Gouldy v. Metcalf, 75 Tex. 455, 12 SW 830, 16 AmSR 912; Berry v. Harnage, 39 Tex. 638.

Va.—Hewes v. Doddridge, 1 Rob. (41 Va.) 143.

Wis.—Rountree v. Denson, 59 Wis. 522, 18 NW 518 (holding that, where a power of attorney is given for a particular purpose, general words therein are not to be construed at large, but merely as giving general powers for carrying into effect the special purpose for which the power is given); Gee v. Bolton, 47 Wis. 604; Chilton v. Williford, 2 Wis. 1, 60 AmD 399.

Eng.—Bryant v. La Banque du Peuple, [1893] A. C. 170; Harper v. Godsell, L. R. 5 Q. B. 422; Danby v. Coutts, 29 Ch. D. 500, 14 ERC 769; Murray v. East India Co., 5 B. & Ald. 204, 7 ECL 118, 106 Reprint 1167; Attwood v. Munnings, 7 B. & C. 278, 14 ECL 130, 108 Reprint 727, 4 ERC 364; Withington v. Herring, 5 Bing. 442, 15 ECL 661, 130 Reprint 1182; Perry v. Hoil, 2 De G. F. & J. 38, 63 EngCh 30, 45 Reprint 536; Esdaile v. Lanoge, 4 L. J. Exch. Eq. 46; Lewis v. Ramsdale, 55 L. T. Rep. N. S. 179.

Can.—Churchill v. McKay, 20 Can. S. C. 472.

N. B.—St. John v. Lockwood, 4 N. B. 443.

Ont.—Hamilton v. Holcomb, 13 U. C. C. P. 9.

Que.—Vigaud v. De Werthemer, 30 Que. Super. 229.

[a] **General words restricted by context.**—The meaning of general words in a power of attorney will be restricted by the context and construed accordingly. Coulter v. Portland Trust Co., 20 Or. 469, 26 P 565, 27 P 266; Gouldy v. Metcalf, 75 Tex. 455, 12 SW 830, 16 AmSR 912.

[b] **Duration of power.**—Where the operative part of a power of attorney contains no limitation on the duration of the power, but it is preceded by a recital that the principal is going abroad and is desirous of appointing agents to act for him during his absence, the recital controls the generality of the operative part of the instrument and limits the exercise of the power to the period of the principal's absence. Danby v. Coutts, 29 Ch. D. 500, 14 ERC 769.

51. Cal.—Alcorn v. Buschke, 132 Cal. 655, 66 P 15.

Fla.—St. Augustine First Nat. Bank v. Kirkby, 43 Fla. 376, 32 S 881 (holding that general powers contained in a power of attorney must be construed with reference to the special powers in connection with which the general authority is given, and that where a special power given therein as to a particular feature of the business is expressly limited, the limitation will control).

Kan.—Philadelphia Mortg., etc., Co. v. Hardesty, 68 Kan. 683, 75 P 1115.

Eng.—Danby v. Coutts, 29 Ch. D. 500, 14 ERC 769.

Ont.—Prince v. Lewis, 21 U. C. C. P. 63.

[a] **Specification limits general words.**—"If authority be vested in the agent in very general terms, but the instrument enumerates certain special objects and acts this specification will be regarded as a limitation upon the general words; and the authority will be confined to action within the scope of the enumerated objects, unless there be some phraseology in the instrument, or some peculiar circumstances, which impress a different purpose upon the instrument." Califf v. Towanda First Nat. Bank, 37 Pa. Super. 412, 419.

52. Hawksley v. Outram, [1892] 3 Ch. 359; Trickett v. Tomlinson, 13 C. B. N. S. 663, 106 ECL 663, 143 Reprint 263; Pariente v. Lubbock, 8 De G. M. & G. 5, 57 EngCh 4, 44 Reprint 290 [aff 20 Beav. 588, 52 Reprint 731]; Routh v. Macmillan, 2 H. & C. 750.

53. Pole v. Leask, 28 Beav. 562, 54 Reprint 481.

54. Osborne v. Ringland, 122 Iowa 329, 98 NW 116.

55. Muth v. Goddard, 28 Mont. 237, 72 P 621, 98 AmSR 558 (holding that where two constructions seem reasonable, one of which would uphold and the other invalidate the agent's

power will with reasonable attention bear the interpretation placed upon it in good faith by the agent and a third person, the principal will be bound,[56] although upon a more refined and critical examination the court might be of the opinion that a different construction would be more correct.[57] But where one of the constructions would enlarge the agent's powers, and the other restrain them to the language used, the latter should be followed.[58] While third persons will not be made to suffer for the principal's lack of clearness and precision, yet the authority is to be restricted to that which is given in terms under a reasonable construction of the language used, or which is reasonably necessary to the performance of the powers expressly given.[59]

[§ 202] **B. Nature and Extent of Authority[60]—1. General Rule.** It is fundamental in the law of agency that the power of every agent to bind his principal rests upon the authority conferred upon him by that principal, and this authority as to third persons consists of the powers intentionally conferred,[61] those incidental to or implied from the main powers conferred,[62] those which custom and usage have added to the main powers,[63] and those which the principal has caused, as by a previous course of dealing, persons dealing with the agent to believe that the principal has conferred,[64] as well as power, the exercise of which by the agent the principal is by his conduct estopped to deny,[65] or which he has subsequently approved and ratified.[66] Without this authority for which the principal himself, by act or conduct, has become responsible, the agent can bind only himself.[67] Ordinarily a third person cannot hold the principal if the agent acted without authority,[68] or outside the scope of the authority really or apparently possessed by such agent.[69] Conversely a party dealing with an agent who is acting within the scope of his authority is

acts, the former construction should if possible be preferred).

56. U. S.—Marsh v. Whitmore, 21 Wall. 178, 22 L. ed. 482; Very v. Levy, 13 How. 345, 14 L. ed. 173; Le Roy v. Beard, 8 How. 451, 12 L. ed. 1151; Courcier v. Ritter, 6 F. Cas. No. 3,282, 4 Wash. C. C. 549; Loraine v. Cartwright, 15 F. Cas. No. 8,500, 3 Wash. C. C. 151.

Cal.—Barber Asphalt Pav. Co. v. Bancroft, 167 Cal. 185, 138 P 742 (holding that, where a power authorized plaintiff's attorney to contract for the laying of "asphalt pavement" on a certain street, it authorized the execution of a contract for the laying of an "asphalt macadam pavement").

Ind.—Kirwan v. Van Camp Packing Co., 12 Ind. A. 1, 39 NE 536.

Iowa.—Minnesota Linseed Oil Co. v. Montague, 65 Iowa 67, 21 NW 184.

Mass.—Mann v. Laws, 117 Mass. 293.

N. Y.—Winne v. Niagara F. Ins. Co., 91 N. Y. 185; Evans v. Wrenn, 93 App. Div. 346, 88 N. Y. 617 [aff 181 N. Y. 566 mem, 74 NE 1117 mem]; Andrews v. Kneeland, 6 Cow. 354.

N. C.—Bessent v. Haris, 63 N. C. 542.

Tex.—Halff v. O'Connor, 14 Tex. Civ. A. 191, 37 SW 238.

Eng.—Ireland v. Livingston, L. R. 5 H. L. 395.

[a] **When instructions uncertain.**—If a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent bona fide adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the order to be read in another sense of which it is equally capable. Ireland v. Livingston, L. R. 5 H. L. 395 [aff L. R. 2 Q. B. 99].

57. Very v. Levy, 13 How. (U. S.) 345, 14 L. ed. 173; Le Roy v. Beard, 8 How. (U. S.) 451, 12 L. ed. 1151; De Tastett v. Crousillat, 7 F. Cas. No. 3,828, 2 Wash. C. C. 132. See also cases supra note 56.

[a] **Void for uncertainty.**—If the language used in a power of attorney is so vague and general that the court is unable to determine the powers conferred, it is void for uncertainty. Stafford v. Lick, 13 Cal. 240; Ashley v. Bird, 1 Mo. 640, 14 AmD 313. See also supra § 54.

58. Stokes v. Dewees, 11 Kulp (Pa.) 140 [aff 24 Pa. Super. 471].

59. Bissell v. Terry, 69 Ill. 184; Hackworth v. Hastings Industrial Co., 146 Ky. 387, 142 SW 681; Craighead v. Peterson, 72 N. Y. 279, 28 AmR 150.

60. Customs and usages as affecting the authority of an agent see Customs and Usages [12 Cyc 1071].

61. Law Reporting Co. v. Elwood Grain Co., 135 Mo. A. 10, 115 SW 475; Dodge v. Williams, 47 Pa. Super. 302; Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396. See also infra § 217.

Intention in general see supra § 28.

62. Law Reporting Co. v. Elwood Grain Co., 135 Mo. A. 10, 115 SW 475; Farmers', etc., Bank v. Butchers', etc., Bank, 16 N. Y. 125, 69 AmD 678; Moore v. Tickle, 14 N. C. 244; Dodge v. Williams, 47 Pa. Super. 302; Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396. See also supra §§ 32-41; infra §§ 218-220.

63. Law Reporting Co. v. Elwood Grain Co., 135 Mo. A. 10, 115 SW 475; Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396. See generally Customs and Usages [12 Cyc 1071].

64. U. S.—Stockton v. Watson, 101 Fed. 490, 42 CCA 211.

Cal.—Baker v. Brown, 82 Cal. 64, 22 P 879.

Ind.—Indiana, etc., R. Co. v. Adamson, 114 Ind. 282, 15 NE 5.

Me.—Trundy v. Farrar, 32 Me. 225.

Mo.—Baker v. Kansas City, etc., R. Co., 91 Mo. 152, 3 SW 486; Law Reporting Co. v. Elwood Grain Co., 135 Mo. A. 10, 115 SW 475; Haubelt v. Rea, etc., Mill Co., 77 Mo. A. 672.

N. Y.—Farmers', etc., Bank v. Butchers', etc., Bank, 16 N. Y. 125, 69 AmD 678; Cosmopolitan Range Co. v. Midland R. Terminal Co., 44 App. Div. 467, 60 NYS 973; Peche v. Sloane, 16 App. Div. 458, 45 NYS 37 [aff 163 N. Y. 578 mem, 57 NE 1119 mem]; New York Cent., etc., R. Co. v. Davis, 86 Hun 86, 34 NYS 206 [aff 158 N. Y. 674 mem, 52 NE 1125 mem]; Graves v. Miami Steamship Co., 29 Misc. 645, 61 NYS 115; Stiefel v. New York Novelty Co., 25 Misc. 221, 55 NYS 90; Briggs v. Kennett, 8 Misc. 264, 28 NYS 540 [aff 149 N. Y. 577 mem, 43 NE 986 mem].

Pa.—Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396.

Wash.—O'Daniel v. Streeby, 77 Wash. 414, 137 P 1025.

See also supra §§ 37-39, 70-74; infra §§ 211-215.

[a] **Two previous acts in the presence of the principal** do not raise an inference of authority. Fadner v. Hibler, 26 Ill. A. 639.

[b] **Being allowed to act in a single instance** gives no future authority. Jaquins v. Gilbert, (Kan.) 53 P 754.

65. See supra §§ 70-74.

66. Law Reporting Co. Elwood Grain Co., 135 Mo. A. 10, 115 SW 475. See also supra §§ 77-146.

67. Ala.—Hill v. Helton, 80 Ala. 528, 1 S 340. See also Gimon v. Terrell, 38 Ala. 208.

Ark.—American Sales Book Co. v. Whitaker, 100 Ark. 360, 140 SW 132, 37 LRANS 91 and note.

Colo.—Hale v. Goodell, 49 Colo. 95, 111 P 708 (holding that the authority of an agent must have its source in the intention of the principal expressly shown or shown by necessary implication from the facts); Lester v. Snyder, 12 Colo. A. 351, 55 P 613.

Ill.—Pease v. Trench, 197 Ill. 101, 64 NE 368 [aff 98 Ill. A. 24]; Boltz v. Huston, 23 Ill. A. 579.

Ind.—Lucas v. Rader, 29 Ind. A. 287, 64 NE 488.

Ky.—Palmer v. Grand Lodge K. P., 121 SW 678.

Minn.—Burchard v. Hull, 71 Minn. 430, 74 NW 163.

Mo.—Law Reporting Co. v. Elwood Grain Co., 135 Mo. A. 10, 115 SW 475.

N. Y.—Curtis v. Leavitt, 15 N. Y. 9.

Vt.—Briggs v. Taylor, 35 Vt. 57.

Eng.—Jacobs v. Morris, [1901] 1 Ch. 261 [aff [1902] 1 Ch. 816].

See also supra § 28.

[a] **Illustration.**—Where a letter is sent to a firm interested in the formation of a corporation, asking for information as to the corporation, which is outside of the firm business, but concerning which two partners are supposed to have peculiar knowledge, acquired as directors of the corporation, a letter containing representations stating the individual knowledge of the members of the firm, signed in the firm name by a stenographer employed by it, is not binding on the firm, for he cannot make representations as to the knowledge of the partners except in so far as they, or any one of them, authorizes him to do so and advises him of his or their knowledge. Thayer v. Schley, 137 App. Div. 166, 121 NYS 1064.

[b] **To bind the principal** on a contract made with the agent it is necessary to establish the existence of sufficient power in the agent to make the contract. Agricultural Ins. Co. v. Fritz, 61 N. J. L. 211, 39 A 910.

[c] **The consideration or inducement which moves an agent** to undertake to bind his principal does not enlarge his authority to bind such principal. Halladay v. Underwood, 90 Ill. A. 130.

68. Colo.—Saul v. Lapidus, 46 Colo. 538, 105 P 863; Sullivan v. Leer, 2 Colo. A. 141, 29 P 817.

Fla.—Atlantic Refinding Co. v. Leffingwell, 61 Fla. 101, 54 S 266, 34 LRANS 351 and note.

Ga.—Phœnix Ins. Co. v. Gray, 107 Ga. 110, 32 SE 948.

Ill.—White v. Pacific Coast Casualty Co., 178 Ill. A. 463.

La.—Campbell v. Nichols, 11 Rob. 16; Allen v. Hart, 10 Rob. 55.

Nebr.—Hartwig v. Gordon, 87 Nebr. 657, 56 NW 324.

N. Y.—Thayer v. Schley, 137 App. Div. 166, 121 NYS 1064.

N. D.—Plano Mfg. Co. v. Doyle, 17 N. D. 386, 116 NW 529, 17 LRANS 606.

Vt.—Hurlburt v. Kneeland, 32 Vt. 316.

Wash.—Brace v. Northern Pac. R. Co., 63 Wash. 417, 115 P 841, 38 LRANS 1135 and note; Holt Mfg. Co. v. Odenrider, 61 Wash. 555, 112 P 670.

Ont.—Moshier v. Keenan, 31 Ont. 658; Hays v. O'Connor, 21 U. C. Q. B. 251.

See also infra §§ 513, 515.

69. U. S.—Moores v. Citizens' Nat.

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regarded as dealing with the principal,[70] and all acts so performed by the agent are binding upon his principal;[71] but it must appear that the acts were done during the agency and were within the scope of the agent's authority,[72] for it is a general principle that the conduct of an agent binds his principal only when he acts within the limits of the power granted to him and with reference to the subject matter of the agency.[73]

When the principal directs that the agent shall contract only in writing it is of course the agent's duty so to do, and the principal will not be bound by oral contracts of the agent,[74] except where the directions were in the nature of secret or private instructions to the agent, in which case the third person cannot be affected thereby.[75]

[§ 203] **2. Knowledge or Notice of Extent of Authority—a. In General.** The principal will not be bound by an act of the agent in excess of his actual authority, within the above rule, where the third person has knowledge of the extent of the agent's authority,[76] or where the facts and circumstances of the case are such as to put him upon inquiry as to the authority and good faith of the agent,[77] as where a third person deals with an agent who is acting for himself as well as for his principal in the transaction,[78] as such a person is chargeable with a knowledge of such facts as a proper inquiry

Bank, 15 Fed. 141 [aff 111 U. S. 156, 4 SCt 345, 28 L. ed. 385].

Ala.—Patterson v. Neal, 135 Ala. 477, 33 S 39; Cummins v. Beaumont, 68 Ala. 204.

Ark.—Froug, etc., Co. v. Outcault Adv. Co., 168 SW 1075; Latham v. Ft. Smith First Nat. Bank, 92 Ark. 315, 122 SW 992; Nicklase v. Griffith, 59 Ark. 641, 26 SW 381; Russell v. Cady, 15 Ark. 540 (where A delivered a deed of land with a house thereon to the wife of B, which at A's request was not recorded, and B hired labor to be performed upon the house, saying that if A did not pay for it he would, and there was no evidence that A assented to the work or that B was his agent, and it was held that, from the terms of the contract, the laborers must have known that B had no authority to pledge the credit of A, and that as no act had been done from which an agency could be inferred A could not be held responsible).

Cal.—Davis v. Trachsler, 3 Cal. A. 554, 56 P 610.

Hawaii.—Nahaolelua v. Kaaahu, 10 Hawaii 18.

Iowa.—Ver Veer v. Malone, 134 Iowa 653, 112 NW 82.

Kan.—Bohart v. Oberne, 36 Kan. 284, 13 P 388.

Ky.—Louisville Fdy., etc., Co. v. Patterson, 93 SW 22, 29 KyL 349.

Mass.—Heath v. New Bedford Safe Deposit, etc., Co., 184 Mass. 481, 69 NE 215.

Mich.—Delta Lumber Co. v. Williams, 73 Mich. 86, 40 NW 940.

Miss.—Odd Fellows' Ben. Assoc. v. Smith, 101 Miss. 332, 58 S 100.

Mo.—Reinhart Grocery Co. v. Knuckles, 172 Mo. A. 627, 155 SW 1105.

Nebr.—Watt v. Davison, 82 Nebr. 712, 118 NW 562.

N. Y.—Reis v. Drug, etc., Club, 55 Misc. 276, 105 NYS 285; Sexsmith v. Siegel-Cooper Co., 88 NYS 925.

Or.—Baker v. Seaward, 63 Or. 350, 127 P 961.

Tex.—Gathright v. Pacific Express Co., 145 SW 1185; Booker-Jones Oil Co. v. National Refining Co., (Civ. A.) 132 SW 815; Galveston, etc., R. Co. v. Allen, 42 Tex. Civ. A. 576, 94 SW 417; Mann v. Dublin Cotton-Oil Co., 20 Tex. Civ. A. 678, 50 SW 190; Taylor Mfg. Co. v. Brown, (A.) 14 SW 1071. See also Nash v. Noble, (Civ. A.) 102 SW 736.

W. Va.—Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 SE 880; Cobb v. Glenn Bloom, etc., Co., 57 W. Va. 49, 49 SE 1005, 110 AmSR 734; Rosendorf v. Poling, 48 W. Va. 621, 37 SE 555.

Eng.—Daniel v. Adams, Ambl. 495, 27 Reprint 322.

Can.—Richards v. Nova Scotia Bank, 26 Can. S. C. 381 [aff 33 N. B. 412].

[a] **Where the agent is merely an overseer or superintendent** his principal is bound only by acts done within the scope of the agent's duties as such. Merrill v. Worthington, 155 Ala. 281, 46 S 477.

[b] **Authority to receive proposals.**—A principal is not liable on a contract made by his agent authorized only to receive proposals, where the contract has not been approved by the principal. Brandensteln v. Douglas, 105 Ga. 845, 32 SE 341.

[c] **An agent without authority to make an express contract** cannot be held to have authority to make an implied contract. Beach v. U. S., 226 U. S. 243, 33 SCt 6, 57 L. ed. 205.

70. Brandt v. Krogh, 14 Cal. A. 39, 111 P 275.

71. Beekman v. Sonntag Inv. Co., (Fla.) 64 S 948; Eagle F. Ins. Co. v. Lewallen, 56 Fla. 246, 47 S 947; Cooper v. Ratliff, (Ky.) 116 SW 748. See also infra §§ 211, 513, 514.

[a] **Acts of agent as acts of principal.**—(1) In law what is done by an agent within the scope of his agency is done by the principal. Nicklisson v. Holman, 17 Kan. 22. (2) But the maxim, Qui facit per alium, facit per se, applies only to an act in fact, and not impliedly, authorized. Wallace v. John A. Casey Co., 132 App. Div. 85, 116 NYS 394. (3) The acts of an authorized agent are the acts of his principal. McCubbin v. Graham, 4 Kan. 397.

72. Ill.—Terre Haute, etc., R. Co. v. Crews, 53 Ill. A. 50.

Mass.—Heath v. New Bedford Safe Deposit, etc., Co., 184 Mass. 481, 69 NE 215.

Mo.—Foley v. Boulware, 86 Mo. A. 674.

N. Y.—Maass v. Jarvis, 30 Misc. 687, 46 NYS 544.

Pa.—Hough v. Doyle, 4 Rawle 291.

Tex.—Taylor Mfg. Co. v. Brown, (A.) 14 SW 1071.

Utah.—Moyle v. Salt Lake City Cong. Soc., 16 Utah 69, 50 P 806.

73. Miss.—Goodloe v. Godley, 21 Miss. 233, 51 AmD 150; Wilcox v. Routh, 17 Miss. 476; Fortner v. Parham, 10 Miss. 151; Wilkins v. Commercial Bank, 7 Miss. 217.

Mo.—Mechanics' Bank v. Schaumburg, 38 Mo. 228.

N. Y.—Fisher v. Abeel, 66 Barb. 381, 44 HowPr 432.

Pa.—Hough v. Doyle, 4 Rawle 291.

Tex.—Taylor Mfg. Co. v. Brown, (A.) 14 SW 1071.

N. B.—Lombard v. Winslow, 3 N. B. 327.

[a] **A principal is presumed to have had notice,** actual or constructive, of all the doings of his agent within the actual or apparent scope of the agency, and to be bound thereby. Andrews v. Robertson, 111 Wis. 334, 87 NW 190, 87 AmSR 870, 54 LRA 673.

[b] **In the absence of facts putting a reasonably prudent man on inquiry,** a principal need not make any effort to discover whether an agent is doing unauthorized acts in his name, but may assume, until otherwise advised, that the agent is acting within the scope of his authority. Raven Red Ash Coal Co. v. Herron, 114 Va. 103, 75 SE 752.

74. Baring v. Peirce, 5 Watts & S. (Pa.) 548, 40 AmD 534.

75. See infra § 209.

76. See infra § 210.

77. U. S.—In re Selman Heating, etc., Co., 203 Fed. 777; Thurber v. Cecil Nat. Bank, 52 Fed. 513 [rev on other grounds 59 Fed. 913, 8 CCA 365].

Cal.—Hayes v. Campbell, 68 Cal. 148; Van Dusen v. Star Quartz Min. Co., 36 Cal. 571, 95 AmD 209.

Iowa.—Wolf v. Davenport, etc., R. Co., 93 Iowa 218, 61 NW 847.

Ky.—Renfrow v. Condor, 153 Ky. 701, 156 SW 385.

La.—Langlois v. Gragnon, 123 La. 453, 49 S 18, 22 LRANS 414; Allen v. Hart, 10 Rob. 55.

Mich.—Clark v. Haupt, 109 Mich. 212, 68 NW 231.

Miss.—Davis v. Henderson, 25 Miss. 549, 59 AmD 229.

Mo.—Mechanics' Bank v. Schamburg, 38 Mo. 228.

N. J.—Perry v. Smith, 29 N. J. L. 74.

N. Y.—Hule v. Allen, 87 Hun 516, 34 NYS 577 [aff 156 N. Y. 658 mem, 50 NE 1118 mem]; Jacoby v. Payson, 85 Hun 367, 32 NYS 1032; Schmidt v. Garfield Nat. Bank, 64 Hun 298, 19 NYS 252 [aff 138 N. Y. 631 mem, 33 NE 1084 mem]; Mull v. Ingalls, 30 Misc. 80, 62 NYS 830.

Oh.—Thomas Gibson Co. v. Carlisle, 3 OhS&CP 27, 1 OhNP 398.

Okl.—Federal Trust Co. v. Coyle, 34 Okl. 635, 126 P 800.

Tex.—Taylor Mfg. Co. v. Brown, 4 Tex. A. Civ. Cas. § 3.

Wis.—Pulto Powder Co. v. Cuba City State Bank, 153 Wis. 324, 141 NW 220; McKindly v. Dunham, 55 Wis. 515, 13 NW 485, 42 AmR 740 (holding that the words "agents not authorized to collect," stamped in large legible print on the face of a bill sent to the purchaser of goods, will be presumed to have been observed by such purchaser, and whether he saw them or not were notice to him not to pay to the agent to whom the purchaser gave the order for the goods).

Eng.—Alexander v. Mackenzie, 6 C. B. 766, 60 ECL 766, 136 Reprint 1449; Howard v. Braithwaite, 1 Ves. & B. 202, 35 Reprint 79.

See Luke v. Grigg, 4 Dak. 287, 30 NW 170.

See also infra § 515.

[a] **Sufficiency of notice of want of authority.**—Where an agent of an express company intrusts to another, in the office with him, but not in the employ of the express company, the transaction of its business, under his supervision and control, and without the knowledge of the company, and such employee of the agent goes out and solicits deposits of money with him in exchange for money orders of the company, and so receives money and issues such orders without requiring payment of the usual fees or charges upon such orders, and absconds with the money, the person making such deposit does it knowing that such issue of orders is beyond the powers of the agent for whom such employee professes to act, and he cannot recover from the company on the orders. Rohrbough v. U. S. Express Co., 50 W. Va. 148, 40 SE 398, 88 AmSR 849.

78. Moores v. Citizens' Nat. Bank, 15 Fed. 141 [rev on other grounds 104 U. S. 625, 26 L. ed. 870]; Langlois v. Gragnon, 123 La. 453, 49 S 18, 22 LRANS 414.

[a] **For example,** an agent cannot lawfully act for his principal and for himself in matters in which they have

as to the agent's powers would have revealed to him.[79]

[§ 204] **b. Duty of Third Person to Ascertain Authority—(1) General Rule.**[80] It follows from the above rules that, as a general rule every person who undertakes to deal with an alleged agent is, by the mere fact of the agency, put upon inquiry, and must discover at his peril that it is in its nature and extent sufficient to permit the agent to do the proposed act, and that its source can be traced to the will of the alleged principal,[81] particularly where he is dealing with an agent whose authority he knows to be specially limited, or where the circumstances are such as to put him upon inquiry as to the agent's authority, and every person dealing with an agent who is acting for himself as well as for his principal in such matters is put upon inquiry as to the authority and good faith of the agent. Moores v. Citizens' Nat. Bank, 15 Fed. 141 [rev on other grounds 104 U. S. 625, 26 L. ed. 870].

79. Jonathan Mills Mfg. Co. v. Whitehurst, 72 Fed. 496, 19 CCA 130; Cummins v. Beaumont, 68 Ala. 204; Ellis v. Horrman, 90 N. Y. 466; Leavens v. Thompson, 48 Hun 389, 1 NYS 18; Sinker v. Lemon, 1 Tex. A. Civ. 466]; Sinker v. Lemon, 1 Tex. A. Civ. Cas. § 290. See also infra § 210.

80. Presumption of continuance of authority as to third persons see infra §§ 650, 651.

81. U. S.—Wheeler v. Northwestern Sleigh Co., 39 Fed. 347; Rust v. Eaton, 24 Fed. 830; Moores v. Citizens' Nat. Bank, 15 Fed. 141 [rev on other grounds 104 U. S. 625, 26 L. ed. 870].

Ala.—Merrill v. Worthington, 155 Ala. 281, 46 S 477; La Fayette R. Co. v. Tucker, 124 Ala. 514, 27 S 447; Wheeler v. McGuire, 86 Ala. 398, 5 S 190, 2 LRA 808; Cummins v. Beaumont, 68 Ala. 204; Lawrence v. Randall, 47 Ala. 240; Powell v. Henry, 27 Ala. 612; Van Eppes v. Smith, 21 Ala. 317; Fisher v. Campbell, 9 Port. 210.

Ark.—Queen of Arkansas Ins. Co. v. Malone, 163 SW 771; U. S. Bedding Co. v. Andre, 105 Ark. 111, 150 SW 413, 41 LRANS 1019 and note; American Sales Book Co. v. Whitaker, 100 Ark. 360, 140 SW 132, 37 LRANS 91 and note; Wilson v. Shocklee, 94 Ark. 301, 126 SW 832; Latham v. Ft. Smith First Nat. Bank, 92 Ark. 315, 122 SW 992.

Cal.—MacDonald v. Cool, 134 Cal. 502, 66 P 727; Blum v. Robertson, 24 Cal. 127; Davidson v. Dallas, 8 Cal. 227; Robinson v. American Fish, etc., Co., 17 Cal. A. 212, 119 P 388; Davis v. Trachsler, 3 Cal. A. 554, 86 P 610.

Colo.—Gates Iron Works v. Denver Engineering Works, 17 Colo. A. 15, 67 P 173; McIntosh-Huntington Co. v. Rice, 13 Colo. A. 393, 58 P 358; Lester v. Snyder, 12 Colo. A. 351, 55 P 613.

D. C.—Philip Carey Co. v. Thyson, 39 App. 233.

Ga.—Baldwin Fertilizer Co. v. Thompson, 106 Ga. 480, 32 SE 591; Camp v. Southern Banking, etc., Co., 97 Ga. 582, 25 SE 362; Claflin v. Continental Jersey Works, 85 Ga. 27, 11 SE 721; Carter v. Pembroke Nat. Bank, 11 Ga. A. 479, 75 SE 824.

Ill.—Merchants' Nat. Bank v. Nichols, etc., Co., 223 Ill. 41, 79 NE 38, 7 LRANS 752 [aff 123 Ill. A. 430]; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 NE 136, 93 AmSR 113, 59 LRA 657 [rev 99 Ill. A. 108]; Blackmer v. Summit Coal, etc., Co., 187 Ill. 32, 58 NE 289; Fortune v. Stockton, 182 Ill. 454, 55 NE 367; Davidson v. Porter, 57 Ill. 300; Peabody v. Hoard, 46 Ill. 242; Henderson v. Gould, 149 Ill. A. 221; Rogers Grain Co. v. Tanton, 136 Ill. A. 533; Kuecks v. New Home Sewing Mach. Co., 123 Ill. A. 660; Schneider v. Lebanon Dairy, etc., Co., 73 Ill. A. 612.

Ind.—Johnson v. Harrison, 177 Ind. 240, 97 NE 930, 39 LRANS 1207; Metzger v. Huntington, 139 Ind. 501, 37 NE 1084, 39 NE 235; Coon v. Gurley, 49 Ind. 199; Reitz v. Martin, 12 Ind. 306, 74 AmD 215; Lucas v. Rader, 29 Ind. A. 287, 64 NE 488.

Iowa.—Albright v. Atchison, etc., R. Co., 137 Iowa 631, 115 NW 219; Blanding v. Davenport, etc., R. Co., 88 Iowa 225, 55 NW 81; Tidrick v. Rice, 13 Iowa 214.

Kan.—Sullivant v. Jahren, 71 Kan. 127, 79 P 1071; Wilcox v. Eadie, 65 Kan. 459, 70 P 338.

Ky.—Vanada v. Hopkins, 1 J. J. Marsh. 287, 19 AmD 92.

La.—Caffe v. Stubbs, 37 La. Ann. 656.

Md.—Brager v. Levy, 122 Md. 554, 90 A 102.

Mass.—Mussey v. Beecher, 3 Cush. 511.

Mich.—Reinforced Concrete Co. v. Boyes, 147 NW 577; Schofield v. Conley, 126 Mich. 712, 86 NW 129; Maxson v. Michigan Cent. R. Co., 117 Mich. 218, 75 NW 459; Busch v. Wilcox, 82 Mich. 336, 47 NW 328, 21 AmSR 563; Chase v. Buhl Iron Works, 55 Mich. 139, 20 NW 827; Hammond v. State Bank, Walk. 214.

Minn.—Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 447, 124 NW 236 [quot Cyc]; Trull v. Hammond, 71 Minn. 172, 73 NW 642; Ermentrout v. Girard F. & M. Ins. Co., 63 Minn. 305, 65 NW 635, 56 AmSR 481, 30 LRA 346.

Miss.—Busby v. Yazoo, etc., R. Co., 90 Miss. 13, 43 S 1; Dozier v. Freeman, 47 Miss. 647; Brown v. Johnson, 12 Sm. & M. 398, 51 AmD 118.

Mo.—Mathes v. Switzer Lumber Co., 173 Mo. A. 239, 247, 158 SW 729 [cit Cyc]; Hodkinson v. McNeal Mach. Co., 161 Mo. A. 87, 142 SW 457. See also Padley v. Neill, 134 Mo. 364, 35 SW 997.

Mont.—Moore v. Skyles, 33 Mont. 135, 82 P 799, 114 AmSR 801, 3 LRANS 136; Cornish v. Woolverton, 32 Mont. 456, 81 P 4, 108 AmSR 598; Helena Nat. Bank v. Rocky Mountain Tel. Co., 20 Mont. 379, 51 P 829, 63 AmSR 628; Dodge v. Birkenfeld, 20 Mont. 115, 49 P 590; Billings First Nat. Bank v. Hall, 8 Mont. 341, 20 P 638; Deer Lodge Bank v. Hope Min. Co., 3 Mont. 146, 35 AmR 458.

Nebr.—Fitzgerald v. Kimball Bros. Co., 76 Nebr. 236, 107 NW 227.

N. H.—Towle v. Leavitt, 23 N. H. 360, 55 AmD 195.

N. M.—Bank of Commerce v. Baird Min. Co., 13 N. M. 424, 85 P 970.

N. Y.—Porges v. U. S. Mortgage, etc., Co., 203 N. Y. 181, 96 NE 424 [rev 135 App. Div. 484, 120 NYS 487]; Miller v. Barnett, 158 App. Div. 862, 144 NYS 40; Everdell v. Carrington, 154 App. Div. 500, 139 NYS 119; Barron v. Brooklyn Heights R. Co., 150 App. Div. 845, 135 NYS 323; Commonwealth Trust Co. v. Young, 122 App. Div. 502, 107 NYS 555; Molloy v. Whitehall Portland Cement Co., 116 App. Div. 839, 102 NYS 363; Leinkauf v. Lombard, etc., Co., 12 App. Div. 302, 42 NYS 391; Brooks v. Mortimer, 10 App. Div. 518, 42 NYS 299; Schmidt v. Garfield Nat. Bank, 64 Hun 298, 19 NYS 252 [aff 138 N. Y. 631, 33 NE 1084]; Metropolitan Aluminum Mfg. Co. v. Lau, 61 Misc. 105, 112 NYS 1059; Miner v. Edison Electric Illum. Co., 22 Misc. 543, 50 NYS 218 [aff 26 Misc. 712, 56 NYS 801]; Buskirk v. Talcott, 96 NYS 714; Sexsmith v. Siegel-Cooper Co., 88 NYS 925; Williams v. Birbeck, Hoffm. 359.

N. C.—Wynn v. Grant, 81 SE 949; Johnson County Sav. Bank v. Scroggin Drug Co., 152 N. C. 142, 67 SE 253, 136 AmSR 821, 50 LRANS 581; Swindell v. Latham, 145 N. C. 144, 58 SE 1010, 122 AmSR 430; Morganton Bank v. Hay, 143 N. C. 326, 55 SE 811; Grubbs v. Ferguson, 136 N. C. 60, 48 SE 551; Ferguson v. Davis, etc., Bldg., etc., Co., 118 N. C. 946, 24 SE 710; Earp v. Richardson, 81 N. C. 5.

N. D.—Corey v. Hunter, 10 N. D. 5, 84 NW 570.

Oh.—Mahler-Wolf Produce Co. v. Meyer, 26 Oh. Cir. Ct. 165.

Or.—Baker v. Seaward, 63 Or. 350, 127 P 961; Reid v. Alaska Packing Co., 47 Or. 215, 83 P 139 (holding that one dealing with an agent of a corporation is bound at his peril to ascertain the extent of the agent's authority and is chargeable with knowledge thereof).

Pa.—Interstate Securities Co. v. Third Nat. Bank, 231 Pa. 422, 80 A 888; Dodge v. Williams, 47 Pa. Super. 302; Mynick v. Bickings, 30 Pa. Super. 401; Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396.

Philippine.—Strong v. Repide, 6 Philippine 680 [rev on other grounds 213 U. S. 419, 9 SCt 521, 53 L. ed. 853].

S. D.—Shull v. New Birdsall Co., 15 S. D. 8, 86 NW 654; Fargo v. Cravens, 9 S. D. 646, 70 NW 1053; Kirby v. Western Wheeled Scraper Co., 9 S. D. 623, 70 NW 1052; Ellis v. Wait, 4 S. D. 454, 57 NW 229.

Tenn.—Fabian Mfg. Co. v. Newman, 62 SW 218.

Tex.—Tompkins' Mach., etc., Co. v. Peter, 84 Tex. 627, 19 SW 860; Sackville v. Storey, (Civ. A.) 149 SW 239; Day v. Snyder Brokerage, etc., Co., (Civ. A.) 130 SW 716; Cameron v. Blackwell, 58 Tex. Civ. A. 414, 115 SW 856; Galveston, etc., R. Co. v. Allen, 42 Tex. Civ. A. 576, 94 SW 417; Baker, etc., Co. v. Kellett-Chatham Mach. Co., (Civ. A.) 84 SW 661; Morton v. Morris, 27 Tex. Civ. A. 262, 66 SW 94.

Wash.—O'Daniel v. Streeby, 77 Wash. 414, 137 P 1025; Brace v. Northern Pac. R. Co., 63 Wash. 417, 115 P 841, 38 LRANS 1135 and note.

W. Va.—Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 69 SE 845, AnnCas1912B 148 and note; Wheeling Ice, etc., Co. v. Conner, 61 W. Va. 111, 55 SE 982; Cobb v. Glenn Boom, etc., Co., 57 W. Va. 49, 49 SE 1005, 110 AmSR 734; Rosendorf v. Poling, 48 W. Va. 621, 37 SE 555; Wells v. Michigan Mut. L. Ins. Co., 41 W. Va. 131, 23 SE 527.

Wis.—Pluto Powder Co. v. Cuba City State Bank, 153 Wis. 324, 141 NW 220.

Wyo.—Brown v. Grady, 16 Wyo. 151, 92 P 622.

Eng.—Reid v. Rigby, [1894] 2 Q. B. 40; Chapleo v. Brunswick Permanent Bldg. Soc., 6 Q. B. D. 696, 2 ERC 366; Attwood v. Munnings, 7 B. & C. 278, 14 ECL 130, 108 Reprint 727, 4 ERC 364; Stein v. Cope, Cab. & E. 63. See also East India Co. v. Tritton, 3 B. & C. 280, 10 ECL 134, 107 Reprint 738.

Can.—Vigaud v. De Werthermer, 6 EastLR 173.

Man.—Bent v. Arrowhead, 18 Man. 632.

N. B.—Nova Scotia Bank v. Richards, 33 N. B. 412 [aff 26 Can. S. C. 381].

N. S.—Hickman v. Baker, 31 N. S. 208.

Que.—La Granda Hermanos y Ca. v. American Electrical, etc., Co., 29 Quebec Super. 444.

[a] **Statements of and reason for rule.**—(1) "There is a general rule that when one deals with an agent it behooves him to ascertain correctly the scope and extent of his authority to contract for and in behalf of his alleged principal, for under any other rule it is said every principal would be at the mercy of his agent however carefully he might limit his authority. The power of an agent is not unlimited unless in some way it either expressly or impliedly appears to be so, and the person who proposes to contract with him as agent for his principal should first inform himself where his authority stops or how far his commission goes, before he closes the bargain with him." Morganton Bank v. Hay, 143 N. C. 326, 330, 55 SE 811. (2) "The extent to which a principal shall authorize his agent is completely with-

cial,[82] or where it is his first transaction with the agent,[83] or the circumstances connected with the agency are such as should put him on inquiry,[84] as where it appears from the circumstances of the particular business that the interests of the agent and principal are necessarily adverse,[85] or that the authority is of an unusual, improbable, or extraordinary nature.[86] Such a person is to be regarded as dealing with the power before him, and must, at his peril, observe that the act done by the agent is legally identical with the act authorized by the power.[87]

Source of information. The person dealing with the agent should ascertain the extent of his authority from the principal,[88] or from some other person who will have a motive to tell the truth in the interests of the principal,[89] and he cannot rely upon the agent's statement or assumption of authority,[90] or

in his determination, and a party dealing with the agent must ascertain the scope and reach of the powers delegated to him and must abide by the consequences if he transcends them." Porges v. U. S. Mortgage, etc., Co., 203 N. Y. 181, 188, 96 NE 424. (3) "The attorney has only such authority as the principal has chosen to confer upon him, and one dealing with him must ascertain at his own risk whether his acts will bind the principal." Golinsky v. Allison, 114 Cal. 458, 460, 46 P 295.

[b] **The mere possession of an application for shares of stock and a promissory note,** signed by another person, should not, of itself, be taken as giving or implying authority to apply for shares on behalf of such person and to deliver the note on account thereof. The authority of the person possessing the instrument should be inquired into. Ottawa Dairy Co. v. Sorley, 34 Can. S. C. 508.

[c] **Where one deals with agents of a railroad company** he must learn the scope of their authority, or act at his own peril. Busby v. Yazoo, etc., R. Co., 90 Miss. 13, 43 S 1.

[d] **Limitations on the mode of contracting** must be observed as well as limitations upon the power to contract. Spalding v. Tucker, 51 SW 2, 21 KyL 233; Craycraft v. Selvage, 10 Bush (Ky.) 696.

82. See infra § 223.

83. Dodge v. Williams, 47 Pa. Super. 302; Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396 (holding that the doctrine that a person dealing with an agent is bound to ascertain the extent of the agent's authority is particularly applicable where the agent is dealt with for the first time. In subsequent dealings it may be assumed that the original authority continues in force and effect unless there is information to the contrary).

84. Robinson v. American Fish, etc., Co., 17 Cal. A. 212, 119 P 388. See also supra § 203.

[a] **Sufficiency of notice of limitation of authority.**—There is an implication that the powers of the local manager of a company are limited, and persons dealing with him out of the ordinary course of business are put upon notice. Breen v. Miehle Printing Press, etc., Co., 8 Pa. Dist. 151, 22 Pa. Co. 275.

[b] **The position of a salesman merely signifies a limited authority,** and one dealing with him is as a matter of law charged with notice thereof, so that before trusting to the authority he is bound to ascertain its extent. Metropolitan Aluminum Mfg. Co. v. Lau, 61 Misc. 105, 112 NYS 1059.

[c] **A person who purchases an overdue note** from an agent is bound to inquire as to the agent's authority. Earp v. Richardson, 81 N. C. 5.

85. Langlois v. Gragnon, 123 La. 453, 49 S 18, 22 LRANS 414 (holding that a third person dealing with an agent under such circumstances is chargeable with notice of his want of authority).

86. Friedman v. Kelly, 126 Mo. A. 279, 290, 102 SW 1066 (where the court said: "If the authority which the . . . salesman assumes to exercise in and about the consummation of the sale of such goods, is of such an unusual, improbable and extraordinary character as would be sufficient to place a reasonably prudent business man in dealing with him, upon his guard, the party so dealing will not be justified in disregarding his senses and overlooking the real situation, and thereafter seek to hold the principal, upon the theory of the agent's apparent authority. Under such circumstances, it is the duty of the party dealing with the agent to either refuse to close negotiations with him at all or first proceed to ascertain from the principal whether the true scope of his authority is such as will authorize the extraordinary and unusual contract proposed"). See also Leavens v. Pinkham, 164 Cal. 242, 128 P 399.

[a] **It is only when a proposed contract with the shipping agent of a carrier** is of an unusual and extraordinary character that the shipper is put on inquiry as to the agent's authority. Rudell v. Ogdensburg Transit Co., 117 Mich. 568, 76 NW 380, 44 LRA 415.

87. U. S.—The Floyd Acceptances, 7 Wall. 666, 19 L. ed. 169; Wheeler v. Northwestern Sleigh Co., 39 Fed. 347.

Ala.—Johnson v. Alabama Gas, etc., Mfg. Co., 90 Ala. 505, 8 S 101; Burks v. Hubbard, 69 Ala. 379; Herring v. Skaggs, 62 Ala. 180, 34 AmR 4; Powell v. Henry, 27 Ala. 612.

Fla.—Yates v. Yates, 24 Fla. 64, 3 S 821.

Ga.—Central of Georgia R. Co. v. Felton, 110 Ga. 597, 36 SE 93; Camp v. Southern Banking, etc., Co., 97 Ga. 582, 25 SE 362.

Ill.—Abrahams v. Weiller, 87 Ill. 179; Baxter v. Lamont, 60 Ill. 237; Theile v. Chicago Brick Co., 60 Ill. A. 559; Schilling v. Rosenheim, 30 Ill. A. 81; Garrels v. Morton, 26 Ill. A. 433; Boltz v. Huston, 23 Ill. A. 579.

Kan.—Bohart v. Oberne, 36 Kan. 284, 13 P 388.

Ky.—Blood v. Herring, 61 SW 273, 22 KyL 1725; Godshaw v. Struck, 109 Ky. 285, 58 SW 781, 22 KyL 820, 51 LRA 668.

La.—Chaffe v. Stubbs, 37 La. Ann. 656.

Me.—Bryant v. Moore, 26 Me. 84, 45 AmD 96.

Miss.—Busby v. Yazoo, etc., R. Co., 90 Miss. 13, 43 S 1.

Mo.—Kilpatrick v. Wiley, 197 Mo. 123, 95 SW 218; Friedman v. Kelly, 126 Mo. A. 279, 102 SW 1066.

Mont.—Schaeffer v. Mutual Benefit L. Ins. Co., 38 Mont. 459, 100 P 225.

Nebr.—Cram v. Sickel, 51 Nebr. 828, 71 NW 724, 66 AmSR 478.

N. J.—Dowden v. Cryder, 55 N. J. L. 329, 26 A 941; Milne v. Kleb, 44 N. J. Eq. 378, 14 A 646; National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331.

N. M.—Bank of Commerce v. Baird Min. Co., 13 N. M. 424, 85 P 970.

N. Y.—Craighead v. Peterson, 72 N. Y. 279, 28 AmR 150; Metropolitan Aluminum Mfg. Co. v. Lau, 61 Misc. 105, 112 NYS 1059; Joseph v. Struller, 25 Misc. 173, 54 NYS 162.

Or.—Coulter v. Portland Trust Co., 20 Or. 469, 26 P 565, 27 P 266; Foster v. Virtue, 17 Or. 607, 22 P 113.

Pa.—Weise's App., 72 Pa. 351; Baring v. Pierce, 5 Watts & S. 548, 40 AmD 534; Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. 285.

S. C.—Mars v. Mars, 27 S. C. 132, 3 SE 60.

S. D.—Shull v. New Birdsall Co., 15 S. D. 8, 86 NW 654.

Vt.—Brown v. West, 69 Vt. 440, 38 A 87; Stewart v. Woodward, 50 Vt. 78, 28 AmR 488; White v. Langdon, 30 Vt. 599.

Va.—Bowles v. Rice, 107 Va. 51, 57 SE 575; Davis v. Gordon, 89 Va. 559, 13 SE 35; Silliman v. Fredericksburg, etc., R. Co., 27 Gratt. (68 Va.) 119; Stainback v. Read, 11 Gratt. (52 Va.) 281, 62 AmD 648.

W. Va.—O'Connor v. O'Connor, 45 W. Va. 354, 32 SE 276; Dyer v. Duffy, 39 W. Va. 148, 19 SE 540, 24 LRA 339; Curry v. Hale, 15 W. Va. 867.

Wyo.—Brown v. Grady, 16 Wyo. 151, 92 P 622.

Can.—Ottawa Dairy Co. v. Sorley, 34 Can. S. C. 508; Rodburn v. Swinney, 16 Can. S. C. 297; Taylor v. Wallbridge, 2 Can. S. C. 616.

Que.—La Granda Hermanos y Ca v. American Electrical, etc., Co., 29 Que. Super. 444.

88. Mussey v. Beecher, 3 Cush. (Mass.) 511; Reinforced Concrete Co. v. Boyes, (Mich.) 147 NW 577; Deffenbaugh v. Jackson Paper Mfg. Co., 120 Mich. 242, 79 NW 197; Clark v. Haupt, 109 Mich. 212, 68 NW 231; Gordeen v. Pearlman, 91 NYS 420; Hambro v. Burnand, [1903] 2 K. B. 399 [rev on other grounds [1904] 2 K. B. 10].

[a] **Inquiry from principal.**—Agents may have as much or as little power as their principals see fit to give them, and one dealing with an agent is bound to inquire into the extent of his authority, not from the agent, in the absence of written evidence of authority, but from the principal, if accessible, and dealings or engagements of the agent beyond the scope of his authority do not bind the principal. Delta Lumber Co. v. Williams, 73 Mich. 86, 40 NW 940.

89. Jonathan Mills Mfg. Co. v. Whitehurst, 72 Fed. 496, 19 CCA 130.

90. U. S.—Jonathan Mills Mfg. Co. v. Whitehurst, 72 Fed. 496, 19 CCA 130 (holding that a purchaser who has reason to believe that the party offering a patent for sale holds it as agent for a third person cannot become a bona fide purchaser for value by relying on the statements of the suspected agent as to his authority, but inquiry must be made of some other person who will have a motive to tell the truth in the interests of the principal).

Ark.—Wilson v. Shocklee, 94 Ark. 301, 126 SW 832; Latham v. Ft. Smith First Nat. Bank, 92 Ark. 315, 122 SW 992.

Cal.—Pease v. Fink, 3 Cal. A. 371, 85 P 657 (holding that one dealing with another, on his mere statement that he is the agent of a third person, takes on himself the risk of being able to show the existence of the agency, and, if he accepts such statement and is deceived, he has no relief against the third person).

D. C.—Phillip Carey Co. v. Thyson, 39 App. 233.

Ga.—Carter v. Pembroke Nat. Bank, 11 Ga. A. 479, 75 SE 824.

Mich.—Gore v. Canada Life Assur. Co., 119 Mich. 136, 77 NW 650; Rice v. Grand Rapids Peninsular Club, 52 Mich. 87, 17 NW 708.

Minn.—Trull v. Hammond, 71 Minn. 172, 73 NW 642.

Mo.—Mathes v. Switzer Lumber Co., 173 Mo. A. 239, 158 SW 729; Friedman v. Kelly, 126 Mo. A. 279, 102 SW 1066.

Nebr.—Fitzgerald v. Kimball Bros. Co., 76 Nebr. 236, 107 NW 227.

N. Y.—MacLatchy v. Hannan, 104 App. Div. 70, 93 NYS 282; Saranac v. Groton Bridge, etc., Co., 55 App. Div. 134, 67 NYS 118; Claflin v. Lenheim, 5 Hun 269 [rev on other grounds 66 N. Y. 301]; Metropolitan Aluminum

upon the mere presumption of authority.[91]

Failure to inquire. If such person makes no inquiry but chooses to rely on the agent's statements he is chargeable with knowledge of the agent's authority,[92] and his ignorance of its extent will be no excuse to him,[93] and the fault cannot be thrown upon the principal who never authorized the act or contract,[94] although he was careless in reposing confidence in his agent.[95]

[§ 205] **(2) Applications of General Rule.** The necessity of inquiry as to the authority of one with whom it is proposed to deal as agent is illustrated in every sort of transaction. Thus one who makes payment to an agent must at his peril discover whether the agent has authority to receive payment at all,[96] or to receive payment in anything but money;[97] and if a debtor, owing money on a written security, pays it to another as the agent of the holder of the security, he must see that the person so paid is in possession of the security, or that he has authority or has been represented by the creditor to have authority to receive such payment.[98] The courts are even more insistent that one dealing with an agent shall inquire whether he has sufficient authority, when such agent assumes to make or indorse negotiable paper.[99]

[§ 206] **(3) Qualifications of General Rule.** Where the third person has ascertained the general character or scope of the agency, he is authorized to rely upon the agent having such powers as naturally and properly belong to such character,[1] and, in the absence of circumstances putting him upon inquiry,[2] is not bound to inquire for secret qualifications or limitations of the apparent powers of the agent.[3]

Co. v. Lau, 61 Misc. 105, 112 NYS 1059; Jones v. Keeler, 40 Misc. 221, 81 NYS 648; Joseph v. Struller, 25 Misc. 173, 54 NYS 162.

Pa.—Smith v. Ebert, 11 Kulp 63.

S. D.—Shull v. New Birdsall Co., 15 S. D. 8, 86 NW 654.

Wash.—O'Daniel v. Streeby, 77 Wash. 414, 137 P 1025.

91. Wilson v. Shocklee, 94 Ark. 301, 126 SW 832; Latham v. Ft. Smith First Nat. Bank, 92 Ark. 315, 122 SW 992.

92. Molloy v. Whitehall Portland Cement Co., 116 App. Div. 839, 102 NYS 363 (holding that, where plaintiff dealt with a broker who was not generally the agent of defendant, a cement manufacturer, and there was no reason why plaintiff should think that he was, plaintiff, in contracting with him for a quantity of cement, was chargeable with notice of his limited authority to agree upon the time of delivery); Sloan v. Brown, 228 Pa. 495, 77 A 821, 139 AmSR 1019 (holding that, where a purchaser, with full knowledge of the ownership of certain stock, pays ten cents a share, when inquiry would have shown that the agent from whom he purchased it had been instructed to sell to another for fifty cents a share, he will be compelled to reassign to the owner); Nova Scotia Bank v. Richards, 33 N. B. 412 [aff 26 Can. S. C. 381].

93. Hurley v. Watson, 68 Mich. 531, 36 NW 726.

[a] **Estoppel to deny knowledge of want of authority.**—Where the owner takes possession of a hired slave, and one makes a demand on him as agent of the hirer for the return of the slave, reasonable evidence of his authority as agent may be required; but if the owner fails to require evidence of such authority and rests his refusal to surrender the slave on the ground of right in himself, he cannot afterward object, in an action on a note given for the hire of the slave, to his want of knowledge of the agent's authority. McNeill v. Easley, 24 Ala. 455.

94. Bond v. Pontiac, etc., R. Co., 62 Mich. 643, 29 NW 482, 4 AmSR 885 (holding that it is the duty of every one to inform himself with what parties he is dealing, and that if he chooses to act without a written contract, or without adequate inquiry, the fault cannot be thrown upon a principal who never authorized such a contract to be made).

95. Hurley v. Watson, 68 Mich. 531, 36 NW 726; Gregory v. Loose, 19 Wash. 599, 54 P 33.

96. Bruen v. Kansas City Agricultural, etc., Assoc., 40 Mo. A. 425 (holding that, where a principal demands of a third person the beneficial results of a contract made by his agent, a payment thereafter to the agent by such third person will be made at his peril, and he will be liable to pay again on demand of the principal); Bassett v. Lederer, 1 Hun (N. Y.) 274, 3 Thomps. & C. 671; Philadelphia Trust, etc., Co. v. Roberts, 17 Phila. (Pa.) 9. See also infra § 263.

97. Mudgett v. Day, 12 Cal. 139; Mathews v. Hamilton, 23 Ill. 470 (holding that an agent to collect a bond is not authorized to take notes instead of money, and that it is for the person desiring to pay in notes to ascertain whether the agent is expressly authorized to take notes); McAlpin v. Cassidy, 17 Tex. 449. See also infra §§ 263, 266–271.

98. Ga.—Howard v. Rice, 54 Ga. 52.

Mo.—City Nat. Bank v. Goodloe-McClelland Commn. Co., 93 Mo. A. 123; Cummings v. Hurd, 49 Mo. A. 139.

Mont.—Cornish v. Woolverton, 32 Mont. 456, 81 P 4, 108 AmSR 598 (holding that one paying a debt secured by mortgage to a supposed agent of the owner of the mortgage is bound to ascertain the scope of the agent's authority).

N. J.—Cox v. Cutter, 28 N. J. Eq. 13.

N. Y.—Brewster v. Carnes, 103 N. Y. 556, 9 NE 323 (holding that authority to collect interest on a mortgage debt does not authorize the agent to receive the principal debt, and that it is incumbent on a debtor who makes a payment on such debt to an agent to see that the securities are in the agent's possession on each occasion that payments are made). See also Crane v. Gruenewald, 120 N. Y. 274, 24 NE 456, 17 AmSR 643.

Or.—Rhodes v. Belchee, 36 Or. 141, 59 P 117, 1119.

Pa.—Cowden v. Bechlar, 6 Pa. Co. 8. See also infra § 263.

[a] **Payment to one known not to have possession.**—Where a mortgagor pays the amount of the debt to one whom he knows has not possession of the papers, and who undertakes merely to procure a release from the mortgagee, the mortgagor assumes the risk of the release being procured in that manner. Lane v. Duchac, 73 Wis. 646, 41 NW 962.

99. Ill.—Strawn Farmers' El. Co. v. Bennett, 168 Ill. A. 428.

Mich.—New York Iron Mine v. Negaunee First Nat. Bank, 39 Mich. 644 (holding that the fact that an agent makes negotiable paper in the name of his principal payable to himself calls for special caution in one taking it).

Mo.—Edwards v. Thomas, 2 Mo. A. 282 [aff 66 Mo. 468].

N. Y.—Nixon v. Palmer, 8 N. Y. 398; Greenwood v. Spring, 54 Barb. 375; Beach v. Vandewater, 3 N. Y. Super. 265.

N. C.—Morganton Bank v. Hay, 143 N. C. 326, 55 SE 811.

Va.—Silliman v. Fredericksburg, etc., R. Co., 27 Gratt. (68 Va.) 119.

Eng.—Attwood v. Munnings, 7 B. & C. 278, 14 ECL 130, 108 Reprint 727, 4 ERC 364; Fenn v. Harrison, 3 T. R. 757, 100 Reprint 842, 4 T. R. 177, 100 Reprint 959.

N. S.—Union Bank v. Eureka Woolen Mfg. Co., 33 N. S. 302.

See also infra §§ 280–286.

[a] **Negotiable paper given for agent's services.**—One who takes a note or check purporting to be given by a corporation to its agent for services rendered is not bound to inquire whether the services were rendered, for that is an extrinsic fact peculiarly within the knowledge of the agent, and one dealing with an agent may take his representations as to any extrinsic fact which rests peculiarly within his knowledge and which cannot be ascertained by a comparison of the power with the act done under it. Wilson v. Metropolitan El. R. Co., 14 Daly (N. Y.) 171.

1. Indian River State Bank v. Hartford F. Ins. Co., 46 Fla. 283, 35 S 228; Grand Rapids Electric Co. v. Walsh Mfg. Co., 142 Mich. 4, 105 NW 1; Howry v. Eppinger, 34 Mich. 29; Landis v. Shadle, 23 Pa. Co. 505.

[a] **In subsequent dealings** (1) the third person may assume that the original authority continues unless informed to the contrary. Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396. (2) But this rule does not apply where the agent of an undisclosed principal afterward embarks in a new enterprise in his own name, the fact that he ever was an agent being unknown to the party with whom he had dealt. Ilston v. Evans, 27 App. Div. 447, 50 NYS 82.

2. Eagle Fire Co. v. Lewallen, 56 Fla. 246, 47 S 947; Grand Rapids Electric Co. v. Walsh Mfg. Co., 142 Mich. 4, 105 NW 1.

3. U. S.—Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank, 97 Fed. 181, 38 CCA 108.

Ala.—Lytle v. Dothan Bank, 121 Ala. 215, 26 S 6.

Fla.—Indian River State Bank v. Hartford F. Ins. Co., 46 Fla. 283, 35 S 228.

Mich.—Grand Rapids Electric Co. v. Walsh Mfg. Co., 142 Mich. 4, 105 NW 1.

Pa.—Williams v. Getty, 31 Pa. 461, 72 AmD 757.

Utah.—Roberts v. Tuttle, 36 Utah 614, 105 P 916 (holding that purchasers of land in making a contract with an agent of the owner may assume that the agent has the authority he appears to have, and need not make investigation respecting such authority, especially where the name of the owner is not disclosed).

Wis.—Roche v. Pennington, 90 Wis. 107, 62 NW 946.

Eng.—Fry v. Smellie, [1912] 3 K. B. 282.

See also infra § 209.

[a] **Reason for rule**—"To what purpose is the party dealing with the agent to enquire, respecting that which he is not to know, and what duty exists upon him to know that, which by the express direction of the principal, or from the nature of the case, is to be concealed from him? Or how can it be said that he trusts the agent, respecting the limit at which he is authorized to sell, or purchase, when if he asks respecting that

It has been said that if the authority of an agent is absolute inquiry as to limitations would be useless, and therefore is not required of the third person.[4]

[§ 207] **(4) Where Authority Is, or Required to Be, in Writing.** Where a third person dealing with an agent has knowledge that his authority must necessarily be in writing in order to bind the principal,[5] it is his duty to ascertain whether the agent has such authority and whether it is in proper form;[6] and where there is written authority, whether it is required or not, and such person has, or is charged with, knowledge thereof, it is his duty to ascertain the nature and extent of the authority conferred, and whether the agent is acting within its scope,[7] unless he is excused from inspecting the written authority by a statement from the principal himself defining the authority.[8] When the authority is by law required to be in writing he is charged with knowledge of that fact, and of the limitations upon the agent's power contained in such writing.[9] But, unless chargeable with notice of some subsequent limitation of the agent's authority, the third person need not look beyond the written instrument.[10]

In the case of a public agent, or of one whose

limit, the principal has precluded him from ascertaining what it is? Who, in fact, places confidence in the agent in a case like that above stated, and who has enabled the agent to practice deception, if deception takes place? So far as a party dealing with a special agent is bound to enquire respecting his authority, so far he is entitled to a definite and distinct answer. And so far as he is bound to enquire and to know, it is bad faith and fraud to conceal anything from him." Hatch v. Taylor, 10 N. H. 538, 547.

[b] **Agent with authority in case of emergency.**—A lender of money to an agent authorized to borrow for the purpose of carrying on business, including power to borrow on exceptional terms outside the ordinary course of business, in an emergency, is not bound to inquire whether, in a particular case, the emergency has arisen. Montaignac v. Shitta, 15 App. Cas. 357.

4. Witcher v. McPhee, 16 Colo. A. 298, 65 P 806, 807 (where the court said: "Ordinarily, unless the conduct of the principal renders inquiry unnecessary, persons transacting business with an agent are bound by the limitations upon his authority. But, when the power of the agent is absolute, inquiry would disclose no limitations; whatever the principal might do, the agent might do; and any lawful act of the agent in relation to the business—any act which the principal himself might lawfully perform—would have the same force, and be followed by the same consequence, as if it had been done by the latter").

5. **Necessity for written authority** see supra §§ 53-66.

6. Peabody v. Hoard, 46 Ill. 242 (holding that where real estate is the subject of sale the person purchasing of an agent must see that the power conferred is of equal dignity with the deed to be executed).

[a] **Persons accepting a lease** of real property for more than three years from an agent are bound to ascertain whether he has written authority for executing it. Clement v. Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 A 82, 118 AmSR 747 [rev 69 N. J. Eq. 347, 60 A 419].

7. U. S.—Thiel Detective Service Co. v. McClure, 142 Fed. 952, 74 CCA 122, 4 LRANS 843 and note; Henry v. Lane, 128 Fed. 243, 62 CCA 625; Bosseau v. O'Brien, 3 F. Cas. No. 1,667, 4 Biss. 395.

Ala.—Cummins v. Beaumont, 68 Ala. 204.

Cal.—Quay v. Presidio, etc., R. Co., 82 Cal. 1, 22 P 925; Blum v. Robertson, 24 Cal. 127; Davis v. Trachsler, 3 Cal. A. 554, 86 P 610.

Fla.—Boord v. Strauss, 39 Fla. 381, 22 S 713.

Ga.—Myers v. Walker, 104 Ga. 316, 30 SE 842; Gorham v. Felker, 102 Ga. 260, 28 SE 1002 (holding that when an agent has special authority in writing, and warning is given not to rely on any representations he may make, one who makes a contract with him exceeding the authority given in the writing cannot enforce it against the principal).

Hawaii.—Caplan v. Hoffschlaeger, 2 Hawaii 691.

Ill.—National Union F. Ins. Co. v. Spry Lumber Co., 235 Ill. 98, 85 NE 256; Blackmer v. Summit Coal, etc., Co., 187 Ill. 32, 58 NE 289 [aff 88 Ill. A. 636]; Baxter v. Lamont, 60 Ill. 237; Peabody v. Hoard, 46 Ill. 242; Rawson v. Curtiss, 19 Ill. 456; Rogers Grain Co. v. Tanton, 136 Ill. A. 533.

Ky.—Johnson v. Park, 11 KyL 526.

Mass.—Mt. Morris Bank v. Gorham, 169 Mass. 519, 48 NE 341; Mussey v. Beecher, 3 Cush. 511.

Minn.—Gilbert v. How, 45 Minn. 121, 47 NW 643, 22 AmSR 724.

Mo.—Hodkinson v. McNeal Mach. Co., 161 Mo. A. 87, 142 SW 457.

Mont.—Schaeffer v. Mutual Ben. L. Ins. Co., 38 Mont. 459, 100 P 225.

Nebr.—Miller v. Wehrman, 81 Nebr. 388, 115 NW 1078; Frahm v. Metcalf, 75 Nebr. 241, 106 NW 227, 13 AnnCas 312; Bradley v. Basta, 71 Nebr. 169, 98 NW 697.

N. H.—Backman v. Charlestown, 42 N. H. 125.

N. Y.—Michael v. Eley, 61 Hun 180, 15 NYS 890; Filley v. Gilman, 34 N. Y. Super. 339; North River Bank v. Aymar, 3 Hill 262; Sanford v. Handy, 23 Wend. 260; Nixon v. Hyserott, 5 Johns. 58; Williams v. Birbeck, Hoffm. 359.

Oh.—Thomas Gibson Co. v. Carlisle, 3 Oh. Dec. 27, 1 OhNP 398.

Pa.—Union Trust Co. v. Means, 201 Pa. 374, 50 A 974; Needles' Est., 4 Pa. Dist. 762, 17 Pa. Co. 289.

Philippine.—Strong v. Repide, 6 Philippine 680 [rev on other grounds 213 U. S. 419, 29 SCt 521, 53 L. ed. 853].

Tex.—Griffith v. Morrison, 58 Tex. 46 (holding that a grantee in a deed executed under a power of attorney is charged with notice that the power of attorney gave no authority to give a deed with covenants); Cameron v. Blackwell, 53 Tex. Civ. A. 414, 115 SW 856; Chalson v. Beauchamp, 12 Tex. Civ. A. 109, 34 SW 303; Rhine v. Blake, 1 Tex. A. Civ. Cas. § 1066. See also Weekes v. Shapleigh Hardware Co., 23 Tex. Civ. A. 577, 57 SW 67.

Va.—Finch v. Causey, 107 Va. 124, 57 SE 562 (holding that one dealing with an agent acting under written authority must take notice of the extent and limits of that authority); Stainback v. Read, 11 Gratt. (52 Va.) 281, 62 AmD 648.

Wash.—Dimmick v. Sprinkel, 59 Wash. 329, 109 P 1018 (holding that one who takes by or through a conveyance executed by an attorney in fact must take notice of his power).

W. Va.—Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 69 SE 845, AnnCas1912B 148 (holding that where an agent's authority is in writing a person dealing with him is presumed to have read his warrant of authority); Dyer v. Duffy, 39 W. Va. 148, 19 SE 540, 24 LRA 339.

Wis.—Pluto Powder Co. v. Cuba City State Bank, 153 Wis. 324, 329, 141 NW 220 [cit Cyc].

Eng.—National Bolivian Nav. Co. v. Wilson, 5 App. Cas. 176; Attwood v. Munnings, 7 B. & C. 278, 14 ECL 130, 108 Reprint 727, 4 ERC 364; Alexander v. Mackenzie, 6 C. B. 766, 60 ECL 766, 136 Reprint 1449.

Can.—Taylor v. Wallbridge, 2 Can. S. C. 616.

N. S.—Ellis v. Halifax, 29 N. S. 90.

[a] **All limitations and conditions** therein contained are limitations and conditions affecting the power to act, and are not in the nature of separate private instructions. Johnson v. Park, 11 KyL 526.

[b] **Notice from indorsement or acceptance.**—Where an agent's acceptance or indorsement of a bill or note shows that he is acting under a power of attorney, as where he indorses "per pro.," or "p. p. a.," the taker is bound to inquire as to the extent of the agent's authority. Mt. Morris Bank v. Gorham, 169 Mass. 519, 48 NE 341; Bryant v. La Banque du Peuple, [1893] A. C. 170; Attwood v. Munnings, 7 B. & C. 278, 14 ECL 130, 108 Reprint 727, 4 ERC 364; Alexander v. Mackenzie, 6 C. B. 766, 60 ECL 766, 136 Reprint 1449; Vigaud v. De Werthemer, 30 Que. S. C. 229.

8. Phipps v. Mallory Commn. Co., 105 Mo. A. 67, 78 SW 1097 (holding that, although one dealing with an agent is bound by a written authority of which he has knowledge, yet, where the principal informs him what the agent's authority is, he may rely upon such information as against the principal).

9. Davis v. Trachsler, 3 Cal. A. 554, 86 P 610; Caplan v. Hoffschlaeger, 2 Hawaii 691; U. S. Fidelity, etc., Co. v. McGinnis, 147 Ky. 781, 145 SW 1112; Miller v. Wehrman, 81 Nebr. 388, 115 NW 1078; Frahm v. Metcalf, 75 Nebr. 227, 106 NW 227.

[a] **Where written authority required.**—Where the nature of the transactions with an agent shows that his power must necessarily be contained in a written document, persons dealing with him are charged with the duty of inquiring as to the extent of his authority, and can recover for no loss resulting from their failure to discharge this duty. Thomas Gibson Co. v. Carlisle, 3 OhS&CP 27, 1 OhNP 398.

[b] **Persons dealing with an agent to sell land,** whose powers must be in writing, are charged with notice of the limitations on his power to make an absolute binding sale, which an examination of his power of attorney would disclose; and what was thought generally of his powers, or what they inferred were his powers from his conduct, is not competent to enlarge the express powers conferred on him by his written appointment. Thompson v. Green River Power Co., 154 N. C. 13, 69 SE 756.

[c] **A recorded power of attorney** is notice of the agent's powers. U. S. Fidelity, etc., Co. v. McGinnis, 147 Ky. 781, 145 SW 1112.

10. La.—Brown v. Frantum, 6 La. 39.

Mo.—Edwards v. Thomas, 66 Mo. 468.

Nebr.—Plummer v. Buck, 16 Nebr. 322, 20 NW 342.

N. J.—Read v. Abbott, 45 N. J. L. 303; Lyle v. Addicks, 62 N. J. Eq. 123, 49 A 1121.

Wash.—Auwarter v. Kroll, 79 Wash. 179, 140 P 326 (holding that, where a power of attorney is general and without ambiguity or uncertainty, one dealing with the agent is not bound to look beyond the instrument for

authority must by law appear on the public records, all persons are chargeable with notice of his authority, so far as it is public in its nature or publicly recorded.[11]

[§ 208] **3. Authority Distinguished from Instructions—a. General Distinctions.** In legal significance an agent's authority is the sum total of the powers which his principal has caused or permitted him to seem to possess. It is not limited to the powers actually conferred and those to be implied as flowing therefrom, but includes as well the apparent powers which the principal by reason of his acts or conduct is estopped to deny.[12] Instructions to the agent include not only terms of the power which are intended to be made known to those who deal with the agent, and a deviation from which will render ineffectual the act of the agent, but also private instructions or directions to the agent as to the manner in which he shall execute his commission, but which from their nature or the desire of the principal it is manifest that he does not expect the agent to disclose to persons with whom he deals.[13] Between these there is a material distinction. The former are part of the agent's authority; the latter, however they may affect the agent, can have no effect to qualify the liability of the principal to third persons to whom they are not, and are not intended to be, communicated.[14] It is proper to receive evidence to establish the former, or to show the knowledge of third persons as to the authority of the agent, and any limitations thereon;[15] but the agent's apparent authority being proved, it is not proper to admit evidence of instructions unknown to third persons and not intended to be communicated by the agent.[16]

[§ 209] **b. Secret or Private Instructions.** Secret or private instructions, or limitations on the general authority of an agent, however binding they may be as between the principal and his agent, can have no effect on a third person who deals with the agent in good faith, in ignorance of the instructions or limitations and in reliance on the apparent authority with which the principal has clothed him.[17]

secret reservations as to the agent's powers); Ross v. Kenwood Inv. Co., 73 Wash. 131, 131 P 649.

11. U. S.—New York, etc., Steamship Co. v. Harbison, 16 Fed. 688; U. S. v. Williams, 28 F. Cas. No. 16,724, 1 Ware 173.

Ark.—Woodward v. Campbell, 39 Ark. 580.

Kan.—Lewis v. Bourbon County Comrs., 12 Kan. 186 (holding that purchasers of negotiable paper issued by an agent, the nature and extent of whose authority must by law appear upon the face of public records, are chargeable with notice of whatever appears upon those records).

Nebr.—Cones v. Neligh, 5 Nebr. 302 (holding that a power of attorney, being of record, is notice to those dealing with the agent of the extent of his authority to bind the principal under it).

N. H.—Sprague v. Cornish, 59 N. H. 161; Backman v. Charlestown, 42 N. H. 125.

N. Y.—Delafield v. Illinois, 2 Hill 159.

Oh.—Thomas Gibson Co. v. Carlisle, 8 OhS&CP 27, 1 OhNP 398.

Eng.—Mann v. Edinburgh Northern Tramways Co., [1893] A. C. 69.

N. B.—Boyer v. Woodstock, 24 N. B. 521.

[a] **A duly recorded power of attorney** to sell and convey real estate is notice to subsequent purchasers dealing with the agent in relation to the property of the terms of the agency. Frink v. Roe, 70 Cal. 296, 11 P 820; Wells v. Michigan Mut. L. Ins. Co., 41 W. Va. 131, 23 SE 527.

12. Ark.—Roach v. Rector, 93 Ark. 521, 528, 123 SW 399 [cit Cyc].

Conn.—Kearns v. Nickse, 80 Conn. 23, 66 A 779, 10 LRANS 1118 and note.

Mo.—Baker v. Kansas City, etc., R. Co., 91 Mo. 152, 3 SW 486; Law Reporting Co. v. Elwood Grain Co., 135 Mo. A. 10, 115 SW 475; Haubelt v. Rea, etc., Mill Co., 77 Mo. A. 672.

Nebr.—Cooper v. Cooper, 90 Nebr. 209, 133 NW 243.

Pa.—Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396 (where the court said that as to third persons the liability of the principal for the acts of his agent is measured, not merely by the authority actually given, but by the authority essential to the business of the agency, and the authority held out by the principal as possessed by the agent, or the apparent authority which he permits the agent to assume; that no express terms are required to define the agents powers; and that the relation of principal and agent implies a grant of the powers necessarily incident to the purposes of the agency, or which by established usage may properly be employed in carrying out those purposes).

S. D.—Aldrich v. Wilmarth, 3 S. D. 523, 54 NW 811.

Tex.—McAlpin v. Cassidy, 17 Tex. 449.

Vt.—Griggs v. Selden, 58 Vt. 561, 5 A 504.

See also infra §§ 211–215.

13. Bryant v. Moore, 26 Me. 84, 45 AmD 96; Van Santvoord v. Smith, 79 Minn. 316, 82 NW 642; Towle v. Leavitt, 23 N. H. 360, 55 AmD 195; Hatch v. Taylor, 10 N. H. 538.

14. Union Sulphur Co. v. Percy, 180 Fed. 1, 103 CCA 355; Barnes v. Downes, 2 Tex. A. Civ. Cas. § 524 (holding that where private instructions are given to a special agent respecting the manner of executing the agency, and they are intended to be kept secret and not communicated to those with whom he may deal, they are not to be regarded as limitations on his authority, and notwithstanding he disregards them his acts will be valid). See also Young v. Wright, 4 Wis. 144, 65 AmD 303. And see infra § 209.

[a] **Distinction between limited authority and private instructions.**— "It is to be observed, that a distinction is to be taken between the limited authority of a special agent, one appointed for a specific purpose to do certain and specified acts, and the private instructions given to such agent. Where the authority is limited in a bona fide manner, and the limitation is to be disclosed by the agent, and is disclosed either with or without enquiry, any departure from such authority or instructions, will not bind the principal; but where the authority or instructions given, are in the nature of private instructions, and so designed to be, they will not be binding upon the parties dealing with the agent. And if the instructions are of such a nature that they would not be communicated if an enquiry was made, (even though it be the duty of the person dealing with the agent to make the enquiry,) it is not necessary that it should be made, for it would not be communicated if made." Towle v. Leavitt, 23 N. H. 360, 374, 55 AmD 195.

15. Foss-Schneider Brewing Co. v. McLaughlin, 5 Ind. A. 415, 31 NE 838; Sage v. Haines, 76 Iowa 581, 41 NW 366; Shaw v. Williams, 100 N. C. 272, 6 SE 196.

16. Hamill v. Ashley, 11 Colo. 180, 17 P 502; Hichhorn v. Bradley, 117 Iowa 130, 90 NW 592; Sanford v. Orient Ins. Co., 174 Mass. 416, 54 NE 883, 75 AmSR 358; Oderkirk v. Fargo, 61 Hun 418, 16 NYS 220; Favill v. Perkins, 2 Silv. Sup. 513, 6 NYS 169.

17. U. S.—Southern L. Ins. Co. v. McCain, 96 U. S. 84, 24 L. ed. 653; Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; Calais Steamboat Co. v. Van Pelt, 2 Black. 372, 17 L. ed. 282; Minor v. Alexandria Mechanics Bank, 1 Pet. 70, 7 L. ed. 47; Fleckner v. U. S. Bank, 8 Wheat. 338, 5 L. ed. 631; Ætna Indemn. Co. v. Ladd, 135 Fed. 636, 68 CCA 274; Russ v. Telfener, 57 Fed. 973 [aff 60 Fed. 228, 8 CCA 585 (rev on other grounds 162 U. S. 170, 16 SCt 695, 40 L. ed. 930)]; Foster v. Cleveland, etc., R. Co., 56 Fed. 434; Lindroth v. Litchfield, 27 Fed. 894; Allen v. Ogden, 1 F. Cas. No. 233, 1 Wash. C. C. 174; Arthur v. The Cassius, 2 F. Cas. No. 564, 2 Story 81; Scarlett v. Van Inwagen, 21 F. Cas. No. 12,437, 9 Bliss. 157; U. S. v. Howard, 26 F. Cas. No. 15,400, 7 Biss. 56.

Ala.—Thornton v. Pinckard, 157 Ala. 206, 47 S 289; British, etc., Mortg. Co. v. Cody, 135 Ala. 622, 33 S 832; Patterson v. Neal, 135 Ala. 477, 33 S 39; Robinson v. Ætna Ins. Co., 128 Ala. 477, 30 S 665; La Fayette R. Co. v. Tucker, 124 Ala. 514, 27 S 447; Lytle v. Dothan Bank, 121 Ala. 215, 26 S 6; Higman v. Camody, 112 Ala. 267, 20 S 480, 57 AmSR 33; Phillips, etc., Mfg. Co. v. Whitney, 109 Ala. 645, 20 S 333; Rhodes Furniture Co. v. Weeden, 108 Ala. 252, 19 S 318; Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 S 46; Shrimpton v. Brice, 102 Ala. 655, 15 S 452; Western Union Tel. Co. v. Cunningham, 99 Ala. 314, 14 S 579; Cawthon v. Lusk, 97 Ala. 674, 11 S 731; Louisville Coffin Co. v. Stokes, 78 Ala. 372; St. John v. Redmond, 9 Port. 428; Fisher v. Campbell, 9 Port 210; Wooten v. Federal Discount Co., 7 Ala. A. 351, 62 S 263.

Ariz.—California Dev. Co. v. Yuma Valley Union Land, etc., Co., 9 Ariz. 366, 84 P 83.

Ark.—Mississippi Valley Constr. Co. v. Abeles, 87 Ark. 374, 112 SW 894; Liddell v. Sahline, 55 Ark. 627, 17 SW 705; Keith v. Herschberg Optical Co., 48 Ark. 138, 2 SW 777.

Cal.—Leavens v. Pinkham, 164 Cal. 242, 128 P 399; Browning v. McNear, 158 Cal. 525, 111 P 541, 145 Cal. 272, 78 P 722; Mabb v. Stewart, 147 Cal. 413, 81 P 1073; Robinson v. American Fish, etc., Co., 17 Cal. A. 212, 119 P 388.

Colo.—Hamill v. Ashley, 11 Colo. 180, 17 P 502; Higgins v. Armstrong, 9 Colo. 38, 10 P 232; Wedge Mines Co. v. Denver Nat. Bank, 19 Colo. A. 182, 73 P 873.

Conn.—Swazey v. Union Mfg. Co., 42 Conn. 556; Woodbury Sav. Bank, etc., Assoc. v. Charter Oak F. & M. Ins. Co., 31 Conn. 517; Eagle Bank v. Smith, 5 Conn. 71, 13 AmD 27.

Del.—Excelsior Refining Co. v. Mur-

As to third persons such secret instructions are no restriction upon the apparent authority of a general agent, for persons dealing with an agent are, in the absence of special proof to the contrary, presumed

phey, 22 Del. 24, 73 A 1040; Watertown Steam Engine Co. v. Davis, 10 Del. 192.

Fla.—Dunwoody v. Saunders, 50 Fla. 202, 39 S 965.

Ga.—Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 SE 980; Armour v. Ross, 110 Ga. 403, 35 SE 787; Byne v. Hatcher, 75 Ga. 289; Thompson v. Douglass, 64 Ga. 57; Nussbaum v. Heilbron, 63 Ga. 312; Macon City Bank v. Kent, 57 Ga. 283; Cable Co. v. Hunt, 3 Ga. A. 562, 70 SE 70; Hopkins v. Armour, 8 Ga. A. 442, 69 SE 580; Johnson v. Waxelbaum Co., 1 Ga. A. 511, 58 SE 56.

Hawaii.—Caplan v. Hoffschlaeger, 2 Hawaii 691; Spencer v. Bennett, 2 Hawaii 415.

Ill.—Crain v. Jacksonville First Nat. Bank, 114 Ill. 516, 2 NE 486; National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427; Union Mut. L. Ins. Co. v. White, 106 Ill. 67; Home L. Ins. Co. v. Pierce, 75 Ill. 426; Sterling Bridge Co. v. Baker, 75 Ill. 139; Hartford F. Ins. Co. v. Farrish, 73 Ill. 166; Rockford Ins. Co. v. Nelson, 65 Ill. 415; Ætna Ins. Co. v. Maguire, 51 Ill. 342; Woodford v. McClenahan, 9 Ill. 85; Gallagher v. Singer Sewing Mach. Co., 177 Ill. A. 198; Gray v. Merchants' Ins. Co., 113 Ill. A. 537; Swisher v. Palmer, 106 Ill. A. 432; Chicago Catholic Bishop v. Troup, 61 Ill. A. 641.

Ind.—Larue v. American Diesel Engine Co., 176 Ind. 609, 96 NE 772 (holding that a principal cannot by general or secret instructions escape the results produced by the acts and declarations of its agent within the scope of his general employment); Cincinnati, etc., R. Co. v. Davis, 126 Ind. 99, 25 NE 878, 9 LRA 503; Commercial Union Assur. Co. v. State, 113 Ind. 331, 15 NE 518; Talmage v. Bierhouse, 103 Ind. 270, 2 NE 716; Robbins v. Magee, 76 Ind. 381; Fatman v. Leet, 41 Ind. 133.

Iowa.—Cable Co. v. Miller, 143 NW 94; Chickering-Chase Bros. Co. v. Moulton, 107 NW 434; Getchell, etc., Lumber, etc., Co. v. National Surety Co., 124 Iowa 617, 100 NW 556; Getchell, etc., Lumber, etc., Co. v. Peterson, 124 Iowa 599, 100 NW 550; Stoner v. Chicago Great Western R. Co., 109 Iowa 551, 80 NW 569; Kruse v. Seiffert, etc., Lumber Co., 108 Iowa 352, 79 NW 118; Francis v. Litchfield, 82 Iowa 726, 47 NW 998; Palmer v. Cheney, 35 Iowa 281.

Kan.—Aultman Thrashing, etc., Co. v. Knoll, 71 Kan. 109, 79 P 1074; Ludlow-Saylor Wire Co. v. Fribley Hardware, etc., Co., 67 Kan. 710, 74 P 237; Dreyfus v. Goss, 67 Kan. 57, 72 P 537; Loomis Milling Co. v. Vawter, 8 Kan. A. 437, 57 P 43.

Ky.—Continental Ins. Co. v. Thomason, 84 SW 546, 27 KyL 158; Travelers' Ins. Co. v. Ebert, 47 SW 865, 20 KyL 1008; Graves v. Cord, 44 SW 665, 19 KyL 1893; Bell v. Offutt, 10 Bush 632; Jones v. Shelbyville F., etc., Ins. Co., 1 Metc. 58; Shelbyville v. Shelbyville, etc., Turnp. Co., 1 Metc. 54; Greenby v. Brooks, 13 KyL 298.

La.—Chaffe v. Barataria Canning Co., 113 La. 215, 36 S 943; Farrar v. Duncan, 29 La. Ann. 126.

Me.—Wood v. Finson, 89 Me. 459, 36 A 911; Frankfort Bank v. Johnson, 24 Me. 490.

Md.—Lister v. Allen, 31 Md. 543, 100 AmD 78; Baltimore v. Eschbach, 18 Md. 276.

Mass.—Brooks v. Shaw, 197 Mass. 376, 84 NE 110; Green v. Star F. Ins. Co., 190 Mass. 586, 77 NE 649; Walker v. Lancashire, Ins. Co., 188 Mass. 560, 75 NE 66; Brown v. Franklin Mut. F. Ins. Co., 165 Mass. 565, 43 NE 512, 52 AmSR 534; Byrne v. Massasoit Packing Co., 137 Mass. 313; Markey v. Mutual Ben. L. Ins. Co., 103 Mass. 78; Lobdell v. Baker, 1 Metc. 193, 35 AmD 358; Williams v. Mitchell, 17 Mass. 98; Odiorne v. Maxcy, 13 Mass. 178.

Mich.—Wierman v. Bay City-Michigan Sugar Co., 142 Mich. 422, 106 NW 75; Grand Rapids Electric Co. v. Walsh Mfg. Co., 142 Mich. 4, 105 NW 1; Austrian v. Springer, 94 Mich. 343, 54 NW 50, 34 AmSR 350; Rice v. Grand Rapids Peninsular Club, 52 Mich. 87, 17 NW 708; Lyell v. Sanbourn, 2 Mich. 109.

Minn.—Baker v. Chicago Great Western R. Co., 91 Minn. 118, 97 NW 650; Parsons Band Cutter, etc., Co. v. Haub, 83 Minn. 180, 86 NW 14; Watts v. Howard, 70 Minn. 122, 72 NW 840.

Miss.—Crane v. Bedwell, 25 Miss. 507; Routh v. Agricultural Bank, 20 Miss. 161; Wilkins v. Natchez Commercial Bank, 7 Miss. 217.

Mo.—Higbee v. Billick, 244 Mo. 411, 148 SW 879; Cross v. Atchison, etc., R. Co., 141 Mo. 132, 42 SW 675; Porter v. Woods, 138 Mo. 539, 39 SW 794; Sails v. Miller, 98 Mo. 478, 11 SW 970; Minter v. Pacific R. Co., 41 Mo. 503, 97 AmD 288; Stothard v. Aull, 7 Mo. 318; Cunningham v. Wabash R. Co., 167 Mo. A. 273, 149 SW 1151; Flournoy v. Phœnix Brick, etc., Co., 159 Mo. A. 376, 140 SW 752; Kelly v. Chicago, etc., R. Co., 113 Mo. A. 468, 87 SW 583; Southwest Missouri Electric R. Co. v. Missouri Pac. R. Co., 110 Mo. A. 300, 85 SW 966; Sharp v. Knox, 48 Mo. A. 169; Flint-Walling Mfg. Co. v. Ball, 43 Mo. A. 504; New Albany Woolen Mills v. Meyers, 43 Mo. A. 124; McGinness v. Mitchell, 21 Mo. A. 493; Crews v. Garneau, 14 Mo. A. 505; Kinealy v. Burd, 9 Mo. A. 359.

Nebr.—Hall v. Hopper, 64 Nebr. 633, 90 NW 549; Howell v. Graff, 25 Nebr. 130, 41 NW 142; Furnas v. Frankman, 6 Nebr. 429; Fidelity Mut. F. Ins. Co. v. Lowe, 4 Nebr. (Unoff.) 159, 93 NW 749; Day, etc., Lumber Co. v. Rixby, 4 Nebr. (Unoff.) 154, 93 NW 688.

N. H.—Cochecho Nat. Bank v. Haskell, 51 N. H. 116, 12 AmR 67; Mayall v. Boston, etc., R. Co., 19 N. H. 122, 49 AmD 149.

N. J.—Law v. Stokes, 32 N. J. L. 249, 90 AmD 655; Milne v. Kleb, 44 N. J. Eq. 378, 14 A 646.

N. Y.—Cullinan v. Bowker, 180 N. Y. 93, 72 NE 911; Rathbun v. Snow, 123 N. Y. 343, 25 NE 379, 10 LRA 355 and note; Ruggles v. American Cent. Ins. Co. 114 N. Y. 415, 21 NE 1000, 11 AmSR 674; Hill v. Miller, 76 N. Y. 32; Walsh v. Hartford F. Ins. Co., 73 N. Y. 5; Price v. Keyes, 62 N. Y. 378; Angell v. Hartford F. Ins. Co., 59 N. Y. 171, 17 AmR 322; Cameron v. Durkheim, 55 N. Y. 425; Cooke v. State Nat. Bank, 52 N. Y. 96, 11 AmR 667; Morrison v. Chapman, 155 App. Div. 509, 140 NYS 700; Waldron v. Fargo, 52 App. Div. 18, 64 NYS 798 [rev on other grounds 170 N. Y. 130, 62 NE 1077]; Stahlberger v. New Hartford Leather Co., 92 Hun 245, 36 NYS 708; Smith v. Robinson Bros. Lumber Co., 88 Hun 148, 34 NYS 518; Engh v. Greenebaum, 2 Hun 136, 4 Thomps. & C. 426 [aff 64 N. Y. 642 mem]; Edwards v. Schaffer, 49 Barb. 291; Cornell v. Masten, 35 Barb. 157; Medbury v. New York, etc., R. Co., 26 Barb. 564; Dows v. Greene, 16 Barb. 72 [aff 24 N. Y. 638]; Johnson v. Jones, 4 Barb. 369; Weeks v. Fox, 3 Thomps. & C. 354; Rourke v. Story, 4 E. D. Smith 54 (holding that, although by an agent's instructions he is directed to employ men by written agreements, parol engagements made by him will be binding upon the principal, if the employee is ignorant of the agent's instructions); Benton v. Moss, 47 Misc. 376, 93 NYS 1113; Clews v. Rielly, 6 NYS 640; New York City Car Adv. Co. v. Greenberger, 142 NYS 226; Cohen v. Goldstein, 128 NYS 69; Commercial Bank v. Norton, 1 Hill 501; Lightbody v. North American Ins. Co., 23 Wend. 18; Commercial Bank v. Kortright, 22 Wend. 348, 34 AmD 317; Jeffrey v. Bigelow, 13 Wend. 518, 28 AmD 476; Rossiter v. Rossiter, 8 Wend. 494, 24 AmD 62; Arnold v. Halenbake, 5 Wend. 33; Jaques v. Todd, 3 Wend. 83; Munn v. Commission Co., 15 Johns. 44, 8 AmD 219; Gibson v. Colt, 7 Johns. 390.

N. C.—Wynn v. Grant, 81 SE 949; Morganton Bank v. Hay, 143 N. C. 326, 55 SE 811; Shaw v. Williams, 100 N. C. 272, 6 SE 196.

Oh.—Massachusetts L. Ins. Co. v. Eshelman, 30 Oh. St. 647; Thomas Gibson Co. v. Carlisle, 3 OhS&CP 27, 1 OhNP 398.

Or.—Pacific Biscuit Co. v. Dugger, 40 Or. 362, 67 P 82.

Pa.—American Car, etc., Co. v. Alexandria Water Co., 218 Pa. 542, 67 A 861; Young v. Coray, 167 Pa. 617, 31 A 856; Harrington v. Bronson, 161 Pa. 296, 29 A 80; Adams Express Co. v. Schlessinger, 75 Pa. 246; Rapp v. Palmer, 3 Watts 178; Laussatt v. Lippincott, 6 Serg. & R. 386, 9 AmD 440; Ruane v. Murray, 26 Pa. Super. 187; Grasselli Chemical Co. v. Biddle Purchasing Co., 22 Pa. Super. 426; Beal v. Adams Express Co., 13 Pa. Super. 143; Himes v. Herr, 3 Pa. Super. 124, 39 WklyNC 568; Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. 285; Breen v. Miehle Printing Press, etc., Co., 8 Pa. Dist. 151, 22 Pa. Co. 275; Long v. Reed, 4 Pa. Dist. 71; Rice v. Jackson, 3 Pa. Dist. 829, 16 Pa. Co. 15.

S. C.—Williams v. Tolbert, 76 S. C. 211, 56 SE 908; Whaley v. Duncan, 47 S. C. 139, 25 SE 54; Mars v. Mars, 27 S. C. 132, 3 SE 60; Carmichael v. Buck, 44 S. C. L. 332, 70 AmD 226.

Tenn.—Mt. Olivet Cemetery Co. v. Shubert, 2 Head 116; Walker v. Skipwith, Meigs 502, 33 AmD 161; Fabian Mfg. Co. v. Newman, (Ch. A.) 62 SW 218.

Tex.—Conn v. Hagan, 93 Tex. 334, 55 SW 323; Planters' Mut. Ins. Co. v. Lyons, 38 Tex. 253; Buick Auto. Co. v. Weaver, (Civ. A.) 163 SW 594; Taber v. Eyler, (Civ. A.) 162 SW 490; Wells v. Hennessy, (Civ. A.) 156 SW 1158, 1159 [cit Cyc]; Stember v. Keene, (Civ. A.) 152 SW 661; Dupree v. Merkel First Nat. Bank, (Civ. A.) 146 SW 608; Hayward Lumber Co. v. Cox, (Civ. A.) 104 SW 403; San Antonio, etc., R. Co. v. Timon, 45 Tex. Civ. A. 47, 99 SW 418; Brennan v. Dansby, 43 Tex. Civ. A. 7, 95 SW 700; Tres Palacios Rice, etc., Co. v. Eidman, 41 Tex. Civ. A. 542, 93 SW 698; Bay City Irr. Co. v. Sweeney, (Civ. A.) 81 SW 545; Greer v. Marble Falls First Nat. Bank, (Civ. A.) 47 SW 1045; Schleicher v. Armstrong, (Civ. A.) 32 SW 327.

Utah.—Smith v. Droubay, 20 Utah 443, 50 P 1112.

Vt.—Barber v. Britton, 26 Vt. 112, 60 AmD 301; Farmers', etc., Bank v. Champlain Transp. Co., 23 Vt. 186, 56 AmD 68; Cross v. Haskins, 13 Vt. 536; Gibbs v. Linsley, 13 Vt. 208; Walsh v. Pierce, 12 Vt. 130; Davis v. Waterman, 10 Vt. 526, 33 AmD 216.

Va.—Pine Beach Inv. Corp. v. Columbia Amusement Co., 106 Va. 810, 56 SE 822; Stovall v. Com., 84 Va. 246, 4 SE 379; Georgia Home Ins. Co. v. Kinnier, 28 Gratt. (69 Va.) 88; Continental Ins. Co. v. Kasey, 25 Gratt. (66 Va.) 268, 18 AmR 681.

Wash.—Starr v. Mutual L. Ins. Co., 41 Wash. 228, 83 P 116; Graton, etc., Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 P 879.

W. Va.—Merchants', etc., Nat. Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 SE 880, 70 LRA 312; Rohrbough v. U. S. Express Co., 50 W. Va. 148, 40 SE 398, 88 AmSR 849.

Wis.—Abrohams v. Revillon Freres, 129 Wis. 235, 107 NW 656; Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 NW 1099; McDermott v. Jackson, 97 Wis. 64, 72 NW 375; Lawson v. Chicago, etc., R. Co., 64 Wis. 447, 24 NW 618, 54 AmR 634; Houghton v. Elkhorn First Nat.

to know only his general authority,[18] and have a right to assume that the principal intended him to employ the usual and appropriate means and do the acts that belong to the particular character of employment or that have been previously employed by such agent, irrespective of any private directions the principal may have thought it best to give to the agent.[19]

A special agent who acts within his apparent power will bind his principal, even though he has received private instructions which limit his special authority,[20] as in such a case the special agent be-

Bank, 26 Wis. 663, 7 AmR 107; Young v. Wright, 4 Wis. 144, 65 AmD 303.

Eng.—International Sponge Importers v. Watt, [1911] A. C. 279; Brocklesby v. Temperance Permanent Bldg. Soc., [1895] A. C. 173; Montaignac v. Shitta, 15 App. Cas. 357; National Bolivian Nav. Co. v. Wilson, 5 App. Cas. 176; Edmunds v. Bushell, L. R. 1 Q. B. 97; Rimmer v. Webster, [1902] 2 Ch. 163; Trickett v. Tomlinson, 13 C. B. N. S. 663, 106 ECL 663, 143 Reprint 263; Perry Herrick v. Attwood, 2 De G. & J. 21, 59 EngCh 17, 44 Reprint 895; Whitehead v. Tuckett, 15 East 400, 104 Reprint 896, 2 ERC 358; Neeld v. Beaufort, 5 Jur. 1123 [aff 12 Cl. & F. 248, 8 Reprint 1399]; De Bouchout v. Goldsmid, 5 Ves. Jr. 211, 31 Reprint 551; Page v. Great, etc., R. Co., 16 Wkly. Rep. 566.

Ont.—Murphy v. Thompson, 28 U. C. C. P. 233.

Man.—Bouchette v. Anderson, Man. t. Wood 64.

[a] **Illustrations.**—(1) Where an agent has power to lease a dredge, an instruction not to take the dredge until it is insured is a limitation on his power such as cannot be said from the nature of the transaction to be apparent, and therefore the other party is not bound without notice of the limitation. California Dev. Co. v. Yuma Valley Union Land, etc., Co., 9 Ariz. 366, 84 P 88. (2) An instruction to a general contracting agent by the principal "not to make parol contracts with agents," not brought to the notice of the person with whom the agent contracts, is not binding on such person. Van Santvoord v. Smith, 79 Minn. 316, 82 NW 642.

[b] **Secret instructions will not lessen the apparent powers** of an agent which have been exercised by him without objection by the principal. Robinson v. American Fish, etc., Co., 17 Cal. A. 212, 119 P 388.

[c] **The limitation of the authority of an agent is of importance** only so far as it is apparent to a responsible public. Swisher v. Palmer, 106 Ill. A. 432.

[d] **A statement by a principal** that his agent has the same authority as if he owned the land himself shows that the agent's authority is general, and any secret limitation or understanding between the agent and the principal would not affect a person dealing with the agent on the strength of such statement. Mitchell v. Samford, 149 Mo. A. 72, 130 SW 99.

[e] **Subsequent limitations.**—Where an agent is vested with general authority, and such authority is subsequently sought to be limited by writing, notice of such subsequent limitation must be conveyed to third persons having dealings with the agent. In the absence of such notice the principal is estopped from setting up the limitation as against a third person acting bona fide. Sayward v. Dunsmuir, 11 B. C. 375.

18. Ala.—Western Union Tel. Co. v. Heathcoat, 149 Ala. 623, 43 S 117; Wheeler v. McGuire, 86 Ala. 398, 5 S 190, 2 LRA 808.

Ariz.—California Dev. Co. v. Yuma Valley Union Land, etc., Co., 9 Ariz. 366, 84 P 88.

Colo.—Saxonia Min., etc., Co. v. Cook, 7 Colo. 569, 4 P 1111.

Ind.—Manning v. Gasharie, 27 Ind. 399; Longworth v. Conwell, 2 Blackf. 469.

Iowa.—Hichhorn v. Bradley, 117 Iowa 130, 90 NW 592 (holding that, where a general agent of a cigar manufacturer contracted with a jobber for the agency for the cigars within the scope of such agent's authority, in an action in which the jobber claimed breach of contract parol evidence of private instructions given to the agent by the principal was inadmissible); Davenport v. Peoria M. & F. Ins. Co., 17 Iowa 276.

Kan.—Banks v. Everest, 35 Kan. 687, 12 P 141.

Mass.—Markey v. Mutual Ben. L. Ins. Co., 103 Mass. 78.

Mich.—Allis v. Voight, 90 Mich. 125, 51 NW 190; Inglish v. Ayer, 79 Mich. 516, 44 NW 942; Hutchings v. Ladd, 16 Mich. 493.

Mo.—Reynolds v. Chicago, etc., R. Co., 114 Mo. A. 670, 90 SW 100 (holding that restrictions imposed by the principal on the ostensible authority of the agent have no effect on the rights of third persons who have no knowledge of such restrictions); Phipps v. Mallory Commn. Co., 105 Mo. A. 67, 78 SW 1097.

Nebr.—Scales v. Paine, 13 Nebr. 521, 14 NW 522.

N. H.—Towle v. Leavitt, 23 N. H. 360, 55 AmD 195; Hatch v. Taylor, 10 N. H. 538.

N. Y.—Newman v. Lee, 87 App. Div. 116, 84 NYS 106 (holding that rules of a stock exchange by which a broker who is a member thereof is prohibited from receiving a certain class of legitimate orders are in the nature of "private instructions" by him to his general agent for the brokerage business, and cannot be received in evidence, as against a client who is ignorant thereof, to limit the agent's authority); White v. Fuller, 67 Barb. 267; Graves v. Miami Steamship Co., 29 Misc. 645, 61 NYS 115; Munn v. Commission Co., 15 Johns. 44.

N. C.—Gooding v. Moore, 150 N. C. 195, 63 SE 895.

Or.—Hillyard v. Hewitt, 61 Or. 58, 120 P 750.

Pa.—Anderson v. National Surety Co., 196 Pa. 288, 46 A 306; De Turck v. Matz, 180 Pa. 347, 36 A 861; Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 AmD 390; Chouteaux v. Leech, 18 Pa. 224, 57 AmD 602; Landis v. Shadle, 23 Pa. Co. 505.

S. C.—Merchants', etc., Nat. Bank v. Chilton Mfg. Co., 56 S. C. 320, 33 SE 750.

Tenn.—Murphy v. Southern L. Ins. Co., 3 Baxt. 440, 27 AmR 761.

Wash.—Hall v. Union Cent. L. Ins. Co., 23 Wash. 610, 63 P 505, 83 AmSR 844, 51 LRA 288.

[a] **The authority of a general agent, within the usual scope of the principal's business,** cannot be limited as to third parties by private instructions from the principal. Allis v. Voight, 90 Mich. 125, 51 NW 190; Inglish v. Ayer, 79 Mich. 516, 44 NW 942.

[b] **Whenever the very act of the agent is authorized by the terms of the power,** that is, whenever, by comparing the act done by the agent with the words of the power, the act is itself warranted by the terms used, such act is binding on the principal as to all persons dealing in good faith with the agent, and the persons so dealing are not bound to inquire into facts aliunde. Morgan v. Johnson, 4 DomLR 643, 3 OntWN 1526, 22 OntWR 868.

[c] **Where a principal puts an agent forward as a general agent,** although in a particular line, or places him in a position where others are justified in the belief that his powers are general, the undisclosed restrictions that may be imposed upon him will be ineffectual, except as between the agent and his principal. Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019.

[d] **General manager of telegraph company.**—Where a person having a claim for delay in delivering a telegram does not know of any limitation imposed by a telegraph company on the authority of its general manager and head man of a local office in charge of its business there, a waiver by him of a written presentation of a claim for damages is binding on the company. Western Union Tel. Co. v. Heathcoat, 149 Ala. 623, 43 S 117.

[e] **Where an oral contract is within a general agent's apparent authority** the fact that he violated his principal's instructions in making the contract by parol is immaterial in the absence of proof that the third person knew of the limitation of his authority. Gooding v. Moore, 150 N. C. 195, 63 SE 895.

19. U. S.—U. S. v. Williams, 28 F. Cas. No. 16,724, 1 Ware 173.

Ala.—Wheeler v. McGuire, 86 Ala. 398, 5 S 190, 2 LRA 808 and note.

Ind.—American Tel., etc., Co. v. Green, 164 Ind. 349, 73 NE 707.

Mo.—Harrison v. Kansas City, etc., R. Co., 50 Mo. A. 332 (laying down the doctrine thus: Those dealing with an agent have a right to conclude that the principal intends the agent to have and exercise those powers and those only, which necessarily, properly, and legitimately belong to the character of his employment, irrespective of any private instructions or restrictions on his power); Hayner v. Churchill, 29 Mo. A. 676.

N. Y.—Lowenstein v. Lombard, 164 N. Y. 324, 58 NE 44; Cox v. Albany Brewing Co., 56 Hun 489, 10 NYS 213; Kelly v. Fall Brook Coal Co., 4 Hun 261, 67 Barb. 183; Kerslake v. Schoonmaker, 1 Hun 436, 3 Thomps. & C. 524.

N. D.—Canham v. Plano Mfg. Co., 3 N. D. 229, 55 NW 583.

Pa.—Watts v. Devor, 1 Grant 267.

Tenn.—Ezell v. Franklin, 2 Sneed 236.

Wis.—Boothby v. Scales, 27 Wis. 626.

Eng.—Biggs v. Evans, [1894] 1 Q. B. 88.

N. S.—Macnutt v. Shaffner, 34 N. S. 402.

See also infra § 222.

20. Me.—Bryant v. Moore, 26 Me. 84, 45 AmD 96.

Mo.—Kinealy v. Burd, 9 Mo. A. 359.

Nebr.—Howell v. Graff, 25 Nebr. 130, 41 NW 142.

N. H.—Towle v. Leavitt, 23 N. H. 360, 55 AmD 195; Hatch v. Taylor, 10 N. H. 538.

Vt.—Hurlburt v. Kneeland, 32 Vt. 316 (holding that, where there is an actual want of authority from the principal for the acts of his special agent, the former will not be liable therefor; but aliter where there is an authority for such acts, notwithstanding the agent has violated his private instructions as to the mode of execution).

See also infra § 223.

[a] **"Where private instructions are given to a special agent,** respecting the mode and manner of executing his agency, intended to be kept secret, and not communicated to those with whom he may deal, such instructions are not to be regarded as limitations upon his authority; and notwithstanding he disregards them, his act, if otherwise within the scope of his agency, will be valid, and bind his employer." Hatch v. Taylor, 10 N. H. 538, 549.

[b] **Reason for rule.**—"No man is at liberty to send another into the market, to buy or sell for him as his

comes, as between the principal and persons dealing with him, a general agent for the transaction of the particular business.[21]

[§ 210] c. **Known Limitations.** Instructions modifying or limiting the authority of the agent, which are known to a person dealing with him, are as binding upon such person as they are upon the agent, and he can acquire no rights against the principal by dealing with the agent contrary thereto.[22] The principal may make the authority of his agent as broad or as narrow as he will, and any lawful limitations which he chooses to impose upon the agent's powers and which are not in the nature of secret instructions will be as binding upon third persons

agent, with secret instructions as to the manner in which he shall execute his agency, which are not to be communicated to those with whom he is to deal, and then, when his agent has deviated from those instructions, to say that he was a special agent—that the instructions were limitations upon his authority—and that those with whom he dealt, in the matter of his agency, acted at their peril, because they were bound to enquire, where enquiry would have been fruitless, and to ascertain that, of which they were not to have knowledge. It would render dealing with a special agent a matter of great hazard. If the principal deemed the bargain a good one, the secret orders would continue sealed; but if his opinion was otherwise, the injunction of secrecy would be removed, and the transaction avoided, leaving the party to such remedy as he might enforce against the agent." Hatch v. Taylor, 10 N. H. 538, 548.

[c] **Discussion of rule.**—"All which may be said to a special agent, about the mode in which his agency is to be executed, even if said at the time that the authority is conferred, or the agency constituted, cannot be regarded as part of the authority itself, or as a qualification or limitation upon it. There may be, at all times, upon the constitution of a special agency, and there often is, not only an authority given to the agent, in virtue of which he is to do the act proposed, but also certain communications, addressed to the private ear of the agent, although they relate to the manner in which the authority is to be executed, and are intended as a guide to direct its execution. These communications may, to a certain extent, be intended to limit the action of the agent; that is, the principal intends and expects that they shall be regarded and adhered to, in the execution of the agency; and should the agent depart from them he would violate the instructions given him by the principal, at the time when he was constituted agent, and execute the act he was expected to perform in a case in which the principal did not intend that it should be done. And yet, in such case he may have acted entirely within the scope of the authority given him, and the principal be bound by his acts. This could not be so, if those communications were limitations upon the authority of the agent. It is only because they are not to be regarded as part of the authority given, or a limitation upon that authority, that the act of the agent is valid, although done in violation of them; and the matter depends upon the character of the communications thus made by the principal, and disregarded by the agent." Hatch v. Taylor, 10 N. H. 538, 545.

21. Smith v. Droubay, 20 Utah 443, 58 P 1112 (holding that an agent for the sale of goods, with private limitations and restrictions imposed upon him by his employer, must nevertheless be regarded as a general agent as to third persons with whom he deals and who have no notice of the restrictions on his authority, that, when the principal accepts a contract made within the apparent scope of the agent's powers, the principal is bound by all the conditions of such contract, and that a failure to comply therewith will render him liable in damages).

[a] **The rule that one dealing with an agent must ascertain the agent's authority,** or deal with him at his peril, and that a special agent, acting outside the scope of his authority, may not bind the principal, is subject to the qualification that, where an agent is intrusted to do a particular kind of business, he becomes, as between the principal and persons dealing with him, the general agent for the transaction of such business, and his acts bind the principal, although he violates a private instruction. Cohen v. Goldstein, 128 NYS 69.

22. U. S.—Slocum v. New York L. Ins. Co., 228 U. S. 364, 33 SCt 523, 57 L. ed. 879 [mod 177 Fed. 842, 101 CCA 56]; Authors, etc., Assoc. v. O'Gorman Co., 147 Fed. 616; Modern Woodmen of America v. Tevis, 117 Fed. 369, 54 CCA 293; Russ v. Telfener, 57 Fed. 973 [aff 60 Fed. 228, 8 CCA 585 (rev on other grounds 162 U. S. 170, 16 SCt 695, 40 L. ed. 930)]; U. S. v. Williams, 28 F. Cas. No. 16,724, 1 Ware 173.

Ala.—Massachusetts Mut. L. Ins. Co. v. Crenshaw, 65 S 65 (holding that, where an actual limitation upon a general agent's authority is made known to the other contracting party, the rule which forbids reliance by the principal upon secret limitations has no effect): Fulton v. Sword Medicine Co., 145 Ala. 331, 40 S 393.

Cal.—Henry v. Continental Bldg., etc., Assoc., 156 Cal. 667, 105 P 960; Iverson v. Metropolitan L. Ins. Co., 151 Cal. 746, 91 P 609, 13 LRANS 866.

Ga.—Hutson v. Prudential Ins. Co., 122 Ga. 847, 50 SE 1000; Whitley v. James, 121 Ga. 521, 49 SE 600; Central of Georgia R. Co. v. Felton, 110 Ga. 597, 36 SE 93; Brandestein v. Douglas, 105 Ga. 845, 32 SE 341; Gorham v. Felker, 102 Ga. 260, 28 SE 1002.

Ind.—Longworth v. Conwell, 2 Blackf. 469; Lucas v. Rader, 29 Ind. A. 287, 64 NE 488 (holding that one who is informed by an agent that the price of property in the agent's hands for sale is to be fixed by the principal cannot claim that the principal has clothed the agent with apparent authority to sell for a certain price).

Iowa.—Fritz v. Chicago Grain, etc., Co., 135 Iowa 699, 114 NW 193.

Kan.—Galbreath v. Condon, 48 Kan. 748, 30 P 124.

Ky.—Seven Hills Chautauqua Co. v. Chase Bros. Co., 81 SW 238, 26 KyL 334; Forked Deer Pants Co. v. Shipley, 80 SW 476, 25 KyL 2299; Charles Brown Grocery Co. v. Becket, 57 SW 458, 22 KyL 393; Spalding v. Tucker, 51 SW 2, 21 KyL 233.

La.—Murphy v. Royal Ins. Co., 52 La. Ann. 775, 27 S 143.

Minn.—Van Santvoord v. Smith, 79 Minn. 316, 82 NW 642.

Miss.—Odd Fellows Ben. Assoc. v. Smith, 101 Miss. 332, 58 S 100.

Mo.—Leathers v. Springfield, 65 Mo. 504; Bronson v. Weber Impl. Co., 135 Mo. A. 483, 116 SW 20; Carson v. Culver, 78 Mo. A. 597.

Nebr.—Bradley v. Basta, 71 Nebr. 169, 98 NW 697; Hall v. Hopper, 64 Nebr. 633, 90 NW 549; Dietz v. Hastings City Nat. Bank, 42 Nebr. 584, 60 NW 896.

N. J.—Catoir v. American L. Ins., etc., Co., 33 N. J. L. 487.

N. Y.—Gilbert v. Deshon, 107 N. Y. 324, 14 NE 318; Marvin v. Universal L. Ins. Co., 85 N. Y. 278, 39 AmR 657; Merserau v. Phœnix Mut. L. Ins. Co., 66 N. Y. 274; Flower City Plant Food Co. v. Roberts, 81 App. Div. 249, 80 NYS 1060; Metropolitan Aluminum Co. v. Lau, 61 Misc. 105, 112 NYS 1059; Stainer v. Tysen, 3 Hill 279.

N. C.—Universal Metal Co. v. Durham, etc., R. Co., 145 N. C. 293, 59 SE 50.

Okl.—Cargile v. Union State Bank, 40 Okl. 506, 139 P 701; Deming Inv. Co. v. Shawnee F. Ins. Co., 16 Okl. 1, 83 P 918, 4 LRANS 607.

Or.—Salene v. Queen City F. Ins. Co., 59 Or. 297, 116 P 1114, 35 LRANS 438.

Pa.—Suffolk Peanut Co. v. Luden, 32 Pa. Super. 603; Landis v. Shadle, 23 Pa. Co. 505.

S. C.—Topham v. Roche, 18 S. C. L. 307, 27 AmD 387.

Tex.—Ft. Worth, etc., R. Co. v. Caruthers, (Civ. A.) 157 SW 238; Sackville v. Storey, (Civ. A.) 149 SW 239; Fetzer v. Haralson, (Civ. A.) 147 SW 290; Bybee v. Embree-McLean Carriage Co., (Civ. A.) 135 SW 203; Tres Palacios Rice, etc., Co. v. Eldman, 41 Tex. Civ. A. 542, 93 SW 698; National Guarantee, etc., Co. v. Thomas, 28 Tex. Civ. A. 379, 67 SW 454.

Vt.—Vermont Marble Co. v. Mead, 85 Vt. 20, 80 A 852; Brown v. West, 69 Vt. 440, 38 A 87.

Wash.—Francis v. Spokane Amateur Athletic Club, 54 Wash. 188, 102 P 1032.

W. Va.—Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 SE 880; Rosendorf v. Poling, 48 W. Va. 621, 37 SE 555.

Wis.—Hoskins v. O'Brien, 132 Wis. 453, 112 NW 466.

Eng.—Russo-Chinese Bank v. Li Yau Sam, [1910] A. C. 174; Forman v. The Liddesdale, [1900] A. C. 190; Jacobs v. Morris, [1901] 1 Ch. 261; [aff [1902] 1 Ch. 816] Spooner v. Browning, [1898] 1 Q. B. 528.

N. S.—Almon v. Foot, Russ. Eq. Cas. 1.

Ont.—Farrell v. Hunt, 21 U. C. C. P. 117.

[a] **"Ordinarily . . . the contracts of an agent made on behalf of his principal are binding between the principal and a third person when within the apparent scope of the agent's authority, but the rule is one of necessity, intended for the protection of the innocent. It has no application when the person dealing with the agent has actual knowledge of the agent's powers."** Francis v. Spokane Amateur Athletic Club, 54 Wash. 188, 189, 102 P 1032.

[b] **Where a principal limits the authority of his agent,** the agent cannot bind the principal beyond the limits of his authority, by contract, estoppel, or waiver, to those who know the extent of his power. Modern Woodmen of America v. Tevis, 117 Fed. 369, 54 CCA 293.

[c] **A general agent may bind his principal** to all matters within the apparent scope of his employment; but the principal is not bound by the acts of the agent beyond the scope of his authority, where the person dealing with the agent had notice of such limitation. Hutson v. Prudential Ins. Co., 122 Ga. 847, 50 SE 1000.

[d] **Where a principal puts an agent in charge of his business,** and limits his authority as to the persons from whom he shall buy, or as to the amount of debt that he may incur, third persons who, with the knowledge of these limitations, permit the agent to exceed his authority in his dealings with them do so at their peril. Thrall v. Wilson, 17 Pa. Super. 376.

[e] **A person employed to perform mere clerical duties and business transactions,** who is prohibited from making contracts for his employer, cannot bind the latter by as-

legally charged with notice of them as upon the agent himself;[23] and if the original authority is a restricted and limited one, then such limitations form part of the power itself, and third persons must know them at their peril,[24] as there is no duty on the part of the agent to disclose them;[25] and it has been held that the law will presume that a person dealing with the agent knows the limits of his powers.[26] If specific instructions are brought home to the knowledge of a third person dealing with the agent it cannot matter whether he is a general or a special agent; in either case his power to bind his principal will be limited by these known instructions or limitations.[27] However, notice of private limitations given to the third person after the transaction with the agent has been completed will not relieve the principal from obligations under such transaction, which have become fixed.[28]

[§ 211] **d. Apparent Scope of Authority—(1) In General.** While as between the principal and the agent the scope of the latter's authority is that authority which is actually conferred upon him by his principal, which may be limited by secret instructions and restrictions,[29] such instructions and restrictions do not affect third persons ignorant thereof;[30] and as between the principal and third persons the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal holds the agent out as possessing or which he permits the agent to represent that he possesses and which the principal is estopped to deny,[31] and the principal

suming to have such authority, and contracting in the name of his employer with a person having knowledge of the scope of his employment, and then passing the void transaction as legitimate in the course of his duties of checking up his employer's trades to avoid mistakes, and giving the customary memorandum evidencing such as may be found on such verification to be correct. Bartlett v. Bartlett, etc., Co., 116 Wis. 450, 93 NW 473.

[f] **Where a foreman of a construction gang has explicit instructions** not to hire teams except by the day, subject to be dispatched at the end of the day, the foreman's employer is not liable on a contract for hiring teams for a term of months of one who knew that the foreman had been hiring other teams by the day only. Langston v. Postal Tel. Cable Co., 6 Ga. A. 833, 65 SE 1094.

[g] **Agents customary violation of limitations.**—Limitations upon an agent's authority are not waived by the principal by a custom of the agent in acting in violation thereof, unless such custom is known and acquiesced in by the principal. Odd Fellows' Ben. Assoc. v. Smith, 101 Miss. 332, 58 S 100.

23. American Lead Pencil Co. v. Wolfe, 30 Fla. 360, 11 S 488; Bryant v. Moore, 26 Me. 84, 45 AmD 96; Barnard v. Wheeler, 24 Me. 412; Graton, etc., Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 P 879.

24. Ky.—Seven Hills Chautauqua Co. v. Chase Bros. Co., 81 SW 238, 26 KyL 334.

Me.—Bryant v. Moore, 26 Me. 84, 45 AmD 96.

Md.—Brager v. Levy, 122 Md. 554, 90 A 102.

N. H.—Hatch v. Taylor, 10 N. H. 538.

N. Y.—Waldorf v. Simpson, 15 App. Div. 297, 44 NYS 291.

N. C.—Ferguson v. Davis, etc., Mfg., etc., Co., 118 N. C. 946, 24 SE 710.

Tex.—Trammell v. Turner, (Civ. A.) 82 SW 325.

Vt.—Vermont Marble Co. v. Mead, 85 Vt. 20, 80 A 852.

25. Mitrovich v. Fresno Fruit Packing Co., 123 Cal. 379, 55 P 1064; Armstrong v. Campbell, 140 Iowa 564, 118 NW 898.

26. Salem Bank v. Gloucester Bank, 17 Mass. 1, 9 AmD 111; Brown v. Johnson, 20 Miss. 398, 51 AmD 118; Leinkauf v. Lombard, etc., Co., 12 App. Div. 302, 42 NYS 391; Cobb v. Glenn Boom, etc., Co., 57 W. Va. 49, 49 SE 1005, 110 AmSR 734; Rosendorf v. Poling, 48 W. Va. 621, 37 SE 555.

[a] **One dealing with an agent with knowledge that he is an agent,** is "bound to know the limitation placed upon his authority." Commonwealth Trust Co. v. Young, 122 App. Div. 502, 503, 107 NYS 555.

27. U. S. v. Williams, 28 F. Cas. No. 16,724, 1 Ware 173; Barnard v. Wheeler, 24 Me. 412; Marvin v. Universal L. Ins. Co., 85 N. Y. 278, 39 AmR 657; Sandford v. Handy, 23 Wend. (N. Y.) 260; Trammell v. Turner, (Tex. Civ. A.) 82 SW 325.

[a] **A person who has notice** of the scope and extent of an agent's authority, especially where he is a special agent whose authority is evidenced in writing, is bound by such notice, and cannot bind the principal by dealing with such agent beyond and outside the scope of his authority. National Union F. Ins. Co. v. John Spry Lumber Co., 235 Ill. 98, 85 NE 256.

28. Crews v. Garneau, 14 Mo. A. 505 (holding that notice by the principal to the other party to an executory contract that the agent in making the contract disobeyed the principal's instructions will not relieve him from obligations which have become fixed under the contract).

29. Ark.—Keith v. Herschberg Optical Co., 48 Ark. 138, 2 SW 777.

Ky.—Forked Deer Pants Co. v. Shipley, 80 SW 476, 25 KyL 2299.

Md.—Lister v. Allen, 31 Md. 543, 100 AmD 78.

Mich.—Marx v. King, 162 Mich. 258, 266, 127 NW 341 [quot Cyc].

Miss.—Routh v. Agricultural Bank, 20 Miss. 161.

Mo.—New Albany Woolen Mills v. Meyers, 43 Mo. A. 124.

N. Y.—Price v. Keyes, 62 N. Y. 378; Edwards v. Schaffer, 49 Barb. 291.

Pa.—De Turck v. Mats, 180 Pa. 347, 36 A 861; Brooke v. New York, etc., R. Co., 108 Pa. 529, 1 A 206, 56 AmR 235.

Tex.—Sackville v. Storey, (Civ. A.) 149 SW 239.

Eng.—Neeld v. Beaufort, 5 Jur. 1123 [aff 12 Cl. & F. 248, 8 Reprint 1899].

30. See supra § 209.

Known limitations see supra § 210.

31. U. S.—Merchants Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; Schimmelpennich v. Bayard, 1 Pet. 264, 7 L. ed. 138; Lamon v. Speer Hardware Co., 198 Fed. 453, 119 CCA 1; Schiffer v. Anderson, 146 Fed. 457, 76 CCA 667; Ætna Indemn. Co. v. Ladd, 135 Fed. 636, 68 CCA 274; Dysart v. Missouri, etc., R. Co., 122 Fed. 228, 58 CCA 592; Oshkosh Nat. Bank v. Munger, 95 Fed. 87, 36 CCA 659; Einstein v. Schnebly, 89 Fed. 540; Alger v. Anderson, 78 Fed. 729; Gowen v. Bush, 76 Fed. 349, 22 CCA 196; Whiting v. Wellington, 10 Fed. 810; Philadelphia Trust, etc., Co. v. Philadelphia Seventh Nat. Bank, 6 Fed. 114; Union Mut. L. Ins. Co. v. Masten, 3 Fed. 881.

Ala.—St. Louis, etc., R. Co. v. Hall, 65 S 33; Kramer v. Compton, 166 Ala. 216, 52 S 351; La Fayette R. Co. v. Tucker, 124 Ala. 514, 27 S 447; Golding v. Merchant, 43 Ala. 705; Wooten v. Federal Discount Co., 7 Ala. A. 351, 62 S 263; Winter-Loeb Grocery Co. v. Mutual Warehouse Co., 4 Ala. A. 431, 58 S 807.

Ark.—American Sales Book Co. v. Whitaker, 100 Ark. 360, 140 SW 132, 37 LRANS 91 and note; Brown v. Brown, 96 Ark. 456, 132 SW 220; Mississippi Valley Constr. Co. v. Abeles, 87 Ark. 374, 112 SW 894; Commercial Assur. Co. v. Rector, 55 Ark. 630, 17 SW 378; Liddell v. Sahline, 55 Ark. 627, 17 SW 705; Jacobson v. Poindexter, 42 Ark. 97.

Cal.—Conklin v. Benson, 159 Cal. 785, 116 P 34, 36 LRANS 537; Buckley v. Silverberg, 113 Cal. 673, 45 P 804; Swinnerton v. Argonaut Land, etc., Co., 112 Cal. 375, 44 P 719; Davidson v. Dallas, 8 Cal. 227; McDonald v. Kingsbury, 16 Cal. A. 244, 116 P 380.

Colo.—Silver Mountain Mine Co. v. Anderson, 51 Colo. 298, 117 P 173; Keith v. Atkinson, 48 Colo. 480, 111 P 55; Hagerman v. Bates, 24 Colo. 71, 49 P 139; Wedge Mines Co. v. Denver Nat. Bank, 19 Colo. A. 182, 73 P 873; Witcher v. Gibson, 15 Colo. A. 163, 61 P 192; Heinz v. American Nat. Bank, 9 Colo. A. 31, 47 P 403.

Del.—Excelsior Refining Co. v. Murphey, 22 Del. 24, 73 A 1040 (holding that, if a principal holds out a person as his agent, and places him in such a position that he is apparently authorized to deal with persons as such agent, without any known restrictions or limitations on his authority, the principal will be bound as to third persons doing business with him in the particular business in which he is engaged); Watertown Steam Engine Co. v. Davis, 5 Del. 192; Lattomus v. Farmers' Mut. F. Ins. Co., 3 Del. 404.

Fla.—Bush Grocery Co. v. Conely, 61 Fla. 131, 55 S 867; Hartford F. Ins. Co. v. Brown, 60 Fla. 83, 53 S 838; Eagle Fire Co. v. Lewallen, 56 Fla. 246, 47 S 947; Indian River State Bank v. Hartford F. Ins. Co., 46 Fla. 283, 35 S 228.

Ga.—Milledgeville Water Co. v. Edwards, 121 Ga. 555, 49 SE 621; Atkinson v. Southern R. Co., 114 Ga. 146, 39 SE 888, 55 LRA 223; Louisville, etc., R. Co. v. Tift, 100 Ga. 86, 27 SE 765 (holding that, where a corporation holds out to the world a person as its general agent with ostensible authority to act for and bind it as such, other persons dealing with such agent are not bound by private limitations upon his authority, of which they have no notice or knowledge); Florida Midland, etc., R. Co. v. Varnedoe, 81 Ga. 175, 7 SE 129; Georgia Military Academy v. Estill, 77 Ga. 409; Blalsdell v. Bohr, 77 Ga. 381; Macon City Bank v. Kent, 57 Ga. 283; McDonald v. Pearre, 5 Ga. A. 130, 62 SE 830.

Hawaii.—Caplan v. Hoffschlaeger, 2 Hawaii 691; Spencer v. Bennet, 2 Hawaii 415.

Ill.—Merchants' Nat. Bank v. Nichols, etc., Co. 223 Ill. 41, 79 NE 33, 7 LRANS 752; Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 NE 427 [aff 118 Ill. A. 89]; Fortune v. Stockton, 182 Ill. 454, 55 NE 567; Dewees v. Osborne, 178 Ill. 39, 52 NE 942; Union Mut. L. Ins. Co. v. White, 106 Ill. 67; Noble v. Nugent, 89 Ill. 522; Thurber v. Anderson, 88 Ill. 167; St. Louis, etc., Packet Co. v. Parker, 59 Ill. 23; Ætna Ins. Co. v. Maguire, 51 Ill. 342; Rawson v. Curtiss, 19 Ill. 456; Hodges v. Bankers Surety Co.,

will be bound by all acts of the agent performed in the usual and customary mode of doing the particular business intrusted to him, although he may have violated his private instructions, and although the principal may have given public notice not to trust the agent.[1]

[1] 152 Ill. A. 372; West Side Hospital v. Elger, 139 Ill. A. 645; Treat v. Smith, 139 Ill. A. 262 [aff 234 Ill. 552, 85 NE 289]; Schmoldt v. Langston, 106 Ill. A. 385; Williams v. Pelley, 96 Ill. A. 346; Slaughter v. Fay, 80 Ill. A. 105; St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 74 Ill. A. 619 [aff 175 Ill. 557, 51 NE 911, 67 AmSR 238]; World's Columbian Exposition v. Richards, 57 Ill. A. 601.

Ind.—Larue v. American Diesel Engine Co., 176 Ind. 609, 96 NE 772; Lake Shore, etc., R. Co. v. Foster, 104 Ind. 293, 4 NE 20, 54 AmR 319; Over v. Schiffling, 102 Ind. 191, 26 NE 91; Rathbone v. Sanders, 9 Ind. 217; Pursley v. Morrison, 7 Ind. 356, 63 AmD 424; King v. Edward Thompson Co., (A.) 104 NE 106; Wagner v. McCool, 52 Ind. A. 124, 100 NE 395; Robinson v. Nipp, 20 Ind. A. 156, 50 NE 408; Ellinger v. Rawlings, 12 Ind. A. 336, 40 NE 146; Union Cent. L. Ins. Co. v. Huyck, 5 Ind. A. 474, 32 NE 580; Foss-Schneider Brewing Co. v. McLaughlin, 5 Ind. A. 415, 31 NE 338; Barnett v. Gluting, 3 Ind. A. 415, 29 NE 154, 927.

Iowa.—Watkins Medical Co. v. Moss, 141 NW 497; Osborne v. Ringland, 122 Iowa 329, 98 NW 116; Fishbaugh v. Spunaugle, 118 Iowa 337, 92 NW 58.

Kan.—Townsend v. Missouri Pac. R. Co., 88 Kan. 260, 128 P 389; Aultman Thrashing, etc., Co. v. Knoll, 71 Kan. 109, 79 P 1074; Banks v. Everest, 35 Kan. 687, 12 P 141. See Kane v. Barstow, 42 Kan. 465, 22 P 588, 16 AmSR 490.

Ky.—Louisville, etc., R. Co. v. Cox, 145 Ky. 667, 141 SW 389; Continental Ins. Co. v. Buchanan, 108 SW 355, 32 KyL 1298; Peyton v. Old Woolen Mills Co., 122 Ky. 361, 91 SW 719, 28 KyL 1303; Forked Deer Pants Co. v. Shipley, 80 SW 476, 25 KyL 2299; Continental Tobacco Co. v. Campbell, 76 SW 125, 25 KyL 569; Tompkins v. Triplett, 110 Ky. 824, 62 SW 1021, 23 KyL 305, 96 AmSR 472; Henry Vogt Mach. Co. v. Lingenfelser, 62 SW 499, 23 KyL 38; Blood v. Herring, 61 SW 273, 22 KyL 1725; Columbia Land, etc., Co. v. Tinsley, 60 SW 10, 22 KyL 1082; Cartmel v. Unverzaught, 54 SW 965, 21 KyL 1282.

La.—Richard v. Springfield F. & M. Ins. Co., 114 La. 794, 38 S 563, 108 AmSR 359, 69 LRA 278; Murphy v. Royal Ins. Co., 52 La. Ann. 775, 27 S 143.

Me.—Heath v. Stoddard, 91 Me. 499, 40 A 547.

Md.—Lister v. Allen, 31 Md. 543, 100 AmD 78.

Mass.—Castle v. Mayer, 104 NE 341; Barry v. New York Mut. L. Ins. Co., 211 Mass. 306, 97 NE 779; Rice v. James, 193 Mass. 458, 79 NE 807; Garfield, etc., Coal Co. v. Rockland-Rockport Lime Co., 184 Mass. 60, 67 NE 863, 100 AmSR 543, 61 LRA 946; Mt. Morris Bank v. Gorham, 169 Mass. 519, 48 NE 341; Butler v. Boyd, 124 Mass. 181; Markey v. Mutual Ben. L. Ins. Co., 103 Mass. 78; Dresser Mfg. Co. v. Waterston, 3 Metc. 9.

Mich.—McBroom v. Cheboygan Brewing, etc., Co., 162 Mich. 323, 329, 127 NW 361 [cit Cyc]; Marx v. King, 162 Mich. 258, 266, 127 NW 341 [quot Cyc]; Young v. Stein, 152 Mich. 310, 116 NW 195, 125 AmSR 412, 17 LRANS 231; Antrim Iron Co. v. Anderson, 140 Mich. 702, 104 NW 319, 112 AmSR 434; Ryerson v. Tourcotte, 121 Mich. 78, 79 NW 933; Baker v. Barnett Produce Co., 113 Mich. 533, 71 NW 866; Verdine v. Olney, 77 Mich. 310, 43 NW 975; Barry v. Boston Mar. Ins. Co., 62 Mich. 424, 29 NW 31; Sorrel v. Brewster, 1 Mich. 373.

Minn.—Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 NW 236; Kilborn v. Prudential Ins. Co., 99 Minn. 176, 108 NW 861; Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224, 53 NW 1061; Tice v. Russell, 43 Minn. 66, 44 NW 886.

Miss.—Germania L. Ins. Co. v. Bouldin, 100 Miss. 660, 56 S 609; McCoy v. McKowen, 26 Miss. 487, 59 AmD 264; Brown v. Johnson, 20 Miss. 398, 51 AmD 118; Wilcox v. Routh, 17 Miss. 476.

Mo.—Carthage First Nat. Bank v. Mutual. Ben. L. Ins. Co., 145 Mo. 127, 46 SW 615; Butler County v. Boatmens Bank, 143 Mo. 13, 44 SW 1047; May v. Jarvis-Conklin Mortg. Trust Co., 138 Mo. 275, 39 SW 782; Johnson v. Hurley, 115 Mo. 513, 22 SW 492; Sparks v. Dispatch Transfer Co., 104 Mo. 531, 15 SW 417, 24 AmSR 351, 12 LRA 714 and note; Baker v. Kansas City, etc., R. Co., 91 Mo. 152, 3 SW 486; Underwood Typewriter Co. v. Century Realty Co., 165 Mo. A. 131, 146 SW 448; Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019; Sublette v. Brewington, 139 Mo. A. 410, 123 SW 1150; Friedman v. Kelly, 126 Mo. A. 279, 102 SW 1066; Reynolds v. Chicago, etc., R. Co., 114 Mo. A. 670, 90 SW 100; Dawson v. Wombles, 111 Mo. A. 532, 86 SW 271; Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013; Phipps v. Mallory Commn. Co., 105 Mo. A. 67, 78 SW 1097; Wimp v. Early, 104 Mo. A. 85, 78 SW 343; Foley v. Boulware, 86 Mo. A. 674.

Mont.—Spelman v. Gold Coin Min., etc., Co., 26 Mont. 76, 66 P 597, 91 AmSR 402, 55 LRA 640.

Nebr.—Fruit Dispatch Co. v. Gilinsky, 84 Nebr. 821, 122 NW 45; Hanson v. Ætna L. Ins. Co., 78 Nebr. 418, 110 NW 1000; Fidelity Mut. F. Ins. Co. v. Lowe, 93 NW 749; Plano Mfg. Co. v. Nordstrom, 63 Nebr. 123, 88 NW 164; Brown v. Eno, 48 Nebr. 538, 67 NW 434; Creighton v. Finlayson, 46 Nebr. 457, 64 NW 1103; Oberne v. Burke, 30 Nebr. 581, 46 NW 838; Levy v. Hastings First Nat. Bank, 27 Nebr. 557, 43 NW 354; Lorton v. Russell, 27 Nebr. 372, 43 NW 112; Webster v. Wray, 17 Nebr. 579, 24 NW 207.

N. H.—Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 AmR 45; Towle v. Leavitt, 23 N. H. 360, 55 AmD 195.

N. J.—Murphy v. Cane, 82 N. J. L. 557, 82 A 854, AnnCas1913D 643 and note; Strauss v. American Talcum Co., 63 N. J. L. 613, 44 A 631; Cranwell v. Clinton Realty Co., 67 N. J. Eq. 540, 58 A 1030.

N. M.—Western Homestead, etc., Co. v. Albuquerque First Nat. Bank, 9 N. M. 1, 47 P 721.

N. Y.—Small v. Houseman, 208 N. Y. 115, 101 NE 700 [rev 142 App. Div. 760, 127 NYS 720]; McNeil v. New York Tenth Nat. Bank, 46 N. Y. 325, 7 AmR 341; Joseph v. Platt, 130 App. Div. 478, 114 NYS 1065; Merkel v. Lazard, 114 App. Div. 25, 99 NYS 686; Ring v. Long Island Real Est. Exch., etc., Co., 93 App. Div. 442, 87 NYS 682 [aff 184 N. Y. 553 mem, 76 NE 1107 mem]; Waldron v. Fargo, 52 App. Div. 18, 64 NYS 798 [rev on other grounds 170 N. Y. 130, 62 NE 1077]; Babin v. Ensley, 14 App. Div. 548, 43 NYS 849; Leinkauf v. Lombard, etc., Co., 12 App. Div. 302, 42 NYS 391; Caffee v. Ottman, 63 Hun 502, 18 NYS 393; Goddard v. Mallory, 52 Barb. 87; Cox v. Albany Brewing Co., 2 Silv. Sup. 590, 6 NYS 841; Dillaye v. Beer, 3 Thomps. & C. 218; J. C. Bogert Co. v. Harpootlian, 74 Misc. 478, 132 NYS 367; Canandalgua Nat. Bank v. Southern R. Co., 64 Misc. 327, 118 NYS 668; Stevenson v. Fox, 19 Misc. 177, 43 NYS 253; Trankla v. McLean, 18 Misc. 221, 41 NYS 385; Delafield v. Illinois, 2 Hill 159, 26 Wend. 192; Lightbody v. North American Ins. Co., 23 Wend. 18; Anderson v. Coonley, 21 Wend. 279; Jeffrey v. Bigelow, 13 Wend. 518, 28 AmD 476; Fatta v. Edgerton, 137 NYS 226.

N. C.—Latham v. Field, 168 N. C. 356, 79 SE 865; Stewart v. Salisbury Realty, etc., Co., 159 N. C. 230, 74 SE 736; Bowers v. Bryan Lumber Co., 152 N. C. 604, 68 SE 19; Farmers', etc., Bank v. Germania L. Ins. Co., 150 N. C. 770, 64 SE 902; Morganton Bank v. Hay, 143 N. C. 326, 55 SE 811.

Oh.—General Cartage, etc., Co. v. Cox, 74 Oh. St. 284, 78 NE 371, 113 AmSR 959; Pullman Co. v. Willett, 27 Oh. Cir. Ct. 649 (holding that, where a person holds out another to the public as agent, he is bound by his acts whether he in fact is such agent or not, and third persons dealing with him are not required to first determine the nature and extent of his authority).

Okl.—Howe v. Martin, 23 Okl. 561, 102 P 128, 138 AmSR 840.

Or.—Gardner v. Wiley, 46 Or. 96, 79 P 341 (holding that, where defendant permitted an employee to transact the business of selling goods as on his own account under the name of a company, holding him out as such company, it is estopped to deny his authority to take notes in his own name, or in the name of the company, for goods sold, and transfer the same to persons dealing with him without notice).

Pa.—American Structural Steel Co. v. Annex Hotel Co., 226 Pa. 461, 75 A 669; De Turck v. Matz, 180 Pa. 347, 36 A 861; Hubbard v. Ten Brook, 124 Pa. 291, 16 A 817, 10 AmSR 585, 2 LRA 823 and note; Eilenberger v. Protective Mut. F. Ins. Co., 89 Pa. 464; Baltimore, etc., Steamboat Co. v. Brown, 54 Pa. 77; Briggs v. Large, 30 Pa. 287; Baring v. Peirce, 5 Watts & S. 548, 40 AmD 534; Phillips v. International Text Book Co., 26 Pa. Super. 230; Ruane v. Murray, 26 Pa. Super. 187; Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396; Grasselli Chemical Co. v. Biddle Purchasing Co., 22 Pa. Super. 426; Fees v. Shadel, 20 Pa. Super. 193; McCormick Harvesting Mach. Co. v. Smith, 9 Kulp 448.

S. C.—Williams v. Tolbert, 76 S. C. 211, 56 SE 908; Carmichael v. Buck, 44 S. C. L. 332, 70 AmD 226.

S. D.—Aldrich v. Wilmarth, 3 S. D. 523, 54 NW 811.

Tenn.—Murphy v. Southern L. Ins. Co., 3 Baxt. 440, 27 AmR 761; Fabian Mfg. Co. v. Newman, (Ch. A.) 62 SW 218; Nunnelly v. Goodwin, (Ch. A.) 39 SW 855.

Tex.—Hull v. East Line, etc., R. Co., 66 Tex. 619, 2 SW 831; McAlpin v. Ziller, 17 Tex. 508; Gray v. Lumpkin, (Civ. A.) 159 SW 880; Birge-Forbes Co. v. St. Louis R. Co., 53 Tex. Civ. A. 55, 115 SW 333; Cadenhead v. Rogers, (Civ. A.) 96 SW 952; Baker v. Kellett-Chatham Mach. Co., (Civ. A.) 84 SW 661; Bay City Irr. Co. v. Sweeney, (Civ. A.) 81 SW 545; Osborne v. Gatewood, (Civ. A.) 74 SW 72 (holding that a principal is equally bound by the authority which he actually gives and by that which by his own act he appears to give); Eastern Mfg. Co. v. Brenk, 32 Tex. Civ. A. 97, 73 SW 538; Waters Pierce Oil Co. v. Davis, 24 Tex. Civ. A. 508, 60 SW 453; Greer v. Marble Falls First Nat. Bank, (Civ. A.) 47 SW 1045; Schleicher v. Armstrong, (Civ. A.) 32 SW 327.

Utah.—Smith Table Co. v. Madsen, 30 Utah 297, 84 P 885; Nichols v. Oregon Short Line R. Co., 24 Utah 83, 66 P 768, 91 AmSR 778; Smith v. Droubay, 20 Utah 443, 58 P 1112.

Vt.—Keyes v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201; Winchell v. National Express Co., 64 Vt. 15, 23 A 728; Putnam v. French, 53 Vt. 402, 38 AmR 682; Fay v. Richmond, 43 Vt. 25.

Va.—Gore v. Buzzard, 4 Leigh (31 Va.) 231; Mann v. King, 6 Munf. (20 Va.) 428.

Wash.—O'Daniel v. Streeby, 77 Wash. 414, 137 P 1025; Ross v. Kenwood Inv. Co., 73 Wash. 131, 139, 131 P 649 [cit Cyc]; Brace v. Northern Pac. R. Co., 63 Wash. 417, 115 P 841, 38 LRANS 1135 and note; Galbraith v. Weber, 58 Wash. 132, 107 P 1050, 28 LRANS 341 and note; Smith v. Gray, 52 Wash. 255, 100 P 339; Northwest Thresher Co. v. Dahlgren, 50

ular business, although he may have acted in violation of private instructions,[32] unless there is something in the nature of the business or the circumstances of the case to indicate that the agent is acting

Wash. 325, 97 P 228, 19 LRANS 324 and note; Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 P 845, 117 AmSR 1064; Gregory v. Loose, 19 Wash. 599, 54 P 33.

W. Va.—Union Bank, etc., Co. v. Long Pole Lumber Co., 70 W. Va. 558, 74 SE 674, 41 LRANS 663; Merchants', etc., Nat. Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 SE 880, 70 LRA 312; Dewing v. Hutton, 48 W. Va. 576, 37 SE 670 (where the court held that if an agent notifies his principal of continuous unauthorized acts committed by himself the principal, to escape responsibility therefor, must promptly repudiate the same before the rights of third persons are affected; otherwise he will be estopped to deny that such acts were authorized).

Wis.—Garlick v. Morley, 147 Wis. 397, 132 NW 601; Cowie v. National Exch. Bank, 147 Wis. 124, 132 NW 900; Napa Valley Wine Co. v. Casanova, 140 Wis. 289, 122 NW 812; Bretz v. R. Connor Co., 140 Wis. 269, 122 NW 717; Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 NW 1099; Kountz v. Gates, 78 Wis. 415, 47 NW 729; Bentley v. Doggett, 51 Wis. 224, 8 NW 155, 37 AmR 827; Dodge v. McDonnell, 14 Wis. 553 (holding that, if a principal holds out his agent to the world as having a greater than his real authority, third persons dealing with the agent under this mistaken belief can hold the principal to the extent of the apparent authority).

Eng.—Montaignac v. Shitta, 15 App. Cas. 357 (holding that where an agent under his power of attorney possessed implied authority to raise money by loan for the purpose of carrying on the business affairs intrusted to him, which authority under circumstances of emergency must be deemed to include power to borrow on exceptional terms outside the ordinary course of business, the lender was not bound to inquire whether in the particular case the emergency had arisen or not, but that he was entitled to recover from the principal if he lent to the agent bona fide and without notice that the agent was exceeding his mandate); Hambro v. Burnand, [1904] 2 K. B. 10; Biggs v. Evans, [1894] 1 Q. B. 88; Robinson v. Montgomeryshire Brewery Co., [1896] 2 Ch. 841; Trickett v. Tomlinson, 13 C. B. N. S. 663, 106 ECL 663, 143 Reprint 263; Gillman v. Robinson, 1 C. & P. 642, 12 ECL 364; Waller v. Drakefore, 1 E. & B. 749, 72 ECL 749, 118 Reprint 616; Smith v. McGuire, 3 H. & N. 554; Needl v. Beaufort, 5 Jur. 1123 [aff 12 Cl. & F. 248, 8 Reprint 1399]; Brazier v. Camp, 63 L. J. Q. B. 257; Todd v. Robinson, R. & M. 217, 21 ECL 736.

B. C.—Sayward v. Dunsmuir, 11 B. C. 375 (holding that a principal who, knowing that an agent with a limited authority is assuming to exercise a general authority, stands by and permits third persons to alter their positions on the faith of the existence in fact of the pretended authority cannot afterward, against such third persons, dispute its existence).

N. S.—Macnutt v. Shaffner, 34 N. S. 402; Almon v. Law, 26 N. S. 340.

Ont.—Conway v. Shibly, 39 U. C. Q. B. 519.

Agency by estoppel see supra §§ 69–76.

[a] **It is a general rule** that the authority of an agent is enlarged by implication as to third persons if the principal allows him to act as his agent beyond his authority without objection. In that case the principal is bound by estoppel to those who deal with the agent as such within the apparent scope of his authority, and are not aware of any want of authority in the matter. Keyes v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201.

[b] **"By creating an agency the principal bestows upon the agent a certain character,** and his authority in a given case is an attribute of this character. If the principal by his express acts or as the lawful and legal result of his words or conduct, impresses upon the agent the character of one authorized to speak or act for him in a given capacity the authority results as a necessary attribute of the character and the principal will not be heard to assert as against third persons who have relied thereon in good faith, that he did not intend to confer so much authority or that he had given the agent express instructions not to exercise it. The principal has the right to impose lawful restrictions and limitations upon the agent, and they are binding and conclusive upon all who have knowledge of them, provided the principal has done nothing inconsistent by which such limitations are nullified." Kilborn v. Prudential Ins. Co., 99 Minn. 176, 184, 108 NW 861.

[c] **While the language of the power is not to be enlarged** beyond the maker's intention, he is answerable for the powers which he confessedly gives as well as those which he appears to give. Com. v. Hawkins, 83 Ky. 246, 7 KyL 238.

[d] **Where the authority is in writing** the principal will be bound by the apparent and visible interpretation which he has put upon the appointment. Osborne v. Ringland, 122 Iowa 329, 98 NW 116.

[e] **Agency by estoppel distinguished.**—"Agency or authority by estoppel arises in those cases where the principal by his culpable negligence permits his agent to exercise powers not granted to him, even though the principal have no notice or knowledge of the conduct of the agent. It is sufficient to estop the principal from disputing the authority in such cases that the course of dealing in the transaction of the principal's business, between the agent and the third persons, was such as to justify them in believing that he possessed the requisite authority, and to make it the duty of the principal to know the manner in which the agent was conducting his affairs. So that where it appears that the principal knew, or by a proper supervision of the affairs of the agency ought to have known, of the acts of the agent, or the general course and manner in which he was conducting the business of the agency, he is estopped as against innocent third persons from denying the power of the agent to act. This doctrine is more or less commingled with apparent authority, though, strictly speaking, they are essentially different in this: Apparent authority is not founded in negligence of the principal, but in the conscious permission of acts beyond the powers granted, where as the rule of estoppel has its basis in the negligence of the principal in failing properly to supervise and control the affairs of the agent." Dispatch Printing Co. v. Commercial Nat. Bank, 109 Minn. 440, 450, 124 NW 236.

32. U. S.—Ætna Indemn. Co. v. Ladd, 135 Fed. 636, 68 CCA 274; U. S. v. Williams, 28 F. Cas. No. 16,724, 1 Wire 173.

Ala.—Wooten v. Federal Discount Co., 7 Ala. A. 351, 62 S 263; Winter-Loeb Grocery Co. v. Mutual Warehouse Co., 4 Ala. A. 431, 58 S 807.

Ark.—Liddell v. Sahline, 55 Ark. 627, 17 SW 705; Keith v. Herschberg Optical Co., 48 Ark. 138, 2 SW 777.

Colo.—Little Pittsburg Cons. Min. Co. v. Little Chief Cons. Min. Co., 11 Colo. 223, 17 P 760, 7 AmSR 226; Merchants' Ins. Co. v. New Mexico Lumber Co., 10 Colo. A. 223, 51 P 174.

Ill.—Michigan Southern, etc., R. Co. v. Day, 20 Ill. 375, 71 AmD 278; Chicago Catholic Bishop v. Troup, 61 Ill. A. 641.

Ind.—Cincinnati, etc., R. Co. v. Davis, 126 Ind. 99, 25 NE 878, 9 LRA 503; Manning v. Gasharie, 27 Ind. 399.

Iowa.—Fishbaugh v. Spunaugle, 118 Iowa 337, 92 NW 58.

Kan.—Dreyfus v. Goss, 67 Kan. 57, 72 P 537; Atlantic, etc., R. Co. v. Reisner, 18 Kan. 458.

Ky.—Jones v. Shelbyville F., etc., Ins. Co., 1 Metc. 58; Shelbyville v. Shelbyville, etc., Turnp. Co., 1 Metc. 54.

La.—Forman v. Walker, 4 La. Ann. 409; Bergerot v. Farish, 9 Rob. 346; Arayo v. Currel, 1 La. 528, 20 AmD 286.

Me.—Greene v. Nash, 85 Me. 148, 26 A 1114; Johnson v. Wingate, 29 Me. 404.

Md.—Kraft v. Fancher, 44 Md. 204.

Mass.—Mussey v. Beecher, 3 Cush. 511; Lobdell v. Baker, 1 Metc. 193, 35 AmD 358.

Mich.—Marx v. King, 162 Mich. 258, 266, 127 NW 341 [quot Cyc]; Howry v. Eppinger, 34 Mich. 29.

Miss.—Potter v. Springfield Milling Co., 75 Miss. 532, 23 S 259; Planters' Bank v. Cameron, 11 Miss. 609.

Mo.—Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013; Edwards v. Home Ins. Co., 100 Mo. A. 695, 73 SW 881.

Nebr.—White v. Leighton, 15 Nebr. 42, 19 NW 478; Day, etc., Lumber Co. v. Bixby, 4 Nebr. (Unoff.) 154, 93 NW 688.

N. H.—Knapp v. U. S., etc., Express Co., 55 N. H. 348; Hatch v. Taylor, 10 N. H. 538.

N. M.—Western Homestead, etc., Co. v. Albuquerque First Nat. Bank, 9 N. M. 1, 47 P 721.

N. Y.—Lowenstein v. Lombard, 164 N. Y. 324, 58 NE 44; Rathburn v. Snow, 123 N. Y. 343, 25 NE 379, 10 LRA 355 and note; Newman v. Lee, 87 App. Div. 116, 84 NYS 106; Edwards v. Schaffer, 49 Barb. 291; Milburn v. Belloni, 34 Barb. 607, 12 AbbPr 451 [rev on other grounds 39 N. Y. 53, 100 AmD 403]; Benesch v. John Hancock Mut. L. Ins. Co., 16 Daly 394, 11 NYS 714; Sandford v. Handy, 23 Wend. 260.

N. D.—Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 NW 717.

Okl.—Howe v. Martin, 23 Okl. 561, 102 P 128, 138 AmSR 840.

Or.—Pacific Biscuit Co. v. Dugger, 40 Or. 362, 67 P 32.

Pa.—De Turck v. Matz, 180 Pa. 347, 36 A 861; Jackson v. Emmens, 119 Pa. 356, 13 A 210; Brooke v. New York, etc., R. Co., 108 Pa. 529, 1 A 206, 56 AmR 235; Williams v. Getty, 31 Pa. 461, 72 AmD 757; The Portland v. Lewis, 2 Serg. & R. 197 (holding that a clerk is an agent, and that whatever he does in the line of his business binds his employers).

Tenn.—Mt. Olivet Cemetery Co. v. Shubert, 2 Head 116.

Tex.—Gulf, etc., R. Co. v. Hume, 87 Tex. 211, 27 SW 110; Clarkson v. Reinhartz, (Civ. A.) 70 SW 111; Strosier v. Lewey, 3 Tex. A. Civ. Cas. § 129; Barnes v. Downes, 2 Tex. A. Civ. Cas. § 524.

Utah.—Smith v. Droubay, 20 Utah 443, 58 P 1112.

Vt.—Linsley v. Lovely, 26 Vt. 123.

Wis.—Ames v. D. J. Murray Mfg. Co., 114 Wis. 85, 89 NW 836.

Can.—Manufacturers' Acc. Ins. Co. v. Pudsey, 27 Can. S. C. 374 [aff 29 N. S. 124].

Man.—Hutchins v. Adams, 12 Man. 118.

N. S.—Ronne v. Montreal Ocean Steamship Co., 19 N. S. 312.

[a] **Where an agent disregards specific instructions** as to the mode of executing his powers, in respect to a matter as to which he is held out to the public by his principal as having full power and authority, his acts are nevertheless binding on his principal, as regards third parties having no notice of such instructions. Rohr-

under special instructions or limited powers.[33] This rule applies whether the agency is a general or special one.[34]

The true limit of the agent's authority to bind the principal as between the principal and third persons is the apparent authority with which the agent is invested, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation, in the absence of circumstances putting him on inquiry, to inquire into the agent's actual authority,[35] as the presumption is that one known to be an agent is acting within the scope of his authority.[36] The fact that the agent's apparent authority is different from the actual authority conferred does not relieve the principal of responsibility.[37]

Reason for rule. For the acts of his agent within his express authority the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent within the scope of the authority which he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such case would be to enable him to commit a fraud upon innocent persons.[38]

In the case of public officers the rules relating to apparent authority are not applicable, as the state is bound only by authority actually vested in the officer, and his powers are limited and defined by its laws.[39]

[§ 212] **(2) Apparent or Ostensible Authority.** Apparent authority in an agent is such authority as

bough v. U. S. Express Co., 50 W. Va. 148, 40 SE 398, 88 AmSR 849.

[b] **Where one refers another to a third person for information,** as authorized to act or answer for him, he is bound by the acts and statements of the third person. Marx v. King, 162 Mich. 258, 127 NW 341.

33. Parker, etc. Mfg. Co. v. Exchange F. Ins. Co., 166 Mass. 484, 44 NE 614. See also infra § 215.

34. Lister v. Allen, 31 Md. 543, 100 AmD 78 (holding that it matters not whether the agent was general or special if he was held out to the world as having the authority in question). See also cases supra note 31. And see infra §§ 221-223.

35. Ala.—Montgomery Furniture Co. v. Hardaway, 104 Ala. 100, 16 S 29.

Fla.—Hartford F. Ins. Co. v. Brown, 60 Fla. 83, 53 S 838; Ætna Ins. Co. v. Holmes, 59 Fla. 116, 52 S 801 (holding that the acts of an agent, performed within the scope of his real or apparent authority, are binding upon his principal, as the public have a right to rely upon the agent's apparent authority, and are not bound to inquire as to his special power, unless the circumstances are such as to put them upon inquiry).

Kan.—Banks v. Everest, 35 Kan. 687, 12 P 141.

La.—Murphy v. Royal Ins. Co., 52 La. Ann. 775, 27 S 143.

Mo.—Law Reporting Co. v. Elwood Grain Co., 135 Mo. A. 10, 115 SW 475.

N. Y.—Walsh v. Hartford F. Ins. Co., 73 N. Y. 5; Bank of Commerce v. Cohen, 4 Silv. Sup. 283, 7 NYS 186 (holding that where, in an action on a note indorsed "C., Agt. for" defendant, it appeared that C was defendant's husband, that he transacted all her business, had full authority to indorse notes for her in her business, and had indorsed notes for the maker of the note in suit, the indorsee of such note is not chargeable with constructive notice that it was an accommodation note which defendant's agent had no authority to indorse); Weeks v. Fox, 3 Thomps. & C. 354.

Pa.—Brooke v. New York, etc., R. Co., 108 Pa. 529, 1 A 206, 56 AmR 235; Williams v. Getty, 31 Pa. 461, 72 AmD 757; Breen v. Miehle Printing Press, etc., Co., 8 Pa. Dist. 151, 22 Pa. Co. 275.

Wash.—Galbraith v. Weber, 58 Wash. 132, 136, 107 P 1050, 28 LRANS 341 and note [quot Cyc].

[a] **Third persons acting in good faith are justified in relying upon the apparent authority** of one held out as the general agent of his principal, notwithstanding secret instructions and restrictions placed by the principal upon such authority. The principal is bound for the acts of the general agent within the scope of his apparent authority, even though such acts are not reported by the agent to the principal. Such third persons may assume that the agent will promptly communicate to the principal all dealings entered into by him on the principal's behalf. Ætna Indemn. Co. v. Ladd, 135 Fed. 636, 68 CCA 274.

[b] **Where an act performed under ordinary circumstances is within the apparent authority** delegated to the agent, a person dealing with such agent in good faith, on the faith of his apparent powers, and without notice of facts showing that the act was unauthorized, may hold the principal, whether the act was authorized or not. St. Louis Southwestern R. Co. v. Elgin Condensed-Milk Co., 74 Ill. A. 619 [aff 175 Ill. 557, 51 NE 911, 67 AmSR 238].

36. Austrian v. Springer, 94 Mich. 343, 54 NW 50, 34 AmSR 350. See also infra § 652.

37. U. S.—Dysart v. Missouri, etc., R. Co., 122 Fed. 228, 58 CCA 592.

Ill.—Merchants' Nat. Bank v. Nichols, etc., Co., 223 Ill. 41, 79 NE 38, 7 LRANS 752; Maxey v. Heckethorn, 44 Ill. 437; Schmoldt v. Langston, 106 Ill. A. 385.

Iowa.—Keenan v. Missouri State Mut. Ins. Co., 12 Iowa 126.

Kan.—Aultman Thrashing, etc., Co. Knoll, 71 Kan. 109, 79 P 1074.

Mich.—Antrim Iron Co. v. Anderson, 140 Mich. 702, 104 NW 319, 112 AmSR 434; Austrian v. Springer, 94 Mich. 343, 54 NW 50, 34 AmSR 350.

Mo.—Wilson v. Missouri Pac. R. Co., 66 Mo. A. 388.

N. Y.—Kilmer v. Hutton, 131 App. Div. 625, 116 NYS 127.

Pa.—Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396; Thrall v. Wilson, 17 Pa. Super. 376.

Tex.—Higley v. Dennis, 40 Tex. Civ. A. 133, 88 SW 400.

[a] **"Where a principal places his servant in a position of apparent authority,** the absence of authority in fact will not protect the principal against the act of the agent in the line of such apparent authority." Buckle v. Probasco, 58 Mo. A. 49, 52 [cit New Albany Woolen Mills v. Meyers, 43 Mo. A. 124].

[b] **Stockbrokers,** having vested apparent authority in an employee to deal with customers, cannot relieve themselves from liability for his acts by testimony tending to show lack of such authority. Kilmer v. Hutton, 131 App. Div. 625, 116 NYS 127.

[c] **It is always competent** for the principal to show the scope and extent of the agent's authority, and it is always competent for a person dealing with an agent to show that the acts of the agent in excess of his express authority are nevertheless within the scope of the authority which the principal has permitted him to assume, or which, by a course of dealing or otherwise, he has been held out by the principal, either to the public in general or to the person dealing with him, as possessing. Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396.

38. U. S.—Farmers' L. & T. Co. v. Fidelity Trust Co., 86 Fed. 541, 30 CCA 247; U. S. v. Williams, 28 F. Cas. No. 16,724, 1 Ware 173.

Ala.—Patterson v. Neal, 135 Ala. 477, 33 S 39.

Ill.—Fortune v. Stockton, 182 Ill. 454, 55 NE 367.

Ind.—German-American Bldg. Assoc. v. Droge, (A.) 41 NE 397.

Ky.—Continental Ins. Co. v. Buchanan, 108 SW 355, 32 KyL 1298.

Me.—Davies v. Eastern Steamboat Co., 94 Me. 379, 47 A 896, 53 LRA 239.

Mo.—Dawson v. Wombles, 111 Mo. A. 532, 86 SW 271.

N. J.—Law v. Stokes, 32 N. J. L. 249, 90 AmD 655.

N. Y.—Walsh v. Hartford F. Ins. Co., 73 N. Y. 5.

Okl.—Ricker Nat. Bank v. Stone, 21 Okl. 833, 97 P 577; U. S. Fidelity, etc., Co. v. Shirk, 20 Okl. 576, 95 P 218 (holding that one who by his conduct has led an innocent person to rely on the appearance of another's authority to act for him will not be heard to deny the agency to that person's prejudice).

Or.—Connell v. McLoughlin, 28 Or. 230, 42 P 218.

S. C.—Carmichael v. Buck, 44 S. C. L. 332, 70 AmD 226.

[a] **"This proceeds upon the most fundamental principles of natural justice** underlying the law of agency to the effect that when one has clothed another with authority and put him forward in the world of commerce to do and perform acts generally in and about the sale of his commodities, he will be responsible for any and all acts of the agent in making the sale which comes within the apparent scope of such an authority; for when one, even though without intentional fraud, has enabled another to do an act which must be injurious to himself or to another innocent party, he who has thus enabled the other person to do the act, should suffer any consequences rather than the innocent party who has placed confidence in him." Friedman v. Kelly, 126 Mo. A. 279, 287, 102 SW 1066. To same effect Wedge Mines Co. v. Denver Nat. Bank, 19 Colo. A. 182, 73 P 873; Harrison v. Legore, 109 Iowa 618, 80 NW 670; Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. 285.

[b] **One may so act as to unintentionally become liable** for the conduct of another whom he permits to hold himself out as his agent, when innocent third persons, relying on such conduct, part with property. Metzger v. Whitehurst, 147 N. C. 171, 60 SE 907.

[c] **In California** under Civ. Code § 3543, providing that, where one of two innocent persons must suffer by the act of a third, he whose negligence caused the act must suffer, where a principal invests his agent with apparent authority to dispose of property, he may not recover its value from an innocent third person to whom it was transferred by the agent in violation of his authority. Wilcox-Rose Constr. Co. v. Evans, 9 Cal. A. 118, 98 P 83.

39. Parsel v. Barnes, 25 Ark. 261; State v. Chilton, 49 W. Va. 453, 39 SE 612. See also Officers [29 Cyc 1431].

the principal knowingly permits the agent to assume or which he holds the agent out as possessing;[40] such authority as he appears to have by reason of the actual authority which he has;[41] such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct would naturally suppose the agent to possess.[42]

Ostensible authority is such authority as a principal intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess,[43] and in some jurisdictions it is so defined by statute.[44] Ostensible authority to act as agent may be conferred if the principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to act on an apparent agency.[45]

[§ 213] **(3) Elements of Rule.** It is essential to the application of the above general rule that two important facts be clearly established: (1) That the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority;[46] and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority.[47]

[§ 214] **(4) Acts of Principal Control.** The apparent power of an agent is to be determined by the acts of the principal and not by the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal himself by his acts or conduct has clothed the agent with the appearance of authority, and not where the agent's own conduct has created the apparent authority.[48] The liability of the principal is determined in any particular case, however, not

40. Brager v. Levy, 122 Md. 554, 90 A 102; Jackson v. Mutual Ben. L. Ins. Co., 79 Minn. 43, 81 NW 545, 82 NW 366. See also cases supra note 31.

[a] **Other definitions.**—(1) "Apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise or which he holds him out as possessing." Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 450, 124 NW 236. (2) Apparent authority in an agent to represent his principal exists when the principal permits the agent to exercise powers not expressly granted. Dispatch Printing Co. v. National Bank of Commerce, 115 Minn. 157, 132 NW 2. (3) The "apparent authority" of an agent is such authority as the acts or declarations of the principal give the agent the appearance of possessing. Farmers' Co-op. Shipping Assoc. v. George A. Adams Grain Co., 84 Nebr. 752, 122 NW 55.

[b] **Apparent powers and acts apparently within powers distinguished.**—In Mechanics' Bank v. New York, etc., R. Co., 13 N. Y. 599, 633, Comstock, J., said: "The distinction is not always attended to between the apparent powers of an agent and his acts apparently but not really within the power. An agent's apparent powers are those which are conferred by the terms of his appointment, notwithstanding secret instructions, or those with which he is clothed by the character in which he is held out to the world, although not strictly within his commission. Whatever is done under an authority thus manifested is actually within the authority as to third persons, and the principal is bound for that reason. But it is obvious that an agent may clothe his act with all the indicia of authority and yet the act itself may not be within the real or apparent power. The appearance of the power is one thing, and for that the principal is responsible. The appearance of the act is another, and for that, if false, I think the remedy is against the agent only. The fundamental proposition, I repeat, is, that one man can be bound only by the authorized acts of another. He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it."

41. Cotton v. Gorrell, (Mo. A.) 167 SW 1187 (holding that, where plaintiffs authorized their agent to deliver certain cattle to defendant, the agent, in the absence of any agreement between the parties, had apparent authority to state the terms on which the cattle were so delivered); Cooper v. Cooper, 90 Nebr. 209, 133 NW 243; Northwest Thresher Co. v. Eddyville State Bank, 80 Nebr. 377, 114 NW 291; Brown v. Eno, 48 Nebr. 538, 67 NW 434; Creighton v. Finlayson, 46 Nebr. 457, 64 NW 1103; Winter v. Iron City Stamping Co., 51 Pa. Super. 11.

"'Apparent authority . . . is that authority which an agent appears to have from that which he actually does have, and not from that which he may pretend to have, or from his actions on occasions which are unknown to and unratified by his principal.'" Cameron v. Blackwell, 53 Tex. Civ. A. 414, 418, 115 SW 856 [quot Corey v. Hunter, 10 N. D. 5, 84 NW 570].

42. Townsend v. Missouri Pac. R. Co., 88 Kan. 260, 128 P 389; St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 295, 90 SW 737; Bogert v. Harpootlian, 74 Misc. 478, 132 NYS 367; Winter v. Iron City Stamping Co., 51 Pa. Super. 11, 16 [cit Cyc]; Ruane v. Murray, 26 Pa. Super. 187. See also Hiller v. Columbia Bank, 96 S. C. 74, 80, 79 SE 899 [cit Cyc].

43. Quay v. Presidio, etc., R. Co., 82 Cal. 1, 22 P 925; Union Trust Co. v. McKeon, 76 Conn. 508, 57 A 109, 111; Harrison v. Legore, 109 Iowa 618, 80 NW 670; Faulkner v. Simms, 68 Nebr. 295, 89 NW 171, 94 NW 113; Lebanon Sav. Bank v. Blanke, 2 Nebr. (Unoff.) 403, 89 NW 169; Harrison Nat. Bank v. Williams, 2 Nebr. (Unoff.) 400, 89 NW 245.

[a] **"There are two essential features** (1) of an authority of this character; viz., the party must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held. A belief founded on the agent's statements is not sufficient; for a party has no right to take the agent's word for the existence of his authority." Harris v. San Diego Flume Co., 87 Cal. 526, 528, 25 P 758. See also infra §§ 214, 215. (2) Where it does not appear that the acts of a principal which are supposed to have been sufficient to justify a belief in an agent's authority were known to the person dealing with him, they could not have generated in his mind any belief on the subject of the agency and hence there is no ostensible authority. Harris v. San Diego Flume Co., supra.

44. See statutory provisions.

[a] **In California,** under Civ. Code § 2317 (1) "ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." See Dover v. Pittsburg Oil Co., 143 Cal. 501, 504, 77 P 405; Buckley v. Sliverberg, 113 Cal. 673, 45 P 804; Harris v. San Diego Flume Co., 87 Cal. 526, 25 P 758; Quay v. Presidio, etc., R. Co., 82 Cal. 1, 22 P 925. See also Ukiah Bank v. Mohr, 130 Cal. 268, 62 P 511; Union Pav., etc., Co. v. Mowry, 7 Cal. Unrep. Cas. 6, 70 P 81. (2) This is the embodiment of a well established principle of the common law which has been called the "foundation of the law of agency." Quinn v. Dresbach, 75 Cal. 159, 16 P 762, 7 AmSR 138. (3) "Ostensible authority" as used in Civ. Code § 2359, providing that a factor has ostensible authority to deal with the property of his principal as his own in transactions with persons not having notice of the actual ownership, has a broader meaning than "ostensible authority" as used in Civ. Code § 2317, defining "ostensible authority" to be such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess, for it has reference to the ostensible authority of agents in general. "The authority is as real where it is declared to be ostensible, as it is where it is declared to be actual." Wisp v. Hazard, 66 Cal. 459, 462, 6 P 91.

[b] **In South Dakota,** under Comp. Laws §§ 3965, 3979, ostensible authority is defined as such authority as a principal intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess. Reid v. Kellogg, 8 S. D. 596, 67 NW 687.

45. Northwest Thresher Co. v. Eddyville State Bank, 80 Nebr. 377, 114 NW 291; Holt v. Schneider, 57 Nebr. 523, 77 NW 1086 [dist Frey v. Curtis, 52 Nebr. 406, 72 NW 478; Porter v. Ourada, 51 Nebr. 510, 71 NW 52]; Phœnix Ins. Co. v. Walter, 51 Nebr. 182, 70 NW 938; Thomson v. Shelton, 49 Nebr. 644, 68 NW 1055; Blanke Tea, etc., Co. v. Trade Exhibit Co., 5 Nebr. (Unoff.) 358, 98 NW 714.

[a] **Negligence of principal.**—The authority of the agent may be assumed or implied in cases where the principal negligently permits the agent to exercise authority not expressly granted. Eggleston v. Advance Thresher Co., 96 Minn. 241, 104 NW 891.

46. Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 44 P 390; Connell v. McLoughlin, 28 Or. 230, 42 P 218; Russo-Chinese Bank v. Li Yau Sam, [1910] A. C. 174. See also infra § 214.

47. Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 44 P 390; Connell v. McLoughlin, 28 Or. 230, 42 P 218. See also infra § 215.

48. U. S.—Empire State Nail Co. v. Faulkner, 55 Fed. 819 [aff 67 Fed. 913, 15 CCA 69].

Ala.—Birmingham Mineral R. Co. v. Tennessee Coal Iron, etc., R. Co., 127 Ala. 137, 28 S 679; Wheeler v. McGuire, 86 Ala. 398, 5 S 190, 2 LRA 808 and note; Van Eppes v. Smith, 21 Ala. 317.

Ark.—St. Louis, etc., R. Co. v. Bennett, 53 Ark. 208, 13 SW 742, 22 AmSR 187 and note.

Cal.—Mitrovitch v. Fresno Fruit Packing Co., 123 Cal. 379, 55 P 1064.

Colo.—Gauthier Decorating Co. v. Ham, 3 Colo. A. 559, 34 P 484.

Ill.—Duncan v. Niles, 33 Ill. 532, 83 AmD 293.

Ind.—Lucas v. Rader, 29 Ind. A. 287, 64 NE 488; Robinson v. Nipp, 10 Ind. A. 156, 50 NE 408.

Iowa.—Anderson v. Patten, 137 NW 1050.

Kan.—Leu v. Mayer, 53 Kan. 419, 34 P 969.

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merely by what was the apparent authority of the agent, but by what authority the third person, exercising reasonable care and prudence, was justified in believing that the principal had by his acts under the circumstances conferred upon his agent.[49]

[§ 215] **(5) Knowledge and Good Faith of Third Person.** It is also necessary to the application of the above general rule that the person dealing with the agent was aware of the principal's acts from which the apparent authority is deduced,[50] and that he dealt with the agent in reliance thereon, in good faith, and in the exercise of reasonable prudence.[51] But where such person has actual or constructive notice of the extent of the agent's authority, or that the agent is exceeding his authority, he cannot claim to be acting in good faith and hold the principal on the ground of apparent authority.[52]

Where the act for which it is sought to hold the

Ky.—Godshaw v. Struck, 109 Ky. 285, 58 SW 781, 24 KyL 820, 51 LRA 668.

La.—Curl v. Bond, 52 La. Ann. 1052, 27 S 577.

Mich.—Reinforced Concrete Co. v. Boyes, 147 NW 577; Starr Piano Co. v. Morrison, 159 Mich. 583, 124 NW 562; Wierman v. Bay City-Michigan Sugar Co., 142 Mich. 422, 106 NW 75.

Minn.—Dispatch Printing Co. v. National Bank of Commerce, 115 Minn. 157, 132 NW 2. See also Humphrey v. Havens, 12 Minn. 298 (holding that persons relying on the previous action of the agent as evidence of his authority must on their own responsibility ascertain the nature and extent of the previous employment).

Mo.—Bronson v. Weber Impl. Co., 135 Mo. A. 483, 116 SW 20; Taylor v. Sartorious, 130 Mo. A. 23, 108 SW 1089; McGraw v. O'Neil, 123 Mo. A. 691, 101 SW 132; Waters-Pierce Oil Co. v. Jackson Jr. Zinc Co., 98 Mo. A. 324, 73 SW 272.

N. Y.—Rathbun v. Snow, 123 N. Y. 343, 25 NE 379, 10 LRA 355 and note; Edwards v. Dooley, 120 N. Y. 540, 24 NE 827; Bickford v. Menier, 107 N. Y. 490, 14 NE 438; Mechanics' Bank v. New York, etc., R. Co., 13 N. Y. 599; Ring v. Long Island Real Est. Exch., etc., Co., 93 App. Div. 442, 87 NYS 682 [aff 184 N. Y. 553 mem. 76 NE 1107 mem]; Leary v. Albany Brewing Co., 77 App. Div. 6, 79 NYS 130; Figueira v. Lerner, 52 App. Div. 216, 65 NYS 293; Conant v. American Rubber Tire Co., 48 App. Div. 327, 62 NYS 972; Sage v. Shepard, etc., Lumber Co., 4 App. Div. 290, 39 NYS 449 [aff 158 N. Y. 672, 52 NE 1126]; Middletown First Nat. Bank v. Council Bluffs City Water-Works Co., 56 Hun 412, 9 NYS 859; Presbrey Co. v. Miller, 65 Misc. 52, 119 NYS 192; Joseph v. Struller, 25 Misc. 173, 54 NYS 162.

N. D.—Corey v. Hunter, 10 N. D. 5, 84 NW 570.

Tex.—Tompkins Machinery, etc., Co. v. Peter, 84 Tex. 627, 19 SW 860; Galveston, etc., R. Co. v. Allen, 42 Tex. Civ. A. 576, 94 SW 417.

Wash.—Bowles Co. v. Clark, 59 Wash. 336, 109 P 812, 31 LRANS 618.

W. Va.—Black Lick Lumber Co. v. Camp Constr. Co., 63 W. Va. 477, 60 SE 409; Crawford v. Whittaker, 42 W. Va. 430, 26 SE 516.

Wis.—Bartlett v. L. Bartlett, etc., Co., 116 Wis. 450, 93 NW 473 (holding that a clerk cannot bind his employer by assuming to have authority).

Eng.—Hambro v. Burnand, [1903] 2 K. B. 399 [rev on other grounds [1904] 2 K. B. 10]; Wright v. Glyn, [1902] 1 K. B. 745.

49. U. S.—Jenkins, etc., Co. v. Alpena Portland Cement Co., 147 Fed. 641, 77 CCA 625.

Conn.—Union Trust Co. v. McKeon, 76 Conn. 508, 57 A 109.

Fla.—T. G. Bush Grocery Co. v. Conely, 61 Fla. 131, 55 S 867.

Ill.—Swisher v. Palmer, 106 Ill. A. 432.

Ind.—Lake Shore, etc., R. Co. v. Foster, 104 Ind. 293, 4 NE 20, 54 AmR 319.

Iowa.—Grant v. Humerick, 94 NW 510.

Me.—Heath v. Stoddard, 91 Me. 499, 40 A 547, 549.

Mich.—Scheibeck v. Van Derbeck, 122 Mich. 29, 80 NW 880; Austrian v. Springer, 94 Mich. 343, 54 NW 50, 34 AmSR 350.

Mo.—Law Reporting Co. v. Elwood Grain Co., 135 Mo. A. 10, 115 SW 475; St. Louis Gumming Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737.

Nebr.—Harrison Nat. Bank v. Austin, 65 Nebr. 632, 91 NW 540, 101 AmSR 639, 59 LRA 294; Faulkner v. Simms, 89 NW 171; Holt v. Schneider, 57 Nebr. 523, 77 NW 1086; Thompson v. Shelton, 49 Nebr. 644, 68 NW 1055; Johnston v. Milwaukee, etc., Inv. Co., 46 Nebr. 480, 64 NW 1100; Lebanon Sav. Bank v. Blanke, 2 Nebr. (Unoff.) 403, 89 NW 169; Harrison Nat. Bank v. Williams, 2 Nebr. (Unoff.) 400, 89 NW 245.

N. Y.—Walsh v. Hartford F. Ins. Co., 73 N. Y. 5; Johnson v. Jones, 4 Barb. 369.

Oh.—General Cartage, etc., Co. v. Cox, 74 Oh. St. 284, 78 NE 371, 113 AmSR 959; Harbison v. Iliff, 10 OhS&CP 58, 8 OhNP 392.

Okl.—Midland Sav., etc., Co. v. Sutton, 30 Okl. 448, 120 P 1007.

Or.—Baker v. Seaward, 63 Or. 350, 127 P 961.

S. C.—Welch v. Clifton Mfg. Co., 55 S. C. 568, 33 SE 739.

S. D.—Aldrich v. Wilmarth, 3 S. D. 523, 54 NW 811.

Tex.—Birge-Forbes Co. v. St. Louis, etc., R. Co., 53 Tex. Civ. A. 55, 115 SW 333; Baker v. Kellett-Chatham Mach. Co., (Civ. A.) 84 SW 661; Osborne v. Gatewood, (Civ. A.) 74 SW 72.

Vt.—Griggs v. Selden, 58 Vt. 561, 5 A 504; Kingsley v. Fitts, 51 Vt. 414.

Wis.—McDermott v. Jackson, 97 Wis. 64, 72 NW 375; Dodge v. McDonnell, 14 Wis. 553.

Eng.—Gillman v. Robinson, 1 C. & P. 642, 12 ECL 364; Smith v. McGuire, 3 H. & N. 554; Todd v. Robinson, R. & M. 217, 21 ECL 736.

"Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped, as against such third person, from denying the agent's authority." T. G. Bush Grocery Co. v. Conely, 61 Fla. 131, 135, 55 S 865; Holt v. Schneider, 57 Nebr. 523, 77 NW 1086.

[a] **The scope of an agency** is to be determined, not alone from what the principal may have told the agent to do, but from what he knows, or ought to know in the exercise of ordinary care and prudence, the agent is doing in the premises. Law Reporting Co. v. Elwood Grain Co., 135 Mo. A. 10, 115 SW 475; Kingsley v. Fitts, 51 Vt. 414.

[b] **"When a plaintiff's case hinges on an apparent, instead of a real authority,** he must show that the defendant's conduct, whether it was so intended or not, was adapted to and did mislead the plaintiff into believing the apparent authority was real, and, so believing, to rely on it." Hackett v. Van Frank, 105 Mo. A. 384, 396, 79 SW 1013.

50. Merchants' Nat. Bank v. Nichols, 223 Ill. 41, 79 NE 38, 7 LRANS 752; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 NE 136, 93 AmSR 113, 59 LRA 657; Maxey v. Heckethorn, 44 Ill. 437; Rawson v. Curtiss, 19 Ill. 456; Schoenhofen Brewing Co. v. Wengler, 57 Ill. A. 184; Grant v. Humerick, 123 Iowa 571, 94 NW 510; Hastings First Nat. Bank v. Farmers', etc., Bank, 56 Nebr. 149, 76 NW 430; Buskirk v. Talcott, 96 NYS 714.

[a] **The question of apparent authority cannot arise** where it appears that the person dealing with the agent has never seen him before and has no knowledge as to the extent of his dominion over his principal's business and is not misled by any assumption of authority. Gibson v. Trow, 105 Wis. 288, 81 NW 411.

[b] **One who did not know** that another, authorized by defendants to collect the interest on an overdue mortgage note, had theretofore collected an installment of the principal upon another note held by defendants and another could not have been influenced by such fact, so as to have relied thereon in paying such agent the principal of the overdue note. Burnham v. Wilson, 207 Mass. 378, 93 NE 704.

51. Ala.—Fulton v. Sword Medicine Co., 145 Ala. 331, 40 S 393; Patterson v. Neal, 135 Ala. 477, 33 S 39; Singer Mfg. Co. v. McLean, 105 Ala. 316, 16 S 912; Gibson v. Snow Hardware Co., 94 Ala. 346, 10 S 304.

Cal.—Rodgers v. Peckham, 120 Cal. 238, 52 P 483.

Colo.—Witcher v. Gibson, 15 Colo. A. 163, 61 P 192.

Ill.—Alton Mfg. Co. v. Garrett Biblical Inst., 243 Ill. 298, 90 NE 704; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 NE 136, 93 AmSR 113, 59 LRA 657 [rev 99 Ill. A. 108]; Maxey v. Heckethorn, 44 Ill. 437; Rawson v. Curtiss, 19 Ill. 456; Schoenhofen Brewing Co. v. Wengler, 57 Ill. A. 184.

Iowa.—Anderson v. Patten, 137 NW 1050, 1052 [quot Cyc].

Md.—Brager v. Levy, 122 Md. 554, 90 A 102.

Minn.—Dispatch Printing Co. v. National Bank of Commerce, 115 Minn. 157, 132 NW 2.

Mo.—McGraw v. O'Neil, 123 Mo. A. 691, 101 SW 132.

Nebr.—Fike v. Ott, 76 Nebr. 439, 107 NW 774 (holding that the ostensible authority of an agent can be invoked only by such as have dealt with him on the faith of such authority); Hastings First Nat. Bank v. Farmers', etc., Bank, 56 Nebr. 149, 76 NW 430.

N. Y.—Brennan v. Albany, 143 App. Div. 752, 128 NYS 334 [rev 67 Misc. 42, 121 NYS 895]; Buskirk v. Talcott, 96 NYS 714; Tallmadge v. Lounsbury, 21 NYS 908 [aff 148 N. Y. 746 mem. 43 NE 990 mem].

N. D.—Trumbo v. Vernon, 22 N. D. 191, 133 NW 296.

Or.—Baker v. Seaward, 63 Or. 350, 127 P 961.

Tenn—W. W. Kimball Co. v. First Nat. Bank, 1 Tenn. Ch. A. 505.

Tex.—Rail v. City Nat. Bank, 3 Tex. Civ. A. 557, 22 SW 865.

[a] **A principal is not estopped** to deny the authority of his agent to perform a particular act, on the ground that it was within the agent's apparent authority, unless the authority to perform it was apparent to the person dealing with the agent, and by him relied on. Hastings First Nat. Bank v. Farmers', etc., Bank, 56 Nebr. 149, 76 NW 430.

52. U. S.—Colorado Springs Co. v. American Pub. Co., 97 Fed. 843, 38 CCA 433; Oshkosh Nat. Bank v. Munger, 95 Fed. 87, 36 CCA 659.

Ark.—Brown v. Brown, 96 Ark. 456, 132 SW 220.

Cal.—Goslinger v. Grangers' Bank, 124 Cal. 225, 56 P 1029.

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principal was within the authority actually conferred by the principal, whether expressly or impliedly, it is not necessary for the third person to show that he had knowledge of that fact and acted on the faith of it.[53]

[§ 216] **4. Express or Implied Authority—a. In General.** In its nature the authority of an agent to act after his appointment, like the original appointment itself,[54] is either express or implied.[55]

[§ 217] **b. Express Authority.** Express authority, as involved in the law of agency, is that authority which the principal directly grants to the agent,[56] and this includes, by implication, whether the agency is general or special, unless restricted to the contrary, all such powers as are proper and necessary as a means of effectuating the purposes for which the agency was created.[57] It does not include, however, apparent authority which arises from a conscious permission by the principal of acts beyond those expressly granted, but only that which arises from those acts which he affirmatively extends to the agent.[58]

Where the authority is expressly conferred in writing the power of the agent is of course confined to the limits thus marked out,[59] particularly where the authority is required by law to be in writing;[60] and third persons having notice that they are dealing with an agent acting under written authority must inform themselves of the extent and limitations of his authority.[61]

Commencement of authority sent by mail. The authority of an agent contained in a letter mailed to him commences at the time the letter is mailed.[62]

[§ 218] **c. Implied Authority—(1) In General.** Implied authority is that authority which the principal intends his agent to possess, and which is proper, usual, and necessary to the exercise of the authority actually granted,[63] or which is implied from the conduct of the principal, as from his previous course of dealing, or from his conduct under circumstances working against him an equitable estoppel.[64] Even where the appointment of an

Colo.—Silver Mountain Mine Co. v. Anderson, 31 Colo. 298, 117 P 173.
Del.—Maher v. Moore, 42 A 721.
Ill.—Schmoldt v. Langston, 106 Ill. A. 385.
Iowa.—German Sav. Bank v. Des Moines Nat. Bank, 122 Iowa 737, 98 NW 606.
Kan.—Hier v. Miller, 68 Kan. 258, 75 P 77, 63 LRA 952; Executors', etc., Ins. Corp. v. Bowling, 2 Kan. A. 770, 44 P 42.
Ky.—Ryan v. American Steel, etc., Co., 148 Ky. 481, 146 SW 1099; McCarty v. Stanfill, 41 SW 278, 19 KyL 612; Russell v. Cox, 38 SW 1087, 18 KyL 1087; Morrison v. Taylor, 6 T. B. Mon. 82.
Mass.—Parker, etc., Mfg. Co. v. Exchange F. Ins. Co., 166 Mass. 484, 44 NE 614.
Mo.—Taylor v. Sartorious, 130 Mo. A. 23, 108 SW 1089; Wilson v. Missouri Pac. R. Co., 66 Mo. A. 388; White v. Massey, 65 Mo. A. 260.
N. Y.—Walsh v. Hartford F. Ins. Co., 73 N. Y. 5; Burlingame v. Ætna Ins. Co., 36 App. Div. 358, 55 NYS 287; Lowenstein v. Lombard, etc., Co., 17 App. Div. 408, 45 NYS 286; Waldorf v. Simpson, 15 App. Div. 297, 44 NYS 921; Leinkauf v. Lombard, etc., Co., 12 App. Div. 302, 42 NYS 391; Sage v. Shepard, etc., Lumber Co., 4 App. Div. 290, 39 NYS 449 [aff 158 N. Y. 672 mem, 52 NE 1126 mem]; Eldridge v. Husted, 24 Misc. 177, 52 NYS 681.
Oh.—General Cartage, etc., Co. v. Cox, 74 Oh. 284, 78 NE 371, 113 AmSR 959.
Pa.—Thrall v. Wilson, 17 Pa. Super. 376; Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. 285.
Tenn.—Fabian Mfg. Co. v. Newman, (Ch. A.) 62 SW 218.
Tex.—Rail v. City Nat. Bank, 3 Tex. Civ. A. 557, 22 SW 865.
Utah.—Nephi First Nat. Bank v. Foote, 12 Utah 157, 42 P 205.
Wash.—National Lumber, etc., Co. v. Grays Harbor Commercial Co., 71 Wash. 31, 127 P 577.
W. Va.—Cobb v. Glenn Boom, etc., Co., 57 W. Va. 49, 49 SE 1005, 110 AmSR 734.
See also supra §§ 203, 210.

[a] **Ignorance of truth essential.**—It is material that the party complaining of a want of authority in the agent should be ignorant of the truth touching the agency. If he has full knowledge of the facts, or of such facts as fairly and fully put him on inquiry, and he fails to avail himself of such knowledge or the means of knowledge reasonably accessible, he cannot, in the absence of fraud, say that he was misled simply on the ground that the party assumed to act as agent without authority. Newman v. Sylvester 42 Ind. 106.

53. Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224, 53 NW 1061; Bonner v. Lisenby, 86 Mo. A. 665; Gibson v. Zeibig, 24 Mo. A. 65; Gallinger v. Lake Short Traffic Co., 67 Wis. 529, 30 NW 790.

54. See supra §§ 29–41.

55. Ark.—U. S. Bedding Co. v. Andre, 105 Ark. 111, 150 SW 413, 41 LRANS 1019 and note.
Colo.—Hale v. Goodell, 49 Colo. 95, 111 P 708.
Ga.—Luckie v. Johnston, 89 Ga. 321, 15 SE 459.
La.—Miller v. New Orleans Canal, etc., Co., 8 Rob. 236.
Me.—Trundy v. Farrar, 82 Me. 225.
Mo.—St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737.
B. C.—Sayward v. Dunsmuir, 11 B. C. 375.

[a] **No express terms are required** to define the agent's powers. Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396.

56. U. S. Bedding Co. v. Andre, 105 Ark. 111, 150 SW 413, 41 LRANS 1019 and note; Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 NW 236.

57. Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 NW 236. See also infra § 220.

58. Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 NW 236.

59. U. S.—Henry v. Lane, 128 Fed. 243, 62 CCA 625 (holding that, where an agency is created by a written instrument the nature and extent of the agent's authority are measured by the terms of such instrument, and he cannot bind his principal beyond their plain import); Chauche v. Pare, 75 Fed. 283, 21 CCA 329.
Mass.—Mussey v. Beecher, 3 Cush. 511.
Mo.—Mechanics' Bank v. Schaumburg, 38 Mo. 228.
Pa.—Getty v. Pennsylvania Inst., 194 Pa. 571, 45 A 333.
S. C.—Stoddard v. McIlwain, 41 S. C. L. 525.
Wis.—Long v. Fuller, 21 Wis. 121.

Construction of written authority see supra §§ 199–201.

[a] **Reason for rule.**—(1) The very purpose of a written power is to prescribe and publish the limits within which the agent shall act, so as not to leave him to the uncertainty of memory, and those who deal with him to the risk of misrepresentation or misconception as to the extent of his authority. To confer express is to withhold implied authority. Claflin v. Continental Jersey Works, 85 Ga. 27, 11 SE 721. (2) Thus where a contract for the erection, alteration, and extension of certain buildings made the architect the agent of the owner, and stipulated that no alteration should be made in the work described by the specifications except on the written order of the architect, and that no extra work would be allowed unless an itemized estimate was submitted by the contractor and the architect's order in writing was given for the same, the architect could not enlarge his powers by waiving the requirement that the contractor should furnish estimates of extra work, and obtain a written order from the architect therefor. Langley v. Rouss, 185 N. Y. 201, 77 NE 1168 [rev 106 App. Div. 225, 94 NYS 108].

60. Davis v. Trachsler, 3 Cal. A. 554, 86 P 610; Frahm v. Metcalf, 75 Nebr. 241, 106 NW 227.

61. See supra § 207.

62. Ruggles v. American Cent. Ins. Co., 114 N. Y. 415, 21 NE 1000, 11 AmSR 674.

63. Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 NW 236; Cameron v. Blackwell, 53 Tex. Civ. A. 414, 115 SW 856. See also infra § 220.

[a] **Custom and usage.**—Where an agent is commissioned to do any act, nothing being said as to the mode of performance, he has an implied power to perform his duties in accordance with any recognized usage or mode of dealing. Rohrbough v. U. S. Express Co., 50 W. Va. 148, 40 SE 393, 88 AmSR 849. See also Customs and Usages [12 Cyc 1071].

64. U. S.—Stockton v. Watson, 101 Fed. 490, 42 CCA 211.
Ala.—Powell v. Henry, 27 Ala. 612; Fisher v. Campbell, 9 Port. 210.
Colo.—Winch v. Edmunds, 34 Colo. 359, 83 P 632; Merchants' Ins. Co. v. New Mexico Lumber Co., 10 Colo. A. 223, 51 P 174.
Iowa.—Tidrick v. Rice, 13 Iowa 214.
Ky.—Cincinnati, etc., R. Co. v. Rednower, 140 Ky. 370, 131 SW 179.
Mo.—Mudd v. Hunnewell Farmers', etc., Bank, 175 Mo. A. 398, 162 SW 314; Haubelt v. Rea, etc., Mill Co., 77 Mo. A. 672; Watkins v. Edgar, 77 Mo. A. 148.
N. Y.—Lippitt v. St. Louis Dressed Beef, etc., Co., 27 Misc. 222, 57 NYS 747.
S. C.—Welch v. Clifton Mfg. Co., 55 S. C. 568, 33 SE 739.
See also supra §§ 32–41, 69–74.

[a] **A general authority** of an agent to do an act may be implied from a course of dealing, or from a particular number of acts of a particular kind authorized or assented to by the principal, and such an authority enables the agent to bind his principal without orders in dealing with those who have no notice of the lack of lawful power in the agent, and who act without collusion. Valiquette v. Clark Bros. Coal Min. Co.,

agent has been expressly made, much of his resulting authority may be left to be implied;[65] and, indeed, an agent acting under the most detailed power of attorney almost invariably has at least a limited implied or incidental authority as to some details inevitably omitted in drawing the power of attorney.[66] Especially in the case of a general agent much must of necessity be left to his discretion and judgment as he is confronted with circumstances not foreseen when he was appointed, but requiring to be met in his best judgment so as to effect the principal's purpose;[67] and extraordinary emergencies may arise in which a person who is an agent may from the very necessities of the case be justified in assuming extraordinary powers.[68]

Must be determined from all facts. But when it is implied, and in so far as it is implied, the power of the agent must be determined from no one fact alone, but from all the facts and circumstances for which the principal is responsible.[69] This is so even when the authority is express and in writing, if it appears that the principal has by his acts or conduct justified third persons in believing that he has given the agent larger powers than those enumerated in the writing.[70] Even as to persons who know that the agent has a written power the principal may orally, or by his acts or conduct, expand the power of the agent beyond the limits specified in the writing.[71] But the authority must be implied from the nature and needs of the business or the conduct of the principal,[72] and it cannot be implied from mere argument or the convenience or propriety of the

83 Vt. 538, 77 A 869, 138 AmSR 1104, 34 LRANS 440 and note.

[b] **Where a principal permits the agent to exercise certain powers continually,** (1) it is reasonable to imply authority to exercise them, as principals usually protest against such conduct if opposed to their wish. Tyler v. Hoffman, 146 Mo. A. 510, 124 SW 535. (2) Thus the authority of an agent to do certain acts in behalf of his principal may be inferred from the continuance of the acts themselves over such a period of time and the doing of them in such a manner that the principal would naturally have become cognizant of them and would have forbidden them if unauthorized. Dierkes v. Hauxhurst Land Co., 80 N. J. L. 369, 79 A 361, 34 LRANS 693 and note.

65. Ala.—Union Refining Co. v. Barton, 77 Ala. 148.

Mass.—Hilliard v. Weeks, 173 Mass. 304, 53 NE 818.

Mo.—State v. Gates, 67 Mo. 139; Law Reporting Co. v. Elwood Grain Co., 135 Mo. A. 10, 115 SCt 475.

Tex.—Texas Bldg. Co. v. Albert, (Civ. A.) 123 SW 716 (holding that, where a master employing laborers sends them out under the supervision of a foreman, it clothes him at least with implied authority to do not only such things as may be incident to the work, but also all necessary things for the advancement of the master's interests); Birge-Forbes Co. v. St. Louis, etc., R. Co., 53 Tex. Civ. A. 55, 115 SW 333.

Wash.—Holt Mfg. Co. v. Dunnigan, 22 Wash. 134, 60 P 128.

Eng.—Howard v. Baillie, 2 H. Bl. 618, 126 Reprint 737.

See also supra § 198.

66. U. S.—Le Roy v. Beard, 8 How. 451, 12 L. ed. 1151.

Cal.—Rothschild v. Swope, 116 Cal. 670, 48 P 911; Hastings v. Halleck, 13 Cal. 203.

Ga.—John Flannery Co. v. James, 13 Ga. A. 425, 79 SE 912.

Ind.—Adams Express Co. v. Byers, 177 Ind. 33, 37, 95 NE 513 [cit Cyc].

La.—Sentell v. Kennedy, 29 La. Ann. 679.

Mo.—State v. Gates, 67 Mo. 139.

N. Y.—Sheffield v. Smith, 8 Misc. 43, 28 NYS 517; Grillenberger v. Spencer, 7 Misc. 601, 27 NYS 864.

Tex.—Sullivan v. Miller, 86 Tex. 677, 26 SW 935 [rev (Civ. A.) 24 SW 819]; Miller v. Sullivan, 14 Tex. Civ. A. 112, 33 SW 695, 35 SW 1084, 37 SW 778; Franklin v. Piper, 5 Tex. Civ. A. 253, 23 SW 942.

Wis.—Gee v. Bolton, 17 Wis. 604.

67. Dunwoody v. Saunders, 50 Fla. 202, 39 S 965 (holding that it is error to charge that a general agent of the charterer of a barge has no authority to enlarge the usual contract of bailment so as to make his principal an insurer of the barge during the term, if the barge is needed in his principal's business and can be had on no other conditions); Randall v. Fay, etc., Co., 158 Mich. 630, 123 NW 574. See also infra § 222.

[a] **A business manager or representative in general** has implied authority to do those things which are necessary and proper to be done in carrying out the business in its usual and accustomed way, and which the principal could and would usually do in like cases if present. The question of the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed and not upon the instructions given; or, in other words, the principal is bound to third persons who have relied thereon in good faith and in ignorance of any limitations or restrictions by the apparent authority he has given to the agent, and not by the actual or express authority, where that differs from the apparent; and this, too, whether the agency be a general or a special one. Hodges v. Bankers Surety Co., 152 Ill. A. 372.

68. Williams v. Shackelford, 16 Ala. 318 [cit Story Agency § 141]; Louisville, etc., R. Co. v. Vaughn's Transfer Co., (Ky.) 123 SW 253; Heinrich v. Pittsburg R. Co., 36 Pa. Super. 612.

[a] **The emergency of an accident, or an unusual condition** which requires prompt action, may invest the representative of the principal highest in authority who is then present with power to do such things as are reasonable to meet the emergency. Short v. Delaware, etc., Co., 41 Pa. Super. 141.

69. Colo.—Merchants' Ins. Co. v. New Mexico Lumber Co., 10 Colo. A. 223, 51 P 174.

La.—Miller v New Orleans Canal, etc., Co., 8 Rob. 236.

Minn.—Drohan v. Merrill, etc., Lumber Co., 75 Minn. 251, 77 NW 957.

Nebr.—Holt v. Schneider, 57 Nebr. 523, 77 NW 1086.

N. Y.—Sariol v. James P. McDonald Co., 127 App. Div. 648, 111 NYS 796 (holding that authority in an agent to bind his principal by an account stated respecting work performed and money due for construction of a railroad which the principal was building cannot be proved by one act alone of the agent); Smith-Premier Typewriter Co. v. National Hartel Light Co., 72 Misc. 405, 130 NYS 136.

Pa.—Fee v. Adams Express Co., 38 Pa. Super. 83.

70. U. S.—Philadelphia Trust, etc., Co. v. Philadelphia Seventh Nat. Bank, 6 Fed. 114.

Ill.—Rawson v. Curtis, 19 Ill. 456; James v. Conklin, 158 Ill. A. 640.

Ind.—Cruzan v. Smith, 41 Ind. 288 (holding that, if a principal puts his agent in a condition to impose upon innocent third persons, the principal will be bound by his dealings with persons ignorant of such limitations).

Mo.—Phipps v. Mallory Commn. Co., 105 Mo. A. 67, 78 SW 1097.

N. D.—Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 NW 717.

Pa.—Duncan v. Hartman, 143 Pa. 595, 22 A 1099, 24 AmSR 570.

71. U. S.—Brush-Swan Electric Light Co. v. Brush Electric Co., 41 Fed. 163; Philadelphia Trust, etc., Co. v. Philadelphia Seventh Nat. Bank, 6 Fed. 114.

Ill.—Bartlett v. Chicago First Nat. Bank, 156 Ill. A. 415.

Minn.—Dayton v. Nell, 43 Minn. 246, 45 NW 231. Compare Allis v. Goldsmith, 22 Minn. 123 (where verbal directions to convey and sell were held to be insufficient to authorize the conveyance).

Oh.—Webster v. Harris, 16 Oh. 490.

Pa.—Duncan v. Hartman, 143 Pa. 595, 22 A 1099, 24 AmSR 570, 149 Pa. 114, 24 A 190 (holding that the previous course of dealing of the principal may amount to an enlargement of the agent's express power).

But see Spofford v. Hobbs, 29 Me. 148, 48 AmD 521.

72. Del.—Geylin v. De Villeroi, 7 Del. 311 (holding that the measure and scope of an agent's authority when not specifically or expressly defined must be ascertained by the nature, necessity, and requirements of the thing to be done or accomplished by him).

N. Y.—Holloway v. Stephens, 2 Thomps. & C. 562.

N. C.—Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 SE 816, 67 LRA 455.

Pa.—Williams v. Getty, 31 Pa. 461, 72 AmD 757; Beal v. Adams Express Co., 13 Pa. Super. 143.

S. C.—Peay v. Seigler, 48 S. C. 496, 26 SE 885, 59 AmSR 731.

Tex.—McAlpin v. Cassidy, 17 Tex. 449; Cameron v. Blackwell, 53 Tex. Civ. A. 414, 115 SW 856.

Wash.—Gregory v. Loose, 19 Wash. 599, 54 P 33.

See also infra § 220.

[a] **The implied powers and authority of an agent depend** largely upon the circumstances in each case, and upon what is necessary or reasonable to enable him to effect the purpose of his agency. National Bank of Republic v. Baltimore Old Town Bank, 112 Fed. 726, 50 CCA 443.

[b] **To justify a person's reliance on an implied authority** of an agent to do a particular act, the act must be necessary to the execution of the duties delegated. Miner v. Edison Electric Illum. Co., 22 Misc. 543, 50 NYS 218 [aff 26 Misc. 712, 56 NYS 801].

[c] **The cashier of a local railway office** has no authority to cause the arrest of a person whom he suspects of having stolen money from the office. Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 SE 816, 67 LRA 455, 1 AnnCas 718 and note.

[d] **An agent appointed to inspect lumber** has no authority to waive the inspection or delegate the inspection to others. Campbellsville Lumber Co. v. Spotswood, 74 SW 235, 24 KyL 2430.

[e] **A porter employed in a garage** has no authority to receive upon behalf of the owner of such garage a sample case for safe-keeping left by one in charge of an automobile while the automobile was being repaired. Chesley v. Woods Motor Vehicle Co., 147 Ill. A. 588.

possession of such power by the agent.[73]

[§ 219] **(2) Nature of Implied Authority.** Whether an agency is implied from the silence or acquiescence of the principal, or from his general habits and course of dealing, the nature and extent of the implied authority are deemed to be limited to acts of a like nature with those from which it is implied,[74] and within the scope of the agent's apparent duty;[75] and if the agency is a special one the authority is to be limited to that particular business and the particular authority given.[76]

Limited to purposes and usual acts of agency. Implied authority is limited to the purposes for which the agency was created and to the acts and duties ordinarily intrusted to such an agent.[77] It is also limited by the usual course of dealing in the business in which he is employed,[78] and an agent has no implied power to do acts that are unusual, extraordinary, or unnecessary, however advantageous to the principal's interests the agent may believe them to be; for such acts he should first secure special authority from the principal.[79]

Cannot do what principal cannot do. An agent has no implied authority to do what the principal himself is not authorized to do.[80]

[§ 220] **(3) Incidental Authority.** As a general rule of law every grant of power implies and carries with it, as an incident, authority to do whatever acts, or use whatever means are reasonably necessary and proper to the accomplishment of the purpose for which the agency was created,[81] unless the

[f] **One employed to drive a race horse** has not implied authority to receive a purse won by the horse. Snow v. Wathen, 127 App. Div. 948, 112 NYS 41.

72. U. S. Bedding Co. v. Andre, 105 Ark. 111, 150 SW 413, 41 LRANS 1019 and note; Halladay v. Underwood, 90 Ill. A. 130.

"Every authority of an agent must find its ultimate source in some act or word of the principal, indicative of his intention, and where the authority is sought to be implied from the words or conduct of the principal, its extent can not exceed the necessary and legitimate effect of the words and conduct relied upon. The extent of the agency can not be assumed because of convenience; it must exist in the intention of the principal, either express of implied." Halladay v. Underwood, 90 Ill. A. 130, 132.

74. Fla.—Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349, 24 S 480.

Ga.—Akers v. Kirke, 91 Ga. 590, 18 SE 366.

Ill.—Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 NE 136, 93 AmSR 113, 59 LRA 657 [rev 99 Ill. A. 108].

Iowa.—Ver Veer v. Malone, 134 Iowa 653, 112 NW 82.

Ky.—Owing v. Myers, 3 Bibb 278.

Mass.—Odiorne v. Maxcy, 13 Mass. 178.

Minn.—Hare v. Bailey, 73 Minn. 409, 76 NW 213.

Mont.—Trent v. Sherlock, 26 Mont. 85, 66 P 700; Trent v. Sherlock, 24 Mont. 255, 61 P 650.

Nev.—Rankin v. New England, etc., Silver Min. Co., 4 Nev. 78.

N. H.—Ames v. Drew, 31 N. H. 475.

Pa.—Williams v. Getty, 31 Pa. 461, 72 AmD 757; Beal v. Adams Express Co., 13 Pa. Super. 143.

[a] **Implied authority limited to like acts or like dealings.**—"If the agency arises by implication from acts done by the agent with the tacit consent or acquiescence of the principal, it is deemed to be limited to acts of a like nature; if from the general habits of dealing between the parties, it is deemed to be limited to dealings of the same kind." McAlpin v. Cassidy, 17 Tex. 449, 463.

75. U. S.—Owings v. Hull, 9 Pet. 607, 9 L. ed. 246; Warren v. Tinsley, 53 Fed. 689, 3 CCA 613; Thurber v. Cecil Nat. Bank, 52 Fed. 513 [rev on other grounds 59 Fed. 913].

Colo.—Field v. Small, 17 Colo. 386, 30 P 1034; Tootle v. Cook, 4 Colo. A. 111, 35 P 193; Sagers v. Nuckolls, 3 Colo. A. 95, 32 P 187.

Ill.—Marine Bank v. Ogden, 29 Ill. 248; Mathews v. Hamilton, 23 Ill. 470; Wider v. Branch, 12 Ill. A. 358.

Mich.—Ruppe v. Edwards, 52 Mich. 411, 18 NW 193.

Minn.—Eckart v. Roehm, 43 Minn. 271, 45 NW 443.

Pa.—In re Dripps, 6 PaLJ 563; Carson v. Cochran, 9 Phila. 21; Beymer v. Hardy, 20 PittsbLegJNS 47.

W. Va.—Wheeling Ice, etc., Co. v. Conner, 61 W. Va. 111, 55 SE 982.

76. See infra § 223.

77. U. S.—Pennsylvania Taximeter Cab Co. v. Cressey, 191 Fed. 337, 112 CCA 81; Wheeler v. Northwestern Sleigh Co., 39 Fed. 347.

Ala.—Wheeler v. McGuire, 86 Ala. 398, 5 S 190, 2 LRA 808 and note; Love v. Davis, 25 Ala. 335.

Ga.—Wikle v. Louisville, etc., R. Co., 116 Ga. 309, 42 SE 525.

Ill.—Compton v. Bates, 10 Ill. A. 78.

Ind.—Hubbard v. Ranje, 52 Ind. A. 611, 98 NE 814.

Md.—Pennsylvania, etc., Steam Nav. Co. v. Dandridge, 8 Gill & J. 248, 29 AmD 543.

Minn.—Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 NW 236.

N. Y.—Matter of Bauer, 68 App. Div. 212, 72 NYS 439, 74 NYS 155 (holding that authority to secure a grave privilege does not imply authority to stipulate that the body shall never be removed); Rubenstein v. Frost, 116 NYS 681.

Oh.—Hoffmaster v. Black, 78 Oh. St. 8, 84 NE 423, 125 AmSR 679, 14 AnnCas 877.

Pa.—Pennsylvania L. Ins., etc., Co. v. Franklin F. Ins. Co., 181 Pa. 40, 37 A 191, 37 LRA 780; Clark v. Lehigh Valley R. Co., 24 Pa. Super. 609; Patterson v. Consolidated Tract. Co., 9 Pa. Dist. 362.

S. C.—Day v. Pickens County, 53 S. C. 46, 30 SE 681.

Tex.—Cameron v. Blackwell, 53 Tex. Civ. A. 414, 115 SW 856; Frugia v. Trueheart, 48 Tex. Civ. A. 513, 106 SW 736.

Wash.—Sweeney v. Ætna Indemn. Co., 34 Wash. 126, 74 P 1057; Gregory v. Loose, 19 Wash. 599, 54 P 33.

Eng.—Meredith v. Footner, 12 L. J. Exch. 183; Deverell v. Bolton, 18 Ves. Jr. 505, 34 Reprint 409.

Can.—Boyer v. Woodstock, 6 CanLT OccNotes 493.

[a] **Illustrations of powers not implied.**—(1) Authority to fill blanks and deliver a deed does not authorize delivery of the deed before the title is accepted or the consideration paid. Lund v. Thackery, 18 S. D. 113, 99 NW 856. (2) A workman sent to look after a machine which was sold on a warranty has no authority to waive a provision in the sale contract providing that six days' use shall be evidence of acceptance of the machine. Massillon Engine, etc., Co. v. Shirmer, (Iowa) 93 NW 599.

[b] **The "route agent" of an express company,** whose duty it is to "check up offices, trace lost goods, solicit business, and look after train messengers," cannot bind his principal by a promise which would take a debt out of the bar of the statute of limitations, where there is no evidence of a general authority, or of a specific authority to make such promise, or of a former course of dealing by the agent from which the existence of such authority might have been inferred. Beal v. Adams Express Co., 13 Pa. Super. 143.

[c] **One employed to receive and report bids** is not an agent to deal with the property. Dempster v. West, 69 Ill. 613; Chadburn v. Moore, 61 L. J. Ch. 674.

78. Jones v. Warner, 11 Conn. 40; Peter Schoenhofen Brewing Co. v. Wengler, 57 Ill. A. 184 (holding that an agent authorized merely to solicit customers and take orders for beer manufactured by his principal and collect bills is without implied authority to fit up saloons for the purchasers of the beer to sell it in); Tidrick v. Rice, 13 Iowa 214; Cameron v. Blackwell, 53 Tex. Civ. A. 414, 115 SW 856. See also Peterson v. New York, 194 N. Y. 437, 87 NE 772; Birge-Forbes Co. v. St. Louis, etc., R. Co., 53 Tex. Civ. A. 55, 115 SW 333.

79. U. S.—Chicago, etc., R. Co. v. Chickasha Nat. Bank, 174 Fed. 923, 98 CCA 535.

Ill.—Peter Schoenhofen Brewing Co. v. Wengler, 57 Ill. A. 184.

Kan.—Hornick v. Union Pac. R. Co., 85 Kan. 568, 575, 118 P 60, 38 LRANS 826 and note [cit Cyc].

La.—Spears v. Turpin, 9 Rob. 293; Richard v. Bird, 4 La. 305.

Me.—Hazeltine v. Miller, 44 Me. 177.

Miss.—King v. Levy, 13 S 282.

Mo.—St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737.

N. Y.—Hogan v. O'Brien, 29 App. Div. 59, 51 NYS 530; Forsberg v. Orange Judd Co., 5 NYS 891.

Okl.—Ricker Nat. Bank v. Stone, 21 Okl. 833, 97 P 577 (holding that authority conferred on an agent includes only the usual means appropriate to the end, it is not unlimited, but must be exercised in a reasonable manner, and cannot be resorted to to justify acts which the principal could not be presumed to intend).

Or.—Rumble v. Cummings, 52 Or. 203, 95 P 1111.

[a] **A superintendent of trucking** has no implied authority, based upon the nature of his position, to offer a reward for the recovery of his principal's property. Rubenstein v. Frost, 116 NYS 681.

[b] **Authority to an agent to give unusual business paper** is not to be construed on technical reasoning, but on the actual intent. New York Iron Mine v. Citizens' Bank, 44 Mich. 344, 6 NW 823.

[c] **The primary employment of a title insurance company** to act as conveyancer and insure the title to land does not clothe the company with authority to accept a delivery of the deed or take possession of it after it has been executed by the grantor. Mack v. Schuylkill Trust Co., 33 Pa. Super. 128.

80. Gambill v. Fuqua, 143 Ala. 448, 42 S 735 (as, for example, authority to make an arrest without a warrant).

[a] **Powers greater than those of the principal** cannot be exercised by the agent as such. Montreal Assur. Co. v. McGillivray, 13 Moore P. C. 87, 15 Reprint 33.

81. U. S.—New York, etc., Min., etc., Co. v. Fraser, 130 U. S. 611, 9

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inference of such power is expressly excluded by | the instrument creating the agency or by the circumSCt 665, 32 L. ed. 1031; National Bank of Republic v. Baltimore Old Town Bank, 112 Fed. 726, 50 CCA 443 (holding that the implied powers and authority of an agent employed for a particular service depend largely upon the circumstances in each case and upon what is necessary or reasonable to enable him to effect the purpose of his agency).

Ala.—Long v. Jennings, 137 Ala. 190, 33 S 857; La Fayette R. Co. v. Tucker, 124 Ala. 514, 27 S 447; Bessemer Land, etc., Co. v. Campbell, 121 Ala. 50, 25 S 793, 77 AmSR 17; Pattison v. Moore, 3 Port. 270; Wooten v. Federal Discount Co., 7 Ala. A. 351, 62 S 263.

Ark.—U. S. Bedding Co. v. Andre, 105 Ark. 111, 150 SW 413, 41 LRANS 1019 and note; St. Louis, etc., R. Co. v. Jones, 96 Ark. 558, 132 SW 636, 37 LRANS 418; Roach v. Rector, 93 Ark. 521, 528, 123 SW 399 [cit Cyc]; Ayer, etc., Tie Co. v. Young, 90 Ark. 104, 117 SW 1080; Commercial Assur. Co. v. Rector, 55 Ark. 630, 17 SW 378.

Cal.—Goldtree v. Swinford, 74 Cal. 586, 16 P 493.

Colo.—Fisk Min., etc., Co. v. Reed, 32 Colo. 506, 77 P 240; Arthur v. Gard, 3 Colo. A. 133, 32 P 343.

Conn.—Kearns v. Nickse, 80 Conn. 23, 66 A 779, 10 LRANS 1118 and note, 10 AnnCas 420 and note; State v. Marley, 78 Conn. 330, 62 A 85; British American Ins. Co. v. Wilson, 77 Conn. 559, 60 A 293.

Del.—Geylin v. De Villeroi, 7 Del. 311.

Ga.—Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 SE 980; Strong v. West, 110 Ga. 382, 35 SE 693; McCroskey v. Hamilton, 108 Ga. 640, 34 SE 111, 75 AmSR 79; Barclay v. Hopkins, 59 Ga. 562; McDonald v. Pearre, 5 Ga. A. 130, 62 SE 830.

Ill.—Nonotuck Silk Co. v. Adams Express Co., 256 Ill. 66, 99 NE 893 [aff 166 Ill. A. 519]; Michigan Southern, etc., R. Co. v. Day, 20 Ill. 375, 71 AmD 278; Gallagher v. Singer Sewing Mach. Co., 177 Ill. A. 198; John Spry Lumber Co. v. McMillan, 77 Ill. A. 280.

Ind.—Cleveland, etc., R. Co. v. Moore, 170 Ind. 328, 82 NE 52, 84 NE 540; American Tel., etc., Co. v. Green, 164 Ind. 349, 73 NE 707; American Quarries Co. v. Lay, 37 Ind. A. 386, 73 NE 608.

Iowa.—Lee v. Conrad, 140 Iowa 16, 117 NW 1096; Massillon Engine, etc., Co. v. Shirmer, 122 Iowa 699, 98 NW 504 [aff reh 93 NW 599]; Cedar Rapids, etc., R. Co. v. Stewart, 25 Iowa 115 (holding that where an agent is intrusted with the delivery of an instrument it will be presumed that the power to affix and cancel stamps was conferred upon the agent in order to render the instrument perfect when delivered); Payne v. Potter, 9 Iowa 549.

Kan.—Shane v. Palmer, 43 Kan. 481, 23 P 594; Bohart v. Oberne, 36 Kan. 284, 13 P 388.

Ky.—Richmond Second Nat. Bank v. Adams, 93 SW 671, 29 KyL 566; Hardee v. Hall, 12 Bush 327; Taylor v. French, 1 Bibb 52.

La.—Destrehan v. Louisiana Cypress Lumber Co., 45 La. Ann. 920, 13 S 230, 40 AmSR 265; Broadway Sav. Bank v. Vorster, 30 La. Ann. 587; Farrar v. Duncan, 29 La. Ann. 126.

Me.—Stanwood v. Laughlin, 73 Me. 112; Kidder v. Knox, 43 Me. 551; Richards v. Folsom, 11 Me. 70.

Mass.—Hawks v. Locke, 139 Mass. 205, 1 NE 543, 52 AmR 702; Caswell v. Cross, 120 Mass. 545; Valentine v. Piper, 22 Pick. 85, 33 AmD 715.

Mich.—Teakle v. Moore, 131 Mich. 427, 91 NW 636; Tanner v. Page, 106 Mich. 155, 63 NW 993; Michigan Slate Co. v. Iron Range, etc., R. Co., 101 Mich. 14, 59 NW 646.

Minn.—American Seeding Mach. Co. v. Holzbauer, 117 Minn. 278, 135 NW 807 (holding that it is within the implied authority of an agent to make a special agreement which is incidental and necessary to the exercise of his actual authority); Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 NW 236; Kilborn v. Prudential Ins. Co., 99 Minn. 176, 108 NW 861; Burchard v. Hull, 71 Minn. 430, 74 NW 168.

Miss.—Potter v. Springfield Milling Co., 75 Miss. 532, 23 S 259.

Mo.—Beheret v. Myers, 240 Mo. 58, 144 SW 824; Kilpatrick v. Wiley, 197 Mo. 123, 95 SW 213; Baker v. Kansas City, etc., R. Co., 91 Mo. 152, 3 SW 486 (holding that a grant of general power includes within it all the necessary and usual means of executing it with effect and all the mediate powers necessary to the end, as incident to the primary power, although not expressly given); Dennis v. Ashley, 15 Mo. 453; Murphy v. Knights of Columbus Bldg. Co., 155 Mo. A. 649, 135 SW 446; Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013; Rider v. Kirk, 82 Mo. A. 120.

Mont.—Muth v. Goddard, 28 Mont. 237, 72 P 621, 98 AmSR 553.

Nebr.—Jones v. Wattles, 66 Nebr. 533, 92 NW 765; White Lake Lumber Co. v. Stone, 19 Nebr. 402, 27 NW 395.

Nev.—Sacalaris v. Eureka, etc., R. Co., 18 Nev. 155, 1 P 835, 51 AmR 737; Wells v. Welter, 15 Nev. 276.

N. H.—Deming v. Grand Trunk R. Co., 48 N. H. 455, 2 AmR 267; Backman v. Charlestown, 42 N. H. 125; Goodale v. Wheeler, 11 N. H. 424.

N. J.—Kelly v. Jersey City Water Supply Co., 74 N. J. L. 734, 67 A 108; Elliott v. Bodine, 59 N. J. L. 567, 36 A 1038.

N. Y.—Cullinan v. Bowker, 180 N. Y. 98, 72 NE 911; Parker v. Saratoga County, 106 N. Y. 392, 13 NE 308; Wicks v. Hatch, 62 N. Y. 535; Robinson v. Springfield Iron Co., 39 Hun 634; Egan v. De Jonge, 113 NYS 737; Meyer v. Harndens Express Co., 24 HowPr 290.

N. C.—Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 SE 816, 67 LRA 455, 1 AnnCas 718 and note; Huntley v. Mathias, 90 N. C. 101, 47 AmR 516.

N. D.—Corey v. Hunter, 10 N. D. 5, 84 NW 570.

Oh.—Mahler-Wolf Produce Co. v. Meyer, 26 Oh. Cir. Ct. 165. Compare Layet v. Gano, 17 Oh. 466.

Okl.—Ricker Nat. Bank v. Stone, 21 Okl. 833, 97 P 577.

Or.—Neppach v. Oregon, etc., R. Co., 46 Or. 374, 80 P 482; Durkee v. Carr, 38 Or. 189, 63 P 117.

Pa.—Pittsburg Sheet Mfg. Co. v. West Penn Sheet Steel Co., 197 Pa. 491, 47 A 338; Bell v. Moss, 5 Whart. 189.

Philippine.—Macke v. Camps, 7 Philippine 553.

R. I.—Anthony v. Providence, 18 R. I. 699, 28 A 766.

S. C.—Mars v. Mars, 27 S. C. 132, 3 SE 60.

S. D.—Davis v. Matthews, 8 S. D. 300, 66 NW 456.

Tenn.—Strong v. Stewart, 9 Heisk. 137; Franklin v. Ezell, 1 Sneed 497; Fabian Mfg. Co. v. Newman, (Ch. A.) 62 SW 218.

Tex.—Gulf, etc., R. Co. v. Jackson, 99 Tex. 343, 89 SW 968 [rev (Civ. A.) 86 SW 47]; Rotan Grocery Co. v. Martin, 95 Tex. 437, 67 SW 883 [den reh (Civ. A.) 66 SW 212]; Collins v. Cooper, 65 Tex. 460; Texas Bldg. Co. v. Albert, 57 Tex. Civ. A. 638, 123 SW 716; Longview v. Capps, (Civ. A.) 123 SW 160; Birge-Forbes Co. v. St. Louis, etc., R. Co., 53 Tex. Civ. A. 55, 115 SW 333; Wright v. Isaacks, 43 Tex. Civ. A. 223, 95 SW 55; Baker v. Kellett-Chatham Mach. Co., (Civ. A.) 84 SW 661; Trammell v. Turner, (Civ A.) 82 SW 325; Halff v. O'Connor, 14 Tex. Civ. A. 191, 37 SW 238.

Utah.—Genter v. Conglomerate Min. Co., 23 Utah 165, 64 P 862.

Vt.—Vermont Marble Co. v. Mead, 85 Vt. 20, 80 A 852; Thayer v. Lyman, 35 Vt. 646; White v. Langdon, 30 Vt. 599.

Va.—Ferguson, v. Gooch, 94 Va. 1, 26 SE 397, 40 LRA 234; Smith v. Tate, 82 Va. 657.

Wash.—Starr v. New York Mut. L. Ins. Co., 41 Wash. 228, 83 P 116.

W. Va.—Elk Dist. Bd. of Education v. Harvey, 70 W. Va. 480, 74 SE 507; Rohrbough v. U. S. Express Co., 50 W. Va. 148, 40 SE 398, 88 AmSR 849; Piercy v. Hedrick, 2 W. Va. 458, 98 AmD 774.

Wis.—Freeman v. Dells Paper, etc., Co., 150 Wis. 93, 135 NW 540; Abrohams v. Revillon Freres, 129 Wis. 235, 107 NW 656; Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 NW 1099; Matteson v. Rice, 116 Wis. 328, 92 NW 1109; McDermott v. Jackson, 97 Wis. 64, 72 NW 375.

Eng.—Heinrich v. Sutton, L. R. 6 Ch. 220; Collen v. Gardner, 21 Beav. 540, 52 Reprint 968 (holding that, when a general authority is given to an agent, this implies a right to do all subordinate acts incident to and necessary for the execution of that authority, and if notice is not given that the authority is specially limited the principal is bound); Richardson v. Cartwright, 1 C. & K. 328, 47 ECL 328; Dawson v. Lawley, 4 Esp. 65; Howard v. Baillie, 2 H. Bl. 618, 126 Reprint 737.

Can.—Taylor v. Wallbridge, 2 Can. S. C. 616.

N. S.—Miller v. Cochran Hill Gold Min. Co., 29 N. S. 304.

[a] **Acts essential to authorized transaction.**—The scope of the agent's authority reaches out, and permits him to do such acts and things as are directly connected with and essential to the business in hand. He may not do everything his principal may do, but where a matter directly appertains to and becomes a necessary part of an authorized transaction it may fairly be said to fall within the scope of the agency. Matteson v. Rice, 116 Wis. 328, 92 NW 1109.

[b] **Direct authority will carry with it** by implication of law such powers as are suitable and reasonably necessary to accomplish the intended purposes, although no secondary or incidental powers were mentioned between the principal and agent. Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013.

[c] **"Apparent authority"** includes the power to do whatever is usually done and necessary to be done in order to carry into effect the principal power conferred upon the agent and to transact the business or to execute the commission which has been intrusted to him. Morganton Bank v. Hay, 143 N. C. 326, 331, 55 SE 811.

[d] **"Necessary" defined.**—"The word 'necessary,' as applied to determine, in this case, the agent's power to do an incidental act, should be held to mean an act or measure requisite to enable him to discharge his main duty; something more urgently required than is signified by the words 'appropriate,' 'suitable,' or 'expedient.' It should not be held to mean an act without which the agent could not move at all toward achieving the main object of the agency; or without which, at a given stage, efforts to perform must utterly cease; but one requisite for the achievement of it according to the desire and intention of the principal; an act necessary in the sense that the main scope and object of the agency must fail unless it is done." St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 291, 90 SW 737 [cit Murphy v. Knights of Columbus Bldg. Co., 155 Mo. A. 649, 135 SW 446].

[e] **Must be "proper, usual, and reasonable" as well as necessary.**—In Durkee v. Carr, 38 Or. 189, 196, 63 P 117, it appeared that an agent with authority to lease land bound his principal to furnish water for

stances of the business to which the agency relates.[82] Such incidental authority includes all acts and things which are connected with and essential to the business in hand;[83] it is measured by the nature and necessities of the purpose to be accomplished and is prima facie coextensive with the business intrusted to the agent's care.[84] The means adopted, however, should be such as are most usual, such means indeed as are ordinarily used by prudent persons in doing similar business.[85] This rule applies both to general and special agents unless the manner of doing the particular act is prescribed by the power.[86]

[§ 221] **5. General and Special Authority—a. In General.** In a number of decisions the authority of general and special agents has been defined and distinguished.[87] This distinction has been variously stated to the effect that a general agent may do

irrigation. The trial court instructed the jury that the agent had authority to do whatever was necessary to accomplish that object. On appeal this was held to be erroneous. The court said: "We think the instruction is erroneous, because the court extended the agent's authority to whatever was necessary to the execution of the power, when it should have limited such authority to that which is 'proper, usual, and reasonable,' as well as necessary. Fertile soil, balmy atmosphere, and genial sunshine are great factors in producing and maturing successful crops, to accomplish which, in the arid region, water is necessary for irrigation. But the cost of securing it for that purpose may be so great as to render its use neither proper, usual, nor reasonable. The necessity for the use of water for irrigation by the plaintiff may be reasonably inferred from the arid character of the land leased, but unless it was usual, proper, and reasonable for a landlord, in that vicinity, to furnish water to his tenants for that purpose, necessity alone would be insufficient to confer upon an agent implied power to covenant so as to bind his principal to furnish water; for, while the land was leased to be sowed in grain, it is possible that, in consequence of a rainy season, the grain might be profitably matured without moisture supplied by artificial means. The authority of an agent to enter into a contract so as to bind his principal thereby cannot always be implied from necessity alone."

[f] **Illustrations.**—(1) If an agent is authorized to negotiate agreements he may conclude and accept the contract and receipt for the same; if to make an offer he may receive the response. Henderson Bridge Co. v. McGrath, 134 U. S. 260, 10 SCt 730, 33 L. ed. 934; Conneautsville First Nat. Bank v. Robinson, 105 Iowa 463, 75 NW 334; Griffith v. Fields, 105 Iowa 362, 75 NW 325; Holmes v. Redhead, 104 Iowa 399, 73 NW 878; Western R. Corp. v. Babcock, 6 Metc. (Mass.) 346; Damon v. Granby, 2 Pick. (Mass.) 345; Ferguson v. Hemingway, 38 Mich. 159; Boynton Furnace Co. v. Clark, 42 Minn. 335, 44 NW 121; Meridian Waterworks Co. v. Marks, (Miss.) 17 S 777; Merchants Mar. Ins. Co. v. Barss, 15 Can. S. C. 185; Bedson v. Smith, 10 Grant Ch. (U. C.) 292. (2) So also authority of an agent to superintend the excavation of a tunnel implies authority to make a contract for the valid disposition of the earth excavated. Thompson v. Mills, 45 Tex. Civ. A. 642, 101 SW 560. (3) A railroad station agent with authority to make a contract for the shipment of cattle has thereby implied authority to agree as to the time when the cars will be furnished for the shipment. San Antonio, etc., R. Co. v. Timon, 45 Tex. Civ. A. 47, 99 SW 418. (4) A "commercial freight agent" of a railroad, who has the right to take up the question of the supply of cars for different stations with the trainmaster, has authority to bind the company by a promise to supply a shipper at a certain point with a sufficient number of cars. Hoffman Heading, etc., Co. v. St. Louis, etc., R. Co., 119 Mo. A. 495, 94 SW 597. (5) Authority to build a house necessarily implies authority to purchase the lumber. John Spry Lumber Co. v. McMillan, 77 Ill. A. 280.

[g] **A corporation engaged in storing goods for hire** is bound by a stipulation to effect insurance on goods stored, the stipulation being incident to a contract of bailment executed in its name by its agent without express authority to insure, who is held out to the public as authorized to make contracts for storage, the bailor acting in good faith and without notice of any limitation on the agent's authority. General Cartage, etc., Co. v. Cox, 74 Oh. St. 284, 78 NE 371, 113 AmSR 959.

[h] **A chauffeur** whose employer's car has broken down has implied authority to make a contract for storage of the car, but has not implied authority to order permanent repairs. Gage v. Callanan, 57 Misc. 479, 109 NYS 844 [rev on other grounds 128 App. Div. 752, 113 NYS 227].

82. Byne v. Hatcher, 75 Ga. 289; Lamy v. Burr, 36 Mo. 85, 88 AmD 135; Collins v. Cooper, 65 Tex. 460.

83. Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 NW 236.

84. U. S.—Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; U. S. v. Williams, 28 F. Cas. No. 16,724, 1 Ware 173.

Ala.—Montgomery Furniture Co. v. Hardaway, 104 Ala. 100, 16 S 29.

Fla.—Dunwoody v. Saunders, 50 Fla. 202, 39 S 965.

Ill.—Young v. Mueller Bros. Art, etc., Co., 124 Ill. A. 94.

Me.—Davies v. Eastern Steamboat Co., 94 Me. 379, 47 A 896, 53 LRA 239.

Mo.—Harrison v. Kansas City, etc., R. Co., 50 Mo. A. 332.

N. Y.—Lowenstein v. Lombard, etc., Co., 164 N. Y. 324, 329, 58 NE 44 (where it was said that "where an entire business is placed under the management of an agent, the authority of the agent may be presumed to be commensurate with the necessities of the situation"); Bickford v. Menier, 107 N. Y. 490, 14 NE 438; Merserau v. Phœnix Mut. L. Ins. Co., 66 N. Y. 274; English v. Rauchfuss, 21 Misc. 494, 47 NYS 639.

Pa.—American Car, etc., Co. v. Alexandria Water Co., 218 Pa. 542, 67 A 861; Mange-Wiener Co. v. Patton Worsham Drug Co., 27 Pa. Super. 315.

Vt.—Chase v. Robinson, 86 Vt. 240, 84 A 867.

Wash.—Starr v. New York Mut. L. Ins. Co., 41 Wash. 228, 83 P 116.

85. Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 AmD 92. See also supra § 198.

86. U. S.—Ernest v. Stoller, 8 F. Cas. No. 4,520, 5 Dill. 438, 2 McCrary 380.

Conn.—Benjamin v. Benjamin, 15 Conn. 347, 39 AmD 384.

Ga.—Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 SE 980.

Ind.—Shackman v. Little, 87 Ind. 181.

Ky.—Vanada v. Hopkins, 1 J. J. Marsh. 285, 19 AmD 92.

La.—Brown v. Frantum, 6 La. 39.

Mich.—Star Line v. Van Vliet, 43 Mich. 364, 5 NW 418.

Minn.—Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 NW 236; Watts v. Howard, 70 Minn. 122, 72 NW 840.

Mo.—State v. Gates, 67 Mo. 139.

N. Y.—Sandford v. Handy, 23 Wend. 260; Anderson v. Coonley, 21 Wend. 279; Andrews v. Kneeland, 6 Cow. 354.

Pa.—Peck v. Harriott, 6 Serg. & R. 146, 9 AmD 415.

Tex.—Ryan v. Missouri, etc., R. Co., 65 Tex. 13, 57 AmR 589; Houston, etc., R. Co. v. McKinney, 55 Tex. 176; Taylor v. Hudgins, 42 Tex. 244; McAlpin v. Cassidy, 17 Tex. 449 (holding that every agency includes in it or carries with it as an incident all the powers which are necessary or proper or usual as means to effectuate the purposes for which it was created, and none other; that in this respect there is no distinction whether the authority given to an agent is general or special, express or implied; that in each case it embraces the appropriate means to accomplish the desired end, and is limited to the use of those means).

See also supra § 219.

87. U. S.—U. S. v. Payette Lumber, etc., Co., 198 Fed. 881 [aff 208 Fed. 231, 125 CCA 431]; Williamson v. Richardson, 30 F. Cas. No. 17,754.

Ala.—Singer Mfg. Co. v. McLean, 105 Ala. 316, 16 S 912; Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 S 46; Johnson v. Alabama Gas, etc., Co., 90 Ala. 505, 8 S 101; Wheeler v. McGuire, 86 Ala. 398, 5 S 190, 2 LRA 808 and note; Burks v. Hubbard, 69 Ala. 379.

Cal.—Billings v. Morrow, 7 Cal. 171, 68 AmD 235; Davis v. Trachsler, 3 Cal. A. 554, 86 P 610.

Colo.—Little Pittsburg Cons. Min. Co. v. Little Chief Cons. Min. Co., 11 Colo. 223, 17 P 760, 7 AmSR 226; Higgins v. Armstrong, 9 Colo. 38, 10 P 232; McIntosh-Huntington Co. v. Rice, 13 Colo. A. 393, 58 P 358; Savage v. Pelton, 1 Colo. A. 148, 27 P 948.

Conn.—Chesebro v. Lockwood, 91 A 188.

Ill.—Union Stockyard, etc., Co. v. Mallory, etc., Co., 157 Ill. 554, 41 NE 888, 48 AmSR 341; Crain v. Jacksonville First Nat. Bank, 114 Ill. 516, 2 NE 486; St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 74 Ill. A. 619.

Ind.—Davis v. Talbot, 137 Ind. 235, 36 NE 1098; Rich v. Johnson, 61 Ind. 246; Longworth v. Conwell, 2 Blackf. 469; Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413; Springfield Engine, etc., Co. v. Kennedy, 7 Ind. A. 502, 34 NE 856.

Iowa.—Conneautsville First Nat. Bank v. Robinson, 105 Iowa 463, 75 NW 334; Sawin v. Union Bldg., etc., Assoc., 95 Iowa 477, 64 NW 401; Siebold v. Davis, 67 Iowa 560, 25 NW 778.

Kan.—Bohart v. Oberne, 36 Kan. 284, 13 P 388; Atlantic, etc., R. Co. v. Reisner, 18 Kan. 458.

La.—Brown v. Frantum, 6 La. 39.

Me.—Johnson v. Wingate, 29 Me. 404.

Md.—Equitable L. Assur. Soc. v. Poe, 53 Md. 28.

Mass.—Norton v. Nevills, 174 Mass. 243, 54 NE 537; Mussey v. Beecher, 3 Cush. 511.

Mich.—Sorrel v. Brewster, 1 Mich. 373.

Mo.—Edwards v. Home Ins. Co., 100 Mo. A. 695, 73 SW 881.

N. H.—Hatch v. Taylor, 10 N. H. 538.

N. Y.—Lowenstein v. Lombard, 164 N. Y. 324, 58 NE 44; Merserau v. Phœnix Mut. L. Ins. Co., 66 N. Y.

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everything his principal may do, whereas a special agent is limited as to the objects or the business to be done;[88] or that in the case of a general agent the principal will be bound by the acts of the agent within the scope of his general authority, although the acts are violative of his private instructions and directions, whereas in the case of a special agent, if the agent exceeds his special authority his principal is not bound by his acts;[89] or to the effect that a general agency imports an authority which is derived from a multitude of instances, whereas a special agency is confined to one or more specific acts.[90] But the great trouble is that the authorities are totally unable to define general and special agents in terms which make the distinction applicable to each particular case,[91] and the distinction at best is unsatisfactory, and will be found insufficient to solve a great variety of the cases.[92] The designation of an agent as "general" or "special" is of little importance, as between the principal and persons who deal with the agent,[93] as it is not the name given to the agent, but the acts he is authorized to do, which determine the extent of his authority;[94] and the agent's powers, when properly analyzed, are governed by the same general principle, to wit, he can do anything within the scope of his agency so as to bind the principal, notwithstanding there may be some secret instructions limiting his powers;[95] and whether the agency is general or special, if the agent exceeds the authority conferred his acts will not bind the principal.[96] An agent of course is more likely to transcend the bounds of a narrow than of an extended power, but the principle in either case is the same.[97]

[§ 222] **b. Extent of General Authority.**[98] A general agent, unless he acts under a special and limited authority, impliedly has power to bind his principal by whatever is usual and proper to effect such a purpose as is the subject of his employment, and in the absence of known limitations third persons dealing with such a general agent have a right to act on the presumption that the scope and char-

274; Martin v. Farnsworth, 49 N. Y. 555; Farmers', etc., Bank v. Butchers', etc., Bank, 16 N. Y. 125, 69 AmD 678; Benesch v. John Hancock Mut. L. Ins. Co., 16 Daly 394, 11 NYS 714; Sandford v. Handy, 23 Wend. 260; Beals v. Allen, 18 Johns. 363, 9 AmD 221.

N. C.—Ferguson v. Davis, etc., Bldg., etc., Co., 118 N. C. 946, 24 SE 710.

Oh.—House v. Vinton Nat. Bank, 43 Oh. St. 346, 358, 1 NE 129, 54 AmR 813; Ish v. Crane, 13 Oh. St. 574, 582; Layet v. Gano, 17 Oh. 466.

Pa.—Kentucky Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Tenn.—Lumpkin v. Wilson, 5 Heisk. 555.

Utah.—Shafer v. Russell, 28 Utah 444, 79 P 559; Smith v. Droubay, 20 Utah 443, 58 P 1112.

Va.—Fore v. Campbell, 82 Va. 808, 1 SE 180.

N. S.—Wilson v. The Windsor Fdy. Co., 33 N. S. 21.

See also supra §§ 15, 16.

88. Kramer v. Blair, 88 Va. 456, 13 SE 914; Hooe v. Oxley, 1 Wash. (1 Va.) 19, 1 AmD 425.

89. Wood v. McCain, 7 Ala. 800, 42 AmD 612; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 AmD 62; Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 AmD 219.

90. Ala.—Wood v. McCain, 7 Ala. 800, 42 AmD 612.

Ark.—Keith v. Herschberg Optical Co., 48 Ark. 138, 2 SW 777.

Ga.—Columbus Show-Case Co. v. Brinson, 128 Ga. 487, 57 SE 871.

Ind.—Thompson v. Michigan Mut. L. Ins. Co., (A.) 105 NE 780.

Mo.—Cross v. Atchison, etc., R. Co., 71 Mo. A. 585.

Tenn.—Walker v. Skipworth, Meigs 502, 33 AmD 161.

Eng.—Whitehead v. Tuckett, 15 East 400, 104 Reprint 896, 2 ERC 358.

[a] **"The distinction between a general and a special agency** (1) is in most cases a plain one. The purpose of the latter is a single transaction, or a transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency, but authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency. And it is not the less a general agency because it does not extend over the whole business of the principal. A man may have many general agents—one to buy cotton, another to buy wheat, and another to buy horses. So he may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood. The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only. Whether, therefore, an agency is general or special is wholly independent of the question whether the power to act within the scope of the authority given is unrestricted, or whether it is restrained by instructions or conditions imposed by the principal relative to the mode of its exercise." Butler v. Maples, 9 Wall. (U. S.) 766, 773, 19 L. ed. 822 [quot Cross v. Atchison, etc., R. Co., 141 Mo. 132, 147, 42 SW 675]. (2) "Agency is said to be general or special, with reference to its object, that is, according as it is confined to a single act, or is extended to all acts connected with a particular employment." Bouchette v. Anderson, Man. t. Wood 64, 68.

91. Merchants' Ins. Co. v. New Mexico Lumber Co., 10 Colo. A. 223, 51 P 174.

92. Mechanics' Bank v. New York, etc., R. Co., 13 N. Y. 599, 632 (where the court said: "There are in the books many loose expressions concerning the distinction between a general and special agency. The distinction itself is highly unsatisfactory, and will be found quite insufficient to solve a great variety of cases. It is not profitable to dwell upon that distinction. Underlying the whole subject there is this fundamental proposition, that a principal is bound only by the authorized acts of his agent. This authority may be proved by the instrument which creates it; and beyond the terms of the instrument, or of the verbal commission, it may be shown that the principal has held the agent out to the world in other instances as having an authority which will embrace the particular act in question. I know of no other mode in which a controverted power can be established. But in whichever way this is done, it cannot be limited by secret instructions of the principal on the one hand, nor can it be enlarged by the unauthorized representation of the agent on the other. These principles, I think, are elementary").

[a] **"The cases in which a distinction has been made** in the responsibility of a principal for the acts of general and of special agents are those where a special agent did not have, and was not held out as having, full authority to do that which he undertook to do, and where one dealing with him was informed, or should have informed himself, of the limitations of his authority." Haskell v. Starbird, 152 Mass. 117, 120, 25 NE 14, 23 AmSR 809.

93. Kilborn v. Prudential Ins. Co., 99 Minn. 176, 182, 108 NW 861 (where the court said: "The designation of agents as 'general,' 'special,' 'local,' and 'soliciting' agents in a rough way serves to indicate their powers, but it is of little importance as between the principal and persons who deal with the agent").

94. Jeffersonville Assoc. v. Fisher, 7 Ind. 699.

[a] **An agent having the apparent authority of a general agent** is deemed, as to persons dealing with him in ignorance of any special limitations, a general agent, although as between the principal and himself he may be deemed a special agent. Sloss-Sheffield Steel, etc., Co. v. Ætna L. Ins. Co., 74 N. J. Eq. 635, 70 A 380.

[b] **The same agent may be special** as to the nature of the acts to be performed, and general as to the manner of performing those acts. Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518, 28 AmD 476.

[c] **The volume of business transacted by an agent** does not determine the extent of his authority, for he may have acted only by express directions in each particular instance, and the volume of business may have been simply the result of the execution of numerous special orders from the principal. Gregg v. Woolfscroft, 52 Ill. A. 214, 222.

95. Thompson v. Michigan Mut. L. Ins. Co., (Ind. A.) 105 NE 780; Mars v. Mars, 27 S. C. 132, 3 SE 60. See also supra § 209.

[a] **"To a very considerable extent, the principles applicable to general agencies** apply also to those of a special and limited character. Thus the general principle, that the acts of the agent, within the scope of his authority, bind his employer; and that his acts beyond that point are void, unless the principal has held him out, or enabled him to hold himself out, as having more enlarged powers than he actually possessed, or unless the employer ratifies his acts, is applicable to all classes of agencies." Hatch v. Taylor, 10 N. H. 538, 543.

[b] **Extent of authority distinguished from nature of agency.**—The extent of the agent's authority, whether limited or unlimited, is to be distinguished from the nature of the agency, whether general or special. Doan v. Duncan, 17 Ill. 272.

96. Godshaw v. Struck, 109 Ky. 285, 58 SW 781, 22 KyL 820, 51 LRA 668. See also infra §§ 222, 223.

97. Cross v. Atchison, etc., R. Co., 141 Mo. 132, 42 SW 675.

98. **Presumption that agency is general** and not special see infra § 649.

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acter of the business he is employed to transact measures the extent of his authority, and to hold the principal responsible for the agent's acts within such authority.[99] This rule applies notwithstanding the agent disregards private instructions, provided the person seeking to hold the principal responsible for the agent's act was ignorant of such instructions.[1] But, as already stated, this rule does not apply where limitations upon the authority of the agent have been brought home to the knowledge of the third person dealing with him,[2] or where the third person fails to make such inquiry as conditions demand, especially if the facts and circumstances are such as to suggest inquiry.[3] A general agency, however, does not import unqualified authority;[4] and the implied power of any agent, however general, must be limited to such acts as are proper for an agent to do, and cannot extend to acts clearly adverse to the interests of the principal, or for the benefit of the agent personally;[5] and an special directions, and the general agent in the execution of the power departs from the precise terms of the instructions given, yet if he pursues substantially the terms and does not undertake to bind his principal by obligations materially different from those authorized his acts will be regarded as the acts of the principal. Simonds v. Clapp, 16 N. H. 222.

[c] **Principal undisclosed.**—The ordinary rule that a principal is liable for the acts of his agent which are within the authority usually confided to an agent of that character, notwithstanding secret limitations upon that authority, applies also where the existence of any principal was unknown to the person contracting with and giving credit to the agent alone. Watteau v. Fenwick, [1893] 1 Q. B. 346; Edmunds v. Bushell, L. R. 1 Q. B. 97; Pickering v. Busk, 15 East 38, 104 Reprint 758.

[d] **Where a general power of attorney by its terms authorizes the agent to act with reference to all manner of business,** the fact that it is given with reference to a certain class of transactions does not limit the agent's authority, as persons dealing with him are not bound to look beyond the instrument. Auwarter v. Kroll, 79 Wash. 179, 140 P 326.

2. See supra § 210.
3. See supra §§ 203–207.
4. Whitehead v. Tuckett, 15 East 400, 104 Reprint 896, 2 ERC 358.
5. U. S.—Central Nat. Bank v. Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693; Wickham v. Morehouse, 16 Fed. 324 (holding that no agent, however general his powers, has implied authority to pledge the credit of his principal for his own private debt, and if he undertakes to do so it is the clear duty of the person dealing with him to make inquiry as to his authority); Moores v. Citizens' Nat. Bank, 15 Fed. 141 [aff 111 U. S. 156, 4 SCt 345, 28 L. ed. 385].
Ala.—Burks v. Hubbard, 69 Ala. 379.
Ky.—Baldwin v. Tucker, 112 Ky. 282, 65 SW 841, 23 KyLR 1538, 57 LRA 451.
La.—Pritchett v. Mechanics', etc., Ins. Co., 27 La. Ann. 525.
Mo.—Mechanics' Bank v. Schaumburg, 38 Mo. 228. And see Henley v. Clover, 6 Mo. A. 181.
Mont.—Muth v. Goddard, 28 Mont. 237, 72 P 621, 98 AmSR 553.
N. H.—Rice v. Lyndeborough Glass Co., 60 N. H. 195.
N. J.—Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728.
N. Y.—Gerard v. McCormick, 130 N. Y. 261, 29 NE 115, 14 LRA 234 and note [aff 16 Daly 40, 8 NYS 860]; Wright v. Cabot, 89 N. Y. 570; Ford v. Union Nat. Bank, 88 N. Y. 672; Mechanics' Bank v. New York, etc., R. Co., 13 N. Y. 599; Jacoby v. Payson, 85 Hun 367, 32 NYS 1032.
Tex.—McAlpin v. Cassidy, 17 Tex. 449.
W. Va.—Merchants', etc., Nat. Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 SE 880, 70 LRA 812.
Man.—Hutchings v. Adams, 12 Man. 118.
N. S.—Hickman v. Baker, 31 N. S. 208; Garden v. Nelly, 31 N. S. 89.
Ont.—Brown v. Smart, 1 Grant Err. & App. (U. C.) 148.
See Sukeley v. Tunno, 2 S. C. L. 505.
See also infra § 354.
[a] **"An act done or a contract**

99. U. S.—Lindroth v. Litchfield, 27 Fed. 894; Allen v. Ogden, 1 F. Cas. No. 233, 1 Wash. C. C. 174.
Ala.—British, etc., Mortg. Co. v. Cody, 135 Ala. 622, 33 S 832; Robinson v. Ætna Ins. Co., 128 Ala. 477, 30 S 665; Montgomery Furniture Co. v. Hardaway, 104 Ala. 100, 16 S 29 (holding that the authority of a general agent is, as to third persons, what it appears to be, and must be determined by the nature of the business, and is prima facie coextensive with its requirements); Wheeler v. McGuire, 86 Ala. 398, 5 S 190, 2 LRA 808 and note; Wood v. McCain, 7 Ala. 800, 42 AmD 612.
Ark.—American Sales Book Co. v. Whitaker, 100 Ark. 360, 140 SW 132, 37 LRANS 91 and note; Everett v. Clements, 9 Ark. 478.
Colo.—Winch v. Edmunds, 34 Colo. 359, 83 P 632.
Conn.—Willard v. Buckingham, 36 Conn. 395.
Ga.—Hutson v. Prudential Ins. Co., 122 Ga. 847, 50 SE 1000.
Ill.—Hodges v. Bankers Surety Co., 152 Ill. A. 372; Young v. Mueller Bros. Art., etc., Co., 124 Ill. A. 94; Gray v. Merchants Ins. Co., 113 Ill. A. 537.
Ind.—Crusan v. Smith, 41 Ind. 288; American Quarries Co. v. Lay, 37 Ind. A. 386, 73 NE 608; Kerlin v. National Acc. Assoc., 8 Ind. A. 628, 35 NE 39, 36 NE 156.
Iowa.—Ney v. Eastern Iowa Tel. Co., 144 NW 383; Currier v. Clark, 145 Iowa 613, 124 NW 622; Sawin v. Union Bldg., etc., Assoc., 95 Iowa 477, 64 NW 401; Palmer v. Cheney, 35 Iowa 281; Bartholomew v. Merchant's Ins. Co., 25 Iowa 507, 96 AmD 65.
Kan.—Bobart v. Oberne, 36 Kan. 284, 13 P 388; New York L. Ins. Co. v. McGowan, 18 Kan. 300.
Ky.—E. T. Kenney Co. v. Anderson, 81 SW 663, 26 KyL 367; Rankin v. McFarlane Carriage Co., 75 SW 221, 25 KyL 258.
Me.—Rhoda v. Annis, 75 Me. 17, 46 AmR 354.
Mass.—Williams v. Mitchell, 17 Mass. 98.
Mich.—Inglish v. Ayer, 79 Mich. 516, 44 NW 942.
Minn.—Baker v. Chicago Great Western R. Co., 91 Minn. 118, 97 NW 650; Gillis v. Duluth, etc., R. Co., 34 Minn. 301, 25 NW 603.
Miss.—Wilcox v. Routh, 17 Miss. 476.
Mo.—Cross v. Atchison, etc., R. Co., 141 Mo. 132, 42 SW 675; Porter v. Woods, 138 Mo. 539, 39 SW 794; Alexander v. Scott, 150 Mo. A. 218, 129 SW 991.
Mont.—Muth v. Goddard, 28 Mont. 237, 72 P 621, 98 AmSR 553 (holding that the authority to accomplish a definite object carries with it the right to adopt the usual and legal means to accomplish the object).
Nebr.—Hall v. Hopper, 64 Nebr. 633, 90 NW 549; Furnas v. Frankman, 6 Nebr. 429.
Nev.—Rankin v. New England, etc., Silver Min. Co., 4 Nev. 78.
N. H.—Flint v. Boston, etc., R. Co., 73 N. H. 141, 59 A 938; Towle v. Leavitt, 23 N. H. 360, 55 AmD 195.
N. Y.—Magnus v. Platt, 62 Misc. 499, 115 NYS 824; Anderson v. Coonley, 21 Wend. 279; Munn v. Commission Co., 15 Johns. 44, 8 AmD 219.
Oh.—Massachusetts L. Ins. Co. v. Eshelman, 30 Oh. St. 647.
Okl.—Midland Sav., etc., Co. v. Sutton, 30 Okl. 448, 120 P 1007.
Pa.—Empire Impl. Mfg. Co. v. Hench, 219 Pa. 135, 67 A 995; American Car, etc., Co. v. Alexandria Water Co., 218 Pa. 542, 67 A 861; Adams Express Co. v. Schlessinger, 75 Pa. 246; Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 AmD 390; Williams v. Getty, 31 Pa. 461, 72 AmD 757; Buckwalter Stove Co. v. Central Trust, etc., Co., 53 Pa. Super. 558.
Tenn.—Mt. Olivet Cemetery Co. v. Shubert, 2 Head 116.
Tex.—Thompson v. Mills, 45 Tex. Civ. A. 642, 101 SW 560; Dabney v. McFarlin, (Civ. A.) 34 SW 142.
Utah.—Smith Table Co. v. Madsen, 30 Utah 297, 84 P 885.
Va.—Continental Ins. Co. v. Kasey, 25 Gratt. (66 Va.) 268, 18 AmR 681.
Wash.—Mauk v. Lee, 66 Wash. 184, 119 P 185; Driver v. Galland, 59 Wash. 201, 109 P 593 (holding that, where an agent had general authority to build a house without special limitations, whatever was done by him in the legitimate carrying out of the enterprise was done under the authority of the agency); Harvey v. Sparks Bros., 45 Wash. 578, 88 P 1108; Rowland v. P. P. Carroll Loan, etc., Co., 44 Wash. 413, 87 P 482.
Wis.—Roehl v. Vlockmann, 103 Wis. 484, 79 NW 755; Saveland v. Green, 40 Wis. 431.
Eng.—Collen v. Gardner, 21 Beav. 540, 52 Reprint 968; Smith v. McGuire, 3 H. & N. 554; Ex p. Howell, 12 L. T. Rep. N. S. 785.
[a] **A general agency is prima facie coextensive** with the requirements of the business at the given time and place. Coles v. Jefferson Ins. Co., 41 W. Va. 261, 23 SE 732.
[b] **A general agent may do everything which the principal** may do. Kramer v. Blair, 88 Va. 456, 13 SE 914; Hooe v. Oxley, 1 Wash. (1 Va.) 19, 1 AmD 425.
[c] **The implied powers of a general agent** ordinarily extend to the conduct of the business in his charge in the usual and customary manner. Lytle v. Dothan Bank, 121 Ala. 215, 26 S 6. See also supra § 218.
[d] **General agency implies authority** in the agent to act generally in all the business usually conducted by the principal. Birmingham Mineral R. Co. v. Tennessee Coal, etc., Co., 127 Ala. 137, 28 S 679.
[e] **A surety company, which appoints agents whom it calls "general agents,"** with authority to solicit business for it as a surety on excise bonds, receive applications, issue bonds, and receive premiums therefor, may not claim that they have not authority to make the agreement with the applicant for a bond, for which an extra premium is paid, that he shall not be liable for any amount the company may become chargeable with on account of the bond. Matter of American Fidelity Co., 54 Misc. 357, 104 NYS 711.
1. See supra §§ 209, 211.
[a] **Persons dealing with a general agent are presumed** to be acquainted only with his general authority, and are not bound to ascertain the extent of his power. Garr, etc., Co. v. Rose, 3 Ind. A. 269, 29 NE 616. See also supra §§ 206, 209.
[b] **Effect of departing from precise terms of power.**—Although the power conferred is accompanied by

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agent has no implied authority to do acts not usually done by agents in that sort of transaction, or to do them in other than the customary manner; the most general authority is limited to the business or purpose for which the agency was created,[6] and it is not sufficient that the agent's act or contract merely relates to the business of his agency.[7] If a general agent exceeds his authority, the principal is not bound.[8]

[§ 223] c. **Extent of Special Authority.** It is a general rule that the authority of a special agent must be strictly pursued,[9] and this authority must be limited to the particular business and particular

made with himself by an agent on behalf of his principal is presumed to be, and is, notice of the fact that it is without the scope of his general powers, and no one who has notice of its character may safely rely or recover upon it without proof that the agent was expressly and specially authorized by his principal to do the act or to make the contract." Park Hotel Co. v. St. Louis Fourth Nat. Bank, 86 Fed. 742, 744, 30 CCA 409. See also State Nat. Bank v. Newton Nat. Bank, 66 Fed. 691, 14 CCA 61; Chrystie v. Foster, 61 Fed. 551, 9 CCA 606.

[b] **Cannot grant interest in principal's business.**—A general agent is not clothed, by virtue of his agency, with power to contract with an employee for an interest in his principal's business, or an interest in the profits thereof. Deffenbaugh v. Jackson Paper Mfg. Co., 120 Mich. 242, 79 NW 197.

6. U. S.—Hodge v. Combs, 1 Black 192, 17 L. ed. 157 (holding that an appointment "to do and transact all manner of business" gives no authority to sell the principal's property).

Ala.—Wheeler v. McGuire, 86 Ala. 398, 5 S 190, 2 LRA 808 and note.

Colo.—Gates Iron Works v. Denver Engineering Works Co., 17 Colo. A. 15, 67 P 173; McIntosh-Huntington Co. v. Rice, 13 Colo. A. 393, 58 P 358; Smyth v. Lynch, 7 Colo. A. 383, 43 P 670 [rev on other grounds 25 Colo. 103, 54 P 634].

Ga.—Hutson v. Prudential Ins. Co., 122 Ga. 847, 50 SE 1000; Macon First Nat. Bank v. Nelson, 38 Ga. 391, 95 AmD 400.

Ill.—Blair v. National Shirt, etc., Co., 137 Ill. A. 413, 418; Halladay v. Underwood, 90 Ill. A. 130.

Ind.—Rich v. Johnson, 61 Ind. 246.

Iowa.—National Loan, etc., Co. v. Bleasdale, 140 Iowa 695, 119 NW 77 (holding that the authority of a general agent is not unlimited but is restricted to the transactions within the scope of the business of the principal with which he is concerned); Hakes v. Myrick, 69 Iowa 189, 28 NW 575.

Me.—Davies v. Eastern Steamboat Co., 94 Me. 379, 47 A 896, 53 LRA 239; Gardner v. Boston, etc., R. Co., 70 Me. 181.

Md.—Pennsylvania, etc., Steam Nav. Co. v. Dandridge, 8 Gill & J. 248, 29 AmD 543.

Mass.—Baldwin v. Connecticut Mut. L. Ins. Co., 182 Mass. 389, 65 NE 837; Odiorne v. Maxcy, 13 Mass. 178.

Mich.—Cowan v. Sargent Mfg. Co., 141 Mich. 87, 104 NW 377; Holmes v. McAllister, 123 Mich. 493, 82 NW 220, 48 LRA 396; Deffenbaugh v. Jackson Paper Mfg. Co., 120 Mich. 242, 79 NW 197; Stilwell-Bierce, etc., Co. v. Niles Paper-Mill Co., 115 Mich. 35, 72 NW 1107.

Minn.—Ermentrout v. Girard F. & M. Ins. Co., 63 Minn. 305, 65 NW 635, 56 AmSR 481, 30 LRA 346.

Mo.—Brosnahan v. Philip Best Brewing Co., 26 Mo. A. 386.

N. H.—Bohanan v. Boston, etc., R. Co., 70 N. H. 526, 49 A 103 (holding that general agents are clothed, as a matter of law, with authority only to employ the usual and ordinary means of accomplishing that for which the agency was created).

N. J.—Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728.

N. Y.—Decker v. Sexton, 19 Misc. 59, 43 NYS 167; Jaques v. Todd, 3 Wend. 83.

N. C.—Moore v. Tickle, 14 N. C. 244.

Tenn.—Walker v. Skipwith, Meigs 502, 33 AmD 161.

Tex.—Weeks v. A. F. Shapleigh Hardware Co., 23 Tex Civ. A. 577, 57 SW 67.

Vt.—Stewart v. Woodward, 50 Vt. 78, 28 AmR 488; La Point v. Scott, 36 Vt. 603.

Wash.—Cosh-Murray Co. v. Adair, 9 Wash. 686, 38 P 749.

Eng.—Hambro v. Burnand, [1903] 2 K. B. 399 [rev on other grounds [1904] 2 K. B. 10]; Cotman v. Orton, Cr. & Ph. 304, 18 EngCh 304, 41 Reprint 506; Atty.-Gen. v. Jackson, 5 Hare 355, 26 EngCh 355, 67 Reprint 950; Ex p. Howell, 12 L. T. Rep. N. S. 785; Treuttel v. Barandon, 8 Taunt. 100, 4 ECL 59, 129 Reprint 320.

Can.—Manufacturer's Acc. Ins. Co. v. Pudsey, 27 Can. S. C. 374 [aff 29 N. S. 124].

N. B.—Boyer v. Woodstock, 6 Can LTOccNotes 493, 24 N. B. 521.

Ont.—Kerr v. Lefferty, 7 Grant Ch. (U. C.) 412.

[a] **A general agent in a particular branch** of his principal's business has no implied authority in any other branch. Dodge v. Williams, 47 Pa. Super. 302; Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396.

[b] **Contracts of extraordinary nature.**—A general agent cannot enter into contracts of an unusual and extraordinary nature wtihout special authority. Shaw v. Stone, 1 Cush. (Mass.) 228; Ricker Nat. Bank v. Stone, 21 Okl. 833, 97 P 577.

7. Richmond v. Greeley, 38 Iowa 666, 668 (where the court said: "It is essential in order to bind the principal that the contract of the agent shall be within the scope of his authority as agent. It is not enough that the agreement be made in regard to the business of the agency, it must be within the scope of the agency. The contract must be within the scope of the general authority conferred upon the agent, and not merely in regard to the business of the agency, for the agent might make a contract in regard to the business of his agency and at the same time exceed the scope of his authority. For instance, an auctioneer, who is a general agent, has authority to sell goods only for ready money, unless otherwise specially authorized, and yet if he should sell on credit the transaction would be one 'in regard to the business of the agency' ").

8. U. S.—Pacific Lumber Co. v. Moffat, 134 Fed. 836, 67 CCA 442 (holding that, where defendant's agent contracted in defendant's name for the purchase of a large quantity of lumber from plaintiff at a price exceeding the market rates in order to make up the amount lost by plaintiff in consequence of previous sales to an insolvent, defendant was not liable on the contract).

Ala.—Stanley v. Sheffield Land, etc., Co., 83 Ala. 260, 4 S 34; St. John v. Redmond, 9 Port. 428.

Colo.—Consolidated Gregory Co. v. Raber, 1 Colo. 511.

Hawaii.—Nahaolelua v. Kaaahu, 10 Hawaii 18.

Ill.—Abrahams v. Weiller, 87 Ill. 179; Pinkerton v. Gilbert, 22 Ill. A. 568.

Iowa.—Beebe v. Equitable Mut. L. etc., Assoc., 76 Iowa 129, 40 NW 122; Taylor v. White, 44 Iowa 295; Richmond v. Greeley, 38 Iowa 666; Wanless v. McCandless, 38 Iowa 20; Jones v. Turck, 33 Iowa 246.

Ky.—Godshaw v. Struck, 109 Ky. 285, 58 SW 781, 22 KyL 820, 51 LRA 668.

Me.—Thomas v. Harding, 8 Me. 417.

Mich.—Cowan v. Sargent Mfg. Co., 141 Mich. 87, 104 NW 377.

Miss.—McCoy v. McKowen, 26 Miss. 487, 59 AmD 264.

Mo.—Fougue v. Burgess, 71 Mo. 389.

Nev.—Lonkey v. Succor Mill, etc., Co., 10 Nev. 17; Ellis v. Central Pac. R. Co., 5 Nev. 255; Yellow Jacket Silver Min. Co. v. Stevenson, 5 Nev. 224.

N. H.—Canaan v. Derush, 47 N. H. 212.

N. Y.—Robinson v. Chemical Nat. Bank, 86 N. Y. 404; Booth v. Bierce, 38 N. Y. 463, 98 AmD 73 [rev 40 Barb. 114].

Utah.—Moyle v. Salt Lake City Cong. Soc., 16 Utah 69, 50 P 806.

Wis.—Kelly v. Strong, 68 Wis. 152, 31 NW 721.

Eng.—Waters v. Brogden, 1 Y. & J. 457.

See generally supra § 202.

9. U. S.—Allen v. Ogden, 1 F. Cas. No. 263, 1 Wash. C. C. 174; U. S. v. Williams, 28 F. Cas. No. 16,724, 1 Ware 173.

Ala.—Moore v. Ensley, 112 Ala. 228, 20 S 744; Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 S 46; Wheeler v. McGuire, 86 Ala. 398, 5 S 190, 2 LRA 808 and note.

Ark.—Mutual L. Ins. Co. v. Reynolds, 81 Ark. 202, 98 SW 963.

Cal.—Iverson v. Metropolitan L. Ins. Co., 151 Cal. 746, 91 P 609, 13 LRANS 866; Billings v. Morrow, 7 Cal. 171, 68 AmD 235; Bryan v. Berry, 6 Cal. 394 (holding that, where the principal authorized the agent to sign the principal's name as surety to a note and the agent signed the principal's name with his own as a joint and several maker of the note, the principal was not liable); Cayford v. Metropolitan L. Ins. Co., (A.) 91 P 266.

Colo.—McIntosh-Huntington Co. v. Rice, 13 Colo. A. 393, 58 P 358.

Conn.—Haywood v. Hamm, 77 Conn. 158, 58 A 695; Harris v. Fitzgerald, 75 Conn. 72, 52 A 315.

Del.—Mears v. Waples, 9 Del. 62 (holding that a special agent, authorized to deliver a bill of lading only on payment of the bill of exchange drawn against the goods and attached to the bill of lading, could not bind his principal by delivery made without such payment); Jefferson v. Chase, 6 Del. 219.

Ga.—Larned v. Wentworth, 114 Ga. 208, 39 SE 855; Phœnix Ins. Co. v. Gray, 107 Ga. 110, 32 SE 948; Littleton v. Loan, etc., Assoc., 97 Ga. 172, 25 SE 826; Lewis v. Equitable Mortg. Co., 94 Ga. 572, 21 SE 224.

Ill.—Thornton v. Boyden, 31 Ill. 200 (holding that if a special agent is empowered to sell land at public auction, at a particular time, at a particular place, and on certain terms, such terms, place, and time must be strictly observed); Young v. Harbor Point Club House Assoc., 99 Ill. A. 290; American Tel., etc., Co. v. Jones, 78 Ill. A. 372; Monson v. Jacques, 44 Ill. A. 306 [aff 144 Ill. 248, 651, 33 NE 43, 757].

Ind.—Drover v. Evans, 59 Ind. 454; Thomas v. Atkinson, 38 Ind. 248; Bagot v. State, 33 Ind. 262; Pursley v. Morrison, 7 Ind. 356, 63 AmD 424; Cleveland, etc., R. Co. v. Moline Plow Co., 13 Ind. A. 225, 41 NE 480.

Iowa.—Elder v. Stuart, 85 Iowa 690, 52 NW 660; Davis v. Robinson, 67 Iowa 355, 25 NW 280; Strickland v. Council Bluffs Ins. Co., 66 Iowa 466, 23 NW 926.

Kan.—Brown v. Gilpin, 75 Kan.

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instructions given,[10] and the agent cannot, by mere silence as to limitations of authority, render them ineffective.[11] Persons dealing with such an agent must at their peril inquire into the nature and extent of his authority and deal with him accordingly,[12] for, as in the case of acts and transactions

773, 90 P 267; Peddicord v. Berk, 74 Kan. 236, 86 P 465.

Ky.—Richmond Second Nat. Bank v. Adams, 93 SW 671, 29 KyL 566; Dugan v. Champion Coal, etc., Co., 105 Ky. 821, 49 SW 958, 20 KyL 1614; Parks v. S. & L. Turnpike Road Co., 4 J. J. Marsh. 456 (holding that where a special agent of a company was authorized to contract for the construction of a road between certain points, payable out of the funds then in the hands of the company, a contract made by him for construction of the road beyond these points at a future day and payable out of funds to be subsequently acquired by the company would not bind the company, since he exceeded his authority); Dehart v. Wilson, 6 T. B. Mon. 577.

Md.—Hardwick v. Kirwan, 91 Md. 285, 46 A 987.

Mass.—Collateral Loan Co. v. Sallinger, 195 Mass. 135, 80 NE 811; Lovett, etc., Co. v. Sullivan, 189 Mass. 535, 75 NE 738; Heath v. New Bedford Safe Deposit, etc., Co., 184 Mass. 481, 69 NE 215; Brown v. Henry, 172 Mass. 559, 52 NE 1073; Stollenwerck v. Thacher, 115 Mass. 224.

Mich.—Saginaw, etc., R. Co. v. Chappell, 56 Mich. 190, 22 NW 278.

Minn.—Williams v. Kerrick, 105 Minn. 254, 116 NW 1026.

Miss.—Brown v. Johnson, 20 Miss. 398, 51 AmD 118 (holding that where a special authority was given in writing by a principal to an agent, directing the agent to purchase for the principal a particular tract of land, and the agent bought a different tract, the sale was void for want of authority in the agent); Carter v. Taylor, 14 Miss. 367; Planters' Bank v. Cameron, 11 Miss. 609.

Nebr.—Driscoll v. Modern Brotherhood of America, 77 Nebr. 282, 109 NW 158; Kampman v. Nicewaner, 60 Nebr. 208, 82 NW 623; Lederer v. Union Sav. Bank, 52 Nebr. 133, 71 NW 954; Norfolk Nat. Bank v. Nenow, 50 Nebr. 429, 69 NW 936.

Nev.—Rankin v. New England, etc., Silver Min. Co., 4 Nev. 78.

N. H.—Hovey v. Brown, 59 N. H. 114.

N. J.—Cooley v. Perrine, 41 N. J. L. 322, 32 AmR 210; Campbell v. Hough, 73 N. J. Eq. 601, 68 A 759; Milne v. Kleb, 44 N. J. Eq. 378, 14 A 646; Black v. Shreve, 13 N. J. Eq. 455.

N. Y.—Martin v. Farnsworth, 49 N. Y. 555; Lamkin v. Rosenthal, 5 App. Div. 532, 39 NYS 483; Nester v. Craig, 69 Hun 543, 23 NYS 948; Metropolitan Aluminum Mfg. Co. v. Lau, 61 Misc. 105, 112 NYS 1059; Cohen v. Mincoff, 96 NYS 411; Nixon v. Hyserott, 5 Johns. 58; Batty v. Carswell, 2 Johns. 48.

N. C.—West v. A. P. Messick Grocery Co., 138 N. C. 166, 50 SE 565.

Okl.—Halsell v. Renfrow, 14 Okl. 674, 78 P 118, 2 AnnCas 286.

Or.—Reid v. Alaska Packing Co., 47 Or. 215, 83 P 139.

Pa.—Getty v. Pennsylvania Inst. for Instruction of Blind, 194 Pa. 571, 45 A 333; Pennsylvania L., etc., Ins. Co. v. Franklin F. Ins. Co., 181 Pa. 40, 37 A 191, 37 LRA 780; Mundis v. Emig, 171 Pa. 417, 32 A 1135; Campbell v. Foster Home Assoc., 163 Pa. 609, 30 A 222, 43 AmSR 818, 26 LRA 117; Devinney v. Reynolds, 1 Watts & S. 328; MacDonald v. O'Neil, 21 Pa. Super. 364.

S. C.—Robert Buist Co. v. Lancaster Mercantile Co., 73 S. C. 48, 52 SE 789; Providence Mach. Co. v. Browning, 72 S. C. 424, 52 SE 117; Welsh v. Parish, 19 S. C. L. 155.

Tenn.—McClure v. Evartson, 14 Lea 495; Lumpkin v. Wilson, 5 Heisk. 555; Gimell v. Adams, 11 Humphr. 283; Hoskins v. Carroll, 7 Yerg. 505; Gordon v. Buchanan, 5 Yerg. 71.

Tex.—Darnell v. Lyon, 85 Tex. 455, 22 SW 304, 960.

Vt.—Goodrich v. Tracy, 43 Vt. 314, 5 AmR 281; Sprague v. Train, 34 Vt. 150; Hurlburt v. Kneeland, 32 Vt. 316.

Va.—Bowles v. Rice, 107 Va. 51, 57 SE 575; Fishburne v. Engledove, 91 Va. 548, 22 SE 354.

Wash.—Bleecker v. Satsop R. Co., 3 Wash. 77, 27 P 1073.

Wis.—Godfrey v. Schneck, 105 Wis. 568, 81 NW 656; Hoyer v. Ludington, 100 Wis. 441, 76 NW 348; Bryant v. Bank of Commerce, 95 Wis. 476, 70 NW 480.

Wyo.—Brown v. Grady, 16 Wyo. 151, 92 P 622.

Eng.—Forman v. The Liddesdale, [1900] A. C. 190; Jordan v. Norton, 1 H. & H. 234, 6 ERC 142.

Can.—Murray v. Jenkins, 28 Can. S. C. 565; Torrop v. Imperial F. Ins. Co., 26 Can. S. C. 585; Taylor v. Wallbridge, 2 Can. S. C. 616.

Man.—Bouchette v. Anderson, Man. t. Wood 64.

N. S.—Macnutt v. Shaffner, 34 N. S. 402; Starr v. Royal Electric Co., 33 N. S. 156.

Ont.—Becherer v. Asher, 23 Ont. A. 202.

Que.—Garneau v. North American Transp. Co., 12 Que. Super. 77.

[a] **Authority to do an act subject to approval** of the principal confers no authority to dispense with such approval. Chauche v. Pare, 75 Fed. 283, 21 CCA 329.

10. U. S.—Walrath v. Champion Min. Co., 63 Fed. 552; Mercier v. Lachenmeyer, 17 F. Cas. No. 9,455, 8 Phila. (Pa.) 152.

Ala.—Moore v. Ensley, 112 Ala. 220, 20 S 744; Singer Mfg. Co. v. McLean, 105 Ala. 316, 16 S 912.

Cal.—Mitrovich v. Fresno Fruit Packing Co., 123 Cal. 379, 55 P 1064.

Ill.—Cowan v. Curran, 216 Ill. 598, 75 NE 322.

Iowa.—Ney v. Eastern Iowa Tel. Co., 144 NW 383; Elder v. Stuart, 85 Iowa 690, 52 NW 660.

Ky.—Pedigo v. Day, 8 KyL 159.

Mich.—Hammond v. Michigan State Bank, Walk. 214.

Miss.—King v. Levy, 13 S 282; Gilchrist v. Pearson, 70 Miss. 351, 12 S 333.

Mo.—Barcus v. Hannibal, etc., Plankroad Co., 26 Mo. 102; Grand Ave. Hotel Co. v. Friedman, 33 Mo. A. 491.

N. J.—Slingerland v. East Jersey Water Co., 58 N. J. L. 411, 33 A 843; Brockway v. Mullin, 46 N. J. L. 448, 50 AmR 442.

N. Y.—Kipp v. East River Electric Light Co., 19 NYS 387; Coykendall v. Eaton, 40 HowPr 266.

Pa.—Hagerstown Bank v. Loudon Sav. Fund Soc., 3 Grant 135 [rev on other grounds 36 Pa. 498, 78 AmD 390]; Kentucky Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Tex.—Conner v. Littlefield, 79 Tex. 76, 15 SW 217; McAlpin v. Cassidy, 17 Tex. 449.

Utah.—Moyle v. Salt Lake City Cong. Soc., 16 Utah 69, 50 P 806.

Vt.—Briggs v. Taylor, 35 Vt. 57.

Va.—Ferguson v. Gooch, 94 Va. 1, 26 SE 397, 40 LRA 234.

Eng.—Forman v. The Liddesdale, [1900] A. C. 190; Graves v. Masters, Cab. & E. 73.

[a] **The implied powers of a special agent** are limited to acts necessary or proper to the accomplishment of the particular matter intrusted to him. Lytle v. Dothan Bank, 121 Ala. 215, 26 S 6. See also supra § 219.

[b] **Authority to subscribe for stock.**—A special power of attorney given by a principal to his agent, authorizing the latter to subscribe for shares of stock in a proposed corporation on behalf of the principal, does not authorize the agent to sign his principal's name to a contract with a building company to erect a building for the proposed corporation. Hackworth v. Hastings Industrial Co., 146 Ky. 387, 142 SW 681.

11. Mitrovich v. Fresno Fruit Packing Co., 123 Cal. 379, 55 P 1064.

12. U. S.—Owins v. Hull, 9 Pet. 607, 9 L. ed. 246; Oshkosh Nat. Bank v. Munger, 95 Fed. 87, 36 CCA 659; Williamson v. Richardson, 30 F. Cas. No. 17,754.

Ala.—Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 S 46; Johnson v. Alabama Gas, etc., Co., 90 Ala. 505, 8 S 101; Burks v. Hubbard, 69 Ala. 379; Fisher v. Campbell, 9 Port. 210.

Ark.—Jonesboro, etc., R. Co. v. McClelland, 104 Ark. 150, 148 SW 523; Schenck v. Griffith, 74 Ark. 557, 86 SW 850; Liddell v. Sahline, 55 Ark. 627, 17 SW 705.

Cal.—Robinson v. American Fish, etc., Co., 17 Cal. A. 212, 119 P 388 (holding that, where an agency is known to be special, one dealing with the agent is bound to inquire into the nature and extent of the authority conferred, and to deal with the agent accordingly); Davis v. Trachsler, 3 Cal. A. 554, 86 P 810.

Colo.—Johnson v. Lennox, 55 Colo. 125, 133 P 744; McIntosh-Huntington Co. v. Rice, 13 Colo. A. 393, 58 P 358; Sioux City Nursery, etc., Co. v. Magnes, 5 Colo. A. 172, 38 P 330.

Conn.—Ladd v. Franklin, 37 Conn. 53.

Ga.—Southern R. Co. v. Grant, 136 Ga. 303, 71 SE 422, AnnCas1912C 472 and note; Chapman v. Americus Oil Co., 117 Ga. 881, 45 SE 268; Inman v. Crawford, 116 Ga. 63, 42 SE 473 (holding that a secret agreement between the third person and a special agent cannot bind the principal); Americus Oil Co. v. Gurr, 114 Ga. 624, 40 SE 780; Harris Loan Co. v. Elliott, etc., Book-Typewriter Co., 110 Ga. 302, 34 SE 1003; Camp v. Southern Banking, etc., Co., 97 Ga. 582, 25 SE 362.

Ida.—Valley Lumber, etc., Co. v. Nickerson, 13 Ida. 682, 93 P 24.

Ill.—Blackmer v. Summit Coal, etc., Co., 187 Ill. 32, 58 NE 289; Chicago, etc., Land Co. v. Peck, 112 Ill. 408; Baxter v. Lamont, 60 Ill. 237; Peabody v. Hoard, 46 Ill. 242; Kuecks v. New Home Sewing Mach. Co., 123 Ill. A. 660; Young v. Harbor Point Club House Assoc., 99 Ill. A. 290; Schneider v. Lebanon Dairy, etc., Co., 73 Ill. A. 612.

Ind.—Hunt v. Illinois Cent. R. Co., 163 Ind. 106, 71 NE 195; Davis v. Talbot, 137 Ind. 235, 36 NE 1098; Robinson v. Anderson, 106 Ind. 152, 6 NE 12; Blackwell v. Ketcham, 53 Ind. 184; Berry v. Anderson, 22 Ind. 36; Reitz v. Martin, 12 Ind. 306, 74 AmD 215; German-American Bldg. Assoc. v. Droge, (A.) 41 NE 397.

Iowa.—Siebold v. Davis, 67 Iowa 560, 25 NW 778; Roberts v. Rumley, 58 Iowa 301, 12 NW 323.

Kan.—Sullivant v. Jahren, 71 Kan. 127, 79 P 1071.

Ky.—Godshaw v. Struck, 109 Ky. 285, 58 SW 781, 22 KyL 820, 51 LRA 668; Dugan v. Champion Coal, etc., Co., 105 Ky. 821, 49 SW 958, 20 KyL 1641; Russell v. Cox, 38 SW 1087, 18 KyL 1087.

La.—Brown v. Frantum, 6 La. 39.

Me.—Johnson v. Wingate, 29 Me. 404.

Md.—Hardwick v. Kirwan, 91 Md. 285, 46 A 987; Equitable L. Assur. Soc. v. Poe, 53 Md. 28; Tubman v. Lowekamp, 43 Md. 318.

Mass.—Lovett, etc., Co. v. Sullivan, 189 Mass. 535, 75 NE 738; Mussey v. Beecher, 3 Cush. 511 (holding that, where a person selling goods to an agent who was acting under a limited power of attorney had inquired of the agent as to his authority, and had been informed by him that it was not full, he could not recover of the prin-

of a general agent,[13] a special agent cannot bind his principal by acts outside the scope of his authority,[14] except perhaps where the principal's own negligence has enabled the agent to perpetrate a fraud thereby;[15] and it has been held that the act of a special agent outside of his authority is voidable

cipal for a debt exceeding the authority); Murdock v. Mills, 11 Metc. 5; Snow v. Perry, 9 Pick. 539. See also Burnham v. Wilson, 207 Mass. 378, 93 NE 704.

Minn.—Williams v. Kerrick, 105 Minn. 254, 116 NW 1026.

Miss.—Everman v. Herndon, 71 Miss. 823, 15 S 135.

Mont.—Schaeffer v. Mutual Ben. L. Ins. Co., 38 Mont. 459, 100 P 225.

N. H.—Towle v. Leavitt, 23 N. H. 360, 55 AmD 195.

N. J.—Dowden v. Cryder, 55 N. J. L. 329, 26 A 941; Black v. Shreve, 13 N. J. Eq. 455 (holding that one claiming through a special agent takes the risk of his lack of a power).

N. Y.—Alexander v. Cauldwell, 83 N. Y. 480; Martin v. Farnsworth, 49 N. Y. 555; Molloy v. Whitehall Portland Cement Co., 116 App. Div. 839, 102 NYS 363; Allen v. St. Lawrence County Farmers Ins. Co., 88 Hun 461, 34 NYS 872; Nester v. Craig, 69 Hun 548, 23 NYS 948; Michael v. Eley, 61 Hun 180, 15 NYS 890; Lippincot v. East River Mill, etc., Co., 79 Misc. 559, 141 NYS 220; Beck v. Donohue, 27 Misc. 230, 57 NYS 741; Joseph v. Struller, 25 Misc. 173, 54 NYS 162; Snow v. Wathen, 112 NYS 41; Delafield v. Illinois, 2 Hill 159, 26 Wend. 192 [aff 8 Paige 527].

N. C.—Swindell v. Latham, 145 N. C. 144, 58 SE 1010, 122 AmSR 430; West-End Hotel, etc., Co. v. Crawford, 120 N. C. 347, 27 SE 31; Ferguson v. Davis, etc., Bldg., etc., Co., 118 N. C. 946, 24 SE 710; Briggs v. North Carolina Home Ins. Co., 88 N. C. 141.

Pa.—Interstate Securities Co. v. Third Nat. Bank, 231 Pa. 422, 80 A 888; Devinney v. Reynolds, 1 Watts & S. 328; MacDonald v. O'Neil, 21 Pa. Super. 364; Breen v. Miehle Printing Press, etc., Co., 8 Pa. Dist. 151, 22 Pa. Co. 275.

S. D.—J. I. Case Threshing Mach. Co. v. Eichinger, 15 S. D. 530, 91 NW 82.

Tex.—Sinker v. Lemon, 1 Tex. A. Civ. Cas. § 290.

Vt.—Ferguson v. Phœnix Mut. L. Ins. Co., 84 Vt. 350, 79 A 997, 35 LRANS 844 and note; White v. Langdon, 30 Vt. 599.

Va.—Finch v. Causey, 107 Va. 124, 57 SE 562; Bowles v. Rice, 107 Va. 51, 57 SE 575; Blair v. Sheridan, 86 Va. 527, 10 SE 414.

W. Va.—Findley v. Cunningham, 53 W. Va. 1, 44 SE 472.

Wyo.—Brown v. Grady, 16 Wyo. 151, 92 P 622.

Eng.—Chapleo v. Brunswick Permanent Bldg. Soc., 6 Q. B. D. 696; Attwood v. Munnings, 7 B. & C. 278, 14 ECL 130, 108 Reprint 727, 4 ERC 364.

Man.—Bouchette v. Anderson, Man. t. Wood 64.

N. S.—Almon v. Foot, Russ. Eq. Cas. 1.

[a] **Reason for rule.**—"It seems very clear that any one who proposes to deal with a special agent has the right, in the first place, to know what authority he possesses, and all the limitations upon it. He deals with him at his peril, because he is bound to enquire into the nature and extent of the authority conferred. . . . The principal is not to be bound by the acts of the special agent beyond what he has authorized, because he has not misled the confidence of the party dealing with him, or enabled the agent to practice any deception; has never held the agent out as having any general authority whatever in the premises; and if the other party trusts without enquiry, he trusts to the good faith of the agent, and not to that of the principal." Hatch v. Taylor, 10 N. H. 538, 547.

[b] **Persons dealing with a special agent are put on their guard** by that fact, and must at their peril see that the act of the agent is authorized by the principal, and persons relying on stipulations by the agent varying printed provisions in a contract made with the agent to do so at their peril. Metropolitan Aluminum Mfg. Co. v. Lau, 61 Misc. 105, 112 NYS 1059.

[c] **Reliance on agents claim of authority.**—(1) One who deals with a person known to be a special agent cannot rely on the agent's claim of authority to act in a transaction merely because he went to the telephone, and conferred, as defendant supposed, with his principal in regard to closing the transaction, and then agreed to the terms of the contract. Joseph v. Struller, 25 Misc. 173, 54 NYS 162. (2) So a purchaser of stock from a special agent is bound to ascertain the nature of the agent's authority, and cannot rely on the agent's possession of a certificate with an assignment and power of attorney, and a telegram stating: "If you can't sell, borrow." Sloan v. Brown, 228 Pa. 495, 77 A 821, 139 AmSR 1019.

[d] **As to carriers.**—It has been said that this rule has been somewhat modified in its application to common carriers of goods when dealing with agents in matters relating to transportation. Smith v. Robinson Bros. Lumber Co., 88 Hun 148, 151, 34 NYS 518 (where the court said: "To attempt to apply this rule of special instructions in its fullest extent to contracts for freight made by agents with common carriers when goods are presented to them for transportation, and require them at their peril to examine into the authority of the person presenting goods for transportation to make contracts in relation thereto, would virtually destroy the utility of the business of common carriers"). See generally Carriers [6 Cyc 431].

[e] **Statute.**—(1) In Georgia, under Civ. Code § 3023, persons dealing with an agent appointed for a particular purpose are bound to inquire as to the extent of his authority. Harris Loan Co. v. Elliott, etc., Book-Typewriter Co., 110 Ga. 302, 34 SE 1003. (2) And the same rule applies under Civ. Code (1910) § 3595. Germain Co. v. Camden County Bank, (A.) 80 SE 302. (3) But this provision does not prevent the principal from waiving his right to object to his agent's want of authority. Germain Co. v. Camden County Bank, supra.

13. See supra § 222.

14. U. S.—Union Sulphur Co. v. Percy, 180 Fed. 1, 103 CCA 355; Thiel Detective Service Co. v. McClure, 142 Fed 952, 74 CCA 122, 4 LRANS 843 and note; Forrest v. Vanderbilt, 107 Fed. 734, 46 CCA 611, 52 LRA 473.

Ala.—Singer Mfg. Co. v. McLean, 105 Ala. 316, 16 S 912; Wood v. McCain, 7 Ala. 800, 42 AmD 612.

Ark.—Little Rock v. State Bank, 8 Ark. 227.

Colo.—Savage v. Pelton, 1 Colo. A. 148, 27 P 948.

Fla.—Yates v. Yates, 24 Fla. 64, 3 S 821.

Ga.—Baldwin Fertilizer Co. v. Thompson, 106 Ga. 480, 32 SE 591 (holding that a settlement made by a special agent, where not within the scope of his authority, is not binding on the principal); Macon First Nat. Bank v. Nelson, 38 Ga. 391, 95 AmD 400.

Ill.—Baxter v. Lamont, 60 Ill. 237.

Ind.—Cruzan v. Smith, 41 Ind. 288; Lucas v. Rader, 29 Ind. A. 287, 64 NE 488.

Iowa.—Siebold v. Davis, 67 Iowa 560, 25 NW 778; Payne v. Potter, 9 Iowa 549.

Ky.—Campbellsville Lumber Co. v. Spotswood, 74 SW 235, 24 KyL 2430; Harber v. Hutson, 13 KyL 333; Carothers v. McChord, etc., Co., 13 KyL 238.

Me.—Johnson v. Wingate, 29 Me. 404; Bryant v. Moore, 26 Me. 84, 45 AmD 96.

Mass.—Norton v. Nevills, 174 Mass. 243, 54 NE 537.

Mich.—Saginaw, etc., R. Co. v. Chappell, 56 Mich. 190, 22 NW 278.

Miss.—Yazoo, etc., R. Co. v. Blum, 102 Miss. 303, 59 S 92; Landsdale v. Shackleford, Miss. 149.

Mo.—Tate v. Evans, 7 Mo. 419; Ridgeley Nat. Bank v. Barse Live Stock Commn. Co., 113 Mo. A. 696, 88 SW 1124; Bensberg v. Harris, 46 Mo. A. 404.

Mont.—Moore v. Skyles, 33 Mont. 135, 82 P 799, 114 AmSR 801, 3 LRANS 136.

N. H.—Hayes v. Colby, 65 N. H. 192, 18 A 251; Hatch v. Taylor, 10 N. H. 538.

N. Y.—Bickford v. Menier, 107 N. Y. 490, 14 NE 438; Milstein v. Mosher, 126 App. Div. 515, 110 NYS 568; Meiggs v. Meiggs, 15 Hun 453; Scott v. McGrath, 7 Barb. 53; Reese v. Drug, etc., Club, 55 Misc. 276, 105 NYS 285; Rossiter v. Rossiter, 8 Wend. 494, 24 AmD 62; Jaques v. Todd, 3 Wend. 83; Beals v. Allen, 18 Johns. 363, 9 AmD 221; Munn v. Commission Co., 15 Johns. 44, 8 AmD 219; Skinner v. Dayton, 5 Johns. Ch. 351. See also Deering v. Starr, 118 N. Y. 665, 23 NE 25 (holding that the burden was on one asserting it to show the authority of one empowered to buy realty to assume the claim for compensation of one who had secured the reduction of an assessment against it).

Pa.—Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 AmD 390; Maryland Casualty Co. v. Peoples, 26 Pa. Super. 142; Mercier v. Lachen-Meyer, 1 LegGas 279.

Tex.—Mann v. Dublin Cotton-Oil Co., 92 Tex. 377, 48 SW 567 (holding that authority to act as agent for the principal in weighing cattle did not give the agent authority to consent to the transportation of the cattle to another place for the purpose of weighing them); Trammell v. Turner, (Civ. A.) 82 SW 325.

Va.—Davis v. Gordon, 87 Va. 559, 13 SE 35; Blair v. Sheridan, 86 Va. 527, 10 SE 414; Fore v. Campbell, 82 Va. 808, 1 SE 180.

Eng.—Collen v. Gardner, 21 Beav. 540, 52 Reprint 968; Cotman v. Orton, Cr. & Ph. 304, 18 EngCh 304, 41 Reprint 506; East India Co. v. Hensley, 1 Esp. 112 (holding that a principal is bound by all the acts of his general agent, but that where he appoints an agent for a particular purpose he is bound only to the extent of the authority given); Jordan v. Norton, 1 H. & H. 234, 6 ERC 142; Fenn v. Harrison, 3 T. R. 757, 100 Reprint 842, 4 T. R. 177, 100 Reprint 959. And see Attwood v. Munnings, 7 B. & C. 278, 14 ECL 130, 108 Reprint 727, 4 ERC 364.

Can.—Commercial Union Assoc. v. Margeson, 29 Can. S. C. 601 [rev 31 N. S. 337]; Atlas Assur. Co. v. Brownell, 29 Can. S. C. 537 [rev 31 N. S. 348].

N. B.—Boyer v. Woodstock, 24 N. B. 521, 6 CanLTOccNotes 493 (holding that a committee appointed for specific duties is not authorized to order extra work outside such duties).

N. S.—Ross v. Sutherland, 32 N. S. 243; Garden v. Neily, 31 N. S. 89.

See generally supra § 202.

[a] **A mere special agent will not be presumed** to have authority to take in his own name and negotiate a note for money due or to become due to his principal. Nickelson v. Dial, 77 Kan. 8, 93 P 606.

15. Saginaw, etc., R. Co. v. Chappell, 56 Mich. 190, 22 NW 278; Brown v. Kent County Probate Judge, 42

at the option of the principal.[16] A special authority, like a general authority, confers by implication all powers necessary for or incident to its proper execution,[17] and acts done by a special agent while acting within the scope of his authority are as binding on the principal as those of a general agent.[18]

Secret instructions or restrictions do not limit the special agent's authority so far as third persons are concerned,[19] unless they are brought to the knowledge of the third person dealing with the agent;[20] and if a principal has permitted a special agent so to act as reasonably to induce others to credit him with broader powers than he actually possesses, he will be estopped to deny the existence of as broad an authority as he permitted the special agent to exercise.[21]

[§ 224] **6. Authority of Agents for Particular Purposes—a. To Purchase—(1) In General.** As a general rule a principal is responsible for the purchases of his agent where, and only where, he authorizes him to make them, or where he permits him to make purchases knowing that the seller parts with the property on the responsibility of the principal, and not on the credit of the agent,[22] as where he has held him out, or permitted him to hold himself out, as having authority to purchase.[23] If the agent makes purchases within the discretion lodged in him by the agency the principal is responsible therefor,[24] although the agent has disregarded private instructions;[25] and, although the agent has exceeded his authority, the principal is responsible if he or the agent has been guilty of fraud in dealing with the vendor.[26]

Implied authority to purchase. An agent has implied authority to purchase for his principal whenever such purchasing is customary or necessary to enable the agent to accomplish that for which he was employed by his principal,[27] but the principal

Mich. 501, 4 NW 195; Hall v. Parker, 37 Mich. 590, 26 AmR 540; Atlas Min. Co. v. Johnston, 23 Mich. 36; Hutchings v. Ladd, 16 Mich. 493; Trudo v. Anderson, 10 Mich. 357, 81 AmD 795; Dripp's Assignees, 4 PaLJR 87, 6 PaLJ 563.

16. Allen v. Ogden, 1 F. Cas. No. 283, 1 Wash. C. C. 174; Payne v. Potter, 9 Iowa 549; Mitchell v. Sproul, 5 J. J. Marsh. (Ky.) 264; Dehart v. Wilson, 6 T. B. Mon. (Ky.) 577; Nixon v. Hyserott, 5 Johns. (N. Y.) 58.

17. See supra § 220.

[a] **The authority of a special agent will be construed to include all usual means** for effectually executing it. Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 SE 980.

18. Morton v. Scull, 23 Ark. 289.

19. Wheeler v. McGuire, 86 Ala. 398, 5 S 190, 2 LRA 808 and note; Barber v. Britton, 26 Vt. 112, 60 AmD 301. See also supra § 209.

[a] **Indorsement of check.**—Where a person authorizes his agent to indorse a check, which he does, and the act is within the scope of his authority, such party cannot deny liability for the acts of his agent because the authority was intended only to apply to checks received by the agent in the proper management of his business, and his agent willfully perverted the power vested in him to do something more than was intended. Slaughter v. Fay, 80 Ill. A. 105.

20. See supra § 210.

21. St. Louis, etc., Packet Co. v. Parker, 59 Ill. 23 (holding that, although an agent's authority may be special and limited, yet, if the principal permits him to advertise his name as agent generally without noting such limitation, and he acts outside of his authority, the principal will be bound thereby, unless the person with whom he deals has notice of the limitation); Southern Pac. Co. v. Duncan, 16 KyL 119; Harber v. Hutson, 13 KyL 333; Lister v. Allen, 31 Md. 543, 100 AmD 78. See also supra § 211.

22. Ala.—Crone v. Long, 159 Ala. 487, 49 S 227 (holding that to hold alleged principals liable for a purchase made by another as agent, it is insufficient to show that he was their agent for any purpose, but it must appear that he was their agent to make the particular purchase).

Ill.—Pomeroy v. Roberts, 13 Ill. 294.

Mass.—Stiles v. Emerson, 17 Pick. 326.

Minn.—Eckart v. Roehm, 43 Minn. 271, 45 NW 443.

Mo.—Carson v. Culver, 78 Mo. A. 597 (holding that where one makes a sale to an agent beyond the limitations of the agent's authority, of which the vendor had notice, the latter cannot recover of the principal as for a purchase on his behalf, in the absence of evidence of any fraudulent purpose on the part of either the principal or his agent in their dealings with the vendor).

Nebr.—Young v. Chi Psi Cattle Co., 79 Nebr. 268, 112 NW 560 (holding that a person or corporation cannot be held liable for goods sold and delivered to an employee in the absence of a showing that he was authorized to make the purchase and bind his employer).

Pa.—White v. Cooper, 3 Pa. 130.

Tex.—Merriman v. Fulton, 29 Tex. 97.

Vt.—Cochran v. Richardson, 33 Vt. 169; Soule v. Dougherty, 24 Vt. 92.

See Peters v. Seaman, 22 N. S. 405.

[a] **Authority must be exercised.**—In case of authority conferred upon an agent to buy, no rights in third persons can arise before the agent has acted on the authority. McCotter v. New York, 35 Barb. 609 [aff 37 NY 325].

[b] **Cannot purchase jointly for separate principals.**—An agent severally authorized by two corporations to make purchases for them has no authority to bind them jointly. Pacific Cable Constr. Co. v. McNatt, 2 Wash. 216, 27 P 869.

[c] **Where an agreement is made by the seller with a department manager** of the buyer to sell goods at a certain maximum price, purchases made by orders of one employed in a section controlled by such manager, who is authorized to give such orders, must be regarded as purchases made for the buyer. Walker v. Field, 179 Ill. A. 3.

23. Colo.—Witcher v. McPhee, 16 Colo. A. 298, 65 P 806; Witcher v. Gibson, 15 Colo. A. 163, 61 P 192.

Ill.—Union Stockyard, etc., Co. v. Mallory, etc., Co., 157 Ill. 554, 41 NE 888, 48 AmSR 341.

Mass.—Rice v. James, 198 Mass. 458, 78 NE 807.

Mich.—Baker v. Barnett Produce Co., 113 Mich. 533, 71 NW 866 (holding that, where an agent is held out to the public as having authority to contract to purchase growing crops for future delivery, the principal is bound by the acts of the agent done within the apparent scope of his authority); Banner Tobacco Co. v. Jenison, 48 Mich. 459, 12 NW 655; Sorrel v. Brewster, 1 Mich. 373.

N. C.—Metzger Bros. v. Whitehurst, 147 N. C. 171, 60 SE 907.

Wis.—Abrohams v. Revillon Freres, 129 Wis. 235, 107 NW 656.

Eng.—Watteau v. Fenwick, [1893] 1 Q. B. 346; Armstrong v. Stokes, L. R. 7 Q. B. 598, 2 ERC 471.

Man.—Hutchings v. Adams, 12 Man. 118.

N. S.—Kenny v. Harrington, 31 N. S. 290.

See also supra §§ 211–215.

[a] **Apparent authority** of an employee to bind the employer, by ordering goods to be delivered to another employee, cannot be inferred from the fact that he had previously ordered small supplies to be delivered to the employer, such fact implying at most authority to order goods to be delivered to the employer. Seely Office Appliance Co. v. Encyclopædia Brittannica Co., 119 NYS 213.

[b] **Subsequent sales without notice of revocation.**—Where a person had been defendant's agent in buying goods from plaintiff, plaintiff was entitled to recover for subsequent sales in case he had no notice of the revocation of the agency but believed that it still continued. Waters-Pierce Oil Co. v. Jackson Junior Zinc Co., 98 Mo. A. 324, 73 SW 272.

24. Boulder Inv. Co. v. Fries, 2 Colo. A. 373, 31 P 174; Baker v. Barnett Produce Co., 113 Mich. 533, 71 NW 866; Schley v. Fryer, 100 N. Y. 71, 2 NE 280 (holding that an agent having general authority to purchase real estate, encumbered or unencumbered, has the power to bind his principal by assuming a mortgage on the estate purchased); Murr v. Western Assur. Co., 24 App. Div. 390, 48 NYS 757. See also cases supra note 22.

25. Ala.—Louisville Coffin Co. v. Stokes, 78 Ala. 372.

Ga.—Comer v. Granniss, 75 Ga. 277.

Ky.—H. Herrmann Saw Mill Co. v. Bailey, 58 SW 449, 22 KyL 552 (where the agent bought more than he was authorized to purchase).

Mich.—Banner Tobacco Co. v. Jenison, 48 Mich. 459, 12 NW 655.

Mo.—Crews v. Garneau, 14 Mo. A. 505.

Pa.—Hubbard v. TenBrook, 124 Pa. 291, 16 A 817, 10 AmSR 585, 2 LRA 823 and note.

Tex.—Hayward Lumber Co. v. Cox, (Civ. A.) 104 SW 403 (holding that where a third person who was the agent of a corporation in charge of its commissary store, with authority to purchase goods therefor, bought goods from one who had no knowledge of a secret limitation on his authority, the limitation did not affect the sale); Clarkson v. Reinhartz, (Civ. A.) 70 SW 111.

Wis.—Napa Valley Wine Co. v. Casanova, 140 Wis. 289, 122 NW 812.

Eng.—Watteau v. Fenwick, [1893] 1 Q. B. 346.

See also supra § 209.

[a] **Where a person buys a store and puts an agent in charge** with instructions not to make any purchases except where countersigned by the principal, third persons without knowledge of the limitation are not bound by it. Landis v. Shadle, 23 Pa. Co. 505.

26. Carson v. Culver, 78 Mo. A. 597.

27. U. S.—Rice v. Montgomery, 20 F. Cas. No. 11,753, 4 Biss. 75.

Cal.—Heald v. Hendy, 89 Cal. 632, 27 P 67; Goss v. Helbing, 77 Cal. 190,

is not bound where an agent who might appropriately purchase certain things purchases other things not necessary to effect the purposes of the agency.[28] Even a general manager of his principal's business has no authority to make purchases which are not necessary to the performance of the duties incident to his station,[29] and still less is authority to purchase to be presumed in the case of an agent acting under restricted authority, or in a special capacity;[30] nor is authority to make subsequent purchases to be inferred from the fact that the agent had made purchases on one occasion.[31]

19 P 277 (holding that where one in charge and having the management of waterworks purchases a pump for use in such works the owners of the waterworks are liable for the price).

La.—Schmidt v. Sandel, 30 La. Ann. 353.

Mass.—Ashley v. Dowling, 203 Mass. 311, 89 NE 434, 133 AmSR 296; Thompson v. Barry, 184 Mass. 429, 68 NE 674.

Mich.—Beecher v. Venn, 35 Mich. 466.

Minn.—Watts v. Howard, 70 Minn. 122, 72 NW 840.

Mo.—Owen v. Brockschmidt, 54 Mo. 285; Kaes v. St. Louis Lime Co., 71 Mo. A. 101; Dellecella v. Harmonie Club, 34 Mo. A. 179.

Pa.—Thrall v. Wilson, 17 Pa. Super. 376.

Tex.—Missouri Pac. R. Co. v. Turner, 2 Tex. A. Civ. Cas. § 815.

Wis.—Gano v. Chicago, etc., R. Co., 66 Wis. 1, 27 NW 628, 838.

[a] **Where a father allows his son to act as general agent** in the father's business, the latter will be liable for goods ordered by the son under his father's name, where they are suited to the business, although the son uses them himself. Thurber v. Anderson, 88 Ill. 167.

[b] **An agent to manage a hotel** (1) may bind his principal by a purchase of necessary supplies for the hotel. Beecher v. Venn, 35 Mich. 466; Oliver v. Shoemaker, 35 Mich. 464. (2) He may bind his principal for liquors, wines, and sugar for use at the bar. Cummings v. Sargent, 9 Metc. (Mass.) 172.

28. U. S.—In re Miley, 187 Fed. 177 (holding that where a vendor, in selling certain real estate, dealt with the vendee as agent for another, it was incumbent on him to inform himself as to the extent of the vendee's authority, for he could not assume, because he knew that the agent was authorized by his principal to purchase cattle, sheep, and hogs, that he was authorized to purchase hotel properties for him).

Ark.—Carter v. Burnham, 31 Ark. 212 (holding that one who manages a farm for another with authority to purchase mules, implements, and supplies for the farm is not thereby authorized to buy goods for the laborers on the farm, and that his representations to that effect are not binding on his principal).

Ga.—Hood v. Hendrickson, 122 Ga. 795, 50 SE 994.

Iowa.—Beebe v. Equitable Mut. Life, etc., Assoc., 76 Iowa 129, 40 NW 122.

Mo.—Brown v. Missouri, etc., R. Co., 67 Mo. 122; Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013 (holding that the fact that one is agent for a person conducting the business of buying and selling beer does not give the agent the right, as incident to the business, to purchase whisky on his principal's credit).

Tex.—Latham v. Pledger, 11 Tex. 439; Ft. Worth, etc., R. Co. v. Johnson, 2 Tex. A. Civ. Cas. § 232.

Vt.—Frisbie v. Felton, 65 Vt. 138, 26 A 110.

Ont.—Dick v. Gordon, 6 Grant Ch. (U. C.) 394.

[a] **An agency to purchase a certain execution** does not comprehend an agency to purchase land upon which such execution has been levied. Hood v. Hendrickson, 122 Ga. 795, 50 SE 994; Akers v. Kirke, 91 Ga. 590, 18 SE 366.

[b] **Unauthorized purchase.**—Where a principal notifies the salesman of another that he does not care to buy certain goods and has notified his own agent in the presence of such salesman that he does not desire goods of that kind, and in the absence of the principal his agent gives an order for such goods, which order the principal promptly repudiates and at once mails a letter to the seller canceling the order, the principal is not liable thereon. Barton-Parker Mfg. Co. v. Wilson, 96 Minn. 334, 104 NW 968.

29. Ala.—Fisher v. Campbell, 9 Port. 210 (holding that the overseer of a plantation has no right as such to bind his employer by the purchase of articles which he may suppose necessary, such authority not being necessary to perform the duties incident to his station).

Colo.—Scholiay v. Moffitt-West Drug Co., 17 Colo. A. 126, 67 P 182.

Ga.—Born v. Simmons, 111 Ga. 869, 36 SE 956.

La.—Vidal v. Russel, 5 Mart. 297.

Mich.—Cowan v. Sargent Mfg. Co., 141 Mich. 87, 104 NW 377 (holding that an agent of a company engaged in manufacturing folding chairs, revolving bookcases, hospital supplies, and invalid goods, who is placed in charge of its store with power to sell its goods, has no authority to bind the company by the purchase from another of ordinary household goods, delivered to third persons, although he represents to the seller that he has authority).

Miss.—Meyer v. Baldwin, 52 Miss. 268.

N. Y.—Klumpp v. American Hardware Mfg. Co., 50 Misc. 662, 99 NYS 526.

Tex.—Lenoir v. Rosenthall, 1 Tex. A. Civ. Cas. § 209.

Eng.—Daun v. Simmins, 41 L. T. Rep. N. S. 783.

[a] **Authority given a foreman of a mill** to employ workmen does not impliedly authorize him to purchase lumber or to enter into contracts regarding it. Rankin v. New England, etc., Silver Min. Co., 4 Nev. 78.

[b] **Purchase of a rival business.**—A general agent has no implied power to buy out for his principal a rival business. This is true even of the agent of a corporation permitted by its charter to make such purchase. Manhattan Liquor Co. v. Magnus, 43 Tex. Civ. A. 463, 94 SW 1117.

30. Kelly v. Tracy, etc., Co., 71 Oh. St. 20, 73 NE 455; Hutton v. Bulloch, L. R. 9 Q. B. 572; Vineberg v. Anderson, 6 Man. 335 (holding that one in charge of a store selling goods has no implied authority to purchase goods).

[a] **A manager of a branch store** who conducts the business under a contract providing that he shall have general charge of the sale of his principal's merchandise and shall sell only the merchandise intrusted to him, and authorizing him to incur expenses for salaries of employees, commissions of salesmen for goods, the hire of horses and wagons for delivering merchandise, etc., and other petty items necessary to maintain the store and prosecute the business, and further providing that he shall have no authority to subject his principal to any liability, except as thereinbefore expressly declared, and that expenses and disbursements not named therein shall be incurred only by express authority from his principal, is not authorized to purchase goods to replenish the stock. Keyes v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201.

[b] **A superintendent of a shop** has no implied authority to purchase machinery for use in the shop. Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 NW 1099.

[c] **A coachman or groom** (1) has no implied authority to pledge his master's credit for feed for his horses (Wright v. Glyn, [1902] 1 K. B. 745); (2) nor has he implied authority to pledge his employer's credit for the transportation of the employer's horses, carriage, and baggage (Saugerties, etc., Steamboat Co. v. Miller, 76 App. Div. 167, 78 NYS 451).

[d] **A chauffeur** in charge of an automobile has no authority, either apparent or implied, to order permanent repairs thereto on the credit of his employer, or any repairs other than such as are necessary to enable him to continue his journey. Gage v. Callanan, 57 Misc. 479, 109 NYS 844 [rev on other grounds 128 App. Div. 752, 113 NYS 227].

[e] **Contracts for extras.**—(1) One is not entitled to recover for extras furnished at the instance of defendant's brother who had authority merely to see that the work was properly done under the original plans and specifications. Maass v. Jarvis, 20 Misc. 687, 46 NYS 544. To same effect Murr v. Western Assur. Co., 50 App. Div. 4, 64 NYS 12. (2) An architect superintending the erection of a building has no implied power to order extra work so as to bind the owners. Day v. Pickens County, 53 S. C. 46, 30 SE 681. (3) But an emergency making extra work necessary to proceed with the undertaking may justify an exception to the rule. Michaud v. MacGregor, 91 Minn. 198, 63 NW 479. See also Benton v. Moss, 47 Misc. 376, 93 NYS 1113. (4) Although each contractor for the different portions of the work of a building agrees to furnish his own scaffolding, yet, where the work necessary to be done before the carpenter work can be completed is delayed, the architect, described in all the contracts as the acting agent of the owner, can bind the owner by an agreement with the contractor for the woodwork that such contractor shall erect a scaffold, not necessary for his work, to be used by the other contractors, and paid for by the owner, the architect agreeing with the other contractors who are to use it that the cost shall be deducted from their payments. Teakle v. Moore, 131 Mich. 427, 91 NW 636.

[f] **One in temporary charge of property** cannot bind his principal for permanent and expensive repairs. Hill v. Coates, 34 Misc. 535, 69 NYS 964.

[g] **Authority to make out orders.**—The mere fact that a department employee is called a "buyer" does not authorize him to bind his employer by contracts for the purchase of goods, when he merely has authority to select and make out orders for the goods which are afterward required to be confirmed by his employer before being binding. Brager v. Levy, 122 Md. 554, 90 A 102.

31. Hinde, etc., Paper Co. v. Atterbury, 185 Fed. 76, 107 CCA 296; Lippincot v. East River Mill, etc., Co., 79 Misc. 559, 141 NYS 220; Smith Premier Typewriter Co. v. National Hartel Light Co., 72 Misc. 405, 130 NYS 136 (holding that where, under the express direction of his superior officer, the bookkeeper of a corporation signed one order for a typewriter, and some days later, and without any authority, he signed another order for a typewriter, and when it was delivered his principal repudiated the sale, the single act done under express authority was insufficient

Authority to sell of itself furnishes no authority to buy.[32]

The seller has no concern with the disposition of goods purchased by the agent within the scope of his authority, and the principal will be bound, although the agent misappropriates them.[33]

[§ 225] **(2) Extent of Authority—(a) In General.** Where an agent's power to purchase is general and unrestricted he has implied authority to do whatever is necessary and usual in the exercise of such power.[34] He may determine the usual and necessary details of the contract,[35] agree upon the price,[36]

to clothe the bookkeeper with such implied authority as would render his principal liable for subsequent acts); Cohen v. Mincoff, 96 NYS 411 (holding that where defendant stated to plaintiffs: "I give permission to my son to buy goods for $50 on the terms of 30 days on my name, and the bill should be sent to me," the son's authority to purchase was special, and was limited to a single purchase); Town v. Hendee, 27 Vt. 258; Heathfield v. Van Allen, 7 U. C. C. P. 346.

[a] **Agency must exist at time of purchase.**—Where the seller of goods seeks to show that the purchaser acted as the agent of another, it is not enough to show that such an agency existed at some other time, but it must be shown that the agency existed at the time of the sale. Booth v. Newton, 46 App. Div. 175, 61 NYS 727.

32. Colo.—Gates Iron Works v. Denver Engineering Works Co., 17 Colo. A. 15, 67 P 178 (holding that where the indicia of authority on which plaintiff, selling mining machinery to an agent of a foreign company, relied consisted of signs, letter heads, and cards showing the fact of the agency and the business of the company, which consisted of manufacturing general mining machinery, the agent's apparent authority extended only to the "sale" of mining machinery, and plaintiff was not warranted in assuming that he had authority to "buy" such machinery, although the company permitted the agent to style himself "manager"); McIntosh-Huntington Co. v. Rice, 13 Colo. A. 393, 58 P 358.

Ga.—Gorham v. Felker, 102 Ga. 260, 28 SE 1002.

Ill.—Thurber v. Anderson, 88 Ill. 167; Doan v. Duncan, 18 Ill. 96.

Iowa.—Bentley v. Snyder, 101 Iowa 1, 69 NW 1023 (holding that a written contract under which possession of a stock of goods was transferred, the transferee to pay the owner a certain sum from their proceeds and to then become the owner of the remainder, but the title not to pass until such payment was made, whether regarded as evidencing a conditional sale or a bailment, does not authorize the transferee to bind the seller or bailor for the price of new goods purchased by him, and added to the stock).

La.—Hyman v. Bailey, 15 La. Ann. 560.

Mass.—Hood v. Adams, 128 Mass. 207.

Mich.—Cowan v. Sargent Mfg. Co., 141 Mich. 87, 104 NW 377.

Minn.—Pennsylvania Finance Co. v. Old Pittsburgh Coal Co., 65 Minn. 442, 68 NW 70 (holding that an agent appointed to sell the coal of a producing company has no apparent authority to purchase coal from rival concerns, and that there is no duty of diligence or prudence imposed upon the principal to discover whether he is exceeding his authority).

N. C.—Winders v. Hill, 141 N. C. 694, 54 SE 440.

Oh.—Kelly v. Tracy, etc., Co., 71 Oh. St. 220, 73 NE 455 (holding that authority to purchase goods as agent for another cannot be implied from special authority to sell goods and devote the purchase to a particular purpose).

Vt.—Keyes v. Tea Co., 81 Vt. 420, 71 A 201; Town v. Hendee, 27 Vt. 258.

[a] **Where a chattel mortgagee of a stock of merchandise places the mortgagor in possession** of the same as his agent, with authority to sell the same, with the agreement that any stock purchased by the mortgagor shall become subject to the mortgage, the fact that the mortgagor has authority to sell such goods thereafter purchased by him and apply the proceeds on the mortgage debt does not make him the agent of the mortgagee for the purchase of such goods, so as to render the mortgagee liable for the price. Kelly v. Tracy, etc., Co., 71 Oh. St. 220, 73 NE 455.

33. Waring v. Henry, 30 Ala. 721; Southwestern R. Co. v. Knott, 48 Ga. 516; Austin v. Elk Mercantile Co., 38 Wash. 365, 80 P 525.

[a] **Purchase for own use.**—An agent authorized to buy cannot charge his principal for goods purchased for his own use not within the scope of his real or apparent authority. Gilbraith v. Lineberger, 69 N. C. 145; Lenoir v. Rosenthall, 1 Tex. A. Civ. Cas. § 209 (holding that, where an agent has the management of a plantation for his principal, goods purchased by him for his own use cannot be charged by the seller to the principal unless expressly authorized by him or in the course of the dealings the principal acknowledged that goods had previously been so bought and charged, paid for them, and by so doing induced the seller to believe that the agent had authority to purchase for his individual benefit on the principal's credit).

34. Mass.—Thompson v. Barry, 184 Mass. 429, 68 NE 674.

Minn.—Watts v. Howard, 70 Minn. 122, 72 NW 840 (holding that an agent with authority to buy logs has authority to agree that the measurement of the logs shall be ascertained by a scale to be made in the usual and ordinary way, and that they shall be paid for according to that scale).

Tenn.—Nunnelly v. Goodwin, (Ch. A.) 39 SW 855 (holding that where an agent is sent out for the express purpose of buying peanuts, and the seller has no notice of any limitation on his authority, the principal is bound by the agent's purchase of a specific stock of peanuts as "recleaned," although in fact below that grade, and by a modification of the contract which allows the seller to put in a quantity of nuts bought from other growers, so as to keep up the agreed proportion between red and white nuts in the stock).

Tex.—Brown v. Jackson, (Civ. A.) 40 SW 162.

Wis.—Schroeder Lumber Co. v. Stearns, 122 Wis. 503, 100 NW 836 (holding that, where an agent engaged in the business of buying and selling lumber is instructed by a principal to ship him a certain quantity but is cautioned not to do so unless the lumber is strictly number one, he has implied authority to pass upon the quality of the lumber delivered).

[a] **A general agent for a large part of the country to purchase fruit** for a corporation has authority to bind the corporation to pay for fruit purchased by another and shipped to the corporation. Tevis v. Savage, 130 Cal. 411, 62 P 611.

[b] **Laying out and dedicating streets.**—An agent authorized to purchase a town site and lay out a town has implied authority to lay out streets and dedicate them to the use of the public. Barteau v. West, 23 Wis. 416.

[c] **Clerk making out order for goods.**—The act of a clerk, authorized by his employer, in filling up blanks in a printed order for the purchase of goods is binding on the employer, and the latter cannot defend a suit brought against him for the price of the goods, upon the ground that the clerk made a mistake and ordered more than he wanted, especially where there was nothing to show plaintiff that the blanks were not filled and the order signed by defendant in person. Shrimpton v. Brice, 102 Ala. 655, 15 S 452.

35. Jones Cotton Co. v. Snead, 169 Ala. 566, 53 S 988 (holding that authority to purchase implies authority to agree upon the necessary terms of sale).

[a] **Agreement to conditional sale.**—(1) An agent to buy may agree to a conditional sale. Wishard v. McNeill, 85 Iowa 474, 52 NW 484. (2) Thus where creditors, after receiving an offer of a bill of sale from their debtor, assign their claims to an agent for the purpose of conducting the transaction, with authority "to take the goods in full of the creditor's claims," the agent has authority to agree with the debtor that the sale shall be conditional and that the goods will be surrendered to him when enough is realized from the sales to satisfy the claims. Rothschild v. Swope, 116 Cal. 670, 48 P 911. (3) Authority to purchase on the best possible terms authorizes a purchase on conditional sale where the agent is not supplied with sufficient funds to make a cash purchase. Merchants, etc., Bank v. Cottrell, 96 Ga. 168, 23 SE 127.

[b] **Agreement for redemption.**—An agent authorized by an execution creditor to buy land at an execution sale has power to make an agreement with the execution debtor to allow the latter to redeem the land on payment of the amount due the principal. Brown v. Jackson, (Tex. Civ. A.) 40 SW 162.

[c] **Stipulation for liquidated damages.**—An agent authorized in writing to buy, at whatever price he pleases, whatever number of cattle he chooses has power to stipulate with the seller for liquidated damages in the event of a breach of the contract by his principal. Haiff v. O'Connor, 14 Tex. Civ. A. 191, 37 SW 238.

36. Jones Cotton Co. v. Snead, 169 Ala. 566, 53 S 988 (holding that an agent having authority to purchase particular cotton has implied authority to agree with the seller on a price, and his principal will be bound by the price fixed unless the seller has knowledge of the principal's instructions to the agent to pay a different price).

[a] **The purchasing agent of a construction company,** who has authority to buy street railway ties for the corporation and to agree to pay for them in the stocks of two street railway companies, may be found to have authority to agree to pay for the ties wholly in one of the stocks rather than in the other. Aldrich v. Bay State Constr. Co., 186 Mass. 489, 72 NE 53.

[b] **May assume mortgage.**—An agent having a general authority to purchase real estate may, as part of the purchase price, assume the payment of mortgages upon the property. Schley v. Fryer, 100 N. Y. 71, 2 NE 280. But see Bucklen v. Hasterlik, 51 Ill. A. 132 [aff 155 Ill. 423, 40 NE 561].

[c] **An agent to solicit consignments on commission** has no authority to bind his principal by a guaranty that the goods will realize a cer-

modify[37] or rescind the contract of purchase,[38] accept delivery for his principal,[39] give directions for the delivery of the property purchased,[40] and may borrow money to pay for the care of the property purchased;[41] but he has no implied power to settle a contest between his principal and a third person as to the ownership of the goods purchased,[42] or to agree to an account stated,[43] or to do anything not usual and necessary to the exercise of such authority.[44] Where the agency is a special one, or is restricted to purchases upon certain terms and conditions, the agent has no authority to purchase upon different terms and conditions from those authorized,[45] or to modify or rescind a contract of purchase made by the principal.[46] And the principal is not responsible if the agent has not purchased what he was authorized to buy within the limits within which he was authorized to act, both as to the quantity[47] and the kind[48] of property purchased and the price to be paid;[49] and, where authorized to purchase only of designated persons in a certain place, he does not bind his principal if he purchases of other persons in different localities,[50] even though the property is of equal quality and value.[51] Thus as a general rule an agent who is commissioned by his principal to purchase a certain price. Quinn v. Carr, 4 Hun (N. Y.) 259, 6 Thomps. & C. 402; Mahler-Wolf Produce Co. v. Meyer, 26 Oh. Cir. Ct. 165 (holding that, where a produce commission house sent out its agent to solicit consignments of fruit, and such agent, without any authority to guarantee what the fruit would bring, guaranteed that a shipment of fruit would bring a certain price, such guaranty was not within the scope of his authority and was not binding on his principal, and, never having ratified his act, his principal was not liable for such guaranteed price).

37. Spaulding Lumber Co. v. Stout, 86 Wis. 89, 56 NW 189. See generally infra § 289.

[a] **A general agent** intrusted by his principal with power to make and enter into contracts for the purchase of grain has power to modify or waive a contract made by him in respect thereto. Anderson v. Coonley, 21 Wend. (N. Y.) 279.

38. Middle Division El. Co. v. Vandeventer, 80 Ill. A 669 (holding that an agent, placed at an elevator to buy and receive grain, and who contracts for future delivery, and attends generally to his principal's business there, has implied authority to rescind a contract for the delivery of grain). See generally infra § 289. Compare Gilly v. Logan, 2 Mart. N. S. (La.) 196.

[a] **An agent empowered to bind his principal without naming him** in the contract or referring to the principal's interest in the transaction may acquiesce in the rescission of a contract of purchase, or abandon all interest therein. Cockerham v. Perot, 48 La. Ann. 209, 19 S 122.

39. Southern R. Co. v. Raney, 117 Ala. 270, 23 S 29 (holding that where defendant's agents, in the course of their duty, accepted and used plaintiff's ties, it is no defense to an action for the price of the same that defendant's rules forbid the acceptance of that quality of ties and require that they shall be first branded and inspected); Proctor v. Spratley, 78 Va. 254. See also Ripley v. Cochran, 10 AbbPrNS (N. Y.) 52 (holding that where defendant went to plaintiff's factory and ordered a log for a certain job, saying that he would send a man for it, but afterward gave up the job, and stated to a third person who was undertaking it that he could get such a log as he wanted at plaintiff's, and the third person went to plaintiff and said that he wanted the log that defendant had selected, and on that request obtained it, defendant was liable to plaintiff for the log). And see infra § 314.

[a] **An inspection and acceptance** of merchandise at the place of delivery by an agent binds the principal. Darby v. Hall, 19 Del. 25, 50 A 64.

40. Owen v. Brockschmidt, 54 Mo. 285.

[a] **Changing place of delivery.**—Where a contract of sale fixes the place of delivery an agreement by the buyer's agent to accept delivery at a different place is not binding in the absence of anything to show that he had authority to change the contract. Day Bros. Lumber Co. v. Daniel, 62 SW 866, 23 KyL 285.

41. Rider v. Kirk, 82 Mo. A. 120.

Power to lend or borrow money see generally infra §§ 304, 305.

42. Lamkin v. Rosenthal, 5 App. Div. 532, 39 NYS 483 (holding that an agent authorized merely to buy goods had no authority, upon their seizure under replevin, to enter into an agreement with plaintiffs in the replevin suit to release them from all claims on account of the levy in consideration of plaintiff's surrendering all the goods which their representatives could not identify as theirs).

43. Moore v. Maxwell, 155 Ala. 299, 46 S 755 (holding that authority to an agent to purchase goods does not authorize him to subsequently admit the correctness of the account therefor, so as to render his principal liable for the price of an account stated).

44. Thompson v. Sproul, 179 Pa. 266, 36 A 290 (holding that authority from a father to his son to purchase stock for the former, although known to the brokers who conduct the transactions for the son, does not authorize them to permit the son to withdraw money from the stock account and use it for another purpose).

45. Hibernia Sav. etc., Soc. v. Dickinson, 167 Cal. 616, 140 P 265 (holding that a principal directing an agent to purchase for him specified property, provided it can be procured for a specified price, does not thereby authorize the agent to make an agreement binding the principal, as purchaser, to assume a debt secured by a mortgage on the property); Oberne v. Burke, 30 Nebr. 531, 46 NW 838 (holding that authority to purchase and ship specified commodities, and make cash advances thereon, is no authority to guarantee, in the name of the principal, an obligation to pay the vendors for cattle sold on time).

[a] **An agent authorized to complete a purchase** of land and receive the deed has no authority to add anything to the consideration named in the contract or attach any new condition to the delivery of the deed. Deering v. Starr, 118 N. Y. 665, 23 NE 125.

[b] **Written agreement.**—An agent who agrees to procure for his principal a "bond or agreement" for a conveyance of property must procure a written agreement, and cannot bind his principal by a verbal stipulation with the owners of the property. Hennessy v. Bond, 77 Fed. 403, 23 CCA 203.

[c] **A coowner in and agent for a syndicate** for the purchase of land has not implied authority to select a trustee to take title and to authorize the trustee to execute for the syndicate notes and deed of trust to secure the purchase price. Ferguson v. Gooch, 94 Va. 1, 26 SE 397, 40 LRA 234.

46. Schenck v. Griffith, 74 Ark. 557, 86 SW 850 (holding that where the purchaser of a horse sent his son to get it he, being a special agent, could not bind the purchaser by any understanding with the seller that title was to remain in him until payment); Campbellsville Lumber Co. v. Spotswood, 74 SW 235, 24 KyL 2430; Day Bros. Lumber Co. v. Daniel, 62 SW 866, 23 KyL 285; Hawley Down-Draft Furnace Co. v. Hooper, 90 Md. 390, 45 A 456 (holding that, where plaintiff, having agreed to put in furnaces with a guaranty that they should make a certain saving in cost of fuel, made tests which did not show such saving, and, when he desired to change a brick arch under the furnaces and make another test, defendant said that whatever "arrangements" plaintiff made with the assistant manager would be satisfactory, this did not confer authority on such manager to agree that such test should be binding and conclusive); Burks v. Stam, 65 Mo. A. 455.

Power to rescind or modify contracts see generally infra § 289.

47. Hood v. Hendrickson, 122 Ga. 795, 50 SE 994; McAtee v. Perrine, 48 Ill. A. 548.

48. Ga.—Hood v. Hendrickson, 122 Ga. 795, 50 SE 994.

Ill.—Theile v. Chicago Brick Co., 60 Ill. A. 559 (holding that a principal who authorizes his agent to buy the best common brick is not bound by a purchase of an inferior quality unless he receives and uses the brick so purchased); Gregg v. Wooliscroft, 52 Ill. A. 214 (holding that an agent authorized to buy one grade of oats has no authority to contract for another).

La.—Hartwell v. Walker, 4 La. Ann. 457, 50 AmD 577.

Tex.—Day v. Snyder Brokerage, etc., Co., (Civ. A.) 130 SW 716.

Va.—Hopkins v. Blane, 1 Call (5 Va.) 361 (holding that if an agent for the purchase of grain buys tobacco the principal cannot be held responsible).

Ont.—Dick v. Gordon, 6 Grant Ch. (U. C.) 394.

[a] **Unencumbered land.**—An agent intrusted with a certain sum with which to purchase land is bound to purchase unencumbered land in the absence of instructions to the contrary. Butterworth v. Shannon, 11 Ont. A. 86.

49. Jackson County v. Applewhite, 62 Ind. 464; Atlas Min. Co. v. Johnston, 23 Mich. 36; Burks v. Stam, 65 Mo. A. 455.

[a] **Purchase at higher price.**—(1) An agent authorized to purchase one-sixteenth part of a ship at forty dollars a ton does not bind his principal by purchasing two sixteenths at forty-four dollars per ton, one sixteenth being on his own account, unless subsequently ratified. Starbird v. Curtis, 43 Me. 352. (2) So also authority to purchase a certain horse at a limited price will not justify the agent in sending a third person to buy it and then buying it of him at an advanced price, although it is within the limit prescribed. Armstrong v. Elliott, 29 Mich. 486.

50. Peckham v. Lyon, 19 F. Cas. No. 10,899, 4 McLean 45; Robinson Mercantile Co. v. Thompson, 74 Miss. 847, 21 S 794.

51. Robinson Mercantile Co. v. Thompson, 74 Miss. 847, 21 S 794 (holding that commission merchants who specially authorized one not their

tain specific amount of property is a special agent, and can no more purchase a smaller than a larger quantity of what he is commissioned to purchase,[52] although under certain circumstances the purchase of a smaller quantity than that ordered may be regarded as valid as an execution of the authority pro tanto, as where an express or implied discretion has been committed to the agent in the exercise of his authority.[53]

Where the authority is conferred in writing the writing must determine whether the agent is empowered to buy, and if so the limits within which the authority is to be exercised.[54] The power to buy is limited to purchases from the persons named in the writing and in the manner, on the terms, and for the purposes therein provided.[55]

[§ 226] **(b) Power to Purchase on Credit—aa. In General.** A mere agency to purchase does not ordinarily imply authority to pledge the credit of the principal for purchases made,[56] particularly where the agent is provided with funds to pay for his purchases, as under such circumstances to pledge the principal's credit for the purchases is not either necessary or proper to enable him to make the purchases;[57] and the principal ordinarily will not be bound by such purchases, unless by his conduct or course of dealing he has held the agent out as having authority to make them,[58] or the custom is well established to buy on credit in such dealings as are intrusted to the agent,[59] or the principal knows that more goods are being purchased than the money furnished will pay for,[60] or unless the principal, with knowledge of the facts, ratifies the transaction.[61] In any event the principal will not be bound to third persons who have knowledge, or by making the inquiry necessary under the circumstances would know, of the agent's want of authority to purchase upon credit.[62]

agent to buy cotton at a certain place, of a designated person, were not liable for cotton of equal value and quality purchased by him from other persons in a different locality).

52. Olyphant v. McNair, 41 Barb. (N. Y.) 446 [aff 41 N. Y. 619].

53. Olyphant v. McNair, 41 Barb. (N. Y.) 446 [aff 41 N. Y. 619]. See also Rice v. Montgomery, 20 F. Cas. No. 11,753, 4 Biss. 75.

[a] **Where the order is divisible,** as where the principal orders his agent to purchase a certain quantity of goods, and the purchaser appears to have contemplated that the whole might not be obtainable at once, the agent will be authorized to buy a smaller quantity if the whole is not to be had. Johnston v. Kershaw, L. R. 2 Exch. 82.

54. Holmes v. Morse, 50 Me. 102; Burks v. Stam, 65 Mo. A. 455; Pollock v. Cohen, 32 Oh. St. 514; Dorland v. Mulhollan, 10 Oh. St. 192; Citizens' Nat. Bank v. Ariss, 68 Wash. 448, 123 P 593.

55. U. S.—Peckham v. Lyon, 19 F. Cas. No. 10,899, 4 McLean 45 (holding that authority to buy from a person named in the letter confers no power to buy the same article from another).

Ind.—Metzger v. Huntington, 139 Ind. 501, 37 NE 1084, 39 NE 235.

Me.—Holmes v. Morse, 50 Me. 102.

Mich.—Dennis v. Leaton, 72 Mich. 586, 40 NW 753; Miller v. Frost's Detroit Lumber, etc., Works, 66 Mich. 455, 33 NW 406.

Miss.—Brown v. Johnson, 20 Miss. 398, 51 AmD 118.

56. Cowan v. Curran, 216 Ill. 598, 75 NE 322 (holding that oral authority to an agent to use his principal's name in the purchase of land does not empower the agent to pledge his principal's credit by binding her to give a note and trust deed for the purchase price).

[a] **Authority to purchase on credit cannot be implied** from a special authority to sell certain goods and apply the money in a particular manner. Kelly v. Tracy, etc., Co., 71 Oh. St. 220, 73 NE 455.

[b] **Authority to barter** does not authorize a purchase on credit. Cochran v. Richardson, 33 Vt. 169.

[c] **Authority to invest certain money in land** does not authorize the agent to purchase more than the money would pay for and to give a mortgage for the balance. Butterworth v. Shannon, 11 Ont. A. 86.

57. U. S.—Parsons v. Armor, 3 Pet. 413, 7 L. ed. 724.

Ala.—Wheeler v. McGuire, 86 Ala. 398, 5 S 190, 2 LRA 808.

Ill.—Proctor v. Tows, 115 Ill. 138, 3 NE 569.

N. H.—Boston Iron Co. v. Hale, 8 N. H. 363.

N. Y.—Saugerties, etc., Steamboat Co. v. Miller, 76 App. Div. 167, 78 NYS 451; Brooks v. Mortimer, 10 App. Div. 518, 42 NYS 299; Laing v. Butler, 37 Hun 144 [aff 108 N. Y. 637 mem, 15 NE 442 mem]. But compare Morey v. Webb, 58 N. Y. 350 [aff 65 Barb. 22] (where it appeared that cash payment was not the usual course of dealing between the parties and that the goods had to be delivered and approved before payment could be made); Goelet v. Meares, 13 Daly 30.

N. C.—Brittain v. Westhall, 137 N. C. 30, 49 SE 54, 135 N. C. 492, 47 SE 616 (holding that if express authority to buy on credit is not given to an agent, but he is authorized to make the purchase, and no funds are advanced to him to enable him to buy for cash, he is by implication clearly authorized to purchase on the credit of his principal).

Oh.—Thomas Gibson Co. v. Carlisle, 3 OhS&CP 27, 1 OhNP 398 (holding that where an agent is authorized to expend for the principal a certain fund for a particular purpose, and is furnished with the money, he has no authority to bind his principal by transactions on credit in furtherance of such purpose).

S. C.—Fraser v. McPherson, 3 S. C. Eq. 393.

Tex.—Greenville First Nat. Bank v. Pennington, 75 Tex. 272, 12 SW 1114.

Vt.—Cleveland v. Pearl, 63 Vt. 127, 21 A 261, 25 AmSR 748.

Wis.—Komorowski v. Krumdick, 56 Wis. 23, 13 NW 881.

Man.—Bennett v. Atkinson, 10 Man. 48.

N. S.—Kenny v. Harrington, 31 N. S. 290.

Ont.—Cloy v. Jacques, 27 U. C. Q. B. 88.

[a] **Funds furnished.**—Where a country merchant ships to his correspondent in town such produce and other articles as he has to sell, and the merchant in town supplies him with such articles of merchandise as he deals in, and fills out his orders by procuring from other merchants, on credit, such articles as he does not deal in, charging them to the country merchant, the latter is not liable to the seller of any articles thus procured if he has funds in the hands of the city merchant and has never authorized him to pledge his credit on the purchase of any articles thus ordered, or recognized such act. Jaques v. Todd, 3 Wend. (N. Y.) 83.

[b] **Evidence of funds admissible.**—In an action to charge a principal with goods purchased by his agent, it is error to exclude evidence to show that the agent was at all times in funds sufficient to pay for the goods. Taft v. Baker, 100 Mass. 68.

[c] **Need not pay instantly.**—Where the agent is furnished with money with which to pay for property procured, there is no such limitation on his authority to buy on credit as to require him to pay the instant, or on the same day, for property purchased without any understanding or agreement that credit is to be given therefor. Adams v. Boies, 24 Iowa 96.

[d] **That a father had told his daughters that, if they would select sealskin coats,** he would give his check for the cost does not warrant the sellers in assuming that they were authorized to purchase the same on their father's credit. Brown v. Reiman, 48 App. Div. 295, 62 NYS 663.

58. Cal.—Heald v. Hendy, 89 Cal. 632, 27 P 67 (where the agent had made previous purchases with the principal's knowledge, and for which the principal had paid).

Colo.—Witcher v. McPhee, 16 Colo. A. 298, 65 P 806; Witcher v. Gibson, 15 Colo. A. 163, 61 P 192.

Mass.—Beston v. Amadon, 172 Mass. 84, 51 NE 452.

N. Y.—Mason v. Partridge, 4 Hun 621; Marsh v. Gilbert, 4 Thomps. & C. 259.

N. C.—Brittain v. Westhall, 137 N. C. 30, 49 SE 54, 135 N. C. 492, 47 SE 616.

Oh.—Darst v. Slevins, 2 Disn. 473.

Pa.—McKinney v. Stephens, 17 Pa. Super. 125 (holding that, where a person purchases a stock of goods at a sheriff's sale, and permits the former owner to continue the business in the name of himself as agent, and the agent with his principal's knowledge secures goods on the faith of the latter's credit, the principal is liable for their price).

Tex.—Greer v. Marble Falls First Nat. Bank, (Civ. A.) 47 SW 1045 (holding that, where an agent had been acting for his principal in a locality for several months, buying cattle, and drafts drawn by him in payment thereof were honored and paid by his principal, and he had the apparent authority of a general agent, his act in purchasing cattle to be consigned to the principal, and giving a draft on him to one who had no knowledge of his limited authority, will bind the principal).

Eng.—Watteau v. Fenwick, [1893] 1 Q. B. 346.

N. S.—Kenny v. Harrington, 31 N. S. 290.

59. Morey v. Webb, 65 Barb. (N. Y.) 22 [aff 58 N. Y. 350]; Darst v. Slevins, 2 Disn. (Oh.) 473.

60. Cruzan v. Smith, 41 Ind. 288; Detwiler v. Green, 1 W. Va. 109 (holding the principal liable for purchases in excess of advances made by him).

61. Jaques v. Todd, 3 Wend. (N. Y.) 83; Brittain v. Westall, 137 N. C. 30, 49 SE 54; Komorowski v. Krumdick, 56 Wis. 23, 13 NW 881. Ratification generally see supra §§ 77–146.

62. American Lead Pencil Co v. Wolfe, 30 Fla. 360, 11 S 488 (holding that, where an agent authorized to buy cedar logs stated at the time of making an arrangement to pay for

Special or general authority. A special agent employed to purchase in a single transaction or under specific restrictions to purchase only for cash,[63] or an agent acting under a written power wherein he is expressly limited to purchases for cash,[64] has no authority to purchase on credit. But an agent with general authority to purchase has, in the absence of any restriction to the contrary, a right to purchase for cash or credit at his discretion.[65] This seems to be true as to a general agent, although he is authorized to buy only for cash, if the seller has no knowledge of the limitation.[66]

No funds provided. Where purchases are reasonably necessary to enable the agent to accomplish the object of the agency, and no funds are provided to pay for such purchases, the agent has implied power to bind the principal by purchases of such goods upon credit.[67]

Where the agent is limited to purchases on credit the principal cannot be bound by his contracts to purchase for cash.[68]

Where no agency is established there can of course be no implied right in the seller to pledge to third persons the credit of the vendee.[69]

[§ 227] **bb. Extent of Authority.** If authorized to purchase on credit, an agent may make the necessary representations as to the solvency of the principal.[70] But it has been held that such an agent has no implied authority to bind the principal by the execution of notes for the goods purchased,[71] unless it is indispensable to the execution of the power.[72]

[§ 228] **(c) Power to Make Payment.** In the absence of a showing to the contrary an agent with authority to purchase is presumed to have authority to purchase for cash and hence to make payment, for which the principal must indemnify him.[73] He

supplies furnished to the seller out of the money due him that he had no authority to make debts, the principal was not bound, although there was a local custom that agents authorized to buy logs should have authority to make such agreements); Stoddard v. McIlwain, 41 S. C. L. 525. See also Saul v. Lapidus, 46 Colo. 538, 105 P 868.

63. Berry v. Barnes, 23 Ark. 411 (holding that the employment of a special agent in a single transaction to buy goods does not imply authority to pledge the credit of his principal, even though in making the purchase he represents himself as a partner of his principal in the business); Chapman v. Americus Oil Co., 117 Ga. 881, 45 SE 268; Americus Oil Co. v. Gurr, 114 Ga. 624, 40 SE 780; Doan v. Duncan, 18 Ill. 96; Cleveland v. Pearl, 63 Vt. 127, 21 A 261, 25 AmSR 748.

[a] **When directed to purchase for cash** the agent cannot bind the principal by a purchase on credit. Patton v. Brittain, 32 N. C. 8.

[b] **Agent purchasing in own name.**—Where an agent authorized to purchase supplies for the use of his principal, and instructed to purchase only for cash, purchases in his own name upon credit from one who supposes him to be buying for himself only, the principal, having settled with the agent, supposing him to have purchased for cash or upon his personal credit, cannot be held liable to the seller for the price of the supplies. Fradley v. Hyland, 37 Fed. 49, 2 LRA 749.

64. Stoddard v. McIlwain, 41 S. C. L. 525.

65. Fradley v. Hyland, 37 Fed. 49, 2 LRA 749; Swindell v. Latham, 145 N. C. 144, 58 SE 1010, 122 AmSR 430; Ruffin v. Mebane, 41 N. C. 507. See also Backman v. Charlestown, 42 N. H. 125; Miller v. McDannell, 1 Tex. Unrep. Cas. 258.

66. Liddell v. Sahline, 55 Ark. 627, 17 SW 705 (holding that, where the agent is a general agent, a limitation upon his authority to purchase on credit will not affect a vendor having no knowledge of such limitation); Fatman v. Leet, 41 Ind. 133; Pacific Biscuit Co. v. Dugger, 40 Or. 362, 67 P 32 (holding that, where an agent was given full charge of defendant's store, with power to sell and dispose of the stock and replenish it by purchasing new goods, the agency was general, although only for a special business; and a purchase on credit was within the scope of his apparent authority, for which defendant was liable, notwithstanding instructions not to purchase on credit).

[a] **Where a general agent for the purchase of wheat** buys wheat to be paid for on demand, at the current price at the time of demand, his principal will be liable, although he may have instructed the agent to purchase only for cash and has paid him for the wheat, if the contract is made in good faith upon the credit of the principal, and in ignorance of the private instructions. Cruzan v. Smith, 41 Ind. 288.

67. Spear, etc., Supply Co. v. Van Riper, 103 Fed. 689 (holding that the owner of a pleasure launch, who sent one of the crew to purchase supplies, in some instances not furnishing him with funds to pay for the same, but paying him the money on his rendering an account thereafter, must be held to have intended that his agent should buy on his credit, or that of his vessel, and is liable for supplies so furnished by a dealer, and which were delivered to and used on the vessel, but were not paid for by the agent); Heald v. Hendy, 89 Cal. 632, 27 P 67 (holding that, when it is necessary to the operation of a mine that provisions be furnished to the keeper of a boarding house at which the miners live, the superintendent of the mine has authority to order the provisions to be furnished and to bind the operator of the mine to pay for them, but not to bind him to pay for articles not necessary for the use of the boarding house); Sprague v. Gillett, 9 Metc. (Mass.) 91; Swindell v. Latham, 145 N. C. 144, 58 SE 1010, 122 AmSR 430. See also Larivee v. A'Hearn, 207 Mass. 288, 93 NE 703 (money supplied at regular intervals but not enough on hand to pay for the necessaries purchased).

[a] **Where a general agent is left in sole charge of a business,** and especially if the principal rarely visits the business, or is an undisclosed principal, the agent in charge may bind his principal by purchases on credit in the usual way to replenish the stock. Moffitt-West Drug Co. v. Lyneman, 10 Colo. A. 249, 50 P 736; Smith v. Holbrook, 99 Ga. 256, 25 SE 627; McDowell v. McKenzie, 65 Ga. 630; Stapp v. Spurlin, 32 Ind. 442; Palmer v. Cheney, 35 Iowa 281; Webster v. Wray, 17 Nebr. 579, 24 NW 207; White v. Leighton, 15 Nebr. 424, 19 NW 478; Backman v. Charleston, 42 N. H. 125; Pacific Biscuit Co. v. Dugger, 40 Or. 362, 67 P 32.

[b] **Where an agent authorized to buy for cash** to be furnished by the principal violates his instructions and buys on credit, and the principal thereafter receives the goods so bought by his agent and appropriates them to his own use, he is liable for the price, unless he can show that he furnished his agent with the necessary funds to buy the lumber, that the latter nevertheless bought on credit, and that the principal received the goods without any notice of that fact, and will be prejudiced if he is made to pay for them. Brittain v. Westhall, 135 N. C. 492, 47 SE 616, 137 N. C. 30, 49 SE 54.

68. Cochran v. Richardson, 33 Vt. 169.

69. Bentley v. Snyder, 101 Iowa 1, 69 NW 1023; Jaquins v. Gilbert, (Kan.) 53 P 754 (holding that the fact that a number of people contribute to the first payment on a parcel of land does not establish authority of the person making it to bind them for future payments); Woods v. Robertson, 31 Mich. 64.

[a] **A merchant, although in one sense agent for his foreign correspondents,** is not by mercantile usage entitled to pledge their credit as purchasers for what he buys in the home market on their account. Poirier v. Morris, 2 E. & B. 89, 75 ECL 89, 118 Reprint 702.

70. Morris v. Posner, 111 Iowa 335, 82 NW 755; Hunter v. Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 493.

[a] **It is within the apparent authority of a purchasing agent** to give the name of the purchaser, or state the class to which he belongs. Thompson v. Barry, 184 Mass. 429, 68 NE 674.

71. Temple v. Pomroy, 4 Gray (Mass.) 128; Paige v. Stone, 10 Metc. (Mass.) 160, 43 AmD 420; Emerson v. Province Hat Mfg. Co., 12 Mass. 237, 7 AmD 66. See generally infra §§ 280–286. Compare Stothard v. Aull, 7 Mo. 318 (holding that an authority to purchase articles on credit must imply a power to acknowledge an indebtedness in the name of the person for whom they are bought, and hence imply power to execute a promissory note in the name of the principal for the articles purchased); Chidsey v. Porter, 21 Pa. 390 (holding that, where a clerk has a general agency of a store and has been accustomed to purchase goods for the store and to give due bills therefor with the knowledge of the principal, he may, on making a purchase of goods, take up due bills previously given by him for purchases previously made, and give a note for the whole of the purchases).

[a] **Special agent.**—As a general rule a special agent to make purchases has no authority to bind his principal by a negotiable promissory note or bill of exchange. Taber v. Cannon, 8 Metc. (Mass.) 456.

72. Edgerly v. Cover, 106 Iowa 670, 77 NW 328; Perrotin v. Cucullu, 6 La. 587; Morris v. Bowen, 52 N. H. 416 (holding that, where a principal instructed an agent to purchase a lot of pelts, to be paid for in cotton goods, and failed to furnish the goods or any other means of payment, the agent might give a promissory note for the price thereof, in which it was stipulated that the pelts were to be paid for in cotton goods, on demand, and indorse his personal guaranty of payment, upon which he could make his principal liable for reimbursement if compelled to pay himself).

[a] **Authority to purchase a saloon and fixtures** has been held to give the agent authority to execute corporation notes in payment thereof. Manhattan Liquor Co. v. Magnus, 43 Tex. Civ. A. 463, 94 SW 1117.

73. Perin v. Parker, 25 Ill. A. 465

has, however, no implied authority to advance money in payment before the goods are to be delivered under the contract.[74] If the agent exceeds the limits set by his principal and the necessary and proper acts to perform the agency, as by making advances or exchanges or other unusual contracts, his principal is not bound by such acts;[75] nor is he liable if the agent departs from his open instructions as to the manner of making payment; this is especially true if the third person accepts the check or other paper credit of the agent in payment.[76]

[§ 229] **b. To Sell Personal Property—(1) In General.** The acts of an agent assuming to have authority to sell his principal's personal property will not bind the principal unless he has actually given the agent such authority, or has held him out to the public as clothed with it.[77]

Implied authority. Authority to sell personal property need not be express and specific, but it will be inferred whenever the intention to bestow such power is distinct and clear from the whole authority, the established usages and customs, and the surrounding circumstances.[78] But such authority cannot be implied from the fact that the agent was in a particular instance authorized to negotiate a sale,[79] or that he has authority to purchase[80] or

[aff 126 Ill. 201, 18 NE 747, 9 AmSR 571, 2 LRA 336] (holding that an order to buy grain on the board of trade is impliedly a request to the agent to make the necessary payments); Johnson v. East Carolina Land, etc., Co., 116 N. C. 926, 21 SE 28 (holding that a power to pay or to agree to pay is implied from a power to purchase).

[a] **Depositing check in bank.**—Where goods are sold to the purchasers through their duly authorized agent, although the agent violates his instructions as to payment by agreeing to leave a check of the purchasers at a bank rather than by giving the seller such a check at the time of the sale, the fact that the seller is ignorant of the agent's instructions in that regard justifies him in delivering the goods to the agent on such agreement. Clarkson v. Reinhartz, (Tex. Civ. A.) 70 SW 111.

[b] **Depositing bills of lading as collateral.**—Where a produce company had for three years without question bought apples for another for shipment to his customers, and deposited the bills of lading as collateral to the drafts drawn upon such other, the produce company was authorized to negotiate the bills in that manner. Canandaigua Nat. Bank v. Southern R. Co., 64 Misc. 327, 118 NYS 668.

74. Salmon v. Austro-American Stave, etc., Co., 187 Fed. 564, 109 CCA 254; Godman v. Meixsel, 53 Ind. 11 [reh den 65 Ind. 32].

75. Bohart v. Oberne, 36 Kan. 284, 13 P 388 (holding that authority given to an agent of a commission house to purchase hides, wool, furs, and tallow, and to pay for the same with the funds furnished by his principals, does not authorize him to make advances of the money of his principals, or to sell and guarantee the payment in his principal's name of unsettled accounts that have been received in satisfaction of such unauthorized advances). See also Thomson-Houston Electric Co. v. Central Electric R. Co., 6 Cal. Unrep. Cas. 202, 55 P 777. Compare Horlor v. Carpenter, 3 C. B. N. S. 172, 91 ECL 172, 140 Reprint 705.

76. Salmon v. Austro-American Stave, etc., Co., 187 Fed. 564, 109 CCA 254; Littleton v. Loan, etc., Assoc., 97 Ga. 172, 25 SE 326; Cleveland v. Pearl, 63 Vt. 127, 21 A 261, 25 AmSR 748; Komorowski v. Krumdick, 56 Wis. 23, 13 NW 881.

77. U. S.—Thatcher v. Kaucher, 131 U. S. appendix cxlvi, 24 L. ed. 511.

Ala.—Cawthon v. Lusk, 97 Ala. 674, 11 S 731.

Ark.—Lee v. Vaughan's Seed Store, 101 Ark. 68, 141 SW 496, 37 LRANS 352.

Ind.—Reitz v. Martin, 12 Ind. 306, 74 AmD 215.

La.—Clark v. Bouvain, 20 La. Ann. 70.

Mo.—Bronson v. Impl. Co., 135 Mo. A. 483, 116 SW 20.

N. Y.—Langstroth v. J. C. Turner Cypress Lumber Co., 162 App. Div. 818, 148 NYS 224 (holding that by permitting its agent to write a letter in answer to a prospective buyer's inquiry, from which it would be assumed that he had general powers in its business, the principal impliedly held him out as having authority to make the sale in controversy).

Philippine.—Strong v. Repide, 6 Philippine 680 [rev on other grounds 213 U. S. 419, 25 SCt 521, 53 L. ed. 853].

[a] **What will amount to such a holding out** admits of no precise definition, but it is certain that the holding out must be by the principal himself, and must rest upon facts for which he is responsible. Thacher v. Kaucher, 131 U. S. appendix cxlvi, 24 L. ed. 511; Sioux City Nursery, etc., Co. v. Magnes, 5 Colo. A. 172, 38 P 330; Clark v. Haupt, 109 Mich. 212, 68 NW 231; Walsh v. Hartford F. Ins. Co., 73 N. Y. 5; Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 44 P 390; Connell v. McLoughlin, 28 Or. 730, 42 P 218. See also supra § 36.

[b] **In the Philippines** "the express mandate," required by civil code art. 1713, to enable an appointee of an "agency stated in general terms only" to sell must be one that expressly mentions a sale or that includes a sale as a necessary ingredient of the act mentioned. This article is not satisfied by an admission of proof that the power exists without disclosing that it was expressed. Strong v. Repide, 6 Philippine 680 [rev on other grounds 213 U. S. 419, 29 SCt 521, 53 L. ed. 853].

[c] **An actual practice of an agent to make contracts of sale** is sufficient to override contrary instructions given years before. Langstroth v. J. C. Turner Cypress Lumber Co., 162 App. Div. 818, 148 NYS 224.

78. U. S.—Jenkins, etc., Co. v. Alpena Portland Cement Co., 147 Fed. 641, 77 CCA 625 (salesman held to have authority to make contract of sale of cement).

Ga.—Blaisdell v. Bohr, 77 Ga. 381 (holding that a power "to attend to any and all descriptions of business in which I may be interested or concerned in a real or personal manner, and to receive for me any sum or sums of money . . . and to receipt therefor," together with the fact that the principal deposited her certificates of stock in a tin box and gave the key to her daughter, the agent's wife, under all the circumstances gave the agent authority to sell the stock); Fitzgerald Cotton Oil Co. v. Farmers Supply Co., 3 Ga. A. 212, 59 SE 713.

La.—Cuny v. Robert, 16 La. 175.

Mich.—Wannebo v. Stone, 148 NW 184.

Mo.—Haubelt v. Rea, etc., Mill Co., 77 Mo. A. 672 (holding that where an agent telegraphed to his principal for prices on certain brands of flour, which the principal promptly wired him, adding, "See letter of yesterday," the agent was authorized to make a sale according to the prices telegraphed, without waiting for the letter).

Pa.—Pittsburg Sheet Mfg. Co. v. West Penn Sheet Steel Co., 197 Pa. 491, 47 A 838.

Wash.—Muir v. Westcott, 34 Wash. 463, 75 P 1107 (holding that where the owner of a bank, by power of attorney, grants authority to take charge of all his property, and particularly of the bank, to direct its policy, to vote his stock, to sell the stock, and to do all things incident to his business, whether the power was explicitly set forth or not, the attorney in fact had authority to dispose of the furniture of the bank for the benefit of the owner's creditors).

Eng.—Bute v. Mason, 7 Moore P. C. 1, 13 Reprint 779.

Ont.—Green v. Lewis, 26 U. C. Q. B. 618.

See also supra §§ 32–41.

[a] **Accepting and filling orders.**—(1) That the principal fills an agent's order and contract for the sale of a certain article is sufficient to show the agent's authority to make such contract. Kelly v. Burke, 132 Ala. 235, 31 S 512. (2) Thus where, in an action for the price of goods sold, the evidence shows that the traveling agent of the seller, who procured the original written contract, called on the seller at its place of business, and immediately thereafter the machinery was shipped from such place to the purchasers, it is sufficient to show apparent authority in the agent to make the parol contract under which defendants claim that the sale was made. Dowagiac Mfg. Co. v. Watson, 90 Minn. 100, 95 NW 884. (3) But the fact that the principal accepts and fills certain orders sent it by another does not show that the latter has general authority to accept orders for him and still less would he have authority to accept for the principal an order for goods at a price nearly one half less than principal's net prices. Harris v. Santee River Cypress Lumber Co. (R. I.) 72 A 392.

[b] **Authority of manufacturer to contract for seller.**—Where a sale of machinery includes a governor which fails to work satisfactorily, and the seller, with the knowledge and consent of the purchaser, instructs the manufacturers of the governor to remedy the defect, afterward suing for the purchase price of the machinery, sufficient evidence is shown to authorize the manufacturers to make a contract for the seller whereby the purchaser accepts the governor. Leffel v. Platt, 126 Mich. 443, 86 NW 65.

[c] **A chattel mortgagee's agent** directed to close the mortgage transaction has authority to arrange a sale of the property. Buffalo Pitts Co. v. Stringfellow-Hume Hardware Co., (Tex. Civ. A.) 129 SW 1161.

79. McCord, etc., Furniture Co. v. Woolpert, 89 Cal. 271, 26 P 969; Graves v. Horton, 38 Minn. 66, 35 NW 568; Gilbert v. Deshorn, 107 N. Y. 324, 14 NE 318; Cohen v. Mincoff, 96 NYS 411.

80. Moffet v. Moffet, 90 Iowa 442, 57 NW 954; Tod v. Benedict, 15 Iowa 591; Union Hosiery Co. v. Hodgson, 72 N. H. 427, 57 A 384 (holding that authority of an agent to contract to supply steam from a boiler could not be inferred from his authority to buy and pay for the coal to heat the boiler); Hogue v. Simonson, 94 App. Div. 139, 87 NYS 1065 (holding that an agent whose only authority was to purchase and pay for potatoes and

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import property for his principal;[81] nor can a power to sell be inferred from a power to store or ship, or to keep and let, or use, the property,[82] or from a power to exchange it for other property.[83]

Authority to solicit orders or seek a purchaser does not ordinarily imply authority to bind the principal by an absolute sale,[84] entered into without obtaining the principal's approval,[85] unless such authority is granted by the contract of employment,[86] or such is the custom and usage in the particular business,[87] or unless he is put in possession of the property for which the orders are solicited;[88] and especially the agent cannot make an absolute sale without the principal's approval, where his authority is expressly so restricted, of which restriction the purchaser has actual or constructive notice.[89] Thus a traveling salesman or drummer, unless expressly authorized or held out as having such authority, has authority only to solicit orders and transmit the same to his principal for approval, and may not make an absolute contract of sale.[90]

A general power to act for the principal in his business and to manage his property conveys no implied right to sell such property,[91] unless sales are

ship them to his principal could not bind his principal by a contract for the sale of potatoes); Gussner v. Hawks, 13 N. D. 458, 101 NW 898 (holding that personal property bought by an agent for his principal with the principal's money cannot be sold to an innocent purchaser, so as to convey title as against the principal, unless he has estopped himself from asserting his ownership).

81. Dyer v. Pearson, 3 B. & C. 38, 10 ECL 27, 107 Reprint 648.

82. Lyon v. Kent, 45 Ala. 656; Cleveland, etc., R. Co. v. Moline Plow Co., 13 Ind. A. 225, 41 NE 480; Powell v. Buck, 35 S. C. L. 427.

[a] **From a power to hire out a slave and receive his wages** the jury cannot infer a power to sell him. Daniel v. Kincheloe, 7 F. Cas. No. 3,561, 2 Cranch C. C. 295.

83. Prouty v. Nichols, 82 Vt. 181, 72 A 988, 137 AmSR 996 (holding that permission by a lessor to a lessee of a farm, with implements and live stock, to exchange personal property leased would not give him authority to sell it).

84. U. S.—Thurston v. The Magnolia, 23 F. Cas. No. 14,017, 1 Bond 92 (holding that a letter from a part owner of a steamboat, requesting another to advertise the writer's interest for sale, and thus advertising the other to act as his agent, confers no authority to sell).

Ga.—Brandenstein v. Douglas, 105 Ga. 845, 32 SE 341.

Ill.—Abrams v. Weiller, 87 Ill. 179; Illinois Moulding Co. v. Page, etc., Mfg. Co., 104 Ill. A. 1.

Mass.—Clough v. Whitcomb, 105 Mass. 482.

N. Y.—McKeige v. Carroll, 120 App. Div. 521, 105 NYS 342.

Que.—Mathys v. Ehrenbach, 33 Que. Super. 19.

[a] **A commission allowed to an agent who solicits orders** on sales effected through such orders does not confer on the agent authority to make absolute contracts of sale. McKeige v. Carroll, 120 App. Div. 521, 105 NYS 342.

[b] **Secret agreement.**—Where the authority of a special agent is limited to procuring written proposals for the sale and delivery of goods, to be binding when agreed to in writing by his principal, the latter is not bound by a secret agreement between such agent and the party who submits the written proposal, which agreement is not contained in the writing. Inman v. Crawford, 116 Ga. 63, 42 SE 473.

85. Brandenstein v. Douglas, 105 Ga. 845, 32 SE 341; Kuhlman v. E. J. Hart Co., (Tenn. Ch. A.) 59 SW 455; Baker v. Kellett-Chatham Mach. Co., (Tex. Civ. A.) 84 SW 661; Spooner v. Browning, [1893] 1 Q. B. 528.

[a] **Orders subject to approval.**—(1) Where an agent takes an order for personal property subject to the approval of his principal, no sale is completed until the principal approves the order, although the agent has accepted part payment of the price, unless such payment has been paid to, and accepted by, the principal with knowledge of the terms of the order. City Drug Co. v. American Soda-Fountain Co., 13 Ga. A. 485, 79 SE 376. (2) Authority conferred on an attorney by one who has received bonds of his county for collection for the owner to receive offers for the purchase of the bonds for the purpose of submitting them to the owner for his approval or rejection does not authorize the attorney to sell the bonds without such submission or approval. Hannon v. Houston, 18 Kan. 561.

[b] **Right to reject orders.**—Under a contract of agency whereby the principal agreed to pay no commissions on orders not shipped, and providing that acceptance of orders should be at the discretion of the principal, the right was reserved by the principal to reject, at his discretion, orders submitted by an agent. Temby v. William Brunt Pottery Co., 127 Ill. A. 441 [aff 229 Ill. 540, 82 NE 336].

86. Pittsburgh Sheet Mfg. Co. v. West Penn Sheet Steel Co., 197 Pa. 491, 47 A 838 (holding that authority not merely to take orders but to make sales is given by a contract providing that the agent should enter into the principal's services and secure such orders as were suitable for its mill; that he should sell to none except such as were in good standing and that all sales made by him should be made in the name of his principal; that in consideration of his services he should be paid a commission on such sales; that settlement should be made monthly for commission on all orders that he should secure; and that the price for which the principal's goods should be sold should be carefully considered by the agent and the principal at such times as might be admissible, and that the minimum or average selling price should be agreed to by the principal).

87. Austrian v. Springer, 94 Mich. 343, 54 NW 50, 34 AmSR 350 (holding that an agent employed by a foreign manufacturer to solicit orders for goods must, as to innocent third persons dealing with him, be deemed to have authority to accept the orders, and to enter into contracts of sale binding on his principal, where that is the general usage in the business as conducted by such manufacturers through such agents, and where it is shown that such sales entered into by the agent in question had been repeatedly recognized by his employers). See also Cawthon v. Lusk, 97 Ala. 674, 11 S 731. See generally Customs and Usages [12 Cyc 1071 et seq].

[a] **Usage as to authority of traveling salesmen.**—Where, by the general custom and usage of the business, a traveling salesman has authority to bind his principal by his contracts, subject to the right of the principal to reject orders when the financial standing of the purchaser is unsatisfactory, and previous orders taken by the salesman from a customer have been recognized, the principal cannot refuse to fill an order on other grounds, as that the price is unsatisfactory. Mabray v. Kelly-Goodfellow Shoe Co., 73 Mo. A. 1.

88. Beckwith v. Reid, 4 Oh. Dec. (Reprint) 436, 2 ClevLRec 162 (holding that, where an agent who has solicited orders is put in possession of the property to deliver to the vendee, he has authority not only to complete the sale but also to collect the price).

Possession as evidence of authority to sell see generally infra § 230.

89. Whitman Agricultural Co. v. Hornbrook, 24 Ind. A. 255, 55 NE 502; Suffolk Peanut Co. v. Luden, 32 Pa. Super. 603.

[a] **Notice of limitation.**—Where an order for machinery shows on its face that the authority of the seller's agent is limited to recommending its acceptance, statements of the agent before signing the order cannot make the contract binding without acceptance. Bronson v. Weber Impl. Co., 135 Mo. A. 483, 116 SW 20.

90. Outcault Adv. Co. v. Young Hardware Co., 110 Ark. 123, 161 SW 142 (holding that a traveling salesman, in the absence of proof of special authority, had no power to accept an order for goods taken by him on behalf of his principal, so as to effectuate a binding contract between the buyer and the seller); Lee v. Vaughan's Seed Store, 101 Ark. 68, 141 SW 496, 37 LRANS 352 (holding that a commercial traveler's implied authority is limited to soliciting orders for the sale of goods, and that the burden is on one asserting special authority in him to prove it); L. A. Becker Co. v. Clardy, 96 Miss. 301, 51 S 211, AnnCas1912B 355; Brennan v. Dansby, 43 Tex. Civ. A. 7, 95 SW 700.

[a] **In the absence of special authority** to bind his principal, (1) a commercial traveler can merely solicit and transmit the order, the contract of sale not becoming complete until it is accepted by the principal, and the purchaser having the right to revoke the order until acceptance (Ryan v. American Steel, etc., Co., 148 Ky. 481, 146 SW 1099; Matthews' Apparatus Co. v. Renz, 61 SW 9, 22 KyL 1528), (2) and the fact that the drummer and the proposed buyer exchange memoranda of the proposed contract, signed by them, does not alter the rule (Matthews' Apparatus Co. v. Renz, supra). (3) Whether or not the rule that an order given to a traveling salesman for goods is a mere proposal, to be accepted or not as the principal may see fit, applies where the purchaser is not put on notice that the authority of the agent is limited to taking orders subject to the principal's approval, it should be applied where a traveling salesman proposed to sell to a customer eight hundred and sixty dollars worth of nails, on a credit, for three hundred and eighty-two dollars and fifty cents, as such a transaction was not within the scope of the apparent authority of the agent, and the customer must have known that he was either joking or perpetrating a fraud on his principal. Charles Brown Grocery Co. v. Becket, 57 SW 458, 22 KyL 393.

91. U. S.—Hodge v. Combs, 1 Black 192, 17 L. ed. 157; Union Switch, etc., Co. v. Johnson R. Signal Co., 61 Fed. 940, 10 CCA 176.

Ala.—Birmingham Mineral R. Co. v. Tennessee Coal, etc., Co., 127 Ala. 137, 28 S 679 (holding that the facts that an agent in possession and control of lands rented part of them, taking rent notes therefor which were

regularly in the line of the business intrusted to the agent.[92]

[§ 230] **(2) Possession as Evidence of Authority.** Simply intrusting the agent with the possession of property confers upon him no authority to sell the same,[93] although possession and control of property for a period may be evidence tending to show authority to sell.[94] Nor can third persons acquire any title to such property from the agent unless he has some other evidence of property or authority to sell than bare possession.[95] If an agent is merely given the goods to seek a purchaser and report the offer to the principal, he can give no title to a third person without the principal's assent,[96] and certainly, as between the principal and agent, such act confers no authority upon the agent to make a sale,[97] although it has been held that property thus left with a regular dealer in such goods may be sold by him so as to bind the principal.[98] The fact that an agent has authority to sell certain property, or a specified interest in property, in his possession, does not warrant a sale by him of other property, or of other interests, which are also in his possession,[99] and an agent authorized to take possession of property and sell it has no power to sell it until it has come into his possession.[1] Where, however, the principal not only intrusts to the agent the possession of the property but also clothes him with apparent ownership or power of sale, then he will not be permitted to deny the agent's authority as against third persons who have dealt with him in good faith and with reasonable prudence,[2] unless the purchaser

afterward found in the owner's possession, and that he employed surveyors, kept off trespassers, and collected pay for timber cut and sold from such lands, do not constitute him the owner's general agent with relation to such lands, so as to authorize a person to purchase timber from him and make payment to him without the principal's knowledge, and without inquiring as to the extent of the agency).

Cal.—Quay v. Presidio, etc., R. Co., 82 Cal. 1, 22 P 925.

Ida.—Johnson v. Sage, 4 Ida. 758, 44 P 641.

Ind.—Coquillard v. French, 19 Ind. 274.

Iowa.—Smith v. Stephenson, 45 Iowa 645.

La.—Ball v. Bender, 22 La. Ann. 493; Smith v. McMicken, 12 Rob. 653.

Mich.—Wells v. Martin, 32 Mich. 478.

N. J.—Camden F. Ins. Assoc. v. Jones, 53 N. J. L. 189, 21 A 458, 23 A 166.

[a] **A clerk in charge of a store** during the proprietor's temporary absence has no authority to sell the stock of goods for any purpose whatever. Barbieri v. Messner, 106 Minn. 102, 118 NW 258 (holding that where a clerk in charge of plaintiff's store represented during his temporary absence that he had absconded, and defendants being creditors took a bill of sale of goods from such clerk, whether defendants took it under an agreement to pay all of plaintiff's debts or under some other agreement was immaterial as such clerk not being a partner had no right to sell the property for any purpose whatever).

92. Scudder v. Anderson, 54 Mich. 122, 19 NW 775. See also cases supra note 91.

[a] **The general agent and manager of a mining company** is presumably empowered to sell its personal property. Scudder v. Anderson, 54 Mich. 122, 19 NW 775.

93. Cal.—Kohler v. Hayes, 41 Cal. 455.

Ill.—Schmidt v. Shaver, 196 Ill. 108, 63 NE 655, 89 AmSR 250; Wilson v. Loeb, 69 Ill. A. 445.

Iowa.—Anderson v. Patten, 137 NW 1050; Goodrich v. Musgrave Fence, etc., Co., 154 Iowa 637, 135 NW 58 (holding that a person in possession of an automobile under an agreement to purchase, not subject to the seller's directions as to the use of the car, is not the seller's agent, although there is an agreement that he is to have a commission on sales made by him); Gilman Linseed Oil Co. v. Norton, 89 Iowa 434, 56 NW 663, 48 AmSR 400.

Md.—Johnson v. Frisbie, 29 Md. 76, 96 AmD 508.

Mass.—Rogers v. Dutton, 182 Mass. 187, 65 NE 56; Coggill v. Hartford, etc., R. Co., 3 Gray 545; Reed v. Upton, 10 Pick. 522, 20 AmD 545.

Mich.—Dunlap v. Gleason, 16 Mich. 158, 93 AmD 231.

Minn.—Peerless Mach. Co. v. Gates, 61 Minn. 124, 63 NW 260.

N. Y.—Edwards v. Dooley, 120 N. Y. 540, 24 NE 827; Barnard v. Campbell, 55 N. Y. 456, 14 AmR 289; McGoldrick v. Willits, 52 N. Y. 612; McNeil v. New York Tenth Nat. Bank, 46 N. Y. 325, 7 AmR 341; Ballard v. Burgett, 40 N. Y. 314; Spraights v. Hawley, 39 N. Y. 441, 10 AmD 452; Saunders v. Payne, 12 NYS 735 [dist Smith v. Clews, 114 N. Y. 190, 21 NE 160, 11 AmSR 627, 4 LRA 392]; Covill v. Hill, 4 Den. 323 [rev on other grounds 1 N. Y. 522 semble]. See also Sage v. Shepard, etc., Lumber Co., 158 N. Y. 672, 52 NE 1126 [aff 4 App. Div. 290, 39 NYS 449].

N. D.—Stewart v. Gregory, etc., Co., 9 N. D. 618, 84 NW 553.

Oh.—Osborn v. McClelland, 43 Oh. St. 284, 1 NE 644; Sanders v. Keber, 28 Oh. St. 630.

Or.—Zorn v. Livesley, 44 Or. 501, 75 P 1057; Velsian v. Lewis, 15 Or. 539, 16 P 631, 3 AmSR 184 and note.

S. C.—Powell v. Buck, 35 S. C. L. 427. See also Carmichael v. Buck, 46 S. C. L. 451.

[a] **Authority "to show" goods** delivered to a person "on approval" does not imply authority to sell the goods. Smith v. Clews, 114 N. Y. 190, 21 NE 160, 11 AmSR 627, 4 LRA 392.

94. Roberts v. Francis, 123 Wis. 78, 100 NW 1076.

95. Ind.—Reitz v. Martin, 12 Ind. 306, 74 AmD 215 (holding that one employed to drive stock from one town to another has no authority to sell any animal that becomes footsore, and that his sale passes no title).

N. Y.—McNeil v. New York Tenth Nat. Bank, 46 N. Y. 325, 7 AmR 34; Ballard v. Burgett, 40 N. Y. 314.

S. C.—Carmichael v. Buck, 46 S. C. L. 451; Powell v. Buck, 35 S. C. L. 427.

Tex.—McBrayer v. Smith, (Civ. A.) 145 SW 1053 (holding that, where an employee of a piano dealer, who was to receive a part of the profits of a special sale, took a piano from the dealer and placed it with his own stock, and sold it to one who did not rely on the agency of the employee, the buyer could not claim title as against the dealer).

Ont.—Hays v. O'Connor, 21 U. C. Q. B. 251.

[a] **A transferee of property, claiming through an exchange** with an agent, is not entitled to retain possession, as against the principal, on proof merely that the agent had possession and control of the property for which the exchange was made. Roberts v. Francis, 123 Wis. 78, 100 NW 1076.

96. Levi v. Booth, 58 Md. 305, 42 AmR 332.

97. Saunders v. Payne, 12 NYS 735.

98. Heath v. Stoddard, 91 Me. 499, 40 A 547; Smith v. Clews, 105 N. Y. 283, 11 NE 632, 59 AmR 502; Pickering v. Busk, 15 East 38, 104 Reprint 758. Compare Gilman Linseed Oil Co. v. Norton, 89 Iowa 434, 56 NW 663, 48 AmSR 400 and note; Levi v. Booth, 58 Md. 305, 42 AmR 332.

99. Wheeler v. Northwestern Sleigh Co., 39 Fed. 347 (holding that where an owner of stock on which a dividend had been declared but not paid authorized an agent to sell the stock, expressly reserving the right to the dividend, and the agent agreed with the purchaser that the dividend should go with the stock, the purchaser had no right to assume that the agent, because possessor of the stock, was authorized to sell the dividend, which formed no part thereof, and did not pass as an incident thereto, and as to that dealt with the agent at his peril, and that the principal was not bound by the representations).

1. Burckle v. Tapperheten, 4 F. Cas. No. 2,141.

2. U. S.—Thatcher v. Kaucher, 131 U. S. appendix cxlvi, 24 L. ed. 511; Authors, etc., Assoc. v. O'Gorman Co., 147 Fed. 616.

Ky.—Abernathy v. Nelson, 6 KyL 651.

Me.—Heath v. Stoddard, 91 Me. 499, 40 A 547 (holding that where plaintiff, a dealer in pianos, intrusted a piano to an agent, also a piano dealer, to leave at defendant's house, intending himself to thereafter go to the house to try to sell the piano to defendant, but the agent sold the piano to defendant, and received and appropriated the money, and the agent had previously, as plaintiff knew, been endeavoring to sell defendant a piano, the sale was within the agent's apparent authority).

Mass.—Cairns v. Page, 165 Mass. 552, 43 NE 503.

Miss.—Parry Mfg. Co. v. Lowenberg, 88 Miss. 532, 41 S 65.

N. Y.—Smith v. Clews, 114 N. Y. 190, 21 NE 160, 11 AmSR 627, 4 LRA 392; McNeil v. New York Tenth Nat. Bank, 46 N. Y. 325, 7 AmR 341 (where it appeared that the owner of stock delivered to his brokers the certificate of his shares, having indorsed on the certificate an assignment, expressed to be "for value received," and an irrevocable power to make all necessary transfers, the names of the transferee and of the attorney and the date being left blank, and it was held that the owner, having thus given to his brokers all the indicia of title to the stock and an apparently unlimited power of disposition over it, could not compel the surrender of the securities to himself by persons who, in good faith, advanced money to the brokers or their assigns on a pledge of the shares); Hazewell v. Coursen, 45 N. Y. Super. 22 [rev on other grounds 81 N. Y. 630]; Commercial Bank v. Kortright, 22 Wend. 348, 34 AmD 317.

N. C.—Winslow, etc., Co. v. Staton, 150 N. C. 264, 63 SE 950.

S. C.—State Bank v. Cox, 32 S. C. Eq. 344, 78 AmD 458.

Wis.—Roehl v. Volckmann, 103 Wis. 484, 79 NW 755 (holding that, where a principal executed and sent to his agent an assignment of a note and mortgage without any instructions, he impliedly authorized the agent to sell the note and mortgage).

has notice of the lack of such authority.[3]

[§ 231] (3) **Extent of Authority—(a) In General.** In sales of personalty, as in other transactions, an agent has implied authority to do whatever is usual and necessary in such transactions.[4] Thus he may make a memorandum to satisfy the statute of frauds,[5] and may agree with a purchaser not to sell to any others in the same town, and such an agreement will bind the principal, if the purchaser does not know of any limitation of the agent's authority.[6]

Powers not implied. An agent to sell has no implied powers beyond those which are usual and necessary to the accomplishment of the sale;[7] nor can he bind his principal beyond the limitations of his authority, of which the purchaser has actual or constructive notice.[8] Thus a mere power to sell personalty does not confer on the agent authority to purchase;[9] or to borrow money,[10] although an agent to sell may borrow money to pay transportation charges on the goods consigned to him for sale;[11] or to execute a chattel mortgage on the property;[12] or to agree to pay another commissions for making sales;[13] or to make a collateral undertaking to answer for the conduct of a competitor;[14] or to confess judgment against the principal;[15] or to can-

Eng.—Turner v. Sampson, 27 T. L. R. 200.

See also supra §§ 71–74.

[a] **Where the owner of a copyrighted book places copies** thereof in the hands of an agent for sale, he thereby clothes the agent with apparent authority to give complete title to the copies sold, so that buyers are not bound by secret instructions to such agent, restricting the title he is authorized to pass, which are uncommunicated. Authors, etc., Assoc. v. O'Gorman Co., 147 Fed. 616.

2. Sloan v. Brown, 228 Pa. 495, 77 A 821, 139 AmSR 1019 (holding that a purchaser of stock with notice of the capacity in which an agent holds it cannot deny the right of the principal therein).

4. U. S.—Lamon v. Speer Hardware Co., 198 Fed. 453, 119 CCA 1; Hartford, etc., Transp. Co. v. Plymer, 120 Fed. 624, 57 CCA 288.

Ill.—Central Commercial Co. v. Lehon Co., 173 Ill. A. 27; McCormick Harvesting Mach. Co. v. Snell, 23 Ill. A 79.

Minn.—Boynton Furnace Co. v. Clark, 42 Minn. 335, 44 NW 121.

Mo.—Hayner v. Churchill, 29 Mo. A. 676.

N. Y.—Reynolds v. Mayor, etc., Co., 39 App. Div. 218, 57 NYS 106.

Wash.—Parker v. Advance Thresher Co., 75 Wash. 505, 135 P 229.

[a] **Illustration.**—A subagent appointed by a threshing machine agent with authority to take notes from farmers to pay for threshing in advance, such notes to be applied on the purchase price of the machine, has authority to bind his principal by a promise to do the threshing. Aultman Thrashing, etc., Co. v. Knoll, 71 Kan. 109, 79 P 1074.

[b] **Local custom.**—An agent given authority to sell in a certain locality will be presumed to have been authorized to make sales in accordance with the local customs; and one dealing with him may, in the absence of notice of limitations, assume that he has such power. Mallory Commn. Co. v. Elwood, 120 Iowa 632, 95 NW 176.

[c] **Purchase of necessary book.**—The sole agent of a corporation engaged in the buying and selling of grain may bind the corporation by a contract to purchase a report of the proceedings of the interstate commerce commission in regard to an investigation into the relations between the railroad companies and grain elevators, such records being incidental and necessary to a proper execution of his duties. Law Reporting Co. v. Elwood Grain Co., 135 Mo. A. 10, 115 SW 475.

[d] **May agree to put in good condition.**—(1) An agent has authority to agree with a purchaser that a machine shall be put in good condition (McCormick Harvesting Mach. Co. Smith, 9 Kulp (Pa.) 448); (2) and also to agree upon a time within which it shall be done, notwithstanding a clause in the contract providing "that no agent has any power to make additions to or to vary the terms and conditions hereof" (Holt Mfg. Co. v. Dunnigan, 22 Wash. 134, 60 128).

[e] **Disposition of defective machine.**—Under an order for a machine purchased by plaintiff of defendant, reciting that general agents, so-called, have no general agency powers, defendant's general agent had authority to direct the disposition of the machine after it was found incapable of performing the work for which it was sold. Womach v. J. I. Case Threshing Mach. Co., 62 Wash. 661, 114 P 509.

5. Potter v. Springfield Milling Co., 75 Miss. 532, 23 S 259. See generally Frauds, Statute of [20 Cyc 275].

6. Keith v. Herschberg Optical Co., 48 Ark. 128, 2 SW 777; Watkins v. Morley, 2 Tex. A. Civ. Cas. § 723.

[a] **Guaranty to maintain price.**—But it has been held that the agent has no authority to guarantee that the principal will not sell the same goods to others for a less price. Anderson v. Bruner, 112 Mass. 14.

7. Central Commercial Co. v. Lehon Co., 173 Ill. A. 27; Stratton v. Todd, 82 Me. 149, 19 A 111 (holding that authority to sell logs after they arrive on the market does not show authority to conduct logging operations).

[a] **A traveling salesman** (1) without express authority cannot bind his principal for his hotel bills—especially is the principal not liable where the credit in the first instance is extended to the agent. Grand Ave. Hotel Co. v. Friedman, 83 Mo. A. 491. (2) Nor can he bind his principal for laundry and other items, such as express and telegrams, unless connected with his business. Grand Ave. Hotel Co. v. Friedman, supra. (3) Nor make a contract to advertise his principal's goods upon billboards. U. S. Bedding Co. v. Andre, 105 Ark. 411, 150 SW 413, 41 LRANS 1019 and note.

[b] **A local agent for the sale of threshing machines** has no implied authority to make representations to a buyer that the new machinery purchased has been shipped by the principal and will arrive in a day or two. J. I. Case Threshing Co. v. Eichinger, 15 S. D. 530, 91 NW 82.

[c] **An agency to sell beer** (1) does not imply an authority to fit up saloons for the use of persons who purchase the beer (Schoenhofen Brewing Co. v. Wengler, 57 Ill. A. 184); (2) or to dispose of the cooperage which the company by its rules has expressly reserved (Jos. Schlitz Brewing Co. v. Grimmon, 28 Nev. 235, 81 P 43, holding that the fact that the cards carried by S bore after his name the words "with [plaintiff] Brewing Co." did not show that he was authorized by plaintiff to sell the kegs).

[d] **Employment of counsel.**—An agent with authority to sell machinery in a few counties of the state has no authority to bind his principal by the employment of counsel generally in all matters relating to the business of the corporation. Kirby v. Western Wheeled Scraper Co., 9 S. D. 623, 70 NW 1052. See generally infra § 308.

[e] **A wholesale selling agent** of talking machines has no implied authority to guarantee that a purchaser of a quantity of such machines will sell an average of twenty-five records to each customer within four months after the machine has been given away; and where a purchaser accepted shipments after notice of repudiation by the seller of his agent's unauthorized guaranty, he waived the guaranty. Johns v. Jaycox, 67 Wash. 403, 121 P 854, 39 LRANS 1151 and note, AnnCas1913D 471 and note.

[f] **Guaranty against loss.**—It is not within the scope of the authority of a general selling agent to guarantee a buyer against loss of rebates for failure to buy all his goods from a competing firm. Braun v. Hess, 187 Ill. 283, 58 NE 371, 79 AmSR 221. See generally infra § 313.

8. Beck v. Donohue, 27 Misc. 230, 57 NYS 741 (holding that a salesman has a limited authority, and that persons dealing with him must ascertain its scope).

Knowledge or notice of extent of authority see generally supra §§ 203-207, 210.

[a] **The form of printed blank contracts carried by a selling agent,** together with the nature of the business, may be sufficient to put the purchaser on inquiry as to the scope of the agent's authority. Johns v. Jaycox, 67 Wash. 403, 121 P 854, 39 LRANS 1151 and note AnnCas 1913D 471 and note.

9. See supra § 224.

10. Merchants' Nat. Bank v. Nichols, etc., Co., 223 Ill. 41, 79 NE 38, 7 LRANS 752. See also infra § 304.

11. Rankin v. McFarlane Carriage Co., 75 SW 221, 25 KyLR 258.

12. See infra § 295.

13. Atlee v. Fink, 75 Mo. 100, 43 AmR 385; Jones v. Keeler, 40 Misc. 221, 81 NYS 648.

[a] **No power to employ others at principal's expense.**—(1) An agent employed to sell a commodity in a given state, or in several given states, at a fixed percentage on the amount of sales, with a stipulation in the contract that he is to pay all his own expenses has no authority merely by virtue of his power as agent to employ others at the expense of the company, either to act as subagent or to advertise and commend the commodity in a particular locality or in a particular community. National Cash Register Co. v. Ison, 94 Ga. 463, 21 SE 228. (2) A sales agent, whose duties are to take orders for his principal's goods within a fixed territory, and who can delegate his authority only to the extent of employing his own salesman, cannot make a contract with a salesman which will bind the principal to pay the salesman for his services in effecting sales. National Cash Register Co. v. Hagan, 37 Tex. Civ. A. 281, 83 SW 727.

14. Kinser v. Calumet Fire Clay Co., 165 Ill. 505, 46 NE 372 [aff 64 Ill. A. 437] (holding that an agent for the sale of sewer pipe has no implied authority to bind his principal by an agreement that, if a prospective buyer of the pipe will reduce his competitive bid below a stated figure, in order to get a certain sewer construction contract, the seller will see that the buyer loses no money on the contract); Hess v. Heegaard, 54 Ill. A. 227.

15. Union Trust Co. v. Means, 201 Pa. 374, 50 A 974. See also infra § 303.

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cel a debt upon the surrender of securities;[16] or to advertise the principal's business;[17] nor will a power to sell to one person authorize a sale to another.[18] An agent employed to sell is not thereby authorized to compromise;[19] but if he has authority to fix the price and collect, this has been held sufficient to enable him to make a deduction by way of settlement.[20]

Exclusiveness of authority. Except where the contract of employment so provides,[21] an agency to sell a certain article in a specified territory does not give the agent the exclusive right to sell therein,[22] especially where the principal has refused to insert the word "exclusive" in the contract of agency.[23]

Manner of exercising authority. In the absence of special instructions as to the manner of sale, the agent must sell in the usual manner;[24] but if the manner of sale is specified in the agent's authority, the specifications must be followed.[25]

[§ 232] **(b) Property Which May Be Sold.** The property sold must be the property the agent was authorized to sell, for authority to sell specified property, or property of a given description, confers no power to sell other property;[26] but it will

Who may confess judgment see generally Judgments [23 Cyc 701].

16. Robinson v. Nipp, 20 Ind. A. 156, 50 NE 408. See generally infra §§ 298-300.

17. Beck v. Donohue, 27 Misc. 230, 57 NYS 741; Tarpy v. Bernheimer, 16 NYS 870.

[a] **An agreement to advertise as a consideration for the purchase** of the goods will not bind the principal. Brooklyn Daily Eagle v. Dellmar, 30 Misc. 747, 62 NYS 1041.

[b] **Agent in charge of branch office.**—But a "selling agent" in charge of a branch office of a firm has authority to bind his principal for such advertising as is reasonable and necessary for the proper transaction of its business unless the facts are such that a prudent man in the exercise of ordinary diligence would not rely on the apparent authority. St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737.

[c] **A financial agent engaged by a company to sell its shares** and merchandise on commission has the power to advertise the sale of the same and solicitations to subscribe for shares in the company. French Gas Sav. Co. v. Desbarats Adv. Agency, 1 DomLR 136.

18. Niles v. Smith, 2 Code Rep. (N. Y.) 81.

19. American Sales Book Co. v. Whitaker, 100 Ark. 360, 140 SW 132, 37 LRANS 91 (holding that where a selling agent has obtained an absolute order for goods, he has neither actual nor apparent authority to compromise the debt by taking the goods back or directing their return); Kilgour v. Ratcliff, 2 Mart. N. S. (La.) 292. See generally infra §§ 298-300.

[a] **Right of salesman to settle for breach of warranty.**—(1) A traveling salesman, engaged in soliciting orders for merchandise and transmitting them to his employer, who has the option to accept or reject them, and not held out as possessing other than the ordinary authority incident to the business of a soliciting agent, although possessing authority, under Cal. Civ. Code § 2323, to warrant the quality of the goods, has no authority to enter into an agreement for the settlement of a customer's claim for breach of warranty of the quality of goods previously sold by him to the customer. Lindow v. Cohn, 5 Cal. A. 388, 90 P 485. (2) Authority to an agent to sell goods does not carry with it authority to compromise differences arising between his principal and those to whom he sells goods by reason of the goods not coming up to the standard represented, and the burden is on the purchaser claiming such authority to prove the same. Scarritt-Comstock Furniture Co. v. Hudspeth, 19 Okl. 429, 91 P 843, 14 AnnCas 857 and note.

[b] **Allowing deductions.**—In the absence of express authority, or proof of similar previous dealings known to and approved by the principal, an agent to sell cannot bind his principal by entering into a contract with the purchaser that his principal will receive and allow deductions for imperfect goods previously shipped to the purchaser by other parties. Phœnix Pottery Co. v. Perkins Co., 79 N. J. L. 78, 74 A 258.

20. Taylor v. Nussbaum, 2 Duer (N. Y.) 302.

[a] **An agent authorized to make sales and collections** has apparent authority to allow a deduction from a balance due for goods sold, where the agent, in selling the goods, has reduced the price without objection from the principal. Stevenson Co. v. Fox, 19 Misc. 177, 43 NYS 253.

21. Stone v. Fox Mach. Co., 145 Mich. 689, 109 NW 659 (holding that where a manufacturer employed an agent under a contract stipulating that the agent should be the sole agent for the manufacturer for the sale of its product throughout Europe, and that he was to prosecute the business of selling the product and further the interests of the manufacturer, the agency to continue for a specified time, and from year to year thereafter until terminated in a manner prescribed, the contract contemplated that the agent alone should be the representative of the manufacturer, to the exclusion of others, and obligated it to make its sales through him); Nickels v. Prewitt Auto Co., (Tex. Civ. A.) 149 SW 1094 (holding that a contract giving defendant the sole right to sell automobiles and supplies in a certain locality is not a mere contract for an exclusive agency, but confers on defendant the sole right to sell in the territory mentioned, and prohibits plaintiff from making sales within such territory).

22. King Powder Co. v. Dillon, 42 Colo. 316, 96 P 439 (holding also that in such a case the principal may contract with another to sell in such territory and on such terms as the principal deems fit); Deering v. Beatty, 107 Iowa 701, 77 NW 325 (holding that an agreement to appoint a firm as agent "for receiving, keeping, and selling in their behalf" the first party's harvesting machinery and parts and binding twine, "on commission, for the following territory only, Jefferson county, for the entire season of 1891," with a power of revocation reserved, does not confer an exclusive selling agency).

23. King Powder Co. v. Dillon, 42 Colo. 316, 96 P 439.

24. Friedman v. Kelly, 126 Mo. A. 279, 102 SW 1066; Towle v. Leavitt, 23 N. H. 360, 55 AmD 195 (holding that an agent has no implied power to sell at auction).

[a] **An agent of two independent and unconnected principals** (1) has no authority to bind his principals or either of them by the sale of the goods of both in one lot, when the articles included in such sale are different in kind and are sold for a single lump price not susceptible of a ratable apportionment except by the mere arbitrary will of the agent. Cameron v. Paxton, 15 Can. S. C. 622. (2) Nor have commercial agents a right to sell merchandise of their principals as part of a lot with other goods, the principals having never agreed to be bound by any sales not made separately. Coe v. Nash, 28 Mich. 259.

[b] **Sale by sample.**—When unrestricted as to the manner of sale the agent may sell by sample. Andrews v. Kneeland, 6 Cow. (N. Y.) 354.

[c] **Liquidators of an insolvent firm** who are authorized to sell firm property may make the sale through an auctioneer. Union Garment Co. v. Newburger, 124 La. 820, 50 S 740.

[d] **A sale by an agent, without mentioning his position** of agent, of an article which the purchaser knows to be the property of the principal is regarded as made for the account of the latter. Pomerlau v. Maheu, 31 Que. Super. 190.

25. Fulton v. Sword Medicine Co., 145 Ala. 331, 40 S 393; Nester v. Craig, 69 Hun 543, 23 NYS 948.

[a] **When instructed to sell at auction** (1) the principal is not bound by a private sale (The G. H. Montague, 10 F. Cas. No. 5,377, 4 Blatchf. 461), (2) although the price received is greater than the price fixed for the sale at auction (Jaques v. Todd, 3 Wend. (N. Y.) 83).

[b] **Oral agreement.**—Where one orders goods of an agent of the seller with direct notice that the agent in making an oral agreement exceeds his authority, the agent's agreement does not bind the seller. Metropolitan Aluminum Mfg. Co. v. Lau, 61 Misc. 105, 112 NYS 1059.

26. U. S.—Forrest v. Vanderbilt, 107 Fed. 734, 46 CCA 611, 52 LRA 473 (holding that agents who are authorized by the owner to sell a yacht are not thereby given any authority, either actual or apparent, to sell a naphtha launch, sometimes used as a tender to the yacht, but which was not legally an appurtenance thereto, but a separate vessel, and, in the absence of actual authority, they cannot bind the owner by a sale of the launch); Cable v. Paine, 8 Fed. 788, 3 McCrary 169 (holding that an agent to sell lumber has no implied power to sell timber in the rough).

Cal.—Harvey v. Duffey, 99 Cal. 401, 33 Pac. 897.

Iowa.—Gladiator Cons. Gold Mines, etc., Co. v. Steele, 132 Iowa 446, 106 NW 737 (holding that where an agent of a corporation is authorized to dispose of stock issued to him as compensation for his services through the agencies of the company, he does not thereby acquire authority to make use of such agencies for the sale of stock purchased by him for speculation).

La.—Angel v. Ellis, McGloin 57.

Or.—Reid v. Alaska Packing Co., 47 Or. 215, 83 P 139 (holding that a selling agent for a corporation which deals only in Alaska salmon has no authority to sell for the corporation salmon taken from other than Alaskan waters).

Pa.—Pennsylvania L. Ins., etc., Co. v. Franklin F. Ins. Co., 181 Pa. 40, 37 A 191, 37 LRA 780.

Tex.—St. Louis, etc., R. Co. v. Bramlette, (Civ. A.) 35 SW 25 (holding that an agent for the sale of land had no authority to sell posts cut from said land, and could not recover the value thereof from his vendee, although he had intended after payment by the vendee to settle with the owner of said land).

[a] **Thus** a letter of attorney authorizing the sale of mortgages of which the owner is "now seized or possessed" does not confer authority

justify a sale of part of the specified property unless it is clear from the authority that the property is to be sold as a whole.[27] General authority to sell the product of a mine or factory empowers the agent to sell for future delivery,[28] but an agent authorized to sell the property of his principal when manufactured has no authority to sell before it is manufactured.[29] Authority to sell of course does not apply to property not owned by the principal.[30]

Samples. A commercial traveler or other agent has not usually authority to sell his samples,[31] except as authorized by his contract of employment.[32]

[§ 233] **(c) Power to Fix Terms of Sale in General.** It is of course a necessary incident of a sale to fix the price and the terms of payment, and accordingly a selling agent has implied power within the limits openly fixed by the principal or determined by usage and custom to agree upon the terms of the sale,[33] including the time, place, and mode of delivery,[34] and the time and mode of payment,[35] and to agree upon the price to be paid for the goods,[36] unless the principal has expressly limited the price,

to sell mortgages acquired after the execution of such letter. Union Trust Co. v. Means, 201 Pa. 374, 50 A 974.

[b] **Goods out of stock.**—An agent sent out to sell goods of "new patterns" to be manufactured or which are in stock has no ostensible authority to sell goods of an old pattern which the principal has ceased to manufacture and does not carry in stock and which he can manufacture only at a loss. McCord, etc., Furniture Co. v. Wollpert, 89 Cal. 271, 26 P 969.

[c] **Coal on leased dock.**—Where a principal contracts with an agent by which he gives him the sole agency of the sale of the output of a certain colliery, "at all points along the line of" a certain railroad, "its branches and connections," and agrees to fill all orders of coal sold by the agent to any persons at such points, coal delivered at one of the termini of the road on coal docks leased by it and under its control is within the contract. Hutchinson v. Root, 2 App. Div. 584, 38 NYS 16 [aff 158 N. Y. 681 mem, 52 NE 1124 mem].

27. Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 AmD 92; Ulster County Sav. Inst. v. New York Fourth Nat. Bank, 5 Silv. Sup. 144, 8 NYS 162 (where a sale of one hundred and forty-four shares of stock was held good under a power to sell one hundred and ninety-four, there being no special directions to the contrary).

28. National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427. See also Albert Cheese Co. v. Leeming, 31 U. C. C. P. 272. Compare Blackmer v. Summit Coal, etc., Co., 88 Ill. A. 636 [aff 187 Ill. 32, 58 NE 289] (holding that where a contract of agency did not empower an agent to sell the output of the principal's coal mine for future delivery, much less the output for a period of ten months, a contract by the agent making such sale cannot be recovered upon by the purchaser).

29. McCord, etc., Furniture Co. v. Wollpert, 89 Cal. 271, 26 P 969; Merriam v. De Turk, 66 Cal. 549, 6 P 424.

30. Torre v. Thiele, 25 La. Ann. 418 (holding that the sale by an agent after the owner has sold the property confers no title); Blackstone v. Buttermore, 53 Pa. 266; Murrell v. Graham, 3 S. C. L. 490.

[a] **Authority to sell specified quantity.**—However, where a principal informs his agent by letter that he has on hand about a certain quantity of specified goods, and instructs him to sell the same, the agent is authorized to assume that the principal has the quantity specified and a sale by him of that quantity binds the principal to the purchaser therefor, although the principal in fact has on hand a lesser quantity. Kirwan v. Van Camp Packing Co., 12 Ind. A. 1, 39 NE 536.

31. Ga.—Harris Loan Co. v. Elliott, etc., Book-Typewriter Co., 110 Ga. 302, 34 SE 1003.

Ill.—Bailey v. Partridge, 134 Ill. 188, 27 NE 89.

N. Y.—Cleveland Knitting Mills Co. v. Shaff, 160 App. Div. 107, 145 NYS 109 (holding that no authority of a sales agent to sell his samples is shown by the phrase, "If a number be missing he was to pay for it," added to the testimony of his employer that they were delivered to him to be returned intact).

Or.—Hibbard v. Stein, 45 Or. 507, 78 P 665 (holding that a traveling salesman has no implied authority from the nature of his employment to sell the samples with which he is intrusted by his principal).

Tex.—Kohn v. Washer, 64 Tex. 131, 53 AmR 745.

[a] **Samples not misleading.**—Delivery of possession of an article of personalty to an agent for the purpose of being used as a sample in making sales of like articles is not an act calculated to mislead others in regard to the ownership of the property, such as to give a purchaser from such agent title to the property as against the true owner. Harris Loan Co. v. Elliott, etc., Book-Typewriter Co., 110 Ga. 302, 34 SE 1003.

[b] **One purchasing from a sales agent his samples is put on inquiry** as to his authority to sell them, and this, although the agent represents that he is the owner of them. Cleveland Knitting Mills Co. v. Shaff, 160 App. Div. 107, 145 NYS 109.

32. Hibbard v. Stein, 45 Or. 507, 78 P 665 (holding that, where a contract employing a traveling salesman provides that the salesman shall return all the samples to his employer, or sell them under the instructions of the house and account for the same in cash or an itemized statement, naming the firm they are to be charged to, and requires the salesman to pay cash for all samples unaccounted for at the end of the year or at the termination of the contract, and the contract also has attached a schedule, which provides that samples are charged as cash, and must be paid for by salesmen, unless returned, or their sale properly accounted for, such contract does not authorize the salesman to sell his samples except in pursuance of express instructions from his employer, and that a sale made without such instructions confers no title on the purchaser).

33. U. S.—Whitman v. Namquit Worsted Co., 206 Fed. 549.

Ala.—Jones Cotton Co. v. Snead, 169 Ala. 566, 53 S 988.

Ga.—Jesse French Piano, etc., Co. v. Cardwell, 114 Ga. 340, 40 SE 292.

Iowa.—Blaess v. Nichols, etc., Co., 115 Iowa 373, 88 NW 829 (holding that an agent, having power to sell and warrant machinery for his principal, and apparently being a general agent, will be presumed, in an action on the warranty, to have been empowered to make such reasonable terms as he saw fit); Wishard v. McNeill, 85 Iowa 474, 52 NW 484.

Md.—Curtis v. Gibney, 59 Md. 131.

N. H.—Daylight Burner Co. v. Odlin, 51 N. H. 56, 59, 12 AmR 45 (where it is said that as incident to his general authority an agent authorized to sell has "power to fix the terms of sale, including the time, place, and mode of delivery, and the price of the goods, and the time and mode of payment, and to receive payment of the price, subject of course to be controlled by proof of the mercantile usage in such trade or business").

Compare Robertson v. Ketchum, 11 Barb. (N. Y.) 652.

[a] **Return of goods.**—(1) A traveling salesman cannot, without authority so to do or custom of trade in that behalf, obligate his principal on the sale of goods by an agreement that any portion of the goods may be returned before the date of settlement, even though the season for the sale by his principal of such goods to the retail trade has expired for the year at that time. Friedman v. Kelly, 126 Mo. A. 279, 288, 102 SW 1066 (where the court said: "The law presumes, and those dealing with the agent have the right to act upon this presumption of law, that the agent is authorized to sell the goods in the usual manner and only in the usual manner, and make such contracts thereabout as are reasonable or comport with the usage and custom of the trade in like undertakings, and it is to this extent, and this extent only, that an agent may be said as a matter of law, to be acting within the scope of his apparent authority"). (2) So also an agent making a sale of merchandise has no implied authority to give the purchaser an option to return any goods which he might subsequently buy of the principal. Ide v. Brody, 156 Ill. A. 479.

[b] **Custom and usage.**—The implied authority of a selling agent is limited to the usages of the business in which he is employed. With reference to such usages, and only such usages, the principal is presumed to confer power on his agent. Authors, etc., Assoc. v. O'Gorman Co., 147 Fed. 616; Leach v. Beardslee, 22 Conn. 404; Upton v. Suffolk County Mills, 11 Cush. (Mass.) 586, 59 AmD 148; Carmichael v. Buck, 46 S. C. L. 451. See generally Customs and Usages [12 Cyc 1071 et seq].

[c] **Insurance.**—Under a custom of wholesalers to insure goods shipped by them on request or instructions by their customers, a commercial traveler authorized only to accept and transmit orders has apparent authority to receive and transmit instructions to insure all goods ordered through him. McDonald v. Pearre, etc., Co., 5 Ga. A. 130, 62 SE 880.

[d] **Reservation of title.**—Where the title to property sold through an agent is shown to be in the seller, and the agency is established, the reservation of title by the agent until payment of the price inures to the seller. Bronson v. Russell, 142 Ala. 360, 37 S 672.

[e] **Extraordinary terms.**—A sales agent has no general authority to sell goods on extraordinary terms. Beck v. Freund, 117 NYS 193.

34. Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 AmR 45; Smith v. Droubay, 20 Utah 443, 58 P 1112 (holding that where the power to take an order or make a contract of sale is incident to an agent's employment the power to fix time of delivery is also incident thereto).

35. Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 AmR 45.

36. Ga.—Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 SE 980 (holding that where, without naming terms of sale, the principal in writing authorized a special agent to sell personalty to a particu-

of which limitation the purchaser has notice.[37] Where, however, the principal has bestowed a restricted authority, or has openly fixed the limits of the authority, the agent's sales on terms not warranted by the authority do not bind the principal,[38] unless with notice of the agent's acts he approves and accepts them.[39] But the principal will be bound if the agent acts within the scope of his authority, although he mistakes or disregards the private instructions of the principal as to some of the terms of the sale,[40] or makes mistakes in judgment in exercising the discretion vested in him by the principal person, the agent had authority to fix the price of the goods).

Ill.—Scudder-Gale Grocer Co. v. Russel, 65 Ill. A. 281.

Ky.—U. S. School Furniture Co. v. Owensboro Bd. of Education, 38 SW 864, 18 KyL 948 (holding that it is no defense to an action for breach of contract to sell school furniture that defendant's agent sold it at too low a price, where there was no collusion between the agent and plaintiff, and the price was not so low as to indicate that the agent violated defendant's orders; and there is no evidence that the agent had instructions as to lowest price, or, if he had instructions, that plaintiff had knowledge of them, except as indicated by a clause in the contract that the agent had no authority except to sell at "proper prices").

N. H.—Flanders v. Putney, 58 N. H. 358; Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 AmR 45.

N. Y.—Langstroth v. Turner Cypress Lumber Co., 162 App. Div. 818, 148 NYS 224 (holding that, while every salesman presumably has to get the price at which he sells from his employer, that would not invalidate a sale by an authorized salesman at a price not approved by his employer); Taylor v. Nussbaum, 9 N. Y. Super. 302; Stirn v. Hoffman House Co., 7 Misc. 241, 27 NYS 271 [aff 8 Misc. 246, 28 NYS 724].

N. C.—Southern Grocery Co. v. Davis, 132 N. C. 96, 43 SE 591 (holding that, where an agent agreed to sell goods consigned to him by his principal and to account for them at invoice prices, it was not a stipulation that none should be sold at less, but a provision that all proceeds above the total of invoices should be the seller's commission or profit).

Philippine.—U. S. v. Torres, 11 Philippine 606.

Wash.—Galbraith v. Weber, 58 Wash. 132, 107 P 1050, 28 LRANS 841 (holding that where the agent has exclusive possession of the property of his principal with authority and for the express purpose of selling it to any purchaser he may find, a purchaser may rely on the agent having power to agree on the price).

[a] **A solicitor and collector for a gas company** has ostensible, if not actual, authority to make a contract binding on the gas company to furnish gas at a certain price. Gallagher v. Equitable Gas Light Co., 141 Cal. 699, 75 P 329 (so holding under statutes providing that actual authority of an agent is such as the principal confers or allows the agent to believe that he possesses; that ostensible authority is such as a principal allows a third person to believe that the agent possesses; and that an agent represents his principal for all purposes in respect to actual or ostensible authority).

37. Seven Hills Chautauqua Co. v. Chase Bros. Co., 81 SW 238, 26 KyL 834 (holding that, where plaintiff, with knowledge that defendant's drummer was authorized to solicit only orders to be forwarded to defendant for its approval, contracted with the drummer for certain goods at a price at which plaintiff knew he had no authority to sell, it could not recover on the contract); Pedigo v. Day, 8 KyL 159 (holding that, where an agent to sell a horse for a certain price sold for less, the title did not pass, the restriction as to price being a part of the authority to sell, and a limitation on it); Waldorf v. Simpson, 15 App. Div. 297, 44 NYS 921.

[a] **Where the agent of a wholesale store** is instructed not to sell certain articles except at the list price, a person buying of such agent is charged with notice that there is a limitation upon the agent's authority, if it appears that the goods are billed at the list prices and that the salesman when collecting for them allows a discount. Brown v. West, 69 Vt. 440, 38 A 87.

[b] **Rebates.**—(1) A traveling salesman empowered to take orders for merchandise at a price consistent with current quotations prescribed by his employer cannot bind his employer by a written rebate agreement signed in his own name, in the absence of special authority. Tollerton, etc., Co. v. Gilruth, 21 S. D. 320, 112 NW 842 (holding, that, where a traveling salesman, empowered to take orders for merchandise, took an order for merchandise at a price consistent with current quotations prescribed by his employer, and signed in his individual capacity an agreement for a rebate, under S. D. Rev. Civ. Code § 1680, providing that an authority expressed in general terms does not authorize an agent to act in his own name, the buyer was put on inquiry as to the extent of the authority of the agent to contract for a rebate, and the buyer could not hold the employer thereon, in the absence of evidence of authority to make it). (2) An agent cannot bind his principal by an agreement to give a rebate of ten per cent where the circumstances are such as to put the third party on inquiry as to the extent of the agent's authority. Taylor Mfg. Co. v. Brown, 4 Tex. A. Civ. Cas. § 8, 14 SW 1071.

38. Ala.—Fulton v. Sword Medicine Co., 145 Ala. 381, 40 S 393; McMillan v. Wooten, 80 Ala. 263 (holding that authority to exchange does not authorize a trade binding the principal to pay a cash difference in values of the articles exchanged).

Colo.—Sioux City Nursery, etc., Co. v. Magnes, 5 Colo. A. 172, 38 P 330.

Conn.—Shoninger v. Peabody, 59 Conn. 588, 22 A 437.

Ill.—Rankin v. Taylor, 49 Ill. 451; Forbis v. Reeves, 109 Ill. A. 98 (holding that, in a suit on a written order for a threshing machine purchased of plaintiff through an agent, defendant cannot recoup as damages a loss claimed because of plaintiff's failure to procure from neighboring farmers threshing contracts for defendant, on the ground that it was agreed with the agent that he would secure such contracts, since such agreement was not within the scope of his agency, and plaintiff was not bound thereby).

Ky.—Seven Hills Chautauqua Co. v. Chase Bros. Co., 81 SW 238, 26 KyL 834.

La.—Advance Thresher Co. v. Roger, 123 La. 1067, 49 S 709.

Me.—Cowan v. Adams, 10 Me. 374, 25 AmD 242.

Nebr.—Michael v. Hoffsteadt, 5 Nebr. (Unoff.) 453, 98 NW 1078.

N. Y.—Falihee v. John Simmons Co., 121 App. Div. 839, 106 NYS 764 (holding that, where plaintiff requested defendant's salesman to reduce an estimated price for supplies, and the salesman notified defendant's manager who told him that it would be all right, and then completed the arrangement directly with plaintiff, this did not confer authority on the salesman to bind defendant on a written contract with plaintiff); Flower City Plant Food Co. v. Roberts, 81 App. Div. 249, 80 NYS 1060; Waldorf v Simpson, 15 App. Div. 297, 44 NYS 921; Robertson v. Ketchum, 11 Barb. 652.

S. D.—Elfring v. New Birdsall Co., 16 S. D. 252, 92 NW 29; Shull v. New Birdsall Co., 15 S. D. 8, 86 NW 654.

Tex.—Skeeters v. Slater Milling Co., 4 Tex. Civ. A. 665, 23 SW 1000 (holding that, where cotton is left with an agent to be sold at the highest market price upon approval by the principal, a sale by the agent without the principal's consent conveys no title).

Vt.—Brown v. West, 69 Vt. 440, 38 A 87; White v. Langdon, 30 Vt. 599.

Va.—Bowles v. Rice, 107 Va. 51, 57 SE 575.

[a] **One who is informed** by an agent that the price of property in the agent's hands for sale is to be fixed by the principal cannot claim that the principal has clothed the agent with apparent authority to sell for a certain price. Lucas v. Rader, 29 Ind. A. 287, 64 NE 488.

[b] **The assignment of a patent in his own name as grantor** by an agent who has authority to grant licenses in the patent only on terms prescribed, or to assign the patent on terms and conditions to be "agreed on and approved by the grantor, or every bargain closed will be void," is in excess of his authority and therefore void as an assignment. Chauche v. Pare, 75 Fed. 283, 21 CCA 329.

39. Gallagher v. Equitable Gas Light Co., 141 Cal. 699, 75 P 329; Sioux City Nursery, etc., Co. v. Magnes, 5 Colo. A. 172, 38 P 330; Susong v. McKenna, 126 Ga. 433, 55 SE 236; Marx v. King, 162 Mich. 258, 127 NW 341. See generally supra §§ 114–123.

40. U. S.—Loraine v. Cartwright, 15 F. Cas. No. 8,500, 3 Wash. C. C. 151.

Ala.—Union Refining Co. v. Barton, 77 Ala. 148.

Ga.—Cable Co. v. Hunt, 8 Ga. A. 562, 70 SE 70 (holding that the purchaser of an organ was not bound by the secret instructions given by the principal to his agent which were not disclosed to the purchaser, and that the fact that the agent did not sell the goods for their full value did not authorize a rescission of the contract of sale, where it appeared that the contract was not dependent on confirmation by the owner of the goods).

Iowa.—Griffith v. Fields, 105 Iowa 362, 75 NW 325.

Miss.—Potter v. Springfield Milling Co., 75 Miss. 532, 23 S 259.

Mo.—Mabray v. Kelly-Goodfellow Shoe Co., 73 Mo. A. 1.

N. Y.—Reynolds v. Mayor, etc., Co., 39 App. Div. 218, 57 NYS 106.

Tex.—Eastern Mfg. Co. v. Brenk, 32 Tex. Civ. A. 97, 73 SW 538 (holding that an agent for the sale of goods having apparent authority to agree that they may be returned if unsatisfactory, and the buyer having no notice that the agent was disregarding instructions in doing so, the fact that he may have acted contrary to instructions is immaterial); Schleicher v. Armstrong, (Civ. A.) 32 SW 327.

[a] **A traveling salesman of a wholesale house** has authority to bind his principal by conditions attached to the contract of sale, where they are reasonable and within the apparent scope of his authority, unless the purchaser has notice of some limitation on such authority, although the agent in fact does not have authority to sell on the conditions named. Ludlow-Saylor Wire Co. v. Fribley Hardware, etc., Co., 67 Kan. 710, 74 P 237.

[b] **Mistake in instructions.**—Where a seller authorized his agent to agree that title should pass upon the payment of one hundred and ten dollars, and the cash was paid, the title passed, although the seller made a mistake of ten dollars in his in-

cipal.[41] The fact that the agent imposes terms in addition to those prescribed by the principal will give third persons no claim against the agent under the contract he had authority to make; third persons cannot complain if the principal does not.[42]

An agent may give the purchaser a reasonable time, if his authority is unrestricted, within which to accept or reject the proposition of sale,[43] or to make trial of machinery, or other similar wares, to determine whether it is satisfactory with the privilege of returning if not satisfactory,[44] unless his authority is merely to solicit orders on a prescribed form.[45]

[§ 234] **(d) Sale for Cash or on Credit; Money Consideration.** As a general rule the sale must be for cash only, and, in the absence of special authority, mere authority to sell does not give the agent authority to sell on credit,[46] and such an agent cannot bind his principal by receiving payment in bonds, notes, or other paper.[47] But a sale on credit is good where it is expressly authorized, or where such is shown to be the usage and custom, well rec-

structions, and in the seller's replevin action against the buyer it was error to strike out an answer setting up such facts to show title in defendant. Lippincott v. Schneider, 84 N. J. L. 653, 87 A 437.

41. Merrimac Paper Co. v. Illinois Trust, etc., Bank, 30 Ill. A. 268 [aff 129 Ill. 296, 21 NE 787] (holding that where an agent is authorized to sell goods to a person if he is responsible and in first-class credit, and does so in good faith and on a mistake in judgment, the principal is bound, although such person's credit is not first-class); McDonald v. Preston Nat. Bank, 111 Mich. 649, 70 NW 143 (holding that, where an agent authorized to make sales treats a consignment of goods made by him as an actual sale, his election is binding on his principal).

[a] **Where a principal directs the agent to sell only to a reliable purchaser**, "one whom you think would make his payments promptly," the principal is bound by the judgment of the agent as to the purchaser's reliability. Peay v. Seigler, 48 S. C. 496, 26 SE 885, 59 AmSR 731.

42. Goodale v. Wheeler, 11 N. H. 424 (where the agent, in addition to the conditions prescribed by the principal, provided that twenty dollars of the purchase money should be paid at the time of the sale, to be forfeited if the purchaser should not complete his contract); McLaughlin v. Wheeler, 1 S. D. 497, 47 NW 816.

[a] **Illustration.** — Although a salesman has special authority to make a particular sale unconditional, yet if in making the contract of sale he inserts a condition that it shall be "subject to confirmation" no action can be maintained for the nondelivery of the goods without showing a confirmation of the sale by the principal; and where such contract is evidenced by a written memorandum signed by the salesman and the purchaser, which memorandum contains such stipulation, in the absence of fraud the stipulation is binding on the purchaser, although he did not notice it and was not aware of it. Gilman v. Stock, 95 Me. 359, 50 A 31.

43. Meister v. Cleveland Dryer Co., 11 Ill. A. 227.

44. Conn.—Zaleski v. Clark, 44 Conn. 218, 26 AmR 446.

Ind.—Marion Mfg. Co. v. Harding, 155 Ind. 648, 58 NE 194 (holding that the state agent of the seller of machinery, having general authority, had authority to bind the seller by a promise to the purchaser that, if the machinery should not work satisfactorily, it would be taken back); Springfield Engine, etc., Co. v. Kennedy, 7 Ind. A. 502, 34 NE 856.

Minn.—Gaar, etc., Co. v. Patterson, 65 Minn. 449, 68 NW 69; Oster v. Mickley, 35 Minn. 245, 28 NW 710; Deering v. Thom, 29 Minn. 120, 12 NW 350.

N. Y.—Dochtermann Van, etc., Co. v. Fiss, etc., Co., 155 App. Div. 162, 140 NYS 72 [aff 208 N. Y. 577 mem, 101 NE 1100 mem].

Tex.—Eastern Mfg. Co. v. Brenk, 32 Tex. Civ. A. 97, 73 SW 538 (holding that it is within the apparent scope of an agency for the sale of goods to stipulate that, if the property sold is unsatisfactory to the purchaser, it may be returned for credit).

Wis.—Warder, etc., Co. v. Pischer, 110 Wis. 363, 85 NW 968.

[a] **Terms of trial.**—Under a contract for the sale of musical instruments, whereby they were to remain the property of the principal until sold and the sale ratified by it, and the agent was to repossess and deliver to the principal any instrument it might direct, etc., such agent was authorized to place an instrument on trial with another, taking from him a portion of the purchase price, and allowing him, at the expiration of a fixed time, the privilege of either paying the balance of the purchase price and retaining the instrument, or of returning it and having the money advanced in part payment refunded to him. Jesse French Piano, etc., Co. v. Cardwell, 114 Ga. 340, 40 SE 292.

[b] **Sale of machinery.**—An agent intrusted with harvesters to sell may give a reasonable opportunity to try the machine, and make a contract to take effect as a sale if it proves satisfactory. The Monte Allegre, 9 Wheat. (U. S.) 616, 6 L. ed. 174; Murray v. Brooks, 41 Iowa 45; McCormick v. Kelly, 28 Minn. 135, 9 NW 675; Boothby v. Scales, 27 Wis. 626.

[c] **It is immaterial that the seller is not apprised of such agreement**, where the agent has apparent authority to agree that the goods may be returned if unsatisfactory. Eastern Mfg. Co. v. Brenk, 32 Tex. Civ. A. 97, 73 SW 538.

45. McCaskey Register Co. v. Curfman, 45 Ind. A. 297, 90 NE 823 (holding that where a selling agent was authorized to solicit orders in writing only on a prescribed form, he was not authorized to agree that a buyer, executing a regular written form of sale contract, should be entitled under a parol agreement to receive the goods on trial and return them if dissatisfied).

46. Ala.—Union Refining Co. v. Barton, 77 Ala. 148; Burks v. Hubbard, 69 Ala. 379; Falls v. Gaither, 9 Port. 605 (holding that an authority to an agent to sell and receive the money does not authorize him to sell without receiving the money).

Cal.—Harlan v. Ely, 68 Cal. 522, 9 P 947.

Ga.—Whitley v. James, 121 Ga. 521, 49 SE 600 (holding that where a purchaser is charged with notice that an agent is authorized to sell only for cash, a sale on credit may be treated as void by his principal); Great Southern Acc., etc., Co. v. Guthrie, 18 Ga. A. 288, 79 SE 162, 164 [cit Cyc]; Herrington v. Shumate Razor Co., 6 Ga. A. 861 65 SE 1064.

Ind.—Rich v. Johnson, 61 Ind. 246.

Iowa.—Graul v. Strutzel, 53 Iowa 712, 6 NW 119, 36 AmR 250 (holding that authority to sell property does not authorize a sale on credit, unless such sale is in accord with the usages of trade); Payne v. Potter, 9 Iowa 549.

Ky.—Baldwin v. Tucker, 112 Ky. 282, 65 SW 841, 24 KyL 1538, 57 LRA 451.

Me.—Moore v. Thompson, 82 Me. 497 (holding the sale good where other goods were sold with those of the principal and enough cash was received to pay for the principal's goods).

Md.—Jones v. Ortel, 114 Md. 205, 78 A 1030.

Mass.—Norton v. Nevills, 174 Mass. 243, 54 NE 537 (holding that a special agent, authorized to sell shares of stock for cash only, has no authority to sell such shares on credit); Brown v. Bull, 3 Mass. 211.

Mich.—Kops Bros. Co. v. Smith, 137 Mich. 28, 100 NW 169.

N. Y.—Delafield v. Illinois, 2 Hill 159, 26 Wend. 192 [aff 8 Paige 527].

N. D.—Aultman, etc., Mach. Co. v. Runck, 23 N. D. 579, 137 NW 831.

Tex.—McCarthy v. Texas Loan, etc., Co., (Civ. A.) 142 SW 96.

Vt.—Riley v. Wheeler, 44 Vt. 189; Chapman v. Devereux, 32 Vt. 616; Catlin v. Smith, 24 Vt. 85; Bliss v. Arnold, 8 Vt. 252, 30 AmD 465.

W. Va.—State v. Chilton, 49 W. Va. 453, 39 SE 612.

Wis.—Hall v. Storrs, 7 Wis. 253 (holding that a direction to sell for cash does not allow the agent to take a check payable the day after the sale, even though that is the customary way at the place of sale of making what are there called cash sales).

Eng.—Wiltshire v. Sims, 1 Campb. 258; Underwood v. Nicholls, 17 C. B. 239, 84 ECL 239, 139 Reprint 1062, 21 ERC 26. Compare Catterall v. Hindle, L. R. 2 C. P. 368, 21 ERC 34 [rev L. R. 1 C. P. 186, 21 ERC 28].

[a] **A sales agent has no general authority** to sell goods with the understanding that the purchaser can pay for them as he sells them. Beck v. Freund, 117 NYS 193. Compare Patton-Worsham Drug Co. v. Stark, (Tex. Civ. A.) 89 SW 799.

[b] **A power to sell for cash does not authorize a sale for part cash** and the balance when the buyer is satisfied with the title. Gault Lumber Co. v. Pyles, 19 Okl. 445, 92 P 175.

[c] **A secretary of state** authorized to sell certain books for the state has no authority to sell on credit. State v. Chilton, 49 W. Va. 453, 39 SE 612.

47. Baldwin v. Tucker, 112 Ky. 282, 65 SW 841, 23 KyL 1538, 57 LRA 451 (holding that, as it is not customary for agents selling pianos to have authority to take notes payable to themselves for the price, the purchaser of a piano from such an agent is bound to know that the agent has no such authority, in the absence of anything to show the contrary); Case v. Kramer, 34 Mont. 142, 85 P 878. See also cases supra note 46.

[a] **An agent with authority to sell for cash** (1) cannot take payment in notes to himself or his principal. Galbraith v. Weber, 58 Wash. 132, 107 P 1050, 28 LRANS 341 and note. (2) However, where such an agent accepts as part payment a check payable to the order of the principal, indorses it for collection, and subsequently cashes it and places the money in the bank to the credit of his principal, the latter cannot complain inasmuch as he actually received the money. Case v. Kramer, 34 Mont. 142, 85 P 878.

[b] **Where an agent, authorized to sell corporate stock for cash only**, takes a note for stock sold, and attaches the stock to the note, title to the stock does not pass to the purchaser, although he has no knowledge of the terms of the contract between the corporation and the agent. Great Southern Acc., etc., Co. v. Guthrie, 18 Ga. A. 288, 79 SE 162.

[c] **Estoppel.**—Where defendant

ognized and known to the person dealt with,[48] as well as in cases where the manner in which the business is conducted makes sales on credit necessary.[49] A sale for cash upon the delivery of the goods has been held to be within the power of an agent authorized to sell for cash.[50]

Money consideration. A sale contemplates a price in money, and hence authority to sell confers power to sell for cash but not to exchange for other property, or for part property and part cash,[51] unless the terms of the agency clearly empower him to exchange;[52] and the fact that the agent can make the sale only by accepting goods in payment does not authorize him to make the sale on such terms.[53]

permitted an employee to transact the business of selling goods as on his own account under the name of a company, holding him out as such company, it is estopped to deny his authority to take notes in his own name or in the name of the company for goods sold, and transfer the same to persons dealing with him without notice. Gardner v. Wiley, 46 Or. 96, 79 P 341.

48. U. S.—Forrestier v. Bordman, 9 F. Cas. No. 4,945, 1 Story 43.

Ala.—Burks v. Hubbard, 69 Ala. 379.

Hawaii.—Spencer v. Bennett, 2 Hawaii 415.

Me.—Cowan v. Adams, 10 Me. 374, 25 AmD 242.

Mo.—Wheeler, etc., Mfg. Co. v. Givan, 65 Mo. 89.

N. Y.—Wait v. Borne, 7 NYSt 113.

Tenn.—May v. Mitchell, 5 Humphr. 365.

W. Va.—State v. Chilton, 49 W. Va. 453, 39 SE 612.

See Payne v. Potter, 9 Iowa 549; Macnutt v. Shaffner, 34 N. S. 402.

[a] **An agent may sell on credit** when so authorized by his power of attorney, or by the fixed usage of trade in reference to the article sold, but such usage cannot prevail contrary to such power of attorney or the law, and moreover the knowledge of such usage must be brought home to the person affected. State v. Chilton, 49 W. Va. 453, 39 SE 612.

[b] **Where directed to sell for cash** the agent cannot claim the protection of a custom among agents of the same class to sell on credit. Catlin v. Smith, 24 Vt. 85; Bliss v. Arnold, 8 Vt. 252, 30 AmD 467; State v. Chilton, 49 W. Va. 453, 39 SE 612.

[c] **To be paid for when sold.**—It is within the scope of the apparent authority of a salesman to the retail trade to make a sale on terms providing that the goods shall be paid for when sold by the buyer, and, in the absence of any notice to the buyer of a limitation on the salesman's authority, a contract so made is binding on the seller, subject, perhaps, to a right expressly reserved by it in the written order signed by the buyer to reject the same, if taken at unsatisfactory prices or terms, although the terms of sale as expressed in the written order are changed by the salesman, or someone else other than the buyer, before the order is received by the seller. Patton-Worsham Drug Co. v. Stark, (Tex. Civ. A.) 89 SW 799. Compare Beck v. Freund, 117 NYS 193.

[d] **Custom controls the period** as well as the fact of the credit. Graul v. Strutzel, 53 Iowa 712, 6 NW 119, 36 AmR 250; Payne v. Potter, 9 Iowa 549.

[e] **Credit must be given in name of principal.**—"It may be conceded that where an agent has authority to sell for cash only, he cannot take payment in notes payable in the future, either to himself or the principal, and it may be also conceded that where the agent has authority to sell upon credit only, he is not authorized to take such credit except in the name of his principal. We mean such authority as a purchaser is bound to notice." Galbraith v. Weber, 53 Wash. 132, 140, 107 P 1050, 28 LRANS 841 (holding, however, that where the agent has authority to sell either for cash or on credit, it is a question for the jury whether the taking of notes payable to the agent is within his apparent authority).

49. Pittman v. The Samuel Marshall, 54 Fed. 396, 4 CCA 385; Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 AmR 45.

50. Bristol v. Mente, 79 App. Div. 67, 80 NYS 52 [aff 178 N. Y. 599 mem, 70 NE 1096 mem] (holding that instructions to an agent authorized to sell goods, "all sales to be net cash," were not disregarded by the agent where, on the buyer offering to make a deposit when the contract of sale was completed, he told him that he could wait until actual delivery of the goods).

51. Colo.—Sioux City Nursery, etc., Co. v. Magnes, 5 Colo. A. 172, 38 P 330.

Conn.—Kearns v. Nickse, 80 Conn. 23, 66 A 779, 10 LRANS 1118 and note (holding that where plaintiff delivered his horse to a special agent for some purpose connected with its sale, the agent had no apparent authority to exchange the horse for another horse and some money).

Ga.—Gorham v. Felker, 102 Ga. 260, 28 SE 1002.

Ill.—Drury v. Barnes, 29 Ill. A. 166.

Iowa.—Holmes v. Redhead, 104 Iowa 399, 73 NW 878; Findley v. Cowles, 93 Iowa 389, 61 NW 998.

Ky.—Russell v. Cox, 38 SW 1087, 18 KyL 1087.

Mich.—Starr Piano Co. v. Morrison, 159 Mich. 583, 124 NW 562; Trudo v. Anderson, 10 Mich. 357, 81 AmD 795.

Mo.—Wheeler, etc., Mfg. Co. v. Givan, 65 Mo. 89.

N. H.—Taylor, etc., Organ Co. v. Starkey, 59 N. H. 142.

N. Y.—Block v. Dundon, 83 App. Div. 539, 81 NYS 1114; Jones v. Richards, 50 Misc. 645, 98 NYS 698; Beck v. Donohue, 27 Misc. 230, 57 NYS 741.

N. C.—Fay, etc., Co. v. Causey, 131 N. C. 350, 42 SE 827 (holding that an agreement by an agent selling machinery that payment might be made in lumber was not binding on the principal, where not ratified); Brown v. Smith, 67 N. C. 245.

Tex.—Stember v. Keene, (Civ. A.) 152 SW 661.

Wis.—Roberts v. Francis, 123 Wis. 78, 100 NW 1076.

Eng.—Guerreiro v. Peile, 3 B. & Ald. 616, 5 ECL 354, 106 Reprint 786.

Man.—Wesbrook v. Willoughby, 10 Man. 600.

Ont.—Stewart v. Rounds, 7 Ont. A. 515.

[a] **Illustrations.**—(1) An agent employed to sell cannot, in the absence of special authority, bind his principal by a contract to deliver goods in exchange for advertising. Beck v. Donohue, 27 Misc. 230, 57 NYS 741. (2) Authority to negotiate a draft for cash does not give any authority to sell for part cash and part merchandise. Dowden v. Cryder, 55 N. J. L. 329, 26 A 941.

[b] **Agents for sale of farm machinery.**—"The employment of agents to solicit orders for farm machinery, which orders must be approved by the company manufacturing the machinery before they can become effectual for any purpose, does not give such agents the authority to contract for and receive second hand machinery in payment for the new machinery ordered, prior to the acceptance of the order and the time for delivering the new machinery. There is nothing in their position as such soliciting agent that would authorize a person dealing with the company through them to believe that they possessed any such authority." Shull v. New Birdsall Co., 15 S. D. 8, 14, 86 NW 654.

[c] **Notice to purchaser.**—A party dealing with an agent knowing him to be such, and having a right to suppose that he had authority to sell goods in his possession, should know that an authority to exchange them is not within an authority to sell. Starr Piano Co. v. Morrison, 159 Mich. 583, 124 NW 562; Jones v. Richards, 50 Misc. 645, 98 NYS 698.

[d] **The principal may be estopped** (1) by his course of dealing to deny the agent's authority to take property in payment. Eggleston v. Advance Thresher Co., 96 Minn. 241, 104 NW 891. Compare Stewart v. Rounds, 7 Ont. A. 515 (holding that a single previous exchange does not warrant an inference of general authority to exchange). (2) Thus, although a written contract between the principal and his agent authorizes the latter to make cash sales only, the acceptance by the principal of anything in lieu of cash is equivalent to cash as to it. Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 P 849.

52. Gaus v. Hathaway, 66 Ill. A. 149 (holding that conditions in a contract of agency for the sale of pianos, providing that all new and secondhand instruments taken in exchange or part payment for instruments are to be regarded the same as goods consigned by the principal to his agent, and credited at a fair cash value to be determined by the principal, clearly imply an authority to exchange or trade pianos, as well as to sell them); Lindley v. Lupton, 118 Mich. 466, 76 NW 1037; Macnutt v. Shaffner, 34 N. S. 402.

[a] **Exchange must be made as authorized.**—(1) Where plaintiff ordered a threshing outfit of defendant, to be paid for, "at the time and place of delivery," in part by a secondhand outfit, and balance with notes, and the order also provided that it was taken subject to the approval of defendant, and that no agent could bind defendant by any agreement preliminary to, collateral with, or additional to the contract as set out, or waive any condition thereof, and the next day after giving the order to defendant's agents, and ten days before it was approved, plaintiff delivered the secondhand outfit to such agents who immediately sold it, the delivery of the old outfit to defendant's agents before the new outfit was delivered was a delivery to them personally, for which defendant was not responsible, since they had no actual or ostensible authority to receive it for defendant prior to the time stated in the order. Shull v. New Birdsall Co., 15 S. D. 8, 14, 86 NW 654. (2) So where plaintiff signed an order for the purchase of a traction machine, to be shipped to defendant's agents at the place of sale, agreeing to accept the property subject to the conditions printed thereon, and to pay a specified sum and deliver certain secondhand machinery in part payment, and the order specified that it was subject to acceptance by defendant, and that no agent had any power to bind defendant by any agreement additional to the contract, or waive any of its conditions, defendant's agents had no authority to receive, but agreed to accept, the secondhand machinery in part payment, which was delivered to them on the day the order was given, and plaintiff was not entitled to recover the value of the secondhand machinery, there being no evidence that defendant ratified the act of its agents in taking it in payment. Elfring v. New Birdsall Co., 16 S. D. 252, 92 NW 29.

53. Block v. Dundon, 83 App. Div.

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Payment of claims. A selling agent presumptively has no power to sell the property in payment of a claim against his principal,[54] and certainly an agent empowered to sell his principal's property has no implied power to dispose of it for his own benefit in payment of his own debt, as the transaction must be for the benefit of the principal, and not of the agent, and third persons are charged with knowledge of this fact,[55] unless such power is expressly conferred or results from the general usage of the business or the habits or dealings between the parties.[56]

[§ 235] **(e) Power to Warrant Title.** General authority given by a principal to an agent to sell personal property carries with it by necessary implication the power to warrant the title to the property so as to bind the owner,[57] unless the agent's authority in this respect is expressly and openly restricted.[58]

[§ 236] **(f) Power to Warrant Quality—aa. In General.**[59] Implied warranties being imposed by law present no questions as to authority to make them;[60] the questions which arise are as to the implied authority to make an express warranty. There is considerable confusion in the decisions as to the implied power of an agent to warrant the quality or condition of personal property sold by him.[61] The rule which is supported by the more numerous and more recent decisions is that if, in the sale of that kind or class of goods which the agent is empowered to sell, it is usual in the market to give a warranty the agent may give that warranty in order to effect a sale, and the law presumes that he has such authority;[62] and that, if an agent with express authority to sell has no actual authority to warrant, no authority can be implied where the property is of a

539, 542, 81 NYS 1114 (holding that, where an agent is authorized to sell liquors for cash or on credit, and to collect accounts, it is not indispensable to the performance of his duties to take cigars in payment of liquors sold by him, and that the fact that he cannot procure a certain person's order unless he takes cigars in payment does not authorize him to make a sale on such terms. In this case the court said: "It was not necessary that he should take this order at all. He could make sales to others for cash or on credit, and could thus perform the duties imposed upon him as agent. The duty was to sell for cash or on credit wherever he could, and not to sell to any one person, at all hazards, whether he could get cash down or at some future time or not").

54. Lombard v. Winslow, 3 N. B. 327.

[a] **A clerk in a retail store,** in the ordinary and usual course of business, has no authority to sell goods by wholesale in payment of a debt of his principal. Lee v. Tinges, 7 Md. 215; Hampton v. Matthews, 14 Pa. 105.

[b] **Liability of purchaser.**—Where a salesman agrees with a creditor of his principal to sell him goods in payment of his debt, and without the knowledge of the principal and against his wishes the goods are selected and sent off by the purchaser, and the salesman at the same time packs up and sends off other goods to pay other creditors of his principal, the purchaser is not liable for the value of the goods, unless he aided, assisted, and concurred in their being so taken and carried away for the other creditors, and the burden is on plaintiff to prove it. Peshine v. Shepperson, 17 Gratt. (58 Va.) 472, 94 AmD 468.

55. U. S.—Warner v. Martin, 11 How. 209, 13 L. ed. 667.

Ala.—Coleman v. Siler, 74 Ala. 435; Burks v. Hubbard, 69 Ala. 379; Powell v. Henry, 27 Ala. 612.

Ark.—Grooms v. Neff Harness Co., 79 Ark. 401, 96 SW 135; Smith v. James, 53 Ark. 135, 13 SW 701.

Colo.—Liebhardt v. Wilson, 38 Colo. 1, 88 P 173, 120 AmSR 97; Sioux City Nursery, etc., Co. v. Magnes, 5 Colo. A. 172, 38 P 330.

Ga.—Walton Guano Co. v. McCall, 111 Ga. 114, 36 SE 469; Kaiser v. Hancock, 106 Ga. 217, 32 SE 123; Sonneborn v. Moore, 105 Ga. 497, 30 SE 947; Hodgson v. Raphael, 105 Ga. 480, 30 SE 416; University Bank v. Tuck, 96 Ga. 456, 23 SE 467; Mitchell v. Printup, 68 Ga. 677; Bostick v. Hardy, 30 Ga. 836.

Ind. T.—Miller v. Springfield Wagon Co., 6 Ind. T. 115, 89 SW 1011.

Kan.—Grubel v. Busche, 75 Kan. 820, 91 P 73.

Ky.—Baldwin v. Tucker, 112 Ky. 282, 65 SW 841, 23 KyL 1538, 57 LRA 451.

Me.—Hook v. Crowe, 100 Me. 399, 61 A 1080 (holding that a selling agent has no implied authority which binds the principal to contract that payment may be made by goods to be sold or services to be rendered to him personally); Rodick v. Coburn, 68 Me. 170.

Mass.—Collateral Loan Co. v. Sallinger, 195 Mass. 135, 80 NE 811.

Mich.—Hurley v. Watson, 92 Mich. 121, 52 NW 457.

Minn.—Stewart v. Cowles, 67 Minn. 184, 69 NW 694.

N. H.—Gould v. Blodgett, 61 N. H. 115; Rice v. Lyndeborough Glass Co., 60 N. H. 195; Holton v. Smith, 7 N. H. 446.

Oh.—Murdock v. National Tube Works Co., 7 Oh. Dec. (Reprint) 465, 3 CincLBul 409.

Pa.—Wilson v. Wilson-Rogers, 181 Pa. 80, 37 A 117 (holding that a general power of attorney for sale of corporate stock does not authorize the attorney in fact to sell the stock in payment of his own debts); Kern's Est., 176 Pa. 373, 35 A 231; Hertzler v. Geigley, 22 LancLRev 1.

Tenn.—Hackney v. Jones, 3 Humphr. 612.

Tex.—Belton Compress Co. v. Belton Brick Mfg. Co., 64 Tex. 337; Low v. Moore, 31 Tex. Civ. A. 460, 72 SW 421; Chattanooga Fdy., etc., Co. v. Gorman, 12 Tex. Civ. A. 75, 34 SW 308.

W. Va.—Merchants', etc., Nat. Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 SE 880, 70 LRA 312.

Eng.—Beveridge v. Beveridge, L. R. 2 H. L. Sc. 133; Bute v. Mason, 7 Moore P. C. 1, 13 Reprint 779.

N. S.—Garden v. Neily, 31 N. S. 89.

[a] **Illustration.**—A sale by an agent who receives a part of the price of the thing sold in cash, and accepts as a satisfaction of the balance the cancellation of a debt due by himself to the vendee, is not binding upon the principal unless ratified by him. Hodgson v. Raphael, 105 Ga. 480, 30 SE 416.

[b] **The principal may expressly authorize** the agent to sell and receive the proceeds for his own use, or to settle a claim he holds against the principal. Tyrrell v. Rose, 17 Grant Ch. (U. C.) 394.

[c] **Proof of authority to sell for agent's debt.**—It is not within the apparent authority of a general agent, having the entire management of his principal's business, to bind him by a contract for the sale of chattels belonging to such business, to be paid for by credit of the purchase price upon an indebtedness due from the agent to the purchaser. The burden is upon the purchaser to show that the agent had such authority. But where there is no question as to the good faith of either the agent or the purchaser and both agent and principal are dead at the time of the trial, any circumstantial evidence fairly tending to establish the agent's authority is sufficient to make a prima facie case. The evidence in this case was held sufficient to establish the authority of the agent to sell the goods of his principal in payment of the agent's debt. Stewart v. Cowles, 67 Minn. 184, 69 NW 694.

[d] **Checks against funds in bank.**—Where an agent gives his principal a check "as agent" drawn against a fund in the bank which is the proceeds of the sale of the principal's goods, the principal can collect the check, although the agent authorized the bank to apply the funds to his own indebtedness. Baker v. New York Nat. Exch. Bank, 100 N. Y. 31, 2 NE 452, 53 AmR 150, 16 AbbNCas 458. To same effect Central Nat. Bank v. Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693.

Authority to pledge the property for agent's debt see infra §§ 295, 296.

56. Belton Compress Co. v. Belton Brick Mfg. Co., 64 Tex. 337 (so held of an agent with power to sell and receive payments).

57. Ezell v. Franklin, 2 Sneed (Tenn.) 236.

58. Bybee v. Embree-McLean Carriage Co., (Tex. Civ. A.) 135 SW 203 (holding that, where an order contract for the sale of buggies provided that all representations and agreements made by the seller's salesman, which were binding upon the parties, were written on the order, and that it was subject to the seller's acceptance and would not be countermanded, the seller was not bound by oral promises by its salesman, without its knowledge, that it would protect the buyer against any claim of title or interest in the buggies by third persons).

59. **Express and implied warranties** see Sales [35 Cyc 365 et seq].

60. See H. B. Smith Co. v. Williams, 29 Ind. A. 336, 63 NE 318 (holding that, where an express warranty made by an agent is nothing more than that which the law would imply, the principal is bound by it).

61. See Dennis v. Ashley, 15 Mo. 453.

62. Ala.—Herring v. Skaggs, 73 Ala. 446; Herring v. Skaggs, 62 Ala. 180, 34 AmR 4; Cocke v. Campbell, 13 Ala. 286; Bradford v. Bush, 10 Ala. 386; Skinner v. Gunn, 9 Port. 305.

Mass.—Upton v. Suffolk County Mills, 11 Cush. 586, 59 AmD 163; Goodenow v. Tyler, 7 Mass. 36, 5 AmD 22.

Mo.—Hayner v. Churchill, 29 Mo. A. 676.

N. Y.—Bierman v. City Mills Co., 151 N. Y. 482; Wait v. Borne, 123 N. Y. 592, 25 NE 1053; Smith v. Tracy, 36 N. Y. 79; Reynolds v. Mayor, etc., Co., 39 App. Div. 218, 57 NYS 106 (holding that an agent to sell property, in the absence of express limitations of his powers, is authorized to make any declaration regarding the property necessary to effect a sale, and usually incidental thereto, and

description not usually sold with warranty;[63] nor can a usage be shown when its effect would be to create between the parties a new contract different, in essential particulars, from that actually made by them.[64]

Broader rule. There are cases, however, which lay down a broader rule and hold that an agent upon whom general authority to sell is conferred will be presumed to have authority to warrant, or make representations, unless the contrary appears,[65] particularly where the article sold is not present and subject to the inspection of the purchaser.[66]

A distinction is sometimes drawn between the power of a general and a special agent in this respect, it being held that a special agent has no implied power to warrant the quality or condition of goods sold by him, while a general agent has such authority, unless the contrary appears.[67] But this distinction has not always been recognized, and there is authority for the proposition that either a general or a

that declarations thus made, if within the scope of his authority, are binding on the principal, although the sale was not concluded until a subsequent day); Piller v. Piser, 67 Misc. 445, 123 NYS 105; Pennsylvania, etc., Oil Co. v. Spitelnik, 27 Misc. 557, 58 NYS 311; Bierman v. City Mills Co., 10 Misc. 140, 30 NYS 929 [rev on other grounds 151 N. Y. 482, 45 NE 856, 56 AmSR 635, 37 LRA 799]. See also Ahern v. Goodspeed, 72 N. Y. 108.

Va.—Reese v. Bates, 94 Va. 321, 26 SE 865.

Wis.—Waupaca Electric Light, etc., Co. v. Milwaukee Electric R., etc., Co., 112 Wis. 469, 88 NW 308; Newell v. Clapp, 97 Wis. 104, 72 NW 366; Larson v. Aultman, etc., Co., 86 Wis. 281, 56 NW 915, 39 AmSR 893; Pickert v. Marston, 68 Wis. 465, 32 NW 550, 60 AmR 876 [overr Boothby v. Scales, 27 Wis. 626].

Eng.—Dingle v. Hare, 7 C. B. N. S. 145, 97 ECL 145, 141 Reprint 770.

[a] **Custom from which authority implied.**—The custom from which authority to make a warranty or representation may be implied must be a usage of sellers of the goods in question so well settled, notorious, and continuous as to raise a fair presumption that it was known to the buyer and seller, and that the sales were made in reference to it. Herring v. Skaggs, 73 Ala. 446. See generally Customs and Usages [12 Cyc 1071 et seq].

[b] **To hold one for any express warranty** by his salesman of the quality of goods sold, the salesman must be shown to have had authority to make such warranty. Whitman v. Jacobson, 119 NYS 246.

[c] **Agent introducing new article.**—The rule in favor of the implied authority of a general agent applies with peculiar force to an agent who is sent out for the purpose of introducing a new article on the market, for example, a new brand of fertilizer. Hille v. Adair, 58 SW 697, 22 KyL 742.

[d] **One employed to sell milk at retail** from house to house may bind his employer by representations to customers as to the quality of the milk furnished, since such representations are within the apparent scope of his authority, but representations made by him to agents of the agricultural department are not binding on the employer, especially in a quasi criminal action against him for selling adulterated milk in violation of statute. Peo. v. Terwilliger, 59 Misc. 617, 110 NYS 1034.

63. Ala.—Troy Grocery Co. v. Potter, 139 Ala. 359, 36 S 12 (holding that a traveling salesman, who has authority to take orders for fish, does not necessarily have authority to bind his principals by warranting in their behalf that the fish will keep sound for a certain number of months from the time they were packed); Herring v. Skaggs, 73 Ala. 446 (warranty of safe as burglar proof).

Fla.—Croom v. Swann, 1 Fla. 211.

Ga.—Florence v. Patillo, 105 Ga. 577, 32 SE 642.

Ill.—Central Commercial Co. v. Lehon Co., 173 Ill. A. 27.

Iowa.—Graul v. Strutzel, 53 Iowa 712, 6 NW 119, 36 AmR 250 (a sale of notes).

Ky.—Case Mill Mfg. Co. v. Vickers, 147 Ky. 396, 144 SW 76 (flour mill machinery).

Mass.—Anderson v. Bruner, 112 Mass. 14; Upton v. Suffolk County Mills, 11 Cush. 586, 59 AmD 163.

Mont.—Kircher v. Conrad, 9 Mont. 191, 23 P 74, 18 AmSR 731, 7 LRA 471 (warranty by clerk in store).

N. J.—Cooley v. Perrine, 41 N. J. L. 322, 32 AmR 210 [aff 42 N. J. L. 623].

N. Y.—Wait v. Borne, 123 N. Y. 592, 25 NE 1053; Smith v. Tracy, 36 N. Y. 79; Pennsylvania, etc., Oil Co. v. Spitelnik, 27 Misc. 557, 58 NYS 311 (holding that a buyer cannot recover damages for breach of warranty of goods sold by an agent without proof that the agent had authority to warrant, or that warranty customarily attended the sale of such goods); Bierman v. City Mills Co., 10 Misc. 140, 30 NYS 929 [rev on other grounds 151 N. Y. 482, 45 NE 856, 56 AmSR 636, 37 LRA 799].

Wis.—Pickert v. Marston, 68 Wis. 465, 32 NW 550, 60 AmR 876.

"The idea upon which is founded the right to warrant on the part of an agent to sell a particular article, is that he has been clothed with power to make all the common and usual contracts necessary or appropriate to accomplish the sale of the article intrusted to him. And if in the sale of that kind or class of goods thus confided to him it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale, and the law presumes that he has such authority. If the agent, with express authority to sell, has no actual authority to warrant, no authority can be implied where the property is of a description not usually sold with warranty." Wait v. Borne, 123 N. Y. 592, 603, 25 NE 1053 [quot Bierman v. City Mills Co., 151 N. Y. 482, 489, 45 NE 856, 56 AmSR 636, 37 LRA 799 (rev on other grounds 10 Misc. 140, 30 NYS 929)].

[a] **Illustration.**—Statements by an agent to a vendee that the goods sold by the agent are all wool does not bind his principals, where there is no custom shown for a selling agent to warrant the quality of his goods, or proof that his principals authorized him to warrant the quality. Ellner v. Priestly, 39 Misc. 535, 80 NYS 371.

[b] **A salesman, authorized to sell goods at the store** of his employer by showing the articles to prospective purchasers, has no implied authority to give a warranty which is binding on his employer, unless it is usual in the market on a sale of that class of goods to give a warranty. Piller v. Piser, 67 Misc. 445, 123 NYS 105.

[c] **An agent authorized to sell a horse** cannot bind his principal by a warranty that the animal is sound, in the absence of express authority or of a usage to warrant on such sale. Westurn v. Page, 94 Wis. 251, 68 NW 1003.

[d] **Ratification.**—The fact that the seller executes the contract of sale by delivering the goods sold does not operate as a ratification of the agent's unauthorized warranty where the former, in thus completing the contract, acted wholly in ignorance of the warranty given by the latter. Bierman v. City Mills Co., 151 N. Y. 482, 45 NE 856, 56 AmSR 635, 37 LRA 799. See generally supra §§ 100, 122.

[e] **No right to guarantee executions** can be implied from an agency to sell them. Lipscomb v. Kitrell, 11 Humphr. (Tenn.) 256.

64. Dodd v. Farlow, 11 Allen (Mass.) 426, 429, 87 AmD 726 (where the court, in holding that the buyer could not introduce evidence of a usage of trade by which certain brokers were authorized to warrant, for their principals, merchandise sold by them, said: "The alleged usage . . . is unauthorized by law, and cannot be regarded as valid. It contravenes the principle, which has been sanctioned and adopted by this court upon full and deliberate consideration, that no usage will be held legal or binding on parties which not only relates to and regulates a particular course or mode of dealing but which also engrafts on a contract of sale a stipulation or obligation which is different from or inconsistent with the rule of the common law on the same subject").

65. U. S.—Schuchardt v. Allens, 1 Wall. 359, 17 L. ed. 642.

Del.—Dietrich v. Badders, 90 A 47 (holding that whether a mother, selling personalty at public auction, authorized her son to make a warranty may be implied from the general authority which she permitted him to exercise in managing the sale).

Ill.—Woodford v. McClenahan, 9 Ill. 85; Eckhart Carriage Co. v. Eden, 163 Ill. A. 552.

Ind.—Talmage v. Bierhause, 103 Ind. 270, 2 NE 716; King v. Edward Thompson Co., (A.) 104 NE 106.

Mo.—Dennis v. Ashley, 15 Mo. 453.

N. Y.—Manley v. Ackler, 76 Hun 546, 28 NYS 131; Milburn v. Belloni, 34 Barb. 607 [rev on other grounds 39 N. Y. 53, 100 AmD 403]; Murray v. Smith, 4 Daly 277.

N. C.—Haynor Mfg. Co. v. Davis, 147 N. C. 267, 61 SE 54, 17 LRANS 193 (holding that as a general rule an agent authorized to sell goods is, in the absence of express limitation of his powers, authorized to bind his principal by warranty, and, although an agent exceeds his authority, he binds his principal); Alpha Mills v. Watertown Steam Engine Co., 116 N. C. 797, 21 SE 917; Hunter v. Jameson, 28 N. C. 252.

Tenn.—Ezell v. Franklin, 2 Sneed 236.

[a] **One permitted by a wholesaler to solicit orders** for goods of the wholesaler has apparent authority to make representations concerning the quality and usefulness of the articles sold. Darks v. Scudders-Gale Grocer Co., 146 Mo. A. 246, 130 SW 430.

[b] **Automobile tires; as advertised.**—Where a contract appointing an agent for the sale of automobile tires provides for the distribution of advertising matter furnished by the principal which contains a statement that the tires will not "blow out," and requires the agent also to participate in such advertising campaign, the agent has implied authority to warrant that tires sold will not blow out. Federal Rubber Co. v. King, 12 Ga. A. 261, 76 SE 1083.

66. Talmage v. Bierhause, 103 Ind. 270, 2 NE 716.

67. Ind.—Brier v. Mankey, 47 Ind. A. 7, 93 NE 672.

Iowa.—Murray v. Brooks, 41 Iowa 45.

N. J.—Decker v. Fredericks, 47 N. J. L. 469, 1 A 470; Cooley v. Perrine, 41 N. J. L. 322, 32 AmR 210 [aff 42 N. J. L. 623].

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special agent may warrant the goods sold by him.[68]

No particular words are necessary to constitute a warranty.[69] A representation or any positive affirmation of the state, quality, condition, or fitness of the thing sold, which may be supposed to have entered into the consideration of the sale, showing an intention to warrant, and which was so understood and relied upon by the purchaser, will amount to a warranty.[70]

Personal liability of agent. If the agent signs his own name to a written warranty or otherwise gives his personal guaranty, the buyer may hold him liable thereon, although he cannot proceed against the principal because of the agent's lack of authority to bind the principal by a warranty.[71]

Different warranties given by principal and agent. Where the agent has authority to warrant, the buyer is not limited to a warranty given by the principal but may rely upon that given by the agent who made the sale;[72] but such warranties are not so independent and distinct that a purchaser will be entitled to a recovery against each for the same breach of warranty.[73]

[§ 237] **bb. Applications of General Rules.** An agent may warrant that an article sold as of a particular description or for a particular purpose shall be of that description or suitable for that purpose.[74]

Sale of horse or slave. It has frequently been held that one having unrestricted power to sell horses may warrant the age and soundness of a horse.[75] The same rule was applied to the sale of

N. Y.—Milburn v. Belloni, 34 Barb. 607 [rev on other grounds 39 N. Y. 53, 100 AmD 403]; Gibson v. Colt, 7 Johns. 390.

Eng.—Brady v. Todd, 9 C. B. N. S 592, 99 ECL 592, 142 Reprint 233 [dist Alexander v. Gibson, 2 Campb. 555; Helyear v. Hawke, 5 Esp. 72; Fenn v. Harrison, 3 T. R. 757, 100 Reprint 842, 4 T. R. 177, 100 Reprint 959].

Man.—Commercial Bank v. Besset, 7 Man. 586.

Compare Reese v. Bates, 94 Va. 321, 26 SE 865 (holding that without express authority a general agent is as powerless as a special agent to make contracts containing warranties, unless by the custom or usage of the trade in which he is engaged such contracts of warranty are made).

[a] **The rightful acts and authority of a special agent** to bind his principal by representations on the sale of personalty are circumscribed by the authority conferred upon him by his principal, and all other acts are mere nullities so far as the principal is concerned. Brier v. Mankey, 47 Ind. A. 7, 93 NE 672.

68. Nelson v. Cowing, 6 Hill (N. Y.) 336.

69. Murray v. Smith, 4 Daly (N. Y.) 277.

70. Murray v. Smith, 4 Daly (N. Y.) 277.

[a] **"This is of course distinguishable from a mere recommendation** of the article, or the expression of an opinion respecting it, or the innumerable things that a vendor will say to enhance the value of his commodity and induce the sale of it, such as its cheapness, excellence, &c., for then the buyer understands that he must examine and judge for himself and not that he is buying upon an express undertaking upon the part of the seller that the article is of a certain kind, or fit for a certain use, and that he will be responsible for any loss or injury that may arise if it should not be." Murray v. Smith, 4 Daly (N. Y.) 277, 279.

[b] **Representations by an agent to sell a newspaper,** as to its circulation and advertising patronage, where the agent had not been connected with the paper for more than a year, which was known to the buyers, did not constitute a warranty of the actual condition of the paper at the time of the sale. Florence v. Pattillo, 105 Ga. 577, 32 SE 642.

71. Croom v. Swann, 1 Fla. 211; Dent. v. McGrath, 3 Bush (Ky.) 174; Argersinger v. Macnaughton, 114 N. Y. 535, 21 NE 1022, 11 AmSR 687. See generally infra §§ 476–480.

[a] **While ordinarily agents acting for a known and disclosed principal** and guilty of no fraud or misrepresentation will not be liable in an action for breach of warranty they may, if they see fit, for a good consideration, make a personal contract of warranty which will be binding and enforceable. Dahlstrom v. Gemunder, 198 N. Y. 449, 92 NE 106, 19 AnnCas 771 and note.

72. Mathers v. Morris, 95 Ill. A. 541.

73. Dahlstrom v. Gemunder, 198 N. Y. 449, 92 NE 106, 19 AnnCas 771.

[a] **"Similar contracts of warranty made respectively by the agent and by the principal** on the same sale of an article would not be so independent and distinct that a vendee would be entitled to a recovery against each for the same breach of warranty and, therefore, to a duplication of damages for the same injury. The contracts of the agent, perhaps, might be regarded as made by him as surety for the principal and to guard against the default of the latter. However this may be, it must be clear that if the vendee recovered full damages and satisfaction from the principal because the article purchased did not correspond with the warranty, he could not then bring a second action against the agent and again recover damages. The two contracts guarantee the same thing, and if for the failure of the article to correspond with the warranty full damages have been recovered on one contract that necessarily must be a satisfaction and discharge of the other." Dahlstrom v. Gemunder, 198 N. Y. 449, 452, 92 NE 106, 19 AnnCas 771.

74. H. B. Smith Co. v. Williams, 29 Ind. A. 336, 63 NE 318 (warranty of heater); Conneautsville First Nat. Bank v. Robinson, 105 Iowa 463, 75 NW 334; Miller Supply Co. v. Limestone Min. Co., 159 Ky. 696, 167 SW 889; White v. Miller, 71 N. Y. 118, 27 AmR 18.

[a] **A general agent's representation that the fertilizers** offered for sale by him are as good as any other fertilizers of like price in the same market is not unjust, as against a principal without knowledge of it. Reese v. Bates, 94 Va. 321, 26 SE 865.

[b] **No special authority** in an agent who makes a sale to give a warranty that the chattel is fit for the purpose for which it was intended need be shown. Laumeier v. Dolph, (Mo. A.) 130 SW 360.

75. Ala.—Bradford v. Bush, 10 Ala. 386; Skinner v. Gunn, 9 Port. 305.

Del.—Ellison v. Simmons, 22 Del. 200, 65 A 591.

Ga.—Turner Bros. v. Manley, (A.) 80 SE 680 (holding that, under Civ. Code [1910] §§ 3593, 3598, an agent authorized to sell mules may agree that if a sick mule does not recover the seller will repay the purchase money).

Ida.—Park v. Brandt, 20 Ida. 660, 119 P 877 (holding that, in an action on a note given for the price of a stallion, where the sale was made by an agent of the seller, it was proper to show representations and statements by the agent where breach of warranty was pleaded as a defense, and that the principal was bound by such representations and warranties).

Ill.—Cochran v. Chitwood, 59 Ill. 53; Savage v. Eakins, 31 Ill. A. 267.

Iowa.—Conneautsville First Nat. Bank v. Robinson, 105 Iowa 463, 75 NW 334 (holding that a purchaser of a stallion from the owner's general agent, who had authority to warrant that the horse was of average breeding qualities, has, in the absence of any information to the contrary, the right to assume that he has the authority to warrant the horse to be a "sure foal getter"); Murray v. Brooks, 41 Iowa 45.

Ky.—Belmont v. Talbot, 51 SW 588, 21 KyL 453 (holding that the superintendent of a stock farm owned by a nonresident, having authority to sell a horse on the farm belonging to his principal, has authority to make a warranty).

Mo.—Samuel v. Bartee, 53 Mo. A. 587.

N. Y.—Tice v. Gallup, 2 Hun 446, 5 Thomps. & C. 51.

Vt.—Deming v. Chase, 48 Vt. 382 (holding that, where the vendor wrote to the vendee, who was negotiating with him as to the sale of a horse, that he might "trade with B., and whatever B. did would be all right," the vendor was bound by B's warranty, and that B's admissions and declarations made while negotiating the bargain were admissible against him).

[a] **Distinction between authority of agent of private individual and of horse dealer.**—"If the servant or agent of a private individual entrusted on one occasion to sell a horse, without authority from his master takes upon himself to warrant soundness of the animal the master is not bound; but, if the servant of a horse-dealer, or even one who only occasionally assists him in his business, being employed to sell, gives a warranty, the principal is bound, even though the agent or servant was expressly forbidden to warrant." Howard v. Sheward, L. R. 2 C. P. 148, 152. To same effect Decker v. Fredericks, 47 N. J. L. 469, 1 A 470; Brady v. Todd, 9 C. B. N. S. 592, 99 ECL 592, 142 Reprint 233 [dist Alexander v. Gibson, 2 Campb. 555; Helyear v. Hawke, 5 Esp. 72; Fenn v. Harrison, 3 T. R. 757, 100 Reprint 842, 4 T. R. 177, 100 Reprint 959]. But compare Baldry v. Bates, 52 L. T. Rep. N. S. 620; Brooks v. Hassall, 49 L. T. Rep. N S. 569; Taylor v. Gardiner, 8 Man. 310 (all criticizing and limiting this rule).

[b] **Where an agent to sell a horse enters him at a public sale,** the principal is bound by the agent's representations as to soundness, which are repeated by the auctioneer, although there is no custom to warrant at such sales. Belmont v. Talbott, 51 SW 588, 21 KyL 453.

[c] **Principal's failure to deny agent's authority.**—The fact that the principal, upon being charged with a breach of warranty by the buyer's attorney, replied in a letter in which he merely denied any breach of the warranty has been held sufficient to warrant the jury in finding that the agent had authority to warrant the horse. Miller v. Lawton, 15 C. B. N.

slaves.[76]

The custom of manufacturers to warrant machinery and other articles manufactured is so general that an agent authorized to sell such a machine or article has implied power, no restrictions appearing, to warrant it to be suitable for its purpose.[77]

Where the sale is by sample, the fact that the agent has been given samples from which to make sales creates an implied authority in the agent to warrant that the goods will be equal in character and quality to the sample.[78]

[§ 238] **cc. Limitations on Power to Warrant.** Where the seller constitutes one his agent to sell a particular article and specifies accurately the kind of warranty he is authorized to give and expressly provides that no other or different warranty shall be binding, a purchaser having knowledge of such limitations cannot enforce, against the principal, a warranty given in excess of them,[79] unless such limitations are waived by the principal.[80] But no secret limitations upon the powers of an agent employed to sell an article can affect the validity of a warranty as a binding obligation upon his principal.[81]

An agent who is not empowered to make sales of goods has no implied power to warrant their quality.[82]

S. 834, 109 ECL 834, 143 Reprint 1013.

[d] **Evidence of limitation of usage not admissible.**—Where a horse dealer, on a single occasion, employs another horse dealer who occasionally assists in his business, to sell a horse for him, the latter has an implied authority to give a warranty of soundness; and evidence of an alleged custom among horse dealers not to give a warranty where the purchaser obtains a veterinary surgeon's certificate of soundness is not admissible to contradict such implied authority. Howard v. Sheward, L. R. 2 C. P. 148.

76. Cocke v. Campbell, 13 Ala. 286; Gaines v. McKinley, 1 Ala. 446; Skinner v. Gunn, 9 Port. (Ala.) 305; Dennis v. Ashley, 15 Mo. 453; Ezell v. Franklin, 2 Sneed (Tenn.) 236; Franklin v. Ezell, 1 Sneed (Tenn.) 497.

77. Ala.—Herring v. Skaggs, 73 Ala. 446; Herring v. Skaggs, 62 Ala. 180, 34 AmR 4.

Iowa.—Conkling v. Standard Oil Co., 138 Iowa 596, 116 NW 822; Blaess v Nichols, etc., Co., 115 Iowa 373, 88 NW 829; Murray v. Brooks, 41 Iowa 45.

Kan.—Gale Sulky Harrow Mfg. Co. v. Stark, 45 Kan. 606, 26 P 8, 23 AmSR 739.

Ky.—Richmond Second Nat. Bank v. Adams, 93 SW 671, 29 KyL 566 (holding that where an agent was employed to sell a stacker warranties made by him as to its durability and adaptability, as to the material out of which it was made, and as to the services it would render, were binding upon the principal, but that his warranty that an engine belonging to the purchaser had ample power to operate the stacker was not).

Minn.—Osborne v. Josselyn, 92 Minn. 266, 99 NW 890; Parsons Band Cutter, etc., Co. v. Haub, 83 Minn. 180, 86 NW 14; J. I. Case Threshing-Mach. Co. v. McKinnon, 82 Minn. 75, 84 NW 646; Gaar v. Patterson, 65 Minn. 449, 68 NW 69; Melby v. Osborne, 33 Minn. 492, 24 NW 253; Flatt v. Osborne, 33 Minn. 98, 22 NW 440; McCormick v. Kelly, 28 Minn. 135, 9 NW 675.

Nebr.—McCormick Harvesting Mach. Co. v. Hiatt, 4 Nebr. (Unoff.) 587, 95 NW 627.

N. D.—Canham v. Plano Mfg. Co., 3 N. D. 229, 55 NW 583. Compare Aultman etc., Mach. Co. v. Runck, 23 N. D. 579, 137 NW 831.

S. D.—Peter v. Plano Mfg. Co., 110 NW 783.

Tex.—Waters Pierce Oil Co. v. Davis, 24 Tex. Civ. A. 508, 60 SW 458 (holding that, where defendant's manager testified that an agent who sold gasoline to the employer of plaintiff's decedent, the explosion of which caused decedent's death, had general control of defendant's business at the place where the gasoline was sold, and decedent's employer testified that he would not have purchased the gasoline if the agent had not represented that it could be safely stored in the place where it was stored at the time of the explosion, the representations of the agent in selling the gasoline were within his apparent authority and were binding on defendant).

Ont.—McMullen v. Williams, 5 Ont. A. 518 (extending the rule to an agent to sell pianos).

See Levis v. Pope Motor Car Co., 202 N. Y. 402, 95 NE 815 (evidence of authority to warrant an automobile held sufficient to require submission to jury); Alpha Mills v. Watertown Steam Engine Co., 116 N. C. 797, 21 SE 917.

[a] **Reason for rule.**—"Where goods are designed for a particular purpose, and therefore to appeal to a particular trade, he naturally expects his agents to make known that purpose, and to represent to proposing purchasers that the goods are adapted to and can be safely used for such purpose. Accordingly it must be presumed that that which he expects to be done, and without which the object of the agency could not adequately be accomplished, he has authorized to be done. And especially this should be the rule where the article offered for sale is of such a character as that the proposing purchaser cannot be expected in reason to have knowledge of the properties thereof, and must rely upon the superior knowledge and skill of the manufacturer and those who represent him." Conkling v. Standard Oil Co., 138 Iowa 596, 604, 116 NW 822.

[b] **Oral warranty.**—A sales agent authorized to sell and warrant farm machinery under written conditions to be required of the purchaser may bind his principal by an oral warranty, where he withholds from the purchaser all knowledge of the limitations on his authority to impose such condition. Parsons Band Cutter, etc., Co. v. Haub, 83 Minn. 180, 86 NW 14.

78. Dreyfus v. Goss, 67 Kan. 57, 72 P 537; Loomis Milling Co. v. Vawter, 8 Kan. A. 437, 57 P 43; Cooley v. Perrine, 41 N. J. L. 322, 32 AmR 210; Dayton v. Hooglund, 39 Oh. St. 671.

[a] **Authority, without restriction, to an agent to sell flour** to be manufactured for the purchaser carries with it authority to warrant that it shall be equal, when manufactured, to certain brands made by another, and adopted as a sample, for the purpose of such sale. Loomis Milling Co. v. Vawter, 8 Kan. A. 437, 57 P 43.

79. Ga.—McCormick Harvesting Mach. Co. v. Allison, 116 Ga. 445, 42 SE 778 (holding the buyer bound by limitations printed in the contract of sale).

Ind.—Bragg v. Bamberger, 23 Ind. 198.

Iowa.—Walter A. Wood Mowing Mach. Co. v. Crow, 70 Iowa 340, 30 NW 609.

N. D.—Canham v. Plano Mfg. Co., 3 N. D. 229, 55 NW 583.

Tex.—Clark v. Gaar-Scott, (Civ. A.) 163 SW 681; Aultman v. York, 1 Tex. Civ. A. 484, 20 SW 851.

See also supra § 210.

[a] **Notice from contract.**—Where a machine is sold by a contract reciting in bold type that it is an order for a secondhand machine not warranted, that no person has any authority to waive, alter, or enlarge the contract, that mechanics and experts are not authorized to bind the seller by any act or statement, and that an acceptance by the buyer will be a full waiver of all claims arising from any cause, and the buyers, who can read and write, sign the order, and after operating the machine admit in writing that it is satisfactory, they cannot avoid payment of the purchase-money notes on the ground that the seller's agent falsely told them that the machine was new and that the seller would warrant it. J. I. Case Threshing Mach. Co. v. McClamrock, 152 N. C. 405, 67 SE 991. See also Clark v. Gaar-Scott, (Tex. Civ. A.) 163 SW 681.

[b] **The condition in a warranty of a thresher** that on discovery of any defect written notice should be given the seller cannot be waived by an agreement by a subagent of the seller to give the notice. Nichols v. Larkin, 79 Mo. 264.

[c] **When the original contract is rescinded** and the principal allows the agent to make a new contract, restrictions in the original contract as to warranty are of no effect. Challenge Wind, etc., Mill Co. v. Kerr, 93 Mich. 328, 53 NW 555.

[d] **Notice in prior rejected order.**—Where plaintiff signed and delivered to defendant's agents orders for the purchase of a threshing outfit, which contained a warranty and stipulated terms of payment, and the orders were rejected by defendant, the terms not being satisfactory, and thereupon plaintiff and the local agents made a verbal contract of warranty, and plaintiff purchased the same outfit upon different terms, the fact that the original order as signed by plaintiff gave notice that local agents had no authority to make sales or contracts, except in prescribed forms, was not of itself sufficient to charge plaintiff with knowledge of the agent's incapacity to contract. Olson v. Aultman Co., 81 Minn. 11, 83 NW 457.

80. New Hamburg Mfg. Co. v. Shields, 16 Man. 212 (holding that, if the vendors accept and fill an order for an engine with a provision specially written by their agent in it that the engine is to be satisfactory to the purchasers, they thereby waive any limitations of the authority of their agent as to giving warranties that may be embodied in the printed part of the order).

81. Me.—Bryant v. Moore, 26 Me. 84, 45 AmD 96.

Mass.—Lobdell v. Baker, 1 Metc. 193, 35 AmD 358.

Mo.—Hayner v. Churchill, 29 Mo. A. 676.

N. Y.—Milburn v. Belloni, 34 Barb. 607 [rev on other grounds 39 N. Y. 53, 100 AmD 403]; Commercial Bank v. Kortright, 22 Wend. 348, 34 AmD 317.

N. D.—Canham v. Plano Mfg. Co., 3 N. D. 229, 55 NW 583.

Va.—Blane v. Proudfit, 3 Call (7 Va.) 207, 2 AmD 546.

Wis.—Boothby v. Scales, 27 Wis. 626.

Eng.—Howard v. Sheward, L. R. 2 C. P. 148.

See also supra § 209.

82. Richmond Trading, etc., Co. v. Farquar, 8 Blackf. (Ind.) 89 (holding that a power given by a seller of wool to an agent to weigh the same and

Power limited to article being sold. Whatever the implied power of an agent to warrant the quality of the goods he is then selling, it cannot extend to authorize a warranty by him of goods of a like kind which his principals have previously sold, or may afterward sell to the same persons, as his implied power to warrant is exhausted with the sale he then makes,[83] and likewise the agent's power is confined to representations made by him at the time of the sale; statements made by him afterward do not bind his principal even though made under such conditions as would have bound the latter had he made them himself.[84]

Unusual warranty. The implied power of an agent to warrant title and quality rests upon the necessity and propriety of such warranties in the sale of goods. It is not therefore to be extended to other warranties of an unusual sort, however impossible the agent may find it to make a sale without giving such warranties.[85] So also authority to warrant certain qualities conveys no power to give a warranty as to other qualities.[86]

An agent's promise to remedy defects in the article warranted will bind his principal, in the absence of an open limitation to the contrary, to the same extent as a warranty given by such agent.[87]

[§ 239] **(g) Power to Receive Payment—aa. In General.**[88] Where the principal intrusts to the agent possession of the goods he is to sell he thereby clothes him with the indicia of authority to receive the price to be paid down at the time of the sale, and such payment will bind the principal.[89] Some cases have even gone so far as to lay down the rule that power to sell personal property, if not restricted, includes power to receive payment therefor.[90] But where the agent has not the possession of the goods, and no other indicia of authority, and is authorized only to solicit orders or to take contracts to submit to the principal for approval, he has no implied power to collect at any time, and the purchaser makes payment to him at his peril.[91] This principle denies to brokers or traveling sales-

deliver it to the buyer does not authorize a warranty as to its quality); Forcheimer v. Stewart, 73 Iowa 216, 32 NW 665, 35 NW 148 (holding that one employed as a bookkeeper in a mercantile establishment has no implied authority to warrant the quality of goods); Lansing v. Coleman, 58 Barb. (N. Y.) 611 (holding that an agent employed to advertise a sale but not to sell has no implied authority to make any warranty).

[a] **Representations made by a servant who is authorized merely to deliver the article sold** and to take from the buyer a receipt are not binding on the seller. Woodin v. Burford, 2 Cromp. & M. 391; Strode v. Dyson, 1 Smith K. B. 400.

83. Wait v. Borhe, 123 N. Y. 592, 25 NE 1053 [rev 1 Silv. Sup. 129, 5 NYS 168]; Fletcher v. Nelson, 6 N. D. 94, 69 NW 53.

84. Helyear v. Hawke, 5 Esp. 72.

85. Anderson v. Bruner, 112 Mass. 14 (holding that a letter from a principal to his agent that he proposes "placing" his goods at a certain price does not authorize the agent to warrant to a customer at that price that his principal will not sell for a less price); Palmer v. Hatch, 46 Mo. 585 (holding that a naked general power of sale does not carry with it authority to warrant against any seizure of the article sold for violation of the revenue laws prior to sale); Johns v. Jaycox, 67 Wash. 403, 121 P 854, 39 LRANS 1151 and note, AnnCas1913D 471 and note.

86. Holcomb v. Cable Co., 119 Ga. 466, 46 SE 671.

87. E. T. Kenney Co. v. Anderson, 81 SW 663, 26 KyL 367 [aff reh 83 SW 581, 26 KyL 1217] (holding that a provision in a contract for the sale of an engine that local agents and salesmen were authorized to make sales only in accordance with instructions, and that mechanical experts were not agents and had no authority to bind the seller by any contract or statement whatever, was not notice to the buyers that a person who transacted the seller's business generally throughout the country, and who was their general collector, was not authorized to agree that if the sellers did not make the machine comply with the warranty they would furnish another, or take it back and return notes and payments made); Canham v. Piano Mfg. Co., 3 N. D. 229, 55 NW 229; McCormick Harvesting Mach. Co. v. Smith, 9 Kulp (Pa.) 448; Bannon v. Aultman, 80 Wis. 307, 49 NW 967, 27 AmSR 37.

[a] **Where the general manager of a company selling threshing machinery** promised and repeatedly attempted to remedy defects, such promises and attempts were as if made by the principal and not as if made by an agent without authority to vary the terms of a written contract of sale. Hull v. Prairie Queen Mfg. Co., 92 Kan. 538, 141 P 592.

88. See also infra §§ 256-279.

89. Ark.—Valentine v. Edwards, 166 SW 531 (holding that if plaintiff authorized another to sell his cotton the purchaser obtained a good title, although the agent afterward wrongfully converted the purchase price to his own use); Meyer v. Stone, 46 Ark. 210, 55 AmR 577.

Cal.—Lumley v. Corbett, 18 Cal. 494.

Ill.—Bailey v. Pardridge, 134 Ill. 188, 27 NE 89 [aff 35 Ill. A. 121].

Mass.—Cairns v. Page, 165 Mass. 552, 43 NE 503. See also American Min., etc., Co. v. Converse, 175 Mass. 449, 56 NE 594.

Mo.—Birch Tree State Bank v. Brown, 152 Mo. A. 589, 133 SW 860 (holding that generally, where one gives his agent apparent authority to receive payment, as by giving him possession of goods to be sold, the purchaser may pay the price to the agent at the time of the sale); John Hutchison Mfg. Co. v. Henry, 44 Mo. A. 263.

N. Y.—Higgins v. Moore, 34 N. Y. 417; Maxfield v. Carpenter, 84 Hun 450, 32 NYS 381 (holding that, where a person is apparently clothed with full authority to sell and deliver, a payment to him is good as against the owner).

Okl.—Scarritt-Comstock Furniture Co. v. Hudspeth, 19 Okl. 429, 91 P 843, 14 AnnCas 857 and note.

Pa.—Irwin v. Seiple, 2 Phila. 208.

Tex.—Schleicher v. Armstrong, 32 SW 327.

Vt.—Cross v. Haskins, 13 Vt. 536.

Wash.—Galbraith v. Weber, 58 Wash. 132, 138, 107 P 1050, 28 LRANS 341 and note [cit Cyc].

Eng.—Capel v. Thornton, 3 C. & P. 352, 14 ECL 605.

[a] **Goods furnished agent to fill order.**—An agent who is furnished with samples and price lists of goods of his principal and who is sent out to sell by sample, and is afterward furnished with goods to fill his orders is ostensibly a general agent and authorized to collect, and payments made to him are binding on the principal. Beckwith v. Reid, 4 Oh. Dec. (Reprint) 436, 2 ClevLRep 162.

[b] **Power to sell negotiable paper** implies power to receive payment therefor. Merchants', etc., Nat. Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 SE 880, 70 LRA 312.

[c] **An agent in possession of stock certificates** with authority to sell has implied authority to collect the proceeds, where he has dealt with the stock exclusively, and payment to him without notice of limitation on his authority is payment to the principal. Birch Tree State Bank v. Brown, 152 Mo. A. 589, 133 SW 860; Mitchell v. Boyer, 160 App. Div. 565, 145 NYS 715.

[d] **By statute** in some jurisdictions it is provided that a general agent to sell with possession of the thing sold may receive payment, and that a special agent may receive payment at the time of delivery but not afterward. See statutory provisions. See also Schaeffer v. Mutual Ben. L. Ins. Co., 38 Mont. 459, 100 P 225.

[e] **Application of purchase money.**—Where a person is intrusted with an article for the purpose of selling it, it is not incumbent upon the purchaser to see the application of the purchase money. Wenner v. Lindsay, 7 Hawaii 150.

90. Hodkinson v. McNeal Mach. Co., 161 Mo. A. 87, 142 SW 457; Collins v. Newton, 7 Baxt. (Tenn.) 269; Hoskins v. Johnson, 5 Sneed (Tenn.) 469; Hackney v. Jones, 3 Humphr. (Tenn.) 612. See also Trainer v. Morison, 78 Me. 160, 3 A 185, 57 AmR 790 (holding that an agent who has authority to contract for the sale of chattels has authority to collect pay for them at the time, or as a part of the same transaction, in the absence of any prohibition known to the purchaser); Scott v. Hopkins, 2 NYSt 324 [questioned Lamb v. Hirschberg, 1 App. Div. 519, 37 NYS 283]; Putnam v. French, 53 Vt. 402, 38 AmR 682 (in which case particular stress was laid upon a custom, proved as existing in New England in such transactions, to make payment either to the principal or the agent).

[a] **Agent to sell stocks.**—A general agent of a corporation for the sale of its stock has the right to do whatever is usual and proper to effect sales, including the receiving of money paid on account of them either before or after delivery. Sawin v. Union Bldg., etc., Assoc., 95 Iowa 477, 64 NW 401.

91. Ga.—Collins v. Crews, 3 Ga. A. 238, 59 SE 727.

Ill.—Smith v. Hall, 19 Ill. A. 17; Greenhood v. Keator, 9 Ill. A. 183. See also Clark v. Smith, 88 Ill. 298; Abrahams v. Weiller, 87 Ill. 179.

Ky.—John Matthews' Apparatus Co. v. Renz, 61 SW 9, 22 KyL 1528.

Mass.—Clark v. Murphy, 164 Mass. 490, 41 NE 674; Clough v. Whitcomb, 105 Mass. 482.

Miss.—Sumrall v. Kitselman Bros., 101 Miss. 783, 790, 58 S 594 [cit Cyc].

Mo.—Chambers v. Short, 79 Mo. 204; Butler v. Dorman, 68 Mo. 298, 30 AmR 795 [expl Rice v. Groffmann, 56 Mo. 434].

Nebr.—Ketelman v. Chicago Brush Co., 65 Nebr. 429, 91 NW 282.

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men not having possession of the goods, but selling for future delivery, to be paid for upon delivery or at any other future time, any authority, upon these facts alone, to collect payment for such goods,[92] unless the principal confers such authority upon him,[93] or unless there is a general and known usage for such agents to make collections.[94]

Implied authority. The authority of an agent to collect need not be express, but may be implied from the fact that the bill for the goods previously sold by him is sent to him by his principal and presented by the agent for payment,[95] or from the fact that the agent is, under his contract, chargeable to his principal for the price of the goods,[96] or from the fact that, by the habits and course of dealing of the principal, he is held out or permitted to appear to have authority to make collections, or to transact business for his principal generally;[97] but the mere fact that a traveling salesman has been allowed on one or two occasions to collect bills does not authorize him to collect bills generally.[98]

Sales over counter. Where payments are made over the counter of the principal's store to a salesman accustomed to receive money there for his employer, authority to receive payment will be implied in favor of innocent persons,[99] because the principal by his own act gives the agent an apparent authority to receive payment.[1] But if a salesman authorized to receive money over the counter only receives money elsewhere than in the shop, the payment is not good.[2]

Release of claim, reinvestment of proceeds. A selling agent has no implied power to release a claim

N. Y.—Goldstein v. Tank, 149 App. Div. 341, 134 NYS 262 [aff 73 Misc. 300, 132 NYS 466]; Lamb v. Hirschberg, 1 App. Div. 519, 37 NYS 283; Hahnenfeld v. Wolff, 15 Misc. 133, 36 NYS 473; L'Artiste Pub. Co. v. Walker, 11 Misc. 426, 32 NYS 151.

Oh.—Crosby v. Hill, 39 Oh. St. 100.

Okl.—Scarritt-Comstock Furniture Co. v. Hudspeth, 19 Okl. 429, 91 P 843, 14 AnnCas 857 and note.

S. D.—Shull v. New Birdsall Co., 15 S. D. 8, 86 NW 654.

Tenn.—Fabian Mfg. Co. v. Newman, (Ch. A.) 62 SW 218 (holding that an agent employed to take orders for the sale of goods, which he is required to submit to his employer for acceptance or rejection, and who has no express authority to make collections has no implied authority to collect, which will protect a debtor making a payment after the agent's discharge).

Wis.—McKindly v. Dunham, 55 Wis. 515, 13 NW 485, 42 AmR 740.

Eng.—Spooner v. Browning, [1898] 1 Q. B. 528.

92. Ala.—Simon v. Johnson, 101 Ala. 368, 13 S 491, 105 Ala. 344, 16 S 884, 53 AmSR 125, 108 Ala. 241, 19 S 244; Lyles-Black Co. v. Alldredge, 10 Ala. A. 632, 65 S 696.

Ark.—Meyer v. Stone, 46 Ark. 210, 55 AmR 577.

Fla.—Lakeside Press, etc., Co. v. Campbell, 39 Fla. 523, 22 S 878 (holding that an agent employed by his principal "as traveling salesman and soliciting work and orders of all kinds and description" done by the principal in the line of its business, all orders to be subject to the principal's acceptance, who has no express authority to make collections for his principal, and who has not been held out by the principal as possessing such authority, has no implied power to collect the amount due his principal for printed circulars for which the agent takes and forwards an order addressed to his principal and which are subsequently delivered by a carrier, and not by the agent).

Ga.—Walton Guano Co. v. McCall, 111 Ga. 114, 36 S 469.

Ill.—Bailey v. Pardridge, 134 Ill. 188, 27 NE 89; Clark v. Smith, 88 Ill. 298; Williams v. Anderson, 107 Ill. A. 32. Compare Harris v. Simmerman, 81 Ill. 413.

Kan.—Dreyfus v. Goss, 67 Kan. 57, 72 P 537; Kane v. Barstow, 42 Kan. 465, 22 P 588, 16 AmSR 490.

Ky.—Graham v. Duckwall, 8 Bush 12.

Mich.—Kornemann v. Monaghan, 24 Mich. 36.

Minn.—Brown v. Lally, 79 Minn. 38, 81 NW 538.

N. J.—Law v. Stokes, 32 N. J. L. 249, 90 AmD 655.

N. Y.—Higgins v. Moore, 34 N. Y. 417 [rev 6 Bosw. 344]; Goldstein v. Tank, 149 App. Div. 341, 134 NYS 262.

Pa.—Seiple v. Irwin, 30 Pa. 513; Giltinan v. Bergey, 5 Pa. Dist. 20, 11 Montg. Co. 162 (holding that the payment to an agent selling goods on credit, but not having the goods in his possession to deliver, is not good without evidence of his authority to receive payment).

S. C.—Ohio Pottery, etc., Co. v. Talbert, 87 S. C. 194, 198, 69 SE 211 [cit Cyc].

W. Va.—Crawford v. Whittaker, 42 W. Va. 430, 26 SE 516.

Compare Collins v. Newton, 7 Baxt. (Tenn.) 269; Hoskins v. Johnson, 5 Sneed (Tenn.) 469; Hackney v. Jones, 3 Humphr. (Tenn.) 612.

[a] **That a traveling salesman falsely claims to be a member of the firm** he represents does not warrant a customer in paying money to him. Crawford v. Whittaker, 42 W. Va. 430, 26 SE 516.

[b] **Duty of purchaser to ascertain power.**—Where a bill of goods is sent to the purchaser by the vendors on an order procured by an agent of the latter, the purchaser is bound to ascertain the agent's powers, and, in the absence of actual authority, the agent's statement that he has authority to receive payment is not binding on the principal. Kornemann v. Monaghan, 24 Mich. 36.

93. American Sales Book Co. v. Cowdrey, 100 Ark. 325, 140 SW 134, 38 LRANS 700 and note; James v. Conklin, 158 Ill. A. 640; Howard v. Chapman, 4 C. & P. 508, 19 ECL 624.

94. Meyer v. Stone, 46 Ark. 210, 55 AmR 577; James v. Conklin, 158 Ill. A. 640. See generally Customs and Usages [12 Cyc 1071]. Compare Higgins v. Moore, 34 N. Y. 417 [rev 6 Bosw. 344].

[a] **Local custom.**—A person who pays a bill to a traveling salesman who is not authorized to make collections cannot justify his payment on the ground of a local custom of making such payments, with which he was not familiar. Lyles-Black Co. v. Alldredge, 10 Ala. A. 632, 65 S 696.

95. Luckie v. Johnston, 89 Ga. 321, 15 SE 459; Adams v. Humphreys, 54 Ga. 496. See also Kinsman v. Kershaw, 119 Mass. 140. Compare Dutcher v. Beckwith, 45 Ill. 460, 92 AmD 232.

96. Diebold Safe, etc., Co. v. Dunnegan, 135 Mo. A. 135, 142, 115 SW 1051 (where the court said: "If, under a proper construction of the contract, he is to be held liable for the price of the goods sold by him, he was of necessity authorized to collect payment for them when delivered to the purchaser. The power to collect was incidental to his agency in order to effectuate its main purpose, for how else could he make payments for the goods sold by him unless he had the authority to collect?").

97. Howe Mach. Co. v. Ballweg, 89 Ill. 318; James v. Conklin, 158 Ill. A. 640; Continental Tobacco Co. v. Campbell, 76 SW 125, 25 KyL 569; Todd v. Everett, 78 Mich. 595, 44 NW 583 (holding that where, after the purchase from a brick company of the brick in its yard burned and unburned, the vendee allows the president of the corporation to manage the yard and sell brick as his agent, and collect the proceeds of such sales, he becomes such an agent that his contracts are binding upon the vendee if made in the due course of the business; and payments made to such agent by a purchaser of brick who had no knowledge of the change of possession under the first purchase are binding upon the principal); Estey v. Snyder, 76 Wis. 624, 45 NW 415. See also Harris v. Simmerman, 81 Ill. 413.

[a] **Illustrations.**—(1) Where an agent for the sale of safes sold a new one, taking an old one in part payment, and the principal accepted the old safe and sent the new one to the purchaser without any notice to him that the agent had transcended his authority, the purchaser was held to have reason for supposing that the agent was authorized to receive payment, and that a payment to him was good as against the principal, if made without notice that he had no such authority. Harris v. Simmerman, 81 Ill. 413. (2) But where a traveling agent took from a customer an order for goods, which he forwarded to his principals who thereupon wrote the agent expressing an unwillingness to fill the order until a former account was settled, and adding that they "should like to draw upon him" therefor, and the customer, upon seeing the letter, gave the agent his acceptance at three months, blank as to the name of the drawer, it was held that the payment of such acceptance at maturity to a third person who had become the holder was no defense to an action by the principals, although it was proved that on a previous occasion a similar bill drawn by the agent and accepted by the customer had been received by plaintiffs as payment. Hogarth v. Wherley, L. R. 10 C. P. 630.

[b] **An agent placed in sole charge of a branch office** is held out as being something more than a mere selling agent and has implied authority to receive payment for goods sold. Carter White Lead Co. v. Pounds, 65 App. Div. 476, 72 NYS 876.

[c] **Agent for sale of machinery.**—Where an agent selling a machine for a company is permitted to transact business in behalf of the company with the knowledge of its controlling representatives, in such a manner that he is held out as an agent with general powers, the purchaser will be protected in subsequent payments made to him. Howe Mach. Co. v. Ballweg, 89 Ill. 318; Brooks v. Jameson, 55 Mo. 505; Sumner v. Saunders, 51 Mo. 89; Kasson v. Noltner, 43 Wis. 646.

98. Lyles-Black Co. v. Alldredge, 10 Ala. A. 632, 65 S 696.

99. Hirshfield v. Waldron, 54 Mich. 649, 20 NW 628; Kaye v. Brett, 5 Exch. 269.

1. Butler v. Dorman, 68 Mo. 298, 30 AmR 795; Law v. Stokes, 32 N. J. L. 249, 90 AmD 655.

2. Hirshfield v. Waldron, 54 Mich.

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without payment,[3] and if he has general authority to collect, this will not authorize him to reinvest the funds so collected.[4]

[§ 240] **bb. Sales on Credit.** Authority in an agent to sell goods on credit does not authorize him to receive money in payment.[5] It seems that if an agent is authorized to sell on credit, he may accept the vendee's note for the purchase price or for so much of it as is to be paid at a future date;[6] but it does not follow that by virtue of his authority to sell he has any authority to collect such paper at maturity, or at any time after the sale, for by the sale and acceptance of the paper for his principal his authority is presumptively exhausted,[7] unless the principal has held him out to third persons as having authority to receive payments.[8] And even where an agent is authorized to collect notes after their maturity, he has not the right to take anything save money in the payment of them, without express authority from his principal.[9]

[§ 241] **cc. Notice of Lack of Authority.** Where goods are sold by an agent and there is notice, direct or implied, to pay the price to the principal, or not to pay to the agent, payment by the purchaser to the agent will not bind the principal, or protect the purchaser.[10] Thus where a notice is printed upon the bill sent the purchaser for the goods that agents are not authorized to receive payment, the purchaser will be presumed to have seen it,[11] although some cases draw a distinction as to the prominence given to the notice, the size of the type in which it is printed, etc.[12]

Where the purchaser of property does not know that he is dealing with an agent of the owner, and has not good reason to know it, he is justified in treating the agent as the owner, and payment of the price to him will be a defense to an action by the owner for the amount.[13]

[§ 242] **(h) Power to Rescind or Modify Sale—aa. In General.**[14] Ordinarily a sales agent is sup-

649, 20 NW 628; Kaye v. Brett, 5 Exch. 269.

3. Deacon v. Greenfield, 141 Pa. 467, 21 A 650. See also infra §§ 298–300.

[a] **If the agent has authority only to sell,** or to negotiate sales, and to collect the price, he has no authority to cancel the debt upon the surrender to him of the property constituting a security for the debt. Robinson v. Nipp, 20 Ind. A. 156, 50 NE 408.

[b] **A traveling salesman** or drummer has no authority to release a purchaser of goods from liability therefor and accept a third person in his place. Key v. Goodall, etc., Co., 7 Ala. A. 227, 60 S 986.

4. Stoddart v. U. S., 4 Ct. Cl. 511.

5. Williams v. Anderson, 107 Ill. A. 32.

6. See Howard v. Rice, 54 Ga. 52.

7. Ga.—Holland v. Van Bell, 89 Ga. 223, 15 SE 302; Howard v. Rice, 54 Ga. 52.

Ind.—Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413.

Iowa.—Draper v. Rice, 56 Iowa 114, 7 NW 524, 8 NW 797, 41 AmR 88.

Kan.—National Fence-Mach. Co. v. Highleyman, 71 Kan. 347, 80 P 568.

Okl.—Scarritt-Comstock Furniture Co. v. Hudspeth, 19 Okl. 429, 91 P 843, 14 AnnCas 857.

Or.—Rhodes v. Belchee, 36 Or. 141, 59 P 117, 1119 (holding that an agency for the sale of machinery, with authority to take notes therefor in the name of the principal, will not authorize the agent to receive payment of such notes after he has parted with the possession thereof).

Pa.—Irwin v. Seiple, 2 Phila. 208.

Wis.—Strachan v. Muxlow, 24 Wis. 21 (holding that the implied authority of an agent for the sale of reaping machines to receive payment of notes taken from purchasers and payable to his principal is terminated by the surrender of the notes to his principal and cannot be extended by an oral agreement that the maker might pay it to him when due).

[a] **Authority to sell cattle and receive the proceeds** does not imply authority to accept a new note and mortgage on the cattle and to sell and receive payment of the new note, and such act does not discharge the lien of the first mortgage. Ridgeley Nat. Bank v. Barse Live Stock Commn. Co., 113 Mo. A. 696, 88 SW 1124.

8. Packer v. Hinckley Locomotive Works, 122 Mass. 484; Law v. Stokes, 32 N. J. L. 249, 90 AmD 655; Scarritt-Comstock Furniture Co v. Hudspeth, 19 Okl. 429, 91 P 843, 14 AnnCas 857 and note; Estey v. Snyder, 76 Wis. 624, 45 NW 415.

9. Woodruff v. American Road Mach. Co., 65 SW 600, 23 KyL 1551; Gunter v. Robinson, (Tex. Civ. A.) 112 SW 134 (holding that where an agent was authorized to sell stock and take a note in part payment, he was not authorized to agree with the buyer that the note could be paid otherwise than in money).

10. Williams v. Anderson, 107 Ill. A. 32 (holding that if there is an express or implied notice to the purchaser that a sales agent has no authority to collect money, a payment will not bind the principal); Lamb v. Hirschberg, 1 App. Div. 519, 37 NYS 283.

[a] **A lease of merchandise to be paid for in weekly installments,** which advises the lessee to pay no money unless the duplicate agreement of the lease is presented by the collector, and to pay no money to canvassers except the first payment on delivery of goods, requires payments of installments to a collector, as distinguished from a canvasser. Drake v. Metropolitan Mfg. Co., (Mass.) 105 NE 634.

11. Law v. Stokes, 32 N. J. L. 249, 253, 90 AmD 655, (where it was said that "not to have seen the directions in the bill-head was the grossest negligence, and to permit a party to defend under the protection of his own carelessness, would be to offer a premium for negligence, and open the door to fraud, especially so when the party is himself bound to see to it, that the person with whom he transacts business, as an agent, has the authority which he assumes"); Zilberman v. Friedman, 54 Misc. 256, 104 NYS 363 (holding that, where goods are sold on credit, and a bill is delivered therewith on which is printed the notice, "Pay none but authorized collectors," a payment for the goods thereafter made to the salesman who sold the same, and who is without actual authority to receive payment or apparent authority other than that he sold the goods, does not discharge the purchaser).

[a] **"Agents not authorized to collect,"** stamped in large, legible print on the face of the bill sent to a purchaser of goods, will be presumed to have been observed by him, and, whether he saw the words or not, are notice to him not to pay to an agent. McKindly v. Dunham, 55 Wis. 515, 13 NW 485, 42 AmR 740.

12. Luckie v. Johnston, 89 Ga. 321, 15 SE 459 (holding that the fact that the words, "Bills payable at this office only," are printed in small letters on the face of the bills does not necessarily negative the agent's authority to collect such bills, when the debtor has no knowledge of the words at the time of making payment); Trainer v. Morison, 78 Me. 160, 3 A 185, 57 AmR 790 (where there were printed across the top of a bill in red ink, the words, "All bills must be paid by check to our order, or in current funds at our office"; the purchaser did not see the notice and it was held that taking into consideration the care ordinarily exercised by prudent men he was not at fault in not doing so. The court said that it was "not so prominent upon the bill as to become a distinctive feature of it; one that would be likely to attract attention in the hurry of business, and that ought to have been seen by the defendants. It would have been an easy matter for the plaintiff to have inclosed the bill in a letter of advice, calling the attention of the defendants to the fact, that he was unwilling to intrust collections to his agent"); Kinsman v. Kershaw, 119 Mass. 140 (holding that a statement printed on a billhead in small letters, "All moneys to be paid to the treasurer, and bills to be receipted by him," does not preclude the debtor from showing payment to another who presented it for payment if the debtor paid it in good faith and without having observed the printed rule); Putnam v. French, 53 Vt. 402, 38 AmR 682 (where the words "Payable at office" were written on the bill rendered when the last invoice was sent, which the purchaser failed to see, and it was held, in view of the obscure manner in which they were written on the billhead and the circumstances under which, and the purposes for which, in other respects, the bill was sent, and the terms of the contract as to when and where and to whom payment was to be made, that the purchaser was not guilty of such negligence in not seeing them as to be chargeable with notice which he did not in fact have).

[a] **Where a selling agent is appointed by a blank form of contract by which he is authorized to collect** all or a part of the price at the time of the sale and the agent, on making the sale, promises to return and show the purchaser how to use the article sold, he has implied authority to collect the balance of the price, notwithstanding a clause printed on a statement of account sent to the purchaser after the sale to "pay no money to agents," as the purchaser is authorized to consider such notice as applying only to agents other than the one who secured the contract. American Sales Book Co. v. Cowdrey, 100 Ark. 325, 140 SW 134, 38 LRANS 700.

13. Tripp, etc., Boot, etc., Co. v. Martin, 45 Kan. 765, 26 P 424; Goldstein v. Tank, 149 App. Div. 341, 134 NYS 262. Compare Sage v. Shepard, etc., Lumber Co., 4 App. Div. 290, 39 NYS 449 [aff 158 N. Y. 672 mem, 52 NE 1126 mem].

14. See generally infra § 289.

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posed to be employed to contract a sale, and has no implied power, once this is done, either to undo or to modify the contract,[15] particularly where the principal has prescribed the limits, or terms upon which the agent may sell, of which the purchaser has actual or constructive notice,[16] as where the contract or order expressly provides or recites that the agent shall have no power to change or modify the same.[17] The sale completes the transaction, and there is no presumption, from the mere authority to sell, that the agency continues so as to enable the agent to rescind the sale, and accept a return of the property,[18] or make another contract for the sale of the same property,[19] or to offer the purchaser further inducements to carry out its terms, or to adjust the damages resulting from a breach of its terms.[20]

Where sale is incomplete. The agency presumptively continues until the sale is complete,[21] and accordingly if the sale is conditional upon the quality of the goods or chattels, and the principal has not fulfilled the terms of his warranty, the sale is not complete, and the agent may modify the terms of the contract as to the notice of the defects in the chattels, or as to their return.[22]

[§ 243] **bb. Express or Implied Power.** Where an agent is given power to modify a sale he may of course do so,[23] notwithstanding a provision in the contract of sale that no agent of the seller has power

15. U. S.—Berthold v. Goldsmith, 24 How. 536, 16 L. ed. 762; Stoddart v. Warren, 23 F. Cas. No. 13,471 [aff 105 U. S. 224, 26 L. ed. 1117].
Ark.—American Sales Book Co. v. Whitaker, 100 Ark. 360, 364, 140 SW 132, 37 LRANS 91 and note [cit Cyc].
Ga.—Terry v. International Cotton Co., 138 Ga. 656, 75 SE 1044.
Ill.—Fuller v. Samuels, 137 Ill. A. 536 [aff 234 Ill. 9, 84 NE 721]; Andrews v. Himrod, 37 Ill. A. 124.
Mo.—White v. Massey, 65 Mo. A. 260.
Or.—Brigham v. Hibbard, 28 Or. 386, 43 P 383.
Pa.—Gardiner v. Nichols Co., 48 Pa. Super. 510; Mange-Wiener Co. v. Patton Worsham Drug Co., 27 Pa. Super. 315.
S. C.—Adrian v. Lane, 13 S. C. 183.
Tex.—Pillman v. Freiberg, 2 Tex. A. Civ. Cas. § 582.

[a] **Where a traveling salesman has no authority to collect** the purchase money for goods sold, he is not authorized to consent to a sale of goods he has sold under a conditional sale contract by the purchaser, freed from the rights acquired by his principal under the conditional contract. McEntire, etc., Co. v. Rock Hill Buggy Co., 172 Ala. 637, 55 S 494.

[b] **An expert sent to repair an engine** which has been sold (1) cannot bind his principal by changing the contract of sale unless explicit authority is shown. Houghton Impl. Co. v. Vavrowski, 19 N. D. 594, 125 NW 1024. (2) Thus where a contract for the sale of a machine provided that six days' use by the purchaser should be conclusive evidence of the fulfillment of all warranties, a workman sent by plaintiff to remedy certain defects in the machine could not vary the conditions of the sale by releasing the purchaser from such stipulation of the contract. Massillon Engine, etc., Co. v. Schirmer, (Iowa) 93 NW 599.

16. Fulton v. Sword Medicine Co., 145 Ala. 331, 40 S 393 (holding that where a traveling salesman sells goods to a customer, who signs a written order to the principal reciting that there is no verbal agreement aside from the order, the customer has notice of the salesman's want of authority to make verbal agreements varying the written order, and, if the salesman orally agrees to inform the principal that he is not to ship the goods unless he agrees to contradictory terms, the principal is not bound thereby unless informed thereof before shipment); Larned v. Wentworth, 114 Ga. 208, 39 SE 855 (where the agent undertook to extend the period of an option); White v. Massey, 65 Mo. A. 260 (holding that an agent who solicits an order in writing cannot bind his principal by an oral alteration of its terms, when his authority is restricted to the mere solicitation of contracts in writing, and the person giving the order has knowledge thereof).

17. Eichelroth v. Long, 156 Ill. A. 108; Larson v. Minneapolis Threshing Mach. Co., 92 Minn. 62, 99 NW 623 (holding that, where the terms of the contract under which the sale is made expressly provide that no modification will be allowed without the consent of the home office, the sale agent at the place of delivery has no power to make a material change in the contract). Compare Robinson v. Berkey, 100 Iowa 136, 69 NW 434.

[a] **Where the order signed by the party** expressly provides that the agent has no authority to change the terms, (1) an indorsement on the back of the contract making it a conditional sale is not binding on the principal. Flower City Plant Food Co. v. Roberts, 81 App. Div. 249, 80 NYS 1060. (2) A notice that agents have no authority to alter the terms of the contract, printed on an order blank directly over the place for the purchaser's signature, is sufficient to show that the agent has no power to change the terms. Metropolitan Aluminum Co. v. Lau, 61 Misc. 105, 112 NYS 1059.

[b] **Warranty.**—(1) Where a contract containing a warranty expressly provides that no agent shall have power to change the same in any respect, an agent of the vendor is unauthorized to waive conditions or requirements of the contract of warranty. Eichelroth v. Long, 156 Ill. A. 108; Garr-Scott v. Nelson, 166 Mo. A. 51, 148 SW 417. (2) Where a contract of warranty, which is executed in duplicate and one of which is retained by each of the parties, contains a provision that no agent has authority to change the warranty, it is a notice to the purchaser of a limitation upon the authority of the agents of the seller, and that they cannot waive or dispense with an express condition of the contract. Furneaux v. Esterly, 36 Kan. 539, 13 P 824. (3) Where a contract for the sale of farm implements contains a warranty and provides that no agent can change it, a conversation between the buyer and an agent of the seller cannot be construed as a waiver by the seller of the conditions of the warranty. Fetzer v. Haralson, (Tex. Civ. A.) 147 SW 290.

18. Lindow v. Cohn, 5 Cal. A. 388, 90 P 485; Mange-Wiener Co. v. Patton Worsham Drug Co., 27 Pa. Super. 315 (holding that no implied authority to rescind and accept a return of the goods is to be inferred in a selling agent from the mere fact of his authority to sell; if the salesman has greater or different authority, that fact must be ascertained by the jury upon competent evidence).

19. Luke v. Griggs, 4 Dak. 287, 30 NW 170; Diversy v. Kellogg, 44 Ill. 114, 92 AmD 154; Fletcher v. Nelson, 6 N. D. 94, 69 NW 53 (holding that after an agent, having authority to sell personalty, sells the same unconditionally, he has no implied authority to rescind the sale and enter into a new contract of sale with the original purchaser); Ludwig v. Gorsuch, 154 Pa. 413, 26 A 434.

20. Bradford v. Bush, 10 Ala. 386; Robinson v. Nipp, 20 Ind. A. 156, 50 NE 408; Brigham v. Hibbard, 28 Or. 386, 43 P 383.

21. Denman v. Bloomer, 11 Ill. 177 (where the court recognizes the rule that an agent cannot act after his authority ceases by the completion of the business to transact which he was constituted agent, but, until the business has been completed, or the power revoked, the authority continues and the agent can bind the principal. Hence, if the price has not been fully paid the agent may return the part paid and rescind the sale; if this were not so the agent could not protect his principal if he discovered before full payment had been made that the vendee was insolvent); Griffith v. Fields, 105 Iowa 362, 75 NW 325 (holding that where plaintiff verbally agreed to purchase trees at an advanced price, defendants to set them out, care for them, and replace dead ones, during four years, and the order for the trees, however, stipulated, "The entire contract is written and printed hereon, and that no verbal agreement or alteration in the printed matter of this contract is binding," and provided only for replacement, and this for but one year, and plaintiff refused to execute notes in payment until one of defendant's agents, "authorized to deliver trees, make settlements with purchasers, and take notes therefor," gave him a written agreement to comply with the terms of the verbal agreement, the agent had authority to make such agreement, as it was merely a completion of the original contract).

22. Ind.—Marion Mfg. Co. v. Harding, 155 Ind. 648, 58 NE 194; Ellinger v. Rawlings, 12 Ind. A. 336, 40 NE 146 (where goods purchased were found unlike the sample and the salesman was held to have implied authority to direct the buyer to retain the unsatisfactory goods until all were in and then make one reshipment of those defective); Springfield Engine, etc., Co. v. Kennedy, 7 Ind. A. 502, 34 NE 856.
Iowa.—Webster City First Nat. Bank v. Dutcher, 128 Iowa 413, 104 NW 497, 111 AmSR 209, 1 LRANS 142 and note; Parsons Band-Cutter, etc., Co. v. Mallinger, 122 Iowa 703, 98 NW 580; Blaess v. Nichols, etc., Co., 115 Iowa 373, 88 NW 829; McCormick Harvesting Mach. Co. v. Brower, 88 Iowa 607, 55 NW 537; Warder v. Robertson, 75 Iowa 585, 39 NW 905; Pitsinowsky v. Beardsley, 37 Iowa 9.
Minn.—Reeves v. Cress, 80 Minn. 466, 83 NW 443; Oster v. Mickley, 35 Minn. 245, 28 NW 710; Deering v. Thom, 29 Minn. 120, 12 NW 350.
Mo.—Heilman Mach. Wks. v. Dollarhide, 32 Mo. A. 178.
Tex.—Eastern Mfg. Co. v. Brenk, 32 Tex. Civ. A. 97, 73 SW 538.
Wis.—Warder, etc., Co. v. Pischer, 110 Wis. 363, 85 NW 968.

23. Milwaukee Harvester Co. v. Glidden, 106 Ill. A. 319; Topper v. Sunlight Oil, etc., Co., 192 Pa. 620, 44 A 286.

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to waive any of the conditions of the contract.[24] Certainly, if the principal asserts the authority of the agent to rescind the sale, third persons will not be heard to deny it.[25] A general agent with full authority to represent the principal in a given locality, or to manage a particular branch of the principal's business, is more than a mere sales agent, and where the conduct of his agency reasonably requires power to modify the contracts he makes, courts have often held the right so to do to be within his implied powers.[26] Thus an agent with general authority to sell and warrant machines has implied power, after having entered into a contract, to waive or change its terms.[27] So also, where an agent is expressly authorized to sell on approval, he has implied authority to waive the return of the goods within the time limited in the contract,[28] or a condition requiring notice when the goods are unsatisfactory,[29] or to give further, or to waive the, time for trial.[30]

[§ 244] **c. To Sell Real Estate—(1) In General.** A power of attorney to sell and convey real estate should be as certain as it is necessary for the deed to be which is to be executed under it; it should possess the same requisites, and the same solemnities and formalities should be observed in its execution as are necessary in a deed directly conveying the estate.[31] An agent's authority to sell real estate is not to be readily inferred, but exists only where the intention of the principal to give him such authority is plainly manifest.[32] The authority must be clear

[a] **Illustrations.**—(1) A letter which states that, after consultation with its traveling salesman, defendant has authorized him to adjust with plaintiff the balance of an account for any part of the amount, and make any change the salesman and plaintiff may deem necessary in the future advertisement of the business, authorizes the salesman to enter into an entirely new contract on settlement of the old, although more advantageous to plaintiff, where, from its face, the contract does not show a betrayal of the interest of the agent's employer. Kuhlman v. E. J. Hart Co., (Tenn. Ch. A.) 59 SW 455. (2) Where, after the receipt of a dray by a purchaser, there was a controversy as to its fitness, and the seller sent its agent "to adjust the matter" as stated in its letter to the purchaser, the agent had apparent authority to make a new contract agreeing that, if the dray would not carry five thousand pounds, the purchaser would not have to pay for it. Garnett v. Parry Mfg. Co., (Ala.) 64 S 559.

[b] **Modifying printed form.**—Provisions in a printed order form that no representations or guaranties had been made by the salesman on behalf of the seller which were not therein expressed, warrant the inference that the salesman had authority to make changes in the contract or representations of the kind not therein expressed. King v. Edward Thompson Co., (Ind. A.) 104 NE 106.

24. Robinson v. Berkey, 100 Iowa 136, 69 NW 434, 62 AmSR 549 (holding that a provision of a contract that no agent or salesman of the seller has power to waive any of the conditions of the contract will not prevent an authorized agent from making such a waiver).

25. Sturtevant v. Orser, 24 N. Y. 538, 82 AmD 321 (holding that the principal may take advantage of the acceptance by his agent of the rescission of a sale by an insolvent vendee).

26. Ill.—Bloomer v. Denman, 12 Ill. 240.

Ind.—Springfield Engine, etc., Co. v. Kennedy, 7 Ind. A. 502, 34 NE 856 (holding that a local agent authorized to sell machines in certain localities is, as to a sale made by him in such territory, a general agent with authority to waive certain conditions in the contract of sale).

Iowa.—Webster City First Nat. Bank v. Dutcher, 128 Iowa 413, 104 NW 497, 1 LRANS 142.

Minn.—Parsons Band Cutter, etc., Co. v. Haub, 83 Minn. 180, 86 NW 14.

N. Y.—Thomas Roberts Stevenson Co. v. Fox, 19 Misc. 177, 43 NYS 253.

Or.—Hughes v. Lansing, 34 Or. 118, 55 P 95, 75 AmSR 574. See also Williamson v. North Pac. Lumber Co., 38 Or. 560, 63 P 16, 64 P 854.

Tex.—Clayton v. Western Nat. Wall Paper Co., (Civ. A.) 146 SW 695 (where a salesman was held to have implied authority to bind his principal by an agreement to take back unsalable goods and give buyer credit for the same upon his note given for the amount of the second purchase). See Scott v. Wells, 6 Watts & S. (Pa.) 357, 40 AmD 568.

[a] **State agent.**—Where a sales agent is described in his letterheads as the agent for a state, and letters produced from his principal contain such letterheads, and circulars issued describe the agent as the agent for the state, and the letterheads pass into possession of the buyer from the agent, the agent has authority to waive a stipulation in a contract of sale which fixes the remedy in case of a breach of implied warranty of fitness. Randell v. Fay, etc., Co., 158 Mich. 630, 123 NW 574.

[b] **An agent for the sale of farm machinery** and twine who is clothed by his principal with power "to make contracts and make settlements and collect balances, and such like," has full power to bind his principal by an agreement to relieve a customer to whom he has sold an amount of twine largely in excess of the demands of trade of such customer by directing the customer to ship such excess to other persons named by said agent. Herpolsheimer v. Acme Harvester Co., 83 Nebr. 53, 119 NW 30.

27. Reeves v. Younglove, 148 Iowa 699, 127 NW 1017 (holding that an agent, having power to sell a machine under a contract containing conditions for the benefit of the seller, has authority to waive such conditions); Webster City First Nat. Bank v. Dutcher, 128 Iowa 413, 104 NW 497, 1 LRANS 142 and note; Blaess v. Nichols, etc., Co., 115 Iowa 373, 88 NW 829.

[a] **Agent may change terms of contract.**—Where, upon the buyer's making complaint, the seller's agent adjusts the matter with him by offering him a new machine under a different contract, the agent is presumed to have authority to make such new agreement and to agree that it shall not affect the buyer's right of action for a breach of the warranty. Aultman Co. v. McDonough, 110 Wis. 263, 85 NW 980.

[b] **Waiving warranty.**—A provision in a contract for the sale of a machine that it shall be warranted according to the terms of a written warranty contained therein, without addition or erasure, does not preclude an agent of the seller from waiving such terms after the machine has been delivered. McCormick Harvesting Mach. Co. v. Hiatt, 4 Nebr. (Unoff.) 587, 95 NW 627.

28. Gaar v. Rose, 3 Ind. A. 269, 29 NE 616; McCormick Harvesting Mach. Co. v. Brower, 88 Iowa 607, 55 NW 537; Warder v. Robertson, 75 Iowa 585, 39 NW 905; Pitsinowsky v. Beardsley, 37 Iowa 9.

29. Acker v. Kimmie, 37 Kan. 276, 15 P 248; Heilman Mach. Wks. v. Dollarhide, 32 Mo. A. 178.

[a] **Where the general agent of a seller of farm machinery,** with full authority to supervise everything in relation to the starting and adjusting of machines, etc., superintends the testing of a machine, which has been purchased by plaintiff under a warranty that if it cannot be made to work on a two days' trial, immediate notice shall be given thereof to the seller, such general agent has authority to waive such provision and request that the machine be retained for further trials after the assistance of an expert can be obtained. Peter v. Plano Mfg. Co., 21 S. D. 198, 110 NW 783.

30. Reeves v. Cress, 80 Minn. 466, 83 NW 443 (holding that, where plaintiff's agent had authority to sell a machine, and authority to receive it back if it was not accepted by the purchaser, he had authority, himself or through his subagent, to request the purchaser to retain the property for the purpose of giving it a further trial, and hence retention of the property by the purchaser on the strength of such request did not constitute an acceptance); Bannon v. Aultman, 80 Wis. 307, 49 NW 967, 27 AmSR 37.

31. Clark v. Graham, 6 Wheat. (U. S.) 577, 5 L. ed. 334; U. S. v. Payette Lumber, etc., Co., 198 Fed. 881 [aff 208 Fed. 231, 125 CCA 431] (sale under power of attorney not delivered by principal held subject to cancellation); Gage v. Gage, 30 N. H. 420; Lumbard v. Aldrich, 8 N. H. 31, 28 AmD 381; Gee v. Bolton, 17 Wis. 604. See generally supra §§ 54, 64.

32. Snell v. Weyerhauser, 71 Minn. 57, 73 NW 633; Smith v. Allen, 86 Mo. 178; Bennett v. Louisiana, etc., Lumber Co., (Tex. Civ. A.) 148 SW 1189; Reddell v. Watkins Land-Mortg. Co., (Tex. Civ. A.) 37 SW 608 (holding that where an agent negotiated a sale of defendant's land, and submitted the proposition to defendant's general manager for approval, and a short time thereafter received instructions by letter to close the sale on terms mentioned in the letter, it showed authority in the agent to make the sale).

[a] **Illustrations.**—(1) Where the written authority to the agent conferred upon him the exclusive right to sell the property, and expressly recited that "we agree to convey the same or cause the same to be conveyed by good and sufficient warranty deed to the person or persons designated by you," it was held that the agent had authority to make a binding contract of sale. Littlefield v. Dawson, 47 Wash. 644, 92 P 428. (2) A request to "please sell for me my houses, and I agree to pay you a commission on the purchase price accepted," was held to give authority to make a sale and to execute a binding contract of sale within the statute of frauds. Rosenbaum v. Belson, [1900] 2 Ch. 267. (3) An agent was held to have authority to execute a binding contract of sale where the authority read, "I will sell the lots for $19,000 and pay you 5 percent com. plus $50, or $1,000 com. in all, for making the sale. In other words, I want $18,000 net for my lots. Terms $3,000 cash, bal. long time." Colvin v. Blanchard, 101 Tex. 231, 106 SW 323.

[b] **Power to do any lawful act** for and in the name of the principal

and distinct and of such a character that a fair and candid person may see without hesitancy that the authority is given;[33] and, where it is not given in express terms, in order that it may be implied it must reasonably be necessary to enable the agent to execute the agency,[34] although it may be inferred from a general, unrestricted power to make sales.[35] A mere statement, or answer to an inquiry, by an owner of land, that he will take a certain sum for it is not sufficient to authorize the person to whom the statement is made to act as agent for its sale.[36]

Authority to sell not implied. Authority to sell, or to sell and convey, land will not be inferred from a general power to settle, compromise, adjust, or attend to the principal's business or property,[37] even though the land is acquired in carrying on the principal's business;[38] or from a previous authority to sell, even though the agent is able to sell on the terms then authorized;[39] or from being put in possession of the property;[40] or from authority to find a purchaser,[41] or to lease and col-

as if he were present empowers the agent to dispose of the real estate of the principal. Veatch v. Gilmer, (Tex. Civ. A.) 111 SW 746.

[c] **A letter to a real estate agent** must be specific and certain in order to create an agency to sell real estate. Fay v. Sullens, 15 Okl. 171, 81 P 426.

[d] **The possession by a third person of a deed** (1) does not show that he is the agent of the grantor for any other purpose than to deliver the deed and to receive the purchase price named therein. Pease v. Fink, 3 Cal. A. 371, 85 P 657. (2) That a sister left with her brother her deed, to enable him to collect rents, does not raise an implied agency in him to make sale of her real estate. Higinbotham v. Pauch, 252 Pa. 620, 81 A 718.

[e] **Estoppel.**—Where an owner of an interest in land signs as executrix an instrument purporting to authorize a certain person to negotiate a sale of the land, and afterward receives the proceeds of a sale and delivers a deed conveying her individual interest in the property, she is in no position to deny that the person who negotiated the same was her agent for the sale of her individual interest. Millard v. Smith, 119 Mo. A. 701, 95 SW 940.

[f] **Conditional power.**—A power of attorney to sell property "if directed by me or my lawful heirs by letters to that effect" is insufficient to authorize a sale except under the prescribed conditions. Gibbons v. Ewer, 2 Tex. Unrep. Cas. 250.

33. Ill.—Albertson v. Ashton, 102 Ill. 50.

Iowa.—Stewart v. Pickering, 73 Iowa 652, 35 NW 690.

Minn.—Graves v. Horton, 38 Minn. 66, 35 NW 568.

Mo.—Cockrell v. McIntyre, 161 Mo. 59, 61 SW 648.

N. Y.—Michael v. Eley, 61 Hun 180, 15 NYS 890.

Okl.—Gault Lumber Co. v. Pyles, 19 Okl. 445, 92 P 175.

Wash.—Valentine v. Carter, 49 Wash. 141, 94 P 932.

Wis.—Webb v. Mason, 152 Wis. 19, 139 NW 442 (authority to sell held sufficient); McCune v. Badger, 126 Wis. 186, 105 NW 667.

[a] **Subject matter of power uncertain.**—Under a power by a husband to his wife "to bargain, purchase, sell, grant, release and convey, to accept and receive all sums of money, to collect and pay, to sue and be sued, to give notes and receipts and to accept the same of . . . all and every person or persons, and in my name to make, seal and deliver and acknowledge for me," she has no authority to convey real estate, inasmuch as the form of the instrument does not exclude the hypothesis that the subject matter of the power was to be something else than land. Gee v. Bolton, 17 Wis. 604 [dist Marr v. Given, 23 Me. 55, 39 AmD 600].

34. U. S.—Union Mut. L. Ins. Co. v. Masten, 3 Fed. 881 (holding, however, that where property has been purchased of an agent in good faith, and the money paid, under the supposition that the agent was duly authorized to make the sale, a court of equity will protect the purchaser if it can do so consistently with principles of law); Bosseau v. O'Brien, 3 F. Cas. No. 1,667, 4 Biss. 395.

Ala.—Southern Cotton Oil Co. v. Henshaw, 89 Ala. 448, 7 S 760.

Ind.—Coquillard v. French, 19 Ind. 274.

Tex.—Hammond v. Hough, 52 Tex. 63; Berry v. Harnage, 39 Tex. 638; Hennessee v. Johnson, 13 Tex. Civ. A. 530, 36 SW 774; Collins v. Durward, 4 Tex. Civ. A. 339, 23 SW 561.

Wis.—Jourdain v. Fox, 90 Wis. 99, 62 NW 936 (holding that an agent employed to purchase tax titles, receiving as compensation a percentage of the net profits, has no authority to convey lands purchased for the principal at a tax sale).

Can.—Elk Lumber Co. v. Crow's Nest Pass Coal Co., 39 Can. S. C. 169.

Ont.—Maybury v. O'Brien, 26 Ont. L. 628, 6 DomLR 268, 3 OntWN 1546, 22 OntWR 677 [allowing app 25 Ont. L. 229, 20 OntWR 683].

See Hay v. Mayer, 8 Watts (Pa.) 203, 34 AmD 453.

[a] **Authority to sell real estate cannot be inferred** from a power authorizing the collection of debts and the granting of acquittances or other discharges, or the execution and delivery of deeds of conveyance upon receipt of the claims, as such a power only allows deeds of release for mortgages, or to affect contracts previously made. Berry v. Harnage, 39 Tex. 638.

[b] **An advertisement on the land** referring to a certain person as agent for the sale of the land does not prove authority to make the sale where such authority is denied by the owner. Mortimer v. Cornwell, Hoffm. (N. Y.) 351.

[c] **Letters stating price, terms, etc.**—An agent is not clothed with authority to make a binding agreement for the sale of land by letters from his principal, in effect stating his price and terms of payment, and that he would refer all inquiries concerning the land to the agent, and directing that the necessary papers, upon a purchaser being found, be sent him for execution, and that he would come at any time if wanted, where, subsequently and before any sale was made by the agent, the principal wrote the agent not to do anything until his arrival. Margolis v. Birnie, 5 DomLR 534, 21 WestLR 462.

35. Sullivan v. Davis, 4 Cal. 291; Marr v. Given, 23 Me. 55, 39 AmD 600.

[a] **Illustration.**—A power of attorney "to sell or dispose of any or the whole of my property" and "in my name to sign and execute any and all instruments of writing" authorizes a sale of real estate. Gardiner v. Griffith, (Tex. Civ. A.) 56 SW 558.

36. Prentiss v. Nelson, 69 Minn. 496, 72 NW 831; Cram v. Long, 154 Wis. 13, 142 NW 267; Canada Settlers L. & T. Co. v. Purvis, 7 Terr. L. 38.

37. U. S.—Hunter v. Sacramento Valley Beet Sugar Co., 11 Fed. 15, 7 Sawy. 498.

Ala.—Southern Cotton Oil Co. v. Henshaw, 89 Ala. 448, 7 S 760.

Cal.—Wilcoxson v. Miller, 49 Cal. 193; Treat v. De Celis, 41 Cal. 202; Blum v. Robertson, 24 Cal. 127; Billings v. Morrow, 7 Cal. 171, 68 AmD 235; Lord v. Sherman, 2 Cal. 498.

Ida.—Johnson v. Sage, 4 Ida. 758, 44 P 641.

Ind.—Coquillard v. French, 19 Ind. 274.

Me.—Matthews v. Matthews, 49 Me. 586.

Mo.—Ashley v. Bird, 1 Mo. 640, 14 AmD 313.

N. Y.—Ferreira v. Depew, 17 HowPr 418.

Tex.—De Cordova v. Knowles, 37 Tex. 19; Watson v. Hopkins, 27 Tex. 637; Wells v. Heddenberg, 11 Tex. Civ. A. 3, 30 SW 702; Connor v. Parsons, (Civ. A.) 30 SW 88 (holding that a power "to bring suit for, settle up, compromise, release, obtain, or recover the interest belonging to and owned by," etc., does not give authority to sell and convey).

Wash.—Scully v. Book, 3 Wash. 182, 28 P 556.

[a] **A general and special agency to transact all manner of business** (1) does not necessarily include the power to sell real estate. Hodge v. Combs, 1 Black (U. S.) 192, 17 L. ed. 157. (2) A power of attorney to "ask, demand, receive, sue and receipt for all moneys . . . lands, tenements, and hereditaments which may be due and owing I. [the principal] as the sole heir of P. . . . and the said L. [the attorney] is further authorized to exercise his discretion in the settlement of any disputes, controversies or suits that are now or may hereafter arise, concerning of or in relation to the above property by compromise or otherwise, as may seem just and right to him," does not confer authority to convey land inherited by I from P. Bean v. Bennett, 35 Tex. Civ. A. 398, 80 SW 662. (3) But it has been held that a power of attorney to "attend to and transact all my business in connection of all my property both real and personal, and generally to do any thing he may think necessary and requisite in the premises as fully and fairly as I could do myself if personally present," authorizes the agent to enter into a contract for the sale of the principal's farm and to make terms as to payment and mortgage and to receive the purchase price. McClellan v. McCaughan, 23 Ont. 679.

[b] **A power to sell "claims and effects"** cannot be construed to authorize a sale of land or real estate. De Cordova v. Knowles, 37 Tex. 19.

38. Smith v. Stephenson, 45 Iowa 645.

39. Sullivan v. Leer, 2 Colo. A. 141, 29 P 817; Matthews v. Sowle, 12 Nebr. 398, 11 NW 857; Wasweyler v. Martin, 78 Wis. 59, 46 NW 890. See also Hoskins v. O'Brien, 132 Wis. 453, 112 NW 466.

40. Ex p. Davidson, 57 Fed. 883.

41. Cal.—Lambert v. Gerner, 142 Cal. 399, 76 P 53; Grant v. Ede, 85 Cal. 418, 24 P 890, 20 AmSR 237; Armstrong v. Lowe, 76 Cal. 616, 18 P 768; Duffy v. Hobson, 40 Cal. 240, 6 AmR 617.

Iowa.—Furst v. Tweed, 93 Iowa 300, 61 NW 857; Burlington, etc., R. Co. v. Sherwood, 62 Iowa 309, 17 NW 564; Lucas v. Barrett, 1 Greene 510.

Minn.—Prentiss v. Nelson, 69 Minn. 496, 72 NW 831.

N. J.—Milne v. Kleb, 44 N. J. Eq. 378, 14 A 646.

Va.—Simmons v. Kramer, 88 Va. 411, 13 SE 902.

Eng.—Hamer v. Sharp, L. R. 19 Eq. 108; Godwin v. Brind, L. R. 5 C. P. 300 note; Wilde v. Watson, L. R. 1 Ir. 402; Chadburn v. Moore, 61 L. J. Ch. 674.

Ont.—Ryan v. Sing, 7 Ont. 266, 268 (holding that the following letter does not authorize the agent to make a

lect rents;[42] or from a particular power to make sales and settle the principal's debts.[43] Nor will such power be implied from an authority to purchase land;[44] or from a power to locate and survey lands,[45] or to locate and acquire for the principal the land in question;[46] or from a power to demand and receive real estate on behalf of the principal,[47] or to receive proposals to purchase land and submit them to the principal.[48]

[§ 245] **(2) Extent of Authority—(a) In General.** In accordance with the rule requiring powers of attorney to be strictly construed,[49] a power of attorney to sell lands must be strictly construed and cannot be extended by construction.[50] Hence an authority to sell must be strictly pursued and acts beyond those which are legitimately necessary to carry the particular power into effect will not bind the principal,[51] although, in the absence of restrictions, the agent has undoubted power to do those things that are usually done in making such sales.[52]

Verbal directions. Where a power of attorney has been given, authorizing the conveyance of land, verbal directions from the maker of the power can confer no new authority, nor enlarge that contained in the power of attorney.[53]

Continuing authority. A power of attorney for the sale of lands recorded, and in no manner revoked, may be rightfully regarded by purchasers as continuing.[54]

Manner of sale. Where the power prescribes the manner in which the sale must be made, the agent must sell in that manner;[55] and hence, where the

binding contract of sale: "Please call on J. J. Ryan. . . . He resides in my house, on Power street, and has been wanting to purchase it for some time. Tell him if he gives me $235 Two hundred and thirty-five dollars, cash, at once, I will send the papers to you for him and he can pay over the money to you. Please write me by return mail").

Compare Hornsby v. Johnstone, 3 N. S. Dec. 1.

See also infra § 250.

42. Higinbotham v. Pauch, 232 Pa. 620, 81 A 718; Samson v. Beale, 27 Wash. 557, 68 P 180.

[a] **A power to manage, control, and lease** the property of a mining corporation does not authorize an attorney in fact or an agent to sell and transfer the property of the corporation, either in trust or absolutely. Johnson v. Sage, 4 Ida. 758, 44 P 641.

43. Alger v. Fay, 12 Pick. (Mass.) 322; Bertschy v. Sheboygan Bank, 89 Wis. 473, 61 NW 1115. See also Kempner v. Rosenthal, 81 Tex. 12, 16 SW 639.

44. Tod v. Benedict, 15 Iowa 591.

45. Moore v. Lockett, 2 Bibb (Ky.) 67, 4 AmD 683.

[a] **Authority to mine and explore.**—Under an instrument authorizing an agent to mine and explore the property of his principal and "to act for and take such action or actions as he may consider necessary in the interest of" his principal, such agent was appointed and employed to "mine and explore" only and the general words in the concluding part of the document are limited to that employment and give the agent no power to sell trees and timber from the principal's property. British North America Min. Co. v. Pigeon River Lumber Co., 2 DomLR 609, 3 OntWN 701, 21 OntWR 291.

46. Campbell v. Lapsley, 2 Bibb (Ky.) 73.

47. Sullivant v. Jahren, 71 Kan. 127, 79 P 1071; Hotchkiss v. Middlekauf, 96 Va. 649, 32 SE 36, 43 LRA 806 (holding that a power of attorney "to demand and receive of and from any person or persons all such real and personal estate" as the principal may be entitled to as son and heir does not authorize the attorney to sell and convey).

[a] **A power to do everything to secure title** to a certain piece of property does not warrant a sale of the land or a contract to sell any portion of it. Blum v. Robertson, 24 Cal. 127.

48. Johnson v. American Freehold Land Mortg. Co., 111 Ga. 490, 36 SE 614 (holding that an agent who has authority only to receive proposals to purchase the property of his principal, and submit the same to the latter for acceptance or rejection, cannot make an absolute contract of sale which will be binding on the principal).

[a] **Approval of principal.**—An instrument by which the owner of land authorizes another to sell the same at not less than a stated price, and to retain a percentage of the proceeds in payment for his services, and which further provides that any security taken for deferred payments shall be payable to the owner, who shall execute proper conveyances on receipt of full payment, does not empower the agent to make a contract of sale, without the approval of the owner, which the latter can be compelled to execute. Hall v. Gambrill, 88 Fed. 709 [aff 92 Fed. 32, 34 CCA 190].

49. See supra § 199.

50. Penfold v. Warner, 96 Mich. 179, 55 NW 680, 35 AmSR 591; Jeffrey v. Hursh, 49 Mich. 31, 12 NW 898.

51. U. S.—Clarke v. Courtney, 5 Pet. 319, 8 L. ed. 140; Warren v. Tinsley, 53 Fed. 689, 3 CCA 613; Bosseau v. O'Brien, 3 F. Cas. No. 1,667, 4 Biss. 395.

Ark.—Swift v. Erwin, 104 Ark. 459, 148 SW 267, AnnCas1914C 363.

Cal.—Dupont v. Wertheman, 10 Cal. 354.

Colo.—Morsch v. Lessig, 45 Colo. 168, 100 P 431; Machebeuf v. Clements, 2 Colo. 36 (holding that a power of attorney appointing an attorney with power to convey land on conditions prescribed confers no authority to bind the grantor therein, except on the performance of the prescribed conditions); Guy v. Rosewater, 18 Colo. A. 1, 69 P 271 (holding that an authority to an agent to enter into possession of, control, and sell, and assign plaintiff's real estate does not empower the agent to enter into a copartnership for plaintiff).

Ill.—Brillhart v. McConnell, 25 Ill. 476 (holding that authority to sell upon fulfillment of conditions named does not confer authority to sell without performance of the conditions).

Iowa.—Iowa R. Land Co. v. Fehring, 126 Iowa 1, 101 NW 120 (no authority to waive claims of title); Hampton v. Moorhead, 62 Iowa 91, 17 NW 202.

Mass.—Wood v. Goodridge, 6 Cush. 117, 52 AmD 771.

Minn.—Dayton v. Buford, 18 Minn. 126; Rice v. Tavernier, 8 Minn. 214, 83 AmD 778.

Mont.—Schaeffer v. Mutual Ben. L. Ins. Co., 38 Mont. 459, 100 P 225.

N. J.—Campbell v. Hough, 73 N. J. Eq. 601, 68 A 759 (holding that an agreement whereby an agent, authorized by parol to enter into a written contract for the sale of land, attempts to bind his principals to terms not authorized by them is void); National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331.

N. Y.—Hogan v. O'Brien, 29 App. Div. 59, 51 NYS 530 (holding that an agreement that an agent for the sale of lots shall lay out and grade streets and put in sewers and water mains, and that the principal shall deed him sufficient lots to pay the cost, does not authorize the agent to contract with a purchaser of lots to lay walks and pavements and put in a sewer).

N. C.—Thompson v. Green River Power Co., 154 N. C. 13, 69 SE 756.

Oh.—Spengler v. Sonnenberger, 88 Oh. St. 192, 102 NE 737.

Tenn.—Lumpkin v. Wilson, 5 Heisk. 555.

Tex.—Horst v. Lightfoot, 103 Tex. 643, 132 SW 761 [rev (Civ. A.) 122 SW 606].

Que.—Amyot v. Daulnais, 15 Que. Super. 311.

[a] **Agreement to pay liquidated damages.**—Authority to sell and make a contract does not give authority to agree to pay liquidated damages for breach of the contract. Michael v. Hoffsteadt, 5 Nebr. (Unoff.) 453, 98 NW 1078.

[b] **No power to create equitable estate.**—Authority to take charge of and sell land does not authorize an agent to create an equitable estate therein. Bohn v. Hatch, 15 NYS 550 [aff 133 N. Y. 64, 30 NE 659].

[c] **Sale to compromise claims to property.**—A power of attorney to sell land and collect the purchase money does not authorize the agent to make deeds in settlement of claims of third persons to the lands of the principal. Skirvin v. O'Brien, 43 Tex. Civ. A. 1, 95 SW 696.

[d] **If unauthorized acts cannot be separated from authorized** the whole fails. Thomas v. Joslin, 30 Minn. 388, 15 NW 675.

52. Smith v. Allen, 86 Mo. 178; Keim v. Lindley, (N. J. Ch.) 30 A 1063.

[a] **An agent's agreement to pay a small interest on earnest money deposited** to bind a contract for the sale of land would not invalidate the contract. Beheret v. Myers, 240 Mo. 58, 144 SW 824.

53. Spofford v. Hobbs, 29 Me. 148, 48 AmD 521; Thompson v. Green River Power Co., 154 N. C. 13, 69 SE 756; Coulter v. Portland Trust Co., 20 Or. 469, 26 P 565, 27 P 266, 23 Or. 131, 31 P 280.

[a] **Secret instructions or communications** (1) between a principal and agent as to the condition upon which a deed shall be delivered cannot affect the purchaser. Thornton v. Pinckard, 157 Ala. 206, 47 S 289. (2) A letter from a party to a contract for the exchange of real estate to the other party, sufficient to warrant the belief that the former party's agent was authorized to deliver the contract, is binding upon such party, although secret instructions had been given the agent not to deliver the contract. Hawes v. Birkholz, 114 NYS 765. See generally supra § 209.

54. Carson v. Smith, 5 Minn. 78, 77 AmD 539.

55. Siebold v. Davis, 67 Iowa 560, 25 NW 778; Amyot v. Daulnais, 15 Que. Super. 311.

[a] **Where a power of attorney to sell land is uncertain** as to the mode of its execution, and the attorney and the purchaser from him adopt a construction rational in itself, the act of the attorney will not be held void because the court may, on a critical conclusion, come to a different conclusion. Reed v. Welsh, 11 Bush (Ky.) 450.

power requires a written contract, he cannot enter into a parol agreement to sell.[56] So also where he is instructed to sell at public auction, he is not authorized to sell at private sale.[57] Where the authority is to sell all the land together the agent is not authorized to sell a portion of it separately;[58] and, on the other hand, if his authority is to sell in lots or portions he is not authorized to make a sale of the entire tract as a whole.[59]

[§ 246] **(b) Powers Implied in General.** Authority may be conferred upon an agent to sell land broad enough to include other acts than mere sale, in which case of course the agent's power to bind his principal will be as broad as the authority.[60] Ordinarily an agent to sell land has by implication authority to perform all acts which are reasonably necessary to effect a binding sale,[61] for the rule of strict construction will not be allowed to defeat the very purpose of the agency.[62] Where the agent has authority to exercise discretion his exercise thereof will bind the principal;[63] but it must be for the principal's benefit,[64] unless it is clearly the object of the agency that the agent should deal with the real estate for his own benefit.[65] A power to sell and convey implies power to deliver possession of the property to the purchaser,[66] or to redeem the land when sold for the payment of taxes.[67] An agent having such authority may also employ counsel as far as may be necessary to prepare such instruments as he is authorized to execute,[68] but he is not authorized to employ and advise with counsel relative to the principal's interests.[69]

[§ 247] **(c) Powers Not Implied in General.** As a general rule authority to sell land does not imply authority to rent it,[70] to grant easements or licenses on or over the land,[71] to partition the land[72] or divide it into lots,[73] to alter boundaries,[74] to dedicate the land to public use,[75] unless such authority is ex-

56. Baring v. Peirce, 5 Watts & S. (Pa.) 548, 40 AmD 534.

57. Daniel v. Adams, Ambl. 495, 27 Reprint 322.

58. Mathews v. Gilliss, 1 Iowa 242.

[a] **Where the agent disobeys positive instructions** and undertakes to sell a portion of the property instead of the whole, specific performance will not be decreed against the principal. Davis v. Gordon, 87 Va. 559, 13 SE 35.

[b] **A power to sell made by two jointly,** without mention of the separate property or business of either, gives no authority to sell land owned solely by one and in which the other has no interest. Gilbert v. How, 45 Minn. 121, 47 NW 643, 22 AmSR 724.

59. Rice v. Tavernier, 8 Minn. 248, 83 AmD 778 (holding that a power to sell certain real estate in "lots as surveyed by B," where the land is about to be surveyed as an addition to a town, gives the agent no authority to sell the entire tract for a certain sum or at a certain price per acre).

[a] **But** where a power authorizes the sale of two tracts of land and a part of a third tract on such terms as the agent thinks most beneficial to all parties in interest, and the land lies in one body, without any visible evidence of a partition, with no separate improvements on the several tracts, and the parties construe it as giving power to sell all the land in one tract, and act on that construction, the principal is bound thereby. Reed v. Welsh, 11 Bush (Ky.) 450.

60. Hitchens v. Ricketts, 17 Ind. 625; Kane v. Dahlbender, 9 Misc. 473, 30 NYS 232; Wright v. Blackwood, 57 Tex. 644; Martin v. Harris, (Tex. Civ. A.) 26 SW 91. See also Rovelsky v. Scheuer, 114 Ala. 419, 21 S 785; Frink v. Roe, 2 Cal. Unrep. Cas. 491, 7 P 481.

61. Vaught v. Paddock, 98 Ark. 10, 13, 135 SW 331 [cit Cyc] (holding that, where a principal employs an agent with full authority to sell certain lots, and the agent makes an amended plat of the property changing the size of the lots and describes certain of the property sold to the purchaser according to the new plat which is never recorded and is subsequently abandoned, the agent's acts in making the sale are binding on the principal regardless of the description of the property); Smith v. Allen, 86 Mo. 178; Judd v. Walker, 114 Mo. A. 128, 89 SW 558; Green v. Worman, 83 Mo. A. 568; Bennett v. Louisiana, etc., Lumber Co., (Tex. Civ. A.) 148 SW 1189; Standard Realty Co. v. Nicholson, 24 Ont. L. 46, 2 OntWN 1189, 19 OntWR 373.

[a] **Correcting description of land.**—An agent authorized to sell land may correct the description so as to cover the land intended to be conveyed. Boykin v. Wright, 11 La. Ann. 531.

62. Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 AmD 92 (holding that an agent empowered to sell a large tract of land may break it up into smaller tracts so as to enable him to sell on more favorable terms); Campbell v. Beard, 57 W. Va. 501, 50 SE 747.

63. Brock v. Pearson, 87 Cal. 581, 25 P 963; McNeil v. Shirley, 33 Cal. 202; Smith v. Allen, 86 Mo. 178.

64. Ill.—Chappell v. McKnight, 108 Ill. 570 (holding that the principal was not bound by a sale by the agent where both the agent and the purchaser knew that the agent could secure more for the property).

Ind.—Goss v. Meadors, 78 Ind. 528 (holding that the agent could not hold the land in opposition to the wishes of the principal).

N. Y.—Wright v. Cabot, 89 N. Y. 570; Kingsland v. Chetwood, 39 Hun 602 (holding that a power of attorney to sell does not empower the agent to apply the property to his own use).

Pa.—Finch v. Conrade, 154 Pa. 326, 26 A 368 (holding that, where an agent to sell land agrees with the purchaser to take an interest, the principal may refuse to convey).

Tex.—Milan County v. Blake, 54 Tex. 169; Hunter v. Eastham, (Civ. A.) 81 SW 336.

65. Frink v. Roe, 2 Cal. Unrep. Cas. 491, 7 P 481 (holding that under these circumstances the agent may transfer the real estate in payment of his debts).

66. Indiana Cent. Canal Co. v. State, 53 Ind. 575.

[a] **Immediate possession.**—Where a principal writes to his agent for the sale of lands: "The party who is living in the house now has not re-rented for this year; so, of course, he can give possession right away. I think there will be no difficulty in getting possession within ten days, if necessary. If you make the trade, this will authorize you to request the party to vacate the house at once," the agent is authorized to put a purchaser into immediate possession. Peay v. Seigler, 48 S. C. 496, 26 SE 885, 59 AmSR 731.

[b] **Agreement to give immediate possession to purchaser at foreclosure sale** under a power as being within the attorney's apparent powers see Cummings v. Pioneer Bldg., etc., Assoc., 18 Hawaii 349.

67. McCord v. Bergautz, 7 Watts (Pa.) 487.

68. Harnett v. Garvey, 36 N. Y. Super. 326. See generally infra § 308.

69. Harnett v. Garvey, 36 N. Y. Super. 326. See also infra § 308.

70. Hitchens v. Ricketts, 17 Ind. 625. Compare Kane v. Dahlbender, 9 Misc. 473, 30 NYS 232 (holding the power broad enough to authorize the agent to rent).

71. McKillip v. McIlhenny, 2 Watts (Pa.) 446.

[a] **License to cut timber.**—An agent authorized to bargain and sell lands has no right, under such power, to grant a license to a proposed purchaser, previous to a conveyance, to enter and cut timber, although such license is given with a bona fide intent to effect a sale of the lands. Hubbard v. Elmer, 7 Wend. (N. Y.) 446, 22 AmD 590.

[b] **To use adjoining land as right of way.**—Where an agent to negotiate a sale of lots has no authority to make a contract without the owner's consent, a parol license given a purchaser to use adjoining land as a private way, of which the owner has no knowledge, is not binding on the owner. Noftsger v. Barkdoll, 148 Ind. 531, 47 NE 960.

72. Borel v. Rollins, 30 Cal. 408; Gosselin v. Chicago, 103 Ill. 623; McQueen v. Farquhar, 11 Ves. Jr. 467, 32 Reprint 1168, 21 ERC 506.

[a] **Power authorizing partition.**—In Baker v. Hamblen, 48 Tex. Civ. A. 529, 107 SW 577, it was held that where the power of attorney authorized the agent "to ask, demand, sue for and recover for us all lands in the State of Texas to which we are entitled by inheritance or purchase or otherwise, hereby giving our said attorney full power to make, execute and deliver deeds of conveyance or other instruments, and to do and perform any and all acts necessary to be done in and about the business as fully as we could do if we were personally present," the powers conferred by these instruments included the power to make the partition and execute the partition deed. See also Martin v. Harris, (Tex. Civ. A.) 26 SW 91 (holding the power broad enough to authorize partition).

73. Gosselin v. Chicago, 103 Ill. 623.

[a] **Authority to lay out lots and ways implied.**—A power to sell any or all of the real estate of the principal without restriction as to the mode of sale may impliedly confer authority upon the agent to plat the land and lay out lots and ways, as the platting of land is a very common step toward its sale, and the laying out of ways, if the sale is to be in parcels, is often necessary and incident to the exercise of the full authority. Anthony v. Providence, 18 R. I. 699, 28 A 766.

74. Fore v. Campbell, 82 Va. 808, 1 SE 180.

75. U. S.—Hanrick v. Patrick, 119 U. S. 156, 7 SCt 147, 30 L. ed. 396; Wirt v. McEnery, 21 Fed. 233.

Cal.—Mott v. Smith, 16 Cal. 533; Dupont v. Wertheman, 10 Cal. 354.

Ill.—Gosselin v. Chicago, 103 Ill. 623.

Wash.—Anderson v. Bigelow, 16 Wash. 198, 47 P 426 (holding that a power of attorney to sell and convey land does not authorize the attorney to dedicate any part of it for public

pressly authorized or necessarily incident to the particular power conferred,[76] to reinvest the proceeds,[77] to assign the land for the benefit of the principal's creditors,[78] or to organize a corporation to purchase the land.[79] So also a power to exchange and convey does not authorize a purchase of land.[80]

Authority to give option. A general authority to sell real estate does not include authority to give an option on the property.[81]

[§ 248] **(d) Power to Mortgage.** The rule is now firmly established that a mere power to sell and convey land does not carry with it, by implication, a power to encumber the land by a deed of trust or mortgage,[82] unless it appears from the circumstances and the nature of the power that such authority was intended.[83]

Discharge or foreclosure of mortgage. Neither will a power to sell authorize an agent to discharge[84] or foreclose a mortgage.[85]

[§ 249] **(e) Property Which May Be Sold.** The power need not describe the specific tract of land provided the power is broad enough to include it, and a general power to sell all lands owned by the principal in a given locality gives authority to sell any particular tract in such locality.[86] If the power describes the lands to be sold, the sale by the agent will be binding if the land conveyed can be ascertained by the description in the power.[87]

Power to sell a particular interest of the principal in lands is good even though there may be an unimportant defect in the description of the interest to be disposed of;[88] but it will not be extended to include other lands, or interests in the same lands derived in other ways, and not referred to in the power, and especially if these interests were unknown at the time of the execution of the power,[89] nor will it include interests conveyed away by the principal before the agent acts,[90] or which never be-

purposes, nor render his declarations of dedication binding on the maker).
Wis.—Campbell v. Campbell, 57 Wis. 288, 15 NW 138; Meade v. Brothers, 28 Wis. 689.

76. Wirt v. McEnery, 21 Fed. 233; Anthony v. Providence, 18 R. I. 699, 28 A 766.

[a] **An agent authorized to "lay out" the grounds** of the principal in order to dispose of them has implied authority to dedicate a portion of them as a highway. State v. Atherton, 16 N. H. 203.

77. Stoddard v. U. S., 4 Ct. Cl. 511.

78. Gouldy v. Metcalf, 75 Tex. 455, 12 SW 830, 16 AmSR 912.

79. Godfrey v. Schneck, 105 Wis. 568, 81 NW 656.

80. Long v. Fuller, 21 Wis. 121 (holding that a power to exchange and convey a certain lot for other real estate does not authorize the agent to purchase land to be paid for in part by an assignment of the principal's interest in said lot and the remainder and greater part in money).

81. Ark.—Swift v. Erwin, 104 Ark. 459, 148 SW 267, AnnCas1914C 363.
Colo.—Field v. Small, 17 Colo. 386, 30 P 1034.
D. C.—Jones v. Holladay, 2 App. 279.
N. Y.—Ives v. Davenport, 3 Hill 373.
N. C.—Trogden v. Williams, 144 N. C. 192, 56 SE 865, 10 LRANS 867 and note.
Ont.—Canadian Pac. R. Co. v. Rosin, 2 OntWN 610, 18 OntWR 387.

[a] **Authority to sell for cash** does not warrant the making of an option contract. Smith v. Merrill, 134 Wis. 227, 114 NW 508.

82. Cal.—Chapman v. Hughes, 134 Cal. 641, 58 P 298, 60 P 974, 66 P 982; Hawxhurst v. Rathgeb, 119 Cal. 531, 51 P 846, 63 AmSR 142; Golinsky v. Allison, 114 Cal. 458, 46 P 295.
Ill.—Salem Nat. Bank v. White, 159 Ill. 136, 42 NE 312.
Kan.—Gaylord v. Stebbins, 4 Kan. 42.
Mass.—Hoyt v. Jaques, 129 Mass. 286; Wood v. Goodridge, 6 Cush. 117, 52 AmD 771.
Mich.—Jeffrey v. Hursh, 58 Mich. 246, 25 NW 176, 27 NW 7; Jeffrey v. Hursh, 49 Mich. 31, 12 NW 898.
Minn.—Morris v. Watson, 15 Minn. 212.
N. J.—Ferry v. Laible, 31 N. J. Eq. 566.
N. Y.—Albany F. Ins. Co. v. Bay, 4 N. Y. 9; Bloomer v. Waldron, 3 Hill 361. But see Williams v. Woodard, 2 Wend. 487.
N. D.—Morris v. Ewing, 8 N. D. 99, 76 NW 1047.
Pa.—Campbell v. Foster Home Assoc., 163 Pa. 609, 30 A 222, 43 AmSR 818, 26 LRA 117. But see Zane v. Kennedy, 73 Pa. 182; Pennsylvania L., etc., Ins. Co. v. Austin, 42 Pa. 257; Duval's App., 38 Pa. 112; Gordon v. Preston, 1 Watts 385, 26 AmD 75; Poor Ministers Relief Corp. v. Wallace, 3 Rawle 109; Lancaster v. Dolan, 1 Rawle 231, 18 AmD 625.
Tex.—Texas Moline Plow Co. v. Klapproth, (Civ. A.) 164 SW 399; Nacogdoches First Nat. Bank v. Hicks, 24 Tex. Civ. A. 269, 59 SW 842.
Wash.—Dimmick v. Sprinkel, 59 Wash. 329, 109 P 1018.
Wis.—Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316, 85 NW 1019, 84 AmSR 927.
Eng.—Devaynes v. Robinson, 24 Beav. 86, 53 Reprint 289; Page v. Cooper, 16 Beav. 396, 51 Reprint 831; Haldenby v. Spofforth, 1 Beav. 390, 17 EngCh 390, 48 Reprint 991; Stroughill v. Anstey, 1 De G. M. & G. 635, 50 EngCh 490, 42 Reprint 700. But see Mills v. Banks, 3 P. Wms. 1, 24 Reprint 948.

83. Coutant v. Servoss, 3 Barb. (N. Y.) 128.

[a] **Payment of debts.**—Where it appears that the real object of the power is to raise money to pay the debts of the principal it has been held that the authority to sell includes authority to mortgage. Lamy v. Burr, 86 Mo. 85, 88 AmD 135; Ball v. Harris, 4 Myl. & C. 264, 18 EngCh 264, 41 Reprint 103.

[b] **Authority to transfer any estate.**—A power of attorney authorizing the agent to buy, sell, or transfer in any form whatsoever any estate, stock, or funds, has been held to authorize a mortgage upon property to which the principal became entitled upon the death of his mother. Davy v. Waller, 31 L. T. Rep. N. S. 107.

84. Barger v. Miller, 2 F. Cas. No. 979, 4 Wash. C. C. 280.

85. Aultman v. Jones, 2 F. Cas. No. 657, Woolw. 99.

86. Tensas Delta Land Co. v. Fleischer, 132 La. 1021, 62 S 129; Baxter v. Yarborough, 46 Tex. 231. See also supra § 54.

[a] **Illustration.**—A power of attorney to sell "three certain lots of land in the village of Pentwater in said county of Oceana, belonging to me," has been held sufficiently precise to support sales from three tracts, two of forty acres each, and one of eighty, lying within an unincorporated settlement called the village of P., but all belonging to the person who gave the power, who could not repudiate this construction after taking the benefit of the sales. Vaughn v. Sheridan, 50 Mich. 155, 15 NW 62.

87. Ill.—Hedrick v. Donovan, 248 Ill. 479, 94 NE 144.
La.—Tensas Delta Land Co. v. Fleischer, 132 La. 1021, 62 S 129.
Mo.—McClure v. Herring, 70 Mo. 18, 35 AmR 404.
Nebr.—Morris v. Linton, 61 Nebr. 537, 85 NW 565.
Pa.—Linton v. Moorhead, 209 Pa. 646, 59 A 264.
Tex.—Dunnegan v. Butler, 25 Tex. 501; Crimp v. Yokely, 20 Tex. Civ. A. 231, 48 SW 1116.
See also supra § 54.

[a] **Sufficiency of description.**—Where a power to sell land generally describes the tract subject to the power as all the land contained in certain survey not previously sold by the patentee or his heirs, a deed executed by the attorney describing the land in the same manner renders sufficiently definite the identity of the land conveyed with that authorized to be conveyed, although the particular description in the deed is not in exactly the same terms as the particular description in the power. Kane v. Sholars, 41 Tex. Civ. A. 154, 90 SW 937.

88. McClaskey v. Barr, 50 Fed. 712; Alemany v. Daly, 36 Cal. 90 (holding that a power of attorney to sell "the one-half" empowers the agent to sell one half in severalty, exercising his own discretion as to which half). See also Dolton v. Cain, 14 Wall. (U. S.) 472, 20 L. ed. 880.

[a] **Authority to assign certificate of mortgage sale.**—A power to "grant, bargain, sell, and convey any and all personal or real property" gives authority to sell and convey by assignment of the certificate of sale the interest or estate which a purchaser at a mortgage sale has in the premises prior to the expiration of the period of redemption. Cooper v. Finke, 38 Minn. 2, 35 NW 469.

89. U. S.—McClaskey v. Barr, 50 Fed. 712.
Minn.—Carson v. Smith, 12 Minn. 546.
N. Y.—Lord v. Underdunck, 1 Sandf. Ch. 46.
Tex.—Blume v. Rice, 12 Tex. Civ. A. 1, 32 SW 1056; Franklin v. Piper, 5 Tex. Civ. A. 253, 23 SW 942. Compare Wynne v. Parke, 89 Tex. 418, 34 SW 907 [rev (Civ. A.) 30 SW 52].
Eng.—In re Dowson, [1904] 2 Ch. 219 (holding that a power of attorney to sell any real or personal property then or thereafter belonging to the principal, and also to receive and give a discharge for any moneys then or thereafter owing to the principal by virtue of any security, did not authorize the agent to sell property held by the principal as mortgagee under the mortgagee's statutory power of sale).
Can.—Murray v. Jenkins, 28 Can. S. C. 565.

90. Watson v. Sutro, 86 Cal. 500, 24 P 172, 25 P 64; General Meat Supply Assoc. v. Bouffier, 41 L. T. Rep. N. S. 719.

[a] **Land sold but not conveyed.**—Where a letter of attorney authorizes an agent to sell all the land of the principal which the latter has not previously conveyed, the agent may convey what his principal has previously sold but not conveyed. Mitchell v. Maupin, 3 T. B. Mon. (Ky.) 185.

longed to the principal.[91]

A power to buy and sell real estate has been construed to authorize the agent to sell and convey only such lands as he had first bought, and not land owned by the principal previous to the execution of the power,[92] although the circumstances may be such as to warrant a contrary conclusion;[93] and authority to claim, recover, and sell lands is restricted to lands held by adverse claimants.[94]

After-acquired land. A general power to sell all lands which the principal may own, especially when such appears to be the intention of the principal as gathered from the whole instrument of appointment and the surrounding circumstances, will be held to include lands acquired during the agency and after the execution of the power;[95] but a power to sell all lands which the principal owns has been held to include only the lands so owned at the time the power was executed.[96]

Appurtenances. Power to sell the realty includes the right to sell everything that is appurtenant thereto, so as to form part of it;[97] and conversely a power to sell land does not authorize a sale of the timber without the land,[98] although an agent may be specially authorized to sell the timber by itself.[99]

[§ 250] **(f) Power to Convey or Make Contract of Sale.** An agent to sell of course has power to execute a conveyance, if he is expressly authorized to do so.[1] Thus a power of attorney to make deeds of conveyance and of partition authorizes a deed of sale as well as a deed of partition,[2] and a power to convey land in payment of or to secure debts authorizes the agent to make a deed of the land for the benefit of the grantor's creditors;[3] and while a power of attorney to sell land is not of itself a conveyance and does not give the agent any title to the land,[4] yet, where an agent is empowered by power of attorney to sell real estate, the authority to execute proper instruments required by law to carry such sale into effect is necessarily incident,[5] unless the wording of the power or the circumstances are such as to show that it was not intended for the agent to do more than negotiate the sale.[6] Once the agent has executed the instrument of conveyance he was

91. Hall v. Scott County, 7 Fed. 341, 2 McCrary 356; Forman v. Berry, 163 App. Div. 594, 148 NYS 959.

92. Greve v. Coffin, 14 Minn. 345, 100 AmD 229.

93. Texas Loan Agency v. Miller, 94 Tex. 464, 61 SW 477.

94. Hazlett v. Harwood, 80 Tex. 508, 16 SW 310. Compare Meyer v. Hale, (Tex. Civ. A.) 23 SW 990 (where the power to "investigate and recover" was held to be broad enough to cover any lands discovered by the investigation).

95. Mass.—Fay v. Winchester, 4 Metc. 513.

Minn.—Tuman v. Pillsbury, 60 Minn. 520, 63 NW 104; Cooper v. Finke, 38 Minn. 2, 35 NW 469; Bigelow v. Livingston, 28 Minn. 57, 9 NW 31; Berkey v. Judd, 22 Minn. 287; Carson v. Smith, 5 Minn. 78, 77 AmD 539.

Nebr.—Benschoter v. Atkins, 25 Nebr. 645, 41 NW 639; Benschoter v. Lalk, 24 Nebr. 251, 38 NW 746.

N. Y.—Wronkow v. Oakley, 133 N. Y. 505, 31 NE 521, 28 AmSR 661, 16 LRA 209 [rev 64 Hun 217, 19 NYS 51].

Tex.—Garrison v. Coffey, 5 SW 638.

[a] **Land held under defective tax deed.**—Land bought in at a tax sale by the donors for which they have received a deed, although such deed is defective for informality, is included. Alexander v. Goodwin, 20 Nebr. 218, 29 NW 468.

96. Weare v. Williams, 85 Iowa 253, 52 NW 328; Penfold v. Warner, 96 Mich. 179, 55 NW 680, 35 AmSR 591 and note.

[a] **Illustrations.**—(1) A power "to bargain, sell, grant, release and convey," which is silent as to what the attorney is to sell or convey, is sufficiently broad to authorize him to sell and convey whatever estate the grantor may then own. Marr v. Given, 23 Me. 55, 39 AmD 600. (2) A power of attorney "to buy and sell lands, etc., and to transact all business necessary in the transaction of my affairs," was held under the circumstances to authorize a sale of lands then owned, since no intention to authorize a business of buying and selling land appeared. Texas Loan Agency v. Miller, 94 Tex. 464, 61 SW 477.

[b] **Conveyance of land mortgaged to principal.**—Where the authority to sell is limited to property owned by the principal at the time of the execution of the power, a deed subsequently made to land which the principal then owned, but in which his only interest at the time of the execution of the power was that of a mortgagee, does not convey a perfect title. Turner v. McDonald, 76 Cal. 177, 18 P 262, 9 AmSR 189.

97. McDonald v. Bear River, etc., Water, etc., Co., 13 Cal. 220 (holding that a power to sell a mill and other improvements authorizes a sale of the water rights attached to the mill).

98. St. Louis Southwestern R. Co. v. Bramlette, (Tex. Civ. A.) 35 SW 25.

99. Limestone Min., etc., Co. v. Lehman, 76 SW 328, 25 KyL 703 (holding that, where the agent of the owner of certain standing timber testified that he had authority from the owner to sell the timber to defendants, which he did, and exhibited a telegram from the owner, informing him, "You may sell timber for two hundred and fifty dollars," a finding that he had authority to make the sale was justified).

1. Paolillo v. Faber, 56 App. Div. 241, 67 NYS 638, 9 NYAnnCas 32 (holding that under a power of attorney containing a power of sale and authorizing the attorney to execute a deed of conveyance of the land in question, the attorney had authority to convey the title to the land by sale); Clawson v. Wilkins, (Tex. Civ. A.) 93 SW 1086 (holding that where, on the death of the owner of land doing business under a firm name, his widow as sole liquidator executed a power of attorney in the firm name, authorizing a conveyance of the land, and signed the same as sole liquidator of the firm, the power was sufficient to authorize a conveyance of the entire land as against both her and her children); Jones v. Gibbs, 18 Tex. Civ. A. 626, 46 SW 73 (holding that, where one has a power of attorney to sell and convey one half of certain lands, including a section upon which a town site was located and established, and sells a lot, a conveyance by lot or by metes and bounds is valid, where no other land had been conveyed at the date of the sale).

2. Jackson v. Hodges, 2 Tenn. Ch. 276.

3. Marshall v. Shibley, 11 Kan. 114.

4. Wendt v. Walsh, 49 App. Div. 184, 63 NYS 62.

5. Ill.—Hemstreet v. Burdick, 90 Ill. 444.

Me.—Nobleboro v. Clark, 68 Me. 87, 28 AmR 22. See also Stanwood v. Laughlin, 73 Me. 112.

Mass.—Valentine v. Piper, 22 Pick. 85, 33 AmD 715. See also Burrill v. Nahant Bank, 2 Metc. 163, 35 AmD 395.

Minn.—Farnham v. Thompson, 34 Minn. 330, 26 NW 9, 57 AmR 59 (holding that, where the term "sale" or "to sell" is used in the ordinary sense, and the general tenor and effect of the instrument is to confer a power to dispose of real estate, the authority to execute the proper instruments required by law to carry such sale into effect is necessarily incident).

Nebr.—Benschoter v. Lalk, 24 Nebr. 251, 38 NW 746; Plummer v. Buck, 16 Nebr. 322, 20 NW 342.

N. J.—Keim v. Lindley, (Ch.) 30 A 1063.

Tex.—Hunter v. Eastham, (Civ. A.) 67 SW 1030 [rev on other grounds 95 Tex. 648, 69 SW 66].

Eng.—Rosenbaum v. Belson, [1900] 2 Ch. 267.

[a] **"To sell" includes completion by conveyance.**—In Hemstreet v. Burdick, 90 Ill. 444, 449, the court said: "The whole question turns on the meaning that shall be given to the word 'sell.' Its popular meaning, we think, clearly embraces the power to contract to sell and to convey or transfer the thing sold. To complete the sale there must be a transfer of the title as well as the thing sold. When the term is applied to personal property, there is no doubt it embraces the delivery as well as the bargain for the sale,—that it in such cases means the bargain for the sale, the receipt of the purchase money and the delivery of possession, by which the sale is completed and the title vested in the purchaser. So, in regard to real estate, the word 'sell,' in its popular sense, implies the contract and its completion by conveyance."

[b] **A power to do any lawful act in the principal's name** as if he were present authorizes the agent to convey the principal's land. Veatch v. Gilmer, (Tex. Civ. A.) 111 SW 746.

[c] **Quitclaim deed of land not owned.**—A power to sell land authorizes a quitclaim deed of land of which the principal has no title. Alexander v. Goodwin, 20 Nebr. 216, 29 NW 468.

[d] **Deed of trust not authorized.**—A power to sell does not authorize the execution of a deed of trust with power of sale in the trustees. Smith v. Morse, 2 Cal. 524.

[e] **Lands previously sold.**—A power which authorizes an attorney to sell and convey land does not authorize him to make a deed for lands previously sold. Johnson v. Sukeley, 13 F. Cas. No. 7,414, 2 McLean 562.

[f] **Conveyance without sale.**—Where a power to "sell and convey" land showed that it was for the purpose of transferring title to an association for certain purposes, it was held to give authority to convey without a sale. Hull v. Glover, 126 Ill. 122, 18 NE 198.

6. Delano v. Jacoby, 96 Cal. 275, 31 P 290, 31 AmSR 201; Valentine v.

authorized to make he has no power to issue a second instrument conveying different property, although he has implied power to correct, by a second instrument, errors in the first one.[7] A deed from one who has power of attorney to sell passes title, although he does not refer to such power and has no estate in the land conveyed.[8]

Contract of sale. Although the power may be insufficient to authorize a conveyance of the real estate, as where it is not under seal,[9] such authority nevertheless may empower him to execute a contract for such sale binding upon his principal.[10] Thus in some jurisdictions it is held that parol authority is not sufficient to enable an agent to execute a contract of sale binding on the principal,[11] although in other jurisdictions it is held that such authority is sufficient for such purpose,[12] and that a contract to sell made by an agent so authorized may be sufficient to transfer the equitable title.[13] But a mere authority to find a purchaser, or negotiate a sale on terms fixed by the owner, does not necessarily show an authority to make a binding contract of sale,[14] as in the case of the mere employment of a real estate broker to find a purchaser.[15]

[§ 251] **(g) Power to Warrant or Make Representations.** A power without restriction to sell and convey real estate gives authority to the agent to deliver deeds with general warranty binding on the principal, where under the circumstances this is the common and usual mode of assurance,[16] although

Piper, 22 Pick. (Mass.) 85, 33 AmD 715; Cook v. Williams, 14 T. L. R. 31.

[a] **"An agency to execute a contract to sell** real property, does not, of necessity, imply authority to pass the title." Farrel v. Edwards, 8 S. D. 425, 66 NW 812.

7. Livermore v. Morgan, 6 Mart. N. S. (La.) 134.

8. Hill v. Conrad, (Tex. Civ. A.) 41 SW 541.

9. Lyon v. Pollock, 99 U. S. 668, 25 L. ed. 265; McNeil v. Shirley, 33 Cal. 202; Jackson v. Badger, 35 Minn. 52, 26 NW 908; Force v. Dutcher, 18 N. J. Eq. 401. See also supra § 64.

10. U. S.—Lyon v. Pollock, 99 U. S. 668, 25 L. ed. 265.

Ala.—Ledbetter v. Walker, 31 Ala. 175.

Cal.—Jones v. Marks, 47 Cal. 242; De Rutte v. Muldrow, 16 Cal. 505.

Ill.—Johnson v. Dodge, 17 Ill. 433.

Ky.—Vanada v. Hopkins, 1 J. J. Marsh. 285, 19 AmD 92.

Minn.—Jackson v. Badger, 35 Minn. 52, 26 NW 908; Minor v. Willoughby, 3 Minn. 225.

Mo.—Smith v. Allen, 86 Mo. 178. See also Glass v. Rowe, 103 Mo. 513, 15 SW 334.

N. J.—Keim v. Lindley, (Ch.) 30 A. 1063 [dist Milne v. Kleb, 44 N. J. Eq. 378, 14 A 646]; Force v. Dutcher, 18 N. J. Eq. 401.

N. Y.—Remington v. Palmer, 62 N. Y. 31 [rev 1 Hun 619]; Haydock v. Stow, 40 N. Y. 363.

Tenn.—Matherson v. Davis, 2 Coldw. 443.

Tex.—Donnell v. Currie, (Civ. A.) 131 SW 88 (holding that a power to convey title is not essential to enable an agent for the sale of land to make an executory contract to convey).

Vt.—Vermont Marble Co. v. Mead, 85 Vt. 20, 80 A 852.

Wash.—Littlefield v. Dawson, 47 Wash. 644, 92 P 428; Roberts v. Hilton Land Co., 45 Wash. 464, 88 P 946.

Ont.—Maybury v. O'Brien, 25 OntLR 229, 3 OntWN 393, 20 OntWR 683.

See also supra §§ 53, 64.

[a] **Illustrations of sufficient authority.**—(1) Where the agent was a general agent to sell at a certain place, and had made other sales which had been carried out by the principal, and it appeared that the principal resided at a distance from the property, it was held that the facts distinguished the case from that of an ordinary broker and that the agent could bind the principal by a contract of sale. Winch v. Edmunds, 34 Colo. 359, 83 P 632. (2) Where the design and terms of the power of attorney manifest an intent to give the agent authority to effect a sale and conveyance, and the instrument assumes to ratify the "bargains" he may make, it will be held to give him authority to bind his principal to convey. Tyrrell v. O'Connor, 56 N. J. Eq. 448, 41 A 674.

[b] **Authority to execute a contract of sale** must be specially conferred. Spengler v. Sonnenberger, 88 Oh. St. 192, 102 NE 737.

[c] **Bond for title.**—A power may authorize a bond, in the name of the principal, to make a sufficient title, although insufficient to authorize a conveyance by the agent. Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 AmD 92.

[d] **A quitclaim deed with the name of the grantee left blank** is void and ineffective to authorize the owner's agent, to whom it was delivered, to empower a broker to execute a contract of sale. Ballou v. Carter, 30 S. D. 11, 137 NW 603.

11. Duffy v. Hobson, 40 Cal. 240, 6 AmR 617 (holding that a verbal authority to sell real estate is not sufficient to authorize the agent to execute a contract of sale in the name of his principal or to sign the name of the latter to such contract). See also supra § 53.

12. Tyrrell v. O'Connor, 56 N. J. Eq. 448, 41 A 674 (holding that it is not necessary that the authority of an agent to bind his principal by written agreement to convey should be in writing, such authority may be given by parol). See also supra § 50.

13. Ledbetter v. Walker, 31 Ala. 175.

14. Cal.—Armstrong v. Lowe, 76 Cal. 616, 18 P 758; Rutenberg v. Main, 47 Cal. 213.

Ill.—Sattler v. Oliver, 138 Ill. A. 210.

Iowa.—Holmes v. Redhead, 104 Iowa 399, 73 NW 878 (holding that authority to negotiate for a sale or exchange of lands does not give implied authority to enter into a contract for an exchange).

Minn.—Larson v. O'Hara, 98 Minn. 71, 107 NW 821, 116 AmSR 342, 8 AnnCas 849.

N. J.—Keim v. Lindley, (Ch.) 30 A 1063 [dist Milne v. Kleb, 44 N. J. Eq. 378, 14 A 646].

N. Y.—Roach v. Coe, 1 E. D. Smith 175.

Okl.—Halsell v. Renfrow, 14 Okl. 674, 78 P. 118, 2 AnnCas 286.

S. D.—Riley v. Grant, 16 S. D. 553, 94 NW 427.

Tex.—Donnan v. Adams, 30 Tex. Civ. A. 615, 71 SW 580 (holding that proof that the owner of a tract of land made and signed a written description of the land, with a price, and handed the memorandum to an agent, is not sufficient to show authority in the agent to bind the owner by executing a written contract of sale).

Va.—Halsey v. Monteiro, 92 Va. 581, 24 SE 258.

Wash.—Lawson v. King, 56 Wash. 15, 104 P. 1118; Armstrong v. Oakley, 23 Wash. 122, 62 P 499; Carstens v. McReavy, 1 Wash. 359, 25 P 471.

Wis.—Cram v. Long, 154 Wis. 13, 142 NW 267 (holding that a letter stating that the owner of real estate would sell for three thousand five hundred dollars does not authorize a managing agent to sign a contract as her agent for the sale of the property with conditions as to abstract and place of payment).

Alta.—Doyle v. Martin, 3 Alta. L. 184, 14 WestLR 666.

Man.—Gilmour v. Simon, 15 Man. 205, 1 WestLR 417.

See also supra § 244.

[a] **A subagent** appointed by an agent to find a purchaser has no authority to bind the principal by a sale. Martin v. Johnson, 54 Fla. 487, 44 S 949.

[b] **Authority determined by circumstances.**—"The extent of the authority conferred by a memorandum in writing merely empowering an agent to sell, must be determined by the circumstances under which the power is given, the person to whom it is given, and all facts surrounding the parties at the time of the execution of the writing. If the language of the writing or the circumstances surrounding the parties indicate that it was intended to confer the power on the agent to enter into contracts of sale and bind his principal by written contract, then the naked power to find a purchaser will confer no such authority on the agent." Donnan v. Adams, 30 Tex. Civ. A. 615, 617, 71 SW 580.

[c] **Mere power to sell lands,** (1) without more, will not authorize an agent to bind his principal by a written contract to convey. Tyrrell v. O'Connor, 56 N. J. Eq. 448, 41 A 674. (2) Authority to sell does not authorize the agent to make a unilateral contract of sale binding only on the vendor. Stengel v. Sergeant, 74 N. J. Eq. 20, 68 A 1106.

[d] **Verbal authority to an agent to procure a purchaser** for land does not authorize him to execute a written contract of sale which will bind his principal. McLeod v. Morrison, 66 Wash. 683, 120 P 528, 38 LRANS 783.

[e] **Authority to negotiate an exchange** of lands will not authorize a binding contract to exchange or the receipt of a deed to be given the principal on exchange. Swain v. Burnette, 89 Cal. 564, 29 P 1093.

15. See Brokers [19 Cyc 197].

16. Iowa.—Malloy v. Foley, 155 Iowa 447, 133 NW 778, 136 NW 131 (holding that where a vendor authorized her agent to sell her land for a fair price, agreeing to furnish a complete abstract, the agent was authorized to warrant a title free from encumbrance).

Mass.—Bronson v. Coffin, 118 Mass. 156; Ward v. Bartholomew, 6 Pick. 409.

Mo.—Beheret v. Myers, 240 Mo. 58, 144 SW 824.

N. H.—Backman v. Charlestown, 42 N. H. 125.

N. M.—Jasper v. Wilson, 14 N. M. 482, 94 P 951, 23 LRANS 982.

N. Y.—Schultz v. Griffin, 121 N. Y. 294, 24 NE 480, 18 AmSR 825 [overr Nixon v. Hyserott, 5 Johns. 58].

S. D.—Farrell v. Edwards, 8 S. D. 425, 66 NW 812.

Vt.—Peters v. Farnsworth, 15 Vt. 155, 40 AmD 671 (agent to execute such contracts, agreements, conveyances, and assurances and perform such acts as might be necessary to perfect the sale).

Va.—Rucker v. Lowther, 6 Leigh 259.

Man.—Taylor v. Gardiner, 3 Man. 310.

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there are some cases which appear to hold a contrary rule,[17] and certainly the agent cannot gives a warranty in excess of his authority.[18]

Representations as to quantity, quality, and title. It has been held that an agent to sell land is acting within his authority in pointing out the boundaries of the land he offers for sale,[19] or in making representations as to the number of acres that the tract contains,[20] or as to things appurtenant to the realty,[21] or in regard to its title or value.[22] But an agent with restricted power to sell has no power to bind his principal by any representation as to the quantity or quality of the land.[23]

[§ 252] **(h) Power to Fix or Modify Terms of Sale.** Where the agent's power expressly prescribes the terms upon which the sale shall be made, he must sell on the terms prescribed[24] and for the price authorized,[25] and a sale otherwise made will not be binding on the principal even though it is on more favorable terms than those authorized.[26] Thus, one who has merely a right to dispose of certain property provided he can obtain a certain price are not binding on the principal. Mayo v. Wahlgreen, 9 Colo. A. 506, 50 P 40.

[c] **Estoppel.**—Where an agent is authorized simply to sell and not to waive claims to title, his representations as to title will not work an estoppel as against his principal, where there is no claim that he knew the purpose of the inquiry, or that his response was to be relied upon, or that the information was given in bad faith. Iowa R. Land Co. v. Fehring, 126 Iowa 1, 101 NW 120.

24. Peterson v. Church, 16 Hawaii 739; Campbell v. Hough, 73 N. J. Eq. 601, 68 A 759; Brown v. Grady, 16 Wyo. 151, 92 P 622. See also supra § 245.

[a] **Approval of principal.**—(1) A power to sell and convey land subject to approval by the grantors authorizes a conveyance only upon terms and conditions approved by them. Alcorn v. Brandeman, 158 Cal. 410, 111 P 104; Alcorn v. Gieske, 158 Cal. 396, 111 P 98. (2) Where a power of attorney authorizes the agent to sell and convey land "for such price or prices and upon such terms and conditions as he may deem best," "subject to our approval," the last clause is not to be rejected as repugnant to the powers granted, but is a limitation of the power, and a deed executed without such approval is void. Alcorn v. Buschke, 133 Cal. 655, 66 P 15.

[b] **Sale subject to reservation of rents.**—Where the owner of real estate, which had been leased until the following March, wrote in September to his agent authorizing the sale of the property for a fixed sum, adding, "It is understood that this year's rents will come to us," he did not authorize a sale for such sum without a reservation of the rent. Philadelphia Mortg., etc., Co. v. Hardesty, 68 Kan. 683, 75 P 1115.

25. Cal.—Holbrook v. McCarthy, 61 Cal. 216.

Ind.—Lucas v. Rader, 29 Ind. A. 287, 64 NE 488.

N. J.—National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331 (holding that an agent authorized to sell land at a fixed price cannot bind his principal to any other terms).

N. Y.—Bush v. Cole, 28 N. Y. 261, 84 AmD 343.

Wis.—Wasweyler v. Martin, 78 Wis. 59, 46 NW 890.

Can.—Clergue v. Murray, 32 Can. S. C. 450.

26. Peterson v. Church, 16 Hawaii 739; Thornton v. Boyden, 31 Ill. 200; Dayton v. Buford, 18 Minn. 126; Nesbitt v. Helser, 49 Mo. 383.

[a] **An agent's written contract for the sale of land is void,** where it includes terms not authorized by his principal. Spengler v. Sonnenberg, 88 Oh. St. 192, 102 NE 737.

[b] **Privilege of cancellation.**—Authority to sell for cash does not authorize a sale with privilege of cancellation at any time before delivery of the deed. Smith v. Merrill, 134 Wis. 227, 114 NW 508.

[c] **Cash to be paid.**—Where an agent is authorized to sell land upon the terms of payment of one third of the price in cash on signing the agreement, an agreement for sale made by him stipulating for a payment of a lesser sum on signing the

See also Johnson v. Sukeley, 13 F. Cas. No. 7,414, 2 McLean 562; Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 AmD 92.

[a] **In full and ample manner as principal.**—A power of attorney which authorizes a conveyance to be made in as full and ample a manner as the principal can execute it authorizes a deed to be made by the attorney, with covenants of general warranty. Le Roy v. Beard, 8 How. (U. S.) 451, 12 L. ed. 1151 (covenant of seizin authorized); Taggart v. Stanbery, 23 F. Cas. No. 13,724, 2 McLean 543. See also Johnson v. Knapp, 146 Mass. 70, 15 NE 134; Bronson v. Coffin, 118 Mass. 156.

[b] **Limited warranty.**—A deed is not avoided because containing less extensive warranties than were authorized by the principal. McMillan v. Hutcheson, 4 Bush (Ky.) 611; Kaempfer v. Lindsay, 121 Mich. 425, 80 NW 107.

17. Stengel v. Sergeant, 74 N. J. Eq. 20, 68 A 1106; Lounsbery v. Locander, 25 N. J. Eq. 554; Howe v. Harrington, 18 N. J. Eq. 495; Chaison v. Beauchamp, 12 Tex. Civ. A. 109, 34 SW 303. In Nixon v. Hyserott, 5 Johns. (N. Y.) 58, it was held that a special authority to convey implies no authority to convey with warranty or personal covenants, since the conveyance is perfectly good without either. This case was disapproved in several of the cases cited in the preceding note, and the court of appeals of New York, in Schultz v. Griffin, 121 N. Y. 294, 24 NE 480, 18 AmSR 825, declared that it was opposed to the weight of authority, and, after noting that the early New York cases holding that an agent to sell personal property has no power to warrant title have been overruled, remarked that there seemed to be no distinction requiring a different construction of an agency for sale in the cases of real and personal property. The actual decision in this case, however, went off upon another point.

18. Peterson v. Church, 16 Hawaii 739 (holding that where the land was mortgaged the agent exceeded his authority in agreeing to give a "warranty deed free from all encumbrances").

[a] **Authority to grant discharges.**—The authority in a power of attorney "to grant any and all discharges by deed or otherwise, both personal and real," as fully as the principal may do, cannot be fairly construed as enabling the agent to convey by deed of warranty the real estate of his principal. Heath v. Nutter, 50 Me. 378.

[b] **If the authority of an agent is limited to the execution of a quitclaim,** a warranty deed executed by him, although not binding as to the warranties, is effectual to convey title. Kane v. Sholars, 41 Tex. Civ. A. 154, 90 SW 937; Robinson v. Lowe, 50 W. Va. 75, 40 SE 454.

[c] **Where the land was subject to a lease** and the agent made a written contract of sale to plaintiff by which he assumed to bind his principal to convey the land "in fee simple, and with a perfect title, free from all incumbrances," the contract was unauthorized and not enforceable. Thomas v. Joslin, 30 Minn. 388, 15 NW 675.

[d] **Guaranty.**—Under a power of attorney providing that the agent shall not bind his principal by any covenant of warranty whatever, a guaranty of performance by third persons of an oil lease of lands sold does not bind the principal. Williamson v. Davey, 52 Tex. Civ. A. 353, 114 SW 195.

19. Green v. Worman, 83 Mo. A. 568 (holding that, where an agent for the sale of land represents the boundaries as including a certain spring and meadow, which representation is in fact false, and the buyer, believing the representation to be true, buys the land, the vendor is bound by the representation, although he had not stated to the agent that such spring and meadow were on his land, since, it being usual in the sale of land to point out the boundaries, such agent was acting within the scope of his authority); Firebaugh v. Bentley, 65 Or. 170, 130 P 1129 (location of land).

[a] **A vendor who refers the purchaser to his agent** to point out the boundaries of the land is bound by the agent's declaration in that regard. Beatty v. Ireland, 152 App. Div. 588, 137 NYS 456.

[b] **Representations as to location.**—In Sandford v. Handy, 23 Wend. (N. Y.) 260, it was held that the principal is responsible for a false representation as to its location, if the purchaser has no opportunity of seeing the land, and also for a misrepresentation as to its costs.

20. Judd v. Walker, 114 Mo. A. 128, 89 SW 558 (holding that it is within the scope of the authority of a real estate agent to represent the acreage of a tract of land placed in his hands for sale, and that the principal is liable for false and fraudulent representations made by the agent in such respect).

21. O'Daniel v. Streeby, 77 Wash. 414, 137 P 1025 (holding that an agent for the sale of land had authority to represent that a meat market refrigerator, shelving in a storeroom, kitchen sink, storm sash, screen doors, and boards about the premises, such as would ordinarily be appurtenant to the realty, belonged to and were a permanent part of the realty, so that the principal was bound thereby).

22. John Gund Brewing Co. v. Peterson, 130 Iowa 301, 106 NW 741 (holding that where a mortgagee sent its agent to negotiate a sale of property on which it had a mortgage, it was bound by representations made by the agent as to encumbrances on the property, such being within the apparent scope of his authority).

23. National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331; Tondro v. Cushman, 5 Wis. 279 (holding that an agent authorized merely to sell or rent real estate is not necessarily authorized to make representations as to the title so as to bind the principal). See also McClurg v. Futer, 52 Pa. Super. 485.

[a] **Mere authority to find a purchaser** does not imply authority to make representations as to the quantity or quality of the land. Samson v. Beale, 27 Wash. 557, 68 P 180 (holding that authority to collect and remit rents, to pay taxes, and to look after ordinary repairs, combined with an authority to sell the premises, will not carry with it authority to bind the principal by any representation that the agent might make as to the condition of the property).

[b] **Representations as to value** by

where the power requires payments to be made on certain dates it is not satisfied by a contract allowing payments to be made on other dates,[27] although earlier than those authorized.[28] However, in the absence of express provisions prescribing such terms the agent, under his power to do what is usual and necessary to effectuate the sale, has power to fix the price,[29] and to make any reasonable agreements as to the time and terms of payment.[30]

Modification or Rescission. As a general rule a power to sell land or to do some act in connection with a sale conveys no authority to modify or rescind the contract of sale after it is made,[31] and the agent cannot thereafter without his principal's consent cancel the contract so as to release the purchaser.[32]

[§ 253] **(i) Sale for Cash or on Credit; Money Consideration.** Whether or not an agent for the sale of land may sell on credit depends largely upon the wording of his power[33] and it has been held that he may do so where his authority is to sell on such terms as to him shall seem meet,[34] although a contrary view has been taken.[35] As a general rule, however, unless specially authorized, he should sell only for cash and not on credit,[36] or not for part cash

agreement and for payment of the balance required to make up the one third cash when the title and documents are accepted is not binding upon his principal. Maybury v. O'Brien, 26 Ont. L. 628, 6 DomLR 268, 3 OntWN 1546, 22 OntWR 677.

27. U. S.—De Sollar v. Hanscome, 158 U. S. 216, 15 SCt 816, 39 L. ed. 956; Henry v. Lane, 128 Fed. 243, 62 CCA 625.

Ill.—Monson v. Kill, 144 Ill. 248, 33 NE 43 [aff 44 Ill. A. 306].

Iowa.—Siebold v. Davis, 67 Iowa 560, 25 NW 778 (holding that a special agent for the sale of real estate to be paid for in certain annual payments exceeds his authority where he enters into a contract providing that such payments may be made at the option of the purchaser before the days fixed therefor).

Minn.—Dana v. Turlay, 38 Minn. 106, 35 NW 860; Jackson v. Badger, 35 Minn. 52, 26 NW 908 (holding that authority to agents to make a contract for the sale of land payable in three years does not empower them to make such a contract providing for payment of the price on or before three years); Dayton v. Buford, 18 Minn. 126.

Can.—Gilmour v. Simon, 37 Can. S. C. 422.

Compare McLaughlin v. Wheeler, 1 S. D. 497, 514, 47 NW 816 (holding that it is not a substantial departure from instructions as to time and payment that the contract after fixing the time for payment as prescribed further provided "if any of said payments shall remain due and unpaid for three days after the time hereinbefore specified when the same shall be payable, that then, and in such case, it shall be at the option of the said parties of the first part [principals and sellers] to declare this contract at an end and forfeited, and to refuse to complete the same").

[a] **Illustration.**—(1) A power of attorney to make a sale of land and to take notes due in one, two, and three years is not complied with by accepting notes "to be paid in full at any time at the option of the maker thereof." Henry v. Lane, 128 Fed. 243, 62 CCA 625. (2) But, where the authority is to make one half payable "on or before" one year, it is a sufficient compliance to make it payable in one year. Deakin v. Underwood, 37 Minn. 98, 33 NW 318, 5 AmSR 827.

[b] **Authority to sell on long time notes** is not complied with by taking notes payable "on or before" the dates stated therein. Colvin v. Blanchard, 101 Tex. 281, 106 SW 323.

28. Speer v. Craig, 16 Colo. 478, 27 P 891 (holding that the law will not presume that the principal desired earlier payment. It may be that he preferred to leave his money out on interest).

29. Sprigg v. Herman, 6 Mart. N. S. (La.) 510 (holding that the fact that the principal stated that the property should bring a certain price did not invalidate a sale for less).

[a] **Authority to employ a subagent** is not inferred from an authority to fix price. Doggett v. Greene, 254 Ill. 134, 98 NE 219, AnnCas1913B 1166.

30. N. C.—Winders v. Hill, 141 N. C. 694, 54 SE 440.

Tex.—Morton v. Morris, 27 Tex. Civ. A. 262, 66 SW 94.

W. Va.—Campbell v. Beard, 57 W. Va. 501, 50 SE 747.

Wis.—Webb v. Mason, 152 Wis. 19, 139 NW 442.

Ont.—Maybury v. O'Brien, 26 Ont. L. 628, 6 DomLR 268, 3 OntWN 1546, 22 OntWR 677 [rev 25 Ont. L. 229, 20 OntWR 683].

See also infra § 253.

[a] **Any variations in the terms of the payment of doubtful effect** on the principal will release the principal. Michael v. Eley, 61 Hun 180, 15 NYS 890.

[b] **Sale of two tracts at combined price.**—An agent, having authority to sell one tract of land at a stipulated price, or that tract and another combined for a certain other price, may, within the time limit of his authority, and with the consent of his principal, verbally expressed, make separate sales of the two tracts to one person at prices amounting in the aggregate to the sum for which he was authorized to sell the two tracts combined. Campbell v. Beard, 57 W. Va. 501, 50 SE 747 (holding also that in such a case, by consent of the principal, expressed verbally at the sale of the one tract which the agent was authorized to sell separately, an election to take the other tract, which the agent was not originally authorized to sell separately, at a price which, added to the price stipulated for the single tract, will equal the price fixed for both, may be exercised by the purchaser of the first mentioned tract at a subsequent date within the period of the agent's authority to sell).

[c] **Discretionary power; unreasonable terms.**—A power to sell and convey real estate on such terms as the agent shall deem meet is not sufficient to authorize him to sell such real estate and defer the payment of a portion of the purchase price until the determination of the validity of an attachment of the land, levied in an action of tort by the grantee against the owner, which is not sufficient to sustain such attachment, and of which the owner has no notice. Morton v. Morris, 27 Tex. Civ. A. 262, 66 SW 94.

[d] **Time of conveyance.**—Where a power to contract for the conveyance of land fixes no date for the time of conveyance, the agent may fix the date. Beheret v. Myers, 240 Mo. 58, 144 SW 824.

31. Morrill v. Cone, 22 How. (U. S.) 75, 16 L. ed. 253; New England L. & T. Co. v. Browne, 157 Mo. 116, 57 SW 760 (holding that the agent cannot extend the time for payment); National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331; Fullerton v. McLaughlin, 70 Hun 568, 24 NYS 280; Taylor v. Hoey, 36 N. Y. Super. 402 [aff 58 N. Y. 677]. See also infra § 289. Compare Ricketson v. Richardson, 19 Cal. 330 (where the agent's power to contract in his own name was held by the court to give him the same right to modify or discharge such contract).

[a] **Taking new securities.**—If the sale was made on credit the agent has no power to take new securities as substitutes for those given at the time of the sale. Hill v. Bess, (Tex. Civ. A.) 40 SW 202.

32. West-End Hotel, etc., Co. v. Crawford, 120 N. C. 347, 27 SE 31.

33. Morton v. Morris, 27 Tex. Civ. A. 262, 66 SW 94.

34. Carson v. Smith, 5 Minn. 78, 77 AmD 539; Neill v. Kleiber, 51 Tex. Civ. A. 552, 112 SW 694 (holding that a power of attorney to sell land, granting full power to do with it as if it were the agent's own property, authorizes a sale upon credit, and that any disposition of the proceeds which the agent may make will not invalidate the sale, as the purchaser can assume that under the power the agent can dispose of the proceeds as he desires); Morton v. Morris, 27 Tex. Civ. A. 262, 66 SW 94.

35. Paul v. Grimm, 165 Pa. 139, 30 A. 721, 44 AmSR 648 (where the letter of attorney under which defendant's intestate sold plaintiffs' land authorized him to sell the same "for such sum or price and on such terms as to him shall seem meet . . . and to ask, demand, recover and receive all sums of money which shall become due and owing to us by means of such bargain, sale or lease and to take all lawful ways and means for such recovery thereof." This was held to authorize a sale for money only). See also dictum to same effect Union Trust Co. v. Means, 201 Pa. 374, 50 A 974.

36. Ark.—Henderson v. Beard, 51 Ark. 483, 11 SW 766 (holding that where an agent is simply authorized to sell land he has no authority to sell it on credit, without retaining a lien by contract for the security of the purchase money, and his agreement to make such unauthorized sale, although in writing, will not bind his principal).

Cal.—Mora v. Murphy, 33 Cal. 12, 23 P 63; McNeil v. Shirley, 33 Cal. 202.

Iowa.—Welke v. Wackershauser, 143 Iowa 107, 120 NW 77; Payne v. Potter, 9 Iowa 549.

Me.—Dresden School District No. 6 v. Ætna Ins. Co., 62 Me. 330; Trundy v. Farrar, 32 Me. 225.

Minn.—Marble v. Bang, 54 Minn. 277, 55 NW 1131.

Mo.—Smith v. Allen, 86 Mo. 178 (holding, however, that a payment of ten dollars earnest money, cash to be paid upon delivery of a deed by the principal, was a cash sale).

Nebr.—Plummer v. Buck, 16 Nebr. 322, 20 NW 342.

N. C.—Winders v. Hill, 141 N. C. 694, 54 SE 440.

Or.—Coulter v. Portland Trust Co., 20 Or. 469, 26 P 565, 27 P 266, 23 Or. 131, 31 P 280.

Pa.—Paul v. Grimm, 165 Pa. 139, 30 A 721, 44 AmSR 648.

Tex.—Frost v. Erath Cattle Co., 81 Tex. 505, 17 SW 52, 26 AmSR 831; McKay v. McKinnon, (Civ. A.) 122 SW 440; Morton v. Morris, 27 Tex. Civ. A. 262, 66 SW 94.

W. Va.—State v. Chilton, 49 W. Va.

and part on credit,[37] especially where his authority is expressly to sell for cash.[38] His right to sell on credit, if not expressly given or justified by the conduct of the principal, arises only when he acts under a power containing no limitations or directions as to whether sales shall be for cash or on credit, and to give credit is shown to be according to the usual custom in such sales.[39]

Credit must be reasonable. Where the agent has authority to sell on credit the credit must be reasonable,[40] and the agent usually has no authority to grant an extension thereof.[41]

Money consideration. As a general rule a power to sell real estate presumptively authorizes a sale for money only,[42] and does not authorize a transfer or exchange for other lands, or anything but money,[43] such as in payment of a debt or claim;[44] nor does it authorize a conveyance without a consideration,[45] or for a consideration of love and affection in the principal for the grantee in the con-

453, 39 SE 612; Dyer v. Duffy, 39 W. Va. 148, 19 SE 540, 24 LRA 339.

Can.—Rodburn v. Swinney, 16 Can. S. C. 297, 303 (holding that a power of attorney "to enter and take possession, make sale and absolutely dispose of at any time, or from time to time, either by way of public auction or private contract, or partly in each such mode as he, in his discretion, may think fit, for the best price or prices that can be gotten for the same respectively, all or any part or parts of the freehold and other estates, lands," etc., did not authorize a sale on credit).

Que.—Amyot v. Daulnais, 15 Que. Super. 311.

[a] **Transaction held cash sale.**—Where A gave B a power of attorney to sell and convey land, and B conveyed the land to C, and, under an arrangement contemporaneously made whereby D was to make a loan to C to enable him to pay for the land, took notes and a mortgage from C payable to himself, B, and immediately indorsed the notes and assigned the mortgage in his individual capacity to D, and received the money, it was held to be a sale for cash, and not a barter, or a sale on credit. Plummer v. Buck, 16 Nebr. 322, 20 NW 342.

[b] **Effect of sale on credit without authority.**—Where there is not authority to sell on credit, and the original purchaser knows or is charged with notice of this fact, a sale on credit may be treated as void at the option of the purchaser. Whitley v. James, 121 Ga. 521, 49 SE 600.

37. Veeder v. McMurray, (Iowa) 23 NW 285 (holding that a sale for part cash and part on time was not within the authority); Stengel v. Sergeant, 74 N. J. Eq. 20, 68 A 1106 (holding that an authority to sell for a specified sum does not authorize a sale for a part of the price in cash, and the balance in a mortgage on the property); Horst v. Lightfoot, 103 Tex. 643, 132 SW 761 [rev (Civ. A.) 122 SW 606] (holding that where a landowner executes a power of attorney to sell and dispose of the land at not less than a fixed price per acre, a sale by the attorney for one-half cash and the balance on credit passes no title, the power to sell implying only power to sell for cash).

38. Downing Inv. Co. v. Coolidge, 46 Colo. 345, 104 P 392; Rundle v. Cutting, 18 Colo. 337, 32 P 994; Bowles v. Rice, 107 Va. 51, 57 SE 575 (holding that the terms of a power of attorney to a special agent expressly prescribing a cash sale must be rigidly observed).

[a] **Authority to sell for half cash** does not warrant the agent in making a sale on time. Monson v. Kill, 144 Ill. 248, 33 NE 43.

[b] **Authority to sell for "about one half cash"** is complied with by a contract for the entire price to be paid in cash on delivery of the deed. Witherell v. Murphy, 147 Mass. 417, 18 NE 215.

39. Silverman v. Bullock, 98 Ill. 11; Payne v. Potter, 9 Iowa 549; Dresden School Dist. No. 6 v. Ætna Ins. Co., 62 Me. 330. See generally Customs and Usages [12 Cyc 1071].

40. Brown v. Central Land Co., 42 Cal. 257 (holding reasonableness to be a question to be determined by the evidence and usage). See also Morton v. Morris, 27 Tex. Civ. A. 262, 66 SW 94 (holding that an agent is not authorized to make a sale on such terms as would require his principal to discharge a lien by the payment of a disputed claim in order to make certain the time when the purchase money for his property would become due).

41. New England L. & T. Co. v. Browne, 157 Mo. 116, 57 SW 760.

[a] **A general agent who transacts his principal's** entire business in relation to the acquisition, sale, and disposition of lands may bind his principal by a contract extending the time for payment by the purchaser, or waiving a strict compliance with the provisions of the contract in that regard. Cranwell v. Clinton Realty Co., 67 N. J. Eq. 540, 58 A 1030; Neppach v. Oregon, etc., R. Co., 46 Or. 374, 80 P 482, 7 AnnCas 1035. See also McDonald v. Kingsbury, 16 Cal. A. 244, 116 P 380.

42. Cal.—Mora v. Murphy, 83 Cal. 12, 23 P 63; Mott v. Smith, 16 Cal. 533.

Iowa.—Ormsby v. Graham, 123 Iowa 202, 98 NW 724; Hampton v. Moorhead, 62 Iowa 91, 17 NW 202.

Pa.—Paul v. Grimm, 165 Pa. 139, 30 A 721, 44 AmSR 648.

Tex.—Turpin v. Sansom, 36 Tex. 142; Morton v. Morris, 27 Tex. Civ. A. 262, 66 SW 94.

Wash.—Ross v. Kenwood Inv. Co., 73 Wash. 131, 131 P 649.

Can.—Rodburn v. Swinney, 16 Can. S. C. 297.

43. U. S.—Morrill v. Cone, 22 How. 75, 16 L. ed. 253.

Cal.—Chapman v. Hughes, 134 Cal. 641, 58 P 298, 60 P 974, 66 P 982.

Ill.—Peabody v. Hoard, 46 Ill. 242.

Iowa.—Wilkin v. Voss, 120 Iowa 500, 94 NW 1123; Hakes v. Myrick, 69 Iowa 189, 28 NW 575; Hampton v. Moorhead, 62 Iowa 91, 17 NW 202 (holding that a power to sell land will not authorize a sale partly for money and partly in consideration of the transfer of a patent right).

N. Y.—Forman v. Berry, 163 App. Div. 594, 148 NYS 959 (holding that a power authorizing an attorney to sell or mortgage the principal's lands did not authorize a contract of exchange, which was predominantly a contract of purchase, involving the execution of a mortgage on the lands to be received).

Oh.—Taylor v. Galloway, 1 Oh. 232, 13 AmD 605.

Pa.—Paul v. Grimm, 165 Pa. 139, 30 A. 721, 44 AmSR 648 (holding that an attorney in fact who is authorized to sell his principal's land only for money, and who accepts bonds of the grantee in payment which prove worthless, is liable to his principal for the price).

Tenn.—Lumpkin v. Wilson, 5 Heisk. 555 (holding that an agent empowered to "sell" land and make title is not thereby authorized to exchange the land for a stock of merchandise).

Tex.—Frost v. Erath Cattle Co., 81 Tex. 505, 17 SW 52, 26 AmSR 831; Griffith v. Morrison, 58 Tex. 46; Reese v. Medlock, 27 Tex. 120, 84 AmD 611; Morton v. Morris, 27 Tex. Civ. A. 262, 66 SW 94.

Wash.—Ross v. Kenwood Inv. Co., 73 Wash. 131, 131 P 649.

Ont.—McMichael v. Wilkie, 18 Ont. A. 464 [rev 19 Ont. 739]; Thayer v. Street, 22 U. C. Q. B. 352.

[a] **Custom or usage.**—In Reese v. Medlock, 27 Tex. 120, 84 AmD 611, it was held that the rule could not be overturned by showing a custom of land agents to barter or exchange property placed in their hands for sale.

[b] **A power to sell or mortgage** real estate does not confer a power to exchange. Forman v. Berry, 163 App. Div. 594, 148 NYS 959.

44. Lewis v. Lewis, 203 Pa. 194, 52 A 203 (holding that, where a husband executed a special power of attorney to his wife, authorizing her to collect debts due him, and to use the same for the support of herself and children, and to sell certain real estate, a conveyance by her to her son of the real estate in consideration of debts which she owed him for money previously loaned her, and an agreement for her future support, was unauthorized and invalid); Frost v. Erath Cattle Co., 81 Tex. 505, 17 SW 52, 26 AmSR 831; Skirvin v. O'Brien, 43 Tex. Civ. A. 1, 95 SW 696; Foltis v. Ferguson, (Tex. Civ. A.) 24 SW 657.

[a] **Authority to sell land and take up a note** allows the agent to sell the land to the holder of the note for the face value of the note, which is the full market value of the land. McNeil v. Shirley, 33 Cal. 202.

[b] **Authority to sell to pay mortgage.**—An attorney with authority to sell premises to raise money to satisfy a mortgage is authorized to make the sale directly to the mortgagee in satisfaction of the debt. Bertschy v. Sheboygan Bank, 89 Wis. 473, 61 NW 1115.

[c] **Legal services.**—Where owners of land give a power of attorney authorizing their attorney in fact "to make sale or other disposition of one half of the lands," or such part of one half of said lands to such grantees, and at such prices and terms as he deems proper, and "to execute all necessary deeds" in their names in conveyance of the land, and receipt for the purchase money in their names, it is sufficient to authorize him to execute a deed to certain lots and blocks belonging to a town site location on the land in consideration of legal services in locating and establishing the same. Jones v. Gibbs, 18 Tex. Civ. A. 626, 46 SW 73.

[d] **Expenses of suit to recover the land.**—A power authorizing the attorneys to sell the whole or any part of the premises, on such terms or credit and to such persons as they shall jointly think fit, does not authorize them to convey a part of the land in consideration of disbursements in the defense of a suit to recover a portion of the land. Brown v. Orange County, 48 Tex. Civ. A. 470, 107 SW 607; Brown v. Orange County, (Tex. Civ. A.) 88 SW 247.

[e] **Debt of agent.**—Where a power of attorney authorizes the donee to sell the donor's lands, it does not authorize a sale in consideration of the individual debt of the donee, or a joint debt of the donee and one of the donors, to the grantee. Hunter v. Eastham, (Tex. Civ. A.) 81 SW 336, [rev on other grounds 98 Tex. 560, 86 SW 328].

45. Welke v. Wackershauser, 143 Iowa 107, 120 NW 77 (holding that an agent authorized to sell land cannot convey by way of gift); Wade v. Northup, (Or.) 140 P 451 (holding, however, that while a power authorizing an attorney to lease, sell, con-

veyance,[46] or for a consideration running to the agent.[47]

[§ 254] **(j) Power to Receive Payment.**[48] An agent empowered to sell and convey for cash may receive the purchase money, or so much thereof as is to be paid in hand at the time of the sale,[49] or falling due before the execution of the conveyance;[50] but he has no implied authority to receive payments to be made thereafter.[51] An agent authorized by parol to sell land, that is, to contract for its sale, or authorized under seal merely to contract for sale, has no power to receive the purchase money,[52] unless such authority is impliedly or specifically granted by the power of attorney[53] or the conduct of the principal.[54]

[§ 255] **(k) Time of Sale.** Where the authority to sell is limited as to time, the sale to bind the principal must be consummated at or within the time stated.[55] In the absence of a time limit the sale must be made within what is under the circumstances a reasonable time.[56]

[§ 256] **d. To Collect or Receive Payment**[57]**—(1) In General.** Authority to collect is broader and more comprehensive than authority to receive payment.[58] Like all authority of an agent, it must be traced to the principal. Moreover it is not to

vey, or mortgage does not technically authorise a gift, conveyances for ten dollars and one dollar respectively are within the letter of the authority); Hunter v. Eastham, 95 Tex. 648, 69 SW 66, [rev (Civ. A.) 67 SW 1080]; Rogers v. Tompkins, (Tex. Civ. A.) 87 SW 379.

[a] **Rights of subsequent purchasers.**—(1) A power of attorney authorizing the donee to sell lands for cash or notes does not authorize him to execute a deed without consideration, and such a deed is absolutely void, except as to subsequent bona fide purchasers or mortgagees for value and without notice. Rogers v. Tompkins, (Tex. Civ. A.) 87 SW 379. (2) A conveyance of real estate without a valuable consideration, by an attorney, under a power "to grant, bargain, sell, exchange, demise, and let for such prices or rents, and on such terms, as to the attorney shall seem meet," is a valid exercise of the power as far as a person purchasing from another claiming under such conveyance is concerned. Van Zandt v. Furlong, 18 NYS 54. See generally Vendor and Purchaser [39 Cyc 1687 et seq].

46. Mott v. Smith, 16 Cal. 533.

47. Hunter v. Eastham, 95 Tex. 648, 69 SW 66 [rev (Civ. A.) 67 SW 1080].

48. See also infra §§ 256–279.

49. U. S.—Morrill v. Cone, 22 How. 75, 16 L. ed. 253.

D. C.—Babson v. Cox, 32 App. 542.

Ky.—McCarty v. Stanfill, 41 SW 278, 19 KyL 612.

Mo.—Johnson v. McGruder, 15 Mo. 365.

N. H.—Goodale v. Wheeler, 11 N. H. 424.

Oh.—Schippicasse v. Church, 29 Oh. Cir. Ct. 678 (holding that, where an owner of real estate gives to his agent a written agreement to sell, to be delivered by him to a proposed purchaser, the law will imply that the agent was empowered to accept the purchase money from the purchaser).

W. Va.—Dyer v. Duffy, 39 W. Va. 148, 19 SE 540, 24 LRA 339.

Ont.—McClellan v. McCaughan, 23 Ont. 679; Farquharson v. Williamson, 1 Grant Ch. (U. C.) 93.

[a] **In Montana,** under Rev. Codes § 5441, a special agent to sell land has authority to receive the price on delivery, but not to receive a part thereof before the contract is completed, or to receive a part on a contract he was not authorized to make. Schaeffer v. Mutual Ben. L. Ins. Co., 38 Mont. 459, 100 P 225.

50. Peck v. Harriott, 6 Serg. & R. (Pa.) 146, 9 AmD 415; Mann v. Robinson, 19 W. Va. 49, 42 AmR 771.

51. Ark.—Johnson v. Craig, 21 Ark. 533.

Md.—Melvin v. Aldridge, 81 Md. 650, 32 A 389.

Mo.—Stewart v. Wood, 63 Mo. 252.

Or.—Kern v. Feller, 140 P 735 (holding that a contract whereby defendant employs agents to plat land and sell the lots and agrees to convey to a purchaser on payment of fifty dollars does not authorize the agents or their assignee to receive money, nor require a deed until the payment of fifty dollars per lot to defendant).

W. Va.—Mann v. Robinson, 19 W. Va. 49, 42 AmR 771.

Eng.—Sykes v. Giles, 9 L. J. Exch. 106.

Ont.—Greenwood v. Commercial Bank, 14 Grant Ch. (U. C.) 40.

Compare Rodgers v. Bass, 46 Tex. 505 (holding that the fact that one has authority to sell land and take a note for the purchase money warrants the inference that he has authority to collect such note).

52. Ark.—Johnson v. Craig, 21 Ark. 533.

Miss.—White v. Lee, 97 Miss. 493, 497, 52 S 206 [cit Cyc].

N. C.—Smith v. Browne, 132 N. C. 865, 43 SE 915 (holding that parol authority of an agent to make a sale of real estate does not imply authority to receive payment therefor).

Okl.—Halsell v. Renfrow, 14 Okl. 674, 78 P 118, 2 AnnCas 286 [aff 202 U. S. 287, 26 SCt 610, 50 L. ed. 1032, 6 AnnCas 189].

Pa.—Peck v. Harriott, 6 Serg. & R. 146, 9 AmD 415; Bergdoll Brewing Co. v. Babe, 33 Pa. Super. 490.

W. Va.—Dyer v. Duffy, 39 W. Va. 148, 19 SE 540, 24 LRA 339; Mann v. Robinson, 19 W. Va. 49, 42 AmR 771.

Eng.—Ireland v. Thomson, 4 C. B. 149, 56 ECL 149, 136 Reprint 460; Mynn v. Joliffe, 1 M. & Rob. 326.

Ont.—Farquharson v. Williamson, 1 Grant Ch. (U. C.) 93.

Compare Alexander v. Jones, 64 Iowa 207, 19 NW 918; Yerby v. Grigsby, 9 Leigh (36 Va.) 387.

[a] **Statement of and reason for rule.**—"Where one appoints an agent to sell lands merely, it seems to be well settled by the authorities that such agency does not carry with it any implied authority to collect payments. The mere fact that one employs an agent to sell lands does not imply any authority to collect the purchase money or to make the conveyance. Such authority must be expressly given. An agent can make a binding contract for his principal to convey, without authority to either collect the purchase money or make the actual conveyance. Again, the owner of land may be willing to trust an agent to negotiate a binding trade, but at the same time be unwilling to trust the agent to collect the purchase price or make the conveyance. Such rights must be left in the principal, unless expressly delegated to the agent." White v. Lee, 97 Miss. 493, 497, 52 S 206 [cit Cyc].

[b] **An attorney employed to obtain authority to sell realty** is not, by force of such an employment, authorized to receive the purchase money offered for the estate sold. Nolan v. Jackson, 16 Ill. 272.

53. Carson v. Smith, 5 Minn. 78, 77 AmD 539.

[a] **Illustration of implied power.**—In Johnson v. McGruder, 15 Mo. 365, the agent was authorized to sell the land and loan the purchase money, and the court, while expressly declaring that the general implied powers of an agent employed to make a contract for the sale of lands were not involved in the case, held that the express power to loan clearly implied the power to receive the purchase money.

54. Little Rock, etc., R. Co. v. Wiggins, 65 Ark. 385, 46 SW 731; Spencer v. Wilson, 4 Munf. (18 Va.) 130 (holding that A, having constituted B, his general agent in a county, and also given him a particular agency to sell a tract of land and receive payment of part of the purchase money, is bound to allow credit for any other payments made to him before notice that his powers are revoked).

55. Thornton v. Boyden, 31 Ill. 200; Bliss v. Clark, 16 Gray (Mass.) 60; Matthews v. Sowle, 12 Nebr. 398, 11 NW 857.

[a] **"Immediately."**—(1) Where an agent is authorized to sell at a certain price if he can find a purchaser "immediately," a sale one month afterward is unauthorized, especially where the agent has written the principal that he cannot sell for the price named, and requests permission to sell for considerably less, or, if the permission is not given, "to let the matter drop." Matthews v. Sowle, 12 Nebr. 398, 11 NW 857. (2) An authority by letter to sell land immediately for cash will not authorize a sale three years later for part cash and part personal property. Peabody v. Hoard, 46 Ill. 242.

[b] **Acceptance of option.**—An agent who is authorized by the owner to give to a prospective buyer an option to purchase described land at a given price if exercised within a named time has no implied authority to consent to a conditional acceptance of the terms of the option, to be performed after the time limit has expired. Larned v. Wentworth, 114 Ga. 208, 39 SE 855.

56. Matthews v. Sowle, 12 Nebr. 398, 11 NW 857; Marquam v. Ray, 65 Or. 41, 131 P 523; Dyer v. Duffy, 39 W. Va. 148, 19 SE 540, 24 LRA 339; Weaver v. Burr, 31 W. Va. 736, 8 SE 743, 3 LRA 94.

[a] **"Short time."**—Where a sale is authorized within a "short time," a sale within two weeks is held to be a compliance with the power. Smith v. Fairchild, 7 Colo. 510, 4 P 757.

[b] **Equity will not enforce conveyance.**—If an agent authorized to sell land at a given price sells it three years afterward, when the value has greatly increased and is rapidly rising, for the price named and at a great sacrifice, without informing his principal of the rise in value, it is such a fraud upon the principal that a court of equity will refuse to enforce the conveyance. Proudfoot v. Wightman, 78 Ill. 553.

57. **Authority of agent to receive mortgage debt** see Mortgages [27 Cyc 1388 et seq].

Authority of agent to sell personalty to receive payment see supra §§ 239–241.

Authority of agent to sell real estate to receive payment see supra § 254.

Authority to collect rent see infra § 292.

Collection by bank see Banks and Banking [5 Cyc 493 et seq].

Right of attorney to collect see Attorney and Client [4 Cyc 947 et seq].

58. Ryan v. Tudor, 31 Kan. 366, 369, 2 P 797.

be inferred from mere employment as agent, but to bind the principal the collection must be made by one who is not only his agent but who also has been clothed with authority to make such collection,[59] and it is the duty of a person paying money to an agent to know that he has authority to receive it.[60] The authority of an agent to collect may be implied as a necessary incident to an authority to perform other acts,[61] or where such appears to be the intention of the principal as determined in the light of all the circumstances surrounding the parties and their business relationship to each other,[62] as where the agent is clothed by the principal with the indicia of ownership of goods or of authority to make collections,[63] although the agent's false or erroneous representation of authority can-

59. U. S.—Fresh v. Gilson, 16 Pet. 327, 10 L. ed. 982 (holding that, where plaintiff, having obtained a contract under defendants for the construction for them of a culvert, made an agreement with an agent for the building of the culvert, defendants were not justified in making payment to the agent, there being no presumption that the agent was authorized to receive payments in the absence of any evidence to that effect).

Ala.—Hill v. Helton, 80 Ala. 528, 1 S 340.

Del.—Stromberg-Carlson Tel. Mfg. Co. v. Derrickson, 84 A 1029.

Ill.—Reynolds v. Ferree, 86 Ill. 570.

Mass.—Robbins v. Horgan, 192 Mass. 443, 78 NE 503.

Mich.—Hirshfield v. Waldron, 54 Mich. 649, 20 NW 628; Kornemann v. Monaghan, 24 Mich. 36.

Miss.—Sumrall v. Kitselman Bros., 101 Miss. 783, 790, 58 S 594 [cit Cyc].

Mo.—Miller v. Wilson, 126 Mo. 48, 28 SW 640.

Nebr.—State v. Cass County, 53 Nebr. 767, 74 NW 254 (subagent).

N. Y.—Sage v. Shepard, etc., Lumber Co., 4 App. Div. 290, 39 NYS 449 [aff 158 N. Y. 672, 52 NE 1126]; Schneider v. Hill, 19 Misc. 56, 42 NYS 879.

S. C.—Ohio Pottery, etc., Co. v. Talbert, 87 S. C. 194, 69 SE 211.

[a] **A general authority may be broad enough to imply power to collect** in a particular case; but the power is a dangerous one and should never be recognized except in clear cases. The fact that the principal is inaccessible and has left the agent to act for him under broad powers is significant. Carr v. Eastabrook, 2 Cox Ch. 390, 30 Reprint 180; De la Viesca v. Lubbock, 10 Sim. 629, 16 EngCh 629, 59 Reprint 760.

[b] **Joint agents.**—Where a power is given to two persons to receive money from a fund, and they are not partners in business and have no interest in the fund, neither of them alone has authority to receive the money without the consent of the other. Robbins v. Horgan, 192 Mass. 443, 78 NE 503 (where one of the agents was a resident and the other a nonresident).

[c] **Authority to calculate amount due on notes.**—Authority in an agent to keep the books of his principal and figure the interest on notes does not show authority to collect and settle such notes and accounts. Reynolds v. Ferree, 86 Ill. 570.

[d] **A mere agency to ship** the goods of the principal carries with it no implied power to receive payment for them, even though the agent has possession of the goods and of a bill of lading for their shipment. Hill v. Helton, 80 Ala. 528, 1 S 340.

60. Dutcher v. Beckwith, 45 Ill. 460, 92 AmD 232 (holding that, where a person makes a payment to a third person on an account due another, he is bound to know that the person to whom he pays is authorized to receive it). See also infra § 263.

[a] **Special indorsement.**—A payment by the obligor of a note indorsed by the obligee to a certain bank "for collection," to an unknown holder or stranger who had no right to collect it is made at the obligor's risk. Barnett v. Ringgold, 80 Ky. 289.

[b] **Receipting in a firm name,** but in the form used by agents, puts the person making payment on inquiry as to the authority to take the payment. Chase v. Buhl Iron-Wks., 55 Mich. 139, 20 NW 827; Jones v. Harris, 10 Heisk. (Tenn.) 98.

61. Luckie v. Johnston, 89 Ga. 321, 15 SE 459.

[a] **Where a principal gives his agent a contract to be delivered** to a third person he impliedly empowers the agent to accept a cash payment specified therein. Schippicasse v. Church, 29 Oh. Cir. Ct. 678.

[b] **Authority to sue** gives implied authority to receive payment. Yates v. Freckleton, 2 Dougl. 623, 99 Reprint 394.

62. U. S.—Buffalo Bayou, etc., R. Co. v. U. S., 16 Ct. Cl. 238.

Ala.—Birmingham Mineral R. Co. v. Tennessee Coal, etc., R. Co., 127 Ala. 137, 28 S 679 (holding that, where an agent, whose authority to sell timber from the principal's land and to collect therefor was in dispute, leased several tracts of the land, took rent notes therefor, one of which at least he turned over to the principal, collected for timber cut, and had surveying done, for which the principal paid, it was error for the court to charge that a payment to such agent for timber would not be a payment to the principal, without notice to him that the agent was making collections, and his ratification thereof).

Ark.—Little Rock, etc., R. Co. v. Wiggins, 65 Ark. 385, 46 SW 731 (holding that a company was estopped to assert that its agent had not authority to receive deferred payments on land sales, although he had originally no authority therefor, where he had on several occasions collected and remitted them without objection of the company, having in some instances been asked by the company to collect some small balances, and it was known that payment by other persons had been made to him before those in question, and had been recognized by the company).

Colo.—Heinz v. American Nat. Bank, 9 Colo. A. 31, 47 P 403 (holding that, where a firm directed a bank to transfer to the firm's name a bank account previously kept by its local agent in his own name, stating that the agent was authorized to indorse and deposit to its credit all paper payable to the firm, and the agent continued collecting for the firm as before, indorsing and collecting some of the checks over the counter of the bank, of which facts the firm had knowledge, it was sufficient to warrant a finding that the bank was authorized to pay such checks to the agent).

Miss.—Sumrall v. Kitselman, 101 Miss. 783, 790, 58 S 594 [cit Cyc].

Mo.—Carthage First Nat. Bank v. Mutual Ben. L. Ins. Co., 145 Mo. 127, 46 SW 615; Miller v. Wilson, 126 Mo. 48, 28 SW 640.

Nebr.—Berkley v. Stewart, 94 Nebr. 550, 143 NW 920; Walker v. Rudd, 92 Nebr. 839, 139 NW 662; Walker v. Hale, 92 Nebr. 829, 139 NW 658.

N. Y.—Bridenbecker v. Lowell, 32 Barb. 9.

Pa.—Brecht v. McParland, 187 Pa. 620, 41 A 378 (holding that where defendant applied to an attorney for a loan, and received, at various times, large sums, part of which included money furnished by plaintiff for that purpose, and plaintiff and defendant were not brought together, but defendant received the money from the attorney and assigned to him assessment bills to secure it, and also assigned to him a mortgage as collateral security, and plaintiff looked to the attorney for payment, and did not know on what security the loans were made, and the mortgage was not assigned to him for several years, and not until after payment had been made to the attorney, the attorney was plaintiff's agent, so that he was bound by payment to him).

Tex.—Osborne v. Gatewood, (Civ. A.) 74 SW 72.

Eng.—Gardiner v. Davis, 2 C. & P. 49, 12 ECL 444; Ex p. Winnall, 3 Deac. & C. 22; Barrett v. Deere, M. & M. 200, 22 ECL 507 (holding that payment to one found in a counting house ostensibly looking after the business was good, although such person was not employed by the merchant at all); Pritchard v. Draper, 1 Russ. & M. 191, 5 EngCh 191, 39 Reprint 74, 1 Taml. 332, 12 EngCh 332, 48 Reprint 132.

[a] **A person put in charge of a sawmill** by the owner or lessee thereof may, in the absence of a known contract to the contrary, lawfully receive payment in money or otherwise for lumber sawed by him at the mill, and evidence of a custom in former years to make such payments to other persons so put in charge of the mill is competent. Green v. Clay, 10 Allen (Mass.) 90, 87 AmD 622.

[b] **A clerk in a country store,** in the absence of his employer, has power to receive pay on the demands left in his care. Davis v. Waterman, 10 Vt. 526, 33 AmD 216.

63. Ark.—Winer v. Blytheville Bank, 89 Ark. 435, 117 SW 232, 131 AmSR 102 (holding that one may pay a note to one whom the holder has led the payer to believe has authority to receive payment).

Ga.—Liberty Fruit Products Co. v. Maloof, 8 Ga. A. 166, 68 SE 846.

Ill.—Padfield v. Green, 85 Ill. 529.

Mich.—Wilson v. La Tour, 108 Mich. 547, 66 NW 474; Warren v. Halley, 107 Mich. 120, 64 NW 1058.

Minn.—Lough v. Thornton, 17 Minn. 253.

Mo.—Diebold Safe, etc., Co. v. Dunnegan, 135 Mo. A. 135, 115 SW 1051.

Nebr.—Faulkner v. Simms, 68 Nebr. 295, 89 NW 171, 94 NW 113; Harrison Nat. Bank v. Austin, 65 Nebr. 632, 91 NW 540, 101 AmSR 639, 59 LRA 294; Cheshire Provident Inst. v. Feusner, 63 Nebr. 682, 88 NW 849; Lebanon Sav. Bank v. Blanke, 2 Nebr. (Unoff.) 403, 89 NW 169; Harrison Nat. Bank v. Williams, 2 Nebr. (Unoff.) 400, 89 NW 245.

N. Y.—Gross v. Owen, 86 NYS 266.

Tex.—Texas Land, etc., Co. v. Watson, (Civ. A.) 35 SW 827.

Wash.—McLiesh v. Ball, 58 Wash. 690, 109 P 209, 137 AmSR 1087.

[a] **Holding out.**—Where one has placed his agent for the investment of money in notes and mortgages in such a situation that persons of ordinary prudence and acquainted with business usages will be justified in regarding such agent as having full authority with reference to the extension, collection, etc., of such notes and mortgages, payment to such agent will be deemed payment to the principal. Harrison Nat. Bank v. Austin, 65 Nebr. 632, 91 NW 540, 101 AmSR 639, 59 LRA 294.

[b] **Where a principal knowingly permits an agent to assume authority to collect** notes, or holds him out to the public or the maker of a note as possessing such authority, and money is paid to him in reliance

not of course avail the third person against the principal; the principal must be responsible for the holding out.[64] Thus an agent's authority to collect may be implied from the fact that he has previously received and receipted for payments of money and his acts have been ratified by his principal.[65] But mere authority to collect certain debts does not justify an inference of general authority to collect, or of authority in a particular case to collect other money due the principal,[66] especially where the collections in question have no connection with the business about which the agent is employed.[67] So also authority to foreclose a chattel mortgage, or to sue, conveys no authority to collect money due,[68] although authority to make settlement of a claim includes power not only to agree upon the amount to be received but also to collect and receipt for the same.[69]

The fact that an agent makes or negotiates the contract, such as the negotiation of a loan, gives him no implied authority to receive payment thereunder,[70] unless he has possession of the evidence of indebtedness.[71] But authority to relend money conferred before the maturity of a loan implies authority to collect such loan.[72]

[§ 257] **(2) Effect of Authority to Receive Interest.** The fact that an agent is authorized to receive installments of interest as they become due on a note or other obligation does not give him implied power to collect the principal,[73] particularly

thereon, the payment will be good as against the principal, although no authority in fact was given. Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019.

[c] **Where an agent transacted all the business with reference to the collection** of the principal and interest of the debt secured by note and mortgage, and acted as the agent of the investor in the care and protection of the security, and dealt with the security as the agent deemed best, with the full knowledge of the principal, payment of the note to such agent was payment to the principal. Pochin v. Knoebel, 63 Nebr. 768, 89 NW 264.

64. Kaye v. Brett, 5 Exch. 269.

65. Grant v. Humerick, 123 Iowa 571, 94 NW 510 (holding that, where plaintiff authorized one of his workmen to receive a payment from defendant's agent, and the workman received and accounted for the money, and at another time defendant's agent made a payment to the same workman, although the latter had not at that time obtained express authority to receive it, and defendant went to plaintiff's place of business and on the workman stating that he had received the other two payments he made final payment to him, the facts were sufficient in an action for the amount of the last payment to support a finding that defendant had good reason to believe that the workman had authority to receive the payment).

66. Ala.—Shackleford v. M. C. Kiser Co., 131 Ala. 224, 31 S 877.

Ark.—Winer v. Blytheville Bank, 89 Ark. 435, 117 SW 232, 131 AmSR 102 (holding that authority to collect some of twenty-nine notes does not authorize payment of all to the collector).

Mass.—Putman v. Bacon, 8 Allen 25.

Mich.—Michigan Church Assoc. v. Walton, 114 Mich. 677, 72 NW 998.

Ont.—Greenwood v. Commercial Bank, 14 Grant Ch. (U. C.) 40.

67. Gray v. Pearson, L. R. 5 C. P. 568. See also Bowen v. Rutland School Dist. No. 9, 36 Mich. 149 (holding that mere proof that one person is clerk for another does not establish his right to receive for his employer payment of demands not shown to have any connection with the business).

68. Kilgour v. Ratcliff, 2 Mart. N. S. (La.) 292; Bacon v. Hooker, 173 Mass. 554, 54 NE 253 (holding that proof that a person was sent to foreclose a chattel mortgage, and was instructed to deliver a notice of foreclosure to the mortgagor, and was also seen at work in the mortgagee's place of business, does not show his authority to accept a tender from the mortgagor).

69. Superior Mfg. Co. v. Russell, 127 Ga. 151, 56 SE 296; New York, etc., R. Co. v. Bates, 68 Md. 184, 11 A 705.

70. U. S.—Mutual Ben. L. Ins. Co. v. Miles, 81 Fed. 32 (holding that, where defendants, through T as their agent, secured a loan from plaintiff on mortgage and afterward they applied to plaintiff, through T, to pay off a part of the loan before maturity and plaintiff consented on certain terms and defendants paid the money to T, plaintiff giving no release, and knowing nothing of the matter until T afterward absconded, the payment was not made to plaintiff).

Ill.—Fortune v. Stockton, 182 Ill. 454, 55 NE 367 [aff 82 Ill. A. 272] (holding that it cannot be inferred, in the absence of usage, that an agent to loan money is empowered to collect it); Thompson v. Elliott, 73 Ill. 221; Cooley v. Willard, 34 Ill. 68, 85 AmD 296; Ortmeier v. Ivory, 109 Ill. A. 361 [aff 208 Ill. 577, 70 NE 665]; Madison v. Cabalek, 86 Ill. A. 450.

Iowa.—Townsend v. Studer, 109 Iowa 103, 80 NW 210; Austin v. Thorp, 30 Iowa 376 (holding that the power to collect money is not included in the power to loan, nor can it, in the absence of proof of ratification or the like, be inferred therefrom, nor would the case be varied by the fact that the agent took as security for the loan he was authorized to make a deed of trust in which he was constituted the trustee).

La.—Tew v. Labiche, 4 La. Ann. 526.

Minn.—White v. Madigan, 78 Minn. 286, 80 NW 1125; Trull v. Hammond, 71 Minn. 172, 73 NW 642.

Mo.—Hefferman v. Boteler, 87 Mo. A. 316; Werth v. Ollis, 70 Mo. A. 318.

N. Y.—Henken v. Schwicker, 174 N. Y. 298, 66 NE 971 [aff 67 App. Div. 196, 73 NYS 656]; Central Trust Co. v. Folsom, 38 App. Div. 295, 57 NYS 504 [rev on other grounds 167 N. Y. 285, 60 NE 599].

N. D.—Corey v. Hunter, 10 N. D. 5, 84 NW 570.

Tex.—Evans-Snider-Buel Co. v. Holder, 16 Tex. Civ. A. 300, 41 SW 404.

Wash.—Western Security Co. v. Douglass, 14 Wash. 215, 44 P 257.

Authority to receive money borrowed see infra § 305.

71. See infra § 260.

72. Wales v. Mower, 44 Colo. 146, 96 P 971; Jones v. Dulick, (Kan. A.) 55 P 522 (holding that a trust company and its secretary, which had for many years loaned money for principals without disclosing their identity, and who were expressly authorized to collect the moneys and reinvest them, had authority to receive payment of a mortgage note).

73. Ark.—Koen v. Miller, 105 Ark. 152, 150 SW 411.

Colo.—Lester v. Snyder, 12 Colo. A. 351, 55 P 613; Barstow v. Stone, 10 Colo. A. 396, 52 P 48.

Ill.—Garrels v. Morton, 26 Ill. A. 433.

Iowa.—Klindt v. Higgins, 95 Iowa 529, 64 NW 414; U. S. Bank v. Burson, 90 Iowa 191, 57 NW 705; Security Co. v. Graybeal, 85 Iowa 543, 52 NW 497, 39 AmSR 311.

Kan.—Bronson v. Ashlock, 2 Kan. A. 255, 41 P 1068.

Mass.—Burnham v. Wilson, 207 Mass. 373, 93 NE 704.

Mich.—Bacon v. Pomeroy, 118 Mich. 145, 76 NW 324; Terry v. Durand Land Co., 112 Mich. 665, 71 NW 525; Van Deusen v. Ingraham, 110 Mich. 38, 67 NW 914; Bromley v. Lathrop, 105 Mich. 492, 63 NW 510.

Minn.—White v. Madigan, 78 Minn. 286, 80 NW 1125; Trull v. Hammond, 71 Minn. 172, 73 NW 642.

Mo.—Hefferman v. Boteler, 87 Mo. A. 316 (holding that, in a suit to cancel a deed of trust on the ground of payment to the lender's broker, the fact that the broker negotiated the loan and collected interest on the loan is insufficient to make the broker the agent to collect the principal, where the lender was in possession of the security).

Mont.—Cornish v. Woolverton, 32 Mont. 456, 81 P 4, 108 AmSR 598 (holding that the mere fact that a company acted as the agent of the owner of the mortgage in collecting interest was not sufficient to show authority to collect the principal and discharge the mortgage).

Nebr.—Campbell v. O'Connor, 55 Nebr. 638, 76 NW 167; Thompson v. Kyner, 53 Nebr. 625, 74 NW 52; Frey v. Curtis, 52 Nebr. 406, 72 NW 478; Richards v. Waller, 49 Nebr. 639, 68 NW 1053; Lay v. Honey, 2 Nebr. (Unoff.) 749, 89 NW 998; Dewey v. Bradford, 2 Nebr. (Unoff.) 388, 89 NW 249; Thompson v. Buehler, 1 Nebr. (Unoff.) 590, 95 NW 854.

N. J.—Cox v. Cutter, 28 N. J. Eq. 13.

N. Y.—Brewster v. Carnes, 103 N. Y. 556, 9 NE 323; Smith v. Kidd, 68 N. Y. 130, 23 AmR 157; Doubleday v. Kress, 50 N. Y. 410, 10 AmR 502; Harrison v. Burlingame, 48 Hun 212, 17 NYSt 909; Crane v. Evans, 2 How PrNS 310 [aff 1 NYSt 216].

N. D.—Corey v. Hunter, 10 N. D. 5, 84 NW 570; Stolzman v. Wyman, 8 N. D. 108, 77 NW 285; Hollinshead v. Stuart, 8 N. D. 35, 77 NW 89, 42 LRA 659.

Oh.—Hoffmaster v. Black, 78 Oh. St. 1, 84 NE 423, 125 AmSR 679, 21 LRANS 52, 14 AnnCas 877; Hitchcock v. Kelley, 18 Oh. Cir. Ct. 808, 4 Oh. Cir. Dec. 180; Antioch College v. Carroll, 11 Oh. Dec. (Reprint) 220, 25 CincLBul 289.

Pa.—Mynick v. Bickings, 30 Pa. Super. 401 (holding that the employment of an attorney as a conveyancer to prepare a mortgage does not invest him with authority to collect the principal of the mortgage, especially where the mortgagor knows that the papers are not in the hands of the attorney, although he has received payments of interest, and such payments have been accepted by the mortgagee).

Tex.—Cunningham v. McDonald, 98 Tex. 316, 83 SW 372 [rev (Civ. A.) 80 SW 871]; Higley v. Dennis, 40 Tex. Civ. A. 133, 88 SW 400.

Wash.—Western Security Co. v. Douglass, 14 Wash. 215, 44 P 257.

Eng.—Wilkinson v. Candlish, 5 Exch. 91; Wolstenholm v. Davies, 2 Freem. 289, 22 Reprint 1217; Kent v. Thomas, 1 H. & N. 473; Whitlock v. Waltham, 1 Salk. 157, 91 Reprint 146; Roberts v. Matthews, 1 Vern. Ch. 150, 23 Reprint 379.

where the principal is not yet due,[74] or where he is not intrusted with the possession of the evidence of the indebtedness, but is merely sent at the time of each interest payment, the interest coupon, or a receipt for the interest.[75] Authority to receive the principal, however, may be implied where the agent in addition to his authority to receive the interest has the usual indicia of the indebtedness in his possession,[76] or where other circumstances or conduct on the part of the principal, is sufficient to show that he has such authority.[77]

[§ 258] **(3) Effect of Designation of Place of Payment.** The mere fact that a note or other obligation is made payable at a certain place or office, although it is the office of the person negotiating the contract or loan, is merely a designation of the place where the money is to be paid,[78] and does not of itself, without possession of the note or other evidence of indebtedness, confer authority upon the person whose office it is to receive payment of the same,[79] unless he is otherwise held out as having au-

Ont.—In re Tracy, 21 Ont. A. 454; Palmer v. Winstanley, 23 U. C. C. P. 586.

[a] **Authority to declare the entire debt due** is not implied from authority to receive payment of interest. Wilcox v. Eadie, 65 Kan. 459, 70 P 338.

[b] **A custom** on the part of a mortgagee to send the interest coupons to a mortgage company for collection does not constitute such company her agent to receive payment of the principal debt. Wilson v. Campbell, 110 Mich. 580, 68 NW 278, 35 LRA 544.

[c] **A course of dealing** by which a loan company has received and receipted for interest payments on a negotiable note from the mortgagor or his assigns will not of itself be sufficient proof of its agency to receive and receipt for the payment of the principal of the note when it is in the hands of an innocent purchaser for value before maturity. Gilbert v. Garber, 62 Nebr. 464, 87 NW 179.

[d] **Where a mortgagor has been in the habit of paying interest coupons to a bank** which remits the proceeds to the mortgagee, which bank is not in fact, nor has ever been, held out as the agent of the holder of the note and mortgage, the payment of the principal to such bank to be forwarded to the mortgagee does not constitute a payment, on failure of such bank to forward the same when paid. Greenman v. Swan, 51 Nebr. 81, 70 NW 504.

74. U. S.—Ilgenfritz v. Newark Mut. Ben. L. Ins. Co., 81 Fed. 27 (holding that payments made before maturity by a mortgagor to a bank, through which the interest on the mortgage has been collected, and through whose cashier the loan has been negotiated, but without authority from the mortgagee, are not payments to the mortgagee).

Ark.—Little Rock, etc., R. Co. v. Wiggins, 65 Ark. 385, 46 SW 731.

Colo.—Lester v. Snyder, 12 Colo. A. 351, 55 P 613; Barstow v. Stone, 10 Colo. A. 396, 52 P 48.

Ill.—Williams v. Pelley, 96 Ill. A. 346; Madison v. Cabalek, 86 Ill. A. 450.

Kan.—Wilcox v. Eadie, 65 Kan. 459, 70 P 338 (holding that an agent to receive payment of interest on a loan has no implied authority to collect the note before maturity or to exercise an option to declare the entire debt due on account of default in interest); Bronson v. Ashlock, 2 Kan. A. 255, 41 P 1068.

Nebr.—Walsh v. Peterson, 59 Nebr. 645, 81 NW 853; Chandler v. Pyott, 53 Nebr. 786, 74 NW 263.

Pa.—Mynick v. Bickings, 30 Pa. Super. 401.

Tex.—Cunningham v. McDonald, 98 Tex. 316, 83 SW 372 [rev (Civ. A.) 80 SW 871, 81 SW 52].

See also infra § 272.

[a] **That a mortgagee has been in the habit of collecting interest** from the mortgagor and remitting it to an assignee of the mortgage, whose assignment is not recorded, does not show that his agency authorized him to collect the entire unmatured mortgage debt. Porter v. Ourada, 51 Nebr. 510, 71 NW 52.

75. Ark.—Koen v. Miller, 105 Ark. 152, 150 SW 411.

Colo.—Barstow v. Stone, 10 Colo. A. 396, 52 P 48.

Ill.—Williams v. Pelley, 96 Ill. A. 346; Madison v. Cabalek, 86 Ill. A. 450; Garrels v. Morton, 26 Ill. A. 433 (holding that, while the authority of an agent who has made a loan to receive payment may be inferred from the retention of the securities by the agent, neither the collection of other securities for the principal nor the collection of interest on the particular debt is sufficient to raise an implied authority in the agent to receive payment of the loan).

Mich.—Wilson v. Campbell, 110 Mich. 580, 68 NW 278, 35 LRA 544; Trowbridge v. Ross, 105 Mich. 598, 63 NW 534; Joy v. Vance, 104 Mich. 97, 62 NW 140 (holding that, where a mortgagee, retaining in his own possession the mortgage papers, from time to time, as interest becomes due, forwards the coupon interest notes to a third person for collection, it does not authorize the payment by the mortgagor of future installments of interest and the principal sum to such person as agent of the mortgagee, he not having the note or mortgage in his possession).

Minn.—White v. Madigan, 78 Minn. 286, 80 NW 1125; Trull v. Hammond, 71 Minn. 172, 73 NW 642 (holding that, where a mortgagee forwards from time to time the coupon interest notes to a third person for collection, it does not authorize the mortgagor or his grantee to pay the principal sum to such person as agent of the mortgagee, if he has not the note and mortgage in his possession).

Mo.—Hefferman v. Boteler, 87 Mo. A. 316.

Nebr.—Chandler v. Pyott, 53 Nebr. 786, 74 NW 263; City Missionary Soc. v. Reams, 51 Nebr. 225, 70 NW 972; Richards v. Waller, 49 Nebr. 639, 68 NW 1053; Dewey v. Bradford, 2 Nebr. (Unoff.) 388, 89 NW 249; Thompson v. Buehler, 1 Nebr. (Unoff.) 590, 95 NW 854.

N. Y.—Brewster v. Carnes, 103 N. Y. 556, 9 NE 323.

Oh.—Hoffmaster v. Black, 78 Oh. St. 1, 84 NE 423 (holding that where payment of interest is made to a person not having possession of the securities properly indorsed, and the creditor accepts the same, it does not imply an agency in such unauthorized person to receive payment of the principal); Hitchcock v. Kelley, 18 Oh. Cir. Ct. 808, 4 Oh. Cir. Dec. 180.

[a] **Illustration.**—That money to pay interest coupons has been paid to a person who sent the same to the original mortgagee at the place of payment, that it was sent to the owner of the note, who returned the paid coupons to the mortgagee, who sent them to be delivered to the mortgagor, is not ground to infer that such person has authority to collect the principal sum, where the note and mortgage are not in his possession. Lay v. Honey, 2 Nebr. (Unoff.) 749, 89 N. W. 998.

76. Central Trust Co. v. Folsom, 167 N. Y. 285, 60 NE 599; Hitchcock v. Kelley, 18 Oh. Cir. Ct. 808, 4 Oh. Cir. Dec. 180. See also infra § 260.

77. Wilcox v. Carr, 87 Fed. 130 (holding that, where plaintiff, a resident of Connecticut, placed in the hands of her agent in that state a sum for investment in western loans, which the agent procured to be negotiated by C in Iowa, and part of the amount was loaned through C to defendant, the principal and interest being made payable at the agent's office in Connecticut, and C collected the principal and interest on the various loans, including nine installments of interest from defendant, and returned to defendant his coupons, the payment of the principal to C in response to the usual notice from him of its maturity was justified).

[a] **Where an undisclosed principal** directs his agent to loan money, taking a note in the name of the agent and a mortgage to secure the loan also in his name as mortgagee, and allows such agent to collect the interest, such facts strongly tend to show authority of the agent to receive payment of the note and satisfy the mortgage. Cheshire Provident Inst. v. Vandegrift, 1 Nebr. (Unoff.) 339, 95 NW 615.

78. Wood v. Merchants' Sav. L. & T. Co., 41 Ill. 267; Caldwell v. Evans, 5 Bush (Ky.) 380, 96 AmD 358.

79. U. S.—Cheney v. Libby, 134 U. S. 68, 10 SCt 498, 33 L. ed. 818; Ward v. Smith, 7 Wall. 447, 19 L. ed. 207.

Ark.—State Nat. Bank v. Hyatt, 75 Ark. 170, 86 SW 1002, 112 AmSR 50, 5 AnnCas 296 and note.

Ill.—Wood v. Merchants' Sav. L. & T. Co., 41 Ill. 267.

Ind.—Glatt v. Fortman, 120 Ind. 384, 22 NE 300.

Iowa.—Montreal Bank v. Ingerson, 105 Iowa 349, 75 NW 351; Klindt v. Higgins, 95 Iowa 529, 64 NW 414; Englert v. White, 92 Iowa 97, 60 NW 224; Callanan v. Williams, 71 Iowa 363, 32 NW 383.

Ky.—Caldwell v. Evans, 5 Bush 380, 96 AmD 358.

La.—Rowland v. Levy, 14 La. Ann. 223; Aguilar v. Bourgeois, 12 La. Ann. 122.

Mich.—Bloomer v. Dau, 122 Mich. 522, 81 NW 331; Trowbridge v. Ross, 105 Mich. 598, 63 NW 534; Bromley v. Lathrop, 105 Mich. 492, 63 NW 510.

Minn.—Dwight v. Lenz, 75 Minn. 78, 77 NW 546; St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 48 NW 526, 24 AmSR 189.

Mo.—Hefferman v. Boteler, 87 Mo. A. 316; White v. Kehlor, 85 Mo. A. 557; Cummings v. Hurd, 49 Mo. A. 139.

Nebr.—Bradbury v. Kinney, 62 Nebr. 754, 89 NW 257; Omaha First Nat. Bank v. Chilson, 45 Nebr. 257, 63 NW 362; Chapman v. Wagner, 1 Nebr. (Unoff.) 492, 96 NW 412.

N. J.—Adams v. Hackensack Imp. Commission, 44 N. J. L. 638, 43 AmR 406.

N. Y.—Indig v. National City Bank, 80 N. Y. 100; Hills v. Place, 48 N. Y. 520, 8 AmR 568; Caldwell v. Cassidy, 8 Cow. 271.

N. D.—Corey v. Hunter, 10 N. D. 5, 84 NW 570; Stolzman v. Wyman, 8 N. D. 108, 77 NW 285; Hollinshead v. Stuart, 8 N. D. 35, 77 NW 89, 42 LRA 659.

Pa.—Williamsport Gas Co. v. Pinkerton, 95 Pa. 62.

Tenn.—Stansbury v. Embrey, 128 Tenn. 103, 158 SW 991, 47 LRANS 980.

Wis.—Bartel v. Brown, 104 Wis.

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thority to do so.[80] Where, however, the note or other evidence of indebtedness is also deposited with such person, he has ostensible authority to receive payment.[81]

[§ 259] **(4) Effect of Possession of Bill and Receipt.** The mere possession by an agent of a copy of an account due his principal does not give him authority to collect the debt evidenced thereby.[82] But the agent's possession of a receipt signed by the creditor confers on him ostensible authority to receive payment,[83] although it has been held that a payment made by a purchaser to his agent upon presentation of a receipt signed by the seller is not good against the seller where it appears that the agent represented to the seller that it was necessary to give a receipt before he could get the money from his principal.[84]

[§ 260] **(5) Effect of Possession or Nonpossession of Notes or Securities—(a) In General.** The mere possession by an agent of notes or other securities evidencing an indebtedness, although a fact to be considered, does not of itself confer authority upon such agent to receive payment thereof,[85] as where he has possession of unindorsed notes.[86] But where the securities are properly indorsed or assigned by the principal to the agent this confers ostensible authority to receive payment, as where the agent has possession of negotiable instruments duly indorsed,[87] or payable to bearer.[88]

Where an agent has negotiated the loan or sale for which notes or securities were given, or has been allowed by the principal to receive payments thereon, and the principal has placed the notes or securities in his possession, then in the absence of notice of the agent's want of authority third persons are warranted in inferring that the agent is authorized to collect both interest and principal when they fall due.[89] In order that this rule, which

493, 80 NW 801 (holding that the mere naming in commercial paper of a place for the payment thereof does not make the proper custodian of money at such place the agent of the owner of such paper to receive such payment).

See also Banks and Banking [5 Cyc 500].

[a] **Payer not relieved.**—The mere fact that a note is made payable at a particular place does not relieve one who pays the amount of it at that place from being required to pay it again if in fact the note is not there, and the holder never receives the money. McNamara v. Clark, 85 Ill. A. 439.

80. Wolford v. Young, 105 Iowa 512, 75 NW 349 (holding that where a vendor of land who has the note and mortgage given for the purchase price made payable to the office of an investment company at which a note and mortgage for other land previously sold to the same purchaser has been made payable, and to which the payment was duly made and forwarded by it to the vendor, he cannot recover from the purchaser for money paid to such company on the second note and mortgage, although it is not forwarded to the vendor, and it did not, at the time of receiving the payment, have the note and mortgage); White v. Kehlor, 85 Mo. A. 557. See also cases supra note 79.

81. Ward v. Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207; Scott v. Gilkey, 49 Ill. A. 116; Camp v. Wiggins, 72 Iowa 643, 34 NW 461; White v. Kehlor, 85 Mo. A. 557. See also infra § 260.

82. Willard v. Buckingham, 36 Conn. 395; Hirshfield v. Waldron, 54 Mich. 649, 20 NW 628.

[a] **The sending of a copy of an account** through the post office to a third person does not of itself constitute the latter an agent for the collection of the claim. Dutcher v. Beckwith, 45 Ill. 460, 92 AmD 232. Compare Adams v. Humphrey, 54 Ga. 496 (holding that where A orders goods for B and they are shipped directly to the latter, but the bill, although made out against B, is sent to A, who forwarded the order, A has, at least prima facie, a right to collect as agent of the sender of the goods). See also supra § 239.

[b] **An agency to collect a debt** is not to be inferred from the mere possession of a copy of an account. Dutcher v. Beckwith, 45 Ill. 460, 92 AmD 232.

[c] **One sent to deliver notice of foreclosure** to a mortgagor has no authority to accept a tender from the mortgagor. Bacon v. Hooker, 173 Mass. 554, 54 NE 253.

83. Nash v. Union Mut. Ins. Co., 43 Me. 343, 69 AmD 65; Baca v. Fulton, 3 N. M. 215, 5 P 467.

84. Willard v. Buckingham, 36 Conn. 395.

85. Ill.—Sinclair v. Goodell, 93 Ill. A. 592.

Ind.—Hackleman v. Moat, 4 Blackf. 164 (holding that the possession of a bond by a third person is a strong circumstance to show his authority to collect the amount of it).

Mich.—Michigan Church Assoc. v. Walton, 114 Mich. 677, 72 NW 998; Terry v. Durand Land Co., 112 Mich. 665, 71 NW 525.

N. J.—Lawson v. Nicholson, 52 N. J. Eq. 821, 31 A 386.

N. Y.—Doubleday v. Kress, 50 N. Y. 410, 10 AmR 502 [rev 60 Barb. 181] (note not indorsed by payee to whose order it was payable); Hoffman v. Froma Realty Co., 153 App. Div. 770, 138 NYS 935 [aff 211 N. Y. 525 mem, 105 NE 1087 mem]; Central Trust Co. v. Folsom, 26 App. Div. 40, 49 NYS 670.

Oh.—Union Cent. L. Ins. Co. v. Jones, 35 Oh. St. 351; Antioch College v. Carroll, 11 Oh. Dec. (Reprint) 220, 25 CincLBul 289.

Va.—Brown v. Taylor, 32 Gratt. (72 Va.) 135.

N. S.—Ross v. Sutherland, 32 N. S. 243.

Ont.—Gillen v. Roman Catholic Episcopal Corp., 7 Ont. 146.

[a] **Possession of bank book.**—(1) Proof that a depositor in a savings bank left her bank book with her mother for the purpose of enabling the latter to draw out money upon special orders, from time to time, and that moneys were at different times deposited and withdrawn by the latter for the former, is not sufficient to authorize a jury to infer an agency on the part of the latter to receive payment of other money due to the former. Butman v. Bacon, 8 Allen (Mass.) 25. (2) The possession of a pass book does not authorize an agent to receive payments of principal and interest where the original authority was to make investments, and the continued possession of the book is consistent with such authority. Belcher v. Manchester Bldg., etc., Assoc., 74 N. J. L. 833, 67 A 399. See generally Banks and Banking [5 Cyc 608].

[b] **Authority to receive the money advanced** on a mortgage is not shown from the fact that an agent has the mortgage in his possession. McMullen v. Polley, 12 Ont. 702, 7 CanLTOccNotes 12.

86. Kingman v. Pierce, 17 Mass. 247; Doubleday v. Kress, 50 N. Y. 410, 10 AmR 502; Wardrop v. Dunlop, 1 Hun 325 [aff in 59 N. Y. 634]. Compare Padfield v. Green, 85 Ill. 529.

87. Ill.—Loomis v. Downs, 26 Ill. A. 257.

La.—Davis v. Lusitanian Portuguese Benev. Assoc., 20 La. Ann. 24.

Mo.—Whelan v. Reilly, 61 Mo. 565.

N. Y.—Smith v. Essex County Bank, 22 Barb. 627; Bliss v. Cutter, 19 Barb. 9.

Wyo.—De Clark v. Waters, 10 Wyo. 31, 65 P 855.

See also Bills and Notes [7 Cyc 1032].

[a] **The holder of a note constitutes an indorser** his agent with authority to collect the note by sending it to such indorser in order that he may take steps against the maker to secure both himself and the holder. Deweese v. Muff, 57 Nebr. 17, 77 NW 361, 73 AmSR 488, 42 LRA 789; Bridenbecker v. Lowell, 32 Barb. (N. Y.) 9; Merchant's, etc., Nat. Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 SE 880, 70 LRA 312.

88. Thornton v. Lawther, 169 Ill. 228, 48 NE 412; Chinberg v. Gale Sulky Harrow Mfg. Co., 38 Kan. 228, 16 P 462; Cone v. Brown, 39 S. C. L. 262; Greve v. Schweitzer, 36 Wis. 554.

[a] **Possession of a note payable to bearer** is presumptive evidence of authority to receive payment. Woodbury v. Larned, 5 Minn. 339.

89. U. S.—Ward v. Smith, 7 Wall. 447, 19 L. ed. 207.

Conn.—Union Trust Co. v. McKeon, 76 Conn. 508, 57 A 109.

Ill.—Meyer v. Hehner, 96 Ill. 400; Smith v. Landecki, 101 Ill. A. 248; Garrels v. Morton, 26 Ill. A. 433.

La.—Baker v. Elstner, 24 La. Ann. 464; Kenner v. His Creditors, 8 Mart. N. S. 54.

Mass.—Doyle v. Corey, 170 Mass. 337, 49 NE 651.

Mich.—Donaldson v. Wilson, 79 Mich. 181, 44 NW 429.

Minn.—McMahon v. German-American Nat. Bank, 111 Minn. 313, 316, 127 NW 7, 29 LRANS 67 [cit Cyc] (holding that a payee who has given his agent credit with the payer, by employing that agent in obtaining the obligation, and then by allowing him to retain its possession, clothes him with apparent authority to receive the payments of interest and principal according to the tenor of the instrument); Dwight v. Lenz, 75 Minn. 78, 77 NW 546.

Mo.—Whelan v. Reilly, 61 Mo. 565; Jolly v. Huebler, 132 Mo. A. 675, 112 SW 1013; Dawson v. Wombles, 111 Mo. A. 532, 86 SW 271.

Nebr.—Berkley v. Stewart, 94 Nebr. 550, 143 NW 920.

N. J.—Lawson v. Carson, 50 N. J. Eq. 370, 25 A 191; Dugan v. Lyman, (Ch.) 23 A 657; Haines v. Pohlmann, 25 N. J. Eq. 179.

N. Y.—Central Trust Co. v. Folsom, 167 N. Y. 285, 60 NE 599 [rev 38 App. Div. 295, 57 NYS 504]; Crane v. Gruenewald, 120 N. Y. 274, 24 NE 456, 17 AmSR 643; Hoffman v. Froma Realty Co., 153 App. Div. 770, 138 NYS 935 [aff 211 N. Y. 525 mem, 105 NE 564 mem]; O'Loughlin v. Billy, 95 App. Div. 99, 88 NYS 567; Schermerhorn v. Farley, 58 Hun 66, 11 NYS

is commonly known as the scrivener's rule, may be applicable, the agent must have had charge of the investment or transaction from the beginning,[90] and this requirement is satisfied by an investment in an existing security instead of the negotiation of an original loan.[91]

Necessity of possession. In the absence of actual authority, an agency to receive payment upon a note or security can be implied only where the one assuming such authority has possession of the instrument, and capacity to deliver the same upon payment,[92] and this rule is particularly applicable where the debt is not yet due.[93]

If the debtor knows that the agent has no authority to collect, then his payment to the agent is not validated by the fact that the securities were in the agent's hands.[94]

[§ 261] **(b) Where Agent Has Not Possession.** It is a general rule that an agent with authority to make loans, or to contract for his principal and to take notes or securities in settlement, will not be presumed to have authority to make collections on such notes or securities if they are not left in his possession by the principal,[95] although the debtor does not have notice of his lack of such possession,[96] and even though the principal has been accus-

466; Williams v. Walker, 2 Sandf. Ch. 325.

Oh.—Hitchcock v. Kelley, 18 Oh. Cir. Ct. 808, 4 Oh. Cir. Dec. 180.

Or.—McLeod v. Despain, 49 Or. 536, 90 P 492, 92 P 1088, 124 AmSR 1066.

Tex.—John M. Bonner Memorial Home v. Collin County Nat. Bank, (Civ. A.) 122 SW 430.

Wash.—Corbet v. Waller, 27 Wash. 242, 67 P 567.

Eng.—Wolstenholm v. Davies, 2 Freem. 289, 22 Reprint 1217; Cleveland v. Dashwood, 2 Freem. 249, 22 Reprint 1189; Penn v. Browne, 2 Freem. 214, 22 Reprint 1168; Martyn v. Kingsly, Prec. Ch. 209, 24 Reprint 102; Whitlock v. Waltham, 1 Salk. 157, 91 Reprint 146; Anonymous, 16 Vin. Abr. 272.

[a] **But the continued possession of securities** by an agent who was empowered to make an investment is not, when plainly consistent with the original authority, evidence of a further authority to receive payments of principal and interest on account of such investment. Belcher v. Manchester Bldg., etc., Assoc., 74 N. J. L. 833, 67 A 399.

[b] **Where the securities were deposited in a sealed package** with the agent and he opens the package, the rule does not apply. Lawson v. Nicholson, 52 N. J. Eq. 821, 31 A 386.

90. Central Trust Co. v. Folsom, 26 App. Div. 40, 49 NYS 670.

[a] **One relying on the "scrivener's rule"** must show that the agent in possession of the indicia of indebtedness was the agent of the lender in making the loan, that the evidence of the debt was intentionally left in his possession, and that the party claiming the rule's protection knew and relied on such possession and agency in making payment. Hoffman v. Froma Realty Co., 153 App. Div. 770, 138 NYS 935 [aff 211 N. Y. 525 mem, 105 NE 564 mem].

91. Central Trust Co. v. Folsom, 167 N. Y. 285, 60 NE 599 [rev 38 App. Div. 295, 57 NYS 504]; Williams v. Walker, 2 Sandf. Ch. (N. Y.) 325.

92. Stockton v. Fortune, 82 Ill. A. 272 [aff 182 Ill. 454, 55 NE 367]; Bautz v. Adams, 131 Wis. 152, 111 NW 69; Bartel v. Brown, 104 Wis. 493, 80 NW 801 (holding that in order to establish the fact of agency for the collection of commercial paper, rendering payment to the proper custodian of money at such agency, a discharge of the debt, possession of such paper when due and collectable, or evidence aliunde of express authority to the agent, is indispensable).

[a] **Reason for rule.**—"The importance of protecting the holders of commercial paper is so great that to warrant finding that a person who assumes to have authority to receive payment of the principal sum on any such paper, has such authority, possession of the paper itself by such person, or proof aliunde of express authority, is indispensable. As said by the court in Smith v. Kidd, 68 N. Y. 130, 23 AmR 157, 'Any other practice would be dangerous in the extreme.' 'If money be due on a written security, it is the duty of the debtor to see that the person to whom he pays it is in possession of the security.' That is the best evidence of authority. The payor is negligent if he relies on anything less, and must abide the event of being able to establish, by clear and satisfactory evidence, an express agreement between the holder of the security and the supposed agent, authorizing the latter to represent the former in the transaction." Bartel v. Brown, 104 Wis. 493, 497, 80 NW 801 [quot Bautz v. Adams, 131 Wis. 152, 157, 111 NW 69].

93. Lester v. Snyder, 12 Colo. A. 351, 55 P 613; Walsh v. Peterson, 59 Nebr. 645, 81 NW 853 (holding that payment by a debtor of the principal of his note, before due, to an agent of the payee, who has neither the possession of the note, nor authority to collect it, is made at the risk of such debtor).

[a] **As a general rule, in the payment before maturity** of a debt secured or evidenced by a written instrument, the possession of such instrument by the alleged agent of the owner is indispensable evidence of his authority to receive payment thereon in order to enable the debtor to rely upon appearances of authority in the absence of an actual authority established. Stockton v. Fortune, 82 Ill. A. 272 [aff 182 Ill. 454, 55 NE 367].

94. Chappelear v. Martin, 45 Oh. St. 126, 12 NE 448; Willis v. Gorrell, 102 Va. 746, 47 SE 826; Buswell v. Peterson, 41 Wis. 82.

95. U. S.—Ilgenfritz v. Mutual Ben. L. Ins. Co., 81 Fed. 27.

Ark.—Little Rock, etc., R. Co. v. Wiggins, 65 Ark. 385, 46 SW 731; Bagnell v. Walker, 65 Ark. 325, 46 SW 126, 53 SW 570.

Colo.—Wales v. Mower, 44 Colo. 146, 96 P 971; Lester v. Snyder, 12 Colo. A. 351, 55 P 613; Barstow v. Stone, 10 Colo. A. 396, 52 P 48.

Ill.—Ortmeier v. Ivory, 208 Ill. 577, 70 NE 665 [aff 109 Ill. A. 361]; Fortune v. Stockton, 182 Ill. 454, 55 NE 367 [aff 82 Ill. A. 272]; Thompson v. Elliott, 73 Ill. 221; Cooley v. Willard, 34 Ill. 68, 85 AmD 296 (holding that authority to loan money and take securities for its payment implies no authority to collect); Madison v. Cabalek, 86 Ill. A. 450.

Iowa.—Klindt v. Higgins, 95 Iowa 529, 64 NW 414; Artley v. Morrison, 73 Iowa 132, 34 NW 779.

Kan.—Bronson v. Ashlock, 2 Kan. A. 255, 41 P 1068.

Mich.—Trowbridge v. Ross, 105 Mich. 598, 63 NW 534; Joy v. Vance, 104 Mich. 97, 62 NW 140.

Minn.—McMahon v. German-American Nat. Bank, 111 Minn. 313, 316, 127 NW 7, 29 LRANS 67 [cit Cyc]; White v. Madigan, 78 Minn. 286, 80 NW 1125; Schenk v. Dexter, 77 Minn. 15, 79 NW 526; Thomas v. Swanke, 75 Minn. 326, 77 NW 981; Budd v. Broen, 75 Minn. 316, 77 NW 979; Smith v. Fletcher, 75 Minn. 189, 77 NW 800; Burchard v. Hull, 71 Minn. 430, 74 NW 163; Trull v. Hammond, 71 Minn. 172, 73 NW 642.

Mo.—Padley v. Neill, 134 Mo. 364, 35 SW 997; Hefferman v. Boteler, 87 Mo. A 316.

Nebr.—Bradbury v. Kinney, 63 Nebr. 754, 89 NW 257; Campbell v. O'Connor, 55 Nebr. 638, 76 NW 167; Porter v. Ourada, 51 Nebr. 510, 71 NW 52; City Missionary Soc. v. Reams, 51 Nebr. 225, 70 NW 972; Phoenix Ins. Co. v. Walter, 51 Nebr. 182, 70 NW 938; Richards v. Waller, 49 Nebr. 639, 68 NW 1053; Bull v. Mitchell, 47 Nebr. 647, 66 NW 632; Osborne v. Kline, 18 Nebr. 344, 25 NW 360.

N. J.—Emery v. Gordon, 33 N. J. Eq. 447; Haines v. Pohlmann, 25 N. J. Eq. 179.

N. Y.—Brewster v. Carnes, 103 N. Y. 556, 9 NE 323; Frank v. Tuozzo, 26 App. Div. 447, 50 NYS 71; Hatfield v. Reynolds, 34 Barb. 612; Williams v. Walker, 2 Sandf. Ch. 325.

N. C.—Wynn v. Grant, 81 SE 949 (holding that the fact that a loan is made through an agent who has collected interest, and who has in special cases been authorized to collect the principal of particular mortgages, does not show general authority to collect money due his principal, and one paying to him the amount of a mortgage without his having the mortgage in his possession does so at his peril).

N. D.—Corey v. Hunter, 10 N. D. 5, 84 NW 570.

Oh.—Hoffmaster v. Black, 78 Oh. St. 1, 84 NE 423, 125 AmSR 679, 21 LRANS 52 and note, 14 AnnCas 877 and note; Antioch College v. Carroll, 11 Oh. Dec. (Reprint) 220, 25 CincLBul 289.

Or.—Rhodes v. Belchee, 36 Or. 141, 59 P 117, 1119.

Pa.—Bryant v. Hamlin, 3 Pa. Dist. 385.

Tex.—Evans-Snider-Buel Co. v. Holder, 16 Tex. Civ. A. 300, 41 SW 404.

Wash.—Western Security Co. v. Douglass, 14 Wash. 215, 44 P 257.

Wis.—Bautz v. Adams, 131 Wis. 152, 111 NW 69; Spence v. Pieper, 107 Wis. 453, 83 NW 660; Kohl v. Beach, 107 Wis. 409, 83 NW 657, 81 AmSR 849, 50 LRA 600; Winkelmann v. Brickert, 102 Wis. 50, 78 NW 164.

Eng.—Henn v. Conisby, 1 Ch. Cas. 93, 22 Reprint 710; Wolstenholm v. Davies, 2 Freem. 289, 22 Reprint 1217; Curtis v. Drought, 1 Molloy 487; Whitlock v. Waltham, 1 Salk. 157, 91 Reprint 146; Roberts v. Matthews, 1 Vern. Ch. 150, 23 Reprint 379.

Compare Morgan v. Neal, 7 Ida. 629, 65 P 66, 97 AmSR 264.

[a] **Illustration.** — Where loan agents make loans, and collect the interest and principal for their principal, but the principal retains the securities in his exclusive possession, sending them for collection only when they become due, and he never knows of the agents' collecting loans without having the securities in their possession, the agents have no implied authority to receive payment of a note and mortgage in the principal's exclusive possession. Budd v. Broen, 75 Minn. 316, 77 NW 979.

[b] **A debtor cannot infer that a third party, formerly having possession** of his note and mortgage, is, as the creditor's agent, empowered to receive payment when the securities have been withdrawn by the creditor. Dwight v. Lenz, 75 Minn. 78, 77 NW 546.

96. Brewster v. Carnes, 103 N. Y.

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tomed, in some instances, to permit the agent to make collections, as the nonpossession of the securities raises an implication of a termination of power, and rebuts the presumption of authority,[97] unless such acts on the part of the principal have amounted to a holding out of the agent as having such authority.[98]

[§ 262] **(c) Want of Possession Not Conclusive of Authority.** The mere fact that the agent has not possession of the notes or securities at the time of payment is not conclusive that he has no authority to collect the same, but is only a circumstance to be considered in determining the question; and the facts and circumstances may be such that, notwithstanding the agent has not such possession, he has actual authority, expressed or implied, to make the collection.[99] Thus where a principal by his habits and course of dealing has held an agent out as having general authority to make loans for him, and to receive payments on the same, he may be bound by payments to the agent, although the securities are not in the possession of the latter,[1]

556, 9 NE 323; Williams v. Walker, 2 Sandf. Ch. (N. Y.) 325. See also infra § 263.

[a] **Where the agent has parted with the securities,** although wrongfully, any payment to him will not bind the principal, although the latter supposes the agent to be still in possession of them. Crane v. Gruenewald, 120 N. Y. 274, 24 NE 456, 17 AmSR 643.

97. Ga.—Walton Guano Co. v. McCall, 111 Ga. 114, 36 SE 469. (holding that an agent's general authority to collect is not shown by proving occasional instances of his receiving partial payments upon a promissory note); Howard v. Rice, 54 Ga. 52; Guilford v. State, 53 Ga. 618.

Mich.—Van Deusen v. Ingraham, 110 Mich. 38, 67 NW 914.

Minn.—Dwight v. Lenz, 75 Minn. 78, 77 NW 546.

Nebr.—Thompson v. Kyner, 53 Nebr. 625, 74 NW 52; Bull v. Mitchell, 47 Nebr. 646, 66 NW 632; Omaha First Nat. Bank v. Chilson, 45 Nebr. 257, 63 NW 362; South Branch Lumber Co. v. Littlejohn, 31 Nebr. 606, 48 NW 476.

N. C.—Wynn v. Grant, 81 SE 949.

Tex.—Evans-Snider-Buel Co. v. Holder, 16 Tex. Civ. A. 300, 41 SW 404.

Eng.—Wolstenholm v. Davies, 2 Freem. 289, 22 Reprint 1217; Roberts v. Matthews, 1 Vern. Ch. 150, 23 Reprint 379.

[a] **That the agent had from time to time made other loans** for the principal and received payments is not evidence to warrant a finding of authority generally to collect money on the loans of the principal where the principal retains possession of the securities. Mynick v. Bickings, 30 Pa. Super. 401.

[b] **Course of business.**—(1) The fact that the agents were accustomed for many years to collect the principal of plaintiff's mortgages, on being intrusted with the securities in each individual case, does not warrant a finding of general authority to collect the principal of all the mortgages which they had taken for the principal without having possession of them. Budd v. Broen, 75 Minn. 316, 77 NW 979. (2) So where a mortgage company, as agent, negotiates a loan and thereafter the notes are assigned, the fact that the company accepts some payments on the notes, which it remits to the bank at which the notes are payable, does not justify the payer in making further payments to such company. Frey v. Curtis, 52 Nebr. 406, 72 NW 478. (3) Proof of a custom for general agents of machinery houses to return for collection to the local agents notes taken by them in payment for machinery is not sufficient evidence of the authority of the local agents to receive payment on such notes without having them in their possession. Rhodes v. Belchee, 36 Or. 141, 59 P 117, 1119.

[c] **A mortgagor is not entitled to presume** that the agency of a bank which has had his note and mortgage for collection still continues, where he knows that the papers are no longer in its hands, and payment thereafter made to the bank is at his risk. Bloomer v. Dau, 122 Mich. 522, 81 NW 331.

98. See infra § 262.

99. Cal.—Quinn v. Dresbach, 75 Cal. 159, 16 P 762, 7 AmSR 138 (holding that the fact that a supposed agent of the payee of a note was not in possession of it at the time the maker made payments to him on its account is not conclusive as to his lack of authority to receive the payments, even though, as the maker knew, the note had been transferred to a bank for collection).

Colo.—Wales v. Mower, 44 Colo. 146, 96 P 971.

Conn.—Union Trust Co. v. McKeon, 76 Conn. 508, 57 A 109 (holding that on an issue as to whether one to whom the maker of a note made payments thereon was the apparent agent of the payee for collection purposes, the fact that the alleged agent did not have possession of the note did not conclusively show that he had no apparent authority).

Fla.—International Harvester Co. v. Smith, 51 Fla. 220, 40 S 840.

Iowa.—Harrison v. Legore, 109 Iowa 618, 80 NW 670 (holding that one who received application for loans for another, to whom such other sent money to loan, and who deposited the money in his own bank account, and paid it out after examining the title and papers, collected interest and principal, and remitted it, is, as to one who knew of the course of business between them, an agent of the other, and payment of the principal of a mortgage to him is a payment thereof, although he does not have the mortgage note and satisfaction); Wolford v. Young, 105 Iowa 512, 75 NW 349.

Mass.—Fitzgerald v. Beckwith, 182 Mass. 177, 65 NE 36; Doyle v. Corey, 170 Mass. 337, 49 NE 651.

Minn.—Springfield Sav. Bank v. Kjaer, 82 Minn. 180, 84 NW 752; Randall v. Eichborn, 80 Minn. 344, 83 NW 154; Hare v. Bailey, 73 Minn. 409, 76 NW 213; Congregational Ministers' Gen. Convention v. Torkelson, 73 Minn. 401, 76 NW 215.

Nebr.—Walker v. Rudd, 92 Nebr. 839, 139 NW 662; Harrison Nat. Bank v. Austin, 65 Nebr. 632, 91 NW 540, 101 AmSR 639, 59 LRA 294; Phoenix Ins. Co. v. Walter, 51 Nebr. 182, 70 NW 938 (holding that the fact that the party to whom money due another is paid is not in possession of the note and mortgage by which the debt is evidenced is not conclusive of the question as to his authority to collect the money); Thomson v. Shelton, 49 Nebr. 644, 68 NW 1055.

N. J.—Haines v. Pohlmann, 25 N. J. Eq. 179 (holding that where, at the time of the execution of a mortgage, the mortgagee told the mortgagors to pay the principal and interest to their attorney, they are afterward estopped to deny the authority of the attorney to receive payment, where the authority was never revoked, although the attorney at the time of the payment did not have the securities in his possession).

N. Y.—Chamberlain v. Hamilton, 8 NYSt 305.

S. D.—Reid v. Kellogg, 8 S. D. 596, 67 NW 687.

Tex.—Hill v. Bess, (Civ. A.) 40 SW 202 (holding that collections made by an agent authorized to collect certain notes are binding on the principal, although the payments were in form made on substituted notes which the agent had obtained from the debtor on a representation that the originals had been lost).

Utah.—Campbell v. Gowans, 35 Utah 268, 100 P 397, 23 LRANS 414 and note, 19 AnnCas 660 and note (holding that the fact that a note and mortgage are not in hands of an agent of the mortgagee when the agent collects the principal is not conclusive as to authority to receive the principal, but is a matter of evidence, to be weighed with all the facts).

See Michigan Church Assoc. v. Walton, 114 Mich. 677, 72 NW 998.

[a] **Written or express authority unnecessary.**—Actual authority to receive payment, to a person not the owner nor in possession of a note and mortgage, need not be expressed in writing nor established by direct evidence, but may be established by circumstances showing with reasonable certainty its existence. Bautz v. Adams, 131 Wis. 152, 111 NW 69.

1. U. S.—Kent v. Congdon, 33 Fed. 228 (holding that where the entire negotiation and collection of mortgage loans is intrusted to an agent, the mortgagors having no intercourse with his principal, payment on demand to the agent discharges the mortgage, although the bond was by its terms payable elsewhere, and at the time of payment the agent had not in his possession the bond and mortgage); Security Co. v. Christy, 33 Fed. 22; Security Co. v. Richardson, 33 Fed. 16.

Ill.—Thornton v. Lawther, 169 Ill. 228, 48 NE 412 [rev 67 Ill. A. 214]; Noble v. Nugent, 89 Ill. 522; Thompson v. Elliott, 73 Ill. 221; Peterson v. Fullerton, 106 Ill. A. 237; McIntosh v. Ransom, 106 Ill. A. 172.

Iowa.—Dilenbeck v. Rehse, 105 Iowa 749, 73 NW 1072; Sessions v. Kent, 75 Iowa 601, 39 NW 914; Sax v. Drake, 69 Iowa 760, 28 NW 423.

Kan.—Meserve v. Hansford, 53 P 835; Shane v. Palmer, 43 Kan. 481, 23 P 594.

Mass.—Doyle v. Corey, 170 Mass. 337, 49 NE 651.

Mich.—Peo. v. Gould, 118 Mich. 75, 76 NW 117; Bissell v. Dowling, 117 Mich. 646, 76 NW 100; Ziegan v. Stricker, 110 Mich. 282, 68 NW 122. See also Wilson v. La Tour, 108 Mich. 547, 66 NW 474.

Minn.—Springfield Sav. Bank v. Kjaer, 82 Minn. 180, 84 NW 752; Randall v. Eichhorn, 80 Minn. 344, 83 NW 154; Dexter v. Berge, 76 Minn. 216, 78 NW 1111; Hare v. Bailey, 73 Minn. 409, 76 NW 213; Congregational Ministers' Gen. Convention v. Torkelson, 73 Minn. 401, 76 NW 215.

Mo.—Carthage First Nat. Bank v. Mutual Ben. L. Ins. Co., 145 Mo. 127, 46 SW 615; May v. Jarvis-Conklin Mortg. Trust Co., 138 Mo. 275, 39 SW 782; Mumford v. Knox, 50 Mo. A. 356.

Nebr.—Pochin v. Knoebel, 63 Nebr. 768, 89 NW 264; Harrison Nat. Bank v. Williams, 89 NW 245; Cheshire Provident Inst. v. Feusner, 63 Nebr. 682, 88 NW 849 (holding that, where a principal loans money to a large number of borrowers through an agent, and the latter by agreement takes all loans payable to himself, and indorses the notes to the lender, and draws a sight draft for the amounts needed, and is intrusted with the care, renewal, and collection of

and although payments are accepted before maturity,[2] or are made to one who has had actual authority which has been revoked, but without notice to the third person.[3]

[§ 263] **(d) Duty of Third Person.**[4] The third person, who pays money to an agent on such instruments, assumes the burden of knowing at his peril that the agent possesses the notes or securities at the time each payment is made, and if as a matter of fact he has parted with such possession, payment to him will not discharge the debtor of liability to the principal,[5] unless he is able to show that the money actually reaches the principal,[6] or that the agent otherwise had authority to receive payment.[7]

Knowledge of payer. The payer, in order to claim protection on account of a payment, in the absence of express authority, must also have acted under the knowledge that the agent had possession of the securities; it will not avail him to prove that subsequently to the payment he discovered that the securities were in the possession of the agent, as he could not have been guided by the existence of a fact which was unknown to him.[8] It is not necessary, however, that he should demand that he be shown the papers. He will be as fully protected if as a matter of fact they are in the agent's possession, although of course if the debtor does not see them he assumes the risk that the agent may be deceiving him.[9]

[§ 264] **(6) Extent of Authority—(a) In General.** In the absence of known restrictions, an authority to make collections carries with it by implication such powers as are usual and necessary to insure success in collecting.[10] But it does not imply power to do any act outside of the ordinary

such loans, payment to the agent is payment to the principal); Brown v. Eno, 48 Nebr. 538, 67 NW 434.

N. Y.—McConnell v. Mackin, 22 App. Div. 537, 48 NYS 18.

[a] **As a principal is bound to the extent of the apparent authority** of his agent, if a principal knowingly permits his agent to assume authority to collect his notes, or holds him out to the public or to the maker of the note as possessing such authority, and the money is paid in reliance thereon, the payment will be good, although in fact no authority was given to the agent. May v. Jarvis-Conklin Mortg. Trust Co., 138 Mo. 275, 39 SW 782.

[b] **Ratification.**—Authority to receive payment without possession of the securities may be inferred from similar acts which have been uniformly ratified by the principal. Harrison Nat. Bank v. Austin, 65 Nebr. 632, 91 NW 540, 101 AmSR 639, 59 LRA 294.

[c] **Representations by the agent as to his authority** (1) will be of no force against the principal in the absence of acts of holding out by the principal himself. Bacon v. Pomroy, 118 Mich. 145, 76 NW 324. (2) But where an agent is held out by his principal as having general authority to collect principal and interest on loans, a statement by the agent that he was not in possession of the securities, and that, according to his principal's course of business, the money should be paid to him, the agent, and then remitted before the securities would be delivered, is not such a suggestion of want of the agent's authority to receive payment as would put a reasonably prudent debtor on inquiry. Carthage First Nat. Bank v. Mutual Ben. L. Ins. Co., 145 Mo. 127, 46 SW 615.

2. Harrison v. Legore, 109 Iowa 618, 80 NW 670 (holding that where, on a prior occasion, the mortgagee wrote to the agent to accept a part of the mortgage debt before it was due, and it was paid, and credited by plaintiff, the mortgagors were warranted in believing the agent was authorized to accept the balance before it was due); Dilenbeck v. Rehse, 105 Iowa 749, 73 NW 1072. See also cases supra note 1.

3. Ulrich v. McCormick, 66 Ind. 243; Edinburgh-American Land Mortg. Co. v. Noonan, 11 S. D. 141, 76 NW 298.

4. See also supra § 205.

5. Ark.—Winer v. Blytheville Bank, 89 Ark. 435, 117 SW 232, 131 AmSR 102.

Ga.—Paris v. Moe, 60 Ga. 90; Howard v. Rice, 54 Ga. 52.

Ill.—Ortmeier v. Ivory, 208 Ill. 577, 70 NE 665 [aff 109 Ill. A. 361]; Stiger v. Bent, 111 Ill. 328; Madison v. Cabolek, 86 Ill. A. 450; McNamara v. Clark, 85 Ill. A. 439; Stockton v. Fortune, 82 Ill. A. 272 [aff 182 Ill. 454, 55 NE 367]; Garrels v. Morton, 26 Ill. A. 433.

Iowa.—Wolford v. Young, 105 Iowa 512, 75 NW 349. See also U. S. Bank v. Benson, 90 Iowa 191, 57 NW 705; Security Co. v. Graybeal, 85 Iowa 543, 52 NW 497, 39 AmSR 311; Draper v. Rice, 56 Iowa 114, 7 NW 524, 8 NW 797, 41 AmR 88; Fisher v. Schiller Lodge, 50 Iowa 459; Tappan v. Morseman, 18 Iowa 499.

Mich.—Trowbridge v. Ross, 105 Mich. 598, 63 NW 534; Bromley v. Lathrop, 105 Mich. 492, 63 NW 510; Joy v. Vance, 104 Mich. 97, 62 NW 140; Eaton v. Knowles, 61 Mich. 625, 28 NW 740.

N. J.—Haines v. Pohlmann, 25 N. J. Eq. 179.

N. Y.—Crane v. Gruenewald, 120 N. Y. 274, 24 NE 456, 17 AmSR 643; Brewster v. Carnes, 103 N. Y. 556, 9 NE 323; Smith v. Kidd, 68 N. Y. 130, 23 AmR 157; Frank v. Tuozzo, 26 App. Div. 447, 50 NYS 71 (where the agent deceived the mortgagor by taking a bundle of papers from his safe when payments were made); Williams v. Walker, 2 Sandf. Ch. 325.

N. D.—Stolzman v. Wyman, 8 N. D. 108, 77 NW 285; Hollinshead v. Stuart, 8 N. D. 35, 77 NW 89, 42 LRA 659.

Oh.—Antioch College v. Carroll, 11 Oh. Dec. (Reprint) 220, 25 CincLBul 289.

Va.—Wooding v. Bradley, 76 Va. 614.

Wash.—Corbet v. Waller, 27 Wash. 242, 67 P 567; Western Security Co. v. Douglass, 14 Wash. 215, 44 P 257.

Wis.—Bartel v. Brown, 104 Wis. 493, 80 NW 801.

[a] **Illustration.**—Where a person makes payments upon a promissory note to a person representing himself to be and whom he believed to be the agent of the owner and holder of such note, without requiring him to produce the note, and is informed, by the receipt for the payment made, that the note was at the time in the possession of the owner, he makes such payments at his peril. McNamara v. Clark, 85 Ill. A. 439.

6. Eaton v. Knowles, 61 Mich. 625, 28 NW 740. See also cases supra note 5.

7. Colo.—Lester v. Snyder, 12 Colo. A. 351, 55 P 613.

Ga.—Walton Guano Co. v. McCall, 111 Ga. 114, 36 SE 469.

Ill.—Keohane v. Smith, 97 Ill. 156.

Iowa.—Townsend v. Studer, 109 Iowa 103, 80 NW 210; Klindt v. Higgins, 95 Iowa 529, 64 NW 414; Englert v. White, 92 Iowa 97, 60 NW 224.

Kan.—Bronson v. Ashlock, 2 Kan. A. 255, 41 P 1068.

Mich.—Eaton v. Knowles, 61 Mich. 625, 28 NW 740.

Minn.—Budd v. Broen, 75 Minn. 316, 77 NW 979 (holding that a mortgagor by paying his debt to a supposed agent of the mortgagee, without the production by the agent of the note and mortgage, assumes the risk of establishing, in case of the denial of such agency, the authority of the agent to receive the payment for the mortgagee).

Mo.—Padley v. Neill, 134 Mo. 364, 35 SW 997.

Nebr.—Gilbert v. Garber, 62 Nebr. 464, 87 NW 179; Lay v. Honey, 2 Nebr. (Unoff.) 749, 89 NW 998; Dewey v. Bradford, 2 Nebr. (Unoff.) 388, 89 NW 249; Thompson v. Buehler, Nebr. (Unoff.) 590, 95 NW 854.

Or.—Rhodes v. Belchee, 36 Or. 141, 59 P 117, 1119; Long Creek Bldg. Assoc. v. State Ins. Co., 29 Or. 569, 46 P 366.

Utah.—Campbell v. Gowans, 35 Utah 268, 100 P 397, 23 LRANS 414 and note, 19 AnnCas 660 and note.

Wash.—Western Security Co. v. Douglass, 14 Wash. 215, 44 P 257.

See also supra § 262.

[a] **Authority established.**—When payment is made to the agent of a holder of a note, and the agent's authority to receive payment is fully established, the payment is binding on the holder of the note, although the agent did not have the note in his possession at the time of payment. Union Stock Yards Nat. Bank v. Haskell, 2 Nebr. (Unoff.) 839, 90 NW 233.

[b] **Surrender of obligation.**—A debtor who pays to an agent does so at his peril, and must secure the surrender of the obligation or show such agent's authority to receive payment without possessing the instrument. City Nat. Bank v. Goodloe-McClelland Commn. Co., 93 Mo. A. 123. See also Bagnell v. Walker, 65 Ark. 325, 46 SW 126, 53 SW 570.

8. Crane v. Gruenewald, 120 N. Y. 274, 24 NE 456, 17 AmSR 643.

[a] **Where the payment to the agent is made without regard to and without inquiry as to his possession of the securities,** such possession cannot be relied on as conferring ostensible authority to receive the payment. Murphy v. Barnard, 162 Mass. 72, 38 NE 29, 44 AmSR 340.

9. Crane v. Gruenewald, 120 N. Y. 274, 24 NE 456, 17 AmSR 643 (where it appeared that upon making payments the debtor had sometimes seen the securities, at others had been assured by the agent that they were in the latter's possession when such was the fact, but finally had made payments when the agent no longer possessed them, and the court held that the attorney must possess the papers with the consent of the mortgagee, and the mortgagor must have knowledge of this fact); Hatfield v. Reynolds, 34 Barb. (N. Y.) 612.

10. Ga.—Gibson v. Ward, 9 Ga. A. 363, 71 SE 506.

Ill.—German F. Ins. Co. v. Grunert, 112 Ill. 68, 1 NE 113.

Kan.—Ryan v. Tudor, 31 Kan. 366, 2 P 797.

Nebr.—Northwest Thresher Co. v. Eddyville State Bank, 80 Nebr. 377,

and necessary means for making the collection or receiving the payment,[11] or to do anything unusual which would modify the rights of the creditor or the liability of the debtor.[12] It does not imply authority in the agent to receive payments except according to the terms of the contract under which they are due,[13] or to reloan the money he has collected.[14]

[§ 265] **(b) Power to Modify Terms.**[15] It is the duty of the agent to make the collection in the manner prescribed by the principal, and he has no implied power to make it in any other mode. In the absence of express instructions the collection is to be made in the usual way, although the principal is free to require the collection to be made in any legal manner.[16] Authority to receive the whole of a debt, unless limited to the receipt of the whole amount in one sum, embraces power to receive partial payments to apply upon it.[17] But where the agent has authority to collect in one mode he cannot settle in any other way.[18]

[§ 266] **(c) Medium of Payment—aa. In General.**[19] In the absence of express authority or an established custom or usage otherwise, an agent with a bare power to collect cannot bind his principal by any arrangement short of an actual collection and receipt of the money.[20] He cannot receive a payment subject to a condition,[21] or agree to offset the amount due against a debt due by his

114 NW 291 (holding that an agent who, under his contract, is constituted a general collection agent, and who, in the performance of his duties, agrees to place with a bank for collection notes received by him for his principal, as consideration of the sale by him to a third person of machinery belonging to his principal, has the power to bind his principal by a contract with the bank, authorizing it to make advancements for freight on the machinery sold, and to retain the amount so advanced from the first moneys collected on such notes and contracts).

N. Y.—Warren v. Dennett, 17 Misc. 86, 39 NYS 830.

Tex.—Edinburgh American Land Mortg. Co. v. Briggs, (Civ. A.) 41 SW 1036 (where an agent of a nonresident loan company negotiated a loan and was named trustee in the deed given to secure the loan, and he continued to be the company's agent for the transaction of all its business where the loan was made and was collecting its money and loaning its funds; it was held that he had authority, even as against the company, to declare money secured by said trust deed to be due, and to sell the lands under such deed, and to make deeds to the purchaser, and to receive the money paid by him).

Wis.—Pluto Powder Co. v. Cuba City State Bank, 153 Wis. 324, 331, 141 NW 220 [quot Cyc].

[a] **Place of payment.**—An agent to receive payments under a contract to be made by him may, in the absence of contrary instructions, provide in the contract that the payments shall be made at a reasonable and proper place or bank convenient to him. McLaughlin v. Wheeler, 1 S. D. 497, 47 NW 816.

[b] **Receive notice of acceptance or rejection.**—An agent to present a claim may receive notice of its acceptance or rejection. Peters v. Stewart, 2 Misc. 357, 21 NYS 993 [rev 1 Misc. 8, 20 NYS 661].

11. Colo.—Hathaway v. Choury, 14 Colo. A. 478, 60 P 574 (holding that an agent, who received notes from a nonresident with authority to receive and receipt for the money due on the notes and to enter satisfactions when the loans were paid and to execute releases of the mortgages and deeds of trust did not have authority to make returns to the tax assessor as to the amount of notes and securities which he held for the principal).

Ky.—Russell v. Newdigate, 44 SW 973, 19 KyL 1965 (holding that an agent to collect moneys is not impliedly authorized to make a warranty in consideration of a payment on a former contract); Dohoney v. Lyon, 3 KyL 249.

Minn.—White v. Madigan, 78 Minn. 286, 80 NW 1125; Dexter v. Morrow, 76 Minn. 413, 79 NW 394; Deering v. Kelso, 74 Minn. 41, 76 NW 792, 73 AmSR 324 (holding that an agent has no authority to indorse checks received in payment).

Mo.—Case v. Hammond Packing Co., 105 Mo. A. 168, 79 SW 732 (holding that authority to an agent to sell goods for the principal and collect the price thereof does not give him real or apparent authority to open a bank account for the principal, or to borrow money for him).

N. J.—Bernheimer v. Verdon, 63 N. J. Eq. 312, 49 A 732 (holding that a bill collector for a brewery company had no implied authority to bind the company to make certain advances to enable a person to start in the saloon business).

N. Y.—Gehl v. Bachmann-Bechtel Brewing Co., 156 App. Div. 51, 141 NYS 133 [motion for leave to appeal den 156 App. Div. 915 mem, 141 NYS 1120 mem].

N. D.—Tee v. Noble, 23 N. D. 225, 135 NW 769 (holding that an agent authorized to foreclose a mortgage and collect the amount due has no implied authority to consent to the assignment of the mortgage on payment of the principal and interest, where there is a controversy over taxes due and unpaid).

Pa.—Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396 (holding that a general collector, as such, had no implied power to contract with a purchaser at wholesale from the principal that such purchaser should be paid for services rendered the principal and should not be liable for uncollected accounts).

Philippine.—Cason v. Rickards, etc., Co., 12 Philippine 444.

Tenn.—Hussey v. Crass, (Ch. A.) 53 SW 986.

[a] **Exchanging money.**—An agent has no authority, after receiving payment in cash, to exchange the money with third persons for bills of a different denomination. Kent v. Bornstein, 12 Allen (Mass.) 342.

[b] **Assign lease.**—An agent who has a power of attorney to collect debts and receive furniture covered by a mortgage has no authority to assign a lease of realty. Milstein v. Mosher, 126 App. Div. 515, 110 NYS 568.

[c] **Expression of opinion.**—Power to collect a note does not authorize an agent to bind his principal by an expression of his opinion as to the correct reading of a doubtful word. Van Vechten v. Smith, 59 Iowa 173, 13 NW 94.

12. Tootle v. Cook, 4 Colo. A. 111, 35 P 193; De Mets v. Dagron, 53 N. Y. 635; Chilton v. Willford, 2 Wis. 1, 40 AmD 399 (holding that a power of attorney authorizing the appointee to collect a debt arising from certain notes secured by a mortgage, and to compromise, settle, and arrange them either in law or otherwise, as to the appointee seems fit, does not authorize him to enter into any speculation by which the value of the security may by chance be enhanced).

13. Indiana Natural Gas, etc., Co. v. Beales, (Ind. A.) 74 NE 551 (holding that the act of the agent of the lessor in receiving a payment after the expiration of the term did not bind the lessor); Hoffman v. Froma Realty Co., 153 App. Div. 770, 138 NYS 935 [aff 211 N. Y. 525 mem, 105 NE 1087 mem].

[a] **It is not to be presumed from the fact that notes are in possession** of the agent that he has authority to act for the principal in other matters; nor with reference to the notes themselves except according to the terms of the contract. Padfield v. Green, 85 Ill. 529 (holding that possession of notes for collection gives no authority to commute the debt for another thing, or to release it upon composition, or to pledge it, or to sue for his own use); Hakes v. Myrick, 69 Iowa 189, 28 NW 575.

14. Haynes v. Carpenter, 86 Mo. A. 30 (holding that a power of attorney to attend to the business of the grantor, to collect all money and obligations due, adjust all business matters of whatever nature, pay and settle all debts, draw checks, and do all acts in the premises which the attorney may deem proper, does not confer power to reloan money after it has been collected, and such reloaning constitutes a conversion by the attorney).

[a] **Authority to make collections** does not necessarily imply authority to make or negotiate loans. International Bldg., etc., Assoc. v. Watson, 158 Ind. 508, 64 NE 23.

15. **Extension of time of payment** see infra § 272.

16. Haven v. Wentworth, 2 N. H. 93; Stewart v. Donelly, 4 Yerg. (Tenn.) 177; Bleser v. Stedl, 135 Wis. 124, 115 NW 837; Chilton v. Willford, 2 Wis. 1, 40 AmD 399.

[a] **Substantial compliance is enough.**—Thus where a creditor in the country directed his debtor to pay money into a London banking house for his account, but he had no account with the house but through a country banker, the court held that such direction to make the payment was complied with by a payment to the credit of his account with the country banker. Breed v. Green, Holt N. P. 204, 3 ECL 87.

[b] **Responsibility for agent's method.**—One who, without giving special instructions, employs a collecting agent whose card announces that he will treat debtors "with delicacy, so as not to offend them, or with such severity as to show that no trifling is intended," is responsible for whatever means the agent adopts. Caswell v. Cross, 120 Mass. 545.

17. Pickett v. Bates, 3 La. Ann. 627; Whelan v. Reilly, 61 Mo. 565, 578; Williams v. Walker, 2 Sandf. Ch. (N. Y.) 325. Compare infra § 277.

18. Powell v. Henry, 27 Ala. 612; Tootle v. Cook, 4 Colo. A. 111, 35 P 193; Sewell v. Hennen, 8 Rob. (La.) 216; Stewart v. Donelly, 4 Yerg. (Tenn.) 177.

19. See also supra §§ 239, 240, 254. See generally Payment [30 Cyc 1173].

20. Ill.—Cooney v. U. S. Wringer Co., 101 Ill. A. 468 [aff 214 Ill. 520, 73 NE 803].

Ind.—Kirk v. Hiatt, 2 Ind. 322; Miller v. Edmonston, 8 Blackf. 291.

Iowa.—National Loan, etc., Co. v. Bleasdale, 140 Iowa 695, 119 NW 77.

Mo.—Ridgeley Nat. Bank v. Barse Live Stock Commn. Co., 113 Mo. A. 696, 88 SW 1124.

N. Y.—De Mets v. Dagron, 53 N. Y. 635.

Eng.—Pearson v. Scott, 9 Ch. D. 198.

21. Bank of Scotland v. Dominion

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principal.[22] Furthermore there is in the agent no implied power to receive in payment anything except lawful money;[23] and unless the third person can establish an express authority to accept something other than money, or conduct of the principal from which such authority may fairly be implied,[24] the principal will be bound by payment to his agent only as far as the payment is in cash.[25]

Kind of money. The payment must be received in such coin or currency as is by law declared to be legal tender,[26] or, in the absence of special instructions, in such currency and bills as are in general circulation, and by common consent considered and treated as money, and pass as such at par.[27] But authority to an agent to take in settlement whatever he can get will give him power to accept paper not current, when circumstances make collection of lawful currency impossible or improbable,[28] and extraordinary conditions may justify the agent in making unusual terms of settlement, and in the case of collecting a claim against an insolvent debtor the acceptance of notes or securities less than money may be best and necessary.[29] The failure of the principal to reject the payment received by the agent may of course become in law an acceptance of it,[30] and if the principal does not reject the settlement it does not lie with third persons to set up the agent's want of authority.[31]

Where an agent is authorized to collect to his own use he may receive in payment anything he thinks proper.[32]

[§ 267] **bb. Commercial Paper.**[33] In the absence of special authority, as a general rule an agent to collect cannot receive payment in notes of the debtor payable either to the agent himself,[34]

Bank, [1891] A. C. 592 (holding that the payment must be absolute and in money, or the principal is not bound).

22. Hill v. Van Duzer, 111 Ga. 867, 36 SE 966; John Gund Brewing Co. v. Peterson, 130 Iowa 301, 106 NW 741; Bigler v. Toy, 68 Iowa 687, 28 NW 17; Drain v. Doggett, 41 Iowa 682; Paisley v. Bannatyne, 4 Man. 255. Compare Grubbs v. Nixon, 93 Ark. 79, 123 SW 785, 137 AmSR 78.

23. U. S.—National Bank of Republic v. Old Town Bank, 112 Fed. 726, 50 CCA 443.

Ala.—Powell v. Henry, 27 Ala. 612.

Ga.—Rogers v. Tiedeman, 9 Ga. A. 811, 72 SE 285.

Ill.—Reed v. Jennings, 196 Ill. 472, 63 NE 1005; Rush v. Rush, 170 Ill. 623, 48 NE 990; Scott v. Gilkey, 153 Ill. 168, 39 NE 265 [aff 49 Ill. A. 116]; Lochenmeyer v. Fogarty, 112 Ill. 572; Padfield v. Green, 85 Ill. 529; Mathews v. Hamilton, 23 Ill. 470; Nolan v. Jackson, 16 Ill. 272; McCormick Harvesting Mach. Co. v. Breen, 61 Ill. A. 528.

Ind.—McCormick v. Walter A. Wood Mowing, etc., Mach. Co., 72 Ind. 518; O'Connor v. Arnold, 53 Ind. 203; Earnhart v. Robertson, 10 Ind. 8 (holding that if the agent accepts anything but money he does so at his risk, and cannot set that up for credit against the principal); Kirk v. Hiatt, 2 Ind. 322; Corning v. Strong, 1 Ind. 329.

Iowa.—National Loan, etc., Co. v. Bleasdale, 140 Iowa 695, 119 NW 77; Graydon v. Patterson, 13 Iowa 256, 81 AmD 432; McCarver v. Nealey, 1 Greene 360.

Ky.—Baldwin v. Tucker, 112 Ky. 282, 65 SW 841, 23 KyL 1538, 57 LRA 451; Woodruff v. American Road Mach. Co., 65 SW 600, 23 KyL 1551.

La.—Waterhouse v. Citizens' Bank, 25 La. Ann. 77.

Mich.—Pitkin v. Harris, 69 Mich. 133, 37 NW 61; Hurley v. Watson, 68 Mich. 531, 36 NW 726.

Mo.—West Pub. Co. v. Corbett, 165 Mo. A. 7, 145 SW 868; Cannon v. Gibson, 162 Mo. A. 386, 142 SW 730; Loy v. McClure, 124 Mo. A. 689, 101 SW 1148.

Mont.—Case v. Kramer, 34 Mont. 142, 85 P 878.

Nebr.—Cram v. Sickel, 51 Nebr. 828, 71 NW 724, 66 AmSR 478.

Nev.—Roberts, etc., Shoe Co. v. McKim, 34 Nev. 191, 117 P 13.

N. Y.—Fellows v. Northrup, 39 N. Y. 117; Sier v. Bache, 7 Misc. 165, 27 NYS 255.

S. C.—Tankersley v. Anderson, 4 S. C. Eq. 44.

Tenn.—Baldwin v. Merrill, 8 Humphr. 132.

Tex.—Rodgers v. Bass, 46 Tex. 506; McAlpin v. Cassidy, 17 Tex. 449; Robson v. Watts, 11 Tex. 764; Merchant v. Rogan, (Civ. A.) 150 SW 956; Zang v. Bldg., etc., Co., (Civ. A.) 125 SW 85; Stringfellow v. Braselton, (Civ. A.) 117 SW 204; Western Brass Mfg. Co. v. Maverick, 4 Tex. Civ. A. 535, 23 SW 728.

Va.—Willias v. Gorrell, 102 Va. 746, 47 SE 826; Smith v. Powell, 98 Va. 431, 36 SE 522.

Wash.—Wees v. Page, 47 Wash. 213, 91 P 766; Corbet v. Waller, 27 Wash. 242, 67 P 567.

Wis.—Becker v. Bluemel, 129 Wis. 491, 109 NW 534; Friend v. Yahr, 126 Wis. 291, 104 NW 997, 110 AmSR 924, 1 LRANS 891.

Man.—Paisley v. Bannatyne, 4 Man. 255.

Ont.—Frazer v. Gore Dist. Mut. F. Ins. Co., 2 Ont. 416.

24. N. C.—Purvis v. Jackson, 69 N. C. 474.

S. C.—Columbia Phosphate Co. v. Farmers' Alliance Store, 47 S. C. 358, 25 SE 116.

Wash.—Northwest Thresher Co. v. Dahlgren, 50 Wash. 325, 97 P 228, 19 LRANS 324 and note; Dusenberry v. McDole, 42 Wash. 470, 85 P 40.

Eng.—Ekins v. Macklish, Ambl. 184, 27 Reprint 125; Barker v. Greenwood, 1 Jur. 541.

Can.—Manufacturers Acc. Ins. Co. v. Pudsey, 27 Can. S. C. 374 [aff 29 N. S. 124].

[a] **Course of dealing.**—"While it is true that an agent authorized to receive payment is ordinarily deemed intrusted with power to receive it in money only, yet when there has been a long course of dealing and payments are received by the agent according to such course, if the agent alone is known, and he is supposed to be the principal, and the debtor has no notice of any claim by the real principal, the latter will be bound." Dusenberry v. McDole, 42 Wash. 470, 472, 85 P 40.

[b] **Effect of custom.**—No custom should be allowed to justify the receipt by a collecting agent of anything other than money in payment so as to discharge the debtor, unless it be in a case where the creditor is connected with and a party to the custom. State Bank v. Byrne, 97 Mich. 178, 56 NW 355, 37 AmSR 332, 21 LRA 753. See generally Customs and Usages [12 Cyc 1071].

25. Tubman v. Lowekamp, 43 Md. 318; Dowden v. Cryder, 55 N. J. L. 329, 26 A 941; Union School Furniture v. Mason, 3 S. D. 147, 52 NW 671; Rhine v. Blake, 59 Tex. 240. But see John Hutchinson Mfg. Co. v. Henry, 44 Mo. A. 263 (holding that if an agent solicits and obtains an order for the purchase of goods and transmits the same to the seller, and the latter delivers the goods to him, and he delivers them to the purchasers, he becomes clothed, by virtue of the possession of the goods, with the ostensible authority to collect payment therefor, including power to accept payment in other property than money).

26. Ward v. Smith, 7 Wall (U. S.) 447, 19 L. ed. 207; Gilbert v. Garber, 62 Nebr. 464, 87 NW 179; Moore v. Pollock, 50 Nebr. 900, 70 NW 541; Rodgers v. Bass, 46 Tex. 505.

27. Gilbert v. Garber, 62 Nebr. 464, 87 NW 179; Baird v. Hall, 67 N. C. 230 (holding that a collecting agent without instructions to the contrary is authorized to receive in payment of such debts as he may have to collect whatever kind of currency is received by prudent business men for similar purposes); Glass v. Davidson, 1 Baxt. (Tenn.) 47; Rodgers v. Bass, 46 Tex. 505 (holding that, in the absence of special instructions to an agent to collect in gold or silver, a payment to the agent in bank bills, or other currency generally taken and used in the payment of debts and current in business transactions as money, satisfies the debt). Compare Graydon v. Patterson, 13 Iowa 256, 81 AmD 432.

Power to receive depreciated currency see infra § 269.

[a] **The payment must be in lawful currency** which is convertible into money or coin. Shurer v. Green, 3 Coldw. (Tenn.) 419.

[b] **Currency of particular kind.**—Where the agent is directed to receive one kind of currency he cannot bind his principal by the receipt of another kind, although it may be the only currency in circulation at the place of payment. Mangum v. Ball, 43 Miss. 288, 5 AmR 488.

28. Mitchell v. Finnell, 101 Cal. 614, 36 P 123; Ruthven v. Clarke, 109 Iowa 25, 79 NW 454; Steele v. Taylor, 4 Dana (Ky.) 445; Oliver v. Sterling, 20 Oh. St. 391 (where the debtors were insolvent and on the eve of bankruptcy).

29. Dolan v. Van Demark, 35 Kan. 304, 10 P 848 (holding that an attorney at law and banker having claims in his hands for collection will, where it is necessary to secure the collection of such claims, presumptively have authority to take as collateral security, and in his own name, a note secured by a chattel mortgage). See also McCormick v. Keith, 8 Nebr. 142; Oliver v. Sterling, 20 Oh. St. 391 (where the debtor was insolvent, and the agent was given "full authority to act for" the creditor).

30. Glass v. Davidson, 1 Baxt. (Tenn.) 47 (holding that, if a debtor, having no notice that his creditor's agent is under special instructions to receive nothing but legal tender, pays the attorney in current bank notes subject to the creditor's approval, a failure to return such notes within a reasonable time will render the payment binding on the creditor).

31. Dolan v. Van Demark, 35 Kan. 304, 10 P 848.

32. Clark v. Shields, 10 N. C. 461; Barker v. Greenwood, 1 Jur. 541.

33. See generally Payment [30 Cyc 1194 et seq].

34. Scott v. Gilkey, 153 Ill. 168, 39 NE 265; Robinson v. Anderson, 106

or to his principal, the creditor.[35] Nor has he authority to receive in payment drafts or bills of exchange[36] or checks,[37] unless he is specially authorized to do so,[38] except that he may receive a draft or check as conditional payment, unless instructed to the contrary, if he has good reason to believe that it will be cashed in the ordinary course of business.[39] But even though the receipt of such a payment is unauthorized, if the agent collects the money on the paper accepted by him the payment is good.[40]

General authority to conduct a business involving the acceptance of checks or notes will of necessity involve implied authority to take and indorse such paper in the course of the business intrusted to the agent.[41]

[§ 268] **cc. Choses in Action.** In the absence of special authority to do so, an agent to collect has no power to receive in payment choses in action against third persons,[42] such as the note of a third

Ind. 152, 6 NE 12 (holding that an agent to collect a debt will not be presumed to have the right to take as payment the note of the debtor payable to himself); McCormick v. Walter A. Wood Mowing, etc., Mach. Co., 72 Ind. 518; O'Conner v. Arnold, 53 Ind. 203; Corning v. Strong, 1 Ind. 329 (holding that, where an agent for the collection of a debt receives a note payable to himself at a future day, in payment, this is not a satisfaction of the debt of the principal nor a bar to an action by him to recover the original debt); Franklin Sav. Bank v. Colby, 105 Iowa 424, 75 NW 346; McCulloch v. McKee, 16 Pa. 289.

[a] **Where a general agent** for loaning, collecting, and reloaning his principal's money takes a note payable to himself from a borrower, in payment of a matured note of the latter, without the knowledge or ratification of the principal, the borrower remains liable to the principal. Everts v. Lawther, 165 Ill. 487, 46 NE 233 [aff 63 Ill. A. 432].

35. Ill.—Mathews v. Hamilton, 23 Ill. 470.

Ind.—Runyon v. Snell, 116 Ind. 164, 18 NE 522, 9 AmSR 839; Miller v. Edmonston, 8 Blackf. 291.

Ky.—Baldwin v. Tucker, 112 Ky. 282, 65 SW 841, 23 KyL 1538, 57 LRA 451.

La.—David v. Neveu, 10 La. Ann. 642.

Minn.—Trull v. Hammond, 71 Minn. 172, 73 NW 640.

Mo.—Cannon v. Gibson, 162 Mo. A. 386, 142 SW 730.

Nebr.—Holt v. Schneider, 57 Nebr. 523, 77 NW 1086.

N. Y.—De Mets v. Dagron, 53 N. Y. 635; Downer v. Carpenter, 1 Hun 591.

[a] **Acceptance of unindorsed notes** in payment as being without authority see In re Selman Heating, etc., Co., 203 Fed. 777.

Authority of attorney at law to receive payment in notes see Attorney and Client [4 Cyc 889].

36. Ill.—Preston v. Jones, 8 Ill. A. 632.

Iowa.—Drain v. Doggett, 41 Iowa 682.

Miss.—Parham v. Stith, 56 Miss. 465.

Mo.—Smith v. Johnson, 71 Mo. 382; Gowling v. American Express Co., 102 Mo. A. 366, 76 SW 712.

N. C.—Goldsborough v. Turner, 67 N. C. 403 (holding that, where the agent had authority to receive a cash payment "in Baltimore and New York funds," this did not authorize him to accept a draft of an insolvent drawer no matter upon whom drawn).

Tex.—Rodgers v. Bass, 46 Tex. 505; Portis v. Ennis, 27 Tex. 574.

Vt.—Moore v. Quint, 44 Vt. 97.

Eng.—Hine v. Steamship Ins. Syndicate, 7 Aspin. 558; Sykes v. Giles, 9 L. J. Exch. 106; Huxley v. Bull, 7 M. & G. 571, 49 ECL 571, 135 Reprint 229.

N. B.—Crane v. Boltenhouse, 4 N. B. 581.

[a] **Personal liability of agent.**—Where one accepts a draft where he might have procured money in payment of a check he has for collection, and the draft is dishonored, he is liable for its value, although the bank issuing and the bank on which the draft is drawn are solvent, and the draft is stopped by telegram of the debtor, a collector having no authority to accept anything but money in payment of a claim. Gowling v. American Express Co., 102 Mo. A. 366, 76 SW 712.

37. Cal.—Harlan v. Ely, 68 Cal. 522, 9 P 947.

Ill.—Antigo Bank v. Union Trust Co., 149 Ill. 348, 36 NE 1029, 23 LRA 611.

Ind.—Hamilton Nat. Bank v. Nye, 37 Ind. A. 464, 77 NE 295, 117 AmSR 333.

Iowa.—Griffin v. Erskine, 131 Iowa 444, 109 NW 13, 9 AnnCas 1193 and note; Ormsby v. Graham, 123 Iowa 202, 98 NW 724 (holding that an agent employed to sell land cannot bind his principals by the acceptance of a check in part payment of the purchase price, in the absence of a waiver by them of objection to such payment).

Mass.—Broughton v. Silloway, 114 Mass. 71, 19 AmR 312.

Mich.—Midland State Bank v. Byrne, 97 Mich. 178, 56 NW 355, 37 AmSR 332, 21 LRA 753; Doran v. Phillips, 47 Mich. 228, 10 NW 350; Woodbury v. Lewis, Walk. 256.

Mont.—Missoula County v. McCormick, 4 Mont. 115, 5 P 287.

Nev.—Roberts, etc., Shoe Co. v. McKim, 34 Nev. 191, 117 P 13 (holding that an agent intrusted with a claim for collection is, in the absence of express authority to that effect, without power to accept anything in payment but lawful money, and where he accepts checks in payment the creditor is not bound thereby in the absence of a ratification).

N. Y.—McLanahan v. Syracuse, 18 Hun 259. But in Thomas Roberts Stevenson Co. v. Fox, 19 Misc. 177, 43 NYS 253, it was held that payment to an agent on an account due the principal is a payment to the principal, where the agent had authority to collect, although made by a check to the agent's order, which was misappropriated by him.

Tex.—Western Brass Mfg. Co. v. Maverick, 4 Tex. Civ. A. 535, 23 SW 728.

Wis.—Hall v. Storrs, 7 Wis. 253.

Eng.—Pape v. Westacott, [1894] 1 Q. B. 272; Blumberg v. Life Interests, etc., Corp., [1897] 1 Ch. 171 [app dism [1898] 1 Ch. 27]; Robb v. Gow, 8 F. (Ct. Sess.) 9; Walker v Barker, 16 T. L. R. 393.

38. Sage v. Burton, 84 Hun 267, 32 NYS 1122 (holding that where the agent is authorized to receive checks, a check given in payment operates as a discharge of the debt, although the agent cashes the check and misappropriates the proceeds).

39. Griffin v. Erskine, 131 Iowa 444, 109 NW 13 (where it is pointed out that checks, drafts, and other bills of exchange are the means of transferring money in nearly all commercial transactions, and in authorizing an agent to make collections he may be assumed to have authority to transmit funds in the ordinary way, and, although such paper will not absolutely cancel the debt, it is conditional payment, good from date of delivery, if the paper is honored, but no payment at all if not honored); Pape v. Westacott, [1894] 1 Q. B. 272; Pearson v. Scott, 9 Ch. D. 198; Bridges v. Garrett, L. R. 5 C. P. 451; Hine v. Steamship Ins. Syndicate, 7 Aspin. 558; Crane v. Boltenhouse, 4 N. B. 581; Ætna L. Ins. Co. v. Green, 38 U. C. Q. B. 459.

[a] **"Checks, drafts, and other bills of exchange** are the means of transferring the money in adjusting nearly all commercial transactions, and in authorizing an agent, whether a bank or individual, to make collections, it may be assumed in the absence of instructions to the contrary that the authority is to be executed in the manner usual and customary in the commercial world. While the agent may not accept anything but the actual cash in satisfaction of the claim, he may receive a check or draft, negotiable and payable on demand, which he has good reason to believe will be honored upon presentation, as a ready and more convenient means of obtaining the money in conditional satisfaction of the debt. Such a payment offers no greater temptations to the agent than payment in cash to which ordinarily it is equivalent. If honored by the drawee, payment relates back to the time of delivery. If not honored, the creditor has parted with nothing by reason of conduct of his agent; for, though the agent may receive such paper as conditional payment, he is not permitted, on its strength, to deliver conveyances, leases, or other valuables at the risk of his principal." Griffin v. Erskine, 131 Iowa 444, 451, 109 NW 13, 9 AnnCas 1193.

40. Ala.—Kansas City, etc., R. Co. v. Ivy Leaf Coal Co., 97 Ala. 705, 12 S 395.

Iowa.—Griffin v. Erskine, 131 Iowa 444, 109 NW 13, 9 AnnCas 1193; Harbach v. Colvin, 73 Iowa 638, 35 NW 668.

Minn.—Bardwell v. American Express Co., 35 Minn. 344, 28 NW 925.

N. Y.—Morrison v. Chapman, 155 App. Div. 509, 140 NYS 700.

Va.—Smock v. Dade, 5 Rand. (26 Va.) 639, 16 AmD 780.

W. Va.—Spence v. Rose, 28 W. Va. 333.

Eng.—Bridges v. Garrett, L. R. 5 C. P. 454.

[a] **A check immediately paid** is equivalent to money. Hine v. Steamship Ins. Syndicate, 7 Aspin. 558.

[b] **Where the debtor turns over to the creditor's agent a draft** for more than the debt, under circumstances indicating an intent, when the draft is collected, that the debt should be paid and the balance retained for the debtor's benefit, and the agent receives the money on the draft, payment is effected, although the agent fails to pay over to the creditor the money which thus came into his hands. Gibson v. Ward, 9 Ga. A. 363, 71 SE 506.

[c] **Agent's note.**—Where an agent has authority to collect a note, but is not authorized to receive anything in payment but money, he cannot accept his own note in payment. However, if he supplies out of his own funds the amount of the note received by him, and turns the same over to his principal less his commission for collection, the principal cannot complain. Wilcox, etc., Organ Co. v. Lasley, 40 Kan. 521, 20 P 228.

41. Hamilton Nat. Bank v. Nye, 37 Ind. A. 464, 77 NE 295, 117 AmSR 333; Nichols, etc., Co. v. Hackney, 78 Minn. 461, 81 NW 322; Levy v. Hastings First Nat. Bank, 27 Nebr. 557, 43 NW 354; Morrison v. Chapman, 155 App. Div. 509, 140 NYS 700. See also infra §§ 280, 281.

42. Walrath v. Abbott, 75 Hun

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person,[43] or a certificate of deposit,[44] a check,[45] or a bond.[46] It has been held, however, that when such security is paid the debtor will be discharged,[47] although some cases hold that the debtor is not discharged until the agent has done some act of appropriation of the proceeds.[48]

[§ 269] **dd. Depreciated Currency.**[49] In the absence of express authority, or special circumstances justifying such an inference, an agent has no authority to receive payment in depreciated currency of any kind,[50] such as the depreciated notes of a state bank.[51]

[§ 270] **ee. Property.** In the absence of special authority a collecting agent has no authority to receive personal property in payment of the debt,[52] unless such authority can be reasonably inferred from the facts and circumstances of the agency,[53] or from usage or a general course of business;[54]

445, 27 NYS 529; Kenny v. Hazeltine, 6 Humphr. (Tenn.) 62.

[a] **"It is well settled that"** if an attorney or other agent, entrusted with the collection of notes or other claims payable in money, receives from the debtor other claims to be collected and applied in payment of the claims held by him for collection, he as to such other claims is the agent of the debtor, and unless he actually receives the money on such claims the transaction will not operate as a payment or bind the creditor." Spence v. Rose, 28 W. Va. 333, 335.

43. Ga.—Reynolds v. Dale, 33 Ga. 585; Jeter v. Haviland, 24 Ga. 252.

Iowa.—Hakes v. Myrick, 69 Iowa, 189, 28 NW 575.

Kan.—Scully v. Dodge, 40 Kan. 395, 19 P 807.

Mass.—Langdon v. Potter, 13 Mass. 319.

Mo.—Buckwalter v. Craig, 55 Mo. 71; Reinhart Grocery Co. v. Knuckles, 172 Mo. A. 627, 631, 155 SW 1105 [cit Cyc]; Cannon v. Gibson, 162 Mo. A. 386, 142 SW 730.

Nebr.—McCormick v. Peters, 24 Nebr. 70, 37 NW 927.

Pa.—Opie v. Serrill, 6 Watts & S. 264.

Tenn.—Kenny v. Hazeltine, 6 Humphr. 62; Cooney v. Wade, 4 Humphr. 444, 40 AmD 657.

Tex.—Garner v. Butcher, 1 Tex. Unrep. Cas. 430.

W. Va.—Spence v. Rose, 28 W. Va. 333.

Eng.—Ward v. Evans, 2 Ld. Raym. 928, 92 Reprint 120.

[a] **An agreement by a general agent, who possesses full power and authority** to make collections and settlements of debts due his principal, entered into with a debtor of the principal, to accept and receive the promissory note of a third person in payment of an indebtedness due the principal from such debtor, is valid, and will bind the principal if founded on a valuable consideration. Nichols, etc., Co. v. Hackney, 78 Minn. 461, 81 NW 322.

44. Downey v. Hicks, 14 How. (U. S.) 240, 14 L. ed. 404; Dixon v. Guay, 70 N. H. 161, 46 A 456 (holding that a collecting agent has no authority to accept a savings bank deposit book in payment of a debt, so that the principal may return it in a reasonable time).

[a] **An agent for the vendor of land** has no implied authority to accept a certificate of deposit and a note instead of cash, as required by the contract, in part payment of the price. Wilken v. Voss, 120 Iowa 500, 94 NW 1123.

45. Bacon v. Westervelt, 29 Conn. 591; Pittsburgh Fifth Nat. Bank v. Ashworth, 123 Pa. 212, 16 A 596, 2 LRA 491.

46. Kent. v. Ricards, 3 Md. Ch. 392; Paul v. Grimm, 166 Pa. 139, 30 A. 721, 44 AmSR 648; Wilkinson v. Holloway, 7 Leigh (34 Va.) 277; Smock v. Dade, 5 Rand. (26 Va.) 639, 16 AmD 780.

47. Poorman v. Woodward, 21 How. (U. S.) 266, 16 L. ed. 151 (holding that, where certain persons gave a joint and several note for the purpose of raising money and their agent received a certificate of deposit, which certificate was afterward duly paid upon presentation, the signers of the note cannot escape from their responsibility upon the plea that the certificate of deposit was not money); Smith v. Lamberts, 7 Gratt. (48 Va.) 138; Smock v. Dade, 5 Rand. (26 Va.) 639, 16 AmD 780.

48. Hatch v. Hutchinson, 64 Ark. 119, 40 SW 578; Price v. White, 70 Ga. 381; Pease v. Dibble, 57 Ga. 446; Kenny v. Hazeltine, 6 Humphr. (Tenn.) 62.

49. See generally Payment [30 Cyc 1218].

50. Ward v. Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207 (holding that, where a bond was made payable at the "office of discount and deposit" of a certain bank, the bank could not receive in payment of such bond notes that were not current at their par value); Fry v. Dudley, 20 La. Ann. 368; Hoffman v. Boisneuf, 4 Harr. & M. (Md.) 352; Purvis v. Jackson, 69 N. C. 474.

[a] **Power to receive payment in Confederate money** see Glasgow v. Lipse, 117 U. S. 327, 6 SCt 757, 29 L. ed. 901; Fretz v. Stover, 22 Wall. (U. S.) 198, 22 L. ed. 769; Anderson v. Cape Fear Bank, 1 F. Cas. No. 354, Chase 535; Kentucky Bank v. Adams Exp. Co., 2 F. Cas. No. 889, 1 Flipp. 242; Stoughton v. Hill, 23 F. Cas. No. 13,501, 3 Woods 404; Leake v. Sutherland, 25 Ark. 219; Hendry v. Benlisa, 37 Fla. 609, 20 S 800, 34 LRA 283 (holding that if, at the time and place of payment in Confederate money, it was generally received in business transactions, and was in fact the current money of the country, an agent's authority to receive it, in the absence of directions to the contrary from a resident principal, will be presumed); Westbrook v. Davis, 48 Ga. 471; King v. King, 37 Ga. 205; Martin v. U. S., 2 T. B. Mon. (Ky.) 89, 15 AmD 129; Waterhouse v. Citizens' Bank, 25 La. Ann. 77; Robinson v. International L. Assur. Soc., 42 N. Y. 54, 1 AmR 400; Pope v. Chafee, 34 S. C. Eq. 69; Dillard v. Clements, 2 Baxt. (Tenn.) 137; Maloney v. Stephens, 11 Heisk. (Tenn.) 738; Burford v. Memphis Bulletin Co., 9 Heisk. (Tenn.) 691; King v. Fleece, 7 Heisk. (Tenn.) 273; Clark v. Thomas, 4 Heisk. (Tenn.) 419; Wood v. Cooper, 2 Heisk. (Tenn.) 441; Shurer v. Green, 3 Coldw. (Tenn.) 419; Bowles v. Glasgow, 36 Tex. 94; Griffin v. Walker, 36 Tex. 88; Reed v. Nelson, 33 Tex. 471; Burleson v. Cleveland, 32 Tex. 397; Ransom v. Alexander, 31 Tex. 448; Pilson v. Bushong, 29 Gratt. (70 Va.) 229; Ewart v. Saunders, 25 Gratt. (66 Va.) 203; Hale v. Wall, 22 Gratt. (63 Va.) 424; Pidgeon v. Williams, 21 Gratt. (62 Va.) 251; Alley v. Rogers, 19 Gratt. (60 Va.) 366; Harper v. Harvey, 4 W. Va. 539. See also Payment [30 Cyc 1215 et seq].

51. Prather v. State Bank, 3 Ind. 356; Lord v. Burbank, 18 Me. 178.

52. Cal.—Taylor v. Robinson, 14 Cal. 396; Mudgett v. Day, 12 Cal. 139.

Colo.—Sioux City Nursery, etc., Co. v. Magnus, 1 Colo. A. 45, 27 P 257.

Ill.—Reynolds v. Ferree, 86 Ill. 570; Padfield v. Green, 85 Ill. 529.

Ind.—Kirk v. Hiatt, 2 Ind. 322; Fellows v. Kress, 5 Blackf. 536; Robinson v. Nipp, 20 Ind. A. 156, 50 NE 408.

Iowa.—Aultman v. Lee, 43 Iowa 404.

Ky.—Martin v. U. S., 2 T. B. Mon. 89, 15 AmD 129; Woodruff v. American Road Mach. Co., 65 SW 600, 23 KyL 1551 (holding that an agent to sell goods on commission, who had taken from a buyer notes for the price, payable to his principal, had no authority, after the maturity of the notes, without express authority from his principal, to accept anything in payment save money, and therefore the obligor cannot plead as a payment that he delivered goods to the agent, to be sold on his account, and that the agent agreed to apply a part of the proceeds to the payment of the notes); Russell v. Cox, 38 SW 1087, 18 KyL 1087.

La.—Kendall v. Wade, 5 La. Ann. 157.

Me.—Patten v. Fullerton, 27 Me. 58.

Minn.—Trull v. Hammond, 71 Minn. 172, 73 NW 642.

Mo.—Loy v. McClure, 124 Mo. A. 689, 101 SW 1148.

Nebr.—Parker v. Leech, 76 Nebr. 135, 107 NW 217; Cram v. Sickel, 51 Nebr. 828, 71 NW 724, 66 AmSR 478.

N. J.—Dowden v. Cryder, 55 N. J. L. 329, 26 A 941.

N. Y.—L'Artiste Pub. Co. v. Walker, 11 Misc. 426, 32 NYS 151.

Oh.—Pollock v. Cohen, 22 Oh. St. 514.

S. C.—Columbia Phosphate Co. v. Farmers' Alliance Store, 47 S. C. 358, 25 SE 116; Ludden, etc., Southern Music House v. Sumter, 45 S. C. 186, 22 SE 738, 55 AmSR 761.

Tex.—Rhine v. Blake, 59 Tex. 240; Wright v. Daily, 26 Tex. 730.

Wash.—Wees v. Page, 47 Wash. 213, 91 P 766 (wheat).

W. Va.—Mann v. Robinson, 19 W. Va. 49, 42 AmR 771.

Eng.—Howard v. Chapman, 4 C. & P. 508, 19 ECL 624.

[a] **By statute** in some of the states the principal is bound if the agent accepts property, although the agent is liable to the principal for a cash accounting. See statutory provisions. See also Holmes v. Langston, 110 Ga. 861, 36 SE 251 (holding that under Civ. Code § 3717, where a "general agent" to collect money receives in payment property other than money, the creditor, so far as the debtor is concerned, is bound thereby, but is not precluded from refusing to accept the property from the agent, or from holding him liable for the amount of the debt); McLaughlin v. Blount, 61 Ga. 168.

[b] **Where a note was to be paid in skins,** one to whom the holder directed the maker to deliver the skins on a certain day has authority to exercise his judgment as to the quality of the skins and receive them in discharge of the contract. Brown v. Berry, 14 N. H. 459.

53. Knowles v. Street, 37 Ala. 357, 6 S 273 (holding that where a general agent is left in charge of a principal's business and is specially instructed to look after a particular debt, to collect something on it or to arrange it in some way, it cannot be assumed that his authority was limited to the collection of debts in the usual mode, and that he had authority to purchase and sell a stock of goods in settlement of the debt); Dusenberry v. McDole, 42 Wash. 470, 85 P 40.

54. Eggleston v. Advance Thresher Co., 96 Minn. 241, 104 NW 891; John Hutchinson Mfg. Co. v. Henry, 44 Mo. A. 263; Northwest Thresher Co. v. Dahlgren, 50 Wash. 325, 97 P 228, 19 LRANS 324 (holding that where an agent sold machinery, and received

and this rule is particularly true where the property is taken by the agent for his own use.[55] The principal, however is the only person entitled to raise an objection to such a payment.[56]

Real estate. As a general rule such an agent has no authority to accept payment in real property,[57] as by accepting a conveyance of the mortgaged premises in payment of a mortgage debt.[58]

[§ 271] **ff. Debt of Agent; Assumption of Liability.** In the absence of some general usage or custom or express authority the agent cannot discharge the debtor by accepting as payment an agreement that an indebtedness owing from the agent to the debtor shall be set off against the indebtedness owing to the principal by the debtor.[59] But where the amount due from the agent is paid in cash to the debtor and forms a part of a cash payment made by him to the agent for his principal, the rule does not apply.[60] So where the agent actually accounts to his principal for the set-off allowed by him to the debtor on account of an indebtedness owing from the agent to the debtor, the transaction will constitute a payment and a discharge of the debtor's liability to the principal.[61]

Agent cannot assume payment. The agent cannot, if not indebted to the debtor, assume the payment of the debtor's indebtedness and discharge the latter from liability to his principal,[62] as where the agent merely credits the account between the principal and himself and debits the account between the debtor and himself,[63] although of course the agent may make a bona fide loan to the debtor and immediately receive back the money loaned, thereby rendering the transaction a payment by the debtor, so as to release the debtor from further liability to the principal.[64]

notes and a mortgage securing them, collected all payments on the notes, some of which were in lumber, and conducted proceedings to foreclose the mortgage, he had such apparent general authority to deal with the notes as to warrant the conclusion that he had full power to make a settlement by which the principal took the mortgaged property and certain other property in satisfaction of the mortgage debt).

55. Hook v. Crowe, 100 Me. 399, 61 A 1080; Williams v. Johnston, 92 N. C. 532, 53 AmR 428. Compare Clark v. Shields, 10 N. C. 461.

56. Hirsch v. Fleming, 77 Ga. 594, 3 SE 9; Keating Impl., etc., Co. v. Terre Haute Carriage, etc., Co., 11 Tex. Civ. A. 216, 32 SW 556.

57. Huston v. Mitchell, 14 Serg. & R. (Pa.) 307, 16 AmR 506; Harrington v. Moore, 21 Tex. 546; Rotan Grocery Co. v. Jackson, (Tex. Civ. A.) 153 SW 687 (conveyance of land with agreement to reconvey).

58. Rodgers v. Peckham, 120 Cal. 238, 52 P 483 (holding that authority given an agent to collect money due on a note and mortgage is not authority to the agent to accept a conveyance of the mortgaged premises in payment thereof). Compare Renwick v. Wheeler, 48 Fed. 431 (holding that a power of attorney expressly authorizing the agent to sell, convey, or mortgage the principal's lands in Iowa, and collect the price thereof, and constituting him "our general attorney in fact to transact any or all business for us . . . of any kind whatsoever, in the state of Iowa; to rent houses . . . and to satisfy any mortgages made or to be made to us," etc., confers power to agree to take certain lands covered by a mortgage in full satisfaction of the debt secured thereby).

59. U. S.—Kingston v. Kincaid, 14 F. Cas. No. 7,822, 1 Wash. C. C. 454.

Ala.—Hill v. Helton, 80 Ala. 528, 1 S 340; Coleman v. Siler, 74 Ala. 435; Burks v. Hubbard, 69 Ala. 379; Childers v. Bowen, 68 Ala. 221; Craig v. Ely, 5 Stew. & P. 354; Guilett v. Lewis, 3 Stew. 23.

Ark.—Ambleton v. Dyer, 53 Ark. 224, 13 SW 926; Smith v. James, 53 Ark. 135, 13 SW 701; Arnett v. Glenn, 52 Ark. 253, 12 SW 497; Quinn v. Sewell, 50 Ark. 380, 8 SW 132.

Cal.—Stetson v. Briggs, 114 Cal. 511, 46 P 603.

Ga.—Maynard v. Cleveland, 76 Ga. 52; Mitchell v. Printup, 68 Ga. 675; Manning v. Manning, 61 Ga. 137; Bostick v. Hardy, 30 Ga. 836.

Ill.—Cooney v. U. S. Wringer Co., 101 Ill. A. 468 [aff 214 Ill. 520, 73 NE 803].

Iowa.—Zelenka v. Port Huron Mach. Co., 144 Iowa 592, 123 NW 332; Thompson v. Barnum, 49 Iowa 392; Aultman v. Lee, 43 Iowa 404; McCarver v. Nealey, 1 Greene 360.

Kan.—St. John, etc., Co. v. Cornwell, 52 Kan. 712, 35 P 785 (holding that an agent of a nonresident corporation having general charge of its local business has no implied authority to collect debts due his principal by a contract for his own personal board); Deatherage v. Howenstein, 43 Kan. 691, 23 P 1054; Deatherage v. Henderson, 43 Kan. 684, 23 P 1052; Wilcox, etc., Organ Co. v. Lasley, 40 Kan. 521, 20 P 228.

Ky.—Farmers', etc., Bank v. Bennett, 47 SW 623, 20 KyL 852.

La.—Hicky v. Sharp, 4 La. 335; Nolan v. Rogers, 4 Mart. N. S. 145.

Me.—Hook v. Crowe, 100 Me. 399, 61 A 1080.

Mich.—Hurley v. Watson, 68 Mich. 531, 36 NW 726.

Minn.—Talboys v. Boston, 46 Minn. 144, 48 NW 688.

Miss.—Baughn v. Shackleford, 48 Miss. 255; Keller v. Scott, 10 Miss. 81; Holmes v. Carman, Freem. 408.

Mo.—Wheeler, etc., Mfg. Co. v. Givan, 65 Mo. 89; Greenwood v. Burns, 50 Mo. 52; Vanderline v. Smith, 18 Mo. A. 55; Merchant's Mut. Ins. Co. v. Excelsior Ins. Co., 4 Mo. A. 579.

Nebr.—Parker v. Leech, 76 Nebr. 135, 107 NW 217; Western White Bronze Co. v. Portrey, 50 Nebr. 801, 70 NW 383; McCormick v. Keith, 8 Nebr. 142 (holding that the fact that an agent is specially empowered to compromise and accept personal property in satisfaction of money demands will not authorize him to extinguish a debt due the principal by setting off against it his own debt).

N. H.—Holton v. Smith, 7 N. H. 446.

N. J.—Dowden v. Cryder, 55 N. J. L. 329, 26 A 941.

N. Y.—Shailer v. Morgan, 16 Daly 166, 9 NYS 492; Henry v. Marvin, 3 E. D. Smith 71; L'Artiste Pub. Co. v. Walker, 11 Misc. 426, 32 NYS 151 (holding that an agent who solicits advertisements has no authority to agree to take out payment therefor in clothes to be furnished to him personally); Martin v. Matthews, 16 NYS 751.

N. C.—Williams v. Johnston, 92 N. C. 532, 53 AmR 428.

Oh.—Murdock v. National Tube Works Co., 7 Oh. Dec. (Reprint) 465, 3 CincLBul 409.

Pa.—Lewis v. Lewis, 203 Pa. 194, 52 A 203; Hays v. Lynn, 7 Watts 524.

S. D.—Union School Furniture Co. v. Mason, 3 S. D. 147, 52 NW 671.

Tenn.—Cooney v. Wade, 4 Humphr. 444, 40 AmD 657.

Tex.—Belton Compress Co. v. Belton Brick Mfg. Co., 64 Tex. 337; McAlpin v. Cassidy, 17 Tex. 449; Zang v. Hubbard Bldg., etc., Co., (Civ. A.) 125 SW 85; Maloney Mercantile Co. v. Dublin Quarry Co., (Civ. A.) 107 SW 904; Chattanooga Foundry, etc., Works v. Gorman, 12 Tex. Civ. A. 75, 34 SW 308.

Vt.—Dunnett v. Gibson, 78 Vt. 439, 63 A 141; Wood v. Hubbard, 50 Vt. 82.

Va.—Wilkinson v. Holloway, 7 Leigh (34 Va.) 277.

W. Va.—Wiley v. Mahood, 10 W. Va. 206.

Eng.—Pearson v. Scott, 9 Ch. D. 198 (where payment was made partly by check and partly by a set-off on the agent's account, and the latter was held not binding on the principal); Kuckein v. Wilson, 4 B. & Ald. 443, 6 ECL 553, 106 Reprint 999; Todd v. Reid, 4 B. & Ald. 210, 6 ECL 455, 106 Reprint 915; Bartlett v. Pentland, 10 B. & C. 760, 21 ECL 320, 109 Reprint 632; Underwood v. Nichols, 17 C. B. 239, 84 ECL 239, 139 Reprint 1062, 21 ERC 26.

Ont.—Donogh v. Gillespie, 21 Ont. A. 292.

[a] **Illustrations.**—(1) An agent with power to sell and receive payment has no apparent authority to accept as payment the cancellation of his own debt, due one who knows, or by the exercise of reasonable diligence could know, that his debtor is acting as agent. Grooms v. Neff Harness Co., 79 Ark. 401, 96 SW 135. (2) So where one to whom a note is payable as agent has authority merely to collect the note and distribute the money, he cannot exchange it for his note held by one who has notice of the extent of his authority, although he represents that he has settled with his principal, and is in fact the owner of the note. Farmers', etc., Bank v. Bennett, 47 SW 623, 20 KyL 852.

[b] **Knowledge of debtor.**—A person dealing with an agent who has general authority to collect debts is bound to know that he has no authority by virtue of his agency to apply his private debt to such person to the payment of the debt due by such person to his principal. Maloney Mercantile Co. v. Dublin Quarry Co., (Tex. Civ. A.) 107 SW 904.

60. Zelenka v. Port Huron Mach. Co., 144 Iowa 592, 123 NW 332.

61. Roseville Union Bank v. Gilbert, 24 Ill. A. 334 (where an accounting by the agent was presumed from the cashier of a bank allowing a set-off against a note due to the bank); Wilcox, etc., Organ Co. v. Lasley, 40 Kan. 521, 20 P 228; Union School Furniture Co. v. Mason, 3 S. D. 147, 52 NW 671.

62. Scott v. Gilkey, 153 Ill. 168, 39 NE 265; Plano Mfg. Co. v. Doyle, 17 N. D. 386, 116 NW 529, 17 LRANS 606 and note; Thompson v. Keys, (Tex. Civ. A.) 162 SW 1196. Compare Bouton v. American Mut. L. Ins. Co., 25 Conn. 542.

63. Scott v. Gilkey, 49 Ill. A. 116 [aff 153 Ill. 168, 39 NE 265]; Bedford Belt R. Co. v. Burke, 13 Ind. A. 35, 41 NE 70; Moore v. Pollock, 50 Nebr. 900, 70 NW 541; Wrout v. Dawes, 25 Beav. 369, 53 Reprint 678.

64. Scott v. Gilkey, 49 Ill. A. 116 [aff 153 Ill. 168, 39 NE 265].

[§ 272] **(d) As to Time of Payment.** An agent with authority to receive payment of an indebtedness ordinarily does not have authority to receive payment before the maturity of the indebtedness,[65] unless he has express authority to receive payment of the obligation whether it is due or not,[66] or unless there is a known usage of trade or course of dealing giving him implied authority to do so.[67] Some cases have held, however, that the payment of a note before maturity to an agent discharges the note.[68] It has also been held that if the debtor pays the agent before maturity he makes the agent his own to pay over the money to the creditor[69]

Extension of time of payment. An agent with authority to receive payment ordinarily has no implied power to extend the time for payment,[70] unless his employment is broad enough to include such power,[71] or unless it is conferred by a long course of dealing.[72]

65. Ark.—Little Rock, etc., R. Co. v. Wiggins, 65 Ark. 385, 46 SW 731 (holding that a company is not bound by payment to its agent long before it was due, although he had authority to receive payments, where he has no general authority or express authority to alter the contracts).

Colo.—Lester v. Snyder, 12 Colo. A. 351, 55 P 613.

Ill.—Thornton v. Lawther, 169 Ill. 228, 48 NE 412 [rev 67 Ill. A. 214]; Thompson v. Elliott, 73 Ill. 221; Madison v. Cabalek, 86 Ill. A. 450; Smith v. Hall, 19 Ill. A. 17.

Iowa.—Dilenbeck v. Rehse, 105 Iowa 749, 73 NW 1072.

Kan.—Wilcox v. Eadie, 65 Kan. 459, 70 P 338; Bronson v. Ashlock, 2 Kan. A. 255, 41 P 1068.

Mass.—Biggerstaff v. Marston, 161 Mass. 101, 36 NE 785; Kingman v. Peirce, 17 Mass. 247.

Minn.—Schenk v. Dexter, 77 Minn. 15, 79 NW 526 (holding that an agent, authorized to loan money on notes and mortgage security, who has possession of the notes and mortgage, has no authority to collect them before due); Park v. Cross, 76 Minn. 187, 78 NW 1107, 77 AmSR 630.

Mo.—City Nat. Bank v. Goodloe-McClelland Commn. Co., 93 Mo. A. 123.

Nebr.—Stark v. Olsen, 44 Nebr. 646, 63 NW 37.

N. Y.—Smith v. Kidd, 68 N. Y. 130, 23 AmR 157 (holding that general authority to receive payment of a mortgage is not authority to receive it before maturity, and payment to such agent before maturity does not protect the payer if the agent fails to pay over); Hutchings v. Munger, 41 N. Y. 155; Schermerhorn v. Farley, 58 Hun 66, 11 NYS 466 (authority to collect interest and principal of mortgage debt); Realty Transfer Co. v. Kimball, 66 Misc. 185, 121 NYS 279.

N. C.—Wynn v. Grant, 81 SE 949.

Pa.—Heffernan v. Addams, 7 Watts 116.

Tex.—Cunningham v. McDonald, 98 Tex. 316, 83 SW 372 [rev (Civ. A.) 80 SW 871].

W. Va.—Mann v. Robinson, 19 W. Va. 49, 42 AmR 771.

Wis.—Pluto Powder Co. v. Cuba City State Bank, 153 Wis. 324, 331, 141 NW 220 [quot Cyc].

Eng.—McGowan v. Dyer, L. R. 8 Q. B. 141; Burbridge v. Manners, 3 Campb. 193; Parnther v. Gaitskell, 13 East 432, 104 Reprint 439; Breming v. Mackie, 3 F. & F. 197; Morley v. Culverwell, Hurl. & W. 13; Campbell v. Hassell, 1 Stark. 233, 2 ECL 94.

[a] **Short time drafts** bearing no interest are not within this rule. Bliss v. Cutter, 19 Barb. (N. Y.) 9.

[b] **Payments near the date of maturity,** although before the very day, are good, but not payments a year in advance. Dilenbeck v. Rehse, 105 Iowa 749, 73 NW 1072.

[c] **Declaring whole debt due on default.**—Where a note and trust deed authorized the owner to declare the entire debt due on default, and the exercise of this option by an agent is set up to support a plea of limitation, it must be shown that the agent was authorized so to do, and proof that he received payments of interest and wrote a letter attempting to declare the option exercised is insufficient. Wilcox v. Eadie, 65 Kan. 459, 70 P 338.

Authority to receive interest as not giving authority to receive principal before due see supra § 257.

66. Cowles v. Burns, 28 Kan. 32.

[a] **Privilege to debtor of paying.**—Where a person is agent for the collection of a note which matures in five years, with a privilege to the maker to pay after three years if he chooses, the receiving of payment by the agent after three years is not in excess of his authority. Frost v. Fisher, 13 Colo. A. 322, 58 P 872.

[b] **Authority to receive all** of the money before it is ultimately due gives authority to receive a portion of it. Frost v. Fisher, 13 Colo. A. 322, 58 P 872.

67. Thornton v. Lawther, 169 Ill. 228, 48 NE 412 [rev 67 Ill. A. 214]; Thompson v. Elliott, 73 Ill. 221; McIntosh v. Ransom, 106 Ill. A. 172; Smith v. Hall, 19 Ill. A. 17; Bliss v. Cutter, 19 Barb. (N. Y.) 9. But see Campbell v. Hassell, 1 Stark. 233, 2 ECL 94 (holding that payment would not be good if it varied from the original terms of the contract, and that evidence of a custom to that effect was inadmissible).

"Though authority to an agent to receive payment of a debt is not of itself authority to receive it before maturity, yet such authority may be implied from a known usage of trade or course of dealing in a particular employment, or from a prior course of dealing between the principal and agent." McIntosh v. Ransom, 106 Ill. A. 172, 174 [quot Thornton v. Lawther, 169 Ill. 228, 48 NE 412].

[a] **"In the case of a general financial agent,** or where the course or habit of dealing between the parties is such as to extend the ordinary authority of the agent, a valid payment may be made to the latter even before the maturity of a note." McIntosh v. Ransom, 106 Ill. A. 172, 174.

[b] **Where an agent has been for years in the habit** of loaning his principal's money, and receiving money on loans before due, and generally transacting his principal's business as he saw fit, and the parties borrowing have had no dealings with or knowledge of the principal, the agent must be held to have authority to receive payment of a note and discharge a mortgage lien before maturity. Peterson v. Fullerton, 106 Ill. A. 237.

[c] **To be applied when due.**—In Bleser v. Stedl, 135 Wis. 124, 115 NW 337, it was held that where a mortgagor dealt wholly with the mortgagee's agent in making payments, which the agent was authorized to receive, the agent could receive sums paid before and after the due date, to be applied as of that date, such payments being within the usual course of dealing in that class of business.

68. Patten v. Fullerton, 27 Me. 58, 67 (holding that the payment of a note made before maturity to the duly authorized agent of the holder has the same effect as if made to the holder. The court, in speaking of a contention that defendant in the case would be liable to repay payments made before the note involved became due, said: "The authorities cited to establish this position show, that if a bill or note be paid before maturity, without being delivered up or canceled, and it be negotiated before maturity; or be paid to an agent, whose authority is revoked before maturity, such payments will not be good, and the person making them may be required to pay them again. Although such payments are not binding upon other parties, yet, as 'between the real and bona fide holder and the maker, the payment, whenever made and however made, will be a conclusive discharge of the note'"); Haughton v. Maurer, 55 Mich. 323, 21 NW 426 (holding that where, before the maturity of a note, an agent of the payee, with authority to receive payment, collected the amount of the note from the maker without the knowledge of the payee, and then defaulted, the payee was estopped from subsequently disputing payment).

69. Cotman v. Orton Cr. & Ph. 304, 18 EngCh 304, 41 Reprint 506 [quot Parnther v. Gaitskell, 13 East 432, 104 Reprint 439].

70. Ala.—Powell v. Henry, 96 Ala. 412, 11 S 311.

Cal.—Low v. Warden, 77 Cal. 94 19 P 235.

Ill.—Lawrence v. Johnson, 64 Ill. 351.

La.—Chappel v. Raymond, 20 La. Ann. 277; Millaudon v. McMicken, 7 Mart. N. S. 34.

Minn.—Woodbury v. Larned, 5 Minn. 339.

Nebr.—Gilbert v. Garber, 62 Nebr. 464, 87 NW 179.

N. Y.—Hutchings v. Munger, 41 N. Y. 155 (holding that authority to an agent to collect and receive payment does not include authority, on payment of part of the amount due, to extend the time of payment of the balance); Ritch v. Smith, 60 HowPr 13 [aff 82 N. Y. 627 mem, 60 HowPr 157].

Tenn.—Stewart v. Donelly, 4 Yerg. 177.

Tex.—Behrns v. Rogers, (Civ. A.) 40 SW 419.

Wis.—Mallory v. Mariner, 15 Wis. 172.

71. Kranss v. Uedelhofen, 193 Ill. 477, 62 NE 239 (holding that, where the holder of a note secured by a deed of trust permits the trustee to hold possession of the note and deed and collect the interest, he thereby holds him out to the grantors as his agent, and is bound by an extension of the time of payment granted by the trustee); Hurd v. Marple, 2 Ill. A. 402, 10 Ill. A. 418 (holding that where an agent, having money placed in his hands with undisputed power to loan, manage, and collect as he should deem best, makes an agreement for an extension of time of payment, his principal is bound thereby); Kane v. Cortesy, 100 N. Y. 132, 2 NE 874 (holding that where the holder of paper secured by a real estate mortgage authorizes an agent to procure additional security, leaving it to his judgment to make the best arrangement he can for that purpose, the agent has authority to bind the holder by an agreement for a reasonable extension of the time of payment, in consideration of the debtor's giving a chattel mortgage as additional security); Scoville v. Landon, 80 N. Y. 686 (holding that one who has the possession of a negotiable note, with all the evidence of ownership, by the owner's consent, may agree with the maker for an extension of the time of payment, and the owner will be bound thereby and indorsees discharged).

72. Wheeler v. Benton, 67 Minn. 293, 69 NW 927.

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[§ 273] **(e) As to Application of Payment.**[73] Where one makes a person an agent to receive money for him, he is also his agent to receive such declarations as accompany the payment and direct its application.[74] Thus the general manager of a creditor's business is such an agent as has power to stipulate for the application of the proceeds of particular collaterals received by him to the payment of a given debt, although this may modify a previous contract made by the creditor with the debtor;[75] but a mere agency to collect a particular claim does not authorize the agent to agree that the proceeds shall be applied to a debt due by his principal.[76] If the agent receives the payment to be applied to a specific purpose he has no authority to apply it to another and different purpose, so as to bind the debtor.[77] If, however, no directions as to its application are given the agent may make application of the payment according to his discretion,[78] and where payments are made by a debtor upon several debts owed to one creditor, a general agent for the collection of such debts has implied power to apply the payments in his discretion;[79] but he cannot, without the consent of the principal, apply such a payment to a claim held by him against the principal.[80]

Ratable distribution. If the agent is under the same obligations to the several creditors, and the debts stand on an equal footing, his duty is to treat all creditors alike, and distribute the payment pro rata.[81] So if a person has two accounts with a person paying money, one due himself and one due a person for whom he is acting as agent, general payments will be applied ratably to the debts due on both accounts,[82] and if an agent blends his own and his principal's accounts in one demand, and receives a general remittance, he must apply it ratably.[83]

[§ 274] **(f) Employment of Subagents.** As the authority of a collecting agent is generally based upon the principal's special confidence or trust in his ability and judgment, like other agents, he must in general personally perform his services, and has no more power than other agents to delegate his authority.[84] Payment to an agent of a collection agent whose employment has not been sanctioned by the principal is accordingly no payment of the debt.[85] Where a principal authorizes one agent to employ another agent to make collections, the former agent is presumed, in the absence of known restrictions, to have power to contract as to the manner and terms of collection, since such power is usual and necessary in one employing a collecting agent.[86]

[§ 275] **(g) Power to Bring Suit.** Unless there is an agreement to the contrary,[87] an authority to collect will usually carry with it power to employ counsel,[88] or appear as attorney,[89] and bring suit to enforce payment,[90] although the agent may resort only to such proceedings as are usual and legitimate

73. See generally Payment [30 Cyc 1233 et seq].

74. Davis v. Amy, 2 Grant (Pa.) 412.

[a] **A general agent** has authority to enter a payment made to him on a mortgage executed to his principal. Long v. Jennings, 137 Ala. 190, 33 S 857.

75. McCathern v. Bell, 93 Ga. 290, 20 SE 315.

76. Hill v. Van Duzer, 111 Ga. 867, 36 SE 966.

77. Frazier v. Poindexter, 78 Ark. 241, 95 SW 464, 115 AmSR 33, 8 Ann Cas 552 and note (as by using as a set-off against it a demand due him from his principal); McLellan v. Walsh, 99 Mich. 265, 58 NW 65.

78. Carpenter v. Goin, 19 N. H. 479; Marshall v. Nagel, 17 S. C. L. 308.

[a] **Where a judgment creditor, as agent for the debtor,** collects certain funds which are to be applied toward the satisfaction of the judgments, of which he has several, all bearing interest, and no specific directions are given by the debtor to apply the funds to any of them in particular, the creditor has a right to make the application and may apply them to the payment, first, of the interest accrued on all the judgments, and the balance only to the principal; he is not bound to apply the funds to pay as many entire judgments, principal and interest, as they will satisfy. Steele v. Taylor, 4 Dana (Ky.) 445.

79. McCathern v. Bell, 93 Ga. 290, 20 SE 315.

80. Morse v. Woods, 5 N. H. 297.

81. Indiana Trust Co. v. International Bldg., etc., Assoc., 36 Ind. A. 685, 74 NE 633; Richards v. New Hampshire Ins. Co., 43 N. H. 263; Colby v. Gopp, 35 N. H. 434; Pointer v. Smith, 7 Heisk. (Tenn.) 137; Favenc v. Bennett, 11 East 36, 103 Reprint 917.

82. Hardenbergh v. Bacon, 33 Cal. 356; Scott v. Ray, 18 Pick. (Mass.) 360; Cole v. Trull, 9 Pick. (Mass.) 325. Compare Poindexter v. La Roche, 15 Miss. 699.

83. Barrett v. Lewis, 2 Pick. (Mass.) 123.

84. See infra § 344.

85. State v. Cass County, 53 Nebr. 767, 74 NW 254.

[a] **Illustrations.**—(1) Where a mortgage debtor paid a sum of money to the son of the mortgagees' agent to be applied on the mortgage, and the agent had authority to receive money for the mortgagees, and the son had for a number of years acted as his clerk or servant in the business of the agency, and had sometimes carried money collected to the mortgagees, but had no authority as their agent, the debtor's payment to him was not payment to the mortgagees' agent, and the promise of the agent that he would allow such payment was not binding on the mortgagees. Lewis v. Ingersoll, 3 Abb. Dec. (N. Y.) 55, 1 Keyes 347. (2) So where an agent who had authority to loan money employed a subagent without authority of the principal, and the subagent made the loan and forwarded all papers to the agent who forwarded them to the principal, and it appeared that a borrower paid money to the subagent without requiring him to produce the note and mortgage by which the loan was secured, these facts did not warrant the inference on the part of the borrower that the agent had authority to collect the money. Kohl v. Beach, 107 Wis. 409, 83 NW 657, 81 AmSR 849, 50 LRA 600.

86. Barclay v. Hopkins, 59 Ga. 562 (holding that an agent to procure an attorney to collect a note has power to contract as to the manner of its collection, unless his agency is restricted and the restriction is known to the attorney at the time the contract for collection is made, and it is immaterial that such note is not negotiable on its face).

87. Satterlee v. Columbus First Nat. Bank, 78 Nebr. 691, 111 NW 591 (holding that the owner of a note already in judgment, who places it in the hands of a collection agency with a distinct agreement that no suit is to be brought thereon, is not bound by the unauthorized action of the agency in bringing suit).

88. See infra § 308.

89. McMinn v. Richtmyer, 3 Hill (N. Y.) 236; Swartz v. Morgan, 163 Pa. 195, 29 A 974, 975, 43 AmSR 786.

90. Cal.—Rigby v. Lowe, 125 Cal. 613, 58 P 153.

Ill.—German F. Ins. Co. v. Grunert, 112 Ill. 68, 1 NE 113 (holding that authority to bring necessary suits to collect insurance in case of loss by fire is indispensably incident to the power of a general agent in charge of his principal's business, and essential to an efficient discharge of his duties).

Iowa.—Briggs v. Yetzer, 103 Iowa 342, 72 NW 647 (holding that authority to an agent to collect a certificate of deposit when due vests the agent with authority to procure a confession of judgment for his principal).

Kan.—Ryan v. Tudor, 31 Kan. 366, 2 P 797.

La.—Joyce v. Duplessis, 15 La. Ann. 242, 77 AmD 185.

Mich.—Moore v. Hall, 48 Mich. 143, 11 NW 844.

N. Y.—Bush v. Miller, 13 Barb. 481; Hirshfield v. Landman, 3 E. D. Smith 208; Scott v. Elmendorf, 12 Johns. 317.

Philippine.—Germann v. Donaldson, etc., Co., 1 Philippine 63.

Tenn.—Cooney v. Wade, 4 Humphr. 444, 40 AmD 657.

Vt.—Davis v. Waterman, 10 Vt. 526, 33 AmD 216. Compare Soule v. Dougherty, 24 Vt. 92 (holding that where the authority of a selling agent has terminated except for the purpose of rendering an account to the principal, and the agent without any necessity to justify an extension of his powers by implication, and without the knowledge or consent of the principal, commences suits in the name of the principal on notes and demands taken by him in the principal's name, the agent exceeds his power and the principal is not liable for the costs that accrue upon the said suits).

[a] **"Authority to collect implies and includes authority** to use the means ordinarily employed for the purpose of accomplishing a collection, and . . . among these are the retaining of counsel and the institution of suit. Indeed, that is generally the only way in which collection can be compelled, and an agent whose duty it is to collect has certainly the implied power to resort to the ordinary and generally the only

for the purpose,[91] including civil, and excluding criminal, proceedings.[92]

In aid of this power the agent has authority to make the suit effective by issuing an attachment[93] or execution upon the judgment when necessary,[94] and by the execution of the necessary bonds.[95] He may also agree with the execution debtor to reconvey the property to him upon payment of the judgment debt,[96] and may pursue the property due the principal on the debt into the hands of third persons who may have acquired it from the debtor;[97] but he has no implied authority to sell the judgment recovered.[98]

Power to foreclose mortgage. It has been held that an unrestricted power to collect authorizes the agent in case of need to bring proceedings to foreclose a mortgage security upon default in payment at maturity;[99] but authority to collect interest does not imply authority to foreclose a collateral mortgage.[1]

[§ 276] **(h) Power to Credit or Receipt.** Authority to collect implies power to give credit upon the claim for payments made,[2] or to give a receipt or acquittance for amounts due and paid,[3] or to surrender the security upon payment,[4] but not to surrender the security without payment or other consideration.[5]

[§ 277] **(i) Power to Release or Compromise.** A general authority to collect or receive payment implies no authority, in the absence of the principal's consent, to assign or compromise the claim,[6] or to waive his principal's lien or release securities, without payment of the debt,[7] or to release some of the parties who are liable on the claim, or to sub-

means of compelling collection." Ryan v. Tudor, 31 Kan. 366, 368, 2 P 797.

[b] **The right to commence an action for the collection of debts owing to a principal** is not an instance of strict ownership which must be conferred in express terms. The power to "legally compel" payment of debts owing to a principal is an express grant of the right to bring suit for the collection of such debts. Germann v. Donaldson, etc., Co., 1 Philippine 63.

91. Equitable Life Assur. Soc. v. Lester, (Tex. Civ. A.) 110 SW 499.

[a] **Appeal.**—An authority to collect accounts gives no authority to incur the expenses of an appeal. Lovelady v. Franklin Davis Nursery Co., 113 Ga. 324, 38 SE 748.

92. Equitable Life Assur. Soc. v. Lester, (Tex. Civ. A.) 110 SW 499.

93. De Poret v. Gusman, 30 La. Ann. 930; Fenn v. Harrison, 4 T. R. 177, 100 Reprint 959.

94. Schock v. Lesley, 2 Del. Ch. 304; Joyce v. Duplessis, 15 La. Ann. 242, 77 AmD 185; Cooney v. Wade, 44 Humphr. (Tenn.) 444, 40 AmD 657.

95. Merrick v. Wagner, 44 Ill. 266; Trowbridge v. Weir, 6 La. Ann. 706; Alexander v. Burns, 6 La. Ann. 704.

[a] **Indemnity.**—An agent has implied authority to indemnify an officer in making a levy. Schoregge v. Gordon, 29 Minn. 367, 13 NW 194; Clark v. Randall, 9 Wis. 135, 76 AmD 252.

96. Brown v. Jackson, (Tex. Civ. A.) 40 SW 162.

97. Sherman v. Sherman, etc., Co., 64 N. J. Eq. 77, 53 A 226.

[a] **One instructed by a landlord to collect the rent** has authority to demand of a buyer of a crop produced by a subtenant the value of the crop. Beck v. Minnesota, etc., Grain Co., 131 Iowa 62, 107 NW 1032, 7 LRANS 930.

98. Malloye v. Coubrough, 96 Cal. 649, 31 P 622; Padfield v. Green, 85 Ill. 529.

99. Curtis v. Cutler, 76 Fed. 16, 22 CCA 16, 37 LRA 737 (holding that an agreement between an investment company and one to whom it sold certain mortgages that it should "attend to all matters of foreclosure and collection of the mortgage," with a recital that such person "expected them to take entire charge of the collection of this mortgage and any foreclosure proceedings that they should deem necessary," authorizes the company to bring such proceedings without further communication with such person); Standard Brewery v. Nudelman, 70 Ill. A. 356 [aff 172 Ill. 337, 50 NE 190].

[a] **To sell lands under trust deed.**—Where an agent of a nonresident loan company negotiated a loan and was named trustee in the deed given to secure the loan, and he continued to be the company's agent for the transaction of all its business where the loan was made, and was collecting its money and loaning its funds, he had authority, even as against the company, to declare money secured by said trust deed to be due, and to sell the lands under such deed, and to make deeds to the purchaser, and to receive the money paid by him. Edinburgh American Land Mortg. Co. v. Briggs, (Tex. Civ. A.) 41 SW 1036.

[b] **Foreclosure not authorized.**—Where a bank held notes indorsed by the payee who had taken a chattel mortgage to secure them, and on maturity the bank sent the notes to the payee for collection, with directions that if the notes were not paid they should be protested and returned, but the payee foreclosed the chattel mortgage in order to procure funds to reimburse the holder, the payee in so doing did not act as the agent of the holder. Sanborn v. Buchanan County First Nat. Bank, 115 Mo. A. 50, 90 SW 1033.

1. White v. Madigan, 78 Minn. 286, 80 NW 1125; Dexter v. Morrow, 76 Minn. 413, 79 NW 394 (holding that the receipt by the loan agent of the coupon interest notes for collection, where sent by the payee of the note secured by mortgage, does not of itself give the agent implied authority to foreclose the mortgage); Burchard v. Hull, 71 Minn. 430, 74 NW 168 (holding that by transmitting to an agent for collection an interest coupon of a note secured by a mortgage no implied authority is given the agent to foreclose the mortgage); Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019 (holding that an agent to collect interest on a note secured by a mortgage or deed of trust, containing a power of sale, has no implied authority to foreclose the mortgage); Corey v. Hunter, 10 N. D. 5, 84 NW 570 (holding that evidence that an agent had been in the habit of loaning funds of his principal and collecting interest thereon as it became due, and on instructions from his principal reinvesting the same, does not warrant a finding that such agent had ostensible authority to foreclose a mortgage running to his principal).

2. Dubreuil v. Rouzan, 1 Mart. N. S. (La.) 158 (holding that a power to receive what is due from a debtor necessarily implies a power to credit for any payments already made); Keating Impl., etc., Co. v. Terre Haute Carriage, etc., Co., 11 Tex. Civ. A. 216, 32 SW 556 (authority to credit on notes for value of goods taken).

3. U. S.—Orr v. Lacy, 18 F. Cas. No. 10,589, 4 McLean 243.

Cal.—Scammon v. Wells, 84 Cal. 311, 24 P 284.

Kan.—Alexander v. Alexander, 8 Kan. A. 571, 54 P 1036.

Mo.—Gentry v. Connecticut Mut. L. Ins. Co., 15 Mo. A. 215.

Tenn.—Cooney v. Wade, 4 Humphr. 444, 40 AmD 657.

Ont.—Bedson v. Smith, 10 Grant Ch. (U. C.) 292.

[a] **Receipt from general agent prima facie good.**—A receipt in full from a general agent to receive money will be binding until avoided by proof. Patterson v. Ackerson, 2 Edw. (N. Y.) 427.

4. Padfield v. Green, 85 Ill. 529; Feldman v. Beier, 78 N. Y. 293.

5. Harrison v. Burlingame, 48 Hun 212, 17 NYSt 905 (holding that a power to surrender securities without payment or other consideration is not an incident to an agent's employment to loan money and collect interest or principal on notes or other securities held by him for his principal). See also infra § 277.

6. Cal.—Malloye v. Coubrough, 96 Cal. 649, 31 P 622.

Colo.—Tootle v. Cook, 4 Colo. A. 111, 35 P 193.

La.—Dupre v. Splane, 16 La. 51; Kenner v. His Creditors, 8 Mart. N. S. 54 (holding that an agent's possession of bills of exchange does not prove his authority to compromise).

Mo.—Ogilvie v. Lee, 158 Mo. A. 493, 138 SW 926; Nichols, etc., Co. v. Jones, 32 Mo. A. 657.

N. Y.—Geiger v. Bolles, 1 Thomps. & C. 129; Garrigue v. Loescher, 16 N. Y. Super. 578; Sier v. Bache, 7 Misc. 165, 27 NYS 255.

Pa.—Googe v. Gaskill, 18 Pa. Super. 39 (holding that, where an owner of a mortgage authorizes an attorney in fact by a letter of attorney duly recorded to receipt for moneys paid and to enter satisfaction of record, the letter of attorney does not authorize the attorney in fact to sign his principal's name to an assignment of the mortgage, and that the certificate of the attorney as a notary public to the assignment adds no weight to the paper).

Wash.—Corbet v. Waller, 27 Wash. 242, 67 P 567.

See also infra §§ 298-300.

7. U. S.—Randon v. Toby, 11 How. 493, 13 L. ed. 784.

Ala.—Johnson v. Wilson, 137 Ala. 468, 34 S 392, 97 AmSR 52.

Colo.—Torbit v. Heath, 11 Colo. A. 492, 53 P 615.

Ga.—Tennille Bd. of Education v. Kelley, 126 Ga. 479, 55 SE 238.

Ill.—McHany v. Schenk, 88 Ill. 357; Padfield v. Green, 85 Ill. 529; Melvin v. Lamar Ins. Co., 80 Ill. 446, 22 AmR 199; Nolan v. Jackson, 16 Ill. 272; Lee v. Chicago City R. Co., 127 Ill. A. 510; Garrels v. Morton, 26 Ill. A. 433.

Ind.—Davis v. Talbot, 137 Ind. 235, 36 NE 1098; McCormick v. Walter A. Wood Mowing, etc., Mach. Co., 72 Ind. 518; Robinson v. Nipp, 20 Ind. A. 156, 50 NE 408.

Iowa.—Hakes v. Myrick, 69 Iowa 189, 28 NW 575.

Kan.—Sweedlund v. Hutchinson, (A.) 47 P 163 (no authority to release part of the land from the mortgage by which the debt was secured).

La.—Sewell v. Hennen, 8 Rob. 216.

Mich.—Eaton v. Knowles 61 Mich. 625, 28 NW 740; Baird v. Randall, 58 Mich. 175, 24 NW 659.

Mo.—Knoche v. Whiteman, 86 Mo. A. 568 (holding that authority to collect a mortgage debt gives no au-

stitute other persons in their stead,[8] or to accept a partial payment of the obligation as full settlement.[9] Such authority, if it exists at all, must be clearly proved and strictly pursued.[10]

[§ 278] **(j) Power to Transfer Claim.** An agent to collect or receive payment cannot bind his principal by a sale or transfer of the claim,[11] although it is made only for the purpose of qualifying the transferee to sue on the same.[12] Thus authority of an agent employed to make collections carries no implied power to transfer or sell negotiable paper, or other interest-bearing debts.[13]

[§ 279] **(7) Effect of Payment to Authorized Agent.** Payment to an agent who is either expressly or impliedly authorized to receive the same is in effect payment to the principal,[14] and, at least to the extent of such payment, is a satisfaction of the debt, and to that extent will discharge the payer, or entitle him to credit on his debt, regardless of what disposition the agent makes of the sum paid,[15]

thority to release the mortgage without a payment of the debt); Hoster v. Lange, 80 Mo. A. 234.

Nebr.—Cram v. Sickel, 51 Nebr. 828, 71 NW 724, 66 AmSR 478.

N. H.—Brown v. Massachusetts Mut. L. Ins. Co., 59 N. H. 298, 47 AmR 205.

N. J.—Dugan v. Lyman, (Ch.) 23 A 657 (holding that the agent had no authority to release mortgaged premises so that they could be sold).

N. Y.—De Mets v. Dagron, 53 N. Y. 635; Fellows v. Northrup, 39 N. Y. 117; Jacoby v. Payson, 91 Hun 480, 36 NYS 240.

N. C.—Herring v. Hottendorf, 74 N. C. 588.

Pa.—Jones v. Vogel, 185 Pa. 1, 39 A 546 (holding that a contract by a mortgagor in default to pay to the mortgagee weekly all money thereafter received from lots then or thereafter sold, the mortgagee to have access to books relating thereto, and to release lots sold when fully paid for, does not make the mortgagor agent of the mortgagee, so that the latter can be compelled to release to purchasers lots, the purchase money of which they had paid to the mortgagor but which he failed to pay to the mortgagee, the contract between mortgagor and mortgagee at the time the lots were sold by the former providing merely for the release of each lot as all the purchase money therefor was paid to the mortgagee); Deacon v. Greenfield, 141 Pa. 467, 21 A 650; Corr v. Greenfield, 134 Pa. 503, 19 A 676.

S. C.—Ludden, etc., Southern Music House v. Sumter, 45 S. C. 186, 22 SE 738, 55 AmSR 761; Mayer v. Blease, 4 S. C. 10.

Tex.—Tompkins' Mach., etc., Co. v. Peter, 84 Tex. 627, 19 SW 860; McAlpin v. Cassidy, 17 Tex. 449.

Wis.—Chilton v. Willford, 2 Wis. 1, 60 AmD 399 (holding that such an agent has no authority to discharge security but upon the receipt of the debt, or of such an amount as upon compromise might be taken in satisfaction thereof).

Eng.—Swinfen v. Swinfen, 24 Beav. 549, 53 Reprint 470; Penn v. Browne, 2 Freem. 214, 22 Reprint 1168; Parrot v. Wells, 2 Vern. Ch. 127, 23 Reprint 691; Roberts v. Matthews, 1 Vern. Ch. 150, 23 Reprint 379. Compare Waller v. Andrews, 1 H. & H. 87; Webber v. Granville, 7 Jur. N. S. 420 (both holding that general authority may be broad enough to justify the inference that it is within the discretion vested in the agent to make waivers or releases).

See also infra §§ 298–300.

[a] **An agent having power to release a lien** after payment cannot without more authority release a lien without payment. Deacon v. Greenfield, 141 Pa. 467, 21 A 650.

[b] **Original holders of vendor's lien notes can excuse their release** of the lien after assignment of the notes by showing authority to do so from the then holders' authorized agent, and the agent's authority is not affected by the fact that the notes are in a bank for collection. Broun v. Busch, (Tex. Civ. A.) 128 SW 1156.

[c] **An agent authorized merely to collect a note** cannot bind his principal by a declaration that the note, which is secured by a lien on real estate, has been paid, and thereby estop the principal from foreclosing the lien, nor can any agreement by such agent to assume the payment thereof bind the principal. Thompson v. Keys, (Tex. Civ. A.) 162 SW 1196.

8. Torbit v. Heath, 11 Colo. A. 492, 53 P 615; Tootle v. Cook, 4 Colo. A. 111, 35 P 193; Tennille Bd. of Education v. Kelley, 126 Ga. 479, 55 SE 238; Hakes v. Myrick, 69 Iowa 189, 28 NW 575; Harber v. Hutson, 13 KyL 333 (holding that an agent authorized to collect a note had no authority to release one of several obligors upon his payment of a part of the note, and that a written release, indorsed by the agent on the note, was not binding on his principal).

[a] **Releasing joint maker.**—A bank holding a note for collection only has no authority to make an agreement releasing one of the joint makers from further liability on his payment of a sum less than the amount due. Torbit v. Heath, 11 Colo. A. 492, 53 P 615.

9. Ala.—Lowenstein v. Bresler, 109 Ala. 326, 19 S 860; Couch v. Davidson, 109 Ala. 313, 19 S 507.

Ga.—Kight v. Stephen Putney Shoe Co., 137 Ga. 493, 73 SE 740.

Ill.—Halladay v. Underwood, 90 Ill. A. 130.

Mass.—Saunders v. Whitcomb, 177 Mass. 457, 59 NE 192 (holding that, where an agent receives a bill for the purpose of collection only, his unauthorized acceptance of a less sum than that due thereon, in full settlement, will not prevent the owner from maintaining a suit for the balance, unless he ratifies the act of the agent).

N. J.—Murphy v. Kastner, 50 N. J. Eq. 214, 24 A 564.

N. Y.—Hoffman v. Froma Realty Co., 153 App. Div. 770, 138 NYS 935 [aff 211 N. Y. 525 mem, 105 NE 1087 mem]. Compare Armstrong v. Gilchrist, 2 Johns. Cas. 424.

N. D.—Westhope First Nat. Bank v. Messner, 25 N. D. 263, 141 NW 999 (holding that, where an agent, in violation of duty, releases notes and securities for less than their face value, he is liable to his principal, although the latter has not sought to collect the sum remitted from the original debtor or reassert his lien in equity); Langdon First Nat. Bank v. Prior, 10 N. D. 146, 86 NW 362.

S. C.—Jenkins v. Atlantic Coast Line R. Co., 84 S. C. 361, 66 SE 415; Jenkins v. Atlantic Coast Line R. Co., 84 S. C. 360, 66 SE 416.

Compare Reed v. Northrup, 50 Mich. 442, 15 NW 543.

[a] **An agent to collect or receive payment has no power to accept a tender of** a lesser amount than that claimed to be due in full payment, or release the debt in whole or in part. Ogilvie v. Lee, 158 Mo. A. 493, 138 SW 926.

10. Crary v. Turner, 6 Johns. (N. Y.) 51.

11. Rigby v. Lowe, 125 Cal. 613, 58 P 153; Dingley v. McDonald, 124 Cal. 682, 57 P 574; Quigley v. Mexico Southern Bank, 80 Mo. 289, 50 AmR 503; Goodfellow v. Landis, 36 Mo. 168; Hardesty v. Newby, 28 Mo. 567, 75 AmD 137; Wade v. Boone, (Mo. A.) 168 SW 360; Garrigue v. Loescher, 16 N. Y. Super. 578; Rodgers v. Bass, 46 Tex. 505.

12. Rigby v. Lowe, 125 Cal. 613, 58 P 153.

13. Ill.—Ryhiner v. Feickert, 92 Ill. 305, 34 AmR 130 (holding that authority given by one joint payee to the other to collect the note when due does not import power to sell or compound it).

Kan.—Hannon v. Houston, 18 Kan. 561.

La.—Smith v. McMicken, 12 Rob. 653 (holding that an agent authorized to settle a partnership, but not expressly to sell its property, cannot transfer a judgment of the partnership unless the transfer is for its benefit, necessary to its liquidation, and duly notified to the debtor); Texada v. Beaman, 6 La. 84, 25 AmD 204; Hickey v. Sharp, 4 La. 335 (both holding that a power to collect a debt and to do all acts necessary to effect the collection does not authorize the agent to transfer the claim to a surety of his principal to protect the transferee from his suretyship). But see Sprigg v. Beaman, 6 La. 59.

Miss.—Holmes v. Carman, Freem. 408.

Mo.—Smith v. Johnson, 71 Mo. 382; Cannon v. Gibson, 162 Mo. A. 386, 142 SW 730.

N. J.—Stonington Sav. Bank v. Davis, 14 N. J. Eq. 286.

Pa.—Hays v. Lynn, 7 Watts. 524.

Tenn.—Wright v. Ray, 3 Humphr. 68; Hussey v. Crass, (Ch. A.) 53 SW 986.

Wis.—Pluto Powder Co. v. Cuba City State Bank, 153 Wis. 324, 331, 141 NW 220 [quot Cyc].

14. Bicknell v. Buck, 58 Ind. 354 (holding that a payment to the authorized agent of a creditor by the debtor is equivalent to a payment to the creditor himself); Ellis v. Maurer, 125 Mich. 400, 84 NW 1114 (holding that an agent authorized to receive payments on a mortgage may bind his principal, although payments made to him are not indorsed); Bonner v. Lisenby, 86 Mo. A. 666; Berkley v. Stewart, 94 Nebr. 550, 143 NW 920.

[a] **A judgment creditor** is bound by the act of his agent in receiving payment of the judgment, if the agent had actual or apparent authority to receive it. Osborne v. Gatewood, (Tex. Civ. A.) 74 SW 72.

15. U. S.—Wilcox v. Carr, 37 Fed. 130.

Ala.—Hamil v. American Freehold Land Mortg. Co., 127 Ala. 90, 28 S 558; American Mortg. Co. v. King, 105 Ala. 358, 16 S 889; Cook v. Cook, 28 Ala. 660.

Ark.—Fayetteville Wagon, etc., Co. v. Kenefick Constr. Co., 88 SW 1031.

D. C.—Held v. Walker, 25 App. 486.

Fla.—International Harvester Co. v. Smith, 51 Fla. 220, 40 S 840.

Ga.—Superior Mfg. Co. v. Russell, 127 Ga. 151, 56 SE 296.

Ill.—Meeker v. Mannia, 162 Ill. 203, 44 NE 397; Howe Mach. Co. v. Ballweg, 89 Ill. 318.

Ind.—Worley v. Moore, 77 Ind. 567; Ulrich v. McCormick, 66 Ind. 248; Ward v. Maccoun, 3 Ind. 407; Indiana Trust Co. v. International Bldg., etc., Assoc., 36 Ind. A. 685, 74 NE 633 [aff 165 Ind. 597, 76 NE 304] (holding that one paying money to an agent authorized to receive it is entitled to a credit therefor without tracing the fund into the hands of the principal, and the latter cannot avoid the effect thereof because of any delinquency of the agent).

Iowa.—Griffin v. Erskine, 131 Iowa 444, 109 NW 13.

Kan.—Thomas v. Arthurs, 8 Kan. A. 126, 54 P 694.

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although the person making the payment does not know of the agent's authority to collect.[16] But where such third person knows of the extent of the agent's authority with respect to receiving payment in order to protect himself he must make payment in such manner as conforms to the agent's authority,[17] although in equity under the doctrine of subrogation any payments made in an unauthorized manner will be applied to the credit of the person making the same in so far as it appears that such payments have reached the proper source.[18] Payment to one who has had authority to collect is no payment to the principal after he has properly terminated the agency.[19]

[§ 280] **e. To Execute, Indorse, or Accept Negotiable Instruments—(1) In General.**[20] Commercial paper, such as bills, notes, and checks, passes current to a limited extent like money, and accordingly power to an agent to execute or indorse it is to be strictly limited, and will never be lightly inferred, but ordinarily must be conferred expressly.[21] The most comprehensive grant, in general terms, of power to an agent conveys no power to subject the principal to liability upon such paper unless the exercise of such power is so necessary to the accomplishment of the agency that such intent of the principal must be presumed in order to make the power effectual.[22] Thus such power is ordinarily not to be in-

Me.—Patten v. Fullerton, 27 Me. 58.
Mass.—Packer v. Hinckley Locomotive Works, 122 Mass. 484.
Mich.—Hoskins v. Rochester Sav., etc., Assoc., 133 Mich. 505, 95 NW 566; Wagner v. Supreme Lodge K. & L. H., 128 Mich. 660, 87 NW 903.
Miss.—Dougherty v. Vanderpool, 35 Miss. 165.
Nebr.—Harrison Nat. Bank v. Williams, 2 Nebr. (Unoff.) 400, 89 NW 245.
N. Y.—Thomas Roberts Stevenson Co. v. Fox, 19 Misc. 177, 43 NYS 253.
Oh.—Crane v. Halford, Wright 72.
Pa.—Kramer v. Lehigh Valley Coal Co., 10 Kulp 548.
Tenn.—King v. Fleece, 7 Heisk. 273 (holding that payment of a note to an agent to whom it was indorsed for collection is a good payment).
Vt.—Williams v. Baldwin, 7 Vt. 503.
W. Va.—Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 SE 707 (holding that, where an oil lease provided that rentals might be paid to the credit of the lessor into a bank, the bank was the lessor's agent to receive the money, and the lessee was not responsible for the mode of entry to the lessor's credit or its disposition by the bank).
Wis.—Kasson v. Noltner, 43 Wis. 646.
Ont.—Ætna L. Ins. Co. v. Green, 38 U. C. Q. B. 459.

[a] **Promissory note.**—(1) If the maker of a note pays other than the rightful owner, he cannot rely on facts unknown to him, and not influencing his action, as an estoppel, but if the money has reached the hands of an agent authorized to collect for the holder, such payment will be a satisfaction of the debt. Boyd v. Pape, (Nebr.) 90 NW 646; Union Stock Yards Nat. Bank v. Haskell, (Nebr.) 90 NW 233; Pochin v. Knoebel, 63 Nebr. 768, 89 NW 264; Stuart v. Stonebraker, 63 Nebr. 554, 88 NW 653. (2) A payment by the maker of a note to a third person, made at the request of the holder, is a payment on the note, entitling the holder's administratrix to a credit therefor, together with interest thereon. Matter of Baker, 72 App. Div. 211, 76 NYS 61 [aff 172 N. Y. 617 mem, 64 NE 1118 mem].

[b] **Payment in settlement.**—Where one appoints a person his agent to receive a sum of money agreed to be paid in settlement of a claim for personal injuries, the settlement is complete the moment the agent receives payment. Florida Cent., etc., R. Co. v. Ragan, 104 Ga. 353, 30 SE 745.

[c] **Where authority is given to sell property to pay debts** the purchaser cannot be required to see that the money is properly applied. Gavigan v. Evans, 45 Mich. 597, 8 NW 545.

16. Bonner v. Lisenby, 86 Mo. A. 666.
17. Crowley v. McCambridge, 154 A. 135.
18. Crowley v. McCambridge, 154 Ill. A. 135.
19. Converse v. Dillaye, 62 N. Y. 621.
20. **Agent's authority to transfer commercial paper** see Bills and Notes [7 Cyc 784 et seq].

Duty to inquire as to agent's authority to execute or indorse negotiable instruments see supra § 205.

21. Ill.—Strawn Farmers' El. Co. v. Bennett, 168 Ill. A. 428; Goodell v. Sinclair, 112 Ill. A. 594; Sinclair v. Goodell, 93 Ill. A. 592; Chicago Electric Light Renting Co. v. Hutchinson, 25 Ill. A. 476.
La.—Hills v. Upton, 24 La. Ann. 427; Nugent v. Hickey, 2 La. Ann. 358; Avery v. Lauve, 1 La. Ann. 457.
Mass.—Torrey v. Dustin Monument Assoc., 5 Allen 327; Webber v. Williams College, 23 Pick. 302.
Mont.—Helena Nat Bank v. Rocky Mountain Tel. Co., 20 Mont. 379, 51 P 829, 63 AmSR 628; Deer Lodge Bank v. Hope Min. Co., 3 Mont. 146, 35 AmR 458.
N. H.—Eaton v. Berlin, 49 N. H. 219; Woodbury v. Woodbury, 47 N. H. 11, 90 AmD 555; Savage v. Rix, 9 N. H. 263.
N. Y.—Jones v. New York, etc., R. Co., 3 App. Div. 341, 38 NYS 284; Lawrence v. Gebhard, 41 Barb. 575; Filley v. Gilman, 34 N. Y. Super. 339.
Tenn.—Sewanee Min. Co. v. McCall, 3 Head 619.
Utah.—Utah Banking Co. v. Newman, 138 P 1146.

[a] **Power to advance money** for a corporation will not authorize signing a note for it. Webber v. Williams College, 23 Pick. (Mass.) 302.

[b] **Authority to keep books and to open mail,** with occasional special authority to collect checks, does not imply authority to indorse the principal's name to checks. Dowdall v. Borgfeldt, 113 NYS 1069 [aff 134 App. Div. 954 mem, 118 NYS 1103 mem].

[c] **Emergency.**—In Sewanee Min. Co. v. McCall, 3 Head (Tenn.) 619, it was held that the acceptance of bills by an agent to avoid the suspension of work of great importance to the principal does not fall within that class of cases of extraordinary emergency or overruling necessity, in which, from the very necessities of the case, an agent is justified in deviating from the authority conferred on him.

[d] **Prior customary acts.**—The authority of an agent to indorse negotiable paper cannot be based upon prior customary acts where it does not appear that the indorsee ever knew of any instance of the payee having knowingly ratified an unauthorized indorsement by such agent. Utah Banking Co. v. Newman, (Utah) 138 P 1146.

22. Ala.—Wood v. McCain, 7 Ala. 800, 42 AmD 612; Wallace v. Mobile Branch Bank, 1 Ala. 565.
Cal.—Brown v. Rouse, 93 Cal. 237, 28 P 1044; Washburn v. Alden, 5 Cal. 463.
Ga.—Exchange Bank v. Thrower, 118 Ga. 433, 45 SE 316 (holding that an employee of a state insurance agent who is given the title "cashier" is not thereby impliedly authorized to indorse and discount drafts in the name of his principal); Born v. Simmons, 111 Ga. 869, 36 SE 956.
Iowa.—Gould v. Bowen, 26 Iowa 77.
La.—Folger v. Peterkin, 39 La. Ann. 815, 2 S 579; Robertson v. Levy, 19 La. Ann. 327; Clay v. Bynum, 1 Mart. N. S. 608, 14 AmD 192 (holding that power to sign the principal's name in any transaction the agent may deem proper does not authorize the indorsement of a note).
Me.—Perkins v. Boothby, 71 Me. 91; Atkinson v. St. Croix Mfg. Co., 24 Me. 171.
Mass.—Ashley v. Dowling, 203 Mass. 311, 89 NE 434; Shepard v. Abbott, 179 Mass. 300, 60 NE 782; Paige v. Stone, 10 Metc. 160, 43 AmD 420 (holding that to facilitate note making, and thus affect the interest and estates of third persons to an indefinite amount, is not within the object and intent of the law in regulating the common duties of the agent); Taber v. Cannon, 8 Metc. 456.
N. Y.—Porges v. U. S. Mortgage, etc., Co., 203 N. Y. 181, 96 NE 424 [rev 135 App. Div. 484, 120 NYS 487]; Jacoby v. Payson, 91 Hun 480, 36 NYS 240. Compare Turner v. Keller, 66 N. Y. 66.
Oh.—Thomas Gibson Co. v. Carlisle, 3 OhS&CP 27, 1 OhNP 398. Compare Layet v. Gano, 17 Oh. 466 (holding that a power of attorney conferring authority to transact a particular affair authorizes the agent to execute a note in the name of the principal, if necessary for the performance of the agency).
Tenn.—Bailey v. Rawley, 1 Swan 295.
Tex.—Weekes v. A. F. Shapleigh Hardware Co., 23 Tex. Civ. A. 577, 57 SW 67 (holding that, where defendant placed an agent in charge of a stock of goods, with written authority to transact any business in reference thereto that might be necessary in accordance with the desire of or by agreement with his principal, such instrument did not confer on the agent the power to borrow money to replenish the stock and sign defendant's name to a note therefor, it being evident from the tenor of the whole instrument that the agent was to sell the stock and remit all the proceeds to defendant).
Vt.—Denison v. Tyson, 17 Vt. 549 (holding that an agent employed to superintend the sale of stoves, etc., in a certain section and authorized to receive payment in articles of produce has no authority to execute a note payable in such wares at a future day and thus bind his principal by his acknowledgment of "value received").
Wis.—Pluto Powder Co. v. Cuba City State Bank, 153 Wis. 324, 141 NW 220.
Eng.—In re Cunningham, 36 Ch. D. 532; Esdaile v. Lanoge, 4 L. J. Exch. Eq. 46.
Can.—Hechler v. Forsyth, 22 Can. S. C. 489.
Ont.—Heathfield v. Van Allen, 7 U. C. C. P. 346.

[a] **Authority not readily implied.**—"The authority to draw, accept or indorse bills, notes and checks will not readily be implied as an incident to the express authority of an agent. It must ordinarily be conferred expressly, but it may be implied if the execution of the paper is a necessary incident to the business. It will not be deemed a necessary incident,

ferred from authority to adjust all the principal's accounts and concerns as he could do in person,[23] or to exchange, buy, sell, collect, or loan for the principal,[24] or to collect debts and execute deeds,[25] or from a general authority to manage a business,[26] unless such authority is necessarily implied from the peculiar circumstances of the particular case and is indispensable to the proper execution of the authority granted.[27] If the authority is to borrow money on the security of the principal's property, the agent cannot bind the principal personally by giving his note.[28] An agent ordinarily has no power to issue or indorse accommodation paper.[29]

Mere authority to receive negotiable paper carries with it no power to indorse it, as the receipt of the paper accomplishes the purpose of the

though, unless the purpose of the agency cannot otherwise be accomplished." Morganton Bank v. Hay, 143 N. C. 326, 331, 55 SE 811.

[b] **Express and special authority.**—Authority to execute notes and bills of exchange must be express and special. Lafourche Transp. Co. v. Pugh, 52 La. Ann. 1517, 27 S 958; Font v. Domingo, Mann. Unrep. Cas. (La.) 175.

23. Scarborough v. Reynolds, 12 Ala. 252; Hills v. Upton, 24 La. Ann. 427; Beach v. Vandewater, 3 N. Y. Super. 265; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 AmD 62; Essick v. Buckwalter, (Pa.) 16 A 849.

24. Ill.—Goodell v. Sinclair, 112 Ill. A. 594; Sinclair v. Goodell, 93 Ill. A. 592 (holding that the mere fact that a collector has indorsed checks payable to the order of his principal, and has turned the money received therefrom over to such principal, does not confer general authority upon him to indorse checks, where such principal did not know and had no means of knowing that such collector had been pursuing such practice); Oliver v. Smith, 66 Ill. A. 94 (holding that an agent authorized to make an exchange of property on the terms agreed on by his principal and the other owner has no authority to execute to the latter a note in his principal's name for the alleged overvaluation of the principal's property).

Kan.—National Fence-Mach. Co. v. Highleyman, 71 Kan. 347, 80 P 568.

Me.—Scott v McLellan, 2 Me. 199.

Mass.—Williams v. Dugan, 105 NE 615 (holding that a power of attorney, which confers general authority to manage certain property with special powers to execute all necessary conveyances and pay taxes, with a provision that the enumeration of such powers does not restrict the general powers, but which does not in terms authorize the borrowing of money, does not authorize the agent to execute a note for money borrowed by him to pay the taxes); Torrey v. Dustin Monument Assoc., 5 Allen 327; Temple v. Pomroy, 4 Gray 128; Gould v. Norfolk Lead Co., 9 Cush. 338, 57 AmD 50; Taber v. Cannon, 8 Metc. 456; Emerson v. Provident Hat Mfg. Co., 12 Mass. 237, 7 AmD 66.

Minn.—McFadden v. Follrath, 114 Minn. 85, 130 NW 542, 37 LRANS 201 and note (holding that authority of an agent to collect bills and receipt therefor carries no implication of authority to indorse negotiable paper); Deering v. Kelso, 74 Minn. 41, 76 NW 792, 73 AmSR 324 (holding that a collecting agent has no implied authority to indorse checks in the name of his principal because he has power to collect accounts and receive money and checks payable to his principal).

Nebr.—Hastings First Nat. Bank v. Farmers', etc., Bank, 56 Nebr. 149, 76 NW 430; Englehart v. Peoria Plow Co., 21 Nebr. 41, 31 NW 391.

N. Y.—Mills v. Carnly, 14 N. Y. Super. 159 [aff 25 HowPr 592 note].

Tenn.—Jackson v. McMinnville Nat. Bank, 92 Tenn. 154, 20 SW 820, 36 AmSR 81, 18 LRA 663 and note.

Wash.—Citizens Nat. Bank v. Ariss, 68 Wash. 448, 123 P 593.

Eng.—Murray v. East India Co., 5 B. & Ald. 204, 7 ECL 118, 106 Reprint 1167 (holding that a power of attorney authorizing an agent to demand, sue for, recover, and receive, by all lawful ways and means, all moneys, debts, and dues whatsoever, and to give sufficient discharges, does not authorize him to indorse bills for his principal).

[a] **A clerk in a store** has no implied power to indorse commercial paper for his principal. Terry v. Fargo, 10 Johns. (N. Y.) 114; Kerns v. Piper, 4 Watts (Pa.) 222 (holding that it is not part of the business of a clerk in a store to borrow money and draw bills or notes for it in the name of the firm); Heathfield v. Van Allen, 7 U. C. C. P. 346.

[b] **The authority of a commercial traveler** in general does not extend to the making or indorsing of negotiable paper on the principal's account, even in the case where he has authority to collect and to receive cash or checks in payment; indorsing checks is no necessary part of the performance of such duty. Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 NE 136, 93 AmSR 113, 59 LRA 657 [rev 99 Ill. A. 108]; Goodell v. Sinclair, 112 Ill. A. 594; Sinclair v. Goodell, 93 Ill. A. 592; Hamilton Nat. Bank v. Nye, 37 Ind. A. 464, 77 NE 295, 117 AmSR 333 (holding that an agent, engaged in selling goods and authorized to collect money for goods sold, had no implied authority to bind his principal by the separate original and independent indorsement of a check payable to the principal and delivered to the agent by a customer in payment for goods sold); Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 P 845, 117 AmSR 1064 (holding that proof that a traveling salesman who was well known to plaintiff had been in the habit of drawing drafts on his principals and inducing plaintiff to cash the same, and that the drafts drawn prior to those in controversy had been paid by the principals was not sufficient to establish that the salesman had authority to draw drafts on his principals); Hogarth v. Wherley, L. R. 10 C. P. 630.

25. Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 AmD 62.

26. Ala.—State Nat. Bank v. O'Neil, 128 Ala. 192, 29 S 688.

Cal.—Golinsky v. Allison, 114 Cal. 458, 46 P 295 (holding that a power of attorney to an agent authorizing him to "superintend" property of his principals, and to "preserve, manage, sell, and dispose of" the same, and to "manage, work, sell, and dispose of" other property, did not confer authority on the agent to execute a promissory note in the name of his principals, although the note was given in settlement of an antecedent debt contracted by the agent in the management of the property).

Colo.—Breed v. Central City First Nat. Bank, 4 Colo. 481; Sanford Cattle Co. v. Williams, 18 Colo. A. 378, 71 P 889.

Ill.—Chicago Electric Light Renting Co. v. Hutchinson, 25 Ill. A. 476.

Ind.—Smith v. Gibson, 6 Blackf. 369.

Iowa.—Whiting v. Western Stage Co., 20 Iowa 554.

La.—Lafourche Transp. Co. v. Pugh, 52 La. Ann. 1517, 27 S 958.

Me.—Perkins v. Boothby, 71 Me. 91.

Mich.—New York Iron Mine v. Negaunee First Nat. Bank, 39 Mich. 644.

Miss.—Fairly v. Nash, 70 Miss. 193, 12 S 149.

Mont.—Helena Nat. Bank v. Rocky Mountain Tel. Co., 20 Mont. 379, 51 P 829, 63 AmSR 628.

N. Y.—Holtsinger v. National Corn Exch. Bank, 31 N. Y. Super. 64.

N. C.—Witz v. Gray, 116 N. C. 48, 20 SE 1019.

Okl.—Stock Exch. Bank v. Williamson, 6 Okl. 348, 50 P 93 (holding that the general authority of an agent to conduct the business of running stage lines for the carrying of passengers, mail, and express gives him no authority to bind the principal by a promissory note).

Or.—Connell v. McLoughlin, 28 Or. 230, 42 P 218.

S. C.—Hamburg Bank v. Johnson, 37 S. C. L. 42.

Tenn.—Sewanee Mfg. Co. v. McCall, 3 Head 619. But see Newland v. Oakley, 6 Yerg. 489 (holding that a power of attorney "to transact all the business" of the maker in a certain place, with no limitation, authorizes the attorney to transfer a note of his principal).

Tex.—Tombstone First Nat. Bank v. Abilene Hotel Co., 46 Tex. Civ. A. 595, 103 SW 1120.

Utah.—Utah Banking Co. v. Newman, 138 P 1146.

Wis.—Pluto Powder Co. v. Cuba City State Bank, 153 Wis. 824, 141 NW 220; McDermott v. Jackson, 97 Wis. 64, 72 NW 375.

Que.—Molson Bank v. Cooke, 27 Que. Super. 130.

See Smith v. Prosser, [1907] 2 K. B. 735, 11 AnnCas 191.

[a] **Securing debt of third person.**—An agent to manage has no authority to execute in the name of his principal a note to secure the debt of a third person. Boord v. Strauss, 39 Fla. 331, 22 S 713.

[b] **Authority to lease and manage a farm** confers no authority to indorse a check which has no connection with the business of the farm. Califf v. Towanda First Nat. Bank, 37 Pa. Super. 412. See also Davidson v. Stanley, 2 M. & G. 721, 40 ECL 324, 133 Reprint 936.

27. See infra § 281.

28. Mylius v. Copes, 23 Kan. 617. But see Taylor v. Hudgins, 42 Tex. 244.

29. Ala.—Wallace v. Mobile Branch Bank, 1 Ala. 565.

Conn.—Ætna Nat. Bank v. Charter Oak L. Ins. Co., 50 Conn. 167.

Ga.—Myers v. Walker, 104 Ga. 316, 30 SE 842.

Mass.—Odiorne v. Maxcy, 13 Mass. 178.

Mich.—McLellan v. Detroit File Works, 56 Mich. 579, 23 NW 321.

Mo.—Mechanics' Bank v. Schaumburg, 38 Mo. 228.

N. J.—Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728.

N. Y.—Stainer v. Tysen, 3 Hill 279; North River Bank v. Aymar, 3 Hill 262.

Tenn.—Kingsley v. State Bank, 3 Yerg. 107.

Va.—Stainback v. Read, 11 Gratt. (52 Va.) 281, 62 AmD 648.

Que.—Molson Bank v. Cooke, 27 Que. Super. 130.

[a] **Agent signing renewal accommodation notes.**—Where an agent, empowered to make and indorse promissory notes for his principal, indorses a promissory note with the assent of his principal for the purpose of taking up paper upon which the principal is already liable as accommodation maker or indorser, the principal will be bound. German Nat. Bank v. Studley, 1 Mo. A. 280. But see Molson Bank v. Cooke, 27 Que. Super. 130.

agency, and hence exhausts the power;[30] as, where the authority is to accept checks and negotiable paper in payment of debts, it ordinarily does not imply authority to indorse or sell the paper, as such indorsement or sale is not a necessary incident to the collection.[31] But it has been held that the circumstances of a particular case may warrant an implication of power to indorse from an authority to collect.[32]

[§ 281] **(2) When Authority Implied.** The rule of strict construction adopted in the case of the execution by an agent of negotiable instruments is not to be pursued to the extent of defeating, by technical interpretation, the obvious intent of the principal as gathered from a reasonable interpretation of the instrument appointing the agent. Hence, if the agent's act in that regard be within such intent it will bind his principal.[33] Much must depend upon the position of the agent and the circumstances of the case, and the agent's authority to execute or indorse commercial paper will be presumed whenever such power is reasonably necessary to effectuate the main object of the agency.[34] In accord with this, it has often been held that power to conduct

30. D. C.—Millard v. National Bank of Republic, 10 D. C. 54.
La.—Ducongé v. Forgay, 15 La. Ann. 37.
Mich.—Lonier v. Ann Arbor Sav. Bank, 162 Mich. 541 127 NW 685 (holding that a traveling salesman with authority to make collections has no implied authority to indorse and discount notes executed by customers to his employer).
Minn.—Dispatch Printing Co. v. Nat. Bank of Commerce, 109 Minn. 440, 124 NW 236 (holding that an agent for the purpose of soliciting advertising and collecting accounts therefor has no implied authority to indorse checks payable to his principal, although delivered to him in payment of accounts in his hands for collection).
Mo.—Graham v. U. S. Savings Inst., 46 Mo. 186.
N. Y.—Brooklyn Nat. City Bank v. Westcott, 118 N. Y. 468, 23 NE 900, 16 AmSR 771; Filley v. Gilman, 34 N. Y. Super. 339; Holtsinger v. National Corn Exch. Bank, 31 N. Y. Super. 64, 6 AbbPrNS 292, 37 HowPr 203 [aff 40 HowPr 720 note].
N. C.—Hines v. Butler, 38 N. C. 307.
Wis.—Pluto Powder Co. v. Cuba City State Bank, 153 Wis. 324, 141 NW 220.
Eng.—Hogg v. Snath, 1 Taunt. 347, 127 Reprint 867.
[a] **Bookkeeper indorsing drafts.**—Where the bookkeeper of a concern, who had authority to receive payment and to indorse drafts for deposit, indorsed certain drafts and delivered them to the office boy for deposit, who received the money thereon and delivered it to the bookkeeper who appropriated it, it was held that the payment was valid, and that the concern was bound by the indorsement of its bookkeeper as its agent. Johnson v. Donnell, 90 N. Y. 1.

31. Ill.—Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 NE 136, 93 AmSR 113, 59 LRA 657 [rev 99 Ill. A. 108]; Bennett v. Chandler, 199 Ill. 97, 64 NE 1052 [mod 101 Ill. A. 409].
Ind.—Robinson v. Winslow Bank, 42 Ind. A. 350, 85 NE 793.
Kan.—Nickelson v. Dial, 77 Kan. 8, 93 P 606.
Mo.—Quigley v. Mexico Southern Bank, 80 Mo. 289, 50 AmR 503; Goodfellow v. Landis, 36 Mo. 168; Hardesty v. Newby, 28 Mo. 567, 75 AmD 137.
N. H.—Ames v. Drew, 31 N. H. 475.
N. Y.—Robinson v. Chemical Nat. Bank, 86 N. Y. 404; Burstein v. Sullivan, 134 App. Div. 623, 119 NYS 317 (holding that authority of an agent to collect a debt does not involve authority to indorse a check given in payment of it, and express authority or power involving authority to indorse a check must be conferred on the agent).
Tenn.—Jackson v. McMinnville Nat. Bank, 92 Tenn. 154, 20 SW 820, 36 AmSR 81, 18 LRA 663; McClure v. Evartson, 14 Lea 495.
Eng.—Murray v. East India Co., 5 B. & Ald. 204, 7 ECL 118, 106 Reprint 1167; Kilgour v. Finlyson, 1 H. Bl. 156, 126 Reprint 92.
[a] **Power to a person to collect cash** does not include authority to indorse his principal's name upon commercial paper and collect the proceeds thereof, and, where a bank pays such a person upon such an indorsement, the payee thereof may recover from the bank the value of the paper. Goodell v. Sinclair, 112 Ill. A. 594.
[b] **Authority to accept notes in payment** for property does not imply authority to bind the principal by an indorsement of the notes. National Fence-Mach. Co. v. Highleyman, 71 Kan. 347, 80 P 568.
[c] **Indorsement for debtor.**—An authority to collect does not authorize an agent to indorse a security for the debtor in order to assist him in raising money to pay the debt. Hines v. Butler, 38 N. C. 307.

32. National Bank of Republic v. Old Town Bank, 112 Fed. 726, 728, 50 CCA 443 (where the court said: "There appears a tendency to relax the strict limitation of implied authority to meet the necessity of prompt action in modern business methods.").

33. U. S.—Exchange Bank v. Hubbard, 62 Fed. 112, 10 CCA 295.
Ark.—Fayetteville Wagon, etc., Co. v. Kenefick Constr. Co., 88 SW 1031.
Colo.—Rio Grande Extension Co. v. Coby, 7 Colo. 299, 3 P 481.
Conn.—Hudson v. Whiting, 17 Conn. 487.
Del.—Gray v. Gray, 25 Del. 308, 80 A 233 (holding that where a person's name is signed to a note by another under a special or general authority, such person is liable on the note).
Ill.—Tanner v. Hastings, 2 Ill. A. 283.
Ky.—Barbour v. Sykes, 1 SW 600, 8 KyL 345.
Mo.—Edwards v. Thomas, 66 Mo. 468; Trenton First Nat. Bank v. Gay, 63 Mo. 33, 21 AmR 430; Sublette v. Brewington, 139 Mo. A. 410, 122 SW 1150.
N. Y.—Rosenthal v. Hasberg, 84 NYS 290 (holding that a writing executed by a partnership, appointing an agent its "true and lawful attorney for us and in our name, place and stead to make, draw, sign and issue promissory notes, checks, drafts and acceptances payable at the 19th Ward Bank . . . out of moneys to the credit of our firm in said bank," conferred authority on the agent to make promissory notes).
Tenn.—Jernegan v. Gray, 14 Lea 536.
Tex.—Presnall v. McLeary, (Civ. A.) 50 SW 1066 (holding that a power of attorney "to transact all business of every nature which I may have in the state of Texas, and to make, execute, and deliver any and all papers, documents, deeds of conveyance, or other instruments," confers authority to transfer a note).
W. Va.—Wheeling City Bank v. Bryan, 78 SE 400.
Ont.—Bryce v. Davidson, 25 U. C. Q. B. 371; Auldjo v. McDougall, 3 U. C. Q. B. O. S. 199.
[a] **Financial agent.**—An agent appointed as the "true and lawful cashier and financial agent" of a company has authority to indorse notes, discount them, draw checks, and make deposits. Edwards v. Thomas, 66 Mo. 468.

34. U. S.—National Bank of Republic v. Old Town Bank, 112 Fed. 726, 50 CCA 443; Glidden, etc., Varnish Co. v. Interstate Nat. Bank, 69 Fed. 912, 16 CCA 534.
Ala.—Lytle v. Dothan Bank, 121 Ala. 215, 26 S 6.
Colo.—Gambrill v. Brown Hotel Co., 11 Colo. A. 529, 54 P 1025 (holding that an agent's authority to draw on his principal need not be shown by positive proof of express authority, but may be established by proof of the circumstances).
Iowa.—State v. Rivers, 124 Iowa 17, 98 NW 785; Edgerly v. Cover, 106 Iowa 670, 77 NW 328.
La.—James v. Lewis, 26 La. Ann. 664; Swift v. Hare, 1 Rob. 303; Perrotin v. Cucullu, 6 La. 587.
Me.—Atkinson v. St. Croix Mfg. Co., 24 Me. 171.
Md.—Black v. Westminster First Nat. Bank, 96 Md. 399, 54 A 88.
Mass.—Sprague v. Gillett, 9 Metc. 91; White v. Westport Cotton Mfg. Co., 1 Pick. 215, 11 AmD 168.
N. Y.—Porges v. U. S. Mortgage, etc., Co., 135 App. Div. 484, 120 NYS 487 [rev on other grounds 203 N. Y. 181, 96 NE 424]; Scofield v. Warren, 18 Misc. 209, 34 NYS 175.
Oh.—Layet v. Gano, 17 Oh. 466.
S. C.—Hamburg Bank v. Johnson, 37 S. C. L. 42.
Tex.—Collins v. Cooper, 65 Tex. 460; Manhattan Liquor Co. v. German Nat. Bank, (Civ. A.) 94 SW 1120; Manhattan Liquor Co. v. Magnus, 43 Tex. Civ. A. 463, 94 SW 1117.
Va.—Whitten v. Fincastle Bank, 100 Va. 546, 42 SE 309.
Wash.—American Sav. Bank, etc., Co. v. Helgesen, 64 Wash. 54, 116 P 837, AnnCas1913A 390.
Eng.—La Banque D'Hochelaga v. Jodoin, [1895] A. C. 612; Waters v. Brogden, 1 Y. & J. 457.
"Authority to endorse commercial paper can only be implied, where the agent is unable to perform the duties of his agency without the exercise of such authority. In other words, the power of an agent to endorse commercial paper for his principal must be a necessary implication from an express authority conferred upon such agent. Wherever such power is implied from the acts of the agent, the acts, subject to such implication, must be acts of a kind like those from which the implication is drawn." Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 156, 65 NE 136, 93 AmSR 113, 59 LRA 657.
[a] **When necessarily incident.**—The authority to draw a bill or note will be deemed necessarily incidental only when the object of the agency cannot be accomplished without it. Morganton Bank v. Hay, 143 N. C. 326, 55 SE 811.
[b] **Authority to draw on the principal** for money to carry on the business includes authority to procure an indorser of the drafts drawn. Marsh v. French, 82 Ill. A. 76.
[c] **Indorsement without recourse.**—An authority to sell a negotiable note carries with it power to indorse it "without recourse" in the name of the principal. Yale v. Eames, 1 Metc. (Mass.) 486.
[d] **A husband carrying on the business of his wife** under a general power of attorney has authority to bind her by a promissory note given for the purpose of the business.

the principal's business as he might do includes power to make and indorse negotiable paper when the nature of the business is such as to require it, although such necessity must be clearly shown.[35] Such authority may be implied from a power to borrow money,[36] to purchase on credit,[37] to discount a bill or note,[38] or to transfer a draft.[39]

Conduct of principal. The authority may on proper showing be presumed from the conduct, or course of dealing, of the principal,[40] as, for example, from his receiving the proceeds of the indorsed paper;[41] but an occasional recognition of a note made or indorsed by the agent will not be enough to establish his authority,[42] although it may afford some evidence on the subject.[43] In any case no one can hold a principal liable upon negotiable paper signed or indorsed by one as agent without proving such agent's authority.[44]

[§ 282] **(3) Extent of Authority—(a) In General.** An authority given to an agent to execute or indorse negotiable paper is subject to strict interpretation,[45] and must be strictly pursued.[46] On the

Quebec Bank v. Jacobs, 23 Que. Super. 167.

35. Ala.—Wimberly v. Windham, 104 Ala. 409, 16 S 23, 53 AmSR 70 (holding that a power of attorney "to carry on a general mercantile business in the city of Greenville, Ala., to do and perform all the necessary acts in the execution and promotion of the aforesaid business and in as full and ample a manner as I might do, if I were personally present," authorized the agent to sign a note for the amount of a lien against some cotton in consideration of a release of the lien).

Conn.—Frost v. Wood, 2 Conn. 23.

Iowa.—Gafford v. American Mortg., etc., Co., 77 Iowa 736, 42 NW 550.

La.—Wallace v. Lamson, 20 La. Ann. 243.

Mass.—Temple v. Pomroy, 4 Gray 128; Paige v. Stone, 10 Metc. 160, 43 AmD 420; Odiorne v. Maxcy, 13 Mass. 178.

Mich.—Shipman v. Byles, 65 Mich. 690, 32 NW 898.

N. Y.—Feldman v. Beier, 78 N. Y. 293.

Tenn.—Jackson v. McMinnville Nat. Bank, 92 Tenn. 154, 20 SW 820, 36 AmSR 81, 18 LRA 663; Bailey v. Rawley, 1 Swan 295.

Tex.—Flewellen v. Mittenthal, (Civ. A.) 38 SW 234 (holding that one who has authority to use another's name in the conduct of a saloon business may sign it to a note for a license).

Utah.—Utah Banking Co. v. Newman, 138 P 1146.

Wash.—Graton, etc., Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 P 879 (holding that where an agent is put in charge of a business, with power to sell, collect therefor, and buy goods ordered and not in stock, it cannot, as matter of law, be said he has not apparent authority to pay for the goods so bought by indorsing checks of his principal).

[a] **"The power to make or endorse negotiable instruments may be implied as a necessary incident** of powers expressly conferred. Where an entire business is placed under the management of an agent, the authority of the agent is presumed to be commensurate with the necessities of the situation. He has implied authority to do whatever is ordinarily incidental to the conduct of such business, whatever is necessary to the efficient execution of the duties, or whatever is customary in a particular trade." Whitten v. Fincastle Bank, 100 Va. 546, 550, 42 SE 309.

[b] **Question for jury.**—In Graton, etc., Mfg. Co. v. Redelsheimer, 28 Wash. 370, 377, 68 P 879, the court said: "Where . . . an agent is put in charge of the business of a principal with power to sell its goods, collect for the same, make purchases of other dealers when it is necessary to fill orders calling for goods that may not be in the stock of which he has charge, it would be too much to say, as a matter of law, that the agent did not have apparent authority to pay for the goods so purchased, even by indorsing the checks of his principal for that purpose; at least, it is a question on which common minds might reasonably differ, and for that reason a question for the jury."

36. School Directors v. Sippy, 54 Ill. 287.

37. Western Newspaper Union v. Judson, 1 Ala. A. 615, 55 S 1026 (holding that evidence that defendant operated a newspaper, that he had employed B as manager and authorized him to buy supplies needed to run the business, and to pledge the credit of the paper, and that as manager he had signed a note to plaintiff on an account so contracted, having been introduced, the note was admissible in evidence against defendant); Stothard v. Aull, 7 Mo. 318; Childsey v. Porter, 21 Pa. 390. See also supra § 227.

38. Merchants' Bank v. Central Bank, 1 Ga. 418, 44 AmD 665; Porges v. U. S. Mortgage, etc., Co., 135 App. Div. 484, 120 NYS 487 [rev on other grounds 203 N. Y. 181, 96 NE 424].

39. Mars v. Mars, 27 S. C. 132, 3 SE 60.

40. Cal.—Ukiah Bank v. Mohr, 130 Cal. 268, 62 P 511.

Colo.—Witcher v. McPhee, 16 Colo. A. 298, 65 P 806.

Ga.—Exchange Bank v. Thrower, 118 Ga. 433, 45 SE 316 (holding that where there was evidence to show that an agent was in full charge of the business during the frequent absences of his principal, and authorized to indorse checks and drafts other than for deposit only, a verdict finding for a bona fide purchaser of drafts so indorsed will not be disturbed); Weaver v. Ogletree, 39 Ga. 586; Germain Co. v. Camden County Bank, (A.) 80 SE 302 (holding that an agent's authority to draw a draft upon his principal may be established by the conduct and course of business of the principal).

Ill.—Strawn Farmers' El. Co. v. Bennett, 168 Ill. A. 428.

Ind.—Smith v. Gibson, 6 Blackf. 369.

La.—Charleston Bank v. Hagan, 2 La. Ann. 999.

Me.—Trundy v. Farrar, 32 Me. 225.

Minn.—Best v. Krey, 83 Minn. 32, 85 NW 822 (holding that, where an agent was employed for the express purpose of collecting accounts and selling goods, and in practice he indorsed checks payable to the order of his principal, and purchased goods for the house, the evidence as to such course of selling was sufficient to sustain the conclusion that the agent was authorized to indorse a check sued on).

Mo.—Edwards v. Thomas, 66 Mo. 468.

N. Y.—Turner v. Keller, 66 N. Y. 66; Allen v. Corn Exch. Bank, 87 App. Div. 335, 84 NYS 1001 [app dism 181 N. Y. 278, 73 NE 1026]; Abeel v. Seymour, 6 Hun 656.

Or.—Connell v. McLaughlin, 28 Or. 230, 42 P 218.

Tex.—Friedlander v. Cornell, 45 Tex. 585 (holding that authority to draw bills of exchange in the name of the principal may be presumed from previous acts of the same nature).

Vt.—Valiquette v. Clark Bros. Coal Min. Co., 83 Vt. 538, 77 A 869, 138 AmSR 1104, 34 LRANS 440 and note (holding that a principal who accepted and paid three drafts drawn on him at different times without authority by his agent in favor of a third person, who took the same in good faith, thereby conferred on the agent an implied authority to draw drafts, and he was liable on a fourth draft similarly drawn and taken by the third person in good faith, and that, if the principal desired not to be bound by any subsequent draft, he should have notified the third person thereof).

W. Va.—Merchants, etc., Nat. Bank, v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 SE 880, 70 LRA 312 (holding that the maker of a promissory note by constituting an agency and intrusting the note to the agent in such form that it may be disposed of by mere delivery holds the agent out to the world as possessing power to pass title to it).

Eng.—Kemble v. Atkins, 7 Taunt. 260, 2 ECL 354, 129 Reprint 104, Holt N. P. 427, 3 ECL 171.

Ont.—Pratt v. Drake, 17 U. C. Q. B. 27.

See also supra §§ 32–41, 69–74.

[a] **Where a person executes a note payable to a third person,** and delivers it to another without limitations as to its use, he makes such other his agent, and he becomes primarily liable to the payee for the amount of the note after its delivery to him by the agent. Thornton Nat. Bank v. Robertson, 89 Kan. 509, 132 P 193.

41. Wells v. Simpson Nat. Bank, 19 Tex. Civ. A. 636, 47 SW 1024; Merchants Bank v. Bostwick, 28 U. C. C. P. 450.

42. Paige v. Stone, 10 Metc. (Mass.) 160, 43 AmD 420; Taber v. Cannon, 8 Metc. (Mass.) 456; Emerson v. Province Hat Mfg. Co., 12 Mass. 237, 7 AmD 66; Deer Lodge Bank v Hope Min. Co., 3 Mont. 146, 35 AmR 458; Stock Exch. Bank v. Williamson, 6 Okl. 348, 50 P 93 (holding that the authority of an agent to make promissory notes is not implied from the act of the principal in directing his agent "to get one hundred dollars at a bank for ninety days" on a single occasion, different from the one in which the principal is sought to be bound, nor can such authority be implied from the fact that the same principal paid a single note made by another agent, in the same business, without authority); Jackson v. McMinnville Nat. Bank, 92 Tenn. 154, 20 SW 820, 36 AmSR 81, 18 LRA 663.

43. Stothard v. Aull, 7 Mo. 318; Turner v. Keller, 66 N. Y. 66.

44. Flax, etc., Mfg. Co. v. Ballentine, 16 N. J. L. 454; Dixon v. Haslett, 7 S. C. L. 615. See also O'Connell v. Marvin, 47 Wash. 8, 91 P 254.

45. Ala.—Brantley v. Southern L. Ins. Co., 53 Ala. 554.

Colo.—Breed v. Central City First Nat. Bank, 4 Colo. 481.

Iowa.—Mordhurst v. Boies, 24 Iowa 99; Witing v. Western Stage Co., 20 Iowa 554.

N. Y.—Union Bank v. Mott, 39 Barb. 180.

Eng.—Attwood v. Munnings, 7 B. & C. 278, 14 ECL 130, 108 Reprint 727, 4 ERC 364.

Que.—Vigaud v. De Werthemer, 30 Que. Super. 229.

[a] **As to the interpretation of a power of attorney** to draw or indorse negotiable instruments see Metropolis Bank v. Moore, 2 F. Cas. No. 901, 5 Cranch C. C. 518; Washington Bank v. Peirson, 2 F. Cas. No. 953, 2 Cranch C. C. 685; Knapp v. McBride, 7 Ala. 19.

46. U. S.—Oshkosh Nat. Bank v. Munger, 95 Fed. 87, 36 CCA 659.

other hand, the principal may of course give to an agent whatever authority he will to make, indorse, or accept commercial paper on his account, and when the agent has acted within the apparent scope of such authority the principal is bound precisely as he would be in the case of other acts done by an agent;[47] and if an agent issues commercial paper which he was authorized to make, the principal is not released from liability because the agent has, without knowledge of the party dealing with him, misused or abused the power confided in him,[48] or because he has exercised the power conferred without first complying with all the conditions imposed upon him.[49]

[§ 283] **(b) Applications.** A power to deal in a certain way with commercial paper is not to be enlarged by construction to permit the doing of other, although somewhat similar, things.[50] So also authority to use such paper with one person, or at one bank, confers no implied power to deal with another person or at another bank;[51] authority to make one kind of commercial paper does not imply authority to make other kinds;[52] authority to sign as surety does not imply authority to sign as

Ga.—Germain Co. v. Camden County Bank, (A.) 80 SE 302.

N. Y.—Eldridge v. Husted, 24 Misc. 177, 52 NYS 681.

N. C.—Morganton Bank v. Hay, 143 N. C. 326, 55 SE 811.

S. C.—Hamburg Bank v. Johnson, 37 S. C. L. 42.

Va.—Hortons v. Townes, 6 Leigh (33 Va.) 47.

Que.—Vigaud v. De Werthemer, 30 Que. Super. 229.

"When the power is expressly conferred, it must be strictly pursued; and unless the apparent exceeds the actual authority of the agent, paper executed by him will not bind his principal if the agent materially departs from the terms of his authority in regard to the amount or the time of the paper or its character in other respects." Morganton Bank v. Hay, 143 N. C. 326, 331, 55 SE 811.

[a] **Confession of judgment and waiver of exemptions.**—Parol authority to sign a note does not empower an agent to make a note under seal containing a warrant to confess judgment and waiving exemption and inquisition laws. Payne v. Robinson, 1 Pa. Dist. 638, 11 Pa. Co. 544.

[b] **Limited to business.**—Authority to make or indorse promissory notes, given in a power of attorney to "take the general control and management of the" principal's "affairs, business, and property" and to "do every act, matter, or thing which the nature of such business shall require," is limited to such notes only as are necessarily connected with the conduct and management of the business. Omro Fist Nat. Bank v. Bean, 141 Wis. 476, 124 NW 656, 135 AmSR 50.

47. U. S.—Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank, 97 Fed. 181, 38 CCA 108 (holding that an agent of a corporation, duly authorized to indorse checks in its behalf for deposit, may bind it by such an indorsement to the payment of a check purporting to have been drawn by the corporation to its own order, although such check was in fact forged by the agent himself).

Ala.—Garrett v. Holloway, 24 Ala. 376.

Cal.—Davidson v. Dallas, 8 Cal. 227 (holding that if notes taken by an agent for his principal run to the agent, he has a right to cure this error at any time by indorsing to his principal without the latter's consent, so that third persons are not injured by the whole transaction).

Ill.—Helena First Nat. Bank v. Garside, 53 Ill. A. 354 (holding that where a person directs his clerk to accept a draft, and by his negligence forgets or does not exactly know just what he ordered the clerk to do, he is bound by the terms of the acceptance as against a bank which parted with its money on the faith of the acceptance).

Ind.—Yeatman v. Cullen, 5 Blackf. 240.

La.—Charleston Bank v. Hagan, 2 La. Ann. 999.

Mo.—German Nat. Bank v. Studley, 1 Mo. A. 260.

N. Y.—Weeks v. Fox, 3 Thomps. & C. 354.

[a] **Procuring indorser.**—Where an agency is established and an express authority shown to draw upon the principal for amounts needed to carry on the business, it carries along with it an authority to procure an indorser of the drafts drawn by the agent for the purpose of the agency. Marsh v. French, 82 Ill. A. 76.

[b] **Power to sign bills, notes, etc.,** and manage the principal's business, carries with it power to indorse notes. Auldjo v. McDougall, 3 U. C. Q. B. O. S. 199.

[c] **Indorsing credits.**—An agent with possession of property for its sale, with authority to deliver the same and receive notes for the price, has authority to agree to indorse credits upon one of the notes. Burgess v. Warr, 53 Colo. 228, 124 P 344.

48. Bartlett v. Chicago First Nat. Bank, 156 Ill. A. 415 [aff 247 Ill. 490, 93 NE 337]; Citizens' Sav. Bank v. Hart, 32 La. Ann. 22; Crescent City Bank v. Hernandez, 25 La. Ann. 43 (holding that the fact that a sufficient amount to meet the check was not deposited when the check was drawn is not a valid defense and does not authorize the principal to refuse paying it into the hands of a person who had no notice of the prohibition put upon the agent); Weeks v. Fox, 3 Thomps. & C. (N. Y.) 354; Dollfus v. Frosch, 1 Den. (N. Y.) 367 (holding that the principal is liable upon bills of exchange drawn in his name by his attorney upon persons who had no funds of the principal in their hands); Mann v. King, 6 Munf. (20 Va.) 428.

[a] **Thus** promissory notes executed by an agent, containing a provision that the agent is not authorized to make, empowering any attorney at law to confess judgment, are not void because of such unauthorized provision. Wheeling City Bank v. Bryan, (W. Va.) 78 SE 400.

49. Great Western El. Co. v. White, 118 Fed. 406, 56 CCA 388; Merchants' Bank of Canada v. Griswold, 72 N. Y. 472, 28 AmR 159; Burquin v. Flinn, 12 S. C. L. 316.

50. Ill.—Fay v. Slaughter, 194 Ill. 157, 62 NE 592, 88 AmSR 148, 56 LRA 564 [rev 94 Ill. A. 111].

Mont.—Deer Lodge Bank v. Hope Min. Co., 3 Mont. 146, 35 AmR 458 (holding that authority given an agent to draw a bill of exchange in his own name does not authorize him to draw in the name of his principal).

Nebr.—Watt v. Davison, 82 Nebr. 712, 118 NW 562.

Tenn.—Sewanee Min. Co. v. McCall, 3 Head 619 (holding that authority to indorse or accept bills cannot be inferred from power to draw such bills, particularly if such power is special); Nichol v. Green, Peck 283.

Tex.—Buzard v. Jolly, 6 SW 422; Stone v. McGregor, (Civ. A.) 84 SW 399 [rev on other grounds 99 Tex. 51, 87 SW 334].

Va.—Hortons v. Townes, 6 Leigh (33 Va.) 47.

Eng.—Robinson v. Yarrow, 7 Taunt. 455, 2 ECL 445, 129 Reprint 183 (holding that authority to draw a bill of exchange does not authorize an indorsement).

Ont.—Gore Bank v. Meredith, 26 U. C. Q. B. 237 (holding that authority to bind the principal in a representative capacity does not give authority to bind him personally).

[a] **Where the power is to draw upon the principal for property bought and received,** there is no authority to draw for property not received. Gray Tie, etc., Co. v. Farmers' Bank, 74 SW 174, 24 KyL 2319 [reh den 78 SW 207, 25 KyL 1596].

51. U. S.—Clement v. Dickey, 5 F. Cas. No. 2,883, 1 Paine 377.

Ala.—Knapp v. McBride, 7 Ala. 19.

Ky.—Morrison v. Taylor, 6 T. B. Mon. 82.

La.—Citizens' Sav. Bank v. Hart, 32 La. Ann. 22.

N. Y.—Sims v. U. S. Trust Co., 103 N. Y. 472, 9 NE 605; Craighead v. Peterson, 10 Hun 596 [aff 72 N. Y. 279, 28 AmR 150] (holding that a power of attorney authorizing an agent to draw and indorse any checks or promissory notes on any bank in the city of New York in which defendant had an account, and to do any and all matters connected with defendant's account which he might do, did not authorize the execution in the name of defendant of two promissory notes payable at a bank where defendant had no account).

S. C.—Mills v. Williams, 16 S. C. 593 (holding that a person who intrusts a sealed note, with the name of the payee left blank, to an agent for the purpose of being delivered to one person in exchange for a particular piece of property specified in the note, is not bound by the act of the agent in delivering the note to another person for a different piece of property, although the person to whom the note was delivered had no notice, at the time, of this departure from his instructions on the part of the agent).

Va.—Stainback v. Read, 11 Gratt. (52 Va.) 281, 62 AmD 648 (holding that a power of attorney to draw bills in the name of his principal does not empower an agent to draw one on a person in whose hands the principal has no funds, and the payment of such bill by such person raises no implied obligation of the principal to repay him); Mann v. King, 6 Munf. (20 Va.) 428 (holding the principal liable on an indorsement at the bank named in the power, although it was not intended by the principal that the agent should indorse for the purpose he did).

[a] **Meaning of "sign and endorse notes at the bank."**—An expression in a power of attorney, "sign and endorse notes at the bank" does not refer to the place where the agent should do the act, but confines his power to the signing and indorsing of notes made payable at and due to the bank. Morrison v. Taylor, 6 T. B. Mon. (Ky.) 82.

52. Hefner v. Palmer, 67 Ill. 161; Avery v. Lauve, 1 La. Ann. 457; New York Iron Mine v. Negaunee First Nat. Bank, 39 Mich. 644; Alder v. Buckley, 1 Swan (Tenn.) 69 (holding that authority not under seal to sign "any note or other instrument of writing" does not authorize the agent to execute a bill single).

[a] **To draw draft.**—Possession of an unindorsed bill of lading by a person other than the consignor or consignee raises no presumption that

maker;[53] authority to execute commercial paper gives no authority to execute an instrument which is not a commercial note;[54] and authority to make or indorse for one purpose, or upon one occasion, cannot be exercised for another purpose, or upon a different occasion,[55] although a principal who has held an agent out as having general authority to indorse paper cannot escape the results of such indorsement because of secret limitations on the purposes for which the indorsement may be made, which the agent has disregarded.[56] Authority to make a restricted indorsement carries no power to make any other indorsement,[57] such as a general indorsement in blank.[58] An agent has no authority to guarantee payment by his principal, except as his authorized indorsement may make his principal answerable.[59]

Joint and several. If the agent's authority is to make a joint note he cannot make a joint and several note, unless the circumstances make it clear that such was the intent of the principal,[60] and if his authority is from several principals, and is severally given, he cannot bind them jointly, nor jointly with himself, by making them joint indorsers of a note or makers of other paper.[61] An authority to indorse for several jointly is not complied with by a several and successive indorsement.[62]

Notice and protest. Mere authority to make or indorse will not empower the agent to receive or waive notice and protest on notes indorsed by the principal.[63]

[§ 284] **(c) As to Amount or Time.** An agent cannot bind his principal by the execution or indorsement of commercial paper differing in amount[64] or time from that authorized,[65] unless the difference in time is immaterial.[66] Thus an agent, unless specially authorized, cannot bind his principal by postdating a bill, draft, or note;[67] nor can he, if specially limited as to the amount, obligate his principal by executing an instrument for a greater amount.[68]

[§ 285] **(d) Must Be for Principal's Benefit.** In the absence of anything to show a different intention, the power to make or indorse commercial paper will be construed as extending only to bills, notes, or drafts, executed or indorsed in the busi-

such person is the agent of the consignor to draw a draft. Stewart v. Gregory, etc., Co., 9 N. D. 618, 84 NW 553.

53. Farmington Sav. Bank v. Buzzell, 61 N. H. 612; Connor v. Uvalde Nat. Bank, (Tex. Civ. A.) 156 SW 1092.

[a] **Authority to bind the principal as indorser** does not give an authority to bind him as a joint maker. Cuyler v. Merrifield, 5 Hun (N. Y.) 559.

54. Trenton First Nat. Bank v. Gay, 63 Mo. 33, 21 AmR 430 (holding that permission to use or sign another's name for the purpose of obtaining money at a bank does not authorize the execution of a nonnegotiable note).

55. Callender v. Golsan, 27 La. Ann. 311; Chouteau v. Filley, 50 Mo. 174; Mechanics' Bank v. Schaumburg, 38 Mo. 228 (holding that a power of attorney given by a principal to his agent to execute, sign, draw, and indorse notes and bills in the business of the principal will not import an implied authority to use the latter's name in joint transactions with other persons and for their benefit); Sukeley v. Tunno, 2 S. C. L. 505; Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 P 845, 117 AmSR 1064.

[a] **An authority to accept a draft** to be drawn for a particular use does not authorize the agent to accept a draft drawn for another purpose. Nixon v. Palmer, 8 N. Y. 398.

[b] **Where authority to sign notes or checks is limited "to a certain business"** the principal is not liable for those given or subscribed by the agent outside of that business, and of which the agent has misapplied the proceeds. Vigaud v. De Werthemer, 35 Que. Super. 436. Compare La Granada Hermanos Y Ca v. American Electrical etc., Mfg. Co., 29 Que. Super. 444.

56. Wedge Mines Co. v. Denver Nat. Bank, 19 Colo. 182, 73 P 873; Heinz v. American Nat. Bank, 9 Colo. A. 31, 47 P 403.

57. Schmidt v. Garfield Nat. Bank, 64 Hun 298, 19 NYS 252 [aff 138 N. Y. 631, 33 NE 1084]; Gompertz v. Cook, 20 T. L. R. 106.

58. Exchange Bank v. Thrower, 118 Ga. 433, 45 SE 316; Schmidt v. Garfield Nat. Bank, 64 Hun 298, 19 NYS 252 [aff 138 N. Y. 631 mem, 33 NE 1084 mem].

[a] **An agent authorized to indorse checks with a stamp for deposit,** and fill a blank therein with his own name, does not empower him to indorse checks and drafts in blank so as to collect the money on them. Exchange Bank v. Thrower, 118 Ga. 433, 45 SE 316.

59. Palmer v. Yarrington, 1 Oh. St. 253. See also infra § 313.

60. Metropolis Bank v. Moore, 2 F. Cas. No. 901, 5 Cranch C. C. 518 [aff 13 Pet. 302, 10 L. ed. 172] (suggesting, although doubtfully, that under a power of attorney from several persons to sign a joint promissory note the attorney may make a joint and several promissory note, the purpose of the parties being to renew a joint and several note which had been discounted by plaintiff).

[a] **Authority to sign a person's name to a note as surety** does not confer authority to sign his name to a joint and several note as principal. Connor v. Uvalde Nat. Bank, (Tex. Civ. A.) 156 SW 1092.

61. Harris v. Johnston, 54 Minn. 177, 55 NW 970, 40 AmSR 312; U. S. Bank v. Beirne, 1 Gratt. (42 Va.) 234, 42 AmD 551; Odell v. Cormack, 19 Q. B. D. 223 [dist Kirk v. Blurton, 12 L. J. Exch. 117].

62. Union Bank v. Beirne, 1 Gratt. (42 Va.) 226.

63. Planters, etc., Bank v. King, 9 Ala. 279; Bird v. Doyal, 20 La. Ann. 541; Needles' Estate, 4 Pa. Dist. 762, 17 Pa. Co. 289; Hockaday v. Skeggs, 2 Phila. (Pa.) 268. Compare Union Bank v. Morgan, 2 La. Ann. 418.

[a] **Authority to receive notice of protest.**—A power of attorney appointing a person an agent "general and special" with full power "to make, indorse, draw, accept, and negotiate all promissory notes, bills of exchange, drafts, and other securities of any and every kind whatsoever. To issue letters of credit, to transact all banking business, to make all manner of renewals and indorsements of my name on all promissory notes, bills of exchange, drafts or other securities of any kind whatsoever, consequent or in any wise dependent upon such renewals, whether the same be payable to me, or to my said attorney, or to any other person or persons, or corporation, or company whatsoever. And generally to do all lawful acts and things whatsoever, concerning, or in any wise appertaining to the premises," with directions that the power was "to be taken and understood in its fullest and most comprehensive sense and construction," authorizes the agent to receive notice of protest of a note executed under the power. Wilcox v. Routh, 9 Sm. & M. (Miss.) 476.

64. King v. Sparks, 77 Ga. 285, 1 SE 266, 4 AmSR 85; Blackwell v. Ketcham, 53 Ind. 184; Nixon v. Palmer, 8 N. Y. 398; Morganton Bank v. Hay, 143 N. C. 326, 55 SE 811.

65. Morganton Bank v. Hay, 143 N. C. 326, 55 SE 811.

66. Adams v. Flanagan, 36 Vt. 400.

[a] **A power to renew a note** at sixty or ninety days will authorize the renewal of the note at eighty-eight days, there being no violation of the object and intention of the parties. State Bank v. Herbert, 15 S. C. L. 89.

67. New York Iron Mine v. Citizens' Bank, 44 Mich. 344, 6 NW 823 (holding that authority to draw sight and time drafts does not include authority to draw postdated drafts purporting to be payable at sight); Tate v. Evans, 7 Mo. 419 (holding that under authority to draw on the principal at four months the principal will not be bound by a draft dated back so as to be payable four months from the time the authority was given); Batty v. Carswell, 2 Johns. (N. Y.) 48.

[a] **A postdated draft purporting** to be payable at sight is for all the legal purposes of presentment, demand, protest, and payment a draft payable so long after date, but in order that authority to make time paper shall be held to cover postdated paper, their legal effect must not only be the same, but all their incidents so far identical that both may fairly be supposed to have been in mind when the authority was given. New York Iron Mine v. Citizens' Bank, 44 Mich. 344, 6 NW 823.

[b] **Authority to sign a renewal note,** to which the principal is a party, carries with it, in the absence of evidence of a contrary intent, authority to antedate the renewal note so that it will bear date when the other became due. Connor v. Uvalde Nat. Bank, (Tex. Civ. A.) 156 SW 1092.

68. U. S.—Parsons v. Arnor, 3 Pet. 413, 7 L. ed. 724.

Nebr.—Wilson v. Beardsley, 20 Nebr. 449, 30 NW 529 (holding that where an agent authorized in writing to draw on his principal for seventy-five dollars raised the figures to one hundred and seventy-five dollars, and thereby induced an innocent third party to indorse a draft on the principal for one hundred and fifty dollars which being protested for nonpayment was paid by the indorsee, the principal was liable to the latter only for seventy-five dollars).

N. Y.—Union Bank v. Mott, 39 Barb. 180 (holding that an agent authorized to draw and indorse checks for and in the name of his principal is not authorized to overdraw his bank account).

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ness of the principal and for his benefit.[69] The broadest possible authority to make and indorse paper presumptively is to be exercised in the principal's interest only, and does not impliedly extend to making or indorsing paper for the accommodation of third persons,[70] and still less for the agent himself. Accordingly, in the absence of a very clear showing of such authority, an agent has no power under the broadest terms in the letter of appointment to make or indorse negotiable paper for his own interest, in the name of his principal,[71] or for his own interest and that of the principal.[72] But it has been held that an agent authorized to make negotiable paper may bind his principal as to innocent holders, although he appropriates the avails to his own use, or although he exercises the power to the detriment and not to the benefit of the principal, as by an accommodation indorsement, for the agent has done just what his power authorized him to do.[73] The principal will not, however, be bound if the third person knew, or if the transaction showed upon its face, that the agent made the paper for his own use or for the accommodation of a third person, for these are acts that are not authorized, and on their face carry to the third person knowledge of that fact;[74] and if the paper is made payable to the agent himself it should put third persons on guard as to the agent's authority and the pur-

Tex.—Connor v. Uvalde Nat. Bank, (Civ. A.) 156 SW 1092, 1094 [cit Cyc].
Va.—Stovall v. Com., 84 Va. 246, 4 SE 379.

69. Ala.—Brantley v. Southern L. Ins. Co., 53 Ala. 554.
Ill.—Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 NE 136, 93 AmSR 113, 59 LRA 657.
Minn.—Humphrey v. Havens, 12 Minn. 298.
Mo.—German Nat. Bank v. Studley, 1 Mo. A. 260.
N. Y.—Stainer v. Tysen, 3 Hill 279; North River Bank v. Aymar, 3 Hill 262.
N. C.—Morganton Bank v. Hay, 143 N. C. 326, 55 SE 811.
Or.—Connell v. McLoughlin, 28 Or. 230, 42 P 218.
S. C.—Suckley v. Tunno, 3 S. C. L. 257.
Vt.—Holden v. Durant, 29 Vt. 184.
Va.—Stainback v. Commonwealth Bank, 11 Gratt. (52 Va.) 269 (holding that a power of attorney to draw, indorse, or accept bills, and to make and indorse notes, negotiable at a particular bank in the name of the principal, in the absence of anything to show a different intention, must be construed as giving authority to act only in the separate individual business of the principal).
W. Va.—Rohrbough v. U. S. Express Co., 50 W. Va. 148, 40 SE 393, 88 AmSR 849.
"Where the power exists, it is of course confined to the business of the agency, and does not authorize the making of paper for the benefit of the agent or the making of accommodation paper, and any contract so made will not be binding upon the principal, unless it may be he has in some way precluded himself from pleading the want or excess of authority or from otherwise repudiating the act of his agent." Morganton Bank v. Hay, 143 N. C. 326, 331, 55 SE 811.

70. Ala.—Wallace v. Mobile Branch Bank, 1 Ala. 565.
Fla.—Boord v. Strauss, 39 Fla. 381, 22 S 713 (holding that an agent having the general control and supervision over all the principal's lands and property, including choses in action, and authority to bring and conduct suits in relation thereto, is not authorized to execute in the name of his principal a note to secure the debt of a third person).
Ga.—Myers v. Walker, 104 Ga. 316, 30 SE 842 (holding that a general power authorizing the making of notes, and the drawing, accepting, and indorsing of drafts, does not authorize the agent to bind his principal by indorsing or issuing accommodation paper).
Mass.—Odiorne v. Maxcy, 13 Mass. 178.
Mo.—Whittaker v. Thomas, 3 Mo. A. 559.
N. J.—Camden Safe Deposit, etc., Co. v. Abbott, 44 N. J. L. 257; Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728.
Tenn.—Kingsley v. State Bank, 3 Yerg. 107.

71. U. S.—Park Hotel Co. v. St. Louis Fourth Nat. Bank, 86 Fed. 742, 30 CCA 409; Butcher v. Tyson, 4 F. Cas. No. 2,233.
Ky.—Mathis v. Taylorsville Bank, 105 SW 157, 32 KyL 200 (holding that a power of attorney authorizing the grantor's son to execute checks on a bank and a note in its favor does not authorize the son three years later to execute the grantor's notes to the bank to cover overdrafts arising on the son's individual account, opened after the power was executed, although a few months before one of the notes was made the son told the grantor he was yet signing notes under the power, and although the grantor knew of the condition of the son's account, the bank knowing of the son's insolvency when he opened his account).
La.—Citizens' Sav. Bank v. Hart, 32 La. Ann. 22; Charleston Bank v. Hagan, 2 La. Ann. 999 (holding that an indorsement for the benefit of the agent himself is good if it was included within the power).
N. Y.—Porges v. U. S. Mortgage, etc., Co., 203 N. Y. 181, 96 NE 424 [rev 135 App. Div. 484, 120 NYS 487]; Voltz v. Blackmar, 64 N. Y. 440, 646 (holding that a power of attorney to an agent authorizing him to sign and indorse checks, notes, etc., gives him no authority to draw the money of his principal from the bank without the principal's knowledge, in payment of a debt due to himself from the principal).
N. C.—Williamston Farmers', etc., Bank v. Germania L. Ins. Co., 150 N. C. 770, 64 SE 902; Morganton Bank v. Hay, 143 N. C. 326, 55 SE 811.
Pa.—Gill v. Hutchinson, 37 Leg. Int. 293.
Tenn.—Nichol v. Green, Peck 283.
Va.—Stainback v. Commonwealth Bank, 11 Gratt. (52 Va.) 269.
Ont.—Gore Bank v. Crooks, 26 U. C. Q. B. 251.
[a] **A power simply to sign the name of the principal to a mortgage** confers no authority on the agent to execute a promissory note in the name of his principal, and then to negotiate both the note and mortgage as collateral security for a loan to himself. Cones v. Neligh, 5 Nebr. 302.
[b] **Proof that agent was acting for own benefit.**—That the agent who was the drawer of the bill upon which he indorsed the name of his principal held the bill at the time it was discounted by the holder, and that the proceeds were passed to his credit, are of themselves full proof that the attorney was acting for his own benefit, and not that of his principal. Stainback v. Commonwealth Bank, 11 Gratt. (52 Va.) 269.

72. Stainback v. Read, 11 Gratt. (52 Va.) 281, 62 AmD 648.

73. Mass.—Bird v. Daggett, 97 Mass. 494.
Mich.—Howry v. Eppinger, 34 Mich. 29.
Mo.—Edwards v. Thomas, 66 Mo. 468.
Nebr.—Harrison Nat. Bank v. Austin, 65 Nebr. 632, 91 NW 540, 101 AmSR 639, 59 LRA 294; Faulkner v. Simms, 89 NW 171; Thompson v. Shelton, 49 Nebr. 644, 68 NW 1055; Johnston v. Milwaukee, etc., Inv. Co., 46 Nebr. 480, 64 NW 1100; Lebanon Sav. Bank v. Blanke, 2 Nebr. (Unoff.) 403, 89 NW 169; Harrison Nat. Bank v. Williams, 2 Nebr. (Unoff.) 400, 89 NW 245.
N. Y.—Westfield Bank v. Cornen, 37 N. Y. 320, 93 AmD 573. See also New York Bank v. Ohio Bank, 29 N. Y. 619.
R. I.—Brown v. William Clark Co., 22 R. I. 36, 46 A 239.
Vt.—Cross v. Haskins, 13 Vt. 536.
[a] **Authority to sign checks for the use of a company** imposes no affirmative duty upon the bank to inquire into the purposes of the check, or the use to which the money is to be put if the bank pays the check in good faith, having no notice of the agent's fraudulent purposes. Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank, 97 Fed. 181, 38 CCA 108.

74. U. S.—Baltimore Cent. Nat. Bank v. Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693.
Del.—Maher v. Moore, 42 A 721.
Ga.—Carter v. Pembroke Nat. Bank, 11 Ga. A. 479, 75 SE 824.
Miss.—Planters' Bank v. Cameron, 11 Miss. 609.
N. J.—Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728.
N. Y.—Gerard v. McCormick, 130 N. Y. 261, 29 NE 115, 14 LRA 234 [aff 16 Daly 40, 8 NYS 860]; Wright v. Cabot, 89 N. Y. 570; Ford v. Union Nat. Bank, 88 N. Y. 672; Burlingame v. Ætna Ins. Co., 36 App. Div. 358, 55 NYS 287 (holding that an insurance company is not liable on a note executed by its agent, in its name, without its authority, to obtain money which the lender knows the agent wants on his own account to pay a shortage in premiums due the company); Huie v. Allen, 87 Hun 516, 34 NYS 577 [aff 156 N. Y. 658 mem, 50 NE 1118 mem] (holding that a broker is chargeable with notice that the manager of a branch office of a manufacturing establishment is not acting within the scope of his authority in signing checks against his principal's account to pay his own personal losses sustained in speculating in wheat); Jacoby v. Payson, 85 Hun 367, 32 NYS 1032 (holding that a person who receives a check from an agent in favor of the principal and indorsed in the principal's name by the agent has notice that the agent has no authority to use the check in payment of his individual debts).
W. Va.—Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 SE 880 (holding that a negotiable note in the hands of an agent, indorsed in blank by the principal, cannot be regarded by a stranger having notice of the agency as prima facie proof of title in the agent, and a power of attorney conferring on the agent all authority incident to ownership, but he may deal with the agent as such, and rely on the note as conferring authority to sell it and receive payment on behalf of the principal).
N. S.—Union Bank v. Eureka Woolen Mfg. Co., 33 N. S. 302.
But compare Hambro v. Burnand, [1904] 2 K. B. 10 [rev [1913] 2 K.

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poses for which he is using his principal's credit.[75]

[§ 286] **(e) Power to Renew.** If the agent's authority is merely to make bills, notes, or bonds he cannot renew them,[76] unless the authority includes power to renew, in which case it extends only to renewals of the original notes and not to notes given later for other purposes, or for the same purpose but with changes affecting the liability of the principal,[77] although the power is continuing as to repeated renewals of the original note.[78]

[§ 287] **f. To Manage Principal's Business or Property—(1) In General.** A general agent for the management of the business or property of his principal has an authority coextensive in scope with the business intrusted to him, that is, he has implied authority to do in the business or with the property, what is usual and customary to do in the business or with property of the same kind in the same locality;[79] and in determining whether an act is within the scope of such an agent's authority due consideration is to be given to such matters as the character of the business, the manner in which it is usual to carry on such a business, and the manner in which the particular business has previously been conducted.[80] It will be sufficient to bind the principal for acts or contracts by the agent that they were reasonably necessary to keep the property in good repair, or the business a going concern, or to protect the interests confided to the management of the agent;[81] and when the principal leaves the agent

B. 399]; Bank of Bengal v. Macleod, 5 Moore Indian App. 1, 18 Reprint 795, 7 Moore P. C. 35, 13 Reprint 792.

75. New York Iron Mine v. Negaunee First Nat. Bank, 39 Mich. 644 (holding that where an agent makes negotiable paper in the name of his principal payable to himself, the fact that thus on the face of the paper he appears to be acting in two capacities, one of which may be antagonistic to the other, imposes on the person taking the paper the obligation of special care in inquiring into its authority); Eldridge v. Husted, 24 Misc. 197, 52 NYS 681 [rev 22 Misc. 534, 49 NYS 1019].

[a] **But a cashier's check** used by the cashier for his own purposes is no notice, since it is part of his usual employment to draw such checks. Goshen Nat. Bank v. State, 141 N. Y. 379, 36 NE 316.

76. Ward v. Commonwealth Bank, 7 T. B. Mon. (Ky.) 93; Stock Exch. Bank v. Williamson, 6 Okl. 348, 50 P 93. See also Stuart v. Com., 91 Va. 152, 21 SE 246. Compare McClure v. Corydon Deposit Bank, 106 SW 1177, 32 KyL 772 (holding that, where a testatrix signed a note as surety and subsequently signed various renewal notes, and afterward, and before her death, her son signed another renewal note in her name as her attorney in fact, under a power of attorney giving him the right to execute all papers for her and in her name which she could execute relating to her personal business, the note was binding on her estate).

77. Crutcher v. Commonwealth Bank, 4 Litt. (Ky.) 436 (holding that a power of attorney, authorizing the attorney to sign the names of the indorsers for the renewal of an accommodation note, will not justify changing the order of the indorsers so as to subject them to greater responsibilities than they were subjected to on the original note); State Bank v. McWillie, 15 S. C. L. 488; State Bank v. Herbert, 15 S. C. L. 89 (holding that a power to renew notes payable at sixty or ninety days includes a power to renew a note at eighty-eight days); Hortons v. Townes, 6 Leigh (33 Va.) 47.

78. Washington Bank v. Peirson, 2 F. Cas. No. 953, 2 Cranch C. C. 685.

79. Ala.—Simpson v. Harris, 174 Ala. 430, 56 S 968 (holding that the general manager of the business in Alabama of nonresidents, who, while doing a constant business of buying and selling lumber, visit the place of business only once every thirty or sixty days, has authority to contract for the cutting and sawing of timber into lumber, in the absence of limitations on his authority, known to the person dealing with him, under the rule that a general agent is employed to transact all the business of his principal, with powers prima facie coextensive with the business, which cannot be limited by secret instructions); Louisville Coffin Co. v. Stokes, 78 Ala. 372.

Ind.—American Quarries Co. v. Lay, 27 Ind. A. 386, 73 NE 608.

Ky.—Hille v. Adair, 58 SW 697, 22 KyL 742.

Mich.—Shipman v. Byles, 65 Mich. 690, 32 NW 898.

Minn.—Swanson v. Andrus, 84 Minn. 168, 87 NW 863, 88 NE 252 (holding that, in an action to recover money expended in preparing to perform a contract for fireproofing a building, evidence that certain agents for defendant had the management of the building under defendant's direction, including the rebuilding, and that such agents telegraphed and wrote defendant as to whether he desired the building fireproofed at a certain cost, to which he replied in the affirmative, is sufficient to show that such agents had authority to enter into the contract).

Mo.—Butts v. Ajax-Grieb Rubber Co., 169 Mo. A. 657, 155 SW 837; Badger Lumber Co. v. Ballentine, 54 Mo. A. 172.

N. Y.—Schultheis v. Caughey, 146 App. Div. 102, 130 NYS 373 (holding that the general manager of a stock brokerage firm in charge of a branch was authorized to receive a protest by a customer such as prevented an account from becoming stated); Bridenbecker v. Lowell, 32 Barb. 9; Standard Fertilizer Co. v. Van Valkenburgh, 21 Misc. 559, 47 NYS 703 (holding that an agent of a manufacturing company, authorized to appoint local agents for the sale of the company's products, to allow such local agents to sell on credit and to superintend their acts, has apparent authority to allow an agent appointed by him to use the company's products in his own business, so that such use will not constitute a conversion).

Pa.—Duncan v. Hartman, 143 Pa. 595, 22 A 1099, 24 AmSR 570; Baltimore, etc., Steamboat Co. v. Brown, 54 Pa. 77.

Tenn.—Bailey v. Rawley, 1 Swan 295.

Tex.—McKaughan v. Baldwin, (Civ. A.) 153 SW 660.

Vt.—Frost v. North British, etc., Ins. Co., 77 Vt. 407, 60 A 803.

Wis.—Ames v. D. J. Murray Mfg. Co., 114 Wis. 85, 89 NW 836; Shepherd v. Milwaukee Gas Light Co., 11 Wis. 234.

[a] **A general agent in charge of lands** may make an entry on lands for his principal. Richards v. Folsom, 11 Me. 70.

[b] **To compromise disputed claims.**—An agent to manage a business may pay a disputed claim, although probably not enforceable by suit, but resting only on a moral obligation. Bergenthal v. Fiebrantz, 48 Wis. 435, 4 NW 89. See generally infra §§ 298, 299.

[c] **Proof of loss by fire.**—In case of loss by fire a managing agent may make proof of loss and sue upon the policy. German F. Ins. Co. v. Grunert, 112 Ill. 68, 1 NE 113.

[d] **Drainage contract.**—The manager of a mining company has authority to contract for the drainage of the mine, when necessary to the continuance of the work. Fisk Min., etc., Co. v. Reed, 32 Colo. 506, 77 P 240.

[e] **Agent protected.**—Where a power of attorney authorizes the attorney to manage the business of the principal with full power and authority in the premises, and the principal leaves the attorney in complete control of his business, with directions to continue and carry on the same during the principal's absence, the attorney can make and meet business engagements, and, there being no fraud or mismanagement on his part, he should be protected for acts done in good faith and without knowledge of the revocation of his authority. Reid v. Bank of New York Nat. Banking Assoc., 47 HowPr (N. Y.) 358.

80. Collins v. Cooper, 65 Tex. 460; Mauk v. Lee, 66 Wash. 184, 119 P 185 (holding that a power of attorney which, after appointing the attorney for the transaction of business of a firm to which the principal belonged, and mentioning what business of the firm was to be performed, recited that the appointee was to be the personal representative of the principal in any and all matters with reference to the firm or its business, "or any matters that might arise during my absence demanding my personal attention," construed in connection with the dealing by plaintiff with the appointee as agent with reference to a contract of sale of land by the principal to plaintiff, except in a single instance when the appointee referred plaintiff to a firm of attorneys, does not limit the agent's authority to matters connected with transactions of the firm referred to, but authorizes him to deal with the personal business of the principal).

81. U. S.—Sun Printing, etc., Assoc. v. Moore, 183 U. S. 642, 22 SCt 240, 46 L. ed. 366.

Ala.—Rhodes Furniture Co. v. Weeden, 108 Ala. 252, 19 S 318.

Ark.—Montgomery v. Arkansas Cold Storage, etc., Co., 93 Ark. 191, 124 SW 768 (holding that where a manager of a cold storage place, who is clothed with power to execute contracts, contracted with defendant to store apples, he is a general agent, and in entering into such contract he stands in the place of his principal, and the principal cannot deny defendant the privileges held out to him by the manager as an inducement to enter into the contract); Grubbs v. Nixon, 93 Ark. 79, 123 SW 785, 137 AmSR 78 (where the manager of a mercantile business was authorized to allow the principal's debt as a set-off).

Cal.—Goss v. Helbing, 77 Cal. 190, 19 P 277.

Ga.—Baldwin v. Garrett, 111 Ga. 876, 36 SE 966.

Ind.—American Tel., etc., Co. v. Green, 164 Ind. 349, 73 NE 707.

Ky.—Chiles v. Stephens, 3 A. K. Marsh. 340.

Mass.—Cummings v. Sargent, 9 Metc. 172 (holding that one engaged to keep a tavern, and to transact all business pertaining to said tavern which in his judgment might promote

as his sole representative in doing the business, third persons are justified in relying on his acts as to matters that would naturally devolve on the principal in such a business.[82] One who is put in the place of a general manager is thereby clothed with his powers.[83]

Applications of rule. Thus a general agent for the management of a business or property has been held to have authority to modify contracts,[84] waive liens,[85] make representations as to the financial standing of his principal,[86] or as to the nature of property under his charge,[87] contract for advertising,[88] rent property required for use in the business,[89] make repairs necessary to preserve the property,[90] lease the property,[91] and employ labor necessary to carry on the business.[92]

[§ 288] **(2) Limits of Authority.** Such agent's authority is limited, as is that of any other agent, to the management and transaction of the business under his control, and, however broad the terms of his authority, he cannot bind his principal by the performance of any act beyond the ordinary needs of his principal's business, or in other words, beyond the apparent and ostensible scope of his authority.[93] Thus an agent to manage a business or

the owner's interest, is authorized to purchase spirituous liquors, wine, and sugar on the credit of the owners to be used at the bar of the tavern).

Mo.—Hill v. Seneca Bank, 100 Mo. A. 230, 73 SW 307; Rosenthal v. St. Louis, etc., R. Co., 40 Mo. A. 579.

N. Y.—Wennerstrom v. Kelly, 7 Misc. 173, 27 NYS 326. See also Krasnow v. Singer Mfg. Co., 115 App. Div. 59, 100 NYS 591.

Oh.—Furnace Run Saw Mill, etc., Co. v. Heller Bros. Co., 84 Oh. St. 201, 95 NE 771 (holding that an instrument executed by an embarrassed debtor and his creditors, placing his business in the hands of a trustee to complete his unfinished contracts, authorizes the person named as trustee to bind the creditors for purchases made in completing the contracts).

Pa.—Short v. Delaware, etc., Co., 41 Pa. Super. 141 (holding that a railroad station agent may contract for the redisposal of perishable fruit, which the consignee refuses to accept).

Eng.—Richardson v. Cartwright, 1 C. & K. 328, 47 ECL 328.

[a] **A managing editor** of a newspaper with full authority in the matter of collecting news was held to have authority to bind the company by a contract for the charter of a yacht to be used in gathering news in Cuban waters during the war with Spain and to bind the company by an absolute agreement to return the yacht. Sun Printing, etc., Assoc. v. Moore, 183 U. S. 642, 22 SCt 240, 46 L. ed. 366.

[b] **Renting telephone.**—The "general manager" of a retail drug store has authority to bind his principal by a contract for the renting of a telephone for the store. New York Tel. Co. v. Barnes, 85 NYS 327.

[c] **The clerk of an inn** is the authorized representative of the innkeepers, and his agreement to forward mail of a guest is binding on the innkeeper. Baehr v. Downey, 133 Mich. 163, 94 NW 750, 103 AmSR 444.

82. Byxbee v. Blake, 74 Conn. 607, 51 A 535, 57 LRA 222; Van Santvoord v. Smith, 79 Minn. 316, 82 NW 642; New York Tel. Co. v. Barnes, 85 NYS 327; Graton, etc., Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 P 879.

83. Citizens' Trust, etc., Co. v. Zane, 113 Fed. 596 [aff 117 Fed. 814, 55 CCA 38].

[a] **Where a servant was employed to perform the duties of a manager** or assistant manager in the conduct of defendant's mill, evidence that he refused to let plaintiff have more than one thousand pounds of meal under the contract with defendant calling for a delivery of a larger amount is not objectionable on the ground that he was not authorized to so act for defendant, and was referred to as a bookkeeper merely. Fitzgerald Cotton Oil Co. v. Farmers Supply Co., 3 Ga. A. 212, 59 SE 713.

84. Van Santvoord v. Smith, 79 Minn. 316, 82 NW 642; Burley v. Hitt, 54 Mo. A. 272; Ireland v. Hyde, 34 Misc. 546, 69 NYS 889. See generally infra § 289. Compare George v. Ross, 128 Ala. 666, 29 S 651 (holding that a manager of a carriage business did not have authority to agree to the reformation of a loan contract).

85. Hughes v. Lansing, 34 Or. 118, 55 P 95, 75 AmSR 574.

86. Morris v. Posner, 111 Iowa 335, 82 NW 755.

87. Waters Pierce Oil Co. v. Davis, 24 Tex. Civ. A. 508, 60 SW 453.

88. B. S. Green Co. v. Blodgett, 55 Ill. A. 556.

[a] **One in charge of a hotel** and having the management thereof has authority to bind his principal by a contract for advertising for the hotel. Calhoon v. Buhre, 75 N. J. L. 439, 67 A 1068; Mullin v. Sire, 34 Misc. 540, 69 NYS 953; H. W. Kastor, etc., Adv. Co. v. Coleman, 11 Ont. L. 262, 6 OntWR 791.

89. See infra § 290.

90. Beckman v. Wilson, 61 Cal. 335.

[a] **Repairing.**—(1) An agent authorized to pay for repairs on a house out of the rents and also recognized as "agent for the house" has authority to contract for repairs. Scofield v. Warren, 13 Misc. 209, 34 NYS 175. (2) But the caretaker of a house has no authority to contract for unnecessary repairs. Hill v. Coates, 34 Misc. 535, 69 NYS 964.

[b] **Mechanic's lien for repairs.**—A power of attorney, given by a married woman to an agent, authorizing him to take general charge of certain property, to make necessary repairs, and to use such sums out of the rents "as may be necessary to pay off the cost of such repairs," authorizes the making of a contract for repairs, under which a mechanic's lien may be claimed. Wright v. Blackwood, 57 Tex. 644.

91. See infra § 290.

92. Forked Deer Pants Co. v. Shipley, 80 SW 476, 25 KyL 2299; Laming v. Peters Shoe Co., 71 Mo. A. 646. See generally infra §§ 306, 307.

[a] **A general manager of a mill** has authority to employ a foreman and to agree to take the risk of the foreman's competency. Roche v. Pennington, 90 Wis. 107, 62 NW 946.

[b] **Limitation of authority not known to employee.**—A general manager of a corporation whose contract provided that his actions were to be in all things under the direction and control of the board of directors was held to have authority to hire an employee for a year where such employee was without knowledge of any restrictions upon his presumptive powers. Stahlberger v. New Hartford Leather Co., 92 Hun 245, 36 NYS 708.

[c] **An arrangement with an agent that he is to do all the work** in the management of a branch office and employ all necessary help will not relieve the principal from paying for services rendered by a person who has no knowledge of the arrangement with the agent. Kruse v. Seiffert, etc., Lumber Co., 108 Iowa 352, 79 NW 118.

93. U. S.—Johnson R. Signal Co. v. Union Switch, etc., Co., 51 Fed. 85, 59 Fed. 20 [aff 61 Fed. 940, 10 CCA 176].

Ala.—Dunn v. Gunn, 149 Ala. 583, 42 S 686; Dearing v. Lightfoot, 16 Ala. 28.

Colo.—Hathaway v. Choury, 14 Colo. A. 478, 60 P 574 (holding that, where a nonresident who had loans outstanding in the state gave a power of attorney to an agent to take charge of all papers relating thereto, receipt for money paid, and release securities, the agent had no authority to schedule such loans for taxation).

Ga.—Claflin v. Continental Jersey Works, 85 Ga. 27, 11 SE 721.

Ill.—McClun v. McClun, 176 Ill. 376, 52 NE 928 (holding that a power of attorney to care for and conserve the principal's property interests, although broad and general in terms, does not authorize the agent to deliver deeds executed by his principal, intending that they should take effect only as a testamentary disposition of his property); Blair v. National Shirt, etc., Co., 137 Ill. A. 413.

Ind.—Metzger v. Huntington, 139 Ind. 501, 37 NE 1084, 39 NE 235.

Me.—Holmes v. Morse, 50 Me. 102; Weston v. Alley, 49 Me. 94; Hazeltine v. Miller, 44 Me. 177.

Md.—Hawley Down-Draft Furnace Co. v. Hooper, 90 Md. 390, 45 A 456.

Mo.—Ridgeley Nat. Bank v. Barse Live Stock Commn. Co., 113 Mo. A. 696, 88 SW 1124.

Nev.—Travers v. Barrett, 30 Nev. 402, 97 P 126.

N. J.—Brockway v. Mullin, 46 N. J. L. 448, 50 AmR 442; Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728.

N. Y.—Holloway v. Stephens, 2 Thomps. & C. 562; Rossiter v. Rossiter, 8 Wend. 494, 24 AmD 62.

N. C.—Stephens v. Roper Lumber Co., 160 N. C. 107, 75 SE 933, 41 LRANS 1141 and note.

Tex.—Manhattan Liquor Co. v. German Nat. Bank, (Civ. A.) 94 SW 1120.

Wash.—Gregory v. Loose, 19 Wash. 599, 54 P 33.

[a] **A manager of a hotel** cannot bind the proprietor by a contract with an electric light company to remove the old lighting apparatus and fixtures and replace them with new. Fisk v. Greeley Electric Light Co., 3 Colo. A. 319, 33 P 70.

[b] **An agent to manage a plantation** or farm (1) cannot contract an account on the credit of his principal (Meyer v. Baldwin, 52 Miss. 263), (2) or bind his principal for the purchase of goods for the laborers on the farm (Carter v. Burnham, 31 Ark. 212).

[c] **Forming partnership.**—(1) An authority to act as an agent confers no authority to form a partnership in the name of the principal with a third person. McIntosh v. Kelly, 31 La. Ann. 649; Wright v. Boynton, 37 N. H. 9, 72 AmD 319. (2) Thus authority to an agent to enter into possession of, control, sell, and assign plaintiff's real estate does not empower the agent to enter into a copartnership for plaintiff. Guy v. Rosewater, 18 Colo. A. 1, 69 P 271.

[d] **Authority to arrest customer.**—The manager of a department in an ordinary business establishment has no implied authority to arrest and search a person suspected by him of stealing goods. Bernheimer v. Becker, 102 Md. 250, 62 A 526, 111 AmSR 356, 3 LRANS 221. Compare Dupre v. Childs, 52 App. Div. 306, 65 NYS

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property cannot sell or dispose of it,[94] make permanent improvements, additions, or alterations,[95] or grant any easements or licenses or impose other burdens upon his principal's property.[96] Nor has such an agent implied power, unless it is necessary to the performance of his agency, to purchase property,[97] to borrow money,[98] to execute or indorse negotiable instruments,[99] to engage his principal in new and different enterprises,[1] or to run the business on the agent's own account.[2] A managing agent ordinarily cannot bind his principal as surety for third persons.[3]

[§ 289] **g. To Rescind or Modify Contracts.**[4] Presumptively an agent is employed to make contracts, not to rescind or modify them, to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up rights or interests for his principal,[5] or to increase his obligations and

179 [aff 169 N. Y. 585 mem, 62 NE 1095 mem] (holding that the proprietors of a restaurant were responsible for the act of their general manager in arresting a man whom the manager supposed was attempting to evade the payment of his bill, where the man, contrary to a rule of the restaurant of which he had no knowledge, had left the restaurant before being served and without stopping at the cashier's desk).

[e] **Employing detectives.**—A power authorizing the attorney in fact generally to manage and control the principal's business and to perform certain enumerated acts in connection with that business does not authorize him to employ detectives to investigate the affairs of a corporation in which the principal is a stockholder. Thiel Detective Service Co. v. McClure, 142 Fed. 952, 74 CCA 122, 4 LRANS 843 and note.

[f] **Purchasing machinery.**—The manager of the milling establishment of a mining corporation has no implied authority to bind the company by the purchase of machinery, for instance, mills. Victoria Gold Min Co. v. Fraser, 2 Colo. A. 14, 29 P 667. To same effect Trent v. Sherlock, 26 Mont. 85, 66 P 700.

94. Ark.—Ft. Smith Wagon Co. v. Baker, 84 Ark. 444, 105 SW 591.

Colo.—Vescelius v. Martin, 11 Colo. 391, 18 P 338; Barry v. Hart, 1 Colo. 246.

Iowa.—Holbrook v. Oberne, 56 Iowa 324, 9 NW 291 (holding that an agent to purchase hides, to superintend their manufacture into leather, and generally to manage the tanning business, cannot sell hides purchased for use at the tannery).

Miss.—Gilchrist v. Pearson, 70 Miss. 351, 12 S 333.

Mo.—Henson v. Keet, etc., Mercantile Co., 48 Mo. A. 214.

Tex.—Hurlbut v. Gainor, 45 Tex. Civ. A. 588, 103 SW 409.

Ont.—In re Briton Medical, etc., L. Assoc., 11 Ont. 478.

See also supra § 229.

[a] **Authority to take care of personal property** will not authorize an agent to agree with a third person to purchase it at a sale under a distress warrant. Brisbane v. Adams, 3 N. Y. 129.

[b] **A manager of a farm or plantation** (1) may not dispose of the crops, but if he does so the principal must notify the purchaser, as soon as he is informed of the fact, that he repudiates the act of the agent. Ball v. Bender, 22 La. Ann. 493. (2) Where a creditor attaches certain lands and the grass growing thereon, the agent of the debtor for the management of the farm has no authority to give the attaching creditor leave to cut and gather the grass and sell it on execution in such suit. Benjamin v. Benjamin, 15 Conn. 347, 39 AmD 384. (3) But a power of attorney sufficiently comprehensive to authorize the agent to manage a plantation and disburse the proceeds of the crops will justify the factor who sells the crops to pay out their proceeds on the orders of the agent. Sentell v. Kennedy, 29 La. Ann. 679.

[c] **Cannot surrender stock in trade.**—Where a power of attorney expressly states the object of the delegation of authority to be a continuation of the business of the principal during his absence, the agent cannot, under the guise of making payments to creditors whose demands have not yet matured, surrender a large part of the stock in trade, inasmuch as such a surrender would be foreign to the object of the power, against the interests of the business, and in excess of the agent's authority. Claflin v. Continental Jersey Wks., 85 Ga. 27, 11 SE 721. See also Conner v. Littlefield, 79 Tex. 76, 15 SW 217.

95. Ala.—Dunn v. Gunn, 149 Ala. 583, 42 S 686 (holding that the superintendent of lime works has no implied authority to construct a ditch across a road running through his principal's property).

Ark.—Halbut v. Forrest City, 34 Ark. 246.

Iowa.—Harvey v. Mason City, etc., R. Co., 129 Iowa 465, 105 NW 958, 113 AmSR 483, 3 LRANS 973 (holding that an agent, having authority to lease the land of his principal and look after the latter's interests in a general way, has no implied authority to construct on his principal's land a ditch for the purpose of draining water from the agent's adjoining land).

Kan.—Peddicord v. Berk, 74 Kan. 236, 86 P 465.

Me.—Holmes v. Morse, 50 Me. 102.

N. Y.—Bowen v. Rathbun, 61 App. Div. 614, 70 NYS 342; Hill v. Coates, 34 Misc. 535, 69 NYS 964.

96. American Tel., etc., Co. v. Jones, 78 Ill. A. 372; Lawrence v. Springer, 49 N. J. Eq. 289, 24 A 933, 31 AmSR 702 (holding that an agent has no authority to impose on the land an easement by granting the right to drain adjoining land by carrying off water through sluices on the same); McKillip v. McIlhenny, 2 Watts (Pa.) 466.

[a] **The general manager of a mining company** is not, by virtue of his office, authorized to convey its lands or to grant an easement or give a license therein. Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co., 21 Mont. 539, 55 P 112.

97. See supra § 224.

98. See infra § 304.

99. See supra §§ 280, 281.

1. Campbell v. Hastings, 29 Ark. 512; Hazeltine v. Miller, 44 Me. 177; Manhattan Liquor Co. v. German Nat. Bank, (Tex. Civ. A.) 94 SW 1120.

2. Kean v. Landrum, 72 S. C. 556, 52 SE 421 (holding that a power of attorney given by plaintiff, authorizing another "to make contracts to conduct farming and mill operations for me," creates an agency in that other to run the mill for plaintiff, and does not authorize that other to run it on his own account).

3. Ark.—Clayton v. Martin, 31 Ark. 217.

Ill.—Doan v. Duncan, 18 Ill. 96.

Mich.—Ruppe v. Edwards, 52 Mich. 411, 18 NW 193; New York Iron Mine v. Negaunee First Nat. Bank, 39 Mich. 644.

Miss.—Meyer v. Baldwin, 52 Miss. 262.

Can.—Poirier v. Jobin, 12 RevLeg 64.

See generally infra § 313.

[a] **A manager of a hotel** cannot bind his principal for the safe-keeping and return of carriages furnished guests of the hotel by a livery stable keeper. State v. Mullin, 46 N. J. L. 448, 50 AmR 442.

4. **Authority of collecting agent** to modify terms see supra § 265.

Authority of managing agent to modify contract see supra § 287.

Authority of purchasing agent to rescind or modify contract see supra § 225.

Authority of selling agent to rescind or modify sale see supra §§ 242, 243, 252.

5. U. S.—Ye Seng Co. v. Corbitt, 9 Fed. 423, 7 Sawy. 368 (holding that the law will not imply the greater authority from the lesser; the power to abrogate from the power to fulfill or carry out).

Ala.—Johnson v. Wilson, 137 Ala. 468, 34 S 392, 97 AmSR 52.

Ark.—Welch v. McKenzie, 66 Ark. 251, 50 SW 505.

Colo.—Hathaway v. Choury, 14 Colo. A. 478, 60 P 574; Torbit v. Heath, 11 Colo. A. 492, 53 P 615.

Conn.—Woodruff v. Noyes, 15 Conn. 335.

Ill.—Fuller v. Samuels, 137 Ill. A. 536; Halladay v. Underwood, 90 Ill. A. 130.

Kan.—Sweedlund v. Hutchinson, 47 P. 163.

La.—Hill v. Barlaw, 6 Rob. 142.

Md.—Sumwalt Ice, etc., Co. v. Knickerbocker Ice Co., 112 Md. 437, 77 A 56.

Mass.—Paige v. Stone, 10 Metc. 160, 43 AmD 420.

Mo.—Knoche v. Whiteman, 86 Mo. A. 568.

Mont.—Blake v. Dick, 15 Mont. 236, 38 P 1072, 48 AmSR 671.

N. Y.—Barron v. Brooklyn Heights R. Co., 150 App. Div. 845, 135 NYS 323; Lamkin v. Rosenthal, 5 App. Div. 532, 39 NYS 483; Mayor v. Dean, 54 N. Y. Super. 315 [rev on other grounds 115 N. Y. 556, 22 NE 261, 5 LRA 540]; Von Wein v. Scottish Union, etc., Ins. Co., 52 N. Y. Super. 490; Dunham v. Pettee, 4 E. D. Smith 500 [rev on other grounds 8 N. Y. 508]; Metropolitan Aluminum Mfg. Co. v. Lau, 61 Misc. 105, 112 NYS 1059.

Pa.—Johnstown, etc., R. Co. v. Egbert, 152 Pa. 53, 25 A 151.

S. C.—Maybank v. Rogers, 82 SE 422; Guess v. South Bound R. Co., 40 S. C. 450, 19 SE 68.

Wash.—Sweeney v. Ætna Indemn. Co., 34 Wash. 126, 74 P 1057.

Wis.—Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 NW 1099.

Can.—Atlas Assur. Co. v. Brownell, 29 Can. S. C. 537; Torrop v. Imperial F. Ins. Co., 26 Can. S. C. 585.

[a] **Authority to accept performance** of a contract does not imply authority to add to or alter the contract. Carson v. Mitchell, 41 Ill. A. 243. See also Watts v. Metcalf, 66 SW 824, 23 KyL 2189.

[b] **Authority to perform a contract** confers no power to change it. Owen v. Sell, 13 Misc. 272, 34 NYS 176.

[c] **A special agent, after the close of his agency,** has no express authority to change, modify, or rescind a contract made by his principal. Greening v. Steele, 122 Mo. 287, 26 SW 971.

[d] **Supervising agent.**—An agent of a lumber company with authority to supervise work being done by a dredging company does not have authority to modify the written contract under which the dredging company is working for the lumber company. Rowland Lumber Co. v. Ross, 100 Va. 275, 40 SE 922.

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liabilities for the mere benefit of third persons,[6] unless the principal knows or approves of such modifications by the agent.[7] Thus an agent has no implied authority to extend the time for the performance of a contract,[8] except where it is clearly within the scope of his agency.[9] However, a general agent may act under such broad power to contract in his own name, or to make terms or to settle within his own discretion, as to overcome this presumption and bind the principal by a modification, rescission, or release,[10] and a principal cannot object to a contract made by his agent upon the plea that he has departed from his instructions where the agent has followed the power in all material points, or where his only departure consists in the use of different phrases having the same legal effect, or perhaps providing a contract more favorable to the principal.[11]

[§ 290] **h. To Lease or Rent—(1) In General.**[12] Authority to lease real estate may be given expressly,[13] or it may be inferred from a general authority to manage the real estate.[14] But authority to lease is not to be inferred from a power to sell or exchange, unless accompanied with further rights or powers in the agent;[15] nor is it to be inferred from a mere power to collect rents[16] or to procure a tenant for the landlord.[17] One in general charge of a business which requires the use of buildings or premises for the conduct of the business of his principal has implied power to rent them.[18] Authority to rent may also be implied from a power to

6. Leafgreen v. Yablonsky, 178 Ill. A. 19 (holding that a superintendent of a building has no implied authority to make an indorsement on the contract allowing the contractor extra pay for additional work); King v. Rogers, 1 Ont. L. 69.

7. Western Granite, etc., Co. v. Souc, 110 Cal. 431, 42 P 913.

8. Ala.—Powell v. Henry, 96 Ala. 412, 11 S 311.

Ill.—Gerrish v. Maher, 70 Ill. 470; Lawrence v. Johnson, 64 Ill. 351.

La.—Chappel v. Raymond, 20 La. Ann. 277; Millaudon v. McMicken, 7 Mart. N. S. 34.

Minn.—Woodbury v. Larned, 5 Minn. 339.

N. Y.—Hutchings v. Munger, 41 N. Y. 155; Creuse v. Defiganiere, 23 N. Y. Super. 122; Ritch v. Smith, 60 HowPr 13 [aff 82 N. Y. 627, 60 HowPr 157].

Okl.—Federal Trust Co. v. Coyle, 34 Okl. 635, 126 P 800.

S. D.—Karcher v. Gans, 13 S. D. 383, 83 NW 431, 79 AmSR 893.

Can.—Atlas Assur. Co. v. Brownell, 29 Can. S. C. 537 [foll Commercial Union Assur. Co. v. Margeson, 29 Can. S. C. 601].

9. Hurd v. Marple, 2 Ill. A. 402, 10 Ill. A. 418; Kane v. Cortesy, 100 N. Y. 132, 2 NE 874 (holding that, where a mortgage is placed in the hands of an agent with directions to obtain a chattel mortgage as collateral security, and no restrictions are placed upon his authority, he may bind his principal by an agreement to extend the time for payment if the chattel mortgage is given; and certainly the principal cannot repudiate the agreement to extend after having taken and foreclosed the chattel mortgage); Bannon v. Aultman, 80 Wis. 307, 49 NW 967, 27 AmSR 37 (holding that an agent of a threshing machine company, empowered to sell machines generally in a given territory, has implied authority, on the purchaser's refusal to accept a machine under the written contract of sale, verbally to extend the time provided in the contract for testing the machine).

10. Ark.—Brown v. Brown, 96 Ark. 456, 132 SW 220.

Cal.—Ricketson v. Richardson, 19 Cal. 330.

Ind.—Cole Carriage Co. v. Hacker, 45 Ind. A. 368, 90 NE 923.

Iowa.—Fishbaugh v. Spunaugle, 118 Iowa 337, 92 NW 58; Blaess v. Nichols, etc., Co., 115 Iowa 373, 88 NW 829; Peterson v. Walter A. Wood Mowing, etc., Mach. Co., 97 Iowa 148, 66 NW 96, 59 AmSR 399; Osborne v. Backer, 81 Iowa 375, 47 NW 70.

La.—Cockerham v. Perot, 48 La. Ann. 209, 19 S 122.

Mass.—Gross v. Milligan, 176 Mass. 566, 58 NE 471.

Minn.—Van Santvoord v. Smith, 79 Minn. 316, 82 NW 642; Schumacher v. Pabst Brewing Co., 78 Minn. 50, 80 NW 838.

Or.—Hughes v. Lansing, 34 Or. 118, 55 P. 95, 75 AmSR 574.

Tenn.—Kuhlman v. E. J. Hart Co., (Ch. A.) 59 SW 455.

Vt.—Sprague v. Train, 34 Vt. 150.

[a] **A general contracting agent,** having a general supervision of his principal's business in a particular territory, whose authority with respect thereto is not limited or restricted, may consent to a change and modification of a contract made by him with a third person, if such change or modification is in the line of the principal's business. Van Santvoord v. Smith, 79 Minn. 316, 82 NW 642.

[b] **Authority to modify a contract is given** to an agent of the assignee of the contract by a letter from the assignee to the other party to the contract, stating that as successor of the original party he is prepared to fulfill all contracts, and that the agent is "fully authorized to do business for me." Berry v. Haldeman, 111 Mich. 667, 70 NW 325.

[c] **Possession of contract.**—In mercantile negotiations the possession of the contract, by the confidence of the party interested, is a sufficient token of authority in the party intrusted with it, and his canceling of the contract on a fair equivalent is a discharge of the party liable on it. Erick v. Johnson, 6 Mass. 193.

[d] **A statement of an account** by a bookkeeper who has authority to make and alter contracts is binding on his principal. Providence Mach. Co. v. Browning, 70 S. C. 148, 49 SE 825.

[e] **The principal cannot revoke a rescission** of a contract made by his general agent and acquiesced in by the other party. St. Paul Second Nat. Bank v. Larson, 80 Wis. 469, 50 NW 499.

[f] **Extending time of payment.**—Where a son had authority from his parents to sign their names to notes and mortgages, and had authority to do anything he saw fit in the management of their business, he had authority to sign the names of his parents to contracts extending the time of payment of a mortgage executed by the parents. Currier v. Clark, 145 Iowa 613, 124 NW 622.

11. Bernard v. Torrance, 5 Gill & J. (Md.) 383; Simonds v. Clapp, 16 N. H. 222; McLaughlin v. Wheeler, 1 S. D. 497, 47 NW 816; Young v. Union Sav. Bank, etc., Co., 23 Wash. 360, 63 P 247.

12. See generally Landlord and Tenant [24 Cyc 895 et seq].

Authority to give notice to quit in own name see Landlord and Tenant [24 Cyc 1332].

13. Mylius v. Copes, 23 Kan. 617 (holding that a power of attorney which authorizes an agent to lease or mortgage land for the purpose of raising money in case he cannot sell it gives the agent the option to procure the money either by lease or mortgage, in case he cannot make a sale at a reasonable price).

[a] **Authority not given.**—A letter from a son owning the remainder in fee of land, in which his mother had a dower interest, to her, which recites that the letter will be her authority to lease the property, if she thinks that she has a good proposition, that she may do as she pleases, and that she may lease the land but, if she does lease it, he must be furnished with a copy of the lease, does not authorize her to execute, as agent of the son, an oil and gas lease. Prout v. Hoy Oil Co., 263 Ill. 54, 105 NE 26.

14. White v. Clow, 135 Ill. A. 464; Underwood Typewriter Co. v. Century Realty Co., 165 Mo. A. 131, 146 SW 448; Duncan v. Hartman, 143 Pa. 595, 22 A 1099, 24 AmSR 570, 149 Pa. 114, 24 A 190; Conway v. Shibly, 39 U. C. Q. B. 519. See also Jordan v. Greig, 33 Colo. 360, 80 P 1045. Compare Howard v. Carpenter, 11 Md. 259 (holding that an attorney either at law or in fact has no authority either to make a lease, or to ratify or confirm an imperfect one, or to perfect an inchoate agreement for a lease of property of his principal, unless authority for such purpose is expressly given); Owens v. Swanton, 25 Wash. 112, 64 P 921 (holding that a term lease cannot be executed by one having charge of property, unless he is specially authorized).

[a] **But authority to manage a farm** for the use and benefit of the agent does not authorize a lease. Ward v. Thrustin, 40 Oh. St. 347.

[b] **Authority to sign checks and attend to routine business** does not include authority to execute a lease of realty. Harris v. Raskin, 142 NYS 342.

15. Hitchens v. Ricketts, 17 Ind. 625 (holding that, under a power of attorney authorizing the agent to sell, assign, transfer, trade, and dispose of the principal's lands, either for cash or in exchange of other property, and providing that the agency was to continue for eighteen months and that the agent was to receive for his services one half of all he might make out of the property over a certain price, the agent had such a power, coupled with an interest, as gave him authority to rent lands which he had taken in exchange, at least until such time as he and his principal should close their accounts).

[a] **A naked power of sale** does not imply a power to lease. Bowler v. Brush Electric Light Co., 10 Oh. Dec. (Reprint) 582, 22 CincLBul 136.

16. Wieboldt v. Best Brewing Co., 163 Ill. A. 246; Dieckman v. Weirich, 73 SW 1119, 24 KyL 2340; Owens v. Swanton, 25 Wash. 112, 64 P 921.

17. Thuman v. Best, 97 L. T. Rep. N. S. 239 (holding that such power does not authorize the agent to bind his principal by a contract to lease).

18. A. G. Rhodes Furniture Co. v. Weeden, 108 Ala. 252, 19 S 318; Singer Mfg. Co. v. McLean, 105 Ala. 316, 16 S 912; National Loan, etc., Co. v. Bleasdale, 140 Iowa 695, 119 NW 77.

[a] **Where an agent is engaged to carry on a mercantile business,** to do which it is necessary to rent a house, the principal is bound for the rent thereof, whether he expressly authorizes the agent to make the contract or not, since an agent, to conduct a given business, necessarily has authority to do everything which is

pay rent;[19] but it has been held that an agent merely having some authority to act for his principal, but no special or general authority to rent premises for him, cannot bind the principal by so doing.[20] A general agent to lease may do so on his own credit and recover from his principal rent payments made by him.[21]

[§ 291] (2) Extent of Authority—(a) In General. An agent with authority to lease property may make a lease upon the customary conditions,[22] and may bind his principal by agreements left to his discretion,[23] as by a contract to lease;[24] and may do what is proper, usual, necessary and reasonable, in the making of such lease.[25] But he has no implied authority to lease the property for an illegal or immoral purpose;[26] nor can he make a lease beyond, or contrary to, the restrictions openly imposed by the principal, either as to the land to be included in the lease or as to the terms upon which it is to be leased;[27] nor, in the absence of special authority or custom or course of dealing, can he bind his principal by agreements or acts which are not proper, usual, or necessary in the execution of the power to lease.[28] Thus authority to lease does not imply authority to erect buildings or make improvements or repairs,[29] or to take out

essential to the performance of his duty. Baldwin v. Garrett, 111 Ga. 876, 36 SE 986.

[b] **The powers of the general agent of the owner of a railroad** are such as will warrant him in executing a lease of property to be used as a ticket office for the road. Ecker v. Chicago, etc., R. Co., 8 Mo. A. 223.

[c] **An agent employed by the month** and authorized to rent a store may rent the store from month to month only. Harrington v. F. W. Brockman Commn. Co., 107 Mo. A. 418, 81 SW 629.

[d] **Salesman.**—(1) The mere fact that one who sells goods for a firm on commission, but who is not otherwise authorized to contract in its behalf, allows the lessor of a store, which he rents in his own name for the display of samples belonging to the firm, to charge a part of the rent to the firm which pays the amount is insufficient to bind it for the rent. Brown v. Salomon, 9 Colo. A. 323, 48 P 278. (2) A salesman of a corporation, with power to sign checks and attend to routine business, does not have implied power to execute a lease of real property for his principal. Harris v. Raskin, 142 NYS 342.

19. Ernst v. Thom, 65 Misc. 206, 119 NYS 631 (holding that a son having authority to draw his father's money from a bank to pay rent for the family has authority to lease premises for the family to occupy).

20. Bonnassa v. Joseph Schlitz Brewing Co., 155 Mich. 36, 118 NW 604. See also Hayden v. Clark, 108 SW 845, 32 KyL 1341.

21. Irions v. Cook, 33 N. C. 203. Compare Anderson v. Conner, 43 Misc. 384, 87 NYS 449.

22. White v. Clow, 135 Ill. A. 464 (holding that authority to rent a dwelling includes authority to make a lease with such conditions as to repairs as are customary in leases and to bind the owner by such contract); Elk Dist. Bd. of Education v. Harvey, 70 W. Va. 480, 74 SE 507 (holding that authority to an agent to procure a lease carries authority to agree on its terms).

23. Indiana Natural Gas, etc., Co. v. Beales, (Ind. A.) 74 NE 551; Ridgley v. De Bough, 83 Iowa 100, 48 NW 996; Babin v. Ensley, 14 App. Div. 548, 43 NYS 849 (holding that one held out as having authority to rent premises without limit as to time may bind his principal by a lease for a year); Anonymous, 5 Vin. Abr. 522 pl 35.

24. Taylor v. Salmon, 4 Myl. & C. 134, 18 EngCh 134, 41 Reprint 53 (holding that an agent authorized to lease may bind his principal by an agreement to lease, and this without regard to the question whether the agent intended that the lease should be for his own benefit or for that of his principal).

25. Durkee v. Carr, 38 Or. 189, 63 P 117.

[a] **Encouraging tenant to buy fixtures.**—Where the landlord's agent rents the premises to a tenant, and at the same time encourages such tenant to buy fixtures from the preceding tenant, the landlord is estopped to claim such fixtures as a part of the realty, and not the personal property of the tenant. Morrison v. Sohn, 90 Mo. A. 76.

26. Stover v. Flower, 120 Iowa 514, 94 NW 1100.

[a] **Lease not void.**—It has been held that the fact that the agent knows the premises are to be used for immoral purposes will not make the lease void, where the landlord has no knowledge of such fact, and where the act of leasing with knowledge of the immoral purpose for which the premises are intended to be used would be criminal. Arras v. Richardson, 5 NYS 755.

27. Cal.—Borderre v. Den, 106 Cal. 594, 39 P 946 (holding that an agent authorized to let the whole of a tract of land for one year from November for six hundred dollars cannot bind his principal by a lease of a part of the tract for two hundred and twenty-five dollars for a term exceeding one year and commencing in the April preceding November).

Mo.—Harrington v. F. W. Brockman Commn. Co., 107 Mo. A. 418, 81 SW 629.

N. Y.—Larkin v. Radosta, 119 App. Div. 515, 104 NYS 165.

Pa.—Pittsburg Mfg. Co. v. Fidelity Title, etc., Co., 207 Pa. 223, 56 A 436.

Vt.—La Point v. Scott, 36 Vt. 603 (holding that a general agent cannot lease his principal's farm jointly with his own, so as to make the principal jointly liable with himself upon the stipulations in the lease in reference to the agent's property).

[a] **Extent of implied authority tested by purpose of lease.**—The general agent of a corporation in charge of lands cannot, in virtue of his general authority to manage the affairs of the corporation, make a lease for the purpose of trying title to land upon which he has entered for a condition broken under a vote of the corporation especially authorizing him to enter, but containing no provision empowering him to lease. The fact that he has been accustomed to lease land for the corporation for the purpose of obtaining rent, without objection to his acts, is not evidence of authority to make such a lease, because the power to make leases for rents, being derived from the exercise thereof with the approbation of the principal, is limited to the description of cases in which it has been exercised. Gillis v. Bailey, 17 N. H. 18.

[b] **Requirement of security for rent.**—Where a principal authorizes his agent to lease premises on condition that security for the payment of rent be given, and no character of security or time for giving it is designated, the principal is bound by a lease made by his agent under which no security is required, where the lessee long before the commencement of the term offers to give security, whenever the agent shall request it. Paris v. Johnson, 155 Ala. 403, 46 S 642.

28. Ga.—McMichen v. Brown, 10 Ga. A. 506, 73 SE 691.

Or.—Durkee v. Carr, 38 Or. 189, 63 P 117.

Pa.—MacDonald v. O'Neil, 21 Pa. Super. 364.

S. C.—Providence Mach. Co. v. Browning, 72 S. C. 424, 52 SE 117 (holding that where an agent is appointed solely to rent the land of his principal, or to do whatever he pleases with it, he has no authority to bind his principal, so as to make her a party to a partnership involving the use of the land).

Tex.—Johnson v. Hulett, 56 Tex. Civ. A. 11, 120 SW 257 (holding that an agreement by a landlord's agents that the tenant might remain in possession for part of a month without payment of rent is unenforceable, in the absence of proof that the agents had authority to make it).

See Moore v. Rankin, 33 Misc. 749, 67 NYS 179.

[a] **Consent to erection of telegraph line.**—Authority to lease farms and collect rents does not include authority to consent to the erection of a telegraph line along the highway adjoining the land. American Tel., etc., Co. v. Jones, 78 Ill. A. 372.

[b] **Waiver of provision.**—A general agent has no implied authority to waive a provision in a contract under seal, executed by the principal and his lessee, that the lease should not take effect until the principal certified in writing that he was satisfied with a certain chattel mortgage to be given by the lessee. Decker v. Sexton, 19 Misc. 59, 43 NYS 167.

[c] **Authority to construct a ditch** across the principal's land will not be implied from a power to lease. Harvey v. Mason City, etc., R. Co., 129 Iowa 465, 105 NW 958, 113 AmSR 483, 3 LRANS 973.

[d] **Agreement to furnish water for irrigation.**—An agent to lease land has no authority to agree to furnish water for irrigation, in the absence of proof of a custom or usage to make such leases or evidence that the principal had been in the habit of making such agreements. Durkee v. Carr, 38 Or. 189, 63 P 117. To same effect Anderson v. Adams, 43 Or. 621, 74 P 215.

[e] **Cannot change terms.**—Authority given an agent merely to execute a lease does not authorize him to thereafter change its terms. Everdell v. Carrington, 154 App. Div. 500, 139 NYS 119. See also infra § 293.

29. Halbut v. Forrest City, 34 Ark. 246; McMichen v. Brown, 10 Ga. A. 506, 73 SE 691 (holding that an agent to rent has no implied power to bind a landlord to pay for improvements by a tenant); McAlear v. New York L. Ins., etc., Co., 177 Ill. A. 339; Peddicord v. Berk, 74 Kan. 236, 86 P 465. Compare White v. Clow, 135 Ill. A. 464 (holding that authority to rent includes authority to lease and bind the principal by a provision in the lease for repairs).

[a] **Improvements by tenant.**—An agency for the collection of rents and the making of ordinary repairs implies no power to agree to pay for, or to authorize, improvements by a tenant, involving the removal of partitions and the painting and plastering of rooms thereby made. Garber v. Spivak, 65 Misc. 37, 119 NYS 269.

and levy a distress warrant;[30] nor does it imply authority to waive a lien for rent,[31] although a general power to deal with a tenant in regard to the payment of rent does imply such authority.[32]

Period of lease. Authority to lease land for a certain period of time does not authorize a lease for a different length of time,[33] or a lease for the prescribed period with a renewal privilege for a different period,[34] although it has been held that a lease for a longer period than that authorized by the power will be good pro tanto to the extent of the power.[35] But where an agent is held out as having authority to lease, without limit as to time, he may bind his principal by a lease for a period of time different from that for which he was actually instructed to lease, but of which instruction the lessee had no knowledge.[36]

Representations. An agent to lease cannot bind his principal by representations as to title;[37] but he has authority to make representations as to the construction and condition of the property, so as to make the principal liable therefor;[38] and the fact that the agent believed the representations to be true and had no intention to deceive the tenant will not affect the principal's liability.[39]

A general agent in full charge of premises has implied power to make any reasonable and necessary arrangement with the tenant.[40]

[§ 292] **(b) Collection of Rent.** An authority to lease does not of itself imply authority to collect the rent,[41] nor is such authority implied from the mere fact that the person assuming such authority is employed in the landlord's office.[42] However, such authority may be implied from power to give notice to a tenant to quit or pay rent,[43] or from a course of dealing or holding out on the part of the

30. Fishburne v. Engledove, 91 Va. 548, 22 SE 354.

31. Wimp v. Early, 104 Mo. A. 85, 91, 78 SW 343 (where the court said: "Mere power as agent to lease land certainly does not of itself necessarily carry power to waive the principal's lien for rent").

32. Wimp v. Early, 104 Mo. A. 85, 78 SW 343.

33. Borderre v. Den, 106 Cal. 594, 39 P 946; Larkin v. Radosta, 119 App. Div. 515, 104 NYS 165 (holding that, where a landlord restricts his agent to the making of monthly leases only, he is not bound by the act of the agent in making a lease for a term of three years, for power to make leases for a term of years is not necessarily within the agent's authority to lease); Duncan v. Hartman, 143 Pa. 595, 22 A 1099, 24 AmSR 570 (holding that an agent authorized to "manage" lands for a year has no prima facie authority to lease them for fifteen years, with a right to quarry and sell stone therefrom).

[a] **Oral authority to act during principal's absence.**—Where an agent orally authorized by the landowner to take charge of the land while he was gone and make it pay the best he could gave a lease for three years, it was held that the lease was terminable by the landowner on his return. Antoni v. Belknap, 102 Mass. 193.

[b] **Where a tenant has been in possession of the premises for years** as a tenant from week to week, an agent's execution of a lease for a year without authority is not binding on the principal. City, etc., Homes Co. v. Marrow, 133 NYS 968.

34. Schumacher v. Pabst Brewing Co., 78 Minn. 50, 80 NW 838 (holding that authority to make a lease for three years does not give power to lease for three years with a renewal privilege for two years more). See also Griffen v. Ford, 14 N. Y. Super. 123.

[a] **An option to renew a lease** is not valid and binding upon the owner, notwithstanding the same is in writing, if such option is signed by an agent who has no written authority, and possesson under a lease containing such a renewal clause does not give it any additional force. Rogan v. Arnold, 135 Ill. A. 281 [aff 233 Ill. 19, 84 NE 58].

35. Chesebrough v. Pingree, 72 Mich. 438, NW 747, 1 LRA 529; Griffen v. Ford, 14 N. Y. Super. 123 (holding that a lease for twenty-one years, with a right of the lessee to renew for two similar terms at the same rate, made under a power to lease for twenty-one years only, is not void; but a court of equity will sustain it for twenty-one years and cut off the right to renew); Alexander v. Alexander, 2 Ves. 640, 28 Reprint 408, 21 ERC 415. See also Newcomb v. Ketteltas, 19 Barb. (N. Y.) 608. But see Roe v. Prideaux, 10 East 158, 103 Reprint 735 (where a distinction was taken between a general power not specifying the kind of lease but adding a restriction to limit the extent of the lease, and a power particularizing the species of lease to be granted).

36. Babin v. Ensley, 14 App. Div. 548, 43 NYS 849 (holding that, where an agent is held out as having authority to lease real estate, instructions given to him by his principal to rent only by the month cannot bind a tenant who has no knowledge of the limitation of the agent's authority).

37. Tondro v. Cushman, 5 Wis. 279.

[a] **Recognition of title of third person.**—A letter of attorney to execute an oil lease will not be extended so as to include authority to the attorney to bind his principal by a recognition of an outstanding title asserted by a third person. MacDonald v. O'Neil, 21 Pa. Super. 364.

38. Clogston v. Martin, 182 Mass. 469, 65 NE 839 (holding that where the agent of a landlord, to induce a tenant to take a lease of a house, states as a matter within his own knowledge that the plumbing with its sewer connections is all right, and the tenant, relying on the statement, takes the house and suffers illness and loss by reason of the defects in the house, the landlord is liable); Cate v. Blodgett, 70 N. H. 316, 48 A. 281; Matteson v. Rice, 116 Wis. 328, 92 NW 1109 (holding that a landlord who had authorized the janitor of his flat building to exhibit the premises to prospective tenants, execute leases, place the tenant in possession, and collect the first month's rent, was liable for the loss of goods by fire sustained by a tenant who was induced to lease by the janitor's false assurance, not amounting to a warranty, that a wall, not open to inspection, between the flat leased and an adjoining storeroom was fireproof, although the janitor had no express authority to make warranties or representations, the representation in question being so far within the scope of the business of the agency as to be deemed authorized).

[a] **The actual condition of the plumbing and sewer connections** of a house can be a matter of personal knowledge on the part of the agent of the landlord, so that the landlord may be liable for the agent's false representations concerning such condition. Clogston v. Martin, 182 Mass. 469, 65 NE 839.

[b] **Where a landlord authorized his tenant to make certain false representations** respecting the leased premises to any person bearing a letter from the landlord instructing him to show the premises to the bearer, and plaintiff called at said premises without any letter and stated that he was a prospective purchaser, whereupon the tenant made said representations, he was authorized so to do, as the object of a letter was merely to designate the bearer as a prospective purchaser. Briggs v. Dunne, 168 Ill. 226, 48 NE 48.

[c] **Authority to collect and remit rents,** pay taxes, and look after ordinary repairs, combined with authority to sell the premises, does not carry with it authority to bind the principal by any representations which the agent might make as to the condition of the property. Samson v. Beale, 27 Wash. 557, 68 P 180.

39. Matteson v. Rice, 116 Wis. 328, 92 NW 1109.

40. National Loan, etc., Co. v. Bleasdale, 140 Iowa 695, 119 N W 77 (holding that, where a landlord's agent has full charge and control of the property rented, and also full charge and control of property for which the tenant furnishes heat, the contract with the tenant for such heat would be within the scope of the agent's authority); Underwood Typewriter Co. v. Century Realty Co., 165 Mo. A. 131, 146 SW 448; Ireland v. Hyde, 34 Misc. 546, 69 NYS 889 (holding that, where a landlord's agent was the general manager of his affairs and leased premises under a monthly tenancy, he had authority to modify such lease after a fire by agreeing that in consideration of the tenant remaining in the premises after repairs no rent should be charged until the premises were restored to their original condition).

[a] **Making repairs, drawing draft for expenses.**—An agent authorized to make repairs out of rents, and who is considered by the owners as the "agent for the house," may bind the owner by a bill of exchange drawn in the latter's name to pay for repairs. Scofield v. Warren, 13 Misc. 209, 34 NYS 175.

41. McGowan v. Treacy, 84 NYS 497; Heflin v. Campbell, 5 Tex. Civ. A. 106, 23 SW 595.

[a] **A subagent** of a lessor, authorized to procure prospective tenants and submit their names to the landlord's agent, who has the leases in charge, has no implied power to collect rents for the landlord's account. McGowan v. Treacy, 84 NYS 497.

42. Schneider v. Hill, 19 Misc. 56, 42 NYS 879 (holding that the fact that a person was employed in the landlord's office does not show that he was authorized to receive rent, and thereby to waive the fact of a prior notice to quit).

43. Cockerline v. Fisher, 140 Mich. 95, 103 NW 522 (holding that where a notice to a tenant to quit or pay rent was intrusted to the agent of the landlord for service, and was served on the premises, the tenant was entitled to treat such agent as having authority to receive the rent and discharge his obligation by making payment).

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principal.[44]

Power of collecting agent. An agent authorized to collect rent has authority to take all usual and necessary steps to collect such rent,[45] and may take proper steps against the tenant in case of nonpayment.[46] But he has no authority to receipt for the rent upon payment of less than the full amount,[47] or to accept anything but money in payment of the rent;[48] nor has he authority to receive rent before it is due,[49] or to receive rent tendered after the expiration of the term,[50] or to contract to repay money paid on the rent if the tenant does not remain the full time,[51] or to make a new lease or change an existing one,[52] or to expend the rent in repairs on the premises.[53]

[§ 293] **(c) Power to Extend or Renew Lease.** An agent with general power to lease or rent has authority to extend or renew a lease,[54] as, where he is in general charge of a business which requires the use of buildings or premises for the conduct of the business, he has power to renew a lease therefor.[55] But mere authority to collect rents implies no authority to renew a lease,[56] although it may be considered as throwing light on the extent of the agency when the right to renew is in question.[57] Where an agent acts within the scope of his authority in renewing a lease, the fact that by reason of his principal's illness he is unable to consult with him in reference to the renewal does not relieve the principal from liability for rent pursuant to such renewal.[58]

[§ 294] **(d) Power to Cancel or Accept Surrender.**[59] An agent with mere power to lease and collect the rents carries with it no power to cancel, or accept surrender of, the lease, and a surrender of the premises to such agent before termination of the lease has no binding force upon the principal;[60] nor does it imply authority to consent to a sub-

44. Gross v. Owen, 86 NYS 266 (holding that, where, in an action to dispossess a tenant for nonpayment of rent for the month of August, 1903, there was no denial that the tenant paid the rent for such month to the janitress, and it appeared that she had authority from the landlord to accept payment of rent "from some of the tenants when they first moved in," and that the tenant had not been notified to pay the rent to any other person, but had paid the rent for the previous month to her, a judgment in favor of plaintiff was erroneous).

45. Beck v. Minnesota, etc., Grain Co., 131 Iowa 62, 107 NW 1032, 7 LRANS 930 (holding that the agent might pursue the landlord's share of a crop in the hands of third persons).

Agency to collect or receive payment in general see supra §§ 256–279.

46. O'Hare v. McCormick, 30 U. C. Q. B. 567.

47. Halladay v. Underwood, 90 Ill. A. 130 (holding that, although an agent is the general agent of his principal at the place where such agent resides and has general power to transact business relating to the principal's property, such agent has no power to alter the terms of a sealed lease, accepting a less amount for the rent of the property and changing the time of payment thereof); Hoster v. Lange, 80 Mo. A. 234 (holding that an agent clothed with authority to collect and receipt for rents generally has no authority to accept as payment in full an amount less than the sum due according to the terms of the contract of lease).

48. Rhine v. Blake, 1 Tex. A. Civ. Cas. § 1066 (holding that the power to rent and collect rent moneys does not authorize such agent to receive merchandise for rents).

[a] **Personal indebtedness of agent.**—An agent with authority only to collect rents cannot bind his principal by accepting as payment a credit on a personal indebtedness of the agent to the tenant. Stetson v. Briggs, 114 Cal. 511, 46 P 603.

49. Everdell v. Carrington, 154 App. Div. 500, 139 NYS 119; Realty Transfer Co. v. Kimball, 66 Misc. 185, 121 NYS 279 (holding that authority of an agent to receive payment of an indebtedness does not confer upon him power to do so before maturity, and payment by a tenant of rent, due May 1, on April 28, to the landlord's agent, where it does not appear that the landlord ratified the premature payment, or received the money, does not constitute a payment of the rent).

[a] **An agent's authority to receive payments of rent in advance** cannot be proved by showing prior similar payments to him, unless it is shown that the principal had knowledge of such prior payments. Everdell v. Carrington, 154 App. Div. 500, 139 NYS 119.

50. Indiana Natural Gas, etc., Co. v. Beales, (Ind. A.) 74 NE 551 (holding that where an oil and gas lease provided that it should continue for a certain period, and so long thereafter as oil or gas should be produced in paying quantities, and also provided for the payment of a certain yearly sum in case operations for the discovery of oil and gas were delayed, and made a bank the agent of the lessor to receive payments, the bank had authority to receive only such payments as were provided for in the lease, and its act in receiving a payment after the expiration of the term did not bind the lessor); Shannon v. Loeb, 65 Wash. 640, 118 P 823 (as against a notice to quit served on the tenant).

[a] **Deposit of payment without objection.**—But where an oil and gas lease provided for a certain annual rental, and stipulated that a deposit in a certain bank to the credit of the lessor should constitute payment, a deposit of a payment after the expiration of the term limited by the lease, which payment was accepted by the bank without notice from the lessor not to do so, was in effect a payment to the lessor. American Window Glass Co., v. Indiana Natural Gas, etc., Co., 37 Ind. A. 439, 76 NE 1006.

51. Stover v. Flower, 120 Iowa 514, 94 NW 1100.

52. Ill.—Wieboldt v. Best Brewing Co., 163 Ill. A. 246 (holding that an agent authorized to collect rents has no authority to change the terms of the lease, or to consent to a substitution of tenants or occupants).

Ind.—Indianapolis Mfg., etc., Union v. Cleveland, etc., R. Co., 45 Ind. 281.

La.—Weil v. Zodiag, 34 La. Ann. 982.

N. Y.—Davidson v. Blumor, 7 Daly 205.

Wash.—Tryon v. Davis, 8 Wash. 106, 35 P 598.

[a] **Contributing to party wall.**—That one collected rents for plaintiffs is insufficient to show his authority to relieve defendant from contributing to the expense of rebuilding a party wall. Howze v. Whitehead, 93 Miss. 578, 46 S 401.

53. Dowlen v. C. W. Georgs Mfg. Co., (Tex. Civ. A.) 125 SW 931.

54. Steuerwald v. Jackson, 123 App. Div. 569, 108 NYS 41 (holding that an agent who has power to rent premises has the power to renew the lease); Pittsburg Mfg. Co. v. Fidelity Title, etc., Co., 207 Pa. 223, 56 A 436 (holding that, under a power of attorney to lease, rent, or let any house, lands, or ground, wherever situate, the attorney has a right to extend a lease).

[a] **Authority to renew lease.**—A school society owning a building called the academy voted in 1824 that the control of such building should thenceforth be vested solely in a committee with power to lease it at its discretion to any person for the purpose of keeping a school. The committee leased the premises for five years, and after the expiration of that time, by the authority of the same vote, executed another lease to the same tenant for the term of five years from that date. It was held that the committee had authority under the vote of 1824 to make a second lease. Emerson v. Goodwin, 9 Conn. 422.

55. Phillips, etc., Mfg. Co. v. Whitney, 109 Ala. 645, 20 S 333; A. G. Rhodes Furniture Co. v. Weeden, 108 Ala. 252, 19 S 313.

[a] **Acts inconsistent with surrender.**—Where the tenant of a store leaves his business in the hands of a manager, and the latter, acting for his principal, removes the stock and attempts to surrender the premises at the end of a monthly term, the lessors are entitled to rely on acts of his with respect to the premises after the end of the term inconsistent with a surrender, in performing duties which would naturally devolve on his principal, and the latter is bound thereby. Byxbee v. Blake, 74 Conn. 607, 51 A 535, 57 LRA 222.

56. Noble v. Burney, 124 Ga. 960, 53 SE 463; Miller v. Barnett, 158 App. Div. 862, 144 NYS 40 (holding that, where an agent was employed only to find a tenant, receive rent, and make ordinary repairs, he had no authority to make a new lease or modify the terms of the old one).

[a] **Illustration.**—That a landlord's agent collected rents for the landlord; that he had been the intermediary in effecting previous leases with defendant, and while in charge of other properties of the landlord he occasionally, in her absence, effected monthly lettings in tenement houses at rentals previously fixed by her; and that, after receipt of the notice that possession of the premises in question was demanded on a certain date, defendant called on the landlord at her residence, and tendered the rent for the succeeding month, which she refused to accept and directed defendant to go to her agent, is insufficient to establish the authority of the agent to agree to renew defendant's lease of the tenement he occupied on the same terms as the former letting. Burgess v. Willis, 43 Misc. 672, 88 NYS 149.

57. Noble v. Burney, 124 Ga. 960, 53 SE 463.

58. Dessar v. Hirsch, 145 NYS 51.

59. **Notice to quit** see Landlord and Tenant [24 Cyc 1331].

60. Ill.—Scanlan v. Hoerth, 151 Ill. A. 582 (holding that an authority to collect rent does not presumptively carry with it the power to cancel a

lease,[61] or to substitute a new tenant for the former one.[62] But it has been held that an authority to cancel or accept a surrender of a lease may be implied from a general authority to manage real estate and make leases,[63] or from authority to modify the terms of a lease.[64]

[§ 295] **i. To Mortgage Property; Cancellation; Foreclosure; Redemption—(1) In General.** An owner of property may invest an agent with authority to encumber the same by a mortgage by giving him a power of attorney sufficiently explicit in terms to warrant the placing of a mortgage on the property;[65] and, where it is clear that such authority is fairly within the power or the purposes of the agency, the courts will not hesitate to uphold a mortgage executed by an agent, although he was not expressly authorized to give mortgages or the mortgage in question;[66] and it has been held that such power will be implied where the principal lives at a distance and the mortgage is given to raise money to pay debts and is upon property which the agent has the right to sell.[67] Such authority, however, is rarely to be inferred, and ordinarily it will not be implied from general authority to manage, or even to sell, the property of the principal,[68] such as from

renting contract under seal); Robinson v. Henaghan, 92 Ill. A. 620.

Ind.—Woodward v. Lindley, 43 Ind. 333.

Iowa.—Faville v. Lundvall, 106 Iowa 135, 76 NW 512.

Mont.—Blake v. Dick, 15 Mont. 236, 38 P 1072, 48 AmSR 671.

N. Y.—Berry v. No. 1465 Broadway Co., 148 App. Div. 159, 132 NYS 1050 (holding that a real estate agent with authority to rent premises and collect the rent has no implied authority to cancel a lease executed by a corporation under its seal and stipulating that it may be modified by an instrument in writing signed by an officer of the corporation and under its seal); Earl v. Gillies, 92 NYS 289; Barkley v. Holt, 84 NYS 957; Ramsay v. Wilkie, 13 NYS 554.

Pa.—Johnstown, etc., R. Co. v. Egbert, 152 Pa. 53, 25 A 151; Murphy v. Losch, 148 Pa. 171, 23 A 1059; Edmundson v. Singer Sewing Mach. Co., 51 Pa. Super. 545.

S. D.—Theo. Hamm Brewing Co. v. Wiggam, 27 S. D. 613, 132 NW 270.

[a] **An agent in control of the legal business** of a company has thereby no implied authority to accept a surrender of a lease. Woodward v. Lindley, 43 Ind. 333; Johnstown, etc., R. Co. v. Egbert, 152 Pa. 53, 25 A 151.

[b] **Authority to approve subtenants and make repairs** does not imply authority to accept a surrender of a lease. Baylis v. Prentice, 75 N. Y. 604.

[c] **Authority to collect the debts of a lessee** does not authorize the agent to assign or surrender a lease held by such lessee. Milstein v. Mosher, 126 App. Div. 515, 110 NYS 568.

61. Theo. Hamm Brewing Co. v. Wiggam, 27 S. D. 613, 132 NW 270 (holding that from mere authority to rent premises and collect the rentals authority to consent to a sublease, under the provision of the lease that the lessee should not sublet without express consent of the lessor, cannot be presumed).

[a] **But** where the owner of a building permitted one to hold himself out as agent for building, collecting rents, etc., he may be held to have conferred apparent authority on the agent to give consent to subletting, and hence is liable for a breach of the agent's agreement to give such consent, whether the agent had actual authority or not. Underwood Typewriter Co. v. Century Realty Co., 165 Mo. A. 131, 146 SW 448.

62. Wallace v. Dinniny, 11 Misc. 317, 32 NYS 159.

63. Mass.—Amory v. Kannoffsky, 117 Mass. 351, 19 AmR 416 (holding that, where the general agent of the owner of real estate, in the management of his buildings, gave a lease, under seal, in which the name of the principal appeared as lessor, but which was signed by the agent who received some of the installments of rent due, and the principal then brought an action against the lessee for subsequent installments, a surrender of the lease to the agent, and an acceptance thereof by him, were a good defense to the action, although the agent had no written authority either to make a lease or to accept a surrender).

Minn.—Buckingham Apartment House Co. v. Dafoe, 78 Minn. 268, 80 NW 974.

N. Y.—Peche v. Sloane, 16 App. Div. 458, 45 NYS 37 [aff 163 N. Y. 578 mem, 57 NE 1119 mem]; Lillian Realty Co. v. Erdurm, 120 NYS 749 (holding that, where it appeared that an agent had authority to sign leases and a large authority over the premises; that on March 16 he wrote to a tenant, stating that he had rented the premises from April 1, and inclosed a bill for the March rent; and that on receiving the check therefor the signed copy of the lease would be returned, the agent had authority to terminate the lease).

Pa.—Weightman v. Harley, 20 Wkly NC 470.

Wis.—Commercial Hotel Co. v. Brill, 128 Wis. 638, 101 NW 1101.

64. Goldsmith v. Schroeder, 93 App. Div. 206, 87 NYS 558 (holding that agents of a landlord who have authority to modify leases made by them for her without consulting her may, for a valuable consideration, accept a surrender of leased premises, and waive a provision of the lease that no surrender shall be valid unless accepted by the landlord in writing).

65. Cal.—Alto Silver Min. Co. v. Alta Placer Min. Co., 78 Cal. 629, 21 P 373.

Nebr.—Morris v. Linton, 61 Nebr. 537, 85 NW 565 (holding that a power of attorney by a married woman residing in England, authorizing her attorney to sell, exchange, or mortgage any realty owned by her in the United States or elsewhere, authorizes such attorney to mortgage the land of his principal in Nebraska).

Wis.—Eaton v. Dewey, 79 Wis. 251, 48 NW 523.

Wyo.—Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 P 624, 93 P 661.

Eng.—Davy v. Waller, 81 L. T. Rep. N. S. 107 (power of attorney to buy, sell, charge, and transfer in any form whatsoever).

66. Cal.—Clute v. Loveland, 68 Cal. 254, 9 P 133.

Mass.—Wood v. Goodridge, 6 Cush. 117, 52 AmD 771.

Miss.—Burnet v. Boyd, 60 Miss. 627.

Mo.—Lamy v. Burr, 36 Mo. 85, 88 AmD 135; State Bank v. McKnight, 2 Mo. 42.

N. Y.—Cumming v. Williamson, 1 Sandf. Ch. 17.

Pa.—Campbell v. Foster Home Assoc., 163 Pa. 609, 30 A 222, 43 AmSR 818, 26 LRA 117.

Eng.—Perry v. Holl, 2 Giffard 138, 66 Reprint 59 [app dism 2 De G. F. & J. 38, 63 EngCh 30, 45 Reprint 536].

See Cohen v. Oliver, 9 Tex. Civ. A. 35, 29 SW 81 (holding that verbal authority to give a deed of trust of a stock of goods is not affected by a previous written authority to the same person to sell goods in the general course of trade).

[a] **A trustee to "take charge of, manage, and control"** real property has implied power to mortgage. Ely v. Pike, 115 Ill. A 284.

[b] **Renewal of mortgage.**—A power of attorney authorizing the grantee therein to prosecute every kind of business, and for and in the name of the grantor to execute and deliver agreements, mortgages, notes, etc., empowers the grantee to execute for the grantor an instrument renewing a mortgage executed by the grantor and the note thereby secured. Moore v. Gould, 151 Cal. 723, 91 P 616.

67. Taylor v. Labeaume, 17 Mo. 338; Thayer v. Nehalem Mill Co., 31 Or. 437, 51 P 202.

68. U. S.—Chicago, etc., R. Co. v. Chickasha Nat. Bank, 174 Fed. 923, 98 CCA 535.

Ala.—Alabama Nat. Bank v. O'Neil, 128 Ala. 192, 29 S 688.

Cal.—Chapman v. Hughes, 134 Cal. 641, 58 P 298, 60 P 974, 66 P 982; Hawxhurst v. Rathgeb, 119 Cal. 531, 51 P 846, 63 AmSR 142; Golinsky v. Allison, 114 Cal. 458, 46 P 295 (holding that a power of attorney to an agent authorizing him to "superintend" property of his principals, and to "preserve, manage, sell, and dispose of" the same, and to "manage, work, sell, and dispose of" other property, did not confer authority on the agent to mortgage their property to secure a note executed by the agent in settlement of an antecedent debt contracted by the agent in the management of the property).

Fla.—Augustine First Nat. Bank v. Kirkby, 43 Fla. 376, 32 S 881 (holding that a general power as managing agent of a corporation does not clothe the agent with authority to mortgage the principal's property).

Kan.—Switzer v. Wilvers, 24 Kan. 384, 36 AmR 259.

N. H.—Packets Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203.

Tex.—Nacogdoches First Nat. Bank v. Hicks, 24 Tex. Civ. A. 269, 59 SW 842.

[a] **Authority to grant mortgages must be express and special,** and is not conveyed by a general mandate authorizing an agent to take charge of, adjust, manage, and control the interests of heirs in a succession, although such agent may be called upon, in the proper discharge of his functions, to manage a plantation which forms part of the inheritance of such heirs, and to obtain advances for that purpose. Lafourche Transp. Co. v. Pugh, 52 La. Ann. 1517, 27 S 958.

[b] **Mortgage of personalty.**—The courts show the same reluctance to recognize the power of an agent to mortgage personal chattels, except where it is expressly given, or the circumstances are such that it is necessarily implied in order to carry out the agency. Reed v. Kimsey, 98 Ill. A. 364 (holding that a power of attorney to control and sell a horse does not authorize the attorney to mortgage it); Reeves v. Baldwin, 1 Ind. 216, Smith 170; Wycoff v. Davis, 127 Iowa 399, 103 NW 349; Edgerly v. Cover, 106 Iowa 670, 77 NW 328; Switzer v. Wilvers, 24 Kan. 384, 36 AmR 259; Wood v. Goodridge, 6 Cush. (Mass.) 117, 52 AmD 771; Henson v. Keet, etc., Mercantile Co., 48 Mo. A. 214; Fraser v. McPherson, 3 S. C. Eq. 393; Lewis v. Ramsdale, 55 L. T. Rep. N. S. 179.

authority to sell and convey land,[69] or from a general power to make a lease,[70] or to purchase property.[71] But the agent himself may have such an interest in the property that he has a right in himself to sell it, and in such case he has the lesser right to pledge or mortgage it.[72]

[§ 296] (2) **Extent of Power.** An agent having authority to mortgage has, as a necessary incident of such authority, the power to insert in the mortgage the usual terms incident to such instruments, including the ordinary warranties and covenants,[73] and a power to sell in case of default,[74] or to give a trust deed, or to make an equivalent conveyance, for the same purposes for which a mortgage was authorized.[75]

Purpose or benefit of mortgage. The principal may empower the agent to execute a mortgage for any lawful purpose, including the agent's personal benefit;[76] but, in the absence of express terms or undoubted proof of such power, no general authority can be broad enough to empower the agent to mortgage the lands of his principal to secure the debt of a third person or of the agent himself, or for any purpose except the benefit of the principal.[77] Where the principal has limited the purposes or extent of the mortgage, the agent has no power to execute a mortgage for any other purpose, or to any greater extent, however beneficial it may be thought to be to the principal.[78] Thus a power to mortgage does not ordinarily imply authority to give a second mortgage,[79] or to sell the property,[80] or to execute a note in the name of the principal for the amount of the mortgage debt.[81]

Property subject to mortgage. Presumptively the power to mortgage is limited to property owned by the principal at the time he gave the power, although when the principal's intent, as gathered from the language of the power and the surrounding circumstances, is broader, the courts will interpret it as extending to after-acquired property.[82]

A power to cancel a mortgage must be strictly pursued,[83] and the agent cannot surrender the mortgage without payment or other consideration.[84]

Authority to foreclose a mortgage will not be implied from authority to take a mortgage;[85] nor will

[c] **A power to sell goods at retail** does not authorize a chattel mortgage, since that would be equivalent to a sale at wholesale, which would not be authorized by a power to sell at retail. Kiefer v. Klinsick, 144 Ind. 46, 42 NE 447; Henson v. Keet, etc., Mercantile Co., 48 Mo. A. 214 (holding that a general agent to conduct a retail store has no implied authority to give a chattel mortgage on the stock, the effect of which is to close the business).

[d] **Loose methods may estop a principal to deny his agent's authority** to mortgage. Poole v. West Point Butter, etc., Assoc., 30 Fed. 513.

69. See supra § 248.

70. Nacogdoches First Nat. Bank v. Hicks, 24 Tex. Civ. A. 269, 59 SW 342.

71. Fraser v. McPherson, 3 S. C. Eq. 393 (holding that an agent employed to purchase property with particular funds has no authority to mortgage the property to secure the purchase money, and that such mortgage will not bind the property).

72. Clute v. Loveland, 68 Cal. 254, 9 P 133; Dingwall v. McBean, 30 Can. S. C. 441 (holding that a factor has the power to sell the property of his principal in his hands to secure his advances).

73. Wilson v. Troup, 2 Cow. (N. Y.) 195, 14 AmD 458 [aff 7 Johns. Ch. 25]; Richmond v. Voorhees, 10 Wash. 316, 38 P 1014 (holding that a power of attorney to borrow money and secure its payment by a mortgage on land authorizes the attorney to execute a mortgage with all the usual covenants demanded by those loaning money on such security).

[a] **Default clause.**—Where such a provision is not usual in mortgages, an agent has no power to insert in a mortgage that it shall become due at the option of the holder upon default in the payment of interest. Jesup v. Racine City Bank, 14 Wis. 331.

[b] **Attorney's fees.**—(1) The insertion of a provision for the payment of attorney's fees in a mortgage has been held not authorized by usage nor implied in a general authority to mortgage as granted to an agent. Pacific Rolling Mill Co. v. Dayton, etc., R. Co., 5 Fed. 852, 7 Sawy. 61. (2) But whether an attorney in fact under a general power of attorney may execute a trust deed containing a stipulation for attorney's fees in case the deed is enforced by an action is immaterial where the trustee in the deed sells the property under a power of sale therein granted. Muth v. Goddard, 28 Mont. 237, 72 P 621, 98 AmSR 553.

74. Wilson v. Troup, 2 Cow. (N. Y.) 195, 14 AmD 458 [aff 7 Johns. Ch. 25] (holding that a power to mortgage real estate authorizes a mortgage with power of sale in a jurisdiction where such a provision is ordinarily and usually inserted in mortgages).

75. Posner v. Bayless, 59 Md. 56; Muth v. Goddard, 28 Mont. 237, 72 P 621, 98 AmSR 553 (holding that, under Civ. Code § 3821, providing that a power of sale may be conferred on the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is security, and Code Civ. Proc. § 1293, declaring that, if a mortgage confers a power of sale after a breach, foreclosure may be had, an attorney in fact under a general power of attorney to sell, convey, and mortgage the grantor's property may secure the payment of his grantor's debt by executing a trust deed conveying the grantor's property, and authorizing the trustee or his successor in trust to sell the same in case of nonpayment of the indebtedness); Gimell v. Adams, 11 Humphr. (Tenn.) 283 (holding that, under a power to "mortgage or convey for the payment of debts," the property may be conveyed to a trustee, with authority to sell for the satisfaction of debts).

76. Ayre v. Palmer, 57 Cal. 309.

77. Cal.—Hibernia Sav., etc., Soc. v. Moore, 68 Cal. 156, 8 P 824.

Colo.—Nippel v. Hammond, 4 Colo. 211.

Kan.—Wolfley v. Rising, 8 Kan. 297.

N. Y.—Greenwood v. Spring, 54 Barb. 375 (holding that a general power to mortgage property of the principal will not sustain a mortgage for the benefit of a third person).

Eng.—Jones v. Stöhwasser, 16 Ch. D. 577; Re Bowles, 31 L. T. Rep. N. S. 365 [aff 22 Wkly. Rep. 317].

[a] **Partnership debt.**—A general agent with authority to mortgage his principal's property may give a trust deed of it to secure a debt of a firm of which he is a member. Muth v. Goddard, 28 Mont. 237, 72 P 621, 98 AmSR 553.

[b] **Collateral undertaking.**—Authority to create and execute a mortgage to one person if it includes discretion respecting its character and terms of payment cannot by implication be extended to embrace a collateral undertaking with a second lien to a stranger. Bangor, etc., R. Co. v. American Bangor Slate Co., 203 Pa. 6, 52 A 40.

78. Roberts v. Mathews, 77 Ga. 458; Giltinan v. Lehman, 65 N. J. L. 668, 48 A 540; Skaggs v. Murchison, 63 Tex. 348; Ex p. Snowball, L. R. 7 Ch. 534; Jones v. Stöhwasser, 16 Ch. D. 577.

79. Skaggs v. Murchison, 63 Tex. 348.

80. Coppage v. Barnett, 34 Miss. 621 (holding that an absolute sale by an agent authorized only to execute a mortgage does not bind the principal unless ratified by him).

81. Mylius v. Copes, 23 Kan. 617 (holding that a power to mortgage does not include the power to execute a note in the name of the principal for the amount of the mortgage debt, inasmuch as the principal cannot be presumed to have intended to give the agent authority to bind him personally, but must be presumed to have authorized him merely to procure money on the security of the land only).

[a] **But** it has been held that where an agent with power to mortgage, hypothecate, and create a lien upon all his principal's lands borrowed a sum of money for which he executed a note and secured it by a deed of trust, and the principal, upon suit being brought against him upon the note and to foreclose the mortgage, pleaded non est factum as to the note only, the note was properly admitted in evidence, inasmuch as it was authorized by the power, and the note and mortgage constituted but one transaction and cause of action, and the mortgage and its covenants would alone have enabled plaintiff to maintain a suit and obtain judgment for his debt with a decree of foreclosure. Taylor v. Hudgins, 42 Tex. 244.

82. Weare v. Williams, 85 Iowa 253, 52 NW 328; Willis v. Palmer, 7 C. B. N. S. 340, 97 ECL 340, 141 Reprint 847 (where a general power to mortgage a ship was held to be broad enough to justify a mortgage of the freight); Davy v. Waller, 31 L. T. Rep. N. S. 107.

83. Foster v. Paine, 56 Iowa 622, 10 NW 214.

[a] **Authority to enter satisfaction** of a mortgage carries no authority to assign it. Googe v. Gaskill, 18 Pa. Super. 39.

84. Harrison v. Burlingame, 48 Hun 212, 17 NYSt 905.

85. Aultman v. Jones, 2 F. Cas. No. 657, Woolw. 99. See also Ver Veer v. Malone, 134 Iowa 653, 112 NW 82. And see supra § 275.

[a] **Necessity for possession of note or mortgage.**—Where a general agent, assuming to order a sale of property under the power contained in a deed of trust to his principal, did not, on the date of sale, have possession of the note or deed of trust, nor

authority to foreclose authorize an extension of the period of redemption.[86]

Authority to redeem from a mortgage empowers the agent to pay any expenses necessarily incurred in enforcing the security.[87]

[§ 297] **j. To Pledge Property.** Authority to pledge does not arise from the possession or management of property by an agent, even though he has power to sell the same;[88] but it may be inferred whenever it appears that it is reasonably necessary to enable the agent to perform his undertaking.[89] Authority to pledge for a specific purpose excludes all other purposes.[90]

For agent's debt. An agent has no right to pledge the chattels of the principal for his own obligations in the absence of express terms or undoubted proof of such power.[91] Thus an authority to take a negotiable note in payment does not authorize the agent to pledge the same for his own debt.[92]

[§ 298] **k. To Release, Settle, or Compromise Claims—(1) In General.**[93] An agent having general authority to compromise or make settlements of claims or accounts for his principal has implied power to do the usual and necessary things to effect such compromise or settlement,[94] and, where the settlement is within the apparent scope of the agent's authority, the principal is bound thereby, especially where he accepts and retains its benefits.[95]

had the sheriff, who acted as trustee, such possession, the purchasers at such sale have no right to presume that the foreclosure was authorized, and it is incumbent upon them to show that either the general agent or the sheriff had express authority from the holder of the note and deed of trust to foreclose. Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019.

86. Karcher v. Gans, 13 S. D. 383, 83 NW 431, 79 AmSR 893 (holding that, since the authority given by plaintiff to his agent to foreclose a mortgage on defendant's property did not give the agent authority to extend the period of redemption, plaintiff was not bound by an agreement for such extension, in the absence of proof of special authority in the agent).

87. Shutes v. Woodard, 57 Mich. 213, 23 NW 775 (holding that an agent empowered to redeem from a mortgage has authority to pay, not only the amount due thereon, but also to bind his principal to pay whatever expense has already been necessarily incurred in taking steps to enforce the security).

88. U. S.—George v. Louisville Fourth Nat. Bank, 41 Fed. 257.

Ala.—Ullman v. Myrick, 93 Ala. 532, 8 S 410.

Mass.—Nash v. Drew, 5 Cush. 422 (holding that a clerk or salesman has no implied right to pledge his employer's property).

Mo.—Platt v. Francis, 247 Mo. 296, 152 SW 332.

N. Y.—Zachrisson v. Ahman, 4 N. Y. Super. 67; Anderson v. McAleenan, 15 Daly 444, 8 NYS 483 (holding that delivery of a chattel to a person with authority to sell it to A does not confer authority to pledge the chattel). See also Maltz v. Westchester County Brewing Co., 140 NYS 521.

Pa.—Newbold v. Wright, 4 Rawle 195.

S. C.—Ravenel v. Lyles, 17 S. C. Eq. 281.

Eng.—Coondoo v. Watson, 9 App. Cas. 561; De Bouchout v. Goldsmid, 5 Ves. Jr. 211, 31 Reprint 551.

Man.—Jones v. Henderson, 3 Man. 433.

[a] **Authority to sell gives no authority to pledge** for existing debts of the principal. Shaw v. Saranac Horse Nail Co., 144 N. Y. 220, 39 NE 73. But see Cairns v. Page, 165 Mass. 552, 43 NE 503 (where it was held that if A, who is the salesman of B, obtains goods of him, not by false and fraudulent representations but pursuant to custom of B to deliver goods to A with authority to sell them either for cash or on conditional contracts of sale, and A pledges them to C as security for the payment of money lent to him by C, B cannot replevy the goods of C: A must be regarded as a person intrusted with merchandise, and having authority to sell the same, within the meaning of Pub. St. c 71 § 3).

[b] **An agent intrusted with the possession of the property of another,** with his consent, and with the apparent ownership, does not thereby acquire authority to pledge it if it is not left with him for the purposes of sale, and such apparent ownership has not been permitted by the true owner with fraudulent intent. Nickerson v. Darrow, 5 Allen (Mass.) 419.

[c] **A pledge of stock** under a power of attorney for debts other than the principal's unauthorized by the power of attorney, which was seen by the pledgee, who also knew who owned the stock and who owned the debts, gives no lien. Kern's Est., 176 Pa. 373, 35 A 231. Compare Carlisle v. Norris, 157 App. Div. 313, 142 NYS 393.

[d] **Where a debtor leaves the state** on account of pecuniary embarrassments, having given verbal directions to a friend "to assist him in the settlement of all his affairs," such friend has no authority thereby to pledge the debtor's personal property as security for his debt. Swett v. Brown, 5 Pick. (Mass.) 178.

[e] **An authority to collect** does not empower an agent to assign the debt as security for a demand against the principal which the agent was instructed to pay out of the proceeds of the collection. Richardson v. Bunker, 7 Phila. (Pa.) 241.

89. Hayes' App., 195 Pa. 177, 45 A 1007.

90. Givens v. Carter, (Tex. Civ. A.) 146 SW 623.

91. Cal.—Hawxhurst v. Rathgeb, 119 Cal. 531, 51 P 846, 63 AmSR 142.

Colo.—Morsch v. Lessig, 45 Colo. 168, 100 P 431 (holding that an agent, empowered by the owner to sell, has no authority to pledge the property for his own debt).

D. C.—Costikyan v. Sloan, 33 App. 420 (holding that an agent in possession of goods for the purpose of sale has no authority to pledge them for a debt of his own or for advances made on them, although the pledgee is ignorant of the fact that the pledgor was not the owner of the goods).

Ga.—Macon First Nat. Bank v. Nelson, 38 Ga. 391, 95 AmD 400.

Ill.—Morrison First Nat. Bank v. Bressler, 38 Ill. A. 499.

Iowa.—Wyckoff v. Davis, 127 Iowa 399, 103 NW 349.

Me.—Jones v. Farley, 6 Me. 226.

Mo.—Wheeler, etc., Mfg. Co. v. Givan, 65 Mo. 89.

Nebr.—Ryan v. Stowell, 31 Nebr. 121, 47 NW 637.

Va.—Hewes v. Doddridge, 1 Rob. (40 Va.) 143 (so holding under a power of attorney authorizing the agent to act in every species of business wherein the principal may be concerned); Skinner v. Dodge, 4 Hen. & M. (14 Va.) 432.

Wis.—Whitney v. State Bank, 7 Wis. 620.

Eng.—Martini v. Coles, 1 M. & S. 140, 105 Reprint 53; De Bouchot v. Goldsmid, 5 Ves. Jr. 211, 31 Reprint 551.

[a] **An agent of a railroad company** with power to sell orders for tickets has no authority to bind his company by a transaction in which he deposits the orders of the company as security for his own debts. Albright v. Atchison, etc., R. Co., 137 Iowa 631, 115 NW 219.

92. Jones v. Farley, 6 Me. 226.

93. See generally Compromise and Settlement [8 Cyc 499].

Authority of collecting agent to release or compromise see supra § 277.

Authority of selling agent to modify terms of sale see supra §§ 242, 243, 252.

94. Ala.—Scarborough v. Reynolds, 12 Ala. 252.

Colo.—Hagerman v. Bates, 24 Colo. 71, 49 P 139.

Iowa.—Zelenka v. Port Huron Mach. Co., 144 Iowa 592, 123 NW 332; Griffith v. Fields, 105 Iowa 362, 75 NW 325; Gafford v. American Mortg., etc., Co., 77 Iowa 736, 42 NW 550.

Minn.—American Seeding Mach. Co. v. Holzbauer, 117 Minn. 278, 135 NW 807.

Miss.—German-American Provision Co. v. Jones, 87 Miss. 277, 39 S 521 (holding that an agent of a seller of lard warranted to be pure leaf lard, when sent to the buyer to arrange and compromise a dispute as to the quality of the lard, had power to authorize the buyer to sell it as compound lard).

Mo.—Hill v. Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 SW 702 (holding that, where a creditor wrote to another creditor of a common debtor that whatever the agent of the former creditor did with reference to a composition would be satisfactory to him, and the agent had general authority to compromise debts and extend the time of payment, he had authority to fix the measure of damages for a breach of a composition with the latter creditor).

N. Y.—Middleton v. Wohlegemuth, 141 App. Div. 678, 126 NYS 734; Ferreira v. Depew, 17 HowPr 418.

Or.—Williamson v. North Pac. Lumber Co., 38 Or. 560, 63 P 16, 64 P 854.

Pa.—McCormick Harvesting Mach. Co. v. Smith, 9 Kulp 448 (holding that an agent appointed to make a settlement with a person who had purchased a machine had apparent authority to make an agreement that the machine would be put in good condition or the note given for it would be void).

[a] **Possession of unadjusted vouchers.**—An agent to whom unadjusted vouchers for services rendered a railroad company are sent, with authority to make the best settlement he can, is authorized to determine the amount due and collect and receive the money. New York, etc., R. Co. v. Bates, 68 Md. 184, 11 A 705.

[b] **Power of an agent to fix an interest in land** implies the authority to demand a deed to the land. Longview v. Capps, (Tex. Civ. A.) 123 SW 160.

95. Colo.—Hagerman v. Bates, 24 Colo. 71, 49 P 139.

Ind.—American Quarries Co. v. Lay, 37 Ind. A. 386, 73 NE 608 (holding that, where defendant's superintendent of quarries, with power to employ and discharge men, and with power coextensive with the business, obtained a release from a servant injured by a blast in a quarry on consideration of payment of wages, doctor's and nurse's bills; future employment, etc., the transaction was within the scope of the superintendent's authority).

In making a settlement the agent may allow credits and deductions,[96] as by agreeing to an account stated,[97] and if authorized to pay money in settlement he may execute a note to raise the money;[98] in short, he may make any contract that the principal can make in reference to a settlement.[99]

Cash or property. Prima facie a claim is to be settled by a payment in cash, and an agent has no authority to accept anything else, although of course the nature of the claim or authority of the agent may be such as to justify the acceptance of other payment,[1] such as a note,[2] or property,[3] although he cannot accept more of the debtor's property than is necessary to cancel the debt, if the result will be to create a debt against the principal.[4]

[§ 299] **(2) Limits of Authority.** Authority to compromise or settle claims must be regularly and strictly pursued.[5] The agent can bind his principal by a settlement of such matters only as are referred to him,[6] and which inures to the benefit of the principal, and not of the agent.[7] However general the authority to settle, the agent has no implied power to make unusual settlements or agreements that impose upon the principal new liabilities or deprive him of his claims or securities,[8] such as mortgages or other liens on the debtor's property;[9] nor has he power to sell or assign the claims,[10] or to bind the principal by agreements as to matters not connected with the settlement of the dispute;[11] or to adopt means or methods of securing a settlement not authorized in the power or in accord with well established customs.[12] Futhermore a mere power to settle

Mich.—Newberry v. Chicago Lumbering Co., 154 Mich. 84, 117 NW 592 (holding that, where an agent was given a power of an attorney by the heirs of an estate to settle and adjust all accounts and rights of action with any person and to compromise and conclude the same, the agent being also administrator of the estate and having control and management thereof, he had authority to compromise a claim of the heirs against defendant for trespasses in cutting timber on the estate's land and to waive a right of forfeiture for defendant's failure to cut and remove timber within a stipulated time).

Nebr.—Herpolsheimer v. Acme Harvester Co., 83 Nebr. 53, 119 NW 30.

Pa.—Natcher v. Natcher, 47 Pa. 496.

[a] **A bookkeeper** of a business man does not have implied authority to settle matters in dispute between the principal and others. Grubbs v. Ferguson, 136 N. C. 60, 48 SE 551.

96. Zelenka v. Port Huron Mach. Co., 144 Iowa 592, 123 NW 332 (holding that, where a seller sent its agent to make a settlement with the buyer on terms already tentatively arranged between the buyer and the seller's general agent, and to obtain more satisfactory security for the final payment of the debt, it was within the scope of the special agent's authority to allow reasonable credits and deductions claimed by the buyer in order to obtain security which made the debt good); Anderson v. Coonley, 21 Wend. (N. Y.) 279.

97. Williams v. Rutherfurd Realty Co., 159 App. Div. 171, 144 NYS 357.

[a] **"An account stated** (1) being simply an agreement between parties who have had previous monetary transactions that all the items of the accounts representing such transactions are true, such agreement need not necessarily be made by the parties personally, but may be made in behalf of either party by an agent having authority." Sariol v. James P. McDonald Co., 127 App. Div. 648, 649, 111 NYS 796. (2) Thus where defendants' bookkeeper in their absence was the general manager of their business, particularly of that part connected with the accounts of which he had direct charge, and when requested for a statement of plaintiff's account with defendants furnished such statement and told him that it would be sent to one of the partners for "payment" as distinguished from "adjustment," the bookkeeper had ostensible authority to bind defendants by the account stated. Alexander v. Scott, 150 Mo. A. 213, 129 SW 991.

98. Tanner v. Hastings, 2 Ill. A 283; Wapples-Platter Grocer Co. v. Kinkaid, 86 Kan. 167, 119 P 537. See generally supra § 281.

99. Hill v. Werthemier-Swarts Shoe Co., 150 Mo. 483, 51 SW 702; Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 NW 717 (holding that, under a contract providing for settlement of accounts to be consummated by written approval of the party of the first part from its home office, a settlement by an agent duly authorized in a particular case, being duly executed, is binding on the principal, and it cannot thereafter repudiate such settlement, although not approved in writing). See also Lewis v. Lewis, 9 La. 101 (holding that an attorney in fact of the heirs of a deceased brother, who is authorized to compound matters concerning the succession, has authority to compromise with a coheir for his share by assuming the payment on the part of the other heirs of a note held by the coheir against the succession, after it is barred by prescription).

[a] **A claim agent of a railroad** has implied authority to agree to pay for the services of a physician to attend an injured passenger, as such services are necessarily a part of the damages for which the agent has authority to settle, and it is therefore immaterial whether he agrees to pay the physician for his services or includes the services as part of the damages paid to the injured party. Reynolds v. Chicago, etc., R. Co., 114 Mo. A. 670, 90 SW 100.

1. Ingersoll v. Bainister, 41 Ill. 388; Dixon v. Ford, 1 Rob. (La.) 253; Craig Silver Co. v. Smith, 163 Mass. 262, 39 NE 1116. And see generally supra §§ 266–271.

2. Nichols, etc., Co. v. Hackney, 78 Minn. 461, 81 NW 322 (holding that an agreement by a general agent, who possesses full power and authority to make collections and settlements of debts due his principal, entered into with a debtor of the principal, to accept and receive the promissory note of a third person in payment of an indebtedness due the principal from such debtor is valid, and will bind the principal, if founded on a valuable consideration). See also supra § 267.

3. Oliver v. Sterling, 20 Oh. St. 391. See also supra § 270.

4. Pollock v. Cohen, 32 Oh. St. 514.

5. Blum v. Robertson, 24 Cal. 127; Nickles v. Wells, 2 Utah 167.

6. Hartford F. Ins. Co. v. Smith, 3 Colo. 422; Morse v. McAlpin, 10 KyL 985; Melcher v. Jefferson City Exch. Bank, 85 Mo. 362.

7. McCormick v. Keith, 8 Nebr. 142; Williams v. Johnston, 94 N. C. 633; Chilton v. Wilford, 2 Wis. 1, 60 AmD 399.

8. U. S.—New York v. DuBois, 86 Fed. 889 (holding that, under a power of attorney authorizing an agent to compromise a pending suit, an agreement by the agent to a method of settlement which is unreasonable and unusual in its terms, and unfair, is not binding on the principal).

Cal.—Johnson v. Wright, 6 Cal. 373.

N. H.—Bohanan v. Boston, etc., R. Co., 70 N. H. 526, 49 A 103 (holding that it was beyond the authority of a claim agent of a railroad company to offer employment for life as a settlement of a claim against the road without proof that such was the ordinary and usual means of settling such claims).

N. Y.—Allen v. Brown, 44 N. Y. 228 (holding that, where an agent having authority merely "to collect, settle or arrange" certain claims received notes in settlement, and without the consent of his principal sold them for less than their face value, he was responsible for the full amounts, on evidence that they were collectable); Geiger v. Bolles, 1 Thomps. & C. 129.

Oh.—Pollock v. Cohen, 32 Oh. St. 514.

Tenn.—Hussey v. Crass, (Ch. A.) 53 SW 936.

Tex.— Simmons Hardware Co. v. Adams, (Civ. A.) 147 SW 1196.

Vt.—Mead v. Owen, 80 Vt. 273, 67 A 722, 12 LRANS 655, 13 AnnCas 231 (holding that an appointment as arbitrator and agent to settle differences with another who had been occupying a house on a farm under an agreement whereby he was to carry on the farm on shares, did not carry with it authority to extend the time within which the house might be occupied to the time of settlement).

[a] **That a railroad company's agent had authority to settle** all matters growing out of a contract with a construction company did not authorize him to agree on the part of the railroad company to pay the claim of a third person against the construction company. Cleveland, etc., R. Co. v. Shea, 174 Ind. 303, 91 NE 1081.

9. Couch v. Davidson, 109 Ala. 313, 19 So. 507; Garrels v. Morton, 26 Ill. A 433; Hakes v. Myrick, 69 Iowa 189, 28 NW 575; Stark v. Olsen, 44 Nebr. 646, 63 NW 37.

10. Wood v. McCain, 7 Ala. 800, 42 AmD 612; Schroeder v. Wolf, 227 Ill. 133, 81 NE 13; Hannon v. Houston, 18 Kan. 561.

[a] **Sale.**— An agent with authority to compromise a debt has no power to sell the evidence thereof. Draughon v. Quillen, 23 La. Ann. 227.

11. Hussey v. Crass, (Tenn. Ch. A.) 53 SW 936 (holding that authority given by a subcontractor of an insolvent railroad to the principal contractor to secure settlement for him does not authorize the principal contractor, on accepting bonds in settlement, to sell the bonds); Congar v. Galena, etc., R. Co., 17 Wis. 477 (holding that a special authority from the owner to look up property mislaid or lost by a common carrier does not imply any authority to settle for the damages resulting from the carrier's neglect).

[a] **Indorsing note received in settlement.**—The agent cannot accept a note in settlement and indorse it so as to make his principal liable thereon. Essick v. Buckwalter, (Pa.) 16 A 849.

[b] **Cannot bind principal for debts of others.**—A power of attorney given to an agent to represent the principal's interest in the settlement of certain claims does not authorize the attorney to bind the principal for the debts of third persons. Hart v. Dixon, 5 Lea (Tenn.) 336.

12. Dixon v. Ford, 1 Rob. (La.) 253; Wright v. Ellison, 1 Wall. (U. S.) 16, 17 L. ed. 555.

is limited to fixing the terms of settlement and does not include authority to receive or distribute payment of the sum agreed upon.[13]

[§ 300] **(3) Release.** An agent is not to be presumed to have authority to release a debtor without any payment, or upon the payment of any sum less than the entire debt,[14] unless the appointment or its surrounding circumstances make it clear that the agent was empowered to compromise, or even entirely to release, in his discretion;[15] nor can the agent substitute the liability of some other person so as to release the debtor.[16]

[§ 301] **(4) Settlement by Litigation.**[17] Power to settle by means of litigation does not exist unless clearly given and strictly pursued;[18] but it is enough that the instrument creating the agency read as a whole, or the circumstances surrounding the employment, make clear the grant of the power,[19] and when so given it justifies the agent in defending or prosecuting the claim before the proper tribunal by suitable proceedings,[20] and empowers him to execute the bonds and other papers that may be usually required or legally demanded of such a litigant,[21] to appeal from a judgment in a suit,[22] and presumptively to collect the amount recovered.[23] Authority to bring suit on a claim does not give the agent

13. Churchill v. McKay, 20 Can. S. C. 472.

[a] **Illustration.**—A power of attorney authorizing the attorney to arbitrate, purchase, sell, dispose of, compromise, or otherwise settle, any claim or claims against a vessel, her freight, and cargo, for salvage services rendered to such vessel and cargo, will not authorize the attorney, after realizing the salvage claim, to make a disposal of the proceeds among those interested, in such manner and proportions as he sees fit, and to allow such charges against the fund as he pleases. Hawkins v. Avery, 32 Barb. (N. Y.) 551.

14. U. S.—Randon v. Toby, 11 How. 493, 13 L. ed. 784.

Ala.—Scales v. Mount, 93 Ala. 82, 9 S 513 (holding that authority to "settle and collect" a claim does not authorize a compromise for less than the full amount).

Colo.—Burlock v. Cross, 16 Colo. 162, 26 P 142.

Ga.—Holland v. Van Bell, 89 Ga. 223, 15 SE 302.

Ill.—McHany v. Schenk, 88 Ill. 357.

N. J.—Perry v. Smith, 29 N. J. L. 74; Wetherbee v. Baker, 32 N. J. Eq. 537; [rev on other grounds 35 N. J. Eq. 501].

N. Y.—Harrison v. Burlingame, 48 Hun 212; De Witt v. Greener, 11 NYCivProc 327.

N. C.—Herring v. Hottendorf, 74 N. C. 588.

Pa.—Corr v. Greenfield, 134 Pa. 503, 19 A 676; Patterson v. Moore, 34 Pa. 69.

Tex.—Wheeler, etc., Mfg. Co. v. Crossland, 2 Tex. A Civ. Cas. § 80.

Utah.—Nickles v. Wells, 2 Utah 167.

Vt.—Angel v. Pownal, 3 Vt. 461. But see Middlebury College v. Loomis, 1 Vt. 189 (holding that if the agent has full power to settle according to his best judgment he may discharge without payment).

Ont.—Hamilton v. Holcomb, 13 U. C. C. P. 9.

See Garth v. Runner, (Ky.) 121 SW 681 (holding that, where a principal wrote his agent: "When Garth has given you a mortgage on [certain property] and had the bond [describing a sale bond] transferred to me, give him a check," etc., "if you think this a good loan," this did not authorize the agent to release the principal's lien on the land under the bond, or to direct a sale of the land by the sheriff, under an execution on the bond, or to accept, in lieu of the lien, any other notes or evidences of debt that Garth might take from persons to whom he had sold any part of the land on which the sale bond was a lien).

See also supra § 277.

[a] **Authority to sign releases of liens** when cash is paid does not imply authority to sign them without payment. Corr v. Greenfield, 134 Pa. 503, 19 A 676.

[b] **A covenant by an obligee not to sue the obligor at all** may be pleaded as a release, but, if it appears to have been executed by an agent, his authority must be proved. Reed v. Shaw, 1 Blackf. (Ind.) 245.

15. Ala.—Scales v. Mount, 93 Ala. 82, 9 S 513.

Cal.—Rothschild v. Swope, 116 Cal. 670, 48 P 911 (holding that, where creditors assigned their claims to plaintiff for the purpose of conducting a sale of the debtor's goods, and plaintiff took possession under the belief that it was to be surrendered to the debtor when enough to cover the claims was realized from sales, and plaintiff employed an agent to make the sales, with authority to act generally for him, and thereafter the creditors corresponded with such agent, a surrender of possession to the debtor by the agent, after conducting sales for two weeks, was authorized).

Iowa.—Hasbrouck v. Western Union Tel. Co., 107 Iowa 160, 77 NW 1034, 70 AmSR 181.

La.—Gruner v. Stucken, 39 La. Ann. 1076, 3 S 338.

Mass.—Gross v. Milligan, 176 Mass. 566, 58 NE 471.

Mich.—Lindley v. Lupton, 118 Mich. 466, 76 NW 1037 (holding that where mortgagors, after negotiations with the mortgagee and consultation with his agent, turned over certain land and paid a certain sum in settlement of the mortgage, they were entitled to a discharge, where the mortgagee had written them that, if they traded with the agent, "you can count the matter as satisfactorily settled with me"); Aultman v. Dodson, 104 Mich. 507, 62 NW 708; Palmer v. Roath, 86 Mich. 602, 49 NW 590.

N. Y.—Equity Gaslight Co. v. McKeige, 19 NYS 914 [aff 139 N. Y. 237, 34 NE 898]; Murray v. Toland, 3 Johns. Ch. 569.

S. C.—Whaley v. Duncan, 47 S. C. 139, 25 SE 54 (holding that where principals authorized their agent to make a settlement of an indebtedness due them, which the agent did, they were bound by the settlement made, although not in all respects in accordance with their instructions, the debtor having no knowledge of such instructions).

Tex.—Martin v. Rotan Grocery Co., (Civ. A.) 68 SW 212 [aff 95 Tex. 437, 67 SW 883]; Wilcoxon v. Howard, 26 Tex. Civ. A. 281, 62 SW 802, 63 SW 938; Smith v. Cantrel, (Civ. A.) 50 SW 1081; Debney v. McFarlin, (Civ. A.) 34 SW 142.

Vt.—Middlebury College v. Loomis, 1 Vt. 189.

[a] **Power to execute deeds of relinquishment.**—An agent authorized to compromise and adjust adverse claims to land is authorized to execute deeds of relinquishment to the adverse claimants. Wilcoxon v. Howard, 26 Tex. Civ. A. 281, 62 SW 802, 63 SW 938; Smith v. Cantrel, (Tex. Civ. A.) 50 SW 1081.

[b] **Payment of amount stated in the power not a condition.**—A power authorizing an attorney in fact to release "the mortgage on the Sobrante for forty thousand dollars" does not condition the execution of the release on the payment of forty thousand dollars, but the sum stated is merely descriptive of the mortgage. Adams v. Hopkins, 144 Cal. 19, 77 P 712.

16. Ingersoll v. Banister, 41 Ill. 388; Batchelder v. Libbey, 66 N. H. 175, 19 A 570; Ludwig v. Gorsuch, 154 Pa. 413, 26 A 434.

17. **Authority of collecting agent to sue** see supra § 275.

Power to conduct litigation see generally infra § 303.

18. U. S.—Wright v. Ellison, 1 Wall. 16, 17 L. ed. 555 (holding that a power of attorney, drawn up in South America by Portuguese agents, in which throughout there is verbiage and exaggerated expression, authorizing the prosecution of a claim in the Brazilian courts, will not be held to give power to prosecute one before a commissioner of the United States at Washington, notwithstanding the first named power is given with great generality and strength of language).

Cal.—Blum v. Robertson, 24 Cal. 127; Davidson v. Dallas, 8 Cal. 227.

Del.—Lesley v. Shock, 8 Del. 130.

La.—Dickson v. Morgan, 7 La. Ann. 490; Fuselier v. Robin, 4 La. Ann. 61.

Me.—Matthews v. Matthews, 49 Me. 586; Woodman v. Neal, 48 Me. 266.

N. Y.—Rogers v. Cruger, 7 Johns. 557.

19. Carter v. Lewis, 15 La. Ann. 574; Warren v. Dennett, 17 Misc. 86, 39 NYS 830; Woerman v. Baas, 12 NYS 59.

20. U. S.—Weile v. U. S., 7 Ct. Cl. 535 (holding that a power of attorney to demand pecuniary indemnification from a foreign government, with power to do every necessary act, empowers the agent to prosecute the claim before a commission).

La.—Miller v. Marmiche, 24 La. Ann. 30.

Md.—Giles v. Ebsworth, 10 Md. 333.

Mont.—State v. Giroux, 15 Mont. 137, 38 P 464.

Eng.—Ex p. Wallace, 14 Q. B. D. 22; Ex p. Hamilton, 2 Deac. & C. 139.

21. Cal.—Davidson v. Dallas, 8 Cal. 227 (holding that a power of attorney to sue, collect, compromise, etc., with a general power to make all necessary deeds and acquittances, authorizes the agent to execute an indemnity bond to the sheriff, whenever the latter has the right to require it).

Ill.—Merrick v. Wagner, 44 Ill. 266 (justifying the execution of a replevin bond by an agent authorized to sue).

Ky.—Com. v. Perkins, 32 SW 134, 17 KyL 542.

Md.—State v. Banks, 48 Md. 513.

Eng.—Ex p. Wallace, 14 Q. B. D. 22; Ex p. Crowther, 4 Deac. & C. 31.

[a] **If the act is one which the principal might easily do himself** the agent should not act for him in signing papers. Matter of Sampson, 3 Deac. & C. 198.

[b] **Power conferred by statute** see statutory provisions. And see Head v. Woods, 92 Ga. 548, 17 SE 928; Cook v. Buchanan, 86 Ga. 760, 13 SE 83.

22. Lowrey v. Bates, 26 Misc. 407, 56 NYS 197 (holding that a power "to acknowledge or contest any claim," and "to defend, compromise or settle any suit," includes power to appeal from a judgment in a suit).

23. Weile v. U. S., 7 Ct. Cl. 535; Alexander v. Alexander, 8 Kan. A. 571, 54 P 1036; Churchill v. McKay, 20 Can. S. C. 472 (holding that the agent has no such power if as a matter of

power to compromise it, unless previously granted or subsequently approved by the principal.[24]

[§ 302] **l. To Submit to Arbitration.**[25] An agent duly authorized may bind his principal by a submission to arbitration;[26] but a reference of a dispute to arbitration being an extraordinary method of settlement, substituting for the discretion of the agent the judgment of another person, the arbitrator, the agent therefore has no authority to submit to arbitration claims or accounts for or against his principal unless such submission has been directly or incidentally authorized,[27] and it has been said that an agent's power to submit to arbitration on behalf of his principal must be express.[28] Thus authority to submit to arbitration does not arise from a power to act as general agent,[29] or from a general power to settle claims or to demand or even to sue for moneys due the principal.[30] Where such authority exists it must be strictly pursued and the principal will not be bound if the agent departs from his authority or agrees to unusual terms of arbitration,[31] although he and not the agent is bound by an award duly authorized and properly made.[32]

[§ 303] **m. To Conduct Litigation.**[33] The same principles that govern the right of an agent to enforce a settlement by a suit[34] may be extended to bringing suits generally. The authority of an agent to engage in litigation for his principal must depend upon the conditions of the agency. Litigation is liable to be hazardous and expensive. Hence, unless the duties intrusted to the agent are in their nature such that the principal must be supposed to have anticipated that the execution of the commission would be likely to entail litigation, such power is not within the scope of general authority, and the principal cannot be bound by the act of his agent in bringing a suit,[35] or, if authorized to bring suit for some purposes, in bringing it for an unauthorized

fact he settles by agreement and not by suit).

24. Head v. Woods, 92 Ga. 548, 17 SE 928; Cook v. Buchanan, 86 Ga. 760, 13 SE 83; Allen v. Champlin, 32 La. Ann. 511; Bonneau v. Poydras, 2 Rob. (La.) 1; Kilgour v. Ratcliff, 2 Mart. N. S. (La.) 292; Dupre v. Splane, 16 La. 51; Armstrong v. Gilchrist, 2 Johns. Cas. (N. Y.) 424.

25. **Authority of attorney to submit to arbitration** see Attorney and Client [4 Cyc 938 et seq].

26. Ill.—Security Live Stock Ins. Assoc. v. Briggs, 22 Ill. A. 107.

Mass.—Buckland v. Conway, 16 Mass. 396.

Miss.—Memphis, etc., R. Co. v. Scruggs, 50 Miss. 284.

N. Y.—Wood v. Auburn, etc., R. Co., 8 N. Y. 160.

Tex.—Houston Saengerbund v. Dunn, 41 Tex. Civ. A. 376, 92 SW 429.

Wis.—Gibbs v. Holcomb, 1 Wis. 23.

Eng.—Henley v. Soper, 8 B. & C. 16, 15 ECL 18, 108 Reprint 949; Curtis v. Laing, 5 B. & C. 141, 11 ECL 402, 108 Reprint 52; Wilks v. Back, 2 East 142, 102 Reprint 323, 8 ERC 634.

27. Ala.—Scarborough v. Reynolds, 12 Ala. 252 (holding that an authority to an agent stated thus, "If you can honorably and fairly settle with Reynolds for me out of court, do so, if not, let the court and jury settle," does not authorize a reference to arbitrators; nor will authority to exercise a reasonable discretion, or to submit to a reasonable sacrifice, confer such power).

Cal.—Talmadge v. Arrowhead Reservoir Co., 101 Cal. 367, 35 P 1000.

Ill.—Trout v. Emmons, 29 Ill. 433, 81 AmD 326.

Nebr.—Manufacturers', etc., F. Ins. Co. v. Mullen, 48 Nebr. 620, 67 NW 445.

N. H.—Eastman v. Burleigh, 2 N. H. 484.

Wis.—Gibbs v. Holcomb, 1 Wis. 23.

N. B.—O'Regan v. Quebec, etc., Steamship Co., 19 N. B. 528.

[a] **Authority to sign an agreement to arbitrate** cannot be inferred from the collection of rent and like acts performed on behalf of the principal. Manufacturers', etc., F. Ins. Co. v. Mullen, 48 Nebr. 620, 67 NW 445.

28. Macdonald v. Bond, 195 Ill. 122, 62 NE 881; Michigan Cent. R. Co. v. Gougar, 55 Ill. 503; Trout v. Emmons, 29 Ill. 433, 81 AmD 326; McPherson v. Cox, 86 N. Y. 472.

29. Mobile v. Wood, 95 Fed. 537; Macdonald v. Bond, 195 Ill. 122, 62 NE 881 [aff 96 Ill. A. 116]; Trout v. Emmons, 29 Ill. 433, 81 AmD 326.

30. U. S.—New York v. Du Bois, 86 Fed. 889 (holding that the power given to compromise implies the exercise by the agent of his own judgment as to the terms accepted, and cannot be delegated by the agent to any other person or tribunal).

Ala.—Huber v. Zimmerman, 21 Ala. 488, 56 AmD 255; Scarborough v. Reynolds, 12 Ala. 252.

Ga.—Allen v. Confederate Pub. Co., 121 Ga. 773, 49 SE 782.

Ill.—Michigan Cent. R. Co. v. Gougar, 55 Ill. 503.

La.—King v. King, 104 La. 420, 29 S 205.

N. J.—Lawrence v. Emson, 31 N. J. Eq. 67.

N. Y.—McPherson v. Cox, 86 N. Y. 472 [rev 21 Hun 493].

N. B.—O'Regan v. Quebec, etc., Steamship Co., 19 N. B. 528 [dist Goodson v. Brooke, 4 Campb. 163].

But see Schoff v. Bloomfield, 8 Vt. 472 (holding that, if a town appoints an agent to compromise a disputed claim for damages on account of a road laid across plaintiff's land by the selectmen, such agent may refer to arbitrators the question of the amount to be paid, and the town will be bound by the award).

[a] **Reason for rule; personal trust.**—In Huber v. Zimmerman, 21 Ala. 488, 489, 56 AmD 255, where it was held that an agent authorized to settle accounts could not submit the matter to arbitration, the court said: "The authority conferred upon the agent to make settlement, &c., was a personal trust, given, it may be, solely in view of the agent's capacity for its performance. The law is well settled, that in such case, unless an authority is expressly given to substitute, the agent has no power to put another in his place and stead. Story on Agency, 14 § 13. Some exceptions, or rather qualifications, in the application of this general rule, have sometimes been allowed in cases where, from the language used, or from a fair presumption growing out of the nature of the business to be transacted, or the usage of trade, it appears that a broader power was intended to be conferred on the agent."

[b] **A power of attorney to conduct a suit** "to final consummation" or to make a compromise does not give authority to submit the dispute to a special tribunal. New York v. Dubois, 132 Fed. 752, 65 CCA 590.

31. Ill.—Macdonald v. Bond, 195 Ill. 122, 62 NE 881.

La.—King v. King, 104 La. 420, 29 S 205; Patterson v. La Farge, 5 Mart. N. S. 669.

Md.—Bullitt v. Musgrave, 3 Gill 31 (holding that an agent appointed to submit a claim to arbitration is not thereby authorized to ratify and confirm the award when made).

Nebr.—Manufacturers', etc., F. Ins. Co. v. Mullen, 48 Nebr. 620, 67 NW 445.

Vt.—Mead v. Owen, 80 Vt. 273, 67 A 722, 12 LRANS 655, 13 AnnCas 231; Cox v. Fay, 54 Vt. 446.

[a] **Waiver of objections to proceedings.**—(1) An agent authorized to submit may bind his principal by waiving an objection to an umpire chosen by lot (Taylor v. Backhouse, 15 Jur. 86), (2) or by permitting the opposite party to produce his books before the arbitrator alone on a subsequent day (Hamilton v. Bankin, 3 De G. & Sm. 782, 64 Reprint 703). (3) But where arbitrators are required by law to take an oath before acting under the submission an agent cannot waive such requirement, unless especially authorized by his principal. King v. King, 104 La. 420, 29 S 205.

[b] **Appointment of additional arbitrator; unanimity of award.**—In Security Live Stock Ins. Assoc. v. Briggs, 22 Ill. A. 107, it was held that where full authority to submit a question to arbitration has been given to anyone he may agree that an additional arbitrator may be chosen, and that an award made by less than the full number of arbitrators shall be binding on the parties.

[c] **Designation of arbitrators.**—An agent empowered merely to submit to the arbitration of specified arbitrators has no power to submit to other arbitrators. Cox v. Fay, 54 Vt. 446.

32. Callahan v. McAlexander, 1 Ala. 866.

33. **Authority of collecting agent** to bring suit see supra § 275.

Authority to sue for possession or protection of property see infra § 314.

Foreclosure of mortgage see supra § 275.

34. See supra § 301.

35. U. S.—Pressley v. Mobile, etc., R. Co., 15 Fed. 199, 4 Woods 569.

Cal.—Fitch v. Brockmon, 2 Cal. 575.

Hawaii.—Honolulu Rapid Transit, etc., Co. v. American-Hawaiian Steamship Co., 3 Hawaii Fed. 1 (holding that authority of an agent to bring suit for his principal must be shown unless he is an attorney at law licensed by the court).

Iowa.—Markham v. Burlington Ins. Co., 69 Iowa 515, 29 NW 435.

Ky.—Robinson v. Morgan, Litt. Sel. Cas. 56.

La.—Prevost v. Martel, 10 Rob. 512; Rowland v. Pascal, 10 La. 598; Seymour v. Cooley, 9 La. 72.

Mo.—Grant City v. Simmons, 167 Mo. A. 183, 151 SW 187.

Va.—Fishburne v. Engledove, 91 Va. 548, 22 SE 354.

[a] **Authority to contract** (1) confers no power to sue upon the contract (Markham v. Burlington Ins. Co., 69 Iowa 515, 29 NW 435); (2) or to release any material benefit thereunder in order to avoid a lawsuit, where there is no dispute as to the validity of the contract (Kountz v. Gates, 78 Wis. 415, 47 NW 729).

[b] **Suit in own name.**—A special power of attorney only authorizing the institution of legal proceedings in the "name, place and stead" of the principals does not confer authority

purpose;[36] but he will be liable for, and, on the other hand, he can take advantage of, authorized acts of his agent either in the litigation or in laying a foundation therefor.[37] The same principles that recognize the prosecution of a suit by an agent apply to defenses to suits through attorneys in fact. Although such matters are for the most part in the hands of attorneys at law, there is no reason why one cannot in litigation do by attorney in fact what he can do personally.[38]

Dismissal. A power to bring a suit implies no authority to dismiss it without full settlement.[39]

Confession of judgment. One may appear and confess judgment by an agent,[40] although the authority must be strictly pursued and exercised within such limits as the principal has imposed.[41]

[§ 304] **n. To Lend or Borrow Money—(1) In General.**[42] Power to lend or borrow money, like most other special powers of an agent, is not to be inferred without clear evidence of such a grant. Such authority must be either expressly conferred or necessarily implied from the authority granted,[43] and will not be implied from a mere general authority,[44] unless the character of the business or the duties of the agent are of such a nature that he is bound to borrow or lend in order to carry out his instructions and the duties of his office.[45] Thus such power is not to be implied from mere power to manage the principal's business, even though with authority to buy goods on credit.[46] Power to borrow money may be implied, as in other cases of implied authority, from the course of conduct of the principal in allowing the agent to borrow on his account;[47] but it is not to be implied from a power merely to manage or act for the principal in his business generally or in other specific matters,[48]

on the agent to institute suit in his own name. Kuite v. Lage, 152 Mich. 638, 116 NW 467, 125 AmSR 421.

[c] **Power to recover excess duties by suit.**—Where an importer executes a power of attorney, whereby he appoints the grantee therein his attorney, with power to recover by suit or otherwise such excess of duties which has been or which may be exacted, the duty cannot be regarded as exacted within the meaning of the power of attorney until the amount is determined and liquidated in accordance with the usual custom of the federal authorities, and the power of attorney embraces only cases where the duties have been finally fixed and charged by the authorities, and where something is necessary to be done either by suit or appeal to the treasury department to obtain a refund. Culver v. Western Union Tel. Co., 50 N. Y. 691.

36. Cleveland Co-operative Stove Co. v. Koch, 37 Ill. A. 595.

37. La.—Materne v. Lion, 35 La. Ann. 988; Maguire v. Bass, 8 La. Ann. 270.

Mass.—Bayley v. Bryant, 24 Pick. 198; Sutton First Parish v. Cole, 3 Pick. 232.

N. Y.—Warren v. Dennett, 17 Misc. 86, 39 NYS 830 (where the principal was held liable, although the agent, acting in the course of his employment, did not follow instructions).

Vt.—Davis v. Waterman, 10 Vt. 526, 33 AmD 216.

Va.—Higginbotham v. May, 90 Va. 233, 17 SE 941.

38. Lowrey v. Bates, 26 Misc. 407, 56 NYS 197; Virginia Ins. Co. v. Barley, 16 Gratt. (57 Va.) 363.

[a] **However, it is not within the ordinary scope** of the duty of an agent who is appointed to manage real estate to appear for his principal in a suit between other persons relating to real estate which does not belong to the principal, but which has been conveyed by the principal, and to take upon himself the defense of such suit. Richmond v. Ames, 164 Mass. 467, 41 NE 671.

39. Emmons v. Myers, 8 Miss. 375.

40. Brown v. Newman, 13 Iowa 546; North River Bank v. Rogers, 22 Wend. (N. Y.) 648 (holding that a power of attorney to execute mortgages, bonds, warrants, etc., and to do all things relating to the business of the principal, confers authority to execute a bond and warrant of attorney to confess judgment for a bona fide debt); Dial v. Farrow, 17 S. C. Eq. 114; Virginia Ins. Co. v. Barley, 16 Gratt. (57 Va.) 363.

[a] **Power not implied.**—(1) A power to give a mortgage on particular property does not authorize the agent to confess judgment. Boykin v. O'Hara, 6 La. Ann. 115. (2) So also a power of attorney authorizing one in the names of partners of a company to which he is a partner to negotiate, compromise, adjust, determine, settle, and arrange all differences and disputes between them and others, to execute and sign their names to any release, covenant, or conveyance of all or any part of their joint estate whether real or personal, and to give and receive discharges, receipts, etc., does not authorize a confession of judgment by such attorney in the names of the partners. Lagow v. Patterson, 1 Blackf. (Ind.) 252.

41. Howell v. Gordon, 40 Ga. 302 (holding that where an agent is appointed by a nonresident to look after or to act as agent for certain lots of land, with no other or general powers, and an attachment is issued against such nonresident owner and levied upon the lots, the agent is not authorized to confess a general judgment binding upon defendant in attachment); Rankin v. Eakin, 3 Head (Tenn.) 229 (holding that where a person constituted another his agent, gave him written authority to confess judgment on a note in his name, and limited his authority as to time and place, the agent could not confess judgment at a different time from that authorized in the power).

42. Authority of agent making loan to collect see supra § 256.

Ratification of unauthorized loan by accepting benefits see supra § 119.

Whether agent of the lender or of the borrower see supra §§ 44-46.

43. Exchange Bank v. Thrower, 118 Ga. 433, 45 SE 316 (holding that authority to borrow money, conferred on an agent, must be created by express terms or necessarily implied from the nature of the agency, for authority to borrow money is one of the most dangerous powers a principal can confer upon an agent); Williams v. Dugan, (Mass.) 105 NE 615.

[a] **Reason for rule.**—"The power to borrow money or to execute and deliver promissory notes is one of the most important which a principal can confer upon an agent. It is fraught with great possibilities of financial calamity. It is not lightly to be implied. It either must be granted by express terms or flow as a necessary and inevitable consequence from the nature of the agency actually created." Williams v. Dugan, (Mass.) 105 NE 615.

44. Cal.—Macdonald v. Cool, 134 Cal. 502, 66 P 727.

Ill.—Merchants' Nat. Bank v. Nichols, etc., Co., 223 Ill. 41, 79 NE 38, 7 LRANS 752 [aff 123 Ill. A. 430].

N. J.—Bernheimer v. Verdon, 63 N. J. Eq. 312, 49 A 732.

N. Y.—Bickford v. Menier, 107 N. Y. 490, 14 NE 438 [aff 122 N. Y. 639 mem, 25 NE 955 mem]; Muller v. Pondir, 6 Lans. 472 [aff 55 N. Y. 325, 14 AmR 259]; Sawyer v. Wayne, 6 NYSt 745.

S. D.—Edinburgh-American Land Mortg. Co. v. Noonan, 11 S. D. 141, 76 NW 298.

Wis.—Heath v. Paul, 81 Wis. 532, 51 NW 876.

45. Ladd v. Ætna Indemn. Co., 128 Fed. 298 [aff 135 Fed. 636, 68 CCA 274] (holding that the power of an agent to borrow money on behalf of his principal does not depend upon whether or not he is a general agent, but, although not a general agent, such authority may be conferred, by implication, from the scope and character of the business he is empowered to transact); Davidson v. Dallas, 8 Cal. 227; Exchange Bank v. Thrower, 118 Ga. 433, 45 SE 316; Williams v. Dugan, (Mass.) 105 NE 615.

46. Bickford v. Menier, 107 N. Y. 490, 14 NE 438 [rev 36 Hun 446]; Weekes v. A. F. Shapleigh Hardware Co., 23 Tex. Civ. A. 577, 57 SW 67; Spooner v. Thompson, 48 Vt. 259.

[a] **Reloan.**—A power of attorney to attend to the business of the grantor, to collect all money and obligations due, adjust all business matters of whatever nature, pay and settle all debts, draw checks, and do all acts in the premises which the attorney may deem proper, does not confer power to reloan money after it has been collected, and such reloaning constitutes a conversion by the attorney. Haynes v. Carpenter, 86 Mo. A. 30.

47. Williams v. Dugan, (Mass.) 105 NE 615; Kelley v. Lindsey, 7 Gray (Mass.) 287 (holding that evidence that a person was the financial agent and confidential clerk of another, and had on various occasions, with his assent, in his behalf accepted drafts, and drawn orders upon others, which he afterward allowed in account, is evidence from which, without any proof of direct authority, a jury may infer a general authority to borrow money to meet the exigencies of the principal's business, even at a usurious rate of interest, and to bind him by a check given therefor); Collins v. Cooper, 65 Tex. 460.

48. U. S.—Chicago, etc., R. Co. v. Chickasha Nat. Bank, 174 Fed. 923, 98 CCA 535.

Colo.—Schramm v. Liebenberg, 42 Colo. 516, 94 P 345 (holding that authority to borrow money for his principal does not follow because an agent is in charge of a store as sole manager and also in charge of the ranch, cattle, and horse interests of his principal, especially where it does not appear that the loan was used in the business of the principal).

Ill.—Merchants' Nat. Bank v. Nichols, etc., Co., 223 Ill. 41, 79 NE 38, 7 LRANS 752.

La.—Font v. Domingo, Mann. Unrep. Cas. 175.

Me.—Perkins v. Boothby, 71 Me. 91.

Mo.—Butts v. Ajax-Grieb Rubber Co., 169 Mo. A. 657, 155 SW 837.

N. Y.—Bickford v. Menier, 107 N.

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unless such authority is reasonably necessary to enable the agent to execute his authority, and then only within the limits of such necessity.[49] But it has been held that even necessity will not extend mere authority to manage property so as to authorize the agent to borrow money.[50] So also such authority is not to be implied from a power to lend,[51] or from a power merely to purchase[52] or to sell property,[53] or to make deposits and draw or indorse checks, drafts, etc.[54] Before making loans to an agent, the lender should investigate and ascertain the extent of such agent's authority;[55] and he is charged with knowledge that no agent, however general his powers, has implied authority to borrow money for himself on the credit of his principal.[56]

[§ 305] **(2) Extent of Authority.** Power to lend or borrow money when conferred, whether expressly or impliedly, must be carefully pursued and exercised within the limits prescribed, and burdens assumed by the agent but not authorized by the principal cannot bind the latter,[57] unless the agent acts within the apparent scope of his authority, although exceeding his actual authority.[58] A general power to borrow includes power to give ordinary

Y. 490, 14 NE 438; Tucker v. Woolsey, 64 Barb. 142.

Wis.—McDermott v. Jackson, 97 Wis. 64, 72 NW 375; Heath v. Paul, 81 Wis. 532, 51 NW 876.

Eng.—Bryant v. La Banque du Peuple, [1893] A. C. 170.

[a] **A power of attorney to wind up the business** of a nonresident principal does not authorize the agent to borrow money on his account. Smith v. McGregor, 96 N. C. 101, 1 SE 695.

[b] **Principal accepting benefits.**—Where the agent borrows money and applies it to the payment and discharge of the legal liabilities of his principal, who knowingly retains the benefit of such payment, the principal will be liable therefor to the lender in an action for money had and received. Perkins v. Boothby, 71 Me. 91.

49. U. S.—Chicago, etc., R. Co. v. Chickasha Nat. Bank, 174 Fed. 923, 98 CCA 535.

Ga.—Exchange Bank v. Thrower, 118 Ga. 433, 45 SE 316.

Ky.—Rankin v. McFarlane Carriage Co., 75 SW 221, 25 KyL 258.

Mo.—Rider v. Kirk, 82 Mo. A. 120 (holding that an agent engaged in buying and shipping horses had authority to borrow money to purchase grain to feed the horses while awaiting shipment, since the exercise of such authority was necessary to the conduct of the business); Butts v. Ajax-Grieb Rubber Co., 169 Mo. A. 657, 155 SW 837.

N. Y.—Hearne v. Keene, 18 N. Y. Super. 579.

Wis.—Newell v. Clapp, 97 Wis. 104, 72 NW 366; McDermott v. Jackson, 97 Wis. 64, 72 NW 375.

[a] **Reason for rule.**—"The granting of power to an agent to borrow money on account of his principals, and to pledge their property as security for its repayment, is an unusual confidence to repose in the discretion of an agent, and being a grant of unusual power, to establish its existence, either express authority from the principals must be shown, or the very nature of the business to be transacted by the agent must require the exercise of such extraordinary authority, and this is true whether the agency be general or special in character." Chicago, etc., R. Co. v. Chickasha Nat. Bank, 174 Fed. 923, 929, 98 CCA 535.

[b] **An agent in charge of a grain elevator,** with authority to issue drafts in payment for grain and the necessary expenses of the business, was held to have authority to use the money of a lumber company of which he was the agent in payment for grain and to give a draft against the elevator in return therefor. Great Western El. Co. v. White, 118 Fed. 406, 56 CCA 388.

50. Hawtayne v. Bourne, 10 L. J. Exch. 224, 226 (where Alderson, B., said: "There is no rule of law that an agent may, in a case of emergency suddenly arising, raise money and pledge the credit of his principals for its repayment").

51. Humphrey v. Havens, 12 Minn. 298.

52. Chicago, etc., R. Co. v. Chickasha Nat. Bank, 174 Fed. 923, 98 CCA 535 (holding that an agent authorized to purchase cotton for his principals in a particular locality from any persons having the same for sale, and at any price agreed on between them, was a general agent with implied authority to bind his principals by any contract for the purchase of cotton in that locality, but such implied authority did not extend to borrowing money and pledging securities belonging to his principals as collateral therefor, where the same was not a necessary incident to the business of purchasing cotton); Martin v. Peters, 27 N. Y. Super. 434; Jacobs v. Morris, [1901] 1 Ch. 261 [aff [1902] 1 Ch. 816].

53. Shaw v. Stone, 1 Cush. (Mass.) 228 (holding that a general agent for buying and selling cannot, without special authority, resort to extraordinary and expensive means to raise money for his principal).

[a] **Authority to sell, collect, and remit** does not authorize the agent to borrow money or open a bank account in the name of the principal. Case v. Hammond Packing Co., 105 Mo. A. 168, 79 SW 732.

54. Fay v. Slaughter, 194 Ill. 157, 62 NE 592, 88 AmSR 148, 56 LRA 564 [rev 94 Ill. A. 111] (holding that the fact that an employer executed to his clerk a power of attorney, authorizing him to indorse checks, drafts, bills of exchange, notes, and orders for deposit in a bank, did not carry with it the implied power to ratify a sale of the employer's stock, and the execution of a loan on other stock, and a deposit of the proceeds thereof to the employer's bank account, from which it was afterward embezzled, such dealings not being within the scope of the clerk's authority); Mordhurst v. Boies, 24 Iowa 99 (holding that authority to draw checks to pay for purchases does not show authority to borrow money generally without a showing that the lender knew that the money was borrowed to pay for purchases).

[a] **A mere power to draw and indorse** checks gives the agent no authority to make an overdraft. Union Bank v. Mott, 39 Barb. (N. Y.) 180.

[b] **Authority to make sales, deposit money, and draw checks** for running expenses only gives the agent no power to borrow money. La Granda Hermanos y Ca v. American Electrical, etc., Mfg. Co., 29 Que. Super. 444.

55. Peoria Merchants' Nat. Bank v. Nichols, etc., Co., 123 Ill. A. 430 [aff 223 Ill. 41, 79 NE 38, 7 LRANS 752].

56. New York Iron Mine v. Negaunee First Nat. Bank, 39 Mich. 644; Wickham v. Morehouse, 16 Fed. 324; Jacobs v. Morris, [1901] 1 Ch. 261 [aff [1902] 1 Ch. 816, and dist Montalgnac v. Shitta, 15 App. Cas. 357]; Perry v. Parkinson, 6 Jur. N. S. 493.

57. MacDonald v. Cool, 134 Cal. 502, 66 P 727; Everts v. Lawther, 165 Ill. 487, 46 NE 233. See also Nourse v. Jennings, 180 Mass. 592, 62 NE 974.

[a] **An agent to solicit loans which must be submitted for approval** to the principal has no authority to make a contract for a loan. Equitable Mortg. Co. v. Thorn, (Tex. Civ. A.) 26 SW 276.

[b] **Agreement for title insurance.**—Where an agent is employed to negotiate a mortgage loan for his principals upon their property by a writing which also authorizes him to bind them to pay for making "complete searches" of the title to premises proposed to be mortgaged, an agreement by him, assuming to act as their attorney with the loaning company, that he will arrange for giving it "clear title insurance with the mortgage security," is ultra vires of such written authority. Giltinan v. Lehman, 65 N. J. L. 668, 48 A 540.

[c] **Release securities.**— An agent to solicit applications for loans has no authority to bind his principal to release certain mortgages in consideration of a new one to be executed by the borrowers. Sweedlund v. Hutchinson, 5 Kan. A. 880, 47 P 163.

[d] **A gratuitous agent with limited authority as to loaning money** has no authority to accept or reject insurance offered under the mortgage. Ver Veer v. Malone, 134 Iowa 653, 112 NW 82.

[e] **A mortgagee is not bound** by the act of his agent, authorized to loan money, to receive payment thereof, and to reloan the same, in purchasing mortgaged property in his own name and in promising the mortgagor that the mortgage will be canceled of record. Walker v. Hokom, 94 Nebr. 399, 143 NW 456.

[f] **A power of attorney authorizing mortgaging certain property** belonging to the principal and executing all notes necessary in the premises does not authorize the agent to borrow money upon an unsecured note executed in the principal's name by him to pay taxes upon the property, no mortgage being executed. Williams v. Dugan, (Mass.) 105 NE 615.

58. Wayne International Bldg., etc., Assoc. v. Moats, 149 Ind. 123, 48 NE 793 (holding that, where the agent of a building and loan association, whose duty was to solicit stock and place loans, agreed with a first mortgagee that if he would waive his prior lien on the mortgaged premises in favor of a second mortgage running to the association he, the agent, would, on behalf of the association, see that the money advanced was used in the improvement of the mortgaged premises, the transaction as a whole related to the act of effecting the loan, and was not beyond the agent's authority); Carlisle v. Norris, 157 App. Div. 313, 142 NYS 393; Brocklesby v. Temperance Permanent Bldg. Soc., [1895] A. C. 173 (holding that, where an agent intrusted with title deeds and authorized to borrow a certain sum upon them borrowed a larger sum by fraud and forgery, and appropriated the difference, the principal could not redeem the securities without repaying all the money borrowed, although the lender was ignorant of the agent's authority to borrow at all and made no inquiry).

[a] **Repledging securities.**—One who places a mortgage and certificate of no defense in the hands of an agent for the purpose of obtaining a loan cannot deny such agent's authority to repledge the securities for a second loan to pay the first. Hayes' App., 195 Pa. 177, 45 A 1007.

securities for the loan,[59] and, in the absence of restrictions, implies power to contract for a loan within a time reasonably meeting the principal's purposes.[60] But where the authority is to make specific loans or loans for specific purposes it is not to be extended by implication to the power to make other loans,[61] or to use the money for other purposes, particularly not for the benefit of other persons than the principal.[62] An authority to lend money does not authorize the agent to lend it to himself,[63] or to take usury,[64] and the principal will not be responsible if he has no knowledge that a higher rate of interest is charged than that allowed by law, and does not receive any of the excess,[65] as where the agent, without his authority or knowledge, charges a bonus for himself in addition to the legal rate of interest;[66] nor does such authority imply power to bring foreclosure proceedings upon default in payment of principal or interest,[67] although the payee of the mortgage has at times sent interest coupons to the agents for collection.[68]

Receipt of money. The borrower's agent negotiating the loan prima facie has authority to receive the amount of the loan from the lender,[69] as where he has possession of the security given for the loan;[70] and, while a loan contemplates receipt by the borrower of cash, yet the loan is complete if the agent accepts ordinary exchange, subject to be defeated if the exchange is not paid.[71] If the loan is made to the principal, and payment is made to the agent authorized to negotiate the loan, there is a good payment to the principal, although the agent absconds with the proceeds,[72] and the principal is bound by payment to the agent authorized to borrow, although the formal power given to the agent was invalid.[73] But if the agent had no authority to borrow, proof of a loan to such agent is not evidence of the receipt of the money by the principal.[74] The lender's agent, however, has no implied authority to receive money on a check from the lender made payable to the borrower, although he is instructed to see that any liens are satisfied out of the proceeds of the check.[75]

Payment. Authority to borrow does not raise a presumption of authority to pay the loan,[76] or to pay the money received to a third person.[77]

[§ 306] **o. To Make Contracts of Employment—(1) In General.** The general power of an agent to delegate his authority is fully explained elsewhere in this article.[78] It is the purpose in this connection to consider the question of the agent's authority to make for his principal contracts of employment of any kind. Such authority may of course be expressly given;[79] and, while it may also

[b] **A loan company making a usurious contract** through its general agent and manager is bound by his acts and statements, notwithstanding an undisclosed limitation of his authority of which the borrower had no notice. Interstate Sav., etc., Co. v. Hornsby, (Tex. Civ. A.) 146 SW 960.

59. Hatch v. Coddington, 95 U. S. 48, 24 L. ed. 339; Posner v. Bayless, 59 Md. 56; Security Sav. Bank v. Smith, 38 Or. 72, 62 P 794, 84 AmSR 756 and note; Young v. Union Sav. Bank, etc., Co., 23 Wash. 360, 63 P 247.

Authority to execute or indorse negotiable instruments see generally supra §§ 280-286.

60. Roelofson v. Atwater, 1 Disn. (Oh.) 346, 12 Oh. Dec. (Reprint) 662 [aff 2 Handy 19, 12 Oh. Dec. (Reprint) 308].

61. Bullen v. Dawson, 139 Ill. 633, 29 NE 1038; Shattuck v. Wilder, 6 Vt. 334; Jacobs v. Morris, [1902] 1 Ch. 816.

[a] **Illustration.**—Where, after the execution of a note and mortgage, the mortgagee refused to make the loan but assigned the note and mortgage to the one who had acted as agent for the mortgagor in endeavoring to negotiate the loan, and the assignment was recorded, the failure of the mortgagor to object to the transfer did not clothe the agent with authority to use the mortgage as security for another loan effected by him for a different purpose. Keegan v. Rock, 128 Iowa 39, 102 NW 805.

62. Walker v. Manhattan Bank, 25 Fed. 247 [rev on other grounds 130 U. S. 267, 9 SCt 519, 32 L. ed. 959]; Silvers v. Hess, 47 Mo. A. 507 (holding that an agent's authority to loan his principal's money is not authority to buy a note therewith, and such purchase does not make the note the property of the principal unless he ratifies the purchase); Charlotte Iron Works v. American Exch. Nat. Bank, 34 Hun (N. Y.) 26.

63. Keyser v. Hinkle, 127 Mo. A. 62, 106 SW 98.

[a] **Cannot raise money for himself.**—The delivery of a deed running to a third person to an agent to raise money for the grantor does not clothe him with apparent authority to deliver it to such person as security for a loan or advance to himself, the purpose of which is known to the grantee. Hubback v. Ross, 96 Cal. 426, 31 P 353.

64. Dryfus v. Burnes, 53 Fed. 410; Gokey v. Knapp, 44 Iowa 32; Fransen v. Hammond, 136 Wis. 239, 116 NW 169, 128 AmSR 1079, 19 LRANS 399 (holding that an agent authorized to loan his principal's funds has no apparent authority to charge the borrower such a commission as will render the loan usurious). See generally Usury [39 Cyc 876].

[a] **Usurious loan with knowledge of principal.**—Where the loan is made under an arrangement between the lender and the agent that the latter is to charge the borrower a bonus for his services, the contract will be usurious. Payne v. Newcomb, 100 Ill. 611, 39 AmR 69.

[b] **When authority to loan on usury presumed.**—In Rogers v. Buckingham, 33 Conn. 81, it was held that authority to make a usurious loan will not be presumed where the agency is special and limited to a single transaction, although it may be presumed where the agency is general and embraces the business of making, managing, and collecting the loans of a moneyed man; but it is a presumption of fact which may be rebutted. See also Stevens v. Meers, 11 Ill. A. 138 (holding that where a general agent to make loans exacts usury the principal is presumed to have known and authorized it).

[c] **Where a nonresident principal** is engaged in the business of loaning money through a resident agent to whose discretion he intrusts the entire management of the business of loaning, collecting, and reloaning money under a general authority for such purpose, on such security and terms as the agent may deem proper, the acts of the agent in conducting such business and in exacting and including in the contract unlawful and excessive rates of interest or bonuses will bind his principal and will be held usurious. Adamson v. Wiggins, 45 Minn. 448, 48 NW 185.

65. Boylston v. Bain, 90 Ill. 283.

66. New England Mortg. Security Co. v. Gay, 33 Fed. 636; Bell v. Day, 32 N. Y. 165; Condit v. Baldwin, 21 N. Y. 219, 78 AmD 137.

67. White v. Madigan, 78 Minn. 386, 80 NW 1125; Kohl v. Beach, 107 Wis. 409, 83 NW 657, 81 AmSR 849, 50 LRA 600. See also supra § 275.

68. Dexter v. Morrow, 76 Minn. 413, 79 NW 394.

69. See supra § 45.

70. National Mortg., etc., Co. v. Lash, 5 Kan. A. 633, 47 P 548.

71. Atwater v. Roelofson, 2 Handy 19, 12 Oh. Dec. (Reprint) 308 [aff 1 Disn. 346, 12 Oh. Dec. (Reprint) 662].

72. Neal v. Wilson, 79 Ga. 736, 5 SE 54; Clark v. McGraw, 14 Mich. 139; Fatta v. Edgerton, 157 App. Div. 852, 143 NYS 225 [aff 137 NYS 226]; Tottenham v. Green, 32 L. J. Ch. 201.

[a] **If the agent is authorized to receive and apply the money,** the borrower is liable for any loss from his misapplication thereof. May v. Mutual Ben. L. Ins. Co., 72 Mo. A. 286.

[b] **It is of no consequence to the lender what becomes of the proceeds** of the negotiations, where they are paid to the agent authorized to receive them. Hamil v. American Freehold Land Mortg. Co. of London, 127 Ala. 90, 28 S 558.

[c] **Refusal of agent to act up to limits of his authority.**—Where an agent authorized to borrow money on a note or mortgage receives the money and places it to the account of his principal but refuses to execute a note therefor as he has promised, the principal is liable for the money received. Barton v. Barton, 52 Ind. A. 537, 100 NE 870.

73. Denyssen v. Botha, 2 L. T. Rep. N. S. 126.

74. Thompson v. Laboringman's Mercantile, etc., Co., 60 W. Va. 42, 53 SE 908.

75. Hastings First Nat. Bank v. Omaha Nat. Bank, 59 Nebr. 192, 80 NW 810; Hastings First Nat. Bank v. Farmers', etc., Bank, 56 Nebr. 149, 76 NW 430.

76. Ballard v. Nye, 138 Cal. 588, 72 P 156.

77. Land Mortg. Inv. Agency Co. v. Preston, 119 Ala. 290, 24 S 707.

78. See infra §§ 342-352.

79. Meadows v. Hudson, 90 Ark. 294, 119 SW 269 (holding that, where a landlord instructed his tenant to employ some person to cultivate a certain crop, he is liable for the wages of the person employed); Pasco v. Smith, 49 Conn. 576; Thompson v. Mills, 45 Tex. Civ. A. 642, 101 SW 560; Alexander v. Rutland Bank, 24 Vt. 223.

[a] **Illustration.**—Where an owner of land employs another to cul-

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be implied, it is in general to be implied only when sanctioned by the usages of the particular agency or by the nature and necessities of the business intrusted to the agent,[80] or when the conduct of the principal is such as to clothe the agent with apparent authority to employ.[81] Thus an agent having no general authority to hire help may, from the exigencies of the business intrusted to his care, have power to contract for employment on behalf of his principal in a special instance.[82] An agent cannot bind his principal to pay for help or supplies furnished to independent contractors who should themselves provide and pay for such services or materials.[83]

[§ 307] (2) **Extent of Authority.** Where an authority to make contracts of employment is given,

tivate the same, specifying the manner of payment for the work to be done, and providing that the owner is to be at no other expense for labor done on said land, if the owner afterward directs the employee to do additional work, and to get some one to help him, the owner is liable for the reasonable value of labor done by a third person, hired by the party employed to cultivate the land. Barnes v. Hogate, 103 Iowa 743, 72 NW 688.

[b] **Direction to an agent to seek help and notify the principal** conveys no power to employ such help, nor does authority to an agent to contract for a piece of work with an independent contractor. Matteson v. Gillett, 86 Hun 386, 33 NYS 471; Mundis v. Emig, 171 Pa. 417, 33 A 1135.

80. Ala.—Patterson v. Neal, 135 Ala. 477, 33 S 39 (holding that, where it appeared from the testimony of certain witnesses that the boss of a mine had employed coal diggers and assigned them to work, but it was also shown that he had never employed diggers until after the approval of the superintendent and had no actual authority to employ them, the evidence did not show any implied authority on his part to hire diggers).

Cal.—Seymour v. Oelrichs, 162 Cal. 318, 122 P 847 (holding that a power of attorney to receive a distributive share of an estate, and to lease, sell, convey, and mortgage lands, and to execute such other instruments as may be necessary, authorized the attorney in fact to employ a superintendent to conserve the property).

Fla.—Wright v. Terry, 23 Fla. 160, 2 S 6.

Ga.—Langston v. Postal Tel. Cable Co., 6 Ga. A. 833, 65 SE 1094.

Ill.—Campbell v. Day, 90 Ill. 363 (holding that an architect employed to direct and supervise the work to be done on a building by a contractor and subcontractors cannot bind the owner by his own contract employing others to perform work contracted to be performed by the original contractor); Lake Erie, etc., R. Co. v. Faught, 31 Ill. A. 110; Crozier v. Reins, 4 Ill. A. 564 (holding that it is not within the scope of the authority of persons employed to collect the rents of a building to employ an engineer to take charge of the engine therein).

Ind.—Pruitt v. Miller, 3 Ind. 16 (holding that a person employed merely to aid in making an arrest has no implied authority to engage others at his employer's expense to assist).

Ky.—Rudd v. Nashville, etc., R. Co., 7 KyL 823 (holding that one empowered to negotiate as to the purchase of a controlling interest in the stock of a corporation cannot be regarded as a general agent with implied power to employ others for the principal, the nature of the business intrusted to the agent not being of such a character as to require others beside himself to perform it).

Me.—Stratton v. Todd, 82 Me. 149, 19 A 111 (holding that an agency to sell logs after they arrive at the market does not imply an agency to employ persons to drive the logs).

Mass.—Cazenove v. Cutler, 4 Metc. 246.

Minn.—Gillis v. Duluth, etc., R. Co., 34 Minn. 301, 25 NW 603 (holding that evidence that defendant employed T as its chief engineer "to survey and establish its line" authorizes a jury to infer apparent authority on T's part to employ such subordinates as were reasonably suitable to that end, and to find that defendant was bound by T's action in employing plaintiff for engineering services).

Mo.—Halliwell v. Oriental Cement, etc., Co., 170 Mo. A. 582, 157 SW 89.

N. Y.—Wicks v. Hatch, 62 N. Y. 535 [aff 38 N. Y. Super. 95] (justifying the employment of a broker by an agent in a business where such employment is usual).

Pa.—Fee v. Adams Express Co., 38 Pa. Super. 83 (holding that, where a route agent of an express company is assigned by his employer to investigate a theft, there is not implied in such assignment a power to contract with a constable, who had been designated previously as the commonwealth's agent in a requisition for a person charged with the theft, to pay such officer a specific sum for apprehending the accused in a distant state, as the making of such a contract is beyond the scope, not only of the agent's actual, but also of his apparent, authority). See also Breen v. Miehle Printing Press, etc., Co., 8 Pa. Dist. 151, 22 Pa. Co. 275.

Philippine.—Garcia Ron v. Campañia de minas de Batan, 12 Philippine 130.

S. C.—Day v. Pickens County, 53 S. C. 46, 30 SE 681.

[a] **An agent in general charge of the business** of a syndicate formed for the purpose of building a railroad has been held to have apparent authority to bind the syndicate by the employment of an engineer to assist in locating the road, securing rights of way, etc., such employment being necessary to carry out the objects of the agency. Rice v. Jackson, 171 Pa. 89, 32 A 1036 [aff 16 Pa. Co. 15].

[b] **A general agency to look after and preserve certain property** (1) implies power to employ another to watch and protect the property. Bruen v. Grahn, 5 KyL 312. (2) But where a person during his absence leaves his house in the hands of a caretaker, and a leak develops in a pipe in an unused portion of the building, which can be temporarily stopped by turning a valve, the caretaker has no authority to employ a plumber to make repairs to the amount of forty dollars. Hill v. Coates, 34 Misc. 535, 69 NYS 964.

[c] **A general road master** of a railroad company has been held to have prima facie authority to employ a person to oversee a force of men ditching along the railroad. King v. Seaboard Air Line R. Co., 140 N. C. 433, 53 SE 237.

[d] **An agent authorized to sell property** (1) at a fixed price and terms cannot employ a broker to sell the property on commission. Craver v. House, 138 Mo. A. 251, 120 SW 686. (2) So where a landowner instructs an agent, who is employed by the year at a specific salary, but who has no general authority to sell the lands, to look after certain lands, and to sell a portion thereof, the agent cannot make a contract with a broker for the sale thereof which will bind the principal to pay the broker for his services in effecting a sale. Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953.

81. Grand Pac. Hotel Co. v. Pinkerton, 217 Ill. 61, 75 NE 427 [aff 118 Ill. A. 89] (holding that the fact that a person had been manager of a hotel, and was then employed as assistant manager without any apparent restriction of authority, and at the time in question was in the private office of the hotel, giving orders to clerks, drawing checks, etc., shows apparent authority in such person to make a contract for services connected with the hotel); Louisville, etc., R. Co. v. Cox, 145 Ky. 667, 141 SW 389 (holding that, where defendant railroad company sent an agent to plaintiff to make a settlement of a cause of action for injuries, the agent had ostensible authority to agree, in consideration of such settlement, to furnish plaintiff permanent employment, so that such contract would be binding on defendant); Gerardo v. Brush, 120 Mich. 405, 79 NW 646 (implied authority of a captain of a yacht to employ an engineer for the season); Ruane v. Murray, 26 Pa. Super. 187 (holding that, where defendant permitted a saloon to be conducted in her name, and actively aided a third person in holding herself out to the public as the responsible proprietor by annually applying for a license in her name, by such positive acts she clothed such third person with apparent authority to bind her by contracts within the scope of that particular business, and if he, when he employed plaintiff, represented himself to be acting as the agent of defendant she was bound by the contract).

[a] **Employment of nurse.**—Where the heirs of a decedent agree that a certain fund shall be placed in the hands of persons to be used in the payment of the expenses, care and support, and nursing of the widow of their decedent, and such persons employ a nurse to care for such widow, such heirs are liable therefor, since the principal is liable for what is done, within the scope of the authority expressly conferred on the agent. Danky v. Parker, 108 Ill. A. 527.

82. La Fayette R. Co. v. Tucker, 124 Ala. 514, 27 S 447; Fox v. Chicago, etc., R. Co., 86 Iowa 368, 53 NW 259, 17 LRA 289 (holding that, where the only regular brakeman on a train is absent, the conductor has authority to supply his place, and, for the time being, the person so engaged is an employee of the company); Michaud v. MacGregor, 61 Minn. 198, 63 NW 479.

[a] **The conductor of a railroad train** (1) has no authority to make contracts of employment, except by reason of unusual circumstances which render outside assistance necessary to carry forward the train (St. Louis, etc., R. Co. v. Jones, 96 Ark. 558, 132 SW 636, 37 LRANS 418), (2) and, in order that a custom or usage may modify this rule, it must be one that is actually known by the officials who conduct the affairs of the railroad company, or one so general and of such long standing that it may be fairly inferred that it was known and assented to by them (St. Louis, etc., R. Co. v. Jones, supra). (3) But such a conductor has been held to have implied authority to employ a person to couple cars and thereby bind the company for injuries received by such person while making the coupling. Newport News, etc., R. Co. v. Carroll, 31 SW 132, 17 KyL 374.

83. Powrie v. Kansas Pac. R. Co., 1 Colo. 529; Wolf v. Davenport, etc., R. Co., 93 Iowa 218, 61 NW 847; Gately v. Kniss, 64 Iowa 537, 21 NW 21; Watts v. Metcalf, 66 SW 824, 23 KyL

whether it is express or implied, it must be exercised strictly within the limits of the grant, as such authority is presumed to be special, for the purpose indicated, and not general,[84] although it will be construed as extensive enough to empower the agent to make contracts of employment on such terms and within such limits as to enable him to perform the purposes of the agency,[85] and a principal cannot deny his liability on contracts of employment made by one whom he has held out as possessing authority to make such contracts.[86] An authority to employ men to work at a certain place will not authorize the agent to bind the principal by an employment to work at another place;[87] but the agent may bind the principal by representations as to the condition of the place where the employee is to work.[88] So also an authority to hire implies no authority to make subsequent agreements modifying or adding to the contract of hiring.[89]

Terms of contract. An authority to employ will, in the absence of restrictive words, include authority to make a complete contract definite as to the amount of compensation, terms of employment, etc.,[90] even though the agent disobeys the express instructions as to the amount of compensation, provided the instructions are unknown to the third person and the compensation agreed upon is reasonable in amount;[91] and the length of time for which the agent may employ will depend upon the character of the business and the length of time which will probably be required to complete the work.[92] But where the authority is expressly limited as to price

2189; Gardner v. Boston, etc., R. Co., 70 Me. 181.

84. U. S.—Gowen v. Bush, 76 Fed. 349, 22 CCA 196.

Cal.—Harris v. San Diego Flume Co., 87 Cal. 526, 25 P 758.

Colo.—Servant v. McCampbell, 46 Colo. 292, 104 P 394.

Conn.—Pasco v. Smith, 49 Conn. 576.

Me.—Stratton v. Todd, 82 Me. 149, 19 A 111.

Minn.—Williams v. Kerrick, 105 Minn. 254, 116 NW 1026.

N. Y.—Brisbane v. Adams, 3 N. Y. 129; Harnett v. Garvey, 36 N. Y. Super. 326.

N. C.—Stephens v. John L. Roper Lumber Co., 160 N. C. 107, 75 SE 933, 41 LRANS 1141.

Ont.—Taylor v. Cobourg, etc., R., etc., Co., 24 U. C. C. P. 200 (per Hagarty, C. J.).

85. Interstate Amusement Co. v. Pauli, 107 Ark. 626, 156 SW 439 (holding that authority to employ a contractor to furnish all of the players for an orchestra necessarily included authority to employ any individual player); Laming v. Peters Shoe Co., 71 Mo. A. 646 (holding that the manager of a manufacturing company whose contract gives him full power to employ all necessary workmen and operatives has authority to employ a foreman); Wanamaker v. Megraw, 92 App. Div. 616, 87 NYS 331 (holding that, where one was employed in May to take charge of a department of plaintiffs' business on July 1, as buyer and seller, and employer of help, he had authority, nothing appearing to indicate the contrary, to bind plaintiffs by the employment of help prior to July 1, so as to have his department organized to begin business on that date); Benton v. Moss, 47 Misc. 376, 93 NYS 1113 (holding that, where an employee of defendant was authorized to purchase a machine which was obviously an experiment, defendant was bound by his contract with the sellers for extra work done under the employee's direction); Cohen v. Goldstein, 128 NYS 69; Fritz v. Western Union Tel. Co., 25 Utah 263, 71 P 209.

86. Cox v. Albany Brewing Co., 56 Hun 489, 10 NYS 213 (holding that where pursuant to a written invitation a laborer goes to defendant's office for service, finds there a person assuming to employ hands, is engaged by him for one year, and put to work, and the service continues for several weeks to the knowledge of the firm's general superintendent, such laborer may assume that the person who employed him was authorized to do so); Mook v. Parke, 9 Misc. 90, 29 NYS 32 (holding that, where defendant, to whom plaintiff applied for employment, refers him, with full knowledge of his application, to a third person, defendant is chargeable with the acts of such third person in regard to the application); Cohen v. Goldstein, 128 NYS 69; Sheetram v. Trexler Stave, etc., Co., 13 Pa. Super. 219 (holding that, where, with the knowledge of his employers, an employee was in the habit of hiring and discharging workmen, the jury may infer that the hiring of plaintiff was within the scope of his authority, and so binding upon the employers).

87. Williams v. Kerrick, 105 Minn. 254, 116 NW 1026.

88. Gowen v. Bush, 76 Fed. 349, 22 CCA 196 [aff 19 SCt 877 mem] (holding that an agent sent to procure miners to work in a mine may bind his principal by representations concerning the safety of the mine as a place to work in).

89. Prior v. Flagler, 10 Misc. 496, 31 NYS 193 [aff 13 Misc. 115, 34 NYS 152] (holding that an agent to employ has no authority to make an agreement that if an employee will resign his position the balance of his salary for the season will be paid to him). Compare Citizens' State Bank v. Bonnes, 76 Minn. 45, 78 NW 875.

[a] **One employed merely to solicit persons** to engage in his principal's employ has no implied authority to make or modify contracts of employment. Nielsen v. Northeastern Siberian Co., 40 Wash. 194, 82 P 292.

[b] **An auditor whose duty is to settle the accounts** of his employer's salesmen and to instruct them how to handle the business has apparent authority to take the books of a salesman and refuse to return them, and refuse to permit him to make sales in territory allotted to him. J. R. Watkins Medical Co. v. Moss, (Iowa) 141 NW 497.

90. Ala.—Alabama Great Southern R. Co. v. Hill, 76 Ala. 303.

Iowa.—Kurtz v. Payne Inv. Co., 135 NW 1075.

Minn.—Drohan v. Merrill, etc., Lumber Co., 75 Minn. 251, 77 NW 957.

N. H.—In re Opinion of Justices, 72 N. H. 601, 54 A 950 (holding that authority to employ agents necessarily implies power to contract with them for their compensation).

N. J.—Kelly v. Jersey City Water Supply Co., 74 N. J. L. 734, 67 A 108.

Vt.—Farrington v. Hayes, 65 Vt. 153, 25 A 1091.

[a] **Payment in cash.**—An agent cannot bind his principal to pay for such services except in the usual way in cash. Deffenbaugh v. Jackson Paper Mfg. Co., 120 Mich. 242, 79 NW 197 (holding that a general agent authorized to hire an employee at a yearly salary has no special authority to contract to compensate the employee with a share of the profits in the principal's business); Berrien v. McLane, Hoffm. (N. Y.) 421 (holding that an agent employed to manage a cause and employ counsel for a land company has no authority to pay the counsel in land).

[b] **A note in the name of the principal** given by a duly authorized agent to the person employed by him is evidence of the fact and the amount of the principal's indebtedness. Chorpenning v. Royce, 58 Pa. 474.

[c] **Agreement to pay rent.**—Authority to employ laborers to work upon the roadbed of a railway company has been held not to imply power to agree to pay the rent of their dwelling houses. Savannah, etc., R. Co. v. Humphreys, 114 Ga. 681, 40 SE 711.

91. Cross v. Atchinson, etc., R. Co., 71 Mo. A. 585, 590 (where the court said: "If a principal sends out an agent clothed with authority to make an employment and to agree upon compensation, but with instructions unknown to the employee, directing such agent not to go beyond a certain amount of compensation for such employee, the principal will be bound by the compensation which the agent agrees to pay; provided, of course, that it be reasonable in its character and amount. In such case the agent is acting within the apparent scope of his authority").

92. World's Columbian Exposition v. Richards, 57 Ill. A. 601 (holding that one authorized to hire ticket sellers at the Columbian Exposition had authority to engage employees for six months, since it was a fact of world-wide notoriety that the Exposition was to remain open for that period); Drohan v. Merrill, etc., Lumber Co., 75 Minn. 251, 77 NW 957 (holding that authority to hire a servant for the principal in the absence of restrictive words as to the length of time of hiring authorizes the agent to hire a servant for such time as is reasonable, considering the nature of the business, the season of the year in which it is prosecuted, and the length of time it is likely to take to complete the work); Decker v. Hassel, 26 HowPr (N. Y.) 528 (holding that authority given by a father to a son to hire a farm laborer will authorize a contract for a term of two months). But see Ames v. D. J. Murray Mfg. Co., 114 Wis. 85, 87, 89 NW 836 (where the court said: "It is by no means clear that, as a matter of law, the foreman in charge of constructing a mill possesses, by implication, authority to employ laborers upon the work, binding his principal to give them employment till the completion thereof. We are inclined to say that there is at least room for conflicting inferences in respect to the matter; that the burden of proving that such an agent has such authority is upon the party relying thereon to make out his cause of action").

[a] **Illustration.**—"If it were such a business as it was apparent would last but six months, a contract for a year doubtless would not be binding on the principal, because the party employed would be acting in bad faith, in undertaking when it was apparent he would not be needed; and besides, it would be equally apparent that such a contract was not necessary to the accomplishment of the object. So, if the business were such as would apparently last for months, an employment for one or more months would seem to all to be cov-

or terms, it is not to be extended so as to bind the principal for a greater price or a longer term, although it will justify a contract to the full extent of such limits.[93] An agent having no power to employ of course cannot bind his principal to pay for services.[94]

Employment must be for principal's benefit. An authority to employ must be exercised only for the benefit of the principal,[95] and therefore such an authority will not authorize the agent to agree to pay an employee money due for past services from another employer.[96]

[§ 308] (3) **Employment of Attorney.**[97] The employment of an attorney is not one of the ordinary incidents of agency. Ordinarily the principal should be consulted first; and hence implied authority to contract for such employment on behalf of the principal exists only in particular classes of agencies, or under circumstances making such employment necessary and proper to the performance of the agency,[98] as the employment of an attorney can be binding on the principal only so far as it may be necessary and proper in matters with reference to which the authority is given; if the agent employs counsel as to other matters the principal is not bound.[99] Thus an incidental benefit promised to his principal will not warrant the employment by an agent of an attorney to appear in a case concerning the property of another person, and to which his principal is not a party;[1] nor has an ordinary general agent authority to employ an attorney to test claims which he thinks might be established for his principal by suit.[2] An agent to collect, having authority to collect by suit if necessary, has the implied power to employ an attorney to conduct such suit.[3] A principal is liable for payment for services rendered by an attorney employed by a general agent to whom the principal has intrusted business requiring the services of an attorney, either in lawsuits or in other matters,[4] and an au-

ered by the agent's implied authority, and would bind." Williams v. Getty, 31 Pa. 461, 464, 72 AmD 757.

93. Galvano Type Engraving Co. v. Jackson, 77 Conn. 564, 60 A 127 (holding that, where agents to contract for services are limited as to the amount to be paid, they cannot bind the principal for a price in excess of their powers, but having entered into such an agreement the third party can hold the principal for a reasonable value and one within the agents' authority); Pasco v. Smith, 49 Conn. 576.

94. Iowa.—Kinkead v. Hartley, 143 NW 591.

S. D.—Fish, etc., Co. v. New England Homestake Co., 27 S. D. 221, 130 NW 841.

Tex.—National Cash Register Co. v. Hagan, 37 Tex. Civ. A. 281, 83 SW 727.

Wis.—Hibbard v. Peek, 75 Wis. 619, 44 NW 641.

Ont.—Taylor v. Cobourg, etc., R., etc., Co., 24 U. C. C. P. 200.

95. Adams Express Co. v. Trego, 35 Md. 47 (holding that an authority to employ does not include the power to allow an employee to engage in other business antagonistic to the interest of the principal).

[a] **An agent with authority to sell a process of manufacture** has no authority to employ a person to assist him in the sale on consideration of releasing a claim of the principal against such person in the absence of a showing that the arrangement was advantageous to the principal. Craig Silver Co. v. Smith, 163 Mass. 262, 39 NE 1116.

96. Ricker Nat. Bank v. Stone, 21 Okl. 833, 97 P 577.

97. **Authority of agent to sell real estate** to employ counsel see supra § 246.

Authority of attorney to employ associate counsel see Attorney and Client [4 Cyc 951].

98. U. S.—Tuttle v. Claflin, 86 Fed. 964 (holding that, where an assignee for the benefit of creditors, who was engaged in prosecuting a suit for infringement of a patent belonging to the estate, contracted with a third person, who was suing the same party for infringement on another patent, to unite their interests for their mutual benefit, and authorized such third person to carry on or settle the litigation at his own expense and divide the net amount recovered equally between them, the latter had authority to employ a solicitor and counsel who should be entitled to a lien for their fees on the fund recovered by their efforts); Lee v. Rogers, 15 F. Cas. No. 8,201, 2 Sawy. 549.

Miss.—Bush v. Southern Brewing Co., 69 Miss. 200, 13 S 856.

N. Y.—Kind v. Cortis, 66 Misc. 186, 121 NYS 323; Egan v. De Jonge, 113 NYS 737 (holding that an agent employed to do an act may do it in the way such business is usually done, and that where an agent negotiated the purchase of land for his principal and signed the contract he had incidental authority to engage attorneys to close the title).

S. D.—Davis v. Matthews, 8 S. D. 300, 66 NW 456.

Tex.—Hanrick v. Gurley, 93 Tex. 458, 54 SW 347, 55 SW 119, 56 SW 330 [aff in part and in part rev (Civ. A.) 48 SW 994] (holding that one employed "to take all proper and legal suits and proceedings to recover possession and obtain undisputed title" to premises claimed by his principals was empowered to employ attorneys to prosecute such suits, and through them make his principals parties thereto); Tabet v. Powell, (Civ. A.) 78 SW 997 (holding that, where a person injured in a collision with a railroad train gave to his brother full charge of the matter and told the claim agent that any settlement would have to be made with the brother, such authority authorized the brother to bind the person injured by a contract employing an attorney to prosecute the claim against the railroad company, agreeing to pay such attorney one half of the amount recovered, and securing such payment by an assignment of one half of the cause of action).

Wash.—Whitham v. Hilton, 139 P 209.

Eng.—Ex p. Frampton, 1 De G. F. & J. 263, 62 EngCh 202, 45 Reprint 359.

See also Attorney and Client [4 Cyc 968].

[a] **A general agent in the management of an estate** (1) may bind his principal by the employment of an attorney to save property sold for taxes, although there is an understanding between the principal and the agent that the latter is to be responsible for all attorneys' fees. Farrar v. Duncan, 29 La. Ann. 126. (2) So also an administrator's agent to settle an estate has authority to engage counsel and pay him a reasonable fee. Harms v. Wolf, 114 Mo. A. 387, 89 SW 1037.

[b] **The manager of a real estate loan business** has implied authority to direct a local agent to retain a lawyer whenever the interests of his principal require it. Davis v. Matthews, 8 S. D. 300, 66 NW 456.

[c] **An agent authorized to sell machinery** in certain designated counties, on commission, has no power to employ counsel to represent his principal generally in legal matters. Kirby v. Western Wheeled Scraper Co., 9 S. D. 623, 70 NW 1052.

[d] **Under a power to "do and transact all and every kind of business** of what nature and kind soever" an agent may engage counsel for his principal. Oliveira v. Silva, 18 Hawaii 602.

99. White v. Young, 122 Ga. 830, 51 SE 28 (holding that a written power authorizing an attorney in fact to enter upon certain land and demand possession, to institute suits for its recovery, and to employ counsel, does not authorize employment of counsel to defend suits by other parties to recover the land after possession has been obtained, or to institute proceedings to enjoin trespass on the land, although the power contains a general expression authorizing the attorney to do such acts as seem necessary in the premises); Harnett v. Garvey, 36 N. Y. Super. 326.

[a] **A general agent has no authority to employ counsel** on the credit of his principal to prosecute a suit in favor of a servant of the principal for a personal injury done to such servant while engaged in the principal's business. Cochran v. Newton, 5 Den. (N. Y.) 482.

1. Berry v. Hart, 1 Colo. 246; Perry v. Jones, 18 Kan. 552.

2. Bush v. Southern Brewing Co., 69 Miss. 200, 13 S 856 (holding that the agent should consult the principal in such matters); Cochran v. Newton, 5 Den. (N. Y.) 482.

3. Cal.—Dingley v. McDonald, 124 Cal. 682, 57 P 574.

Colo.—Hagerman v. Bates, 24 Colo. 71, 49 P 139.

Ga.—Strong v. West, 110 Ga. 382, 35 SE 693 (holding that, where one holding a note against another, with a claim on certain land as security, sends the note and papers evidencing her claims to a collecting agency, a power is created in the latter to procure the services of an attorney, if necessary, to collect the note and enforce the security).

Kan.—Ryan v. Tudor, 81 Kan. 366, 2 P 797.

Ky.—Jones v. Jones, 39 SW 251, 19 KyL 129 (holding that, where an insurance policy belonged to a mother and her children, and the children authorized the mother to collect it, they were liable to an attorney employed by the mother in collecting the same).

La.—Morgan v. Brown, 12 La. Ann. 159.

Vt.—Davis v. Waterman, 10 Vt. 526, 33 AmD 216.

4. U. S.—Dale v. Redfield, 22 Fed. 506, 23 Blatchf. 3.

Iowa.—Barbee v. Aultman, 102 Iowa 278, 71 NW 235 (holding that an agreement by one who turns over to an attorney certain judgments in favor of a corporation for collection that the attorney shall have one half

thority to employ an attorney implies power to agree as to his compensation;[5] but the principal cannot be held liable for the compensation of an attorney who is the agent of the original agent, and not of the principal.[6]

[§ 309] **(4) Employment of Medical or Surgical Attendance.**[7] An employer is not ordinarily bound to provide medical attendance for a sick or injured employee, and hence his agent has no implied authority to contract in his name for such attendance.[8] But because of the peculiar nature of certain occupations the courts, upon humanitarian grounds, and for reasons of public policy as well, have held that the agent of persons or corporations engaged in such occupations may provide medical attendance upon the credit of his principal.[9] It has been held that one having general power to employ and discharge men, and whose power is coextensive with the business, may contract for board and nursing for an injured employee.[10]

Seamen are exposed to hardships and dangers, and are subject to illness and injuries when far from home, to such an extent that the maritime law has always been solicitous for their protection. The master of the vessel is agent of the owners with authority to furnish to all mariners on the ship medical attendance at the cost of the owners.[11]

[§ 310] **p. To Contract for Board.**[12] The implied authority of an agent to contract on his principal's account for board involves no peculiar rules. It arises when such contract is necessary and proper to the performance of the duties intrusted to the agent, but not otherwise.[13]

[§ 311] **q. To Ship Goods.**[14] Authority of an agent to make contracts of shipment for his principal may be conferred upon him expressly,[15] or it may be implied from the conduct or course of dealing of the parties,[16] and such contracts if made by

of the amount collected binds the corporation).

Minn.—Mason v. Taylor, 38 Minn. 32, 35 NW 474.

Mo.—Flournoy v. Pheonix Brick, etc., Co., 159 Mo. A. 376, 140 SW 752.

N. Y.—Prindle v. Washington L. Ins. Co., 73 Hun 448, 26 NYS 474 [dist Adriatic F. Ins. Co. v. Treadwell, 108 U. S. 361, 2 SCt 772, 27 L. ed. 754]; Harnett v. Garvey, 36 N. Y. Super. 826.

S. D.—Davis v. Matthews, 8 S. D. 300, 66 NW 456.

Vt.—Farrington v. Hayes, 65 Vt. 153, 25 A 1091.

Ont.—Clarke v. Union F. Ins. Co., 10 Ont. Pr. 339.

[a] **An attorney employed to bring suit on a cause of action in the name of the assignee** may recover for his services from the assignor, if the assignment was merely nominal, as between the parties to it, and the assignee was the assignor's agent in employing him. Simon v. Sheridan, etc., Shea Co., 21 Misc. 489, 47 NYS 647.

5. Harms v. Wolf, 114 Mo. A. 387, 89 SW 1037; Cross v. Atchison, etc., R. Co., 71 Mo. A. 585 (holding that an authority to a railroad attorney to employ attorneys for various counties implies the right to fix the compensation of attorneys so employed); Tabet v. Powell, (Tex. Civ. A.) 78 SW 997.

[a] **Unauthorized payment.**—Where an agent is authorized to employ a lawyer and pay him in money, and pays part of his fee in money and the residue in land belonging to the principal, the agreement does not bind the principal to convey the land. Ross v. Daviess, 4 J. J. Marsh. (Ky.) 383.

6. Mussey v. Vanstone, 82 Mo. A. 353 (holding that, where defendant engaged a collection agency in writing to make collections for a certain per cent of the amount actually collected, and the agency forwarded certain notes and accounts of defendant to plaintiffs to institute suit on them, plaintiffs cannot maintain an action against defendant for the reasonable value of their services, and for the costs expended by them in conducting the suit).

7. **By officers or agents of corporations** in general see Corporations [10 Cyc 926].

8. Sevier v. Birmingham, etc., R. Co., 92 Ala. 258, 9 S 405; Harris v. Fitzgerald, 75 Conn. 72, 52 A 315 (holding that, in an action against a railroad contractor for medical services rendered to one of his laborers under an alleged request from the contractor's son who was his bookkeeper and timekeeper, it was error to instruct that it was for the jury to determine whether such son had authority to employ plaintiff, but the court should have instructed that he had no implied authority to make such contract). See also Corporations [10 Cyc 926]; Master and Servant [26 Cyc 1050].

[a] **A superintendent and general manager,** whose duties are to figure on contracts and see that the work contracted for is carried on diligently and in a proper manner, has no implied authority to employ a physician to attend an injured employee. Harris v. Fitzgerald, 75 Conn. 72, 52 A 315.

[b] **The manager of a plantation** cannot bind the owner for medical services rendered to sick or injured employees. Malone v. Robinson, (Miss.) 12 S 709.

[c] **Forewoman of laundry.**—Where an employee in a laundry injured her hand, and the forewoman called plaintiff, a physician, to attend her, which he did at the laundry, at her home, and at his office, until the wound was healed, and he claimed compensation for his services from defendants, and no authority in the forewoman to represent the firm was shown except in her general management of the laundry in the absence of one of defendants, and plaintiff never had any conversation with anyone but the forewoman who stated that she did not know what the firm would do about it, defendants were not liable for the services. Holmes v. McAllister, 123 Mich. 493, 82 NW 220, 48 LRA 396.

[d] **Where a physician called by the master took the injured employee to a hospital** and informed the authorities that the master would pay the bill, the master was bound by such acts on the part of his agent. Omaha Gen. Hospital v. Strehlow, (Nebr.) 147 NW 846.

9. Sevier v. Birmingham, etc., R. Co., 92 Ala. 258, 9 S 405 (holding that the general manager and the superintendent of a railroad company, but not the conductor of a train, have implied power to contract for surgical attendance for an injured employee); Chaplin v. Freeland, 7 Ind. A. 676, 34 NE 1007 (holding that the general manager of an ordinary manufacturing corporation has no authority to bind the company for medical or surgical services rendered to an injured employee in the absence of an absolute necessity therefor); Texas Bldg. Co. v. Albert, (Tex. Civ. A.) 123 SW 716 (power of agent of building company).

10. American Quarries Co. v. Lay, 37 Ind. A. 886, 73 NE 608 (holding that an agent in charge of a quarry, with authority to employ and discharge men, was a general agent with power to make a contract with an injured employee for the release of the principal in consideration of the payment for nurses, physicians, and wages of the employee during disability).

11. Scarff v. Metcalf, 107 N. Y. 211, 13 NE 796, 1 AmSR 807 and note. See also Holt v. Cummings, 102 Pa. 212, 48 AmR 199 (where it appeared that the engineer of a tugboat was injured by an explosion on the boat at the home port, and that the officer in charge summoned a physician who attended him on the boat, and at his own house whither he was carried at his own request, and it was held that the owner was liable for the physician's services).

[a] **But where seamen are injured by an accident, and put on shore** while the ship proceeds on her voyage, the captain has no implied authority to make the shipowner liable for expenses incurred for their maintenance and care. Organ v. Brodie, 10 Exch. 449.

12. **Authority to contract for board of injured employee** see supra § 309. See also Corporations [10 Cyc 926].

13. Burley v. Kitchell, 20 N. J. L. 305 (holding that, where there is a general agency to carry on the business of the principal during his absence, the principal is liable on contracts made by the agent for the board of the workmen employed, where the principal if present must have made such provision).

[a] **A commercial traveler** who is a transient patron at plaintiff's hotel does not bind his employer for board furnished him from time to time, through an extended period, where it is the custom for transient patrons to pay cash, and notice is not given the employer of the failure of the traveler to do so. Covington v. Newberger, 99 N. C. 523, 6 SE 205. See also Cannon v. Henry, 78 Wis. 167, 47 NW 186, 23 AmSR 399.

14. **Authority of agents of carriers** to make contracts see Carriers [6 Cyc 431 et seq].

15. Chesapeake, etc., R. Co. v. Hall, 136 Ky. 379, 124 SW 372, AnnCas 1912A 364.

16. Hix v. Eastern Steamship Co., 107 Me. 357, 78 A 379 (holding that, where the employee of shippers of horses had supervised several shipments for his employers and signed bills of lading in their name, and had given the duplicate bills to one of them, who had never repudiated the agency or questioned his authority to sign, the agent was held out to the carrier as authorized both to deliver the horses and to sign the bills).

[a] **A cotton factor's agent** authorized to solicit cotton shipments is presumptively authorized to make the terms under which the cotton shall be shipped, sold, and handled by his principal, and, under Ga. Civ. Code (1910) § 3595, this rule is not altered by any secret instructions to the agent by the principal. John Flannery Co. v. James, 13 Ga. A. 425, 79 SE 912.

the agent within the apparent scope of his authority are binding on the principal.[17] Thus where goods are put in the charge of an agent to deliver to a carrier for shipment,[18] or where he is employed to accompany the goods in transit,[19] he is presumed to have authority to make the necessary contracts as to carriage at the point of shipment, or, if arrangements must be made along the way, during the transit, unless the carrier has knowledge that he has not such authority.[20]

Extent of authority. The principal question growing out of authority to ship goods has to do with the agent's implied authority to assent for his principal to contracts affecting the carrier's liability. Such authority includes all the necessary and usual means of carrying it into effect,[21] and also is limited to what is usual and necessary to enable the agent properly to ship the goods.[22] Thus the agent may arrange for the receipt and delivery of the goods,[23] and stipulate for and accept the terms of transportation.[24] This ordinarily includes authority to assent to the usual contracts limiting, or releasing the carriers from, their strict common-law liabilities as common carriers of goods,[25] to make agreements

17. Wabash R. Co. v. Curtis, 134 Ill. A. 409 (holding that, where an agent has authority to make a consignment, he also in law has authority to consign upon such terms as the carrier would make upon that kind of a shipment, and his act in that regard will bind his principal); Chesapeake, etc., R. Co. v. Hall, 136 Ky. 379, 124 SW 372, AnnCas1912A 364; Smith Meat Co. v. Oregon R., etc., Co., 59 Or. 206, 117 P 803 (holding that, where the agent of a meat company, buying and shipping cattle, entered into a contract with a railroad company for the shipment of cattle, the contract was binding upon the meat company).

[a] **Receiving goods.**—An agent of a shipper of cotton with authority to demand and receive from the carrier a designated quantity of cotton cannot bind the shipper by accepting in common with other claimants cotton not identified as a delivery. Whitin v. Pendegast, 50 N. Y. 674.

[b] **Representations** by a shipper's agent to a carrier as to the nature of the goods binds the shipper as if made by himself. Head v. Pacific Express Co., (Tex. Civ. A.) 126 SW 682.

18. U. S.—Great Northern R. Co. v. O'Connor, 232 U. S. 508, 34 SCt 380 (holding that a carrier has the right to assume that a forwarder combining shipments of various owners to secure carload rates has authority to agree on the terms of shipment and is not bound by private instructions of one of the owners).

Cal.—California Powder Works v. Atlantic, etc., R. Co., 113 Cal. 329, 45 P 691, 36 LRA 648.

Colo.—Atchison, etc., R. Co. v. Baldwin, 53 Colo. 416, 128 P 449.

Minn.—Christenson v. American Express Co., 15 Minn. 270, 2 AmR 122.

Mo.—McElvain v. St. Louis, etc., R. Co., 151 Mo. A. 126, 141, 131 SW 736 [cit Cyc].

N. Y.—Donovan v. Standard Oil Co., 155 N. Y. 112, 49 NE 678; Wright v. Fargo, 59 Misc. 416, 112 NYS 358 (holding that, where plaintiff requested an express company to transport a trunk from her residence and authorized her maid to deliver the trunk, the maid had power to stipulate the terms of the contract).

Tex.—Ft. Worth, etc., R. Co. v. Caruthers, (Civ. A.) 157 SW 238.

Eng.—Aldridge v. Great Western R. Co., 15 C. B. N. S. 582, 109 ECL 582, 143 Reprint 913.

Compare Love v. Davis, 25 Ala. 335 (holding that a receiving and forwarding merchant cannot, unless under some special contract, custom, or usage of trade, forward cotton to a port without instructions from his principal, and direct its delivery on arrival to a commission merchant).

[a] **Authority to haul goods to a warehouse** (1) does not imply authority to ship the goods and take a shipping receipt. Zorn v. Livesley, 44 Or. 501, 75 P 1057. (2) Thus in an action against a carrier for loss of goods a bill of lading limiting the carrier's liability, signed by a teamster in the consignor's employ, is properly excluded, where it appears that the teamster had no authority to sign and where no assent by the consignor is shown. New v. Chicago, etc., R. Co., 171 Ill. A. 488.

19. Conn.—Converse v. Norwich, etc., Transp. Co., 33 Conn. 166.

Mass.—Hill v. Boston, etc., R. Co., 144 Mass. 284, 10 NE 836.

Minn.—Harrington v. Wabash R. Co., 108 Minn. 257, 122 NW 14, 23 LRANS 745; Armstrong v. Chicago, etc., R. Co., 53 Minn. 183, 54 NW 1059.

N. Y.—Lamb v. Camden, etc., Transp. Co., 46 N. Y. 271, 7 AmR 327.

Pa.—Camden, etc., R. Co. v. Forsyth, 61 Pa. 81.

Compare Gulf, etc., R. Co. v. White, (Tex. Civ. A.) 32 SW 322 (holding that employees sent along with a shipment of cattle cannot be assumed to have authority to make a contract with a connecting line to which the cattle are delivered).

20. Wright v. Fargo, 59 Misc. 416, 112 NYS 358.

[a] **A special contract** of carriage, made with a shipper's agent, with the carrier's knowledge that the goods were the shipper's, is not binding on the shipper, if made without his knowledge, when he does nothing to ratify it. Welborn v. Southern R. Co., 6 Ga. A. 151, 64 SE 491.

21. Michigan Southern, etc., R. Co. v. Day, 20 Ill. 375, 71 AmD 278; Nelson v. Hudson River R. Co., 48 N. Y. 498.

[a] **Representations as to goods.**—A carrier receiving a carload shipment billed as household goods of small value is not required to make special inquiry as to value, but may rely on the forwarder's statement that the car is loaded with goods of the character and value stated. Great Northern R. Co. v. O'Connor, 232 U. S. 508, 34 SCt 380.

22. North-West Transp. Co. v. McKenzie, 25 Can. S. C. 38 (holding that the shipping agent's authority is limited to what is usual, and he has ordinarily no authority to bind his principal by the receipt of a bill of lading after the vessel has sailed).

[a] **To pledge bill of lading.**—A merchant's general clerk who transacts the outdoor business of his employer, negotiates purchases and charter parties in the name of and ratified by his principal, and prepares and presents bills of lading for signature on shipping property of the principal, has no authority as such clerk, or as commercial agent, to pledge such bills of lading. Zachrisson v. Ahman, 4 N. Y. Super. 68.

[b] **Receiving advances.—Authority** to ship cotton and forward the bills of lading to the consignees does not imply authority to receive advances from the consignees. Hill v. Helton, 80 Ala. 528, 1 S 340; Zachrisson v. Ahman, 4 N. Y. Super. 68.

23. Michigan Southern, etc., R. Co. v. Day, 20 Ill. 375, 71 AmD 278; Hix v. Eastern Steamship Co., 107 Me. 357, 78 A 379.

24. Adams Express Co. v. Byers, 177 Ind. 33, 37, 95 NE 513 [cit Cyc]; McKinney v. Boston, etc., R. Co., (Mass.) 104 NE 446; Peirce v. American Express Co., 210 Mass. 383, 96 NE 1026; Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 28 NE 394; Nelson v. Hudson River R. Co., 48 N. Y. 498; Wright v. Fargo, 59 Misc. 416, 112 NYS 358; Missouri Pac. R. Co. v. International Mar. Ins. Co., 84 Tex. 149, 19 SW 459; Ryan v. Missouri, etc., R. Co., 65 Tex. 13, 57 AmR 589 (holding that the carrier may act upon this presumption in dealing with the agent and need not inquire as to his authority in the particular case); Gulf, etc., R. Co. v. White, (Tex. Civ. A.) 32 SW 322.

[a] **Giving carrier benefit of insurance.**—The agent may agree that the carrier shall have the benefit of any insurance that may have been effected. Missouri Pac. R. Co. v. International Mar. Ins. Co., 84 Tex. 149, 19 SW 459.

[b] **A hotel proprietor's authority from a guest** to deliver a trunk to a carrier's agent and to "get a receipt for it" did not authorize him to make a special contract for its transportation. Stickel v. U. S. Express Co., 85 N. J. L. 285, 89 A 23.

25. U. S.—Van Schaack v. Northern Transp. Co., 28 F. Cas. No. 16,876, 3 Biss. 394.

Ala.—Smith v. Southern Express Co., 104 Ala. 387, 16 S 62.

Cal.—California Powder Works v. Atlantic, etc., R. Co., 113 Cal. 329, 45 P 691, 36 LRA 648.

Del.—Klair v. Philadelphia, etc., R. Co., 25 Del. 274, 78 A 1085.

Ill.—Illinois Cent. R. Co. v. Morrison, 19 Ill. 136; Illinois Cent. R. Co. v. Jonte, 13 Ill. A. 424. Compare New v. Chicago, etc., R. Co., 171 Ill. A. 488.

Ind.—Cleveland, etc., R. Co. v. Blind, 105 NE 483 (holding that the owner of a horse, whose servant, to whom it had been intrusted for shipment, shipped it under a special contract in his own name, was bound by a limitation of the carrier's liability therein, in the absence of fraud, unreasonableness, or want of opportunity to ship at a higher rate, with unlimited liability, regardless of whether the owner specifically authorized its execution); Adams Express Co. v. Byers, 177 Ind. 33, 95 NE 513 (holding that in general authority by a shipper to an agent to deliver an article at a carrier's shipping station for shipment carries with it authority to fix a valuation, and to contract with the carrier to limit the latter's liability to a value fixed in the contract); Adams Express Co. v. Carnahan, 29 Ind. A. 606, 63 NE 245, 64 NE 647, 94 AmSR 279.

Me.—Hix v. Eastern Steamship Co., 107 Me. 357, 78 A 379.

Mass.—Johnson v. New York, etc., R. Co., 104 NE 445.

Mo.—McElvain v. St. Louis, etc., R. Co., 151 Mo. A. 126, 141, 131 SW 736 [cit Cyc]; Lewis v. Inhof, 138 Mo. A. 370, 122 SW 329 (holding that, where the seller acts as the buyer's agent in shipping the goods, his authority to make a carrier's limited liability contract may be implied from the course of dealing between the parties, or from a known custom to ship in that way); Craycroft v. Atchison, etc., R. Co., 18 Mo. A. 487.

N. J.—Russell v. Erie R. Co., 70 N. J. L. 808, 59 A 150, 67 LRA 433, 1 Ann Cas 672 and note.

N. Y.—Shelton v. Merchants' Dispatch Transp. Co., 59 N. Y. 258 [rev

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and give directions as to the delivery of the goods,[26] and to assent to reasonable regulations as to the shipment, or the time and manner of presenting claims for damages,[27] and an agent employed to accompany goods or animals in transit has the same authority.[28] This power, however, extends only to goods shipped by the particular agent, and not to those shipped by another agent.[29]

Where the shipper has made his own contract with the carrier it has been held that the agent has no implied authority to assent to any modification of such contract.[30]

[§ 312] **r. To Make Deposits and Payments.** A deposit in bank, or with a third person, when authorized by the principal, must be made for the principal's benefit, and not upon terms benefiting

36 N. Y. Super. 527]; Jones v. New York, etc., R. Co., 3 App. Div. 341, 38 NYS 284; Root v. New York, etc., R. Co., 76 Hun 23, 27 NYS 611; Soumet v. National Express Co., 66 Barb. 284; Moriarty v. Harnden's Express Co., 1 Daly 227; Meyer v. Harnden's Express Co., 24 HowPr 290.

Tex.—Southern Pac. R. Co. v. Maddox, 75 Tex. 300, 12 SW 815; Ryan v. Missouri, etc., R. Co., 65 Tex. 13, 57 AmR 589.

Wis.—Willard v. Chicago, etc., R. Co., 150 Wis. 234, 136 NW 646 (holding that a shipper of live stock is bound by a contract of shipment made by his drover fixing a value upon the animals shipped and limiting the carrier's liability to such valuation, in the absence of a showing of lack of authority to make such an agreement).

Wyo.—Oregon Short Line R. Co. v. Blyth, 19 Wyo. 410, 118 P 649, Ann Cas1913E 288 and note.

Eng.—London, etc., R. Co. v. Bartlett, 7 H. & N. 400, 23 ERC 434; Lewis v. Great Western R. Co., 5 H. & N. 867.

Contracts limiting liability of Carrier see generally Carriers [6 Cyc 385].

[a] **Illustrations.**—(1) In Nelson v. Hudson River R. Co., 48 N. Y. 498, plaintiff bought a large mirror and gave instructions to the person from whom he purchased it to forward it to him, as his agent, by defendant railroad company. The agent sent it to defendant company's depot by a drayman who delivered it and received from the company's agent a receipt containing a provision releasing the company from any liability for loss or damage resulting from breakage. This receipt was handed by the drayman to plaintiff's agent, the seller, who retained it without making objection, and, the mirror having been broken on the route, it was held that the company could not be made liable to plaintiff for the loss, as the latter was bound by the terms of the special contract. (2) So where it was the usual course of business for a shipper of goods to send his boxes, etc., to a carrier by a teamster, and for the carrier to deliver to the teamster a bill of lading for each shipment, which bill was in a form containing an exception of loss by fire, and was brought by the teamster to the shipper and retained, there was a special and mutual contract between the shipper and the carrier, limiting the liability of the latter. Van Schaack v. Northern Transp. Co., 3 F. Cas. No. 16,876, 3 Biss. 394; Nelson v. Hudson River R. Co., 48 N. Y. 498. (3) So also where the owner of a suit case knew the custom of an express company to give receipts limiting its liability for loss of goods shipped, and authorized his agent to deliver the suit case to the company and pay the charges and take a receipt, the agent had authority to assent to a provision in the receipt limiting the company's liability. Brunner v. Platt, 50 Misc. 571, 99 NYS 526. (4) But in Seller v. The Pacific, 21 F. Cas. No. 12,644, Deady 17, 1 Or. 409, it was held that a drayman who is a mere bailee to deliver goods to the carrier and take a receipt therefor has "no authority to make any contract for the shipper or give his assent to any proposition on the part of the carrier to limit his liability." (5) In Benson v. Oregon Short Line R. Co., 35 Utah 241, 99 P 1072, 136 AmSR 1052, 19 AnnCas 803 and note, it was held that the drayman employed by a shipper to take goods to a railroad depot and ship them is not authorized to enter into a contract limiting the carrier's liability, and that the shipper is not bound by the contract if the drayman is not in the habit of taking plaintiff's goods to the depot and arranging for their shipment, and if the shipper is not furnished with a copy of the contract and does not know of its existence until long after the goods are shipped.

[b] **Where a guest at a hotel** (1) left an order at the office of an express company to procure her goods at the hotel and transfer them to a designated point, and subsequently she directed the hotel clerk to deliver the goods to the company and take a receipt for her, and the hotel clerk complied, and received a receipt limiting the company's liability to fifty dollars in the absence of the giving of a greater value, the hotel clerk was the guest's agent, with authority to contract for a limited liability. Knapp v. Wells, 134 App. Div. 712, 119 NYS 117. (2) But, where a hotel proprietor was authorized by a guest to deliver her trunk to an express company's agent and get a receipt, it was held that he had no authority to assent for her to a limited liability clause contained in the receipt which he accepted. Stickel v. U. S. Express Co., 85 N. J. L. 285, 89 A 23.

[c] **Liability for fire.**—An agent to purchase and ship cotton has been held to have authority to release a railroad company from all liability for fire, provided they would allow him to store cotton on their platform until ready for shipment. Birge-Forbes Co., v. St. Louis, etc., R. Co., 53 Tex. Civ. A. 55, 115 SW 833.

[d] **A person employed to construct glass cases and superintend their shipment** cannot bind the owner by a contract limiting the carrier's liability for loss from breakage. Merriman v. The May Queen, 17 F. Cas. No. 9,481, Newb. Adm. 464.

[e] **Where a purchaser of live stock authorizes the seller to arrange the shipment,** the seller has authority to agree to conditions concerning notice of injury in consideration of a reduced freight rate. McElvain v. St. Louis, etc., R. Co., 176 Mo. A. 379, 158 SW 464.

26. Michigan Southern, etc., R. Co. v. Day, 20 Ill. 375, 71 AmD 278.

27. Armstrong v. Chicago, etc., R. Co., 53 Minn. 183, 54 NW 1059; Nelson v. Hudson River R. Co., 48 N. Y. 498.

[a] **Notice of claim.**—A seller directed by the buyer to ship live stock could agree to limit the carrier's liability, and could agree that notice of claim for injury to the shipment before removal from the place of destination and before mingling with other stock should be a condition precedent to the carrier's liability. McElvain v. St. Louis, etc., R. Co., 151 Mo. A. 126, 131 SW 736.

28. Squire v. New York Cent. R. Co., 98 Mass. 239, 93 AmD 162 (holding that, where a shipper of live stock sends his agent in charge of the property, the agent stands in the position of owner, and a contract made by him limiting the liability of the carrier is binding on the shipper, in the absence of fraud on the carrier's part); Zimmer v. New York Cent., etc., R. Co., 137 N. Y. 460, 33 NE 642.

29. St. Louis, etc., R. Co. v. Blocker, (Tex. Civ. A.) 138 SW 156 (holding that any apparent authority of B, under his contract with plaintiffs, making him their special agent to buy and ship timber of a certain kind, to release a railroad from liability for the burning of plaintiffs' timber piled on its right of way, would extend only to timber bought and shipped by him, and not to that bought and shipped by another such special agent of plaintiffs).

30. Atchison, etc., R. Co. v. Watson, 71 Kan. 696, 81 P 499; Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 28 NE 394 [aff 52 Hun 227, 5 NYS 140]; Wilson v. Canadian Dev. Co., 33 Can. S. C. 432; North-West Transp. Co. v. McKenzie, 25 Can. S. C. 38.

[a] **Illustrations.**—(1) In Jennings v. Grand Trunk R. Co., 127 N. Y. 438, 28 NE 394 [aff 52 Hun 227, 5 NYS 140], before the goods were sent to the station the consignor had an extended conversation with the carrier's representatives relative to a contemplated shipment of potatoes, and made a tentative arrangement with them for transportation. When the consignor's agent delivered the potatoes to the carrier, he was handed shipping bills therefor which contained conditions limiting the liability of the carrier to a greater extent than the original arrangement contemplated. The court held that, although these bills were accepted by the consignor's agent, they would not bind the consignor, it being, under the circumstances, obviously beyond the agent's authority to make a contract of shipment varying from that already agreed on. (2) An agent in charge of cattle for the purpose of seeing that they are properly at the place of shipment is not presumed to have authority to make a contract for such shipment where the principal has already made a contract for that purpose. Atchison, etc., R. Co. v. Watson, 71 Kan. 696, 81 P 499. (3) In Ohio, etc., R. Co. v. Hamlin, 42 Ill. A. 441, after plaintiff had bought certain horses, he contracted with the soliciting agent of defendant railroad company to ship them by its line; he then delivered the horses to the agent who afterward handed him a bill of lading, signed by the agent in the name of the persons from whom plaintiff had bought the horses, and containing conditions limiting the carrier's liability, and, it appearing that plaintiff had given no authority to either party to sign such a bill of lading, it was held that he was not bound thereby. (4) But in Waldron v. Fargo, 52 App. Div. 18, 64 NYS 798 [rev on other grounds 170 N. Y. 130, 62 NE 1077], it was held that, where plaintiff enters into an oral contract with an express agent for the transportation of a car of horses and their delivery by a certain hour, and an agent of plaintiff, authorized to ship, afterward enters into a written contract with the express agent, before shipment, under which the company is not to be liable for injuries resulting from its negligence or from delay in transportation, plaintiff will be bound by the written contract and precluded from afterward claiming damages for injuries resulting from such a delay, and failure to deliver by the hour orally agreed on.

[b] **To procure cargo.**—An agent for the charterers of a vessel to procure a cargo in a foreign port has no authority to modify or cancel the charter party of his principal. Ye

the agent alone;[31] nor does authority to deposit money in a bank imply power to draw it out.[32] The power of a purchasing agent to pay for the goods purchased by him has already been discussed.[33] An agent may disburse moneys of his principal only by the latter's authority,[34] or pursuant to an order or judgment of a court binding on the principal.[35] The principal may of course expressly authorize his agent to pay obligations which he owes, and such authority may be implied in a particular case from a general power to make collections and to settle the principal's accounts from the proceeds;[36] and power to make payments may be part of the acts necessary and proper to enable the agent to perform the duties intrusted to him, and in such cases authority to make them is to be inferred;[37] but such authority is not to be lightly implied. The mere fact that an agent has general power to conduct a merchant's retail business in his absence of itself raises no implication that he has authority to pay the merchant's debts,[38] particularly before they are due;[39] nor is authority to make payments implied from a power to receive money.[40]

Extent of authority. An agent authorized to make payments for his principal must do so in the manner authorized,[41] and, in the absence of special powers to that end, he has no authority to make payments in his own notes,[42] or in anything but money,[43] such as in property;[44] and he has no power to pledge the principal's credit for future payments,[45] or for the debts of other persons who have assumed to buy or otherwise contract on the principal's credit.[46]

[§ 313] **3. To Make Contracts of Guaranty and Suretyship.**[47] A power to make a contract of guaranty may be expressly given,[48] and it is always competent to show that the agent has been clothed with such authority, and in such case the principal will of course be bound thereby.[49] But such authority ordinarily is not to be implied from a general agency of any kind,[50] such as a power to buy[51] or sell,[52] unless it is a usual or necessary incident to the

Seng Co. v. Corbitt, 9 Fed. 423, 7 Sawy. 368.

31. Robards v. Hamrick, 39 Ind. A. 134, 79 NE 386 (holding that an agent cannot, by agreement with a third person who knows the facts, deposit the money of his principal with the third person to his own credit, and thereby exclude his principal from the recovery of the same); Guarantee Title, etc., Co. v. Gillespie, 223 Pa. 377, 72 A 703 (holding that, where a mother wrote her son offering to sell her corporate stock for a certain amount, and authorizing him to deposit the proceeds of the sale at four per cent interest in the bank aiding him in making the sale, such power gave no authority to him, as agent, to contract with the bank to leave her money on deposit until a loan made to the son by the bank was paid and as collateral therefor).

32. Brown v. Daugherty, 120 Fed. 526; New Albany Second Nat. Bank v. Gibboney, 43 Ind. A. 492, 87 NE 1064; Heath v. New Bedford Safe Deposit, etc., Co., 184 Mass. 481, 69 NE 215; Walker v. State Trust Co., 40 App. Div. 55, 57 NYS 525.

[a] **Authority to open an account at a bank** and make deposits to the account of the principal does not imply authority to overdraw the account. Merchants' Nat. Bank v. Nichols, etc., Co., 123 Ill. A. 430 [aff 223 Ill. 41, 79 NE 38, 7 LRANS 752].

33. See supra § 228.

34. Brant v. Glore, 172 Mo. A. 420, 158 SW 453; Reibstein v. Stenz, 140 App. Div. 519, 125 NYS 508.

[a] **An agent appointed by an administrator** to assist in the settlement of the estate has authority by virtue of the agency, to pay an attorney reasonable compensation for services rendered in the administration and accepted by the administrator; but he has no authority to make other disbursements, except to the administrator or at his instance. Harms v. Wolf, 114 Mo. A. 387, 89 SW 1037.

35. Reibstein v. Stenz, 140 App. Div. 519, 125 NYS 508.

36. Tanner v. Page, 106 Mich. 155, 63 NW 993 (holding that one who held certain accounts for collection, from the proceeds whereof he was to pay the assignor's creditors, was justified in paying a tax due from the assignor to the state).

37. Litchfield Bank v. Church, 29 Conn. 137; Taylor v. Labeaume, 14 Mo. 572, 17 Mo. 338.

38. Claflin v. Continental Jersey Works, 85 Ga. 27, 11 SE 721; Lee v. Tinges, 7 Md. 215.

39. Claflin v. Continental Jersey Works, 85 Ga. 27, 11 SE 721; Beals v. Allen, 18 Johns. (N. Y.) 363, 9 AmD 221; Hampton v. Matthews, 14 Pa. 105.

40. Knowlton v. Logansport, 75 Ind. 103.

Application of payments made to agent see generally supra § 273.

41. Snow v. Perry, 9 Pick. (Mass.) 539 (holding that, where a debtor sent bank bills to his creditor, with instructions to the messenger to see them indorsed on the note held by such creditor, or to take a receipt, or to bring back the bills, the messenger was not authorized to take an agreement to "indorse the amount or to return the bills"); Dixon v. Jackson Exch. Bank, 149 Mo. A. 585, 129 SW 481 (holding that, where an agent who is authorized to collect has authority to make certain specific payments for the principal out of the funds so collected, he is not a general agent, and has no right to treat as his own the money collected and deposited in bank in the principal's name or to make such representations to the cashier of the bank as to induce him to pay checks out of the principal's money as he the agent, sees fit); Kennedy v. Bowbells State Bank, 22 N. D. 69, 132 NW 657.

[a] **An agent, instructed to pay over money on a certain contingency** to a particular person, cannot bind his principal by payment to a different person before the contingency occurs. Adams Exp. Co. v. Reno, 48 Mo. 264.

42. English v. Rauchfuss, 21 Misc. 494, 49 NYS 639.

43. Berrien v. McLane, Hoffm. (N. Y.) 421.

44. Lee v. Tinges, 7 Md. 215; Beals v. Allen, 18 Johns. (N. Y.) 363, 9 AmD 221; Hampton v. Matthews, 14 Pa. 105; Peshine v. Shepperson, 17 Gratt. (58 Va.) 472, 94 AmD 468. Compare Taylor v. Labeaume, 14 Mo. 572, 17 Mo. 338 (holding that a person "with full authority to transact any business . . . to employ men, purchase logs, sell lumber, or to perform any other business connected" with his principal, has a general authority and may transfer lumber in payment to men employed by him).

[a] **Even a statute allowing an agent to take payment in property** other than money does not thereby give power to make payment in the same way. Claflin v. Continental Jersey Works, 85 Ga. 27, 11 SE 721.

45. Jaquins v. Gilbert, (Kan.) 53 P 754; Wells v. Martin, 32 Mich. 478. But compare In re Hale, [1899] 2 Ch. 107.

46. Baker v. Pagaud, 26 La. Ann. 220; Ruppe v. Edwards, 52 Mich. 411, 18 NW 193 (holding that a bookkeeper has no power by virtue merely of his position, to bind his employer for the debt of a third person); Reading R. Co. v. Johnson, 7 Watts & S. (Pa.) 317 (holding that the authority of an agent to assume the payment of the debt of a third person for his principal should be clearly proved, or no recovery can be had upon such promise against the principal).

47. See generally Guaranty [20 Cyc 1392].

48. Guaranty Trust Co. v. Koehler, 195 Fed. 669, 115 CCA 475 [rev 187 Fed. 192] (holding that principals who authorize agents to make a guaranty are liable on a guaranty made by the agents for them and for another who gave them no authority); Helmer v. St. John, 8 Hun (N. Y.) 166.

49. Lake Erie, etc., R. Co. v. Faught, 31 Ill. A. 110; Ludlow-Saylor Wire Co. v. Fribley Hardware, etc., Co., 67 Kan. 710, 74 P 237; Porter v. Woods, 138 Mo. 539, 39 SW 794.

50. Ill.—Kinser v. Calumet Fire-Clay Co., 165 Ill. 505, 46 NE 372 [aff 64 Ill. A. 437]; Hess v. Heegaard, 54 Ill. A. 227; Lake Erie, etc., R. Co. v. Faught, 31 Ill. A. 110.

Nebr.—Bullard v. De Groffe, 59 Nebr. 783, 82 NW 4; Oberne v. Burke, 30 Nebr. 581, 46 NW 838.

N. Y.—English v. Rauchfuss, 21 Misc. 494, 47 NYS 639. But compare Lossee v. Williams, 6 Lans. 228.

Oh.—Mahler-Wolf Produce Co. v. Meyer, 26 Oh. Cir. Ct. 165.

Pa.—Stevenson v. Hoy, 43 Pa. 191. But compare McClure v. Corydon Deposit Bank, 106 SW 1177, 32 KyL 772.

[a] **Under a power providing that the agent should not bind his principal by any covenant of warranty** whatever, a guaranty of performance by third persons of an oil lease of the lands sold did not bind the principal. Williamson v. Davey, 52 Tex. Civ. A. 353, 114 SW 195.

51. Oberne v. Burke, 30 Nebr. 581, 46 NW 838.

52. Braun v. Hess, 187 Ill. 283, 58 NE 371, 79 AmSR 221 [aff 86 Ill. A. 544] (holding that, from the fact that A is agent of H to sell its cigarettes, he has no implied authority to guarantee a purchaser against the loss of rebates from another dealer; because of such loss being due to the purchaser handling cigarettes other than those of the other dealer); Kinser v. Calumet Fire-Clay Co., 165 Ill. 505, 46 NE 372 [aff 64 Ill. A. 437]; Saginaw Medicine Co. v. Batey, (Mich.) 146 NW 329 (holding that the fact that a certain person was plaintiff's agent to sell goods would not make him plaintiff's agent in furnishing a guaranty of such agent's indebtedness to plaintiff, which guaranty was required as a condition to his becoming plaintiff's agent).

particular power granted,[53] or unless it may be implied from the conduct of the parties.[54] Except in so far as the principal may be bound by an authorized indorsement by the agent, the latter, when empowered to give or sell notes, cannot give a guaranty of their payment by the principal.[55] Where authority to make a guaranty is special, it must be strictly pursued.[56]

Suretyship. While it is entirely competent to empower an agent to bind his principal as a surety,[57] yet such a contract is extraordinary, and ordinarily does not impliedly come within the powers of the most general agent.[58] Moreover, when the power does exist it must be exercised strictly within the limits prescribed by the principal or he will not be bound at all.[59]

[§ 314] **t. To Receive and Maintain Possession of Property.** One may be constituted an agent with authority to receive the property of the principal, and when such an agent accepts such property the delivery to and acceptance by him are binding on the principal in so far as the agent was acting within the scope of his authority;[60] and an authority to receive possession of property may be implied where such authority is naturally a part of his ordinary duties as agent.[61] But an agent as such has no authority to receive property for the principal if this is not a necessary part of the performance of the duties intrusted to him.[62]

Extent of authority. Like other special au-

53. Dickson v. Lambert, 98 Ind. 487 (holding that, where an agent has unlimited authority to make contracts for the purchase of wheat such authority embraces all the usual incidents of his business, and authorizes him to guarantee cars for the shipment of the grain purchased).

54. State Bank, etc., Co. v. Evans, 198 Mass. 11, 84 NE 329.

55. Graul v. Strutzel, 53 Iowa 712, 6 NW 119, 36 AmR 250 (holding that an agent who is authorized only to sell notes cannot bind his principal by a guaranty of their payment); Humphrey v. Havens, 12 Minn. 298 (holding that authority to bind the principal to pay the note and mortgage of a third person cannot be implied from authority to make notes for the principal). Compare Lossee v. Williams, 6 Lans. (N. Y.) 228 (holding that authority to sell a note owned by the principal gave authority to guarantee the collectability of the note).

56. Lovett, etc., Co. v. Sullivan, 189 Mass. 535, 75 NE 738 (holding that, where an agent was authorized to sign his principal's name to a guaranty to secure purchases made by S during his minority, the agent's authority was special, and he was not authorized to execute in the name of his principal a guaranty of such purchases, good until canceled in writing by the principal).

[a] **Implied authority to write over the signature of an indorser** of a note in blank a contract of guaranty does not authorize one to write a contract making the guarantor absolutely liable. Clymer v. Terry, 50 Tex. Civ. A. 300, 109 SW 1129.

57. Helmer v. St. John, 8 Hun (N. Y.) 166.

[a] **Proof of authority.**—Where the certificate of the secretary of state, admitted without objection, shows that certain persons are the agents of a foreign surety company, it is sufficient proof that such agents are authorized to bind their principal as surety on an appeal bond. Holmes v. Tennessee Coal, etc., Co., 49 La. Ann. 1465, 22 S 403.

58. Wood v. McCain, 7 Ala. 800, 42 AmD 612; Gates v. Bell, 3 La. Ann. 62 (holding that an express authority is necessary to bind the principal by a contract of suretyship for a stranger); Copley v. Flint, 6 Rob. (La.) 56 (holding that an agent having general and special powers "to manage all the business of the constituent, and more especially to draw notes and drafts, and to endorse those made by himself or others," cannot bind his principal as surety in solido with himself, in a contract relating exclusively to his own interests); Hamburg Bank v. Johnson, 37 S. C. L. 42 (holding that a general agent with authority to transact all the mercantile business of his principal has not, by such general power, authority to bind his principal as surety on mercantile paper, nor on accommodation paper). Compare In re American Fidelity Co., 54 Misc. 357, 104 NYS 711 (holding that a surety company which appoints agents whom it calls "general agents," with authority to solicit business for it as a surety on excise bonds, receive applications, issue bonds, and receive premiums therefor, cannot claim that such agents have not authority to make the agreement with the applicant for a bond, for which an extra premium is paid, that he shall not be liable for any amount the company may become chargeable with on account of the bond).

[a] **Where a physician left his books and accounts** with an agent "for settlement," this did not authorize the agent to assign the books and accounts to a surety of the principal for his indemnity. Wood v. McCain, 7 Ala. 800, 42 AmD 612.

59. Dugan v. Champion Coal, etc., Co., 105 Ky. 821, 49 SW 958, 20 KyL 1641 (holding that a power of attorney executed by defendant authorizing another to sign his name as surety to a bond for six thousand dollars, in place of a bond for a like amount on which he was already surety, and which was then barred by limitations, did not authorize the agent to execute a bond for the principal and accrued interest of the existing bond, amounting to eight thousand six hundred and sixty-seven dollars, and a bond for that amount executed by the agent is void as to the surety); Preston v. Henning, 6 Bush (Ky.) 556 (holding that a power of attorney "to indorse on any paper, renewing any paper, on which I am responsible as the surety of John Preston or Susan P. Christy, and to render me liable as surety for the same on any new paper hereafter to be negotiated * * * not exceeding twenty thousand dollars," authorized the attorney to bind the principal for the renewal of debts then existing on which he stood surety for J, and also to bind him on debts subsequently created by J, not exceeding twenty thousand dollars).

[a] **Power to waive conditions.**—Where the surety in a building contractor's bond informs the owner that the matter of the inability of the contractor to perform is referred to a particular agent, without stating that any limitations have been placed on the powers of the agent, the agent has power to waive a condition of the bond. Keenan v. Empire State Surety Co., 62 Wash. 250, 113 P 636.

60. Ala.—Alabama Great Southern R. Co. v. Clark, 136 Ala. 450, 34 S 917.

Ind.—Rahm v. Deig, 121 Ind. 283, 23 NE 141 (holding that to bind the principal for the acceptance of corn by the agent the jury must believe that the agent was acting within the scope of his authority, and that if he did undertake to accept the corn as to its quality, he was, at the time, in full knowledge of all facts with reference thereto, and that he acted in good faith, without fraud or collusion with plaintiff); Rupp v. Stith, 33 Ind. 244.

Mich.—Harris v. Pellens, 146 Mich. 529, 109 NW 1044.

N. Y.—Carlisle v. Norris, 157 App. Div. 313, 142 NYS 393 (authority of an employee of a stockbroker to receive delivery of stock for a customer).

Vt.—Strong v. Dodds, 47 Vt. 348.

Wash.—Austin v. Elk Mercantile Co., 38 Wash. 365, 80 P 525.

Eng.—Matthews v. Haydon, 2 Esp. 509; Staples v. Alden, 2 Mod. 309, 86 Reprint 1091; Mead v. Hamond, Str. 505, 93 Reprint 663; Cary v. Webster, Str. 480, 93 Reprint 647.

[a] **Delivery to an agent having authority to receive it** is in law a delivery to the principal himself. Pottinger v. Hecksher, 2 Grant (Pa.) 309.

[b] **The rule ceases to apply** where the third person makes delivery to the agent after notice of the termination of the agency. Newlove v. Pond, 130 Cal. 342, 62 P 561.

[c] **Agent's receipt for goods never delivered.**—An agent has no power to bind his principal by a receipt for goods as delivered which in fact were never delivered. Coleman v. Riches, 16 C. B. 104, 81 ECL 104, 139 Reprint 695; Grant v. Norway, 10 C. B. 665, 70 ECL 665, 138 Reprint 263, 24 ERC 258; Hubbersty v. Ward, 8 Exch. 330.

61. Clydesdale Horse Co. v. Bennett, 52 Mo. A. 333 (holding that an agent who sells a horse on the agreement to replace it with another if it does not prove as warranted has power to bind the principal by receiving the horse on its return by the purchaser, and a demand of him to replace it is sufficient); Sacalaris v. Eureka, etc., R. Co., 18 Nev. 155, 1 P 835, 51 AmR 737 (holding that a railroad superintendent may be presumed to have authority to determine an ordinary matter, such as the receipt of fuel for the company); Purcell v. Jaycox, 59 N. Y. 288 [rev 3 Thomps. & C. 406] (holding that the receipt by a cartman who ordinarily received goods for plaintiff was binding, although plaintiff had notified defendant that he would not accept the goods); Callahan v. Crow, 91 Hun 346, 36 NYS 225 [aff 157 N. Y. 695 mem, 51 NE 1089 mem] (holding that the delivery of property to the agent who negotiated for its purchase is a delivery to his principal); Gallup v. Lederer, 1 Hun 282, 3 Thomps. & C. 710.

[a] **General directions to foreclose a mortgage** which in terms covers the right of possession of the premises leave to the agent the exercise of discretion as to taking possession of the premises. Standard Brewery v. Nudelman, 70 Ill. A. 356 [aff 172 Ill. 337, 50 NE 190].

[b] **Authority to take possession of land in principal's name.**—A general power authorizing the agent "to finish all the principal's unsettled business" authorizes the agent to take possession of lands to which the principal has claim, in the name of the principal. Chiles v. Stephens, 3 A. K. Marsh. (Ky.) 340.

62. Singer Mfg. Co. v. McLean, 105 Ala. 316, 16 S 912 (holding that an agent authorized to take an inventory and report the business of a salesman cannot, by accepting property of his principal, relieve the salesman

thorities, authority to receive or hold possession of property must be strictly construed and carefully pursued.[63] Thus an authority to receive the property at a certain time or place does not authorize the agent to accept it at an unusual or unauthorized time or place,[64] although a substantial compliance is all that is required,[65] and an authority to receive it at a certain place is sufficiently complied with by its receipt at a place near by.[66] If an agent is in possession of the principal's property by the authority of the principal, the possession of the agent is the possession of the principal,[67] and will authorize the agent to maintain against third persons possessory actions with reference to the property.[68] An agent to manage property cannot sue in his own name to recover possession thereof,[69] although he may sue to restrain a trespass.[70] Possession as indicia of ownership or of authority to the agent to sell the property intrusted to him, or to collect, has been elsewhere considered.[71]

VIII. MANNER OF EXECUTION OF AUTHORITY[72]

[§ 315] **A. In General.** There is probably no subject of the law relative to which the legal principles are better settled in the abstract or more confused in the application than that of the manner of the execution of authority by agents. Reconciliation in respect to application of the rules is beyond possibility, for in cases identical, or practically identical, in fact, the courts, even in the same jurisdiction, have reached varying conclusions as to the consequences of contracts executed by agents.[73] It is elementary and fundamental and involved in the very name, that agency exists only to enable the principal to execute his will through another, the agent. It is therefore the first duty of the agent to execute the will of his principal, and to do so as he has been directed.[74] In doing this, as is elsewhere explained, the agent should act within the scope of the authority conferred upon him,[75] and if he does not, his execution fails of its object, and he is liable to the principal for the resulting damages.[76] Where,

from liability for it); Weston v. Alley, 49 Me. 94 (holding that, where the owners of a certain tannery appointed an agent to act for them in "all matters relating to the tannery," he was not thereby authorized to bind his principals as receiptors to an officer for horses, etc., used in the tannery, which had been attached as the property of a third person); Dorr v. New England Mar. Ins. Co., 4 Mass. 221 (holding that a mere correspondent, to whom a shipper has written that the proceeds of a cargo shipped to another port will be remitted to him, has no authority, on the ship's being captured and brought into his port, to accept a restoration of the cargo for the shipper).

63. McGraw v. O'Neil, 123 Mo. A. 691, 101 SW 132 (holding that a ranch foreman in the possession of cattle has no implied authority to surrender the cattle to a person who claims to have a mortgage on them); Nash v. Noble, 46 Tex. Civ. A. 369, 102 SW 736 (holding that an agent authorized to procure a few bottles of whisky from the principal's barrels of whisky, and to bring them to the principal's place of business, has no authority to deliver the whole, or any part, of the whisky to any other person).

[a] **Agreement not to hold adversely.**—Where an agent is in actual possession and control of land, his agreement not to hold adversely, during the pendency of a suit, is sufficient to suspend the running of limitations. Ellwood v. Stallcup, 57 Tex. Civ. A. 343, 122 SW 906.

64. Longworth v. Conwell, 2 Blackf. (Ind.) 469; Brown v. Berry, 14 N. H. 459.

65. Richardson v. Goddard, 23 How. (U. S.) 28, 16 L. ed. 412 [rev 10 F. Cas. No. 5,494, Brunn. Col. Cas. 602].

66. Davis v. Reamer, 105 Ind. 318, 4 NE 857 (holding that one authorized to receive and take property, to be shipped in a vessel from the "landing" may take it from a wharf boat, stationed at a wharf on to which the property was discharged from the carrying vessel).

67. Beaumont v. Covington, 6 Rob. (La.) 189; Arden v. Soileau, 16 La. 28; Merrill v. Hilliard, 59 N. H. 481; Bean v. Smith, 20 N. H. 461.

68. Beaumont v. Covington, 6 Rob. (La.) 189; Arden v. Soileau, 16 La. 28.

[a] **Limits of authority.**—"Power to the agent to recover possession of certain property, to institute suits therefor, if necessary, and to employ counsel to prosecute the same, contemplates a recovery of property not in the possession of the maker of the power. After recovery has been had, such a power of attorney does not continue indefinitely of force, so as to authorize the attorney in fact to defend a suit which may at some future time be brought by others seeking to recover the land, or for the purpose of enjoining persons who may in the future trespass upon it, and to incur expenses and employ an attorney in such suits." White v. Young, 122 Ga. 830, 832, 51 SE 28.

69. McHenry v. Painter, 58 Iowa 365, 12 NW 338.

70. State v. Banks, 48 Md. 513.

71. See supra §§ 280, 259–263.

72. **Affidavit made by agent** see Affidavits, §§ 19–22; Attachments [4 Cyc 496, 499, 500].

Acknowledgment by agent see Acknowledgments §§ 90, 91.

Authority of agent to execute power in own name where coupled with interest in subject matter of agency see supra § 155.

73. Sanborn v. Neal, 4 Minn. 126, 77 AmD 502 (where the court said: "The decisions of the courts of the various states, upon the questions here involved, have been so conflicting and discordant, that authorities are not wanting to sustain either side of the question"). In Barlow v. Lee Cong. Soc., 8 Allen (Mass.) 460, 463, the court said: "Upon the question what words in a simple contract, made by the hand of an agent of an individual or private corporation, will bind the principal, the line of distinction between the cases, even in the same court, is very narrow." In Hewitt v. Wheeler, 22 Conn. 557, 562, the court said: "It is not necessary, in deciding this case, to go through the numerous cases which have been cited at the bar, to show, where agents really or professedly contracting in behalf of others, do not bind their principals, but themselves; or what should be the form of the agent's signature, to save himself from responsibility. The books are full of cases upon this refined subject, and are burdened, and overburdened, with elaborate learning, not unfrequently more nice than wise. They show such embarrassing conflict of judicial opinion, that one, in search of the law, is well nigh tempted to discard the whole that is written, and follow the dictates of his own understanding. The notions too, which prevail in one state or country, and in some cases, in courts of the same country, seem not to be consistent or uniform with themselves. We find one rule applied, in cases of deeds, and another in cases of simple contracts; one in case of public, another in case of private agents; and yet they all profess to take the intention of the parties, as the only proper and just rule of construction." And in Giddens v. Byers, 12 Tex. 75, 82, the court said: "It appears surprising, that in any enlightened system of jurisprudence, it should have ever been held that the particular mode of executing an instrument, under a power of attorney, should have the opposite effects of binding or absolving the principal, or making it in the one case the contract of the principal, in the other that of the agent, although on any plain, common-sense construction of the language and acts of the agent, it might be manifest that he was acting not for himself, but for the principal and under his authority. . . . The fact of the execution of the power in either the one mode or the other [referring to the various modes employed in the execution of contracts by agents] makes no difference, and has no effect anywhere except in the hard, naked regions of the Common Law, and there only as to instruments under seal. No such sophistical distinctions and absurdities are tolerated in relation to instruments not under seal, executed by an agent in commercial or maritime contracts, and, in fact, in contracts affecting the ordinary transaction of life. Such distinction is repudiated by the doctrines and principles of equity. It was totally unknown to the Spanish law, and is believed to have no existence in any system of jurisprudence derived from the Roman fountains."

[a] **Source of difficulty.**—(1) The difficulty in determining who is liable on a contract executed by an agent arises, not from any difference in the principles of construction governing in such cases, but from their application to particular cases, and no uniform and consistent rule can be extracted from the authorities. Haile v. Peirce, 32 Md. 327, 3 AmR 139. (2) "The difficulty is not in ascertaining the general principles which must govern cases of this nature, but in applying them to the different forms and shades of expression in particular instruments." Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101, 104.

[b] **Apparently slight changes in the phraseology** of the paper have affected the construction adopted by different courts, and by the same court in different cases. Sturdivant v. Hull, 59 Me. 172, 8 AmR 409.

74. See supra §§ 1, 26 et seq; infra §§ 353 et seq, 476 et seq.

75. See supra § 202 et seq.

76. McIntosh-Huntington Co. v. Rice, 13 Colo. A. 393, 58 P 358; Marshall v. Ferguson, 101 Mo. A. 653,

however, in performing one transaction he does an authorized act and also something which he was not authorized to do, the authorized portion of the act may be treated as valid and binding and the other portion rejected, provided the two portions are not so interwoven that they cannot be separated.[77] But it is otherwise where the authorized act cannot be separated from the unauthorized.[78] The power to the agent may be broader than the interest of the principal, and in such case an execution of the power according to its terms will be effective to the extent of the actual interest of the principal.[79] If the principal does not prescribe how the authority shall be executed, he cannot escape liability because the agent did not execute it as he would have preferred or as he would himself have done it.[80]

Custom and usage. In the absence of instructions the principal is presumed to consent that the agent may execute his authority in accordance with general custom and usage in that trade or business.[81]

[§ 316] **B. What Law Governs.**[82] The general rule is that the authority given by a principal to an agent, and the execution of that authority when so given, are to be controlled by the lex loci contractus. The principal in sending the agent forth is presumed to consent that he shall be governed by the law of the place where he is to act.[83] The law of the state where an agency is constituted determines the validity of the appointment and the extent of the agent's authority.[84] The validity of a power to sell realty and of a conveyance executed by virtue of such power depends upon the lex situs.[85]

[§ 317] **C. Execution by Joint or Several Agents and Agents of Joint or Several Principals—1. Several Agents.**[86] A principal may have more than one agent, each one appointed to act separately in a particular branch of his principal's business or in a particular locality.[87] Such agents are several agents, and are to act severally, and when more than one agent is appointed with reference to the same business they are still several agents if it appears that it was the intention of the principal that they should act separately, and an execution of the power by one of them is valid and binding on the principal.[88]

[§ 318] **2. Joint Agents.** Generally it is presumed that when a principal employs more than one agent to represent him in the same matter of business they are joint agents, the exercise of whose joint discretion is desired, and an act performed by one or by

74 SW 393 (holding that, where an agent who was directed to loan money to a third person and to take as security a trust deed violated his instructions by including in the trust deed a note owed by the third person to himself, without his principal's knowledge or consent, the agent was liable to the principal for the resulting damages); Urquhart v. McIver, 4 Johns. (N. Y.) 103. And see infra § 353 et seq.

77. U. S.—New York Guaranty Trust Co. v. Koehler, 195 Fed 669, 115 CCA 475 [rev 187 Fed. 192] (holding that a principal was liable on a separable part of a contract which he authorized his agent to make, although the latter undertook to further bind him in excess of his authority).

Ga.—Mosely v. Gordon, 16 Ga. 384.

Ky.—See Poage v. Chinn, 4 Dana 50; Vanada v. Hopkins, 1 J. J. Marsh. 285, 19 AmD 92.

La.—De Gentile v. White Castle Lumber, etc., Co, 130 La. 705, 58 S 517.

Mich.—Hammond v. State Bank, Walk. 214.

Minn.—Reed v. Seymour, 24 Minn. 273 (holding that the exercise of a mere excess of authority in some one particular in the making of a contract by an agent will not make it void as to the residue, which was within his authority).

Miss.—Johnson v. Blasdale, 9 Miss. 17, 40 AmD 85 (holding that the acts of an agent are binding on his principal to the extent of his authority, but void as to the residue).

Nebr.—Wilson v. Beardsley, 20 Nebr. 449, 30 NW 529.

N. M.—Jasper v. Wilson, 14 N. M. 482, 94 P 951, 23 LRANS 982 (holding that, where part of the acts are within and part are without the power, the former are valid).

Pa.—Stokes v. Dewees, 24 Pa. Super. 471.

Tenn.—Gordon v. Buchanan, 5 Yerg. 71.

Va.—Yost v. Ramey, 103 Va. 117, 48 SE 862.

Wis.—Gano v. Chicago, etc., R. Co., 49 Wis. 57, 5 NW 45; Jesup v. Racine City Bank, 14 Wis. 331.

78. Mich.—Hammond v. Michigan State Bank, Walk. 214.

Minn.—Thomas v. Joslin, 30 Minn. 388, 15 NW 675.

Mo.—Chouteau v. Allen, 70 Mo. 290 (holding that, if the officers of a corporation convey a quantity of land in excess of that specified in the resolution of the board of directors therefor, and there is no way to determine what is rightfully conveyed and what wrongfully, the conveyance is fatally defective).

Oh.—Feike v. Cincinnati, etc., R. Co., 3 Oh. Cir. Ct. 72, 2 Oh. Cir. Dec. 41.

S. C.—Dellet v. Whitner, 15 S. C. Eq. 213 (holding that under a power to sell land without warranty a sale with warranty is void in toto).

Tex.—Hunter v. Eastham, 95 Tex. 648, 69 SW 66 [rev (Civ. A.) 67 SW 1080] (holding that a person claiming title to real estate under a conveyance by an agent having power to sell, but who exceeds his authority by conveying the property for his own debt, acquires no title unless he is an innocent purchaser).

Eng.—Clinan v. Cooke, 1 Sch. & Lef. 22, 6 ERC 721, 15 ERC 344 (holding that, where an agent authorized to make agreements for leases for lives or years makes an agreement in which the term of the proposed lease is not mentioned, this is an agreement not pursuant to his authority, and not binding on his principal); Alexander v. Alexander, 2 Ves. 640, 28 Reprint 408, 21 ERC 415. And see Coke Litt. 158.

79. Bowman v. Bartlet, 3 A. K. Marsh. (Ky.) 86 (holding that, where a devisee of a particular estate with remainder over gave a power to dispose of the fee, the conveyance made under such power was valid to the extent of the particular estate).

80. McClung v. Spotswood, 19 Ala. 165; Ruggles v. Washington County, 3 Mo. 496.

81. Guesnard v. Louisville, etc., R. Co., 76 Ala. 453 (holding that the law implies that he gives his assent for his agent to act as all similar agents who are honest and diligent are accustomed to do, and it is immaterial, as a general rule, whether the principal is informed of such customs and usages or not); Dickey v. Grant, 6 Cow. (N. Y.) 310. See generally Customs and Usages [12 Cyc 1071].

82. See generally Conflict of Laws.

83. Owings v. Hull, 9 Pet. (U. S.) 607, 630, 9 L. ed. 246; Johnson v. Sukely, 13 F. Cas. No. 7414, 2 McLean 562; Condit v. Baldwin, 21 N. Y. 219, 78 AmD 137; Nye v. Macdonald, L. R. 3 P. C. 331; Tharsis Sulphur, etc., Co. v. La Société des Metaux, 58 L. J. Q. B. 435. And see Martin v. Roberts, 36 Fed. 217 (holding that a contract of agency to be performed in the state in which the agency was accepted is governed by the laws of that state); Canadian F. Ins. Co. v. Robinson, 31 Can. S. C. 488; Walter Blue Co. v. Reid, 11 Que. Pr. 205. Compare Routh v. Agricultural Bank, 20 Miss. 161.

"No rule of law suggests itself why a man within the State of New York may not authorize his agent to enter into a lawful contract in a sister State, even though such a contract would be opposed to the public policy of this State and would not be enforced here." Thompson v. Erie R. Co., 147 App. Div. 8, 10, 131 NYS 627 [rev on other grounds 207 N. Y. 171, 100 NE 791].

84. Freeman's App., 68 Conn. 533, 37 A 420, 57 AmSR 112, 37 LRA 452 [crit Milliken v. Pratt, 125 Mass. 374, 28 AmR 241] (holding that a married woman under disability in the state of her domicile cannot in that state authorize an agent to bind her by a contract delivered in another state where married women are not under such disabilities).

85. Bissell v. Terry, 69 Ill. 184; Linton v. Moorhead, 209 Pa. 646, 59 A 264; Gilmer v. Veatch, 56 Tex. Civ. A. 511, 121 SW 545 (holding that, where a power of attorney not coupled with an interest was given in California, with nothing in its terms to indicate where it was to be executed, and in an attempt to carry out the powers conferred land in Texas was sought to be sold, the law of Texas would control). See also supra § 53.

86. Execution of authority by boards or commissioners see Officers [29 Cyc 1433 et seq].

Execution of authority by corporate directors or committees see Corporations [10 Cyc 774 et seq].

87. Butler v. Maples, 9 Wall. (U. S.) 766, 19 L. ed. 822; House v. Vinton Nat. Bank, 43 Oh. St. 346, 1 NE 129, 54 AmR 813.

88. Ala.—Minto v. Moore, 1 Ala. A. 556, 563, 55 S 542 [cit Cyc].

Colo.—Doland v. Grand Valley Irr. Co., 28 Colo. 150, 63 P 300.

Ill.—Cushman v. Glover, 11 Ill. 600, 52 AmD 461.

Iowa.—Cedar Rapids, etc., R. Co. v. Stewart, 25 Iowa 115.

N. Y.—Hawley v. Keeler, 53 N. Y. 114.

Pa.—In re Turnpike Road, 5 Binn. 481.

Wis.—Soens v. Racine, 10 Wis. 271.

[a] **One of two independent agents cannot repudiate** the act of the other. Law v. Cross, 1 Black (U. S.) 533, 17 L. ed. 185.

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any number less than the whole is not such an execution of the authority as to bind the principal;[89] if one dies or refuses to act the others have no authority under the joint power, and cannot bind the principal;[90] furthermore such agents are bound jointly for acts jointly done and money jointly received.[91] This presumption, however, is not conclusive, and a number less than the whole may act if it is clear from the authority that such was the intention of the principal,[92] or if it appears from his course of dealing or subsequent approval that he has waived the requirement by allowing a number less than the whole to act for him.[93]

Ministerial acts. It has been held that mere ministerial acts, which involve no discretion, may be done by any one or more of several joint agents.[94]

Partnership as agent. The rule requiring all of the agents to participate in the act does not apply where a partnership is appointed agent, and under the general rule governing the acts of partners any member of the firm may execute the authority conferred and bind the principal.[95]

Majority authorized to act. Where authority is given to a majority to act for the principal, the failure of one to concur or participate in the act will not affect its validity;[96] but all must have proper notice and an opportunity to participate in the act.[97] Authority so conferred cannot be validly exercised by a minority.[98] Where the authority is conferred on several classes, a majority of each class must concur in order to make the act binding.[99] However, an act done at a meeting of those upon whom the power is conferred, purporting to be the act of the meeting, is presumed to be the act of the majority.[1]

[§ 319] **3. Joint and Several, or Joint or Several, Agents.** Where the authority is joint and several, then, it has been held, all or one may act, but not an intermediate number. This rests on the highly technical ground that an execution by an intermediate number is not joint and not several, and therefore not within the power.[2] If the power is joint or

[b] **An instrument executed by both the independent agents** is not a joint instrument, but the several contract of each. They have no power to act jointly. Gaines v. Catron, 1 Humphr. (Tenn.) 514.

89. U. S.—Boone v. Clarke, 3 F. Cas. No. 1641, 3 Cranch C. C. 389.
Ala.—Loeb v. Drakeford, 75 Ala. 464; Caldwell v. Harrison, 11 Ala. 755.
Ark.—Pulaski County v. Lincoln, 9 Ark. 320.
Colo.—Rundle v. Cutting, 18 Colo. 337, 32 P 994.
Conn.—McKinster v. Smith, 27 Conn. 627; Patterson v. Leavitt, 4 Conn. 50, 10 AmD 98.
Ill.—Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180.
Iowa.—Cedar Rapids, etc., R. Co. v. Stewart, 25 Iowa 115.
La.—Penn. v. Evans, 28 La. Ann. 576; Pechaud v. Peytavin, 4 Mart. 73 (holding that, where the principal authorizes one or two to act in the absence or on the death of a third, all must act except in the case of absence or death).
Md.—White v. Davidson, 8 Md. 169, 63 AmD 699.
Mass.—Robbins v. Horgan, 192 Mass. 443, 78 NE 503; Copeland v. Mercantile Ins. Co., 6 Pick. 198; Sutton First Parish v. Cole, 3 Pick. 232; Kupfer v. Augusta South Parish, 12 Mass. 185; Towne v. Jaquith, 6 Mass. 46, 4 AmD 84.
Mich.—Scott v. Detroit Young Men's Soc., 1 Dougl. 119.
Minn.—Deakin v. Underwood, 37 Minn. 98, 33 NW 318, 5 AmSR 827; Rollins v. Phelps, 5 Minn. 463.
N. H.—Packets Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203; Andover v. Grafton, 7 N. H. 304; Jewett v. Alton, 7 N. H. 253.
N. J.—Moore v. Ewing, 1 N. J. L. 144, 1 AmD 195.
N. Y.—Unterberg v. Elder, 211 N. Y. 499, 105 NE 834 [rev 149 App. Div. 647, 134 NYS 242 (rev 72 Misc. 363, 130 NYS 166)]; Wilder v. Ranney, 95 N. Y. 7; Salisbury v. Brisbane, 61 N. Y. 617; Hawley v. Keeler, 53 N. Y. 114; Auburn v. Draper, 23 Barb. 425; Perry v. Tynen, 22 Barb. 137; Holtsinger v. National Corn Exch. Bank, 31 N. Y. Super. 64, 6 AbbPrNS 292, 37 HowPr 203 [aff 40 HowPr 720]; Kind v. Barry, 66 Misc. 188, 121 NYS 324; Rogers v. Cruger, 7 Johns. 557; Green v. Miller, 6 Johns. 39, 5 AmD 184; McCoy v. Curtice, 9 Wend. 17, 24 AmD 113.
Pa.—Cooper v. Lampeter Tp., 8 Watts 125; Allegheny County v. Lecky, 6 Serg. & R. 166, 9 AmD 418; In re Turnpike Road, 5 Binn. 481.
Vt.—Low v. Perkins, 10 Vt. 532, 33 AmD 217.
Va.—Union Bank v. Beirne, 1 Gratt. (42 Va.) 226.
Wis.—Soens v. Racine, 10 Wis. 271; Walker v. Rogan, 1 Wis. 597.
Eng.—Bell v. Nixon, 9 Bing. 393, 23 ECL 630, 131 Reprint 664; Brown v. Andrew, 13 Jur. 938.

90. Davidson v. Provost, 35 Ill. A. 126; Rollins v. Phelps, 5 Minn. 463.

91. Wolkowich v. Mason, 150 Fed. 699, 80 CCA 435, 10 LRANS 765 (holding that, where the owner of personal property gave to an attorney at law, who was under the ordinary employment by him as attorney and counsel, and to another person joint authority to sell the property and receive the proceeds, payment by the other person to the attorney of the amount received on the sale, without special authority from the principal, did not relieve either from the usual joint liability to account to the principal therefor and to pay the same to him); Olinde v. Salzan, 10 La. Ann. 153. See also Percy v. Millaudon, 8 La. 568.

92. Ala.—Caldwell v. Harrison, 11 Ala. 755.
Iowa.—Cedar Rapids, etc., R. Co. v. Stewart, 25 Iowa 115.
Mass.—Heard v. March, 12 Cush. 580; French v. Price, 24 Pick. 13; Damon v. Granby, 2 Pick. 345.
N. Y.—Green v. Miller, 6 Johns. 39, 5 AmD 184.
Eng.—Peterson v. Ayre, 15 C. B. 724, 80 ECL 724, 139 Reprint 610 (where an arbitration was made under authority of two or three to make an award, and it was held that even if the award was made by two instead of three they must act jointly and at the same time and place); Berry v. Penring, Cro. Jac. 399, 79 Reprint 341 (where four were appointed to make an award, with a proviso that the award should be made and delivered by the four, or by any three of them); Sallows v. Girling, Cro. Jac. 278, 79 Reprint 238.

[a] **General rule not inflexible.**— The rule that an authority conferred by a principal upon two or more agents is presumed to be joint is not inflexible but yields to indications of a contrary intent, and such indications may be looked for in the surrounding circumstances, in the course of dealing, or in the terms of the power. Unterberg v. Elder, 211 N. Y. 499, 105 NE 834 [rev 149 App. Div. 647, 134 NYS 242 (rev 72 Misc. 363, 130 NYS 166)].

93. Conn.—Johnson v. Smith, 21 Conn. 627 (holding that, if the principal does not object, third persons cannot).
Ill.—Davidson v. Provost, 35 Ill. A. 126.
La.—Pechaud v. Peytavin, 4 Mart. 73.
Mass.—French v. Price, 24 Pick. 13.
Mich.—Scott v. Detroit Young Men's Soc., 1 Dougl. 119.
N. Y.—Hawley v. Keeler, 53 N. Y. 114.

94. St. Paul Div. No. 1 S. T. v. Brown, 11 Minn. 356 (holding that, where three agents are appointed by a corporation to tender payment and receive a conveyance of certain property in trust for the corporation, any one of the three may make such tender, for the act is merely ministerial); Powell v. Tuttle, 3 N. Y. 396. But see Johnston v. Bingham, 9 Watts & S. (Pa.) 56 (holding that, where powers are granted to several persons to transact private business, all must join in the execution of it; and the rule applies in all cases, whether the duty is ministerial or judicial). See also Corporations [10 Cyc 779].

95. See Partnership [30 Cyc 478].

96. Doland v. Grand Valley Irr. Co., 28 Colo. 150, 63 P 300; Heard v. March, 12 Cush. (Mass.) 580 (holding that, where a town chooses a committee to superintend the building of a church, a majority of such committee constitutes a quorum, and a majority of such quorum may act as the committee).

97. Wilson v. Dennison, Ambl. 82, 27 Reprint 52; Atty.-Gen. v. Scott, 1 Ves. 413, 27 Reprint 1113. See also Corporations [10 Cyc 774 et seq]; Officers [29 Cyc 1434].

98. Damon v. Granby, 2 Pick. (Mass.) 345; Dodge v. Tullock, 110 Mich. 480, 68 NW 239; Ex p. Willcocks, 7 Cow. (N. Y.) 402, 17 AmD 525; Wilson v. Dennison, Ambl. 82, 27 Reprint 52; Atty.-Gen. v. Scott, 1 Ves. 413, 27 Reprint 1113.

[a] **Where a board of trustees was composed of twenty-five persons,** and after the death of one of the members the board met for official action, and there was a tie vote, and subsequently another member died, and the twelve who had cast opposing votes met and passed the act, it was held invalid. Wilson v. Dennison, Ambl. 82, 27 Reprint 52; Atty.-Gen. v. Scott, 1 Ves. 413, 27 Reprint 1113.

99. In re St. Mary's Church, 7 Serg. & R. (Pa.) 517; Walker v. Rogan, 1 Wis. 597.

1. Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203. See also Corporations [10 Cyc 780].

2. Caldwell v. Harrison, 11 Ala. 755; Purinton v. Security L. Ins., etc., Co., 72 Me. 22; Guthrie v. Armstrong, 5 B. & Ald. 628, 7 ECL 343, 106 Reprint 1320.

[a] **Where a partnership is appointed agent,** it will be implied that the authority is joint and several. Unterberg v. Elder, 211 N. Y. 499, 105 NE 834 [rev 149 App. Div. 647, 134 NYS 242 (rev 72 Misc. 363, 130 NYS 166)].

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several it may be executed by all or by any less number.[3]

[§ 320] **4. Agents of Joint or Several Principals.** An agent may execute authority for several joint principals, and in such case all who authorized the execution will be bound.[4] But the agent of such principals has of course no authority to execute contracts to bind one principal in the separate business of another.[5] An agent of two independent and unconnected principals has no right to act for them jointly,[6] unless there should be actual consent of the principals, or a custom to lump orders or sales for different principals, each becoming liable for his share of the contract.[7]

[§ 321] **D. Formal Execution—1. Simple Contracts—a. General Rules.** A contract by an agent should be in the name of his principal, so as to show beyond question that it is the principal who contracts, and not the agent,[8] since the intention of the parties, as legally evidenced by the terms of the contract itself, is always the governing consideration in determining who is bound by the contract.[9] It is not alone sufficient that the agent has authority to bind the principal, but he must in fact make the contract the obligation of the principal in terms, in order to bind him.[10] No particular form of words is necessary for this purpose; the material thing is that it appear on the face of the instrument that it is the principal who makes the grant or incurs the obligation, which induces the contract to be made by the other party.[11]

An oral contract is binding on the principal if his name is disclosed and the person making it contracts as his agent and on his behalf.[12]

[§ 322] **b. Intention of Parties Controls.** In the case of simple contracts, other than negotiable instruments, the courts are inclined to look through the form, and if possible give effect to the intention of the parties, if this is made clear by an examination of the instrument as a whole.[13] The rule is

3. Baskett v. Ohio Valley Banking, etc., Co., (Ky.) 125 SW 1066; U. S. Fidelity, etc., Co. v. Ettenheimer, 70 Nebr. 144, 147, 97 NW 227, 99 NW 652, 113 AmSR 783 (holding that one of three persons appointed attorneys in fact by a power of attorney may act for the principal, if the power of attorney contains no provision requiring more than one to join in the act); Guthrie v. Armstrong, 5 B. & Ald. 628, 7 ECL 343, 106 Reprint 1320 (holding that, where a power of attorney was given to fifteen persons therein named, jointly or severally to execute such policies as they or any of them should jointly or severally think proper, an execution of such power by four of the persons named was sufficient).

4. Wilson v. Henderson, 123 Cal. 258, 55 P 986. See Stewart v. Hall, 3 B. Mon. (Ky.) 218 (holding that a deed by an attorney, executed under a power purporting to have been given by five, but in fact given by only two of the five, passes but two fifths of the property conveyed). Compare Cooper v. Breckenridge, 11 Minn. 341 (holding that the mere fact that one is an agent for several persons interested in a particular enterprise, such as the establishment of a town, does not authorize him to conduct the business for them under a common name, thus making them severally liable, under Pub. St. c 60 § 38, providing that any one of such joint associates may be sued for the obligations of all).

5. Citizens' Ins. Co. v. Kountz Line, 10 Fed. 768.

6. Cameron v. Tate, 15 Can. S. C. 622 (holding that an agent of two independent and unconnected principals has no authority to bind his principals, or either of them, by the sale of the goods of both in one lot, when the articles included in such sale are different in kind, and are sold for a single lump price not susceptible of a ratable apportionment except by the mere arbitrary will of the agent; and that there can be no ratification of such a contract unless the parties whom it is sought to bind have, either expressly or impliedly by conduct, with full knowledge of all the terms of the agreement made by the agent, assented to the same terms and agreed to be bound by the contract undertaken on their behalf).

7. Scott v. Godfrey, [1901] 2 K. B. 726.

8. U. S.—Hunt v. Ennis, 12 F. Cas. No. 6,889, 2 Mason 244 [aff 1 Pet. 1, 7 L. ed. 27]; The Schooner Tilton, 23 F. Cas. No. 14,054, 5 Mason 465, 481.

Ala.—McTyer v. Steele, 26 Ala. 487.

Cal.—Estrella Vineyard Co. v. Butler, 125 Cal. 232, 57 P 980; Jones v. Post, 6 Cal. 102; Sayre v. Nichols, 5 Cal. 487.

Conn.—Hall v. Bradbury, 40 Conn. 32.

Ga.—Cleaveland v. Stewart, 3 Ga. 283.

Ill.—Frankland v. Johnson, 147 Ill. 520, 35 NE 480, 37 AmSR 234; Harms v. McCormick, 132 Ill. 104, 22 NE 511; New Market Sav. Bank v. Gillet, 100 Ill. 254, 39 AmR 39; Lombard v. Chicago Sinai Cong., 64 Ill. 477.

Ind.—Warrick County v. Butterworth, 17 Ind. 129.

Iowa.—Tryon v. Oxley, 3 Greene 289.

Ky.—Carson v. Lucas, 13 B. Mon. 213; Hunter v. Miller, 6 B. Mon. 612; Nichols v. Davis, 1 Bibb 490.

La.—Cockerham v. Perot, 48 La. Ann. 209, 19 S 122.

Me.—Irish v. Webster, 5 Me. 171.

Mass.—Wood v. Goodridge, 6 Cush. 117, 52 AmD 771; Abbey v. Chase, 6 Cush. 54; Bradlee v. Boston Glass Mfy., 16 Pick. 347; Elwell v. Shaw, 16 Mass. 42, 8 AmD 126; Arfridson v. Ladd, 12 Mass. 173; Stackpole v. Arnold, 11 Mass. 27, 6 AmD 150.

Mich.—Farmers', etc., Bank v. Troy City Bank, 1 Dougl. 457.

Nebr.—Persons v. McDonald, 60 Nebr. 452, 83 NW 672.

N. J.—Sheldon v. Dunlap, 16 N. J. L. 245.

N. Y.—Pumpelly v. Phelps, 40 N. Y. 59, 67, 100 AmD 463; Cortland Wagon Co. v. Lynch, 32 Hun 173, 31 NYS 325; Galusha v. Hitchcock, 29 Barb. 193; Stanton v. Camp, 4 Barb. 274; Evans v. Wells, 22 Wend. 324; Pentz v. Stanton, 10 Wend. 271, 25 AmD 558; Walker v. Swartwout, 12 Johns. 444, 7 AmD 334.

N. C.—Godley v. Taylor, 14 N. C. 178.

Pa.—Sharpe v. Bellis, 61 Pa. 69, 100 AmD 618.

Philippine.—Pastells v. Hollman, 2 Philippine 235 (holding that the liability of the principal for the purchase price of goods sold to him through a commission agent depends upon whether the agent acted in the name of the principal).

S. C.—Wallace v. Langston, 52 S. C. 133, 29 SE 552; Welsh v. Parish, 19 S. C. L. 155.

W. Va.—Findley v. Cunningham, 53 W. Va. 1, 44 SE 472.

Eng.—Combes' Case, 9 Coke 75a, 76b, 77 Reprint 843 (where the court said: "When any [one] has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act of him who gives the authority"); Comyns Dig. tit Attorney c 14.

9. See infra § 322.

10. Tiller v. Spradley, 39 Ga. 35; Merchants' Bank v. Hayes, 7 Hun (N. Y.) 530; Williams v. Christie, 11 N. Y. Super. 29, 10 HowPr 12; Stone v. Wood, 7 Cow. (N. Y.) 453, 17 AmD 529.

[a] **In order to bind the principal** and make it his contract, the instrument must on its face purport to be the contract of the principal and his name must be inserted in it and signed to it, and not merely the name of the agent, although the latter is described as agent in the instrument. Prather v. Ross, 17 Ind. 495.

11. Steele v. McElroy, 1 Sneed (Tenn.) 341; Wilks v. Back, 2 East 142, 102 Reprint 323, 8 ERC 634.

[a] **The mere use by an agent of a company of the words "we" and "us,"** and the payment by its check of the rental of property leased by him, are not of themselves sufficient to make the company a party to the contract, although, taken in connection with other facts, they are admissible to prove it a party thereto. Martin v. Zahnizer, 10 Pa. Super. 582.

12. Eckhart v. Reidel, 16 Tex. 62.

13. U. S.—Sun Printing, etc., Assoc. v. Moore, 183 U. S. 642, 22 SCt 240, 46 L. ed. 366; Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050 (holding that, while sealed instruments must be treated as the contracts of the parties therein named, in unsealed instruments the question is always one of intent, and the court, untrammeled by any other consideration, is bound to give it effect); Stark v. Starr, 94 U. S. 477, 24 L. ed. 276; Gill v. General Electric Co., 129 Fed. 349, 64 CCA 99 [aff 127 Fed. 241].

Ala.—Roney v. Winter, 37 Ala. 277.

Colo.—Frambach v. Frank, 33 Colo. 529, 81 P 247.

Conn.—Ogden v. Raymond, 22 Conn. 379, 58 AmD 429; Magill v. Hinsdale, 6 Conn. 464, 16 AmD 70; Adams v. Whittlesey, 3 Conn. 560; Hovey v. Magill, 2 Conn. 680.

Ga.—Phinizy v. Bush, 129 Ga. 479, 59 SE 259; Raleigh, etc., R. Co. v. Pullman Co., 122 Ga. 700, 50 SE 1008; Partridge v. Hollingshead, 105 Ga. 278, 30 SE 787.

Ind.—Avery v. Dougherty, 102 Ind. 443, 2 NE 123, 52 AmR 680.

Ky.—Hunter v. Miller, 6 B. Mon. 612.

Me.—Winship v. Smith, 61 Me. 118; Andrews v. Estes, 11 Me. 267, 26 AmD 521.

Mass.—Cutler v. Ashland, 121 Mass. 588; Blanchard v. Blackstone, 102 Mass. 343; Shattuck v. Eastman, 12 Allen 369; Bray v. Kettell, 1 Allen 80; New England Mar. Ins. Co. v. De Wolf, 8 Pick. 56.

Minn.—Sanborn v. Neal, 4 Minn. 126, 77 AmD 502.

Mo.—Jones v. Williams, 139 Mo. 1, 39 SW 486, 40 SW 353, 61 AmSR 436, 37 LRA 682; Heath v. Goslin, 80 Mo. 310, 50 AmR 505.

N. Y.—Hall v. Lauderdale, 46 N. Y.

well established that, if the nature and circumstances of the transaction and the face of the instrument show that the intention was to bind the principal and not the agent, effect will be given to such intention, however inartificial may be the language used to express the intention;[14] and although the principal has no potential existence or power to contract, where that fact is known to the other party.[15]

Intention generally determined from instrument. As a general rule the intent of the contracting parties must be gathered from the instrument;[16] and the whole instrument must be considered;[17] and where there are several instruments, each of which refers to the others, all may be considered in ascertaining the intention.[18]

[§ 323] **c. Form of Signature or Name in General.** The approved manner of executing a simple written contract by an agent is to do so entirely in the name of the principal, signing the name of his principal by himself as agent.[19] However, this is not the only form of execution that binds the prin-

70; Jones v. Gould, 123 App. Div. 286, 108 NYS 31 [rev on other grounds 200 N. Y. 18, 92 NE 1071]; Randall v. Snyder, 1 Lans. 163, 165 (where the rule is thus stated: "If the name of the principal and a relation of agency be stated in the writing, and the agent really be authorized, the principal is alone bound, unless the language express a clear intention to bind the agent personally; or, in other words, a written contract not under seal is binding on the principal in whatever form made or executed, if the principal's name appear in it, and the intention to bind him be apparent"); Stanton v. Camp, 4 Barb. 274; Allen v. Bareda, 20 N. Y. Super. 204; Townsend v. Hubbard, 4 Hill 351; Evans v. Wells, 22 Wend. 324; Kirkpatrick v. Stainer, 22 Wend. 244; Pentz v. Stanton, 10 Wend. 271, 25 AmD 558; Mott v. Hicks, 1 Cow. 513, 13 AmD 550.

N. C.—Fowle v. Kerchner, 87 N. C. 49; Delius v. Cawthorn, 13 N. C. 90.

Oh.—Ish v. Crane, 13 Oh. St. 574.

Va.—Walker v. Christian, 21 Gratt. (62 Va.) 291.

Eng.—Concordia Chemische Fabrik v. Squire, 34 L. T. Rep. N. S. 824.

Construction of contracts see generally Contracts [9 Cyc 577].

[a] **Illustration.**—In Gilmore v. Pope, 5 Mass. 491, the cause came before the court on a statement of facts agreed, from which it appeared that plaintiff was the authorized agent of a corporation to whose stock defendant had subscribed and at the same time had given a written promise to plaintiff, without designating him as agent, to pay all assessments of the corporation. It was held that plaintiff could not maintain an action in his own name for unpaid assessments, but that the promise would support an action by the corporation.

[b] **Intention doubtful.**—If, from the circumstances or the instrument executed, it is doubtful whether an agent intended to execute a power, it will be held that the power was not in fact executed. Neill v. Kleiber, 51 Tex. Civ. A. 552, 112 SW 694.

14. U. S.—Post v. Pearson, 108 U. S. 418, 2 SCt 799, 27 L. ed. 774; Oelricks v. Ford, 23 How. 49, 16 L. ed. 534; Columbia Bank v. Patterson, 7 Cranch 299, 3 L. ed. 351.

Cal.—Schindler v. Green, (A.) 82 P 341.

Conn.—Hewitt v. Wheeler, 22 Conn. 557; Bulkley v. Derby Fishing Co., 2 Conn. 252, 7 AmD 271.

Ga.—Merchants' Bank v. Central Bank, 1 Ga. 418, 44 AmD 665 (holding that where it appears from the face of an instrument executed by an agent that the credit was not given to the agent, and the name of the principal is disclosed at the time of the transaction, and the act is within the power of the agent, the principal is bound); Fitzgerald Cotton Oil Co. v. Farmers Supply Co., 3 Ga. A. 212, 59 SE 713.

Ill.—Laguna Valley Co. v. Fitch, 121 Ill. A. 607.

Ind.—Herod v. Rodman, 16 Ind. 241.

Iowa.—Armstrong v. Borland, 35 Iowa 537; Wheelock v. Winslow, 15 Iowa 464; Harkins v. Edwards, 1 Iowa 426.

Ky.—Carson v. Lucas, 13 B. Mon. 213; McCalla v. Rigg, 2 A. K. Marsh. 259.

Me.—Rogers v. March, 33 Me. 106.

Md.—McClernan v. Hall, 33 Md. 293.

Mass.—Crawford v. Moran, 168 Mass. 446, 47 NE 132; Cook v. Gray, 133 Mass. 106; Page v. Wight, 14 Allen 182; Barlow v. Lee Cong. Soc., 8 Allen 460; Lyon v. Williams, 5 Gray 557; Abbey v. Chase, 6 Cush. 54.

Mich.—Knickerbocker v. Wilcox, 83 Mich. 200, 47 NW 123, 21 AmSR 595; Farmers' etc., Bank v. Troy City Bank, 1 Dougl. 457.

Minn.—Deering v. Thom, 29 Minn. 120, 12 NW 350.

Mo.—McGee v. Larramore, 50 Mo. 425; Shuetze v. Bailey, 40 Mo. 69; Smith v. Alexander, 51 Mo. 193; Meyers v. Kilgen, 177 Mo. A. 724, 160 SW 569; Haubelt v. Rea, etc., Mill Co., 77 Mo. A. 672; Friesz v. Fallon, 24 Mo. A. 439.

Nebr.—Meade Plumbing, etc., Co. v. Irwin, 77 Nebr. 885, 109 NW 391; Western Wheeled Scraper Co. v. McMillen, 71 Nebr. 686, 99 NW 512; Wheeler v. Walden, 17 Nebr. 122, 22 NW 346.

N. H.—Dow v. Moore, 47 N. H. 419; Underhill v. Gibson, 2 N. H. 352, 9 AmD 82.

N. J.—Kean v. Davis, 20 N. J. L. 425; Burley v. Kitchell, 20 N. J. L. 305.

N. Y.—Hill v. Miller, 76 N. Y. 32; A. B. Farquhar Co. v. New River Mineral Co., 87 App. Div. 329, 84 NYS 802 [rev 40 Misc. 404, 82 NYS 241]; Conant v. American Rubber Tire Co., 48 App. Div. 327, 62 NYS 972; Morrill v. C. T. Segar Mfg. Co., 32 Hun 543; Bellinger v. Bentley, 1 Hun 562; Trankla v. McLean, 18 Misc. 221, 41 NYS 385; Finnegan v. Geoghegan, 111 NYS 656; Townsend v. Corning, 23 Wend. 435; Collins v. Butts, 10 Wend. 399 [aff 13 Wend 139]; Olney v. Wickes, 18 Johns. 122.

N. D.—Donovan v. Welch, 11 N. D. 113, 90 NW 262.

Or.—Guthrie v. Imbrie, 12 Or. 182, 6 P 664, 53 AmR 331. See also Rowley v. Hager, 63 Or. 246, 250, 127 P 36 [cit Cyc].

Pa.—Campbell v. Baker, 2 Watts 83; Passmore v. Mott, 2 Binn. 201.

Tenn.—Turner v. Kingston Lumber, etc., Co., (Ch. A.) 59 SW 410.

Tex.—Johnson v. Armstrong, 33 Tex. 325, 18 SW 594, 29 AmSR 648.

Vt.—Alexander v. Rutland Bank, 24 Vt. 222; Roberts v. Button, 14 Vt. 195.

Wash.—Belt. v. Washington Water Power Co., 24 Wash. 337, 64 P 525.

Eng.—Irvine v. Watson, 5 Q. B. D. 414; Phelps v. Prothero, 16 C. B. 370, 81 ECL 370, 32 EngL&Eq 474, 139 Reprint 801; Whitehead v. Tuckett, 15 East 400, 104 Reprint 896, 2 ERC 358; Owen v. Gooch, 2 Esp. 567; Wake v. Harrop, 1 H. & C. 202; Price v. Taylor, 5 H. & N. 540; Lee v. Everest, 2 H. & N. 285; Bowen v. Morris, 2 Taunt. 374, 127 Reprint 1122; Unwin v. Wolseley, 1 T. R. 674, 99 Reprint 1314; Kemeys v. Proctor, 3 Ves. & B. 57, 35 Reprint 400.

[a] **Illustrations.**—(1) An order to deliver goods addressed to "Union Stone Co.," having written across its face, "Accepted, Jno. F. Wood, Treas.," is the contract of the company. Rogers v. Union Stone Co., 134 Mass. 31. (2) "Where a contract is made to deliver a chattel 'to A as agent of B,' and in default, to pay a sum certain 'to the said A' without saying as agent, B upon default, may maintain debt for the penalty in his own name." Allen v. Brazier, 18 S. C. L. 55.

[b] **Contract by subagent in agent's name.**—If an agent is authorized to make contracts for the sale of his principal's land in his own name, the principal is bound by a contract executed in the name of the agent by one having authority from the agent. McWilliams v. Lawless, 15 Nebr. 181, 17 NW 349.

15. Fowle v. Kerchner, 87 N. C. 49.

16. Me.—Sturdivant v. Hull, 59 Me. 172, 8 AmR 409.

Md.—Lafin, etc., Powder Co. v. Sinsheimer, 48 Md. 411, 30 AmR 472.

Mass.—Carpenter v. Farnsworth, 106 Mass. 561, 8 AmR 360; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101; Barlow v. Lee Cong. Soc., 8 Allen 460; Draper v. Massachusetts Steam Heating Co., 5 Allen 338; Morell v. Codding, 4 Allen 403; Bray v. Kettell, 1 Allen 80.

Mich.—Detroit v. Jackson, 1 Dougl. 106.

Mo.—Klostermann v. Loos, 58 Mo. 290.

Nebr.—Seth Thomas Clock Co. v. Cass County, 60 Nebr. 566, 83 NW 733.

Nev.—Chase v. Savage Silver Min. Co., 2 Nev. 9 (holding that every written contract made by an agent, in order to be binding upon his principal, must purport on its face to be made by the principal, or the intent to bind him must appear in the instrument itself).

N. J.—Kean v. Davis, 20 N. J. L. 425.

N. C.—Potts v. Lazarus, 4 N. C. 180.

Eng.—Siffkin v. Walker, 2 Campb. 308.

See also generally Contracts [9 Cyc 577].

17. Winship v. Smith, 61 Me. 118; Allen v. Brazier, 18 S. C. L. 55.

18. Washington Mut. F. Ins. Co. v. St. Mary's Seminary, 52 Mo. 480.

19. U. S.—Sun Printing, etc., Assoc. v. Moore, 183 U. S. 642, 22 SCt 240, 46 L. ed. 366 [aff 101 Fed. 591, 41 CCA 506].

Ala.—Clealand v. Walker, 11 Ala. 1058, 46 AmD 238.

Fla.—Lay v. Austin, 25 Fla. 933, 7 S 143.

Ill.—Mears v. Morrison, 1 Ill. 223 (holding that the usual and appropriate mode of executing a deed or other writing by an agent or attorney is for the agent or attorney to sign his principal's name, and then his own as agent); Sear v. Moore, 172 Ill. A. 351.

Ind.—Freese v. Crary, 29 Ind. 524; Butterfield v. Beall, 3 Ind. 203; Wilburn v. Larkin, 3 Blackf. 55.

Mass.—Gardner v. Gardner, 5 Cush. 483, 52 AmD 740.

Minn.—Tidd v. Rines, 26 Minn. 201, 2 NW 497; Fowler v. Atkinson, 6 Minn. 578; Sencerbox v. McGrade, 6 Minn. 484. See also Morton v. Stone, 39 Minn. 275, 39 NW 496.

Mo.—Sparks v. Dispatch Transfer Co., 104 Mo. 531, 15 SW 417, 24 AmSR 351, 12 LRA 714; Shuetze v. Bailey, 40 Mo. 69; Martin v. Almond, 25 Mo. 313.

N. J.—Kean v. Davis, 20 N. J. L. 425.

N. Y.—Walker v. State Bank, 9 N.

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cipal and him alone. If the body of the instrument is in the name of the principal, or clearly shows an intention to bind him, the form of the signature is immaterial;[20] it is sufficient if the signature is that of the agent acting as agent.[21] In such a case the principal is bound whether the signature is in his name alone;[22] or in his name followed by that of the agent;[23] or in his name followed by that of the agent with a suffix describing the agent's relation to the principal;[24] or in the name of the agent alone;[25] or in the name of the agent with descriptio personæ and the name of the principal;[26]

Y. 582, Seld. 257 [aff 13 Barb. 636]; Rand v. Moulton, 72 App. Div. 236, 76 NYS 174; Clark v. Titcomb, 42 Barb. 122; Cochran v. MacRae, 49 Misc. 529, 98 NYS 852; Townsend v. Hubbard, 4 Hill 351; Spencer v. Field, 10 Wend. 87.

N. C.—Whitehead v. Reddick, 34 N. C. 95; Oliver v. Dix, 21 N. C. 158; Redmond v. Coffin, 17 N. C. 437; Delius v. Cawthorn, 13 N. C. 90; Locke v. Alexander, 9 N. C. 155, 11 AmD 750, 8 N. C. 412.

Or.—Dennison v. Story, 1 Or. 272.

Tenn.—Turner v. Kingston Lumber, etc., Co., (Ch. A.) 59 SW 410.

Va.—Stinchcomb v. Marsh, 15 Gratt. (56 Va.) 202; Shanks v. Lancaster, 5 Gratt. (46 Va.) 110, 50 AmD 108; Martin v. Flowers, 8 Leigh (35 Va.) 158; Jones v. Carter, 4 Hen. & M. (14 Va.) 184.

[a] **Absence of the word "by"** before the name of the agent will not raise a presumption that he intended to bind himself. Williams v. Hipple, 17 Pa. Super. 81, 8 Del. Co. 197.

[b] **The agent of a foreign principal** is subject to the general rule. Thus a written agreement signed, "A. B., by C. D., agent," does not bind the agent personally, although the principal resides beyond seas. Bray v. Kettell, 1 Allen (Mass.) 80.

[c] **It is not material that another person signs the name of the party executing a document** if the act of signing is authorized by him at the time of the execution or is afterward adopted or ratified by the performance of acts under and in pursuance of the contract. Co-Boo v. Lim-Tian, 3 Philippine 186.

20. Steele v. McElroy, 1 Sneed (Tenn.) 241; Gadd v. Houghton, 1 Ex. D. 357.

[a] **"The test question** [in determining who is bound by a written contract] is, whether the person signing professes and intends to bind himself, and adds the name of another, to indicate the capacity or trust in which he acts, or the person for whose account his promise is made; or whether the words referring to a principal, are intended to indicate, that he does a mere ministerial act, in giving effect and authenticity to the act, promise and contract of another." Bradlee v. Boston Glass Mfy., 16 Pick. (Mass.) 347, 350.

21. U. S.—Gottfried v. Miller, 104 U. S. 521, 26 L. ed. 851 (holding that an assignment of a patent purporting upon its face to be the act of a corporation, signed by A as president of the company, who declared that he signed "as the act of the said company," but not sealed, binds the company, and not A); Smith v. Morse, 9 Wall. 76, 19 L. ed. 597.

Ala.—Lazarus v. Shearer, 2 Ala. 718.

Ill.—Durham v. Stubbings, 111 Ill. A. 10.

Iowa.—Thilmany v. Iowa Paper Bag Co., 108 Iowa 357, 79 NW 261, 75 AmSR 259.

Ky.—Brondrup v. Trueman, 12 KyL 47.

La.—Bristow v. Erwin, 6 La. Ann. 102.

Md.—Bend v. Susquehanna Bridge, etc., Co., 6 Harr. & J. 128, 14 AmD 261.

Mass.—Goodenough v. Thayer, 132 Mass. 152.

Mo.—Thompson v. Chouteau, 12 Mo. 488.

Mont.—Largey v. Leggat, 30 Mont. 148, 75 P 950.

N. Y.—Ferris v. Kilmer, 48 N. Y. 300; Davis v. Lynch, 31 Misc. 724, 65 NYS 225 (holding that, although the contract in suit was signed by defendant's agent, defendant may nevertheless be sued thereon, where the proofs justify the finding that defendant was the real principal, and was so regarded by both parties).

Eng.—Mahony v. Kekule, 14 C. B. 390, 78 ECL 390, 139 Reprint 161.

[a] **The strict rule is applied** only to instruments under seal. Merchants' Bank v. Central Bank, 1 Ga. 418, 44 AmD 665; Andrews v. Estes, 11 Me. 267, 26 AmD 521; Detroit v. Jackson, 1 Dougl. (Mich.) 106. See also infra § 330.

[b] **Repugnant addition to signature.**—If the agent inadvertently describes himself, after his signature, as the agent of the other contracting party, the validity of the contract is not affected. Bend v. Susquehanna Bridge, etc., Co., 6 Harr. & J. (Md.) 128, 131, 14 AmD 261 (where an agent having a power of attorney from his principal to sell stock executed the following assignment: "I, John H. Poor, by my attorney, Samuel Clendenen, do hereby transfer and make over unto William B. Bend," etc., signed "Samuel Clendenen . . . Att'y for Wm. B. Bend." It was held that it was sufficient for C to sign the contract without any addition of the character in which he acted, the same having been distinctly averred in the instrument, and that the words "Att'y for Wm. B. Bend" must be rejected, being repugnant to the whole instrument, and appearing to be a mere act of inadvertence).

22. See infra § 324.

23. Williams v. Hipple, 17 Pa. Super. 81, 8 Del. Co. 197.

24. Draper v. Massachusetts Steam Heating Co., 5 Allen (Mass.) 338; Abbey v. Chase, 6 Cush. (Mass.) 54; North River Bank v. Aymar, 3 Hill (N. Y.) 262.

25. U. S.—Rainey v. Potter, 120 Fed. 651, 57 CCA 113.

Ala.—Jones v. Morris, 61 Ala. 518; Roney v. Winter, 37 Ala. 277; McTyer v. Steele, 26 Ala. 487.

Cal.—Southern Pac. Co. v. Von Schmidt Dredge Co., 118 Cal. 368, 50 P. 650; Burgess v. Fairbanks, 83 Cal. 215, 23 P 292, 17 AmSR 230; Love v. Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 AmD 602; Verzan v. McGregor, 23 Cal. 339 (holding that where an agreement refers to the subject matter of the contract as belonging to a certain corporation, and recites that the corporation "hereby agrees," etc., it sufficiently appears that the corporation is the party really interested and that the contract is its contract, although it was entered into in the name of the directors of the company and signed only by them); McDonald v. Bear River, etc., Water, etc., Co., 13 Cal. 220; Haskell v. Cornish, 13 Cal. 45.

Ga.—Phinizy v. Bush, 129 Ga. 479, 59 SE 259; Fitzgerald Cotton Oil Co. v. Farmers Supply Co., 3 Ga. A. 212, 59 SE 713.

Ind.—Akron Second Nat. Bank v. Midland Steel Co., 155 Ind. 581, 58 NE 833; Herod v. Rodman, 16 Ind. 241.

Iowa.—Lyon v. Adamson, 7 Iowa 509; Baker v. Chambles, 4 Greene 428.

Kan.—Edwards v. Gildenmeister, 61 Kan. 141, 59 P 259.

Ky.—Yowell v. Dodd, 3 Bush 581, 96 AmD 256; Carson v. Lucas, 13 B. Mon. 213.

La.—Milligan v. Lyle, 24 La. Ann. 144; Maher v. Overton, 9 La. 115.

Me.—Simpson v. Garland, 72 Me. 40, 39 AmR 297; Nobleboro v. Clark, 68 Me. 87, 28 AmR 22; Dyer v. Burnham, 25 Me. 9.

Md.—McClernan v. Hall, 33 Md. 293. Key v. Parnham, 6 Harr. & J. 418; McDonough v. Templeman, 1 Harr. & J. 156, 2 AmD 510.

Mass.—Tobin v. Larkin, 183 Mass. 389, 67 NE 340; White v. Dahlquist Mfg. Co., 179 Mass. 427, 60 NE 791; Lamson, etc., Mfg. Co. v. Russell, 112 Mass. 387; Williams v. Bacon, 2 Gray 387.

Mich.—Detroit v. Jackson, 1 Dougl. 106 (holding that, where it distinctly appears in the body of a parol agreement, signed by an agent in his own name without the addition of the name of his principal, that the principal is the contracting party, the agreement will be construed to be that of the principal and not of the agent).

Minn.—Sanborn v. Neal, 4 Minn. 126, 77 AmD 502.

Mo.—Jones v. Williams, 139 Mo. 1, 39 SW 486, 40 SW 353, 61 AmSR 436, 37 LRA 682.

Nebr.—Meade Plumbing, etc., Co. v. Irwin, 77 Nebr. 385, 109 NW 391; State v. Cass County, 60 Nebr. 566, 83 NW 733 (holding that a contract, even though signed by the agent individually, will be held to be the contract of the principal, if it appears by its terms that it was intended and executed as the contract of the principal).

N. H.—Montgomery v. Dorion, 7 N. H. 475; Underhill v. Gibson, 2 N. H. 352, 9 AmD 82.

N. J.—Campbell v. Hough, 73 N. J. Eq. 601, 68 A 759.

N. Y.—Whitford v. Laidler, 94 N. Y. 145, 46 AmR 131; Nicoll v. Burke, 78 N. Y. 580; Hill v. Miller, 76 N. Y. 32; Dykers v. Townsend, 24 N. Y. 57; Collier v. Myers, 52 Misc. 116, 101 NYS 659; Kain v. Postley, 2 Edm. Sel. Cas. 132; Townsend v. Corning, 23 Wend. 435; Many v. Beekman Iron Co., 9 Paige 188.

N. C.—J. H. Hayes Woolen Co. v. McKinnon, 114 N. C. 661, 19 SE 761.

Oh.—Anderton v. Shoup, 17 Oh. St. 125; Ish v. Crane, 13 Oh. St. 574; Ish v. Crane, 8 Oh. St. 520; Wheeler v. Knaggs, 8 Oh. 169.

Pa.—Lancaster v. Knickerbocker Ice Co., 153 Pa. 427, 26 A 251; Woodwell v. Brown, 44 Pa. 121.

S. C.—Builders Supply Co. v. North Augusta Electric, etc., Co., 71 S. C. 361, 51 SE 231. And see Welsh v. Usher, 11 S. C. Eq. 167, 29 AmD 63 (holding that equity will execute such an agreement, although it is void in law).

Tex.—Traynham v. Jackson, 15 Tex. 170, 65 AmD 152 (holding that in the execution by an agent, in the exercise of the powers delegated, of a contract not under seal, the fact that the agency appears at the time is sufficient to bind the principal, although on its fact it is the agent's contract).

Va.—Walker v. Christian, 21 Gratt. (62 Va.) 291; Richmond, etc., R. Co. v. Snead, 19 Gratt. (60 Va.) 354, 100 AmD 670.

W. Va.—Conaway v. Sweeney, 24 W. Va. 643.

Eng.—Downman v. Williams, 7 Q. B. 103, 53 ECL 103, 115 Reprint 427; Southwell v. Bowditch, 1 C. P. D. 374 [rev 1 C. P. D. 100]; Gadd v. Houghton, 1 Ex D. 357; Spittle v. Lavender, 2 B. & B. 452, 6 ECL 224, 129 Reprint 1041; Kymer v. Suwercropp, 1 Campb. 109, 180c; Waring v. Favenck, 1 Campb. 85; Phelps v. Prothero, 16 C. B. 370, 81 ECL 370, 32 EngL&Eq 474, 139 Reprint 801; Aggs v. Nicholson, 1 H. & N. 165; Parker v. Kett, 1 Ld. Raym. 658, 91 Reprint 1338, 1 Salk. 95, 91 Reprint 88.

N. B.—Hersey v. Hathaway, 11 N. B. 237.

[a] **Notice to quit in agent's name.**—Where an agent has general authority to deal with the land of his principal, a notice to quit, signed by him individually, is valid. Jones v. Phipps, L. R. 3 Q. B. 567.

26. Kansas City v. Hannibal, etc.,

or in the name of the agent alone, his name being followed by words indicating that he acts for the principal named.[27]

Agent "for" principal. The signature in form "A, agent for B," has often been held to bind the agent personally, particularly where there is nothing in the body of the instrument to show an intent to bind some one else.[28] But in a number of cases, in most of which an intention to bind the principal was disclosed by the instrument, it has been held that the principal is bound where the signature is in the name of the agent "for" the principal,[29] or where the signature is "for" the principal, followed by the name and descriptio personæ of the agent;[30] or followed by the name of the agent alone;[31] or where the signature is in the name of the agent "in behalf of" the principal.[32]

[§ 324] **d. Necessity of Agent's Signature.** While the advantage of preserving the testimony connected with the transaction renders it desirable and important that the agent's signature should appear upon the instrument,[33] it is not legally essential that he should sign it, or that his name should appear at all upon it, the signature of the principal alone being sufficient, without regard to the nature of the instrument,[34] especially where the

R. Co., 77 Mo. 180; Cochran v. MacRae, 49 Misc. 529, 98 NYS 852. See also infra § 327.

27. Ala.—Collins v. Hammock, 59 Ala. 448.

Cal.—Blanchard v. Kaull, 44 Cal. 440.

Conn.—Magill v. Hinsdale, 6 Conn. 464, 16 AmD 70.

Ill.—Little v. Bailey, 87 Ill. 239; Hancock v. Yunker, 83 Ill. 208; Neufeld v. Beidler, 37 Ill. A. 34.

Ind.—Hamilton v. Newcastle, etc., R. Co., 9 Ind. 359; Pitman v. Kintner, 5 Blackf. 250, 33 AmD 461.

Iowa.—Wheelock v. Winslow, 15 Iowa 464; Harvey v. Irvine, 11 Iowa 82; Harkins v. Edwards, 1 Iowa 426.

Ky.—Yowell v. Dodd, 3 Bush 581, 96 AmD 256; Carson v. Lucas, 13 B. Mon. 213.

La.—Maury v. Ranger, 38 La. Ann. 485, 58 AmR 197.

Me.—Winship v. Smith, 61 Me. 118; Andrews v. Estes, 11 Me. 267, 26 AmD 521.

Mass.—Cook v. Gray, 133 Mass. 106; Murphy v. Welch, 128 Mass. 489; Whitney v. Stow, 111 Mass. 368; Blanchard v. Blackstone, 102 Mass. 343; Sherman v. Fitch, 98 Mass. 59; Barlow v. Lee Cong. Soc., 8 Allen 460; Ellis v. Pulsifer, 4 Allen 165; Hutchins v. Byrnes, 9 Gray 367; Fay v. Noble, 12 Cush. 1; Kingman v. Kelsie, 3 Cush. 339.

Mich.—Shaw v. Gilmore, 76 Mich. 127, 42 NW 1082.

Miss.—Leach v. Blow, 16 Miss. 221.

Mo.—Martin v. Almond, 25 Mo. 313.

Nebr.—Wheeler v. Walden, 17 Nebr. 122, 22 NW 346.

N. J.—Shotwell v. McKown, 5 N. J. L. 973.

N. Y.—Rand v. Moulton, 72 App. Div. 236, 76 NYS 174; Lee v. Ft. Edward M. E. Church, 52 Barb. 116; Haight v. Sahler, 30 Barb. 218; Horton v. Garrison, 23 Barb. 176; Stanton v. Camp, 4 Barb. 274; Parks v. Brinkerhoff, 2 Hill 663; Mott v. Hicks, 1 Cow. 513, 13 AmD 550; Rathbon v. Budlong, 15 Johns. 1.

N. C.—Bason v. King's Mountain Min. Co., 90 N. C. 417; Osborne v. High Shoals Min., etc., Co., 50 N. C. 177.

R. I.—Bradstreet v. Baker, 14 R. I. 546.

S. C.—Varnum v. Evans, 27 S. C. L. 409.

Tenn.—Turner v. Kingston Lumber, etc., Co., 106 Tenn. 1, 58 SW 854.

Vt.—McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274; Proctor v. Webber, 1 D. Chipm. 371.

Va.—Shanks v. Lancaster, 5 Gratt. (47 Va.) 110, 50 AmD 108.

Eng.—Lindus v. Melrose, 3 H. & N. 177 [aff 2 H. & N. 293].

28. Ala.—Crutcher v. Memphis, etc., R. Co., 38 Ala. 579.

Colo.—Tannant v. Rocky Mountain Nat. Bank, 1 Colo. 278, 9 AmR 156.

Ky.—Musgrove v. McIlroy, 5 J. J. Marsh. 646; Parks v. S. & L. Turnpike Road Co., 4 J. J. Marsh. 456; Offutt v. Ayres, 7 T. B. Mon. 356.

Minn.—Peterson v. Homan, 44 Minn. 166, 46 NW 303, 20 AmSR 564 (holding that "agent for" prima facie is descriptive merely, and that the burden is on the agent to show by parol that he was not binding himself personally).

W. Va.—Virginia Exch. Bank v. Lewis County, 28 W. Va. 273.

29. Ala.—Stringfellow v. Mariott, 1 Ala. 573.

Ark.—Gibbs v. Dickson, 33 Ark. 107.

Ill.—King v. Handy, 2 Ill. A. 212.

Iowa.—Ford v. Stuart Independent Dist., 46 Iowa 294.

Ky.—Webb v. Burke, 5 B. Mon. 51; Cook v. Sanford, 3 Dana 237 [dist Offut v. Ayres, 7 T. B. Mon. 356]. Compare Garrison v. Combs, 7 J. J. Marsh. 84, 88, 22 AmD 120; Patterson v. Henry, 4 J. J. Marsh. 126.

Me.—Sheridan v. Carpenter, 61 Me. 83.

Mass.—Jefts v. York, 4 Cush. 371, 10 Cush. 392, 50 AmD 791; Rice v. Gove, 22 Pick. 158, 33 AmD 724; Ballou v. Talbot, 16 Mass. 461, 8 AmD 146; Long v. Colburn, 11 Mass. 97, 6 AmD 160. Compare Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101.

Mich.—Detroit v. Jackson, 1 Dougl. 106.

Miss.—Grubbs v. Wiley, 17 Miss. 29.

Mo.—Shuetze v. Bailey, 40 Mo. 69.

N. H.—Hale v. Woods, 10 N. H. 470, 34 AmD 176; Olcott v. Little, 9 N. H. 259, 32 AmD 357.

N. Y.—Dean v. Roesler, 1 Hilt. 420; Stiats v. Howlett, 4 Den. 559; Spencer v. Field, 10 Wend. 87.

N. C.—McCall v. Clayton, 44 N. C. 422; Oliver v. Dix, 21 N. C. 158; Potts v. Lazarus, 4 N. C. 180.

N. D.—Donovan v. Welch, 11 N. D. 113, 90 NW 262.

Pa.—Campbell v. Baker, 2 Watts 83.

R. I.—Bradstreet v. Baker, 14 R. I. 546.

S. C.—Robertson v. Pope, 30 S. C. L. 501, 44 AmD 267 [overr Fash v. Ross, 20 S. C. L. 294; Moore v. Cooper, 28 S. C. L. 87; Taylor v. McLean, 26 S. C. L. 352].

Tex.—Rogers v. Bracken, 15 Tex. 564; Giddens v. Byers, 12 Tex. 75.

Va.—Stinchcomb v. Marsh, 15 Gratt. (56 Va.) 202; Bryan v. Stump, 8 Gratt. (49 Va.) 241, 56 AmD 139; Martin v. Flowers, 8 Leigh (35 Va.) 158; Jones v. Carter, 4 Hen. & M. (14 Va.) 184.

See Rawlings v. Robson, 70 Ga. 595.

[a] **Significance of word "for."**—(1) An examination of the cases on this subject discloses a disposition to regard "of" as referring to the relationship merely, while "for" is considered as referring to the act, and operates to make it the act of the principal. See J. H. Hayes Woolen Co. v. McKinnon, 114 N. C. 661, 19 SE 761 (where a bill of sale made to the agent, wherein he was described as "agent for" the principal, was held to transfer the title to the principal); Donovan v. Welch, 11 N. D. 113, 90 NW 262 (where the agent was referred to throughout a deed and acknowledgment as "attorney in fact for" the principal, a woman, and the words "he," "his," "him," and "himself" were used in referring to the grantor, and the deed was held to be that of the principal, stress being laid on the word "for" in the description of the agent). (2) Where an agent has authority to execute a contract for the sale of land in his own name, and the principal consents to have the agent's clerk sign for the agent in his absence, such a contract signed by the clerk "for" the agent, describing him as "agent for the seller," binds the principal. Coles v Trecothick, 9 Ves. Jr. 234, 32 Reprint 592.

[b] **Inclosing principal's name in brackets.**—A note signed by an agent, followed by the word "for" and the name of the principal inclosed in brackets, has been held to be prima facie the note of the agent, although but for the brackets it would have been the note of the principal. Early v. Wilkinson, 9 Gratt. (50 Va.) 68.

30. Ala.—Roney v. Winter, 37 Ala. 277.

Ind.—Wilburn v. Larkin, 3 Blackf. 55.

Iowa.—Wheelock v. Winslow, 15 Iowa 464.

Mass.—Long v. Colburn, 11 Mass. 97, 6 AmD 160.

N. Y.—Hunter v. Hudson River Iron, etc., Co., 20 Barb. 493; Scott v. Johnson, 18 N. Y. Super. 213.

Pa.—Heffernan v. Addams, 7 Watts 116.

Eng.—Deslandes v. Gregory, 2 E. & E. 602, 105 ECL 602, 121 Reprint 226.

See also infra § 327.

[a] **Where a contract is made in the names of the agents as principals,** but is signed "for" the principal whose name is followed by those of the agents with descriptio personæ, and the intention of all parties is to bind the principal, the agents are not liable on the contract. Wake v. Harrop, 1 H. & C. 202.

31. Campbell v. Baker, 2 Watts (Pa.) 83; Galway v. Matthew, 1 Campb. 403; Mahony v. Kekule, 14 C. B. 390, 78 ECL 390, 139 Reprint 161; Wilks v. Back, 2 East 142, 102 Reprint 323, 8 ERC 634.

32. McHenry v. Duffield, 7 Blackf. (Ind.) 41; Tuttle v. Ayres, 3 N. J. L. 682.

[a] **Compare.**—A contract in the form I, "in behalf of," or "on behalf of," a named principal, and signed individually by the agent, is prima facie the contract of the agent. Pomeroy v. Slade, 16 Vt. 220; Cooke v. Wilson, 1 C. B. N. S. 153, 87 ECL 153, 87 EngL&Eq 361, 140 Reprint 65; Tanner v. Christian, 4 E. & B. 591, 82 ECL 591, 29 EngL&Eq 103, 119 Reprint 217.

33. Forsyth v. Day, 41 Me. 382; Berkey v. Judd, 22 Minn. 287; Youngs v. Perry, 42 App. Div. 247, 59 NYS 19.

34. D. C.—Nichols v. Bealmear, 36 App. 352.

Ill.—Hefner v. Vandolah, 62 Ill. 483, 14 AmR 106; Walter v. School Trustees, 12 Ill. 63.

Me.—Forsyth v. Day, 41 Me. 382.

Mass.—Hunter v. Giddings, 97 Mass. 41, 93 AmD 54; Brigham v. Peters, 1 Gray 139; Huntington v. Knox, 7 Cush. 371.

Minn.—Deakin v. Underwood, 37 Minn. 98, 33 NW 318, 5 AmSR 827; Rock Island First Nat. Bank v. Loyhed, 28 Minn. 396, 10 NW 421; Berkey v. Judd, 22 Minn. 287.

Mo.—Trenton First Nat. Bank v. Gay, 63 Mo. 33, 21 AmR 430; Cravens v. Gillilan, 63 Mo. 28; Human v. Cuniffe, 32 Mo. 316; Northwestern

instrument recites the fact that it is executed by an agent,[35] or where it is executed in the presence and by the direction of the principal.[36]

Agent signing should use name by which he was appointed. Where the agent signs his name to the instrument he should use the name by which he was appointed, or in some manner identify himself, for otherwise the variance may exclude the contract as evidence.[37]

[§ 325] **e. Necessity of Principal's Signature.** Where a person acts as agent of another, and in that capacity signs instruments other than those requiring a seal, whether negotiable or not, and the party with whom he deals has full knowledge of his agency and, of the principal for whom he acts, an express disclosure of the latter's name on the face of the instruments, or in the signature, is not essential to protect the agent from personal liability,[38] or to bind his principal.[39]

[§ 326] **f. Use of Word "As."** The weight of authority favors the rule that, where the body of the contract recites that it is made by the person signing it "as" agent or other representative, it is sufficient to show an intention to contract for the principal, and he, not the representative, is bound, and that the form of the signature is immaterial,[40] although it has been held otherwise in some cases.[41]

[§ 327] **g. Descriptio Personæ.** It has been decided in a number of cases that the mere addition of the word "agent," or other words descriptive of representation, to the name of a person signing a contract, cannot be regarded as a certain indication that the contract was made on behalf of another, as such addition may be regarded as mere descriptio personæ,[42] and no liability be imposed on the principal by the contract.[43] Much of the confusion in the application of the law relative to the

Sav. Bank v. International Bank, 90 Mo. A. 205.

N. H.—Woodbury v. Woodbury, 47 N. H. 11, 90 AmD 555; Morse v. Green, 13 N. H. 32, 38 AmD 471.

N. Y.—Youngs v. Perry, 42 App. Div. 247, 59 NYS 19; Canandaigua First Nat. Bank v. Whitney, 4 Lans. 34; Clark v. Farmers' Woolen Mfg. Co., 15 Wend. 256; Pentz v. Stanton, 10 Wend. 271, 25 AmD 558.

Oh.—Wheeler v. Knaggs, 8 Oh. 169.

Pa.—Devinney v. Reynolds, 1 Watts & S. 328.

Eng.—In re Whitley, 32 Ch. D. 337, 2 ERC 276; Wilks v. Back, 2 East 142, 102 Reprint 323, 8 ERC 634; Watkins v. Vince, 2 Stark. 368, 3 ECL 448.

35. Berkey v. Judd, 22 Minn. 287; Devinney v. Reynolds, 1 Watts & S. (Pa.) 328.

36. Me.—Lovejoy v. Richardson, 68 Me. 386.

Mass.—Gardner v. Gardner, 5 Cush. 483, 52 AmD 740.

N. H.—Cushman v. Wooster, 45 N. H. 410; Opinion of Justices, 44 N. H. 633; Hanson v. Rowe, 26 N. H. 327; Kidder v. Prescott, 24 N. H. 263.

N. J.—Mutual Ben. L. Ins. Co. v. Brown, 30 N. J. Eq. 193 [aff 32 N. J. Eq. 809].

Eng.—Ball v. Dunsterville, 4 T. R. 313, 100 Reprint 1038.

37. Moore v. Allen, 26 Colo. 197, 57 P 698, 77 AmSR 255.

38. U. S.—Metcalf v. Williams, 104 U. S. 93, 26 L. ed. 665.

Cal.—Bean v. Pioneer Min. Co., 66 Cal. 451, 6 P 86, 56 AmR 106; Sayre v. Nichols, 7 Cal. 535, 68 AmD 280.

La.—Milligan v. Lyle, 24 La. Ann. 144; Barry v. Pike, 21 La. Ann. 221; Spotts v. Cowan, 9 La. Ann. 520; Hazard v. Lambeth, 3 Rob. 378; Lincoln v. Smith, 11 La. 11; Wolfe v. Jewett, 10 La. 383; Krumbhaar v. Ludeling, 3 Mart. 640.

N. Y.—Genesee Bank v. Patchin Bank, 19 N. Y. 312.

Pa.—Sharpe v. Bellis, 61 Pa. 69, 100 AmD 618.

See also infra §§ 486–488.

39. Lockwood v. Coley, 22 Fed. 192; Burkhalter v. Perry, 127 Ga. 438, 56 SE 631; Edwards v. Glidemeister, 61 Kan. 141, 59 P 259; Meyers v. Kilgen, 177 Mo. A. 724, 160 SW 569. See also infra § 514.

40. Cal.—Blanchard v. Kaull, 44 Cal. 440.

Ill.—Little v. Bailey, 87 Ill. 239.

Mass.—Cook v. Gray, 133 Mass. 106; Barlow v. Lee Cong. Soc., 8 Allen 460.

Miss.—Leach v. Blow, 16 Miss. 221.

Mo.—Klostermann v. Loos, 58 Mo. 290.

N. Y.—Stearns v. Allen, 25 Hun 558.

N. C.—Fowle v. Kerchner, 87 N. C. 49.

Pa.—Baum v. Dubois, 43 Pa. 260.

Vt.—Proctor v. Webber, 1 D. Chipm. 371.

Eng.—Green v. Kopke, 18 C. B. 549, 86 ECL 549, 139 Reprint 1484 (holding that a contract made in the name of the principal and signed by the agent alone, with the affix "as agent," binds the principal, and the agent incurs no liability thereon); Deslandes v. Gregory, 2 E. & E. 602, 105 ECL 602, 121 Reprint 226.

[a] **Significance of "as."**—(1) In Hayes v. Crane, 48 Minn. 39, 44, 50 NW 925, the court said: "Many of the cases holding such contracts [contracts by agents] to be personal contracts have overlooked the significance of the word 'as,' immediately preceding the one indicating representative character. We think ordinarily, and unless there be something in the writing to show the contrary, the word must be taken to have been used for a purpose, and that the only purpose of it is to express the character in which the party makes the contract. When so used it is equivalent to the expression, 'in his character of.'" To like effect Sanborn v. Neal, 4 Minn. 126, 77 AmD 502. (2) In Gadd v. Houghton, 1 Ex. D. 357, 359, James, L. J., criticizing the case of Paice v. Walker, L. R. 5 Exch. 173, where a rule contrary to the text was announced, said: "I cannot conceive that the words 'as agents' can be properly understood as implying merely a description. The word 'as' seems to exclude that idea. If that case were now before us, I should hold that the words 'as agents' in that case had the same effect as the words 'on account of' in the present case, and that the decision in that case ought not to stand."

41. Ross v. Brown, 74 Me. 352 (holding that a note reciting "for value received as treasurer of the town of Monmouth, I promise to pay," etc., and signed by the treasurer with his name and official title, was binding on him personally in the absence of proof of his authority to issue the note); McColgan v. Katz, 29 Misc. 136, 60 NYS 291 (holding that, where a lease was executed by "William P. O'Connor, as agent for Est., John McColgan, as Landlord," and signed and sealed "William P. O'Connor, agent," Elizabeth McColgan, the principal, could not bring an action on the lease as in view of its form and the manner of its execution she was a stranger to it); Titus v. Kyle, 10 Oh. St. 444 (holding that a note, "We or either of us, as directors . . . promise to pay" etc., dated and signed by the makers without further designation of their official capacity, was binding on the directors individually); Paice v. Walker, L. R. 5 Exch. 173 [crit Gadd v. Houghton, 1 Ex. D. 357].

[a] **Effect of custom on rule.**—If a custom of trade requires the agent to disclose his principal within a reasonable time, agents failing to do so are bound on a contract made by them "as agents to merchants," although, but for the custom, they would not be bound. Hutchinson v. Tatham, L. R. 8 C. P. 482.

[b] **As applied to attorneys and solicitors.**—In Burrell v. Jones, 3 B. & Ald. 47, 48, 5 ECL 37, 106 Reprint 580, the instrument recited "we, as solicitors of" a person named, "undertake to pay," and was signed by the solicitors in their individual names only, and it was held that they were personally bound, Abbott, C. J., saying, "Many persons will deal with solicitors and professional men (from the confidence they have in their known character and situation in life), who would not deal with an unknown client. It would be preventing much of the ordinary business of life, if we were to hold, that a solicitor entering into such a contract as this did not make himself personally liable."

42. U. S.—In re Miley, 187 Fed. 177 (holding that the word "agent," written after the name of the vendee in a written contract for the sale of real estate without further disclosure of the person for whom he was agent, would be rejected as surplusage or treated as descriptio personæ, and not a word of limitation).

Ala.—Lazarus v. Shearer, 2 Ala. 718.

Ind.—Avery v. Dougherty, 102 Ind. 443, 2 NE 123, 52 AmR 680; Prather v. Ross, 17 Ind. 495; Crum v. Boyd, 9 Ind. 289; Mears v. Graham, 8 Blackf. 144; Pitman v. Kintner, 5 Blackf. 250, 33 AmD 461; Deming v. Bullitt, 1 Blackf. 241; McClure v. Bennett, 1 Blackf. 189, 12 AmD 223. Compare Akron Second Nat. Bank v. Midland Steel Co., 155 Ind. 581, 58 NE 833.

Ky.—Taul v. Winn, 5 J. J. Marsh. 437.

Minn.—Pershing v. Swenson, 58 Minn. 310, 59 NW 1084; Brunswick-Balke-Collender Co. v. Boutell, 45 Minn. 21, 47 NW 261; Pratt v. Beaupre, 13 Minn. 187; Sencerbox v. McGrade, 6 Minn. 484.

Mo.—Chouteau v. Paul, 3 Mo. 260 (holding that an agreement purporting to be made by A, which is signed by A who styles himself the agent of B, is the agreement of A himself, and not the agreement of B).

Nebr.—Fowler v. McKay, 88 Nebr. 387, 129 NW 551 (holding that parties contracting in their own name do not exclude personal responsibility by describing themselves as agents of another, and that such a contract is their obligation, and not that of their principal).

N. H.—Savage v. Rix, 9 N. H. 263.

N. Y.—Buffalo Catholic Inst. v. Bitter, 87 N. Y. 250; De Witt v. Walton, 9 N. Y. 571; Campbell v. Porter, 61 NYS 712; Brockaway v. Allen, 17 Wend. 40; Hills v. Bannister, 8 Cow. 31.

S. C.—J. L. Mott Iron Works v. Clark, 87 S. C. 199, 69 SE 227.

43. Vail v. Northwestern Mut. L. Ins. Co., 192 Ill. 567, 61 NE 651;

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execution of authority by agents finds its source in this rule, and, although the rule is recognized, it has been adversely criticized,[44] and it has been held that words of agency employed in a written contract are to be regarded, not as descriptive, merely, but as importing character and capacity,[45] and that where the instrument shows on its face that such words are not simply descriptio personæ they will be given their proper force and effect,[46] and also that in such a case resort may be had to parol evidence to determine whose contract it is; even in cases where the instrument is sufficiently clear in terms to bind the agent personally.[47]

[§ 328] **h. Principal Adopting Agent's Name.** Where the principal has adopted the agent's name as his own, he is bound by simple contracts made in the name of the agent,[48] and such a contract is admissible in evidence against him.[49] Where the principal has actually or by his course of dealing authorized the agent to execute contracts or to make and indorse paper in his own name, or has chosen to do business, using the name of the agent as his trade name, the principal cannot escape liability on such contracts on the ground that they were executed in the name of the agent.[50]

Parks v. S. & L. Turnpike Road Co., 4 J. J. Marsh. (Ky.) 456. See also cases supra note 42; and infra § 338.

44. Sayre v. Nichols, 7 Cal. 535, 538, 68 AmD 280 (where the court said: "It was decided by this Court, when the case was up before, that the word 'agent,' appended to the name of the agent, had always been held as merely descriptio personæ, and in no respect affected his liability. The current of decisions certainly supports this view. But I confess I could never understand the reason upon which this rule was founded. When a party appends to his name the place of his residence, as, for example, Charles Carroll of Carrollton, or affixes a letter to his name, as John Smith, T., I can well understand that he intends by this a description of the person; but when he appends the term, agent, or other term of like import, I cannot understand it as a description of the person, but I take it to be a clear designation of the capacity in which the party acts. To use the general word agent, as descriptive of a particular person, would seem to be entirely improper. And as the sole object of a Court in construing written instruments, is to arrive at the true intention of the parties, it would seem that this rule has been established by explaining the true meaning of the instrument entirely away, contrary to the good sense of the thing, and the evident intent of the parties. For I cannot believe that a person signing his name and appending the word 'agent' to it, ever did intend anything else than a designation of the capacity in which he acted. If a party sign a promissory note, and append to his name the word 'security,' or 'surety,' he only means to bind himself as such and not as a principal. (Bryan v. Berry, 6 Cal. 394; Lightstone v. Laurence, 4 Cal. 277.) So, if a party append to his name the word 'agent,' he clearly designates the capacity in which he acts, and he thus designates such capacity for the evident purpose of showing that he intends to bind himself only in that capacity. By assuming to act as agent he does guaranty his authority thus to act, and no more. The party who takes the paper is not bound to take it in that form. He is bound to know the contents of the paper, and knowing the contents, he is bound by the express intention of the party signing it. There can be no difference in principal, as there is no difference in the interest, between the case of a surety appending the word 'surety' to his name, and the case of an agent appending the word 'agent.' And to use the forcible language of this Court in the case of Bryan v. Berry, supra: 'Is not the meaning, sense, and information, conveyed alike in both cases?' And I must think that this rule, which seems to do entire justice to the plain intention of the parties, has forced the Courts to admit parol testimony in many cases, to explain or vary the terms of written instruments, in violation of that statutory rule, that when the meaning can be collected from the writing, that meaning must prevail. The rule that the word 'agent,' appended to the name of the agent, is merely a description of the person, is not, in my view, sustained by common sense; and when a rule is not sustained by common sense, well understood and legitimately applied, it is certain to be wrong").

[a] **"The rule is firmly engrafted in our law,** but it is not easy to find any real ground for it in this country, where there are no titles, designating rank or condition in life. In England there was reason for the rule; here there is none. The better doctrine would be that the words annexed to the name may be explained by extrinsic evidence; but the rule has been too long and too firmly settled to be shaken now. While accepting the general rule to be that stated, the American authorities agree that, if the contract itself shows that the words were not used as merely descriptive of the person, they will not be so regarded, but will be assigned their real meaning." Avery v. Dougherty, 102 Ind. 443, 445, 2 NE 123, 52 AmR 680.

[b] **Illustrations.**—A note signed J. T. H., "Treas. St. Paul's Parish," was held to be the note of J. T. H. individually in Sturdivant v. Hull, 59 Me. 172, 8 AmR 409; and so was one signed J. T. H., "Treas. of St. Paul's Parish," in Sheridan v. Carpenter, 61 Me. 33; but one signed J. T. H., "Treas. for St. Paul's Parish," was held to bind the parish, in Sheridan v. Carpenter, supra; yet in each instance the agent intended to bind his principal, and the payee knew that the principal received the consideration.

45. Southern Pac. Co. v. Von Schmidt Dredge Co., 118 Cal. 368, 50 P 650; Sayre v. Nichols, 7 Cal. 535, 68 AmD 280.

46. Avery v. Dougherty, 102 Ind. 443, 2 NE 123, 52 AmR 680; Garrison v. Combs, 7 J. J. Marsh. (Ky.) 84, 22 AmD 120; Eckhart v. Reidel, 16 Tex. 62.

[a] **Body of instrument controls.**—In Revolving Scraper Co. v. Tuttle, 61 Iowa 423, 16 NW 353, 47 AmR 816, it was held that the language in the body of an instrument controls its legal effect, and that if that imports a personal obligation it will be held to be such, notwithstanding the signers may have appended to their names some official designation.

47. Southern Pac. Co. v. Von Schmidt Dredge Co., 118 Cal. 368, 50 P 650. See also Avery v. Dougherty, 102 Ind. 443, 2 NE 123, 52 AmR 680. And see infra § 707.

48. Bulkley v. Derby Fishing Co., 2 Conn. 252, 7 AmD 271.

[a] **Where an agent has been conducting business for his principal in his own name,** and the facts are known to those who deal with him, a contract made by him on his own account, after the revocation of his authority, but before notice to the other party, binds the principal. Trueman v. Loder, 11 A. & E. 589, 39 ECL 319, 113 Reprint 539.

49. Bulkley v. Derby Fishing Co., 2 Conn. 252, 7 AmD 271.

50. U. S.—Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank, 97 Fed. 181, 38 CCA 108; Lockwood v. Coley, 22 Fed. 192.

Kan.—Lovejoy v. Citizens' Bank, 23 Kan. 331.

Me.—Forsyth v. Day, 46 Me. 176.

Mass.—Brown v. Parker, 7 Allen 337; Brigham v. Peters, 1 Gray 139; Melledge v. Boston Iron Co., 5 Cush. 158, 51 AmD 59.

N. H.—Chandler v. Coe, 54 N. H. 561 (holding that, where a principal carries on business in the name of his agent as a business name, such principal is liable upon a contract made by his agent for him in the agent's name, whether it is verbal or written, and if written, whether it is negotiable or not, and whether the agent disclosed his agency or not).

N. Y.—Lake Shore Nat. Bank v. Butler Colliery Co., 51 Hun 63, 3 NYS 771; Elwell v. Dodge, 33 Barb. 336; Buffalo Mar. Bank v. Butler Colliery Co., 1 Silv. Sup. 155, 5 NYS 291 [aff 125 N. Y. 695 mem, 26 NE 751 mem] (holding that indorsements by an agent in his name, followed by the word "agent" and the name of his principal, are within the intent of an authority to indorse notes and are good, especially when that has been the course of dealing to the principal's knowledge); Brown v. Butchers, etc., Bank, 6 Hill 443, 41 AmD 755 [aff 1 NYLegObs 149]. See also De Witt v. Walton, 9 N. Y. 571.

Tex.—Heffron v. Pollard, 73 Tex. 96, 11 SW 165, 15 AmSR 764.

Eng.—Trueman v. Loder, 11 A. & E. 589, 39 ECL 319, 113 Reprint 539.

Ont.—Taillifer v. Taillifer, 21 Ont. 337.

[a] **A bank cashier who signs commercial paper "A, Cashier,"** binds the bank as much as though he had written the name of the bank by himself as agent. Commercial usage makes such a signature, made in the business of the bank and in the usual course of such business, the signature of the principal, the bank, and not that of the agent. Baldwin v. Newbury Bank, 1 Wall. (U. S.) 234, 17 L. ed. 534; Chillicothe Branch Ohio State Bank v. Fox, 5 F. Cas. No. 2,683, 3 Blatchf. 431; Lafayette Bank v. Illinois Bank, 14 F. Cas. No. 7,987, 4 McLean 208; Erwin Lane Paper Co. v. Farmers' Nat. Bank, 130 Ind. 367, 30 NE 411, 30 AmSR 246; Nave v. Lebanon First Nat. Bank, 87 Ind. 204; Dutch v. Boyd, 81 Ind. 146; State Bank v. Wheeler, 21 Ind. 90; Pratt v. Topeka Bank, 12 Kan. 570; Farrar v. Gilman, 19 Me. 440, 36 AmD 766; Burnham v. Webster, 19 Me. 232; Barlow v. Lee Cong. Soc., 8 Allen (Mass.) 460; Barney v. Newcomb, 9 Cush. (Mass.) 46; Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 AmD 280; Garton v. Union City Nat. Bank, 84 Mich. 279; Angelica First Nat. Bank v. Hall, 44 N. Y. 395, 4 AmR 698; Mechanics' Banking Assoc. v. New York, etc., White Lead Co., 35 N. Y. 505; New York Bank v. Ohio State Bank, 29 N. Y. 619; Genesee Bank v. Patchin Bank, 19 N. Y. 312; Barbour v. Litchfield, 4 Abb. Dec. (N. Y.) 665; Robb v. Ross County Bank, 41 Barb. (N. Y.) 586; Brenner v. Lawrence, 27 Misc. 755, 58 NYS 769; Watervliet Bank v. White, 1 Den. (N. Y.) 608; Manchester Bank v. Slason,

[§ 329] **2. Execution of Bills and Notes.**[51] A less strict application of the general rule governing the execution of authority by agents is required in regard to bills and notes than in regard to sealed instruments. While a person may obligate himself for a bill or note as effectually by the hand of an agent as by his own, yet it must appear on the face of the instrument itself in some way or other that it was in fact drawn for him or else he is not bound; the particular form of the execution is not material, but in order to exempt the agent from liability and bind the principal the instrument must be substantially executed in the name of the principal.[52]

[§ 330] **3. Execution of Sealed Instruments.—a. In General.**[53] When the authority is under seal, it authorizes the agent to attach a seal to his principal's signature to contracts he is empowered to make with a third person.[54] According to the strict common-law rule, in order to bind a principal by a deed or contract under seal, it is not enough for the agent to declare in the instrument that he makes it as the agent of his principal, and to add to his signature words expressive of the same thing, but the instrument must profess to bind the principal and must be executed in his name and under his seal as his deed or contract,[55] and if it purports to be executed as the instrument of the agent or under his individual seal, it is not binding on the principal,[56] even though the other party to the instrument knows the principal and that the agent is contracting for him.[57] The most approved form for the execution of sealed instruments, as all others, is to put in the body of the instrument the principal's name, and to sign the name of the principal at the end, with the agent's name below, preceded by the preposition "by" and followed by the word "agent," or "by his agent," followed by the agent's name.[58] But as a general rule no particular form of words is necessary, provided the instrument is signed and sealed as the instrument of the principal, and it is sufficient if the words used clearly show that the agent in executing the instrument is acting solely for and in the name of

13 Vt. 334; Houghton v. Elkhorn First Nat. Bank, 26 Wis. 663, 7 AmR 10.

51. Authority to execute bills and notes see generally supra §§ 280-286.

52. See Bills and Notes [7 Cyc 549 et seq].

53. Bond signed by agent see Bonds [5 Cyc 735].

Form of acknowledgment by agent see Acknowledgments § 191.

54. Wickham v. Knox, 33 Pa. 71. See also supra §§ 61-66.

55. U. S.—Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Machesney v. Brown, 29 Fed. 145; Barger v. Miller, 2 F. Cas. No. 979, 4 Wash. C. C. 280.

Ala.—Taylor v. West Alabama Agricultural, etc., Assoc., 68 Ala. 229; Hall v. Cockrell, 28 Ala. 507; Dawson v. Cotton, 26 Ala. 591; Carter v. Doe, 21 Ala. 72; Skinner v. Gunn, 9 Port. 305 [overr Martin v. Dortch, 1 Stew. 479].

Ark.—Hackney v. Butts, 41 Ark. 393; Henderson v. Martin, 19 Ark. 477, 70 AmD 606.

Cal.—Gerdes v. Moody, 41 Cal. 335; Love v. Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 AmD 602; Morrison v. Bowman, 29 Cal. 337; McDonald v. Bear River, etc., Water, etc., Co., 13 Cal. 220.

Colo.—McIntosh-Huntington Co. v. Rice, 13 Colo. A. 393, 58 P 358.

Ga.—Lenney v. Finley, 118 Ga. 718, 45 SE 593. Compare Tenant v. Blacker, 27 Ga. 418.

Ill.—Walsh v. Murphy, 167 Ill. 228, 47 NE 354; Home Library Assoc. v. Witherow, 50 Ill. A. 117.

Iowa.—Arts v. Guthrie, 75 Iowa 674, 37 NW 395; Vance v. Anderson, 39 Iowa 426. Compare Harkins v. Edwards, 1 Iowa 426.

Ky.—Parmers v. Respass, 5 T. B. Mon. 562. But compare Hunter v. Miller, 6 B. Mon. 612.

La.—Daniels v. Burnham, 2 La. 243; Lynch v. Postlewaite, 7 Mart. 293.

Md.—Stewart v. Katz, 30 Md. 334; Harper v. Hampton, 1 Harr. & J. 622. But compare Herbert v. Reu, 72 Md. 307, 20 A 182; McDonough v. Templeman, 1 Harr. & J. 156, 2 AmD 510.

Mass.—Bartlett v. Tucker, 104 Mass. 336, 6 AmR 240; Ward v. Bartholomew, 6 Pick. 409; Copeland v. Mercantile Ins. Co., 6 Pick. 198; Couch v. Ingersoll, 2 Pick. 292; Tippets v. Walker, 4 Mass. 595.

Mich.—Farmers', etc., Bank v. Troy City Bank, 1 Dougl. 457; Detroit v. Jackson, 1 Dougl. 106.

Nebr.—Persons v. McDonald, 60 Nebr. 452, 83 NW 672; Morgan v. Bergen, 3 Nebr. 209.

N. J.—Sheldon v. Dunlap, 16 N. J. L. 245; Borcherling v. Katz, 37 N. J. Eq. 150.

N. Y.—Kiersted v. Orange, etc., R. Co., 69 N. Y. 343, 25 AmR 199 [aff 1 Hun 151]; Spencer v. Huntington, 100 App. Div. 463, 91 NYS 561 [aff 183 N. Y. 506 mem, 76 NE 1109 mem]; Whitehouse v. Drisler, 37 App. Div. 525, 56 NYS 95; Stanton v. Camp, 4 Barb. 274; Willis v. Bellamy, 52 N. Y. Super. 373; Pinckney v. Hagadorn, 1 Due 89 [aff July 1854 (see 14 N. Y. 590)]; Dean v. Roesler, 1 Hilt. 420; Townsend v. Hubbard, 4 Hill 351; Townsend v. Corning, 23 Wend. 435; Evans v. Wells, 22 Wend. 324; Minard v. Mead, 7 Wend. 68; Guyon v. Lewis, 7 Wend. 26; Stone v. Wood, 7 Cow. 453, 17 AmD 529. See also Briggs v. Partridge, 64 N. Y. 357, 21 AmR 617 [aff 39 N. Y. Super. 339]; Farrar v. Lee, 10 App. Div. 130, 41 NYS 672; Robbins v. Austin, 42 Hun 469; Sherman v. New York Cent. R. Co., 22 Barb. 239 (holding that a written contract purporting on its face to be made by one of the parties thereto "by their agent," signed and sealed by the agent in his own name merely, is void). Compare Rand v. Moulton, 72 App. Div. 236, 76 NYS 174 [dist Schaefer v. Henkel, 75 N. Y. 378].

N. C.—Woodbury v. King, 152 N. C. 676, 68 SE 221; Cadell v. Allen, 99 N. C. 542, 6 SE 399; Bryson v. Lucas, 84 N. C. 680, 37 AmR 634; Locke v. Alexander, 8 N. C. 412. Compare Redmond v. Coffin, 17 N. C. 437.

Or.—Eagle Woolen Mills Co. v. Monteith, 2 Or. 277.

Pa.—Heffernan v. Addams, 7 Watts 116; Hopkins v. Mehaffy, 11 Serg. & R. 126; Bellas v. Hays, 5 Serg. & R. 427, 9 AmD 385; Samuel v. Scott, 13 Phila. 64.

R. I.—Providence v. Miller, 11 R. I. 272, 23 AmR 453.

S. C.—Wallace v. Langston, 52 S. C. 133, 29 SE 552; Pryor v. Coulter, 17 S. C. L. 517. Compare State v. Spartanburg, etc., R. Co., 8 S. C. 129; Webster v. Brown, 2 S. C. 428; Varnum v. Evans, 27 S. C. L. 409.

Va.—Stinchcomb v. Marsh, 15 Gratt. (56 Va.) 202; Martin v. Flowers, 8 Leigh (35 Va.) 158.

Eng.—In re International Contract Co., L. R. 6 Ch. 525; Berkeley v. Hardy, 5 B. & C. 355, 11 ECL 495, 108 Reprint 132, 2 ERC 274; Combes' Case, 9 Coke 75a, 77 Reprint 843; Frontin v. Small, 2 Ld. Raym. 1418, 92 Reprint 423, Str. 705, 93 Reprint 797; Bacon v. Dubarry, 1 Ld. Raym. 246, 91 Reprint 1060; Hall v. Bainbridge, 1 M. & G. 42, 39 ECL 634, 133 Reprint 240; Schack v. Anthony, 1 M. & S. 573, 105 Reprint 214; Gardner v. Lachlan, 4 Myl. & C. 129, 18 EngCh 129, 41 Reprint 51 [dism app 8 Sim. 123, 8 EngCh 123, 59 Reprint 49]; Bowen v. Morris, 2 Taunt. 374, 127 Reprint 1122; White v. Cuyler, 6 T. R. 176, 101 Reprint 497; Cayhill v. Fitzgerald, 1 Wils. C. P. 28, 95 Reprint 473.

Man.—Ashdown v. Manitoba Land Co., 3 Man. 444.

Ont.—Dacksteder v. Baird, 5 U. C. Q. B. 591.

[a] **Whether the principal is a corporation or a natural person,** a deed must be executed in the principal's name. Taylor v. West Alabama Agricultural, etc., Assoc., 68 Ala. 229.

56. Williams v. Paine, 7 App. (D. C.) 116; Stanton v. Granger, 125 App. Div. 174, 109 NYS 134 [aff 193 N. Y. 656 mem, 87 NE 1127 mem] (holding that an action does not lie against an alleged undisclosed principal to compel the specific performance of a contract for the purchase of land executed by an alleged agent in his own name under seal, where the contract contains no intimation that the person who signed and sealed the same was acting for anyone other than himself); Blanchard v. Archer, 93 App. Div. 459, 87 NYS 665 (holding that an owner of real estate is not bound by a contract for its sale made by an agent individually and under his own seal); Furculi v. Bittner, 69 Misc. 112, 125 NYS 36.

[a] **Illustration.**—A power of attorney from J to C for the sale of lands is not properly executed in the following form: "'I, the said Carey L. Clarke, attorney as aforesaid,' &c., 'do hereby relinquish,' &c." concluding, "in witness whereof, the said Carey L. Clarke, attorney as aforesaid, has hereunto subscribed his hand and seal," and signed "Carey L. Clarke [L. S.]." Clarke v. Courtney, 5 Pet. (U. S.) 319, 349, 8 L. ed. 140.

57. Rice v. Bush, 16 Colo. 484, 27 P 720; McIntosh-Huntington Co. v. Rice, 13 Colo. A. 393, 58 P 358.

58. State v. Jennings, 10 Ark. 428; Northwestern Distilling Co. v. Brant, 69 Ill. 658, 18 AmR 631 (holding that where a lease in which "Edward F. Lawrence, president of the Northwestern Distilling Company," appeared as party of the second part, and throughout which the parties were mentioned as of the first or second part, and the pronoun "he" was everywhere used in referring to the party of the second part, and the instrument concluded: "In testimony whereof the said parties have hereunto set their hands and seals," and was signed "Northwestern Distilling Co. [seal.] By Edward Lawrence, President," it was well executed and binding on the company, and not on Lawrence personally); Tiger v. Button Land Co., 91 Nebr. 433, 136 NW 46, AnnCas1913D 97 and note; Bradstreet v. Baker, 14 R. I. 546.

the principal,[59] and it may be sufficient if the instrument is signed in the name of the agent for the principal naming him, with a seal annexed.[60]

Necessity for agent's signature. In the execution of such an instrument it is not necessary, although as a matter of evidence it is desirable, that the agent should sign his own name at all; the name of the principal is enough, where the instrument on its face purports to be the instrument of the principal.[61]

Sufficiency of single seal. Where the names of the agent and the principal, or principals, are signed to the instrument, a single seal placed thereon is sufficient for a valid execution as to the principal or principals,[62] although the contract is made in the body in the singular number.[63]

[§ 331] **b. Descriptio Personæ.** In accordance with the above rule, it is not sufficient, in order to bind the principal or relieve the agent from liability on his personal covenants,[64] that the agent merely affixes words to his name indicating that he acts in a representative capacity or as the representatives of a named principal, whether the description occurs in the body of the instrument,[65] in the signature,[66]

59. Redmond v. Coffin, 17 N. C. 437; Jones v. Carter, 4 Hen. & M. (14 Va.) 184 (holding that no particular form of words is necessary in the signature of a deed by an attorney in fact, provided the act is done in the name of his principal); Wilks v. Back, 2 East 142, 102 Reprint 323, 8 ERC 634; McArdle v. Irish Iodine Co., 15 Ir. C. L. 146 (holding that a deed executed by A on behalf of B must, in order to bind B, be executed by A in the name of B, or by A in his own name with such words as show that he is acting solely as the agent of B in such execution). See also infra § 332.

[a] **"No particular form of words is necessary** to render it valid and binding upon the principal, provided it appears upon the face of the instrument that it was intended to be executed as the deed of the principal, and that the seal affixed to the instrument is his seal and not the seal of the attorney or agent merely." Townsend v. Hubbard, 4 Hill (N. Y.) 351, 357.

[b] **"There is no inflexible rule** as to the mode in which this is to be done; and when both names are used, both in the caption or body and signature of the instrument, it is a question of intention and construction, whether the act is done, or the engagement made, in the name of the principal or of the agent. The terms of the covenant itself are commonly decisive as to intention. The description in the caption and the mode of signature, are referred to, either as aids in discovering the intention, or as determining whether the form of the instrument corresponds with this intention, so as that it may be carried out. If in view of all its parts, the instrument can be regarded as the deed or covenant of the party intended to be bound, it must, on principle, be so regarded. There is, as we believe, no difference of opinion with regard to the propriety of these positions, though there doubtless may be in their application." Hunter v. Miller, 6 B. Mon. (Ky.) 612, 621.

60. Mussey v. Scott, 7 Cush. (Mass.) 215, 54 AmD 719; Grubbs v. Wiley, 17 Miss. 29; Shanks v. Lancaster, 5 Gratt. (46 Va.) 110, 50 AmD 108; Wilks v. Back, 2 East 142, 144, 102 Reprint 323, 8 ERC 634 (where Grose, J., said: "Where is the difference between signing J. B. by M. W. his attorney (which must be admitted to be good) and M. W. for J. B.; in either case the act of sealing and delivering is done in the name of the principal and by his authority. Whether the attorney put his name first or last cannot affect the validity of the act done").

[a] **Illustrations.**—(1) An agreement under seal purporting to be between "William B. Whitehead, for and on behalf of the Albemarle Swamp Land Company of the one part, and Burwell Reddick and Willis S. Reddick on the other part," in which "the party of the first part" and "the party of the second part" respectively agreed to perform certain acts, and concluding, "In witness whereof, William B. Whitehead for and on behalf of the party of the first part, being the Albemarle Swamp Land Company," etc., "set their hands and affixed their seals; . . . W. B. Whitehead, for and on behalf of the Albemarle Swamp Land Comp'y, (Seal.)," —is the deed of the A. S. L. Co. and not of W. B. W. personally. Whitehead v. Reddick, 34 N. C. 95. (2) In Varnum v. Evans, 27 S. C. L. 409, 410, a deed in the form following was held well executed as the deed of the principal: "By virtue of the authority vested in me, as aforesaid, in the name and in behalf of the said Varnum, Fuller & Co. [I] accept the provisions in the said assignment, made in this behalf, and do further release," etc. The release was signed "John Winslow, [Seal.] Agent for Varnum, Fuller & Co."

61. Berkey v. Judd, 22 Minn. 287; Tiger v. Button Land Co., 91 Nebr. 433, 136 NW 46, AnnCas 1913D 97 and note [mod reh 91 Nebr. 63, 135 NW 368, 41 LRANS 805 and note]; Devinney v. Reynolds, 1 Watts & S. (Pa.) 328; In re Whitley, 32 Ch. D. 337, 2 ERC 276. Contra Wood v. Goodridge, 6 Cush. (Mass.) 117, 52 AmD 771.

[a] **"Although it is usual** and better for him to sign the name of his principal, and to add thereto his own signature, with proper words indicating that the act is done by him as such attorney, yet it is not in all cases necessary that he should so append his own name. When the deed on its face purports to be the indenture of the principal, made by his attorney in fact therein designated by name, it may be properly executed by such attorney by his subscribing and affixing thereto the name and seal of his principal alone." Berkey v. Judd, 22 Minn. 287, 302.

62. U. S.—McDill v. McDill, 1 Dall. 63, 1 L. ed. 38.

Ala.—Martin v. Dortch, 1 Stew. 479.

Ky.—Bohannons v. Lewis, 3 T. B. Mon. 376.

Md.—Stabler v. Cowman, 7 Gill & J. 284.

Miss.—Grubbs v. Wiley, 17 Miss. 29.

N. Y.—Townsend v. Hubbard, 4 Hill 351.

Or.—Eagle Woolen Mills Co. v. Monteith, 2 Or. 277.

Eng.—Ball v. Dunsterville, 4 T. R. 313, 100 Reprint 1038; Lovelace's Case, W. Jones 268, 82 Reprint 140.

[a] **Where it is uncertain whether the seal is that of the agent or the principal,** the body of the instrument will be looked to in determining who is bound by it. Carter v. Doe, 21 Ala. 72.

[b] **Where there is but one seal, and this purports to be that of the principal,** the agent is not bound by the contract, although in affixing the seal he exceeded his authority and failed to bind his principal. Delius v. Cawthorn, 13 N. C. 90.

63. Martin v. Dortch, 1 Stew. (Ala.) 479.

64. See infra § 340.

65. Ala.—Jones v. Morris, 61 Ala. 518; Crutcher v. Memphis, etc., R. Co., 38 Ala. 579; Hall v. Cockrell, 28 Ala. 507.

Ill.—Stobie v. Dills, 62 Ill. 432.

Ind.—Potts v. Henderson, 2 Ind. 327; Deming v. Bullitt, 1 Blackf. 241.

Me.—Stinchfield v. Little, 1 Me. 231, 237, 10 AmD 65 (where the court said: "Nor is it sufficient that the agent describe himself in the deed or contract, as acting for, and in behalf, or as attorney of the principal . . . for if he do not bind his principal, but set his own name and seal, such expressions are but designatio personæ—it is his own act and deed, and he is bound personally").

Mass.—Elwell v. Shaw, 16 Mass. 42, 8 AmD 126; Kimball v. Tucker, 10 Mass. 192; Tucker v. Bass, 5 Mass. 164.

Mo.—Einstein v. Holt, 52 Mo. 340.

Nebr.—Morgan v. Bergen, 3 Nebr. 209.

N. J.—Dayton v. Warne, 43 N. J. L. 659.

N. Y.—Kiersted v. Orange, etc., R. Co., 69 N. Y. 343, 25 AmR 199; Whitford v. Laidler, 25 Hun 136 [rev on other grounds 94 N. Y. 145, 46 AmR 131]; Stone v. Wood, 7 Cow. 453, 17 AmD 529; White v. Skinner, 13 Johns. 307, 7 AmD 381.

N. C.—Locke v. Alexander, 9 N. C. 155, 11 AmD 750.

Oh.—Potts v. Rider, 3 Oh. 70, 17 AmD 581.

Pa.—Quigley v. De Haas, 82 Pa. 267; Meyer v. Barker, 6 Binn. 228; Frazer v. Shelley, 6 Phila. 429.

R. I.—Providence v. Miller, 11 R. I. 272, 23 AmR 453.

S. C.—Pryor v. Coulter, 17 S. C. L. 517.

Eng.—Hancock v. Hodgson, 4 Bing. 269, 13 ECL 499, 130 Reprint 770; Appleton v. Binks, 5 East 148, 102 Reprint 1025; Frontin v. Small, 2 Ld. Raym. 1418, 92 Reprint 423, Str. 705, 93 Reprint 797.

66. Ala.—Dawson v. Cotton, 26 Ala. 591; Carter v. Doe, 21 Ala. 72; Skinner v. Gunn, 9 Port. 305.

D. C.—Magruder v. Belt, 12 App. 151.

Ill.—Braun v. Hess, 187 Ill. 283, 58 NE 371, 79 AmSR 221 [aff 86 Ill. A. 544].

Ky.—Parks v. S. & L. Turnpike Road Co., 4 J. J. Marsh. 456; Daviess v. Mead, 2 Bibb 397.

Mass.—Copeland v. Mercantile Ins. Co., 6 Pick. 198; Tileston v. Newell, 13 Mass. 406.

N. Y.—Henricus v. Englert, 137 N. Y. 488, 33 NE 550; McColgan v. Katz, 29 Misc. 136, 60 NYS 291 (holding that, where an agent executed a sealed lease of premises belonging to an estate in his own name as lessor, and it did not appear from the lease who was the principal, the executrix of the estate cannot sue thereon, although the agent appended the word "Agent" to his signature, since such words are descriptio personæ).

N. C.—Bryson v. Lucas, 84 N. C. 680, 37 AmR 634.

Oh.—Potts v. Rider, 3 Oh. 71, 17 AmD 581.

Pa.—Seyfert v. Bean, 83 Pa. 450; Holt v. Martin, 51 Pa. 499.

S. C.—Wallace v. Langston, 52 S. C. 133, 29 SE 552; Moos v. Johnson, 36 S. C. 551, 15 SE 709; McDowall v. Reed, 28 S. C. 466, 6 SE 300; Edings v. Brown, 30 S. C. L. 255.

[a] **Descriptive words following the seal** are still less effective to show that the agent acts in a representative capacity than such words immediately following the name. Thus where a bond phrased, "I promise to pay," etc., and not mentioning the obligor's name in the body, is exe-

or in both.[67]

[§ 332] **c. Conveyance of Land.**[68] In accordance with the strict common-law rule, and as a mere authority to convey real estate confers no title on the agent, a conveyance by him does not operate to divest the title of the principal, unless made in the name and under the seal of the principal,[69] or unless authority is expressly given to

cuted by an agent as follows: "Witness my hand and seal. . . . (Signed by H. S. Lucas. [seal] For Charles Callender, President of the Chester Mica and Porcelain Co.)," the agent is individually liable thereon. Bryson v. Lucas, 84 N. C. 680, 37 AmR 634. See also Avery v. Dougherty, 102 Ind. 443, 2 NE 123, 52 AmR 680; Kennerly v. Weed, 1 Mo. 672.

[b] **Principal and agent coöwners.**—Where the principal and agent are coöwners of the land conveyed, and a part of the deed is made on behalf of both, and another part on behalf of the principal only, and the agent alone signs and seals it, the title of neither is divested by it. Locke v. Alexander, 9 N. C. 155, 11 AmD 750; Locke v. Alexander, 8 N. C. 412.

67. U. S.—Lutz v. Linthicum, 8 Pet. 165, 8 L. ed. 904; Duvall v. Craig, 2 Wheat. 45, 4 L. ed. 180; Calvary Cathedral Chapter v. U. S., 29 Ct. Cl. 269.

Ark.—Henderson v. Martin, 19 Ark. 477, 70 AmD 606.

Conn.—Mitchell v. Hazen, 4 Conn. 495, 10 AmD 169.

Ill.—Sperry v. Fanning, 80 Ill. 371.

Ind.—Prather v. Ross, 17 Ind. 495; McClure v. Bennett, 1 Blackf. 189, 12 AmD 223.

Ky.—Banks v. Sharp, 6 J. J. Marsh. 180; Taul v. Winn, 5 J. J. Marsh. 437.

Mass.—Fullam v. West Brookfield, 9 Allen 1; Seaver v. Coburn, 10 Cush. 324.

Minn.—Rollins v. Phelps, 5 Minn. 463.

N. Y.—Buffalo Catholic Inst. v. Bitter, 87 N. Y. 250; Schaefer v. Henkel, 75 N. Y. 378, 7 AbbNCas 1, 57 HowPr 97; Peck v. Gardner, 9 Hun 704; McColgan v. Katz, 29 Misc. 136, 60 NYS 291; Platt v. Cathell, 3 Den. 604 [aff How. A. Cas. 230]; Spencer v. Field, 10 Wend. 87; Tart v. Brewster, 9 Johns. 334, 6 AmD 280.

N. C.—Godley v. Taylor, 14 N. C. 178. In Potts v. Lazarus, 4 N. C. 180, a charter party entered into by defendant, describing himself in every part of the instrument, and signing and sealing, as agent of another, was held to be the contract of his principal. The court cited two decisions as establishing the rule governing the case—Unwin v. Wolseley, 1 T. R. 674, 99 Reprint 1314, and Hodgson v. Dexter, 1 Cranch (U. S.) 345, 2 L. ed. 130. But it is to be noted that in both of these cases the instruments were executed by public agents, and a different rule was recognized as applying to agents of individuals; and this fact is commented upon and the authority of this case questioned in Godley v. Taylor, supra.

Pa.—Ulam v. Boyd, 87 Pa. 477.

S. C.—Wallace v. Langston, 52 S. C. 133, 29 SE 552.

Tenn.—Steele v. McElroy, 1 Sneed 341.

68. **Reference to power in conveyance** see infra § 336.

69. U. S.—Lutz v. Linthicum, 8 Pet. 165, 8 L. ed. 904; Clarke v. Courtney, 5 Pet. 319, 350, 8 L. ed. 140 (where Story, J., said: "The act does not, therefore, purport to be the act of the principals, but of the attorney. It is his deed, and his seal, and not theirs. This may savor of refinement, since it is apparent, that the party intended to pass the interest and title of his principals. But the law looks not to the intent alone, but to the fact, whether that intent has been executed in such a manner as to possess a legal validity"); Randall v. Jaques, 20 F. Cas. No. 11,553 (holding that a deed executed by an attorney in fact, although he is duly authorized, and although it is manifest on the face of the deed that it was the intention of the grantor to execute the power by conveying the title of the principal, yet it will not be the deed of the principal, unless the attorney shall either sign the name of the principal, with a seal annexed, stating it to be done as attorney for the principal, or sign his own name, with a seal annexed, stating it to be for the principal).

Ala.—Gillespy v. Hollingsworth, 169 Ala. 602, 604, 53 S 987 [cit Cyc] (holding that a deed executed by an attorney in fact of the grantor and signed by the attorney in his own name, followed by the words "attorney in fact for," followed by the grantor's name, does not convey the legal title, but to do so the deed must be signed in the name of the grantor); Jones v. Morris, 61 Ala. 518.

Cal.—Morrison v. Bowman, 29 Cal. 337; Echols v. Cheney, 28 Cal. 157; Salmon v. Hoffman, 2 Cal. 138, 56 AmD 322; Fisher v. Salmon, 1 Cal. 413, 54 AmD 297.

D. C.—Williams v. Paine, 7 App. 116 [aff 169 U. S. 55, 18 SCt 279, 42 L. ed. 658] (holding that a deed of land executed under a power of attorney is not valid where it recites that the attorney, and not his principals, thereby bargains and sells, and it is signed, sealed, and acknowledged as the deed of the attorney, and not of the principals).

Ill.—Harms v. McCormick, 132 Ill. 104, 22 NE 511.

Ky.—Casey v. Lucas, 2 Bush 55; Banks v. Sharp, 6 J. J. Marsh. 180.

La.—Fetter v. Field, 1 La. Ann. 80.

Me.—Elwell v. Shaw, 1 Me. 339 [foll decision in Elwell v. Shaw, 16 Mass. 42, 8 AmD 126, and decided there before the division of the two states]; Stinchfield v. Little, 1 Me. 231, 10 AmD 65.

Md.—Herbert v. Pue, 72 Md. 307, 310, 20 A 182 (holding that a deed reciting that it was made "by Dr. Arthur Pue, for himself and under and by virtue of a power of attorney duly executed and acknowledged by Thomas B. D. Pue," the granting clause of which "witnesseth, that in consideration of . . . the said Arthur Pue, as attorney aforesaid of the said Thomas B. D. Pue, doth grant" the property described, is not a grant by A in his own right but only as attorney for T); Smith v. Perry, 1 Harr. & J. 706 note; Harper v. Hampton, 1 Harr. & J. 622.

Mass.—Sharon First Baptist Church v. Harper, 191 Mass. 196, 77 NE 778 (holding that, where the trustees of a religious society were authorized to transfer only the title of their principal, a deed to land purporting in its recitals, covenants, execution, and acknowledgment to be the individual act of such trustees did not pass the fee); Abbey v. Chase, 6 Cush. 54; Brinley v. Mann, 2 Cush. 337, 48 AmD 669; Copeland v. Mercantile Ins. Co., 6 Pick. 198; Elwell v. Shaw, 16 Mass. 42, 8 AmD 126; Fowler v. Shearer, 7 Mass. 14.

Miss.—Holmes v. Carman, Freem. 408.

Nebr.—Persons v. McDonald, 60 Nebr. 452, 83 NW 672; Morgan v. Bergen, 3 Nebr. 209.

N. Y.—Townsend v. Hubbard, 4 Hill 351; Spencer v. Field, 10 Wend. 87; Stone v. Wood, 7 Cow. 453, 17 AmD 529; Bogart v. De Bussy, 6 Johns. 94.

N. C.—Woodbury v. King, 152 N. C. 676, 68 SE 221 (holding that a paper writing purporting to be a deed to land by an attorney in fact does not bind the principal, if not signed and sealed by the attorney in fact eo nomine); Oliver v. Dix, 21 N. C. 158; Locke v. Alexander, 9 N. C. 155, 11 AmD 750; Locke v. Alexander, 8 N. C. 412; Scott v. McAlpin, 4 N. C. 587, 7 AmD 703.

Oh.—Hatch v. Barr, 1 Oh. 390.

Or.—Eagle Woolen Mills Co. v. Monteith, 2 Or. 277.

S. C.—Webster v. Brown, 2 S. C. 428.

Vt.—Isham v. Bennington Iron Co., 19 Vt. 230.

Va.—Martin v. Flowers, 8 Leigh (35 Va.) 158.

Wis.—North v. Henneberry, 44 Wis. 306.

Eng.—Reynolds v. Kingman, Cro. Eliz. 115, 78 Reprint 373; Appleton v. Binks, 5 East 148, 102 Reprint 1025; Wilks v. Back, 2 East 142, 102 Reprint 323, 8 ERC 634; Frontin v. Small, 2 Ld. Raym. 1418, 92 Reprint 423, Str. 705, 93 Reprint 797; White v. Cuyler, 6 T. R. 176, 101 Reprint 497.

[a] **Illustrations.**—(1) In Carter v. Doe, 21 Ala. 72, 81, a deed began: "This indenture, made and entered into between Joshua Kennedy and S. H. Garrow, both of Mobile city," etc., " of the first (part,) and Daniel Duval, of the county and Territory aforesaid, of the other part, witnesseth:" Following this was the recital of a power of attorney. The granting clause purported to be by Joshua Kennedy, by his attorney, S. H. Garrow. The deed proceeded in the name of Joshua Kennedy alone, and concluded: "In witness whereof the parties have hereunto set their hands and seals. . . . S. H. Garrow, [Seal] Attorney in fact for J. Kennedy." The court construed the deed to be sufficiently executed to bind the principal. (2) In Werner v. Wheeler, 142 App. Div. 358, 127 NYS 158, 163, it was contended that the words in a deed, "as attorney in fact for William Mackenzie," following the name of the attorney in fact were mere descriptio personæ and that therefore the conveyance was to Matthews, the attorney in fact, individually. The court said: "If the word 'as' had not been used, and it did not appear by the recorded power of attorney that Matthews was the attorney in fact for Mackenzie for certain purposes, then doubtless the words, 'attorney in fact for William Mackenzie' following Matthew's name, would be regarded as mere descriptio personæ, and the title would be deemed vested in Matthews in his individual capacity. . . . The use of the word 'as' and the nature of the capacity in which it is recited in the conveyance that the grantee took title, in view of the fact that there was a power of attorney from Mackenzie to him on record, to which he referred in conveying as attorney in fact, thus showing that he was assuming to act under it, preclude any inference that the title was intended to be taken either in Matthew's name or in his right, individually, and clearly show that it was intended to vest title in him in a representative capacity, and that he took nothing for himself." (3) In Woodbury v. King, 152 N. C. 676, 68 SE 221, it was held that an instrument signed by the attorney individually and not by him as attorney in fact, reciting that the grantor as attorney in fact of the owner grants and conveys a sawmill plant and its fixtures, and which provides for the execution of a bill of sale thereof, to be deposited in escrow as security for the performance of a contract by the grantee, and that possession shall be given to the grantee, as was in fact done, passed title to the sawmill plant and its fixtures.

[b] **Deed in agent's name signed with principal's name.**—A deed made in the body thereof in the name of the agent, but signed in name of the principal with a seal opposite his name, with the affix "by" the agent, conveys the title of the principal.

execute the conveyance in the name of the agent;[70] for the law looks not to the intent alone, but to the fact whether the intent has been executed in such a manner as to possess a legal validity.[71] It has been held that the necessity for conveying in the name of the principal is uninfluenced by a statute dispensing with seals on conveyances of land.[72]

Agent's authority must be shown. Furthermore the agent's authority to convey must be clearly shown and appear to have been conferred in a due and lawful manner.[73]

Conveying public land. An exception to the general rule is made in the case of an agent conveying public land, it being held that a conveyance in his own name and under his individual seal conveys the title;[74] but if the mode of conveyance is otherwise prescribed he must follow it, or the deed is invalid.[75]

[§ 333] **d. Relaxation of Common-Law Rule—(1) In General.** There is a manifest disposition on the part of the courts in some jurisdictions to relax the strict common-law rule and to have due regard for the doctrine that the intention of the parties must control in the construction of contracts, even in the case of contracts under seal; and it may be stated as a general rule, in these jurisdictions, that an instrument under seal executed by an agent in a manner evidencing a clear intention to contract for the principal, as inferred from the body or signature of the instrument, is generally valid and binds the principal, and does not bind the agent, whether it is signed with the name and sealed with the seal of the principal or the agent,[76] and in some jurisdictions this rule is, in effect, prescribed by statute.[77] Thus it has been held that a contract purporting throughout the body thereof to be made by and in behalf of the agent becomes the contract of and binding on the principal when signed with his name and sealed with his seal.[78] So also a deed made in the name of the principal "by" the agent,

Shanks v. Lancaster, 5 Gratt. (46 Va.) 110, 50 AmD 108.

[c] **In Connecticut** it was held that in order to bind a principal by the act of an authorized agent in the execution of a deed no particular form of words is necessary; but the capacity in which the agent acts must appear from the face of the instrument, and where this is the case it is sufficient. Magill v. Hinsdale, 6 Conn. 464a, 16 AmD 70. However, this case was practically overruled in New Haven Sav. Bank v. Davis, 8 Conn. 191.

70. Cranston v. Crane, 97 Mass. 459, 93 AmD 106 (holding that, where authority is given by one person to another to execute a conveyance of the former's land in the name of the latter, a deed so executed conveys the title of the landowner).

71. Clarke v. Courtney, 5 Pet. (U. S.) 319, 8 L. ed. 140; Stinchcomb v. Marsh, 15 Gratt. (56 Va.) 202.

72. Jones v. Morris, 61 Ala. 518. But see infra § 334.

73. Citizens' F. Ins., etc., Co. v. Doll, 35 Md. 89, 6 AmR 360; Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 AmD 66; Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 AmD 121; Skinner v. Dayton, 19 Johns. (N. Y.) 513, 10 AmD 286; White v. Skinner, 13 Johns. (N. Y.) 307, 7 AmD 381.

Reference to power see infra § 336.

74. Ward v. Bartholomew, 6 Pick. (Mass.) 409. See also Freeman v. Otis, 9 Mass. 272, 6 AmD 66.

[a] **In New Hampshire** a deed purporting to convey property of a town, executed in the individual names of a duly authorized committee, was held to be well executed and to pass the title to the land. The decision was based on the mischief which would ensue from holding otherwise, it having been the custom in New Hampshire for thirty years to convey in this manner property belonging to towns. Cofran v. Cockran, 5 N. H. 458.

75. Coburn v. Ellenwood, 4 N. H. 99.

76. Colo.—Mulford v. Rowland, 45 Colo. 172, 100 P 603 (holding that, although, perhaps, a deed by an attorney in fact, describing him, instead of the principal, as party of the first part, and signed by him as attorney in fact for the principal, instead of the principal by him as attorney in fact, was irregular, the title of the principal passed, where it was apparent that the intention was to pass such title).

Ga.—Georgia-Alabama Business College v. Constitution Pub. Co., 8 Ga. A. 348, 69 SE 34.

Ind.—Avery v. Dougherty, 102 Ind. 443, 2 NE 123, 52 AmR 680; Deming v. Bullitt, 1 Blackf. 241.

Me.—Copeland v. Hewett, 96 Me. 525, 52 A 36; Purinton v. Security L. Ins., etc., Co., 72 Me. 22; Nobleboro v. Clark, 68 Me. 87, 28 AmR 22; Decker v. Freeman, 8 Me. 338. But see Stinchfield v. Little, 1 Me. 231, 10 AmD 65.

Mo.—McClure v. Herring, 70 Mo. 18, 35 AmR 404; Martin v. Almond, 25 Mo. 313; Ziegler v. Fallon, 28 Mo. A. 295. And see Moore v. Granby Min., etc., Co., 80 Mo. 86.

N. H.—Hale v. Woods, 10 N. H. 470, 34 AmD 176; Montgomery v. Dorion, 7 N. H. 475.

N. Y.—Dubois v. Delaware, etc., Canal Co., 4 Wend. 285 (holding that, where the contract was made in the name of the principal, but was signed and sealed by the agent with an affix describing him as agent of the principal, the principal was bound).

N. D.—Donovan v. Welch, 11 N. D. 113, 90 NW 262 (holding that, where the owner of certain real estate gave a power of attorney to sell and convey the same, under which a warranty deed was executed which described the grantor as A, attorney in fact for B, which words were repeated in describing the grantor in the covenants, and were used in signing the instrument and in the acknowledgment, the deed which appeared on its face to have been executed in the name of the owner of the land, and for her by her attorney in fact, although not in approved form, was her deed, and operated to transfer the title, and was not an independent deed of the attorney in fact).

Tenn.—McCreary v. McCorkle, (Ch. A.) 54 SW 53.

Tex.—Eckhart v. Reidel, 16 Tex. 62. See also Rogers v. Bracken, 15 Tex. 564; Gidden v. Byers, 12 Tex. 75; Elwell v. Tatum, 6 Tex. Civ. A. 397, 24 SW 71, 25 SW 434.

Va.—Shanks v. Lancaster, 5 Gratt. (46 Va.) 110, 50 AmD 108 (holding that it is a sufficient execution of a deed by an attorney in fact for his principal, if he signs the name of the principal, with a seal annexed, stating it to be done by him as attorney for the principal, or if he signs his own name, with a seal annexed, stating it to be for his principal).

W. Va.—Winding Gulf Colliery Co. v. Campbell, 78 SE 384.

See Bradstreet v. Baker, 14 R. I. 546; Providence v. Miller, 11 R. I. 272, 23 AmR 453.

[a] **That agent and not principal is bound mere presumption.**—In Abrams v. Musgrove, 12 Fa. 292, 295, a judgment bond in form, "I, Jacob Johnson, guardian of Gabriel Abrams, . . . am held and firmly bound," etc., and signed "Jacob Johnson, Guardian" [seal], was held not to render Johnson personally liable, it appearing in the evidence that the instrument was signed in the presence and by the direction of Abrams who was himself stricken with palsy and unable to rise from his bed. The court said: "Every presumption of law must give way to facts. The general rule, to be sure, is that a deed signed by an agent and sealed with his own seal, is his deed, but there are exceptions. . . . The law raises a presumption that he intended to bind himself. For if it is not his deed, it is the deed of nobody. But if from the nature and terms of the instrument it appears that the party is an agent, and that he means to bind his principal, and to act for him, and not on his own account, the law will give the paper that intendment to carry out the actual meaning of the parties, however inartificial the language may be. . . . And there is no difference on this point whether the instrument be a deed or an unsealed contract."

[b] **The instrument must at least identify the principal.**—(1) A deed executed by G as attorney for the "heirs of A" conveys no title, where the names of the heirs do not appear in the deed, unless the deed refers to the power of attorney and the names of the heirs appear therein. McMaster v. Childress, 10 Tex. Civ. A. 92, 30 SW 843; Baldwin v. Goldfrank, 9 Tex. Civ. A. 269, 26 SW 155 [aff 88 Tex. 249, 31 SW 1064]. (2) But where a power of attorney authorized the grantee to sell the lands belonging to the estate of W, of which the grantor was the lawful heir, and there were several heirs of W, and the attorney made a deed wherein he described himself "as attorney in fact for the heirs of W," and executed the deed in the same form, it was held that in equity the deed conveyed whatever interest the grantor in the power had in the land as heir of W. Wynee v. Parke, (Tex. Civ. A.) 30 SW 52.

77. See statutory provisions. And see Purinton v. Security L. Ins., etc., Co., 72 Me. 22; Nobleboro v. Clark, 68 Me. 87, 28 AmR 22 (holding that, under Rev. St. c 73 §§ 10, 15, where a deed is executed by an agent or attorney with authority therefor, and it appears from the deed that it was the intention of the parties to bind the principal, it must be regarded as the deed of the principal, although signed by the agent or attorney in his own name); Turner v. Kingston Lumber, etc., Co., (Tenn. Ch. A.) 59 SW 410; McCreary v. McCorkle, (Tenn. Ch. A.) 54 SW 53 (holding that a deed showing on its face that it is executed by the grantor as attorney in fact of the owners, but signed by the attorney's name only, conveys the title of his principals under Shannon Code § 3679, providing that a deed may be executed by the attorney simply signing his own name, if the instrument on its face shows the character in which the deed is intended to be executed).

78. Northwestern Distilling Co. v.

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and signed by the agent "for" the principal, is the principal's deed and passes his title, although the seal is set opposite the agent's name.[79] Likewise, a contract referring to the subject matter as the property of the principal, and which is signed and sealed only by the agent, is binding on the principal.[80]

[§ 334] **(2) Seal Not Required.** As to an instrument not required to be under seal but so executed by an agent, it has been held that it must be executed in the name of the principal and purport to be sealed with his seal.[81] But in a number of cases it has been decided that when a sealed contract has been executed in such form that it is in law the contract of the agent and not that of the principal, but the principal's interest in the contract appears upon its face, and he has received the benefit of the performance by the other party, and has ratified and confirmed it by acts in pais, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement.[82] Where a contract not required to be under seal is executed under seal by an agent having authority to execute simple contracts but not sealed contracts, and is otherwise executed in a manner sufficient to bind the principal under the rules relating to simple contracts, it is valid, against the principal, as a simple contract;[83] but it is necessary that the form of action should be in assumpsit, as covenant will not lie against the principal.[84] It has been held in some jurisdictions that a recovery cannot be had on the contract, but that an action of assumpsit based on the original consideration is the proper remedy.[85]

Under statutes dispensing with necessity of seal, etc. In those jurisdictions wherein the distinction between sealed and unsealed instruments, recognized at common law, has been abolished by statute, the general rule stated above is held inapplicable, and sealed contracts executed in conformity with the rules for the execution of simple contracts will bind the principal, the seal being disregarded.[86] On the other hand, particular statutes of this class have been held not to abrogate the common-law rule when a seal is in fact used, but merely to provide an additional method of execution.[87]

Brant, 69 Ill. 658, 18 AmR 631; Tidd v. Rines, 26 Minn. 201, 2 NW 497 (holding that a deed signed "A. B., (the name of the grantor,) by C. D., his attorney in fact," sufficiently indicates that it was executed on the part of the grantor by an attorney in fact, although there is no recital of the fact in the deed itself).

79. Bryan v. Stump, 8 Gratt. (49 Va.) 241, 56 AmD 139.

80. Ky.—Reynolds v. Glasgow Academy, 6 Dana 37.

Md.—McDonough v. Templeman, 1 Harr. & J. 156, 2 AmD 510.

Mo.—Martin v. Almond, 25 Mo. 313.

N. H.—Montgomery v. Dorion, 7 N. H. 475.

Pa.—Hopkins v. Mehaffy, 11 Serg. & R. 126.

Vt.—McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274.

Va.—Yerby v. Grigsby, 9 Leigh (36 Va.) 387.

W. Va.—Conaway v. Sweeney, 24 W. Va. 643.

[a] **Deed in principal's name signed by agent.**—Where a corporation, by proper resolution, authorizes its agent to make a mortgage of its property, a mortgage made throughout the body thereof in the name of the corporation binds it, although signed by the agent with descriptive affix and sealed with his seal. McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274.

81. Machesney v. Brown, 29 Fed. 145. But see Kirschbon v. Bonzel, 67 Wis. 178, 29 NW 907 [cit Stowell v. Eldred, 39 Wis. 614] (holding that, where a person makes a written contract, to the validity of which a seal is not essential, in his own name but in fact as the agent of another, the other contracting party may show the fact of agency, and may enforce the contract against the principal).

82. Damon v. Granby, 2 Pick. (Mass.) 345; Haight v. Sahler, 30 Barb. (N. Y.) 218; Cochran v. MacRae, 49 Misc. 529, 98 NYS 852; Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 10 AmD 193 (holding that, where the name of the owner of premises was affixed to a lease thereof by the owner's agent, the owner's name being followed by a seal and that by the signature of the agent, the owner might sue to recover the rents as though he had made the lease personally). In Schaefer v. Henkel, 75 N. Y. 378, 7 AbbNCas 1, 57 HowPr 97, the court said: "It is therefore settled law, that in order to take a case out of the general rule, where the contract is one which is valid without a seal, and the seal is therefore of no account, it must appear that the contract was really made on behalf of the principal, from the instrument, and that the party derived benefit from and accepted and confirmed it by acts on his part." To same effect Briggs v. Partridge, 64 N. Y. 357, 21 AmR 617 [aff 39 N. Y. Super. 339]; Simpson v. New York, etc., R. Co., 51 N. Y. Super. 419.

83. Del.—Hartnett v. Baker, 20 Del. 431, 56 A 672.

Mass.—Cook v. Gray, 133 Mass. 106; Blanchard v. Blackstone, 102 Mass. 343; Sherman v. Fitch, 98 Mass. 59; Sargent v. Webster, 13 Metc. 497, 46 AmD 743; Tapley v. Butterfield, 1 Metc. 515, 35 AmD 374.

Minn.—Thomas v. Joslin, 30 Minn. 388, 15 NW 675.

Mo.—Einstein v. Holt, 58 Mo. 340; Shuetze v. Bailey, 40 Mo. 69; Human v. Cunliffe, 32 Mo. 316.

N. J.—Calhoon v. Buhre, 75 N. J. L. 439, 67 A 1068.

N. Y.—Worrall v. Munn, 5 N. Y. 229, 55 AmD 330; Lawrence v. Taylor, 5 Hill 107; Evans v. Wells, 22 Wend. 324 [rev 20 Wend. 251]; Skinner v. Dayton, 19 Johns. 513, 10 AmD 286. See dis. op. of Gaynor, J., in Stanton v. Granger, 125 App. Div. 174, 109 NYS 134, 138 (where the question is learnedly discussed).

Oh.—Purviance v. Sutherland, 2 Oh. St. 478.

Pa.—Lancaster v. Knickerbocker Ice Co., 153 Pa. 427, 26 A 251; Schmertz v. Shreeve, 62 Pa. 457, 1 AmR 439; Jones v. Horner, 60 Pa. 214; Baum v. Dubois, 43 Pa. 260.

Va.—Yerby v. Grigsby, 9 Leigh (36 Va.) 387.

Wis.—Kirschbon v. Bonzel, 67 Wis. 178, 29 NW 907; Stowell v. Eldred, 39 Wis. 614.

[a] **Lease.**—Where seals are not required to give validity to a lease, if its form of execution is sufficient without the addition of the seals to make the lease binding upon the principals as parties to a simple contract, the addition of the seals do not render it unenforceable as to them. Rand v. Moulton, 72 App. Div. 236, 76 NYS 174.

[b] **Deed conveying real and personal property.**—Where an agent makes a conveyance of real and personal property in the name of the principal, but signs and seals it with his own name and seal, it is valid as a transfer of the personalty, on the theory that as to that the seal is unnecessary. Sargent v. Webster, 13 Metc. (Mass.) 497, 46 AmD 743; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203. To same effect Warner v. Mower, 11 Vt. 385.

84. Henry County v. Gates, 26 Mo. 315.

85. Ruffin v. Mebane, 41 N. C. 507; Delius v. Cawthorn, 13 N. C. 90; White v. Cuyler, 6 T. R. 176, 101 Reprint 497.

86. U. S.—Williams v. Paine, 169 U. S. 55, 18 SCt 279, 42 L. ed. 658 (where a deed was held good under a statute providing that an acknowledgement by an authorized attorney that a deed is his act and deed shall have the same effect as if such attorney had acknowledged it to be the deed of his principal, the grantor); Post v. Pearson, 108 U. S. 418, 2 SCt 799, 27 L. ed. 774.

Ark.—Gibbs v. Dickson, 33 Ark. 107.

Cal.—Southern Pac. Co. v. Von Schmidt Dredge Co., 118 Cal. 368, 50 P 650 (holding that, where a statute abolished distinctions between sealed and unsealed instruments, and provided that any instrument within the authority of an agent will bind the principal if the intent to bind him is plainly inferable therefrom, a contract under seal, signed by the agent, will nevertheless bind the principal if its language as a whole makes such intent clear).

Nebr.—Wheeler v. Walden, 17 Nebr. 122, 22 NW 346 (holding that the strict rule of the common law in regard to contracts under seal, made by an agent for the sale or leasing of real estate is not in force in Nebraska, private seals being abolished; and that a lease signed with the principal's name and that of the agent is sufficient if, from the terms of the instrument itself or from any other matter therein, it appears that the parties intended it as the agreement of the principal, and his name appears therein, however informally it may be signed by the agent).

N. D.—Donovan v. Welch, 11 N. D. 113, 90 NW 262.

87. Jones v. Morris, 61 Ala. 518 (holding that a statute merely dispensing with the necessity of seals, or of executing in the name of the principal, does not affect the common-law rule as to the manner of the execution of a deed by an agent, whenever as matter of fact the agent does make the contract under seal or in his principal's name); Posner v. Bayless, 59 Md. 56 (holding that statutes providing the manner of executing deeds by attorney are presumed to provide an additional method, and

[§ 335] **(3) Rule in Equity.** Some courts, while maintaining the rigid rule of law, hold that equity will step in and give effect to the contract as a simple contract, provided it is so executed as to be binding on the principal except for the fact that it is sealed,[88] and the reformation of the deed is not necessary as a condition precedent to specific performance.[89] And a deed invalid as a deed because of defective execution may nevertheless be good evidence of a contract, and has often been construed in equity as a contract vesting an equitable title or as foundation for an action on the implied obligation,[90] and it has been held that if made in the name of the agent, and inoperative to pass the principal's title, it will nevertheless pass whatever right the agent had, either personally or as agent.[91]

Likewise, a contract to convey, made in the name of the agent, may be held in equity to bind the principal.[92]

Agent as grantee. A deed made to an agent in his own proper name with a suffix describing him as representative of another vests the title in the agent;[93] but on a proper showing, equity will decree a trust in favor of the principal.[94]

[§ 336] **e. Reference to Power in Instrument.** While it is best that a deed by an agent should make reference to the power of the agent, this is not essential, and if the deed is executed by the agent, within his power, and in the name of his principal, it is good, although in it there is no reference to the power of attorney under which the agent acts.[95] The deed and the power must correspond so as to make it clear that the conveyance is executed in behalf of the principal who gave the power, although the validity of the deed cannot be affected by immaterial defects or differences.[96] Presumptively, if the agent has an interest of his own

not to abrogate the common-law rule, and that a deed under a power of attorney is properly executed at common law in the name of the principal by his attorney, and that form is still valid, notwithstanding Acts [1856] c 154 § 23, providing that the agent shall sign the deed as agent or attorney).

88. Cal.—Gerdes v. Moody, 41 Cal. 335; Love v. Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 AmD 602 (holding that an agreement under seal, made by an attorney for his principal, although inoperative at law for want of a formal execution in the name of the principal, is binding in equity if the attorney had authority; and that if the instrument so defectively executed is a conveyance of real estate, it will be sustained in equity as an agreement to convey, and will be good against the principal, subsequent lien creditors, and subsequent purchasers with notice); Salmon v. Hoffman, 2 Cal. 138, 56 AmD 322.

D. C.—Williams v. Paine, 7 App. 116 [aff 169 U. S. 55, 18 SCt 279, 42 L. ed. 658].

Ill.—Hemstreet v. Burdick, 90 Ill. 444; Robbins v. Butler, 24 Ill. 387.

Ky.—Colsten v. Chaudet, 4 Bush 666; Casey v. Lucas, 2 Bush 55; Banks v. Sharp, 6 J. J. Marsh. 130; Vanada v. Hopkins, 1 J. J. Marsh. 285, 19 AmD 92.

Miss.—McCaleb v. Pradat, 25 Miss. 257.

Mo.—Kearney v. Vaughan, 50 Mo. 284 (holding that an agreement under seal by an attorney for a principal, although inoperative at law for want of a formal execution in the name of his principal, is binding in equity, if the attorney has authority).

Nebr.—Hall v. Hooper, 47 Nebr. 111, 66 NW 33.

N. C.—Rogerson v. Leggett, 145 N. C. 7, 58 SE 596 (holding that it is a good equitable defense to an action for land that defendant bought it of one having a power of attorney to sell and convey it, and paid him therefor, recorded his deed, and entered and remained in possession thereunder, although the deed was executed in the name of the agent, as attorney, instead of in the name of the principal, by the agent as attorney); Oliver v. Dix, 21 N. C. 158.

S. C.—Ramage v. Ramage, 27 S. C. 39, 2 SE 834; Welsh v. Usher, 11 S. C. Eq. 167, 29 AmD 63.

Tenn.—Turner v. Kingston Lumber, etc., Co., (Ch. A.) 59 SW 410.

Tex.—Rogers v. Frost, 14 Tex. 267; Giddens v. Byers, 12 Tex. 75.

Va.—Martin v. Flowers, 8 Leigh (35 Va.) 158.

But see Henricus v. Englert, 137 N. Y. 488, 494, 33 NE 550; Schaefer v. Henkel, 75 N. Y. 378; Briggs v. Partridge, 64 N. Y. 357, 21 AmR 617; Anderson v. Conner, 43 Misc. 384, 87 NYS 449.

[a] **A mortgage made by an agent in his own name** is binding in equity, if the agent had authority, and the failure to execute it in the name of the principal resulted from accident or mistake. Hall v. Hooper, 47 Nebr. 111, 66 NW 33; Turner v. Kingston Lumber, etc., Co., (Tenn. Ch. A.) 59 SW 410.

[b] **In Texas,** where a deed, under the equitable rule prevailing there, was held to convey the title of the principal, the attorney was held not liable on the warranties, although they were made by him personally. Daughtrey v. Knolle, 44 Tex. 450.

89. Love v. Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 AmD 602.

90. Ala.—Gillespy v. Hollingsworth, 169 Ala. 602, 604, 53 S 987 [cit Cyc] (where the court said: "It is true that, at common law, a deed so signed does not convey the legal title, but this court has held distinctly that a court of equity will cure the defective execution of the deed and will not permit the parties 'to be disappointed and their just rights defeated merely because, from inadvertence or from ignorance, or mistake as to the method which ought to be pursued to bind' the party passing his 'estate and interest in the land, there is a defective execution of the power'"); Taylor v. West Alabama Agricultural, etc., Assoc., 68 Ala. 229; Jones v. Morris, 61 Ala. 518 (both holding that a deed running in the name of the principal, but executed by the agent in his own name, is not regarded at law as the deed of the principal, but can be enforced as such in equity).

Ind.—Joseph v. Fisher, 122 Ind. 399, 23 NE 856. In Butterfield v. Beall, 3 Ind. 203, in which Beall filed a bill in chancery, from which it appeared that there was executed to him a deed in form as follows: "This indenture, made . . . between Jonathan C. Wright . . . attorney in fact for Abel Butterfield, Caroline Butterfield, his wife, and Richard Bush and Adaline Bush, his wife, parties of the first part, and John Beall . . . of the second part, witnesseth, that the said Jonathan C. Wright, party of the first part . . . hath granted," etc. "In witness whereof, the said Jonathan C. Wright, attorney, hath hereunto set their hands and seals. . . . Abel Butterfield, [seal] . . . Richard Bush, [seal]. . . . By Jonathan C. Wright, [seal], their attorney in fact," it was held that the parties were bound by it. The court said that the deed, "though very inartificially drawn, we have determined, not however without a good deal of hesitation, should be held operative to the extent of the power that had been legally conveyed to him. . . . It was Wright's intention to act under the power granted him; and justice will be promoted and litigation, perhaps saved, by holding the deed operative."

Mo.—Moore v. Granby Min., etc., Co., 80 Mo. 86.

N. C.—Holland v. Clark, 67 N. C. 104.

Wis.—Kirschbon v. Bonzel, 67 Wis. 178, 29 NW 907.

Eng.—White v. Cuyler, 6 T. R. 176, 101 Reprint 497.

91. Bennett v. Virginia Ranch, etc., Co., 1 Tex. Civ. A. 321, 21 SW 126.

92. Butler v. Kaulback, 8 Kan. 668; Johnson v. Johnson, 1 Dana (Ky.) 364.

93. Combs v. Brown, 29 N. J. L. 36; Den v. Hay, 21 N. J. L. 174.

94. Combs v. Brown, 29 N. J. L. 36; Den v. Hay, 21 N. J. L. 174. See generally Deeds [13 Cyc 625].

95. Earle v. Earle, 20 N. J. L. 347 (holding that, if a deed is silent as to the power under which it is executed, and such a power exists, the law will refer the deed to the power); Taylor v. Eatman, 92 N. C. 601 (holding that a deed made in execution of a power of attorney need not refer to the power, where it is apparent that it is made in execution thereof, or where, unless so deemed, it would be a nullity); Robins v. Bellas, 4 Watts (Pa.) 256; Allison v. Kurtz, 2 Watts (Pa.) 185. See also Hanby v. Warner, 51 Pa. 276. Compare Scott v. McAlpin, 4 N. C. 587, 7 AmD 703.

[a] **In Texas** (1) if an agent has power to convey, a conveyance made by him is binding upon his principal and passes title, although executed in the agent's name and without reference to his power of attorney. Hill v. Conrad, 91 Tex. 341, 43 SW 789; Link v. Page, 72 Tex. 592, 10 SW 699; Hough v. Hill, 47 Tex. 148; Rogers v. Bracken, 15 Tex. 564; Rye v. J. M. Guffey Petroleum Co., 42 Tex. Civ. A. 185, 95 SW 622; Pool v. Unknown Heirs, (Civ. A.) 49 SW 923; Trinity County Lumber Co. v. Pinckard, 4 Tex. Civ. A. 671, 23 SW 720, 1015. See also Hunter v. Easthan, 95 Tex. 648, 69 SW 66 [rev (Civ. A.) 67 SW 1080]. (2) Thus a deed, by one holding a power of attorney to convey, of all the grantor's "interest" in the land, to have and to hold unto the grantee, his heirs and assigns forever, is a conveyance of the land itself, and not a mere act of the attorney without reference to the power. Pool v. Unknown Heirs, supra. (3) So also a deed in the name of the attorney, to which the power of attorney was attached, has been held an execution of the power and sufficient to convey the principal's title. Neill v. Kleiber, 51 Tex. Civ. A. 552, 112 SW 694. (4) Where the power of attorney was recorded, a bond for title in the name of the attorney alone, nowhere disclosing the principal, has been held enforceable against the principal. Rogers v. Bracken, 15 Tex. 564.

96. Moore v. Allen, 26 Colo. 197,

in property and a power of attorney from another to convey it, a deed from the agent which does not refer to the power conveys the interest of the agent only, and is not to be regarded as an exercise of the power.[97] In accordance with the principle that the power need not be recited, the validity of a deed executed by an agent will not be affected by a misrecital of the power in the deed; it is sufficient if he had the authority and has pursued it.[98] And it has been held that a deed is good, although it refers to an invalid power, if another and a valid one is in existence.[99] However, it must appear either from the instrument itself or from the attendant circumstances that he has acted under a power conferred, and if this is doubtful, or it appears that he did not intend to execute the power he possessed, the deed will not be held good by referring it to such power.[1]

A mere recital of authority in the instrument will not relieve the agent of the liability which he has incurred by contracting in his own name,[2] nor will it operate to bind his principal.[3]

[§ 337] **E. Effect of Improper Execution or Execution in Name of Agent.—1. Simple Contracts. a. In General.** Generally the agent and not the principal is personally bound by a contract containing apt words to bind him, if he executes the contract in his own name and makes the promises and undertakings his own without any suggestion or indication that he is contracting for another, although he recites that he is an agent or the other party knows that he is such,[4] and the agent also will be liable when he so executes the contract as in terms to bind both himself and the principal,[5] and it has been held that where the contract is signed by the agent with an affix indicating his agency and principal, and the consideration moves to the principal, both may be held liable.[6]

Agent not bound. On the other hand it does not necessarily follow that a contract made by an authorized agent, which does not bind the principal, becomes the agent's contract and makes him liable if it is not performed. This depends on the legal effect of the terms of the contract, and if there are no apt words to charge the agent he cannot be held liable, although by reason of defective execution he has failed to give a right of action against his principal on the contract.[7] Thus one who exe-

97 P 698, 77 AmSR 255 (holding that, under a power of attorney to "Waltimore Arens," a deed executed by "Waldimar Arens" is not prima facie the act of the grantors by virtue of the power of attorney); Jackson v. Hodges, 2 Tenn. Ch. 276; Winding Gulf Colliery Co. v. Campbell, (W. Va.) 78 SE 384 (holding that, where an agent who executes a deed under power of attorney is coheir with his principals, he need not designate his principals by name, but a recital that he conveys for and on behalf of himself and the "other heirs" as their agent and attorney is sufficient). Compare Crimp v. Yokeley, 20 Tex. Civ. A. 231, 48 SW 1116.

97. Davenport v. Parsons, 10 Mich. 42, 81 AmD 772; Bassett v. Hawk, 114 Pa. 502, 8 A 18; Hay v. Mayer, 8 Watts (Pa.) 203, 34 AmD 453.

98. Jones v. Tarver, 19 Ga. 279; Allison v. Kurtz, 2 Watts (Pa.) 185; Glasgow v. Smith, 1 Overt. (Tenn.) 144.

99. Link v. Page, 72 Tex. 592, 10 SW 699. See also Earle v. Earle, 20 N. J. L. 347. Compare Davenport v. Parsons, 10 Mich. 42, 81 AmD 772.

1. Hill v. Conrad, 91 Tex. 341, 43 SW 789 [rev (Civ. A.) 41 SW 541] (holding that, where from a deed executed by one having a power giving authority to execute it, or from the attending circumstances, it appears that it was not the intention of the party who executed the deed to exercise the power granted to him, the deed cannot be made sufficient to convey the title of the donor by referring it to the power which the donee actually had but failed to exercise); Huffman v. Cartwright, 44 Tex. 296; Rye v. J. M. Guffey Petroleum Co., 42 Tex. Civ. A. 185, 95 SW 622.

2. Cobb v. Arnold, 8 Metc. (Mass.) 398; Fowler v. Shearer, 7 Mass. 14.

3. Townsend v. Corning, 23 Wend. (N. Y.) 435; Webster v. Brown, 2 S. C. 428.

4. U. S.—Gill v. General Electric Co., 129 Fed. 349, 64 CCA 99.

Ala.—Gillaspie v. Wesson, 7 Port. 454, 31 AmD 715.

Ark.—Hite v. Kendall, 2 Ark. 338.

Cal.—Sayre v. Nichols, 5 Cal. 487; Whiting v. Heslep, 4 Cal. 327.

Ga.—Phinizy v. Bush, 129 Ga. 479, 59 SE 259; Florida Midland, etc., R. Co. v. Varnedoe, 81 Ga. 175, 7 SE 129.

Ill.—Frankland v. Johnson, 147 Ill. 520, 35 NE 480, 37 AmSR 234; Macdonald v. Bond, 96 Ill. A. 116 [aff 195 Ill. 122, 62 NE 881]; Loehde v. Halsey, 88 Ill. A. 452; Stockbarger v. Sain, 69 Ill. A. 436.

Ind.—Wiley v. Shank, 4 Blackf. 420.

Iowa.—Revolving Scraper Co. v. Tuttle, 61 Iowa 423, 16 NW 353, 47 AmR 816; Bryan v. Brazil, 52 Iowa 350, 3 NW 117.

Ky.—McKown v. Gettys, 80 SW 169, 25 KyL 2070; Miller v. Early, 58 SW 789, 22 KyL 825.

La.—Cockerham v. Perot, 48 La. Ann. 209, 19 S 122; Mithoff v. Byrne, 20 La. Ann. 363.

Mass.—Eustis Mfg. Co. v. Saco Brick Co., 198 Mass. 212, 84 NE 449; Guernsey v. Cook, 117 Mass. 548; Southard v. Sturtevant, 109 Mass. 390; Simonds v. Heard, 23 Pick. 120, 34 AmD 41; Copeland v. Mercantile Ins. Co., 6 Pick. 198; Couch v. Ingersoll, 2 Pick. 292; Stackpole v. Arnold, 11 Mass. 27, 6 AmD 150.

Mich.—Detroit v. Jackson, 1 Dougl. 106.

Minn.—Williams v. Journal Printing Co., 43 Minn. 537, 45 NW 1133; Bacon v. Rupert, 39 Minn. 512, 40 NW 832; Rollins v. Phelps, 5 Minn. 463.

Mo.—Lapsley v. McKinstry, 38 Mo. 245 (holding that a person who assumes to contract as agent must see to it that his principal is legally bound by his act, for, if he does not give a right of action against his principal, he will be himself personally responsible); Thompson v. McCullough, 31 Mo. 224, 77 AmD 644; Overton v. Stevens, 8 Mo. 622.

Nebr.—Dockarty v. Tillotson, 64 Nebr. 432, 89 NW 1050; Johnson v. McNatt, 4 Nebr. (Unoff.) 55, 93 NW 425 (holding that an agent failing to disclose his agency, but representing himself as a principal will be liable to a stranger as a principal).

N. H.—Leighton v. Walker, 9 N. H. 59; Underhill v. Gibson, 2 N. H. 352, 9 AmD 82.

N. J.—Kean v. Davis, 20 N. J. L. 425.

N. Y.—Tew v. Wolfsohn, 174 N. Y. 272, 66 NE 934; Newman v. Greeff, 101 N. Y. 663, 5 NE 335; Taintor v. Prendergast, 3 Hill 72, 38 AmD 618; Spencer v. Field, 10 Wend. 87; Stone v. Wood, 7 Cow. 453, 17 AmD 529.

Oh.—Post v. Kinney, 7 Oh. Dec. (Reprint) 439, 3 CincLBul 118.

Pa.—Eichbaum v. Irons, 6 Watts & S. 67, 40 AmD 540.

R. I.—Bourne v. Campbell, 21 R. I. 490, 44 A 806.

S. C.—Pryor v. Coulter, 17 S. C. L. 517.

Tex.—Lang v. Henke, 22 Tex. Civ. A. 490, 55 SW 374.

Vt.—Hodges v. Green, 28 Vt. 358.

Va.—McWilliams v. Willis, 1 Wash. (1 Va.) 199.

Wash.—Murphy v. Clarkson, 25 Wash. 585, 66 P 51; Shuey v. Adair, 18 Wash. 188, 51 P 388, 63 AmSR 879, 39 LRA 473.

Eng.—Long v. Millar, 4 C. P. D. 450; Paice v. Walker, L. R. 5 Exch. 173; Jones v. Littledale, 6 A. & E. 486, 33 ECL 265, 112 Reprint 186; Hick v. Tweedy, 6 Aspin. 599; Cooke v. Wilson, 1 C. B. N. S. 153, 87 ECL 153, 37 EngL&Eq 361, 140 Reprint 65; Norton v. Herron, 1 C. & P. 648, 12 ECL 366; Parker v. Winlow, 7 E. & B. 942, 90 ECL 942, 119 Reprint 1497; Tanner v. Christian, 4 E. & B. 591, 82 ECL 591, 29 EngL&Eq 103, 119 Reprint 217; Stewart v. Shannessy, 2 F. (Ct. Sess.) 1288; Chadwick v. Maden, 9 Hare 188, 41 EngCh 188, 68 Reprint 469; Magee v. Atkinson, 6 L. J. Exch. 115.

Ont.—Ballantyne v. Watson, 30 U. C. C. P. 529.

See also infra §§ 487, 489, 522.

[a] **Where it does not appear on the face of the contract that the signer acts as agent,** he will be personally responsible, and not the principal, although the other party knew that he acted as agent. Hastings v. Lovering, 2 Pick. (Mass.) 214, 13 AmD 420; Arfridson v. Ladd, 12 Mass. 173; Mayhew v. Prince, 11 Mass. 54.

[b] **In Georgia,** under Civ. Code (1895) § 2998, which provides that an instrument signed by one as agent, or the like, without more, is the individual undertaking of the maker, and § 3022, which declares that the form in which the agent acts is immaterial, if the principal's name is disclosed, and the agent professes to act for him, a contract reciting, "I, J. L. De Give, President of the Southern Historical Association, hereby agree to pay Governor A. D. Candler," and signed "J. L. De Give, President," was sufficient to sustain an action against the signer as an individual. Candler v. De Give, 133 Ga. 486, 66 SE 244.

5. Nall v. Farmers' Warehouse Co., 95 Ga. 770, 22 SE 665 (holding that, where persons intending to act in behalf of others in the execution of a contract for the rent of a warehouse, act for themselves as well as for their principals, and in pursuance of the contract engage in the business of warehousemen, they cannot excuse a nonperformance of their duty as such by showing by parol that they were acting only for the principals in the conduct of the business); Brown v. Bradlee, 156 Mass. 28, 30 NE 85, 32 AmSR 430, 15 LRA 509; Byington v. Simpson, 134 Mass. 169, 45 AmR 314; Calder v. Dobell, L. R. 6 C. P. 486, 2 ERC 457.

6. Froelich v. Froelich Trading Co., 120 N. C. 39, 26 SE 647.

7. Ala.—Hall v. Cockrell, 28 Ala. 507.

cutes and signs an instrument in the name of another, and adds his own name only as agent for that other, cannot be treated as a party to that instrument;[8] and if, reading the instrument as a whole, it appears that the person who signed acted in a representative capacity, or that the obligation is that of his principal, he will not be bound personally on the contract,[9] although he does thereby represent that he has authority as agent to execute the instrument, and may thereby make himself liable to third persons in damages, if as a matter of fact he is acting without, or outside of his, authority.[10]

Liability of principal. It has been decided that a principal may be charged upon a written simple executory contract entered into by an agent in his own name within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the person dealing with the agent supposed that he was acting for himself, and that this rule obtains as well in respect to contracts which are required to be in writing as to those where a writing is not essential to their validity;[11] but as a general rule he is not liable on a contract so executed, without or in excess of the agent's authority,[12] although he may be held liable in equity on the original consideration, on the principle of ex æquo et bono.[13]

A contract which because of defective execution is void binds neither agent nor principal.[14]

[§ 338] **b. Effect of Descriptio Personæ.** The mere addition to the name of the agent, of words descriptive of his agency, either in the body of the instrument, or in the signature, or in both, is not sufficient to bind the principal and relieve the agent of the obligation, and the agent is prima facie liable on a contract so executed, which contains apt words to charge him;[15] and if in the body of the instru-

Colo.—Frambach v. Frank, 33 Colo. 529, 81 P 247 (holding that, where a person contracts as the agent of another, which fact is shown by the contract itself, he will not be personally liable on the contract, although he executes the instrument in his own name instead of that of his principal, unless it clearly appears from the language of the contract that he intends to be personally liable).

Conn.—Ogden v. Raymond, 22 Conn. 379, 58 AmR 429; Perry v. Hyde, 10 Conn. 329.

Del.—McCaulley v. Jenney, 10 Del. 32.

Ill.—Hancock v. Yunker, 83 Ill. 208; Mann v. Richardson, 66 Ill. 481; McCormick v. Seeberger, 73 Ill. A. 87 [aff 178 Ill. 404, 53 NE 340]; Neufeld v. Beidler, 37 Ill. A. 34; Mida v. Geissmann, 17 Ill. A. 207.

Ind.—Freese v. Crary, 29 Ind. 524.

Me.—Harper v. Little, 2 Me. 14, 11 AmD 25. See also How v. Codman, 4 Me. 79 (holding that the common-law rule that an agent acting in the name of his principal does not bind himself is altered by St. [1821] c 59 § 8, so far as it regards indorsers of writs).

Md.—McClernan v. Hall, 33 Md. 293.

Mass.—Abbey v. Chase, 6 Cush. 54; Jefts v. York, 4 Cush. 371, 50 AmD 791.

Nebr.—Brong v. Spence, 56 Nebr. 638, 77 NW 54.

N. Y.—Whitford v. Laidler, 94 N. Y. 145, 46 AmR 131; Sherman v. New York Cent. R. Co., 22 Barb. 239; Sinclair v. Jackson, 8 Cow. 543.

N. C.—Locke v. Alexander, 9 N. C. 155, 11 AmD 750.

Oh.—Cincinnati Hotel Co. v. Marsh, 8 Oh. Dec. (Reprint) 669, 9 CincLBul 176.

Pa.—Abrams v. Musgrove, 12 Pa. 292; Hopkins v. Mehaffy, 11 Serg. & R. 126; Passmore v. Mott, 2 Binn. 201; Stephenson v. Dodson, 36 Pa. Super. 343 (holding that, when the execution of a contract is by written obligation, or of sealed covenants, the agent signing it cannot be sued upon the instrument itself, unless there are apt personal, contractual words of his own, or he signs it as his own).

W. Va.—Johnson v. Welch, 42 W. Va. 18, 24 SE 585.

Wis.—McCurdy v. Rogers, 21 Wis. 197, 91 AmD 468.

See also infra §§ 486, 489.

8. New York, etc., Steamship Co. v. Harbison, 16 Fed. 681; Bray v. Kettell, 1 Allen (Mass.) 80; Largey v. Leggat, 30 Mont. 148, 75 P 950 (holding that one who signs a contract only as attorney in fact for a party thereto is not bound by the contract, and it has the same effect, so far as an action against him based thereon is concerned, as if the party had signed only his own name thereto).

9. Conn.—Jacobs v. Williams, 85 Conn. 215, 82 A 202, AnnCas1913B 900 and note.

Ill.—King v. Handy, 2 Ill. A. 212.

Ind.—Freese v. Crary, 29 Ind. 524.

Iowa.—Baker v. Chambles, 4 Greene 428.

Ky.—Humber v. Crabb Orchard, etc., Turnp. Co., 13 KyL 327; Brondrup v. Tureman, 12 KyL 47.

La.—Maury v. Ranger, 38 La. Ann. 485, 58 AmR 197.

Me.—Winship v. Smith, 61 Me. 118; Rogers v. March, 33 Me. 106.

Md.—Key v. Parnham, 6 Harr. & J. 418.

Mass.—Lyon v. Williams, 5 Gray 557.

Mo.—Hartzell v. Crumb, 90 Mo. 629, 3 SW 59 (holding that it will be sufficient to relieve a person of liability as principal in a contract not under seal if from the whole instrument it can be gathered that he acted as agent and intended to bind the principal and not himself); Coffman v. Harrison, 24 Mo. 524.

N. Y.—Stanton v. Camp, 4 Barb. 274; Chase v. Pattberg, 12 Daly 171.

N. C.—Fowle v. Kerchner, 87 N. C. 49.

W. Va.—McKay v. Ripley, etc., R. Co., 42 W. Va. 23, 24 SE 685; Smith v. Bond, 25 W. Va. 387.

Eng.—Spittle v. Lavender, 2 B. & B. 452, 6 ECL 224, 129 Reprint 1041; Ogden v. Hall, 40 L. T. Rep. N. S. 751.

10. New York, etc., Steamship Co. v. Harbison, 16 Fed. 681; McCormick v. Seeberger, 73 Ill. A. 87 [aff 178 Ill. 404, 53 NE 340]; Conant v. Alvord, 166 Mass. 311, 44 NE 250 (holding that the act of A in writing on an order, "Accepted . . . Cape Ann Savings Bank, by Alvord," is a representation that he has authority to accept the order for C, notwithstanding the addition of the words, "Agts. for the negotiation of within mentioned loan," they being mere words of description and not such as to disclose the full scope of A's authority). See also infra § 476.

11. Ford v. Williams, 21 How. (U. S.) 287, 16 L. ed. 36; Eastern R. Co. v. Benedict, 5 Gray (Mass.) 561, 66 AmD 384; Huntington v. Knox, 7 Cush. (Mass.) 371; Briggs v. Partridge, 64 N. Y. 357, 21 AmR 617; Coleman v. Elmira First Nat. Bank, 53 N. Y. 388; Calder v. Dobell, L. R. 6 C. P. 486, 2 ERC 457; Trueman v. Loder, 11 A. & E. 589, 39 ECL 319, 113 Reprint 539; Higgins v. Senior, 11 L. J. Exch. 199. See also infra § 522.

[a] **Under the civil law** a power executed by an agent in his own name binds the principal, when he acts in the business intrusted to him and according to the power conferred; and he is also personally liable. Hopkins v. Lacouture, 4 La. 64.

12. Cal.—Estrella Vineyard Co. v. Butler, 125 Cal. 232, 57 P 980.

Colo.—McIntosh-Huntington Co. v. Rice, 13 Colo. A. 393, 58 P 358.

Iowa.—Davidson v. Davenport Gaslight, etc., Co., 24 Iowa 419.

Nebr.—Moline, etc., Co. v. Neville, 38 Nebr. 433, 56 NW 983.

N. Y.—Meeker v. Claghorn, 44 N. Y. 349; Galusha v. Hitchcock, 29 Barb. 193; Hyde v. Paige, 9 Barb. 150; Williams v. Christie, 10 HowPr 12; Evans v. Wells, 22 Wend. 324.

Wash.—Murphy v. Clarkson, 25 Wash. 585, 66 P 51.

Eng.—Armstrong v. Stokes, L. R. 7 Q. B. 598, 2 ERC 471; Paul v. Birch, 2 Atk. 621, 26 Reprint 771; Paterson v. Gandasequi, 15 East 62, 104 Reprint 768; Bacon v. Dubarry, 1 Ld. Raym. 246, 91 Reprint 1060; Blore v. Sutton, 3 Meriv. 237, 36 Reprint 91.

See also infra § 522.

13. Van Reimsdyk v. Kane, 28 F. Cas. No. 16,872, 1 Gall. 630; Davison v. Davenport Gaslight, etc., Co., 24 Iowa 419.

14. Morrison v. Hazzard, (Tex. Civ. A.) 88 SW 385 (holding that a contract void under the statute of frauds, as it would not be enforceable against the principal, although executed in his name, would not bind the agent). See also infra § 487, 489.

15. Cal.—Hall v. Jameson, 151 Cal. 606, 91 P 518, 121 AmSR 137, 12 LRANS 1190; Jones v. Post, 6 Cal. 102.

Colo.—Rhone v. Powell, 20 Colo. 41, 36 P 899.

D. C.—Magruder v. Belt, 12 App. 151.

Ga.—Partridge v. Hollinshead, 105 Ga. 278, 30 SE 787; Faw v. Meals, 65 Ga. 711 (holding that persons who as the "building committee" of a named "institute" make with another a contract for materials with which to build a school house are, whether such "institute" has or has not a legal existence, personally liable for a breach of such contract, where they intended to bind themselves individually and were not acting for any principal); Hearn v. Gower, 1 Ga. A. 265, 57 SE 916.

Ill.—Macdonald v. Bond, 96 Ill. A. 116 [aff 195 Ill. 122, 62 NE 881].

Ind.—Hobbs v. Cowden, 20 Ind. 310.

Iowa.—Revolving Scraper Co. v. Tuttle, 61 Iowa 423, 16 NW 353, 47 AmR 816.

Ky.—Parks v. S. & L. Turnpike Road Co., 4 J. J. Marsh. 456.

Mass.—Brown v. Bradlee, 156 Mass. 28, 30 NE 85, 32 AmSR 430, 15 LRA 509 and note; Guernsey v. Cook, 117 Mass. 548.

Minn.—Peterson v. Homan, 44 Minn. 166, 46 NW 303, 20 AmSR 564; Deering v. Thom, 29 Minn. 120, 12 NW 350; Bingham v. Stewart, 13 Minn. 106.

Mo.—Chouteau v. Paul, 3 Mo. 260; Ziegler v. Fallon, 28 Mo. A. 295.

N. H.—Moor v. Wilson, 26 N. H.

ment the alleged agent in terms imposes obligations upon himself and not on his principal, he will not escape liability, although he signs the instrument only as agent or attorney for another.[16]

[§ 339] **c. Improperly Executed Instrument as Evidence.**[17] Although an instrument is so defectively executed that it cannot be sued on, it may nevertheless be used as evidence in an action on the money counts in assumpsit against the principal, provided the contract is one on which the principal would have been liable except for the defective execution;[18] but it is not admissible against the principal in the absence of proof of the agency, or that the principal acted under the contract.[19]

[§ 340] **2. Sealed Instruments—a. In General.** A deed or other sealed instrument so executed as not to be binding upon the principal, as where it is made by the agent in his own name or signed and sealed in his name, although he describes himself as agent,[20] is not necessarily void, but may bind the agent if it contains apt words to bind him personally.[21] Thus, where an agent makes a deed which, by reason of improper execution, is ineffectual to convey the title of his principal, he is individually liable on his personal covenants contained in the deed;[22] but if it is clear from the instrument as a whole that the agent is promising and covenanting, and acting generally, in a representative capacity, it will not bind him.[23] It has been held that a lease in which the lessor styles himself as agent, but which is signed by him individually, cannot be sued on by the principal.[24]

[§ 341] **b. Improperly Executed Sealed Instrument as Evidence.**[25] In the absence of evidence that the title was in the principal, a deed executed by and in the name of an agent, conveying his title to the land, is admissible in favor of the grantee in an action against a stranger for use and occupation;[26] and an instrument under seal executed in the agent's name is competent evidence for the principal suing to enforce it against the other party who pleads non est factum.[27] It is also admissible for the purpose of showing that it is void, and therefore that plaintiff may resort to the common counts notwithstanding the writing,[28] or as

332; Underhill v. Gibson, 2 N. H. 352, 9 AmD 82.
N. J.—Kean v. Davis, 20 N. J. L. 425.
N. Y.—Pumpelly v. Phelps, 40 N. Y. 59, 100 AmD 463; Campbell v. Porter, 46 App. Div. 628, 61 NYS 712; United Electric Light, etc., Co. v. Blackton, 128 NYS 92.
S. D.—Hardman v. Kelley, 19 S. D. 608, 104 NW 272; Western Pub. House v. Bachman, 2 S. D. 512, 51 NW 214.
Tex.—Marx v. Luling Co-op. Assoc., 17 Tex. Civ. A. 408, 43 SW 596.
Eng.—Burrell v. Jones, 3 B. & Ald. 47, 5 ECL 37, 106 Reprint 580; Kennedy v. Gouveia, 3 D. & R. 503, 16 ECL 174. See also Hough v. Manzanos, 4 Ex. D. 104; Adams v. Hall, 3 Aspin. 496.
See also supra §§ 327, 331; infra § 491.

16. Cal.—Murphy v. Helmrich, 66 Cal. 69, 4 P 958.
Ill.—Kerfoot v. Cromwell Mound Co., 115 Ill. 502, 25 NE 960.
Me.—Mattocks v. Young, 66 Me. 459.
N. H.—Savage v. Rix, N. H. 263.
Eng.—Cooke v. Wilson, 1 C. B. N. S. 153, 87 ECL 153, 37 EngL&Eq 361, 140 Reprint 65; Parker v. Winlow, 7 E. & B. 942, 90 ECL 942, 119 Reprint 1497; Lennard v. Robinson, 5 E. & B. 125, 85 ECL 125, 32 EngL&Eq 127, 119 Reprint 428; Tanner v. Christian, 4 E. & B. 591, 82 ECL 591, 29 EngL&Eq 103, 119 Reprint 217.

17. **Improperly executed sealed instrument** as evidence see infra § 341.
Void or defective instrument as evidence generally see Evidence [17 Cyc 363].

18. Thurston v. Mauro, 1 Greene (Iowa) 231; Benham v. Emery, 46 Hun (N. Y.) 156; Pentz v. Stanton, 10 Wend. (N. Y.) 271, 25 AmD 558; Holland v. Clark, 67 N. C. 104; Harper v. Tiffin Nat. Bank, 54 Oh. St. 425, 44 NE 97.

19. Estrella Vineyard Co. v. Butler, 125 Cal. 232, 57 P 980.

20. Colo.—Rice v. Bush, 16 Colo. 484, 27 P 720 (holding that, where the principal is known at the time of making a sealed contract, and is not referred to therein, he is not bound).
Ga.—Compton v. Cassada, 32 Ga. 428.
Mass.—Sharon First Baptist Church v. Harper, 191 Mass. 196, 77 NE 778; Ellis v. Pulsifer, 4 Allen 165; Abbey v. Chase, 6 Cush. 54.
Miss.—Holmes v. Carman, Freem. 408.
N. C.—Woodbury v. King, 152 N. C. 676, 68 SE 221.
Pa.—Bassett v. Hawk, 114 Pa. 502, 8 A 18.
Va.—Martin v. Flowers, 8 Leigh (35 Va.) 158.
See also supra § 331.

21. U. S.—Duvall v. Craig, 2 Wheat. 45, 4 L. ed. 180.
Ala.—Hall v. Cockrell, 28 Ala. 507.
Kan.—Klopp v. Moore, 6 Kan. 27.
Md.—Carroll v. Bowen, 113 Md. 150, 77 A 128; Harper v. Hampton, 1 Harr. & J. 622.
Mass.—Tippets v. Walker, 4 Mass. 595. See also Ellis v. Pulsifer, 4 Allen 165; Abbey v. Chase, 6 Cush. 54.
Miss.—Holmes v. Carman, Freem. 408.
Mo.—Einstein v. Holt, 52 Mo. 340. But see Potter v. Bassett, 35 Mo. A. 417.
N. J.—Dayton v. Warne, 43 N. J. L. 659.
Pa.—Seyfert v. Bean, 83 Pa. 450.
S. C.—McDowall v. Reed, 28 S. C. 466, 6 SE 300.
S. D.—Hardman v. Kelley, 19 S. D. 608, 104 NW 272.
Wis.—North v. Henneberry, 44 Wis. 306.
See Saxton v. Ridley, 13 U. C. Q. B. 522.
See also supra § 330.

[a] **When one acting without authority bound.**—When a contract is entered into by an individual or a private corporation through an agent, if the contract is by parol, the agent is liable only where he has no authority to bind his principal; but if the agent covenants under his seal for the act of the principal, although he describes himself as contracting for and on behalf of his principal, he is liable on his express covenant, whether he has the authority of the person he thus professes to bind or not. Williams v. Hipple, 17 Pa. Super. 81, 8 Del. Co. 197.

[b] **Where a bond is signed by one as agent for another,** and such agent is solvent, it constitutes a good and sufficient bond, although his late principal is not bound thereby. State v. Judge Orleans Paris Fifth Dist. Ct. 27 La. Ann. 306.

22. U. S.—Lutz v. Linthicum, 8 Pet. 165, 8 L. ed. 904.
Ala.—Whiteside v. Jennings, 19 Ala. 784.
Conn.—Ogden v. Raymond, 22 Conn. 379, 58 AmD 429; Sterling v. Peet, 14 Conn. 245; Mitchell v. Hazen, 4 Conn. 495, 10 AmD 169.
D. C.—Magruder v. Belt, 12 App. 151.
Me.—Stinchfield v. Little, 1 Me. 231, 10 AmD 65.
Mass.—Whiting v. Dewey, 15 Pick. 428; Sumner v. Williams, 8 Mass. 162, 208, 5 AmD 83.
N. C.—Oliver v. Dix, 21 N. C. 158; Godley v. Taylor, 14 N. C. 178; Locke v. Alexander, 9 N. C. 155, 11 AmD 750.

[a] **Illustration.**—In North v. Henneberry, 44 Wis. 306, there was offered in evidence a deed which purported to be by "Edward Henneberry, attorney in fact, and by virtue of a power of attorney . . . of the first part," and which concluded: "In testimony whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written; this deed is made by virtue of said power of attorney." The deed was originally signed "Edward Henneberry. [L. S.]." The execution was afterward altered so as to read as follows: "William Powers. [L. S.], B. his attorney in fact, Edward Henneberry [L. S.]." The acknowledgment was to the effect that the above named Edward Henneberry acknowledged that he executed the foregoing instrument. It was held that the deed was the deed of Henneberry, and that he was bound by the covenant therein contained, and that after acquired title to the land conveyed inured to the benefit of his grantee. As to the alteration, it was held that its effect was to change the whole character of the deed, so that the deed, which was a deed of Henneberry personally, became the deed of his principal.

23. Hunter v. Miller, 6 B. Mon. (Ky.) 612 (holding that where an agent contracting for his principals agreed for the relinquishment of a title which he professed not to hold but recited to be in his principals, and which he stipulated that his principals should release on payment of a certain sum, and signed and sealed the contract as agent, the contract was not personally binding on the agent); Ellis v. Pulsifer, 4 Allen (Mass.) 165; Abbey v. Chase, 6 Cush. (Mass.) 54; Grubbs v. Wiley, 17 Miss. 29; Hopkins v. Mehaffy, 11 Serg. & R. (Pa.) 126. See also supra § 333.

24. Sheldon v. Dunlap, 16 N. J. L. 245.

25. **Void or defective instruments** as evidence generally see Evidence [17 Cyc 363].

26. Cobb v. Arnold, 8 Metc. (Mass.) 398.

27. Bellas v. Hays, 5 Serg. & R. (Pa.) 427, 9 AmD 385.

28. Sherman v. New York Cent. R. Co., 22 Barb. (N. Y.) 239; Osborne v. High Shoals Min., etc., Co., 50 N. C. 177.

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evidence of a contract by the principal under which plaintiff may recover in assumpsit;[29] but it is not admissible as a basis of recovery in an action by the principal founded on the contract itself.[30]

IX. DELEGATION OF AUTHORITY.

[§ 342] **A. General Rule.**[31] The general rule is that an agent in whom is reposed trust or confidence, or who is required to exercise discretion or judgment, may not intrust the performance of his duties to another without the consent of his principal, and, since nearly all acts of agency involve discretion, and the very selection as agent ordinarily implies personal confidence in the agent chosen, it follows that one clothed with authority to act for a principal must ordinarily perform the act himself, and cannot without the principal's consent delegate it to another;[32] or, as is frequently stated, an agent cannot delegate powers calling for the exercise of discretion, skill, or judgment,[33] or to do

29. Damon v. Granby, 2 Pick. (Mass.) 345; Shuetze v. Bailey, 40 Mo. 69; Purviance v. Sutherland, 2 Oh. St. 478; Heidelberg School Dist. v. Horst, 62 Pa. 301.

30. Schaefer v. Henkel, 75 N. Y. 378, 7 AbbNCas 1, 57 HowPr 97.

31. **Authority to make contracts of employment** see supra §§ 306-309.

32. U. S.—Warner v. Martin, 11 How. 209, 13 L. ed. 667; Shankland v. Washington, 5 Pet. 390, 8 L. ed. 166; Bancroft v. Scribner, 72 Fed. 988, 21 CCA 352; Howe Sewing-Mach. Co. v. Rosensteel, 24 Fed. 583; Ex p. Winsor, 30 F. Cas. No. 17,884, 3 Story 411.

Ala.—Springfield F., etc., Ins. Co. v. De Jarnett, 111 Ala. 248, 19 S 995; Waldman v. North British, etc., Ins. Co., 91 Ala. 170, 8 S 666, 24 AmSR 883; Loeb v. Drakeford, 75 Ala. 464; Harralson v. Stein, 50 Ala. 347; Mound City Mut. L. Ins. Co. v. Huth, 49 Ala. 529; Couthway v. Berghaus, 25 Ala. 393.

Ariz.—King v. Hawkins, 2 Ariz. 358, 16 P 434.

Ark.—Bromley v. Aday, 70 Ark. 351, 68 SW 32.

Cal.—McCarty v. Fremont, 23 Cal. 196; Johnson v. Pacific Mail Steamship Co., 5 Cal. 407.

Colo.—Ware v. Mosher, 52 Colo. 318, 121 P 751; Vescelius v. Martin, 11 Colo. 391, 18 P 338.

Conn.—Davis v. King, 66 Conn. 465, 34 A 107, 50 AmSR 104.

Ill.—Doggett v. Greene, 254 Ill. 134, 98 NE 219, AnnCas1913B 1166 [rev 163 Ill. A. 369]; Ingraham v. Whitmore, 75 Ill. 24; Eldridge v. Holway, 18 Ill. 445.

Iowa.—Ruthven v. American F. Ins. Co., 92 Iowa 316, 60 NW 663; Renwick v. Bancroft, 56 Iowa 527, 9 NW 367; Loomis v. Simpson, 13 Iowa 532.

Ky.—Jones v. Brand, 106 Ky. 410, 50 SW 679, 20 KyL 1997; Jones v. Jones, 39 SW 251, 19 KyL 129; Lynn v. Burgoyne, 13 B. Mon. 400.

Md.—Carroll v. Manganese Safe Co., 111 Md. 252, 73 A 665; White v. Davidson, 8 Md. 169, 63 AmD 699; Wilson v. York, etc., R. Co., 11 Gill & J. 58.

Mass.—Murray v. Postal Tel.-Cable Co., 210 Mass. 188, 96 NE 316; AnnCas1912C 1183; Connor v. Parker, 114 Mass. 331; Appleton Bank v. McGilvray, 4 Gray 518, 64 AmD 92; Dorchester, etc., Bank v. New England Bank, 1 Cush. 177; Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 AmD 66; Stoughton v. Baker, 4 Mass. 522, 3 AmD 236.

Miss.—Mayer v. McLure, 36 Miss. 389, 72 AmD 190.

Mo.—Chouteau Land, etc., Co. v. Chrisman, 204 Mo. 371, 102 SW 973; Stone v. State, 12 Mo. 400; Meux v. Haller, (A.) 162 SW 688; Hodkinson v. McNeal Mach. Co., 161 Mo. A. 87, 91, 142 SW 457 [cit Cyc]; Winkleblack v. National Exch. Bank, 155 Mo. A. 1, 13, 136 Sw 712 [cit Cyc]; Craver v. House, 138 Mo. A. 251, 120 SW 686; Bowman v. Lickey, 86 Mo. A. 47; McClure v. Mississippi Valley Ins. Co., 4 Mo. A. 148.

Mont.—Underwood v. Birdsell, 6 Mont. 142, 9 P 922.

Nebr.—Furnas v. Frankman, 6 Nebr. 429.

N. H.—Wright v. Boynton, 37 N. H. 9, 72 AmD 319; Moor v. Wilson, 26 N. H. 332; Hanson v. Rowe, 26 N. H. 327; Curry v. Rogers, 21 N. H. 247; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 AmD 203; Flanders v. Lamphear, 9 N. H. 201; Jaffrey v. Mt. Vernon, 8 N. H. 486.

N. J.—Titus v. Cairo, etc., R. Co., 46 N. J. L. 393.

N. Y.—Cullinan v. Bowker, 180 N. Y. 93, 72 NE 911 [aff 88 App. Div. 170, 84 NYS 696]; Newton v. Bronson, 13 N. Y. 587, 67 AmD 89; Peo. v. Public Service Commn., 143 App. Div. 769, 128 NYS 384 [aff 202 N. Y. 547 mem, 95 NE 1137 mem]; Merrill v. Farmers' L. & T. Co., 24 Hun 297; Daly v. Stetson, 54 N. Y. Super. 202 [aff 118 N. Y. 269, 23 NE 369]; Bonwell v. Howes, 15 Daly 43, 2 NYS 717 [rev 1 NYS 435]; Commercial Bank v. Norton, 1 Hill 501; Lyon v. Jerome, 26 Wend. 485, 37 AmD 271.

N. C.—Planters', etc., Bank v. Wilmington First Nat. Bank, 75 N. C. 534.

Or.—U. S. National Bank v. Brogan First Trust, etc., Bank, 60 Or. 266, 119 P 343; Patterson v. Portland Smelting Works, 35 Or. 96, 56 P 407.

Pa.—Locke's App., 72 Pa. 491, 13 AmR 716; Mechanics' Bank v. Fisher, 1 Rawle 341; Breen v. Miehle Printing Press, etc., Co., 8 Pa. Dist. 151, 22 Pa. Co. 275; Peabody Bldg. Assoc. v. Houseman, 7 WklyNC 193.

S. C.—Entz v. Mills, 26 S. C. L. 453.

Tenn.—Merchants' Nat. Bank v. Trenholm, 12 Heisk. 520; Campbell v. Reeves, 3 Head 226.

Tex.—McCormick v. Bush, 38 Tex. 314; Smith v. Sublett, 28 Tex. 163; Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953; White v. San Antonio Waterworks Co., 9 Tex. Civ. A. 465, 29 SW 252.

Vt.—In re Municipal Charters, 86 Vt. 562, 86 A 307; Lyman v. Burlington, 22 Vt. 131; Hunt v. Douglass, 22 Vt. 128.

Wash.—Bleecker v. Satsop R. Co., 3 Wash. 77, 27 P 1073.

W. Va.—Rohrbough v. U. S. Express Co., 50 W. Va. 148, 40 SE 398, 88 AmSR 849; Smith v. Lowther, 35 W. Va. 300, 13 SE 999.

Wis.—Puffer v. Welch, 144 Wis. 506, 511, 129 NW 525, AnnCas1912A 1120 [cit Cyc]; McKinnon v. Vollmar, 75 Wis. 82, 43 NW 800, 17 AmSR 178, 6 LRA 121.

Eng.—Bell v. Balls, [1897] 1 Ch. 663; Catlin v. Bell, 4 Campb. 188; Blore v. Sutton, 3 Meriv. 237, 36 Reprint 91; Henderson v. Barnewall, 1 Y. & J. 387.

Can.—Canadian F. Ins. Co. v. Robinson, 31 Can. S. C. 488; Summers v. Commercial Union Assur. Co., 6 Can. S. C. 19; Edgar v. Caskey, 7 DomLR45, 22 WestLR 91.

Ont.—Bank of British North America v. Rattenbury, 1 Ch. Chamb. (U. C.) 65; Masecar v. Chambers, 4 U. C. Q. B. 171.

[a] **"Generally speaking** the appointment of an agent does not authorize the agent to appoint a subagent unless that power is granted in the appointment." Hodkinson v. McNeal Mach. Co., 161 Mo. A. 87, 91, 142 SW 457.

[b] **Where an agent for several fire insurance companies,** as part of a contract of the sale of his agency, agreed with others to procure for them authority to represent such companies, the consent of the companies to the agency is a condition precedent to the agent's liability on the contract, and, upon their refusal to give such consent, he will not be liable. Kelsey v. Distler, 141 App. Div. 78, 125 NYS 602.

33. U. S.—North America Ins. Co. v. Wisconsin Cent. R. Co., 134 Fed. 794, 67 CCA 300; Bancroft v. Scribner, 72 Fed. 988, 21 CCA 352.

Ark.—Lanier v. Little Rock Cooperage Co., 88 Ark. 557, 115 SW 401 (power to inspect staves).

Ga.—Allen v. Confederate Pub. Co., 121 Ga. 773, 49 SE 782.

Ind.—New v. Germania F. Ins. Co., 171 Ind. 33, 85 NE 703, 131 AmSR 245.

Iowa.—Kinkead v. Hartley, 143 NW 591.

Md.—Groscup v. Downey, 105 Md. 273, 65 A 930.

Mo.—Brown v. Railway Pass. Assur. Co., 45 Mo. 221; Neiner v. Altemeyer, 68 Mo. A. 243.

Mont.—Trent v. Sherlock, 24 Mont. 255, 61 P 650.

Nebr.—Home F. Ins. Co. v. Garbacz, 48 Nebr. 827, 67 NW 864.

N. H.—Gillis v. Bailey, 21 N. H. 149.

N. Y.—Cullinan v. Bowker, 180 N. Y. 93, 72 NE 911; Binghamton First Nat. Bank v. Commercial Travelers' Home Assoc., 108 App. Div. 78, 95 NYS 454 [aff 185 N. Y. 575 mem, 78 NE 1103 mem]; Lyon v. Jerome, 26 Wend. 485, 37 AmD 271.

Or.—Patterson v. Portland Smelting Works, 35 Or. 96, 56 P 407.

R. I.—Silver Hook Road v. Greene, 12 R. I. 164.

S. D.—Fargo v. Cravens, 9 S. D. 646, 70 NW 1053.

Wis.—Kohl v. Beach, 107 Wis. 409, 83 NW 657, 81 AmSR 849, 50 LRA 600.

Eng.—In re County Palatine Loan, etc., L. R. 9 Ch. 691; Alexander v. Alexander, 2 Ves. 640, 28 Reprint 408, 21 ERC 415.

Can.—Canadian F. Ins. Co. v. Robinson, 31 Can. S. C. 488.

[a] **Agency to make transportation contracts.**—(1) In Pendall v. Rench, 19 F. Cas. No. 10, 917, 4 McLean 259, the court held that an agency to make contracts for transportation was one of special trust and confidence, and could not be discharged by a substitute; and where the agent swore that he had made the contracts for transportation, and had adopted the signature of his confidential clerk to the bills of lading, the court permitted the bills to go to the jury, not as bills of lading, but as part of the deposition of the agent, showing the contract for the transportation. (2) But where the general freight agent of several steamboat companies with authority to issue bills of lading gave authority to persons at different points along the route to sign blank bills of lading which he furnished to them, the principals were bound, as the necessity of the case authorized the general agent to delegate his authority. Bennitt v. The Guiding Star, 53 Fed. 936 [aff 62 Fed. 408].

[b] **Statutes affecting rule.**—(1) Under the Montana statute, Civ. Code (1895) § 3140, regulating the delegation of authority by an agent, it was held that, where an agent was authorized to hire a physician to attend an injured person, such agent

acts that are not merely clerical, mechanical, or ministerial in their nature.[34]

Who may invoke rule. This rule avails for the advantage of the principal and not of the agent, and the latter cannot invoke its aid either to acquire rights, or to escape liability to the third person, or to the principal;[35] nor can a third person, who has dealt with the subagent as one having authority, set up, as against the principal, that the subagent's appointment was unauthorized.[36]

[§ 343] **B. Applications of Rule—1. In General.**[37] Among the powers which ordinarily have been held to be of such a nature as may not be delegated may be mentioned authority to give or receive negotiable paper,[38] or to accept a bill for accommodation;[39] to loan money;[40] to settle a claim;[41] to sign a memorandum within the statute of frauds;[42] to compromise a suit;[43] to purchase[44] or sell personalty;[45] to lease[46] or sell real estate;[47] to arrange for the insurance of property;[48] or to manage or superintend the principal's property or business,[49] unless the extent of the agent's duties makes such assistance necessary, as frequently is the case where there is a general agency.[50]

had no authority to delegate to the physician authority to employ another physician to assist him. Bond v. Hurd, 31 Mont, 314, 78 P 579, 3 AnnCas 566 and note. (2) Under the California civil code (1901) § 2349, which makes certain exceptions to the general rule that an agent's authority may not be delegated, it was held that a person employed to secure a tenant for a ranch did not come within the exceptions. Fairchild v. King, 102 Cal. 320, 36 P 649.

34. Fairchild v. King, 102 Cal. 320, 36 P 649 (holding that one employed to secure a tenant may not delegate his authority); Terre Haute, etc., R. Co. v. Brown, 107 Ind. 336, 8 NE 218; Bonwell v. Howes, 15 Daly 43, 2 NYS 717; Smith v. Sublett, 28 Tex. 163 (holding that authority to locate a land certificate involves discretion).

35. Harralson v. Stein, 50 Ala. 347 (where an agent sued a third person and sought to avoid the effect of the act of the subagent, and the court held that the legal maxim that an agent cannot delegate his authority to a subagent is not of universal application, and can be invoked only by the principal when sought to be charged by the act of the subagent); Peterson v. Christensen, 26 Minn. 377, 4 NW 623.

36. Mayer v. McLure, 36 Miss. 389, 72 AmD 190.

37. **Delegation of authority by:** Attorney at law see Attorney and Client [4 Cyc 950]; Brokers see Brokers [19 Cyc 192]; Factors see Factors [19 Cyc 119]; Insurance agents see Insurance [22 Cyc 1431]; Public officers see Officers [29 Cyc 1433].

Employment of subagents by bank see Banks and Banking [5 Cyc 502 et seq].

38. Brewster v. Hobart, 15 Pick. (Mass.) 302; Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 AmD 66; Blore v. Sutton, 3 Meriv. 237, 36 Reprint 91; Henderson v. Barnewall, 1 Y. & J. 387.

39. Lake Erie Commercial Bank v. Norton, 1 Hill (N. Y.) 501.

40. Kohl v. Beach, 107 Wis. 409, 83 NW 657, 81 AmSR 849, 50 LRA 600 (holding that, where a principal employed an agent to loan money for him at a certain rate of interest and to conduct the business in every way as though it were his own, the agent had no authority to appoint a subagent for the principal).

41. Fargo v. Cravens, 9 S. D. 646, 70 NW 1053 (holding that one authorized by the holder of a note to make a proposition to the maker to accept property in payment on certain terms has no authority to employ a subagent to transact the business).

42. Henderson v. Barnewall, 1 Y. & J. 387; Stevenson v. Smith, 13 B. C. 213, 7 WestLR 161.

Statute of frauds.—Signature by agent see Frauds, Statute of [20 Cyc 275].

43. New York v. Dubois, 132 Fed. 752, 65 CCA 590; New York v. Du Bois, 86 Fed. 889.

44. Birch v. Powell, 15 KyL 445 (holding that one employed as agent to purchase railroad ties does not have by virtue of that employment power to employ a subagent to make purchases for the principal and to bind the principal to pay the compensation agreed on between the agent and the subagent for the services of the latter).

45. Ga.—National Cash Register Co. v. Ison, 94 Ga. 463, 21 SE 228 (holding that one employed to sell goods paying his own expenses, has no authority by virtue of his power as agent to employ others at the expense of his principal).

Ill.—Fudge v. Seckner Contracting Co., 80 Ill. A. 35.

Ind.—Lucas v. Rader, 29 Ind. A. 287, 64 NE 488 (holding that an attorney with whom a brother attorney leaves a set of law books to be sold cannot delegate his authority to another).

Ky.—Barret v. Rhem, 6 Bush 466.

Mo.—Atlee v. Fink, 75 Mo. 100, 42 AmR 385; Hodkinson v. McNeal Mach. Co., 161 Mo. A. 87, 142 SW 457.

Tex.—National Cash Register Co. v. Hagan, 37 Tex. Civ. A. 281, 83 SW 727.

Eng.—Catlin v. Bell, 4 Campb. 183.

[a] **In the absence of restriction** the power to sell implies the power to receive and transmit the price to the principal, and hence an agent authorized to receive the price cannot appoint a subagent to make the sale in view of the confidence so vested in him. Hodkinson v. McNeal Mach. Co., 161 Mo. A. 87, 142 SW 457.

[b] **Bailees with power of sale** have a trust which may not be delegated. Barret v. Rhem, 6 Bush (Ky.) 466; Hunt v. Douglass, 22 Vt. 128.

46. Blore v. Sutton, 3 Meriv. 237, 36 Reprint 91.

47. Ark.—Bromley v. Aday, 70 Ark. 351, 68 SW 32 (holding that an agent authorized to sell real estate could not delegate his authority to a subagent, as he must have been regarded by his principal as having a special fitness for the responsibility imposed upon him).

Kan.—Topliff v. Shadwell, 64 Kan. 884, 67 P 545; Hanback v. Corrigan, 7 Kan. A. 479, 54 P 129.

Ky.—Floyd v. Mackey, 112 Ky. 646, 66 SW 518, 23 KyL 2030 (holding that an agent to sell land had no power to delegate his authority to his son, and that the principal was not bound by a sale made by the son).

Md.—Groscup v. Downey, 105 Md. 273, 65 A 930.

N. Y.—Newton v. Bronson, 13 N. Y. 587, 67 AmD 89; Southack v. Ireland, 109 App. Div. 45, 95 NYS 621; Carroll v. Tucker, 2 Misc. 397, 21 NYS 952.

Oh.—Bocock v. Pavey, 8 Oh. St. 270 (holding that an agent having a power of attorney to sell real estate cannot by a similar power delegate that authority to another).

Tex.—Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953; Tynan v. Dullnig, Civ. A. 25 SW 465, 818.

Compare infra § 347; Stinchcomb v. Marsh, 15 Gratt. (56 Va.) 202.

[a] **An agent to sell land cannot, without special authority** bind his principal by the employment of a broker by a promise of commission, to effect the sale, although the customary method of selling land in the city where the transaction occurs is by means of a broker. Bonwell v. Howes, 15 Daly 43, 2 NYS 717 [rev 1 NYS 435].

[b] **Where a real estate agent has power only to collect and remit** rents and pay taxes and receive offers for the property, he has no authority to appoint a subagent to sell the property. Jones v. Brand, 106 Ky. 410, 50 SW 679, 20 KyL 1997.

[c] **A general agent respecting the control and sale** of real estate may bind his principal by the employment of a broker for the sale thereof, notwithstanding the principal's instruction to the agent that she will not consent to the allowance of broker's commissions. Gold v. Serrell, 6 Misc. 124, 26 NYS 5 [aff 2 Misc. 224, 21 NYS 1078].

[d] **An executor** has authority to employ an agent to find a purchaser for land, and to pay to him an agreed commission therefor; but he cannot delegate to him a discretion as to the terms of sale. Dyer v. Winston, 33 Tex. Civ. A. 412, 77 SW 227.

48. North American Ins. Co. v. Wisconsin Cent. R. Co., 134 Fed. 794, 67 CCA 300 (holding that a person authorized by a corporation to act in its behalf as to all matters pertaining to the insurance of its property, including the fixing of rates and the acceptance and cancellation of policies, cannot delegate his power to another, without the corporation's consent, express or implied).

49. Crozier v. Reins, 4 Ill. A. 564.

50. Ala.—North American Ins. Co. v. Thornton, 130 Ala. 222, 30 S 614, 55 LRA 547 [dist Springfield F. & M. Ins. Co. v. De Jarnett, 111 Ala. 248, 19 S. 995; Waldman v. North British, etc., Ins. Co., 91 Ala. 170, 8 S 666, 24 AmSR 883].

Ga.—Louisville, etc., R. Co. v. Tift, 100 Ga 86, 27 SE 765 (holding that if a general agent of a corporation, having ostensible authority to bind it as such in carrying out a contract made by himself for his principal with another, who acts upon the faith that the agency is general, employs a subagent to attend to mere matters of detail within the scope of the contract, the principal will be bound by the acts of the subagent thus performed, especially if it appears that these acts were ratified by the general agent himself).

N. Y.—Bodine v. Exchange F. Ins. Co., 51 N. Y. 117, 10 AmR 566; McConnell v. Mackin, 22 App. Div. 537, 48 NYS 18; Kuney v. Amazon Ins. Co., 36 Hun 66.

Oh.—Krumm v. Jefferson F. Ins. Co., 40 Oh. St. 225.

Tex.—Wright v. Isaacks, 43 Tex. Civ. A. 223, 95 SW 55; Ladonia Dry Goods Co. v. Conyers, (Civ. A.) 58 SW 967.

Utah.—Fritz v. Western Union Tel. Co., 25 Utah 263, 71 P 209.

W. Va.—Rohrbough v. U. S. Express Co., 50 W. Va. 148, 40 SE 393, 88 AmSR 849; Deitz v. Providence Washington Ins. Co., 33 W. Va. 526, 11 SE 50, 25 AmSR 908.

Wis.—Garlick v. Morley, 147 Wis. 397, 132 NW 601 (holding that, where one apparently clothes another with authority to represent him generally, or in a particular line of business, he

[§ 344] **2. Collection Agents.** As a general rule an agency to collect and receive money is one of personal trust and confidence, and therefore cannot be delegated to another,[51] unless the agent is specially authorized to do so;[52] but this rule does not apply to a general agency to take charge of and manage the business of a principal.[53] A collecting agency which undertakes to make collections at all points in the country through local agents and attorneys whom it employs and represents as skillful and reliable is responsible for the negligence of an attorney whom it employs on terms known only to itself;[54] but when the agent employed is not a collection agent, and collecting is no part of his regular business, it has been held with good reason that impliedly his undertaking is merely to forward the paper to a suitable collecting agent in the place where it is to be collected.[55]

[§ 345] **3. Joint Agents.** It has been shown that joint agents must act jointly, and that the principal will not be bound by the act of less than the whole number.[56] This is but an application of the principle that delegated power cannot be delegated. Several joint agents cannot delegate to one of their number the performance of the duties intrusted to them jointly.[57]

[§ 346] **C. Exceptions to Rule—1. Express Authority to Delegate; Ratification.** Clearly subagents may be appointed when their appointment has been expressly authorized by the principal,[58] and in some jurisdictions this exception is expressly provided for by statute.[59] In such a case the agent assumes no liability for the acts of the subagent[60] who is directly accountable to the principal.[61] The principal's consent to look to the subagent will be presumed when he knowingly assents to the substitution of another in place of the agent he appointed.[62]

A subsequent ratification by the principal of the appointment of a subagent is of course equally effective with a prior consent to justify the delegation of authority, and to establish a direct agency relation between the principal and the subagent.[63]

is bound by contracts made by the latter within the scope of his apparent authority, including the making of subagency contracts); Johnston v. Chicago, etc., R. Co., 130 Wis. 492, 110 NW 424 (holding that a general agent of a railway company who had authority to look after the safety of passenger cars and to investigate any damage done to them, and who sometimes made the investigation himself and sometimes through subordinates and did not get special authority from his superior officers for each investigation but had such authority as general agent, could give a watchman, employed by the company authority to make the investigation).

See also infra § 347.

[a] **Where the proper transaction and carrying on of business requires the services of subagents,** an agent has authority to appoint subagents, and the acts performed by subagents so appointed, in the discharge of the duties conferred on the agent, are binding upon the principal. North American Ins. Co. v. Thornton, 130 Ala. 222, 30 S 614, 89 AmSR 30, 55 LRA 547.

[b] **Manager of business.**—It is within the scope of the authority of the general manager of a mercantile establishment to employ subagents. Ladonia Dry-Goods Co. v. Conyers, (Tex. Civ. A.) 58 SW 967.

51. Hodkinson v. McNeal Mach. Co., 161 Mo. A. 87, 91, 142 SW 457 [cit Cyc]; Fellows v. Northrup, 39 N. Y. 117; Lewis v. Ingersoll, 3 Abb. Dec. (N. Y.) 55, 1 Keyes 347; McConnell v. Mackin, 22 App. Div. 537, 48 NYS 18; Talcott v. Cowdry, 17 Misc. 333, 39 NYS 1076; Stephens v. Badcock, 3 B. & Ad. 354, 23 ECL 160, 110 Reprint 133; Bank of British North America v. Rattenbury, 1 Ch. Chamb. (U. C.) 65; Masecar v. Chambers, 4 U. C. Q. B. 171.

[a] **Cannot assign for collection.**—(1) An agent to collect has no implied authority to assign the debt to a third person to collect. Rigby v. Lowe, 125 Cal. 613, 58 P 153. (2) Thus in California a special agent, with general power for the collection of a claim, cannot delegate his authority by assignment so as to invest his assignee with power to sue thereon, as Civ. Code § 2349 provides that an agent can delegate his authority, when not specially authorized, where the act to be done is purely mechanical, and the power to bring a suit implies the power to control it and is more than a mechanical act. Dingley v. McDonald, 124 Cal. 682, 57 P 574.

[b] **The mere clerical act of receiving and paying over money,** it has been held, is not one involving a personal trust and confidence, and may be delegated. Grinnell v. Buchanan, 1 Daly (N. Y.) 538.

52. Wilson v. Smith, 3 How. (U. S.) 763, 11 L. ed. 820 (holding that, whenever by express agreement between the parties a subagent is to be employed by an agent to receive money, payment to him is good). See generally infra § 346.

53. McConnell v. Mackin, 22 App. Div. 537, 48 NYS 18 (holding that the rule that an agency to collect and receive money is one of personal trust and confidence, and therefore not to be delegated to another without authorization, is applicable to special authority, but not to a general agency to take charge of and manage the business of a principal).

54. Weyerhauser v. Dun, 100 N. Y. 150, 2 NE 274 [rev 16 NYWklyDig 412]; Bradstreet v. Everson, 72 Pa. 124, 13 AmR 665. See also infra § 391.

[a] **A collection agency, which is defined** as a concern which collects all kinds of claims for others, to whom it renders accounts, guarantees to use its best endeavors to collect the claims and to select a competent and reliable attorney when suit is necessary, for whose negligence, dishonesty, or unauthorized acts it will save the creditor harmless. McCarthy v. Hughes, (R. I.) 88 A 984.

55. Wilson v. Smith, 3 How. (U. S.) 763, 11 L. ed. 820; Davis v. King, 66 Conn. 465, 34 A 107, 50 AmSR 104 and note; Willison v. Smith, 52 Mo. A. 133 (holding that a person authorized to collect a note for the payee, but himself residing at a point far distant from the place of payment, has implied authority to indorse it in the name of the payee to a resident of the place of payment for collection).

Bank as collecting agent see Banks and Banking [5 Cyc 493].

56. See supra §§ 318, 319.

57. Loeb v. Drakeford, 75 Ala. 464; White v. Davidson, 8 Md. 169, 63 AmD 699; Cook v. Ward, 2 C. P. D. 255; Wilson v. Dennison, Ambl. 82, 27 Reprint 52; Atty.-Gen. v. Scott, 1 Ves. 413, 27 Reprint 1113.

58. Cal.—McConnell v. McCormick, 12 Cal. 142 (holding that where a principal wrote to his general agent, "You will do better by getting new . . . agents," new subagents might be appointed).

Conn.—Davis v. King, 66 Conn. 465, 34 A 107, 50 AmSR 104 and note.

Mass.—Appleton Bank v. McGilvray, 4 Gray 518, 64 AmD 92; Brewster v. Hobart, 15 Pick. 302.

Mo.—Meux v. Haller, (A.) 162 SW 688.

N. Y.—National Steamship Co. v. Sheahan, 122 N. Y. 461, 25 NE 858, 10 LRA 782.

S. C.—Blowers v. Southern R. Co., 74 S. C. 221, 54 SE 368.

Tenn.—Duluth Nat. Bank v. Knoxville F. Ins. Co., 85 Tenn. 76, 1 SW 689, 4 AmSR 744.

Va.—Stinchcomb v. Marsh, 15 Gratt. (56 Va.) 202.

Eng.—Coles v. Trecothick, 9 Ves. Jr. 234, 32 Reprint 592.

[a] **If there is direct authority to employ subagents,** it is not material whether it is within the apparent scope of the agent's authority. International Harvester Co. v. Campbell, 43 Tex. Civ. A. 421, 96 SW 93.

59. See statutory provisions. See also Bond v. Hurd, 31 Mont. 314, 78 P 579, 3 AnnCas 566; Fanset v. Garden City State Bank, 24 S. D. 248, 123 NW 686.

60. U. S.—Dun v. Birmingham City Nat. Bank, 58 Fed. 174, 7 CCA 152, 23 LRA 687 [rev 51 Fed 160].

Mass.—Fiske v. Fisher, 100 Mass. 97.

Pa.—Sergeant v. Emlen, 141 Pa. 580, 21 A 663.

S. C.—McCants v. Wells, 4 S. C. 381.

Tenn.—Louisville, etc., R. Co. v. Blair, 4 Baxt. 407.

Eng.—Gosling v. Gaskell, [1897] A. C. 575.

61. Wilson v. Smith, 3 How. (U. S.) 763, 11 L. ed. 820; Hoag v. Graves, 81 Mich. 628, 46 NW 109; Commercial, etc., Bank v. Jones, 18 Tex. 811. See also infra § 352.

62. Dingley v. McDonald, 124 Cal. 682, 57 P 574; Albany Land Co. v. Rickel, 162 Ind. 222, 70 NE 158 (holding that assent by the principal to the assignment of a contract of agency is equivalent to an agreement to substitute the assignee as agent); Hornbeck v. Gilmer, 110 La. 500, 34 S 651 (holding that a special agent who employs another to assist in effecting a sale, to the knowledge and with the approval of his principal, binds the principal to pay the fee of which the seller had knowledge, and which was promised to the one thus employed).

63. Lucas v. Rader, 29 Ind. A. 287, 64 NE 488; Booth v. Majestic Mfg. Co., 105 Mich. 562, 63 NW 524; McCormick v. Bush, 2 Tex. Unrep. Cas 412 (holding that, where an agent without authority constitutes a third person a subagent, and the principals afterward acknowledge and treat him as their agent, he must be considered as such); Dewing v. Hutton, 48 W. Va. 576, 37 SE 670 (holding that, where a person employs an agent to buy up timberlands, and such agent engages the services of another for a certain compensation agreed between them, the principal cannot escape the payment of such compensation if he accepts the purchases secured thereby).

But the mere fact that the principal knew of the employment of the subagent and acquiesced therein is not a ratification, if there is nothing to show that he understood that the subagent was employed as his agent and not as the agent of the primary agent,[64] particularly where it is expressly stipulated that subagents shall be employed as the agents of the general agent, and that the latter shall be responsible for their acts.[65]

[§ 347] 2. **Authority Implied from Nature of Agency.** Express authority to appoint subagents is not always necessary, as such authority is usually to be implied when the agency obviously and from its very nature is such as to make the employment of subagents necessary and proper. In such cases the employment of subagents is presumed to have been contemplated when the power was given, and the agent has implied authority to appoint such subagents within the limits of the necessities of the case,[66] and in some jurisdictions it is expressly provided by statute that an agent may delegate his authority when it is such that he cannot himself perform it.[67] Accordingly, whenever the agent can show that the instructions of his principal could not have been properly executed without the employment of subagents, he will be warranted in delegating so much of his authority as the character of the agency demands.[68] Thus, where an agent is appointed to sell land located at a distance it is necessarily implied that he has authority to appoint subagents to effect a sale;[69] the converse of the proposition is equally true, and an agent has no implied power to delegate his power to a subagent when such delegation is not necessary, proper, or usual.[70] Authority to delegate may also be implied when it is shown that the principal knew of the agent's intention to delegate.[71] The agent incurs no liability for the acts of such subagents if chosen with reasonable care,[72] and the principal is bound by the acts of a subagent so employed, even though he has no personal knowledge of him.[73] The mere fact, however, that the employment of a subagent is nec-

Ratification generally see supra §§ 77-146.

64. Barnard v. Coffin, 141 Mass. 37, 6 NE 364, 55 AmR 443; Tynan v. Dullnig, (Tex. Civ. A. 1894) 25 SW 465, 818; Skinner v. Weguelin, Cab. & E. 12.

65. Union Casualty, etc., Co. v. Gray, 114 Fed. 422, 52 CCA 224.

66. U. S.—Wilson v. Smith, 3 How. 763, 11 L. ed. 820.

Ala.—Insurance Co. of North America v. Thornton, 130 Ala. 222, 30 S 614, 89 AmSR 30, 55 LRA 547; Schloss v. Gibson Dry Goods Co., 6 Ala. A. 155, 60 S 436.

Cal.—McConnell v. McCormick, 12 Cal. 142; Corcoran v. Hinkle, 4 Cal. Unrep. Cas. 360, 34 P 1031.

Conn.—Davis v. King, 66 Conn. 465, 34 A 107, 50 AmSR 75; East Haddam Bank v. Scovil, 12 Conn. 303.

Ill.—Delawder v. Jones, 99 Ill. A. 301 (holding that, where a father, after his wife's death, left his children in care of his daughter, with directions to dispose, as best she could, of the property left, and such daughter, because of her inexperience, procured a relative to coöperate with her and dispose of the property, applying the proceeds to the payment of debts, such father cannot recover the property from the purchaser, on the ground that if such daughter was appointed as his agent to sell the property it was a personal trust reposed in her, which could not be delegated).

Ind.—Tippecanoe L. & T. Co. v. Jester, 101 NE 915.

Iowa.—White v. Elgin Creamery Co., 108 Iowa 522, 79 NW 283.

Ky.—Gaither v. O'Doherty, 12 SW 306, 11 KyL 594.

La.—Hum v. Union Bank, 4 Rob. 109.

Md.—Dentzel v. City, etc., R. Co., 90 Md. 434, 45 A 201; Northern Cent. R. Co. v. Bastian, 15 Md. 494.

Mass.—Murray v. Postal Tel. Cable Co., 210 Mass. 188, 96 NE 316, AnnCas1912C 1183; Dorchester, etc., Bank v. New England Bank, 1 Cush. 177.

Mo.—Hodkinson v. McNeal Mach. Co., 161 Mo. A. 87, 142 SW 457; Willison v. Smith, 52 Mo. A. 133.

Nebr.—Breck v. Meeker, 68 Nebr. 99, 93 NW 993.

N. Y.—McConnell v. Mackin, 22 App. Div. 537, 48 NYS 18; Raney v. Weed, 5 N. Y. Super. 577.

N. C.—Planters', etc., Nat. Bank v. Wilmington First Nat. Bank, 75 N. C. 534.

N. D.—Kuhnert v. Angell, 10 N. D. 59, 84 NW 579, 88 AmSR 675.

Oh.—Krumm v. Jefferson F. Ins. Co., 40 Oh. St. 225.

S. C.—Blowers v. Southern R. Co., 74 S. C. 221, 54 SE 368.

S. D.—Fanset v. Garden City State Bank, 24 S. D. 248, 123 NW 686.

Tex.—Barnes v. Downes, 2 Tex. A. Civ. Cas. § 524. See also Wright v. Isaacks, 43 Tex. Civ. A. 223, 95 SW 55.

Utah.—Fritz v. Western Union Tel. Co., 25 Utah 263, 71 P 209.

Wash.—Lemcke v. Funk, 78 Wash. 460, 139 P 234 (holding that it was within the apparent scope of the authority of an agent of a realty company to make an agreement with another agent, whose assistance was required to make a particular sale, for a division of the commissions).

W. Va.—Rohrbough v. U. S. Express Co., 50 W. Va. 148, 40 SE 398, 88 AmSR 849; Deitz v. Providence Washington Ins. Co., 38 W. Va. 526, 11 SE 50, 25 AmSR 908.

Wis.—Shepherd v. Milwaukee Gas Light Co., 11 Wis. 234.

Eng.—Gwilliam v. Twist, [1895] 1 Q. B. 557 [app allowed [1895] 2 Q. B. 84]; De Bussche v. Alt, 8 Ch. D. 286, 2 ERC 289; Rossiter v. Trafalgar L. Assur. Assoc., 27 Beav. 377, 54 Reprint 148; Quebec, etc., R. Co. v. Quinn, 12 Moore P. C. 232 14 Reprint 899; Harris v. Fiat Motors, 22 T. L. R. 556; Dew v. Metropolitan R. Co., 1 T. L. R. 358.

Can.—Edgar v. Caskey, 7 DomLR 45, 22 West LR 91.

Ont.—Standard Realty Co. v. Nicholson, 24 Ont. L. 46, 2 OntWN 1189, 19 OntWR 373.

[a] **Authority of general agent.**—(1) The civil law rule has been held to be that under a general power an agent has a right to substitute. Dubreuil v. Rouzan, 1 Mart. N. S. (La.) 158. (2) The common-law doctrine is not so broad, although doubtless an authority might be general enough for such a purpose. Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953; Shepherd v. Milwaukee Gas Light Co., 11 Wis. 234 (holding that a general manager of a business may be clothed with such large powers as to justify an inference of authority to appoint subagents for purposes within the scope of his employment, but not specially intrusted to his discretion). See also Tennessee River Transp. Co. v. Kavanaugh, 101 Ala. 1, 13 S 283. And see supra § 342.

67. See statutory provisions. See also Bond v. Hurd, 31 Mont. 314, 78 P 579, 3 AnnCas 566; Fanset v. Garden City State Bank, 24 S. D. 248, 123 NW 686.

68. U. S.—Hartford, etc., Transp. Co. v. Plymer, 120 Fed. 624, 57 CCA 288.

Ala.—Johnson v. Cunningham, 1 Ala. 249.

Ark.—Arkadelphia Lumber Co. v. Thornton, 83 Ark. 403, 104 SW 169.

Ind.—Irwin v. Reeves Pulley Co., 20 Ind. A. 101, 48 NE 601, 50 NE 317.

Miss.—Fearn v. Mayers, 53 Miss. 458.

N. H.—Gillis v. Bailey, 21 N. H. 149.

N. Y.—Wright v. Eldred, 46 Hun 12, 11 NYSt 73, 27 NYWklyDig 249 [aff 137 N. Y. 556 mem, 33 NE 337 mem].

S. C.—McCants v. Wells, 4 S. C. 381.

Utah.—Fritz v. Western Union Tel. Co., 25 Utah 263, 71 P 209.

Wis.—Saveland v. Green, 40 Wis. 431.

Eng.—Gwilliam v. Twist, [1895] 1 Q. B. 557 [aff allowed [1895] 2 QB 84]; De Bussche v. Alt, 8 Ch. D. 286. ERC 289; Harris v. Fiat Motors, 22 T. L. R. 556; Dew v. Metropolitan R. Co., 1 T. L. R. 358.

69. Arkadelphia Lumber Co. v. Thornton, 83 Ark. 403, 104 SW 169; Fritz v. Chicago Grain, etc., Co., 136 Iowa 699, 114 NW 193 (holding that, where the land is located at a distance from the agent's place of business, he may appoint a subagent to make the sale, and the principal will be bound by the acts of such subagent); Wright v. Isaacks, 43 Tex. Civ. A. 223, 95 SW 55.

[a] **Agent in California, land in Texas.**—Where an agent to sell land lived in California and the land to be sold was located in Texas, the exigencies of the occasion implied an authority to appoint a subagent to negotiate the sale. Eastland v. Maney, 36 Tex. Civ. A. 147, 81 SW 574.

[b] **Different counties.**—The fact that an agent to sell land lives in a different county from that in which the land is located does not necessarily authorize the employment of a subagent, where the other duties of the agent are such as frequently to require him to be in the vicinity of the land. Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953.

70. Harris v. San Diego Flume Co., 87 Cal. 526, 25 P 758; Barnard v. Coffin, 141 Mass. 37, 6 NE 364, 55 AmR 443; Bell v. Balls, [1897] 1 Ch. 663. See also supra § 342.

71. Groscup v. Downey, 105 Md. 273, 65 A 930.

72. Davis v. King, 66 Conn. 465, 34 A 107, 50 AmSR 104 and note; McVeagh v. Douglass, 4 Phila. (Pa.) 69; Fanset v. Garden City State Bank, 24 S. D. 248, 123 NW 686; Louisville, etc., R. Co. v. Blair, 1 Tenn. Ch. 351.

73. U. S.—Grace v. American Cent. Ins. Co., 10 F. Cas. No. 5,648, 16 Blatchf. 433 [rev on other grounds 109 U. S. 278, 3 SCt 207, 27 L. ed. 932]; Gum v. Equitable Trust Co., 11 F. Cas. No. 5,867, 1 McCrary 51.

Ala.—Insurance Co. of North America v. Thornton, 130 Ala. 222, 30 S 614, 89 AmSR 30, 55 LRA 547.

essary is not conclusive of the principal's consent to rely on him and not the primary agent; and where it is apparent that the principal relies on his agent alone, or that he consents that such agent shall employ subagents only on his own account, the principal can continue to hold the primary agent accountable for the acts of himself and the subagent.[74]

[§ 348] **3. Performance of Ministerial or Mechanical Acts.** Where an agent is employed to do acts which do not call for the exercise of judgment or discretion, or where he has exercised his discretion and determined upon the propriety of an act, he may delegate to a subagent the execution of merely mechanical, clerical, or ministerial acts involving no judgment or discretion;[75] and the acts of such a subagent, to whom such power and authority have been delegated by the agent, are regarded as the acts of the agent himself, and are therefore as such binding on the principal.[76] In some jurisdictions this exception to the general rule is provided for by statute.[77]

Illustrative Applications. Thus an agent may delegate to another power to sign or countersign a paper which the agent has decided to execute for the principal,[78] or to act as a messenger, or to perform mere acts of manual delivery.[79] An agent authorized to indorse business paper for his principal, or to bind him by accommodation acceptances, may direct another to write them, having himself first made up his mind as to the propriety of the acts;[80] the same principal is applicable in the case of agents authorized to sign notes,[81] or bills of exchange.[82] An agent with authority to loan money may delegate to another authority to receive applications for loans.[83] So also, an agent authorized by the owners to sell lands may, having exercised his own discretion as to price and terms, after an examination of the property, delegate to his subagent authority to find a purchaser,[84] or to point

Cal.—State Bank v. Western Union Tel. Co., 52 Cal. 280.

La.—Hewes v. Lauve, 10 Mart. 21.

Md.—Hoogewerff v. Flack, 101 Md. 371, 61 A 184.

Nebr.—Breck v. Meeker, 68 Nebr. 99, 93 NW 993.

S. C.—Blowers v. Southern R. Co., 74 S. C. 221, 54 SE 368; Banks v. Southern Exp. Co., 73 S. C. 211, 53 SE 166.

74. St. Louis, etc., R. Co. v. Smith, 48 Ark. 317, 3 SW 364; Barnard v. Coffin, 141 Mass. 37, 6 NE 364, 55 AmR 443; Kohl v. Beach, 107 Wis. 409, 83 NW 657, 81 AmSR 856, 50 LRA 600; Skinner v. Weguelin, Cab. & E. 12.

75. U. S.—Estill County v. Embry, 144 Fed. 913, 75 CCA 654; Pearson v. Jamison, 19 F. Cas. No. 10,879, 1 McLean 197.

Ala.—Drum v. Harrison, 83 Ala. 384, 3 S 715.

Ark.—White-Wilson-Drew Co. v. Egelhoff, 96 Ark. 105, 131 SW 208.

Ga.—McCroskey v. Hamilton, 108 Ga. 640, 34 SE 111, 75 AmSR 79.

Iowa.—Kinkead v. Hartley, 143 NW 591; Worsley v. Ayres, 144 Iowa 676, 123 NW 353 (holding that, where an agent caused his brother to write and sign, in the principal's name, a contract with a third person, the transaction being in the presence of the agent and the other party to the contract, it was not an attempt to delegate the agent's authority as such, the brother being merely an amanuensis).

Ky.—Page v. Hardin, 8 B. Mon. 648.

Me.—Achron v. Matthews, 38 Me. 173.

Md.—Groscup v. Downey, 105 Md. 273, 65 A 930; Williams v. Woods, 16 Md. 220.

Mich.—Star line of Steamers v. Van Vliet, 43 Mich. 364, 5 NW 418.

Mo.—Grady v. American Cent. Ins. Co., 60 Mo. 116; Hodkinson v. McNeal Mach. Co., 161 Mo. A. 87, 142 SW 457; Bowman v. Lickey, 86 Mo. A. 47; Neiner v. Altemeyer, 68 Mo. A. 243.

N. H.—Hanson v. Rowe, 26 N. H. 327.

N. J.—Ryer v. Turkel, 75 N. J. L. 877, 70 A 68; Calhoon v. Buhre, 75 N. J. L. 439, 67 A 1068 (holding that the rule that an agent cannot delegate his powers unless a subagency is directly authorized or ratified by his principal, with full knowledge of the facts, has no application to acts purely ministerial); Titus v. Cairo, etc., R. Co., 46 N. J. L. 393.

N. Y.—Gibson v. National Park Bank, 98 N. Y. 87; Peo. v. Bank of North America, 75 N. Y. 547; Bodine v. New York Exch. F. Ins. Co., 51 N. Y. 117, 10 AmR 566; Covell v. Hart, 14 Hun 252; Grinnell v. Buchanan, 1 Daly 538 (which states the rule thus: The rule that an agent cannot delegate the trust or duty applies only where the act to be done involves personal trust and confidence, and calls for the agent's discretion or judgment. A mere ministerial or executive authority may be delegated by an agent to another); Lyon v. Jerome, 26 Wend. 485, 37 AmD 271; Peo. v. Smith, 20 Johns. 63.

Or.—Patterson v. Portland Smelting Works, 35 Or. 96, 56 P 407.

Tex.—Bound v. Simkins, (Civ. A.) 151 SW 572; Michael v. Crawford, (Civ. A.) 150 SW 465; Bennett v. Louisiana, etc., Lumber Co., (Civ. A.) 148 SW 1189; Wright v. Isaacks, 43 Tex. Civ. A. 223, 95 SW 55; Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953.

W. Va.—Rohrbough v. U. S. Express Co., 50 W. Va. 148, 40 SE 398, 88 AmSR 849.

Wis.—Kohl v. Beach, 107 Wis. 409, 83 NW 657, 81 AmSR 849, 50 LRA 600; McKinnon v. Vollmar, 75 Wis. 82, 43 NW 800, 17 AmSR 178, 6 LRA 121; Shepherd v. Milwaukee Gas Light Co., 11 Wis. 234.

Eng.—St. Margaret Parish Burial Bd. v. Thompson, L. R. 6 C. P. 445; Johnson v. Osenton, L. R. 4 Exch. 107; Hemming v. Hale, 7 C. B. N. S. 487, 97 ECL 487, 141 Reprint 905; Baker v. Cave, 1 H. & N. 674; Parker v. Kett, 1 Ld. Raym. 658, 91 Reprint 1338, 1 Salk. 95, 91 Reprint 88; Mason v. Joseph, 1 Smith K. B. 406; Coles v. Trecothick, 9 Ves. Jr. 234, 32 Reprint 592.

Ont.—Ovens v. Davidson, 10 U. C. C. P. 302 (holding that a line run by a subordinate and adopted by the principal surveyor is the work of the latter and must be treated as such).

See Union Garment Co. v. Newburger, 124 La. 820, 50 S 740.

[a] **Signing subscription papers.**—A person having authority to sign the name of another to a subscription paper may delegate the actual writing of the name to another. Norwich Univ. v. Denny, 47 Vt. 13.

[b] **Where plaintiff agrees with one of a firm to buy and sell stocks** on joint account, the purchases and sales to be made by the firm, the latter, when a sale has been determined on, has a right to employ a subagent for that purpose; and where the stock is sold at the market rates, and the order is faithfully carried out, it is as if made by the firm. Sims v. May, 49 Hun 607, 1 NYS 671.

[c] **Employing persons as instrumentalities to obtain information** is not delegating the authority of an agent and does not make the persons so employed agents of the principal. Williamson v. North Pac. Lumber Co., 43 Or. 337, 73 P 7. See also Pattison v. Moore, 3 Port. (Ala.) 270.

76. White-Wilson-Drew Co. v. Egelhoff, 96 Ark. 105, 131 SW 208 (holding that where an agent directs another to do mere ministerial acts in his presence or with his knowledge they become his acts); Rohrbough v. U. S. Express Co., 50 W. Va. 148, 40 SE 398, 88 AmSR 849 [cit Lingenfelter v. Phœnix Ins. Co., 19 Mo. A. 252] (holding that, while an agent has no power to delegate his agency to another or to sublet it, he may employ clerks whose acts, if done in his name and recognized by him, either specially or according to his usual mode of dealing with them will be regarded as his acts, and as such binding on the principal).

[a] **Filling blanks.**—Where one receiving from another a note, blank as to the amount, with authority to use his judgment in arriving at the sum to be inserted, exercised his judgment, and merely requested a third person to do the mechanical act of writing the sum in the note in his presence, the act of the third person was binding on the maker. White-Wilson-Drew Co. v. Egelhoff, 96 Ark. 105, 131 SW 208.

77. See statutory provisions. See also Dingley v. McDonald, 124 Cal. 682, 57 P 574; Bond v. Hurd, 31 Mont. 314, 78 P 579; Kuhnert v. Angell, 10 N. D. 59, 84 NW 579, 88 AmSR 675; Fanset v. Garden City State Bank, 24 S. D. 248, 123 NW 686.

78. Bennitt v. The Guiding Star, 53 Fed. 936; Evansville, etc., R. Co. v. Evansville, 15 Ind. 395; Cullina v. Bowker, 180 N. Y. 93, 72 NE 911; Newell v. Smith, 49 Vt. 255.

79. Couthway v. Berghaus, 25 Ala. 393 (holding that, although an agent appointed to make a tender cannot delegate his authority to another, he may make the tender by letter sent by another); Eldridge v. Holway, 18 Ill. 445 (holding that the delivery of a written notice requires no confidence, skill, discretion, or judgment, and may be deputed by the agent to a subagent); Fiske v. Fisher, 100 Mass. 97.

80. Lake Erie Commercial Bank v. Norton, 1 Hill (N. Y.) 501; Lord v. Hall, 2 C. & K. 698, 61 ECL 698; Ex p. Sutton, 2 Cox Ch. 84, 30 Reprint 39.

81. Weaver v. Carnall, 35 Ark. 198, 37 AmR 22.

82. Sayre v. Nichols, 7 Cal. 535, 68 AmD 280; Brown v. Railway Pass. Assur. Co., 45 Mo. 221; Lingenfelter v. Phœnix Ins. Co., 19 Mo. A. 252.

83. Bowman v. Lickey, 86 Mo. A. 47.

84. Triplett v. Jackson, 130 Iowa 408, 106 NW 954; Renwick v. Bancroft, 56 Iowa 527, 9 NW 367; Dyer v. Winston, 33 Tex. Civ. A. 412, 77 SW 227; Rogers v. Hewer, 1 DomLR 747, 19 WestLR 868 (holding that the fact that the donee of a power of attorney for the sale of land, which

out the land to intending purchasers.[86]

[§ 349] **4. Custom and Usage to Employ Subagent.**[86] Every man is supposed to contract with reference to the custom and usage of the business in which he engages. Hence where it is the usual custom of a trade or business to employ subagents, the principal, in the absence of proof to the contrary, is presumed to consent that agents appointed by him shall appoint subagents within the limits of such custom,[87] and this exception is recognized by statute in some jurisdictions.[88] But a custom or usage of trade will not justify the agent in departing from the express directions of his principal, by delegating his authority.[89]

[§ 350] **D. Effect of Delegation[90]—1. Responsibility of Principal for Acts of Subagent.** A subagent appointed by the express or implied authority of the principal becomes the agent of such principal,[91] provided the instructions of the principal are complied with in the appointment of the subagent,[92] and if the principal has either expressly or impliedly assented to the subagent's employment, which assent may be implied from slight circumstances, he is liable for such subagent's acts within the course of his employment;[93] this result also follows where the principal has expressly or impliedly ratified the appointment of the subagent.[94] But, eo converso, the acts of a subagent will not bind the original principal if the appointment of such subagent was not by authority expressed or implied, or was not afterward ratified by the principal.[95]

[§ 351] **2. Responsibility of Agent for Acts of**

power left to his discretion the price and terms of payment, authorized a third person to find purchasers for him at a stated price and on stated terms did not constitute a delegation to such third person of the discretion lodged in the donee).

85. Renwick v. Bancroft, 56 Iowa 527, 9 NW 367; Wright v. Isaacks, 43 Tex. Civ. A. 223, 95 SW 55; Eastland v. Maney, 36 Tex. Civ. A. 147, 81 SW 574; McKinnon v. Vollmar, 75 Wis. 82, 43 NW 800, 17 AmSR 178, 6 LRA 121.

86. See generally Customs and Usage [12 Cyc 1071].

87. U. S.—Warner v. Martin, 11 How. 209, 223, 13 L. ed. 667 (where the court said: "The utmost relaxation of the rule, Potestas delegata non potest delegare, in respect to mercantile persons, is, that a consignee or agent for the sale of merchandise may employ a broker for the purpose, when such is the usual course of business"); Wilson v. Smith, 3 How. 763, 11 L. ed. 820; Washington Bank v. Triplett, 1 Pet. 25, 7 L. ed. 37.

Ala.—Guesnard v. Louisville, etc., R. Co., 76 Ala. 453; Harralson v. Stein, 50 Ala. 347; Johnson v. Cunningham, 1 Ala. 249; Pattison v. Moore, 3 Port. 270.

Conn.—Woodbury Sav. Bank, etc., Assoc. v. Charter Oak F., etc., Ins. Co., 31 Conn. 517.

Ill.—Doggett v. Greene, 254 Ill. 134, 98 NE 219, AnnCas1913B 1166 [rev 163 Ill. A. 369].

Ky.—Lynn v. Burgoyne, 13 B. Mon. 400.

Md.—Groscup v. Downey, 105 Md. 273, 65 A 930; Northern Cent. R. Co. v. Bastian, 15 Md. 494; Newson v. Douglass, 7 Harr. & J. 417, 16 AmD 317; Jackson v. Union Bank, 6 Harr. & J. 146.

Mass.—Darling v. Stanwood, 14 Allen 504; Appleton Bank v. McGilvray, 4 Gray 518, 64 AmD 92 (holding that authority "to collect it [the note] in the ordinary way justifies the employment of subagents where that is the custom); Warren Bank v. Suffolk Bank, 10 Cush. 582; Dorchester, etc., Bank v. New England Bank, 1 Cush. 177.

Miss.—Mayer v. McLure, 36 Miss. 389, 72 AmD 190.

Nebr.—Breck v. Meeker, 68 Nebr. 99, 93 NW 993.

N. J.—Titus v. Cairo, etc., R. Co., 46 N. J. L. 393.

N. Y.—Lamson v. Sims, 48 N. Y. Super. 281; Gray v. Murray, 3 Johns. Ch. 167.

N. C.—Planters', etc., Nat. Bank v. Wilmington First Nat. Bank, 75 N. C. 534.

Pa.—Carter v. Philadelphia Coal Co., 77 Pa. 286.

Tenn.—Jackson Ins. Co. v. Partee, 9 Heisk. 296.

Tex.—Smith v. Sublett, 28 Tex. 163; White v. San Antonio Waterworks Co., 9 Tex. Civ. A. 465, 29 SW 252; Barnes v. Downes, 2 Tex. A. Civ. Cas. § 524.

W. Va.—Rohrbough v. U. S. Express Co., 50 W. Va. 148, 40 SE 398, 88 AmSR 849.

Eng.—De Bussche v. Alt, 8 Ch. D. 286, 2 ERC 289; Moon v. Witney Union, 3 Bing. N. Cas. 814, 32 ECL 374, 132 Reprint 624; Combes' Case, 9 Coke 75a, 77 Reprint 843; Ex p. Sutton, 2 Cox Ch. 84, 30 Reprint 39; Blore v. Sutton, 3 Meriv. 237, 36 Reprint 91.

Compare Segar v. Parrish, 20 Gratt. (61 Va.) 672 (holding that, where an agent authorized to sell scrip sold the scrip bona fide to F, and received the money for it before the scrip was issued, he might substitute F as attorney for the principal to enable F to obtain the scrip, and, this being the mode recognized at the land office, F did not become liable to the principals, as their agent, for the purchase money).

88. See statutory provisions. See also Bond v. Hurd, 31 Mont. 314, 78 P 579, 3 AnnCas 566; Fanset v. Garden City State Bank, 24 S. D. 248, 123 NW 686.

89. Fay v. Strawn, 32 Ill. 295; Robinson v. Mollett, L. R. 7 H. L. 802.

90. **Liability to subagent for compensation** see infra § 445.

91. U. S.—Smith v. D. O. Mills, etc., Nat. Bank, 191 Fed. 226 (under Cal. Civ. Code § 2351); Jones v. U. S., 1 Ct. Cl. 383.

Ala.—Schloss v. Gibson Dry Goods Co., 6 Ala. A. 155, 60 S 436.

Ind.—Tippecanoe L. & T. Co. v. Jester, 101 NE 915.

N. Y.—Murphy v. Emigration Com'rs, 28 N. Y. 134; Olifiers v. Belmont, 12 Misc. 160, 33 NYS 275 [aff 15 Misc. 120, 36 NYS 813].

Pa.—Bingaman v. Hickman, 115 Pa. 420, 8 A 644.

S. D.—Fanset v. Garden City State Bank, 24 S. D. 248, 123 NW 686 (holding that a subagent lawfully appointed represents the principal in the same manner as the original agent).

Eng.—Hobson v. Jones, L. R. 9 Eq. 456.

92. Buckland v. Conway, 16 Mass. 396; Perles v. Aycinena, 3 Watts & S. (Pa.) 64.

93. Cal.—State Bank v. Western Union Tel. Co., 52 Cal. 280.

Ga.—Louisville, etc., R. Co. v. Tift, 100 Ga. 86, 27 SE 765.

Iowa.—Merritt v. Huber, 137 Iowa 135, 114 NW 627; Bellinger v. Collins, 117 Iowa 173, 90 NW 609.

Mass.—Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 AmD 66.

Mich.—Bath v. Caton, 37 Mich. 199.

Minn.—Haluptzok v. Great Northern R. Co., 55 Minn. 446, 57 NW 144, 26 LRA 739.

Mo.—Bowman v. Lickey, 86 Mo. A. 47; Canfield v. Chicago, etc., R. Co., 59 Mo. A. 354.

Nebr.—Furnas v. Frankman, 6 Nebr. 429.

N. Y.—Lincoln v. Battelle, 6 Wend. 475; Boyd v. Vanderkemp, 1 Barb. Ch. 273.

N. D.—Kuhnert v. Angell, 10 N. D. 61, 84 NW 579, 88 AmSR 675.

S. C.—Blowers v. Southern R. Co., 74 S. C. 221, 54 SE 368; Banks v. Southern Exp. Co., 73 S. C. 211, 53 SE 166.

Tenn.—Louisville, etc., R. Co. v. Blair, 4 Baxt. 407.

Tex.—Wright v. Isaacks, 43 Tex. Civ. A. 223, 95 SW 55.

Vt.—Landon v. Proctor, 39 Vt. 78.

Wis.—McKinnon v. Vollmar, 75 Wis. 82, 43 NW 800, 17 AmSR 178, 6 LRA 121.

Eng.—Coles v. Trecothick, 9 Ves. Jr. 234, 32 Reprint 592.

See Sorg v. Crandall, 233 Ill. 79, 84 NE 181 [aff 129 Ill. A. 255, 266, and rev 129 Ill. A. 261].

See also supra § 347.

[a] **Extent of subagent's authority.**—A special agent cannot confer upon a subagent a power greater than his own. Fargo v. Cravens, 9 S. D. 646, 70 NW 1053.

[b] **Adoption of subagent's acts.**—Where the usual course of the management of the principal's concerns in the employment of a subagent has been pursued for a length of time, and has been recognized by the owners of property, they will be taken to have adopted the acts of the subagent as the acts of the agent himself. Combes' Case, 9 Coke 75a, 76 Reprint 843; Blore v. Sutton, 3 Meriv. 237, 36 Reprint 91.

Liability of principal for torts of subagent see infra § 539.

94. Bellinger v. Collins, 117 Iowa 173, 90 NW 609 (holding that, where the principal was told by the agent that others were helping him to sell the land, and no objection was made, there was a ratification such as to make the acts of the subagent binding upon the principal); Rudd v. Nashville, etc., R. Co., 7 KyL 823 (holding that, although an agent employs another for the principal without authority, express or implied, yet if the principal ratifies the act of the subagent he is equally liable as if he had originally employed him, or given the agent the power to do so; and, while this ratification will often be implied by the acceptance of the benefit arising from the services of the subagent yet the acceptance must be under such circumstances as imply an obligation to pay for them). See also supra § 346.

95. Ala.—Springfield F. & M. Ins. Co. v. De Jarnett, 111 Ala. 248, 19 S 995 (holding that evidence of the scope of authority of a clerk of an agent, employed by the agent for his own convenience, and without knowledge of or authority from his principal, express or implied, is incompetent to fasten a liability upon the principal).

Fla.—Martin v. Johnson, 54 Fla. 487, 44 S 949.

Ind.—O'Connor v. Arnold, 53 Ind. 203.

Mass.—Tippets v. Walker, 4 Mass. 595.

Mo.—Chouteau Land, etc., Co. v. Chrisman, (A.) 102 SW 973; Lindsay v. Singer Mfg. Co., 4 Mo. A. 571.

N. Y.—Cronkite v. Wells, 32 N. Y. 247; Lewis v. Ingersoll, 3 Abb. Dec.

Subagent.[96] Where the employment of a subagent is authorized, he generally becomes the agent of the principal,[97] and the original agent is not responsible for his acts or omissions,[98] unless he has not exercised good faith and reasonable care in selecting a suitable and proper subagent,[99] or improperly coöperates in the acts or omissions.[1] This rule exempting the agent from liability will apply where the employment, although not expressly authorized, arises from unforeseen exigencies or emergencies, imposing upon the agent the necessity of employing subagents.[2] But by an unauthorized delegation of his authority, or by the employment of a subagent on his own account, the agent makes himself personally responsible for the acts of the subagent, who is regarded as his agent and not as the agent of the principal,[3] although the principal has knowledge of the appointment of the subagent,[4] and this responsibility results, although the subagent is appointed with the consent of the principal, but not as his agent.[5]

Where subagent appointed by principal. An agent will not be responsible for the defaults of subagents employed by the principal and placed under his control, unless the defaults are committed with his knowledge.[6]

[§ 352] **3. Responsibility of Subagent.** Where, by usage of trade or otherwise, a subagent is employed with the express or implied consent of the principal, the subagent will be responsible, not to

55, 1 Keyes 347; McGowan v. Treacy, 84 NYS 497.

Wis.—Kohl v. Beach, 107 Wis. 409, 83 NW 657, 81 AmSR 849, 50 LRA 600.

Eng.—Wray v. Kemp, 26 Ch. D. 169; Doe v. Robinson, 3 Bing. N. Cas. 677, 32 ECL 313, 132 Reprint 571; Blore v. Sutton, 3 Meriv. 237, 36 Reprint 91; Dunlop v. De Murrieta, 3 T. L. R. 166.

Ont.—Hope v. Dixon, 22 Grant Ch. (U. C.) 439.

[a] **Where a tobacco company authorized a certain advertising firm to place advertisements for it,** and such firm contracted with another advertising company to have the tobacco company's advertisements inserted in certain publications, the latter advertising company was not the agent of the tobacco company. Hoffman v. American Tobacco Co., 148 NYS 151.

96. Liability of agent to third persons for torts of subagent see infra § 503.

Liability of mercantile agency for negligence of its agents see Mercantile Agency [27 Cyc 474].

97. See supra § 350.

98. U. S.—Kentucky Bank v. Adams Exp. Co., 93 U. S. 174, 23 L. ed. 872.

Conn.—Davis v. King, 66 Conn. 465, 34 A 107, 50 AmSR 104 and note.

Ga.—Morris v. Warlick, 118 Ga. 421, 45 SE 407.

Ill.—Whitlock v. Hicks, 75 Ill. 460; Smith v. Pawlak, 136 Ill. A. 276 [aff 233 Ill. 401, 84 NE 272].

Iowa.—Loomis v. Simpson, 13 Iowa 532.

La.—Joor v. Sullivan, 5 La. Ann. 177; Ledoux v. Goza, 4 La. Ann. 160; Saul v. Lalaurie, 1 La. Ann. 401 (holding that, where an agent divests himself of all authority by substituting another in his place with the approbation of the principal, he cannot afterward revive his extinct authority and bind the principal without the consent of the latter).

Mass.—Williamsburg City F. Ins. Co. v. Frothingham, 122 Mass. 391; Darling v. Stanwood, 14 Allen 504.

Mich.—Hoag v. Graves, 81 Mich. 628, 46 NW 109; Bath v. Caton, 37 Mich. 199.

Mo.—Hilton v. Newman, 6 Mo. A. 304.

Nebr.—Bianki v. Greater American Exposition Co., 3 Nebr. (Unoff.) 656, 92 NW 615.

N. Y.—National Steamship Co. v. Sheahan, 122 N. Y. 461, 25 NE 858, 10 LRA 782.

N. D.—Kuhnert v. Angell, 10 N. D. 59, 84 NW 579, 88 AmSR 675.

Pa.—Harrison v. Van Gunten, 15 Pa. Super. 491; Commonwealth Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. 180.

S. C.—Blowers v. Southern R. Co., 74 S. C. 221, 54 SE 368; Bates v. American Mortg. Co., 37 S. C. 88, 16 SE 883, 21 LRA 340; Burrell v. Letson, 32 S. C. L. 239.

S. D.—Fanset v. Garden City State Bank, 24 S. D. 248, 123 NW 686.

Tenn.—Johnson v. Memphis, 9 Lea 125; Strong v. Stewart, 9 Heisk. 137.

Tex.—Ladonia Dry-Goods Co. v. Conyers, (Civ. A.) 58 SW 967; Tynan v. Dullnig, (Civ. A.) 25 SW 465.

Vt.—Brown v. Lent, 20 Vt. 529.

Eng.—Gosling v. Gaskell, [1897] A. C. 575; Stone v. Cartwright, 6 T. R. 411, 101 Reprint 622.

See also supra §§ 346, 347.

[a] **Employment of commission merchants.**—Where it is customary for an agent to whom goods are consigned to employ a commission merchant to dispose of them, the agent will not be responsible for the failure of the commission merchant to account for the goods, provided he uses reasonable care in the selection of the merchant. Whitlock v. Hicks, 75 Ill. 460; Maxwell v. Evans, 2 Bibb (Ky.) 399; Davis v. Larguier, 2 La. Ann. 326; Bailey v. Baldwin, 8 Mart. N. S. (La.) 114; McCants v. Wells, 4 S. C. 381.

99. Conn.—Davis v. King, 66 Conn. 465, 34 A 107, 50 AmSR 104 and note.

Ga.—Morris v. Warlick, 118 Ga. 421, 45 SE 407 (holding that, where an agent has authority to employ a subagent to do work of the principal, the agent is not liable for the negligence of the subagent, if due care has been used in his selection).

Mich.—Hoag v. Graves, 81 Mich. 628, 46 NW 109.

Pa.—Commonwealth Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. 180; McVeagh v. Douglass, 4 Phila. 69.

Tenn.—Louisville, etc., R. Co. v. Blair, 1 Tenn. Ch. 351.

1. Williams v. White, 70 Me. 138 (holding that where an agent mingles goods of his principal with those of others, and consigns them to another party to be disposed of, he will be liable upon the failure of the latter to account for the full value of the goods).

[a] **Changing instructions.**—Where there is a power of substitution, but the original attorney changes the instructions to the substitute, the original attorney is liable for the acts of the substitute. Foster v. Preston, 8 Cow. (N. Y.) 198.

2. New Orleans Commercial Bank v. Martin, 1 La. Ann. 344, 45 AmD 87; Bromley v. Coxwell, 2 B. & P. 438, 126 Reprint 1372; Goswill v. Dunkley, Str. 680, 93 Reprint 779. See also supra § 347.

3. U. S.—Nat. Bank of Republic v. Old Town Bank, 112 Fed. 726, 50 CCA 443.

Ark.—St. Louis, etc., R. Co. v. Smith, 48 Ark. 317, 3 SW 364.

Conn.—Davis v. King, 66 Conn. 465, 34 A 107, 50 AmSR 104.

Ky.—Thompson v. Taylor, 124 SW 357.

La.—Reynolds v. Kirkman, 8 Mart. N. S. 464 (holding that a factor who employs an agent to sell the goods of his principal without authority is responsible for the agent's acts); Mark v. Bowers, 4 Mart. N. S. 95 (holding that, where goods were shipped to commission merchants, and before they were disposed of the firm dissolved and turned over the goods to a third person for sale, without the order of the principal, the firm was responsible).

Me.—Cleaves v. Stockwell, 33 Me. 341.

Mass.—Barnard v. Coffin, 141 Mass. 37, 6 NE 364, 55 AmR 443.

Mich.—Hoag v. Graves, 81 Mich. 628, 46 NW 109.

Mo.—Winkleblack v. National Exch. Bank, 155 Mo. A. 1, 13, 136 SW 712 [cit Cyc]; Lindsay v. Singer Mfg. Co., 4 Mo. A. 571.

Pa.—Franklin F. Ins. Co. v. Bradford, 201 Pa. 32, 50 A 286, 88 AmSR 770, 55 LRA 408; Clark v. Wheeling Bank, 17 Pa. 322.

S. D.—Fanset v. Garden City State Bank, 24 S. D. 248, 123 NW 686.

Tex.—Smith v. Sublett, 28 Tex. 163; Tynan v. Dullnig, (Civ. A.) 25 SW 465, 818.

Eng.—Skinner v. Weguelin, Cab. & E. 12.

Ont.—Hope v. Dixon, 22 Grant Ch. (U. C.) 439; Reg. v. Stanton, 2 U. C. C. P. 18.

Que.—Awde v. Chaurest, 30 Que. Super. 9.

See also supra § 344.

[a] **California civil code § 2351,** which provides that a subagent lawfully appointed represents the principal in like manner with the original agent, and that the original agent is not responsible to third persons for the subagent's act, is merely declaratory of the general rule, affecting the responsibility of an agent, that the acts of his subagent as to third persons do not limit or affect the responsibility of such agent to his principal. Smith v. D. O. Mills, etc., Nat. Bank, 191 Feb. 226.

[b] **Misappropriation of money by subagent.**—Where a principal gave to his agent a promissory note to be discounted, with instructions not to let it go out of his hands without receiving the proceeds, and the agent delivered the note to a third person, directing him to discount it and return the money to him, upon the appropriation by the subagent of the money received in discounting the note the agent was liable for the conversion of the note. Laverty v. Snethen, 68 N. Y. 522, 23 AmR 184.

[c] **"If an agent to collect and receive payment** of bills, transmits them to his own private agent to receive the money, and places the amount when received to his private credit, payment to such agent is payment to the original agent; and if there be a failure, it is the loss of the latter and not of his principal." Taber v. Perrot, 2 Gall. (U. S.) 565 [quot Landa v. Kansas City Traders' Bank, 118 Mo. A. 356, 365, 94 SW 770].

4. Barnard v. Coffin, 141 Mass. 37, 6 NE 364, 55 AmR 443.

5. Cholmondeley v. Payne, 8 C. & P. 482, 34 ECL 348.

6. Robinson v. Illinois Cent. R. Co., 30 Iowa 401; State Univ. v. Rose, 45 Mich. 284, 4 NW 738, 5 NW 674, 7 NW 875; Bath v. Caton, 37 Mich. 199; Louisville, etc., R. Co. v. Blair, 4 Baxt. (Tenn.) 407; Brown v. Lent, 20 Vt. 529.

the agent who employed him, but directly to the principal, since a privity under such circumstances exists between them.[7] Thus where a subagent is employed, by the express or implied authority of the principal, to collect or receive money for the principal, the latter may treat the subagent as his agent, and when the subagent has received the money may recover it from him;[8] and the subagent has no right to retain the money, in order to satisfy a debt due from the original agent to himself,[9] unless the course of dealing between the agent and the subagent, and the unqualified possession of the security, give rise to the inference that the agent is the owner of the claim.[10]

But where no privity exists between the subagent and the principal, either by express or implied agreement or the usages and customs of business, the subagent is merely a subaltern of the original agent, and as such is directly responsible, not to the principal, but to the original agent,[11] unless the subagent has by express promise made himself liable to the principal.[12] In such a case the subagent is accountable to the original agent for his conduct, and for any liability to the principal which his acts may have put upon his employer; as to him the subagent acquires the same rights, owes the same duties, and assumes the same obligations, as any agent toward his principal.[13] A subagent has no authority to bind the agent who employed him by agreements with the original principal.[14]

X. EFFECT OF THE RELATION AS BETWEEN PRINCIPAL AND AGENT

[§ 353] **A. Duties and Liabilities of Agent to Principal—1. Duty to Be Loyal[15]—a. General Rule.** The relation of an agent to his principal is ordinarily that of a fiduciary, and as such it is his duty, in all dealings concerning or affecting the subject matter of his agency, to act with the utmost good faith and loyalty for the furtherance and advancement of the interests of his principal.[16] So

7. U. S.—Wilson v. Smith, 3 How. 763, 11 L. ed. 820.
Cal.—Porter v. Peckham, 44 Cal. 204.
Conn.—East Haddam Bank v. Scovil, 12 Conn. 303; Lawrence v. Stonington Bank, 6 Conn. 521.
Iowa.—Guelich v. National State Bank, 56 Iowa 434, 9 NW 328, 41 AmR 110.
Kan.—Lindsborg Bank v. Ober, 31 Kan. 599, 3 P 324.
Me.—McKenzie v. Nevius, 22 Me. 138, 38 AmD 291.
Mich.—Finch v. Karste, 97 Mich. 20, 56 NW 123.
Mo.—Butler County v. Boatmen's Bank, 143 Mo. 13, 44 SW 1047; Hoffman v. Parry, 23 Mo. A. 20.
N. Y.—Wicks v. Hatch, 62 N. Y. 535.
N. D.—Kuhnert v. Angell, 10 N. D. 59, 84 NW 579, 88 AmSR 675.
Tenn.—Jackson Ins. Co. v. Partee, 9 Heisk. 296; Campbell v. Reeves, 3 Head 226.
Tex.—Turner v. Turner, 36 Tex. 41.
Eng.—Powell v. Jones, [1905] 1 K. B. 11, 3 BRC 252; De Bussche v. Alt, 8 Ch. D. 286, 2 ERC 289.
[a] **Whenever privity exists** between the principal and the subagent, either by express authority to appoint a subagent or by authority implied by the usage of the trade or the nature of the particular employment or otherwise, the subagent will incur a direct and immediate responsibility to the principal, and not merely to the agent who employed him. Commercial, etc., Bank v. Jones, 18 Tex. 811.

8. Wilson v. Smith, 3 How. (U. S.) 763, 11 L. ed. 820; Miller v. Farmers', etc., Bank, 30 Md. 392; Cecil Bank v. Farmers' Bank, 22 Md. 148. See also generally Banks and Banking [5 Cyc 502 et seq].
[a] **Revocation of primary agent's authority.**—A principal who has employed an agent to collect commercial paper may revoke the agency and proceed against a subagent employed by the primary agent for the paper or its proceeds. Naser v. State First Nat. Bank, 116 N. Y. 492, 22 NE 1077. See also Dickerson v. Wason, 47 N. Y. 439, 7 AmR 455; Warner v. Lee, 6 N. Y. 144; Commercial Bank v. Marine Bank, 1 Abb. Dec. (N. Y.) 405, 3 Keyes 337, 1 Transcr. A. 302, 6 AbbPrNS 33, 37 HowPr 432; Ex p. Norton, 11 Jur. 699.
[b] **Misappropriation of collection.**—Where the primary agent forwards collections to a subagent and directs the latter to make a use of the funds other than the usual one of their application to the payment of the debt to the principal, and the subagent complies with such direction, he becomes responsible therefor to the principal. Milton v. Johnson, 79 Minn. 170, 81 NW 842, 47 LRA 529.

9. Milton v. Johnson, 79 Minn. 170, 81 NW 842, 47 LRA 529; Grant v. Seitsinger, 2 Penr. & W. (Pa.) 525; Cockran v. Irlam, 2 M. & S. 301 note, 105 Reprint 393.

10. Metropolis Bank v. New England Bank, 1 How (U. S.) 234, 11 L. ed. 115.

11. U. S.—National Bank of Republic v. Old Town Bank, 112 Fed. 726, 50 CCA 443; Trafton v. U. S., 24 F. Cas. No. 14,135, 13 Story 646 (holding that in general subagents acting ex contractu are responsible only to the immediate agent who employed them, and not to the principal of such agent).
Ark.—Kellogg v. Norris, 10 Ark. 18.
Iowa.—Guelich v. National State Bank, 56 Iowa 434, 9 NW 328, 41 AmR 110.
Mass.—Barnard v. Coffin, 141 Mass. 37, 6 NE 364, 55 AmR 443; Appleton Bank v. McGilvray, 4 Gray 518, 64 AmD 92.
Mo.—Butler County v. Boatmen's Bank, 143 Mo. 13, 44 SW 1047; Landa v. Traders' Bank, 118 Mo. A. 356, 94 SW 770 (holding that, where an agent accepts a draft for collection and transmits it to another for collection, with authority to collect and place the proceeds to his credit, he makes such person his agent, and for loss, if any, such subagent is liable to the agent, and not to the principal).
N. J.—Stephens v. Bacon, 7 N. J. L. 1.
N. Y.—Commercial Bank v. Union Bank, 11 N. Y. 203; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Murray v. Toland, 3 Johns. Ch. 569.
N. D.—Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 NW 859 (holding that, where two notes were indorsed for collection to plaintiff, and he transmitted them to defendant for collection, under Rev. Code § 4133, which provides that the mere agent of an agent is not responsible as such to the principal of the latter, plaintiff may sue defendant for any damages arising from the negligence of defendant in the matter of such agency).
Tenn.—Campbell v. Reeves, 3 Head 226 (holding that whenever the authority to appoint a subagent exists a privity is created between the principal and the subagent, and the latter will be held directly responsible to the principal, but that if no such privity exists, the subagent will be responsible to his immediate employer, and the remedy of the principal will be against his agent).
Tex.—Commercial, etc., Bank v. Jones, 18 Tex. 811 (where it is said to be a general rule that an inferior agent is accountable only to his immediate employer, and it is upon this principle that where an agent employs a subagent without the knowledge or consent of his principal there exists no privity between the principal and the subagent); Carlton v. Texas Banking, etc., Co., (Civ. A.) 152 SW 698.
Eng.—New Zealand, etc., Land Co. v. Watson, 7 Q. B. D. 374 [rev 5 Q. B. D. 474]; Robbins v. Fennell, 11 Q. B. 248, 63 ECL 248, 116 Reprint 468; Cobb v. Becke, 6 Q. B. 930, 51 ECL 930, 115 Reprint 350; Sims v. Brittain, 4 B. & Ad. 375, 24 ECL 169, 110 Reprint 496; Stephens v. Badcock, 3 B. & Ad. 354, 23 ECL 160, 110 Reprint 133; Atty.-Gen. v. Chesterfield, 18 Beav. 596, 52 Reprint 234; Myler v. Fitzpatrick, 6 Madd. 360, 56 Reprint 1128; Tickel v. Short, 2 Ves. 239, 28 Reprint 154.
[a] **Where an attorney confided a note to another attorney for collection,** but failed to give instructions in regard to the ownership of the note, and the second attorney collected the money and remitted it to the payee whose name was indorsed on the note, this remittance (the payee not being the owner of the note) did not discharge the collecting attorney from liability to his immediate principal. Lewis v. Peck, 10 Ala. 142.

12. Chickering v. Hosmer, 12 Mass. 183 (holding that, where an agent to sell goods intrusted to him delegated his authority to another, who executed it and promised to pay the proceeds to the principal, such other was liable to the principal in assumpsit for money had and received, if the goods were converted into money in his hands).

13. McKenzie v. Nevius, 22 Me. 138, 38 AmD 291; Hoag v. Graves, 81 Mich. 628, 46 NW 109; Ledwith v. Merritt, 74 App. Div. 64, 77 NYS 341 [aff 174 N. Y. 512 mem, 66 NE 1111 mem]; Pownfall v. Bair, 78 Pa. 403 (holding that, where an agent has become responsible to his principal by the misconduct of his own subagent, and has been compelled to pay his principal, he may recover from the subagent).

14. Wass v. Atwater, 33 Minn. 83, 22 NW 8. Compare Havens v. Church, 104 Mich. 135, 62 NW 149.

15. **Illegality of agreement tending to induce breach of duty** by agent see Contracts [9 Cyc 470].
Insurance of fidelity of agent see Fidelity Insurance [19 Cyc 516].
Liability of arbitrator for misconduct as agent see Arbitration and Award [3 Cyc 810].
Liability on bond given by agent for performance of duties see Bonds [5 Cyc 770, 809].

16. U. S.—Hoffiin v. Moss, 67 Fed. 440, 14 CCA 459.

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sedulously is this principle guarded that all acts of an agent which tend to violate his fiduciary duty are regarded as frauds upon the confidence bestowed,[17] and are not only invalid as to the principal, but are also against public policy;[18] but as the presumption in the absence of proof to the contrary is that an agent has performed his duty in good faith,[19] the principal may rely upon the agent's faithfulness until he receives notice that he is not trustworthy.[20] If the agent has openly and fairly dealt with the matters of the agency on terms fixed by the principal the transaction will be upheld,[21] as is also the case where the principal with the full knowledge of all the facts fails to dissent, as he alone can take advantage of the rule;[22] nor is the agent liable as for fraud where the principal has not been deceived by his acts, and has suffered no injury therefrom;[23] nor does the mere fact that he has exceeded his authority or been negligent, whereby a loss has resulted, render him liable as for fraud.[24]

If the agent fails to exercise good faith and loyalty to his principal, and is guilty of misconduct which operates to his principal's disadvantage or injury he is responsible to his principal for any loss resulting therefrom,[25] or the principal may re-

Ala.—Clifford v. Armstrong, 176 Ala. 441, 58 S 430.
Ark.—Forrester-Duncan Land Co. v. Evatt, 90 Ark. 301, 119 SW 282.
Cal.—Calmon v. Sarraille, 142 Cal. 638, 76 P 486.
Colo.—Fisher v. Seymour, 23 Colo. 542, 49 P 30.
Conn.—Schleifenbaum v. Rundbaken, 81 Conn. 623, 71 A 899.
Ga.—Pollock v. Skelton, (A.) 82 SE 381; Williams v. Moore-Gaunt Co., 3 Ga. A. 756, 60 SE 372.
Ida.—Ainsworth v. Harding, 22 Ida. 645, 128 P 92.
Ill.—Moneta v. Hoffman, 249 Ill. 56, 94 NE 72; Pearson v. Luecht, 199 Ill. 475, 65 NE 363 [rev 101 Ill. A. 236]; Davis v. Hamlin, 108 Ill. 39, 48 AmR 541; Merryman v. David, 31 Ill. 404; Fairman v. Bavin, 29 Ill. 75 (holding that, when a case is made the court will go to the extreme length in holding agents and those acting in a fiduciary capacity to the strictest fairness and integrity); Jacobs v. Eide, 170 Ill. A. 524; Fidelity Trust Co. v. Poole, 136 Ill. A. 266.
Ind.—Bedford Coal, etc., Co. v. Parke County Coal Co., 44 Ind. A. 390, 89 NE 412.
Iowa.—Bracken v. Jackson, 140 NW 892; Merrill v. Sax, 141 Iowa 386, 118 NW 434 (holding that, where plaintiffs authorized defendant to sell stock owned by them and himself, all of them desiring to sell the whole issue of stock, each was entitled to frank and fair treatment by the others in the transaction, and especially by defendant whom they authorized to make the sale); Morey v. Laird, 108 Iowa 670, 77 NW 835.
Ky.—Eagle Distillery Co. v. McFarland, 11 KyL 905.
La.—Cuggy v. Zeller, 132 La. 222, 61 S 209.
Md.—Lord v. Smith, 109 Md. 42, 71 A 430.
Mass.—Malden, etc., Gas Light Co. v. Chandler, 211 Mass. 226, 97 NE 906; Little v. Phipps, 208 Mass. 331, 94 N. E. 260, 34 LRANS 1046 and note.
Mich.—McNair v. Parr, 177 Mich. 327, 335, 143 NW 42 [cit Cyc]; Ranney v. Henry, 160 Mich. 597, 125 NW 693 (holding that an agent must act in good faith in dealing with his principal in all stages of the negotiations); Walling v. Poulsen, 160 Mich. 392, 395, 125 NW 373 [cit Cyc]; Pikes Peak Co. v. Pfuntner, 158 Mich. 412, 123 NW 19. See also Backus v. Cowley, 162 Mich. 585, 127 NW 775.
Miss.—Gillenwaters v. Miller, 49 Miss. 150.
Mo.—Dennison v. Aldrich, 114 Mo. A. 700, 91 SW 1024.
Nebr.—Jansen v. Williams, 36 Nebr. 869, 55 NW 279, 20 LRA 207.
N. Y.—Reis v. Volck, 151 App. Div. 613, 136 NYS 367; Krafft v. Dyersburg Citizens' Bank, 139 App. Div. 610, 124 NYS 214; LaForge v. Cornell, 127 NYS 453.
N. D.—Queen City F. Ins. Co. v. Hannaford First Nat. Bank, 18 N. D. 603, 120 NW 545, 22 LRANS 509.
Or.—Williamson v. North Pac. Lumber Co., 42 Or. 153, 70 P 387, 532.
Utah.—Little v. Herzinger, 34 Utah 327, 97 P 639.
Vt.—Vermont Marble Co. v. Mead, 85 Vt. 20, 80 A 852.
Eng.—Burdick v. Garrick, L. R. 5 Ch. 233, 74 ERC 565; Gray v. Haig, 20 Beav. 219, 52 Reprint 587.

"The law is now well settled that the relationship of principal and agent is one involving confidence, and it is the duty of every agent to act with the most perfect good faith towards his principal, and not in any way to abuse the confidence reposed in him." Pommerenke v. Bate, 3 Sask. L. 51, 56, 13 WestLR 248.

[a] **Utmost good faith required.**—Nothing shall be said or done, either directly or indirectly, which is calculated to mislead or deceive, or to give an undue advantage. An advantage is unduly taken when it is such as a man of ordinary prudence would not have allowed or submitted to if he had been in possession of all the facts known to the other. Eagle Distillery Co. v. McFarland, 11 KyL 905.

[b] **Same as tenants in common.**—The relation between principal and agent rests upon essentially the same basis of trust and confidence as the relation between tenants in common. Hill v. Coburn, 105 Me. 437, 75 A 67.

[c] **One whose agency is coupled with an interest** is bound to discharge his duties with fidelity and good faith toward his principal. Perkins v. Hershey, 77 Mich. 504, 43 NW 1021.

[d] **What law governs.**—Where defendant was employed by plaintiff to sell his stock in a Kansas corporation, and the parties at the time lived in Kansas, the sale by defendant pursuant to such contract was a Kansas contract, and any fraud perpetrated by defendant on plaintiff in making the sale would be governed by the laws of that state, although they were both absent therefrom at the time the sale was made. Horner v. Perry, 112 Fed. 906.

17. U. S.—McKinley v. Williams, 74 Fed. 94, 20 CCA 312; St. Louis Electric Light, etc., Co. v. Edison Gen. Electric Co., 64 Fed. 997; Michoud v. Girod, 4 How. 503, 11 L. ed. 1076.
Ala.—Firestone v. Firestone, 49 Ala. 128.
Cal.—Sterling v. Smith, 97 Cal. 343, 32 P 320.
Fla.—Boswell v. Cunningham, 32 Fla. 277, 13 S 354, 21 LRA 54.
Ill.—Stone v. Daggett, 73 Ill. 367; Dennis v. McCagg, 32 Ill. 429; Merryman v. David, 31 Ill. 404; Tilden v. Blackwell, 94 Ill. A. 605.
Iowa.—Smeltzer v. Lombard, 57 Iowa 294, 10 NW 669.
La.—Meeker v. York, 13 La. Ann. 18.
Md.—Keighler v. Savage Mfg. Co., 12 Md. 383, 71 AmD 600; Brooke v. Berry, 2 Gill 83.
Mich.—People v. Overyssel Tp., 11 Mich. 222.
Minn.—Hegenmyer v. Marks, 37 Minn. 6, 32 NW 785, 5 AmSR 808.
Mont.—Largey v. Bartlett, 18 Mont. 265, 44 P 962.
Nebr.—Columbus Co. v. Hurford, 1 Nebr. 146.
N. J.—Young v. Hughes, 32 N. J. Eq. 372.
N. Y.—Moore v. Moore, 5 N. Y. 256; Townsley v. Bankers' L. Ins. Co., 56 App. Div. 232, 67 NYS 664; Bruce v. Davenport, 36 Barb. 349 [rev on other grounds 1 Abb. Dec. 233].
Pa.—Persch v. Quiggle, 57 Pa. 247.
Tenn.—Tisdale v. Tisdale, 2 Sneed 596, 64 AmD 775.
W. Va.—West End Real Est. Co. v. Nash, 51 W. Va. 341, 41 SE 182.
Eng.—Lamb v. Evans, [1893] 1 Ch. 218.

18. Stephens v. Gall, 179 Fed. 938.

19. Crittenden v. Canfield, 87 Mich. 152, 49 NW 554. See also infra § 656.

[a] **Fraud** in the transaction of an agent as against his principal must be proved, not inferred. Rixey v. Moorhead, 79 Va. 575.

20. Haswell v. Standring, 152 Iowa 291, 132 NW 417, AnnCas1913B 1326.

21. Wheadon v. Mead, 72 Minn. 372, 75 NW 598; Atwood v. Shenandoah Valley R. Co., 85 Va. 966, 9 SE 748; Guy v. Churchill, 62 L. T. Rep. N. S. 132 [dism app 60 L. T. Rep. N. S. 740].

22. Alabama Eastern Bank v. Taylor, 41 Ala. 93.

23. Baker v. Brown, 82 Cal. 64, 22 P 879; Hetzler v. Morrell, 82 Iowa 562, 48 NW 938; Gotcher v. Haefner, 107 Mo. 270, 17 SW 967.

[a] **Retention in good faith by an agent of funds** to cover disputed commissions does not constitute fraud or dishonesty, although erroneous. National Surety Co. v. Empire State Surety Co., 143 App. Div. 241, 128 NYS 10.

[b] **Selling agent's desire for compensation.**—Where an agent, vested with a power to sell the property of his principal, makes a sale within the limits of his authority, which he believes to be for the best interest of his principal, the fact that, in making the sale, the impelling motive which actuated him was the compensation he was to receive, and not his duty to his principal, does not give the latter a right of action for fraud in case the sale proves disadvantageous. Price v. Keyes, 62 N. Y. 378.

[c] **Where an agent is employed to examine land** and determine at what valuation in his judgment the same can be taken in exchange for other property, and in good faith gives his opinion which is acted upon, he is not liable for a loss occasioned by making the exchange, although he may have been mistaken as to the quality or value of the land. Durward v. Hubbell, 149 Iowa 722, 128 NW 953.

24. Price v. Keyes, 62 N. Y. 378.

[a] **Mere negligence or unauthorized acts not enough.**—Dealings of an agent for the sale of property with the purchaser, in which irregularities and carelessness sufficient to excite suspicion appear, but not amounting to fraud, do not call for the interposition of a court of equity. Jewett v. Bowman, 29 N. J. Eq. 174.

25. U. S.—Bischoffsheim v. Baltzer, 20 Fed. 890.
Cal.—Hunsaker v. Sturgis, 29 Cal. 142.
Colo.—Pouppirt v. Greenwood, 48 Colo. 405, 110 P 195.
Ill.—Dazey v. Roleau, 111 Ill. A. 367; Miller v. John, 111 Ill. A. 56 [aff 208 Ill. 173, 70 NE 27] (holding that an agent who makes a positive affirmation as of his own knowledge con-

pudiate the acts of the agent and recover back any money or property paid him,[26] less the agent's proper charges and compensation;[27] and an agent who has defrauded his principal cannot set up the negligence of such principal as a defense to an action for an accounting.[28]

The general rule as to loyalty does not apply to cases where no relation of trust or confidence exists between the parties, as where the agent is bound merely as an instrument, more properly as a servant, to perform a service,[29] or where the relation of principal and agent is not shown to exist.[30]

Gratuitous agency. The fact that the agency is gratuitous does not affect the rule requiring good faith and loyalty on the part of the agent, if he has entered upon the performance of his duties.[31]

[§ 354] **b. Individual or Adverse Interests in General.**[32] In accordance with the above rule, good faith and loyalty to the principal's interests require that an agent must not, except with his principal's full knowledge and consent, assume any duties or enter into any transaction concerning the subject matter of the agency in which he has individual interests, or represents interests adverse to those of his principal.[33] He cannot, without the knowledge and consent of his principal, represent himself to be compelled to enter upon the performance of the service, nor be mulcted in damages for his failure to do so, when he did enter upon such performance, he was, in common with all other agents, bound to exercise the utmost good faith in dealing with his principal. An agent for hire is bound to exercise a greater degree of care and diligence than an agent acting gratuitously, but the latter has no greater license to indulge in misrepresentations, concealment or other breaches of good faith than the former. It is a maxim of jurisprudence that no person will be permitted to take advantage of his own wrong, and this general rule is subject to no exception favoring those who voluntarily and gratuitously undertake the performance of service for another. No man can be compelled to don the yoke of special, unremunerated duty to another, but when that yoke is voluntarily assumed, the wearer will not be permitted to lay down his burden when profit to himself furnishes an inducement, and that profit results from detriment suffered by the other party."

cerning the quality of land, when he possesses no knowledge on the subject, is responsible to his employer who has been injured thereby).

Ind.—Indianapolis v. Skeen, 17 Ind. 628.

Iowa.—Varner v. Interstate Exch., 138 Iowa 201, 115 NW 1111 (holding that, where defendant, as plaintiff's agent in negotiating an exchange of a horse for certain land, expressly undertook that the title to the land which he was inducing his principal to receive in exchange for the horse was good, subject only to a certain mortgage or trust deed on which no foreclosure proceedings had been instituted, defendant could be held to make good such representation, if it proved false to his principal's damage); Faust v. Hosford, 119 Iowa 97, 93 NW 58.

Ky.—Myles v. Myles, 6 Bush 237.

Me.—Comings v. Stuart, 22 Me. 110.

Minn.—Barnett v. Block, 94 Minn. 138, 102 NW 390.

Miss.—Gillenwaters v. Miller, 49 Miss. 150.

N. Y.—Tuers v. Tuers, 100 N. Y. 196, 2 NE 922; Palmer v. Pirson, 4 Misc. 455, 24 NYS 333 [aff 144 N. Y. 654 mem, 39 NE 494 mem].

Pa.—Hart v. Girard, 56 Pa. 23.

Porto Rico.—Blanco v. Perez, 4 Porto Rico Fed. 428.

S. C.—Tate v. Marco, 27 S. C. 493, 4 SE 71.

Tex.—Armstrong v. Simms, (Civ. A.) 132 SW 500 (holding that an agent may not in equity deal with the matter of his agency in such manner as to injure his principal).

Eng.—Salvesen v. Rederi Aktiebolaget Nordstjernan, [1905] A. C. 302.

Que.—Menard v. Jackson, 14 Que. K. B. 348.

[a] **Indemnity.**—If the fraud of the agent has caused the principal to incur liability, he is entitled to indemnity from the agent without waiting to take an account of all the transactions involved to determine the precise final amount of the loss. Dick v. Gordon, 6 Grant Ch. (U. C.) 394 (holding that a principal standing in the position of a surety in respect of notes wrongfully indorsed by the agent under power of attorney is entitled to a decree for indemnity in respect of his liability as indorser, against his agent and the subsequent indorser, without waiting to take an account of all the transactions between the parties).

[b] **The measure of damages** for falsely reporting the value and condition of property, thereby inducing the principal to trade for or purchase the same, is the difference between the fair market value of the property as represented and its market value in its actual condition; and this is true whether the principal purchased the land outright or exchanged other property at an inflated valuation in part payment therefor. Durward v. Hubbell, 149 Iowa 722, 128 NW 953.

26. Cal.—Ritchey v. McMichael, 35 P 151.

Iowa.—Briggs v. Hartman, 10 Iowa 63.

Minn.—Friesenhahn v. Bushnell, 47 Minn. 443, 50 NW 597.

Mo.—Kelly v. Gay, 55 Mo. A. 39.

N. Y.—Voris v. McCredy, 16 HowPr 87.

27. Briggs v. Hartman, 10 Iowa 63.

28. Calkins v. Worth, 117 Ill. A. 478 [aff 215 Ill. 78, 74 NE 81].

29. Ill.—Brown v. Brown, 154 Ill. 35, 39 NE 983.

Ind.—Pomeroy v. Wimer, 167 Ind. 440, 78 NE 233, 79 NE 446.

Ky.—Spalding v. Mattingly, 89 Ky. 83, 1 SW 488.

Mo.—Grady v. O'Reilly, 116 Mo. 346, 22 SW 798.

N. C.—Deep River Gold Min. Co. v. Fox, 39 N. C. 61.

W. Va.—Curlett v. Newman, 30 W. Va. 182, 3 SE 578 (where a farm overseer was held not disqualified to buy the farm).

30. Ark.—Aldrich v. McClay, 75 Ark. 387, 87 SW 813 (holding that, where a borrower claimed that the lender acted as his agent in purchasing certain debts to be paid from the proceeds of a loan, and that the lender was guilty of fraud in reserving out of the loan more than he paid for the debts, such fraud would operate only as a reduction of the debt pro tanto, and would not render the entire debt void, unless it was a mere device to conceal usury).

Cal.—Spinks v. Clark, 147 Cal. 439, 82 P 45; Baker v. Brown, 82 Cal. 64, 22 P 879.

Ga.—Brinson v. Exley, 122 Ga. 8, 49 SE 810 (holding that the fact that defendant assumed to act as agent of plaintiff, if in fact there was no agency, would not entitle plaintiff to recover in an action of deceit).

Ky.—Carter v. Jolly, 22 SW 747, 15 KyL 217.

Minn.—Bartleson v. Vanderhoff, 96 Minn. 184, 104 NW 820 (holding that the rule that an agent is responsible for profits fraudulently obtained at the expense of his principal applies only when the agency is established).

Mont.—Largey v. Leggat, 30 Mont. 148, 75 P 950.

N. J.—Sanford v. Miller, 80 N. J. L. 411, 78 A 177.

Utah.—Haarstick v. Fox, 9 Utah 110, 33 P 251 [aff 156 U. S. 674, 15 SCt 457, 39 L. ed. 576].

Wash.—Townsend v. Dilsheimer, 50 Wash. 294, 97 P 53.

31. Merrill v. Sax, 141 Iowa 386, 118 NW 434; Wright v. Smith, 23 N. J. Eq. 106; Bergner v. Bergner, 219 Pa. 113, 67 A 999. See also infra § 354.

[a] **Agent to purchase.**—In Kevane v. Miller, 4 Cal. A. 598, 602, 88 P 643, where an agent gratuitously undertaking to purchase property for his principal purchased the property for himself and resold to the principal for an advanced price, the court said: "It is contended in appellant's behalf that because the service was voluntary and gratuitous, no duty or obligation to respondent rested upon him. With this contention we cannot agree. Appellant, having undertaken this agency, was bound to exercise good faith, and at least slight care and diligence, in executing what he had voluntarily undertaken to do. Samorset v. Mesnager, 108 Cal. 354, 41 P 337; Herrick v. Hodges, 13 Cal. 431; Civ. Code § 1975. While he could not

32. Adverse interests: Of auctioneers see Auctions and Auctioneers [4 Cyc 1047]. Of brokers see Brokers [19 Cyc 206, 227, 228]. Of factors see Factors [19 Cyc 116]. Of insurance agents see Insurance [22 Cyc 1435, 1442]. Of agent as affecting imputation to principal of knowledge acquired by agent see infra §§ 549, 550.

Authority of collecting agent to accept discharge of his own indebtedness see supra § 271.

Breach of duty as creating constructive trust see Trusts [39 Cyc 188].

33. U. S.—Michoud v. Girod, 4 How. 503, 11 L. ed. 1076; Audubon Bldg. Co. v. Andrews, 187 Fed. 254; Alger v. Anderson, 78 Fed. 729; St. Louis Electric Light, etc., Co. v. Edison Gen. Electric Co., 64 Fed. 997; Chrystie v. Foster, 61 Fed. 551, 9 CCA 606; Glover v. Ames, 8 Fed. 351.

Ark.—Wassell v. Reardon, 11 Ark. 705, 44 AmD 245.

Cal.—Brown v. Spencer, 163 Cal. 589, 126 P 493; Smith v. Goethe, 147 Cal. 725, 82 P 384; Rubidoex v. Parks, 48 Cal. 215.

Colo.—Webb v. Marks, 10 Colo. A. 429, 51 P 518.

Conn.—Schleifenbaum v. Rundbaken, 81 Conn. 623, 71 A 899; Porter's App., 56 Conn. 1, 12 A 513, 7 AmSR 272 and note.

D. C.—Holtzman v. Linton, 27 App. 241.

Fla.—Burnham City Lumber Co. v. Rannie, 59 Fla. 179, 52 S 617.

Ga.—Sessions v. Payne, 113 Ga. 955, 39 SE 325; Williams v. Moore-Gaunt Co., 3 Ga. A. 756, 60 SE 372.

Ill.—Fox v. Simons, 251 Ill. 316, 96 NE 233; Pearson v. Luecht, 199 Ill. 475, 65 NE 363 [rev 101 Ill. A. 236]; Davis v. Hamlin, 108 Ill. 39, 48 AmR 541; Hughes v. Washington, 72 Ill. 84; Cottom v. Holliday, 59 Ill. 176; Bouton v. Cameron, 99 Ill. A. 600 [aff 205 Ill. 50, 68 NE 800].

Ind.—Bedford Coal, etc., Co. v. Parke County Coal Co., 44 Ind. A. 390, 89 NE 412.

Iowa.—Larson v. Thoma, 143 Iowa

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self and the principal, where their interests conflict;[34] and he must not put himself into such a position that his interests become antagonistic to those of his principal,[35] or speculate in the subject matter of the agency.[36]

Reason for rule. This rule is adopted on the ground of public policy, in order to remove from the agent all temptation to neglect his principal's interest.[37]

Application. This rule is very general in its application.

338, 121 NW 1059; Morey v. Laird, 108 Iowa 670, 77 NW 835; Smeltzer v. Lombard, 57 Iowa 294, 10 NW 669.

La.—Knabe v. Ternot, 16 La. Ann. 13; Meeker v. York, 13 La. Ann. 18.

Mass.—Dzuris v. Pierce, 216 Mass. 132, 103 NE 296; Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 NE 221.

Mich.—Pikes Peak Co. v. Pfuntner, 158 Mich. 412, 123 NW 19; Flint, etc., R. Co. v. Dewey, 14 Mich. 477.

Minn.—Lum v. McEwen, 56 Minn. 278, 57 NW 662; Friesenhahn v. Bushnell, 47 Minn. 443, 50 NW 597; Crump v. Ingersoll, 44 Minn. 84, 46 NW 141.

Miss.—Dorrah v. Hill, 73 Miss. 787, 19 S 961, 32 LRA 631; Wildberger v. Hartford F. Ins. Co., 72 Miss. 338, 17 S 282, 48 AmSR 558, 28 LRA 220; Murphy v. Sloan, 24 Miss. 658.

Mo.—Witte v. Storm, 236 Mo. 470, 139 SW 384; Atlee v. Fink, 75 Mo. 100, 43 AmR 385; Neuman v. Friedman, 156 Mo. A. 142, 136 SW 251; Smith v. Tyler, 57 Mo. A. 668; Gaty v. Sack, 19 Mo. A. 470.

Nebr.—Clarke v. Kelsey, 41 Nebr. 766, 60 NW 138; Englehart v. Peoria Plow Co., 21 Nebr. 41, 31 NW 391.

N. J.—Campbell v. Manufacturers' Nat. Bank, 67 N. J. L. 301, 51 A 497, 91 AmSR 438; Rogers v. Genung, 76 N. J. Eq. 306, 312, 74 A 473 [cit Cyc]; Porter v. Woodruff, 36 N. J. Eq. 174.

N. Y.—Munson v. Syracuse, etc., R. Co., 103 N. Y. 58, 8 NE 355; Claflin v. Farmers', etc., Bank, 25 N. Y. 293 [rev 36 Barb. 540]; Moore v. Moore, 5 N. Y. 256; Jacobs v. Beyer, 141 App. Div. 49, 125 NYS 597; Townsley v. Bankers' L. Ins. Co., 56 App. Div. 232, 67 NYS 664; Barnett v. Daw, 55 App. Div. 202, 66 NYS 880; Morrison v. Ogdensburgh, etc., R. Co., 52 Barb. 173; Cumberland Coal, etc., Co. v. Sherman, 30 Barb. 553; Parkist v. Alexander, 1 Johns. Ch. 394.

N. C.—Swindell v. Latham, 145 N. C. 144, 58 SE 1010, 122 AmSR 430; Deep River Gold Min. Co. v. Fox, 39 N. C. 61.

N. D.—Smith v. Courant Co., 23 N. D. 297, 136 NW 781.

Pa.—Marshall v. Reed, 32 Pa. Super. 60; Gillespie v. Weiss, 8 Pa. Dist. 170, 22 Pa. Co. 177.

S. D.—Lemon v. Little, 21 S. D. 628, 114 NW 1001.

Tenn.—Tynes v. Grimstead, 1 Tenn. Ch. 508.

Tex.—Amarillo Nat. Bank v. Harrell, (Civ. A.) 159 SW 858. See also Dayton Lumber Co. v. Stockdale, 54 Tex. Civ. A. 611, 118 SW 805 (holding that an agent's contract is not a fraud on his principal because the agent owns an interest in the property which is to be used in performing the work, and rents his interest to the contractor for a monthly rental payable whether the property is used or not).

Va.—Ferguson v. Gooch, 94 Va. 1, 26 SE 397, 40 LRA 234; Neilson v. Bowman, 29 Gratt. (70 Va.) 732.

Wash.—Hay v. Long, 78 Wash. 616, 139 P 761; Wallace v. Oceanic Packing Co., 25 Wash. 143, 64 P 938.

Eng.—Smith v. Sorby, 3 Q. B. D. 552 note; Lamb v. Evans, [1893] 1 Ch. 218; Henchman v. East India Co., 8 Bro. P. C. 85, 3 Reprint 459 [aff 1 Ves. Jr. 287, 30 Reprint 347].

B. C.—Laycock v. Lee, 17 B. C. 73, 1 DomLR 91, 19 WestLR 841 (holding that, where an option of purchase has been obtained by real estate agents from the owner to themselves, under circumstances which render the same voidable for nondisclosure by the agents of facts brought to their knowledge while they were acting in a fiduciary capacity for the owner, a conveyance made to the agents in conformity with such option may be set aside together with the option agreement which is impeached; and the conveyance will not operate by way of estoppel or confirmation unless it clearly appears that the owner had, in the meantime, obtained from some source the information and advice which his agents had improperly withheld, and, notwithstanding the same, had elected to affirm the transaction).

Man.—Martin v. Brown, 19 Man. 630.

N. S.—Atty.-Gen. v. Halifax, 36 N. S. 177.

"It is a familiar doctrine, frequently recognized by this court, that an agent cannot, either directly or indirectly, have an interest in the business of the principal, within the scope of his agency, without the consent of his principal, freely given, after full knowledge by the principal of every matter known to the agent which might in any way affect the interests of the principal, and it is of no consequence in such case that no fraud was intended, or that no advantage was, in fact, derived by the agent." Fox v. Simons, 251 Ill. 316, 321, 96 NE 233 [rev 158 Ill. A. 482]. "It is, further, the duty of the agent to use his best endeavors to promote the interests of the principal, and no agent will be permitted to enter into any transaction in which he has a personal interest in conflict with such duty, except with the consent of the principal, given after all the material circumstances and the exact nature and extent of the interest of the agent have been fully disclosed." Pommerenke v. Bate, 3 Sask. L. 51, 56, 13 WestLR 248.

[a] **An agent will not be permitted to gain a personal advantage** in the matter of his agency to the detriment of his principal. Bouton v. Cameron, 99 Ill. A. 600 [aff 205 Ill. 50, 68 NE 800].

[b] **Relocating mining claim.**—The attempt of an agent, who is employed to do the annual assessment work on a mining claim to relocate the claim, after failure or intentional neglect to do such work, although such attempted relocation is in the name of a third person from whom the agent subsequently obtained title by deed, is a fraud upon his principal. O'Neill v. Otero, 15 N. M. 707, 113 P 614; Argentine Min. Co. v. Benedict, 18 Utah 183, 55 P 559.

[c] **An agent who agrees to take his principal's money and loan it** to good parties must loan it in fact; he cannot use the money himself, and then pay the principal with a note of his own debtor, growing out of an independent transaction, without advising his principal of the facts. Scott v. Turley, 9 Lea (Tenn.) 631.

[d] **Agent to insure cannot take risk.**—An agent, if instructed to insure, will not be allowed to take the risk upon himself, and if he does he cannot recover the premiums. Keane v. Branden, 12 La. Ann. 20.

34. Swindell v. Latham, 145 N. C. 144, 58 SE 1010, 122 AmSR 430.

[a] **An agent, whether general or special,** cannot act as such and at the same time act in his own behalf against the interest of his principal. When that antagonism of interests arises the law vacates the agency. Temmen v. Sayre, 1 SW 875, 8 KyL 421.

[b] **An agent cannot act for his principal in the same transaction in two inconsistent capacities;** the one favorable to his wishes and interests, and the other hostile to them. Pittsburgh, etc., Iron Co., v. Kirkpatrick, 92 Mich. 252, 52 NW 628.

[c] **An agent cannot bind his principal to the receipt of money due from himself** by a mere acknowledgment signed by himself as agent that he has received it. Neuendorff v. World Mut. L. Ins. Co., 69 N. Y. 389.

[d] **In making a contract for himself** a person cannot act as the agent of another. Leigh v. American Brake-Beam Co., 107 Ill. A. 444 [aff 205 Ill. 147, 68 NE 713].

[e] **Where it appears that the interests of the agent and those of his principal conflict,** the courts will subject the acts of the former to the closest scrutiny, and will infer that he acted corruptly and from a self-interest in all cases of doubt, thus casting upon him the burden of proving the good faith and honesty of the transaction. And it will not suffice simply to show that the principal has received all that he directed the agent to ask, or that the amount received was all that could have been procured from a stranger, for here, again, the rule applies that the agent cannot act in the transaction in the dual rôle of both agent and principal. Hammond v. Bookwalter, 12 Ind. A. 177, 39 NE 872.

35. Bedford Coal, etc., Co. v. Parke County Coal Co., 44 Ind. A. 390, 89 NE 412. And see cases cited supra note 33.

[a] **The agent is under a moral duty** not to put himself in any situation whatsoever which would tend to excite a conflict between his own interest and his duty to his principal. Holtzman v. Linton, 27 App. (D. C.) 241.

[b] **Cannot assume incompatible duties.**—An agent cannot be permitted to assume duties and trusts incompatible with his agency, nor to exercise such agency validly after he has acquired an interest adverse to his principal. Knabe v. Ternot, 16 La. Ann. 13.

Having or representing adverse interests as disqualifying agent see supra § 23.

36. Forrester-Duncan Land Co. v. Evatt, 90 Ark. 301, 119 SW 282 (holding that, if an agent attempts to speculate in the subject matter of the agency, his acts will be subjected to the closest scrutiny); Krutz v. Fisher, 8 Kan. 90; Gillespie v. Weiss, 8 Pa. Dist. 170, 22 Pa. Co. 177.

[a] **In equity** an agent is disabled from dealing with the subject matter on his own account. Henyan v. Trevino, (Tex. Civ. A.) 137 SW 458.

37. German Ins. Co. v. Milford Independent School Dist., 80 Fed. 366, 25 CCA 492; Wilbur v. Lynde, 49 Cal. 290, 19 AmR 645; Tewksbury v. Spruance, 75 Ill. 187; Mollett v. Robinson, L. R. 5 C. P. 646.

[a] **The object of the principle** is to elevate the agent to a position where he cannot be tempted to betray his trust. To guard against uncertainty, all possible temptation is removed, and the prohibition against the agent's acting in a dual capacity is made broad enough to cover all his transactions. Porter v. Woodruff, 36 N. J. Eq. 174.

[b] **"The underlying thought** is, that an agent should not unite his personal and his representative characters in the same transaction; and equity will not permit him to be exposed to the temptation, or brought into a situation where his own personal interests conflict with the interests of his principal." Sterling v. Smith, 97 Cal. 343, 347, 32 P 320.

[c] **To remove temptation.**—The law does not presume that such transactions will always be impressed with fraud; but they furnish an inducement to fraud and afford opportunities to persons who should always

plication, embracing not only agencies of a private character, but also those public in their nature;[38] and it applies to all cases where there is danger that the agent may be induced to use his powers for his own advantage;[39] and hence it does not apply where the agent's interest is merely nominal and offers him no temptation to sacrifice his principal's interests.[40]

Violation of rule. If in violation of such rule the agent, without his principal's full knowledge and consent, has individual interests, or represents interests which are in conflict with those of his principal, the principal when he acquires full knowledge of the facts may repudiate the transaction,[41] without regard to whether the agent actually acted in bad faith, or whether the transaction resulted in a loss to the principal;[42] or the principal may adopt the transaction and compel the agent to account for any profits made thereby.[43] Nothing will defeat this right of the principal except his own confirmation after full knowledge of all the facts,[44] and it does not matter that the agent was a mere volunteer agent or that he was acting gratuitously.[45] Nor is this rule affected by a custom or usage to the contrary of which the principal had no notice, actual or constructive.[46]

Third person cannot object. The fact that the agent is adversely interested in the contract which he was authorized to make on behalf of his principal does not render the contract void, but merely voidable, at the option of the principal, and a third person cannot raise such objection.[47]

[§ 355] **c. Engaging in Rival Business.** In the absence of a clear consent or waiver by the principal the agency relation denies to the agent the right to engage in any business or dealings on his own account of the same character as the principal's,[48] or of such a nature as will take the time he has contracted to give to his principal,[49] although, where the agent has not contracted to give his full time

act with the most conscientious and scrupulous good faith to abuse their trust. A total disability is therefore enjoined to take away all temptation. Grumley v. Webb, 44 Mo. 444, 100 AmD 304.

38. Maryland F. Ins. Co. v. Dalrymple, 25 Md. 242, 89 AmD 779; Ames v. Port Huron Log Driving, etc., Co., 11 Mich. 139, 83 AmD 731; Ten Eyck v. Craig, 62 N. Y. 406; Torrey v. Orleans, etc., Bank, 9 Paige (N. Y.) 649 [aff 7 Hill 260].

39. McCloskey v. Goldman, 62 Misc. 462, 115 NYS 189.

[a] **"The rule that an agent cannot bind his principal** by contract when the agent is personally, or as representing another, interested adversely in the subject matter, is founded upon plain reason, and is applied whenever the adverse interest of the agent is real and substantial, presenting a temptation to the agent to sacrifice the interest of the principal." German Ins. Co. v. Milford Independent School Dist., 80 Fed. 366, 367, 25 CCA 492.

40. German Ins. Co. v. Milford Independent School Dist., 80 Fed. 366, 25 CCA 492 (holding that the rule does not apply where a school board, by vote, authorizes its president to enter into a contract of insurance through an insurance agent who is also a member of the board, as the latter's interest as a school director in the property insured is nominal, and is no greater than that of any resident of the school district); Brown v. Spencer, 163 Cal. 589, 126 P 493.

41. White v. Leech, (Iowa) 96 NW 709; Wann v. Scullin, 210 Mo. 429, 109 SW 688; Lardner's Est., 16 Wkly NC (Pa.) 51; Thorne v. Brown, 63 W. Va. 603, 60 SE 614 (holding that if an agent, in dealing with his principal about the subject of the agency, obtains an advantage by the suppression of information acquired by means of the agency, or by misrepresentation, his contract is voidable). And see cases supra note 33. See also infra § 519–521.

[a] **A contract of an agent for his principal made with himself** is prima facie void. Arnkens v. Rouse, 11 Oh. Dec. (Reprint) 380, 26 CincLBul 221; Hay v. Long, 78 Wash. 616, 139 P 761.

[b] **Where an agent makes a profit out of a purchase** of property by himself from his principal, it constitutes fraud entitling the principal to annul the contract of sale. Cadwallader v. Smith, etc., Co., 7 Philippine 461.

[c] **A lease made by an agent to his wife** is voidable by the owner, for the act of the wife, if not engaged in separate business, is the act of the community, and hence the agent is really leasing to himself. Hay v. Long, 78 Wash. 616, 139 P 761.

[d] **Rescission by suit.**—Where defendant commits a fraud by appropriating to himself and using money placed in his hands for investment, and by furnishing plaintiff with fraudulent copies and assignments of mortgages, the transaction loses its contractural nature, and becomes a tort, so that all the rescission that is necessary is the bringing of an action within the period of limitations. Irwin v. Harris, 199 Pa. 405, 49 A 218.

42. U. S.—Glover v. Ames, 8 Fed. 351.

Ind.—Hammond v. Bookwalter, 12 Ind. A. 177, 39 NE 872.

Mich.—McNutt v. Dix, 83 Mich. 328, 47 NW 212, 10 LRA 660.

Minn.—Friesenhahn v. Bushnell, 47 Minn. 443, 50 NW 597.

Miss.—Spinks v. Davis, 32 Miss. 152.

Mo.—Neuman v. Friedman, (A.) 136 SW 251; De Steiger v. Hollington, 17 Mo. A. 382.

N. J.—Porter v. Woodruff, 36 N. J. Eq. 174.

N. Y.—New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85.

Pa.—Everhart v. Searle, 71 Pa. 256.

Tenn.—Tynes v. Grimstead, 1 Tenn. Ch. 508.

Va.—Ferguson v. Gooch, 94 Va. 1, 26 SE 397, 40 LRA 234.

[a] **An agent who invests his principal's money in a corporation of which he is a member,** and which is deeply in debt, without informing her either of his membership or of the debt, is guilty of fraud, although there may be no actual wrongful intent; and the principal may recover such sum from the agent in the absence of a ratification by her of such investment. Sterling v. Smith, 97 Cal. 343, 32 P 320.

[b] **No inquiry as to fairness.**—(1) The transaction will be set aside by a court of equity without inquiry as to its fairness. Sturdevant v. Pike, 1 Ind. 277. (2) "If, therefore, such contracts were to be held valid, until shown to be fraudulent or corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud or corruption. Hence, the only safe rule in such cases, is to treat the contract as void, without reference to the question of fraud in fact, unless affirmed by the opposite party." Peo. v. Overyssel Tp., 11 Mich. 222, 228.

43. See infra §§ 356, 357.

44. Neuman v. Friedman, (Mo. A.) 136 SW 251; Ferguson v. Gooch, 94 Va. 1, 26 SE 397, 40 LRA 234.

45. Hunsaker v. Sturgis, 29 Cal. 142; Kevane v. Miller, 4 Cal. A. 598, 88 P 643; Salsbury v. Ware, 183 Ill. 505, 56 NE 149 [rev 80 Ill. A. 485]; Rogers v. Genung, 76 N. J. Eq. 306, 312, 74 A 473 [cit Cyc]; Wright v. Smith, 23 N. J. Eq. 106; Conkey v. Bond, 36 N. Y. 427.

[a] **Where an agent, on being directed to loan money** on deed of trust, included in the trust deed a note owed by the borrower to the agent, the fact that the agent acted without compensation is no defense. Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935.

46. U. S.—Audubon Bldg. Co. v. Andrews, 187 Fed. 254.

Mich.—Milligan v. Sligh Furniture Co., 111 Mich. 629, 70 NW 133.

Mo.—Jacques v. Edgell, 40 Mo. 76.

Va.—Ferguson v. Gooch, 94 Va. 1, 26 SE 397, 40 LRA 234.

Eng.—Robinson v. Mollett, L. R. 7 H. L. 802 [rev L. R. 7 C. P. 84]; Bartram v. Lloyd, 88 L. T. Rep. N. S. 286.

47. Alabama Eastern Bank v. Taylor, 41 Ala. 93; McKinley v. Irvine, 13 Ala. 681; Jenison v. Hapgood, 7 Pick. (Mass.) 1, 19 AmD 258; Remick v. Butterfield, 31 N. H. 70, 64 AmD 316.

48. Clarke v. Kelsey, 41 Nebr. 766, 60 NW 138.

[a] **The principal may waive his right,** as where a contract of agency between a machinery company and a local agent provided that if the agent solicited orders for other houses the company might cancel the contract, and the agent did solicit orders for other houses, and the company knew of it, but did nothing. Davis v. Huber Mfg. Co., 119 Iowa 56, 93 NW 78.

[b] **If there is an agreement that the agent may engage in other business** not prejudicial to the principal, he must show that he has acted within the limits fixed, or else account to the principal for the advantages derived from such business. Boston Deep Sea Fishing, etc., Co. v. Ansell, 39 Ch. D. 339.

49. U. S.—St. Louis Electric Light, etc., Co. v. Edison Gen. Electric Co., 64 Fed. 997.

Nebr.—Clarke v. Kelsey, 41 Nebr. 766, 60 NW 138.

N. Y.—Seaburn v. Zachmann, 99 App. Div. 218, 90 NYS 1005.

Pa.—Ewing's App., 4 A 832 (holding that an agent who agrees for an exclusive right in the sale of his principal's machine in certain territory does not devote himself primarily to the latter's interest if he takes an agency for the sale of a machine of another manufacturer, and in such case he forfeits his rights under a contract so conditioned).

Eng.—Thompson v. Havelock, 1 Campb. 527 (holding that an agent cannot engage to act for a third person, when he has agreed to give the whole of his services to his principal).

[a] **Custom.**—An employer of a traveling salesman is not bound by

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to the principal, there is nothing to prevent him from engaging in other business or having other interests which do not interfere with or threaten the principal's interests.[50] Thus it has been held that the mere fact that he has contracted to sell certain articles for his principal, does not preclude him from selling similar articles for himself.[51] Nor is it a breach of duty for an agent to purchase the business and materials of a rival concern, just prior to the expiration of his term of service, for the purpose of entering into business for himself at the end of such term.[52]

[§ 356] **d. Duty to Account for Profits of Agency—(1) In General.** As a general rule it is a breach of good faith and loyalty to his principal for an agent, while the agency exists, so to deal with the subject matter thereof, or with information acquired during the course of the agency, as to make a profit out of it for himself in excess of his lawful compensation; and if he does so he may be held as a trustee and may be compelled to account to his principal for all profits, advantages, rights, or privileges acquired by him in such dealings, whether in performance or in violation of his duties,[53] and be required to transfer them to his principal upon

a custom to allow such salesman to work in a retail store during the holidays where he had no knowledge of such custom. Milligan v. Sligh Furniture Co., 111 Mich. 629, 70 NW 133.

[b] **An agreement by an agent with his principal not to sell, canvass for, or be interested in the sale of, goods of other persons** in competition with the principal is not violated by entering into an agreement with a rival manufacturer accepting an agency for the latter, until the agent has actually sold, or canvassed for, or been interested in the sale of, some of the goods of the latter. Graham v. J. I. Case Threshing Mach. Co., 19 Man. 27.

50. Mass.—Randall v. Peerless Car Co., 212 Mass. 352, 99 NE 221 (provision requiring the devotion of an agent's best energies to his principal's business does not require him to give it his exclusive attention).

Mich.—Geiger v. Harris, 19 Mich. 209 (holding that a traveling commercial agent commits no violation of duty by gratuitously taking orders for goods upon a house in whose service he has formerly been, if he can do so without prejudice to the interests of his employers).

Mo.—Gaty v. Sack, 19 Mo. A. 470.

Nebr.—Clarke v. Kelsey, 41 Nebr. 766, 60 NW 138.

N. Y.—Reis v. Volck, 151 App. Div. 613, 136 NYS 367.

51. Hitchhorn v. Bradley, 117 Iowa 130, 90 NW 592 (holding that where a jobber of cigars, in consideration of being given the sole agency for a certain cigar, agreed to render his best services in pushing their sale by putting them in the hands of his agent, advertising them, etc., it was not a breach of his contract that at the time he was performing the same he also made efforts to introduce and sell another cigar of the same general character manufactured by himself); Butterick Pub. Co. v. Boynton, 191 Mass. 175, 77 NE 705.

52. Greenburg v. Childs, 147 Ill. A. 477 [aff 242 Ill. 110, 89 NE 679] (holding also that if an agent just prior to the expiration of his term of service, purchases material, etc., of a rival concern for the purpose of going into business himself at the end of his term, an agreement to continue his service after the expiration of his contract, in consideration of which the principal is to take over, use, and pay for, as its business requires, the material so purchased by the agent, is valid, and the market value of such of the materials in question as are used by the principal may be recovered by the agent in an appropriate action).

[a] **An agent may, in anticipation of the termination of his agency,** make arrangements for other employment so long as he does not abuse the confidence reposed in him by his principal. Martin v. Brown, 19 Man. 680.

53. U. S.—Sandoval v. Randolph, 222 U. S. 161, 32 SCt 48, 56 L. ed. 142; U. S. v. Carter, 217 U. S. 286, 30 SCt 515, 54 L. ed. 769; McKinley v. Williams, 74 Fed. 94, 20 CCA 312 [aff 65 Fed. 4] (holding that an agent of a vendor who speculates in the subject matter of his agency, or intentionally becomes interested in it as a purchaser or as the agent of a purchaser, violates his contract of agency, betrays his trust, and becomes indebted to his principal for the profits he gains by his breach of duty); Northern Pac. R. Co. v. Kindred, 14 Fed. 77, 3 McCrary 627; Dunlevy v. Mowry, 8 F. Cas. No. 4,165, 2 Bond 214; Yates v. Arden, 30 F. Cas. No. 18,126, 5 Cranch C. C. 526.

Ala.—Clifford v. Armstrong, 176 Ala. 441, 58 S 430; Messer-Moore Ins., etc., Co. v. Trotwood Park Land Co., 54 S 228, 229 [cit Cyc]; Lindsey Lumber Co. v. Mason, 165 Ala. 194, 51 S 750; Whelan v. McCreary, 64 Ala. 319.

Ark.—Forrester-Duncan Land Co. v. Evatt, 90 Ark. 301, 119 SW 282 (holding that all profits made by an agent, directly or indirectly, in selling the principal's property belong to the principal); Rhea v. Puryear, 26 Ark. 344; Leake v. Sutherland, 26 Ark. 219.

Cal.—Shaw v. Shaw, 160 Cal. 733, 117 P 1048; In re Watkins, 121 Cal. 327, 53 P 702; Wiard v. Brown, 59 Cal. 194; King v. Wise, 43 Cal. 628; Ritchey v. McMichael, 4 Cal. Unrep. Cas. 384, 35 P 151.

Colo.—Calumet Gold Min., etc., Co. v. Phillips, 31 Colo. 267, 72 P 1064; Whitehead v. Lynn, 20 Colo. A. 51, 76 P 1119 (holding that, where an agent, in loaning his principal's money, collected two per cent per annum in cash, and took for the amount loaned notes bearing eight per cent interest per annum, the agent was liable to the principal for the amount of cash collected).

Ga.—Forlaw v. Augusta Naval Stores Co., 124 Ga. 261, 52 SE 898; Williams v. Moore-Gaunt Co., 3 Ga. A. 756, 60 SE 372.

Ill.—Moneta v. Hoffman, 249 Ill. 56, 94 NE 72; James T. Hair Co. v. Daily, 161 Ill. 379, 43 NE 1096 [rev 58 Ill. A. 647]; Glover v. Layton, 145 Ill. 92, 34 NE 53; Montgomery County v. Robinson, 85 Ill. 174; Byrd v. Hughes, 84 Ill. 174, 25 AmR 442; Cottom v. Holliday, 59 Ill. 176; Dennis v. McCagg, 32 Ill. 429; Edwards v. Hamilton, 168 Ill. A. 662; Tilden v. Blackwell, 94 Ill. A. 605; New Era Gas Fuel Appliance Co. v. Shannon, 44 Ill. A. 477.

Ind.—Lafferty v. Jelley, 22 Ind. 471; Beckett v. Bledsoe, 4 Ind. 256.

Iowa.—Bracken v. Jackson, 140 NW 892; Leonard v. Omstead, 141 Iowa 485, 119 NW 973; Merrill v. Sax, 141 Iowa 386, 118 NW 434; Keys v. Bradley, 73 Iowa 589, 35 NW 656; Brown v. Collins, 45 Iowa 709; Stoner v. Weiser, 24 Iowa 434. See also Blodgett v. Brown, 82 NW 482.

Kan.—Jones v. Adair, 76 Kan. 343, 91 P 78; Mulvane v. O'Brien, 58 Kan. 463, 49 P 607.

Ky.—McDoel v. Ohio Valley Impr., etc., Co., 36 SW 175, 18 Kyl 294; Taylor v. Knox, 1 Dana 391, 5 Dana 466 (holding that, where an agent received land warrants to locate on shares to and sell the land, and he bought up his principal's share of the land for less than its value without informing him of the price for which a part of the land had been sold, he was accountable for the full value at the time he sold it).

La.—Clement v. South Atlantic Steamship Line, 128 La. 399, 54 S 920; Denson v. Stewart, 15 La. Ann. 456.

Md.—Lord v. Smith, 109 Md. 42, 71 A 430; Vansant v. State, 96 Md. 110, 53 A 711.

Mass.—Essex Trust Co. v. Enwright, 214 Mass. 507, 102 NE 441, 47 LRANS 567 and note; Malden, etc., Gas Light Co. v. Chandler, 211 Mass. 226, 97 NE 906.

Mich.—Hogle v. Meyering, 161 Mich. 472, 126 NW 1063; Pikes Peak Co. v. Pfuntner, 158 Mich. 412, 123 NW 19; Gay v. Paige, 150 Mich. 463, 114 NW 217; Spencer v. Towles, 18 Mich. 9.

Minn.—Barnett v. Block, 94 Minn. 138, 102 NW 390; Schick v. Suttle, 94 Minn. 135, 102 NW 217; Farmers' Warehouse Assoc. v. Montgomery, 92 Minn. 194, 99 NW 776; Snell v. Goodlander, 90 Minn. 533, 97 NW 421; Smitz v. Leopold, 51 Minn. 455, 53 NW 719; Cock v. Van Etten, 12 Minn. 522.

Miss.—Gillenwaters v. Miller, 49 Miss. 150; Murphy v. Sloan, 24 Miss. 658.

Mo.—Exter v. Sawyer, 146 Mo. 302, 47 SW 951; Grady v. O'Reilly, 116 Mo. 346, 22 SW 798 (holding that, where it was claimed, in negotiating a certain loan and securing an extension of notes, that a certain person was acting as the agent of the debtor, if he was acting as such agent he could be required to account for the advantage obtained in the reduction of interest, as an agent must act honestly, and will not be allowed to make a profit out of a transaction conducted in behalf of his principal); Bent v. Priest, 86 Mo. 475; Murdoch v. Milner, 84 Mo. 96; Grumley v. Webb, 44 Mo. 444, 100 AmD 304; Jacques v. Edgell, 40 Mo. 76; Jamison v. Clascock, 29 Mo. 191; Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935; Smith v. Tayler, 57 Mo. A. 668.

Nebr.—Davis v. Haire 93 Nebr. 819, 142 NW 303; Latson v. Buck, 87 Nebr. 16, 126 NW 760; Wells v. Cochran, 84 Nebr. 278, 120 NW 1123; State v. State Journal Co., 75 Nebr. 275, 106 NW 434, 9 LRANS 174, 13 AnnCas 254 [den new trial 77 Nebr. 752, 110 NW 763]; Duesman v. Hale, 55 Nebr. 577, 76 NW 205; Buck v. Reed, 27 Nebr. 67, 42 NW 894.

Nev.—Frances Mohawk Min., etc., Co. v. McKay, 141 P 456.

N. J.—Vreeland v. Van Blarcom, 35 N. J. Eq. 530; Dodd v. Wakeman, 26 N. J. Eq. 484 [aff 27 N. J. Eq. 564]; Thalman v. Canon, 24 N. J. Eq. 127.

N. M.—O'Neill v. Otero, 15 N. M. 707, 113 P 614.

N. Y.—Fowler v. New York Gold Exch. Bank, 67 N. Y. 138; Wilson v. Wilson, 4 Abb. Dec. 621, 4 Keyes 413; Reis v. Volck, 151 App. Div. 613, 136 NYS 367; Carruthers v. Diefendorf, 66 App. Div. 31, 72 NYS 941 [aff 174 N. Y. 549 mem, 67 NE 1081 mem]; Bruce v. Davenport, 36 Barb. 349 [rev on other grounds 1 Abb. Dec. 233, 3 Keyes 472, 3 Transcr. A. 82, 5 AbbPrNS 185]; Loeb v. Hellman, 45 N. Y. Super. 336 [aff 83 N. Y. 601 mem]; La Forge v. Cornell, 127 NYS 453.

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being reimbursed for his expenditures for the same,[54] unless the principal has consented to or ratified the transaction knowing that benefit or profit would accrue, or had accrued, to the agent,[55] or unless with such knowledge he has allowed the agent to so change his condition that he cannot be put in statu quo.[56] The application of this rule is not affected by the fact that the principal did not suffer any injury by reason of the agent's dealings,[57] or that he in fact obtained better results;[58] nor is it affected by the fact that there is a usage or custom to the contrary,[59] or that the agency is a gratuitous one.[60]

[§ 357] **(2) Particular Applications of Rule.** In accordance with this rule, if an agent by compromise or otherwise is able to effect a favorable settlement of a claim against the principal, he is accountable to the principal for the amount saved or gained.[61] So also, if he derives profits from invest-

Oh.—Ætna Ins. Co. v. Church, 21 Oh. St. 492.

Pa.—Humbird v. Davis, 210 Pa. 311, 59 A 1082; Graham v. Cummings, 208 Pa. 516, 57 A 943; Pennsylvania R. Co. v. Flanigan, 112 Pa. 558, 4 A 364; Coursin's App., 79 Pa. 220; Norris' App., 71 Pa. 106; Simons v. Vulcan Oil, etc., Co., 61 Pa. 202, 100 AmD 628; Landis v. Scott, 32 Pa. 495; Reeside v. Reeside, 6 Phila. 507.

Tenn.—Moinett v. Days, 1 Baxt. 431.

Tex.—Bell v. Maximos, 85 Tex. 140, 19 SW 1070; Borden v. Houston, 2 Tex. 594; Bargman v. Brown, (Civ. A.) 95 SW 39; Moore v. Waco Bldg. Assoc., 19 Tex. Civ. A. 68, 45 SW 974.

Utah.—Little v. Herzinger, 34 Utah 337, 97 P 639.

Vt.—Thorp v. Thorp, 75 Vt. 34, 52 A 1051; Noyes v. Landon, 59 Vt. 569, 10 A 342; Judevine v. Hardwick, 49 Vt. 180.

W. Va.—Pardee v. Crane, 82 SE 340.

Wis.—Grant v. Hardy, 33 Wis. 668.

Eng.—Nitedals Taendstikfabrick v. Bruster, [1906] 2 Ch. 671; Parker v. McKenna, L. R. 10 Ch. 96; Great Western Ins. Co. v. Cunliffe, L. R. 9 Ch. 525; Kimber v. Barber, L. R. 8 Ch. 56; Morison v. Thompson, L. R. 9 Q. B. 480; Ward v. Carttar, L. R. 1 Eq. 29; Bank of London v. Tyrrell, 27 Beav. 273, 54 Reprint 107 [aff 10 H. L. Cas. 26, 11 Reprint 934]; Machen v. Stanyon, 1 Bro. P. C. 133, 1 Reprint 466; Rogers v. Boehm, 2 Esp. 702; Turnbull v. Garden, 38 L. J. Ch. 331; Brown v. Litton, 1 P. Wms. 140, 24 Reprint 329; Bulfield v. Fournier, 15 Reports 176; Tarkwa Main Reef v. Merton, 19 T. L. R. 367; Massey v. Davies, 2 Ves. Jr. 317, 30 Reprint 651; International Tel. Co. v. Renter, 4 Wkly. Rep. 510.

Can.—Coy v. Pommerenke, 44 Can. S. C. 543 [dism app 3 Sask. L. 417]; Hutchinson v. Fleming, 40 Can. S. C. 134.

Ont.—Earle v. Burland, 27 Ont. A. 540; Jones v. Linde British Refrigeration Co., 32 Ont. 191; Wright v. Rankin, 18 Grant. Ch. (U. C.) 625.

Similar rule as to trustees see generally Trusts [39 Cyc 188]; as to officers and directors of corporations see Corporations [10 Cyc 787, 919].

[a] **"It is elementary law** that all profit made or advantage gained by an agent in the execution of his agency belongs to the principal, and it is immaterial whether that advantage is the result of the performance or violation of the agent's duty." Wells v. Cochran, 84 Nebr. 278, 280, 120 NW 1123.

[b] **Agent held as trustee.**—"The relation of principal and agent is a fiduciary one, and the latter can not make advantage and profit for himself out of the relationship, or out of knowledge thus obtained, to the injury of his principal; and the agency being established, the agent will be held to be a trustee as to any profits, advantages, rights, or privileges under any contract made and obtained within the scope and by reason of such agency, and he will be compelled to transfer to the principal the benefit of his contract upon repayment to him of such sums as he may have expended in consideration of the same." Forlaw v. Augusta Naval Stores Co., 124 Ga. 261, 262, 52 SE 898.

[c] **"It matters not how fair the conduct of the agent may have been** in the particular case, nor that the principal would have been no better off if the agent had strictly executed his power, nor that the principal was not in fact injured by the intervention of the agent for his own benefit. If the agent deals with the subject matter of his agency, or, by departing from the instructions of his principal, obtains a better result than could have been obtained by following them, the principal can claim the advantage thus obtained, even though the agent may have contributed his own funds or responsibility in producing the result. The rule which places it beyond the power of the agent to profit by such transactions is founded upon considerations of policy, and is intended not merely to afford a remedy for discovered frauds, but to reach those which may be concealed; and also to prevent them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates." Dutton v. Willner, 52 N. Y. 312, 319.

[d] **An agent cannot avail himself of any advantage** which his agency may give him to profit out of the subject matter of the agency beyond the agreed compensation for his services. State v. State Journal Co., 75 Nebr. 275, 106 NW 434, 9 LRANS 174, 13 AnnCas 254 [den new trial 77 Nebr. 752, 110 NW 763].

[e] **Any breach of the good faith due a principal from his agent,** whereby the principal suffers any disadvantage and the agent reaps any benefit, is a fraud of such nature as to preclude the agent from taking or retaining the benefit and claiming his commissions. Williams v. Moore-Gaunt Co., 3 Ga. A. 756, 60 SE 372.

[f] **A purchase outside the agency** has been held to be subject to the rule. Thus if, at the time it was made, the agent assumed to act for his principal and purchased for his benefit, the transaction, as against the agent, will inure to the benefit of the principal. Watson v. Union Iron, etc., Co., 15 Ill. A. 509.

[g] **Any one employed to procure an option** for the purchase of property, and who obtains the same in writing in his own name, with the distinct oral understanding between himself and the owner that the option is procured for the person by whom he is employed, is an agent, and his employer is 'entitled to the benefit of the option, as against an assignee of the agent. Henry v. Black, 213 Pa. 620, 63 A 250.

[h] **Renewal of insurance policy for own benefit.**—Where an agent, instructed to surrender an insurance policy on the life of his principal and secure a return of the premium notes, renews the policy for his own benefit, it inures to the benefit of the principal and, upon his death, the agent is liable to account for the amount of the policy. Dutton v. Willner, 52 N. Y. 312.

[i] **A person who ostensibly acts as an associate of syndicate members,** when in fact he is acting as a promoter, is liable to his principals for the return of any secret profit received by him. Maxwell v. McWilliams, 145 Ill. A. 155. See also Buchanan Cent. Land Co. v. Obenchain, 92 Va. 130, 22 SE 876.

[j] **The measure of the principal's relief** in equity is the exact amount of the agent's profit. Loudenslager v. Woodbury Heights Land Co., 58 N. J. Eq. 556, 43 A 671.

[k] **Subagent.**—Where an agent for the sale of land employed a subagent to effect a sale for an agreed portion of the agent's commission, perfect good faith is demanded, and the subagent is prohibited from any misrepresentation to the landowner for whom he is dealing, whereby the latter might be induced to surrender his rights, and for any benefits derived by such subagent from such misrepresentations he is liable in damages to the agent. Barnett v. Block, 94 Minn. 138, 102 NW 390.

54. Forlaw v. Augusta Naval Stores Co., 124 Ga. 261, 52 SE 898; Judevine v. Hardwick, 49 Vt. 180; Jackson v. Pleasanton, 101 Va. 282, 43 SE 573; Dana v. Duluth Trust Co., 99 Wis. 663, 75 NW 429. Right to reimbursement generally see infra §§ 458–466.

55. Ackenburgh v. McCool, 36 Ind. 473; Vreeland v. Van Blarcom, 35 N. J. Eq. 530; Wilson v. Wilson, 4 Abb. Dec. (N. Y.) 621, 4 Keyes 413; Kramer v. Winslow, 154 Pa. 637, 25 A 766; Maull's Est., 11 Pa. Dist. 256. See also Holden v. Webber, 29 Beav. 117, 54 Reprint 571.

[a] **Unless an agent makes full and complete disclosure** to his principal with reference to a contract entered into with a third person which renders the agent's position antagonistic to his principal, the principal may recover any reward received thereunder. Frances Mohawk Min., etc., Co. v. McKay, (Nev.) 141 P 456.

[b] **Consent to profit.**—Where an agent is employed to procure from a third person a deed to land held by the principal under a contract, and it is agreed that the agent in consideration of his services and of advancing the money necessary in the transaction shall have the benefit of whatever reduction of the price he can secure, he is entitled to the profits in the transaction, and a mortgage to him of the principal to secure the amount of such profits is valid. O'Day v. Conn, 131 Mo. 321, 32 SW 1109.

56. Exter v. Sawyer, 146 Mo. 302, 47 SW 951; Euneau v. Rieger, 105 Mo. 659, 16 SW 354.

57. Leonard v. Omstead, 141 Iowa 485, 119 NW 973; Parker v. McKenna, L. R. 10 Ch. 96.

58. Dutton v. Willner, 52 N. Y. 312 (holding that, where an agent by departing from instructions obtains a better result than could have been obtained by following them, the principal can claim the advantage thus obtained even though the agent may have contributed his own funds or responsibility in producing the result and no risk or expense was incurred by the principal).

59. Mauran v. Warren, 16 F. Cas. No. 9,310, 2 Lowell 53; Jacques v. Edgell, 40 Mo. 76.

60. Salsbury v. Ware, 183 Ill. 505, 56 NE 149 [rev 80 Ill. A. 485]; Wright v. Smith, 23 N. J. Eq. 106.

61. Owsley v. Woolhopter, 14 Ga. 124; Hitchcock v. Watson, 18 Ill. 289 (holding that an agent who satisfies a debt of his principal at less than he has received for that purpose is accountable to his principal for the surplus); Switzer v. Skiles, 8 Ill. 529, 44 AmD 723; Spencer v. Towles, 18 Mich. 9; Ash v. A. B. Frank Co., (Tex.

ments in his own name or for his own benefit of the principal's money or property,[62] or from inducing his principal to accept on a claim less than what he actually collects on it,[63] he will be deemed to hold them in trust for his principal and will be liable to account therefor. So an agent may be compelled to account for profits made by selling his principal's property at a greater price than that which he represents to his principal that he can sell or has sold it for,[64] or than that which the principal specified that it should be sold for,[65] or by purchasing at a less price than that which he charges against the principal for the property,[66] unless the principal had full knowledge of such facts

Civ. A.) 142 SW 42 (holding that, where plaintiff assigned insurance policies to defendant for collection and payment of the proceeds to plaintiff's creditors, and defendant settled with the creditors on the basis of seventy cents on the dollar, any surplus belonged to plaintiff, and not to defendant).

62. U. S.—Moore v. Petty, 135 Fed. 668, 68 CCA 306 (holding that, where agents, during the continuance of their agency, purchased for themselves land of their principals, using the name of another to give color to the transaction, and resold the same at a higher price, the benefit of the resale inured to the principals, and they could sue at law for the profit received and retained by the agents).

Ark.—White v. Ward, 26 Ark. 445.

Conn.—Stebbins v. Waterhouse, 58 Conn. 370, 20 A 480; Thompson v. Stewart, 3 Conn. 171, 8 AmD 168.

Ind.—Rising Sun Nat. Bank v. Seward, 106 Ind. 264, 6 NE 635; Ackenburgh v. McCool, 36 Ind. 473.

La.—Beugnot v. Tremoulet, 111 La. 1, 35 S 362.

N. Y.—Manville v. Lawton, 19 NYS 587.

N. D.—Persons v. Smith, 12 N. D. 403, 97 NW 551.

Pa.—Rundell v. Kalbfus, 125 Pa. 123, 17 A 238.

Eng.—Erskine v. Sachs, [1901] 2 K. B. 504.

63. Albright v. Phœnix Ins. Co., 72 Kan. 591, 84 P 383 (holding that, where an agent of an insurance company, having charge of the foreclosure of a mortgage, induced the company to accept a certain sum for its debt, and on the foreclosure sale so manipulated the transaction that the property was sold for more than the company had agreed to accept, and the agent appropriated the difference to his own use, he was liable to the company for such difference).

64. Colo.—Schoelkopf v. Leonard, 8 Colo. 159, 6 P 209.

Ind.—Blanchard v. Jones, 101 Ind. 542; Love v. Hoss, 62 Ind. 255.

Iowa.—Hewitt v. Young, 82 Iowa 224, 47 NW 1084; Brown v. Collins, 45 Iowa 709.

Kan.—Mulvane v. O'Brien, 58 Kan. 463, 49 P 607.

Mass.—Greenfield Sav. Bank v. Simons, 133 Mass. 415.

Mich.—McNutt v. Dix, 83 Mich. 328, 47 NW 212, 10 LRA 660.

Minn.—Hegenmyer v. Marks, 37 Minn. 6, 32 NW 785, 5 AmSR 808.

Nebr.—Barber v. Martin, 67 Nebr. 445, 93 NW 722.

N. Y.—Bain v. Brown, 56 N. Y. 285 [aff 7 Lans. 506]; Brown v. Post, 1 Hun 303.

Pa.—Kramer v. Winslow, 154 Pa. 637, 25 A 766.

Philippine.—Cadwallader v. Smith, etc., Co., 7 Philippine 461.

Can.—McLeod v. Higginbotham, 18 WestLR 296.

[a] **Secret profit on sale of stock.**—(1) Where a broker sold stock for his principal and remitted a smaller amount than he had actually received for it although the principal, under the impression that the smaller amount was the highest market price, had consented to sell for that amount, it was held that he could recover from the broker the price actually received by him. Cutter v. Demmon, 111 Mass. 474. (2) So where the stockholders of a corporation, being ignorant of the selling value of their stock, authorized the president of the company to find a purchaser and effect a sale of their shares at par, and the president, at and before such time, was in secret correspondence and negotiation for the sale of the stock, with a view to a large profit to himself, and, by affirmative acts and misrepresentations, concealed his transactions from the stockholders, and effected a sale of their stock for a sum largely in excess of par, he cannot retain such excess, but must account to the stockholders for the profits made, notwithstanding he had stated to them that he would retain for his services as agent any sum realized above that for which he was authorized to sell. Mulvane v. O'Brien, 58 Kan. 463, 49 P 607.

[b] **To enable a principal to recover for secret profits** made by his agent in exchange of property, it must appear that the agent had knowledge of the value of the property taken, unknown to his principal, which the agent used to his advantage. Davis v. Haire, 93 Nebr. 819, 142 NW 303.

65. Ala.—Miller v. Louisville, etc., R. Co., 83 Ala. 274, 4 S 842, 3 AmSR 722.

Ill.—Kerfoot v. Hyman, 52 Ill. 512 (holding that, where an agent who was authorized to sell a tract of land at a given price, sold a portion of it for a larger sum, and placed the legal title to the residue in a third person for his benefit, he should account to his principal for the excess received for the portion sold, and the legal title to the residue of the land not sold should be released to the principal); Merryman v. David, 31 Ill. 404.

Iowa.—Merrill v. Sax, 141 Iowa 386, 118 NW 434.

La.—Denson v. Stewart, 15 La. Ann. 456 (holding that, where an agent authorized to sell a thing for a particular price, sells it at a higher price, the surplus will belong to the principal, and the agent is entitled only to his stipulated commission).

Tex.—Turnley v. Michael, (Civ. A.) 15 SW 912.

[a] **Secret contract for higher price.**—Where an agent with written authority to sell land for a specified price contracts for its sale at a greater price, and, concealing this fact from his principal, obtains a conveyance of the latter's title for the originally specified price, after which he consummates the sale previously contracted for, such agent is bound to account to the principal for the difference between the amount paid by him for the title and the proceeds of the sale made by him. Kramer v. Winslow, 130 Pa. 484, 18 A 923, 17 AmSR 782.

66. U. S.—Primeau v. Granfield, 180 Fed. 847 [aff 184 Fed. 480]; Northern Pac. R. Co. v. Kindred, 14 Fed. 77, 3 McCrary 627.

Cal.—Lomita Land, etc., Co. v. Robinson, 154 Cal. 36, 97 P 10, 18 LRANS 1106 and note; Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 P 151; Calmon v. Sarraille, 142 Cal. 638, 76 P 486 (holding that an agent who induces his principal to give more than is necessary for property, himself fraudulently appropriating the excess, cannot resist a recovery by his principal on the ground that the latter was willing to give the entire amount, and therefore was not injured); Callaway v. Wilson, 141 Cal. 421, 74 P 1035; Kuhlman v. Burns, 117 Cal. 469, 49 P 585; Ritchey v. McMichael, 35 P 151; Smith v. Elderton, 16 Cal. A. 424, 117 P 563; Kevane v. Miller, 4 Cal. A. 598, 88 P 643.

Colo.—Whitehead v. Linn, 45 Colo. 427, 102 P 286.

Ill.—Salsbury v. Ware, 183 Ill. 505, 56 NE 149 [rev 80 Ill. A. 485] (holding that, where the agent represented that the price was more than it actually was, and received the full amount from his principal, he must account therefor, notwithstanding the principal sold at a profit, even on the price represented to have been paid); Ely v. Hanford, 65 Ill. 267; Cottom v. Holliday, 59 Ill. 176.

Ind.—Rising Sun Nat. Bank v. Seward, 106 Ind. 264, 6 NE 635.

Iowa.—Rorebeck v. Van Eaton, 90 Iowa 82, 57 NW 694; Hewitt v. Young, 82 Iowa 224, 47 NW 1084; Keyes v. Bradley, 73 Iowa 589, 35 NW 656; Anderson v. Weiser, 24 Iowa 428.

La.—Dwyer v. Powell, 18 La. 99 (holding that an agent to buy tobacco, who gets it for less than the market price, acts in bad faith if he charges it to his principal for a higher price than that paid).

Me.—Bunker v. Miles, 30 Me. 431, 50 AmD 632 (holding that an agent employed to purchase a horse and intrusted with a limited amount of money for the purpose is liable to his principal for the excess of that amount over the price actually paid by him for the horse, deducting his compensation for services).

Minn.—Crump v. Ingersoll, 44 Minn. 84, 46 NW 141.

Mo.—Kanada v. North, 14 Mo. 615.

N. H.—Parsons v. Merrill, 59 N. H. 227.

N. J.—Wright v. Smith, 23 N. J. Eq. 106.

N. Y.—Duryea v. Vosburgh, 138 N. Y. 621, 33 NE 932; McMillan v. Arthur, 98 N. Y. 167 [aff 48 N. Y. Super. 424]; Moore v. Moore, 5 N. Y. 256; Boyle v. Staten Island, etc., Land Co., 17 App. Div. 624, 45 NYS 496; Marvin v. Buchanan, 62 Barb. 468; Willink v. Vanderveer, 1 Barb. 599.

Pa.—Yeaney v. Keck, 183 Pa. 532, 38 A 1041.

Tex.—Dolinski v. Pittsburg First Nat. Bank, (Civ. A.) 122 SW 276.

Va.—Jackson v. Pleasanton, 101 Va. 282, 43 SE 573.

Wash.—Stewart v. Preston, 77 Wash. 559, 137 P 993; Watson v. Bayliss, 62 Wash. 329, 113 P 770, 34 LRANS 1210 and note (holding that a principal, defrauded by his agent pretending to have paid a larger sum for property than he actually paid, may recover the difference, although he retains the property); Hindle v. Holcomb, 34 Wash. 336, 75 P 873 (holding that, where a principal, relying on his agent's representations as to the least sum for which land could be bought, paid him that sum, but the agent purchased the land for him for a less sum, the principal might recover the difference between the two amounts).

Wis.—Collins v. Case, 23 Wis. 230.

Ont.—Arthurton v. Dalley, 2 Grant Ch. (U. C.) 1.

Que.—Martel v. Pageau, 9 Que. Super. 175.

[a] **An agent to buy lands, who has deceived his principal** by representations that the price was greater than that actually paid, and has appropriated the excess, will not be compelled to account for the part thereof which he has paid another to discover lands for sale, such other person not having been a party to, or knowing of, the deception on the principal. Salsbury v. Ware, 183 Ill. 505, 56 NE 149 [rev 80 Ill. A. 485].

[b] **That an agent has a personal option on property** does not permit

and consented thereto,[67] or unless he had expressly agreed to sell at a fixed price, the agent to have all he could get above that price,[68] or unless the principal had expressly agreed before to pay the agent a certain price for the property regardless of what it cost him.[69]

Secret commission. The agent may also be compelled to account for any secret commissions or any private collateral benefits which he receives for himself in contracting for his principal,[70] as where, when authorized to purchase or sell for his principal, he receives from the purchaser or seller a commission in consideration of his making the purchase or sale.[71] But it has been held that he is not required to account for mere gratuities received by him from third persons, although incidentally connected with the agency.[72]

[§ 358] **e. Selling Agent Must Not Sell to Himself—(1) In General.** Good faith and loyalty require that an agent authorized to sell or lease his principal's property must in doing so act solely for his principal's interest; and since, if in making the sale or lease he himself is interested as purchaser or lessee, there will be an inducement to act adversely to his principal's interest, such an agent must, as a general rule, sell or lease only to a third person, and must not, without his principal's full knowledge and consent, himself become the purchaser or lessee either directly[73] or through the agency of a

him to retain the difference between what he pays for it for the principal and the larger amount which he pretends to have paid. Watson v. Bayliss, 62 Wash. 329, 113 P 770, 34 LRANS 1210.

[c] **The principal's right to recover from the agent is not lost** by his paying over money to complete the purchase, with knowledge of the agent's fraud, as he is not bound to rescind or to resort to an action to compel a completion of the purchase at the lesser price. Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 P 151.

67. Kramer v. Winslow, 154 Pa. 637, 25 A 766.

68. Ranney v. Barlow, 112 U. S. 207, 5 SCt 304, 28 L. ed. 662; Synnott v. Shaughnessy, 2 Ida. (Hasb.) 122, 7 P 82; Hale El. Co. v. Hale, 201 Ill. 131, 66 NE 249 [aff 98 Ill. A. 430].

69. Anderson v. Weiser, 24 Iowa 428.

70. U. S.—Alger v. Anderson, 78 Fed. 729; Garrow v. Davis, 10 F. Cas. No. 5,257, 10 NYLegObs 225 [aff 15 How. 272, 14 L. ed. 692]; Mauran v. Warren, 16 F. Cas. No. 9,310, 2 Lowell 53.

Mass.—Smith v. Townsend, 109 Mass. 500.

Minn.—Lum v. McEwen, 56 Minn. 278, 57 NW 662.

Mo.—Dennison v. Aldrich, 114 Mo. A. 700, 91 SW 1024; Patterson v. Missouri Glass Co., 72 Mo. A. 492 (holding that money paid to an agent, who has had his principal's property insured, by the agent of the insurers for having taken policies in their companies, belongs to the principal, such money being profits made by an agent in the execution of his agency).

N. Y.—Densmore v. Searle, 7 App. Div. 45, 39 NYS 948; Morrison v. Ogdensburgh, etc., R. Co., 52 Barb. 173; Adams v. Van Brunt, 11 NYSt 659.

Pa.—Graham v. Cummings, 208 Pa. 516, 57 A 943; Yeaney v. Keck, 183 Pa. 532, 38 A 1041.

Utah.—In re Evans, 22 Utah 366, 62 P 913 (holding that a person employed to act as agent in securing the services of attorneys cannot contract to receive a portion of the fees himself as assistant attorney).

Va.—Segar v. Edwards, 11 Leigh (38 Va.) 213.

Eng.—Powell v. Jones, [1905] 1 K. B. 11, 3 BRC 252; Morison v. Thompson, L. R. 9 Q. B. 480; Phosphate Sewage Co. v. Hartmont, 5 Ch. D. 394, 457; Turnbull v. Garden, 38 L. J. Ch. 331; Fawcett v. Whitehouse, 4 L. J. Ch. O. S. 64 [aff 1 Russ. & M. 132, 5 EngCh 132, 39 Reprint 51].

Ont.—Wright v. Rankin, 18 Grant Ch. (U. C.) 625; Culverwell v. Campton, 31 U. C. C. P. 342.

[a] **Incidental benefits.**—The principal may recover a secret commission or discount received by the agent in the performance of his undertaking, although it related to an incidental matter not connected with the agent's duty, and the agent acted in good faith. Hippisley v. Knee, [1905] 1 K. B. 1. But see Heckscher v. Blanton, (Va.) 66 SE 859, 863 (where the court said: "It is not strictly true that all profits made by agents or trustees . . . belong to their principals, but only such profits as are thereby diverted from, and therefore made out of, funds belonging to their principals. They cannot keep as their own what rightly belongs to their principals; but, in order for such result to follow, the ageney must be the proximate or direct, not the remote or indirect, cause of the profit, i. e., the profit must be traceable to the agency as its efficient cause and not as its mere incidental occasion").

71. Minn.—Crump v. Ingersoll, 44 Minn. 84, 46 NW 141.

Mo.—Shubart v. Federated Mines, etc., Co., 143 Mo. A. 574, 128 SW 2.

Nebr.—Barber v. Martin, 67 Nebr. 445, 93 NW 722.

Pa.—Graham v. Cummings, 208 Pa. 516, 57 A 943.

Eng.—Lister v. Stubbs, 45 Ch. D. 1.

Que.—Metabetchouan Pulp Co. v. Paquet, 29 Que. Super. 211.

Sask.—Mitchell v. Sparling, 3 Sask. L. 213, 14 WestLR 268 [foll Morison v. Thompson, L. R. 9 Q. B. 480].

[a] **That an agent is entitled to reasonable compensation** from his principal for selling stock will not justify him in secretly obtaining a personal profit from the buyer out of the transaction. Merrill v. Sax, 141 Iowa 386, 118 NW 434.

72. Ginn v. Almy, 212 Mass. 486, 99 NE 276; Gay v. Paige, 150 Mich. 463, 114 NW 217; Lamb Knit-Goods Co. v. Lamb, 119 Mich. 568, 78 NW 646. But see Mauran v. Warren, 16 F. Cas. No. 9,310, 2 Lowell 53.

[a] **Gifts prompted by politeness.**—Where an agent was employed by an insurance company to adjust losses, and other insurance companies, adopting the adjustment by the agent, paid gratuities to the agent, it was held that the agent was not bound to account therefor to his principal. Ætna Ins. Co. v. Church, 21 Oh. St. 492, 498 (in this case the court said: "Neither the Ætna company [principal] nor Church [agent] had any legal claim against them for so doing. The several amounts paid on these occasions were mere gratuities. Had they been paid to the principal the agent would have had no claim therefor, nor can the principal call the agent to account merely because it was his good fortune to be the donee instead of the principal. These gratuities were not properly earnings or profits made by the agent in the course of the business of the principal. They were gifts prompted by the politeness of the donors and belong to the donee").

73. U. S.—Robertson v. Chapman, 152 U. S. 673, 14 SCt 741, 38 L. ed. 592; Marsh v. Whitmore, 21 Wall. 178, 22 L. ed. 482; Blank v. Aronson, 187 Fed. 241, 109 CCA 327; McKinley v. Williams, 74 Fed. 94, 20 CCA 312 [aff 65 Fed. 4]; Aultman v. Jones, 1 F. Cas. No. 657, 1 Woolw. 99; Barker v. Marine Ins. Co., 2 F. Cas. No. 992, 2 Mason 369.

Ala.—Walker v. Palmer, 24 Ala. 358; McKinley v. Irvine, 13 Ala. 681.

Ark.—Forrester-Duncan Land Co. v. Evatt, 90 Ark. 301, 119 SW 282; Rogers v. Lockett, 28 Ark. 290; White v. Ward, 26 Ark. 445.

Cal.—Paige v. Akins, 112 Cal. 401, 44 P 666; Burke v. Bours, 92 Cal. 108, 28 P 57, 3 Cal. Unrep. Cas. 393, 26 P 102, 98 Cal. 171, 32 P 980; Wilbur v. Lynde, 49 Cal. 290, 19 AmR 645.

Colo.—Finnerty v. Fritz, 5 Colo. 174.

Conn.—Jones v. Hoyt, 23 Conn. 157; Church v. Sterling, 16 Conn. 388; Banks v. Judah, 8 Conn. 145.

D. C.—George v. Ford, 36 App. 315.

Ga.—Reeves v. Callaway, 140 Ga. 101, 78 SE 717; Mackenzie v. Minis, 132 Ga. 323, 63 SE 900, 23 LRANS 1003, 16 AnnCas 723; Hodgson v. Raphael, 105 Ga. 480, 30 SE 416; Roe v. Doe, 31 Ga. 544.

Ill.—Tyler v. Sanborn, 128 Ill. 136, 21 NE 193, 15 AmSR 97, 4 LRA 218 and note; Francis v. Kerker, 85 Ill. 190; Kerfoot v. Hyman, 52 Ill. 512; Norris v. Tayloe, 49 Ill. 17, 95 AmD 568; Casey v. Casey, 14 Ill. 112; McDonald v. Fithian, 6 Ill. 269; Fidelity Trust Co. v. Poole, 136 Ill. A. 266.

Ind.—Sturdevant v. Pike, 1 Ind. 277; Gage v. Pike, Smith 145.

Iowa.—Douglass v. Lougee, 147 Iowa 406, 123 NW 967; In re Acken, 144 Iowa 519, 123 NW 187; Rogers v. French, 122 Iowa 18, 96 NW 767; Fisher v. Lee, 94 Iowa 611, 63 NW 442; Green v. Peeso, 92 Iowa 261, 60 NW 531; Ingle v. Hartman, 37 Iowa 274; Clark v. Lee, 14 Iowa 425.

Ky.—Hoskins v. Morton, 77 SW 195, 25 KyL 1089; Butcher v. Krauth, 14 Bush 713.

La.—Hobson v. Peake, 44 La. Ann. 383, 10 S 762; Meeker v. York, 13 La. Ann. 18; Allard v. Allard, 6 Rob. 320; Robertson v. Western M. & F. Ins. Co., 19 La. 227, 36 AmD 673; Scott v. Gorton, 14 La. 111, 33 AmD 576; Shepherd v. Percy, 4 MartNS 267.

Me.—Parker v. Vose, 45 Me. 54; Matthews v. Light, 32 Me. 305.

Md.—Keighler v. Savage Mfg. Co., 12 Md. 383, 71 AmD 600; Dorsey v. Clarke, 4 Harr. & J. 551.

Mass.—Middlesex Bank v. Minot, 4 Metc. 325; Litchfield v. Cudworth, 15 Pick. 23; Jenison v. Hapgood, 7 Pick. 1, 19 AmD 258; Copeland v. Mercantile Ins. Co., 6 Pick. 198.

Mich.—McNutt v. Dix, 83 Mich. 328, 47 NW 212, 10 LRA 660; McKay v. Williams, 67 Mich. 547, 35 NW 159, 11 AmSR 597; Peo. v. Overyssel Tp. Bd., 11 Mich. 222; Ames v. Port Huron Log Driving, etc., Co., 11 Mich. 139, 83 AmD 731; Ingerson v. Starkweather, Walk. 346.

Minn.—Tilleny v. Wolverton, 46 Minn. 256, 48 NW 908.

Miss.—Murphey v. Sloan, 24 Miss. 658.

Mo.—Meek v. Hurst, 223 Mo. 688, 122 SW 1022; Grumley v. Webb, 44 Mo. 444, 100 AmD 304.

Nebr.—Jansen v. Williams, 36 Nebr. 869, 55 NW 279, 20 LRA 207 (holding that a real estate agent must disclose to his principal all the information he has concerning sales of the prop-

third person.[74] Thus he must not, without his principal's knowledge and consent, become a partner or otherwise jointly interested in purchasing the property.[75]

erty, and that he cannot become a purchaser for his own benefit without the full knowledge and acquiescence of his principal); Rockford Watch Co. v. Manifold, 36 Nebr. 801, 55 NW 236 (holding that an agent for the purpose of selling goods cannot sell to himself, although the sale is public and no actual fraud appears); Englehart v. Peoria Plow Co., 21 Nebr. 41, 31 NW 391; Stettnische v. Lamb, 18 Nebr. 619, 26 NW 374.

N. H.—Remick v. Butterfield, 31 N. H. 70, 64 AmD 316; Martin v. Moulton, 8 N. H. 504.

N. J.—Ruckman v. Bergholz, 37 N. J. L. 437; Porter v. Woodruff, 36 N. J. Eq. 174; Staats v. Bergen, 17 N. J. Eq. 554.

N. Y.—Bain v. Brown, 56 N. Y. 285 [aff 7 Lans. 506]; Post v. Thomas, 153 App. Div. 865, 139 NYS 6 [rev on other grounds 212 N. Y. 264, 106 NE 69]; Bruce v. Davenport, 36 Barb. 349 [rev on other grounds 1 Abb. Dec. 233, 3 Keyes 472, 3 Transcr. A. 82, 5 AbbPrNS 185]; Cumberland Coal, etc., Co. v. Sherman, 30 Barb. 553; McDonald v. Lord, 25 N. Y. Super. 7, 26 HowPr 404; Torrey v. Orleans Bank, 9 Paige 649 [aff 55 N. Y. 680].

N. C.—Deep River Gold Min. Co. v. Fox, 39 N. C. 61.

N. D.—Clendenning v. Hawk, 10 N. D. 90, 86 NW 114 (holding that, where an agent is clothed with authority to lease land for his principal, such authority extends to leasing only to third persons, and a lease attempted to be made to himself in reliance on such agency is wholly unauthorized and without force or legal effect as a contract); Anderson v. Grand Forks First Nat. Bank, 5 N. D. 451, 67 NW 821, 5 N. D. 80, 64 NW 114.

Oh.—Peckham Iron Co. v. Harper, 41 Oh. St. 100; Telling v. Sullivan, 32 Oh. Cir. Ct. 312.

Okl.—Barnes v. Lynch, 9 Okl. 11, 156, 59 P 995.

Or.—Franck v. Blazier, 66 Or. 377, 382, 133 P 800 [cit Cyc]; Fisk v. Waite, 53 Or. 142, 99 P 283.

R. I.—Fisher v. Budlong, 10 R. I. 525.

S. C.—Butler v. Haskell, 4 S. C. Eq. 651.

Tenn.—Tynes v. Grimstead, 1 Tenn. Ch. 508.

Tex.—Armstrong v. O'Brien, 83 Tex. 635, 19 SW 268; McMahan v. Alexander, 38 Tex. 135; Scott v. Mann, 36 Tex. 157; Shannon v. Marmaduke, 14 Tex. 217.

Vt.—Noyes v. Landon, 59 Vt. 569, 10 A 342; Davis v. Smith, 43 Vt. 269.

Va.—Halsey v. Monteiro, 92 Va. 581, 24 SE 258; Colbert v. Shepherd, 89 Va. 401, 16 SE 246; Atwood v. Shenandoah Valley R. Co., 85 Va. 966, 9 SE 748; Segar v. Edwards, 11 Leigh (38 Va.) 213; Moseley v. Buck, 3 Munf. (17 Va.) 232, 5 AmD 508.

Wis.—Cook v. Berlin Woolen Mill Co., 43 Wis. 433; Stewart v. Mather, 32 Wis. 344; Collins v. Case, 23 Wis. 230.

Eng.—De Bussche v. Alt, 8 Ch. D. 286, 2 ERC 289; Bentley v. Craven, 18 Beav. 75, 52 Reprint 29; Clarke v. Tipping, 9 Beav. 284, 50 Reprint 352; Reed v. Norris, 2 Myl. & C. 361, 14 EngCh 361, 40 Reprint 678; Ex p. Lacey, 6 Ves. Jr. 625, 31 Reprint 1228.

N. S.—Sutherland v. Whidden, 3 N. S. 410.

Ont.—Thompson v. Holman, 28 Grant Ch. (U. C.) 35.

[a] **In the absence of express authorization** to that effect, an agent appointed to sell cannot himself be the buyer. McKenzie v. State, 8 Ga. A. 124, 68 SE 622.

[b] **The reason of the rule** (1) is that owing to the selfishness and greed of human nature there must, in the great mass of transactions, be a strong antagonism between the interests of the seller and the buyer, and universal experience shows that the average man, when his interests conflict with his employer's, will not look upon his employer's interests as more important or entitled to more protection than his own. Porter v. Woodruff, 36 N. J. Eq. 174. (2) "The interests of vendor and purchaser are diametrically opposed. To the vendor the highest price, to the purchaser the lowest price, is the greatest good. For the agent of a seller to permit himself to become interested in a purchase from his principal is to inaugurate so dangerous a conflict between duty and self-interest that this has long been wisely and strictly forbidden. No man, whether he be principal or agent, can be a vendor and a purchaser at the same time, and an agent of a vendor who intentionally becomes interested as a purchaser in the subject-matter of his agency violates his contract of agency, betrays his trust, forfeits his commission as agent and is liable to his principal for all the profits he makes by his purchase." Warren v. Burt, 58 Fed. 101, 103, 7 CCA 105.

[c] **Rule of great antiquity.**—The rule that a person cannot, either directly or indirectly, be both vendor and purchaser in the same transaction is as old as are the principles of equity. Schenck v. Dart, 22 N. Y. 422; Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; Green v. Sargeant, 23 Vt. 466, 56 AmD 88; Fox v. Mackreth, 2 Bro. Ch. 400, 29 Reprint 224, 2 Cox Ch. 320, 30 Reprint 148; Downes v. Grazebrook, 3 Meriv. 200, 36 Reprint 77.

[d] **Agent winning raffle of property.**—An agent to sell cannot acquire title by raffling the property and becoming the winner at the raffle. Hodgson v. Raphael, 105 Ga. 480, 30 SE 416.

[e] **The clerk of a broker** employed to make a sale of land, who has access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the latter that if he becomes a purchaser he is chargeable as trustee for the vendor, and must reconvey or account for the value of the land. Gardner v. Ogden, 22 N. Y. 327, 78 AmD 192.

74. U. S.—Moore v. Petty, 135 Fed. 668, 68 CCA 306; Glover v. Ames, 8 Fed. 351; Cleveland Ins. Co. v. Reed, 5 F. Cas. No. 2,889, 1 Biss. 180 (holding that, where an agent, by virtue of a power of attorney, conveys the property of his principal and takes a conveyance to himself, and then mortgages it, such use of the power of attorney will not give him title as against his principal).

Ark.—Quertermous v. Taylor, 62 Ark. 598, 37 SW 229.

Colo.—Webb v. Marks, 10 Colo. A. 429, 51 P 518 (holding that an agent who induces his principal by false statements as to value to sell and convey land to a third person for a sum much less than its true value is guilty of actual fraud which vitiates the whole transaction, where the grantee, without the principal's knowledge, holds the title in trust for the agent).

Ga.—Reeves v. Callaway, 140 Ga. 101, 78 SE 717; Hodgson v. Raphael, 105 Ga. 480, 30 SE 416.

Ill.—Davis v. Hamlin, 108 Ill. 39, 48 AmD 541 (where a lease by an agent was held to inure to the benefit of the principal); Hughes v. Washington, 72 Ill. 84; Eldridge v. Walker, 60 Ill. 230; Pensonneau v. Bleakley, 14 Ill. 15; Off v. J. B. Inderrieden Co., 74 Ill. A. 105 (holding that an agent who has taken an order for the sale and delivery of goods cannot afterward take an assignment of the order from the purchaser to himself, and thus become a purchaser from his principal, nor can he consent to an assignment of the order to a third person so as to bind his principal).

Iowa.—White v. Leech, 96 NW 709.

Md.—Prichard v. Abbott, 104 Md. 560, 65 A 421.

Mass.—George N. Pierce Co. v. Beers, 190 Mass. 199, 76 NE 603.

Mich.—Moore v. Mandelbaum, 8 Mich. 433.

Mo.—Euneau v. Rieger, 105 Mo. 659, 16 SW 854; Smith v. Tyler, 57 Mo. A. 668.

Mont.—Davis v. Davis, 9 Mont. 267, 23 P 715.

N. Y.—Gardner v. Ogden, 22 N. Y. 327, 78 AmD 192; Hinman v. Devlin, 31 App. Div. 590, 52 NYS 124.

Pa.—Rich v. Black, 173 Pa. 92, 33 A. 880; Jones v. Aronson, 45 Pa. Super. 148.

Philippine.—Baldodino v. Amenos, 9 Philippine 537 (holding that in order to set aside a contract made in violation of Philippine civil code art 1459 par 2, where it is alleged that the contract was made by an agent through a third person, it is necessary that the evidence shall show some agreement between the agent and the third person to the effect that the latter should buy the property for the benefit of the former).

Tenn.—Armstrong v. Campbell, 3 Yerg. 201, 24 AmD 556 (holding that where an agent authorized to sell lands sells the warrants of survey of such of the lands as cannot be discovered, and takes them back from the vendee and locates them in his own name, he cannot hold them against the principal).

Tex.—McMahan v. Alexander, 38 Tex. 135; Shannon v. Marmaduke, 14 Tex. 217; Texas Brokerage Co. v. Barkley, (Civ. A.) 128 SW 431, 433 [cit Cyc].

Wash.—Anderson v. Lawler, 46 Wash. 543, 90 P 913 (holding that, where the owner of land executed a contract of sale, on representations that the contract was to a third party and not to the agent, which sale to the third party was not made, the agent acquired no personal interest in the contract or in the property which he could enforce in his favor).

Eng.—Dunne v. English, L. R. 18 Eq. 524; Molony v. Kernan, 2 Dr. & War. 31; Murphy v. O'Shea, 8 Ir. Eq. 329; Lowther v. Lowther, 13 Ves. Jr. 95, 33 Reprint 230.

Can.—Coy v. Pommerenke, 44 Can. S. C. 543 [dism app 3 Sask. L. 417]; Taylor v. Wallbridge, 2 Can. S. C. 616 [rev 1 Ont. A. 245 (aff 23 Grant Ch. (U. C.) 496)]; McMillan v. Barton, 19 Ont. A. 602, 12 CanLTOcc Notes 407 [aff 20 Can. S. C. 404].

Ont.—Ingalls v. McLaurin, 11 Ont. 380; Upper Canada College v. Jackson, 3 Grant Ch. (U. C.) 171.

75. Colo.—Fisher v. Seymour, 23 Colo. 542, 49 P 30.

Ga.—Whitley v. James, 121 Ga. 521, 49 SE 600 (holding that a conveyance by a selling agent to a corporation of which he is president and a stockholder may be treated as void by his principal).

Ill.—Hughes v. Washington, 72 Ill. 84; Robbins v. Butler, 24 Ill. 387 (holding that, where one having an interest in land gave his coöwner authority to sell, a sale by the coöwner to an association of which he was a member was void).

Ind.—Bedford Coal, etc., Co. v. Parke County Coal Co., 44 Ind. A. 390, 89 NE 412 (holding that a contract for the sale of coal by the general manager of a coal company to a partnership of which he is a member, or to a corporation into which the partnership is converted, may be repudiated by his principal).

Kan.—Fry v. Platt, 32 Kan. 62, 3 P 781.

Mass.—George N. Pierce Co. v. Beers, 190 Mass. 199, 76 NE 603.

Pa.—Finch v. Conrade, 154 Pa. 326, 26 A 368.

It is immaterial to the application of this rule that there was in fact no fraud or unfairness on the part of the agent,[76] or that the sale was at public auction,[77] or that the agent gave a full and valuable consideration for the property,[78] or that he was authorized to sell at a stipulated price and he bought at that price.[79]

Rule not applicable. However, this rule does not prevent an agent employed to sell the property at auction from making a bid for it on behalf of a third person;[80] nor does it of itself invalidate a sale to a near relation of the agent,[81] although it has been held that the rule prohibits a sale by the agent to his wife;[82] nor does this rule incapacitate the agent from becoming the purchaser after the agency has ceased,[83] nor prevent a bona fide purchaser of the property from afterward selling in good faith the property to the agent;[84] although it has been held that where an agent is found, shortly after his sale, to have acquired an interest in the property from the purchaser, a strong presumption of indirection and attempted evasion arises which he is required to remove by cogent and convincing evidence.[85]

[§ 359] **(2) Effect of Purchase by Agent.** The mere fact of a purchase by an agent appointed to sell makes the sale prima facie voidable.[86] Such a sale is not absolutely void, but is voidable merely,[87] and may be rendered effectual and valid either by the express ratification by the principal with a knowledge of all the facts, or by the principal's acquiescence for an unreasonable length of time with a like knowledge of the facts,[88] and further-

Eng.—Ex p. Huth, 4 Deac. 294; Salomons v. Pender, 3 H. & C. 639.
Can.—Coy v. Pommerenke, 44 Can. S. C. 543 [dism app 3 Sask. L. 417, 15 WestLR 542 (mod 3 Sask. L. 51)]; Henderson v. Thompson, 41 Can. S. C. 445.

76. Cal.—Burke v. Bours, 92 Cal. 108, 28 P 57.
Conn.—Mills v. Goodsell, 5 Conn. 475, 13 AmD 90.
Ill.—Tyler v. Sanborn, 128 Ill. 136, 21 NE 193, 15 AmSR 97, 4 LRA 218.
Ind.—Sturdevant v. Pike, 1 Ind. 277.
Mich.—McKay v. Williams, 67 Mich. 547, 35 NW 159, 11 AmSR 597.
Nebr.—Rockford Watch Co. v. Manifold, 36 Nebr. 801, 55 NW 236.
N. J.—Porter v. Woodruff, 36 N. J. Eq. 174.
N. Y.—McDonald v. Lord, 25 N. Y. Super. 7, 26 HowPr 404.
N. C.—Mealor v. Kimble, 6 N. C. 272.

77. Ind.—Martin v. Wyncoop, 12 Ind. 266, 74 AmD 209.
La.—Shepherd v. Percy, 4 Mart. N. S. 267.
Md.—Mason v. Martin, 4 Md. 124.
Mich.—Ingerson v. Starkweather, Walk. 346.
Miss.—Union Planters' Bank v. Edgell, 33 S 409; Scott v. Freeland, 15 Miss. 409, 45 AmD 310.
Nebr.—Rockford Watch Co. v. Manifold, 36 Nebr. 801, 55 NW 236.
N. C.—Patton v. Thompson, 55 N. C. 285; Brothers v. Brothers, 42 N. C. 150.
W. Va.—Newcomb v. Brooks, 16 W. Va. 32.

[a] **Cannot purchase at foreclosure sale.**—An agent intrusted with the foreclosure of his principal's mortgage cannot, as against his principal, purchase at the foreclosure sale. Moore v. Moore, 5 N. Y. 256.

[b] **Bidding in through third person.**—Where a shipmaster, finding no representative at the port of delivery of the owner of certain goods shipped on board his vessel, had the goods sold at public auction to pay freight and charges, according to a provision in the bill of lading, giving notice by advertisement in the newspapers, and had them bid for his own benefit by a third person, the sale was held to be void. Jones v. Hoyt, 23 Conn. 157.

78. Pensonneau v. Bleakley, 14 Ill. 15.

79. Ill.—Tyler v. Sanborn, 128 Ill. 136, 21 NE 193, 15 AmSR 97, 4 LRA 218; Eldridge v. Walker, 60 Ill. 230; Merryman v. David, 31 Ill. 404.
Mich.—McNutt v. Dix, 83 Mich. 328, 47 NW 212, 10 LRA 660.
Minn.—Tilleny v. Wolverton, 46 Minn. 256, 48 NW 908 (holding that, where an agent for the sale of property purchased it at a sale made by himself, the fact that it brought the price at which he was authorized to sell would not make the transaction valid).
Nebr.—Rockford Watch Co. v. Manifold, 36 Nebr. 801, 55 NW 236.
N. J.—Ruckman v. Bergholz, 37 N. J. L. 437; Porter v. Woodruff, 36 N. J. Eq. 174.
N. D.—Anderson v. Grand Forks First Nat. Bank, 5 N. D. 451, 67 NW 821 (holding that the agent is liable for the value of the property at the time of the conversion irrespective of the price at which he was authorized to sell to a third person).
Oh.—Peckham Iron Co. v. Harper, 41 Oh. St. 100.
Pa.—Rich v. Black, 173 Pa. 92, 33 A 880.
Va.—Colbert v. Shepherd, 89 Va. 401, 16 SE 246.
Wash.—Chesum v. Kreighbaum, 4 Wash. 680, 30 P 1098, 32 P 109 (holding that a contract giving a person the exclusive sale of land for sixty days for six thousand dollars, and providing that he must get his commission above that sum, simply confers on such person the exclusive agency for the sale of the property, and does not entitle him to an option authorizing him to demand and receive a deed for himself).
Compare Synnott v. Shaughnessy, 2 Ida. (Hasb.) 111, 7 P 82 (holding that, where an agent is authorized to sell at a fixed price with the understanding that he is to have all that he can get above that price, he may purchase himself, and is under no obligation to disclose to his principal anything he may have discovered concerning the property after such arrangement is made).

[a] **Where a landowner gives a written option** thereon for a given time at an agreed price to certain persons whom he thereby constitutes his agents to sell on commission, the agents cannot buy for themselves at the price named, since where such option papers are doubtful the law will not infer that the agents could themselves become the purchaser. Colbert v. Shepherd, 89 Va. 401, 16 SE 246.

80. Scott v. Mann, 36 Tex. 157.

81. Walker v. Carrington, 74 Ill. 446 (brother-in-law).

[a] **Sale to agent's son.**—In Lingke v. Wilkinson, 57 N. Y. 445, 451, where the sale was by the agent to his son, the court said: "The relationship between a father and son does not, of itself, create any connection or relation between the son and the cestui que trust or principal of the father, to make the rule applicable. It is a material circumstance, pertinent to the question of fraud in fact, to be determined by a court or jury, in reference to any dealings between them, but it is not, per se, a fraud in law. The peculiar nature of the relationship between a husband and wife has been held to invalidate transactions resulting in the transfer of property, held in trust, to or for the benefit of the wife, and to prevent dealings between them affecting the subject of the trust. See Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; Dundas' App., 64 Pa. 325. Such transactions are properly treated as made by the trustee with himself. We have not been referred to any case, nor am I aware of any, where any other relationship has, of itself, been held to be within the principle of the rule referred to; and we do not think that public policy requires it to be extended to that of father and son."

82. Tyler v. Sanborn, 128 Ill. 136, 21 NE 193, 15 AmSR 97, 4 LRA 218. See also Prichard v. Abbott, 104 Md. 560, 65 A 421.

83. O'Reiley v. Bevington, 155 Mass. 72, 29 NE 54; Davis v. Haire, 93 Nebr. 819, 142 NW 303 (holding that, where an agent agreed with a third party to purchase a restaurant taken by him in exchange with his principal for other property at a price much less than that fixed by his principal in making the exchange, but which was its fair value, he was not liable to his principal for secret profits); Ex p. Lacey, 6 Ves. Jr. 625, 31 Reprint 1228. See also infra §§ 363, 364, 368.

84. U. S.—Robertson v. Chapman, 152 U. S. 673, 14 SCt 741, 38 L. ed. 592; Walker v. Derby, 29 F. Cas. No. 17,068, 5 Biss. 134.
Ala.—McGar v. Adams, 65 Ala. 106.
Ill.—Walker v. Carrington, 74 Ill. 446.
Ky.—Moore v. Green, 3 B. Mon. 407.
Mo.—Smith v. Tyler, 57 Mo. A. 668.
Nebr.—Bookwalter v. Lansing, 23 Nebr. 291, 36 NW 549.

85. McGar v. Adams, 65 Ala. 106; McKay v. Williams, 67 Mich. 547, 35 NW 159, 11 AmSR 597.

86. Rochester v. Levering, 104 Ind. 562, 4 NE 203; Tilleny v. Wolverton, 46 Minn. 256, 48 NW 908.

87. Ala.—Gaines v. Acre, Minor 141.
Ark.—American Mortg. Co. v. Williams, 103 Ark. 484, 145 SW 234.
Ga.—Whitley v. James, 121 Ga. 521, 49 SE 600.
Ky.—Louisville Bank v. Gray, 84 Ky. 565, 2 SW 168, 8 KyL 664.
Mass.—Wadsworth v. Gay, 118 Mass. 44.
N. C.—Mealor v. Kimble, 6 N. C. 272.
N. D.—Anderson v. Grand Forks First Nat. Bank, 5 N. D. 451, 67 NW 821.

88. U. S.—Marsh v. Whitmore, 21 Wall. 178, 22 L. ed. 482.
Ala.—Alabama Eastern Bank v. Taylor, 41 Ala. 93.
Cal.—Burke v. Bours, 3 Cal. Unrep. Cas. 393, 26 P 102.
Ill.—Francis v. Kerker, 85 Ill. 190.
Ind.—Sturdevant v. Pike, 1 Ind. 277.
Mass.—Bassett v. Brown, 105 Mass. 551; Copeland v. Mercantile Ins. Co., 6 Pick. 198.
Minn.—Bartleson v. Vanderhoff, 96 Minn. 184, 104 NW 820.
Tex.—Pridgen v. Adkins, 25 Tex. 388.
Eng.—Dunbar v. Tredennick, 2 Ball & B. 304; Fenn v. Harrison, 3 T. R. 757, 100 Reprint 842; Smith v. Colo-

more, if the principal does not dissent no one else can object.[89]

Purchase in good faith. Where, however, the agent buys the property openly and fairly on terms fixed by the principal, or fixed by the agent and accepted by the principal, with knowledge that the agent is the purchaser, the sale may be upheld,[90] provided the agent has made the fullest disclosures of all matters connected with the property and sale, within his knowledge, which it was important for his principal to know in order to treat with him understandingly.[91]

[§ 360] **(3) Remedies of Principal.** Unless the principal consents to the agent becoming a purchaser with full knowledge of all the facts, or unless he subsequently ratifies the transaction,[92] he may have the sale set aside and the property returned or reconveyed to him;[93] or, if the agent has sold the property, the principal may compel him to account for the proceeds;[94] or he may allow the transaction to stand and compel the agent to account for any profits he has made out of it.[95]

[§ 361] **f. Purchasing Agent Must Not Purchase from Himself.** An agent authorized to purchase

gan, 2 T. R. 189 note, 100 Reprint 102.

Ratification see generally supra §§ 104–136.

[a] **Agent must show principal's knowledge.**—The principal cannot acquiesce in the purchase of his property by his agent until he knows that such purchase has been made, and the onus of showing such knowledge is upon the agent. Fountain Coal Co. v. Phelps, 95 Ind. 271.

89. U. S.—Cleveland Ins. Co. v. Reed, 5 F. Cas. No. 2,889, 1 Biss. 180.
Ala.—Alabama Eastern Bank v. Taylor, 41 Ala. 93.
Ark.—Leach v. Fowler, 22 Ark. 143.
Mass.—Copeland v. Mercantile Ins. Co., 6 Pick 198.
N. C.—Mealor v. Kimble, 6 N. C. 272.
Tex.—Pridgen v. Adkins, 25 Tex. 388.

90. Cal.—Burke v. Bours, 98 Cal. 171, 32 P 980.
Ind.—Rochester v. Levering, 104 Ind. 562, 4 NE 203.
Iowa.—Douglass v. Lougee, 147 Iowa 406, 123 NW 967; Swan v. Davenport, 119 Iowa 46, 49, 93 NW 65 (where the court said: "An agent may purchase property in his hands belonging to his principal, and the sale will be good if the transaction be dominated by good faith and fairness").
Nebr.—Olson v. Lamb, 56 Nebr. 104, 76 NW 433, 71 AmSR 670.
Tex.—Texas Brokerage Co. v. Barkley, (Civ. A.) 128 SW 431.
Va.—Atwood v. Shenandoah Valley R. Co., 85 Va. 966, 9 SE 748.
W. Va.—Campbell v. Beard, 57 W. Va. 501, 50 SE 747.
Eng.—Ex p. Lacey, 6 Ves. Jr. 625, 31 Reprint 1228.

91. Ill.—Norris v. Tayloe, 49 Ill. 17, 95 AmD 568.
Iowa.—Douglass v. Lougee, 147 Iowa 406, 123 NW 967 (holding that in general an agent having authority to sell may not purchase for his own benefit, and that, if he so does purchase, he must show, not only that he did so with his principal's consent, but the burden is also on him to prove that he dealt fairly, and in the strictest of faith imparted to his principal all the information possessed by him concerning the property.
Nebr.—Jansen v. Williams, 36 Nebr. 869, 55 NW 279, 20 LRA 207.
N. D.—Van Dusen v. Bigelow, 13 N. D. 277, 100 NW 723, 67 LRA 288.
Pa.—Audenreid v. Walker, 11 Phila. 183.

[a] **Judicial discussion of rule.**—(1) "While it is true that an agent for the sale of property may, with his principal's consent, purchase the subject-matter of the agency, where the facts are fully disclosed, and the agent acts in good faith, taking no advantage of his situation, yet a court of equity, on grounds of public policy, will, nevertheless, subject the sale to the severest scrutiny. 'Its purpose will be to see that the agent, by reason of the confidence reposed in him, secures no advantage from the contract.' 'When the transaction is seasonably challenged, a presumption of invalidity arises, and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the strictest of faith imparted to his principal all the information concerning the property, possessed by him. The confidential relation and the transaction having been shown, the onus is upon the agent to show that the bargain was fair and equitable; that he gave all the advice in his knowledge pertaining to the subject of the sale and the value of the property; and that there was no suppression or concealment which might have influenced the conduct of the principal.'" Green v. Peeso, 92 Iowa 261, 265, 60 NW 531. (2) In Van Dusen v. Bigelow, 13 N. D. 277, 281, 100 NW 723, 67 LRA 288, the court said: "Where a party accepts the position of an agent to take charge of the lands of his principal, collect the rents and royalty, and pay taxes, a fiduciary and confidential relation is thereby created in regard to everything relating to such lands, and in treating with his principal for the property the agent is bound to make the fullest disclosures of all matters connected therewith, within his knowledge, which it is important for his principal to know in order to treat understandingly." (3) But in Douglass v. Lougee, 147 Iowa 406, 411, 123 NW 967, the court said: "There can be no reasonable doubt as to this rule where the agency is one to sell. If, however, the agency is not to sell, but to handle the property in some other manner, as to lease it or collect the rents, and the agent enters into independent negotiations with his principal for the purchase of the land, we see no reason for attaching any suspicion to the transaction from that fact alone. In such circumstances he is under no obligation to assist the principal in obtaining the highest price he can. On the contrary, from the moment he attempts to buy, the parties are at arm's length, and it is the buyer's right to obtain the property for the least sum he can, without aiding the seller, to whom, with reference to such sale, he is under no obligations whatever."

92. American Mortg. Co. v. Williams, 103 Ark. 484, 145 SW 234; Jansen v. Williams, 36 Nebr. 869, 55 NW 279, 20 LRA 207; Ruckman v. Bergholz, 37 N. J. L. 437. And see cases supra notes 89, 90.

93. Ark.—American Mortg. Co. v. Williams, 103 Ark. 484, 145 SW 234.
Cal.—Calmon v. Sarraille, 142 Cal. 638, 76 P 486; Curry v. King, 6 Cal. A. 568, 92 P 662.
Ga.—Reeves v. Callaway, 140 Ga. 101, 78 SE 717.
Ill.—Hughes v. Washington, 72 Ill. 84; Fidelity Trust Co. v. Poole, 136 Ill. A. 266.
Ind.—Sturdevant v. Pike, 1 Ind. 277 (holding that, if an agent appointed to sell and convey lands causes part of them to be conveyed to himself, a court of equity will, upon application within a reasonable time by the heirs of the principal, decree reconveyance to them, unless the transaction is shown to have been ratified by the principal).
Iowa.—White v. Leech, 96 NW 709; Green v. Peeso, 92 Iowa 261, 60 NW 531; Ingle v. Hartman, 37 Iowa 274.
Md.—Prichard v. Abbott, 104 Md. 560, 65 A 421.
Mo.—Euneau v. Rieger, 105 Mo. 659, 16 SW 854.
N. Y.—Cumberland Coal, etc., Co. v. Sherman, 30 Barb. 553.
Pa.—Rich v. Black, 173 Pa. 92, 33 A 880.
Tex.—Texas Brokerage Co. v. Barkley, (Civ. A.) 128 SW 431.
Va.—Moseley v. Buck, 3 Munf. (17 Va.) 232, 5 AmD 508 (upon repayment of the purchase money or so much of it as has been paid with interest).
Eng.—Bentley v. Craven, 18 Beav. 75, 52 Reprint 29; York Buildings Co. v. Mackenzie, 8 Bro. P. C. 42, 3 Reprint 432; Brookman v. Rothschild, 3 Sim. 153, 6 EngCh 153, 57 Reprint 957 [aff 5 Bligh N. S. 165, 5 Reprint 273, 2 Dow & Cl. 188, 6 Reprint 699].

[a] **The principal is not required to resort to a court of equity** to set aside a purchase by his agent. Thus, in case of a sale of land, the principal may repudiate the conveyance to the agent and recover possession in an action of ejectment. McKay v. Williams, 67 Mich. 547, 35 NW 159, 11 AmSR 597.

[b] **Mere lapse of time,** short of four years from the discovery by the principal that an agent to sell stock bought the stock for himself, will not bar an action in equity for the restoration of the stock, notwithstanding meanwhile it has greatly increased in value. Telling v. Sullivan, 32 Oh. Cir. Ct. 312.

94. Ark.—Aldrich v. McClay, 75 Ark. 387, 87 SW 813.
Minn.—Smitz v. Leopold, 51 Minn. 455, 53 NW 719; Tilleny v. Wolverton, 46 Minn. 256, 48 NW 908 (holding that, if the agent resells at an increased price, the principal may require him to account for what he received on the resale).
Nebr.—Rockford Watch Co. v. Manifold, 36 Nebr. 801, 35 NW 236.
Tex.—McMahan v. Alexander, 38 Tex. 135.
Eng.—Bentley v. Craven, 18 Beav. 75, 52 Reprint 29.

[a] **Accounting for profits on resale.**—If an agent to sell conceals from his principal information that he has obtained as to the price at which the property can be sold, and purchases it himself, selling it afterward for a much larger sum, he will be required to account to the principal for the sum obtained over and above the amount received by the latter. Bell v. Bell, 3 W. Va. 183.

[b] **Principal's right to vendor's lien.**—Where an agent employed to sell property fraudulently purchases the same for his own benefit, and thereafter with the profits of such fraudulent purchase pays for land conveyed to him by his principal, since the money so paid belongs to the principal, the price of the land will be considered unpaid, and the principal will have a lien therefor. Porter v. Woodruff, 36 N. J. Eq. 174.

[c] **If the agent to sell is surety for the principal,** any claim he has on the property sold will continue, to the extent of his liability, when he has become the purchaser of such property. Walker v. Palmer, 24 Ala. 353.

95. U. S.—Moore v. Petty, 135 Fed. 668, 68 CCA 306.
D. C.—George v. Ford, 36 App. 315.
Mass.—George N. Pierce Co. v. Beers, 190 Mass. 199, 76 NE 603;

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property for his principal must not, except with the principal's full knowledge and consent, purchase the property from himself either directly or indirectly;[96] and in accordance with this rule an agent employed to purchase cannot, without the principal's full knowledge and consent, purchase the property for himself and then resell it to the principal at an advance.[97]

The burden of proof is upon the agent to show that he fully informed his principal, prior to the transaction, of all facts within the agent's knowledge.[98]

If the agent is guilty of wrongdoing in this respect the principal, when he acquires knowledge of the facts, may at his election avoid the transaction,[99] or he may compel the agent to account for any excess he received above the real value of the property.[1] This rule applies whether the agent acted fraudulently or not,[2] and although the purchase was fair or at the price set by the principal and therefore no injury was in fact suffered by the principal,[3] and even though the price charged by the agent

Greenfield Sav. Bank v. Simons, 133 Mass. 415.

Mich.—Moore v. Mandlebaum, 8 Mich. 433.

Mo.—Smith v. Tyler, 57 Mo. A. 668.

N. J.—Porter v. Woodruff, 36 N. J. Eq. 174. See also Kunz v. Mason, 75 N. J. Eq. 616, 73 A 869.

Va.—Segar v. Edwards, 11 Leigh (38 Va.) 213.

Eng.—Dunne v. English, L. R. 18 Eq. 524.

[a] **Measure of damages.**—Where he sells to himself for the minimum price fixed by the principal, he will be liable for the difference between the market value and the price paid by himself. Greenfield Sav. Bank v. Simons, 133 Mass. 415. See also George N. Pierce Co. v. Beers, 190 Mass. 199, 76 NE 603.

[b] **Specific performance.**—The principal may refuse an offer to reconvey the property and maintain a bill for specific performance, and therein recover reasonable compensation for counsel fee and expenses, if evidence to support such claim is offered; but he will not be entitled in such a proceeding to recover punitive damages. Jones v. Aronson, 45 Pa. Super. 148.

96. U. S.—Bischoffsheim v. Baltzer, 20 Fed. 890; Marye v. Strouse, 5 Fed. 483, 6 Sawy. 204.

Ala.—Spratt v. Wilson, 94 Ala. 608, 10 S 209.

Cal.—Davidson v. Dallas, 8 Cal. 227.

Ill.—Tewksbury v. Spruance, 75 Ill. 187; Ely v. Hanford, 65 Ill. 267.

La.—Brownson v. Fenwick, 19 La. 431 (holding that an agent to buy cannot purchase from himself in his personal capacity or as administrator of another's estate); Beal v. McKiernan, 6 La. 407.

Md.—Keighler v. Savage Mfg. Co., 12 Md. 383, 71 AmD 600.

Mich.—Antiseptic Fiber Package Co. v. Klein, 119 Mich. 225, 77 NW 931.

Minn.—State v. Phillips, 105 Minn. 375, 117 NW 508 (holding that, where applications for the purchase of stock are made to an agent authorized to sell such stock, and the money is paid to the agent by the customer, the payment will be deemed to have been made to the principal, and the agent has no authority to fill the orders by delivering his own personal stock to the purchaser).

Miss.—Stokes v. Terrell, 23 S 371 (holding that, where one acting as the trustee and confidential adviser of his sister had three hundred dollars belonging to her in his hands for safe investment, and transferred to her in exchange a note for the same sum owing to him by insolvent persons, the transaction was voidable).

Mo.—McLain v. Parker, 229 Mo. 68, 129 SW 500; Meek v. Hurst, 223 Mo. 688, 122 SW 1022, 135 AmSR 531.

N. J.—Porter v. Woodruff, 36 N. J. Eq. 174.

N. Y.—Heckscher v. Edenborn, 203 N. Y. 210, 96 NE 441 (holding that it was in effect a purchase by defendant as agent for his principals of property which belonged to him, where the other members of a syndicate made him manager for it, with power to purchase, in his discretion, the stock of a corporation, of his interest in which they did not know, and he paid his subscription to the syndicate by turning in to himself, as manager, his shares of the stock, buying the remaining stock with the cash paid in by the others on their subscriptions); King v. Mackellar, 109 N. Y. 215, 16 NE 201; Conkey v. Bond, 36 N. Y. 427 [aff 34 Barb. 276]; Marvin v. Buchanan, 62 Barb. 468; Gould v. Gould, 36 Barb. 270 [aff 41 N. Y. 619 mem]; Miller v. Curtiss, 59 N. Y. Super. 503, 15 NYS 140 [aff 133 N. Y. 622 mem, 30 NE 1150 mem]; Davoue v. Fanning, 2 Johns. Ch. 252.

N. C.—Deep River Gold Min. Co. v. Fox, 39 N. C. 61.

Okl.—Barnes v. Lynch, 9 Okl. 11, 156, 59 P 995.

Pa.—Bergner v. Bergner, 219 Pa. 113, 67 A 999.

Tex.—Shannon v. Marmaduke, 14 Tex. 217; Oliven v. Kastor, 45 Tex. Civ. A. 555, 101 SW 563.

Eng.—Bentley v. Craven, 18 Beav. 75, 52 Reprint 29; King Viall v. Howell, 27 T. L. R. 114.

Ont.—Harrison v. Harrison, 14 Grant Ch. (U. C.) 586.

[a] **"If one by misrepresentation or suppression of facts** when he ought to speak induces another ignorantly to make a contract appointing the first his agent to buy and conferring upon him discretionary power to purchase his own property, the contract is voidable and even if executed may be rescinded and the money recovered back on restoration of what has been received." Heckscher v. Edenborn, 203 N. Y. 210, 222, 96 NE 441.

[b] **"An agent may deal directly with his principal, and sell to him** property which he is authorized to buy for him, provided the principal in making the purchase from him acts with full knowledge, and there is no deception or concealment on the part of the agent; but, in order to render such an agreement valid and binding, the agent must make a full and fair disclosure of all the facts and circumstances within his knowledge in any way calculated to enable the principal to judge of the propriety of the transaction." Jackson v. Pleasanton, 95 Va. 654, 658, 29 SE 680.

[c] **One having an option** on corporate stock is such an owner thereof as to bring him within the rule that an agent to buy cannot purchase of himself. Montgomery v. Hundley, 205 Mo. 138, 103 SW 527, 11 LRANS 122 and note.

[d] **Furnishing supplies or materials.**—(1) It is one of the elementary principles of the law of agency that an agent to procure supplies cannot, without the most distinct authority from his principal, furnish those supplies himself. Sikes v. Hatfield, 13 Gray (Mass.) 347. (2) Thus an agent to superintend the building of a mill has no right to reject material offered by others and furnish it himself at a higher price. Rhodes v. Cox, 9 KyL 895.

97. U. S.—Sandoval v. Randolph, 222 U. S. 161, 32 SCt 48, 56 L. ed. 142 (holding that this rule precludes an agent from availing himself of an option to purchase which he had secured prior to date of agency).

Cal.—Kevane v. Miller, 4 Cal. A. 598, 88 P 643 (holding that, where defendant agreed, without compensation, to purchase certain corporate stock for plaintiff as his agent, defendant was not entitled to purchase the stock for himself and then resell it to plaintiff at a higher price, on the misrepresentation that the price so charged was the price paid).

Iowa.—Rorebeck v. Van Eaton, 90 Iowa 82, 57 NW 694 (holding that where a person acting as the agent of another for the purchase of property represents that the owner demands a certain price, and purchases it for a less sum, and conveys the same to the principal for the larger sum, he is liable to the principal for the difference).

Mass.—Boston v. Simmons, 150 Mass. 461, 23 NE 210, 15 AmSR 230, 6 LRA 629.

N. J.—Wright v. Smith, 23 N. J. Eq. 106.

N. Y.—Willink v. Vanderveer, 1 Barb. 599; Farrar v. Kingsley, 126 NYS 584; Manville v. Lawton, 19 NYS 587.

Va.—Jackson v. Pleasanton, 95 Va. 654, 29 SE 680.

Wash.—Hindle v. Holcomb, 34 Wash. 336, 75 P 873.

Eng.—Bentinck v. Fenn, 12 App. Cas. 652; Kimber v. Barber, L. R. 8 Ch. 56.

Ont.—Earle v. Burland, 27 Ont. A. 540.

98. Jackson v. Pleasanton, 95 Va. 654, 29 SE 680. See also Fox v. Simons, 251 Ill. 316, 96 NE 233 (where the rule was applied to an agent purchasing for himself).

99. Colo.—Whitehead v. Lynn, 20 Colo. A. 51, 76 P 1119.

Conn.—Disbrow v. Secor, 58 Conn. 35, 18 A 981.

Ky.—Baird v. Ryan, 35 SW 182, 17 KyL 1417.

Minn.—Donnelly v. Cunningham, 58 Minn. 376, 59 NW 1052; Friesenhahn v. Bushnell, 47 Minn. 443, 50 NW 597 (holding that the principal might repudiate the purchase and recover the money furnished if the agents concealed from him the fact that they were owners of the land in which they invested).

Mo.—McLain v. Parker, 229 Mo. 68, 129 SW 500 (may recover the price and interest); Montgomery v. Hundley, 205 Mo. 138, 103 SW 527, 11 LRANS 122.

N. Y.—Conkey v. Bond, 36 N. Y. 427 [aff 34 Barb. 276]; Miller v. Curtiss, 59 N. Y. Super. 503 15 NYS 140 [aff 133 N. Y. 622 mem, 30 NE 1150 mem]; Darby v. Pettee, 9 N. Y. Super. 139.

Eng.—Gillett v. Peppercorne, 3 Beav. 78, 43 EngCh 78, 49 Reprint 31; White v. Benekendorff, 29 L. T. Rep. N. S. 475; Tetley v. Shand, 25 L. T. Rep. N. S. 658.

Ont.—Harrison v. Harrison, 14 Grant Ch. (U. C.) 586.

1. Kevane v. Miller, 4 Cal. A. 598, 88 P 643; Oliver v. Lansing, 48 Nebr. 338, 67 NW 195; Kimber v. Barber, L. R. 8 Ch. 56; Massey v. Davies, 2 Ves. Jr. 317, 30 Reprint 651.

2. U. S.—Marye v. Strouse, 5 Fed. 483, 6 Sawy. 204.

Minn.—Donnelly v. Cunningham, 58 Minn. 376, 59 NW 1052.

Mo.—Montgomery v. Hundley, 205 Mo. 138, 103 SW 527, 11 LRANS 122.

N. Y.—Conkey v. Bond, 36 N. Y. 427 [aff 34 Barb. 276].

Ont.—Harrison v. Harrison, 14 Grant Ch. (U. C.) 586.

3. Friesenhahn v. Bushnell, 47

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was less than he could have purchased for in the open market.[4] The distinction has been made that if an agent sells to his principal property which he owned or had contracted for before becoming agent, and the principal chooses to keep the property, he cannot compel the agent to refund the advance paid to him in excess of what the property cost him;[5] but that if the agent acquires the property for the express purpose of selling it to his principal at an advance, the principal may retain the property and compel the agent to account for the excess, and that it is immaterial to plaintiff's recovery in such case whether the agent contracted for the land before or after the principal agreed to purchase it.[6]

Custom and usage. Evidence of usage is not admissible to convert an agent employed to buy for his principal into a principal to sell to him, except where the employer knows and assents to the dealing on the footing of such custom.[7]

[§ 362] **g. Purchasing Agent Must Not Purchase for Himself.** As a general rule an agent must not, without his principal's full knowledge and consent, purchase for himself property which he is employed to purchase for his principal.[8] If he does so it is a breach of faith and he will be regarded as holding the property so purchased, although purchased in his own name, or its proceeds, for his principal,[9] although he contributes his own funds to the purchase.[10] This rule is held to apply, although the agent had no actual authority to purchase, if at the time of the purchase he assumed to act for the principal and purchased for his benefit;[11] and the rule is not affected by a custom or usage to the contrary of which the principal had no notice.[12] But the rule does not apply where the purchase is made in good faith after the agency has been terminated,[13] or where the agent has purchased for himself at a higher price after unsuccessful efforts to purchase for the principal at the price limited by the latter.[14] Nor does it preclude the agent from purchasing property of the same class for himself at the same time that

Minn. 443, 50 NW 597; Montgomery v. Hundley, 205 Mo. 138, 103 SW 527, 11 LRANS 122; Conkey v. Bond, 36 N. Y. 427 [aff 34 Barb. 276]; Gillett v. Peppercorne, 3 Beav. 78, 43 EngCh 78, 49 Reprint 31.

[a] **A commission merchant,** employed to go into the market and buy a given quantity of wheat for cash, is not authorized to turn over to his principal wheat held by him, even if he charges no more than the market price. His interests must not come in conflict with his duty. Tewksbury v. Spruance, 75 Ill. 187.

[b] **Where one of several partners** was employed to purchase goods for his firm, and, unknown to his copartners, purchased goods of his own at the market price, making a considerable profit thereby, he was held accountable to the firm for the profit thus made. Bentley v. Craven, 18 Beav. 75, 52 Reprint 29.

4. Taussig v. Hart, 58 N. Y. 425.

5. Whitehead v. Lynn, 20 Colo. A. 51, 76 P 1119; Sunderland v. Kilbourn, 14 D. C. 506 [aff 130 U. S. 505, 9 SCt 594, 32 L. ed. 1005] (holding that where A employed B to purchase land on commission, and B had previously negotiated for a purchase on his own account, and he completed the purchase and sold to A at an advance, not disclosing the fact that he was the owner, A, on discovering this, could not retain the property and recover the advance paid); Ely v. Hanford, 65 Ill. 267.

[a] **The principal will not be permitted to keep the property** and compel a return of the money paid, but can recover only the amount which the agent has received in excess of the entire value of the property. Antiseptic Fiber Package Co. v. Klein, 119 Mich. 225, 77 NW 931.

6. Hindle v. Holcomb, 34 Wash. 336, 75 P 873 (holding that, where defendant took a contract on land for the sole purpose of selling it to plaintiff, and did not intend to buy it unless he could sell it to plaintiff, and falsely represented to plaintiff that another owned the land, and procured plaintiff to employ him as agent to purchase it, and plaintiff, acting in ignorance of any contract by defendant, employed him to purchase the land, it was immaterial to plaintiff's right of recovery of an amount paid by him in excess of what defendant paid whether defendant contracted for the land before or after plaintiff agreed to purchase it).

7. Robinson v. Mollett, L. R. 7 H. L. 802.

8. Clifford v. Armstrong, 176 Ala. 441, 58 S 430; McKinley v. Irvine, 13 Ala. 681; Rhea v. Puryear, 26 Ark. 344; Allen v. Malone, 2 Iowa 591 (holding that, where one receives funds with which, if he can use them, he is to purchase land for the owner of the funds, an agency for that purpose is established precluding a purchase by the agent for his own advantage); Pikes Peak Co. v. Pfuntner, 158 Mich. 412, 123 NW 19.

9. U. S.—Baker v. Whiting, 2 F. Cas. No. 787, 3 Sumn. 475.

Ark.—White v. Ward, 26 Ark. 445.

Conn.—Church v. Sterling, 16 Conn. 388 (holding that an agent employed to purchase for another, whether he is actually or constructively an agent, cannot purchase for himself, but is a trustee for his employer).

Ill.—Fox v. Simons, 251 Ill. 316, 96 NE 233.

Ind.—Rising Sun Nat. Bank v. Seward, 106 Ind. 264, 6 NE 635; Ackenburgh v. McCool, 36 Ind. 473.

La.—New Orleans Exch., etc., Co. v. Yorke, 4 La. Ann. 138.

Me.—Matthews v. Light, 32 Me. 305.

Mich.—Carroll v. McKale, 111 Mich. 348, 69 NW 644 (holding that, where plaintiff as agent, exchanged property of his principal for a bicycle, but without the principal's knowledge or consent sent him a different bicycle instead, claiming it to be the one received in the trade, the bicycle retained did not become his property, although the other was not returned, and he could not maintain replevin for it against an officer levying on it under an execution against his principal).

Nebr.—Morrison v. Hunter, 74 Nebr. 559, 105 NW 88.

N. J.—Seacoast R. Co. v. Wood, 65 N. J. Eq. 530, 56 A 337; Von Hurter v. Spengeman, 17 N. J. Eq. 185.

N. Y.—Edwards v. Dooley, 120 N. Y. 540, 24 NE 827 (holding that, where an agent purchases in his own name, with trust funds, the very property which his principal authorized him to purchase, the title is in the principal as soon as the purchase is made; and such title is not affected by the fact that the agent used the money furnished him for his own use, and purchased the property with money derived from other sources); Maitz v. Westchester County Brewing Co., 140 NYS 521 (taking lease in his own name); Torrey v. Orleans Bank, 9 Paige 649 [aff 7 Hill 260]; Reed v. Warner, 5 Paige 650.

N. C.—Dowd v. Holbrook, 152 N. C. 547, 67 SE 1060 (holding that, where an agent purchases for himself property which he is authorized to purchase for his principal, the title vests in the principal, as is also the case where the agent makes the purchase with his own funds for the principal's benefit).

Pa.—Bergner v. Bergner, 219 Pa. 113, 67 A 999.

S. C.—Hutchinson v. Hutchinson, 4 S. C. Eq. 77.

Tenn.—Thompson v. Thompson, (Ch. A.) 54 SW 145.

Tex.—Satterthwaite v. Loomis, 81 Tex. 64, 16 SW 616.

Va.—Jackson v. Pleasanton, 95 Va. 654, 29 SE 680.

Eng.—Lees v. Nuttall, 2 Myl. & K. 819, 7 EngCh 819, 39 Reprint 1157 [aff 1 Russ. & M. 53, 5 EngCh 53, 39 Reprint 21, Taml. 282, 12 EngCh 282, 48 Reprint 112]; Longfield Parish Council v. Robson, 29 T. L. R. 357.

Ont.—Williams v. Jenkins, 18 Grant Ch. (U. C.) 536; Arthurton v. Dalley, 2 Grant Ch. (U. C.) 1.

Que.—Revillon v. Boivin, 15 Que. K. B. 314; In re Lemelin, 22 Que. Super. 87.

See also Trusts [39 Cyc 188].

Application of the statute of frauds to such trusts see Frauds, Statute of [20 Cyc 234]; Trusts [39 Cyc 108, 170].

[a] **The principal must act within a reasonable time;** and where he waited ten months the court held that the delay was unreasonable, and that the agent had a right to repudiate the agency and hold the property as his own. Wenham v. Switzer, 51 Fed. 351 [aff 59 Fed. 942, 8 CCA 404].

10. Rhea v. Puryear, 26 Ark. 344; Dowd v. Holbrook, 152 N. C. 547, 67 SE 1060; Bergner v. Bergner, 219 Pa. 113, 67 A 999; Oliven v. Kastor, (Tex. Civ. A.) 101 SW 563. See also Trusts [39 Cyc 188].

11. Watson v. Union Iron, etc., Co., 15 Ill. A. 509. See generally Trusts [39 Cyc 188].

12. Robinson v. Mollett, L. R. 7 H. L. 802 [rev L. R. 7 C. P. 84].

13. Denver First Nat. Bank v. Bissell, 4 Fed. 694, 2 McCrary 273 [aff 114 U S 252, 4 SCt 851, 29 L. ed. 126] (holding that an agent for the purchase of property cannot be declared a trustee for his principal where he repudiates the agency and purchases the property with his own funds); Baker v. Whiting, 2 F. Cas. No. 787, 3 Sumn. 475 (holding this to be true where the agent has openly and notoriously and with full notice to his principal discharged himself from this agency); Lamb Knit-Goods Co. v. Lamb, 119 Mich. 568, 78 NW 646. See also infra § 368.

14. Pearsall v. Hirsh, 59 N. Y. Super. 410, 14 NYS 305 (holding that, where an agent has used all reasonable efforts to obtain the property for his principal at the price limited without success, he has a right to purchase the same for himself at a larger sum, the contract of employment fixing the law of the case without regard to the fiduciary relations of the parties).

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he is purchasing for his principal, where he does so with the principal's full knowledge and consent,[15] or where the agency is not exclusive.[16]

The burden of proof is upon the agent to show consent and knowledge of the principal and his own good faith.[17]

Outstanding obligations of principal. Where an agent undertakes to purchase for his principal outstanding obligations of the latter, he cannot purchase such obligations for himself;[18] but the confidential relation and trust have the same limit as the agency, and, after he has purchased for his principal obligations to the extent of his agency, he may purchase additional obligations on his own behalf.[19]

Remedies of principal. In case of a purchase by the agent in breach of his duty to purchase for his principal, he may be compelled to convey the property so purchased, to his principal,[20] upon his being reimbursed,[21] and upon the principal complying with the terms of the contract of purchase,[22] or if the agent has sold the property he may be compelled to account for the proceeds,[23] or the principal may, if he prefers, repudiate the transaction and throw the loss if any upon the agent.[24]

Third person cannot object. A purchase by the agent for himself is treated as a purchase for his principal at the election of the latter, only, and does not entitle third persons to question the agent's title.[25]

[§ 363] **h. Transactions between Principal and Agent—(1) General Rule.** As a general rule an agent is not permitted to enter into any transaction with his principal on his own behalf respecting the subject matter of the agency, unless he acts with entire good faith and without any undue influence or imposition, and makes a full disclosure of all the facts and circumstances attending the transaction.[26] The existence of the relation does not of itself forbid transactions between the principal and agent;[27] and, since the above rule exists to protect the principal, it has no application to cases in which the agent openly and fairly deals with the principal, without any concealment or deception, as in such cases an agent is as competent to deal with the principal as another.[28] However, because of pos-

15. Fox v. Simons, 251 Ill. 316, 96 NE 233.

16. Amber Petroleum Co. v. Breech, [Tex. Civ. A.] 111 SW 668 (holding that, where an offer was made to employ an agent to procure leases at a certain price for each lease, to which the agent answered that he would take some blank leases, and that if he could he would get his principal some leases on the terms named, the contract of agency was not exclusive, and the agent might take leases in his own name.)

17. Fox v. Simons, 251 Ill. 316, 321, 96 NE 233 [rev 158 Ill. A. 482] (where the court said: "An agent hired to give his full time to the purchase of property for his principal may, undoubtedly, with the consent of his principal, buy property of the same class for himself at the same time that he is purchasing for the principal, but in such case the burden of proof is upon him to show such consent and that the principal had knowledge of every material fact known to the agent which might affect the transaction. Such transactions are voidable on the grounds of public policy. They will be closely scrutinized by a court of equity, and the burden is on the agent to show affirmatively that he acted in perfect good faith and gave his principal full information with reference to the transaction in question").

[a] **Where an agent to purchase land takes a deed to himself** the burden is on him to show that he was directed to do so before he can require the principal to accept the property. Nelms v. Dougherty, 45 SW 870, 20 KyL 657.

18. McKinley v. Irvine, 13 Ala. 681 (holding that an agent appointed by the trustees of an unincorporated land company to bring its affairs to a close—to receive all moneys due from, and to adjust, settle, and compromise with the debtors of the company—and having authority to receive the stock of the company at four hundred and seventy-five dollars a share, in the final settlement with the purchasers of lots and lands of the company, cannot purchase in the stock of the company for his own use; but such purchase will be regarded as being made on behalf of his principals).

[a] **One who acts as agent of the mortgagor** and receives an assignment of the outstanding certificate of purchase, under a written agreement with him to buy up the same, cannot afterward set up that the mortgagor's title in the land was cut off by foreclosure, and hold the property as his own. Mason v. Hartgrove, 103 Ill. A. 163.

19. Low v. Graydon, 50 Barb. (N. Y.) 414.

20. Rhea v. Puryear, 26 Ark. 344; Quinn v. Le Duc, (N. J. Ch.) 51 A 199; Hutchinson v. Hutchinson, 4 S. C. Eq. 77 (holding also that the fact that the principal failed to pay the purchase money at the stipulated time would not forfeit his right to a conveyance from the agent); Wellford v. Chancellor, 5 Gratt. (46 Va.) 39 (holding that the property must be conveyed in the same plight and condition in which it was conveyed to the agent).

21. Quinn v. Le Duc, (N. J. Ch.) 51 A 199.

Right to reimbursement see generally infra §§ 458-466.

22. Wellford v. Chancellor, 5 Gratt. (46 Va.) 39.

23. Wellford v. Chancellor, 5 Gratt. (46 Va.) 39 (holding that, where the agent had disposed of part of the property so that the principal could not obtain that part, the agent would be held to account for the same at its true value at the time when it should have been conveyed to the principal).

24. Robinson v. Mollett, L. R. 7 H. L. 802 [rev L. R. 7 C. P. 84]. See also Nading v. Howe, 23 Ind. A. 690, 55 NE 1032 (holding that, where plaintiff's agents purchased wheat for him as such agents, which they subsequently refused to deliver, title to the wheat passed to plaintiff immediately on its purchase, and he was therefore entitled, in an action against such agents, to recover such profit as he might have made by a subsequent sale thereof).

25. New Orleans Exch., etc., Co. v. Yorke, 4 La. Ann. 138.

26. Cal.—Paige v. Akins, 112 Cal. 401, 44 P 666; Burke v. Bours, 92 Cal. 108, 28 P 57, 3 Cal. Unrep. Cas. 393, 26 P 102, 98 Cal. 171, 32 P 980; Hemenway v. Abbott, 8 Cal. A. 450, 97 P 190; Curry v. King, 6 Cal. A. 568, 92 P 662.

D. C.—Holtzman v. Linton, 27 App. 241.

Ill.—McDonald v. Fithian, 6 Ill. 269.

Iowa.—Green v. Peeso, 92 Iowa 261, 60 NW 531.

Md.—Kerby v. Kerby, 57 Md. 345; Brooke v. Berry, 2 Gill 83 (holding that agents are not permitted to deal with their principals in any case except where there is the most entire good faith, a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition).

Mich.—Moore v. Mandlebaum, 8 Mich. 433.

Mo.—Evans v. Evans, 196 Mo. 1, 93 SW 969.

N. Y.—Brown v. Post, 1 Hun 303 mem [aff 62 N. Y. 651 mem]; Comstock v. Comstock, 57 Barb. 453.

Utah.—Little v. Herzinger, 34 Utah 337, 97 P 639.

Vt.—Hobart v. Vail, 80 Vt. 152, 66 A 820.

Va.—Jackson v. Pleasanton, 95 Va. 654, 29 SE 680; Neilson v. Bowman, 29 Gratt. (70 Va.) 732.

Eng.—Williamson v. Barbour, 9 Ch. D. 529; Selsey v. Rhoades, 2 Sim. & St. 41, 1 EngCh 41, 57 Reprint 260 [aff 1 Bligh N. S. 1, 4 Reprint 774].

[a] **Transactions which would be held unobjectionable between other persons** are often declared void, if between persons occupying confidential relations. Comstock v. Comstock, 57 Barb. (N. Y.) 453.

[b] **Equity treats the relation** of principal and agent in the same general manner, although not with quite the same strictness, as that of trustee and beneficiary; and in any contract of purchase or sale with the principal, or other transaction by which the agent obtains a benefit, a presumption arises against its validity which the agent must overcome, but this presumption is not so weighty or strong as in the case of a trustee. Hemenway v. Abbott, 8 Cal. A. 450, 97 P 190.

Burden of proof on agent to show fairness and good faith of transaction see infra § 682.

27. Uhlich v. Muhlke, 61 Ill. 499.

28. U. S.—Barreda y Osma v. Brown, 180 Fed. 194 [aff 184 Fed. 986, 106 CCA 664]; Jenkins v. Einstein, 13 F. Cas. No. 7,265, 3 Biss. 128.

Cal.—Burke v. Bours, 92 Cal. 108, 28 P 57, 3 Cal. Unrep. Cas. 393, 26 P 102, 98 Cal. 171, 32 P 980; Hemenway v. Abbott, 8 Cal. A. 450, 97 P 190.

Ind.—Pomeroy v. Wimer, 167 Ind. 440, 78 NE 233, 79 NE 446; Haynie v. Johnson, 71 Ind. 394.

Iowa.—Rathke v. Tyler, 136 Iowa 284, 111 NW 435; Swan v. Davenport, 119 Iowa 46, 93 NW 65; Buell v. Buckingham, 16 Iowa 284, 85 AmD 516.

Md.—Kerby v. Kerby, 57 Md. 345.

Mo.—Evans v. Evans, 196 Mo. 1, 93 SW 969.

N. Y.—Dobson v. Racey, 8 N. Y. 216.

Pa.—Alman v. Stout, 42 Pa. 114; Fisher's App., 34 Pa. 29; Audenreid v. Walker, 11 Phila. 183.

Vt.—Hobart v. Vail, 80 Vt. 152, 66 A 820.

Va.—Jackson v. Pleasanton, 95 Va.

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sible abuses of the confidence and trust reposed in the agent, and of his commanding influence over the principal, and of the natural conflict of duty and interest in dealings between the principal and the agent, the law views with suspicion, and scrutinizes closely, all dealings between them in the subject matter of the agency, in order to see that the agent has dealt with the utmost good faith and fairness, and that he has given the principal the benefit of all his knowledge and skill, and, if it appears that the agent has been guilty of any concealment or unfairness, or if he has taken any advantage of his confidential relation, the transaction will not be allowed to stand.[29] This rule has been held to apply to dealings, shortly after the confidential relation has been technically dissolved, growing out of the old relation.[30] It forms no exception to this rule that the agent had no authority to contract for his principal as to the subject matter, but that he was merely employed to investigate or seek a person with whom the principal might deal.[31] But the fact that the agent was employed by the principal in one matter will not incapacitate him from dealing with the principal in another matter as to which he was not so employed and trusted.[32]

[§ 364] **(2) Applications of Rule.** In accordance with the above rule all gifts procured by agents and purchases made by them from their principals should be scrutinized with a close and vigilant

654, 29 SE 680; Atwood v. Shenandoah Valley R. Co., 85 Va. 966, 9 SE 748.
Wis.—Stewart v. Mather, 32 Wis. 344.

29. U. S.—Ralston v. Turpin, 129 U. S. 663, 9 SCt 420, 32 L. ed. 747 [aff 25 Fed. 7]; McKinley v. Williams, 74 Fed. 94, 20 CCA 312; Jeffries v. Wiester, 13 F. Cas. No. 7,254, 2 Sawy. 135.
Ala.—Whelan v. McCreary, 64 Ala. 319.
Cal.—Burke v. Bours, 92 Cal. 108, 28 P 57, 3 Cal. Unrep. Cas. 393, 26 P 102, 98 Cal. 171, 32 P 980; Rubidoex v. Parks, 48 Cal. 215; Curry v. King, 6 Cal. A. 568, 92 P 662.
Colo.—Fisher v. Seymour, 23 Colo. 542, 49 P 80.
D. C.—Holtsman v. Linton, 27 App. 241.
Ga.—Pollock v. Skelton, (A.) 32 SE 381 (holding that any breach of loyalty resulting in advantage to an agent at the expense of his principal will, at the principal's instance, avoid a contract procured between them by such breach); Williams v. Moore-Gaunt Co., 3 Ga. A. 756, 60 SE 372 (holding that a contract obtained by an agent from his principal through a violation of the loyalty and good faith imposed by that relation is void).
Ill.—Tyler v. Sanborn, 128 Ill. 186, 21 NE 193, 15 AmSR 97, 4 LRA 218 and note; Mason v. Bauman, 62 Ill. 76; Uhlich v. Muhlke, 61 Ill. 499; Dennis v. McCagg, 32 Ill. 429; McDonald v. Fithian, 6 Ill. 269.
Ind.—Rochester v. Levering, 104 Ind. 562, 4 NE 203.
Iowa.—Watson v. Clark, 122 NW 913 (holding that, where plaintiff's agent procured an assignment of a note and mortgage from her on the plea that it was necessary to satisfy an inheritance tax and other expenses connected with the estate of plaintiff's sister, when in fact the tax had never been levied, defendant having contracted to furnish plaintiff with support and to manage her affairs in consideration of a conveyance of certain land, the assignment was properly set aside); Drefahl v. Security Sav. Bank, 132 Iowa 563, 107 NW 179; Rogers v. French, 122 Iowa 18, 96 NW 767; Fisher v. Lee, 94 Iowa 611, 63 NW 442; Green v. Peeso, 92 Iowa 261, 60 NW 531; Smith v. Dell, 30 Iowa 594.
Me.—Thompson v. Hallet, 26 Me. 141.
Md.—Kerby v. Kerby, 57 Md. 345; Keighler v. Savage Mfg. Co., 12 Md. 383, 71 AmD 600.
Mich.—Moore v. Mandlebaum, 8 Mich. 433.
Miss.—Stokes v. Terrell, 23 S 371.
Mo.—Reed v. Carroll, 82 Mo. A. 102.
Nebr.—Jansen v. Williams, 36 Nebr. 869, 55 NW 279, 20 LRA 207.
N. J.—Porter v. Woodruff, 36 N. J. Eq. 174.
N. Y.—Comstock v. Comstock, 57 Barb. 488; Gould v. Gould, 36 Barb. 270 (holding that where one holds funds as an agent with duties in the nature of a trust, although not technically a trustee, he falls within the suspected relation; and the law indulges the presumption of fraud against a release obtained by him from the actual owner, although such fraud is not visible to the eye of the court).
N. C.—Pegram v. Charlotte, etc., R Co., 84 N. C. 696, 37 AmR 639.
N. D.—Van Dusen v. Bigelow, 13 N. D. 277, 100 NW 723, 67 LRA 288.
Pa.—Persch v. Quiggle, 57 Pa. 247; Gillespie v. Weiss, 8 Pa. Dist. 170; 22 Pa. Co. 177; Audenreid v. Walker, 11 Phila. 183.
S. C.—Neely v. Anderson, 21 S. C. Eq. 262; Poag v. Poag, 10 S. C. Eq. 235.
Utah.—Foote v. Utah Commercial, etc., Bank, 17 Utah 283, 54 P 104.
Va.—Triplett v. Woodward, 98 Va. 187, 35 SE 455; Jackson v. Pleasanton, 95 Va. 654, 29 SE 680; Neilson v. Bowman, 29 Gratt. (70 Va.) 732; Wellford v. Chancellor, 5 Gratt. (46 Va.) 39; Moseley v. Buck, 3 Munf. (17 Va.) 232, 5 AmD 508.
W. Va.—Thorne v. Brown, 63 W. Va. 603, 60 SE 614; Lane v. Black, 21 W. Va. 617; Newcomb v. Brooks, 16 W. Va. 62.
Wis.—Cook v. Berlin Woolen Mill Co., 43 Wis. 433; Stewart v. Mather, 32 Wis. 344.
Eng.—Dunne v. English, L. R. 18 Eq. 524; Ormond v. Hutchinson, 16 Ves. Jr. 94, 33 Reprint 919.
Ont.—Walmsley v. Griffith, 10 Ont. A. 327; Disher v. Clarris, 25 Ont. 493, 14 CanLTOccNotes 469.

[a] **"The agent is bound to act with absolute good faith** toward the principal in respect to every matter entrusted to his care and management. In accepting a gift from his principal he is under an obligation to withhold no information in his possession respecting the subject of the gift, or the condition of the estate in his hands, which good faith requires to be disclosed, or that may reasonably influence the judgment of the principal in making the gift. All transactions between them whereby the agent derives advantages beyond legitimate compensation for his services will be closely examined by courts of equity, and set aside if there be any ground to suppose that he has abused the confidence reposed in him." Ralston v. Turpin, 129 U. S. 663, 674, 9 SCt 420, 32 L. ed. 747 [aff 25 Fed. 7].

[b] **"Contracts between principal and agent** should be jealously scrutinized, and slight circumstances of inequality, surprise and hardship may be sufficient to vacate them, even sometimes without proof of fraud." McHarry v. Irvin, 85 Ky. 322, 342, 3 SW 374, 4 SW 800, 9 KyL 245.

[c] **Courts of equity will closely scrutinize** transactions between principal and agent sustaining confidential relations toward each other, and will see to it that the agent shall not by reason of the confidence reposed in him by the principal, secure to himself an undue advantage from the contract. Drefahl v. Security Sav. Bank, 132 Iowa 563, 107 NW 179.

[d] **Modification of contract.**— After the agency has commenced and a fiduciary relation has been established, a modification of the contract at the instance of the agent and for his benefit, unless attended by the utmost good faith upon his part, will be invalid; and any misrepresentation made by the agent as to the subject of the agency to induce the principals to modify the contract in his favor is bad faith. Neilson v. Bowman, 29 Gratt. (70 Va.) 732.

[e] **Business dealings between a principal and his agent** will be keenly scrutinized to prevent such relation being used as an instrument of extortion, speculation, or other unfair advantage. Evans v. Evans, 196 Mo. 1, 93 SW 969.

[f] **It is a well settled rule of equity jurisprudence** (1) that all gifts, contracts, or benefits from a principal to one occupying a fiduciary or confidential relation to him are constructively fraudulent and void. Comstock v. Comstock, 57 Barb. (N. Y.) 453. (2) Thus where a general agent has entire management of his principal's affairs, so as, in effect, to be as much his guardian as the regularly appointed guardian of an infant, the presumption of fraud as a matter of law arises from a conveyance from the principal to the agent for the latter's benefit, and it will be decisive of the issue in favor of the principal unless rebutted by evidence. Smith v. Moore, 149 N. C. 185, 62 SE 892 [reh den 150 N. C. 158, 63 SE 735].

30. Evans v. Evans, 196 Mo. 1, 93 SW 969.

31. McDonald v. Fithian, 6 Ill. 269.

32. Colo.—British America Assur. Co. v. Cooper, 6 Colo. A. 25, 40 P 147.
Ill.—Brown v. Brown, 154 Ill. 35, 39 NE 983.
Iowa.—Collar v. Ford, 45 Iowa 331.
Ky.—Spalding v. Mattingly, 89 Ky. 83, 1 SW 488, 8 KyL 343.
W. Va.—Curlett v. Newman, 30 W. Va. 182, 3 SE 578.
Eng.—Waters v. Shaftesbury, 12 Jur. N. S. 311 [rev on other grounds 15 L. T. Rep. N. S. 489].

[a] **Illustrations.**—(1) Where defendants were authorized by plaintiff to sell real estate, and placed a sign, with their names thereon, on the property, and received one or two offers, which they submitted to plaintiff, and which were declined, and subsequently plaintiff, having investigated certain corporate stock, transferred the real estate to the agents in exchange for stock in the corporation belonging to them, there was no such relation of principal and agent as could affect the validity of the exchange. Spinks v. Clark, 147 Cal. 439, 82 P 45. (2) So where an agent has no power to sell property, but is to lease it or collect the rents, and the agent enters into independent negotiations with the principal to purchase the land, no suspicion of fraud arises from that fact alone, and the agent is not bound to assist the principal to obtain the highest possible price, since, from the moment he attempts to buy, the parties as to that transaction are dealing at arm's length.

suspicion;[33] and an agent can purchase property from his principal only where he acts in good faith and makes a full disclosure of all facts within his knowledge affecting the value of the property.[34] If he does not make such disclosure or act in good faith, the principal may have the sale set aside[35] and compel the agent to reconvey the property to him upon repayment of the purchase money or of so much as has been paid,[36] and to account for the rents and profits received by him;[37] or the principal may allow the conveyance to stand and compel the agent to account to him for such profits as he may have made.[38] Where the consideration given by the agent is very inadequate, or less than the agent can actually procure for the property,[39] or the agent conceals the fact that he is himself the purchaser,[40] or where the principal is infirm and of doubtful business capacity,[41] very slight circumstances will suffice to cause the court to set aside the dealings between the principal and agent. But where the agent makes a full disclosure of all the facts and acts honestly and in good faith, a purchase by him from his principal will be unheld;[42] and a deed of gift by the principal to the agent will be held good, if there is no improper influence or conduct on the part of the agent in procuring it.[43]

Purchasers from the agent with knowledge of the facts stand in no better position than the agent himself.[44]

[§ 365] **i. Acquisition of Adverse Right or Title.**[45] **(1) In General.** Good faith and loyalty to his principal's interest also require that an agent

Douglass v. Lougee, 147 Iowa 406, 123 NW 967.

33. Holtzman v. Linton, 27 App. (D. C.) 241; Comstock v. Comstock, 57 Barb (N. Y.) 453.

34. D. C.—Holtzman v. Linton, 27 App. 241 (holding that, whenever there exists such a confidence of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert an influence over the person trusting him, and who conveys property to him, the court will not allow such transaction to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him).

Hawaii.—Wilcox v. Marshall, 2 Hawaii 296.

Ill.—Casey v. Casey, 14 Ill. 112.

Iowa.—Ingle v. Hartman, 37 Iowa 274.

Mass.—Farnam v. Brooks, 9 Pick, 212 (holding that anyone standing in the relation of trustee or quasi trustee, as agent, factor, steward, and the like, if he would purchase of his principal or employer any property committed to his care, must deal with the utmost fairness, and conceal nothing within his own knowledge which may affect the price or value).

Mich.—Walsh v. Goulden, 130 Mich. 531, 90 NW 406; Beedle v. Crane, 91 Mich. 429, 51 NW 1070 (holding that an agent cannot make a valid purchase from his principal without fully and fairly disclosing all the facts and circumstances within his knowledge in any way calculated to enable the principal to judge of the propriety of the sale); Moore v. Mandlebaum, 8 Mich. 433.

N. Y.—Brown v. Post, 1 Hun 303 mem [aff 62 N. Y. 651 mem].

Philippine.—Enriquez v. Enriquez, 8 Philippine 607.

S. C.—Butler v. Haskell, 4 S. C. Eq. 651.

Va.—Halsey v. Monteiro, 92 Va. 581, 24 SE 258; Buckles v. Lafferty, 2 Rob. (41 Va.) 292, 40 AmD 752.

Sask.—Newstead v. Rowe, 3 Sask. L. 176.

[a] **"An agent to lease** may enter into negotiations for, and become the purchaser of, property which is the subject of the agency, provided he does not use his position as a means to that end, and makes full disclosure of all matters which the principal is entitled to know because of the relations between them." Douglass v. Lougee, 147 Iowa 406, 422, 123 NW 967.

[b] **Certainty of disclosure.**—Where an agent buys land from the principal, and the transaction has remained unchallenged for a number of years, and the value of real estate has fluctuated from time to time, resulting in a final increase, it is sufficient for the agent to show, as regards the original price paid by him, with certainty to a common intent that it was fair and equitable. Rochester v. Levering, 104 Ind. 562, 4 NE 203.

35. Cal.—Calmon v. Sarraille, 142 Cal. 638, 76 P 486 (holding that a principal induced by his agent to execute a deed running to the agent, on the representation that another person is grantee, may set the deed aside for the fraud, notwithstanding he had the opportunity to read the instrument at the time of signing it).

Ill.—Prince v. Dupuy, 163 Ill. 417, 45 NE 298 (holding that, where an owner of land, residing in a foreign state, intrusted to his agent the duty of investigating the value and the title to such land, and the agent concealed information which would have been of value to his principal, and induced his principal to convey the land to him for an inadequate consideration, an action would lie by the principal or his grantee to set aside such deed for fraud).

Iowa.—Watson v. Clark, 122 NW 913.

La—Cuggy v. Zeller, 132 La. 222, 61 S 209.

Mass.—Farnam v. Brooks, 9 Pick. 212.

Mich.—Moore v. Mandlebaum, 8 Mich. 433.

N. J.—Condit v. Blackwell, 22 N. J. Eq. 481.

Porto Rico.—Blanco v. Perez, 4 Porto Rico Fed. 428.

S. C.—Neely v. Anderson, 21 S. C. Eq. 262.

[a] **Concealment renders transaction voidable.**—Where a party accepts an agency to take charge of a house and lot belonging to his principal, collects the rents, pays taxes, and sees to repairs, and gives advice as to the value of the principal's unimproved farm lands, a fiduciary and confidential relation is thereby created between them in regard to everything connected with such property; and, if the agent purchases such farm lands for himself and in his own name he is bound to make full disclosure of all facts bearing on the value of such lands necessary for the principal to know in order to act intelligently, and if the agent conceals such facts the conveyance is voidable at the principal's election. Van Dusen v. Bigelow, 13 N. D. 277, 100 NW 723, 67 LRA 288.

36. Adams v. Sayre, 76 Ala. 509; Disbrow v. Secor, 58 Conn. 35, 18 A 981; Bassett v. Brown, 105 Mass. 551; Savage v. Savage, 12 Or. 459, 8 P 754. Right to reimbursement generally see infra §§ 458–466.

37. Fisher v. Lee, 94 Iowa 611, 63 NW 442; Moseley v. Buck, 3 Munf. (17 Va.) 232, 5 AmD 508.

38. Stoner v. Weiser, 24 Iowa 434; Cuggy v. Zeller, 132 La. 222, 61 S 209; Kramer v. Winslow, 130 Pa. 484, 18 A 923, 17 AmSR 782; Bell v. Bell, 3 W. Va. 183.

39. U. S.—Ferguson v. Dent, 24 Fed. 412 [rev on other grounds 132 U. S. 50, 10 SCt 13, 33 L. ed. 242]; Jeffries v. Wiester, 13 F. Cas. No. 7,254, 2 Sawy. 135.

Iowa.—Fisher v. Lee, 94 Iowa 611, 63 NW 442; Green v. Peeso, 92 Iowa 261, 60 NW 531; Ingle v. Hartman, 37 Iowa 274; Smith v. Dell, 30 Iowa 594.

Or.—Savage v. Savage, 12 Or. 459, 8 P 754.

Pa.—Kramer v. Winslow, 130 Pa. 484, 18 A 923, 17 AmSR 782.

S. C.—Neely v. Anderson, 21 S. C. Eq. 262; Butler v. Haskell, 4 S. C. Eq. 651.

Va.—Jackson v. Pleasanton, 95 Va. 654, 29 SE 680; Moseley v. Buck, 3 Munf. (17 Va.) 232, 5 AmD 508 (holding that, where an agent employed to sell land becomes himself the purchaser by bargain directly with his employer from whom he conceals the fact that a greater price may be gotten from another person, he is guilty of a fraud, and the contract should be vacated).

W. Va.—Bell v. Bell, 3 W. Va. 183.

40. Burke v. Bours, 92 Cal. 108, 28 P 57, 3 Cal. Unrep. Cas. 393, 26 P 102, 98 Cal. 171, 32 P 980; Schneider v. Schneider, 125 Iowa 1, 98 NW 159.

41. Brooke v. Berry, 2 Gill (Md.) 83; Reed v. Carroll, 82 Mo. A. 102; Neely v. Anderson, 21 S. C. Eq. 262; Butler v. Haskell, 4 S. C. Eq. 651.

42. Barreda y Osma v. Brown, 180 Fed. 194 [aff 184 Fed. 986, 106 CCA 664]; Hemenway v. Abbott, 8 Cal. A. 450, 97 P 190; Rochester v. Levering, 104 Ind. 562, 4 NE 203; Haynie v. Johnson, 71 Ind. 394; Fisher's App., 34 Pa. 29. See also Douglass v. Lougee, 147 Iowa 406, 123 NW 967.

[a] **Where the agent deals with the principal at arm's length** and after a full disclosure of all that he knows concerning the property which he is authorized to sell, or where the principal ratifies the purchase by the agent from himself, with full knowledge of all the circumstances connected with the transaction, he can thereafter avoid the sale only upon the same grounds as if the purchase had been made by a stranger. Burke v. Bours, 92 Cal. 108, 28 P 57, 3 Cal. Unrep. Cas. 393, 26 P 102, 98 Cal. 171, 32 P 980.

43. Ralston v. Turpin, 129 U. S. 663, 9 SCt 420, 32 L. ed. 747 [aff 25 Fed. 7]; Harris v. Tremenheere, 15 Ves. Jr. 34, 33 Reprint 668; Trusts, etc., Co. v. Hart, 32 Can. S. C. 553 [aff 2 Ont. L. 251 (rev 31 Ont. 414)].

44. Louisville Bank v. Gray, 84 Ky. 565, 2 SW 168, 8 KyL 664.

[a] **Transfer to corporation.**—Where an agent to sell, after purchasing the property, organizes a company in which he becomes a director and large shareholder, and transfers and conveys the land and assigns the contract relating to it to such company, the latter will be charged with notice of the facts and circumstances attending the purchase by the agent, and will stand in no better position than the agent. Cumberland Coal, etc., Co. v. Sherman, 30 Barb. (N. Y.) 553.

45. Adverse possession by agent against principal see Adverse Possession § 216.

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shall not use his position or information obtained by him during the course of his agency to acquire for himself, without the principal's knowledge and consent, any adverse right, title, or interest in the subject matter of the agency.[46] Thus an agent employed to perfect the principal's title, or who in the performance of his duty as agent discovers a defect in the principal's title to property, the subject matter of the agency, will not be permitted, without his principal's knowledge and consent, to purchase for himself any outstanding adverse right or title thereto,[47] although he purchases such right or title at a judicial sale,[48] and this is especially true when at such sale the agent represents himself as purchasing for his principal.[49] So also he will not be permitted to acquire for himself any out-

46. U. S.—Stephens v. Gall, 179 Fed. 938; Baker v. Whiting, 2 F. Cas. No. 787, 3 Sumn. 475.

Ala.—Lagarde v. Anniston Lime, etc., Co., 126 Ala. 496, 28 S 199.

Cal.—Gower v. Andrew, 59 Cal. 119, 43 AmR 242. See also Smith v. Goethe, 147 Cal. 725, 82 P 384.

Ga.—Larey v. Baker, 86 Ga. 468, 12 SE 684.

Ill.—Davis v. Hamlin, 108 Ill. 39, 48 AmR 541; Cottom v. Holliday, 59 Ill. 176; Bouton v. Cameron, 99 Ill. A. 600 [aff 205 Ill. 50, 68 NE 800].

Kan.—Russell v. Bradley, 47 Kan. 438, 28 P 176.

La.—McClendon v. Bradford, 42 La. Ann. 160, 7 S 78, 8 S 256.

Me.—Comings v. Stuart, 22 Me. 110.

Mich.—Pikes Peak Co. v. Pfuntner, 158 Mich. 412, 123 NW 19.

Miss.—Dorrah v. Hill, 73 Miss. 787, 19 S 961, 32 LRA 631; Winn v. Dillon, 27 Miss. 494 (holding that, where a party contracted with an agent to give him two hundred dollars if he would furnish him with numbers and information of certain specified lands which he desired to enter, and the agent, after having furnished the information, went to the office and entered the land in his own name, and afterward claimed it as his own property, the land so acquired must be held in trust for the benefit of the principal).

Mo.—Witte v. Storm, 236 Mo. 470, 139 SW 384; Grumley v. Webb, 44 Mo. 444, 100 AmD 304; Dennison v. Aldrich, 114 Mo. A. 700, 91 SW 1024.

Mont.—Largey v. Bartlett, 18 Mont. 265, 44 P 962.

Nebr.—Morrison v. Hunter, 74 Nebr. 559, 105 NW 88; Clarke v. Kelsey, 41 Nebr. 766, 60 NW 138.

S. D.—Johnson v. Knappe, 24 S. D. 407, 123 NW 857; Fowler v. Iowa Land Co., 18 S. D. 131, 99 NW 1095 (holding that, under Civ. Code § 1641, providing that a trustee cannot enforce any claim against the trust property which he purchases after or in contemplation of his appointment as trustee, an instruction that a purchase of certain pledged bonds by one while acting as manager and agent of a certain corporation conveyed no interest therein, but that such purchase inured to the benefit of the corporation, was proper).

Utah.—Argentine Min. Co. v. Benedict, 18 Utah 183, 55 P 559; Victor Gold, etc., Min. Co. v. National Bank of Republic, 15 Utah 391, 49 P 826.

Va.—Staples v. Webster, 5 Call (9 Va.) 261.

Eng.—Carter v. Palmer, 8 Cl. & F. 657, 8 Reprint 256.

Can.—Telfer v. Brown, 19 CanLT OccNotes 232.

[a] **"There is no rule of law more firmly rooted** in sound policy and morals than that an agent cannot use his fiduciary relation to obtain for himself the advantages or rewards of a contract made in the name of his principal. Nor will the law imply an understanding between him and his principal of a joint interest in contracts made by him in his fiduciary relation." Stephens v. Gall, 179 Fed. 938, 940.

[b] **What not adverse interest.**—The financial officer of a bank is not disqualified from purchasing for his own benefit property pledged to it for a debt. He discharges his duty when he sees to it that the sale is for a price sufficient to discharge the lien, and does not stand as a trustee for any profit he may obtain by buying at that price. Smith v. Lansing, 22 N. Y. 520.

[c] **Where an agent employed to invest his principal's money** takes a mortgage and forecloses it, taking title after sale in his own name, and a judgment recovered against the agent becomes a lien thereon, the agent becomes liable to the principal for the amount loaned. Momsen v. Atkins, 105 Wis. 557, 81 NW 647.

[d] **Where there is no relation of agency** the prohibition does not apply. Carter v. Jolly, 22 SW 747, 15 KyL 217.

[e] **Where an agent with the consent of his principal** purchases titles to land adverse to others who are not tenants in common of his principal as to the land affected the agent is guilty of no violation of trust. Hill v. Coburn, 105 Me. 437, 75 A 67.

[f] **Trade-marks.**—An agent cannot acquire the property of his principal during his agency as by securing trade-marks upon the property. Munoz v. Struckmann, 9 Philippine 52.

47. U. S.—Cragin v. Powell, 128 U. S. 691, 9 SCt 203, 32 L. ed. 566; Ringo v. Binns, 10 Pet. 269, 9 L. ed. 420.

Ark.—Rogers v. Lockett, 28 Ark. 290.

Cal.—Hardenbergh v. Bacon, 33 Cal. 356; Wilson v. Crabtree, 12 Cal. A. 360, 107 P 828 (purchase of principal's stock at a delinquent sale thereof).

Colo.—Fisher v. Seymour, 23 Colo. 542, 49 P 30.

Ida.—Lockhart v. Rollins, 2 Ida. (Hasb.) 540, 21 P 413.

Ill.—Vallette v. Tedens, 122 Ill. 607, 14 NE 52, 3 AmSR 502; Stewart v. Duffy, 116 Ill. 47, 6 NE 424 (holding that the agent must secure the consent of the principal before he can buy in an outstanding interest against the principal's property); Dennis v. McCagg, 32 Ill 429.

Mich.—Moore v. Mandlebaum, 8 Mich. 433.

Mont.—Largey v. Bartlett, 18 Mont. 265, 44 P 962.

N. Y.—Case v. Carroll, 35 N. Y. 385.

N. C.—Blount v. Robeson, 56 N. C. 73.

Tex.—Barziza v. Story, 39 Tex. 354 (holding that, if an agent employed to buy up an encumbrance to perfect title to his principal takes a deed in his own name, he takes no title as against his principal).

See Hill v. Coburn, 105 Me. 437, 75 A 67.

[a] **An attorney** may not buy in an adverse title to land about which he has been consulted by his client. Cameron v. Lewis, 56 Miss. 76.

48. U. S.—Aultman v. Jones, 2 F. Cas. No. 657, Woolw. 99.

Ala.—Enslen v. Allen, 160 Ala. 529, 49 S 430; Adams v. Sayre, 70 Ala. 318 (holding that an agent in charge of real estate, renting it, paying taxes and insurance, and having power to sell, cannot himself become the purchaser at a sale under a mortgage, and hold it against his principal).

Ill.—Hays v. Beaird, 59 Ill. A. 529.

Ind.—Fountain Coal Co. v. Phelps, 95 Ind. 271.

Iowa.—Bowman v. Officer, 53 Iowa 640, 6 NW 28.

Ky.—Dodge v. Black, 53 SW 1039, 21 KyL 992 (holding that an agent who purchased his principals' property at a sale made to pay a claim for purchase money, which it was his duty to pay out of funds in his hands, acquired no title thereto, but held the property in trust for his principals, and must account to them for the rents).

Mich.—Kimball v. Ranney, 122 Mich. 160, 80 NW 992, 80 AmSR 548 and note, 46 LRA 403.

Miss.—Gillenwaters v. Miller, 49 Miss. 150.

Mo.—Witte v. Storm, 236 Mo. 470, 139 SW 384 (holding that, where an agent is given charge of his principal's property to discharge it from certain liabilities, he cannot, by purchasing the property with his own funds at an execution sale, acquire an interest adverse to his principal); Jamison v. Glascock, 29 Mo. 191 (where the rule was applied to a creditor who had accepted a trust by becoming the agent of the debtor to dispose of property to pay the debts).

N. Y.—Moore v. Moore, 5 N. Y. 256.

[a] **Mortgage sale.**—(1) An agent employed by the mortgagor in a foreclosure suit cannot buy in the mortgaged property for himself. Case v. Carroll, 35 N. Y. 385; Davis v. Smith, 43 Vt. 269. (2) And this rule is not altered by the fact that the agent notified the principal several days prior to the sale that he would purchase at the foreclosure sale to protect his interest, which consisted of a prospective commission for the sale of the premises, to accomplish which he had made some effort. Kimball v. Ranney, 122 Mich. 160, 80 NW 992, 80 AmSR 548, 46 LRA 403. (3) Likewise an agent employed to collect a mortgage cannot purchase the mortgaged premises at a foreclosure for his own benefit, notwithstanding he bids more than the price limited by his principal, but less than the mortgage debt; and if he does so the principal may elect to treat him as a trustee with respect to such property. Moore v. Moore, 5 N. Y. 256.

[b] **An agent having charge of the enforcement of a judgment** for his principal will not be permitted to purchase the debtor's property at the sheriff's sale below its value and for less than the amount of the judgment. Quinn v. Le Duc, (N. J. Ch.) 51 A 199.

[c] **Owner present at sale.**—Where one purchases property at a judicial sale at which the owner is present, it will not be presumed that he purchased as the owner's agent without strong testimony. Evans v. Rogers, 11 S. C. L. 563.

[d] **A mere formal surrender of the agency** is not sufficient to give the agent the right to purchase his principal's property at a sheriff's sale. Fountain Coal Co. v. Phelps, 95 Ind. 271.

[e] **Rule held not applicable.**—It has been held that the rule that one who stands in a fiduciary relation to another in the management of property cannot become the purchaser of such property himself at a forced sale thereof does not always apply where the agent or trustee was not responsible for and took no part in bringing about the sale at which he became the purchaser; and even if a bill to recover the property could be maintained it would be inequitable to permit the recovery without obliging complainant to return the purchase price to such agent or trustee. Ubarri & Iramategui v. Matienzo, 5 Porto Rico Fed. 562.

49. Satterthwaite v. Loomis, 81 Tex. 64, 16 SW 616.

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standing claims or liens against the principal's property,[50] and, where he is employed to compromise or settle claims against his principal, he will not be permitted to purchase such claims himself and enforce them against his principal.[51] Where an agent is guilty of a breach of duty in this respect, all rights, title, or interests thus acquired inure to the benefit of the principal and the agent will be regarded as holding them as trustee for the latter,[52] and may be compelled to transfer them to the principal,[53] and to account to him for all profits and benefits gained thereby,[54] although he will be entitled to repayment of so much of the purchase money as he has paid out of his own funds,[55] and to reimbursement for expenses necessarily incurred in the protection or preservation of the property,[56] and for useful improvements to the extent to which they enhance the value of the property.[57] The principal, however, may permit the agent to hold the property thus purchased and claim from him the value of the principal's interest in money.[58] The above principles apply, although the title asserted by the principal is insufficient, and that purchased by the agent is paramount,[59] and although the rights of the principal were about to expire.[60]

[§ 366] **(2) Acquisition of Tax Title.** In accordance with the above rules an agent in charge of his principal's lands for the purpose of paying taxes, etc., cannot, without the principal's knowledge and consent, acquire a valid title to such lands by becoming a purchaser at a tax sale thereof,[61]

50. Marshall v. Ferguson, 78 Mo. A. 645; James v. McKernon, 6 Johns. (N. Y.) 543; Reed v. Warner, 5 Paige (N. Y.) 650. Compare Low v. Graydon, 50 Barb. (N. Y.) 414.

51. Larey v. Baker, 86 Ga. 468, 12 SE 684; James v. McKernon, 6 Johns. (N. Y.) 543; Reed v. Warner, 5 Paige (N. Y.) 650; Noyes v. Landon, 59 Vt. 569, 10 A 842; Reed v. Norris, 2 Myl. & C. 362, 14 EngCh 362, 40 Reprint 678.

52. U. S.—Stephens v. Gall, 179 Fed. 938; Aultman v. Jones, 2 F. Cas. No. 657, Woolw. 99.

Ala.—Houston v. Farris, 93 Ala. 587, 11 S 330.

Ida.—Lockhart v. Rollens, 2 Ida. (Hasb.) 540, 21 P 413.

Ill.—Vallette v. Tedens, 122 Ill. 607, 14 NE 52, 3 AmSR 502; Davis v. Hamlin, 108 Ill. 39, 48 AmR 541.

Ky.—Dodge v. Black, 53 SW 1039, 21 KyL 992. Compare Craig v. Craig, 6 J. J. Marsh. 171 (holding that an agent buying property of his principal at a sale under execution does not hold it as pledgee).

Mich.—Kimball v. Ranney, 122 Mich. 760, 80 NW 992, 46 LRA 403 (holding that the owner's laches in bringing suit did not estop him from making a claim that the agent held as trustee for his benefit).

Mo.—Grumley v. Webb, 44 Mo. 444, 100 AmD 304.

Nebr.—Crile v. Fries, 86 Nebr. 789, 126 NW 655.

N. Y.—Fatta v. Edgerton, 157 App. Div. 852, 143 NYS 225 [aff 137 NYS 226] (holding that, where plaintiff's agent, in paying off prior mortgages on property so as to make the mortgage given by plaintiff to defendant a first lien as agreed, instead of having the mortgage discharged, took an assignment in blank, the assignment inured to the benefit of plaintiff, and both plaintiff and defendant were entitled to have it discharged of record); Parkist v. Alexander, 1 Johns. Ch. 394.

Porto Rico.—New Colonial Co. v. Canovanas Sugar Factory, 2 Porto Rico Fed. 195.

Wash.—Soderberg v. McRae, 70 Wash. 235, 126 P 538.

See generally Trusts [39 Cyc 188].

53. Schedda v. Sawyer, 21 F. Cas. No. 12,443, 4 McLean 181; Erwin v. Duplessis, 11 La. 543; Essex Trust Co. v. Enwright, 214 Mass. 507, 102 NE 441, 47 LRANS 567 (holding that, where a newspaper reporter by reason of his employment learned of the peculiar value of a lease to his principal, and that the principal was in default in the payment of rent, and procured the lease to himself, he might be compelled to deliver the same to his principal).

54. Schedda v. Sawyer, 21 F. Cas. No. 12,443, 4 McLean 181; Dodge v. Black, 53 SW 1039, 21 KyL, 992 (must account for rents); Hobson v. Peake, 44 La. Ann. 383, 10 S 762.

[a] **A mortgagee who has acquired the principal's property** and business by foreclosure and is carrying on his business is required, upon assignment of the lease which the agent has secured on the premises where the business is conducted, to repay any rent the agent has paid under the lease but not the rent paid by the agent which was due from the principal. Essex Trust Co. v. Enwright, 214 Mass. 507, 102 NE 441, 47 LRANS 567 and note.

55. Ind.—Ridenour v. Wherritt, 30 Ind. 485 (holding that the principal cannot take the benefit of the purchase without an offer to pay the agent).

Iowa.—Continental L. Ins. Co. v. Perry, 65 Iowa 709, 22 NW 937 (holding, however, that an agent holding a tax certificate for his principal cannot be allowed to take and hold a tax deed as against him, on account of the negligence of the principal in reimbursing him, unless the agent has made a full and fair statement to his principal of the account between them and the amount necessary to reimburse him).

La.—Erwin v. Duplessis, 11 La. 543.

N. Y.—Reed v. Warner, 5 Paige 650 (holding, however, that, where a debtor employs an agent to effect a compromise with his creditors, such agent cannot purchase a debt against his principal for his own benefit; and that, although the principal neglects to reimburse the agent for the amount paid by him in purchasing the debts of the principal, such agent is entited to hold the claims so purchased only for the amount paid and a reasonable compensation for his services).

Pa.—Grant v. Seitsinger, 2 Penr. & W. 525 (holding that an agent buying his principal's note at a discount is not entitled to charge full price in settling).

Porto Rico.—Ubarri & Iramategui v. Matiengo, 5 Porto Rico Fed. 562.

Wash.—Soderberg v. McRae, 70 Wash. 235, 126 P 538.

[a] **The agent may buy claims to protect the principal,** and in such case he acquires a right to collect the note secured by the mortgage which he buys and has discharged. Thus where purchasers of land retained part of the consideration to pay off liens reported by their attorney who subsequently, discovering another lien, purchased the same with his own money, such attorney was not estopped by reason of his confidential relation to deny payment of such claim by the money so retained, but was entitled to recover the same in an action against the vendor. Flick v. Stauffer, 97 Va. 649, 34 SE 476.

[b] **Subrogation.**—An agent who advances money to buy in or pay off a mortgage or judgment which is pressing on the property in his hands should be permitted to hold the encumbrance thus discharged as a security for repayment. Spring Garden v. Blight, 1 Phila. (Pa.) 553.

56. Hobson v. Peake, 44 La. Ann. 383, 10 S 762.

Right to reimbursement see generally infra §§ 458–466.

[a] **Interest.**—Where an agent employed to sell mortgaged premises purchased for his own benefit, a decree requiring him to account to his principal for the property should allow interest on his bid, and on the amount of his disbursements. Kimball v. Ranney, 122 Mich. 160, 80 NW 992, 80 AmSR 548, 46 LRA 403.

57. Hobson v. Peake, 44 La. Ann. 383, 10 S 762.

58. Houston v. Farris, 93 Ala. 587, 11 S 330.

59. Hardenbergh v. Bacon, 33 Cal. 356, 376 (holding that it is enough that the principal asserts a claim to or interest in the property, without regard to the sufficiency of the title. In this case the court said: "The subject matter of the agency was the plaintiff's claim to the mining ground. Where property, or the claim to property, is the subject to which the agency relates, we do not understand it to be requisite that the principal must hold a perfect title, or an equitable title that will enable him to acquire the legal title; and we know of no rule that will prevent the parties from creating an agency which has for its subject matter a mere naked claim to property. If a perfect title will suffice, and a mere claim will not, where is the line to be drawn between the several grades and characters of title, on the one side of which they will, and on the other side they will not, amount to enough to support the agency? The agency may be created for the very purpose of procuring title, either legal or equitable, and so it may be for the protection of an asserted title, whether well founded or not. Otherwise, the rule forbidding the agent from acquiring an outstanding title for his own use never could have any application when the principal held a legal title; for if the outstanding title was not the true one, its acquisition by the agent could be of no possible injury to the principal; and if it was the true title, the principal could not complain, for his title, not being the true title, amounted to no more than a mere claim"); Lockhart v. Rollins, 2 Ida. (Hasb.) 540, 21 P 413; Dennis v. McCagg, 32 Ill. 429.

60. Gower v. Andrew, 59 Cal. 119, 43 AmR 242 (holding that an agent who in the course of his agency learns the value of a lease which is about to expire and which the principal seeks to renew will be compelled to transfer to his principal a lease on the same property which he procures for himself); Davis v. Hamlin, 108 Ill. 39, 48 AmR 541 (holding that, where the confidential agent of a theater manager uses his position to ascertain the profits of the business and secretly overbids his principal and secures for himself a lease of the theater, equity will regard the lease as taken for the principal's benefit).

61. U. S.—Kirlicks v. Interstate Bldg., etc., Assoc., 113 Fed. 290, 51 CCA 318 (holding that, where one has obligated himself to a mortgagee

except where the agency has been first terminated.[62] This rule is particularly applicable where the agent has funds in his hands with which to pay the taxes and in breach of his trust neglects to pay them and bids the land in at the sale,[63] although the rule is not changed by the mere fact that the principal has failed to furnish funds with which to pay the taxes.[64]

Effect of such purchase. A title so acquired, however, is voidable only, and the agent is entitled, upon being compelled to give up such title, to receive from the principal the amount paid therefor,[65] and reimbursement for expenditures necessary to protect the principal's interests in the land, with interest thereon,[66] except that the rule requiring reimbursement does not apply where the agent is in receipt of rents from the property sufficient to pay the taxes,[67] nor in any case unless the agent by a

of property to pay the taxes thereon, but fails to do so, by reason of which the property is sold for taxes, and he becomes the purchaser, he takes the same subject to the mortgage, or as trustee for the mortgagee); Baker v. Whiting, 2 F. Cas. No. 787, 3 Sumn. 475; Curts v. Cisna, 6 F. Cas. No. 3,507, 7 Biss. 260; Schedda v. Sawyer, 21 F. Cas. No. 12,443, 4 McLean 181.

Ark.—Grober v. Clements, 71 Ark. 565, 76 SW 555, 100 AmSR 91 (holding that where a son went to a tax sale intending to pay the taxes on his father's land as his agent, but found, when he arrived, that the land was being offered for sale, and therefore bid it in to protect his father's interest, the purchase amounted merely to a redemption and gave him no title that he could set up against a claim of dower made by his father's widow); Collins v. Rainey, 42 Ark. 531. But compare Pack v. Crawford, 29 Ark. 489 (holding that the mere fact that a purchaser of land at a tax sale was, during the life of the deceased owner, his attorney in some suits does not cast on him the duty of paying the taxes or redeeming the land, or affect his right to purchase).

Cal.—O'Connor v. Irvine, 74 Cal. 435, 16 P 236.

D. C.—Nailor v. Nailor, 16 D. C. 93.

Fla.—McRae v. Preston, 54 Fla. 190, 44 S 946.

Ill.—Peabody v. Burri, 255 Ill. 592, 99 NE 690; Gonzalia v. Bartelsman, 143 Ill. 634, 32 NE 532; Barton v. Moss, 32 Ill. 50; Stanley v. McConnell, 64 Ill. A. 591.

Iowa.—Continental L. Ins. Co. v. Perry, 65 Iowa 709, 22 NW 937; Ellsworth v. Cordrey, 63 Iowa 675, 16 NW 211; Bowman v. Officer, 53 Iowa 640, 6 NW 28 [dist Eckrote v. Meyers, 41 Iowa 324].

Kan.—Woodman v. Davis, 32 Kan. 344, 4 P 262; Fisher v. Krutz, 9 Kan. 501; Krutz v. Fisher, 8 Kan. 90.

Ky.—Page v. Webb, 7 SW 308, 9 KyL 868; Oldhams v. Jones, 5 B. Mon. 458.

La.—Bell v. Germain Boyd Lumber Co., 134 La. 397, 64 S 223.

Me.—Matthews v. Light, 32 Me. 305.

Mich.—Backus v. Cowley, 162 Mich. 585, 127 NW 775 (holding that, where a person is authorized as agent to pay certain taxes, while the relation thereby created is not strictly speaking fiduciary, yet good faith is required, and the agent taking a tax deed to himself without his principal's consent is a breach of that faith).

Mo.—Murdoch v. Milner, 84 Mo. 96; Grumley v Webb, 44 Mo. 444, 100 AmD 304.

Nebr.—Crile v. Fries, 86 Nebr. 789, 126 NW 655.

Pa.—Wheeler v. Knupp, 206 Pa. 306, 55 A 979 (holding that, where taxes on unseated land had been regularly assessed, and an agent of the owner bought in the land at a tax sale, and before maturity of the deed paid the taxes, and they were accepted by the treasurer, the agent's tax title thereon could not be sustained); Knupp v. Syms, 200 Pa. 489, 50 A 210; Huzzard v. Trego, 35 Pa. 9; Myer's App., 2 Pa. 463 (holding that if the general agent of heirs purchases the land of their ancestor from the vendee at a tax sale instead of redeeming the land, it inures to the benefit of the heirs); Bartholemew v. Leech, 7 Watts 472.

S. D.—Bush. v. Froelich, 14 S. D. 62, 84 NW 230 (holding that, where a loan company collected interest on loans secured by a mortgage assigned by it to plaintiff, and acted as her agent with reference thereto, it had no right to purchase the land at a tax sale, and to hold the title so acquired as against plaintiff, although it had not guaranteed the loan).

Tenn.—McKee v. Dail, 1 Tenn. Ch. 689.

W. Va.—Siers v. Wiseman, 58 W. Va. 340, 52 SE 460; Curtis v. Borland, 35 W. Va. 124, 12 SE 1113 (holding that a purchase of land at a delinquent sale by the agent of the owner, in whom he had confided and whose duty it was to purchase in the land for the owner, operated only as a payment of the taxes, and such purchaser acquired no rights as against the owner of the land, by neglecting his duty to the owner and by buying the same for himself); Franks v. Morris, 9 W. Va. 664; Morris v. Joseph, 1 W. Va. 256, 91 AmD 386.

Wis.—Dana v. Duluth Trust Co., 99 Wis 663, 75 NW 429; Fox v. Zimmermann, 77 Wis. 414, 46 NW 533 (where he has rents in his hands sufficient to pay the taxes).

See generally Trusts [39 Cyc 188].

[a] **An indirect sale through a third person** is subject to the same infirmity. Geisinger v. Beyl, 80 Wis. 443, 50 NW 501.

[b] **An agent of a mortgagee** cannot in his own name, or in the interest of his wife, undermine the security taken by a purchase of the mortgaged property at a tax sale. Abrams v. Wingo, 9 Kan. A. 884, 59 P 661.

[c] **The presumption is,** where a person buys at a tax sale for himself and also acts in some purchases as the agent of another, that the purchases made in his own name and upon which he takes the certificates are made for himself, not for his principal. Smith v. Stephenson, 45 Iowa 645.

[d] **One employed merely to ascertain the amount of taxes due** upon a certain piece of land by request of the owner does not become such an agent of the owner as to be chargeable with fraud in buying the same for himself for less than half value. Collar v. Ford, 45 Iowa 331.

[e] **Where one acting as attorney in fact or agent of a bank** secures a sale of its lands for taxes after it has gone into the hands of receivers, and purchases the tax title thereto, such title is void in equity for fraud, although regular in other respects, and according to the state statutes. Persons v. Beling, 116 Fed. 877 [aff 126 Fed. 449, 62 CCA 63].

62. Bemis v. Plato, 119 Iowa 127, 93 NW 83 (holding that, where an agent in charge of land for a nonresident landowner informed his principal of on impending tax sale of the land, and she took the matter out of his hands and allowed the sale to go to deed, the agent, after his discharge, might acquire a valid title to the land under the tax deed); Bartholemew v. Leach, 7 Watts (Pa.) 472 (holding that an agent for unseated lands cannot be a purchaser of them at a tax sale unless he previously and explicitly renounces the agency); McMahon v. McGraw, 26 Wis. 614 (holding that an agent in respect to lands cannot acquire a tax title thereto as against his principal, unless he first distinctly notifies the principal that he renounces the agency); Fleming v. McNabb, 8 Ont. A. 656. See also infra § 368.

63. Barton v. Moss, 32 Ill. 50; Woodman v. Davis, 32 Kan. 344, 4 P 262; Crile v. Fries, 86 Nebr. 789, 126 NW 655 (holding that, where the owner of land gave her niece money to pay the delinquent taxes thereon, and the niece, instead of paying them, obtained a tax sale certificate therefor, which she afterward assigned to her father, the owner's brother, the transaction was a payment of the taxes by the owner, and her brother could not foreclose an alleged tax lien by virtue of the tax sale certificate); T. D. Kellogg Lumber, etc., Co. v. Webster Mfg. Co., 140 Wis. 341, 122 NW 737; Fox v. Zimmermann, 77 Wis. 414, 46 NW 533.

[a] **Illustrations.**—(1) Where an agent is to pay taxes on mortgaged property for the mortgagee, and has money of the latter with which to do it, he cannot acquire a tax title as against the mortgagee. Young v. Iowa Tollers' Protective Assoc., 106 Iowa 447, 76 NW 822. (2) So also one who was the agent of the deceased at his death and when taxes were assessed against his property, and had the property in charge, and had funds of the deceased sufficient to pay the taxes when they accrued, and the sale was made therefor, cannot claim title in himself under the purchase made by him at the tax sale. State v. Goldberg, 113 Tenn. 298, 86 SW 717.

64. Bowman v. Officer, 53 Iowa 640, 6 NW 28; Page v. Webb, 7 SW 308, 9 KyL 868; McMahon v. McGraw, 26 Wis. 614.

[a] **An agent who purchases a tax certificate** upon the land of his principal holds it in trust for his principal, and he cannot be allowed to take and hold a tax deed as against his principal on account of the negligence of the principal in reimbursing him, unless he has made a full and fair statement to his principal of the account between them, and of the amount necessary to reimburse him. Continental L. Ins. Co. v Perry, 65 Iowa 709, 22 NW 937.

65. Ellsworth v. Cordrey, 63 Iowa 675, 16 NW 211 (holding that, although an agent cannot acquire a tax title to land as against his principal, yet the purchase by the agent is not void, but voidable only, and before the principal can redeem from the agent, or from his assignee to whom a deed has been made, and who has paid the subsequent taxes, he must pay, on account of such subsequent taxes, the same amount which he would have had to pay the treasurer in case the taxes had not been paid by the claimant under the tax title).

Right of reimbursement see generally infra §§ 458–466.

[a] **Where a person buys land at a tax sale, and subsequently pays taxes thereon** as the agent of the owner, he possesses a mere naked legal title, with a lien for taxes, and his heirs inherit no better title than he possesses which will be held in trust for the successors in interest of the principal, subject only to the lien. Hudson v. Herman, 81 Kan. 627, 107 P 35.

66. Dana v. Duluth Trust Co., 99 Wis. 663, 75 NW 429.

Right of reimbursement see generally infra §§ 458–466.

67. Dana v. Duluth Trust Co., 99 Wis. 663, 75 NW 429.

proper showing places the court in a position that it may do complete equity by its decree.[68]

[§ 367] **j. Acting for Both Parties.** As a rule an agent cannot act as such for both parties to the same transaction in matters which involve the exercise of discretion, where the interests of the parties are conflicting,[69] unless he does so with the knowledge and consent of both,[70] and this rule is not affected by a custom or usage otherwise, of which the principal is ignorant.[71] In accordance with this rule one cannot act as agent for both buyer and seller in the same transaction in matters involving discretion, since it is to the interest of the vendor to secure the highest price and of the purchaser to pay the least, and the agent thereby puts himself into a conflicting position.[72] If he acts for both parties without their knowledge and consent he is chargeable as trustee for all the profits of the transaction,[73] and is responsible to his principal for any loss thereby sustained,[74] and

68. Dana v. Duluth Trust Co., 99 Wis. 663, 75 NW 429.

69. U. S.—Alger v. Anderson, 78 Fed. 729; Findlay v. Pertz, 66 Fed. 427, 13 CCA 559, 29 LRA 188.

Cal.—Blood v. La Serena Land, etc., Co., 118 Cal. 221, 41 P 1017, 45 P 252.

Colo.—British America Assur. Co. v. Cooper, 6 Colo. A. 25, 40 P 147.

Fla.—Burnham City Lumber Co. v. Rannie, 59 Fla. 179, 52 S 617.

Ga.—Whitley v. James, 121 Ga. 521, 49 SE 600; Fitzsimmons v. Southern Express Co., 40 Ga. 330, 2 AmR 577.

Ill.—Bunn v. Keach, 214 Ill. 259, 73 NE 419; Fish v. Leser, 69 Ill. 394; Honeycutt v. Logg, 160 Ill. A. 237; Manchester F. Assur. Co. v. Illinois Ins. Co., 91 Ill. A. 609.

Ind.—Bedford Coal, etc., Co. v. Parke County Coal Co., 44 Ind. A. 390, 89 NE 412.

Iowa.—Larson v. Thoma, 143 Iowa 338, 121 NW 1059; Merrill v. Sax, 141 Iowa 386, 118 NW 434; Morey v. Laird, 108 Iowa 670, 77 NW 835 (holding that an agent who acts for two principals must exercise the utmost good faith to each, and if he cannot do so he should at once end the agency); Seymour v. Shea, 62 Iowa 708, 16 NW 196.

Kan.—Madden v. Cheshire Provident Inst., 77 Kan. 415, 418, 94 P 793 (where the court said: "The vital principle of the law of agency is said to be good faith, and this prohibits one from acting as the agent of opposing parties").

Ky.—McDoel v. Ohio Valley Impr., etc., Co., 36 SW 175, 18 KyL 294.

La.—Draughon v. Quillen, 23 La. Ann. 237; Florance v. Adams, 2 Rob. 556, 38 AmD 226; Shepherd v. Lanfear, 5 La. 336, 25 AmD 181 (holding, however that if the same agent is appointed for two persons whose interests clash he may choose to act for one of them).

Md.—Baltimore Sugar Refining Co. v. Campbell, etc., Co., 83 Md. 36, 34 A 369.

Mass.—Walker v. Osgood, 98 Mass. 348, 93 AmD 168.

Mich.—Dull v. Royal Ins. Co., 159 Mich. 671, 124 NW 533; Scribner v. Collar, 40 Mich. 375, 29 AmR 541; Moore v. Mandlebaum, 8 Mich. 433.

Miss.—Dorrah v. Hill, 73 Miss. 787, 19 S 961, 32 LRA 631; Wildberger v. Hartford F. Ins. Co., 72 Miss. 338, 17 S 282, 48 AmSR 558, 28 LRA 220.

Mo.—Atlee v. Fink, 75 Mo. 100, 43 AmR 385; Winter v. Carey, 127 Mo. A. 601, 106 SW 539; Carr v. Ubsdell, 97 Mo. A. 326, 71 SW 112; Robinson v. Jarvis, 25 Mo. A. 421; Mercantile Mut. Ins Co. v. Hope Ins. Co., 8 Mo. A. 408.

Nebr.—Duesman v. Hale, 55 Nebr. 577, 76 NW 205; Judkins v. Burr, 1 Nebr. (Unoff.) 267, 95 NW 475.

Nev.—Frances Mohawk Min., etc., Co. v. McKay, 141 P 456.

N. J.—Young v. Hughes, 32 N. J. Eq. 372.

N. Y.—Carr v. Watertown Nat. Bank, etc., Co., 167 N. Y. 375, 60 NE 649, 82 AmSR 725 [aff 189 U. S. 426, 23 SCt 513, 47 L. ed. 881]; Empire State Ins. Co. v. American Cent. Ins. Co., 138 N. Y. 446, 34 NE 200 [aff 64 Hun 485, 19 NYS 504]; New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85; Utica Ins. Co. v. Toledo Ins. Co., 17 Barb. 132 (holding that a person cannot act as the agent of both parties in the making of a contract, where he is invested with a discretion by each, and where each is entitled to the benefit of his skill and judgment); Dunlop v. Richards, 2 E. D. Smith 181; Vanderpoel v. Kearns, 2 E. D. Smith 170.

Pa.—Everhart v. Searle, 71 Pa. 256; Marshall v. Reed, 32 Pa. Super. 60.

R. I.—Lynch v. Fallon, 11 R. I. 311, 23 AmR 458.

Tex.—Centennial Mut. Life Assoc. v. Parham, 80 Tex. 518, 16 SW 316; Burck v. Wynn, (Civ. A.) 168 SW 49; Liverpool, etc., Ins. Co. v. McCollum, (Civ. A.) 149 SW 775; Cameron v. Blackwell, 53 Tex. Civ. A. 414, 115 SW 856.

Va.—Ferguson v. Gooch, 94 Va. 1, 26 SE 337, 40 LRA 234.

W. Va.—Guthrie v. Huntington Chair Co., 71 W. Va. 383, 76 SE 795; West End Real Est. Co. v. Nash, 51 W. Va. 341, 41 SE 182.

Wis.—Walworth County Bank v. Farmers' L. & T. Co., 16 Wis. 629.

Eng.—Panama etc., Tel. Co. v. India Rubber, etc., Tel Works Co., L. R. 10 Ch. 515; Bartram v. Lloyd, 88 L. T. Rep. N. S. 286 [app allowed 90 L. T. Rep. N. S. 357].

[a] **To be secretly in the service of one party,** while ostensibly acting solely for the opposite party, is a fraud upon the latter, and a breach of public morals which the law will not permit. Ferguson v. Gooch, 94 Va. 1, 26 SE 337, 40 LRA 234.

[b] **One party to a contract has no right to rely upon any implication of authority** to his own agent to act as the agent of the other party with whom he is dealing. Bensley v. Moon, 7 Ill. A. 415.

70. Ga.—Ramspeck v. Pattillo, 104 Ga. 772, 30 SE 962, 69 AmSR 197, 42 LRA 197.

Or.—Bonelli v. Burton, 61 Or. 429, 123 P 37.

Tex.—Burck v. Wynn, (Civ. A.) 168 SW 49; Austin v. Rupe, (Civ. A.) 141 SW 547.

Wash.—Philips v. Langlow, 55 Wash. 385, 388, 104 P 610 [cit Cyc].

W. Va.—Guthrie v. Huntington Chair Co., 71 W. Va. 383, 76 SE 795.

Wis.—Meyer v. Hanchett, 39 Wis. 419, 43 Wis. 246.

See also cases supra note 69; infra note 72.

"An agent cannot bind two parties having opposing interests in the same transaction, nor can he be at the same time a party and the agent of the opposite party, unless both parties know of the dual relation and assent to it." Dull v. Royal Ins. Co., 159 Mich. 671, 674, 124 NW 533.

[a] **An agent of both parties to a proposed contract** cannot bind either party thereto; but the proposed contract must have the approval of both principals, after full knowledge of the facts, to bind either. Manchester F. Assur. Co. v. Illinois Ins. Co., 91 Ill. A. 609.

71. Burnham City Lumber Co. v. Rannie, 59 Fla. 179, 52 S 617; Farnsworth v. Hemner, 1 Allen (Mass.) 494, 79 AmD 756; Robinson v. Mollett, L. R. 7 H. L. 802.

[a] **A custom for real estate agents** having property in their hands for sale to act as agents both for the syndicate formed to purchase the land and for the vendor does not render the purchase binding on the members of the syndicate. Ferguson v. Gooch, 94 Va. 1, 26 SE 397, 40 LRA 234.

72. U. S.—Kilbourn v. Sunderland, 130 U. S. 505, 9 SCt 594, 32 L. ed. 1005 [aff 14 D. C. 506]; Donovan v. Campion, 85 Fed. 71, 29 CCA 30.

Ala.—Minto v. Moore, 1 Ala. A. 556, 564, 55 S 542 [quot Cyc].

Ill.—Cottom v. Holliday, 59 Ill. 176; Walker v. Field, 179 Ill. A. 3.

Mich.—Leathers v. Canfield, 117 Mich. 277, 75 NW 612, 45 LRA 33 and note; Moore v. Mandlebaum, 8 Mich. 433.

Minn.—Webb v. Paxton, 36 Minn. 532, 32 NW 749 (holding that where real estate is placed in the hands of a person to sell as agent for the owner, although the price and terms of sale are fixed by the owner himself, it is incompatible with the agent's duty to his principal to accept employment as agent also of the purchaser, which would render it to his interest to sell only to one who would give him such double employment to the exclusion of other persons).

Mo.—Smith v. Tyler, 57 Mo. A. 668.

N. J.—Sternberger v. Young, 73 N. J. Eq. 586, 75 A 807.

N. Y.—Cumberland Coal, etc., Co. v. Sherman, 30 Barb. 553; Egan v. De Jonge, 113 NYS 737.

Pa.—Addison v. Wanamaker, 185 Pa. 536, 39 A 1111; Rice v. Davis, 136 Pa. 439, 20 A 513, 20 AmSR 931; Everhart v. Searle, 71 Pa. 256; Lightcap v. Nicola, 34 Pa. Super. 189; Fulton v. Walters, 28 Pa. Super. 269 [rev on other grounds 216 Pa. 56, 64 A 860]; Wireman's Est., 7 Pa. Dist. 759.

R. I.—Lynch v. Fallom, 11 R. I. 311, 23 AmR 458.

Va.—Ferguson v. Gooch, 94 Va. 1, 26 SE 397, 40 LRA 234 (holding that a man cannot be the agent of both the seller and the buyer in the same transaction without the intelligent consent of both).

Wis.—Shirland v. Monitor Iron Works Co., 41 Wis. 162.

[a] **Illustration.**—Where the seller of land, or his agent in the transaction, has knowledge that there exists between the purchaser and another such a relation that it would be a breach of duty on the part of that other person to enter into a similar relation with the seller, the same principle of law which forbids him to do so while still acting for the purchaser must forbid the seller to enter into that relation with the purchaser's agent without the knowledge and consent of his principal. Lightcap v. Nicola, 34 Pa. Super. 189.

[b] **An agent of the vendor may act as agent of the vendee** to accept delivery of the property sold. Colwell v. Keystone Iron Co., 36 Mich. 51.

[c] **One who conducts a sale under a trust deed** as agent of the trustee may buy as agent of the purchaser. Union Planters' Bank v. Edgell, (Miss.) 33 S 409; Dunton v. Sharpe, 70 Miss. 850, 12 S 800.

73. Burnham City Lumber Co. v. Rannie, 59 Fla. 179, 52 S 617; Merrill v. Sax, 141 Iowa 386, 118 NW 434; Shubart v. Federated Mines, etc., Co., 143 Mo. A. 574, 128 SW 2; Smith v. Tyler, 57 Mo. A. 668.

[a] **If a pledgor makes the pledgee his agent** to sell the property pledged, and the pledgee then becomes the agent of the purchaser, he commits a fraud on the pledgor, and is bound to pay him all that he received from the purchaser for acting on his behalf. Hunsaker v. Sturgis, 29 Cal. 142.

74. Hunsaker v. Sturgis, 29 Cal.

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can recover no compensation from either party.[75] But a contract so made is not void, but merely voidable at the election of his principal, and the latter's right to have the contract rescinded may be waived by his failure to disaffirm the same within a reasonable time,[76] and moreover, if one selects as his agent the agent of another, he cannot take advantage of his own wrong so as to avoid the contract or transaction on the ground that the agent acted as the agent of both parties.[77]

Application of rule. This rule is not limited to cases where the agent is openly acting for both parties or where he has actually favored one at the expense of the other;[78] but, for the reason that it is based on public policy, it applies, notwithstanding the agent acts in good faith and no harm comes to the principal objecting;[79] and it does not enable the agent to shield himself from liability to his second principal by setting up his agency for the first.[80]

Consent of principals. But, since the reason underlying the rule is the fact of the agent being in a position in which he has a tendency to act in bad faith toward one or both of his principals,[81] there is no legal objection to such double employment if both principals fully understand the situation and consent thereto.[82] However, the presumption is that inconsistent duties have been assumed by the double agency,[83] and it must appear that both principals are fully informed of every fact material to their interests, and that they freely consent.[84]

Interests not conflicting. The above general rule does not apply where the interests of the two principals are not conflicting and loyalty by the agent to one of them is not a breach of his duty to the other,[85] as where the agent exercises no discretion

142; Morrison v. Ogdensburgh, etc., R. Co., 52 Barb. (N. Y.) 173.

[a] **Where a person voluntarily becomes an unpaid agent** of another to negotiate a sale of stock, and thus receives a certain sum from the purchaser as a reward for acting in his behalf and procuring a sale for less than the purchaser was willing to pay, the agent becomes liable to the owner for the loss sustained by this breach of confidence. Hunsaker v. Sturgis, 29 Cal. 142.

75. See infra §§ 430–432.

76. Lightcap v. Nicola, 34 Pa. Super. 189. But see Larson v. Thoma, 143 Iowa 338, 121 NW 1059 (holding that an agent cannot act for two principals, and that any contract by which he attempts to do so is void).

77. Fitzsimmons v. Southern Express Co., 40 Ga. 330, 2 AmR 577 (holding that, where an express company receives goods directed to the special care of its agent at a specified place, it will be assumed that the shipper intended to make such agent his own agent for receiving the goods, and the express company is discharged from responsibility in delivering the goods to such agent).

78. Manchester F. Ins. Co. v. Illinois Ins. Co., 91 Ill. A. 609.

[a] **"The true test** is whether the agent owes fidelity to each party to the contract, and has a discretion to exercise for either party, in a matter where there is a conflict of interest between the two principals, so that a strain might be placed upon the probity of the agent, and he might be under temptation to betray or neglect the interests of one of the parties." Manchester F. Ins. Co. v. Illinois Ins. Co., 91 Ill. A. 609, 612.

79. Colo.—British America Assur. Co. v. Cooper, 6 Colo. A. 25, 40 P 147 (wherein it is pointed out that if an agent of two adverse principals is honest the utmost he can do is to be impartial; but impartiality is exactly the qualification which is inconsistent with agency; the agent is chosen to be a partisan of his principal, not an impartial arbitrator between him and someone else).

Ill.—Black v. Miller, 71 Ill. A. 342 [rev on other grounds 173 Ill. 489, 50 NE 1009].

Mo.—Clinkscales v. Clark, 137 Mo. A. 12, 118 SW 1182 (holding that, where an agent for the purchase of land fraudulently induced payment of a certain price, receiving an increased commission from the vendor, the fact that it was worth all that plaintiff paid for it was no defense to a suit for the deceit); Winter v. Carey, 127 Mo. A. 601, 106 SW 539; Harper v. Fidler, 105 Mo. A. 680, 78 SW 1034; Reese v. Garth, 36 Mo. A. 641; De Steiger v. Hollington, 17 Mo. A. 382.

N. J.—Young v. Hughes, 32 N. J. Eq. 272.

N. Y.—Greenwood v. Spring, 54 Barb. 375.

Pa.—Fulton v. Walters, 28 Pa. Super. 269 [rev on other grounds 216 Pa. 56, 64 A 860].

W. Va.—Truslow v. Parkersburg Bridge, etc., R. Co., 61 W. Va. 628, 57 SE 51.

80. Pungs v. American Brake-Beam Co., 200 Ill. 306, 65 NE 645 [aff 102 Ill. A. 76]; Cottom v. Holliday, 59 Ill. 176.

81. Carr v. Ubsdell, 97 Mo. A. 326, 71 SW 112.

82. Cal.—Pauly v. Pauly, 107 Cal. 8, 40 P 29, 48 AmSR 98.

Ga.—Ramspeck v. Patillo, 104 Ga. 772, 30 SE 962, 69 AmSR 197, 42 LRA 197; Croghan v. New York Underwriters' Agency, 53 Ga. 109; Fitzsimmons v. Southern Express Co., 40 Ga. 330, 2 AmR 577.

Ind.—Alexander v. Northwestern Christian Univ., 57 Ind. 476.

Mich.—Dull v. Royal Ins. Co., 159 Mich. 671, 124 NW 533; Helmer v. Krolick, 36 Mich. 371; Colwell v. Keystone Iron Co., 36 Mich. 51; Adams Min. Co. v. Senter, 26 Mich. 73.

Mo.—Peters v. Carroll, 153 Mo. A. 375, 134 SW 49 (holding that a person may act as agent for both parties to a transaction where both know of his relation to each and see fit, mutually, to trust him); Robinson v. Jarvis, 25 Mo. A. 421; De Steiger v. Hollington, 17 Mo. A. 382.

N. Y.—Joslin v. Cowee, 56 N. Y. 626.

Oh.—U. S. Rolling Stock Co. v. Atlantic, etc., R. Co., 34 Oh. St. 450, 32 AmR 380.

Pa.—Paterson v. Van Loon, 186 Pa. 367, 40 A 495 (holding that the fact that one acts for and receives his compensation from defendant does not prevent his being agent for plaintiff in a transaction with defendant, if such double agency is mutually understood); Marshall v. Reed, 32 Pa. Super. 60.

Wash.—Phillips v. Langlow, 55 Wash. 385, 388, 104 P 610 [cit Cyc].

W. Va.—Cassiday Fork Boom, etc., Co. v. Terry, 69 W. Va. 572, 73 SE 278.

See Latson v. Buck, 87 Nebr. 16, 126 NW 760.

See also supra § 47.

[a] **Thus the rule does not prohibit** an attorney at law, in whose hands a debt has been placed for collection, from acting as the attorney in fact of the debtor to confess judgment on the debt, the debtor being advised of the extent of the attorney's agency for the creditor, and executing the power to avoid costs of suit. Wassell v. Reardon, 11 Ark. 705, 44 AmD 245.

[b] **Perfect good faith exacted.**—Where a professional land agent acts as agent for both the seller and the buyer, and that fact is known to them, the law exacts the most perfect good faith, honesty, and fairness on his part, and will not adjudge the specific performance of a contract thus made unless it has been entered into with perfect fairness and without misapprehension or misrepresentation. Morgan v. Hardy, 16 Nebr. 427, 20 NW 337.

[c] **Interpreter acting for both parties.**—Where two persons speaking different languages, neither of whom is able to understand the language of the other, voluntarily use a third person understanding the language of both to interpret their conversations relative to a business transaction, the interpreter will be deemed the agent of each to translate and communicate what he says to the other. Terrapin v. Barker, 26 Okl. 93, 109 P 931.

83. Jones v. Draper, 26 Oh. Cir. Ct. 785.

84. Jones v. Draper, 26 Oh. Cir. Ct. 785; Clark v. Hubbard, 44 Pa. Super. 37; Marshall v. Reed, 32 Pa. Super. 60 (holding that where one acts in a dual capacity as agent for two separate employers, nothing less than clear proof of consent of both employers, not merely to the double service but to the double compensation, will suffice to validate an express contract with the second employer).

[a] **An agent representing both parties to a transaction, with their consent,** cannot by contract with one, without the consent of the other, acquire an interest in the subject matter of the agency, to the detriment of the nonconsenting principal. Pardee v. Crane, (W. Va.) 82 SE 340.

85. U. S.—Nevada Nickel Syndicate v. National Nickel Co., 96 Fed. 133; German Ins. Co. v. Milford Independent School Dist., 80 Fed. 366, 367, 25 CCA 492 (where the court said: "The rule that an agent cannot bind his principal by contract when the agent is personally, or as representing another, interested adversely in the subject-matter, is founded upon plain reason, and is applied whenever the adverse interest of the agent is real and substantial, presenting a temptation to the agent to sacrifice the interest of the principal. But a merely nominal interest, offering no such temptation, will not disqualify the agent").

Ga.—Cunningham v. State, 105 Ga. 676, 31 SE 585; Todd v. German-American Ins. Co., 2 Ga. A. 789, 59 SE 94 (holding that the maxim, No man shall serve two masters, does not prevent the same person from acting as agent, for certain purposes, of two or more parties to the same transaction when their interests do not conflict, and where loyalty to the one is not a breach of duty to the other).

Kan.—Chautauqua Citizens' State Bank v. Shawnee F. Ins. Co., 91 Kan. 18, 137 P 78, 49 LRANS 972 and note.

in the matter but acts merely to bring the parties together, and they themselves settle the terms of the agreement between them.[86] Furthermore, the rule does not disqualify one who is agent of one party for a certain purpose from acting as agent of an adverse party for an entirely different purpose.[87]

[§ 368] **k. Transactions after Termination of Agency.** The above rules as to good faith and loyalty do not apply after the agency has been fully terminated. As a general rule, after one has performed his office as agent or has in good faith severed his relation as agent, he is free to take up negotiations for his own interest, and can act adversely to his former principal as fully as any other person.[88] Because of the previous trust relations, however, equity will subject such transactions to a rigorous examination to see that the former agent did not abuse his position of trust and influence, or in any way fail in his attitude as agent during the agency;[89] and an agent cannot terminate the agency in order to take advantage of his principal's condition or of information resulting from his agency.[90]

[§ 369] **l. Duty to Notify Principal of Material Facts.**[91] Loyalty to his principal's interests requires that an agent shall make known to his principal every material fact concerning his transactions and the subject matter of his agency that comes to his knowledge or is in his memory in the course of his agency;[92] and if he fails to do so he is liable in

Mass.—Smith v. Moore, 134 Mass. 405.

Mo.—Stone v. Slattery, 71 Mo. A. 442; Casey v. Donovan, 65 Mo. A. 521 (holding that, where a horse was placed in the custody of a trainer for the purpose of being trained, and further of being entered and driven in races, the trainer could, as to the first of these purposes, be the representative of a bailee of the owner, and as to the other be the representative of the owner himself).

Oh.—Nolte v. Hulbert, 37 Oh. St. 445.

Vt.—Williams v. Baldwin, 7 Vt. 503.

Wis.—Northrup v. Germania F. Ins. Co., 48 Wis. 420, 4 NW 350, 33 AmR 815; Herman v. Martineau, 1 Wis. 151, 60 AmD 368.

86. Ind.—Alexander v. Northwestern Christian Univ., 57 Ind. 466.

Mass.—Rupp v. Sampson, 16 Gray 398, 77 AmD 416; Bayley v. Bryant, 24 Pick. 198.

Mich.—Ranney v. Donovan, 78 Mich. 318, 44 NW 276; Scribner v. Collar, 40 Mich. 375, 29 AmR 541.

N. Y.—Siegal v. Gould, 7 Lans. 177.

Tex.—Blair v. Baird, 43 Tex. Civ. A. 134, 94 SW 116.

Wis.—Barry v. Schmidt, 57 Wis. 172, 15 NW 24, 46 AmR 35; Herman v. Martineau, 1 Wis. 151, 60 AmD 368.

Ont.—White v. Curry, 39 U. C. Q. B. 569.

87. Hinckley v. Arey, 27 Me. 362 (holding that, while in making a composition of a debt the same man cannot be the agent of both parties, yet when the composition is agreed upon by the agent of the debtor with the creditor such agent can act as agent for the creditor for another and a distinct purpose, namely, to receive from the debtor the sum agreed upon); Stoddert v. Port Tobacco Parish, 2 Gill & J. (Md.) 227; Natchez Ins. Co. v. Stanton, 10 Miss. 340, 41 AmD 592 (holding that the master and crew of a boat before a loss occurs are agents of the owners of the cargo, but after a loss they are agents of the insurers of the cargo); Williams v. Baldwin, 7 Vt. 502.

[a] **The right to act as agent for both parties in a transaction should not be extended** to a case where the agent acts for one of the parties only in a single transaction and for the other in a series of transactions covering a considerable period of time. Union Cent. L. Ins. Co. v. Pappan, 36 Okl. 344, 128 P 716.

88. U. S.—Robertson v. Chapman, 152 U. S. 673, 14 SCt 741, 38 L. ed. 592; Havana City R. Co. v. Ceballos, 131 Fed. 381 [aff 139 Fed. 538, 71 CCA 326]; Proctor, etc., Co. v. Mahin, 93 Fed. 875 (holding that an agent who has ceased to represent his principal and has gone into the same line of business for himself may lawfully solicit the future business of his former principal's customers); Denver First Nat. Bank v. Bissell, 4 Fed. 694, 2 McCrary 73 [aff 114 U. S. 252, 5 SCt 851, 29 L. ed. 126]; Walker v. Derby, 29 F. Cas. No. 17,068, 5 Biss. 134 (holding that the agency of a real estate agent and his duty to his principal cease upon delivery of the title papers and payment for the property, and thereafter he may deal with the property as any other person, and that the agency is not continued by the fact that notes for the unpaid price and a mortgage securing the same were left with the agent in escrow to await the delivery of a quit-claim deed from a third person which the vendor was to furnish).

Ala.—McKinley v. Irvine, 13 Ala. 681.

Ill.—Bucher v. Bucher, 86 Ill. 377; Walker v. Carrington, 74 Ill. 446; New Era Gas Fuel Appliance Co. v. Shannon, 44 Ill. A. 477 (where the agent's right is said to justify him in carrying with him into a new employment all the skill and knowledge acquired in previous engagements, and nothing but an express contract will debar him from so doing, and then only under the strict rules established to protect trade secrets).

Ind.—Fountain Coal Co. v. Phelps, 95 Ind. 271.

Iowa.—Rathke v. Tyler, 136 Iowa 284, 111 NW 436 (holding that where an agent purchased land from his principal and made a payment thereon, and the next day sold the land at a substantial advance, he was not liable to account to the principal for the profit realized as the agency was terminated by the sale to the agent); Collar v. Ford, 45 Iowa 331 (holding that an agent employed to sell lands may abandon his character of agent and negotiate directly for the purchase of the property himself, and in such case he is not bound to disclose the value thereof and pay full value therefor to his former principal).

Md.—Schwartze v. Yearly, 31 Md. 270; Peters v. Speights, 4 Md. Ch. 375.

Mass.—O'Reily v. Bevington, 155 Mass. 72, 29 NE 54.

Mich.—Lamb Knit-Goods Co. v. Lamb, 119 Mich. 568, 78 NW 646 (holding that an agent who has done his full duty in making a purchase for his principal at the lowest possible price cannot be required to deliver to the principal property received from the seller after the termination of the agency).

Mo.—Dennison v. Aldrich, 114 Mo. A. 700, 91 SW 1024.

S. C.—Foster v. Calhoun, 23 S. C. L. 75 (holding that the delivery to the principal of the property intrusted to an agent is the end of the agent's duties, and that a subsequent purchase by the latter of a preëxisting mortgage of the same property will not inure to the benefit of the principal).

Tex.—Pridgen v. Adkins, 25 Tex. 388.

Eng.—Reuter's Telegram Co. v. Byron, 43 L. J. Ch. 661; Shaw v. Davis, 3 L. T. Rep. N. S. 135 (holding that, although it was questionable conduct, the law did not forbid an agent to purchase a house for which his principal had been negotiating on the very day the principal ceased his effort). See also Nichol v. Martyn, 2 Esp. 732 (holding that a servant, while in his master's service, may solicit business from his customers for himself when his services are at an end and he sets up on his own account, provided the orders he takes at the time are for his master).

Ont.—Fleming v. McNabb, 8 Ont. A. 656.

See also supra §§ 362, 366.

[a] **While good faith requires a fiduciary to serve alone the interest of his correlate,** as in the case of principal and agent, in the subject of the employment, the termination of such interest ends all duty and leaves him free to serve himself or others, provided he has done nothing during the continuance of such interest to lay a foundation for future advantage to himself at the expense of his principal's rights. Dennison v. Aldrich, 114 Mo. A. 700, 91 SW 1024.

[b] **An absolute and unequivocal surrender** of the agency is necessary before the agent can deal for himself adversely to his principal. A mere formal surrender without full notice to the principal of the altered relation is not sufficient. Fountain Coal Co. v. Phelps, 95 Ind. 271; Witte v. Storm, 236 Mo. 470, 139 SW 384.

89. Teakle v. Bailey, 23 F. Cas. No. 13,811, 2 Brock. 43; Lamb v. Evans, [1893] 1 Ch. 218; Loog v. Bean, 26 Ch. D. 306 (denying an agent's right after his discharge to receive and use information contained in a letter addressed to him about his principal's business). See also Dennison v. Aldrich, 114 Mo. A. 700, 91 SW 1024.

90. Means v. Ross, 106 La. 175, 30 S 300 (holding that, although the principals had failed, the agents could not terminate the agency and become the employees of a third person to the contract between them and their principals); Dennison v. Aldrich, 114 Mo. A. 700, 91 SW 1024; Blount v. Robeson, 56 N. C. 73.

[a] **Agency must be genuinely terminated.**—One who has undertaken, in a covenant, to act as an agent to explore, survey, and sell a body of lands, and account at stated periods, and who takes from his principal a power of attorney enabling him to make title, cannot, without taking steps to put an end to the trust, purchase for himself another title to the land thus intrusted to him. The death of the principal, after the agent has bid off the land at a sheriff's sale, although it revokes the power of attorney to sell, does not affect the agent's duty under the covenant and enable him to take an adverse position toward the heirs. Blount v. Robeson, 56 N. C. 73.

91. **Notice to agent as notice to principal** see infra §§ 542–552.

92. U. S.—Hall v. Gambrill, 88 Fed. 709 [aff 92 Fed. 32, 34 CCA 190]; De Tastett v. Crousillat, 7 F. Cas. No. 3,828, 2 Wash. C. C. 132.

Cal.—Duff v. Duff, 71 Cal. 513, 12 P 570.

Ill.—Prince v. Dupuy, 163 Ill. 417, 45 NE 298.

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damages to his principal for any injury incurred or loss suffered in consequence of such failure,[93] although it has been held that by so doing the agent makes the obligation or claim his own on which he is liable to the principal as the third person would have been.[94]

[§ 370] **2. Duty to Obey Instructions—a. General Rule.** It is the duty of an agent whose authority is limited by instructions to adhere faithfully thereto,[95] regardless of his own opinion as to their propriety or expediency,[96] and if he exceeds, violates, or neglects such instructions he will be liable to the principal for any loss or damage resulting therefrom;[97] in some jurisdictions this duty and

Iowa.—Morey v. Laird, 108 Iowa 670, 77 NW 835.

Me.—Comings v. Stuart, 22 Me. 110.

Minn.—Snell v. Goodlander, 90 Minn. 533, 97 NW 421; Holmes v. Cathcart, 88 Minn. 213, 92 NW 956, 97 AmSR 513, 60 LRA 734; Hegenmyer v. Marks, 37 Minn. 6, 32 NW 785, 5 AmSR 808.

Nebr.—Pringle v. Modern Woodmen of America, 76 Nebr. 384, 107 NW 756, 113 NW 231; Modern Woodmen of America v. Colman, 68 Nebr. 660, 94 NW 814, 96 NW 154; Jansen v. Williams, 36 Nebr. 869, 55 NW 279, 20 LRA 207.

N. Y.—Edmonstone v. Hartshorn, 19 N. Y. 9.

Oh.—Victoria First Nat. Bank v. Hayes, 64 Oh. St. 100 59 NE 893.

Pa.—Clark v. Wheeling Bank, 17 Pa. 322; Devall v. Burbridge, 4 Watts & S. 305; Cloyd v. Reynolds, 52 Pa. Super. 365, 378 [cit Cyc]; Moore v. Thompson, 9 Phila. 164.

S. D.—Bush v. Froelich, 14 S. D. 62, 84 NW 230.

W. Va.—Dorr v. Camden, 55 W. Va. 226, 46 SE 1014, 65 LRA 348 (holding that neither agents nor subagents can withhold from the principal information acquired by them in the exercise of the agency and use the same to extort an increased compensation, or to coerce the principal into a contract he would not enter into on full examination).

Eng.—Rederi v. Salvesen, 6 F. (Ct. Sess.) 64.

Can.—Bentley v. Nasmith, 46 Can. S. C. 477 [rev 16 B. C. 308].

Ont.—Malcolm v. Dominion Fruit Exch., 15 OntWR 652; Machar v. Vandewater, 26 Grant Ch. (U. C.) 83 (distinguishing between the disclosure necessary by a vendor in selling his own stock and that required of the same person when he becomes agent of the vendee to procure shares from others).

[a] **Failure to notify principal evidence of fraud.**—The failure of an agent for plaintiff in an exchange of land with M, wherein plaintiff assumed a mortgage on M's land, securing a note indorsed by the agent, to inform plaintiff that he was indorser on the note, while evidence of fraud in connection with other matters, does not as matter of law establish it. Beatty v. Bulger, 28 Tex. Civ. A. 117, 66 SW 893.

[b] **Facts affecting value of land.**—It is the duty of an agent authorized to sell land for a certain sum, upon learning of a fact in the condition of the land increasing its value, and of which the principal was ignorant when he named the price, to inform the principal of the fact; and a sale by him on the basis of the sum fixed without so informing the principal is a fraud. Snell v. Goodlander, 90 Minn. 533, 97 NW 421; Hegenmyer v. Marks, 37 Minn. 6, 32 NW 785, 5 AmSR 808.

[c] **Facts learned shortly after termination of agency.**—An agent, employed to obtain orders for the construction of machinery by his principal, had been engaged in a negotiation for such an order, which was broken off, and he had no reason to suppose that it would be renewed. He received the order, after terminating his agency, in a letter written before that event. It was held that it was his duty to communicate the letter to his former principal, and that his failure to do so was not excused by his supposing himself in good faith to have ascertained that the principal was unable to comply with the order. Edmonstone v. Hartshorn, 19 N. Y. 9.

[d] **A surety on a note** is not a fiduciary to the payee, nor under any obligations to disclose to such payee any facts within the knowledge of such surety as to the value of such note, or of the security thereof. Opie v. Pacific Inv. Co., 26 Wash. 505, 67 P 231, 56 LRA 778.

93. Norris v. Tayloe, 49 Ill. 17, 95 AmD 568; Wiruth v. Lashmett, 82 Nebr. 375, 117 NW 887 (holding that the exalting of value by an agent employed to purchase real estate for his principal beyond what he believes it to be is not allowed; and, if the principal relies on the representations of the agent, the latter and his coconspirator are liable in damages); Devall v. Burbridge, 4 Watts & S. (Pa.) 305; Arrott v. Brown, 6 Whart. (Pa.) 9 [aff 1 Miles 137, and rev reh 6 Watts & S. 402]; Cloyd v. Reynolds, 52 Pa. Super. 365, 373; Moore v. Thompson, 9 Phila. (Pa.) 164; Rogers v. Bradford, 1 Pinn. (Wis.) 418.

[a] **An agent for the investment and transmission of money** has been held liable for every default of a subagent occurring during the period in which he kept his principal in ignorance of the destination of a draft purchased by him on account of the principal. Clark v. Wheeling Bank, 17 Pa. 322.

[b] **The measure of damages** for an agent failing to keep his principal informed of all material facts is to be proportioned to the actual loss sustained by the principal. Arrott v. Brown, 6 Whart. (Pa.) 9 [aff 1 Miles 137, and rev reh 6 Watts & S. 402].

[c] **The measure of damages for falsely reporting the value and condition of property,** thereby inducing the principal to trade for or purchase the same, is the difference between the fair market value of the property as represented and its market value in its actual condition. Durward v. Hubbell, 149 Iowa 722, 128 NW 953.

94. Harvey v. Turner, 4 Rawle (Pa.) 223 (holding that an agent selling goods of his principal on credit, taking a note, giving his principal notice of the sale, and crediting him with the amount, renders himself responsible for the whole amount of the debt by omitting to give his principal notice of the nonpayment of the note at maturity, and the principal need not prove that he has sustained any damage thereby). See also Arrott v. Brown, 6 Whart. (Pa.) 9 [aff 1 Miles 137, and rev reh 6 Watts & S. 402] (holding that where an agent by his information transmitted induces the principal to rely upon an outstanding claim, whereby loss is suffered, the agent adopts the claim as his own).

95. U. S.—Brown v. McGran, 14 Pet. 479, 10 L. ed. 550; Courcier v. Ritter, 6 F. Cas. No. 3,282, 4 Wash. C. C. 549; Loraine v. Cartwright, 15 F. Cas. No. 8,500, 3 Wash. C. C. 151, 153 (where Washington, J., said: "This Court has always thought it right to hold agents to a strict account, in relation to the orders they receive, provided they are expressed in terms, plain and free from ambiguity; and in this respect, the same measure of justice has been dealt out to agents within the United States, acting for persons abroad, as to the foreign agents of citizens of the United States").

Ala.—Mobile Bank v. Huggins, 3 Ala. 206.

Cal.—Holbrook v. McCarthy, 61 Cal. 216.

Ga.—Central of Georgia R. Co. v. Felton, 110 Ga. 597, 36 SE 93; Hardeman v. Ford, 12 Ga. 205; Gordon v. Cobb, 4 Ga. A. 49, 60 SE 821.

Ill.—Dasey v. Roleau, 111 Ill. A. 367; Stanley v. McConnell, 64 Ill. A. 591 (holding that an instruction to pay taxes on particular property is not complied with by permitting the property to be sold for taxes and purchasing at the tax sale).

La.—Ralston v. Pamar, 5 Mart. 8.

Me.—Sawyer v. Mayhew, 51 Me. 398.

Mass.—Whitney v. Merchants' Union Express Co., 104 Mass. 152, 6 AmR 207.

Minn.—Thomas v. Joslin, 30 Minn. 388, 15 NW 675.

Mo.—Rechtscherd v. St. Louis Accommodation Bank, 47 Mo. 181; Hall v. Hopkins, 14 Mo. 450; Switzer v. Connett, 11 Mo. 88; Marshall v. Ferguson, 101 Mo. A. 653, 74 SW 393; Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935.

Nebr.—Northern Assur. Co. v. Borgelt, 67 Nebr. 282, 93 NW 226.

N. Y.—Cowley v. Fabien, 204 N. Y. 566, 97 NE 458; Minneapolis Trust Co. v. Mather, 181 N. Y. 205, 73 NE 987 [rev 90 App. Div. 361, 85 NYS 510]; Loeb v. Hellman, 45 N. Y. Super. 326 [aff 83 N. Y. 601 mem]; Monks v. Bruce, 3 NYS 419; Stone v. Hayes, 3 Den. 575 [aff 7 Hill 128]; Williams v. Littlefield, 12 Wend. 362; Urquhart v. McIver, 4 Johns. 103; Le Guen v. Gouverneur, 1 Johns. Cas. 436, 1 AmD 121.

N. D.—Queen City F. Ins. Co. v. Hannaford First Nat. Bank, 18 N. D. 603, 120 NW 545, 22 LRANS 509 (holding that an agent must carry out promptly and in good faith his principal's instructions relating to the subject of the agency).

Pa.—Wilson v. Wilson, 26 Pa. 393; Hampton v. Speckenagle, 9 Serg. & R. 212, 11 AmD 704.

S. C.—Fraser v. Tenants, 39 S. C. L. 375.

Tenn.—Raht v. Union Cons. Min. Co., 5 Lea 1; Walker v. Walker, 5 Heisk. 425.

Va.—Howatt v. Davis, 5 Munf. (19 Va.) 34, 7 AmD 681.

W. Va.—Maloney v. Barr, 27 W. Va. 381.

Wis.—Hall v. Storrs, 7 Wis. 253.

Eng.—Smart v. Sandars, 3 C. B. 380, 54 ECL 380, 136 Reprint 152.

Ont.—Johnson v. Birkett, 21 Ont. L. 319, 16 OntWR 445.

[a] **It is a well established rule of law** that an agent is bound to execute the orders of his principal whenever for a valuable consideration he has undertaken to perform them, whether reasonable or not, unless prevented by some unavoidable accident without default on his part, or unless the instructions require him to do an illegal or immoral act. Rechtscherd v. St. Louis Accommodation Bank, 47 Mo. 181; Switzer v. Connett, 11 Mo. 88. See also infra §§ 375, 376.

[b] **Agreement to pay encumbrances.**—Where defendant was to liquidate encumbrances, pay a named sum to the vendors, and retain the excess, by procuring a conveyance to its clerk, it became bound by an implied agreement, to pay off the encumbrances, with interest, and pay the vendors the stipulated sum, unless there was a subsequent modification of the agreement. Clyne v Easton, etc., Co., 148 Cal. 287, 83 P 36, 113 AmSR 253.

96. Coker v. Ropes, 125 Mass. 577.

97. U. S.—Bowerman v. Rogers,

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liability are expressly prescribed by statute.[98] Thus an agent is liable for the resulting loss, where he sells to irresponsible persons when instructed to sell only to those of undoubted solvency,[99] or where, instructed to remit in a certain manner or in a certain medium, he remits in a different manner or medium,[1] or where, instructed to sell for cash or for a certain price, he sells on credit[2] or for a less price,[3] or where he fails to effect insurance as instructed,[4] or where an agent to consummate a loan fails to take security as instructed.[5] The liability of the agent arises from an omission to perform as well as from a positive departure from instructions,[6] and if there is a clear violation of instructions the principal has a right of action and is entitled to at least nominal damages;[7] but the agent will not be liable if his performance was contingent upon the fulfillment of certain conditions on the part of the principal which the latter failed to perform.[8] A violation of instructions will

125 U. S. 585, 8 SCt 986, 31 L. ed. 815; Scanlan v. Hoges, 52 Fed. 354, 3 CCA 113; Courcier v. Ritter, 6 F. Cas. No. 3,282, 4 Wash. C. C. 549; Short v. Skipwith, 22 F. Cas. No. 12,809, 1 Brock. 104; Walker v. Smith, 28 F. Cas. No. 17,086, 4 Dall. (Pa.) 389, 1 L. ed. 878, 1 Wash. C. C. 152.

Ala.—Adams v. Robinson, 65 Ala. 586; Austill v. Crawford, 7 Ala. 335.

Conn.—British-American Ins. Co. v. Wilson, 77 Conn. 559, 60 A 293; Thompson v. Stewart, 3 Conn. 171, 8 AmD 168.

Fla.—Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349, 24 S 480.

Ga.—Holmes v. Langston, 110 Ga. 861, 36 SE 251; Hardeman v. Ford, 12 Ga. 205.

Ill.—Dazey v. Roleau, 111 Ill. A. 367; Germania F. Ins. Co. v. Harraden, 90 Ill. A. 250; Harvey v. Miles, 16 Ill. A. 533.

Ind.—Hasselman v. Carroll, 102 Ind. 153, 26 NE 202; Welsh v. Brown, 8 Ind. A. 421, 35 NE 921.

Iowa.—Continental Ins. Co. v. Clark, 126 Iowa 274, 100 NW 524.

La.—Keane v. Branden, 12 La. Ann. 20; Lowe v. Bell, 6 La. Ann. 28; Ward v. Warfield, 3 La. Ann. 468; Vigers v. Kilshaw, 13 La. 488; Passano v. Acosta, 4 La. 26, 23 AmD 470; Madeira v. Townsley, 12 Mart. 84.

Me.—Sawyer v. Mayhew, 51 Me. 398.

Mass.—Whitney v. Merchant's Union Express Co., 104 Mass. 152, 6 AmR 207; Amory v. Hamilton, 17 Mass. 103.

Minn.—Rice v. Longfellow Bros. Co., 82 Minn. 154, 84 NW 660; Lake City Flouring-Mill Co. v. McVean, 32 Minn. 301, 20 NW 233.

Mo.—Butts v. Phelps, 79 Mo. 302 (holding that forwarding a claim for collection to a different person from the one specified by the principal renders the agent liable for the resulting loss); Rechtscherd v. St. Louis Accommodation Bank, 47 Mo. 181; Switzer v. Connett, 11 Mo. 88; McAnaw v. Moore, 163 Mo. A. 598, 147 SW 220; Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935.

Nebr.—Cooper v. Cooper, 90 Nebr. 209, 133 NW 243 (holding that if an agent is not authorized to make certain contracts, and because of his assumption of power to do so his principal is damaged, he will be liable to the principal); Northern Assur. Co. v. Borgelt, 67 Nebr. 282, 93 NW 226; Unland v. McCormack Harvesting Mach. Co., 54 Nebr. 364, 74 NW 629; McCormick Harvesting Mach. Co. v. Carpenter, 1 Nebr. (Unoff.) 273, 95 NW 617.

N. Y.—Minneapolis Trust Co. v. Mather, 181 N. Y. 205, 73 NE 987 [rev 90 App. Div. 361, 85 NYS 510]; Harrison v. Glover, 72 N. Y. 451 [rev 9 Hun 196, 4 Hun 121]; Scott v. Rogers, 31 N. Y. 676; Blot v. Boiceau, 3 N. Y. 78, 51 AmD 345; Bruce v. Davenport, 36 Barb. 349 [rev on other grounds 1 Abb. Dec. 233, 3 Keyes 472, 3 Transcr. A. 82, 5 AbbPrNS 185]; Clarke v. Meigs, 23 N. Y. Super. 337; Talcott v. Cowdry, 17 Misc. 333, 39 NYS 1076; Stone v. Hayes, 3 Den. 575 [aff 7 Hill 128]; Foster v. Preston, 8 Cow. 198; Leverick v. Meigs, 1 Cow. 645; Rundle v. Moore, 3 Johns. Cas. 36.

Pa.—Paul v. Grimm, 183 Pa. 330, 38 A 1006; Wilson v. Wilson, 26 Pa. 393; Eicholz v. Fox, 12 Phila. 382.

S. C.—Holmes v. Misroon, 6 S. C. L. 21.

Tenn.—Walker v. Walker, 5 Heisk. 425.

Tex.—Kerr v. Cotton, 23 Tex. 411; Urquhart v. Saner, (Civ. A.) 94 SW 902 [reh den (Civ. A.) 96 SW 939].

Vt.—Fuller v. Ellis, 39 Vt. 345, 94 AmD 327.

Va.—Howatt v. Davis, 5 Munf. (19 Va.) 34, 7 AmD 681 (where the agent delivered goods to an insolvent buyer, notwithstanding orders to stop them while in transit).

Wash.—Bevis v. Big Bend Abstract Co., 62 Wash. 513, 114 P 191.

Wis.—J. I. Case Threshing Mach. Co. v. Folger, 136 Wis. 468, 117 NW 944; Milwaukee County v. Hackett, 21 Wis. 613; Hall v. Storrs, 7 Wis. 253.

Eng.—Michael v. Hart, [1901] 2 K. B. 867; Pape v. Westacott, [1894] 1 Q. B. 272; Lilley v. Doubleday, 7 Q. B. D. 510; Corlett v. Gordon, 3 Campb. 472; Smart v. Sandars, 3 C. B. 380, 54 ECL 380, 136 Reprint 152.

Can.—Southerland v. Cox, 8 CanLT 35.

Ont.—Holmes v. Thompson, 38 U. C. Q. B. 292.

Measure of damages see infra § 380.

[a] **"It is the duty of an agent of limited authority** to adhere faithfully to the instructions of his principal, and if he exceeds, violates, or neglects them, and loss results to his principal as a natural and ordinary consequence, it is his duty to make such loss good." Northern Assur. Co. v. Borgelt, 67 Nebr. 282, 288, 93 NW 226. "It is the first duty of an agent, whose authority is limited, to adhere faithfully to his instructions, in all cases to which they can be properly applied. If he exceeds or violates or neglects them, he is responsible for all losses which are the natural consequence of his act." Whitney v. Merchants' Union Express Co., 104 Mass. 152, 154, 6 AmR 207.

[b] **Where a principal places money in the hands of an agent** (1) to pay a debt when ordered, it remains in the hands of the agent subject to the orders of the principal, and if he refuses to obey such orders he becomes liable to an action for the amount remaining in his hands. Henry County v. Allen, 50 Mo. 231. (2) If a principal gives an agent money to invest in a certain manner and he invests it in an unauthorized manner, the principal may sue for and recover the amount placed in his hands. Safford v. Kinsley, 40 Vt. 506.

[c] **Mistake or design.**—If an agent, through mistake or design, disobeys his instructions he is undoubtedly responsible for any loss resulting. Rundle v. Moore, 3 Johns. Cas. (N. Y.) 36.

98. See statutory provisions. See also Cave v. Lougee, 134 Ga. 135, 67 SE 667 (holding that if an agent exceeds or violates his instructions resulting in loss of the principal's money he will be liable under the express provisions of Civ. Code [1895] § 3004).

99. Robinson Mach. Works v. Vorse, 52 Iowa 207, 2 NW 1108; Clark v. Roberts, 26 Mich. 506. See also infra § 387.

[a] **Taking worthless paper in payment.**—Where the agent is instructed to take nothing but "undoubted paper," or "first-class collectible paper," in payment, and he makes no effort to ascertain the solvency of the parties, or takes paper which he knows to be worthless, he may be charged with any loss or held liable as a guarantor. Osborne v. Rider, 62 Wis. 235, 22 NW 394.

1. Buell v. Chapin, 99 Mass. 594, 97 AmD 58; Kerr v. Cotton, 23 Tex. 411.

[a] **By letter instead of draft.**—If, being instructed to remit by draft, an agent remits by letter, he is liable for the loss. Foster v. Preston, 8 Cow. (N. Y.) 198.

[b] **By check instead of by express.**—An agent instructed to remit by express, who remits by check, is liable for the loss if the drawers afterward become insolvent before payment. Walker v. Walker, 5 Heisk. (Tenn.) 425.

[c] **Notes of smaller denomination.**—Where one is instructed to remit by mail in notes of fifty and one hundred dollars, and he sends notes of the denominations of five, ten, and twenty dollars, thus increasing the size of the package which is lost, he is liable. Wilson v. Wilson, 26 Pa. 393.

2. Clark v. Roberts, 26 Mich. 506; Barksdale v. Brown, 10 S. C. L. 517, 9 AmD 720; Hall v. Storrs, 7 Wis. 253.

[a] **Express contract not required.**—In assumpsit by a principal against his agent for the value of goods sold on credit by the agent to insolvent persons, contrary to the positive instructions of plaintiff, it is not necessary to aver in the declaration that there was an express contract between plaintiff and defendant that the latter should not sell on credit. It is sufficient to aver that the sale was made in violation of plaintiff's instructions, and that thereby the value of the goods was lost to plaintiff. Maloney v. Barr 27 W. Va. 381.

3. Wolfe v. Luyster, 1 N. Y. Super. 161; Steele v. Ellmaker, 11 Serg. & R. (Pa.) 86.

[a] **Liable for full amount fixed.**—An agent to sell who is instructed not to sell for less than a certain price will be liable for the full amount so fixed if he sells for a less price. Reynolds v. Rogers, 63 Mo. 17; Guy v. Oakley, 13 Johns. (N. Y.) 332.

4. Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 645; Thorne v. Deas, 4 Johns. (N. Y.) 84; Matteson v. Rice, 116 Wis. 328, 92 NW 1109; Park v. Hammond, 4 Campb. 344. See also infra §§ 393, 394.

5. Guernsey v. Davis, 67 Kan. 378, 73 P 101; Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935. See also infra § 392.

6. Kaw Brick Co. v. Hogsett, 73 Mo. A. 432; Magnolia Metal Co. v. Sterlingworth Railway-Supply Co., 53 NYS 490.

[a] **An agent to invest** in certain securities is liable for any loss resulting from his failure to invest. Short v. Skipwith, 22 F. Cas. No. 12,809, 1 Brock. 103.

7. Adams v. Robinson, 65 Ala. 586; Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935.

Measure of damages see generally infra § 380.

8. Rice v. Montgomery, 20 F. Cas. No. 11,653, 4 Biss. 75.

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defeat the agent's right to recover commissions,[9] or losses which he may himself have sustained in the transaction in question,[10] and also constitutes a breach of contract for which he may be discharged from his employment by the principal.[11]

What constitutes instruction; request. No particular form of words is necessary to constitute an instruction which the agent is bound to follow; it may be in the form of a wish or request.[12]

[§ 371] **b. Qualifications and Exceptions in General.** Ordinarily a substantial compliance with the terms of the authority is all that can be required, and where this has been done a circumstantial variance from the instructions is immaterial.[13] But it must be shown affirmatively that the deviation in no manner contributed to the loss.[14] Deviations cannot be justified on the ground that they were not material if the principal in giving the instructions regarded them as material.[15]

Discretionary and positive instructions. In so far as the agent is invested with discretionary powers he is required to act only according to the best of his judgment for the interest of his principal, and in the absence of negligence or bad faith he will not be liable;[16] but if the instructions are direct and positive the agent has no discretion,[17] and his motives in departing therefrom are not material,[18] and it will not affect his liability that he did so in good faith for what he believed to be the advantage of the principal.[19]

[§ 372] **c. Gratuitous Agency.** If the agency is gratuitous the agent will not be liable for a nonfeasance if he never entered upon the service expected of him;[20] but if the agent once enters upon the execution of the business and any loss results from his neglect or failure to carry out his instructions, he may be held responsible.[21]

Relinquishing a commission to which the agent would have been entitled does not release him from liability for a loss caused by a violation of instructions.[22]

[§ 373] **d. Where Power Is Coupled with an Interest.** Where the agent's power is coupled with an interest in the subject matter, unreasonable instructions of the principal, detrimental to the agent's interests, may be disregarded.[23]

[§ 374] **e. Where Instructions Are Ambiguous.**[24] If the instructions of a principal to his agent are ambiguous or capable of different constructions, the agent is not chargeable with disobedience or its consequences in case he makes an honest mistake and adopts a construction different from that intended by the principal;[25] in such cases the loss if any must fall upon the principal rather than

9. See infra § 435.
10. See infra § 464.
11. See supra §§ 157–161.
12. Brown v. McGran, 14 Pet. (U. S.) 479, 10 L. ed. 550; British American Ins. Co. v. Wilson, 77 Conn. 559, 60 A 293; Wilson v. Wilson, 26 Pa. 393.

[a] **Where a principal writes to his agent referring him to another letter written to a third person** for his government, the two letters together are to be taken as his letter of instructions; and if the principal refers the agent to the third person for advice, the agent is bound to apply to him for instructions and to await a reasonable time for their receipt. Mactier v. Wirgman, 4 Harr. & J. (Md.) 568.

13. Parkhill v. Imlay, 15 Wend. (N. Y.) 431; Parker v. Kett, 1 Salk. 95, 91 Reprint 88; Cornwal v. Wilson, 1 Ves. 510, 27 Reprint 1173.
14. Wilson v. Wilson, 26 Pa. 393.
15. Wilson v. Wilson, 26 Pa. 393.

[a] **If an agent undertakes to judge that he may innocently depart from the instructions** of his principal, and that the variation would not be material, he does so at his peril. Parkist v. Alexander, 1 Johns. Ch. (N. Y.) 394.

16. Ala.—McLaughlin v. Simpson, 3 Stew. & P. 85.
Conn.—Judson v. Sturges, 5 Day 556.
Ga.—Brown v. Clayton, 12 Ga. 564.
Mich.—Kaempfer v. Lindsay, 121 Mich. 425, 80 NW 107.
S. C.—Willson v. Imperial Fertilizer Co., 67 S. C. 467, 46 SE 279; Nixon v. Bogin, 26 S. C. 611, 2 SE 302.
Eng.—Pariente v. Lubbock, 20 Beav. 588, 52 Reprint 731 [aff 8 DeG. M. & G. 5, 57 EngCh 4, 44 Reprint 290]; Bromley v. Coxwell, 2 B. & P. 438, 126 Reprint 1372.
Ont.—Markle v. Thomas, 13 U. C. Q. B. 321.

[a] **Alternative acts.**—(1) Where an agent is appointed to do one of several acts in the alternative, and in his opinion it is impossible to perform the first, he may then perform the secondary act. Gordon v. Buchanan, 5 Yerg. (Tenn.) 71. (2) Where there is an imperative order to purchase goods of one of two different descriptions and the only discretion of the agent is as to their selection, he will be liable if he does not purchase either. Heinemann v. Heard, 50 N. Y. 27 [rev 58 Barb. 524].

Liability for negligence see infra § 381 et seq.

17. Courcier v. Ritter, 6 F. Cas. No. 3,282, 4 Wash. C. C. 549.
18. Switzer v. Connett, 11 Mo. 88; Walker v. Walker, 5 Heisk. (Tenn.) 425.

[a] **If the instructions are free from ambiguity** and are positive and unqualified, they must be rigidly obeyed, if that is practicable, and no motive connected with the interest of the principal, however honestly entertained or wisely adopted, can excuse a breach of them. Courcier v. Ritter, 6 F. Cas. No. 3,282, 4 Wash. C. C. 549.

[b] **Fraud on the part of the agent** is not necessary in order to charge him with liability for a failure to obey instructions. Heinemann v. Heard, 50 N. Y. 27 [rev 58 Barb. 524].

19. U. S.—Courcier v. Ritter 6 F. Cas. No. 3,282, 4 Wash. C. C. 549.
Fla.—Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349, 24 S 480.
Ga.—Hardeman v. Ford, 12 Ga. 205.
Ill.—Dazy v. Roleau, 111 Ill. A. 367.
La.—Merritt v. Wright, 19 La. Ann. 91; Lowe v. Bell, 6 La. Ann. 28; Ledoux v. Goza, 4 La. Ann. 160; Ward v. Warfield, 3 La. Ann. 468; Vigers v. Kilshaw, 13 La. 438.
Mass.—Coker v. Ropes, 125 Mass. 577.
Mo.—Rechtscherd v. St. Louis Accommodation Bank, 47 Mo. 181; Switzer v. Connett, 11 Mo. 88; Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935.
S. C.—Holmes v. Misroon, 5 S. C. L. 209.

[a] **Reasonable diligence no defense.**—If the agent disregards specific instructions he does so at his peril, and will be liable for any loss resulting from having adopted his own course, although he may have used reasonable diligence. Butts v. Phelps, 79 Mo. 302.

20. Thorne v. Deas, 4 Johns. (N. Y.) 84. See also Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935. And see infra § 384.

[a] **Nudum pactum.**—If the promise is made without consideration, it is mere nudum pactum, and no action can be maintained upon it. Benden v. Manning, 2 N. H. 289.

21. U. S.—Walker v. Smith, 29 F. Cas. No. 17,086, 1 Wash. C. C. 152, 153, 4 Dall. (Pa.) 389, 1 L. ed. 878 (where the court said: "No man can compel another to render him acts of friendship, or services of any kind, whether gratuitously, or with a view to remuneration. But, if the person applied to, consents to render service, and undertakes the business, he is bound to act in conformity to the terms on which the request was made").
Ala.—Nashville, etc., R. Co. v. Smith, 132 Ala. 434, 31 S 481.
Ind.—Criswell v. Riley, 5 Ind. A. 496, 30 NE 1101, 32 NE 814.
Ky.—McGee v. Bast, 6 J. J. Marsh. 453.
La.—Passano v. Acosta, 4 La. 26, 23 AmDec 470.
Md.—Williams v. Higgins, 30 Md. 404.
Mo.—Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935.
Pa.—Opie v. Serrill, 6 Watts & S. 264.
See also infra § 384.

[a] **By undertaking the commission** he becomes an agent, whether he could have been compelled to assume the agency or not, and is then bound to carry out his instructions unless waived or countermanded. Spencer v. Towles, 18 Mich. 9.

[b] **Investment of money.**—One undertaking, without consideration, to invest money for another, and disregarding positive instructions as to the specific character of the security to be taken, is liable if the investment should fail. Passano v. Acosta, 4 La. 26, 23 AmD 470; Williams v. Higgins, 30 Md. 404.

22. Walker v. Smith, 29 F. Cas. No. 17,086, 1 Wash. 152, 4 Dall. (Pa.) 389, 1 L. ed. 878.
23. Gordon v. Cobb, 4 Ga. A. 49, 60 SE 821 (so provided in Civ. Code [1895] § 3004).
24. **Construction of letters or powers of attorney** see supra § 201.
25. U. S.—Courcier v. Ritter, 6 F. Cas. No. 3,282, 4 Wash. C. C. 549; De Tastett v. Crousillat, 7 F. Cas. No. 3,828, 2 Wash. C. C. 132.
Fla.—Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349, 24 S 480 (holding that, where the instructions to an agent are reasonably susceptible of two different meanings, and the agent, in good faith and without negligence, adopts one of them,

upon the agent.[26] But the agent is not, under such circumstances, at liberty to disregard the instructions entirely and to substitute therefor his own judgment, but must follow one of the interpretations reasonably derivable from the terms of the instructions.[27]

[§ 375] **f. In Cases of Emergency.** In cases of necessity arising from a sudden emergency the conditions may be such as not only to justify but also to require a deviation by the agent from his previous instructions,[28] or from the customs and usages of the particular agency.[29] In such cases if the agent does what he deems best for the interests of the principal in the exercise of a sound discretion he will not be liable,[30] although it may subsequently appear that a course different from that adopted would have been more to the advantage of the principal.[31] Acts done in a bona fide effort to save perishing property come within this rule.[32]

Notice to principal. Ordinarily where unforeseen conditions arise the agent should notify the principal and procure additional instructions,[33] and the agent so acting in good faith will not be liable in case a loss is occasioned by the delay;[34] but in the case of a sudden emergency the agent may and should do whatever he deems best in the exercise of a sound discretion.[35]

Limit of deviation. The agent is not, however, justified in deviating further from his instructions than the necessities of the case require.[36]

[§ 376] **g. Illegal or Immoral Acts.** An agent cannot be held accountable for his failure to obey instructions to perform acts which are illegal or immoral,[37] or which if complied with would work a fraud upon others.[38]

[§ 377] **h. Effect of Custom and Usage.**[39] Except as limited by special instructions the known usages and customs of the particular business for which an agent is engaged enter into and form a part of his authority and duty,[40] and he will be liable for losses due to a failure to act according

the principal cannot assert, either as against the agent or as against third persons who have in good faith and without negligence relied on the same construction, that he intended the authority to be executed in accordance with the other interpretation).

Iowa.—Minnesota Linseed Oil Co. v. Montague, 65 Iowa 67, 21 NW 184 (holding that, where the instructions are susceptible of two meanings, that meaning which the agent in good faith attaches to them and acts upon is to be adopted, and if loss thereby occurs the principal, and not the agent, must bear it, and it is immaterial whether or not the principal had reason to believe that the agent understood the instructions as he intended them).

Mich.—Berry v. Haldeman, 111 Mich. 667, 70 NW 325.

Nebr.—Falsken v. Falls City State Bank, 71 Nebr. 29, 98 NW 425 (holding that, where an agent in good faith and without negligence acts upon his own understanding of faulty or ambiguous instructions, he is not liable in damages to his principal, although his interpretation of them may be erroneous).

N. C.—Bessent v. Harris, 63 N. C. 542.

N. D.—Anderson v. Grand Forks First Nat. Bank, 4 N. D. 182, 59 NW 1029.

S. C.—Holmes v. Misroon, 6 S. C. L. 21.

Vt.—Pickett v. Pearsons, 17 Vt. 470 (holding that the agent is bound by the instructions only as he understood them, unless there is fraud or some fault on his part in not comprehending them).

Eng.—Withington v. Herring, 5 Bing. 442, 15 ECL 661, 130 Reprint 1132; Boden v. French, 10 C. B. 886, 70 ECL 886, 138 Reprint 351.

26. Courcier v. Ritter, 6 F. Cas. No. 3,282, 4 Wash. 549; Minnesota Linseed Oil Co. v. Montague, 65 Iowa 67, 21 NW 184; Anderson v. Grand Forks First Nat. Bank, 4 N. D. 182, 59 NW 1029.

27. Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349, 357, 24 S 480 (where the court said: "Because an agent's instructions will admit of different interpretations, he is not thereby authorized to disregard them entirely, and substitute his own judgment in the place thereof. If he acts at all in such cases, he must follow one of the interpretations reasonably derivable from the uncertain terms of the instructions").

28. U. S.—Forrestier v. Bordman, 9 F. Cas. No. 4,945, 1 Story 43.

Ala.—Williams v. Shackelford, 16 Ala. 318.

La.—Perez v. Miranda, 7 Mart. N. S. 493.

Mass.—Greenleaf v. Moody, 13 Allen 363; Gould v. Rich, 7 Metc. 538; Parker v. Brancker, 22 Pick. 40.

Mo.—Bartlett v. Sparkman, 95 Mo. 136, 18 SW 406, 6 AmSR 35 and note; Rechtscherd v. St. Louis Accommodation Bank, 47 Mo. 181.

N. H.—Frothingham v. Everton, 12 N. H. 239.

N. Y.—Milbank v. Dennistoun, 21 N. Y. 386; Jervis v. Hoyt, 2 Hun 637; Harter v. Blanchard, 64 Barb. 617; Liotard v. Graves, 3 Cai. 226; Drummond v. Wood, 2 Cai. 310.

Pa.—Stall v. Meek, 70 Pa. 181; Wilson v. Wilson, 26 Pa. 393.

S. C.—Nixon v. Bogin, 26 S. C. 611, 2 SE 302.

Va.—Bernard v. Maury, 20 Gratt. (61 Va.) 434.

Eng.—Wolff v. Horncastle, 1 B. & P. 316, 126 Reprint 924, 13 ERC 265.

[a] **An event not contemplated** at the time orders were given excuses a deviation therefrom. Dusar v. Perit, 4 Binn. (Pa.) 361.

[b] **An agent instructed to get a certain physician** is justified, upon being unable to procure him, and in case of an emergency, in employing another instead. Bartlett v. Sparkman, 95 Mo. 136, 8 SW 406, 6 AmSR 35.

[c] **A merchant directed by his correspondent to deposit his funds in a certain place** may send them to another, if reasonable ground of alarm or danger prevents him from following directions; but he must, if possible, keep them within his reach and under his control, or he will be liable in case of loss. Perez v. Miranda, 7 Mart. N. S. (La.) 493.

29. Greenleaf v. Moody, 13 Allen (Mass.) 363.

30. U. S.—Forrestier v. Bordman, 9 F. Cas. No. 4,945, 1 Story 43.

Conn.—Judson v. Sturges, 5 Day 556.

Mass.—Greenleaf v. Moody, 13 Allen 363.

Pa.—Dusar v. Perit, 4 Binn. 361.

Va.—Bernard v. Maury, 20 Gratt. (61 Va.) 434.

31. Greenleaf v. Moody, 13 Allen (Mass.) 363 (holding that a factor has implied authority, in case of unforeseen circumstances of necessity or great urgency, to act for his principal irrespective of instructions or the ordinary usages of trade in adjusting contracts and claims and disposing of property; and if he has acted in good faith, with a sound discretion under the circumstances as they appeared to him at the time, he will not be held liable for the consequences, although his course should subsequently turn out disadvantageously to his principal).

32. Greenleaf v. Moody, 13 Allen (Mass.) 363; Jervis v. Hoyt, 2 Hun (N. Y.) 637.

33. Henry v. Buckner, 13 Colo. 18, 21 P 916. See also Greenleaf v. Moody, 13 Allen (Mass.) 363.

34. Bernard v. Maury, 20 Gratt. (61 Va.) 434 (holding that, where a principal instructed an agent to purchase certain bonds, but before the money for their purchase was received by the agent there had been a great and unexpected advance in the price, the agent was justified in not making the purchase but in asking for and awaiting further instructions).

35. Greenleaf v. Moody, 13 Allen (Mass.) 363.

36. Foster v. Smith, 2 Coldw. (Tenn.) 474, 88 AmD 604 (holding that where an agent was authorized to purchase and deliver grain to his principal, and a boat loaded with grain sank in three feet of water, the agent would have been justified in employing hands to take the grain out of the water and preserve it to prevent a total loss, but was not justified in selling the grain).

37. Ill.—Bishop v. American Preservers' Co., 157 Ill. 284, 41 NE 765, 48 AmSR 317.

La.—Goodhue v. McClarty, 3 La. Ann. 56.

Mo.—Rechtscherd v. St. Louis Accommodation Bank, 47 Mo. 181; Switzer v. Connett, 11 Mo. 88.

N. Y.—Brown v. Howard, 14 Johns. 119.

Pa.—Wilson v. Wilson, 26 Pa. 393.

Eng.—Cohen v. Kittell, 22 Q. B. D. 680 (agency to bet on horse races).

Que.—Latraverse v. Morgan, 14 Que. Super. 511.

[a] **The command of the principal** to commit a trespass or other unlawful act is no justification to the agent. Brown v. Howard, 14 Johns. (N. Y.) 119. See also infra § 502; Master and servant [26 Cyc 1518 et seq].

38. Goodhue v. McClarty, 3 La. Ann. 56.

39. See generally Customs and Usages [12 Cyc 1028].

40. Harlan v. Ely, 68 Cal. 522, 9 P 947; Phillips v. Moir, 69 Ill. 155; Switzer v. Connett, 11 Mo. 88; Fraser v. Tenants, 39 S. C. L. 375. See also Customs and Usages [12 Cyc 1071].

[a] **The instructions given by a principal** to his agent as a general rule constitute the leading outlines of the contract between them, and where the instructions are silent, if there is a known usage of trade or mode of transacting business applicable to the particular agency, the agent is not only permitted but it is also his duty to conform to it. Fraser v. Tenants, 39 S. C. L. 375.

[b] **Knowledge of custom.**—A custom or usage pertaining to any particular agency will not affect the principal, if not known to him, unless

to such usages and customs,[41] and on the other hand if he does act in accordance therewith he will not, in the absence of any instructions to the contrary, be liable for any loss resulting;[42] but where the instructions given are direct and positive they must be strictly complied with,[43] and no usage or custom will authorize a departure from such instructions or relieve the agent from liability for a resulting loss, if he does so.[44]

[§ 378] **i. Effect of Ratification by Principal.**[45] Although an agent may have violated his instructions, he will not be liable to the principal if the latter, with knowledge of the facts, ratifies what he has done,[46] and such ratification may be either express or implied;[47] but in order to relieve the agent from liability the ratification must be with knowledge on the part of the principal of the material facts.[48]

[§ 379] **j. Nature of Liability for Disobedience; Conversion.** The most usual remedies of a principal against his agent for a violation of instructions are an action of assumpsit and an action on the case.[49]

Conversion. But the instructions of the principal may be violated in such a manner as to amount to a conversion,[50] and authorize an action of trover.[51] A wrongful or fraudulent intent on the part of the agent is not a necessary element of such a conversion;[52] but it is sufficient if the principal has been deprived of his property by the act of the agent in assuming an unauthorized dominion and control over it.[53] It is not, however, every violation of instructions through which a loss occurs entitling the principal to damages which will amount to a conversion,[54] but ordinarily there must be an entire departure from his authority;[55] and if the

it has existed for such a length of time and become so widely known as to warrant the presumption that the principal had it in view when he appointed the agent. Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019.

41. Harlan v. Ely, 68 Cal. 522, 9 P 947.

42. Ill.—Phillips v. Moir, 69 Ill. 155.

Ky.—De Lazardi v. Hewitt, 7 B. Mon. 697.

Me.—Greely v. Bartlett, 1 Me. 172, 10 AmD 54.

S. C.—Fraser v. Tennants, 39 S. C. L. 375.

Tex.—Merchants' Nat. Bank v. Dorchester, (Civ. A.) 136 SW 551, 556 [quot Cyc].

43. Parsons v. Martin, 11 Gray (Mass.) 111; Hall v. Storrs, 7 Wis. 253. See also supra § 370.

44. U. S.—Courcier v. Ritter, 6 F. Cas. No. 3,282, 4 Wash. 549.

Ga.—Central of Georgia R. Co. v. Felton, 110 Ga. 597, 36 SE 93; Clark v. Cumming, 77 Ga. 64, 4 AmSR 72; Hatcher v. Comer, 73 Ga. 418.

Iowa.—Robinson Mach. Works v. Vorse, 52 Iowa 207, 2 NW 1108; Wanless v. McCandless, 38 Iowa 20.

Mass.—Day v. Holmis, 103 Mass. 306; Parsons v. Martin, 11 Gray 111 (holding that an agent, acting under a written authority contained in a letter, was bound to regard the instructions given him in every particular, and that no usage or custom could affect the legal rights of the parties, nor, if fully proved, would the law sustain or tolerate it); Strong v. Bliss, 6 Metc. 393.

Mich.—Hutchings v. Ladd, 16 Mich. 493.

N. Y.—Douglass v. Leland, 1 Wend. 490.

Pa.—Porter v. Patterson, 15 Pa. 229.

S. C.—Barksdale v. Brown, 10 S. C. L. 517, 9 AmD 720.

Tex.—Wootlers v. Kaufman, 73 Tex. 395, 11 SW 390.

Vt.—Catlin v. Smith, 24 Vt. 85; Bliss v. Arnold, 8 Vt. 252, 30 AmD 467.

W. Va.—State v. Chilton, 49 W. Va. 453, 39 SE 612.

Wis.—Osborne, etc., Co. v. Rider, 62 Wis. 235, 22 NW 394; Hall v. Storrs, 7 Wis. 253.

45. **Ratification** see generally supra §§ 77–146.

46. Ark.—Lyon v. Tams, 11 Ark. 189.

Ind.—U. S. Mortgage Co. v. Henderson, 111 Ind. 24, 12 NE 88.

Kan.—Lowry v. Stewart, 5 Kan. 663.

Md.—Williams v. Higgins, 30 Md. 404.

Nebr.—Falsken v. Falls City State Bank, 71 Nebr. 29, 98 NW 425.

N. Y.—Codwise v. Hacker, 1 Cai. 526.

Oh.—Woodward v. Suydam, 11 Oh. 360.

See also supra § 142.

47. Law v. Cross, 1 Black (U. S.) 533, 17 L. ed. 185; Lyon v. Tams, 11 Ark. 189; Vianna v. Barclay, 3 Cow. (N. Y.) 281; Cairnes v. Bleecher, 12 Johns. (N. Y.) 300. See also supra § 142.

48. Bell v. Cunningham, 3 Pet. (U. S.) 69, 7 L. ed. 606; Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349, 24 S 480; Hardeman v. Ford, 12 Ga. 205; Walker v. Walker, 5 Heisk. (Tenn.) 425. See also supra § 142.

49. McMorris v. Simpson, 21 Wend. (N. Y.) 610. See Assumpsit, Action of [4 Cyc 317]; Case, Action of [6 Cyc 681].

50. Kan.—Guernsey v. Davis, 67 Kan. 378, 73 P 101.

Minn.—Chase v. Baskerville, 93 Minn. 402, 101 NW 950; Farrand v. Hurlburt, 7 Minn. 477.

Mo.—Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935.

N. Y.—Comley v. Dazian, 114 N. Y. 161, 21 NE 135; Laverty v. Snethen, 68 N. Y. 522, 23 AmR 184.

Eng.—Syeds v. Hay, 4 T. R. 260, 100 Reprint 1008; Tickel v. Short, 2 Ves. 239, 28 Reprint 154.

[a] **Violations constituting a conversion.**—(1) An agent is liable for a conversion where he is intrusted with property to sell at a price to be approved by his principal, and he sells without such approval (Comley v. Dazian, 114 N. Y. 161, 21 NE 135); (2) where he is instructed to sell goods at a certain price on a certain day and if not so sold to ship them to a certain place, and he sells them upon the following day (Scott v. Rogers, 31 N. Y. 676); (3) where, on being authorized to negotiate a note, he is instructed not to part with the note until he gets the money, and he delivers the note to a third person, and such person discounts it and appropriates the proceeds (Laverty v. Snethen, 68 N. Y. 522, 23 AmR 184); (4) where the owner of goods on a vessel instructs the captain not to land them on the wharf against which the vessel is moored, and the captain disobeys the order and delivers the goods into the possession of the wharfinger (Syeds v. Hay, 4 T. R. 260, 100 Reprint 1008); (5) where goods are delivered to an agent to be held in store for an advance in price and then sold at a certain place, and the agent, without the principal's knowledge or consent, ships them to another place (Galbreath v. Epperson, (Tenn.) 1 SW 157); or (6) where an agent is given a horse with instructions to sell it, and he exchanges it for another horse (Ainsworth v. Partillo, 13 Ala. 460).

[b] **Investing contrary to instructions.**—Where an agent, who has received money from his principal to be invested, invests the same after notice from his principal not to invest, the agent makes the investment on his own responsibility, and is liable to the principal. Richardson v. Futrell, 42 Miss. 525.

51. Chase v. Baskerville, 93 Minn. 402, 101 NW 950; Laverty v. Snethen, 68 N. Y. 522, 23 AmR 184; Syeds v. Hay, 4 T. R. 260, 100 Reprint 1008. See generally Trover and Conversion [38 Cyc 1997].

52. Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935; Laverty v. Snethen, 68 N. Y. 522, 23 AmR 184.

53. Chase v. Baskerville, 93 Minn. 402, 101 NW 950; Laverty v. Snethen, 68 N. Y. 522, 23 AmR 184.

54. Knapp v. Sioux Falls Nat. Bank, 5 Dak. 378, 40 NW 587; Minneapolis Trust Co. v. Mather, 181 N. Y. 205, 73 NE 987 [rev 90 App. Div. 361, 85 NYS 510]; Wolfe v. Brouwer, 28 N. Y. Super. 601; McMorris v. Simpson, 21 Wend. (N. Y.) 610; Sarjeant v. Blunt, 16 Johns. (N. Y.) 74; Cairnes v. Bleecher, 12 Johns. (N. Y.) 300; Palmer v. Jarmain, 2 M. & W. 282; Dufresne v. Hutchinson, 3 Taunt. 117, 128 Reprint 48.

[a] **Violations not amounting to conversion.**—(1) An agent authorized to sell goods is not guilty of a conversion because he sells them at a price less than that stipulated by the principal (Moore v. McKibbin, 33 Barb. (N. Y.) 246; Monks v. Bruce, 3 NYS 419; Sarjeant v. Blunt, 16 Johns. (N. Y.) 74; Dufresne v. Hutchinson, 3 Taunt. 117, 128 Reprint 48); (2) nor is an agent so guilty who is given a bill of exchange with instructions to have it discounted and apply the proceeds in a particular way, where he has it discounted as authorized but misapplies a portion of the proceeds (Palmer v. Jarmain, 2 M. & W. 282); (3) and where an agent was authorized to deliver goods only upon receiving sufficient security, and they were delivered upon an inadequate security, it was held that the agent was not liable for a conversion as the sufficiency of the security was a matter resting within his judgment (Cairnes v. Bleecher, 12 Johns. (N. Y.) 300). (4) And the same has been held true where an agent authorized to pledge his principal's property for a certain sum pledges it for a greater sum. Dickinson v. Dudley, 17 Hun (N. Y.) 569.

[b] **A mere violation of instructions** does not amount to a conversion. Woods Mach. Co. v. Woodcock, 43 Wash. 317, 86 P 570.

55. McMorris v. Simpson, 21 Wend. (N. Y.) 610.

[a] **Where the agent wholly departs from his authority** in disposing of the goods, he makes the property his own, and may be treated as a tort-feasor, but there must be some act on the part of the agent. A mere omission of duty is not enough, although the property may be lost in consequence of the neglect; nor will trover lie where the agent, although wanting in good faith, has acted within the general scope of his powers.

agent does what he was authorized to do but merely violates some instruction, such as in regard to the terms of sale or manner of disposing of the proceeds, it will not amount to a conversion,[56] although the contract of agency provides that such a violation shall be deemed a "conversion."[57] The distinction between the two classes of cases is technical and in some cases difficult to determine, but it exists,[58] and is important as it affects the nature of the remedy and the measure of the recovery.[59]

Remedy and damages where no conversion. In cases of violation of instructions not amounting to a conversion, as where the agent is instructed to sell for a certain price and he sells for less, the proper remedy is not trover but an action on the case,[60] and the measure of damages is the loss actually sustained by reason of the agent's misconduct.[61] The same is true where an agent to buy within a specified price or limit purchases at a higher price than his instructions warrant.[62] So also where an agent is authorized to deliver goods to a third person on receiving sufficient security, and he delivers them but does not take sufficient security, the remedy against him is by action on the case, and trover will not lie.[63] It has been held that, where an agent misappropriates funds placed in his hands for a particular purpose, the proper remedy is by an action for money had and received, and not by an action of trover.[64]

[§ 380] **k. Measure of Damages for Disobedience.**[65] Where actual damages have been sustained the measure of damages is compensation for the loss actually and proximately sustained by the principal from the agent's violation of instructions,[66] and exemplary damages should not be awarded.[67] Thus where an agent, instructed to sell for cash only or to take certain security for the price, sells on credit without taking the required security, he may render himself liable for the price;[68] and where an agent is instructed to sell for cash only and he takes instead securities for the price, he is prima facie liable for the price for which he sold.[69] If, however, it should appear that the price named in the deed was not the real price, but was fictitious, being stated only by reason of the acceptance in payment of doubtful securities, the agent is liable only for the market value of the land at the time of sale, with interest.[70] Where an agent to invest money for his principal fails to take security according to his instructions, he may be held liable as a debtor for the money intrusted to him.[71] So where he is instructed to sell for a specified price, and he sells for less, he is prima facie liable for the entire amount specified.[72]

[§ 381] **3. Duty to Exercise Care, Skill, and Diligence—a. Extent of Duty and Liability—(1) In General.** An agent in the performance of his duties as such must exercise ordinary and reasonable care,

There must be an entire departure from his authority before an action for the conversion of the goods can be maintained. McMorris v. Simpson, 21 Wend. (N. Y.) 610.

[b] **Refusal to obey instructions to sell.**—Where property is intrusted to an agent, his refusal to sell, when directed to do so by his principal, and the continued retention of the property after such direction without any lawful excuse, constitute a conversion. Coleman v. Pearce, 26 Minn. 123, 1 NW 846.

56. Loveless v. Fowler, 79 Ga. 134, 4 SE 103, 11 AmSR 407; Minneapolis Trust Co. v. Mather, 181 N. Y. 205, 73 NE 987 [rev 90 App. Div. 361, 85 NYS 510]; Moore v. McKibbin, 33 Barb. (N. Y.) 246; Palmer v. Jarmain, 2 M. & W. 282.

57. J. I. Case Threshing Mach. Co. v. Folger, 136 Wis. 468, 117 NW 944 (in which case, by a contract of agency for the sale of agricultural machinery, no machinery was to be delivered to purchasers except for cash or notes actually received, and it was provided that any sale in violation of that requirement should be deemed a conversion of the machinery by the agents who should thereupon become personally liable to the principal for the full price thereof. In an action by the principal against the agents the complaint set out the contract and alleged that in violation thereof the agents sold and delivered certain machinery without its being paid or settled for in cash or notes, and that plaintiff elected to treat such delivery as a conversion of the machinery by defendants who were personally liable therefor. It was held that the action was one for breach of contract, and that the "conversion" mentioned in the contract and complaint meant merely that by default of the agents the property had become theirs and that they had become personally liable as stipulated in the contract).

58. Minneapolis Trust Co. v. Mather, 181 N. Y. 205, 73 NE 987 [rev 90 App. Div. 361, 85 NYS 510]; Laverty v. Snethen, 68 N. Y. 522, 23 AmR 184.

[a] **The result of the authorities** has been said to be that if the agent parts with the property in a way or for a purpose not authorized he is liable for a conversion, but if he parts with it in accordance with his authority, although at a less price, or misapplies the proceeds or takes an inadequate security he is not liable for a conversion of the property but only in an action on the case for misconduct. Laverty v. Snethen, 68 N. Y. 522, 23 AmR 184.

59. Minneapolis Trust Co. v. Mather, 181 N. Y. 205, 73 NE 987 [rev 90 App. Div. 361, 85 NYS 510].

60. McDermid v. Cotton, 2 Ill. A. 297; Mangum v. Ball, 43 Miss. 288, 5 AmR 488; Moore v. McKibbin, 33 Barb. (N. Y.) 246; Spencer v. Blackman, 9 Wend. (N. Y.) 167; Sarjeant v. Blunt, 16 Johns. (N. Y.) 74; Cairnes v. Bleecker, 12 Johns. (N. Y.) 300; Dufresne v. Hutchinson, 3 Taunt. 117, 128 Reprint 48.

61. Minneapolis Trust Co. v. Mather, 181 N. Y. 205, 73 NE 987 [rev 90 App. Div. 361, 85 NYS 510].

62. Minneapolis Trust Co. v. Mather, 181 N. Y. 205, 73 NE 987 [rev 90 App. Div. 361, 85 NYS 510].

63. Cairnes v. Bleecker, 12 Johns. (N. Y.) 300.

64. Palmer v. Jarmain, 2 M. & W. 282. See also Guernsey v. Davis, 67 Kan. 378, 73 P 101.

65. See also supra §§ 370, 380.

66. U. S.—Bell v. Cunningham, 3 Pet. 69, 7 L. ed. 606.

Ill.—Dazey v. Roleau, 111 Ill. A. 367 (holding that, where an agent is directed to foreclose a chattel mortgage and to purchase the property mortgaged at a foreclosure sale, unless third persons bid a specified sum therefor, and such agent permits such property to be sold for a less sum, he is liable for the difference between the amount for which the goods sold and their fair cash market value).

La.—Ryder v. Thayer, 3 La. Ann. 149; George v. McNeill, 7 La. 124, 26 AmD 498.

Mich.—Birdsell Mfg. Co. v. Brown, 96 Mich. 213, 55 NW 801.

Mo.—Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935.

N. Y.—Minneapolis Trust Co. v. Mather, 181 N. Y. 205, 73 NE 987 [rev 90 App. Div. 361, 85 NYS 510]; Hope v. Lawrence, 50 Barb. 258.

[a] **"Where one person furnishes money to another to discharge an incumbrance** from the land of the person furnishing the money, and the person undertaking to discharge the incumbrance neglects to do it, and the land is lost to the owner by reason of the incumbrance, the measure of damages may be the money furnished, with interest, or the value of the land lost, according to circumstances. If the landowner has knowledge of his agent's failure in time to redeem the land himself, his damages will be the money furnished with interest. But if the landowner justly relies upon his agent, to whom he has furnished money to discharge the incumbrance, and the land is lost without his knowledge, and solely through the fault of the agent, then the agent will be liable for the value of the land at the time it is lost." Blood v. Wilkins, 43 Iowa 565, 567.

67. Bell v. Cunningham, 3 Pet. (U. S.) 69, 7 L. ed. 606; Ryder v. Thayer, 3 La. Ann. 149.

68. Unland v. McCormick Harvesting Mach. Co., 54 Nebr. 364, 74 NW 629.

69. Paul v. Grimm, 165 Pa. 139, 30 A 721, 44 AmSR 648.

70. Paul v. Grimm, 183 Pa. 330, 38 A 1017.

71. Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935.

72. Reynolds v. Rogers, 63 Mo. 17 (holding that, where, by the terms of an agreement between an agent and his principal, the former is authorized to sell goods for a certain price, and he sells for a less amount, the principal may prima facie recover from the agent the entire amount named in the agreement). But see Ainsworth v. Partillo, 13 Ala. 460 (holding that the price fixed by the principal was not necessarily the measure of damages, and that the proper criterion of damages was the actual injury sustained by the principal); Lowry v. Stewart, 5 Kan. 663, 668 (where the court said: "The value placed upon the goods by the principals at the time they gave their instructions to the agent must be prima facie, regarded as the actual value of the flour; and to do away with the prima facie case thus made, the agent 'should be required to give strong proof for the purpose of showing the market value to be less than the in-

skill, and diligence,[73] and for his negligence in failing to do so he will be liable to his principal for any loss or injury occasioned thereby.[74] However, he is required to exercise only ordinary and reasonable care, skill, and diligence,[75] and if he does so he will not be liable for losses which the principal may sustain.[76] By ordinary care, skill, and diligence is meant such as a person of ordinary prudence would exercise in the conduct of his own affairs of the same nature under similar circumstances,[77] or such as is usually possessed and exercised by persons of ordinary care and capacity engaged in the same business,[78] and what will amount to its exercise will depend upon all the circumstances of the particular case, including the character and subject matter of the agency,[79] and hence is ordinarily a question of fact for the jury.[80]

Failure to do unauthorized acts. An agent is not chargeable with negligence in failing to do something that he has no authority to do,[81] or in failing to go on and do things connected with or arising out of the agency which are beyond the powers and duties conferred upon him;[82] and where one employs an agent who is employed in the service of another principal with full knowledge of the first employment and of the fact that the second is to be concurrent therewith, the second contract must be construed in the light of the duties imposed by the first, and the agent will not be liable to the second principal for a failure of duty caused solely by the obligation imposed by the first employment.[83] Where one assumes as a mere intruder to act for

struction price' "). Compare Austill v. Crawford, 7 Ala. 335.

73. Ark.—Arkansas Fertilizer Co. v. Banks, 95 Ark. 86, 128 SW 566.

Cal.—San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 P 410.

Ga.—Cave v. Lougee, 134 Ga. 185, 67 SE 667; Brown v. Clayton, 12 Ga. 564.

La.—Madeira v. Townsley, 12 Mart. 84.

Minn.—Lake City Flouring-Mill Co. v. McVean, 32 Minn. 301, 20 NW 233.

N. Y.—Loeb v. Hellman, 83 N. Y. 601; Heinemann v. Heard, 50 N. Y. 27 [rev 58 Barb. 524]; Leverick v. Meigs, 1 Cow. 645.

Eng.—Commonwealth Portland Cement Co. v. Weber, [1905] A. C. 66.

74. U. S.—Preston v. Prather, 137 U. S. 604, 11 SCt 162, 34 L. ed. 788; Bowerman v. Rogers, 125 U. S. 585, 8 SCt 986, 31 L. ed. 815.

Ala.—Steiner v. Clisby, 103 Ala. 181, 15 S 612; Adams v. Robinson, 65 Ala. 586.

Ark.—Emerson v. Turner, 95 Ark. 597, 130 SW 538.

Cal.—San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 P 410.

Conn.—Geisse v. Franklin, 56 Conn. 83, 13 A 148; Redfield v. Davis, 6 Conn. 439.

Ill.—Munford v. Miller, 7 Ill. A. 62.

Ind.—Union Mut. L. Ins. Co. v. Buchanan, 100 Ind. 63.

Kan.—Guernsey v. Davis, 67 Kan. 378, 73 P 101.

Ky.—Smith v. Frost, 1 Bibb 375.

La.—In re Alexander, 125 La. 808, 51 S 906; Imboden v. Richardson, 15 La. Ann. 534; Kirkby v. Armistead, 11 Rob. 81; Crawford v. Louisana State Bank, 1 Mart. N. S. 706; Madeira v. Townsley, 12 Mart. 84; Durnford v. Patterson, 7 Mart. 460, 12 AmD 514.

Mass.—Phœnix Ins. Co. v. Frissell, 142 Mass. 513, 8 NE 348; Gould v. Rich, 7 Metc. 538; Baltimore Mechanics' Bank v. Boston Merchants' Bank, 6 Metc. 13.

Mich.—Page v. Wells, 37 Mich. 415.

Minn.—Rice v. Longfellow Bros. Co., 82 Minn. 154, 84 NW 660.

Mo.—Neuman v. Friedman, 156 Mo. A. 142, 136 SW 251.

Nebr.—Northern Assur. Co. v. Borgelt, 67 Nebr. 232, 93 NW 226.

N. Y.—Vernier v. Knauth, 7 App. Div. 57, 39 NYS 784; Dickey v. Grant, 6 Cow. 310; Leverick v. Meigs, 1 Cow 645.

Oh.—Victoria First Nat. Bank v. Hayes, 64 Oh. St. 100, 59 NE 893.

Pa.—Kentucky Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. 180; Canfield v. Gilmore, 31 LegInt 397.

S. C.—Dickson v. Screven, 23 S. C. 212.

Wash.—Glover v. Richardson, etc., Co., 64 Wash. 403, 116 P 861; Bevis v. Big Bend Abstract Co., 62 Wash. 513, 114 P 191; Crawford v. Cochran, 2 Wash. T. 117, 3 P 837.

W. Va.—Ruffner v. Hewitt, 7 W. Va. 585.

Eng.—Reece v. Righy, 4 B. & Ald. 202, 6 ECL 451, 106 Reprint 912; Story v. Richardson, 6 Bing. N. Cas. 123, 37 ECL 541, 133 Reprint 49; Heys v. Tindall, 1 B. & S. 296, 101 ECL 296, 121 Reprint 724; Stevenson v. Rowand, 2 Dow & Cl. 104, 6 Reprint 668.

Ont.—Butterworth v. Shannon, 11 Ont. A. 86; Douglass v. Woodside, 11 Grant Ch. (U. C.) 375; Bradburne v. Shanly, 7 Grant Ch. (U. C.) 569.

[a] **Competent skill as well as fidelity** may be legally demanded of an agent, and for a deficiency in either he is responsible. Redfield v. Davis, 6 Conn. 439.

[b] **Liable for gross mismanagement.**—Although a power of attorney may confer on an agent the fullest authority and discretion consistent with fidelity and good faith in the performance of his trust, it will not protect him from responsibility if he acts unfaithfully or grossly mismanages the business intrusted to him. Myles v. Myles, 6 Bush (Ky.) 237.

75. Ala.—Morrison v. Orr, 3 Stew. & P. 49, 23 AmD 319.

Ga.—Brown v. Clayton, 12 Ga. 564.

Iowa.—Montgomery County v. American Emigrant Co., 47 Iowa 91.

Ky.—Withers v. Thompson, 4 T. B. Mon. 323.

N. Y.—Loeb v. Hellman, 83 N. Y. 601 mem; Lawler v. Keaquick, 1 Johns. Cas. 174.

[a] **"It is not the law** that an agent or factor is bound by law to exercise the utmost care and diligence in the business of his principal. The extent of his duty is to exercise reasonable care and diligence." Darlington v. Fredenhagen, 18 Ill. A. 273, 276.

[b] **An agent is not bound to meet consequences which are not contemplated** in the contract, and the probability of which is as well known to his principal as to himself. Commonwealth Portland Cement Co. v. Weber, [1905] A. C. 66.

76. Ga.—Brown v. Clayton, 12 Ga. 564.

Ill.—Stanberry v. Moore, 56 Ill. 472.

Ky.—Withers v. Thompson, 4 T. B. Mon. 323; Smith v. Frost, 1 Bibb 375.

La.—Clark v. Norwood, 19 La. Ann. 116; Gillet v. Theall, 16 La. 46.

Mass.—Hurley v. Packard, 182 Mass. 216, 65 NE 64.

Mich.—Page v. Wells, 37 Mich. 415.

Minn.—Lake City Flouring-mill Co. v. McVean, 32 Minn. 301, 20 NW 233; Burpe v. Van Eman, 11 Minn. 327.

N. Y.—De Bavier v. Funke, 21 NYS 410 [aff 142 N. Y. 633 mem, 37 NE 566 mem]; Lawler v. Keaquick, 1 Johns. Cas. 174.

S. C.—Nixon v. Bogin, 26 S. C. 611, 2 SE 802.

Tex.—Williams v. O'Daniels, 35 Tex. 542.

Vt.—Rich v. Austin, 40 Vt. 416.

Va.—Betts v. Cralle, 1 Munf. (15 Va.) 238.

Eng.—Commonwealth Portland Cement Co. v. Weber, [1905] A. C. 66; Pappa v. Rose, L. R. 7 C. P. 32 [aff L. R. 7 C. P. 525]; Zwilchenbart v. Alexander, 1 B. & S. 234, 101 ECL 234, 121 Reprint 702.

[a] **One who fails to do the very thing his agency requires** cannot be considered as having used ordinary care and diligence, but on the contrary must be viewed as grossly negligent and liable for all resulting damages. Crawford v. Louisiana State Bank, 1 Mart. N. S. (La.) 706.

77. Ala.—Steiner v. Clisby, 103 Ala. 181, 15 S 612.

Ga.—Southern Express Co. v. Frink, 67 Ga. 201; Brown v. Clayton, 12 Ga. 564.

La.—Cuggy v. Zeller, 132 La. 222, 61 S 209; Madeira v. Townsley, 12 Mart. 84.

Minn.—Lake City Flouring-mill Co. v. McVean, 32 Minn. 301, 20 NW 233.

Tex.—Williams v. O'Daniels, 35 Tex. 542.

78. Wheadon v. Mead, 72 Minn. 372, 75 NW 598.

[a] **An agent for hire, without specific instructions,** is bound to observe all the precautions ordinarily pursued in relation to the particular business in which he is employed, and according to the usage of the place and the circumstances of the times within which the business is transacted. Wright v. Central R., etc., Co., 16 Ga. 38.

[b] **It is not necessary to show fraud** upon the part of an agent in order to maintain an action against him for neglecting to perform a duty which he has undertaken. An agent is bound not only to good faith, but also to reasonable diligence, and to such skill as is ordinarily possessed by persons of common capacity engaged in the same business. Heinemann v. Heard, 50 N. Y. 27.

79. Preston v. Prather, 137 U. S. 604, 11 SCt 162, 34 L. ed. 788; Brown v. Clayton, 12 Ga. 564.

[a] **"The degree of diligence** which any contractor [agent] is called upon to exercise is proportionate to the duty imposed, and the existence of negligence depends upon the failure to exercise the degree of diligence which the peculiar conditions require. Whether in any given case a party has been guilty of negligence necessarily depends then upon what is required of him in the particular case, and it is a trite saying that what would be due diligence in one case might, under other conditions with regard to the same kind of business, be serious negligence." Vernier v. Knauth, 7 App. Div. 57, 62, 39 NYS 784.

80. See infra §§ 729, 730.

81. Brown v. Clayton, 12 Ga. 564.

82. Hodge v. Durnford, 1 Mart. N. S. (La.) 100; Commonwealth Portland Cement Co. v. Weber, [1905] A. C. 66.

83. Southern Exp. Co. v. Frink, 67 Ga. 201 (holding that, where an express company employed as messenger a conductor on a railroad, it must have contracted with him with reference to his prior obligations to the railroad company, and that he was not liable to it for a neglect caused by

another without the latter's consent, he will be held to a strict account and liable for as much as could have been made by the best of management.[84]

Illegal transactions. Where the agreement between the principal and the agent is for the performance of an illegal act, the former cannot recover from the latter for damages sustained through the negligence of the latter;[85] but if the agent agrees, before proceeding to do the act, to procure the proper license and authority therefor, and then proceeds without it, he will be liable unless the principal subsequently agreed thereto.[86]

[§ 382] **(2) Agent Not an Insurer.** Since the agent is required to exercise only ordinary care, skill, and diligence, he is not, in the absence of an express agreement, an insurer of the success of his undertaking,[87] and does not guarantee the principal against incidental losses,[88] or undertake that he will commit no errors or mistakes,[89] and so will not be liable for losses occurring without any fault or negligence on his part.[90] Neither is he liable, if he has acted in good faith and with due care, for losses due to a mere mistake,[91] including losses arising out of mistakes in doubtful matters of law,[92] nor for losses due to an error of judgment in regard to matters with which he is invested with discretionary powers.[93]

[§ 383] **(3) Special Undertakings.** The rule of ordinary care, skill, and diligence is that which, in the absence of express agreement, the law attaches to the relation of principal and agent,[94] and it may by special stipulation between the parties be varied and either narrowed or enlarged.[95] In such cases the liability of the agent is to be measured according to the terms of his undertaking,[96] which may be such as to render him liable as an insurer;[97] but an undertaking to keep property intrusted to the agent in good order is not an absolute undertaking to respond in damages for its loss or destruction if it occurs without the fault of the agent.[98] And, while by special contract the agent may be relieved from liability for his failure to use reasonable diligence, still to give a contract such an effect it must plainly appear that such was the intention of the parties.[99]

[§ 384] **(4) Gratuitous Agency.** If an agent acts gratuitously he cannot be held liable for a mere nonfeasance where he has never entered upon the undertaking;[1] but if he does enter upon it he may be held liable for negligence in the performance

his attending to his duties as conductor).

84. McLaughlin v. Simpson, 3 Stew. & P. (Ala.) 85.

85. Baynard v. Harrity, 6 Del. 200.

86. Baynard v. Harrity, 6 Del. 200.

87. Ala.—Louisville, etc., R. Co. v. Buffington, 131 Ala. 620, 31 S 592.

Ill.—Schmidt v. Pfau, 114 Ill. 494, 2 NE 522; Stanberry v. Moore, 56 Ill. 472.

Iowa.—Norton v. Melick, 97 Iowa 564, 66 NW 780.

La.—Davis v. Larguier, 2 La. Ann. 326; Bogert v. Dorsey, 14 La. 430.

Md.—Bannon v. Warfield, 42 Md. 22.

Mich.—Fick v. Runnels, 48 Mich. 302, 12 NW 204.

Minn.—Rice v. Longfellow Bros. Co., 82 Minn. 154, 84 NW 660; Lake City Flouring-mill Co. v. McVean, 32 Minn. 301, 20 NW 233.

N. Y.—Loeb v. Hellman, 33 N. Y. 601; Heinemann v. Heard, 50 N. Y. 27 [rev 58 Barb. 524]; Keystone Watch Case Co. v. Romero, 36 Misc. 381, 73 NYS 636; Brown v. Denison, 2 Wend. 593.

Pa.—Gheen v. Johnson, 90 Pa. 38.

S. C.—McCants v. Wells, 3 S. C. 569.

Tenn.—James v. Borgeois, 4 Baxt. 345; Weakley v. Pearce, 5 Heisk. 401.

Tex.—Williams v. O'Daniels, 35 Tex. 542.

Va.—Hale v. Wall, 22 Gratt. (63 Va.) 424; Betts v. Cralle, 1 Munf. (15 Va.) 238.

Eng.—Commonwealth Portland Cement Co. v. Weber, [1905] A. C. 66.

[a] **No warranty is implied,** in the contracts of locators, of the title of the land; good faith, ordinary skill and diligence, and no more are to be expected. Withers v. Thompson, 4 T. B. Mon. (Ky.) 323.

[b] **Deterioration of goods purchased.**—Where an agent is employed to buy a quantity of fish in barrels, with discretionary powers to do the best he can in executing the order, and he procures fish which have passed inspection, but, in consequence of the barrels not retaining the brine, the greater part of the fish is spoiled on their arrival, and the fish are sold at a great loss, this is not such a degree of negligence on the part of the agent as will authorize a recovery in damages. Forstall v. Fowle, 15 La. 299.

88. Page v. Wells, 37 Mich. 415; Lake City Flouring-mill Co. v. McVean, 32 Minn. 301, 20 NW 233.

[a] **Guaranty of performance.**—An agent, who has bound himself by a contract containing the terms of his agency, does not increase his liability by signing a mere guaranty of performance of his contract after such guaranty has been executed by a third party. Schultz v. Wise, 93 Nebr. 718, 141 NW 813.

89. Richardson v. Taylor, 136 Mass. 143; Page v. Wilson, 37 Mich. 415.

90. Smallhouse v. Keller, 142 Ky. 432, 134 SW 493; Furber v. Barnes, 32 Minn. 105, 19 NW 728; Dominion Express Co. v. Krigbaum, 18 Ont. L. 533, 13 OntWR 364, 924.

91. Richardson v. Taylor, 136 Mass. 143; Page v. Wells, 37 Mich. 415; Briere v. Taylor, 126 Wis. 347, 105 NW 817.

92. Iowa.—Rice v. Melendy, 41 Iowa 395.

Kan.—Watson v. Rickard, 25 Kan. 662.

La.—Barrett v. Zacharie, 5 La. Ann. 253.

Mass.—Howe v. Dewing, 2 Gray 476; Baltimore Mechanics' Bank v. Boston Merchants' Bank, 6 Metc. 13.

N. Y.—Hicks v. Minturn, 19 Wend. 550.

Pa.—Watson v. Muirhead, 57 Pa. 161, 98 AmD 213.

[a] **It is requiring too much of an agent** who has acted in good faith to oblige him to determine, at his peril, difficult questions of law which have not been adjudicated in this state, and upon customs not judicially recognized. Barrett v. Zacharie, 5 La. Ann. 253.

93. U. S.—Blumenthal v. Shaw, 77 Fed. 954, 23 CCA 590.

Ala.—McLaughlin v. Simpson, 3 Stew. & P. 85.

Ill.—Merrimac Paper Co. v. Illinois Trust, etc., Bank, 129 Ill. 296, 21 NE 787 [aff 30 Ill. A. 268]; Schmidt v. Pfau, 114 Ill. 494, 2 NE 522.

Ind.—Rochester v. Levering, 104 Ind. 562, 4 NE 203; Union Mut. L. Ins. Co. v. Buchanan, 100 Ind. 63.

Iowa.—Durward v. Hubbell, 149 Iowa 722, 128 NW 953 (holding that if defendant was employed by plaintiff to examine land and determine at what valuation in his judgment plaintiff should take it in exchange for other property and in good faith gave plaintiff his opinion thereon, he would not be liable for loss to plaintiff in exchanging, although he was mistaken as to the quality or value of the land).

Ky.—Steele v. Taylor, 4 Dana 445.

La.—Barrett v. Zacharie, 5 La. Ann. 253; Lesesne v. Cook, 16 La. 58; Forstoll v. Fowle, 15 La. 299.

Me.—Coombs v. Beede, 89 Me. 187, 36 A 104, 56 AmSR 406.

Mich.—Page v. Wells, 37 Mich. 415.

N. Y.—Milbank v. Dennistoun, 21 N. Y. 386.

N. C.—Long v. Pool, 68 N. C. 479.

Pa.—Stewart v. Parnell, 147 Pa. 523, 23 A 838.

[a] **This discretion is not deemed to be unlimited;** it must be exercised in a reasonable manner, and cannot be resorted to to justify acts which the principal could not be presumed to intend. Adams Express Co. v. Trego, 35 Md. 48; Ricker Nat. Bank v. Stone, 21 Okl. 833, 97 P 577.

94. Loeb v. Hellman, 33 N. Y. 601.

95. Varner v. Interstate Exch., 138 Iowa 201, 115 N.W 1111; Norton v. Melick, 97 Iowa 564, 66 NW 780; Loeb v. Hellman, 33 N. Y. 601.

96. Kan.—Avery Planter Co. v. Murphy, 6 Kan. A. 29, 49 P 626 (holding that, where defendant in a contract of agency with plaintiff agreed to verify from the record, and guarantee to be correct, the property statement of the purchasers of goods from plaintiff, and certified on the statement as follows: "We learn from personal examination of the record the statements made herein are reliable," and signed the same as agent, he was bound to make a personal examination of the record, and, if he failed to do so, he could not plead ignorance of what the record contained).

Mass.—Wareham Bank v. Burt, 5 Allen 113.

N. J.—Vermilye's Case, 43 N. J. Eq. 146, 10 A 605.

Oh.—Van Camp v. Gilbert, 1 Cinc. Super. 358.

Eng.—Sheppherd v. Maidstone, 10 Mod. 144, 88 Reprint 666; Morris v. Cleasby, 4 M. & S. 566, 105 Reprint 943.

97. Morris v. Cleasby, 4 M. & S. 566, 105 Reprint 943.

Liability of del credere agent see Factories [19 Cyc 133].

98. Norton v. Melick, 97 Iowa 564, 66 NW 780.

99. Geisse v. Franklin, 56 Conn. 83, 13 A 148 (holding that, where defendant agreed to conduct certain business for plaintiff for her benefit and as her representative, without accountability for the manner of conducting the same or for any errors of judgment in the conduct thereof, defendant was liable for losses in the business caused by his neglect).

1. Ala.—Morrison v. Orr, 3 Stew. & P. 49, 23 AmD 319.

Ky.—Vickery v. Lanier, 1 Metc. 133.

of the duties which he has undertaken.[3] A gratuitous agent is clearly liable if he is guilty of gross negligence,[3] or needlessly exposes his principal to the danger of loss;[4] but, except where the undertaking is one which implies the exercise of special or professional skill,[5] it is ordinarily decided that he will be held to a degree of responsibility greatly inferior to that of a hired agent,[6] and will not be liable in the absence of gross negligence.[7] It has been said, however, that to define what will constitute gross negligence on the part of a gratuitous agent is difficult if not impossible,[8] since what would be slight negligence in dealing with one matter or on the part of one person might be gross negligence in dealing with a different matter or on the part of a different person,[9] and that gross negligence is no more than a failure to exercise such care as the situation reasonably demands,[10] and that what will constitute such negligence depends upon all the circumstances of the case, including the subject matter and objects of the agency and the character, qualifications, and relations of the parties,[11] so that it is ordinarily a question of fact for the determination of the jury.[12] A gratuitous agent will not be liable if he acts in good faith and with ordinary prudence,[13] or exercises such care and diligence as would be exercised by a prudent person in the management of his own affairs;[14] and it has been held that he is not chargeable with gross negligence if he has exercised the same care in regard to his principal's property as he did in regard to his own.[15]

[§ 385] **(5) Employment Requiring Special Skill.** In case of an employment which requires special or professional skill an agent who professes or holds himself out as possessing such skill will be liable for losses due to his failure to possess or exercise the same,[16] and this is true notwith-

N. Y.—Thorne v. Deas, 4 Johns. 84.
Ont.—Baxter v. Jones, 6 Ont. L. 360, 2 OntWR 573, 23 CanLTOccNotes 258 [aff 4 Ont. L. 541, 1 OntWR 554, 22 CanLTOccNotes 372].
Newfoundl.—Young v. Attwood, 1 Newfoundl. 233.

2. Ark.—Charlesworth v. Whitlow, 74 Ark. 277, 85 SW 423.
Cal.—Samonset v. Mesnager, 108 Ca. 354, 41 P 337; Herrick v. Hodges, 13 Cal. 431.
D. C.—Battelle v. Cushing, 21 D. C. 59.
Ky.—Vickery v. Lanier, 1 Metc. 133.
La.—Montillet v. U. S. Bank, 1 Mart. N. S. 365; Durnford v. Paterson, 7 Mart. 460, 12 AmD 514.
Md.—Williams v. Higgins, 30 Md. 404.
Mass.—Dodge v. Perkins, 9 Pick. 368.
Tenn.—Anthony v. Smith, 9 Humphr. 508.
Eng.—Wilkinson v. Coverdale, 1 Esp. 75.
Ont.—Baxter v. Jones, 6 Ont. L. 360, 2 OntWR 573, 23 CanLTOccNotes 258 [aff 4 Ont. L. 541, 1 OntWR 554, 22 CanLTOccNotes 372]; Johnston v. Graham, 14 U. C. C. P. 9.
Newfoundl.—Young v. Attwood, 1 Newfoundl. 233.

3. U. S.—Preston v. Prather, 137 U. S. 604, 11 SCt 162, 34 L. ed. 788.
Ark.—Charlesworth v. Whitlow, 74 Ark. 277, 85 SW 423 (holding that, where lumber was received by the agents of the owners under such circumstances that their failure to discover and account therefor would amount to gross negligence, they were liable for its value, unless they could show that they still had the lumber or could account for its loss, whether they were remunerated agents or merely gratuitous bailees).
Cal.—Samonset v. Mesnager, 108 Cal. 354, 41 P 337.
Ill.—Gray v. Merriam, 148 Ill. 179, 35 NE 810, 39 AmSR 172, 32 LRA 769 and note.
Miss.—Richardson v. Futrell, 42 Miss. 525.
N. H.—Hammond v. Hussey, 51 N. H. 40, 12 AmR 41.
N. C.—Staton v. Bell, 9 N. C. 145, 11 AmD 744.
Oh.—Grant v. Ludlow, 8 Oh. St. 1.
Can.—Worsley v. Brunton, 12 WestLR 531.

[a] **Gratuitous agent to lend money.**—A gratuitous agent for the lending of the money of his principal is bound to exercise good faith and ordinary diligence, and to act with sound discretion in investing it. It is not a sound discretion to invest it on the mere personal security of the person to whom it is lent; and if he so lent it, and neglected to collect the money for the principal when he might have done so, because he feared that if he should attempt to collect it the debtor would be crippled and rendered unable to pay a debt owed to himself and his partner, until the debtor became bankrupt, he is guilty of gross negligence in the management of the money intrusted to him and is liable for its loss. Samonset v. Mesnager, 108 Cal. 354, 41 P 337.

4. Persch v. Quiggle, 57 Pa. 247.

5. Shiells v. Blackburne, 1 H. Bl. 158, 126 Reprint 94. See also infra § 385.

6. U. S.—Walker v. Smith, 29 F. Cas. No. 17,086, 1 Wash. C. C. 152, 4 Dall. 389, 1 L. ed. 878.
Ala.—Haynie v. Waring, 29 Ala. 263.
Ark.—Lyon v. Tams, 11 Ark. 189.
Ill.—Stewart v. Butts, 45 Ill. A. 512.
Ky.—Sodowsky v. McFarland, 3 Dana 204.
La.—Bataille v. Ribet, 35 La. Ann. 1203 (holding that an agent without compensation is bound to use only prudence in administration and cannot be held liable for losses which such administration could not avail).
Mass.—Foster v. Essex Bank, 17 Mass. 479, 9 AmD 168.
Miss.—Moore v. Gholson, 34 Miss. 372; Lampley v. Scott, 24 Miss. 528.
N. Y.—Beardslee v. Richardson, 11 Wend. 25, 25 AmD 596.
N. C.—Stanton v. Bell, 9 N. C. 145, 11 AmD 744.
S. C.—Nixon v. Bogin, 26 S. C. 611, 2 SE 302.
Tenn.—Kirtland v. Montgomery, 1 Swan 452.
Va.—Pate v. McClure, 4 Rand. (25 Va.) 164.
Wis.—Briere v. Taylor, 126 Wis. 347, 105 NW 817.

"It is often said, that a gratuitous agent is liable for gross negligence only; but without regard to degrees of negligence, it is plain that the duty imposed upon such an agent is less stringent than when the service undertaken is founded upon a consideration paid." Higgins v. McCabe, 126 Mass. 12, 20, 30 AmR 642.

7. Eddy v. Livingston, 35 Mo. 487, 88 AmD 122; Grant v. Ludlow, 8 Oh. St. 1; Burgoyne v. Clarkson, 1 Oh. Dec. (Reprint) 119, 2 WestLMonth 325; Doorman v. Jenkins, 2 A. & E. 256, 29 ECL 132, 111 Reprint 99; Shiells v. Blackburne, 1 H. Bl. 158, 126 Reprint 94. But see Samonset v. Mesnager, 108 Cal. 354, 41 P 337 (where the court, although holding that the evidence showed gross negligence, said that a gratuitous agent is bound to exercise "good faith and ordinary diligence"); Anthony v. Smith, 9 Humphr. (Tenn.) 508 (holding, without any reference to the different degrees of negligence, that an agent, although acting gratuitously, "was bound to have used such diligence as became a prudent man in reference to his own interests; and, if he failed in this, he would be responsible"). And in Briere v. Taylor, 126 Wis. 347, 360, 105 NW 817, the court, in discussing this rule, said: "An examination of the authorities, however, upon which the text referred to is grounded, indicates that the term gross negligence is not used in the sense in which it is understood here, but rather in the sense of inexcusable failure,—mere inadvertence,—to exercise the care which the particular person is accustomed to exercise in the same and similar cases of his own."

[a] **An agent acting as a gratuitous bailee** of the principal's property is not liable in the absence of gross negligence. Doorman v. Jenkins, 2 A. & E. 256, 29 ECL 132, 111 Reprint 99. See also Bailments [5 Cyc 186].

8. Grant v. Ludlow, 8 Oh. St. 1.

9. Grant v. Ludlow, 8 Oh. St. 1.

10. Preston v. Prather, 137 U. S. 604, 11 SCt 162, 34 L. ed. 788; Gray v. Merriam, 148 Ill. 179, 35 NE 810, 39 AmSR 172, 32 LRA 769 and note.

11. Gray v. Merriam, 148 Ill. 179, 35 NE 810, 39 AmSR 172, 32 LRA 769 and note; Eddy v. Livingston, 35 Mo. 487, 88 AmD 122; Grant v. Ludlow, 8 Oh. St. 1; Doorman v. Jenkins, 2 A. & E. 256, 29 ECL 132, 111 Reprint 99.

12. See infra §§ 729–730.

13. Eddy v. Livingston, 35 Mo. 487, 88 AmD 122.

[a] **A mere mistake** (1) in performing a gratuitous act at the request of another will not create a liability. Chapman v. Clements, 56 SW 646, 22 KyL 17. (2) Thus the secretary of a producers' association, who served gratuitously, was not liable for a mere mistake in paying money for the benefit of certain members of the association, which, upon a proper accounting and construction of the association agreement, should have been otherwise applied. Briere v. Taylor, 126 Wis. 347, 105 NW 817.

14. Pate v. McClure, 4 Rand. (25 Va.) 164.

15. Shiells v. Blackburne, 1 H. Bl. 158, 126 Reprint 94 (holding, where a general merchant voluntarily and without reward undertook to enter at the custom-house for exportation, a parcel of goods for B together with a parcel of his own of the same sort, and made the entry under a wrong denomination, whereby both parcels were seized, that, having taken the same care of the goods of B as of his own, and having received no reward, and not being of a profession or employment which necessarily implied skill in what he undertook, he was not liable to an action for the loss).

16. Ill.—Lasher v. Colton, 80 Ill. A. 75.
Ind.—Tyson v. State Bank, 6 Blackf. 225, 38 AmD 139.
N. Y.—Isham v. Post, 141 N. Y. 100, 35 NE 1084, 38 AmSR 766 and note, 23 LRA 90 [rev 71 Hun 184, 23 NYS 211, 1168].
Pa.—Lawall v. Groman, 180 Pa. 532, 37 A 98, 57 AmSR 662.

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standing the agency is gratuitous.[17] An agent, although professing special skill, does not, however, insure the success of the undertaking or guarantee against mistakes or errors of judgment;[18] but is held only to the exercise of the care and skill of one ordinarily skilled and competent in the particular business or profession,[19] and is judged with reference to the standards and degree of skill and knowledge existing at the time the services are rendered.[20]

A principal cannot demand or expect the exercise of special skill if he employs in an undertaking requiring it an agent who does not profess such skill,[21] or who he knows does not possess it;[22] in such cases the agent will not be liable if he acts in good faith and with due care according to such skill as he does possess.[23]

[§ 386] **b. Particular Agencies or Undertakings —(1) In General.** The rule requiring agents to exercise reasonable care, skill, and diligence applies to all classes of agents, appointed for all kinds of purposes.[24]

[§ 387] **(2) Agent to Buy or Sell.** An agent to buy or sell property for his principal is bound to use reasonable care and diligence in making the purchase or sale, and will be liable for losses which the principal may sustain by reason of his negligence in this regard,[25] as where, without authority to sell on credit,[26] he sells on credit instead of for cash;[27] or where he fails to exercise reasonable care and diligence to sell for a fair and adequate price;[28] or, in case he is authorized to sell on credit,

Wis.—Shipman v. State, 43 Wis. 381; Kuehn v. Wilson, 13 Wis. 104.

Eng.—Willson v. Brett, 12 L. J. Exch. 264.

Can.—Hamilton Provident, etc., Soc. v. Bell, 1 CanLTOccNotes 105.

Applications of rule: To architects see Builders and Architects [6 Cyc 34]. To attorneys see Attorney and Client [4 Cyc 964]. To bailees see Bailments [5 Cyc 180]. To physicians and surgeons see Physicians and Surgeons [30 Cyc 1575].

17. Durnford v. Patterson, 7 Mart. (La.) 460, 12 AmD 514; Isham v. Post, 141 N. Y. 100, 35 NE 1084, 38 AmSR 766 and note, 23 LRA 90 [rev 71 Hun 184, 23 NYS 211, 1168]; Willson v. Brett, 12 L. J. Exch. 264. See generally supra § 384.

[a] **It is equivalent to gross negligence** which will render even a gratuitous agent liable if, in an employment which implies special skill, he fails to possess or exercise such skill. See The New World v. King, 16 How. (U. S.) 469, 14 L. ed. 1019; Eddy v. Livingston, 35 Mo. 487, 88 AmD 122; Shiells v. Blackburne, 1 H. Bl. 158, 126 Reprint 94.

18. Coombs v. Beede, 89 Me. 187, 36 A 104, 56 AmSR 406; Chapel v. Clark, 117 Mich. 638, 76 NW 62, 72 AmSR 587.

19. Chapel v. Clark, 117 Mich. 638, 76 NW 62, 72 AmSR 587; Malone v. Gerth, 100 Wis. 166, 75 NW 972.

[a] **Discretion as to quantity and nature of service.**—Where an agent is employed to obtain the benefit of his expert knowledge in any particular business, and is clothed with discretion as to the quantity and nature of service to be rendered, he is liable only for the proper exercise of this discretion for the benefit of his principal. Fitzgerald Citizens' Bank v. Benton, 10 Ga. A. 808, 73 SE 417.

20. Chapel v. Clark, 117 Mich. 638, 76 NW 62, 72 AmSR 587.

21. Nixon v. Bogin, 26 S. C. 611, 2 SE 302.

22. Morrison v. Orr, 3 Stew. & P. (Ala.) 49, 23 AmD 319; Felt v. Rockingham School Dist. No. 2, 24 Vt. 297.

23. Morrison v. Orr, 3 Stew. & P. (Ala.) 49, 23 AmD 319; Felt v. Rockingham School Dist. No. 2, 24 Vt. 297; Briere v. Taylor, 126 Wis. 347, 105 NW 817.

24. Bowerman v. Rogers, 125 U. S. 585, 8 SCt 986, 31 L. ed. 815 (holding that an agent to attend to entries of goods at the customhouse, and instructed to appeal from certain illegal assessments of duties and employ counsel, is liable for damages if he allows the time to elapse within which suit can be brought to recover the illegal duties without entering suit); Walker v. State Bank, 9 N. Y. 582, Seld. 257 (agent to present a draft for acceptance); Vernier v. Knauth, 7 App. Div. 57, 39 NYS 784 (agent failing to enter goods before statute increasing tariff duties went into effect).

Applications of rule: To attorney see Attorney and Client [4 Cyc 964]. To brokers see Brokers [19 Cyc 204]. To factors see Factors [19 Cyc 118]. To insurance agents and brokers see Insurance [22 Cyc 1437, 1448].

[a] **An agent to procure the acceptance of a draft upon a corporation** is liable to his principal for the amount of the draft, if it is lost in consequence of the agent's taking acceptance thereof by the secretary and treasurer of the corporation alone, where he knows that that officer had no authority to give the acceptance. Kirkeys v. Crandall, 90 Tenn. 532, 18 SW 246.

[b] **An agent to rent lands and collect the rents** is liable to his principal for neglect only where he has, or with reasonable diligence could have, collected rent, or rented the lands to some one who could or would have paid rent therefor. Burpe v. Van Eman, 11 Minn. 327.

25. Ark.—Arkansas Fertilizer Co. v. Banks, 95 Ark. 86, 128 SW 566.

Cal.—Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 29 P 640, 28 AmSR 122; Harlan v. Ely, 68 Cal. 522, 9 P 947.

Ga.—Montgomery v. Hunt, 99 Ga. 499, 27 SE 701 (holding that, under the terms of an agreement by which the maker of a note became agent for the sale of a patented article, the note being given as collateral security for the payment to the principal of a certain part of the commissions on such sales, it was incumbent upon the maker to use reasonable diligence in endeavoring to effect such sales; and that, if the failure to make them resulted solely from a want of such diligence, he would, as to the commissions, be chargeable as if the sales had been actually made, to the extent that they could have been made by the exercise of such diligence; otherwise, he would not); National Produce Distributing Co. v. Cairo Melon Growers' Assoc., 10 Ga. A. 338, 73 SE 606.

Ill.—Pulsifer v. Shepard, 36 Ill. 513 (holding that an agent neglecting to sell when directed to do so is liable to his principal for the loss sustained by reason of his failure).

Ind.—Babcock v. Orbison, 25 Ind. 75.

Iowa.—Robinson Mach. Works v. Vorse, 52 Iowa 207, 2 NW 1108.

Kan.—Frick v. Larned, 50 Kan. 776, 32 P 383.

La.—Kinney v. Crane, 17 La. 417; Chew v. Keane, 2 La. 120; Barron v. Blanchard, 2 Mart. N. S. 662.

Minn.—Rice v. Longfellow Bros. Co., 82 Minn. 154, 84 NW 660.

N. J.—Lissberger v. Kellogg, 78 N. J. L. 85, 73 A 67 (holding that an agent to buy goods abroad is under a duty, if he cannot procure the goods desired, to so inform his principal, and, if he buys an inferior grade, is liable for damages).

N. D.—Morris v. Bradley, 20 N. D. 646, 128 NW 118.

Wash.—Crawford v. Cochran, 2 Wash. T. 117, 3 P 837 (holding that an agent selling logs is liable for loss caused by inaccurate scaling if he accepts the purchaser's scaling without having the logs measured by the official scaler).

Wis.—Kountz v. Gates, 78 Wis. 415, 47 NW 729.

Eng.—Solomon v. Barker, 2 F. & F. 726; Smith v. Barton, 15 L. T. Rep. N. S. 294; Mainwaring v. Brandon, 8 Taunt. 202, 4 ECL 109, 129 Reprint 361.

Ont.—Deady v. Goodenough, 5 U. C. C. P. 163.

[a] **Failure to sell.**—Where defendant agrees to sell specified quantities of certain metals for plaintiff, the fact that the contract does not specify the price at which sales shall be made does not preclude a recovery of damages for failure to perform in the absence of any showing that the price fixed by plaintiff was unreasonable, or prevented performance by defendant. Magnolia Metal Co. v. Sterlingworth Railway-Supply Co., 53 NYS 490 [aff 162 N. Y. 607 mem, 57 NE 1116 mem].

[b] **Exclusive agents.**—Where a contract is signed by the obligors, by which they appoint the obligees their exclusive agents for a certain territory, and agree to sell them stone of certain kinds at certain prices and to quote no prices and make no sales to others in that territory without the obligees' consent, its acceptance, by the signature of the obligees, binds the latter to be the exclusive agents of the obligors in the territory named, including the performance of the duties of good faith and due diligence in bringing the obligors' stone to the notice of possible customers for the purpose of sale to them. W. G. Taylor Co. v. Bannerman, 120 Wis. 189, 97 NW 918.

26. **As to when agents may sell on credit** see supra §§ 234, 253.

27. U. S.—Scanlan v. Hodges, 52 Fed. 354, 3 CCA 113.

Cal.—Harlan v. Ely, 68 Cal. 522, 9 P 947.

Ga.—Loveless v. Fowler, 79 Ga. 134, 4 SE 103, 11 AmSR 407.

Ind.—Babcock v. Orbison, 25 Ind. 75.

Mass.—Hemenway v. Hemenway, 5 Pick. 389.

Mich.—Morrison v. Cole, 30 Mich. 102.

Mo.—McAnaw v. Moore, 163 Mo. A. 598, 147 SW 220.

N. D.—Aultman, etc., Mach. Co. v. Runck, 23 N. D. 579, 137 NW 831 (where the contract rendered the agent liable for selling on credit).

Tenn.—Scoby v. Woods, 3 Baxt. 66.

Vt.—Thompson v. Babcock, Brayt. 24.

Wis.—Hall v. Storrs, 7 Wis. 253.

28. Ark.—Arkansas Fertilizer Co. v. Banks, 95 Ark. 86, 128 SW 566.

Minn.—Chase v. Blaisdell, 4 Minn. 90.

S. C.—Willson v. Imperial Fertilizer Co., 67 S. C. 467, 46 SE 279.

Vt.—Bigelow v. Walker, 24 Vt. 149, 58 AmD 156.

Eng.—Solomon v. Barker, 2 F. & F. 726.

[a] **He must sell at the best price obtainable** notwithstanding he is given

where he fails to ascertain the financial standing of a purchaser,[29] or to take fair securities for the purchase price;[30] or where he sells to persons of questionable standing without taking security;[31] or where he is negligent in regard to collecting for property sold, where it is his duty to do so,[32] or in accepting payment in something other than money;[33] or where, in case of purchases for his principal, he is negligent in regard to ascertaining the value or quality of the property bought.[34]

Discretionary powers. Where the time, terms, and place of sale are left to the discretion of the agent, he is required to use only reasonable skill and diligence, to act fairly, and to use his best judgment;[35] and if he has acted with reasonable skill and ordinary care and diligence he will not be liable,[36] although, if he has expressly agreed to realize a certain price for the property intrusted to him to sell, he will be liable on his contract.[37] Thus where the agent is authorized to sell on credit, he is not, as a general rule, unless he acts under a del credere commission,[38] liable to his principal for losses where he has used reasonable diligence in selling to trustworthy persons.[39]

authority to sell at a lower price. Kellogg v. Keeler, 27 Ill. A. 244; Hall Min. Co. v. Consolidated Fuel Co., 69 W. Va. 47, 70 SE 857.

29. Arkansas Fertilizer Co. v. Banks, 95 Ark. 86, 128 SW 566; Harper v. Buder, 88 Iowa 701, 54 NW 203; Robinson Mach. Works v. Vorse, 52 Iowa 207, 2 NW 1108; Frick v. Larned, 50 Kan. 776, 32 P 383; Clark v. Roberts, 26 Mich. 506. See also Shipman v. Seymour, 40 Mich. 274.

[a] **Instructions to accept none but "undoubted paper."**—A dealer in machinery ordered a machine from plaintiffs for a customer, and the order was accepted on condition that none but "undoubted paper" should be taken in payment. The machine was shipped, and the dealer was directed to take property statements from the makers of the notes taken in payment, which he did, but exercised no further diligence to ascertain their truth or the solvency of the parties. The statements were in fact false and fraudulent and the paper worthless. It was held that the dealer's estate was liable for the loss. Robinson Mach. Works v. Vorse, 52 Iowa 207, 2 NW 1108.

30. Singmaster v. Beckett, 86 Kan. 494, 121 P 339 (holding that a salesman who took bad notes contrary to his directions was liable for the loss, if he knew or should have known that they were uncollectable when taken); Morris v. Bradley, 20 N. D. 646, 128 NW 118 (holding that, where an agent is authorized to sell his principal's property on time, and to take "fair" securities for the purchase price, a failure to exercise reasonable diligence in so doing renders him liable to his principal for the resulting loss). See also International Harvester Co. v. McKeever, 21 S. D. 91, 109 NW 642.

31. Chew v. Keane, 2 La. 120.

32. Ark.—Arkansas Fertilizer Co. v. Banks, 95 Ark. 86, 128 SW 566.

Ill.—Deshler v. Beers, 32 Ill. 368, 83 AmD 274. See also Aultman v. Van Duyn, 18 Ill. A. 655.

Ind.—Babcock v. Orbison, 25 Ind. 75.

La.—Kinney v. Crane, 17 La. 417.

Me.—Folsom v. Mussey, 8 Me. 400, 23 AmD 522.

Mass.—Hemenway v. Hemenway, 5 Pick. 389.

Pa.—Brown v. Arrott, 6 Watts & S. 402; Harvey v. Turner, 4 Rawle 223.

W. Va.—Simmons v. Looney, 41 W. Va. 738, 24 SE 677.

Wis.—J. I. Case Threshing Mach. Co. v. Folger, 136 Wis. 468, 117 NW 944 (holding, where an agency contract prohibited the agents from delivering machines to purchasers without settlement, and a separator was sent to the agents for delivery to a purchaser, and, having been unloaded and the purchaser notified, they permitted the machine to be left where the purchaser could obtain it, telephoned him, and sent him a message to get the machinery and settle for it, that, the purchaser having taken the machinery without settlement, the agents were liable to their principal as for breach of contract).

[a] **Rule of principal requiring agent to collect.**—One appointed to sell goods on commission, who agreed in the contract to conform to all rules the employer might make for the conduct of his business, is bound to comply with a rule requiring him to collect the money for goods he himself has sold. Durand, etc., Co. v. Rockwell, 23 Ind. A. 11, 54 NE 771.

33. Paul v. Grimm, 165 Pa. 139, 30 A 721, 44 AmSR 648 (holding that where an agent to sell accepts in payment certain bonds instead of money, and the bonds prove to be worthless, he will be liable for the loss); Childs v. Boyd, 43 Vt. 532 (holding that, where an agent to sell takes a colt in part payment and the colt dies, the agent is liable). See also infra § 390.

[a] **Authority to take notes conditionally.**—Where an agent is appointed to sell a manufacturer's product for cash or notes, on condition that, if any of the notes at settlement are found to be worthless at the time of sale, they are to be replaced by such agent with cash or secured notes acceptable to the company, such condition applies to notes accepted at the settlement, but afterward found by the company to have been worthless at the time of sale. Wilson v. McCormick Harvesting Mach. Co., 96 Ill. A. 545. See also International Harvester Co. v. McKeever, 21 S. D. 91, 109 NW 642.

34. Rice v. Longfellow Bros. Co., 82 Minn. 154, 84 NW 660; Smith v. Barton, 15 L. T. Rep. N. S. 294; Mainwaring v. Brandon, 8 Taunt. 202, 4 ECL 109, 129 Reprint 361.

35. Betts v. Planters', etc., Bank, 3 Stew. (Ala.) 18; Lesesne v. Cook, 16 La. 58; Adams v. Capron, 21 Md. 186, 83 AmD 566; Willson v. Imperial Fertilizer Co., 67 S. C. 467, 46 SE 279 (holding that, where an agent under a power of attorney was appointed to take charge of the business of a party who had contracted to sell fertilizers, and prices advanced during his agency to such an extent that he was in a position, without incurring further expense, to dispose of all fertilizers unsold at a good profit, whereas if he had waited to sell to the country trade with the usual proportion of credit sales, he would have run the risk of loss from bad debts and the danger of a decline in prices, his act in making such sale showed reasonable care and prudence).

[a] **All that can be required of the agent is** (1) that he act fairly and use his best judgment; and where an agent received cotton upon which he made an advance and agreed to ship it to New Orleans or New York, and have it sold for the best price it would bring, the agent to have the entire control of it, and he shipped it to New York where it sold for less than it would have brought in New Orleans, he was not responsible for the loss. Betts v. Planters', etc., Bank, 3 Stew. (Ala.) 18. (2) So where an agent was engaged in selling fertilizers, his act in closing out all the fertilizers in bulk showed prudence and care in view of a letter from one fertilizer company to another, which was using its brand, claiming the right to terminate such use on demand. Willson v. Imperial Fertilizer Co., 67 S. C. 467, 46 SE 279.

36. La.—Bogert v. Dorsey, 14 La. 430 (holding that an agent to whom goods are consigned to sell on commission without special instructions as to sale is not liable for losses by deterioration where he has acted with diligence and to the best of his ability for the interest of the principal); Bailey v. Baldwin, 8 Mart. N. S. 114 (holding that an agent who receives goods to be shipped to another place and sold is not liable if the person to whom he shipped them was in good standing at the time of the shipment).

Me.—Washburn v. Blake, 47 Me. 316 (holding that, where the cashier of a bank was employed to sell certain shares therein at a fixed price, but before completion of the sales the sale was enjoined and the bank proved insolvent, he could not be held responsible for the supposed value of the stock, no neglect being shown on his part in forwarding the sale).

Mich.—Fick v. Runnels, 48 Mich. 302, 12 NW 204 (holding that, where a principal authorizes his surety to sell certain of his property, indemnify himself, and use the rest of the proceeds for specific purposes, he cannot complain, if on his own advice the surety takes paper instead of cash in payment, or if he takes it in his own name, so long as he acts in a careful, prudent, honest, and businesslike way, and with such care and judgment as a reasonable man should exercise).

Minn.—Rice v. Longfellow Bros. Co., 82 Minn. 154, 84 NW 660.

N. Y.—Gilchrist v. Brooklyn Grocers' Mfg. Assoc., 66 Barb. 390 [aff 59 N. Y. 495].

Philippine.—Nepomuceno v. Heredia, 7 Philippine 563 (holding that, where an agent acts in good faith and exercises reasonable care and diligence in examining title to land purchased by his principal, he cannot be held responsible for hidden defects in the title).

Eng.—Alsop v. Silvester, 1 C. & P. 107, 12 ECL 72.

37. Dunn v. Mackey, 80 Cal. 104, 22 P 64.

38. See generally Factors [19 Cyc 133].

39. U. S.—Evans v. Lawton, 84 Fed. 233; Forrestier v. Bordman, 9 F. Cas. No. 4,945, 1 Story 43.

Ky.—De Lazardi v. Hewitt, 7 B. Mon. 697 (holding that a general agent to sell is not personally liable for losses arising from sales on credit, where he adheres to the custom of the place of the sales, and the purchasers are good at the date of the sale, and the principal had reasonable notice).

La.—Bird v. Dix, 4 Mart. N. S. 254 (holding that an agent who sells on credit is not liable to the principal until the price is paid unless the sale was made improperly).

Me.—Greely v. Bartlett, 1 Me. 172, 10 AmD 54.

Mich.—Birdsell Mfg. Co. v. Brown, 96 Mich. 213, 55 NW 801; Fick v. Runnels, 48 Mich. 302, 12 NW 204.

Minn.—Plano Mfg. Co. v. Buxton, 36 Minn. 203, 30 NW 668.

S. C.—Tate v. Marco, 27 S. C. 493, 4 SE 71.

Tex.—A. B. Frank Co. v. Waldrup, (Civ. A.) 71 SW 298.

[a] **A general agent is not responsible for the solvency of a purchaser;** it is sufficient that the pur-

Rescinding sale. After a sale has been consummated the agent has no power, without his principal's consent, to rescind the sale,[40] and by so doing he will render himself liable to his principal for the resulting loss.[41]

[§ 388] **(3) Agent to Collect—(a) In General.**[42] An agent to collect a debt or claim must exercise ordinary care, skill, and diligence in the performance of all the duties incident to the undertaking, and will be liable to his principal for any loss which his negligence in this respect may occasion;[43] but if the agent has acted in good faith and with ordinary care, skill, and diligence he will not be liable,[44] except in cases where he has guaranteed the collection,[45] nor will he be liable if the principal himself has prevented him from collecting.[46]

What will amount to due care on the part of the agent will depend upon the nature of the undertaking and all the circumstances in the particular case,[47] and is ordinarily a question of fact for the jury.[48] If the agent is unable to make a collection intrusted to him, it is his duty to notify the principal,[49] and he must return the notes or other obligations intrusted to him or furnish a sufficient excuse for not doing so.[50] A mere offer to return them after a lapse of time is not sufficient to relieve him from liability unless he shows that he has used due care and diligence in endeavoring to collect them.[51]

Surrender or release of securities. Where claims accompanied with securities are placed in the hands of an agent for collection, it is negligence for the agent to deliver the securities to the debtor without receiving payment, and he will be liable to his principal for the resulting loss.[52]

An agent who is merely to receive money after it not thereby become a collecting agent. He is not responsible, therefore, for not causing a suit to be instituted in another precinct, in which the maker resided. White v. Goffe, 24 Tex. 658.

45. U. S.—Ex p. Flannagans, 9 F. Cas. No. 4,855, 2 Hughes 264.
Ga.—Simmons v. Martin, 54 Ga. 47.
Md.—Lewis v. Brehme, 33 Md. 412, 3 AmR 190.
R. I.—Balderston v. National Rubber Co., 18 R. I. 338, 27 A 507, 49 AmSR 772.
Tenn.—Arbuckle v. Kirkpatrick, 93 Tenn. 221, 39 SW 3, 60 AmSR 854, 36 LRA 285.
Tex.—Milburn Mfg. Co. v. Peak, 89 Tex. 209, 34 SW 102.
Wis.—Osborne v. Rider, 62 Wis. 235, 22 NW 394.
Eng.—Ex p. White, L. R. 6 Ch. 397.

Del credere agent see Factors [19 Cyc 133].

46. Tate v. Marco, 27 S. C. 493, 4 SE 71 (holding that, if the principal takes notes out of the hands of the agent, the latter cannot be held liable for thereafter failing to collect the money due thereon).

47. Buell v. Chapin, 99 Mass. 594, 97 AmD 58.

48. See infra §§ 729, 730.

49. Wingate v. Mechanics' Bank, 10 Pa. 104 (holding that, if an agent is not successful in a reasonable time in collecting a note, he should give notice to the principal and return the note). See generally supra § 369.

50. Stancill v. Gilmore, 6 La. Ann. 763; Wiley v. Logan, 95 N. C. 358; Brumble v. Brown, 71 N. C. 513; Scoby v. Woods, 3 Baxt. (Tenn.) 66.

51. Livaudais v. Denis, 4 La. Ann. 300; Natchitoches Police Jury v. Bullit, 8 Mart. N. S. (La.) 328; Brumble v. Brown, 71 N. C. 513.

52. Milwaukee Nat. Bank v. Oswego City Bank, 103 U. S. 668, 26 L. ed. 417; Scanlan v. Hodges, 52 Fed. 354, 3 CCA 113; Wareham Bank v. Burt, 5 Allen (Mass.) 113. See also supra § 277.

[a] **Satisfaction of mortgage for less than due.**—An agent who, through a mistake in counting the money, discharges a mortgage, which he is authorized to collect, for a less sum than is actually due thereon, is liable to his principal for the deficiency. Kempker v. Roblyer, 29 Iowa 274.

[b] **Fraudulent release of mortgage.**—Where a person, having in his possession a note and mortgage, with a power of attorney from the mortgagee, and knowing of an assignment of such note and mortgage, although it is unrecorded, secures a settlement with the mortgagors and, under his power of attorney, releases the mortgage, takes a deed of the land to himself, and then resells it, a judgment for the amount of the debt and interest is properly entered against him. Persons v. Smith, 12 N. D. 403, 97 NW 551.

chaser was in good credit at the time of the sale. Duggan v. Trimmingham, 1 Newfoundl. 167.

40. See supra §§ 242, 243, 252.

41. Stoddart v. Warren, 23 F. Cas. No. 13,471; Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 29 P 640, 28 AmSR 122; Kountz v. Gates, 78 Wis. 415, 47 NW 729.

[a] **Waiver by principal.**—An agent who allows the purchaser to return unsatisfactory goods cannot be charged by his principal with a share of their value after the latter has caused the agent to send them back to him and has kept them. Filer v. Jenks, 33 Mich. 585.

42. **Authority of agent to collect or receive payment** see generally supra §§ 256-279.
Authority of selling agent to collect or receive payment see supra §§ 239-241, 254.

43. U. S.—Kingston v. Kincaid, 14 F. Cas. No. 7,822, 1 Wash. C. C. 454.
Ind.—Rochester v. Levering, 104 Ind. 562, 4 NE 203; Hall v. Junction R. Co., 15 Ind. 362.
Ky.—Prentice v. Buxton, 3 B. Mon. 35.
La.—Bush v. Guion, 6 La. Ann. 797; Police v. Hebert, 2 La. Ann. 149; Littlejohn v. Ramsay, 4 Mart. N. S. 655 (holding that an agent to collect a note who surrenders the note and takes another payable to himself at a later date and fails to collect the same is liable for the amount).
Mass.—Hemenway v. Hemenway, 5 Pick. 389; Baltimore Mechanics' Bank v. Boston Merchants' Bank, 6 Metc. 13.
Minn.—Bardwell v. American Express Co., 35 Minn. 344, 28 NW 925.
Mo.—Dyas v. Hanson, 14 Mo. A. 363.
N. H.—Richards v. New Hampshire Ins. Co., 43 N. H. 263.
N. Y.—Meadville First Nat. Bank v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 AmR 618 [rev 16 Hun 332]; Walker v. State Bank, 9 N. Y. 582, Seld. 257.
N. C.—Wiley v. Logan, 95 N. C. 358; Brumble v. Brown, 71 N. C. 513.
N. D.—Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 NW 859.
Pa.—Wingate v. Mechanics' Bank, 10 Pa. 104; Miller v. Gettysburg Bank, 8 Watts 192, 34 AmD 449.
Porto Rico.—Olivieri v. Tomei, 1 Porto Rico Fed. 125 (holding that it is the duty of an agent to collect interest on collections which are overdue).
S. C.—Dickson v. Screven, 23 S. C. 212.
Tenn.—Kirkeys v. Crandall, 90 Tenn. 532, 18 SW 246; Kinnard v. Willmore, 2 Heisk. 619.
Tex.—Diamond Mill Co. v. Groesbeck Nat. Bank, 9 Tex. Civ. A. 31, 29 SW 169.
W. Va.—Simmons v. Looney, 41 W. Va. 738, 24 SE 677.

[a] **Express companies** acting as collecting agents are subject to the same duties and liabilities as other collecting agents, both with regard to their own acts and to the acts of subagents employed by them. American Express Co. v. Haire, 21 Ind. 4, 83 AmD 334; Bardwell v. American Express Co., 35 Minn. 344, 28 NW 925; Knapp v. U. S., etc., Express Co., 55 N. H. 348; Palmer v. Holland, 51 N. Y. 416, 10 AmR 616. Compare Merrill v. Wells, 50 Cal. 108.

[b] **Failure to procure proper amount.**—(1) An agent to settle and collect a claim against a railroad company, although invested with sufficient discretion to justify his taking a promissory note in payment, will, in case he sells the note before maturity for less than its face value, be liable to the principal for the full amount thereof Allen v. Brown, 44 N. Y. 228. (2) Where an agent collects both for himself and for his principal, and accepts a part of the amount due and grants indulgence as to the rest, but collects enough to pay the principal, he is bound to pay the principal in full and cannot apportion the amount collected. Simmons v. Looney, 41 W. Va. 738, 24 SE 677.

44. U. S.—Lawrence v. McCalmont, 2 How. 426, 11 L. ed. 326.
Ala.—Morrison v. Orr, 3 Stew. & P. 49, 23 AmD 319.
Iowa.—Darr v. Darr, 59 Iowa 81, 12 NW 765 (holding that, where the agent of a foreign principal was given notes to collect, and the principal died, thus terminating the agency, the agent was not liable for negligence in failing to get a domestic administrator appointed to collect the notes).
Ky.—Ford v. Stewart, 4 B. Mon. 326.
La.—Evans v. Hatcher, 10 La. Ann. 98; Stancill v. Gilmore, 6 La. Ann. 763.
Mass.—Buell v. Chapin, 99 Mass. 594, 97 AmD 58; Baltimore Mechanics' Bank v. Boston Merchants' Bank, 6 Metc. 13.
Mich.—Reed v. Northrup, 50 Mich. 442, 15 NW 543.
Minn.—Burpe v. Van Eman, 11 Minn. 327.
N. Y.—Moore v. Coler, 114 App. Div 301, 99 NYS 846; Buckingham v. Payne, 36 Barb. 81.
N. C.—Bland v. Scott, 53 N. C. 100.
Vt.—Pickett v. Pearsons, 17 Vt. 470.
Va.—Blosser v. Harshbarger, 21 Gratt. 214; Hawkins v. Minor, 5 Call (9 Va.) 118.

[a] **An omission to do that which, if done, would have been fruitless** and unavailing, cannot properly be denominated negligence. Folsom v. Mussey, 10 Me. 297.

[b] **A justice of the peace receiving and receipting for a note** for collection, in his official capacity, does

is collected by another is under no duty to exercise any diligence in seeing that it is collected.[53]

[§ 389] **(b) Bills and Notes.** In the case of bills and notes the agent will be liable for negligence in regard to any of the steps necessary to effect their collection or to fasten liability upon acceptors or indorsers, whereby a loss or liability is imposed upon his principal.[54] Thus an agent may be liable where he fails to use due care and diligence in presenting a bill or note intrusted to him for collection, at the proper time and place for payment or acceptance, or, if no place is fixed, in making a demand;[55] and although bills of exchange, payable at a certain day, are not required to be presented for payment or acceptance before such day in order to render the drawer and indorser liable, still it is the duty of an agent holding such a bill for collection to use reasonable diligence to present it for acceptance before such day, and he will be liable to his principal for a loss resulting from his neglect to do so.[56] And, if upon such presentment or demand, payment is refused, he will be liable, if he fails to use due diligence in giving notice thereof to his principal, so that he may take the necessary measures for his own security;[57] or if he fails to protest or give notice of dishonor.[58] As a general rule, the agent should so act as to secure and preserve the liability on the paper of all parties prior to his principal,[59] and, where protest is necessary to fix liability upon particular parties, it then becomes the duty of the agent to protest;[60] but it is not incumbent upon him to cause the paper to be protested, if it is not necessary to fix the liability on anterior parties, or unless his principal will thereby gain some advantage which otherwise the law would not accord to him.[61] In the absence of a local usage or custom, it has been held not to be incumbent on an agent to notify the indorsers, unless he has particular instructions from his principal to do so.[62]

Loss of bill or note by agent. The agent will be liable where he negligently fails to notify his principal of the loss of a bill or note forwarded by mail, whereby the principal loses an opportunity to protect himself;[63] and, if in such a case the agent promises to pay such bill or note, the promise will be binding on his estate.[64]

[§ 390] **(c) Medium of Payment.**[65] As a general rule a collecting agent may render himself liable to his principal for the resulting loss if he accepts anything in payment, other than legal tender, or that which generally circulates in the locality as money.[66] Thus the agent may be liable for accept-

53. Miller v. Gettysburg Bank, 8 Watts (Pa.) 192, 34 AmD 449.

54. U. S.—Washington Bank v. Triplett, 1 Pet. 25, 7 L. ed. 37; Hamilton v. Cunningham, 11 F. Cas. No. 5,978, 2 Brock. 350.

Ind.—American Express Co. v. Haire, 21 Ind. 4, 83 AmD 334; Tyson v. State Bank, 6 Blackf. 225, 38 AmD 139.

Mass.—Fabens v. Mercantile Bank, 23 Pick. 330, 34 AmD 59.

Mo.—Dyas v. Hanson, 14 Mo. A. 363.

Nebr.—Omaha Nat. Bank v. Kiper, 60 Nebr. 33, 82 NW 102.

N. Y.—Meadville First Nat. Bank v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 AmR 618 [rev 16 Hun 332]; Coghlan v. Dinsmore, 22 N. Y. Super. 453 [aff 1 Abb. Dec. 375, 35 HowPr 416]; Allen v. Suydam, 20 Wend. 321, 32 AmD 555 [rev 17 Wend. 368].

[a] **Banks as collecting agents** are bound to take the necessary steps to fasten liability upon the parties to commercial paper. Tyson v. State Bank, 6 Blackf. (Ind.) 225, 38 AmD 139. See Banks and Banking [5 Cyc 509].

[b] **Draft with bill of lading.**—Where a bank is sent a bill of lading, together with a draft payable forty-five days after date, the bank is not, in the absence of instructions to the contrary, negligent in giving up the bill of lading to the consignee upon acceptance of the draft, without waiting until the draft is paid. Wisconsin Mar., etc., Ins. Co. Bank. v. Bank of British North America, 21 U. C. Q. B. 284 [aff 2 Grant Err. & App. (U. C.) 282].

Steps to be taken in the collection of commercial paper see Bills and Notes [7 Cyc 959 et seq].

55. Ala.—Mobile Bank v. Huggins, 3 Ala. 206.

Ind.—Tyson v. State Bank, 6 Blackf. 225, 38 AmD 139.

La.—McAllister v. Srodes, 14 La. 442; Miranda v. City Bank, 6 La. 740, 26 AmD 493; Crawford v. Louisiana State Bank, 1 Mart. N. S. 214.

Minn.—Bidwell v. Madison, 10 Minn. 13.

Mo.—Dyas v. Hanson, 14 Mo. A. 363.

N. Y.—Allen v. Suydam, 20 Wend. 321, 32 AmD 555 [rev 17 Wend. 368].

Tenn.—Kirkeys v. Crandall, 90 Tenn. 532, 18 SW 246 (holding that an agent is liable for taking an invalid acceptance of a draft from a person not authorized to give the acceptance).

[a] **If there is not an unreasonable delay in** presenting a bill for acceptance, and the agent has acted according to the usual course of the business, he will not be liable, although he might have acted more promptly, and, if he had done so, the loss would have been avoided. Van Diemen's Land Bank v. Victoria Bank, L. R. 3 P. C. 526.

56. Meadville First Nat. Bank v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 AmR 618.

[a] **The owner of a bill has an interest in having it presented** for acceptance without delay, although such presentment is not necessary in the case of a bill payable on a day certain, to enable him to retain his claim against the drawer or indorser of such bill; and, if the agent who has been intrusted with the bill for the purpose of getting it accepted and paid, or accepted only, neglects to comply with the direction of the owner, to get the bill accepted without any unnecessary delay, he will be liable to the owner for the damage which the latter has sustained by such negligence. Allen v. Suydam, 20 Wend. (N. Y.) 321, 32 AmD 555.

57. Mobile Bank v. Huggins, 3 Ala. 206; Crawford v. Louisiana State Bank, 1 Mart. N. S. (La.) 706.

58. Hamilton v. Cunningham, 11 F. Cas. No. 5,978, 2 Brock. 350; Neely v. Airey, 28 La. Ann. 123 (holding that, where defendants received a draft for collection, but failed to have protest made and notice given, and at the time the draft was presented, the drawees had funds of the drawer in their hands, defendants were liable to plaintiff for the amount lost through their laches); Miranda v. New Orleans City Bank, 6 La. 740, 26 AmD 493; Liennan v. Dinsmore, 10 AbbPr NS (N. Y.) 209; Utica Bank v. McKinster, 11 Wend. (N. Y.) 473; Smedes v. Utica Bank, 20 Johns. (N. Y.) 372 [aff 3 Cow. 662].

59. Meadville First Nat. Bank v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 AmR 618; Coghlan v. Dinsmore, 22 N. Y. Super. 453 [aff 1 Abb. Dec. 375, 35 HowPr 416].

60. Washington Bank v. Triplett, 1 Pet. (U. S.) 25, 7 L. ed. 37; Troy State Bank v. Capitol Bank, 41 Barb. (N. Y.) 343.

61. Mobile Bank v. Huggins, 3 Ala. 206.

62. Mobile Bank v. Huggins, 3 Ala. 206.

[a] **No duty to notify all indorsers.**—In the case of a bill or note, sent to an agent for collection merely, in the absence of proof of an express contract or of commercial usage, it is not obligatory on the collecting bank to notify and duly charge all the prior parties to the paper, but only its own principal, or immediate indorser. If the collecting agent undertakes to transmit notices of protest to other parties besides its immediate indorser, although this may be some evidence of an agreement to notify all the indorsers, it is not sufficient evidence of such an agreement, in the absence of proof of custom or usage. Troy State Bank v. Capitol Bank, 41 Barb. (N. Y.) 343.

[b] **But, if it is according to the established and understood custom** of a bank to give notice to all indorsers, it will be liable for failure to do so. Utica Bank v. McKinster, 11 Wend. (N. Y.) 473; Smedes v. Utica Bank, 20 Johns. (N. Y.) 372 [aff 3 Cow. 662].

63. Shipsey v. Bowery Nat. Bank, 59 N. Y. 485.

64. Sandefur v. Mattingley, 16 Ark. 237.

65. **Medium of payment collecting agent is empowered to receive** see generally supra §§ 266–271.

66. Ala.—Cameron v. Clarke, 11 Ala. 259.

Ga.—Holmes v. Langston, 110 Ga. 861, 36 SE 251.

La.—Littlejohn v. Ramsay, 4 Mart. N. S. 655.

Pa.—Opie v. Serrill, 6 Watts & S. 264.

Vt.—Childs v. Boyd, 43 Vt. 532.

Eng.—Pape v. Westacott, [1894] 1 Q. B. 272.

[a] **"The general rule is** that an agent being authorized to receive money only, has no implied power to receive a check, or anything else except money, in payment, and, if he does so he assumes the risk of its payment, and becomes liable to his principal for the amount of the check with interest from the date of its receipt by him. . . . In such circumstances the law will presume damages to the principal and dispense with proof thereof." National Bank of Commerce v. American Exch. Bank, 151

ing payment of a debt in a depreciated currency,[67] particularly if the obligation is in terms payable in another and particular form of currency;[68] but if not in terms so payable the circumstances may be such that the agent will not be liable for taking a depreciated currency,[69] and he will not be liable if it is done with the express consent of the principal,[70] or with his knowledge and acquiescence,[71] or if the principal, knowing the facts, accepts and retains what the agent has collected;[72] nor can the agent be held liable if the principal declines to accept a payment made to the agent in a medium other than money, and elects to treat the debtor as still liable on the claim.[73]

Where the agent accepts the debtor's check in payment, a delay in presenting the check for payment, for any length of time within which, with proper and reasonable diligence, it could be presented, will render the agent liable to the principal for the resulting loss, although the delay is not such as would, between the drawer and the payee, affect the former's liability.[74]

[§ 391] **(d) Employment of Subagent.**[75] If an agent to collect employs a subagent he will ordinarily, in the absence of any stipulation to the contrary, be liable for any negligence or default on the part of the subagent,[76] and the subagent will be liable to the agent who is his immediate principal.[77] Thus the subagent will be liable to the agent for any money collected by him and paid over to any other person than the true owner;[78] and the principal also may recover from the subagent money which the latter has collected and failed to pay over, either to the first agent or to the principal.[79] If, however, the subagent is employed with the consent of the principal, which may be either express or implied,[80] and it may be implied from the usual course of trade or nature of the transaction,[81] the agent will not be liable for the negligence or default of the subagent, if he has exercised due care in selecting a competent and reliable person.[82] It is also competent for the agent to expressly stipulate against liability from the acts of a subagent,[83] in which case he will not be liable, in the absence of negligence in selecting the subagent;[84] but ordinarily where an agent acts

Mo. 320, 329, 52 SW 265, 74 AmSR 527.

[b] **Where one accepts a draft where he might have procured money** in payment of a check he has for collection, and the draft is dishonored, he is liable for its value, although the bank issuing and the bank on which the draft is drawn are solvent, and the draft is stopped by a telegram from the debtor, as a collector has no authority to accept anything but money in payment of a claim. Gowling v. American Express Co., 102 Mo. A. 366, 76 SW 712.

[c] **Where an agent undertakes gratuitously to collect a note and book account** and surrenders them to the debtor from whom he takes a new note to himself for their amount, this is an extinguishment of the original debt, and the agent is liable for its amount to his principal. Opie v. Serrill, 6 Watts & S. (Pa.) 264.

[d] **Where an agent for the collection of a note receives lumber** in payment of the note, and, without authority from the principal, sells the lumber to one whom he knows to be insolvent, he is responsible to the principal for the value of the lumber. Griffin v. Gorman, 13 KyL 879.

[e] **The agent will not be liable,** although he has no right to receive his own note instead of money in payment of a debt due to his principal, if he supplies out of his own funds the amount of the note received and turns the money over to his principal. Wilcox, etc., Organ Co. v. Lasley, 40 Kan. 521, 20 P 228.

67. Anderson v. Cape Fear Bank, 1 F. Cas. No. 354, Chase 535; Webster v. Whitworth, 49 Ala. 201; Shuford v. Ramsour, 63 N. C. 622; Turner v. Turner, 36 Tex. 41.

68. Fry v. Dudley, 20 La. Ann. 368 (holding that, where an agent in 1862 received two drafts for collection which upon their face were payable "in currency," the words "in currency" meant current money in the legal sense, and that the agent was liable for receiving payment in Confederate money); Mangum v. Ball, 43 Miss. 288, 5 AmR 488 (holding that, if an agent, in the absence of express instructions, receives depreciated Confederate currency in payment of bonds payable in terms in United States currency, he will be liable for the loss); Pilson v. Bushong, 29 Gratt. (70 Va.) 229 (holding that, in the absence of express instructions, an agent has no right to receive depreciated Confederate currency in payment of bonds payable only in gold coin or currency equivalent thereto).

69. Henry v. Northern Bank, 63 Ala. 527; Turner v. Beall, 22 La. Ann. 490; Baird v. Hall, 67 N. C. 230; Pilson v. Bushong, 29 Gratt. (Va.) 229.

70. Baird v. Hall, 67 N. C. 230.

71. Turner v. Beall, 22 La. Ann. 490.

72. Pickett v. Pearsons, 17 Vt. 470.

73. Perkins v. Hershey, 77 Mich. 504, 43 NW 1021.

74. Meadville First Nat. Bank v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 AmR 618.

75. See also supra §§ 274, 344, 352.

76. U. S.—Tabor v. Perrot, 23 F. Cas. No. 13,721, 2 Gall. 565.

Ala.—Lewis v. Peck, 10 Ala. 142.

Ind.—American Express Co. v. Haire, 21 Ind. 4, 83 AmD 334.

Ky.—Thompson v. Taylor, 124 SW 857.

Mo.—Dyas v. Hanson, 14 Mo. A. 363 (holding that, where a draft is sent to an agent to collect and he places it in a bank to be collected, he will be liable for the negligence of the bank).

N. Y.—Talcott v. Cowdry, 17 Misc. 333, 39 NYS 1076; Mandel v. Mower, 55 HowPr 242.

N. D.—Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 NW 859.

Oh.—Young v. Noble, 2 Disn. 485.

Pa.—Siner v. Stearne, 155 Pa. 62, 25 A 826; Morgan v. Tener, 83 Pa. 305 [rev 10 Phila. 412]; Bradstreet v. Everson, 72 Pa. 124, 13 AmR 665.

R. I.—McCarthy v. Hughes, 88 A 984.

Tenn.—Harrold v. Gillespie, 7 Humphr. 57.

Eng.—Mackersy v. Ramsays, 9 Cl. & F. 818, 8 Reprint 628, 3 ERC 763.

77. Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 NW 859.

78. Wallace v. Peck, 12 Ala. 768.

79. Harrison Mach. Works v. Coquillard, 26 Ill. A. 513.

80. Davis v. King, 66 Conn. 465, 34 A 107, 50 AmSR 104 and note.

81. Wilson v. Smith, 3 How. (U. S.) 763, 11 L. ed. 820; Miller v. Farmers', etc., Bank, 30 Md. 392.

[a] **Place of payment or acceptance.**—Where a bill or note is placed in the hands of a bank for collection, and the bill or note is payable in a different place, or if the acceptor or promisor resides in a different place, it must be presumed to be understood that such bill or note will be sent there for collection, and if the bank transmits such paper to another solvent bank in good standing it will not be liable for the negligence of the latter bank. Dorchester, etc., Bank v. New England Bank, 1 Cush. (Mass.) 177; Fabens v. Mercantile Bank, 23 Pick. (Mass.) 330, 34 AmD 59.

82. U. S.—Wilson v. Smith, 3 How. 763, 11 L. ed. 820. See also Dun v. Birmingham City Nat. Bank, 58 Fed. 174, 7 CCA 152, 23 LRA 687.

Conn.—Davis v. King, 66 Conn. 465, 34 A 107, 50 AmSR 104 and note.

Ill.—Fay v. Strawn, 32 Ill. 295.

Ky.—Ford v. Stewart, 4 B. Mon. 326.

La.—Baldwin v. Preston, 11 Mart. 32; Young v. McLaughlin, 7 Mart. 628.

Md.—Miller v. Farmers', etc., Bank, 30 Md. 392.

Mass.—Dorchester, etc., Bank v. New England Bank, 1 Cush. 177.

N. Y.—Jacobsohn v. Belmont, 20 N. Y. Super. 14.

Ont.—McQuarrie v. Fargo, 21 U. C. C. P. 478.

[a] **Employing attorney.**—Where a person receives a paper which it was his duty to collect, and places the same for suit in the hands of a competent attorney at law, he will not be responsible for the opinions or directions of the attorney. Joor v. Sullivan, 5 La. Ann. 177; Hawkins v. Minor, 5 Call (9 Va.) 118 (holding that, if a person with whom bonds are left for collection puts them into the hands of a lawyer to collect, he is not responsible further, except for moneys received from the lawyer).

[b] **Loss of note in transmission.**—Where an agent who undertakes to collect a note payable in a distant place makes known to his principal the mode of conveyance by which the note will be sent, and the latter does not disapprove of it, the agent will not be liable if it is lost in transmission. Delavigne v. New Orleans City Bank, 16 La. 471.

83. Dun v. Birmingham City Nat. Bank, 58 Fed. 174, 7 CCA 152, 23 LRA 687 [rev 51 Fed. 160]; Fay v. Strawn, 32 Ill. 295; Sanger v. Dun, 47 Wis. 615, 3 NW 388, 32 AmR 789.

[a] **Notice of stipulation.**—Where plaintiff sent defendant a claim for collection, and the latter, without request, sent a receipt, plaintiff, in the absence of any circumstance or intimation to indicate it to be anything other than an ordinary voucher, was justified in so regarding it, and is not bound by a condition printed on its back, of which he had no knowledge, limiting defendant's liability for the acts of his agents. Neuman v. National Shoe, etc., Exch., 26 Misc. 388, 56 NYS 193 [aff 25 Misc. 412, 54 NYS 942].

84. Sanger v. Dun, 47 Wis. 615, 3 NW 388, 32 AmR 789.

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through another he must exercise due care in selecting a competent and reliable person.[85]

[§ 392] **(4) Agent to Lend or Invest.** Where an agent is authorized to lend or invest money of his principal he must exercise reasonable skill and ordinary care and diligence, and will be liable for losses occasioned by his negligence,[86] as in lending money on the unsecured obligation of the borrower,[87] or on inadequate security,[88] or on property subject to prior mortgages, liens, or other encumbrances,[89] unless the principal expressly or impliedly releases him from liability for the loss.[90] The agent may also become personally liable by a guaranty to the principal against loss, in which case he must make good his guaranty.[91]

Agent acting in good faith. But ordinarily the agent does not insure against losses due to honest mistakes or errors of judgment,[92] and, if he has

85. Prentice v. Buxton, 3 B. Mon. (Ky.) 35; Smedes v. Utica Bank, 20 Johns. (N. Y.) 372 [aff 3 Cow. 662].

86. Cal.—Samonset v. Mesnager, 108 Cal. 354, 41 P 337.

Ind.—Rochester v. Levering, 104 Ind. 562, 4 NE 203.

Ky.—Owensboro Bank v. Western Bank, 13 Bush 526, 26 AmR 211.

Minn.—Hardwick v. Ickler, 71 Minn. 25, 73 NW 519 (holding that, where defendant carried on the business of loan agent, and, as agent of plaintiff to lend his money on first-mortgage security, lent it, and took a mortgage on real estate without procuring an abstract of the title, or having the title examined, and without even inquiring whether or not there was any prior encumbrance on the property, the court was warranted in finding that defendant was guilty of negligence in making the loan).

N. J.—De Hart v. De Hart, 70 N. J. Eq. 744, 67 A 1074; Porter v. Woodruff, 36 N. J. Eq. 174; Nancrede v. Voorhis, 32 N. J. Eq. 524.

N. Y.—Whitney v. Martine, 88 N. Y. 535 [rev 47 N. Y. Super. 396 (rev 6 AbbNCas 72)]; Van Cott v. Hull, 11 App. Div. 89, 42 NYS 1060; Ehmer v. Title Guarantee, etc., Co., 89 Hun 120, 34 NYS 1132 [aff 156 N. Y. 10, 50 NE 420].

Can.—Lowenburg v. Wolley, 25 Can. S. C. 51.

Ont.—Carter v. Hatch, 31 U. C. C. P. 293; Holmes v. Thompson, 38 U. C. Q. B. 292.

[a] **Violation of instructions.**—Where an agent who is directed to loan money to a third party, and to take as security a deed of trust, violates his instructions by including in the trust deed a note owed by the third party to himself, without his principal's knowledge or consent, the latter may entirely ignore the deed of trust, and look to the agent himself for the money loaned Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935.

[b] **An agent employed to lend money through a subagent** is liable for a loss of money paid by him for an assignment to the principal of a worthless mortgage held by the subagent, and an indorsement, without recourse, of the mortgage note, where the agent had no other assurance of the value of the mortgage than the statement made by the mortgagor, a stranger to him, that the premises were unencumbered, the agent making no inquiry and having no abstract. Van Cott v. Hull, 11 App. Div. 89, 42 NYS 1060.

[c] **An agent who lends the funds of his principal to himself** without authority is liable therefor. Afong v. Chun Hoy, 8 Hawaii 499.

[d] **Where a person, relying upon representations made by his agent, makes a loan,** he may recover of such agent, if such representations were false and fraudulent, without first enforcing the security given upon the making of the loan. Pratt v. Worthington, 169 Ill. A. 533.

87. Samonset v. Mesnager, 108 Cal. 354, 41 P 337; Benson v. Liggett, 78 Ind. 452 (holding that an agent, having no authority beyond the possession and duty to keep safely certain money, has no right to loan it on the individual note of the borrower, however responsible he may be).

88. Ala.—Ledbetter, etc., Land, etc., Assoc. v. Vinton, 108 Ala. 644, 18 S 692.

Cal.—Samonset v. Mesnager, 108 Cal. 354, 41 P 337.

Ind.—Bronnenburg v. Rinker, 2 Ind. A. 391, 28 NE 568.

Ky.—Owensboro Bank v. Western Bank, 13 Bush 526, 26 AmR 211 (holding that, where an agent to lend money takes insufficient security, the principal is not bound, at his peril, to accept and discharge the agent, or to reject the security, and look only to the responsibility of the agent. The principal in such a case may take the security, and still hold the agent bound for any deficiency which, after due diligence, he suffers on it).

Md.—Bannon v. Warfield, 42 Md. 22 (holding that, where an agent lends the money of his principal upon a security which proves to be insufficient, the judgment of such agent as to the value of the security at the time it was taken is not conclusive; evidence may be introduced, as reflecting on the question of the want of good faith and reasonable care in making the loan and taking the security, to show that the value of the security was very much less than the estimate placed thereon by the agent).

Mo.—Marshall v. Ferguson, 78 Mo. A. 645.

Pa.—McFarland v. McClees, 1 Pa. Cas. 504, 5 A 50.

Tex.—Murrah v. Brichta, 9 SW 185.

Can.—Lowenburg v. Wolley, 25 Can. S. C. 51.

89. Ill.—Shipherd v. Field, 70 Ill. 438 (holding that, where a person engaged in the business of lending money on real estate security solicits money to lend, promising to take a first mortgage on real estate in value double the sum lent, and obtains the money, which he lends, taking a mortgage on real estate which is subject to prior encumbrances which are unknown to the party advancing the money, and under which the property mortgaged is sold, whereby the debt is lost, such agent will be responsible to the person advancing the money, in an action on the case. The fact, in such a case, that the mortgaged property was of double the value of all the encumbrances on it will not relieve the agent of liability to his principal, who had no knowledge of any prior liens until the property was lost by sale under a prior deed of trust).

Ky.—Owensboro Bank v. Western Bank, 13 Bush 526, 26 AmR 211.

Minn.—Hardwick v. Ickler, 71 Minn. 25, 73 NW 519.

N. J.—De Hart v. De Hart, 70 N. J. Eq. 744, 67 A 1074; Nancrede v. Voorhis, 32 N. J. Eq. 524.

N. Y.—Whitney v. Martine, 88 N. Y. 535 [rev 47 N. Y. Super. 396 (rev 6 AbbNCas 72)]; Van Cott v. Hull, 11 App. Div. 89, 42 NYS 1060.

Ont.—Butterworth v. Shannon, 11 Ont. A. 86; Carter v. Hatch, 31 U. C. C. P. 293.

[a] **"The right of an agent to advance funds on second mortgages** or security not of the first class may well be questioned. (Thomson v. Christie, 1 Macq. 236.) And, as a general rule, it may properly be laid down that it is not prudent or safe to advance moneys on second mortgages when there are large prior incumbrances, and especially where the personal security of the mortgagor is in any way precarious. Such an investment is not a first-class one. The risk of protecting a small investment by advancing more than three times as much, and quite a large sum for most persons, is far too great to be taken by an agent without his principal being fully aware of the security he is to receive for his money." Whitney v. Martine, 88 N. Y. 535, 539 [rev 47 N. Y. Super. 396 (rev 6 AbbN Cas 72)].

[b] **Extent of liability.**—Where an agent disregards his instructions to lend the money placed in his hands on unencumbered real estate security, and lends the money with a preëxisting mortgage still on the land, he is liable to the principal if a loss results, in a sum not exceeding the amount of the preëxisting mortgage. Welsh v. Brown, 8 Ind. A. 421, 35 NE 921.

[c] **Where no loss is occasioned.**—An agent should not as a general rule lend money upon property subject to a mortgage and take a second mortgage, and if he does he takes the risk of being personally liable in case a loss occurs; but he is not liable merely because he has made such an investment, where no loss has been sustained and there is no evidence that any will be sustained. Porter v. Woodruff, 36 N. J. Eq. 174.

90. Nicolai v. Lyon, 6 Or. 457 (holding that, where plaintiff deposited a sum of money with defendant to be loaned to N upon a first mortgage, and defendant loaned it to N on a second mortgage, and all of the property was absorbed in discharging the first mortgage, and N became insolvent and compromised with his creditors, and plaintiff signed the composition deed without notice to defendant, who being a creditor of N on a separate account also signed it, plaintiff, by entering into the composition agreement, released defendant from liability for breach of the agreement under which the money was to have been loaned).

91. Ledbetter, etc., Land, etc., Assoc. v. Vinton, 108 Ala. 644, 18 S 692; Simmons v. Martin, 54 Ga. 47; Denny v. Campbell, 4 SW 301, 9 KyL 367 (holding that, in an action upon an agreement by an agent to take off the principal's hands, at a certain price, bonds in which the agent had invested the principal's money, the price to be paid when the bonds had been collected, it was no defense that the bonds had not been collected, defendant having neglected to sue upon them, as he should have done); Vermilye's Case, 43 N. J. Eq. 146, 10 A 605.

[a] **The principle that an agent cannot "serve two masters"** does not render invalid an express agreement by an agent intrusted with the lending of his principal's money to be liable for the repayment of the money by the borrower. Ledbetter, etc., Land, etc., Assoc. v. Vinton, 108 Ala. 644, 18 S 692.

[b] **Does not apply to prior loans.**—An agreement by an agent to stand as security for all loss the principal might sustain on loans made by the agent by reason of insufficient security or defect of title cannot be made to apply to loans made prior to the making of the agreement. Perkins v. Hershey, 77 Mich. 504, 43 NW 1021.

92. Myers v. Zetelle, 21 Gratt. (62 Va.) 733.

[a] **An agent, in lending or investing money,** is bound to exercise only such reasonable skill and ordinary diligence as is usually exercised by men of ordinary care and capacity

acted in good faith and with reasonable skill and ordinary care and diligence, he will not be liable for losses which the principal may sustain, as by reason of the insufficiency of the security,[93] and, if he has invested money strictly in accordance with the terms of his agreement, he will not be liable if the investment results in loss.[94] If an agent lends money upon property which is amply adequate security at the time the loan is made, he will not be liable for a loss due to its subsequent depreciation in value;[95] and, if a principal gives an agent money for purposes of speculation according to the latter's discretion, and the agent acts in good faith, he will not be liable for losses due to errors of judgment.[96]

[§ 393] **(5) Agent to Effect Insurance—(a) Duty to Insure.** In the absence of any instructions from the principal or any duty implied from established usage or the previous dealings between the parties, an agent will not be liable for a failure to insure property of the principal in his possession.[97] But duty to insure may be imposed upon the agent by an express agreement of the parties,[98] by instructions from his principal to do so,[99] or by the usages and customs of the trade.[1] The agent may also, by his course of conduct in taking out insurance, impose upon himself the duty of continuing to do so,[2] and if he intends to discontinue such duty he must notify his principal of such fact, or he will be liable for his failure to insure.[3]

[§ 394] **(b) Skill, Care, and Diligence in Insuring.** An agent whose duty it is and who undertakes to effect insurance for his principal must exercise due care and skill in so doing, and will be held liable for losses resulting from his negligence,[4] such as negligence in failing to effect the insur-

when engaged in the same business. Wheadon v. Mead, 72 Minn. 372, 75 NW 598; De Hart v. De Hart, 70 N. J. Eq. 774, 76 A 1074; Goodwin v. Kraft, 23 Okl. 329, 101 P 856.

93. Colo.—Haines v. Christie, 28 Colo. 502, 66 P 883.

Minn.—Wheadon v. Mead, 72 Minn. 372, 75 NW 598.

Miss.—Richardson v. Futrell, 42 Miss. 525.

N. J.—Vermilye's Case, 43 N. J. Eq. 146, 10 A 605.

N. Y.—King v. MacKellar, 94 N. Y. 317.

Okl.—Goodwin v. Kraft, 23 Okl. 329, 101 P 856 (holding that, in order to entitle a principal to recover from his agent the amount of a loan alleged to have been lost through the agent's negligence in passing on the title of the borrower to proposed security, he must show that his agent did not exercise the degree of care ordinarily exercised in similar business affairs).

Pa.—Kennedy v. McCain, 146 Pa. 63, 23 A 322.

S. C.—Bellinger v. Gervais, 1 S. C. Eq. 174.

Tenn.—James v. Borgeois, 4 Baxt. 345.

Tex.—Texas Loan Agency v. Swayne, (Civ. A.) 27 SW 183; Rand v. Johns, 4 Tex. A. Civ. Cas. 203, 15 SW 200.

Va.—Myers v. Zetelle, 21 Gratt. (62 Va.) 733.

Wis.—Momsen v. Atkins, 105 Wis. 557, 81 NW 647 (holding that an agent, employed to invest a small sum of money in a mortgage, acting on information given him by an agent in another state and on his general knowledge of the country, is not guilty of want of ordinary care in placing the loan, although it thereafter appears that the quality of the soil and the character of the land were not as represented in the application).

Que.—Tempest v. Bertrand, 19 Que. Super. 365.

[a] **Where an attorney, as an agent to loan money, takes a judgment note** as security, and gives it to his principal, instead of entering the judgment, he is not liable for a loss caused by the omission to enter the note. Merrill v. Norton, 2 Walk. (Pa.) 213.

94. Van Camp v. Gilbert, 1 Cinc. Super. (Oh.) 358 (holding that, where an agent received money from a principal to be used by him in the purchase and sale of stocks in the same manner as if it were his own, and he in good faith invested the same amount of his own money in the same stocks and sustained the same loss, he will not be liable for the loss sustained by the principal).

95. Nancrede v. Voorhis, 32 N. J. Eq. 524; King v. MacKellar, 94 N. Y. 317.

96. Vermilye's Case, 43 N. J. Eq. 146, 10 A 605; Stewart v. Parnell, 147 Pa. 523, 23 A 838 (holding that an agent intrusted with money to be invested, in his discretion, in speculations in stocks and securities is not liable for the loss if he has acted in good faith); Wagner v. Phillips, 12 S. D. 335, 81 NW 632 (holding that, where plaintiff's sent money to defendant to invest in real estate, and either authorized or ratified all he did in the matter, including his advancement of funds in part payment, and his taking of a deed in his own name, they have no claim against him because the investment proved unprofitable, if there was no fraud or bad faith on his part).

97. Ark.—Walsh v. Frank, 19 Ark. 270.

Ill.—Shoenfeld v. Fleisher, 73 Ill. 404; Schaeffer v. Kirk, 49 Ill. 251.

Ky.—Vickery v. Lanier, 1 Metc. 133.

La.—Duncan v. Boye, 17 La. Ann. 273.

N. Y.—Lee v. Adsit, 37 N. Y. 78; Field v. Banker, 22 N. Y. Super. 467; Brisban v. Boyd, 4 Paige 17.

S. C.—Shirtliff v. Whitfield, 4 S. C. L. 71, 3 AmD 701.

Ont.—Maitland v. Tylee, 7 U. C. C. P. 335.

98. Shoenfeld v. Fleisher, 73 Ill. 404; Milburn Wagon Co. v. Evans, 30 Minn. 89, 14 NW 271; Prichard v. Deering Harvester Co., 117 Wis. 97, 93 NW 827.

99. De Tastett v. Crousillat, 7 F. Cas. No. 3,828, 2 Wash. C. C. 132; Miner v. Tagert, 3 Binn. (Pa.) 204; Shirtliff v. Whitfield, 4 S. C. L. 71, 3 AmD 701.

[a] **Instances when instruction must be obeyed.**—In Smith v. Lascelles, 2 T. R. 187, 189, 100 Reprint 101, 13 ERC 401, Buller, J., said: "It is now settled as clear law, that there are three instances in which such an order to insure must be obeyed. First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet, if the course of dealing between them be such, that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing. 3dly, if the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one intire transaction."

[b] **"A simple request to insure,** where no funds are provided, or where there has been no previous dealing between the parties or no goods on consignment from which the party requested may reimburse himself, will not, of itself, devolve upon him the duty to insure, or render him liable for failing so to do. Neither will his subsequent effort to comply with such request have that effect. There must have been an undertaking or promise to insure, made at the time and intended as such by the parties. The party making the request must have had some assurance on which he had the right to rely, and from which he had the right to expect the other party would insure, or, in other words, there must in the language of all the books have been an undertaking to that effect. Without it no liability attaches. Such promise or undertaking is implied where the course of dealing has been such that the agent has been used to effect insurances, or where he has funds or effects on hand, or even where the bill of lading from which he derives his authority contains an order to insure, or where the general usage is to insure, and in such case he is bound at his peril to insure." Vickery v. Lanier, 1 Metc. (Ky.) 133, 137.

1. Kingston v. Wilson, 14 F. Cas. No. 7,823, 4 Wash. C. C. 310; De Forest v. Fulton F. Ins. Co., 1 N. Y. Super. 84; Shirtliff v. Whitfield, 4 S. C. L. 71, 3 AmD 701.

2. De Tastett v. Crousillat, 7 F. Cas. No. 3,828, 2 Wash. C. C. 132; Strong v. High, 2 Rob. (La.) 103, 38 AmD 195 (holding that, where the special agent of the owner of a steamboat, for the purpose of attending to the business of the boat, collecting the money earned, and doing everything necessary to the interest of the owner, had been in the habit of keeping the boat insured, but had inadvertently allowed the policy to run out, upon the boat being destroyed, he was liable to his principal for the loss); Berthoud v. Gordon, 6 La. 579; Ralston v. Barclay, 6 Mart. (La.) 649, 12 AmD 483; Smith v. Lascelles, 2 T. R. 187, 100 Reprint 101, 13 ERC 401.

3. Area v. Milliken, 35 La. Ann. 1150 (holding that, where it has been the practice or custom of a factor to insure consignments of goods, and this is brought to the knowledge of the consignor by uniform charges for insurance on his accounts rendered, he cannot discontinue the practice without notice, and will be liable for losses due to a failure to insure a subsequent consignment).

[a] **Where one of two joint owners** of a vessel having the possession and control thereof has been in the habit of insuring the interest of the other owner as well as his own, he will be liable to the other if without notice he subsequently insures only his own interest, and a loss occurs. Berthout v. Gordon, 6 La. 579; Ralston v. Barclay, 6 Mart. (La.) 649, 12 AmD 483.

4. U. S.—De Tastett v. Crousillat,

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ance,[5] to procure the proper amount,[6] to procure a valid and enforceable policy,[7] to keep it renewed and in force,[8] or to notify companies in which insurance has been taken of other insurance subsequently taken in other companies.[9] If an agent whose duty it is to insure neglects to do so he is himself to be considered as the insurer and liable as such, and entitled to credit for the premium which should have been paid;[10] but an agent instructed to insure has no right, without the principal's consent, to take the risk himself as insurer, and if he does so he cannot recover premiums, and in case of loss he will be liable not as an insurer but as an agent who has failed to comply with instructions,[11] although if done with the acquiescence of the principal the agent will be liable as an insurer and entitled to credit for the premium.[12] An agent who neglects his instructions to insure a shipment of goods cannot, in case they arrive safely, recover for a premium on insurance, although in case of loss he would have been liable.[13]

An agent to insure is not liable if he acted in good faith and with due care and diligence,[14] as where he could not procure insurance upon any more favorable terms than those accepted,[15] or could not procure it at all and notified his principal promptly of his inability to do so.[16] So also an agent will not be liable, at least not for more than nominal damages, for failing to procure insurance where no loss has resulted,[17] or where the insurance if effected according to the instructions of the principal would have been void.[18] The agent is not liable for the insolvency of the insurance company, if he insures in one generally considered safe, using due care in the selection of the company.[19]

[§ 395] **(6) Forwarding Agents.** A person acting as a forwarding agent in the shipment of goods or property must conform to any express instructions of his principal,[20] and must exercise ordinary care and diligence in the performance of all the duties involved in his undertaking;[21] but a mere forwarding agent is not an insurer of the safety of the shipment,[22] and will not be liable if he acts with due care and diligence according to the nature of the undertaking.[23]

7 F. Cas. No. 3,828, 2 Wash. C. C. 132.

Ill.—Shoenfeld v. Fleisher, 73 Ill. 404.

La.—Strong v. High, 2 Rob. 103, 38 AmD 195.

Me.—Sawyer v. Mayhew, 51 Me. 398.

Pa.—Miner v. Tagert, 3 Binn. 204.

Eng.—Wilkinson v. Coverdale, 1 Esp. 75.

Can.—Rudd Paper Box Co. v. Rice, 3 DomLR 253, 3 OntWN 534, 20 Ont WR 979 (failing to read a policy containing an erroneous specification).

Ont.—Baxter v. Jones, 4 OntL 541; McGuffin v. Ryall, 2 Grant Err. & App. (U. C.) 415 [rev 13 U. C. C. P. 115]; Johnston v. Graham, 14 U. C. C. P. 9.

[a] **Failure to follow instructions.**—Where the owner of a vessel instructed his agent to procure a policy of insurance, stating that he valued the vessel at four thousand dollars, three fourths of which sum he wished to be insured, and the agent neglected to insure according to the instructions, he was held answerable as in the case of a valued policy, although the letter contained no precise order to have the policy valued. Miner v. Tagert, 3 Binn. (Pa.) 204.

[b] **Failure to incorporate stipulations in policy.**—Where insurance brokers were ordered to effect a policy "at and from Teneriffe to London," they were held liable for not inserting in the policy the liberty "to touch and stay at all or any of the Canary Islands," that being usually inserted in policies from Teneriffe. Mallough v. Barber, 4 Campb. 150.

5. U. S.—De Tastett v. Crousillat, 7 F. Cas. No. 3,828, 2 Wash. C. C. 132.

Ark.—Walsh v. Frank, 19 Ark. 270.

Ill.—Shoenfeld v. Fleisher, 73 Ill. 404.

N. Y.—Shepard v. Davis, 42 App. Div. 462, 59 NYS 456.

Pa.—Miner v. Tagert, 3 Binn. 204.

Wis.—Pritchard v. Deering Harvester Co., 117 Wis. 97, 93 NW 827.

6. Beardsley v. Davis, 52 Barb. (N. Y.) 159 (holding that, where there is no difficulty in procuring full insurance, and such is the general practice in the matter embraced, the agent is liable for not procuring a contract for a full indemnity, the measure of damages in such case being the difference between the value of the property and the amount received under the policy).

7. Sawyer v. Mayhew, 51 Me. 398 (holding that, where an agent to effect insurance upon property of the principal takes out a policy not as agent but on his own account and payable to himself, and he has no insurable interest in the property so that the policy under the statutes would be invalid and unenforceable by the principal, the agent is liable for a resulting loss); Park v. Hamond, 4 Campb. 344; McGuffin v. Ryall, 2 Grant Err. & App. (U. C.) 415 [rev 13 U. C. C. P. 115].

8. Strong v. High, 2 Rob. (La.) 103, 38 AmD 195.

[a] **Character of instructions.**—Where a manufacturing company sent certain wagons to an agent to sell with instructions to insure the same, but did not specify any period for which the insurance should be taken or maintained, and the wagons remaining unsold at the end of eight months were to be subject to the orders of the company, the agent was required to effect insurance only for a reasonable time not exceeding eight months, and would not be liable, on the ground of negligence in failing to keep the property insured, for a loss occurring three years after the date of the original contract. Milburn Wagon Co. v. Evans, 30 Minn. 89, 14 NW 271.

9. Baxter v. Jones, 4 OntL 541 (per Lount, J.).

10. De Tastett v. Crousillat, 7 F. Cas. No. 3,828, 2 Wash. C. C. 132; Shoenfeld v. Fleisher, 73 Ill. 404; Storer v. Eaton, 50 Me. 219, 79 AmD 611.

11. Keane v. Branden, 12 La. Ann. 20.

12. Miller v. Tate, 12 La. Ann. 160.

13. Storer v. Eaton, 50 Me. 219, 79 AmD 611.

14. De Tastett v. Crousillat, 7 F. Cas. No. 3,828, 2 Wash. C. C. 132; Williams v. Rost, 13 La. Ann. 327; Sanches v. Davenport, 6 Mass. 258; Silverthorne v. Gillespie, 9 U. C. Q. B. 414.

15. Silverthorne v. Gillespie, 9 U. C. Q. B. 414 (holding that an agent to insure a shipment of goods by boat will not be liable for taking a policy not covering losses due to the ignorance, unskillfulness, or negligence of those navigating the vessel, where he could not procure a policy covering losses from such causes).

16. De Tastett v. Crousillat, 7 F. Cas. No. 3,828, 2 Wash. C. C. 132; Williams v. Rost, 13 La. Ann. 327.

[a] **Implied agreement to give notice.**—Upon an undertaking to effect an insurance according to special instructions, a part of the duty implied is the giving of notice to the employer in case of failure, and an actual promise to that effect, although averred in the declaration, need not be proved. Callander v. Oelrichs, 5 Bing. N. Cas. 58, 35 ECL 41, 132 Reprint 1026.

17. Brant v. Gallup, 111 Ill. 487, 53 AmR 638.

18. Alsop v. Colt, 12 Mass. 40 (where the principal's misrepresentations of fact in regard to the property to be insured would have avoided the policy if one had been issued).

19. Gettins v. Scudder, 71 Ill. 86.

[a] **Insuring with company in bad credit.**—If the agent procures insurance from underwriters notoriously in bad credit or insolvent, and loss results, it falls upon him. Strong v. High, 2 Rob. (La.) 103, 38 AmD 195.

20. Wilts v. Morrell, 66 Barb. (N. Y.) 511.

Duty to obey instructions see generally supra §§ 370–380.

21. Kirkby v. Armistead, 11 Rob. (La.) 81 (holding that, where an agent negligently delays for an unreasonable time to ship goods which he has undertaken to forward, and they are destroyed while still in his possession, he will be liable therefor); Railey v. Porter, 32 Mo. 471, 82 AmD 141 (holding that it is the duty of a forwarding agent to advise his consignee of a shipment made to his address, and that the fact that the carrier may be liable for failure to deliver the goods shipped in accordance with the bill of lading will not discharge the agent from liability to his principal).

22. Brown v. Denison, 2 Wend. (N. Y.) 593.

[a] **Violation of instructions.**—An agent shipping goods in a manner prohibited by his principal is liable as an insurer. Wilts v. Morrell, 66 Barb. (N. Y.) 511.

23. Davis v. Larguier, 2 La. Ann. 326 (holding that, where a merchant in one town acts as forwarding agent for planters in shipping cotton to market in a different place, and exercises reasonable prudence in selecting the merchant to whom it is consigned for sale, he will not be liable in case of a default by such consignee); Field v. Banker, 22 N. Y. Super. 467 (holding that, where an agent was instructed to ship goods by boat at the lowest rate of freight, he was not liable for accepting a bill of lading exempting the carrier from liability for losses by fire, if such contract of shipment was according to the usual course of business and it did not appear that any better contract could have been made at the lowest rate); Brown v. Denison, 2 Wend. (N. Y.) 593 (holding that forwarding merchants are discharged from their liability by showing that they used ordinary diligence in sending on property by responsible persons); McCants v. Wells, 3 S. C. 569.

[§ 396] **(7) Care and Custody of Property.**[24] An agent who is intrusted with the care and custody of property belonging to his principal becomes a bailee of the property and, like ordinary bailees, must use reasonable care and diligence in the protection and preservation of the property, and if he fails to do so he will be liable for the resulting loss to the principal;[25] but this liability does not arise until the actual delivery of the property to the agent or its constructive delivery whereby he accepts its care.[26] The agent, however, is not an insurer of the safety of the property, and he will not be liable if in keeping and protecting it he exercises ordinary care, skill, and diligence,[27] or such as an ordinarily prudent person would exercise in regard to his own property,[28] and if, without any fault or negligence on his part, the property is lost, injured,[29] stolen,[30] or destroyed by fire.[31] What will amount to ordinary care and diligence in this regard will depend upon all the circumstances of the case,[32] and particularly upon the nature and value of the property;[33] and in any case where an agent has property of the principal in his care and custody he will be liable therefor unless he can show that he still has the property or can account for its loss.[34] But, unless expressly required to do so by his contract, an agent is under no duty to use his own means to protect the property under his care.[35]

[§ 397] **(8) Custody, Disposition, and Remittance of Funds—(a) In General.** It is the duty of an agent who has received or collected money for his principal to notify the latter at once,[36] and ordinarily he should pay over such money to the principal as soon as, or within a reasonable time after, it is received or collected,[37] or apply or dispose of it according to the directions of the principal.[38] In any case he holds the money for the principal and has no right to pay it over to anyone else,[39] except an authorized agent;[40] or to

24. **Duty to insure** see supra §§ 393, 394.

25. U. S.—Preston v. Prather, 137 U. S. 604, 11 SCt 162, 34 L. ed. 788.

Ark.—Emerson v. Turner, 95 Ark. 597, 130 SW 538 (holding that an agent is liable for the loss of his principal's property in his charge, whether the loss is caused by some tortious act committed or by his omission to perform some duty with reference thereto); Charlesworth v. Whitlow, 74 Ark. 277, 85 SW 423.

Ky.—Chenowith v. Dickinson, 8 B. Mon. 156.

La.—Williams v. Dotterer, 111 La. 822, 35 S 921.

N. Y.—Hartmann v. Schnugg, 113 App. Div. 254, 99 NYS 83 [aff 188 N. Y. 617 mem, 81 NE 1165 mem].

[a] **"It is a fundamental rule** that an agent owes to his principal diligence and good faith in respect to the property of the principal confided to its care." Krafft v. Dyersburg Citizens' Bank, 139 App. Div. 610, 615, 124 NYS 214.

[b] **Liability as bailee.**—(1) An agent for hire or where the bailment is for the benefit of both parties will be liable if he fails to exercise ordinary care in the custody of the property. Preston v. Prather, 137 U. S. 604, 11 SCt 162, 34 L. ed. 788. (2) A gratuitous bailee will be liable only for gross negligence. Doorman v. Jenkins, 2 A. & E. 256, 29 ECL 132, 111 Reprint 99. See also supra § 384. And see generally Bailments [5 Cyc 186].

[c] **Use of machine.**—Where an agent to sell machines has no right to make any use of a machine left with him by the principal, then any use of it is a conversion; but, if he has a right to use it for the purpose of testing it and thereby facilitating its sale, he is not guilty of a conversion by using it, unless he uses it in an unreasonable or unauthorized manner. Hence where an agent to sell threshing machines agrees with the principal to keep the machines well housed, clean, bright, and well cared for, and always subject to the order of the principal and to be accountable to the principal for any losses or expenses resulting from any deviation from this agreement, and the agent uses the machines in threshing grain for pay, and thereafter the principal, with full knowledge of the use the agent has made of the machines, has them cleaned, and does not, until the machines have been destroyed by fire, notify the agent that he elects to treat the use that has been made of the machines as a conversion, the agent and one who guaranteed the performance of his contract are liable only for the depreciation in value of the machines by reason of the use which the agent made of them. Aultman v. Perkins, 12 KyL 893.

26. O'Bannon v. Southern Express Co., 51 Ala. 481.

27. Stanberry v. Moore, 56 Ill. 472; Clark v. Norwood, 19 La. Ann. 116; Gillet v. Theall, 16 La. 46; Lamoureau v. Fowler, 2 La. 174.

[a] **Destruction by vis major.**—An agent having charge of cotton purchased is bound to exercise a prudent care over it, and preserve and ship it to his principal, but he is not responsible against an overpowering force, whereby the cotton is destroyed and ruinous loss occurs. Clark v. Norwood, 19 La. Ann. 116.

28. Hill v. White, 11 La. Ann. 170; Williams v. O'Daniels, 35 Tex. 542.

29. Norton v. Melick, 97 Iowa 564, 66 NW 780; Furber v. Barnes, 32 Minn. 105, 19 NW 728; R. C. Stone Milling Co. v. McWilliams, 121 Mo. A. 319, 98 SW 828 (holding that where an agent, pursuant to contract, bought a quantity of wheat for his principal, as shown by his reports and the amount of the checks signed by the principal in blank, used by the agent to pay therefor, and the agent shipped the wheat to the principal, and a shortage in the quantity thereof was discovered, if the agent shipped to his principal all the wheat he bought for him he was not liable for the shortage).

30. Southern Express Co. v. Frink, 67 Ga. 201; Wright v. Central R., etc., Co., 16 Ga. 38; Stanberry v. Moore, 56 Ill. 472; Keystone Watch Case Co. v. Romero, 36 Misc. 381, 73 NYS 636 (holding that, where, in an action for breach of a provision in a contract to return samples furnished, the contract shows that the relation is that of principal and agent, a defense that the samples were stolen from the agent in the nighttime, without his negligence, and that no part of them had been recovered by the agent, is not demurrable); Dominion Express Co. v. Krigbaum, 18 Ont. L. 533, 13 OntWR 364, 924. See Fidelity Inv. Co. v. Carico, 1 Colo. A. 292, 28 P 1131.

31. Gillet v. Theall, 16 La. 46; Lamoureau v. Fowler, 2 La. 174.

[a] **Agreement to keep "in good order."**—An undertaking on the part of the agent to keep the property "in good order" does not render him liable in case it is destroyed by fire without his fault. Norton v. Melick, 97 Iowa 564, 66 NW 780.

32. Wright v. Central R., etc., Co., 16 Ga. 38.

33. Preston v. Prather, 137 U. S. 604, 11 SCt 162, 34 L. ed. 788.

34. Charlesworth v. Witlow, 74 Ark. 277, 85 SW 423; Bartle v. Phelps, 39 Iowa 498 (holding that an agent is liable for goods shipped to him for sale, upon his order, which arrived at his place of residence and business, unless he shows that their loss occurred without fault or negligence on his part).

35. Smallhouse v. Keller, 142 Ky. 432, 134 SW 493 (holding that, where there is nothing in his contract requiring it, an agent merely authorized by another to act for him and represent his one-tenth interest in a lease is under no duty to use his own means to make erections on the leased property, required by the lease to prevent a forfeiture thereof).

36. Lyle v. Murray, 6 N. Y. Super. 590.

[a] **Failure to give notice of receipt of money.**—Where an agent collecting money for his principal fails to notify the principal of his receipt of the money, he may be liable to his principal therefor, although the money is subsequently stolen. McMahan v. Franklin, 38 Mo. 548.

37. Ga.—Merchants' Bank v. Rawls, 21 Ga. 289.

Ill.—Bedell v. Janney, 9 Ill. 193.

N. Y.—Howe Mach. Co. v. Fagan, 8 Hun 174 (holding that, where an agent to sell his principal's machines sold a machine to a third person who gave his note to the principal for the price, and before its maturity the third person paid the amount to the agent who agreed to apply the same on and therewith take up the note, and who gave to the third person a receipt reciting, "Received from [third person] . . . to take up machine note," the receipt was prima facie evidence of a promise by the agent to pay over the money to his principal, authorising the principal to sue the agent thereon); Lyle v. Murray, 6 N. Y. Super. 590.

Pa.—Campbell v. Boggs, 48 Pa. 524, 2 Grant 273.

Tex.—Watson v. Dodson, (Civ. A.) 143 SW 329 (holding that, where notes were given to defendant to collect, without any agreement that defendant was to retain the amount collected and reloan the same, it was the duty of defendant to pay over the amount so collected within a reasonable time).

W. Va.—Thompson v. Thompson, 5 W. Va. 190.

Ont.—Fletcher v. Campbell, 5 OntWN 261.

38. Gray v. Barge, 47 Minn. 498, 50 NW 1014; Hamilton v. Peace, 2 S. C. Eq 79; Every v. Mould, 1 L. J. Ch. 23; McLean v. Grant, 20 Grant Ch. (U. C.) 76.

39. Land Mortg. Inv., etc., Co. v. Preston, 119 Ala. 290, 24 S 707; Ganseford v. Dutillet, 1 Mart. N. S. (La.) 284; Crosskey v. Mills, 1 C. M. & R. 298; McFatridge v. Carvill, 16 N. S. 286; Blanchet v. Roy, 14 Que. Super. 402.

40. Ledwith v. Merritt, 74 App.

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return it to the person from whom he received it,[41] unless authorized by the principal to do so;[42] and if paid over to another agent of the same principal it must be paid in cash.[43]

While the money is in his custody he must exercise ordinary care, or such as a prudent person would exercise under the same circumstances, in keeping it safely,[44] and he will be liable if he lends the money without authority to do so and it is lost;[45] or if it is stolen from him because of his failure to perform his duty in safeguarding it.[46] But, in the absence of a special agreement to that effect, he is not an insurer of its safety,[47] and he will not be liable if it is lost or stolen without culpable negligence on his part.[48]

[§ 398] **(b) Remittance of Funds.** In the absence of instructions, either express or implied from the nature of the transaction, it is not the duty of the agent to make remittances of money to his principal, but merely to hold the same subject to instructions,[49] and if, without authority, he remits in a particular manner, the remittance is at his risk.[50] But if he is instructed to remit he must follow any instructions given as to the mode of remittance or he will be liable for any resulting loss;[51] and conversely if he does follow the instructions given the remittance will be at the risk of the principal.[52] In the absence of express instructions as to the mode of remittance he must exercise due care and discretion in reference thereto;[53] but his liability is not absolute;[54] and if he has acted with due care and according to the usual course of business in such cases he will not be liable;[55] and where an agent for the purpose of remittance, in pursuance of authority from his principal, draws bills of exchange in favor of the latter, he does not incur, as regards his principal, the general liability of a drawer of a bill of exchange.[56]

[§ 399] **c. Ratification by or Negligence of Principal.**[57] Although an agent has been guilty of negli-

Div. 64, 77 NYS 341 [aff 174 N. Y. 512 mem, 66 NE 1111 mem] (holding that, where a real estate agent collected rents from certain property under authority from the daughter of the owner, who was authorized by the owner to confer such authority, and paid the rents over to the daughter who converted them to her own use, the agent was not liable for the rents to the estate of the owner on the ground that he was a joint tortfeasor with the daughter in collecting them); Hanley v. Cassan, 11 Jur. 1088.

41. Hancock v. Gomez, 58 Barb. (N. Y.) 490 [aff 50 N. Y. 668 mem]; Prisco v. Hug, 58 N. Y. Super. 140, 9 NYS 720.

[a] **Return of money wrongfully collected.**—Where plaintiff and defendant agreed that defendant should collect from a third person for their joint benefit, money to which neither of them was entitled, and defendant, after collecting the money, returned it to the person from whom it had been wrongfully collected, plaintiff had no cause of action against defendant therefor. Needles v. Fuson, 68 SW 644, 24 KyL 369.

42. Walkley v. Griffith, 4 E. D. Smith (N. Y.) 343.

43. Hanley v. Cassan, 11 Jur. 1088 (holding that where an agent who receives money for another pays it to another agent of the principal he is bound to pay it in cash, and he cannot merely settle it in an account between that agent and himself, unless he can show an authority from the principal and that there was an account between the principal and that agent with a balance in favor of the agent).

44. Robinson v. Illinois Cent. R. Co., 30 Iowa 401.

[a] **A person acting for an express company** as its agent in selling its money orders in caring for the money of such company is bound to the exercise of only that degree of care and caution which would be exercised by an ordinarily careful and prudent person under like or similar circumstances. American Express Co. v. Stuart, 134 Ill. A. 390.

45. Benson v. Liggett, 78 Ind. 452.

46. Cave v. Lougee, 134 Ga. 135, 67 SE 667 (holding that, if money of a principal is stolen from an agent because of his failure to perform some duty as to its handling and custody which rested on him independently of instructions under which he was acting, he will be liable if he failed to exercise ordinary care, under Civ. Code [1895] § 3009, providing that an agent for hire must exercise ordinary care about the principal's business).

47. Louisville, etc., R. Co. v. Buffington, 131 Ala. 620, 31 S 592.

[a] **If the agent is instructed not to invest** money previously given him for such purpose, he is required to exercise only ordinary care in keeping it subject to the future orders of the principal, and need not return or offer to return it or keep the specific funds received, provided he has sufficient funds on hand to make return of the amount whenever called on. Richardson v. Futrell, 42 Miss. 525.

48. Cave v. Lougee, 134 Ga. 135, 67 SE 667 (holding that if an agent follows authorized instructions, and a loss of the principal's money results therefrom, or from the doing of acts consented to by the principal or his authorized agent, the agent losing the money will not be liable); Robinson v. Illinois Cent. R. Co., 30 Iowa 401. See also supra § 396.

[a] **Burglary from iron safe.**—Where, in the absence of any special agreement to act as the insurer of moneys collected by him, an agent for the collection of money, who, not being able to remit it the day it was collected, locked it up in an iron safe which belonged to his principal, and which he found in the principal's office when he took charge thereof as agent, and then fastened the doors and windows of the office and left it for the night, such agent is not lacking in the exercise of ordinary diligence, so as to make him responsible for the loss of the money that night by burglary; and such facts present a defense to the recovery by the principal of such money from said agent. Louisville, etc., R. Co. v. Buffington, 131 Ala. 620, 31 S 592.

[b] **Where money delivered to a bank is taken from its agent by robbers,** when he is using ordinary care and is guilty of no negligence, he is not liable to the bank. Rechtscherd v. St. Louis Accommodation Bank, 47 Mo. 181.

49. Lyon v. Tams, 11 Ark. 189.

50. Lyon v. Tams, 11 Ark. 189 (holding that if an agent remits money to his principal without any instructions, express or implied, he will be liable if it is lost in transit unless the principal ratified his act); Rourk v. Pegram, 10 La. Ann. 394 (holding that an agent who without instructions remits a bill at forty-five days after date on drawees at a place distant from the principal's residence and drawn by a house of inferior and doubtful credit will be liable for a resulting loss).

51. Stone v. Hayes, 3 Den. (N. Y.) 575 [aff 7 Hill 128]; Foster v. Preston, 8 Cow. (N. Y.) 198; Wilson v. Wilson, 26 Pa. 393; Kerr v. Cotton, 23 Tex. 411.

[a] **Remittance by bill.**—If an agent, who is directed to remit in a bill, sends one which is not purchased by him, but which is received by him in payment of a sale of his own property, he is liable in case the bill is not paid. Akin v. Bedford, 5 Mart. N. S. (La.) 502.

52. Warwicke v. Noakes, 1 Peake N. P. 67, 21 ERC 14.

53. Rourk v. Pegram, 10 La. Ann. 394.

54. Buell v. Chapin, 99 Mass. 594, 97 AmD 58 (holding that an agent in remitting money is required to exercise only ordinary and reasonable skill and diligence, and that whether it is negligence to transmit money by mail in the form of bills inclosed in a letter depends upon the circumstances of the case, including the amount sent, expense of different modes of transmission, the time and distance intervening, and the prevailing usage in similar cases).

[a] **Remittance by mail.**—"There is no rule of law that the post-office established by the government for the purpose of carrying letters is a less safe or appropriate means of forwarding money than a private carrier or banker. Whether it is so in any particular case is a question of fact, depending upon the amount to be sent, the proportionate expense of different modes of transmission, the time and distance intervening, the prevailing usage in similar cases, and other circumstances surrounding the transaction, all which are proper for the consideration of the jury." Buell v. Chapin, 99 Mass. 594, 596, 97 AmD 58.

55. Jones v. Lathrop, 44 Ga. 398; Underwriters' Wrecking Co. v. Board of Underwriters, 35 La. Ann. 803 (holding that an agent who is instructed by his principal to remit without indicating any particular mode of remittance, and who does remit in the customary mode, is not responsible further); Potter v. Morland, 3 Cush. (Mass.) 384 (holding that, where goods are consigned to an agent for sale, with general instructions to remit the proceeds, it is a sufficient compliance with such instructions if the agent remits by a bill of exchange, without indorsing it or guaranteeing it, provided such is the usage at the agent's place of business, and the agent uses proper diligence and discretion in the purchase of the bill; and, in an action against the agent to recover the proceeds of such a sale, proof of the usage and of a remittance accordingly is a sufficient prima facie defense, and if it is established by the agent the burden of proof is then on the principal to show that bills remittted in pursuance of the usage ought to be indorsed or guaranteed by the agent); Warwicke v. Noakes, 1 Peake N. P. 67, 21 ERC 14.

56. Jones v. Lathrop, 44 Ga. 398.

57. **Ratification** see generally supra §§ 77–146.

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gence, he will not be liable to the principal if the latter ratifies what he has done,[58] either expressly or impliedly;[59] but such ratification to relieve the agent must be with knowledge on the part of the principal of the material facts.[60]

Negligence of principal. The agent will not be liable if the loss is due to the fault of the principal himself,[61] or to the principal's contributory negligence,[62] or if the principal, notwithstanding the negligence of the agent, can, by the exercise of ordinary care, protect himself and avoid any loss therefrom and fails to do so.[63]

[§ 400] **d. Measure of Damages.**[64] An agent is liable on the ground of negligence only for such damages as are the natural and proximate result of his negligence,[65] and the measure of damages is the loss or injury actually sustained by the principal as the result of such negligence,[66] and no further damages can be recovered.[67] If there has been a breach of duty on the part of the agent the principal is entitled to recover at least nominal damages;[68] but if no loss or injury has been sustained as the result of such negligence he is entitled only to nominal damages,[69] and no substantial damages can be recovered.[70]

Negligence in collecting. As a general rule the measure of liability on the part of an agent for negligence in collecting claims is the actual amount of injury sustained by the principal.[71] This injury is prima facie the amount of the debt or claim;[72] but it is competent for the agent to show that the principal has not been damaged to this extent or

58. Codwise v. Hacker, 1 Cai. (N. Y.) 526; Towle v. Stevenson, 1 Johns. Cas. (N. Y.) 110; Wagner v. Phillips, 12 S. D. 335, 81 NW 632.

59. Vianna v. Barclay, 3 Cow. (N. Y.) 281; Cairnes v. Bleecker, 12 Johns. (N. Y.) 300.

60. Bannon v. Warfield, 42 Md. 22; Williams v. Higgins, 30 Md. 404; Whitney v. Martine, 88 N. Y. 535 [rev 47 N. Y. Super. 396 (rev 6 AbbNCas 72)]; Grant v. Ludlow, 8 Oh. St. 1; Butterworth v. Shannon, 11 Ont. A. 86.

61. Fitz v. Hayden, 1 La. 411; Brooks v. Lawrence, 1 Edm. Sel. Cas. (N. Y.) 496; Herbert v. Lukens, 153 Pa. 180, 25 A 1116.

62. Moore v. Coler, 114 App. Div. 301, 99 NYS 846.

63. Brant v. Gallup, 111 Ill. 487, 53 AmR 638; Sioux City, etc., R. Co. v. Walker, 49 Iowa 273 (holding that an agent charged with the disbursement of funds is not liable for a loss occurring through his negligence, provided the exercise of reasonable care on the part of his principal would have prevented the loss).

Avoidable consequences see generally Damages [13 Cyc 71].

64. **Damages generally see** Damages [13 Cyc 1]. For disobedience of instructions see supra § 380. For negligence in effecting insurance see supra § 393.

65. Meadville First Nat. Bank v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 AmR 618; Allen v. Suydam, 20 Wend. (N. Y.) 321, 32 AmD 555; Lowenburg v. Wolley, 25 Can. S. C. 51.

66. U. S.—Bell v. Cunningham, 3 Pet. 69, 7 L. ed. 606; Hamilton v. Cunningham, 11 F. Cas. No. 5,978, 2 Brock. 350.

Ala.—Mobile Bank v. Huggins, 3 Ala. 206.

Ill.—Plumb v. Campbell, 129 Ill. 101, 18 NE 790.

La.—Dunford v. Patterson, 7 Mart. 460, 12 AmD 514.

N. Y.—Meadville First Nat. Bank. v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 AmR 618; Goodwin v. O'Brien, 3 Silv. Sup. 96, 6 NYS 239 [aff 127 N. Y. 649 mem, 27 NE 856 mem]; Allen v. Suydam, 20 Wend. 321, 32 AmD 555.

Pa.—Arrott v. Brown, 6 Whart. 9.

Eng.—Salvesen v. Rederi, [1905] A. C. 302; Cassaboglou v. Gibbs, 9 Q. B. D. 220 [app dism 11 Q. B. D. 797].

Can.—Lowenburg v. Wolley, 25 Can. S. C. 51.

Man.—Vivian v. Scoble, 1 Man. 125.

[a] **Bad investments.**—In an action to recover for bad investments in mortgage securities made by defendant for plaintiff, the case being submitted on three counts, one for breach of defendant's undertaking to invest plaintiff's money safely; another for negligence in putting her money, as her agent, into worthless securities; and the other for fraudulent representations inducing plaintiff to allow defendant to place her money in the investments, the measure of damages in case of recovery for breach of contract or for negligence is the difference between the value of the mortgages at the time they were bought, and safe mortgages, and this is also the measure in cases of fraudulent representations, unless the facts of the particular case warrant a different rule. Coffing v. Dodge, 167 Mass. 231, 45 NE 928.

[b] **Neglecting to remit.**—Where an agent, contrary to his duty, neglected to remit funds to London, his principal, in an action against him for money had and received, was held entitled to the benefit of the rate of exchange with England. Dodge v. Perkins, 9 Pick. (Mass.) 368.

67. Sawyer v. Mayhew, 51 Me. 398; Meadville First Nat. Bank v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 AmR 618.

[a] **Damages too remote.**—Where an employee to take orders for shoes got one for goods to be delivered in two and one-half months, but delayed several days to hand it in, and in the meantime the order was canceled, this not being an event which, according to common experience, was naturally and reasonably to be expected from the delay, the employee was not liable for the damages. Hurley v. Packard, 182 Mass. 216, 65 NE 64.

68. Adams v. Robinson, 65 Ala. 586; Brant v. Gallup, 111 Ill. 487, 53 AmR 638; Van Wart v. Woolley, M. & M. 520, 22 ECL 578.

69. Mobile Bank v. Huggins, 3 Ala. 206; Meadville First Nat. Bank v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 AmR 618.

70. Ala.—Mobile Bank v. Huggins, 3 Ala. 206.

Ill.—Brant v. Gallup, 111 Ill. 487, 53 AmR 638.

Me.—Washburn v. Blake, 47 Me. 316; Folsom v. Mussey, 10 Me. 297.

Mass.—Alsop v. Coit, 12 Mass. 40.

N. J.—Porter v. Woodruff, 36 N. J. Eq. 174 (holding that an agent should not as a general rule invest in second mortgages, but he will not be held personally liable because he has done so, in the absence of proof that loss has ensued or will probably ensue).

N. Y.—Meadville First Nat. Bank v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 AmR 618; Commercial Bank v. Ten Eyck, 48 N. Y. 305; Lienan v. Dinsmore, 3 Daly 365, 10 AbbPrNS 209, 41 HowPr 97; Talcott v. Cowdry, 17 Misc. 333, 39 NYS 1076.

71. U. S.—Hamilton v. Cunningham, 11 F. Cas. No. 5,978, 2 Brock. 350.

Ala.—Mobile Bank v. Huggins, 3 Ala. 206.

Mich.—Reed v. Northrup, 50 Mich. 442, 15 NW 543.

Minn.—Borup v. Nininger, 5 Minn. 523.

N. Y.—Meadville First Nat. Bank v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 AmR 618 [rev 16 Hun 332]; Allen v. Suydam, 20 Wend. 321, 32 AmD 555 [rev 17 Wend. 368].

[a] **To sustain a recovery for more than nominal damages,** in favor of the owner of commercial paper, against a collecting agent, for failure to give due notice of nonpayment, there must be evidence that if due notice had been given plaintiff might have collected the amount, or some part of it. Lienan v. Dinsmore, 3 Daly 365, 10 AbbPrNS 209, 41 HowPr 97. See also Omaha Nat. Bank v. Kiper, 60 Nebr. 33, 82 NW 102.

72. Omaha Nat. Bank v. Kiper, 60 Nebr. 33, 82 NW 102 (holding that, where a debt is lost through the negligence of a collecting agent, the measure of damages is the amount of the debt, in case there is a reasonable probability that, but for the agent's default, the debt would have been collected); Meadville First Nat. Bank v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 AmR 618 [rev 16 Hun 332].

[a] **Where commercial paper becomes worthless** through the negligence of a collecting agent, he is prima facie liable for the face value of the paper with interest. Armington v. New Orleans Gas Light, etc., Co., 15 La. 414, 35 AmD 205; Pritchard v. Louisiana State Bank, 2 La. 415; Durnford v. Patterson, 7 Mart. (La.) 460, 12 AmD 514; Knapp v. U. S., etc., Express Co., 55 N. H. 348; Downer v. Madison County Bank, 6 Hill (N. Y.) 648; McKinster v. Utica Bank, 9 Wend. (N. Y.) 146 [aff 11 Wend. (N. Y.) 473]; Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 NW 859; Merchants' State Bank v. Phillips State Bank, 94 Wis. 444, 69 NW 170.

[b] **Paper lost.**—In an action against an express company for the loss of a note which was delivered to defendant company by plaintiff for the purpose of collection, and which was negligently lost by defendant, the amount expressed in the note is prima facie the measure of damages. American Express Co. v. Parsons, 44 Ill. 312.

[c] **One to whom a bill of exchange is intrusted** as agent for collection does not bear the same relation to his principal that the holder bears to the drawer or indorser, and the same negligence or omission that will deprive the holder of recourse against the previous parties to the bill will not necessarily render the agent liable to his principal to the extent of the bill. Hamilton v. Cunningham, 11 F. Cas. No. 5,978, 2 Brock. 350.

[d] **If the negligence of the agent results in the release of some of the parties** liable on commercial paper, and other parties liable thereon are perfectly solvent, (1) this will not subject him to liability for the face value of the paper. Mobile Bank v. Huggins, 3 Ala. 206. (2) But in at least one jurisdiction it is held that the agent is bound in the same manner and to the same extent as if he were a party to the bill or note, and that he is liable for the amount of the bill or note whenever a solvent party is discharged, although other parties who are solvent may continue liable. Miranda v. New Orleans City Bank,

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has sustained only nominal damages,[72] and if it is shown that the principal has not suffered any damage by the negligence of the collecting agent no more than nominal damages can be recovered.[74] Thus the financial circumstances of the parties liable at the time when the agent should have acted may be shown in mitigation of damages, and then the recovery will be limited to the actual loss sustained;[74½] and, if the debtor was insolvent, the agent is liable only for the amount of the debt which would have been collectable through the exercise of due diligence.[75] So also the fact that the creditor holds collateral security from which a portion of the sum due may be realized may be shown in mitigation of damages.[75½]

[§ 401] **4. Duty to Account—a. In General.**[76] It is the duty of an agent to account to his principal for all property or funds belonging to his principal which come into his hands by virtue of his agency,[77] or which come into the hands of a subagent appointed by the agent to receive them;[78] and in case of the death of an agent his personal representatives must account wherever it would have been the agent's duty so to do.[79] This duty to account includes all profits resulting from his transactions as agent or on his own account in breach of his duty as agent,[80] and the proceeds of all sales and collections for his principal,[81] although in the case of a sale, the proceeds amount to more than

6 La. 740, 26 AmD 493; Pritchard v. Louisiana State Bank, 2 La. 415; Durnford v. Patterson, 7 Mart. (La.) 460, 12 AmD 514; Montillet v. U. S. Bank, 1 Mart. N. S. (La.) 365; Crawford v. Louisiana State Bank, 1 Mart. N. S. (La.) 214.

73. Andrews v. Pardee, 5 Day (Conn.) 29; Crawford v. Louisiana State Bank, 1 Mart. N. S. (La.) 214; Meadville First Nat. Bank v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 AmR 618 [rev 16 Hun 332].

74. Andrews v. Pardee, 5 Day (Conn.) 29; Lienan v. Dinsmore, 3 Daly (N. Y.) 365, 10 AbbPrNS 209, 41 HowPr 97; Brumble v. Brown, 73 N. C. 476.

[a] **Negligence in collecting note.**—In receiving a note for collection, the agent assumes the duty of taking the proper steps to fix the liability of the indorser, and for a neglect of that duty he will be responsible to the extent of the damages occasioned thereby. If the maker is solvent so that the note can be collected from him the damages resulting from the discharge of the indorser will be merely nominal. Angell v. Rosenburg, 12 Mich. 241; West v. St. Paul Nat. Bank, 54 Minn. 466, 56 NW 54; Burr v. Willson, 22 Minn. 206; Nininger v. Knox, 8 Minn. 140; State v. Cochran, 13 N. C. 63; Middlebury Bank v. Rutland, 33 Vt. 414.

[b] **There is no actual damage** (1) from failing to present a bill for acceptance where it is shown that it would not have been accepted if presented (Allen v. Suydam, 20 Wend. (N. Y.) 321, 32 AmD 555 [rev 17 Wend. 368]), or (2) from the negligence of an agent in failing promptly to present a draft for payment so that by reason of the delay it cannot be collected from the drawee if the maker is still liable thereon and is solvent (Meadville First Nat. Bank v. New York Fourth Nat. Bank, 77 N. Y. 320, 33 AmR 618 [rev 16 Hun 332]).

74½. Andrews v. Pardee, 5 Day (Conn.) 29 (insolvency of debtor); Mitchell v. Shuert, 16 Mich. 444; West v. St. Paul Nat. Bank, 54 Minn. 466, 56 NW 54; Povall v. Dansville Cigar Mfg. Co., 59 Hun 70, 12 NYS 653; Lienau v. Dinsmore, 3 Daly (N. Y.) 365, 10 AbbPrNS 209, 41 HowPr 97. See also Fox v. Davenport Nat. Bank, 73 Iowa 647, 35 NW 688.

75. Russell v. Palmer, 2 Wils. C. P. 325, 95 Reprint 837.

75½. Borup v. Nininger, 5 Minn. 523; Mott v. Havana Nat. Bank, 22 Hun (N. Y.) 354.

76. **Accounting by factors** see Factors [19 Cyc 134 et seq].

Agent's liability to arrest for failing to account see Arrest [3 Cyc 909].

77. Ala.—Ins., etc., Co. v. Land Co., 54 S 228.

Ark.—Arkansas Fertilizer Co. v. Banks, 95 Ark. 86, 128 SW 566.

Ga.—Jackson v. Gallagher, 128 Ga. 321, 57 SE 750; Dodge v. Hatchett, 118 Ga. 383, 45 SE 667.

Ind.—Earnhart v. Robertson, 10 Ind. 8; McClelland v. Hubbard, 2 Blackf. 361; Nading v. Howe, 23 Ind. A. 690, 55 NE 1032.

Iowa.—Gladiator Consol. Gold Mines, etc., Co. v. Steele, 132 Iowa 446, 106 NW 737.

Kan.—Miller v. Wiley, 86 Kan. 926, 122 P 888.

La.—Clement v. South Atlantic Steamship Line, 128 La. 399, 54 S 920; Saint v. Martel, 127 La. 78, 53 S 432; Holmes v. Murdock, 125 La. 916, 51 S 1035; Nolan v. Shaw, 6 La. Ann. 40 (holding that an agent may become a debtor of the principal, but not until dissolution of the agency and his neglect or refusal to deliver over the property; that while the agency continues the property or money in his hands belongs to the principal); McDonogh v. Delassus, 10 Rob. 481.

Mass.—Cushman v. Snow, 186 Mass. 169, 71 NE 529.

Mich.—Wasey v. Whitcomb, 167 Mich. 58, 132 NW 572; Muir v. Kalamazoo Corset Co., 155 Mich. 441, 119 NW 589 (holding that an agent is bound to account to his principal for money of the latter coming into his hands for disbursement).

Mo.—Beagles v. Robertson, 185 Mo. A. 306, 115 SW 1042.

N. J.—Walker v. Hancock Mut. L. Ins. Co., 80 N. J. L. 342, 79 A 354, 35 LRANS 153, AnnCas1912A 526; Sherman v. Sherman, etc., Co., 64 N. J. Eq. 57, 53 A 226; Hartshorne v. Thomas, 43 N. J. Eq. 419, 10 A 843.

N. Y.—Duff v. Blair, 74 App. Div. 364, 77 NYS 444; Auburn v. Draper, 23 Barb. 425. See Hay v. Hall, 28 Barb. 378.

Pa.—Johnson v. Thumm, 4 Pa. Cas. 433, 7 A 739.

S. C.—Brock v. Lewis, 28 S. C. Eq. 77.

Tenn.—Royston v. McCulley, (Ch. A.) 59 SW 725, 52 LRA 899 (holding that, where one takes possession of land and manages it, not as tenant, but as attorney in fact for the owner, he is liable for the proceeds thereof less the expenditures, but not for the rental value, in the absence of fraud or dereliction of duty).

Vt.—Smith v. Woods, 4 Vt. 400 (holding that, where an agent takes notes for his principal's benefit, payable on a certain day at a particular bank, which notes, after the commencement of an action of account against the agent, are paid by the maker at the time and place appointed, such payment is a payment to the agent and he is accountable to his principal for the amount of the notes).

Wis.—United American F. Ins. Co. v. American Bonding Co., 146 Wis. 573, 131 NW 994, 996, 40 LRANS 661 [cit Cyc].

Eng.—North American Land, etc., Co. v. Watkins, [1904] 2 Ch. 233 [dism app [1904] 1 Ch. 242]; Lister v. Lister, Rep. t. Finch 285, 23 Reprint 156. See Ehrensperger v. Anderson, 3 Exch. 148.

Can.—Vivian v. Scoble, 4 CanLT OccNotes 297.

Ont.—Clayton v. Patterson, 32 Ont. 435.

Que.—Violett v. Sexton, 14 Que. K. B. 360.

See West v. McLaughlin, 162 Fed. 124, 89 CCA 124.

[a] **That an infant agent cannot be made to account** see Smally v. Smally, 1 Eq. Cas. Abr. 6, 21 Reprint 831.

78. Matthews v. Haydon, 2 Esp. 509.

79. Walsham v. Stainton, 9 Jur. N. S. 1261; Salisbury v. Morrice, 11 L. J. Ch. 114; Lee v. Bowler, Rep. t. Finch 125, 23 Reprint 68.

80. See supra §§ 356, 357.

[a] **Additional profits.**—An agent selling goods and accounting for the proceeds is not obliged to account for profits he may make out of further investments of those proceeds, but he is liable to the consignor merely for the proceeds of the sale of his goods. Kirkham v. Peel, 44 L. T. Rep. N. S. 195 [dism app 43 L. T. Rep. NS 171].

81. La.—McClendon v. Bradford, 42 La. Ann. 160, 7 S 78, 8 S 256. But see Frank v. Hollander, 35 La. Ann. 582.

Minn.—Bardwell v. American Express Co., 35 Minn. 344, 28 NW 925.

Nebr.—Wells v. Cochran, 84 Nebr. 278, 120 NW 1123.

N. Y.—Reed v. Hayward, 82 App. Div. 416, 81 NYS 608; Haebler v. Luttgen, 2 App. Div. 390, 37 NYS 794 [aff 158 N. Y. 693 mem 53 NE 1125 mem]; Clark v. Merchants' Bank 3 N. Y. Super. 498 [rev on other grounds 2 N. Y. 380]; Dempsey v. Zittel, 90 NYS 1054; Paris Hill Mfg. Co. v. Sheldon, 13 N. Y. 370 [aff 122 N. Y. 650 mem, 26 NE 753].

N. C.—Lance v. Butler, 135 N. C. 419, 47 SE 488.

Eng.—Topham v. Braddick, 1 Taunt. 572, 127 Reprint 956.

[a] **Debts.**—Where an agency to sell merchandise for another is terminated by the agent's insolvency, debts arising from sales made by the agent on credit in his own name belong to the principal, subject to legal liens, although in pursuance of the agreement between the parties the agent has rendered monthly accounts of all his sales, and given notes or acceptances to the principal for the cost of the merchandise at wholesale prices, taking a receipt containing a promise to account for the same at maturity. Audenried v. Betteley, 8 Allen (Mass.) 302.

[b] **Where an agent sells on credit without authority,** (1) he is liable to account to the principal for all the property so sold. Morrison v. Cole, 30 Mich. 102. (2) If he delivers the property without the price being paid he is personally liable to his principal, although the amount is more than the price fixed by the principal. Boorman v. Brown, 3 Q. B. 511, 43 ECL 843, 114 Reprint 603 [aff 11 Cl. & F. 1, 8 Reprint 1003].

[c] **Sale by another agent.**—Where plaintiff delivered certain pumps to defendant, giving him the right to sell the same, but reserving the right to sell them himself if he wished, and subsequently authorized B to make a sale of the pumps for him, he cannot recover from defendant for a pump sold by B for which B failed to account. Reid v. Furness, 11 Ill. A. 645.

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the price fixed by the principal;[82] and if the principal cannot specially trace such proceeds he becomes a creditor at large of the agent for the amount.[83] The agent must account for the very property or funds he has received for his principal.[84]

Property or funds received for specific purpose. It is the duty of an agent to account for property or funds which he has received to be applied to a specific purpose,[85] and if he fails to apply them to the purposes for which they were received, the principal may recover the same;[86] and it has been held that, where money is delivered by a principal to be paid by the agent to a third person, the principal may countermand the payment, before the money has been paid over, and thereafter the agent cannot escape liability to his principal by paying over the money to the third person.[87]

Where the property received consists of money, the agent need not account for and turn over the identical money received unless it can be identified.[88]

If the property is sold or exchanged, or the money invested, the title of the principal at once attaches, and the agent must account for the money or property so received,[89] as it is well settled that the principal may follow and recover his property or the proceeds thereof in the hands of his agent.[90] If

82. Hammond v. Olmstead, 10 Fed. 223 (holding that, where an agent sells property for his principal on various dates upon a fluctuating market and accounts to his principal for sales as all of a particular date, he will be liable for the balance between what he accounted for and what he actually received); Dunlevy v. Mowry, 8 F. Cas. No. 4,165, 2 Bond 214 (holding that, where an agent sells bonds at fifty cents on the dollar and accounts to his principal for thirty-seven and one-half cents on the dollar, he is liable to the principal for the difference between the rates, subject to a deduction for reasonable charges); Whitehead v. Lynn, 20 Colo. A. 51, 76 P 1119; Kellogg v. Keeler, 27 Ill. A. 244 (holding that authority to an agent to sell at a stipulated figure does not amount to a contract to give him all he sells for above that sum, and it is still his duty to obtain the highest price for which the property will sell, and account to his principal for the entire proceeds, less a reasonable compensation).

83. Clark v. Merchants' Bank, 3 N. Y. Super. 498 [rev on other grounds 2 N. Y. 380].

84. Skannall v. Stevenson, 23 La. Ann. 755 (holding that, where defendant purchased certain cotton as plaintiff's agent under a contract to dispose of the same and divide the net proceeds, defendant was bound to account for all the cotton so purchased); Sale v. Pulaski Stave Co., (Ky.) 117 SW 404 (holding that, where plaintiff purchased land at a judicial sale through his agent, he was entitled to land described in the sale).

[a] **Receiving gold, must account for gold.**—An agent receiving payment for his principal in gold is bound to account to his principal for gold, although the debtor could not have been forced to pay in gold, which was at a premium over currency. Simpkins v. Low, 49 Barb. (N. Y.) 382 [aff 54 N. Y. 179].

85. Wells v. Collins, 74 Wis. 314, 43 NW 160, 5 LRA 531 and note (holding that, where an agent is instructed by his principal to pay over certain collections, when made to a third person, the relation of debtor and creditor does not arise between the agent and his principal on the collection of the money, in the absence of an express agreement, but the property in the very money collected remains in the principal until it is applied to the purpose specified).

86. Strong v. Bliss, 6 Metc. (Mass.) 393; Allen v. O'Bryan, 118 App. Div. 213, 103 NYS 125 (holding that, where plaintiff gave defendant a certain amount of money to be expended for a specific legal purpose, defendant could be required to account for it).

87. Henry County v. Allen, 50 Mo. 231. But see Allen v. Thompson, 3 Metc. (Ky.) 198, 77 AmD 169 (where the court denied the right of the principal to call back money paid to the agent for a third person on the ground that the agent would be liable to the third person).

88. Young v. Teutonia Bank, etc., Co., 134 La. 879, 64 S 806 (holding that before a principal can recover, as owner, money in his agent's hands he must prove the identity of the fund); Longbottom v. Babcock, 9 La. 44; Pakas v. Hurley, 146 App. Div. 746, 131 NYS 454 [rearg allowed 132 NYS 1140 mem, and aff 133 NYS 499] (holding that, where the owner of a hotel employed defendant as its manager, giving him sole charge, and after defendant had been discharged and the owner had obtained possession the latter brought an action of conversion for rentals received by defendant while managing the hotel, the owner was not entitled to the identical money collected but only to the net amount after deduction of defendant's expenses from the rents received). Compare Simpkins v. Low, 49 Barb. 382 [aff 54 N. Y. 179].

[a] **Where a principal intrusts money to his agent** to buy property, their relations are those of debtor and creditor, not those of depositor and depository and the agent is bound to account for but not to restore the money, and if he becomes insolvent or dies the principal will not be a privileged creditor. Stetson v. Gurney, 17 La. 162; Longbottom v. Babcock, 9 La. 44; Mason v. Mann, 3 S. C. Eq. 116.

[b] **A principal has no lien on money** in the hands of an agent. Young v. Teutonia Bank, etc., Co., 134 La. 879, 64 S 806.

89. Ga.—Sibley v. Ober, 87 Ga. 55, 13 SE 711.

Iowa.—Dows v. Morse, 62 Iowa 231, 17 NW 495.

Miss.—Fairly v. Fairly, 38 Miss. 280 (holding that, if an agent purchases property for his principal and uses it with the latter's knowledge and consent, it is not a circumstance tending to show title in the agent unless it also appears that he claims to do so in his own right and with the knowledge of the principal).

N. Y.—Childs v. Waterloo Wagon Co., 37 App. Div. 242, 57 NYS 520 [aff 167 N. Y. 576 mem, 60 NE 1108 mem]; Haebler v. Luttgen, 2 App. Div. 390, 37 NYS 794 [aff 158 N. Y. 693 mem, 53 NE 1125 mem]; Anstice v. Brown, 6 Paige 448.

N. C.—Dowd v. Holbrook, 152 N. C. 547, 548, 67 SE 1060 [cit Cyc].

Wis.—Kountz v. Gates, 78 Wis. 415, 47 NW 729; Wells v. Collins, 74 Wis. 341, 43 NW 160, 5 LRA 531.

Eng.—Williams v. Everett, 14 East 582, 104 Reprint 725; Wells v. Ross, 7 Taunt. 403, 2 ECL 420, 129 Reprint 161.

Can.—Turner v. Francis, 14 CanLTOccNotes 406.

Ont.—Long v. Carter, 23 Ont. A. 121 [aff 26 CanSC 430].

Que.—In re Lemelin, 22 Que. Super. 87 (holding that goods bought by an agent for his principal, for which he was to be paid a commission, are the property of the principal, even when bought in the name of the agent).

[a] **The presumption of ownership from possession** does not extend to property intrusted to an avowed agent for the special purpose of his vocation. Boisblanc's Succession, 32 La. Ann. 109.

[b] **A deposit in bank** by a depositor as agent is prima facie the property of his principal, and it is not liable to attachment for the debt of the agent; but in all such cases the name of the principal should be stated on the account. Northern Liberties Bank v. Jones, 42 Pa. 536.

[c] **Right against creditors of agent.**—(1) A principal's right to property in the hands of his agent, which is impressed with a trust, is good as against the agent's creditors. Watertown Steam-Engine Co. v. Palmer, 84 Ga. 368, 10 SE 969, 20 AmSR 368; Dexter v. Stewart, 7 Johns. Ch. (N. Y.) 52. (2) A merchant's goods in the hands of a factor are not liable to debts of a superior nature; but otherwise of money. Ex p. Dumas, 1 Atk. 232, 26 Reprint 149, 2 Ves. 582, 28 Reprint 372; Mace v. Cadell, Cowp. 232, 98 Reprint 1060, 4 ERC 58; Godfrey v. Furzo, 3 P. Wms. 186, 24 Reprint 1022; Whitecomb v. Jacob, 1 Salk. 160, 91 Reprint 149. (3) If notes and not money are taken for the goods, they belong to the principal. Ex p. Oursell, Ambl. 297, 27 Reprint 200.

[d] **Where an agent invests a greater amount than was authorized** or was deposited with him for such purpose, and refuses to deliver the amount of the property which the sum deposited with him would purchase, the principal may recover the value of the property in an action of account. Bradfield v. Patterson, 106 Ala. 397, 17 S 536.

[e] **A purchase in the principal's name** with the agent's funds does not vest in the agent, even though made without the principal's knowledge, unless the principal consents to give the agent the benefit. Giannoni v. Gunny, 14 La. Ann. 632.

[f] **Election of principal.**—(1) The principal may elect to hold the agent or claim goods taken by the agent without authority. Thus an agent, although authorized to sell or exchange the property of his principal, does not by any exchange divest his principal of his right of property in the thing received; nor does an agent, by investing his funds in the property of his principal, make the property his own. The principal may claim the property received by his agent in exchange, or sue for the value and suing for its value is an election of remedy. Lowry v. Beckner, 5 B. Mon. (Ky.) 41; Greene v. Haskell, 5 R. I. 447. (2) But he cannot both hold the agent and demand the goods. Meyers v. Walker, 31 Ill. 353; Perkins v. Hershey, 77 Mich. 504, 43 NW 1021.

90. German Sav. Inst. v. Adae, 3 Fed. 106, 1 McCrary 501.

Following trust funds see generally Trusts and Trustees [39 Cyc 528].

[a] **The product or substitute of the original property** of a principal, traced to the hands of his agent, and which the principal seeks to recover, has the nature of the original thing itself imparted to it so long as it can be ascertained to be such product

an agent wrongfully disposes of the funds or property, he may be compelled to account to his principal therefor on the basis of conditions existing immediately before such wrongful disposition.[91] In calling an agent to account a principal may repudiate any unauthorized acts of the agent and hold him strictly accountable according to the agreement between them.[92]

Waiver. A principal's waiver of an agent's weekly itemized statement of expenses is not a waiver of the agent's obligation to account at some time.[93]

[§ 402] **b. Duty to Deliver Funds or Property to Principal.**[94] An agent must deliver the funds or the property to his principal upon a proper demand therefor,[95] or at such times as may be fixed by the express or implied terms of the agency,[96] or upon the termination of the agency;[97] or he must satisfactorily explain why he does not do so.[98] The agent cannot set up the title of a stranger to money received for his principal,[99] nor can he escape liability by paying over the money to a person who has no right thereto;[1] nor does a breach of contract on the part of the principal absolve him from his obligation to account;[2] but it seems that, if the money collected by the agent belongs in fact to a third person, the agent may escape liability to his principal by paying over the same to the true owner.[3]

Duty to accept return of property. Where the agency is an experimental one, the principal may be required, under the terms of the contract, to accept the return of articles which the agent has on hand at the time the agency is discontinued.[4]

[§ 403] **c. To Whom Accountable.** An agent's duty to account is ordinarily owing to his principal only,[5] or, upon his death, to his heirs or personal representatives.[6] In accordance with this rule, a subagent is ordinarily under a duty to account to the primary agent only,[7] unless his employment is such that a privity of contract exists between him

or substitute. Norfolk Overseers of Poor v. Commonwealth Bank, 2 Gratt. (43 Va.) 544, 44 AmD 399.

91. Kounts v. Gates, 78 Wis. 415, 47 NW 729 (holding that where an agent disposes of his principal's property according to his authority, and secures a contract for the payment of a valuable consideration therefor, and wrongfully surrenders such contract or releases the purchaser from payment of any part thereof without authority, he must account to his principal on the basis of conditions existing immediately before such surrender). See also Witsell v. Riggs, 48 S. C. L. 186 (where an action was brought to recover damages for an alleged breach of duty in not paying over to plaintiff the purchase money—Confederate treasury notes—of land which defendant had sold for plaintiff, the money having been retained by defendant, without giving notice that he had received it, until it became valueless, and the declaration contained no specific allegation of fraud or collusion, nor of special damages; and it was held that the measure of damages was the value of the currency at the time it was received by defendant, with interest thereon).

92. Chapman v. Hughes, 134 Cal. 641, 58 P 298, 60 P 974, 66 P 982.

93. Muir v. Kalamazoo Corset Co., 155 Mich. 441, 119 NW 589.

94. See also infra § 410.

95. De Leonis v. Etchepare, 120 Cal. 407, 52 P 718 (holding that the agent was bound to pay over moneys collected on demand, although he obtained his power of attorney by fraud); Nolan v. Shaw, 6 La. Ann. 40; Brumble v. Brown, 71 N. C. 513 (holding that one who receives notes for collection is bound, on demand of settlement, either to return them or show sufficient reason for not doing so).

[a] **Improper demand.**—Under a provision in a contract for the sale of machines by an agent that he should promptly deliver all machines remaining unsold at the end of the season on demand of the principal, such agent cannot be compelled to pay for machines as sold which he refused to deliver on demand, where the demand was coupled with a claim for the value of other machines, under another provision of the contract, and compliance with the demand might have been construed as an admission of the validity of the latter claim, which the agent disputed. Esterly Harvesting Mach. Co. v. Veeder, 29 Nebr. 664, 45 NW 1103.

[b] **Where an agent sells on credit** he cannot be called upon to pay the money over to the principal until he has received the whole amount from the purchaser, unless the delay in payment has been occasioned by his neglect. Varden v. Parker, 2 Esp. 710.

[c] **Books and papers of correspondence** between an agent and his principal are the agent's private property, necessary for his protection, and he cannot be compelled to turn them over. Evans v. Van Hall, Clarke (N. Y.) 22.

96. Hemenway v. Hemenway, 5 Pick. (Mass.) 389; Haebler v. Luttgen, 2 App. Div. 390, 37 NYS 794 [aff 158 N. Y. 693 mem, 53 NE 1125 mem] (holding that, where an agent agrees to sell and remit the proceeds, and he sells and takes notes, he is still bound to remit the proceeds at the time fixed for remittance, whether or not the notes are paid); U. S. v. Kiene, 7 Philippine 737 (holding that, where nothing to the contrary appears, the provisions of Civ. Code art 1720, imposes upon an agent the obligation to deliver to the principal all funds collected on his account); Morison v. Thompson, L. R. 9 Q. B. 480 (holding that, where no account remains to be taken between principal and agent, it is the duty of the agent to pay over money as absolutely belonging to the principal). See also supra § 397.

[a] **It is not sufficient that the agent has rendered a satisfactory accounting,** but in addition thereto it is indispensable that he should pay to his principal any balance shown by such accounts. De la Pena v. Hidalgo, 16 Philippine 450.

97. Weaver v. Fisher, 110 Ill. 146 (holding that an agent may be compelled to return a certificate of membership in an exchange to his principal on leaving his employment, where such certificate was furnished to him by the principal to enable him to carry on the agency); Duff v. Blair, 74 App. Div. 364, 77 NYS 444; Halifax Merchants Bank v. Whidden, 19 Can. S. C. 53.

[a] **An action will lie for advances** made to a salesman, in the absence of a specific agreement as to their payment, after the termination of his employment. Freudenberg v. Cooper, 61 Misc. 314, 113 NYS 493.

98. Fidelity Inv. Co. v. Carico, 1 Colo. A. 292, 28 P 1131 (holding that evidence of robbery is not a good defense, unless the agent shows that he kept the full amount for his principal in his safe); Gladiator Cons. Gold Mines, etc., Co. v. Steele, 132 Iowa 446, 106 NW 737.

99. See infra § 410.

[a] **A bank receiving a note for collection** cannot refuse to return it or its proceeds to the depositor on the ground that it was given to defraud creditors of a third party, unless the bank itself is one of the creditors. Leadville First Nat. Bank v. Leppel, 9 Colo. 594, 13 P 776.

1. Wallace v. Peck, 12 Ala. 768.

2. Equitable Mut. F. Ins. Co. v. McCrae, 156 Ill. A. 467 (holding that the breach of a contract with an agent, consisting in failing to place to his credit a deposit of money for certain purposes, does not absolve such agent from the obligation of accounting for and paying over to the principal who is guilty of such breach money collected for his account).

3. Wallace v. Peck, 12 Ala. 768; Robinson v. Easton, etc., Co., 93 Cal. 80, 28 P 796, 27 AmSR 167 and note (holding that an agent who is authorized to make a contract for the sale of land has a right to refund money to an intending purchaser, such rights being coextensive with the obligation created by the agreement under which it has been paid, whether the terms of the agreement with the intending purchaser were pursuant to the authority given or were not and such refunded money cannot be recovered by the principal from the agent); Stevens v. Lee, 2 Wkly. Rep. 16 (holding that money had and received by an agent in pursuance of a contract founded on false statements by his principal is money had and received to the use of the person paying the same, and not to the use of the principal, and the agent may show this as a defense against the principal).

4. Handlan-Buck Mfg. Co. v. Stave Electrical Co., (Mo. A.) 168 SW 785.

[a] **Experimental agency; return of articles purchased by agent.**—Where a contract of sale of certain articles creates an experimental selling agency, and provides that the articles purchased by the agent at the execution of the contract may be returned on the discontinuance of the agency at the close of the first term, the fact that the agent fails to distinctly decide to discontinue the contract does not relieve the principal from his obligation to accept a return of the articles on hand, if it is discontinued at such time; nor is such obligation affected by the agent's delay in tendering the articles, where the principal acquiesces in such delay. Handlan-Buck Mfg. Co. v. Stave Electrical Co., (Mo. A.) 168 SW 785.

5. Rosaler v. Mandeville, 92 NYS 341; Atty.-Gen. v. Chesterfield, 18 Beav. 596, 52 Reprint 234 (holding also that the case of a charity forms no exception to the rule).

6. Carrau v. Chapotel, 47 La. Ann. 408, 16 S 873 (holding, however, that, where a principal dispensed with the keeping of an account by the agent, and none was kept, the heir of the principal cannot compel the agent to account, if there are no books or data from which an account can be made up).

7. Ford Lumber Co. v. Arvine, 39 SW 137, 18 KyL. 711 (holding where defendant, after having received a

and the principal, in which case he may be compelled to account directly to the principal;[8] and in any case he may be compelled to account to the principal if notice of the latter's ownership is given to him before he turns over the funds or the property to the primary agent.[9] But, having settled with the primary agent, a subagent cannot be compelled to account again to some other person who has a beneficial interest in the funds or the property, but who sustains no legal relation to him.[10] Where a principal has assigned his right to the property or the funds, of which fact the agent has notice, the agent may be compelled thereafter to pay over such property or funds to the assignee.[11]

Where a number of persons constitute one person their common agent for a common purpose, he should account to all of them together and not to one separately,[12] except where the understanding between the parties is that he should account to only one,[13] or to each one separately.[14]

[§ 404] **d. Keeping and Rendering Accounts.** In accordance with his duty to account, it is ordinarily the duty of an agent, where the business in which he is employed admits of or requires it, to keep true, regular, and accurate accounts of all his transactions and dealings in the subject matter of the agency, as to both the receipts and the disbursements,[15] and be ready to render to his principal a full and complete statement of his dealings and of the state of the accounts between them,[16] supported by proper vouchers,[17] or show some good reason

check from plaintiff to pay his employees, was discharged by N, his superior, and having retained the amount due to himself, he turned over the balance of the check to N, who paid it to plaintiff's employees, that plaintiff had no cause of action against defendant for the proceeds of the check); Toland v. Murray, 18 Johns. (N. Y.) 24; Gooderham v. Hyde, 6 U. C. C. P. 341. See Lockwood v. Abdy, 14 Sim. 437, 37 EngCh 437, 60 Reprint 428.

8. Wilson v. Smith, 3 How. (U. S.) 763, 11 L. ed. 820 (holding that, whenever by express agreement of the parties a subagent is to be employed by an agent to receive money for the principal, or where an authority to do so may be implied from the usual course of trade or the nature of the transaction, the principal may treat the subagent as his agent, and when he has received the money may recover it in an action for money had and received); Miller v. Farmers', etc., Bank, 80 Md. 392. See also Crossley v. Magniac, [1893] 1 Ch. 594; Beaumont v. Boultbee, 7 Ves. Jr. 599, 32 Reprint 241.

9. Harrison Mach. Works v. Coquillard, 26 Ill. A. 513. See also Lewis v. Peck, 10 Ala. 142, 12 Ala. 768 (holding that, where money is collected by an agent on a note for persons who are themselves agents, he may discharge himself by paying it over either to those from whom he received the claim or to the true owner, but cannot discharge himself by paying it to the payee of the note, if the payee is not in fact the true owner, and is not the person from whom he received the note for collection).

[a] **The privity of the trust relation** has been held sufficient to enable a principal to sue a subagent having funds belonging to the principal, which the subagent refuses to pay over. Milton v. Johnson, 79 Minn. 170, 81 NW 842, 47 LRA 529.

10. Tripler v. Olcott, 3 Johns. Ch. (N. Y.) 473 (holding that, where an agent has fairly accounted with his immediate and authorized principal, he is not bound to account over again to a person beneficially interested or cestui que trust to the principal); New Zealand, etc., Land Co. v. Watson, 7 Q. B. D. 374; Clavering's Case, Prec. Ch. 535, 24 Reprint 240; Potts v. Potts, 1 Vern. Ch. 207, 23 Reprint 418. Compare Pollard v. Downes, 2 Ch. Cas. 121, 22 Reprint 876 (in which the court, without offering any reason, held that an agent who had accounted to the trustee who appointed him could be compelled to account again to the cestui que trust); Wagstaffe v. Bedford, 1 Vern. Ch. 95, 23 Reprint 337.

11. Dempsey v. Tittel, 90 NYS 1054.

12. Louisiana Bd. of Trustees v. Dupuy, 31 La. Ann. 305; Hatsall v. Griffith, 2 Cromp. & M. 679.

13. Gray v. Reardon, 10 F. Cas. No. 5,727, 2 Cranch C. C. 219; Killock v. Greg, 4 Russ. 285, 4 EngCh 285, 38 Reprint 813.

[a] **Joint interests.**—If one sells personal property as the agent and by the authority of another, and agrees to pay him the proceeds, he is liable to such other for the proceeds of the sale, although other persons may be jointly interested in the property. Gray v. Reardon, 10 F. Cas. No. 5,727, 2 Cranch C. C. 219.

[b] **Where notice is given to an agent in a particular adventure that another person is jointly interested** with his principal, this prima facie imposes upon the agent the necessity of accounting to such other person for his share of the adventure; but this obligation ceases to exist if the transaction shows that it was the intention of such other person and of the person originally interested in the adventure that the agent should account solely to the latter. Killock v. Greg, 4 Russ. 285, 4 EngCh 285, 38 Reprint 813.

14. Lawless v. Lawless, 39 Mo. A. 539 (holding that, where an agent employed by three owners of certain land to sell the land is to account to each one separately for his respective interest, he is liable to each one separately for the amount realized on such interest at the sale).

15. U. S.—Quirk v. Quirk, 155 Fed. 199.

Cal.—San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 P 410.

Ga.—Dodge v. Hatchett, 118 Ga. 883, 45 SE 667.

Ill.—Illinois Linen Co. v. Hough, 91 Ill. 63; Chicago Title, etc., Co. v. Ward, 113 Ill. A. 327.

Iowa.—Gladiator Cons. Gold Mines, etc., Co. v. Steele, 132 Iowa 446, 106 NW 737 (holding that one who takes an agency is presumptively capable of keeping accounts sufficient for the conduct of the business, and will in general be held responsible for so doing).

Ky.—Peterson v. Poignard, 8 B. Mon. 309.

Md.—Keighler v. Savage Mfg. Co., 12 Md. 383, 71 AmD 600.

N. Y.—Armour v. Gaffey, 30 App. Div. 121, 51 NYS 846.

Pa.—Landis v. Scott, 32 Pa. 495.

S. C.—Riley v. Allendale Bank, 57 S. C. 98, 35 SE 535 (holding that, where a bank that has been placed in charge of the property of a customer is called upon to account for its dealings with such property, the accounting should be exact).

W. Va.—Ruffner v. Hewitt, 7 W. Va. 585.

Eng.—Keighley v. Durant, [1901] A. C. 240, 1 BRC 851; Gray v. Haig, 20 Beav. 219, 52 Reprint 587 (holding that it is imperative upon an agent to preserve correct accounts of all his dealings and transactions; and the loss, and still more the destruction, of such evidence by an agent falls most heavily upon himself); Clarke v. Tipping, 9 Beav. 284, 50 Reprint 352. See Chedworth v. Edwards, 8 Ves. Jr. 46, 32 Reprint 268.

[a] **Duty arises from nature of employment.**—In Gallup v. Merrill, 40 Vt. 133, 137, the court said: "As to the duty of an agent, while acting for and on behalf of his principal, there can be no doubt. When the character and nature of the business in which he is employed requires it, he should keep full, accurate, and regular accounts of all his transactions—of his payments and disbursements—and should render, at all proper times, an account thereof to his principal, 'without suppression, concealment, or overcharge.' This duty is incident to the relation, and arises from the nature of his employment."

[b] **A traveling salesman** who receives his salary and his expenses must keep an account of his expenses, it being an incident of his duty to account to his employer. Wolf v. Salem, 33 Ill. A. 614.

16. Ill.—Chicago Title, etc., Co. v. Ward, 113 Ill. A. 327 (holding that an agent must furnish detailed and itemized statements of his receipts and his expenditures); Moyses v. Rosenbaum, 98 Ill. A. 7 (holding that it will not do to account for expenses in a round sum, but they must be itemized).

La.—Holmes v. Murdock, 125 La. 916, 51 S 1035 (holding that an agent must render a proper account to his principal showing the receipts and the manner of disbursement).

Mass.—Campbell v. Cook, 193 Mass. 251, 79 NE 261 (holding that where, in an action for an accounting by an agent acting as trustee for his principals, it appears that the property was for the most part insured in companies of which the agent was the local representative, the principals are entitled to an itemization of the insurance on the property, so as to show the companies issuing the policies and the rates paid, although such companies were solvent).

Mich.—Boyce v. Boyce, 124 Mich. 696, 83 NW 1013.

N. J.—Hartshorne v. Thomas, 43 N. J. Eq. 419, 10 A 843.

N. Y.—Terwilliger v. Beals, 6 Lans. 403.

Pa.—Landis v. Scott, 32 Pa. 495.

Vt.—Gallup v. Merrill, 40 Vt. 133.

Eng.—Finch v. Burden, 12 L. T. Rep. N. S. 302; Hardwicke v. Vernon, 14 Ves. Jr. 504, 33 Reprint 614.

[a] **The character of the statement** must be such as to enable the principal to make some test of its honesty and accuracy. Chicago Title, etc., Co. v. Ward, 113 Ill. A. 327.

[b] **An "account" by an agent of moneys coming into his hands** belonging to the principal for disbursement, in order to satisfy the agent's duty to account, must consist of a detailed statement. Muir v. Kalamazoo Corset Co., 155 Mich. 441, 119 NW 589.

17. Dodge v. Hatchett, 118 Ga. 883, 45 SE 667; Riley v. Allendale Bank, 57 S. C. 98, 35 SE 533.

[a] **Petty disbursements.**—It is proper to credit the agent with an amount composed of a large number

for not doing so,[18] whenever an accounting is reasonably requested or demanded,[19] or to render such statement at reasonable intervals without demand, especially if to make such demand would be impracticable or very inconvenient.[20] But of course there may be something in the nature or character of the particular agency that excuses the agent from keeping written accounts,[21] as where the principal's own conduct or carelessness makes it impossible for the agent to render an account.[22]

An agent who fails to keep an account raises thereby a suspicion of infidelity or neglect, creates a presumption against himself, and brings upon himself the burden of accounting to the utmost for all that has come into his hands; and in such a case every doubt will be resolved against the agent, and in favor of the principal;[23] and if he renders an untrue account, giving a false balance, he becomes at once liable to his principal.[24]

If the agent refuses to account when it is his duty to do so, the principal may at once terminate the agency and sue for the balance then due.[25]

[§ 405] **e. Set-Off and Counterclaim.** In rendering an account between principal and agent, any lawful claims of the agent arising out of the agency, by way of compensation, reimbursement, or interest may as a general rule be deducted from the claim of the principal.[26] But the agent may not deduct or

of small items paid by him for which he has no vouchers or receipts, where such disbursements are shown by the books as kept by him and by other records, and it is not customary for a bookkeeper to take receipts for such items. Glasgow v. Hood, (Tenn. Ch. A.) 57 SW 162.

18. Saint v. Martel, 127 La. 73, 53 S 432 (holding that one in possession of property of another, somewhat in the character of a negotiorum gestor, ought, when called on to account for it, show some definite and controlling reason for not doing so, and dilatory tactics in such cases are not favored by the courts).

19. Dodge v. Hatchett, 118 Ga. 883, 45 SE 667; Chase v. Chapman, 89 Kan. 196, 131 P 615; Nolan v. Shaw, 6 La. Ann. 40.

20. Clark v. Moody, 17 Mass. 145; Ormond v. Hutchinson, 13 Ves. Jr. 47, 33 Reprint 212 [aff 16 Ves. Jr. 94, 33 Reprint 919].

21. Carrau v. Chapotel, 47 La. Ann. 408, 16 S 873; Hamilton v. Hamilton, 15 App. Div. 47, 44 NYS 97 (where the court refused to hold a son liable for keeping accounts in the careless fashion taught him by the father, who put him in charge of his business); Rich v. Austin, 40 Vt. 416; Oddy v. Secker, 2 Smale & G. 193, 65 Reprint 361 (holding, however, that it is no objection to a claim or bill filed for an accounting against a confidential agent that he has been also employed as a solicitor in respect to the same property).

[a] **An agent may be excused from keeping an account,** where it appears that he had not undertaken the duty of keeping accounts, and that his education and capacity, as well as the course of dealing between him and his employer, were inconsistent with his keeping regular accounts. Tindall v. Powell, 4 Jur. N. S. 944.

[b] **An agreement as to the amount due an agent** will not excuse him from rendering an account to his principal. Jenkins v. Gould, 3 Russ. 385, 3 EngCh 385, 38 Reprint 620.

22. Macauley v. Elrod, 28 SW 782, 29 SW 734, 16 KyL 549.

[a] **Interference of principal in management of property.**—In Robbins v. Robbins, (N. J. Ch.) 3 A 264, 265, Bird, V. C., said: "It is true, it is the duty of an agent to account strictly; but if the principal has himself, by his interference, created or so contributed to such confusion as to render an absolutely satisfactory accounting impossible, the agent ought not to be held to the most rigid rule."

23. Ill.—Illinois Linen Co. v. Hough, 91 Ill. 63.

Ky.—Peterson v. Poignard, 8 B. Mon. 309, 310 (where the court said: "There are several circumstances which tend strongly to excite suspicion with regard to the fidelity of Poignard in his agency. Indeed we regard it as being well established, that he acted in several particulars in violation of his trust, and that he has neglected his duty in a most important point, in not having kept a precise and accurate account of all transactions pertaining to his agency. His competency to do this is well established, and it cannot be doubted that he was well aware of its importance and necessity. His failure authorizes unfavorable inferences, and subjects him now when called on for an account, to a heavy burthen of suspicion, as well as of proof").

Or.—Salem Tract. Co. v. Anson, 41 Or. 562, 67 P 1015, 69 P 675.

Pa.—Landis v. Scott, 32 Pa. 495.

Eng.—Stainton v. Carron Co., 24 Beav. 346, 53 Reprint 391 (holding that, where the accounts of an agent acting for a company have been improperly kept or mystified, and not duly rendered and explained when asked for, the court will direct them to be taken through a period of twenty-five years, although accounts sent in had been acted on, and although shareholders who asked for further information and explanation as to such accounts did not persevere to obtain them); Gray v. Haig, 20 Beav. 219, 52 Reprint 587; Middleditch v. Sharland, 5 Ves. Jr. 87, 31 Reprint 485; Hardwicke v. Vernon, 4 Ves. Jr. 411, 31 Reprint 209 (in which an account between principal and agent was settled from loose papers, the agent having kept no regular books; and after his death liberty was given to surcharge and falsify upon an allegation of errors subsequently discovered).

[a] **"It is ordinarily the duty of agents to keep regular accounts** and vouchers of the business in the course of their agency, and if this duty is not faithfully performed, the omission will always be construed unfavorably to the rights of the agent, and care will be taken that the principal shall not suffer thereby." Illinois Linen Co. v. Hough, 91 Ill. 63, 69.

[b] **An agent cannot complain if he is charged the highest amount** that might have been received on the ground that the proof does not show that such amount was actually in his hands; and if he utterly fails to account he may be required to pay the price of the property whether he has disposed of it or not. Strouse v. Love, 16 NYS 933; Landis v. Scott, 32 Pa. 495.

[c] **Disbursements not allowed.**—An agent, on an accounting for money collected for his principal, will not be allowed for disbursements claimed to have been made by him where he failed to keep proper accounts, and the testimony in support of his claim is vague and unsatisfactory. Quirk v. Quirk, 155 Fed. 199.

24. Clark v. Moody, 17 Mass. 145.

25. Contractors', etc., Supply Co. v. Alta Portland Cement Co., 26 Oh. Cir. Ct. 49.

[a] **Refusal not unreasonable.**—Where a principal drew an order directing his agent to deposit the proceeds of the sale of certain lumber to the credit of a third person, and the next day he demanded of the agent an account of the proceeds, and the agent replied that he had nothing to do with him, and referred him to such third person, there was not an unreasonable refusal to account. Torrey v. Bryant, 16 Pick. (Mass.) 528.

26. U. S.—Evans v. Lawton, 34 Fed. 233. See also Goodwin v. Fox, 129 U. S. 601, 9 SCt 367, 32 L. ed. 805.

Ind.—English v. Devarro, 5 Blackf. 588 (holding an agent entitled to a deduction for his commissions and expenses).

Iowa.—Bayliss v. Davis, 47 Iowa 340 (holding an agent entitled to credit, on his note for the balance due on certain machines, for the value of machines recovered from the person to whom the agent had fraudulently sold them).

Ky.—Hoskins v. Morton, 85 SW 742, 27 KyL 529; White v. Treadway, 52 SW 960, 21 KyL 702; Ford Lumber Co. v. Arvine, 38 SW 137, 18 KyL 711.

La.—Gilly v. Roumieu, 11 La. Ann. 746 (holding that, where an agent is compelled to render his account, he has the right to retain only a sufficient amount of the property of the principal in his hands to satisfy his expenses and costs, and may retain by way of set-off what the principal owes him if the debt is liquidated); Nolan v. Shaw, 6 La. Ann. 40.

Mich.—Wasey v. Whitcomb, 167 Mich. 58, 132 NW 572; Kimball v. Ranney, 122 Mich. 160, 80 NW 992, 80 AmSR 548, 46 LRA 403.

Minn.—McBrady v. Monarch El. Co., 118 Minn. 104, 129 NW 163.

Mo.—Harms v. Wolf, 114 Mo. A. 387, 89 SW 1037.

N. J.—Hutchinson v. Van Voorhis, 54 N. J. Eq. 439, 35 A 371.

N. Y.—National Surety Co. v. Empire State Surety Co., 143 App. Div. 241, 128 NYS 10; Duff v. Blair, 74 App. Div. 364, 77 NYS 444; Picker v. Weiss, 39 Misc. 22, 78 NYS 761.

N. C.—Lance v. Butler, 135 N. C. 419, 47 SE 488.

Pa.—Shearman v. Morrison, 149 Pa. 386, 24 A 313; Johnson v. Hoosier Dill Co., 99 Pa. 216; Evans v. Lyon, 33 Pa. Super. 255 (holding that, where a suit is brought to recover a balance alleged to be due by defendants to plaintiff for goods of the latter sold by defendants on commission as agents, defendants may show that plaintiff wrongfully terminated the contract before the time specified therein, and may set off against plaintiff's claim the expenses incurred after the breach in endeavoring to carry out the requirements of the contract as to themselves).

Tenn.—Royston v. McCulley, (Ch. A.) 59 SW 725, 52 LRA 899; Glascow v. Hood, (Ch. A.) 57 SW 162.

Wis.—Warner v. Cuckow, 90 Wis. 291, 63 NW 238.

Eng.—Stonehouse v. Read, 3 B. & C. 669, 10 ECL 304, 107 Reprint 881. See also Dale v. Sollet, 4 Burr. 2133, 98 Reprint 112.

Ont.—Hamilton v. Street, 8 U. C. Q. B. 124.

See Wilmer v. Placide, 119 Md. 49, 86 A 43; Marshall v. Matheson, 31 N. S. 238.

See generally Accounts and Accounting § 119; Recoupment, Set-Off, and Counterclaim [34 Cyc 618].

[a] **Interest.**—Where the accounts between a principal and an agent are closed, and a suit is brought three years later to recover a balance due,

set off a debt due to himself in a matter not arising out of the agency;[27] nor can he set off a claim where it would be a breach of his duty to the principal,[28] nor set off sums wrongfully or unauthorizedly expended or applied by him.[29] An agent cannot, without the principal's knowledge and consent, apply the principal's funds or property, which he has in his possession, to a debt due to himself by the principal,[30] or by a third person,[31] particularly where the funds or the property are intrusted to him to be applied to another and specific purpose.[32]

[§ 406] **f. Approving, Stating, and Opening Accounts.** Questions relative to a stated or a settled account between a principal and his agent are ordinarily governed by the rules governing stated or settled accounts generally.[33] Where an account is received by the principal and not objected to within a reasonable time, it is presumed to have been accepted as correct;[34] and it has been held that, where it is the duty of the agent to keep and render accounts to his principal, accounts rendered in performance of such duty are to be deemed prima facie correct.[35] If the principal accepts and acts upon an account, with full knowledge, so as to make it a settled account or an account stated, it ordinarily cannot be thereafter impeached.[36] But if the ac-

and the agent presents no claim for commissions until they are asserted in the action against him, he is not entitled to interest until the date of filing his answer. Orr v. Louisville Tobacco Warehouse Co., 99 SW 225, 30 KyL 457.

[b] **An agent to buy lands** is entitled, in a settlement with his principal, to credit by the whole amount invested in land, although he took the deeds to himself and the principal jointly; the deeds being taken in this way by the consent of the principal, and on the understanding that the agent would convey the land to him at any time, and the agent having tendered him such a conveyance pending the action. White v. Treadway, 52 SW 960, 21 KyL 702.

[c] **Cross bill by agent.**—Where the object of a bill in equity is to secure an accounting of a terminated agency, the agreement for which agency contemplates that the agent shall be paid for his services, it is proper for the defendant agent, by cross bill, to demand payment for his services and to have such demand adjusted with the accounting, so that by its decree the court may give complete relief between the parties in respect of the agency. Hutchinson v. Van Voorhis, 54 N. J. Eq. 439, 35 A 871.

27. Melvin v. Aldridge, 81 Md. 650, 32 A 389 (holding that in a suit for an accounting between owners of property and their agents for its sale, a personal indebtedness of one of the owners to one of the agents cannot be considered); Tagg v. Bowman, 99 Pa. 376, 108 Pa. 273, 56 AmR 204; Simpson v. Pinkerton, 10 WklyNC (Pa.) 423. But see Noble v. Leary, 37 Ind. 186 (holding that an attorney, when sued for money collected for plaintiff, might set off a note held by him, but executed by plaintiff); Evans v. Trenton, 24 N. J. L. 764 (holding that in a suit against defendant in his individual capacity, and not as city treasurer, for moneys in his hands, he might offset a demand due to him from the city).

[a] **Claim arising out of prior agency.**—Where a subsequent agreement for the sale of land supersedes a former agreement under which defendant had incurred all items of expense charged in the account to that date, and provides that all excess received over a named sum and all crop returns now in hand, or due on account of crops growing on the land, shall belong to defendant as compensation, no expenses incurred by defendant, nor any payment to or on account of the vendors prior to the second agreement, can be charged as a credit against its indebtedness arising on the subsequent sale of the land. Clyne v. Easton, etc., Co., 148 Cal. 287, 83 P 36, 113 AmSR 253.

[b] **Subagent.**—Where a principal sues a properly constituted subagent for the amount of a bill of exchange received in the course of his employment for the principal, and the subagent has made no advances and given no new credit to the agent on account of the remittance of the bill, the subagent cannot protect himself against suit by passing the amount of the bill to the credit of the agent, although the agent may be his debtor. Wilson v. Smith, 3 How. (U. S.) 763, 11 L. ed. 820.

28. See New Orleans v. Finnerty, 27 La. Ann 681, 21 AmR 569.

29. Middleton, etc., Turnp. Road v. Watson, 1 Rawle (Pa.) 330; Dowlen v. C. W. Georgs Mfg. Co., (Tex. Civ. A.) 125 SW 931; Jay v. Macdonnell, 17 Grant Ch. (U. C.) 436.

30. Iowa.—Clark v. Lee, 14 Iowa 425 (holding that, where an agent sold to his wife, for his own use and benefit, real estate of his principal which he claimed to hold as security for advances made to his principal, a court of equity would set aside the sale).

La.—Young v. Jackson, 37 La. Ann. 810 (holding that an agent cannot retain from funds of the principal in his hands sums to meet anticipated future services and expenses); Palmer v. Haynes, 2 La. 370.

Nebr.—Englehart v. Peoria Plow Co., 21 Nebr. 41, 31 NW 391 (holding that an agent for the sale of agricultural machinery cannot, by virtue of his agency, indorse a note, taken by him for such machinery payable to the order of his principal, to himself in payment for his commissions, and thereby divest his principal of property in such note, even if the agency includes the power of indorsing his principal's notes).

N. H.—Morse v. Woods, 5 N. H. 297 (holding that, where an agent is employed to receive money for his principal, he cannot, without the consent of the latter, appropriate it to the payment of a debt due to him from the principal).

Pa.—Shearman v. Morrison, 149 Pa. 386, 24 A 313; Smuller v. Union Canal Co., 37 Pa. 68.

31. Edwards v. Powell, 13 N. C. 190 (holding that property which is delivered to an agent under a contract of the principal with a third person cannot, without the consent of the principal, be applied by the agent to the payment of a debt due to himself from that person).

[a] **A subagent** cannot use funds of the principal in his possession to settle his own accounts with the primary agent. Arnold v. Clark, 3 N. Y. Super. 491.

32. Frazier v. Poindexter, 78 Ark. 241, 95 SW 464, 115 AmSR 33.

33. McLendon v. Wilson, 52 Ga. 41 (holding that a settlement of accounts between an agent and his principal, the principal giving his promissory notes for the amount of the agent's demand but at the time protesting against its fairness, is not an estoppel upon the principal, and the fairness and legality of the account is still open to inquiry, even though no fraud or mistake or ignorance of fact is shown); Wilmer v. Placide, 119 Md. 49, 86 A 43; Tupper v. Rider, 61 Vt. 69, 17 A 47. See generally Accounts and Accounting §§ 249–406.

[a] **Stale demands.**—A mandatary who has acted as such continuously for a long period of years without being called upon for an accounting, and who then renders an account showing a balance in his favor, does not subject his demand to a charge of staleness because the credits giving rise to the balance arose in the first years of the mandate. Borge's Succ., 44 La. Ann. 1, 10 S 418.

[b] **Where a principal signs drafts for his agent** with the full knowledge of the state of the accounts and in liquidation or settlement of the same, he is as a general rule prima facie bound thereby for the payment of the money expressed therein, and if there are any facts showing that it was not the intention of the parties that the drafts should be a full and final settlement and compromise of the subject matter of the accounts for which the drafts were given, the burden of proof to show such facts is on the principal, and he should rebut the presumption of the law against him by clear and satisfactory evidence. McLendon v. Wilson, 52 Ga. 41.

34. McCord v. Manson, 17 Ill. A. 118 (holding that the fact that a principal has from time to time received statements from his agent, and has retained them without objection, is prima facie evidence of an admission by the principal that such statements are correct).

35. Mertens v. Nottebohms, 4 Gratt. (45 Va.) 163, 168 (where Baldwin, J., said: "I take it to be correct as a general proposition that in the case of a factor, agent, trustee or executor, whose duty it is, by law or by contract, to sell and account for the proceeds of goods in his hands, and who makes a due return of his sales to the proper person, or the proper custody, he may rely upon the same as prima facie evidence in his favour; inasmuch as he is bound not only to sell, but to keep and render an account of his sales"); Ruffner v. Hewitt, 7 W. Va. 585. See also Hill v. Hatch, 11 Me. 450.

[a] **Agent's right to show other charges.**—Where the books of an agent profess to contain an account of all receipts, payments, and services, on account of the agency, and they are offered in evidence by the agent, he shall not be allowed any other charges than those therein contained; but, unless the books purport to contain an account of all payments to and from his principal, he will not be confined to them in discharging himself. Lever v. Lever, 11 S. E. Eq. 158.

36. U. S.—Standard Oil Co. v. Van Etten, 107 U. S. 325, 27 L. ed. 319; Wiggins v. Burkham, 10 Wall. 129, 19 L. ed. 884; Perkins v. Hart, 11 Wheat. 237, 6 L. ed. 463; Curtis v. Newton, 58 Fed. 495; Talcott v. Chew, 27 Fed. 273.

Iowa.—Minnesota Linseed Oil Co. v. Montague, 65 Iowa 67, 21 NW 184.

La.—Mansell v. Payne, 18 La. Ann. 124; Rion v. Gilly, 6 Mart. 417, 12 AmD 483.

Mass.—Warren v. Para Rubber Shoe Co., 166 Mass. 97, 44 NE 112 (holding that, where it does not appear that the complainant corporation was ignorant of any of the transactions made in its behalf by its selling agents, and had in its own possession all the means necessary for stating the accounts correctly, a bill cannot be maintained by it to have the accounts of the agents reopened and a new accounting made after a

count is merely preliminary and is not accepted by the principal it does not become binding.[37]

When impeachable. Where the principal can establish some omissions, mistakes, or fraud, the account may be ordered reopened;[38] and, where the agent has failed to render accounts or has perpetrated frauds, lapse of time or the death of the agent will not prevent an opening of the account, although in order that such opening may be ordered the case should be very clear.[39]

When the contract of agency provides who shall pass upon the accounts of the agent, the report of such inspector is conclusive in the absence of fraud or mistake.[40]

[§ 407] **g. Commingling of Funds or Property.**[41] As an important part of his duty to keep clear and regular accounts, it is the duty of an agent to keep separate and distinct from his own property the business and property of his principal, and if he fails to do so he is put to the necessity of showing clearly which part belongs to his principal and which to himself;[42] and he is personally responsible for any loss resulting to the intermingled fund or mass,[43] unless he acted in good faith and no detri-

termination of the agency); Farnam v. Brooks, 9 Pick. 212.

Mo.—Werckmann v. Taylor, 112 Mo. A. 365, 87 SW 44 (holding that, where an agent called on his principal for the purpose of settling the account between them, and submitted the account, and they went over it, and the principal agreed that all the charges were satisfactory and the account correct, the agent was entitled to recover the balance in his favor as shown by the account).

N. Y.—Stenton v. Jerome, 54 N. Y. 480; Myer v. Abbett, 105 App. Div. 537, 94 NYS 238 [aff 186 N. Y. 519 mem, 78 NE 1107 mem].

Philippine.—Ojinaga v. Perez, 9 Philippine 185 (holding that, where, in the management of property, a principal receives from an agent periodical statements of account, and, knowing all the facts of the case, repeatedly agrees to the correctness thereof and approves the same, the result is a species of contract between the parties which can only be set aside upon the grounds similar to those upon which any other contract can be annulled or rescinded); Lucia v. Perez, 6 Philippine 219; Pastor v. Nicasio, 6 Philippine 152.

S. C.—Geddes v. Hutchinson, 40 S. C. 402, 19 SE 9 (holding that, where a person purchased land and took title in himself, as agent for himself and others, and the parties personally adjusted their accounts, equity will not reopen the account after the death of any of the parties and the accomplishment of the specific object of the agency).

Vt.—Tupper v. Rider, 61 Vt. 69, 17 A 47; Tharp v. Tharp, 15 Vt. 105.

Eng.—Williamson v. Barbour, 9 Ch. D. 529.

Can.—Peters v. Worrall, 32 Can. S. C. 52.

See also infra § 409.

[a] **Right of principal to assure himself of proper accounting.**—The duty of an agent to account involves the right of the principal to assure himself that the accounts are correct, and measures taken by the principal in good faith to secure a proper accounting and to assure himself of its propriety are not in violation of the contract of agency, although they may not be within its express terms. Walker v. John Hancock Mut. L. Ins. Co., 80 N. J. L. 342, 79 A 354, 35 LRANS 153, AnnCas1912A 526.

[b] **Facts peculiarly within knowledge of agent.**—(1) The retention by a principal for a number of years of the accounts rendered by an agent, without objection thereto, when the accounts contained statements of facts peculiarly within the knowledge of the agent and not known by the principal until shortly before an action was brought, does not constitute an acquiescence which will prevent the principal from maintaining an action for a difference in his favor. Gale v. New York Hay Co., 54 App. Div. 72, 66 NYS 291. (2) Entries in the books of agents which were never brought to the notice of, nor assented to by, their principals constitute neither a contract between the parties, nor a modification of an existing one. Cushman v. Snow, 186 Mass. 169, 71 NE 529.

[c] **Where differences arising between a manufacturer and his agent are closed and settled** at the time the agent enters into contract relations with the incorporated successor of the manufacturer, such differences cannot be made the basis of a claim against either the manufacturer or the corporation in a bill subsequently filed for an accounting. Stone v. Fox Mach. Co., 145 Mich. 689, 109 NW 659.

37. Smith v. Redford, 19 Grant Ch. (U. C.) 274. See also Farquhar v. East India Co., 8 Beav. 260, 50 Reprint 102.

38. U. S.—Delano v. Winsor, 7 F. Cas. No. 3,754, 1 Cliff. 501.

Ill.—Follansbee v. Parker, 70 Ill. 11.

Miss.—Taylor v. Blackman, 12 S 458.

N. Y.—Gale v. New York Hay Co., 54 App. Div. 72, 66 NYS 291; Phillips v. Belden, 2 Edw. 1.

Philippine.—Pastor v. Nicasio, 6 Philippine 152 (holding that, where the accounts of an agent to his principal are once approved by the principal, the latter has no right to ask afterward for a revision of the same or for a detailed account of the business, unless he can show that there was fraud, deceit, error, or mistake in the approval of the accounts).

Eng.—Williamson v. Barbour, 9 Ch. D. 529 (where it was held that one case of proved fraudulent overcharge is sufficient to open the accounts between the parties); Stainton v. Carron Co., 24 Beav. 346, 53 Reprint 391 [mod 7 Jur. N. S. 645]; Rothschild v. Brookman, 5 Bligh N. S. 165, 5 Reprint 273, 2 Dow & Cl. 188, 6 Reprint 699 [aff 3 Sim. 153, 6 EngCh 153, 57 Reprint 957]; Broadbent v. Barlow, 3 De G. F. & J. 570, 64 EngCh 447, 45 Reprint 999; Beaumont v. Boultbee, 7 Ves. Jr. 599, 32 Reprint 241 [aff 5 Ves. Jr. 485, 31 Reprint 695].

See generally Accounts and Accounting §§ 335–376.

[a] **In settling an extended insurance account** between an agent and the representatives of his deceased principal, the fact that defendant omitted to credit his principal with interest and the balance due to him from year to year, where there was no express contract to allow interest, is not evidence of fraud; and the fact that certain claims which were then of little or no value, although they afterward became very valuable, were not mentioned in the account, although both parties had full means of knowing the facts, is not proof of fraud on the part of the agent. Farnam v. Brooks, 9 Pick. (Mass.) 212.

[b] **An agent's account in which he charges himself with sums received is not conclusive** against him as to the facts of those receipts; but the account may be opened to let in the fact of the sums not having been received in either of the following cases: If the account on the face of it discloses that the money has not been actually received; if the principal shows by his conduct that he knows the money has not been actually received; or if the principal does not express his assent to a subsequent correction of the account by the agent, in which correction he relieves himself from the sum with which he had previously charged himself. Shaw v. Dartnall, 6 B. & C. 56, 13 ECL 37, 108 Reprint 373.

39. O'Bannon v. Vigus, 32 Ill. A. 473 [rev on other grounds 118 Ill. 334, 8 NE 778]; Stainton v. Carron Co., 24 Beav. 346, 53 Reprint 391 [mod 7 Jur. N. S. 645] (holding that if a company does not discover, and has not the means of discovering, the correctness of entries in a succession of accounts rendered by its agent, it is not, after the decease of the agent, precluded by lapse of time or because certain shareholders omit against opposition to press for explanations previously asked for, from showing that such entries are not only erroneous but also fraudulent); Clarke v. Tipping, 9 Beav. 284, 50 Reprint 352 (where fraudulent accounts between a principal and a factor were opened from the beginning, the court holding that the relief ought not under such circumstances to be limited to a right to surcharge and falsify); Holstcomb v. Rivers, 1 Ch. Cas. 127, 22 Reprint 726; Hunter v. Belcher, 2 De G. J. & S. 194, 67 EngCh 152, 46 Reprint 349 [aff 9 L. T. Rep. N. S. 501; Ormond v. Hutchinson, 13 Ves. Jr. 47, 33 Reprint 212 [aff 16 Ves. Jr. 94, 33 Reprint 919].

40. Metropolitan L. Ins. Co. v. Long, 65 Ill. A. 295; Stevens v. Metropolitan L. Ins. Co., 13 App. Div. 16, 43 NYS 60.

[a] **In the absence of agreement,** the principal cannot insist that the agent shall submit the accounts to an improper person. Dadswell v. Jacobs, 34 Ch. D. 278.

41. **Right of principal to follow trust funds in hands of third person** see infra § 567.

42. Atkinson v. Ward, 47 Ark. 533, 2 SW 77; Illinois Linen Co. v. Hough, 91 Ill. 63; Hooley v. Gieve, 9 AbbNCas (N. Y.) 8 [aff 9 Daly 104] (holding this burden also to be on the agent's creditors and representatives). See generally Confusion of Goods [8 Cyc 570].

43. U. S.—Chicago Mar. Bank v. Fulton County Bank, 2 Wall. 252, 17 L. ed. 785.

Ill.—Webster v. Pierce, 35 Ill. 158 (holding that an agent has no right to mix the funds of his principal with his own, and to hold the principal liable for the depreciation of money in his hands).

Me.—Bartlett v. Hamilton, 46 Me. 435.

N. Y.—Massachusetts Mut. L. Ins. Co. v. Carpenter, 32 N. Y. Super. 734 [aff 49 N. Y. 668 mem] (holding that the loss must be sustained wholly by the agent).

S. C.—Pinckney v. Dunn, 2 S. C. 314.

Tenn.—Mason v. Whitthorne, 2 Coldw. 242.

[a] **If goods bought are mixed with those of the agent,** the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase, as well as to the unexpended balance. Long v. Carter, 23 Ont. A. 121 [aff 26 Can. S. C. 430].

[b] **Where a portion of the mixed funds is stolen** and it is impossible to determine to whom the money stolen actually belonged, the agent is liable

ment resulted to the principal.[44] In such case the whole commingled mass will be treated as trust property except in so far as the agent may be able to distinguish what is his,[45] and every doubt will be resolved in the principal's favor; and if the two sums cannot be distinguished the agent must satisfy to the full every legal or equitable claim of the principal, even to the extent, if that should be necessary, of giving the whole fund or mass to the principal.[46]

Bank deposits. Where an agent deposits his principal's money in a bank in good standing, either in his principal's name or under some mark to indicate that the deposit is not his own personal account, he will not be liable, although the bank proves insolvent;[47] but if he deposits it in his own name or in any manner other than to indicate that it belongs to his principal, and mixes it with his own, ordinarily he is personally liable for any resulting loss;[48] this rule has been applied even though the agent had no other funds in the bank at the time.[49]

[§ 408] **h. Liability of Agent for Interest.**[50] As a general rule, where an agent is ready at the proper time to account for and turn over funds or property in his hands belonging to his principal, he is not liable for interest thereon before a demand;[51] but where the agent fails or refuses to account upon

to account to the principal for the funds received from him, even though a loss has occurred, as by the agent's act in mingling the principal's funds with his own the identity of the principal's funds is lost, and the loss should fall on the agent as a penalty for not keeping the principal's funds separate from his own and those of others. Massachusetts L. Ins. Co. v. Carpenter, 32 N. Y. Super. 734 [aff 49 N. Y. 668 mem].

[c] **Failure of factor.**—Where an agent to sell hay consigned his whole cargo, comprising that of plaintiff and several lots of other owners, to commission merchants who from time to time sold portions of it and made remittances on account of sales of the cargo, but who failed before the whole was disposed of, the agent should have consigned plaintiff's hay separately and required separate accounts of its sale, and he was responsible for the loss resulting from the failure. Williams v. White, 70 Me. 138.

44. Wood v. Cooper, 2 Heisk. (Tenn.) 441, 450 (where the court said: "If he acts in good faith, and takes the same care of the fund that he does of his own, and the intermixture is not detrimental to the interests of his principal, no personal responsibility attaches to his act").

45. Central Nat. Bank v. Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693; State Sav. Bank v. Thompson, 88 Kan. 461, 128 P 1120 (holding that, where a principal delivers personalty to an agent to sell on commission, the proceeds, subject to the agent's lien for commission, constitute a trust fund which the principal may reclaim so long as its identity is not lost).

46. U. S.—Yates v. Arden, 30 F. Cas. No. 18,126, 5 Cranch C. C. 526 (holding that an agent who, without authority, mixes his principal's goods with his own, so that he cannot distinguish them, must lose what he contributed).

Ark.—Atkinson v. Ward, 47 Ark. 533, 2 SW 77.

Colo.—Fidelity Inv. Co. v. Carico, 1 Colo. A. 292, 28 P 1131.

Ga.—Kennesaw Guano Co. v. Wappoo Mills, 119 Ga. 776, 47 SE 205; Claflin v. Continental Jersey Works, 85 Ga. 27, 11 SE 721.

Ill.—Illinois Linen Co. v. Hough, 91 Ill. 63.

N. J.—Jewett v. Dringer, 30 N. J. Eq. 291.

N. Y.—Harding v. Field, 1 App. Div. 391, 37 NYS 399; Hart v. Ten Eyck, 2 Johns. Ch. 62 [rev on other grounds 1 Cow. 744 note].

N. C.—Lance v. Butler, 135 N. C. 419, 47 SE 488 (holding that, where an agent for the sale of goods mixes such goods with his own stock of goods, the title of his principal will attach to the whole stock of goods until the value of his goods is returned to him or properly accounted for).

Tenn.—Brooks v. Lowenstein, 95 Tenn. 262, 35 SW 89.

Vt.—Blodgett v. Converse, 60 Vt. 410, 15 A 109.

W. Va.—Simmons v. Looney, 41 W. Va. 738, 24 SE 677 (holding that, if an agent sells his own and his principal's goods in common, and collects enough to pay his principal but not enough to pay both, and as an act of his own indulges the purchaser, he must pay his principal, and cannot apportion what he has collected between himself and his principal).

Eng.—Pariente v. Lubbock, 20 Beav. 588, 52 Reprint 731 [aff 8 De G. M. & G. 5, 57 EngCh 4, 44 Reprint 290]; Clarke v. Tipping, 9 Beav. 284, 50 Reprint 352; Broadbent v. Barlow, 3 De G. F. & J. 570, 64 EngCh 447, 45 Reprint 999; Lupton v. White, 15 Ves. Jr. 432, 33 Reprint 817; Chedworth v. Edwards, 8 Ves. Jr. 46, 32 Reprint 268 (granting an injunction to prevent an agent from transferring stock, which the agent had confounded so as to confuse in one mass his own and his principal's property, until the agent shall have satisfactorily distinguished the same).

Ont.—Gore Bank v. Hodge, 2 U. C. C. P. 359.

47. Ind.—Naltner v. Dolan, 108 Ind. 500, 8 NE 289, 58 AmR 61; State v. Greensdale, 106 Ind. 364, 6 NE 926, 55 AmR 753; Norwood v. Harness, 98 Ind. 134, 49 AmR 739.

Ky.—Cartmell v. Allard, 7 Bush 482.

La.—Norris v. Hero, 22 La. Ann. 605; Beatty v. McCleod, 11 La. Ann. 76 (holding that, where an agent deposits money in the name of his principal, it is to be presumed that the money so deposited is the identical money which he received from or on account of his principal).

Pa.—Hammon v. Cottle 6 Serg. & R. 290 (holding that an agent who deposits the money of his principal in a solvent house, subject to the draft of his principal, is not liable for the subsequent failure of the house).

Tex.—Commercial, etc., Bank v. Jones, 18 Tex. 811.

Eng.—Massey v. Banner, 1 Jac. & W. 241, 37 Reprint 367 [aff 4 Madd. 413, 56 Reprint 757].

[a] **Should earmark principal's money.**—In Robinson v. Ward, 2 C. & P. 59, 60, 12 ECL 449, Abbott, C. J., in speaking of the method by which the agent might escape liability, said: "The defendant should have paid this money into a banker's hands, by opening a new account in his own name, 'for the credit of Robinson's estate,' and so to ear-mark the money, as belonging to that estate: then it would have been kept separate."

48. Ill.—Webster v. Pierce, 35 Ill. 158.

Ind.—State v. Greensdale, 106 Ind. 364, 6 NE 926, 55 AmR 753; Norwood v. Harness, 98 Ind. 134, 49 AmR 739.

Ky.—Cartmell v. Allard, 7 Bush 482 (holding that, if an agent makes an unauthorized deposit of funds in his hands, together with his own money in a common account with a banker, such disposition will be treated as a conversion of the funds, and will devolve on him any loss which may be sustained by the banker's insolvency).

La.—Norris v. Hero, 22 La. Ann. 605 (holding also that the agent cannot urge the failure of the bank after the deposit was made, as ground for throwing the loss on the principal).

Md.—Jenkins v. Walter, 8 Gill & J. 218, 29 AmD 539.

Wis.—Sargeant v. Downey, 49 Wis. 524, 5 NW 902.

Eng.—Fletcher v. Walker, 3 Madd. 73, 56 Reprint 436; Macdonnell v. Harding, 7 Sim. 178, 8 EngCh 178, 58 Reprint 805; Wren v. Kirton, 11 Ves. Jr. 377, 32 Reprint 1133.

[a] **Agent assumes risk.**—By mingling it with his own money and depositing the whole in the bank in his own name and to his own individual and private account, he treats the money as his own, and from that moment it ceases to be at the risk of the principal, and is at the risk of the agent. Mason v. Whitthorne, 2 Coldw. (Tenn.) 242.

[b] **Bank may treat deposit as agent's.**—In Greenfield School Dist. v. Greenfield First Nat. Bank, 102 Mass. 174, it was held that in the absence of any notice that the deposit was not the private property of the agent the bank might apply it as such. But compare Central Nat. Bank v. Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693.

49. Williams v. Williams, 55 Wis. 300, 12 NW 465, 13 NW 274, 42 AmR 708 [overr School Dist. v. Zink, 25 Wis. 636, in so far as inconsistent] (where the liability was carried still further, and an administrator was held responsible for the loss of funds deposited in his individual name, although he had no other funds in the bank and informed its officers at the time of making the deposit that the fund was held by him in trust). Compare Hale v. Wall, 22 Gratt. (63 Va.) 424.

50. See generally Interest [22 Cyc 1459].

51. U. S.—Mason v. Wolkowich, 150 Fed. 699, 80 CCA 435, 10 LRANS 765; Bischoffsheim v. Baltzer, 21 Fed. 531; Pope v. Barrett, 19 F. Cas. No. 11,273, 1 Mason 117; Williams v. Baxter, 29 F. Cas. No 17,715, 3 McLean 471.

Ill.—Williams v. Chicago Coal Co., 60 Ill. 149.

La.—Gordon v. Zacharie, 15 La. Ann. 17.

Me.—Wheeler v. Haskins, 41 Me. 432.

Mass.—Hill v. Hunt, 9 Gray 66; Ellery v. Cunningham, 1 Metc. 112.

Mich.—Beardslee v. Horton, 3 Mich. 560.

N. J.—Burlington County v. Fennimore, 1 N. J. L. 293.

N. Y.—Miller v. Clark, 5 Lans. 388 (holding that as a general proposition an agent is not liable to be charged with interest upon moneys received and held by him for the use of the principal, but in order to render him liable for interest some other fact must be shown in addition to the mere receiving and retaining of the money in his hands); Hudson v. Hudson, Sheld. 386; Chase v. Union Stone Co., 11 Daly 107; Williams v. Storrs, 6 Johns. Ch. 353, 10 AmD 340; Mason v. Roosevelt, 5 Johns. Ch. 534.

N. C.—Porter v. Grimsley, 93 N. C.

a demand, or when it is his duty to do so, and keeps in his hands funds for which he should have accounted, the principal may collect from him, in addition to such funds, lawful interest on the same from the time when the accounting should have been made, and the funds turned over,[52] as where he is specially instructed to remit the funds as fast as collected and he fails to do so.[53] An agent will also be liable for interest where he expressly or impliedly agrees to pay it,[54] or where he makes some investment or use of the funds from which he receives interest or profit,[55] or where he fails to apply the funds to the purpose for which his principal put them in his charge,[56] or uses them himself.[57] If an agent neglects to inform his principal of the receipt of money belonging to him, he is liable for interest from the time when he ought to have given such information.[58] It has been held that an agent is also liable for interest if he fails to invest funds which he cannot safely pay over.[59] But an agent entitled to retain the property for his indemnity, although he disposes of it without authority, is not chargeable with interest on the avails of that property during the continuance of his lien.[60] Where an agent entitled to a certain per cent on amounts collected by him as compensation is charged with interest on the full amount collected, he is entitled to be credited with interest on his commissions from the time the money was received by him.[61]

As a general rule interest is reckoned from the date of a demand for the funds,[62] or from the date of suit for their recovery;[63] or, if the agent was to invest the money, then from the date the investment should have been made, and presumptively this is immediately upon receipt of the money;[64] but, where

550, 4 SE 529; Thornton v. Thornton, 63 N. C. 211; Pipkin v. Bond, 40 N. C. 91.

Vt.—Hauxhurst v. Hovey, 26 Vt. 544.

Eng.—Rogers v. Boehm, 2 Esp. 702; Chedworth v. Edwards, 8 Ves. Jr. 46, 32 Reprint 268.

[a] **Attachment of money in agent's hands.**—An agent having collected money for his principal, which is subsequently attached and condemned in his hands by process of garnishment, is not liable for interest while the money remained in his hands, unless a demand is first made. Gunn v. Howell, 35 Ala. 144, 73 AmD 484.

52. U. S.—Bischoffsheim v. Baltzer, 21 Fed. 531.

Ga.—Anderson v. State, 2 Ga. 370; Nisbet v. Lawson, 1 Ga. 275.

Ill.—Bedell v. Janney, 9 Ill. 193; Miller v. McCormick Harvesting Mach. Co., 84 Ill. A. 571 (holding that, where the report of an agent shows a balance in his hands, which he neglects to pay over on demand, the principal is entitled to interest on such balance from the date of such report).

Ind.—Hackleman v. Moat, 4 Blackf. 164.

La.—Millaudon v. Lesseps, 17 La. Ann. 246.

Me.—Wheeler v. Haskins, 41 Me. 432.

Md.—Melvin v. Aldridge, 81 Md. 650, 32 A 389.

N. Y.—De Crano v. Moore, 50 App. Div. 361, 63 NYS 585, 64 NYS 3; Miller v. Clark, 5 Lans. 388; Bonn v. Steiger, 2 NYSt 90; Peo. v. Gasherie, 9 Johns. 71, 6 AmD 263 (holding that interest is recoverable against a person intrusted with the collection of money who retains and converts it to his own use from the time when the same ought to have been paid over); Williams v. Storrs, 6 Johns. Ch. 353, 10 AmD 340.

N. C.—Porter v. Grimsley, 98 N. C. 550, 4 SE 529; Neal v. Freeman, 85 N. C. 441; Hill v. Williams, 59 N. C. 242.

Pa.—Crawford v. Willing, 4 Dall. 286, 1 L. ed. 836; Rapelie v. Emory, 1 Dall, 349, 1 L. ed. 170.

S. C.—Kimbrel v. Glover, 47 S. C. L. 191; Black v. Goodman, 17 S. C. L. 201; Wardlaw v. Gray, 13 S. C. Eq. 85 (holding that an agent who has stipulated to account semiannually is liable to interest on all sums received and not accounted for at the stipulated time).

Vt.—Thorp v. Thorp, 75 Vt. 34, 52 A. 1051; Hauxhurst v. Hovey, 26 Vt. 544 (holding, however, that an agent who receives money for his principal is not liable for interest thereon before demand is made for such money, unless he has received instructions to remit as fast as collected, or is in default by neglecting to render an account).

Va.—Hawkins v. Minor, 5 Call (9 Va.) 118.

Eng.—Pearse v. Green, 1 Jac. & W. 135, 37 Reprint 327; Fry v. Fry, 10 Jur. N. S. 983; Harsant v. Blaine, 56 L. J. Q. B. 511; Hardwicke v. Vernon, 14 Ves. Jr. 504, 33 Reprint 614.

N. B.—Simonds v. Coster, 3 N. B. Eq. 329.

[a] **Interest is sometimes made entirely a matter of statute.**—See statutory provisions. And see Pettit v. Thalheimer, 3 Colo. A. 355, 33 P 277; and Interest [22 Cyc 1476].

53. Hauxhurst v. Hovey, 26 Vt. 544.

54. Chase v. Union Stone Co., 11 Daly (N. Y.) 107; Browne v. Southouse, 3 Bro. Ch. 107, 29 Reprint 437 (where the agent of an administrator keeping money of the estate in his hands which he had proposed to his principal to lay out in the funds was ordered to pay interest with annual rests); Barwell v. Parker, 2 Ves. 363, 28 Reprint 233.

55. Dillman v. Hastings, 144 U. S. 136, 12 SCt 662, 36 L. ed. 378; Bassett v. Kinney, 24 Conn. 267, 63 AmD 161; Munson v. Plummer, 59 Iowa 136, 12 NW 796; De Crano v. Moore, 50 App. Div. 361, 63 NYS 585, 64 NYS 3 (holding that where money was invested by an agent, and it does not appear that the agent ever changed the investment, it may be presumed that the money continued to earn the original rate of interest); Hudson v. Hudson, Sheld. (N. Y.) 386; Williams v. Storrs, 6 Johns. Ch. (N. Y.) 353, 10 AmD 340.

[a] **Where an agent has possession of interest-bearing securities** belonging to his principal, it is presumed in the absence of proof that he receives the interest as it falls due, and hence is chargeable with it. Blodgett v. Converse, 60 Vt. 410, 15 A 109.

56. Dodge v. Perkins, 9 Pick. (Mass.) 368; Fowler v. Shearer, 7 Mass. 14; Schisler v. Null, 91 Mich. 321, 51 NW 900; Harrison v. Long, 4 S. C. Eq. 110; Browne v. Southouse, 3 Bro. Ch. 107, 29 Reprint 437; Hughes Kearney, 1 Sch. & Lef. 132.

57. U. S.—Hinckley v. Gilman, etc., R. Co., 100 U. S. 153, 25 L. ed. 591; Short v. Skipwith, 22 F. Cas. No. 12,809, 1 Brock. 103.

Ala.—Lewis v. Bradford, 8 Ala. 632.

Ga.—Nisbet v. Lawson, 1 Ga. 275.

Ill.—Stern v. Peo., 102 Ill. 540; Jenkins v. Doolittle, 69 Ill. 415.

Ind.—Rochester v. Levering, 104 Ind. 562, 4 NE 203.

Kan.—Cummins v. Heald, 24 Kan. 600, 36 AmR 264.

Ky.—Taylor v. Knox, 1 Dana 391.

La.—Beugnot v. Tremoulet, 52 La. Ann. 454, 27 S 107, 111 La. 1, 35 S 362 (holding that an agent, having used his principal's funds in his own affairs, is answerable for interest on the same, under Rev. Civ. Code art 3015, providing that an attorney is answerable for the interest of any sum of money he has employed to his own use, from the time he has so employed it); Gridley v. Conner, 2 La. Ann. 87.

Mass.—Hill v. Hunt, 9 Gray 66.

Miss.—Kerr v. Laird, 27 Miss. 544.

N. Y.—Tuers v. Tuers, 100 N. Y. 196, 2 NE 922; Miller v. Clark, 5 Lans. 388; Hudson v. Hudson, Sheld. 386; Peo. v. Gasherie, 9 Johns. 71, 6 AmD 263.

Pa.—In re Hovey, 198 Pa. 385, 48 A 311.

Vt.—Blodgett v. Converse, 60 Vt. 410, 15 A 109 (holding that where a financial agent mixes the money of his principal with his own by depositing it in his general bank account, and uses it in his own business, it is presumed that he has gained a benefit, and on failure to show how much he has derived from the use he is chargeable with interest).

Wis.—Rogers v. Priest, 74 Wis. 538, 43 NW 510.

Eng.—Lonsdale v. Church, 3 Bro. Ch. 41, 29 Reprint 396; Rogers v. Boehm, 2 Esp. 702; Craufurd v. Atty.-Gen., 7 Price 1, 146 Reprint 884.

Ont.—Landman v. Crooks, 4 Grant Ch. (U. C.) 353.

[a] **Long retention of funds.**—Where an agent retains money in his hands for fifteen years, furnishing no account of the manner in which it has been employed, he will be treated as if he had actually used the fund and charged with interest as a matter of right. Comegys v. State, 10 Gill & J. (Md.) 175.

58. Ga.—Nisbet v. Lawson, 1 Ga. 275.

Ill.—Bedell v. Janney, 9 Ill. 193.

Mass.—Dodge v. Perkins, 9 Pick. 368 (holding that an agent unreasonably neglecting to inform his principal of the receipt of money is liable for interest, although he acted in good faith); Clark v. Moody, 17 Mass. 145.

N. Y.—Williams v. Storrs, 6 Johns. Ch. 353, 10 AmD 340.

Vt.—Thorp v. Thorp, 75 Vt. 34, 52 A 1051.

59. Landis v. Scott, 32 Pa. 495.

60. Thompson v. Stewart, 3 Conn. 171, 8 AmD 168.

61. Wiley v. Logan, 95 N. C. 358.

62. U. S.—McCormick v. Elliot, 42 Fed. 469.

Ind.—Hackleman v. Moat, 4 Blackf. 164.

Me.—Wheeler v. Haskins, 41 Me. 432.

N. C.—Neal v. Freeman, 85 N. C. 441; Hyman v. Gray, 49 N. C. 155 (holding that, where an agent has money in his hands, and when it is demanded he denies his obligation to pay, there is no principle on which he can be charged with interest further back than the time of such demand).

S. C.—Rowland v. Martindale, 8 S. C. Eq. 226.

63. Melvin v. Aldridge, 81 Md. 650, 32 A 389.

64. Ward v. Grayson, 9 Dana (Ky.) 280; Rogers v. Priest, 74 Wis. 538, 43 NW 510.

the agent has wrongfully converted the funds to his own use, interest is reckoned from the date of their conversion.[65]

The rate of interest chargeable against an agent is ordinarily the legal rate,[66] and if the agent refuses to pay after a demand the principal is entitled to the legal rate from the time of such demand, although the money has been invested by the agent at a lower rate.[67] But ordinarily, if the money was to be invested at a given rate and is so invested, the agent will be chargeable with such rate;[68] and if the agent has secured a rate higher than the legal rate the principal is entitled to all that he has received.[69] The agent is not chargeable with compound interest on money collected by him and not reported.[70]

[§ 409] **i. Estoppel between Principal and Agent —(1) In General.**[71] Estoppel between a principal and his agent is ordinarily governed by the rules regulating estoppel generally.[72] Thus as a general rule an agent is estopped to deny the amount shown to be due by his account;[73] and, if he represents to his principal that he received certain funds or property, he cannot later show that he received nothing at all or something else instead, but must account for the cash or property which he acknowledged that he had received.[74] The mere fact, however, that an agent has made tentative statements of account to his principal from time to time does not deprive the principal of the right to demand a full and complete account of all the agent's dealings for him;[75] but if the principal has with full knowledge accepted the agent's account he is estopped from later trying to hold the agent liable for his acts,[76] although he is not precluded from suing for a balance due by the account.[77]

[§ 410] **(2) Estoppel to Deny Principal's Title.** As a general rule an agent's duty to his principal prevents him, when called upon to account for property or funds received by him from his principal or on his account, from disputing his principal's right or title thereto.[78] However, an agent

65. Gordon v. Zacharie, 15 La. Ann. 17; New Orleans Draining Co. v. De Lizardi, 2 L. Ann. 281; Marr v. Hyde, 8 Rob. (La.) 13; Hill v. Hunt, 9 Gray (Mass.) 66; Peo. v. Gasherie, 9 Johns. (N. Y.) 71, 6 AmD 263.

66. Bischoffsheim v. Baltzer, 21 Fed. 531; Rogers v. Priest, 74 Wis. 538, 43 NW 510.

67. De Crano v. Moore, 50 App. Div. 361, 63 NYS 585, 64 NYS 3.

68. Dillman v. Hastings, 144 U. S. 136, 12 SCt 662, 36 L. ed. 378; Rogers v. Priest, 74 Wis. 538, 43 NW 510.

69. Whitehead v. Lynn, 20 Colo. A. 51, 76 P 1119; Munson v. Plummer, 59 Iowa 136, 12 NW 796.

70. Sidway v. American Mortg. Co., 119 Ill. A. 502 [aff 222 Ill. 270, 78 NE 561].

71. Estoppel to deny agency see supra §§ 69–75.

72. Las Palmas Winery, etc. v. Garrett, 167 Cal. 397, 139 P 1077; Henekin v. Indiana Bridge Co., 36 Ill. A. 166 (holding that the agent of a bridge company who, under his contract, receives from the company the bridges which are charged to him by the pound, and makes no objection to the weight then given, cannot, after the bridges are erected, claim that he was overcharged in the weights and prove the actual weight as he claims by measurement); Earnhart v. Robertson, 10 Ind. 8 (holding that an agent cannot set up, in defense of a suit by the principal, transactions unauthorized and not within the scope of his employment); Penney v. Kaldenberg, 56 N. Y. Super. 178, 3 NYS 212. See generally Estoppel [16 Cyc 722 et seq].

[a] **Fraud.**—Where defendant, intrusted by plaintiff with the purchase for both of them of shares of stock, having bought at one dollar per share and represented the price to be two dollars per share is sought to be held liable for fraud, he is estopped to deny plaintiff's reliance on his representation. Smith v. Elderton, 16 Cal. A. 424, 117 P 563.

[b] **One who buys property as attorney** is not estopped to show that he bought particularly for himself. Garner's App., 1 Walk. (Pa.) 438.

73. Phelps v. Plum, 32 SW 753, 17 KyL 817; Hartmann v. Schnugg, 113 App. Div. 254, 99 NYS 33 [aff 188 N. Y. 617 mem, 81 NE 1165 mem]; Johnston v. Thum, 4 Pa. Cas. 433, 7 A 739.

74. Wood v. Blaney, 107 Cal. 291, 40 P 428 (holding an agent estopped, under Code Civ. Proc. § 1952 subd 3, from showing that he did not receive a deposit in cash but in a note of the vendee, where he acknowledged that he received a cash deposit on the sale, as provided for in his contract); Perry v. Smith, 15 Iowa 202 (holding that, if an agent in good faith sets apart a sum of money or chose in action and treats it as the property of the principal, a court of equity will, at the option of the principal, treat it as the principal's, unless the paramount interest or lien of some third person intervenes); Blandy v. Raguet, 14 Minn. 491 (holding that where an agent telegraphed that he had received a certain deposit on machinery, whereupon the machinery was shipped, he could not deny the correctness of the statement or show that such deposit had been made upon another understanding than the original one); Higginson v. Fabre, 3 S. C. Eq. 89 (holding an agent bound by the amount he had reported that he had sold for, although more than he actually received). Compare Hall v. Edrington, 9 Dana (Ky.) 364.

[a] **Funds for investment.**—An agent who causes the person from whom he has received funds to believe that they are profitably invested, and leads him not to change the agency thereby, cannot urge, when called on to account, that the funds were deposited all the time in bank, and that he was not called upon to make investments. Beugnot v. Tremoulet, 111 La. 1, 35 S 362.

75. Jordan v. Underhill, 91 App. Div. 124, 86 NYS 620. See also supra § 406.

76. Underwriters' Wrecking Co. v. Board of Underwriters, 35 La. Ann. 803 (holding that the payee of a bill who elected to treat it as his own and received the dividend was estopped from holding responsible his agent who purchased it under instructions). See also supra § 406.

77. Anderson v. Grand Forks First Nat. Bank, 4 N. D. 182, 59 NY 1029 (holding that where a principal retained the amount sent in by his agent as the proceeds of a sale made under the agency, it does not estop him from suing for a balance claimed to be due thereunder, where he does not seek to repudiate the sale).

78. U. S.—Gray v. Reardon, 10 F. Cas. No. 5,727, 2 Cranch C. C. 219.

Ala.—Shields v. Sheffield, 79 Ala. 91; Hungerford v. Moore, 65 Ala. 232; Firestone v. Firestone, 49 Ala. 128 (holding that an agent who becomes trustee for his principal by taking title to property in his own name will not be allowed to set up the statute of frauds against the enforcement of the trust).

Colo.—Wanamaker v. Pendleton, 21 Colo. A. 174, 121 P 108.

Conn.—Collins v. Tillou, 26 Conn. 368, 68 AmD 398.

Ga.—Loveless v. Bridges, 136 Ga. 338, 71 SE 166 (holding that, if there was an agreement between the buyer and the seller of corporate stock that the seller should hold the certificate to secure payment of the price, and the seller delivered the certificate which had been given him by the buyer to a third person for safe-keeping, such third person could not defeat a recovery of the certificate by the seller on the ground that there was no written assignment thereof by the buyer, in whose name it was made out, to the seller, under Civ. Code [1910] § 3584, providing that an agent cannot dispute his principal's title, except where legal proceedings at the instance of others have been commenced against him); Claflin v. Continental Jersey Works, 85 Ga. 27, 11 SE 721.

Ill.—Mason v. Hartgrove, 103 Ill. A. 163.

Ind.—Reed v. Dougan, 54 Ind. 306; U. S. Express Co. v. Lucas, 36 Ind. 361.

Kan.—McWhirt v. McKee, 6 Kan. 412.

Ky.—Farrow v. Edmundson, 4 B. Mon. 605, 41 AmD 250.

La.—Palmer v. Haynes, 2 La. 370; Canonge v. Louisiana State Bank, 3 Mart. N. S. 344; Butler v. Kenner, 2 Mart. N. S. 274.

Mich.—Blanchard v. Tyler, 12 Mich. 339, 86 AmD 57.

Mo.—Witte v. Storm, 236 Mo. 470, 139 SW 384 (holding that where agents accept the management of certain property belonging to their principal they are estopped from denying the title of the principal); Witman v. Felton, 28 Mo. 601.

Nev.—Ah Tone v. McGarry, 22 Nev. 310, 39 P 1009.

N. J.—Von Hurter v. Spengeman, 17 N. J. Eq. 185.

N. Y.—Hancock v. Gomez, 58 Barb. 490; Cowing v. Greene, 45 Barb. 585; Murray v. Vanderbilt, 39 Barb. 140; Hammond v. Christie, 28 N. Y. Super. 160; Fogerty v. Jordan, 25 N. Y. Super. 319; Crosbie v. Leary, 19 N. Y. Super. 312; King v. Kaiser, 3 Misc. 523, 23 NYS 21; Toland v. Murray, 18 Johns. 24; Marvin v. Ellwood, 11 Paige 365.

N. C.—McNair v. McKay, 33 N. C. 602; Tarkinton v. Latham, 33 N. C. 596.

Pa.—Monongahela Nat. Bank v. California First Nat. Bank, 226 Pa. 270, 75 A 359, 26 LRANS 1098 (holding that it is no defense to an action against an agent for money collected by him to show that in equity the money belonged to a third person).

S. C.—Charleston City Council v. Duncan, 6 S. C. L. 436.

Wis.—Day v. Southwell, 3 Wis. 657.

Eng.—Dixon v. Hamond, 2 B. & Ald. 310, 106 Reprint 380; Zulueta v. Vinent, 1 De G. M. & G. 315, 50 EngCh 242, 42 Reprint 573; Evans v. Nichol, 3 M. & G. 614, 42 ECL 321, 133 Reprint 1286; Roberts v. Ogilby, 9

does not, by accepting the agency, lose any prior claim he himself may have had to the property with which he deals;[79] nor is he estopped from asserting that money or property in his hands was not received by him as agent for the principal,[80] or that the principal parted with his interest in the property subsequently to the delivery to him,[81] or that the property has been taken from the principal by a paramount title,[82] or that he has been lawfully required to account to another,[83] or that the title is in another to whom he would be liable if he should surrender the property to the principal,[84] or that the property is in dispute, as by reason of an infringement of a trademark.[85]

In the case of an adverse claim the agent is not bound to pay the amount claimed to his principal unless he is protected against the claim;[86] he must interplead the principal and the claimant if he can,[87] and demand indemnity and deliver the property to the party who indemnifies him;[88] and, if after proper notice of the claim by a third person he turns over the property or funds to his principal, he becomes liable to the claimant if the latter has a right thereto,[89] although he will not be liable if he turns over the property to his principal with knowledge of a third person's claim but before it has been legally asserted.[90]

[§ 411] **j. Illegality of Transaction.**[91] An agent cannot be compelled to account for funds or property received by him for his principal in the course of an illegal transaction where the right of recovery and the illegal transaction are so closely connected that the principal cannot enforce his right without showing the illegality,[92] as where the agent transacts the illegal business with a third person in his own name, without disclosing the name of his principal, as in such a case the principal must show the

Price 269; Eachus v. Moss, 14 Wkly. Rep. 327.

Can.—Turner v. Francis, 14 CanLT OccNotes 406.

[a] **Sales.**—(1) An agent undertaking the sale of property for his principal is estopped, in an action brought by the principal to recover the avails of the sale, from denying the validity of the title by which his principal held the property at the time of the sale. Collins v. Tillou, 26 Conn. 368, 68 AmD 398; Von Hurter v. Spengeman, 17 N. J. Eq. 185. (2) Where a party is in the possession of money which he has received upon a sale by him as agent of plaintiff, a municipality, of bonds issued by plaintiff, which money belongs to plaintiff, such party is liable for the amount, in an action for money had and received, notwithstanding the issue and sale of the bonds were unauthorized. Auburn v. Draper, 23 Barb. (N. Y.) 425.

79. Shaeffer v. Blair, 149 U. S. 248, 13 SCt 856, 37 L. ed. 721 [rev 33 Fed. 218]; Davis v. Davis, 9 Mont. 267, 23 P 715 (holding that an attorney in fact, by accepting a power of attorney and attempting to convey thereunder land of his principal to himself, is not estopped from asserting an equitable title thereto previously vested in himself).

80. Gillam v. Gillam, 29 S. C. Eq. 67.

81. Marvin v. Ellwood, 11 Paige (N. Y.) 365.

82. Doty v. Hawkins, 6 N. H. 247, 25 AmD 459; Bliven v. Hudson River R. Co., 36 N. Y. 403; Van Winkle v. U. S. Mail Steamship Co., 37 Barb. (N. Y.) 122; Moss Mercantile Co. v. Payette First Nat. Bank, 47 Or. 361, 82 P 8, 2 LRANS 657 (holding that an agent to collect and remit the amount due on a judgment is not estopped, by reason of his relationship to his principal, to assert as against the latter that the amount due in fact belonged to another, and that he paid it over to that other on demand prior to the commencement of suit against him by the principal); Biddle v. Bond, 6 B. & S. 225, 118 ECL 225, 122 Reprint 1179, 3 ERC 573.

[a] **True owner entitled to possession.**—In Western Transp. Co. v. Barber, 56 N. Y. 544, 552, Grover, J., said: "The right of a bailee to set up title in a third person, as against the claim of his bailor has been much considered. It is said that neither a wharfinger nor warehouseman can deny the right of the person from or for whom he receives the property. That they are the agents of the persons from whom they receive the property, and cannot dispute their title. . . . This general rule is sustained by numerous cases, a citation of which is unnecessary. It applies in all cases where the bailee seeks to avail himself of the title of a third person for the purpose of keeping the property himself from the bailor, and to all cases where the bailee has not yielded to a paramount title in another. The question in this case is whether it applies in case he has done so. It does not apply where the property has been taken from the bailee by due process of law . . . nor where the bailor has obtained possession feloniously or by force, or fraud. . . . I think the best considered cases hold that the right of a third person to which the bailee has yielded, by delivering the property, may be interposed in all cases as a defence to an action brought by the bailor, subsequently, for the property. When the owner comes and demands his property he is entitled to its immediate delivery, and it is the duty of the possessor to make it. The law will not adjudge the performance of this duty tortious as against a bailor having no title."

[b] **If the title of the third person is not paramount** the agent is liable to the principal for the money paid him. Thus where a portion of the price of land is paid to an agent of the owner of the land by the intending purchaser, and the agent, on the representations of the intending purchaser that the owner's title is not perfect, returns it, and the title is afterward shown to be perfect, the agent is liable to his principal for the money so paid to him. Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 29 P 640, 28 AmSR 122.

83. Day v. Southwell, 3 Wis. 657.

84. Robertson v. Woodward, 37 S. C. L. 251 (holding that where an agent refuses to deliver to his principal property received of him in a suit brought by the principal to recover the same, the agent may defend by showing property in another to whom he would be liable if he should surrender the property to the principal); Murray v. Mann, 2 Exch. 538 (holding that money had and received by an agent under a contract, defeasible by reason of the fraud of one of the contracting parties, ceases to be had and received to the use of the principal when the contract is defeated, and that the agent may show this as a defense against the principal, although the fraud is entirely his and the principal was inocent of it).

85. Hunt v. Maniere, 34 Beav. 157, 55 Reprint 594 (holding an injunction of a sale of goods for an infringement of a trade-mark justifies an agent in refusing to deliver the goods to his principal).

86. Sims v. Brown, 6 Thomps. & C. (N. Y.) 5 [aff 64 N. Y. 660 mem]; Peyser v. Wilcox, 64 HowPr (N. Y.) 525.

87. Sims v. Brown, 6 Thomps. & C. (N. Y.) 5 [aff 64 N. Y. 660 mem]; Peyser v. Wilcox, 64 HowPr (N. Y.) 525.

88. Sims v. Brown, 6 Thomps. & C. (N. Y.) 5 [aff 64 N. Y. 660 mem]; Peyser v. Wilcox, 64 HowPr (N. Y.) 525.

89. Sims v. Brown, 6 Thomps. & C. (N. Y.) 5 [aff 64 N. Y. 660 mem]; Peyser v. Wilcox, 64 HowPr (N. Y.) 525.

90. Wando Phosphate Co. v. Parker, 93 Ga. 414, 21 SE 53; Sims v. Brown, 6 Thomps. & C. (N. Y.) 5 [aff 64 N. Y. 660 mem]; Hammond v. Christie, 28 N. Y. Super. 160 (holding that, where one employs another as his agent to collect a claim, the latter agreeing to pay the same to his principal when collected, in an action to recover a balance remaining in the agent's hands from collections made by him on such claim the doctrine applies that an agent receiving money for his principal is bound to pay it over to him and cannot be converted into a trustee for a third person by a mere notice of his claim); McNair v. Burns, 9 Watts (Pa.) 130; Green v. Maitland, 4 Beav. 524, 49 Reprint 442.

91. Effect of illegality of agency see also Contracts [9 Cyc 557]; Gaming [20 Cyc 950, 951]; Intoxicating Liquors [23 Cyc 335]; Lotteries [25 Cyc 1653].

92. U. S.—Fales v. Mayberry, 8 F. Cas. No. 4,622, 2 Gall. 560; Lanahan v. Pattison, 14 F. Cas. No. 8,036, 1 Flipp. 410.

Cal.—Moore v. Moore, 130 Cal. 110, 62 P 294, 80 AmSR 78 (holding that an action by a father to enforce a trust upon a title acquired by his son necessarily dependent upon the enforcement of an illegal contract cannot be maintained).

Ga.—Clarke v. Brown, 77 Ga. 606, 4 AmSR 98.

Kan.—Alexander v. Barker, 64 Kan. 396, 67 P 829 (rent collected under an illegal agency as to lands of the Cherokee nation).

La.—Little v. Johnson, 22 La. Ann. 474; Burch v. Willis, 21 La. Ann. 492; West Tennessee Bank v. Citizens' Bank, 21 La. Ann. 18; Wells v. Addison, 20 La. Ann. 295.

Md.—Stewart v. McIntosh, 4 Harr. & J. 233.

Nebr.—Rocco v. Frapoli, 50 Nebr. 665, 70 NW 236 (illegal sale of liquor).

N. H.—Udall v. Metcalf, 5 N. H. 396 (agent for the sale of lottery tickets).

N. Y.—Leonard v. Poole, 114 N. Y. 371, 21 NE 707, 11 AmSR 667, 4 LRA 728 [aff 55 N. Y. Super. 213] (holding that the courts will not aid in adjusting differences arising out of and requiring an investigation of illegal transactions); English v. Rumsey, 32 Hun 486; Bettinger v. Bridenbecker, 63 Barb. 395; Negley v. Devlin, 12 AbbPrNS 210; Le Guen v. Gouverneur, 1 Johns. Cas. 436, 1 AmD 121.

Utah.—Mexican International Banking Co. v. Lichtenstein, 10 Utah 338, 37 P 574.

illegal transaction as a basis for his recovery.[93] Of course if the action of the principal is based on and is in furtherance of the illegal agency, as distinguished from an action to recover property received by the agent from or for the principal, no recovery can be had.[94]

Money or property received for principal. Where money or property has been actually paid or delivered to an agent for his principal, it is usually held that the latter may recover such money or property from the agent, although it was received by the agent as the fruits of an illegal contract or transaction.[95] The fact that the contract or transaction between the principal and the third person, in pursuance of which the funds or property was delivered to the agent, was illegal and unenforceable does not affect the liability of the agent to account therefor to the principal;[96] this has

Wis.—Lemon v. Grosskopf, 22 Wis. 447, 99 AmD 58.

See Latraverse v. Morgan, 14 Que. Super. 511.

93. Mass.—Wakefield v. Farnum, 170 Mass. 422, 49 NE 640 (gambling transaction in wheat on margin).

Miss.—Woodson v. Hopkins, 85 Miss. 171, 182, 37 S 1000, 38 S 298, 107 AmSR 275, 70 LRA 645 [cit Cyc]; Wooten v. Miller, 15 Miss. 380.

Okl.—Ruemmeli v. Cravens, 13 Okl. 342, 74 P 908.

Pa.—Maybin v. Coulon, 4 Dall. 298, 1 L. ed. 841.

Tex.—Floyd v. Patterson, 72 Tex. 202, 10 SW 526, 13 AmSR 787.

Vt.—Buck v. Albee, 26 Vt. 184, 62 AmD 564.

94. Rocco v. Frapoli, 50 Nebr. 665, 70 NW 236; Woodworth v. Bennett, 43 N. Y. 273, 3 AmR 706; Staples v. Gould, 9 N. Y. 520; Hunt v. Knickerbacker, 5 Johns. (N. Y.) 327 (agency for the sale of lottery tickets—an action to hold the agent liable under a contract as a purchaser for tickets not returned); Rogers v. Corre, 10 Oh. Cir. Ct. 346, 6 Oh. Cir. Dec. 602.

95. U. S.—Farley v. Hill, 150 U. S. 572, 14 SCt 186, 37 L. ed. 1186; Armstrong v. American Exch. Nat. Bank, 133 U. S. 433, 10 SCt 450, 33 L. ed. 747; Tennessee Planters Bank v. Louisiana Union Bank, 16 Wall. 483, 21 L. ed. 473; Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732; McBlair v. Gibbes, 17 How. 232, 15 L. ed. 132; Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468; Chicago Star Brewery v. United Breweries Co., 121 Fed. 713, 58 CCA 133; Gilbert v. American Surety Co., 121 Fed. 499, 57 CCA 619, 61 LRA 253; McMullen v. Hoffman, 75 Fed. 547; Buchanan v. Chicago Drovers' Nat. Bank, 55 Fed. 223, 5 CCA 83; Burke v. Flood, 1 Fed. 541, 6 Sawy. 220.

Ark.—Mitchell v. Fish, 97 Ark. 444, 134 SW 940, 36 LRANS 838.

Conn.—Owen v. Dixon, 17 Conn. 492.

Ga.—Clarke v. Brown, 77 Ga. 606, 4 AmSR 98; Ingram v. Mitchell, 30 Ga. 547.

Ind.—State v. Tumey, 81 Ind. 559; Daniels v. Barney, 22 Ind. 207.

Iowa.—Sternburg v. Callanan, 14 Iowa 251 (holding that a person acting as agent in the loan of money charged with usurious interest cannot plead the usury in an action by his principal for a balance remaining in his hands, where he is not a privy to the usurious contract).

La.—Chinn v. Chinn, 22 La. Ann. 599.

Me.—Hovey v. Storer, 63 Me. 486.

Md.—Haacke v. Knights of Liberty Social, etc., Club, 76 Md. 429, 25 A 422; State v. Baltimore, etc., R. Co., 24 Md. 344; Newson v. Douglass, 7 Harr. & J. 417, 16 AmD 317.

Mass.—Fairbanks v. Blackington, 9 Pick. 93.

Mich.—Reed v. McCready, 170 Mich. 532, 136 NW 488; Willson v. Owen, 30 Mich. 474.

Miss.—Decell v. Hazelhurst Oil Mill, etc., Co., 83 Miss. 346, 35 S 761 (holding that the law making void contracts in reference to a business carried on in disregard of the privilege tax does not shield an agent from liability for misappropriations in the conduct of such business).

N. J.—Evans v. Trenton, 24 N. J. L. 764 (holding that the mere agent of a party to an illegal transaction cannot set up the illegality in a suit by his principal on account of the transaction; that this defense can be set up only by a party to the transaction).

N. Y.—Woodworth v. Bennett, 43 N. Y. 273, 3 AmR 706; Murray v. Vanderbilt, 39 Barb. 140; Alvord v. Latham, 31 Barb. 294; Fogerty v. Jordan, 25 N. Y. Super. 319; Merritt v. Millard, 23 N. Y. Super. 309 [aff 3 Abb. Dec. 291, 4 Keyes 208]; Hamilton v. Canfield, 2 N. Y. Super. 526.

Oh.—Norton v. Blinn, 39 Oh. St. 145.

Pa.—Smith v. Blachley, 188 Pa. 550, 41 A 619, 68 AmSR 887; Peters v. Grim, 149 Pa. 163, 24 A 192, 34 AmSR 599.

S. C.—Tate v. Pegues, 28 S. C. 463, 6 SE 298; Owen v. Davis, 17 S. C. L. 315; Andersons v. Moncrieff, 3 S. C. Eq. 124.

Tenn.—Pointer v. Smith, 7 Heisk. 137; Jones v. Davidson, 2 Sneed 447 (act of agent illegal, principal innocent).

Tex.—Floyd v. Paterson, 72 Tex. 202, 10 SW 526, 13 AmSR 787 (holding that the law implies a promise on the part of an agent to pay over to his principal money received for him, and that the illegality of the contract by virtue of which the money was collected affords no defense); Pfeuffer v. Maltby, 54 Tex. 454, 38 AmR 631; De Leon v. Trevino, 49 Tex. 88, 30 AmR 101; Taul v. Edmondson, 37 Tex. 556; Lovejoy v. Kaufman, 16 Tex. Civ. A. 377, 41 SW 507.

Utah.—Overholt v. Burbridge, 28 Utah 408, 417, 79 P 561 [quot Cyc].

Vt.—Baldwin v. Potter, 46 Vt. 402.

Wash.—McDonald v. Lund, 13 Wash. 412, 43 P 348.

W. Va.—Cheuvront v. Horner, 62 W. Va. 476, 59 SE 964.

Wis.—Hurd v. Doty, 86 Wis. 1, 56 NW 371, 21 LRA 746; Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 42 NW 259, 17 AmSR 149 and note; Kiewert v. Rindskopf, 46 Wis. 481, 1 NW 163, 32 AmR 731; Lemon v. Grosskopf, 22 Wis. 447, 99 AmD 58.

Eng.—Betteley v. Reed, 4 Q. B. 511, 45 ECL 511, 114 Reprint 991; Farmer v. Russell, 1 B. & P. 296, 126 Reprint 913; Tenant v. Elliott, 1 B. & P. 3, 126 Reprint 744; French v. Styring, 2 C. B. N. S. 357, 89 ECL 357, 140 Reprint 455; Williams v. Trye, 18 Jur. 442; Bousfield v. Wilson, 16 M. & W. 185; Sharp v. Taylor, 2 Phil. 801, 22 EngCh 801, 41 Reprint 1153. See also Bousfield v. Wilson, 16 M. & W. 185.

Que.—Cambridge Corp. v. Canada Sovereign Bank, 18 Que. K. B. 423.

[a] **"Thus rule, however, only applies in one class of cases."**—It must be a case in which the illegal transaction or act has been entirely completed or consummated, and the property or money, the proceeds of the illegal act or transaction, remains in the hands of the agent, and the test whether the demand connected with the illegal act can be enforced, is whether the plaintiff requires any aid from the illegal transaction to establish his case." Ruemmeli v. Cravens, 13 Okl. 342, 354, 74 P 908.

[b] **Illustrations.**—(1) Thus where a broker procured illegal insurance for his principal, and upon a loss the insurance company paid the money to the broker who refused to pay it over to the insured, setting up the illegality of the insurance, it was held that the principal was entitled to recover, the implied promise of the defendant, arising from the receipt by him of the money, being a new undertaking, unaffected by the illegality of the insurance. Tenant v. Elliott, 1 B. & P. 3, 126 Reprint 744. (2) On the same principle where the treasurer of a horse fair association received money for entrance fees, stock subscriptions, and commissions on pools sold, which he refused to pay over, and it was conceded that the business in which the money was earned was illegal, it was held that he was liable to the association in an action for money had and received. Willson v. Owen, 30 Mich. 474 [dist Bronson Agricultural, etc., Assoc. v. Ramsdell, 24 Mich. 441].

[c] **Statute forbidding assignment of contract.**—The provision of the federal statutes, U. S. Rev. St. § 3963, 5 Fed. St. Annot. 895, prohibiting a contractor for the carrying of mails between the United States and a foreign country from assigning his contract, and declaring any assignment or transfer thereof void, does not, where the contractor is in fact an agent for another, operate to annul the agency or to vitiate his liability to the principal, so far at least as money actually received by the former under the contract is concerned; and an action against him is maintainable by the principal to recover the same. Oregon Steamship Co. v. Otis, 100 N. Y. 446, 3 NE 485, 53 AmR 221.

96. Conn.—Owen v. Dixon, 17 Conn. 492.

Ga.—Ingram v. Mitchell, 30 Ga. 547.

Ind.—Daniels v. Barney, 22 Ind. 207.

La.—Chinn v. Chinn, 22 La. Ann. 599.

Me.—Hovey v. Storer, 63 Me. 486.

Md.—Haacke v. Knights of Liberty Social, etc., Club, 76 Md. 429, 25 A 422; Newson v. Douglass, 7 Harr. & J. 417, 16 AmD 317.

Mass.—Fairbanks v. Blackington, 9 Pick. 93.

Mich.—Willson v. Owen, 30 Mich. 474.

N. Y.—Woodworth v. Bennett, 43 N. Y. 273, 3 AmR 706.

Pa.—Monongahela Nat. Bank v. California First Nat. Bank, 220 Pa. 270, 75 A 359, 26 LRANS 1098 (holding that, where an agent received money from third persons for his principal by his authority, the agent was liable to the principal therefor, although the money accrued from an illegal transaction between his principal and such third persons who had no connection with the agent).

S. C.—Owen v. Davis, 17 S. C. L. 315.

Va.—McVeigh v. Old Dominion Bank, 26 Gratt. (67 Va.) 188.

W. Va.—Cheuvront v. Horner, 62 W. Va. 476, 59 SE 964 (holding that, where money has been paid to an agent for the use of his principal, the illegality of the action of which it is the fruit, or with which it was connected, does not affect the right of the principal to recover the same).

Wis.—Hurd v. Doty, 86 Wis. 1, 56 NW 371, 21 LRA 746; Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 42 NW 259, 17 AmSR 149; Lemon v. Grosskopf, 22 Wis. 447, 99 AmD 58.

Eng.—Betteley v. Reed, 4 Q. B. 511, 45 ECL 511, 114 Reprint 991; Bousfield v. Wilson, 16 M. & W. 185.

[a] **Proceeds of illegal sales.**—An agent is bound to account to his principal for money received by him in the course of his agency for goods sold by his principal on orders ob-

been held true, although the agent negotiates the illegal transaction or is otherwise a participant therein.[97] In other cases, however, it has been held that if the agent was an active participant in the execution of the illegal contract or business, he could defend on the ground of illegality an action by his principal to recover property received in the course thereof.[98] The ground taken in sup-

tained by him as such agent, although such sales as between the principal and the purchaser are illegal. Tennessee Planters Bank v. Louisiana Union Bank, 16 Wall. (U. S.) 483, 21 L. ed. 473 (sale of Confederate bonds by agent—proceeds received held recoverable by principal); Holleman v. Bradley Fertilizer Co., 106 Ga. 156, 32 SE 83 (holding that, in a suit by a principal against his agent for money collected by the latter as the proceeds of sales of the principal's goods, the agent could not set up as a defense the fact that, when he sold the fertilizers to third persons, the same had not been inspected, analyzed, tagged, or branded, as required by law); Wilt v. Redkey, 29 Ind. A. 199, 64 NE 228 (agent selling municipal bonds below par); Hertzler v. Geigley, 196 Pa. 419, 46 A 366, 79 AmSR 724 (illegal sale of intoxicating liquors); Baldwin v. Potter, 46 Vt. 402, 408 (where a person employed another to make sales of candy by a scheme which was violative of the law prohibiting lotteries, and in a suit by the principal against the agent for the money so received the agent pleaded the illegality of the transaction by which he obtained the money, it was held that the action would lie, the court saying: "The defendant (the agent) insists that, inasmuch as the plaintiff could not have enforced the contracts of sale as between himself and the purchaser, therefore, as the purchaser has performed the contracts by paying the money to the plaintiffs through me, as their agent, I can now set up the illegality of the contract of sale to defeat an action brought to enforce a contract on my part to pay the money that I as agent received, over to my principal. In other words, because my principal did not receive the money on a legal contract, I am at liberty to steal the money, appropriate it to my own use, and set my principal at defiance. We think the law is well settled otherwise"). But see cases infra note 98.

[b] **Usurious interest.**—It is immaterial that the money coming into the hands of an agent for collection is composed of usurious interest and not collectable by the principal from the person paying. Dillman v. Hastings, 144 U. S. 136, 12 SCt 662, 36 L. ed. 378; Sternburg v. Callanan, 14 Iowa 251; Chinn v. Chinn, 22 La. Ann. 599.

[c] **Payments under voidable contracts** must be accounted for. Monitor Mut. F. Ins. Co. v. Young, 111 Mass. 537 (premiums received by an insurance agent in behalf of an insolvent insurance company).

97. U. S.—Tennessee Planters Bank v. Louisiana Union Bank, 16 Wall. 483, 21 L. ed. 473.

Ark.—O'Bryan v. Fitzpatrick, 48 Ark. 487, 3 SW 527.

Conn.—Washington County Ins. Co. v. Colton, 26 Conn. 42.

Ill.—Snell v. Pells, 113 Ill. 145 (holding that an agent who receives money for his principal upon a contract not criminal or immoral in its character, but contrary to public policy only, will be estopped from setting up the illegality of such contract in defense to an action by his principal to recover the money in his hands).

Ind.—U. S. Express Co. v. Lucas, 36 Ind. 361.

Kan.—Hardy v. Jones, 63 Kan. 8, 64 P 969, 88 AmSR 223.

Minn.—Eagle Roller-Mill Co. v. Dillman, 67 Minn. 232, 69 NW 910.

Miss.—Andrews v. New Orleans Brewing Assoc., 74 Miss. 362, 20 S 837, 60 AmSR 509; Howe v. Jolly, 68 Miss. 323, 8 S 513; Gilliam v. Brown, 43 Miss. 641.

N. H.—Edgerly v. Hale, 71 N. H. 138, 51 A 679; Portsmouth Brewing Co. v. Mudge, 68 N. H. 462, 44 A 600.

N. J.—Evans v. Trenton, 24 N. J. L. 764.

N. Y.—Auburn v. Draper, 23 Barb. 425.

Oh.—Norton v. Blinn, 39 Oh. St. 145.

S. C.—Tate v. Pegues, 28 S. C. 463, 6 SE 298.

Tenn.—Pointer v. Smith, 7 Heisk. 137.

Tex.—Floyd v. Patterson, 72 Tex. 202, 10 SW 526, 13 AmSR 787.

Vt.—Baldwin v. Potter, 46 Vt. 402.

[a] **Gambling transactions.**—(1) An agent to make bets for his principal cannot refuse to pay over the winnings on the ground that the debts were wagering contracts. Bridger v. Savage, 15 Q. B. D. 363 [overr Beyer v. Adams, 3 Jur. N. S. 709]. (2) A bucket shop may be compelled to account to a customer for profits made by him, which have been received for his benefit from the other party to the transaction. Overholt v. Burbridge, 28 Utah 408, 79 P 561. But compare Leonard v. Poole, 114 N. Y. 371, 21 NE 707, 11 AmSR 667, 4 LRA 728 (holding that a broker who had acted for a syndicate in an attempt to corner the market could not be compelled to account, the broker, although acting as agent for the other parties, being deemed a principal in the illegal scheme). See also Benton v. Singleton, 114 Ga. 548, 40 SE 811, 58 LRA 181 (holding that an action would not lie against a broker to recover the amount of a common-law award, based on a gambling transaction in "cotton futures").

[b] **Agent for foreign corporation illegally transacting business.**—(1) A foreign insurance company which was illegally transacting business in the state of New York, through an agent, may compel the agent to account for moneys received during such agency. Walker v. Kremer, 29 F. Cas. No. 17,076; Penn Mut. L. Ins. Co. v. Bradley, 21 NYS 876 [aff 142 N. Y. 660 mem, 37 NE 569 mem]. See also U. S. Express Co. v. Lucas, 36 Ind. 361; Daniels v. Barney, 22 Ind. 207. (2) In State v. O'Brien, 94 Tenn. 79, 28 SW 311, 26 LRA 252, the agent of a foreign insurance company which failed to comply with the statute so as to entitle it to do business in the state was convicted of embezzlement for the appropriation of funds received by him for the corporation during the course of his agency.

98. U. S.—Fales v. Mayberry, 8 F. Cas. No. 4,622, 2 Gall. 560.

Ga.—Clarke v. Brown, 77 Ga. 606, 4 AmSR 98.

Ill.—Samuels v. Oliver, 130 Ill. 73, 22 NE 499.

La.—Burch v. Willis, 21 La. Ann. 492; West Tennessee Bank v. Citizens' Bank, 21 La. Ann. 18.

Md.—Stewart v. McIntosh, 4 Harr. & J. 233.

Miss.—Woodson v. Hopkins, 37 S 1000, 1003 [overr Andrews v. New Orleans Brewing Assoc., 74 Miss. 362, 20 S 837, 60 AmSR 509; Howe v. Jolly, 68 Miss. 323, 8 S 513; Gilliam v. Brown, 43 Miss. 641] (where Whitfield, C. J., said: "We declare the law in Mississippi now to be as it was stated to be in the four cases Hoover v. Pierce, 26 Miss. 627; Deans v. McLendon, 30 Miss. 343; McWilliams v. Phillips, 51 Miss. 196, and Williams v. Simpson, 70 Miss. 113, 11 S 689—viz.: That neither a court of law nor a court of equity, in this state, will entertain a suit for relief by either of two parties in pari delicto against the other, where the contract is against public policy. . . . The other misconception is in confusing the case of a suit by one of two parties to an illegal contract against the other with a suit by one of the parties against a third party, no way connected with the illegal contract, to collect money paid by the other party to the illegal contract, which has been executed, to such third person for the use of the party suing. . . . The reason that the third person cannot defend an action by the latter is 'that in such a case the action is not based on the illegal contract, but, instead, upon the independent contract of such third person to deliver over the property'").

N. H.—Udall v. Metcalf, 5 N. H. 396. See also Chauncy v. Yeaton, 1 N. H. 151.

N. Y.—Leonard v. Poole, 114 N. Y. 371, 21 NE 707, 11 AmSR 667, 4 LRA 728.

Tex.—Houts v. Scharbauer, (Civ. A.) 103 SW 679 (holding that, where a rescission of a contract for the sale of land was allowed the purchasers, because it had not been disclosed that one of the purchasers was the vendor's agent in making the sale and received three thousand dollars' commission, a recovery between the agent and the vendor of money paid under the contract was refused, they being in pari delicto).

Utah.—Mexican International Banking Co. v. Lichtenstein, 10 Utah 338, 37 P 574.

Eng.—Bridger v. Savage, 15 Q. B. D. 363 [overr Beyer v. Adams, 3 Jur. N. S. 709]; Beeston v. Beeston, 1 Ex. D. 13; Tenant v. Elliott, 1 B. & P 3, 126 Reprint 744; Bone v. Ekless, 5 H. & N. 925.

[a] **Agent for sale of lottery tickets.**—In Udall v. Metcalf, 5 N. H. 396, where a person sent lottery tickets to an agent for sale, such sale being illegal, it was held that the principal could maintain no action against the agent to recover the proceeds of such tickets. See also Lanahan v. Pattison, 14 F. Cas. No. 8,036, 1 Flipp. (U. S.) 410; Lanham v. Patterson, 14 F. Cas. No. 8,069 (both cases holding that a due bill for the payment of money by an agent to his principal, on account of money received by the agent for the sale of lottery tickets, is unlawful and cannot be enforced); Negley v. Devlin, 12 AbbPrNS (N. Y.) 210; Mexican International Banking Co. v. Lichtenstein, 10 Utah 338, 37 P 574; Lemon v. Grosskopf, 22 Wis. 447, 99 AmD 58 (holding that a principal could not recover from his agent the price of lottery tickets sold by the agent, but could recover the proceeds of such tickets sold by another agent and paid over to defendant for the principal). But see Hamilton v. Canfield, 2 N. Y. Super. 526 (where plaintiff's intestate won a prize in a lottery on a ticket sold him by defendant. Defendant procured the same to be discounted, and plaintiff's intestate allowed defendant to retain part of such discount as a loan. It was held that the loan could be recovered in assumpsit for money had and received).

[b] **Illegal sales of liquor.**—(1) A principal conducting an illegal liquor business, without a license, cannot recover the proceeds of illegal sales embezzled by his agent. Ruemmeli v. Cravens, 13 Okl. 342, 74 P 908. (2) Nor can he compel the agent to account for such liquors. Rocco v. Frapoli, 50 Nebr. 665, 70 NW 236.

[c] **Illegal loan agency.**—Where the lender of money at extortionate rates of interest and by contracts void as against public policy established an agency in charge of defendant, who subsequently claimed the business as his own and refused to account, his principal could not maintain a bill to recover the money and for injunction and receiver, depending for a decree on said illegal con-

port of a recovery is that, although the law would not have assisted the principal by enforcing the recovery of the money from the party by whom it was paid, because the law will not aid in the completion of an illegal contract, yet when that contract is at an end, the agent, whose liability arises solely from having received the money for another's use, can have no right to claim it.[99] Another reason given for this doctrine appears sound. It is that it is contrary to public policy and good morals to permit employees, agents, or public servants to seize or retain the property of their principals, although it may be employed in an illegal business and under their control. No consideration of public policy can justify a lowering of the standard of moral honesty required of persons acting in such capacities.[1] Theoretically, there is a distinction between enforcing an illegal contract and enforcing a duty not springing from the contract, but arising solely from the receipt of the money or goods. But practically it is impossible to reconcile the actual decisions on this point.[2] A number of courts have refused to allow a recovery by a principal in an illegal enterprise, on the ground that to do so would be to enforce, or at least to recognize, the illegal agreement.[3]

Money or property received from principal. Where the illegal transaction has not been carried out, the principal may rescind the agency and compel a return of the unexpended funds or the property which he had turned over to the agent for the furtherance of the illegal design, and the agent cannot set up the illegal object to prevent a recovery by the principal, as long as the funds or the property remain in his hands.[4]

tracts and transactions. Woodson v. Hopkins, (Miss.) 37 S 1000, 1003 [cit Cyc] (where Whitfield, C. J., said that Gilliam v. Brown, 43 Miss. 641, had been overruled by McWilliams v. Phillips, 51 Miss. 196, and Williams v. Simpson, 70 Miss. 113, 11 S 689, and that Howe v. Jolly, 68 Miss. 323, 8 S 513, and Andrews v. New Orleans Brewing Co., 74 Miss. 362, 20 S 837, 60 AmSR 509, had inadvertently followed an overruled case).

[d] **Money deposited to secure absence of witness.**—Where money is placed in a person's hands to be held till a witness carries out his agreement to leave the state, and not to appear on the trial of a pending case, when it is to be paid over to him, it is an unlawful agreement to stifle public justice, and the witness cannot recover the money from the person holding it on the ground that the illegal agreement is fully executed, and that its illegality did not affect his right as a principal to recover the money paid to his agent. Feltner v. Feltner, 132 Ky. 705, 116 SW 1196.

[e] **Where agent not party to transaction.**—A person who receives from one party to an illegal contract money paid in execution and satisfaction of it to the use of the other party to the contract, on a promise to pay it over to such other party, cannot defend an action brought by the latter to recover the money, on the ground of such prior illegal contract, where the person receiving the money and making the promise in no way participated in or was a party to the illegal contract, and did not know of it when he received the money and made the promise. Merritt v. Millard, 18 N. Y. Super. 645.

99. Overholt v. Burbridge, 28 Utah 408, 417, 79 P 561 [quot Cyc]. See also cases cited supra note 98.

"If a contract is illegal, certainly it does not follow that it is illegal or immoral for the parties, after its completion, to fairly settle and adjust the profits and losses which have resulted from it. The vice in the contract does not enter into the settlement." De Leon v. Trevino, 49 Tex. 88, 92, 30 AmR 101 [quot Mitchell v. Fish, 97 Ark. 444, 448, 134 SW 940, 36 LRANS 838].

1. Yale Jewelry Co. v. Joyner, 159 N. C. 644, 647, 75 SE 993 [quot Cyc]; Norton v. Blinn, 39 Oh. St. 145; Gist v. Western Union Tel. Co., 45 S. C. 344, 23 SE 143, 55AmSR 763.

2. Woodson v. Hopkins, (Miss.) 37 S 1000, 1001 [quot Cyc]; Haswell v. Blake, (Tex. Civ. A.) 90 SW 1125 (where a debtor conveyed his property to a trustee with authority to convert the same into cash and pay the creditors. The trustee verbally agreed with the debtor to settle the indebtedness as cheaply as possible, and to give him the benefit of discounts procured from creditors. It was held that the illegal verbal agreement was distinct from the implied contract binding the trustee to return the property not needed to satisfy the claims of the creditors, as the debtor did not require any aid from the verbal agreement to establish his case for moneys received by the trustee and not accounted for); Overholt v. Burbridge, 28 Utah 408, 417, 79 P 561 (where the court said: "This distinction, viz., the difference between suing on or trying to enforce the illegal contract itself, and a suit to recover money which is admitted to be due, although it may have been obtained by prosecuting an illegal enterprise, has always been respected by the courts, from its announcement in the cases we have above cited up to the present time").

[a] **Recovery on implied contract.**—"When the plaintiff shows that the defendant has received of a third party money for his use, the law from the naked fact implying a promise, the case is made out without going into the illegal transaction, and the defendant will not be permitted to set up the illegality of the original contract in order to defeat a recovery." Floyd v. Patterson, 72 Tex. 202, 204, 10 SW 526, 13 AmSR 787 [quot Overholt v. Burbridge, 28 Utah 408, 417, 79 P 561].

3. U. S.—Wheeler v. Sage, 1 Wall. 518, 17 L. ed. 646; Bartle v. Nutt, 4 Pet. 184, 7 L. ed. 825 [aff 2 F. Cas. No. 1,072, 3 Cranch C. C. 283]; Hoffman v. McMullen, 83 Fed. 372, 28 CCA 178, 45 LRA 410, 69 Fed. 509; Jackson v. McLean, 36 Fed. 213; Lanahan v. Pattison, 14 F. Cas. No. 8,036, 1 Flipp. 410; Lanham v. Patterson, 14 F. Cas. No. 8,069.

Ala.—Boyd v. Barclay, 1 Ala. 34, 34 AmD 762.

Ga.—Clarke v. Brown, 77 Ga. 606, 4 AmSR 98.

Ill.—Craft v. McConoughy, 79 Ill. 346, 22 AmR 171; Skeels v. Phillips, 54 Ill. 309.

Kan.—Alexander v. Barker, 64 Kan. 396, 67 P 829; Hinnen v. Newman, 35 Kan. 709, 12 P 144.

La.—Little v. Johnson, 22 La. Ann. 474.

Mass.—Dunham v. Presby, 120 Mass. 285; Denny v. Lincoln, 5 Mass. 385.

Mo.—Green v. Corrigan, 87 Mo. 359.

Mont.—Morrison v. Bennett, 20 Mont. 560, 52 P 553, 40 LRA 158.

N. H.—Udall v. Metcalf, 5 N. H. 396.

N. J.—Watson v. Murray, 23 N. J. Eq. 257.

N. Y.—Leonard v. Poole, 114 N. Y. 371, 21 NE 707, 11 AmSR 667, 4 LRA 728; Bettinger v. Bridenbecker, 63 Barb. 395; Negley v. Devlin, 12 AbbPrNS 210; Belding v. Pitkin, 2 Cai. 147.

N. C.—King v. Winants, 71 N. C. 469, 17 AmR 11.

Pa.—Eberman v. Reitzel, 1 Watts & S. 181.

Utah.—Mexican International Banking Co. v. Lichtenstein, 10 Utah 338, 37 P 574.

Wis.—Lemon v. Grosskopf, 22 Wis. 447, 99 AmD 58.

Eng.—Edgar v. Fowler, 3 East 222, 102 Reprint 582; Thomson v. Thomson, 7 Ves. Jr. 470, 32 Reprint 190.

4. U. S.—Congress, etc., Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347.

Ark.—O'Bryan v. Fitzpatrick, 48 Ark. 487, 3 SW 527; McLain v. Huffman, 30 Ark. 428; Perkins v. Clemm, 23 Ark. 221.

Cal.—Wassermann v. Sloss, 117 Cal. 425, 49 P 566, 59 AmSR 209, 38 LRA 176 (holding that a person who deposits money with another to be used in the furtherance of an illegal design is entitled to the return of the money as long as such design remains unexecuted).

Conn.—Phalen v. Clark, 19 Conn. 421, 50 AmD 253 (where the agent defrauded the proprietor of a lottery by pretending that a ticket whose number had drawn a prize had been sold before the drawing, and a recovery was permitted).

Ga.—Clarke v. Brown, 77 Ga. 606, 4 AmSR 98; Ingram v. Mitchell, 30 Ga. 547.

Iowa.—Munns v. Donovan Commn. Co., 117 Iowa 516, 91 NW 789.

Kan.—Ware v. Spinney, 76 Kan. 289, 91 P 787, 13 LRANS 267 and note, 13 AnnCas 1181 and note; State v. Patterson, 66 Kan. 447, 71 P 860; Hardy v. Jones, 63 Kan. 8, 64 P 969, 88 AmSR 223.

Ky.—Smith v. Richmond, 114 Ky. 303, 70 SW 846, 24 KyL 1117, 102 AmSR 283.

Mass.—Fisher v. Hildreth, 117 Mass. 558; Sampson v. Shaw, 101 Mass. 145, 3 AmR 327; McKee v. Manice, 11 Cush. 357.

Mo.—Adams Express Co. v. Reno, 48 Mo. 264.

N. H.—Souhegan Nat. Bank v. Wallace, 61 N. H. 24 (holding that an agent cannot keep money belonging to his principal on the ground that it was furnished for an unlawful purpose); Perkins v. Eaton, 3 N. H. 152.

N. Y.—Morgan v. Groff, 4 Barb. 524 [overr in effect Morgan v. Groff, 5 Den. 364, 49 AmD 273]; Vischer v. Yates, 11 Johns. 23 [rev on other grounds 12 Johns. 1]. But see Rolfe v. Delmar, 30 N. Y. Super. 80.

Oh.—Norton v. Blinn, 39 Oh. St. 145.

Okl.—Ruemmeli v. Cravens, 13 Okl. 342, 74 P 908.

Pa.—Smith v. Blachley, 188 Pa. 550, 41 A 619, 68 AmSR 887; Dauler v. Hartley, 178 Pa. 23, 35 A 857; Reppler v. Jacobs, 149 Pa. 167, 24 A 194; Peters v. Grim, 149 Pa. 163, 24 A 192, 34 AmSR 599; McAllister v. Hoffman, 16 Serg. & R. 147, 16 AmD 556; Davenger v. Everett, 7 LegGaz 222.

S. C.—Tate v. Pegues, 28 S. C. 463, 6 SE 298.

Va.—Berkshire v. Evans, 4 Leigh (31 Va.) 223.

W. Va.—Cheuvront v. Horner, 62 W. Va. 476, 59 SE 964.

Wis.—Kiewert v. Rindskopf, 46 Wis. 481, 1 NW 163, 32 AmR 731; Douville v. Merrick, 25 Wis. 688.

Eng.—Hastelow v. Jackson, 8 B. &

[§ 412] **k. Liability of Agent for Conversion.**[5] An agent is ordinarily liable for a conversion of his principal's funds or property, where, without legal excuse, he refuses to account for and deliver the same on a proper demand therefor;[6] but where his possession is lawful he is not liable for a conversion until a demand for the funds or property has been made and refused.[7] However, such a refusal does not render the agent liable for a conversion, if he has a sufficient excuse therefor,[8] or asserts no claim to the property himself and has done nothing in reference to it amounting to an appropriation of it,[9] as where he merely refuses to deliver the property until his advances and commissions are paid.[10]

Failure to pay over money. Where the agent is not bound to pay over the identical money received by him as agent, his failure to pay over to his principal on demand is not a conversion so as to render him liable in trover;[11] but where the

C. 221, 15 ECL 117, 108 Reprint 1026; Farmer v. Russell, 1 B. & P. 296, 126 Reprint 913; Edgar v. Fowler, 3 East 222, 102 Reprint 582; Bone v. Ekless, 5 H. & N. 925; Bousfield v. Wilson, 16 M. & W. 185.

[a] **The only remedy,** where a principal furnished an agent with funds for an illegal purpose, is an action in assumpsit to recover such portion of the money as was not actually used by the agent in carrying out such purpose. Benton v. Singleton, 114 Ga. 548, 40 SE 811, 58 LRA 181.

[b] **A mere stakeholder in a gambling transaction** may be compelled to return the money held by him upon notice of the rescission or the abandonment of the transaction. Lewy v. Crawford, 5 Tex. Civ. A. 293, 23 SW 1041 [foll Jageman v. Necco, (Tex. Civ. A.) 59 SW 822 (stakeholder under contract to suppress competition)]. But see Morgan v. Groff, 5 Den. (N. Y.) 364, 366, 49 AmD 273 (holding that one who places money in the hands of another with which to make a bet on the event of an election, cannot recover it back, although no bet is made. The court said, however: "Neither can the plaintiff say that he repented of his intended violation of the statute. Perhaps if before the election was had, and before any bet was made, he had countermanded his orders to make the bet and had so notified the defendant, and it had not, in point of fact, been made, the plaintiff might have recovered. In such a case it might be said he had taken advantage of the locus penitentie. But this space for repentance I take it did not extend beyond the election; and it was not until after that had passed that he asked for the money").

[c] **Money deposited with a broker as a margin** in an illegal stock gambling transaction cannot be recovered. Staples v. Gould, 9 N. Y. 520.

[d] **Money not in possession of agent.**—Where the agent was given money to use in a gambling transaction, on a board of trade, a note given by the agent to the principal, for the amount thereof, while the deal is in progress, and the money is up on the deal, cannot be enforced, because given in furtherance of a gambling transaction. Rogers v. Corre, 10 Oh. Cir. Ct. 346, 6 Oh. Cir. Dec. 602 [aff 57 Oh. St. 661, 50 NE 1128] (where the court said that if the money had been in the agent's possession, either before the deal had been inaugurated or after it had been closed, it would be against good morals to permit the agent to retain it, and that therefore the principal could have recovered it).

[e] **Suppression of bidding at judicial sale.**—An agent intrusted with money to purchase property at a judicial sale, under an agreement which had for one of its objects the suppression of competition at the sale, who executes the agreement by making the purchase, cannot withhold a surplus portion of the fund placed in his hands on the ground that the agreement by which he obtained it was illegal as against public policy, but must account for it to his principal. Hardy v. Jones, 63 Kan. 8, 64 P 969, 88 AmSR 223.

[f] **Encouraging divorce.**—In Douville v. Merrick, 25 Wis. 688, a husband deposited with an attorney a sum of money under an agreement that the attorney should bring an action for divorce in behalf of his wife, and that the money should be paid by the attorney to the wife as alimony. The action was not in fact brought, and it was held that the husband could recover the money so deposited.

[g] **Securing pardon.**—Where a person deposited in a bank money which was to be paid to a sheriff when he secured the pardon of the depositor's brother, who was then in the penitentiary, convicted of a felony, the depositor could recover the money as long as it remained in the possession of the bank. Adams Express Co. v. Reno, 48 Mo. 264.

[h] **Lotteries.**—(1) Money advanced to an agent by the managers of a lottery, to forward the sale of tickets by him, cannot be recovered back. Rolfe v. Delmar, 30 N. Y. Super. 80. (2) The managers of a lottery cannot maintain an action to recover for tickets in the hands of their agent. Hunt v. Knickerbacker, 5 Johns. (N. Y.) 327. See also Roby v. West, 4 N. H. 285, 17 AmD 423.

[i] **The consignor of liquors for illegal sale** cannot maintain an action to compel an accounting for such liquors against the agent to whom they were consigned. Rocco v. Frapoli, 50 Nebr. 665, 70 NW 236.

5. **Conversion by disobedience** see supra § 379.

Conversion in general see Trover and Conversion [38 Cyc 1997].

Criminal liability of agent for embezzlement see Embezzlement [15 Cyc 497].

Measure of damages for conversion see Damages [13 Cyc 170 et seq]; Factors [19 Cyc 149]; Brokers [19 Cyc 214]; Trover and Conversion [38 Cyc 2088 et seq].

6. Cal.—Wood v. Blaney, 107 Cal. 291, 40 P 428.

Ind.—Nading v. Howe, 23 Ind. A. 690, 55 NE 1032 (holding that an agent's refusal to deliver wheat purchased for his principal as his agent constitutes a conversion thereof).

Mass.—Brown v. Cushman, 173 Mass. 368, 53 NE 860 (holding that, where a contract, under which goods were left with an agent for sale, ceased on the death of the principal, the goods then in the hands of the agent remaining unsold belonged to the principal's estate, and, on refusal to deliver the same to the representative of the deceased, the agent was guilty of conversion).

Mich.—Reed v. McCready, 170 Mich. 532, 136 NW 488 (holding that, in trover for the conversion of the proceeds of a note, where it was shown that plaintiff delivered the note to defendant, as agent for him, to have it discounted, it is no defense to show that by having the note discounted plaintiff violated a trust).

N. Y.—Solomon v. Waas, 2 Hilt. 179 (holding that an agent to sell who claims that he has bought the goods from his principal and refuses to account thereby converts them to his own use); Jones v. Smith, 65 Misc. 528, 120 NYS 865; Crowley v. Meuer, 128 NYS 657; Rhinelander v. Barrow, 17 Johns. 538 [rev 3 Johns. Ch. 614]. See also Potter v. Merchants' Bank, 28 N. Y. 641, 86 AmD 273 (holding that the demand of a note sent to a bank as agent for collection terminates the agency and a refusal to return it may be evidence of a conversion).

N. C.—Bridgeport Organ Co. v. Snyder, 147 N. C. 271, 61 SE 51 (holding that the fact that an agent having in his possession for sale a number of organs, and also having in his possession for collection notes and mortgages, refuses to deliver the same to the owner, is evidence of a breach of trust and of a fraudulent conversion).

Tex.—Jones v. Hunt, 74 Tex. 657, 12 SW 832.

Va.—Jackson v. Pleasanton, 101 Va. 282, 43 SE 573.

[a] **Intent.**—In a civil action for fraudulent conversion by an agent, the question of intent is not material. Bridgeport Organ Co. v. Snyder, 147 N. C. 271, 61 SE 51.

7. Madison v. Gross, 54 App. Div. 129, 66 NYS 412.

Necessity of demand and refusal see infra § 592.

8. Welker v. Appleman, 44 Ind. A. 699, 90 NE 35; Fletcher v. Fletcher, 7 N. H. 452, 28 AmD 359; National Surety Co. v. Empire State Surety Co., 143 App. Div. 241, 128 NYS 10.

[a] **Sale, not agency.**—Where, in an action for conversion of property, the evidence shows that the property alleged to have been converted was sold to defendant by plaintiff, and was not delivered to him as plaintiff's agent, as plaintiff contends, plaintiff is not entitled to recover. South Bend Ironworks v. Wagner, (Tex. Civ. A.) 74 SW 601.

9. Stroup v. Bridger, 124 Iowa 401, 100 NW 113 (holding that where a widow, on making a division between her children and grandchildren of property left her by her husband, delivered certain notes to a son-in-law, taking therefor his receipt, reciting that they were received for collection, and that when they, or any part thereof, were collected, the proceeds were to be divided so as to make an even division of the property given by her to her heirs, the mere refusal of the son-in-law thereafter to surrender possession of the notes in response to her demand does not amount to a conversion of the notes; the son-in-law asserting no claim to the notes himself, and having done nothing in reference to them amounting to an appropriation); Handlan-Buck Mfg. Co. v. Stave Electrical Co., (Mo. A.) 168 SW 785 (holding that the retention of certain property by defendant's selling agent while waiting shipping directions and by reason of its refusal to pay storage charges for which it was not liable, while, however, claiming no interest in the goods, did not constitute a conversion).

10. Welker v. Appleman, 44 Ind. A. 699, 90 NE 35 (holding that, where a purchasing agent did not claim title to wool sued for, but claimed only the right to hold the wool until his advances and commissions were paid, his refusal to deliver the wool on demand was not a conversion).

11. Washington v. Eames, 6 Allen (Mass.) 417; Walter v. Bennett, 16 N. Y. 250; Harris v. Schultz, 40 Barb. (N. Y.) 315; Herrmann Furniture, etc., Works v. Hyman, 28 Misc. 567, 59 NYS 526; Hartman v. Hicks, 28 Misc. 527, 59 NYS 529; Rothchild v. Schwarz, 28 Misc. 521, 59 NYS 527; Wright v. Duffie, 23 Misc. 338, 51 NYS 255.

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agent is to account for the identical money received, which was to remain the property of the principal, trover may be maintained by the principal for its conversion.[12]

Unauthorized exercise of control or dominion over property. An agent may also be liable for conversion where he deals with the funds or property in subversion of or inconsistent with the principal's rights therein,[13] as where he sells it as the property of another[14] or otherwise parts with it in a way or for a purpose not authorized,[15] although he has no wrongful intent in doing so;[16] or where he deals with the property for his own purposes,[17] or fails or refuses to turn it over to a third person for whom it was given to him by his principal,[18] or otherwise deals with it in fraud of the principal's rights therein.[19] Where an agent is intrusted with money to be invested in the name of his principal, he is guilty of conversion if he invests it in his own name,[20] or fails or refuses to invest it as directed.[21] But an agent is not guilty of conversion if he acts in apparent accord with his authority, although he may be guilty of a technical departure from his duty, or of negligence in its performance, which results in loss to the principal,[22] although he acts in bad faith but within the scope of his

[a] **Reason for rule.**—"As a general rule, the mere failure of an agent to pay over or account for money collected for his principal will not sustain an action of conversion, because the agent is not bound to pay over the identical money received, and the transactions create nothing more than the relation of debtor and creditor between him and his principal . . . but where the principal is entitled to receive, and the terms of the employment of the agent require him to pay over, the identical money received, an action of trover will lie for its conversion." Salem Tract. Co. v. Anson, 41 Or. 562, 567, 67 P 1015, 69 P 675.

[b] **That an agent for the sale of goods** does not deliver the specific proceeds of the goods to his principal does not render him guilty of a conversion. Rosenberg v. Block, 49 N. Y. Super. 488.

12. Clegg v. Baumberger, 110 Ind. 536, 9 NE 700; Michigan Carbon-Works v. Schad, 1 NYS 490; Hartman v. Hicks, 28 Misc. 527, 59 NYS 529; Rothchild v. Schwarz, 28 Misc. 521, 59 NYS 527; Salem Tract. Co. v. Anson, 41 Or. 562, 567, 67 P 1015, 69 P 675 (where the court said: "Where the principal is entitled to receive, and the terms of the employment of the agent require him to pay over, the identical money received, an action of trover will lie for its conversion. . . . And such was the case here. The defendant was the agent and general manager of the plaintiff corporation, with power and authority to collect the moneys due it for services rendered. All the money so collected belonged to his principal. The title immediately vested in the plaintiff, and the defendant had no interest therein, and no authority to make any use thereof whatever. He was bound by the terms of his employment to pay the money over to the treasurer of the plaintiff corporation, and could not even use it for the payment of current expenses without the approval of his superior. The plaintiff, as a matter of right, therefore, was entitled to the identical money received by the defendant on its account, and any unlawful use or misapplication thereof constituted a conversion, for which an action of trover was an appropriate remedy"); Wells v. Collins, 74 Wis. 341, 43 NW 160, 5 LRA 531 and note.

[a] **Agent's duty to keep money.**—In Cotton v. Sharpstein, 14 Wis. 226, 235, 80 AmD 774, Justice Paine, after a full discussion of the question, says: "We have found no case where the exact question now under discussion has been decided. But we are satisfied that it is the clear result of principles well established, that it is the duty of an agent to keep money collected by him, for the principal to whom it belongs, and that if, in the absence of any authority, express or implied, to treat it as his own, and himself as a mere debtor, he wrongfully converts it to his own use, he is liable to an action of trover, and to all the legal consequences of such an action."

[b] **Unauthorized collection.**—A salesman collected, without authority from his employers, from a customer of theirs one bill for the price of two suits of clothes. They sued the customer, but upon discovering on the trial of that action that their salesman had collected the bill, discontinued the action and brought one against the salesman for a conversion. It was held that he was liable; that their suing him ratified his collection of the money, but not his retention of it thereafter; and that it was his duty to return to them the identical money he had collected. Schanz v. Martin, 37 Misc. 492, 75 NYS 997.

13. Colcman v. Pearce, 26 Minn. 123, 1 NW 846; Covell v. Hill, 6 N. Y. 374.

14. Covell v. Hill, 6 N. Y. 374.

15. Firemen's Ins. Co. v. Cochran, 27 Ala. 228 (holding that the unauthorized transfer by the secretary of an insurance company of notes and bills of exchange belonging to the company is a conversion for which trover may be maintained); Holmes v. Langston, 110 Ga. 861, 36 SE 251; Barrett v. Messer, 115 Minn. 476, 132 NW 991; Laverty v. Snethen, 68 N. Y. 522, 23 AmR 184; Michigan Carbon Works v. Schad, 1 NYS 490.

[a] **Where an agent wrongfully disposes of his principal's property,** he cannot escape liability by applying the proceeds to the payment of the principal's debts without his authority or consent. Price v. Keyes, 1 Hun (N. Y.) 177, 3 Thomps. & C. 720 [rev on other grounds 62 N. Y. 378].

16. Kennesaw Guano Co. v. Wappoo Mills, 119 Ga. 776, 47 NE 205; Laverty v. Snethen, 68 N. Y. 522, 23 AmR 184.

[a] **Where a traveling salesman, after being discharged, refuses to return his samples** until his commissions have been paid, and thereafter sells the samples, and applies the proceeds on what is due him, he is liable, in the absence of bad faith, only for their fair market value when sold. Glockner v. Jacobs, (Okl.) 140 P 142.

17. Ala.—Coleman v. Siler, 74 Ala. 435 (holding that, where an agent sells his principal's property in consideration of a satisfaction of his individual debt, both he and the purchaser are guilty of conversion).

Cal.—Bellus v. Peters, 165 Cal. 112, 130 P 1186 (stock acquired by fraud in stating purchase price of plant).

Ga.—Holmes v. Langston, 110 Ga. 861, 36 SE 251; Wyly v. Burnett, 43 Ga. 438.

Md.—Barton v. White, 1 Harr. & J. 579.

Mo.—Bartels v. Kinnenger, 144 Mo. 370, 46 SW 163 (holding that an agent who has in his hands money belonging to his principal, which he is instructed to loan upon real estate security, becomes charged with the money without demand immediately upon conversion of it to his own use, although the principal subsequently took the agent's note for the amount so converted, and judgment was taken on the note); White Sewing Mach. Co. v. Betting, 46 Mo. A. 417.

N. H.—Gould v. Blodgett, 61 N. H. 115.

N. Y.—Florence Sewing Mach. Co. v. Warford, 31 N. Y. Super. 433; Schanz v. Martin, 37 Misc. 492, 75 NYS 997.

Or.—Salem Light, etc., Co. v. Anson, 41 Or. 562, 67 P 1015, 69 P 675; Nichols v. Gage, 10 Or. 82 (pledging the property for an advance made on his own account).

Pa.—Persch v. Quiggle, 57 Pa. 247; Etter v. Bailey, 8 Pa. 442.

Eng.—Dantra v. Stiebel, 3 F. & F. 951.

[a] **A bookkeeper or salesman** who receives the money of his employer by virtue of his employment receives it in a fiduciary capacity, and, if he fraudulently appropriates it to his own use, he is guilty of a breach of trust. Riehl v. Evansville Fdy. Assoc., 104 Ind. 70, 3 NE 633.

[b] **One who has transferred his book accounts to a creditor** as security, and is authorized to collect them for the transferee's benefit, is not the agent of the transferee, so as to charge him with collections appropriated by the transferor to his own use, as between the transferee and the transferor's assignee for the benefit of creditors. Cornwell v. Baldwin's Bank Yan, 12 App. Div. 227, 43 NYS 771.

18. Crowley v. Meuer, 128 NYS 657 (holding that, where defendant received money as plaintiff's agent to pay to a designated person, his failure to do so was a conversion).

19. White v. Wall, 40 Me. 574 (holding that where a consignee of goods, with power to sell, sells with intent to defraud the consignor, which intent is known to the purchaser, such sale and transfer of possession constitute a joint conversion for which both parties will be liable in trover); King v. Mackellar, 109 N. Y. 215, 16 NE 201; Ward v. Forrest, 20 HowPr (N. Y.) 465. See also Newstead v. Rowe, 3 Sask. L. 176, 14 WestLR 509.

20. Cock v. Van Etten, 12 Minn. 522; Farrand v. Hurlbut, 7 Minn. 477.

[a] **That an agent deposits in a bank a box of specie** belonging to his principal on general deposit and takes a certificate of deposit in his own name and subject to his own order is sufficient to authorize a jury to infer a conversion. Ringo v. Field, 6 Ark. 43.

21. Zindel v. Finck, 120 NYS 738 (holding that, where plaintiff engaged defendant to purchase a home for him and to obtain a title policy, and gave him money with which to obtain a title policy, and defendant obtained no policy for plaintiff, an action for conversion will lie).

22. Ark.—Emerson v. Turner, 95 Ark. 597, 130 SW 538 (holding that an agent in charge of land will not be held liable as for conversion of the timber growing thereon, in the absence of evidence showing an affirmative tortious act on the part of the agent by which the timber was lost to the principal).

Iowa.—Twogood v. Allee, 125 Iowa 59, 99 NW 288 (holding that an agent is not liable for conversion pursuant to the latter's authorization).

Mich.—Hallett v. Gordon, 122 Mich. 567, 81 NW 556, 82 NW 827.

Nebr.—Stone v. Neeley, 42 Nebr. 567, 60 NW 965.

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general powers.[23] Where an agent guarantees a sale and is also authorized to sell on credit and does so, he cannot be held liable as for a conversion of the goods for which he is unable to collect; the principal's remedy is by action on the guaranty.[24]

[§ 413] **B. Duties and Liabilities of Principal to Agent—1. Agent's Right to Compensation—a. As Affected by Contract of Employment—(1) Necessity of Authority—(a) In General.** To entitle a person to compensation for services rendered as the agent of another, he must ordinarily have been employed by that other to render such services;[25] and if he performs services or acts without authority, he is not entitled, in the absence of ratification, to compensation therefor.[26]

Express and implied authority.[27] The authority of the agent, to entitle him to compensation, may be given to him expressly,[28] or it may be implied from the conduct and words of the parties and the facts and circumstances surrounding the case.[29]

[§ 414] **(b) Ratification.**[30] Although a person assumes to act for another without authority, yet he may recover compensation for his services in an otherwise proper case if the latter ratifies the unauthorized act.[31] So where one for whom an agent has been employed by a third person without authority ratifies the unauthorized employment, the agent may, if otherwise entitled, recover compensation of him.[32]

[§ 415] **(2) Necessity and Effect of Contract for Compensation—(a) In General.** The right of an agent to recover compensation for his services rests upon contract, express or implied, as affected by custom or usage. Accordingly the principal is not liable for compensation in the absence of any express or implied contract to pay it, or of a custom or usage entitling the agent to compensation.[33] Thus an agent cannot recover compensation where neither party contemplates that compensation is to be paid to him,[34] or where, before accepting the agent's

N. Y.—Greentree v. Rosenstock, 61 N. Y. 583; Walter v. Bennett, 16 N. Y. 250 (holding that an agent employed to make a sale and collect the proceeds on receiving from the purchaser a bank draft payable to his own order is not acting in violation of his duty in reducing the draft into money and passing it to his own credit in bank); Dickinson v. Dudley, 17 Hun 569; Monks v. Bruce, 3 NYS 419; Gruard v. O'Reilly, 65 NYS 511.

Eng.—Bromley v. Coxwell, 2 B. & P. 438, 126 Reprint 1372; Ross v. Johnson, 5 Burr. 2825, 98 Reprint 483; Brown v. Boorman, 11 Cl. & F. 1, 8 Reprint 1003; Weymouth v. Boyer, 1 Ves. Jr. 416, 30 Reprint 414.

[a] **A sudden emergency or an unusual condition** (1) may excuse the agent. Thus where an agent who by the circumstances of war was unable to communicate with his principal laid away the money belonging to the latter with his own, and also placed part of the money in his brother's hands, hoping thereby to make it more secure, and exchanged some of the bills for others of larger denominations so as to reduce the bulk of the funds, he was not guilty of a conversion. Wood v. Cooper, 2 Heisk. (Tenn.) 441. (2) Insolvency of a principal indebted to the agent will justify a sale by the agent of property of his principal in his hands, but not of more than enough to indemnify himself. Henriques v. Franchise, Prec. Ch. 205, 24 Reprint 100.

[b] **Renting to improper person.**—An agent to whom a piano is intrusted "to rent or sell," and who under this authority rents it to a person who never returns it, is not liable to the owner of the piano as for conversion. The appropriate remedy is an action for breach of duty or negligence in letting the piano to an improper person. Bogatcka v. Walker, 1 NYCityCt 447.

[c] **That an agent takes a note payable to himself** for the debt of his principal is not of itself evidence of a conversion. Kidd v. King, 5 Ala. 84; Floyd v. Day, 3 Mass. 403, 3 AmD 171.

23. McMorris v. Simpson, 21 Wend. (N. Y.) 610.

24. Standard Fertilizer Co. v. Van Valkenburgh, 21 Misc. 559, 47 NYS 703.

25. Del.—Cranston v. Nields, 5 Del. 372.

Mich.—McDonald v. Boeing, 43 Mich. 394, 5 NW 439, 38 AmR 199.

N. Y.—Harnickell v. Parrot Silver, etc., Min. Co., 2 Silv. A. 456; David v. Rick, 57 App. Div. 623, 67 NYS 1052.

Pa.—Copeland v. Stoneham Tannery Co., 142 Pa. 446, 21 A 825.

Ont.—Macklem v. Thorne, 30 U. C. Q. B. 464.

See Toulmin v. Millar, 12 App. Cas. 746.

See also infra §§ 444, 445. Brokers [19 Cyc 217]; Factors [19 Cyc 150].

26. Willard v. Pennsylvania Co., 140 Ill. A. 306; Dahlman v. White Co., 132 NYS 771 (holding that one employed as an automobile salesman for a commission by the manager of a department for the sale of commercial automobiles, without authority to make contracts covering the department for the sale of automobiles for pleasure use, is not entitled to commissions for the sale of an automobile for pleasure use); Yates v. Killman, (Tenn. Ch. A.) 57 SW 221 (holding that, where plaintiff was instrumental in obtaining a purchaser for defendants' patent rights and claimed commissions under a verbal contract therefor, and defendants denied plaintiff's employment for such purpose, claiming that he was acting for the purchasers with the desire to obtain an agency for the new company, and defendants' letter to plaintiff said, "anything that you can do in the way of putting our scale on the market will be greatly appreciated by us, and besides you shall not lose anything thereby," there was no employment of plaintiff as claimed by him, and hence he could not recover commissions); Haffner v. Northern Trusts Co., 14 WestLR 403.

[a] **An unauthorized real estate agent** who calls the attention of a purchaser to a piece of property is not entitled to a commission where the owner of the property is unaware of such agent's intervention. Plummer v. Gillespie, 10 Que. Super. 243.

[b] **Agent for cotenant; no authority from other cotenant.**—Real estate agents who are employed by one of several tenants in common to find a purchaser for their land, and who bring about a sale, are not entitled to a commission thereon from another of the cotenants, who has not authorized such employment, and who, until after the sale is completed, neither knows that they are rendering or have rendered him any services nor has any knowledge of facts which should put him upon inquiry. Brown v. Scott, 91 Wis. 674, 65 NW 499.

[c] **Benefit to third person.**—The fact that services rendered by an agent to his principals result in a benefit to a third person creates no legal liability on the part of such third person to pay the employee, although such third person is one of the common employers. Saul v. Busenbark, 83 Ill. A. 256 [rev on other grounds 184 Ill. 343, 56 NE 417].

27. Express and implied employment of brokers see Brokers [19 Cyc 218].

Necessity of written authority see Brokers [19 Cyc 219]; Frauds, Statute of [20 Cyc 234].

28. See generally supra § 29.

29. Ice v. Maxwell, 61 W. Va. 9, 55 SE 899 (holding that to entitle an agent to recover for services rendered it is not necessary to show an express request, but one may be implied from the circumstances in the case). See generally supra §§ 32–42. Compare McLiney v. Gomprecht, 7 Misc. 169, 27 NYS 253 (holding that where, in an action to recover commissions for renting defendant's building, it appeared that plaintiff, who was then the lessee and wished to surrender the lease, had an interview with defendant concerning it, and that defendant told him to "get him a tenant" and that he would do "what was right," a contract of hiring could not be inferred, the question in the minds of the parties being a surrender of the existing lease).

30. Ratification: What constitutes ratification see supra §§ 77–137. Ratification of acts done in excess of authority see infra §§ 435, 440. Ratification as to broker see Brokers [19 Cyc 220].

31. Goss v. Stevens, 32 Minn. 472, 21 NW 549; Wilson v. Dame, 58 N. H. 392 (holding that if a person acts as an agent without authority, and his acts are ratified, he is entitled to the same compensation and remedy as if he had been duly authorized); Low v. Connecticut, etc., R. Co., 46 N. H. 284; Copeland v. Stoneham Tannery Co., 142 Pa. 446, 21 A 825; Ice v. Maxwell, 61 W. Va. 9, 55 SE 899.

32. Mahony v. Ungrich, 59 N. Y. Super. 377, 14 NYS 375 [aff 129 N. Y. 632 mem, 29 NE 1030 mem].

Ratification of unauthorized employment of subagent see infra § 445.

33. Hubbard v. New York, etc., Inv. Co., 14 Fed. 675 [aff 119 U. S. 696, 7 SCt 353, 30 L. ed. 548]; Muckle v. Westinghouse Electric, etc., Co., 230 Pa. 472, 79 A 707; McClure v. McMichael, etc., Mfg. Co., 20 Montg. Co. (Pa.) 137; Lever v. Lever, 11 S. C. Eq. 158; Poag v. Poag, 10 S. C. Eq. 285; Muckenfuss v. Heath, 10 S. C. Eq. 182; Ravenel v. Pinckney [quot 10 S. C. Eq. 183, and partially reported 36 Fed. 221 note]; Hall v. Gurney, 2 C. & K. 644, 61 ECL 644. See also Brokers [19 Cyc 219].

[a] **By the civil law** the contract of mandate is presumed to be gratuitous in the absence of a contrary agreement. Merrick Rev. Civ. Code La. § 2991. And see Stewart v. Sonbral, 119 La. 211, 43 S 1009; Ploton's Succ., 36 La. Ann. 211; Fowler's Succ., 7 La. Ann. 207; Elkins v. Elkins, 11 La. 224; De Coux v. Plantevignes, 10 La. 503.

Contract as to amount of compensation see infra § 446.

34. Elkins v. Elkins, 11 La. 224; De Coux v. Plantevignes, 10 La. 503; Goodwin v. O'Brien, 3 Silv. Sup. 96, 6 NYS 239 [aff 127 N. Y. 649 mem, 27

services the principal expressly refuses to pay therefor,[35] or where the agent renders the services without any intention to charge therefor.[36]

[§ 416] **(b) Express and Implied Contracts.** The contract for compensation may be not only express,[37] but also implied from the words and conduct of the parties and the facts and circumstances of the case,[38] and in general it may be said that when an agent performs services for his principal of such a nature and under such circumstances as to imply that he expects compensation, and there is nothing in the case from which the principal may reasonably assume that the services are rendered gratuitously, a contract to pay the agent a reasonable compensation may be implied;[39] but as a promise of payment for services may be implied only when they are rendered under such circumstances as authorize the party performing them to entertain a reasonable expectation of payment by the party soliciting the performance, the relation of the parties or the circumstances of the case may be such as to rebut any presumption of an implied agreement for compensation.[40]

Consideration. The contract for compensation

NE 856 mem] (holding that where at the time an agent took charge of certain property it was not contemplated by either party that he should receive compensation for his services, and nothing arose by which the relations between the parties were changed, and the owners were not informed of any intent to charge for such services until shortly before the termination of the agency, the agent is not entitled to a recovery on a quantum meruit).

35. Coffin v. Linxweiler, 34 Minn. 320, 25 NW 636.

36. Grandin v. Reading, 10 N. J. Eq. 370; Higginson v. Fabre, 3 S. C. Eq. 89 (so holding, although the principal had recognized the agent's right to commissions).

[a] **Friendly act.**—(1) Where one, on the footing of a friend, neighbor, and relative, undertook to manage the money affairs of an old lady, without any stipulation as to compensation, and without intending to make any charge, he was not entitled after her death to claim a remuneration for his services, and his being held to a strict account by her administrator did not vary the case. Hill v. Williams, 59 N. C. 242. (2) So where an agent under a contract whereby he was to receive commission for all sales made or closed up by him completed a sale as a favor for his principal, and did not claim compensation for a long time thereafter, he was not entitled to such compensation. Bilz v. Powell, 50 Colo. 482, 117 P 344, 38 LRANS 847.

[b] **However,** a person acting under a power of attorney, having revoked a previous renunciation of fixed compensation for his services, is placed in the position he occupied before renunciation in respect to compensation for the services he may perform. Carricarte v. Blanco, 1 NYS 744. Compare Bard v. Banigan, 39 Fed. 13 [aff 134 U. S. 291, 10 SCt 565, 33 L. ed. 932].

37. U. S.—Bard v. Banigan, 39 Fed. 13 [aff 134 U. S. 291, 10 SCt 565, 33 L. ed. 932].

La.—Stewart v. Soubral, 119 La. 211, 43 S 1009.

Mass.—Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 NE 695 (holding that a statement made to plaintiff by defendant's district agent that any man that left his card or admitted that he had had any conversation with plaintiff in regard to a car should be plaintiff's customer, and that plaintiff should get a commission, constituted a promise that if plaintiff should introduce defendant's car to one who afterward became a purchaser at defendant's branch office, and who admitted that plaintiff had called the car to his attention, plaintiff should receive a commission).

Nebr.—Fredrickson v. Locomobile Co. of America, 78 Nebr. 775, 111 NW 845 (holding that where one party requests another to perform services in effecting the sale of an article, agreeing "to protect" him if such sale is made, and the influence of the party so engaged is the efficient cause in effecting the sale, such party is entitled to a commission); Singer Mfg. Co. v. Doggett, 16 Nebr. 609, 21 NW 468 (where plaintiff was employed by defendant as its agent to take charge of its office and business at L, and the contract of employment provided that the company should "place to the credit of the said Lincoln office" fifteen per cent of the amount of money collected on contracts made by the former agent, and it was held that plaintiff was entitled to such fifteen per cent as his compensation).

Pa.—Bingaman v. Hickman, 115 Pa. 420, 8 A 644.

Ont.—Young v. Crossland, 18 U. C. C. P. 312.

See also Brokers [19 Cyc 219].

[a] **"Charges" as excluding commissions.**—An agreement that defendant, employed to sell lands purchased by him for plaintiff's benefit, should be reimbursed for any costs and charges he may have been or thereafter might be at, by reason of such purchase, excludes defendant from any claim to commissions or other compensation for his services. These cannot come under the head of charges; that word includes only expenses paid out in attending to the business. Green v. Jones, 78 N. C. 265.

38. U. S.—Martin v. Roberts, 36 Fed. 217.

Ky.—Lane v. Coleman, 8 B. Mon. 569.

S. C.—Harrison v. Long, 4 S. C. Eq. 110 (holding that there need be no express contract for commissions in order to entitle the agent thereto).

Vt.—Miller v. Powell, 85 Vt. 285, 287, 81 A 921 (where the court said: "The fact that the written contract says nothing regarding compensation is not conclusive in law against the plaintiff's right to reasonable compensation for the services performed").

Ont.—Singer v. Russell, 25 OntL 444, 1 DomLR 646, 21 OntWR 24.

[a] **In Louisiana,** (1) although as a general rule a mandate is gratuitous, it is not essentially so (Baker v. Stoutmeyer, 2 McG. 61), (2) and where, from the nature of the business or conduct of the parties, it appears that no such thing was intended or expected, the law is otherwise, and an agreement to compensate the agent will be implied (Krekeler's Succ., 44 La. Ann. 726, 11 S 35; Fowler's Succ., 7 La. Ann. 207). (3) And Civ. Code art 2991, providing that "the procuration is gratuitous unless there has been a contrary agreement," does not require that the agreement which shall render a contract of agency not gratuitous shall be express. Baker v. Stoutmeyer, supra. In Waterman v. Gibson, 5 La. Ann. 672, 673 [quot Krekeler's Succ., 44 La. Ann. 726, 11 S 35], the court said: "It is said that a contract of mandate is presumed to be gratuitous, unless there has been a contrary agreement. Under our code, which has modified the principles of the Roman law, it is not of the essence of mandate that it be gratuitous. And, in our opinion, it is not necessary for an agent to establish an express agreement that he should have a pecuniary remuneration for his services. Courts may infer such an agreement from the nature of the employment and the relations of the parties." (4) Thus where for a number of years an agent rendered important services to his principal, although there was no contract for compensation, nor any intention to charge for his services while their relations existed, yet where from their habits of friendly intercourse and from the evidence, it may be inferred that the one intended and the other expected that, upon the termination of those relations, a liberal reward would be made for the services, and the principal died intestate and without making any reward, the agent may recover from the succession a reasonable compensation. Fowler's Succ., supra. (5) It cannot be presumed of one who has been released from his debt to a creditor by a discharge in bankruptcy that services subsequently rendered to the creditor as agent are intended to be gratuitous, and the fact that friendly relations existed between the parties does not assist the presumption. A moral obligation cannot compensate one which is legal. Fowler's Succ., supra.

39. U. S.—Bard v. Banigan, 39 Fed. 13 [aff 134 U. S. 291, 10 SCt 565, 33 L. ed. 932].

Ala.—Taylor Mfg. Co. v. Key, 86 Ala. 212, 5 S 303.

Ill.—Cone v. Newkirk, 24 Ill. 508.

Ind.—U. S. Mortgage Co. v. Henderson, 111 Ind. 24, 12 NE 88 (holding that, under a contract of agency providing that the agent should loan money of the principal on mortgage and other security and collect money coming due on such loans, and further that the principal should not be liable for any charges, disbursements, or commissions to the agent for services in the agency, the principal is liable to the agent for services rendered by the latter on the principal's request in foreclosing mortgages, collecting moneys by legal proceedings, looking or attending to property bought in by the principal on foreclosure, renting and collecting rents of such property, and looking after the payment of taxes and insurance, as such services are different from those comprised by the contract of agency, which relates exclusively to loaning money on bonds and mortgages and collecting money payable on loans made).

La.—Brownson v. Fenwick, 19 La. 431; Elkins v. Elkins, 11 La. 224; De Coux v. Plantevignes, 10 La. 503.

Mass.—Hollis v. Weston, 156 Mass. 357, 31 NE 483.

Miss.—Mangum v. Ball, 43 Miss. 288, 5 AmR 488.

Mo.—Levitt v. Miller, 64 Mo. A. 147.

N. C.—McEwen v. Loucheim, 115 N. C. 348, 20 SE 519.

Oh.—Harrison v. Gotleib, 3 Oh. Cir. Ct. 191, 2 Oh. Cir. Dec. 109.

Pa.—Kentucky Bank v. Combs, 7 Pa. 543.

S. C.—Harrison v. Long, 4 S. C. Eq. 110.

Ont.—Singer v. Russell, 25 Ont. L. 444, 1 DomLR 646, 21 OntWR 24.

40. McLiney v. Gomprecht, 7 Misc. 169, 27 NYS 253; Harrison v. Gotlieb, 3 Oh. Cir. Ct. 191, 2 Oh. Cir. Dec. 109.

[a] **Services rendered for joint benefit of parties.**—(1) Where one of several parties interested in a joint enterprise acts for the benefit of all, he is not, in the absence of an express contract, entitled to any compensation. Wilson v. Anthony, 19 Ark. 16; Everhart v. Camp, 55 Ill. A. 248; Hopkins Mfg. Co. v. Ruggles, 51 Mich. 474, 16 NW 862. See also Landis v.

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must be based upon a valid and sufficient consideration else no compensation is recoverable.[41]

[§ 417] **(c) Modification of Contract.** Contracts as to compensation may be modified by agreement of the parties, subject to the rules that apply to the modification of contracts generally,[42] as that it is made upon a sufficient consideration.[43]

[§ 418] **(d) Effect of Contract in General.** Where the agent's employment is by special agreement, his right to compensation will, of course, be determined by the terms of the agreement,[44] and the express terms of the agreement are not to be

Scott, 32 Pa. 495. (2) So an agent who in his character of agent collects a debt due to his principal and retains it under a contract of loan with his principal as debtor, entered into before the debt is collected, is not entitled to commissions on the amount so collected. Short v. Skipwith, 22 F. Cas. No. 12,809, 1 Brock. 103. And see Rogers v. Priest, 74 Wis. 538, 43 NW 510. (3) And where plaintiff, being desirous of surrendering premises which he held under a lease from defendant, had an interview with defendant in relation thereto, during which defendant told him to get a tenant and that he would do what was right, no agreement to pay plaintiff commissions for procuring the tenant could be implied from such remark. McLiney v. Gomprecht, 7 Misc. 169, 27 NYS 263. See also Joint Adventures [23 Cyc 459]; Partnership [30 Cyc 448, 466]. (4) Where, however, a landlord and tenant agree on the expiration of the lease that the tenant shall remain in possession, in order to care for the premises, collect the rents in his own behalf, and apply them on the landlord's indebtedness to him for a building erected on the premises, the law will imply a promise to allow the tenant reasonable compensation for his services. Allen v. Gates, 73 Vt. 222, 50 A 1092.

41. Washburne v. Pintsch, 17 Fed. 582 (holding that where the owner of property, induced to believe that another, who has been trying to sell such property on speculation for his own benefit alone, is clearly acting as his agent in the matter, and that he is under a moral obligation to compensate him for his trouble, promises to do so, such promise is without color of consideration and void); Fife v. Blake, 38 Minn. 426, 38 NW 202 (holding that where plaintiff buys property on monthly payments, and surrenders the contract and vacates the property, an action against the vendors on their promise that if he can sell the property he can have all he gets above the amount of their claim cannot be sustained, the promise being without consideration and void); Murray v. Beard, 102 N. Y. 505, 7 NE 553 (holding that a contract by an agent with several employers separately to obtain a sale of piles for each one of them on commissions, he knowing that proposals are about to be made by a company building a pier for the purchase of the same of the lowest bidder but not disclosing the same to his principals, cannot be enforced by him against one of his employers who is the successful bidder, on account of no consideration).

[a] **Sufficient consideration.**—(1) An agreement to pay an agent a certain sum if he sells a farm, and half that sum if the owner sells it outside his influence, is upon a good consideration. Hoskins v. Fogg, 60 N. H. 402. (2) Where a sales agent sent a man to see a customer after the principal had said to him that any man that left his card or admitted that he had had any conversation with the agent in regard to the property to be sold should be the agent's customer, and that he should get the commission, the agent's efforts to sell the property afforded a consideration for a promise thereafter made by the principal to pay the agent a commission should it later sell to such prospective purchaser. Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 NE 695.

42. See Brush-Swan Electric Light Co. v. Brush Electric Co., 41 Fed. 163; Missouri Glass Co. v. Roberts, (Tex. Civ. A.) 137 SW 433. See also Contracts [9 Cyc 593].

[a] **Implied modification.**—Where a principal, after appointing an agent to sell property for a certain commission, writes to him reducing its amount, his silence for upwards of three months will be considered an acquiescence. Livaudais v. Perret, 11 La. 294.

[b] **Supersession of original contract.**—(1) Defendant entered into a written agreement with plaintiff to pay him a certain commission for selling real estate. Subsequently she entered into an oral contract with him whereby it was agreed that he should enter into her service and manage her general business for a certain compensation per day. It was held that the oral contract did not supersede the original agreement, there being evidence that it was not modified or abrogated. Smith v. Lane, 101 Ind. 449. (2) An oral agreement to pay an agent a commission for selling land is not superseded by subsequent letters raising the price and giving more specific instructions as to the terms to be made with the purchaser, and the letters will control the oral instructions so far only as they are inconsistent therewith. McLaughlin v. Wheeler, 1 S. D. 497, 47 NW 816.

[c] **Verbal modification.**—A provision in a written contract of agency forbidding its change unless approved in writing by the principal does not invalidate an oral agreement for commissions on sales not within its terms. Shook v. Marion Mfg. Co., 138 Mich. 467, 101 NW 657.

43. Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 NE 695 (holding that, where a contract appointing plaintiff defendant's exclusive agent for the sale of automobiles within a certain territory provided that all inquiries from territory other than his own should be promptly referred to defendant, efforts made by plaintiff to sell a car to a resident of a territory other than his own constituted a violation of the contract, and not an act done thereunder, and hence such efforts constituted a sufficient consideration for defendant's promise to pay plaintiff a commission for a sale resulting therefrom); Forbes v. Bushnell, 47 Minn. 402, 50 NW 368 (holding, where plaintiff and defendants agreed that the former should devote his time and energy to selling real estate for the latter at specified rates of compensation, "for such time as may be mutually agreeable," that as no time was fixed by the agreement plaintiff was not bound by it except as to what was actually done under it, so that a subsequent agreement that defendants should pay him a different rate if he should sell a particular piece was upon a valid consideration).

44. Ala.—Taylor Mfg. Co. v. Key, 86 Ala. 212, 5 S 303.

Cal.—Crane v. McCormick, 92 Cal. 176, 28 P 222.

Ill.—Sann v. Hosterman, 174 Ill. A. 219.

Ind.—Huber Mfg. Co. v. Seabold, 14 Ind. A. 109, 42 NE 648.

Iowa.—Wolfson v. Allen Bros. Co., 120 Iowa 455, 94 NW 910.

Ky.—Huber Mfg. Co. v. Watson, 42 SW 110, 19 KyL 864.

Md.—McCay Engineering Co. v. Crocker-Wheeler Electric Co., 100 Md. 530, 60 A 443.

Mass.—Masters v. Wayne Auto. Co., 198 Mass. 25, 84 NE 103 (holding that, under an agreement by which defendant was to pay plaintiff a commission on all sales made in a certain territory by defendant on which he had no knowledge that plaintiff had individually solicited to buy an automobile manufactured by defendant, commissions were not payable on all sales made in the territory, but were payable in all cases where plaintiff had individually solicited the purchase, although defendant was ignorant of such solicitation); Pearson v. Mason, 120 Mass. 53.

Mich.—Fuchs v. Standard Thermometer Co., 178 Mich. 37, 144 NW 484; Dillon v. Pinch, 110 Mich. 149, 67 NW 1113.

Minn.—Forbes v. Bushnell, 47 Minn. 402, 50 NW 368.

Nebr.—Singer Mfg. Co. v. Doggett, 16 Nebr. 609, 21 NW 468.

N. J.—Giltinan v. Lehman, 65 N. J. L. 668, 48 A 540.

N. Y.—Dibble v. Dimick, 143 N. Y. 549, 38 NE 724; Jacquin v. Boutard, 89 Hun 437, 35 NYS 496 [aff 157 N. Y. 686 mem, 51 NE 1091 mem]; Johnson v. Sirret, 83 Hun 317, 31 NYS 917 [rev on other grounds 153 N. Y. 51, 46 NE 1035]; Dewey v. Brown, 59 Hun 37, 12 NYS 661; Shaw v. McQueeney, 85 Misc. 395, 147 NYS 407.

Pa.—Sherman v. Consolidated Dental Mfg. Co., 202 Pa. 451, 52 A 2; Smythe v. O'Brien, 198 Pa. 223, 47 A 1102.

Eng.—Bray v. Chandler, 18 C. B. 718, 86 ECL 718, 139 Reprint 1553.

Ont.—Petrie v. Machan, 28 Ont. 642.

[a] **Compensation for retransfer of machines.**—Where defendant stored machines with complainant, its agent, to be conveniently delivered to other agents in the state, and the contract between defendant and complainant declared that the complainant should be allowed compensation for the retransfer of such machines, but that he should ship at the order of defendant all unused machines free of charge, and on demand of an agent of defendant all machines were surrendered, and by such agent's direction immediately transferred to parties who had been appointed agents instead of the complainant, he was not entitled to compensation for the transfer, it not being to other agents, within the meaning of the contract, and being governed by the agreement to deliver to the company free of charge. Brown v. McCormick Harvesting Mach. Co., (Tenn. Ch. A.) 59 SW 196.

[b] **Compensation for selling secondhand machines.**—(1) A season contract of agency for the sale of machinery which provides that no commissions shall be paid for the sale of secondhand machinery once before sold by the agent has no reference to commissions for the second sale of machines which had been sold by the agent before the date of the contract and bought in by the principal at foreclosure sale. Shook v. Marion Mfg. Co., 138 Mich. 467, 101 NW 657. (2) So a provision in a contract between a threshing machine company and its local agents at a certain town that the agents should receive no commission on the sale of secondhand goods referred to secondhand machines taken in part payment for new machines sold by the agents in their territory, and did not preclude them from recovering a commission for selling, at a special request of the company, a secondhand machine taken by it in trade in another locality. Gooch v. J. I. Case Threshing Mach. Co., 119 Mo. A. 397, 96 SW 431. (3) And where, in a contract of agency, the principal reserved the right to sell secondhand machinery in any territory, and the contract provided that he should not be liable for commissions on such sales, and it was

varied by the usages or customs of the trade,[45] although the meaning of particular words may be fixed by such usages and customs.[46] The general rules of construction and interpretation of contracts apply of course to contracts for the remuneration of agents,[47] such as regards the intention of the parties,[48] the giving effect to all words of the agreement,[49] and the consideration of the circumstances surrounding the parties at the time of the execution of the contract.[50]

Accrual of right to compensation. Where the contract of agency expressly provides as to when the agent's right to compensation shall accrue, it will, of course, govern.[51]

[§ 419] **b. As Affected by Termination of Agency[52]—(1) Termination by Act of Parties—(a) In General.** An agent selling goods on commission is ordinarily entitled to a commission on goods sold by him during the continuance of the agency, although the principal does not deliver the goods,[53] or collect the price[54] until after the agency has terminated; the same rule applies to orders for work taken by an agent before termination of the agency and fulfilled by the principal thereafter.[55] However, except where there is a provision in the contract to the contrary,[56] an agent is not entitled

also provided that no commissions should be paid on secondhand goods except when sold by an agent other than the one who sold them in the first instance, it was held that upon the sale by plaintiff of a secondhand engine which had not been sold by plaintiff before and which was represented by the general agent to be a new engine, plaintiff was entitled to a commission. Odum v. J. I. Case Threshing Mach. Co., (Tenn. Ch. A.) 36 SW 191.

[c] **An undertaking to make "advances"** to a salesman is not equivalent to an obligation to pay salary absolutely. Strauss v. Cohen Bros. Co., 169 Ill. A. 337.

[d] **Where a contract of an advertising solicitor provides that he shall be given copies** of live advertising contracts that are in force, and that on a failure to furnish the copies such advertising contracts shall be considered as "new" business, if such copies are not furnished, commissions for such advertisements may be recovered. Sann v. Hosterman, 174 Ill. A. 219.

45. Andrews v. Thornton, 8 Bing. 64, 21 ECL 446, 131 Reprint 324 (holding that, where by agreement T, an agent, was to have a commission on all sales effected or orders executed by him, the principal to be responsible for bad debts, and the agent to draw his commission monthly, and by the custom of the trade commission was not allowed on sales which produced bad debts, under the terms of this agreement T was entitled to commission on bad debts). See also Customs and Usages [12 Cyc 1071].

46. Warde v. Stuart, 1 C. B. N. S. 88, 87 ECL 88, 140 Reprint 36.

47. See generally Contracts [9 Cyc 577 et seq].

[a] **"Automobiles" includes taxicabs.**—Where a manufacturer of automobiles, experimenting with a view of manufacturing taxicabs, gave to one the right to sell its automobiles for a commission, and during the life of the agreement the agent sold taxicabs and repeatedly demanded commissions thereon, and the manufacturer never denied that they were due or notified the agent that commissions would not be allowed on the sale of taxicabs, a finding that the word "automobiles" included taxicabs was justified. Wier v. American Locomotive Co., 215 Mass. 303, 102 NE 481.

48. Tribe v. Taylor, 1 C. P. D. 505.

49. Fullwood v. Akerman, 11 C. B. N. S. 737, 103 ECL 737, 142 Reprint 985.

50. Singer Mfg. Co. v. Doggett, 16 Nebr. 609, 21 NW 468; Fullwood v. Akerman, 11 C. B. N. S. 737, 103 ECL 737, 142 Reprint 985.

51. American L. & T. Co. v. Toledo, etc., R. Co., 47 Fed. 343 [aff 155 U. S. 534, 15 SCt 214, 39 L. ed. 251]; Olsen v. Jodon, 38 Minn. 466, 38 NW 485; Allen v. Armstrong, 58 App. Div. 427, 68 NYS 1079. See also infra § 436.

[a] **Commissions where payment by installments.**—Where the contract provided that defendants, as agents of the owners of a tract of land, should lay out, develop, and sell the same in lots and be entitled to certain commissions on sales, and some of the lots were sold under contracts by which the purchase money was made payable in installments, the agents were not entitled to the full commission on the entire price of a lot out of the first installment collected by them, but were entitled to commissions only on the installments as paid from time to time. Melvin v. Aldridge, 81 Md. 650, 32 A 389.

[b] **Commissions on "amount received."**—Where the commission on sales is payable on "amount received," in case of deferred payments commissions are not payable until such payments are received. Gresham v. Galveston County, (Tex Civ. A.) 36 SW 796.

[c] **Express postponement of payment of commissions.**—Where a principal authorizes his agent by letter to sell certain property on condition that he shall wait for a time for his commissions, and the agent writes to his principal refusing to wait for his commissions, and the sale is made, the principal may enforce the condition as to the time of payment of the commissions. Frankel v. Wathen, 58 Hun 543, 12 NYS 591.

52. **Compensation of broker as affected by termination of employment** see Brokers [19 Cyc 221, 254].

Termination of agency in general see supra §§ 147–197.

53. Dibble v. Dimick, 143 N. Y. 549, 38 NE 724 [aff 4 Misc. 190, 23 NYS 680] (so holding, although the commissions were not payable until delivery of the goods); Jacquin v. Boutard, 89 Hun 437, 35 NYS 496 [aff 157 N. Y. 686 mem, 51 NE 1091 mem] (where the agent was held entitled to commissions on goods sold before, but delivered after, the expiration of the agency); Bickley v. Browning, 30 T. L. R. 134. See however Merriman v. McCormick Harvesting Mach. Co., 96 Wis. 600, 71 NW 1050 (where it appeared that an agency contract for the sale of machines provided that the agents should obtain orders, house the machines, instruct the purchasers, draw notes, and remit the same; that they should receive a specified selling commission, to be paid only on machines sold and settled for and not on orders not filled; that the principal might at any time terminate the contract and take into its possession all orders, notes, moneys, machines, etc.; and that after the agents took orders for machines, but before they were filled, the principal canceled the contract and afterward delivered machines to persons from whom such orders were obtained, and it was held that the agents were entitled to reasonable compensation for obtaining such orders, but not to the full commission specified in the agreement).

54. Singer Sewing Mach. Co. v. Brewer, 78 Ark. 202, 93 SW 755 (so holding under a contract which stipulated for a fixed weekly compensation, for a commission on sales payable as payments on the sales were made, and for a remitting commission on the net amounts collected and remitted to the company, and provided that all claims for compensation should cease on the termination of the contract, which was subject to termination at the pleasure of either party; and holding also that a custom that an agent selling a machine to a buyer who moved out of his territory should forfeit his commission on the balance unpaid at the time of the removal, and that the account should be transferred to the agent into whose territory the purchaser moved, where future collections were to be made, does not show that the parties intended that the agent on his discharge should forfeit his selling commission on uncollected sales). But see Wheeler, etc., Mfg. Co. v. Gallivan, 10 Nebr. 313, 4 NW 1061 (where plaintiff and defendant entered into a contract for the sale and leasing by the former of machines furnished by the latter, plaintiff to receive certain commissions "during the continuance of said contract," and the contract ceased by the consent of both parties, after which payments were made to defendant for machines disposed of by plaintiff under the contract, and it was held that plaintiff was not entitled to commissions on payments so subsequently made).

55. Greene v. Freund, 150 Fed. 721, 80 CCA 387 (where it appeared that plaintiff made a contract with defendant for an indefinite term to act as its agent in procuring orders for the bleaching, printing, and dyeing of cotton goods; that the contract provided that plaintiff should receive a commission, to be paid each month on all the work secured by him and completed by defendant during the preceding month; and that his manner of doing business was to interview a prospective customer, and, if favorable, to prepare and send him a writing called a "price memo," which was in the form of a letter, setting forth all the conditions of a contract and was in effect an offer which, if accepted, became a contract binding the customer to send to defendant at least a minimum quantity of work to be done at prices therein specified; and it was held that on plaintiff's discharge he was entitled to recover commissions, not only on the work previously done, but also on all work called for by contracts so secured by him by the acceptance of his offers by customers, either formally or by sending orders thereunder for any part of the work called for). See however Hilton v. Helliwell, [1894] 2 Ir. 94 (holding that the agent was not entitled to commissions under such circumstances where the contract provided that he was to be paid a commission for work done or supplied from the date of the contract at a certain per cent on amount of orders; that the contract should be terminable on notice, neither party to be entitled to compensation, but the agent to receive, on the termination of the contract, such commission as should have been earned and should be or become payable).

56. Fuchs v. Standard Thermometer Co., 178 Mich. 87, 144 NW 484 (holding that, under a contract employing an agent to sell articles on commission, the agent was entitled to recover compensation earned under its terms, although the re-orders on which the commissions became due

to commissions on new orders delivered to the principal after termination of the agency by customers procured by the agent while the agency existed,[57] and agents who manage realty are not entitled, on the termination of the agency, to retain commissions on rents to accrue in the future from leases made by them.[58]

The right to advances of money on account of unearned commissions, as sometimes given by the contract of agency, ceases upon termination of the agency.[59]

[§ 420] **(b) Termination by Force of Contract of Agency; Expiration of Time.** If the contract sets a time within which the agent must perform, he is not as a rule entitled to compensation unless, within the time set, he finds a third person who is able, ready, and willing to enter into a binding contract with the principal.[60] Where a contract of agency running for a definite term and calling for continuing services on the part of the agent has by its terms expired, the agent cannot ordinarily recover for like services subsequently performed,[61] unless the contract is extended by agreement,[62] or the subsequent services are performed at the principal's request;[63] much less can the agent recover as for services which he might have performed under the contract had it been renewed.[64]

[§ 421] **(c) Termination by Mutual Consent.**[65] Where a contract under which an agent is regularly employed on a salary is terminated by mutual consent of the parties, the agent's right to future salary thereupon ceases;[66] and an agent employed

were not received by the principal until after termination of the employment contract); Ract v. Duviard-Dime, 4 NYS 156; Wilson v. Harper, [1908] 2 Ch. 370 (holding that, where customers have been introduced to a business firm on an agreement that the introducer is to receive commission "on all goods supplied to customers introduced by you . . . as long as we do business with them you place on the books," this commission will continue to be payable on orders given, even after the death of the introducer, by customers originally introduced by him. See also Ballard v. Travelers' Ins. Co., 119 N. C. 187, 25 SE 956. But see Gilbert v. Quinlan, 59 Hun 508, 13 NYS 671 (where defendant agreed to pay plaintiff half his commissions on the business of customers whom plaintiff should bring him, and by a subsequent change in the rules of the board of brokers to which defendant belonged the payment by him of such commissions to plaintiff was prohibited, and it was held that the contract might be terminated, after the lapse of a reasonable time, for a good reason, and on proper notice; that such change in the rules of the board was sufficient reason for a termination of the contract; and that, on dealings after such termination with a customer introduced by plaintiff, defendant was not liable to plaintiff for commissions).

57. Gilbert v. Quinlan, 59 Hun 508, 13 NYS 671; O'Neill v. Howe, 16 Daly 181, 9 NYS 746 (holding also that the fact that the accounts of such customers were marked in defendant's books with the initials of plaintiff to designate them as his customers did not prove that such later sales were made by him, it further appearing that the marks were originally made on old accounts while plaintiff was in defendant's employ, and were continued in the subsequent accounts by the bookkeepers for their own convenience, and not by order of defendant); Jackson v. Stephens, 83 Misc. 232, 145 NYS 827 (holding that, where a person is engaged to sell goods on a commission, the termination of his contract of employment, although wrongful, terminates all rights he may have to commissions for orders thereafter placed with this employer by customers whom he first secured, and his only right of redress is an action for wrongful discharge); Ract v. Duviard-Dime, 4 NYS 156; Nayler v. Yearsley, 2 F. & F. 41; Weare v. Brimsdown Lead Co., 103 L. T. Rep. N. S. 429; Bickley v. Browning, 30 T. L. R. 134; Gerahty v. Baines, 19 T. L. R. 554 (renewals of newspaper advertisements); Bettany v. Eastern Morning, etc., News Co., 16 T. L. R. 401; Kelly v. Croft, 14 T. L. R. 543 [dism app 14 T. L. R. 348]. See also Toulmin v. Millar, 12 App. Cas. 746; Tribe v. Taylor, 1 C. P. D. 505; Curtis v. Nixon, 24 L. T. Rep. N. S. 706; Lumley v. Nicholson, 34 Wkly. Rep. 716.

[a] **Orders secured after the termination** of the agency carry no right to commission. Barrett v. Gilmour, 17 T. L. R. 292.

58. Thomas v. Gwyn, 131 N. C. 460, 42 SE 964 (holding that, where agents for the management of realty on the discontinuance of the agency retained commissions on rents to accrue in the future, transmitting the balance, and, in an action by the principal for the money retained, one of the agents testified that there was no formal contract, that it was usual to collect this commission as the rents accrued, and that the commissions covered the trouble of securing a tenant, collecting and remitting rents, supervising the property, and keeping it in repair, these duties terminated with the agency, so that there could be no implied contract to justify the charge of the commissions, and the agents had no right thereto). See also Andrews v. Travelers' Ins. Co., 70 SW 43, 24 KyL 844; Ballow v. Travelers' Ins. Co., 119 N. C. 187, 25 SE 956.

59. Souler v. McDowell Garment Mach. Co., 38 Misc. 786, 78 NYS 836.

60. Iowa.—McCarthy v. Cavers, 66 Iowa 342, 23 NW 757 (holding that, if a customer found by the agent is not willing to close the deal unconditionally before the specified time expires, the principal is not bound to accept him when, after the expiration of that time, he accepts the terms previously proposed).

Mich.—Wright v. Beach, 82 Mich. 469, 46 NW 673.

Mo.—La Force v. Washington Univ., 106 Mo. A. 517, 81 SW 209 (so holding, although the principal afterward closed a deal with a person found by the agent).

Can.—Counsell v. Devine, 16 West LR 675.

Ont.—Sibbitt v. Carson, 27 Ont. L. 237 [dism app 26 Ont. L. 585, 5 Dom LR 193, 22 OntWR 640, 3 OntWN 1491].

Que.—Donovan v. Hyde, 18 Que. K. B. 310.

But see Goodmanson v. Rosenstein, 144 Ill. A. 243.

[a] **Necessity of completing transaction within specified time.**—(1) If, before the day set for negotiating a transaction, the agent finds a customer who is able, ready, and willing to close the deal, the agent has a reasonable time after the contract date within which to bring the customer to the principal, where the parties live a considerable distance apart. O'Connor v. Semple, 57 Wis. 243, 15 NW 136. (2) And where a contract of agency for a sale of land expressly stipulates that if a customer is introduced through the agent and a sale is afterward consummated with such customer the owner shall pay the commission whether the time of the agreement has expired or not, the agent is entitled to his commission if during his agency he introduces a customer to whom the land is afterward sold, whether the sale is ultimately consummated through his instrumentality or otherwise. Williams v. Leslie, 111 Ind. 70, 12 NE 102.

61. Anderson v. Dickinson, 72 Hun 556, 25 NYS 533 (where it appeared that a contract between an importer of foreign nursery stock and an agent to make sales provided that losses arising from bad debts should be borne by them equally, and that the contract was to continue in force for one year from Aug. 26, 1886, "or until the business of the season of 1886-1887 is wholly closed up," but provided that final settlement between the parties should be made by Aug. 1, 1887, if possible; and it appeared that the business season in the nursery business extends from the commencement to the close of the shipping season, beginning in the fall of the year, and continuing until spring, and it was held that the agent was entitled to commissions only on orders secured during the business season of 1886–1887, the contract continuing until Aug. 27, 1887, only to wind up the business of the previous season).

62. Schurra v. Buffalo-Pitts Co., 44 Wash. 693, 87 P 945 (holding that if the contract is extended by agreement of the parties then of course the agent may recover for services rendered before expiration of the extended time).

[a] **Time for performance held not to have been extended** by letter see La Force v. Washington Univ., 106 Mo. A. 517, 81 SW 209.

63. Taylor Mfg. Co. v. Key, 86 Ala. 212, 5 S 303; Dewey v. Brown, 59 Hun 37, 12 NYS 661 (holding that an agent who agrees to sell goods on commission for another during a trip which he then contemplates is entitled to commissions on goods sold on orders received in response to letters written by him at the employer's request after his return). See also Attrill v. Patterson, 58 Md. 226.

64. Crum v. Murray, 102 Fed. 92, 42 CCA 185 (holding that, under a contract appointing an agent to solicit applications for shares in a corporation within stated territory, and to collect the monthly dues thereon for the period of three years, for which service the agent is to receive eighty per cent of the first month's dues collected and five per cent of the succeeding months' "dues collected," he cannot recover the stipulated commissions on dues which he might have collected if the contract had been continued after the three years, where there is no claim that the contract has been renewed, or that the agent is entitled to have it renewed, or that he has been unlawfully discharged, or that any other breach has been committed by the corporation).

65. See also supra § 419.

66. Greer v. Featherstone, 95 Tex. 654, 69 SW 69 [aff in effect (Civ. A.) 68 SW 48] (where it appeared that a soliciting agent of a live stock commission company whose contract of employment required him to solicit shipments of stock, to make and collect loans for the company, and to guarantee such loans, sent his resignation to the company, which was

to effect a particular transaction on a commission cannot recover the commission where by mutual consent the contract is abandoned before performance and a new and different arrangement is entered into by the parties.[67]

[§ 422] **(d) Revocation or Repudiation of Agency by Principal—aa. In General.**[68] The right of an agent to compensation, when the agency has been revoked by the principal, depends upon a variety of circumstances.[69] Where an agent is employed on commission, and the principal, acting within his rights, terminates the agency before the commission is earned, the agent cannot recover the same,[70] although the principal subsequently enters into the transaction the agent was employed to negotiate,[71] and although the person with whom the principal deals was originally found by the agent during his agency,[72] particularly where the transaction is completed on different terms from those which such person proposed to the agent;[73] nor is a salaried agent, after his rightful discharge, entitled to unearned salary.[74] This rule applies where the principal revokes the agency under a contract which is silent as to the duration of the agency,[75] or at least where he revokes it after the expiration of a reasonable time;[76] and in any event where he revokes the agency for a good cause.[77] Thus, where an agent is discharged for cause, he will not be entitled to compensation for services which, but for the discharge, he might have rendered;[78] and where the inability of the agent to render the stipulated services, although caused by no fault of his, is such as to warrant the principal in revoking the agency, all liability on the part of the principal for further compensation to the agent ceases.[79]

Past services. A revocation of authority will

accepted; but that before he received the acceptance, although after it had been mailed to him, he wrote the company that he would insist on his salary until the loans of which he was a guarantor were paid, unless the company would release him from liability therefor, which the company declined to do; that thereafter there was other correspondence between the parties in which the agent claimed the right to such compensation, which was denied by the company; and that the agent continued to look after the payment of the loans, and payment thereof was frequently urged by the company; and it was held that the agent was not entitled to his salary after the acceptance of his resignation, although his liability as guarantor was the more important part of his obligation under the contract of employment); Southmayd v. Watertown F. Ins. Co., 47 Wis. 517, 2 NW 1137.

67. Clear v. Fox, 26 Fed. 90 (holding that, where a tenant of land is promised commissions for the cash sale of the land, but subsequently, with the consent of the tenant, a scheme is made of putting it into the form of shares in a joint stock company, the tenant to become one of the directors, the contract for commissions expires; and that the tenant is entitled to nothing for the incorporation); Freeman v. Tiffany Studios, 128 App. Div. 868, 113 NYS 64 (holding that, where an agent entitled to commissions on sales and contracts procured by him under an employment which may be terminated at the option of either party, no claim for commissions to be made on any contract made thereafter, executes a receipt for a specific sum "in full payment of all commissions and of all claims of any nature, to date, the payment of this sum hereby cancelling all arrangements heretofore existing regarding the payment of commissions," he is not entitled to recover commissions on contracts secured for his principal while working under a subsequent contract at a certain salary).

68. See also supra § 419.

Discharge of servant by master see Master and Servant [26 Cyc 987 et seq 1045].

Power and right to revoke see supra §§ 151-161.

69. Glover v. Henderson, 120 Mo. 367, 376, 25 SW 175, 41 AmSR 695 (where the court said: "Contracts of agency are numerous and widely variant in their objects, purposes and terms; so that the question of compensation of the agent, when the agency has been revoked by the principal, will depend upon a variety of circumstances").

70. U. S.—West Virginia Merchants' Coal Co. v. Leonard, 184 Fed. 295, 106 CCA 437.

Ala.—Chambers v. Seay, 73 Ala. 372.

Ark.—Addressograph Co. v. Office Appliances Co., 106 Ark. 536, 153 SW 804 (holding that, where a contract authorized withdrawal of the agent's authority at any time, he was not, in the absence of bad faith, entitled to commission on a sale after the revocation, although he had been negotiating therefor previous to such revocation).

Iowa.—Milligan v. Owen, 123 Iowa 285, 98 NW 792.

N. C.—Brookshire v. Voncannon, 28 N. C. 231.

Pa.—Morrow v. Tunkhannock Ice Co., 211 Pa. 445, 60 A 1004 (holding that, where an agent was employed to sell the product of defendant's manufactory, and he made no sales, and was discharged before the end of his term, he could recover nothing from his employer).

Eng.—Northey v. Trevillion, 18 T. L. R. 648 [fol Rhodes v. Forwood, 1 App. Cas. 256]; Toppin v. Healey, 11 Wkly. Rep. 466.

Can.—Holmes v. Lee Ho, 15 West LR 226.

[a] **Custom and usage.**—In England an agent who has the business taken out of his hands before completion is by the custom of merchants entitled to half the commission which he would have earned by completing it. Reg. v. Parr, 39 L. J. Ch. 73.

[b] **Customer subsequently produced by agent.**—After termination of the agency the principal is under no obligation to accept a customer subsequently produced by the agent. Kelly v. Phelps, 57 Wis. 425, 15 NW 385; Toppin v. Healey, 11 Wkly. Rep. 466. Subsequent services at request of principal as entitling agent to compensation see supra § 421.

71. Chambers v. Seay, 73 Ala. 372.

[a] **Illustration.**—Where an agent is to have a percentage of the gross revenues on loans made for his principal, but is to incur the expense of making and collecting them, with no limit as to the time the agency is to continue, and the contract is terminated by the principal on reasonable grounds which justify him in preventing the agent from making further collections on the outstanding loans made by him, the agent can recover no percentage on the gross revenue from the loans subsequently collected. Urquhart v. Scottish-American Mortg. Co., 85 Minn. 69, 88 NW 264.

72. Lumley v. Nicholson, 34 Wkly. Rep. 716.

73. Kelly v. Marshall, 172 Pa. 396, 33 A 690; Eidson v. Saxon, (Tex. Civ. A. 1895) 30 SW 957.

74. Galibert v. Atteaux, 23 Que. Super. 427.

75. Sheahan v. National Steamship Co., 87 Fed. 167, 30 CCA 593; Jacobs v. Warfield, 23 La. Ann. 395; Royal Remedy, etc., Co. v. Gregory Grocery Co., 90 Mo. A. 53; Coffin v. Landis, 46 Pa. 426. See Hollingsworth v. Young County, 40 Tex. Civ. A. 590, 91 SW 1094. See also supra §§ 157-161.

[a] **Where the agent's right to compensation is contingent upon his accomplishing a certain result,** and the agency is also terminable at the will of the principal, it seems that if the agency is revoked before the result has been accomplished, and the services rendered are of no benefit to the principal, the agent is not entitled to any compensation therefor. Coffin v. Landis, 46 Pa. 426.

76. La Force v. Washington Univ., 106 Mo. A. 517, 81 SW 209; Gilbert v. Quinlan, 59 Hun 508, 13 NYS 671; Abraham v. Worthington, 43 Pa. Super. 450; Barrett v. Gilmour, 17 T. L. R. 292.

77. Colo.—Bilz v. Powell, 50 Colo. 482, 117 P 344, 38 LRANS 847 (holding that, where an agent engaged in selling automobiles secures a buyer who is to take a machine, if it is satisfactory, and before the machine is delivered the agent is discharged because of his acting adversely to his principal in other transactions, the agent forfeits all right to his commission).

La.—Jacobs v. Warfield, 23 La. Ann. 395.

Minn.—Urquhart v. Scottish-American Mortg. Co., 85 Minn. 69, 88 NW 264.

N. Y.—Gilbert v. Quinlan, 59 Hun 508, 13 NYS 671; Huntington v. Claflin, 23 N. Y. Super. 262 [aff 38 N. Y. 182].

Pa.—Henderson v. Hydraulic Works, 9 Phila. 100; Realty Co. v. Gallinger Co., 31 PittsbLJNS 396 [aff 210 Pa. 74, 59 A 435].

Eng.—Boston Deep Sea Fishing, etc., Co. v. Ansell, 39 Ch. D. 339.

[a] **"It is held, without exception,** that the discharge of an agent for just cause terminates all right to commissions or compensation not then already earned and accrued." Bilz v. Powell, 50 Colo. 482, 496, 117 P 344, 38 LRANS 847.

78. Du Quoin Star Coal Min. Co. v. Thorwell, 3 Ill. A. 394; Kessee v. Mayfield, 14 La. Ann. 90; Murdock v. Phillips Academy, 12 Pick. (Mass.) 244; Urquhart v. Scottish-American Mortg. Co., 85 Minn. 69, 88 NW 264.

79. Leopold v. Salkey, 89 Ill. 412, 31 AmR 93 (holding that, where a party agreed in writing to serve as another's agent for three years, covenanting to devote himself entirely to the business, giving his whole time, attention, and skill thereto, for which he was to receive a specified annual salary in monthly payments, each of his covenants went to the entire consideration, and the covenant of the employer to pay was not for a part, but for the whole, of the term; and that a failure on the part of the agent to render the services agreed for about two weeks during the busiest and most important part of the season, although without fault on his part, was a substantial breach of his covenant, and authorized the employer to treat the contract as abandoned,

not be allowed to work injury to the agent with reference to what he has already done under the appointment;[80] and where an agency, terminable at the will of the principal, is revoked by him without any fault on the part of the agent, it is the usual rule, unless otherwise stipulated,[81] that the agent is entitled to commissions or salary already earned at the time of his discharge,[82] or to a reasonable compensation for his services rendered before that time.[83]

Severable or entire contract. The rule that the agent is entitled to recover for services rendered before his discharge is particularly applicable where the contract of agency is severable.[84] In some jurisdictions it is held, where the contract is entire, that, although the agent cannot recover on the contract of agency in case of his discharge for cause, he may recover for the services actually rendered to the extent of what such services were reasonably worth to his principal, not exceeding the rate of compensation stipulated for by the express contract;[85] but according to the better rule he is not entitled to any compensation for his services in such cases.[86]

Rate of compensation. Where the employment is for a specified term on a certain monthly salary, which is subject to diminution in case the total sales for the term do not amount to a fixed sum, the agent, on discharge before the end of the term, is entitled to compensation at the specified monthly rate, without any deduction based on the amount of sales made while he continued in the employment.[87] But a contrary view has been taken.[88]

[§ 423] **bb. Agency Wrongfully Revoked—(aa) In General.**[89] An agent is entitled to the commissions or salary he has earned, or the reasonable value of his services, at the time of his discharge, where such discharge is wrongful;[90] and he is entitled to the full compensation specified in the contract where such services result in a subsequent

and to employ another person in his place; and that in such case the person so originally employed, when he had been paid for the services actually performed, could not maintain an action on the contract for not being allowed to resume his position, after his discharge, and complete the contract).

80. U. S.—Sanborn v. Rodgers, 33 Fed. 851.

Ark.—White Sewing Mach. Co. v. Shaddock, 79 Ark. 220, 95 SW 143.

Mo.—Green v. Cole, 103 Mo. 70, 15 SW 317; Royal Remedy, etc., Co. v. Gregory Grocer Co., 90 Mo. A., 53 (holding that, while a contract for an agency for an indefinite time, not coupled with an interest, is revocable at any time, if the agent has incurred expense and expended time and labor in the matter the principal cannot appropriate the results without compensation).

Nebr.—Hallstead v. Perrigo, 87 Nebr. 128, 126 NW 1078.

N. Y.—Culver v. Western Union Tel. Co., 50 N. Y. 691 (holding that a power of attorney executed by an importer whereby he appointed the grantee therein his attorney with authority to recover by suit or otherwise such excessive duties as have been or which might be exacted from him is revocable, and, in case of a revocation after the commencement of services to procure a refund, the grantee therein is entitled to recover for services on the basis of the agreement).

Can.—Cadwell v. Stephenson, 3 DomLR 759, 21 WestLR 199.

81. Simpson v. Lamb, 17 C. B. 603, 84 ECL 603, 139 Reprint 1213.

[a] **Where there is a contract** that no compensation whatever shall be received if the agent's authority is revoked before the completion of the services, he cannot recover on a quantum meruit. Hotchkiss v. Gretna Ginnery, etc., Co., 36 La. Ann. 517; Spear v. Gardner, 16 La. Ann. 383.

82. Adams-Smith Co. v. Hayward, 52 Nebr. 79, 71 NW 949 (where it appeared that a contract of employment of a traveling salesman required him to sell a certain amount of goods within the year, and gave the employer the option to terminate the contract at any time, and to retain one month's salary of the employee, which should be forfeited in case the contract was terminated, and it was held that the salary so retained was in the nature of a pledge to secure performance by the employee, and that the employer could not arbitrarily terminate the contract and claim the forfeiture); Winslow v. Mayo, 123 App. Div. 753, 108 NYS 640 [aff 195 N. Y. 551 mem, 88 NE 1135 mem]; Realty Co. v. Gillinger Co., 31 Pittsb LegJNS (Pa.) 396 [aff 210 Pa. 74, 59 A 435].

83. U. S.—Martin v. Roberts, 36 Fed. 217 (where an agent for mortgagees of land, valuable principally for its phosphate rock, caused the mortgage to be foreclosed, employed a watchman to look after the property, occasionally visited it during a period of eight years, and often gave advice and information in regard to this and other investments of the mortgagees, and the agent expected to be remunerated for his services in part from the management of the property or from its sale, but the mortgagees terminated the agency without fault on his part, and it was held that he was entitled to two thousand dollars).

Ala.—Chambers v. Seay, 73 Ala. 372.

Ind.—Ætna L. Ins. Co. v. Nexsen, 84 Ind. 347, 43 AmR 91.

La.—Lanusse v. Pimpienella, 4 Mart. N. S. 439.

N. C.—Martin v. Holly, 104 N. C. 36, 10 SE 83.

Pa.—Jaekel v. Caldwell, 156 Pa. 266, 26 A 1063; Blackstone v. Buttermore, 53 Pa. 266.

Tex.—McCormick v. Bush, 47 Tex. 191.

Wis.—Merriman v. McCormick Harvesting Mach. Co., 96 Wis. 600, 71 NW 1050.

Man.—Aldous v. Grundy, 21 Man. 559.

Compare Fish v Hahn, 124 App. Div. 173, 108 NYS 782.

84. Robinson v. Sanders, 24 Miss. 391; Eaken v. Harrison, 15 S. C. L. 249.

[a] **Illustration.**—Where it is provided that an agent shall receive his compensation from sales of lots as made from time to time, and not at the termination of the agency, he is entitled to recover the compensation earned when the agency is forfeited. Cotton v. Rand, 93 Tex. 7, 51 SW 838, 53 SW 343 [rev (Civ. A.) 51 SW 55].

85. Kessee v. Mayfield, 14 La. Ann. 90; Lawrence v. Guilifer, 38 Me. 532; Massey v. Taylor, 5 Coldw. (Tenn.) 447, 98 AmD 429; Children of Israel Cong. v. Peres, 2 Coldw. (Tenn.) 620.

86. Urquhart v. Scottish-American Mortg. Co., 85 Minn. 69, 88 NW 264; Posey v. Garth, 7 Mo. 95, 37 AmD 183; Boston Deep Sea Fishing, etc., Co. v. Ansell, 39 Ch. D. 339 (holding that where an agent's salary was payable yearly, and he was discharged for cause before the end of the term, he was entitled to nothing); Ridgway v. Hungerford Market Co., 3 A. & E. 171, 30 ECL 97, 111 Reprint 378; Turner v. Robinson, 6 C. & P. 15, 25 ECL 298; Atkin v. Acton, 4 C. & P. 208, 19 ECL 478; Spain v Arnott, 2 Stark. 256, 3 ECL 400.

[a] **Discharge for refusal to obey instructions.**—A contract of employment was as follows: "In consideration of Mr. F. F. Waters having agreed to give his undivided time and services in our business, as we may direct, we agree to pay him a salary [etc.] for a term of two years, &c." The services of Waters were in traveling over the country and selling his employers' goods. Shortly before January 12 they directed him to go to St. Paul with samples, and to take a room and sell in and from it. He refused to go unless his employers would agree to pay him, besides his salary, eight dollars a day for his traveling expenses. In an action by Waters against his employers it was held that the service demanded was within the contract, and that, it having been the custom to pay the salary on the 1st and 15th of each month, and plaintiff having been rightfully discharged on the 12th of the month for refusing to follow directions, he was not entitled to any pay for his services from the 1st of the month. Waters v. Davies, 55 N. Y. Super. 39, 8 NYSt 163.

87. Earle v. Warren Axe, etc., Co., 167 Mass. 41, 43, 44 NE 1056 (where the court said: "It seems probable that efforts to sell made early in the year would not bear their full fruit until late in the year").

88. King v. Garrett, 18 Phila. (Pa.) 296.

89. **Remedies of agent** wrongfully discharged see infra § 586.

90. Gazette Printing Co. v. Morss, 60 Ind. 153; Glover v. Henderson, 120 Mo. 367, 25 SW 175, 41 AmSR 695 (holding that, where an agent is employed to perform an act which involves expenditure of labor and money before it is possible to accomplish the desired object, and after the agent has in good faith incurred expense and expended time and labor, but before he has had a reasonable opportunity to avail himself of the results of this preliminary effort, the principal will not be permitted to terminate the agency and take advantage of the agent's services, without rendering any compensation therefor); Howard v. Daly, 61 N. Y. 362, 19 AmR 285; Baker v. Angell, 12 NYSt 406; James v. Allen County, 44 Oh. St. 226, 6 NE 246, 58 AmR 821.

[a] **Estoppel to set up contract.**—Where a company has wrongfully discharged its agent and released him from the obligations imposed on him by the contract of agency, it cannot set up such contract in an action by him for the value of the work done. George O. Richardson Mach Co. v. Swartzel, 70 Kan. 773, 79 P 660.

[b] **Necessity of tender of performance.**—Where a principal has wrongfully dismissed an agent employed under a contract, it is not necessary for the latter to make any tender of his readiness to perform his part of the contract in order to enable him to recover for services previously rendered. Bull v. Schuberth, 2 Md. 38.

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fulfillment of the purpose of the agency, and the contract is terminated by the principal for the purpose of avoiding payment of compensation.[91] If the agent is employed for a definite term, the principal cannot defeat his right to compensation by a premature termination of the agency.[92]

What amounts to discharge. Where a corporation principal voluntarily enters into liquidation proceedings, it is equivalent to a dismissal of the agent, and the latter's right to compensation is governed accordingly.[93] But the serving of notice by the principal of his intention to terminate the contract at a future date is not equivalent to a present discharge.[94]

[§ 424] **(bb) Constructive Services; Remedies.** It was the prevailing doctrine formerly, and is the doctrine in several states at present, that where an agent has been wrongfully discharged before the expiration of the stipulated term he may elect to treat the contract as continuing, keep himself in readiness to perform it on his part, and after the expiration of the term sue his principal on the contract for the whole of the wages due him by its terms;[95] and under this rule, where the compensation is payable in installments, a separate action may be maintained for each installment as it falls due.[96] The better authority, however, favors the rule that an action will not lie to recover, as though actually earned, compensation accruing subsequently to the discharge, but the remedy in such case is by an action for damages arising from the breach of the contract.[97]

91. U. S.—Mellen v. U. S., 13 Ct. Cl. 71 (where the principal employed an attorney to collect a debt for a percentage of it, reserving to itself the right to terminate the agreement at any time, and it was held that after the attorney had fully secured the debt, although the payment was to be subsequently made, the principal could not terminate the agreement so as to deprive the attorney of his percentage).

Ark.—Greenspan v. Miller, 163 SW 776.

Ga.—Strong v. West, 110 Ga. 382, 35 SE 693 (holding that, where an attorney agreed that as compensation for the recovery of certain property pledged to secure a debt he would accept a specified amount and look for the same to the excess for which he could sell the property over and above the amount necessary to satisfy the debt due to his client, and after making the recovery, but before being allowed a fair opportunity to make a sale, the client withdrew the property from his hands, he had a right of action against the client for the amount agreed upon in the contract).

Minn.—Urquhart v. Scottish-American Mortg. Co., 85 Minn. 69, 88 NW 264 (holding that, where an agent is to have a percentage of the gross revenue on loans made for his principal, but is to incur the expense of making and collecting them, with no limit as to the time the agency is to continue, and the contract is terminated by the principal without cause, the agent is entitled to receive his percentage on the gross revenue receipts collected on all loans made by him prior to his discharge, subject to a reasonable deduction for the costs and expenses of making them).

N. Y.—Warren Chemical, etc., Co. v. Holbrook, 118 N. Y. 586, 23 NE 908, 16 AmSR 788 (holding that, where the compensation of an agent is dependent on the success of his efforts in procuring a contract for his principal and his subsequent performance of the work, the principal will not be permitted to stimulate his efforts with the promise of reward, and then, when the contract is obtained and the compensation assured after construction, terminate the agency for the sole purpose of securing to himself the agent's profits).

Pa.—Kelly v. Marshall, 172 Pa. 396, 33 A 690.

[a] **Where, however,** plaintiff entered into an agreement with defendant whereby plaintiff was to look up defective titles, old judgments, and any such matter as might be profitable, and defendant was to furnish the money with which to purchase the same, and the profits were to be equally divided, plaintiff was entitled to only reasonable compensation for his services in looking up property and informing defendant thereof, when the same was not purchased by defendant until after his business relations with plaintiff had been terminated. Stillman v. Lefferts, (Iowa) 82 NW 491.

[b] **An agent employed to sell real estate,** who finds a purchaser, brings him and his principal into communication, and sets on foot negotiations which result in a sale, cannot be deprived of his right to compensation by a discharge prior to consummation of the sale. Gillett v. Corum, 7 Kan. 156; Keener v. Harrod, 2 Md. 63, 56 AmD 706.

92. Goodmanson v. Rosenstein, 144 Ill. A. 243; Baker v. Angell, 12 NYSt 406; McKone v. Metropolitan L. Ins. Co., 131 Wis. 243, 110 NW 472; Turner v. Goldsmith, [1891] 1 Q. B. 544. See also Union Refining Co. v. Barton, 77 Ala. 148. Compare Brown v. Pforr, 38 Cal. 550; Milligan v. Owen, 123 Iowa 285, 98 NW 792 (holding that, where an owner simply states to the agent that if he or anyone can find a purchaser on the terms stated by a certain time he will sell, no agency coupled with an interest is created, and there is no liability for commissions on account of a revocation prior to the time specified); Wright v. Beach, 82 Mich. 469, 46 NW 673.

93. In re Imperial Wine Co., L. R. 14 Eq. 417.

[a] **Right to compensation.**—(1) Where an agent employed for a certain term is to receive a fixed salary and also a specified commission on profits, and the principal, a company, goes into voluntary proceedings before expiration of the term, the agent is entitled to compensation in respect of his full salary for the residue of the term, but not to additional compensation by way of damages for loss of commissions during the unexpired portion of the term. In re English, etc., Mar. Ins. Co., L. R. 5 Ch. 737. (2) Where, however, the compensation of an agent employed for a fixed term consists solely of a commission on orders obtained by him he is entitled, upon the determination of the agreement by the winding up of the company, to compensation in respect of the commission which he might otherwise have earned during the unexpired portion of the term. In re Patent Floor Cloth Co., 41 L. J. Ch. 476. (3) And where a company employed an agent to dispose of its shares on the terms that he should be paid £100 down, and £400 in addition upon the allotment of the whole of the shares of the company, and he disposed of a considerable number of shares, when the company was voluntarily wound up, he was prevented from earning the £400 by the act of the company, and was therefore entitled to recover a portion of that sum. Inchbald v. Western Neilgherry Coffee, etc., Plantation Co., 17 C. B. N. S. 733, 112 E. C. L. 733, 144 Reprint 293.

Involuntary liquidation as terminating agency see infra § 426.

94. Smith v. Philip B. Hunt Co., 90 Minn. 255, 95 NW 907 (holding that, where the principal, within the first year of a contract of agency, notifies the agent of his intention to terminate the contract at a future date after the expiration of the year, it does not constitute a termination of the contract within the year, within a provision of the contract guaranteeing the agent a specified compensation for the year in case the principal should terminate the contract within that time).

95. Ala.—Strauss v. Meertief, 64 Ala. 299, 39 AmR 8; Fowler v. Armour, 24 Ala. 194; Ramey v. Holcombe, 21 Ala. 567; Davis v. Ayres, 9 Ala. 292.

Ark.—Gardenhire v. Smith, 39 Ark. 280; Fain v. Goodwin, 35 Ark. 109.

Cal.—Webster v. Wade, 19 Cal. 291, 79 AmD 218.

Miss.—Armfield v. Nash, 31 Miss. 361.

Mo.—Booge v. Pacific R. Co., 33 Mo. 212, 82 AmD 160.

Tenn.—Jones v. Jones, 2 Swan 605.

Wis.—Gordon v. Brewster, 7 Wis. 355.

96. Strauss v. Meertief, 64 Ala. 299, 38 AmR 8; Davis v. Preston, 6 Ala. 83; Isaacs v. Davies, 68 Ga. 169; Armfield v. Nash, 31 Miss. 361; Booge v. Pacific R. Co., 33 Mo. 212, 82 AmD 160.

97. U. S.—Alaska Fish, etc., Co. v. Chase, 128 Fed. 886, 64 CCA 1; Newcomb v. Imperial L. Ins. Co., 51 Fed. 725 [aff 62 Fed. 97, 10 CCA 288].

Ind.—Richardson v. Eagle Mach. Works, 78 Ind. 422, 41 AmR 584; Ricks v. Yates, 5 Ind. 115.

Ky.—Whitaker v. Sandifer, 1 Duv. 261; Chamberlin v. McCallister, 6 Dana 352.

Mass.—Moulton v. Trask, 9 Metc. 577.

N. Y.—Weed v. Burt, 78 N. Y. 191; Howard v. Daly, 61 N. Y. 362, 19 AmR 285 [overr Thompson v. Wood, 1 Hilt. 93]; Durkee v. Mott, 8 Barb. 423; Moody v. Leverich, 4 Daly 401, 14 AbbPrNS 145; Heim v. Wolf, 1 E. D. Smith 70; Clark v. Marsiglia, 1 Den. 317, 43 AmD 670.

Oh.—James v. Allen County, 44 Oh. St. 226, 6 NE 246, 58 AmR 821.

Va.—Willoughby v. Thomas, 24 Gratt. (65 Va.) 521.

Eng.—Goodman v. Pocock, 15 Q. B. 576, 69 ECL 576, 117 Reprint 577; Aspdin v. Austin, 5 Q. B. 671, 48 ECL 671, 114 Reprint 1402; Smith v. Hayward, 7 A. & E. 544, 34 ECL 292, 112 Reprint 575; Elderton v. Emmons, 6 C. B. 160, 60 ECL 160, 136 Reprint 1213 [aff 13 C. B. 495, 76 ECL 495, 138 Reprint 1292, 4 H. L. Cas. 624, 10 Reprint 606]; Archard v. Hornor, 3 C. & P. 349, 14 ECL 604; Clossman v. Lacoste, 28 EngL&Eq 140; Fewings v. Tisdal, 1 Exch. 295. But see Gandell v. Pontigny, 4 Campb. 375.

See Carroll v. Welch, 26 Tex. 147.

See also infra §§ 453, 454.

[a] **Doctrine of "constructive service" repudiated.**—In Howard v. Daly, 61 N. Y. 362, 373, 19 AmR 285, Dwight, Commissioner of Appeals, in commenting upon the doctrine of "constructive service," said: "This doctrine is, however, so opposed to principle, so clearly hostile to the great mass of the authorities, and so wholly irreconcilable to that great and beneficent rule of law, that a person discharged from service must not re-

[§ 425] **(e) Abandonment or Renunciation of Agency by Agent.**[98] If, as is often the case, the contract of agency contemplates complete performance on the part of the agent in order to entitle him to compensation, he can recover nothing for part performance if he voluntarily abandons his employment without cause before completion;[99] much less can he recover as for complete performance.[1] This is true, although the principal subsequently enters into the transaction which the agent was employed to negotiate;[2] but where the agent, on account of the principal's wrongful conduct, is justified in abandoning his contract and renouncing the agency, he may recover the value of his services rendered.[3]

Where the contract is severable the agent by abandoning further performance does not forfeit the compensation theretofore earned.[4]

[§ 426] **(2) Termination by Operation of Law.**[5] The right to compensation for part performance under a contract of agency is not defeated by the death of the principal[6] pending performance, nor by the fact that the principal has become unable to fulfill the contract either by reason of insolvency,[7] or because of the stringency of legislative measures regulating the business which forms the

main idle, but must accept employment elsewhere if offered, that we cannot accept it. If a person discharged from service may recover wages, or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. How absurd it would be that one rule of law should call upon him to accept other employment, while another rule required him to remain idle in order that he may recover full wages. The doctrine of 'constructive service' is not only at war with principle, but with the rules of political economy, as it encourages idleness and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor." And in James v. Allen County, 44 Oh. St. 226, 233, 6 NE 246, 15 AmR 821, the court said: "The theory of that doctrine seems to be that inasmuch as the employe holds himself ready to do the work, therefore he has done the work; that readiness is, for all purposes, equivalent to performance. For the purpose of allowing a recovery in some amount his readiness to do and tender of performance may have the effect of performance to the extent of putting the employer in the wrong, but how can it be said, in truth, that he has done the work? that he has performed? The claim is based upon a fiction, an untruth. There is no acceptance of the services; there is no delivery of them; the defendant has not had the benefit of them; he has not had value received, and upon what principle is it that in law he is liable for the agreed price when he has not received the commodity which he agreed to buy, and the other party has not parted with the commodity which he agreed to sell? The doctrine of 'constructive service,' as applied to a case of this character, is one beset with difficulties. It requires a plaintiff to assume that to exist which in fact has no existence. He is demanding wages when he has rendered no service. The doctrine contradicts the very term itself. How can he truthfully aver, as in indebitatus assumpsit, that the defendant is indebted to him for work and labor done? Averring it, how could he prove it? But, aside from the matter of pleading and proof, in order to recover upon the strength of this doctrine, the employe must not only be willing to perform on his part, but must hold himself in readiness to perform. This implies that he will remain idle. Public policy, not to say public morals, forbids the encouragement of an idle class. Being subject to the universal rule that a person injured by the act of another is bound to use ordinary diligence to make the damage as light as may be, the discharged employe must use ordinary care to obtain employment. He may not be required to seek elsewhere, or to engage in a different industry. But he is bound to use ordinary effort to obtain similar employment in the same vicinity; at least if such employment is offered he is bound to take advantage of it. It would be a direct encouragement to idleness to hold that he who may have, but refuses, similar service, is entitled to full compensation the same as though he performed full labor."

98. See also supra § 419.

Abandonment of service by servant see Master and Servant [26 Cyc 986, 1042].

Renunciation or abandonment by agent see generally supra §§ 169-171.

99. U. S.—Newcomb v. Imperial L. Ins. Co., 51 Fed. 725 [aff 62 Fed. 97, 10 CCA 288] (where it is said that if a person agrees to act as agent for an insurance company, for a stated commission to be paid on premiums collected, he cannot abandon the agency at any time without cause, and sue upon a quantum meruit).

Ala.—Whitley v. Murray, 34 Ala. 155.

Ga.—Henderson v. Stiles, 14 Ga. 135.

Pa.—Martin v. Schoenberger, 8 Watts & S. 367 (holding that an agent cannot recover for part performance of an entire contract, where he has failed in the performance on his part).

S. C.—Byrd v. Boyd, 15 S. C. L. 246, 17 AmD 740.

Vt.—St. Albans Steam Boat Co. v. Wilkins, 8 Vt. 54.

[a] **Contract to sell goods on commission.**—However, a contract which stipulated that plaintiff should sell defendant's goods throughout the country, paying his own expenses; that defendant should pay him therefor a sum equal to fifteen per cent of the gross amount of the orders accepted; that in case plaintiff's sales exceeded in the aggregate fourteen thousand dollars during the year, one half of the commission should go toward payment of a prior indebtedness due defendant; and that the agreement should remain in force one year, was simply an agreement to pay a certain rate of commission for the sale of goods, and that the commission should be paid and the goods should be sold during the period of one year, and could not be so construed that nothing became due in favor of either party until the expiration of the year. Bair v. Hilbert, 84 App. Div. 621, 82 NYS 1010.

1. Sidway v. American Mortg. Co., 222 Ill. 270, 78 NE 561 [aff 119 Ill. A. 502] (holding that, under an agreement whereby agents were to care for and manage loans of their principal's money up to and including their maturity and collection, where they had given up the business of the principal they could not claim commissions on the interest notes not then due and thereafter to be collected); Scoville v. School Trustees, 65 Ill. 523 (holding that an agent undertaking to collect a debt for a share of the profits, who finally abandons further efforts as useless, cannot claim the share to which his contract would have entitled him if he had secured payment by his own efforts, where the principal subsequently receives payment through new instrumentalities, or from causes with which the agent has no connection).

2. Barkley v. Olcott, 52 Hun 452, 5 NYS 525; Warren v. Rendrock Powder Co., 9 NYS 842 (where it appeared that defendant had agreed to pay plaintiff a commission if he should obtain the approval of the United States government to the use in a certain blasting operation of an explosive manufactured by defendant; that plaintiff called the attention of the government to the explosive, and experiments were made which resulted in its being rejected; that nothing further was done by plaintiff to induce the government to use the explosive; that two years later, after plaintiff had left defendant's employ, defendant claimed to have improved its explosive, and further experiments were made, with which plaintiff had no connection and which resulted in the government approving the explosive; and that afterward the government invited proposals for explosives for the operation in question, and defendant's bid was accepted; and it was held that plaintiff's claim for his commission could not be maintained); Fleming v. Withrow, 3 N. S. 492, 1 EastLR 6.

[a] **Where an agent abandoned all efforts to sell certain machinery** more than a month before the principal made a sale to the person with whom the agent had been negotiating, at another place to which he came of his own motion, the agent is not entitled to commissions under a contract reserving to the principal the right to sell to persons who may come to the place of the principal's residence without liability to the agent for commissions. Gaar, etc., Co. v. Brundage, 89 Minn. 412, 94 NW 1091.

3. Duffield v. Michaels, 97 Fed. 825 [aff 102 Fed. 820, 42 CCA 649].

4. Hand-Stitch Broom Sewing-Mach. Co. v. Blood, 47 Fed. 361; Parker v. Brown, 173 Ill. A. 48 (holding that, where a contract employing a traveling salesman for a year provides that a part of his commission shall be payable monthly and the balance at the expiration of the year, the salesman on wrongfully abandoning his employment does not forfeit all his commissions and is entitled to the amount that was payable monthly); Taylor v. Laird, 1 H. & N. 266 (holding that where a contract is for monthly salary it gives a cause of action for the salary at the end of each month, and when once vested it is not subject to be lost or divested by the agent's desertion or abandonment of the contract).

Entire and severable contracts see generally Contracts [9 Cyc 642].

5. **Termination of relation of master and servant by operation of law** see Master and Servant [26 Cyc 984 et seq].

6. Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592 (holding that an agent who is authorized to improve and sell lands is entitled, after the termination of his authority by the death of the party conferring the same, to be compensated from the proceeds of the property, when sold, for services theretofore rendered by him in reliance thereon).

[a] **However,** agents, being also appointed executors of the principals, are not entitled to commissions on remittances from abroad by the testator, not received until after his death. Hovey v. Blakeman, 4 Ves. Jr. 596, 31 Reprint 306.

7. Bard v. Banigan, 39 Fed. 13

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subject matter of the agency.[8] But the death of the principal precludes a recovery by the agent for unearned salary or compensation.[9]

Sickness or death of agent. Where the death of the agent prevents full performance of the contract on his part, the general rule is that a recovery may be had by his representative on a quantum meruit for the services performed,[10] and likewise the agent may recover on a quantum meruit where his sickness has prevented full performance of the services.[11] In such cases the compensation cannot exceed the proportionate amount of the compensation expressly contracted for,[12] and it seems that the principal is entitled to recoup such damages as he may have suffered from the agent's failure fully to perform.[13]

[§ 427] **c. As Affected by Illegality of Transaction.** An agent who negotiates an illegal transaction in behalf of the principal, or whose services are otherwise tainted with illegality, cannot as a rule recover compensation therefor, if he has knowledge of the illegality at the time of performance.[14] If the agent has no knowledge of the illegality of the transaction, or if his act is not a part of it then he may recover.[15]

[§ 428] **d. As Affected by Fraud or Misconduct.**[16] **(1) In General.** As a general rule an agent who is guilty of fraud upon his principal in the transaction of his agency is not entitled to compensation for his services.[17] Thus he generally

[aff 134 U. S. 291, 10 SCt 565, 33 L. ed. 932]; Vanuxen v. Bostwick, (Pa.) 7 A 598.

[a] **Involuntary liquidation of corporation principal.**—By the articles of association of a company a manager was appointed, and it was provided that if he should at any time be deprived of or removed from his office for any other cause than gross misconduct the directors should pay him a certain sum within one month from the time of his removal. The company was ordered to be wound up. It was held that he was entitled to prove in the winding-up for the sum specified by the articles. In re London, etc., Bank, L. R. 9 Eq. 149. Voluntary liquidation as affecting right to compensation see supra § 423.

8. Lewis v. Atlas Mut. L. Ins. Co., 61 Mo. 534.

9. Holmes v. Murdock, 125 La. 916, 51 S 1035; Weare v. Brimsdown Lead Co., 103 L. T. Rep. N. S. 429 (where the agent was not entitled to commission on indirect sales after termination of the employment).

10. Persons v. McKibben, 5 Ind. 261, 61 AmD 85; Coe v. Smith, 4 Ind. 79, 58 AmD 618; State v. Roberts, 60 Mo. 402; Clark v. Gilbert, 26 N. Y. 279, 86 AmD 189 (holding that, where it was agreed by a contract that an agent should have a certain salary and one third of the profits of certain work, and he died before the completion of the work, his representatives were entitled to compensation at the rate specified in the contract for the time of service, and that in the absence of evidence the profits should be regarded as distributed ratably throughout the work).

11. Hunter v. Waldron, 7 Ala. 753; Ryan v. Dayton, 25 Conn. 188, 65 AmD 560; Fuller v. Brown, 11 Metc. (Mass.) 440; Wolfe v. Howes, 20 N. Y. 197, 75 AmD 388.

12. Clark v. Gilbert, 26 N. Y. 279, 84 AmD 189. See also infra § 446.

13. Clark v. Gilbert, 26 N. Y. 279, 84 AmD 189. See also infra § 448.

14. U. S.—Embrey v. Jemison, 131 U. S. 336, 9 SCt 776, 33 L. ed. 172; Burke v. Child, 21 Wall. 441, 22 L. ed. 623; Marshall v. Baltimore, etc., R. Co., 16 How. 314, 14 L. ed. 953. See also Irwin v. Williar, 110 U. S 499, 509, 4 SCt 160, 28 L. ed. 225 [quot Leonard v. Poole, 114 N. Y. 371, 378, 21 NE 707, 11 AmSR 667, 4 LRA 728] (where Mr. Justice Matthews said: "In Roundtree v. Smith, 108 U. S. 269, 2 SCt 630, 27 L. ed. 722, it was said that brokers who had negotiated such contracts, suing not on the contracts themselves, but for services performed and money advanced for defendant at his request, though they might under some circumstances be so connected with the immorality of the contract as to be affected by it, they are not in the same position as a party sued for the enforcement of the original agreement. It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is particeps criminis, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction").

Ill.—Byrd v. Hughes, 84 Ill. 174, 25 AmR 442; Brennan v. Purington Pav. Brick Co., 171 Ill. A. 276; Foss v. Cummings, 47 Ill. A. 665 [aff 149 Ill. 353, 36 NE 553].

Kan.—McBratney v. Chandler, 22 Kan. 692, 31 AmR 213.

La.—Irwin v. Levy, 24 La. Ann. 302; Christian v. Baer, 22 La. Ann. 459.

Me.—Black v. Security Mut. L. Assoc., 95 Me. 35, 49 A 51, 54 LRA 939.

Md.—Paine v. France, 26 Md. 46.

Mass.—Harvey v. Merrill, 150 Mass. 1, 22 NE 49, 15 AmSR 159, 5 LRA 200; Fuller v. Dame, 18 Pick. 472.

Mich.—McDonnell v. Rigney, 108 Mich. 276, 66 NW 52.

Mo.—Nash v. Kerr Murray Mfg. Co., 19 Mo. A. 1; Crane v. Whittemore, 4 Mo. A. 510.

N. H.—Bixby v. Moor, 51 N. H. 402.

N. Y.—Gray v. Hook, 4 N. Y. 449; Coffey v. Burke, 132 App. Div. 128, 116 NYS 514; Rose v. Truax, 21 Barb. 361; Harris v. Roof, 10 Barb. 489; Cahill v. Gilman, 84 Misc. 372, 146 NYS 224; Brinkman v. Eisler, 16 NYS 154 [aff 7 NYS 193]; Belding v. Pitkin, 2 Cai. 147. But see Ormes v. Dauchy, 45 N. Y. Super. 85.

Pa.—Fareira v. Gabell, 89 Pa. 89; Smith v. Bouvier, 70 Pa. 325; Clippinger v. Hepbaugh, 5 Watts & S. 315, 40 AmD 519; Hatzfield v. Gulden, 7 Watts 152, 31 AmD 750.

Tenn.—Rhodes v. Summerhill, 4 Heisk. 204.

Eng.—Allkins v. Jupe, 2 C. P. D. 375; Wybund v. Stanton, 4 Esp. 179; Stackpole v. Earle, 2 Wils. C. P. 133, 95 Reprint 727.

Que.—Brand v. Metropolitan Stock Exch., 11 Que. Super. 303.

See also Brokers [19 Cyc 273]; Contracts [9 Cyc 560]; Foreign Corporations [19 Cyc 1307]; Gaming [20 Cyc 952]; Lotteries [25 Cyc 1653 et seq].

[a] **Acting as agent in illegal sale of liquor.**—Defendants kept a billiard saloon and a bar for the sale of liquor. The liquor traffic was illegal. Plaintiff was employed by defendants to work generally in and about the saloon. There was no special agreement that he should or should not sell liquor, or as to what particular duty he should do, but he was accustomed to work generally in and about the saloon, taking care of the room, building the fire, taking care of the billiard tables, tending at the bar, and waiting upon customers. In the absence of defendants he had the whole charge of the business. Plaintiff at the time he entered into the service of defendants knew what business was carried on there. In assumpsit upon a quantum meruit it was held that plaintiff could not recover for any portion of his services. Bixby v. Moor, 51 N. H. 402.

15. U. S.—Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468.

Ala.—Moore v. Appleton, 26 Ala. 633.

Ga.—Warren v. Hewitt, 45 Ga. 501.

Me.—Rumsey v. Berry, 65 Me 570; Drummond v. Humphreys, 39 Me. 347.

Mass.—Greenwood v. Curtis, 6 Mass. 458, 4 AmD 145.

Eng.—Rosewarne v. Billing, 15 C. B. N. S. 316, 109 ECL 316, 143 Reprint 806.

16. **Deductions and forfeitures not based on fraud or misconduct** see infra § 448.

Fraud or misconduct as ground for discharge of agent see supra § 160.

Fraud or misconduct of broker as defeating right to compensation see Brokers [19 Cyc 225–229, 234].

Right of principal to recover payments made to agent by way of compensation in ignorance of fraud or misconduct see infra § 452.

17. U. S.—Shaeffer v. Blair, 149 U. S. 248, 13 SCt 856, 37 L. ed. 721 [rev 33 Fed. 218]; McKinley v. Williams, 74 Fed. 94, 20 CCA 312; Hoffiin v. Moss, 67 Fed. 440, 14 CCA 459; The Taranto, 23 F. Cas. No. 13,751, 1 Sprague 170.

Ark.—Doss v. Long Prairie Levee Dist., 96 Ark. 451, 454, 132 SW 443 [cit Cyc] (holding that, under the rule that an agent guilty of fraud in discharging his duties cannot recover compensation from his principal, an agent who was guilty of fraud in his transactions with others in discharge of his agency, so as to cause his principal to litigate in order to maintain his rights, forfeited his right to compensation for his services).

Conn.—Schleifenbaum v. Rundbaken, 81 Conn. 623, 71 A 899.

Ill.—Myers v. Walker, 31 Ill. 353; Sidway v. American Mortg. Co., 119 Ill. A. 502 [aff 222 Ill. 270, 78 NE 561] (so holding where the fraud is intentional).

Ind.—U. S. Mortgage Co. v. Henderson, 111 Ind. 24, 12 NE 88; Rochester v. Levering, 104 Ind. 562, 4 NE 203; Porter v. Silvers, 35 Ind. 295.

Iowa.—Steele v. Crabtree, 130 Iowa 313, 106 NW 753; Vennum v. Gregory, 21 Iowa 226 (so holding where the principals are put to the trouble and expense of litigation to secure their rights).

Ky.—Chamberlain v. Chamberlain, 41 SW 312, 19 KyL 572.

Mo.—Witte v. Storm, 236 Mo. 470, 139 SW 384 (holding that, where agents having charge of property for their principal attempt to acquire that property by fraud, they are not entitled to compensation for services rendered with respect to the property); Harkness v. Briscoe, 47 Mo. A. 196.

Nebr.—Jansen v. Williams, 36 Nebr. 869, 55 NW 279, 20 LRA 207.

N. Y.—Martin v. Bliss, 57 Hun 157,

forfeits compensation where he is guilty of misrepresentation, concealment, or nondisclosure with reference to facts material to the subject matter of the agency,[18] and a contract to pay a fixed compensation may likewise be invalidated by the agent's nondisclosure of material facts.[19] So, if an agent in transacting the agency is guilty of unfaithfulness, treachery, or dishonesty,[20] or of gross misconduct,[21] gross mismanagement,[22] gross unskillfulness,[23] or of a failure to follow his instructions,[24] he generally forfeits his right to compensation.

Negligence. Where an agent has been guilty of such gross negligence in the transaction of his principal's business as to render his services worthless, he can recover no compensation whatever.[25] But mere errors of judgment on the part of the agent, or omissions which do not amount to misconduct or culpable negligence, do not work a forfeiture of his right to compensation,[26] although the principal is entitled to deduct from the agent's compensation whatever damages he has suffered through the negligence of the agent in the transaction of the business.[27]

Separate transactions. However, the fact that an agent is guilty of fraud, misconduct, etc., with reference to one transaction does not defeat his

10 NYS 886 [aff 132 N. Y. 551 mem, 30 NE 865 mem]; Palmer v. Pirson, 4 Misc. 455, 24 NYS 333 [aff 144 N. Y. 654 mem, 39 NE 494 mem].

Pa.—Pratt v. Patterson, 112 Pa. 475, 3 A 858; Millingar v. Hartupee, 53 Pa. 362.

Tex.—Eidson v. Saxon, (Civ. A.) 30 SW 957.

Va.—Jackson v. Pleasanton, 101 Va. 282, 43 SE 573.

Wash.—Hindle v. Holcomb, 34 Wash. 336, 75 P 873.

Eng.—Ellis v. Pond, [1898] 1 Q. B. 426.

Can.—Manitoba, etc., Land Corp. v. Davidson, 34 Can. S. C. 255.

B. C.—Canadian Financiers v. Hong Wo, 17 B. C. 8, 1 DomLR 38, 19 WestLR 843.

N. B.—Ring v. Potts, 36 N. B. 42.

[a] **Claiming illegal compensation.**—Where a broker effects a loan without any agreement as to the amount to be paid for his services, the fact that he afterward presents to the borrower, and the latter promises to pay, a bill for commissions charged at a greater rate than the statute allows will not forfeit his right to legal compensation. Vanderpoel v. Kearns, 2 E. D. Smith (N. Y.) 170.

[b] **Where the owner of an equitable interest in land** becomes the agent of another to procure the legal title for their joint benefit, and to dispose of enough of the land on commission to reimburse the principal for advances made to procure the legal title, the agent's fraud in overstating to the principal the amount of advances required to obtain the legal title defeats his right to commissions on subsequent sales of part of the land, but does not forfeit his equitable interest in the lands. Shaeffer v. Blair, 149 U. S. 248, 13 SCt 856, 37 L. ed. 721 [rev 33 Fed. 218].

[c] **Proof of extent of injury to principal unnecessary to show forfeiture.**—The right of a principal to insist that his agent has forfeited his right to compensation by reason of fraud cannot be dependent upon the principal's ability to show by facts and figures, the precise extent of the injury to him on account of such misconduct. Prescott v. White, 18 Ill. A. 322.

18. Schleifenbaum v. Rundbaken, 81 Conn. 623, 71 A 899; Humphrey v. Eddy Transp. Co., 107 Mich. 163, 65 NW 13; Murray v. Beard, 102 N. Y. 505, 7 NE 553; Haskell v. Smith, 90 NYS 353; Moore v. Kelley, (Tex. Civ. A.) 162 SW 1034. See also Johnson v. Alexander, 4 LegGaz (Pa.) 393.

[a] **The intentional concealment of important and material facts** from the knowledge of his principal by an agent employed to sell real estate will deprive him of his right to commissions for procuring a buyer. Pratt v. Patterson, 112 Pa. 475, 3 A 858.

[b] **Misrepresentation, concealment, or nondisclosure of the best terms obtainable** (1) for the principal ordinarily forfeits the agent's right to compensation, especially where he reaps a secret profit as the result of his fraud (Shaeffer v. Blair, 149 U. S. 248, 13 SCt 856, 37 L. ed. 721 [rev 33 Fed. 218]; Wright v. Smith, 23 N. J. Eq. 106), (2) or where the principal has rejected the adverse party's offer as communicated to him by the agent, and closed a deal with another party before the agent communicated the adverse party's true offer (Wadsworth v. Adams, 138 U. S. 380, 11 SCt 303, 34 L. ed. 984). (3) But where a selling agent is to receive as his compensation a fixed sum and all he may receive above a named price for the property, he is not bound to disclose what he receives above that price and does not forfeit his compensation for failing or refusing to do so. Fulton v. Walters, 216 Pa. 56, 64 A 860 [rev 28 Pa. Super. 269]. To same effect Hale El. Co. v. Hale, 201 Ill. 131, 66 NE 249 [aff 98 Ill. A. 430] (where a corporation in the elevator business agreed with an agent that he might retain any sum over a named price that he could obtain on a contract for the installation of elevators, and thereafter the agent represented that he could not obtain such price, whereupon the corporation fixed a lower price, and the agent then secured a contract for a greater price than that originally agreed on, and it was held that, even though the agent's representations were fraudulent and the price was reduced on that account, he might recover the amount obtained over the price first fixed).

Concealment or nondisclosure: Of agent's individual interest see infra § 433. Of dual agency see infra § 430. Of receipt of compensation from adverse party or of adverse party's promise to make compensation see infra § 431. Of secret profits obtained by agent see infra § 433.

19. Haskell v. Smith, 86 NYS 779, 90 NYS 353 (holding that where plaintiff was retained to obtain a settlement of defendant's claim for damages against a railway company, and plaintiff omitted to disclose to defendant the company's standing offer to settle such claims at a fixed rate, he was not entitled to recover under his contract for services). Compare Raht v. Union Cons. Min. Co., 5 Lea (Tenn.) 1 (holding that a principal and agent, in defining the nature of the agency and fixing the amount of compensation, deal with each other as strangers, not only in the original contract, but also in a renewal thereof, and that the agent is not bound to disclose the true value of his services).

20. Ill.—Prescott v. White, 18 Ill. A. 322.

Iowa.—Steele v. Crabtree, 130 Iowa 313, 106 NW 753.

Kan.—Sumner v. Reicheniker, 9 Kan. 320.

Oh.—Sea v. Carpenter, 16 Oh. 412.

Pa.—Landis v. Scott, 32 Pa. 495.

Tex.—Hahl v. Kellogg, 42 Tex. Civ. A. 636, 94 SW 389.

21. Ill.—Sidway v. American Mortg. Co., 119 Ill. A. 502 [aff 222 Ill. 270, 78 NE 561]; Prescott v. White, 18 Ill. A. 322 (holding that, where a traveling salesman, in the course of his employment, filled out fictitious orders, and was guilty of such dishonesty in obtaining orders that customers refused to accept and pay for the goods when delivered, he cannot recover his salary).

Ind.—Porter v. Silvers, 35 Ind. 295.

Kan.—Sumner v. Reicheniker, 9 Kan. 320.

La.—Hobson v. Peake, 44 La. Ann. 883, 10 S 762.

Oh.—Set v. Carpenter, 16 Oh. 412.

Wis.—Rogers v. Priest, 74 Wis. 538, 43 NW 510 (where a loan agent, among other improper acts, accepted bad security for loans).

Eng.—Palmer v. Goodwin, 13 Ir. Ch. 171 (holding that a land agent misconducting himself in the management of property, although receiving and accounting for the rents, may be disallowed his fees on the sum received by him); White v. Chapman, 1 Stark, 113, 2 ECL 51.

[a] **Conduct not forfeiting compensation.**—(1) Where a landowner authorized an agent to sell his land, but afterward, when he knew the agent was about to complete a sale, expressed unwillingness to have him do so, without, however, forbidding it, and merely adding the additional stipulation that the sale be for cash, no duty rested on the agent to discourage the purchase on the part of those with whom he had been negotiating, even though it was for the best interests of the owner not to sell at the price stipulated. Millett v. Barth, 18 Colo. 112, 31 P 769. (2) Although the principal has repudiated a verbal contract of sale made by the agent in his behalf, yet the agent does not forfeit his right to commissions on the sale by the fact that he afterward executes a written contract of sale to the purchaser. McEwan v. Kerfoot, 37 Ill. 530. (3) And it seems that an agent to sell land does not disentitle himself to his commission by accepting a deposit from the purchaser and receipting for it. McKenzie v. Champion, 4 Man. 158.

22. Smith v. Crews, 2 Mo. A. 269. Compare Johnson v. Alexander, 4 LegGaz (Pa.) 393.

23. Porter v. Silvers, 35 Ind. 295; Sumner v. Reicheniker, 9 Kan. 320.

24. Short v. Skipwith, 22 F. Cas. No. 12,809, 1 Brock. 104; Dodge v. Tileston, 12 Pick. (Mass.) 328; Zurn v. Noedel, 113 Pa. 336, 6 A 63.

25. Ind.—Fisher v. Dynes, 62 Ind. 348; Porter v. Silvers, 35 Ind. 295.

Kan.—Sumner v. Reicheniker, 9 Kan. 320.

Pa.—Aikins v Thackara Mfg. Co., 15 Pa. Super. 250.

Tex.—Cleveland School-Furniture Co. v. Hotchkiss, 89 Tex. 117, 33 SW 855; Nugent v. Martin, 1 Tex. A. Civ. Cas. § 1173.

Eng.—Bracey v. Carter, 12 A. & E. 373, 40 ECL 189, 113 Reprint 853; Denew v. Daverell, 3 Camph. 451; Moneypenny v. Hartland, 1 C. & P. 352, 12 ECL 211.

But see Field v. Banker, 22 N. Y. Super. 467 (where a forwarding agent was held to be entitled to compensation, although he had accepted a bill of lading exempting the carrier from its common-law liability and yet had failed to insure the goods).

26. Rochester v. Levering, 104 Ind. 562, 4 NE 203; Williams v. Gregg, 21 S. C. Eq. 297.

27. Lee v. Clements, 48 Ga. 128.

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right to compensation in regard to another transaction negotiated for the same principal, although he is regularly employed by the principal and the transactions are like in nature, where by the contract of agency his compensation is computed separately with reference to each transaction.[28] It has also been held that where an agent is regularly employed on a salary, he may, notwithstanding fraud or misconduct which resulted in a termination of the agency, recover for past services, if they are of a uniform character, and the salary may fairly be proportioned by the time of actual service.[29]

[§ 429] **(2) Conversion, Failure to Account, Etc.** Where an agent, after purchasing property for his principal, converts it to his own use, he is not as a rule entitled to compensation for his services.[30] In like manner an agent generally forfeits his compensation where he wrongfully refuses or fails to account for funds of the principal in his hands,[31] as where, when intrusted with goods to be sold, he appropriates the proceeds of the sale,[32] or where, when intrusted with money to buy goods, he keeps the money and fails to buy the goods.[33]

Failure to keep and render accounts. Ordinarily the right to compensation is lost if the agent has wrongfully failed to keep and render regular accounts and vouchers in the transaction of the agency,[34] unless his duty to account is separable from his other duties.[35] But where the agent has acted honestly and his failure to perform these duties does not amount to gross negligence, it will have the effect simply to reduce the agent's compensation to the extent of whatever loss the prin-

28. Hand-Stitch Broom Sewing Mach. Co. v. Blood, 47 Fed. 361 (holding that, where machines were placed on royalties, under an agreement that the party so placing them should receive one fourth of the royalties paid thereon as compensation, the fact that the party by his negligence forfeits his right to place other machines under the agreement does not deprive him of his right to share in the royalties on machines placed by him before the forfeiture); Merriman v. McCormick Harvesting Mach. Co., 96 Wis. 600, 71 NW 1050 (holding that the fact that selling agents refused, on termination of the agency, to deliver to the principal orders which they had previously taken did not disentitle them to compensation as to such of said orders as were afterward actually filled by the principal); Nitedals Taendstikfabrik v. Bruster, [1906] 2 Ch. 671 (holding that, where the transactions between a principal and his agent are severable, and in some of them the agent has been honest while in others he has been dishonest, he is entitled to his commission in all the instances in which he has been honest; but that he is not entitled to it in the instances in which he has been dishonest). But see Gibson v. Bailey Co., 114 Mo. A. 350, 89 SW 597 (holding that a general agent for the sale of goods in a certain territory, who entices away from his principal orders in that territory which the principal had previously acquired, and gives them to another company in which he, the agent, is interested, is guilty of such misconduct as will defeat his right to commissions for other goods sold during his agency).

[a] **An agent who contracts to sell particular goods** to a particular house on commission is entitled to commissions on making the sale, notwithstanding the fact that he competes with his principal and acts in commercial hostility to him in other independent transactions. Gibson v. Bailey Co., 114 Mo. A. 350, 89 SW 597.

29. Cotton v. Rand, 93 Tex. 7, 51 SW 338, 53 SW 34 [rev (Civ. A.) 51 SW 55] (holding that a contract providing for an agent's compensation by an annual salary, with no other condition than that the principals should not be required to advance the same, but that the agent should raise the money for its payment by sales of property or by borrowing money thereon, did not contemplate performance of the entire work by the agent before receiving some compensation; nor did it call for a forfeiture of his right to partial compensation on termination of the agency because of his misconduct. See however Prescott v. White, 18 Ill. A. 322.

30. Mitchem v. Georgia Cotton Oil Co., 139 Ga. 519, 77 SE 627; Myers v. Walker, 31 Ill. 353 (holding that, where a person purchases grain for another under an agreement that he is to receive a certain commission therefor, he is not entitled to the commission for making the purchase, if he fails to deliver the grain or appropriates it to his own use). See also Gray v. Haig, 20 Beav. 219, 52 Reprint 587. See however Hoy v. Reade, 31 N Y Super. 626 (where it is held that the remedy of the principal is to offset the value of the property against the agent's claim).

[a] **A like rule applies to an agent who purchases real estate.**—Pleasanton v Jackson, 101 Va. 282, 43 SE 573 (holding that an agent who agrees to purchase land for his principal and to make the necessary advances, and who, after taking title in his own name, refuses possession to the principal, on his offering to reimburse him, until after he is compelled by suit to do so, is not entitled to compensation for his services, but is liable for the fair rental value).

31. U. S.—Quirk v. Quirk, 155 Fed. 199.

Ill.—Sidway v. American Mortg. Co., 222 Ill. 270, 78 NE 561 [aff 119 Ill. A. 502] (holding that, where agents collected money belonging to their principal, but retained it without making report thereof, and represented mortgage loans as outstanding when in fact they had been fully paid to the agents, they are not entitled to commissions).

Kan.—Sumner v. Reicheniker, 9 Kan. 320.

Ky.—Maupin v. Everett, 8 KyL 356.

N. J.—Ridgeway v. Ludlam, 7 N. J. Eq. 123.

Pa.—Millinger v. Hartupee, 58 Pa. 362; Landis v. Scott, 82 Pa. 495.

Wis.—Rogers v. Priest, 74 Wis. 538, 43 NW 510.

Que.—Violett v. Sexton, 14 Que. Q. B. 360; Eddy v. Eddy, 7 Que. Q. B. 300 [aff [1900] A. C. 299].

See Gray v. Haig, 20 Beav. 219, 52 Reprint 587.

32. Brannan v. Strauss, 75 Ill. 234; Segar v. Parrish, 20 Gratt. (61 Va.) 672 (holding that an agent for the sale of property who sells it but fails to pay over the proceeds within a reasonable time forfeits compensation).

33. Hildreth v. Ayer, etc., Tie Co., 108 SW 255, 32 KyL 1212 (holding that an agent, who receives the money of his principal to buy goods for him on commission, is not entitled to commission, where he keeps the money and fails to buy the goods; and, when the agent is sued for the money, it is incumbent on him to show what he has done with it).

34. U. S.—Quirk v. Quirk, 155 Fed. 199; Blair v. Shaeffer, 33 Fed. 218 [rev on other grounds 149 U. S. 248, 13 SCt 856, 37 L. ed. 721] (holding that an agent who, out of more than ninety thousand dollars supplied him to buy land, from the proceeds of whose sale he is to be paid, can account for only about sixty thousand dollars, forfeits all his rights under the contract).

Ky.—Maupin v. Everett, 8 KyL 356.

Mich.—Boyce v. Boyce, 124 Mich. 696, 83 NW 1013 (holding that, where defendant contracted to lumber the timber on certain land, but failed to keep any account of his time or expense in superintending the manufacture of the lumber, etc., and was at the time engaged in other work, he could not recover for his services and expenses as superintendent).

Mo.—Smith v. Crews, 2 Mo. A. 269.

N. J.—Ridgeway v. Ludlam, 7 N. J. Eq. 123 (where it was held that if the agent for the performance of certain services, for which a salary or yearly sum is to be allowed him, neglects to keep an account of moneys received by him in his agency, and several annual accounts are settled between him and his principal, in which considerable amounts of money previously received by him are omitted to be credited to the principal, and the omission is not supplied until the principal, in consequence of information received from others, makes inquiry of the agent in reference thereto, the salary or yearly sum for the years in which such omission occurred shall be disallowed).

N. C.—Motley v. Motley, 42 N. C. 211.

Tenn.—Pointer v. Smith, 7 Heisk. 137.

Tex.—Nugent v. Martin, 1 Tex. A. Civ. Cas. § 1173.

Eng.—White v. Lincoln, 8 Ves. Jr. 363, 32 Reprint 395. And see Gray v. Haig, 20 Beav. 219, 52 Reprint 587.

[a] **But if an agent is made to account for interest and damages** he should be allowed his compensation. Maupin v. Everett, 8 KyL 356.

35. Sampson v. Somerset Iron Works Co., 6 Gray (Mass.) 120, 122 (holding that, under a written contract to perform for a fixed quarterly salary all the duties of a general agent of a manufacturing corporation, one of which, specified in the contract, was to render monthly accounts of the funds in his hands, distinct and separable from the other duties of the agency, a failure to render such accounts would not defeat the agent's right to recover his salary while he remained the agent of the corporation. Merrick, J., in giving the opinion of the court in this case, said: "The agreement of the plaintiff to render a monthly account of the funds of the company had no necessary connection with the other duties he was bound to perform in their behalf. It was without doubt considered a very useful and important part of the special services he was to render to his employers, the neglect of which might have afforded them just cause of complaint. But it was distinct and separable from many other things to be done by him in his capacity as agent, and therefore cannot be regarded as a condition precedent. It was a stipulation only, upon the breach of which he was liable for damages for what-

cipal has suffered thereby.[36]

[§ 430] **(3) Representing Adverse Interest; Commissions from Adverse Party or Both Parties —(a) In General.**[37] An agent is held to the utmost good faith in his dealings with his principal, and if, in the transaction of the agency, he represents persons having interests adverse to those of the principal, he generally loses his right to compensation,[38] unless the principal, either expressly or by implication from the facts and circumstances of the case, consents to the dual employment,[39] or waives, or estops himself from asserting, any objection based thereon.[40]

Knowledge on part of principal. This rule is based on the grounds of public policy, and the mere fact that the principal had knowledge that the agent was also acting for the other party, without any consent thereto, will not enable the agent to recover compensation.[41]

Extent of rule. An agent who represents the adverse party, without his principal's consent, not only loses his right to compensation from his principal;[42] but he cannot recover compensation from the adverse party, on either an express or an implied promise to pay,[43] unless the principal consents not only to the dual agency, but also to the double

ever injury was in any way caused to the defendants").

36. Jones v. Hoyt, 25 Conn. 374 (holding that, if the agent has acted honestly, and has given a satisfactory explanation of his neglect to keep exact accounts, and such neglect does not amount to gross carelessness, then he may recover compensation); Lee v. Clements, 48 Ga. 128; Gallup v. Merrill, 40 Vt. 133; Walker v. Norton, 29 Vt. 226.

37. **Capacity of agent of one party to represent another** see supra § 23.

Misrepresentation, concealment, or nondisclosure of best terms obtainable as defeating right to compensation see supra § 428.

Right of principal to compel agent to account for compensation secretly paid him by adverse party see supra §§ 356, 357.

Representation of adverse interest: By auctioneer see Auctions and Auctioneers [4 Cyc 1047]. By broker see Brokers [19 Cyc 207, 226, 234]. By insurance agent see Insurance [22 Cyc 1436, 1445].

38. U. S.—Wadsworth v. Adams, 138 U. S. 380, 11 SCt 303, 34 L. ed. 984; Audubon Bldg. Co. v. Andrews, 187 Fed. 254, 111 CCA 92; Williams v. McKinley, 65 Fed. 4 [aff 74 Fed. 94, 20 CCA 312]; St. Louis Electric Light, etc., Co. v. Edison Gen. Electric Co., 64 Fed. 997.

Cal.—Berlin v. Farwell, 3 Cal. Unrep. Cas. 634, 31 P 527 (so holding, although the agent had no agreement with the adverse party for compensation, and was to get his compensation from his principal).

Colo.—Bilz v. Powell, 50 Colo. 482, 117 P 344, 38 LRANS 847; Alta Inv. Co. v. Worden, 25 Colo. 215, 53 P 1047; Deutsch v. Baxter, 9 Colo. A. 58, 47 P 405.

Conn.—Schleifenbaum v. Rundbaken, 81 Conn. 623, 71 A 899.

Del.—Cranston v. Nields, 5 Del. 372.

Ga.—Larey v. Baker, 86 Ga. 468, 12 SE 684.

Ill.—Smythe v. Evans, 209 Ill. 376, 70 NE 906; Byrd v. Hughes, 84 Ill. 174, 25 AmR 442; Hampton v. Lackens, 72 Ill. A. 442; Boyd v. Dullaghan, 33 Ill. A. 266; Kronenberger v. Fricke, 22 Ill. A. 550.

Ky.—Mullen v. Keetzleb, 7 Bush 253.

Md.—Raisin v. Clark, 41 Md. 158, 20 AmR 66; Schwartze v. Yearly, 31 Md. 270.

Mass.—Farnsworth v. Hemmer, 1 Allen 494, 79 AmD 756 [appr Rice v. Wood, 113 Mass. 133, 18 AmR 459].

Mich.—McDonald v. Maltz, 94 Mich. 172, 53 NW 1058, 34 AmSR 331. And see Humphrey v. Eddy Transp. Co., 107 Mich. 163, 65 NW 13.

Mo.—Atterbury v. Hopkins, 122 Mo. A. 172, 99 SW 11; Dennison v. Aldrich, 114 Mo. A. 700, 91 SW 1024; Carr v. Ubsdell, 97 Mo. A. 326, 71 SW 112; Rosenthal v. Drake, 82 Mo. A. 358; Chapman v. Currie, 51 Mo. A. 40.

N. Y.—Murray v. Beard, 102 N. Y. 505, 7 NE 553; Levy v. Loeb, 85 N. Y. 365; Carman v. Beach, 63 N. Y. 97; Frankel v. Wathen, 58 Hun 543, 12 NYS 591; Siegel v. Gould, 7 Lans. 177; Bennett v. Kidder, 5 Daly 512; Pugsley v. Murray, 4 E. D. Smith 245; Dunlop v. Richards, 2 E. D. Smith 181; Watkins v. Cousall, 1 E. D. Smith 65; Palmer v. Pirson, 4 Misc. 455, 24 NYS 333 [aff 144 N. Y. 654 mem, 39 NE 494 mem].

Oh.—Capener v. Hogan, 40 Oh. St. 203; Bell v. McConnell, 37 Oh. St. 396, 41 AmR 528.

Pa.—Rice v. Davis, 136 Pa. 439, 20 A 513, 20 AmSR 931 [cit Pennsylvania R. Co. v. Flanigan, 112 Pa. 558, 4 A 364; Everhart v. Searle, 71 Pa. 256]; Pratt v. Patterson, 112 Pa. 475, 3 A 858; Marshall v. Reed, 32 Pa. Super. 60.

S. D.—Lemon v. Little, 21 S. D. 628, 114 NW 1001.

Tenn.—Moinett v. Days, 1 Baxt. 431.

Tex.—Armstrong v. O'Brien, 83 Tex. 635, 19 SW 268; Moore v. Kelley, (Civ. A.) 162 SW 1034. See also Cotton v. Rand, 93 Tex. 7, 51 SW 838, 53 SW 343 [rev (Civ. A.) 51 SW 55]; Smith v. Tripis, 2 Tex. Civ. A. 267, 21 SW 722.

Wis.—Orton v. Scofield, 61 Wis. 382, 21 NW 261.

Eng.—Bartram v. Lloyd, 88 L. T. Rep. N. S. 286 [app allowed 90 L. T. Rep. N. S. 357]; Hurst v. Holding, 3 Taunt. 32, 128 Reprint 13.

Can.—Onsum v. Hunt, 12 WestLR 680.

[a] **"An agent will forfeit his commissions** if he engages in any transaction which amounts to a fraud upon his principal, such as betraying his trust by acting adversely to his interests." Bilz v. Powell, 50 Colo. 482, 497, 117 P 344, 38 LRANS 847.

[b] **Reason for rule.**—In Bell v. McConnell, 37 Oh. St. 396, 399, 41 AmR 528, the court said: "Several reasons may be given for this rule. In law, as in morals, it may be stated that as a principal, no servant can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Luke, 16, 13. Unless the principal contracts for less, the agent is bound to serve him with all his skill, judgment and discretion. The agent cannot divide this duty and give part to another. Therefore, by engaging with the second, he forfeits his right to compensation from the one who first employed him. By the second engagement, the agent, if he does not in fact disable himself from rendering to the first employer the full quantum of service contracted for, at least tempts himself not to do so. And for the same reason, he cannot recover from the second employer, who is ignorant of the first engagement. And if the second employer has knowledge of the first engagement, then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract entered into in fraud of the rights of the first employer. It is no answer, to say, that the second employer having knowledge of the first employment should be held liable on his promise, because he could not be defrauded in the transaction. The contract itself is void as against public policy and good morals, and both parties thereto being in pari delicto, the law will leave them as it finds them. Ex dolo malo non oritur actio."

[c] **Agent jointly interested with other party.**—An agent for the sale of real estate was furnished by his principal with the lowest price for, and the terms on which, the property should be sold. The agent communicated this information to a proposed purchaser, and entered into an agreement with him by which they were to purchase the property jointly. Part of the agreement was that the agent should apply his commissions for procuring the purchaser, in part payment of the interest he was to have in the purchase, and that he should afterward operate the stone quarry which was on the property for the joint account of the purchaser and himself. It was held that the agent was not entitled to his commissions. Finch v. Conrade, 154 Pa. 326, 26 A 368.

[d] **As between agent and subagent.**—Where an agent appointed to sell real estate, employs a subagent, the latter cannot, as against the former, terminate the subagency while the primary agency continues, and accept independent employment from the principal to sell the property. If he does so, he forfeits his right to the compensation agreed upon between him and the primary agent. Dennison v. Aldrich, 114 Mo. A. 700, 91 SW 1024.

[e] **What not acting for other party.**—Where the interviews of a land broker with a proposed purchaser, who knew before examining the premises that the broker had them for sale, grew out of such agency, the broker's conduct on securing the offer of purchase and reporting it to the owner of the property, will not bear the interpretation that he was acting as an agent for such purchaser, instead of for the owner. Lorimer v. Boylan, 98 Mich. 18, 56 NW 1043.

39. Wright v. Welch, 10 D. C. 479; McGeehan v. Gaar, 122 Wis. 630, 100 NW 1072. See also Jarvis v. Schaefer, 105 N. Y. 289, 11 NE 634; Barry v. Schmidt, 57 Wis. 172, 15 NW 24, 46 AmR 35.

[a] **Rule for principal's benefit.**—The rule that an agent cannot represent both parties to a transaction is to protect the principal, and not to benefit the general public. Where the parties agree to allow an agent to represent them both, he may do so, and may collect compensation from both. Fryer v. Harker, 142 Iowa 708, 121 NW 526, 23 LRANS 477.

40. See infra § 434.

41. Conn.—Bollman v. Loomis, 41 Conn. 581.

Mass.—Walker v. Osgood, 98 Mass. 348, 93 AmD 168; Farnsworth v. Hemmer, 1 Allen 494, 79 AmD 756.

N. Y.—Goodell v. Hurlbut, 5 App. Div. 77, 38 NYS 749.

Oh.—Bell v. McConnell, 37 Oh. St. 396, 41 AmR 528.

Pa.—Law v. Billington, 180 Pa. 84, 36 A 402 (holding that the mere fact that the principal knows that his agent is also representing adverse interests does not entitle the agent to compensation, where the principal does not consent to the dual agency).

Eng.—Morison v. Thompson, L. R. 9 Q. B. 480.

42. See supra this section, text and notes 38–41.

43. Colo.—Alta Inv. Co. v. Wor-

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compensation,[44] because a secret contract by the adverse party to compensate the agent is illegal, as tending to work a fraud upon the principal.[45] Nor can two agents, representing adverse parties, lawfully agree to share their commissions, so as to render the one liable to the other for his agreed share.[46]

Where the agent acts with the consent of both parties he may recover commissions from either party.[47]

[§ 431] **(b) Commission from Adverse Party or Both Parties.** In the absence of estoppel or waiver,[48] an agent loses his right to compensation from the principal, if, without the principal's express or implied consent,[49] he accepts compensation from the adverse party,[50] or has even a promise of compensation from him.[51] But the mere fact that a subagent, employed by the agent and ratified by the principal, secretly accepts compensation from the adverse party, does not cause the agent to lose his right to compensation from the principal.[52]

[§ 432] **(c) Application of Rules.** The above rules apply notwithstanding any custom or usage to the contrary,[53] and regardless of the facts that

den, 25 Colo. 215, 53 P 1047 (holding that an agent who represents both buyer and seller, without their knowledge of such double representation, their interests being antagonistic, cannot recover from either).

Ill.—Kronenberger v. Fricke, 22 Ill. A. 550.

Ky.—Lloyd v. Colston, 5 Bush 587.

Mich.—Leathers v. Canfield, 117 Mich. 277, 75 NW 612, 45 LRA 33 and note.

Mo.—Rosenthal v. Drake, 82 Mo. A. 358.

Nebr.—Shelton Impl. Co. v. Schieck, 81 Nebr. 826, 116 NW 951.

N. Y.—Vanderpoel v. Kearns, 2 E. D. Smith 170; Labinsks v. Holst, 84 NYS 991.

Or.—Jameson v. Coldwell, 25 Or. 199, 35 P 245.

Wis.—Meyer v. Hanchett, 39 Wis. 419, 43 Wis. 246.

Ont.—Jones v. Linde British Refrigeration Co., 32 Ont. 191.

Que.—Browne v. Gault, 19 Que. Super. 523.

See In re Etna Ins. Co., Ir. R. 7 Eq. 235 [aff Ir. R. 7 Eq. 424].

[a] **Ratification of adverse party.**—Where a corporation purchaser rescinds a contract of sale made by its president and secretary, because of a secret arrangement by which the seller was to pay those officers a commission, the fact that the seller, in an action against him by the officers for commissions, counterclaims for damages because of the officers' unauthorized execution of the contract, does not constitute a ratification of the contract by the seller, and make him liable for the commissions. Jameson v. Coldwell, 25 Or. 199, 35 P 245.

44. Pennsylvania R. Co. v. Flanigan, 112 Pa. 558, 4 A 364.

[a] **If the principal thus consents, the adverse party is liable** to the agent on his agreement. Leekins v. Nordyke, 66 Iowa 471, 24 NW 1; Bell v. McConnell, 37 Oh. St. 396, 41 AmR 528. But see Raisin v. Clark, 41 Md. 158, 20 AmR 66.

Necessity of promise by adverse party to compensate agent see infra § 444.

45. Conn.—Bollman v. Loomis, 41 Conn. 581.

Ill.—Hampton v. Lackens, 72 Ill. A. 442.

Mass.—Holcomb v. Waver, 136 Mass. 265; Rice v. Wood, 113 Mass. 133, 18 AmR 459; Smith v. Townsend, 109 Mass. 500.

Mich.—Scribner v. Collar, 40 Mich. 375, 29 AmR 541.

Mo.—Chapman v. Currie, 51 Mo. A. 40.

N. Y.—Goodell v. Hurlbut, 5 App. Div. 77, 38 NYS 749.

Oh.—Bell v. McConnell, 37 Oh. St. 396, 41 AmR 528; Cincinnati, etc., R. Co. v. Morris, 10 Oh. Cir. Ct. 502, 6 Oh. Cir. Dec. 640.

Pa.—Rice v. Davis, 136 Pa. 439, 20 A 513, 20 AmSR 931; Pennsylvania R. Co. v. Flanigan 12 Pa. 558, 4 A 364; Everhart v. Searle, 71 Pa. 256.

Eng.—Harrington v. Victoria Graving Dock Co., 3 Q. B. D. 549.

[a] **Where an agent to sell enters into a contract with one desiring to buy,** that he will introduce him to the vendor and promote the sale if he will subsequently sell him part of the property at an agreed price, such contract is invalid and cannot be enforced. Hughes v. Washington, 72 Ill. 84; Smith v. Townsend, 109 Mass. 500.

46. Levy v. Spencer, 18 Colo. 532, 33 P 415, 36 AmSR 303; Howard v. Murphy, 70 N. J. L. 141, 56 A 143 (holding that a contract between an agent acting for the vendor and an agent acting for the purchaser to share between them the difference between the price paid by the purchaser and the price received by the vendor which contract is unknown to the purchaser is not enforceable). And see In re Etna Ins. Co., Ir. R. 7 Eq. 235 [aff Ir. R. 7 Eq. 424].

47. U. S.—Nevada Nickel Syndicate v. National Nickel Co., 96 Fed. 133; Pine Mountain Iron, etc., Co. v. Bailey, 94 Fed. 258, 36 CCA 229.

Ind.—Alexander v. Northwestern Christian Univ., 57 Ind. 466.

Mo.—Robinson v. Jarvis, 25 Mo. A. 421; De Steiger v. Hollington, 17 Mo. A. 382.

N. Y.—Jarvis v. Schaefer, 105 N. Y. 289, 11 NE 634; Reed v. Hayward, 82 App. Div. 416, 81 NYS 608; Pugsley v. Murray, 4 E. D. Smith 245; Dunlop v. Richards, 2 E. D. Smith 181.

Oh.—Capener v. Hogan, 40 Oh. St. 203; Bell v. McConnell, 37 Oh. St. 396, 41 AmR 528.

Pa.—Valley Glass Co. v. American Cent. Ins. Co., 197 Pa. 254, 47 A 232; Patterson v. Van Loon, 186 Pa. 367, 40 A 495; Lawall v. Groman, 180 Pa. 532, 37 A 98, 57 AmSR 662.

Tex.—Baldwin v. Root, 38 SW 630; Shropshire v. Adams, 40 Tex. Civ. A. 339, 89 SW 448.

Wis.—Barry v. Schmidt, 57 Wis. 172, 15 NW 24, 46 AmR 35.

[a] **Contract with seller by authority of purchaser.**—If a principal, in authorizing an agent to make a purchase, also authorizes him to contract with the seller for a commission sufficient to pay him for his services, and the seller, knowing his relation to the purchaser, contracts to pay him a commission, he cannot afterward avoid paying it on the ground that the contract was void, as being in violation of the good faith which an agent owes to his principal. Leekins v. Nordyke, etc., Co., 66 Iowa 471, 24 NW 1.

48. See infra § 434.

49. See cases cited infra note 50.

[a] **If the principal consents** to the agent's receiving a commission from the adverse party, the agent by receiving it does not forfeit his right to compensation from the principal. Such consent may be implied, as well as express. Culverwell v. Birney, 11 Ont. 265, 272 (where the court said: "It does not appear to me that the agent is bound to give express notice to the principal, nor that the principal's assent must be made in express terms. It is sufficient if from the nature of the circumstances, it appears that the principal must have been aware of the fact, and that by making no active objection at the time he intended not to raise any objection").

50. Ind.—Cleveland, etc., R. Co. v. Pattison, 15 Ind. 70.

Ky.—Lloyd v. Colston, 5 Bush 587.

Mo.—Dennison v. Aldrich, 114 Mo. A. 700, 91 SW 1024. See also Chapman v. Currie, 51 Mo. A. 40.

Nebr.—Campbell v. Baxter, 41 Nebr. 729, 60 NW 90.

N. Y.—Frankel v. Wathen, 58 Hun 543, 12 NYS 591. See also Pugsley v. Murray, 4 E. D. Smith 245.

R. I.—Lynch v. Fallon, 11 R. I. 311, 23 AmR 458.

S. D.—Lemon v. Little, 21 S. D. 628, 114 NW 1001 (holding that one employed to secure for his employer options on mining claims cannot receive compensation from the parties executing the options without losing his right to compensation from his employer if he is ignorant of the facts).

Tex.—Tinsley v. Penniman, 12 Tex. Civ. A. 591, 34 SW 365.

Can.—Kersteman v. King, 15 Can. L. J. 140.

Ont.—Peacock v. Crane, 29 Ont. L. 282, 3 OntWN 1184, 21 OntWR 990, 4 OntWN 1240.

See Hampton v. Lackens, 72 Ill. A. 442.

See also supra § 430.

[a] **Deduction of amount.**—An agreement by a tenant to accept a certain commission for aiding his lessor to sell the premises implies a willingness on the part of the tenant to surrender possession to the purchaser, and, on the tenant demanding and receiving a certain amount from the purchaser in consideration for surrendering the premises, the lessor is entitled to deduct such amount from the commission. Irick v. Wise, 44 Ga. 272.

51. Walker v. Osgood, 98 Mass. 348, 93 AmD 168; Manitoba, etc., Land Corp. v. Davidson, 34 Can. S. C. 255 [rev 14 Man. 232]; Kersteman v. King, 15 Can. L. J. 140.

52. Powell v. Jones, 20 T. L. R. 329 [app dism [1905] 1 K. B. 11, 3 BRC 252].

53. Md.—Raisin v. Clark, 41 Md. 158, 20 AmR 66.

Mass.—Walker v. Osgood, 98 Mass. 348, 93 AmD 168; Farnsworth v. Hemmer, 1 Allen 494, 79 AmD 756.

R. I.—Lynch v. Fallon, 11 R. I. 311, 23 AmR 458.

Wis.—Meyer v. Hanchett, 39 Wis. 419, 43 Wis. 246.

Eng.—Bartram v. Lloyd, 88 L. T. Rep. N. S. 286 [app allowed 90 L. T. Rep. N. S. 357]. Contra Great Western Ins. Co. v. Cunliffe L. R. 9 Ch. 525; Holden v. Webber, 29 Beav. 117, 54 Reprint 571.

[a] **Usage unreasonable and contrary to good morals.**—In Farnsworth v. Hemmer, 1 Allen (Mass.) 494, 496, 79 AmD 756, the court said: "A custom or usage to be legal and valid must be reasonable and consistent with good morals and sound policy, so that parties may be supposed to have made their contracts with reference to it. If such a usage is shown to exist, then it becomes the law by which the rights of the parties are to be regulated and governed. But the usage on which the plaintiff relied was wanting in these essential elements. It would be unreasonable, because, if established, it would operate to prevent the faithful fulfillment of the contract of agency. It would be contrary to good morals and sound policy, because it would tend to sanction an unwarrantable concealment of facts essential to a contract, and op-

the agent acted in good faith,[54] and that the principal was not injured by the breach of duty.[55]

When Rules Not Applicable. After the transaction for which the agent was employed has been closed, however, and the agency has terminated, the agent does not forfeit his right to compensation from his principal by representing the adverse party or by accepting compensation from him.[56] It is to be observed that the rules stated above do not apply against agents or brokers who act as mere middlemen in bringing the parties together, and have no hand in the negotiations between the parties, and take no part in settling the terms of the transaction between them.[57]

[§ 433] **(4) Individual Interest of Agent; Secret Profits.**[58] An agent who falsely denies that he has an individual interest in the subject matter of the agency which is antagonistic to that of the principal, or who misstates the nature or extent of his interest, or who conceals or fails to disclose his interest or its nature or extent, thereby deceiving the principal, is guilty of a fraud which generally forfeits his right to compensation for his services as agent.[59] Similarly he loses the right to compensation if in transacting the agency he seeks to advance his own interests at the expense of the principal's,[60] thereby reaping a secret profit,[61] as, where he sells to his principal property in which

erate as a fraud on parties who had a right to rely on the confidence reposed in their agents."

54. Mass.—Rice v. Wood, 113 Mass. 133, 18 AmR 459.

Mich.—Scribner v. Colla, 40 Mich. 375, 378, 29 AmR 541 (where the court said: "The cases are nearly, if not quite, uniform that where the double employment exists and is not known, no recovery can be had against the party kept in ignorance, and the result is not made to turn upon the presence or absence of designed duplicity and fraud, but is a consequence of established policy").

Mo.—Chapman v. Currie, 51 Mo. A. 40; De Steiger v. Hollington, 17 Mo. A. 382.

S. D.—Lemon v. Little, 21 S. D. 628, 114 NW 1001.

Eng.—Harrington v. Victoria Graving Dock Co., 3 Q. B. D. 549.

See Lightcap v. Nicola, 34 Pa. Super. 189.

55. U. S.—St. Louis Electric Light, etc., Co. v. Edison General Electric Co., 64 Fed. 997.

Colo.—Finnerty v. Fritz, 5 Colo. 174.

Mo.—Chapman v. Currie, 51 Mo. A. 40.

Pa.—Everhart v. Searle, 71 Pa. 256.

S. D.—Lemon v. Little, 21 S. D. 628, 114 NW 1001.

See Harrington v. Victoria Graving Dock Co., 3 Q. B. D. 549.

56. Green v. Robertson, 64 Cal. 75, 28 P 446; Finnerty v. Fritz, 5 Colo. 174 (holding that, where an agent to sell property negotiates such sale, as is evidenced by the delivery of a title bond and deed in escrow, to be delivered upon the payment in full of the price, he may negotiate a sale of the same property for the purchaser without forfeiting his commissions); Short v. Millard, 68 Ill. 292 (holding, that where the owner of land employed an agent to sell the same, agreeing, if the latter would find a purchaser at a fixed price, which he did, to pay him five hundred dollars, as soon as the agent procured the purchaser, his agency ceased, and that his taking a retainer from the purchaser, to see that the papers were properly prepared and executed, presented no ground for defeating a recovery of the price agreed to be paid him). Compare Asher v. Beckner, 41 SW 35, 19 KyL 521 (holding that an agent who sells land and subsequently accepts employment as attorney for the persons to whom the land was sold to resist the enforcement of the contract for the sale, defeats his right to compensation from the vendor, whether he acts as attorney or as agent in making the sale, and whether or not he uses adversely to the vendor information which he has acquired in relation to the land).

57. Cal.—Green v. Robertson, 64 Cal. 75, 28 P 446.

Mass.—Walker v. Osgood, 98 Mass. 348, 93 AmD 168; Rupp v. Sampson, 16 Gray 398, 77 AmD 416.

Mich.—Leathers v. Canfield, 117 Mich. 277, 75 NW 612, 45 LRA 33 and note; Montross v. Eddy, 94 Mich. 100, 53 NW 916, 34 AmSR 323; Ranney v. Donovan, 78 Mich. 318, 44 NW 276.

R. I.—Lynch v. Fallon, 11 R. I. 311, 23 AmR 458.

Wis.—Orton v. Scofield, 61 Wis. 382, 21 NW 261; Barry v. Schmidt, 57 Wis. 172, 15 NW 24, 46 AmR 35; Herman v. Martineau, 1 Wis. 151, 60 AmD 368.

See also Brokers [19 Cyc 226, 234].

[a] **Illustration.**—An agent who is employed to sell lands at a fixed price, and who, after finding a purchaser at that price, acts, with the knowledge of the vendor, as the agent of such purchaser in signing his name to the contract of sale, is entitled, nevertheless, to recover from the vendor the agreed commission on the sale. Barry v. Schmidt, 57 Wis. 172, 15 NW 24, 46 AmR 35.

[b] **Plaintiff held to have acted as agent and not as mere middleman** see Rice v. Wood, 113 Mass. 133, 18 AmR 459; Walker v. Osgood, 98 Mass. 348, 93 AmD 168; Leathers v. Canfield, 117 Mich. 277, 75 NW 612, 45 LRA 33; Scribner v. Collar, 40 Mich. 375, 29 AmR 541.

58. **Capacity of person individually interested to represent another** see supra § 23.

Individual interest: Of auctioneer see Auctions and Auctioneers [4 Cyc 1047]. Of broker see Brokers [19 Cyc 206, 227, 228]. Of insurance agent see Insurance [22 Cyc 1435, 1442].

59. Hoffin v. Moss, 67 Fed. 440, 14 CCA 459; Eagle Distillery Co. v. McFarland, 11 KyL 905; Humphrey v. Eddy Transp. Co., 107 Mich. 163, 65 NW 13. See also Cotton v. Rand, 93 Tex. 7, 51 SW 838, 53 SW 343 [rev (Civ. A.) 51 SW 55].

[a] **Misrepresentations as to necessity of acquiring interest.**—A principal employed an agent to sell land at a minimum price of four dollars per acre. The agent found two persons who wanted the land, and they, supposing that he was their agent in the premises, took him in as an equal partner in the purchase at four dollars per acre. The agent falsely represented to the principal that his customers would not take the land unless he was admitted as a partner in the purchase. The principal signed a contract to convey the land to the agent and his customers at the minimum price. It was held that the agent was not entitled to recover compensation, since he acted in bad faith and in hostility to the interests of the principal. Smith v. Tripis, 2 Tex. Civ. A. 267, 21 SW 722.

60. Hoffin v. Moss, 67 Fed. 440, 14 CCA 459; Preston v. Grimes, 14 KyL 810; Hobson v. Peake, 44 La. Ann. 883, 10 S 762; Witte v. Storm, 236 Mo. 470, 139 SW 384; Gibson v. Bailey Co., 114 Mo. A. 350, 89 SW 597 (holding that a general agent for the sale of the principal's goods, who during his agency procured the cancellation of orders taken by him for his principal so that he might place them with another company in which he was interested, is guilty of such misconduct as will defeat his action for compensation for other goods sold for his principal). See however Jackson v. Pleasanton, 101 Va. 282, 43 SE 573.

61. U. S.—Williams v. McKinley, 65 Fed. 4 [aff 74 Fed. 94, 20 CCA 312] (where it appeared that complainant was the owner of a quantity of land on which iron ore had been discovered; that at the request and upon the representation of defendant that it would facilitate negotiations by him with certain capitalists for a lease of the mines to them, complainant executed to defendant a lease of certain lands providing for certain royalties on all ore mined in lieu of rent, and a contract was executed at the same time by both parties by which defendant agreed, in consideration of the receipt by him of one fifth of the net revenues derived by complainant from royalties, faithfully to manage said property under complainant's direction, for their mutual interests; that the contract also provided that if defendant, without complainant's consent, used or transferred the lease otherwise than to the capitalists with whom he was negotiating he should thereby forfeit his one-fifth interest; that defendant's negotiations failed, and complainant then at his request consented to his leasing a part of the land to M; that instead of leasing a part, defendant leased to M the whole of the land, and immediately took back a lease to himself of the part as to which no permission to lease had been given by complainant; that he then proceeded to lease parts of this land to sundry persons for mining purposes, receiving from them large sums in money and stocks and that of all these facts complainant had no knowledge until long afterward).

Conn.—Schleifenbaum v. Rundbaken, 81 Conn. 623, 71 A 899.

Ga.—Williams v. Moore-Gaunt Co., 3 Ga. A. 756, 60 SE 372.

Mass.—Little v. Phipps, 208 Mass. 331, 94 NE 260, 34 LRANS 1046 and note.

N. J.—Quinn v. Le Duc, (Ch.) 51 A 199 (where it appeared that the agent had been employed to collect by attachment a debt owing the principal; that the agent knew that the principal expected to attend the attachment sale in order to bid; and that he could have bid at least nine hundred dollars, with no obligation to pay more than eighty dollars in cash; but that owing to the agent's conduct the principal did not attend the sale, and the property was sold for eighty dollars, and shortly afterward conveyed to the agent, he having furnished the money).

N. Y.—La Forge v. Cornell, 127 NYS 453.

Eng.—Price v. Metropolitan House Inv., etc., Co., 23 T. L. R. 630. See also Gray v. Haig, 20 Beav. 219, 52 Reprint 587.

Secret profits resulting from misrepresentation, concealment, or nondisclosure of best terms obtainable for principal see supra § 428.

Right of principal to compel agent to account for secret profits see supra §§ 356, 357.

[a] **Profit of agent as counterclaim against compensation.**—A claim on the part of the principal against his agent for profit made by him in the course of his employment may be interposed as a counterclaim in an

he has an interest.[62] If an agent acquires an individual interest in the subject matter of the agency, without his principal's consent, he likewise forfeits his right to compensation,[63] as where, having been employed to sell his principal's property, he purchases the same without the principal's knowledge and consent, and is therefore not entitled to commissions on the sale.[64] This rule also applies to a purchase through others, as a result of which the agent acquires the property or an interest therein.[65]

After the termination of the agency, however, the agent may acquire an individual interest in the subject matter of the agency without forfeiting compensation previously earned.[66]

[§ 434] **(5) Estoppel and Waiver.** The principal may by his words or conduct waive the fraud, misconduct, etc., of his agent, or estop himself from taking advantage thereof, in which case the agent may recover compensation, if otherwise entitled thereto.[67] Thus a principal may preclude himself from asserting the agent's negligence or breach of duty to defeat the latter's right to compensation earned, by continuing him in his employment, with knowledge that he is not prosecuting his work with diligence, or is otherwise guilty of a breach of duty.[68]

[§ 435] **e. As Affected by Sufficiency of Agent's Services[69]—(1) In General.** In determining whether or not an agent is entitled to compensation under the contract of employment, it is of prime importance carefully to scrutinize the contract in order to determine precisely the nature and extent of the agent's undertaking.[70] Thus, where the agent is employed on a salary, the contract of agency determines when the salary begins,[71] and also when it accrues.[72] If an agent performs no service under his contract of employment, he cannot as a rule recover compensation thereunder.[73] So if he otherwise fails to perform his undertaking according to the terms of his contract, he is ordinarily debarred from recovering the compensation specified therein.[74] Generally speaking an agent is not entitled to compensation on account of unsuccessful efforts to negotiate the transaction which he was employed to negotiate.[75]

Where on the other hand an agent performs the undertaking assumed by him, he is generally entitled to the compensation specified in his contract of

action by the agent against the principal to recover for services rendered in a transaction other than that in which the profit was made. Schick v. Suttle, 94 Minn. 135, 102 NW 217.

[b] **Where an agent makes profit out of a sale of property by the principal to him** and such sale is afterward annulled by the principal, the agent is not entitled to any commissions on the sale of such property. Cadwallader v. Smith, etc., Co., 7 Philippine 461.

62. Wright v. Welch, 10 D. C. 479.

63. McGar v. Adams, 65 Ala. 106.

64. McGar v. Adams, 65 Ala. 106; Hobson v. Peake, 44 La. Ann. 383, 10 S 762; Jansen v. Williams, 36 Nebr. 869, 55 NW 279, 20 LRA 207; Salomons v. Pender, 3 H. & C. 639. See also Finch v. Conrade, 154 Pa. 326, 26 A 368; Cotton v. Rand, 93 Tex. 7, 51 SW 838, 53 SW 343 [rev (Civ. A.) 51 SW 55].

65. McGar v. Adams, 65 Ala. 106; Reardon v. Washburn, 59 Ill. A. 161; Smith v. Townsend, 109 Mass. 500.

[a] **Corporation in which agent stockholder.**—(1) An agent for the sale of property loses his right to commission from his principal where he does not disclose the fact that a corporation in which he is interested as stockholder and director is the real purchaser, and that the nominal purchaser, who has a valuable contract with the seller dependent upon the making of the sale, is furnishing a large bonus toward the purchase. Humphrey v. Eddy Transp. Co., 107 Mich. 163, 65 NW 13. (2) But where the general manager of a company was authorized to arrange for the sale of its property and to agree upon the commission to be paid to the agent for bringing about the sale, the company cannot avoid paying the commissions on the ground that the agent was himself interested in the company to which the sale was made, and that a third company was contributing a bonus toward the purchase price, if knowledge of these facts was brought home to the general manager before the sale. Humphrey v. Eddy Transp. Co., 115 Mich. 420, 73 NW 422.

66. McGar v. Adams, 65 Ala. 106. See also supra § 368.

67. McKenzie v. Champion, 4 Man. 158 (holding that misconduct of an agent in taking a deposit from a customer for the principal's property does not defeat his right to compensation, where the principal accepts the deposit).

[a] **Where the agent has accepted compensation from the adverse party** he cannot recover compensation from the principal, unless the latter agreed expressly, with a knowledge of all the circumstances, to waive his right to refuse compensation. Rice v. Davis, 136 Pa. 439, 20 A 513, 20 AmSR 931 (holding that, where an agent of the owner for the sale of stock receives from a purchaser thereof compensation for his services, the fact that such receipt was with the knowledge and without the objection of the seller will not constitute a waiver of the rule and preserve the right of the agent to be compensated by the seller). But see Davis v. Huber Mfg. Co., 119 Iowa 56, 93 NW 78 (holding that, where a contract of agency between a machinery company and a local agent provided that, if the agent solicited orders for other houses, the company might cancel the contract, and the agent did solicit orders for other houses, but the company knew of it, and did nothing, the company could not interpose the breach of contract to defeat commissions earned by the agent); Culverwell v. Campton, 31 U. C. C. P. 342 (where an express waiver was not required in order to entitle the agent to recover from his principal).

[b] **Waiver by crediting wages on ledger.**—In an action by an agent against his principals for wages for services rendered under a contract terminated by them, evidence that on terminating it they credited him on their ledger for the full amount of his stipulated wages up to that time is competent to prove that they waived any claim to a forfeiture thereof, although the entry on the ledger was made without his knowledge. Bell v. Smith, 99 Mass. 617.

68. Davis v. Huber Mfg. Co., 119 Iowa 56, 93 NW 78 (where the principal, with knowledge of the agent's breach of duty, continued him in the employment and accepted the benefits of his services); Spinks v. Georgia Quincy Granite Co., 114 La. 1044, 38 S 824; Williams v. Gregg, 21 S. C. Eq. 297.

69. **Construction of contract as to compensation in general** see supra § 416.

Illegality of transaction as defeating right to compensation see supra § 427.

Sufficiency of broker's services as affecting right to compensation see Brokers [19 Cyc 240 et seq].

Termination of agency as affecting right to compensation for past or future services see supra §§ 419–426.

Time within which transaction must be negotiated see supra § 420.

70. See Endleman v. Rothschild, 2 OntWN 25, 16 OntWR 925.

71. Louisville Soap Co. v. Vance, 58 SW 985, 22 KyL 847 (holding that where plaintiff, who was employed by defendant as a traveling salesman for an indefinite time and who was to receive both a salary and commissions, must have understood from the circumstances that defendant was acting on the idea that plaintiff's salary would not begin until he was sent out, plaintiff, by remaining silent, acquiesced in that construction of the contract).

72. Bair v. Hilbert, 84 App. Div. 621, 82 NYS 1010 (holding that a contract in writing which stipulated that plaintiff should sell defendant's goods throughout the country, paying his own expenses, that defendant should pay him therefor a sum equal to fifteen per cent of the gross amount of the orders accepted, that in case plaintiff's sales exceeded in the aggregate fourteen thousand dollars during the year, one half of the commissions should go toward payment of a prior indebtedness due defendant, that the agreement should remain in force one year, was simply an agreement to pay a certain rate of commission for the sale of goods, and that the commissions should be paid and the goods should be sold during the period of one year, and it could not be so construed that nothing became due in favor of either party until the expiration of the year); Cotton v. Rand, 93 Tex. 7, 51 SW 838, 53 SW 343 (holding that a stipulation in an agreement that an agent was not to look to his principal for payment, but that his salary, a fixed amount per year, would be paid from sales of, or by borrowing money upon, the property which he was to manage, controlled the manner and source of payment, but not the time when the salary fell due, which was at the end of each year).

73. Sanborn v. U. S., 135 U. S. 271, 10 SCt 812, 34 L. ed. 112; Landis v. Scott, 32 Pa. 495 (where an agent was disallowed commissions on rents of his principal's property of which he himself was the tenant).

74. Attrill v. Patterson, 58 Md. 226; Warde v. Stuart, 1 C. B. N. S. 88, 87 ECL 88, 140 Reprint 36.

75. Gilbert v. Judson, 85 Cal. 105, 24 P 643; Hamond v. Holiday, 1 C. & P. 384, 12 ECL 228; Cousens v. Mitcheson, 1 New Rep. 240. Compare Attrill v. Patterson, 58 Md. 226 (where it appeared that plaintiff was employed to negotiate a compromise between two gas companies, the agree-

employment,[76] even though his services are in fact of no benefit to the principal;[77] and a substantial performance on his part is generally sufficient for this purpose.[78] Thus, where a sales agent is by the contract entitled to commissions on orders taken by him and accepted by the principal, he is entitled to the commission on orders accepted, although the buyer subsequently proves financially irresponsible,[79] or refuses to complete the purchase.[80] But the agent's right to compensation may be restricted by contract to sales made to responsible parties only;[81] and, where such is the case, it would seem that the burden is upon the agent to show that the purchaser whom he procured was responsible.[82]

In the absence of any express agreement as to when compensation is to be made, the whole service or duty on the part of the agent must, as a general rule, be performed before the right to compensation accrues,[83] unless the principal waives a full performance on the part of the agent.[84]

Ratification. Although the agent acts in excess of his authority, yet, if the principal ratifies his acts and accepts the benefits of his services, he is entitled to compensation therefor.[85]

[§ 436] **(2) Contingent Compensation. In General.** Frequently the agent's right to compensation, whether by way of commissions or salary, is made to depend upon various contingencies and conditions, or upon the accomplishment of a certain result, and to entitle him to compensation where this is the case, such contingencies and conditions, or contemplated result, must, as a general rule, first be performed or accomplished.[86] Thus the agent's right to compensation may be made to depend upon

ment being that if successful he should receive fifty thousand dollars therefor; that he failed to effect a compromise, and thereupon defendant took legal advice, as the result of which suit was brought, and after judgment had been obtained against the hostile company, they compromised; that plaintiff's services were not entirely dispensed with after the institution of the legal proceedings, but he took at most only a subordinate part in the management of the matter thereafter; and it was held that while he was not entitled to the fee of fifty thousand dollars, he was entitled to a reasonable sum to reimburse him for his services after the failure of his efforts to compromise without suit); McEwen v. Loucheim, 115 N. C. 348, 20 SE 519; Stewart v. Kahle, 3 Stark. 161, 3 ECL 636.

[a] **Agent entitled to reasonable remuneration** under an oral promise of expenses and remuneration if there was no sale, although there was a written agreement for commission see Harris v. Dunsmuir, 9 B. C. 303.

76. Ga.—Mitchem v. Georgia Cotton Oil Co., 139 Ga. 519, 77 SE 627.

Ill.—Mayer v. McCann, 136 Ill. A. 501 [aff 232 Ill. 507, 83 NE 1042] (contract to introduce seller to parties who shall afterward buy, performed by introduction).

Md.—Law v. Townsend, 11 Gill & J. 407 (holding that, where a contract was that A should allow B a commission on all business sent by the latter to the former, the title to the commission is completed by sending the business).

Mich.—McKinnon v. Gates, 102 Mich. 618, 61 NW 74; Tompkins v. Hitchcock, 69 Mich. 121, 36 NW 742.

Minn.—Scovell v. Upham, 55 Minn. 267, 56 NW 812.

N. Y.—Newhall v. Appleton, 61 N. Y. Super. 251, 19 NYS 701; Dibble v. Dimick, 4 Misc. 190, 23 NYS 680 [aff 143 N. Y. 549, 38 NE 724].

Or.—Saubert v. Conley, 10 Or. 488 (holding that, where payments were made to a principal in consequence of the efforts made by his agent, who had been employed and authorized to collect for ten per cent of the amount collected, the agent was entitled to his commission on the payments).

Eng.—Gunn v. Showell's Brewery Co., 18 T. L. R. 659; Auckland v. Collins, 14 T. L. R. 348.

Ont.—Gledhill v. Telegram Print Co., 13 OntWR 1000 [aff 1 OntWN 161, 14 OntWR 957].

[a] **Purchasing at public auction.**—A person employed by a trustee in a deed of trust to act as agent in the purchase at public auction of the property conveyed by the deed, pursuant to an agreement binding the trustee to save the agent harmless for any bid, and binding the agent to turn over the property on his bidding it in, need not, to recover compensation for bidding in the property, convey it to the trustee and his wife; the agent being only required to turn over the property to the trustee. Miller v. Powell, 85 Vt. 285, 81 A 921.

77. Glenn v. Davidson, 37 Md. 365; Eveland v. Eastern Min. Co., 14 Phillippine 509 (regardless of whether benefits have accrued to principal).

[a] **Profit to principal no criterion of agent's right.**—In Lockwood v. Levick, 8 C. B. N. S. 603, 609, 98 ECL 603, 141 Reprint 1303, Erle, J., said: "It is urged on the part of the defendant that it would be unreasonable that he should be held liable to the payment of a commission upon an order which yielded him no profit. But here he had an opportunity of making profit. The plaintiff performed all the service for which he was employed; and the defendant had the option of delivering the goods and so making profit. But I do not agree that the profit to the manufacturer is to be the criterion of the agent's right to commission. The buyer might be an insolvent person, or, the manufacturer might sell his commodity for less than cost price; still that would not affect the agent's rights. Although there might be a loss upon the transaction, it might yet be very desirable for the manufacturer to execute the order."

78. Keene v. Frick Co., (Iowa) 93 NW 582; Rimmer v. Knowles, 30 L. T. Rep. N. S. 496.

79. Steinbach v. Montpelier Carriage Co., 37 Fed. 760.

80. Dougan v. Turner, 51 Minn. 330, 53 NW 650; Strong v. Prentice Brown Stone Co., 10 Misc. 380, 31 NYS 144. Compare In re Ladue Tate Mfg. Co., 135 Fed. 910; Lafferty v. Lorimer, 86 Mich. 591, 49 NW 586.

[a] **Presumption of acceptance of orders.**—Plaintiff sold goods for defendant, a manufacturer, under an agreement that he should receive a percentage as his compensation on all orders taken, sent in, and accepted, and also that he should be notified in case of defendant's refusal to accept any of the orders sent it. It was held in an action to recover such percentage, that acceptance of the orders might be inferred from the fact that defendant received and retained them, without objection or notification that they had been rejected. O'Brien v. Colchester Rubber Co., 60 Minn. 535, 63 NW 106.

81. Williams Harvester Co. v. Pope, 69 Iowa 523, 29 NW 438; Frick, etc., Co. v. Larned, 50 Kan. 776, 32 P 383; Plano Mfg. Co. v. Buxton, 36 Minn. 203, 30 NW 668.

82. Williams Harvester Co. v. Pope, 69 Iowa 523, 29 NW 438.

83. Ga.—Hyams v. Miller, 71 Ga. 608.

Ill.—Evans v. Hughey, 76 Ill. 115; Hoyt v. Shipherd, 70 Ill. 309.

Ind.—Thomas v. Lincoln, 71 Ind. 41.

Mich.—Haas v. Malto-Grapo Co., 148 Mich. 358, 111 NW 1059.

Mo.—Harkness v. Briscoe, 47 Mo. A. 196.

Mont.—Nixon v. Cutting Fruit Packing Co., 17 Mont. 90, 42 P 108.

Tenn.—Halloway v. Lacy, 4 Humphr. 468.

Tex.—Cleveland School Furniture Co. v. Hotchkiss, 89 Tex. 117, 33 SW 855.

Wash.—Wallace v. Johnston, 3 Wash. 54, 28 P 34.

[a] **Agent to "sell"—uncompleted sale.**—An agent authorized "to sell" property, for which service the compensation to be paid is agreed upon, does not earn such compensation by procuring a person who proceeds so far toward a contemplated purchase as to pay a part of the price as earnest money, but who enters into no obligatory contract to purchase, and who, upon examination of the title, refuses to accept a deed of conveyance. Yeager v. Kelsey, 46 Minn. 402, 49 NW 199.

84. Nichols, etc., Co. v. Bachant, 45 Ill. A. 497 (waiver of provisions for forfeiture of compensation).

85. U. S. Mortgage Co. v. Henderson, 111 Ind. 24, 12 NE 88 (holding that, although the agent of a loan company may have been instructed to foreclose for the accrued interest only, yet if he in good faith believed, from circumstances arising after the suit had been begun according to instructions, that the interests of the company required a foreclosure of all the debt, and he did so foreclose for the entire amount, notifying the company within a reasonable time, and the company made no objection, but accepted the benefits thereof, and adopted the receivership established thereunder, such acceptance was a ratification of his acts, and he is entitled to reasonable compensation for his services); Kentucky Bank v. Combs, 7 Pa. 548 (holding that, where an agent employed for a particular purpose, acts beyond the extent of his authority without objection from his principal, the assent of the principal will be presumed, and the agent will be entitled to compensation). See also supra § 414, infra § 440.

86. U. S.—Currier v. Mutual Reserve Fund Life Assoc., 108 Fed. 737, 47 CCA 651; Idler v. Borgmeyer, 65 Fed. 910, 13 CCA 198 (holding that an agreement to pay a commission of ten per cent on the amount of a claim against a foreign government, in consideration of services in obtaining judgment against such government, "as soon as the payment or satisfaction is realized," is contingent on satisfaction of the judgment; and when, after failure to collect it, payment of the claim is obtained through the award of a mixed commission established by treaty, no right to recover the ten per cent commission exists); Ebert v. U. S., 29 Ct. Cl. 183 (where the right to salary was held to be dependent, not merely upon the rendition of services, but also upon personal attendance at the principal's office).

Cal.—Witte v. Taylor, 110 Cal. 224, 42 P 807; McPhail v. Buell, 87 Cal. 115, 25 P 266; Gilbert v. Judson, 85 Cal. 105, 24 P 643.

the amount of current sales made by him,[87] or upon the profits of the transaction.[88]

Where the agent has performed on his part all acts necessary to the performance of the contingencies or conditions, or to the accomplishment of the contemplated result, he cannot, as a general rule, be deprived of his right to compensation by the refusal of the principal to perform necessary acts on his part, whereby the contingency or contemplated result is defeated,[89] although the agent may so contract as to make his compensation dependent on a contingency which his efforts cannot control even though it relates to acts of the principal,[90] and established usages or customs have the same effect in this regard as an express agreement.[91]

Commission consisting of excess of price over fixed sum. Where the compensation of an agent for negotiating a sale is to consist of the excess of the price over a fixed sum, the agent is entitled to nothing unless the price exceeds that sum;[92] and,

Ill.—Scoville v. School Trustees, 65 Ill. 523; Harvey v. Cook, 24 Ill. A. 134.
Iowa.—Wolfson v. Allen Bros. Co., 120 Iowa 455, 94 NW 910.
La.—Spear v. Gardner, 16 La. Ann. 383.
Md.—McCay Engineering Co. v. Crocker-Wheeler Electric Co., 100 Md. 530, 60 A 443 (where it was agreed that a sales agent should receive only such commissions as the net proceeds of the sales should warrant); Jones v. Adler, 34 Md. 440; Kalkman v. Causten, 2 Gill & J. 357.
Mass.—Zerrahn v. Ditson, 117 Mass. 553; Tombs v. Alexander, 101 Mass. 255, 3 AmR 349.
Mo.—Blackwell v. Adams, 28 Mo. A. 61; Beauchamp v. Higgins, 20 Mo. A. 514.
N. J.—Hinds v. Henry, 36 N. J. L. 328.
N. Y.—Smith v. Brady, 17 N. Y. 173, 72 AmD 442; Fraser v. Wyckoff, 2 Hun 545 [aff 63 N. Y. 445]; Robinson v. New York Ins. Co., 2 Cai. 357 [aff 1 Johns. 616]; Franklin v. Robinson, 1 Johns. Ch. 157.
Pa.—Creveling v. Wood, 95 Pa. 152.
Tex.—Compania Industrial Mexicana v. Stillwell-Bierce, etc., Co., (Civ. A.) 81 SW 538 (sale of a certain amount of goods); Thornton v. Stevenson, (Civ. A.) 31 SW 232.
Va.—Smith v. Tate, 82 Va. 657.
Eng.—Moffatt v. Laurie, 15 C. B. 583, 80 ECL 583, 139 Reprint 553; Alder v. Boyle, 4 C. B. 635, 56 ECL 635, 136 Reprint 657; Chapman v. Winson, 91 L. T. Rep. N. S. 17; White v. Turnbull, 78 L. T. Rep. N. S. 726; Roberts v. Jackson, 2 Stark. 225, 3 ECL 387; Henry v. Gregory, 22 T. L. R. 53.
Can.—Beveridge v. Awaya, etc., Co., 15 WestLR 634.
Ont.—Cahill v. Timmins, 2 OntWN 73, 16 OntWR 980.
Que.—New York L. Ins. Co. v. Dubeau, 15 Que. Super. 100.

[a] **Payment not effected by agent.**—If an agent, having undertaken to collect a debt for a certain share of what he may recover, finally abandons further effort as useless, and at a subsequent period the principal receives payment through new instrumentalities, or from causes with which the agent has no connection, the latter cannot claim the share to which his contract would have entitled him, if payment had been secured by his own efforts. Scoville v. School Trustees, 65 Ill. 523.

87. Haas v. Malto-Grapo Co., 148 Mich. 358, 111 NW 1059 (holding that, where a contract for the establishment of a sales agency provided for a salary and an additional commission on all the sales during the continuance of the contract, and stipulated that the average sales must amount to at least five hundred dollars a month, to constitute a fulfillment of the contract, if the agent's monthly sales were less than five hundred dollars, he was not entitled to either salary or commission); Austin v. Smith, 12 Oh. Cir. Ct. 757 (holding that in a contract with an agent that he shall have a salary of six dollars a week, with a guaranty of at least one good sale a week, the words, "if there is no sale there is no salary to be paid," do not mean that the salary is to be paid if, on an average through the whole time, there is one sale a week; but the right construction is that for any week in which there is no sale there is to be no salary paid). Compare Atkins v. Keener, 109 Ala. 143, 19 S 402 (holding that, where plaintiff was employed by defendants for a year as a traveling salesman, he agreeing to devote all his time to the business, and they agreeing to pay his traveling expenses and also "to pay him $600, payable monthly, $50 per month, and six per cent. commission on all his sales above $10,000, provided said salary and traveling expenses do not exceed ten per cent. of his net sales," the salary of six hundred dollars was not dependent on the amount of the sales).

88. Allen v. Armstrong, 58 App. Div. 427, 68 NYS 1079 (holding that, where defendant engaged plaintiff as general manager, and in addition to a stated salary agreed to pay him ten per cent commission on all contracts personally secured by him on which the usual profits accrued, and five per cent on all on which one half of the usual profits were secured, and special orders for greater or smaller profits were to be arranged at the time the orders were taken, plaintiff was not entitled to commissions on orders which had been taken and accepted by defendant, but on which nothing was payable or had been paid at the time suit was brought, since the profits cannot be said to have accrued until the work secured by the orders was paid for, or until the right to enforce present payment existed); Rogers-Ruger Co. v. McCord, 115 Wis. 261, 91 NW 685 (holding that, under a contract by defendant to give to plaintiff half the profits above the purchase price, on a resale of property purchased by defendant through the intermediation of plaintiff, there can be no recovery until defendant has reduced the proceeds of the sale to money, or so appropriated them to his own use as to constitute a complete equivalent for the reception of their money value).

89. U. S.—Sowles v. Plattsburg First Nat. Bank, 130 Fed. 1009; Currier v. Mutual Reserve Fund Life Assoc., 108 Fed. 737, 47 CCA 651.
Colo.—Squires v. King, 15 Colo. 416, 25 P 26.
Md.—Law v. Townsend, 11 Gill & J. 407.
Mass.—Walker v. Tirrell, 101 Mass. 257, 3 AmR 352.
Mo.—Dildine v. Ford Motor Co., 159 Mo. A. 410, 140 SW 627.
Nebr.—Westinghouse Co. v. Tilden, 1 Nebr. (Unoff.) 745, 96 NW 74.
N. J.—Hinds v. Henry, 36 N. J. L. 328.
N. Y.—Warren Chemical, etc., Co. v. Holbrook, 118 N. Y. 586, 23 NE 908, 16 AmSR 788; Hix v. Edison Electric Light Co., 10 App. Div. 75, 41 NYS 680; Madden v. Equitable Life Assur. Soc., 11 Misc. 540, 32 NYS 752 [aff 146 N. Y. 402 mem, 42 NE 543 mem].
Pa.—Aikins v. Thackara Mfg. Co., 15 Pa. Super. 250.
Tenn.—Tyler v. E. G. Bernard Co., (Ch. A.) 57 SW 179.
Tex.—Brackenridge v. Claridge, 91 Tex. 527, 44 SW 819, 43 LRA 593 and note; Scottish-American Mortg. Co. v. Davis, (Civ. A.) 72 SW 217; Burns v. Hill, 2 Tex. A. Civ. Cas. § 523.
Utah.—Reed v. Cincinnati Union Cent. L. Ins. Co., 21 Utah 295, 61 P 21.
Vt.—Durkee v. Vermont Cent. R. Co., 29 Vt. 127.
Man.—Aronovitch v. Loper, 22 Man. 325, 3 DomLR 389, 21 WestLR 263.

[a] **Although commissions are payable only on net sales,** yet if, through the principal's fault, orders procured by the agent are not filled, the agent is entitled to commissions thereon. Abel v. Nelson, 104 NYS 362. And see Lafferty v. Lorimer, 86 Mich. 591, 49 NW 586; Stone v. Argersinger, 32 App. Div. 208, 53 NYS 63.

90. Newell v. Port Huron Engine, etc., Co., 2 Ala. A. 423, 57 S 68; Wheeler, etc., Mfg. Co. v. Worrall, 80 Ind. 297 (holding that, where a contract for the sale of sewing machines by plaintiff, as defendant's agent, on commission, provided that, when a note was taken for a machine, plaintiff should not receive any commission for the sale, until defendant had become satisfied that the person giving the note was responsible for the amount, and had signed a certificate that he was satisfied with the machine, and that all promises made by plaintiff had been faithfully fulfilled, plaintiff was not entitled to recover commissions on a sale without proving that the purchaser's note taken therefor had been accepted by defendant, and that he had furnished defendant with the required certificate); Hinds v. Henry, 36 N. J. L. 328; Johnson v. Sirret, 153 N. Y. 51, 46 NE 1035 [rev 83 Hun 317, 31 NYS 917] (holding that a contract by the joint purchasers of a tract of land, conveyed to them in undivided equal parts, to pay the broker who negotiated the transaction a certain sum per acre whenever a resale of the land should be effected, and a proportionate part in case the land should be resold in parcels, contemplates a joint conveyance of the whole or a part of the land, and does not apply to a transfer by one of the joint purchasers of his undivided interest).

91. Broad v. Thomas, 7 Bing. 99, 20 ECL 53, 131 Reprint 38, 4 C. & P. 338, 19 ECL 543; Dalton v. Irvin, 4 C. & P. 289, 19 ECL 519.

92. Indiana Road Mach. Co. v. Lebanon Carriage, etc., Co., 78 SW 861, 25 KyL 1763; Bradford v. Menard, 35 Minn. 197, 28 NW 248; La Force v. Washington Univ., 106 Mo. A. 517, 81 SW 209; Strong v. Prentice Brown Stone Co., 10 Misc. 380, 31 NYS 144 [aff 6 Misc. 57, 26 NYS 85]. See also Gregory v. Mack, 3 Hill (N. Y.) 380.

[a] **Thus** (1) where an agency contract for the sale of threshing machinery contemplated a cutting of prices and declared that no commission would be paid on a sale unless the price exceeded the net prices specified, plaintiff was not entitled to commissions on a sale made by another agent to one claimed to be plaintiff's customer, at a price which was less than the net price so specified. Hilliker v. Northwest Thresher Co., 145 Iowa 721, 122 NW 906. (2) The fact that the agent took an unenforceable contract from a third person to purchase at a price in excess of the fixed sum does not entitle him to recover the excess, where the purchaser did not tender performance and the sale was not effected. Bradford v. Menard, 35 Minn. 197, 28 NW 278. (3) Nor is the agent entitled to compensation where the purchaser defaults in carrying out a valid con-

even though he sells for a greater sum than that so fixed, yet if he sells on credit, unless he is authorized by the principal to do so,[93] he is not entitled to the excess until the price has been paid,[94] or at least not until after the price has fallen due and the lapse of a reasonable time for the collection thereof.[95]

Advances. The principal may agree to make advances of money to the agent on account of commissions to be earned on subsequent sales, and in this event the agent is entitled to the advances without reference to the amount of sales already made by him.[96]

[§ 437] **(3) Production of Person Willing to Contract.** Where an agent undertakes merely to produce a person who is able, ready, and willing to enter into a specified transaction with the principal on the terms prescribed by the latter, the production of such a person generally entitles the agent to the contract compensation, although the principal fails or refuses to enter into the transaction in question,[97] or although the third person fails or refuses to complete the transaction on account of some default by the principal;[98] and the agent is all the more entitled to the stipulated compensation if he procures a contract from a third person binding him to accept the principal's offer.[99] It is essential to the agent's right to compensation, however, if the transaction falls through, that the person procured by him was able, ready, and willing to contract with the principal on the terms originally proposed by the latter;[1] and it is of course necessary that the agent notify the principal that he has secured such person, otherwise the principal is not liable for commissions, if the transaction is not entered into.[2] It has been held that where the principal wrongfully rejects an offer procured by the agent, the latter cannot recover commissions eo nomine,[3] but is entitled to only reasonable compensation for his services.[4]

Agent to sell or find purchaser. The test of an agent's right to commissions for finding a purchaser is not whether his contract with the purchaser is specifically enforceable, but whether he has found a purchaser able, ready, and willing to contract or take the property on the terms prescribed by his

tract of purchase at a price in excess of the sum so fixed, it being one of the terms of the employment that the principal was "to receive the full sum" so fixed "without deduction." Beale v. Bond, 84 L. T. Rep. N. S. 313.

93. Fuller v. Brady, 22 Ill. A. 174.

94. Evans v. Hughey, 76 Ill. 115.

[a] **The principal cannot refuse to sell** (1) where the agent finds a person who is willing to pay the fixed sum in cash, and the excess to the agent on time, if credit for the excess is to be granted by the agent (Van Gorder v. Sherman, 81 Iowa 403, 46 NW 1087); (2) but if credit for the excess is to be granted by the principal, and there is no agreement that the agent's compensation is to come out of the deferred payment, the principal may refuse to sell (Marble v. Bang, 54 Minn. 277, 55 NW 1131. Contra Wheeler v. Knaggs, 8 Oh. 169).

95. Evans v. Hughey, 76 Ill. 115.

96. Isaacsen v. Andrews, 64 App. Div. 408, 72 NYS 177; Weinberg v. Blum, 13 Daly (N. Y.) 399.

97. U. S.—Taylor Mfg. Co. v. Hatcher Mfg. Co., 39 Fed. 440, 3 LRA 527.

Colo.—Squires v. King, 15 Colo. 416, 25 P 26.

Ill.—Goodmanson v. Rosenstein, 144 Ill. A. 243.

Iowa.—Van Gorder v. Sherman, 81 Iowa 403, 46 NW 1087.

N. Y.—Taylor v. Enoch Morgan's Sons Co., 124 N. Y. 184, 26 NE 314 [aff 48 Hun 488, 1 NYS 293]. And see Jacquin v. Boutard, 89 Hun 437, 35 NYS 496 [aff 157 N. Y. 686 mem, 51 NE 1091 mem].

Utah.—Lawson v. Thompson, 10 Utah 462, 37 P 732.

Vt.—Durkee v. Vermont Cent. R. Co., 29 Vt. 127 (holding that, where the principal declines to complete the negotiations, the agent is entitled to his commission, unless there is a custom or usage giving those that deal with the agent the right to recede to the last moment).

Wis.—Kelly v. Phelps, 57 Wis. 425, 15 NW 385; O'Connor v. Semple, 57 Wis. 243, 15 NW 136. And see Oliver v. Morawetz, 97 Wis. 332, 72 NW 877.

Can.—MacKenzie v. Champion, 12 Can. S. C. 649 [aff 4 Man. 158].

Terr.—Boyle v. Grassick, 6 Terr. L. 232, 2 WestLR 284 [allowing app 2 WestLR 99].

See Gooch v. J. I. Case Threshing Mach. Co., 119 Mo. A. 397, 96 SW 431; Atkinson v. Pack, 114 N. C. 597, 19 SE 628.

[a] **Estoppel.**—The agent may by his conduct estop himself to assert a claim to commissions on orders not actually filled by the principal. Belgian Glass Co. v. Pabst, (N. Y.) 4 NE 519.

[b] **Implied terms of principal's offer.**—(1) Where a principal employs an agent to find a purchaser for real estate, and nothing is said or understood between them as to the title, the implication of the law is, between principal and agent as between owner and purchaser, that the owner has and intends to convey a good title; and it is no defense to the agent's claim for commission that the agent's agreement provided that the purchaser should get a good title, either in general terms or that certain particular encumbrances should be removed. McLaughlin v. Wheeler, 1 S. D. 497, 47 NW 816. (2) Where all the terms of an offer are stated except the term as to the time when it is to be carried out, and there is no express stipulation as to the time, it is implied that the agreement is to be performed within a reasonable time. Thus, where plaintiff was instructed by defendant to find a purchaser for his house for a certain sum, and on January 16 he found a person ready and willing to pay that sum who required possession by March 15, defendant could not refuse the offer on the ground that he could not give up possession on March 15, the jury having found that from January 16 to March 15 was a reasonable time, and plaintiff was entitled to his commission. Nosotti v. Auerbach, 79 L. T. Rep. N. S. 413 [aff 15 T. L. R. 140].

[c] **The agent himself cannot accept the principal's offer** and thus become entitled to commissions, where the principal refuses to deal with the agent as a customer. Tower v. O'Neil, 66 Pa. 332.

[d] **Good faith of principal.**—It has been held that if an offer procured by the agent is rejected by the principal in good faith and not merely to defeat the agent's right to commissions, he is not liable to the agent. Taylor v. Cox, (Tex.) 7 SW 69. Compare Gooch v. J. I. Case Threshing Mach. Co., 119 Mo. A. 397, 96 SW 431; Jacquin v. Boutard, 89 Hun 437, 35 NYS 496 [aff 157 N. Y. 686 mem, 51 NE 1091 mem].

98. Green v. Lucas, 33 L. T. Rep. N. S. 584 (holding that, where an agent employed to borrow money on leasehold security finds a person able and willing to lend, but the negotiations fail because such person discovers unusual covenants in the lease of which the agent was not informed, the principal having represented that the lease contained only the usual covenants, the agent is entitled to the whole of the agreed commission for procuring the loan); Spiers v. Gluck, 17 T. L. R. 236.

99. Goss v. Stevens, 32 Minn. 472, 21 NW 549; Goss v. Broom, 31 Minn. 484, 18 NW 290 (although such person pays down no cash). And see Wheeler v. Knaggs, 8 Oh. 169.

1. Kan.—Acme Harvester Co. v. Madden, 4 Kan. A. 598, 46 P 819.

Mich.—Wright v. Beach, 82 Mich. 469, 46 NW 673.

Pa.—Aikins v. Thackara Mfg. Co., 15 Pa. Super. 250.

Wis.—Darrow v. Harlow, 21 Wis. 302, 94 AmD 541.

Can.—Mackenzie v. Champion, 12 Can. S. C. 649 [aff 4 Man. 158].

Ont.—Culverwell v. Birney, 14 Ont. A. 266.

See Smith v. Patrick, (Tex. Civ. A.) 36 SW 762.

See also infra § 440.

[a] **Where the negotiations come to nothing** because the person produced by the agent is unable or unwilling to comply with the principal's terms, the agent cannot as a rule recover on a quantum meruit. Mason v. Clifton, 3 F. & F. 899; Culverwell v. Birney, 14 Ont. A. 266.

[b] **An agent employed to find a purchaser** for land cannot recover compensation therefor without showing that the purchaser found was financially responsible, although the principal may have sold the land to another in the interim between the time the agent was employed and the time he found the purchaser. Iselin v. Griffith, 62 Iowa 668, 18 NW 302.

[c] **If a person offering to exchange lands** (1) with the principal has no title to the land offered by him, the agent is not entitled to compensation for finding him. Culverwell v. Birney, 14 Ont. A. 266. (2) If in the course of the negotiations the principal discovers an undisclosed encumbrance on the land offered him, he may break off the negotiations without assigning any reasons therefor and without notice, and the agent who found the person who offered the land will be entitled to nothing, although such person failed to mention the encumbrance solely through inadvertence and was able and prepared to remove it. Rockwell v. Newton, 44 Conn. 333.

2. Wright v. Beach, 82 Mich. 469, 46 NW 673. And see cases cited supra note 1.

3. Stevenson v. Morris Mach. Works, 69 Miss. 232, 13 S 834; Adamson v. Yeager, 10 Ont. A. 477.

4. Stevenson v. Morris Mach. Works, 69 Miss. 232, 13 S 834 (holding that the agreed commissions afford a measure of damages); Prickett v.

principal.[5] If he produces such a person he cannot be deprived of his right to compensation by reason of the principal's failure or refusal to consummate the transaction;[6] or by reason of the fact that the sale is effected through another agent.[7] Nor, in such a case, does the inability of the principal to comply with his offer relieve him from liability to compensate the agent;[8] nor can he defeat the agent's right to compensation by refusing to enter into the contract except on different terms, or by entering into it on different terms.[9]

Grounds for refusing to sell. Where the principal's refusal to consummate the transaction is justified, the agent is not entitled to compensation,[10] as where the terms of sale are different from those stipulated for,[11] or where the purchaser, in a sale

Badger, 1 C. B. N. S. 296, 87 ECL 296, 140 Reprint 123; Adamson v. Yeager, 10 Ont. A. 477.

5. McLaughlin v. Wheeler, 1 S. D. 497, 47 NW 816; Kelly v. Phelps, 57 Wis. 425, 15 NW 385; Bagshawe v. Rowland, 13 B. C. 262, 7 WestLR 158; Brydges v. Clements, 14 Man. 588, 24 CanLTOccNotes 96; McKenzie v. Champion, 4 Man. 158 [aff 12 Can. S. C. 649] (holding that the owner cannot refuse to pay the commission because no agreement in writing was actually entered into; at all events, when the reason was that he refused to sign it unless some unusual term was inserted, and he had accepted the purchaser and by various acts showed that he considered that there was a valid verbal contract).

[a] **Necessity of written contract.**—Where an agent to sell lands finds a purchaser who is able, ready and willing to purchase it on the terms given to the agent by the landowner, the contract of sale need not be in writing, as a condition precedent to the agent's right to recover for his services. Vaughan v. McCarthy, 59 Minn. 199, 60 NW 1075; Lawson v. Thompson, 10 Utah 462, 37 P 732; Boughton v. Hamilton Provident Soc., 10 Man. 683 (holding, however, that the agent is not entitled to full commissions in such case).

[b] **Submission of offer from one already in negotiation with principal.**—Where one authorized to sell certain property within a specified time for a given sum, he to have a certain amount for procuring a purchaser or making a sale, notifies the owners within the time that he has a proposition on certain terms at the price fixed, and the proposition is not accepted, he cannot recover the agreed compensation, the customer being one with whom the owners had themselves been in treaty for the property for several months prior thereto, and who on that very day had made them an offer of the same amount. Hartley v. Anderson, 150 Pa. 391, 24 A 675.

6. U. S.—In re Ladue Tate Mfg. Co., 135 Fed. 910; Taylor Mfg. Co. v. Hatcher Mfg. Co., 39 Fed. 440, 3 LRA 587; Brady v. Stillman, 31 Fed. 791.

Cal.—Mattingly v. Roach, 84 Cal. 207, 23 P 1117; Neilson v. Lee, 60 Cal. 555; Blood v. Shannon, 29 Cal. 393.

Ill.—Miller v. Russell, 224 Ill. 68, 79 NE 434.

Iowa.—Brown v. Wilson, 98 Iowa 316, 67 NW 251; Boland v. Kistle, 92 Iowa 369, 60 NW 632; Ford v. Easley, 88 Iowa 603, 55 NW 336; Van Gorder v. Sherman, 81 Iowa 403, 46 NW 1087.

Mass.—Witherell v. Murphy, 147 Mass. 417, 18 NE 215.

Mich.—Stange v. Gosse, 110 Mich. 153, 67 NW 1108; Lafferty v. Lorimer, 86 Mich. 591, 49 NW 586.

Minn.—Vaughan v. McCarthy, 59 Minn. 199, 60 NW 1075; Goss v. Stevens, 32 Minn. 472, 21 NW 549; Goss v. Broom, 31 Minn. 484, 18 NW 290.

Miss.—Stevenson v. Morris Mach. Works, 69 Miss. 232, 13 S 834; Roberts v. Kimmons, 65 Miss. 332, 3 S 736.

Nebr.—Quick v. Sachsse, 31 Nebr. 312, 47 NW 935; Griffith v. Woolworth, 28 Nebr. 715, 44 NW 1137.

N. J.—Shinn v. Haines, 21 N. J. L. 340.

N. Y.—Taylor v. Enoch Morgan's Sons Co., 124 N. Y. 184, 26 NE 314; Abel v. Nelson, 104 NYS 362.

N. C.—Atkinson v. Pack, 114 N. C. 597, 19 SE 628.

Pa.—Sweeny v. Ten-Mile Oil, etc., Co., 130 Pa. 193, 18 A 612.

S. D.—Sherman v. Port Huron Engine, etc., Co., 13 S. D. 95, 82 NW 413; McLaughlin v. Wheeler, 1 S. D. 497, 47 NW 816.

Tenn.—Tyler v. Bernard, (Ch. A.) 57 SW 179.

Utah.—Lawson v. Thompson, 10 Utah 462, 37 P 732.

Wis.—Kelly v. Phelps, 57 Wis. 425, 15 NW 385; O'Connor v. Semple, 57 Wis. 243, 15 NW 136.

Eng.—Nosotti v. Auerbach, 79 L. T. Rep. N. S. 413 [aff 15 T. L. R. 140].

Can.—Ross v. Matheson, 13 WestLR 490; Hughes v. Houghton, 11 WestLR 100.

B. C.—Bagshawe v. Roland, 13 B. C. 262, 7 WestLR 158 (holding that the agent is entitled to his commission if, the parties having been shown to be agreed upon the terms, the sale is subsequently prevented by the fault or default of the vendor).

Man.—Bell v. Rokeby, 15 Man. 327, 1 WestLR 531 [dism app 1 WestLR 124].

[a] **Refusal made to save commissions.**—A principal cannot refuse to accept orders placed by an agent appointed to sell goods on commission before the expiration of his agency, where the refusal is merely to defeat the agent's right to commissions. Jacquin v. Boutard, 89 Hun 437, 35 NYS 496 [aff 157 N. Y. 686 mem, 51 NE 1091 mem].

[b] **Sale by agent defeated by sale by principal.**—(1) Where an agent to sell land is not authorized to execute a conveyance, but merely to obtain a purchaser, he is entitled to compensation on finding a person ready and willing to make the purchase, although, owing to the owner's subsequently selling the land to another, the sale is not consummated. Ford v. Easley, 88 Iowa 603, 55 NW 336; Marriott v. Brennan, 14 Ont. L. 508, 10 OntWR 159. (2) If, however, the principal himself sells the property before he learns that the agent has found a customer, the agent is not as a rule entitled to the contract compensation. Darrow v. Harlow, 21 Wis. 302, 94 AmD 541.

[c] **The principal must make good his representations concerning the subject matter of the agency.**—Thus, he is liable to the agent for compensation for finding a person willing to purchase property where such person failed to buy because of the nonexistence of advantages which the principal had represented as existing. Hannan v. Moran, 71 Mich. 261, 38 NW 909.

[d] **Goods not up to principal's representations.**—Where a principal authorized his agent to sell machines for him and to make certain representations in regard thereto, the agent to receive a per cent out of the proceeds of sales made by him, and the agent made sales, but the machines were all returned because of their not coming up to the representation made in regard to them by the authority of the principal, the agent can recover the amount of his per cent upon the sales so made by him, as he has done all the contract requires of him. Garnhart v. Rentchler, 72 Ill. 535.

7. Fox v. Rouse, 47 Mich. 558, 11 NW 384 (holding that, where a party is by contract to receive a certain commission for finding a purchaser for real estate, he becomes entitled to such commission on procuring a person ready, willing and in a situation to purchase, although, before the principal accepts him, another agent, acting within his authority, binds the principal to sell to another person); Osler v. Moore, 8 B. C. 115. See also infra § 442. Compare Bailey v. McCully, 28 Mo. A. 572 (holding that, where an agent sues for commissions earned by him in effecting a sale of the defendant's property, he cannot recover for an alleged wrong committed by the principal in causing the sale to be effected by another person without the agent's knowledge).

8. Fox v. Rouse, 47 Mich. 558, 11 NW 384; Stone v. Argersinger, 32 App. Div. 208, 53 NYS 63. And see McLaughlin v. Wheeler, 1 S. D. 497, 47 NW 816; Nosotti v. Auerbach, 79 L. T. Rep. N. S. 413 [aff 15 T. L. R. 140].

9. Squires v. King, 15 Colo. 416, 25 P 26; Triplett v. Jackson, 130 Iowa 408, 106 NW 954; Hannan v. Moran, 71 Mich. 261, 38 NW 909; Morson v. Burnside, 31 Ont. 438, 20 CanLTOcc Notes 169 (lease instead of sale); Cuthbert v. Campbell, 12 WestLR 219 (holding that, where the agent found a purchaser who was ready to buy, but after terms were settled, defendant, the vendor, wished some of them varied, and as a result the purchaser backed out, the agent had done all he could and was entitled to his commissions). And see McLaughlin v. Wheeler, 1 S. D. 497, 47 NW 816; Nosotti v. Auerbach, 79 L. T. Rep. N. S. 413 [aff 15 T. L. R. 140]. See also infra § 440.

10. Finch v. Conrade, 154 Pa. 326, 26 A 368 (holding that, where an agent employed to sell land agreed with the proposed buyer to take an interest therein and apply his compensation toward payment for his interest, the owner is justified in refusing to convey, and the agent cannot recover compensation as for a sale); Sherman v. Port Huron Engine, etc., Co., 8 S. D. 343, 66 NW 1077.

[a] **Procuring a purchaser ready and willing but not able** to enter into and carry out a contract of sale does not entitle the agent to commission. Coward Inv. Co. v. Lloyd, 11 WestLR 338 [aff 12 WestLR 497].

11. Cal.—Masten v. Griffing, 33 Cal. 111.

Ill.—Hoyt v. Shipherd, 70 Ill. 309.

Iowa.—Sanderson v. Tinkham Smoke-Consumer Co., 83 Iowa 446, 49 NW 1034.

Minn.—Marble v. Bang, 54 Minn. 277, 55 NW 1131; Bradford v. Menard, 35 Minn. 197, 28 NW 248.

N. Y.—Schultz v. Griffin, 121 N. Y. 294, 24 NE 480, 18 AmSR 825; Ives v. Davenport, 3 Hill 378.

Tex.—Taylor v. Cox, 7 SW 69; Smith v. Patrick, (Civ. A.) 36 SW 762.

Can.—Reser v. Yates, 41 Can. S. C. 577 [rev 1 Sask. L. 247, 7 WestLR 848]; Calloway v. Stobart, 35 Can. S. C. 301 [aff 14 Man. 650]; Millar v. Napper, 14 WestLR 335; Egan v. Simon, 11 WestLR 319.

Man.—Rogers v. Braun, 16 Man. 580, 4 WestLR 40.

See also infra § 440.

[a] **Procuring conditional purchasers.**—Under a contract by which an agent agreed to solicit orders for a machine in consideration of the payment of a certain percentage of the amount for which he obtained purchasers for such machine, payable when the orders were received, the principal was held not liable for the payment of commissions upon verbal promises obtained by the agent to purchase such machine if, upon a demonstration to be made, the same

on credit, is not in good financial standing.[12]

[§ 438] **(4) Procuring Parties to Enter into Contract—(a) In General.** If the agent undertakes not merely to find a person who is able, ready, and willing to enter into a particular transaction with the principal, but to effectuate the transaction itself, then, unless the parties actually enter into that transaction, the agent is not entitled to the compensation specified in his contract of employment;[13] and in such a case the agent cannot recover the reasonable value of his services in attempting to negotiate the transaction.[14] Thus, where the principal has the right to reject the order or contract secured by the agent, if he acts in good faith he may refuse to fill the order or complete the contract without rendering himself liable to the agent for his commissions.[15] But if the parties enter into the transaction the agent is entitled to his compensation.[16]

[§ 439] **(b) Effect of Failure to Carry Out Contract.** The terms of the employment may be such that the right to compensation is dependent, not merely upon the agent finding a person who will enter into a specified contract with the principal, but also upon the carrying out of that contract by the parties thereto according to its terms.[17] This

would accomplish what was claimed for it. Sanderson v. Tinkham Smoke-Consumer Co., 83 Iowa 446, 49 NW 1034.

12. McKiernan v. Ballin, 26 Misc. 826, 56 NYS 949.

[a] **If the principal deems a proposed buyer to be financially irresponsible,** (1) and relying on the reports of the well known commercial agencies, he acts in good faith, he may refuse to fill the proposed buyer's order without rendering himself liable to the agent who took the orders. Stone v. Argersinger, 32 App. Div. 208, 53 NYS 63; Allhouse v. Baum, 11 Oh. Dec. (Reprint) 205, 25 CincLBul 250. (2) Thus, where a principal contracted that an agent should have a commission on all orders taken by him which the manufacturer should "accept and ship," and letters from the principal to the agent stated that orders from persons with a rating over five hundred dollars would be promptly filled, and others as soon as information of a satisfactory nature could be obtained, it was held in an action by the agent for commissions, in which he claimed bad faith on the part of the principal in refusing to fill orders, that this rating of customers must have been one known to and in use by defendant, and not some private rating of financial standing, procured by and known only to plaintiff; that private information obtained by the agent as to the responsibility of customers of which defendant had no notice could not be considered as evidence of bad faith on the part of defendant in failing to ship orders to such customers; nor could the fact that certain parties to whom goods were sold might have been entitled to credit for the amount of their orders be considered as such. Wolfson v. Allen Bros. Co., 120 Iowa 455, 94 NW 910.

13. Ill.—Garnhart v. Rentchler, 72 Ill. 535 (holding that a contract by a principal to pay his agent a commission on sales does not authorize the agent to recover commissions upon contracts to sell).

Iowa.—Wolfson v. Allen Bros. Co., 120 Iowa 455, 94 NW 910 (holding that a contract which provides that an agent is not to receive any commission on orders taken by him unless his principals "accept and ship" the goods is valid in the absence of a showing of fraud or bad faith on the part of the principals).

N. Y.—Reis v. Automatic Mail Delivery Co., 115 NYS 168 (holding that, under an agreement whereby selling agents were to receive a stated commission on each contract of sale of apparatus on payment of the purchase price, and in any event within sixty days after installation, the agent's right to commission rested upon a completed contract of sale and was not earned under a contract which was to become effective on the happening of a contingency not shown to have happened).

Eng.—Broad v. Thomas, 7 Bing. 99, 20 ECL 53, 131 Reprint 38, 4 C. & P. 338, 19 ECL 543; Dalton v. Irvin, 4 C. & P. 289, 19 ECL 519; Hamond v. Holiday, 1 C. & P. 384, 12 ECL 228; Cousens v. Mitcheson, 1 New Rep. 240; Mestaer v. Atkins, 5 Taunt. 381, 1 ECL 199, 128 Reprint 737. And see Bull v. Price, 7 Bing. 237, 20 ECL 112, 131 Reprint 91; Alder v. Boyle, 4 C. B. 635, 56 ECL 635, 136 Reprint 657.

Can.—Mackenzie v. Champion, 12 Can. S. C. 649 [aff 4 Man. 158].

Man.—Haffner v. Cordingly, 18 Man. 1, 8 WestLR 743 [dism app 7 WestLR 764].

See In re Ladue Tate Mfg. Co., 135 Fed. 910.

14. Broad v. Thomas, 7 Bing. 99, 20 ECL 53, 131 Reprint 38, 4 C. & P. 338, 19 ECL 543.

15. Nairn v. Luce, etc., Co., 4 Porto Rico Fed. 31 (holding that, where plaintiff and defendant entered into a contract whereby plaintiff was to find a purchaser for defendant's land, the latter, however, reserving a right to know the name of the proposed purchaser and to finally accept or reject his bid, plaintiff's commission was not earned unless defendant accepted the bid; and also that if such bidder agreed to pay the price fixed by defendant with knowledge on the part of plaintiff that defendant had already closed with a third person, plaintiff's commission was not earned); Acme Harvester Co. v. Madden, 4 Kan. A. 598, 46 P 319; Walker v. Tirrell, 101 Mass. 257, 3 AmR 352; Calloway v. Stobart, 14 Man. 650, 24 CanLTOcc Notes 148.

[a] **An order for goods subject to cancellation** by vendee is not a "sale," within a contract entitling a salesman to a commission on sales. Wolfsheimer v. Frankel, 130 App. Div. 853, 115 NYS 958.

[b] **Validity of transaction.—** Plaintiff contracted with defendant to act as its agent in selling school furniture on commission, and bound himself to sell to such persons only as were legally qualified to enter into contracts, which contracts were to be subject to defendant's acceptance. Plaintiff sold on contracts that were not binding on the districts they purported to obligate, and such contracts were accepted by defendant, both plaintiff and defendant acting in good faith, believing them to be legal. It was held that defendant was not estopped by its acceptance of the contracts to plead their invalidity in defense to a claim for compensation. Cleveland School Furniture Co. v. Hotchkiss, 89 Tex. 117, 33 SW 855.

[c] **Contract as conferring right to reject orders.—** (1) A contract between principal and agent provided that the principal should furnish the agent with machines to fill orders, and that the agent should deliver no machines until the orders therefor were accepted by the principal, and that the agent should receive a commission on machines sold, settled for, and delivered, but that no commission should be paid on any order not filled. It was held that the principal did not have an absolute right to reject an order, and thus defeat the agent's right to compensation. Sherman v. Port Huron Engine, etc., Co., 13 S. D. 95, 82 NW 413. (2) So a clause in a contract obliging a manufacturing company to furnish engines, if the exigencies of their business permit, when ordered by its agent selling on commission, and who has made large expenditures in building up a trade, gives it no arbitrary right to refuse. Taylor Mfg. Co. v. Hatcher Mfg. Co., 39 Fed. 440, 3 LRA 587. (3) However, under a contract with an agent that no commissions are to be paid on orders not shipped, and that the acceptance of orders is at the discretion of the principal, the agent cannot collect compensation for orders not accepted. Temby v. William Brunt Pottery Co., 229 Ill. 540, 82 NE 336 [aff 127 Ill. A. 441].

16. Redwine v. Continental Realty Co., 184 Fed. 851, 107 CCA 175; Ward v. Cobb, 148 Mass. 518, 20 NE 174, 12 AmSR 587; Newhall v. Appleton, 61 N. Y. Super. 251, 19 NYS 701 [aff 136 N. Y. 666 mem, 33 NE 335 mem]; McKenzie v. Champion, 12 Can. S. C. 649 [aff 4 Man. 158]. See also In re Ladue Tate Mfg. Co., 135 Fed. 910.

[a] **A sales agent is entitled to compensation** (1) where orders taken by him are filled by the principal, although the principal, for reasons of his own, sees fit to have the customers execute new written orders. Merriman v. McCormick Harvesting Mach. Co., 101 Wis. 619, 77 NW 880. And see Gooch v. J. I. Case Threshing Mach. Co., 119 Mo. A. 397, 96 SW 431. (2) A salesman is entitled to commissions on goods sold, where the customer has no right to reject them, although the orders provide for future delivery of the goods. Ross v. Portland Coffee, etc., Co., 30 Wash. 647, 71 P 184.

[b] **Where a principal contracts with an agent to purchase property** agreeing to pay a fixed price for such property and to allow the agent a sum equal to the difference between this fixed price and any sum less than that for which he is able to purchase the property, and the agent completes the contract of sale and there is nothing left to be done except to make payment of the money and to issue the documents necessary to the transfer of the property, and the principal then closes the contract without the intervention of the agent, the principal is liable to the agent for an amount equal to the difference between the actual purchase price of the property and the price which he agreed to pay for the same. Simmie v. Brodek, 5 Philippine 379.

17. National Drill, etc., Co. v. Davis, 29 Okl. 625, 637, 120 P 976 [quot Cyc]; White v. Turnbull, 8 Aspin. 406.

[a] **By custom and usage** (1) in England in certain lines of trade an agent is not allowed a commission unless the transaction is carried out. Read v. Rann, 10 B. & C. 438, 21 ECL 189, 109 Reprint 513; Bower v. Jones, 8 Bing. 65, 21 ECL 447, 131 Reprint 325. (2) But the parties may contract to the contrary. Bower v. Jones, supra.

[b] **Construction of contract.—** (1) Defendants agreed with plaintiff to remunerate him "in the event of their taking into partnership" one M, introduced by plaintiff, and afterward entered into a written agreement with M by which it was agreed that they should enter into partnership as and from a specified future day, when a

rule is especially true where it is not the principal but the agent's customer who defaults in carrying out the contract negotiated by the agent.[18] But if it is due to the fault of the principal that the contract is not carried out the agent is entitled to compensation,[19] as where the customer refuses or fails to carry out the contract on account of some default on the part of the principal.[20]

Selling commission dependent upon payment of price. The terms of the contract of employment are frequently such that the agent's right to commission for negotiating a sale does not accrue until and unless the purchaser pays the price,[21] although the principal cannot deprive the agent of his right

formal deed of partnership should be executed carrying out the terms of the agreement. This agreement recognized and adopted the agreement between plaintiff and defendants, but no partnership deed was ever executed, nor did M ever in fact act as a partner of defendants. It was held that there was evidence of a "taking into partnership" within the meaning of the agreement between plaintiff and defendants, so as to entitle plaintiff to his commission. Harris v. Petherick, 39 L. T. Rep. N. S. 543. (2) Plaintiff, a commission agent, proposed to do business with defendant, a manufacturer, on terms as follows: "We expect to receive our commission on all goods bought by houses whose accounts are opened through us." Plaintiff introduced a customer who gave defendant an order for goods which he accepted but did not execute. It was held that plaintiff was entitled to a commission, since the word "goods bought," applied to all goods ordered by customers introduced by plaintiff, whether the order was executed by defendant or not. Lockwood v. Levick, 8 C. B. N. S. 603, 98 ECL 603, 141 Reprint 1303. See however Creveling v. Wood, 95 Pa. 152.

[c] **Right of agent to retain forfeited installments.**—An agent for the sale of land is not entitled to installments paid to him by the purchaser and subsequently forfeited by the purchaser's abandoning his contract. Melvin v. Aldrich, 81 Md. 650, 32 A 389.

[d] **Right of agent to opportunity to resell on purchaser's default.**—Under a contract by which complainant was to sell shares in an association, he to receive a certain amount per share for selling the same, to be paid in installments as the installments of the purchase price were paid, with a provision that, if any purchasers failed to make payments, their shares should be forfeited and complainant's compensation for such sales should cease; but he should receive notice of the forfeiture, and be given thirty days in which to resell the forfeited shares, for which he should receive full compensation, shares having been forfeited, and complainant not having been given any notice thereof for two years, and it appearing that at the time of the forfeiture there was a ready sale for them, and that if complainant had been promptly notified he might have sold them, defendant cannot complain that it is required to account on the basis of complainant having resold them, and full payment therefor having thereafter been made. Miller v. Russell, 224 Ill. 68, 79 NE 434.

18. Stanley v. Dryer, 70 Misc. 561, 127 NYS 468 (holding that, under an agreement that if plaintiff secures for defendant a contract for the sale of certain carriages he shall, when they are delivered, receive a commission, defendant's offer of delivery and the buyer's refusal of acceptance will not support an action for the commission, unless there is an action for transfer of possession or the buyer's refusal is caused by defendant's fault; the term "delivered" when used in a contract of sale meaning a transfer sufficient to give the seller an action for goods sold and delivered, or at least a complete voluntary transfer of the possession of the goods from one to another); Chapman v. Winson, 91 L. T. Rep. N. S. 17; Beale v. Bond, 84 L. T. Rep. N. S. 313; Fletcher v. Campbell, 5 OntWN 261 (default of purchaser defeating compensation, purchaser unable to complete contract).

[a] **Thus** (1) where the owner of personalty agreed to pay an agent a commission in case he should succeed "in disposing of" the property on acceptable terms, and the agent procured a purchaser who made a written contract with the owner to buy goods, and to pay for the same partly with a deed to certain land, and such purchaser was unable to perform his contract for want of title to such land, the agent was not entitled to commissions, Greusel v. Dean, 98 Iowa 405, 67 NW 275. (2) So a contract by which a manufacturer employs a person as a "selling agent" at a commission "on all sales" contemplates actual sales, and not mere contracts of purchase and sale, and hence if an accepted order procured by the agent is filled in part only because of the buyer's inability to pay for more, the agent is not entitled to commissions on the unfilled part. Creveling v. Wood, 95 Pa. 152. See however Lockwood v. Levick, 8 C. B. N. S. 603, 98 ECL 603, 141 Reprint 1303.

19. Paul E. Wolff Shirt Co. v. Sacks, (Mo. A.) 168 SW 641; Fisher v. Drewett, 48 L. J. Exch. 32 (holding that, if the principal, having accepted an offer of a loan procured by the agent, afterward refuses to complete the transaction, the agent is entitled to his commission even though it was payable only "on any money received" by the principal).

[a] **Thus** (1) where a vendor promises to the agent, to effect a sale, a certain sum for his services, if the purchaser shall fulfill his agreement, the agent is entitled to recover of the vendor if the purchaser is ready to fulfill, but through the default of the vendor does not. Shinn v. Haines, 21 N. J. L. 340. (2) So it is not ground for withholding commissions, earned under a contract providing that commissions shall be due out of all sums collected from sales made by the employee, that it was not possible for the employer to fill the orders in the usual course of business. Stone v. Argersinger, 32 App. Div. 208, 53 NYS 63. (3) So also, where a person was employed on a written contract to sell goods for a commission on all net sales which he procured, the commission to be paid only after the goods were paid for, he could recover his commissions, not only on goods sold by him and paid for, but on goods the orders for which were not filled through the fault of the employer. Abel v. Nelson, 104 NYS 362. And see Lafferty v. Lorimer, 86 Mich. 591, 49 NW 586. (4) So, where a traveling salesman, in good faith and without violation of any selling instructions, solicits and obtains orders from solvent customers, he is entitled to his commission, although the manufacturer, because of a shortage of stock is unable to fill the orders. Paul E. Wolff Shirt Co. v. Sacks, (Mo. A.) 168 SW 641.

[b] **Arbitrary refusal to deliver.**—Where a salesman is to receive commissions on the delivery of goods sold, his employer cannot arbitrarily refuse to deliver the goods, and so deprive him of compensation for his labor. Aikins v. Thackara Mfg. Co., 15 Pa. Super. 250.

[c] **Grounds of default; customer's title to land offered principal.**—The agent of a contract purchaser of land who refuses to carry out the purchase is not entitled to a commission on the sale where by the terms of the employment the vendor's title was to be approved by the purchaser's solicitor, and it does not appear either that the title was so approved or that it was such a title as could not reasonably be disapproved. Clack v. Wood, 9 Q. B. D. 276.

20. Garnhart v. Rentchler, 72 Ill. 535 (holding that, where an agent is authorized to sell machines and to make certain representations relative to them, and is to receive as compensation a percentage of the proceeds of sales made by him, and the machines sold do not prove to be as represented, and are returned, he is entitled to recover his compensation on the sales of such machines); Stanley v. Dryer, 70 Misc. (N. Y.) 561, 127 NYS 468; Austen v. Canadian Fire Engine Co., 42 N. S. 77 (engine not standing test).

21. Ala.—Taylor Mfg. Co. v. Key, 86 Ala. 212, 5 S 303.

Ill.—Evans v. Hughey, 76 Ill. 115. But see Fuller v. Brady, 22 Ill. A. 174.

Md.—McCay Engineering Co. v. Crocker-Wheeler Electric Co., 100 Md. 530, 60 A 443.

Nebr.—Westinghouse Co. v. Tilden, 56 Nebr. 129, 76 NW 416.

N. Y.—Stone v. Argersinger, 32 App. Div. 208, 53 NYS 63. Compare Strong v. Prentice Brown Stone Co., 10 Misc. 380, 31 NYS 144 [aff 6 Misc. 57, 26 NYS 85] (holding that the mere fact that a person wrote to his sales agent, whose commissions were to be the excess above a certain amount, that he would want him to take his pay from the sale of the goods, does not prevent the principal from being personally liable for the commissions, in the absence of an acceptance of such proposition by the agent).

Tex.—Gresham v. Galveston County, (Civ. A.) 36 SW 796; Thompson-Houston Electric Co. v. Berg, 10 Tex. Civ. A. 200, 30 SW 454.

Wash.—Park v. Mighell, 3 Wash. 737, 29 P 556.

Ont.—Wiley v. Blum, 10 OntWR 565.

See Bull v. Price, 7 Bing. 237, 20 ECL 112, 131 Reprint 91.

Compare Bills v. A. W. Stevens Co., 146 Mich. 515, 109 NW 1059 (holding that, where a contract employing an agent for the sale of the employer's machinery stipulated that commission on machinery sales should be payable as the notes, securities, or other proceeds of sale were paid in money, and the agent sold machinery, and received as part payment secondhand machinery which the employer sold, accepting in payment an engine, valued at a specified amount, and cash and securities, the agent was entitled to recover commissions on the price for which the employer sold the secondhand machinery, as fixed by the value of the engine and the securities and the amount of the cash, without waiting until the securities had been paid and the engine had been sold); Sherman v. Consolidated Dental Mfg. Co., 202 Pa. 451, 52 A 2 (holding that, under a contract by which defendant appoints plaintiff its manager for the sale of its goods, and he agrees to use his best endeavors to promote the sale, it agreeing to give him for selling them a sum equal to the difference between the list and the trade prices of the articles, and he agreeing that in making sales they shall be made only to such persons as are responsible, he

to compensation under such a contract by disposing of his own right to receive the funds,[22] or by unreasonable delay on his part in seeking to enforce collection;[23] and if the purchaser pays in part the agent may be entitled to his commissions on the part payment.[24]

Compensation for services. However it is to be observed that as a rule the failure, refusal, or inability of either the principal or the third person to carry out the contract entered into by them does not defeat the agent's right to compensation for negotiating that contract;[25] and this rule is especially applicable where the contract negotiated by the agent is not carried out because of the principal's default;[26] and even though the failure to carry out the contract is due to the default of the customer, yet the agent is ordinarily entitled to his commission for negotiating the contract,[27] particularly where the customer has good grounds for his default,[28] such as by reason of a defect in the principal's title.[29] Nor is such right defeated by the fact that the principal and the third person subsequently modify, rescind, or cancel the contract by mutual consent.[30]

is entitled to compensation on sales on credit, although the purchase price has not been collected).

[a] **Illustrations.**—(1) An agent for the sale of land who makes a sale payable in installments is not entitled to his entire commission out of the first installment paid. Melvin v. Aldridge, 81 Md. 650, 32 A 389; Peters v. Anderson, 88 Va. 1051, 14 SE 974. (2) Where a contract between a principal and a sales agent stipulates that the agent shall not be entitled to commissions on a sale of machinery "taken back" by the principal, the agent is not entitled to commissions on a sale of machinery which is not paid for by the purchaser, and which the principal is obliged to take back in a worn condition on foreclosure of a mortgage given by the purchaser to secure the price. Reeves v. Watkins, 89 SW 266, 28 KyL 401, 622. Contra see Clark v. Gaar, 78 Minn. 492, 81 NW 530.

[b] **Where the price is not paid through the act of the principal** the agent is entitled to commissions on the entire price. Taylor Mfg. Co., v. Key, 86 Ala. 212, 5 S 303; Aultman v. Ritter, 81 Wis. 395, 51 NW 569.

22. Hix v. Edison Electric Light Co., 10 App. Div. 75, 41 NYS 680; Reed v. Union Cent. L. Ins. Co., 21 Utah 295, 61 P 21. Compare Blassingame v. Keating Impl. etc., Co., (Tex. Civ. A.) 74 SW 344 (where it appeared that a principal gave his agent notes for commissions on a sale of machinery made by him, it being understood that such notes should be paid as the purchase money notes given the principal were paid; and that another party became the owner of the purchase money notes, and subsequently, by arrangement with the purchaser of the machinery, took the machinery and returned the purchase money notes to the purchaser, and it was held that if the principal had received the full amount of the purchase money notes on a sale thereof which terminated his liability on such notes, he was liable to the agent on the notes given to him, but if the principal remained liable on the purchase money notes, he was not liable to the agent).

23. Evans v. Hughey, 76 Ill. 115. See also Taylor Mfg. Co. v. Key, 86 Ala. 212, 5 S 303; Aultman v. Ritter, 81 Wis. 395, 51 NW 569; Bull v. Price, 7 Bing. 237, 20 ECL 112, 131 Reprint 91.

[a] **Collections to be made by principal.**—Where by the terms of the agency contract, the agent's commission for sales is only payable when the purchase price has been collected by the principal, the negligence of the principal in making collections may entitle the agent to recover the stipulated compensation, although the collections have not been made. Westinghouse Co. v. Tilden, 1 Nebr. (Unoff.) 745, 96 NW 74.

24. Md.—Melvin v. Aldridge, 81 Md. 650, 32 A 389.

Minn.—Clark v. Gaar, etc., Co., 78 Minn. 492, 81 NW 530.

S. D.—Baskerville v. Gaar, etc., Co., 15 S. D. 211, 88 NW 103.

Tenn.—Odum v. J. I. Case Threshing-Mach. Co., (Ch. A.) 36 SW 191.

Tex.—Gresham v. Galveston County, (Civ. A.) 36 SW 796.

Va.—Peters v. Anderson, 88 Va. 1051, 14 SE 974.

25. Nagl v. Small, (Iowa) 138 NW 849, 850 [cit Cyc]; Boland v. Kistle, 92 Iowa 369, 60 NW 632; Aikens v. Thackara Mfg. Co., 15 Pa. Super. 250; Lockwood v. Levick, 8 C. B. N. S. 603, 98 ECL 603, 141 Reprint 1303; Smith v. Barff, 27 Ont. L. 276; McMillan v. Barratt, 16 WestLR 209. But see Read v. Rann, 10 B. & C. 438, 21 ECL 189, 109 Reprint 513.

[a] **Litigation delaying settlement.**—A party having undertaken, on behalf of a foreign corporation, to effect the sale of an ice machine and accompanying paraphernalia to persons domiciled in Louisiana, for a designated and fixed commission on the amount of the sale effected, payable when the plant is turned over to the purchaser and settled for at a given date, is entitled to payment of such commissions at that date, notwithstanding litigation arises between the contracting parties with reference to the vendor's fulfillment of its contract, which operates a delay in settlement between them. Gravely v. Southern Ice Mach. Co., 47 La. Ann. 389, 16 S 866.

26. Ill.—Searing v. Butler, 69 Ill. 575.

Iowa.—Brown v. Wilson, 98 Iowa 316, 67 NW 251.

Mass.—Witherell v. Murphy, 147 Mass. 417, 18 NE 215.

Utah.—Lawson v. Thompson, 10 Utah 462, 37 P 732.

Eng.—Fisher v. Drewett, 48 L. J. Exch. 32.

B. C.—Bagshawe v. Rowland, 13 B. C. 262, 7 WestLR 158.

[a] **Thus** it does not defeat the agent's right to commission for taking an order which is accepted by the principal that the latter becomes unable to execute the order, and derives no benefit from it. Lockwood v. Levick, 8 C. B. N. S. 603, 98 ECL 603, 141 Reprint 1303.

27. Lara v. Hill, 15 C. B. N. S. 45, 109 ECL 45, 143 Reprint 699. See also McCallum v. Russell, 12 WestLR 267. But see supra note 18.

[a] **Wrongful refusal of purchaser to complete purchase.**—Where the agent is to receive compensation in case he "effect a sale" of certain property, he is entitled to such compensation where he furnishes a purchaser who enters into a contract of purchase, although the purchaser wrongfully refuses to complete the purchase. Ward v. Cobb, 148 Mass. 518, 20 NE 174, 12 AmSR 587.

28. Restein v. McCadden, 166 Pa. 340, 31 A 99 (holding that, if a buyer refuses to accept the goods on the ground that they were not properly made, the agent is entitled to his commission notwithstanding a provision that it was not to be paid until the goods were delivered and paid for); Tyler v. Bernard, (Tenn. Ch. A.) 57 SW 179 (holding that a contract buyer of goods may lawfully refuse to carry out the contract because of the seller's delay in manufacturing the goods, in which case the seller's agent is entitled to a commission for negotiating the contract of sale).

29. Mich.—Stange v. Gosse, 110 Mich. 153, 67 NW 1108 (holding that a vendor's agent is entitled to a commission for negotiating the contract of purchase and sale where the sale falls through because the vendor's title is defective or encumbered).

Miss.—Roberts v. Kimmons, 65 Miss. 232, 3 S 736 (where the principal represented that he had a good title).

Mo.—Hart v. Hopson, 52 Mo. A. 177 (holding that a person employed to procure a contract for the sale of a leasehold interest for a fixed compensation, to be paid as soon as the contract was obtained, is entitled to the stipulated compensation on procuring the contract, although the sale, owing to the fact that the leasehold title was encumbered for its full value and valueless, was not consummated, if he acts in ignorance of the defect in the title).

Pa.—Sweeney v. Ten Mile Oil, etc., Co., 130 Pa. 193, 18 A 612.

Can.—Mackenzie v. Champion, 12 Can. S. C. 649 [dism app 4 Man. 158].

Man.—Brydges v. Clements, 14 Man. 588, 24 CanLTOccNotes 96.

30. Taylor Mfg. Co. v. Key, 86 Ala. 212, 5 S 303 (holding that, where a contract of employment to sell machinery on specified commissions provides that "no commissions shall be allowed or paid . . . on any article taken back, or on any order taken and not filled, on machinery not settled for, or any sale to irresponsible persons," the agent, on making a sale to a responsible person, becomes entitled to his commissions, and cannot be deprived of them because the principal, after extending the indebtedness at maturity, finally releases a part of the security and takes back the machinery in settlement of the debt); Leopuld v. Weeks, 96 Md. 280, 53 A 937 (where it appeared that a corporation appointed an agent to sell patent rights, and agreed to pay him ten per cent of the price received from sales made by him; that the agent procured a buyer, with whom a contract was entered into, which was modified through the efforts of a third person in behalf of the corporation; that the last agreement professed on its face to be a modification of the original contract, and the changes, although numerous, were stated in detail by reference to the numbered paragraphs of the former contract; and it was held that the agent was entitled to the ten per cent commission on the price received pursuant to the last agreement); Pancoast v. Industrial Glass Co., 148 App. Div. 473, 132 NYS 821 [210 N. Y. 565 mem, 104 NE 1135 mem]; Howland v. Coffin, 47 Barb. (N. Y.) 653 (where it appeared that the owners of a steamship signed a contract with a ship broker, "on account of his obtaining a charter from the government" for their ship, to pay him "five per cent on amount of charter, say two hundred dollars per diem, more or less, so long as she remains in government service"; that the broker obtained the charter, and under it the government paid the owners two hundred dollars per diem until March 25, when, by agreement between the government and the owners indorsed

[§ 440] **(5) Procuring Contract Differing from That Which Agent Was Authorized to Negotiate.** If the principal and a third person enter into a contract as a result of the agent's intervention, the agent is not deprived of his right to compensation by the fact that the contract so concluded differs in terms from the one which he was employed to negotiate;[31] unless it differs not only in terms but also in substance, so as to render it an entirely new and altogether different transaction.[32] However, an agent employed to negotiate a contract on particular terms is not entitled to compensation under the terms of his employment for producing a person who is willing to enter into the contract only on different terms,[33] unless the principal ratifies what the agent has done, or waives the right to object to the agent's nonfulfillment of the terms of his employment, or estops himself from asserting that right.[34] So if

on the charter, no other provisions of which were changed, the compensation was reduced to one hundred and twenty dollars per diem; that the owners refused to pay the broker any commission after that time, on the ground that the charter obtained by the broker had ceased to exist, it was held that the identity of the instrument or transaction was not affected by the indorsement, and that the broker was entitled to his commission upon one hundred and twenty dollars per day, until the charter was given up); Langley v. Rowlands, 46 Can. S. C. 626 [dism app 16 B. C. 72]; Hammer v. Bullock, 14 WestLR 652. See also Lafferty v. Lorimer, 86 Mich. 591, 49 NW 586.

31. Iowa.—Woods v. J. I. Case Threshing Mach. Co., 155 Iowa 177, 135 NW 399.

Mich.—Fuchs v. Standard Thermometer Co., 178 Mich. 87, 144 NW 484.

Minn.—Scovell v. Upham, 55 Minn. 267, 96 NW 812 (where a lender agreed to pay an agent a commission if he loaned the agent's customer a certain sum at a certain rate, and he loaned the customer a less sum at a higher rate).

Mo.—Gooch v. J. I. Case Threshing Mach. Co., 119 Mo. A. 397, 96 SW 431 (where a contract of sale concluded by agents was altered by the principal in some immaterial respects, and a new contract executed for the purpose of depriving the agents of their commissions).

Pa.—McClure v. McMichael, etc., Mfg. Co., 20 Montg. Co. 137 (where an agent negotiated a sale, and the principal accepted property in part payment).

W. Va.—Reynolds v. Tompkins, 23 W. Va. 229.

Eng.—Rimmer v. Knowles, 30 L. T. Rep. N. S. 496.

Man.—Thordarson v. Jones, 17 Man. 295, 7 WestLR 106 (agent held entitled to one-half commissions where the parties exchanged property instead of making a sale); Wilkes v. Maxwell, 14 Man. 599, 24 CanLTOcc Notes 150.

Ont.—McBrayne v. Imperial Loan Co., 28 Ont. L. 653.

Que.—Cruickshank v. Prud'homme, 31 Que. Super. 313.

[a] **Sale at lower price.**—One employed to find a customer for property at a certain price is entitled to his commission, although the principal sells to such customer at a lower price, the agent having nothing to do with the reduction. Dexter v. Campbell, 137 Mass. 198; Daily v. Young, 13 NYS 435; Mansell v. Clements, L. R. 9 C. P. 139; Robertson v. Carstens, 18 Man. 227, 9 WestLR 397 [dism app 7 WestLR 742]; Cronk v. Carman, 2 OntWN 1027, 19 OntWR 145; Milestone Land, etc., Agency v. Lucksinger, 1 Sask. L. 61, 7 WestLR 497. See however, Stephens v. Janes, 2 NYSt 659 (holding that, where an agent to lease certain premises for a stated sum, who merely makes an offer to lease them to a firm, which offer is not accepted before the death of a partner, does not earn any commission, where after such death the agent makes an unsuccessful effort to renew the negotiations and the owner transfers the premises to her husband, who leases them to the successors of said firm for a less amount); Glines v. Cross, 12 Man. 442; Culverwell v. Birney, 14 Ont. A. 266.

Effect of termination of agency before conclusion of contract between principal and third person see supra § 419.

32. Starr v. Royal Electric Co., 30 Can. S. C. 384 [aff 33 N. S. 156] (holding that in such a case the agent cannot recover as for negotiating the contract contemplated by the terms of his employment). But see Rimmer v. Knowles, 30 L. T. Rep. N. S. 496 (where an agent employed to sell realty was held entitled to a commission for effecting a lease with option to buy).

[a] **Sale of part of property.**—A contract by defendant to pay plaintiff a specified commission after six months from the delivery to defendant of a deed for a one-half interest in a ranch owned by a third person is indivisible, and plaintiff cannot, upon defendant's purchase of a one-third interest in such ranch, recover a proportionate commission. Witte v. Taylor, 110 Cal. 224, 42 P 807. See also Eidson v. Saxon, (Tex. Civ. A.) 30 SW 957; Culverwell v. Birney, 14 Ont. A. 266. But see Welsh v. Lemert, 92 Iowa 116, 60 NW 230 (holding that, where an owner writes his agent, who is negotiating a sale of his farm, that he wishes to sell with the farm his horses, implements, etc., and that if the stock is not sold it will be necessary to retain a portion of the farm, the sale of the stock, implements, and farm together is not a condition on which the sale must be made to entitle the agent to his commissions).

33. Minn.—Marble v. Bang, 54 Minn. 277, 55 NW 1131 (holding that authority to an agent to sell land, unless otherwise expressly provided, is authority to sell only for cash on delivery of the deed; and that the agent is not entitled to a commission for procuring a person who is willing to buy on time); Hamlin v. Schulte, 31 Minn. 486, 18 NW 415.

N. Y.—Schultz v. Griffin, 121 N. Y. 294, 24 NE 480, 18 AmSR 825 (holding that, where defendant agreed to pay plaintiff certain compensation to sell his farm for twenty thousand dollars to be paid as follows: "1st mortgage, $5,000; 2d mortgage . . . $2,500; the balance" to defendant in cash, the mortgages having been made to secure bonds of defendant, plaintiff did not earn the compensation by the tender of a contract whereby the purchaser agreed to pay that portion of the price represented by the mortgages "by assuming" the mortgages, in the absence of evidence that the mortgages were not due and could not be paid); Fraser v. Wyckoff, 63 N. Y. 445 [aff 2 Hun 545] (where defendant agreed to pay plaintiff one thousand five hundred dollars, provided he effected a sale of a certain patent, or obtained a customer who should pay seventeen thousand five hundred dollars for such patent, or ten per cent on any less sum defendant might agree to take, and in pursuance of the agreement plaintiff entered into copartnership with two others for selling rights under the patent, and the firm was to pay defendant fifteen thousand dollars as follows: twenty-five per cent of the net profits to be realized from the sale of rights secured, and twenty per cent of the net profits to be realized from the construction of waterworks under the patent, until the whole amount was paid; and it was held that the agreement did not constitute such a sale as was contemplated by the contract of agency, and that plaintiff was not entitled to the commissions agreed to be paid); Stone v. Argersinger, 32 App. Div. 208, 53 NYS 63 (holding that, where a sales agent takes orders for goods differing from the samples furnished him by the principal, the latter is not bound to accept the orders).

Tex.—Eidson v. Saxon, (Civ. A.) 30 SW 957.

Eng.—Mason v. Clifton, 3 F. & F. 899; Toppin v. Healey, 11 Wkly. Rep. 466.

Can.—Bridgman v. Hepburn, 42 Can. S. C. 228.

See also supra § 437.

[a] **A sale of land by an agent on different terms from those authorized** by his principal will not bind the latter to pay for the services of the former. Peterson v. Church, 16 Hawaii 739.

34. Cal.—Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 29 P. 640, 28 AmSR 122; Blood v. Shannon, 29 Cal. 393 (where an agent authorized to sell for gold coin took the purchaser's check for the price, and the principal refused to convey solely on the ground that he had already sold to another).

Ill.—Searing v. Butler, 69 Ill. 575.

Mich.—Shepherd v. Gibbs, 85 Mich. 85, 48 NW 179.

Oh.—Winpenny v. French, 18 Oh. St. 469 (holding that one who employs an agent to negotiate a contract, and afterward, as toward the other contracting party, ratifies the contract which the agent obtains cannot be heard, in a subsequent action by the agent for the compensation promised for his services, to dispute that the latter succeeded in negotiating the contract as desired).

Or.—Heywood Bros., etc., Co. v. Doernbecher Mfg. Co., 48 Or. 359, 86 P 357, 87 P 530.

Eng.—Sentance v. Hawley, 13 C. B. N. S. 458, 106 ECL 458, 143 Reprint 182; Mason v. Clifton, 3 F. & F. 899; Rimmer v. Knowles, 30 L. T. Rep. N. S. 496.

[a] **Ratification of sale as made by agent.**—(1) If the principal ratifies a sale on the terms made by the agent, the latter is generally entitled to compensation under the contract of employment, although the sale is not made on the terms on which the agent was employed to make it. Goss v. Stevens, 32 Minn. 472, 21 NW 549; Gelatt v. Ridge, 117 Mo. 553, 23 SW 882, 38 AmSR 683; Wolf v. Tait, 4 Man. 59. See however Gregory v. Mack, 3 Hill (N. Y.) 380; Eidson v. Saxon, (Tex. Civ. A.) 30 SW 957. (2) This rule applies where the agent negotiates a sale at a lower price than that which he was authorized to accept. Austin v. Burroughs, 62 Mich. 181, 28 NW 862; Doty v. Case, etc., Thresher Co., 50 Hun 595, 3 NYS 510. But see Blackwell v. Adams, 28 Mo. A. 61.

[b] **Reasonable compensation.**—Although an agent negotiates a contract on different terms from those on which he was authorized to negotiate it, yet if the principal enters into the contract as negotiated the agent may recover reasonable compensation for his services. Wycott v. Campbell, 31 U. C. Q. B. 584. Compare Diltz v. Spahr, (Ind. A.) 42 NE 823; Blackwell v. Adams, 28 Mo. A.

an agent authorized to negotiate a contract merely procures a third person to enter into a conditional or optional agreement, instead of procuring the absolute and final contract which he was employed to procure, he is not entitled to compensation,[35] unless and until the condition is fulfilled or the option is exercised and the absolute and final contract is made.[36]

[§ 441] **(6) Agent as Procuring Cause of Transaction.** An agent is not entitled to compensation as for negotiating a transaction which has been entered into by the principal and a third person unless he was the procuring cause thereof,[37] although he had previously negotiated with the person with whom the principal subsequently entered into a contract,[38] and although his efforts contributed remotely to the consummation of the contract;[39] and where an agent has negotiated a transaction between the principal and a third person, and been paid therefor, he is not entitled to a commission on a subsequent, although similar, transaction between the principal and the same person without his further intervention.[40]

If, on the other hand, the agent was the procuring cause of the transaction, he is entitled to compensation for effecting it,[41] even though he had no personal intercourse with the third person.[42] Thus an agent employed to negotiate a particular transaction is ordinarily entitled to compensation if he brings the principal and a third person into communication, and as a result they enter into the transaction,[43] although he is not personally present when the transaction is finally entered into,[44] as, where he is the procuring cause in effecting a sale, he may be entitled to the stipulated commission, although the sale is actually consummated by the principal.[45]

61; Culverwell v. Birney, 14 Ont. A. 266.

35. Smith v. Tate, 82 Va. 657 (where an agent employed to sell land made a sale on consideration that the tract on a survey should contain a certain number of acres, and he failed to have the land surveyed as he had authority to do, as a result of which the sale was not made). Compare Curtis v. Nixon, 24 L. T. Rep. N. S. 706.

[a] **A sale on approval** does not entitle an agent to compensation as for making a sale, where the buyer has not accepted or does not accept the property. Thomas v. Lincoln, 71 Ind. 41; Sanderson v. Tinkham Smoke-Consumer Co., 83 Iowa 446, 49 NW 1034; McCarthy v. Cavers, 66 Iowa 342, 23 NW 757; Ross v. Portland Coffee, etc., Co., 30 Wash. 647, 71 P 134.

[b] **Option to forfeit deposit and abandon purchase.**—Although a prospective purchaser deposits part of the price, yet if he does not bind himself to complete the purchase, but may forfeit the deposit and abandon the purchase, the agent is not entitled to compensation as for effecting a sale. Yeager v. Kelsey, 46 Minn. 402, 49 NW 199; Ives v. Davenport, 3 Hill (N. Y.) 373. But see Ward v. Cobb, 148 Mass. 518, 20 NE 174, 12 AmSR 587.

36. Morson v. Burnside, 31 Ont. 438. But see Taylor v. Cobourg, etc., R., etc., Co., 24 U. C. C. P. 200.

37. U. S.—Palne v. Standard Plunger El. Co., 203 Fed. 242, 121 CCA 440; Idler v. Borgmeyer, 65 Fed. 910, 13 CCA 198.

Md.—Attrill v. Patterson, 58 Md. 226.

Nebr.—Burkholder v. Fonner, 34 Nebr. 1, 51 NW 293 (holding that a person to whom the owner of land has agreed to pay a certain sum if he should sell the land or procure a purchaser therefor is not entitled to recover the sum if the person to whom the land is subsequently sold received the information which led to the purchase from other sources and did not purchase from or through him).

N. Y.—Stephens v. Jones, 41 Hun 641; Blumberg v. Sterling Bronze Co., 111 NYS 529; David v. Rick, 67 NYS 1052.

Pa.—Hartley v. Anderson, 150 Pa. 391, 24 A 675.

Eng.—Antrobus v. Wickens, 4 F. & F. 291.

Can.—White v. Maynard, 15 WestLR 388; Sam Chong v. Lee, 11 WestLR 200.

[a] **Reasonable value of services.**—If the agent is not the procuring cause of the transaction, he is not entitled to compensation for his efforts to procure it. Culverwell v. Birney, 14 Ont. A. 266.

38. Bridgman v. Hepburn, 13 B. C. 389, 8 WestLR 28; Boydell v. Snarr, 6 U. C. C. P. 94 (holding that the fact that the agent had negotiated with the person from whom the principal subsequently purchased property did not entitle the agent to a commission as for negotiating the purchase, where he was not the procuring cause thereof); Blackstock v. Bell, 3 Sask. L. 181, 14 WestLR 519 [aff 16 WestLR 363] (holding that, where plaintiffs who were agents for the sale of defendant's hotel property saw a person mentioned to them by defendants as a likely purchaser, but did not procure him as a purchaser, and defendants themselves afterward effected a sale to the same person but on different terms and at a lower price than those upon which plaintiffs had been instructed to sell, they were not entitled to a commission or to payment for their services on a quantum meruit basis). See also infra § 442.

39. Commercial Nat. Bank v. Hawkins, 35 Ill. A. 463 (holding that the fact that an agent's efforts contributed remotely to the consummation of a sale does not entitle him to a commission as for selling). See also Flack v. Condict, 66 N. J. L. 351, 49 A 508; Northwestern Port Huron Co. v. Zickrick, 32 S. D. 28, 141 NW 983.

[a] **An agent to earn his commission must be the direct cause** of the sale; it is not sufficient merely to mention it to a person who afterward mentions it to the purchaser; the agent must bring vendor and purchaser together. Vachoe v. Straton, 2 Sask. L. 72, 10 WestLR 157.

[b] **Principal ignorant that purchaser sent by agent.**—A principal who has placed his property in the hands of an agent for sale on commission will not be liable to the agent for commission if he afterward sells to a purchaser in ignorance that such purchaser was sent to him by the agent, unless there are circumstances sufficient to put the principal upon inquiry as to whether the purchaser was not in fact sent to him by the agent. Hughes v. Houghton Land Co., 18 Man. 686, 9 WestLR 646; Locators v. Clough, 17 Man. 659; Elvin v. Clough, 7 WestLR 762 [app allowed 8 WestLR 590].

40. Toulmin v. Millar, 12 App. Cas. 746 (where an agent procured a tenant, and the tenant afterward bought the premises); Tribe v. Taylor, 1 C. P. D. 505 (where an agent procured a loan, and the lender made subsequent advances to the principal); Curtis v. Nixon, 24 L. T. Rep. N. S. 706 (where an agent negotiated a lease with option to renew, and the tenancy was afterward continued on different terms); Lumley v. Nicholson, 34 Wkly. Rep. 716 (where an agent sold part of the property he was employed to sell, and the purchaser afterward bought the residue).

[a] **Who determines cause of sale.**—A provision in a contract to pay commissions on all sales of defendants' goods made "directly" by plaintiff, and a certain other commission on such other sales as should be "considered" by defendants as the result of plaintiff's original sales, does not give defendants the right arbitrarily to determine the question. Ransom v. Wheelwright, 17 Misc. 141, 39 NYS 342.

41. Ill.—Hammer v. Huber Mfg. Co., 157 Ill. A. 357 (sale resulting in part from former efforts).

Nebr.—Wasmer v. Lean, 32 Nebr. 519, 49 NW 463.

N. Y.—Sinclair v. Galland, 8 Daly 508.

Eng.—Burchell v. Gowrie, [1910] A. C. 614 (holding that, where an agent employed to sell property on commission introduces to his principal an intending purchaser, and the principal behind the back of the agent, and without his knowledge, sells to that person so introduced on terms which the agent had advised his principal not to accept, the agent is entitled to the commission as his act was the effective cause of the sale).

Man.—Aikins v. Allan, 14 Man. 549, 24 CanLTOccNotes 154.

Ont.—McBrayne v. Imperial Loan Co., 28 Ont. L. 653; Rice v. Galbraith, 26 Ont. L. 43, 3 OntWN 815, 21 OntWR 570; Singer v. Russell, 25 Ont. L. 444, 21 OntWR 24.

Sask.—Schuchard v. Drinkle, 1 Sask. L. 16, 7 WestLR 344 (holding that an agent employed to sell land upon commission is entitled to recover commission upon a sale resulting from negotiations brought about by his efforts).

See Saubert v. Conley, 10 Or. 488.

[a] **Right does not depend on outcome of transaction.**—The right of an agent to commissions on sales to purchasers furnished by him cannot be made to depend upon the successful outcome of a sale by his principal to a person in the agent's territory but without his consent. Woods v. J. I. Case Threshing Mach. Co., 155 Iowa 177, 135 NW 899.

42. Gemunder v. Hauser, 7 Misc. 487, 27 NYS 977 [aff 6 Misc. 210, 26 NYS 529]; Wilkinson v. Alston, 4 Aspin. 191. See also Bayley v. Chadwick, 39 L. T. Rep. N. S. 429. But see Antrobus v. Wickens, 4 F. & F. 291.

43. Gould v. Ricard Boiler, etc., Co., 186 Ill. A. 322; Stratton v. Vachon, 44 Can. S. C. 395 [rev 3 Sask. L. 286] (holding that as the steps taken by the agent had brought the owner into relation with the persons who finally became purchasers, he was entitled to recover the customary commission upon the price at which the property in question had been sold); Singer v. Russell, 25 Ont. L. 444, 21 OntWR 24. See also supra §§ 437, 438. But see White v. Baxter, Cab. & E. 199; Green v. Mules, 30 L. J. C. P. 343; Culverwell v. Birney, 14 Ont. A. 266.

44. Green v. Bartlett, 14 C. B. N. S. 681, 108 ECL 681, 143 Reprint 613. See also In re Beale, 5 Morr. Bankr. Cas. 37.

45. Iowa.—Davis v. Huber Mfg. Co., 119 Iowa 56, 93 NW 78.

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[§ 442] (7) **Transactions Negotiated by Principal or Outside Agent.** As a rule the employment of an agent to negotiate a transaction does not preclude the principal himself from negotiating the transaction.[46] Accordingly, except where the parties expressly agree that the agent shall be entitled to compensation upon sales or contracts made by the principal,[47] the agent is not entitled to compensation where the principal himself negotiates the transaction without the agent's aid and without deriving any advantage from the agent's efforts.[48] Thus, where an agent is to receive a commission for the sale of particular property, he is not, as a general rule, entitled to any compensation upon sales made by his principal.[49]

After the agent has commenced negotiations with a possible customer, neither the principal nor the customer can defeat the right to compensation by breaking off negotiations with the agent and concluding the transaction without his further aid,[50] and if an agent is the procuring cause of the transaction which he is authorized to negotiate, he is not deprived of the right to compensation by the fact that another agent similarly employed by the principal intervenes in the negotiations.[51] If, however, the intervening agent and not the original

Kan.—Gillett v. Corum, 7 Kan. 156.
Md.—Keener v. Harrod, 2 Md. 63, 56 AmD 706.
Mass.—Dexter v. Campbell, 137 Mass. 198.
Mich.—Hannan v. Moran, 71 Mich. 261, 38 NW 909.
Mo.—Morton v. J. I. Case Threshing Mach. Co., (A.) 74 SW 434.
Nebr.—Nicholas v. Jones, 23 Nebr. 813, 37 NW 679.
N. C.—Martin v. Holly, 104 N. C. 36, 10 SE 83.
Pa.—Brodhead v. Pullman Ventilator Co., 29 Pa. Super. 19.
S. D.—Baskerville v. Gaar, etc., Co., 14 S. D. 1, 84 NW 204.
Tenn.—Sharpless v. Warren, (Ch. A.) 58 SW 407; Odum v. J. I. Case Threshing-Mach. Co., (Ch. A.) 36 SW 191.
W. Va.—Ice v. Maxwell, 61 W. Va. 9, 55 SE 899; Reynolds v. Tompkins, 23 W. Va. 229.
Eng.—Burchell v. Gowrie, [1910] A. C. 614.

"To entitle an agent employed to sell property for his principal to compensation for his services it is not essential that the sale should have been accomplished through his unaided efforts. If he perform such duties about making the sale as it is expected of him, under the terms of the agreement, and a sale is thereby effected, he is entitled to, and may demand the agreed compensation for his services." McDearmott v. Sedgwick, 140 Mo. 172, 180, 39 SE 776.

46. Hungerford v. Hicks, 39 Conn. 259; Darrow v. Harlow, 21 Wis. 302, 94 AmD 541.

Sole and exclusive agents see infra § 443.

47. Cal.—Crane v. McCormick, 92 Cal. 176, 28 P 222 (holding that where defendants authorized plaintiff to sell certain real estate for them at any time within a year, and agreed for a valuable consideration to pay a commission if the sale should be effected in any way during that time, and the land was sold by defendants within the year, plaintiff, to recover the commission, need not show that he had produced or could produce a purchaser); Dobinson v. McDonald, 92 Cal. 33, 27 P 1098; Campbell v. Thomas, 87 Cal. 428, 25 P 545.
Iowa.—Hilliker v. Allen, 128 Iowa 607, 105 NW 120; Attix v. Pelan, 5 Iowa 336.
Ky.—Albin Co. v. Kuttner, 77 SW 181, 25 KyL 1100.
Mass.—Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 NE 695.
Mich.—Fuchs v. Standard Thermometer Co., 178 Mich. 37, 144 NW 484.
Minn.—Turnbull v. Northwestern Terra Cotta Co., 46 Minn. 513, 49 NW 229.
N. Y.—Taylor v. Enoch Morgan's Sons Co., 124 N. Y. 184, 26 NE 314 [aff 48 Hun 483, 1 NYS 293]; Gemunder v. Hauser, 6 Misc. 210, 26 NYS 529 [aff 7 Misc. 487, 27 NYS 977]. Compare Winslow v. Mayo, 123 App. Div. 758, 108 NYS 640 [aff 195 N. Y. 551 mem, 88 NE 1135 mem].
S. D.—Roberts v. Minneapolis Threshing Mach. Co., 8 S. D. 579, 67 NW 607, 59 AmSR 777.
Tex.—Thompson-Houston Electric Co. v. Berg, 10 Tex. Civ. A. 200, 30 SW 454 (holding that where the contract between a manufacturer and his agent provides that the agent shall receive a percentage on all products to be used in a certain territory, the fact that a contract for the sale of goods to be used in such territory is made by the principal outside of the territory is immaterial).
Wash.—American Bldg., etc., Assoc. v. Hart, 2 Wash. 594, 27 P 468.
Wis.—McGeehan v. Gaar, etc., Co., 122 Wis. 630, 100 NW 1072.
Ont.—Petrie v. Machan, 28 Ont. 642.
See also infra § 443.

[a] **Contract for half commissions if sale by principal.**—A contract to pay an agent a certain sum for selling a farm, and half the sum if the owner sells it outside the agent's influence, is upon a good consideration, and the agent, if prevented from making a sale by the owner's selling it outside his influence, can recover upon the contract the half sum agreed to be paid. Hoskins v. Fogg, 60 N. H. 402.

[b] **Introduction of person who afterward purchases.**—Where an agency to sell land is limited to nine months, but it is stipulated in the contract that if a customer is introduced through the agency of the broker, and a sale is afterward consummated with such customer, the owner shall pay a commission, whether the time of the agreement shall have expired or not, the broker may recover the commission if, during his agency, he introduces a customer to whom the land is afterward sold, whether the sale is ultimately consummated through his instrumentality or otherwise. Williams v. Leslie, 111 Ind. 70, 12 NE 102.

48. U. S.—Sanborn v. U. S., 135 U. S. 271, 10 SCt 812, 34 L. ed. 112.
Cal.—Hipwell v. Pioneer Inv., etc., Co., 150 Cal. 723, 89 P 1085.
Conn.—Hungerford v. Hicks, 39 Conn. 259.
Ill.—Hammer v. Huber Mfg. Co., 157 Ill. A. 357 (sale resulting in part from former efforts).
N. Y.—Winslow v. Mayo, 123 App. Div. 758, 108 NYS 640 [aff 195 N. Y. 551 mem, 88 NE 1135 mem].
Tex.—J. I. Case Threshing Mach. Co. v. Wright Hardware Co., (Civ. A.) 130 SW 729; Burns v. Hill, 2 Tex. A. Civ. Cas. § 523 (where both principal and agent tried to sell to the same person, and the principal himself was eventually successful).
Eng.—Brinson v. Davies, 105 L. T. Rep. N. S. 134.
Ont.—Travis v. Coates, 27 Ont. L. 63, 5 DomLR 807, 3 OntWN 1651, 22 OntWR 917.
See Wolf v. Tait, 4 Man. 59.

49. U. S.—Hubbard v. New York, etc., Inv. Co, 14 Fed. 675 [aff 119 U. S. 696, 7 SCt 353, 30 L. ed. 548].
Colo.—Alta Inv. Co. v. Worden, 25 Colo. 215, 53 P 1047.
Conn.—Hungerford v. Hicks, 39 Conn. 259.
Ga.—Irby v. Lawshe, 62 Ga. 216.
Ill.—Gilbert v. Coons, 37 Ill. A. 448.
Iowa.—McCarthy v. Cavers, 66 Iowa 342, 23 NW 757.
Kan.—Robinson v. Kindley, 36 Kan. 157, 12 P 587.
Ky.—Indiana Road Mach. Co. v. Lebanon Carriage, etc., Co., 79 SW 861, 25 KyL 1763 (holding that, where plaintiff was granted the right to sell machines for defendant in certain territory for a remuneration of all that the sale price exceeded the net list price at the factory, but the privilege was not exclusive, and defendant entered the territory and sold to a customer secured by plaintiff at a price beneath the net list price, plaintiff was not entitled to commissions on such sale).
Md.—McCay Engineering Co. v. Crocker-Wheeler Electric Co., 100 Md. 530, 60 A 443.
Mich.—Wyckoff v. Bishop, 115 Mich. 414, 73 NW 392.
Minn.—Gaar v. Brundage, 89 Minn. 412, 94 NW 1091.
Nebr.—Burkholder v. Fonner, 34 Nebr. 1, 51 NW 293; Earl v. Reid, 32 Nebr. 45, 48 NW 894.
N. Y.—O'Neill v. Howe, 16 Daly 181, 9 NYS 746; Jacobs v. Kolff, 2 Hilt. 133; Warren v. Rendrock Powder Co., 9 NYS 842.
Pa.—Kelly v. Marshall, 172 Pa. 396, 33 A 690.
S. D.—Roberts v. Minneapolis Threshing Mach. Co., 8 S. D. 579, 67 NW 607, 59 AmSR 777.
Wis.—Darrow v. Harlow, 21 Wis. 302, 94 AmD 541.
Ont.—Willis v. Colville, 1 OntWN 212, 14 OntWR 1019.
Sask.—Munro v. Beischel, 1 Sask. L. 238, 8 WestLR 846 [allowing app 8 WestLR 63]; Thompson v. Milling, 1 Sask. L. 150, 8 WestLR 622.

[a] **Sales of real estate by principal.**—In case of an agency to sell real estate on commission, the exclusive right to sell not being given, the owner himself has still the right to make a sale independent of the agent, and in such case he will not be liable to the agent for commissions unless he sells to a purchaser procured by the agent, and an exclusive agency to sell merely prohibits the appointment of another agency for the sale of the property, but does not prevent the owner himself from making a sale. Dole v. Sherwood, 41 Minn. 535, 43 NW 569, 16 AmSR 731, 5 LRA 720.

50. Howe v. Werner, 7 Colo. A. 530, 44 P 511; Gresham v. Connally, 114 Ga. 906, 41 SE 42; Keys v. Johnson, 68 Pa. 42; Baskerville v. Gaar, etc., Co., 14 S. D. 1, 84 NW 204. See Boughton v. Hamilton Provident Soc., 10 Man. 683. See also supra § 441.

51. Woods v. J. I. Case Threshing Mach. Co., 155 Iowa 177, 135 NW 399 (holding that a contract by a threshing machine company to pay its agent for a certain territory a commission "for each engine, etc., 'sold, duly settled for, and delivered within the proper territory by or through the agency of said agent,'" entitled the agent to a commission on a sale to a purchaser procured by him, although the actual sale was consummated by other agents of the com-

agent is the procuring cause of the transaction, the latter is generally entitled to nothing.[52] Where the contract of employment so provides, there may be a division of commissions between the agent who first solicits the customer and the agent who closes the transaction with him, and in such a case the rights of the agents are determined by the contract and do not depend on which agent was the procuring cause of the transaction.[53]

[§ 443] **f. As Affected by Agreement Creating Exclusive or Sole Agency.** By their contract of employment agents for the continuous sale of goods are frequently given the sole or exclusive agency, especially in a certain territory, and persons employed to sell a particular piece of property are likewise not infrequently made sole or exclusive agents for that purpose.[54] As a rule these contracts are not so worded as to entitle the agent to compensation when the principal himself, acting independently of the agent, sells the particular piece of property in question or sells his goods in the agent's territory,[55] although the contract may be so framed as to entitle the agent to commissions on sales made by the principal himself in the agent's territory.[56] Such

pany); Livezy v. Miller, 31 Md. 336; Dowling v. Morrill, 165 Mass. 491, 43 NE 295; Sager v. Sheffer, 2 OntWN 671, 18 OntWR 485 (holding that where plaintiff first introduced the purchaser to the vendor he was entitled to his commission, although the transaction was concluded through other agents). See also Davis v. Huber Mfg. Co., 119 Iowa 56, 93 NW 78; Bray v. Chandler, 18 C. B. 718, 86 ECL 718, 139 Reprint 1553; Murray v. Curry, 7 C. & P. 584, 32 ECL 771, 2 ERC 527; Kynaston v. Nicholson, 8 L. T. Rep. N. S. 671.

52. Iowa.—Hilliker v. Northwest Thresher Co., 145 Iowa 721, 122 NW 906 (holding that, where an agency contract for the sale of threshing machinery provided that when other property was taken in exchange no commission should be allowed, unless the net proceeds of the property taken in exchange, added to the property and notes received from the purchaser, should exceed defendant's net price specified, and another agent sold certain property in plaintiff's alleged territory, and in part payment took machinery in exchange, and in both instances the net amount received was less than the net prices specified for the new machinery sold plaintiff was not entitled to any commissions under his contract); Goin v. Hess, 102 Iowa 140, 71 NW 218.

N. Y.—Halperin v. Callender, 17 Misc. 362, 39 NYS 1044.

Tex.—Wilson v. Alexander, 18 SW 1057.

Eng.—Curtis v. Nixon 24 L. T. Rep. N. S. 706.

Can.—Mason v. Reeves, 18 WestLR 536.

B. C.—Johnson v. Appleton, 11 B. C. 128, 1 WestLR 14.

Ont.—Robins v. Hess, 2 OntWN 1150, 19 OntWR 277.

See Glines v. Cross, 12 Man. 442.

[a] **Contract for division of commission.**—An agent appointed to procure a loan within a time limited employed a subagent to assist him on an agreement to divide the commission. Upon the expiration of the time limit the principal refused to proceed in the matter, but subsequently employed the subagent to procure the loan. It was held that the agreement for division of the commission terminated with the primary agency, and that the subagent, upon his subsequent success, was entitled to the whole commission. Halperin v. Callender, 17 Misc. 362, 39 NYS 1044.

[b] **After termination of agency.**—Under an agency contract for the sale of machinery at a certain place and contiguous territory for a certain season and terminating at a specified date, such agent is not entitled to commissions on a sale made by another agent, after the termination of such contract, to a customer formerly living within his territory but who had, prior to the termination of his contract, moved to another part of the state. Hilliker v. Northwest Thresher Co., 145 Iowa 721, 122 NW 906.

53. Shaw v. McQueeney, 85 Misc. 395, 147 NYS 407.

54. Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 NE 695 (holding that, where plaintiff was made an exclusive agent for the sale of defendant's automobiles in a specified territory, and there was nothing in the contract to limit the words "exclusive agent," the right to plaintiff's territory was exclusive of the principal as well as of other agents). See also Hutchinson v. Root, 2 App. Div. 584, 38 NYS 16 [aff 158 N. Y. 681 mem, 52 NE 1124 mem]. Compare Stone v. Fox Mach. Co., 145 Mich. 689, 109 NW 659 (where a manufacturer employed an agent under a contract stipulating that he should be the sole agent for the manufacturer for the sale of its product throughout Europe, and declaring that it was understood that the manufacturer should do no advertising "in European papers without including his name and address [of]" the agent as its sole European agent, "the intention being to bring before the public . . . the fact that" the agent was "the sole agent for the manufacturer," and it was held that the contract provided that the manufacturer should not advertise in European papers without including the name and address of the agent as sole European agent; but that the manufacturer might advertise in American papers without doing so).

[a] **An exclusive agency is not to be implied** (1) from an unnatural construction of the terms of the contract. Indiana Road Mach. Co. v. Lebanon Carriage, etc., Co., 78 SW 861, 25 KyL 1763. (2) Thus an agreement to appoint a firm as agent "for receiving, keeping, and selling in their behalf" the first parties' harvesting machinery and parts and binding twine "on commission, for the following territory only, Jefferson county, for the entire season of 1891," with a power of revocation reserved, does not confer an exclusive selling agency. Deering v. Beatty, 107 Iowa 701, 77 NW 325. (3) And the fact that plaintiff for three years preceding a written contract of employment as salesman had solicited orders for defendant in a certain territory would not entitle him to an exclusive privilege to sell in such territory when it was not given by the contract. Wiley v. California Hosiery Co., (Cal.) 32 P 522.

[b] **"Exclusive agent" not distinguishable from "exclusive sale".**—Where a contract makes a person the "exclusive agent" for the sale of its cars in certain territory, it is not to be distinguished from a contract giving an "exclusive sale," and a sale to a customer in plaintiff's territory by the principal directly or through an agent in other territory is a violation of the contract. Illsley v. Peerless Motor Car Co., 177 Ill. A. 459.

55. Ark.—Gay Oil Co. v. Muskogee Refining Co., 97 Ark. 502, 134 SW 639.

Cal.—Golden Gate Packing Co. v. Farmers' Union, 55 Cal. 606.

Ill.—Gilbert v. Coons, 37 Ill. A. 448.

Minn.—Dole v. Sherwood, 41 Minn. 535, 43 NW 569, 16 AmSR 731, 5 LRA 720.

N. Y.—White Co. v. White Motor Co., 159 App. Div. 716, 144 NYS 960 (holding that, where a contract making defendant plaintiff's sales agent merely provided that plaintiff should establish no other dealer in the city of defendant's residence, that stipulation did not preclude plaintiff from making sales direct to customers).

Tex.—J. I. Case Threshing Mach. Co. v. Wright Hardware Co., (Civ. A.) 130 SW 729, 731 [cit Cyc] (holding that, where a contract employing an agent to make sales on commission provides that the principal shall not appoint any other agent to sell the articles, or to sell in a special territory, if it does not give the agent the exclusive right to sell such articles, or to sell in such territory, he is not entitled to commission on a sale made by the principal without his assistance).

Ont.—Curry v. E. M. F. Co., 28 Ont. L. 427.

Que.—Mainwaring v. Crane, 22 Que. Super. 67.

See McCay Engineering Co. v. Crocker-Wheeler Electric Co., 100 Md. 530, 60 A 443.

See also supra § 442.

[a] **If the agent is the procuring cause of the sale, however,** he is entitled to compensation. Baskerville v. Gaar, etc., Co., 14 S. D. 1, 84 NW 204. And see Gilbert v. Coons, 37 Ill. A. 448; Dole v. Sherwood, 41 Minn. 535, 43 NW 569, 16 AmSR 731, 5 LRA 720. See also supra §§ 441, 442.

[b] **A sale by the principal without the designated territory to a resident thereof** does not, in the absence of trade usage, entitle the agent to commissions. Haynes Auto. Co. v. Woodill Auto Co., 163 Cal. 102, 124 P 717, 40 LRANS 971 and note. But see Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 NE 695 (holding that, where a manufacturer's contract appointed plaintiff exclusive agent for the sale of automobiles for a certain vicinity, and expressly provided that, if the agent should receive inquiries from territory other than his own, he should promptly refer them to defendant, the agent was entitled to commissions on a sale made outside of his territory to a resident thereof temporarily residing elsewhere).

[c] **Where there is an exclusive agency to sell without the state,** a sale in the state of manufacture for resale without the state does not entitle the agent to commission. Haynes Auto. Co. v. Woodill Auto Co., 163 Cal. 102, 124 P 717, 40 LRANS 971 and note.

56. Cal.—Clairmonte v. Napier Motor Co., 11 Cal. A. 265, 104 P 712 (holding that a contract whereby a manufacturer appointed one its exclusive agent for the sale within a territory of its motor cars for a commission on sales in the territory, although construed as entitling the agent to a commission on all cars sold in the territory, does not prevent the manufacturer from making sales in the territory on the payment of the commissions, and a commission due on a sale made by the manufacturer is due and payable when the sale is made).

Ill.—Marshall v. Canadian Cordage, etc., Co., 160 Ill. A. 114 (holding that, if a principal sells merchandise within territory which it has exclusively granted to an agent upon commission, it is liable to such agent for the com-

sole or exclusive agency contracts, however, generally preclude the principal from appointing other agents to sell the same articles, or within the same territory, and from thus depriving the exclusive agent of compensation on account of independent sales made by such others;[57] but, in order to entitle the agent to recover his commission from his principal for such a sale, he must show that the new agent actually made a sale within his territory,[58] and that he himself would have made the sale, or that he performed, in connection therewith, the requirements imposed upon him by his contract.[59]

[§ 444] **g. Persons Liable for Compensation—(1) In General.** In the absence of an agreement to the contrary,[60] the person who employs an agent is the person liable for his compensation.[61] Thus a seller's agent cannot recover commissions from the buyer;[62] nor can the buyer's agent recover a commission from the seller.[63] So also the agent of a money lender cannot charge a borrower commission unless employed by him to procure the loan.[64]

[§ 445] **(2) Liability to Subagent.** If it is within the scope of the real or apparent authority of an agent to employ a subagent to act for the principal in reference to the subject matter of the agency, the principal is generally liable to the subagent for his compensation;[65] but in the absence of such authority the principal is ordinarily not liable to the

missions which would have accrued to him if he had made the sale in person). See also La Favorit Rubber Mfg. Co. v. H. Channon Co., 113 Ill. A. 491.

Iowa.—Keene v. Frick Co., 93 NW 582.

Wis.—Taylor Co. v. Bannerman, 120 Wis. 189, 97 NW 918.

Eng.—Snelgrove v. Ellringham Colliery Co., 45 J. P. 408.

See also McCay Engineering Co. v. Crocker-Wheeler Electric Co., 100 Md. 530, 60 A 443; Caffe v. Newark Auto. Mfg. Co., 78 Misc. 152, 137 NYS 906.

And see supra § 442.

Compare Hubbard v. New York, etc., Inv. Co., 119 U. S. 696, 7 SCt 353, 30 L. ed. 548 (where it was held that certain business done by the principal did not originate in the agent's district, so as to entitle him to compensation); Wyckoff v. Bishop, 115 Mich. 414, 73 NW 392 (holding that where one contracts with a firm to sell typewriter machines in certain territory, in which no sale is to be made without his receiving a benefit, he cannot claim a commission on a machine sold and delivered by the firm to a person residing outside, but having a branch office within, said territory, even though the machine is shipped to and used in the branch office).

[a] **Where an agent has the exclusive right** to sell in certain territory for a certain commission on the list price of goods, he is entitled on sales made by the principal in breach of the contract to such commission less the expense he would have incurred in making sales, although the goods were sold for less than the list price. Wier v. American Locomotive Co., 215 Mass. 303, 102 NE 481.

57. Perkins Electric Lamp Co. v. Hood, 44 Ill. A. 449; Snelgrove v. Ellringham Colliery Co., 45 J. P. 408. And see Dole v. Sherwood, 41 Minn. 535, 43 NW 569, 16 AmSR 731, 5 LRA 720. Compare Cedar Rapids Auto., etc., Co. v. Jeffrey, 139 Iowa 7, 116 NW 1054 (holding that a contract granting plaintiff the right to sell defendant's automobiles in a designated territory, whereby defendant agreed to refer to plaintiff all inquiries received from that territory as to automobiles of its manufacture, does not entitle plaintiff to commissions, profits, or damages, because of a sale of automobiles in plaintiff's territory by another agent having a like contract, except as to territory, where such other agent did not disclose to defendant any purpose to sell the automobiles in plaintiff's territory, and it does not appear that defendant had any notice that such other agent intended to sell them outside of its own territory).

[a] **Other agents authorized by contract; notice of appointment.**—A contract binding an agent to canvass certain territory for the sale of the principal's machines, and stipulating that if he fails to canvass the territory or to conduct the business in a satisfactory manner the principal may terminate the agency, or place other canvassers in the territory and deprive the agent of commissions on sales made by other canvassers, does not authorize the principal to employ other canvassers in the agent's territory and deprive him of the commissions on sales made by them without first giving the agent notice of an intention to employ other canvassers. Hilliker v. Allen, 128 Iowa 607, 105 NW 120.

[b] **Contract held not to create an exclusive agency** so as to entitle the agent to commissions on sales made in his territory by another agent not appointed for such territory see King Powder Co. v. Dillon, 42 Colo. 316, 96 P 439; Schroeder v. Fine, 131 NYS 575 (holding that a contract employing for a commission a traveling salesman in a specified territory, without giving any exclusive right to solicit orders for the employer in that territory, does not prevent the employer from employing other solicitors in that territory, although the salesman agrees to devote his entire time to the business); J. I. Case Threshing Mach. Co. v. Wright Hardware Co., (Tex. Civ. A) 130 SW 729.

[c] **Consent of agent.**—Where the general agent of the principal comes within the exclusive territory of the local agent, and there makes a sale with his consent, agreeing to pay him a fixed sum less than his commissions would have been, the local agent may recover this sum from the principal, if it appears that the general agent had authority to make such special agreement. Taylor Mfg. Co. v. Key, 86 Ala. 212, 5 S 303.

58. Brush-Swan Electric Light Co. v. Brush Electric Co., 49 Fed. 5.

59. Roberts v. Minneapolis Threshing Mach. Co., 8 S. D. 579, 67 NW 607, 59 AmSR 777.

60. Browne v. Gault, 19 Que. Super. 523.

[a] **An agreement by vendor and purchaser** that the latter shall pay the commissions agreed upon between the vendor and plaintiff for the services of the latter in negotiating the sale does not relieve the vendor of liability to plaintiff, in the absence of an agreement on plaintiff's part to release the vendor. Burnett v. Casteel, (Tex. Civ. A.) 36 SW 782.

61. Mich.—Stone v. Fox Mach. Co., 145 Mich. 689, 109 NW 659 (where a manufacturer employed an agent to sell his product and subsequently a corporation to carry on the business was formed, and it continued dealing with the agent, and the transactions between the manufacturer and the agent were settled at the time the relations between the corporation and the agent began, and it was held that the agent had no claim against the manufacturer).

N. Y.—Sinclair v. Galland, 8 Daly 508.

Tex.—Burnett v. Casteel, (Civ. A.) 36 SW 782. See also Blassingame v. Keating Impl., etc., Co., (Civ. A.) 74 SW 344.

Eng.—Gunn v. Showell's Brewery Co., 18 T. L. R. 659 [dism app 17 T. L. R. 563] (where defendant brewery desired to acquire some public houses in a particular district, and agreed to pay plaintiff a commission on all licensed property it might purchase through his introduction, and subsequently defendant abandoned that idea, and instead promoted a new company which ultimately acquired certain licensed property originally brought to the notice of defendant by plaintiff, and it was held that, as the new company was merely ancillary to the old, the commission was payable by defendant).

Can.—McLaws v. Smith, 5 DomLR 559, 21 WestLR 780.

See also supra § 418.

[a] **Liability as between principal and adverse party.**—(1) A person appointed by a number of subscribers for stock in a proposed joint stock company to receive and remit their subscriptions to the head office of the company is not the agent of the latter, and has no claim against the company for his services. Quebec, etc., Steam Nav. Co. v. Cunard, 2 N. B. 90. See also supra § 432. (2) Where, however, a debtor, by a compromise with his creditors, gives one of them claims to collect the proceeds thereof to pay his debts, the creditor thus chosen is the joint mandatary of both parties, but the debtor is liable for a commission to the agent. Clamagaran v. Sacerdotte, 8 Mart. N. S. (La.) 533. And see Cash v. Kennion, 11 Ves. Jr. 314, 32 Reprint 1109.

[b] **Sale in name of another.**—Where a salesman is employed by a contract which provides that his sales, etc., shall be made in the name of another corporation, such other corporation is not liable for the commissions earned by such salesman. McLean v. National Press Assoc., 157 Ill. A. 191.

62. Lorimer v. Boylan, 98 Mich. 18, 56 NW 1043; Browne v. Gault, 19 Que. Super. 523 (holding that an agent acting for and representing the vendor of real estate is not entitled, in the absence of an agreement to that effect, to recover from the purchaser a commission on the value of a property belonging to the latter, which was accepted by and transferred to the vendor in part payment of the price).

63. Lorimer v. Boylan, 98 Mich. 18, 56 NW 1043; Harnickell v. Parrot Silver, etc., Min. Co., (N. Y.) 22 NE 1079; Yates v. Killman, (Tenn. Ch. A.) 57 SW 221.

64. Cranston v. Nields, 5 Del. 372.

65. Cal.—McConnell v. McCormick, 12 Cal. 142.

Colo.—Holmes v. Griffith, 1 Colo. A. 423, 29 P 382.

Ga.—Cotton States L. Ins. Co. v. Mallard, 57 Ga. 64.

Iowa.—Kruse v. Seiffert, etc., Lumber Co., 108 Iowa 352, 79 NW 118 (holding that the payment by the master to his agent of the money for the wages of a servant employed by the agent will not relieve the master from liability to the servant, where the agent does not make the payment). See also Barnes v. Hogate, 103 Iowa 743, 72 NW 688.

Kan.—Randolph Lumber Co. v.

subagent,[66] unless the agent's agreement employing the subagent is subsequently adopted and ratified by the principal,[67] although it has been held that the fact that the principal recognizes the subagent and accepts the benefit of his services does not necessarily bind him to pay his compensation.[68] Nor is the principal liable if the agent employs the subagent in his own behalf and not as agent.[69]

Against agent. If an agent in employing a subagent acts for himself and not for his principal, he is liable to the subagent for the latter's compensation;[70] the same is true where the agent has no

Western Silo Co., 92 Kan. 368, 140 P 867.

La.—Hornbeck v. Gilmer, 110 La. 500, 34 S 651. See however Brown, etc., Co. v. Haigh, 113 La. 563, 37 S 478.

Md.—Carroll v. Manganese Steel Safe Co., 111 Md. 252, 73 A 665.

Nebr.—Furnas v. Frankman, 6 Nebr. 429.

N. Y.—Kyle v. Horbert, 122 NYS 204; Cornelius v. Reiser, 18 NYS 114; Lincoln v. Battelle, 6 Wend. 475.

Oh.—Ætna Ins. Co. v. Church, 21 Oh. St. 492 (holding that, where a contract, made by an agent of an insurance company for his principal for the services of another person in the business of the principal, provided that as part compensation for such services the person so employed should receive a specified per cent of the amount paid by the principal for the services of the agent so making the contract, the contract for such percentage was a contract with the principal and not with the agent, and the former was therefore liable to the subagent for such compensation).

S. D.—Linquist v. Northwestern Port Huron Co., 22 S. D. 298, 117 NW 365.

Tex.—Eastland v. Maney, 36 Tex. Civ. A. 147, 81 SW 574.

W. Va.—Fisher v. Berwind-White Coal Min. Co., 64 W. Va. 304, 61 SE 910, 131 AmSR 898.

[a] **Where a principal authorized his agent to employ subagents,** or where the principal knew that the agent was employing subagents and suffered the agent to hold himself out as having such authority, the principal will be liable to pay the compensation agreed on between the agent and a subagent for the services of the latter. Birch v. Powell, 15 KyL 445.

[b] **Private instructions to agent.** —Where a general agent charged with the duty of appointing subagents makes a contract obligating the principal to pay the subagents a fixed sum per month, although limited by private instructions to making contracts on commission, and signs the contract as the general agent of the principal, the principal and not the general agent is liable for the salary of such subagents. Cotton States L. Ins. Co. v. Mallard, 57 Ga. 64. Compare U. S. Life Ins. Co. v. Hessberg, 27 Oh. St. 393.

[c] **A private agreement between principal and agent** by which the latter is to pay the subagent does not preclude the subagent from recovering from the principal, if the agreement was not brought to his notice. Furnas v. Frankman, 6 Nebr. 429.

Amount of subagent's compensation see infra § 450.

Payment to agent as payment to subagent see infra § 451.

66. U. S.—Union Casualty, etc., Co. v. Gray, 114 Fed. 422, 52 CCA 224; Jenkins v. Funk, 33 Fed. 915.

Cal.—Johnson v. Pacific Mail Steamship Co., 5 Cal. 407.

Ill.—Fudge v. Seckner Contracting Co., 80 Ill. A. 35.

Ind.—Terre Haute, etc., R. Co. v. Brown, 107 Ind. 336, 8 NE 218.

Iowa.—Kinkead v. Hartley, 143 NW 591.

Kan.—Perry v. Jones, 18 Kan. 552; Hanback v. Corrigan, 7 Kan. A. 479, 54 P 129.

Ky.—Burger v. Allen, 71 SW 641, 24 KyL 1418; Jones v. Brand, 106 Ky. 410, 50 SW 679, 20 KyL 1997.

Mo.—Atlee v. Fink, 75 Mo. 100, 43 AmR 385.

Mont.—Bond v. Hurd, 31 Mont. 314, 78 P 579, 3 AnnCas 566.

N. Y.—Rice v. Poost, 78 Hun 547, 29 NYS 553. See also Dale v. Hepburn, 11 Misc. 286, 32 NYS 269 [aff 154 N. Y. 763 mem, 49 NE 1095 mem]; Beyers v. Hodge, 1 Misc. 76, 19 NYS 830 (where it was held that a principal cannot be held to pay a specific sum to a subagent, contracted for by a general agent, unless the principal has ratified the contract).

Pa.—Breen v. Miehle Printing Press, etc., Co., 8 Pa. Dist. 151, 22 Pa. Co. 275; De Baril v. Campoy, 17 Phila. 383.

S. D.—Quale v. Hazel, 19 S. D. 483, 104 NW 215 (holding that by an option contract for the sale of land at a specified sum, providing that the vendor should pay the vendee a certain amount as liquidated damages if he should refuse to accept the price and execute a deed as he had therein contracted to do, the vendor conferred no authority on the vendee to bind the vendor to pay any commission to a third person on account of the sale).

Tex.—Carlton v. Texas Banking, etc., Co., (Civ. A.) 152 SW 698; National Cash Register Co. v. Hagan, 37 Tex. Civ. A. 281, 83 SW 727; Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953.

Wis.—Hand v. Conger, 71 Wis. 292, 37 NW 235.

Eng.—Ex p. Edwards, 7 Q. B. D. 155; Waller v. Holmes, 1 Johns. & H. 239, 70 Reprint 735; Farewell v. Coker, 2 P. Wms. 460, 24 Reprint 814; Schmaling v. Thomlinson, 6 Taunt. 147, 1 ECL 549, 128 Reprint 989.

Man.—Bent v. Arrowhead Lumber Co., 18 Man. 632, 10 WestLR 339 [allowing app 8 WestLR 594].

[a] **An agent to sell** has no authority to agree in behalf of his principal to pay a third person a commission on sales made by the latter. Jenkins v. Funk, 33 Fed. 915; Atlee v. Fink, 75 Mo. 100, 43 AmR 385; Rice v. Post, 78 Hun 547, 29 NYS 553; De Baril v. Campoy, 17 Phila. (Pa.) 383.

[b] **By express contract with the general agent** a principal may exempt himself from liability for commissions to subagents. Union Casualty, etc., Co. v. Gray, 114 Fed. 422, 52 CCA 224.

67. Carroll v. Manganese Steel Safe Co., 111 Md. 252, 73 A 665; Beyers v. Hodge, 1 Misc. 76, 19 NYS 830; Nelson v. National Drill Mfg. Co., 20 S. D. 299, 105 NW 630 (holding that, where, in an action to recover a commission on the sale of a machine, plaintiff claimed that, with knowledge of a promise by its agent to pay plaintiff such commission, defendant had agreed to pay the same, the terms of the contract between defendants and its agent were immaterial); Fisher v. Berwind-White Coal Min. Co., 64 W. Va. 304, 61 SE 910, 131 AmSR 898. See also Laguna Valley Co. v. Fitch, 121 Ill. A. 607.

68. Hanback v. Corrigan, 7 Kan. A. 479, 54 P 129; Homan v. Brooklyn L. Ins. Co., 7 Mo. A. 22 (holding that where a person was employed by an agent the mere fact that the agent's principal knew that the person so employed was acting in the business committed by the principal to his agent, and accepted such employment as beneficial, did not prove an agreement on the principal's part to pay for the services of the person so employed; and that in order to hold the principal liable for such payment the element of privity of contract between the principal and the subagent should appear); Carroll v. Tucker, 2 Misc. 397, 21 NYS 952; Swayne v. Union Mut. L. Ins. Co., 92 Tex. 575, 50 SW 566 (holding that the fact that the principal knew that the subagent was rendering services in his behalf did not warrant a recovery from the principal where it appeared that the principal did not authorize the employment of the subagent and believed that he was looking to the agent for his fees); Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953. See also Brown v. Scott, 91 Wis. 674, 65 NW 499. But see Hornbeck v. Gilmer, 110 La. 500, 34 S 651 (holding that, where a special agent employs another to assist in making a sale for his principal, and the owner has been informed of the amount to which the special agent would be entitled, he is bound therefor by accepting the result of the services of the special employee); Carroll v. Manganese Steel Safe Co., 111 Md. 252, 73 A 665; Lindquist v. Northwestern Port Huron Co., 22 S. D. 298, 117 NW 365; Clark v. Lillie, 39 Vt. 405; Mason v. Clifton, 3 F. & F. 899.

[a] **Where a principal accepts the services of a subagent without knowledge** that anyone had aided the authorized agent, and the services of the subagent and the principal agent are so intermingled that in order not to receive the benefit of the services of the subagent the principal would be compelled to reject all that his authorized agent had done, an obligation on the part of the principal to pay the subagent will not be implied. Rudd v. Nashville, etc., R. Co., 7 KyL 823.

69. Boren v. Manhattan L. Ins. Co., 99 Ga. 238, 25 SE 314; Dale v. Hepburn, 11 Misc. 286, 32 NYS 259 [aff 154 N. Y. 763 mem, 49 NE 1095 mem]; Houston County Oil Mill, etc., Co. v. Bibby, 43 Tex. Civ. A. 100, 95 SW 562.

70. U. S.—National Bank of Republic v. Old Town Bank, 112 Fed. 726, 50 CCA 443; Farrell v. Campbell, 8 F. Cas. No. 4,681, 3 Ben. 8.

Colo.— Miles v. Mays, 15 Colo. 133, 25 P 312.

Ga.—Boren v. Manhattan L. Ins. Co., 99 Ga. 238, 25 SE 314.

Ill.—Corbett v. Schumacker, 83 Ill. 403. And see Wyman v. Snyder, 112 Ill. 99, 1 NE 469.

Iowa.—Triplett v. Jackson, 130 Iowa 408, 106 NW 954.

Ky.—Wilkins v. Duncan, 2 Litt. 168; Clay v. Hopkins, 3 A. K. Marsh. 485.

Me.—Cleaves v. Stockwell, 33 Me. 341.

Minn.—Scovell v. Upham, 55 Minn. 267, 56 NW 812 (so holding, although the agent himself receives nothing from the principal).

Mo.—Hill v. Morris, 15 Mo. A. 322.

N. Y.—Taylor v. Nostrand, 134 N. Y. 108, 31 NE 246; Brown v. Barse, 3 App. Div. 257, 38 NYS 400; Dulon v. Camp, 28 Misc. 548, 59 NYS 508; Dale v. Hepburn, 11 Misc. 286, 32 NYS 269 [aff 154 N. Y. 763 mem, 49 NE 1095 mem]. And see Campbell v. Porter, 46 App. Div. 628, 61 NYS 712.

Tex.—Houston County Oil Mill, etc., Co. v. Bibby, 43 Tex. Civ. A. 100, 95 SW 562; Williams v. Moore, 24 Tex. Civ. A. 402, 58 SW 953.

Wis.—Russell v. Andrae, 79 Wis. 108, 48 NW 117.

[a] **"The rule is well settled** that where an agent, having undertaken the performance of some duty to his principal, employs upon his own account a servant or subagent to assist him, the subagent must look to his immediate employer, the agent, and not the principal." Houston Cotton Oil Mill, etc., Co. v. Bibby, 43 Tex. Civ. A. 100, 101, 95 SW 562.

authority to employ a subagent,[71] and where, although he has such authority, he fails to disclose his principal.[72] If, on the other hand, an agent in employing a subagent acts for a disclosed principal and within the scope of his authority, he is not liable to the subagent;[73] much less is he liable where he does not in fact employ the subagent or agree to compensate him.[74]

Agents acting for a common principal may agree to share the commission to become due, in which event whichever one receives the commission is liable to the other for his share.[75]

[§ 446] **h. Nature and Amount of Compensation[76]—(1) In General.** The nature and the amount of an agent's compensation are generally determined by the contract of agency.[77] If there is an express contract fixing the compensation, it is generally conclusive as to the rate or amount which the agent is entitled to receive for his services,[78] and upon performance of his undertaking he is entitled to that amount;[79] although it is more than his services are reasonably worth;[80] and on the other hand he is entitled to no more than that stipulated, although his services are worth more.[81]

Form of compensation. The compensation quite commonly takes the form of a commission to be computed on the amount of business done—sales or purchases effected, loans made or procured, moneys collected or disbursed, etc.[82] Less frequently the

[b] **A collection agency,** in the absence of a special contract limiting its liability, is an independent contractor, and as such it is liable to a constable whom it employs in the course of its business to serve writs of attachment. McCarthy v. Hughes, (R. I.) 88 A 984.

71. Hanback v. Corrigan, 7 Kan. A. 479, 54 P 129. See also Campbell v. Porter, 46 App. Div. 628, 61 NYS 712.

[a] **Where a traveling salesman employs a subagent** without the authority of his principal, the principal is not liable to the subagent for his compensation. National Cash Register Co. v. Hagan, 37 Tex. Civ. A. 281, 83 SW 727.

72. Keener v. Harrod, 2 Md. 63, 56 AmD 706.

73. Ga.—Cotton States L. Ins. Co. v. Mallard, 57 Ga. 64.

La.—Gilman v. Bonner, 7 La. Ann. 674.

N. H.—Hoyt v. Hoyt, 73 N. H. 549, 64 A 18 (where plaintiff applied to a motor company for an agency to sell automobiles, and was referred to defendant who was then the motor company's agent in the locality in question, and plaintiff was informed by defendant that he would have to purchase or sell a machine in order to be appointed an agent, together with the time and terms on which such sales might be made, and it was held that defendant acted as agent of the motor company, and not for himself, and hence was not liable to plaintiff for commissions on sales made).

N. Y.—Covell v. Hart, 14 Hun 252; Gray v. Murray, 3 Johns. Ch. 167.

Tex.—Scottish-American Mortg. Co. v. Davis, (Civ. A.) 72 SW 217 [mod on other grounds 96 Tex. 504, 74 SW 17, 97 AmSR 932]; Ladonia Dry-Goods Co. v. Conyers, (Civ. A.) 58 SW 967.

74. Hubbard v. New York, etc., Inv. Co., 14 Fed. 675 [aff 119 U. S. 696, 7 SCt 353, 30 L. ed. 548].

75. Loan v. Gillmor, 165 Pa. 643, 30 A 989.

Validity of agreements by agents of adverse parties for division of commission see supra § 431.

76. **Amount of compensation as affected by termination of agency before full performance** see supra §§ 419–426.

Express and implied contracts for compensation see supra § 416.

77. Strong v. West, 110 Ga. 382, 35 SE 693; Clement v. South Atlantic Steamship Line, 128 La. 399, 54 S 920.

[a] **Implied acceptance by agent of principal's terms.**—Where the principal offers the agent a specified commission if he will perform a certain service, and the agent proceeds to perform such service, he thereby accepts the offer, although before commencing performance he rejected it in terms. Moore v. Maxwell, 2 C. & K. 554, 61 ECL 554.

78. Ark.—Singer Mfg. Co. v. Brewer, 78 Ark. 202, 93 SW 755.

Cal.—Gilbert v. Judson, 85 Cal. 105, 24 P 643.

Ga.—American Life Assoc. v. Ferrill, 60 Ga. 414.

Ill.—Pierce v. Powell, 57 Ill. 323.

Ind.—Huber Mfg. Co. v. Seabold, 14 Ind. A. 109, 42 NE 648.

Iowa.—Davis v. Huber Mfg. Co., 119 Iowa 56, 93 NW 78.

Kan.—Frick v. Larned, 50 Kan. 776, 32 P 383.

Ky.—Huber Mfg. Co. v. Watson, 42 SW 110, 19 KyL 864.

La.—Livaudais v. Perret, 11 La. 294.

Me.—Webber v. Dunn, 71 Me. 331.

Md.—Leupold v. Weeks, 96 Md. 280, 53 A 937; State v. Chase, 3 Harr. & J. 182.

Mass.—Coughlin v. Randall, 153 Mass. 549, 27 NE 767; Gillespie v. Wilder, 99 Mass. 170.

Mich.—Gray v. Josselyn, 117 Mich. 23, 75 NW 96; McKinnon v. Gates, 102 Mich. 618, 61 NW 74; Hamilton v. Frothingham, 59 Mich. 253, 26 NW 486.

Minn.—Urquhart v. Scottish-American Mortg. Co., 85 Minn. 69, 88 NW 264.

Nebr.—Singer Mfg. Co. v. Doggett, 16 Nebr. 609, 21 NW 468; Wheeler, etc., Mfg. Co. v. Gallivan, 10 Nebr. 313, 4 NW 1061.

N. H.—Low v. Connecticut, etc., Rivers R. Co., 46 N. H. 284.

N. J.—Vandyke v. Brown, 8 N. J. Eq. 657 [rev on other grounds 8 N. J. Eq. 795, 55 AmD 250].

N. Y.—Weiss v. Farrington, 3 NE 90 [rev 49 N. Y. Super. 512]; Wight v. Wood, 85 N. Y. 402; Howland v. Coffin, 47 Barb. 653; Martine v. Huyler, 5 Silv. Sup. 466, 8 NYS 734.

Pa.—American Button-Hole, etc., Co. v. Maurer, 10 A 762; Wallace v. Floyd, 29 Pa. 184, 72 AmD 620.

Tenn.—Brown v. McCormick Harvesting Mach. Co., (Ch. A.) 59 SW 166.

Tex.—McCormick v. Bush, 47 Tex. 191.

Wis.—Coolican v. Milwaukee, etc., Impr. Co., 79 Wis. 471, 48 NW 717.

Eng.—Bray v. Chandler, 18 C. B. 718, 86 ECL 718, 139 Reprint 1553; Warde v. Stuart, 1 C. B. N. S. 88, 87 ECL 88, 140 Reprint 36.

B. C.—Beveridge v. Awaya Ikeda, 16 B. C. 474 (part of amount fixed).

Ont.—Petrie v. Machan, 28 Ont. 642.

Que.—McPherson v. Brice, 31 Que. Super. 218.

[a] **Compensation to be fixed by principal.**—Where, under a special contract of employment it is left to the principal to determine and fix the agent's compensation after the services are performed, at such price and amount as under the circumstances the principal shall consider right and proper, and the principal determines to fix the amount pursuant to the contract, in the absence of fraud or bad faith the amount so fixed is the measure of the compensation to which the agent is entitled. Butler v. Winona Mill Co., 28 Minn. 205, 9 NW 697, 41 AmR 277. See also Bryant v. Flight, 3 Jur. 681.

[b] **Compensation to be fixed by agent.**—In Van Arman v. Byington, 38 Ill. 443, it was held that when a person engages the services of another, as of an attorney at law, to defend a suit, agreeing to pay him therefor whatever he may see fit to charge, the person for whom the services may be rendered is not precluded by the terms of such an agreement from disputing the charge, but the measure of recovery will be whatever the services are reasonably worth.

[c] **Reduced commission.**—Where an agent employed to sell goods on commission is informed before his agency is terminated that he will be entitled to receive only a reduced commission in the event of effecting a given sale, and he continues his employment without objection, such conduct constitutes consent to the reduced commission, and he cannot recover a greater commission. Greenspan v. Miller, (Ark.) 163 SW 776.

79. Wells v. Parrott, 43 Ill. A. 656.

80. Adam v. Oteri, 36 La. Ann. 386; Smythe v. O'Brien, 198 Pa. 223, 47 A 1102 (holding that the fact that the compensation stipulated for is much more than the services were worth is immaterial); Eveland v. Eastern Min. Co., 14 Philippine 509.

81. Carruthers v. Diefendorf, 66 App. Div. 31, 72 NYS 941 [aff 174 N. Y. 549 mem, 67 NE 1081 mem] (so holding, although he based his fixed charge on the mistaken supposition that he would be allowed to make an individual profit in carrying out the agency); McCormick v. Bush, 47 Tex. 191 (holding that, where, by the terms of a contract between principal and agent, it was stipulated that the agent should receive ten per cent on the entire amount of sales made by him, and that if the principal should resume control so that the agency ceased the agent should be paid "in proportion to the services rendered by him previous to the closing of his connection with their business," it was error to instruct the jury in a suit by the agent, whose agency had been so terminated, that he was entitled to recover whatever the evidence might show that his services actually performed were reasonably worth).

82. See cases infra this note.

[a] **Commission is an allowance** to one who manages the affairs of others for his services therein, and is usually ascertained by a percentage on the value of the property sold, or the amount of business done. It is not limited to a compensation or percentage on the receipt, payment, or transmission of money or its equivalent. Stevenson v. Maxwell, 2 Sandf. Ch. (N. Y.) 273 [rev on other grounds 2 N. Y. 408].

[b] **Construction of particular contracts as to amount of commissions.**—See Hildreth v. Ayer, etc., Tie Co., 108 SW 255, 32 KyL 1212 (holding that an agent who received money from his principal, for use in buying ties for the principal, in satisfaction of the advances, less the commission on such ties as he bought, was entitled to commissions only on the ties which he bought, and was not entitled to commissions on those which he had when the advances were made); Shook v. Marion Mfg. Co., 138 Mich. 467, 101 NW 657 (holding that a season con-

compensation takes the form of a share in the | profits of the business done by the agent,[83] or a

tract of agency in writing for the sale of threshing machinery, which by its terms ends September 30 of the season, and provides that no commission shall be paid for the sale of secondhand machinery once before sold by the agent, has no reference to commissions for the second sale of machines which had once been sold by the agent prior to the date of the contract); Locke v. Gross, 48 Mich. 266, 12 NW 181; Clark v. Gaar, etc., Co., 78 Minn. 492, 81 NW 530; Northwestern Impr. Co. v. Rowell, 52 Minn. 326, 54 NW 186 (where plaintiff corporation agreed to act as agent for defendant, selling goods and making settlements with purchasers, and for these services it was to receive ten per cent of the net amount of settlements, one third to be paid on the gross amount of sales on acceptance of the orders, one third on shipment of the goods, and the balance on the making of settlements, it was held that, on the termination of the agency by mutual consent, plaintiff was entitled to ten per cent on all settlements previously made, that is, to six and two-thirds per cent on the goods shipped, and not settled for, and three and one-third per cent on orders accepted, but not yet filled); Buffington v. Brand Stove Co., 86 Mo. A. 160; Doty v. Case, etc., Thresher Co., 50 Hun 595, 3 NYS 510 (where, after the expiration of a written contract by which plaintiff sold machines for defendant, plaintiff was orally employed to sell machines under an agreement that plaintiff should have "the commissions," but nothing was said as to their amount, it was held that, defendant having accepted an order for a machine procured by plaintiff under this agreement, plaintiff's commission should be the same per cent as that provided for in the written contract); Ryer v. Wiberley, 4 Hun (N. Y.) 632 (holding that, where defendant promised plaintiff ten per cent on all sales made to customers that plaintiff solicited, or that might be made through his influence, by a fair interpretation of the agreement, whenever the solicitation was of, or the influence was exercised on, a person who had already dealt with defendant, the commission should be confined to the transaction accomplished, thus requiring separate sales by plaintiff to entitle him to a continuing benefit under the agreement, while, if the customer was made such by the intervention of plaintiff's solicitation, the commission should be payable on all sales to him as long as the agreement continued); Ashley v. Wrought Iron Bridge Co., 4 Silv. Sup. 230, 7 NYS 361; Ransom v. Wheelwright, 17 Misc. 141, 39 NYS 342; Brandenburg v. Brooke, 45 Pa. Super. 490; Brown v. McCaul, 6 S. D. 16, 60 NW 151; Dyer v. Winston, 33 Tex. Civ. A. 412, 77 SW 227 (holding that, where a contract describing a tract of land which plaintiff therein agreed to purchase from defendant for other parties stipulated that when the sale was completed defendant was to pay plaintiff five hundred and thirty dollars, it evidenced an agreement to pay the amount named as a commission to plaintiff); Biggs v. Gordon, 8 C. B. N. S. 638, 98 ECL 638, 141 Reprint 1316; Hovenden v. Hawkes, 7 OntWR 132, 437.

[c] **Commission on value of land sold; deduction of encumbrances.**—It has been held that, in the absence of an agreement to the contrary, a commission for selling land will be estimated on the whole value of the land without regard to encumbrances. Culverwell v. Birney, 11 Ont. 265. See also Glendinning v. Cavanagh, 40 Can. S. C. 414 [aff 10 OntWR 475].

[d] **Computation of commission for sale on part credit.**—An agent is usually entitled to commission upon the whole amount of the purchase money, whether paid in cash or secured by mortgage; but, where the owner himself conducts a part of the negotiations, a verdict calculated upon the cash payment will not be disturbed. Wolf v. Tait, 4 Man. 59.

[e] **Computation of commission for sale where property is accepted in payment.**—Where an agent effects a sale of his principal's land for a specified sum in cash, but the principal accepts property in payment, the agent is entitled to a commission based on the real price, not a fictitious price or a price so regarded by the parties to the exchange. But if the parties to the exchange, or the principal and his agent, judge the property taken in payment to be worth the price named, that price is not fictitious, even though in fact the property is of less value. Wakefield v. Merrick, 38 Vt. 82.

[f] **Partial commission where principal or outside agent intervenes.**—(1) It has been held that an agent who finds a purchaser for his principal's land is not entitled to the full commission, where an outside agent intervenes and closes the sale. Murray v. Curry, 7 C. & P. 584, 32 ECL 771, 2 ERC 527; Glines v. Cross, 12 Man. 442. (2) In any event an arrangement by which two agents have authority to sell the same land, and one is to receive one per cent commission in case of a sale by the other, cannot be construed as giving the other the right to sue for two per cent commission on finding a customer who was wrongfully rejected by the principal. Lorimer v. Boylan, 98 Mich. 18, 56 NW 1043. (3) So it has been held that an agent who procures a purchaser, but who fails to obtain a binding contract from him, is not entitled to full commissions, although the principal and the purchaser subsequently carry out the purchase. Boughton v. Hamilton Provident Soc., 10 Man. 683. (4) A verdict for less than the full commission has been sustained where the principal conducted part of the negotiations. Wolf v. Tait, 4 Man. 59.

[g] **Proportionate commission.**—(1) Where an agent is employed to procure the loan of a specified sum for a certain commission, and a less sum is loaned, he is not entitled to a lesser commission in proportion, unless it appears that his services were reasonably worth the lesser commission. Diltz v. Spahr, (Ind. A.) 42 NE 823. (2) And the same rule applies where an agent is employed to sell land for a specified price for a certain commission, and the land is sold for a less price. Blackwell v. Adams, 28 Mo. A. 61.

[h] **Commissions on collections.**—(1) A bank holding a judgment agreed to pay plaintiff one half of anything she could collect thereon, and after suit brought and attachments levied the bank caused the same to be dismissed, and settled with the judgment debtor for an amount much less than the face of the judgment. In a suit to recover plaintiff's proportion of the amount due on such judgment there was no testimony tending to show that the debtor owned any particular property or credits which would be covered by the attachment liens except the mere opinion of plaintiff's father that the debtor had inherited from his father's estate more than sufficient to pay the judgment. It was held that plaintiff was entitled to recover only one half of the amount for which the claim was settled by the bank. Sowles v. Plattsburg First Nat. Bank, 130 Fed. 1009. (2) So, under an agreement for collecting a claim, which, after describing the claim, stated that the "collection charges upon above will be 25 per cent.," the collector is not entitled to the stipulated percentage on the face of the claim, but only on the sum actually collected. Shead v. Hinman, 122 Cal. 70, 54 P 388. (3) A real estate agent employed to collect the rents on a lease taken in his name for the owners, but not negotiated by him, is not entitled to a commission for the whole life of the lease, but only to commissions for collecting the rent while employed for that purpose by the owners. Lucas v. Jackson, 140 Pa. 122, 21 A 310.

[i] **Commissions on disbursements.**—Where one takes charge of a farm under a contract which provides that he "is to receive 5 per cent. of the money used or collected," the contract will be construed as allowing him five per cent of all disbursements made in accordance with the terms of the contract, as well as five per cent of all moneys collected. Whitmore v. Nelson, (Tex. Civ. A.) 29 SW 521.

[j] **Commissions on gross sales** (1) are sometimes provided for by the contract of agency. See Graver's App., 1 LancLRev (Pa.) 227. (2) Where a contract provides for the payment as royalties to sellers of a certain article of "a sum equal to 20 per cent. of the amount of the gross sales made by them," the amount to be allowed is twenty per cent of the actual gross sales after deducting discounts allowed to customers. Seven Sutherland Sisters v. McInnerney, 24 Misc. 720, 53 NYS 771. (3) Under a contract for commissions to be paid a general manager of sales of a bicycle department, which provides that the commissions shall be computed on the gross sales, after deducting "all wheels returned or taken back, either in exchange for new wheels or for any other reason," it was held that the words "wheels returned or taken back" referred to wheels which had once belonged to the employer and had been sold by it, and were returned to or taken back by the employer; and that those words do not authorize any deduction from the gross sales for wheels made by others, which never before belonged to the employer, but are by the general manager, by consent of his employer, taken as part payment for new machines sold. Wheelock v. Fisher, 93 Ill. A. 491.

[k] **Commissions on net income** see Grinton v. Strong, 148 Ill. 587, 36 NE 559.

83. See Hipwell v. Pioneer Ins., etc., Co., 150 Cal. 723, 89 P 1085; Marks v. Davis, 72 Mo. A. 557 (holding that where a portion of a salesman's compensation depended on the profits on his sales, slips made out monthly by an employee of the firm in accordance with a custom of the firm, and sent to the salesman, purporting to show the profits on his sales, were binding on the firm); Paine v. Howells, 90 N. Y. 660 (holding that, under a contract by which a salesman is to receive for his services a share of the "net profits" of the business, the interest on capital invested by the principal in the business is not an expense to be deducted in ascertaining the net profits); Bergen v. Hitchings, 22 App. Div. 395, 48 NYS 96 (where plaintiffs, wholesale grocers, employed defendant as traveling salesman, and agreed to pay him one third of the profits of his sales, it was held that, in computing profits, defendant was entitled to share the benefit of any discounts obtained by plaintiffs on cash purchases); Ettenson v. Mendelson, 75 Misc. 307, 133 NYS 283 (holding that, where defendant employed plaintiff as a traveling salesman, agreeing to pay a salary of one thousand eight hundred dollars per year, to allow one thousand two hundred dollars for traveling expenses, and to pay a commission of five per cent in excess "to $40,000" sales made by plaintiff and shipped by defendant, the use of the word "to" was a mere grammatical error, the intention of the parties being that plaintiff was only to re-

share in land acquired by him for the principal.[84] Sales agents are sometimes allowed to retain all that they can obtain for the property in excess of a fixed price;[85] and purchasing agents are sometimes allowed to retain the difference between a specified sum and a less sum for which they may be able to buy the property.[86]

Interest. It has been held that interest on the amount of the agent's claim may be allowed in a proper case.[87]

Guaranty of amount. The principal sometimes guarantees that the agent's contemplated commissions shall amount to a minimum sum in a given period;[88] but an agreement by the principal to advance to the agent, at regular intervals during the term of service, certain sums on account of commissions to be earned does not constitute such a guaranty.[89]

[§ 447] **(2) Where No Express Agreement.** In the absence of any stipulation in the contract fixing the amount of compensation or a method for determining it, the law allows the agent a reasonable compensation.[90] In arriving at what will constitute a fair and reasonable compensation in a particular case all the facts and circumstances of the case must be taken into consideration,[91] such as the

ceive commissions on sales made by him in excess of forty thousand dollars, and that the preposition "to" should give place to "of" with which it was synonymous); Heidenheimer v. Walthew, 2 Tex. Civ. A. 501, 21 SW 981 (where defendant employed plaintiff to charter a ship for him, agreeing to pay him therefor one fourth of the profits of the voyage, and defendant associated a third person with him in the enterprise of loading the vessel, and divided the profits with him, and it was held that this arrangement did not prevent plaintiff from recovering from defendant one fourth of the entire profits).

84. See cases infra this note.

[a] **Rights of locator of public lands.**—(1) A locator is not entitled to a "locative interest" in the land located, as compensation for his services, unless he shows a contract to that effect, with the owner of the certificate. Sypert v. McCowen, 28 Tex. 635; Branch v. Jones, 2 Tex. Civ. A. 550, 22 SW 245. (2) To give a lien on lands to the locator, there must be a contract with the owner or his agent. The locator is not entitled to a part of the land by custom for his services. Steele v. Payne, 2 A. K. Marsh. (Ky.) 187. (3) A contract between the owner of a land certificate and a locator for the location of the land, the latter to have a portion thereof when titled, is a contract for its joint acquisition, and the owner of the certificate holds the title in trust for the locator to the extent of the interest of the latter. Doss v. Slaughter, 53 Tex. 235. (4) Where the owner of a right to locate public land executed a power of attorney, authorizing the grantee therein named to make such location, and to receive for his services one third of the land thus located, such grantee becomes the equitable owner of an undivided one third of the land, wherever located, and in such cases the attorney in fact occupies the position of the vendee in a land contract after full payment of the contract price, and can maintain partition or compel specific performance. Stieler v. Hooper, 66 Tex. 353, 1 SW 317. (5) If the certificate be located on separate tracts of land, the interest of the locator attaches to each; if but a portion of the certificate is located and titled, the locator prima facie is entitled to a pro rata interest in such portion. Doss v. Slaughter, supra. (6) Where a locator of land contracted to receive in payment one third, the second choice of a division into three parts, the division should be made into an equal number of acres, regardless of its value. Withers v. Thompson, 4 T. B. Mon. (Ky.) 323.

[b] **Contracts giving no interest in land.**—(1) A contract that if land is sold at a specified price, the owner will allow to his agent in the purchase and sale of the lands a certain portion of the net profits, is only a personal contract, and gives the agent no interest in the land. Le Moyne v. Quimby, 70 Ill. 399. (2) So where A contracted with B that with A's money B should purchase and sell lands in the name of A, and for his services should have half the profits, B had no title to or interest in the land, but only an interest in the profits. Porter v. Ewing, 24 Ill. 617.

85. Rosenfield v. Fortier, 94 Mich. 29, 53 NW 930 (holding, however, that, where a dealer in tobacco furnished plaintiff, his salesman, a list of prices for which sales were to be made, agreeing to pay plaintiff a certain commission and "whatever above these prices" he could get, the fact that plaintiff was afterward allowed to make sales for less than the list price did not entitle him to claim all he received in excess of such reduced price). See also supra § 436.

[a] **Right to excess over fixed price.**—Where a principal agreed to pay his agent a certain commission on the amount for which land was sold, if the agent furnished a buyer at not less than a certain price, and the agent furnished a purchaser at more than that price, the agent was not entitled to any surplus above the fixed price. Blanchard v. Jones, 101 Ind. 542.

86. Smythe v. O'Brien, 198 Pa. 223, 47 A 1102 (holding that plaintiff, having authorized defendants to negotiate for and purchase certain stock for him in exchange for certain land and eight thousand dollars in cash, they to have as compensation any amount they can save out of the eight thousand dollars, and such agreement being without deception or misrepresentation, they, having obtained the stock for the land alone, are entitled to retain the eight thousand dollars, although that is much more than their services were worth).

87. Ridley v. Sexton, 18 Grant Ch. (U. C.) 580 [aff 19 Grant Ch. (U. C.) 146].

[a] **Necessity of demand.**—(1) Interest will not be allowed upon a commission until after a demand in writing. McKenzie v. Champion, 4 Man. 158. (2) Where the accounts between principal and his agent were closed in 1898 and suit was brought in 1901 by the principal to recover a balance due it, the agent presented no claim for commissions until such claim was asserted in the action against him, he was not entitled to interest until the date of filing his answer. Orr v. Louisville Tobacco Warehouse Co., 99 SW 225, 30 KyL 457.

88. Jones v. Dunn, 3 Watts & S. (Pa.) 109 (where plaintiffs proposed to defendant that he should act as their agent at Canton for a term of years, engaging to make consignments to an amount that would insure him commissions to the amount of twenty-five thousand dollars per annum at least; and subsequently they bound themselves to the fulfillment of the agreement by the payment of the above sum annually, although from unforeseen events they might not ship an amount that would produce that sum; and one of the stipulations was that defendant's commissions should be invested in return cargoes, as his separate property, at Canton, and defendant agreed to the proposal for a term of two years, and in the first year the commissions did not equal twenty-five thousand dollars, and during the next year they considerably exceeded it, so that together they exceeded fifty thousand dollars, it was held that the commissions were to be charged separately for each year, and that defendant was entitled to have his commissions the first year made up to twenty-five thousand dollars, and to retain all he received the second year). Compare Callaway v. Boroughs, (Tex.) 19 SW 611.

[a] **Contingent guaranty** as to amount of compensation see Smith v. Philip B. Hunt Co., 90 Minn. 255, 95 NW 907.

89. Menage v. Rosenthal, 187 Mass. 470, 73 NE 537; Wilcox v. Baer, 85 Mo. A. 587; Souler v. McDowell Garment Mach. Co., 38 Misc. 786, 78 NYS 836.

[a] **The rule seems to be otherwise** in some lines of trade. Christopher v. Hechheimer, 127 Mich. 451, 86 NW 959.

90. U. S.—Stanton v. Embry, 93 U. S. 548, 23 L. ed. 983; Martin v. Roberts, 36 Fed. 217.

Ala.—Taylor Mfg. Co. v. Key, 86 Ala. 212, 5 S 303; Spence v. Whitaker, 3 Port. 297.

Cal.—Toomy v. Dunphy, 86 Cal. 639, 25 P 130.

Hawaii.—Montgomery v. Montgomery, 2 Hawaii 677.

Ill.—Patten v. Patten, 75 Ill. 446.

Iowa.—Triplett v. Jackson, 130 Iowa 408, 106 NW 954.

Kan.—Jones v. Neosho County School Dist. No. 47, 8 Kan. 362.

Me.—Weston v. Davis, 24 Me. 374.

Mich.—Montross v. Eddy, 94 Mich. 100, 53 NW 916, 34 AmSR 323; Millar v. Cuddy, 43 Mich. 273, 5 NW 316, 38 AmR 181.

Mont.—Nyhart v. Pennington, 20 Mont. 158, 50 P 418.

N. J.—Van Atta v. McKinney, 16 N. J. L. 235.

N. Y.—Erben v. Lorillard, 2 Keyes 567.

Tenn.—Arrington v. Cary, 5 Baxt. 609.

Vt.—Vilas v. Downer, 21 Vt. 419.

Wis.—Best v. Sinz, 73 Wis. 248, 41 NW 169; Nauman v. Zoerhlaut, 21 Wis. 466.

Newfoundl.—Duggan v. Trimmingham, 1 Newfoundl. 157 (holding that a commission of two and one half per cent is all that an agent is entitled to on a purchase or a sale of property for his principal, in the absence of any express agreement between them on that point).

91. West New Jersey Soc. v. Morris, 6 F. Cas. No. 3,065, Pet. C. C. 59; Conrad v. Conrad, 156 Ky. 231, 160 SW 937; Eggleston v. Boardman, 37 Mich. 14. In Nickell v. Nickell, (Ky.) 118 SW 966, it was held, that where an agent for heirs, who was in charge of lands for about twelve years, received as rents about two thousand dollars, and the lands increased in value from four hundred dollars to six hundred dollars, an allowance of seven hundred dollars for services as agent and of three hundred dollars for attorney's fees was excessive, where the services were not extraordinary, and the litigation was not of much moment, that the allowance should be reduced to twenty per cent of the amount of rents plus two hundred dollars for

agent's skill and experience,[92] the nature of the services performed,[93] and the responsibility incurred.[94]

Custom as evidence to fix amount. For the purpose of aiding in the determination of the value of the agent's services, it is proper to receive evidence of and consider the usual price charged and received for similar services by others engaged in the same line of work in the same vicinity;[95] but such customary charges are not conclusive as to the compensation of the agent in the particular case.[96]

[§ 448] **(3) Deductions and Forfeitures.**[97] By the terms of the contract of agency or otherwise, the amount otherwise due an agent may be subject to forfeiture or deduction for various reasons independent of his fraud or misconduct,[98] as for in-

attorney's fees, and that he should be charged with interest on all rents received from the first of the year after they were received, and should be credited with amounts paid out of the rents, with interest from date of payment.

[a] **What constitutes reasonable compensation** see West New Jersey Soc. v. Morris, 6 F. Cas. No. 3,065, Pet. C. C. 59 (holding that an agent for the sale and management of the estates of absent proprietors was entitled to ten per cent on all collections made by him and remitted, and to a per diem allowance for the days spent by him in the management of the estates); Cone v. Newkirk, 24 Ill. 508 (where A, acting as agent of B, with the understanding that he was to be reasonably compensated for his services, procured a contract for the sale of certain lands from the owner, and assigned it to B, the assignment expressing a certain consideration, it was held that such consideration must be taken as fixing the amount of his compensation, in the absence of evidence to the contrary); Cowgill v. Pickerell, 98 Iowa 465, 67 NW 384 (holding that for acting as defendant's agent in the cultivation and lease of a farm for a number of years, and for the sale thereof, two hundred dollars was not excessive compensation); Parrish v. Bradley, 73 Mich. 610, 41 NW 818 (where it appeared, in an action for services in going to L, and looking after defendant's business there, that defendant had informed plaintiff that he was going to L himself in a few days, but nothing was said as to the precise time when plaintiff should go to L, and he had no instructions as to his manner of procedure, it was held that, while he might recover for a few days spent at L, he was not justified in remaining there thirty days, waiting for defendant, and could not recover therefor); McClellan v. Duncombe, 52 App. Div. 189, 65 NYS 19 (holding that, where plaintiff had acted as defendant's agent in renting property valued at one hundred and eighty thousand dollars, and had previously made memoranda relating to the same, it was error to allow plaintiff one per cent as compensation for valuing the property after having been discharged, since the appraisement was made from information acquired while acting as defendant's agent for the renting of the property); Ex p. Jones, 17 Ves. Jr. 332, 34 Reprint 128.

Amount of compensation as question for jury see infra § 730.

92. Stanton v. Embry, 93 U. S. 548, 23 L. ed. 983; Eggleston v. Boardman, 37 Mich. 14; Vilas v. Downer, 21 Vt. 419.

[a] **Professional services.**—In Stockbridge v. Crooker, 34 Me. 349, 350, 56 AmD 662, it was held that in awarding compensation for professional services the jury may properly take into consideration the degree of skill exhibited in the performance of them, but they are not imperatively bound to award a sum commensurate with such skill. In this case, the court said that the law "permits jurors to take into consideration the exhausting studies, the time consumed, and the expenses incurred, to acquire great professional knowledge and distinction, or great mechanical or other skill." See also Attorney and Client [4 Cyc 994]; Physicians and Surgeons [30 Cyc 1599].

93. Stanton v. Embry, 93 U. S. 548, 23 L. ed. 983; Stockbridge v. Crooker, 34 Me. 349, 56 AmD 662; Eggleston v. Boardman, 37 Mich. 14; Vilas v. Downer, 21 Vt. 419. See also Waddington v. Humberstone, 15 OntWR 824.

94. Stockbridge v. Crooker, 34 Me. 349, 56 AmD 662.

[a] **Amount involved.**—Where an agent is employed to solicit pardon for a fugitive from justice and thus enable him to return to the state, so that the principal may use him as a witness in a claim for which suit has been brought, the amount of the claim is proper for the consideration of the jury in estimating the compensation for such agency. Kentucky Bank v. Combs, 7 Pa. 543, 545 (where the court said: "It is not to be doubted that responsibility, in a confidential employment, is a legitimate subject of compensation, and in proportion to the magnitude of the interests committed to the agent").

95. U. S.—Stanton v. Embry, 93 U. S. 548, 23 L. ed. 983.

Ga.—Glenn v. Salter, 50 Ga. 170.

La.—De Coux v. Plantevignes, 10 La. 503.

Mass.—Hollis v. Weston, 156 Mass. 357, 31 NE 483.

Mich.—Eggleston v. Boardman, 37 Mich. 14.

Mo.—Kennerly v. Sommerville, 64 Mo. A. 75.

Nebr.—Fredrickson v. Locomobile Co. of America, 78 Nebr. 775, 111 NW 845 (holding that, where one party requests another to perform services in effecting the sale of an article, agreeing "to protect" him if such sale is made, and the influence of the party so engaged is the efficient cause in effecting the sale, he is entitled to a commission therefor equal to the discount allowed to regular agents).

N. Y.—McClellan v. Duncombe, 52 App. Div. 189, 65 NYS 19.

Vt.—Vilas v. Downer, 21 Vt. 419.

Wis.—Kelly v. Phelps, 57 Wis. 425, 15 NW 385.

[a] **What other like agent would have charged.**—(1) In Elting v. Sturtevant, 41 Conn. 176, the testimony of a real estate broker as to what his charges would have been for certain services was admitted in evidence as tending to show the price ordinarily charged for such services by persons engaged in that business. (2) But it has been stated as a general doctrine, that statements of what the witness himself would have charged for a similar service furnish no criterion for determining the reasonable value of an agent's services, and should not be admitted in evidence. Fairchild v. Michigan Cent. R. Co., 8 Ill. A. 591.

[b] **Compensation for selling land.**—(1) If no rate of compensation is fixed by the contract of employment, an agent who effects a sale of land for his principal may be awarded the commissions customarily paid for that service to real estate brokers, although he is not such. Stewart v. Soubral, 119 La. 211, 43 S 1009; Ruckman v. Bergholz, 38 N. J. L. 531. And see Murray v. Curry, 7 C. & P. 584, 32 ECL 771, 2 ERC 527. (2) However, he is not entitled to that amount if his services are not reasonably worth it; and if his services are worth more than the customary commissions he is entitled to more. Erben v. Lorillard, 2 Keyes (N. Y.) 567. See however Stewart v. Soubral, supra. (3) And commissions, although a proper basis of compensation for brokers and agents of that character, do not furnish a correct measure of compensation for a case where a person not engaged in that kind of business has merely introduced the seller to the purchaser, although the seller promised to pay for finding a customer for the estate. Lyon v. Valentine, 33 Barb. (N. Y.) 271.

[c] **Presumption.**—In contracts relating to the performance of services, it is to be presumed that a certain definite compensation was agreed upon, not only where there is an express stipulation to this effect, but also where the same may be ascertained from the custom and usages of the place where such services or labor were performed, except where the parties have agreed that such compensation be fixed by a third person, or where the same shall be determined by the courts upon the testimony of experts. Smith v. Lopez, 5 Philippine 78.

96. Kennerly v. Sommerville, 64 Mo. A. 75; Erben v. Lorillard, 2 Keyes (N. Y.) 567.

97. Deductions and forfeitures on account of fraud or misconduct see supra §§ 428–434.

98. Ill.—McEwen v. Kerfoot, 37 Ill. 530 (where an agent sold land, which sale his principal repudiated, and the agent thereafter gave a contract of sale to the purchaser, it was held that, although the agent was entitled to his commissions, the principal could recoup any expense in removing from his title the cloud put thereon by the improper act of the agent). See however Wheelock v. Fisher, 93 Ill. A. 491 (holding, under a contract for commissions to be paid the general manager of a bicycle department, which provided that the commissions should be computed on the gross sales after deducting "all wheels returned or taken back, either in exchange for new wheels or for any other reason," that when wheels, either returned and taken back or exchanged, were sold again, the general manager was entitled to commissions on said sales, although the contract also provided that the general manager should bear half the losses and have half the profits on all sales of wheels, either returned or taken in exchange).

Ky.—Huber Mfg. Co. v. Watson, 42 SW 110, 19 KyL 864 (holding that, where a contract for the payment of commissions to a selling agent provides that no commission is to be allowed or paid "on sale of goods where foreclosure proceedings at any time might become necessary," the agent is not entitled to commissions on the proceeds of a foreclosure sale, but only on payments made before the foreclosure proceedings took place); Preston v. Grimes, 14 KyL 810 (holding that, where an agent who is intrusted with the control of lands belonging to heirs living in remote parts of the state cuts and removes timber from the land without authority from his principals, and, in an action to recover compensation for his services, fixes the value of the timber thus taken and charges himself with it, he is not entitled to compensation beyond what he has received).

Mont.—McCormick v. Johnson, 31 Mont. 266, 78 P 500 (where the agent failed to pay a debt due the principal from another as he agreed to do in consideration of obtaining the agency).

N. Y.—Field v. Banker, 22 N. Y. Super. 467 (holding that while the

stance where the principal has incurred losses on account of the default of the customers procured by the agent,[99] or where the principal has made money advances to the agent during the course of the employment which have not been repaid.[1] But a technical violation of a contract causing a forfeiture of the agent's commission will be held to have been waived, where no damage resulted to the principal and he apparently acquiesced in the agent's conduct for some time.[2]

[§ 449] **(4) Additional or Extra Compensation.**[3] Compensation in addition to that specified in the contract of employment cannot be recovered by the agent on account of services which were performed as a mere incident to the fulfillment of his undertaking, and the performance of which, although not expressly called for by the contract of agency, may fairly be regarded as having been within the con-

fact that an agent employed to purchase goods and ship them accepted a bill of lading for the goods exempting the carriers from their common-law liability, and failed to procure insurance, did not forfeit their right to commissions, where the goods were not wholly lost, the principal had a remedy for injury to the goods by way of recoupment or counterclaim to an action by the agent for his commissions).

Wash.—Sheeran v. Ford Grain Co., 71 Wash. 604, 129 P 378.

Eng.—In re Imperial Wine Co., L. R. 14 Eq. 417 (where the agent of a corporation was appointed its liquidator, and the amount he received as such was deducted from what the corporation owed him as agent).

See Culverwell v. Birney, 11 Ont. 265 (where an amount which the agent had received from the adverse party was deducted from his contract commission).

[a] **Selling below list price.**—(1) Where an employer agrees to pay an employee a commission of fifteen per cent, on orders obtained by him, and a commission of only five per cent on all orders which he sells at a lower price than fifty and ten per cent off the list of a certain catalogue, such employee was to have fifteen per cent for selling goods at a certain price, or if the employer should make the sale for him; but if the employee in order to make a sale, or if the employer in dealing directly with his customers, was compelled to cut the price below that mentioned, such employee was only entitled to five per cent commissions. Buffington v. Brand Stove Co., 86 Mo. A. 160. (2) Where, however, a contract between a company and a local agent provided that the agent should have commissions on all sales secured by his efforts, but that he should stand all cuts made by him below the list price, and sales brought about by the efforts of the local agent were consummated by the general agent at a cut price, the local agent need not stand the cut. Davis v. Huber Mfg. Co., 119 Iowa 56, 93 NW 78.

[b] **Deduction for guaranty.**—Although agents to sell machinery, who, by provision of their contract of employment guarantee notes taken in payment for machinery sold by them, make no claim for commissions on the sale to a certain purchaser, yet where the principal pleads as a defense to an action for commissions on other sales, their guaranty of the notes of such purchaser which have not been paid, there is properly deducted from the amount otherwise owing them, not the full amount of such notes, but the part thereof which would have come to the principal after deducting the agent's commission, which was all the principal would have been entitled to under its contract with the agents. Walton v. Nichols, etc., Co., 26 S. D. 111, 128 NW 474.

[c] **Absence from work.**—A person who is employed at monthly wages as manager of a branch real estate office, and who has, after notice to his employers and without objection on their part, absented himself from his place of employment for a period of six weeks on a pleasure trip, has no right on resuming his work to claim wages for the period covered by his absence. Hoover v. Jackson, 53 Pa. Super. 169.

99. Morrison Mfg. Co. v. Bryson, 129 Iowa 645, 103 NW 1016, 106 NW 153 (where it appeared that a contract with a salesman employed to cover certain territory provided that on such orders as the employer should lose the account or take back the goods, any commissions paid were to be charged back; and that subsequently another contract was made whereby the agent was assigned to new territory, and it recited that the new contract superseded the other contract, it was held that the new contract did not release the salesman from liability to refund commissions paid under the first contract, which, under the terms thereof, it became the salesman's duty to refund); Raynor v. Buttlar, 87 NYS 119 (where it appeared that plaintiff was employed by defendant under a contract that plaintiff should stand a third of all loss on customers procured by him; that a customer procured by plaintiff went into bankruptcy while indebted to defendant, and in an action by plaintiff, he claimed that he should not stand a third of that loss for the reason that he had, after leaving defendant's employ, sought permission to collect the claim, which was refused; that defendant showed that he had used diligence to collect it, and there was no evidence that plaintiff could have obtained any better results than defendant did, it was held that it was proper to charge plaintiff with one third of the loss); International Harvester Co. v. McKeever, 21 S. D. 91, 109 NW 642 (holding that a harvester machine company, on settlement with its agent, was entitled to reject doubtful or worthless notes taken by the agent on the sale of certain machines, where the contract of agency provided that in case sales were made by the agent to parties who were adjudged by the company to have been doubtful or worthless at the time of the sale, the notes taken for such sales should be applied to the payment of commissions due the agent upon sales approved by the company, and also that, in case the company should, within three months, find that any notes taken and passed upon at settlement were doubtful or worthless at the time of the sale, then the agent should take such notes and replace them with cash or notes secured by good and responsible parties acceptable to the company); F. T. Ramsey v. Cook, (Tex. Civ. A.) 151 SW 346. But see Hayner v. Trott, 4 Kan. A. 679, 46 P 37 (holding that, where a contract of agency for the sale of machines provided that sales should be for cash, the commission then being payable in cash; on credit, the commission payable in notes; or on part credit and part cash, the commission payable in part cash and part notes, and stipulated that the agent should "refund any commissions allowed on notes that may afterwards prove to be worthless, or otherwise uncollectible," the principal was entitled to recover back only such commissions as the agent had received in cash primarily, or through collecting notes taken by him for commissions, in sales in which the notes taken for the balance of the price proved worthless).

[a] **Otherwise in absence of contract.**—(1) Where the contract under which an agent undertook to manage the business of his principal at a certain city for a fixed salary and a percentage of the net profits contained no guaranty that the agent would make good any loss from failure of customers to pay their accounts, losses accruing from such source cannot be deducted from his fixed salary, but can be considered only in determining the net profits. A. R. Frank Co. v. Waldrup, (Tex. Civ. A.) 71 SW 298. (2) When a traveling salesman who is employed by a committee of creditors of an assigned estate to make sales on commissions takes an order from a responsible party, he is not liable to a deduction for the expenses of collecting the proceeds of sale from such party, in the absence of any provision in the agreement to that effect. Manley v. Hickman, 1 Chest. Co. (Pa.) 557.

[b] **Wrong of other agent.**—An agent suing for commissions for the sale of oils in certain territory was not obliged to account for sales made by another representative of defendant on credit and was not subject to a deduction therefor, where he merely made the deliveries and payment was made directly to defendant. Whitaker v. Bell Oil Co., (Mo. A.) 167 SW 619.

1. Johnson v. U. S. Life Ins. Co., (Mass.) 27 NE 882; Wilcox v. Baer, 85 Mo. A. 587; Bellman v. Thacher, 151 App. Div. 387, 136 NYS 730; Freudenberg v. Cooper, 61 Misc. 314, 113 NYS 493. See also Wrought Iron Range Co. v. Young, 76 Ark. 18, 88 SW 586. Compare Luce v. Consolidated Ubero Plantations Co., 195 Mass. 84, 80 NE 793 (holding that, where defendant owed plaintiff commissions for selling its bonds, and they made a written agreement whereby plaintiff relinquished certain claims for commissions and retained others and his employment was ended, and immediately thereafter he was reëmployed under a new agreement whereby plaintiff should receive a commission for the sale of bonds and defendant should make advances against his commission account, the advances were chargeable against commissions to be earned under the new contract and not on bonds sold under the old contract); Christopher v. Hechheimer, 127 Mich. 451, 86 NW 959 (where plaintiff was employed by defendants as a traveling salesman under a contract providing that he should be paid a sum equal to seven per cent commission on all sales accepted, and that a drawing account of one hundred dollars a month should be allowed him, traveling expenses and drawings to be deducted before payment of commissions, it was held that the term "drawing account" meant a guaranty of commissions, so that there was no obligation on the part of the salesman to repay the amount so drawn).

2. Nichols v. Bachant, 45 Ill. A. 497.

[a] **Waiver of daily reports.**—Where a contract with a traveling salesman provided that he should give the employer daily reports by post of his location on pain of forfeiture of his salary, and the agent failed to report as required almost from the beginning, but the employer made no complaint, and after the first month of service sent the agent out again under the same contract with the clause as to daily reports eliminated, the employer was estopped to defend an action for the first month's salary on the ground of the failure to give daily reports. Clegg v. Gee, 2 Tex. A. Civ. Cas. § 543.

3. Right of agent to retain profit

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templation of the parties when the contract was made.[4] And an agent cannot recover extra compensation on account of services which are not within the scope of the original contract of agency, and which are not merely incidental to the performance of his undertaking, in the absence of an express or implied promise to pay him therefor,[5] or some legal custom entitling him to such compensation.[6] The agent may of course recover for extra services where there is an express[7] or implied promise on the part of the principal to pay therefor.[8] The additional services rendered by the agent may be so independent of the services originally contracted for as to entitle him upon a quantum meruit to extra compensation.[9]

Where agent serves beyond stipulated time. If an agent, employed at an agreed price for a certain time, continues in the same employment after the expiration of the term without any new agreement, the presumption of law is that he continues at the original rate of compensation.[10]

[§ 450] **(5) Compensation of Subagents.** It has

earned in course of agency see supra §§ 356, 357.

4. Colton v. Dunham, 2 Paige (N. Y.) 267 (holding that, where a loan was effected by an agent who charged a commission for the service and for becoming security for the repayment, a further commission was not chargeable for paying over the money to his principal, or on his orders); Marshall v. Parsons, 9 C. & P. 656, 38 ECL 382 (where it appeared that A acted under a written agreement as the commission agent of B in the sale of goods and was paid a commission; that B was a contractor with the admiralty for the supply of a variety of articles, on the sale of which A was paid his commission, and A attended on a number of occasions at Somerset house, where the patterns of these articles were inspected by the government officers; that A sought to charge B for these attendances in addition to his commission, it was held that if in giving these attendances A was only acting in the discharge of his business as an agent he was not entitled to charge for the attendances). See also Fish v. Hodsdon, 16 NYS 92. Compare Blanchard v. Jones, 101 Ind. 542; McClellan v. Duncombe, 52 App. Div. 189, 65 NYS 19.

[a] **Where an agent takes charge of certain property without an express agreement as to his compensation,** and from time to time renders accounts to his principal in which he charges for his services five per cent on the gross amounts collected, he thereby places a value on his services and where it is assented to and paid by the principal, he can recover no additional compensation on a quantum meruit for his services, such as the making of repairs, hiring janitors, etc. Carruthers v. Diefendorf, 66 App. Div. 31, 72 NYS 941 [aff 174 N. Y. 549 mem, 67 NE 1081 mem].

[b] **Compensation for selling another's property with principal's.**—(1) Where an agent agreed to sell a farm on commission, he was not entitled to commissions on the value of part of the crop which he knew belonged to another and which was deducted from the gross amount received. Barrett v. Johnson, 64 Pa. 223. (2) So an agent employed to sell machines on commission cannot claim commissions from his employer on sales of attachments used with the machines, not a necessary part thereof, and made by another company, in the absence of evidence of a contract that such commissions would be allowed. McClure v. McMichael, etc., Mfg. Co., 20 Montg. Co. (Pa.) 137.

5. U. S.—Fraser's Case, 16 Ct. Cl. 507.

Ga.—Jordan v. Jordan, 65 Ga. 351.

Ill.—Sidway v. South Park Comrs., 120 Ill. 496, 11 NE 852; Decatur v. Vermillion, 77 Ill. 315.

Iowa.—Merrill v. Sax, 141 Iowa 386, 118 NW 434 (holding that, where plaintiffs authorized defendant to sell stock owned by them and by himself, all the parties desiring to sell the stock as a whole, their express agreement to reimburse defendant for expenses incurred excludes the idea of an implied agreement for additional compensation).

Kan.—Guthrie v. Merrill, 4 Kan. 187.

La.—Moreau v. Dumagene, 20 La. Ann. 230 (so holding where the principal, having an agent in his employ, confers upon him additional powers, which involve greater duties, with no stipulation, express or implied, for additional compensation).

Mass.—Pew v. Gloucester First Nat. Bank, 130 Mass. 391.

Mich.—Muir v. Kalamazoo Corset Co., 155 Mich. 441, 119 NW 589.

Mo.—Warwick v. North American Inv. Co., 112 Mo. A. 633, 87 SW 78.

N. Y.—Taylor v. Pullman Automatic Ventilating Co., 87 NYS 404 (holding that an agent, entitled under his contract to commissions for orders for goods procured by him, cannot recover by virtue of the contract for services rendered in installing goods sold by another agent, but must show an agreement to pay a specified sum therefor, or a promise to pay the reasonable value of the services, and what the services are reasonably worth).

Pa.—Carr v. Chartiers Coal Co., 25 Pa. 337. See also McClure v. McMichael, etc., Mfg. Co., 20 Montg. Co. 137.

6. U. S.—U. S. v. Fillebrown, 7 Pet. 28, 8 L. ed. 596; U. S. v. Macdaniel, 7 Pet. 1, 8 L. ed. 587.

Conn.—Luske v. Hotchkiss, 37 Conn. 219, 9 AmR 314.

Mich.—Muir v. Kalamazoo Corset Co., 155 Mich. 441, 119 NW 589.

N. H.—Brooks v. Cotton, 48 N. H. 50, 2 AmR 172.

N. Y.—McCarthy v. New York, 96 N. Y. 1, 48 AmR 601.

7. Triplett v. Jackson, 130 Iowa 408, 106 NW 954; Gray v. Josselyn, 117 Mich. 23, 75 NW 96 (holding that an insurance company's contract to allow a state agent whatever it allowed any other state agent of the company, under similar circumstances, in excess of the amount expressed in the written agreement, entitled him to an allowance equal to that of any other state agent, although their services were not precisely identical).

[a] **Contracts construed.**—(1) A gratuity payable to an insurance agent subject to "his accounts being in a condition entirely satisfactory to the company" cannot be recovered, where an inspection of the agent's accounts, which he agreed should be conclusive, show him to be indebted to the company in excess of the gratuity claimed. Metropolitan L. Ins. Co. v. Strohmberg, 65 Ill. A. 288. (2) A contract provided that a traveling salesman should receive on sales sixty-five per cent of the profits, and that he was to receive two hundred and seventy-five dollars per month, although his percentage of profits fell below that sum. By a subsequent agreement he was to receive a commission of ten per cent on sales of cigars. The percentage of profits not amounting to the guaranteed monthly salary, he sued for the balance, and also for commissions on cigars. It was held that the commission on cigars was not in addition to his monthly salary, but was to form a part of it. Callaway v. Boroughs, (Tex.) 19 SW 611.

8. U. S. Mortgage Co. v. Henderson, 111 Ind. 24, 12 NE 88 (holding that the fact that an attorney is employed as an agent to negotiate and collect loans does not preclude him from rendering and receiving compensation for services of a different character, such as legal services, looking after repairs, and renting property bought in by the principal on foreclosure sales, looking after taxes and insurance on such property, and on other property mortgaged to the principal to secure loans, and the like); Gilchrist v. Brooklyn Grocers Mfg. Assoc., 66 Barb. (N. Y.) 390 [aff 59 N. Y. 495] (where defendant employed plaintiff to purchase potatoes and ship them to defendant, plaintiff to buy at market value, to furnish a certain number of pounds to the bushel, and to receive a stated commission for buying and storing, it was held that if plaintiff was to perform other duties or incur other liabilities than shipping and guaranteeing safe delivery, beyond the terms of the agreement, he would be entitled to compensation therefor); Marshall v. Parsons, 9 C. & P. 656, 38 ECL 382; Ridley v. Sexton, 18 Grant Ch. (U. C.) 580 [aff reh 19 Grant Ch. (U. C.) 146].

[a] **Promise not implied.**—(1) Where plaintiff sold goods for defendants on commission for more than five years, during which time frequent settlements were had and receipts given, and when going among his customers plaintiff was in the habit of making collections from them on account of past sales, and in a few instances rendered a bill and received pay therefor from defendants, and after leaving defendants' employ, he brought an action to recover for such collections, no contract to pay therefor should be implied on defendants' part. Lyons v. Jube, 17 NYS 664. (2) Defendant was employed as a general agent within a certain territory under a written contract by which he agreed to devote his entire time to the service of the company, to conduct its business as directed, and was to receive as compensation stipulated commissions on the business done. For more than a year and until his discharge, he rendered a monthly account as required, in which he credited himself with the commissions specified in the contract, and no more. It was held that the fact that he was directed by the company to designate himself on his stationery as "general manager," which he did, or that he performed some services as general manager different from those usually performed by a general agent, did not, under the circumstances and course of dealing, establish an implied promise on the part of the company to pay him for his services as general manager in addition to the commissions fixed by the contract. Montgomery v. Ætna L. Ins. Co., 97 Fed. 913, 38 CCA 553.

9. Standard Plunger El. Co. v. Brumley, 149 Fed. 184, 79 CCA 132; Gooch v. J. I. Case Threshing Mach. Co., 119 Mo. A. 397, 96 SW 431.

10. N. H.—New Hampshire Iron Factory Co. v. Richardson, 5 N. H. 294.

N. Y.—Doty v. Case, etc., Thresher Co., 50 Hun 595, 3 NYS 510.

N. C.—Spence v. Wilmington Cotton Mills, 115 N. C. 210, 20 SE 372.

Pa.—Ranck v. Albright, 36 Pa. 367;

been held that a subagent appointed for the principal by his general agent is not bound by secret limitations on the power of the latter to fix the salaries of subagents;[11] but that where an agent employs a subagent in his own behalf, the amount of the subagent's compensation cannot, as between him and the principal, exceed the amount fixed in the contract existing between the principal and the agent.[12]

[§ 451] **i. Accounting and Settlement; Payment; Release—(1) In General.** An accounting and settlement between principal and agent is generally conclusive on the agent,[13] in the absence of mistake.[14] On the other hand if an account is stated between the parties the agent may recover the amount thereby appearing to be due him.[15] The agent may waive compensation;[16] but the fact that an agent informally declares to the principal that a certain amount is due him as compensation does not estop him from subsequently claiming compensation for the same services in a greater sum.[17] Payment to one agent of a commission due to another does not discharge the debt as to the latter.[18] If the agent accepts from a purchaser, in lieu of the cash payment, a conveyance of a tract of land to himself, and the transaction is ratified by his principal, he cannot retain the land and claim commissions to the amount of the agreed value.[19] Title to bonds may be transferred to an agent in payment of his commissions, although he has not performed his undertaking.[20]

[§ 452] **(2) Recovery Back of Payments by Principal.**[21] If a principal has paid commissions in ignorance of fraud on the part of the agent forfeiting

Wallace v. Floyd, 29 Pa. 184, 72 AmD 620.

Wash.—Schurra v. Buffalo-Pitts Co., 44 Wash. 693, 87 P 945.

[a] **Reasonable compensation.**—In Taylor Mfg. Co. v. Key, 86 Ala. 212, 5 S 303, it was held that if an agent, after the expiration of his special contract, makes a sale at the request of the principal, nothing being said about his compensation, there is an implied promise to pay him a reasonable compensation.

11. Cotton States L. Ins. Co. v. Mallard, 57 Ga. 64.

12. Brown v. Haigh, 113 La. 563, 37 S 478.

13. Prouty v. Perry, 142 Iowa 294, 120 NW 722 (holding that where agents who agreed to rent and look after farms for ten per cent of rental collected forwarded the owners the balance, retaining ten per cent as compensation, and did not complain that rental notes for overdue rent were being collected by others and claimed no commission thereon, and the compensation was acquiesced in, they could not subsequently claim commissions on the amounts collected by others on the notes on the ground that they were entitled to commissions on all rentals collected by anyone); Brownson v. Fenwick, 19 La. 431 (holding that an agent who, after settling his account with his principal, is sued by the latter for money fraudulently retained, cannot claim for services prior to the settlement, which he does not show to be erroneous; they are presumed gratuitous); Mornay v. Bordelais, 6 Rob. (La.) 318; Dignowity v. Elmendorf, (Tex. Civ. A.) 40 SW 1005 (holding that when plaintiff undertook to effect a sale of defendant's land at a certain price for an agreed commission, and effected a sale at a less price, and defendant conveyed the land to the purchaser, and a settlement in full was made, whereby plaintiff received less than the commission originally agreed on, such settlement is a defense in a suit on the original agreement). See generally: Accord and Satisfaction §§ 1, 2; Accounts and Accounting §§ 329–334; Compromise and Settlement [8 Cyc 518]; Payment [30 Cyc 1220]; Release [34 Cyc 1077].

[a] **Where, in an action for malicious prosecution** based on defendant, as principal, having charged plaintiff, as agent, with embezzlement, it appeared that plaintiff, as agent, had furnished to defendant, as principal, weekly reports reciting that he had received full payment for his compensation and expenses, and defendant acted on the faith of such reports in instituting the criminal prosecution, plaintiff was estopped on a trial for malicious prosecution from denying the correctness of his reports. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 SE 320.

[b] **Construction of decree of court that the agent was entitled to have** as compensation "the whole amount he had in his hand at the date of the filing of his bill," as not entitling him to an overdue note in his hands payable to him as agent, etc. See Gore v. Poteet, (Tenn. Ch. A.) 46 SW 1050.

[c] **Subsequent contract construed.**—Where the manager of a corporation, given the exclusive right to sell a manufacturer's automobiles, demands payment of commissions on taxicabs sold, a subsequent agreement between the manufacturer and the owner of all the stock of the corporation, which fixes definitely the liabilities of the corporation, but contains no statement of the amount or character of its assets, does not preclude the corporation from recovering commissions. Wier v. American Locomotive Co., 215 Mass. 303, 102 NE 481.

14. Murphy v. Kastner, 50 N. J. Eq. 214, 24 A 564 (where it appeared that defendant authorized plaintiff to sell his brewery to an English corporation, the consideration to be paid part in cash and part in debentures, and agreed to give complainant all the price above seven hundred and fifty thousand dollars; that in pursuance of complainant's efforts the sale was effected between defendant and an English agent for seven hundred and ninety thousand dollars, the bonds to be counted at four dollars and eighty-eight and one-fourth cents to the pound sterling; that in a statement made by defendant to complainant's agents, he counted the bonds at four dollars and eighty-four cents to the pound, the current rate of exchange, and the agent settled on that basis, receiving £800 less than if the contract rate of exchange had been used, and gave a receipt in full, it was held that relief should be granted against the mistake).

15. Werckmann v. Taylor, 112 Mo. A. 365, 87 SW 44 (holding that where an agent called on his principal for the purpose of settling the account between them, and submitted the account, and they went over it, and the principal agreed that all the charges were satisfactory and the account correct, the agent was entitled to recover the balance in his favor shown by the account). See however Smith v. Redford, 19 Grant Ch. (U. C.) 274 (where accounts were delivered in 1862 and 1865 by a trustee and agent to his principal, and the confidential relationship existed for upward of two years after the latter account had been rendered, it was held that the accounts were not binding on the principal as stated accounts).

16. Wilmer v. Placide, 119 Md. 49, 86 A 43 (holding that defendant, who, in submitting to plaintiff an account of his collections and disbursements, stated that he had not charged commissions, and who in a suit for an accounting made no claim therefor until after the order for an accounting, waived his right thereto); Flack v. Condict, 66 N. J. L. 351, 49 A 508 (where a sales agent had disobeyed instructions in taking a contract for less than the price fixed, and the contract was accepted by the principal on the condition that the agent would waive his commission, it was held that the evidence was sufficient to show an unconditional waiver and that such waiver was not void for want of consideration).

17. Alliance Ins. Co. v. McKnight, 97 Ill. 80.

[a] **Rendition of incomplete account by agent** as not precluding a subsequent charge for matters omitted see Thompson v. Salmon, 18 Cal. 632.

18. Odum v. J. I. Case Threshing Mach. Co., (Tenn. Ch. A.) 36 SW 191 (holding that the failure of an agent for the sale of property to notify his principal that he claimed commissions on a certain sale until after the principal paid the commission to another who claimed the same does not bar his right to a recovery of the commissions, where the general agent of the principal superintended the making of the sale and was cognizant of the special agent's rights therein); Douglas v. Cross, 12 Man. 534 (holding that the fact of the recovery by another plaintiff of a commission in respect of the same sale is res inter alios acta and is not in itself material). See also Brodhead v. Pullman Ventilator Co., 29 Pa. Super. 19.

[a] **Payment to agent as discharging claim of subagent.**—Where a principal notified a subagent that, on the sale of the principal's land, he would be fully protected in the matter of his commission, a payment of the whole commission to the agent, without reserving anything for the subagent, does not release the claim of such subagent against the principal. Hornbeck v. Gilmer, 110 La. 500, 34 S 651. And see Clark v. Lillie, 39 Vt. 405.

19. Taylor Mfg. Co. v. Key, 86 Ala. 212, 5 S 303.

Double payment as by allowing additional compensation see supra § 449.

20. American L. & T. Co. v. Toledo, etc., R. Co., 47 Fed. 343 [aff 155 U. S. 534, 15 SCt 214, 39 L. ed. 251] (where a finance company agreed to negotiate the sale of eight hundred thousand dollars of railroad bonds for a commission of ten per cent payable in the bonds, and afterward the parties to this agreement entered into an agreement with a third person, in which the latter agreed to make a loan, to be secured by pledge of part of these bonds, and it was provided that eighty thousand dollars of the bonds should be appropriated to the finance company in payment of its claims for commission, it was held that the second agreement passed title to the eighty thousand dollars of bonds to the finance company, although it had not then negotiated a sale of the eight hundred thousand dollars of bonds).

21. **Recovery back of payments** see generally Payment [30 Cyc 1298].

his right to compensation,[22] they may be recovered back;[23] and commissions paid and received under a mutual mistake are likewise recoverable by the principal.[24]

Advances on commissions. In the absence of a special agreement, an agent who receives advances on account of commissions cannot be held to a personal liability for such advances, although the commissions earned by him do not equal the advances, and although his employment has ceased.[25]

[§ 453] **2. Agent's Right to Damages for Breach of Contract by Principal—a. In General.** In the absence of an express or implied stipulation to the contrary in the contract of agency, the principal of a commercial agent is under no obligation to continue in business and afford the agent opportunity, means, and facilities for earning his commissions; and hence his failure to do so affords the agent no ground for the recovery of damages.[26] Where, however, there is such an obligation, whether expressed or

22. See supra §§ 428–434.

23. Ala.—McGar v. Adams, 65 Ala. 106.

Nebr.—Campbell v. Baxter, 41 Nebr. 729, 60 NW 90 (holding that money paid by a principal to his agent for the latter's services in effecting a sale or exchange of the principal's property may be recovered back, in an action at law, when it appears that such agent had or was to receive a commission or compensation from the other party to the trade or exchange, for his services in bringing it about, if it also appears that at the time such principal made such payment he was ignorant of the fact that his agent was acting for both parties to such trade or exchange).

N. Y.—Palmer v. Pirson, 4 Misc. 455, 464, 24 NYS 333 [aff 144 N. Y. 654 mem, 39 NE 494 mem] (where the court said: "If the defendant was guilty of fraudulent practice upon the plaintiff, he could not maintain an action to recover the contract price for his services, or of the value of them, and when she paid him in ignorance of his fraud, she could recover the sum paid when she discovered the fraud. The defendant, in view of his fraudulent conduct, earned no compensation, and was not entitled to be paid, and no rule is better settled than that if money is paid under a mistake of the facts, or under fraudulent representations, it may be recovered on discovery of the true state of facts").

Pa.—Johnson v. Alexander, 4 Leg Gaz 393.

Wash.—Hindle v. Holcomb, 34 Wash. 336, 75 P 878.

Eng.—Andrews v. Ramsay, [1903] 2 K. B. 635 (holding that where an agent in effecting a sale of property for his principal has taken a secret commission from the purchaser, the principal, notwithstanding he has recovered from the agent the amount of the secret commission, is further entitled to recover back the commission which he himself has paid to the agent). See however Hippisley v. Knee, [1905] 1 K. B. 1 (holding that where an agent, in effecting a sale of property for his principal, has without fraud received a secret commission or discount in an incidental matter which is not connected with his duty to sell, the principal, while entitled to recover from the agent the secret commission or discount, cannot recover the commission which has been paid by him to the agent for effecting the sale).

See Sanborn v. U. S., 135 U. S. 271, 10 SCt 812, 34 L. ed. 112 (where it appeared that defendant notified the secretary of the treasury that a legacy tax was due the United States, and made a contract to collect it, under the act of congress of May 8, 1872, authorizing the secretary to employ persons to assist in collecting money due the United States; that the revenue officers knew of the tax before; that when it was due the executor, without any knowledge of defendant, wrote the secretary of the treasury about it, and afterward paid it over to the proper officer; that the latter handed the money to defendant, who had previously called upon him to assist in the collection; that defendant forwarded it to the secretary, with the representation that he had collected it, and received his commission, it was held that defendant, having performed no service, was not entitled to the commission,. and the United States could recover it).

24. Frick, etc., Co. v. Larned, 50 Kan. 776, 32 P 383 (where commissions on credit sales were payable only where the buyers were responsible, and they were paid on the mistaken assumption of the buyers' responsibility); Cleveland School-Furniture Co. v. Hotchkiss, 89 Tex. 117, 33 SW 855 (where the parties erroneously supposed that the transaction on which commission was paid was valid). Compare L. J. Wing Mfg. Co. v. Thompson, 120 NYS 51.

25. Arbaugh v. Shockney, 34 Ind. A. 268, 71 NE 232, 72 NE 668 (holding that the term "advances," as used in an agreement between an insurance company and a solicitor made in anticipation of expected commissions, does not create a debt so as to enable the company to recover such advances upon the unsuccessful termination of the venture); Northwestern Mut. L. Ins. Co. v. Mooney, 108 N. Y. 118, 15 NE 303; Wolfsheimer v. Frankel, 130 App. Div. 853, 115 NYS 958 (holding that, where a contract of a traveling salesman provided that he should receive a commission on sales, and that the principal would advance a certain sum per month and all traveling expenses, "all of which is to be charged to his commission account," and where the commissions did not exceed the amount advanced, the principal could not recover the difference in the absence of a provision therefor); L. J. Wing Mfg. Co. v. Thompson, 120 NYS 51 (holding that a contract providing that an agent should be allowed to draw thirty dollars a week against his share of the profit, and should he fail to make sufficient sales to yield a profit equal to the thirty dollars, the principal had the option to discontinue the advances until the profits on the agent's sales equaled the money so advanced, does not change the rule that an agent is not personally liable for advances received). See also Fowler v. Catton, 16 Hawaii 535 (holding that where one claiming to be sole agent charged commissions on orders secured by an alleged coagent at the rate usually charged on orders sent through others than the agent, and after he had ceased to be agent and had sent his statements of accounts to the principal showing these charges, the principal paid the alleged coagent certain special commissions on the orders, the principal was not entitled to recover from the agent the commissions so charged by him).

[a] **"Without a promise to repay, express, or fairly to be implied** from the agreement under which the 'advances' were made, a promise to 'advance' money for a particular purpose, as here, the furtherance of the defendants' business, does not import an expectation of its return personally by the person to whom the money was 'advanced.' Unquestionably, it may have the meaning of a loan if the verb is used in connection with a promise, express or implied, to repay the money." Schlesinger v. Burland, 42 Misc. 206, 208, 85 NYS 350.

[b] **Construction of contracts.**—(1) Where a principal owed his agent commissions for selling bonds and they made a written agreement whereby the agent relinquished certain claims for commissions and retained others, and his employment was ended, and immediately thereafter he was reëmployed under a new agreement whereby the agent should receive a commission for the sale of bonds and the principal should make advances against his commission account, the advances were chargeable against commissions to be earned under the new contract, and not on bonds sold under the old contract. Luce v. Consolidated Ubero Plantations Co., 195 Mass. 84, 80 NE 793. (2) Where a contract whereby a corporation agreed to act as selling agent provided that the other party would "advance" fifty dollars a week for expenses, and that "so much as may have been advanced on the expense account" shall be retained out of the commissions earned, the payments to be made were merely advancements to be later accounted for by the agent, and were not payments toward the maintenance of an office for the agency. Bellman v. Thacher, 151 App. Div. 387, 136 NYS 730.

26. Parry Mfg. Co. v. Lyon, 64 SW 436, 23 KyL 844 (holding that, where plaintiffs and defendant entered into a contract designated as "an agency contract for the sale of vehicles," by which it was provided that vehicles shipped to plaintiffs were to remain the property of defendant, and defendant reserved the right to have any of such vehicles returned, and also the right to revoke the agency at will, plaintiffs cannot recover damages for defendant's refusal to deliver vehicles ordered); Fuchs v. Standard Thermometer Co., 178 Mich. 37, 144 NW 484; Rhodes v. Forwood, 1 App. Cas. 256 (holding that, where two parties agree, for a fixed period, the one to employ the other as his sole agent in a certain business at a certain place, the other to act in that business for no other principal at that place, there is no implied contract that the business itself shall continue to be carried on during the term named); In re English, etc., Mar. Ins. Co., L. R. 5 Ch. 737 (holding that, where a person entered into an agreement with an insurance company to act as their agent for five years, and to transact no business except for the company, in consideration of which he was to receive a fixed salary and also a commission on all business transactions, the company violated no obligation by voluntarily winding up before the expiration of the five years); Bovine v. Dent, 21 T. L. R. 82 [dist Ogdens v. Nelson, [1904] 2 K. B. 410] [aff 74 L. J. K. B. 433] (where it appeared that plaintiffs entered into a contract with defendants who carried on business in partnership, whereby the latter were appointed sole buying agents for plaintiffs for a certain district, the intention being that the whole district should be represented by defendants for a period of five years; that plaintiffs agreed that defendants should retain the agency as long as they met their engagements and kept strictly to the terms of the engagement for a period of five years, and in consideration thereof defendants agreed to act as buying agents for the district on the terms stated in the agreement, and to accept delivery and to pay for a minimum quantity of plaintiffs' products during each year of the term, and defendants had the option of re-

implied, on the part of the principal, he is liable in damages to the agent for a breach thereof.[27] Thus the principal may be held liable in damages for a breach of an obligation to supply the agent with goods,[28] or with samples,[29] or price lists,[30] or to make money advances to the agent.[31] He may also be

newing the agreement at its termination; that within the five years defendants dissolved partnership, and plaintiffs sued for damages for breaches of the contract committed after the dissolution; and it was held that there was no implied term in the contract that defendants should not dissolve partnership within the term and thus disable themselves from carrying out the contract, and that therefore defendants were not liable); Northey v. Trevillion, 18 T. L. R. 648 (holding that, where there is a contract to employ another as an agent merely, but with no service or subordination, there is no implied undertaking that the agent is to be supplied with the means of earning his commission; but that if the contract is one of service, then the commission is merely intended to be in the place of salary, and the contract cannot be determined without compensation to the servant); Morris v. Dinnick, 25 Ont. 291, 14 Can LTOccNotes 394 (holding that, where, in a written contract of agency, the principal agreed to pay the agent a fixed commission on all sales effected by the latter of goods manufactured by the former, and the contract was made terminable at the end of a year on a month's notice by either party, there was no implied obligation on the part of the principal to manufacture any goods).

[a] **Obligation to continue agency.**—(1) An obligation of the principal to continue the agency for any definite period cannot be implied where, in a written contract of agency, the principal agreed to pay the agent a fixed commission on all sales effected by the latter of goods manufactured by the former, and the contract was made terminable at the end of a year on a month's notice by either party. Morris v. Dinnick, 25 Ont. 291, 14 Can LTOccNotes 394. But see Lewis v. Atlas Mut. L. Ins. Co., 61 Mo. 534. (2) So where by the terms of a contract between plaintiff and defendant, plaintiff, in consideration of a certain sum for the year 1873, and of another sum for the year 1874, to be paid in semimonthly or monthly installments, agreed to devote his whole time and attention solely to the business of defendant under the contract, and plaintiff entered the service of defendant, and continued in it up to June, 1873, when defendant suspended business, it was held, in a suit by plaintiff for damages on account of being thrown out of employment, that there was no undertaking on the part of defendant to continue plaintiff in his employment for any definite length of time, and that plaintiff could not recover. Orr v. Ward, 73 Ill. 318.

27. Graham v. J. I. Case Threshing Mach. Co., 11 WestLR 170.

[a] **Excuses for discontinuing business.**—(1) Where a manufacturer obligates himself to his sales agent to continue the business and to supply him with goods for a definite period, he is not excused from performance by the fact that, before the expiration of the specified period, his manufactory is destroyed by fire. Turner v. Goldsmith, [1891] 1 Q. B. 544. (2) So the fact that a foreign insurance company becomes unable, by reason of the insufficiency of its assets, to comply with a statute regulating foreign insurance companies, does not excuse it from carrying out a contract by which it has obligated itself to employ a state agent for a specified period. Lewis v. Atlas Mut. L. Ins. Co., 61 Mo. 534.

[b] **Obligation to make fair prices.**—Under an executory contract between a corporation engaged in the business of refining cottonseed oil in Alabama and an agent employed to introduce and establish a market for the sale of its oils in Georgia, by which it was stipulated that for three years the agent was to have the sole right of selling the company's oils in Georgia through himself and his subagents, was to pay the expenses of himself and his agents, was to receive as compensation ten per cent of the amount of his sales, and was to be subject to the orders of the company, it was held that the company, in regulating the price to be charged for oils, was neither required to sell its oils at a loss, nor authorized to raise the price above a fairly remunerative profit, which would defeat or substantially hinder sales, in order to get rid of the agency. Union Refining Co. v. Barton, 77 Ala. 148.

[c] **Obligations as to agent for sale of corporate stock.**—(1) By the contract between plaintiff and defendant building and loan association he became agent for the sale of "shares of its stock" in a certain territory, his compensation being fixed at a certain sum per share, which was to cover all his expenses as well; and he further bound himself to sell at least five hundred shares per month. Shortly afterward defendant changed the nature of its shares, and issued them on a new basis, whereby they became less salable. It was held that this was a breach of the contract, as it contemplated only shares of the character defendant was issuing when the contract was made. Gates v. National Bldg., etc., Union, 46 Minn. 419, 49 NW 232. (2) An agent was employed by the stockholders of a corporation to place its stock under a contract that he should receive a commission on all the stock so placed. The contract contained no restrictions as to whether he should sell at par or at the market price, nor did it specify that the corporation or any of its members should not sell any stock for less than par. The agent placed part of the stock at par, but after members of the company had put their own stock on the market and had sold it for less than par, the agent found that he could place no more stock at par, and ceased to make further efforts to place additional stock, at any price. It was held that he was entitled to his commission only on the amount of stock he had placed, and not on the whole amount of stock to be placed, since the stockholders, in putting their own stock on the market, violated no term of the contract. Vine v. Munson, 5 Oh. Dec. (Reprint) 480, 6 AmLRec 240, 2 Cinc LBul 293.

[d] **Suspending sales.**—A provision in a contract, appointing plaintiff the sales agent of defendant, which reserves the option to decide "when the plant shall be operated and how many goods shall be made," does not give power to refuse to allow plaintiff to make any sales, but only gives power of temporarily suspending sales. Oberfelder v. J. G. Mattingly Co., (Ky.) 120 SW 352.

[e] **Remedy not by action for commissions.**—In Greenberg v. American Technical Book Co., 83 Misc. 786, 67 NYS 974, it was held that, where the agent is unable to complete his right to commissions because of conduct of his principal which worked a breach of the contract, his remedy is an action for damages for the breach and not an action for commissions.

28. Turner v. Goldsmith, [1891] 1 Q. B. 544 (holding that, where defendant entered into an agreement in writing with plaintiff whereby defendant agreed to employ plaintiff as agent for five years, and plaintiff agreed to do his utmost to obtain orders for the various goods manufactured or sold by defendant which might be submitted to him, plaintiff to be paid by a commission, and after two years defendant ceased to carry on business and discharged plaintiff, in an action for wrongful dismissal there was an implied agreement to supply plaintiff with goods to a reasonable extent, and plaintiff was entitled to damages). See also Picker v. Weiss, 39 Misc. 22, 78 NYS 761 (holding that, where, in an action by a principal against his agent for moneys converted, the agent interposed a counterclaim alleging employment to sell liquors of the principal to certain customers of his own, under an agreement that the principal would furnish liquors of the quality which same were held out to represent with an agreement for a commission on such sales, it set up a contract to furnish liquors of the quality represented, and a failure to furnish that quality would prevent the agent from earning his commission).

[a] **Obligation to supply agent with goods.**—(1) Where plaintiff had contracted with defendant to act as its sole agent in another state to establish a market for its oils, and was to receive as compensation ten per cent of the amount of his sales, and to be subject to the orders of the company, defendant was bound to furnish the oils necessary to fulfill contracts made by plaintiff. Union Refining Co. v. Barton, 77 Ala. 148. (2) Where, however, defendants agreed to furnish plaintiff with goods for sale by him, but not all he could sell, and after goods had been furnished him for a part of the season it developed that defendants could not manufacture more than they themselves could sell at retail, which plaintiff had understood they were to continue to do, they were under no obligation to supply him further with goods. Dodge v. Reynolds, 135 Mich. 692, 98 NW 737.

29. Jacquin v. Boutard, 89 Hun 437, 35 NYS 496 [aff 157 N. Y. 686 mem, 51 NE 1091 mem] (holding that where a manufacturer hired an agent to sell his goods on commission, and, although he had not agreed in terms to send the agent samples, yet did so until he gave six months' notice to terminate the agency, as allowed by the contract, his obligation to do so while the agency continued was clearly within the intent of the parties and will be enforced); Turner v. Goldsmith, [1891] 1 Q. B. 544.

[a] **"Sufficient samples"; question for jury.**—A contract by which a principal agrees to supply his agent for the sale of a certain article "with sufficient samples" of the said article, "as may be called for" by the agent, means only that the agent shall be furnished with a quantity of samples such as shall be reasonably sufficient for the business actually done, and, in case of disagreement, the question as to what is a reasonable quantity is to be determined by the jury. Jenson v. Perry, 126 Pa. 495, 17 A. 665, 12 AmSR 888.

30. Jacquin v. Boutard, 89 Hun 437, 35 NYS 496 [aff 157 N. Y. 686 mem, 51 NE 1091 mem].

31. Beck v. West, 87 Ala. 213, 6 S 70 (holding that a contract by which plaintiff is to serve defendants as a traveling salesman for a certain term, his compensation to be half the profits made on sales effected through his agency, he to pay his own expenses, and defendants to furnish supplies, and, to enable him to meet expenses until profits are realized, to honor his orders on them for fifty dollars every two weeks during his employment, binds defendants to make such payments, not as compensation, but as loans, the rights of the parties to be adjusted on settlement of the profits; and their refusal to make such payments is a breach of the contract).

[a] **Excuses.**—Where in establishing an agency the principal agrees to

held so liable for making sales in the exclusive territory of the agent,[32] or for wrongfully failing or delaying to fill orders taken by the agent;[33] or where he is otherwise guilty of a breach of the contract of employment, whereby the agent is injured.[34]

When cause of action arises. An agent's cause of action for damages for a breach of contract of agency arises as soon as the injury is done, and he may sue immediately.[35] Where the principal rejects the services of the agent before the time for performance arrives, the agent may bring an immediate action.[36]

[§ 454] **b. Termination of Agency.** An agent wrongfully discharged may treat the contract of employment as continuing, although broken by the principal, and recover damages for the breach,[37]

lend the agent a specific sum each month for the period of one year, he is not excused from so doing by the fact that such agency does not prove profitable or by the fact that the commissions earned by the agent, out of which the loans are to be repaid, are not sufficient to make such repayment. Siver v. Tyree, 148 Ill. A. 103; Gannon v. Tyree, 148 Ill. A. 99.

32. Marshall v. Canadian Cordage, etc., Co., 160 Ill. A. 114, 119 (where the court said: "Where there is an exclusive agency and the principal violates the contract by making the sales directly and knowingly within the exclusive territory, he is clearly liable"). Compare W. G. Taylor Co. v. Bannerman, 120 Wis. 189, 97 NW 918 (holding that, where it appeared that defendants sold to a customer, in plaintiffs' territory, under plaintiffs' written consent, certain consignments for certain private jobs; that some of the consignments were to be used on private jobs, within the meaning of plaintiffs' consent, but that as to others there was no evidence of such consent, it was error to award plaintiffs damages on any such consignments, defendants' good faith in making the sales being undisputed).

33. Las Palmas Winery, etc. v. Garrett, 167 Cal. 397, 139 P 1077 (holding, however, that defendant was not estopped from setting up its right to decline to fill the order, as beyond plaintiff's territory, because it stated in reply to the order that it would fill it if defendant would pay all past-due accounts); Acme Harvester Co. v. Madden, 4 Kan. A. 598, 46 P 319 (holding, however, that an agent for the sale of machines on commission cannot recover damages for the failure of his principal to fill orders submitted for machines, in the absence of a showing that the orders were taken from persons to whom under the contract of agency he was entitled to sell); Stevenson v. Morris Mach. Works, 69 Miss. 232, 13 S 834 (holding that, where defendant, a manufacturer, agreed to fill orders for engines to be sold by plaintiff, and to allow him a commission on all moneys realized from sales, and plaintiff found purchasers whose orders were secured and forwarded according to the agreement, there was an implied contract on the part of defendant to ship within a reasonable time, and if through his fault in not doing so the sales were lost, plaintiff could recover damages for breach of the contract); W. G. Taylor Co. v. Bannerman, 120 Wis. 189, 97 NW 918 (holding that, where defendants refused to complete the filling of an order, within the terms of a contract with plaintiffs, but dealt directly with plaintiffs' customer, defendants' only excuse for refusal to complete the order on plaintiffs' account being that plaintiffs owed defendants a balance which they refused to pay, and plaintiffs claimed that the balance was more than overcome by damages due plaintiffs for breach of the contract, which was true, plaintiffs were properly allowed as damages the profits of which they were deprived by defendants' refusal to fill the order on plaintiffs' account).

[a] **Where no damage is shown.**—A principal is not liable at the suit of its agents for damages for nonfulfillment of orders on which commissions were to be paid, in the absence of proof of sales having been made, or of liabilities of the agent resulting therefrom having been paid, especially where the persons to whom the alleged liabilities had accrued are not made parties to the suit. Kirby Lumber Co. v. Cummings, 39 Tex. Civ. A. 220, 87 SW 231.

34. Caffe v. Newark Auto. Mfg. Co., 78 Misc. 152, 137 NYS 906; Wilson v. Deacon, 2 OntWN 1229, 19 OntWR 433 (holding that, where an owner acts mala fide in the sale of goods for the purpose of preventing an agent from making a commission, the agent is entitled to damages).

[a] **The law requires of principals the utmost good faith** in their dealings with agents, and that nothing shall be said or done, either directly or indirectly, which is calculated to mislead or deceive, or give an undue advantage. An advantage is unduly taken when it is such as a man of ordinary prudence would not have allowed or submitted to if he had been in possession of all the facts known to the other. Eagle Distillery Co. v. McFarland, 11 KyL 905.

35. Strauss v. Meertief, 64 Ala. 299, 38 AmR 8; Forked Deer Pants Co. v. Shipley, 80 SW 476, 25 KyL 2299; Sutherland v. Wyer, 67 Me. 64; Brinkley v. Swicegood, 65 N. C. 626.

[a] **Action not premature.**—Where, three days after the discharge and before the expiration of his term of employment, plaintiff commenced his action to recover damages for defendant's breach of contract, the action was not premature. Sutherland v. Wyer, 67 Me. 64.

Accrual of cause of action on contract see Contracts [9 Cyc 697].

36. Dugan v. Anderson, 36 Md. 567, 11 AmR 509; Hochster v. De la Tour, 2 E. & B. 678, 75 ECL 678, 118 Reprint 922, 6 ERC 576.

37. U. S.—MacGregor v. Union L. Ins. Co., 121 Fed. 493, 57 CCA 613.

Ala.—Strauss v. Meertief, 64 Ala. 299, 38 AmR 8.

Ark.—Gardenhire v. Smith, 39 Ark. 280.

Colo.—Saxonia Min., etc., Co. v. Cook, 7 Colo. 569, 4 P 1111.

Ga.—Britt v. Hays, 21 Ga. 157; Rogers v. Parham, 8 Ga. 190.

Ill.—Williams v. Chicago Coal Co., 60 Ill. 149.

Ind.—Richardson v. Eagle Mach. Works, 78 Ind. 422, 41 AmR 584.

Iowa.—Milligan v. Owen, 123 Iowa 285, 98 NW 792.

Kan.—George O. Richardson Mach. Co. v. Swartzel, 70 Kan. 773, 79 P 660.

Ky.—Chamberlin v. McCallister, 6 Dana 352.

Me.—Miller v. Goddard, 34 Me. 102, 56 AmD 638.

Mass.—Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 NE 221 (holding that, where defendant had appointed plaintiff its automobile selling agent in New England, defendant's refusal to permit plaintiff, during the continuance of the contract, to longer act as its agent in soliciting orders constituted a present breach of contract).

Minn.—Horn v. Western Land Assoc., 22 Minn. 233.

Mo.—Booge v. Pacific R. Co., 33 Mo. 212, 82 AmD 160; Ream v. Watkins, 27 Mo. 516, 72 AmD 283; Stone v. Vimont, 7 Mo. A. 277.

N. Y.—Moody v. Leverich, 4 Daly 401, 14 AbbPrNS 145; Greenberg v. American Technical Book Co., 67 NYS 974.

N. C.—Brinkley v. Swicegood, 65 N. C. 626; Hendrickson v. Anderson, 50 N. C. 246.

Oh.—James v. Allen County, 44 Oh. St. 226, 6 NE 246, 58 AmR 821.

Philippine.—Reyes v. Maritima, 3 Philippine 519.

Vt.—Derby v. Johnson, 21 Vt. 17.

Va.—Willoughby v. Thomas, 24 Gratt. (65 Va.) 521.

Eng.—Goodman v. Pocock, 15 Q. B. 576, 69 ECL 576, 117 Reprint 577.

Man.—Richardson v. McCleary, 16 Man. 69, 3 WestLR 141 (holding that, where an agent entitled to commissions for finding a purchaser for the principal's farm, consented to forego the commission on the principal's giving him a special sole right to sell the land for a fixed higher price within a time named, the principal was liable in damages for having, before the expiration of the time limit, notified the agent that he would not sell).

[a] **Revocation of an agency coupled with an interest** may be made subject to liability for damages only as for breach of any other contract. Laux v. Hogi, 45 Mont. 445, 123 P 949. See also supra §§ 154, 157.

[b] **Agency uncoupled with interest.**—(1) "The general rule seems to be that, where an agency is uncoupled with an interest, it may be revoked by the principal at will, without liability for damages; but where it is for a fixed time, and contemplates on the part of the agent the expenditure of time and money to carry it out, and is accepted and the duties imposed are entered upon by the agent, and money and time are expended in pursuance of the object of the agency, that, although the principal has the power to revoke and bring to a termination the contract, yet he lacks the right of so doing, except upon the burden of responding to the agent for such damages as he may suffer by reason thereof." Cloe v. Rogers, 31 Okl. 255, 260, 121 P 201, 38 LRANS 366 and note. See also supra § 157. (2) "While an agency at will may be terminated by the principal at any time before the acts which the agent is to perform under the contract of employment have been performed, it is also the law that if, before revocation by the principal, the authority conferred upon the agent has been executed in part, the unexecuted portion cannot be revoked, and if, by revocation of the part unexecuted, damage results to the agent, as to the executed part the principal must indemnify him to that extent." Briggs v. Chamberlain, 47 Colo. 382, 394, 107 P 1082, 1086, 135 AmSR 223. (3) In Meyer v. Pulitzer Pub. Co., 156 Mo. A. 170, 177, 136 SW 5, the court said: "Though the principal may revoke an agency so given for an indefinite time, the circumstances of the case not infrequently present a situation in which there inheres a right to some compensation against the principal on the precepts of natural justice alone, notwithstanding the abstract right of revocation which the law generously concedes. In this view, even where an indefinite agency has been revoked, if it appears the agent, induced by his appointment, has in good faith incurred expense, devoted time and bestowed labor in the matter of the agency, without having a sufficient opportunity to recoup such outlays from the undertaking, the principal will be required to compensate him in that behalf, for the law will not permit one to thus deprive another of value without awarding just compensation. But the just principle acted upon by the courts in the

unless the principal abandons the contract with the agent's consent.[38] But the agent can recover full damages in such a case only on proof that he was able to perform on his part.[39]

Termination by operation of law. Where the termination of the agency is caused by operation of law,[40] the agent is not entitled to any damages therefor.[41]

[§ 455] c. **Measure of Damages—(1) In General.** The general rules of law governing the measure of damages for breach of contract,[42] apply in determining the measure of damages for breach of a contract to appoint an agent;[43] and also in determining the measure of damages, where the principal violates the contract of agency,[44] as where he wrongfully terminates the agency,[45] or wrongfully prevents the agent from earning his commission,[46] as by refusing or failing to supply the agent with goods or to fill his orders.[47] If a sales agent's commissions are payable in purchase-money notes executed by his

circumstances suggested requires no more than in every instance the agent shall be afforded a reasonable opportunity to avail himself of the preliminary expenditure and efforts put forward to the end of executing the authority conferred, and if it is denied him that the principal should make compensation accordingly."

38. Goodman v. Haynes Auto. Co., 205 Fed. 352, 123 CCA 480 (holding, however, that, where plaintiff having paid defendant one thousand two hundred and fifty dollars under an automobile agency contract in two checks, and defendant having cashed one of the checks and then repudiated the contract and returned to plaintiff its own check of an equal amount, plaintiff's act in cashing such check after it had unsuccessfully attempted to induce defendant to perform did not constitute a consent to defendant's abandonment of the contract).

39. Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 NE 221.

40 See supra §§ 172–194.

41. Yerrington v. Greene, 7 R. I. 589, 84 AmD 578; Farrow v. Wilson, L. R. 4 C. P. 744.

[a] **Dissolution of corporation by state.**—The dissolution of a corporation by the action of the state being in the nature of a corporate death, contracts of employment with its agents are revoked by operation of law, and such agents are not entitled to recover any damages therefor. Peo. v. Globe Mut. L. Ins. Co., 91 N. Y. 174 (holding that, where a registered policy life insurance company contracted with a general agent for his services for a specified term at a stipulated salary, and, before any breach of the contract on its part, was restrained from further prosecuting its business by order of the court, and a receiver of its assets was appointed, the agent had no valid claim upon the funds in the hands of the receiver, for damages for breach of the contract, in the absence of evidence of fault on the part of the company).

42. See Damages [13 Cyc 155 et seq].

43. Courier-Journal Co. v. Miller, 50 SW 46, 20 KyL 1811 (holding that, where the time of the beginning of plaintiff's agency for defendant, which was to continue as long as satisfactory to defendant, was postponed indefinitely, plaintiff can recover as damages for breach of the contract only compensation for the actual outlay of time or money in preparing for the employment prior to notice that defendant would not comply with the contract); American Bldg., etc., Assoc. v. Hart, 2 Wash. 594, 27 P 468 (holding, in an action for breach of contract to give plaintiffs sole authority to solicit members and collect admission fees for a building association in a certain territory, that plaintiffs, in order to recover more than nominal damages, must show approximately the profit derivable from admission fees, after deducting the cost of collection, and the number of shares they would have sold if other agents had not sold in violation of their contract; and that plaintiffs could not assume that, because other agents sold a certain number of shares, plaintiffs themselves would have sold the same number).

[a] **Upon a breach of a contract to make a person sole agent** for the sale of goods in a given territory, expenses incurred by him in advertising the principal's product cannot be recovered, where a recovery for profits that he would otherwise have received but for the wrongful revocation is sought. Ewart Lumber Co. v. American Cement Plaster Co., 9 Ala. A. 152, 62 S 560.

44. Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 NE 221 (holding that, where loss of profits was within the contemplation of the parties as a probable result of a breach of an automobile agency contract, and appeared to be its natural, primary, and probable consequence, susceptible of proof by evidence reasonably certain, the agent was not limited to a recovery of nominal damages, but could recover for such loss).

[a] **Damages for breach of an agency contract by a corporation** do not necessarily extend beyond the period for which the corporation was organized, as there is no presumption of law that such a corporation will prolong its artificial existence. Newhall v. Journal Printing Co., 105 Minn. 44, 117 NW 228, 20 LRANS 899 (holding that, although defendant, a newspaper company, was not justified in terminating a contract with a carrier, such breach of the contract did not entitle plaintiff to recover damages for prospective profits for a longer time than during the remainder of the period for which the company was incorporated).

[b] **For a breach of contract to renew an agency** for the sale of automobiles, the measure of damages is such a sum as the evidence shows would be the net profits of plaintiff had he continued in business, at the same place, down to the time when the new contract would have expired. French v. Pullman Motor Car Co., 242 Pa. 136, 88 A 876.

45. See infra § 456.

46. Roberts v. Barnard, Cab. & E. 336 (holding that, in an action for damages by a commission agent for wrongfully preventing him from earning his commission, the damages recoverable, where nothing remained to be done by the commission agent to entitle him to his commission if the transaction had gone through, are the full amount of the commissions which he would have earned).

[a] **Refusal to convey to purchaser found by agent.**—(1) Where the owner of land agrees with agents to convey the same to a purchaser who was to pay the agent's commission, and afterward refuses to convey, the agents can recover from the owner the amount they would have received as commission from the purchaser had the owner complied with his contract. Atkinson v. Pack, 114 N. C. 597, 19 SE 628. (2) However, where defendant employed plaintiff to negotiate the sale of a number of lots, and defendant's wife thereafter refused to sign the deeds so that defendant could conclude the sale, plaintiff's measure of damages is his expenses in the transaction, and he cannot recover commissions on the lots not sold. Hill v. Jones, 152 Pa. 433, 25 A 834.

[b] **Sale by principal before expiration of agency.**—In an action by agents employed to sell lands, against the owner who has, in violation of their contract, sold the lands himself within the time allowed the agents for such sale, the proper measure of damages is the profit, if any, which would have resulted to plaintiffs had they been allowed to complete their contract with defendant and had the land been sold by them under the contract. Green v. Cole, 127 Mo. 587, 30 SW 135.

47. U. S.—Taylor Mfg. Co. v. Hatcher Mfg. Co., 89 Fed. 440, 3 LRA 587 (holding that, where a company manufacturing agricultural steam engines agrees to furnish an agent, who sells on commission, the engines necessary to supply the season's demand, and the agent incurs great expense in advertising, canvassing, and otherwise building up the trade, and proves a heavy demand on him for these particular engines largely in excess of his order to the company, the company, refusing without sufficient cause to furnish the engines ordered, will be held liable for the amount of commissions on the engines ordered, and for the reasonable expenses of the agent in the undertaking).

Ala.—Union Refining Co. v. Barton, 77 Ala. 148.

Iowa.—Howe Mach. Co. v. Bryson, 44 Iowa 159, 24 AmR 735.

Kan.—Osborne v. Stassen, 25 Kan. 736 (where it appeared that an agent for the sale of machines was to receive a commission of sixty dollars on each machine sold, and he was to set up the machines and put them in operation, which cost him about twenty dollars, and that he was entitled to receive five machines which the principal failed to deliver, and it was held that his measure of damages was the actual loss he sustained, and not necessarily sixty dollars on each machine).

Ky.—Smith v. Perry, 18 KyL 683 (holding that, defendants having appointed plaintiff their agent for the sale of pianos of a certain kind, and afterward refused to deliver the pianos, plaintiff was entitled to recover his share of the profits upon the number of pianos which he could have sold by reasonable efforts at the price agreed upon).

N. Y.—Meylert v. Gas Consumers' Ben. Co., 26 AbbNCas 262, 14 NYS 148 (holding that a sole agent for the sale of a patented article within a specified territory, who has abandoned his profession as a physician, and has devoted his entire time to the business of the agency, in reliance on his contract with the manufacturers, is entitled to recover from them for their total breach of the contract to furnish him with the articles not only the amounts which he actually expended in the business of the agency but also the earnings which the evidence reasonably establishes he otherwise would have made from his profession).

Pa.—Rightmire v. Hirner, 188 Pa. 325, 41 A 538 (holding, in an action for breach of a contract to sell machines on commission, that, where it appears that at the time of the breach the contract had three years to run, but defendants were not bound to furnish any definite number of machines, and could practically terminate the contract at any time by ceasing to manufacture them, the measure of damages is not the profit which plaintiff would have made on his contract, but the value of the contract at the time of breach; and that in consider-

customers to the principal, the latter to have the right of selection, the measure of damages to which the agent is entitled on account of the principal's refusal to deliver notes which the principal has selected for him is the actual value of the notes, not their face value.[48]

The measure of damages to which an exclusive agent is entitled where the principal, in violation of his contract, sells his goods in the agent's territory, is the actual loss suffered by the latter,[49] and that ordinarily is the commissions which would have accrued to him if he had made the sales in person.[50]

Speculative damages are not recoverable.[51] Thus, where the compensation of the agent is a commission on sales made by him, damages on the basis of suppositive sales are not recoverable,[52] unless it is shown that the sales would in fact have been made by the agent.[53]

[§ 456] **(2) In Case of Wrongful Discharge—(a) In General.** The general rules of law governing the measure of damages for breach of contract[54] also govern in determining the agent's measure of damages where the principal wrongfully terminates the agency.[55] As a general rule the prima facie

ing the value the jury must bear in mind that defendants were not obliged to furnish any specified number of machines, or even to continue their manufacture; that plaintiff's rights under his contract were subject to the contingencies of business and the depression of trade, which might tend to reduce the sales; and that in estimating the damages consequent on the loss of the contract, the jury must take into consideration what plaintiff probably could earn in some other employment or occupation during the time which the contract had to run).

Tex.—Kirby Lumber Co. v. Cummings, 39 Tex. Civ. A. 220, 87 SW 231 (holding that a sales agent who has made contracts of sale in his own name, his principal being undisclosed, cannot, as the vendees might do, recover the difference between the contract and the market prices in the absence of evidence that he has paid the vendees' claims).

Wis.—Taylor Co. v. Bannerman, 120 Wis. 189, 97 NW 918 (where it appeared that defendants rejected an order by which plaintiffs were deprived of a profit; that defendants could not have produced from their quarry sufficient stone to fill this order of plaintiffs, and in addition thereto fill those orders for which they had damages assessed against them for breach of the same contract in the case at bar; and it was held that it was error to allow damages to plaintiffs for the rejection of the order, since it would result in a duplication of damages).

48. Brown v. McCaul, 6 S. D. 16, 60 NW 151.

49. Schiffman v. Peerless Motor Car Co., 13 Cal. A. 600, 110 P 460 (holding that, in an action for a breach of an agency contract by the principal's invasion of the agent's territory, the agent's measure of damages is compensation for all the detriment approximately caused thereby, or which in the ordinary course of things would be likely to result therefrom, so far as they are clearly ascertainable in both their nature and origin, as provided by Civ. Code §§ 3300, 3301); LaFavorite Rubber Mfg. Co. v. H. Channon Co., 113 Ill. A. 491 (holding that, where a party has by contract the exclusive sale rights of particular goods for a specified period within certain territory, and the party granting such rights sells goods within such territory and refuses to allow such sales agent anything on account thereof, such agent can recover only the actual damages which he has suffered, and cannot recover any particular percentage of profit, without proof that he could or would have made the sales in question at a price which would have netted him such percentage of profit); W. G. Taylor Co. v. Bannerman, 120 Wis. 189, 97 NW 918 (holding that, in an action for breach of contract appointing plaintiffs the exclusive agents in a certain territory for the sale of stone from defendants' quarry at a certain price, by which defendants bound themselves to quote no prices and make no sales in plaintiffs' territory, where it appeared that defendants sold to a customer in plaintiffs' territory stone which plaintiffs had offered to sell to the same customer at the same price, plaintiffs would have to pay defendants for the stone under the contract, it was error to award damages to plaintiffs therefor, although breach of the contract was established; but that where defendants sold to a customer in plaintiffs' territory stone which otherwise plaintiffs could have sold at an established market price so as to yield a profit, the profit the sale would have yielded plaintiffs was properly allowed as damages). See also Mueller v. Bethesda Mineral Spring Co., 88 Mich. 390, 50 NW 319; Bredemeier v. Pacific Supply Co., 64 Or. 576, 131 P 312 (as to admissibility of evidence); American Bldg., etc., Assoc. v. Hart, 2 Wash. 594, 27 P 468.

[a] **Profits.**—In an action for a breach of an automobile agency contract by the principal's invading the agent's territory, the profits, of which the agent was deprived by such an invasion, consisting of sales of machines and parts to other agents, were not objectionable as speculative or uncertain. Schiffman v. Peerless Motor Car Co., 13 Cal. A. 600, 110 P 460.

[b] **Estoppel.**—Where a principal breaks an agency contract by selling automobiles and parts in the agent's exclusive territory, the principal is estopped to deny, in an action for the breach of such contract, that the agent would have made such sales but for the principal's violation of the contract. Schiffman v. Peerless Motor Car Co., 13 Cal. A. 600, 110 P 460; Sparks v. Reliable Dayton Motor Car Co., 85 Kan. 29, 116 P 363, AnnCas 1912C 1251 and note.

50. Marshall v. Canadian Cordage, etc., Co., 160 Ill. A. 114; Sparks v. Reliable Dayton Motor Car Co., 85 Kan. 29, 116 P 363, AnnCas1912C 1251 (holding that the measure of damages for a breach of contract giving plaintiff exclusive agency for the sale of automobiles, where the manufacturer invades plaintiff's territory, is the amount of commission of which plaintiff is deprived by sales made by defendant); Caffe v. Newark Auto. Mfg. Co., 78 Misc. (N. Y.) 152, 137 NYS 906; Milsom v. Bechstein, 14 T. L. R. 159. Compare Curry v. E. M. F. Co., 28 Ont. L. 427 (where plaintiff was held entitled to nominal damages only).

51. Lewis v. Atlas Mut. L. Ins. Co., 61 Mo. 534 (commissions on insurance to be taken).

52. Ala.—Union Refining Co. v. Barton, 77 Ala. 148 (holding that, where the principal wrongfully fails to supply the agent with goods, the agent cannot recover as damages the supposed profits which he would or might have realized from sales during the entire period stipulated for the continuance of the contract; that such damages are entirely speculative; and that no rule can be laid down by which they can be accurately ascertained or measured).

Cal.—Wiley v. California Hosiery Co., 32 P 522.

Iowa.—Howe Mach. Co. v. Bryson, 44 Iowa 159, 24 AmR 735 (where a person made a contract with the general agents of a sewing machine company, by the terms of which he was to rent a room, provide himself with a team, and furnish other necessary means for the sale of machines, and devote his time thereto; and the agents were to furnish him with all the machines he could sell, at a price twenty-five per cent below the retail rate, and he performed his undertaking, but the machines were not supplied as agreed; and it was held that the measure of damages was the value of the time lost as the result of the breach, without reference to the profits which might have been realized if the contract had been performed).

Mich.—Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 NW 457.

N. Y.—Barkley v. Olcott, 52 Hun 452, 5 NYS 525; Washburn v. Hubbard, 6 Lans. 11.

S. D.—Roberts v. Minneapolis Threshing Mach. Co., 8 S. D. 579, 67 NW 607, 59 AmSR 777.

[a] **Loss of profits.**—However, where a contract gives plaintiffs the exclusive agency to sell in a limited district for a specified time, loss of profits is contemplated as an element of damages flowing from defendant's breach thereof, so that defendant cannot escape liability because the losses sustained and gains prevented are to some extent speculative and problematical. Bredemeier v. Pacific Supply Co., 64 Or. 576, 131 P 312.

53. Mueller v. Bethesda Mineral Spring Co., 88 Mich. 390, 50 NW 319; Green v. Cole, 127 Mo. 587, 30 SW 135 (sale made by principal).

54. See Damages [13 Cyc 155 et seq].

55. Norddeutschen Feuer-Versicherungs Gesellschaft v. Bertheau, 79 Cal. 495, 21 P 975 (holding that the consideration paid by the agent for his appointment is not necessarily his measure of damages); Parke v. Frank, 75 Cal. 364, 17 P 427 (holding that the damages recoverable are such as result naturally, that is, in the usual course of things, and proximately from the breach); Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 NE 221 (holding that, where plaintiff's acceptance of the agency for another automobile was not a breach of his contract to devote his best energies to the sale of defendant's car, and did not justify a rescission of plaintiff's agency contract to sell the same, plaintiff's profits in the sale of the other car could not be deducted from the net loss of profits resulting to him by defendant's wrongful breach of the contract); Menage v. Rosenthal, 187 Mass. 470, 73 NE 537 (holding that the amount of an agent's weekly drawing account does not furnish the measure of damages for his wrongful discharge); Lewis v. Atlas Mut. L. Ins. Co., 61 Mo. 534 (holding that, in a suit by an agent for damages resulting from his discharge during the terms of his engagement, his measure of damages is the amount he has lost in consequence); Fish v. Hahn, 124 App. Div. 173, 108 NYS 782 (holding that, where plaintiff declared on a contract of employment by defendant by which plaintiff was to purchase a lot for defendant to secure a loan of five thousand dollars thereon, and to superintend the erection of the building on the lot for a compensation equal to ten per cent of the actual cost of

measure of damages for a wrongful discharge of the agent is the compensation stipulated for the entire services, reducible on proof that the agent has sustained an actual loss less than such amount;[56] this is especially true where the action is not commenced until after the time for the completion of the services,[57] or where the action is brought before the termination of the period for the rendition of the services, but the trial is not had until after such period,[58] although it has been held otherwise where the action is tried before the period for the rendition of the entire services.[59]

the building, and plaintiff was discharged after the contract for the erection had been let, he could not recover, in the absence of proof of the actual cost of the building erected).

[a] **"The broad general rule** in such cases being that the plaintiff may recover such damages, including gains prevented, as well as losses sustained, as are shown to have been in the contemplation of both parties at the time of the making of the contract as the proximate and natural consequence of a breach of defendant; and in determining the same all the facts relating to the subject-matter of the contract and surrounding the execution thereof known to both parties may be considered; and to establish the amount recoverable all facts which would reasonably tend in any way to make certain the amount of injury inflicted are admissible, but it is proper and right that the jury should be cautioned not to deal in speculative conjecture in drawing these deductions from the evidence offered." Cloe v. Rogers, 31 Okl. 255, 271, 121 P 201, 38 LRANS 366 and note.

[b] **Profits; probable sales.**—(1) On the revocation of an appointment of an agent for the sale of land, the measure of damages is the profit which would have resulted to the agent had he been allowed to complete the contract, when the recovery thereunder is not greater than the agent's compensation would be, treating a sale by the owner as though made by the agent. Green v. Cole, (Mo.) 24 SW 1058. (2) Where plaintiff was sole agent for the sale of defendant's mineral water for one year, and before the year expired the agency was transferred to another, plaintiff's measure of damage was the profits he might have realized if defendant had performed its contract. Hence where the agency was transferred to another before the end of the year proof of the actual sales of water by the new agent during plaintiff's unexpired term is not speculative. Mueller v. Bethesda Mineral Spring Co., 88 Mich. 390, 50 NW 319. (3) So a machine company employing a salesman under a contract giving him exclusive territory is liable to the salesman for loss of profits on sales which he was deprived of making by reason of the company's violation of the contract in putting other salesmen into the territory allotted to him, and for damages resulting from sales made by other salesmen put into the territory after the date of notice to the salesman taking from him a part of the territory, in so far as he was deprived of profits on machines which he had already purchased when the notice was given. But where there was nothing to show that the salesman failed to make sales of all the machines which he had purchased from the company, and no proof of any loss or profit on them except the general statement of the salesman that he had to sell the machines in the best way he could by taking cattle and secondhand machines in exchange, he did not show that he had sustained any damages. White Sewing Mach. Co. v. Shaddock, 79 Ark. 220, 95 SW 143. (4) Where plaintiff was to receive a fixed annual salary, to be paid in monthly installments, a portion of which he would be compelled to refund unless at the end of the year his sales reached thirty thousand dollars, and he was not permitted to complete the contract through the wrongful act of defendant, his damages for the unexpired time ought to be based on the amount which it is supposed that he would have earned during the year. Wilcox v. Baer, 85 Mo. A. 587. (5) Defendants employed plaintiff as a traveling salesman, agreeing to supply him with samples, to allow him as compensation one half of the profits on sales effected by him, and to advance to him, by paying his drafts at the commencement of his work, fifty dollars at the end of every two weeks, to be repaid out of his share of the profits, while he was to furnish his own outfit. It was held that, on a breach of defendants by refusing to pay plaintiff's drafts and instructing him to quit work before the expiration of the stipulated term, plaintiff was entitled to recover as damages, not only his share of the profits on sales consummated, but also on sales negotiated so far as it could be ascertained with certainty that they would be completed, and the amount or extent thereof; but that mere expectation, doubtful offers, or other vague assurances of intention to purchase, without expression of quantity or value, are speculative merely and not recoverable; that opinions as to what sales he could or probably would have made are also speculative and contingent; and that he could not recover for the loss of his horse and buggy, the value of his services per month, or the damages to his credit by being thus thrown out of employment. Beck v. West, 87 Ala. 213, 6 S 70. (6) So, in an action for breach of a contract to continue plaintiff as defendant's sales agent and allow him commissions on sales, estimates of probable sales furnish no criterion for fixing damages, and evidence of the amount of profits which might have been made during the term of the contract, based upon the calculation of the probable amount of sales during such term, is inadmissible. Washburn v. Hubbard, 6 Lans. (N. Y.) 11. (7) So where, in an action for breach by the principal of a contract of agency under which plaintiff's profits depended on the amount of business done, the volume of business done while the contract was in force might be considered in estimating profits reasonably to be anticipated in the future if the contract had been continued in force, together with all other evidence tending to explain why such volume was not greater or less. Brown v. Norwich, etc., Acc. Ins. Assoc., 173 Fed. 927. (8) And where plaintiffs were to represent defendant in the sale, on commission, of certain goods during a year on the same terms that they had represented it the previous year, testimony warranting the inference that if defendant had continued to manufacture during the year it would have manufactured as much or more than it did in the previous year, and that plaintiffs would have been able to sell at least that much, was sufficient, as evidence of probable profits which would have been realized by plaintiffs if defendant had fulfilled its contract, to afford a basis for the assessment of damages. Horton v. Hall, etc., Mfg. Co., 94 App. Div. 404, 88 NYS 73.

[c] **Nominal damages.**—Where the financial condition of an agent was such that it would have been impossible for him to have performed the requirements of his agency contract, and this would have been manifest shortly after the principal wrongfully terminated the contract, the agent would be entitled to recover only nominal or small damages for the breach. Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 NE 221.

Measure of damages for wrongful discharge of employee in general see Master and Servant [26 Cyc 1009 et seq].

56. U. S.—Leatherberry v. Odell, 7 Fed. 641.
Cal.—Utter v. Chapman, 38 Cal. 659.
Colo.—Saxonia Min., etc., Co. v. Cook, 7 Colo. 569, 4 P 1111.
Conn.—Perry v. Simpson Waterproof Mfg. Co., 37 Conn. 520.
Ga.—Strong v. West, 110 Ga. 382, 35 SE 693; Ansley v. Jordan, 61 Ga. 482; Putney v. Swift, 54 Ga. 266.
Ind.—Richardson v. Eagle Mach. Works, 78 Ind. 422, 41 AmR 584.
Ky.—Whitaker v. Sandifer, 1 Duv. 261; Chamberlin v. McCallister, 6 Dana 352; Oberfelder v. J. G. Mattingly Co., 120 SW 352 (holding that, where plaintiff was employed by defendant as a sales agent for one year, with an agreement to renew for five years under specified conditions, and subsequently defendant withdrew its goods from the market and refused to recognize plaintiff as agent, the measure of plaintiff's damages is the commissions earned up to the withdrawal of the goods and commissions on all sales of defendant's goods in the territory from the date of the withdrawal to the expiration of the first year of the contract; but that damages for sales made after that time are too remote).
Md.—Cumberland, etc., R. Co. v. Slack, 45 Md. 161; Jaffray v. King, 34 Md. 217.
Minn.—Horn v. Western Land Assoc., 22 Minn. 233.
Miss.—Hunt v. Crane, 33 Miss. 669, 69 AmD 381.
Mo.—Ream v. Watkins, 27 Mo. 516, 72 AmD 283.
N. Y.—Heim v. Wolf, 1 E. D. Smith 70.
Pa.—King v. Steiren, 44 Pa. 99, 84 AmD 419.
Tenn.—Jones v. Jones, 2 Swan 605.
Va.—Willoughby v. Thomas, 24 Gratt. (65 Va.) 521.
Wis.—Gordon v. Brewster, 7 Wis. 355.

57. Sutherland v. Wyer, 67 Me. 64; Everson v. Powers, 89 N. Y. 527, 42 AmR 319; Gordon v. Brewster, 7 Wis. 355.

58. Sutherland v. Wyer, 67 Me. 64; Everson v. Powers, 89 N. Y. 527, 42 AmR 319.

59. Gordon v. Brewster, 7 Wis. 355 (holding that where A entered into a contract to hire B to superintend his lumbering business, etc., for five years at a salary of two thousand dollars per year, and discharged him at the end of the year, and B brought his action for breach of the contract, the rule of damages was the rate of the salary from the time of the breach up to the time of the trial, less the amount B might have earned in the meantime).

[a] **Depends on circumstances of case.**—In Ream v. Watkins, 27 Mo. 516, 518, 72 AmD 283, the court said: "The measure of damages, in an action for a wrongful discharge brought before the expiration of the term, is not necessarily the contract price for the whole term, because a plaintiff, after he is dismissed, may sue and recover a judgment, and then obtain employment elsewhere, and receive for the residue of the term as much or more than by the broken contract he would have been entitled to if he had served his time out. The damages must depend on the kind of service to be performed and the wages

Cannot exceed contract amount. In no case will the damages be allowed to exceed the amount to which the agent would have been entitled had the contract been fulfilled.[60]

[§ 457] **(b) Duty as to Other Employment.**[61] The agent upon his discharge is bound to use reasonable efforts to secure employment elsewhere. If he secures employment, or by reasonable diligence might have done so, the amount of compensation received or that might have been received must be deducted from the amount of compensation for the balance of the original term of employment.[62] This is true, although the action is not commenced until after the termination of the period for which the services were to have been rendered and is on the theory of a constructive service.[63]

Nature of employment. The duty of the agent to seek or accept other employment extends only to the offer or opportunity of employment of the same general nature as that from which he has been dismissed,[64] and to be carried on in the same locality.[65]

[§ 458] **3. Agent's Right to Reimbursement and Indemnity—a. In General.**[66] Except where the contract of agency contains stipulations contrary to or inconsistent with any right of the agent to indemnity or reimbursement for liabilities or expenditures incurred in the furtherance of the agency,[67] an agent ordinarily is entitled to indemnity against the con-

to be paid, and allowance should be made for the time that would probably be lost before similar employment could be obtained. In some pursuits it may be almost certain that the dismissal of a person at a particular season will throw him entirely out of employment for the residue of the year; whilst in other pursuits similar employment could readily be obtained elsewhere on the same or better terms; and, therefore, the amount of damages is a question for the jury under all the circumstances of the case."

60. Utter v. Chapman, 38 Cal. 659; Meade v. Rutledge, 11 Tex. 44.

61. **Avoidable consequences** see generally Damages [13 Cyc 71].

62. U. S.—Alaska Fish, etc., Co. v. Chase, 128 Fed. 886, 64 CCA 1; Leatherberry v. Odell, 7 Fed. 641.

Ala.—Strauss v. Meertief, 64 Ala. 299, 38 AmR 8.

Ark.—Fain v. Goodwin, 35 Ark. 109.

Cal.—Utter v. Chapman, 38 Cal. 659.

Colo.—Saxonia Min, etc., Co. v. Cook, 7 Colo. 569, 4 P 1111.

Conn.—Perry v. Simpson Waterproof Mfg. Co., 37 Conn. 520.

Ga.—Putney v. Swift, 54 Ga. 266.

Ill.—Williams v. Chicago Coal Co., 60 Ill. 149.

Ky.—Forked Deer Pants Co. v. Shipley, 80 SW 476, 25 KyL 2299.

La.—Word v. Winder, 16 La. Ann. 111.

Me.—Sutherland v. Wyer, 67 Me. 64.

Md.—Cumberland, etc., R. Co. v. Slack, 45 Md. 161; Jaffray v. King, 34 Md. 217.

Minn.—Horn v. Western Land Assoc., 22 Minn. 233; Williams v. Anderson, 9 Minn. 50.

Miss.—Hunt v. Crane, 33 Miss. 669, 69 AmD 381.

Mo.—Lewis v. Atlas Mut. L. Ins. Co., 61 Mo. 534; Stone v. Vimont, 7 Mo. A. 277; Squire v. Wright, 1 Mo. A. 172.

N. Y.—Heim v. Wolf, 1 E. D. Smith 70.

Pa.—Rightmire v. Hirner, 188 Pa. 225, 41 A 538; Chamberlin v. Morgan, 68 Pa. 168; Kirk v. Hartman, 63 Pa. 97; King v. Steiren, 44 Pa. 99, 84 AmD 419.

Tenn.—Congregation of Children of Israel v. Peres, 2 Coldw. 620; Jones v. Jones, 2 Swan 605.

Wis.—Barker v. Knickerbocker L. Ins. Co., 24 Wis. 630; Gordon v. Brewster, 7 Wis. 355.

See also Master and Servant [26 Cyc 1013].

[a] **Agent presumed to get best wages.**—When an agent obtains employment, it has been held that the presumption is that he gets the best wages he can, which presumption must prevail unless it is shown by the adverse party, or it otherwise appears from the proof that he accepted less than he could have obtained. Hunt v. Crane, 33 Miss. 669, 69 AmD 381.

63. Gardenhire v. Smith, 39 Ark. 280; Fain v. Goodwin, 35 Ark. 109; Brinkley v. Swicegood, 65 N. C. 626; Hendrickson v. Anderson, 50 N. C. 246.

64. Marx v. Miller, 134 Ala. 347, 32 S 765; Strauss v. Meertief, 64 Ala. 299, 38 AmR 8; Squire v. Wright, 1 Mo. A. 172; Costigan v. Mohawk, etc., R. Co., 2 Den. (N. Y.) 609, 43 AmD 758; Wolf v. Studebaker, 65 Pa. 459.

65. Sheffield v. Page, 21 F. Cas. No. 12,743, 1 Sprague 285; Strauss v. Meertief, 64 Ala. 299, 38 AmR 8; Harrington v. Gies, 45 Mich. 374, 8 NW 87; Costigan v. Mohawk, etc., R. Co., 2 Den. (N. Y.) 609, 43 AmD 758.

66. **Indemnity** see generally Indemnity [22 Cyc 78].

Broker's right to reimbursement and indemnity see Brokers [19 Cyc 229].

Factor's right to reimbursement and indemnity see Factors [19 Cyc. 153].

Subrogation of agent to rights of principal on payment of debt due from latter see Subrogation [37 Cyc 439].

67. U. S.—Montgomery v. Ætna L. Ins. Co., 97 Fed. 913, 38 CCA 553 (where a contract of employment of a general agent obligated the agent to employ subagents in his territory, and provided that commissions allowed him on the business done should be in full compensation for his own services and those of his subagents, and also provided that the contract might be terminated at the option of either party, and that in case of its termination before five years the company should be under no obligation to pay the agent anything beyond the commissions earned up to the time of its termination, and it was held that, on the termination of the contract by the company within the five years it could not be held liable to the agent for advances made by him to subagents, and which had never been charged by him to the company in his monthly reports).

Cal.—Clyne v. Easton, etc., Co., 148 Cal. 287, 83 P 36, 113 AmSR 253 (holding that where a subsequent agreement creating an agency for the sale of land superseded a former agreement under which defendant had incurred all items of expense charged in the account to that date, and provided that all excess received over a named sum and all crop returns then in hand, or due on account of crops growing on the land for the year, should belong to defendant as compensation, no expenses incurred by defendant, nor any payment to or on account of the vendors prior to the second agreement, can be charged as a credit against its indebtedness arising on the subsequent sale of the land).

La.—Clamagaran v. Sacerdotte, 8 Mart. N. S. 533.

Mo.—Artz v. Metropolitan L. Ins. Co., 90 Mo. A. 539 (holding that, where an insurance agent's contract requires him to pay all the usual and necessary expenses of every kind incident to his agency, and a manual book by which such agent is bound prohibits agents from incurring any expense to the company unless authorized by writing, the company is not liable for expenses incurred for office rent and for lighting and cleaning the office, in the absence of written authority from the company to rent the offices).

Nebr.—Aultman, etc., Co. v. Martin, 37 Nebr. 826, 56 NW 622 (holding that a stipulation in a contract between a manufacturer of machines and a dealer retailing them on commission that the latter shall pay the freight on machines ordered is material to a settlement of accounts between them, and the retailer cannot be credited with any freight charges paid).

N. Y.—Drake v. White Sewing Mach. Co., 138 App. Div. 446, 118 NYS 178 [aff 199 N. Y. 595 mem, 93 NE 1120 mem]. See also Ract v. Duviard-Dime, 4 NYS 156.

Or.—Bartholomew v. Aumack, 25 Or. 78, 34 P 817 (holding that under an agreement by a real estate agent to clear certain land, survey and plat it into lots, and advertise and sell it, for a commission of ten dollars on each lot sold, providing that in case of eviction as the result of a pending action the owner shall pay him a designated sum for clearing the land, after which the contract is to become void, the agent cannot recover the expenses of surveying when the action results in eviction).

S. D.—Northwestern Port Huron Co. v. Zickrick, 32 S. D. 28, 141 NW 983 (expenses which the agent had agreed to pay).

Tex.—Champion Mach. Co. v. Ervay, (A.) 16 SW 172 (holding that where a written contract of agency for the sale of goods provided that the agents should pay freight charges, store the goods, and keep them insured, and that on a settlement they should hold the unsold goods subject to the principal's order and free of expense, the agents were not entitled to be reimbursed for freight charges paid by them, and evidence of a custom to that effect was not competent).

See Gray v. Haig, 20 Beav. 219, 52 Reprint 587.

[a] **Contracts construed.**—(1) An agreement by agents not to charge a party for whom they loan money anything for making loans and collecting the interest thereon will not prevent their recovering the cash disbursements necessarily made in foreclosing by advertisement a mortgage taken by them to secure a loan, and the fee paid an attorney for the use of his name in making such statutory foreclosure. Lyon v. Sweeny, 91 Mich. 478, 51 NW 1106. (2) A contract by which defendant appointed plaintiff manager of its branch office and agreed to consign goods to him, to remain its property, it to pay him for selling them a sum equal to the difference between the list and trade prices of the articles, and he to send it monthly statements of sales and remit therewith the trade price of goods sold during the preceding month as shown by the statement, is practically construed by the parties as not requiring him to pay the expenses of the business, he having, during the two years the arrangement lasted, sent it monthly accounts of cash recipts and cash pay-

sequences of all proper acts done by him in the execution of his agency or in pursuance of the authority conferred upon him,[68] and to reimbursement from his principal for all advances and expenditures properly made in carrying into effect the purposes of the agency.[69] The fact that the agent in the transaction of the business of his principal fails to disclose the name of his principal does not affect the latter's obligation to reimburse the agent for expenditures or for loss or damage sustained.[70]

Voluntary payments. Where, however, the agent has not been authorized to discharge his principal's liabilities, and he is not individually liable therefor, he acts as a mere volunteer in paying them, and is not entitled to reimbursement;[71] but if he is individually liable he may discharge the liability and recover of the principal.[72]

[§ 459] **b. Applications of Rule.** According to

ments on blanks furnished by it therefor, in which, under the latter head, appeared items for expenses for salaries, rent, lighting, etc., and having made remittances of balances after deducting such items, which were received without objection. Sherman v. Consolidated Dental Mfg. Co., 202 Pa. 466, 52 A 1.

68. U. S.—Bibb v. Allen, 149 U. S. 481, 13 SCt 950, 37 L. ed. 819 (holding that the employment of an agent to sell property for future delivery implies an undertaking to indemnify him with respect to the execution of his agency).

Ala.—Moore v. Appleton, 26 Ala. 633.

Ill.—Samuels v. Oliver, 130 Ill. 73, 22 NE 499; Chicago First Nat. Bank v. Tenney, 43 Ill. A. 544.

Ky.—Lexington City Nat. Bank v. Rutherford, 12 KyL 632 (holding that, where an agent, in pursuing the instructions of his principal, and acting within the scope of his authority, becomes personally liable for the performance of the contract he makes for his principal, and without which personal liability the orders of the principal cannot be executed at all, or not so well executed, if a loss occur to the agent, he can look to the principal for indemnity).

Mass.—Greene v. Goddard, 9 Metc. 212, 222 (where the court said: "Where an agent, in pursuing the instructions of his principal, and acting within the scope of his authority, becomes personally liable for the performance of the contract he makes for his principal, and without which personal liability the orders of the principal cannot be executed at all, or not so well executed, and this is known by the principal at the time of giving his instructions and creating the agency, if a loss occur to the agent, it is most clear that he can look to the principal for indemnity for the damage sustained by him. And this rests upon those sound principles of common sense and mutual justice in the transaction of business, upon which the law merchant, in its various branches, is founded; and which law, as it regulates and prescribes the rights and duties of principal and agent, alike furnishes protection to the agent, when he suffers loss through fidelity to his employer, and gives redress to the principal who sustains an injury from the breach of orders or neglect of duty by the agent").

Minn.—Henderson v. Eckern, 115 Minn. 410, 132 NW 715, AnnCas1912D 989 (holding that, where one is employed to do an act in another's behalf not manifestly wrong, the law implies a promise of indemnity for damages resulting proximately from a good faith execution of the agency).

N. Y.—Powell v. Newburgh, 19 Johns. 284.

Pa.—Maitland v. Martin, 86 Pa. 120.

Eng.—Betts v. Gibbins, 2 A. & E. 57, 29 ECL 47, 111 Reprint 22; Adamson v. Jarvis, 4 Bing. 66, 13 ECL 403, 130 Reprint 693; Toplis v. Grane, 5 Bing. N. Cas. 636, 35 ECL 341, 132 Reprint 1245; Sentance v. Hawley, 13 C. B. N. S. 458, 106 ECL 458, 143 Reprint 182; Taylor v. Stray, 2 C. B. N. S. 175, 89 ECL 175, 140 Reprint 380.

[a] **Loss through wrongful act of third person.**—Where an agent, acting in the service and for the benefit of his principal, is subjected, without any fault of his own, to a loss by means of a groundless suit brought against him by a third person, such loss will constitute a sufficient consideration to support a promise by the principal to indemnify the agent. Stocking v. Sage, 1 Conn. 519. But see Halbronn v. International Horse Agency, etc., [1903] 1 K. B. 270.

69. Cal.—Thompson-Houston Electric Co. v. Central Electric R. Co., 55 P 777.

Del.—Massey v. Greenabaum, 21 Del. 20, 58 A 804.

Ga.—Armstrong v. Pease, 66 Ga. 70; Beach v. Branch, 57 Ga. 362; Warren v. Hewitt, 45 Ga. 501.

Kan.—Arnold v. Arnold, 83 Kan. 539, 112 P 163 [reh den 84 Kan. 889, 113 P 417].

Ky.—Martin v. Kennedy, 90 SW 975, 28 KyL 966.

La.—Adam v. Oteri, 36 La. Ann. 886.

Md.—Rosenstock v. Tormey, 32 Md. 169, 3 AmR 125.

Mass.—Beckwith v. Sibley, 11 Pick. 482.

Mich.—Lyon v. Sweeny, 91 Mich. 478, 51 NW 1106; Hatch v. McBrien, 83 Mich. 159, 47 NW 214.

Mo.—Harms v. Wolf, 114 Mo. A. 387, 89 SW 1037.

N. Y.—Hoy v. Reade, 31 N. Y. Super. 626; Herman v. Leland, 80 Misc. 598, 142 NYS 664; Bang v. Dovey, 11 Misc. 350, 32 NYS 154; De Bavier v. Funke, 21 NYS 410 [aff 142 N. Y. 633 mem, 37 NE 566 mem]; Bacon v. New York Fourth Nat. Bank, 9 NYS 435; Powell v. Newburgh, 19 Johns. 284.

Or.—Gardner v. Kinney, 60 Or. 292, 117 P 971 (holding that an agent employed to make surveys, with authority to incur necessary expenses therein, could contract in his own name for hiring a boat in making them, and recover the amount paid therefor from the principal).

Pa.—Wynkoop v. Seal, 64 Pa. 361.

Philippine.—Fortis v. Hermanos, 6 Philippine 101 (holding that in an action by an agent to recover the amount of certain disbursements and not compensation for services the article of the civil code applicable to the case is art 1728 and not art 1711).

Tex.—Whitmore v. Nelson, (Civ. A.) 29 SW 521.

Eng.—Aston v. Kelsey, [1913] 3 K. B. 314; Sentance v. Hawley, 13 C. B. N. S. 458, 106 ECL 458, 143 Reprint 182; Bristow v. Whitmore, 9 H. L. Cas. 391, 11 Reprint 781.

[a] **Implied promise to reimburse.**—A request to undertake an agency, the proper execution of which involves the expenditure of money on the part of the agent, operates not only as an implied request on the part of the principal to incur such expenditure but also as a promise to repay it. Clifton v. Ross, 60 Ark. 97, 28 SW 1085.

[b] **Traveling expenses.**—In an action by an agent for services, where he came to Kentucky from the state of Kansas by request of defendant to manage her business, he was entitled to an allowance for traveling expenses in coming to Kentucky and in going back and returning from Kansas. Riley v. Riley, 14 KyL 895.

70. Nixon v. Downey, 49 Iowa 166; Knapp v. Simon, 86 N. Y. 311; Maitland v. Martin, 86 Pa. 120.

71. Whitley v. Murray, 34 Ala. 155; Meadows v. Smith, 34 N. C. 18 (holding that if an agent, contracting for his principal, discloses the name of his principal, he is not legally responsible to the person with whom he contracts; and if, therefore, he pays any damages arising from the breach of the contract, he cannot recover the amount so paid from the principal, under the count for money paid, unless it was paid at the principal's special instance and request); Wemys v. Greenwood, 5 L. J. K. B. O. S. 257 (holding that in general an agent is not warranted in paying a debt due from his principal without a previous authority or a subsequent assent; but where a person fills the character of agent to two parties and receives from one a sum on account of the other, which sum he carries to the account, it seems that he may make any deductions afterward from that sum which the person who paid it would have had a right to make in the form of set-off).

72. Ill.—Searing v. Butler, 69 Ill. 575 (where a commission merchant, by direction of his principal, sold wheat for the latter, to be delivered at any time during the current year at the seller's option, and after an advance in the price the principal refused to stand to the contract, and the merchant settled with the buyer by paying him the difference between the contract price and the market value, the principal being unknown to the purchaser).

Iowa.—Nixon v. Downey, 49 Iowa 166 (holding that an agent's right to reimbursement from his principal of moneys paid by him under a contract made for the principal under authority from him is not affected by the fact that he made the contract in his own name, the principal not having instructed him to contract otherwise).

Ky.—Thomas v. Beckman, 1 B. Mon. 29 (holding that, where an agent made himself liable as surety of his principal in a bill of sale of a slave, the agent was entitled to recover from his principal the amount paid by him to the vendee on failure of title to the slave).

N. Y.—Ulster County Sav. Inst. v. New York Fourth Nat. Bank, 5 Silv. Sup. 144, 8 NYS 162 (where the agent of a New York principal, pursuant to instructions, sold stock on the New Orleans Exchange for delivery the next day, and, delivery being impossible because of the corporation's refusal to transfer the stock, he paid the purchaser the damages awarded him by the exchange, and it was held that he was entitled to reimbursement, although he did not give the principal notice so as to afford the later an opportunity to compel the corporation to transfer the stock); Schaefer v. Sherwood, 61 Misc. 642, 113 NYS 1068 (holding that, where an agent contracting on his personal credit for repairs of his principal's tenements paid for the repairs after the revocation of his agency, the payments were not voluntary, and the principal was bound to reimburse him).

Vt.—Dow v. Worthen, 37 Vt. 108 (where, in assumpsit for not receiving a lot of poultry purchased by plaintiff as defendant's agent, it was held that the fact that plaintiff became personally responsible for the price of the poultry, the seller being unwilling to trust defendant, did not change the relation of the parties as between themselves).

Wis.—Saveland v. Green, 36 Wis.

the above rules the principal is liable for money advanced directly to him by the agent in the course of the agency.[73] So if an agent, acting within the scope of his authority and in good faith, expends money for the benefit and account of the principal in the course of the agency, he is entitled to reimbursement.[74] Thus an agent who buys property for the principal and pays the price pursuant to his authority is entitled to reimbursement on that account.[75] Taxes paid on the principal's property while in charge of the agent may be recovered.[76] An agent is entitled to reimbursement on account of reasonable and proper expenses incurred by him in transacting the agency,[77] such as counsel fees and

612 (holding that, where an agent contracts in his own name for the benefit of the principal who fails to fulfill the contract, the agent may pay the damage at once without waiting to be sued).

73. Ala.—Betts v. Planters', etc., Bank, 3 Stew. 18.

Mo.—Paramore v. Campbell, 245 Mo. 287, 149 SW 6.

N. Y.—Welsh v. Gossler, 89 N. Y. 540, 11 AbbNCas 452 [rev 47 N. Y. Super. 104].

Eng.—In re Pavy's Patent Felted Fabric Co., 1 Ch. D. 631; Zulueta v. Vinent, 13 Beav. 215, 51 Reprint 83.

Ont.—Young v. Crossland, 18 U. C. C. P. 312; Hyde v. Gooderham, 6 U. C. C. P. 21; Gooderham v. Marlatt, 14 U. C. Q. B. 228.

[a] **Conclusiveness of accounts.**—Where the agent of an investor renders accounts in which he charges himself with interest as having been received, and pays over the balance thereby appearing to be due the investor, he will not, after the investor's death, be heard to say that he did not receive the interest but merely advanced the amount thereof to the investor by way of accommodation. He may, however, be permitted to recover the interest in the investor's name from the person owing it. Owens v. Kirby, 30 Beav. 31, 54 Reprint 799.

74. U. S.—Bartlett v. Smith, 13 Fed. 263, 4 McCrary 388.

Ga.—Thompson v. Cummings, 68 Ga. 124.

Mass.—Shearman v. Akins, 4 Pick. 283 (holding that, where an agent pays his principal's debts, relying on funds that are withdrawn or that become unavailable by mistake or accident or by the act of the principal without the agent's fault, an action lies against the principal for money paid to his use).

Minn.—Veltum v. Koehler, 85 Minn. 125, 88 NW 432.

N. J.—Rodman v. Weinberger, 81 N. J. L. 441, 79 A 338 (holding that, where a principal is bound to indemnify an agent and the agent pays money to prevent loss, a request will be implied, and the agent may sue for money paid for the use of the principal).

N. Y.—Nagle v. Richards, 134 App. Div. 25, 118 NYS 53.

N. C.—Irons v. Cook, 33 N. C. 203.

Or.—Gardner v. Kinney, 60 Or. 292, 117 P 971.

Pa.—Bingaman v. Hickman, 115 Pa. 420, 8 A 644.

Va.—Kelly v. Richmond Bd. of Public Works, 75 Va. 263.

W. Va.—Ruffner v. Hewitt, 7 W. Va. 585.

Wis.—Green v. Feil, 41 Wis. 620.

Eng.—Warr v. Præd, Colles 57, 1 Reprint 178.

75. Clifton v. Ross, 60 Ark. 97, 28 SW 1085 (holding that, where a principal requests his agent to purchase for him a certain machine without stating the price to be paid therefor, the agent is authorized to pay the market price therefor and recover the same from the principal, although the machine does not prove to be what the principal expected); Wyeth v. Walzl, 43 Md. 426 (holding that where defendant had, in writing, authorized plaintiff to purchase the property, part to be paid in cash, any payments made by plaintiff imposed an obligation on defendant to repay him without any further request on defendant's part); Joseph v. Sulzberger, 136 App. Div. 499, 507, 121 NYS 73 (where the court said: "Unexpressed promises will often be implied where it is plain that they have been inadvertently omitted from the contract, whether written or oral, and the facts are such that it can be assumed that the promise would have been made if attention had been called to it. It may, however, be implied only to enforce a manifest equity, or to reach a result which the unequivocal acts of the parties indicate that they intended to effect. . . . Such a case is presented where an agent purchases property at the request and for the account of his principal. Although there may not be any definite promise on the part of the principal to reimburse his agent, the law will imply and enforce one"); Spinney v. Thurber, 33 Hun 448 [aff 102 N. Y. 652 mem] (holding that where commercial correspondents on the order of a principal make a purchase of property ultimately for him but on their own credit and with their own funds, and such course is contemplated when the order is given, they may retain the title in themselves until they are reimbursed); Mohawk, etc., R. Co. v. Costigan, 2 Sandf. Ch. (N. Y.) 306 (so holding where an agent purchased land in his own name on the request and for the benefit of his principal, and paid part of the consideration); Wynkopp v. Seal, 64 Pa. 361 (holding that, where an agent bought and paid for stock at the request of his principal and notified him of the purchase, the principal could not relieve himself from liability for the price paid by showing that the agent did not have the stock at all times for delivery, he having made no demand or offer of payment); Johnston v. Gerry, 34 Wash. 524, 76 P 258, 77 P 503; Green v. Feil, 41 Wis. 620 (holding that one who, being duly authorized thereto, orders in his own name, but for the use of another as the latter's agent, a chattel from a distant market, which is so forwarded as to make the agent liable therefor to the vendor, has the right to pay for the chattel, and on delivering it to the principal may recover from him the amount so paid, although the chattel on its arrival is not in good condition and he paid for it after receiving notice of that fact from the principal who refused to accept it).

76. Warren v. Adams, 19 Colo. 515, 36 P 604 (holding that an agent who, by his principal's direction, took the title to land in his own name in payment of a debt due his principal is entitled to receive the money advanced by him to pay taxes before being divested of title); Erwin's Succ., 16 La. Ann. 132 (holding that a negotiorum gestor has the right to be refunded the taxes assessed on the property and paid by him during the continuance of his possession, although no privilege exists therefor); Bush v. Froelich, 14 S. D. 62, 84 NW 230 (holding that where a loan company acted as the agent of plaintiff, to whom it had assigned a mortgage loan, in collecting interest, etc., and after foreclosure proceedings had been brought paid taxes due, which were a lien on the land, the company was entitled to be reimbursed by plaintiff for the amount so paid).

77. Ill.—Selz v. Guthman, 62 Ill. A. 624.

Mass.—Tufts v. Plymouth Gold Min. Co., 14 Allen 407.

Mo.—Carson v. Ely, 28 Mo. 378 (where an agent for a transportation line, transacting business as a general commission and forwarding merchant, as agent for the transportation line agreed to forward goods without St. Louis charges, and when the goods reached St. Louis they were not in a condition to be forwarded, and such agent as the general consignee incurred expense in preparing the goods for further transportation, and it was held that, the charges being reasonable and necessary to prepare the goods for shipping, he was entitled to recover such expenses as such general consignee).

N. Y.—Herman v. Leland, 80 Misc. 598, 142 NYS 664.

Pa.—Keiser v. Reading Suburban Real Est. Co., 43 Pa. Super. 139 (where an agent was held entitled to one half of the office expenses).

Tex.—A. R. Frank Co. v. Waldrup, (Civ. A.) 71 SW 298 (where it appeared that an agent who was employed to manage the business of the principal at a certain city for a fixed compensation and percentage of the net profits employed necessary assistants and paid their salary with his own funds, and it was held that he might recover the amounts so paid from his principal).

Vt.—Allen v. Gates, 73 Vt. 222, 50 A 1092 (holding that where a landlord and tenant agree on the expiration of the lease that the tenant shall remain in possession, caring for the premises, and shall collect the rents in his own behalf, and apply them on the landlord's indebtedness to him for a building erected on the premises, the law will imply a promise to allow the tenant for his necessary disbursements in caring for the property).

W. Va.—Ruffner v. Hewitt, 7 W. Va. 585.

[a] **"The expense or outlay must be reasonable and necessary,** and made in due course of the agency and not unreasonable in amount or occasioned by the default or negligence of the agent himself." Herman v. Leland, 80 Misc. 598, 603, 142 NYS 664.

[b] **A traveling salesman** (1) is ordinarily entitled to his reasonable expenses. McEwan v. Loucheim, 115 N. C. 348, 20 SE 519. (2) So where a contract for the employment of a traveling salesman provided that he should receive his expenses in addition to his salary, but that the expenses should not exceed an average of seven dollars per working day, and the employee was required on several occasions to travel and work on Sunday, expenses incurred on such Sundays, actually made in the service, should be included in calculating the average expense per working day under the contract. Ornstein v. Yahr, etc., Drug Co., 119 Wis. 429, 96 NW 826. (3) A contract of employment of a traveling salesman at a salary and an allowance for expenses does not include his board while not on the road. Dowd v. Krall, 32 Misc. 252, 65 NYS 797.

[c] **Necessity of actual expenditure.**—(1) Defendants agreed to divide the profits of sales made by plaintiff and to pay him two hundred dollars per month, one hundred dollars for his own use and one hundred dollars to be expended for his traveling expenses, and that in case plaintiff's share of the net profits should amount to more than the money advanced, such money was to be applied as part of his share of the profits, and in case his share of the profits did not amount to such sum, the money advanced

costs in litigation on behalf of the principal or in his interest,[78] and also on account of losses or damages sustained by him without his fault in the proper conduct of the agency,[79] especially where, without fault on his part, he is compelled by legal proceedings to pay out money to third persons on account of responsibilities incurred as agent,[80] and he is entitled to reimbursement in such cases notwithstanding error in the judgment against him.[81]

Advances by agent for benefit of himself or third person. No right of reimbursement arises where the agent makes advances not on the principal's account but for his own individual benefit,[82] or where he makes advances to the principal for the

was not to be charged to him. It was held that plaintiff was not entitled to the one hundred dollars for his expenses unless he expended that sum. Weiss v. Farrington, (N. Y.) 3 NE 90. (2) It has been held, however, that an agent entitled to charge for expenses may recover the fair worth of his board, even though he actually paid nothing for it in money. Moore v. Remington, 34 Barb. (N. Y.) 427.

[d] **Unjustifiable expenses.**—Defendant, an attorney, was employed to devote part of his time to the benefit of plaintiff corporation, looking to the sale of its stock. Plaintiff rented an office next to that occupied by defendant, it being agreed that the latter should make use of both offices. On some occasions plaintiff's employees occupied defendant's office for not more than two days at a time, during which defendant was compelled to borrow the use of a neighboring office two or three times, but it did not appear that any expense was incurred in so doing. It was held that such facts did not justify defendant in paying sixteen dollars rent for his office out of the company's funds. Gladiator Consol. Gold Mines, etc., Co. v. Steele, 132 Iowa 446, 106 NW 737. See also Armstrong v. Pease, 66 Ga. 70.

78. Ill.—Selz v. Guthman, 62 Ill. A. 624; Chicago First Nat. Bank v. Tenney, 43 Ill. A. 544 (both holding that when an agent is sued for an act done in pursuance of his employment he is not obliged to let judgment go against him, but may defend the suit, and recover from his principal the expenses of such defense, made in good faith).

Ky.—Whitehead v. Darling, 5 SW 356, 9 KyL 340.

La.—Clamagaran v. Sacerdotte, 8 Mart. N. S. 533.

Mich.—Lyon v. Sweeney, 91 Mich. 478, 51 NW 1106.

Mo.—Shearer v. Guardian Trust Co., 136 Mo. A. 229, 116 SW 456 (holding that, where an agent, at the principal's request, sold by warranty deed land which he had purchased and taken title to for the principal, and was afterward sued by the purchaser for breach of warranty and was compelled to defend the suit on the principal's refusal to do so, when judgment went against him, the agent could recover against the principal the reasonable expenses of making the defense, including counsel fees paid out).

N. Y.—Monnet v. Merz, 127 N. Y. 151, 27 NE 827; Woerz v. Schumacher, 37 App. Div. 374, 56 NYS 8 [aff 161 N. Y. 530, 56 NE 72]; In re Titus, 86 Misc. 375, 148 NYS 359; Herman v. Leland, 84 Misc. 82, 145 NYS 972.

N. C.—Hunter v. Jameson, 28 N. C. 252.

Tenn.—Clark v. Jones, 16 Lea 351.

Eng.—Curtis v. Barclay, 5 B. & C. 141, 11 ECL 402, 108 Reprint 52; Re Wells, 72 L. T. Rep. N. S. 359.

Que.—Talbot v. Montmagny Assur. Co., 12 Que. Super. 64.

79. Ga.—Dozier v. Davidson, 138 Ga. 190, 74 SE 1086; Beach v. Branch, 57 Ga. 362.

Ill.—Haskin v. Haskin, 41 Ill. 197; Selz v. Guthman, 62 Ill. A. 624.

Miss.—Denney v. Wheelwright, 60 Miss. 733.

N. Y.—Herman v. Leland, 80 Misc. 598, 142 NYS 664.

W. Va.—Ruffner v. Hewitt, 7 W. Va. 585.

[a] **Refunding money collected for principal.**—(1) Where a mortgagee's attorney accepted a note from the redemptioner for the full amount bid on foreclosure, including excessive attorney's fees, and, after remitting the amount to the mortgagee excepting attorney's fees, and selling the note, was compelled to refund to the purchaser of the note the excessive attorney's fees, the note having been held invalid as to them, the mortgagee was bound to make good to the attorney the amount so refunded, since the taking of the excessive attorney's fee was for his benefit, and he was primarily liable therefor. Owen v. Baxter, 97 Mich. 539, 56 NW 930. (2) So where plaintiffs as agents received a draft and forwarded it for collection, not disclosing the agency, and on its being paid at maturity paid over the amount to defendant who had become entitled thereto by purchase, and the draft proved to be a forgery, and plaintiffs were compelled to refund to the drawee, they were entitled to receive back from defendant the money so paid him. Little v. Derby, 7 Mich. 325. (3) Where, however, an attorney collected money on a judgment confessed by a debtor in favor of his client, and paid the same over to defendant, another creditor of the debtor, under direction of his client, in satisfaction of a claim against the debtor on which his client was security, and subsequently, the confessed judgment having been set aside as fraudulent, the attorney, under the decree, paid to the receiver appointed for the debtor the amount collected and paid to defendant, it was held that defendant, not having employed the attorney to collect the judgment, was not bound to repay to him the amount so paid. Flower v. Beveridge, 161 Ill. 53, 43 NE 722 [aff 58 Ill. A. 431].

[b] **Rule of exchange compelling payment.**—An agent is entitled to reimbursement where the money is paid out pursuant to a rule of an exchange of which he is a member, a breach of which rule would subject him to certain disqualifications as such member. Read v. Anderson, 13 Q. B. D. 779. And see Ulster County Sav. Inst. v. New York Fourth Nat. Bank, 5 Silv. Sup. 144, 8 NYS 162.

[c] **Remission of price to principal before collection.**—If an agent, in anticipation of the receipt of the amount of sales for his principal, remits such amount, and the purchasers fail to pay, it is not the loss of the agent, but of the principal, unless the agent sells on a del credere commission. McLarty v. Middleton, 6 Wkly. Rep. 379, 853. Del credere agents see Factors [19 Cyc 133, 152].

[d] **Reduction of damages.**—It seems that an agent who, as a result of incurring responsibilities in the transaction of the agency, is arrested on civil process is not entitled to recover damages for the imprisonment from his principal, where he, the agent, had the means of paying the claim. Leavitt v. Parks, 7 N. B. 282.

80. Yeatman v. Corder, 38 Mo. 337 (holding that if an agent in consequence of a deception practiced on him by his principal, innocently incurs a risk or responsibility, and is compelled to pay damages to a purchaser on account thereof, he will be entitled to remuneration from his principal); Knapp v. Simon, 86 N. Y. 311; Hunter v. Jameson, 28 N. C. 252 (holding that, where an agent appointed to sell articles of personal property sells the articles with a warranty which binds him personally, and judgment is recovered against him for a breach, he is entitled to recover the amount); Elliott v. Walker, 1 Rawle (Pa.) 126. See also Leavitt v. Parks, 7 N. B. 282. Compare Field v. Allen, 9 M. & W. 694.

[a] **Where an agent draws or indorses bills of exchange** as directed by the principal in the conduct of the agency and is subsequently compelled to pay the amount of the drafts with protest fees and damages, he is entitled to reimbursement from his principal. Riggs v. Lindsay, 7 Cranch (U. S.) 500, 3 L. ed. 419; Greene v. Goddard, 9 Metc. (Mass.) 212; Ramsay v. Gardner, 11 Johns. (N. Y.) 439.

81. Howe v. Buffalo, etc., R. Co., 38 Barb. 124 [aff 37 N. Y. 297]; D'Arcy v. Lyle, 5 Binn. (Pa.) 441; Clark v. Jones, 16 Lea (Tenn.) 351; Frizione v. Tagliaferro, 4 Wkly. Rep. 373.

82. Woodlief v. Moncure, 17 La. Ann. 241 (where an agreement for the sale of a plantation provided that fifty thousand dollars should be paid in cash, to be made up in a certain way, and in arranging this matter a small balance of account between the parties, required to complete the cash payment, was disputed, and the agent who effected the sale paid it to the vendee to prevent the transaction from failing and the consequent loss of his large commission, and it was held, in an action against the vendor to recover this balance, that the suit could not be maintained, as it was clear that plaintiff did not act in making the payment as negotiorum gestor for defendant, but for his own advantage). See also Talbot v. Montmagny Assur. Co., 12 Que. Super. 64. But see Bartholomew v. Aumack, 25 Or. 78, 34 P 817 (holding that under a contract by an agent for the sale of lands, providing that when the owner has received a designated amount in actual cash from the sale of the property, if realized during the existence of the contract, he will convey to the agent all the unsold lots and all the notes wholly or partly unpaid, the agent may recover from the owner an amount advanced to prevent a forfeiture of the contract after the latter has received in actual cash the full sum contracted for within the time agreed upon, where a total failure of the title after full performance of the agreement precludes the agent from selecting any property in repayment of the amount advanced).

[a] **Return of deposit.**—Where an agent orders automobiles under a contract granting him the right to sell his principal's automobiles in a designated territory, and makes a cash deposit, as to such automobiles he stands in the relation of a buyer who has paid a part of the price in advance of delivery, and cannot, without good cause, refuse to consummate the deal and demand the return of the deposit. Cedar Rapids Auto, etc., Co. v. Jeffrey, 139 Iowa 7, 116 NW 1054 (holding also that, even though the contract required a twenty-five dollar deposit with each order and not on each automobile, it simply showed that the agent in making a deposit of six hundred and twenty-five dollars on a single order for twenty-five automobiles chose to make a larger advance payment than he had agreed to make and did not entitle him to a return of at least six hundred dollars).

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benefit of a third person.[83]

[§ 460] **c. Accrual of Right.** Where the agent's acts in the course of his agency impose upon him a liability to a third person, his right of action against his principal for reimbursement does not, as a general rule, accrue until he has discharged such liability;[84] but the right accrues immediately upon his discharge of the liability either voluntarily or involuntarily.[85] In equity, however, it has been held that an agent who has incurred individual liability in the proper conduct of his agency may sue the principal for indemnity, although nothing has been paid in discharge of the liability.[86]

[§ 461] **d. Conditions Affecting Right—(1) Want of Authority.** An agent who advances money for account of his principal or incurs expenses or losses in transacting the agency is not entitled to reimbursement and indemnity, where the money was paid out or the loss incurred with respect to a matter as to which the agent acted in excess of his authority, or in violation of his instructions,[87] unless the principal ratifies the agent's acts in this

83. Wilson v. Crosby, 109 Mich. 449, 67 NW 693 (holding that a collecting agent who advances money to his principal for the debtor, under such circumstances that the latter becomes liable to the agent rather than to the principal, cannot retain the amount of such advance from moneys subsequently collected).

84. Ill.—Brand v. Henderson, 107 Ill. 141 (holding that an agent who contracts for the purchase of wheat, and tenders the warehouse receipts therefor to his principal within the stipulated time, cannot recover the difference between the purchase price and market price on the day of tender, save upon proof that he has actually paid for the wheat); Otter Creek Lumber Co. v. McElwee, 87 Ill. A. 285 (holding that an action will not lie by an agent to recover of his principal damages from the failure of the principal to supply goods which were sold to purchasers on the agent's responsibility, unless it appears that the agent has actually parted with money or other value in settlement of the damages to the purchaser; and an action brought before such payment is premature, and will be dismissed).

Iowa.—Price, etc., Piano Co. v. Sheenan, 150 Iowa 189, 129 NW 836.

Mass.—Shearman v. Akins, 4 Pick. 283.

Mich.—Owen v. Baxter, 97 Mich. 539, 56 NW 930.

N. Y.—Monnet v. Merz, 127 N. Y. 151, 27 NE 827; Brown v. Mechanics', etc., Bank, 16 App. Div. 207, 44 NYS 645.

Tex.—Kirby Lumber Co. v. Cummings, 39 Tex. Civ. A. 220, 87 SW 231.

Compare Flower v. Jones, 7 Mart. N. S. (La.) 140 (judgment recovered against agent but not paid); Lacey v. Hill, L. R. 18 Eq. 182, 2 ERC 519; Leavitt v. Parks, 7 N. B. 282.

[a] **"The distinction** between an agreement to indemnify against liability and an agreement to indemnify against actual loss is well settled, and has been many times applied in actions brought upon contracts of this character. In a case of a contract to indemnify against liability, there is a breach of the contract the moment the liability is imposed upon the party to be indemnified, and a cause of action at once arises which entitled the obligee to maintain an action to recover for the breach, but that right arises because of the fact that there was a breach of the contract. In the case of a contract to indemnify against loss, however, it cannot be said that there is a breach of the contract until the obligee has sustained damage." Brown v. Mechanics', etc., Bank, 43 App. Div. 173, 176, 59 NYS 354.

[b] **Indemnity against actual loss only.**—In Brown v. Mechanics', etc., Bank, 16 App. Div. 207, 210, 44 NYS 645, the court said: "So long as he [the agent] suffers no loss because of his liability, there is no reason why the agent should call upon his principal for any reimbursement. Justice requires that the principal should step in to protect him, only when it appears that because of the duty which he assumed towards his principal he has suffered some loss which ought to be made good to him. If that is done, then the principal has done everything which equity calls for, and the agent is none the worse for having stood in that relation. The performance of this duty by the principal fully protects the agent against any damage which he can suffer because of the relationship which he has assumed, and to require the principal to do more than this would be to impose upon him a duty to protect the agent against some damage which he may never suffer. To limit this implied contract of indemnity to indemnity against loss merely, would seem to be the more reasonable rule, and one which is best calculated to subserve the interest of both parties, and it seems to be the rule which is laid down in the books."

85. Welker v. Appleman, 44 Ind. A. 699, 90 NE 35 (holding that, where an agent contracted to purchase wool with money furnished by the principal, the payments of money thus expended in advance by the agent became due without reference to the delivery of the wool purchased); Howe v. Buffalo, etc., R. Co., 37 N. Y. 297 (where a judgment against the agent was satisfied on his giving his note for the amount); Saveland v. Green, 36 Wis. 612.

86. Mohawk, etc., R. Co. v. Costigan, 2 Sandf. Ch. (N. Y.) 306 (holding that, where an agent purchases land in his own name, on request and for the benefit of his principal, pays part of the consideration, and gives his mortgage for the residue, with a bond in which his principal joins, the agent is a surety in respect of such bond, and equity will decree that he be indemnified against the bond and mortgage on his conveying the title to his principal); Lacey v. Hill, L. R. 18 Eq. 182, 2 ERC 519 (holding that in equity the liability of a principal to indemnify his agent is not confined to actual losses, but extends to all the liabilities of the agent incurred on behalf of the principal); Smith v. Belleville School Trustees, 16 Grant Ch. (U. C.) 130. And see Bastable v. Denegre, 22 La. Ann. 124.

87. U. S.—Montgomery v. Ætna L. Ins. Co., 97 Fed. 913, 38 CCA 553.

Cal.—Beckman v. Wilson, 61 Cal. 335 (holding that, if one employed to manage property for its owner is empowered to make such repairs only as are necessary to preserve and protect the property from ordinary wear and tear, he cannot charge the owner with the expense of permanent improvements, or of rebuilding after a fire).

Colo.—Ross v. Clark, 18 Colo. 90, 31 P 497 (holding that, where an agent is authorized to make a certain contract for the purchase of a property, and makes a contract differing from the one authorized in that it requires a larger cash payment and a larger installment the first year, such contract is not enforceable against the principal, even though the purchase price is smaller, and the agent cannot recover from his principal a deposit made by him on the unauthorized contract).

Ga.—Hardeman v. Ford, 12 Ga. 205 (holding that, where a factor has made advances to his principal and sells the goods intrusted to him in an unauthorized manner for less than the amount of the advance, he cannot recover the difference).

Ill.—St. Louis, etc., R. Co. v. Thomas, 85 Ill. 464; Bensley v. Moon, 7 Ill. A. 415.

Ind.—Godman v. Meixsel, 65 Ind. 32 (where it appeared that a sale of corn had been made by A for B, the same to be delivered at a certain price per bushel during a certain month; that about the middle of the month the price of corn advanced, and B thereupon telegraphed to A to buy enough to fill the balance of the sale; that instead of so doing A paid the purchaser, as upon a forfeited contract, the difference between the agreed price and the then market price, and before the end of the month the price fell to very nearly that agreed upon; and it was held that this payment by A was unauthorized, and that B was not liable to him therefor); Ackenburgh v. McCool, 36 Ind. 473.

Ky.—Wells v. Best, 10 KyL 317.

La.—Western Assur. Co. v. Uhlhorn, 41 La. Ann. 385, 6 S 485; Summers v. Clark, 29 La. Ann. 93; Woodlief v. Moncure, 17 La. Ann. 241; Garland v. Scott, 15 La. Ann. 143; Weber v. Coussy, 12 La. Ann. 534; Noland v. Shaw, 6 La. Ann. 40; Jackson v. Morse, 3 La. 555; Pelletier v. Roumage, 2 La. 528.

Md.—Mears v. Adreon, 31 Md. 229.

Mass.—Day v. Holmes, 103 Mass. 306; Keyes v. Westford, 17 Pick. 273.

Mich.—Sheffield v. Linn, 62 Mich. 151, 28 NW 761.

Nebr.—New Orleans Coffee Co. v. Cady, 69 Nebr. 412, 95 NW 1017.

N. Y.—Olyphant v. McNair, 41 Barb. 446 [aff 41 N. Y. 619 mem] (holding that, where N authorized M to buy for him five hundred shares of the stock of a mining company, and M bought only one hundred shares, N was not liable for the money so advanced by M); Cooper v. Hong Kong, etc., Banking Corp., 18 Daly 183 [rev on other grounds 107 N. Y. 282, 14 NE 277]; Burby v. Roome, 7 Misc. 167, 27 NYS 250 (holding that where the owner of a building informs his agent who has charge of the building that he has contracted with a certain person to make repairs for the ensuing year, and the agent employs another person to make repairs, he is not entitled to the amount thereof as a disbursement); Offerman v. Reich, 88 NYS 936. Compare Monnet v. Merz, 127 N. Y. 151, 27 NE 827 (where a principal authorized his agent to employ counsel in a suit brought against the agent, and the agent did so, and afterward compromised the suit without the principal's authority, and upon an accounting the lower court allowed the agent credit for half the attorney's fees and half the amount paid in settlement of the suit, and it was held that the agent should be allowed credit for the entire amount of the attorney's fees).

Pa.—Shrack v. McKnight, 84 Pa. 26 (holding that, where an agent employed to subscribe for stock in a railroad company for his principal and in his principal's name subscribed and paid calls in his own name, and afterward procured a certificate and tendered a transfer to the principal who refused to take and pay for them, the agent could not recover).

respect.[88] Thus, in the absence of ratification, where an agent pays a judgment recovered against him on an unauthorized warranty he cannot recover the same from his principal.[89]

[§ 462] **(2) Termination of Agency.** The termination of the agency before full performance thereof does not defeat the agent's right to reimbursement and indemnity on account of moneys expended or liabilities incurred by him before his authority ceased, or was revoked;[90] but he is not entitled to reimbursement or indemnity on account of moneys expended or liabilities incurred with reference to acts subsequently done by him under his expired authority.[91]

[§ 463] **(3) Illegality of Transaction.** An agent who knowingly engages in an illegal transaction for his principal cannot recover of the latter for advances made on his account or for losses incurred in conducting the agency.[92] But where, in obeying the instructions or orders of his principal, an agent

Tex.—Ranger v. Harwood, 39 Tex. 139 (holding that an agent cannot withdraw goods from a prescribed route of transportation and retain charges thereon additional to the charges which would properly have been made upon the route prescribed by the contract by which he received the goods for shipment).

Vt.—Fuller v. Ellis, 39 Vt. 345, 94 AmD 327.

Wis.—Carpenter v. Momsen, 92 Wis. 449, 65 NW 1027, 66 NW 692.

Eng.—Johnston v. Usborne, 11 A. & E. 549, 39 ECL 299, 113 Reprint 524 (where commission agents were authorized by principals to sell on their account certain oats, and the agents sold the same with a warranty but without disclosing the names of their principals, and, the oats not answering the warranty, the agents were compelled to make a reduction in the price, and it was held that they could not recover the damages they thus sustained from their principals, as they had chosen to sell in their own names, and as there was no privity of contract between them and their principals which would create a guaranty that the oats were of a specific quality); Howard v. Tucker, 1 B. & Ad. 712, 20 ECL 661, 109 Reprint 951; Edmiston v. Wright, 1 Campb. 88; Stokes v. Lewis, 1 T. R. 20, 99 Reprint 949; Beaumont v. Boultbee, 11 Ves. Jr. 358, 32 Reprint 1126; Frixione v. Tagliaferro, 4 Wkly. Rep. 373.

Can.—Butler v. Murphy, 41 Can. S. C. 618.

88. Cornwall v. Wilson, 1 Ves. 509, 27 Reprint 1173 (where plaintiff, a factor abroad, exceeded the price limited for the purchase of hemp, and defendant, who objected to the contract but afterward reshipped and disposed of some of it on a risk, was ordered to account for the cost price); Frixione v. Tagliaferro, 4 Wkly. Rep. 373.

[a] **Where a principal retains the benefits of his agent's negligent foreclosure** of a chattel mortgage, he cannot repudiate the agent's claim for expenses in defending an action in which the buyer recovered his money back. Herrman v. Leland, 84 Misc. 82, 145 NYS 972.

89. Croom v. Swann, 1 Fla. 211 (false warranty of a horse sold by agent for principal); J. I. Case Threshing Mach. Co. v. Gardner, 67 SW 367, 24 KyL 63 (holding that, where an agent to sell machines is authorized by the principal to make a warranty requiring the buyer to make a test at once and give prompt notice of any defect so that it may be remedied if possible, a warranty by the agent giving the buyer the absolute right to return the machine if it does not give satisfaction during the first week of its use varies materially from the warranty the agent is authorized to make, and if the agent is held personally liable thereon he cannot look to the principal for reimbursement). See also Johnston v. Usborne, 11 A. & E. 549, 39 ECL 299, 113 Reprint 524.

90. U. S.—U. S. v. Jarvis, 26 F. Cas. No. 15,468, 2 Ware 274, 4 NYLeg Obs 298. See however Montgomery v. Ætna L. Ins. Co., 97 Fed. 913, 38 CCA 553.

Colo.—Briggs v. Chamberlain, 47 Colo. 382, 107 P 1082, 135 AmSR 223.

Minn.—Deering Harvester Co. v. Hamilton, 80 Minn. 162, 83 NW 44.

Mo.—Paramore v. Campbell, 245 Mo. 287, 149 SW 6; Royal Remedy, etc., Co. v. Gregory Grocer Co., 90 Mo. A. 53 (holding that, while a contract for an agency for an indefinite time and not coupled with an interest is revocable at any time, yet if the agent has incurred expense in the matter the principal cannot appropriate the results without compensation).

Nebr.—Hallstead v. Perrigo, 87 Nebr. 128, 126 NW 1078 (holding that, where an agent is vested with a mere naked authority not coupled with an interest, his principal may revoke the authority before performance, but if the agent has granted services and incurred expense in the course of the employment before revocation the principal will be liable therefor, unless otherwise provided by their agreement).

N. H.—Healy v. Healy, 76 N. H. 504, 85 A 156.

N. Y.—Terwilliger v. Ontario, etc., R. Co., 149 N. Y. 86, 43 NE 432 [rev 73 Hun 335, 26 NYS 268]; Baker v. Angell, 12 NYSt 406 (where it appeared that defendant employed plaintiff to sell his farm on commission, and at once commenced work and expended moneys in an honest endeavor to sell the farm; that by the contract of employment plaintiff had a year in which to procure a purchaser, he alone to bear the risk of failure and to receive compensation only in the event of success; that at the end of a month, and before plaintiff had found a purchaser, defendant revoked his authority to act as agent, and it was held that plaintiff was entitled to recover his reasonable and necessary expenses). See also Drake v. White Sewing Mach. Co., 133 App. Div. 446, 118 NYS 178 [aff 199 N. Y. 595 mem, 93 NE 1120 mem] (holding that, where an automobile agency contract requires the agent to purchase a certain number of cars from the principal and the principal, pursuant to the terms of the contract, cancels the agency after the agent has paid a portion of the purchase price of the cars and has received only one of them, the agent may maintain an action to recover the deposit paid on the other cars, although he has failed to furnish shipping directions as requested by the principal, and that the principal cannot escape the effect of his rescission in such a case by charging the agent with the full value of the car received, where he is entitled to certain discount, and there is no promise on his part to pay an additional sum if the agency is canceled).

N. C.—Fisher v. Southern L. & T. Co., 138 N. C. 90, 50 SE 592 (holding that one authorized to improve and sell lands and reimburse himself for his expenses out of the proceeds of the sale is entitled, after the termination of his authority by the death of the principal, to be repaid from the proceeds of the property, when sold, expenses incurred by him under the contract).

Pa.—Jaekel v. Caldwell, 156 Pa. 266, 26 A 1063 (holding that where one employed to sell mining land, he to receive all over a certain amount, incurs large expenses in seeking to effect the sale, and is permitted to do so for a period of years, he is entitled to recover his expenses, if his authority is revoked); Blackstone v. Buttermore, 53 Pa. 266 (holding that, if the agent has expended money upon the business, the principal, on revocation, becomes liable to him on an implied assumpsit).

Eng.—Hodgson v. Anderson, 3 B. & C. 842, 10 ECL 379, 107 Reprint 945.

Que.—Labonte v. Desjardins, 40 Que. Super. 521 (holding that a paid mandatary, whose mandate has been revoked without fault on his part, has a right of action against his mandator for his expenses and disbursements, and for the value of his services up to the time of such revocation).

See Hyde v. Gooderham, 6 U. C. C. P. 21.

[a] **Advances made after revocation** of the agency are a proper subject of reimbursement, where the money is paid in discharge of liabilities previously incurred in pursuance of authority. Gelpcke v. Quentell, 74 N. Y. 599; U. S. v. Jarvis, 26 F. Cas. No. 15,468, 2 Ware 274, 4 NYLegObs 298.

[b] **These rules apply in favor of public agents.**—U. S. v. Jarvis, 26 F. Cas. No. 15,468, 2 Ware 274, 4 NYLeg Obs 298.

91. Soule v. Dougherty, 24 Vt. 92 (holding that where the agency has terminated except for the purpose of rendering an account to the principal, and the agent, without any necessity to justify an extension of his powers by implication and without the knowledge or consent of the principal, commences suits in the name of the principal upon demands taken by him in the principal's name, he exceeds his power, and the principal is not liable for the costs that accrue in the suits); In re Overweg, [1900] 1 Ch. 209; Phillips v. Jones, 4 T. L. R. 401 (both holding that a stockbroker is not entitled to reimbursement for losses resulting from stock operations carried on by him after the principal's death).

92. U. S.—Bibb v. Allen, 149 U. S. 481, 13 SCt 950, 37 L. ed. 819; Gibbs v. Consolidated Gas Co., 130 U. S. 396, 9 SCt 553, 32 L. ed. 979; Kennett v. Chambers, 14 How. 38, 14 L. ed. 316; Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468; Kirkpatrick v. Adams, 20 Fed. 287; Bartlett v. Smith, 13 Fed. 263, 4 McCrary 388.

Ga.—Cunningham v. Augusta Nat. Bank, 71 Ga. 400, 51 AmR 266, 75 Ga. 366.

Ill.—Samuels v. Oliver, 130 Ill. 73, 22 NE 499 (holding that an agent who knowingly aids his principal in effecting an unlawful combination to raise the price of wheat cannot recover for advances made for such purpose); Colderwood v. McCrea, 11 Ill. A. 543.

Ind.—Whitesides v. Hunt, 97 Ind. 191, 49 AmR 441.

Md.—Stewart v. Schall, 65 Md. 289, 4 A 399, 57 AmR 327.

Mass.—Stebbins v. Leowolf, 3 Cush. 137.

Mich.—Gregory v. Wendell, 39 Mich. 337, 33 AmR 390.

Minn.—Mohr v. Miesen, 47 Minn. 228, 49 NW 862.

Mo.—Connor v. Black, 119 Mo. 126, 24 SW 184; Hill v. Johnson, 38 Mo. A. 383.

N. Y.—Monnet v. Merz, 127 N. Y. 151, 27 NE 827; Leonard v. Poole,

does acts which he does not know at the time are illegal, the principal is still liable to reimburse him for the expenditures or damages thereby incurred.[93]

[§ 464] **(4) Fraud and Misconduct—(a) In General.** An agent is not as a rule entitled to reimbursement and indemnity on account of advances made, expenses incurred, or losses sustained in reference to transactions as to which he has been guilty of fraud, negligence, or other misconduct,[94] as where he makes advances or expenditures in the principal's

114 N. Y. 371, 21 NE 707, 11 AmSR 667, 4 LRA 728; St. John v. St. John's Church, 15 Barb. 346; Ward v. Van Duzer, 2 N. Y. Super. 162; Newburgh v. Galatian, 4 Cow. 340; Graves v. Delaplaine, 14 Johns. 146; Callagan v. Hallett, 1 Cai. 104.

Oh.—Kahn v. Walton, 46 Oh. St. 195, 20 NE 203.

Pa.—Smith v. Kammerer, 152 Pa. 98, 25 A 165; Fareira v. Gabell, 89 Pa. 89.

S. C.—Harvey v. Doty, 54 S. C. 382, 32 SE 501.

Tex.—Oliphant v. Markham, 79 Tex. 543, 15 SW 569, 23 AmSR 363; Seeligson v. Lewis, 65 Tex. 215, 57 AmR 593.

Wis.—Everingham v. Meighan, 55 Wis. 354, 13 NW 269; Hooker v. Knab, 26 Wis. 511.

Eng.—Levy v. Warburton, 70 L. J. K. B. 708; Bailey v. Ralins, 7 L. J. K. B. O. S. 208; Thacker v. Hardy, 4 Q. B. D. 685 (holding that, as speculative stock exchange transactions are not illegal, the broker is entitled to indemnity). But see Read v. Anderson, 13 Q. B. D. 779 (holding that a betting commissioner who pays a lost wager may recover the amount from his principal, notwithstanding payment of the debt could not have been enforced by the winner). See also Seymour v. Bridge, 14 Q. B. D. 460 (holding that a stockbroker who has paid the price of shares purchased for his principal could recover the amount where the purchase was binding upon the broker under the rules of the stock exchange, although the contract was not a binding contract in law. Matthew, J., said the case was concluded by Read v. Anderson, supra).

N. B.—Wilkins v. Wallace, 38 N. B. 80; Leavitt v. Parks, 7 N. B. 282.

See also Contracts [9 Cyc 560]; Gaming [20 Cyc 952].

[a] **An express promise by the principal to reimburse the agent** is illegal and void under such circumstances. Bailey v. Rawlins, 7 L. J. K. B. O. S. 208; Leavitt v. Parks, 7 N. B. 282.

[b] **A ratification of a tort** will not enable the agent to recover indemnity from his principal, since there can be no contribution between joint tort-feasors. Leavitt v. Parks, 7 N. B. 282. See also supra § 85.

[c] **Where an agent commits a trespass** with full notice that it is such, and in consequence he is compelled to pay damages, he is not entitled to look to the principal for reimbursement and indemnity. Young's Est. 15 PittsbLegJNS (Pa.) 403.

[d] **Transactions held not to be illegal** so as to preclude reimbursement see Owen v. Baxter, 97 Mich. 539, 56 NW 930; Howe v. Buffalo, etc., R. Co., 37 N. Y. 297 [aff 38 Barb. 124]; Moore v. Remington, 34 Barb. (N. Y.) 427.

93. U. S.—Bibb v. Allen, 149 U. S. 481, 13 SCt 950, 37 L. ed. 819; Bartlett v. Smith, 13 Fed. 263, 4 McCrary 388.

Ala.—Moore v. Appleton, 26 Ala. 633.

Ga.—Thompson v. Cummings, 68 Ga. 124.

Me.—Rumsey v. Berry, 65 Me. 570; Drummond v. Humphreys, 39 Me. 347; Gower v. Emery, 18 Me. 79.

Mass.—Jacobs v. Pollard, 10 Cush. 287, 57 AmD 105; Avery v. Halsey, 14 Pick. 174.

N. Y.—Howe v. Buffalo, etc., R. Co., 37 N. Y. 297 [aff 38 Barb. 124]. Contra Pierson v. Thompson, 1 Edw. 212 (holding that an agent has no claim against his principal for indemnity against the consequences of a trespass, although he commits the act in good faith, supposing himself authorized, in the absence of an express promise of indemnity).

N. C.—Ives v. Jones, 25 N. C. 538, 40 AmD 421.

S. C.—Jamelson v. Calhoun, 29 S. C. L. 19; Davis v. Arledge, 21 S. C. L. 170, 30 AmD 360.

Utah.—Hoggan v. Cahoon, 26 Utah 444, 73 P 512, 99 AmSR 837.

[a] **The general rule that there shall be no contribution between joint tort-feasors** does not apply in such a case. Adamson v. Jarvis, 4 Bing. 66, 13 ECL 403, 130 Reprint 693.

[b] **Secret intention of principal.**—There is no principle of general law upon which a principal can avoid liability to his agent for advances made in good faith on his request because the contract on which they were made was rendered illegal by the secret intention of the principal not to perform the same in accordance with its terms. Parker v. Moore, 115 Fed. 799, 53 CCA 369 [rev 111 Fed. 470].

[c] **Act not manifestly illegal.**—Where an agent is employed by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, as to take personal property, which, although claimed adversely by another, he has reasonable ground to believe belongs to his principal, the law implies a promise of indemnity by the principal for such losses and damages as flow directly and immediately from the execution of the agency. Moore v. Appleton, 26 Ala. 633.

[d] **Trespass committed by principal's orders.**—(1) If an agent, by order of his principal, commits a trespass upon the property of another, acting bona fide without suspicion of wrong, he has a claim for reimbursement from his principal for all damages he sustains thereby. Gower v. Emery, 18 Me. 79. (2) Thus if an agent, acting under the direction of his principal, cuts timber by mistake partly upon the wrong township, and his principal receives the timber and disposes of it, he can recover of his principal what he has been obliged to pay for damages in a suit for trespass. Drummond v. Humphreys, 39 Me. 347.

[e] **Violation of injunction.**—Where the agent of a corporation does acts in obedience to its orders which are in violation of an injunction restraining such acts, or which amount to a trespass, and such agent has no notice of the injunction or the invalidity or wrongfulness of such acts, or of any liability or danger of arrest likely to be incurred in the performance thereof, and such liability and threatened danger are known to his principal, but concealed from him, the principal is bound to indemnify him for the damages suffered by him as the natural result of his acts done in obedience to the orders of his superiors. And the liability of the principal does not, in such case, depend upon the ultimate determination of the question as to whether an alleged trespass by or upon the agent is or is not legally justifiable, or as to the legality or propriety of the issuance of the injunction. The principal may not willfully expose his agent to danger of loss or injury in the course of his employment, the risk of which is known to him, but notice of which is wrongfully withheld from the agent. Guirney v. St. Paul, etc., R. Co., 43 Minn. 496, 46 NW 78, 19 AmSR 256.

94. U. S.—Mills Novelty Co. v. Dupouy, 203 Fed. 254, 121 CCA 452, 45 LRANS 788 and note.

Ky.—Ayer, etc., Tie Co. v. Witherspoon, 100 SW 259, 29 KyL 1067; Chamberlain v. Chamberlain, 41 SW 312, 19 KyL 572.

La.—Fisk v. Offit, 3 Mart. N. S. 553 (holding that if an agent in New Orleans sells his principal's property for a bill on New York in his own favor, with the proceeds of which when discounted he credits the principal in an account current without informing him of the circumstances, he cannot claim for a loss from the dishonor of the bill); Beal v. McKiernan, 6 La. 407 (where an agent to buy sold his own property to the principal without informing the latter of the facts).

Mass.—Grosvenor v. Stone, 8 Pick. 79.

N. J.—Baily v. Burgess, 48 N. J. Eq. 411, 22 A 733.

N. Y.—Moore v. Moore, 21 HowPr 211 (holding that an agent who procured property sold under foreclosure by him to be bought in for him by a friend at an inadequate price was not to be entitled to interest on the sum as an advance); Herman v. Leland, 80 Misc. 598, 142 NYS 664. Compare Hoy v. Reade, 31 N. Y. Super. 626 (holding that where, before an action brought by an agent for expenses, he has wrongfully converted the goods, such conversion does not constitute a defense to the action, but the principal, if he still remains the owner of the property, may offset the value of the property so converted).

Oh.—Victoria First Nat. Bank v. Hayes, 64 Oh. St. 100, 59 NE 893.

Or.—Williamson v. North Pac. Lumber Co., 43 Or. 337, 73 P 7 (where defendant sold lumber to plaintiff, to be shipped to plaintiff's customers in another country, the contract providing that, if a dispute arose at the port of discharge as to the quality of the lumber, defendant should appoint an agent on the spot to settle it, and a dispute arose, and defendant appointed plaintiff its agent to settle, and plaintiff appointed other persons to examine the lumber and report what allowance should be made to the buyers, and such persons recommended a certain reduction, and plaintiff settled with the buyers on such basis, it was held that if plaintiff acted fraudulently in making the settlement defendant would not be liable for the cost thereof).

Vt.—Fuller v. Ellis, 39 Vt. 345, 94 AmD 327.

Wash.—Glover v. Richardson, etc., Co., 64 Wash. 403, 116 P 861 (holding that one who enters the employment of another, using his own team and wagon, cannot recover from the principal the cost of repairing the wagon after its injury by his own act in overloading it).

Eng.—Capp v. Topham, 6 East 392, 102 Reprint 1337.

N. B.—Leavitt v. Parks, 7 N. B. 282.

Compare Betts v. Planters', etc., Bank, 3 Stew. (Ala.) 18 (where A received cotton of B, made an advance, and agreed to ship it to New Orleans or New York, and have it sold for the best price it would bring, A to have the entire control of it, and the proceeds to be applied to refund the advance, and when in New Orleans it would have produced enough to pay the advance, and A did not sell it there but reshipped it for New York, where it sold for less, it was held that A, having acted fairly, was not holden for the loss); Poole v. Poindexter, 72 Kan. 654, 83 P 126 (holding that a transaction by which a member of an association furnished

business which might have been avoided by ordinary diligence.[95]

[§ 465] **(b) Failure to Keep and Render Accounts.** It is the duty of an agent to keep and render an account of advances made and expenses incurred in the course of the agency, and his failure to do so may bar him from reimbursement,[96] unless he has acted in good faith and has a sufficient excuse for such failure.[97]

[§ 466] **(5) Failure to Effect Transaction.** Ordinarily an agent who is employed to negotiate a particular transaction is not entitled to expenses incurred in unsuccessful efforts to effect the transaction.[98]

[§ 467] **e. Amount of Recovery.** Where the payment by the agent is voluntary his recovery against the principal is not necessarily the amount paid, as it cannot exceed the amount which he could have been forced to pay.[99] But where the principal, although not a party to a suit against his agent, is duly notified of the pendency of the suit and requested to appear and defend it, and fails to do so, he cannot dispute the recovery therein against the agent.[1] The implied agreement of a principal to indemnify his agent against loss incurred in the performance of his duties does not entitle the agent to recover more than nominal damages for a liability incurred, but from which he has not suffered actual loss.[2]

[§ 468] **f. Enforcement of Right.**[3] An agent who has bought goods for the principal with his own funds may, in case the principal refuses to accept them, sell the same for the purpose of reimbursing himself.[4] Although an agent may have a lien for advances[5] on property of the principal in his hands, yet he is not bound to resort to the property in the first instance, but may demand reimbursement immediately.[6]

[§ 469] **4. Agent's Lien—a. In General.**[7] Where an agent is entitled to compensation, or to reimbursement and indemnity on account of advances, expenses, and losses, and the money or property of the principal with reference to which his services were rendered, or the advances were made, or the expenses or losses incurred, is in his hands, he has a lien thereon which entitles him to retain the property until his claim is satisfied.[8] Thus a purchasing agent has a lien on the property purchased for re-

funds to a corporation which was conducting experiments under a contract with the association, and accepted stock for the funds so furnished, did not, in the absence of anything inconsistent with actual good faith and fair dealing, preclude the member from recovering from the association for expenses incurred in looking after operations under the contract with the corporation).

[a] **Negligence.**—(1) If the agent neglects his duty in reference to the matter out of which his loss arises, to the injury of his principal, such neglect will, to the extent of the injury, reduce or discharge the liability of the principal to indemnify the agent. Haskin v. Haskin, 41 Ill. 197. And see Jackson v. Morse, 3 La. 555. (2) If, however, such neglect does not result in injury to the principal, the rights of the agent will not be affected thereby. Haskin v. Haskin, supra. Compare Armstrong v. Pease, 66 Ga. 70; Gossler v. Lau, 59 N. Y. Super. 365, 14 NYS 289; Field v. Banker, 9 Bosw. (N. Y.) 467; Gooderham v. Marlatt, 14 U. C. Q. B. 228.

[b] **Representing adverse party.**—(1) A broker purchased goods on commission at a month's credit, and paid duties on them, and sent them to the place of the purchaser's abode, consigned to his own order. The seller, being fearful of the purchaser's credit, procured the broker to delay the arrival of the goods until the month's credit expired, and to tender them to the buyer on payment of the price, whereupon they were refused. It was held that the broker could recover neither the price nor the duties. Hurst v. Holding, 3 Taunt. 32, 128 Reprint 13. (2) So an agent is not entitled to recover a loss sustained on a shipment of cotton purchased for his principal, where, without the principal's knowledge, he filled the order of purchase with cotton consigned to him by another for sale. Beal v. McKierman, 6 La. 407. (3) And if the agent of one party secretly becomes the agent of the adverse party, and pays out money for him in transacting the agency, he cannot compel the adverse party to reimburse him. Cincinnati, etc., R. Co. v. Morris, 10 Oh. Cir. Ct. 502, 6 Oh. Cir. Dec. 640. (4) However, a general confidential business agent who pays insurance premiums on the principal's property is entitled to credit therefor from his principal, although he may also have been the agent of the insurance company, provided he informed the company that the property was in his control, and they permitted the policies to stand without attempting to avoid them, as in such a case the policies at the most were merely voidable, and it will not be presumed that the insurance companies would elect to avoid. Rochester v. Levering, 104 Ind. 562, 4 NE 203. (5) And in an action to recover money paid by plaintiff at defendant's request to bind a contract for the sale of land to defendant, the fact that plaintiff was to receive commissions from the vendor does not affect plaintiff's right to recover. Bang v. Dovey, 11 Misc. 350, 32 NYS 154.

95. Brown v. Clayton, 12 Ga. 564; Veltum v. Koehler, 85 Minn. 125, 128, 88 NW 432 (where the court said: "It may be stated, as a general rule, that an agent is entitled to reimbursement for all advances and expenditures made in the course of his agency for the benefit of his principal, when the same have been properly and in good faith paid. But he cannot claim such reimbursement when the advances and expenditures were rendered necessary by his own failure to exercise reasonable care and diligence in the performance of the duties of his agency. When they are incurred and made necessary by his own neglect, the principal is not liable therefor"); Frixione v. Tagliaferro, 4 Wkly. Rep. 373.

96. Dillman v. Hastings, 144 U. S. 136, 12 SCt 662, 36 L. ed. 378; Quirk v. Quirk, 155 Fed. 199 (holding that an agent on an accounting for money collected for his principal will not be allowed for disbursements claimed to have been made by him where he failed to keep proper accounts, and the testimony in support of his claim is vague and unsatisfactory); Moyses v. Rosenbaum, 98 Ill. A. 7; Eddy v. Eddy, 7 Que. Q. B. 300 [aff [1900] A. C. 299]. See also Motley v. Motley, 42 N. C. 211 (holding that an agent is not entitled to charge for payments made for his principal without showing that upon a settlement of the transactions of his agency such an amount was due to him). Compare Blest v. Versteeg Shoe Co., 97 Mo. A. 137, 70 SW 1081 (holding that it is necessary for an agent to introduce only substantial testimony by which the jury can estimate his expenses); Gallup v. Merrill, 40 Vt. 133 (holding that an agent who refuses to render a specific account to his principal when required is not thereby barred from maintaining an action for a balance due from the principal, but such refusal only affects the agent unfavorably as a matter of evidence).

[a] **Principal entitled to know nature of expenditures.**—Where a merchant employs a traveling agent for a year at a fixed salary, payable monthly, and agrees to pay in addition to it all his expenses not to exceed a certain sum per annum, he has a right to know that the expenses charged are legitimate business charges, and he is not bound to pay anything without knowing what it is for, and that it is a legitimate expense of his business. Moyses v. Rosenbaum, 98 Ill. A. 7.

97. Jones v. Hoyt, 25 Conn. 374 (holding that if an agent has conducted himself fairly in the sale of certain lumber, obtaining the best prices that by reasonable diligence could be obtained, and accounting honestly according to his best means, and has explained to the satisfaction of the jury his neglect to keep exact accounts, and such neglect involved no gross carelessness or dishonesty on his part, he ought to be allowed out of the proceeds of the lumber all the necessary expenses of managing and disposing of the same).

98. Dalton v. Irvin, 4 C. & P. 289, 19 ECL 519 (unless such expenses are unusual and have been incurred in consequence of the principal having urged him to extraordinary expedition in the matter). But see Stewart v. Kahle, 3 Stark. 161, 3 ECL 636.

Termination of agency as affecting right to reimbursement and indemnity see supra § 462.

99. Saveland v. Green, 36 Wis. 612.

1. Denney v. Wheelwright, 60 Miss. 733.

2. Brown v. Mechanics', etc., Bank, 16 App. Div. 207, 44 NYS 645.

3. **Enforcement by suit** see infra § 587.

4. Zoit v. Millaudon, 4 Mart. N. S. (La.) 470; De Bavier v. Funke, 21 NYS 410 [aff 142 N. Y. 633 mem, 37 NE 566 mem].

5. See infra § 469.

6. Beckwith v. Sibley, 11 Pick. (Mass.) 482; Hoy v. Reade, 31 N. Y. Super. 626.

7. **Liens generally** see Liens [25 Cyc 655]. Of brokers see Brokers [19 Cyc 288]. Of factors see Factors [19 Cyc 156].

8. U. S.—Dowell v. Cardwell, 7 F. Cas. No. 4,039, 4 Sawy. 217 (holding that an agent employed to collect a claim against the United States for a certain per cent of the amount realized has a lien upon the fund for his compensation).

Ala.—White v. Sheffield, etc., R.

imbursement and indemnity where he purchases on his own credit, or with his own funds, or where he incurs expenses in the purchase, and the property is in his possession;[9] and where commercial correspondents on the order of a principal make a purchase of property ultimately for him, but on their own credit or with funds furnished by them, and such course is contemplated when the order is given, they may retain the title in themselves until they are reimbursed.[10] So also a selling agent has a lien on the property for reimbursement where it is in his possession.[11]

Priorities. An agent's lien on property in his possession is generally superior to claims of assignees,[12] or creditors of the principal.[13]

[§ 470] **b. Rights of Subagent.** The right of lien

Co., 90 Ala. 254 (holding that where a private agent of a corporation, having an order from its president or superintendent to take possession of personal property belonging to it, is required to pay freight charges due to a common carrier in order to get possession, and pays the amount out of his own moneys, he is entitled to retain the possession, as against his principal, until the amount is repaid him).

Ark.—Byers v. Danley, 27 Ark. 77.

Ind.—Vinton v. Baldwin, 95 Ind. 433.

Kan.—Arnold v. Arnold, 83 Kan. 539, 112 P 163 [reh den 84 Kan. 889, 113 P 417].

Ky.—Grauman v. Reese, 13 KyL 683.

La.—Bastable v. Denegre, 22 La. Ann. 124 (holding that a party acting as agent for heirs in the prosecution of a land claim under an agreement may withhold the payment of so much of the proceeds of the sale of the land, which he has received for them, as will be necessary to cover possible liabilities on account of suits brought by settlers for improvements made on the land, unless the heirs give satisfactory security against loss resulting from such suits); Hereford v. Leverich, 16 La. Ann. 397; King v. Osborne, 2 Mart. N. S. 247 (holding that one receiving indorsed notes to collect, the proceeds to be applied to his advances, may retain them until indemnified); Ganseford v. Dutillet, 1 Mart. N. S. 284.

Me.—McKenzie v. Nevius, 22 Me. 138, 38 AmD 291; Newhall v. Dunlap, 14 Me. 180, 31 AmD 45 (holding that where an agent has a lien on property for his security, the general owner cannot maintain replevin against him for it until the lien is discharged).

Minn.—Deering Harvester Co. v. Hamilton, 80 Minn. 162, 83 NW 44.

N. Y.—Cooper v. Hong Kong, etc., Banking Corp., 107 N. Y. 282, 14 NE 277 [rev 13 Daly 183]; Nagle v. McFeeters, 97 N. Y. 196; Underhill v. Jordan, 72 App. Div. 71, 76 NYS 266 (holding that an agent acting in a fiduciary capacity in the management of a quasi trust fund which, if paid over by him to his principals, will be removed from the jurisdiction of the court so as to prevent him from collecting a claim for services and expenses and disbursements paid out in its management, has an equitable lien on such fund, at least to the extent of his claim for expenses and disbursements); Mount v. Suydam, 4 Sandf. Ch. 399.

Pa.—Cranston v. Philadelphia Ins. Co., 5 Binn. 538 (holding that an agent who effects insurance for his principal and becomes answerable for the premium has a lien on the policy so long as he retains it); Com. v. Evans, 2 LegOp 3 (holding that an agent has a lien on the papers or property of his principal to secure payment of his compensation); Devereux v. Philadelphia Bank, 1 Phila. 477 (holding that a principal cannot countermand the payment of a bill in the possession of his agent, where the agent has a lien for a debt growing out of his agency).

S. C.—State Bank v. Levy, 26 S. C. L. 431 (holding that where an agent for a commission negotiates exchanges for a firm, buys bills for them, and to raise the funds for that purpose draws and sells bills on such firm for corresponding amounts, some of which the firm accepts and others are protested, such agent, on the failure of the firm, has a lien on any funds which came to his hands for his principals to secure himself against the outstanding liabilities, although in fact he may not have paid any of the bills).

Tenn.—Wade v. Roberts, 6 Humphr. 124 (holding that where a distributee brought his bill against his agent for property which had come to his hands under an agreement to collect the distributive share, the agent was entitled to a decree to subject the estate in his hands to preëxisting claims and advances made in the execution of his agency).

Tex.—Gresham v. Galveston County, (Civ. A.) 36 SW 796 (holding that, under an order of the commissioners' court appointing defendant agent for the sale of school lands, and providing that he should be paid a commission on the "amount received" by him for the sale of such lands, defendant has a lien for his commission upon notes given for such deferred payments entitling him to the possession of the notes for the purpose of collection).

Eng.—In re Fawcus, 3 Ch. D. 795; Hammonds v. Barclay, 2 East 227, 102 Reprint 356; Foxcraft v. Wood, 4 Russ. 487, 4 EngCh 487, 38 Reprint 888.

Can.—Reid v. Rogerson, 1 CanAppCas 8, Stuart K. B. (L. C.) 412, 1 Knapp 362, 12 Reprint 357.

Que.—Eddy v. Eddy, 7 Que. Q. B. 300 [aff [1900] A. C. 299].

[a] **A mere forwarding agent** has no lien upon goods sent to him to be shipped to a consignee resident in another city. Farwell v. Price, 30 Mo. 587.

[b] **Agent to conduct suit; no lien on judgment.**—An agent who carries on a suit has no lien or preference on the amount of the judgment in the hands of defendant attached by a creditor of the principal. Martinez v. Perez, 8 Mart. N. S. (La.) 668, 669 (where the court said: "An agent or attorney appointed to collect debts, who expends money in prosecuting the claims of the creditor to judgments, would have no lien on such judgments to give him a preference over other creditors of his employer. An attorney at law might retain the title papers of his client until the latter should pay to him the fees stipulated between the parties; so a person who is in possession of any papers intrusted to him to have them recorded, might lawfully hold them until the fees for recording, by him advanced, should be refunded. But such privileges result from the possession of things corporeal").

[c] **Taxes paid by agent.**—Where an agent has possession of his principal's property which is subject to taxation, with a view to a pecuniary profit to both, he is personally chargeable with the taxes thereon and has a lien upon the property to reimburse him. German Trust Co. v. Davenport Tp. Bd. of Equal., 121 Iowa 325, 96 NW 878.

9. Merrill v. Rokes, 54 Fed. 450, 4 CCA 433; Matthews v. Menedger, 16 F. Cas. No. 9,289, 2 McLean 145 (holding that this is especially the rule where the principal is insolvent, and the liability of the agent to pay is about to be enforced); Welker v. Appleman, 44 Ind. A. 699, 90 NE 35 (holding that where moneys advanced by an agent for the purchase of wool were to be repaid as expended, and the agent's commissions were due on delivery, the contract was not inconsistent with the agent's common-law lien to secure satisfaction of his claims); Stevens v. Robins, 12 Mass. 180; Johnston v. Gerry, 34 Wash. 524, 76 P 258, 77 P 503 (holding that one who, under an agreement to attempt to procure title to a tract of land for another, expends money in his endeavors, and finally obtains a title in his own name and takes possession of the land, is entitled, on judgment for possession being rendered against him at suit of the person for whom he rendered the services, to be reimbursed for his expenditures in obtaining the title, and to have the amount of such expenditures made a lien on the premises).

10. Moors v. Kidder, 106 N. Y. 32, 12 NE 818; Farmers', etc., Nat. Bank v. Logan, 74 N. Y. 568 [aff 42 N. Y. Super. 522] (holding that this may be done by taking the bill of sale in their own names, and, when the property is shipped, by taking from the carrier a bill of lading in such terms as to show that they retain the power to control the property); Spinney v. Thurber, 33 Hun 448 [aff 102 N. Y. 652 mem]; Jenkyns v. Brown, 14 Q. B. 496, 68 ECL 496, 117 Reprint 193.

11. Deering Harvester Co. v. Hamilton, 80 Minn. 162, 83 NW 44 (holding that, where a contract provided that defendants should act as sole agents of plaintiff in selling machinery in certain territory, machines and fixtures to be cared for and stored by defendants, and the contract contained a provision that it might be terminated at any time by plaintiff, plaintiff could not terminate the contract without reasonable cause, and where none was shown defendants had a lien upon the machinery in their possession for their expenses in caring for and storing it during the life of the contract); In re Pavy's Patent Felted Fabric Co., 1 Ch. D. 631. Compare Blight v. Ewing, 1 Pittsb. (Pa.) 275 (holding that where a person agreed to become the agent of a landowner to sell, rent, and dispose of a certain lot of land, upon the terms that said property was to be charged with its cost, interest, and necessary expenses, such person to contribute his services, etc., and the net profits to be divided between the parties, such agent had no lien on the land for his services).

12. Lane v. Coleman, 8 B. Mon. (Ky.) 569 (holding that where an agent is acting under a power of attorney which provides for the payment of the costs of the litigation arising in the transaction of the business, being entitled to a compensation for his services, his claim is superior to that of one to whom the principal has assigned the fruits of the litigation); Snee v. Prescot, 1 Atk. 245, 26 Reprint 157 (holding that where agents abroad have expended money for their principal, and, upon being doubtful of his circumstances, make bills of lading to their own order indorsed in blank, notwithstanding these bills of lading come to the principal's hands, yet, if the agents' partner in London writes them word that their principal is become bankrupt and desires them to send the bills of lading and an order to the captain to deliver the goods to him, he may retain them for himself and company against the assignees under the commission till paid and rembursed so much as the partnership is in advance).

13. Paul v. Rogers, 5 T. B. Mon.

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exists only in favor of the agent, and cannot be claimed by one to whom the agent delegates his authority where no privity exists between such subagent and the principal.[14] Where, however, the delegation is made in such a manner that a privity exists between the subagent and the principal, the subagent will have a right of lien to the extent of the services performed and the advances and disbursements properly made by him on account of the subagency,[15] although he will have no general lien on the property of the principal on account of any balance due to him from the primary agent who employs him, where he knows or has reason to believe that the latter is acting for another person at the time of his subagency.[16]

[§ 471] **c. Extent of Lien.** An agent's lien extends only to services, advances, or expenditures properly made by the agent as such on behalf of his principal,[17] and not to claims wholly disconnected with the business of the agency;[18] and in the absence of an express or implied agreement creating a general lien, the lien does not cover a general balance of account between the principal and agent, but exists only for services rendered, or advances made, or expenses or losses incurred in reference to the particular property.[19]

[§ 472] **d. Necessity for Possession.** To entitle the agent to a lien the funds or property against which it is asserted must be in the actual or constructive possession of the agent,[20] and he must have acquired that possession lawfully,[21] and in his capacity as agent.[22] The lien does not arise where possession of the property is acquired by the agent under a contract which expressly or impliedly shows a contrary intention,[23] as where it is delivered to him for a particular purpose inconsistent with the existence of the lien thereon.[24]

[§ 473] **e. Extinguishment or Loss of Lien.** The lien may be lost by waiver, express or implied.[25] And as this lien continues only so long as the agent has possession of the property,[26] if he parts with or surrenders possession thereof voluntarily and

(Ky.) 164 (holding that one having the possession of funds of an insolvent as his agent may retain the same for his claims on other accounts as against any other creditor because of his equality in equity and advantage at law by reason of his having possession).

[a] **A verbal understanding** between a principal and his agent that the proceeds of lands, when sold by the agent, should be applied to the liquidation of a debt due him from his principal, and for which he was bound as surety, raises no equity in favor of the agent as against creditors of the principal who have sought legal remedies, and acquired liens by attachment of the property. Graves v. Ward, 2 Duv. (Ky.) 301.

[b] **An agent with unrestricted management** of a general trading business carried on in his name with the right to buy, sell, or exchange, has a lien on all the property accumulated in such business for advances made and expenses incurred which is superior to any lien placed on the property by the reputed owner thereof. Dewing v. Hutton, 40 W. Va. 521, 21 SE 780.

[c] **A clerk** has a general privilege over all the property of his employer which cannot be defeated by attachment. Tiernan v. Murrah, 1 Rob. (La.) 443.

14. Clay v. Hopkins, 3 A. K. Marsh. (Ky.) 485; Phelps v. Sinclair, 2 N. H. 554, 555 (where the court said: "We consider it as settled, that if an agent or factor, for sale, agree with a third person, to take charge of a consignment, pay the freight and duties, and sell the goods: yet as against the principal, such third person has no lien on the goods").

15. McKenzie v. Nevius, 22 Me. 138, 38 AmD 291; Fisher v. Smith, 4 App. Cas. 1; Snook v. Davidson, 2 Campb. 218; Maanss v. Henderson, 1 East 335, 102 Reprint 130; Blackburn v. Kymer, 5 Taunt. 584, 1 ECL 299, 128 Reprint 818.

16. Crown Point First Nat. Bank v. Richmond First Nat. Bank, 76 Ind. 561, 40 AmR 261; Miller v. Farmers', etc., Bank, 30 Md. 392; Cecil Bank v. Farmers' Bank, 22 Md. 148; Buckley v. Packard, 20 Johns. (N. Y.) 421 (holding that where A, a merchant, consigned goods to the master of a vessel bound to Havana for sale, and the master upon his arrival at Havana delivered the goods to B, a commission merchant, for sale, the master having no authority to pledge the goods for his own account, B by receiving the goods with knowledge that they belonged to A became substituted as agent or factor in place of the master, and was accountable to A, and could not retain them for any advances made to the master); Foster v. Hoyt, 2 Johns. Cas. (N. Y.) 327; Mildred v. Maspons, 8 App. Cas. 874; Snook v. Davidson, 2 Campb. 218; Cahill v. Dawson, 3 C. B. N. S. 106, 91 ECL 106, 140 Reprint 679; Ladbroke v. Lee, 4 De G. & Sm. 106, 64 Reprint 755; Maanss v. Henderson, 1 East 335, 102 Reprint 130; Levy v. Barnard, 2 Moore C. P. 34; Solly v. Rathbone, 2 M. & S. 298, 105 Reprint 392.

[a] **Where the subagents believe they are acting for principals** and not for an agent, and there is nothing in the case to lead them to suppose that the persons for whom they are acting are not principals, they have a lien for the general account due to them by the agent. Montagu v. Forwood, [1893] 2 Q. B. 350.

[b] **Lien on insurance policy.**—(1) Where the agent to obtain insurance falsely represented to the person whom he employed to obtain the insurance that he had authority to indorse the bill of lading of the goods it was held that the subagent had no general lien on the policy for a balance due to him from the agent. Lanyon v. Blanchard, 2 Campb. 597; Man v. Shiffner, 2 East 523, 102 Reprint 469. (2) But in Westwood v. Bell, 4 Campb. 349, it was held that where A employed B to effect a policy of insurance for his benefit, and B, without A's knowledge, employed C to effect the policy, representing himself to C as the principal, C had a lien on the policy, as against A, for the general balance due to him from B, since he had no knowledge that B was not the real principal.

17. Merrill v. Rokes, 54 Fed. 450, 4 CCA 433; Jones v. Evans, 62 Mo. 375 (holding that where, in rendering services or making advances, a person does not act in the capacity of an agent for the owner of property in his possession he is not entitled as such to a lien thereon); Mack v. Schuylkill Trust Co., 33 Pa. Super. 128 (holding that where a title insurance company, after having performed its duties as a conveyancer and title insurer, as such further assumes the duty specifically intrusted to it of accepting a deed, and delivering the consideration therefor, and placing the deed on record, it cannot retain possession of the deed and refuse to place it on record until its bill as a conveyancer and title insurer has been paid).

18. McKenzie v. Nevius, 22 Me. 138, 38 AmD 291; Carpenter v. Momsen, 92 Wis. 449, 65 NW 1027, 66 NW 692.

19. McIntyre v. Carver, 2 Watts & S. (Pa.) 392, 37 AmD 519; Houghton v. Matthews, 3 B. & P. 485, 127 Reprint 263; Bock v. Gorrissen, 2 De G. F. & J. 434, 63 EngCh 339, 45 Reprint 689, 16 ERC 113; Walker v. Birch, 6 T. R. 258, 101 Reprint 541; Quebec, etc., Nav. Co. v. Cunard, 2 N. B. 90.

20. U. S.—Ex p. Foster, 9 F. Cas. No. 4,960, 2 Story 131.

Ala.—Donald v. Hewitt, 33 Ala. 534, 73 AmD 431.

Ark.—Byers v. Danley, 27 Ark. 77.

Ind.—Tucker v. Taylor, 53 Ind. 93.

Iowa.—Nevan v. Roup, 8 Iowa 207.

Me.—Oakes v. Moore, 24 Me. 214, 41 AmD 379.

Mass.—Hall v. Jackson, 20 Pick. 194.

N. Y.—Winter v. Coit, 7 N. Y. 288, 57 AmD 522.

N. C.—Gwyn v. Richmond, etc., R. Co., 85 N. C. 429, 39 AmR 708.

Eng.—Taylor v. Robinson, 8 Taunt. 648, 4 ECL 317, 129 Reprint 536.

Que.—Gourdeau v. Lyon, 12 Que. Pr. 89 (holding that an agent who is paid commission on sales by his principal as the latter might make deliveries and obtain payments is an ordinary creditor; he has no right to seize by conservatory attachment whatever particular moneys may remain due for goods delivered and the work done by him in connection therewith).

Loss of lien by surrender of property see infra § 473.

21. Randel v. Brown, 2 How. (U. S.) 406, 11 L. ed. 318; Hoffman v. Barthelmess, 63 Ga. 759, 36 AmR 129 (possession obtained illegally, no lien); Madden v. Kempster, 1 Campb. 12; Burn v. Brown, 2 Stark. 272, 3 ECL 406.

22. Scott v. Jester, 13 Ark. 437; Thacher v. Hannahs, 27 N. Y. Super. 407; McIntyre v. Carver, 2 Watts & S. (Pa.) 392, 37 AmD 519.

23. Randel v. Brown, 2 How. (U. S.) 406, 11 L. ed. 318.

24. Randel v. Brown, 2 How. (U. S.) 406, 11 L. ed. 318; Burn v. Brown, 2 Stark. 272, 3 ECL 406.

25. Ala.—Leigh v. Mobile, etc., R. Co., 58 Ala. 165.

Ind.—Hanna v. Phelps, 7 Ind. 21, 63 AmD 410.

Me.—Danforth v. Pratt, 42 Me. 50.

Mich.—Au Sable River Boom Co. v. Sanborn, 36 Mich. 358.

N. H.—Stoddard Woolen Manufactory v. Huntley, 8 N. H. 441, 31 AmD 198.

N. Y.—Dows v. Morewood, 10 Barb. 183; Chandler v. Belden, 18 Johns. 157, 9 AmD 193.

Eng.—In re Taylor, [1891] 1 Ch. 590.

26. Byers v. Danley, 27 Ark. 77.

Necessity for possession see supra § 472.

unconditionally he loses his lien;[27] and he loses it also by a tortious pledge of the property.[28] The lien is not affected by the bankruptcy or insolvency of the principal,[29] nor by his death.[30] It has been held that the lien continues notwithstanding the agent's claim becomes barred by limitations,[31] but a contrary view also has been taken.[32]

[§ 474] **f. Enforcement of Lien.**[33] At common law the agent's particular lien cannot be directly enforced by legal proceedings, as it is a mere right of retention,[34] and his only remedy by proceedings is in equity.[35] But where the transaction amounts to a pledge the agent may sell the property on notice to satisfy his claim.[36]

[§ 475] **5. Agent's Right of Stoppage in Transitu.**[37] An agent who buys goods in his own name or on his own credit and ships them to the principal may exercise the right of stoppage in transitu;[38] but where one through his agent sells goods to another, and they are shipped to the purchaser, the agent has no right to stop the goods in transitu because his principal owes him on account of money advanced in the purchase of the goods.[39]

XI. EFFECT OF THE RELATION AS BETWEEN AGENT AND THIRD PERSONS

[§ 476] **A. Liability of Agent to Third Person—1. On Contract—a. Unauthorized Contracts—(1) In General—(a) General Rules.** A person who assumes to act as agent for another impliedly warrants that he has authority to do so;[40] and if therefore he in fact lacks authority he renders himself personally liable on the warranty to one who deals with him in good faith in reliance thereon,[41] although, accord-

27. Ark.—Byers v. Danley, 27 Ark. 77.
Ind.—Tucker v. Taylor, 53 Ind. 93; Welker v. Appleman, 44 Ind. A. 699, 90 NE 35 (holding that a purchasing agent's lien for advances and commissions may be waived by the agent's absolute surrender of possession of the property after the lien has attached, with no intention on his part to preserve the lien).
Me.—Spaulding v. Adams, 32 Me. 211.
N. Y.—McFarland v. Wheeler, 26 Wend. 467.
Pa.—Cranston v. Philadelphia Ins. Co., 5 Binn. 538 (holding that an agent who effects insurance for his principal, and becomes answerable for the premium, has a lien upon the policy so long as he retains it, but if he delivers it up his lien is gone; and although the underwriters are entitled to deduct the premium, if unpaid, from the loss, yet if paid by the agent he has no equity to stand in their place and to claim payment out of the sum due for the loss).
Eng.—Watson v. Lyon, 7 De G. M. & G. 288, 56 EngCh 223, 44 Reprint 113.
[a] **Deposit with third person.**—An agent's lien on his principal's goods for expenses relative thereto is not lost by their deposit with a third person for sale. Ganseford v. Dutillet, 1 Mart. N. S. (La.) 284.
28. Keutgen v. Parks, 4 N. Y. Super. 60 (where an agent to negotiate a note for the owner gave to him his own checks, post-dated, for the amount, and pledged the note to secure a usurious loan to himself, and the checks were not paid at maturity, and the owner brought suit against the pledgee to recover the note, and subsequently the agent paid money to plaintiff on account of the note, and it was held that the agent had no lien on the note for his advance, his lien thereon having been extinguished by his tortious pledge of the note, and that no lien passed to the pledgee which he could set up against a recovery by the owner).
29. Muller v. Pondir, 55 N. Y. 325, 14 AmR 259 (holding that if an agent incurs liability on the faith of the solvency of his principal, and the latter becomes insolvent before the fruit and proceeds of such liability have come into his actual possession, and while they are yet within the reach of the agent, the latter has a lien upon them for his protection and indemnity); In re Pavy's Patent Felted Fabric Co., 1 Ch. D. 631; General Share Trust Co. v. Chapman, 1 C. P. D. 771; Ogle v. Story, 4 B. & Ad. 735, 24 ECL 321, 110 Reprint 632.
30. Newhall v. Dunlap, 14 Me. 180, 31 AmD 45; Hammonds v. Barclay, 2 East 227, 102 Reprint 356.
31. Curwen v. Milburn, 42 Ch. D. 424; Spears v. Hartly, 3 Esp. 81.
32. Byers v. Danley, 27 Ark. 77.
33. Enforcement of liens see generally Liens [25 Cyc 681].
34. Ark.—Crumbacker v. Tucker, 9 Ark. 365.
Me.—Hunt v. Haskell, 24 Me. 339, 41 AmD 387.
Mass.—Briggs v. Boston, etc., R. Co., 6 Allen 246, 83 AmD 626.
N. H.—Bailey v. Shaw, 24 N. H. 297, 55 AmD 241.
N. Y.—Fox v. McGregor, 11 Barb. 41. See however Mount v. Suydam, 4 Sandf. Ch. 399.
35. Hall v. Edrington, 9 Dana (Ky.) 364 (holding that where an agent is entitled to a lien on his principal's property for advances, his only remedy is in equity).
36. Parker v. Brancker, 22 Pick. (Mass.) 40; Wicks v. Hatch, 38 N. Y. Super. 95 [aff 62 N. Y. 535] (holding that where a power of attorney is given to buy, sell, and assign stocks and bonds, etc., and the attorney purchases on his own credit for the account of the principal, the attorney possesses the right of a pledgee to sell on demand and reasonable notice); Potter v. Thompson, 10 R. I. 1.
Sale by pledgee see Pledges [31 Cyc 779].
37. Stoppage in transitu see generally Sales [35 Cyc 493].
38. Welker v. Appleman, 44 Ind. A. 699, 90 NE 35 (holding that, where no time was specified for the payment of an agent's commissions for the purchase of wool for his principal, it would be presumed that payment was to be made on delivery of the wool, and hence the agent by offering delivery f. o. b. cars did not lose his right to retake and retain the wool on the principal's refusal to pay the commissions pursuant to the agent's lien therefor); Newhall v. Vargas, 13 Me. 93, 29 AmD 489; Seymour v. Newton, 105 Mass. 272; Ilsley v. Stubbs, 9 Mass. 65, 6 AmD 29; Tucker v. Humphrey, 4 Bing. 516, 13 ECL 614, 130 Reprint 866; Hawkes v. Dunn, 1 Cromp. & J. 519; Feise v. Wray, 3 East 93, 102 Reprint 532; Turner v. Liverpool Docks, 6 Exch. 543, 4 ERC 725. And see Ex p. Banner, 2 Ch. D. 278; D'Aquila v. Lambert, Ambl. 399, 27 Reprint 266, 2 Eden 75, 28 Reprint 824.
39. Gwyn v. Richmond, etc., R. Co., 85 N. C. 429, 39 AmR 708.
40. U. S.—Williams v. De Soto Oil Co., 213 Fed. 194.
Ala.—Ware v. Morgan, 67 Ala. 461.
Ark.—Little Rock Furniture Mfg. Co. v. Kavanaugh, 164 SW 289.
Ill.—Rice v. Western Fuse, etc., Co., 64 Ill. A. 603.
Ind.—Mendenhall v. Stewart, 18 Ind. A. 262, 47 NE 943.
Mass.—May v. Western Union Tel. Co., 112 Mass. 90; Bartlett v. Tucker, 104 Mass. 336, 6 AmR 240; Jefts v. York, 4 Cush. 371, 50 AmD 791.
N. Y.—Baltzen v. Nicolay, 53 N. Y. 467; White v. Madison, 26 N. Y. 117; Noe v. Gregory, 7 Daly 283; Lord v. Van Gelder, 16 Misc. 22, 37 NYS 668; Nelligan v. Campbell, 20 NYS 234; Bartholomae v. Kaufman, 16 NYWkly Dig 127.
Oh.—Farmers' Co-operative Trust Co. v. Lloyd, 47 Oh. St. 525, 26 NE 110, 21 AmSR 846, 12 LRA 346 and note.
Or.—Cochran v. Baker, 34 Or. 555, 52 P 520, 56 P 641.
Pa.—Kroeger v. Pitcairn, 101 Pa. 311, 47 AmR 718.
S. C.—Hamburg Bank v. Wray, 35 S. C. L. 87, 51 AmD 659.
W. Va.—Haupt v. Vint, 68 W. Va. 657, 70 SE 702, 34 LRANS 518 and note.
Wis.—McCurdy v. Rogers, 21 Wis. 197, 91 AmD 468.
Eng.—Cherry v. Colonial Bank, L. R. 3 P. C. 24, 6 Moore P. C. N. S. 235, 16 Reprint 714; Richardson v. Williamson, L. R. 6 Q. B. 276; Oliver v. Bank of England, [1902] 1 Ch. 610 [aff [1901] 1 Ch. 652]; Randell v. Trimen, 18 C. B. 786, 86 ECL 786, 139 Reprint 1580; Collen v. Wright, 8 E. & B. 647, 657, 92 ECL 647, 120 Reprint 241, 2 ERC 484 [aff 7 E. & B. 301, 90 ECL 301, 119 Reprint 1259] (where the court said: "The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such a contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist").
Ont.—Calvin v. Davidson, 31 U. C. Q. B. 396.
[a] **"The rule is** that one who undertakes to act for another, without authority is liable to the person with whom he deals, on the ground of an implied warranty of his authority, and his liability is not necessarily measured by the contract, but embraces all injury resulting from his want of power." Hyman v. Caspary, 117 NYS 966, 967.
[b] **Implied warranty of same effect as if express.**—The warranty which the law implies in the case of an assumed agent depends on the position of the parties and on the nature and effect of the representation; but, when ascertained as a matter of fact, the legal effect is the same as if the warranty had been express. Cherry v. Colonial Bank, L. R. 3 P. C. 24, 6 Moore P. C. N. S. 235, 16 Reprint 714.
[c] **Breach of warranty of authority is not shown** by proving that the principal, for whose benefit a purchase was made, is an infant, such contract being voidable and not void. Patterson v. Lippincott, 47 N. J. L. 457, 1 A 506.
41. U. S.—Williams v. De Soto Oil Co., 213 Fed. 194; Kent v. Addicks, 126 Fed. 112, 60 CCA 660.
Ala.—Gillaspie v. Wesson, 7 Port. 454, 31 AmD 715.
Ark.—Little Rock Furniture Mfg.

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ing to some decisions, his liability is that of principal.[42]

Acts in excess of authority. The position of an authorized agent who undertakes to act or contract on behalf of his principal in excess of the authority conferred upon him differs from that of one who acts with knowledge that he has no authority only in the degree of moral wrong and not in the degree of injury,[43] as the agent's warranty of authority embraces not only the existence of the authority but also its sufficiency to cover the contract which he attempts to make, and if, whether in good faith or otherwise, he acts in excess of an authority actually possessed he renders himself personally liable to the third person.[44]

The reason for the rule rendering the agent personally liable where he acts without or in excess of his authority is that he has been guilty of a wrong or omission depriving a party dealing with him of the benefit of the liability of the principal for whom he assumed to act.[45]

Cases in which agent liable classified. The cases in which an agent, acting without or in excess of authority, has been held personally liable are gen-

Co. v. Kavanaugh, 164 SW 289; Lasater v. Crutchfield, 92 Ark. 535, 123 SW 394.

Cal.—Knoch v. Haizlip, 163 Cal. 146, 124 P 998; Wallace v. Bentley, 77 Cal. 19, 18 P 788, 11 AmSR 231; Hall v. Crandall, 29 Cal. 567, 89 AmD 64. See also Moore v. Gould, 151 Cal. 723, 91 P 616.

Ill.—Chicago Chronicle Co. v. Franklin, 119 Ill. A. 384; McCormick v. Seeberger, 73 Ill. A. 87 [aff 178 Ill. 404, 53 NE 340].

Ind.—Terwilliger v. Murphy, 104 Ind. 32, 3 NE 404.

Iowa.—Young v. Inman, 146 Iowa 492, 125 NW 177; Klay v. Dallas Centre Bank, 122 Iowa 506, 98 NW 315; Andrews v. Tedford, 37 Iowa 314.

Kan.—Simmonds v. Long, 80 Kan. 155, 101 P 1070, 23 LRANS 553.

La.—Dodd v. Bishop, 30 La. Ann. 1178; Clay v. Oakley, 5 Mart. N. S. 137.

Mass.—Conant v. Alvord, 166 Mass. 311, 44 NE 250; Boston, etc., R. Co. v. Richardson, 135 Mass. 473; Donahoe v. Emery, 9 Metc. 63.

Minn.—Skaaraas v. Finnegan, 32 Minn. 107, 19 SW 729; Pratt v. Beaupre, 13 Minn. 187.

Mo.—Lingenfelder v. Leschen, 134 Mo. 55, 34 SW 1089; Byars v. Dooers, 20 Mo. 284.

N. J.—Patterson v. Lippincott, 47 N. J. L. 457, 1 A 506, 54 AmR 178.

N. Y.—Dung v. Parker, 52 N. Y. 494; Ætna L. Ins. Co. v. Pelham, 59 Misc. 225, 110 NYS 220; Bloodgood v. Short, 50 Misc. 286, 98 NYS 775; Klotz v. Gordon, 117 NYS 240; Palmer v. Stephens, 1 Den. 471; Mott v. Hicks, 1 Cow. 513, 13 AmD 550; White v. Skinner, 13 Johns. 307, 7 AmD 381; Dusenbury v. Ellis, 3 Johns. Cas. 70, 2 AmD 144.

Pa.—Stiteler v. Ditzenberger, 45 Pa. Super. 266; Williams v. Hipple, 17 Pa. Super. 81, 8 Del. Co. 197.

Philippine.—Herranz v. Ker, 8 Philippine 162.

S. D.—Bliss v. Tidrick, 25 S. D. 533, 127 NW 852, AnnCas1912C 671, 32 LRANS 854.

Utah.—Roberts v. Tuttle, 36 Utah 614, 634, 105 P 916 [cit Cyc].

W. Va.—Haupt v. Vint, 68 W. Va. 657, 70 SE 702, 34 LRANS 518 and note.

Eng.—Cherry v. Colonial Bank, L. R. 3 P. C. 24, 6 Moore P. C. N. S. 235, 16 Reprint 714; Halbot v. Lens, [1901] 1 Ch. 344; In re National Coffee Palace Co., 24 Ch. D. 367; Godwin v. Francis, L. R. 5 C. P. 295; Simons v. Patchett, 7 E. & B. 568, 90 ECL 568, 119 Reprint 1357; Eastwood v. Bain, 3 H. & N. 738; Hughes v. Graeme, 33 L. J. Q. B. 335.

Ont.—Eckstein v. Whitehead, 10 U. C. C. P. 65.

"An agent is undoubtedly personally liable in case of a fraudulent misrepresentation of authority. He is also personally liable if he has no authority and knows it, but nevertheless makes the contract as having such authority, and this for the reason that he induces the other party to enter into the contract by what amounts to a misrepresentation of a fact peculiarly within his own knowledge, and he must be considered as holding himself out as one having authority to contract, and as guaranteeing the consequences arising from any want of such authority. And the courts have also held that, when a party making a contract bona fide believes that such authority is vested in him, but as a matter of fact has no such authority, he is still personally liable upon the contract. In this last case, while it is quite true that the agent is not actuated by any fraudulent motive, nor has he made any statements which he knows to be untrue, yet it is a wrong differing only in degree from a case where he entered into a contract when he had no authority and knew it, for the effect upon a third party with whom he deals is the same." Williams v. De Soto Oil Co., 213 Fed. 194, 197 [quot Cyc].

[a] **Nature of liability.**—"This promise is not a part of the agreement supposed to have been entered into with the principal, but independent thereof, and tantamount to an implied warranty that, if a third party will enter into a contract with the agent on behalf of his principal, he will indemnify such party against any loss that he may sustain, if it shall be ascertained that he does not possess the measure of authority which he assumes. Such warranty being impliedly given, it cannot be said that in enforcing it the court makes a new contract for the agent and a third party." Anderson v. Adams, 43 Or. 621, 626, 74 P 215. See also infra § 479.

[b] **Indemnity.**—Whenever persons assume the character of duly authorized agents they must prove their agency or indemnify third parties against the consequence of its absence. Letellier v. Boivin, 16 Que. Super. 428.

[c] **When cause of action accrues.**—The third person may repudiate the contract on learning of the assumed agent's lack of authority and immediately hold him responsible without waiting for the time when an action might be instituted on the contract itself. White v. Madison, 26 N. Y. 117.

42. See infra § 480.

43. Ware v. Morgan, 67 Ala. 461; Hamburg Bank v. Wray, 35 S. C. L. 87, 51 AmD 659; Smout v. Ilbery, 12 L. J. Exch. 357.

44. Ala.—Crawford v. Barkley, 18 Ala. 270; Lazarus v. Shearer, 2 Ala. 718.

Ark.—Dale v. Donaldson Lumber Co., 48 Ark. 188, 2 SW 703, 3 AmSR 224.

Colo.—Charles v. Eshleman, 5 Colo. 107.

Hawaii.—McKeague v. Helen, 3 Hawaii 328.

Ill.—Sheridan v. Pease, 93 Ill. A. 219; Walker v. Haughey, 25 Ill. A. 135; Clay v. Clay, 23 Ill. A. 109.

Ind.—Lewis v. Reed, 11 Ind. 239; Pitman v. Kintner, 5 Blackf. 250, 33 AmD 461; Deming v. Bullitt, 1 Blackf. 241.

Iowa.—Groeltz v. Armstrong, 125 Iowa 39, 99 NW 128; Thilmany v. Iowa Paper Bag Co., 108 Iowa 357, 79 NW 261, 75 AmSR 259.

Ky.—Sanford v. McArthur, 18 B. Mon. 411.

La.—Merritt v. Wright, 19 La. Ann. 91; Richie v. Bass, 15 La. Ann. 668.

Md.—Keener v. Harrod, 2 Md. 63, 56 AmD 706.

Mich.—White v. Taylor, 113 Mich. 543, 71 NW 871; Knickerbocker v. Wilcox, 83 Mich. 200, 47 NW 123, 21 AmSR 595.

Miss.—Brown v. Johnson, 20 Miss. 398, 51 AmD 118.

Mo.—Queen City Furniture, etc., Co. v. Crawford, 127 Mo. 356, 30 SW 163; McClenticks v. Bryant, 1 Mo. 598, 14 AmD 310; Bradshaw v. Cochran, 91 Mo. A. 294; Anderson v. Stapel, 80 Mo. A. 115; Myers Tailoring Co. v. Keeley, 58 Mo. A. 491. Compare Mathews v. Martin, 177 Mo. A. 379, 164 SW 154 (holding that where an agent of an express company without authority told a shipper, who had lost a shipment of materials made to comply with a contract, to go ahead and make them again and charge them to the company, the agent could not be held personally responsible as for an unauthorized contract for the purchase of goods, since it was not a sale of goods, but merely a method of settling the loss).

N. J.—Tinken v. Tallmadge, 54 N. J. L. 117, 22 A 996.

N. Y.—Taylor v. Nostrand, 134 N. Y. 108, 31 NE 246; Baltzen v. Nicolay, 53 N. Y. 467; Luckes v. Meserole, 132 App. Div. 20, 116 NYS 350; Van Valkenburgh v. Thomasville, etc., R. Co., 4 NYS 782; Feeter v. Heath, 11 Wend. 477; Meech v. Smith, 7 Wend. 315.

Or.—Anderson v. Adams, 43 Or. 621, 74 P 215; Cochran v. Baker, 34 Or. 555, 52 P 520, 56 P 641.

Pa.—Hopkins v. Everly, 150 Pa. 117, 24 A 624; Kroeger v. Pitcairn, 101 Pa. 311, 47 AmR 718; Layng v. Stewart, 1 Watts & S. 222; Hampton v. Speckenagle, 9 Serg. & R. 212, 11 AmD 704; Stiteler v. Ditzenberger, 45 Pa. Super. 266; Wolff v. Wilson, 28 Pa. Super. 511; In re Dripps, 6 PaLJ 563, 4 PaLJR 87.

S. C.—Danforth v. Timmerman, 65 S. C. 259, 43 SE 678.

Tex.—Chaison v. Beauchamp, 12 Tex. Civ. A. 109, 34 SW 308.

Utah.—Roberts v. Tuttle, 36 Utah 614, 634, 105 P 916 [cit Cyc].

Vt.—Roberts v. Button, 14 Vt. 195.

Wis.—McCurdy v. Rogers, 21 Wis. 197, 91 AmD 468.

Eng.—Jones v. Downman, 4 Q. B. 235 note, 45 ECL 235 note, 114 Reprint 887 note; Weeks v. Propert, L. R. 8 C. P. 427; Simons v. Patchett, 7 E & B 568, 90 ECL 568, 119 Reprint 1357; East India Co. v. Hensley, 1 Esp. 112; Reid v. Dreaper, 6 H. & N. 813; Parrot v. Wells, 2 Vern. Ch. 127, 23 Reprint 691.

[a] **Liability not joint.**—If the agent exceeds his authority and makes himself liable, his principal is not jointly liable with him. Walker v. Haughey, 25 Ill. A. 135.

45. Schloss v. McIntyre, 147 Ala. 557, 41 S 11; Ware v. Morgan, 67 Ala. 461; Weeks v. Propert, L. R. 8 C. P. 427; Collen v. Wright, 8 E. & B. 647, 92 ECL 647, 120 Reprint 241, 2 ERC 484; Smout v. Ilbery, 12 L. J. Exch. 357.

[a] **Other statements of reason for rule.**—(1) "The rule, that the agent is liable when he acts without authority, is founded upon the supposition, that there has been some wrong, or omission on his part, either in misrepresenting, or in affirming, or concealing the authority under which he assumes to act." Hall v. Lauderdale, 46 N. Y. 70, 75. (2) "The agent,

erally classified as follows: (1) Where the agent makes a false representation of his authority with intent to deceive; (2) where with knowledge of his want of authority but without intending any fraud he assumes to act as though he were fully authorized; and (3) where he undertakes to act honestly believing that he has authority when in fact he has not.[46]

[§ 477] **(b) Where Agent Has Knowledge of Want of Authority.** Where an agent with knowledge of his want of authority assumes to act or contract as agent of another he is personally liable to the person with whom he deals,[47] regardless of whether in so doing he acts without intending any wrong,[48] or whether he falsely represents his authority with intent to deceive.[49]

[§ 478] **(c) Where Agent Believes He Has Authority.** Where a person acts or contracts as agent for another, without authority to do so, although honestly believing that he has such authority, and thereby causes an injury to a third person who has in good faith relied upon the correctness of his position as agent, he will be personally liable for such injury, notwithstanding he has acted in good faith.[50] While the liability of an agent acting upon a forged power of attorney which he supposed to be

by undertaking to act for another as his principal, tacitly and impliedly represents himself to be authorized as a matter of fact to so act, and becomes liable if it appears that he assumed as true that which he did not know to be so. The reason upon which the liability is founded is that the party dealing with such a supposed agent is deprived of any remedy upon the contract against the principal. The contract, though in form that of the principal, is not his in fact, and, of course, is not susceptible of enforcement against him; and, as the loss must fall somewhere, it is but a rule of justice that it should be borne by him whose acts made it possible." Cochran v. Baker, 34 Or. 555, 562, 52 P 520, 56 P 641. (3) "The reason why the agent is liable in such case to the person with whom he contracts is that the party dealing with him is deprived of any remedy against the principal. The contract, though apparently with the principal, is not his, in fact, and it is but just that the loss should be borne by the agent who contracted without authority. . . . The liability of the agent rests on the ground that he warrants his authority, not that the contract is to be deemed his own; and on the question of damages the agent's liability is not necessarily measured by the contract, but embraces all injury resulting from his want of power, which was held to include the costs of an unsuccessful action against the alleged principal." Campbell v. Muller, 19 Misc. 189, 192, 43 NYS 233. (4) "Although no fraud or wrongful motive can be imputed to the agent, still his act is an affirmation that he has authority to make the contract, and he may justly be held responsible for the truth of it; and it is no more than reasonable that he should suffer the consequences of his mistake, rather than the party who is misled by it, because, before holding himself out as such agent, it is his duty to ascertain whether his claim so to act is well founded or not; and he surely can not be heard to complain that others have confided in his assertion of authority, and upon the strength of it have entered into reciprocal engagements with him. Even if wholly innocent of any wrongful purpose, his case falls within the familiar principle, that when one of two innocent persons must suffer a loss, it ought to be borne by him who has been the means of causing it, by inducing the other to confide in the truth of his representations." Weare v. Gove, 44 N. H. 196, 198 [quot Farmers' Co-operative Trust Co. v. Floyd, 47 Oh. St. 525, 539, 26 NE 110, 21 AmSR 846, 12 LRA 346].

46. Ala.—Thomas v. Drennen, 112 Ala. 670, 20 S 848.
N. H.—Weare v. Gove, 44 N. H. 196.
Pa.—Kroeger v. Pitcairn, 101 Pa. 311, 47 AmR 718; Wolff v. Wilson, 28 Pa. Super. 511.
Tenn.—Woodard v. Bird, 105 Tenn. 671, 59 SW 143.
Eng.—Smout v. Ilbery, 12 L. J. Exch. 357.

47. U. S.—Patrick v. Bowman, 149 U. S. 411, 13 SCt 31, 37 L. ed. 790; Williams v. De Soto Oil Co., 213 Fed. 194.
Ala.—Ware v. Morgan, 67 Ala. 461.
Ark.—Dale v. Donaldson Lumber Co., 48 Ark. 188, 2 SW 703, 3 AmSR 224.
Cal.—Tuite v. Wakelee, 19 Cal. 692.
Colo.—Charles v. Eshleman, 5 Colo. 107.
Ill.—Wallace v. Bozarth, 223 Ill. 339, 79 NE 57 [aff 123 Ill. A. 624]; Macdonald v. Bond, 195 Ill. 122, 62 NE 881; Frankland v. Johnson, 147 Ill. 520, 35 NE 480, 37 AmSR 234; Roby v. Cossit, 78 Ill. 638; Duncan v. Niles, 32 Ill. 532, 83 AmD 293; Kadish v. Bullen, 10 Ill. A. 566.
Iowa.—Funk v. Church, 132 Iowa 1, 109 NW 286.
La.—Levy v. Lane, 38 La. Ann. 252; Hewitt v. Roudebush, 24 La. Ann. 254; Richie v. Bass, 15 La. Ann. 668.
Md.—Keener v. Harrod, 2 Md. 63, 56 AmD 706.
Mass.—Bartlett v. Tucker, 104 Mass. 336, 6 AmR 240; Jefts v. York, 10 Cush. 392.
Mich.—Solomon v. Penoyar, 89 Mich. 11, 50 NW 644.
Mo.—Wright v. Baldwin, 51 Mo. 269.
N. H.—Weare v. Gove, 44 N. H. 196; Woodes v. Dennett, 9 N. H. 55; Grafton Bank v. Flanders, 4 N. H. 239.
N. Y.—White v. Madison, 26 N. Y. 117; New York Bank-Note Co. v. McKeige, 31 App. Div. 188, 52 NYS 597; Parker v. Knox, 60 Hun 550, 15 NYS 256; Noe v. Gregory, 7 Daly 283; Campbell v. Muller, 19 Misc. 189, 43 NYS 233; Lord v. Van Gelder, 16 Misc. 22, 37 NYS 668; Kip v. Howes, 39 HowPr 139; Smith v. Teets, 1 NYCityCt 457; Sinclair v. Jackson, 8 Cow. 543.
N. D.—Kennedy v. Stonehouse, 13 N. D. 232, 100 NW 258.
Oh.—Farmers' Co-Operative Trust Co. v. Floyd, 47 Oh. St. 525, 26 NE 110, 21 AmSR 846, 12 LRA 346 and note.
Pa.—Lane v. Corr, 156 Pa. 250, 25 A 830; Lasher v. Stinson, 145 Pa. 80, 23 A 552; Kroeger v. Pitcairn, 101 Pa. 311, 47 AmR 718; Layng v. Stewart, 1 Watts & S. 222; Wolff v. Wilson, 28 Pa. Super. 511.
S. C.—Hamburg Bank v. Wray, 35 S. C. L. 87, 51 AmD 659.
Tenn.—Luttrell v. White, (Ch. A.) 42 SW 61.
Utah.—Roberts v. Tuttle, 36 Utah 614, 634, 105 P 916 [cit Cyc].
Vt.—Clark v. Foster, 8 Vt. 98.
Wash.—McReavy v. Eshelman, 4 Wash. 757, 31 P 35.
Wis.—Oliver v. Morawetz, 97 Wis. 332, 72 NW 877.
Eng.—Beattie v. Ebury, L. R. 7 Ch. 777 [aff L. R. 7 H. L. 102]; Jenkins v. Hutchinson, 13 Q. B. 744, 66 ECL 744, 116 Reprint 1448; Polhill v. Walter, 3 B. & Ad. 114, 23 ECL 59, 110 Reprint 43; Eaton v. Bell, 5 B. & Ald. 34, 7 ECL 30, 106 Reprint 1106; Randell v. Trimen, 18 C. B. 786, 86 ECL 786, 139 Reprint 1580; Collen v. Wright, 8 E. & B. 647, 92 ECL 647, 120 Reprint 241, 2 ERC 484; Smout v. Ilbery, 12 L. J. Exch. 357.

48. Ala.—Gillaspie v. Wesson, 7 Port. 454, 31 AmD 715.
Ill.—Welker v. Hinze, 16 Ill. A. 326.
Ind.—Newman v. Sylvester, 42 Ind. 106.
Iowa.—Groeltz v. Armstrong, 125 Iowa 39, 99 NW 128.
Ky.—McKown v. Gettys, 80 SW 169, 25 KyL 2070; Murray v. Carothers, 1 Metc. 71.
Mass.—Conant v. Alvord, 166 Mass. 311, 44 NE 250.
Minn.—Newport v. Smith, 61 Minn. 277, 63 NW 734.
Mo.—Lingenfelder v. Leschen, 134 Mo. 55, 34 SW 1089; Wright v. Baldwin, 51 Mo. 269; Duffy v. Mallinkrodt, 81 Mo. A. 449; Gestring v. Fisher, 46 Mo. A. 603.
N. H.—Weare v. Gove, 44 N. H. 196; Pettingill v. McGregor, 12 N. H. 179; Woodes v. Dennett, 9 N. H. 55; Underhill v. Gibson, 2 N. H. 352, 9 AmD 82.
N. Y.—Simmons v. More, 100 N. Y. 140, 2 NE 640; Baltzen v. Nicolay, 53 N. Y. 467; Hall v. Lauderdale, 46 N. Y. 70; Campbell v. Porter, 46 App. Div. 628, 61 NYS 712; Bartholomae v. Kauffmann, 47 N. Y. Super. 552 [aff 91 N. Y. 654]; Campbell v. Muller, 19 Misc. 189, 43 NYS 233.
N. C.—Fowle v. Kerchner, 87 N. C. 49.
Pa.—Stiteler v. Ditzenberger, 45 Pa. Super. 266.
S. C.—Yagrone v. Timmerman, 46 S. C. 372, 24 SE 290; Hamburg Bank v. Wray, 35 S. C. L. 87, 5 AmD 659.
Vt.—Clark v. Foster, 8 Vt. 98.
W. Va.—Cobb v. Glenn Boom, etc., Co., 57 W. Va. 49, 49 SE 1005, 110 AmSR 734.
N. S.—Outram v. Doyle, 13 N. S. 1.
See Benjamin v. Mattler, 3 Colo. A. 227, 32 P 837.
Compare Thomson v. Playfair, 2 DomLR 37, 25 Ont. L. 365, 3 OntWN 506, 20 OntWR 867 (holding that there is no cause of action for breach of implied warranty of authority of an alleged agent where there is no misrepresentation of the fact of authority, for example, where the person signing in a representative capacity tells the person with whom he is dealing that he has no authority, but the negotiations proceed in anticipation of their being confirmed by the principal).

49. Ill.—McCormick v. Seeberger, 73 Ill. A. 87 [aff 178 Ill. 404, 53 NE 340].
Mo.—Duffy v. Mallinkrodt, 81 Mo. A. 449.
Pa.—Stiteler v. Ditzenberger, 45 Pa. Super. 266.
Wis.—Oliver v. Morawetz, 97 Wis. 332, 72 NW 877.
Eng.—Starkey v. Bank of England, [1903] A. C. 114; Beattie v. Ebury, L. R. 7 Ch. 777 [aff L. R. 7 H. L. 102]; Randell v. Trimen, 18 C. B. 786, 86 ECL 786, 139 Reprint 1580; Johnson v. Ogilby, 3 P. Wms. 277, 24 Reprint 1064.
Man.—Maneer v. Sanford, 15 Man. 181.

50. U. S.—Williams v. De Soto Oil Co., 213 Fed. 194.
Ala.—Ware v. Morgan, 67 Ala. 461; Belisle v. Clark, 49 Ala. 98.
Colo.—Charles v. Eschleman, 5 Colo. 114.
Ga.—Rogers v. Durrence, 10 Ga. A. 657, 73 SE 1083.
Ill.—McCormick v. Seeberger, 73 Ill. A. 87 [aff 178 Ill. 404, 53 NE 340];

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genuine has sometimes been doubted in dicta in cases involving a different state of facts,[51] it has been held in cases directly involving the point that the agent is liable, although he acted in good faith and in entire ignorance of the forgery.[52]

[§ 479] (d) Nature of Agent's Liability—aa. **Agent Not Liable on Contract.** By the weight of authority an agent is not liable upon a contract which he enters into without or in excess of his authority unless it contains apt words to bind him personally.[53] The reason assigned for this view is that it is not the contract of the principal, as the

Rice v. Western Fuse, etc., Co., 64 Ill. A. 603.

Ind.—Mendenhall v. Stewart, 18 Ind. A. 262, 47 NE 943.

Iowa.—Groeltz v. Armstrong, 125 Iowa 39, 99 NW 128 (holding that the liability of the assumed agent does not depend on whether the representations were intentionally false, but is absolute in every case where the third person was not chargeable with notice of the want of authority).

Ky.—Wells v. Maley, 6 KyL 77.

Mass.—May v. Western Union Tel. Co., 113 Mass. 90; Bartlett v. Tucker, 104 Mass. 336, 6 AmR 240; Jefts v. York, 10 Cush. 392.

Mo.—Lingenfelder v. Leschen, 134 Mo. 55, 34 SW 1089 (holding that the fact that the agent acted in the utmost good faith, and honestly believed that he had the necessary power, makes no difference).

N. H.—Weare v. Gove, 44 N. H. 196; Woodes v. Dennett, 9 N. H. 55.

N. Y.—Simmons v. More, 100 N. Y. 140, 2 NE 640; White v. Madison, 26 N. Y. 117; Noe v. Gregory, 7 Daly 283; Nelligan v. Campbell, 20 NYS 234; Rossiter v. Rossiter, 8 Wend. 494, 24 AmD 62.

Oh.—Farmers' Co-Operative Trust Co. v. Floyd, 47 Oh. St. 525, 26 NE 110, 21 AmSR 846, 12 LRA 346 and note.

Or.—Cochran v. Baker, 34 Or. 555, 52 P 520, 56 P 641.

Pa.—Kroeger v. Pitcairn, 101 Pa. 311, 47 AmR 718; Stiteler v. Ditzenberger, 45 Pa. Super. 266; Simpson v. Kerkeslager, 41 Pa. Super. 347.

S. C.—Lagrone v. Timmerman, 46 S. C. 372, 24 SE 290; Hamburg Bank v. Wray, 35 S. C. L. 87, 51 AmD 659; Edings v. Brown, 30 S. C. L. 255.

Utah.—Roberts v. Tuttle, 36 Utah 614, 634, 105 P 916.

Wis.—McCurdy v. Rogers, 21 Wis. 197, 91 AmD 468.

Eng.—Starkey v. Bank of England, [1903] A. C. 114; Firbank v. Humphreys, 18 Q. B. D. 54; Richardson v. Williamson, L. R. 6 Q. B. 276; Lewis v. Nicholson, 18 Q. B. 503, 83 ECL 503, 118 Reprint 190; Oliver v. Bank of England, [1902] 1 Ch. 610 [aff [1901] 1 Ch. 652]; Collen v. Wright, 8 E. & B. 647, 92 ECL 647, 120 Reprint 241, 2 ERC 484 [aff 7 E. & B. 301, 90 ECL 301, 119 Reprint 1259]; Smout v. Ilbery, 12 L. J. Exch. 357. At first reading, Derry v. Peek, 12 App. Cas. 337, 12 ERC 250, appears to be inconsistent with the doctrine stated in the text, but what was actually decided in that case was that in the form of action there brought, which was an action for deceit, recovery could not be had without proof of fraud. As was said in Oliver v. Bank of England, supra, the principal laid down in Collen v. Wright, supra, is not affected by the decision in Derry v. Peek, supra.

Ont.—Selkirk v. Windsor, etc., R. Co., 20 Ont. L. 290, 15 OntWR 87.

[a] **Reason for rule.**—(1) "The fact that the professed agent honestly thinks that he had authority affects the moral character of his act; but his moral innocence, in so far as the person he has induced to contract is concerned, in no way aids him, or alleviates the inconvenience and damage which such person sustains. If one of the two in such case is to suffer, it ought not to be the person who has been guilty of no error, but he who, by an untrue assertion believed and acted upon as he intended it should be, and touching a subject within his peculiar knowledge and as to which he gave the other party no opportunity of judging for himself, has brought about the damage." Collen v. Wright, 6 Wkly. Rep. 123, 124, 2 ERC 484. (2) "The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise." Collen v. Wright, 8 E. & B. 647, 657, 92 ECL 647, 120 Reprint 241, 2 ERC 484 [aff 7 E. & B. 301, 90 ECL 301, 119 Reprint 1259].

51. Kroeger v. Pitcairn, 101 Pa. 311, 47 AmR 718; Polhill v. Walter, 3 B. & Ad. 114, 23 ECL 59, 110 Reprint 43.

52. Starkey v. Bank of England, [1903] A. C. 114; Oliver v. Bank of England, [1902] 1 Ch. 610 [aff [1901] 1 Ch. 652].

53. Ark.—Dale v. Donaldson Lumber Co., 48 Ark. 188, 2 SW 703, 3 AmSR 224.

Cal.—Senter v. Monroe, 77 Cal. 347, 19 P 580; Lander v. Castro, 43 Cal. 497; Hall v. Crandall, 29 Cal. 567, 89 AmD 64; Sayre v. Nichols, 7 Cal. 535, 68 AmD 280.

Conn.—Taylor v. Shelton, 30 Conn. 122; Ogden v. Raymond, 22 Conn. 379, 58 AmD 429; Johnson v. Smith, 21 Conn. 627.

Fla.—Tedder v. Riggin, 65 Fla. 153, 61 S 244.

Ill.—Hancock v. Yunker, 83 Ill. 208, 214; Duncan v. Niles, 32 Ill. 532, 83 AmD 293; McCormick v. Seeberger, 73 Ill. A. 87 [aff 178 Ill. 404, 53 NE 340]; Rice v. Western Fuse, etc., Co., 64 Ill. A. 603; Neufeld v. Beidler, 37 Ill. A. 84. Contra Frankland v. Johnson, 147 Ill. 520, 35 NE 480, 37 AmSR 234 (holding the agent liable, although there were no apt words to bind him). This case, however, was decided upon the authority of Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 AmD 550, which has since been repudiated in New York (see New York cases infra this note), and upon the authority of Wheeler v. Reed, 36 Ill. 81, concerning which case the court, in Hancock v. Yunker, supra, said: "The question under consideration was not before the court in Wheeler v. Reed, 36 Ill. 91 . . . and what was there said affecting it was by way of argument merely, and, so far as intended to announce a principle, must be understood as restricted to cases where there are apt words in the instrument to charge the agent personally, by rejecting the words descriptive of his agency as surplusage."

Iowa.—Doolittle v. Murray, 134 Iowa 536, 111 NW 999; Groeltz v. Armstrong, 125 Iowa 39, 99 NW 128; Thilmany v. Iowa Paper Bag Co., 108 Iowa 357, 79 NW 261, 75 AmSR 259; Willett v. Young, 82 Iowa 292, 47 NW 990, 11 LRA 115; Burlington First Nat. Bank v. Owen, 52 Iowa 107, 2 NW 980. See also Andrews v. Tedford, 37 Iowa 314 (holding that an agent who, acting without authority, makes a contract not binding on his principal is himself bound. The instrument upon which defendant was sued in this case, however, contained apt words to bind him personally, and furthermore the question of the nature of the liability was not before the court, whose holding was manifestly intended to be merely a general statement of the rule of liability of the agent).

Ky.—McKown v. Gettys, 80 SW 169, 25 KyL 2070. But see Wells v. Maley, 5 KyL 853.

Me.—Simpson v. Garland, 76 Me. 202; Noyes v. Loring, 55 Me. 408; Stetson v. Patten, 2 Me. 358, 11 AmD 111; Harper v. Little, 2 Me. 14, 11 AmD 25.

Mass.—Bartlett v. Tucker, 104 Mass. 336, 6 AmR 240; Draper v. Massachusetts Steam Heating Co., 5 Allen 338; Abbey v. Chase, 6 Cush. 54; Jefts v. York, 4 Cush. 371, 50 AmD 791; Ballou v. Talbot, 16 Mass. 461, 8 AmD 146; Long v. Colburn, 11 Mass. 97, 6 AmD 160; Hatch v. Smith, 5 Mass. 42; Tippets v. Walker, 4 Mass. 595.

Mich.—Hallett v. Gordon, 128 Mich. 364, 87 NW 261; Solomon v. Penoyar, 89 Mich. 11, 50 NW 644. But see Holland v. Stewart, 2 Mich. N. P. 39.

Minn.—Skaaras v. Finnegan, 32 Minn. 107, 19 NW 729; Sheffield v. Ladue, 16 Minn. 388, 10 AmR 145; Sanborn v. Neal, 4 Minn. 126, 77 AmD 502. In Rollins v. Phelps, 5 Minn. 463, apparently contra, and asserting that the liability of the agent rests on the contract, the contract sued on did contain apt words to bind the agent. The decision therefore comes well within the rule stated.

Mo.—Wright v. Baldwin, 51 Mo. 269; Coffman v. Harrison, 24 Mo. 524; Byars v. Dooers, 20 Mo. 283; Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. A. 135. In Myers Tailoring Co. v. Keeley, 58 Mo. A. 491, the court lays down the broad rule that an agent who fails to bind his principal binds himself. The agent in that case, however, contracted in his own name, which brings the decision in line with the better rule followed in the other Missouri cases.

Nebr.—Brong v. Spence, 56 Nebr. 638, 77 NW 54; Huffman v. Newman, 55 Nebr. 713, 76 NW 409; Cole v. O'Brien, 34 Nebr. 68, 51 NW 316, 33 AmSR 616.

N. H.—Weare v. Gove, 44 N. H. 196; Moor v. Wilson, 26 N. H. 332; Pettingill v. McGregor, 12 N. H. 179; Savage v. Rix, 9 N. H. 263; Woodes v. Dennett, 9 N. H. 55. Contra Moor v. Wilson, 26 N. H. 332; Grafton Bank v. Flanders, 4 N. H. 239 (holding a person who forged another's name to an instrument liable upon the instrument itself, although it contained no apt words to bind him, the decision seeming to be based upon the theory that one doing business under an assumed name should be held as if he had contracted in his own proper name); Underhill v. Gibson, 2 N. H. 352, 9 AmD 82 (holding that where an agent contracts in writing without authority he is liable on the writing itself. In this case, however, there were no words used proper to bind the principal, but only the agent himself).

N. J.—Patterson v. Lippincott, 47 N. J. L. 457, 1 A 506, 54 AmR 178 [overr in effect Bay v. Cook, 22 N. J. L. 343, which held the agent directly upon the contract, an oral one, and which followed Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 AmD 550. The doctrine of Mott v. Hicks, however, has been repudiated in New York. See New York cases infra this note]; Tuttle v. Ayres, 3 N. J. L. 682.

N. Y.—Taylor v. Nostrand, 134 N. Y. 108, 31 NE 246; Simmons v. More, 100 N. Y. 140, 2 NE 640; Baltsen v. Nicolay, 53 N. Y. 467; Dung v. Parker, 52 N. Y. 494 [rev 3 Daly 89]; White v. Madison, 26 N. Y. 117; Hegeman v. Johnson, 35 Barb. 200; Noe v. Gregory, 7 Daly 283; Campbell v. Muller, 19 Misc. 189, 43 NYS 233. The theory of liability upon the contract itself seems to have originated in this state (see Kennedy v. Stonehouse, 13 N. D. 232, 100 NW 258), and the earlier decisions all hold the agent upon this

assumed agent has no power to bind him, and it is not the contract of the agent, for in making it he did not attempt to bind himself,[54] and where no contract has been entered into the law will not undertake to create one.[55]

Nature of remedy. According to this rule the remedy against one assuming to act as the agent of another and undertaking in that capacity to make a contract binding upon his principal is in the nature of an action for deceit, or upon the breach of the implied warranty of his authority, according to the facts of the case,[56] although in some states it seems that no implied warranty of authority is recognized, and that the only action which may be brought is an action ex delicto for deceit, where the facts will warrant it.[57]

If the contract contains apt words to bind the agent personally he may of course be held liable directly on the contract.[58]

[§ 480] **bb. Agent Liable on Contract.** Accordground even though the contract contains no apt words to bind him (Plumb v. Milk, 19 Barb. 74; Palmer v. Stephens, 1 Den. 471; Feeter v. Heath, 11 Wend. 477; Rossiter v. Rossiter, 8 Wend. 494, 24 AmD 62; Meech v. Smith, 7 Wend. 315; Mott v. Hicks, 1 Cow. 513, 13 AmD 550, a leading case often followed in other states; White v. Skinner, 13 Johns. 307, 7 AmD 381; Taft v. Brewster, 9 Johns. 334, 6 AmD 280; Dusenbury v. Ellis, 3 Johns. Cas. 70, 2 AmD 144). As stated in White v. Madison, 26 N. Y. 117, the authority of these cases was first somewhat shaken by the remarks of the judges who delivered the opinion in Walker v. State Bank, 9 N. Y. 582, and in the later cases this doctrine has been repudiated and the agent held liable only when there are words apt to bind him personally, that is, when the contract can be construed as his own; otherwise the remedy is by action for breach of warranty or for deceit.

N. C.—Le Roy v. Jacobosky, 136 N. C. 443, 48 SE 796, 67 LRA 977; Delius v. Cawthorn, 13 N. C. 90.

Oh.—Farmers' Co-Operative Trust Co. v. Floyd, 47 Oh. St. 525, 26 NE 110, 21 AmSR 846, 12 LRA 346 and note.

Okl.—American Surety Co. v. Morton, 32 Okl. 687, 689, 122 P 1103, 39 LRANS 702 [quot Cyc].

Or.—Anderson v. Adams, 43 Or. 621, 74 P 215; Cochran v. Baker, 34 Or. 555, 52 P 520, 56 P 641.

Pa.—Stephenson v. Dodson, 36 Pa. Super. 343; Hopkins v. Mehaffy, 11 Serg. & R. 126. But see Kroeger v. Pitcairn, 101 Pa. 311, 47 AmR 718; McConn v. Lady, 10 WklyNC 493 (holding the agent liable upon a contract wholly made in the name of the principal, upon which the name of the agent did not appear). And see Hampton v. Speckenagle, 9 Serg. & R. 212, 11 AmD 704.

Tex.—Wimple v. Patterson, (Civ. A.) 117 SW 1034.

Wash.—McReavy v. Eshelman, 4 Wash. 757, 31 P 35.

W. Va.—Haupt v. Vint, 68 W. Va. 657, 660, 70 SE 702, 34 LRANS 518 and note [quot Cyc]; Johnson v. Welch, 42 W. Va. 18, 24 SE 585.

Wis.—Oliver v. Morawetz, 97 Wis. 332, 72 NW 877; McCurdy v. Rogers, 21 Wis. 197, 91 AmD 468.

Eng.—Richardson v. Williamson, L. R. 6 Q. B. 276; Lewis v. Nicholson, 18 Q. B. 503, 83 ECL 503, 118 Reprint 190; Jenkins v. Hutchinson, 13 Q. B. 744, 66 ECL 744, 116 Reprint 1448; Jones v. Downman, 4 Q. B. 235 note, 45 ECL 235 note, 114 Reprint 887 note; Polhill v. Walter, 3 B. & Ad. 114, 23 ECL 59, 110 Reprint 43; Thomas v. Hewes, 2 Cromp. & M. 519; Downman v. Jones, 9 Jur. 454; Wilson v. Barthrop, 1 Jur. 949. See Smout v. Ilbery, 12 L. J. Exch. 357.

[a] **Discussion of rule.**—"It is not unfrequently laid down, as a rule of law, that, if an agent does not bind his principal, he binds himself; but this rule needs qualification, and can not be said to be universally true or correct. . . . If the form of the contract is such, that the agent personally covenants, and then adds his representative character, which he does not, in truth, sustain, his covenant remains personal and in force, and binds him, as an individual; but if the form of the contract is otherwise, and the language, when fairly interpreted, does not contain a personal undertaking or promise, he is not personally liable; for it is not his contract, and the law will not force it upon him. He may be liable, it is true, for tortious conduct, if he has knowingly or carelessly assumed to bind another, without authority; or, when making the contract, has concealed the true state of his authority, and falsely led others to repose in his authority; but, as we have said, he is not, of course, liable on the contract itself, nor, in any form of action whatever. The question in these cases, will be found to be one of construction of the language and meaning of the person who attempts to act for another, and is a question often attended with very great difficulty and doubt; but when the intention is ascertained, that intention should ever be the rule for deciding whose contract it is." Ogden v. Raymond, 22 Conn. 379, 385, 58 AmD 429.

[b] **In equity.**—Where the contract purports to be the contract of the principal only, it cannot be enforced against the agent in equity any more than at law. Hegeman v. Johnson, 35 Barb. (N. Y.) 200.

[c] **Where a person without authority executes an agreement for the sale of the land of another** and agrees that the title to the property shall be conveyed by a warranty deed and free from all liens and encumbrances, such agreement cannot be construed as a promise on the part of the agent himself to warrant the title, or that the person for whom he is acting has a title in fee at the time the contract is entered into; but is only an agreement on the part of the agent to sell the principal's interest in the land and that he will make a warranty deed thereto. Lingenfelder v. Leschen, 134 Mo. 55, 34 SW 1089.

54. Hall v. Crandall, 29 Cal. 567, 89 AmD 64; Noyes v. Loring, 55 Me. 408.

55. Thilmany v. Iowa Paper Bag Co., 108 Iowa 357, 79 NW 261, 75 AmSR 259; Le Roy v. Jacobosky, 136 N. C. 443, 48 SE 797, 67 LRA 977; Starkey v. Bank of England, [1903] A. C. 114; Lewis v. Nicholson, 18 Q. B. 503, 83 ECL 503, 118 Reprint 190.

56. U. S.—Kent v. Addicks, 126 Fed. 112, 60 CCA 660; New York, etc., Steamship Co. v. Harbison, 16 Fed. 681.

Conn.—Chieppo v. Chieppo, 90 A 940 (holding that an agent who in good faith makes a contract in the name of his principal, under the belief that he has authority so to do, is not liable where the contract is enforceable against his principal, but is liable on an implied warranty of authority in case the contract is not so enforceable); Taylor v. Shelton, 30 Conn. 122.

Fla.—Tedder v. Riggin, 65 Fla. 153, 61 S 244.

Ill.—Seeberger v. McCormick, 178 Ill. 404, 53 NE 340; Hancock v. Yunker, 83 Ill. 208.

Iowa.—Groeltz v. Armstrong, 125 Iowa 39, 99 NW 128; Thilmany v. Iowa Paper Bag Co., 108 Iowa 357, 79 NW 261, 75 AmSR 259.

Minn.—Newport v. Smith, 61 Minn. 277, 63 NW 734.

Mo.—Byars v. Doores, 20 Mo. 283.

Nebr.—Cole v. O'Brien, 34 Nebr. 68, 51 NW 316, 33 AmSR 616.

N. J.—Patterson v. Lippincott, 47 N. J. L. 457, 1 A 506, 54 AmR 178.

N. Y.—New York Bank Note Co. v. McKeige, 31 App. Div. 188, 52 NYS 597; Campbell v. Muller, 19 Misc. 189, 43 NYS 233.

N. C.—Russell v. Koonce, 104 N. C. 237, 10 SE 256.

Okl.—American Surety Co. v. Morton, 32 Okl. 687, 122 P 1103, 39 LRANS 702.

Wis.—Oliver v. Morawetz, 97 Wis. 332, 72 NW 877; McCurdy v. Rogers, 21 Wis. 197, 91 AmD 468.

Eng.—Starkey v. Bank of England, [1903] A. C. 114; Firbank v. Humphreys, 18 Q. B. D. 54; Lewis v. Nicholson, 18 Q. B. 503, 83 ECL 503, 118 Reprint 190; In re National Coffee Palace Co., 24 Ch. D. 367; Randell v. Trimen, 18 C. B. 786, 86 ECL 786, 139 Reprint 1580; Collen v. Wright, 7 E. & B. 301, 90 ECL 301, 119 Reprint 1259 [aff 8 E. & B. 647, 92 ECL 647, 120 Reprint 241, 2 ERC 484].

[a] **Form of action sufficient.**—"Either form of action will apprise him that the question to be litigated is his authority to act for the person whom he represented to be his principal; and he may come prepared to try that issue." Noe v. Gregory, 7 Daly (N. Y.) 283 [quot Campbell v. Muller, 19 Misc. 189, 43 NYS 233].

[b] **Where an action on the contract is unavailable,** relief may be had by an action for the deceit or a special action on the case. Roberts v. Button, 14 Vt. 195; Clark v. Foster, 8 Vt. 98.

[c] **Where an agent knew or ought to have known** when he made a contract in the name of his principal that he had no authority to make such contract, he could be sued for deceit by the person with whom the contract was made. Chieppo v. Chieppo, (Conn.) 90 A 940.

57. Gilmore v. Bradford, 82 Me. 547, 20 A 92; Teele v. Otis, 66 Me. 329; Noyes v. Loring, 55 Me. 408 [crit Dusenbury v. Ellis, 3 Johns. Cas. (N. Y.) 70, 2 AmD 144]; Stetson v. Patten, 2 Me. 358, 11 AmD 111; Harper v. Little, 2 Me. 14, 11 AmD 25; Bartlett v. Tucker, 104 Mass. 336, 6 AmR 240; Draper v. Massachusetts Steam Heating Co., 5 Allen (Mass.) 338; Abbey v. Chase, 6 Cush. (Mass.) 54; Jefts v. York, 10 Cush. (Mass.) 392, 4 Cush. 371, 50 AmD 791; Ballou v. Talbot, 16 Mass. 461, 8 AmD 146; Long v. Colburn, 11 Mass. 97, 6 AmD 160; Clark v. Foster, 8 Vt. 98. See also Webster v. Larned, 6 Metc. (Mass.) 522. But see Lewis v. Friend, (Mass.) 1 Dane Abr. 217.

[a] **Where the instrument executed without authority purports to be the contract of the principal,** the agent is not personally liable on the instrument, the remedy against him being an action on the case for false representations. People's Nat. Bank v. Dixwell, 217 Mass. 436, 105 NE 435.

58. Mass.—Tippets v. Walker, 4 Mass. 595.

Mo.—Queen City Furniture, etc., Co. v. Crawford, 127 Mo. 356, 30 SW 163; Blakely v. Bennecke, 59 Mo. 193; Coffman v. Harrison, 24 Mo. 524; Byars v. Dooers, 20 Mo. 283; Potter v. Bassett, 35 Mo. A. 417.

N. H.—Pettingill v. McGregor, 12 N. H. 179; Woodes v. Dennett, 9 N. H. 55.

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ing to some decisions, particularly in the earlier cases, an agent may be held personally liable on the contract itself and be compelled personally to answer or perform it as if it were his own, although it contains no apt words to bind him personally, but only to bind the principal,[59] and in some jurisdictions this rule is expressly provided for by statute.[60]

This rule is based upon the theory that the contract must have been intended to bind someone, and if not the principal then of necessity it must bind the agent.[61]

[§ 481] **(2) Nonexistent or Incompetent Principal.** An agent will be held personally liable where he professes to enter into a contract for a principal who is at the time nonexistent,[62] or legally incompetent or irresponsible,[63] even though in thus entering

N. C.—Hite v. Goodman, 21 N. C. 364; Delius v. Cawthorn, 13 N. C. 90.

Pa.—Layng v. Stewart, 1 Watts & S. 222.

[a] **Rejection of unauthorized part of contract.**—If a contract entered into by one assuming to act as the agent of another without having the requisite authority still contains apt words to charge the agent with a personal obligation when read without that which the agent had no right to put in it, he is bound to the performance of the contract. Byars v. Dooers, 20 Mo. 283; Weare v. Gove, 44 N. H. 196 (in which case this rule is applied, although from the language of the opinion it would seem that the court was deciding in accord with the rule stated infra § 480); Moor v. Wilson, 26 N. H. 332; Pettingill v. McGregor, 12 N. H. 179; Savage v. Rix, 9 N. H. 263, Woodes v. Dennett, 9 N. H. 55.

[b] **Where an agent covenants under his seal** for the act of the principal, although he describes himself as contracting for and on behalf of his principal, he is liable on his express covenant, whether he had the authority of the person he thus professes to bind or not. Williams v. Hipple, 17 Pa. Super. 81, 8 Del. Co. 197.

59. Ala.—Lazarus v. Shearer, 2 Ala. 718; Gillaspie v. Wesson, 7 Port. 454, 31 AmD 715.

Ind.—Terwilliger v. Murphy, 104 Ind. 32, 3 NE 404 (holding that where one person assumes to act as agent of another, but without authority to do so, he makes himself personally liable as a principal in the transaction). See also Pitman v. Kintner, 5 Blackf. 250, 33 AmD 461; McClure v. Bennett, 1 Blackf. 189, 12 AmD 223. But see Potts v. Henderson, 2 Ind. 327; McHenry v. Duffield, 7 Blackf. 41, 42 (where the court said: "No suit on the instrument before us can be sustained against the defendants, because it does not contain any acknowledgment by them individually. If they were authorized by the trustees to execute it, the suit should be against the trustee. If they were not so authorized, they are liable in case for acting in the matter without authority").

La.—Levy v. Lane, 38 La. Ann. 252; Hewitt v. Roudebush, 24 La. Ann. 254; Richie v. Bass, 15 La. Ann. 668.

S. C.—Hamburg Bank v. Wray, 35 S. C. L. 87, 51 AmD 659 [cit Edings v. Brown, 30 S. C. L. 255].

Vt.—Royce v. Allen, 28 Vt. 234; Roberts v. Button, 14 Vt. 195; Clark v. Foster, 8 Vt. 98; Proctor v. Webber, 1 D. Chipm. 371.

[a] **Agent as plaintiff.**—Consistently with this rule it was decided in Lance v. Barrett, 19 S. C. L. 204, that an agent who contracted in the name of his principal, but without authority, since he may be sued on the contract, may also sue thereon in his own name.

[b] **Agent acting in his own interest.**—Where a party purporting to act as the agent of another makes certain promises and agreements on behalf of his principal, if such party is at the time acting in his own interest, or in a matter in which he and his alleged principal are jointly interested, then such person will be personally bound upon such promises and agreements. Moore v. Booker, 4 N. D. 543, 62 NW 607.

60. See statutory provisions. See also Richie v. Bass, 15 La. Ann. 668 (construing §§ 2979, 2982, of the civil code, and holding the assumed agent personally responsible in the precise terms of the contract); Kennedy v. Stonehouse, 13 N. D. 232, 100 NW 258 (where the court says that it holds the agent upon the contract only because constrained by its construction of Rev. Code [1899] §§ 4342, 4343, but that it considers this ground of liability "illogical and absurd," and it indicates clearly that in the absence of statutory provision the decision would be otherwise).

61. See Hall v. Crandall, 29 Cal. 567, 571, 89 AmD 64 (where the court said: "Those cases, which hold that the agent may be sued upon the contract itself, treat all matter which the contract contains in relation to the principal as surplusage, which is, in effect, to make a new contract for the parties concerned instead of construing the one which they themselves have made"); St. Peter's Episcopal Church v. Varian, 28 Barb. (N. Y.) 644 (but as held in this case in order to fix and enforce this personal liability, it must appear that the party whom it is sought to charge signed as agent, that is, professed to act for another, and that such act was without authority).

[a] **The fallacy of this rule.**—(1) Those cases which hold the agent upon the contract, although it contains no apt words to bind him, base their conclusion upon the fallacious argument that the contract was intended to bind someone, and that if the principal is not bound the contract must be that of the agent. Thilmany v. Iowa Paper Bag Co., 108 Iowa 357, 79 NW 261, 75 AmSR 259. See also infra § 481 note 65. (2) But such a contract is not the contract of the principal, for the pretended agent had no power to bind him, and it is not the contract of the agent, for in making it the agent did not bind and did not attempt to bind himself. Noyes v. Loring, 55 Me. 408, 411. (3) The contract may be therefore absolutely void, and thus bind nobody. Noyes v. Loring, supra (where the court said: The "inconsistency" of holding the agent upon the contract, "to use no stronger term, will be apparent by supposing that instead of a promise to pay money, the pretended agent had signed a promise that his principal should marry plaintiff within a given time or do some other act which it was perfectly competent for the principal to perform, but which the agent could not. What would be thought of a declaration charging the pretended agent as a principal in such a case?").

62. Ark.—Little Rock Furniture Mfg. Co. v. Kavanaugh, 164 SW 289.

D. C.—Magruder v. Belt, 12 App. 151.

Iowa.—Allen v. Pegram, 16 Iowa 163.

La.—Washburn v. Frank, 31 La. Ann. 427.

Mo.—Queen City Furniture, etc., Co. v. Crawford, 127 Mo. 356, 30 SW 163; Fay v. Richmond, 18 Mo. A. 355.

Nebr.—Learn v. Upstill, 52 Nebr. 271, 72 NW 213.

N. J.—Wonderly v. Booth, 36 N. J. L. 250.

N. Y.—Rowland v. Hall, 121 App. Div. 459, 106 NYS 55 (holding that where an agent employed to sell land contracted to sell it in the name of an executor who had no existence, the owners of the property were not bound, and hence the agent himself was bound); Thistle v. Jones, 45 Misc. 215, 92 NYS 113; Hauser v. Falk, 133 NYS 438; Schenkberg v. Treadwell, 94 NYS 418; Hub. Pub. Co. v. Richardson, 13 NYS 665; Bartholomae v. Kaufman, 16 NYWklyDig 127.

Pa.—O'Rorke v. Geary, 33 PittsbLeg JNS 431, 17 YorkLegRec 51.

S. C.—Lagrone v. Timmerman, 46 S. C. 372, 24 SE 290.

Wis.—Fredendall v. Taylor, 23 Wis. 538, 99 AmD 203.

Eng.—Kelner v. Baxter, L. R. 2 C. P. 174.

[a] **An agent who is the real principal** is liable, although he assumes to contract as agent, there being no other existing principal. Washburn v. Frank, 31 La. Ann. 427; Adams v. Hall, 3 Aspin. 496.

[b] **One assuming to act as agent for the estate of a deceased person** purchasing liquors without authority from the probate court and without a saloon license is personally liable for the contract price of the liquor so purchased. Willow Springs Brewing Co. v. Newcomb, 92 Nebr. 682, 139 NW 224.

63. Cal.—Murphy v. Helmrich, 66 Cal. 69, 4 P 958.

Conn.—Johnston v. Allis, 71 Conn. 207, 41 A 816.

Ill.—John Spry Lumber Co. v. McMillan, 77 Ill. A. 280.

Iowa.—Comfort v. Graham, 87 Iowa 295, 54 NW 242; Lewis v. Tilton, 64 Iowa 220, 19 NW 911, 52 AmR 436.

Kan.—Latham Mercantile, etc., Co. v. Harrod, 71 Kan. 565, 81 P 214.

Ky.—Vertrees v. Head, 138 Ky. 83, 127 SW 523 (acting for an unauthorized foreign company).

Mass.—Jefts v. York, 12 Cush. 196; Hastings v. Lovering, 2 Pick. 214, 13 AmD 420.

Mo.—Blakely v. Bennecke, 59 Mo. 193; Anderson v. Stapel, 80 Mo. A. 115; Ziegler v. Fallon, 28 Mo. A. 295; McLaughlin v. Concordia College, 20 Mo. A. 42.

Nebr.—Codding v. Munson, 52 Nebr. 580, 72 NW 846, 66 AmSR 524 and note.

N. J.—Martin v. Holman, 65 N. J. L. 87, 46 A 723; Timken v. Tallmadge, 54 N. J. L. 117, 22 A 996.

N. Y.—Fulton v. Sewall, 116 App. Div. 744, 102 NYS 109; McCartee v. Chambers, 6 Wend. 649, 22 AmD 556.

Pa.—Eichbaum v. Irons, 6 Watts & S. 67, 40 AmD 540.

Tex.—Elwell v. Tatum, 6 Tex. Civ. A. 397, 24 SW 71, 25 SW 434.

Vt.—Button v. Winslow, 53 Vt. 430.

Eng.—Drew v. Nunn, 4 Q. B. D. 661.

[a] **An agent who renders his principal inaccessible or irresponsible** is himself liable. Bridges v. Bidwell, 20 Nebr. 185, 29 NW 902.

[b] **Where marriage disables a woman from contracting** she is considered an irresponsible principal, and a person acting as her agent is himself liable. Edings v. Brown, 30 S. C. L. 255. See Hoppe v. Laylor, 53 Mo. A. 4. Power of married woman to appoint agent see Husband and Wife [21 Cyc 1304].

[c] **If the principal has general capacity to enter into contracts,** however, the agent is not personally liable where he makes, in his principal's behalf, a contract which the principal in the particular case has no power in law to enter into. Thilmany v. Iowa Paper Bag Co., 108 Iowa 357, 79 NW 261, 75 AmSR 259. And see infra § 483.

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into the contract he acts in good faith,[64] as an agent assuming to contract for a principal must make a contract binding upon some principal, or else he himself is liable.[65] In accordance with this rule it has been held that an agent is personally liable where he professes to enter into a contract on behalf of an unincorporated association, club, or committee,[66] or on behalf of a corporation, before its incorporation,[67] even though the contract is entered into under the seal of the corporation.[68]

This rule, however, does not apply where the third person has knowledge of the nonexistence or incompetency of the principal;[69] or where it is expressly understood either that the agent shall not be held, and the contractee with knowledge of the facts extends credit to the supposed principal,[70] or that the agent's liability shall be limited to a fund held by him for the purpose of his agency.[71]

An exception to the rule of the personal liability of an agent for a nonexisting principal exists where an agent's authority has been revoked by the death of the principal, and the agent acts in ignorance thereof.[72]

[§ 482] **(3) Third Persons's Knowledge of Lack of Authority.**[73] The rule that an agent acting without or in excess of authority is personally liable is subject to the qualification that the person dealing with him must have acted on the faith of the representation that the agent had authority, or that he would lead one naturally to infer. For independent of the cases already suggested, where the contract is or may be treated as a nullity on account of its inherent infirmity or defective mode of execution, other cases may exist in which it is well known to both of the contracting parties, that there exists no authority in the agent to bind other persons for whom he is acting, or that there is no other responsible principal; and yet the other contracting party may be content to deal with the agent, not upon his personal credit or personal responsibility, but in the perfect faith and confidence that such contracting party will be repaid and indemnified by the persons who feel the same interest in the subject matter of the contract, even though there may be no legal obligation in the case. The question generally is, 'to whom is the credit knowingly given, according to the understanding of both parties?' The law in all these cases pronounces the same decision; that he to whom the credit is knowingly and exclusively given is the proper person who incurs liability, whether he be the principal or the agent.' Story Agency § 288." Elwell v. Tatum, 6 Tex. Civ. A. 397, 402, 24 SW 71, 25 SW 434.

64. Lagrone v. Timmerman, 46 S. C. 372, 24 SE 290.

65. Mo.—Heath v. Goslin, 80 Mo. 310, 50 AmR 505.
Nebr.—Learn v. Upstill, 52 Nebr. 271, 72 NW 213.
N. J.—Timken v. Tallmadge, 54 N. J. L. 117, 22 A 996; Wonderly v. Booth, 36 N. J. L. 250.
N. Y.—Rowland v. Hall, 121 App. Div. 459, 106 NYS 55.
Pa.—Eichbaum v. Irons, 6 Watts & S. 67, 40 AmD 540.
Tex.—Elwell v. Tatum, 6 Tex. Civ. A. 397, 24 SW 71, 25 SW 434.
See also supra § 480.

[a] **The rule, however, may be based upon a broader principal** (1) for one who assumes to act as agent impliedly warrants his authority (see supra § 476), but if there is no principal then the agent cannot have authority, and therefore he should be held liable for a breach of his implied warranty (see Bartholomae v. Kaufman, 16 NYWklyDig 127). (2) "The ground upon which this liability depends is said by Judge Selden, in White v. Madison, 26 N. Y. 117, to be that the agent warrants his authority, and this ground of liability is said by Judge Andrews, in Baltzen v. Nicolay, 53 N. Y. 467, to be accepted by the later and better-considered opinion." Fulton v. Sewall, 116 App. Div. 744, 748, 102 NYS 109.

66. Iowa.—Comfort v. Graham, 87 Iowa 295, 54 NW 242; Lewis v. Tilton, 64 Iowa 220, 19 NW 911, 52 AmR 436.
Mo.—Blakeley v. Bennecke, 59 Mo. 193.
Nebr.—Codding v. Munson, 52 Nebr. 580, 72 NW 846, 66 AmSR 524.
N. Y.—Thistle v. Jones, 45 Misc. 215, 92 NYS 113.
Pa.—Eichbaum v. Irons, 6 Watts & S. 67, 40 AmD 540.
S. D.—Winona Lumber Co. v. Church, 6 S. D. 498, 62 NW 107.
Tenn.—Steele v. McElroy, 1 Sneed 341.
Vt.—Button v. Winslow, 53 Vt. 430.
Eng.—Cullen v. Queensberry, 1 Bro. Ch. 101, 28 Reprint 1011; Steele v. Gourley, 3 T. L. R. 772; Jones v. Hope, 3 T. L. R. 247 note; Overton v. Hewett, 3 T. L. R. 246.

67. Queen City Furniture, etc., Co. v. Crawford, 127 Mo. 356, 30 SW 163; De Remer v. Brown, 55 NYS 867 [aff 165 N. Y. 410, 59 NE 129] (holding that where a party to a contract under seal assumes a personal liability for the payment of the contractual obligation, and there is nothing in the contract to show that he was acting for another, and the company for which he claims to have been acting was not in existence at the time the contract was made, he is personally liable, although the contract was for the benefit of such company); Wilson v. Baker, 17 T. L. R. 473; Kelner v. Baxter, L. R. 2 C. P. 174, 183 (where the court said: "Where a contract is signed by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby: and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed: but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made").

Liability of promoter of incorporation for contracts entered into prior to incorporation see Corporations [10 Cyc 269 et seq].

68. Bartholomae v. Kauffmann, 47 N. Y. Super. 552 [aff 91 N. Y. 654 mem]; Schenkberg v. Treadwell, 94 NYS 418.

69. Belding v. Vaughan, 108 Ark. 69, 157 SW 400 (contract for a lease to become effective upon incorporation); Merchants, etc., Packet Co. v. Streuby, 91 Miss. 211, 44 S 791, 124 AmSR 651; Fowle v. Kerchner, 87 N. C. 49.

70. Codding v. Munson, 52 Nebr. 580, 72 NW 846, 66 AmSR 524; Von Lengerke v. New York, 150 App. Div. 98, 134 NYS 832; Jones v. Hope, 3 T. L. R. 247 note.

[a] **Statements of qualification of general rule.**—(1) "The rule is founded upon a presumption of fact, and is not the expression of any positive or rigid legal principle. The presumption referred to is that the parties to a contract contemplate the creation of a legal obligation capable of enforcement, and that, therefore, it is understood that the obligation shall rest on the individuals who actively participate in the making of the contract, because of the difficulty in all cases, the impossibility in many, of fixing it upon the persons taking part in or submitting to the action of the evanescent assemblage. If, however, the person with whom the contract is made expressly agrees to look to another source for the performance of its obligations, or if the circumstances be such as to disclose an intention not to charge the agent, as where the other agrees to accept the proceeds of a particular fund, there is no longer reason to indulge the presumption, and it may be rebutted by proof of such facts." Codding v. Munson, 52 Nebr. 580, 587, 72 NW 846, 66 AmSR 524. (2) "Although it is thus true that persons contracting as agents are ordinarily held personally responsible, where there is no other responsible principal to whom resort can be had, yet the doctrine is not without some qualifications and exceptions, as indeed the words 'ordinarily held'

71. Heath v. Goslin, 80 Mo. 310, 50 AmR 505; Codding v. Munson, 52 Nebr. 580, 72 NW 846, 66 AmSR 524; Steele v. Gourley, 3 T. L. R. 772; Jones v. Hope, 3 T. L. R. 247 note. See also Learn v. Upstill, 52 Nebr. 271, 72 NW 213.

72. Carriger v. Whittington, 26 Mo. 311, 72 AmD 212; Ginochio v. Porcella, 3 Bradf. Surr. (N. Y.) 277; Cassidy v. McKenzie, 4 Watts & S. (Pa.) 282, 39 AmD 76; Hollman v. Pullin, Cab. & E. 254; Smout v. Ilbery, 12 L. J. Exch. 357. In Halbot v. Lens, [1901] 1 Ch. 344, the court says that Collen v. Wright, 8 E. & B. 647, 92 ECL 647, 120 Reprint 241, 2 ERC 484 [aff 7 E. & B. 301, 90 ECL 301, 119 Reprint 1259], must be considered as having overruled Smout v. Ilbery, supra; but the facts in the two cases were entirely dissimilar, and the rule of liability upon the death of the principal is as has been stated. See Jenkins v. Atkins, 1 Humphr. (Tenn.) 294, 34 AmD 648. See also supra §§ 179–182.

[a] **The principal on which this doctrine is founded** seems to be that, although the authority of the agent has expired, yet the agent is not in fault, nor in the commission of any fraud; but the revocation occurs by the act of God; and, although the estate of the principal may not be liable, the agent, acting in good faith, is not liable. Ginochio v. Porcella, 3 Bradf. Surr. (N. Y.) 277; Smout v. Ilbery, 12 L. J. Exch. 357.

[b] **If the agent knows of his principal's death** he may of course be held personally liable. Ziegler v. Fallon, 28 Mo. A. 295.

73. **Knowledge or notice of extent of agent's authority generally** as affecting principal's liability see supra §§ 202–207.

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sentation, express or implied, that the agent had the authority assumed and without knowledge of any want of authority on the agent's part.[74] If therefore the agent fully discloses to the third person the facts concerning his authority, so that the latter may have the same opportunity of judging of the sufficiency thereof as the agent himself,[75] or if the third person himself has actual[76] or presumptive knowledge of those facts,[77] the agent cannot be held personally liable, even though the principal is not bound. This rule is particularly applicable where the agent's agreement binds him to the performance of a stipulation antagonistic to the interests of his principal, and the third person knows of its fraudulent character and shares in its wrongful purpose.[78]

Mutual mistake. Where all the facts touching the agent's authority or its source are equally within the knowledge of both parties who act thereupon under a mutual mistake of law as to the liability of the principal, the agent cannot be held.[79]

[§ 483] **(4) Contracts Such as Would Not Bind Principal If Authorized.** An agent who falsely represents his authority to make a contract on behalf of another is not liable in contract or in tort, unless the contract is one which the law would enforce against the principal if it had been authorized by him,[80] or unless the agent by some apt expression

74. Ala.—Ware v. Morgan, 67 Ala. 461.
Ind.—Newman v. Sylvester, 42 Ind. 106.
Ky.—Sanford v. McArthur, 18 B. Mon. 411; McKown v. Gettys, 80 SW 169, 25 KyLR 2070.
Minn.—Newport v. Smith, 61 Minn. 277, 63 NW 734; Sanborn v. Neal, 4 Minn. 126, 77 AmD 502.
Miss.—Merchants, etc., Packet Co. v. Streuby, 91 Miss. 211, 44 S 791, 124 AmSR 651.
Mo.—Western Cement Co. v. Jones, 8 Mo. A. 373.
N. Y.—Crandall v. Rollins, 83 App. Div. 618, 82 NYS 317.
N. C.—Le Roy v. Jacobosky, 136 N. C. 443, 48 SE 796, 67 LRA 977; Fowle v. Kerchner, 87 N. C. 49.
Eng.—Jones v. Downman, 4 Q. B. 235 note, 45 ECL 235 note, 114 Reprint 887 note; Halbot v. Lens, [1901] 1 Ch. 344.
See Senter v. Monroe, 77 Cal. 347, 19 P 580.

75. Ala.—Ware v. Morgan, 67 Ala. 461.
Ark.—Little Rock Furniture Mfg. Co. v. Kavanaugh, 164 SW 289.
Conn.—Ogden v. Raymond, 22 Conn. 379, 58 AmD 429.
Ind.—Newman v. Sylvester, 42 Ind. 106.
Iowa.—Klay v. Dallas Center Bank, 122 Iowa 506, 98 NW 315; Thilmany v. Iowa Paper-Bag Co., 108 Iowa 357, 79 NW 261, 75 AmSR 259.
Minn.—Newport v. Smith, 61 Minn. 277, 63 NW 734.
N. Y.—Sinclair v. Jackson, 8 Cow. 543.
Okl.—Martin v. Schuermeyer, 30 Okl. 735, 739, 121 P 248 [cit Cyc].
Tex.—Heard v. Clegg, (Civ. A.) 144 SW 1145.
Vt.—Snow v. Hix, 54 Vt. 478.
Ont.—Thomson v. Playfair, 25 Ont. L. 365, 20 OntWR 867.

76. U. S.—New York, etc., Steamship Co. v. Harbison, 16 Fed. 681 [rev on other grounds 16 Fed. 688, 21 Blatchf. 332].
Ala.—McQuiddy Printing Co. v. Head, 7 Ala. A. 384, 62 S 287.
Ill.—Chase v. Debolt, 7 Ill. 371.
Ind.—Sourwine v. McRoy Clay Works, 42 Ind. A. 358, 85 NE 782.
Ky.—Murray v. Carothers, 1 Metc. 71; McCarthy v. Standfill, 41 SW 278, 19 KyL 612.
La.—Barry v. Pike, 21 La. Ann. 221.
N. J.—Patterson v. Lippincott, 47 N. J. L. 457, 1 A 506, 54 AmR 178.
N. Y.—Hall v. Lauderdale, 46 N. Y. 70; Title Guarantee, etc., Co. v. Levitt, 121 App. Div. 485, 106 NYS 147; Aspinwall v. Torrance, 1 Lans. 381 [aff 57 N. Y. 331].
Okl.—Martin v. Schuermeyer, 30 Okl. 735, 739, 121 P 248 [cit Cyc].
Wis.—McCurdy v. Rogers, 21 Wis. 197, 91 AmD 468.
N. S.—Outram v. Doyle, 18 N. S. 1.
"One assuming to act as agent for another without authority does not necessarily render himself liable. It is when he knowingly or carelessly assumes to act without being authorized, or conceals the true state of his authority, and falsely leads the party with whom he thus contracts to repose in his authority, that he may be liable. . . . If he enter into the contract in the name and as the agent of another, and does it honestly, fully disclosing all the facts touching the authority under which he acts, so that the one contracted with, from such information or otherwise, is fully informed of the authority possessed or claimed by him, he is not liable on the ground of deceit or for misleading the other party. It is material in such cases that the party complaining of a want of authority in the agent should be ignorant of the truth touching the agency. If he has a full knowledge of the facts, or of such facts as fairly and fully put him upon inquiry for them, and he fails to avail himself of such knowledge, or the means of knowledge reasonably accessible to him, he cannot say that he was misled, simply on the ground that the party assumed to act as agent without authority, in the absence of fraud." Newman v. Sylvester, 42 Ind. 106, 112 [cit with appr Sourwine v. McRoy Clay Works, 42 Ind. A. 358, 85 NE 782].

77. U. S.—New York, etc., Steamship Co. v. Harbison, 16 Fed. 681 [rev on other grounds 16 Fed. 688, 21 Blatchf. 332].
Conn.—Perry v. Hyde, 10 Conn. 329.
Ill.—McCormick v. Seeberger, 73 Ill. A. 87 [aff 173 Ill. 404, 53 NE 240].
Ind.—Newman v. Sylvester, 42 Ind. 106.
Kan.—Abeles v. Cochran, 22 Kan. 405, 31 AmR 194.
Ky.—Murray v. Carothers, 1 Metc. 71; Sanford v. McArthur, 18 B. Mon. 411.
Wash.—McReavy v. Eshelman, 4 Wash. 757, 31 P 35.
Wis.—McCurdy v. Rogers, 21 Wis. 197, 91 AmD 468.
Ont.—McDonald v. McMillan, 17 U. C. Q. B. 377.
See Smout v. Ilbery, 12 L. J. Exch. 357.

78. Isenbeck v. Burroughs, 217 Mass. 587, 105 NE 595.

79. Ala.—Schloss v. McIntyre, 147 Ala. 557, 41 S 11.
Conn.—Perry v. Hyde, 10 Conn. 329.
Iowa.—Smith v. Sherman, 113 Iowa 601, 85 NW 747.
Kan.—Abeles v. Cochran, 22 Kan. 405, 31 AmR 194.
Mass.—Jefts v. York, 10 Cush. 392, 395 (where the court said: "If the defect of authority arises from a want of legal capacity, and if the parties act under a mutual mistake of the law, and are both equally well informed in regard to the facts, so that the lender is not misled by any word or act of the agent, he would have no legal remedy against the agent; not in assumpsit, for it is not his contract; not in tort, for he is chargeable with no deceit").
Mo.—Michael v. Jones, 84 Mo. 578; Humphrey v. Jones, 71 Mo. 62; Western Cement Co. v. Jones, 8 Mo. A. 373.
N. Y.—Walker v. State Bank, 9 N. Y. 582.
Vt.—Snow v. Hix, 54 Vt. 478.
Wash.—McReavy v. Eshelman, 4 Wash. 757, 31 P 35.
Eng.—Beattie v. Ebury, L. R. 7 Ch. 777 [aff L. R. 7 H. L. 102]; Rashdall v. Ford, L. R. 2 Eq. 750.

[a] **Effect of inquiry as to authority.**—"If there is no misrepresentation in point of fact, but merely a mistake or misrepresentation in point of law, that is to say, if the person who deals with the agent is fully aware in point of fact what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not, under those circumstances I have no doubt that the agent would not be liable. For instance, supposing when an agent comes and professes to make a contract on behalf of his principal, instead of trusting his representation that he has power to bind his principal the person dealing with the agent were to ask to see his authority, and a power of attorney executed by the principal was shewn to him, and he took the opinion of his lawyer as to whether the power of attorney was sufficient to bind the principal, and was advised that it was sufficient to bind the principal, and then after that a contract was made, and it turned out when the point was raised in a Court of Law that the power of attorney was insufficient—under such circumstances I am clearly of opinion that there would be no warranty on the part of the agent that the power of attorney was good in point of law." Beattie v. Ebury, L. R. 7 Ch. 777, 800 [aff L. R. 7 H. L. 102].

80. U. S.—Kent v. Addicks, 126 Fed. 112, 60 CCA 660.
Ala.—Wolfe v. McKeon, 2 Ala. A. 421, 428, 57 S. 63 [cit Cyc].
Iowa.—Thilmany v. Iowa Paper-Bag Co., 108 Iowa 357, 79 NW 261, 75 AmSR 259.
Miss.—Merchants, etc., Packet Co. v. Streuby, 91 Miss. 211, 44 S 791, 124 AmSR 651.
N. Y.—Baltzen v. Nicolay, 53 N. Y. 467; Dung v. Parker, 52 N. Y. 494; Bloodgood v. Short, 50 Misc. 286, 98 NYS 775 (holding that an agent who makes an unauthorized contract on behalf of his principal is liable to the person dealing with him on the faith that he possessed the authority which he assumed, where the contract is one on which the principal could have been held if the agent had in fact possessed the assumed authority).
Wash.—McReavy v. Eshelman, 4 Wash. 757, 31 P 35.
But see Knickerbocker v. Wilcox, 83 Mich. 200, 47 NW 123, 21 AmSR 595 (which, although apparently contrary to the rule stated in the text, was really decided upon the theory that the agent knew that his principal could not authorize such a contract as the agent attempted to make, and that from this fact and from the face of the document itself the agent might as well have intended to bind himself as principal as to act merely as agent).

[a] **The reason for the rule has**

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guarantees the contract or assumes it himself.[81] Thus an agent entering into an unauthorized contract will not be held liable where the contract is void under the statute of frauds.[82]

The third person contracting with the agent must also have the ability to perform in order to hold the agent liable, for, if he is not in a position to ask or compel a performance from the supposed principal, he can demand nothing by way of damages from the agent.[83]

[§ 484] **(5) Ratification by Principal.** Ratification by the principal of a contract made by one assuming to act as agent without authority or in excess of authority operates as an antecedent authorization, and, the third person having received all the security for which he originally contracted, the agent is relieved from personal liability for breach of his warranty of authority.[84] But the view has been taken that where the agent is held liable on the contract instead of on the theory of a breach of the implied warranty of authority,[85] his authorization must have existed at the time of making the contract, and that a subsequent ratification, although it may bind the principal,[86] will not relieve the agent from his several liability.[87]

[§ 485] **(6) Damages.** In an action against one who assumed, without authority, to enter into a contract as agent for another, or against an agent for acting in excess of his authority, brought by the person with whom he assumed to contract, the measure of damages is the loss which has accrued as a natural and probable consequence of the want of authority, and is not limited by the contract but embraces all injuries resulting from the wrongful assumption of authority.[88] This includes the loss sustained by the third person through his failure to secure a valid contract,[89] and also the costs reasonably

been said to be that without it "the anomaly would exist of giving a right of action against an assumed agent for an unauthorized representation of his power to make the contract, when a breach of the contract itself, if it had been authorized, would have furnished no ground of action." Thilmany v. Iowa Paper-Bag Co., 108 Iowa 357, 362, 79 NW 261, 75 AmSR 259; Baltzen v. Nicolay, 53 N. Y. 467.

81. McReavy v. Eshelman, 4 Wash. 757, 31 P 35.

82. Baltzen v. Nicolay, 53 N. Y. 467; Dung v. Parker, 52 N. Y. 494; Bloodgood v. Short, 50 Misc. 286, 98 NYS 775; Morrison v. Hazzard, (Tex. Civ. A.) 88 SW 385 [mod on other grounds 99 Tex. 583, 92 SW 33]; Snow v. Hix, 54 Vt. 478; Pow v. Davis, 1 B. & S. 220, 101 ECL 220, 121 Reprint 697; Warr v. Jones, 24 Wkly. Rep. 695. See also Simmons v. More, 100 N. Y. 140, 2 NE 640; Harper, etc., Co. v. Jackson, 240 Pa. 312, 87 A 430 (lack of written authority to execute a lease).

83. Kent v. Addicks, 126 Fed. 112, 114, 60 CCA 660 (where the court said: "Not only must the contract be of a character that would be enforceable against the principal if the supposed agent was really authorized . . . but the party seeking to enforce it must also have the ability to comply, for, if he is not in shape to ask or compel a performance from the supposed principal, he has lost nothing by not having a valid contract with him, and so can demand nothing by way of damages from the agent on its account").

84. Conn.—Hewitt v. Wheeler, 22 Conn. 557.

La.—Merritt v. Wright, 19 La. Ann. 91.

Mass.—Ballou v. Talbot, 16 Mass. 461, 8 AmD 146.

Minn.—Sheffield v. Ladue, 16 Minn. 388, 10 AmR 145 (holding, however, that the ratification must be before action is brought and before the other party is placed in any worse position than he would otherwise have occupied).

Mo.—Lingenfelder v. Leschen, 134 Mo. 55, 34 SW 1089.

Pa.—Harper, etc., Co. v. Jackson, 240 Pa. 312, 87 A 430; Hopkins v. Everly, 150 Pa. 117, 24 A 624.

Wis.—Moody v. Port Washington M. E. Church, 99 Wis. 49, 74 NW 572.

Ont.—Thomson v. Playfair, 25 Ont. L. 365, 2 DomLR 37, 20 OntWR 867.

See also supra § 141.

85. See supra § 480.

86. See supra § 144.

87. Lazarus v. Shearer, 2 Ala. 718; Arfridson v. Ladd, 12 Mass. 173; Palmer v. Stephens, 1 Den. (N. Y.) 472; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 24 AmD 62. And see Ballou v. Talbot, 16 Mass. 461, 8 AmD 146.

88. Cal.—Wallace v. Bentley, 77 Cal. 19, 18 P 788, 11 AmSR 231 (holding that while the assumed agent is liable to an action to recover money paid or for labor performed under the unauthorized contract, or for special damages sustained by reason of the wrong in assuming to act without authority, he is not liable for special damages by reason of false representations of authority, on account of which plaintiff failed to negotiate with the owner or his authorized agent in respect of the value of the contract).

Fla.—Tedder v. Riggin, 65 Fla. 153, 61 S 244 (holding that, where defendant assumes to act as agent and contracts in the name of his principal for the sale of property of such assumed principal, he is not liable on the contract for damages for breach thereof, unless the contract makes him personally liable, and plaintiff cannot recover for profits which he might have made if the assumed principal had performed the agreement).

Ill.—Seeberger v. McCormick, 178 Ill. 404, 53 NE 340.

Iowa.—Groeltz v. Armstrong, 125 Iowa 39, 99 NW 128.

Mass.—Boston, etc., R. Co. v. Richardson, 135 Mass. 473.

Minn.—Skaaraas v. Finnegan, 32 Minn. 107, 19 NW 729 (holding that the third person may recover for the loss of improvements made on real estate in good faith in pursuance of an unauthorized contract of purchase, in addition to his damages for the loss of his bargain).

Mo.—Lingenfelder v. Leschen, 134 Mo. 55, 34 SW 1089; Wright v. Baldwin, 51 Mo. 269; Bradshaw v. Cochran, 91 Mo. A. 294; Duffy v. Mallinkrodt, 81 Mo. A. 449; Myers Tailoring Co. v. Keeley, 58 Mo. A. 491; Gestring v. Fisher, 46 Mo. A. 603.

N. Y.—Taylor v. Nostrand, 134 N. Y. 108, 31 NE 246; Simmons v. More, 100 N. Y. 140, 2 NE 640; White v. Madison, 26 N. Y. 117; Parker v. Knox, 60 Hun 550, 15 NYS 256 (holding that, in an action for making an unauthorized contract of sale for future delivery, the measure of damages is the difference between the contract price and what the goods were worth at the time when they should, by the terms of the contract, have been delivered); Feeter v. Heath, 11 Wend. 477 (holding also that the third person is not bound to look to the principal for so much of the contract as the agent was authorized to make, but may hold the agent responsible to the full amount of the contract).

N. C.—Le Roy v. Jacobosky, 136 N. C. 443, 48 SE 796, 67 LRA 977.

N. D.—Kennedy v. Stonehouse, 13 N. D. 232, 100 NW 258 (construing Rev. Codes [1899] § 4995).

Okl.—American Surety Co. v. Morton, 32 Okl. 687, 690, 122 P 1103, 39 LRANS 702 [quot Cyc].

Tex.—Heard v. Clegg, (Civ. A.) 144 SW 1145.

Utah.—Roberts v. Tuttle, 36 Utah 614, 634, 105 P 916 [cit Cyc] (holding that an agent for the sale of land, who placed the purchaser in possession under a contract which he had no authority to make, is liable to the purchaser for the money paid on the purchase price, with interest thereon, the value of improvements made on the premises, the costs and expenses incurred in defending ejectment against him, and the loss of his bargain, which is the difference between the contract price and the market value of the property at the time the judgment in ejectment was rendered, less the value of the improvements placed thereon by the purchaser).

Eng.—Meek v. Wendt, 21 Q. B. D. 126; Firbank v. Humphreys, 18 Q. B. D. 54 (holding the damages to be the difference between the position in which the third person would have been if the alleged agent's assertion had been true and his actual position by reason of the assertion being false); In re National Coffee Palace Co., 24 Ch. D. 367; Weeks v. Propert, L. R. 8 C. P. 427; Godwin v. Francis, L. R. 5 C. P. 295 (holding that, where the agent attempts without authority to make a contract for the sale of certain realty, he is liable for the difference between the contract price and the market value of the estate, the price at which it is resold being prima facie evidence of the market value); Spedding v. Nevel, L. R. 4 C. P. 212; Randell v. Trimen, 18 C. B. 786, 86 ECL 786, 139 Reprint 1580; Simons v. Patchett, 7 E. & B. 568, 90 ECL 568, 119 Reprint 1357; Hughes v. Graeme, 33 L. J. Q. B. 335.

[a] **Loss of profit.**—Recovery may be had not only of the expenses actually incurred but also of the loss of the profit the third person would have made if the bargain had been carried out. Maneer v. Sanford, 24 CanLTOccNotes 70, 15 Man. 181.

[b] **In the case of money paid** to one acting as the agent of another without authority, which has not been paid over to the principal, the amount paid is the measure of damages. Senter v. Monroe, 77 Cal. 347, 19 P 580; Wallace v. Bentley, 77 Cal. 19, 18 P 788, 11 AmSR 231; Jefts v. York, 10 Cush. (Mass.) 392; McManus v. Porter, 15 WestLR 269.

[c] **Where the action is solely on the warranty,** the measure of damages is the same as in any other action for a breach of warranty. In re National Coffee Palace Co., 24 Ch. D. 367.

89. Farmers Co-Operative Trust Co. v. Floyd, 47 Oh. St. 525, 26 NE 110, 21 AmSR 846, 12 LRA 346 (holding that the measure of damages, where the agent acted in good faith, is the loss sustained by plaintiff through not having the valid contract

incurred by him in an unsuccessful action against the principal to enforce the agent's contract.[90] But where the contract entered into is one which would not have bound the principal, although the agent had been acting within the scope of his authority, there can be no recovery, even of the expenses incurred on the faith of the agent's unauthorized act.[91]

[§ 486] **b. Authorized Contracts—(1) Where Principal Is Disclosed—(a) In General.** Where an agent acts on behalf of a disclosed principal, his acts and contracts, within the scope of his authority, are generally considered as the acts and contracts of the principal, and, in the absence of an agreement otherwise, involve no personal liability on the part of the agent to a third person,[92] except in an action

which defendant assumed to make); Richardson v. Williamson, L. R. 6 Q. B. 276; In re National Coffee Palace Co., 24 Ch. D. 367, 371 (where it was stated that the measure of damages was "what the plaintiff actually lost by losing the particular contract which was to have been made by the alleged principal if the defendant had had the authority he professed to have; in other words, what the plaintiff would have gained by the contract which the defendant warranted should be made." This statement was quoted with approval in Meek v. Wendt, 21 Q. B. D. 126, 129); Weeks v. Propert, L. R. 8 C. P. 427; Spedding v. Nevell, L. R. 4 C. P. 212; Simons v. Patchett, 7 E. & B. 568, 90 ECL 568, 119 Reprint 1357.

90. Mass.—Boston, etc., R. Co. v. Richardson, 135 Mass. 473.

Mo.—Wright v. Baldwin, 51 Mo. 269; Duffy v. Mallinkrodt, 81 Mo. A. 449.

N. Y.—Wright v. Madison, 26 N. Y. 117; Campbell v. Muller, 19 Misc. 189, 43 NYS 283.

N. D.—Kennedy v. Stonehouse, 13 N. D. 232, 100 NW 258 (construing Rev. Codes [1899] § 4995).

Oh.—Farmers' Co-operative Trust Co. v. Floyd, 47 Oh. St. 525, 26 NE 110, 21 AmSR 846, 12 LRA 346.

Eng.—Godwin v. Francis, L. R. 5 C. P. 295; Spedding v. Nevell, L. R. 4 C. P. 212 (holding, however, that the agent was not liable for costs of an action brought against the third person in consequence of an assignment of the contract by the latter, which was not in the contemplation of the parties); Randell v. Trimen, 18 C. B. 786, 86 ECL 786, 139 Reprint 1580; Collen v. Wright, 8 E. & B. 647, 92 ECL 647, 120 Reprint 241, 2 ERC 484 [aff 7 E. & B. 301, 90 ECL 301, 119 Reprint 1259]; Hughes v. Graeme, 33 L. J. Q. B. 335.

Ont.—Eckstein v. Whitehead, 10 U. C. C. P. 65.

91. Baltzen v. Nicolay, 53 N. Y. 467; Dung v. Parker, 52 N. Y. 494. See also supra § 483.

[a] **Illustration.**—Where one assuming to have authority from the owners grants a parol lease of certain premises for seven years, and the owners disavow his authority and bring an ejectment against the third person, who, in good faith and on the advice of his attorney and of the agent, attempts unsuccessfully to defend the ejectment, the agent is not liable to him for the costs incurred in the ejectment, as, even had the agent possessed the authority assumed, a parol lease for that length of time would not have bound the principal, but the third person would have acquired at most merely a tenancy at will. Pow v. Davis, 1 B. & S. 220, 227, 101 ECL 220, 121 Reprint 697 (where the court said: "Supposing, therefore, the defendant had, to the full extent, the authority under which he professed to act, although the plaintiff might have gone into equity to enforce the contract in its terms, he would have been unprotected against an action of ejectment, if the owners of the property had thought proper, contrary to equity and justice, to bring one against him. That being the state of things, and those the consequences that would have followed if the defendant had the authority which he held himself out as having, it is contended that, when it turned out that he had not that authority, he became liable to all the consequences that would flow naturally from the act he did, just as his principals would have been liable if he had made this agreement with their sanction and authority. The plaintiff cannot be in a better position than he would have been under those circumstances. He would have been entitled to go to equity to restrain the ejectment, and should have done so on this occasion, and if defeated in equity, would have been entitled to hold the defendant responsible for what had taken place. Instead of that he defends the ejectment, which he could not have done even if the defendant had full authority to act as he did. Can he, then, hold the defendant responsible for the erroneous course he has himself adopted? No. It is clear that the ejectment was wholly incapable of being defended, and that that was a matter which any one (certainly any one conversant with the law) ought to have known. Then, however, it is said the defendant misled the plaintiff by opening out to him the prospect that if he resisted the action of ejectment the owners would not go on with it. That was very bad advice, and the plaintiff must very soon have found out that it was based altogether in error. But the question we have to solve is whether the consequential injury to the plaintiff, for which he now seeks compensation in damages, is comprehended in and naturally flows out of the warranty given by the defendant. For the reasons already stated, I think not").

92. U. S.—Baldwin v. Black, 119 U. S. 643, 7 SCt 326, 30 L. ed. 530; Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; In re Denson, 195 Fed. 854; Walker v. Cross, 160 Fed. 372, 87 CCA 324; Great Lakes Towing Co. v. Worthington, 147 Fed. 926; Lehman v. Field, 31 Fed. 852; Bradford v. Eastburn, 3 F. Cas. No. 1,767, 2 Wash. C. C. 219; U. S. v. Bevan, 24 F. Cas. No. 14,588, Crabbe 324.

Ala.—Hudson v. Scott, 125 Ala. 172, 28 S 91; Gulf City Constr. Co. v. Louisville, etc., R. Co., 121 Ala. 621, 25 S 579; Manly v. Sperry, 115 Ala. 524, 22 S 870; Sampson v. Fox, 109 Ala. 662, 19 S 896, 55 AmSR 950; Humes v. Decatur Land Impr., etc., Co., 98 Ala. 461, 13 S 368 [appr Anderson v. Timberlake, 114 Ala. 377, 22 S 431, 62 AmSR 105] (holding that if credit is given exclusively to the agent, he must be informed of that fact); Comer v. Bankhead, 70 Ala. 493; Ware v. Morgan, 67 Ala. 461; Roney v. Winter, 37 Ala. 277; Steele v. Dart, 6 Ala. 798; Gillaspie v. Wesson, 7 Port. 454, 31 AmD 715; McQuiddy Printing Co. v. Head, 7 Ala. A. 384, 62 S 287.

Ariz.—Harper v. Independence Dev. Co., 13 Ariz. 176, 108 P 701.

Ark.—Little Rock Furniture Mfg. Co. v. Kavanaugh, 164 SW 289; Drake v. Pope, 78 Ark. 327, 95 SW 774.

Cal.—Moore v. Gould, 151 Cal. 723, 91 P 616; Tevis v. Savage, 130 Cal. 411, 62 P 611; Merrill v. Williams, 63 Cal. 70; Engels v. Heatly, 5 Cal. 135; Schindler v. Green, 7 Cal. Unrep. Cas. 229, 233, 82 P 341, 631; Jewell v. Colonial Theater Co., 12 Cal. A. 681, 108 P 527 (holding that, where a contract showed on its face that it was made by a person as agent for another, and there is no question as to his authority to act as such, he is not liable for a breach of the contract by his principal).

Colo.—Frambach v. Frank, 33 Colo. 529, 81 P 247; Hewes v. Andrews, 12 Colo. 161, 20 P 338.

Conn.—Taylor v. Shelton, 30 Conn. 122; Ogden v. Raymond, 22 Conn. 379, 58 AmD 429; Johnson v. Smith, 21 Conn. 627; Magill v. Hinsdale, 6 Conn. 464a, 16 AmD 70; Hovey v. Magill, 2 Conn. 680.

Del.—Sharp v. Swayne, 17 Del. 210, 40 A 113.

Fla.—Blount v. Tomlinson, 57 Fla. 35, 48 S 751.

Ga.—Phinizy v. Bush, 129 Ga. 479, 59 SE 259; Raleigh, etc., R. Co. v. Pullman Co., 122 Ga. 700, 50 SE 1008; Brooke v. Western Union Tel. Co., 119 Ga. 694, 46 SE 826; Cureton v. Wright, 73 Ga. 8; Fleming v. Hill, 62 Ga. 751; Tiller v. Spradley, 39 Ga. 35.

Ill.—Stevenson v. Mathers, 67 Ill. 123; Wheeler v. Reed, 36 Ill. 81; Seery v. Socks, 29 Ill. 313; Marckle v. Haskins, 27 Ill. 382; Warren v. Dickson, 27 Ill. 115; Chase v. Debolt, 7 Ill. 371; Perlman v. Perlman, 178 Ill. A. 382; St. Louis Southwestern R. Co. v. White Lumber Co., 169 Ill. A. 482; Ketchum v. Sears, 154 Ill. A. 52; Laguna Valley Co. v. Fitch, 121 Ill. A. 607; Durham v. Stubbings, 111 Ill. A. 10; Scaling v. Knollin, 94 Ill. A. 443; Wheeler v. Cannon, 84 Ill. A. 591; John Spry Lumber Co. v. McMillan, 77 Ill. A. 280; Fisk v. Carbonized Stone Co., 67 Ill. A. 327; Brainard v. Turner, 4 Ill. A. 61; Dunton v. Chamberlain, 1 Ill. A. 361.

Ind.—Newman v. Sylvester, 42 Ind. 106; Robeson v. Chapman, 6 Ind. 352; Pitman v. Kintner, 5 Blackf. 250, 33 AmD 461.

Iowa.—Doolittle v. Murray, 134 Iowa 536, 111 NW 999; Klay v. Dallas Center Bank, 122 Iowa 506, 98 NW 315; Thilmany v. Iowa Paper-Bag Co., 108 Iowa 357, 79 NW 261, 75 AmSR 259; Guest v. Burlington Opera-House Co., 74 Iowa 457, 38 NW 158; Baker v. Chambles, 4 Greene 428.

Kan.—Irwin v. Thompson, 27 Kan. 643; McCubbin v. Graham, 4 Kan. 397.

Ky.—Lewis v. Harris, 4 Metc. 353.

La.—Maury v. Ranger, 38 La. Ann. 485, 58 AmR 197; Rosenthal v. Myers, 25 La. Ann. 463; Barry v. Pike, 21 La. Ann. 221; Marx v. Wheelis, 21 La. Ann. 140; Delaroderie v. Hart, 20 La. Ann. 126; Bienvenu v. Vienne, 18 La. Ann. 113; Trastour v. Fallon, 12 La. Ann. 25; Spotts v. Cowan, 9 La. Ann. 520; Hazard v. Lambeth, 3 Rob. 378; Zacharie v. Nash, 13 La. 20; Lincoln v. Smith, 11 La. 11; Wolfe v. Jewett, 10 La. 383; Boimare v. Toby, 5 La. 333; Waring v. Cox, 1 La. 198; Lafarge v. Ripley, 4 Mart. N. S. 303; Honore v. White, 1 Mart. N. S. 219; Krumbhaar v. Ludeling, 3 Mart. 640.

Me.—Teele v. Otis, 66 Me. 329; Rogers v. March, 33 Me. 106.

Md.—McClernan v. Hall, 33 Md. 293; Key v. Parnham, 6 Harr. & J. 418.

Mass.—Goodenough v. Thayer, 132 Mass. 152; Southard v. Sturtevant, 109 Mass. 390; Bray v. Kettell, 1 Allen 80; Lyon v. Williams, 5 Gray 557; Raymond v. Crown, etc., Mills, 2 Metc. 319; Simonds v. Heard, 23 Pick. 120, 34 AmD 41.

Mich.—Mercer v. Lethy, 139 Mich. 447, 102 NW 972; Bleau v. Wright, 110 Mich. 183, 68 NW 115; Banks v. Cramer, 109 Mich. 168, 66 NW 946.

Minn.—J. D. Moran Mfg. Co. v. Clarke, 59 Minn. 456, 61 NW 556.

Mo.—Ray County Sav. Bank v. Hutton, 224 Mo. 42, 123 SW 47; Huston v. Tyler, 140 Mo. 252, 36 SW 654, 41 SW 795; Michael v. Jones, 84 Mo. 578; Humphrey v. Jones, 71 Mo. 62; Hearne v. Chillicothe, etc., R. Co., 53

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for tort.[93] The application of this rule is not affected by the fact that the contract is made for the agent's benefit,[94] or that the agent appropriates the proceeds of the contract to his own use,[95] or that the principal, who has become insolvent, transfers his property to the agent.[96]

[§ 487] **(b) Intention as Governing Liability.** Whether the agent of a disclosed principal binds himself depends upon the intention of the parties, which must be gathered from the facts and circumstances of each particular case.[97] The presumption in such cases is that it was the agent's intention to

Mo. 324; Meyers v. Kilgen, (A.) 160 SW 569; Lang v. Friedman, 166 Mo. A. 354, 148 SW 992; Martin v. Allen, 125 Mo. A. 636, 103 SW 138; Emery-Bird-Thayer Dry Goods Co. v. Coomer, 87 Mo. A. 404; Thompson v. Irwin, 76 Mo. A. 418; Ziegler v. Fallon, 28 Mo. A. 295; Western Cement Co. v. Jones, 8 Mo. A. 373.

Mont.—Roach v. Rutter, 40 Mont. 167, 105 P 555.

Nebr.—McNeny v. Campbell, 81 Nebr. 754, 116 NW 671 [mod reh on other grounds 81 Nebr. 761, 117 NW 885]; Meade Plumbing, etc., Co. v. Irwin, 77 Nebr. 385, 109 NW 391; Freemont Carriage Mfg. Co. v. Thomsen, 65 Nebr. 370, 91 NW 376; Huffman v. Newman, 55 Nebr. 713, 76 NW 409; Wheeler v. Walden, 17 Nebr. 122, 22 NW 346.

N. H.—Hoyt v. Hoyt, 73 N. H. 549, 64 A 18; Sleeper v. Weymouth, 26 N. H. 34; Brown v. Rundlett, 15 N. H. 360; Hanover v. Eaton, 3 N. H. 38.

N. J.—McCauley v. Ridgewood Trust Co., 81 N. J. L. 86, 79 A 327; Hauenstein v. Ruh, 73 N. J. L. 98, 62 A 184; Colloty v. Schuman, 73 N. J. L. 92, 62 A 186; Zeigenfuss v. Moore, (Ch.) 60 A 520; Patterson v. Lippincott, 47 N. J. L. 457, 1 A 506, 54 AmR 178; Kean v. Davis, 20 N. J. L. 425; Burley v. Kitchell, 20 N. J. L. 305; Shotwell v. McKown, 5 N. J. L. 828; Tuttle v. Ayres, 3 N. J. L. 682.

N. Y.—Jones v. Gould, 200 N. Y. 18, 92 NE 1071 [rev on other grounds 123 App. Div. 236, 108 NYS 31]; American Nat. Bank v. Wheelock, 82 N. Y. 118; Bonynge v. Field, 81 N. Y. 159; Colvin v. Holbrook, 2 N. Y. 126; Renault Freres Selling Branch v. Sewall, 152 App. Div. 23, 136 NYS 800; Title Guarantee, etc., Co. v. Sage, 146 App. Div. 578, 131 NYS 278; Valois v. Gardner, 122 App. Div. 245, 106 NYS 808; Title Guarantee, etc., Co. v. Levitt, 121 App. Div. 485, 106 NYS 147; Argus Co. v. Hotchkiss, 121 App. Div. 378, 107 NYS 138; Crandall v. Rollins, 83 App. Div. 618, 82 NYS 317; Baer v. Bonynge, 72 Hun 33, 25 NYS 666 [aff 147 N. Y. 393, 42 NE 31]; McDougall v. Travis, 24 Hun 590; Durston v. Butterfield, 66 Barb. 601; Plumb v. Milk, 19 Barb. 74; Stanton v. Camp, 4 Barb. 274; Buck v. Amidon, 4 Daly 126; Donohue v. Watson, 72 Misc. 56, 128 NYS 1089; Ernst v. Thom, 65 Misc. 206, 119 NYS 631; Underhill v. Smith, 52 Misc. 349, 102 NYS 142; Collier v. Meyers, 52 Misc. 116, 101 NYS 659; Livingston Middleditch Co. v. New York College of Dentistry, 31 Misc. 259, 64 NYS 140; Brenner v. Lawrence, 27 Misc. 755, 58 NYS 769; Whiting v. Saunders, 23 Misc. 332, 51 NYS 211; Iserman v. Conklin, 21 Misc. 194, 47 NYS 107; Morris v. Murray, 20 Misc. 7, 44 NYS 600; Hayden v. Post, 12 Misc. 204, 33 NYS 269; Jones v. Gould, 136 NYS 600 [aff 209 N. Y. 419, 103 NE 720]; J. & E. Homan Co. v. Payne, 127 NYS 418; Kyle v. Horbert, 122 NYS 204; Levine v. Field, 114 NYS 819; Finnegan v. Geoghegan, 111 NYS 656; T. E. Hayman Co. v. Knepper, 88 NYS 930; Buck v. Amidon, 41 HowPr 370; Kirkpatrick v. Stainer, 22 Wend. 244; Pentz v. Stanton, 10 Wend. 271, 25 AmD 558; Mott v. Hicks, 1 Cow. 513, 13 AmD 550; Rathbon v. Budlong, 15 Johns. 1.

N. C.—McCall v. Clayton, 44 N. C. 422; Meadows v. Smith, 34 N. C. 18. See Davis v. Burnett, 49 N. C. 71, 67 AmD 263.

Or.—Stewart v. Perkins, 3 Or. 508.

Pa.—Roberts v. Austin, 5 Whart. 313; Campbell v. Baker, 2 Watts 83; Joyce v. Sims, 2 Dall. 223, 1 L. ed. 358; Schalcher v. Bergdoll, 41 Pa. Super. 547; Schaetzel v. Christman, 16 Pa. Super. 294; Rosenberg v. Clyde, 2 Pa. Super. 572; Fisher v. Rhodes, 4 Phila. 94; People's Nat. Bank v. Kern, 8 Pa. Dist. 72.

R. I.—McCarthy v. Hughes, 88 A 984; Pease v. Francis, 25 R. I. 226, 55 A 686.

S. C.—Goodale v. Page, 92 S. C. 413, 75 SE 700; Whaley v. Duncan, 47 S. C. 139, 25 SE 54; Rucker v. Smoke, 37 S. C. 377, 16 SE 40, 34 AmSR 758; Waddell v. Mordecai, 21 S. C. L. 22; James v. Attaway, 16 S. C. L. 438.

Tenn.—Siler v. Perkins, 126 Tenn. 380, 149 SW 1060, 47 LRANS 232 and note; Bailey v. Galbreath, 100 Tenn. 599, 47 SW 84; Powell v. Finch, 5 Yerg. 446.

Tex.—Brackenridge v. Claridge, 91 Tex. 527, 44 SW 819, 43 LRA 593; Mathews v. Globe-Star Realty Co., (Civ. A.) 167 SW 764; Chicago, etc., R. Co. v. Floyd, (Civ. A.) 161 SW 954; Cuneo v. Wimberly, (Civ. A.) 115 SW 673; Scottish-American Mortg. Co. v. Davis, (Civ. A.) 72 SW 217.

Utah.—Smith v. Orpheum Amusement Co., 41 Utah 350, 125 P 684.

Vt.—Johnson v. Cate, 77 Vt. 218, 59 A 830; Abbott v. Cobb, 17 Vt. 593; Hall v. Huntoon, 17 Vt. 244, 44 AmD 332; Peters v. Farnsworth, 15 Vt. 155, 40 AmD 671; Roberts v. Button, 14 Vt. 195.

Va.—Lambert v. Phillips, 109 Va. 632, 64 SE 945; Richmond Union Pass. R. Co. v. New York, etc., R. Co., 95 Va. 386, 28 SE 573.

Wash.—Tripple v. Littlefield, 46 Wash. 156, 89 P 493; Wilson v. Wold, 21 Wash. 398, 58 P 223, 75 AmSR 846.

W. Va.—Johnson v. Welch, 42 W. Va. 13, 24 SE 585; Piercy v. Hedrick, 2 W. Va. 458, 98 AmD 774.

Wis.—Alexander, etc., Lumber Co. v. McGeehan, 124 Wis. 325, 102 NW 571; McCurdy v. Rogers, 21 Wis. 197, 91 AmD 468.

Eng.—Plumpton v. Burkinshaw, [1908] 2 K. B. 572; Downman v. Williams, 7 Q. B. 103, 53 ECL 103, 115 Reprint 427; Elkington v. Hurter, [1892] 2 Ch. 452; Clark v. Rivers, L. R. 5 Eq. 91; Green v. Kopke, 18 C. B. 549, 86 ECL 549, 139 Reprint 1484; Lennard v. Robinson, 5 E. & B. 125, 85 ECL 125, 119 Reprint 428; Owen v. Gooch, 2 Esp. 567; Wake v. Harrop, 6 H. & N. 768; Johnson v. Ogilby, 3 P. Wms. 277, 24 Reprint 1064; Armour v. Duff, [1912] S. C. 120; Dixon v. Parker, 2 Ves. 219, 28 Reprint 142; Le Texier v. Anspach, 15 Ves. Jr. 159, 33 Reprint 714; Ex p. Hartop, 12 Ves. Jr. 349, 33 Reprint 132.

Man.—Bell v. Rokeby, 15 Man. 327.

N. B.—Blair v. Robinson, 5 N. B. 487.

Ont.—Armstrong v. Lye, 24 Ont. A. 543 [rev 27 Ont. 511].

"A contract made for the principal by his agent or attorney in fact is the contract of the principal and not of the agent or attorney in fact, and where the fact of his agency is known to the party with whom he is contracting and he acts within the scope of his authority, the agent incurs no responsibility." Durham v. Stubbings, 111 Ill. A. 10, 12.

[a] **A submission to arbitration** by an agent with authority, on behalf of a disclosed principal, imposes no personal liability on the agent. Callahan v. McAlexander, 1 Ala. 366.

[b] **One signing a contract as agent** and performing no act inconsistent with the relation of agency is not liable as principal, and can be sued neither for a breach nor for specific performance. Davis v. Lee, 52 Wash. 330, 100 P 752, 132 AmSR 973.

[c] **Failure of principal's title.**—One who buys personalty of an agent with the knowledge of the agency cannot sue the agent for damages on failure of the owner's title. Pyle v. Boos, 10 Ga. A. 760, 73 SE 1085.

[d] **Cost of suit.**—Where an agent acts within his authority and discloses his principal and takes a note in his own name, he is not responsible for costs on failure of a suit on the note. Baird v. Sharrow, 27 Pa. Co. 90.

[e] **Public agent.**—(1) Ordinarily an agent contracting in behalf of the government, or of the public, is not personally bound by the contract. Perrin v. Lyman, 32 Ind. 16. (2) Thus a public officer acting in his official capacity as agent of the government is not personally liable on contracts negotiated by him within the line of his duties. Richardson v. Harding, 2 Hawaii 433. See generally Officers [29 Cyc 1446].

[f] **An agent indorsing a note for the benefit of his principal,** who assures him that he shall not be held responsible, ought not to be compelled to pay the money at the suit of a person to whom the note is indorsed, with notice of such equity, but the decree should be against the principal; and if the indorsee had no such notice, yet, if the principal is solvent, the decree ought still to be against him in the first place. Chalmers v. McMurdo, 5 Munf. (19 Va.) 252, 7 AmD 684.

93. See infra §§ 498-502.

94. Emery-Bird-Thayer Dry Goods Co. v. Coomer, 87 Mo. A. 404 (holding that the facts that the agent making the contract was a minor child of the principal and that the goods were bought for the benefit of the agent do not alter the rule).

95. Shelton v. Darling, 2 Conn. 435.

96. Emery-Bird-Thayer Dry Goods Co. v. Coomer, 87 Mo. A. 404.

97. U. S.—Metcalf v. Williams, 104 U. S. 93, 26 L. ed. 665; Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Society of Shakers v. Watson, 68 Fed. 730, 15 CCA 632.

Ala.—Anderson v. Timberlake, 114 Ala. 377, 22 S 431, 62 AmSR 105.

Ark.—J. W. Boyd Grain Co. v. Thomas, 142 SW 1150 (intention of agent not to be bound shown).

Colo.—Cox v. Borstadt, 49 Colo. 83, 111 P 64; Frambach v. Frank, 33 Colo. 529, 81 P 247.

Conn.—Hewitt v. Wheeler, 22 Conn. 557; Perry v. Hyde, 10 Conn. 329; Hovey v. Magill, 2 Conn. 680.

Del.—Sharp v. Swayne, 17 Del. 210, 40 A 113.

Ga.—Fleming v. Hill, 62 Ga. 751.

Ill.—Wheeler v. Reed, 36 Ill. 81.

Mass.—Steamship Bulgarian Co. v. Merchants Despatch Transp. Co., 135 Mass. 421; Worthington v. Cowles, 112 Mass. 30; Wilder v. Cowles, 100 Mass. 487; Bray v. Kettell, 1 Allen 80.

Mo.—Hovey v. Pitcher, 13 Mo. 191; Coble v. Denison, 151 Mo. A. 319, 131 SW 719; Martin v. Allen, 125 Mo. A. 636, 103 SW 138.

N. H.—Brown v. Rundlett, 15 N. H. 360; Hanover v. Eaton, 3 N. H. 38; Underhill v. Gibson, 2 N. H. 352, 9 AmD 82.

N. J.—Kean v. Davis, 20 N. J. L. 425.

N. Y.—Cobb v. Knapp, 71 N. Y. 348, 27 AmR 51; Jones v. Gould, 123 App. Div. 236, 108 NYS 31 [rev on other grounds 200 N. Y. 18, 92 NE 1071]; Maryland Coal Co. v. Edwards, 4 Hun 432; Genin v. Isaacson, 6 NYLegObs 213; Brockway v. Allen, 17 Wend. 40; Walker v. Swartwout, 12 Johns. 444, 7 AmD 334; Gill v. Brown, 12 Johns.

bind his principal and not to incur a personal liability;[98] and ordinarily the agent will not be personally bound except upon clear and explicit evidence of an intention to substitute or superadd his personal liability for or to that of the principal.[99] But it is the disclosed intention which governs, not any intention hidden in the mind of the agent, and accordingly the agent may render himself personally liable, although this is contrary to his actual intention, if he has in fact bound himself according to the terms of the contract;[1] and he is not relieved therefrom by the fact that the other party knows of his agency,[2] even where he describes himself in the contract as agent.[3]

[§ 488] (c) **Pledge of Individual Credit by Agent.**[4] Although an agent acts within the scope of his authority and for a disclosed principal, he may so exclusively pledge his own credit or superadd it to that of the principal as to render himself personally liable to the extent to which credit has been extended to him;[5] and this liability is not affected by the fact that the consideration moves

385. See also Balmford v. Peffer, 31 Misc. 715, 65 NYS 271.

Tenn.—Siler v. Perkins, 126 Tenn. 380, 149 SW 1060, 47 LRANS 232 and note.

Eng.—Green v. Kopke, 18 C. B. 549, 86 ECL 549, 139 Reprint 1484; Lennard v. Robinson, 5 E. & B. 125, 85 ECL 125, 119 Reprint 428.

See McCurdy v. Rogers, 21 Wis. 197, 91 AmD 468 (holding that to make the agent personally liable where he does not so intend, and the credit is not given to him, there must be some wrong or omission of right on his part).

[a] **Unsealed instrument; intent governs.**—"Where the question of agency in making a contract arises there is a broad line of distinction between instruments under seal and stipulations in writing not under seal, or by parol. In the former case the contract must be in the name of the principal, must be under seal, and must purport to be his deed and not the deed of the agent covenanting for him. Stanton v. Camp, 4 Barb. (N. Y.) 274. In the latter cases the question is always one of intent; and the court, being untrammeled by any other consideration, is bound to give it effect. As the meaning of the law-maker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased, nor how it is signed, whether by the agent for the principal or with the name of the principal by the agent or otherwise. The intent developed is alone material, and when that is ascertained it is conclusive." Whitney v. Wyman, 101 U. S. 392, 395, 25 L. ed. 1050.

[b] **An agent jointly interested with his principal** in a contract which he makes in the latter's behalf is personally bound thereby. Moore v. Booker, 4 N. D. 543, 62 NW 607.

[c] **That a receipt for part of the purchase price is given to an agent** of the acceptor, or signed by the agent of the proposer, is not sufficient to constitute such agent the contracting party. Jones v. Wattles, 66 Nebr. 533, 92 NW 765.

98. See infra § 661.

99. Whiting v. Saunders, 23 Misc. 332, 51 NYS 211; Gerloff v. Carleton, 121 NYS 338.

[a] **In order to compel an agent to perform the covenants** of a contract made on behalf of his principal, by an action on the contract, it must be shown that he covenanted to be bound individually, or it must be averred and proved that in making the contract he acted without the authority of his principal. Schalcher v. Bergdoll, 41 Pa. Super. 547.

[b] **A person known to be acting and contracting merely as the agent of a known principal** is not generally responsible for acts and contracts within the scope of his authority, unless circumstances show that he has expressly or impliedly incurred, or intended to incur, such liability. McCarthy v. Hughes, (R. I.) 88 A 984.

1. Ala.—Humes v. DeCatur Land Impr., etc., Co., 98 Ala. 461, 13 S 368; Bell v. Teague, 85 Ala. 211, 3 S 861.

Ky.—Scott v. Messick, 4 T. B. Mon. 535; McAlexander v. Lee, 3 A. K. Marsh. 483.

Me.—Stinchfield v. Little, 1 Me. 231, 10 AmD 65.

Mass.—Taber v. Cannon, 8 Metc. 46; Simonds v. Heard, 23 Pick. 120, 34 AmD 41; Mayhew v. Prince, 11 Mass. 54.

Mich.—Landyskowski v. Lark, 108 Mich. 500, 66 NW 371 (holding that agents may bind themselves by their contracts, notwithstanding it is known to both parties that the contract is not for their benefit directly, but is for the benefit of another; and, having done so, they cannot evade their clearly expressed liability under the contract by showing that they were agents).

Miss.—Garland v. Stewart, 31 Miss. 314.

Mo.—Meyers v. Kilgen, 177 Mo. A. 724, 160 SW 569; Thompson v. Irwin, 76 Mo. A. 418.

N. H.—Brown v. Rundlett, 15 N. H. 360; Savage v. Rix, 9 N. H. 263.

N. J.—Sadler v. Young, 78 N. J. L. 594, 75 A 890.

N. Y.—Thomas Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528, 100 NE 457, 461 [mod 142 App. Div. 925 mem, 126 NYS 1148 mem]; Bassett v. Perkins, 65 Misc. 103, 119 NYS 854 (holding that, although an agent discloses the name of his principal, he may incur a personal liability by contracting in his own name); McBratney v. Heydecker, 8 Misc. 309, 28 NYS 780; Mills v. Hunt, 20 Wend. 431.

Okl.—Calman v. Kreipke, 40 Okl. 516, 139 P 698 (holding that, where an agent's contract and the circumstances are such as to bind him personally, he will be liable thereon, although he intended to bind his principal only and incidentally disclosed the principal's name); McConnell v. Holderman, 24 Okl. 129, 103 P 593.

Pa.—Meyer v. Barker, 6 Binn. 228; Boon, etc., Co. v. Prudential Trust Co., 39 Pa. Super. 65 (assignee for benefit of creditors).

Tenn.—Siler v. Perkins, 126 Tenn. 380, 149 SW 1060, 47 LRANS 232; Cruse v. Jones, 3 Lea 66; Ahrens v. Cobb, 9 Humphr. 648.

Va.—Leterman v. Charlottesville Lumber Co., 110 Va. 769, 67 SE 281 (holding that an agent may become liable on a contract contrary to his actual intent; and if he contracts in such a form or under such circumstances as to make himself personally responsible he cannot afterward, whether his principal was or was not known at the time of the contract, relieve himself of responsibility).

Eng.—Norton v. Herron, 1 C. & P. 648, 12 ECL 366, R. & M. 229, 21 ECL 739.

[a] **When intention must be gathered from contract alone.**—If the contract is in writing and is clear and unambiguous in its terms, the intention of the parties must be gathered from it alone without resorting to other facts and circumstances to vary its construction and legal effect. Bray v. Kettell, 1 Allen (Mass.) 80. See generally as to construction of contracts Contracts [9 Cyc 577].

[b] **Consideration.**—The liability of an agent on a mining lease signed so as to bind himself only formed a sufficient consideration to bind the other party to the contract. Brooks v. Cook, 141 Ala. 499, 38 S 641.

2. Merrell v. Witherby, 120 Ala. 418, 23 S 994, 26 S 974, 74 AmSR 39; Miller v. Early, 58 SW 789, 22 KyL 825; Eustis Mfg. Co. v. Saco Brick Co., 198 Mass. 212, 84 NE 449; Hastings v. Lovering, 2 Pick. (Mass.) 214, 13 AmD 420; Meyers v. Kilgen, 177 Mo. A. 724, 160 SW 569. See also cases cited supra note 1.

3. Mead v. Altgeld, 136 Ill. 298, 26 NE 388; Morgan v. Bergen, 3 Nebr. 209; Timken v. Tallmadge, 54 N. J. L. 117, 22 A 996; Dayton v. Warne, 43 N. J. L. 659; Hardman v. Kelley, 19 S. D. 608, 104 NW 272. See also supra § 338.

4. **Presumption as to intention of parties** see infra § 661.

5. U. S.—Moline Malleable Iron Co. v. York Iron Co., 83 Fed. 66, 27 CCA 442; Sprague v. Rosenbaum, 38 Fed. 386.

Ala.—Manly v. Sperry, 115 Ala. 524, 22 S 870; Humes v. Decatur Land Impr., etc., Co., 98 Ala. 461, 13 S 368; Bell v. Teague, 85 Ala. 211, 3 S 861. See also Clealand v. Walker, 11 Ala. 1059, 46 AmD 238.

Conn.—Johnson v. Smith, 21 Conn. 627.

Del.—Sharp v. Swayne, 17 Del. 210, 40 A 113; Andrews v. Allen, 4 Del. 452.

Ga.—Phinizy v. Bush, 139 Ga. 479, 59 SE 259; Holcomb v. Cable Co., 119 Ga. 466, 46 SE 671; Nall v. Farmers' Warehouse Co., 95 Ga. 770, 22 SE 665.

Ill.—Mead v. Altgeld, 136 Ill. 298, 26 NE 388; Fisher v. Haggerty, 36 Ill. 128; Watte v. Thayer, 56 Ill. A. 282.

Ind.—Shordan v. Kyler, 87 Ind. 38.

Iowa.—Triplett v. Jackson, 130 Iowa 408, 106 NW 954; Nixon v. Downey, 49 Iowa 166.

Ky.—Miller v. Early, 58 SW 789, 22 KyL 825.

La.—Thompson v. Moulton, 20 La. Ann. 535; Campbell v. Nicholson, 12 Rob. 428; Linton v. Walsh, 16 La. 113; Hopkins v. Lacouture, 4 La. 64.

Mass.—Wilder v. Cowles, 100 Mass. 487. And see Worthington v. Cowles, 112 Mass. 30 (holding the agent liable unless the third person understood, or ought as a reasonable man to have understood, that he was dealing with the principal).

Miss.—Garland v. Stewart, 31 Miss. 314.

Mo.—Hovey v. Pitcher, 13 Mo. 191; Ross v. McAnaw, 72 Mo. A. 99 (holding that, where an agent contracts for work for his principal with the distinct understanding that the agent is to pay for such work, he becomes liable therefor; and the fact that his principal is joined with him in the suit for the price of such work will not release him from his liability).

Nebr.—Sholes v. Kreamer, 26 Nebr. 556, 42 NW 724.

N. J.—McCauley v. Ridgewood Trust Co., 81 N. J. L. 86, 79 A 327.

N. Y.—Jones v. Gould, 200 N. Y. 18, 92 NE 1071; Dahlstrom v. Gemunder, 198 N. Y. 449, 92 NE 106, 19 AnnCas 771 and note [rev 133 App. Div. 69, 117 NYS 576] (holding that, while, ordinarily, agents acting for a disclosed principal, and guilty of no fraud or misrepresentation, are not liable on a warranty of a thing sold, an agent may on a good considera-

to the principal.[6] Although a person in making a contract describes himself as an agent or affixes to his signature words descriptive of agency, these terms may be treated as mere descriptio personæ, and if the alleged agent has otherwise assumed a personal obligation or has pledged his own credit he may still be held upon the contract.[7] But in order to hold the agent personally liable in such cases it must be clearly shown that credit was given exclusively to him,[8] that he had knowledge of that fact,[9] and that it was his intention to become the sole debtor.[10] The agent cannot be held liable on the contract, where the other contracting party knows of the principal and enters into the contract intending to hold such principal to its performance, or to extend credit to him only.[11]

[§ 489] **(d) Failure to Bind Principal.** An agent who, while entering into an authorized contract, fails to bind his principal does not necessarily bind himself, and, where there are no apt words used to bind either the principal or the agent, the contract is absolutely void and imposes obligations on neither.[12] Where the contract is made in the name of the principal and without any personal covenant on the part of the agent and without any wrong on his part, either in act, statement, or omission, the agent is not liable, even though the contract is not binding on the principal,[13] particularly where it contains restrictive words or terms expressly relieving him of liability under it.[14]

[§ 490] **(e) Liability of Agent of Foreign Principal.** In England, it is the rule, based on the usage of trade, that where a domestic agent contracts for a principal resident in a foreign country, he is presumed to have contracted on his personal credit, in the absence of a clear showing of a contrary intention, either from the terms of the contract or from the surrounding circumstances.[15] This liability of

tion make an enforceable personal warranty); Jones v. Gould, 123 App. Div. 238, 108 NYS 31; Durston v. Butterfield, 66 Barb. 601; Clarke v. Watt, 83 Misc. 404, 145 NYS 145; Underhill v. Smith, 52 Misc. 349, 102 NYS 142; McBratney v. Heydecker, 8 Misc. 309, 28 NYS 730; Stone v. Wood, 7 Cow. 453, 17 AmD 529. See also Rathbone v. Budlong, 15 Johns. 1; Gill v. Brown, 12 Johns. 385.

Pa.—Cook v. Forker, 193 Pa. 461, 44 A 560, 74 AmSR 699.

S. C.—Danforth v. Timmerman, 65 S. C. 259, 43 SE 673.

Tenn.—Siler v. Perkins, 126 Tenn. 380, 149 SW 1060, 47 LRANS 232; Bailey v. Galbreath, 100 Tenn. 599, 47 SW 84. See also Cruse v. Jones, 3 Lea 66.

Vt.—Button v. Winslow, 53 Vt. 430; Hinsdale v. Partridge, 14 Vt. 547.

Va.—Strider v. Winchester, etc., R. Co., 21 Gratt. (62 Va.) 440; Richmond First Presb. Church v. Manson, 4 Rand. (25 Va.) 197. See also Lambert v. Phillips, 109 Va. 632, 64 SE 945 (holding that the fact that defendant was an independant contractor in making improvements on property, so as to be responsible to employees and others for injuries resulting from his negligence, was not conclusive as to whether he was liable for materials furnished in doing the work, but was only a fact to be considered in determining whether credit was given to him or to the owner, that being the criterion of liability for the materials).

Wash.—Tripple v. Littlefield, 46 Wash. 156, 89 P 493.

W. Va.—Johnson v. Welch, 42 W. Va. 18, 24 SE 585; Sayre v. Edwards, 19 W. Va. 352.

Wis.—Hull v. Brown, 35 Wis. 652; Fredendall v. Taylor, 26 Wis. 286; McCurdy v. Rogers, 21 Wis. 197, 91 AmD 468.

Eng.—Armstrong v. Stokes, L. R. 7 Q. B. 598, 2 ERC 471; Jones v. Littledale, 6 A. & E. 486, 33 ECL 265, 112 Reprint 186; Norton v. Herron, 1 C. & P. 648, 12 ECL 366, R. & M. 229, 21 ECL 739; Owen v. Gooch, 2 Esp. 567; Turrel v. Collet, 1 Esp. 321.

Man.—Bell v. Rokeby, 15 Man. 327.

Ont.—Wood v. Grand Valley R. Co., 26 Ont. L. 441, 5 DomLR 428, 22 OntWR 269 [aff 27 Ont. L. 556, 4 OntWN 556, 23 OntWR 664].

6. Shordan v. Kyler, 87 Ind. 38 (so holding, although the agent's lack of interest in the transaction, except as agent, is known to the other contracting party); Crum v. Boyd, 9 Ind. 289; Cook v. Forker, 193 Pa. 461, 44 A 560, 74 AmSR 699; Ahrens v. Cobb, 9 Humphr. (Tenn.) 643.

7. See supra §§ 337, 338.

8. Anderson v. Timberlake, 114 Ala. 377, 22 S 431, 62 AmSR 105 (holding, however, that where plaintiff knew that defendant was an agent when he contracted an account, the fact that defendant directed the account to be charged to himself is not decisive that he intended to become the sole debtor, to the exclusion of liability on the part of his principal; nor is it decisive that plaintiff did not extend credit to the principal); Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 AmD 618; McKeen v. Providence County Sav. Bank, 24 R. I. 542, 54 A 49; Ahrens v. Cobb, 9 Humphr. (Tenn.) 643.

[a] **Entries on the books of the vendor charging** the goods to the agent, although of much weight upon the question, are not conclusive evidence that the credit was given exclusively to him. Foster v. Persch, 68 N. Y. 400; McKeen v. Providence County Sav. Bank, 24 R. I. 542, 54 A 49.

[b] **Payments made to the agent in previous similar transactions** do not warrant an inference that it was contemplated either by the third person or by the agent that the principal should be ignored in the transaction, where the receipt of such payments was in the scope of the agent's duty. Moline Malleable Iron Co. v. York Iron Co., 83 Fed. 66, 27 CCA 442.

9. Anderson v. Timberlake, 114 Ala. 377, 22 S 431, 62 AmR 105; Humes v. Decatur Land Impr., etc., Co., 93 Ala. 461, 13 S 368.

10. Anderson v. Timberlake, 114 Ala. 377, 22 S 431, 62 AmSR 105.

11. Meade Plumbing, etc., Co. v. Irwin, 77 Nebr. 385, 109 NW 391; Balmford v. Peffer, 31 Misc. 715, 65 NYS 271. See also cases supra note 93.

12. Taylor v. Shelton, 30 Conn. 122; Ogden v. Raymond, 22 Conn. 379, 58 AmD 429; Stetson v. Patten, 2 Me. 358, 11 AmD 111; McCurdy v. Rogers, 21 Wis. 197, 91 AmD 468. See however Le Roy v. Jacobosky, 136 N. C. 443, 48 SE 796, 67 LRA 977 (holding that, where an agent fails to bind his principal, whereby another is misled and parts with something of value or acquires legal rights, the agent, although not liable on the contract as made, may be held liable in a special action on the case under the common-law procedure, or, under the code, in an action upon an implied assumpsit, where he has received the consideration, or for damages).

13. Holt v. Winfield Bank, 25 Fed. 812; Abeles v. Cochran, 22 Kan. 405, 31 AmR 194; Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. A. 135 (holding that, where an agent of a corporation discloses the name of his principal, and makes no concealment or false representation, but acts in good faith, he incurs no liability, although he does not bind the corporation); Fowle v. Kerchner, 87 N. C. 49.

Liability of agent where contract unauthorized see supra § 483.

14. Perry v. Hyde, 10 Conn. 329; Fowle v. Kerchner, 87 N. C. 49.

[a] **Express exclusion of liability.**—(1) A promissory note in part, "We as trustees but not individually promise to pay," and signed by three persons with the word "trustees" after their names, does not bind them personally. The court declared it unnecessary under the circumstances to determine whether or not the principals were liable on the instrument Shoe, etc., Nat. Bank v. Dix, 123 Mass. 148, 25 AmR 49. (2) But in Furnival v. Coombes, 5 M. & G. 736, 44 ECL 384, 134 Reprint 756, the agents described themselves as such in the body of the contract, and promised for themselves and their successors; following this was a stipulation that they should not be held personally on the contract, and the latter stipulation was held void as repugnant to the personal promise, and judgment was given against them.

15. Hutton v. Bulloch, L. R. 9 Q. B. 572; Armstrong v. Stokes, L. R. 7 Q. B. 598, 2 ERC 471; Wilson v. Zulueta, 14 Q. B. 405, 68 ECL 405, 117 Reprint 159; Gadd v. Houghton, 1 Ex. D. 357 [disappr Paice v. Walker, L. R. 5 Exch. 173]; Gonzales v. Sladen, Buller N. P. 130; Green v. Kopke, 18 C. B. 549, 86 ECL 549, 139 Reprint 1484; Peterson v. Ayre, 13 C. B. 353, 76 ECL 353, 138 Reprint 1235; Heald v. Kenworthy, 10 Exch. 739; Ogden v. Hall, 40 L. T. Rep. N. S. 751; Jack v. Clews, 5 N. B. 637. Compare Murphy v. Butler, 18 Man. 111. In Thomson v. Davenport, 9 B. & C. 78, 17 ECL 45, 109 Reprint 30, it was strongly intimated that, in the absence of a trade usage to the contrary, the rule would not be extended to contracts between residents of Scotland and England.

[a] **Reasons for rule.**—(1) "The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness perhaps still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known, that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of

the agent is not, however, a rule of law, but is in all cases a question of intention dependent upon the contract and subject to be explained by the surrounding circumstances, such as a custom or usage of trade, when any such exists.[16] So where the express language of a written contract clearly excludes the idea that the agent is contracting on his own behalf, the principal and not the agent will be bound.[17]

In the United States some early decisions adopted the view that the liability of the agent of a foreign principal was absolute, irrespective of the fact that the contract disclosed the agency,[18] also basing it on the usage of trade.[19] Other early decisions, while holding that there was a prima facie presumption that the agent was personally bound, held that the presumption might be rebutted by proof that credit was given to both principal and agent or to the principal alone,[20] or by proof that the usage of trade did not embrace the case in question.[21] By the more modern rule, however, it is immaterial whether the principal is a foreigner or not. If by the language of the contract the agent, and not the principal, is bound, such must be its construction; and, on the other hand, if it clearly binds the principal and is in form a contract with him only, the agent will be exonerated.[22]

[§ 491] **(2) Where Principal Is Undisclosed—(a) Disclosure of Both Agency and Principal Necessary.** It is the duty of the agent, if he would avoid personal liability on a contract entered into by him on behalf of his principal, to disclose not only the fact that he is acting in a representative capacity but also the identity of his principal,[23] as the person dealt with is not bound to inquire whether or not the agent is acting as such for another.[24]

an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit." Armstrong v. Stokes, L. R. 7 Q. B. 598, 605, 2 ERC 471. (2) "I quite agree that a man may, as agent, make a contract upon such terms as not only to bind himself but also so as to bind the principal; in other words, so that the principal shall be party to the contract, and may then either sue or be sued. I must say I think that the two things are correlative. A man cannot make a contract in such a way as to take the benefit, unless also he take the responsibility of it. But although such a contract may be where the principals are English; yet where a foreigner has instructed English merchants to act for him, I take it that the usage of trade, established for many years, has been that it is understood that the foreign constituent has not authorized the merchants to pledge his credit to the contract, to establish privity between him and the home supplier. On the other hand, the home supplier, knowing that to be the usage, unless there is something in the bargain shewing the intention to be otherwise, does not trust the foreigner, and so does not make the foreigner responsible to him, and does not make himself responsible to the foreigner." Die Elbinger Actien-Gesellschaft, etc. v. Claye, L. R. 8 Q. B. 313, 317.

[b] **This rule has its most frequent application** where goods are sold to the agent of a foreign principal to be delivered in England. Wilson v. Zulueta, 14 Q. B. 405, 68 ECL 405, 117 Reprint 159.

16. Green v. Kopke, 18 C. B. 549, 86 ECL 549, 139 Reprint 1484. To same effect Heald v. Kenworthy, 10 Exch. 739.

17. Gadd v. Houghton, 1 Ex. D. 357; Mahony v. Kekule, 14 C. B. 390, 78 ECL 390, 139 Reprint 161; Taylor v. Davenport, 14 WestLR 257, 259 (where the court said: "The case of Green v. Kopke, 18 C. B. 549, 86 ECL 549, 139 Reprint 1484, however, shows that the question is always one of intention, and that where it is found . . . that the agent never intended to bind himself, the fact that his principals are foreigners does not make him liable").

[a] **An agent who expressly contracts not to be liable** cannot of course be held, even though acting for a foreign principal. Milvain v. Perez, 3 E. & E. 495, 107 ECL 495, 121 Reprint 528.

18. Hochster v. Baruch, 5 Daly (N. Y.) 440; In re Merrick, 5 Watts & S. (Pa.) 9.

19. Rogers v. March, 33 Me. 106; McKenzie v. Nevius, 22 Me. 138, 143, 38 AmD 291 (where the court said: "By the usage of trade, a rule may be considered as established, that agents or factors acting for merchants resident in a foreign country, are held personally liable for contracts made by them for their employers, notwithstanding they fully disclose at the time the character in which they act. This arises from the consideration, that the merchant abroad and his ability to discharge his obligations may be unknown to those, who assume pecuniary responsibility, or make advances or perform services on his account; the presumption is, that the credit is given exclusively to the foreigner's agent, unless rebutted by an agreement express or implied; and that the party dealing with the agent intends to trust one, who is known to him and resides in the same country and subject to the same laws, as himself, rather than trust to one, who if known cannot from his residence in a foreign country, be amenable to those laws, and whose ability may be affected by local institutions and local exemptions, which may put at hazard both his rights and his remedies").

20. Vawter v. Baker, 23 Ind. 63; Thorne v. Tait, 8 La. Ann. 8; New Castle Mfg. Co. v. Red River R. Co., 1 Rob. (La.) 145, 36 AmD 686. But see Maury v. Ranger, 38 La. Ann. 485, 58 AmR 197.

[a] **Limitations to rule.**—(1) It has been held that this rule did not extend to a contract, made in one of the United States by one resident there, for personal services to be rendered in a foreign country (Rogers v. March, 33 Me. 106), (2) nor to a contract made by parties resident in different states of the United States, which are held to be not foreign in the sense of the term necessary to make the rule operative (Vawter v. Baker, 23 Ind. 63; Rogers v. March, supra; Barham v. Bell, 112 N. C. 131, 16 SE 903).

21. Vawter v. Baker, 23 Ind. 63.

22. U. S.—Oelricks v. Ford, 23 How. 49, 16 L. ed. 534; Berwind v. Schultz, 25 Fed. 912.

La.—Maury v. Ranger, 38 La. Ann. 485, 58 AmR 197.

Mass.—Goldsmith v. Manheim, 109 Mass. 187; Bray v. Kettell, 1 Allen 80 (holding that an agent is not personally responsible on contracts entered into by him on behalf of a foreign principal, if it appears that in point of fact exclusive credit was given to his principal; and if the contract is in writing, and clear and unambiguous in its terms, the intention of the parties must be gathered from it alone without resorting to other facts and circumstances to vary its construction and legal effect); Alcock v. Hopkins, 6 Cush. 484. See Barry v. Page, 10 Gray 398.

N. H.—Kaulback v. Churchill, 59 N. H. 296.

N. Y.—Taintor v. Prendergast, 3 Hill 72, 38 AmD 618; Kirkpatrick v. Stainer, 22 Wend. 244, 263 (where Verplanck senator reviewed the English rule and said: "No usage or course of business analogous to that prevalent in England, being notorious or well established by former evidence as existing here, and no proof having been offered to the referees of any special or local usage, or common understanding, charging the agent alone, and not his foreign principal, for purchases or contracts made avowedly for such known principal, the case must be governed by the general law as to the contracts of a private agent, clothed with full authority and acting openly in behalf of his principal").

[a] **Intention controlling.**—"It is just this distinction that has been taken in the case of an agent contracting in behalf of a foreign principal. There, if the language of the contract is at all ambiguous, so as to leave it doubtful to whom the credit was given, the principal or the agent, the circumstance that the principal is resident abroad may be taken into consideration in determining that question—it being reasonable, in a case admitting of doubt, to suppose that the other contracting party trusted the agent residing at home and subject to the laws and process familiar to himself, rather than one living beyond the reach of domestic laws. But still it is a question of intention, and if the contract be in writing, and its terms clearly manifest a purpose to bind the principal, though a foreigner, it must be deemed to be the final repository of the intention of the parties, and its construction and effect should not be varied so as to charge the agent in consideration of its unreasonableness or inconvenience." Fowle v. Kerchner, 87 N. C. 49, 59.

23. U. S.—Horan v. Hughes, 129 Fed. 248 [aff 129 Fed. 1005, 64 CCA 581].

Ala.—Armour Packing Co. v. Vietch-Young Produce Co., 39 S 680.

Cal.—Murphy v. Helmrich, 66 Cal. 69, 4 P 958.

Mo.—Hamlin v. Abell, 120 Mo. 188, 25 SW 516 (holding that if an agent would bind only his principal it is his duty to disclose such principal, and if he fails to do so it must be taken that he intends to bind himself); Heath v. Goslin, 80 Mo. 310, 50 AmR 505; Lapsley v. McKinstry, 38 Mo. 245.

N. Y.—Morrison v. Currie, 11 N. Y. Super. 79; Cabre v. Sturges, 1 Hilt. 160; Beidleman v. Kelly, 51 Misc. 51, 99 NYS 907; Brockway v. Allen, 17 Wend. 40.

S. D.—Cockran v. Rice, 26 S. D. 393, 398, 128 NW 583, AnnCas1913B 570 [quot Cyc].

Tenn.—Cruse v. Jones, 3 Lea 66; Kahn v. Hulmes, 5 Sneed 610.

Vt.—Baldwin v. Leonard, 39 Vt. 260, 94 AmD 324.

W. Va.—Curtis v. Miller, 80 SE 774.

[a] **An agent who does not disclaim liability** upon being treated with as a principal by the third person is personally bound. Porter v. Merrill, 138 Mo. 555, 39 SW 798.

24. Armour Packing Co. v. Vietch-

Disclosure of principal. An agent who enters into a contract in his own name without disclosing the identity of his principal renders himself personally liable even though the third person knows that he is acting as agent, unless it affirmatively appears that it was the mutual intention of the parties to the contract that the agent should not be bound,[25] and in some jurisdictions this rule is made the subject of statutory provision in regard to certain classes of agents.[26] This rule applies, although the agent

Young Produce Co., (Ala.) 39 S 680; Curtis v. Miller, (W. Va.) 80 SE 774.

25. U. S.—In re Miley, 187 Fed. 177; Horan v. Hughes, 129 Fed. 248 [aff 129 Fed. 1005, 64 CCA 581]; Armstrong v. Brolaski, 46 Fed. 903; Ye Seng Co. v. Corbitt, 9 Fed. 423, 7 Sawy. 368.

Ala.—Manly v. Sperry, 115 Ala. 524, 22 S 870.

Ark.—Cooley v. Ksir, 105 Ark. 307, 151 SW 254, 43 LRANS 527; Boynton v. Brannum, 136 SW 979; Drake v. Pope, 78 Ark. 327, 95 SW 774; Neely v. State, 60 Ark. 66, 28 SW 800, 46 AmSR 148, 27 LRA 503.

Cal.—Jewell v. Colonial Theater Co., 12 Cal. A. 681, 108 P 527 (holding that an agent who binds himself by the terms of a contract without disclosing his principal is liable for breach of the contract by the principal).

Ill.—Geiselman v. Roddinghaus, 158 Ill. A. 316; Laguna Valley Co. v. Fitch, 121 Ill. A. 607; Macdonald v. Bond, 96 Ill. A. 116 [aff 195 Ill. 122, 62 NE 881]; Scaling v. Knollin, 94 Ill. A. 443.

Ind. T.—Lowrey v. Scargill, 7 Ind. T. 497, 104 SW 813 (liable for the purchase price of goods).

Iowa.—Lull v. Anamosa Nat. Bank, 110 Iowa 537, 81 NW 784.

Ky.—McKown v. Gettys, 80 SW 169, 25 KyL 2070.

La.—Pugh v. Mone, 44 La. Ann. 209, 10 S 710.

Mass.—Welch v. Goodwin, 123 Mass. 71, 25 AmR 24; Winsor v. Griggs, 5 Cush. 210. See Lyon v. Williams, 5 Gray 557.

Mich.—Rochester Distilling Co. v. Bostrum, 158 Mich. 543, 123 NW 27; Mercer v. Lelhy, 139 Mich. 447, 102 NW 972; Lewis v. Weidenfield, 114 Mich. 581, 72 NW 604 (holding that one who, in his individual name, contracted to purchase property, and gave a mortgage thereon to secure the price thereof, is personally liable for any deficiency after foreclosure of such mortgage, although the seller knew that others were interested, or that the purchaser was acting with the intention of conveying the property to others).

Minn.—Gay v. Kelley, 109 Minn. 101, 123 NW 295, 26 LRANS 742; Brown v. Ames, 59 Minn. 476, 61 NW 448; Rollins v. Phelps, 5 Minn. 463.

Mo.—Porter v. Merrill, 138 Mo. 555, 39 SW 798; Queen City Furniture, etc., Co. v. Crawford, 127 Mo. 356, 30 SW 163; Johnston v. Parrott, 92 Mo. A. 199.

Nebr.—Western Wheeled Scraper Co. v. McMillen, 71 Nebr. 686, 99 NW 512; Dockarty v. Tillotson, 64 Nebr. 432, 89 NW 1050; Bridges v. Bidwell, 20 Nebr. 185, 29 NW 302.

N. J.—Sadler v. Young, 78 N. J. L. 594, 75 A 890.

N. Y.—Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co., 211 N. Y. 68, 105 NE 88; Meyer v. Redmond, 205 N. Y. 478, 98 NE 906, 41 LRANS 675 [aff 141 App. Div. 123, 125 NYS 1052]; Tew v. Wolfsohn, 174 N. Y. 272, 66 NE 934; De Remer v. Brown, 165 N. Y. 410, 59 NE 129; McClure v. Central Trust Co., 165 N. Y. 108, 58 NE 777, 53 LRA 153; Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 NE 994; Argersinger v. MacNaughton, 114 N. Y. 535, 21 NE 1022, 11 AmSR 687; Knapp v. Simon, 96 N. Y. 284; Cobb v. Knapp, 71 N. Y. 348, 27 AmR 51; Pond v. Clark, 57 N. Y. 653; Good v. Rumsey, 50 App. Div. 280, 63 NYS 981; Petrolia Mfg. Co. v. Jenkins, 29 App. Div. 403, 51 NYS 1028; Powers v. McLean, 14 App. Div. 92, 43 NYS 477 [aff 164 N. Y. 588 mem, 58 NE 1091 mem]; Adamson v. Elwell, 49 N. Y. Super. 494 [aff 99 N. Y. 661 mem]; Nichols v. Weil, 30 Misc. 441, 62 NYS 477; Nelson v. Andrews, 19 Misc. 623, 44 NYS 384; Richards v. Robin, 148 NYS 822; Dages v. Melrose Iron Co., 140 NYS 392; Taubenblatt v. Galewski, 108 NYS 588; Waring v. Mason, 18 Wend. 425; McComb v. Wright, 4 Johns. Ch. 659.

N. C.—Rounsaville v. North Carolina Home Ins. Co., 138 N. C. 191, 50 SE 619.

Oh.—Soutter v. Stoeckle, 6 Oh. Dec. (Reprint) 1054, 10 AmLRec 23.

Pa.—Meyer v. Barker, 6 Binn. 228; Manley v. Hickman, 1 Chest. Co. 557.

S. C.—Long v. McKissick, 50 S. C. 218, 27 SE 636; Conyers v. Magrath, 15 S. C. L. 392.

S. D.—Cockran v. Rice, 26 S. D. 393, 397, 128 NW 583, AnnCas1913B 570 [quot Cyc]; Hardman v. Kelley, 19 S. D. 608, 104 NW 272.

Tenn.—Siler v. Perkins, 126 Tenn. 380, 149 SW 1060, 47 LRANS 232 and note; Steele v. McElroy, 1 Sneed 341.

Tex.—Abney v. Hillsboro Citizens' Nat. Bank, (Civ. A.) 152 SW 734; Hunter v. Adoue, 38 Tex. Civ. A. 542, 86 SW 622.

Vt.—Arnold v. Sprague, 34 Vt. 402.

Va.—Leterman v. Charlottesville Lumber Co., 110 Va. 769, 67 SE 281; Hoge v. Turner, 96 Va. 624, 32 SE 291.

Wash.—Gordon v. Brinton, 55 Wash. 568, 104 P 832, 133 AmSR 1038.

W. Va.—Morris v. Clifton Forge Grocery Co., 46 W. Va. 197, 32 SE 997.

Que.—Dagenais v. Modern Realty, etc., Co., 41 Que. Super. 428, 5 DomLR 315.

See Roberts v. Tuttle, 36 Utah 614, 634, 105 P 916 [cit Cyc].

[a] **Reason for rule.**—(1) "This rule has not only the support of authority but also that of reason and common sense. If a person should be permitted to go through the form of entering into a contract with another, as agent of a third person, and fail or refuse to disclose the name of his principal, inasmuch as the contract could not be enforced against the unknown principal, it could not be enforced at all unless the agent could be held personally liable, and thus the transaction would become nugatory." Long v. McKissick, 50 S. C. 218, 236, 27 SE 636. (2) "It may be supposed that [the other contracting party] relies upon the responsibility of the person with whom he deals for the performance of the contract, and that he is not required to look elsewhere to obtain it. When there is, in fact, a principal the agent may ordinarily relieve himself from personal liability, upon a contract made in his behalf, by disclosing his name at the time of making it. Upon such disclosure, however, the party proceeding to deal with the agent may or may not, as he pleases, enter into contract upon the responsibility of the named principal, but to permit an agent to turn over to his customer an undisclosed and, to the latter, unknown principal, might have the effect to deny to the customer the benefit of any available or responsible means of remedy or relief founded upon the contract. The rule is no less salutary than reasonable that an agent may be treated as the party to the contract made by him in his own name, unless he advises the other party to it of the name of the principal whom he assumes to represent in making it where that is unknown to such party." Argersinger v. MacNaughton, 114 N. Y. 535, 539, 21 NE 1022, 11 AmSR 687.

[b] **"An agent who contracts in such form as to make himself personally responsible** cannot afterward, whether his principal was or was not known at the time of the making of the contract, relieve himself from that responsibility." Sadler v. Young, 78 N. J. L. 594, 596, 75 A 890.

[c] **In England and Canada** a custom exists in various trades rendering the agent liable when he fails to disclose the name of his principal. Pike v. Ongley, 18 Q. B. D. 708; Hutcheson v. Eaton, 13 Q. B. D. 861; Barrow v. Dyster, 13 Q. B. D. 635; Fleet v. Murton, L. R. 7 Q. B. 126; Imperial Bank v. London, etc., Docks Co., 5 Ch. D. 195; Hutchinson v. Tatham, L. R. 8 C. P. 482; Bacmeister v. Levy, Cab. & E. 121; Gurney v. Womersley, 4 E. & B. 133, 82 ECL 133, 119 Reprint 51; Ex p. Hartop, 12 Ves. Jr. 349, 33 Reprint 132; Boultbee v. Gzowski, 29 Can. S. C. 54; Demers v. McCrae, 40 Que. Super. 123. See also Wildy v. Stephenson, Cab. & E. 3.

[d] **Where an agent submits to arbitration** without disclosing the name of his principal who is unknown to the other party, he will incur a personal liability. Winsor v. Griggs, 5 Cush. (Mass.) 210; Smith v. Van Nostrand, 5 Hill (N. Y.) 419.

[e] **An agent is liable for a breach of warranty** where he makes a sale with warranty in his own name, without disclosing his principal. Arfman v. Hare, 27 Misc. (N. Y.) 777, 57 NYS 759.

[f] **Damages.**—If an agent of an undisclosed principal is sued by the other party to the contract the latter may recover such damages as have resulted from the breach of the contract on the agent's part. Leterman v. Charlottesville Lumber Co., 110 Va. 769, 67 SE 281.

[g] **Consideration.**—Where one party executed a contract on his part, the promise of the other party thereto, although an agent acting for an undisclosed principal, rested on a sufficient consideration. Buffington v. McNally, 192 Mass. 198, 78 NE 309.

26. See statutory provisions. See also infra § 570.

[a] **Thus** under some statutes (1) where a person transacts business as a trader or otherwise, with the addition of the word "agent," "factor," or other like word and fails to disclose the name of his principal in the manner provided by statute, the property used in the business shall, as to the creditors of such person, be liable for his debts. Dale v. Harrahan, 85 Miss. 49, 37 S 458; Hoge v. Turner, 96 Va. 624, 32 SE 291 (construing Code [1887] § 2877); Cable Co. v. Mathers, 72 W. Va. 807, 79 SE 1079; Morris v. Clifton Forge Grocery Co., 46 W. Va. 197, 32 SE 997 (construing Code 100 § 13). (2) To constitute one a "trader" within such a provision he must be both a buyer and a seller, or a barterer of goods, for profit. Cable Co. v. Mathers, supra. (3) Hence where a person to whom pianos and organs are consigned by the owner, to be sold on commission, carries no goods for sale on his own account, he is not a trader. Cable Co. v. Mathers, supra. (4) So also the fact that a consignee of goods to be sold on commission occasionally accepted new musical instruments in part payment for old ones does not constitute him a "barterer" of goods so as to render the consigned property liable for his debts. Cable Co. v. Mathers, supra.

[b] **In the Philippines,** under commerce code art 246, "when an agent transacts business in his own name, it shall not be necessary for him to state who is the principal, and he shall be directly liable, as if the business were for his own account, to the persons with whom he trans-

was not particularly requested to disclose his principal;[27] nor is the agent released from liability by a subsequent agreement between his principal and the third person to submit the matter in dispute to arbitration;[28] but the rule does not apply where there is no contract relation induced and entered into between the third person and the agent.[29]

Disclosure of agency. With stronger reason an agent who, without disclosing his agency, enters into contractual relations in his own name with one who is unaware of the agency binds himself and becomes subject to all liabilities, express and implied, created by the contract and transaction, in like manner as if he were the real principal, although in contracting he may have intended to act solely for his principal,[30] and although the other

acts the same, said persons not having any right of action against the principal, nor the latter against the former." Lim Tiu v. Ruiz, 15 Philippine 367, 371.

27. Morrison v. Currie, 11 N. Y. Super. 79.

28. Nason v. Cockroft, 10 N. Y. Super. 366.

29. American Alkali Co. v. Kurtz, 134 Fed. 663, 665 [aff 138 Fed. 392, 70 CCA 532] (where the court said: "It is contended by the plaintiffs that the defendant is estopped from denying liability because he acted as agent in procuring the issuance of the stock in the name of Magee, upon the principle that the agent of an undisclosed principal is equally liable with the principal. This is a salutary principle of law enforced against an agent acting for an undisclosed principal in cases where his action is such as to induce the other party to extend a credit on his account; or where one enters into a contract with the agent without knowing him to be such, upon discovery of the principal he may elect between them which to sue; and in contracts the rule is the same where he states himself to be an agent without disclosing the name of his principal. But this principle has no application where there is no contract relation induced and entered into between the plaintiff and defendant, as in this case"). See also Bierce v. Memphis State Nat. Bank, 25 Okl. 44, 105 P 195 (holding that where, in an action by a nonresident bank on a note transferred in due course, defendant answered that plaintiff was not the owner and not the real party in interest, and by a cross petition set up a transaction between himself and the original payee, in which he averred that the payee was indebted for an amount largely in excess of the note, and that plaintiff was the agent of the payee, its undisclosed principal, and was liable for the amount due from the payee to defendant, a demurrer to the cross complaint was properly sustained).

30. U. S.—Ye Seng Co. v. Corbitt, 9 Fed. 423, 7 Sawy. 368; Allen v. Schuchardt, 1 F. Cas. No. 236 [aff 1 Wall. 359, 17 L. ed. 642]; Farrell v. Campbell, 8. F. Cas. No. 4,681, 3 Ben. 8. See White v. Boyce, 21 Fed. 228.

Ala.—Armour Packing Co. v. Vietch-Young Produce Co., 39 S 680; Brent v. Miller, 81 Ala. 309, 8 S 219; Wood v. Brewer, 73 Ala. 259; Endowment Dept. Dist. Grand Lodge No. 23 G. U. O. O. F. v. Harvey, 6 Ala. A. 239, 60 S 602.

Ark.—Bryant Lumber Co. v. Crist, 87 Ark. 434, 112 SW 965; Drake v. Pope, 78 Ark. 327, 95 SW 774.

Cal.—Bradford v. Woodworth, 108 Cal. 684, 41 P 797; Murphy v. Helmrich, 66 Cal. 69, 4 P 958.

Colo.—Haviland v. Mayfield, 38 Colo. 185, 88 P 143; Mackey v. Briggs, 16 Colo. 143, 26 P 554; Hewes v. Andrews, 12 Colo. 161, 20 P 338.

Conn.—Pierce v. Johnson, 34 Conn. 274.

Del.—Sharp v. Swayne, 17 Del. 210, 40 A 113.

D. C.—Griffith v. Stewart, 31 App. 29.

Ga.—Burkhalter v. Perry, 127 Ga. 438, 56 SE 631; Garrard v. Moody, 48 Ga. 96.

Hawaii.—Montgomery v. Montgomery, 2 Hawaii 677.

Ida.—Whitney v. Woodmansee, 15 Ida. 735, 99 P 968.

Ill.—Bickford v. Chicago First Nat. Bank, 42 Ill. 238, 89 AmD 436; Wheeler v. Reed, 36 Ill. 81; Mace v. McChesney, 170 Ill. A. 454; Geiselman v. Roddinghaus, 158 Ill. A. 316; Scaling v. Knollin, 94 Ill. A. 443; Loehde v. Halsey, 83 Ill. A. 452; John Spry Lumber Co. v. McMillan, 77 Ill. A. 280; Trench v. Hardin County Canning Co., 67 Ill. A. 269 [aff 168 Ill. 135, 48 NE 64]; Weil v. Defenbaugh, 65 Ill. A. 489; Corrigan v. Reilly, 64 Ill. A. 531; Porter v. Day, 44 Ill. A. 256.

Ind.—Wilson v. Nicholson, 61 Ind. 241; Merrill v. Wilson, 6 Ind. 426.

Iowa.—Temple v. Pennell, 123 Iowa 729, 99 NW 567; Fritz v. Kennedy, 119 Iowa 628, 93 NW 603; Thompson v. People's Building, etc., Co., 114 Iowa 481, 87 NW 438; Blackmore v. Fairbanks, etc., Co., 79 Iowa 282, 44 NW 548; Nixon v. Downey, 49 Iowa 166; Baker v. Chambles, 4 Greene 428.

Ky.—Jones v. Johnson, 86 Ky. 530, 6 SW 582, 29 KyL 789; Chiles v. Nelson, 7 Dana 281; Tutt v. Brown, 5 Litt. 1, 15 AmD 38.

La.—Mithoff v. Byrne, 20 La. Ann. 363; Nott v. Papet, 15 La. 306; Bedford v. Jacobs, 4 Mart. N. S. 528. See Lochte v. Gélé, McGloin 52.

Me.—Nolan v. Clark, 91 Me. 38, 39 A 344.

Md.—York County Bank v. Stein, 24 Md. 447.

Mass.—Chelmsford Fdy. Co. v. Shepard, 206 Mass. 102, 92 NE 75; Brigham v. Herrick, 173 Mass. 460, 53 NE 906; Bartlett v. Raymond, 139 Mass. 275, 30 NE 91; Welch v. Goodwin, 128 Mass. 71, 25 AmR 24; Worthington v. Cowles, 112 Mass. 30; Hutchinson v. Wheeler, 3 Allen 577; Hastings v. Lovering, 2 Pick. 214, 13 AmD 420.

Mich.—Fitzpatrick v. Manheimer, 157 Mich. 307, 122 NW 83; Mercer v. Leihy, 139 Mich. 447, 102 NW 972; Rathburn v. Allen, 135 Mich. 699, 98 NW 135; Banks v. Cramer, 109 Mich. 168, 66 NW 946; Mitchell v. Beck, 88 Mich. 342, 50 NW 305. See Lewis v. Weidenfeld, 114 Mich. 581, 72 NW 604.

Minn.—Amans v. Campbell, 70 Minn. 493, 73 NW 506, 68 AmSR 547; Pratt v. Beaupre, 18 Minn. 187.

Miss.—Simmons Hardware Co. v. Todd, 79 Miss. 163, 29 S 851.

Mo.—Porter v. Merrill, 138 Mo. 555, 39 SW 798; Malone v. Morton, 84 Mo. 436; Heath v. Goslin, 80 Mo. 310, 50 AmR 505; Schell v. Stephens, 50 Mo. 375; Lapsley v. McKinstry, 38 Mo. 245; McClellan v. Parker, 27 Mo. 162; Lewis v. Fisher, 167 Mo. A. 674, 151 SW 172; O'Neil Lumber Co. v. Greffert, 154 Mo. A. 33, 133 SW 113; Sheehy v. Wollman, 152 Mo. A. 506, 133 SW 852 (holding that, where the agent of an undisclosed principal contracted with a third person to sell land of the undisclosed principal, the agent is liable for the commission as if he were the principal); Thompson v. Irwin, 76 Mo. A. 418; Dodd v. Butler, 7 Mo. A. 583. See also Greene v. Chickering, 10 Mo. 109.

Nebr.—Fowler v. McKay, 88 Nebr. 387, 129 NW 551; Bridges v. Bidwell, 20 Nebr. 185, 29 NW 302; Jackson v. McNatt, 4 Nebr. (Unoff.) 55, 93 NW 425.

N. H.—Batchelder v. Libbey, 66 N. H. 175, 19 A 570.

N. J.—Greenburg v. Palmieri, 71 N. J. L. 83, 58 A 298; Yates v. Repetto, 65 N. J. L. 294, 47 A 632; Elliott v. Bodine, 59 N. J. L. 567, 36 A 1038.

N. M.—Luna v. Mohr, 8 N. M. 56, 1 P 860.

N. Y.—Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528, 100 NE 457, 461; Tew v. Wolfsohn, 174 N. Y. 272, 66 NE 934 [aff 77 App. Div. 454, 33 Civ. Proc. 278, 79 NYS 286]; Argersinger v. MacNaughton, 114 N. Y. 535, 21 NE 1022, 11 AmSR 687; Knapp v. Simon, 96 N. Y. 284; Cobb v. Knapp, 71 N. Y. 348, 27 AmR 51 [aff 42 N. Y. Super. 91]; Holt v. Ross, 54 N. Y. 472, 13 AmR 615 [aff 59 Barb. 554]; Baltzen v. Nicolay, 53 N. Y. 467; Wasserman v. Bacon, 80 App. Div. 505, 81 NYS 193; Booth v. Barron, 29 App. Div. 66, 51 NYS 391; Jemison v. Citizens' Sav. Bank, 44 Hun 412; Morrison v. Currie, 11 N. Y. Super. 79; Blakeman v. Mackay, 1 Hilt. 266; Cabre v. Sturges, 1 Hilt. 160; Harder v. Continental Printing, etc., Card Co., 64 Misc. 89, 117 NYS 1001; Beidleman v. Kelly, 51 Misc. 51, 99 NYS 907; Forrest v. McCarthy, 30 Misc. 125, 61 NYS 853; McDonald v. Wesendonck, 29 Misc. 776, 61 NYS 491 [rev on other grounds 30 Misc. 601, 62 NYS 764]; Dulon v. Camp, 28 Misc. 548, 59 NYS 508; Whiting v. Saunders, 23 Misc. 332, 51 NYS 211; Ashner v. Abenheim, 19 Misc. 282, 43 NYS 69 [aff 31 App. Div. 623, 52 NYS 270]; Boyd v. L. H. Quinn Co., 17 Misc. 278, 40 NYS 370 [aff 18 Misc. 169, 41 NYS 391]; Whitman v. Johnson, 10 Misc. 725, 31 NYS 1009; Kahn v. Weill, 9 Misc. 150, 29 NYS 53; Mahoney v. Kent, 7 Misc. 726, 28 NYS 19; Schmerler v. Barasch, 113 NYS 745; Kneeland v. Coatsworth, 9 NYS 416; Roosevelt v. Strohkoefer, 3 NYSt 578; Rochester Bank v. Monteith, 1 Den. 402, 43 AmD 681; Mills v. Hunt, 20 Wend. 431; Waring v. Mason, 18 Wend. 425; Brockway v. Allen, 17 Wend. 40; Mauri v. Heffernan, 13 Johns. 58; National F. Ins. Co. v. Loomis, 11 Paige 431; McComb v. Wright, 4 Johns. Ch. 659. See also Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 NE 994.

N. C.—Forney v. Shipp, 49 N. C. 527. See Stamps v. Cooley, 91 N. C. 316.

Oh.—Lee v. Fraternal Mut. Ins. Co., 1 Handy 217, 12 Oh. Dec. (Reprint) 109. See Miller v. Sullivan, 39 Oh. St. 79.

Pa.—Beymer v. Bonsall, 79 Pa. 298; Paine v. Berg, 23 Pa. Super. 577; Manley v. Hickman, 1 Chest. Co. 557.

S. C.—Danforth v. Timmerman, 65 S. C. 259, 43 SE 678; Bacon v. Sondley, 34 S. C. L. 542, 51 AmD 646; Davenport v. Riley, 13 S. C. L. 198.

S. D.—Cockran v. Rice, 26 S. D. 393, 397, 128 NW 583, AnnCas1913B 570 [quot Cyc]; Lindsay v. Pettigrew, 5 S. D. 500, 59 NW 726.

Tex.—Johnson v. Armstrong, 83 Tex. 325, 18 SW 594, 29 AmSR 648; Sydnor v. Hurd, 8 Tex. 98; Hauser v. Layne, (Civ. A.) 131 SW 1156; Hatchett v. Sunset Brick, etc., Co., (Civ. A.) 99 SW 174; Book v. Jones, (Civ. A.) 98 SW 891; Harris v. Cain, 41 Tex. Civ. A. 139, 91 SW 866; Ash v. Beck, (Civ. A.) 68 SW 53; Neal v. Andrews, (Civ. A.) 60 SW 459; Williams v. Leon, etc., Land Co., (Civ. A.) 55 SW 374.

Vt.—Johnson v. Porter, 63 Vt. 653, 21 A 608; Button v. Winslow, 53 Vt. 430; Baldwin v. Leonard, 39 Vt. 260, 94 AmD 324; Coverly v. Braynard, 28 Vt. 738; Royce v. Allen, 28 Vt. 234.

Wash.—Gordon v. Brinton, 55 Wash. 568, 104 P 832 (holding that, where sellers sign a written contract in their own name merely, which contract does not upon its face show that

party afterward discovers the undisclosed principal,[31] unless he waives his right to hold the agent, and elects to hold the principal.[32]

[§ 492] **(b) Nature of Duty to Disclose.** This duty to disclose principal and agency is a positive one, and the agent cannot be relieved of liability, if he fails to make such disclosure, by the fact that the third person fails to discover his representative capacity,[33] although if in fact the third person has actual knowledge of the agency and the identity of the principal it will have the effect to relieve the agent, whether the agent himself makes the disclosure, or the third person acquires his knowledge through some other source.[34]

[§ 493] **(c) Time of Disclosure.** It is sufficient to relieve the agent from liability, if the disclosure of the fact of the agency and the identity of the principal is made before or at the time the contract is entered into,[35] or before liability is incurred on either side.[36] But a disclosure, made after the transaction has been practically brought to a close and liabilities incurred, comes too late to relieve the agent from liability.[37]

[§ 494] **(d) Sufficiency of Disclosure.** Ordi-

they are acting as agents of another, and the parties act upon the contract as drawn, the sellers are bound by the contract as it is written, and cannot, in an action for breach thereof, contend that they contracted merely as agents); State v. Clark County Super. Ct., 45 Wash. 316, 88 P 332.

W. Va.—Poole v. Rice, 9 W. Va. 73.

Wis.—Alexander, etc., Lumber Co. v. McGeehan, 124 Wis. 325, 102 NW 571.

Eng.—Simon v. Motivos, 3 Burr. 1921, 97 Reprint 1170; Gurney v. Womersley, 4 E. & B., 133, 82 ECL 133, 119 Reprint 51; Stewart v. Shaunessy, 2 F. (Ct. Sess.) 1288; Rabone v. Williams, 7 T. R. 360 note, 101 Reprint 1020 note, 2 ERC 391.

[a] **"It is a well-recognized rule** of law that where an agent conceals the fact of his agency and enters into a contract in his own name, he may be treated as the principal by the party with whom he deals, and may be held liable on the contract to the same extent as if he were in fact a principal in interest." Whitney v. Woodmansee, 15 Ida. 735, 739, 99 P 968; Book v. Jones, (Tex. Civ. A.) 98 SW 891.

[b] **Reasons for rule.**—(1) "The reason for the rule is that, generally speaking, every contracting party has the right to choose for himself those with whom he deals, and if a party acting for another fails to disclose to the one with whom he deals the fact of his agency, but misleads the party into the belief that he is himself the sole contractor and is acting for himself, then he is estopped to deny the reality of the assumed character. The party with whom he deals, being led to believe by him that he was dealing with him personally, is on this account permitted to enforce against him any obligation created." Bierce v. Memphis State Nat. Bank, 25 Okl. 44, 46, 105 P 195. (2) It has been assigned as a reason for this elementary principle that as the credit has been given to the undisclosed agent personally by the other party to the contract acting on the faith of the agent's assumed character as principal, the agent cannot take advantage of his own misleading representation to exonerate himself from liability, but will be held to the responsibility which he assumed. Montgomery v. Montgomery, 2 Hawaii 677; Jackson v. McNatt, 4 Nebr. (Unoff.) 55, 93 NW 425. (3) "This principle is just, and works no hardship upon the agent, because he has it in his power, if he desires to escape personal liability, to do so by disclosing his principal and contracting in his name." Book v. Jones, (Tex. Civ. A.) 98 SW 891, 892. (4) Furthermore, "it is a well-settled rule of law that a party is not permitted by his own acts to make evidence for himself when knowledge of the act or of its purport is not brought home to the party to be affected thereby." McDonald v. Wesendonck, 29 Misc. 776, 777, 61 NYS 491 [rev on other grounds 30 Misc. 601, 62 NYS 764].

[c] **Liability not to principal.**—The liability on a contract made by an agent of an undisclosed principal is to the other party to the contract, and not to his principal. Hale v. Triest, 150 App. Div. 166, 134 NYS 673.

[d] **One who requests a physician to attend another person** professionally, without indicating that he acts as an agent or messenger, is liable for the physician's charges. Foster v. Meeks, 18 Misc. 461, 41 NYS 950.

[e] **Where a person goes into and continues in a partnership** in his own name, and his copartners have no knowledge that he is acting as secret agent for his wife, he becomes a partner so far as the other members of the partnership are concerned. Leckie v. Rothenbarger, 82 Mo. A. 615.

[f] **One who buys ostensibly for himself is not released from liability** because thereafter the seller takes a note signed not only by him as a principal but also by the person for whom the articles were in fact bought. Hatchett v. Sunset Brick, etc., Co., (Tex. Civ. A.) 99 SW 174.

31. O'Neil Lumber Co. v. Greffet, 154 Mo. A. 33, 133 SW 113 (holding that an agent dealing ostensibly as principal is personally liable for a debt incurred, although the creditor afterward discovers the undisclosed principal, unless the creditor elects to waive his right to so proceed and to sue the principal).

32. O'Neil Lumber Co. v. Greffet, 154 Mo. A. 33, 133 SW 113. See also infra § 526.

33. Conn.—Hall v. Bradbury, 40 Conn. 32.

Iowa.—Fritz v. Kennedy, 119 Iowa 628, 93 NW 603.

Mass.—Tippets v. Walker, 4 Mass. 595.

Mo.—Johnston v. Parrott, 92 Mo. A. 199.

Nebr.—Jackson v. McNatt, 4 Nebr. (Unoff.) 55, 93 NW 427.

N. Y.—De Remer v. Brown, 165 N. Y. 410, 59 NE 129; McClure v. New York Cent. Trust Co., 165 N. Y. 108, 58 NE 777, 53 LRA 153; Holt v. Ross, 54 N. Y. 472, 13 AmR 615; Powers v. McLean, 14 App. Div. 92, 43 NYS 477 [aff 164 N. Y. 588 mem, 58 NE 1001 mem]; Peo. v. Roosevelt, 13 App. Div. 404, 43 NYS 73 [aff 153 N. Y. 646 mem, 47 NE 1110 mem]; Dulon v. Camp, 28 Misc. 548, 59 NYS 508; Whiting v. Saunders, 23 Misc. 332, 51 NYS 211; Foster v. Meeks, 18 Misc. 461, 41 NYS 950; Stone v. Wood, 7 Cow. 453, 17 AmD 529; Randall v. Van Vechten, 19 Johns. 60, 10 AmD 193.

S. C.—Davenport v. Riley, 13 S. C. L. 198.

Tenn.—East Tennessee Iron Mfg. Co. v. Gaskell, 2 Lea 742; Broyles v. McCoy, 5 Sneed 602.

Compare Marine Ins. Co. v. Walsh-Upstill Coal Co., 23 Oh. Cir. Ct. 191 (holding that an application by plaintiff for insurance, speaking of the property as belonging to plaintiff "and as agents" was sufficient to notify defendant that plaintiff had a principal for whom it was agent or might act in taking out insurance, and that so acting for such principal the insurance was for the benefit of the principal, and that so long as defendant made no inquiry as to who was the principal it could not complain of the failure to disclose the principal).

34. Del.—Sharp v. Swayne, 17 Del. 210, 40 A 113 (holding that one contracting with another who knew at the time that, in such particular transaction, he was acting as agent of a third person was not personally liable, in the absence of a distinct agreement to be so).

Ill.—Warren v. Dickson, 27 Ill. 115; Chase v. Debolt, 7 Ill. 371; Scaling v. Knollin, 94 Ill. A. 443.

Ind.—Cochran v. Brooks, 15 Ind. 343 (holding that, where ties were delivered to a railroad company through the agency of a third person, and plaintiff was cognizant of the principal when he contracted with the agent, he should have sued the company).

N. Y.—Fulton v. Sewall, 116 App. Div. 744, 102 NYS 109; Forrest v. McCarthy, 80 Misc. 125, 61 NYS 853; Turchin Sheffield Plate, etc., Co. v. Baugh, 117 NYS 137 (holding that, where plaintiff who dealt with defendant, the agent of C, sold goods, thinking that he was selling to C, as he was, and relying on C's responsibility and shipping the goods to C's place of business, could not hold defendant as principal, because he thought that defendant was C).

Pa.—Schaetzle v. Christman, 16 Pa. Super. 294.

S. D.—Cockran v. Rice, 26 S. D. 393, 397, 128 NW 583, AnnCas1913B 570 [quot Cyc].

Vt.—Johnson v. Cate, 77 Vt. 218, 59 A 830.

Eng.—Seaber v. Hawkes, 9 L. J. C. P. O. S. 217; Morley v. Makin, 22 T. L. R. 7.

35. Mo.—Porter v. Merrill, 138 Mo. 555, 39 SW 798; Haskett v. Unsell, (A.) 164 SW 651.

N. H.—Brown v. Rundlett, 15 N. H. 360.

N. Y.—Meyer v. Redmond, 141 App. Div. 123, 125 NYS 1052; Beidleman v. Kelly, 51 Misc. 51, 99 NYS 907; Rathbon v. Budlong, 15 Johns. 1.

Pa.—Paine v. Berg, 23 Pa. Super. 577.

Tenn.—Bass v. Gerst Brewing Co., 2 Tenn. Civ. A. 639.

[a] **A notice of the agency upon the heading of a confirmatory letter** sent after the contract was entered into is insufficient to relieve the agent of liability, unless such notice was called to the attention of the opposite party before or at the time of making the contract. Whitman v. Johnson, 10 Misc. 725, 31 NYS 1009.

36. N. Y.—Baer v. Bonynge, 72 Hun 33, 25 NYS 666 [aff 147 N. Y. 393, 42 NE 81]; Blakeman v. Mackay, 1 Hilt. 266; Cabre v. Sturges, 1 Hilt. 160; Mills v. Hunt, 20 Wend. 431.

S. D.—Cockran v. Rice, 26 S. D. 393, 397, 128 NW 583, AnnCas1913B 570 [quot Cyc].

Tex.—Brackenridge v. Claridge, 91 Tex. 527, 44 SW 819, 43 LRA 593 [rev (Civ. A.) 42 SW 1005]; Sydnor v. Hurd, 8 Tex. 98; Scottish-American Mortg. Co. v. Davis, (Civ. A.) 72 SW 217.

Eng.—Franklyn v. Lamond, 4 C. B. 637, 56 ECL 637, 136 Reprint 658; Pratt v. Willey, 2 C. & P. 350, 12 ECL 611.

Ont.—Haight v. Howard, 11 U. C. C. P. 487.

37. Iowa.—Lull v. Anamosa Nat. Bank, 110 Iowa 537, 81 NW 784.

Mass.—Hutchinson v. Wheeler, 3

narily the agent should clearly indicate by apt words or other means the name or identity of his principal in such a manner that the contract will be entered into, not on his own behalf, but on behalf of the principal.[38] But, although it has frequently been said that the name of the principal must be disclosed,[39] a disclosure of the principal's name, while a convenient form of disclosure, is not indispensable, if his identity is otherwise established.[40] It is not sufficient, however, that the third person has knowledge of facts and circumstances which would, if reasonably followed by inquiry, disclose the identity of the principal; actual knowledge on his part of the principal's identity is necessary to exonerate the agent.[41] Thus a person dealing in his own name, without disclosing

Allen 577; Hastings v. Lovering, 2 Pick. 214, 13 AmD 420.

Mo.—Haskett v Unsell, (A.) 164 SW 651 (holding that, where defendant contracted with plaintiffs for certain plastering, and did not disclose that he was acting for another until the work was nearly done, the disclosure was not in sufficient time to relieve defendant from personal liability).

N. H.—Batchelder v. Libbey, 66 N. H. 175, 19 A 570.

N. Y.—Meyer v. Redmond, 141 App. Div. 123, 125 NYS 1052 [aff 205 N. Y. 478, 98 NE 906, 41 LRANS 675]; Burnham v. Eyre, 123 App. Div. 777, 108 NYS 452 [aff 196 N. Y. 560 mem, 90 NE 1156 mem] (after the rights of the parties had become fixed); Jemison v. Citizens' Sav. Bank, 44 Hun 412; Whiting v. Saunders, 23 Misc. 332, 51 NYS 211 (in which case a husband employing brokers to negotiate the sale of his wife's realty, and failing to disclose his representative character until after a purchaser had been secured, was held liable to the brokers, although his agency was disclosed before the contract between the vendor and the purchaser was executed); Strauch Co. v. Landeker, 145 NYS 43 (holding that one concealing the fact that he is agent and pretending to be principal cannot, after incurring liability as principal, discharge himself therefrom by giving notice that he is only an agent).

N. C.—Forney v. Shipp, 49 N. C. 527.

S. C.—Long v. McKissick, 50 S. C. 218, 27 SE 636 (holding that, where the purchaser at an execution sale refused to disclose his principal until after the sale had been closed, the disclosure came too late, as the contract was closed when the hammer fell and the bid was entered in the sheriff's sale book).

S. D.—Cockran v. Rice, 26 S. D. 393, 397, 128 NW 583, AnnCas1913B 570 [quot Cyc].

Tex.—Hauser v. Layne, (Civ. A.) 131 SW 156 (holding that, where an agent contracts in his own name without disclosing his agency, he is liable to the other party as principal, irrespective of knowledge of the fact of agency after accrual of a cause of action upon the contract). See also Hatchett v. Sunset Brick, etc., Co., (Civ. A.) 99 SW 174.

Eng.—Franklyn v. Lamond, 4 C. B. 637, 56 ECL 637, 136 Reprint 658.

38. Dulon v. Camp, 28 Misc. 548, 59 NYS 508; Whitman v. Johnson, 10 Misc. 725, 31 NYS 1009; Beebe v. Worth, 146 NYS 146 (holding that, where the principal is not disclosed by the written contract which was signed by defendant as agent, plaintiff may proceed personally against the agent as the ostensible principal). See also supra § 321 et seq.

39. See cases supra note 25.

40. Mercer v. Leihy, 139 Mich. 447, 452, 102 NW 972 (where the court said: "The question here seems to be whether anything less than a disclosure of the name of the principal is sufficient, and a number of authorities are cited which use language to the effect that a disclosure of the name of the principal is essential. Many of these are cases where there is nothing to indicate that there was an agency; others that the principal was not present, and no clue to his identity could be found in the facts stated; while there are others which show that there was an absent principal, yet the language used makes such indefinite reference to him as not to afford an opportunity to immediately ascertain who he is. Such is the case of Neely v. State, 60 Ark. 66, 28 SW 800, 46 AmSR 148, 27 LRA 503, where a minor bought intoxicating liquor, which he said was for two teachers at a neighboring college, without naming or otherwise identifying them. Raymond v. Crown, etc., Mills, 2 Metc. (Mass.) 319, is another case where the court held that it was not error to submit the question of the sufficiency of the disclosure to the jury, where an agent stated that goods which he was buying were for the C. & E. Mills, the language being ambiguous. So in Cobb v. Knapp, 71 N. Y. 348, 27 AmR 51, the statement that the property was for the Blissville Distillery was held not conclusive. In each of these cases except the first there is an implication that the facts shown might be found sufficient, otherwise they should not have gone to the jury. They were not so strong in favor of the agent as the case before us, because the opportunity to ascertain was not immediately present; and in the case last mentioned there was testimony not only that the plaintiff did not know who were the proprietors of the distillery, but that the defendant directed the property to be charged to him. In Hanson v. Roberdeau, 1 Peake N. P. 120, it is indicated, as it is in many later authorities, that, where the auctioneer fully discloses the fact of his agency and his principal, the presumption arises that he is not contracting upon his own behalf, and that the law recognizes the transaction as one on behalf of the principal. In 2 Kent Com. 630, 631, it is said: 'If a person would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal (not the name of his principal) at the time of making the contract, and that he acted on his behalf.' Other authorities quoted from text-writers and other sources are found in Neely v. State, supra. See also Reinhardt on Agency, § 303. We are of the opinion that the statement, frequently found, that the agent, to avoid personal liability, must disclose the name of his principal, is due to the fact that such is, in the nature of things, the natural and ordinary, and many times the only convenient and practicable, way of identifying him. The important information to be given to the purchaser is that the auctioneer is an agent, acting for a principal whom he discloses, and it would seem that the accurate giving of his principal's name is not indispensable where other means of clearly pointing out and identifying him are adopted. The testimony in this case indisputably shows that the principal was present, and in the presence of the plaintiff identified himself to a degree sufficient to carry that question to a jury, or to the court, where, as in this case, a jury has been waived. It is equally certain that the auctioneer disclosed the fact of agency, and it is inferable that he designed to and did inform those present that he was not selling the property as his own, but for and on behalf of a man who came from Ypsilanti, was present, and upon whom he called to appear and make himself known. We are of the opinion that the court did not err in treating the question as one of fact, subject to decision by him"); Clarke v. Watt, 83 Misc. 404, 145 NYS 145.

[a] **Rents and profits of land** cannot be recovered from the agent, where the possession is not in him but in the persons for whom he has acted as agent. Chaison v. McFaddin, (Tex. Civ. A.) 159 SW 69.

41. Rollins v. Phelps, 5 Minn. 463; De Remer v. Brown, 165 N. Y. 410, 59 NE 129; Cobb v. Knapp, 71 N. Y. 348, 27 AmR 51; Meyer v. Redmond, 141 App. Div. 123, 125 NYS 1052 [aff 205 N. Y. 478, 98 NE 906, 41 LRANS 675] (holding that where a person, in fact an agent, undertakes to contract as principal, he becomes such, notwithstanding the other party may suspect that he is an agent and has means of ascertaining the name of the principal); Burnham v. Eyre, 123 App. Div. 777, 108 NYS 452 [aff 196 N. Y. 560 mem, 90 NE 1156 mem]; Philips v. Hine, 61 App. Div. 428, 70 NYS 593 (holding that, in an action to recover for work done at the request of defendant who claimed that he was merely the superintendent for the owner, the fact that plaintiff, while engaged on other work, had been paid by checks of such owner was not necessarily notice to plaintiff that he was employed by the same party, when he was given no notice of the fact); Good v. Rumsey, 50 App. Div. 280, 63 NYS 981; Powers v. McLean, 14 App. Div. 92, 43 NYS 477 [aff 164 N. Y. 588 mem, 58 NE 1091 mem]; Mahoney v. Kent, 7 Misc. 726, 28 NYS 19; Kneeland v. Coatsworth, 9 NYS 416; Johnson v. Hoover, (Tex. Civ. A.) 165 SW 900 (holding that the sending by defendant to plaintiff of the check of another for part of the price, after a sale by plaintiff to defendant personally of wheat had been consummated by delivery, could not operate as notice that he was buying for such other); Book v. Jones, (Tex. Civ. A.) 98 SW 891; Hunter v. Adune, 38 Tex. Civ. A. 542, 86 SW 622; Curtis v. Miller, (W. Va.) 80 SE 774 (holding that a person who performs services at the request of an agent who fails to disclose his principal may recover from the agent, although he may have had reason to suspect the agency). See also Manley v. Hickman, 1 Chest. Co. (Pa.) 557. Compare Worthington v. Cowles, 112 Mass. 30; Huston v. Tyler, 140 Mo. 252, 36 SW 654, 41 SW 795; Johnson v. Armstrong, 83 Tex. 325, 18 SW 594, 29 AmSR 648.

[a] **Services for estate.**—A plaintiff employed to render certain services, although informed that the services were to be rendered for the "Bradford estate" and that defendant was the agent of the owner, may hold the agent liable on the contract, as there was not a sufficient disclosure of the principal, even though he might have inquired at the time of his employment as to who were the executors, trustees, or heirs of the estate, and so have gotten some knowledge concerning the owners. Nelson v. Andrews, 19 Misc. 623, 44 NYS 384.

[b] **Use of firm name not sufficient.**—"The fact that defendant used the name 'Campbell & Co.,' but without indicating in any way that he did so as agent, and not as his own business name, did not, under the circumstances, amount to a disclosure of an agency. There was nothing in this to indicate that he was not 'Campbell & Co.' or the Campbell of 'Campbell & Co.' The name might probably suggest that there were others asso-

the name of his principal, is personally bound by his contract, even though he is known by the other party to be an auctioneer, broker, or other professional agent usually employed in contracting as the agent of others.[42]

Express notice of agency not required. It is not necessary, however, that the knowledge of the agency and the principal be brought home to the third person by an express notice, but the third person may be charged with notice by reason of the attendant circumstances and the general knowledge that the transactions of the agent in that particular line of business are done in his character as agent, not on his own behalf.[43]

To whom made. The disclosure should be made to the person dealt with, or to his agent.[44]

[§ 495] **2. For Money Paid to Agent—a. In General.**[45] Where money has been paid to an agent for his principal, under such circumstances that it may be recovered back from the latter, as where it has been paid through fraud or mistake, the agent is liable as a principal as long as he stands in his original position and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it.[46] But it is held that where the agent is known as such to the third person and the payment to him is a proper one, in pursuance of a

ciated with him as partners, but we think that would be all. If there had been a firm consisting of members other than defendant doing business under that name, generally known as such in the community, a different case would be presented. In such case knowledge of the fact of defendant's agency might be chargeable to the plaintiff." Amans v. Campbell, 70 Minn. 493, 73 NW 506, 68 AmSR 547.

[c] **Disclosure in writing.**—Where, upon the sale of cattle under an oral agreement, the agent delivers to the purchaser before the completion of the sale a stockyards weighmaster's scale ticket, showing both on its face and on its back that another person is the owner of the cattle, and also containing a statement of the agent that such person is the owner, and furthermore there is delivered to the purchaser at the same time a health certificate for the cattle showing that the same third person is the owner, there is a sufficient disclosure of the principal. Johnston v. Parrott, 92 Mo. A. 199.

42. Ala.—Brent v. Miller, 81 Ala. 309, 8 S 219; Wood v. Brewer, 73 Ala. 259.

Ill.—Wheeler v. Reed, 36 Ill. 81; Scaling v. Knollin, 94 Ill. A. 443.

Mass.—Hastings v. Lovering, 2 Pick. 214, 13 AmD 420.

Mich.—Mercer v. Leihy, 139 Mich. 447, 102 NW 972.

Mo.—Hamlin v. Abell, 120 Mo. 188, 25 SW 516; Schell v. Stephens, 50 Mo. 375 (holding also that the joint signature of a bill of sale by an auctioneer with the principal raises a presumption that the auctioneer acted also as principal).

N. Y.—Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 NE 994; Holt v. Ross, 54 N. Y. 472, 13 AmR 615; Mills v. Hunt, 20 Wend. 431.

Tenn.—Siler v. Perkins, 126 Tenn. 380, 149 SW 1060, 47 LRANS 232 and note.

Eng.—Franklyn v. Lamond, 4 C. B. 637, 56 E. C. L. 637, 136 Reprint 658; Magee v. Atkinson, 6 L. J. Exch. 115; Hanson v. Roberdeau, 1 Peake N. P. 120.

[a] **That the general business of an express company is to act as agent** for others does not relieve it from liability on a contract in which it fails to disclose its principal. Holt v. Ross, 54 N. Y. 472, 13 AmR 615.

43. Great Lakes Towing Co. v. Worthington, 147 Fed. 926; Monticello Bank v. Bostwick, 71 Fed. 641 [rev on other grounds 77 Fed. 123, 23 CCA 73].

[a] **Discussion and illustrations of rule.**—(1) "The rule is often stated unqualifiedly thus: If in a simple contract made by an agent the agent does not disclose his agency and name his principal, he will render himself liable. Royce v. Allen, 28 Vt. 234. That is a correct statement, but like most general rules it is not entirely without exceptions. The general statement should not be construed as requiring the agent under all circumstances to expressly declare his agency and the name of his principal, —to do so regardless of whether the person dealing with him knows the facts, or is chargeable with knowledge thereof from circumstances brought to his attention. Where one deals with the agent of a known principal in the regular course of conducting the principal's business by such agent, the presumption, in the absence of any evidence to the contrary, is that the credit is extended to the former." Alexander, etc., Lumber Co. v. McGeehan, 124 Wis. 325, 102 NW 571. (2) So the failure of an agent expressly to disclose his agency does not make him personally liable upon a contract made by him, where the other party thereto knew that he was dealing with the principal and had had prior dealings of a similar nature with the principal. Forrest v. McCarthy, 30 Misc. 125, 61 NYS 853. (3) Under such circumstances, it is necessary, in order to charge the agent with liability for the transaction in question, to show acts or statements by him from which an inference could be drawn that he was dealing otherwise than as formerly, or that he interposed his personal liability. Falk v. Wolfsohn, 7 Misc. 314, 27 NYS 903.

44. Porter v. Merrill, 138 Mo. 555, 39 SW 798 (holding that a disclosure by the agent to his subagent of the name of his principal is not a sufficient disclosure to the third person, as the subagent is the agent of the agent proper and not of the third person).

[a] **Disclosure to one partner as disclosure to firm.**—Where an agent, a considerable time previous to a purchase from a partnership and as no part of the negotiation therefor, disclosed his principal to one partner, and subsequently purchased from another partner to whom no disclosure was made, the disclosure was not sufficient as to the partnership, and the agent was personally liable. Baldwin v. Leonard, 39 Vt. 260, 94 AmD 324 (distinguishing the transaction from one commenced with one partner to whom the principal is disclosed, and completed with another partner to whom the principal is not disclosed).

45. **Recovery of payments** see generally Payment [30 Cyc 1298 et seq].

46. U. S.—Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373; Wallis v. Shelly, 30 Fed. 747.

Ala.—Upchurch v. Norsworthy, 15 Ala. 705.

Del.—Griffith v. Johnson, 2 Del. 177.

Ga.—McDonald v. Napier, 14 Ga. 89; Law v. Nunn, 3 Ga. 90; Great Southern Acc., etc., Co. v. Guthrie, 13 Ga. A. 288, 79 SE 162; Rogers v. Durrence, 10 Ga. A. 657, 73 SE 1083.

Ill.—Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 NE 360, 74 AmSR 180; Gray v. Callender, 181 Ill. 173, 54 NE 910 [rev 81 Ill. A. 547]; Smith v. Binder, 75 Ill. 492.

Kan.—Simmonds v. Long, 80 Kan. 155, 101 P 1070, 23 LRANS 553 and note (holding that, where persons enter into a written contract, assuming to act as agents, and receive money to be paid to the principal as part of the consideration, and retain it, and the principal refuses to be bound, action may be maintained against them for money had and received to the use of the person from whom they received it).

Ky.—Pool v. Adkisson, 1 Dana 110.

Me.—Pancoast v. Dinsmore, 105 Me. 471, 75 A 43, 134 AmSR 582.

Mass.—Cabot v. Shaw, 148 Mass. 459, 20 NE 99; Jefts v. York, 10 Cush. 392, 12 Cush. 196; Garland v. Salem Bank, 9 Mass. 408, 6 AmD 86.

Mich.—Granger v. Hathaway, 17 Mich. 500.

Minn.—Shepard v. Sherin, 43 Minn. 382, 45 NW 718.

Miss.—O'Connor v. Clopton, 60 Miss. 349 (agent receiving usurious interest for principal).

Mo.—Martin v. Allen, 125 Mo. A. 636, 103 SW 138.

N. Y.—Herrick v. Gallagher, 60 Barb 566; Klotz v. Gordon, 117 NYS 240; Mowatt v. McLelan, 1 Wend. 173; La Farge v. Kneeland, 7 Cow. 456.

Or.—Gosslin v. Martin, 56 Or. 281, 107 P 957.

S. C.—Parkerson v. Dinkins, 24 S. C. L. 185.

Tenn.—Embry v. Galbreath, 110 Tenn. 297, 75 SW 1016; Galbraith v. State, 10 Lea 568; Metcalf v. Denson, 4 Baxt. 565.

Vt.—Gray v. Otis, 11 Vt. 628.

Eng.—Pollard v. Bank of England, L. R. 6 Q. B. 623; Burrough v. Skinner, 5 Burr. 2639, 98 Reprint 387; Sadler v. Evans, 4 Burr. 1984, 98 Reprint 34; Buller v. Harrison, Cowp. 565, 98 Reprint 1243; Kleinwort v. Dunlop Rubber Co., 97 L. T. N. S. 263; Cox v. Prentice, 3 M. & S. 344, 105 Reprint 641; Cary v. Webster, Str. 480, 93 Reprint 647.

[a] **"The rule is this,** to wit: (1) so long as the money has not been paid over by the agent to his principal; nor his situation altered, relatively to his principal, as touching that fund, it may be recovered from him. Neither he nor his principal, is, in conscience, entitled to retain it; but, ex equo et bono, it belongs to the payer; and an action lies to recover it. It is not the property of the agent; and therefore he cannot retain it. And it is not the property of the principal; and therefore, he does not hold it for the use of the principal. He holds it for the use of him who illegally, or by mistake, has paid it. The agent is not liable to the principal for it. The equitable action for money, had and received for his use, will lie against the agent, to recover it back." McDonald v. Napier, 14 Ga. 89, 96. (2) "The principle with reference to an agent is, so long as he stands in his original situation, where he has received money by mistake and has done no act on the assumption that the payment was good, and there has been no change of circumstances by reason of his having paid over the money to his principal or nothing done equivalent to it, he remains liable individually." Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 377, 55 NE 360, 74 AmSR 180.

[b] **Bound to return only what received.**—Where agents made a con-

valid authority, and without fraud, duress, or mistake, the third person's remedy, in case he ultimately becomes entitled to a return of the money, is against the principal, and he cannot hold the agent individually liable for its return, although he has not paid it over to his principal.[47] Where the agent has in good faith paid the money over to his principal before receiving notice of the third person's right to reclaim the same, the latter's remedy is against the principal, and the agent is relieved from liability therefor.[48] Neither is the agent liable to the third person for the return of the money,

tract of sale agreeing to accept as first payment an assignment of an account against a third person, as cash, subject to their principal's approval, and he refused to ratify it, they were not obliged to pay the purchaser the cash, but only to return the account. Mitchell v. Chick, 136 Mo. A. 559, 118 SW 517.

[c] **Where money has been paid to an agent as part of the purchase price** (1) of real estate it may be recovered back from the agent before he turns it over to the principal, if the principal fails to make a conveyance in accordance with his contract. Pancoast v. Dinsmore, 105 Me. 471, 75 A 43, 134 AmSR 582. See also Coble v. Denisen, 151 Mo. A. 319, 131 SW 719. (2) But the mere fact that the agent acted as such in securing the purchaser or making the sale does not make him jointly liable with the principal for the return of money paid on account of the principal's failure to make the title good. McNeny v. Campbell, 81 Nebr. 754, 761, 116 NW 671, 117 NW 885.

47. Gulf City Constr. Co. v. Louisville, etc., R. Co., 121 Ala. 621, 25 S 579 (holding that one receiving money as agent for another who is known to the person paying is not liable to the payer in an action to recover back the payment, in the absence of fraud or want of authority); Colvin v. Holbrook, 2 N. Y. 126; Fisher v. Meeker, 118 App. Div. 452, 454, 103 NYS 261 (where the court said: "There is a class of cases to which the respondent refers in which the responsibility of agents and servants has been upheld. They are cases where the principal had no right to receive the money, and, of course, could confer none upon the agent, or where it was paid by mistake, or where the agent exceeded his authority, or was guilty of misfeasance, not as an agent or servant but as a wrongdoer, or where payment was induced by a wrongful act of the agent, or there was an explicit agreement to return it. These cases differ from a case like this, where the agent had a right to receive the money for his principal and receives it, not in his individual capacity, but as the agent of the creditor and for his use. No case has been cited, and I think none can be found, where an agent or servant has been held under such circumstances"); Cooper v. Tim, 16 Misc. 372, 38 NYS 67 (holding that one who pays money to another whom he knows to be acting as an agent, although such payment is made upon condition that it be repaid in a certain event, cannot recover such money from such agent upon the happening of such event, although the latter has not paid it to his principal, but must look to the principal); Cohen v. Barry, 108 NYS 573, 574 (holding that, where plaintiff paid money to defendants, knowing them to be agents of another, the payment being free from any wrongful act of the agents, he must look to the principal, and not to the agents, for a return of the money, should he ultimately become entitled to it. And in this case the court said: "The defendants were not only known to the plaintiff to be agents merely, but they disclosed their principal. In the absence of fraud, mistake, or other wrongful act, the identity of the defendants was merged in that of their principal, and the obligation, which appears to be due the plaintiff, is due not from them but from their principal"); Wilson v. Wold, 21 Wash. 398, 58 P 224, 75 AmSR 846 (holding that a right of action by a third person who has knowledge that defendant was merely an agent, to recover money rightfully collected by the agent for his principal, is against the principal and not against the agent).

[a] **"It is settled** in principle, and by authority, that if one person knowingly pays money to another as the agent of a third, the payment not having been induced by any wrongful act of such agent, resort cannot be had to the latter, but must be had to his principal, if the person who made the payment ultimately became entitled to the return of the money paid; and this although the agent may not yet have accounted to his principal therefor." Cooper v. Tim, 16 Misc. 372, 373, 38 NYS 68 [quot Cohen v. Barry, 108 NYS 573, 574].

[b] **Not liable for conversion or money had and received.**—(1) Where an agent, the fact of agency and the name of the principal being disclosed, receives money for his principal which he fails to pay to the latter he is not liable to the payer in an action for conversion (Huffman v. Newman, 55 Nebr. 713, 76 NW 409; Mathews v. O'Shea, 45 Nebr. 299, 63 NW 820), (2) or for money had and received (Huffman v. Newman, supra).

[c] **Proof of facts justifying rescission.**—"An agent who receives money paid on account of a contract for the purchase of real estate made with his principal cannot be held liable in an action by the purchaser to recover the money back on proof of facts which would entitle the purchaser to rescind the contract." Kurzawski v. Schneider, 179 Pa. 500, 503, 36 A 319 [quot Gable v. Crane, 24 Pa. Super. 56, 58].

48. U. S.—U. S. Bank v. Washington Bank, 6 Pet. 8, 8 L. ed. 299; U. S. v. Pinover, 3 Fed. 305.

Cal.—Allen v. Globe Grain, etc., Co., 156 Cal. 286, 104 P 305 (holding that, where the cash partial payment made by a purchaser to the agent of the vendor was paid to and received by the agent solely as agent for the vendor, and the money was accounted for and paid to the vendor by the agent, the vendor was alone liable for the repayment thereof on the happening of the conditions calling for repayment).

Ga.—Law v. Nunn, 8 Ga. 90; Rogers v. Durrence, 10 Ga. A. 657, 73 SE 1083.

Ill.—Smith v. Binder, 75 Ill. 492.

Mass.—Cabot v. Shaw, 148 Mass. 459, 20 NE 99; Appleton Bank v. McGilvray, 4 Gray 518, 64 AmD 92.

Mich.—Miller v. Seeley, 90 Mich. 218, 51 NW 366; Granger v. Hathaway, 17 Mich. 500.

Minn.—Shepard v. Sherin, 43 Minn. 382, 45 NW 718.

Mo.—Lang v. Friedman, 166 Mo. A. 354, 148 SW 992; Roemer Commn. Co. v. Annan, 81 Mo. A. 572; Winningham v. Fancher, 52 Mo. A. 458; Crippen v. American Nat. Bank, 51 Mo. A. 508; Ashley v. Jennings, 48 Mo. A. 142.

Nebr.—Huffman v. Newman, 55 Nebr. 713, 76 NW 409.

N. J.—Hauenstein v. Ruh, 73 N. J. L. 98, 62 A 184 (holding that, where defendant, as a collecting agent, after informing plaintiff that he was acting only as an agent received from plaintiff the amount of a claim against plaintiff's brother, which was in his hands for collection, and at once paid it over to his principal, in the absence of any personal fraud or guaranty of the validity of the claim, defendant was not answerable to plaintiff for the amount received on proof that the claim was invalid).

N. Y.—Brooklyn Nat. City Bank v. Westcott, 118 N. Y. 468, 23 NE 900, 16 AmSR 771; Colvin v. Holbrook, 2 N. Y. 126 [aff 3 Barb. 475]; Middleworth v. Blackwell, 85 App. Div. 613, 82 NYS 704; Ledwith v. Merritt, 74 App. Div. 64, 77 NYS 341 [aff 174 N. Y. 512 mem, 66 NE 1111 mem]; Ward v. Work, 65 App. Div. 84, 72 NYS 736 [aff 175 N. Y. 519 mem, 67 NE 1091 mem]; Zimmele v. American Plaster Board Co., 1 App. Div. 327, 37 NYS 183; National Park Bank v. Seaboard Bank, 44 Hun 49, 7 NYSt 406, 26 NYWklyDig 477 [aff 114 N. Y. 28, 20 NE 632, 11 AmSR 612]; Costigan v. Newland, 12 Barb. 456; Levine v. Field, 114 NYS 819 (holding that, where the purchaser of a business knew that the person who received the amount paid on the contract acted merely as the seller's agent, and the agent had accounted therefor to his principal, the seller alone was liable to the purchaser for failure to repay the amount as required by the contract in case the business failed to show an agreed weekly income); Bixby v. Drexel, 56 HowPr 478; La Farge v. Kneeland, 7 Cow. 456; Frye v. Lockwood, 4 Cow. 454; Duffy v. Buchannan, 1 Paige 453.

Pa.—Hobensack v. Hallman, 17 Pa. 154; Gable v. Crane, 24 Pa. Super. 56.

R. I.—Crafts v. Trafford, 85 A 673; Phetteplace v. Bucklin, 18 R. I. 297, 27 A 211.

Tenn.—Embry v. Galbreath, 110 Tenn. 297, 75 SW 1016; Metcalf v. Denson, 4 Baxt. 565.

Wash.—Tripple v. Littlefield, 46 Wash. 156, 89 P 493 (holding that, where a purchaser of land paid earnest money to a firm which he knew to be acting as agents for the owner, and took a receipt providing that if the owner should not approve the sale the agreement would be void and the earnest money would be refunded, and the agents paid the money to the principal, they were not personally liable to the purchaser for the return of the earnest money or damages on the breach of the contract by the principal).

W. Va.—Smith v. Bond, 25 W. Va. 387.

Eng.—Taylor v. Metropolitan R. Co., [1906] 2 K. B. 55; Davys v. Richardson, 21 Q. B. D. 202; Bamford v. Shuttleworth, 11 A. & E. 926, 39 ECL 488, 113 Reprint 666; East India Co. v. Tritton, 3 B. & C. 280, 10 ECL 134, 107 Reprint 738; Holland v. Russell, 4 B. & S. 14, 116 ECL 14, 122 Reprint 365; Shand v. Grant, 15 C. B. N. S. 324, 109 ECL 324, 143 Reprint 809; Hurley v. Baker, 16 L. J. Exch. 273; Cary v. Webster, Str. 480, 93 Reprint 647.

[a] **Where consideration fails.**—Where a party makes a purchase from an innocent agent who afterward parts with the money of his principal, and it subsequently turns out that such purchase avails the purchaser nothing, no action will lie against the agent. Engels v. Heatly, 5 Cal. 135.

[b] **No presumption as to payment over.**—In an action against an agent by one who paid money to him for his principal, when it is shown that the money was paid to the agent, it will not be presumed, there being no proof on the subject, that the agent paid the money over to his principal. Shipherd v. Underwood, 55 Ill. 475. Compare Ex p. Bird, 4 De G. & Sm. 273, 64 Reprint 829 (holding that in an action against the agent of a disclosed principal to recover money paid to him for his principal the burden is on plaintiff to show that the money has not been paid to the principal).

[c] **Agent to collect rents; sufficiency of notice.**—An agent employed

where under the principal's direction he retains a portion of the same in settlement of an indebtedness due him from the principal,[49] nor where he retains a part of the payment in pursuance of a previous agreement, but without the consent of the principal at the time, provided there is no fraud on his part;[50] nor is he so liable where the amount has been placed to the credit of another account than that of the principal.[51] But a mere placing of the amount to the principal's credit on the books of the agent is not sufficient to relieve the agent from liability.[52]

Where the agent pays the money over after notice of the third person's claim thereto by reason of a mistake of fact, the payment does not protect him.[53]

Agency undisclosed. Where an agent receiving money does not disclose his agency to the party making the payment, there is no presumed consent or direction that he pay over to the principal, and such a payment will not relieve him from liability.[54]

Where an agent receives money from his principal to enable him to fulfill his contract with the third person, and he refuses or neglects to pay it over, or otherwise diverts it, he is liable to the third person for money had and received.[55]

[§ 496] **b. Assumption of Personal Liability.** Where the terms under which the agent has received the money impose upon him a personal liability for its return upon certain contingencies, he may be held personally liable, upon the happening of such contingencies, for its return, although he has paid it over to his principal.[56]

[§ 497] **c. Money Illegally Received.** Where money is knowingly illegally demanded and received by an agent from a third person by compulsion or otherwise, the agent cannot exonerate himself from personal responsibility by paying it over to his principal;[57] but where the agent receives money for his principal without any notice that the money has

by a grantor in a deed of trust to collect the rents of the land conveyed, who continues to collect and pay them over to the grantor after a sale under the deed to a third person until the purchaser is awarded possession of the property, is not liable to the purchaser for the rents so collected and paid over after the sale; and such agent is not affected by actual notice that the purchaser at the sale claimed the property and would hold the agent for the rents collected, as the persons paying the rents to the agent alone had the right to stop them in the hands of the agent; and furthermore the agent is not affected by the registration of the deed made to the purchaser at the trust sale as such registration is notice only to creditors or subsequent purchasers or parties claiming some interest in it or lien on the property. Embry v. Galbreath, 110 Tenn. 297, 75 SW 1016.

49. Mowatt v. McClelan, 1 Wend. (N. Y.) 173; White v. Rutherford, (Tex. Civ. A.) 148 SW 598 (holding that plaintiff, on rescinding a contract to trade land for fictitious vendor's lien notes, is not entitled to hold the other party's agent personally for money paid him as part consideration for the notes where the payment was made at the other party's direction for services in negotiating the trade, and the agent had not participated in any fraud). To same effect Taylor v. Metropolitan R. Co., [1906] 2 K. B. 55; Ellis v. Goulton, [1893] 1 Q. B. 350.

50. Hurley v. Baker, 16 L. J. Exch. 273.

51. La Farge v. Kneeland, 7 Cow. (N. Y.) 456.

52. La Farge v. Kneeland, 7 Cow. (N. Y.) 456; Buller v. Harrison, Cowp. 565, 98 Reprint 1243.

[a] **"The mere passing of such money in account** with his principal, or making a rest, without any new credit given to him, fresh bills accepted, or further sums advanced to the principal in consequence of it, is not equivalent to a payment of the money to the principal." Smith v. Binder, 75 Ill. 492, 495 [quot Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 377, 55 NE 360, 74 AmSR 180].

[b] **Settlement between principal and agent.**—(1) When the account between the principal and the agent has been settled and closed, the agent is discharged. Mowatt v. McClelan, 1 Wend. (N. Y.) 173. (2) But when the account remains open, and no other change of circumstances has taken place, the agent will not be relieved. Mowatt v. McClelan, supra; Buller v. Harrison, Cowp. 566, 98 Reprint 1243; Cox v. Prentice, 3 M. & S. 344, 105 Reprint 641. But see Cabot v. Shaw, 148 Mass. 459, 20 NE 99.

53. Smith v. Binder, 75 Ill. 492; O'Connor v. Clopton, 60 Miss. 349; Carter v. Stork, 18 NYS 470; Hearsey v. Pruyn, 7 Johns. (N. Y.) 179; Burrough v. Skinner, 5 Burr. 2639, 98 Reprint 387; Edwards v. Hodding, 5 Taunt. 815, 1 ECL 416, 128 Reprint 913.

[a] **Who may give notice.**—The notice must be given by one having some interest or authority. Shepard v. Sherin, 43 Minn. 382, 45 NW 718.

[b] **Sufficiency of notice.**—"The notice of the mistake, and requirement not to pay to the principal, need not be formal. The rule that, if he pays over without notice, he is not liable, is for the agent's protection; and, to deprive him of the protection, the notice to him should be sufficient to apprise him what the mistake is, and that by reason of it the party paying it to him intends to reclaim it." Gilfillan, C. J., in Shepard v. Sherin, 43 Minn. 382, 383, 45 NW 718.

[c] **Implied notice.**—Where an agent of the vendor of land is also the attorney at law of the vendor, notice to him of the claim of the purchaser to a deposit paid into his hands on account of the purchase price of land, the title to which proved defective, will be implied, and the payment over of the deposit so made will not relieve him from liability. Edwards v. Hodding, 5 Taunt. 815, 1 ECL 416, 128 Reprint 913.

54. U. S. v. Pinover, 3 Fed. 305; Smith v. Kelly, 43 Mich. 390, 5 NW 437; Bank of Commerce v. Union Bank, 3 N. Y. 230; Canal Bank v. Albany Bank, 1 Hill (N. Y.) 287; Newall v. Tomlinson, L. R. 6 C. P. 405.

55. Gray v. Ellis, 164 Cal. 481, 129 P 791; Freeman v. Otis, 9 Mass. 272, 6 AmD 66 (so holding in reference to an agent of the government, and also holding that if the agent should deny to the government that he had entered into the contract, and thereby prevent the other party from his remedy against the government, he would be personally liable as by his conduct he has in fact disavowed his action in the character of a public agent).

[a] **Where an agent receives money to pay off certain debts** of his principal, and makes a payment to the creditor, for which the principal is by mistake credited twice, such agent, in an action against him by the creditor to recover the amount of the mistake, cannot be rendered liable therefor if it appears that he afterward has a settlement with his principal and pays over to him the balance remaining in his hands, after being allowed for only what he has actually paid the creditor. State Bank v. Robards, 19 N. C. 111.

56. Cox v. Borstadt, 49 Colo. 83, 111 P 64 (holding that a contract for the sale and purchase of real estate signed by one as agent of the vendor and by the purchaser, which stipulated for a deposit by the purchaser, for a clear title, for a return of the deposit if the premises could not be conveyed under a clear title, and for a forfeiture thereof to the agent on the purchaser failing to perform, executed before the agent had any authority to bind the vendor who subsequently executed an instrument accepting the offer of the purchaser as embodied in the contract, was a contract binding the agent to refund the deposit on failure of title, especially where the purchaser demanded of the agent the return of the money before he had delivered it to the purchaser); Goodridge v. Wood, 133 Ill. A. 483 (holding that, where an agent receives a deposit on behalf of his principal and personally undertakes to return the same on a particular contingency, it is the agent and not the principal who is liable for the return of such money); Coggins v. Murphy, 121 Mass. 166; White v. Taylor, 113 Mich. 543, 71 NW 871 (holding that a representative of a corporation who receives part payment of an option to buy from the corporation, and agrees personally to return such payment to the buyer if he elects not to purchase, cannot relieve himself of personal liability by remitting the payment to the corporation). See also Burrough v. Skinner, 5 Burr. 2639, 98 Reprint 387; Gray v. Gutteridge, 3 C. & P. 40, 14 ECL 440.

[a] **Agent as stakeholder or trustee.**—"An agent, by the express or implied agreement of himself and the parties to a contract, may assume the position of trustee with relation to money or property involved in the transaction, and where, as an agreed stakeholder, he receives money to be paid over upon the happening of a certain contingency or the performance of certain conditions, and pays it over before the happening of the contingency or the performance of the conditions, such payment will be no defense to an action by the party ultimately entitled to receive the money." Martin v. Allen, 125 Mo. A. 636, 103 SW 138, 140. See also Conness v. Baird, (Tex. Civ. A.) 124 SW 113.

[b] **Where an agent indorses notes and has them discounted** by plaintiffs, and takes a check therefor in his name, which he indorses, he is liable for money had and received on the check, although he is known to be acting as agent. Cook v. Forker, 193 Pa. 461, 44 A 560, 74 AmSR 699.

57. U. S.—Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373.

Ill.—Shipherd v. Underwood, 55 Ill. 475.

Ind.—Moore v. Shields, 121 Ind. 267, 23 NE 89.

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been wrongfully obtained, and without any knowledge thereof, pays it over to his principal, he cannot be held personally liable.[58]

[§ 498] **3. In Tort—a. In General.** An agent is liable to third persons for his own torts in like manner as other persons, his liability being neither increased nor decreased by the fact of his agency,[59] and in some jurisdictions this rule is expressly prescribed by statute.[60] A distinction exists, however, between the liability of an agent to third persons for nonfeasance, or the breach of a duty owed only to his principal,[61] and his liability for misfeasance or malfeasance, or the breach of a duty owed to third persons.[62]

Tort of principal. An agent is not liable for torts committed by his principal personally.[63]

[§ 499] **b. Nonfeasance.** An agent is not responsible to a third person for injury resulting from nonfeasance, meaning by that term the omission of the agent to perform a duty owed solely to his principal by reason of his agency,[64] and with stronger reason an agent is not liable for neglect to perform an act, performance of which he owes neither to third persons nor to his principal;[65] and it has been held that this rule applies, although the agent's nonfeasance is the result of malice.[66]

Mass.—Hardy v. American Express Co., 182 Mass. 328, 65 NE 375, 59 LRA 731.

Miss.—O'Connor v. Clopton, 60 Miss. 349.

N. J.—Bocchino v. Cook, 67 N. J. L. 467, 51 A 487.

N. Y.—Herrick v. Gallagher, 60 Barb. 566; Frye v. Lockwood, 4 Cow. 454.

Pa.—Seidel v. Peckworth, 10 Serg. & R. 442.

Tenn.—Metcalf v. Denson, 4 Baxt. 565.

Vt.—Larkin v. Hapgood, 56 Vt. 597.

W. Va.—Parsons v. Maxwell, 53 W. Va. 39, 44 SE 172.

Wis.—Wright v. Eaton, 7 Wis. 595.

Eng.—Ex p. Edwards, 13 Q. B. D. 747; Wakefield v. Newbon, 6 Q. B. 276, 51 ECL 276, 115 Reprint 107; Townson v. Wilson, 1 Campb. 396; Oates v. Hudson, 6 Exch. 346; Sharland v. Mildon, 5 Hare 469, 26 EngCh 469, 67 Reprint 997; Close v. Phipps, 7 M. & G. 586, 49 ECL 586, 135 Reprint 236; Smith v. Sleap, 12 M. & W. 585; Snowdon v. Davis, 1 Taunt. 359, 127 Reprint 872.

[a] **Notice to the agent is not necessary** where the payment is compulsory and is not made expressly for the use of the principal. Frye v. Lockwood, 4 Cow. (N. Y.) 454; Ripley v. Gelston, 9 Johns. (N. Y.) 201, 6 AmD 271.

58. Owen v. Cronk, [1895] 1 Q. B. 265.

59. U. S.—Carey v. Rochereau, 16 Fed. 87.

Colo.—Humphreys Tunnel, etc., Co. v. Frank, 46 Colo. 524, 105 P 1093.

Conn.—Bennett v. Ives, 30 Conn. 329.

Ill.—Baird v. Shipman, 132 Ill. 16, 23 NE 384, 22 AmSR 504 and note, 7 LRA 128; Frorer v. Baker, 137 Ill. A. 588.

Ind.—Berghoff v. McDonald, 87 Ind. 549; Block v. Haseltine, 3 Ind. A. 491, 29 NE 937.

La.—Delaney v. Rochereau, 34 La. Ann. 1123, 44 AmR 456; Carmouche v. Bouis, 6 La. Ann. 95, 54 AmD 558.

Me.—Campbell v. Portland Sugar Co., 62 Me. 552, 16 AmR 503; Richardson v. Kimball, 28 Me. 463.

Md.—Blaen Avon Coal Co. v. McCulloh, 59 Md. 403, 43 AmR 560.

Mass.—Osborne v. Morgan, 130 Mass. 102, 39 AmR 437; Hawkesworth v. Thompson, 98 Mass. 77, 93 AmD 137.

Mich.—Bannigan v. Woodbury, 158 Mich. 206, 122 NW 531, 133 AmSR 371 (holding that an agent in the control of property is responsible for his own tortious acts); Ellis v. McNaughton, 76 Mich. 237, 42 NW 1113, 15 AmSR 308.

Mo.—Lottman v. Barnett, 62 Mo. 159; Harriman v. Stowe, 57 Mo. 93; Martin v. Benoist, 20 Mo. A. 262.

N. J.—Horner v. Lawrence, 37 N. J. L. 46.

N. Y.—Crane v. Onderdonk, 67 Barb. 47; Suydam v. Moore, 8 Barb. 358.

Wis.—Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 63 NW 93, 48 AmSR 911 and note, 28 LRA 439.

Eng.—Parry v. Smith, 4 C. P. D. 325.

[a] **A public agent is liable for torts** in like manner as a private agent. Rogers v. Dutt, 13 Moore P. C. 209, 15 Reprint 78; Baker v. Ranney, 12 Grant Ch. (U. C.) 228.

60. See statutory provisions. See also Trippe v. Bell, 139 Ga. 782, 78 SE 126; Wadley v. Dooly, 138 Ga. 275, 75 SE 153 (both applying Civ. Code [1910] § 3613, under which an agent is personally responsible for his own tortious acts).

61. See infra § 499.

62. See infra §§ 500–502.

63. Kimbrough v. Boswell, 119 Ga. 201, 45 SE 977 (holding that, if the agent of the owner of land takes up stock trespassing on his principal's property, and if, while impounded, they are in the possession and under the control of the principal, and are damaged by the failure of the principal to give them the proper care and attention, the agent is not responsible for the injury thus caused).

[a] **In the absence of some specific law to the contrary,** no agent who is conducting a business is personally responsible for the acts of the principal, unless the business is of itself unlawful, such as gambling, the sale of intoxicating liquors, or other public nuisance which a license legalizes, and which, until the principal has been legally authorized thereto, neither he nor his agent may lawfully carry on. Carterville v. Gibson, (Mo.) 168 SW 673.

64. U. S.—Carey v. Rochereau, 16 Fed. 87 (where the court adds that "it is very doubtful if an agent per se is liable to third person on any account").

Ga.—Owens v. Nichols, 139 Ga. 475, 77 SE 635; Richmond Hosiery Mills v. Western Union Tel. Co., 123 Ga. 216, 51 SE 290; Brooke v. Western Union Tel. Co., 119 Ga. 694, 46 SE 826; Kimbrough v. Boswell, 119 Ga. 201, 45 SE 971; Reid v. Humber, 49 Ga. 207; Southern R. Co. v. Rowe, 2 Ga. A. 557, 59 SE 462.

Ind.—Dean v. Brock, 11 Ind. A. 507, 38 NE 829.

La.—Delaney v. Rochereau, 34 La. Ann. 1123, 44 AmR 456 (where the court states that "no man increases or diminishes his obligations to strangers by becoming an agent"); Poydras v. Delamare, 13 La. 98.

Md.—Consolidated Gas. Co. v. Connor, 114 Md. 140, 78 A 725; Lamm v. Port Deposit Homestead Assoc., 49 Md. 233, 33 AmR 246.

Mass.—Brown Paper Co. v. Dean, 123 Mass. 267; Albro v. Jaquith, 4 Gray 99, 64 AmD 56; Livermore v. Herschell, 3 Pick. 33. And see Osborne v. Morgan, 130 Mass. 102, 39 AmR 437.

Miss.—Feltus v. Swan, 62 Miss. 415.

Mo.—Ray County Sav. Bank v. Hutton, 224 Mo. 42, 123 SW 47; Steinhauser v. Spraul, 127 Mo. 541, 28 SW 620, 30 SW 102, 27 LRA 441; Bissell v. Roden, 34 Mo. 63, 84 AmD 71; Carson v. Quinn, 127 Mo. A. 525, 105 SW 1088; O'Neil v. Young, etc., Seed, etc., Co., 58 Mo. A. 628; Peckham v. Lindell Glass Co., 9 Mo. A. 459.

N. Y.—Murray v. Usher, 117 N. Y. 542, 23 NE 564; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Colvin v. Holbrook, 2 N. Y. 126; Dunham v. City Trust Co., 115 App. Div. 584, 101 NYS 87 [aff 193 N. Y. 642 mem, 86 NE 1123 mem]; Van Antwerp v. Linton, 89 Hun 417, 35 NYS 318 [aff 157 N. Y. 716 mem, 53 NE 1133 mem]; Burns v. Pethcal, 75 Hun 437, 27 NYS 499; Denny v. Manhattan Co., 5 Den. 639 [aff 2 Den. 115].

N. C.—Mitchell v. Durham, 13 N. C. 538.

Oh.—Henshaw v. Noble, 7 Oh. St. 226.

Pa.—Berry v. Vantries, 12 Serg. & R. 89.

Tenn.—Drake v. Hagan, 108 Tenn. 265, 67 SW 470. And see Deaderick v. Bank of Commerce, 100 Tenn. 457, 45 SW 786; Erwin v. Davenport, 9 Heisk. 44.

Tex.—Eastin v. Texas, etc., R. Co., 99 Tex. 654, 92 SW 838; Labadie v. Hawley, 61 Tex. 177, 48 AmR 278; Morrison v. Ashburn, (Civ. A.) 21 SW 993.

Vt.—Crandall v. Loomis, 56 Vt. 664.

Wis.—Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 63 NW 93, 48 AmSR 911 and note, 28 LRA 439.

See Lane v. Cotton, 12 Mod. 472, 88 Reprint 1458 (the leading case on this point, and which is repeatedly cited as sustaining the proposition stated in the text; but it seems that the question of the agent's liability did not directly arise, the question before the court being whether an action lay against the postmaster-general for the loss of a letter delivered to the postal clerk and lost from the office, and it was held that the postmaster-general was not liable).

[a] **Failure to do act detrimental to principal.**—The agent cannot be held liable for damages accruing to a third person by reason of the failure of the agent to do an act detrimental to his principal, where there is no duty owing from the agent to the third person. Madden v. Cheshire Provident Inst., 77 Kan. 415, 94 P 793 (holding that agents to procure a purchaser of real estate owe no duty to one offering to purchase, and that he is not entitled to recover of them where, after receiving his offer which they communicated to the owner, they received and communicated to the owner a better offer which the owner accepted, and under which the real estate was sold).

65. Kuhnert v. Angell, 10 N. D. 59, 84 NW 579, 88 AmSR 675 (holding that where an agent's authority was limited to leasing and collecting rent for certain premises of his principal, but did not extend to making improvements, such authority was not broad enough to render him liable for injuries sustained by reason of the unsafe condition of the premises). See also Crandall v. Loomis, 56 Vt. 664.

[a] **An agent merely operating a mill** for his owner's benefit is not liable for damages caused by the too great weight of the dam, a permanent structure, whereby the water is set back to another's injury, the agent having no authority to change or remove the dam, which existed prior to the creation of his agency. Brown Paper Co. v. Dean, 123 Mass. 267.

66. Feltus v. Swan, 62 Miss. 415 (holding that an agent is liable to no one except his principal for damage resulting from an omission or neglect of duty with respect to the

Nonfeasance, misfeasance, and malfeasance distinguished. As generally stated, nonfeasance is distinguished from misfeasance and malfeasance, in that nonfeasance is the omission of an act which the agent ought to do,[67] whereas misfeasance is the improper doing of an act which he may lawfully do,[68] and malfeasance is the doing of an act which he ought not to do at all.[69] There is, however, some confusion among the authorities in the statement and application of this distinction.[70] Thus according to some authorities the agent is guilty of nonfeasance only, where he neglects or omits a duty which he owes to his principal by virtue of the contract relationship.[71] The reasoning of this rule, however, has been criticized,[72] and the decisions in several jurisdictions take the view that the mere

business of his agency, even though such omission is with a malicious intent to injure a third person, and has that effect).

67. Southern R. Co. v. Rowe, 2 Ga. A. 557, 59 SE 462; Bell v. Josselyn, 3 Gray (Mass.) 309, 63 AmD 741; Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 63 NW 93, 48 AmSR 911, 28 LRA 439.

[a] **Nonfeasance.**—(1) "Is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do" (Southern R. Co. v. Grizzle, 124 Ga. 735, 737, 53 SE 244, 110 AmSR 191), or (2) "the failure to do that which one, by reason of his undertaking, and not because imposed upon him as a legal duty, agrees to do for another; that which is imposed upon him merely by virtue of his relation to his principal" (Dean v. Brock, 11 Ind. A. 507, 38 NE 829).

68. Southern R. Co. v. Rowe, 2 Ga. A. 557, 59 SE 462; Bell v. Josselyn, 3 Gray (Mass.) 309, 63 AmD 741; Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 63 NW 93, 48 AmSR 911, 28 LRA 439. See also infra §§ 500, 501.

[a] **Other definitions.**—(1) "The performance of an act, which might lawfully be done, in an improper manner, by which another person receives an injury." Bouvier L. D. [quot Illinois Cent. R. Co. v. Foulks, 191 Ill. 57, 69, 60 NE 890]. (2) "The performing [by the agent] of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons." Southern R. Co. v. Grizzle, 124 Ga. 735, 737, 53 SE 244, 110 AmSR 191.

69. Bell v. Josselyn, 3 Gray (Mass.) 309, 63 AmD 741; Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 63 NW 93, 48 AmSR 911, 28 LRA 439. See also infra § 500.

70. See cases infra this note.

[a] **Statements of distinction.**—(1) "The courts and text-writers have not always been accurate in defining the terms 'nonfeasance' and 'misfeasance,' or in discriminating between them. As applied in cases of this character, we think the term 'nonfeasance' refers to the omission on the part of the agent to perform a duty which he owes to his principal by virtue of the relationship existing between them; but, whenever the omission on the part of the agent consists of his failure to perform a duty which he owes to third persons, then, as to such third persons, his omission amounts to 'misfeasance,' for which he is responsible." Hagerty v. Montana Ore Purchasing Co., 38 Mont. 69, 76, 98 P 643, 25 LRANS 856. (2) "It is often said in the books, that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly." Osborne v. Morgan, 130 Mass. 102, 103, 39 AmR 437 [quot Carson v. Quinn, 127 Mo. A. 525, 105 SW 1088, 1090]. See also Bell v. Josselyn, 3 Gray (Mass.) 309, 311, 63 AmD 741 (where, in holding that an agent who negligently directed water to be admitted to a pipe, whereby a third person was injured, was liable for the injury so caused, the court said: "The defendant's omission to examine the state of the pipes in the house, before causing the water to be let on, was a nonfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes and left them in a proper condition, and then caused the letting on of the water, there would have been neither nonfeasance nor misfeasance. As the facts are, the nonfeasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of it being preceded by a nonfeasance"). (3) "If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable." Burns v. Pethcal, 75 Hun 437, 443, 27 NYS 499 [quot Van Antwerp v. Linton, 89 Hun 417, 419, 35 NYS 318].

71. Delaney v. Rochereau, 34 La. Ann. 1123, 1128, 44 AmR 456 (where the court said: "Every one, whether he is principal or agent, is responsible directly to persons injured by his own negligence, in fulfilling obligations resting upon him in his individual character and which the law imposes upon him, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence, in respect to duties imposed by law upon him in common with all other men. An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations towards third persons other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so, he wrongs no one but his principal, who alone can hold him responsible. The whole doctrine on that subject culminates in the proposition that wherever the agent's negligence, consisting in his own wrongdoing, therefore in an act, directly injures a stranger, then such stranger can recover from the agent damages for the injury").

[a] **The negligent omission of an agent to superintend** the erection of a stand in accordance with his duty, whereby the stand is defectively constructed and falls, injuring a third person, does not render the agent liable to such person, the injury being due to his nonfeasance. Van Antwerp v. Linton, 89 Hun 417, 35 NYS 318 [aff 157 N. Y. 716 mem, 53 NE 1133 mem].

72. Lough v. Davis, 30 Wash. 204, 208, 70 P 491, 94 AmSR 848, 59 LRA 802 (where the court said: "The reason assigned to sustain this rule is that the responsibility must arise from some express or implied obligations between the particular parties standing in privity of law or contract with each other. If this be true, it is difficult to see what difference there is in the obligation to their principal between the commission of an act by the agents which they are bound to their principal not to do and the omission of an act which they have obligated themselves to their principal to do. They certainly stand in privity of law or contract with their principal exactly as much in the one instance as in the other, for the obligation to do what ought to be done is no more strongly implied in the ordinary contract of agency than is the obligation not to do what ought not to be done. This reason for the rule not being tenable, and no other reason being obvious, the rule itself ought not to obtain; for jurisprudence does not concern itself with such attenuated refinements. It rests upon broad and comprehensive principles in its attempt to promote rights and redress wrongs. If it takes note of a distinction, such distinction will be a practical one, founded on a difference in principle, and not a distinction without a difference; and there can be no distinction in principle between the acts of a servant who puts in motion an agency which, in its wrongful operation, injures his neighbor, and the acts of a servant who, when he sees such agency in motion, and when it is his duty to control it, negligently refuses to do his duty, and suffers it to operate to the damage of another. There is certainly no difference in moral responsibility; there should be none in legal responsibility. Of course, if the omission of the act or the nonfeasance does not involve a non-performance of duty, then the responsibility would not attach. If it does involve a non-performance of duty to such an extent that the agent is liable to the principal for the damages ensuing from his neglect, there is no hardship in compelling him to respond directly to the injured party. Such practice is less circuitous than that which necessitates first the suing of the master by the party injured, and then a suit by the master against the servant to recoup the damages. But the honorable judge who wrote the opinion in Delaney v. Rochereau, 34 La. Ann. 1123, 44 AmR 456, was mistaken in his announcement that the civil law indorsed the distinction upon which his decision was based, for, while the doctrine is stated in the Justinian Code that no man could usually be made liable for a mere omission to act, it was otherwise when the omission to act involved a negligence of duty. Domat argues that, as an agent is at liberty not to accept the order and power which are given him, so he is bound, if he does accept the order, to execute it; and, if he fail to do so, he will be liable for the damages which he shall have occasioned by his not acting. Under the Aquilian law the distinction between omission and commission was not recognized under such circumstances. In the ninth digest

relation of agency does not exempt a person from liability for an injury to a third person, resulting from his neglect of duty for which he would otherwise be liable,[73] basing this liability not on the contract relation existing between the principal and the agent, but upon the common-law obligation so to use that which he controls as not to injure another.[74] As an illustration of the difference in the application of this distinction, it has been held on the one hand that an agent having charge of property and whose duty it is to make all necessary repairs is not guilty of misfeasance in neglecting to keep the premises in repair and is not liable for injuries sustained by a third person by reason of his neglect;[75] but on the other hand it has been held under similar circumstances that the agent is responsible to a person injured by reason of his neglect to make such repairs.[76]

[§ 500] c. **Misfeasance and Malfeasance—(1) In General.** While an agent is not liable to third persons for injury resulting from his mere omission to perform a duty owed to the principal alone,[77] he is liable to them for injury resulting from his misfeasance or malfeasance, meaning by those terms the breach of a duty owed to third persons generally, independent of the particular duties imposed by his agency;[78] and within the meaning of this rule the neglect or omission of the agent to perform some act which he ought to perform may amount to a positive misfeasance for which he is responsible to third persons.[79] This rule is, however, subject to the qualification that the agent will

of the Aquilian law the following instance is given: One servant lights a fire, and leaves it to another. The latter neglects to check the fire at the proper time and place, and a villa is burned. The first servant was charged with no negligence, because it was his duty to light the fire, and it is argued, very sensibly, that, if the second could not be charged because not putting out the fire was simply an omission of duty, there would be a miscarriage of justice. Is the keeper of a draw-bridge, whose duty it is to close the draw after a ship passes through, and who negligently fails to perform that duty, allowing a car loaded with passengers to be hurled into the river below, to escape responsibility to the injured, while the man who attempts to operate it, but, in so attempting, operates it negligently and unskillfully, is held responsible? Instances in the ordinary transactions of life might be multiplied almost without end, the very statement of which shows conclusively the fallacy of the rule").

73. Mayer v. Thompson-Hutchison Bldg. Co., 104 Ala. 611, 16 S 620, 53 AmSR 88, 28 LRA 433 and note; Frorer v. Baker, 137 Ill. A. 588; Campbell v. Portland Sugar Co., 62 Me. 552, 16 AmR 503.

74. Stiewel v. Borman, 63 Ark. 39, 37 SW 404; Baird v. Shipman, 132 Ill. 16, 23 NE 384, 22 AmSR 504, 7 LRA 128 and note; Schlosser v. Great Northern R. Co., 20 N. D. 406, 127 NW 502; Lough v. Davis, 30 Wash. 204, 70 P 491, 94 AmSR 848, 59 LRA 802.

75. Dean v. Brock, 11 Ind. A. 507, 38 NE 829; Delaney v. Rochereau, 34 La. Ann. 1123, 44 AmR 456.

76. Baird v. Shipman, 132 Ill. 16, 23 NE 384, 22 AmSR 504 and note, 7 LRA 128; Campbell v. Portland Sugar Co., 62 Me. 552, 16 AmR 503; Lough v. Davis, 35 Wash. 449, 77 P 732; Lough v. Davis, 30 Wash. 204, 70 P 491, 94 AmSR 848, 59 LRA 802.

77. See supra § 499.

78. U. S.—Washington Gaslight Co. v. Lansden, 172 U. S. 534, 19 SCt 296, 43 L. ed. 543. See Carey v. Rochereau, 16 Fed. 87.

Ala.—Luling v. Sheppard, 112 Ala. 588, 21 S 352; Hudmon v. Du Bose, 85 Ala. 446, 5 S 162, 2 LRA 475.

Ark.—Merchants', etc., Bank v. Meyer, 56 Ark. 499, 20 SW 406; Gaines v. Briggs, 9 Ark. 46.

Cal.—Brownell v. Fisher, 57 Cal. 150; Webb v. Winter, 1 Cal. 417.

Dak.—Nichols v. Burns, 5 Dak. 28.

Ga.—Owens v. Nichols, 139 Ga. 475, 77 SE 635; Baker v. Davis, 127 Ga. 649, 57 SE 62; Menken v. Atlanta, 78 Ga. 668, 2 SE 559; Williams v. Inman, 1 Ga. A. 321, 57 SE 1009.

Ill.—Illinois Cent. R. Co. v. Foulks, 191 Ill. 57, 60 NE 890; Gravett v. Mugge, 89 Ill. 218; Walker v. Haughey, 25 Ill. A. 135; Dally v. Young, 3 Ill. A. 39.

Ind.—Shearer v. Evans, 89 Ind. 400; McNaughton v. Elkhart, 85 Ind. 384.

Iowa.—Carraher v. Allen, 112 Iowa 168, 83 NW 902 (wrongful attachment); Byford v. Girton, 90 Iowa 661, 57 NW 588; Warder-Bushnell, etc., Co. v. Harris, 81 Iowa 153, 46 NW 859.

Kan.—Dowell v. Chicago, etc., R. Co., 83 Kan. 562, 566, 112 P 136 [cit Cyc]; Topeka Cent. Nat. Bank v. Brooke, 71 Kan. 767, 81 P 498; Barnhart v. Ford, 37 Kan. 520, 15 P 542.

Ky.—Martin v. Louisville, etc., R. Co., 95 Ky. 612, 26 SW 801, 16 KyL 150.

La.—Ledoux v. Cooper, 2 La. Ann. 586; Ledoux v. Anderson, 2 La. Ann. 558.

Md.—Consolidated Gas Co. v. Connor, 114 Md. 140, 157, 78 A 725, 32 LRANS 809 [cit Cyc]; Hambleton v. Rhind, 84 Md. 456, 36 A 597, 40 LRA 216 and note.

Mass.—Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Draper v. Arnold, 12 Mass. 449.

Mich.—Cascarella v. National Grocer Co., 151 Mich. 15, 114 NW 857; Chapel v. Smith, 80 Mich. 100, 45 NW 69.

Mo.—Steinhauser v. Spraul, 127 Mo. 541, 28 SW 620, 30 SW 102, 27 LRA 441; Buis v. Cook, 60 Mo. 391; Carson v. Quinn, 127 Mo. A. 525, 105 SW 1088; Mohr v. Langan, 77 Mo. A. 481; Peckham v. Lindell Glass Co., 9 Mo. A. 459.

N. H.—Page v. Parker, 40 N. H. 47, 43 N. H. 363, 80 AmD 172.

N. J.—Bocchino v. Cook, 67 N. J. L. 467, 51 A 487 (extortion); Newman v. Fowler, 37 N. J. L. 89.

N. Y.—Bruff v. Mali, 36 N. Y. 200, 1 Transcr. A. 96, 34 HowPr 338; Phelps v. Wait, 30 N. Y. 78; Coon v. Froment, 25 App. Div. 250, 49 NYS 305; Bliss v. Schaub, 48 Barb. 339; Montfort v. Hughes, 3 E. D. Smith 591; Hardrop v. Gallagher, 2 E. D. Smith 523; Newberry v. Lee, 3 Hill 523; Williams v. Merle, 11 Wend. 80, 25 AmD 604; Livingston v. Bishop, 1 Johns. 290, 3 AmD 330. See also Burns v. Pethcal, 75 Hun 437, 27 NYS 499.

N. D.—Schlosser v. Great Northern R. Co., 20 N. D. 406, 127 NW 502.

Oh.—Clark v. Fry, 8 Oh. St. 358, 72 AmD 590 [foll Seelen v. Ryan, 2 Cinc. Super. 158].

Pa.—New York, etc., Printing Tel. Co. v. Dryburg, 35 Pa. 298, 78 AmD 338.

S. C.—Bacon v. Sondley, 34 S. C. L. 542, 51 AmD 646.

Tenn.—Erwin v. Davenport, 9 Heisk. 44; Roberts v. State, 7 Coldw. 359. And see Drake v. Hagan, 108 Tenn. 265, 67 SW 470.

Tex.—Texas, etc., R. Co. v. Eastin, 100 Tex. 556, 102 SW 105; Eastin v. Texas, etc., R. Co., 99 Tex. 654, 92 SW 838; Mathonican v. Scott, 87 Tex. 396, 28 SW 1063; Parlin, etc., Co. v. Miller, 25 Tex. Civ. A. 190, 60 SW 881. See also Labadie v. Hawley, 61 Tex. 177, 48 AmR 278.

Wash.—Lough v. Davis, 35 Wash. 449, 77 P 732.

Eng.—Swift v. Winterbotham, L. R. 8 Q. B. 244; Pearson v. Graham, 6 A. & E. 899, 33 ECL 468, 112 Reprint 344; Farebrother v. Ansley, 1 Camph. 343; Petrie v. Lamont, C. & M. 93, 41 ECL 57; Lysley v. Clarke, 14 EngL&Eq 510; Parker v. Godin, Str. 813, 93 Reprint 866; Cary v. Webster, Str. 480, 93 Reprint 647.

[a] **"Where an agent is guilty of misfeasance,** that is, where he has actually entered upon the performance of his duties to his principal, and in doing so fails to respect the rights of others, by doing some wrong as where he fails or neglects to use reasonable care and diligence in the performance of his duties, he will be personally responsible to a third person who is injured by reason of his misfeasance." Schlosser v. Great Northern R. Co., 20 N. D. 406, 411, 127 NW 502.

[b] **Basis of liability.**—"An agent's liability in such cases is not based upon the ground of his agency, but on the ground that he is a wrongdoer, and as such, is responsible for any injury he may cause." Schlosser v. Great Northern R. Co., 20 N. D. 406, 411, 127 NW 502.

[c] **Trespass** by an agent (1) renders him liable in damages. Marshall v. Eggleston, 82 Ill. A. 52. (2) An agent is not liable as for trespass in committing an act by authority or direction of his principal unless the act is such that it would have amounted to a trespass had the principal himself committed it. Strong v. Colter, 13 Minn. 82.

79. Ala.—Mayer v. Thompson-Hutchison Bldg. Co., 104 Ala. 611, 16 S 620, 53 AmSR 88, 28 LRA 433.

Ga.—Southern R. Co. v. Grizzle, 124 Ga. 735, 53 SE 244, 110 AmSR 191; Southern R. Co. v. Rowe, 2 Ga. A. 577, 59 SE 462.

Ill.—Baird v. Shipman, 132 Ill. 16, 23 NE 384, 22 AmSR 504, 7 LRA 128.

Ind.—Dean v. Brock, 11 Ind. A. 507, 38 NE 829.

Iowa.—Minnis v. Younker, 118 NW 532 (holding that an agent of a nonresident owner of premises with authority to rent the same and collect the rents is not liable for injuries to a pedestrian slipping on ice on a sidewalk, formed from water running from a private hydrant on the premises, unless he is guilty of misfeasance, which is not shown, where the evidence does not prove that he knew that water had been running from the hydrant to the sidewalk, or that any ice had been formed there).

Me.—Campbell v. Portland Sugar Co., 62 Me. 552, 16 AmR 503.

Mass.—Osborne v. Morgan, 130 Mass. 102, 39 AmR 437.

Mich.—Ellis v. McNaughton, 76 Mich. 237, 242, 42 NW 1113, 15 AmSR 308 (where the court said: "Misfeasance may involve to some extent the idea of not doing; as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances; as, for instance, when he does not exercise that care which a due regard for the rights of others would require. This is not doing, but it is the not

incur no liability for the doing of an act which his principal might lawfully have done.[80]

[§ 501] **(2) Applications of Rule.** In accordance with the rule that an agent is liable for injury resulting from his misfeasance or malfeasance, an agent may be held liable in damages to third persons for conversion,[81] unless he acts solely for his principal, by his direction, and without any knowledge, actual or constructive, of the wrongful conversion being committed by the principal.[82] He may also be held liable for damages resulting from the performance of illegal acts,[83] or from false and fraudulent[84] or malicious acts committed by him on

doing of that which is not imposed upon the agent merely by his relation to his principal, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes negligence in any relation, and is actionable").

Mont.—Hagerty v. Montana Ore Purchasing Co., 38 Mont. 69, 98 P 643, 25 LRANS 356.

N. J.—Horner v. Lawrence, 37 N. J. L. 46.

N. Y.—Burns v. Pethcal, 75 Hun 437, 443, 27 NYS 499 (holding that, "if the duty rests upon [the agent] in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable" for an omission thereof).

Wash.—Lough v. Davis, 30 Wash. 204, 70 P 491, 94 AmSR 848, 59 LRA 802.

See also supra § 499.

80. Rochford v. Atkins, 213 Mass. 368, 100 NE 669; Strong v. Colter, 13 Minn. 82.

81. Ala.—Perminter v. Kelly, 18 Ala. 716, 54 AmD 177; Lee v. Matthews, 10 Ala. 682, 44 AmD 498.

Conn.—Bennett v. Ives, 30 Conn. 329.

Ga.—McConnell v. Prince, 12 Ga. A. 54, 76 SE 754.

Ill.—Allen v. Hartfield, 76 Ill. 358.

Ind.—Berghoff v. McDonald, 87 Ind. 549.

Ky.—Ayer, etc., Tie Co. v. Witherspoon, 100 SW 259, 30 KyL 1067.

Me.—McPheters v. Page, 83 Me. 234, 22 A 101, 23 AmSR 772; Kimball v. Billings, 55 Me. 147, 92 AmD 581; Richardson v. Kimball, 28 Me. 463.

Mass.—Wamesit Power Co. v. Allen, 120 Mass. 352; McPartland v. Read, 11 Allen 231; Coles v. Clark, 3 Cush. 399; Dench v. Walker, 14 Mass. 500; Higginson v. York, 5 Mass. 341.

Minn.—Schall v. Northland Motor Car Co., 123 Minn. 214, 143 NW 357.

Mo.—Sheffler v. Mudd, 71 Mo. A. 78 (holding the agent of a tenant in common liable for the conversion of the common property on behalf of his principal); Lafayette County Bank v. Metcalf, 40 Mo. A. 494.

N. H.—Gage v. Whittier, 17 N. H. 312.

N. Y.—Spraights v. Dudley, 39 N. Y. 441, 100 AmD 452; Crane v. Onderdonk, 67 Barb. 47; Thompson v. McLean, 10 NYS 411; Farrar v. Chauffetete, 5 Den. 527; Hoffman v. Carow, 22 Wend. 285; Thorp v. Burling, 11 Johns. 285; Ripley v. Gelston, 9 Johns. 201, 6 AmD 271.

Okl.—Butler v. Corey, 35 Okl. 471, 130 P 137.

Pa.—Rice v. Yocum, 155 Pa. 538, 26 A 698; Berry v. Vantries, 12 Serg. & R. 89.

R. I.—Singer Mfg. Co. v. King, 14 R. I. 511.

Tenn.—Elmore v. Brooks, 6 Heisk. 45.

Tex.—Kauffman v. Beasley, 54 Tex. 562.

Eng.—Fowler v. Hollins, L. R. 7 Q. B. 616 [aff L. R. 7 H. L. 757, 2 ERC 410]; Lee v. Bayes, 18 C. B. 599, 86 ECL 599, 139 Reprint 1504; Greenway v. Fisher, 1 C. & P. 190, 12 ECL 118; Stephens v. Elwall, 4 M. & S. 259, 105 Reprint 880; Perkins v. Smith, 1 Wils. C. P. 328, 95 Reprint 644. And see Lane v. Cotton, 12 Mod. 472, 488, 88 Reprint 1458 (per Holt, C. J., dissenting, a case in which, however, the agent's liability was neither involved nor passed on by the majority). But see Reg. v. Parr, 39 L. J. Ch. 73 (holding that an agent is justified in refusing to give up goods until he has communicated with his principal).

[a] **Trover.**—An agent who, in behalf of his principal, takes the property of another without the latter's consent is, as to the latter, guilty of conversion and may be sued in trover for the property, although through ignorance of the state of the title he acts in good faith and turns the property over to his principal before he has notice who is the owner. Miller v. Wilson, 98 Ga. 567, 25 SE 578, 58 AmSR 319.

[b] **An agent holding money to be paid to his principal on the performance of a condition** is liable to the person entitled thereto where he pays it over before the condition is performed; but not where the depositor intends a breach of contract without regard to performance by the principal. Conness v. Baird, (Tex. Civ. A.) 124 SW 113.

82. Cal.—Rogers v. Huie, 2 Cal. 571, 65 AmD 363.

Mass.—Spooner v. Holmes, 102 Mass. 503, 3 AmR 491.

Minn.—Hodgson v. St. Paul Plow Co., 78 Minn. 172, 80 NW 956 and note, 50 LRA 664; Leuthold v. Fairchild, 35 Minn. 99, 27 NW 503, 28 NW 218.

N. H.—Gage v. Whittier, 17 N. H. 312.

N. Y.—Ledwith v. Merritt, 74 App. Div. 64, 77 NYS 341 [aff 174 N. Y. 512 mem, 66 NE 1111 mem]; Jackson v. Klinger, 33 Misc. 758, 67 NYS 850 (holding that one purchasing articles as agent for others, and having no property in or control over them, cannot be held as for a conversion thereof by one having a better right thereto than the seller); Iserman v. Conklin, 21 Misc. 194, 47 NYS 107 (holding that, where personal property conditionally sold is retaken by one known by the purchaser to be acting as agent for the seller, an action to recover the property, or for damages, should be brought against the principal, not against the agent).

Pa.—Berry v. Vantries, 12 Serg. & R. 89. See also Carey v. Bright, 58 Pa. 70.

Tenn.—Roach v. Turk, 9 Heisk. 708, 24 AmR 360.

Va.—Travis v. Claiborne, 1 Munf. (15 Va.) 435.

Wyo.—Wilson v. Rogers, 1 Wyo. 51.

Eng.—Greenway v. Fisher, 1 C. & P. 190, 12 ECL 118; Mires v. Solebay, 2 Mod. 242, 86 Reprint 1050.

See Lafayette County Bank v. Metcalf, 40 Mo. A. 494.

[a] **An agent is not liable for a conversion by his principal** in which he does not actually participate. McLennan v. Minneapolis, etc., Elevator Co., 57 Minn. 317, 59 NW 628.

83. Duluth v. Mallett, 43 Minn. 204, 45 NW 154; Swaggard v. Hancock, 25 Mo. A. 596; Elmore v. Brooks, 6 Heisk. (Tenn.) 45; Bennett v. Bayes, 5 H. & N. 391.

[a] **Assault and battery** by an agent renders him liable to the person injured. Peck v. Cooper, 112 Ill. 192, 54 AmR 231; Carmouche v. Bouis, 6 La. Ann. 95, 54 AmD 558; Hewett v. Swift, 3 Allen (Mass.) 420; Brown v. Howard, 14 Johns. (N. Y.) 119.

[b] **An agent selling stolen goods** (1) will be liable to the true owner. Thompson v. Irwin, 76 Mo. A. 418. (2) The innocent agent of a thief selling stolen property is liable to the true owner for the value of the property, less the value of any the owner may have recovered, reduced by the expenses of such recovery. Laughlin v. Barnes, 76 Mo. A. 258.

[c] **An agent who collects money on a forged note** for an undisclosed principal is liable to the payer individually. Welch v. Goodwin, 123 Mass. 71, 25 AmR 24.

[d] **If an agent does not promote an unlawful act** which constitutes a nuisance he is not liable for injuries resulting therefrom. Crandall v. Loomis, 56 Vt. 664.

[e] **An agent knowingly participating in a lottery scheme** is equally liable with his principal for money received thereunder. Fidelity Funding Co. v. Vaughn, 18 Okl. 13, 90 P 34, 10 LRANS 1123.

84. Cal.—Wilder v. Beede, 119 Cal. 646, 51 P 1088.

Colo.—Wilkins, etc., Realty Co. v. Jones, 53 Colo. 355, 127 P 224; Mayo v. Wahlgreen, 9 Colo. A. 506, 50 P 40.

Conn.—Salmon v. Richardson, 30 Conn. 360, 79 AmD 255.

Fla.—Wheeler v. Baars, 33 Fla. 696, 15 S 584.

Ga.—Lewis v. Equitable Mortg. Co., 94 Ga. 572, 21 SE 224; McDonald v. Napier, 14 Ga. 89.

Ill.—Donovan v. Purtell, 216 Ill. 629, 75 NE 334, 1 LRANS 176; Reed v. Peterson, 91 Ill. 288; Shiperd v. Underwood, 55 Ill. 475.

Ind.—Moore v. Shields, 121 Ind. 267, 23 NE 89.

Iowa.—Riley v. Bell, 120 Iowa 618, 95 NW 170; Norris v. Kipp, 74 Iowa 444, 38 NW 152; Maichen v. Clay, 62 Iowa 452, 17 NW 658.

Ky.—Vertrees v. Head, 138 Ky. 83, 127 SW 523 (holding that as a rule an agent, acting within the scope of his authority in the course of the employment, is not responsible for representations made as to matters in the course of his agency; but, if they are to his knowledge false and fraudulent, he is personally liable for injury therefrom); Campbell v. Hillman, 15 B. Mon. 508, 61 AmD 195.

Mass.—Hedden v. Griffin, 136 Mass. 229, 49 AmR 25; White v. Sawyer, 16 Gray 586. See also Fay v. Winchester, 45 Mass. 513.

Mich.—Hallett v. Gordon, 122 Mich. 573, 81 NW 556, 82 NW 827; Weber v. Weber, 47 Mich. 569, 11 NW 389; Whitman v. Johnston, 35 Mich. 406; Starkweather v. Benjamin, 32 Mich. 305; Burchard v. Frazer, 23 Mich. 224.

Minn.—Hedin v. Minneapolis Medical, etc., Inst., 62 Minn. 146, 64 NW 158, 54 AmSR 628, 35 LRA 417; Clark v. Lovering, 37 Minn. 120, 33 NW 776.

Mo.—Atchison County Bank v. Byers, 139 Mo. 627, 41 SW 325; Hamlin v. Abell, 120 Mo. 188, 25 SW 516; Thompson v. Irwin, 76 Mo. A. 418 (holding that an agent may make himself liable, although he discloses the principal, if he makes false and fraudulent representations as to title, with intent to cheat).

Nebr.—Willard v. Key, 83 Nebr. 850, 120 NW 419.

N. J.—White v. New York, etc., R. Co., 68 N. J. L. 128, 52 A 216; Bocchino v. Cook, 67 N. J. L. 467, 51 A 487.

N. Y.—Warren v. Banning, 140 N. Y. 227, 35 NE 428 [aff 21 NYS 883] (holding an agent liable for misrepresentations and concealments in making a sale of land for his principal); Gutchess v. Whiting, 46 Barb. 139; Hecker v. De Groot, 15 HowPr 314. See also Butler v. Livermore, 52 Barb. 570.

N. C.—Alpha Mills v. Watertown Steam Engine Co., 116 N. C. 797, 21 SE 917.

behalf of his principal,[85] unless the third person is not injured thereby;[86] but he is not liable for the fraud of his principal, in which he does not participate.[87]

Negligence. An agent may be held liable for negligence causing death or personal injuries[88] or injuries to property,[89] although his negligence, in order to render him liable, must be in the performance of a duty which he owes to the person injured, independent of the agency.[90]

False representations of agency. One who falsely represents himself to be the agent of another is liable in an action on the case to those who are injured by his misrepresentation.[91]

[§ 502] **(3) Matters of Defense.** In an action against an agent by a third person for misfeasance or malfeasance it is no defense that he acted as agent or by the authority or direction of another, for no one can lawfully authorize the commission of a tort;[92] nor is it a defense that the agent acted

Okl.—Fidelity Funding Co. v. Vaughn, 18 Okl. 13, 90 P 34, 10 LRANS 1123.

Pa.—White v. Cooper, 3 Pa. 130; Seidel v. Peckworth, 10 Serg. & R. 442.

Tenn.—Caulkins v. Memphis Gas-Light Co., 85 Tenn. 683, 4 SW 287, 4 AmSR 786; Carpenter v. Lee, 5 Yerg. 265.

Tex.—Poole v. Houston, etc., R. Co., 58 Tex. 134; Lewis v. Hoeldtke, 76 SW 309; Baker v. Wasson, 53 Tex. 150; Jones v. Montague, (Civ. A.) 158 SW 1053, 1055 [quot Cyc]; Kleine v. Gidcomb, (Civ. A.) 152 SW 462; McKenzie v. Easton, (Civ. A.) 138 SW 1089, 1090 [cit Cyc]; Wimple v. Patterson, (Civ. A.) 117 SW 1034.

Wash.—Garrett v. Sparks, 61 Wash. 397, 112 P 501 (holding that the agent of a disclosed principal is liable for his own fraud in falsely representing to a prospective purchaser of land that the principal has title, when it has only a contract to purchase). See also P. D. Hillis Logging Co. v. Mescher, 69 Wash. 454, 125 P 768.

W. Va.—Mann v. McVey, 3 W. Va. 232.

Wis.—Wright v. Eaton, 7 Wis. 595.

Eng.—Swift v. Jewsbury, L. R. 9 Q. B. 301; Bulkeley v. Dunbar, Anstr. 37; Wright v. Self, 1 F. & F. 704; Cullen v. Thomson, 9 Jur. N. S. 85; Arnot v. Biscoe, 1 Ves. 95, 27 Reprint 914, 18 ERC 156. See Cargill v. Bower, 10 Ch. D. 502.

Can.—Whittaker v. Taylor, 19 WestLR 662.

[a] **Facts held not to constitute fraudulent concealment by agent** see Johnson v. Bank of North America, 5 Rob. (N. Y.) 554; P. D. Hillis Logging Co. v. Mescher, 69 Wash. 454, 125 P 768 (holding that a bill of sale containing the usual covenants of title, and signed by the seller's agent, as agent, is insufficient to charge him personally for misrepresentations as to the seller's title in the absence of a showing that he knew the representations to be false).

[b] **On a bill to follow assets fraudulently removed,** one who acted as a mere agent in selling the property and paid over the proceeds to his principal is not liable, the bill not proceeding on the idea of punishing for a tort. Delta Bank v. Oliver-Finnie Grocery Co., 70 Miss. 868, 13 S 239; Barnawell v. Threadgill, 56 N. C. 50.

85. Ill.—Donovan v. Purtell, 216 Ill. 629, 75 NE 334, 1 LRANS 176.

Iowa.—Carraher v. Allen, 112 Iowa 168, 83 NW 902.

Mich.—Cascarella v. National Grocer Co., 151 Mich. 15, 114 NW 857.

N. J.—Bocchino v. Cook, 67 N. J. L. 467, 51 A 487.

Tex.—Wallace v. Finberg, 46 Tex. 35.

Eng.—Johnson v. Emerson, L. R. 6 Exch. 329.

86. Baker v. Brown, 82 Cal. 64, 22 P 879 (holding that the purchaser of land from a real estate agent has no cause of action against him for misrepresentations or concealments, where such purchaser is not injured thereby; and that the fact that the agent receives a greater compensation than is ordinarily paid is immaterial).

87. Huston v. Tyler, 140 Mo. 252, 36 SW 654, 41 SW 795; Lipscomb v. Kitrell, 11 Humphr. (Tenn.) 256 (holding that an agent acting in good faith in making false representations authorized by his principal is not liable for the fraud); White v. Rutherford, (Tex. Civ. A.) 148 SW 593.

88. Ala.—Mayer v. Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 16 S 620, 53 AmSR 88, 28 LRA 433 and note.

Ark.—Stiewel v. Borman, 63 Ark. 30, 37 SW 404 (holding that where, in the discharge of his principal's business, an agent fails in his duty either negligently or intentionally, and thereby causes an injury to another, he is liable for damages to the person injured).

Ga.—Southern R. Co. v. Grizzle, 124 Ga. 735, 53 SE 244, 110 AmSR 191; Southern R. Co. v. Rowe, 2 Ga. A. 557, 59 SE 462.

Ill.—Baird v. Shipman, 132 Ill. 16, 23 NE 384, 22 AmSR 504, 7 LRA 128.

Ind.—Tippecanoe L. & T. Co. v. Jester, 101 NE 915 (holding that an agent in full control and management of an apartment house for the owners is personally liable to one having a right to use the passenger elevator for injury to him from the negligence of the agent in respect to it).

Me.—Campbell v. Portland Sugar Co., 62 Me. 552, 16 AmR 503.

Mass.—Osborne v. Morgan, 130 Mass. 102, 39 AmR 437; Hawkesworth v. Thompson, 98 Mass. 77, 93 AmD 137.

Mich.—Ellis v. McNaughton, 76 Mich. 237, 42 NW 1113, 15 AmSR 308.

Mo.—Orcutt v. Century Bldg. Co., 201 Mo. 424, 99 SW 1062, 8 LRANS 929; Lottman v. Barnett, 62 Mo. 159; Harriman v. Stowe, 57 Mo. 93; Carson v. Quinn, 127 Mo. A. 525, 105 SW 1088 (holding that, where an agent in complete control of a tenement house constructed a new walk in the court, leaving a large hole in the walk, and plaintiff, a new tenant, without previous knowledge of the existence of the hole, stepped into it after dark and was severely injured, it is misfeasance of the agent rendering him liable, and not a mere nonfeasance).

N. Y.—Yarslowitz v. Bienenstock, 130 NYS 931 [aff 141 App. Div. 64, 125 NYS 649] (holding that one who employed plaintiff to work on a building, concealing from him the fact that he was not the owner, is liable to plaintiff for negligent injuries as if he were the owner, the rule being the same in tort as in contract actions).

Tenn.—Nashville, etc., R. Co. v. Price, 125 Tenn. 646, 655, 148 SW 219 [cit Cyc].

Wash.—Lough v. Davis, 30 Wash. 204, 70 P 491, 94 AmSR 848, 59 LRA 102.

Wis.—Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 63 NW 93, 48 AmSR 911 and note, 28 LRA 443.

89. Colo.—Miller v. Staple, 3 Colo. A. 93, 32 P 81.

Ga.—Owens v. Nichols, 139 Ga. 475, 77 SE 635; Kimbrough v. Boswell, 119 Ga. 201, 45 SE 977.

Ind.—Block v. Haseltine, 3 Ind. A. 491, 29 NE 937.

Mass.—Bell v. Josselyn, 3 Gray 309, 63 AmD 741 [cit Gilmore v. Driscoll, 122 Mass. 199, 23 AmR 312].

Mo.—Martin v. Benoist, 20 Mo. A. 262.

N. J.—Horner v. Lawrence, 37 N. J. L. 46.

N. Y.—Suydam v. Moore, 8 Barb. 358.

Pa.—Malone v. Pierce, 231 Pa. 534, 80 A 979.

90. Ind.—Dean v. Brock, 11 Ind. A. 507, 38 NE 829.

La.—Delaney v. Rochereau, 34 La. Ann. 1123, 44 AmR 456.

Mass.—Albro v. Jaquith, 4 Gray 99, 64 AmD 56.

Miss.—Felton v. Swan, 62 Miss. 415.

Oh.—Henshaw v. Noble, 7 Oh. St. 226.

Tenn.—Drake v. Hagan, 108 Tenn. 265, 67 SW 470.

Eng.—Lane v. Cotton, 12 Mod. 472, 488, 88 Reprint 1458 (per Holt, C. J., dissenting, a case in which, however, the agent's liability was neither involved nor passed on by the majority).

See also supra § 499.

[a] **The mere fact of the agency will not render an agent personally liable** for personal injuries, but he must be so connected with the tortious acts complained of that he will be personally liable without regard to the liability of his principal. Frorer v. Baker, 137 Ill. A. 588.

[b] **Proximate cause.**—The negligence of a mining company's superintendent in charge of its mine in maintaining a shaft in a dangerous condition, and in permitting its use by third persons unaware of its dangerous character, is not a "nonfeasance" for which he is responsible to the company only, but is "misfeasance" for which he is liable when such negligence is the proximate cause of injuries. Hagerty v. Montana Ore Purchasing Co., 38 Mont. 69, 98 P 643, 25 LRANS 356.

91. Ill.—Duncan v. Niles, 32 Ill. 532, 83 AmD 293.

Ind.—McHenry v. Duffield, 7 Blackf. 41.

Me.—Teele v. Otis, 66 Me. 329; Noyes v. Loring, 55 Me. 408; Harper v. Little, 2 Me. 14, 11 AmD 25.

Mass.—People's Nat. Bank v. Dixwell, 217 Mass. 436, 105 NE 435; Bartlett v. Tucker, 104 Mass. 336, 6 AmR 240; Draper v. Massachusetts Steam Heating Co., 5 Allen 338; Abbey v. Chase, 6 Cush. 54; Jefts v. York, 4 Cush. 371, 50 AmD 791; Ballou v. Talbot, 16 Mass. 461, 8 AmD 146; Long v. Colburn, 11 Mass. 97, 6 AmD 160.

N. Y.—Noe v. Gregory, 7 Daly 283.

Eng.—Jenkins v. Hutchinson, 13 Q. B. 744, 66 ECL 744, 116 Reprint 1448.

See also supra § 479.

92. Ala.—Mayer v. Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 16 S 620, 53 AmSR 88, 28 LRA 433 and note; Lee v. Matthews, 10 Ala. 682, 44 AmD 498.

Conn.—Bennett v. Ives, 30 Conn. 329.

Ga.—Owens v. Nichols, 139 Ga. 475, 77 SE 635.

Ill.—Illinois Cent. R. Co. v. Foulks, 191 Ill. 57, 60 NE 890; Baird v. Shipman, 132 Ill. 16, 23 NE 384, 22 AmSR 504, 7 LRA 128; Peck v. Cooper, 112 Ill. 192, 54 AmR 231; Reed v. Peterson, 91 Ill. 288; Johnson v. Barber, 10 Ill. 425, 50 AmD 416.

Ind.—McNaughton v. Elkhart, 85 Ind. 384; Blue v. Briggs, 12 Ind. A. 105, 39 NE 885.

Ky.—Pool v. Adkisson, 1 Dana 110; Campbell v. Hillman, 15 B. Mon. 508, 61 AmD 195.

La.—Delaney v. Rochereau, 34 La. Ann. 1123, 44 AmR 456; Carmouche v. Bouis, 6 La. Ann. 95, 54 AmD 558.

Me.—Wing v. Milliken, 91 Me. 387, 40 A 138, 64 AmSR 238; McPheters v. Page, 83 Me. 234, 22 A. 101, 23 AmSR 772; Kimball v. Billings, 55 Me.

contrary to the instructions of his principal,[93] or that he himself received no benefit by reason of his wrong,[94] or that he has paid over the proceeds of his wrong to his principal,[95] or that he is liable to the latter therefor.[96]

[§ 503] **d. Liability of Agent for Misfeasance or Malfeasance of Subagent.** An agent is not in general liable to third persons for the misfeasance or malfeasance of subagents employed by him in the service of his principal,[97] unless he is guilty of fraud or gross negligence in the appointment of such subagent, or improperly coöperates in the latter's acts or omissions;[98] and in some jurisdictions this rule is in effect prescribed by statute.[99] Where, however, the agent directs or authorizes the particular wrongful act of the subagent he will be liable to third persons therefor.[1]

[§ 504] **B. Liability of Third Person to Agent[2]—1. On Contract—a. Where Principal Is Disclosed.** The general rule is that where an agent makes a contract with a third person, naming his principal, the contract is made with the principal and not with the agent, and no cause of action for its breach subsists in favor of the agent against the other party thereto.[3] But even where the principal is known, a contract may be made by an agent with

147, 92 AmD 581; Norton v. Kidder, 54 Me. 189; Richardson v. Kimball, 28 Me. 463.

Mass.—Higginson v. York, 5 Mass. 341.

Mich.—Weber v. Weber, 47 Mich. 569, 11 NW 389; Josselyn v. McAllister, 22 Mich. 300.

Minn.—Hedin v. Minneapolis Medical, etc., Inst., 62 Minn. 150, 64 NW 158, 54 AmSR 628, 35 LRA 417.

Miss.—O'Connor v. Clopton, 60 Miss. 349.

Mo.—Huston v. Tyler, 140 Mo. 252, 36 SW 654, 41 SW 795; Martin v. Benoist, 20 Mo. A. 262.

N. H.—Gage v. Whittier, 17 N. H. 312.

N. J.—Bocchino v. Cook, 67 N. J. L. 467, 51 A 487; Horner v. Lawrence, 37 N. J. L. 46.

N. Y.—Crane v. Onderdonk, 67 Barb. 47; Brown v. Howard, 14 Johns. 119; Hecker v. De Groot, 15 HowPr 314.

Okl.—Butler v. Corey, 35 Okl. 471, 130 P 137.

R. I.—Singer Mfg. Co. v. King, 14 R. I. 511.

S. D.—Cockran v. Rice, 26 S. D. 393, 397, 128 NW 588, AnnCas1913B 570 [quot Cyc].

Tenn.—Elmore v. Brooks, 6 Heisk. 45.

Tex.—Poole v. Houston, etc., R. Co., 58 Tex. 134; Baker v. Wasson, 53 Tex. 150; Diamond v. Smith, 27 Tex. Civ. A. 558, 66 SW 141 (holding that in an action against joint tort-feasors an answer by one that he acted as agent for the other in committing the tort is insufficient).

Wis.—Wright v. Eaton, 7 Wis. 595.

Eng.—Mill v. Hawker, L. R. 10 Exch. 92; Stephens v. Elwall, 4 M. & S. 259, 105 Reprint 830; Perkins v. Smith, 1 Wils C. P. 328, 95 Reprint 644; Heugh v. Abergavenny, 23 Wkly. Rep. 40.

Compare supra § 501 text and note 82.

[a] **The fact that the principal is liable is no defense.**—Baird v. Shipman, 132 Ill. 16, 23 NE 384, 22 AmSR 504, 7 LRA 128; O'Connor v. Clopton, 60 Miss. 349.

[b] **In torts the relation of principal and agent does not exist;** they are all wrongdoers and may be sued jointly or separately, and the liability of each and all does not cease until payment has been made or satisfaction rendered. Berghoff v. McDonald, 87 Ind. 549. See also Evans v. MacMicking, 2 Alta. L. 5.

[c] **False imprisonment.**—An agent who has rendered himself liable for false imprisonment in commencing suits on behalf of his principal cannot defend himself on the ground that he was acting under instructions from his principal. Josselyn v. McAllister, 22 Mich. 300. See generally False Imprisonment [19 Cyc 327].

[d] **Wrongful ejectment.**—Where a person wrongfully ejects others from land which they are cultivating under a contract, and appropriates the crop, he cannot set up as a defense that he was acting for another, since joint tort-feasors are severally as well as jointly liable. Ellis v. Stine, (Tex. Civ. A.) 55 SW 758.

[e] **A tax collector** for whom plaintiffs were sureties on his bond to the state was not their agent so as to bar an action by plaintiffs for his wrong. Boaz v. Ferrell, (Tex. Civ. A.) 152 SW 200.

[f] **A seller of horses** is not absolved from liability for fraudulent representations made by him, although he is acting as agent for another party. Underwood v. Jordan, (Tex. Civ. A.) 166 SW 88.

93. Starkweather v. Benjamin, 32 Mich. 305.

94. Cal.—Wilder v. Beede, 119 Cal. 646, 51 P 1083.

Ind.—Moore v. Shields, 121 Ind. 267, 23 NE 89.

Mich.—Weber v. Weber, 47 Mich. 569, 11 NW 389.

N. Y.—Jones v. Gould, 123 App. Div. 236, 108 NYS 31 [rev on other grounds 200 N. Y. 18, 92 NE 1017].

Tenn.—Caulkins v. Memphis Gas-Light Co., 85 Tenn. 683, 4 SW 287, 4 AmSR 786.

Tex.—McKenzie v. Easton, (Civ. A.) 138 SW 1089.

Vt.—Larkin v. Hapgood, 56 Vt. 597.

[a] **Reason for rule.**—"A person cannot avoid responsibility merely because he gets no personal advantage from his fraud. All persons who are active in defrauding others are liable for what they do, whether they act in one capacity or another. No one can lawfully pursue a knowingly fraudulent employment; and while it may be true that the principal is often liable for the fraud of his agent though himself honest, his own fraud will not exonerate his fraudulent agent." Weber v. Weber, 47 Mich. 569, 571, 11 NW 389.

95. McConnell v. Prince, 12 Ga. A. 54, 76 SE 754; Bocchino v. Cook, 67 N. J. L. 467, 51 A 487; Wright v. Eaton, 7 Wis. 595. See also Butler v. Livermore, 52 Barb. (N. Y.) 570.

96. Osborne v. Morgan, 130 Mass. 102, 39 AmR 437.

97. Ill.—Smith v. Pawlak, 136 Ill. A. 276 [aff 233 Ill. 401, 84 NE 272].

Mich.—Miller v. Seeley, 90 Mich. 218, 51 NW 366.

Mo.—Canfield v. Chicago, etc., R. Co., 59 Mo. A. 354.

N. H.—Brown v. West, 75 N. H. 463, 464, 76 A 169 [cit Cyc].

N. D.—Kuhnert v. Angell, 8 N. D. 198, 77 NW 1015.

Pa.—Hidson v. Markle, 171 Pa. 138, 33 A 74; Harrison v. Van Gunten, 15 Pa. Super. 491 (agent held not liable for damages for a loss occasioned by an improper and tortious distress executed by the subagent).

Tenn.—Johnson v. Memphis, 9 Lea 125.

Vt.—Brown v. Lent, 20 Vt. 529.

Eng.—Cargill v. Bower, 10 Ch. D. 502 (holding that an agent is not liable for the fraud of a subagent, unless he does something which makes him a principal in the fraud); Randleson v. Murray, 8 A. & E. 109, 35 ECL 504, 112 Reprint 777; Bush v. Steinman, 1 B. & P. 404, 126 Reprint 978; Rapson v. Cubitt, C. & M. 64, 41 ECL 41; Lonsdale v. Littledale, 2 H. Bl. 267, 126 Reprint 544; Quarman v. Burnett, 4 Jur. 969; Bear v. Stevenson, 30 L. T. Rep. N. S. 177; Stone v. Cartwright, 6 T. R. 411, 101 Reprint 622.

Responsibility of agent for acts of subagent see generally supra § 351.

98. Harrison v. Van Gunten, 15 Pa. Super. 491.

99. See statutory provisions.

[a] **In North Dakota** under Rev. Code § 4248, which provides that "the original agent is not responsible to third persons for the acts of the subagent," it has been held that where an agent of a landowner was directed to have a fence erected across a trail which was commonly used by the public, and directions for this erection included a provision for guard rails, and the agent employed a subagent to erect the fence in accordance with such instructions but the latter failed and neglected to put on the guard rails, the original agent was not liable to the third person for an injury resulting to the latter's horses because of the negligent construction of the fence. Kuhnert v. Angell, 10 N. D. 59, 84 NW 579, 88 AmSR 675.

1. U. S.—Hills v. Ross, 3 Dall. 331, 1 L. ed. 623.

Ill.—Peck v. Cooper, 112 Ill. 192, 54 AmR 231 [aff 8 Ill. A. 403].

Md.—Blaen Avon Coal Co. v. McCulloh, 59 Md. 403, 43 AmR 560.

Mo.—Canfield v. Chicago, etc., R. Co., 59 Mo. A. 354.

Vt.—Brown v. Lent, 20 Vt. 529.

Eng.—Bear v. Stevenson, 30 L. T. Rep. N. S. 177; Stone v. Cartwright, 6 T. R. 411, 101 Reprint 622. See also Swire v. Francis, 3 App. Cas. 106 (holding that where an agent gave a subagent authority to draw on third persons for certain amounts advanced them on the latter's account, and the subagent drew for amounts not advanced and converted the proceeds, the agent was liable); Easton v. Hitchcock, [1912] 1 K. B. 535.

[a] **Liability of trustee.**—The fact that a person is trustee of an estate does not place him in the position of an intermediate agent between his principal and an employee committing a tort so as to relieve the trustee of personal responsibility therefor. Baker v. Tibbetts, 162 Mass. 468, 39 NE 850.

Liability of master of vessel for negligence of subofficer see Shipping [36 Cyc 150].

2. **Right of action,** whether in name of principal or agent or both see infra §§ 594–603.

Subrogation of agent to principal's rights see Subrogation [37 Cyc 439 et seq].

3. U. S.—Atchison, etc., R. Co. v. Tiedt, 196 Fed. 348, 116 CCA 168, 40 LRANS 848; The A. Cheesebrough, 1 F. Cas. No. 25, 3 Blatchf. 305; Thatcher v. Winslow, 23 F. Cas. No. 13,863, 5 Mason 58.

Cal.—Pinson v. Schmalz, 94 Cal. 651, 30 P 3; Lineker v. Ayeshford, 1 Cal. 75.

Me.—Garland v. Reynolds, 20 Me. 45.

Mass.—Medway Cotton Manufactory v. Adams, 10 Mass. 360.

N. Y.—Thompson v. Fargo, 49 N. Y. 188, 10 AmR 342, 63 N. Y. 479; Buckbee v. Brown, 21 Wend. 110; Oakey v. Bend, 3 Edw. 482.

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a third person in such terms that he, the agent, is personally liable for the fulfillment of it, and he may therefore enforce the same;[4] and the authorities are practically uniform that where the nominal promisee is an agent, and he has a beneficial interest in the performance of the contract or a special property in the subject matter of the agreement, the legal interest and right of action are in him.[5] The agent, however, cannot enforce an illegal contract made by him with a third person on behalf of his principal.[6]

[§ 505] **b. Where Principal Is Undisclosed.** Since the law is that where an agent acts for an undisclosed principal he becomes personally bound on the contract,[7] where a contract is made in the agent's name, and he is individually liable thereon, the liability is reciprocal, and the person with whom the contract is made is bound to him for its performance,[8] unless the principal asserts his rights.[9] However, an agent who, in selling property of his principal, binds himself personally, acquires no greater rights against the purchaser than if he had contracted for the sale of his own property.[10]

[§ 506] **c. Money Paid under Mistake of Fact or on Illegal Contract.** The general rule is that, where an agent pays money to a third person for his principal under a mistake of fact, a cause of action subsists in his favor for its recovery.[11] Likewise a cause of action subsists in favor of an agent for the recovery of money which he has paid on behalf of his principal on an illegal contract, the illegality of which was unknown to the agent at the time,[12] or for money the payment of which has been induced by the third person's fraud.[13] Where, however, such mistake occurs through the fault or negligence of the agent alone, and no fault or fraud can be imputed to the third person, the agent has no cause of action by reason thereof.[14]

[§ 507] **d. Defenses—(1) In General.** In an action by an agent for an undisclosed principal on a contract made by the agent in his own name, any defense good against the principal, if the action

Okl.—Grimes v. Wilson, 30 Okl. 822, 120 P 294 [cit Cyc].

Eng.—Sharman v. Brandt, L. R. 6 Q. B. 720; Sargent v. Morris, 3 B. & Ald. 277, 5 ECL 166, 106 Reprint 665; Pigott v. Thompson, 3 B. & P. 147, 127 Reprint 80; Fisher v. Marsh, 6 B. & S. 411, 118 ECL 411, 122 Reprint 1247; Bramwell v. Spiller, 21 L. T. Rep. N. S. 672; Leigh v. Thomas, 2 Ves. 312, 28 Reprint 201. And see Rex v. Machado, 4 Russ. 225, 4 EngCh 225, 38 Reprint 790.

N. S.—Wurzburg v. Webb, 19 N. S. 414.

See also infra §§ 594, 595.

4. Whitman v. Namquit Worsted Co., 206 Fed. 549; McDermott v. Stella, 127 NYS 335 (holding that where an agent of a consignor, under a duty to deliver goods to the consignee on payment of the charges, delivered the goods to the consignee on request that the agent pay charges, and on his promise to repay him, the agent could recover on the promise only if he had paid the charges, or had in reliance on the consignee's promise incurred a personal liability therefor); Fisher v. Marsh, 6 B. & S. 411, 118 ECL 411, 122 Reprint 1247. See also San Jacinto Rice Co v. Lockett, (Tex. Civ. A.) 145 SW 1046.

5. See infra § 600.

6. Isanbeck v. Burroughs, 217 Mass. 537, 542, 105 NE 595 (holding that an agreement by agents, which would bind them to the performance of a stipulation antagonistic to the interests of their principals, cannot be enforced by them. In this case the court said: "The reason why they could not enforce such an agreement is that it would be against public policy as calling for fraudulent conduct on their part, so neither could it be enforced against them by a party who when he made it knew of its fraudulent character and shared in its wrongful purpose").

7. See supra § 491.

8. U. S.—Albany, etc., Iron, etc., Co. v. Lundberg, 121 U. S. 451, 7 SCt 958, 30 L. ed. 982.

Cal.—Crosby v. Watkins, 12 Cal. 85.

Ga.—Georgia, etc., R. Co. v. Marshman, 121 Ga. 235, 48 SE 961.

Ill.—Saladin v. Mitchell, 45 Ill. 79; Stockbarger v. Sain, 69 Ill. A. 436.

La.—Girault v. Feucht, 120 La. 1070, 46 S 26.

Mass.—Colburn v. Phillips, 13 Gray 64.

Minn.—Holliston v. Ernston, 124 Minn. 49, 144 NW 415 (holding that a party to a bill of sale of a bus and baggage transfer business, which obligated the seller not to engage in the same business in a certain city, can enforce such obligation by injunction, although he purchased the business for an undisclosed principal and his only interest is under a contract of his principal to employ him if he made the purchase).

Miss.—Ackerman v. Cook, 34 Miss. 262.

Mo.—Keown v. Vogel, 25 Mo. A. 35.

N. H.—Porter v. Raymond, 53 N. H. 519; Barnes v. Union Mut. F. Ins. Co., 45 N. H. 21.

N. J.—Hughes v. Young, 31 N. J. Eq. 60 [rev on other grounds 32 N. J. Eq. 372] (holding therefore that where one purchases lands as an agent only, it is no defense to an action by him for specific performance that he did not disclose his agency or his principal).

N. Y.—Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co., 211 N. Y. 68, 105 NE 88 (although the principal renounces it); Ludwig v. Gillespie, 105 N. Y. 653, 11 NE 885 [aff 51 N. Y. Super. 310]; Considerant v. Brisbane, 22 N. Y. 389.

N. C.—Whitehead v. Potter, 26 N. C. 257.

N. D.—Stewart v. Gregory, etc., Co., 9 N. D. 618, 84 NW 553.

Pa.—Baltimore, etc., Steamboat Co. v. Atkins, 22 Pa. 522.

Tex.—Snow v. Rudolph, (Civ. A.) 131 SW 249; Neal v. Andrews, (Civ. A.) 60 SW 459; Edwards v. Ezell, 2 Tex. A. Civ. Cas. § 276. See also San Jacinto Rice Co. v. Lockett, (Civ. A.) 145 SW 1046.

Va.—Leterman v. Charlottesville Lumber Co., 110 Va. 769, 772, 67 SE 281 [cit Cyc].

Eng.—Schmaltz v. Avery, 16 Q. B. 655, 71 ECL 655, 117 Reprint 1031; Sims v. Bond, 5 B. & Ad. 389, 393, 27 ECL 168, 110 Reprint 834 (where the court said: "It is a well-established rule of law, that where a contract, not under seal, is made with an agent, in his own name, for an undisclosed principal, either the agent or the principal may sue upon it").

Ont.—Lister v. Burnham, 1 U. C. Q. B. 419.

Estoppel of tenant to deny title of agent of undisclosed principal signing as lessor see Landlord and Tenant [24 Cyc 941 note 83].

[a] **Contract under seal.**—Where an agent makes a contract in his own name, and under his own seal, he alone can maintain an action thereon, since the contract is his alone. See infra § 599.

[b] **Sale of goods.**—A purchaser of goods, having no knowledge of the existence of an agency to make the sale, is liable to the agent. Rosser v. Darden, 82 Ga. 219, 7 SE 919, 14 AmSR 152; Keown v. Vogel, 25 Mo. A. 35; DuBois v. Perkins, 21 Or. 189, 27 P 1044.

[c] **Infancy of principal.**—If the agent binds himself personally for the fulfillment of a contract, he has a right of action thereon, and the fact that his principal is a minor is no defense to the action. Nelson v. Nixon, 13 AbbPr (N. Y.) 104.

9. Saladin v. Mitchell, 45 Ill. 79; Stockbarger v. Sain, 69 Ill. A. 436; Rowe v. Rand, 111 Ind. 206, 12 NE 377; Leterman v. Charlottesville Lumber Co., 110 Va. 769, 772, 67 SE 281 [cit Cyc].

10. Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 AmD 618; Evrit v. Bancroft, 22 Oh. St. 172 (holding that the liability of the third person to the agent is to be ascertained from their own agreement, irrespective of the agreement between the agent and his principal, and that the rule of damages is the same whether the suit is brought in the name of the principal or in the name of the agent as one of the contracting parties); Leterman v. Charlottesville Lumber Co., 110 Va. 769, 772, 67 SE 281. See also infra §§ 507, 508.

11. Parks v. Fogleman, 97 Minn. 157, 105 NW 560, 114 AmSR 703, 4 LRANS 303 and note; Newall v. Tomlinson, L. R. 6 C. P. 405; Stevenson v. Mortimer, Cowp. 805, 98 Reprint 1372; Holt v. Ely, 1 E. & B. 795, 72 ECL 795, 118 Reprint 634.

12. Kent v. Bornstein, 12 Allen (Mass.) 342, 344 (where an agent who had authority only to sell goods belonging to his principal and to pay over the proceeds therefrom to his principal exchanged some of the money in his possession, received from the sale of goods, for a counterfeit bill, and the court allowed a recovery to the agent for the money so exchanged, and stated that "it plainly appears that" the agent's "right to recover in this action is the only mode in which he can indemnify himself against the rightful claim of his employer for the loss caused by his abuse of the authority intrusted to him"); Oom v. Bruce, 12 East 225, 104 Reprint 87.

13. Johnson v. Cate, 77 Vt. 218, 59 A 830 (holding also that, in an action for money paid by plaintiff for goods purchased for a firm of which plaintiff was agent, the firm having previously paid defendant, who knew that plaintiff purchased the property for the firm as his principals, it was immaterial to defendant whether such transactions appeared on the firm's books or not); Holt v. Ely, 1 E. & B. 795, 72 ECL 795, 118 Reprint 634.

14. Yetter v. Van Patten, 103 Ill. A. 59; Hungerford v. Scott, 37 Wis. 341 (holding that an agent who by mistake sells his principal's goods for less than the schedule price cannot call upon an innocent purchaser to make good the difference). See also Winkley v. Foye, 28 N. H. 513 (holding that money paid to a creditor by

was brought by him, is available against the agent,[15] in addition to such defenses as would be good against the agent only.[16]

[§ 508] **(2) Counterclaim against Principal.**[17] In an action on a contract by an agent for his principal, defendant may generally set off any claim or debt which he has against the principal;[18] except that he cannot set off a claim for unliquidated damages which he has against the principal, arising out of another transaction.[19]

[§ 509] **e. Measure of Damages.** Where the agent brings an action against the third person for a breach of the contract, he is entitled to recover damages for its breach, to the same extent as though the action had been brought by the principal,[20] the recovery being based upon the theory that the agent sues and recovers as trustee for his principal.[21]

[§ 510] **2. In Tort—a. In General.** The general rule is that an action will lie in favor of an agent against a third person for any injury or trespass committed by such third person against the agent personally while acting in the course of his employment.[22]

[§ 511] **b. For Procuring Agent's Discharge.** An agent may maintain an action against a third person who maliciously procures his principal to discharge him from employment under a legal contract, whether the term of service is for a fixed period or not, and although his principal has the right to discharge him at any time.[23] However, where a third person commits an act which is legal in itself, and violates no right of the agent, the fact that the act is done with malice or other bad motive toward the agent, and thereby causes him to lose his employment, does not give the latter a right of action against the former.[24]

[§ 512] **c. For Injury to Principal's Property.** Although a mere servant has not such a special property as will enable him to maintain an action for the recovery of the principal's property taken from his possession,[25] yet an agent, who is in the possession of or entitled to the possession of property belonging to his principal by virtue of his agency, and who has a special or general property or interest therein, as in the case of a bailee or trustee, may maintain an action against a third person who disturbs his possession or unlawfully injures the property;[26] and the recovery of a judg-

an agent of the debtor on his account passes to the creditor as money of the principal, and cannot be reclaimed by the agent, although in fact it was his money).

15. U. S.—Leeds v. Marine Ins. Co., 6 Wheat. 565, 5 L. ed. 332. See also Carr v. U. S., 13 Ct. Cl. 136 (where it appeared that A orally agreed to furnish military transportation for certain articles, and sent B, his agent, to perform the service; that some negotiations took place between B, acting as A's agent, and the officers of the government, but nothing appeared to have been done; that after the lapse of a month or more the quartermaster's department entered into a contract with B in his own name for the transportation of the same articles at a much higher rate, the agency being unknown to the quartermaster; and that B brought suit on this contract; and it was held that he was entitled to recover only at the rate specified in A's contract).

Mass.—Huntington v. Knox, 7 Cush. 371; Lime Rock Bank v. Plimpton, 17 Pick. 159, 28 AmD 286.

N. Y.—Taintor v. Prendergast, 3 Hill 72, 38 AmD 618; Hogan v. Shorb, 24 Wend. 458; McVickar v. Wolcott, 4 Johns. 510.

Vt.—Holden v. Rutland R. Co., 73 Vt. 317, 50 A 1096.

Eng.—Grice v. Kenrick, L. R. 5 Q. B. 340; Humble v. Hunter, 12 Q. B. 310, 64 ECL 310, 116 Reprint 885; Thomson v. Davenport, 9 B. & C. 78, 17 ECL 45, 109 Reprint 30; Harrison v. Vallance, 1 Bing. 45, 8 ECL 394, 130 Reprint 19; Smith v. Lyon, 3 Campb. 465; Solomons v. Bank of England, 13 East 135 note, 104 Reprint 319 note, 3 ERC 634; Rex v. Hardwick, 11 East 578, 103 Reprint 1129; Stewart v. Aberdein, 1 H. & H. 284; Coppin v. Craig, 7 Taunt. 243, 2 ECL 345, 129 Reprint 97.

See also supra § 505.

[a] **Contract with agent as principal.**—A defendant may always show that he did not contract with the agent as such, but as principal. Winchester v. Howard, 97 Mass. 303, 93 AmD 93; Humble v. Hunter, 12 Q. B. 310, 64 ECL 310, 116 Reprint 885.

16. Holden v. Rutland R. Co., 73 Vt. 317, 50 A 1096; Gibson v. Winter, 5 B. & Ad. 96, 27 ECL 50, 110 Reprint 728.

17. See generally Recoupment, Set-off, and Counterclaim [34 Cyc 618].

18. Bliss v. Sneath, 103 Cal. 43, 36 P 1029; Hayden v. Alton Nat. Bank, 29 Ill. A. 458 (where plaintiff deposited money in defendant's bank in his name "as agent," and under the findings of fact in the case it appeared that this money belonged to his principal, and in an action by plaintiff against the bank for the sum so deposited it was held that defendant could offset against plaintiff any indebtedness which they held against his principal). Compare Alsop v. Caines, 10 Johns. (N. Y.) 396 [aff 13 Johns. 9]; Isberg v. Bowden, 8 Exch. 852.

19. Tagart v. Marcus, 36 Wkly. Rep. 469.

20. Groover v. Warfield, 50 Ga. 644 (where cotton agents brought an action to recover damages resulting from a breach of contract by the buyers of cotton from them, such breach consisting in the failure to complete the purchase, and the court granted a recovery for full damages, to wit, the difference between the contract price for the cotton and the value thereof on the day of the breach, although plaintiffs were bound to pay the same when recovered to their consignors); U. S. Telegraph Co. v. Gildersleve, 29 Md. 232, 96 AmD 519; Leterman v. Charlottesville Lumber Co., 110 Va. 769, 67 SE 281 (holding that an agent suing on a contract for an undisclosed principal may recover the damages resulting from the breach by the other contracting party, unless his principal interferes; and he may recover the full measure of damages, as though action was brought by the principal); Dancer v. Hastings, 4 Bing. 2, 13 ECL 371, 130 Reprint 667; Joseph v. Knox, 3 Campb. 320; Gardiner v. Davis, 2 C. & P. 49, 12 ECL 444.

21. U. S. Telegraph Co. v. Gildersleve, 29 Md. 232, 96 AmD 519.

22. Weiss v. Whittemore, 28 Mich. 366 (which was an action of libel by an agent against a third person who had published a libel in reference to the subject matter of the agency, whereby plaintiff had lost business and his normal profits had decreased); Williams v. Millington, 1 H. Bl. 81, 126 Reprint 49, 3 ERC 583.

23. Chipley v. Atkinson, 23 Fla. 206, 1 S 934, 11 AmSR 367; Loughery v. Huxford, 206 Mass. 324, 92 NE 328 (as to measure of damages). See also Labor Unions [24 Cyc 822]; Master and Servant [26 Cyc 1583]; Torts [38 Cyc 507 et seq].

24. Chipley v. Atkinson, 23 Fla. 206, 1 S 934, 11 AmSR 367.

25. Tuthill v. Wheeler, 6 Barb. (N. Y.) 362; Deitch v. Maher, 135 NYS 1072 (holding that one who acts merely as the agent and representative of a judgment debtor, whose property has been levied on by an officer under an execution, and who acts merely as a dummy in the transaction, is not entitled to sue for the conversion of the property); Faulkner v. Brown, 13 Wend. (N. Y.) 63.

26. Ala.—Beyer v. Bush, 50 Ala. 19.

Conn.—White v. Webb, 15 Conn. 302.

Ga.—Mitchell v. Georgia, etc., R. Co., 111 Ga. 760, 36 SE 971, 51 LRA 622 (holding that the word "agent," as used in Civ. Code § 3038, providing that an "agent" having possession, actual or constructive, of the property of his principal, has a right of action for any interference with that possession by third persons, will be held to mean an agent who has a special interest or property in the chattel); Southern Express Co. v. Palmer, 48 Ga. 85.

Ill.—Owens v. Weedman, 82 Ill. 409.

Ky.—Donahoe v. McDonald, 92 Ky. 123, 17 SW 195, 13 KyL 413 (holding that, when the agent is a bailee, he may maintain the action).

Me.—Little v. Fossett, 34 Me. 545, 56 AmD 671.

Md.—Dungan v. New Jersey Mut. Ben. L. Ins. Co., 38 Md. 242.

Mass.—White v. Dolliver, 113 Mass. 400, 18 AmR 502; Pomeroy v. Smith, 17 Pick. 85.

Mich.—Stephenson v. Little, 10 Mich. 433.

N. Y.—Fitzhugh v. Wiman, 9 N. Y. 559; Bass v. Pierce, 16 Barb. 595; Tuthill v. Wheeler, 6 Barb. 362; Porter v. Schendel, 25 Misc. 779, 55 NYS 602; Cary v. Hotailing, 1 Hill 312, 37 AmD 323; Faulkner v. Brown, 13 Wend. 63; Buck v. Aikin, 1 Wend. 466, 19 AmD 535; Thorp v. Burling, 11 Johns. 285.

Pa.—Lyle v. Barker, 5 Binn. 457.

Tex.—Triplett v. Morris, 18 Tex. Civ. A. 50, 44 SW 684.

Vt.—Taylor v. Hayes, 63 Vt. 475, 21 A 610; Edwards v. Edwards, 11 Vt. 587, 34 AmD 711.

Eng.—Rooth v. Wilson, 1 B. & Ald. 59, 106 Reprint 22, 19 ERC 15; De la Chaumette v. Bank of England, 9 B. & C. 208, 17 ECL 100, 109 Reprint 78; Burton v. Hughes, 2 Bing. 173, 9 ECL 533, 130 Reprint 272; Nicolls v. Bastard, 2 C. M. & R. 659; Solomons v. Bank of England, 13 East 135 note, 104 Reprint 319 note, 3 ERC 634; Williams v. Millington, 1 H. Bl. 81, 126 Reprint 49, 3 ERC 583; Sutton v. Buck, 2 Taunt. 302, 127 Reprint 1094.

See generally Bailments [5 Cyc 210]; Trusts [39 Cyc 446 et seq].

[a] **Thus one having possession of the goods of another to sell on commission** can maintain an action for any damage done to them while so in his possession. Robinson v. Webb, 11

ment by the agent is a bar to any action subsequently brought by the general owner of the property.[27]

Measure of damages. Where an agent has a right of action for an injury to the property of his principal in his possession, he may recover, as against a third person, the full measure of damages for such injury.[28]

XII. EFFECT OF THE RELATION AS BETWEEN PRINCIPAL AND THIRD PERSONS

[§ 513] **A. Liability of Principal to Third Person—1. In General.** It may be stated as a general rule that where the relation of agency legally exists[29] the principal will be liable to third persons for all acts committed by the agent in his behalf in the course and within the actual or apparent scope of his agency,[30] although some of the acts are to the principal's advantage and some to his disadvantage,[31] and although they are done in disobedience of positive but private instructions;[32] or where, if not duly authorized, they are subsequently ratified by the principal with the full knowledge of the circumstances of the case.[33] But in the absence of ratification or estoppel he is not liable for acts of the agent not within the scope of his authority.[34]

[§ 514] **2. On Contract—a. Disclosed Principal—(1) Authorized Contract.** As a general rule, subject to certain well defined exceptions which are considered hereafter, a principal is liable to third persons for all contracts made for him by his agent, and for all acts of the agent in connection therewith, while acting in the course of his employment and within the scope of his actual or apparent authority,[35]

Bush (Ky.) 464; Gorum v. Carey, 1 AbbPr (N. Y.) 285.

[b] **One who is in possession of land merely as agent** cannot maintain an action for damages for the burning of the grass and turf on the land. Galveston, etc., R. Co. v. Stockton, 15 Tex. Civ. A. 145, 38 SW 647.

[c] **Ownership by principal no defense.**—The defendant in an action of trover brought by an agent cannot set up property in the principal without showing some title, claim, or interest in himself derived from such principal. Harker v. Dement, 9 Gill (Md.) 7, 52 AmD 670.

27. Porter v. Schendel, 25 Misc. 779, 55 NYS 602.

28. Schley v. Lyon, 6 Ga. 530; Little v. Fossett, 34 Me. 545, 56 AmD 671; Finn v. Western R. Corp., 112 Mass. 524, 17 AmR 128; Pomeroy v. Smith, 17 Pick. (Mass.) 85; Mechanics', etc., Bank v. Farmers, etc., Nat. Bank, 60 N. Y. 40.

[a] **Where the agent has a special property** in his right of action he can recover the full damages to the property according to the general rule, and hold the balance beyond his own interest in trust for the owner. White v. Webb, 15 Conn. 302.

29. **Creation and existence of relation** see generally supra §§ 26-76.

30. U. S.—Mather v. Barnes, 146 Fed. 1000; American Bonding, etc., Co. v. Takahashi, 111 Fed. 125, 49 CCA 267 (responsibility for acts of agent as trustee).

Nebr.—Hanson v. Ætna L. Ins. Co., 78 Nebr. 418, 110 NW 1000.

N. Y.—Merritt v. Shale Brick Exch., 41 App. Div. 620, 58 NYS 231.

N. C.—Latham v. Field, 163 N. C. 356, 79 SE 865.

Or.—Baker v. Seaward, 63 Or. 350, 127 P 961.

Tex.—Texas Seed, etc., Co. v. Watson, (Civ. A.) 160 SW 659.

Va.—Harvey v. Steptoe, 17 Gratt. (58 Va.) 289.

See also cases infra § 514; supra §§ 211-215.

[a] **Cannot be repudiated.**—The acts of an agent made with the knowledge and concurrence of his principal cannot thereafter be repudiated by the latter. Hao v. Hutchinson Sugar Plantation Co., 19 Hawaii 315.

[b] **Estoppel.**—The mere fact that an agent of one claiming to be the sole owner of a right of way joins in a petition requesting that one half of the cost of paving the street in front of the way be taxed against the owner does not estop the owner from insisting on his exclusive ownership of the way, especially where the agent is unacquainted with the status of the title at the time, and the adjacent owner claiming an interest in the way does not suffer any change of condition by reason of the petition. Barker v. Mobile Electric Co., 173 Ala. 28, 55 S 364.

[c] **Cannot bind third persons.**—An agent may bind his principal by acts, and sometimes by omissions of duty, but he cannot bind others. Tippecanoe County v. Cox, 6 Ind. 403.

[d] **It is the principal's "duty to protect innocent third persons** dealing with his agent, and of which dealings he had notice." Jansen v. Jacobson, 112 Minn. 520, 128 NW 824.

Nature and extent of authority see generally supra §§ 202-314.

Liability of carrier where agent fraudulently issues fictitious bill of lading see Carriers [6 Cyc 419].

Liability of corporation where agent fraudulently issues stock see Corporations [10 Cyc 444 et seq].

31. Singleton v. Mann, 3 Mo. 464.

32. Larue v. American Diesel Engine Co., 176 Ind. 609, 96 NE 772; Wallace v. John A. Casey Co., 132 App. Div. 35, 116 NYS 394. See generally supra § 209.

33. See generally supra §§ 77-146.

34. Ark.—Wilson v. Shocklee, 94 Ark. 301, 126 SW 832.

Mass.—Drake v. Metropolitan Mfg. Co., 105 NE 634.

Miss.—White v. Lee, 97 Miss. 493, 52 S 206.

Mo.—Wahrendorff v. Whitaker, 1 Mo. 205.

Nebr.—Spies v. Stein, 70 Nebr. 641, 97 NW 752; Lederer v. Lincoln Union Sav. Bank, 52 Nebr. 133, 71 NW 954.

N. Y.—Lippincott v. East River Mill, etc., Co., 79 Misc. 559, 141 NYS 220 (although such acts are beneficial to the principal); Lurie v. New York Public Bank, 65 Misc. 583, 120 NYS 855.

Okl.—Callahan v. Graves, 37 Okl. 503, 132 P 474, 46 LRANS 350 (holding that, where the unauthorized act of an agent is not such as to render him liable in damages the principal cannot be held liable for such act).

Wis.—Ratcliffe v. Chicago, etc., R. Co., 153 Wis. 281, 141 NW 229; Godfrey v. Schneck, 105 Wis. 568, 81 NW 656.

See also supra §§ 202-215.

[a] **A principal, whether private or corporate,** is not bound by the action or silence of an agent or officer outside of his powers, or where he is not acting officially; and this is true as to officers and directors individually. Bond v. Pontiac, etc., R. Co., 62 Mich. 643, 29 NW 482, 4 AmSR 885.

[b] **One is not answerable for the acts of another unless** he has clothed the latter with power to do the particular acts or acts including the acts in question, or allowed him, through negligence or otherwise, to possess, in the face of the public, the appearance of such power, or unless such acts have been ratified. Western Inv., etc., Co. v. Denver First Nat. Bank, 23 Colo. A. 143, 128 P 476.

35. U. S.—Post v. Pearson, 108 U. S. 418, 2 SCt 799, 27 L. ed. 774; Lucas v. Brooks, 18 Wall. 436, 21 L. ed. 779; Minor v. Alexandria Mechanics Bank, 1 Pet. 46, 7 L. ed. 47; Alexandria Mechanics Bank v. Columbia Bank, 5 Wheat. 326, 5 L. ed. 100; Rainey v. Potter, 120 Fed. 651, 57 CCA 113; Spear, etc., Supply Co. v. Van Riper, 103 Fed. 689; Stockton v. Watson, 101 Fed. 490, 42 CCA 211; Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank, 97 Fed. 181, 38 CCA 108; Einstein v. Schnebly, 89 Fed. 540; Alger v. Anderson, 78 Fed. 729; Exchange Bank v. Hubbard, 62 Fed. 112, 10 CCA 295; Interstate Tel. Co. v. Baltimore, etc., Tel. Co., 51 Fed. 49 [aff 54 Fed. 50, 4 CCA 184]; Alderson v. Crocker, 28 Fed. 745; Kirkpatrick v. Adams, 20 Fed. 287; In re Troy Woolen Co., 24 F. Cas. No. 14,203, 8 NatBankrReg 412.

Ala.—Kramer v. Compton, 166 Ala. 216, 52 S 351; Tutwiler v. McCarty, 121 Ala. 356, 25 S 828; Southern R. Co. v. Raney, 117 Ala. 270, 23 S 29; Rovelsky v. Scheuer, 114 Ala. 419, 21 S 785; Alfred Shrimpton v. Brice, 102 Ala. 655, 15 S 452; Edinburgh American Land Mortg. Co. v. Peoples, 102 Ala. 241, 14 S 656; Renard v. Turner, 42 Ala. 117; Waring v. Henry, 30 Ala. 721; Edwards v. Benham, 2 Stew. & P. 147. See Herring v. Skaggs, 62 Ala. 180, 34 AmR 4; Boykin v. McLaughlin, 35 Ala. 286.

Ark.—Montgomery v. Arkansas Cold Storage, etc., Co., 93 Ark. 191, 124 SW 768; Russell v. Cady, 15 Ark. 540.

Cal.—Moore v. Gould, 151 Cal. 723, 91 P 616; Gallagher v. Equitable Gas Light Co., 141 Cal. 699, 75 P 329; Corbit v. Kimball, 107 Cal. 665, 40 P 1029; Schultz v. McLean, 93 Cal. 329, 28 P 1053; Fogel v. Schmalz, 92 Cal. 412, 28 P 444; Jones v. Marks, 47 Cal. 242; Hellmann v. Potter, 6 Cal. 13. See also Salmon v. Hoffman, 2 Cal. 138, 56 AmD 322.

Colo.—Hagerman v. Bates, 24 Colo. 71, 49 P 139. See also Diebold Safe, etc., Co. v. Luqueer, 4 Colo. A. 430, 36 P 65.

Conn.—Kearns v. Nickse, 80 Conn. 23, 66 A 779, 10 LRANS 1118 and note, 10 AnnCas 420 and note; Starkweather v. Goodman, 48 Conn. 101, 40 AmR 152; Litchfield Bank v. Church, 29 Conn. 137; Hudson v. Whiting, 17 Conn. 487; Frost v. Wood, 2 Conn. 23.

Dak.—Rea v. Steamboat Eclipse, 4 Dak. 218, 30 NW 159.

Del.—Ellison v. Simmons, 22 Del. 200, 65 A 591; Darby v. Hall, 19 Del. 25, 50 A 64; Geylin v. De Villeroi, 7 Del. 311.

D. C.—Main v. Aukam, 12 App. 375.

Fla.—Ætna Ins. Co. v. Holmes, 59 Fla. 116, 52 S 801; Eagle Fire Co. v. Lewallen, 56 Fla. 246, 47 S 947; Indian River State Bank v. Hartford F. Ins. Co., 46 Fla. 283, 35 S 228.

Ga.—Phinizy v. Bush, 129 Ga. 479, 59 SE 259; Raleigh, etc., R. Co. v. Pullman Co., 122 Ga. 700, 50 SE 1008; Baldwin Fertilizer Co v. Thompson, 106 Ga. 480, 32 SE 591; Brandenstein v. Douglas, 105 Ga. 845, 32 SE 341; Macon City Bank v. Kent, 57 Ga. 283; Hodnett v. Tatum, 9 Ga. 70. See also Verdell v. Ketchum, 52 Ga. 134.

and this is true, although the agent fails to | comply with private instructions given to him by

Hawaii.—Coolidge v. Puaaiki, 3 Hawaii 810; Spencer v. Bennett, 2 Hawaii 415.

Ill.—Butman v. Butman, 213 Ill. 104, 72 NE 821; Glucose Sugar Refining Co. v. Flinn, 184 Ill. 123, 56 NE 400; Dewar v. Montreal Bank, 115 Ill. 22, 3 NE 746 [aff 6 Ill. A. 294]; Pardridge v. La Pries, 84 Ill. 51; Goodrich v. Hanson, 33 Ill. 498; Marckle v. Haskins, 27 Ill. 332; Taylor v. Taylor, 20 Ill. 650; Bloomer v. Denman, 12 Ill. 240; Denman v. Bloomer, 11 Ill. 177; Laguna Valley Co. v. Fitch, 121 Ill. A. 607; Cozzens, etc., Typesetting Co. v. Western Ranch, etc., Co., 112 Ill. A. 309; Danky v. Parker, 108 Ill. A. 527; Milwaukee Harvester Co. v. Glidden, 106 Ill. A. 319; Terre Haute, etc., R. Co. v. Crews, 53 Ill. A. 50; Wider v. Branch, 12 Ill. A. 358.

Ind.—Wolfe v. Pugh, 101 Ind. 293; Rend v. Boord, 75 Ind. 307; Croy v. Busenbank, 72 Ind. 48. See also Blackwell v. Ketchum, 53 Ind. 184.

Iowa.—John Gund Brewing Co. v. Peterson, 130 Iowa 301, 106 NW 741; Findley v. Koch, 126 Iowa 131, 101 NW 766; Iowa R. Land Co. v. Fehring, 126 Iowa 1, 101 NW 120; Osborne v. Ringland, 122 Iowa 329, 98 NW 116; Barbee v. Aultman, 102 Iowa 278, 71 NW 235; Mankin v. Mankin, 91 Iowa 406, 59 NW 292; Hopkins v. Hawkeye Ins. Co., 57 Iowa 203, 10 NW 605, 42 AmR 41; Whiting v. Western Stage Co., 20 Iowa 554. See also Hawke v. Manning, 39 Iowa 707.

Kan.—Ross Oil, etc., Co. v. Eastham, 73 Kan. 464, 85 P 581; Aultman Thrashing, etc., Co. v. Knoll, 71 Kan. 109, 79 P 1074; Ludlow-Saylor Wire Co. v. Fribley Hardware, etc., Co., 67 Kan. 710, 74 P 237; Lewis v. Bourbon County Comrs., 12 Kan. 186.

Ky.—Cincinnati, etc., R. Co. v. Ashurst, 124 SW 303; Cooper v. Ratliff, 116 SW 748; Luttrell v. East Tennessee Tel. Co., 86 SW 1124, 27 KyL 872; Rankin v. McFarlane Carriage Co., 75 SW 221, 25 KyL 258; Henry Vogt Mach. Co. v. Lingenfelser, 62 SW 499, 23 KyL 38; H. Herrmann Sawmill Co. v. Bailey, 58 SW 449, 22 KyL 552.

La.—Cristie v. Pennsylvania Iron Works Co., 127 La. 208, 54 S 742; Destrehan v. Louisiana Cypress Lumber Co., 45 La. Ann. 920, 13 S 230, 40 AmSR 265; Eskridge v. Farrar, 34 La. Ann. 709; Broadway Sav. Bank v. Vorster, 30 La. Ann. 587; Hills v. Upton, 24 La. Ann. 427; Wallace v. Lamson, 20 La. Ann. 243; Kock v. Bringier, 19 La. Ann. 183; Mackey v. De Blanc, 12 La. Ann. 377; Carlisle v. The Eudora, 5 La. Ann. 15; Pellerin v. Dungan, 2 La. Ann. 383; Marsh v. Laforest, 1 La. Ann. 7; Hivert v. Lacaze, 3 Rob. 357; Williams v. Winchester, 7 Mart. N. S. 22; Honore v. White, 1 Mart. N. S. 219.

Me.—Heath v. Stoddard, 91 Me. 499, 40 A 547; Forsyth v. Day, 46 Me. 176; Bryant v. Moore, 26 Me. 84, 45 AmD 96.

Md.—Lamm v. Port Deposit Homestead Assoc., 49 Md. 233, 33 AmR 246; Keener v. Harrod, 2 Md. 63, 56 AmD 706; Swartara R. Co. v. Brune, 6 Gill 41.

Mass.—Schendel v. Stevenson, 153 Mass. 351, 26 NE 889; Rich v. Crandall, 142 Mass. 117, 7 NE 547; Caswell v. Cross, 120 Mass. 545; Washington Bank v. Lewis, 22 Pick. 24; Northampton Bank v. Pepoon, 11 Mass. 288. See also Antoni v. Belknap, 102 Mass. 193.

Mich.—Young v. Stein, 152 Mich. 310, 116 NW 195, 125 AmSR 412, 17 LRANS 231; McDonald v. Preston Nat. Bank, 111 Mich. 649, 70 NW 143; Thompson v. Clay, 60 Mich. 627, 27 NW 699; Atlas Min. Co. v. Johnston, 23 Mich. 36.

Minn.—Ballard v. Lyons, 114 Minn. 264, 131 NW 320, 38 LRANS 301; Baker v. Chicago, etc., R. Co., 91 Minn. 118, 97 NW 650; Otte v. Hartford L. Ins. Co., 88 Minn. 428, 93 NW 608, 97 AmSR 532; Parsons Band Cutter, etc., Co. v. Haub, 83 Minn. 180, 86 NW 14; Van Santvoord v. Smith, 79 Minn. 316, 82 NW 642; Nichols, etc., Co. v. Hackney, 78 Minn. 461, 81 NW 322; Watts v. Howard, 70 Minn. 122, 72 NW 840; Adamson v. Wiggins, 45 Minn. 448, 48 NW 185.

Miss.—Southern R. Co. v. Humphries, 79 Miss. 761, 31 S 440; Carter v. Taylor, 14 Miss. 367; Fox v. Fisk, 7 Miss. 328.

Mo.—Weber v. Collins, 139 Mo. 501, 41 SW 249; Bank of Commerce v. Hoeber, 88 Mo. 37, 57 AmR 359; McCrary v. Ashbaugh, 44 Mo. 410; King v. Pearce, 40 Mo. 222; Tate v. Evans, 7 Mo. 419; Greenbrier Distillery Co. v. Van Frank, 147 Mo. A. 204, 126 SW 232; Freeman v. Junge Baking Co., 126 Mo. A. 124, 103 SW 565; Mabray v. Kelly-Goodfellow Shoe Co., 73 Mo. A. 1; Hayward v. Graham Book, etc., Co., 59 Mo. A. 453; Bensberg v. Harris, 46 Mo. A. 404; Greeley-Burnham Grocer Co. v. Capen, 23 Mo. A. 301 (holding that a contract made by an agent who had full authority is not affected by his inaccurate report of its terms to his principal); Stotesburg v. Massengale, 13 Mo. A. 221.

Mont.—Muth v. Goddard, 28 Mont. 237, 72 P 621, 98 AmSR 553.

Nebr.—Fruit Dispatch Co. v. Gilinsky, 84 Nebr. 321, 122 NW 45 [reh den 85 Nebr. 475, 123 NW 1018]; Pochin v. Knoebel, 63 Nebr. 768, 89 NW 264.

N. H.—Rice v. Lyndeborough Glass Co., 60 N. H. 195; Taylor v. Jones, 42 N. H. 25; Webster v. Clark, 30 N. H. 245; Clement v. Leverett, 12 N. H. 317; Boston Iron Co. v. Hale, 8 N. H. 363.

N. J.—Colloty v. Schuman, 73 N. J. L. 92, 62 A 186; Bennett v. Millville Impr. Co., 67 N. J. L. 320, 51 A 706; Lambert v. Metropolitan Sav., etc., Assoc., 65 N. J. L. 79, 46 A 766; Stokes v. New Jersey Pottery Co., 46 N. J. L. 237; Camden Safe Deposit, etc., Co. v. Abbott, 44 N. J. L. 257; Law v. Stokes, 32 N. J. L. 249, 90 AmD 655; National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331; Kirkpatrick v. Winans, 16 N. J. Eq. 407.

N. M.—Jasper v. Wilson, 14 N. M. 482, 94 P 951, 23 LRANS 982 and note.

N. Y.—Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 NE 982, 37 AmSR 596, 23 LRA 584; Schley v. Fryer, 100 N. Y. 71, 2 NE 280; Westfield Bank v. Cornen, 37 N. Y. 320, 93 AmD 573; Mechanics' Bank v. New York, etc., R. Co., 13 N. Y. 599; Johnstone v. Horowitz, 139 App. Div. 800, 124 NYS 689; Jones v. Gould, 123 App. Div. 236, 108 NYS 31 [rev on other grounds 200 N. Y. 18, 92 NE 1071]; Birkett v. Postal Tel.-Cable Co., 107 App. Div. 115, 94 NYS 918 [aff 186 N. Y. 591 mem, 79 NE 1101 mem]; Weber v. Mapes, 98 App. Div. 165, 90 NYS 225; Hunt v. Chapin, 6 Lans. 139; Tucker v. Woolsey, 64 Barb. 142; Hunter v. Hudson River Iron, etc., Co., 20 Barb. 493; Thurman v. Wells, 18 Barb. 500; Rich v. Monroe, 14 Barb. 602; Marsh v. Gilbert, 4 Thomps. & C. 259; Hazewell v. Coursen, 45 N. Y. Super. 22 [rev on other grounds 81 N. Y. 630]; Hearne v. Keene, 18 N. Y. Super. 579; Adams v. Cole, 1 Daly 147; Clarke v. Watt, 83 Misc. 404, 145 NYS 145; Benton v. Moss, 47 Misc. 376, 93 NYS 1113; Davis v. Lynch, 31 Misc. 724, 65 NYS 225; Brenner v. Lawrence, 27 Misc. 755, 58 NYS 769; Forster v. Wilshusen, 14 Misc. 520, 35 NYS 1083; Kyle v. Horbert, 122 NYS 204; Cooper v. Townsend, 13 NYS 760; Dawson v. Chisholm, 1 NYS 171; Rumery v. Syracuse Distillery, etc., Co., 27 How Pr 111; Dollfus v. Frosch, 1 Den. 367; North River Bank v. Aymar, 3 Hill 262; Sandford v. Handy, 23 Wend. 260; Tradesmen's Bank v. Astor, 11 Wend. 87; Lincoln v. Battelle, 6 Wend. 475 (holding that, where a person is employed by an agent, he may call upon the principal for payment for the services rendered, although he knows that the agent has charged the demand to the principal and received the amount, unless he has agreed to discharge the principal and rely upon the responsibility of the agent).

N. C.—Wynn v. Grant, 81 SE 949; Trollinger v. Fleer, 157 N. C. 81, 72 SE 795; Hanover Nat. Bank v. Cocke, 127 N. C. 467, 37 SE 507; Forsyth v. Lash, 89 N. C. 159; Ruffin v. Mebane, 41 N. C. 507; Patton v. Brittain, 32 N. C. 8; Hunter v. Jameson, 28 N. C. 252; Williamson v. Canaday, 25 N. C. 349; Lane v. Dudley, 6 N. C. 119, 5 AmD 523.

Oh.—Aetna Ins. Co. v. Stambaugh-Thompson Co., 76 Oh. St. 138, 81 NE 173; Maple v. Cincinnati, etc., R. Co., 40 Oh. St. 313, 48 AmR 685; Aetna Ins. Co. v. Church, 21 Oh. St. 492; Darst v. Sievins, 2 Disn. 574; Lambert v. Carroll, Wright 108; Crane v. Halford, Wright 72.

Or.—Baker City Mercantile Co. v. Idaho Cement Pipe Co., 67 Or. 372, 136 P 23; Smith Meat Co. v. Oregon R., etc., Co., 59 Or. 206, 117 P 303; McLeod v. Despain, 49 Or. 536, 90 P 492, 92 P 1088, 124 AmSR 1066, 19 LRANS 276; Connell v. McLoughlin, 28 Or. 230, 42 P 218.

Pa.—Douglas v. Hustead, 216 Pa. 292, 65 A 670; Tapper v. Sunlight Oil, etc., Co., 192 Pa. 620, 44 A 286; Mundorff v. Wickersham, 63 Pa. 87, 3 AmR 531; Butler's App., 26 Pa. 63; U. S. Life Ins. Co. v. Guarantee Trust, etc., Co., 2 Walk. 433; McDonald v. Todd, 1 Grant 17; New York Cent., etc., R. Co. v. Deer Creek Lumber Co., 49 Pa. Super. 458; Fees v. Shadel, 20 Pa. Super. 193; Commonwealth Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. 180. See also Hagerstown Bank v. Loudon Sav. Fund Soc., 3 Grant 135.

S. C.—Walker v. Crittenden, 34 S. C. L. 229.

Tenn.—Kuhlman v. E. J. Hart Co., 59 SW 455 (holding that, where the contract reported by defendant's agent to him was not the one actually made, a clause as to the manner of settlement being omitted, the contract may be enforced if plaintiff does not insist on the feature omitted); Ezell v. Franklin, 2 Sneed 236; Gordon v. Buchanan, 5 Yerg. 71.

Tex.—Bruce v. Washington, 80 Tex. 368, 15 SW 1104; Calhoun v. Wright, 23 Tex. 522, 19 Tex. 412; Birge-Forbes Co. v. St. Louis, etc., R. Co., 53 Tex. Civ. A. 55, 115 SW 333; Goldschmidt v. Wagner, (Civ. A.) 99 SW 737; Graham v. Edwards, (Civ. A.) 99 SW 436; Horter v. Herndon, 12 Tex. Civ. A. 637, 35 SW 80; Halsell v. Musgrave, 5 Tex. Civ. A. 476, 24 SW 358; Bennett v. Virginia Ranch, etc., Co., 1 Tex. Civ. A. 321, 21 SW 126. See also Morgan v. Darragh, 39 Tex. 171; Broun v. Busch, (Civ. A.) 128 SW 1156.

Vt.—Barker v. Troy, etc., R. Co., 27 Vt. 766; Emery v. Thompson, 27 Vt. 614; Alexander v. Rutland Bank, 24 Vt. 222; Fitzsimmons v. Joslin, 21 Vt. 129, 52 AmD 46.

Va.—Yerby v. Grigsby, 9 Leigh (36 Va.) 387; Hopkins v. Blane, 1 Call (5 Va.) 361.

Wash.—Keenan v. Lauritsen Malt Co., 57 Wash. 367, 106 P 1122; Heinemann v. Sullivan, 57 Wash. 346, 106 P 911; Smith v. Gray, 52 Wash. 255, 100 P 339; Littlefield v. Dawson, 47 Wash. 644, 92 P 428; Brittain v. Pioneer State Bank, 45 Wash. 41, 87 P 1051; Graton, etc., Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 P 879.

W. Va.—State v. McNeal, 66 W. Va. 411, 66 SE 512, 135 AmSR 1038, 25 LRANS 178; Nutter v. Brown, 51 W. Va. 598, 42 SE 661; Spence v. Rose, 28 W. Va. 333.

Wis.—Matteson v. Rice, 116 Wis. 328, 92 NW 1109; McKinnon v. Vollmar, 75 Wis. 82, 43 NW 800, 17 AmSR 178, 6 LRA 121; Saveland v. Green, 40 Wis. 431; Emmons v. Dowe, 2 Wis. 322. See Dodge v. McDonnell, 14 Wis. 553.

Eng.—Forman v. The Liddesdale,

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his principal,[36] or has defrauded his principal.[37] An agreement between the principal and his agent cannot be invoked to relieve the principal from liability on the agent's authorized contract with a third person, unless such person had knowledge of the agreement at the time of entering into the contract.[38]

[§ 515] (2) **Unauthorized Contract—(a) General Rule.** Conversely a person is not as a rule bound by the contracts of one who assumes without authority to represent him as agent, nor by contracts made by his agent beyond the scope of his actual or apparent authority, nor by acts done in connection therewith without authority or in excess of authority,[39] unless the principal ratifies the

[1900] A. C. 190; Shaw v. Port Philip, etc., Gold Min. Co., 13 Q. B. D. 103; Rosenbaum v. Belson, [1900] 2 Ch. 267; In re Hale, [1899] 2 Ch. 107; Hamer v. Sharp, L. R. 19 Eq. 108; Taylor v. Green, 8 C. & P. 316, 34 ECL 754; Glyn v. Baker, 13 East 509, 104 Reprint 468; Dyas v. Cruise, 8 Ir. Eq. 407; Flinn v. Hoyle, 63 L. J. Q. B. 1; Baldry v. Bates, 52 L. T. Rep. N. S. 620; Fenn v. Harrison, 4 T. R. 177, 100 Reprint 959; Doe v. Martin, 4 T. R. 39, 100 Reprint 882; Re Japanese Curtains, etc., Co., 28 Wkly. Rep. 339.

Can.—Agnew v. Davis, 17 WestLR 570.

N. S.—Pope v. Pictou Steamboat Co., 6 N. S. 18.

Ont.—Williams v. Cobourg Town Trust, 23 U. C. Q. B. 330; Molsons' Bank v. Brockville, 31 U. C. C. P. 174.

Newfoundl.—Baine, etc., Co. v. Cosnard, 1 Newfoundl. 185.

[a] **The reason for the rule** is expressed in the familiar maxim, Qui facit per alium facit per se. The agent being the alter ego of the principal for the purpose of the agency, his act or contract is in effect that of the principal who is bound thereby exactly as if he in fact had executed it himself. See cases supra this note.

[b] **"The principal is held to be liable upon a contract** duly made by his agent with a third person: 1. When the agent acts within the scope of his actual authority. 2. When the contract, although unauthorized, has been ratified. 3. When the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his authority, the term 'apparent authority' including the power to do whatever is usually done and necessary to be done in order to carry into effect the principal power conferred upon the agent and to transact the business or to execute the commission which has been entrusted to him; and the principal cannot restrict his own liability for acts of his agent which are within the scope of his apparent authority by limitations thereon of which the person dealing with his agent has not notice." Morganton Bank v. Hay, 143 N. C. 326, 330, 55 SE 811.

[c] **Every contract made by an agent of a business** in relation to the business is a contract with the principal, provided the agent acts in the name of the principal. Queen City Furniture, etc., Co. v. Crawford, 127 Mo. 356, 30 SW 163.

[d] **That one appointing an agent lacked authority to appoint** does not relieve him from liability for the agent's acts and contracts. Forsyth v. Lash, 89 N. C. 159.

[e] **Interpreter.**—Where a party not understanding English engaged another party to do the talking for him in making a contract of employment, the party engaged was his agent, and he is bound by the contract made by him. Laughlin v. Ettinger, 14 Ill. A. 335.

[f] **Delay in notifying the principal of the agent's default** in payment for goods purchased does not relieve the principal from liability therefor, although the principal has in the meantime settled with the agent. Strapp v. Spurlin, 32 Ind. 442.

[g] **Cancellation of contract made by agent.**—The agent cannot control the principal, and hence the principal may cancel a contract made in his behalf by the agent, the other party not objecting, and enter into a new contract which will supersede the contract made by the agent. Palfrey v. Stinson, 11 La. 77.

Apparent scope of authority see supra §§ 211–215.

Estoppel to deny agency see supra §§ 70–74.

36. See supra § 209.

[a] **The failure of agents to report to their principals,** in accordance with the terms of their authority, does not relieve the principals from liability on a contract made by their agents. Galvano Type Engraving Co. v. Jackson, 77 Conn. 564, 60 A 127.

37. Shirey v. All Night, etc., Bank, 166 Cal. 50, 134 P 1001 (holding that, where the owner of real estate conveyed it to his agent to sell, who contracted to convey it to an innocent purchaser for value, the purchaser is not to be deprived of an honest bargain because the agent defrauded the real owner, and the purchaser, upon compliance with the contract of purchase, may bring action to compel a conveyance from the real owner to whom it had been reconveyed).

[a] **Cannot repudiate contract.**—"The perfidy of the agent in his conduct towards his principal will not enable the latter to repudiate the contract [made by the agent] if within the scope of the agent's authority." Union Cent. L. Ins. Co. v. Huyck, 5 Ind. A. 474, 32 NE 580, 582.

38. Kruse v. Seiffert, etc., Lumber Co., 108 Iowa 352, 79 NW 118 (holding that a master cannot relieve himself of liability for the wages of his servant by an arrangement with his agent by which the master furnishes the agent with money to pay the servant, and the agent hires one, and is to be personally responsible for his wages, unless knowledge of such arrangement is brought home to the servant before the services are rendered); Finkelstein v. Waldo, 20 Misc. 701, 46 NYS 686 [rev on other grounds 21 Misc. 460, 47 NYS 590] (holding that it is no defense to an action to recover for work, the doing of which was authorized by defendant through an agent, that there was an agreement between defendant and the agent that the latter should pay for the work, unless plaintiff did the work with knowledge of such agreement; nor is the payment of money to the agent, which is not paid by him to plaintiff, a defense).

39. U. S.—Curtis v. Innerarity, 6 How. 146, 12 L. ed. 380; In re Miley, 187 Fed. 177; Oshkosh Nat. Bank v. Munger, 95 Fed. 87, 36 CCA 659; Young Reversible Lock-Nut Co. v. Young Lock-Nut Co., 72 Fed. 62; Harper v. National L. Ins. Co., 56 Fed. 281, 5 CCA 505; Johnson R. Signal Co. v. Union Switch, etc., Co., 51 Fed. 85 (holding that an agent acting beyond his authority in selling a chattel, does not pass title as against a subsequent transferee of the principal); Pioneer Gold Min. Co. v. Baker, 20 Fed. 4. See also Merrick v. Bernard, 17 F. Cas. No. 9,464, 1 Wash. 479.

Ala.—Continental Baking Powder Co. v. Stoner, 168 Ala. 304, 53 S 303; Moore v. Robinson, 62 Ala. 537.

Ark.—American Sales Book Co. v. Whitaker, 100 Ark. 360, 140 SW 132, 37 LRANS 91 and note; Pratt v. Meyer, 75 Ark. 206, 87 SW 123. See also Dyer v. Bean, 15 Ark. 519.

Cal.—Alcorn v. Buschke, 133 Cal. 655, 66 P 15. See Savings, etc., Soc. v. Gerichten, 64 Cal. 520, 2 P 405.

Colo.—Oxford Hotel Co. v. Lind, 47 Colo. 57, 107 P 222, 28 LRANS 495, 18 AnnCas 983; Jerman v. Neef Bros. Brewing Co., 46 Colo. 33, 102 P 743 (holding that, in an action on a lease signed by an alleged agent of defendant, defendant could not be charged, in absence of proof that the agent had authority to bind him); Consolidated Gregory Co. v. Raber, 1 Colo. 511. See also Ohio Creek Anthracite Coal Co. v. Hinds, 15 Colo. 173, 25 P 502.

Fla.—Atlantic Refining Co. v. Leffingwell, 61 Fla. 101, 54 S 266, 34 LRANS 351 and note.

Ga.—Power v. Garrison, 141 Ga. 429, 81 SE 225; Lynch v. Poole, 138 Ga. 303, 75 SE 158 (contract under seal); Gorham v. Telker, 102 Ga. 260, 28 SE 1002; Wynn v. Smith, 40 Ga. 457; Fruit Dispatch Co. v. Roughton-Halliburton Co., 9 Ga. A. 108, 70 SE 356.

Hawaii.—Wright v. Hawaiian Steam Nav. Co., 1 Hawaii 426 (where the court refused a motion for judgment by default upon a promissory note made by a party as agent of a joint stock company, upon the ground that it was not shown that the maker of the note was the legally constituted agent of the company and had authority to bind the company by his promissory note).

Ill.—Las Vegas First Nat. Bank v. Oberne, 121 Ill. 25, 7 NE 85; Kent v. Beam, 163 Ill. A. 596; Plaff v. Pacific Express Co., 159 Ill. A. 493 [aff 251 Ill. 243, 95 NE 1089]; Merchants' Nat. Bank v. Nichols, etc., Co., 123 Ill. A. 430 [aff 223 Ill. 41, 79 NE 38, 7 LRANS 752] (holding that, unless it is found as a question of fact that a depositor has been so negligent as to create an estoppel against him because of his failure to examine his pass book and returned checks, he is not liable for the unauthorized overdraft made by his agent upon his account); Fudge v. Seckner Contracting Co., 80 Ill. A. 35.

Ind.—Shearer v. Evans, 89 Ind. 400 (holding that, where a farm hand in charge of his employer's farm during the temporary absence of the employer and without authority so to do sold and delivered his employer's wheat, the sale was tortious, and conferred no title on the purchasers); Baldwin v. Siddons, 46 Ind. A. 313, 90 NE 1055, 92 NE 349.

Iowa.—Fritz v. Chicago Grain, etc., Co., 136 Iowa 699, 114 NW 193; National Impr., etc., Co. v. Maiken, 103 Iowa 118, 72 NW 431; Forcheimer v. Stewart, 73 Iowa 216, 32 NW 665, 35 NW 148; Gage v. Parry, 69 Iowa 605, 29 NW 822.

Kan.—Grubel v. Busche, 75 Kan. 820, 91 P 73; Trustees', Executors', etc., Corp. v. Bowling, 2 Kan. A. 770, 44 P 42.

Ky.—Garrett v. State Tobacco Warehouse Co., 153 Ky. 1, 154 SW 376; Garth v. Runner, 121 SW 681; Barret v. Rhem, 6 Bush 466 (holding that an unauthorized sale by a person who assumes to represent an agent is not the act of the agent, and therefore does not bind the principal).

La.—Grigsby Constr. Co. v. Colly, 124 La. 1071, 50 S 855; Union Garment Co. v. Newburger, 124 La. 820, 50 S 740; Warren v. Goodwyn, 110 La. 198, 34 S 411; Campbell v. Nichols, 11 Rob. 16; Allen v. Hart, 10 Rob. 55; Menefee v. Johnson, 2 Rob. 274. See also Thiel v. Butker, 125 La. 473, 51 S 500, 28 LRANS 1065; Scottish-American Mortg. Co. v. Ogden, 49 La. Ann. 8, 21 S 116.

Me.—Newhall v. Dunlap, 14 Me. 180, 31 AmD 45.

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Md.—Keener v. Harrod, 2 Md. 63, 56 AmD 706.

Mass.—People's Nat. Bank v. Dixwell, 217 Mass. 436, 105 NE 435 (note executed without authority); Young v. Hayes, 212 Mass. 525, 99 NE 327; Heath v. New Bedford Safe Deposit, etc., Co., 184 Mass. 481, 69 NE 215; Rogers v. Holden, 142 Mass. 196, 7 NE 768; Washington Bank v. Lewis, 22 Pick. 24; Banorgee v. Hovey, 5 Mass. 11, 4 AmD 17.

Mich.—Kops Bros. Co. v. Smith, 137 Mich. 28, 100 NW 169; Barry v. Boston Mar. Ins. Co., 62 Mich. 424, 29 NW 31; Butler v. Michigan Cent. R. Co., 60 Mich. 83, 26 NW 841; Frost v. Lawler, 34 Mich. 235 (contract for board); Atlas Min. Co. v. Johnston, 23 Mich. 36; Chamberlin v. Darragh, Walk. 149.

Minn.—Barton-Parker Mfg. Co. v. Wilson, 96 Minn. 334, 104 NW 968; Olson v. Great Northern R. Co., 81 Minn. 402, 84 NW 219; Anderson v. Johnson, 74 Minn. 171, 77 NW 26; Humphrey v. Havens, 12 Minn. 298.

Miss.—Yazoo, etc., R. Co. v. Blum, 102 Miss. 303, 59 S 92; Odd Fellows Ben. Assoc. v. Smith, 101 Miss. 332, 58 S 100; Fox v. Fisk, 7 Miss. 328. See also Dick v. Mawry, 17 Miss. 448.

Mo.—Tate v. Evans, 7 Mo. 419; Luecke v. Cohen, 150 Mo. A. 48, 129 SW 1002 (holding that, if a sales agent contracts, without authority, for the sale of goods at less than the market price, the buyer cannot insist on delivery thereof at the contract price, and recover for refusal to comply with the contract); Mitchell v. Chick, 136 Mo. A. 559, 118 SW 517; Citizen's Sav. Bank v. Marr, 129 Mo. A. 26, 107 SW 1009; Waters-Pierce Oil Co. v. Jackson Junior Zinc Co., 98 Mo. A. 324, 73 SW 272; Carter v. Ætna Loan Co., 61 Mo. A. 218; Bensberg v. Harris, 46 Mo. A. 404.

Mont.—Ming v. Pratt, 22 Mont. 262, 56 P 279.

Nebr.—Miller v. Wehrman, 81 Nebr. 388, 115 NW 1078; Bullard v. De Groff, 59 Nebr. 783, 82 NW 4. See also McCormick v. Peters, 24 Nebr. 70, 37 NW 927.

Nev.—Rankin v. New England, etc., Min. Co., 4 Nev. 78.

N. J.—Blanchard v. Berendge, 85 N. J. L. 532, 89 A 992 (holding that a written contract to purchase goods, entered into by a clerk in the name of his employers without their consent or ratification, is not binding upon them); Kirkpatrick v. Winans, 16 N. J. Eq. 407.

N. Y.—Walsh v. Hartford F. Ins. Co., 73 N. Y. 5; Conklin v. Mitchell, 57 N. Y. 650; McGoldrick v. Willits, 52 N. Y. 612; Marvin v. Wilber, 52 N. Y. 270 (holding that, where the agent of a firm represents himself to be agent of an individual member thereof, the partner for whom he assumes to act is not individually bound by his acts for an agent cannot bind a person for whom he is not an agent, no matter how much he assumes, nor can he create an agency by representations); Henry v. Wilkes, 37 N. Y. 562; Gould v. Sterling, 23 N. Y. 439; Nixon v. Palmer, 8 N. Y. 398; Barron v. Brooklyn Heights R. Co., 150 App. Div. 845, 135 NYS 323; Burlingame v. Ætna Ins. Co., 36 App. Div. 358, 55 NYS 287; Burke v. Ireland, 26 App. Div. 487, 50 NYS 369; Downer v. Carpenter, 1 Hun 591, 4 Thomps. & C. 59; Lippincott v. East River Mill, etc., Co., 79 Misc. 559, 141 NYS 220; Metropolitan Aluminum Mfg. Co. v. Lau, 61 Misc. 105, 112 NYS 1059; Brooklyn Daily Eagle v. Dellmar, 30 Misc. 747, 62 NYS 1041; Dahlman v. White Co., 132 NYS 771; Durando v. New York, etc., Steamboat Co., 4 NYS 386, 23 AbbNCas 56 [aff 12 NYS 958]. See also Berrien v. McLane, Hoffm. 421.

N. C.—Case Threshing Mach. Co. v. McClamrock, 152 N. C. 405, 67 SE 991; Johnston County Sav. Bank v. Scroggin Drug Co., 152 N. C. 142, 67 SE 253, 136 AmSR 821, 50 LRANS 581; Ruffin v. Mebane, 41 N. C. 507.

N. D.—Reeves v. Corrigan, 3 N. D. 415, 57 NW 80 (holding that a stipulation in a contract of sale "that no one has authority to add to or abridge or change it in any manner" is valid, and an oral agreement by a purchaser with a seller's agent, inconsistent therewith, is void, being beyond the agent's authority). And see Deering v. Russell, 5 N. D. 319, 65 NW 691 (holding that parol statements of the agent of a party to a contract which are not incorporated into the contract are not binding on the principal, where the contract recites that the principal is not to be bound by the contract until it approved the same).

Okl.—Stock Exch. Bank v. Williamson, 6 Okl. 348, 50 P 93.

Or.—Baker v. Seaweard, 63 Or. 350, 127 P 961; Salene v. Queen City F. Ins. Co., 59 Or. 297, 116 P 1114, 35 LRANS 438.

Pa.—Rafferty v. Haldron, 31 Pa. 438; Reaney v. Culbertson, 31 Pa. 507; Falconi v. Magee, 47 Pa. Super. 560 (forged indorsement of check); O'Toole v. Escher, 47 Pa. Super. 272 (holding that, when a party enters into a contract for the purchase of land, with an alleged agent of the owner, and knows that the agent is exceeding his authority, the owner is not bound by the contract, nor answerable for any money paid upon it, unless such owner, after knowledge, has ratified it); Schomacker Piano Forte Mfg. Co. v. Yankee Dauntless Club, 30 Pa. Super. 162; Thrall v. Wilson, 17 Pa. Super. 376; Goodrich v. Strawbridge, 5 Pa. Co. 427; Weible v. Fleshman, 5 Dauph. Co. 164. See also Com. v. Kraeger, 78 Pa. 477; Harvey v. Dimon, 36 Pa. Super. 82.

S. C.—Chandler v. Franklin, 65 S. C. 544, 44 SE 70 (holding that, where a vendee of land paid a part of the purchase money to an agent of the owner, and, taking the receipt therefor, was put in possession by the agent after notice that the owner had sold to another, the agent having no authority to accept the money and to put the vendee in possession, there was no contract of sale).

S. D.—Frick Co. v. Hoff, 26 S. D. 360, 128 NW 495; Quale v. Hazel, 19 S. D. 483, 104 NW 215.

Tenn.—Calhoun v. McCrory Piano, etc., Co., 168 SW 149; Jones v. Harris, 10 Heisk. 98.

Tex.—Swayne v. Union Mut. L. Ins. Co., 92 Tex. 575, 50 SW 566; O'Connor v. Camp, (Civ. A.) 158 SW 203; Merchant v. Rogan, (Civ. A.) 150 SW 956; Simmons Hardware Co. v. Adams, (Civ. A.) 147 SW 1196; Kuteman v. Lacy, (Civ. A.) 144 SW 1184; Heard v. Clegg, (Civ. A.) 144 SW 1145; Day v. Snyder Brokerage, etc., Co., (Civ. A.) 130 SW 716; Cameron v. Blackwell, 53 Tex. Civ. A. 414, 115 SW 856; Thompson v. Fitzgerald, (Civ. A.) 105 SW 334; Morton v. Morris, 27 Tex. Civ. A. 262, 66 SW 94; Dunovant v. Taylor, (Civ. A.) 40 SW 326; Ft. Worth, etc., R. Co. v. Johnson, 2 Tex. A. Civ. Cas. § 232. See also Friedlander v. Hillcoat, 14 SW 786.

Vt.—Follett v. Stanton, 16 Vt. 35. See Equitable Mfg. Co. v. Allen, 76 Vt. 22, 56 A 87, 104 AmSR 915.

Wash.—Brace v. Northern Pac. R. Co., 63 Wash. 417, 115 P 841, 38 LRANS 1135 and note; Holt Mfg. Co. v. Odenrider, 61 Wash. 555, 112 P 670; Walsh v. Colvin, 53 Wash. 309, 101 P 1085.

W. Va.—Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 69 SE 845, AnnCas1912B 148; Rohrbough v. U. S. Express Co., 50 W. Va. 148, 40 SE 398, 88 AmSR 849; Rosendorf v. Poling, 48 W. Va. 621, 37 SE 555 (holding that, where a party purchases goods from an agent who has no authority to sell, he acquires no title to the goods purchased, and can confer none upon third parties).

Wis.—Price v. Wisconsin M. F. Ins. Co., 43 Wis. 267; McDonell v. Dodge, 10 Wis. 106; Emmons v. Dowe, 2 Wis. 322.

Wyo.—Brown v. Grady, 16 Wyo. 151, 92 P 622.

Eng.—Hutton v. Bulloch, L. R. 9 Q. B. 572; Ex p. Blain, 12 Ch. D. 522, 4 ERC 1; Burnell v. Brown, 1 Jac. & W. 168, 37 Reprint 339; Atty.-Gen. v. Briggs, 1 Jur. N. S. 1084; Howard v. Braithwaite, 1 Ves. & B. 202, 35 Reprint 79. See also Brady v. Todd, 9 C. B. N. S. 592, 99 ECL 592, 142 Reprint 233; Woodin v. Burford, 2 Cromp. & M. 391 (warranty by servant merely delivering article sold); Lucas v. Wilkinson, 1 H. & N. 420; Robertson v. Beatson, [1908] S. C. 921; Pearson v. Bardsley, 7 Wkly. Rep. 52.

Can.—Clergue v. Murray, 32 Can. S. C. 450; Commercial Union Assur. Co. v. Margeson, 29 Can. S. C. 601; Atlas Assur. Co. v. Brownell, 29 Can. S. C. 537; Havner v. Weyl, 5 DomLR 141, 21 WestLR 800 [aff 7 DomLR 682, 22 WestLR 455] (holding that one who enters into possession of land, under an agreement for its purchase made by an agent of the owner, which was not satisfactory to the latter, cannot obtain specific performance of the agreement, where the agent had authority only to secure a purchaser and not to enter into a contract for the sale of the property); Auld v. Traders' Bank of Canada, 16 WestLR 24.

Man.—Gordon v. Leary, 17 Man. 383, 7 WestLR 533 [rev 6 WestLR 206] (unauthorized purchase of goods on principal's credit).

N. S.—Levine v. Sebastian, 45 N. S. 190; McDonald v. Royal Ins. Co., 15 N. S. 428.

Ont.—Re Hall, 14 Ont. 557; Nelson v. Wigle, 8 Ont. 82; Marks v. Michigan Sulphite Fibre Co., 1 OntWN 334, 14 OntWR 567; West v. MacInnes, 23 U. C. Q. B. 357. See also McConnell v. Wilkins, 13 Ont. A. 438.

Que.—Garneau v. North American Transp. Co., 12 Que. Super. 77.

Apparent scope of authority see supra §§ 211–215.

[a] **Where a person assumes to bind another in respect to the purchase of property** in his absence, some relation must be shown to exist between the person contracting and the one contracted for, and, unless such authority is shown, or unless it appears that the person for whom it is made afterward ratifies it on a sufficient consideration, it creates no obligation against him. Carnahan v. Hughes, 108 Ind. 225, 9 NE 79.

[b] **A deed** to property made by one holding a power of attorney from the legal owner in plain violation of the spirit and intent of the power, which was well known to both the grantor and the grantee, is ineffective to convey any interest. Holmes v. Dowie, 148 Fed. 634; Alcorn v. Batterman, 6 Cal. Unrep. Cas. 776, 66 P 17.

[c] **A lease** (1) executed by a third person can confer no rights on the lessee, in the absence of proof of such third person's authority to act as the landlord's agent. Moore v. Rankin, 33 Misc. 749, 67 NYS 179. (2) An owner is not bound by a lease made by an agent without authority and in his own name. McMurrow App., 4 Walk. (Pa.) 499.

[d] **A stranger cannot disaffirm an agreement made with an agent** on the ground that he exceeded his authority. Jackson v. Van Dalfsen, 5 Johns. (N. Y.) 43.

[e] **Action for money had and received.**—(1) Where goods are purchased by another without authority, and are brought into a merchant's store without his knowledge or consent, and placed upon his shelves, there must be some evidence that he sold the goods and received the money therefor in order to make him liable, in an action for money had and received to plaintiff's use. Lesher v. Loudon, 85 Mich. 52, 48 NW 273. (2)

same,[40] or is estopped to deny the agent's authority in the particular case;[41] and this rule is not affected by the fact that the agent in acting in excess of his authority, intended to benefit the principal.[42] If the principal is not apprised of the nature of the unauthorized obligation, he will not be bound by it, although he was in the room when it was executed;[43] and although his subsequent agent conceives himself authorized to comply with similar obligations so executed by the first agent.[44] The principal need not assail such contracts by direct proceedings, as they are open to attack for want of authority of the agent to enter into them whenever rights are asserted under them.[45]

[§ 516] **(b) Acts in Emergencies.** An exception to the general rule that a principal is not liable for the unauthorized contracts of his agent is held to exist in cases of necessity arising from sudden or unexpected emergencies, and if the agent acts in good faith, although in excess of his authority, the principal may be bound.[46] This exception, however, must be narrowly confined, and unless the agent's unauthorized conduct is clearly necessary and limited to the exigencies of the case the principal will not be bound.[47]

[§ 517] **(3) Illegal Contract.** A principal is not bound by an illegal executory contract made in his behalf by his agent,[48] especially where the agent had no authority to make it.[49]

[§ 518] **(4) Where Credit Is Given Exclusively to Agent.**[50] A person who, upon entering into contractual relations with an agent, has full knowledge of the principal, but extends credit to the agent exclusively, cannot thereafter resort to the principal, and the latter is not bound, although the agent acted in the course of his employment and for the principal's benefit.[51] Thus where a creditor elects to give credit to the agent and not to his principal

Where money is received as a deposit by an agent and that money is by the agent turned over to his principal with notice that it is the money of the depositor, the principal is bound to deliver it to the depositor, even though his agent is not authorized to receive such deposits. Cason v. Rickards, 5 Philippine 611. (3) So where money is advanced to an agent as a loan to his principal, but without the latter's knowledge and consent, and the money is used to pay the principal's debts, he may be held liable as for money had and received. Reversion Fund, etc., Co. v. Cosway, [1913] 1 K. B. 364. (4) But, where an attorney in fact exceeds his authority in making a sale of real estate, the vendee, being chargeable with notice of the attorney's power, cannot recover of the vendor money paid to the agent in carrying out the sale if the vendor has not received such money. Kern v. Feller, (Or.) 140 P 735; Morton v. Morris, 27 Tex. Civ. A. 262, 66 SW 94.

[f] **A principal residing abroad is not liable to pay for the board and lodging** of his agent in this country unless he promises or undertakes to do so. Smithers v. Williams, 1 Newfoundl. 79.

[g] **A reasonable excess of authority** on the part of the agent will not operate to prevent specific performance of the contract. Bromet v. Neville, 53 Sol. J. 321, 322 (where the agent executed a contract of lease on telegraphic authority. Eve, J., said: "The telegram did not state the date of the commencement of the term, the peppercorn rent for six months, the option to purchase, the money to be spent, or the plans to be approved. But that excess of authority ought not to vitiate the contract. It cannot be that every excess of authority will vitiate a contract, and I hold, therefore, that the excess of authority does not operate to prevent specific performance of the contract. The agents consequently had authority to enter into the contract, and that part of the defence fails").

40. Harris, etc., Co., v. Oneonta Trust, etc., Co., (Ala.) 65 S 68 (holding that, where a bank which had agreed to honor checks drawn by defendant's agent for the purchase price of cotton honored checks drawn by the agent for expenses which were not included in the agreement, it cannot recover unless the payment of such checks was ratified, the agent not being a general one). See generally supra §§ 77–146.

[a] **Consent of principal a condition.**—(1) A court will not hold a contract to exist as against a respondent who denies the same, where it appears that the agent who it was claimed entered into the same for such respondent, specifically provided that it should not be binding upon the party referred to until the latter had consented to the same in writing. Arroyo v. White, etc., Co., 5 Porto Rico Fed. 569. (2) Where an agent, acting under a power of attorney to sell and convey land subject to the approval of his principals, executes a deed thereof without consideration and without approval, the deed is void and conveys no title. Alcorn v. Buschke, 133 Cal. 655, 66 P 15.

41. See supra §§ 70–74.

42. Ure v. Currell, 4 Mart. N. S. (La.) 502; Keish v. Purvis, 4 S. C. Eq. 114. Compare Frantz v. Jacob, 88 Ky. 525, 11 SW 654, 11 KyL 55 (holding that, where an agent protects the interest of his principal by making a better bargain than authorized, his action is to be sustained, because for the interest of his principal).

43. Modisett v. Lindley, 2 Blackf. (Ind.) 119.

44. Modisett v. Lindley, 2 Blackf. (Ind.) 119.

45. Nelson v. Nelson, (Minn.) 126 NW 731.

46. Forrestier v. Bordman, 9 F. Cas. No. 4,945, 1 Story 43 (where an agent to sell a cargo of flour at a certain port for cash found the market glutted, and, the property being in danger of decaying and becoming worthless, sold it at another port on credit); Louisville, etc., R. Co. v. Vaughn Transfer Co., (Ky.) 123 SW 253 (a station agent of a railroad company contracting for carrying mail to other railroads); Bartlett v. Sparkman, 95 Mo. 136, 8 SW 406, 6 AmSR 35 and note (where the principal sent the agent for a particular doctor, fourteen miles distant, and the agent, not finding the doctor at home, engaged another); Jervis v. Hoyt, 2 Hun (N. Y.) 637 (where an agent exceeded his authority in disposing of a cargo of grain which had begun to spoil). See also supra § 309.

47. Gage v. Callanan, 57 Misc. 479, 109 NYS 844 [rev on other grounds 128 App. Div. 752, 113 NYS 227] (where a chauffeur ordered permanent repairs to an automobile); Foster v. Smith, 42 Tenn. 474, 88 AmD 604 (where an agent to buy wheat for and ship it to his principal, but not authorized to sell, bought wheat, and the vessel on which he shipped it sank, and the agent sold the wheat, and it was held that, although the exigencies might have warranted the agent engaging help to take the wheat out of the water and preserve it, they did not warrant a sale).

48. See Arnot v. Pittston, etc., Coal Co., 2 Hun (N. Y.) 591, 5 Thomps. C. 143 [rev on other grounds 68 N. Y. 558, 23 AmR 190]; Contracts [9 Cyc 546 et seq]. See also supra § 25.

49. Stover v. Flower, 120 Iowa 514, 94 NW 1100 (holding that, where the agent of the owner of premises has no authority to lease them for an illegal purpose, a payment of rent to the agent by one renting the premises for an illegal purpose cannot be made the basis of any recovery from the owner on his failure to make a lease); Arnot v. Pittston, etc., Coal Co., 2 Hun 591, 5 Thomps. & C. 143 [rev on other grounds 68 N. Y. 558, 23 AmR 190]; Brown v. Johnson, (Utah) 134 P 590 (taking usury without the knowledge of the principal and without his receiving any benefits of the transaction). See also supra § 84.

[a] **Violation of Sunday law.**—A principal cannot repudiate, as beyond the agent's authority, a contract made and completely executed by the agent on Sunday in violation of the Sunday law, the contract itself being within the agent's authority. Rickards v. Rickards, 98 Md. 136, 56 A 397, 103 AmSR 393, 33 LRA 724.

50. **Personal liability of agent to whom credit is extended** see supra § 488.

Presumption as to whom credit is extended see infra § 661.

51. U. S.—Atlas Steamship Co. v. Colombian Land Co., 102 Fed. 358, 42 CCA 398; Pope v. Meadow Spring Distilling Co., 20 Fed. 35; In re Troy Woolen Co., 24 F. Cas. No. 14,403, 3 NatBankrReg 412. See also Berwind v. Schultz, 25 Fed. 912.

Ala.—Merrell v. Witherby, 120 Ala. 418, 23 S 994, 26 S 974, 74 AmSR 39.

Del.—Bush v. Devine, 5 Del. 375; Bate v. Burr, 4 Del. 130.

Ga.—Andrews Co. v. Columbus Nat. Bank, 129 Ga. 53, 58 SE 633, 121 AmSR 186, 12 AnnCas 616; Fleming v. Hill, 62 Ga. 751 (holding that, under code § 2211, making the agent not personally responsible upon the contract if the agency was known and the credit not expressly given to him, the question is, "To whom was the credit knowingly given, according to the understanding of both parties?"); Fontaine v. Eagle, etc., Mfg. Co., 52 Ga. 31.

Ill.—Watte v. Thayer, 56 Ill. A. 282; McFadden v. Lynn, 49 Ill. A. 166 (holding that one dealing with an agent known to be such may give him the exclusive credit, and in such case the creditor cannot afterward elect to hold the principal).

Ind.—Allen v. Davis, 17 Ind. A. 338, 45 NE 798.

Iowa.—McLean v. Ficke, 94 Iowa 283, 62 NW 753.

Ky.—Adams Oil Co. v. Christmas, 101 Ky. 564, 41 SW 545, 19 KyL 760; Smith v. Forwood, 7 KyL 378 (holding that, where the jury found that personal property had been sold to one on his own account, the fact that he had been constituted the agent of another to purchase the property would not enable the vendor to shift the liability to the principal).

La.—Stehn v. Fasnacht, 20 La. Ann. 83; Rankin v. Stewart, 5 La. Ann. 357. See Amory v. Grieve, 4 Mart. 632.

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when he has all the facts before him, he cannot hold the principal for the debt, although the latter gets the benefit of the credit.[52] So where an agent gives his own note to a third person who has full knowledge of the principal, his acceptance generally constitutes an election to extend credit exclusively to the agent, and relieves the principal from liability;[53] but not where it appears that such note was not given or received in payment.[54]

[§ 519] (5) **Agent Having or Representing Adverse Interest—(a) Individual Interest of Agent.**[55] A principal is not bound by a contract made in his behalf if, without his knowledge and consent,[56] the agent acts in furtherance of his individual interests, and the other party to the contract has notice of the agent's breach of trust.[57] But where the other party has acted in good faith, the principal cannot repudiate his liability on the contract on the ground that the agent in making it acts in his own interests, and not in those of the principal.[58]

Me.—Wilkins v. Reed, 6 Me. 220, 19 AmD 211.

Md.—Henderson v. Mayhew, 2 Gill 393, 41 AmD 434.

Mass.—Silver v. Jordan, 136 Mass. 319; Mussey v. Beecher, 3 Cush. 511 (holding that, in an action against a principal for the price of goods sold to an agent who had a power of attorney, plaintiff must show that the goods were sold under the power of the agent as such, and not on his personal credit); Paige v. Stone, 10 Metc. 160, 43 AmD 420; French v. Price, 24 Pick. 13; James v. Bixby, 11 Mass. 34.

Mich.—Sullivan v. Ross, 39 Mich. 511.

Miss.—Edwards v. Simmons, 27 Miss. 302.

Mo.—Leader Realty Co. v. Markham, 163 Mo. A. 314, 143 SW 1104; Mitchell v. Chick, 136 Mo. A. 559, 118 SW 517; Henry Ames Packing, etc., Co. v. Tucker, 8 Mo. A. 95.

Nev.—Rankin v. New England, etc., Min. Co., 4 Nev. 78.

N. H.—Brown v. Rundlett, 15 N. H. 360.

N. J.—Yates v. Repetto, 65 N. J. L. 294, 47 A 632.

N. Y.—Meeker v. Claghorn, 44 N. Y. 349; Burdin v. Williamson, 5 Hun 560 (holding that, although a person who sells goods to another on the supposition that he is dealing with him as principal, and subsequently discovers that such person is but an agent, may resort to his principal, even if he has personally charged them to the agent, yet, if at the time he knows who the principal is and still voluntarily and without fraud selects the agent as his debtor, he cannot afterward resort to the principal); McMonnies v. Mackay, 39 Barb. 561; Ranken v. Deforest, 18 Barb. 143; Hyde v. Paige, 9 Barb. 150; Matter of Bateman, 7 Misc. 633, 28 NYS 36 [aff 145 N. Y. 623, 40 NE 10]; Consolidated Safety Pin Co. v. Humbert, 128 NYS 710. See also Maryland Coal Co. v. Edwards, 4 Hun 432; Buck v. Amidon, 4 Daly 126 (holding that, upon the question as to whom plaintiff gives credit, where one person orders him to do work for another, the circumstance as to whom plaintiff charges the work on his books, and to whom he makes out his bill, is most material, and, unexplained, is controlling).

Oh.—Smart v. N. C. Lodge No. 2, 27 Oh. Cir. Ct. 273 (acts not constituting election to hold agent and release principal); Post v. Kinney, 7 Oh. Dec. (Reprint) 439, 3 CincLBul 118.

S. D.—Union Trust Co. v. Branch Mint Operating Co., 28 S. D. 549, 134 NW 65.

Tenn.—Davis v. McKinney, 6 Coldw. 15; Ahrens v. Cobb, 9 Humphr. 643 (holding that where a person sells property to the agent of a known principal, and gives credit exclusively to the agent, the principal is not bound for the purchase money, although he receives the property).

Eng.—Kymer v. Suwercropp, 1 Campb. 109; Addison v. Gandassequi, 4 Taunt. 574, 128 Reprint 454.

Ont.—Mail Printing Co. v. Devlin, 17 Ont. 15.

[a] **Constructive notice of principal by third person.**—The rule which prevents a seller who has given credit to an agent from afterward resorting to the principal for payment does not apply to a case in which the seller, at the time of sale, merely has the means of knowing the principal, but is confined to cases in which he has actual knowledge. Raymond v. Crown, etc., Mills, 2 Metc. (Mass.) 317 [appr Cobb v. Knapp, 71 N. Y. 348, 27 AmR 51]. But see Burns v. Royal Bank, 128 NYS 723 (holding that where it is apparent that plaintiff, when making a sale to A, gave exclusive credit to it, the article having been charged to A, and the bill therefor sent to it, A's principal, whether or not known at the time of the sale, cannot be held for the price).

[b] **The value of goods sold to an agent on his own credit** may not be recovered of the principal unless the latter actually received the benefit of the goods. Mickleberry v. O'Neal, 98 Ga. 42, 25 SE 933.

[c] **The failure of a warranty** made by a seller's agents on their own responsibility does not authorize a rescission by the buyer. Jesse French Piano, etc., Co. v. Garza, 53 Tex. Civ. A. 346, 116 SW 150.

52. McFadden v. Lynn, 49 Ill. A. 166 (holding that where the creditor voluntarily gives an enlarged credit to the agent, or adopts a particular mode of payment whereby the principal is placed in a worse condition than he otherwise would have been, the liability of the original debtor is discharged); Hazelhurst Lumber Co. v. Carlisle Mfg. Co., 130 Ky. 1, 112 SW 934.

[a] **In the Philippines,** (1) under Civ. Code art 1727, the principal is directly liable to the creditor for the payment of a debt incurred by his agent acting within the scope of his authority. Tuason v. Orozco, 5 Philippine 596. (2) But, under art 1725, irrespective of such liability on the part of the principal the agent may bind himself personally to the payment of the debt incurred for the benefit of his principal, and in such a case the liability expressly incurred by the agent does not preclude the personal liability of the principal but constitutes a further security in favor of the creditor. Tuason v. Orozco, supra. (3) And under art 1876, where a debt is secured by a mortgage upon property belonging to the principal and is duly recorded, the creditor may bring his action directly against the mortgaged property, notwithstanding the liability is personally incurred by the agent and the fact that the agent delivered to the creditor certain shares of stock as security for the liability incurred by himself. Tuason v. Orozco, supra.

53. Merrell v. Witherby, 120 Ala. 418, 23 S 994, 26 S 974, 74 AmSR 39; Paige v. Stone, 10 Metc. (Mass.) 160, 43 AmD 420 (holding also that after the giving of the note the contract cannot be rescinded and a new one be made by which the principal will be bound, unless he consents); French v. Price, 24 Pick. (Mass.) 13 (holding that, where an agent purchased goods and gave therefor his own negotiable note, the seller knowing at the time when the goods were delivered and the note taken, but not at the time of the sale, that other persons were interested in the purchase, the note was a payment, and so the others were discharged from their liability); Tudor v. Whiting, 12 Mass. 212; Chapman v. Durant, 10 Mass. 47; Schepflin v. Dessar, 20 Mo. A. 569; McMonnies v. Mackay, 39 Barb. (N. Y.) 561; Ranken v. Deforest, 18 Barb. (N. Y.) 143; Hyde v. Paige, 9 Barb. (N. Y.) 150.

54. Melledge v. Boston Iron Co., 5 Cush. (Mass.) 158, 51 AmD 59; Maneely v. McGee, 6 Mass. 143, 4 AmD 105; Rathbone v. Tucker, 15 Wend. (N. Y.) 498 [aff 18 Wend. 175] (holding that the taking of the note of an agent at an extended credit for goods furnished for the benefit of the principal does not discharge the principal, unless it is affirmatively shown on his part that on the supposition that the debt was paid or the personal responsibility of the agent accepted for it he dealt differently with the agent than he would have done had the note not been taken and the extended credit given). See also Keller v. Singleton, 69 Ga. 703 (holding that if a person sells goods to an agent for his principal, and takes the promissory note of the agent for the price, this without more will not operate as payment of the debt of the principal; and that on failure of payment by the agent the principal will be liable to an action founded on the original consideration); Alcock v. Hopkins, 6 Cush. (Mass.) 484; Calder v. Dobell, L. R. 6 C. P. 486, 2 ERC 457.

55. **As affecting liability:** Of agent to principal see supra §§ 354, 367. Of principal to agent see supra §§ 430–433.

Indirect purchases or sales by selling or purchasing agent from, for, or to himself see supra §§ 358–362.

56. Tyler v. Sanborn, 128 Ill. 136, 21 NE 193, 15 AmSR 97, 4 LRA 218 and note.

57. U. S.—Glover v. Ames, 8 Fed. 351.

Ala.—Miller v. Louisville, etc., R. Co., 83 Ala. 274, 4 S 842, 3 AmSR 722.

Ill.—Tyler v. Sanborn, 128 Ill. 136, 21 NE 193, 15 AmSR 97, 4 LRA 218 (holding also that the mere fact that the principal received full consideration for property sold by his agent did not preclude him from avoiding the sale).

Iowa.—Mayer v. Hamre, 144 NW 334.

La.—Langlois v. Gragnon, 123 La. 453, 49 S 18, 22 LRANS 414; Florance v. Adams, 2 Rob. 556, 38 AmD 226.

Mo.—Wann v. Scullin, 210 Mo. 429, 109 SW 688.

N. J.—Dowden v. Cryder, 55 N. J. L. 329, 26 A 941 (holding also that where a transaction between an agent and another person is entire, and known to such other person to be a breach of trust on the part of the agent, the principal is not bound at all, although some portions of the transaction might, if standing alone, have been within the agent's power and duty).

[a] **Illustration.**—A bank which permits an agent of a depositor to have money transferred from the depositor's account to the credit of a concern which it knows the agent to be chiefly interested in is chargeable with knowledge that he cannot bind his principal in such a transaction, and acts at its peril. Oshkosh Nat. Bank v. Munger, 95 Fed. 37, 36 CCA 659.

[b] **A person claiming title to real estate** under a conveyance by an agent having power to sell, but who exceeds his authority by conveying the property for his own debt, acquires no title, unless he is an innocent purchaser. Hunter v. Eastham, 95 Tex. 648, 69 SW 66 [rev (Civ. A.) 67 SW 1080].

58. Hambro v. Burnand, [1904] 2

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[§ 520] **(b) Agent Acting for Both Parties—aa. In General.** An agent may with their full knowledge and consent represent both parties to a contract, and his contracts under these circumstances bind each within the scope of his authority;[59] but where an agent without the full knowledge and consent of his principal represents the adverse party in a transaction, his contracts relating thereto are voidable at the option of the principal.[60] This rule is not altered by a custom or usage to the contrary of which the principal has no knowledge.[61] But the principal is bound if he ratifies the trans-

K. B. 10 [allowing app [1903] 2. K. B. 399].

[a] **The mere fact that a purchasing agent secretly intends to make a profit** out of a resale of the goods bought does not relieve the principal from liability to pay for the goods. Garrett v. Trabue, 82 Ala. 227, 3 S 149.

[b] **Right to possession of principal's property.**—Where a principal delivers property to his agent to sell on commission, a third person who loans the agent money on the property is entitled to possession as against the principal, if he has no notice that the agent is not the owner with unlimited right to sell. Chickering-Chase Bros. Co. v. Moulton, (Iowa) 107 NW 434. But see Wycoff v. Davis, 127 Iowa 399, 103 NW 349 (holding that, where plaintiff's agent, who had authority to sell typewriters and collect the price, borrowed money for himself from defendant and turned over two typewriters belonging to plaintiff as security, stating to defendant that the machines were his and that he had authority to sell them, plaintiff was entitled to recover the typewriters from defendant without repaying the loan).

[c] **Assignment of mortgage.**—Where an agent, being authorized to pay off a mortgage on his principal's land, fraudulently takes an assignment thereof to himself, an assignment by him of the mortgage to a bona fide purchaser for value will vest in the latter a good title thereto, and the principal will be estopped to deny the agent's title. Gearon v. Kearney, 22 Misc. 285, 50 NYS 26.

59. U. S.—Nevada Nickel Syndicate v. National Nickel Co., 96 Fed. 133 (holding that, where the parties to a contract agree upon an agent who is given discretionary power in carrying out the contract on the part of one party, he becomes the agent of both, and his acts within the scope of his agency are binding upon both).

Ark.—Wassel v. Reardon, 11 Ark. 705, 54 AmD 245.

Ga.—Ranespeck v. Patillo, 104 Ga. 772, 30 SE 962, 69 AmSR 197, 42 LRA 197; Fitzsimmons v. Southern Express Co., 40 Ga. 330, 2 AmR 577 (holding that two persons may always by mutual consent, no matter how adverse their interest, make a third person their agent).

La.—Metcalfe v. Alter, 31 La. Ann. 389; Draughon v. Quillen, 23 La. Ann. 237; Florance v. Adams, 2 Rob. 556, 38 AmD 226.

Mich.—Dull v. Royal Ins. Co., 159 Mich. 671, 124 NW 533; Colwell v. Keystone Iron Co., 36 Mich. 51 (holding that an agent for the seller could, with the consent of all parties, accept as agent of the vendee the delivery of the property sold); Adams Min. Co. v. Senter, 26 Mich. 73 (holding that where the same person is made agent of two mines in the same vicinity, and it becomes necessary for one to deal with the other, he must be presumed to have the same power to act for both that would be possessed if there were two agents acting separately, and may dispose of property in the same way; and such a double authority dispenses with such formalities as could not be complied with where one man acts for both companies).

Mo.—Aiple-Hemmelmann Real Est. Co. v. Spelbrink, 211 Mo. 671, 111 SW 480, 14 AnnCas 652 (holding that, where defendant, at the time he executed a contract for the sale of certain land to plaintiff, had knowledge that plaintiff was acting not only as defendant's agent for the sale of the land but also as agent for the purchaser, the contract was not rendered invalid by reason of such dual agency); Robinson v. Jarvis, 25 Mo. A. 421; De Steiger v. Hollington, 17 Mo. A. 352.

Or.—Bonelli v. Burton, 61 Or. 429, 123 P 37.

Wis.—Meyer v. Hanchett, 43 Wis. 246.

Eng.—Rowland v. Chapman, 17 T. L. R. 669.

[a] **Failure of a mutual agent to perform the mutual agreement** according to its terms cannot be imputed to one party to the agreement so as to render him liable to the other party as for a breach of the agreement. Crippen v. Hope, 34 Mich. 55.

[b] **Change in commission of agent for both parties as fraud.**—Where an agent was representing both the parties in the sale of land, and the commission which he was to receive was changed by one party, the failure to disclose the change was a fraud in law on the other party. Jones v. Draper, 26 Oh. Cir. Ct. 785.

[c] **Transactions admitting of double agency.**—(1) An agent for the owner in the construction of a building may act as agent for an insurance company in effecting insurance on the building. British America Assur. Co. v. Cooper, 6 Colo. A. 25, 40 P 147. (2) One employed as a mere watchman or guard of certain property is not by such employment incapacitated to issue a valid policy on the property in behalf of an insurance company of which he is the agent. Northrup v. Germania F. Ins. Co., 48 Wis. 420, 4 NW 350, 33 AmR 815. (3) Where a school board by a vote authorizes its president to enter into a contract of insurance through an insurance agent who is also a member of the board, the policy is binding on the company, as the agent's interest as a school director in the property insured is nominal and no greater than that of any resident of the school district. German Ins. Co. v. Independent School Dist., 80 Fed. 366, 25 CCA 492. (4) A payee of a note secured by a mortgage may, after the transfer of the note and mortgage, act as agent of the maker to renew the note and mortgage, even though the renewal may result in the payee's release as an indorser or guarantor, since, under Civ. Code § 3116, the maker is bound to pay the debt, and the payee is liable only to a subsequent holder. Moore v. Gould, 151 Cal. 723, 91 P 616.

[d] **Where an architect is employed by both the owner and the contractors,** no contract can be implied to pay the contractors for extra work directed by such architect. Day v. Pickens County, 53 S. C. 46, 30 SE 681.

60. U. S.—Donovan v. Campion, 85 Fed. 71, 29 CCA 30 (holding that no sale from which a substantial advantage has been derived can be sustained when he who actively promoted it acted as the ostensible agent for the vendor, when in reality he was the secret agent of the purchaser); Findlay v. Pertz, 66 Fed. 427, 13 CCA 559 [aff 74 Fed. 681, 20 CCA 662].

Colo.—British America Assur. Co. v. Cooper, 6 Colo. A. 25, 40 P 147.

Ga.—Ranespeck v. Patillo, 104 Ga. 772, 30 SE 962, 69 AmSR 197, 42 LRA 197; English v. Georgia Bank, 76 Ga. 537; Fitzsimmons v. Southern Express Co., 40 Ga. 330, 2 AmR 577.

Ill.—Smythe v. Evans, 209 Ill. 376, 70 NE 906 [rev 108 Ill. A. 145].

Ky.—McDoel v. Ohio Valley Impr., etc., Co., 36 SW 175, 18 KyL 294.

Me.—Hinckley v. Arey, 27 Me. 362 (holding, however, that while, in making a contract for the composition of a debt, the same man cannot be the agent of both parties, yet when the composition is agreed upon with the creditor by the agent of the debtor, such agent can become the agent of the creditor to receive the payment of the amount agreed upon).

Miss.—Spinks v. Davis, 32 Miss. 152.

Mo.—Beagles v. Robertson, 135 Mo. A. 306, 115 SW 1042; McClure v. Ullman, 102 Mo. A. 697, 77 SW 325; Huggins Cracker, etc., Co. v. People's Ins. Co., 41 Mo. A. 530; Robinson v. Jarvis, 25 Mo. A. 421; De Steiger v. Hollington, 17 Mo. A. 382; Mercantile Mut. Ins. Co. v. Hope Ins. Co., 8 Mo. A. 403.

N. Y.—Palmer v. Gould, 144 N. Y. 671, 39 NE 378; Empire State Ins. Co. v. American Cent. Ins. Co., 138 N. Y. 446, 34 NE 200 [aff 64 Hun 485, 19 NYS 504]; New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85 [rev 20 Barb. 468]; Greenwood v. Spring, 54 Barb. 375 (holding that it is not necessary for a party seeking to avoid such contract to show that any improper advantage has been gained over him; it is at his option to repudiate or confirm the contract irrespective of any proof of actual fraud).

Oh.—U. S. Rolling Stock Co. v. Atlantic, etc., R. Co., 34 Oh. St. 450, 32 AmR 380.

Okl.—Hunter Realty Co. v. Spencer, 21 Okl. 155, 95 P 757, 17 LRANS 622 and note (holding that, where an agent acts for both parties in making a contract requiring the exercise of discretion, the contract is contrary to public policy and voidable on the application of either party).

Tex.—Cameron v. Blackwell, 53 Tex. Civ. A. 414, 115 SW 856.

Va.—Ferguson v. Gooch, 94 Va. 1, 26 SE 337, 48 LRA 234.

Wash.—Hoerling v. Lowry, 58 Wash. 426, 108 P 1090.

W. Va.—Guthrie v. Huntington Chair Co., 71 W. Va. 383, 76 SE 795 (holding that either principal without showing injury to himself may avoid a contract made by a dual agent without his knowledge of such dual agency); Truslow v. Parkersburg Bridge, etc., Co., 61 W. Va. 628, 57 SE 51 (holding that it is immaterial that the principal was not in fact injured by the agent's wrongdoing).

Wis.—Walworth County Bank v. Farmers' Loan, etc., Co., 16 Wis. 629.

Eng.—Salford v. Lever, [1891] 1 Q. B. 168; Smith v. Sorby, 3 Q. B. D. 552 note.

See Cameron v. Tate, 15 Can. S. C. 622.

[a] **Where an agent represents a principal in several transactions,** each must be considered separate, and although in some the agent acted for both parties, the principal may be bound by others in which he did not so act. Sunderland v. Kilbourn, 3 Mackey (D. C.) 506.

[b] **A purchaser at a tax sale** acquires no title against the owner, where his agent, in making the purchase, was also the owner's agent to pay the taxes. Young v. Iowa Toilers' Protective Assoc., 106 Iowa 447, 76 NW 822.

[c] **A contract for the exchange of property** procured by one acting as agent for both parties is not enforceable where one of the parties had no knowledge that the agent was also acting for the other party. Harper v. Fidler, 105 Mo. A. 680, 78 SW 1034.

61. Ferguson v. Gooch, 94 Va. 1.

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action with full knowledge of the facts.[62]

[§ 521] **bb. Collusion between Agent and Third Party.** A fortiori the principal may avoid contracts made by the agent as the result of fraud or collusion between the agent and the third party;[63] and the payment of a secret commission, bribe, or gratuity to the agent by the third party as an inducement for entering into contractual relations on behalf of his principal, or an agreement to pay such commission, is such collusion as entitles the principal to avoid the contract.[64]

It is otherwise where the principal has full knowledge of the transaction and assents to it.[65] By statute, the payment of a secret commission, bribe, or bonus to another's agent has been made a misdemeanor,[66] and where this is so a contract thus tainted is wholly void and will not support an action for the price of goods sold and delivered,[67] or

26 SE 337, 40 LRA 234; Bartram v. Lloyd, 88 L. T. Rep. N. S. 286.

62. British American Assur. Co. v. Cooper, 6 Colo. A. 25, 40 P 147; Truslow v. Parkersburg Bridge, etc., R. Co., 61 W. Va. 628, 57 SE 51.

63. U. S.—Pacific Lumber Co. v. Moffat, 134 Fed. 836, 67 CCA 442; Findlay v. Pertz, 66 Fed. 427, 13 CCA 559 [aff 74 Fed. 681].

Ariz.—Jacobs v. George, 2 Ariz. 93, 11 P 110.

Iowa.—Stover v. Flower, 120 Iowa 514, 94 NW 1100; Seymour v. Shea, 62 Iowa 708, 16 NW 196. And see White v. Leech, 96 NW 709.

La.—Beal v. McKiernan, 6 La. 407; Shepherd v. Lanfear, 5 La. 336, 25 AmD 181.

N. Y.—Callanan v. Keeseville, etc., R. Co., 131 App. Div. 306, 115 NYS 779 [rev on other grounds 199 N. Y. 268, 92 NE 747]; Smith v. Seattle, etc., R. Co., 72 Hun 202, 25 NYS 368; Union Bank v. Mott, 39 Barb. 180; Egan v. De Jonge, 113 NYS 737.

Or.—Bonelli v. Burton, 61 Or. 429, 123 P 37.

Pa.—McNair v. McLennan, 24 Pa. 384; Lloyd v. Greenfield, 32 PittsbLeg JNS 119.

Vt.—Holden v. Durant, 29 Vt. 184.

W. Va.—Rohrbough v. U. S. Express Co., 50 W. Va. 148, 40 SE 398, 88 AmSR 849.

Eng.—Salford v. Lever, [1891] 1 Q. B. 168; Smith v. Sorby, 3 Q. B. D. 552 note.

64. Com. Steamship Co. v. American Shipbuilding Co., 197 Fed. 780; Findlay v. Pertz, 66 Fed. 427, 13 CCA 559 [aff 74 Fed. 681, 20 CCA 662]; Smith v. Sorby, 3 Q. B. D. 552 note (holding that, where a secret gratuity is given to an agent with the intention of influencing his mind in favor of the giver of the gratuity, and the agent, on subsequently entering into a contract with such giver on behalf of his principal, is actually influenced by the gratuity in assenting to stipulations prejudicial to the interests of his principal, although the gratuity was not given directly with relation to such particular contract, the transaction is fraudulent as against the principal, and the contract is voidable at his option); Meyer v. John W. Corley Pub., etc., Co., 179 Mo. A. 695, 162 SW 273; Sirkin v. Fourteenth St. Store, 124 App. Div. 384, 108 NYS 830; Jablon v. Traynor, 76 Misc. 532, 135 NYS 545; Smith v. Seattle, etc., R. Co., 72 Hun 202, 210, 25 NYS 368 (holding that an action to recover damages for breach of contract cannot be maintained against a principal whose agent has been given a secret interest in such contract by plaintiff); Panama, etc., Tel. Co. v. India Rubber, etc., Co., L. R. 10 Ch. 515; Salford v. Lever, [1891] 1 Q. B. 168; Smith v. Sorby, 3 Q. B. D. 552 note; Bartram v. Lloyd, 88 L. T. Rep. N. S. 286; Cohen v. Kuschke, 83 L. T. Rep. N. S. 102. Compare Yellow Poplar Lumber Co. v. Daniel, 109 Fed. 39, 48 CCA 204 (holding that a contract of sale to a company is not voidable at the instance of the company after it has been fully performed by the seller, so as to preclude him from maintaining a suit in equity to enforce a lien given thereby, by the fact that after the contract had been made an agreement was made between the seller and the manager of the company, who acted in its behalf in making the purchase, for a division of the profits of the sale, where such agreement was not contemplated at the time of the sale, but was subsequently exacted by the manager, and acceded to by the seller, under threat of a repudiation of the contract by the company, and no damage is shown to have resulted to the company from the agreement); Smith v. Tyler, 57 Mo. A. 668 (holding that a bona fide sale to a third person will not be set aside because such person afterward in good faith sells the same property to the agent); Brewster v. Hatch, 13 Daly (N. Y.) 65, 18 AbbNCas 205 (holding that, where an agent is induced by bribery to make a contract on behalf of his principal, such fact is not of itself, after the contract has been performed and the principal has derived benefit therefrom, and there can be no rescisson, a defense to an action against the principal on the contract, without evidence that his interests were prejudiced thereby).

[a] **It is immaterial that the agent was not in fact biased** by the secret profit. Shipway v. Broadwood, [1899] 1 Q. B. 369; Hovenden v. Millhoff, 83 L. T. Rep. N. S. 41. See Harrington v. Victoria Graving Dock Co., 3 Q. B. D. 549, 551 [quot Smith v. Seattle, etc., R. Co., 72 Hun 202, 209, 25 NYS 368] (where Cockburn, C. J., said: "I will assume, for the purposes of argument, that the agreement did not influence the mind of the plaintiff so as to induce him to do anything dishonest towards his employers, the Great Eastern Railway Company. I entertain no doubt, however, that when a bribe is given, or a promise of a bribe is made, to a person in the employ of another by some one who has contracted, or is about to contract, with the employer, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one, and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be. The tendency of such an agreement as this must be to bias the mind of the agent or other person employed, and to lead him to act disloyally to his principal. It is intended by the party who promises the bribe to have that effect, and the other party knows such is his intention. Such a bargain is obviously corrupt").

[b] **Recovery by principal; damages.**—A principal whose agent has received a consideration from the other party to the contract, made or induced by the agent, may recover the sum received by the agent, in an action against him, and also all damages sustained from the agent and the contractor, defendant and the contractor being joint wrongdoers. Salford v. Lever, 25 Q. B. D. 363 [app dism [1891] 1 Q. B. 168].

Officers and agents of corporations as fiduciaries see Corporations [10 Cyc 787 et seq].

65. Ballin v. Fourteenth St. Store, 123 App. Div. 582, 108 NYS 26 [aff 54 Misc. 359, 105 NYS 1028, and cit Cyc].

[a] **Burden of proof.**—"When it appears that an agent has an interest in the contract negotiated by him in behalf of his principal the burden is on the party seeking to enforce the contract of showing that the agent made a full disclosure of his interest to his principal. (Dunne v. English, L. R. 18 Eq. 524.) Such knowledge on the part of the principal as would put a prudent person on inquiry is not sufficient." Smith v. Seattle, etc., R. Co., 72 Hun 202, 210, 25 NYS 368.

66. See statutory provisions.

67. Sirkin v. Fourteenth St. Store, 124 App. Div. 384, 387, 391, 108 NYS 830 [rev 55 Misc. 288, 105 NYS 179] (where Laughlin, J., said: "The corrupt practice of secretly offering bribes to servants, agents and employees, to induce them to place contracts for their masters or employers, had spread to such an alarming extent, in this State that its viciousness and dishonesty and demoralizing tendencies attracted the attention of the Legislature at its session in 1905, and led it to declare it to be a misdemeanor to give or receive such a bribe, by enacting section 384r of the Penal Code. . . . The Legislature has not expressly declared either that the contract to pay the bribe or the contract induced by the bribe is void or unenforceable. A contract, however, made in violation of a penal statute, although not expressly prohibited or declared to be void, is prohibited, void, and unenforcible, whether executory or executed . . . It is therefore quite clear that the purchasing agent could not enforce the contract to recover the consideration agreed to be paid to him; and it may be here observed that this would have been so under the common law, if the statute had not been enacted, for the contract contravened public policy. Harrington v. Victoria Graving Dock Co., 3 Q. B. D. 549. The question appears to be presented now for the first time as to whether this is the limitation of the disability for violating the penal statute, or whether the court may refuse its aid to the party obtaining the contract for the purchase or sale of property, or for work, in violation of the statute, upon the same ground that it leaves a party to a contract which is void as against public policy, or offends against good morals, where it finds him. It is manifest that the Legislature in enacting this penal statute intended to emphasize and extend the public policy of the common law, which rendered such contracts by agents for their own benefit void. It being the province of the Legislature to declare the public policy of the State, it is the duty of the court to be guided thereby in administering the law. The acts of the plaintiff not only offended against good morals and public policy at common law, but constituted a crime under the statutory law of this State, and he is here seeking the aid of the court to enforce a contract which he procured by violating our penal statute." The court distinguished Brewster v. Hatch, 13 Daly (N. Y.) 65, 18 AbbNCas 205, as follows: "When that decision was made, bribing an agent to place a contract was not a crime. On the facts it is also distinguishable. There, pursuant to a custom, presents were given by a carriage manufacturer and repairer to coachmen on New Year's day; but there was no evidence of an agreement, express or implied, that they were to bring their employers' carriages to the shop for repairs. The opinion shows that the coachman of the defendant was directed by his employer to have repairs made at the shop of the plaintiff. The court ruled that if the employer sustained any damages by reason of the coachman

for work and labor done and materials furnished.[68]

[§ 522] **b. Undisclosed Principal—(1) In General.** As has been seen in another connection, an agent who enters into contractual relations on behalf of an undisclosed principal may be held liable by the person with whom he deals, as though he himself were in fact the principal.[69] The liability of the agent is not, however, exclusive, for, although the third person extended credit to the agent in ignorance of the fact that the latter was acting in a representative capacity, he may elect to hold the undisclosed principal when discovered, it being a firmly established rule that an undisclosed principal is bound by executory simple contracts made by the agent, and by acts done by the agent in relation thereto, within the scope of his authority and in the course of his employment,[70] although the contract purports to be the individual contract of the

being induced by the presents to have repairs made when unnecessary, his remedy was to counterclaim for his damages"); Mutual Coal Co. v. H. G. Realty Co., 130 NYS 169. But see Ballin v. Fourteenth Street Store, 123 App. Div. 582, 108 NYS 26 [aff 195 N. Y. 580 mem, 89 NE 1095 mem] (where a judgment for the price of goods sold was upheld on the ground that the principal had knowledge of the proposed payment to his agent. The decision below thus affirmed proceeded on the ground that violation of Pen. Code § 384r afforded no defense to an action for the price. This point was not decided on the appeal and is contrary to Sirkin v. Fourteenth St. Store, supra).

68. Standard Lumber Co. v. Butler Ice Co., 146 Fed. 359, 76 CCA 639, 7 LRANS 467 and note (where the court refused its aid to plaintiff to collect any part of the purchase price of constructing an ice plant it appearing that by an agreement between the president of the defendant and an officer of the plaintiff a bid which the plaintiff had submitted was increased more than fifty per cent on the understanding that the excess should be divided between them and the plaintiff, which was a violation of a statute of the state [Pa. Pub. Laws 413 § 128; P. L. 196, 197]); Jablon v. Traynor, 76 Misc. 532, 135 NYS 545 [foll Sirkin v. Fourteenth St. Store, 124 App. Div. 384, 108 NYS 830] (holding that where by contract with an agent work is done for his principal an agreement to pay the agent a percentage on the agreed price renders the entire contract void); General Tire Repair Co. v. Price, 115 NYS 171 [foll Sirkin v. Fourteenth Street Store, supra] (holding that, where plaintiff, who furnished supplies and work in repairing defendant's automobile pursuant to a contract on defendant's behalf with his chauffeur, paid to the chauffeur a discount in violation of Pen. Code § 384r, he could not recover, the contract being void as against public policy).

69. See supra §§ 491–494.

70. U. S.—Callas Steamboat Co. v. Scudder, 2 Black 372, 17 L. ed. 282; Berry v. Chase, 179 Fed. 426, 102 CCA 572; Berry v. Chase, 146 Fed. 625, 77 CCA 161; Moore v. Sun Printing, etc., Assoc., 101 Fed. 591, 41 CCA 506 [aff 183 U. S. 642, 22 SCt 240, 46 L. ed. 366]; Prichard v. Budd, 76 Fed. 710, 22 CCA 504; Pope v. Meadow Spring Distilling Co., 20 Fed. 35.

Ala.—Harris, etc., Co. v. Oneonta Trust, etc., Co., 65 S 68; Sellers v. Malone-Pilcher Co., 151 Ala. 426, 44 S 414.

Ark.—Bryant Lumber Co. v. Crist, 87 Ark. 434, 112 SW 965; Mississippi Valley Constr. Co. v. Abeles, 87 Ark. 374, 112 SW 894.

Cal.—Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 46 P 738; Dashaway Assoc. v. Rogers, 79 Cal. 211, 21 P 742; Thomas v. Moody, 57 Cal. 215; McKee v. Cunningham, 2 Cal. A. 684, P 260. See also Glidden v. Lucas, 7 Cal. 26; Eddy v. American Amusement Co., 9 Cal. A. 624, 99 P 1115.

Colo.—Burnell v. Morrison, 46 Colo. 533, 105 P 876; Bice v. Hoover, 2 Colo. A. 172, 29 P 1042.

Conn.—J. B. Owens Pottery Co. v. Turnbull Co., 75 Conn. 628, 54 A 1122; National Shoe, etc., Bank's App., 55 Conn. 469, 12 A 646; Merrill v. Kenyon, 48 Conn. 314, 40 AmR 174; Jones v. Ætna Ins. Co., 14 Conn. 501.

Del.—Connally v. McConnell, 17 Del. 133, 39 A 773; Coxe v. Devine, 5 Del. 375; Smith v. Jessup, 5 Del. 121 (holding that a general agency will charge the principal, although unknown, and although he furnishes his agent money to pay all dues for him incurred, which money the agent has misapplied). See also Scott v. Heather, 1 Del. 330.

Ga.—Pinkston v. Cedar Hill Nursery, etc., Co., 123 Ga. 302, 51 SE 387; Holbrook v. Hodgson Cotton Co., 122 Ga. 814, 50 SE 916; Baldwin v. Garrett, 111 Ga. 876, 36 SE 966 (construing Civ. Code § 3024, prescribing this rule); Simpson v. Patapsco Guano Co., 99 Ga. 168, 25 SE 94; Allison v. Sutlive, 99 Ga. 151, 25 SE 11; Cable Co. v. Hunt, 8 Ga. A. 562, 70 SE 70.

Hawaii.—Matter of Levinho, 11 Hawaii 110.

Ill.—Walsh v. Murphy, 167 Ill. 228, 47 NE 354; West Chicago St. R. Co. v. Morrison, 160 Ill. 288, 43 NE 393; Barker v. Garvey, 83 Ill. 184; Koch v. Willi, 63 Ill. 144; Fishback v. Brown, 16 Ill. 74; Daniel Forbes Co. v. Leonard, 119 Ill. A. 629; Heywood, etc., Co. v. Andrews, 89 Ill. A. 195.

Ind.—Woodford v. Hamilton, 139 Ind. 481, 39 NE 47.

Iowa.—Calnan Constr. Co. v. Brown, 110 Iowa 37, 81 NW 163; Steele-Smith Grocery Co. v. Potthast, 109 Iowa 413, 80 NW 517; Glick v. Bramer, 78 Iowa 568, 43 NW 531. See also Harrison v. Schoff, 101 Iowa 463, 70 NW 689.

Kan.—Fowle v. Outcalt, 64 Kan. 352, 67 P 889; Freund v. Hixon, (A.) 49 P 640.

Ky.—Cecil v. Citizens' Nat. Bank, 145 Ky. 842, 141 SW 416 (holding that one dealing with an agent of an undisclosed principal may, on learning of his agency, hold the principal for debts incurred in the transaction); Cooper v. Ratliff, 116 SW 748; Wilson v. Thompson, 1 Metc. 123; Violett v. Powell, 10 B. Mon. 347, 52 AmD 548; Tutt v. Brown, 5 Litt. 1, 15 AmD 33; Ware v. Long, 69 SW 797, 24 KyL 696.

La.—Ballister v. Hamilton, 3 La. Ann. 401; Hyde v. Wolf, 4 La. 234, 23 AmD 484; Buckingham v. Williams, 4 La. 62; Williams v. Winchester, 7 Mart. N. S. 22.

Me.—Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 36 A 1003, 56 AmSR 436; Upton v. Gray, 2 Me. 373.

Md.—York County Bank v. Stein, 24 Md. 447; Mayhew v. Graham, 4 Gill 339; Henderson v. Mayhew, 2 Gill 393, 41 AmD 434.

Mass.—Brooks v. Shaw, 197 Mass. 376, 84 NE 110; Tobin v. Larkin, 183 Mass. 389, 67 NE 340; Crawford v. Moran, 168 Mass. 446, 47 NE 132; Schendel v. Stevenson, 153 Mass. 351, 26 NE 689; Weil v. Raymond, 142 Mass. 206, 7 NE 860; Silver v. Jordon, 136 Mass. 319; Carroll v. St. John's Catholic Total Abstinence, etc., Soc., 125 Mass. 565; Lovell v. Williams, 125 Mass. 439; National L. Ins. Co. v. Allen, 116 Mass. 398; Kingsley v. Davis, 104 Mass. 178; Lerned v. Johns, 9 Allen 419; French v. Price, 24 Pick. 13.

Mich.—Schweyer v. Jones, 152 Mich. 241, 115 NW 974; Hillman v. Hulett, 149 Mich. 289, 112 NW 918; Frohlich v. Carroll, 127 Mich. 561, 86 NW 1034. See also MacRoberts v. Eastman, 2 Mich. N. P. 35.

Minn.—Efta v. Swanson, 115 Minn. 373, 132 NW 335 (holding that an undisclosed principal is bound by covenants of warranty in a deed made by his agent with authority); Gay v. Kelley, 109 Minn. 101, 123 NW 295, 26 LRANS 742; Lindquist v. Dickson, 98 Minn. 369, 107 NW 958, 6 LRANS 729 and note, 8 AnnCas 1024 and note; Streeter, Jr., Co. v. Janu, 90 Minn. 393, 96 NW 1128; William Lindeke Land Co. v. Levy, 76 Minn. 364, 79 NW 314.

Miss.—Simmons Hardware Co. v. Todd, 79 Miss. 163, 29 S 851.

Mo.—Weber v. Collins, 139 Mo. 501, 41 SW 249; Richardson v. Farmer, 36 Mo. 35, 88 AmD 129; Higgins v. Dellinger, 22 Mo. 397 (holding that if an agent borrows money for his principal, and procures another to become surety, without disclosing his relation as agent, the principal is answerable to the surety if he pays the debt); Leckie v. Rothenbarger, 82 Mo. A. 615; Herd v. Buffalo Bank, 66 Mo. A. 643; Provenchere v. Reifess, 62 Mo. A. 50.

Nebr.—Jones v. Wattles, 66 Nebr. 533, 92 NW 765; Cheshire Provident Ins. v. Feusner, 63 Nebr. 682, 88 NW 849; Lamb v. Thompson, 31 Nebr. 448, 48 NW 58.

N. H.—Chandler v. Coe, 54 N. H. 561.

N. J.—Greenberg v. Palmieri, 71 N. J. L. 83, 58 A 297; Yates v. Repetto, 65 N. J. L. 294, 47 A 632 (holding, in an action to recover for goods sold, that the fact that the goods were charged and billed to a person other than defendant was not per se conclusive proof that the debt was not the debt of defendant, and did not preclude plaintiff from showing that defendant was an undisclosed principal); Elliott v. Bodine, 59 N. J. L. 567, 36 A 1038; Perth Amboy Mfg. Co. v. Condit, 21 N. J. L. 659; Bocherling v. Katz, 37 N. J. Eq. 150.

N. Y.—City Trust, etc., Co. v. American Brewing Co., 182 N. Y. 285, 74 NE 948 [rev 93 App. Div. 606 mem, 87 NYS 1130 mem]; Jessup v. Steurer, 75 N. Y. 613; Cobb v. Knapp, 71 N. Y. 348, 27 AmR 51; Coleman v. Elmira First Nat. Bank, 53 N. Y. 388; Meeker v. Claghorn, 44 N. Y. 349; Dykers v. Townsend, 24 N. Y. 57; Pelletreau v. Brennan, 113 App. Div. 806, 99 NYS 955; Kinsey v. Meaney, 98 App. Div. 420, 90 NYS 327; Wasserman v. Bacon, 80 App. Div. 505, 81 NYS 193; City Trust, etc., Co. v. American Brewing Co., 70 App. Div. 511, 75 NYS 140 [aff 174 N. Y. 486, 67 NE 62]; Jennings v. Davies, 29 App. Div. 227, 51 NYS 437; New York Cent., etc., R. Co. v. Davis, 86 Hun 86, 34 NYS 206 [aff 158 N. Y. 674 mem, 52 NE 1125]; Laing v. Butler, 37 Hun 144 [aff 108 N. Y. 637 mem, 15 NE 442 mem] (holding that, in order to hold the principal under such circumstances, it must be clearly shown that the agent acted according to his authority, or that his acts had been subsequently ratified and confirmed); Inglehart v. Thousand Island Hotel Co., 7 Hun 547; Pulver v. Burke, 56 Barb. 390; Bonnell v. Briggs, 45 Barb. 470 (holding that where one employs an agent to purchase goods, and he purchases in his own name without disclosing the name of his principal, and delivers the property to his principal, and the latter without further inquiry pays the agent who keeps the money, the seller may recover the price of the principal); McMonnies v. Mackay, 39 Barb. 561; Conro v. Port Henry Iron Co., 12 Barb. 27; Nicoll v. Burke, 78 N. Y. 580 [mod on other grounds 45 N. Y. Super. 75]; Knicker-

agent,[71] and although the third person had previously refused to enter into contractual relations with the principal.[72]

This rule applies only where the person sought to be held as undisclosed principal was not known to be a party to the transaction at the time thereof;[73] but it is not dependent upon the diligence of the third person in discovering the fact of the concealed agency.[74]

Applies to written or oral contracts. The rule of

bocker Biscuit Co. v. De Voe, 81 Misc. 1, 142 NYS 1035 (holding that, where not until after judgment for goods sold did the seller discover that defendant was merely an agent, the seller can recover of the principal the balance due on the account, the judgment remaining unpaid); Indelli v. Lowenfeld, 68 Misc. 577, 125 NYS 190 (holding that where an owner of land refused to give an executory contract of sale, but directed the proposed purchaser to begin operations thereon, he is liable as an undisclosed principal to one who is employed under a written contract with the proposed purchaser); Whipple v. Webb, 44 Misc. 332, 89 NYS 900; Davis v. Lynch, 31 Misc. 724, 65 NYS 225; Adolff v. Schmitt, 13 Misc. 823, 34 NYS 930; Ernst v. Harrison, 86 NYS 247; Keller v. Haug, 96 N. Y. Suppl. 1058; Frank v. Olin, 15 NYSt 161; McGraw v. Godfrey, 14 AbbPrNS 397 [aff 56 N. Y. 610, 16 AbbPrNS 358]; Beebee v. Robert, 12 Wend. 413, 27 AmD 132. See also City Trust, etc., Surety Co. v. American Brewing Co., 88 App. Div. 383, 84 NYS 771; Ward v. Work, 65 App. Div. 84, 72 NYS 736 [aff 175 N. Y. 519 mem, 67 NE 1091 mem].

N. C.—Fountain v. West Lumber Co., 161 N. C. 85, 76 SE 533; Rounsaville v. North Carolina Home Ins. Co., 138 N. C. 191, 50 SE 619.

N. D.—Patrick v. Grand Forks Mercantile Co., 13 N. D. 12, 99 NW 55.

Oh.—Harper v. Tiffin Nat. Bank, 54 Oh. St. 425, 44 NE 97.

Or.—Du Bois v. Perkins, 21 Or. 189, 27 P 1044.

Pa.—Brown v. German-American Title, etc., Co., 174 Pa. 443, 34 A 355; Hubbard v. Ten Brook, 124 Pa. 291, 16 A 817, 10 AmSR 585, 2 LRA 823 and note; Beymer v. Bonsall, 79 Pa. 298; Youghiogheny Iron, etc., Co. v. Smith, 66 Pa. 340; Hubbert v. Borden, 6 Whart. 79; Pennsylvania Ins. Co. v. Smith, 3 Whart. 520; Phillips v. International Text Book Co., 26 Pa. Super. 230; Ruane v. Murray, 26 Pa. Super. 187; Fees v. Shadel, 20 Pa. Super. 193; McKinney v. Stephens, 17 Pa. Super. 125; McCracken v. Hamburger, 8 Pa. Co. 167.

S. C.—Bacon v. Sondley, 34 S. C. L. 542, 51 AmD 646; Macon Episcopal Church v. Wiley, 11 S. C. Eq. 584, 30 AmD 386.

S. D.—Garvin v. Pettee, 15 S. D. 266, 88 NW 573.

Tex.—Sessums v. Henry, 38 Tex. 37; Strauss v. Jones, 37 Tex. 313.

Vt.—Coverly v. Braynard, 28 Vt. 738 (holding that one who purchases goods for his own benefit is liable for them, although he purchased them upon the credit of another with his consent and without disclosing his own interest in them); Carney v. Dennison, 15 Vt. 400.

Va.—Letterman v. Charlottesville Lumber Co., 110 Va. 769, 67 SE 281; Waddill v. Sebree, 88 Va. 1012, 14 SE 849, 29 AmSR 766.

Wash.—Pennsylvania Casualty Co. v. Washington Portland Cement Co., 63 Wash. 689, 693, 116 P 284 [cit Cyc]; Jones v. Western Mfg. Co., 32 Wash. 375, 73 P 359; Belt v. Washington Water-Power Co., 24 Wash. 387, 64 P 525. See Harper v. Sinclair, 7 Wash. 372, 35 P 61.

W. Va.—State v. Nichols, 67 W. Va. 659, 662, 69 SE 304, 33 LRANS 419, 21 AnnCas 184 [cit Cyc]; Poole v. Rice, 9 W. Va. 73; Detwiler v. Green, 1 W. Va. 109.

Eng.—Browning v. Provincial Ins. Co., L. R. 5 P. C. 263; Gaskell v. Gosling, [1896] 1 Q. B. 669; Watteau v. Fenwick, [1893] 1 Q. B. 346; Calder v. Dobell, L. R. 6 C. P. 486, 2 ERC 457; Trueman v. Loder, 11 A. & E. 589, 39 ECL 319, 113 Reprint 539; Thompson v. Davenport, 9 B. & C. 78, 17 ECL 45, 109 Reprint 30; Smyth v. Anderson, 7 C. B. 21, 62 ECL 21, 137 Reprint 9; Paterson v. Gandasequi, 15 East 62, 104 Reprint 768; Smethurst v. Mitchell, 1 E. & E. 622, 102 ECL 622, 120 Reprint 1043; Higgins v. Senior, 11 L. J. Exch. 199. See Beckhuson v. Hamblet, [1901] 2 K. B. 73.

Can.—Morgan v. Johnson, 4 DomL 643, 3 OntWN 1526, 22 OntWR 868 [aff 3 OntWN 297, 20 OntWR 509]; Edgar v. Caskey, 4 DomLR 460, 21 WestLR 444.

Man.—Hutchings v. Adams, 12 Man. 118.

Ont.—Maybury v. O'Brien, 25 Ont. L. 229, 20 OntWN 683; Sanderson v. Burdett, 18 Grant Ch. (U. C.) 417.

See Hughes v. Settle, (Tenn. Ch. A.) 36 SW 577; Marshall v. Rugg, 6 Wyo. 270, 44 P 700, 45 P 486, 33 LRA 679.

[a] **The ordinary rules of responsibility** of a principal to third persons for the acts of his agent within the apparent scope of his authority apply when the relationship of principal and agent is found to exist in a case in which the agent had been acting for an undisclosed principal. Brooks v. Shaw, 197 Mass. 376, 84 NE 110.

[b] **A party to a contract bearing on its face evidence that the other party is only an agent** contracting for the benefit of another may assume that the latter is an undisclosed principal and liable as such. Clarke v. Watt, 83 Misc. 404, 145 NYS 145.

[c] **Both principal and agent liable.**—Where an agent acts in behalf of himself and an undisclosed principal, both are liable on the contract. Lull v. Anamosa Nat. Bank, 110 Iowa 537, 81 NW 784.

[d] **A foreign principal may be sued** upon a contract made by his resident agent, although the name of the principal was not disclosed by the agent at the time of making the contract. Hardy v. Fairbanks, 2 Nova Scotia 432. To the contrary see Hutton v. Bulloch, L. R. 9 Q. B. 572.

[e] **Husband acting as agent for wife; necessity of benefit to principal.**—Although the value of goods sold to an agent upon his own credit alone may, under certain circumstances, be recovered from the principal when disclosed, this under the facts of a case, where it is sought to hold a wife liable for her husband's debt, cannot be done unless the principal actually received and used or in some way got the benefit of such goods. Mickleberry v. O'Neal, 98 Ga. 42, 25 SE 933.

[f] **Knowledge of agent's irresponsibility immaterial.**—Where an agent makes purchases for an undisclosed principal it is immaterial in respect to the principal's liability upon the contract whether the purchaser knew or by reasonable diligence could have known of the agent's financial irresponsibility. Burnell v. Morrison, 46 Colo. 533, 105 P 876.

[g] **In the Philippines,** under code of commerce art 246, one who deals with an agent acquires no rights against the undisclosed principal. Castle v. Go-Juno, 7 Philippine 144.

[h] **The principal is liable for a judgment** rendered against a corporation, carrying on business under its own name, but as agent for the principal, where, after the judgment had been rendered, the principal took over the business and property of the agent, and thereafter conducted the business in its own name. Hough v. St. Louis Car Co., (Mo. A.) 165 SW 1[illegible]

Liability of dormant partner see Partnership [30 Cyc 532].

Liability of property in possession of agent of undisclosed principal for agent's debts see supra § 491.

71. Moore v. Sun Printing, etc., Assoc., 101 Fed. 591, 41 CCA 506 [aff 183 U. S. 642, 22 SCt 240, 46 L. ed. 366]; Cable Co. v. Miller, (Iowa) 143 NW 94. See also cases supra note 70.

[a] **Where a written contract of sale** is an unrestricted undertaking by the agent to perform, and is signed by such agent individually, both principal and agent are liable thereon; the agent because of the unrestricted undertaking to perform, and the principal on proof that he is the real party in interest. Eustis Mfg. Co. v. Saco Brick Co., 198 Mass. 212, 84 NE 449.

[b] **Where an agent buys in his own name** for an undisclosed principal, (1) both are bound, if the goods are received by the principal and the agent has acted within his authority, or if his acts are afterward ratified. Harder v. Continental Printing, etc., Card Co., 64 Misc. 89, 117 NYS 1001. (2) The fact that a buyer's agent signs the memorandum of the contract of sale merely with his own name does not render the contract unenforceable against his principal, where the agent has apparent authority to bind the principal and the principal's relation to the transaction is understood by the seller. Hager v. Henneberger, 83 Misc. 417, 145 NYS 152.

72. Kayton v. Barnett, 116 N. Y. 625, 23 NE 24 [rev 54 N. Y. Super. 78] (holding that, even though the third person had previously refused to enter into contractual relations with the principal or to extend to him credit, yet he may hold the principal liable on a contract made on his behalf by an agent who does not disclose him).

73. Brown v. Tainter, 114 App. Div. 446, 99 NYS 1030 (holding that, where defendant's son applied to plaintiff for a loan, which was refused unless defendant would sign the note, which she thereupon did, proof that the loan was in fact negotiated by the son for the benefit of defendant did not entitle plaintiff to hold her as an undisclosed principal).

[a] **"The rule respecting the liability of an undisclosed principal is very plain.**—Where there is in fact an agency, and that fact is concealed, the person dealing with the agent may, upon discovering the principal, proceed against the latter and not against the agent (Kayton v. Barnett, 116 N. Y. 625, 23 NE 24; Brown v. Reiman, 48 App. Div. 295, 62 NYS 663); and the rule has been carried so far that, notwithstanding there is a written agreement by which the agent appears as a principal, the true relation may be established by parol evidence and the real principal made liable (Coleman v. Elmira First Nat. Bank, 53 N. Y. 388); but all the cases in which the liability of an undisclosed principal has been enforced contain the feature that the person sought to be held liable was an unknown party to the transaction whose relationship to it was not discovered or disclosed until after it was completed." Brown v. Tainter, 114 App. Div. 446, 448, 99 NYS 1030.

74. Baldwin v. Garrett, 111 Ga. 376, 36 SE 966 (construing Civ. Code § 3024, and holding that where one dealt with an agent who failed to disclose his principal his right to proceed against the principal was not dependent on the diligence used in discovering the fact of the concealed

liability of an undisclosed principal applies as well to a simple contract in writing as to an oral contract,[75] although the written contract is such that it is required to be in writing by the statute of frauds.[76]

Executed contract. But the principal is not liable upon a contract which has been fully executed by the agent.[77]

[§ 523] **(2) Unauthorized Acts and Contracts.** The converse of the above rule is also true. Accordingly, it is the rule that, in the absence of estoppel[78] or ratification[79] an undisclosed principal is not liable on the contracts of one assuming without authority to act for him,[80] or on contracts made by his agent in excess of his authority or not in the course of his employment.[81]

agency); Raymond v. Crown, etc., Mills, 2 Metc. (Mass.) 319, 324 (where the court said: "It was contended, that if the plaintiffs had, at the time of the sale, the means of knowing that the goods were purchased on account of the defendants and for their benefit, and yet debited them to the account of Rogerson, this should bar the claim of the plaintiffs against the defendants, although they had no actual knowledge who the principal was. 'Such a principal as is suggested would present great practical difficulties in its application, and might do great injustice. The question at once arises, to what extent are the means of knowledge to exist, to justify its application? It is necessary that the vendor should avail himself of every possible means to learn whether the individual he is dealing with be principal or agent? If so, the mere neglect by the vendor to inquire of the person with whom he was actually dealing, whether he was acting as principal or agent, and if agent, the name of the principal, would be, in most cases, not using the means of knowledge which were at hand. We do not understand the rule to be applied with this strictness; but that, on the contrary, there must be actual knowledge, on the part of the vendor, of the relation of the parties, and their interest in the matter, to exonerate the principal by giving the credit to the agent. If, with such knowledge, the vendor chooses to give credit to the agent as his debtor, he discharges the liability of the principal. It is not however enough that there might exist circumstances, that would, in the minds of some men, have awakened suspicions and led to further inquiries. Nor is it enough (if we adopt the decision in the case of Thomson v. Davenport, 9 B. &. C. 78, 17 ECL 45, 109 Reprint 30) to exonerate an unknown principal, that the agent declared, at the time of the sale, that he was dealing for another, if he did not disclose the name of his principal. That case, while it fully recognizes the general rule already stated—that if one, knowing the name of the principal, elects to credit the agent, he cannot afterwards resort to the principal—denies its application to cases where the name of the principal was unknown, although the fact of the agency of the one dealing with him was disclosed, and the vendor must have been apprised that another party might be made the debtor").

[a] **Mere knowledge by the third person that there is a principal** will not destroy his right to look to the principal when afterward discovered, if from the state of his accounts with the agent no hardship follows. Ballister v. Hamilton, 3 La. Ann. 401.

[b] **Knowledge of principal under another name.**—An undisclosed principal is bound by the contracts of his agent acting within the scope of his authority, although the party with whom the contract was made may have known the principal under some other name. Phillips v. International Text Book Co., 26 Pa. Super. 230.

75. U. S.—Ford v. Williams, 21 How. 287, 16 L. ed. 36; Darrow v. H. R. Horne Produce Co., 57 Fed. 463.

Ill.—Hypes v. Griffin, 89 Ill. 134, 31 AmR 71; McConnell v. Brillhart, 17 Ill. 354, 65 AmD 661.

Kan.—Edwards v. Gildemeister, 61 Kan. 141, 59 P 259; Butler v. Kaulback, 8 Kan. 668.

Ky.—Violett v. Powell, 10 B. Mon. 347, 52 AmD 548.

Mass.—Byington v. Simpson, 134 Mass. 169, 45 AmR 314; Eastern R. Co. v. Benedict, 5 Gray 561, 66 AmD 384; Huntington v. Knox, 7 Cush. 371.

Mo.—Mantz v. Maguire, 52 Mo. A. 136.

N. H.—Chandler v. Coe, 54 N. H. 561.

N. J.—Borcherling v. Katz, 37 N. J. Eq. 150.

N. Y.—Brady v. Nally, 151 N. Y. 258, 45 NE 547 [rev 8 Misc. 9, 28 NYS 64]; Briggs v. Partridge, 64 N. Y. 357, 21 AmR 617 [aff 39 N. Y. Super. 339] (semble).

Pa.—Hubbert v. Borden, 6 Whart. 79.

Va.—Waddill v. Sebree, 88 Va. 1012, 14 SE 849, 29 AmSR 766.

Eng.—Trueman v. Loder, 11 A. & E. 589, 39 ECL 319, 113 Reprint 539; Higgins v. Senior, 11 L. J. Exch 199; Beckham v. Drake, 9 M. & W. 79 [rev on other grounds 7 Jur. 204].

Ont.—Maybury v. O'Brien, 25 Ont. L. 229, 20 OntWR 683.

Compare Rockwell v. Edgcomb, 72 Wash. 694, 131 P 191, 45 LRANS 661 (holding that, where an agent procuring in his own name, but for the benefit of the principal, an option, assigned the contract to the principal who agreed to make the deferred payments, the vendor could not compel the principal to make the deferred payments called for by the option).

76. See Frauds, Statute of [20 Cyc 275]. See also cases supra note 75.

77. Ranger v. Thalmann, 84 App. Div. 341, 82 NYS 846 [aff 178 N. Y. 574 mem, 70 NE 1108 mem, and rev 39 Misc. 420, 80 NYS 19] (holding that where an agent of an undisclosed principal buys property and executes notes therefor in his own name, and the vendor accepts the notes in payment of the price and conveys the property to the agent, the contract of sale is fully executed, and the principal is not liable thereon for the price, upon the agent's failure to pay the notes so given by him).

[a] **Accepting payment from agent.**—In any event the principal is not liable for the price where the vendor subsequently by way of compromise accepts money and securities from the agent in full payment and discharge of the notes. McMonnies v. Mackay, 39 Barb. (N. Y.) 561.

78. See supra §§ 70–74, 211–215.

79. See supra §§ 77–146.

80. Cal.—Estrella Vineyard Co. v. Butler, 125 Cal. 232, 57 P 980 (holding that, where a contract does not show on its face that the person named was acting as agent of anybody, and no reference is made to the alleged principal, and on trial no offer is made to prove that the person named in the instrument was acting for the alleged principal, and with his authority, in executing the contract, and the person named in the contract testifies that he had no authority to sign it for the alleged principal, such contract is inadmissible in evidence against the alleged principal).

Iowa.—Young v. Inman, 146 Iowa 492, 125 NW 177 (holding that, where a contract is made with an agent in his own name and apparently on his own responsibility, an actual agency must exist before his principal may be held liable).

Mich.—Hilller v. Eldred, 91 Mich. 54, 51 NW 705.

Mo.—Greenville Lumber Co. v. National Pressed Brick Co., 133 Mo. A. 217, 113 SW 236.

N. Y.—Perkins v. Huntington, 19 NYS 71 [aff 139 N. Y. 630 mem, 35 NE 206 mem].

Pa.—Brown v. German-American Title, etc., Co., 174 Pa. 443, 34 A 335 (holding that the rule as to the undisclosed principal's liability does not apply, where the relation of principal and agent does not exist in fact).

Wash.—National Lumber, etc., Co. v. Grays Harbor Commercial Co., 71 Wash. 31, 37, 127 P 577 [cit Cyc]; Murphy v. Clarkson, 25 Wash. 585, 66 P 51.

W. Va.—State v. McNeal, 66 W. Va. 411, 66 SE 512, 135 AmSR 1038, 25 LRANS 178.

Eng.—Kinahan v. Parry, [1911] 1 K. B. 459 [allowing app [1910] 2 K. B. 389].

Ont.—Maybury v. O'Brien, 26 Ont. L. 628, 6 DomLR 268, 22 OntWR 677, 3 OntWN 154 [allowing app 25 Ont. L. 229, 20 OntWR 683].

See also W. K. Niver Coal Co. v. Piedmont, etc., Coal Co., 136 Fed. 179, 69 CCA 195 (holding that, where the N. Coal Company was a general coal dealer, and not the selling agent of defendant, but bought coal from defendant and others, which it sold to whomsoever it pleased, defendant was not liable as an undisclosed principal for the N. Company's breach of a contract for the sale of coal to plaintiff).

81. U. S.—Fradley v. Hyland, 37 Fed. 49, 2 LRA 749.

Colo.—McIntosh-Huntington Co. v. Rice, 13 Colo. A. 393, 58 P 358 (holding that a principal is not bound by a written contract executed by an agent in his own name, and which is beyond the scope of his authority, and does not contain any words tending to show that it was executed for or in behalf of such principal).

La.—Curl v. Bond, 52 La. Ann. 1052, 27 S 577 (holding that the fact that an agent in possession and use of the property of his principal held himself out to the public as the owner of the same in such manner as to induce credit to be given him cannot prevail against the principal, where he did nothing to superinduce the agent's conduct, and did not acquiesce therein).

Nebr.—Moline, etc., Co. v. Neville, 38 Nebr. 433, 56 NW 983 (holding that the principal is not liable for individual contracts of the agent which have no reference to the principal's business).

N. Y.—Laing v. Butler, 37 Hun 144 [aff 108 N. Y. 637 mem, 15 NE 442 mem]; Harder v. Continental Printing, etc., Co., 64 Misc. 89, 117 NYS 1001 (holding that, if an agent, without the principal's knowledge or consent, purchases on credit without disclosing the principal, the latter is not liable to the seller); McKenna v. Stayman Mfg. Co., 112 NYS 1099. See also Coates v. Posner, 117 NYS 807.

Tex.—Edwards v. Annan, (Civ. A.) 127 SW 299 (holding that, where an agent had no authority to contract for architect's services on behalf of his principal, the principal was not liable for such services obtained by the agent, under the doctrine of undisclosed principal).

Wash.—Bowles Co. v. Clark, 59 Wash. 336, 109 P 812, 31 LRANS 613.

Ont.—Maybury v. O'Brien, 26 Ont. L. 628, 6 DomLR 268, 22 OntWR 667, 3 OntWN 1546 [app allowed 25 Ont.

[§ 524] **(3) Contracts under Seal.** It is the firmly established common-law doctrine that an action can be brought upon a sealed contract only against those whose names appear therein; and hence the general rule is that an undisclosed principal cannot be held liable upon a contract under seal executed by an agent in his own name.[82]

Where seal is unnecessary. According to some authorities, a qualification of this rule exists where the seal affixed to the contract by the agent was not necessary to the validity of the instrument at common law, it being held in such cases that the seal may be disregarded as surplusage and the principal be held liable as upon a simple contract.[83] But it has been held that an undisclosed principal is not liable on a contract executed in the name and under the seal of the agent, although the seal is unnecessary to the validity of the contract under the common law.[84]

Effect of statutes abolishing seal. By some authorities the statutes dispensing with seals upon instruments required at common law to be under seal do not alter the rule that an undisclosed principal cannot be sued thereon;[85] but, in at least one jurisdiction, it is held that the obliteration of the distinction between simple contracts and contracts under seal does away with the operation of the rule.[86]

[§ 525] **(4) Negotiable Instruments.** To the general rule of liability of an undisclosed principal on simple contracts a well defined exception exists in the case of negotiable instruments, and it is very generally held that an undisclosed principal is not liable upon a bill or note drawn, accepted, signed, or indorsed by the agent in his own name, although the agent was acting in the course of his employment and within the scope of his authority, even though the agent in making the contract adds words of procuration to his name, if he does not also disclose his principal.[87]

[§ 526] **(5) Election to Hold Agent or Principal—(a) In General.**[88] While a person who has dealt with the agent of an undisclosed principal may elect to hold either the agent,[89] or, upon discovery,

L. 229, 20 OntWR 683]; Becherer v. Asher, 23 Ont. A. 202.

[a] **Property purchased by an agent in his own name** for his undisclosed principal cannot be seized for the agent's debt, unless the creditor has been misled by appearances or by the conduct of the parties into giving him credit upon a false basis. Reed v. McIlroy, 44 Ark. 346.

82. U. S.—Clarke v. Courtney, 5 Pet. 319, 8 L. ed. 140; Western Sugar Refining Co. v. Helvetia Swiss F. Ins. Co., 163 Fed. 644; Badger Silver Min. Co. v. Drake, 88 Fed. 48, 31 CCA 378; Machesney v. Brown, 29 Fed. 145.

Ala.—Jones v. Morris, 61 Ala. 518.

Colo.—McIntosh-Huntington Co. v. Rice, 13 Colo. A. 393, 58 P 858.

Ga.—Van Dyke v. Van Dyke, 123 Ga. 686, 51 SE 582 (holding that the rule that an undisclosed principal shall stand liable for the contract of his agent, as provided by Civ. Code [1895] § 3024 does not apply where the contract is under seal); Lenney v. Finley, 118 Ga. 718, 45 SE 593; Haves v. Atlanta, 1 Ga. A. 25, 57 SE 1087.

Ill.—Walsh v. Murphy, 167 Ill. 228, 47 NE 354.

Mass.—Sharon First Baptist Church v. Harper, 191 Mass. 196, 77 NE 778; Haley v. Boston Belting Co., 140 Mass. 78, 2 NE 785; Huntington v. Knox, 7 Cush. 371.

Minn.—J. B. Streeter Co. v. Janu, 90 Minn. 393, 96 NW 1128.

Mo.—Kelley v. Thuey, 102 Mo. 522, 15 SW 62.

N. J.—Beck v. Eagle Brewery, (Ch.) 30 A 1100; Borcherling v. Katz, 37 N. J. Eq. 150.

N. Y.—Elliott v. Brady, 192 N. Y. 221, 85 NE 69, 127 AmSR 898, 18 LRANS 600; Spencer v. Huntington, 183 N. Y. 506, 76 NE 1109; Tuthill v. Wilson, 90 N. Y. 423; Kiersted v. Orange, etc., R. Co., 69 N. Y. 343, 25 AmR 199; Briggs v. Partridge, 64 N. Y. 357, 21 AmR 617; Stanton v. Granger, 125 App. Div. 174, 109 NYS 136 [aff 193 N. Y. 656 mem, 87 NE 1127 mem]; Blanchard v. Archer, 93 App. Div. 459, 87 NYS 665; Koslovki v. International Heater Co., 75 App. Div. 60, 77 NYS 794 [aff 178 N. Y. 631, 71 NE 1132]; Smith v. Pierce, 45 App. Div. 628, 60 NYS 1011; Farrar v. Lee, 10 App. Div. 130, 41 NYS 672; Baker v. Kilburn, 77 Misc. 624, 137 NYS 512; Anderson v. Connor, 43 Misc. 384, 87 NYS 449; Canda v. Casey, 14 Misc. 322, 35 NYS 1054; Evans v. Wells, 22 Wend. 324; Guyon v. Lewis, 7 Wend. 26; Taft v. Brewster, 9 Johns. 334, 6 AmD 280. See also Henricus v. Englert, 137 N. Y. 488, 33 NE 550.

R. I.—Providence v. Miller, 11 R. I. 172, 23 AmR 453.

Tex.—Sanger v. Warren, 91 Tex. 472, 44 SW 477, 66 AmSR 913.

Eng.—Beckham v. Drake, 9 M. & W. 79 [rev on other grounds 7 Jur. 204].

83. Moore v. Granby Min., etc., Co., 80 Mo. 86 (holding that such a contract will create an implied obligation on the part of the principal arising from the facts in the case); Briggs v. Partridge, 64 N. Y. 357, 21 AmR 617 (holding that, when a sealed contract has been executed in such form that it is in law the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face, and he has received the benefit of performance by the other party, and has ratified and confirmed it by acts in pais, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement); Worrall v. Munn, 5 N. Y. 229, 55 AmD 330; Lawrence v. Taylor, 5 Hill (N. Y.) 107; Evans v. Wells, 22 Wend. (N. Y.) 324; Dubois v. Delaware, etc., Canal Co., 4 Wend. (N. Y.) 285; Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 10 AmD 198; Lancaster v. Knickerbocker Ice Co., 153 Pa. 427, 26 A 251 (holding that, where a simple contract, other than a bill or note, is made by an agent in his own name, his undisclosed principal may be sued upon it; and that an unauthorized and unnecessary addition of a seal to such contract may be treated as surplusage); Kirschbon v. Bonzel, 67 Wis. 178, 29 NW 907; Stowell v. Eldred, 39 Wis. 614 (holding that, where the instrument would be valid without a seal, it is to be treated, although in fact under seal, as mere evidence of a simple contract). See also supra §§ 333–335.

[a] **In Georgia** the distinction drawn by this line of authorities does not obtain. Van Dyke v. Van Dyke, 123 Ga. 686, 51 SE 582, 3 AnnCas 978 and note.

[b] **Where the action is on an implied collateral obligation** growing out of the contract and the facts in the case, and not on the contract itself, the common-law rule has no application. Moore v. Granby Min., etc., Co., 80 Mo. 86.

84. Walsh v. Murphy, 167 Ill. 228, 47 NE 354; Moore v. House, 64 Ill. 162; Spencer v. Huntington, 100 App. Div. 463, 91 NYS 561 [aff 183 N. Y. 506 mem, 76 NE 1109 mem] (reviewing the New York cases).

85. Jones v. Morris, 61 Ala. 518, 524 (where the court said: "The instrument . . . though shorn of its dignity of a seal, retains all the operation and effect of a deed sealed at common law"); Briggs v. Partridge, 64 N. Y. 357, 21 AmR 617; Sanger v. Warren, 91 Tex. 472, 44 SW 477, 66 AmSR 913 (holding that the undisclosed principal of one who, as agent, takes a deed to himself for land, in which he becomes liable for a mortgage thereon without disclosing his agency, cannot be held for the mortgage debt upon being discovered, under the rule that, on discovery of an undisclosed principal, recovery may be had against him, since such rule did not apply at common law to instruments required to be under seal; and the force and effect of deeds under the common law was not changed by Rev. St. [1895] art 4862, providing that no seal shall be necessary to the validity of any instrument in writing, and that the addition or omission of a seal shall not affect the same).

86. Efta v. Swanson, 115 Minn. 373, 132 NW 335; J. B. Streeter, Jr., Co. v. Janu, 90 Minn. 393, 395, 96 NW 1128 (where the court said: "The distinction between sealed and unsealed private contracts has been abrogated by Laws 1899, p 88 c 86, whereby the use of private seals on written contracts is abolished, and it is expressly declared that the addition of a private seal to an instrument in writing 'shall not affect its character in any respect.' The result of this legislation is that all differences thertofore existing in the law between simple contracts and specialties, executed by private parties, and which had long prevailed, are discarded. They are alike in all respects, for the unequivocal language used must be given its full effect. See Noyes v. French Lumbering Co., 80 Minn. 397, 83 NW 385. Statutes of this import prevail in a large number of states, but the one in question is much like those of Tennessee (Shannon's Code 1896 § 3213) and Washington (Ballinger's Ann Codes & St. 1897 § 4523). We find no cases in these states which bear upon the exact question now presented. With the distinction abolished, it follows that testimony tending to show that the act of the alleged agent was within the limits of the power delegated, and that defendant was an undisclosed principal, was competent, and in this instance a prima facie case had been made against him").

87. See Bills and Notes [7 Cyc 549 et seq].

88. **Election to extend credit to agent or to disclosed principal** see supra § 518.

89. Drake v. Pope, 78 Ark. 327, 95 SW 774; Gay v. Kelley, 109 Minn. 101, 123 NW 295, 26 LRANS 742. See also supra §§ 491, 492.

the principal,[90] he cannot hold both, and, if with full knowledge of the facts material to his rights he elects to hold the agent, he thereby discharges the liability of the principal; and conversely, if he elects to hold the principal, he thereby discharges the liability of the agent,[91] He must elect between the two, and when an election is once made he must abide by it,[92] unless the principal and agent have by their acts waived the right to claim that an election to hold one releases the other.[93]

[§ 527] (b) **What Constitutes an Election—aa. In General.** An election is shown by any words or acts on the part of the third person, after knowledge of his rights, evidencing an unequivocal and final determination to depend solely upon the liability of the agent and to abandon the right to proceed against the principal, or conversely.[94] An election implies a deliberate intention, a definite purpose, to accept one party or debtor in lieu of another,[95] and an act, to have the effect of an elec-

90. Gay v. Kelley, 109 Minn. 101, 123 NW 295, 26 LRANS 742. See also supra § 522.

91. U. S.—Berry v. Chase, 146 Fed. 625, 77 CCA 161; Barrell v. Newby, 127 Fed. 656, 62 CCA 382; Atlas Steamship Co. v. Columbian Land Co., 102 Fed. 358, 42 CCA 398.

Ala.—Eufaula Grocery Co. v. Missouri Nat. Bank, 118 Ala. 408, 24 S 389.

Conn.—Jones v. Ætna Ins. Co., 14 Conn. 501.

Ill.—Ferry v. Moore, 18 Ill. A. 135.

Iowa.—Steele-Smith Grocery Co. v. Potthast, 109 Iowa 413, 80 NW 517.

Ky.—Cooper v. Ratliff, 116 SW 748; Hoffman v. Anderson, 112 Ky. 893, 67 SW 49, 24 KyL 44; Jones v. Johnson, 86 Ky. 530, 6 SW 582, 9 KyL 789.

La.—Hyde v. Wolf, 4 La. 234, 23 AmD 484.

Md.—York County Bank v. Stein, 24 Md. 447.

Mass.—Reid v. Miller, 205 Mass. 80, 91 NE 223; Weil v. Raymond, 142 Mass. 206, 7 NE 860; Kingsley v. Davis, 104 Mass. 178; Paige v. Stone, 10 Metc. 160, 43 AmD 420; Raymond v. Crown, etc., Mills, 2 Metc. 319; French v. Price, 24 Pick. 13.

Minn.—Stevens v. Wisconsin Farm Land Co., 124 Minn. 421, 145 NW 173; Lindquist v. Dickson, 98 Minn. 369, 107 NW 958, 6 LRANS 729 and note.

Miss.—Murphy v. Hutchinson, 93 Miss. 643, 48 S 178, 21 LRANS 785 and note, 17 AnnCas 611 and note.

Mo.—Provenchere v. Reifess, 62 Mo. A. 50; Sessions v. Block, 40 Mo. A. 569; Henry Ames Packing, etc., Co. v. Tucker, 8 Mo. A. 95.

N. J.—Greenberg v. Palmieri, 71 N. J. L. 83, 58 A 297.

N. Y.—Cobb v. Knapp, 71 N. Y. 348, 27 AmR 51; Coleman v. Elmira First Nat. Bank, 53 N. Y. 388; Swartwout v. McGowan, 141 App. Div. 846, 126 NYS 887; Ranger v. Thalmann, 84 App. Div. 341, 82 NYS 846 [aff 178 N. Y. 574 mem, 70 NE 1108 mem, and rev 39 Misc. 420, 80 NYS 19]; Brown v. Reiman, 48 App. Div. 295, 62 NYS 663; Remmel v. Townsend, 83 Hun 353, 31 NYS 985; Robison v. Bass, 80 Misc. 132, 141 NYS 693; Jablon v. Traynor, 76 Misc. 532, 135 NYS 545; Furcull v. Bittner, 69 Misc. 112, 125 NYS 36; Consolidated Safety Pin Co. v. Humbert, 128 NYS 710; Rathbone v. Tucker, 15 Wend. 498 [aff 18 Wend. 175].

Pa.—Beymer v. Bonsall, 79 Pa. 298. See also Pennsylvania Ins. Co. v. Smith, 3 Whart. 520.

Tenn.—Bass v. Gerst Brewing Co., 2 Tenn. Civ. A. 639, 642 [cit Cyc] (until election he may pursue either party).

Vt.—Daggett v. Champlain Mfg. Co., 71 Vt. 370, 45 A 755.

Va.—Leterman v. Charlottesville Lumber Co., 110 Va. 769, 67 SE 281.

Wash.—Le Vette v. Hardman, 77 Wash. 320, 137 P 454 (holding that a lessee who dealt with a known owner and sought to enforce her cause of action for damages caused by the flooding of her premises against such owner could not hold the owner's rental agent also liable for the damages); McDonald v. New World L. Ins. Co., 76 Wash. 488, 136 P 702 (election to hold agent); Pennsylvania Casualty Co. v. Washington Portland Cement Co., 63 Wash. 689, 693, 116 P 284 [cit Cyc].

Eng.—Thomson v. Davenport, 9 B. & C. 78, 17 ECL 45, 109 Reprint 30; Paterson v. Gandasequi, 15 East 62, 104 Reprint 768; Thornton v. Meux, M. & M. 43, 22 ECL 467; Addison v. Gandassequi, 4 Taunt 574, 128 Reprint 454; MacClure v. Schemeil, 20 Wkly. Rep. 168.

Ont.—Mail Printing Co. v. Devlin, 17 Ont. 15.

[a] **Reason for rule.**—"Respecting election, what difference in reason does it make whether the seller ascertains the identity of the principal before he delivers the goods and extends the credit, or after delivery but before he seeks to exact payment? In the first case, we understand plaintiffs to agree that the seller must elect. In the second, the seller manifestly has passed on the credit of but a single person. If, before payment, he finds out who the principal is, it is just that he should be able to hold the agent, for the agent offered his own credit and it was accepted. It is also just that the seller should be permitted to abandon the right that he had in the first instance to pursue the agent, and to hold the principal, for the contract of purchase was in reality the principal's. When, after delivery, but before seeking to exact payment, the seller learns the identity of the principal, he has an opportunity for investigating and comparing the standings of agent and principal, just as he would have had if he had known the principal before delivery. We apprehend no rule of law that warrants the conclusion that the seller must elect in the one case and not in the other. We perceive no solid reason why the law, in behalf of the seller, who in both cases has really contemplated and contracted for a single credit only, should in the one case more than the other create a contract under which the agent and principal stand as joint and several, or several, obligors. The decision in Beymer v. Bonsall, 79 Pa. 298, and expressions in some other cases, to the effect that one who sells to the agent of an undisclosed principal may, on discovery of the principal, pursue either or both until he has obtained satisfaction (as though they were joint tortfeasors), do not meet our approval." Barrell v. Newby, 127 Fed. 656, 660, 62 CCA 382.

[b] **Election as distinguished from equitable estoppel.**—"Election, whether of remedies or of defendants, has no regard to the situation of the defendant, but is founded on a public policy that forbids a plaintiff to trifle with the courts. Equitable estoppel, on the other hand, grows out of a consideration of the defendant's state. They are distinct defenses, and he who pleads election need not show that it would be inequitable to permit the plaintiff to recover; it is enough if he shows that the plaintiff, having by law the right to take either of two courses, has taken and holds to the one that leads away from him." Barrell v. Newby, 127 Fed. 656, 661, 62 CCA 382.

[c] **Where both the agent and the principal are made defendants,** it does not require a directed verdict for defendants, where no motion is made to require plaintiff to elect. Stevens v. Wisconsin Farm Land Co., 124 Minn. 421, 145 NW 173.

92. Berry v. Chase, 146 Fed. 625, 77 CCA 161; Greenburg v. Palmieri, 71 N. J. L. 83, 58 A 297 (holding that, where a party giving credit to an agent sues after knowledge of the agency, and the name of the principal, he cannot recede from his election); Cherrington v. Burchell, 147 App. Div. 16, 131 NYS 631 (holding that, where a broker who sold realty under a belief that it was owned by defendant learned that defendant only acted as the agent of his wife who owned the land, in procuring its sale, he was bound to elect whether he would hold defendant for failure to disclose his agency, or hold the wife for the acts of defendant as her agent, and could not sue them both for commission); Goodale v. Page, 92 S. C. 413, 75 SE 700.

[a] **Claim cannot be split.**—Where materials are furnished, and charged to the agent of an undisclosed principal, the creditor may, after discovering the facts, hold either the principal or agent, at his election, but he cannot divide his claim, and hold both as principal debtors, the one for a part and the other for the remainder of the debt. Booth v. Barron, 29 App. Div. 66, 51 NYS 391.

93. Brannan v. Purcell, 41 Oh. St. 187, 202 [aff 8 Oh. Dec. (Reprint) 159, 6 CincLBul 67] (where the court said: "It is true that, ordinarily, one who so deals with an agent that he may choose whether he will make the agent, or the principal, his debtor, by taking judgment against the agent, or by accepting a dividend from the agent's assignee, estops himself from thereafter suing the principal. But the principal and agent may by agreement, or by act convert this alternative liability into a joint and several liability; or a liability in succession. Either may estop himself from claiming that the election of the creditor to treat the other as his debtor has released him").

94. U. S.—Berry v. Chase, 179 Fed. 426, 102 CCA 572; Atlas Steamship Co. v. Colombian Land Co., 102 Fed. 358, 42 CCA 398.

Ill.—Ferry v. Moore, 18 Ill. A. 135.

Iowa.—Steele-Smith Grocery Co. v. Potthast, 109 Iowa 413, 80 NW 517.

Oh.—Smart v. N. C. Lodge No. 2, 27 Oh. Cir. Ct. 273 (holding that, where a business office was alleged to have been occupied by the agent of defendant, the fact that plaintiff took possession of the furniture left in the office by the agent was not an election to proceed against the agent for the rent, so as to bar suit against the principal).

Eng.—Thornton v. Meux, M. & M. 43, 22 ECL 467; MacClure v. Schemeil, 20 Wkly. Rep. 168.

Ont.—Mail Printing Co. v. Devlin, 17 Ont. 15.

[a] **Attachment.**—(1) Where a borrower, who has sustained loss through the embezzlement of funds paid by the lender to the lender's agent, attaches the property of the agent, alleging that the money embezzled was received for plaintiff's use and benefit, he waives the right to recover of the lender. McLean v. Ficke, 94 Iowa 283, 62 NW 753. (2) But the issuance against the agent, as defendant, of a writ of foreign attachment and the seizure thereunder of the principal's property do not constitute an election to hold the agent. Glenn v. Davis, 2 Grant Cas. (Pa.) 153.

95. Atlas Steamship Co. v. Colombian Land Co., 102 Fed. 358, 42 CCA 398.

tion, must be decisive.[96] Thus accepting a note of the agent, after discovery of the principal, is generally held to constitute an election to hold the agent and to release the principal from liability.[97]

Knowledge of facts necessary. In order, however, to render an election binding upon the third person he must at the time of electing have full knowledge of all facts material to his rights and to the liabilities of the several parties,[98] including not only the fact of agency but the name of the principal.[99]

[§ 528] **bb. Commencement of Suit.** Commencing an action against the agent after discovery of the principal, although evidence of an election, is generally held not to be conclusive evidence thereof, and does not of itself operate to discharge the principal,[1] although it has been held otherwise.[2] Likewise the commencement of a suit against the principal, when disclosed, does not bar a suit against the agent.[3] Commencement of action against both agent and undisclosed principal does not operate as an election to hold the principal and not the agent, and vice versa.[4] So, where a suit against both principal and agent jointly is dismissed against one of them with-

96. Berry v. Chase, 179 Fed. 426, 102 CCA 572.

[a] **To relieve the principal** "there must be acts indicating an intent, with full knowledge of all the facts, to give sole credit to the agent, and to abandon all claim against the principal." Netterstrom v. Peerless Portland Cement Co., 133 Ill. A. 579, 585 [quot Ferry v. Moore, 18 Ill. A. 135, 141].

[b] **An assignment of a claim** against an agent, with an express authorization of suit against any undisclosed principal, although the assignor had knowledge of the principal originally undisclosed, does not amount to an election to look to either the agent or principal to the exclusion of the other. Berry v. Chase, 179 Fed. 426, 102 CCA 572.

[c] **The mere act of charging the agent,** after knowledge of the principal, does not amount to an election to hold the agent and relieve the principal. Jones v. Johnson, 86 Ky. 530, 6 SW 532, 9 KyL 789.

[d] **Filing a claim in bankruptcy** against the estate of the insolvent agent of an undisclosed principal is not a conclusive election of the creditor to hold the agent. Curtis v. Williamson, L. R. 10 Q. B. 57; Borries v. Imperial Ottoman Bank, L. R. 9 C. P. 38; Taylor v. Sheppard, 1 Y. & C. Exch. 271.

[e] **Demands made upon the agent** by the contracting party, after the principal has been disclosed, do not necessarily amount to an election on the part of such party to give credit to the agent, and to him only. Calder v. Dobell, L. R. 6 C. P. 486, 2 ERC 457.

[f] **Negotiating with the agent after discovery of the agency** does not constitute an election by the third person to hold him rather than his principal. Sanger v. Warren, (Tex. Civ. A. 1897) 40 SW 840.

97. Paige v. Stone, 10 Metc. (Mass.) 160, 43 AmD 420; French v. Price, 24 Pick. (Mass.) 13; Henry Ames Packing, etc., Co. v. Tucker, 8 Mo. A. 95; Coleman v. Elmira First Nat. Bank, 53 N. Y. 388. See also supra § 518. Compare Bowman v. Lickey, 86 Mo. A. 47 (holding that, where, after a lender's agent had converted the loan, he, at the suggestion of another's agent, conveyed certain securities to the borrower, who consented to the transaction only on the condition that it should inure to the benefit of the lender and with the understanding that the latter should make him whole, the doctrine of the election of remedies does not apply to the borrower and he is not estopped to pursue his remedy against the lender, especially where the securities are worthless).

[a] **Taking the agent's note without knowledge** of the principal's existence or identity does not constitute an election. Merrill v. Kenyon, 48 Conn. 314, 40 AmR 174.

[b] **An election is not shown,** it seems, where the agent's note is accepted in payment of a debt, under the impression that it is the note of the principal. Keller v. Singleton, 69 Ga. 703.

[c] **Submission to arbitration.**—Where an agent has rendered himself personally liable by not disclosing in time the name of his principal, he is not discharged from such liability merely by the fact that the third party subsequently agreed with the principal to submit to arbitration, the controversy between them relative to the subject matter of the transaction. Nason v. Cockroft, 10 N. Y. Super 366.

98. U. S.—Pope v. Meadow Spring Dist. Co., 20 Fed. 35.

Conn.—Merrill v. Kenyon, 48 Conn. 314, 40 AmR 174.

Ky.—Hoffman v. Anderson, 112 Ky. 893, 67 SW 49, 24 KyL 44.

Md.—Henderson v. Mayhew, 2 Gill 393, 41 AmD 434.

Mass.—Reid v. Miller, 205 Mass. 80, 91 NE 223; Beston v. Amadon, 172 Mass. 84, 51 NE 452; Kingsley v. Davis, 104 Mass. 178; Paige v. Stone, 10 Metc. 160, 43 AmD 420; French v. Price, 24 Pick. 13.

Minn.—Linquist v. Dickson, 98 Minn. 369, 107 NW 958, 6 LRANS 729.

Mo.—Henry Ames Packing, etc., Co. v. Tucker, 8 Mo. A. 95.

N. Y.—Coleman v. Elmira First Nat. Bank, 53 N. Y. 388; Sweeney v. Douglas Copper Co., 149 App. Div. 568, 134 NYS 247; Ranger v. Thalmann, 84 App. Div. 341, 82 NYS 846 [rev 39 Misc. 420, 80 NYS 19, and aff 178 N. Y. 574 mem, 70 NE 1108 mem]; Brown v. Reiman, 48 App. Div. 295, 62 NYS 663 (holding that "it is a well-settled rule that a creditor can not make an election either of remedies or parties without first realizing that the opportunity of exercising his preference is afforded him"); Remmel v. Townsend, 83 Hun 353, 355, 31 NYS 985 (where the court said: "The act of electing between two remedies presupposes such knowledge on the part of the one performing the act that he has an opportunity of choosing between two or more courses to pursue. If he understands there is but one thing for him to obtain, or but one course that he can take, he cannot be said to have made a choice"); Knickerbocker Biscuit Co. v. De Voe, 81 Misc. 1, 142 NYS 1035; Dages v. Melrose Iron Co., 140 NYS 392.

Eng.—Curtis v. Williamson, L. R. 10 Q. B. 57; Dunn v. Newton, Cab. & E. 278 (holding that the knowledge of the real facts required as the foundation of an election to charge the agent or the undisclosed principal must be actual personal knowledge; knowledge of a foreman would not defeat the employer's right).

99. U. S.—Barrell v. Newby, 127 Fed. 656, 62 CCA 382.

Ala.—Clealand v. Walker, 11 Ala. 1058, 46 AmD 238.

Conn.—Merrill v. Kenyon, 48 Conn. 314, 40 AmR 174 (holding that, where one sells goods to another, who informs him that he is an agent, but does not disclose his principal's name, and the seller does not inquire as to the name, and does not know who the principal is, but takes the agent's note for the price, he may still elect to hold the principal); Jones v. Ætna Ins. Co., 14 Conn. 501.

Ga.—Graham v. Campbell, 56 Ga. 258.

Iowa.—Steele-Smith Grocery Co. v. Potthast, 109 Iowa 413, 80 NW 517; Thurston v. Mauro, 1 Greene 231.

La.—Ballister v. Hamilton, 3 La. Ann. 401.

Md.—York County Bank v. Stein, 24 Md. 447; Henderson v. Mayhew, 2 Gill 393, 41 AmD 434.

Mass.—Bartlett v. Hawley, 120 Mass. 92; Raymond v. Crown, etc., Mills, 2 Metc. 319.

N. J.—Greenburg v. Palmieri, 71 N. J. L. 83, 58 A 297.

N. Y.—Taylor v. Jackson, 35 Misc. 300, 71 NYS 745; McGraw v. Godfrey, 14 AbbPrNS 397 [aff 56 N. Y. 610 mem, 16 AbbPrNS 358] (holding that a creditor is not presumed to elect to hold either an undisclosed principal or his agent as debtor until the name and credit of both are before him).

Vt.—Chase v. Robinson, 86 Vt. 240, 84 A 867; Arnold v. Sprague, 34 Vt. 402; Carney v. Dennison, 15 Vt. 400.

Eng.—Curtis v. Williamson, L. R. 10 Q. B. 57; Thomson v. Davenport, 9 B. & C. 78, 17 ECL 45, 109 Reprint 30.

1. Ill.—Netterstrom v. Peerless Portland Cement Co., 133 Ill. A. 579; Ferry v. Moore, 18 Ill. A. 135.

Mass.—Raymond v. Crown, etc., Mills, 2 Metc. 319.

N. Y.—Cobb v. Knapp, 71 N. Y. 348, 27 AmR 51.

Vt.—Daggett v. Champlain Mfg. Co., 71 Vt. 370, 45 A 755 (holding that, where the evidence tended to show that one sold goods directly to the principal, the fact that he brought suit against the agent to recover for such goods did not operate as such an election as to bar an action against the principal); Bertoli v. Smith, 69 Vt. 425, 38 A 76.

Va.—Richmond Union Pass. R. Co. v. New York, etc., R. Co., 95 Va. 386, 28 SE 573.

Eng.—Curtis v. Williamson, L. R. 10 Q. B. 57.

[a] **A fortiori,** the commencement of an action against the agent which is never prosecuted is no bar to an action against the principal. Richmond Union Pass. R. Co. v. New York, etc., R. Co., 95 Va. 386, 28 SE 573.

[b] **Filing affidavit against insolvent agent.**—It has been held that the mere fact of filing an affidavit of proof against the estate of an insolvent agent of an undisclosed principal, after the undisclosed principal is known to the creditor, is not a conclusive election to the creditor to treat the agent as his debtor. Beymer v. Bonsall, 79 Pa. 298.

[c] **Discovery after commencement of suit.**—Where, after an action for goods sold and delivered had been commenced against an undisclosed agent, the fact of agency was discovered, the commencement of the action does not constitute an election to charge the agent, so as to preclude an action against the principal. Steele-Smith Grocery Co. v. Potthast, 109 Iowa 413, 80 NW 517.

2. McLean v. Ficke, 94 Iowa 283, 62 NW 753; Greenberg v. Palmieri, 71 N. J. L. 83, 58 A 297.

3. Bartlett v. Chicago First Nat. Bank, 156 Ill. A. 415 [aff 247 Ill. 490, 93 NE 337]. See also Hoffman v. Anderson, 112 Ky. 893, 67 SW 49, 24 KyL 44.

4. Tew v. Wolfsohn, 77 App. Div. 454, 79 NYS 286, 33 NYCivProc 278 [aff 174 N. Y. 272, 66 NE 934]; Mattlage v. Poole, 15 Hun (N. Y.) 556;

out proceeding to judgment against the other, it does not operate as an election to rely solely on the other, against whom no judgment is rendered.[5]

[§ 529] **cc. Recovery of Judgment.** It is, as a general rule, held that, in cases where the principal and the agent are both liable, they cannot be sued jointly, but the plaintiff must elect which one he will hold; and a suit prosecuted to judgment against either, although without satisfaction, will have the effect of discharging the remedy against the other.[6] Some authorities, however, incline to the view, analogous to the general doctrine in actions for tort, that the principal and the agent may be pursued, either jointly or severally, until one satisfaction has been obtained, and that a judgment against one is not an election to hold him only, unless the judgment is satisfied.[7] A judgment obtained against either the principal or agent, before the third person has knowledge of the other, does not amount to an election to hold the party against whom the judgment is obtained, unless after such knowledge he satisfies the judgment against him.[8]

[§ 530] **(c) Time of Election.** The right to hold the principal where the fact of the agency and his name are subsequently discovered must be exercised within a reasonable time.[9]

[§ 531] **(6) Effect of Change of Status or of State of Accounts between Principal and Agent.** The rule that an undisclosed principal, when discovered, may be held liable upon a contract made in his behalf[10] will not be enforced for the advantage of a third party, if it will work injustice to the principal.[11] An undisclosed principal may be relieved from liability by reason of a changed state of ac-

Bass v. William Gerst Brewing Co., 2 Tenn. Civ. A. 639, 642 [cit Cyc].

[a] **Where agency is denied,** one seeking to enforce a contract made by an alleged agent without disclosing his principal may commence an action against both to ascertain the facts. Gay v. Kelley, 109 Minn. 101, 123 NW 295, 26 LRANS 742.

5. Mussenden v. Raiffe, 131 Ill. A. 456; Ross v. McAnaw, 72 Mo. A. 99; Equitable Co-op. Fdy. Co. v. Hersee, 33 Hun 169 [aff 103 N. Y. 25, 9 NE 487]. Compare Gay v. Kelley, 109 Minn. 101, 123 NW 295, 26 LRANS 742 (holding that, in an action against both an alleged agent and his undisclosed principal, a dismissal at the close of plaintiffs' case as to the alleged agent, in response to a motion that plaintiffs be required to elect, was equivalent to an election to hold the alleged undisclosed principal).

6. U. S.—Barrell v. Newby, 127 Fed. 656, 62 CCA 382 (holding that, where plaintiffs, having made a contract with one known to be acting as agent for an undisclosed principal, after knowledge of the identity of the principal, brought two actions against the agent on the contract, in each of which they procured attachments and garnished persons who owed money to the agent, this constituted an election to hold the agent which precluded them from subsequently maintaining an action against the principal); Orvis v. Wells, 73 Fed. 110, 19 CCA 382.

Conn.—Jones v. Ætna Ins. Co., 14 Conn. 501.

Ky.—Hoffman v. Anderson, 112 Ky. 893, 67 SW 49, 24 KyL 44; Jones v. Johnson, 86 Ky. 530, 6 SW 582, 9 KyL 789.

Md.—E. J. Codd Co. v. Parker, 97 Md. 319, 55 A 623 (holding that, where a seller of goods, after discovering the purchaser's principal, elects to sue the principal, and does so to final judgment, he cannot thereafter sue the agent).

Mass.—Weil v. Raymond, 142 Mass. 206, 7 NE 860; Kingsley v. Davis, 104 Mass. 178.

Mo.—Provenchere v. Reifess, 62 Mo. A. 50; Sessions v. Block, 40 Mo. A. 569.

N. J.—Coles v. McKenna, 80 N. J. L. 48, 76 A 344; Yates v. Repetto, 65 N. J. L. 294, 47 A 632; Elliott v. Bodine, 59 N. J. L. 567, 36 A 1038.

N. Y.—Tuthill v. Wilson, 90 N. Y. 423; Ranger v. Thalmann, 65 App. Div. 5, 72 NYS 451; Equitable Co-op. Fdy. Co. v. Hersee, 33 Hun 169 [aff 103 N. Y. 25, 9 NE 487]; Mattlage v. Poole, 15 Hun 556 [cit Meeker v. Claghorn, 44 N. Y. 349]; Nason v. Cockroft, 10 N. Y. Super. 366; Borell v. Newell, 3 Daly 233; Fitzsimmons v. Baxter, 3 Daly 81; Furculi v. Bittner, 69 Misc. 112, 125 NYS 36 (recovering judgment against agent); Lage v. Weinstein, 35 Misc. 298, 71 NYS 744; Oxford First Nat. Bank v. Turner, 24 NYS 793. But see Tew v. Wolfsohn, 77 App. Div. 454, 458, 79 NYS 286, 33 NYCivProc 278 [aff 38 Misc. 54, 76 NYS 919, and aff 174 N. Y. 272, 66 NE 934] (holding that, in an action against an agent and his principal on a contract made by the agent without disclosing his agency, there need be no election by plaintiff as to which party he will hold until the close of the case. And where the court said: "The doctrine of election, in its general application, is inequitable and harsh, and it should not be applied to an action brought upon a contract made by an agent without disclosing his principal, until the debt has been satisfied by one or the other"); McLean v. Sexton, 44 App. Div. 520, 523, 60 NYS 871 (where the court said: "There is no good reason why both the principal and agent who are liable for a debt should not be sued in the same action. Both will be discharged by the satisfaction of the debt, and neither can be discharged without it"); Dages v. Melrose Iron Co., 140 NYS 392.

N. C.—Rounsaville v. North Carolina Home Ins. Co., 138 N. C. 191, 50 SE 619.

Tenn.—Ahrens v. Cobb, 9 Humphr. 643.

Tex.—Pittsburg Plate Glass Co. v. Roquemore, (Civ. A.) 88 SW 449 (holding that, where suit is brought against the agent of an undisclosed principal, and the agent discloses his principal, who is thereupon brought in as a party, and plaintiff establishes a case against both the agent and the principal, he must elect which of the two he will ask judgment against).

Eng.—Kendall v. Hamilton, 4 App. Cas. 504, 1 ERC 175; Paterson v. Gandasequi, 15 East 62, 104 Reprint 768; Priestly v. Fernie, 3 H. & C. 977; Cross v. Matthews, 91 L. T. N. S. 500.

B. C.—Semisch v. Guenther, 10 B. C. 371.

[a] **An agent's liability on a warranty** is discharged by a recovery of full damages from the principal. Dahlstrom v. Gemunder, 198 N. Y. 449, 92 NE 106, 19 AnnCas 771 [rev 133 App. Div. 69, 118 NYS 1102 mem].

[b] **A judgment on the merits for the agent** warrants a reversal of a judgment against the principal. Callahan v. Graves, 37 Okl. 503, 132 P 474, 46 LRANS 350.

7. U. S.—Interstate Tel. Co. v. Baltimore, etc., Tel. Co., 51 Fed. 49 [aff 54 Fed. 50, 4 CCA 184].

Colo.—Marriott v. Clise, 12 Colo. 561, 21 P 909.

Ind.—Nave v. Hadley, 74 Ind. 155.

Mich.—Krolik v. Curry, 148 Mich. 214, 111 NW 761.

Oh.—Maple v. Cincinnati, etc., R. Co., 40 Oh. St. 313, 48 AmR 685.

Pa.—Beymer v. Bonsall, 79 Pa. 298 [appr Cobb. v. Knapp, 71 N. Y. 348, 27 AmR 51].

See Partington v. Hawthorne, 52 J. P. 807 (holding that if the judgment against the agent is subsequently set aside, action may thereupon be brought against the principal).

[a] **One who fails to recover the whole amount** of his claim, in a suit against a corporation as maker of a draft which was drawn by it and accepted by its treasurer so as to bind him individually, is not thereby estopped to sue the officer as acceptor, for the balance. Eells v. Shea, 20 Oh. Cir. Ct. 527, 11 Oh. Cir. Dec. 304.

8. Greenberg v. Palmieri, 71 N. J. L. 83, 58 A 297 (holding that, where a party giving credit to an agent recovers judgment before he has knowledge of the principal, he may recover from the principal, unless he satisfies the judgment against the agent); Brown v. Reiman, 48 App. Div. 295, 62 NYS 663 (holding that sellers who gave credit to and sued agents authorized to buy goods from them cannot be said to have elected to rely solely on the personal responsibility of the agents, nor can they be concluded, by reason of their actions against the agents, from pursuing the principal, when his existence only became known to the seller after the commencement of bankruptcy proceedings by the agents to avoid judgments which the sellers had secured against them).

9. Ark.—Mississippi Valley Constr. Co. v. Abeles, 87 Ark. 374, 112 SW 894.

Iowa.—Steele-Smith Grocery Co. v. Potthast, 109 Iowa 413, 80 NW 517.

La.—New Castle Mfg. Co. v. Red River R. Co., 1 Rob. 145, 36 AmD 686.

N. Y.—McGraw v. Godfrey, 14 AbbPrNS 397 [aff 56 N. Y. 610 mem, 16 AbbPrNS 358].

Eng.—Irvine v. Watson, 5 Q. B. D. 102 [app dism 5 Q. B. D. 414]; Curtis v. Williamson, L. R. 10 Q. B. 57; Smethurst v. Mitchell, 1 E. & E. 622, 102 ECL 622, 120 Reprint 1043. Compare Campbell v. Hicks, 28 L. J. Exch. 70 (holding that the sellers' right to resort to the undisclosed principal, on a contract made by an agent in his own name, is not affected by their delaying to do so until persons to whom the agent has resold have become insolvent, the principal not having paid the agent in the meantime or otherwise altered his position. On the other hand the third person, on discovering the principal, may take a reasonable time to investigate and compare the standings of principal and agent).

[a] **A delay of a few months** after knowledge of the principal before bringing suit against him is not so unreasonable as to bar the right of election, where it does not appear that defendant was prejudiced by such delay. Berry v. Chase, 179 Fed. 426, 103 CCA 572.

10. See supra § 522.

11. Yenni v. Ocean Nat. Bank, 5 Daly (N. Y.) 421, 432 (where the court, referring to the general rule as to the liability of an undisclosed principal, said: "That rule is founded upon the justice of holding the undisclosed principal responsible, although the agent made the contract in his own name, or generally as

counts between him and the agent, the rule formerly laid down in England and now very generally followed in the United States being that, where the principal, acting in good faith, has settled with the agent so that he would be subjected to loss were he compelled to pay the third person, he is relieved from liability to the latter,[12] and this doctrine is, in at least one jurisdiction, in effect prescribed by statute.[13] This doctrine is now held in England, and in a few cases in the United States, to be too broad, and the better rule is stated to be that the principal is discharged only where he has been induced to settle with the agent by conduct on the part of the third person leading him to believe that such person has settled with the agent or has elected to hold the latter.[14] In any event the principal is relieved from liability, where he has been induced by the conduct of the third person to settle with the agent.[15]

[§ 532] **3. In Tort—a. Civil Liability—(1) In General.**[16] Upon the principle that he who does an act by another does it himself, a principal is liable to third persons for torts committed by his agent in pursuance of, or as a natural result of, express orders given by the principal, or which he has expressly authorized or specially directed his agent to commit.[17]

[§ 533] **(2) Tort within Course of Employ-**

agent, without specifying his principal, because the contract was made by the principal's direction and for his benefit. But that rule is never enforced for the advantage of a third party, if it would work injustice to the principal. As the third party contracted with the agent in his own name, or generally as an agent, without any knowledge of the principal, he has no right to look to the principal, if the principal, without any default upon his part, would then be prejudiced by being made personally liable. The rule is subject to the correlative rights existing, as between the principal and his agent, and will not be enforced against the principal where it would be inequitable and unjust to do so").

12. U. S.—Fradley v. Hyland, 37 Fed. 49, 2 LRA 749.

Ala.—Clealand v. Walker, 11 Ala. 1058, 46 AmD 238.

Del.—Bush v. Devine, 5 Del. 375.

Ga.—Baldwin v. Garrett, 111 Ga. 876, 36 SE 966 (construing Civ. Code § 3024, so providing); Ketchum v. Verdell, 42 Ga. 534.

Ill.—Fowler v. Pearce, 49 Ill. 59.

Ind.—Thomas v. Atkinson, 38 Ind. 248 (holding that, where a special agent purchases on credit, without disclosing his agency, and without authority to purchase on credit, the principal is not liable after having paid the agent).

Mass.—Emerson v. Patch, 123 Mass. 541 (holding, however, that the principal is relieved only when it is ascertained as a fact that a bona fide settlement with the agent has actually been effected).

N. Y.—Knapp v. Simon, 96 N. Y. 284; Laing v. Butler, 37 Hun 144 [aff 108 N. Y. 637 mem, 15 NE 442 mem]; McCullough v. Thompson, 45 N. Y. Super. 449; Rowan v. Buttman, 1 Daly 412; Fish v. Wood, 4 E. D. Smith 327; Harder v. Continental Printing, etc., Co., 64 Misc. 89, 117 NYS 1001 (holding that, where an agent purchases on the credit authorized by his principal and without disclosing him, and the principal subsequently pays the agent in good faith before the agency is disclosed to the seller, the principal is not liable to the seller); Daly v. Monroe, 2 NYCityCt 160; Rathbone v. Tucker, 15 Wend. 498; Muldon v. Whitlock, 1 Cow. 290, 13 AmD 533; Cheever v. Smith, 15 Johns. 276. See also Jaques v. Todd, 3 Wend. 88.

Eng.—Thomson v. Davenport, 9 B. & C. 78, 17 ECL 45, 109 Reprint 30. And see Nelson v. Powell, 3 Dougl. 410, 26 ECL 269, 99 Reprint 723.

N. S.—Almon v. Tremlet, 1 N. S. 89.

[a] **Settlement with the agent must be bona fide.**—Emerson v. Patch, 123 Mass. 541; Powell v. Nelson [cit Paterson v. Gandasequi, 15 East 65, 104 Reprint 768, 769].

13. Sims v. Frew, (Cal. A.) 142 P 106 (holding that, under Civ. Code § 2335, if exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment or other satisfaction made by him to his agent in good faith, before receiving notice of the creditor's election to hold him responsible).

14. Ballister v. Hamilton, 3 La. Ann. 401; Hyde v. Wolf, 4 La. 234, 23 AmD 484 (holding the principal liable, unless the third person furnishes the agent with some document by which he obtains a settlement from the principal); Brown v. Bankers', etc., Tel. Co., 30 Md. 39; York County Bank v. Stein, 24 Md. 447; Davison v. Donaldson, 9 Q. B. D. 623; Irvine v. Watson, 5 Q. B. D. 102 [app dism 5 Q. B. D. 414]; Armstrong v. Stokes, L. R. 7 Q. B. 598, 2 ERC 471; Smyth v. Anderson, 7 C. B. 21, 62 ECL 21, 137 Reprint 9; Wyatt v. Hertford, 3 East 147, 102 Reprint 558; Heald v. Kenworthy, 10 Exch. 739; MacClure v. Schemell, 20 Wkly. Rep. 168; Arbuthnot v. Dupas, 15 Man. 634, 12 WestLR 445 (holding that a person who sells goods to the agent of an undisclosed principal, believing the agent to be the principal, may sue the principal on discovery of the facts, and the principal will not be discharged from liability by having made payment to the agent before such discovery, unless the conduct of the seller has been such as to make it unjust for him to call upon the principal for payment, or unless the character of the business is such as naturally to lead the principal to suppose that the seller would give credit to the agent alone).

[a] **Delay in obtaining payment from the agent** may operate to relieve the principal if he is induced thereby to settle in the belief that settlement has been consummated between the agent and the third person. Kymer v. Suwercropp, 1 Campb. 109 (holding that the principal may be discharged by the third person's allowing the date of payment to elapse); MacClure v. Schemell, 20 Wkly. Rep. 168. But see Davison v. Donaldson, 9 Q. B. D. 623.

[b] **Delay in presenting claim to principal.**—Where a principal receives of his agent a voucher for work done by another employed by the agent, receipted by the agent in such other's name, and the sum so evidenced is credited to the agent and the balance due from him proportionately reduced, but no actual settlement by payment of this balance is had; such other is not estopped, by delay in presenting his claim to the principal, to hold him liable. McKeen v. Providence County Sav. Bank, 24 R. I. 542, 54 A 49.

[c] **Origin, development, and qualification of the rule.**—The leading English case in which the rule was first laid down and which has been almost universally followed in the United States was Thomson v. Davenport, 9 B. & C. 78, 17 ECL 45, 109 Reprint 30, in which the court said by way of dictum, that the liability of an undisclosed principal was subject to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. A later English case, Heald v. Kenworthy, 10 Exch. 739, declared that this dictum was too broad, and that the principal was relieved only when he had been induced to settle with the agent by acts of the third person. A still later case, Armstrong v. Stokes, L. R. 7 Q. B. 598, 2 ERC 471, attempted to establish a distinction between cases in which the agency was undisclosed and those in which the agency was disclosed, but the identity of the principal was undisclosed, holding the rule in Thomson v. Davenport, supra, applicable to the former state of facts, and the rule of Heald v. Kenworthy, supra, applicable to the latter state of facts. This distinction, however, is characterized by Lord Bramwell in Irvine v. Watson, 5 Q. B. D. 414, 417, as "very remarkable" and "difficult to understand," and he held further that the better rule is that of Heald v. Kenworthy, supra, which is applicable alike to cases of undisclosed agency and undisclosed identity of principal. And this is now the well settled law in England.

15. Schepflin v. Dessar, 20 Mo. A. 569; English v. Rauchfuss, 21 Misc. (N. Y.) 494, 47 NYS 639; Horsfall v. Fauntleroy, 10 B. & C. 755, 21 ECL 318, 109 Reprint 630; Kymer v. Suwercropp, 1 Campb. 109; Wyatt v. Hertford, 3 East 147, 102 Reprint 558. Compare Willard v. Buckingham, 36 Conn. 395.

16. **Exemplary or punitive damages** against principal for wrongs of agent see Damages [13 Cyc 114].

False and fraudulent representations and declarations see infra § 541.

17. U. S.—Oshkosh Nat. Bank v. Munger, 95 Fed. 87, 36 CCA 659; Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129.

Ala.—Raisler v. Springer, 38 Ala. 703, 82 AmD 736.

Del.—Harrington v. Hall, 22 Del. 72, 63 A 875.

Ga.—Baker v. Davis, 127 Ga. 649, 57 SE 62.

Ill.—Moir v. Hopkins, 16 Ill. 313; Ziegenhein v. Smith, 116 Ill. A. 80.

Ind.—Ogle v. Hudson, 30 Ind. A. 539, 66 NE 702.

Iowa.—Kaus v. Gracey, 144 NW 625.

Kan.—Hynes v. Jungren, 8 Kan. 391.

Me.—State v. Smith, 78 Me. 260, 4 A 412, 57 AmR 802; Bacheller v. Pinkham, 68 Me. 253; Eaton v. European, etc., R. Co., 59 Me. 520, 8 AmR 430.

Mass.—Hewett v. Swift, 3 Allen 420.

Minn.—Crandall v. Boutell, 95 Minn. 116, 103 NW 890, 5 AnnCas 122.

Mo.—Milton v. Missouri Pac. R. Co., 193 Mo. 46, 91 SW 949, 4 LRANS 282 and note.

N. Y.—Dunlop v. James, 174 N. Y. 411, 67 NE 60; Herring v. Hoppock, 15 N. Y. 409; Barber v. Dewes, 101 App. Div. 432, 91 NYS 1059 [aff 184 N. Y. 548 mem, 76 NE 1089 mem]; Wall v. Osborn, 12 Wend. 39; Morgan v. Varick, 8 Wend. 587; Guille v. Swan, 19 Johns. 381, 10 AmD 234.

Tenn.—Wilkins v. Gilmore, 2 Humphr. 140.

Tex.—Grand Temple, etc., K. D. T. I. O. T. v. Johnson, (Civ. A.) 135 SW 173; Wimple v. Patterson, (Civ. A.) 117 SW 1084; Waters Pierce Oil Co. v. Davis, 24 Tex. Civ. A. 508, 60 SW 453.

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ment[18]—(a) **In General.** The liability of the principal for torts committed by his agent is not limited to torts which he has expressly authorized or directed; he is liable for all the torts which his agent commits in the course of his employment;[19] and if the agent commits a tort in the course of his employment the principal is liable therefor even though he was ignorant thereof and the agent in

Va.—Cerriglio v. Pettit, 113 Va. 533, 75 SE 303.

Eng.—Robinson v. Vaughton, 8 C. & P. 252, 34 ECL 718; Sutton v. Clarke, 6 Taunt. 29, 1 ECL 493, 128 Reprint 943; Scott v. Shepherd, W. Bl. 892, 96 Reprint 525.

[a] **The reason for the rule** is that, although the tort is not the work of the principal's hands, yet it is the result of his will and his purposes, which are the efficient cause of the agent's operations. State v. Smith, 78 Me. 260, 4 A 412, 57 AmR 802.

[b] **Natural result of employment.**—"If the injury was the natural result of work contracted to be done, and it could not be accomplished without causing the injury, the person contracting for doing it would be held responsible." Eaton v. European, etc., R. Co., 59 Me. 520, 526, 8 AmR 430.

[c] **Ex delicto and ex contractu liabilities compared.**—Whenever the tort consists of a violation of a duty which springs from a contract between the parties, the ostensible principal is liable to the same extent in an action ex delicto as in one ex contractu. Hannon v. Siegel-Cooper Co., 167 N. Y. 244, 60 NE 597, 52 LRA 429.

18. See also Master and Servant [26 Cyc 1525 et seq].

19. U. S.—Washington Gaslight Co. v. Landsen, 172 U. S. 534, 19 SCt 296, 43 L. ed. 543; Hanover F. Ins. Co. v. Bradford, 102 Fed. 45 [rev on other grounds 102 Fed. 48, 49 LRANS 530, 43 CCA 310]; Blumenthal v. Shaw, 77 Fed. 954, 23 CCA 590; Harris v. Louisville, etc., R. Co., 35 Fed. 116; Heenrich v. Pullman Palace Car Co., 20 Fed. 100; Pressley v. Mobile, etc., R. Co., 15 Fed. 199, 4 Woods 569; Nicoll v. American Ins. Co., 18 F. Cas. No. 10,259, 3 Woodb. & M. 529; U. S. v. Haberstadt, 26 F. Cas. No. 15,276, Gilp. 262.

Ala.—Robinson v. Greene, 148 Ala. 434, 43 S 797; Ewing v. Shaw, 83 Ala. 333, 3 S 692.

Ark.—St. Louis Southwestern R. Co. v. Furlow, 81 Ark. 496, 99 SW 689; St. Louis, etc., R. Co., v. Ryan, 56 Ark. 245, 19 SW 889.

Cal.—Otis El. Co. v. San Francisco First Nat. Bank, 163 Cal. 31, 124 P 704, 41 LRANS 529; Donnelly v. San Francisco Bridge Co., 117 Cal. 417, 49 P 559 (holding that Civ. Code § 2334, providing that a principal is bound by the acts of his ostensible agent "to those persons only" who have incurred a liability or parted with value on the faith of such agency, deals solely with contract obligations, and does not exonerate a principal from liability for torts of an ostensible agent); Mitchell v. Finnell, 101 Cal. 614, 36 P 123; Fogel v. Schmalz, 92 Cal. 412, 28 P 444; Turner v. North Beach, etc., R. Co., 34 Cal. 594; Castroville Co-op. Creamery Co. v. Col, 6 Cal. A. 533, 92 P 648.

Conn.—Dunn v. Hartford, etc., R. Co., 43 Conn. 434; Thames Steamboat Co. v. Housatonic R. Co., 24 Conn. 40, 63 AmD 154; Church v. Mansfield, 20 Conn. 284.

Del.—Harrington v. Hall, 22 Del. 72, 63 A 875.

D. C.—Pickford v. Talbott, 28 App. 498.

Ga.—Southern R. Co. v. Chambers, 126 Ga. 404, 55 SE 37, 7 LRANS 926; Century Bldg. Co. v. Lewkowitz, 1 Ga. A. 636, 57 SE 1036.

Ill.—Wabash, etc., R. Co. v. Rector, 104 Ill. 296; Reed v. Peterson, 91 Ill. 288; Noble v. Cunningham, 74 Ill. 51; Illinois Cent. R. Co. v. Read, 37 Ill. 484, 87 AmD 260; Oxford v. Peter, 28 Ill. 434; Chicago, etc., R. Co. v. McCarthy, 20 Ill. 385, 71 AmD 285; Chicago, etc., R. Co. v. Parks, 18 Ill. 460, 68 AmD 562; Armstrong v. Cooley, 10 Ill. 509; Sanders v. Illinois Cent. R. Co., 90 Ill. A. 582; Slaughter v. Fay, 80 Ill. A. 105.

Ind.—Commercial Union Assur. Co. v. State, 113 Ind. 331, 15 NE 518 (holding that, where the misconduct of an agent acting within the scope of his authority causes a loss, it must be borne by the principal rather than by a third person who has fairly dealt with the agent); Pittsburgh, etc., R. Co. v. Kirk, 102 Ind. 399, 1 NE 849, 52 AmR 675; Ogle v. Hudson, 30 Ind. A. 539, 66 NE 702.

Iowa.—Rhomberg v. Avenarius, 135 Iowa 176, 112 NW 548.

Kan.—Clark v. Folscroft, 67 Kan. 446, 73 P 86.

Ky.—Louisville Univ. v. Hammock, 127 Ky. 564, 106 SW 219, 32 KyL 431, 128 AmSR 355, 14 LRANS 784; Pennsylvania Iron Works Co. v. Henry Voght Mach. Co., 96 SW 551, 29 KyL 861; Singer Mfg. Co. v. Stephens, 53 SW 525, 21 KyL 946.

La.—Lutz v. Forbes, 13 La. Ann. 609; Weeks v. McMicken, 7 Mart. 54. See also Strawbridge v. Turner, 8 La. 537.

Md.—Deck v. Baltimore, etc., R. Co., 100 Md. 168, 59 A 650, 108 AmSR 399; Baltimore, etc., R. Co. v. Blocher, 27 Md. 277.

Mass.—White v. Apsley Rubber Co., 194 Mass. 97, 80 NE 500, 8 LRANS 484; Allen v. Fuller, 182 Mass. 202, 65 NE 31; Salem Bank v. Gloucester Bank, 17 Mass. 1, 9 AmD 111 (holding however, that the liability of a principal for the torts of his agent extends only to the direct effects of such torts).

Mich.—Cleveland v. Newsom, 45 Mich. 62, 7 NW 222.

Minn.—Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 NW 930, 1136; Eggleston v. Advance Thresher Co., 96 Minn. 241, 104 NW 891; Crandall v. Boutell, 95 Minn. 114, 103 NW 890, 5 AnnCas 122 and note.

Miss.—Rivers v. Yazoo, etc., R. Co., 90 Miss. 196, 43 S 471, 9 LRANS 931.

Mo.—Milton v. Missouri Pac. R. Co., 193 Mo. 46, 91 SW 949, 4 LRANS 282 and note; Commerce Bank v. Hoeber, 88 Mo. 37, 57 AmR 359 [aff 11 Mo. A. 475]; Canfield v. Chicago, etc., R. Co., 59 Mo. A. 354.

Nebr.—Blanki v. Greater American Exposition Co., 3 Nebr. (Unoff.) 656, 92 NW 615.

N. Y.—Yeoman v. McClenahan, 190 N. Y. 121, 82 NE 1086 [rev 114 App. Div. 921 mem, 100 NYS 1151 mem]; Henken v. Schwicker, 174 N. Y. 293, 66 NE 971 [aff 67 App. Div. 196, 73 NYS 656]; Jarvis v. Manhattan Beach Co., 148 N. Y. 652, 43 NE 68, 51 AmSR 727, 31 LRA 776; Palmeri v. Manhattan R. Co., 133 N. Y. 261, 30 NE 1001, 28 AmSR 632, 16 LRA 136 [aff 14 NYS 468]; Lee v. Sandy Hill, 40 N. Y. 442; Mali v. Lord, 39 N. Y. 381, 100 AmD 448; Thomas v. Winchester, 6 N. Y. 397, 57 AmD 455; Johnstone v. Horowitz, 139 App. Div. 800, 124 NYS 689; Wilmerding v. Postal-Tel. Cable Co., 118 App. Div. 685, 103 NYS 594 [aff 192 N. Y. 580 mem, 85 NE 1118 mem]; Dealy v. Coble, 112 App. Div. 296, 98 NYS 452; Tway v. Salvin, 109 App. Div. 288, 95 NYS 653; Birkett v. Postal Tel. Cable Co., 107 App. Div. 115, 94 NYS 918 [aff 186 N. Y. 591 mem, 79 NE 1101 mem]; Dupre v. Childs, 52 App. Div. 306, 65 NYS 179 [aff 169 N. Y. 585 mem, 62 NE 1095 mem]; Watson v. Bennett, 12 Barb. 196; Warren v. Dennett, 17 Misc. 86, 39 NYS 830; Buffalo v. New York, etc., R. Co., 23 NYS 803 [rev on other grounds 152 N. Y. 276, 46 NE 496] (tort committed through violating a municipal ordinance); Davis v. Chautauqua Lake Sunday School Assembly, 2 NYSt 365; Wright v. Wilcox, 19 Wend. 343, 32 AmD 507; Jeffrey v. Bigelow, 13 Wend. 518, 28 AmD 476.

N. C.—Stewart v. Salisbury Realty, etc., Co., 159 N. C. 230, 74 SE 736; Jackson v. American Tel., etc., Co., 139 N. C. 347, 51 SE 1015, 70 LRA 738; Huntley v. Mathias, 90 N. C. 101, 47 AmR 516.

Okl.—Moore v. Atchison, etc., R. Co., 26 Okl. 682, 110 P 1059.

Pa.—Douglas v. Hustead, 216 Pa. 292, 65 A 670 (holding that where the agent of a vendor wrongfully refuses to deliver a deed to the vendee on the final day for the declaration of an option, and it appears that the vendee is ready and willing on that day to take the land, the vendor cannot take advantage of his agent's misconduct or mistake); Reformed Presb. Church v. Livingston, 210 Pa. 536, 60 A 154; Flower v. Pennsylvania R. Co., 69 Pa. 210, 8 AmR 251; Hill v. Canfield, 63 Pa. 77; Philadelphia, etc., R. Co. v. Brannen, 1 Pa. Cas. 369, 2 A 429; Kentucky Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. 180.

S. C.—Mitchell v. Leech, 69 S. C. 413, 48 SE 290, 104 AmSR 811, 66 LRA 723; Hutchison v. Rock Hill Real Est., etc., Co., 65 S. C. 45, 43 SE 295; Rucker v. Smote, 37 S. C. 377, 16 SE 40, 34 AmSR 758.

Tex.—Security L. Ins. Co. v. Stephenson, (Civ. A.) 136 SW 1137; Grand Temple, etc., K. D. T. I. O. T. v. Johnson, (Civ. A.) 135 SW 173; Seffel v. Western Union Tel. Co., (Civ. A.) 65 SW 897.

Vt.—Barber v. Britton, 26 Vt. 112, 60 AmD 601.

Wash.—Sibson v. Hamilton, etc., Co., 22 Wash. 449, 61 P 162.

W. Va.—McDonald v. Cole, 46 W. Va. 186, 32 SE 1033; Hall v. Norfolk, etc., R. Co., 44 W. Va. 36, 28 SE 754, 67 AmSR 757, 41 LRA 669.

Eng.—Citizens' L. Assur. Co. v. Brown, [1904] A. C. 423; Mackay v. Commercial Bank, L. R. 5 P. C. 394; Penny v. Wimbledon Urban Dist. Council, [1899] 2 Q. B. 72; Roe v. Birkenhead, etc., R. Co., 7 Exch. 36; Hill v. Tottenham Urban Dist. Council, 79 L. T. Rep. N. S. 495; Malcolm v. Waterhouse, 24 T. L. R. 854.

Ont.—Ontario Industrial Loan, etc., Co. v. Lindsey, 4 Ont. 473; Maclennan v. Royal Ins. Co., 39 U. C. Q. B. 515; Re Gloy Adhesives, 7 DomLR 454, 4 OntWN 350, 23 OntWR 348.

Que.—Lamarre v. Woods, 13 Que. Super. 466.

[a] **Reason for rule.**—"Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. The omission of such care by the latter, is the omission of the principal, and for injury resulting therefrom to others, the principal is justly held liable. If he employs incompetent or untrustworthy agents it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim respondeat superior applies, provided only, that the agent was acting at the time for the principal, and within the scope of the business intrusted to him." Higgins v. Watervliet Turnpike, etc., Co., 46 N. Y. 23, 27, 7 AmR 293. It has also been said that "whoever commits a wrong is liable for it, and it is immaterial whether it be done by him in person or by another acting by his authority, express or implied. Qui facit per alium facit per se. Upon this maxim of the law is founded the doctrine that the principal is liable for the tort of his agent, and the master for the tort of his servant. If the wrongful act is done by express command of the master, or even if he has afterwards made it his own by adoption, there is no difficulty in applying the

committing it exceeded his actual authority or disobeyed the express instructions of his principal,[20] and although the agent acted fraudulently or with bad faith toward his principal.[21]

[§ 534] **(b) Applications of Rule.** In accordance with the above rule a principal may be held civilly liable to third persons where his agent, while acting within the course or scope of his real or apparent authority, is guilty of assault and battery,[22] conversion,[23] trespass,[24] libel and slander,[25] malicious prosecution,[26] wrongful arrest or false imprisonment,[27] or wrongful levy.[28]

Fraud. Acts of fraud by the agent, committed in the course or scope of his employment, are also binding on the principal, even though the principal did not in fact know of or authorize the commission of the fraudulent acts,[29] and although he de-

rule; but it is otherwise when the liability must proceed only from an implied authority. Where the servant does a wrong to a third person, the rule of respondeat superior applies, and the master must answer for the tort, if it was committed in the course and scope of the servant's employment, and in furtherance of the master's business." Jackson v. American Tel., etc., Co., 139 N. C. 347, 353, 51 SE 1015, 70 LRA 733.

[b] **"The maxim of respondeat superior** is founded on the principle that he who expects to derive advantage from an act which is done by another for him must answer for any injury which another may sustain from it." Barker v. Chicago, etc., R. Co., 243 Ill. 482, 488, 90 NE 1057, 134 AmSR 382, 26 LRANS 1058.

[c] **One receiving money through duress** exercised by his agent is liable for the return thereof, although not personally participating in the wrongful act. Vroom v. Litt, 70 Misc. 375, 128 NYS 758.

[d] **Election to hold agent.**— Where a borrower who has sustained loss through the embezzlement of funds paid by the lender to the lender's agent attaches the property of the agent alleging that the money embezzled was received for plaintiff's use and benefit, he waives the right to recover of the lender. McLean v. Ficke, 94 Iowa 283, 62 NW 753.

Liability of married woman for torts of her agent see Husband and Wife [21 Cyc 1424, 1491].

20. U. S.—Philadelphia, etc., R. Co. v. Derby, 14 How. 468, 14 L. ed. 502. But see Dun v. Birmingham City Nat. Bank, 58 Fed. 174 [rev 51 Fed. 160].

Ill.—Moir v. Hopkins, 16 Ill. 313, 63 AmD 312; Johnson v. Barber, 10 Ill. 425, 50 AmD 416.

Mass.—George v. Gobey, 128 Mass. 289, 35 AmR 376.

Minn.—Smith v. Munch, 65 Minn. 256, 68 NW 19.

Mo.—Barree v. Cape Girardeau, 197 Mo. 382, 95 SW 330, 114 AmSR 763, 6 LRANS 1090 and note; Garritzen v. Duenckel, 50 Mo. 104, 11 AmR 405.

Nev.—Daugherty v. Wells, 7 Nev. 368.

N. Y.—Dupre v. Childs, 52 App. Div. 306, 65 NYS 179 [aff 169 N. Y. 585 mem, 62 NE 1095 mem].

Okl.—Moore v. Atchison, etc., R. Co., 26 Okl. 682, 110 P 1059.

Pa.—Kentucky Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. 180.

S. C.—Brown v. American Tel., etc., Co., 82 S. C. 173, 63 SE 744; Williams v. Tolbert, 76 S. C. 211, 56 SE 908 (holding that, where a chattel mortgage after condition broken authorizes seizure of the personal property, and the mortgagee directs an agent to make such seizure, the mortgagee is liable for any misconduct of the agent, although he acted contrary to orders).

Tenn.—Luttrell v. Hazen, 3 Sneed 19.

Tex.—Henderson v. San Antonio, etc., R. Co., 17 Tex. 560, 67 AmD 675; Grand Temple, etc., K. D. T. I. O. T. v. Johnson, (Civ. A.) 135 SW 173.

Vt.—Andrus v. Howard, 36 Vt. 248, 84 AmD 680; May v. Bliss, 22 Vt. 477.

Eng.—Black v. Christchurch Finance Co., [1894] A. C. 48; Fuller v. Wilson, 3 Q. B. 58, 43 ECL 629, 114 Reprint 429; Udell v. Atherton, 7 H. & N. 172.

21. Taylor v. Flynt, 28 Tex. Civ. A. 219, 67 SW 347 (holding that bad faith toward a loan agency on the part of its agent in negotiating its loan was not sufficient to shield it from the consequences of the agent's knowledge of the homestead character of the property on which the loan was made, where it was not shown that the borrowers were aware of the agent's purpose to deceive his principal, or themselves entertained a like purpose, or in some manner made him their agent to secure the loan); Re Gloy Adhesives, 7 DomLR 454, 4 OntWN 350, 23 OntWR 348. See also cases supra note 20.

[a] **Where a seller of goods to an agent does not know of the agent's intention to defraud** his principal and acts in good faith, the seller cannot be required, on account of such fraud, to rescind the contract. Hayward Lumber Co. v. Cox, (Tex. Civ. A.) 104 SW 403.

22. Ark.—St. Louis, etc., R. Co. v. Grant, 75 Ark. 579, 88 SW 580, 1133.

Cal.—Turner v. North Beach, etc., R. Co., 34 Cal. 594.

Ga.—Century Bldg. Co. v. Lewkowitz, 1 Ga. A. 636, 57 SE 1036 (holding the principal liable for assault committed by the agent in protecting the principal's property).

Ill.—Field v. Kane, 99 Ill. A. 1.

Kan.—Hynes v. Jungren, 8 Kan. 391.

Me.—Hanson v. European, etc., R. Co., 62 Me. 84, 16 AmR 404; Goddard v. Grand Trunk R. Co., 57 Me. 202, 2 AmR 39.

Mass.—Bryant v. Rich, 106 Mass. 180, 8 AmR 311; Ramsden v. Boston, etc., R. Co., 104 Mass. 117, 6 AmR 206.

N. Y.—Higgins v. Watervliet Turnp., etc., Co., 46 N. Y. 23, 7 AmR 293.

Oh.—Passenger R. Co. v. Young, 21 Oh. St. 518, 8 AmR 78.

S. C.—Palmer v. Charlotte, etc., R. Co., 3 S. C. 580, 16 AmR 750.

Tenn.—Louisville, etc., R. Co. v. Fleming, 14 Lea 128.

Ont.—Kinver v. Phœnix Lodge I. O. O. F., 7 Ont. 377 (holding a lodge liable for personal injuries received on occasion of initiation into a secret society).

See also Assault and Battery [3 Cyc 1069].

[a] **The principal is not liable** where the agent in committing the assault acts beyond the scope of his authority, unless the principal ratifies the act. Hardeman v. Williams, 150 Ala. 415, 43 S 726, 10 LRANS 653; Callahan v. Hyland, 59 Ill. A. 347; Little Miami R. Co. v. Wetmore, 19 Oh. St. 110, 2 AmR 373. See generally infra § 535.

23. Ala.—Land Mortg. Inv. Agency Co. v. Preston, 119 Ala. 290, 24 S 707.

Cal.—Hoskins v. Swain, 61 Cal. 338.

Ga.—Hirsh v. Beverly, 125 Ga. 657, 54 SE 678 (holding that, if a chattel mortgagee duly authorized agents to sell the property free from the lien of the mortgage and to apply the proceeds to the payment of the mortgage, and if one of them made the sale and received the proceeds, a misapplication thereof by him would not cause the property to remain liable).

Iowa.—Rhomberg v. Avenarius, 135 Iowa 176, 112 NW 548.

Kan.—Thomas v. Arthurs, 8 Kan. A. 126, 54 P 694.

Ky.—Kentucky Mut. L. Ins. Co. v. Chosen Friends Lodge No. 2 I. O. O. F., 93 SW 1044, 29 KyL. 394.

Mo.—Donnell v. Lewis County Sav. Bank, 80 Mo. 165; Pacific Express Co. v. Carroll County Bank, 66 Mo. A. 275; Hyre v. Kansas City Cent. Bank, 48 Mo. A. 434.

N. H.—Burnham v. Holt, 14 N. H. 367.

N. J.—Corona Kid Co. v. Lichtman, 84 N. J. L. 363, 86 A 371; Chetwood v. Berrian, 39 N. J. Eq. 203 [aff 39 N. J. Eq. 517].

N. Y.—Johnson v. Donnell, 90 N. Y. 1; Fatta v. Edgerton, 143 App. Div. 658, 128 NYS 181; Briggs v. Jones, 8 Misc. 261, 28 NYS 709 [aff 149 N. Y. 577 mem, 43 NE 986 mem]; Shotwell v. Few, 7 Johns. 302.

N. C.—Lamb v. Trogden, 22 N. C. 190.

S. C.—Reynolds v. Witte, 13 S. C. 5, 36 AmR 673; Miller v. Reigne, 20 S. C. L. 592.

Tex.—Buffalo Pitts Co. v. Stringfellowhume Hardware Co., (Civ. A.) 129 SW 1161.

Wash.—Northern Pac. R. Co. v. Edmunds, 71 Wash. 98, 127 P 587.

Eng.—Lloyd v. Grace, [1912] A. C. 716 [rev [1911] 2 K. B. 489]; Thompson v. Bell, 10 Exch. 10; Re Mutual Aid Permanent Ben. Bldg. Soc., 49 L. T. Rep. N. S. 530; Duncan v. Surrey Canal Co., 3 Stark. 50, 3 ECL 589.

Ont.—Gilpin v. Royal Canadian Bank, 26 U. C. Q. B. 445.

See generally Trover and Conversion [38 Cyc 1997].

24. Raisler v. Springer, 38 Ala. 703, 82 AmD 736; Williams v. Inman, 1 Ga. A. 321, 57 SE 1009 (holding that, where an agent commits an active trespass on behalf of his principal, such principal is a joint trespasser with the agent); Ogle v. Hudson, 30 Ind. A. 539, 66 NE 702; Freeman v. Rosher, 13 Q. B. 780, 66 ECL 780, 116 Reprint 1462. See also Trespass [38 Cyc 1040].

25. See Libel and Slander [25 Cyc 427].

26. See Malicious Prosecution [26 Cyc 18 et seq].

27. Pennsylvania Co. v. Weddle, 100 Ind. 138 (holding that a principal who selects an agent to detect and arrest offenders is responsible for the acts of the agent committed within the general scope of his employment, although the agent may have done an unlawful act, and may have arrested an innocent man); Parke v. Fellman, 145 App. Div. 836, 130 NYS 361. See also False Imprisonment [19 Cyc 327 et seq].

28. See Attachment [4 Cyc 840]; Executions [17 Cyc 1572]; Landlord and Tenant [24 Cyc 1329].

[a] **Distress warrant.**—Where a person sues out a distress warrant, and sends others to levy under it, he is liable for their misconduct while acting within the scope of their agency. Jones v. Parker, 81 S. C. 214, 62 SE 261.

29. U. S.—McIntire v. Pryor, 173 U. S. 38, 19 SCt 352 43 L. ed. 606 [aff 10 App. (D. C.) 432] (holding that, where frauds are committed by an agent in procuring title to property for the benefit of his principal, the principal is chargeable therewith in the same manner as if he had committed them personally); Alger v. Keith, 105 Fed. 105, 44 CCA 371; Palo Alto Bank v. Pacific Postal Tel. Cable Co., 103 Fed. 841; Alger v. Anderson, 78 Fed. 729; Lynch v. Mercantile Trust Co., 18 Fed. 486, 5 McCrary 623; Andrews v. Solomon, 1 F. Cas. No. 378, Pet. C. C. 356. But see Dun

rives no benefit from the success of the fraud.[30]

Negligence. A principal is also liable for the negligent acts of his agent within the scope of his employment and the course of his duties, resulting in injuries to the person or property of another,[31] although the negligence causing the tort occurs

v. Birmingham City Nat. Bank, 58 Fed. 174 [rev 51 Fed. 160].

Ala.—King v. Livingston Mfg. Co., 180 Ala. 118, 125, 60 S 143 [cit Cyc]; Edinburgh American Land Mortg. Co. v. Peoples, 102 Ala. 241, 14 S 656; Herbert v. Huie, 1 Ala. 18, 34 AmD 755.

Ark.—Binghampton Trust Co. v. Auten, 68 Ark. 299, 57 SW 1105, 82 AmSR 295.

Cal—Conklin v. Benson, 159 Cal. 785, 116 P 34, 36 LRANS 537.

Ga.—Lunday v. Thomas, 26 Ga. 537.

Ill.—Johnson v. Barber, 10 Ill. 425, 50 AmD 416; Checkley v. Joseph Lay Co., 171 Ill. A. 252 (holding that, where an agent of an automobile manufacturer falsly states that the car has a certain capacity and is as good as a car of a certain make and that it is impossible to tell where the tonneau is joined to the rest of the body, such representations are binding upon the manufacturer in an action of deceit); McFadden v. Lynn, 49 Ill. A. 166.

Ind.—Wolfe v. Pugh, 101 Ind. 293; Brier v. Mankey, 47 Ind. A. 7, 93 NE 672; Goshorn v. People's Nat. Bank, 32 Ind. A. 428, 69 NE 185, 102 AmSR 248.

Iowa.—Shuttlefield v. Neil, 145 NW 1 (holding that, where defendant employed an agent to point out his land to plaintiff, it appearing that plaintiff and defendant were negotiating for an exchange of lands, defendant is liable for the fraud of his agent in pointing out the land not owned by defendant); Fulton v. Fisher, 151 Iowa 429, 131 NW 662; Providence Jewelry Co. v. Fressler, 145 Iowa 74, 123 NW 957 (holding that a principal may not enforce a contract procured by the fraud of his agent, irrespective of the authority or want of authority of the agent, unless the party imposed on is estopped from relying on the fraud); Mankin v. Mankin, 91 Iowa 406, 59 NW 292; Noble v. The Steamboat Northern Illinois, 23 Iowa 109.

Ky.—Western Mfg. Co. v. Cotton, 126 Ky. 749, 104 SW 758, 31 KyL 1130, 12 LRANS 427.

La.—Lutz v. Forbes, 13 La. Ann. 609.

Me.—Rhoda v. Annis, 75 Me. 17, 46 AmR 354.

Md.—New England Mut. L. Ins. Co. v. Swain, 100 Md. 558, 60 A 469; Andrews v. Clark, 72 Md. 396, 20 A 429.

Mass.—Jacquith v. Davenport, 191 Mass. 415, 78 NE 93; Thompson v. Barry, 184 Mass. 429, 68 NE 674; Haskell v. Starbird, 152 Mass. 117, 25 NE 14, 23 AmSR 809; White v. Sawyer, 16 Gray 586; Locke v. Stearns, 1 Metc. 560, 35 AmD 382.

Mich.—Krolik v. Curry, 148 Mich. 214, 111 NW 761.

Minn.—Freeman v. F. P. Harbaugh Co., 114 Minn. 283, 130 NW 1110; McCord v. Western Union Tel. Co., 39 Minn. 181, 39 NW 315, 12 AmSR 636, 1 LRA 143; Aultman v. Olson, 34 Minn. 450, 26 NW 451.

Mo.—Greer v. Lafayette County Bank, 128 Mo. 559, 30 SW 319; Goetz v. Flanders, 118 Mo. 342, 22 SW 945; Bank of Commerce v. Hoeber, 88 Mo. 37, 57 AmR 359; Darks v. Scudder-Gale Grocer Co., 146 Mo. A. 246, 130 SW 430 (holding that any fraud perpetrated by an agent on a third person in the course of his employment and for the benefit of the principal is imputed to the principal, whether he had actual knowledge of it or not); Robertson v. Covenant Mut. L. Ins. Co., 123 Mo. A. 238, 100 SW 686; Phipps v. Mallory Commn. Co., 105 Mo. A. 67, 78 SW 1097.

Nebr.—Willard v. Key, 83 Nebr. 850, 120 NW 419; McKeighan v. Hopkins, 19 Nebr. 33, 26 NW 614.

Nev.—Dougherty v. Wells, 7 Nev. 368.

N. J.—Mick v. Royal Exch. Assur., 91 A 102; Vulcan Detinning Co. v. American Can Co., 70 N. J. Eq. 588, 62 A 881.

N. Y.—Nowack v. Metropolitan St. R. Co., 166 N. Y. 433, 60 NE 32, 82 AmSR 691, 54 LRA 592; Fifth Ave. Bank v. Forty-second St., etc., Ferry R. Co., 137 N. Y. 231, 33 NE 378, 33 AmSR 712, 19 LRA 331 and note; Titus v. Great Western Turnp. Road, 61 N. Y. 237; Durst v. Burton, 47 N. Y. 167, 7 AmR 428 [aff 2 Lans. 137]; Griswold v. Haven, 25 N. Y. 595, 82 AmD 380; Sharp v. New York, 40 Barb. 256, 25 HowPr 389; Union Bank v. Mott, 39 Barb. 180; Briggs v. Jones, 8 Misc. 261, 28 NYS 709 [aff 149 N. Y. 577 mem, 43 NE 986 mem]; Jeffrey v. Bigelow, 13 Wend. 518, 28 AmD 476; Jackson v. Leonard, 13 Johns. 180. See also Lurie v. Public Bank, 65 Misc. 583, 120 NYS 855.

N. C.—Peebles v. Patapsco Guano Co., 77 N. C. 233, 24 AmR 447.

Okl.—Fish v. Bloodworth, 36 Okl. 586, 129 P 32.

Or.—Clough v. Dawson, 138 P 233; Porter v. O'Donovan, 65 Or. 1, 130 P 393 (holding that, where a grantee obtained the benefit of a deed procured by the fraud of his agent practiced on the grantor, he was chargeable with the fraud whether he knew or participated in it or not, and the deed must be set aside as against him).

Pa.—Millward-Cliff Cracker Co.'s Est., 161 Pa. 157, 28 A 1072; Independent Bldg., etc., Assoc. v. Real Est. Title Co., 156 Pa. 181, 27 A 62; Wilson v. Sale, 41 Pa. Super. 566; Hoover v. Beech Creek Coal, etc., Co., 29 Pa. Super. 615; Vanderslice v. Royal Ins. Co., 13 Pa. Super. 455.

S. C.—Whaley v. Duncan, 47 S. C. 139, 25 SE 54; Reynolds v. Witte, 13 S. C. 5, 36 AmR 678; Johnston v. South Western R. Bank, 22 S. C. Eq. 263.

Tenn.—Stephens v. Ozbourne, 107 Tenn. 572, 64 SW 902, 89 AmSR 957 (holding that, where a vendee procures land through fraudulent acts of her agent, she cannot deny responsibility for those acts, and at the same time retain the land).

Tex.—Wright v. Calhoun, 19 Tex. 412; Henderson v. San Antonio, etc., R. Co., 17 Tex. 560, 67 AmD 675; Washington County State Bank v. Houston Cent. Bank, etc., Co., (Civ. A.) 168 SW 456; Sullivan v. Ramsey, (Civ. A.) 155 SW 580; Kleine v. Gidcomb, (Civ. A.) 152 SW 462; Mutual Reserve L. Ins. Co. v. Seidel, (Civ. A.) 113 SW 945 (holding that fraud of an authorized agent will invalidate a contract, although the principal had no knowledge of the fraud, and did not consent to it).

Wis.—Matteson v. Rice, 116 Wis. 328, 92 NW 1109; Roehl v. Volckmann, 103 Wis. 484, 79 NW 755; McKinnon v. Vollmar, 75 Wis. 82, 43 NW 800, 17 AmSR 178, 6 LRA 121.

Eng.—Pearson v. Dublin, [1907] A. C. 351; Brocklesby v. Temperance Permanent Bldg. Soc., [1895] A. C. 173; Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259, 12 ERC 298; Udell v. Atherton, 7 H. & N. 172; Hern v. Nichols, 1 Salk. 289, 91 Reprint 256.

B. C.—Canadian Financiers v. Hong Wo, 17 B. C. 8, 1 DomLR 38, 19 West LR 769 (holding that a principal is bound to refund to the party with whom his agent contracted on his behalf any profit in the transaction represented by the money he has received through the fraud of his agent, whether the principal authorized the fraud or not).

Ont.—London L. Ins. Co. v. Molsons Bank, 5 Ont. L. 407.

See also Fraud [20 Cyc 35 et seq].

Liability for fraudulent representations generally see infra § 541.

[a] **Reasons for rule.**—(1) "The doctrine, broadly stated, is rested upon the ground that the principal, having held the agent out as having authority, and having clothed him with power to act in a particular matter, as between two innocent persons, should suffer as having given occasion for the loss. This is the statement of the rule in cases where the fraud was in fact committed by the agent, without the knowledge and consent of the principal." Alger v. Anderson, 78 Fed. 729, 735. (2) The liability of the principal is, furthermore, referable to his negligence in employing and retaining a dishonest agent. Foster v. Essex Bank, 17 Mass. 479, 9 AmD 168; Reynolds v. Witte, 13 S. C. 5, 16, 36 AmR 678 (where the court said: "It is difficult to understand upon what ground the principal should be held liable for the negligence of his agent and not for his fraud, where the act is done or omitted to be done to the very property as to which the agency exists and in the course of the agency. Fraud by which the property is lost is generally considered one of the forms of gross negligence. What is the proper understanding of the phrase 'within the scope of the agency'? Does 'the scope' include negligence and exclude fraud? It cannot properly be restricted to what the parties intended in the creation of the agency, for that would also exclude negligence, as no agent is appointed for the purpose of being negligent, any more than for the purpose of acting fraudulently. The question cannot be determined by the authority intended to be conferred by the principal. We must distinguish between the authority to commit a fraudulent act and the authority to transact the business in the course of which the fraudulent act was committed. Tested by reference to the intention of the principal, neither negligence nor fraud is within 'the scope of the agency;' but tested by the connection of the act with the property and business of the agency, fraud in taking the very property is as much 'within the scope of the agency' as negligence in allowing others to take it. The proper inquiry is, whether the act was done in the course of the agency and by virtue of the authority as agent. If it was, then the principal is responsible, whether the act was merely negligent or fraudulent").

[b] **Deceit.**—A principal is liable for the deceit of his agent, where the deceitful act is for the principal's benefit and is done in the course of his business, although he has not expressly authorized it. Whiting v. Crandall, 78 Mo. 593 [aff 7 Mo. A. 564].

[c] **An innocent principal cannot assert any rights or retain any benefit** on a contract procured by the fraud of his agent. Reitman v. Fiorillo, 76 N. J. L. 315, 72 A 74.

[d] **Each of a number of promoters** is liable in damages for the fraud of an agent employed by them to effect the sale of corporate securities, without reference to their personal guilt. Downey v. Finucane, 205 N. Y. 251, 98 NE 391, 40 LRANS 307 [aff 146 App Div. 209, 130 NYS 988].

[e] **Failure to disclose instructions.**—Failure of an agent to disclose to the third person instructions or information received by him from his principal for his own guidance has in it no element of fraud or bad faith. Armstrong v. Campbell, 140 Iowa 564, 118 NW 898.

30. Mick v. Royal Exch. Assur., (N. J.) 91 A 102.

31. U. S.—Philadelphia, etc., R. Co. v. Derby, 14 How. 468, 14 L. ed. 502; The Nellie, 139 Fed. 753; Parsons v. Empire Transp. Co., 111 Fed. 202, 49 CCA 302; Wrought-Iron Range Co. v. Graham, 80 Fed. 474, 25 CCA 570;

while the agent is deviating from the method in which he has been directed to perform the principal's business,[32] unless the negligent act is committed while he is willfully deviating from the instructions which the principal has given him.[33]

[§ 535] (3) **Torts outside Course of Employment.** The principal's liability for the torts of his agent is limited to acts within the scope of the agent's authority, or committed in the course of his employment;[34] unless he subsequently ratifies

Flint v. Norwich, etc., Transp. Co., 9 F. Cas. No. 4,873, 34 Conn. 554; Lowe v. Stockton, 15 F. Cas. No. 8,567, 4 Cranch C. C. 537; Mandeville v. Cookendorfer, 16 F. Cas. No. 9,010, 3 Cranch C. C. 397; Nicoll v. American Ins. Co., 18 F. Cas. No. 10,259, 3 Woodb. & M. 529.

Ala.—Birmingham Water-Works Co. v. Hubbard, 85 Ala. 179, 4 S 607, 7 AmSR 35; Ewing v. Shaw, 83 Ala. 333, 3 S 692.

Cal.—Davoust v. Alameda, 149 Cal. 69, 84 P 760, 5 LRANS 536 and note, 9 AnnCas 847 and note; Paige v. Roeding, 96 Cal. 388, 31 P 264; Tackett v. Henderson Bros. Co., 12 Cal. A. 658, 108 P 151 (holding that the owners of property are liable for the negligence of persons acting within the scope of their employment in the management of the property for them).

Conn.—Haywood v. Hamm, 77 Conn. 158, 58 A 695; Stone v. Hills, 45 Conn. 44, 29 AmR 635; Phelon v. Stiles, 43 Conn. 426.

Ill.—Noble v. Cunningham, 74 Ill. 51; Illinois Cent. R. Co. v. Middlesworth, 46 Ill. 494; Schwartz v. Gilmore, 45 Ill. 455, 92 AmD 227 (holding that an architect who is the superintendent of the owner for the erection of a building, and who has control of the work and knows that the walls are unsafe from want of bracing, cannot relieve the owner from responsibility for an injury, resulting therefrom, by merely directing the bracing to be done); Chicago, etc., R. Co. v. McCarthy, 20 Ill. 385, 71 AmD 285; Galena, etc., R. Co. v. Rae, 18 Ill. 488, 68 AmD 574; Illinois Cent. R. Co. v. Downey, 18 Ill. 259; Moir v. Hopkins, 16 Ill. 313, 63 AmD 312; Kieshkowski v. Bostrom, 179 Ill. A. 73, 77 [cit Cyc]; McNemar v. Cohn, 115 Ill. A. 31.

Ind.—Block v. Haseltine, 3 Ind. A. 491, 29 NE 937.

Ky.—Owensboro Wagon Co. v. Boling, 107 SW 264, 32 KyL 816; Louisville Univ. v. Hammock, 127 Ky. 564, 106 SW 219, 32 KyL 431, 128 AmSR 355, 14 LRANS 784; Johnson v. Small, 5 B. Mon. 25.

La.—Holmes v. Tennessee Coal, etc., Co., 49 La. Ann. 1465, 22 S 403; Taylor v. Mexican Gulf R. Co., 2 La. Ann. 654 (holding also that the agent's assumption of the risk of safely transporting a raft belonging to the principal does not relieve the principal from liability for the agent's negligence in transporting it); Weeks v. McMicken, 7 Mart. 54.

Md.—Geiselman v. Schmidt, 106 Md. 580, 68 A 202; Mattingly v. Montgomery, 106 Md. 461, 68 A 205; Evans v. Davidson, 53 Md. 245, 36 AmR 400.

Mass.—Gordon v. Levine, 197 Mass. 263, 83 NE 861, 125 AmSR 361, 15 LRANS 243 (holding that, where the payee of a check negotiates the same to his own agent, the failure of such agent to present the check within a reasonable time, and until after the failure of the bank, is the payee's own neglect); Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 NE 776, 39 AmSR 467, 22 LRA 364; Wilton v. Middlesex R. Co., 107 Mass. 108, 9 AmR 11; Forsyth v. Hooper, 11 Allen 419; Southwick v. Estes, 7 Cush. 385.

Mich.—Joslin v. Grand Rapids Ice Co., 50 Mich. 516, 15 NW 887, 45 AmR 54; Chicago, etc., R. Co. v. Bayfield, 37 Mich. 205.

Minn.—Osborne v. McMasters, 40 Minn. 103, 41 NW 543, 12 AmSR 698; Mulvehill v. Bates, 31 Minn. 364, 17 NW 959, 47 AmR 796.

Mo.—Orcutt v. Century Bldg. Co., 201 Mo. 424, 99 SW 1062, 8 LRANS 929; Harriman v. Stowe, 57 Mo. 93 (holding that, where an agent is employed to superintend work, the principal is responsible to third persons for injuries caused by the negligence or nonfeasance of the agent in doing the work, although the agent exceeds his powers or disobeys his instructions, provided he does the act in the course of his employment); Haggerty v. St. Louis, etc., R. Co., 100 Mo. A. 424, 74 SW 456.

Nebr.—Bianki v. Greater American Exposition, 3 Nebr. (Unoff.) 656, 92 NW 615.

N. J.—Driscoll v. Carlin, 50 N. J. L. 28, 11 A 482.

N. Y.—Weyerhauser v. Dun, 100 N. Y. 150, 2 NE 274 (holding that, where a mercantile agency undertakes the collection of a note, it becomes responsible for the negligence of attorneys whom it employs); Stroher v. Elting, 97 N. Y. 102, 49 AmR 515; Vogel v. New York, 92 N. Y. 10, 44 AmR 349; Quinn v. Power, 87 N. Y. 535, 41 AmR 392; Ochsenbein v. Shapley, 85 N. Y. 214; Roberts v. Johnson, 58 N. Y. 613; Cosgrove v. Ogden, 49 N. Y. 255, 10 AmR 361; Higgins v. Watervliet Turnp., etc., Co., 46 N. Y. 23, 7 AmR 293; Thomas v. Winchester, 6 N. Y. 397, 57 AmD 455; Roney v. Aldrich, 44 Hun 320; Beckwith v. Oatman, 43 Hun 265; McCamus v. Citizens' Gas Light Co., 40 Barb. 380; Denny v. Manhattan Co., 5 Den. 639; Champion v. Bostwick, 18 Wend. 175, 31 AmD 376.

N. C.—Elliott v. Jordan, 44 N. C. 298; Wiswall v. Brinson, 32 N. C. 554; Cox v. Hoffman, 20 N. C. 319.

Oh.—Pickens v. Diecker, 21 Oh. St. 212, 8 AmR 55.

Okl.—Owins v. Howington, 31 Okl. 651, 124 P 1058.

Or.—Oliver v. North Pac. Transp. Co., 3 Or. 84.

Pa.—Siner v. Stearne, 155 Pa. 62, 25 A 826; Morgan v. Tener, 83 Pa. 305; Bradstreet v. Everson, 72 Pa. 124, 13 AmR 665; Pittsburgh, etc., R. Co. v. Hinds, 53 Pa. 512, 91 AmD 224; New York, etc., Printing Tel. Co. v. Dryburg, 35 Pa. 298, 78 AmD 338; Hennessey v. Baugh, etc., Co., 29 Pa. Super. 310; New v. Milligan, 27 Pa. Super. 516.

Tenn.—Luttrell v. Hazen, 3 Sneed 20; Puryear v. Thompson, 5 Humphr. 397.

Vt.—Andrus v. Howard, 36 Vt. 248, 84 AmD 680; May v. Bliss, 22 Vt. 477.

Va.—Aultman, etc., Mach. Co. v. Gay, 108 Va. 647, 62 SE 946; De Voss v. Richmond, 18 Gratt. (59 Va.) 338, 98 AmD 646.

Wash.—Wodnik v. Luna Park Amusement Co., 69 Wash. 638, 125 P 941, 42 LRANS 1070.

Eng.—Samson v. Atchison, [1912] A. C. 844; Hughes v. Percival, 8 App. Cas. 443; Dalton v. Angus, 6 App. Cas. 740, 10 ERC 98; Holliday v. National Tel. Co., [1899] 2 Q. B. 392; Penny v. Wimbledon Urban Dist. Council, [1899] 2 Q. B. 72; Venables v. Smith, 2 Q. B. D. 279; Whiteley v. Pepper, 2 Q. B. D. 276; Lemaitre v. Davis, 19 Ch. D. 281; The Snark, [1900] P 105; The Rhosina, 10 P. D. 131; Duke v. Courage, 46 J. P. 453; Quarman v. Burnett, 4 Jur. 969; In re Mitchell, 54 L. J. Ch. 342; Hill v. Tottenham Urban Dist. Council, 79 L. T. Rep. N. S. 495.

Negligence of agent imputable to principal see generally Negligence [29 Cyc 545].

32. Md.—Evans v. Davidson, 53 Md. 245, 36 AmR 400.

Mass.—Wilton v. Middlesex R. Co., 107 Mass. 108, 9 AmR 11.

Mich.—Chicago, etc., R. Co. v. Bayfield, 37 Mich. 205.

Mo.—Garretzen v. Duenckel, 50 Mo. 104, 11 AmR 405.

N. Y.—Quinn v. Power, 87 N. Y. 535, 41 AmR 392; Ochsenbein v. Shapley, 85 N. Y. 214; Cosgrove v. Ogden, 49 N. Y. 255, 10 AmR 361; Higgins v. Watervliet Turnp., etc., Co., 46 N. Y. 23, 7 AmR 293.

Or.—Oliver v. North Pac. Transp. Co., 3 Or. 84.

Va.—De Voss v. Richmond, 18 Gratt. (59 Va.) 338, 98 AmD 646.

Eng.—Hughes v. Percival, 8 App. Cas. 443.

33. Conn.—Stone v. Hills, 45 Conn. 44, 29 AmR 635.

Ga.—Marsh v. South Carolina R. Co., 56 Ga. 274; Lewis v. Amorous, 3 Ga. A. 50, 59 SE 338.

Ill.—Sawyer v. Martins, 25 Ill. A. 521.

Me.—Maddox v. Brown, 71 Me. 432, 36 AmR 336.

Md.—Adams v. Cost, 62 Md. 264, 50 AmR 211.

Mass.—Herlihy v. Smith, 116 Mass. 265; Howe v. Newmarch, 12 Allen 49.

Mich.—Chicago, etc., R. Co. v. Bayfield, 37 Mich. 205.

Minn.—Morier v. St. Paul, etc., R. Co., 31 Minn. 351, 17 NW 952, 47 AmR 793.

Mo.—Milton v. Missouri Pac. R. Co., 193 Mo. 56, 91 SW 949, 4 LRANS 282 and note; Garretzen v. Duenckel, 50 Mo. 104, 11 AmR 405; Evans v. A. L. Dyke Auto. Supply Co., 121 Mo. A. 266, 101 SW 1132.

N. H.—Wilson v. Peverly, 2 N. H. 548.

N. J.—Ayerigg v. New York, etc., R. Co., 30 N. J. L. 460.

N. Y.—Cosgrove v. Ogden, 49 N. Y. 255, 10 AmR 361; Isaacs v. Third Ave. R. Co., 47 N. Y. 122, 7 AmR 418; Fero v. Buffalo, etc., R. Co., 22 N. Y. 209, 78 AmD 178; Cavanagh v. Dinsmore, 12 Hun 465; Haack v. Fearing, 28 N. Y. Super. 528, 4 AbbPrNS 297, 35 HowPr 459; Sheridan v. Charlick, 4 Daly 338; Richmond Turnp. Co. v. Vanderbilt, 1 Hill 480.

Or.—Oliver v. North Pac. Transp. Co., 3 Or. 84.

Pa.—Bard v. Yohn, 26 Pa. 482; Blattenberger v. Little Schuylkill Nav., etc., Co., 2 Miles 309.

Wash.—Hart v. Maney, 12 Wash. 266, 40 P 987.

Eng.—Stevens v. Woodward, 6 Q. B. D. 318; Story v. Ashton, L. R. 4 Q. B. 476; Croft v. Alison, 4 B. & Ald. 590, 6 ECL 614, 106 Reprint 1052; Joel v. Morison, 6 C. & P. 501, 25 ECL 546; Butler v. Basing, 2 C. & P. 613, 12 ECL 764; Woodman v. Joiner, 10 Jur. N. S. 852.

34. U. S.—American Banana Co. v. United Fruit Co., 166 Fed. 261, 92 CCA 325 [aff 213 U. S. 347, 29 SCt 511, 53 L. ed. 826]; International Text-Book Co. v. Heartt, 136 Fed. 129, 69 CCA 127; Pressley v. Mobile, etc., R. Co., 15 Fed. 199, 4 Woods 569; U. S. v. Halberstadt, 26 F. Cas. No. 15,276, Gilp. 262.

Ala.—Singer Mfg. Co. v. Taylor, 150 Ala. 574, 43 S 210, 9 LRANS 929; Hardeman v. Williams, 150 Ala. 415, 43 S 726, 10 LRANS 653 (holding that, where the agent of defendant, who was in the loan business, accompanied a constable to plaintiff's house to assist him in taking some furniture under a writ of detinue, and while there plaintiff and the constable got into a quarrel over a contemptuous remark made by plaintiff in respect to a matter having no connection with the taking of the furniture or the executing of the writ, and the agent, in aiding the constable, knocked plaintiff down, defendant was not liable, since the assault was not committed by his agent in the course and within the scope of his employment).

Ark.—St. Louis, etc., R. Co. v. Grant, 75 Ark. 579, 88 SW 580, 1133.

Cal.—Thiele v. Newman, 116 Cal.

them.[35] Thus in the absence of ratification or estoppel the principal will not be liable for fraud committed by the agent without the scope of his authority.[36]

Where no relation of agency. A person is not liable for the torts of one who does not bear to him the relation of agent,[37] unless he has so acted in permitting the alleged agent to represent him

571, 48 P 713; Fogel v. Schmalz, 92 Cal. 412, 28 P 444.

Conn.—Maisenbacker v. Concordia Soc., 71 Conn. 369, 42 A 67, 71 AmSR 213.

Ga.—Wikla v. Louisville, etc., R. Co., 116 Ga. 309, 42 SE 525; Merchants' Nat. Bank v. Guilmartin, 88 Ga. 797, 15 SE 831, 17 LRA 322 (holding that code § 2201, declaring that the principal shall be bound for the care, diligence, and fidelity of his agent, and § 2961, declaring that every person shall be liable for torts committed by his servant by his command or in the prosecution and within the scope of his business, do not render a bank liable for the theft by its cashier of a deposit gratuitously received, the defalcation not being in the line of his duty); Lewis v. Amorous, 3 Ga. A. 50, 59 SE 338 (holding that, in an action for the death of plaintiff's son by being struck by an automobile while operated by one not the owner, a petition, in order to state a cause of action against the owner, must either expressly or by necessary implication allege not only the existence of an agency between the owner and the operator but also the connection of the act with the employment).

Ill.—Fay v. Slaughter, 194 Ill. 157, 62 NE 592, 56 LRA 564, 88 AmSR 148 [aff 94 Ill. A. 111]; Hancock v. Singer Mfg. Co., 174 Ill. 503, 51 NE 820; Chicago, etc., R. Co. v. Moran, 129 Ill. A. 38; Singer Mfg. Co. v. Hancock, 74 Ill. A. 556 [aff 174 Ill. 503, 51 NE 820]; Matthews v. People's F. Ins. Co., 64 Ill. A. 280; Callahan v. Hyland, 59 Ill. A. 347; Fraser v. Hollenberg, 30 Ill. A. 163; Goldstein v. Goldstein, 11 Ill. A. 530.

Ind. T.—Bartles v. Courtney, 6 Ind. T. 379, 98 SW 133.

Kan.—Laird v. Farwell, 60 Kan. 512, 57 P 98.

Ky.—Ferguson v. Terry, 1 B. Mon. 96; Ayer, etc., Tie Co. v. Davenport, 82 SW 177, 26 KyL 115.

La.—Vara v. R. M. Quigley Constr. Co., 114 La. 261, 38 S 162; Richoux v. Mayer, 29 La. Ann. 828; Henderson v. Western M. & F. Ins. Co., 10 Rob. 164, 43 AmD 176.

Me.—Stickney v. Munroe, 44 Me. 195.

Md.—Baltimore, etc., Turnpike Road v. Green, 86 Md. 161, 37 A 642; Hardy v. Chesapeake Bank, 51 Md. 562, 34 AmR 325.

Mass.—Stimpson v. Achorn, 158 Mass. 342, 33 NE 518; Com. v. Reading Sav. Bank, 137 Mass. 431.

Mich.—Michigan Lumber Yard v. Blesch, 166 Mich. 470, 131 NW 1105.

Minn.—Slater v. Advance Thresher Co., 97 Minn. 305, 107 NW 133, 5 LRANS 598; Commonwealth Title Ins., etc., Co. v. Dakko, 89 Minn. 386, 94 NW 1088; Larson v. Fidelity Mut. Life Assoc., 71 Minn. 101, 73 NW 711.

Mo.—Milton v. Missouri Pac. R. Co., 193 Mo. 56, 91 SW 949, 4 LRANS 282 and note; Worthington v. Vette, 77 Mo. A. 445 (holding that, where an agent was authorized to transport goods to a storage house and take a receipt therefor in his principal's name, and after the goods had been thus stored the agent retook the same and pledged them to a third person, exhibiting to the latter as evidence of title on the part of the agent a receipt from the depository, such third person had no right to the goods as against the principal).

N. J.—Kennedy v. Parke, 17 N. J. Eq. 415.

N. Y.—Mulligan v. New York, etc., R. Co., 129 N. Y. 506, 29 NE 952, 26 AmSR 539, 14 LRA 791 and note; Baird v. New York, 96 N. Y. 567; Welsh v. German American Bank, 73 N. Y. 424, 29 AmR 175; Flinn v. World's Dispensary Medical Assoc., 64 App. Div. 490, 72 NYS 243; Schmidt v. Garfield Nat. Bank, 64 Hun 298, 19 NYS 252 [aff 138 N. Y. 631 mem, 33 NE 1084 mem]; Fellows v. U. S. Loaning Comrs., 36 Barb. 655; Ryan v. Hudson River R. Co., 33 N. Y. Super. 137; Kutner v. Fargo, 20 Misc. 207, 45 NYS 753 [aff 34 App. Div. 317, 54 NYS 332].

N. C.—West v. A. P. Messick Grocery Co., 138 N. C. 166, 50 SE 565.

Oh.—Kilfoyl v. Hull, 4 Oh. Dec. (Reprint) 552, 2 ClevLRep 370.

Pa.—Canon v. Sharon, etc., St. R. Co., 216 Pa. 408, 65 A 795; Comly v. Wanamaker, 14 Montg. Co. 30.

Tenn.—Horrigan v. First Nat. Bank, 9 Baxt. 137.

Tex.—Donovan v. Texas, etc., R. Co., 64 Tex. 519; Grand Temple, etc., K. D. T. I. O. T. v. Johnson, (Civ. A.) 135 SW 173; O'Neil v. Davis, 1 Tex. A. Civ. Cas. § 415.

Wash.—Samson v. Beale, 27 Wash. 557, 68 P 180; Hart v. Maney, 12 Wash. 266, 40 P 987.

Wis.—Ratcliffe v. Chicago, etc., R. Co., 153 Wis. 281, 141 NW 229; Firemen's Fund Ins. Co. v. Schreiber, 150 Wis. 42, 135 NW 507, 45 LRANS 314 and note, AnnCas 1913E 823 and note; Hoyer v. Ludington, 100 Wis. 441, 76 NW 348.

Eng.—Lloyd v. Grace, [1911] 2 K. B. 489; British Mut. Banking Co. v. Charnwood Forest R. Co., 18 Q. B. D. 714; Duncan v. Luntley, 2 Hall & T. 78, 47 Reprint 1604, 2 Macn. & G. 30, 48 EngCh 23, 42 Reprint 12; Carter v. St. Mary Abbott's Vestry, 63 J. P. 487; Malcolm v. Waterhouse, 24 T. L. R 854.

Can.—B. & R. Co. v. McLeod, 7 DomLR 579, 22 WestLR 274.

Ont.—Emerson v. Niagara Nav. Co., 2 Ont. 528.

See also Master and Servant [26 Cyc 1518 et seq].

[a] **Where a forced custodian of property** which is in litigation has instructed his agent to deliver the property on a proper order of the court before which the suit is pending, and the agent refuses to deliver it when the order is presented, the offense of the agent is beyond the scope of his agency and the principal is not responsible therefor. Miller v. Buckner, Mann. Unrep. Cas. (La.) 170.

[b] **Misappropriation of proceeds of note.**—Where a person dealing with an agent gives him as payment a promissory note payable to the agent's order personally, without reference to his principal, he has no recourse against the principal to recover the amount which the agent has appropriated after discounting the note. Beaudoin v. Charruau, 32 Que. Super. 361.

35. See supra § 85.

36. U. S.—Pacific Lumber Co. v. Moffat, 134 Fed. 836, 67 CCA 442.

Cal.—Walsh v. Hunt, 120 Cal. 46, 52 P 115, 39 LRA 697 (holding that an authority given to an agent to obtain a loan for a certain amount and to deliver a note and mortgage executed therefor will not bind the borrower for an excess of such amount which the agent obtained by altering the instrument; and also holding that where neither the borrower nor the lender knew of the alterations until a year afterward the borrower was not so negligent as to be estopped from setting up the fraud).

Ga.—Merchants' Nat. Bank v. Guilmartin, 88 Ga. 797, 15 SE 831, 17 LRA 322.

Mass.—Stimpson v. Achorn, 158 Mass. 342, 33 NE 518; Foster v. Essex Bank, 17 Mass. 479, 9 AmD 168.

Mo.—Union Biscuit Co. v. Springfield Grocery Co., 143 Mo. A. 300, 126 SW 996 (holding that, where defendant mailed a check to plaintiff in payment of a debt and plaintiff's bookkeeper on receiving the check forged an indorsement and cashed the check, and plaintiff did not receive it or its proceeds, defendant's debt to plaintiff was not thereby paid); Taylor v. Sartorious, 130 Mo. A. 23, 108 SW 1089 (holding that, where defendant and others signed a power of attorney authorizing one of the signers to perform all necessary acts pending the incorporation of a proposed company, the power providing that any acts so performed were thereby ratified by the parties thereto "subject to the approval of all parties concerned," the fact that the clause requiring the approval of the agent's acts by the parties was attached by a wafer so as to be easily removed, and was in fact removed by the agent, thereby leaving his powers apparently unrestricted, did not render defendant liable for the acts of the agent outside of the original power before the clause was removed, the act of the agent being similar to forgery, which cannot render the principal liable); Merchants' Bank v. Prudential Ins. Co., 110 Mo. A. 62, 84 SW 101.

N. J.—Kennedy v. Parke, 17 N. J. Eq. 415.

Pa.—Harvey v. Schuylkill Trust Co., 199 Pa. 421, 49 A 277; Gunster v. Scranton Illum. Heat, etc., Co., 181 Pa. 327, 37 A 550, 59 AmSR 650; Allentown First Nat. Bank v. Rex, 89 Pa. 308, 33 AmR 767; Scott v. Chester Valley Nat. Bank, 72 Pa. 471, 13 AmR 711.

Eng.—Farquharson v. King, [1902] A. C. 325; Thorne v. Heard, [1895] A. C. 495 [aff [1894] 1 Ch. 599]; Giblin v. McMullen, L. R. 2 P. C. 317, 3 ERC 613; Gomperts v. Cook, 20 T. L. R. 106.

See Greenebaum v. Bornhofen, 167 Ill. 640, 47 NE 857 [rev 68 Ill. A. 645]; McKay v. Williams, 67 Mich. 547, 35 NW 159, 11 AmSR 597.

37. Ill.—Compton v. Bunker Hill Bank, 96 Ill. 301, 36 AmR 147.

Ind.—Ft. Wayne, etc., Turnpike Co. v. Deam, 10 Ind. 563.

Iowa.—Goodrich v. Musgrave Fence, etc., Co., 154 Iowa 637, 135 NW 58.

Kan.—Swofford Bros. Dry Goods Co. v. Berkowitz, 7 Kan. A. 24, 51 P 796 (holding that the fact that a person had in his possession an account or statement of goods sold by defendant to plaintiff of whom he was demanding payment was not sufficient proof of agency upon which to charge defendant with tortious acts and declarations respecting the same).

La.—Brooking v. Wade, 3 Mart. N. S. 518.

Md.—Willner v. Silverman, 109 Md. 341, 71 A 962, 24 LRANS 895 (holding that, where the son of a member of an association of clothiers, organized primarily to discipline employees, wrote and circulated through the association a letter concerning a discharged employee of the member, but there was nothing to show that the member either authorized or ratified the act, and there was nothing to show that the member was responsible on the ground of the agency of the son, the member was not responsible for the damages sustained by the employee in consequence of the letter).

Mo.—Cupples v. Whelan, 61 Mo. 583.

Tenn.—Collier v. Struby, 47 SW 90.

Vt.—Ross v. Fuller, 12 Vt. 265, 36 AmD 342.

Eng.—Flood v. Jackson, [1895] 2 Q. B. 21 [dism app 72 L. T. Rep. N. S. 589].

See Exchange Nat. Bank v. Little Rock Bank, 58 Fed. 140, 7 CCA 111, 22 LRA 686.

that he is estopped to deny the agency.[38]

[§ 536] (4) **Meaning of "Course of Employment."** The phrases "scope of authority" and "course of employment," used to express the test of a principal's liability for the acts of his agent, are generally used synonymously,[39] although a distinction has been attempted.[40] Much of the confusion and conflict in the cases is due to the gradual extension of the rule of liability so as to impose liability for acts not authorized and even forbidden, but nevertheless committed in the transaction of the principal's business,[41] and also to a failure to note the distinction between acts done by an agent within the scope and course of his employment, and acts done merely during his employment.[42] In order to render the principal liable for his agent's torts they must have been committed while carrying out the principal's business;[43] and it may be stated broadly that the tort of an agent is within the course of his employment where the agent in performing it is endeavoring to promote his principal's business within the scope of the actual or apparent authority conferred upon him for that purpose.[44] But if the agent steps aside from the principal's business, for however short a time, to do acts not connected with such business the relation of agency is for that time suspended, and the agent is not acting within the course of his employment.[45]

38. See supra §§ 533, 534.
Estoppel to deny agency see generally supra §§ 70–74.

39. See cases passim. See also Master and Servant [26 Cyc 1518 et seq].

[a] **The test is phrased in modern cases** as "scope" or "course of employment," "scope of authority," etc. See generally cases supra §§ 532–535. See also Laugher v. Pointer, 5 B. & C. 547, 577, 11 ECL 579, 108 Reprint 204 (where Lord Kenyon said: "I admit the principle, that a man is answerable for the conduct of his servants in matters done by them in the exercise of the authority that he has given them"); Coleman v. Riches, 16 C. B. 104, 81 ECL 104, 139 Reprint 695; Sleath v. Wilson, 9 C. & P. 607, 38 ECL 355; Nicholson v. Mouncey, 15 East 384, 392, 104 Reprint 890 (where Lord Ellenborough said that a master "is answerable for those whom he employs, for injuries done by them to others within the scope of their employment"); Cornfoot v. Fowke, 4 Jur. 919. "The liability of the principal extends to all acts done by the agent in furtherance and within the scope of the business with which he was intrusted." And again: "He is liable even for the wrongful acts committed by the agent in the course of the employment or the carrying out of the business with which he is intrusted." Per Keating, J., in Bolingbroke v. Swindon Local Bd., L. R. 9 C. P. 575, 577.

[b] **"Course of employment" defined.**—"For the lack of a better term it is said that in order to charge the master with the servant's negligence, the servant must be acting 'in the course of his undertaking' or 'within the course of his employment.' This term 'course of his employment,' like the corresponding term 'the scope of the authority' in cases of agency, and 'the scope of the business' in cases of partnership, is one not capable of precise definition although many attempts have been made to define it. It is largely a question of fact and its determination may vary in each case in view of the particular circumstances. The utmost that can ordinarily be said is that a servant is acting within the course of his employment when he is engaged in doing, for his master, either the act consciously and specifically directed or any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act or a natural, direct and logical result of it. If in doing such an act, the servant acts negligently, that is negligence within the course of the employment." Mechem Agency § 1879. See also Jaggard Torts p 251 et seq for an acute discussion of the phrases "scope of authority" and "course of employment."

40. See Jaggard Torts p 251 et seq, where "course of employment" is treated as the broader term.

41. See 7 Harv. L. Rev. 383, for an able historical discussion of a principal's liability for the acts of his agents, by John H. Wigmore. See also Jaggard Torts p 247 et seq.

42. Hardeman v. Williams, 150 Ala. 415, 43 S 726, 10 LRANS 653.

43. St. Louis, etc., R. Co. v. Grant, 75 Ark. 579, 585, 88 SW 580, 1133 [quot Clark & Skyles Agency § 494] (where the court said: "It is certain, however, that the agent must be engaged in the principal's business, and the tort must be committed while he is carrying out such business. If, from a consideration of all the facts and circumstances of the case, it is determined that the agent was acting for his principal, and in pursuance of his real or apparent agency, at the time the tort was committed, then it may be said that he was acting in the course of his employment, and the principal will be liable for such tort, whether authorized or not"); Axman v. Washington Gaslight Co., 38 App. (D. C.) 150, 158 (where the court said: "We conceive the true test in measuring the principal's responsibility, to be whether the act of the agent was done in the prosecution of the business either impliedly or expressly intrusted to the agent by the principal. If it was, the principal is responsible for the manner in which the agent executed his commission, even if he acted wantonly, recklessly, or against orders. He represented his principal, and what he did was for the benefit of his principal. If his recklessness or lack of judgment caused loss or damage, it was only just that the one who selected and commissioned him should be held accountable therefor. Of course, the moment the agent turns aside from the business of the principal and commits an independent trespass, the principal is not liable. The agent is not then acting within the scope of his authority in the business of the principal, but in the furtherance of his own ends"); Firemen's Fund Ins. Co. v. Schreiber, 150 Wis. 42, 135 NW 507, 45 LRANS 314, AnnCas1913E 823.

44. Gallagher v. Singer Sewing Mach. Co., 177 Ill. A. 198, 239 [quot Cyc].

[a] **Torts held to be within course of employment** see Blumenthal v. Shaw, 77 Fed. 954, 23 CCA 590 (where a factory superintendent reclaimed as a runaway apprentice one who was not legally an apprentice); Mitchell v. Finnell, 101 Cal. 614, 36 P 123 (where an agent to settle with a debtor threatened unlawful imprisonment); Dunn v. Hartford, etc., Horse R. Co., 43 Conn. 434 (where agent received a third person's property from the principal's debtor and sold it to pay the debt); Field v. Kane, 99 Ill. A. 1 (where a floorwalker followed a customer suspected of theft to the street and forcibly compelled her to reënter the store); Strader v. Lexington Hydraulic, etc., Co., 146 Ky. 580, 142 SW 1078 (holding that, where an agent with power to remove trespassers attempts to remove one peaceably, and in the following altercation wrongfully kills him, his principal is liable, the killing being a continuation of the authorized act of removal); Pennsylvania Iron Works v. Vogt Mach. Co., 96 SW 551, 29 KyL 861, 8 LRANS 1023 (where an agent managing a business office wrote a libelous letter concerning another's credit in order to obtain a contract); Commerce Bank v. Hoeber, 88 Mo. 37, 57 AmR 359 (where an agent to effect a secret preference to a creditor); Dupre v. Childs, 52 App. Div. 306, 62 NYS 179 [aff 169 N. Y. 585 mem, 62 NE 1095 mem] (where an agent managing a restaurant followed an alleged diner to the street and caused his arrest).

[b] **Torts by real estate agent** held to be within course of employment see Ogle v. Hudson, 30 Ind. A. 539, 66 NE 702 (where an agent to manage a farm discharged surface water on to adjoining land).

[c] **The hiring of a horse by a traveling salesman** with which to reach another town (1) is such a "necessary" and "reasonable" incident to the performance of his employer's business as to render the latter liable for his negligent injury of the horse (Ewing v. Shaw, 83 Ala. 333, 3 S 692; Rexroth v. Holloway, 45 Ind. A. 36, 90 NE 87; Huntley v. Mathias, 90 N. C. 101, 47 AmR 516), (2) although the town could have been reached by other modes of travel (Rexroth v. Holloway, supra).

[d] **Torts by ticket agent** (1) held to be within course of employment see St. Louis, etc., R. Co. v. Ryan, 56 Ark. 245, 19 SW 839 (where a ticket agent made a penal overcharge); Palmeri v. Manhattan R. Co., 133 N. Y. 261, 30 NE 1001, 28 AmSR 632, 16 LRA 136 (where a ticket agent detained and insulted a passenger for giving an alleged bad coin for a ticket). (2) Torts by ticket agent held to be outside course of employment see Wikle v. Louisville, etc., R. Co., 116 Ga. 309, 42 SE 525 (where a ticket agent caused the arrest of a loiterer whom he suspected of pilfering the cash drawer); Mulligan v. New York, etc., R. Co., 129 N. Y. 506, 29 NE 952, 26 AmSR 539, 14 LRA 791 and note (where a ticket agent acting under a notice issued by police officials caused the arrest of a person offering an alleged counterfeit bill in payment for a ticket); Donovan v. Texas, etc., R. Co., 64 Tex. 519 (where a freight agent used actionable language in giving reasons for the regulations of the carrier by whom he was employed). See generally Carriers [6 Cyc 352].

45. Hardeman v. Williams, 150 Ala. 415, 43 S 726, 10 LRANS 653; Axman v. Washington Gaslight Co., 38 App. (D. C.) 150.

[a] **Change of mental attitude.**—The stepping aside by an agent from the scope of his employment, essential to break the connection between the principal and the agent, requires only a change of mental attitude, no particular interval of time being necessary. Firemen's Fund Ins. Co. v. Schreiber, 150 Wis. 42, 135 NW 507, 45 LRANS 314 and note, AnnCas1913E 823 and note.

[b] **Torts held to be outside of course of employment** see National

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[§ 537] **(5) Wanton or Malicious Acts.**[46] **Former rule.** It was the rule formerly that wanton and malicious acts of an agent imposed no liability on the principal unless done under the direction or with the assent of the principal.[47]

Modern rule. The weight of recent authority, however, disregards the intent of the agent in committing the tort, and holds that the principal is as liable for torts prompted by wantonness, willfulness, or malice as for other torts, if they are committed in the course of the agent's employment;[48] but where the agent steps aside from the business of his principal and wantonly or maliciously commits an act to accomplish an independent purpose of his own the principal is not liable therefor, unless such act has been previously authorized or is

Packing So. v. Boullion, 105 Ark. 326, 151 SW 244 (slander); Thiele v. Newman, 116 Cal. 571, 48 P 713 (where an agent ordered to set fire to a part of the principal's land set fire also to his own land, thereby damaging a third person); Merchants' Nat. Bank v. Guilmartin, 88 Ga. 797, 15 SW 831, 17 LRA 822 (where the cashier of a bank stole a deposit gratuitously received); Callahan v. Hyland, 59 Ill. A. 347 (where an agent in endeavoring to collect a disputed account made a willful and malicious assault on a bystander); Goldstein v. Goldstein, 11 Ill. A. 530 (where a guardian put his ward's money into his principal's business and immediately withdrew it again); Laird v. Farwell, 60 Kan. 512, 57 P 98 (where an agent to foreclose a chattel mortgage caused the arrest of a person for perjury in an attachment affidavit covering goods in the mortgage); Strader v. Lexington Hydraulic, etc., Co., 146 Ky. 580, 142 SW 1073 (shooting trespassers under power to remove them); Baltimore, etc., Turnpike Road v. Green, 86 Md. 161, 37 A 642 (where a tollgate keeper caused an arrest on a charge of defrauding the company of tolls); Welsh v. German American Bank, 73 N. Y. 424, 29 AmR 175 (where a bookkeeper made fictitious accounts, drew checks therefor for his own benefit, and circulated them); Schmidt v. Garfield Nat. Bank, 64 Hun 298, 19 NYS 252 [aff 138 N. Y. 631 mem, 33 NE 1084 mem] (where an agent authorized to indorse the principal's commercial paper with a stamp indorsed it without a stamp and deposited it to his own account); Kilfoyl v. Hull, 4 Oh. Dec. (Reprint) 552, 2 ClevLRep 369 (where an agent, ordered to paint a sign on another's house after obtaining proper authority, painted it without obtaining proper authority); Ralph v. Fon Dersmith, 3 Pa. Super. 618, 40 WklyNC 116 (where a purchasing agent made false representations as to the financial standing of his employer); Comly v. Wanamaker, 14 Montg. Co. (Pa.) 30 (where a farm foreman procured the arrest for larceny of one removing property from the farm); Horrigan v. First Nat. Bank, 9 Baxt. (Tenn.) 137 (where a bank clerk made false representations as to a firm's financial standing); Emerson v. Niagara Nav. Co., 2 Ont. 528 (where the purser of a steamer assaulted a passenger in attempting to seize his baggage for alleged nonpayment of fare).

[c] **Torts by real estate agent held to be outside course of employment** see Pressly v. Mobile, etc., R. Co., 15 Fed. 199, 4 Woods 569 (where an agent to manage real estate caused the arrest of a person on a charge of larceny of timber therefrom); Ayer, etc., Tie Co. v. Davenport, 82 SW 177, 26 KyL 116 (where an agent to sell land went thereon subsequently to selling and appropriated timber growing thereon); Hoyer v. Ludington, 100 Wis. 441, 76 NW 348 (where an agent to sell land induced, by false representation, the purchase of stock in a corporation organized to buy the land).

[d] **Torts by sales agent** held to be outside course of employment see Singer Mfg. Co. v. Taylor, 150 Ala. 574, 43 S 210, 9 LRANS 929 and note (where a sewing machine agent slandered a customer); Singer Mfg. Co. v. Hancock, 74 Ill. A. 556 [aff 174 Ill. 503, 51 NE 820] (where a sewing machine agent caused the arrest of a person who maliciously injured a machine); Baird v. New York, 96 N. Y. 567 (where an agent to sell to a city offered bribes to city officials); Adams v. Cole, 1 Daly (N. Y.) 147 (where an agent employed to sell made false bills and obtained payment thereof by fraud).

46. See also Master and Servant [26 Cyc 1527].

47. Cal.—Turner v. North Beach, etc., R. Co., 34 Cal. 594.

Ill.—Tuller v. Voght, 13 Ill. 277; Johnson v. Barber, 10 Ill. 425, 50 AmD 416.

Iowa.—De Camp v. Mississippi, etc., R. Co., 12 Iowa 348.

Md.—Brown v. Purviance, 2 Harr. & G. 316.

Mich.—Wood v. Detroit City St. R. Co., 52 Mich. 402, 18 NW 124, 50 AmR 259.

Nev.—Levey v. Fargo, 1 Nev. 415.

N. Y.—Mali v. Lord, 39 N. Y. 381, 100 AmD 448; Vanderbilt v. Richmond Turnpike Co., 2 N. Y. 479, 51 AmD 315; Richmond Turnpike Co. v. Vanderbilt, 1 Hill 480; Wright v. Wilcox, 19 Wend. 343, 32 AmD 507.

N. C.—Welsson v. Seaboard, etc., R. Co., 49 N. C. 379.

Tenn.—Puryear v. Thompson, 5 Humphr. 397.

Eng.—McManus v. Crickett, 1 East 106, 102 Reprint 48; Middleton v. Fowler, 1 Salk. 282, 91 Reprint 247; Bowcher v. Noidstrom, 1 Taunt. 568, 127 Reprint 954; Ellis v. Turner, 8 T. R. 531, 101 Reprint 1529.

48. U. S.—Chamberlain v. Chandler, 5 F. Cas. No. 2,575, 3 Mason 242.

Ala.—Gilliam v. South, etc., R. Co., 70 Ala. 268.

Ark.—Duggins v. Watson, 15 Ark. 118, 60 AmD 560.

Del.—Harrington v. Hall, 22 Del. 72, 63 A 875.

Ga.—Southern R. Co. v. Chambers, 126 Ga. 404, 55 SE 37, 7 LRANS 926 (where a station agent willfully refused to deliver goods to a drayman).

Ill.—Hancock v. Singer Mfg. Co., 174 Ill. 503, 51 NE 820; North Chicago City R. Co. v. Gastka, 128 Ill. 613, 21 NE 522, 4 LRA 481 and note; Chicago, etc., R. Co. v. Flexman, 103 Ill. 546 42 AmR 33; Chicago, etc., R. Co. v. Sykes, 96 Ill. 162; Northwestern R. Co. v. Hack, 66 Ill. 238; Chicago, etc., R. Co. v. Dickson, 63 Ill. 151, 14 AmR 114; Chicago, etc., R. Co. v. Williams, 55 Ill. 185, 8 AmR 641; Toledo, etc., R. Co. v. Harmon, 47 Ill. 298, 95 AmD 489; Illinois Cent. R. Co. v. Read, 37 Ill. 484, 87 AmD 260; Carlberg v. Spiegels House Furnishing Co., 178 Ill. A. 424; Singer Mfg. Co. v. Hancock, 74 Ill. A. 556 [aff 174 Ill. 503, 51 NE 820]; Arasmith v. Temple, 11 Ill. A. 39.

Ind.—Evansville, etc., R. Co. v. McKee, 99 Ind. 519, 50 AmR 102; Detroit, etc., R. Co. v. Barton, 61 Ind. 293; Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 AmR 103; Grand Rapids, etc., R. Co. v. King, 41 Ind. A. 701, 83 NE 778 (holding that a corporation is responsible for the acts of an agent in arresting and imprisoning plaintiff performed while engaged in the discharge of duties, within the general scope of his agency, although the particular act was willful, and was not directly authorized).

Iowa.—McKinley v. Chicago, etc., R. Co., 44 Iowa 314, 24 AmR 748.

Kan.—Southern Kansas R. Co. v. Rice, 38 Kan. 398, 16 P. 817, 5 AmSR 766; Hynes v. Jungren, 8 Kan. 391.

Ky.—Sherley v. Billings, 8 Bush 147, 8 AmR 451.

La.—Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 3 S 631, 8 AmSR 512.

Me.—Goddard v. Canada Grand Trunk R. Co., 57 Me. 202, 2 AmR 39.

Mass.—Levi v. Brooks, 121 Mass. 501; Hawes v. Knowles, 114 Mass. 518, 19 AmR 383; Bryant v. Rich, 106 Mass. 180, 8 AmR 311; Ramsden v. Boston, etc., R. Co., 104 Mass. 117, 6 AmR 200; Howe v. Newmarch, 12 Allen 49.

Mich.—Cascarella v. National Grocer Co., 151 Mich. 15, 114 NW 857.

Miss.—New Orleans, etc., R. Co. v. Bailey, 40 Miss. 395.

Mo.—Milton v. Missouri Pac. R. Co., 198 Mo. 46, 91 SW 949, 4 LRANS 282; Tanger v. Southwest Missouri Electric R. Co., 85 Mo. A. 28; Canfield v. Chicago, etc., R. Co., 59 Mo. A. 354.

Nev.—Forrester v. Southern Pac. Co., 36 Nev. 247, 134 P 753, 136 P 705, 48 LRANS 1 and note.

N. Y.—Magar v. Hammond, 183 N. Y. 387, 76 NE 474, 3 LRANS 1038; Stewart v. Brooklyn, etc., R. Co., 90 N. Y. 588, 43 AmR 185; Hoffman v. New York Cent., etc., R. Co., 87 N. Y. 25, 41 AmR 327; Rounds v. Delaware, etc., R. Co., 64 N. Y. 129, 21 AmR 597; Shea v. Sixth Ave. R. Co., 62 N. Y. 180, 20 AmR 480; Isaacs v. Third Ave. R. Co., 47 N. Y. 122, 7 AmR 418; Weed v. Panama R. Co., 17 N. Y. 362, 72 AmD 474; Schmidt v. Vanderveer, 110 App. Div. 758, 97 NYS 441.

N. C.—Jackson v. American Tel., etc., Co., 139 N. C. 347, 51 SE 1015, 70 LRA 738; Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 SE 816, 67 LRA 455, 1 AnnCas 718 and note; Moore v. Cohen, 128 N. C. 345, 38 SE 919.

Oh.—Passenger R. Co. v. Young, 21 Oh. St. 518, 8 AmR 78; Little Miami, R. Co. v. Wetmore, 19 Oh. St. 110, 2 AmR 373; Blumenthal v. Cincinnati Chamber of Commerce, 8 Oh. Dec. (Reprint) 410, 7 CincLBul 327 (holding the principal liable for a malicious injury committed by his agent, if the business in which the agent is engaged requires the exercise of good faith and sound discretion).

Pa.—Pennsylvania R. Co. v. Vandiver, 42 Pa. 365, 82 AmD 520.

S. C.—Riser v. Southern R. Co., 67 S. C. 419, 46 SE 47; Rucker v. Smoke, 37 S. C. 377, 16 SE 40, 34 AmSR 758; Palmer v. Charlotte, etc., R. Co., 3 S. C. 580, 16 AmR 750; Redding v. South Carolina R. Co., 3 S. C. 1, 16 AmR 681.

Tenn.—Nashville, etc., R. Co. v. Starnes, 9 Heisk. 52, 24 AmR 296; Springer Transp. Co. v. Smith, 16 Lea 498, 1 SW 280; Cantrell v. Colwell, 3 Head 471.

Tex.—Lipscomb v. Houston, etc., R. Co., 95 Tex. 5, 64 SW 923, 93 AmSR 804, 55 LRA 869; Dillingham v. Russell, 73 Tex. 47, 11 SW 139, 15 AmSR 753, 3 LRA 634 and note; Equitable L. Assur. Soc. v. Lester, (Civ. A.) 110 SW 499.

Wis.—Craker v. Chicago, etc., R. Co., 36 Wis. 657, 17 AmR 504; Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388; Pritchard v. La Crosse, etc., R. Co., 7 Wis. 232.

Eng.—Limpus v. London Gen. Omnibus Co., 1 H. & C. 526, 17 ERC 258.

Liability of principal for exemplary damages in such cases see Damages [13 Cyc 114].

[a] **Where the principal employs the agent to do an illegal act,** as where a justice orders the illegal detention and imprisonment of a prisoner by a constable, it has been held

subsequently ratified.[49]

Excessive force in executing authority. Where the principal delegates to the agent authority requiring the exercise of force, the principal is liable for the agent's tort notwithstanding the force employed by the latter is in excess of proper limits.[50]

[§ 538] **(6) Torts by Agent Acting Adversely to Principal; for Both Parties.** A principal is not liable for torts committed by the agent while acting for himself and adversely to the interests of the principal.[51]

Agent for both parties. Neither party is liable to the other for the tortious acts of an agent acting for both parties with their consent,[52] unless one of the parties participates in such acts as against the other.[53]

[§ 539] **(7) Torts of Subagent.** The liability of the principal for the torts of a subagent depends upon the question whether the primary agent was authorized expressly or impliedly to appoint the subagent.[54] If the primary agent was authorized to appoint a subagent so as to create a privity between the principal and the subagent, the principal is liable for the torts of the latter in like manner as for the torts of an agent appointed directly by the principal;[55] but he is not as a rule liable for the torts of a subagent appointed without authority.[56]

[§ 540] **b. Criminal Liability.** To render a principal liable criminally for acts of his agent, the principal must, as a general rule, have authorized, commanded, or connived at the commission of the offense.[57] There are, however, exceptions to this rule, such as the criminal responsibility of the proprietor of a publication for libel by his agent.[58] There are also certain offenses created by statute, the commission of which by the agent will usually render the principal liable, such as offenses under statutes prohibiting the sale of adulterated articles,[59] regulating the sale of intoxicating liquors,[60] and other statutory offenses of a kindred nature.[61]

[§ 541] **4. For Representations, Declarations,**

that the principal will be responsible, whether the agent acts innocently or maliciously. Hynes v. Jungren, 8 Kan. 391, 396 (where the court said: "The question is not presented as to whether the principal is responsible where his agent, employed to do a lawful act, transcends such employment and does a willful and malicious wrong. For here the act which the principal procures the agent to do, is illegal, and whether the agent acted innocently or maliciously the principal is responsible for the injury").

49. Ala.—Gilliam v. South, etc., Alabama R. Co., 70 Ala. 268.
Ga.—Southern R. Co. v. Chambers, 126 Ga. 404, 55 SE 37, 7 LRANS 926; Central of Georgia R. Co. v. Morris, 121 Ga. 484, 49 SE 606, 104 AmSR 164.
Ill.—Oxford v. Peter, 28 Ill. 434; Illinois Cent. R. Co. v. Downey, 18 Ill. 259; Cleveland Co-operative Stove Co. v. Koch, 37 Ill. A. 595; Daily v. Young, 3 Ill. A. 39.
Ind.—Evansville, etc., R. Co. v. Baum, 26 Ind. 70.
Kan.—Laird v. Farwell, 60 Kan. 512, 57 P 98.
La.—Richoux v. Mayer, 29 La. Ann. 828.
Md.—Bernheimer v. Becker, 102 Md. 250, 62 A 526, 111 AmSR 356, 3 LRANS 221 and note.
Mass.—Bacon v. Hooker, 173 Mass. 554, 54 NE 253.
Minn.—Larson v. Fidelity Mut. L. Assoc., 71 Minn. 101, 73 NW 711 (where an agent to solicit life insurance maliciously caused the arrest of a subagent for embezzlement).
Mo.—Milton v. Missouri Pac. R. Co., 193 Mo. 46, 91 SW 949, 4 LRANS 282.
N. Y.—Hoffman v. New York Cent., etc., R. Co., 87 N. Y. 25, 41 AmR 337; Rounds v. Delaware, etc., R. Co., 64 N. Y. 129, 21 AmR 597; Isaacs v. Third Ave. R. Co., 47 N. Y. 122, 7 AmR 418; Cullinan v. Burkhard, 93 App. Div. 31, 86 NYS 1003; Kutner v. Fargo, 20 Misc. 207, 45 NYS 753 [aff 34 App. Div. 317, 54 NYS 332] (where the clerk of a criminal prosecutor maliciously testified in the prosecution).
N. C.—Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 SE 816, 67 LRA 455, 1 AnnCas 718 and note.
Pa.—Canon v. Sharon, etc., St. R. Co., 216 Pa. 408, 65 A 795.
Tenn.—Cantrell v. Colwell, 3 Head 471.
Tex.—Little v. Rich, 55 Tex. Civ. A. 326, 118 SW 1077 (not responsible for the personal malice of the agent).
Wash.—Murrey v. Kelso, 10 Wash. 47, 38 P 879.
Eng.—Poulton v. London, etc., R. Co., L. R. 2 Q. B. 534; Lyons v. Martin, 8 A. & E. 512, 35 ECL 707, 112 Reprint 932; Croft v. Alison, 4 B. & Ald. 590, 6 ECL 614, 106 Reprint 1052; McManus v. Crickett, 1 East 106, 102 Reprint 43; Middleton v. Fowler, 1 Salk. 282, 91 Reprint 247.

[a] **A principal is not liable in exemplary damages** for the wanton acts of his agent, unless he participated either expressly or impliedly, or by conduct authorizing or approving the act before or after its commission. Dunshee v. Standard Oil Co., (Iowa) 146 NW 830.

50. Ga.—Century Bldg. Co. v. Lewkowitz, 1 Ga. A. 636, 57 SE 1036 (holding that, although one has a right by himself or his agent to protect his property from malicious mischief or trespass, he is responsible for the manner in which such right is exercised, and is liable for injury inflicted by his agent beyond the limits of reasonable force).
Ill.—Northwestern R. Co. v. Hack, 66 Ill. 238; St. Louis, etc., R. Co. v. Dalby, 19 Ill. 353.
Me.—Hanson v. European, etc., R. Co., 62 Me. 84, 16 AmR 404.
Mass.—Ramsden v. Boston, etc., R. Co., 104 Mass. 117, 6 AmR 200; Hewett v. Swift, 3 Allen 420.
N. Y.—Hoffman v. New York Cent., etc., R. Co., 87 N. Y. 25, 41 AmR 337; Shea v. Sixth Ave. R. Co., 62 N. Y. 180, 20 AmR 480; Jackson v. Second Ave. R. Co., 47 N. Y. 274, 7 AmR 448; Higgins v. Watervliet Turnp., etc., R. Co., 46 N. Y. 23, 7 AmR 293.
Tex.—International, etc., R. Co. v. Miller, 9 Tex. Civ. A. 104, 28 SW 233.

51. Keyser v. Hinkle, 127 Mo. A. 62, 106 SW 98 (holding that the doctrine that a principal will not be permitted to enjoy a benefit from his agent's services and disclaim responsibility for the consequences of his wrongful act by which the benefit was conferred has no application where the agent acts for himself, and adversely to the interest of his principal); Dittman Boot, etc., Co. v. Pratt, (Tex. Civ. A.) 153 SW 1186.

52. Brown v. St. John Trust Co., 71 Kan. 134, 80 P 37; Western R. Co. v. Roberts, 4 Phila. (Pa.) 110; Blair v. Baird, 43 Tex. Civ. A. 134, 94 SW 116; Willson v. Huron, 10 U. C. C. P. 498; Gore Bank v. Middlesex County, 16 U. C. Q. B. 595. Compare Paige v. Roeding, 96 Cal. 388, 31 P 264 (holding that the fact that a packing company designates, in a contract with certain persons to manufacture and ship to them certain goods, the particular person whom it intends putting in charge of its business as superintendent does not relieve it from liability for the neglect or incompetency of such person on the theory that he has thus become the agent of both parties).

53. Blair v. Baird, 43 Tex. Civ. A. 134, 94 SW 116 (holding that, where a contract for the sale of a ranch and the cattle thereon provided for payment for the cattle at a certain price per head, and named a certain person as joint agent of the parties to count the cattle, the seller was not liable for any misconduct of the joint agent unless it was shown that the two conspired together to defraud the buyer). See also Darner v. Brown, (Iowa) 137 NW 461.

54. **Delegation of authority** see supra §§ 342–352.
Power of collecting agent to employ subagent see supra § 274.
Power to make contracts of employment see supra §§ 306–309.

55. State Bank v. Western Union Tel. Co., 52 Cal. 280; Louisville, etc., R. Co. v. Blair, 4 Baxt. (Tenn.) 407; Stone v. Cartwright, 6 T. R. 411, 101 Reprint 622.

[a] **A vendor receiving the benefits of a transaction** is liable for fraudulent representations by the salesman, although he was only a subagent. Nelson v. Title Trust Co., 52 Wash. 258, 100 P 730.

56. Lindsay v. Singer Mfg. Co., 4 Mo. A. 571. But see State Bank v. Western Union Tel. Co., 52 Cal. 280 (holding the principal liable on the ground of public policy for the fraud and negligence of a subagent who was appointed by the primary agent without authority, and who was at the time of the commission of the tort transacting the principal's business).

57. U. S.—U. S. v. Beaty, 24 F. Cas. No. 14,555, Hempst. 487; U. S. v. Birch, 24 F. Cas. No. 14,595, 1 Cranch C. C. 571.
Ala.—Seibert v. State, 40 Ala. 60; Nall v. State, 34 Ala. 262.
Ind.—Hipp v. State, 5 Blackf. 149, 33 AmD 463.
Md.—Boyer v. Coxen, 92 Md. 366, 48 A 161.
Mass.—Com. v. Putnam, 4 Gray 16; Com. v. Nichols, 10 Metc. 259, 43 AmD 432.
Mich.—Peo. v. Parks, 49 Mich. 333, 13 NW 618.
Miss.—Kittrell v. State, 89 Miss. 666, 42 S 609.
Tex.—Mitchell v. Mims, 8 Tex. 6.
Va.—Com. v. Lewis, 4 Leigh (31 Va.) 664.
Wash.—Spokane v. Patterson, 46 Wash. 93, 89 P 402, 125 AmSR 921, 8 LRANS 1104, 13 AnnCas 706 and note.
W. Va.—Hall v. Norfolk, etc., R. Co., 44 W. Va. 36, 28 SE 754, 67 AmSR 757, 41 LRA 669.
Eng.—Somerset v. Hart, 12 Q. B. D. 360; Rex v. Huggins, Str. 883, 93 Reprint 915.
Principals and accessories see generally Criminal Law [12 Cyc 74].

58. See Libel and Slander [25 Cyc 428].

59. See Adulteration [1 Cyc 944].

60. See Intoxicating Liquors [23 Cyc 207].

61. See Atty.-Gen. v. Siddon, 1

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and Admissions of Agent.[62] Where an agent, in negotiating a transaction or making a contract on behalf of his principal, makes representations, declarations, and admissions in connection therewith respecting the subject matter, they will be binding on the principal,[63] where they are made at the time and as a part of the transaction,[64] and although they are false and fraudulent,[65] made without the

Cromp. & J. 220 (a case of concealing smuggled goods, where it was held that a trader is liable to a penalty for the illegal act of a servant done in the conduct of his business, with a view to protect the smuggled goods, although the master is absent at the time the act is done).

62. **Representations, declarations, and admissions of agent as evidence** against principal see Evidence [16 Cyc 1003 et seq]; to prove agency or authority see infra §§ 692–698.

Representations of sales agent see supra § 251.

63. U. S.—El Paso Live Stock Commn. Co. v. Colorado Live Stock Commn. Co., 171 Fed. 20, 96 CCA 262.

Cal.—Seymour v. Oelrichs, 156 Cal. 782, 106 P 88, 134 AmSR 154 (holding that, where an agent is authorized in writing to enter into a contract in behalf of his principal, the latter is bound by the agent's acts, conduct, and statements to the same extent that he would have been had he been personally present).

Conn.—Hill v. Bennett, 23 Conn. 363.

D. C.—Main v. Aukam, 12 App. 375.

Ill.—Hartford L. Ins. Co. v. Sherman, 223 Ill. 329, 78 NE 923; Allin v. Millison, 72 Ill. 201.

Ind.—Larue v. American Diesel Engine Co., 176 Ind. 609, 96 NE 772; United Coal Min. Co. v. Daugherty, 51 Ind. A. 165, 96 NE 477.

Ky.—Brock v. Tennis Coal Co., 97 SW 46, 29 KyL 1283, 101 SW 300, 30 KyL 1370; Tompkins v. Triplett, 110 Ky. 824, 62 SW 1021, 23 KyL 305, 96 AmSR 472.

La.—Hills v. Jacobs, 7 Rob. 406.

Mass.—Dzuris v. Pierce, 216 Mass. 132, 103 NE 296; Garfield, etc., Coal Co. v. Rockland-Rockport Lime Co., 184 Mass. 60, 67 NE 863, 100 AmSR 543, 61 LRA 946; Jewett v. Carter, 132 Mass. 335.

Mich.—Busch v. Wilcox, 82 Mich. 315, 46 NW 940; Reeves v. Kelly, 30 Mich. 132.

Nebr.—White Lake Lumber Co. v. Stone, 19 Nebr. 402, 27 NW 395.

N. Y.—Caffee v. Ottman, 63 Hun 502, 18 NYS 393; Ferguson v. Hamilton, 35 Barb. 427; Hunter v. Hudson River Iron, etc., Co., 20 Barb. 493; Marine Bank v. Butler Colliery Co., 1 Silv. Sup. 155, 5 NYS 291 [aff 125 N. Y. 695 mem, 26 NE 751 mem]; Smith v. Frank, 25 N. Y. Super. 626; Horton v. Carhart, 14 NYSt 546.

Tex.—Bruce v. Washington, 80 Tex. 368, 15 SW 1104; Sullivan v. Ramsey, (Civ. A.) 155 SW 580; Jones v. Chapman, (Civ. A.) 41 SW 527; New York, etc., Land Co. v. Gardner, (Civ A.) 25 SW 737; Halsell v. Musgrave, 5 Tex. Civ. A. 476, 24 SW 358.

Va.—Finch v. Causey, 107 Va. 1214, 57 SE 562 (holding that an owner of land is bound by the representations of her agent in negotiating a lease thereof).

Wis.—Burke v. Milwaukee, etc., R. Co., 33 Wis. 410, 53 NW 692.

[a] **Good faith of agent.**—A principal who undertakes to enforce a contract is bound by the authorized representations made by his agent to induce the contract, although the agent did not know at the time whether the representations were true or false. Bennett v. Judson, 21 N. Y. 238.

[b] **Admissions** of any fact by an agent during his agency, relating directly thereto, bind the principal, particularly if such fact is a thing done by the agent himself, or within his own knowledge. Dykes v. Cockrell, 6 La. Ann. 707.

[c] **A warranty by an agent on a sale** for a known principal renders the latter alone liable. Robert Thomson Co. v. Levis, 132 App. Div. 519, 117 NYS 1056.

[d] **Third persons have a right to rely upon statements of an agent** as to the existence of such extrinsic matters relating to his agency as lie within his own peculiar knowledge. Edwards v. Thomas, 66 Mo. 468. See also supra §§ 204, 206.

[e] **Where the effect of a written contract depends upon contemporaneous verbal representations** made by a third person, he must be an actual agent, or his action must be ratified with knowledge of what he has done. McGraw v. Germania F. Ins. Co., 54 Mich. 145, 19 NW 927.

64. Del.—Maher v. Moore, 42 A 721; Geylin v. DeVillerol, 2 Houst. 311.

Ga.—National Bldg. Assoc. v. Quin, 120 Ga. 358, 47 SE 962; Wynne v. Stevens, 101 Ga. 808, 28 SE 1000.

Ill.—Hartford L. Ins. Co. v. Sherman, 223 Ill. 329, 78 NE 923.

Ky.—Smith v. Ohler, 104 SW 995, 31 KyL 1275.

Mass.—Randall v. Peerless Motor Car Co. 212 Mass. 352, 99 NE 221.

Mo.—Bergeman v. Indianapolis, etc., R. Co., 104 Mo. 77, 15 SW 992; Robinson v. Walton, 58 Mo. 380.

N. Y.—Peo. v. Terwilliger, 59 Misc. 617, 110 NYS 1034.

W. Va.—Nutter v. Brown, 51 W. Va. 598, 42 SE 661; Coyle v. Baltimore, etc., R. Co., 11 W. Va. 94.

[a] **Where the acts of the agent will bind the principal, his representations** respecting the subject matter, made while he is transacting the business and exercising his authority, will also bind the principal. Hartford L. Ins. Co. v. Sherman, 123 Ill. A. 202 [aff 223 Ill. 329, 78 NE 923]; Ayres v. Hubbard, 71 Mich. 594, 40 NW 10.

[b] **Where an agent has exclusive care and letting of premises,** his misrepresentations as to their condition made preliminary to a lease, although within the scope of his authority, will not be binding on his principal, unless made contemporaneous with the contract and constituting a part of the res gestæ. Cate v. Blodgett, 70 N. H. 316, 317, 48 A 281 (where the court said: "While it is a familiar general doctrine of law that a principal is liable to third persons in a civil suit for the false representations of his agent relative to a contract made in the course of and connected with his employment, although the principal did not authorize, or justify, or in any manner participate in such representations, it is nevertheless to be borne in mind that this doctrine is qualified by and subject to the no less familiar general doctrine that the representations so made will not bind the principal unless they are made at the very time of the contract and constitute a part of the res gestæ").

[c] **An agent's conversation with strangers concerning past transactions** of his principal is not part of the res gestæ, and cannot affect his principal's rights under a contract on which the transactions were based. Benner v. Feige, 51 Mich. 568, 17 NW 60.

65. U. S.—Mather v. Barnes, 146 Fed. 1000; Keli v. Trenchard, 142 Fed. 16, 72 CCA 202 [mod 127 Fed. 596]; Briggs v. Foster, 137 Fed. 773, 70 CCA 349.

Ala.—King v. Livingston Mfg. Co., 180 Ala. 118, 60 S 143; Kendrick v. Colyar, 143 Ala. 597, 42 S 110; Williamson v. Tyson, 105 Ala. 644, 17 S 336.

Ariz.—Western Min. Co. v. Toole, 2 Ariz. 82, 11 P 119.

Ark.—Morton v. Scull, 23 Ark. 289.

Cal.—Brandt v. Krogh, 14 Cal. A. 39, 111 P 275 (holding that, where an agent at the time of the making of a contract with another makes any representation or admission, whether true or false, touching the matter of the contract, it is treated as the representation or admission of the principal).

D. C.—Crook v. International Trust Co., 32 App. 490 (holding that one may be bound by the misrepresentation of his agent if it is made in the exercise of the agent's apparent authority and relates to the matter intrusted to his management and control, and if the party dealt with has no knowledge of the misrepresentation).

Fla.—West Florida Land Co. v. Studebaker, 37 Fla. 28, 19 S 176; Wheeler v. Baars, 33 Fla. 696, 15 S 584.

Ga.—Barrie v. Miller, 104 Ga. 312, 30 SE 840, 69 AmSR 171 (holding that where a seller's agent misrepresents to a purchaser the meaning of foreign words used in a contract of sale, thereby deceiving him as to the value of the articles described, he may rescind the contract, although it contains a stipulation that no other representations than those therein printed will be binding on the principal).

Ill.—Hahl v. Brooks, 213 Ill. 134, 72 NE 727 [aff 114 Ill. A. 644]; Hartford L. Ins. Co. v. Sherman, 123 Ill. A. 202 [aff 223 Ill. 329, 78 NE 923].

Ind.—Du Souchet v. Dutcher, 113 Ind. 249, 15 NE 459; Teter v. Hinders 19 Ind. 93; Beem v. Lockhart, 1 Ind. A. 202, 27 NE 239.

Iowa.—Chase v. Wolgamot, 137 Iowa 128, 114 NW 614; John Gund Brewing Co. v. Peterson, 130 Iowa 301, 106 NW 741; Cook v. Boyd, 99 NW 1063.

La.—Christie v. Pennsylvania Iron Wks. Co., 128 La. 208, 54 S 742.

Md.—Wilson, etc., Co. v. Pritchett, 99 Md. 583, 58 A 360; Lamm v. Port Deposit Homestead Assoc., 49 Md. 233, 33 AmR 246.

Mass.—Isenbeck v. Burroughs, 217 Mass. 537, 105 NE 595; Weeks v. Currier, 172 Mass. 53, 51 NE 416 (holding that, in a suit in equity to compel the reconveyance of property obtained by false and fraudulent representations, a defendant is affected by representations made by his agent acting within the scope of his authority, as if he had made them himself).

Mo.—Heath v. Schroer, 119 Mo. A. 93, 96 SW 313; McNichols v. Nelson, 45 Mo. A. 446.

Nebr.—Wullenwaber v. Dunigan, 33 Nebr. 477, 50 NW 428.

N. Y.—Cunningham v. Wathen, 14 App. Div. 553, 43 NYS 886 (holding that joint lessees are liable for false representations as to the length of the term made by one of their number while acting as their agent in assigning the lease); Aron v. De Castro, 13 NYS 372 [aff 30 NE 491]; Williams v. Goldberg, 58 Misc. 210, 109 NYS 15; Gould v. Cayuga County Nat. Bank, 56 HowPr 505; Sanford v. Handy, 23 Wend. 260.

N. C.—Haynor Mfg. Co. v. Davis, 147 N. C. 267, 61 SE 54, 17 LRANS 193.

Pa.—Meyerhoff v. Daniels, 173 Pa. 555, 34 A 298, 51 AmSR 782; McNeile v. Cridland, 168 Pa. 16, 31 A 939; Erie City Iron Wks. v. Barber, 106 Pa. 125, 51 AmR 508; Chicago Cottage Organ Co. v. McManigal, 8 Pa. Super. 632; Gebbie v. Griswold, 6 Pa. Co. 212.

Tenn.—Union Bank v. Campbell, 4 Humphr. 394.

Tex.—Conn v. Hagan, 93 Tex. 334, 55 SW 323; Foix v. Moeller, (Civ. A.) 159 SW 1048; Sargent v. Barnes, (Civ. A.) 159 SW 366; Brand v. Odom, (Civ. A.) 156 SW 547; Reed v. Holloway, (Civ. A.) 127 SW 1139 (holding that,

principal's knowledge,[66] and constitute a breach of trust against the principal;[67] and this rule is particularly applicable where the principal has knowledge of or participates in the representations.[68]

Principal not bound. But the principal is not bound by such representations, declarations, or admissions if the third person does not rely upon them,[69] or is not justified in doing so,[70] or has notice of the agent's want of authority to make them;[71] nor is the principal bound thereby, in the

in an action for fraudulent representations inducing a purchase of corporate stock, the testimony of a witness that the seller told him that, if the buyer asked any questions about the business of the corporation, he was to answer the questions and let a third person do the talking, made the witness and the third person the agents of the seller in the transaction, so that their fraud, if any, became in law his fraud); Wimple v. Patterson, (Civ. A.) 117 SW 1034 (holding that a principal is liable for damages actually suffered by material and false representations of his agent if authorized or made in the course of his employment, and whether either knew the representations to be false or believed them true, where they were intended to and did induce one to purchase property he would not otherwise have purchased); Western Cottage Piano, etc., Co. v. Anderson, (Civ. A.) 101 SW 1061; Schram v. Strouse, (Civ. A.) 28 SW 262.

W. Va.—McDonald v. Cole, 46 W. Va. 186, 32 SW 1033.

Wis.—Shepard v. Pabst, 149 Wis. 35, 135 NW 158 (holding that, where two innocent persons must suffer in consequence of the fraudulent representations of the agent of one of them, the principal is liable to the person defrauded).

Eng.—Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259, 12 ERC 298.

Can.—Milburn v. Wilson, 31 Can. S. C. 481.

See also supra § 534.

Liability of principal for torts of agent see generally supra §§ 532–539.

False and fraudulent representations: As ground for rescission of contract see Contracts [9 Cyc 433 et seq]. As ground for action of deceit see Fraud [20 Cyc 10 et seq].

[a] **"It is a familiar principle** that false and fraudulent representations of an agent, when acting within the scope of his authority, bind his principal." Judd v. Walker, 114 Mo. A. 128, 145, 89 SW 558.

[b] **Reason for rule.**—"The principal is liable for the false representations of the agent made in and about the matter for which he was appointed agent, not on the ground of express authority, given to the agent to make the statement, but on the ground that as to the particular matter for which the agent is appointed he stands in the place of the principal, and whatever he does or says in and about that matter is the act and declaration of the principal; for which the principal is just as liable as if he had personally done the act or made the declaration. The power of the agent to render the principal liable for representations flows from his mere appointment to do the act or transact the business in and about which the representations are made." Sharp v. New York, 40 Barb. (N. Y.) 256, 273, 25 HowPr 389.

[c] **Apparent scope of authority governs.**—In determining whether a principal is responsible to third persons for the misrepresentations of his agent, it is the apparent scope of the agent's authority, and not his actual instructions, that must govern. Wilson v. Sale, 41 Pa. Super. 566.

[d] **Liability need not rest in tort.**—(1) Where a person is induced by the fraudulent representations of a principal or his agent to purchase property he would not otherwise have purchased, the liability of the principal need not be rested on the tort but may be referred to the contract, such representations operating against him as a warranty. Foix v. Moeller, (Tex. Civ. A.) 159 SW 1048; Wimple v. Patterson, (Tex. Civ. A.) 117 SW 1034. (2) Even where a party cannot recover damages against the principal on account of the fraudulent representations of his special agent, he may avail himself of those representations by way of defense to an action on the contract by the principal. Concord Bank v. Gregg, 14 N. H. 331.

[e] **The personal guaranty by the agent** of the truth of representations which are made by him with the authority of the principal does not relieve the latter from liability. Busch v. Wilcox, 82 Mich. 336, 47 NW 328, 21 AmSR 563; Foix v. Moeller, (Tex. Civ. A.) 159 SW 1048.

[f] **Rescission of contract.**—(1) One who is induced by fraudulent representations of an agent within the scope of his authority to enter into a contract for the purchase of land with such agent's principal may rescind on discovering the fraud. Pitcher v. Webber, 103 Me. 101, 68 A 593; Ballard v. Lyon, 114 Minn. 264, 131 NW 320, 38 LRANS 301. (2) A principal cannot enforce a contract against a party induced to sign it by his agent's representations as to the character of the instrument, although such representations were not authorized by the principal. Dunston Lith. Co. v. Borgo, 84 N. J. L. 623, 87 A 334.

[66] Wheeler v. Baars, 33 Fla. 696, 15 S 584; Rhoda v. Annis, 75 Me. 17, 46 AmR 354; Millard v. Smith, 119 Mo. A. 701, 95 SW 940 (holding that, where an agent employed to sell lands effects a sale by means of false representations in respect to the land, the principal is chargeable with the fraud, even though he had no personal knowledge of it); Hunter v. Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 493. See also cases supra notes 62–65.

[a] **Where an agent is employed to sell certain land,** the principal is responsible for his false representations as to the land, although the agent is not authorized to make them, and although the principal has no knowledge of them until after the sale is completed. Wolfe v. Pugh, 101 Ind. 293; Haskell v. Starbird, 152 Mass. 117, 25 NE 14, 23 AmSR 809; Crump v. U. S. Mining Co., 7 Gratt. (48 Va.) 352, 56 AmD 116; Law v. Grant, 37 Wis. 548.

[b] **A principal furnishing his agent with his billheads** on which to send out bills due the principal is liable for the representations of the agent in regard thereto, although made without the principal's knowledge. Trankla v. McLean, 18 Misc. 221, 41 NYS 385.

[c] **But where an agent has innocently made a misrepresentation of facts** while effecting a contract of his principal, it will not amount to fraud of the principal if he, although aware of the real state of facts, is not cognizant of the misrepresentation as made or did not direct the agent to make it. Kelly v. Troy F. Ins. Co., 3 Wis. 254.

[67] Hartford L. Ins. Co. v. Sherman, 123 Ill. A. 202 [aff 223 Ill. 329, 78 NE 923]; Jewett v. Carter, 132 Mass. 335.

[68] Nichols v. Colgan, 130 Ind. 341, 30 NE 301 (holding that fraudulent representations made by an agent pursuant to a conspiracy between him and his principal are imputable to the principal); Heath v. Schroer, 119 Mo. A. 93, 96 SW 313; Van Campen v. Bruns, 54 App. Div. 86, 66 NYS 344; Cerriglio v. Pettit, 113 Va. 533, 75 SE 303 (holding that false representations by an agent in an exchange of properties bind his principal, although made honestly, the agent having been deceived by his principal).

[a] **Where there is connivance between principal and agent,** the principal is charged with the misrepresentations of his agent. Fulton v. Fisher, 151 Iowa 429, 131 NW 662.

[69] Chicago Bldg., etc., Co. v. Higginbotham, (Miss.) 29 S 79 (holding that, where persons signing a contract do not rely on representations made by the agent of the other party, but send a representative to investigate the proposition, they cannot defeat their liability on the ground that the representations of the agent were false and fraudulent). See generally Contracts [9 Cyc 426]; Fraud [20 Cyc 39].

[a] **Where certain facts are as much within the knowledge of the third person** as of the agent, representations of the agent as to the existence of such facts are not binding on his principal. Gould v. Sterling, 23 N. Y. 439.

[70] Renard v. Grenthal, 81 Misc. 135, 142 NYS 328 (holding that, where a lessee was injured by the fall of plaster in an apartment, she cannot recover on the theory of misrepresentations by the lessor because the janitor in charge informed her that the ceiling had been fixed and that there was no danger, his statement that it had been repaired being true, and the observation as to the danger being a mere opinion).

[71] Keyser v. Hinkle, 127 Mo. A. 62, 106 SW 98 (holding that, where defendant signed a note also signed as maker by A, the alleged agent of the payee, defendant was chargeable with notice that, in becoming one of the obligors, A could not act as agent for the payee, and consequently that any misrepresentation made by A could not be imputed in law to the payee); Bernheimer v. Verdon, 63 N. J. Eq. 312, 49 A 732; Gordeen v. Pearlman, 91 NYS 420 (holding that, where, as a part of a conditional sale of a piano, the buyer agreed to insure the same for the seller's benefit, evidence that when the piano was delivered the buyer was informed by an unidentified agent of the seller that "the piano was insured at the store," and that the buyer need not insure the same, without proof that the agent had authority to change the terms of the written contract, was insufficient to establish a waiver of the covenant to insure); National Guarantee, etc., Co. v. Thomas, 28 Tex. Civ. A. 379, 67 SW 454.

[a] **Notice in contract.**—(1) Where a contract of sale stipulated that no agreements save those in the contract would be recognized, statements of the seller's agent not included in the contract are not binding on the seller. Bruner v. Kansas Moline Plow Co., 7 Ind. T. 506, 104 SW 816; Blackstad Mercantile Co. v. Porter, (Tex. Civ. A.) 158 SW 216. (2) It has been held, however, that a provision in a contract procured by the agent of one of the parties thereto, that such party "will not be held responsible for any agreement . . . not expressed on this contract in writing," does not relieve him from liability for the fraudulent representations of his agent made within the scope of his apparent authority for the purpose of securing the contract. Smith v. Hildenbrand, 15 Misc. 129, 36 NYS 485. To same effect Shepard v. Pabst, 149 Wis. 35, 135 NW 158. (3) A provision in a contract of sale that no statements by the salesman shall be a part thereof unless written in the original order, and that the salesman's authority is limited to taking orders on the regular forms, does not exclude a written agreement by the salesman and attached to the original contract on a separate piece of paper,

absence of ratification or estoppel, if the representations or declarations are without the scope of the agent's apparent authority,[72] as where they are made after the transaction has been completed.[73]

Action for deceit. In some decisions the view is taken that, while the false and fraudulent representations of an agent made in the course of his employment may render the principal liable in an appropriate action, he cannot be held liable in an action for deceit unless he coöperated in the fraud of the agent.[74] Other decisions, however, appear to be in favor of discarding all distinction in this respect and holding the principal liable, at law and in equity alike, for the frauds of his agent, provided they were committed in the course of his employment and in the interest of the principal.[75]

as such provision refers only to verbal representations by the salesman, and hence such an attached agreement becomes a part of the contract. National Novelty Import Co. v. Griffin, (Tex. Civ. A.) 168 SW 85.

72. Ala.—Singer Mfg. Co. v. McLean, 105 Ala. 316, 16 S 912.

Ark.—Wilson v. Shocklee, 94 Ark. 301, 126 SW 832.

Cal.—Daley v. Quick, 99 Cal. 179, 33 P 859.

Ga.—Akers v. Kirke, 91 Ga. 590, 18 SE 366.

Ind.—Pittsburgh, etc., R. Co. v. Nuzum, 60 Ind. 533.

Ind. T.—Bartles v. Courtney, 6 Ind. T. 379, 98 SW 133 (holding that, where an agent of a firm with no interest in its business made an alleged misrepresentation, not in the transaction of any business for the firm, concerning the credit of another, the firm was not chargeable therewith, unless it knew of and ratified such representation).

Iowa.—Providence Jewelry Co. v. Fessler, 145 Iowa 74, 123 NW 957; Davenport Cent. R. Co. v. Davenport Gas Light Co., 43 Iowa 301.

Kan.—Missouri Pac. R. Co. v. Stults, 31 Kan. 752, 3 P 522.

Md.—Lamm v. Port Deposit Homestead Assoc., 49 Md. 233, 33 AmR 246.

Mich.—Michigan Lumber Yard v. Blesch, 166 Mich. 470, 131 NW 1105.

Minn.—Browning v. Hinkle, 48 Minn. 544, 51 NW 605, 31 AmSR 691; Greene v. Dockendorf, 13 Minn. 70.

Miss.—Cook v. Whitfield, 41 Miss. 541 (holding that a representation made by an agent without authority, and contradicted by the express terms of a contract made at the time, is not binding on the principal); Skipwith v. Robinson, 24 Miss. 688.

Mo.—Midland Lumber Co. v. Kreeger, 52 Mo. A. 418.

Nebr.—Hanson v. Ætna L. Ins. Co. 78 Nebr. 418, 110 NW 1000.

N. J.—Polhemus v. Holland Trust Co., 59 N. J. Eq. 93, 45 A 534 [rev on other grounds 61 N. J. Eq. 654, 47 A 417] (holding that, where defendant held bonds of a foreign corporation as security for a loan, under an agreement that they should be surrendered as the corporation might sell them, and that the proceeds of the sale should be applied in liquidation of the debt, and plaintiff was induced to purchase some of the bonds by defendant's clerk by false representations that they were first mortgage bonds, defendant was not liable for the loss sustained, since the clerk in such transaction acted for the corporation, and not as defendant's agent); National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331.

N. Y.—New York Univ. v. Loomis Laboratory, 178 N. Y. 137, 70 NE 413 [aff 68 App. Div. 635, 74 NYS 175]; Lansing v. Coleman, 58 Barb. 611; Wheaton v. Voorhis, 53 HowPr 319.

Pa.—Getty v. Pennsylvania Inst. for Instruction of Blind, 194 Pa. 571, 45 A 333; Shelhamer v. Thomas, 7 Serg. & R. 106; Ralph v. Fon Dersmith, 3 Pa. Super. 618, 40 WklyNC 116.

R. I.—Skelton v. Manchester, 12 R. I. 326.

S. D.—J. I. Case Threshing Mach. Co. v. Eichinger, 15 S. D. 530, 91 NW 82.

Tenn.—Horrigan v. First Nat. Bank, 9 Baxt. 137.

Tex.—Atkinson v. Reed, (Civ. A.) 49 SW 260.

Utah.—Myers v. San Pedro, etc., R. Co., 39 Utah 198, 116 P 1119 (holding that a declaration made by an agent not relating to any business then being transacted for the principal and not within the scope of agency generally does not bind the principal).

Va.—Engleby v. Harvey, 93 Va. 440, 25 SE 225.

Wis.—Hoyer v. Ludington, 100 Wis. 441, 76 NW 348; Kelly v. Troy, F. Ins. Co., 3 Wis. 254. See also Newell v. Clapp, 97 Wis. 104, 72 NW 366.

[a] **The mere fact that one employs another to work for him** does not make him chargeable with what that other may say about him or his affairs while in his employ, unless he is employed to talk for his employer. Standard Oil Co. v. Linol Co., 75 N. J. L. 294, 68 A 174.

[b] **Necessity for authority.**—An admission by an alleged agent does not bind his alleged principal in the absence of proof of the authority of such agent to make it. Skarkowska v. Bartholomae, etc., Brewing, etc., Co., 152 Ill. A. 48.

[c] **A special agent** has no implied authority to bind his principal by fraudulent representations, unless the latter has held him out as possessing a more enlarged authority. Hovey v. Brown, 59 N. H. 114.

[d] **Representations before agency.**—Persons who buy property from a debtor, acting through an agent, will not be affected with the fact that before he became their agent he represented to a person having a lien on the property that they had compromised this claim, by reason of which the lienholder released his lien. Feder v. Ervin (Tenn. Ch. A.) 38 SW 446, 36 LRA 335.

73. Woolsey v. Haynes, 165 Fed. 391, 91 CCA 341 (holding that authority to an agent to negotiate for and purchase real estate does not render statements or declarations made by the agent after the deed has been delivered and recorded binding on the principal).

74. Mayo v. Wahlgreen, 9 Colo. A. 506, 50 P 40 (holding that, where a vendor's agent has misrepresented lands sold by him, and there is no attempt on the part of the purchaser to rescind, he may bring his action for deceit only against the agent, unless he can trace some connection between the principal and the agent, and thereby charge the principal with responsibility for the agent's misrepresentations); Wachsmuth v. Martini, 45 Ill. A. 244 [aff 154 Ill. 515, 39 NE 129]; White v. New York, etc., R. Co., 68 N. J. L. 123, 52 A 216; Decker v. Frefericks, 47 N. J. L. 469, 1 A 470 (holding that an innocent vendor is not liable in an action for deceit brought for the fraudulent representation of his agent); Kennedy v. McKay, 43 N. J. L. 288, 39 AmR 581; Keefe v. Sholl, 181 Pa. 90, 37 A 116; Freyer v. McCord, 165 Pa. 539, 30 A 1024 (holding that an action of deceit for fraud in the sale of land to plaintiff by defendant's agent cannot be maintained where the evidence fails to show that the principal participated in or knew or ought to have known of such fraud). In Western Bank v. Addie, L. R. 1 H. L. Sc. 145, 146, the action was against the bank for deceit, which was alleged to consist in certain fraudulent representations charged to have been made on a sale of stock to plaintiff by the directors of such corporation as its agents. Lord Chelmsford, in giving his views, said: "The distinction to be drawn from the authorities, and which is sanctioned by sound principles, appears to be this: Where a person has been drawn into a contract to purchase shares belonging to a company, by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to this contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally." See also Udell v. Atherton, 7 H. & N. 172.

Action for deceit see generally Fraud [20 Cyc 1].

[a] **Necessity to show principal's knowledge.**—"While the general rule that the principal is liable for his agent's misrepresentations is unquestionable, as was held in Griswold v. Gebbie, 126 Pa. 353, 17 A 673, 12 AmSR 888; yet the action of deceit being founded on fraud or moral wrong, to sustain it against the principal on such representations, the fraud should be clear, and there should in addition be some evidence of participation or knowledge on the part of the principal, or circumstances which should have put him upon inquiry. In other words, as said in Griswold v. Gebbie, supra, 'the scienter must not only be alleged but proved.'" Freyer v. McCord, 165 Pa. 539, 540, 30 A 1024.

75. Alger v. Anderson, 78 Fed. 729; Indianapolis, etc., R. Co. v. Tyng, 63 N. Y. 653 [aff 3 Hun 311]. In commenting upon the decisions taking a contrary view, it was said by the court, in Birmingham City Nat. Bank v. Dun, 51 Fed. 160, 162 [rev on other grounds 58 Fed. 174, 7 CCA 152, 23 LRA 687]: "But it is said by the defendant that later English cases, and a well-considered modern case in New Jersey, have denied that an action of deceit would lie against an innocent principal; and the cases of Udell v. Atherton, 7 H. & N. 171; Western Bank v. Addie, L. R. 1 H. L. Sc. 145, and Kennedy v. McKay, 43 N. J. L. 288, 39 AmR 581,—are cited. An examination of each of those cases shows that the old doctrine was not denied that the principal is liable whenever his agent, who is, at the time, acting within the scope of his authority and for the principal, makes a fraudulent misrepresentation which influences and is acted upon by the plaintiff to his injury, but that the cases turned upon the question whether the alleged agent was, under the circumstances in each case, acting within the scope of his authority. . . . It will thus be seen that the cases upon which reliance is placed show nothing more than a disposition on the part of the English judges to demand that, when an innocent principal is made liable, it shall clearly appear that the fraudulent agent was not acting outside the known scope and power of his agency. But the question was re-examined, in the light of the Addie case, in Mackay v. Commercial Bank, L. R. 5 P. C. 394,—a case in which no doubts of the extent of the agency existed,—and it was

[§ 542] **5. Notice to Agent as Affecting Principal—a. General Rule.**[76] Subject to the qualifications hereafter considered,[77] it is a well settled general rule that a principal is affected with constructive knowledge, regardless of his actual knowledge, of all material facts of which his agent receives notice or acquires knowledge while acting in the course of his employment and within the scope of his authority, although the agent does not in fact inform his principal thereof;[78] and in some jurisdictions this rule is applied even where the agent is acting adversely to his principal, unless the latter has participated in the agent's misconduct or has ratified his acts.[79] The rule is based on the principle that it is the duty of the agent to communicate to his principal all material facts coming to his knowledge in the course of the agency, and the presumption that he has done so is so strong that it cannot be rebutted even by proof that he has forgotten the facts.[80] The rule is also based on the principle that a person who employs an agent to act for him in a matter is responsible for the manner in which the agent performs the business intrusted to him, and that he cannot escape responsibility by showing that the agent has failed to perform his duty.[81] The rule is applied to corporations as well as to individuals.[82]

76. **Notice to agent:** As affecting master's liability for injuries to servant see Master and Servant [26 Cyc 1147]. In proceedings to perfect mechanic's lien see Mechanics' Liens [27 Cyc 113]. Of dishonor of commercial paper see Bills and Notes [7 Cyc 1077].

Notice to husband as agent of wife see Husband and Wife [21 Cyc 1422].

Notice to municipal agents of defects or obstructions in streets see Municipal Corporations [28 Cyc 1397].

Notice to particular agents see Attorney and Client [4 Cyc 933]; Banks and Banking [5 Cyc 46 et seq]; Brokers [19 Cyc 301]; Corporations [10 Cyc 1054]; Partnership [30 Cyc 530].

77. See infra §§ 544–550.

78. U. S.—Armstrong v. Ashley, 204 U. S. 272, 27 SCt 270, 51 L. ed. 482; Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; Astor v. Wells, 4 Wheat. 466, 4 L. ed. 616; The Hiram, 1 Wheat. 440, 4 L. ed. 131; Constam v. Haley, 206 Fed. 260, 124 CCA 128 (operation of notice, once imputed to the principal, may continue after the termination of the agency); Campbell v. Balcomb, 183 Fed. 766, 767, 106 CCA 474 [cit Cyc]; U. S. v. Smith, 181 Fed. 545 [aff 196 Fed. 593, 116 CCA 267]; El Paso Live Stock Commn. Co. v. Colorado Live Stock Commn. Co., 171 Fed. 20, 96 CCA 262; In re Nassau, 140 Fed. 912; Dennis v. Atlanta Nat. Bldg., etc., Assoc., 136 Fed. 539, 69 CCA 315; Citizens' Trust, etc., Co. v. Zane, 113 Fed. 596 [aff 117 Fed. 814, 55 CCA 38]; La Dow v. North American Trust Co., 113 Fed. 13; Hoffmann v. Mayaud, 93 Fed. 171, 35 CCA 256; Blaine First Nat. Bank v. Blake, 60 Fed. 78; Dickerson v. Matheson, 50 Fed. 73 [aff 57 Fed. 524, 6 CCA 466]; New England Mortg. Security Co. v. Gay, 33 Fed. 636; Lakin v. Sierra Buttes Gold Min. Co., 25 Fed. 337, 11 Sawy. 231; Carter v. Ottawa, 24 Fed. 546; Sias v. Roger Williams Ins. Co., 8 Fed. 183; Hough v. Richardson, 12 F. Cas. No. 6,722, 3 Story 659; U. S. v. Arkansas Bank, 24 F. Cas. No. 14,515, Hempst. 460; Varnum v. Milford, 28 F. Cas. No. 16,891, 4 McLean 93.

Ala.—Hall, etc., Mach. Co. v. Haley Furniture, etc., Co., 174 Ala. 190, 56 S 726; People's Bank v. Robbins, 167 Ala. 497, 52 S 412; McCleskey v. Howell Cotton Co., 147 Ala. 573, 42 S 67; Kendrick v. Colyar, 143 Ala. 597, 42 S 110; Long v. Jennings, 137 Ala. 190, 33 S 857; Houston Biscuit Co. v. Dial, 135 Ala. 168, 33 S 268; Kelly v. Burke, 132 Ala. 235, 31 S 512; Harris v. American Bldg., etc., Assoc., 122 Ala. 545, 25 S 200; Farmer v. American Mortg. Co., 116 Ala. 410, 22 S 426; Smith v. Southern Express Co., 104 Ala. 387, 16 S 62; Sheffield Land, etc., Co. v. Neill, 87 Ala. 158, 6 S 1; Stewart v. Sonneborn, 49 Ala. 178; Smyth v. Oliver, 31 Ala. 39; Wiley v. Knight, 27 Ala. 336; Schloss, etc., v. Gibson Dry Goods Co., 6 Ala. A. 155, 60 S 486. See also Russell v. Peavy, 131 Ala. 568, 32 S 492.

Ark.—Carter v. Gray, 79 Ark. 273, 96 SW 377; Whitehead v. Wells, 29 Ark. 99; Miller v. Fraley, 21 Ark. 22.

Cal.—McKenney v. Ellsworth, 165 Cal. 526, 132 P 75; Edson, etc., Co. v. Winsell, 160 Cal. 783, 118 P 248 (evidence held admissible to show notice); Continental Bldg., etc., Assoc., v. Boggess, 158 Cal. 469, 111 P 357; Mabb v. Stewart, 147 Cal. 413, 81 P 1073; Chapman v. Hughes, 134 Cal. 641, 58 P 298, 916, 60 P 974, 61 P 76, 66 P 982; Hunter v. Watson, 12 Cal. 363, 73 AmD 543; Stanley v. Green, 12 Cal. 148; Northern Assur. Co. v. Stout, 16 Cal. A. 548, 117 P 617; Pacific Lumber Co. v. Wilson, 6 Cal. A. 561, 92 P 654.

Colo.—Little Pittsburgh Cons. Min. Co. v. Little Chief Cons. Min. Co., 11 Colo. 223, 17 P 760, 7 AmSR 226; Scholl ay v. Moffitt-West Drug Co., 17 Colo. A. 126, 67 P 182.

Conn.—New York, etc., R. Co. v. Russell, 83 Conn. 581, 78 A 324; Indiana Bicycle Co. v. Tuttle, 74 Conn. 489, 51 A 538; Smith v. Norwich Water Comrs., 38 Conn. 208; Watson v. Wells, 5 Conn. 468.

D. C.—Johnson v. Tribby, 27 App. 281; Slater v. Hamacher, 15 App. 558.

Ga.—Hardee v. Tietjen, 140 Ga. 527, 530, 79 SE 117 [cit Cyc]; People's Sav. Bank v. Smith, 114 Ga. 185, 39 SE 920; Morris v. Georgia Loan, etc., Banking Co., 109 Ga. 12, 34 SE 278, 46 LRA 506; Strickland v. Vance, 99 Ga. 531, 27 SE 152, 59 AmSR 241; North America Guarantee Co. v. East Rome Town Co., 96 Ga. 511, 23 SE 503, 51 AmSR 150; Lampkin v. Cartersville First Nat. Bank, 96 Ga. 487, 23 SE 390; Lewis v. Equitable Mortg. Co., 94 Ga. 572, 21 SE 224; Thompson v. Overstreet, 80 Ga. 767, 6 SE 690; Broughton v. Foster, 69 Ga. 712; Prater v. Cox, 64 Ga. 706; Saulsbury v. Wimberly, 60 Ga. 78; Scofield Rolling Mill Co. v. State, 54 Ga. 635; Whitten v. Jenkins, 34 Ga. 297; Mounce v. Byars, 11 Ga. 180; Taylor v. Felder, 3 Ga. A. 287, 59 SE 844.

Ill.—Hayes v. Wagner, 220 Ill. 256, 77 NE 211 [aff 113 Ill. A. 299]; Butman v. Butman, 213 Ill. 104, 72 NE 821; Bouton v. Cameron, 205 Ill. 50, 68 NE 800 [aff 99 Ill. A. 600]; Roderick v. McMeekin, 204 Ill. 625, 68 NE 473; Fischer v. Tuohy, 186 Ill. 143, 57 NE 801 [aff 87 Ill. A. 574]; Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 26 NE 640, 25 AmSR 401; Booth v. Smith, 117 Ill. 370, 7 NE 610; Ventres v. Cobb, 105 Ill. 33; Quincy Coal Co. v. Hood, 77 Ill. 68; Sterling Bridge Co. v. Baker, 75 Ill. 139; Worden v. William, 24 Ill. 67; Page v. Brant, 18 Ill. 37; Rector v. Rector, 8 Ill. 105; Doyle v. Teas, 5 Ill. 202; Knickerbocker Ice Co. v. Halsey Bros. Co., 178 Ill. A. 629; Illinois Trust, etc., Bank v. Pontiac, 112 Ill. A. 545 [aff 212 Ill. 326, 72 NE 411]; McChesney v. Davis, 86 Ill. A. 380; Sheppard v. Wood, 78 Ill. A. 428; Schneider v. Lebanon Dairy, etc., Co., 73 Ill. A. 612; Germania L. Ins. Co. v. Koehler, 63 Ill. A. 188 [aff 168 Ill. 293, 48 NE 297, 61 AmSR 108]; Ryan v. Potwin, 62 Ill. A. 134.

Ind.—Indianapolis Tract., etc., Co. v. Henby, 178 Ind. 239, 97 NE 313; Cleveland, etc., R. Co. v. Moore, 170 Ind. 328, 82 NE 52, 84 NE 540 (holding that, where a general agent is in charge of work for his principal, the presumption that the principal knew all facts of which the agent had knowledge is so violent that it may not be controverted in determining the parties' rights in respect to a claim of compensation for additional work done); Field v. Campbell, 164 Ind. 389, 72 NE 260, 108 AmSR 301; Marion Mfg. Co. v. Harding, 155 Ind. 648, 58 NE 194; Forsythe v. Brandenburg, 154 Ind. 588, 57 NE 247; Vawter v. Bacon, 89 Ind. 565; Brannon v. May, 42 Ind. 92; Pittsburgh, etc., R. Co. v. Ruby, 38 Ind. 294, 10 AmR 111; Blair v. Whittaker, 31 Ind. A. 664, 69 NE 182; Rauh v. Waterman, 29 Ind. A. 344, 61 NE 743, 63 NE 42.

Ind. T.—Noyes v. Tootle, 2 Ind. T. 144, 48 SW 1031.

Iowa.—Ware v. Heiss, 133 Iowa 285, 110 NW 594; Condon v. Barnum, 106 NW 514; Campbell v. Park, 128 Iowa 181, 101 NW 861, 104 NW 799; Getchell, etc., Lumber, etc., Co. v. Peterson, 124 Iowa 599, 100 NW 550; Manson v. Simplot, 119 Iowa 94, 93 NW 75; Baldwin v. Davis, 118 Iowa 36, 91 NW 778; McClelland v. Saul, 113 Iowa 208, 84 NW 1034, 86 AmSR 370; Morris v. Posner, 111 Iowa 335, 82 NW 755; Simonson Bros. Mfg. Co. v. Citizens' State Bank, 105 Iowa 264, 74 NW 905; Deering v. Grundy County Nat. Bank, 81 Iowa 222, 46 NW 1117; Baldwin v. St. Louis, etc., R. Co., 75 Iowa 297, 39 NW 507, 9 AmSR 479; Gardner v. Early, 72 Iowa 518, 34 NW 311; Thompson v. Merrill, 58 Iowa 419, 10 NW 796; Crumb v. Davis, 54 Iowa 25, 6 NW 53; Smith v. Dunton, 42 Iowa 48; Slater v. Irwin, 38 Iowa 261; Thornburgh v. Madren, 33 Iowa 380; Jones v. Bamford, 21 Iowa 217; Keenan v. Missouri State Mut. Ins. Co., 12 Iowa 126 (holding that a principal will be charged with notice of facts known to one whom he has held out to third persons as a general agent, and which it would have been his duty as such general agent to communicate, although in fact such agency was only a special one); Warburton v. Lauman, 2 Greene 420.

Kan.—Hess v. Conway, 92 Kan. 787, 142 P 253; Memphis, etc., R. Co. v. Koch, 28 Kan. 565; Roach v. Karr, 18 Kan. 529, 26 AmR 788; Nicklisson v. Holman, 17 Kan. 22; Ayres v. Probasco, 14 Kan. 175; New Hampshire Banking Co. v. Walker, 5 Kan. A. 881, 47 P 543; Hawley v. Smeiding, 3 Kan. A. 159, 42 P 841.

Ky.—Childers v. Billiter, 144 Ky. 53, 137 SW 795 (holding that notice to an agent, who purchased a promissory note for his principal, of infirmities in the note, and equities between the maker and the payee, is notice to the principal); Connolly v. Beckett, 105 SW 446, 32 KyL 356; Holzhauer v. Sheeny, 104 SW 1034, 31 KyL 1238; Mutual L. Ins. Co. v. Chosen Friends Lodge No. 2 I. O. O. F., 93 SW 1044, 29 KyL 394; Baries v. Louisville Electric Light Co., 118 Ky. 830, 80 SW 814, 25 KyL 2303, 85 SW 1136, 27 KyL 653; Day v. Exchange Bank, 117 Ky. 357, 78 SW 132, 25 KyL 1449; Com. v. Roark, 116 Ky. 396, 76 SW 140, 25 KyL 603; Adams Oil Co. v. Christmas, 101 Ky. 564, 41 SW 545, 19 KyL 760; American Bank v. McNeil, 10 Bush 54; Bright v. Wagle, 3 Dana 252; Fowler v. Halbert, 4 Bibb 52.

La.—Poirier v. Burton-Swartz Cypress Co., 127 La. 936, 54 S 292; Bloom v. Beebe, 15 La. Ann. 65; Cummings v. Harsabrauch, 14 La. Ann. 711; Kemp v. Rowly, 2 La. Ann. 316; Pontchartrain R. Co. v. Heirne, 2 La. Ann. 129; Fetter v. Field, 1 La. Ann. 80; Wolf v. Rogers, 6 Rob. 97; Lafarge v. Ripley, 4 Mart. N. S. 303.

Md.—Schwind v. Boyce, 94 Md. 510, 51 A 45; Boyd v. Chesapeake, etc., Canal Co., 17 Md. 195, 79 AmD 646.

Mass.—Daw v. Lally, 213 Mass. 578, 100 NE 1024; Clark v. Roberts, 206 Mass. 235, 92 NE 461; Street Lumber Co. v. Sullivan, 201 Mass. 484, 87 NE 905, 16 AnnCas 354; Jaquith v. Davenport, 191 Mass. 415, 78 NE 98; Hawks v. Davis, 185 Mass. 119, 69 NE 1072; Clement v. Western Union Tel. Co., 137 Mass. 463; National Security Bank v. Cushman,

121 Mass. 490; Suit v. Woodhall, 113 Mass. 391.

Mich.—Westinghouse Electric, etc., Co. v. Hubert, 175 Mich. 568, 141 NW 600; Brown v. People's Nat. Bank, 170 Mich. 416, 136 NW 506, 40 LRANS 657 (holding that the payee of a draft was chargeable with knowledge of the forgery possessed by her agent whom she had authorized to act for and represent her, and to use his own judgment in collecting the money for which the draft was given); Geel v. Goulden, 168 Mich. 413, 134 NW 484; Town v. Jepson, 133 Mich. 673, 95 NW 742; Davis v. Kneale, 97 Mich. 72, 56 NW 220; Macomb v. Wilkinson, 83 Mich. 486, 47 NW 336; Johnston Harvester Co. v. Miller, 72 Mich. 265, 40 NW 429, 16 AmSR 536; Morgan v. Michigan Air-Line R. Co., 57 Mich. 430, 25 NW 161, 26 NW 865; Advertiser, etc., Co. v. Detroit, 43 Mich. 116, 5 NW 72; Henkel v. Welsh, 41 Mich. 664, 3 NW 171; Campau v. Konan, 39 Mich. 362; Hoyt v. Jeffers, 30 Mich. 181; Terry v. Tuttle, 24 Mich. 206; Sanford v. Nyman, 23 Mich. 326; Peoria Mar., etc., Ins. Co. v. Hall, 12 Mich. 202; Emerson v. Atwater, 7 Mich. 12.

Minn.—Lindgren v. William Bros. Boiler Mfg. Co., 112 Minn. 186, 127 NW 626 (holding that notice to an agent as to a matter of which he has the management or control is notice to the principal); Wiita v. Interstate Iron Co., 103 Minn. 303, 115 NW 169, 16 LRANS 128; Robertson Lumber Co. v. Anderson, 96 Minn. 527, 105 NW 972; Jefferson v. Leithauser, 60 Minn. 251, 62 NW 277.

Miss.—Illinois Cent. R. Co. v. Bryant, 70 Miss. 665, 12 S 592; Allen v. Poole, 54 Miss. 323; Ross v. Houston, 25 Miss. 591, 59 AmD 231; Doe v. Ingersoll, 11 Sm. & M. 249, 49 AmD 57.

Mo.—Thompson v. Lindsay, 242 Mo. 53, 145 SW 472 (holding that notice to the agent of a mortgagee is notice to the mortgagee of any facts affecting the validity of the mortgage); St. Louis v. Ruecking, 232 Mo. 325, 134 SW 657; Hickman v. Green, 123 Mo. 165, 22 SW 455, 29 LRA 39; Hedrick v. Beeler, 110 Mo. 91, 19 SW 492; Bergeman v. Indianapolis, etc., R. Co., 104 Mo. 77, 15 SW 992; Meier v. Blume, 80 Mo. 179; Hayward v. National Ins. Co., 52 Mo. 181, 14 AmR 400; Columbus City Bank v. Phillips, 22 Mo. 85, 64 AmD 254; Roberts v. Wabash R. Co., 153 Mo. A. 638, 134 SW 89; Birch Tree State Bank v. Brown, 152 Mo. A. 589, 133 SW 860; McElvain v. St. Louis, etc., R. Co., 151 Mo. A. 126, 131 SW 736; Johnson v. Springfield Ice, etc., Co., 143 Mo. A. 441, 127 SW 692; Jackson County v. Schmid, 141 Mo. A. 229, 234, 124 SW 1074; Hardin Grain Co. v. Chicago, etc., R. Co., 134 Mo. A. 681, 114 SW 1117; Council v. St. Louis, etc., R. Co., 123 Mo. A. 432, 100 SW 57; Atterbury v. Hopkins, 122 Mo. A. 172, 99 SW 11; Atkinson v. Elmore, 103 Mo. A. 403, 77 SW 492; Babbitt v. Kelley, 96 Mo. A. 529, 70 SW 384, 9 AmBankr 335; Rhinehart v. Peoples Bank, 89 Mo. A. 511; Mayer v. Old, 57 Mo. A. 639.

Mont.—Coombs v. Barker, 31 Mont. 526, 79 P 1 (holding that one who joins by an agent in the redemption of property is charged with all the knowledge that the agent possesses concerning the equities in the property).

Nebr.—Crilly v. Ruyle, 87 Nebr. 367, 127 NW 251 (holding that, where the evidence tended to show that a buyer's agent clothed with authority to accept cattle did accept them with knowledge that they had been fed alfalfa and made no protest on that score, the buyer could not after securing possession of the stock repudiate the vendor's weights because the stock had been so fed in violation of the contract of sale); Henry v. Omaha Packing Co., 81 Nebr. 237, 115 NW 777; Pringle v. Modern Woodmen of America, 76 Nebr. 384, 107 NW 756, 118 NW 231; Modern Woodmen of America v. Colman, 68 Nebr. 660, 94 NW 814, 96 NW 154; Pochin v. Knoebel, 63 Nebr. 768, 89 NW 264; Farmers, etc., Ins. Co. v. Wiard, 59 Nebr. 451, 81 NW 312; American Bldg., etc., Assoc. v. Rainbolt, 48 Nebr. 434, 67 NW 493; Merriam v. Calhoun, 15 Nebr. 569, 19 NW 708; Kellogg v. Lavender, 9 Nebr. 418, 2 NW 748; Cheney v. Eberhardt, 8 Nebr. 423, 1 NW 197; Nehawka Bank v. Ingersoll, 2 Nebr. (Unoff.) 617, 89 NW 618.

Nev.—Clark v. Mitchell, 35 Nev. 464, 130 P 764, 134 P 449.

N. H.—Patten v. Merchants' etc., Ins. Co., 40 N. H. 375; Hovey v. Blanchard, 13 N. H. 145.

N. M.—Lockhart v. Washington Gold, etc., Min. Co., 16 N. M. 223, 234, 117 P 833 [cit Cyc] (knowledge of conspiracy, its scope and object, against principal).

N. Y.—Small v. Housman, 208 N. Y. 115, 101 NE 700 [rev 142 App. Div. 760, 127 NYS 500]; Jefferson County Nat. Bank v. Dewey, 197 N. Y. 14, 90 NE 113 [aff 121 App. Div. 894 mem, 105 NYS 1122 mem]; Sternaman v. Metropolitan L. Ins. Co., 170 N. Y. 13, 62 NE 763, 88 AmSR 625, 57 LRA 318; Bennett v. Buchan, 76 N. Y. 386; Ingalls v. Morgan, 10 N. Y. 178; Weisser v. Denison, 10 N. Y. 68, 61 AmD 731; Monks v. West St. Impr. Co., 149 App. Div. 504, 134 NYS 39; Gaspard v. Fourteenth St. Store, 143 App. Div. 402, 128 NYS 58; Lockwood v. Dillenbeck, 104 App. Div. 71, 93 NYS 321; Consolidated Fruit Jar Co. v. Wisner, 103 App. Div. 453, 93 NYS 128 [aff 110 App. Div. 99, 97 NYS 52 (aff 188 N. Y. 624 mem, 81 NE 1162 mem)]; Prescott v. Le Conte, 83 App. Div. 482, 82 NYS 411 [aff 178 N. Y. 585 mem, 70 NE 1108 mem]; Koslovki v. International Heater Co., 75 App. Div. 60, 77 NYS 794 [aff 178 N. Y. 631 mem, 71 NE 1132 mem]; Central Trust Co. v. West India Impr. Co., 48 App. Div. 147, 63 NYS 853 [rev on other grounds 169 N. Y. 314, 62 NE 387]; Trimble v. New York Cent., etc., R. Co., 39 App. Div. 403, 57 NYS 437 [aff 162 N. Y. 84, 56 NE 532, 48 LRA 115]; Stephens v. Humphreys, 73 Hun 190, 25 NYS 946 [aff 141 N. Y. 586 mem, 36 NE 739 mem]; Hier v. Odell, 18 Hun 314; Black v. Camden, etc., Transp. Co., 45 Barb. 40; Sutton v. Dillaye, 3 Barb. 529; Constant v. Rochester Univ., 60 N. Y. Super. 181, 17 NYS 363; Constant v. American Baptist Home Mission Soc., 53 N. Y. Super. 170; Kendall v. Niebuhr, 45 N. Y. Super. 542, 58 HowPr 156 [aff 46 N. Y. Super. 544 (aff 87 N. Y. 1)]; Lesznysky v. Ross, 35 Misc. 652, 72 NYS 352; Mull v. Ingalls, 30 Misc. 80, 62 NYS 830 [aff 62 App. Div. 631 mem, 71 NYS 1142 mem]; Canda v. Casey, 14 Misc. 322, 35 NYS 1054; Peters v. Stuart, 2 Misc. 357, 21 NYS 993; Jackson v. Sharp, 9 Johns. 163, 6 AmD 267; Griffith v. Griffith, 9 Paige 315.

N. C.—Jenkins Bros. Shoe Co. v. Renfrow, 151 N. C. 323, 66 SE 212, 25 LRANS 231 and note; Straus, etc., Co. v. Sparrow, 148 N. C. 309, 62 SE 308; Neal v. Pender-Hyman Hardware Co., 122 N. C. 104, 29 SE 96, 65 AmSR 697; Cowan v. Withrow, 111 N. C. 306, 16 SE 397; Follette v. Mutual Acc. Assoc., 110 N. C. 377, 14 SE 923, 28 AmSR 693, 15 LRA 668; Farmer v. Willard, 71 N. C. 284; Merril v. Sloan, 5 N. C. 121.

N. D.—Ackerman v. Maddux, 26 N. D. 50, 143 NW 147.

Oh.—Orme v. Baker, 74 Oh. St. 337, 78 NE 439, 113 AmSR 968; Cincinnati, etc., R. Co. v. Kassen, 49 Oh. St. 230, 31 NE 282, 16 LRA 674; Conant v. Reed, 1 Oh. St. 298; Worthington v. Cleveland City R. Co., 29 Oh. Cir. Ct. 321 [aff 75 Oh. St. 626, 80 NE 1135]; Tate v. Tate, 19 Oh. Cir. Ct. 532, 10 Oh. Cir. Dec. 321; Mehner v. Schmidlapp, 9 Oh. Dec. (Reprint) 87, 10 Cinc LBul 390; Stone v. Davenport, 7 Oh. Dec. (Reprint) 83, 1 CincLBul 102; West v. Gibson, 6 Oh. Dec. (Reprint) 1034, 9 AmLRec 689.

Okl.—U. S. Fidelity, etc., Co. v. Shirk, 20 Okl. 576, 95 P 218. See also Hale v. Van Buren, etc., Co., 24 Okl. 13, 103 P 1026.

Or.—La Forest v. Downer, 63 Or. 176, 126 P 995; Hoffman v. Habighorst, 49 Or. 379, 89 P 952, 91 P 20.

Pa.—Ward's App., 172 Pa. 185, 33 A 552; Reed's App., 34 Pa. 207; Grove v. Donaldson, 15 Pa. 128; Barnes v. McClinton, 3 Penr. & W. 67, 23 AmD 62; Sefler v. Union Furniture Co., 36 Pa. Super. 636; Latch v. West End Trust Co., 32 Pa. Super. 472; Nutting v. Lynn, 18 Pa. Super. 59; Moulton v. O'Bryan, 17 Pa. Super. 593; Peabody Bldg. Assoc. v. Houseman, 7 WklyNC 193.

R. I.—Cook v. American Tubing, etc., Co., 28 R. I. 41, 65 A 641, 9 LRANS 193.

S. C.—Brown v. Northwestern R. Co., 88 S. C. 15, 70 SE 319; Gibbs Mach. Co. v. Roper, 77 S. C. 39, 57 SE 667; Faust v. Southern R. Co., 74 S. C. 360, 54 SE 566; Pearlstine v. Phœnix Ins. Co., 74 S. C. 246, 54 SE 372; Blowers v. Southern R. Co., 74 S. C. 221, 54 SE 368; Blackwell v. British-American Mortg. Co., 65 S. C. 105, 43 SE 395; Salinas v. Turner, 33 S. C. 231, 11 SE 702; Pritchett v. Sessions, 44 S. C. L. 293.

S. D.—Lindquist v. Northwestern Port Huron Co., 22 S. D. 298, 117 NW 365; Parker v. Randolph, 10 S. D. 402, 73 NW 906; Black Hills Nat. Bank v. Kellogg, 4 S. D. 312, 56 NW 1071.

Tenn.—Boro v. Hidell, 122 Tenn. 80, 120 SW 961, 135 AmSR 857 (knowledge of fraud); Myers v. Ross, 3 Head 59; Woodfork v. Blount, 3 Hayw. 147, 9 AmD 736; Major v. Stone's River Nat. Bank, (Ch. A.) 64 SW 352; Kuhlman v. E. J. Hart Co., (Ch. A.) 59 SW 455; Renner v. Marshall, (Ch. A.) 58 SW 863; Cheek v. Winchester Bottling Works, 2 Tenn. Civ. A. 614, 617 [quot Cyc].

Tex.—Morrison v. Insurance Co. of North America, 69 Tex. 353, 6 SW 605, 5 AmSR 63; Aultman, etc., Co. v. Hefner, 67 Tex. 54, 2 SW 861; National Novelty Import Co. v. Griffin, (Civ. A.) 168 SW 85; Ft. Worth, etc., R. Co. v. Caruthers, (Civ. A.) 157 SW 238; General Bonding, etc., Ins. Co. v. Beckville Independent School Dist., (Civ. A.) 156 SW 1161; Fordtran v. Cunningham, (Civ. A.) 141 SW 562, 563 [cit Cyc]; McElvain v. St. Louis, etc., R. Co., (Civ. A.) 131 SW 736; Missouri, etc., R. Co. v. Raney, 44 Tex. Civ. A. 517, 99 SW 589; Flynt v. Taylor, (Civ. A.) 91 SW 864 [rev on other grounds 100 Tex. 60, 93 SW 423]; Morrill v. Bosley, 40 Tex. Civ. A. 7, 88 SW 519; June v. Doke, 35 Tex. Civ. A. 240, 80 SW 402; Cooper v. Sawyer, 31 Tex. Civ. A. 620, 73 SW 992; Abilene Oil Co. v. Briscoe, 27 Tex. Civ. A. 157, 66 SW 315; Bexar Bldg., etc., Assoc. v. Lockwood, (Civ. A.) 54 SW 253; Pughe v. Coleman, (Civ. A.) 44 SW 576; Wright v. U. S. Mortgage Co., (Civ. A.) 42 SW 1026; Baldwin v. Root, (Civ. A.) 38 SW 630 [rev on other grounds 90 Tex. 546, 40 SW 3]; Merchants' Nat. Bank v. McAnulty, (Civ. A.) 31 SW 1091; U. S. v. Schwalby, 8 Tex. Civ. A. 679, 29 SW 90 [aff 87 Tex. 604, 30 SW 435 and rev on the facts 162 U. S. 255, 6 S. Ct. 754, 40 L. ed. 960]; Rand v. Davis, (Civ. A.) 27 SW 939; Smith v. Adams, 4 Tex. Civ. A. 5, 23 SW 49.

Vt.—Ward v. Preferred Acc. Ins. Co., 80 Vt. 321, 67 A 821; Drake v. Barker, 54 Vt. 372; Hill v. North, 34 Vt. 604; Smith v. South Royalton Bank, 32 Vt. 341, 76 AmD 179.

Va.—Lambert v. Jenkins, 112 Va. 376, 71 SE 718, AnnCas1913B 778; Traders', etc., Bank v. Black, 108 Va. 59, 60 SE 743; Mack Mfg. Co. v. Smoot, 102 Va. 724, 47 SE 859 (holding that notice to an agent bound, in the discharge of his duty, to act upon it, and communicate it to his principal,

dictions this rule is in effect prescribed by statute.[78]

is notice to the principal); Schreckhise v. Wiseman, 102 Va. 9, 45 SE 745. But see Easley v. Barksdale, 75 Va. 274 (holding that, under Code [1873] c 182 § 5, requiring "actual notice" to a purchaser in order to charge him with knowledge of certain facts, notice to the purchaser's agent is not sufficient).

Wash.—Alaska Steamship Co. v. Pacific Coast Gypsum, 78 Wash. 247, 138 P 875; Rothschild v. Northern Pac. R. Co., 68 Wash. 527, 123 P 1011, 40 LRANS 773; Staats v. Pioneer Ins. Assoc., 55 Wash. 51, 104 P 185; Conrad v. Graham, 54 Wash. 641, 103 P 1122, 132 AmSR 1137 (holding that, in an action for injuries through the explosion of a chemical furnished plaintiff by defendant, notice by defendant to the messenger sent by plaintiff to purchase the chemical that it was not the kind ordered, but a more dangerous kind, was notice to plaintiff); Allen v. Treat, 48 Wash. 552, 94 P 102; Lucile Dreyfus Min. Co. v. Willard, 46 Wash. 345, 89 P 935; Haynes v. Gay, 37 Wash. 230, 79 P 794; Lynch v. Kineth, 36 Wash. 368, 78 P 923, 104 AmSR 958; Dormitzer v. German Sav., etc., Soc., 23 Wash. 132, 62 P 862; Curtis v. Janzen, 7 Wash. 58, 34 P 131.

W. Va.—Buckeye Saw Mfg. Co. v. Rutherford, 65 W. Va. 395, 64 SE 444; Hart v. Sandy, 39 W. Va. 644, 20 SE 665.

Wis.—Peterson v. Elholm, 130 Wis. 1, 109 NW 76, 1034; Weeks v. Robert A. Johnson Co., 116 Wis. 105, 92 NW 794; Andrews v. Robertson, 111 Wis. 334, 87 NW 190, 87 AmSR 870, 54 LRA 673; Knott v. Tidyman, 86 Wis. 164, 56 NW 632; Pringle v. Dunn, 37 Wis. 449, 19 AmR 772; Owens v. Roberts, 36 Wis. 258.

Eng.—Bawden v. London, etc., Assur. Co., [1892] 2 Q. B. 534; Blackburn v. Haslam, 21 Q. B. D. 144; Taylor v. Yorkshire Ins. Co., [1913] 2 Ir. 1; LeNeve v. LeNeve, Ambl. 436, 27 Reprint 291, 21 ERC 774; Downes v. Power, 2 Ball & B. 491; Coote v. Mammon, 5 Bro. P. C. 355, 2 Reprint 727; Dresser v. Norwood, 17 C. B. N. S. 466, 112 ECL 466, 144 Reprint 188; Merry v. Abney, 1 Ch. Cas. 38, 22 Reprint 682; Nixon v. Hamilton, 2 Dr. & Wal. 364; Butler v. Portarlington, 1 Dr. & War. 20; Sheldon v. Cox, 2 Eden 224, 28 Reprint 884; Lanehan v. McCabe, 2 Ir. Eq. 342; Dryden v. Frost, 1 Jur. 330; Jennings v. Moore, 2 Vern. Ch. 609, 23 Reprint 998; Brotherton v. Hatt, 2 Vern. Ch. 574, 23 Reprint 973; Ashley v. Baillie, 2 Ves. 368, 28 Reprint 236; Maddox v. Maddox, 1 Ves. 61, 27 Reprint 892.

Can.—Richards v. Nova Scotia Bank, 26 Can. S. C. 381.

Man.—Graham v. British Canadian Loan, etc., Co., 12 Man. 244.

Alta.—Auld v. Traders Bank, 3 Alta. L. 263, 16 WestLR 24.

"Notice to and knowledge of the agent or attorney, acquired and present in his mind while he is exercising the powers and discharging the duties of his agency, are notice to and the knowledge of his principal." Chicago, etc., R. Co. v. Bellwith, 83 Fed. 437, 440, 28 CCA 358.

[a] **In New Jersey** (1) a broader rule seems to be followed, and it has been held in that state that the knowledge of the agent is chargeable to the principal whenever the principal, if acting for himself, or if a corporation, when acting through some agent, would have acquired the knowledge or have been put upon such inquiry as was equivalent to knowledge. Sooy v. State, 41 N. J. L. 394; Geyer v. Geyer, 75 N. J. Eq. 124, 78 A 449; Vulcan Detinning Co. v. American Can Co., 72 N. J. Eq. 387, 400, 67 A 339, 12 LRANS 102 (where the court said: "The scope, and to some extent, the theory of the presumption of imputed knowledge has been the subject of two decisions in this court which are not in accord. I refer to Sooy v. State, 41 N. J. L. 394, and Willard v. Denise, 50 N. J. Eq. 482, 26 A 29, 35 AmSR 783. The latter of these cases, which was also the later in point of time, laid down the rule that 'where information is casually obtained by an agent of a corporation, the corporation is not charged with notice from the mere fact of its agent's knowledge, but if the corporation act through such agent in a matter where the information possessed by him is pertinent, the knowledge of the agent will be imputed to the principal.' . . . We are not, however, willing to rest our decision of this matter upon the case of Willard v. Denise, supra. In the earlier case of Sooy v. State, supra, the rule stated in the syllabus of the opinion, delivered by Mr. Justice Dixon is this: '"The knowledge of the agent is chargeable upon his principal whenever the principal, if acting for himself, would have received notice of the matters known to the agent.' This rule, it will be observed, is far more favorable to the respondents in the present case than that of Willard v. Denise, supra, and is, in our judgment, the rule to be applied whenever the presumption of imputed knowledge becomes pertinent to the rights or remedies of litigating parties. . . . In applying this rule we think it is reasonably certain that if the board of directors of the American Can Company, when they contemplated going into competition with the complainant in the detinning business by the use of its process, has set about the acquisition of a practical knowledge of the construction and working details of such process, either as a board of directors or by the employment of agents not already possessed of such knowledge, they must inevitably have run up against the barrier of secrecy maintained by the complainant for the express purpose of heading off such competition. In that case they would either have failed to obtain the secret of the complainant's process, except with its knowledge and consent, or if they did obtain it clandestinely from someone who held it in confidence, would have done so under circumstances that would have put them upon inquiry, and hence, have charged their corporation with whatever knowledge such inquiry would have led to. This is the test established by the case of Sooy v. State, supra (as applied to a corporation) and the conclusion to which it leads is that the defendant corporation holds the fruits of Assmann's agency in its behalf, with the burden of so much of the knowledge possessed by him as would have come to it if it had acted for itself or through an agent who was not already possessed of such knowledge"); Boice v. Conover, 71 N. J. Eq. 269, 65 A 191. See also Law v. Stokes, 32 N. J. L. 249, 90 AmD 655; Camden Safe Deposit, etc., Co. v. Lord, 67 N. J. Eq. 489, 58 A 607; Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117. (2) This rule, however, is a rule of evidence by which the knowledge of the principal in point of fact can be established. Thomson v. Central Pass. R. Co., 80 N. J. L. 328, 78 A 152; Vulcan Detinning Co. v. American Can Co., supra. (3) Notice of the rights of a person claiming title under a consignee to have goods delivered to him, when given to the agent of a carrier charged with the duty of delivering the freight is notice to the carrier. National Newark Banking Co. v. Delaware, etc., R. Co., 70 N. J. L. 774, 58 A 311, 103 AmSR 825, 66 LRA 595.

[b] **Illustrations.**—(1) Notice to an agent who purchases a note that it is tainted with usury is notice to his principal. Sheppard v. Wood, 78 Ill. A. 428; Haynes v. Gay, 37 Wash. 230, 79 P 794. (2) Where an order for the purchase of a machine and a contract appointing one a local agent for the seller to procure orders for machines are executed on the same day, and immediately forwarded to the home office of the seller by its general agent, the seller is charged with the knowledge possessed by the general agent with respect to his agreement with the local agent as to commissions on the order. Linquist v. Northwestern Port Huron Co., 22 S. D. 298, 117 NW 365. (3) Knowledge of a railroad ticket agent that he is infected with smallpox is notice to the carrier, although he is not the principal ticket agent at the station. Missouri, etc., R. Co. v. Raney, 44 Tex. Civ. A. 517, 99 SW 589. (4) Where a condition on which a person signs and delivers a bond is known to the agent of the obligee at the time of the delivery thereof to him, the principal has notice of the condition, and is bound thereby. Newlin v. Beard, 6 W. Va. 110. (5) Notice of the dissolution of a partnership to a traveling salesman is notice to his principal, where the salesman was the sole representative of the principal dealing with the firm, and the firm made all its purchases through him, and the salesman reported references given by new customers and reported dissolutions of partnerships, and sometimes received payments of bills due, although not instructed to collect bills, and in a general way inquired about the condition of the business of those with whom he was dealing for his principal. Jenkins Bros. Shoe Co. v. G. V. Renfrow, etc., Co., 151 N. C. 323, 66 SE 212, 25 LRANS 231 and note. See also Straus, etc., Co. v. Sparrow, 148 N. C. 309, 62 SE 308. (6) Where a customer who traded at the branch office of a brokerage firm gave the manager a letter authorizing him to buy and sell for her account and the firm acquiesced in the arrangement, notice to the manager of the revocation of his authority was notice binding on the firm. Eng. v. Cammann, 85 Misc. 27, 147 NYS 23.

[c] **In bankruptcy proceedings.**—(1) Notice to the agent or actual knowledge of the agent of proceedings in bankruptcy is notice or knowledge of the principal. In re Beerman, 112 Fed. 662; Atkinson v. Elmore, 103 Mo. A. 403, 77 SW 492. (2) An agent's knowledge that a preference is intended also affects his principal. Rogers v. Palmer, 102 U. S. 263, 26 L. ed. 164; Babbitt v. Kelley, 96 Mo. A. 529, 70 SW 384.

[d] **The locator of public land** for the entryman is his agent, so that the entryman and those claiming under him are charged with the locator's knowledge. Breckenridge Cannel Coal Co. v. Scott, 121 Tenn. 88, 114 SW 930.

[e] **Where one of two persons owning property acts for both** in contracting with a broker to sell it, such owner is the agent of the other regardless of whether the other is a partner or tenant in common, and notice to the agent that the person engaged to sell the property was also acting for the prospective purchaser was notice to the other owner. Atterbury v. Hopkins, 122 Mo. A. 172, 99 SW 11.

[f] **Where the principal has actual notice** of facts known to his agent, the agent's knowledge is immaterial. Morgan v. Fleming, (Tex. Civ. A.) 133 SW 736.

78. See statutory provisions.

[a] **In California** Civ. Code § 2332 declares that as against the principal both principal and agent are deemed to have notice of whatever either has notice of or should in good faith communicate to the other. See Gallagher v. Equitable Gas Light Co., 141 Cal. 699, 75 P 329 (construing this section in connection with § 2330).

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the rights of another therein, or of defects in the title thereto, is notice to his principal;[80] and likewise notice to an agent purchasing goods that another than the seller has an interest therein or lien thereon is notice to the principal.[81]

Reason for rule. This rule is generally rested upon the principle that it is the duty of the agent to disclose to his principal all material facts coming to his knowledge, and upon the presumption that he has discharged that duty,[82] and also upon the fiction of the legal identity of principal and agent.[83]

This rule applies even though the principal comes forward before the agent has completed the

80. Ind.—Blair v. Whittaker, 31 Ind. A. 664, 69 NE 182.
Iowa.—Young v. Iowa Toilers Protective Assoc., 106 Iowa 447, 76 NW 822 (holding that one who furnishes money to his debtor with which to buy in a tax title, and who holds the certificate as security for the debt, is charged with notice that the debtor had an arrangement with the owner whereby he was to pay the taxes, and hence can acquire no title as against the owner).
Kan.—Greer v. Higgins, 8 Kan. 519.
Ky.—Miller v. Jones, 107 SW 783, 32 KyL 1078.
Mich.—Taylor v. Young, 56 Mich. 285, 22 NW 799 (holding that notice to an agent of the condition of the title to land which he buys for his principal is notice also to the principal, whatever the latter's actual knowledge may be on the subject); Russell v. Sweezey, 22 Mich. 235 (holding that, where the purchase of a tract of land was negotiated by an agent, and the fact that the land was at the time adversely held by a party in possession was treated as a circumstance which diminished the value of the vendor's interest, the knowledge of the agent of the adverse possession will be the knowledge of the purchaser; and he, not inquiring of the party in possession as to the title, will not be regarded as a bona fide purchaser without notice).
N. J.—Brown v. Columbus, (Ch.) 75 A 917.
N. Y.—Peo. v. Woodruff, 75 App. Div. 90, 77 NYS 722 (holding that where the land commissioners, while representing the state in acquiring title to land, had notice of an unrecorded lien thereon, the state is bound by such notice, and holds the land subject to such lien).
Tenn.—Renner v. Marshall, (Ch. A.) 58 SW 863 (holding that, in a suit to rescind a sale of land for defective record title, where complainant had left the matter of the purchase to an agent whom he directed to examine the title and look after the whole matter, it would be presumed that the agent did examine the title, and had actual knowledge of its condition, before he consummated the purchase for his principal, such agent having died in the meantime, and nothing to the contrary being shown; and hence the principal was bound).
Tex.—Harrell v. Broocks, 52 Tex. Civ. A. 334, 113 SW 961; Sykes v. Speer, (Civ. A.) 112 SW 422; Baldwin v. Root, (Civ. A.) 38 SW 630 [rev on other grounds 90 Tex. 546, 40 SW 3].
Va.—Schreckhise v. Wiseman, 102 Va. 9, 45 SE 745.
W. Va.—Cassiday Fork Boom, etc., Co. v. Terry, 69 W. Va. 572, 73 SE 278 (holding that the rule that notice to an agent binds his principal applies to a purchase of property through an agent in violation of an equitable title thereto, or right respecting it in a third person, and, if the agent with such notice purchases the property for his principal, the principal holds the title in trust for such third person).
[a] **Notice of the repudiation of a contract for the purchase of land** given to an agent of the vendor is notice to the vendor, unless the agent's authority is limited to the collection of the purchase-money notes or the interest thereon. Pughe v. Coleman, (Tex. Civ. A.) 44 SW 576.
[b] **Knowledge of the existence of poles and wires** of an electric power company across land which one acquires in inspecting the land as agent for the purpose of purchase is knowledge of the principal. New York, etc., R. Co. v. Russell, 83 Conn. 581, 78 A 324.

81. Helfrech Lumber, etc., Co. v. Honaker, 76 SW 842, 25 KyL 717 (holding that, where a principal in the purchase of lumber procured by the seller thereof from a third person was represented by an agent who was present when the third person held possession of the lumber, and was informed of the liens of the third person thereon, the principal was bound by the notice to the agent); Bramblett v. Henderson, 41 SW 575, 19 KyL 692; Schwind v. Boyce, 94 Md. 510, 51 A 45 (holding that, where defendant's attorney was given "full authority" to act for him in the purchase of stock, and the transaction was completed solely through him, and without investigation by defendant, or any meeting between him and the vendor of the stock, the attorney was defendant's agent, so that his knowledge of a lien on the stock should be imputed to defendant).

82. U. S.—Harrington v. U. S., 11 Wall. 356, 20 L. ed. 167.
Cal.—McKenney v. Ellsworth, 165 Cal. 326, 132 P 75.
N. Y.—Henry v. Allen, 151 N. Y. 1, 45 NE 355, 36 LRA 658.
Tex.—LaBrie v. Cartwright, 55 Tex. Civ. A. 144, 118 SW 785.
Va.—Traders', etc., Bank v. Black, 108 Va. 59, 60 SE 748.
Duty of agent to disclose material facts see supra § 369.
[a] **Presumption and public policy.**—"The doctrine of constructive notice, arising from an agent's knowledge, is based upon the principle, that it is the duty of an agent to communicate facts material to the interests of his principal, of which he has notice or knowledge arising from or connected with the subject matter of his agency; and upon grounds of public policy it is presumed he has communicated such facts to his principal; but if he has not, still the principal, having entrusted the agent with the particular business, the other party has the right to deem the agent's knowledge obligatory upon his principal; otherwise the neglect of the agent might operate most injuriously to the rights and interests of such party." Traders', etc., Bank v. Black, 108 Va. 59, 65, 60 SE 748. Lord Brougham in Kennedy v. Green, 3 Myl. & K. 699, 719, 10 EngCh 699, 40 Reprint 266, 21 ERC 820, said: "The doctrine of constructive notice depends upon two considerations; first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds the knowledge to exist, because it is highly improbable it should not; and next, that policy, and the safety of the public, forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge. In such a case it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not."
[b] **Furthermore,** if such were not the law, notice might be avoided in every case by the employment of an agent. Wiley v. Knight, 27 Ala. 336; U. S. Bank v. Davis, 2 Hill (N. Y.) 451; Cowan v. Withrow, 111 N. C. 306, 16 SE 397; Sheldon v. Cox, Ambl. 624, 27 Reprint 404.
[c] **Conclusiveness of presumption.**—(1) Where others than the principal and agent are concerned, the presumption that the agent has discharged his duty to his principal in communicating the facts of which he has notice is as conclusive as the presumption that the principal remembers the facts brought home to him personally. Bierce v. Red Bluff Hotel Co., 31 Cal. 160. (2) In an action between the principal and an adverse party, the agent is conclusively presumed to have obeyed his duty to communicate to his principal every fact affecting the transaction intrusted to his care which comes to his knowledge during its performance, in the absence of evidence that such adverse party and the agent acted fraudulently. Pringle v. Modern Woodmen of America, 76 Nebr. 384, 107 NW 756, 113 NW 231; Modern Woodmen of America v. Colman, 68 Nebr. 660, 94 NW 814, 96 NW 154.
[d] **Overcoming presumption.**—Where it is sought to charge a principal with notice, he is required to offer only the agent to whom the opposite party claims he gave the notice. He need not undertake to prove a negative by producing all of his agents, in order to show that each did not receive the notice. Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 SE 678.

83. Hall, etc., Mach. Co. v. Haley Furniture, etc., Co., 174 Ala. 190, 56 S 726; Advertiser, etc., Co. v. Detroit, 43 Mich. 116, 5 NW 72 (holding that the doctrine that notice to the agent is notice to the principal is based on the view that the agent represents the principal in the particular transaction, and the latter is bound by the knowledge which the agent then has); Knobelock v. Germania Sav. Bank, 50 S. C. 259, 290, 27 SE 962 (where the court said: "The rule imputing to the principal the agent's knowledge is by some courts based upon the reason that the agent is substituted for the principal, has legal identity with the principal, and under the operation of this reason, the principal is more inflexibly held bound by the agent's knowledge"); La Brie v. Cartwright, 55 Tex. Civ. A. 144, 118 SW 785.
[a] **Identification of agent with principal.**—"This is usually explained by saying that the law conclusively presumes that the agent has in fact communicated his knowledge to his principal. We think, however, that the better and more logical explanation is that with respect to the given transaction the agent is in law identified with his principal; that knowledge that comes to the agent, while acting in such matter for his principal, would have come to the principal had he been acting for himself and that, as a rule of policy and justice, he must be equally charged therewith. Sooy v. State, 41 N. J. L. 394; Houseman v. Girard Mut. Bldg., etc., Assoc., 81 Pa. 256–262." Hall, etc., Mach. Co. v. Haley Furniture, etc., Co., 174 Ala. 190, 197, 56 S 726.
[b] **Discussion of rule and principle.**—"Constructive notice to the principal through the actual knowledge of the agent is not a rule of evidence, but one of substantive law. Given notice to or knowledge of the agent, received while so acting, and the principal is conclusively bound by it; not because he ever knows it in fact, because his actual knowledge is utterly immaterial, but because as to the thing the agent is doing the agent is in law the principal, and the principal is in law

negotiations and completes the transaction in person without the agent participating in the final stages of the transaction.[84] But as the rule is in some cases a harsh and severe one, its operation should be rigidly confined to those cases to which it is strictly applicable;[85] and it cannot be invoked for the purpose of imputing actual malice in the conduct of the principal because of facts known to his agent.[86]

Constructive notice to the agent is generally sufficient to charge the principal with knowledge of the facts which the agent would have acquired by a proper inquiry,[87] although the contrary has been held.[88]

Knowledge of principal. While it is true that notice to the agent is notice to the principal, yet the knowledge of the principal cannot be imputed to the agent with respect to a matter in which the latter is acting in his own interest.[89]

[§ 543] **b. Notice to One of Several Agents.** Notice to one of two or more joint agents in the course of his employment and within the scope of his authority is notice to the principal;[90] but notice to one agent in a transaction which he does not conduct to a termination and which is completed by another agent does not affect the principal.[91]

[§ 544] **c. Character of Notice—(1) As Regards Relation to Scope of Agency.** The rule that notice to an agent is notice to his principal is not applicable unless the notice has reference to business in which the agent is engaged under authority from the principal, and is pertinent to matters coming within that authority;[92] and hence a principal is not affected with knowledge which the

the agent. Their legal identity is complete. Nor can it matter, in this aspect of the rule, whether the agent has or has not, private reasons or interests which make it unlikely or even certain that he will not inform his principal, as correctly ruled in Birmingham First Nat. Bank v. Allen, 100 Ala. 476, 14 S 335, 46 AmSR 80, 27 LRA 426. On the other hand, the actual knowledge of the principal, when material, may be proved like any other fact. It is the duty of an agent to inform his principal of every material fact within his knowledge, no matter when acquired, bearing upon the subject matter of his agency, which may affect the interests of his principal with respect thereto; and it will be presumed that he has discharged this duty. Harrington v. U. S., 11 Wall. (U. S.) 356, 20 L. ed. 167. Here we have a true rule of evidence, a presumption of law that a duty has been discharged, from which follows the further presumption that the principal has acquired the knowledge of his agent. But this presumption like others of a similar nature, is disputable, and not conclusive. Unless rebutted, it is sufficient to fasten upon the principal, not an unreal constructive notice which is incontestable, but simply an implied actual notice which is contestable. A failure to distinguish between these entirely distinct principles has, in our judgment, produced most of the confusion and contrariety of judicial opinion which seems to have always attended the consideration of this subject by the courts". Hall, etc., Mach. Co. v. Haley Furniture, etc., Co., 174 Ala. 190, 202, 56 S 726 [cit Cyc].

84. Bryant v. Booze, 55 Ga. 438.

85. Trentor v. Pothen, 46 Minn. 298, 49 NW 129, 24 AmSR 225 and note; Hargadine, etc., Dry Goods Co. v. Krug, 2 Nebr. (Unoff.) 52, 96 NW 286 (where the court said: "It is a harsh and severe rule which imputes to a principal the knowledge possessed by his agent, and oftentimes, as in the case at bar, punishes an innocent party for participation in a transaction of which he was concededly ignorant. It was adopted, not as adapted to secure the ends of justice in all cases, but as a concession to the weakness of the powers of discernment of human tribunals. The principle is too firmly established to be shaken, and its wisdom is not doubted, but, as it is not infrequently the cause of rank injustice, its operation should be rigidly confined to those cases to which it is strictly applicable").

86. Reisan v. Mott, 42 Minn. 49, 51, 43 NW 691, 18 AmSR 489 (where the court said: "Actual malice implies a wrongful purpose or intent in the mind of the person whose conduct is in question. It is not to be conclusively presumed or legally imputed to him merely because of the mental condition or the knowledge of another person, however related to him").

87. Cal.—Bauer v. Pierson, 46 Cal. 293 (holding that, where a person is about to make a loan and take a mortgage upon land as security, and employs an agent to make the negotiation, a declaration made by a tenant in possession of the land to the agent that another person owns an interest in the land is sufficient to put the mortgagee on inquiry, and, if due diligence is not exercised in making such inquiry, the mortgage, even if the paper title appears to be in the mortgagor, is subject to the rights of such other person in the land).

Iowa.—Furry v. Ferguson, 105 Iowa 231, 74 NW 903 (holding that the failure of an agent, who, as clerk of the district court, could have easily ascertained whether an action affecting the property he was employed to buy had been dismissed, as appeared by the record, or was still pending, to ascertain the true condition of the action must be imputed to his principal who must be held to have had due notice of the rights of plaintiffs therein at the time of her purchase from defendants).

Mo.—Babbitt v. Kelley, 96 Mo. A. 529, 70 SW 384 (holding that, where the agent of a creditor knows or has reason to believe that the debtor is insolvent when he executes a mortgage in behalf of the agent's principal, the latter is affected with the knowledge of the agent).

N. J.—Vulcan Detinning Co. v. American Can Co., 72 N. J. Eq. 387, 67 A 339, 12 LRANS 102.

N. C.—Neal v. Pender-Heyman Hardware Co., 122 N. C. 104, 29 SE 96, 65 AmSR 697.

Or.—Chapman v. Multnomah County, 63 Or. 180, 126 P 996.

Tex.—Ferguson v. McCrary, 20 Tex. Civ. A. 529, 50 SW 472 (holding that a principal is chargeable with notice of all facts which would be disclosed by an inquiry following the discovery of other facts by the agent while acting within the scope of his employment).

[a] **Notice to agent no defense to fraud.**—Where a plaintiff relied on and was induced by the false representations of defendant to part with her property, and was thereby damaged, it seems that, when defendant is sued for the damages suffered by his deceit, it is no defense for him to say that an agent of plaintiff, who was ignorant of the fraud practiced on her, was in possession of information which, if disclosed by him to her, would have shown that she was deceived. Lee v. Tarplin, 183 Mass. 52, 66 NE 431.

88. Wheatland v. Pryor, 133 N. Y. 97, 30 NE 652 (holding that constructive notice to an agent cannot operate as constructive notice to the principal, and that the notice to an agent to be notice to his principal must be actual notice); New York Cent. Trust Co. v. West India Impr. Co., 48 App. Div. 147, 63 NYS 853 [rev on other grounds 169 N. Y. 314, 62 NE 38].

89. Luton v. Sharp, 94 Mich. 202, 53 NW 1054.

90. Wittenbrock v. Parker, 102 Cal. 93, 36 P 374, 41 AmSR 172, 24 LRA 197; National Security Bank v. Cushman, 121 Mass. 490; U. S. Bank v. Davis, 2 Hill (N. Y.) 451; St. Paul F., etc., Ins. Co. v. Stogner, 44 Tex. Civ. A. 60, 98 SW 218 (holding that notice to one of two joint agents is notice to the principal, although the one receiving notice was not the one to eventually accomplish the transaction in regard to which the notice was given).

91. Irvine v. Grady, 85 Tex. 120, 19 S. W. 1028; Blackburn v. Vigors, 12 App. Cas. 531, 13 ERC 514 (holding that where a broker received material information while acting as agent to effect an insurance for plaintiffs, which information he failed to communicate to them, and upon his failure to effect the insurance another agent was appointed, who succeeded in effecting it, the principal was not liable for the knowledge possessed by the former agent). See also Allen v. Rostain, 11 Serg. & R. (Pa.) 362 (holding that one agent's knowledge does not bind another agent at a distance, although both acted for the same firm).

[a] **Exception; agent employed to furnish information.**—The English decisions, however, have made a distinction between the case where the agent is employed to effect a certain transaction, and one where he is employed for the express purpose of furnishing information which may pertain to such transaction. Thus, to illustrate the latter case, it has been held that where a shipowner effects an insurance on a ship he will be affected by the knowledge of the master or ship agent as to the condition of the ship, although such master or agent had no hand in procuring the policy, it being the special function of a master and ship agent to keep their employer informed of all casualties encountered by his ship which would materially influence the judgment of the insured. Proudfoot v. Montefiore, L. R. 2 Q. B. 511; Gladstone v. King, 1 M. & S. 35, 105 Reprint 13; Fitzherbert v. Mather, 1 T. R. 12, 99 Reprint 944. Compare General Interest Ins. Co. v. Ruggles, 12 Wheat. (U. S.) 408, 6 L. ed. 674.

92. U. S.—McCalmont v. Lanning, 154 Fed. 353, 84 CCA 138; Curtice v. Crawford County Bank, 110 Fed. 830; Zeis v. Potter, 105 Fed. 671, 44 CCA 665; Denver v. Sherret, 88 Fed. 226, 31 CCA 499; Chicago, etc., R. Co. v. Belliwith, 83 Fed. 437, 28 CCA 358.

Ala.—Alabama Western R. Co. v. Bush, 62 S 89; Hall, etc., Woodworking Mach. Co. v. Haley Furniture, etc., Co., 174 Ala. 190, 56 S 726; Patterson v. Irvin, 142 Ala. 401, 38 S 121; Central of Georgia R. Co. v. Joseph, 125 Ala. 313, 28 S 35; Huntsville Branch Bank v. Steele, 10 Ala. 915.

Ark.—Arkansas Mut. F. Ins. Co. v. Clark, 84 Ark. 224, 105 SW 257; Whitehead v. Wells, 29 Ark. 99.

agent acquires while not acting in the course of his employment, or which relates to matters not within the scope of his authority, unless the agent actually communicates his information to the principal.[98] Furthermore the relation of principal and agent must exist in order to charge one person with

Cal.—Iverson v. Metropolitan L. Ins. Co., 151 Cal. 746, 91 P 609, 13 LRANS 866; Ayers v. Green Gold Min. Co., 116 Cal. 333, 48 P 221.

Colo.—Deane v. Roaring Fork Electric Light, etc., Co., 5 Colo. A. 521, 39 P 346.

Conn.—Marsh v. Wheeler, 77 Conn. 449, 59 A 410, 107 AmSR 40; Indiana Bicycle Co. v. Tuttle, 74 Conn. 489, 51 A 538.

Del.—Downs v. German Alliance Ins. Co., 22 Del. 166, 67 A 146.

Ga.—Pursley v. Stahley, 122 Ga. 362, 50 SE 139; McLean v. Camak, 97 Ga. 804, 25 SE 493; Githens v. Murray, 92 Ga. 748, 18 SE 975.

Ill.—Lowden v. Wilson, 238 Ill. 340, 84 NE 245 (holding that notice to an agent, in order to charge the principal, must be in relation to the matter in which the agent is employed); Home Sav., etc., Bank v. Peoria Agricultural, etc., Soc., 206 Ill. 9, 69 NE 17, 99 AmSR 132; Wieboldt v. Best Brewing Co., 163 Ill. A. 246.

Ind.—Marion Mfg. Co. v. Harding, 155 Ind. 648, 58 NE 194.

Kan.—Arkansas City First Nat. Bank v. Skinner, 10 Kan. A. 517, 62 P 705; Sehrt-Patterson Milling Co. v. Hughes, 8 Kan. A. 514, 56 P 143.

Ky.—Tate v. Illinois Cent. R. Co., 81 SW 256, 26 KyL 309, 341.

Mass.—Foote v. Cotting, 195 Mass. 55, 80 NE 600, 15 LRANS 693 (holding that, where an agent having the entire management of certain premises in behalf of the owners thereof, and as incident to such management the power to pay the taxes thereon, wrongfully appropriated the money of another to pay such taxes, the existence of such agency of itself did not render the owners chargeable with a knowledge of the fraud); Low v. Low, 177 Mass. 306, 59 NE 57; Allen v. South Boston R. Co., 150 Mass. 200, 22 NE 917, 15 AmSR 185, 5 LRA 716.

Mich.—Haapa v. Metropolitan L. Ins. Co., 150 Mich. 467, 114 NW 380, 121 AmSR 627, 16 LRANS 1165; Thompson v. Mecosta, 141 Mich. 175, 104 NW 694.

Minn.—Jackson v. Mutual Ben. L. Ins. Co., 79 Minn. 43, 81 NW 545, 82 NW 366.

Miss.—Illinois Cent. R. Co. v. Bryant, 70 Miss. 665, 12 S 592.

Mo.—Smith v. Boyd, 162 Mo. 146, 62 SW 439; Hayward v. National Ins. Co., 52 Mo. 181, 14 AmR 400; Watson Fireproof Window Co. v. Henry Weis Cornice Co., (A.) 168 SW 905; O'Neill v. Blase, 94 Mo. A. 648, 68 SW 764; National Bank of Commerce v. Fitze, 76 Mo. A. 356.

Mont.—Collins v. Metropolitan L. Ins. Co., 32 Mont. 329, 80 P 609, 1092, 108 AmSR 578.

Nebr.—Stoner v. Keith County, 48 Nebr. 279, 67 NW 311.

N. J.—Canda Mfg. Co. v. Woodbridge Tp., 58 N. J. L. 134, 32 A 66; Sooy v. State, 41 N. J. L. 394.

N. Y.—Butler v. Michigan Mut. L. Ins. Co., 184 N. Y. 337, 77 NE 398; Henry v. Allen, 151 N. Y. 1, 45 NE 355, 36 LRA 658; Baer v. American Credit-Indemn. Co., 116 App. Div. 233, 101 NYS 672 [aff 191 N. Y. 540 mem, 84 NE 1108 mem]; Crooks v. People's Nat. Bank, 34 Misc. 450, 70 NYS 271; Champlin v. Laytin, 6 Paige 189 [aff 18 Wend. 407, 31 AmD 382].

Pa.—Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. 291.

S. C.—Sparkman v. Supreme Council A. L. H., 57 S. C. 16, 35 SE 391; American Freehold Land Mortg. Co. v. Felder, 44 S. C. 478, 22 SE 598.

Tenn.—Nashville, etc., R. Co. v. Elliott, 1 Coldw. 611, 78 AmD 506.

Tex.—Allen v. Garrison, 92 Tex. 546, 50 SW 335; Galveston, etc., R. Co. v. Gormley, 91 Tex. 393, 43 SW 877, 66 AmSR 894; Storms v. Mundy, 46 Tex. Civ. A. 88, 101 SW 258; Grayson County Nat. Bank v. Hall, (Civ. A.) 91 SW 808; Ash v. Fidelity Mut. L. Assoc., 26 Tex. Civ. A. 501, 63 SW 944; Campbell v. Crowley, (Civ. A.) 56 SW 373; Smith v. Smith, 23 Tex. Civ. A. 304, 55 SW 541; Ferguson v. McCrary, 20 Tex. Civ. A. 529, 50 SW 472; Smith v. Boatman Sav. Bank, 1 Tex. Civ. A. 115, 20 SW 1119.

Va.—Foreman v. German Alliance Ins. Assoc., 104 Va. 694, 52 SE 337, 113 AmSR 1071, 3 LRANS 444 and note.

Wis.—Andrews v. Robertson, 111 Wis. 334, 87 NW 190, 87 AmSR 870, 54 LRA 673; Congar v. Chicago, etc., R. Co., 24 Wis. 157, 1 AmR 164.

Wyo.—Rock Springs Nat. Bank v. Luman, 5 Wyo. 159, 38 P 678.

[a] **"The general rule is,** that notice to the agent is notice to the principal. The word agent, as used in this connection, means the person who has power to act for the principal with reference to the very subject matter to which the notice relates, and does not include a person who has no such power, though he may have power to act for the principal with reference to similar subjects. The words agent and act are from the same root, and the above limitation of the use of the former is inherent in its derivation." Missouri, etc., R. Co. v. Belcher, 88 Tex. 549, 551, 32 SW 518.

[b] **"The fundamental requirement** is that such knowledge on the part of an agent to bind his principal 'must be limited to such knowledge or information as comes to the agent in transacting the business of his principal.'" Hall, etc., Woodworking Mach. Co. v. Haley Furniture, etc., Co., 174 Ala. 190, 197, 56 S 726.

[c] **Purpose of rule.**—In Trentor v. Pothen, 46 Minn. 298, 300, 49 NW 129, 24 AmSR 225 and note, the court, discussing the rule that notice to the agent is notice to the principal, said: "But while this rule may be a salutary and just one if properly applied, it would be a very dangerous one if applied without proper discrimination. Hence the tendency of the courts is rather to restrict the doctrine of imputed notice, or at least not to extend it, but to reduce it within clear and definite principles. The rule which imputes to the principal the knowledge possessed by the agent applies only to cases where the knowledge is possessed by an agent within the scope of whose authority the subject matter lies; in other words, the knowledge or notice must come to an agent who has authority to deal in reference to those matters which the knowledge or notice affects. The facts of which the agent had notice must be within the scope of the agency, so that it becomes his duty to act upon them or communicate them to his principal. As it is the rule that whether the principal is bound by contracts entered into by the agent depends upon the nature and extent of the agency, so does the effect upon the principal of notice to the agent depend upon the same conditions."

[d] **Tests in applying rule.**—(1) "That rule does not charge the principal with his agent's knowledge of facts affecting the subject matter of the business in which the latter is employed, unless the agent in fact acts for the principal in what he does in the matter in respect to which it is sought to charge the principal with his knowledge . . . In other words, the principal is not charged with his agent's knowledge regarding a particular transaction unless the latter's acts in respect to it were within the scope of his employment. To illustrate: If a person employs an agent to buy property, and the latter, instead of buying, sells to the principal property procured from a stranger by fraud, the agent's knowledge of that fraud will not be imputed to the principal (Allen v. South Boston R. Co., 150 Mass. 200, 206, 22 NE 917, 15 AmSR 185, 5 LRA 716); but if the agent buys property for the principal, the latter will be charged with the agent's knowledge of any defects in the grantor's title. Hovey v. Blanchard, 13 N. H. 145, 149. The test, therefore, to determine whether an agent's knowledge is to be imputed to his principal is to inquire whether or not the agent was acting for the principal when he did that in respect to which it is sought to charge the principal with his knowledge." Warren v. Hayes, 74 N. H. 355, 356, 68 A 193. (2) "The knowledge of an agent, in order to be binding upon his principal, must be not only such as he possessed during the time of his employment, but such as related to his duties in such a way as that, if it was known to the principal, it would affect the conduct of the latter in doing the very act of transacting the very business which the agent was engaged to do." Hargadine, etc., Dry Goods Co. v. Krug, 2 Nebr. (Unoff.) 52, 96 NW 286, 287.

93. U. S.—Holm v. Atlas Nat. Bank, 84 Fed. 119, 28 CCA 297; Satterfield v. Malone, 35 Fed. 445, 1 LRA 35.

Ala.—Hall, etc., Woodworking Mach. Co. v. Haley Furniture, etc., Co., 174 Ala. 190, 56 S 726; Frenkel v. Hudson, 82 Ala. 158, 2 S 758, 60 AmR 736; Hinton v. Citizens' Mut. Ins. Co., 63 Ala. 488; Graham v. Tankersley, 15 Ala. 634; Grant v. Cole, 8 Ala. 519; Magee v. Billingsley, 3 Ala. 679.

Ark.—Lanier v. Little Rock Cooperage Co., 88 Ark. 557, 115 SW 401.

Cal.—Renton v. Monnier, 77 Cal. 449, 19 P 820; Lowe v. Los Angeles Suburban Gas Co., (A.) 141 P 399 (holding that where a director of a corporation was the agent of a third party for the purchase of bonds of the corporation, notice to such agent and directors of the invalidity of the proceedings for the issuance of the bonds was not imputable to his principal, as he received such notice in his capacity as director, and not as agent).

Conn.—Hill v. Hays, 38 Conn. 532.

Ga.—Camp v. Southern Banking, etc., Co., 97 Ga. 582, 25 SE 362; Freeman v. Mutual Bldg., etc., Assoc., 90 Ga. 190, 15 SE 758; Mims v. Brook, 3 Ga. A. 247, 59 SE 711; Collins v. Crews, 3 Ga. A. 238, 59 SE 727.

Ill.—Roderick v. McMeekin, 204 Ill. 625, 68 NE 473; Wieboldt v. Best Brewing Co., 163 Ill. A. 246; Mackay-Nisbet Co. v. Kuhlman, 119 Ill. A. 144 (holding that a statement made to a traveling salesman, not purporting to be a general agent, that a change of ownership has taken place is not notice to the employer of such salesman selling goods in reliance on no change of ownership); Seaverns v. Presbyterian Hospital, 64 Ill. A. 463 [aff 173 Ill. 414, 50 NE 1079, 64 AmSR 125]; Wright v. Bruschke, 62 Ill. A. 358 [rev on other grounds 166 Ill. 183, 46 NE 813, 57 AmSR 125]; St. Louis Consolidated Coal Co. v. Block, etc., Smelting Co., 53 Ill. A. 565.

Ind.—Shaffer v. Milwaukee Mechanics', Ins. Co., 17 Ind. A. 204, 46 NE 557.

Iowa.—Thomas v. Desney, 57 Iowa 58, 10 NW 315.

Kan.—Topliff v. Shadwell, 68 Kan. 317, 74 P 1120; Roach v. Karr, 18 Kan. 529, 26 AmR 788.

Ky.—German Ins. Co. v. Goodfriend, 97 SW 1098, 30 KyL 218 (where notice by an insurance agent to a merchant's salesman that his company had refused to renew a policy was held not notice to the merchant).

La.—Carlin v. Dumartrait, 8 Mart. N. S. 212.

Md.—Gemmell v. Davis, 75 Md. 546, 23 A 1032, 32 AmSR 412.

another's knowledge, and the knowledge of a person who is not in fact the agent of another cannot be imputed to the latter.[94]

Notice to ministerial agent or servant. Notice to

Mass.—Shepard, etc., Lumber Co. v. Eldridge, 171 Mass. 516, 51 NE 9, 68 AmSR 446, 41 LRA 617 (holding that, where the examination of corporate books in making trial balances was not made in the performance of a duty owed by the corporation to any other party, the knowledge acquired by the agent making the examinations is not to be imputed to the corporation).

Mich.—Weaver v. Richards, 150 Mich. 20, 113 NW 867.

Minn.—Strauch v. May, 80 Minn. 343, 83 NW 156 (holding that one whose duties and authority as cashier are restricted to the payment of money under the direction of his employer is not the agent of his principal for the purpose of receiving notice of the assignment of wages by an employee); Sandberg v. Palm, 53 Minn. 252, 54 NW 1109 (holding that knowledge by an agent, authorized only to sell land, that a house is being built on it is not knowledge by the owner, for the purpose of creating a mechanic's lien under L. [1889] c 200 § 5); Trenton v. Pothen, 46 Minn. 298, 49 NW 129, 24 AmSR 225.

Miss.—Goodloe v. Godley, 13 Sm. & M. 233, 51 AmD 150.

Mo.—Hickman v. Green, 123 Mo. 165, 22 SW 455, 27 SW 440, 29 LRA 39; Benton v. German-American Nat. Bank, 122 Mo. 332, 26 SW 975; Walker v. Hannibal, etc., R. Co., 121 Mo. 575, 26 SW 360, 42 AmSR 547, 24 LRA 363; Tennent v. Union Cent. L. Ins. Co., 133 Mo. A. 345, 112 SW 754; King v. Rowlett, 120 Mo. A. 120, 96 SW 493; Girard L. Ins. etc., Co. v. Mangold, 94 Mo. A. 125, 67 SW 955.

Nebr.—Hargadine-McKettrick Dry Goods Co. v. Krug, 2 Nebr. (Unoff.) 52, 96 NW 286.

N. H.—Warren v. Hayes, 74 N. H. 355, 68 A 193; Bohanan v. Boston, etc., R. Co., 70 N. H. 526, 49 A 103.

N. J.—Hightstown First Nat. Bank v. Christopher, 40 N. J. L. 435, 29 AmR 262; Force v. Dutcher, 18 N. J. Eq. 401.

N. Y.—New York v. New York Tenth Nat. Bank, 111 N. Y. 446, 18 NE 618; Ritch v. Smith, 82 N. Y. 627, 60 HowPr 157 [aff 60 HowPr 13]; Atlantic State Bank v. Savery, 82 N. Y. 291; Lewis v. Blackwood, 153 App. Div. 36, 137 NYS 1061; Comey v. Harris, 133 App. Div. 686, 118 NYS 244 [aff 200 N. Y. 534 mem, 93 NE 1118 mem] (holding that a mortgagee is not affected with knowledge acquired casually by his broker, having no authority other than to sell the premises on given terms, as to the infancy of the owner of the funds used by the mortgagor in purchasing the premises, although such knowledge was acquired during the negotiations for the purchase); Matter of Bauer, 68 App. Div. 212, 72 NYS 439, 74 NYS 155 [aff 36 Misc. 33, 72 NYS 439]; Olyphant v. Phyfe, 48 App. Div. 1, 62 NYS 688 [mod 27 Misc. 64, 58 NYS 217, and aff 166 N. Y. 630 mem, 60 NE 1117 mem]; Slattery v. Schwannecke, 44 Hun 75, 7 NYSt 430; Graves v. Mumford, 26 Barb. 94; Spadone v. Manvel, 2 Daly 263; Goldenson v. Lawrence, 16 Misc. 570, 38 NYS 991; Long v. Poth, 16 Misc. 85, 37 NYS 670 (holding that the rule as to notice cannot be extended to imply that a special agent, whose powers are limited to making a lease for one year, informed his principal that he had transcended his authority and made two leases for longer terms); Casco Nat. Bank v. Clark, 18 NYS 887 [aff 139 N. Y. 307, 34 NE 908, 36 AmSR 705].

N. C.—Commercial Bank v. Burgwyn, 110 N. C. 267, 14 SE 623, 17 LRA 326.

Or.—Price v. Oregon R. Co., 47 Or. 350, 83 P 843; Pennoyer v. Willis, 26 Or. 1, 36 P 568, 46 AmSR 594.

Pa.—Meehan v. Williams, 48 Pa. 238; Huhn v. Long, 2 Whart. 200; Wilson v. Second Nat. Bank, 4 Pa. Cas. 68, 7 A 145; Lightcap v. Nicola, 34 Pa. Super. 189.

S. D.—Reeves v. Lewis, 25 S. D. 44, 125 NW 289, 29 LRANS 82.

Tenn.—Lambreth v. Clarke, 10 Heisk. 32.

Tex.—Missouri, etc., R. Co. v. Belcher, 88 Tex. 549, 32 SW 518; Texas Loan Agency v. Taylor, 88 Tex. 47, 29 SW 1057; Labbe v. Corbett, 69 Tex. 503, 6 SW 808, 6 SW 812; Kauffman v. Robey, 60 Tex. 308, 48 AmR 264; Weathersby v. Texas, etc., Lumber Co., (Civ. A.) 146 SW 243; Lane v. De Bode, 29 Tex. Civ. A. 602, 69 SW 437, Cooper v. Ford, 29 Tex. Civ. A. 253, 69 SW 487; Rand v. Davis, (Civ. A.) 27 SW 939.

Vt.—Hall v. Dewey, 10 Vt. 593.

Va.—Finch v. Causey, 107 Va. 124, 57 SE 562.

Wash.—Meyers v. Gerhart, 54 Wash. 657, 103 P 1114; Moon Bros. Carriage Co. v. Devenish, 42 Wash. 415, 85 P 17, 7 AnnCas 649 (holding that, where it is not shown that a traveling salesman was authorized to collect for goods sold to a partnership, the principal is not charged with such salesman's knowledge that on the dissolution of the partnership its liabilities were assumed by one of the partners); Washington Nat. Bank v. Pierce, 6 Wash. 491, 33 P 972, 36 AmSR 174.

W. Va.—Thompson v. Laboringman's Mercantile, etc., Co., 60 W. Va. 42, 53 SE 908.

Wis.—Wells v. American Express Co., 44 Wis. 342.

Eng.—In re Cousins, 31 Ch. D. 671; Arden v. Arden, 29 Ch. D. 702.

"Ordinarily, knowledge of the agent becomes knowledge of the principal; but this cannot apply when the agent is attempting to act beyond his authority, either actual or ostensible, and the party with whom he is dealing knows he is so acting without authority, and where, as in this case, there is absolutely nothing to notify the principal that the agent has attempted to enter into a new or modified agreement." Reeves v. Lewis, 25 S. D. 44, 49, 125 NW 289, 29 LRANS 82. "Knowledge acquired by an agent . . . in regard to matters outside the line of his duty, or while pursuing his own or some other person's business, is not notice to his principal of such fact or facts, and is not binding upon him." Hall, etc., Woodworking Mach. Co. v. Haley Furniture, etc., Co., 174 Ala. 190, 196, 56 S 726.

[a] **Reason for rule.**—"The general rule that charges a principal with knowledge of facts known to his agent cannot be invoked, when the fact with which the principal is to be charged is the unauthorized act or agreement of the agent, whose knowledge thereof is sought to be imputed to the principal. To hold a principal chargeable with notice of the unauthorized agreement of the agent, and in this way raise the issue of estoppel by ratification on the part of the principal, would in effect destroy the rule which relieves the principal from liability for the unauthorized act or agreement of his agent." Weathersby v. Texas, etc., Lumber Co., (Tex. Civ. A.) 146 SW 243, 247.

[b] **An agency to sell land** is not general, and knowledge of the agent which may be imputed to the principal is only that which he obtains in the course of his own employment, and not with reference to what others are doing in effecting a sale. Kyle v. Gaff, 105 Mo. A. 672, 78 SW 1047.

[c] **Where an agent's duties are limited to finding borrowers** for his principal's money, and the approval of the security is not intrusted to him, his knowledge of the trust character of the land offered as security cannot be attributed to his principal. Donham v. Hahn, 127 Mo. 439, 30 SW 134.

[d] **Where a contract of sale provides for notice to be given to the seller,** direct by registered mail, of defects in machines sold, notice to the local selling agent is not notice to the seller. Gaar, etc., Co. v. Nelson, 166 Mo. A. 51, 148 SW 417.

[e] **Where an agent, participating in criminal transactions** beyond the scope of the agency, acquires knowledge of matters affecting the business of his principal, the presumption of notice fails. Hart v. Bier, 74 Fed. 592.

94. U. S.—Craig v. Continental Ins. Co., 141 U. S. 638, 12 SCt 97, 35 L. ed. 886; Johnston v. Laflin, 103 U. S. 800, 26 L. ed. 532.

Ala.—Farmer v. American Mortg. Co., 116 Ala. 410, 22 S 426; Allen v. McCullough, 99 Ala. 612, 12 S 810.

Cal.—Mabb v. Stewart, 133 Cal. 556, 65 P 1085.

Colo.—Kenney v. Jaynes, 26 Colo. 154, 56 P 562 (holding that one who buys land for himself, taking a deed in his own name, does not, by selling it to another, erasing his own name from the deed, and inserting the name of the other, become the agent of the latter, so as to charge him with notice which he had); Kinkel v. Harper, 7 Colo. A. 45, 42 P 173.

Conn.—Platt v. Birmingham Axle Co., 41 Conn. 255; Hill v. Hayes, 38 Conn. 532 (holding that, although a person is a general agent of another, the latter is not affected by the former's knowledge relating to a transaction between the principal and a third person in which the agent was acting for the third person).

Ga.—Godwynne v. Bellerby, 116 Ga. 901, 43 SE 275; McNamara v. McNamara, 62 Ga. 200.

Ind.—International Bldg., etc., Assoc. v. Watson, 158 Ind. 508, 64 NE 23; Craig School Tp. v. Scott, 124 Ind. 72, 24 NE 585 (holding that the knowledge of a member of a masonic lodge is not the knowledge of the lodge); Jones v. Ransom, 3 Ind. 327; Wheeler v. Barr, 7 Ind. A. 381, 34 NE 591.

Iowa.—Chicago Lumber, etc., Co. v. Garmer, 132 Iowa 282, 109 NW 780; Polk v. Foster, 71 Iowa 26, 32 NW 7; Thomas v. Desney, 57 Iowa 58, 10 NW 315.

Kan.—Tucker v. Gibson, 80 Kan. 90, 101 P 633.

Ky.—Barnes v. F. Weikel Chair Co., 89 SW 222, 28 KyL 315; Hardin v. Chenault, 77 SW 192, 25 KyL 1083.

Mich.—Sanford v. Pettit, 83 Mich. 499, 47 NW 357.

N. H.—Kimball v. American Express Co., 76 N. H. 81, 79 A 492.

N. J.—Dodge v. Romain, 18 A 114; Clement v. Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 A 82, 118 AmSR 747 [rev 69 N. J. Eq. 347, 60 A 419] (holding that knowledge possessed by one person cannot be imputed to another, unless there exists between them a relation of agency in the exercise of which the knowledge would be pertinent).

N. Y.—Curtis v. Leavitt, 15 N. Y. 9; Riley v. Robinson, 128 App. Div. 178, 112 NYS 753 [aff 202 N. Y. 531 mem, 95 NE 1138 mem].

N. C.—Hockfield v. Southern R. Co., 150 N. C. 419, 64 SE 181, 134 AmSR 945; Farmers' Bank v. Hunt, 124 N. C. 171, 32 SE 546.

N. D.—Ætna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 NW 436.

Tex.—Stringfellow v. Braselton, 54 Tex. Civ. A. 1, 117 SW 204; Marx v. Luling Co-operative Assoc., 17 Tex. Civ. A. 408, 43 SW 596.

Va.—Norfolk, etc., R. Co. v. Harman, 91 Va. 601, 22 SE 490, 50 AmSR 855, 44 LRA 289 (holding that the sellers of live stock, who deliver the stock to a carrier for shipment, are not, in making the delivery, the agents of the buyer, and their knowledge of the condition of the carrier's pens cannot be imputed to the buyer).

or knowledge of a mere ministerial agent, clerk, or servant will not be imputed to the principal.[95]

[§ 545] **(2) As Regards Materiality and Source.** Notice to an agent in order to be notice to the principal must relate to facts so material to the purpose of the agency as to make it the agent's duty to communicate the notice to his principal.[96] Furthermore the information must come from a source so apparently reliable that a man of ordinary prudence would be influenced thereby; and mere rumors or loose information coming to the knowledge of the agent will not constitute notice to the principal.[97]

[§ 546] **d. Time of Receiving Notice—(1) During Agency.** While the general rule is that notice received by an agent during his agency is notice to the principal,[98] its operation is sometimes held to be narrowed by the condition that not only must notice be received during the existence of the agency, but also that notice to bind the principal must be received by the agent while engaged in the particular transaction to which the information relates, and that notice to the agent in a prior disconnected transaction, although for the same principal, will not charge the latter,[99] unless it is shown that such knowledge is present in the agent's mind

[a] **Agency must be proved.**—"Where notice or knowledge is sought to be imputed to the principal through the agent, it is essential and requisite that such agency or authority to act for the principal in the transaction in question be first proved by either positive or circumstantial evidence; at least to the extent of establishing a prima facie case of such agency." International Bldg., etc., Assoc. v. Watson, 158 Ind. 508, 513, 64 NE 23.

[b] **A transfer company in the habit of hauling goods** for a consignee and others in a town is only the consignee's agent, as concerning notice to the agent as to the goods actually hauled, and hence notice given by a carrier to such company of the arrival of goods is not notice thereof to the consignee. Hockfield v. Southern R. Co., 150 N. C. 419, 64 SE 181, 134 AmSR 945.

[c] **Agents to inspect land offered as security for a loan,** the inspection being for the sole purpose of ascertaining its character and value, are not agents of the lender to receive notice of an adverse title or an outstanding equity. Lewis v. Equitable Mortg. Co., 94 Ga. 572, 21 SE 224.

[d] **Bidding in property for another.**—Where an agent perpetrates a fraud on his principal to obtain his property at a sacrifice and bids in the property for another and has the deed taken to such other, he is then acting as the latter's agent and notice to him is notice to the latter. Burt v. Rynex, 55 Mo. 569.

95. Ill.—Booker v. Booker, 208 Ill. 529, 70 NE 709, 100 AmSR 250 (notice to a mere messenger in a transaction).

La.—Mercier v. Canonge, 8 La. Ann. 37.

Me.—Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 AmR 319.

Md.—Sloan, etc., Co. v. Grollman, 113 Md. 192, 197, 77 A 577, AnnCas 1912A 544 and note [cit Cyc].

Mass.—Rogers v. Dutton, 182 Mass. 187, 65 NE 56 (holding that, where a person, falsely representing himself to be acting for defendant, purchased of plaintiff hay for defendant, and then sold it on his own account to defendant, the fact that plaintiff's teamster heard the wrongdoer asserting title to the hay, and said nothing, did not estop plaintiff to set up title to the hay).

Mo.—Royle Min. Co. v. New York Fidelity, etc., Co., 161 Mo. A. 185, 199, 142 SW 438 [cit Cyc]; Wheeler v. St. Joseph Stock-Yards, etc., Co., 66 Mo. A. 260.

N. D.—Ætna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 NW 436 (holding that the knowledge of an agent will not be imputed to his principal, when the agent is a nominal agent merely, or is acting as to ministerial matters merely).

S. C.—Hicks v. Southern R. Co., 63 S. C. 559, 41 SE 753.

Tex.—Storms v. Mundy, 46 Tex. Civ. A. 88, 101 SW 258 (holding that, where plaintiff negotiated a sale of land through a broker, believing that it was being sold to a third person, when in fact the broker was purchasing for his own benefit for much less than the value of the property, the fact that plaintiff employed S to see if he could not obtain an increase in the price, and after that notified S to close the sale at the offer made, which he proceeded to do, did not constitute the latter plaintiff's agent, except for the ministerial act of closing the transaction, and hence plaintiff was not bound by information that S could have obtained with reference to the fraud).

Eng.—Wyllie v. Pollen, 3 De G. J. & S. 596, 68 EngCh 451, 46 Reprint 767.

[a] **Reason for limitation.**—"The general rule is that notice to an agent is notice to his principal, but the rule does not apply where the agent is acting in a merely ministerial capacity. When so acting, the agent does not act as a substitute for the principal, nor is there imposed upon the agent the duty of communicating to his principal the knowledge thus acquired." Royle Min. Co. v. New York Fidelity, etc., Co., 161 Mo. A. 185, 198, 142 SW 438.

96. Ga.—Central of Georgia R. Co. v. Americus Constr. Co., 133 Ga. 392, 65 SE 855.

Ill.—Pittman v. Sofley, 64 Ill. 155.

Ind.—Day v. Wamsley, 33 Ind. 145.

Ky.—Bramblett v. Henderson, 41 SW 575, 19 KyL 692.

Me.—Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 AmR 319.

Minn.—Robertson Lumber Co. v. Anderson, 96 Minn. 527, 105 NW 972; Trentor v. Pothen, 46 Minn. 298, 49 NW 129, 24 AmSR 225 and note.

Or.—Wood v. Rayburn, 18 Or. 3, 22 P 521.

"The rule upon this subject, which was adopted by the Supreme Court in Philadelphia v. Lockhardt, 73 Pa. 211, is well stated in Fulton Bank v. New York, etc., Canal Co., 4 Paige (N. Y.) 127, as follows: 'Notice to the agent, when it is the duty of the agent to act upon such notice, or communicate it to his principal in the proper discharge of his duty as agent, is notice to the principal, and applies to agents of corporations as well as of others.'" Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. 285, 291.

97. U. S.—Stanley v. Schwalby, 162 U. S. 255, 16 SCt 754, 40 L. ed. 960 [rev 87 Tex. 604, 30 SW 435 (aff 8 Tex. Civ. A. 679, 29 SW 90]; Satterfield v. Malone, 35 Fed. 445, 1 LRA 35.

Ill.—Pittman v. Sofley, 64 Ill. 155.

Ind.—Day v. Wamsley, 33 Ind. 145.

Pa.—Mulliken v. Graham, 72 Pa. 484; Wilson v. McCullough, 23 Pa. 440, 62 AmD 347; Jaques v. Weeks, 7 Watts 261; Kerns v. Swope, 2 Watts 75.

Wis.—Shafer v. Phœnix Ins. Co., 53 Wis. 361, 10 NW 381.

[a] **A casual communication** made to an agent at a time when no act or transaction of the agency is pending, and which has no reference to the principal, nor to his business, does not constitute notice to the principal of the fact communicated. Patterson v. Irvin, 142 Ala. 401, 38 S 121; Willard v. Denise, 50 N. J. Eq. 482, 26 A 29, 35 AmSR 788 (holding that where information is casually obtained by an agent the principal is not charged with notice from the mere fact of the agent's knowledge, but if the principal acts through the agent in a matter where the information possessed by him is pertinent the knowledge of the agent will be imputed to the principal).

98. See supra § 542.

99. U. S.—Alger v. Keith, 105 Fed. 105, 44 CCA 371 (holding that notice of facts to an agent is constructive notice to his principal only when it comes to the agent while concerned for his principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it).

Cal.—Cooke v. Mesmer, 164 Cal. 332, 128 P 917.

Ga.—Georgia Milk Producers' Assoc. v. Crane, 137 Ga. 50, 51, 72 SE 414 [cit Cyc].

Iowa.—Louisville Second Nat. Bank v. Curren, 36 Iowa 555 (holding that the rule that knowledge of the agent is knowledge of the principal cannot be extended beyond the particular transaction in which the agent is authorized to act).

N. Y.—Howard Ins. Co. v. Halsey, 8 N. Y. 271, 59 AmD 478; Lewis v. Blackwood, 153 App. Div. 36, 137 NYS 1061; Comey v. Harris, 133 App. Div. 686, 118 NYS 244 [aff 200 N. Y. 534 mem, 93 NE 1118 mem]; Flanagan v. Shaw, 74 App. Div. 508, 77 NYS 1070 [aff 174 N. Y. 530 mem, 66 NE 1108 mem]; New York Cent. Ins. Co. v. National Protection Ins. Co., 20 Barb. 468 [rev on other grounds 14 N. Y. 85].

Pa.—Bracken v. Miller, 4 Watts & S. 102; Lightcap v. Nicola, 34 Pa. Super. 189; Chester v. Schaffer, 24 Pa. Super. 162; Arthurs v. Bascom, 28 LegInt 284.

Tex.—Cooper v. Ford, 29 Tex. Civ. A. 253, 69 SW 487 (holding that a principal is not bound by knowledge acquired by his agent in ordinary social intercourse before the transaction with the principal was contemplated, but only by such knowledge as comes to the agent in the course of the transaction).

Va.—Johnson v. Richmond Nat. Exch. Bank, 33 Gratt. (74 Va.) 473.

Eng.—Taylor v. Yorkshire Ins. Co., [1913] 2 Ir. 1; Mountford v. Scott, 3 Madd. 34, 56 Reprint 422 [aff Turn. & R. 274, 12 EngCh 274, 37 Reprint 1105]; Hiern v. Mill, 13 Ves. Jr. 114, 33 Reprint 237.

See Hart v. Sandy, 39 W. Va. 644, 655, 20 SE 665 [quot 1 Pars. Contr. (8th ed) 75, and quot Black v. Johnson, 65 W. Va. 518, 522, 64 SE 626] (where it was said: "A principal is affected by notice to his agent respecting any matter distinctly within the scope of his agency, when the notice is given before the transaction begins, or before it is so far completed as to render the notice nugatory").

"To visit the principal with constructive notice, it is necessary that the knowledge of the agent or attorney should be gained in the course of the same transaction in which he is employed by his client." Hood v. Fahnestock, 8 Watts (Pa.) 489, 492, 34 AmD 489 [quot Lightcap v. Nicola, 34 Pa. Super. 189, 200]. "It is only

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while acting in the subsequent transaction.[1] Knowledge acquired by an agent in a prior transaction will not affect the principal in a subsequent transaction in which the agent does not represent him.[2]

Where the agency is continuous, consisting of a series of transactions, as distinguished from an agency involving distinct transactions separated by considerable periods of time, knowledge acquired by the agent at one period of the agency will charge the principal in a subsequent transaction by the same agent in which the knowledge is material.[3]

[§ 547] **(2) Prior to Agency.** On the question whether a principal is chargeable with knowledge acquired by an agent prior to the existence of his agency the authorities differ widely, some holding that in order to charge the principal the knowledge must be acquired by the agent during the agency, and that, as a general rule, knowledge acquired prior thereto will not affect the principal.[4] The more logical rule, however, and that which is supported by the great weight of recent authority, is that knowledge of an agent acquired prior to the existence of the agency will be chargeable to the principal if it is clearly shown that the agent, while acting for the principal in a transaction to which the information is material, has the information present in his mind,[5] or where it was acquired so recently, or under such circumstances, that it

during the agency that the agent represents, and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be." Houseman v. Girard Mut. Bldg., etc., Assoc., 81 Pa. 256, 262 [quot Lightcap v. Nicola, 34 Pa. Super. 189, 200].

[a] **Knowledge or notice on the part of a special agent** that will bind his principal is ordinarily such as is given or acquired during the agency. Whitson v. Farber Bank, 105 Mo. A. 605, 80 SW 327.

1. Cooke v. Mesmer, 164 Cal. 332, 128 P 917; Great Western R. Co. v. Wheeler, 20 Mich. 419; Majoribanks v. Hovenden, 6 Ir. Eq. 238. See also Harrington v. U. S., 11 Wall. (U. S.) 356, 20 L. ed. 167; Alger v. Keith, 105 Fed. 105, 44 CCA 371; infra § 547.

2. Ross v. Houston, 25 Miss. 591, 59 AmD 231; Ehrgott v. George Weber Brewing Co., Oh. Prob. 260; Irvine v. Grady, 85 Tex. 120, 19 SW 1028; Blackburn v. Vigors, 12 App. Cas. 531, 13 ERC 514.

3. Campbell v. Balcomb, 183 Fed. 766, 767, 106 CCA 474 [cit Cyc]; Cox v. Pearce, 112 N. Y. 637, 20 NE 566, 3 LRA 563; Cragie v. Hadley, 99 N. Y. 131, 1 NE 537, 52 AmR 9; Holden v. New York, etc., Bank, 72 N. Y. 286, 292; Foote v. Utah Commercial, etc., Bank, 17 Utah 283, 54 P 104; Johnson v. Richmond Nat. Exch. Bank, 33 Gratt. (74 Va.) 473.

"Where the agency is continuous, and concerned with a business made up of a long series of transactions of a like nature, of the same general character, it will be held that knowledge acquired as agent in that business in any one or more of the transactions, making up from time to time the whole business of the principal, is notice to the agent and to the principal, which will affect the latter in any other of those transactions in which that agent is engaged, in which that knowledge is material." Holden v. New York, etc., Bank, 72 N. Y. 286.

4. Ala.—Hall, etc., Mach. Co. v. Haley Furniture, etc., Co., 174 Ala. 190, 197, 56 S 726 [qualifying Lea v. Iron Belt Mercantile Co., 147 Ala. 421, 42 S 415, 119 AmSR 93, 8 LRANS 279] (where the court said: "The Alabama rule, as above defined, is not in accord with the weight of authority in other jurisdictions. . . . The more generally accepted rule is that the agent's knowledge, though acquired previously to his agency, if retained by him and carried with him into the subsequent business which he transacts for his new principal, is notice to the latter whether communicated to him or not. This rule we regard as both illogical and unjust—a criticism which is fully vindicated by a consideration of the numerous and unpractical qualifications and exceptions which courts expounding the rule have been compelled to adopt. In this connection we note Mr. Pomeroy's observation that 'several of the ablest English judges have, in recent cases, expressed a decided opinion against the rule itself, and while considering themselves bound by it, as far as it is settled, have wished that it should be abrogated by the Legislature'"); Scotch Lumber Co. v. Sage, 132 Ala. 598, 32 S 607, 90 AmSR 932; Pearce v. Smith, 126 Ala. 116, 28 S 37 (holding that knowledge of one, who buys land for his wife, of an outstanding equity does not bind her, being acquired long before he became her agent); Bessemer Land, etc., Co. v. Jenkins, 111 Ala. 135, 18 S 565, 56 AmSR 26; Cofer v. Scroggins, 98 Ala. 342, 13 S 115, 39 AmSR 54; Wheeler v. McGuire, 86 Ala. 398, 5 S 190, 2 LRA 803; McCormick v. Joseph, 83 Ala. 401, 3 S 796; Pepper v. George, 51 Ala. 190; Mundine v. Pitts, 14 Ala. 84.

Conn.—Farmers', etc., Bank v. Payne, 25 Conn. 444, 68 AmD 362.

Ill.—Snyder v. Partridge, 138 Ill. 173, 29 NE 851, 32 AmSR 130; Herrington v. McCollum, 73 Ill. 476; Campbell v. Benjamin, 69 Ill. 244; McCormick v. Wheeler, 36 Ill. 114, 85 AmD 388.

Ind.—Day v. Wamsley, 33 Ind. 145.

Ky.—Miller v. Jones, 107 SW 783, 32 KyL 1078; Willis v. Vallette, 4 Metc. 186.

La.—Plympton v. Preston, 4 La. Ann. 356.

Mich.—Bonewell v. North American Acc. Ins. Co., 167 Mich. 274, 132 NW 1067, AnnCas1913A 847 and note.

Miss.—Ross v. Houston, 25 Miss. 591, 59 AmD 231.

Mo.—Kyle v. Gaff, 105 Mo. A. 672, 78 SW 1047.

Nebr.—Samuelson v. Gale Mfg. Co., 1 Nebr. (Unoff.) 815, 95 NW 809.

Pa.—Bangor, etc., R. Co. v. American Bangor Slate Co., 203 Pa. 6, 52 A 40; Mencke v. Rosenberg, 202 Pa. 131, 51 A 767, 90 AmSR 618; Barbour v. Wiehle, 116 Pa. 308, 9 A 520; Houseman v. Girard Mut. Bldg., etc., Assoc., 81 Pa. 256; Martin v. Jackson, 27 Pa. 504, 67 AmD 489; Bracken v. Miller, 4 Watts & S. 102; Hood v. Fahnestock, 8 Watts 489, 34 AmD 489; Langenheim v. Anschultz-Bradberry Co., 2 Pa. Super. 285.

S. C.—Pritchett v. Sessions, 44 S. C. L. 293.

Tenn.—Feder v. Ervin, (Ch. A.) 88 SW 446, 36 LRA 835 (holding that persons who buy property from a debtor, acting through an agent, will not be affected with the fact that, before he became their agent, he represented to a person having a lien on the property that they had compromised this claim, by reason of which the lienholder released his lien).

Tex.—Texas Loan Agency v. Taylor, 88 Tex. 47, 29 SW 1057; Kauffmann v. Robey, 60 Tex. 308, 48 AmR 264; Dawson v. Sparks, 1 Tex. Unrep. Cas. 735; Merrill v. Southwestern Tel., etc., Co., 31 Tex. Civ. A. 614, 73 SW 422.

N. B.—McLachlan v. Ætna Ins. Co., 9 N. B. 173.

[a] **Reasons for rule.**—(1) The basis of the rule has been held to be the fiction of the legal identity of the principal and the agent. As was said in Houseman v. Girard Mut. Bldg., etc., Assoc., 81 Pa. 256, 262, "the true reason of the limitation is a technical one, that it is only during the agency that the agent represents, and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be." (2) Another reason for the rule is said to be that no man can be supposed always to carry in his mind the recollection of former occurrences. Satterfield v. Malone, 35 Fed. 445, 1 LRA 35; Snyder v. Partridge, 138 Ill. 173, 29 NE 851, 32 AmSR 130; Gregg v. Baldwin, 9 N. D. 515, 519, 84 NW 373 (where the court said: "This holding is based upon the recognition of the frailty of human memory, and the fact that no duty rests upon the agent to disclose knowledge that he has forgotten, or, which is the same thing, that was not present in his mind when its disclosure could have influenced his principal, provided the circumstances be such that the forgetfulness can in law be excused"); Hood v. Fahnestock, 8 Watts (Pa.) 489, 34 AmD 489. But see Houseman v. Girard Mut. Bldg., etc., Assoc., supra, (where the court said: "It is a mistake to suppose that it [the above mentioned rule] depends upon the reason that no man can be supposed to always carry in his mind a recollection of former occurrences, and that if it be proved that he actually had it in his mind at the time, the rule is different. It may support the reasonableness of the rule to consider that the memory of men is fallible in the very best, and varies in different men").

5. U. S.—Harrington v. U. S., 11 Wall. 356, 20 L. ed. 167; Brown v. Cranberry Iron, etc., Co., 72 Fed. 96, 18 CCA 444; Curts v. Cisna, 6 F. Cas. No. 3,507, 7 Biss. 260.

Cal.—Wittenbrock v. Parker, 102 Cal. 93, 102, 36 P 374, 41 AmSR 172, 24 LRA 197 (holding that "the rule has, in many instances, and by eminent jurists, been extended so as to deem the principal to have constructive notice of information acquired by the agent prior to, and independent of, the scope of the agency," but adding that "this enlargement . . . which, in a few cases, may prove a salutary one, but which needs to be closely guarded to prevent injustice from the difficulty and uncertainty which must attend its application"); Bierce v. Red Bluff Hotel Co., 31 Cal. 160; Hunter v. Watson, 12 Cal. 363, 73 AmD 543.

Ga.—Whitten v. Jenkins, 34 Ga. 297.

Ill.—Booker v. Booker, 208 Ill. 529, 70 NE 709, 100 AmSR 250; Roderick v. McMeekin, 204 Ill. 625, 68 NE 473; Burton v. Perry, 146 Ill. 71, 34 NE 60 (holding, however, that the principal is not charged unless it is clear from the evidence that the information obtained by the agent in the former transaction is so precise and definite that it is or must be present in his mind and memory while engaged in the second transaction); Snyder v. Partridge, 138 Ill. 173, 29 NE 851, 32 AmSR 130; Dunlap v. Wilson, 32 Ill. 517; Page v. Brant, 18 Ill. 37.

Iowa.—McClelland v. Saul, 113 Iowa 209, 84 NW 1034, 86 AmSR 370; Stennett v. Pennsylvania F. Ins. Co., 68 Iowa 674, 28 NW 12 (holding, how-

will be presumed to have been in his mind at the time of the transaction in question;[6] and provided the information was not obtained under such circumstances as to make it the legal duty of the agent not to divulge it to the principal.[7]

[§ 548] **(3) After Termination of Agency.** A principal is not charged with notice received by an agent after the termination of his agency,[8] unless the third person had a right to rely upon the continuance of the agency at the time when the notice was given.[9]

[§ 549] **e. Where Presumption Is That Agent Will Not Inform His Principal—(1) General Rule.** The rule that notice to an agent is notice to the

ever, that where an agent, in transacting business not connected with his agency, acquires knowledge which might affect a policy subsequently issued by him as agent, evidence of such knowledge cannot be given against the company, where it was acquired so long before the issuance of the policy as not to justify an inference that he had it in mind and acted upon it in issuing the policy); Yerger v. Barz, 56 Iowa 77, 8 NW 769.

Kan.—Westerman v. Evans, 1 Kan. A. 1, 41 P 675.

Me.—Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 AmR 319 (holding, however, that in order to charge the principal the knowledge must be so fully in the agent's mind when transacting the principal's business that it could not have been forgotten by him).

Md.—Schwind v. Boyce, 94 Md. 510, 51 A 45.

Mass.—Suit v. Woodhall, 113 Mass. 391.

Minn.—Haines v. Starkey, 82 Minn. 230, 84 NW 910; Wilson v. Minnesota Farmers' Mut. F. Ins. Assoc., 36 Minn. 112, 30 NW 401, 1 AmSR 659; Lebanon Sav. Bank v. Hollenbeck, 29 Minn. 322, 13 NW 145.

Miss.—Equitable Securities Co. v. Sheppard, 78 Miss. 217, 28 S 842.

Mo.—Hayward v. Hannibal Nat. Ins. Co., 52 Mo. 181, 14 AmR 400. See also George v. Wabash Western R. Co., 40 Mo. A. 438.

N. H.—Patten v. Merchants', etc., Mut. F. Ins. Co., 40 N. H. 375; Hovey v. Blanchard, 13 N. H. 145.

N. J.—Vulcan Detinning Co. v. American Can. Co., 72 N. J. Eq. 387, 67 A 339, 12 LRANS 102.

N. Y.—Slattery v. Schwannecke, 118 N. Y. 543, 23 NE 922; Constant v. Rochester Univ., 111 N. Y. 604, 19 NE 631, 7 AmSR 769, 2 LRA 734 and note (holding, however, that it must very clearly appear that the information was in the agent's mind); Cragie v. Hadley, 99 N. Y. 131, 1 NE 537, 52 AmR 9; Badger v. Cook, 117 App. Div. 328, 101 NYS 1067. Compare Howard Ins. Co. v. Halsey, 8 N. Y. 271, 59 AmD 478; Comey v. Harris, 133 App. Div. 686, 118 NYS 244 [aff 200 N. Y. 534 mem, 93 NE 1118 mem]; North River Bank v. Aymar, 3 Hill 262; U. S. Bank v. Davis, 2 Hill 451.

N. C.—Jenkins Bros. Shoe Co. v. Renfrow, 151 N. C. 323, 66 SE 212, 25 LRANS 231.

N. D.—Gregg v. Baldwin, 9 N. D. 515, 84 NW 373.

Okl.—First State Bank v. Bridges, 39 Okl. 355, 135 P 378; U. S. Fidelity, etc., Co. v. Shirk, 20 Okl. 576, 95 P 218.

Or.—Pennoyer v. Willis, 26 Or. 1, 36 P 568, 46 AmSR 594.

Tenn.—Tagg v. Tennessee Nat. Bank, 9 Heisk. 479; Union Bank v. Campbell, 4 Humphr. 394.

Tex.—Wright v. Hooker, 55 Tex. Civ. A. 47, 118 SW 765 (holding that, where an agent of payee of a note received a payment with knowledge of the maker's insolvency, the payee was chargeable therewith, although the agent learned of the maker's insolvency prior to his agency).

Utah.—George v. Butler, 16 Utah 111, 50 P 1032.

Vt.—Mullin v. Vermont Mut. F. Ins. Co., 58 Vt. 113, 4 A 817; Abell v. Howe, 43 Vt. 403; Hart v. Farmers' etc., Bank, 33 Vt. 252.

Va.—Cabin Branch Min. Co. v. Hutchinson, 112 Va. 37, 70 SE 480, AnnCas1912D 93 and note; Morrison v. Bausemer, 32 Gratt. (73 Va.) 225 (holding that, where an agent before the commencement of his agency received notice of an unrecorded lien on real estate of which his principal afterward became a purchaser, such notice will not be imputable to the principal, unless there is very strong evidence that at the time of the purchase the agent remembered the fact that he had received such notice).

Wash.—Deering v. Holcomb, 26 Wash. 588, 67 P 240, 561.

Wis.—Melms v. Pabst Brewing Co., 93 Wis. 153, 66 NW 518, 57 AmSR 899 and note; Shafer v. Phœnix Ins. Co., 53 Wis. 361, 10 NW 381. Compare Pringle v. Dunn, 37 Wis. 449, 19 AmD 772; Congar v. Chicago, etc., R. Co., 24 Wis. 157, 1 AmR 164.

Eng.—Rolland v. Hart, L. R. 6 Ch. 678; Dresser v. Norwood, 17 C. B. N. S. 466, 112 ECL 466, 144 Reprint 188. Compare the earlier cases, Le Neve v. Le Neve, 3 Atk. 648, 26 Reprint 1172; Worsley v. Scarborough, 3 Atk. 392, 26 Reprint 1025; Warrick v. Warrick, 3 Atk. 291, 26 Reprint 970; Lowther v. Carlton, 2 Atk. 242, 26 Reprint 549; Mountford v. Scott, 3 Madd. 34, 56 Reprint 422 [aff Turn. & R. 274, 12 EngCh 274, 37 Reprint 1105]; Preston v. Tubbin, 1 Vern. Ch. 287, 23 Reprint 474; Hiern v. Mill, 13 Ves. Jr. 114, 33 Reprint 237.

[a] **The basis of this rule** is the duty of the agent to inform his principal of any knowledge which he may have material to the transaction in which he represents the latter, the authorities which support this rule holding that it is the duty of the agent to inform his principal of all facts of which he has actual knowledge, whether acquired during or prior to the agency. Harrington v. U. S., 11 Wall. (U. S.) 356, 20 L. ed. 167. And see cases supra this note.

[b] **Limitations of rule.**—"It is, however, only when the knowledge acquired by an agent in a previous transaction is legally presumed or clearly shown by circumstances, or other evidence, to have been in his mind at the time of the subsequent transaction, that it can be imputed to his principal therein." Guaranty Trust Co. v. Koehler, 195 Fed. 669, 683, 115 CCA 475 [rev 187 Fed. 192].

6. U. S.—Alger v. Keith, 105 Fed. 105, 44 CCA 371.

Iowa.—McClelland v. Saul, 113 Iowa 208, 84 NW 1034 (holding that it will be presumed that an agent retains for a reasonable time knowledge obtained prior to the agency).

Mo.—Chouteau v. Allen, 70 Mo. 290 (holding that the rule that the knowledge of the agent affects the principal may apply to knowledge acquired so shortly before the agency began as necessarily to cause the inference that it remained fixed in the mind of the agent during his employment); Richardson v. Palmer, 24 Mo. A. 480.

Nebr.—Henry v. Omaha Packing Co., 81 Nebr. 237, 115 NW 777 (holding that, while an agency exists and the agent receives notice in his private capacity of facts not then concerning his principal, but afterward acts for the principal in a matter in which such fact is material, the notice so received should be imputed to the principal).

N. C.—Jenkins Bros. Shoe Co. v. Renfrow, 151 N. C. 323, 66 SE 212, 25 LRANS 231.

N. D.—Red River Valley Land, etc., Co. v. Smith, 7 N. D. 236, 245, 74 NW 194 (where the court said: "If such knowledge was received before such official capacity or such agency began, then no presumption of knowledge on the part of the principal will arise, unless it appears by clear and satisfactory proof either that the knowledge was present in the mind of the officer or agent at the time of the transaction in which the principal is sought to be charged with such knowledge, or that such knowledge was received by such officer or other agent at so short a time before such transaction that, in the language of Lord Eldon, it is impossible 'to give a man credit for having forgotten it' ").

Oh.—Worthington v. Cleveland City R. Co., 29 Oh. Cir. Ct. 321 [aff 75 Oh. St. 626, 80 NE 1135].

Okl.—Keota First State Bank v. Bridges, 39 Okl. 355, 135 P 378; U. S. Fidelity, etc., Co. v. Shirk, 20 Okl. 576, 95 P 218.

Tex.—Western Union Tel. Co. v. Henderson, (Civ. A.) 131 SW 1153 (holding that, in an action against a telegraph company for damages for failure to deliver a message sent by a shipper of cattle requesting the addressee to meet the cattle at the station to which they were sent, knowledge which defendant's agent acquired as railroad agent is admissible as evidence of defendant's negligence).

Wis.—Brothers v. Kaukauna Bank, 84 Wis. 381, 54 NW 786, 36 AmSR 932 (holding that, if the agent acquires his information so recently as to make it incredible that he should have forgotten it, his principal will be bound).

See also cases supra note 5.

7. Harrington v. U. S., 11 Wall. (U. S.) 356, 20 L. ed. 167; Wittenbrock v. Parker, 102 Cal. 93, 36 P 374, 41 AmSR 172, 24 LRA 197; Snyder v. Partridge, 138 Ill. 173, 29 NE 851, 32 AmSR 130. See also infra § 549.

8. U. S.—Alger v. Keith, 105 Fed. 105, 117, 44 CCA 371 (where the court said: "Notice after the agency has terminated will not, ordinarily, affect the principal. Nor is a principal bound by any subsequent narration of a past occurrence. 'The reason is that the agent to do the act is not authorized to narrate what he had done, or how he had done it.' Northwestern Union Packet Co. v. Clough, 20 Wall. 528, 22 L. ed. 406").

Ga.—Boardman v. Taylor, 66 Ga. 638.

Iowa.—Emmetsburg First Nat. Bank v. Gunhus, 133 Iowa 409, 110 NW 611, 9 LRANS 471.

Ky.—Miller v. Jones, 107 SW 783, 32 KyL 1078; Day v. Exchange Bank, 117 Ky. 357, 78 SW 132, 25 KyL 1449 (holding that while knowledge acquired by an agent, in purchasing bank stock from a bank, of the institution's impaired condition will be imputed to his principal, so as to start limitations against an action for false representations inducing the puchase, similar knowledge acquired some years later, where the same person became agent to effect the stock's sale to third persons, will not be so imputed, the transactions being separate and distinct).

Mass.—Green v. Star F. Ins. Co., 190 Mass. 536, 77 NE 649.

Mich.—Great Western R. Co. v. Wheeler, 20 Mich. 419.

Mo.—Smith v. Boyd, 162 Mo. 146, 62 SW 439; Anderson v. Volmer, 83 Mo. 403; Richardson v. Palmer, 24 Mo. A. 480.

Pa.—Houseman v. Girard Mut. Bldg., etc., Assoc., 81 Pa. 256; Lightcap v. Nicola, 34 Pa. Super 189.

9. Lockwood v. Dillenbeck, 104 App. Div. 71, 93 NYS 321 (where person giving notice had a right to rely upon the continuation of the agency).

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principal does not apply when the circumstances are such as to raise a clear presumption that the agent will not transmit his knowledge to his principal;[10] and accordingly, where the agent is engaged in a transaction in which he is interested adversely to his principal or is engaged in a scheme to defraud the latter, the principal will not be charged with knowledge of the agent acquired therein,[11] unless the fraud is of such a character that its consummation will not be interfered with by imparting

10. U. S.—Campbell v. Balcomb, 183 Fed. 766, 767, 106 CCA 474 [quot Cyc].

Ark.—Lanier v. Little Rock Cooperage Co., 88 Ark. 557, 115 SW 401.

Ill.—Merchants' Nat. Bank v. Nichols, etc., Co., 223 Ill. 41, 79 NE 38, 7 LRANS 752 [aff 123 Ill. A. 430]; Cowan v. Curran, 216 Ill. 598, 75 NE 322; Booker v. Booker, 208 Ill. 529, 70 NE 709, 100 AmSR 250.

Iowa.—Findley v. Cowles, 93 Iowa 389, 61 NW 998; Hummel v. Monroe Bank, 75 Iowa 689, 37 NW 954.

Minn.—Benton v. Minneapolis Tailoring, etc., Co., 73 Minn. 498, 76 NW 265 (holding that the principal is not bound when the character or circumstances of the agent's knowledge are such as to make it intrinsically improbable that he will inform his principal).

N. J.—Camden Safe Deposit, etc., Co. v. Lord, 67 N. J. Eq. 489, 58 A 607.

N. C.—Jenkins Bros. Shoe Co. v. Renfrow, 151 N. C. 323, 66 SE 212, 25 LRANS 231 (holding that notice to or knowledge of an agent will not be imputed to his principal, where the agent's relation to the subject matter, or his previous conduct, renders it certain that he will not disclose it).

Eng.—Cave v. Cave, 15 Ch. D. 639; Muir v. Craig, [1913] S. C. 349.

Ont.—Gibbons v. Wilson, 17 Ont. 290.

[a] **A person cannot be held as a conspirator** simply and solely because his agent may have had knowledge of a conspiracy to defraud, or have been a participant therein. Benton v. Minneapolis Tailoring, etc., Co., 73 Minn. 498, 76 NW 265.

[b] **Stockholders of a corporation,** by giving proxies to vote at stockholders' meetings to the directors and trustees, are not charged with knowledge possessed by such directors and trustees, where knowledge of the facts is being withheld from the stockholders by the directors and trustees themselves. Tooker v. National Sugar Refining Co., 80 N. J. Eq. 305, 84 A 10.

11. U. S.—American Nat. Bank v. Miller, 229 U. S. 517, 33 SCt 883, 57 L. ed. 1310; American Surety Co. v. Pauly, 170 U. S. 133, 18 SCt 552, 42 L. ed. 977 [aff 72 Fed. 470, 18 CCA 644]; U. S. v. Nat. Bank of Commerce, 205 Fed. 433, 123 CCA 501; Eccles v. Louisville, etc., R. Co., 198 Fed. 898; Benner v. Blumauer-Frank Drug Co., 198 Fed. 362; Skud v. Tillinghast, 195 Fed. 1, 115 CCA 83; Union Cent. L. Ins. Co. v. Robinson, 148 Fed. 358, 78 CCA 268, 8 LRANS 883; Central Coal, etc., Co. v. Good, 120 Fed. 793, 57 CCA 161; Overton Bank v. Thompson, 118 Fed. 798, 56 CCA 554; Levy, etc., Mule Co. v. Kaufman, 114 Fed. 170, 52 CCA 126; Lamson v. Beard, 94 Fed. 41, 36 CCA 56, 45 LRA 822; Waite v. Santa Cruz 89 Fed. 619; Pine Mountain Iron, etc., Co. v. Bailey, 87 Fed. 29; Whittle v. Vanderbilt Min., etc., Co., 83 Fed. 48; Louisville Trust Co. v. Louisville, etc., R. Co., 75 Fed. 433, 22 CCA 378 [mod on other grounds 174 U. S. 552, 19 SCt 817, 43 L. ed. 1081]; Hart v. Bier, 74 Fed. 592; Hatch v. Ferguson, 66 Fed. 668, 14 CCA 41; Thomson-Houston Electric Co. v. Capitol Electric Co., 65 Fed. 341, 12 CCA 643; Lindsay v. Lambert Bldg., etc., Assoc., 4 Fed. 48.

Ala.—Scotch Lumber Co. v. Sage, 132 Ala. 598, 32 S 607, 90 AmSR 932; Frenkel v. Hudson, 82 Ala. 158, 2 S 758, 60 AmR 736; Reid v. Mobile Bank, 70 Ala. 199. But see Birmingham First Nat. Bank v. Allen, 100 Ala. 476, 14 S 335, 46 AmSR 80, 27 LRA 426 (holding that it is the duty of a depositor to examine vouchers returned with his bank book, and to denounce any check that has been forged, and that where such examination is left to a clerk his knowledge will be the knowledge of the depositor, and it is then his duty to make it known, and the fact that such clerk was the forger is immaterial).

Cal.—McKenney v. Ellsworth, 165 Cal. 326, 132 P 75.

Colo.—Sanford Cattle Co. v. Williams, 18 Colo. A. 378, 71 P 889.

Conn.—Willimantic First Nat. Bank v. Bevin, 72 Conn. 666, 45 A 954.

Fla.—Aycock Bros. Lumber Co. v. Dothan First Nat. Bank, 54 Fla. 604, 45 S 501.

Ga.—Pursley v. Stahley, 122 Ga. 862, 50 SE 139 (holding that where an agent is guilty of an independent fraud for his own benefit, and to communicate the same would prevent the accomplishment of his fraudulent design, the principal is not charged with notice of his misconduct); People's Bank v. Macon Exch. Bank, 116 Ga. 820, 43 SE 269, 94 AmSR 144; English-American L. & T. Co. v. Hiers, 112 Ga. 823, 38 SE 103.

Ill.—Cowan v. Curran, 216 Ill. 598, 75 NE 322; Booker v. Booker, 208 Ill. 529, 70 NE 709, 100 AmSR 250; Seaverns v. Presbyterian Hospital, 173 Ill. 414, 50 NE 1079, 64 AmSR 125; Merchants' Nat. Bank v. Nichols, etc., Co., 123 Ill. A. 430 [aff 223 Ill. 41, 79 NE 38, 7 LRANS 752]; Jummel v. Mann, 80 Ill. A. 288 [aff 183 Ill. 523, 56 NE 161].

Ind.—Peckham v. Hendren, 76 Ind. 47.

Iowa.—Findley v. Cowles, 93 Iowa 389, 61 NW 998; Hummel v. Monroe Bank, 75 Iowa 689, 37 NW 954; Davenport First Nat. Bank v. Gifford, 47 Iowa 575.

Kan.—Wickersham v. Chicago Zinc Co., 18 Kan. 481, 26 AmR 784; Hart Pioneer Nurseries v. Coryell, 8 Kan. A. 496, 55 P 514.

Ky.—Sebald v. Citizens Deposit Bank, 105 SW 130, 31 KyL 1244, 14 LRANS 376; Davis v. Boone County Deposit Bank, 80 SW 161, 25 KyL 2078; Lyne v. Commonwealth Bank, 5 J. J. Marsh. 546. But see Mutual L. Ins. Co. v. Chosen Friends Lodge No. 2 I. O. O. F., 93 SW 1044, 29 KyL 394.

La.—Seixas v. Citizens' Bank, 38 La. Ann. 424.

Md.—Hardy v. Chesapeake Bank, 51 Md. 562, 34 AmR 325; Winchester v. Baltimore, etc., R. Co., 4 Md. 231; Chappell v. Wysham, 4 Harr. & J. 560.

Mass.—Newell v. Hadley, 206 Mass. 335, 356, 92 NE 507, 29 LRANS 908 [quot Cyc]; Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577, 58 NE 162; Shepard, etc., Lumber Co. v. Eldridge, 171 Mass. 516, 51 NE 9, 68 AmSR 446, 41 LRA 617; Indian Head Nat. Bank v. Clark, 166 Mass. 27, 43 NE 912; Allen v. South Boston, etc., R. Co., 150 Mass. 200, 22 NE 917, 15 AmSR 185, 5 LRA 716 (holding that the real reason for the rule is that a fraud committed by an agent for his own benefit is beyond the scope of his employment); Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 1 NE 282, 52 AmR 710; Dillaway v. Butler, 135 Mass. 479; Loring v. Brodie, 134 Mass. 453; National Security Bank v. Cushman, 121 Mass. 490; Atlantic Nat. Bank v. Harris, 118 Mass. 147; Commercial Bank v. Cunningham, 24 Pick. 270, 35 AmD 322; Washington Bank v. Lewis, 22 Pick. 24; Frost v. Belmont, 6 Allen 152.

Mich.—Zeigler v. Valley Coal Co., 150 Mich. 82, 113 NW 775, 13 AnnCas 90; Huot v. Reeder Bros. Shoe Co., 140 Mich. 162, 103 NW 569; Brown v. Harris, 139 Mich. 372, 102 NW 960 (holding that where, at the time an alleged notice that goods sued for did not conform to the contract was given to plaintiff's agent, defendants knew that the agent was acting in antagonism to plaintiff, that he would disregard it, and not communicate it to plaintiff, such notice was not notice to plaintiff); Ionia State Sav. Bank v. Montgomery, 126 Mich. 327, 85 NW 879; Gallery v. National Exch. Bank, 41 Mich. 169, 2 NW 193, 32 AmR 149; Stevenson v. Bay City, 26 Mich. 44.

Minn.—Woodworth v. Carroll, 104 Minn. 65, 112 NW 1054, 115 NW 946; Benton v. Minneapolis Tailoring, etc., Co., 73 Minn. 498, 76 NW 265 (holding that the notice to an agent of the fraudulent nature of a transaction will not be treated as a notice to the principal when the character of the knowledge is such as to make it impossible that he will inform his principal); Bang v. Brett, 62 Minn. 4, 63 NW 1067.

Mo.—Kansas City Cent. Bank v. Thayer, 184 Mo. 61, 82 SW 142; Southern Commercial Sav. Bank v. Slattery, 166 Mo. 620, 66 SW 1066; Smith v. Boyd, 162 Mo. 146, 62 SW 439; Traber v. Hicks, 131 Mo. 180, 32 SW 1145 (holding that notice of a fact acquired by an agent while transacting the business of his principal will be imputed to the principal, but it will not be so imputed when the agent acquires his knowledge while acting for himself); Merchants' Nat. Bank v. Lovitt, 114 Mo. 519, 21 SW 825, 35 AmSR 770; Johnston v. Shortridge, 93 Mo. 227, 6 SW 64; Kenneth Inv. Co. v. National Bank of Republic, 96 Mo. A. 125, 70 SW 173; Butler v. Montgomery Grain Co., 85 Mo. A. 50 (holding that, where the agent, during the time he is purchasing corporation stock for his principal, has independent transactions with the corporation, in which he acts for himself and against his principal's interest, his knowledge of such transactions cannot be attributed to his principal).

Mont.—Stanford v. Coram, 26 Mont. 285, 67 P 1005.

Nebr.—Wilcox Exch. Bank v. Underwriters Ins. Co., 84 Nebr. 110, 120 NW 1010; Houghton v. Todd, 58 Nebr. 360, 78 NW 634 (holding that the knowledge of an agent engaged in an independent fraudulent scheme without the scope of his agency is not the knowledge of his principal); Koehler v. Dodge, 31 Nebr. 328, 47 NW 913, 28 AmSR 518; Jones v. Lincoln First Nat. Bank, 3 Nebr. (Unoff.) 78, 90 NW 912.

N. H.—Brookhouse v. Union Pub. Co., 73 N. H. 368, 62 A 219, 111 AmSR 623, 2 LRANS 993 and note, 6 AnnCas 675 and note.

N. J.—Hightstown First Nat. Bank v. Christopher, 40 N. J. L. 435, 29 AmR 262; Tooker v. National Sugar Refining Co., 80 N. J. Eq. 305, 84 A 10 (voting proxy); Campbell v. Perth Amboy Mut. Loan Homestead, etc., Assoc., 76 N. J. Eq. 347, 74 A 144; Clement v. Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 A 82; Camden Safe Deposit, etc., Co. v. Lord, 67 N. J. Eq. 489, 58 A 607; De Kay v. Hackensack Water Co., 38 N. J. Eq. 158; Barnes v. Trenton Gas Light Co., 27 N. J. Eq. 33; Stratton v. Allen, 16 N. J. Eq. 229.

N. M.—Lockhart v. Washington, etc., Min. Co., 16 N. M. 223, 234, 117 P 833 [cit Cyc].

N. Y.—Bienenstok v. Ammidown, 155 N. Y. 47, 49 NE 321; Benedict v. Arnoux, 154 N. Y. 715, 49 NE 326 [rev 7 App. Div. 1, 39 NYS 793]; Henry v. Allen, 151 N. Y. 1, 45 NE 355, 36 LRA 658 [rev 77 Hun 49, 28 NYS 242]; New York v. Tenth Nat. Bank, 111 N. Y. 446, 18 NE 618; Welsh v. German American Bank, 73 N. Y. 424, 29 AmR 175; Brooklyn Distilling Co. v. Standard Distilling, etc., Co., 120 App. Div.

the knowledge of the facts acquired by the agent to his principal.[12] In some decisions the view has been taken that the presumption that the agent did or did not communicate his knowledge where he was interested adversely to the principal depends on the extent and nature of the agent's representative capacity in the particular transaction, these decisions holding that the presumption of communication obtains where the agent wholly or partly represents the principal, but not where he represents himself, although ostensibly acting as agent.[13]

237, 105 NYS 264 [aff 193 N. Y. 551, 86 NE 564]; Brady v. Mt. Morris Bank, 65 App. Div. 212, 73 NYS 532; Critten v. Chemical Nat. Bank, 60 App. Div. 241, 70 NYS 246 [mod on other grounds 171 N. Y. 219, 63 NE 969, 57 LRA 529]; Barnett v. Daw, 55 App. Div. 202, 66 NYS 880; City Bank v. Barnard, 1 N. Y. Super. 80; Crooks v. People's Nat. Bank, 34 Misc. 450, 70 NYS 271 [rev on other grounds 72 App. Div. 331, 76 NYS 1012 (aff 177 N. Y. 68, 69 NE 228)]; English v. Rauchfuss, 21 Misc. 494, 47 NYS 639.

N. D.—Nome First Nat. Bank v. German American Ins. Co., 23 N. D. 139, 134 NW 873, 38 LRANS 213; Ætna Indemn. Co. v. Schroeder, 12 N. D. 110, 95 NW 436.

Oh.—Cincinnati, etc., R. Co. v. Urbana Third Nat. Bank, 1 Oh. Cir. Ct. 199, 1 Oh. Cir. Dec. 109.

Okl.—Keota First State Bank v. Bridges, 39 Okl. 355, 359, 135 P 378 [quot Cyc]; Sulphur Springs First Nat. Bank v. Stribling, 16 Okl. 41, 86 P 512.

Pa.—Sproul v. Standard Plate Glass Co., 201 Pa. 103, 50 A 1003; United Security L. Ins., etc., Co. v. Central Nat. Bank, 185 Pa. 586, 40 A 97; Gunster v. Scranton Illum., etc., Power Co., 181 Pa. 327, 37 A 550, 59 AmSR 650; Musser v. Hyde, 2 Watts & S. 314; Falconi v. Magee, 47 Pa. Super. 560.

S. C.—Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 SE 658, 114 AmSR 1004; Knobelock v. Germania Sav. Bank, 50 S. C. 259, 27 SE 962 (holding that knowledge of the agent while engaged in a fraud for his own benefit cannot be imputed to the principal, unless the principal also is benefited by the fraud).

Tex.—Teagarden v. R. B. Godley Lumber Co., 154 SW 973 [aff (Civ. A.) 135 SW 1109]; Schneider v. Sellers, 98 Tex. 380, 84 SW 417; LaBrie v. Cartwright, 55 Tex. Civ. A. 144, 118 SW 785; Grayson County Nat. Bank v. Hall, (Civ. A.) 91 SW 807; Root v. Baldwin, (Civ. A.) 52 SW 586 (holding that notice to a grantor of an adverse title is not notice to his grantee, where the parties have dealt at arm's length; and this, notwithstanding intimacy of the parties and agency had existed between the parties in other transactions); Harrington v. McFarland, 1 Tex. Civ. A. 289, 21 SW 116.

Utah.—Brown v. Johnson, 134 P 590, 46 LRANS 1157; Victor Gold, etc., Min. Co. v. National Bank of Republic, 15 Utah 391, 49 P 826; Jungk v. Reed, 12 Utah 196, 42 P 292; Nephi First Nat. Bank v. Foote, 12 Utah 157, 42 P 205.

Va.—Baker v. Berry Hill Mineral Springs Co., 112 Va. 280, 71 SE 626 (where the agent, in order to commit a fraud upon a third person, perpetrates a fraud upon the principal).

Wash.—Elliott v. Knights of Modern Maccabees, 46 Wash. 320, 89 P 929, 13 LRANS 856.

Wis.—Cole v. Getzinger, 96 Wis. 559, 71 NW 75; In re Plankinton Bank, 87 Wis. 378, 58 NW 784.

Wyo.—Rock Springs Nat. Bank v. Luman, 5 Wyo. 159, 38 P 678.

Eng.—In re Marseilles Extension R. Co., L. R. 7 Ch. 161; Rolland v. Hart, L. R. 6 Ch. 678; In re European Bank, L. R. 5 Ch. 358; Kettlewell v. Watson, 21 Ch. D. 685; Cave v. Cave, 15 Ch. D. 639; Thompson v. Cartwright, 33 Beav. 178, 55 Reprint 335 [app dism 2 De G. J. & S. 10, 67 EngCh 9, 46 Reprint 277]; Kennedy v. Green, 3 Myl. & K. 699, 10 EngCh 699, 40 Reprint 266, 21 ERC 320.

Can.—Commercial Bank v. Morrison, 32 Can. S. C. 98.

N. S.—Commercial Bank v. Smith, 34 N. S. 426.

[a] **Reasons for rule.**—(1) "Where the agent is dealing for himself, and not for the principal, or is perpetrating a fraud upon his principal, the presumption that he would communicate his knowledge to his principal is contrary to the experience of men and to their nature. It would be doing violence to every probability to presume that the agent under such circumstances would communicate his knowledge to his principal. Hence it would be unjust and illogical to impute the knowledge of the agent under such circumstances to the principal." Sebald v. Citizens' Deposit Bank, 105 SW 130, 132, 31 KyL 1244. (2) "In such case the adverse character of his interest takes the case out of the operation of the general rule, because, first, he will be likely, in such case, to act for himself, rather than for his principal; and, secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be, therefore, both unjust and unreasonable to impute notice by mere construction under such circumstances." Union Cent. L. Ins. Co. v. Robinson, 148 Fed. 358, 360, 78 CCA 268, 8 LRANS 883. (3) "If the agent, in the course of the business in which he is employed, commits an independent fraud for his own benefit, designedly against his principal, and it is essential to the carrying out of the fraud that he should conceal the real facts from his principal, the presumption of constructive notice is destroyed, and the inference is, rather, that no communication was made." Camden Safe Deposit, etc., Co. v. Lord, 67 N. J. Eq. 489, 492, 493, 58 A 607 (where the court also said: "In addition to the general rule that the presumption of constructive notice is overcome when the essential element in the successfully carrying out of the agent's fraud is the concealment of facts from the principal, the knowledge of which might render the principal liable, we have the rule, well settled in this state, that, where an officer deals with a corporation, in the matter in which his interest is opposed to that of the corporation, he does not, in such transaction, represent the corporation so as to impute his knowledge to his principal"). (4) "The truth is that where an agent, though ostensibly acting in the business of the principal, is really committing a fraud, for his own benefit, he is acting outside of the scope of his agency, and it would therefore be most unjust to charge the principal with knowledge of it." Thomson-Houston Electric Co. v. Capitol Electric Co., 65 Fed. 341, 343, 12 CCA 643 [quot Overton Bank v. Thompson, 118 Fed. 798, 801, 56 CCA 554]. (5) "It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it. On this view, such a fraud bears some analogy to a tort wilfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master. Whatever the reason may be, the exception is well established." Allen v. South Boston R. Co., 150 Mass. 200, 206, 22 NE 917, 15 AmSR 185, 5 LRA 716.

[b] **This rule applies to certain wanton torts or wrongs** committed by the agent, but not to a case where the principal acquired possession of bonds through its agent's fraudulent use of the power vested in him, in which case the principal could not hold the bonds without ratifying the acts and authority of the agent who transferred them. Washington, etc., R. Co. v. Philadelphia Real Est. Trust Co., 177 Fed. 306.

[c] **As against innocent third person.**—The fraud of an agent cannot alter the legal effect of his knowledge with respect to his principal in regard to third persons who had no connection whatever with such agent in relation to the perpetration of the fraud, and no knowledge that any such fraud had been perpetrated. Armstrong v. Ashley, 204 U. S. 272, 27 SCt 270, 51 L. ed. 482 [aff 22 App. (D. C.) 368].

[d] **Where agent's interest is balanced.**—In Ft. Worth Traders' Nat. Bank v. Smith, (Tex. Civ. A.) 22 SW 1056, where the official whose knowledge was imputed to the bank was also stockholder and director in a corportation from which the bank, through the president, purchased the note, the court upheld the notice on the ground that the interests of the officer were balanced.

[e] **Fraud on third person for agent's benefit.**—"In such cases of fraud the general presumption that the agent will communicate his knowledge to his principal is displaced by the stronger special presumption that he will not do what would effectually defeat his purpose; but this counter-presumption will not avail where an agent or officer acting, or ostensibly acting, in behalf of his principal or corporation, commits a fraud upon a third person and not upon his principal or corporation; in such case the principal or corporation will be held chargeable with the guilty knowledge of the agent or officer; that is to say, if he is acting in behalf of the corporation and representing it in the transaction. For example, should a bank president acting officially and representing the bank in the transaction commit a breach of trust or perpetrate a fraud upon a third person, the knowledge of that officer that his act is fraudulent, and his purpose is fraudulent and a breach of trust, will be imputed to the bank, and the bank would be properly considered a party to the fraud and held liable to the injured person for his loss." Knobelock v. Germania Sav. Bank, 50 S. C. 259, 273, 27 SE 962. To same effect Taylor v. Flynt, 28 Tex. Civ. A. 219, 67 SW 347.

12. Baker v. Orme, 27 Oh. Cir. Ct. 470. See also cases supra note 11.

13. McKenney v. Ellsworth, 165 Cal. 326, 132 P 75 (holding that, where the interest of an agent in a particular transaction is adverse to his principal, it will not be presumed that he communicated to the principal facts affecting the transaction; but where the agent acts for the principal, even though he has an opposing personal interest, it will be presumed, in favor of third persons, that he made such communications); Citizens' Sav. Bank

Where communication of knowledge by agent would be a breach of duty. Where it is not the agent's duty to communicate his knowledge to his principal, or where it would be unlawful for him to do so, as for example when it has been acquired confidentially as attorney for another client in a prior transaction, the principal will not be bound by his agent's secret and confidential information.[14]

Knowledge acquired in illegal transaction. Where the agent takes part in an illegal transaction which is not connected with the principal's business, the law does not presume that he will communicate to the principal knowledge so acquired.[15]

[§ 550] **(2) Collusion between Agent and Third Person.** The rule charging the principal with his agent's knowledge is established for the protection of those who deal with the agent in good faith.[16] If, therefore, the third person acts in collusion with the agent to defraud the principal, the latter will not be chargeable with any information which the agent receives pertaining to the transaction,[17] and this applies with greater force where the third person instructs the agent, or enters into an agree-

v. Walden, 52 SW 953, 21 KyL 739; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 17 NE 496, 9 AmSR 698; Cook v. American Tubing, etc., Co., 28 R. I. 41, 65 A 641, 9 LRANS 193.

[a] **Validity of distinction denied.**—In Nephi First Nat. Bank v. Foote, 12 Utah 157, 169, 42 P 205, the court said: "In a case where the presumption arises that an agent will not communicate his knowledge to his principal, or to another acting for the principal, it would seem to be unreasonable to hold the principal responsible for the knowledge of the agent solely because the agent in the particular transaction appeared himself for the principal. The presumption would naturally be, in such a case, that he would fail to act upon such knowledge as the principal would act, just as he would fail to impart his knowledge in a case where another appeared for the principal". This was quoted in Overton Bank v. Thompson, 118 Fed. 798, 802, 56 CCA 554 [disappr Blaine First Nat. Bank v. Blake, 60 Fed. 78].

14. U. S.—Harrington v. U. S., 11 Wall. 356, 20 L. ed. 167; Western Mortg., etc., Co. v. Ganzer, 63 Fed. 647, 11 CCA 371.

Ala.—Pepper v. George, 51 Ala. 190; Mundine v. Pitts, 14 Ala. 84.

Cal.—Hunter v. Watson, 12 Cal. 363, 73 AmD 543.

Ill.—Mack v. McIntosh, 181 Ill. 633, 54 NE 1019 (holding that a purchaser is not affected with notice to an agent negotiating the purchase that the vendor had sold to a third party under an executory contract, where the agent acquired the notice confidentially as an attorney for the vendor); McCormick v. Wheeler, 36 Ill. 114, 85 AmD 388.

La.—Templeman v. Hamilton, 37 La. Ann. 754.

Me.—Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 AmR 319.

Md.—Schwind v. Boyce, 94 Md. 510, 51 A 45.

Mich.—Littauer v. Houck, 92 Mich. 162, 52 NW 464, 31 AmSR 572.

Minn.—William Bergenthal Co. v. Monticello Security State Bank, 102 Minn. 138, 112 NW 892.

Miss.—Equitable Securities Co. v. Sheppard, 78 Miss. 217, 28 S 842.

Nebr.—Hargadine, etc., Dry Goods Co. v. Krug, 2 Nebr. (Unoff.) 52, 96 NW 286.

N. Y.—Henry v. Allen, 151 N. Y. 1, 45 NE 355, 36 LRA 658; Constant v. Rochester Univ., 111 N. Y. 604, 19 NE 631, 7 AmSR 769, 2 LRA 734; Union Square Bank v. Hellerson, 90 Hun 262, 35 NYS 871.

N. C.—Jenkins Bros. Shoe Co. v. Renfrow, 151 N. C. 323, 66 SE 212, 25 LRANS 231.

S. C.—Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 SE 658, 114 AmSR 1004; Akers v. Rowan, 33 S. C. 451, 12 SE 165, 10 LRA 705 and note.

Wash.—Elliott v. Knights of Modern Maccabees, 46 Wash. 320, 89 P 929, 13 LRANS 856.

Wis.—Melms v. Pabst Brewing Co., 93 Wis. 153, 66 NW 518, 57 AmSR 899 and note.

Eng.—Worsley v. Scarborough, 3 Atk. 392, 393, 26 Reprint 1025 (where the court said that "it would be very mischievous" if an attorney's previously acquired knowledge could be imparted to his client, "for the man of most practice and greatest eminence would then be the most dangerous to employ"); Warrick v. Warrick, 3 Atk. 291, 26 Reprint 970.

Compare Havan v. Snow, 14 Pick. (Mass.) 28 (holding that where the same attorney commenced two actions in favor of two different creditors against the same debtor, and directed the order of the attachments of certain real estate thereon, notice to him of the first attachment was notice to the second attaching creditor).

Notice to attorney as notice to client see generally Attorney and Client [4 Cyc 933].

[a] **Knowledge not obtained professionally.**—Where such knowledge was not obtained by the attorney from a former client under professional secrecy, it has been held that a subsequent client will be liable. Thus, if an attorney receives notice that the person holding the record title of land is not the real owner but merely a trustee, one who subsequently employs the same attorney to attach and levy upon the land as the property of the trustee will be affected by the attorney's knowledge of the real state of the title, although not communicated to him. Hart v. Farmers', etc., Bank, 33 Vt. 252.

[b] **When agent requested not to inform principal.**—Notice to an agent, coupled with a request not to transmit it to his principal, is not notice to the latter, when such request is complied with. Lenhart v. St. Louis, etc., R. Co., 62 Mo. A. 90.

15. Hart v. Bier, 74 Fed. 592, 596 (where the court said: "Where the agent, participating in criminal transactions beyond the scope of the agency, acquires knowledge of matters affecting the business of his principal, the presumption of notice fails. From the reasons upon which the exceptions to the general rule are maintained, we think it clear that for this case we may safely hold that where an agent participates in illegal transactions or in contracts contra bonos mores, not in the interest of his principal, and not shown to be within the scope of his agency, there is no presumption, in law or otherwise, that the agent communicates to his principal information concerning such illegal transactions or such contracts contra bonos mores. The scope of the agency conferred by Judah Hart upon Samuel J. Hart not being shown, it is presumed to have been within lawful limits. It cannot be presumed to have covered unlawful purposes, or to have authorized immoral transactions").

16. National L. Ins. Co. v. Minch, 53 N. Y. 144; Pennoyer v. Willis, 26 Or. 1, 36 P 568, 46 AmSR 594.

17. U. S.—Schutz v. Jordan, 141 U. S. 213, 11 SCt 906, 35 L. ed. 705; McCourt v. Singers-Bigger, 145 Fed. 103, 76 CCA 73; Pine Mountain Iron, etc., Co. v. Bailey, 94 Fed. 258, 36 CCA 229; Waite v. Santa Cruz, 89 Fed. 619; Hudson v. Randolph, 66 Fed. 216, 13 CCA 402; Western Mortg., etc., Co. v. Ganzer, 63 Fed. 647, 11 CCA 371.

Ill.—Cowan v. Curran, 216 Ill. 598, 75 NE 322 (holding that notice to an agent is not notice to his principal, where the party seeking to benefit by the notice conspires with the agent to conceal the facts from the principal and defraud him); Merchants' Nat. Bank v. Nichols, etc., Co., 128 Ill. A. 430 [aff 223 Ill. 41, 79 NE 88, 7 LRANS 752].

Iowa.—Van Buren County v. American Surety Co., 137 Iowa 490, 115 NW 24.

Mo.—Hickman v. Green, 123 Mo. 165, 22 SW 455, 27 SW 440, 29 LRA 39.

Nebr.—Pringle v. Modern Woodmen of America, 76 Nebr. 384, 107 NW 756, 113 NW 231.

N. Y.—Peterson v. New York, 194 N. Y. 437, 87 NE 772; National L. Ins. Co. v. Minch, 53 N. Y. 144.

N. C.—Jenkins Bros. Shoe Co. v. Renfrow, 151 N. C. 323, 66 SE 212, 25 LRANS 231 (holding that notice to, or knowledge of, an agent will not be imputed to his principal, where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to defraud the principal).

Pa.—Musser v. Hyde, 2 Watts & S. 214.

S. C.—Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 SE 658, 114 AmSR 1004; Akers v. Rowan, 33 S. C. 451, 12 SE 165, 10 LRA 705 and note.

Tex.—Centennial Mut. L. Assoc. v. Parham, 80 Tex. 518, 16 SW 316; Cooper v. Ford, 29 Tex. Civ. A. 253, 69 SW 487; Campbell v. Crowley, (Civ. A.) 56 SW 373; Scripture v. Scottish-American Mortg. Co., 20 Tex. Civ. A. 153, 49 SW 644; People's Bldg., etc., Assoc. v. Dailey, 17 Tex. Civ. A. 38, 42 SW 264; Cunningham v. Holcomb, 1 Tex. Civ. A. 331, 21 SW 125.

Wash.—Elliott v. Knights of Modern Maccabees, 46 Wash. 320, 89 P 929, 13 LRANS 856.

Wis.—Cole v. Getsinger, 96 Wis. 559, 71 NW 75.

Eng.—Kennedy v. Green, 3 Myl. & K. 699, 10 EngCh 699, 40 Reprint 266, 21 ERC 320.

[a] **Basis of rule.**—(1) "So long as the agent acts within the scope of his employment in good faith, for the interest of his principal, he is presumed to have disclosed to his principal all the facts that come to his knowledge as agent; but just as soon as the agent forms the purpose of dealing with his principal's property . . . for the benefit and advantage of other persons who are opposed in interest, he ceases, in fact, to be an agent acting in good faith for the interest of his principal, and his action thereafter based upon such purpose is deemed to be in fraud of the rights of his principal, and the presumption that he has disclosed all the facts that have come to his knowledge no longer prevails." Benedict v. Arnoux, 154 N. Y. 715, 728, 49 NE 326. (2) "The doctrine of constructive notice, when properly limited, is a useful one, but to apply it to a case where the parties relying on the doctrine are the agents themselves and others who had expressly agreed that the facts in possession of the agents should not be communicated to the principal, would make it an instrument of fraud." Traders, etc., Bank v. Black, 108 Va. 59, 65, 60 SE 742.

[b] **Rule applicable to both general and special agents.**—"If an agent, no matter how general may be his powers, conspires with another to defraud

ment with him, not to communicate his knowledge to the principal.[18]

[§ 551] **f. Notice to Subagent.** Whether a principal is chargeable with notice to, or knowledge of, a subagent depends upon the authority of the primary agent to appoint the subagent. Where the primary agent has such authority, under contract or by custom, the principal will be charged with the subagent's knowledge;[19] if he has not such authority the principal will not be charged.[20]

[§ 552] **g. Notice to Agent for Both Parties.** Notice to an agent, who, with their knowledge and consent, represents both parties to a transaction, is notice to either of them to whom it would be notice if the agent represented him alone, and if each would be charged the notice to the agent is notice to both.[21] Thus where a principal knows that his agent is also acting as agent for the party adversely interested in the transaction, and yet consents to let him act as his agent, the principal is estopped from denying notice and knowledge which the agent has during the negotiation.[22] If, however, either party does not know that the agent is acting for the other, the agent's knowledge will not affect the one who is ignorant thereof.[23]

[§ 553] **B. Liability of Third Person to Principal—1. On Contract—a. Disclosed Principal—(1) In General.** The rule is well recognized that, where an agent is duly constituted, and names his principal, and contracts in his name, and does not exceed his authority, the person so contracting with the agent is responsible to the principal for any breach of the contract, in the same manner as though the principal had made the contract personally;[24] and the fact that such principal is a

his principal, notice to such agent will not be imputed to the principal. It is a question as to whether there was a conspiracy with intent to defraud, not whether the agent possessed general or limited powers. The principal is entitled to protection against the fraud of a general agent on the same ground and with as great reason, as he is against the fraud of a special agent, and one conspiring with a general agent to defraud the principal is entitled to as little consideration as if he had colluded with a special agent." Cooper v. Ford, 29 Tex. Civ. A. 253, 257, 69 SW 487.

18. Lenhart v. St. Louis, etc., R. Co., 62 Mo. A. 90; Pennoyer v. Willis, 26 Or. 1, 36 P 568, 46 AmSR 594; Traders', etc., Bank v. Black, 108 Va. 59, 60 SE 743; Woteshek v. Newmann, 151 Wis. 365, 370, 138 NW 1000 [cit Cyc].

19. U. S.—Hoover v. Wise, 91 U. S. 308, 23 L. ed. 392 (holding also that a principal is not chargeable with knowledge of an agent employed by an intermediate independent employer).

Ala.—Schloss v. Gibson Dry Goods Co., 6 Ala. A. 155, 60 S 436.

Ark.—Carter v. Gray, 79 Ark. 273, 96 SW 377.

Iowa.—Merritt v. Huber, 137 Iowa 135, 114 NW 627.

Mich.—Union Cent. L. Ins. Co. v. Smith, 105 Mich. 353, 63 NW 438.

N. Y.—Carpenter v. German American Ins. Co., 135 N. Y. 298, 31 NE 1015; Arff v. Star F. Ins. Co., 125 N. Y. 57, 25 NE 1073, 21 AmSR 721, 10 LRA 609; Storrs v. Utica, 17 N. Y. 104, 72 AmD 437; Chase v. People's F. Ins. Co., 14 Hun 456; Rourke v. Story, 4 E. D. Smith 54; Lincoln v. Battelle, 6 Wend. 475; Boyd v. Vanderkemp, 1 Barb. Ch. 273.

S. C.—Blowers v. Southern R. Co., 74 S. C. 221, 54 SE 368; Bates v. American Mortg. Co., 37 S. C. 88, 16 SE 883, 21 LRA 340 and note.

Tex.—Missouri, etc., R. Co. v. Raney, 44 Tex. Civ. A. 517, 99 SW 589.

20. North British, etc., Ins. Co. v. Union Stockyards Co., 120 Ky. 465, 87 SW 285, 27 KyL 852; Peabody Bldg. Assoc. v. Houseman, 7 WklyNC (Pa.) 193; Smith v. Boatman Sav. Bank, 1 Tex. Civ. A. 115, 20 SW 1119.

21. U. S.—Wolf v. Lovering, 159 Fed. 91, 86 CCA 281; Pine Mountain Iron, etc., Co. v. Bailey, 94 Fed. 258, 36 CCA 229 (holding that the fact that an agent also acts as agent for the party adversely interested in the transaction does not prevent his principal from being bound by notice to, or knowledge acquired by, such agent where the principal consents to such adverse agency).

Colo.—British America Assur. Co. v. Cooper, 6 Colo. A. 25, 40 P 147.

Ga.—Taylor v. Felder, 3 Ga. A. 287, 59 SE 844.

Minn.—William Bergenthal Co. v. Monticello Security State Bank, 102 Minn. 138, 112 NW 892 (holding that, where, with the mutual consent of the parties, one acted as the agent of a bank and its customer in procuring a loan, knowledge derived by him from the customer would be imputed to the bank).

Mo.—Ford v. French, 72 Mo. 250; Smith v. Farrell, 66 Mo. A. 8 (holding that, where a dual agent, known to each principal to be such, is himself the sole actor in the transaction between the principals, his knowledge is to be taken as the knowledge of each in so far as it affects either).

N. J.—Losey v. Simpson, 11 N. J. Eq. 246.

N. D.—Ætna Indemn. Co. v. Schroeder, 12 N. D. 110, 95 NW 436.

Okl.—Keota First State Bank v. Bridges, 39 OkL 355, 359, 135 P 378 [quot Cyc].

S. C.—Holley v. Still, 91 S. C. 487, 74 SE 1065.

Wis.—Ross v. Northrup, etc., Co., 156 Wis. 327, 144 NW 1124 (holding that an agent both for the purchaser and the seller of seed was bound to communicate to the buyer the knowledge, with which he was chargeable, that there was no warranty, and the buyer cannot recover as for a warranty).

Eng.—In re Payne, [1904] 2 Ch. 608; In re Fenwick, [1902] 1 Ch. 507; Hewitt v. Loosemore, 9 Hare 449, 41 EngCh 449, 68 Reprint 586; Toulmin v. Steere, 3 Meriv. 210, 36 Reprint 81; Kennedy v. Green, 3 Myl. & K. 699, 10 EngCh 699, 40 Reprint 266, 21 ERC 820. See also Dryden v. Frost, 3 Myl. & C. 670, 14 EngCh 670, 40 Reprint 1084.

See Black v. Johnson, 65 W. Va. 518, 64 SE 626 (holding that a railroad company's agent to inspect crossties, and to whom a vendor intrusts the duty to measure, inspect, and report concerning them to him, makes him his agent so as to make notice to him, while so engaged, of rights and claims of the true owner notice to the vendor).

[a] **Classification of authorities.**—"The authorities perhaps may be properly classified as follows: First. Those in which the one principal received, through the interevention and the wrongful act of a mutual agent of the parties, the property of the other principal. In such case the party receiving the property of the other is chargeable with the knowledge of the wrong which was possessed by the mutual agent. Or, to state the proposition shortly, one may not avail himself of the results of his agent's fraud without responsibility for the fraud. . . . Second. Those cases in which the fraudulent agent, being the agent of both parties, did not in the particular transaction represent the principal sought to be charged, but was, on one side of the transaction, representing himself, and the principal, in person, or others representing him, were upon the other side. In such case knowledge of the wrongs is not imputed; otherwise, however, if in the particular transaction the agent acted for both principals." Oshkosh Nat. Bank v. Munger, 95 Fed. 87, 92, 36 CCA 659.

22. U. S.—Astor v. Wells, 4 Wheat. 466, 4 L. ed. 416.

Ga.—Fitzsimmons v. Southern Express Co., 40 Ga. 330, 2 AmR 577.

Ind.—Alexander v. Northwestern Christian Univ., 57 Ind. 466.

Iowa.—Leekins v. Nordyke, etc., Co., 66 Iowa 471, 24 NW 1.

Mich.—Adams Min. Co. v. Senter, 26 Mich. 73.

23. De Kay v. Hackensack Water Co., 38 N. J. Eq. 158; Bunton v. Palmer, (Tex.) 9 SW 182.

Effect of collusion between agent and third person see supra § 550.

24. U. S.—Rea v. Barker, 135 Fed. 890; Moline Malleable Iron Co. v. York Iron Co., 83 Fed. 66, 27 CCA 442.

Ark.—Caldwell v. Meshew, 44 Ark. 564.

D. C.—Nichols v. Bealmear, 36 App. 352.

Ind.—Sharp v. Jones, 18 Ind. 314, 81 AmD 359.

Iowa.—Owen v. National Hatchet Co., 147 Iowa 393, 121 NW 1076, 126 NW 333.

Kan.—St. Louis, etc., R. Co. v. Thacher, 13 Kan. 564.

Ky.—Donahoe v. McDonald, 92 Ky. 123, 17 SW 195, 13 KyL 413.

La.—Destrehan v. Louisiana Cypress Lumber Co., 45 La. Ann. 920, 13 S 230, 40 AmSR 265.

Mass.—Lamson, etc., Mfg. Co. v. Russell, 112 Mass. 387.

Mo.—Randolph v. Wheeler, 182 Mo. 145, 81 SW 419.

N. Y.—Nicol v. Burke, 78 N. Y. 580, 8 AbbNCas 213 [mod 45 N. Y. Super. 75]; Rand v. Moulton, 72 App. Div. 236, 76 NYS 174; Waldorf v. Simpson, 15 App. Div. 297, 44 NYS 921; Bayley v. Onondaga County Mut. Ins. Co., 6 Hill 476, 41 AmD 759 (holding that suit should be brought in the name of the principal on a contract which on its face purports to be made by or with an agent having no direct or beneficial interest in the transaction, as the contract is in legal effect made with the principal, and not with the agent).

Pa.—Henry v. Black, 213 Pa. 620, 63 A 250 (holding that one who was employed to procure an option for the purchase of property, and who obtained the same in writing in his own name, with the distinct oral understanding between himself and the owner that the option was procured for the person by whom he was employed, was an agent, and that his employer was entitled to the benefit of the option, as against an assignee of the agent).

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foreigner does not alter this rule;[25] nor is the principal's right lost or waived by an account and settlement between the principal and his agent, made in ignorance of the actual dealings of the agent with the third person.[26] Where, however, the contract was unauthorized it is not, in the absence of ratification by the principal, binding on the third party, and he need not give notice of his repudiation in order to relieve himself from liability thereon.[27]

[§ 554] **(2) Defenses and Equities.**[28] Equities arising betwen the third person and a known agent cannot, as a rule, be set up against the principal when he sues on the contract made by the agent as such with the third person.[29] Where, however, an agent takes a promissory note for his principal payable to himself, and then transfers it to his principal, the principal stands in the position of the original holder, and the note in his hands is subject to whatever defenses might have been made to it in the hands of the agent.[30] Where a principal accepts a contract made by the agent, he takes it as the agent made it, and subject to all equities and defenses arising out of the conditions thereof, and the means and instrumentalities by which the agent procured it, even though the agent acted without authority or in excess of his powers.[31]

[§ 555] **b. Undisclosed Principal—(1) In General.** As a corollary to the principle that the rights of the other contracting party are not affected by the disclosure of a theretofore unknown principal,[32] it is a well established general rule that, where an agent on behalf of his principal, enters into a simple contract as though made for himself, and the existence of the principal is not disclosed, the contract inures to the benefit of the principal who

Tex.—Cameron, etc., Co. v. Blackwell, 53 Tex. Civ. A. 414, 115 SW 856.

Vt.—Arlington v. Hinds, 1 D. Chipm. 431, 12 AmD 704.

Eng.—Fairlie v. Fenton, L. R. 5 Exch. 169; Pratt v. Willey, 2 C. & P. 350, 12 ECL 611.

[a] **Where the instrument discloses on its face the name of the principal** (1) as one of the contracting parties and his name is attached thereto by his duly authorized agent at the time of its execution, it constitutes a valid contract enforceable by the principal (Nichols v. Bealmear, 36 App. (D. C.). 352. See also supra § 321 et seq), (2) and in such a case it is immaterial that the agency of the party negotiating the contract is undisclosed, or that the principal subsequently erases his name as signed by his agent and substitutes it in his own handwriting, since the status of the parties remains unchanged (Nichols v. Bealmear, supra).

[b] **Right not affected by agent's qualified title.**—The right of the principal to collect the proceeds of a sale of goods is not impaired by the fact that the agents who made the sale had a qualified title in the goods as security for the payment of obligations assumed for their principal. Moline Malleable Iron Co. v. York Iron Co., 83 Fed. 66, 27 CCA 442.

[c] **A lease** made by an agent in the name of the owner of the premises, the owner's name being followed by a seal and that by the signature of the agent, may be enforced by the owner as though he had made it personally. Cochran v. MacRae, 49 Misc. 529, 98 NYS 852. See also Rand v. Moulton, 72 App. Div. 236, 76 NYS 174.

25. U. S.—Oelricks v. Ford, 23 How. 49, 16 L. ed. 534.

Mass.—Barry v. Page, 10 Gray 398.

N. H.—Kaulback v. Churchill, 59 N. H. 296.

N. Y.—Taintor v. Prendergast, 3 Hill 72, 38 AmD 618; Kirkpatrick v. Stainer, 22 Wend. 244.

N. C.—Barham v. Bell, 112 N. C. 131, 16 SE 903.

Ont.—Webb v. Sharman, 34 U. C. Q. B. 410.

[a] **In England, by usage of trade,** the foreign principal cannot hold the other party to the contract made with the agent, unless there is something in the bargain showing the intention to be otherwise. Elbinger Actien-Gesellschaft v. Claye, L. R. 8 Q. B. 313.

[b] **Principal residing in another state of the Union.**—In Barham v. Bell, 112 N. C. 131, 134, 16 SE 903, the court said: "We do not regard it as entirely settled that a foreign principal cannot maintain an action upon such a contract [where the principal is undisclosed]; but however this may be, it seems clear that, while the States of the American Union are in some senses foreign to each other, yet, so far as concerns the reason of the rule . . . 'they do not bear the same reciprocal relations as does one of these States to a transatlantic country.'"

26. Rogers v. Holden, 142 Mass. 196, 7 NE 768 (holding that an entry on the books of the principal of an account and settlement between himself and his agent, made in ignorance of the actual dealings of the agent with a third person, cannot bind the principal or defeat him from recovering the amount actually due on a contract made by the agent for his principal's benefit).

27. Nugent v. Wade, (Tex. Civ. A.) 132 SW 833 (holding that, where an alleged agent had no authority to make a contract for the sale of land, and the purported contract was not ratified by the owners, notice by the other party of his repudiation of the contract is not necessary).

Third party's right of withdrawal see generally supra § 146.

28. Fraud of agent as a defense see infra § 563.

Illegality of agency as a defense see Contracts [9 Cyc 546 et seq]; Gaming [20 Cyc 741 et seq].

Payment to agent as a defense see infra § 564.

29. U. S.—Hurlbert v. Pacific Ins. Co., 12 F. Cas. No. 6,919, 2 Sumn. 471.

Ill.—Stinson v. Gould, 74 Ill. 80; Reutchler v. Hucke, 3 Ill. A. 144.

Md.—Miller v. Lea, 35 Md. 396, 6 AmR 417.

Mass.—Ilsley v. Merriam, 7 Cush. 242, 54 AmD 721.

N. Y.—Wright v. Cabot, 89 N. Y. 570 [aff 47 N. Y. Super. 229]; Ladd v. Arkell, 40 N. Y. Super. 150.

Eng.—Semenza v. Brinsley, 18 C. B. N. S. 467, 114 ECL 467, 144 Reprint 526; Dresser v. Norwood, 17 C. B. N. S. 466, 112 ECL 466, 144 Reprint 188; Morris v. Cleasby, 1 M. & S. 576, 105 Reprint 215.

Man.—Wood v. Arbuthnot Co., 16 Man. 320, 4 WestLR 305 (holding that where a buyer of goods from an agent knows that the person he is dealing with is only an agent, he cannot set off a claim against the agent, in an action by the principal for the price of the goods, although the ownership of the goods may have been transferred to another principal before he bought them and without his knowledge).

See Robert Bell Engine Co. v. Burke, 4 DomLR 342, 19 WestLR 934.

[a] **Mutual mistake of law.**—Where a mutual mistake of law claimed by defendant is based on a collateral oral agreement in the name of an agent, independent of the written agreement on behalf of the principal, evidence that defendant and the agent misapprehended the law as to such oral agreement is insufficient to establish a mutual mistake of law on the part of the principal. Northwest Thresher Co. v. McNinch, (Okl.) 140 P 1170.

30. Hutchinson v. Hutchinson, 46 Me. 154. See also McCormick Harvesting Mach. Co. v. Taylor, 5 N. D. 53, 63 NW 890, 57 AmSR 538 (holding that, if an agent for the sale of machinery sells machinery of his own and takes in payment therefor a horse, which he afterward sells with a warranty, taking in payment therefor a note made payable to his principal, and the latter, being ignorant of the transaction and supposing that the note was taken in payment for his own machinery, receives the note upon a settlement of the agency account and gives his agent a credit for the full amount thereof, the maker of the note may, in an action upon it by the payee, set up a breach of warranty of the horse, and defeat a recovery).

31. Iowa.—Davis v. Danforth, 65 Iowa 601, 22 NW 889 (where plaintiffs' agent who was authorized to take orders for wagons and carriages and transmit them to plaintiffs, took defendants' order, but defendants, not being content with plaintiffs' printed and published warranty, demanded a further warranty, whereupon a warranty was written out by the agent in duplicate, one copy of which was left with defendants and the other copy the agent agreed to forward with the order to his principals for their acceptance or rejection; and he sent the order to the principals but failed to send the warranty, and plaintiffs forwarded the wagons and carriages without any knowledge of the written warranty, and the goods did not fulfill the conditions thereof; and it was held that plaintiffs were liable to the same extent as if the goods had been sold by them upon that warranty).

La.—Findley v. Breedlove, 4 Mart. N. S. 105.

Mass.—Brigham v. Palmer, 3 Allen 450.

Mich.—Davis v. Kneale, 97 Mich. 72, 56 NW 220 (holding that the fact that agents canvassing for subscriptions to a manufacturing plant to be put in by their principals, had no authority to accept signatures on condition is no reply to the defense of one so signing, that the condition had not been complied with).

Miss.—Bowers v. Johnson, 18 Miss. 169.

N. Y.—Elwell v. Chamberlin, 31 N. Y. 611.

N. C.—Sprunt v. May, 156 N. C. 388, 72 SE 821.

S. D.—Union Trust Co. v. Phillips, 7 S. D. 225, 63 NW 903.

See also infra § 560.

Ratification of authorized contract as ratification of unauthorized conditions see supra § 100.

32. See supra § 522.

may appear and hold the other party to the contract made by the agent.[33] By appearing and claiming the benefit of the contract, it thereby becomes his own to the same extent as if his name had originally appeared as a contracting party,[34] and the fact that the agent has made the contract in his own name does not preclude the principal from suing thereon as the real party in interest;[35] nor does the fact that the identity of the principal has been concealed because of the belief that, if it were disclosed, the contract would not be made, authorize an exception to the rule.[36] Thus, in accordance

33. U. S.—Ford v. Williams, 21 How. 287, 16 L. ed. 36; Salmon Falls Mfg. Co. v. Goddard, 14 How. 446, 14 L. ed. 493; New Jersey Steam Nav. Co. v. Merchants Bank, 6 How. 344, 12 L. ed. 465; Block v. Meridian, 169 Fed. 516, 95 CCA 14; Rea v. Barker, 135 Fed. 890; Morris v. Chesapeake, etc., Steamship Co., 125 Fed. 62 [aff 148 Fed. 11, 78 CCA 179].

Ala.—Western Union Tel. Co. v. Walker, 158 Ala. 578, 48 S 102; Western Union Tel. Co. v. Northcutt, 158 Ala. 539, 48 S 553, 132 AmSR 38; Sellers, etc., Co. v. Malone-Pilcher Co., 151 Ala. 426, 44 S 414; Western Union Tel. Co. v. Manker, 145 Ala. 418, 41 S 850; D. J. McDonald Stone Co. v. Stern, 142 Ala. 506, 38 S 643; Brooks v. Cook, 141 Ala. 499, 38 S 641; Manker v. Western Union Tel. Co., 137 Ala. 292, 34 S 839; McFadden v. Henderson, 128 Ala. 221, 29 S 640; Bell v. Reynolds, 78 Ala. 511, 56 AmR 52; Huntsville v. Huntsville Gas Light Co., 70 Ala. 190.

Cal.—Eldridge v. Mowry, (A.) 140 P 978.

Conn.—Sullivan v. Shallor, 70 Conn. 733, 40 A 1054; Sutton v. Mansfield, 47 Conn. 388.

Ga.—Propeller Tow-Boat Co. v. Western Union Tel. Co., 124 Ga. 478, 52 SE 766; Spain v. Beach, 52 Ga. 494; Woodruff v. McGehee, 30 Ga. 158.

Ill.—Barker v. Garvey, 83 Ill. 184; Conklin v. Leeds, 58 Ill. 178; Saladin v. Mitchell, 45 Ill. 79; Cleveland, etc., R. Co. v. McNutt, 138 Ill. A. 66; Delaware, etc., R. Co. v. Thayer, 41 Ill. A. 192; Warder v. White, 14 Ill. A. 50.

Iowa.—Shields v. Coyne, 148 Iowa 313, 127 NW 63, 29 LRANS 472 and note, AnnCas1912C 905 and note; Temple v. Pennell, 123 Iowa 729, 99 NW 567; Young v. Lohr, 118 Iowa 624, 92 NW 684; Darling v. Noyes, 32 Iowa 96.

Kan.—St. Louis, etc., R. Co. v. Thacher, 13 Kan. 564.

Ky.—Tharp v. Farquar, 6 B. Mon. 3; Smith v. Lewis, 3 B. Mon. 229; Harrow v. Dugan, 6 Dana 341.

Me.—Putnam v. White, 76 Me. 551; Machias Hotel Co. v. Coyle, 35 Me. 405, 58 AmD 712; Edmond v. Caldwell, 15 Me. 340.

Md.—Anderson v. Stewart, 108 Md. 340, 70 A 228.

Mass.—Buffington v. McNally, 192 Mass. 198, 78 NE 309; Cushman v. Snow, 186 Mass. 169, 71 NE 529; Beston v. Amadon, 172 Mass. 84, 51 NE 451; Foster v. Graham, 166 Mass. 202, 44 NE 129; Kelley v. Munson, 7 Mass. 319, 5 AmD 47; Barry v. Page, 10 Gray 398; Eastern R. Co. v. Benedict, 5 Gray 561, 66 AmD 384; Merrill v. Norfolk Bank, 19 Pick. 32.

Minn.—Davidson v. Hurty, 116 Minn. 280, 133 NW 862, 39 LRANS 324; Ames v. First Div. St. Paul, etc., R. Co., 12 Minn. 412.

Miss.—Stonewall Mfg. Co. v. Peek, 63 Miss. 342.

Mo.—Kelly v. Thuey, 143 Mo. 422, 45 SW 300 [overr Kelly v. Thuey, 102 Mo. 522, 15 SW 62]; Briggs v. Munchon, 56 Mo. 467; Odessa Bank v. Jennings, 18 Mo. A. 651.

N. H.—Bryant v. Wells, 56 N. H. 152; Chandler v. Coe, 54 N. H. 561.

N. Y.—Milliken v. Western Union Tel. Co., 110 N. Y. 403, 18 NE 251, 1 LRA 281; Nicoll v. Burke, 78 N. Y. 580, 8 AbbNCas 213 [mod 45 N. Y. Super. 75]; McKay v. Draper, 27 N. Y. 256; Navarre Hotel, etc., Co. v. American Appraisal Co., 156 App. Div. 795, 142 NYS 89; Nitro Powder Co. v. Marx, 148 App. Div. 571, 133 NYS 151; Union India Rubber Co. v. Tomlinson, 1 E. D. Smith 364; Wiehle v. Saffold, 27 Misc. 562, 58 NYS 298; Johnson v. Doll, 11 Misc. 345, 32 NYS 132; In re Pfeiffer, 146 NYS 1080; Gubner v. Vick, 6 NYSt 4; Erickson v. Compton, 6 HowPr 471; Taintor v. Prendergast, 3 Hill 72, 38 AmD 618; Beebee v. Robert, 12 Wend. 413, 27 AmD 132.

N. C.—Brown v. Morris, 83 N. C. 251.

Oh.—Marine Ins. Co. v. Walsh-Upstill Coal Co., 23 Oh. Cir. Ct. 191.

Okl.—Rankin v. Blaine County Bank, 20 Okl. 68, 93 P 536, 18 LRANS 512 and note.

Or.—Kitchen v. Holmes, 42 Or. 252, 70 P 830 (holding that a principal, whose money is loaned by an agent, may maintain an action against the borrower, even though the latter had no knowledge of the agency when he made the loan).

Pa.—Lancaster v. Knickerbocker Ice Co., 153 Pa. 427, 26 A 251; Gilpin v. Howell, 5 Pa. 41, 45 AmD 720; Girard v. Taggart, 5 Serg. & R. 19, 9 AmD 327.

R. I.—Battey v. Lunt, etc., Co., 30 R. I. 1, 73 A 353, 136 AmSR 926.

S. C.—Ramey v. Anderson, 26 S. C. L. 300.

Tenn.—Foster v. Smith, 2 Coldw. 474, 88 AmD 604.

Tex.—Kempner v. Dillard, 100 Tex. 505, 101 SW 437, 123 AmSR 822; Low v. Moore, 31 Tex. Civ. A. 460, 72 SW 421.

Vt.—Culver v. Bigelow, 43 Vt. 249; Wait v. Johnson, 24 Vt. 112.

Va.—National Bank v. Nolting, 94 Va. 263, 26 SE 826; Waddill v. Sebree, 88 Va. 1012, 14 SE 849, 29 AMSR 766.

W. Va.—Coulter v. Blatchley, 51 W. Va. 163, 41 SE 133; Deitz v. Providence-Washington Ins. Co., 31 W. Va. 851, 8 SE 616, 13 AmSR 909.

Wis.—Wilson v. Groelle, 88 Wis. 530, 53 NW 900; McNair v. Rewey, 62 Wis. 167, 22 NW 339; Stowell v. Eldred, 39 Wis. 614.

Eng.—North Western Bank v. Poynter, [1895] A. C. 56; Langton v. Waite, L. R. 6 Eq. 165; Lisset v. Reave, 2 Atk. 394, 26 Reprint 638; Skinner v. Stocks, 4 B. & Ald. 437, 6 ECL 550, 106 Reprint 997; McCaul v. Strauss, Cab. & E. 106; Phelps v. Prothero, 16 C. B. 370, 81 ECL 370, 139 Reprint 801; Humphrey v. Lucas, 2 C. & K. 152, 61 ECL 152 (holding that if a broker enters into a contract for an undisclosed principal, the latter may sue on the contract in his own name; and a rule of the exchange on which the contract was made which declares that a contract made by a broker for an undisclosed principal shall be regarded as the contract of the broker only does not control this right, even though the principal was cognizant of the rule); Cooke v. Seeley, 2 Exch. 746; Wester Moffat Colliery Co. v. Jeffrey, [1911] S. C. 346; Grojan v. Wade, 2 Stark. 443, 3 ECL 481.

N. B.—Kennedy v. Turnbull, 15 N. B. 378.

N. S.—Layton v. Smith, 17 N. S. 331.

Ont.—Abbott v. Atlantic Refining Co., 4 Ont. L. 701, 1 OntWR 701, 22 CanLTOccNotes 411; Crawford v. Fraser, 21 U. C. Q. B. 518; Mair v. Holton, 4 U. C. Q. B. 505.

Que.—Read v. Birks, 2 LCJur 161.

[a] **"It is a well-established rule of law,** both in England and in this country, that, where a contract is made by an agent, the principal whom he represents may maintain an action on it in his own name, although the name of the principal was not disclosed at the time of the making of the contract." Block v. Meridan, 169 Fed. 516, 521, 95 CCA 14.

[b] **"The reason of the rule** which permits the principal to sue in such cases in his own name, is that he is entitled to the ultimate benefit of the contract made by his agent." Sullivan v. Shallor, 70 Conn. 733, 786, 40 A 1054.

[c] **Election to hold agent.**—Where an agent sold goods without disclosing his principal, and the principal understood from the buyers' statement that they had paid the agent therefor, the bringing of suit by the principal against the agent was no defense to a subsequent action by the principal against the buyers. Bertoli v. Smith, 69 Vt. 425, 38 A 76.

[d] **A stipulation by the agent that a contract shall not be assigned** without the consent of the other party does not estop the undisclosed principal from suing on the contract. Prichard v. Budd, 76 Fed. 710, 22 CCA 504.

[e] **Where a person supposes he is contracting with an agent personally,** and the supposition is caused by any fraud or pretense of the agent, the agent may be bound personally by the contract, but the fact that the agent is personally bound will not prevent the undisclosed principal from suing on it. Hunter v. Giddings, 97 Mass. 41, 93 AmD 54.

[f] **Notice to account to principal.**—A principal's right upon a contract made by his agent is established if the agent notifies the other party that he must account to the principal; such a notification operates as an equitable assignment of the agent's interest in the contract. Dustin v. Radford, 57 Mich. 163, 23 NW 715.

[g] **Either agent or principal may sue.**—Where a contract not under seal is made with an agent, and in the agent's name, for an undisclosed principal, either the agent or principal may sue on it. Stockbarger v. Sain, 69 Ill. A. 486; Anderson v. Stewart, 108 Md. 340, 70 A 228; Leterman v. Charlottesville Lumber Co., 110 Va. 769, 67 SE 281; Commonwealth Nat. Bank v. Nolting, 94 Va. 263, 26 SE 826.

[h] **A request of another to send a telegram,** which such other does on his own account and not as the requester's agent, does not establish an agency so as to entitle the person making the request to recover for a delay in the delivery of the telegram. Western Union Tel. Co. v. Northcutt, 158 Ala. 539, 48 S 553, 132 AmSR 38. See also generally Telegraphs and Telephones [37 Cyc 1720].

[i] **A contract of bailment,** made by the bailee with the agent of an undisclosed principal who is a minor, cannot be rescinded by the bailee on the ground of the bailor's minority, without delivering the goods to him, even if the contract is voidable; and it is immaterial that the bailee would not have made the contract if he had known that the bailor was a minor. Stiff v. Keith, 143 Mass. 224, 9 NE 577.

Right of undisclosed principal to avail himself of guaranty addressed to agent see Guaranty [20 Cyc 1428 et seq].

34. Great Lakes Towing Co. v. Mills Transp. Co., 155 Fed. 11, 83 CCA 607.

35. Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co., 211 N. Y. 68, 105 NE 88; Cole v. Utah Sugar Co., 35 Utah 148, 99 P 681. See also cases supra note 33.

36. Kelly Asphalt Block Co. v.

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with this rule, an undisclosed principal may maintain an action for specific performance of a contract made by his agent.[37]

[§ 556] **(2) Where Exclusive Credit Is Given to Agent.** A person has a right to determine with whom he will contract, and he cannot have another person thrust upon him against his expressed will.[38] Accordingly if a person, in contracting with an agent whose agency is unknown, gives exclusive credit to the agent, as where he imposes personal trust or confidence in the agent or relies on his solvency, or on his special knowledge or skill, the principal cannot come forward and hold the other party to the contract,[39] unless the contract has been fully performed by the agent or performance by the principal has been accepted.[40]

[§ 557] **(3) Contracts of Purchase or Sale.** Subject to the above limitation an undisclosed principal may claim the benefit of a contract of purchase or sale of property made by his agent, and may maintain an action thereon, and enforce any remedies which might have been pursued by the agent himself.[41]

[§ 558] **(4) Contracts for Transportation.** Where

Barber Asphalt Pav. Co., 211 N. Y. 68, 105 NE 88.

37. Lenman v. Jones, 33 App. (D. C.) 7 (holding that an agent may contract for the purchase of real estate for an undisclosed principal who may enforce specific performance against the vendor); Randolph v. Wheeler, 182 Mo. 145, 81 SW 419; Mitchell v. Knudston Land Co., 19 N. D. 736, 124 NW 946; McCarthy v. Cooper, 8 Ont. 316 [aff 12 Ont. A. 284]. See also generally Specific Performance [36 Cyc 528].

38. See Contracts [9 Cyc 386].

[a] **"It is the right of a party to a contract to know with whom he deals** unless he consents to deal with an agent in behalf of an undisclosed principal. He has a right to rely upon representations made as to the identity of the other party to the contract, and, if deceived by such representations, he has a right to rescind." New York Brokerage Co. v. Wharton, 143 Iowa 61, 66, 119 NW 969.

39. Ala.—Birmingham Matinée Club v. McCarty, 152 Ala. 571, 44 S 642, 13 LRANS 156, 15 AnnCas 237 and note (holding that an undisclosed principal cannot compel performance or recover damages for the breach of a contract, made by his agent in the agent's name, for the sale to another of lands of the principal, in which contract it is stipulated that the agent, as the ostensible seller, will grant by warranty deed an unencumbered title, as such stipulation involves the elements of personal trust and confidence, and the purchaser may recover back the purchase money paid thereunder).

Ill.—Cowan v. Curran, 216 Ill. 598, 75 NE 322 (holding that, where exclusive credit was given to an agent in his own name, the agent's undisclosed principal could not sue on the contract). To the contrary Warder v. White, 14 Ill. A. 50 [cit Grojan v. Wade, 2 Stark. 443, 3 ECL 481, where it appeared that the other contracting party would not be prejudiced by allowing the principal to sue on the contract].

Iowa.—Shields v. Coyne, 148 Iowa 313, 127 NW 63, 29 LRANS 472 and note, AnnCas1912C 905 (holding that, if the party contracting with the agent, without knowledge of the agency, enters into the contract because of personal trust and confidence in the alleged agent, and the contract remains wholly executory, the undisclosed principal cannot enforce the contract in his own name); New York Brokerage Co. v. Wharton, 119 NW 969 (holding that, where one represents that he is dealing on his own behalf, although he signs the contract in the name of a company, the other party to the contract is justified in believing that it is a name used for his private business).

Me.—Pancoast v. Dinsmore, 105 Me. 471, 75 A 43, 134 AmSR 582 (holding that, where one contracts to take a deed with covenants of warranty from a person who is the ostensible owner of the land, but who is really the agent of an undisclosed principal, he need not accept a deed from the principal, when discovered, as one may determine with whom he will contract).

Mass.—Boston Ice Co. v. Potter, 123 Mass. 28, 25 AmR 9; Winchester v. Howard, 97 Mass. 303, 93 AmD 93.

N. Y.—Navarre Hotel, etc., Co. v. American Appraisal Co., 156 App. Div. 795, 142 NYS 89; Kent v. De Coppet, 149 App. Div. 589, 134 NYS 195; Moore v. Vulcanite Portland Cement Co., 121 App. Div. 667, 106 NYS 393. See however Wiehle v. Safford, 27 Misc. 562, 58 NYS 298 (where the facts were held not to bring the case within the exception to the general rule).

Philippine.—Lim Tiu v. Ruiz y Rementeria, 15 Philippine 867.

R. I.—King v. Batterson, 13 R. I. 117, 43 AmR 13.

See Whiting v. William H. Crawford Co., 93 Md. 390, 49 A 615 (holding that, where a manufacturer refuses to sell goods to a broker on account of the broker's principal, but offers to sell the goods to the broker individually, and he purchases the same, representations by the broker to his principal that the goods have been purchased for the latter do not render the manufacturer liable to the latter).

[a] **Reasons for rule.**—(1) "It is good sense, as well as sound law, that, in case of a purely executory contract, a party dealing with another as principal, though in fact he is agent, is not compellable, at all events, to accept performance from the undisclosed principal, when discovered, though he may do so. He may well say: 'This is not the contract I made.' In case an agent, in making a contract with a third party, acts in his own name, and does not disclose the name of his principal, or the existence of an agency, the agent becomes, as to that third party, the contracting party. . . . And the third party may stand on the contract which he has made. It was well said in Boston Ice Co. v. Potter, 123 Mass. 28, 25 AmR 9: 'A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract . . . he may contract with whom he pleases, and the sufficiency of his reasons for so doing cannot be inquired into.' And were such reasons open to inquiry, it is easy to see that one might be willing to take the warranties of one person in a deed, when he would not take those of another. At any rate, he is only obliged to take the deed which he contracted to take." Pancoast v. Dinsmore, 105 Me. 471, 474, 75 A 43, 134 AmSR 582. (2) "This exception is based on the ground that it is the right of every party to choose with whom he will have business dealings, and ordinarily the courts will not enforce an executory contract in behalf of an undisclosed principal, where the other party thereto objects to performance on the ground that he executed the contract under the belief that the agent was the real party to it, and that he would not have entered into it with the undisclosed principal of such agent, or where it appears clearly that exclusive credit was given to the agent." Davidson v. Hurty, 116 Minn. 280, 283, 133 NW 862, 39 LRANS 324.

[b] **Undisclosed principal, one with whom the other party would not have dealt.**—If the person who seeks to avail himself of a contract made by another is one with whom, for personal reasons, the other party to the agreement would not have contracted had he known that such person was the real principal, it has been held, for the reasons just stated, that such an undisclosed principal could not avail himself of the contract. Winchester v. Howard, 97 Mass. 303, 93 AmD 93. See also Boston Ice Co. v. Potter, 123 Mass. 28, 25 AmR 9; Real Estate Inv. Co. v. Richmond, 23 Que. Super. 151.

[c] **In the Philippines,** under the provisions of the code of commerce art 246, an undisclosed principal cannot maintain an action upon a contract made by his agent, unless such principal was disclosed in such contract. Castle v. Go-Juno, 7 Philippine 144.

[d] **Contract with agent clearly shown.**—When it is clearly shown, either from the terms of the agreement or by the attendant circumstances, that the contract was with the agent personally, the principal, even though known, does not become a party to the contract, and cannot sue upon it in his own name. Sullivan v. Shailor, 70 Conn. 733, 40 A 1054.

[e] **Prejudice to third party.**—The rule that a promise to an agent is one to the principal, upon which he may maintain an action, is not to be applied to the prejudice of a promisor who is ignorant of that relation. It cannot be applied in behalf of an unknown principal so as to convert a promise of indemnity upon a draft, understood as made to the payee, into one as made to the drawer, and change the relation of the promisor towards the drawer from one of guarantor as supposed, into that of principal debtor. Peoria Second Nat. Bank v. Diefendorf, 90 Ill. 396.

[f] **The fact that an undisclosed principal had executed and recorded a power of attorney** authorizing a person as his ranch foreman to contract for him in respect to the ranch did not charge a creamery company with notice that such person, in contracting to supply cream, was acting for the undisclosed principal. Walton v. Davis, 22 Cal. A. 456, 134 P 795.

[g] **Contract for personal services.**—Where a contract between a creamery company and a person who had formerly operated a cream route was for personal services rather than the sale of cream, it was nonassignable, and an undisclosed principal could not sue thereon. Walton v. Davis, 22 Cal. A. 456, 134 P 795.

40. Ala.—Birmingham Mati Club v. McCarty, 152 Ala. 571, 44 S 642, 13 LRANS 156, 15 AnnCas 237 and note.

Conn.—Sullivan v. Shailor, 70 Conn. 733, 40 A 1054.

Mass.—Boston Ice Co. v. Potter, 123 Mass. 28, 25 AmR 9.

Mich.—Eggleston v. Boardman, 37 Mich. 14.

R. I.—King v. Batterson, 13 R. I. 117, 43 AmR 13.

41. Colo.—Satisfaction Title, etc., Co. v. York, 54 Colo. 566, 570, 131 P 444 [cit Cyc]; Parker v. Cochrane, 11 Colo. 363, 18 P 209.

Ill.—Havana, etc., R. Co. v. Walsh,

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an agent contracts in his own name for the transportation of goods without disclosing the name of his principal, the principal has a right of action against the carrier for failure to comply with the contract, or for loss of or injury to the property.[42]

[§ 559] **(5) Written Contracts; Sealed Contracts; Negotiable Instruments.** The rule that an undisclosed principal may maintain an action on a contract made by his agent in his name alone, on proof that in making the contract the agent was acting for the principal, is not varied by the fact that such contract was in writing,[43] although according to some authorities the rule is otherwise where the agent contracts expressly in writing as principal.[44]

Sealed contracts. In jurisdictions where the dis-

85 Ill. 58; Rice, etc., Malting Co. v. International Bank, 86 Ill. A. 136 [aff 185 Ill. 422, 56 NE 1062] (holding that the fact that a person, in making a sale to defendant, was acting as plaintiff's agent may be shown, although defendant did not know thereof, where he is not injured by want of notice).

Ind.—Johnson v. Hoover, 72 Ind. 395. See also Summers v. Hutson, 43 Ind. 228.

Kan.—Hawkins v. Windhorst, 87 Kan. 176, 177, 123 P 761 [quot Cyc].

Me.—Cushing v. Rice, 46 Me. 303, 309, 71 AmD 579 (where the court said: "In case of a purchase . . . of goods, by an agent, even if the principal be not disclosed, or the bill of sale be made to the agent himself, the property, immediately upon the execution of the contract, vests in the principal; and the right of action upon an implied warranty, or on fraudulent representations made to the agent, is in the principal; for the damages, which ground the action, follow the property").

Md.—Noel Constr. Co. v. Atlas Portland Cement Co., 103 Md. 209, 63 A 384; Miller v. Lea, 35 Md. 396, 6 AmD 417; Oelrichs v. Ford, 21 Md. 489.

Mass.—Tuckwell v. Lambert, 5 Cush. 23 (action for false and fraudulent representations).

Mich.—Jenness v. Shaw, 35 Mich. 20.

Minn.—Davidson v. Hurty, 116 Minn. 280, 133 NW 862, 39 LRANS 324; Haines v. Starkey, 82 Minn. 230, 84 NW 910.

Mo.—Kelly v. Thuey, 143 Mo. 422, 45 SW 300 [overr Kelly v. Thuey, 102 Mo. 522, 15 SW 62].

N. Y.—Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co., 136 App. Div. 22, 120 NYS 163; Kilpatrick v. America West Africa Trading Co., 59 Misc. 180, 110 NYS 381 (holding that an undisclosed principal in a contract of sale of personality may enforce the same against the buyer, irrespective of whether or not the buyer knew that the ostensible seller was or was not an agent).

N. C.—Nicholson v. Dover, 145 N. C. 18, 58 SE 444, 13 LRANS 167 and note (holding that, where an owner of land authorized another to sell the same to a named third person and the agent contracted to sell the same to such person, but such person was merely acting as agent for another, such principal was entitled to enforce the contract to the same extent that the agent could enforce it, notwithstanding the owner of the land was without knowledge of the principal's interest); Cowan v. Fairbrother, 118 N. C. 406, 24 SE 212, 54 AmSR 733, 32 LRA 829.

N. D.—Mitchell v. Knudtson Land Co., 19 N. D. 736, 124 NW 946 (holding that a contract of a vendee for the purchase of real estate, made through his agent in his own name, without stating the name of his principal, may be enforced by an action for specific performance by such principal in his own name).

R. I.—Battey v. Lunt, etc., Co., 30 R. I. 1, 73 A 353, 136 AmSR 926.

Vt.—Vertoil v. Smith, 69 Vt. 425, 38 A 76; Edwards v. Golding, 20 Vt. 30.

Can.—Hudon Cotton Co. v. Canada Shipping Co., 13 Can. S. C. 401; Carlstadt Dev. Co. v. Alberta Pacific Elevator Co., 7 DomLR 200, 21 WestLR 433 (where the principal was known to the purchaser).

N. S.—Layton v. Smith, 17 N. S. 331.

Ont.—McCarthy v. Cooper, 8 Ont. 316 [aff 12 Ont. A. 284].

See also Norfolk v. Worthy, 1 Camp. 337.

Compare Guggenheime v. Youell, 53 Wash. 163, 101 P 711 (construing California statute).

[a] **Breach of implied warranty.**—Under the rule that an undisclosed principal in a contract may sue or be sued on the contract made in the name of his agent, the undisclosed principal in a contract of sale may sue the seller for breach of an implied warranty where the contract has been executed, although the seller would not have made the contract if he had known that the undisclosed principal was the party in interest. Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co., 136 App. Div. 22, 120 NYS 163.

[b] **Where a purchaser is notified before payment** that he was dealing with an agent when the purchase was made, he is liable to the principal, and the latter may recover the purchase price from him. Rice, etc., Malting Co. v. International Bank, 86 Ill. A. 136 [aff 185 Ill. 422, 56 NE 1062].

[c] **A statement by the agent that he was the owner** of the property, made during the negotiations, does not defeat the right of an undisclosed principal to enforce the contract of sale made by his agent. Hawkins v. Windhorst, 87 Kan. 176, 123 P 761.

42. U. S.—New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465.

Ala.—Southern R. Co. v. Jones, 132 Ala. 437, 31 S 501 (holding that, where plaintiff's agent, without disclosing his agency, shipped her horse over defendant's road under a contract in which such agent was named as both consignor and consignee, and the horse, while being so carried, was injured by defendant's negligence, plaintiff, as owner, may recover the damages for such injury); Nashville, etc., R. Co. v. Hinds, 5 Ala. A. 596, 59 S 670; Greek-American Produce Co. v. Illinois Cent. R. Co., 4 Ala. A. 377, 58 S 994 (holding that a principal may sue a railroad company for breach of a contract to give notice of the arrival of goods to his agent to whom they were consigned).

Ga.—Georgia Cent. R. Co. v. James, 117 Ga. 832, 45 SE 223.

Ill.—Cleveland, etc., R. Co. v. McNutt, 138 Ill. A. 66.

Iowa.—Wells v. Western Union Tel. Co., 144 Iowa 605, 123 NW 371, 138 AmSR 317, 24 LRANS 1045 and note (holding that, where an agent makes a contract for the transportation of goods without disclosing the fact that he is acting merely as agent, his principal may sue the carrier for injury to the goods).

Kan.—St. Louis, etc., R. Co. v. Thacher, 13 Kan. 564 (where an agent acted for himself and also for an undisclosed principal, and entered into a contract in his own name with defendant company for the transportation of certain cattle, a part of the cattle belonging to the agent and part to the principal, and the cattle were injured in transportation through the negligence of defendant company, and the principal was allowed to maintain an action in his own name for the loss which he had sustained).

Minn.—Ames v. First Div. St. Paul, etc., R. Co., 12 Minn. 412.

Mo.—Griffin v. Wabash R. Co., 115 Mo. A. 549, 91 SW 1015.

N. H.—Elkins v. Boston, etc., R. Co., 19 N. H. 337, 51 AmD 184.

N. Y.—Talcott v. Wabash R. Co., 159 N. Y. 461, 54 NE 1 [mod 89 Hun 492, 35 NYS 574] (holding that an undisclosed principal may sue to enforce a contract entered into by his traveling agent for the transportation of trunks containing merchandise); Trimble v. New York Cent., etc., R. Co., 39 App. Div. 403, 57 NYS 437 [aff 162 N. Y. 84, 56 NE 532, 48 LRA 115]. See also Talcott v. Wabash R. Co., 109 App. Div. 491, 96 NYS 548 [aff 39 Misc. 443, 80 NYS 149].

N. C.—Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co., 155 N. C. 148, 71 SE 71 (holding that, where a carrier contracted with an agent of an undisclosed principal for the transportation of machinery, without being informed of any special circumstance requiring prompt delivery, but was subsequently notified thereof, and negligently delayed the transportation, the undisclosed principal suing for the negligent delay could prove the special circumstances of which the carrier received notice).

Pa.—Cumberland Valley R. Co. v. Hughes, 11 Pa. 141, 51 AmD 513.

Tex.—Pacific Express Co. v. Redman, (Civ. A.) 60 SW 677. See also Gulf, etc., R. Cy. v. Zimmerman, (Civ. A.) 86 SW 54 [rev on other grounds 99 Tex. 349, 89 SW 971].

[a] **Damages for pain and retarded recovery** by reason of the failure of an express company to promptly deliver medicine purchased by an undisclosed principal through an agent see Pacific Express Co. v. Redman, (Tex. Civ. A.) 60 SW 677.

43. U. S.—Ford v. Williams, 21 How. 287, 16 L. ed. 36; Darrow v. H. R. Horne Produce Co., 57 Fed. 463.

Ala.—Powell v. Wade, 109 Ala. 95, 19 S 500, 55 AmSR 915 and note.

Me.—Kingsley v. Siebrecht, 92 Me. 23, 42 A 249, 69 AmSR 486.

Md.—Oelrichs v. Ford, 21 Md. 489.

Mass.—Huntington v. Knox, 7 Cush. 371.

Mo.—Odessa Bank v. Jennings, 18 Mo. A. 651.

N. H.—Bryant v. Wells, 56 N. H. 152.

N. Y.—Sherman v. New York Cent. R. Co., 22 Barb. 239; Nicoll v. Burke, 8 AbbNCas 213.

N. C.—Barham v. Bell, 112 N. C. 131, 16 SE 903.

Okl.—Schmucker v. Higgins-Roberts Grain Co., 28 Okl. 721, 116 P 184.

Pa.—Messier v. Amery, 1 Yeates 533, 1 AmD 316.

Tex.—Edwards v. Ezell, 2 Tex. A. Civ. Cas. § 276.

Utah.—Child v. Gillis Constr. Co., 42 Utah 120, 126, 129 P 356, 358 [quot Cyc].

Ont.—Standard Realty Co. v. Nicholson, 24 Ont. L. 46, 2 OntWN 1189, 19 OntWR 373.

44. Archer v. Makee, 1 Hawaii 77; Humble v. Hunter, 12 Q. B. 310, 64 ECL 310, 116 Reprint 885. See also Temple v. Pennell, 123 Iowa 729, 99 NW 567 (holding that if an agent makes a contract to subserve some purpose of his own, and deals with the property as though he were the owner thereof, he alone can enforce it).

[a] **Government contracts required to be in writing.**—Since the act of June 2, 1862 (U. S. Rev. St. § 3744) requiring the contracts of the war, navy, and interior departments to be in writing, the doctrine that an action may be brought by the principal, although the contract is in the

tinction between sealed and unsealed instruments is still recognized, the principal may not sue upon a contract under seal made by an agent in his own name.[45]

Negotiable instruments. Although there are some early cases to the contrary,[46] it is now well settled, at least in most of the states, that where a bill or note is executed to an agent in his own name, without disclosing the principal, but the principal is the real payee, the principal may nevertheless sue thereon as the real party in interest,[47] even though it is payable to order and is not indorsed to the principal.[48] This is also true as to nonnegotiable paper.[49]

[§ 560] **(6) Defenses and Equities[50]—(a) In General.** Where a third person who has entered into a contract with an agent in ignorance of the fact that he was not the real principal, as he assumed to be, is sued upon the contract by the principal, he may avail himself of every defense which existed in his favor against the agent at the time the principal first demanded fulfillment of the contract.[51]

[§ 561] **(b) Set-Off and Counterclaim.** The general rule is that a person contracting with an agent in his own name without notice of the agency may set off a debt or claim due to him from the agent personally, in an action by the principal on the contract;[52] and this right is not affected by the fact that the agent in contracting in his own name

name of the agent, is not applicable to contracts made with those departments. Calvary Cathedral v. U. S., 29 Ct. Cl. 269. See also United States [39 Cyc 735].

45. See infra § 599.

46. U. S. Bank v. Lyman, 2 F. Cas. No. 924, 1 Blatchf. 297, 20 Vt. 666 [aff 12 How. 225, 13 L. ed. 965]; Chandler v. Coe, 54 N. H. 561; Grist v. Backhouse, 20 N. C. 496.

[a] **Where the drawer of a bill knows of the agency of the payee,** the principal may maintain an action thereon in his own name. Jordan v. Tarkington, 15 N. C. 357.

47. McConnell v. East Point Land Co., 100 Ga. 129, 28 SE 80; Nave v. Hadley, 74 Ind. 155; Lawrence v. Shepherd, Anth. N. P. (N. Y.) 281.

48. Little v. Bradley, 43 Fla. 402, 31 S 342; America First Nat. L. Assur. Soc. v. Farquhar, 75 Wash. 667, 135 P 619; Stinson v. Sachs, 8 Wash. 391, 36 P 287.

49. National L. Ins. Co. v. Allen, 116 Mass. 398; Lerned v. Johns, 9 Allen (Mass.) 419.

50. **Fraud of agent as a defense** see infra § 563.

Illegality of agency as a defense see Contracts [9 Cyc 546 et seq]; Gaming [20 Cyc 741 et seq].

Payment to agent as a defense see infra § 565.

51. U. S.—New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465; Leeds v. Marine Ins. Co., 6 Wheat. 565, 5 L. ed. 332; Morris v. Chesapeake, etc., Steamship Co., 125 Fed. 62 [aff 148 Fed. 11, 78 CCA 179]; Buchanan v. Cleveland Linseed-Oil Co., 91 Fed. 88, 33 CCA 351.

Ala.—Sellers v. Malone-Pilcher Co., 151 Ala. 426, 44 S 414; Huntsville v. Huntsville Gaslight Co., 70 Ala. 190.

Cal.—Amann v. Lowell, 66 Cal. 306, 5 P 363; Ruiz v. Norton, 4 Cal. 355, 20 AmD 618.

Conn.—Sullivan v. Shallor, 70 Conn. 733, 40 A 1054.

Del.—Connally v. McConnell, 17 Del. 133, 39 A 773.

Ga.—McConnell v. East Point Land Co., 100 Ga. 129, 28 SE 80; Allison v. Sutlive, 99 Ga. 151, 25 SE 11; Peel v. Shepherd, 58 Ga. 365; Woodruff v. McGehee, 30 Ga. 158.

Ill.—Stinson v. Gould, 74 Ill. 80; Saladin v. Mitchell, 45 Ill. 79; Wiser v. Springside Coal Min. Co., 94 Ill. A. 471.

Ind.—Nave v. Hadley, 74 Ind. 155.

Iowa.—Wells v. Western Union Tel. Co., 144 Iowa 605, 123 NW 371, 138 AmSR 317, 24 LRANS 1045; Young v. Lohr, 118 Iowa 624, 92 NW 685.

Ky.—Tutt v. Brown, 5 Litt. 1, 15 AmD 33.

Me.—Hook v. Crowe, 100 Me. 399, 61 A 1080 (holding that, where a purchaser in dealing with a selling agent believes him to be the principal, the undisclosed principal, if he seeks to enforce the contract, must take it as his agent and the purchaser left it, and must suffer its burdens and must take the pay as the agent agreed to take it); Traub v. Milliken, 57 Me. 63, 2 AmR 14.

Md.—Anderson v. Stewart, 108 Md. 340, 70 A 228; Baltimore Coal Tar, etc., Co. v. Fletcher, 61 Md. 288; Miller v. Lea, 35 Md. 396, 6 AmD 417; York County Bank v. Stein, 24 Md. 447; Oelrichs v. Ford, 21 Md. 489.

Mass.—Cushman v. Snow, 186 Mass. 169, 71 NE 529; Foster v. Graham, 166 Mass. 202, 44 NE 129; Locke v. Lewis, 124 Mass. 1, 26 AmR 631; Barry v. Page, 10 Gray 398; Eastern R. Co. v. Benedict, 5 Gray 561, 66 AmD 384; Huntington v. Knox, 7 Cush. 371; Ilsley v. Merriam, 7 Cush. 242, 54 AmD 721.

Minn.—Baxter v. Sherman, 73 Minn. 434, 76 NW 211, 72 AmSR 631; Lough v. Thornton, 17 Minn. 253.

Mo.—Henderson v. Botts, 56 Mo. A. 141 (holding that where the agent would have no cause of action the undisclosed principal can have none); Bruen v. Kansas City Agricultural, etc., Fair Assoc., 40 Mo. A. 425.

N. J.—Bernshouse v. Abbott, 45 N. J. L. 531, 46 AmR 789.

N. Y.—Burnham v. Eyre, 123 App. Div. 777 mem, 108 NYS 452 [aff 196 N. Y. 560 mem, 90 NE 1156 mem]; Larbig v. Peck, 69 App. Div. 170, 74 NYS 602 mem [aff 174 N. Y. 513 mem, 66 NE 1111 mem]; Nichols v. Martin, 35 Hun 168; Wright v. Cabot, 47 N. Y. Super. 229 [aff 89 N. Y. 570]; Van Lien v. Byrnes, 1 Hilt. 133; Bliss v. Sherrill, 42 NYS 432; Taintor v. Prendergast, 3 Hill 72, 38 AmD 618.

N. C.—Winslow v. Staton, 150 N. C. 264, 63 SE 950; Nicholson v. Dover, 145 N. C. 18, 58 SE 444, 13 LRANS 167; Barham v. Bell, 112 N. C. 133, 16 SE 903.

Oh.—Miller v. Sullivan, 39 Oh. St. 79; Hitchcock v. Kelley, 18 Oh. Cir. Ct. 808, 4 Oh. Cir. Dec. 180.

Okl.—Eldridge v. Finnegar, 25 Okl. 28, 105 P 334, 28 LRANS 227 and note.

Pa.—Girard v. Taggart, 5 Serg. & R. 19, 9 AmD 327; Matter of Merrick, 2 Ashm. 485 [rev on another point 5 Watts & S. 9].

Tenn.—Foster v. Smith, 2 Coldw. 474, 88 AmD 604.

Tex.—Low v. Moore, 31 Tex. Civ. A. 460, 72 SW 421; Western Union Tel. Co. v. Kerr, 4 Tex. Civ. A. 280, 23 SW 564.

Utah.—Child v. Gillis Constr. Co., 42 Utah 120, 129 P 356.

Va.—Leterman v. Charlottesville Lumber Co., 110 Va. 769, 67 SE 281.

Wis.—Ross v. Northrup, etc., Co., 156 Wis. 327, 144 NW 1124.

Eng.—Mildred v. Maspous, 8 App. Cas. 874; Browning v. Provincial Ins. Co., L. R. 5 P. C. 263; Ex p. Dixon, 4 Ch. D. 133; Borries v. Imperial Ottoman Bank, L. R. 9 C. P. 38; Sims v. Bond, 5 B. & Ad. 389, 27 ECL 168, 110 Reprint 834; Gibson v. Winter, 5 B. & Ad. 96, 27 ECL 50, 110 Reprint 728; Carr v. Hinchliff, 4 B. & C. 547, 10 ECL 697, 107 Reprint 1164; Semenza v. Brinsley, 18 C. B. N. S. 467, 114 ECL 467, 144 Reprint 526; Isberg v. Bowden, 8 Exch. 852; Morris v. Cleasby, 1 M. & S. 576, 105 Reprint 215; George v. Clagett, 7 T. R. 359, 101 Reprint 1019.

N. B.—Kennedy v. Turnbull, 15 N. B. 378.

[a] **"It is undoubtedly the law** that where an undisclosed principal sues on a contract made by his agent in his own name with some person who had no knowledge of an agency, but supposed that the agent dealt for himself, such suit is subject to any defense or set-off acquired by the third party against the agent before he had notice of the principal's rights." Frazier v. Poindexter, 78 Ark. 241, 244, 95 SW 464, 115 AmSR 33, 8 AnnCas 552.

[b] **Reason for rule.**—"As the reason of the rule which permits the principal to sue in such cases in his own name, is that he is entitled to the ultimate benefit of the contract made by his agent, so in seeking to recover that benefit he must assume the position of the agent whose contract he is enforcing, and the action so instituted by him is open to the defenses which might have been interposed to a suit commenced by the agent at the time the principal first sought to enforce the contract." Sullivan v. Shallor, 70 Conn. 733, 736, 40 A 1054.

[c] **Where an undisclosed principal permits an agent to conduct a business in the agent's own name** "as agent," and the agent purchases goods for the purpose of the business, and subsequently confesses judgment to parties from whom he purchased the goods, the principal has no standing to intervene and prevent the distribution of the fund raised by the sale of the goods under regular process, or to ask the court that the confessed judgments should be stricken off or vacated. Fees v. Shadel, 20 Pa. Super. 193.

[d] **The contract which an unknown principal may claim the benefit of** is the entire contract as made by the agent, and not a part of it. Delaware, etc., R. Co. v. Thayer, 41 Ill. A. 192. See also Roosevelt v. Doherty, 129 Mass. 301, 37 AmR 356; and supra § 554. Ratification of authorized contract as ratification of unauthorized conditions see supra § 100.

52. U. S.—Morris v. Chesapeake, etc., Steamship Co., 125 Fed. 62 [aff 148 Fed. 11, 78 CCA 179].

Ala.—Gardner v. Allen, 6 Ala. 187, 41 AmD 45.

Ark.—Frazier v. Poindexter, 78 Ark. 241, 95 SW 464, 115 AmSR 33.

Ga.—Ruan v. Gunn, 77 Ga. 53; Atlantic Coast Line R. Co. v. Gordon, 10 Ga. A. 311, 73 SE 594; Durant Lumber Co. v. Sinclair, etc., Lumber Co., 2 Ga. A. 209, 58 SE 485.

Ill.—Stinson v. Gould, 74 Ill. 80.

Ky.—Munroe v. Adamo, 136 Ky. 252, 256, 124 SW 296 [quot Cyc]; Violett v. Powell, 10 B. Mon. 347, 52 AmD 548; Tutt v. Brown, 5 Litt. 1, 15 AmD 33.

Md.—Miller v. Lea, 35 Md. 396, 6 AmD 417.

Mo.—Greene v. Chickering, 10 Mo. 109.

N. Y.—Kent v. De Coppet, 149 App. Div. 589, 134 NYS 195; Burnham v. Eyre, 123 App. Div. 777, 108 NYS 452 [aff 196 N. Y. 560 mem, 90 NE 1156 mem]; Pollacek v. Scholl, 51 App. Div. 319, 64 NYS 979; Pratt v. Collins, 20 Hun 126; Tannebaum v. Marsellus, 3

without disclosing the agency is acting in contravention of the express directions of his principal;[53] nor is the third person confined merely to claims which arise out of the particular contract in question.[54]

When set-off must accrue. It is essential that the set-off, in order to be available, should be due and payable at the time when the right to offset equities is claimed.[55]

[§ 562] (c) **Limitations of Rules.**[56] In order that the third person may be entitled to the benefit of equities and defenses good only as against the agent, he must be innocent of any knowledge of facts and circumstances which would put a reasonably prudent person on inquiry that he is dealing with an agent; and, although the agent acts in his own name, if the third person knows or has reason to believe that he is dealing with one who is agent for another he cannot successfully set up such a defense or set-off,[57] as where he knows that the person he is dealing with is an agent, although he does not know who the principal is.[58] Accordingly a person purchasing from an agent who has neither the possession nor other indicia of property in himself is not entitled to set off a debt due to him from the agent when sued by the undisclosed

Misc. 351, 22 NYS 928; Hogan v. Shorb, 24 Wend. 458.

N. C.—Winslow v. Staton, 150 N. C. 264, 63 SE 950 (holding that one who purchases goods from an agent in ignorance of his representative character is entitled to set off against the demand of the principal a debt due from the agent himself).

Okl.—Eldridge v. Finnegar, 25 Okl. 28, 105 P 334, 28 LRANS 227 and note.

Pa.—Frame v. William Penn Coal Co., 97 Pa. 309; Finn-Vipond Constr. Co. v. Wolf, 12 Pa. Super. 317.

Utah.—Child v. Gillis Constr. Co., 42 Utah 120, 129 P 356 (holding that defendant may set up any counterclaim or defense he may have against the agent, arising out of the contract, and which existed before he had notice of the rights of the undisclosed principal).

Eng.—Ex p. Dixon, 4 Ch. D. 133; George v. Clagett, 7 T. R. 359, 101 Reprint 1019. See also Turner v. Thomas, L. R. 6 C. P. 610 (set-off not allowed where agent has become bankrupt).

Compare Stevenson v. Kyle, 42 W. Va. 229, 24 SE 886, 57 AmSR 854 (holding that, if an agent sells the principal's property and takes in payment an order on a third person in his own name, the principal may compel payment of the order free from any set-off as between the agent and the third person, although the latter knew nothing of the agency).

[a] **"This rule applies** not only to sale of goods, but as well to other contracts where the agent is authorized to collect money for his undisclosed principal." Frazier v. Poindexter, 78 Ark. 241, 245, 95 SW 464, 115 AmSR 33, 8 AnnCas 552 and note. See also Montagu v. Forwood, [1893] 2 Q. B. 350.

[b] **This rule does not apply** where the person who contracted with the agent becomes the moving party and attempts to hold the undisclosed principal, and it appears that he who is thus moving did nothing and gave up nothing on the faith of the agent's apparent principalship. Atlantic Coast Line R. v. Gordon, 10 Ga. A. 311, 73 SE 594.

[c] **Where an agent sells property** to another who does not know and has no reason to believe that he is acting otherwise than on his own behalf, and to whom the agent is indebted in a sum larger than the purchase price of the property, the agent's principal cannot recover the price from the purchaser, since he is subject to the equities in the purchaser's favor which exist between the purchaser and the agent, and the purchaser has a right to set off the agent's debt to him. Munroe v. Whitehouse, 90 Me. 139, 37 A 866; Deane v. American Glue Co., 200 Mass. 459, 86 NW 890; Belfield v. National Supply Co., 189 Pa. 189, 42 A 131, 69 AmSR 799. See also Guggenheime v. Youell, 53 Wash. 163, 101 P 711.

[d] **Bank deposits by agent of principal's money.**—A bank which receives from an agent for deposit in his own name the money of his principal, without notice of the agency, is protected, in applying it to a past-due debt of the depositor, to the same extent as in paying it out upon his checks, whenever such application is authorized by the agent, either expressly or by legal implication, and such authority ordinarily arises from the making of a deposit, without other directions, where the debt to which it is applied is an overdraft. Kimmel v. Bean, 68 Kan. 598, 75 P 1118, 104 AmSR 415, 64 LRA 785. See also Hayden v. Alton Nat. Bank, 29 Ill. A. 458; Douglas v. Hastings First Nat. Bank, 17 Minn. 35.

[e] **Prerequisites to right of set-off.**—In Ex p. Dixon, 4 Ch. D. 133, 135, the court held that in the case of a contract of sale the following conditions must be complied with to establish a set-off: "1, that the sale should be made by a person entrusted with the possession of the goods; 2, that the agent should sell the goods as his own, and in his own name as principal, by the authority of the principal; and, 3, that the purchaser dealt with the agent as, and believed him to be, the principal in the transaction up to the time when the set-off occurred."

[f] **Secret commissions paid agent.**—In an action for the price of goods sold, the buyer is entitled to set off secret commissions paid by the seller to the agent of the buyer which were included in the price charged for the goods. Walker v. Field, 179 Ill. A. 3.

53. Ga.—Peel v. Shepherd, 58 Ga. 365.

Iowa.—Eclipse Wind Mill Co. v. Thorson, 46 Iowa 181.

N. Y.—Burnham v. Eyre, 123 App. Div. 777, 108 NYS 453 [aff 196 N. Y. 560 mem, 90 NE 1156 mem].

Vt.—Squires v. Barber, 37 Vt. 558.

Eng.—Stevens v. Biller, 25 Ch. D. 31; Ex p. Dixon, 4 Ch. D. 133.

Can.—Bowmanville Mach. Co. v. Dempster, 2 Can. S. C. 21 [aff 11 N. S. 273].

Man.—Smith v. Grouette, 2 Man. 314.

N. S.—Baird v. Anderson, 3 N. S. Dec. 181.

54. Durant Lumber Co. v. Sinclair, etc., Lumber Co., 2 Ga. A. 209, 58 SE 485. See also cases supra note 52.

55. McCobb v. Lindsay, 15 F. Cas. No. 8,704, 2 Cranch C. C. 215; Kennedy v. Turnbull, 15 N. B. 378 (holding that the right to set-off must accrue before the third person acquires knowledge of the principal). See also Munroe v. Adamo, 136 Ky. 252, 124 SW 296 (evidence held sufficient to show that a debt was due at the time of purchase).

56. **Estoppel of third person to deny agency or authority** see supra § 76.

57. U. S.—Moline Malleable Iron Co. v. York Iron Co., 83 Fed. 66, 27 CCA 442; McCobb v. Lindsay, 15 F. Cas. No. 8,704, 2 Cranch C. C. 215.

Ky.—Munroe v. Adamo, 136 Ky. 252, 124 SW 296; Weingartner v. Missouri Lumber, etc., Co., 44 SW 355, 19 KyL 1941.

Mo.—Rhea v. Buckley Custom Shirt Mfg. Co., 81 Mo. A. 400 (holding that actual knowledge that one is the agent of another is not necessary in order to bind the party, but only such knowledge on his part as would cause an ordinarily prudent person to believe that such agency exists).

N. Y.—McLachlin v. Brett, 105 N. Y. 394, 12 NE 17; Wright v. Cabot, 89 N. Y. 570; Kent v. De Coppet, 149 App. Div. 589, 134 NYS 195; Nichols v. Martin, 35 Hun 168; White v. Jaudon, 9 Bosw. 415; Mullin v. Lamphear, 15 NYSt 647.

Pa.—Thompson v. Sproul, 179 Pa. 266, 36 A 290 (evidence held to show knowledge).

Eng.—Young v. White, 7 Beav. 506, 29 EngCh 506, 49 Reprint 1162; Moore v. Clementson, 2 Campb. 22; Semenza v. Brinsley, 18 C. B. N. S. 467, 114 ECL 467, 144 Reprint 526; Dresser v. Norwood, 17 C. B. N. S. 466, 112 ECL 466, 144 Reprint 188; Pratt v. Willey, 2 C. & P. 350, 12 ECL 611. See also Ferrand v. Bischoffsheim, 4 C. B. N. S. 710, 93 ECL 710, 140 Reprint 1271; De Gaminde v. Pigou, 4 Taunt. 246, 128 Reprint 323.

"If the party who dealt with the agent, acting in his own name, knew or had reason to believe that he was dealing with one who was an agent for some third person, he can not successfully plead such defense or set-off. He must, in order to be protected, be innocent of any knowledge or of facts and circumstances which would put a reasonably prudent person on inquiry that he was dealing with an agent. Where he knows that the party he is dealing with is an agent, although he does not know who the principal is, he is not protected." Frazier v. Poindexter, 78 Ark. 241, 245, 95 SW 464, 115 AmSR 33, 8 AnnCas 552 and note.

[a] **Sufficiency of notice.**—"The notice or information acquired will be sufficient when it indicates the propriety of further inquiry as to the facts which may be supposed from it to have an existence. A general notice of this description is all that can be exacted under the rule. . . . And it will be effectual when it shall be received before the purchaser has acquired the property, or upon the faith of its purchase placed himself in a position which he will afterwards prove incapable of changing." McLachlin v. Brett, 34 Hun 478, 481.

[b] **Insufficient notice.**—Where stock is bought by an agent of an undisclosed principal and the broker is directed to put the stock in the name of the principal, it is not a sufficient notice that the buyer is acting as agent. Burnham v. Eyre, 123 App. Div. 777, 108 NYS 453 [aff 196 N. Y. 560 mem, 90 NE 1156 mem].

58. Frazier v. Poindexter, 78 Ark. 241, 95 SW 464, 115 AmSR 33, AnnCas 552; Wright v. Cabot, 89 N. Y. 570 [aff 47 N. Y. Super. 229]; Semenza v. Brinsley, 18 C. B. N. S. 467, 114 ECL 467, 144 Reprint 526 (holding that a party who bought goods of a person whom he knew to be selling them as agent could not set off, in an action by the principal for the price, a debt due to him from the agent, even though he did not at the time of the purchase know, and had not the means of knowing, who was the real owner).

[a] **Knowledge of agency only.**—Where a purchaser at a sale made by an agent under a power in a mortgage has knowledge of the fact of agency, although not of the principal's name, he is put on inquiry as to the name of the principal; and if, instead of paying the purchase money

principal, since the absence of such apparent title or authority is sufficient to put the purchaser upon inquiry as to the agent's true position in the transaction.[59] And if the character of one of the contracting parties is equivocal—if he is known to be in the habit of contracting sometimes as principal and sometimes as agent—a purchaser who buys with a view of covering his own debt and availing himself of a set-off is bound to inquire in what character he is acting in the particular transaction; and if the purchaser chooses to make no inquiry, and it should appear that he has contracted with an undisclosed principal, he will be denied the benefit of his set-off.[60]

Brokers and factors. The English rule, followed by many American cases, is that purchasers from a broker who does not disclose his principal cannot set off a debt due them by the broker against the owner, since the broker is employed without being put into possession of the goods; but that it is otherwise as to factors who are intrusted with the possession as well as the disposition of the property.[61]

[§ 563] **c. Fraud or Misconduct of Agent as Defeating Liability.** A contract induced by the fraud or misrepresentation of an agent while acting within the real or apparent scope of his authority cannot be enforced by the principal against the party misled, whether the principal was disclosed or not at the time of the making of the contract, and even though the principal did not authorize the agent to act fraudulently or to misrepresent,[62] unless the party so wronged has in some way estopped himself from relying on the fraud.[63] But where the fraudulent acts or misrepresentations of the agent were not within either the real or apparent scope of his authority, they cannot be set up as a defense to an action on the contract by the principal;[64] nor can the third person rely upon the agent's fraud or bad faith against his princi-

according to the terms of the sale, he makes an agreement with the agent prejudicial to the rights of the principal he can claim no advantage from his ignorance of the principal's name. Whelan v. McCreary, 64 Ala. 319.

59. Ark.—Frazier v. Poindexter, 78 Ark. 241, 95 SW 464, 115 AmSR 33.

Ga.—Rosser v. Darden, 82 Ga. 219, 7 S 919, 14 AmSR 152.

Ill.—Clark v. Smith, 88 Ill. 298; Stinson v. Gould, 74 Ill. 80.

Me.—Munroe v. Whitehouse, 90 Me. 139, 37 A 866; Traub v. Milliken, 57 Me. 63, 2 AmR 14.

Mich.—Kornemann v. Monaghan, 24 Mich. 36.

N. J.—Bernshouse v. Abbott, 45 N. J. L. 531, 46 AmR 789.

N. Y.—Pratt v. Collins, 20 Hun 126; Harrison v. Ross, 44 N. Y. Super. 230 [aff 80 N. Y. 646 mem]. See also Mull v. Ingalls, 30 Misc. 80, 62 NYS 830 [aff 62 App. Div. 631 mem, 71 NYS 1142 mem].

Oh.—Crosby v. Hill, 39 Oh. St. 100.

Vt.—Bertoli v. Smith, 69 Vt. 425, 28 A 76 (holding that one who purchases from an agent that has neither possession of the goods nor muniments of title cannot defend an action by the undisclosed principal for the price by showing that he credited the goods on a claim against the agent, supposing that he was the owner).

Eng.—Pearson v. Scott, 9 Ch. D. 198; Borries v. Imperial Ottoman Bank, L. R. 9 C. P. 38; Semenza v. Brinsley, 18 C. B. N. S. 467, 114 ECL 467, 144 Reprint 526; Rabone v. Williams, 7 T. R. 360 note, 101 Reprint 1020 note, 2 ERC 391.

See Brown v. Morris, 83 N. C. 251.

60. Miller v. Lea, 35 Md. 396, 406, 6 AmD 417 (where the court, after referring to the general rule that the third person at the suit of the principal is entitled to the benefit of all equities as against the agent when the fact of the agency is undisclosed, said: The third person "must be cautious and not act regardless of the rights of the principal . . . if he has any reasonable grounds to believe that the party with whom he deals is but an agent. Hence, if the character of the seller is equivocal—if he is known to be in the habit of selling sometimes as principal and sometimes as agent . . . and if the buyer chooses to make no inquiry, and it should turn out that he has bought of an undisclosed principal, he will be denied the benefit of his set-off. . . . If by due diligence the buyer could have known in what character the seller acted, there would be no justice in allowing the former to set-off a bad debt at the expense of the principal"); Baxter v. Sherman, 73 Minn. 434, 76 NW 211; 72 AmSR 631; Judson v. Stilwell, 26 HowPr (N. Y.) 513; Browne v. Robinson, 2 Cai. Cas. (N. Y.) 341; Cook v. Eshelby, 12 App. Cas. 271, 2 ERC 398; Baring v. Corrie, 2 B. & Ald. 137, 106 Reprint 317, 2 ERC 391; Fish v. Kempton, 7 C. B. 687, 62 ECL 687, 137 Reprint 272; Semenza v. Brinsley, 18 C. B. N. S. 467, 114 ECL 467, 144 Reprint 526; Ramazotti v. Bowring, 7 C. B. N. S. 851, 97 ECL 851, 141 Reprint 1050.

61. Butler v. Dorman, 68 Mo. 298, 30 AmR 795; Dunn v. Wright, 51 Barb. (N. Y.) 244; White v. Jaudon, 22 N. Y. Super. 415; Bliss v. Bliss, 20 N. Y. Super. 339; Hogan v. Shorb, 24 Wend. (N. Y.) 458; Hall v. Fay, etc., Co., 15 Pa. Dist. 207; Ex p. Dixon, 4 Ch. D. 133; Baring v. Corrie, 2 B. & Ald. 137, 106 Reprint 317, 2 ERC 391; Fish v. Kempton, 7 C. B. 687, 62 ECL 687, 137 Reprint 272; Semenza v. Brinsley, 18 C. B. N. S. 467, 114 ECL 467, 144 Reprint 526; Warner v. McKay, 5 L. J. Exch. 276; Morris v. Smith, 4 M. & S. 566, 105 Reprint 943. See also Factors [19 Cyc 171]. Contra as to factors see Dortic v. Jeffers, 44 S. C. L. 83.

[a] **The reason for this rule** with regard to brokers is thus stated by the court in Baring v. Corrie, 2 B. & Ald. 137, 148, 106 Reprint 317, 2 ERC 391. The broker "has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound. But it is said, that by these means, the broker would be enabled by his principal to deceive innocent persons. The answer however is obvious, that that cannot be so, unless the principal delivers over to him the possession and indicia of property."

[b] **A mere general knowledge** on the part of the third party that the person with whom he is contracting is a factor, if he also carries on business on his own account, will not be sufficient to charge the third party with notice, and he must know or have good reason to believe that such person is acting as the agent for some other person in that particular transaction. Hogan v. Shorb, 24 Wend. (N. Y.) 458; Bliss v. Bliss, 7 Bosw. (N. Y.) 347; Moore v. Clementson, 2 Campb. 22.

62. Ark.—Morton v. Scull, 23 Ark. 289.

Ga.—Barrie v. Miller, 104 Ga. 312, 30 SE 840, 69 AmSR 171; Lewis v. Equitable Mortg. Co., 94 Ga. 572, 21 SE 224; Byne v. Hatcher, 75 Ga. 289; Fruit Dispatch Co. v. Roughton-Halliburton Co., 9 Ga. A. 108, 70 SE 356.

Ill.—Briggs v. Dunne, 168 Ill. 226, 48 NE 48; O'Donnell, etc., Brewing Co. v. Farrar, 163 Ill. 471, 45 NE 283 [aff 62 Ill. A. 471]; Rockford, etc., R. Co. v. Shunick, 65 Ill. 223.

Ind.—Du Souchet v. Dutcher, 113 Ind. 249, 15 NE 459; Haskit v. Elliott, 58 Ind. 493; Madison, etc., R. Co. v. Norwich Sav. Soc., 24 Ind. 457.

Iowa.—Providence Jewelry Co. v. Fessler, 145 Iowa 74, 123 NW 957.

Me.—Pitcher v. Webber, 103 Me. 101, 68 A 593.

Md.—Wilson v. Pritchett, 99 Md. 583, 58 A 360.

Mass.—Brown v. Hartford F. Ins. Co., 117 Mass. 479.

Mich.—Shrimpton v. Netzorg, 104 Mich. 225, 62 NW 343.

Minn.—Aultman v. Olson, 34 Minn. 450, 26 NW 451.

Miss.—Mayer v. McLure, 36 Miss. 389, 72 AmD 190; Lawrence v. Hand, 23 Miss. 103.

Mo.—Barcus v. Hannibal, etc., Plank Road Co., 26 Mo. 102; Millard v. Smith, 119 Mo. A. 701, 95 SW 940.

N. H.—Concord Bank v. Gregg, 14 N. H. 331.

N. J.—Reitman v. Fiorillo, 76 N. J. L. 815, 72 A 74.

N. Y.—Smith v. Tracy, 36 N. Y. 79; Elwell v. Chamberlin, 31 N. Y. 611; Bennett v. Judson, 21 N. Y. 238; Cassard v. Hinman, 19 N. Y. Super. 8; Sandford v. Handy, 23 Wend. 260.

Pa.—McNelle v. Cridland, 168 Pa. 16, 31 A 939; Keough v. Leslie, 92 Pa. 424; Mundorff v. Wickersham, 63 Pa. 87, 3 AmR 531; Vanderslice v. Royal Ins. Co., 13 Pa. Super. 455.

S. D.—Union Trust Co. v. Phillips, 7 S. D. 225, 63 NW 903.

Tex.—Mutual Reserve L. Ins. Co. v. Seidel, 52 Tex. Civ. A. 278, 113 SW 945.

Va.—Crump v. U. S. Mining Co., 7 Gratt. (48 Va.) 352, 56 AmD 116.

W. Va.—Honaker v. Pocatalico Dist. Bd. of Education, 42 W. Va. 170, 24 SE 544, 57 AmSR 847, 32 LRA 413.

Wis.—Kickland v. Menasha Woodenware Co., 68 Wis. 34, 31 NW 471, 60 AmR 831; Law v. Grant, 37 Wis. 548. See Shepard v. Pabst, 149 Wis. 35, 135 NW 158.

Eng.—Mullens v. Miller, 22 Ch. D. 194; Foster v. Green, 7 H. & N. 881; Archer v. Stone, 78 L. T. Rep. N. S. 34.

63. Providence Jewelry Co. v. Fessler, 145 Iowa 74, 123 NW 957 (defendant, however, held not estopped); Chicago Bldg., etc., Co. v. Higginbotham, (Miss.) 29 S 79 (holding that where the third person does not rely on the false representation of the agent, but sends a representative to investigate, he cannot avoid the contract because of the fraud).

64. Advance Thresher Co. v. Roger, 123 La. 1067, 49 S 709; Roome v. Nicholson, 8 AbbPrNS (N. Y.) 343; Hackney v. Alleghany County Mut Ins. Co., 4 Pa. 185; Pennsylvania

pal as a defense.[65]

Acting for both parties. If an agent is guilty of a breach of trust in acting for both parties to a transaction without their consent to the dual agency, his primary principal is not bound,[66] and the adverse party also may repudiate the transaction.[67]

Negligence of agent. That the cause of action arose out of the negligence of the agent is a good defense to an action by the principal against a third person.[68]

[§ 564] **d. Payment to Agent as Discharging Liability—(1) Where Agency Is Disclosed.** Payment to one whose agency is known but whose authority to receive payment is not shown will not preclude the principal from recovering from the debtor where the agent has failed to account to the principal;[69] but it is otherwise where the agent has authority to receive payment.[70] A principal is not bound by the receipt in full of his agent, where it is shown that the agent was deceived by false representations of the debtor,[71] or where it is not shown that the agent had authority to compromise the debt;[72] and the principal may recover from the debtor the balance remaining due after deducting the amount paid to the agent.[73] Where a debtor has knowledge or notice that his creditor's agent has authority to receive nothing but legal tender in payment of the debt, payment to the agent in anything other than legal tender will not bind the creditor.[74]

[§ 565] **(2) Where Agency Is Undisclosed.** The general rule is that where a person contracts with one who is the agent of an undisclosed principal but who has the indicia of ownership of the property involved in the transaction, payment to such agent prior to notice of his agency is a good defense to an action thereafter brought by the principal on the contract.[75] Payment after notice of the agency, however, is at the debtor's risk.[76]

Cent. Ins. Co. v. Kniley, 2 Pearson (Pa.) 229; Delaware Mercantile Co. v. Knight, 20 LancLRev (Pa.) 141; Jesse French Piano, etc., Co. v. Garza, 53 Tex. Civ. A. 346, 116 SW 150.

65. Kempner v. Dillard, 100 Tex. 505, 101 SW 437, 123 AmSR 822; Snow v. Rudolph, (Tex. Civ. A.) 131 SW 249.

66. See supra §§ 520, 521.

67. British-America Assur. Co. v. Cooper, 6 Colo. A. 25, 40 P 147; Empire State Ins. Co. v. American Cent. Ins. Co., 138 N. Y. 446, 34 NE 200 [aff 64 Hun 485, 19 NYS 504]; Houts v. Scharbauer, 46 Tex. Civ. A. 605, 103 NW 679; Truslow v. Parkersburg Bridge, etc., R. Co., 61 W. Va. 628, 57 SE 51.

68. Brown v. St. John Trust Co., 71 Kan. 134, 138, 80 P 37 (where the court said: "Plaintiffs cannot well complain of, nor recover damages for, the neglect of their own agent").

69. Colo.—Lester v. Snyder, 12 Colo. A. 351, 55 P 613.

Ill.—Merchants' Nat. Bank v. Nichols, etc., Co., 123 Ill. A. 430 [aff 223 Ill. 41, 79 NE 38, 7 LRANS 752]; Williams v. Anderson, 107 Ill. A. 32.

Ind.—O'Conner v. Arnold, 53 Ind. 203.

Me.—Stanwood v. Trefethen, 84 Me. 295, 24 A 855; Pitts v. Mower, 18 Me. 361, 36 AmD 727.

Mo.—Butler v. Dorman, 68 Mo. 298, 30 AmR 795; Union Biscuit Co. v. Springfield Grocer Co., 143 Mo. A. 300, 126 SW 996.

N. J.—Law v. Stokes, 32 N. J. L. 249, 90 AmD 655.

N. Y.—Everdell v. Carrington, 154 App. Div. 500, 139 NYS 119; Coyle v. Brooklyn, 53 Barb. 41 [aff 41 N. Y. 619]; Realty Transfer Co. v. Kimball, 66 Misc. 185, 121 NYS 279.

Pa.—Barker v. Dinsmore, 72 Pa. 427, 13 AmR 697; Farmers', etc., Nat. Bank v. King, 57 Pa. 202, 98 AmD 215; Seiple v. Irwin, 30 Pa. 513.

See Cooper v. Farmers', etc., Bank, 68 Wash. 310, 123 P 465 (as to right of third person to show insolvency of agent and thus establish right in equity to inquire into the real nature of the dealings between principal and agent).

[a] **Payment to an agent is no defense** where the agent has neither actual nor apparent authority to collect. Zilberman v. Friedman, 54 Misc. 256, 104 NYS 363.

[b] **Assumption by an agent of a debt** due from a third party to the agent's principal, without authority from, or ratification by, the latter does not constitute payment. Piano Mfg. Co. v. Doyle, 17 N. D. 386, 116 NW 529, 17 LRANS 606. See also supra § 271.

[c] **Judgment against agent.**—Where a vendor obtains a judgment against an agent negotiating the sale for the price paid to him, thereby ratifying such payment, he cannot maintain an action against the vendee. Terry v. Buek, 40 App. Div. 419, 57 NYS 980.

Authority of agent to collect or receive payment see supra §§ 256–279.

What constitutes payment see generally Payment [30 Cyc 1173].

70. See supra § 279.

[a] **Payment of a judgment** to the judgment creditors' agent for the purpose of collecting it constitutes the satisfaction thereof. McLiesh v. Ball, 58 Wash. 690, 109 P 209, 137 AmSR 1087 and note.

71. Bayly v. Bayly, 22 La. Ann. 17.

72. Johnson v. Baugh, etc., Co., 58 Fed. 424; In re Pate, 4 Ct. Cl. 523; Brown v. Berry, 14 N. H. 459; Conklin v. Raymond, 127 App. Div. 663, 112 NYS 77 [aff 197 N. Y. 509 mem, 90 NE 1158 mem]. See also supra § 277. And see Hammons v. Bigelow, 115 Ind. 363, 17 NE 192 (holding that where plaintiff, at the request of defendant who was liable on bonds, sent the bonds to a bank for collection with instructions to receive a sum less than their face if paid at a certain time, and defendant at a later date paid an amount less than the bank was authorized to accept, for which the bank gave a release, defendant was liable for the balance, it appearing that he knew the extent of the bank's authority).

73. Conklin v. Raymond, 127 App. Div. 663, 112 NYS 77 [aff 197 N. Y. 509 mem, 90 NE 1158 mem].

74. Crowley v. McCambridge, 154 Ill. A. 135; Aultman v. Lee, 43 Iowa 404 (where payment was made to the agent in wheat); Glass v. Davidson, 1 Baxt. (Tenn.) 47 (where payment was made in current bank notes, and it was held that the creditor was not bound thereby). See also Blackburn v. Scholes, 2 Campb. 341; and supra §§ 266–271.

75. Ala.—Copeland v. Touchstone, 16 Ala. 333, 50 AmD 381.

Cal.—Lumley v. Corbett, 18 Cal. 494; Argenti v. Brannan, 5 Cal. 351.

Del.—Connally v. McConnell, 17 Del. 133, 39 A 773.

Fla.—International Harvester Co. v. Smith, 51 Fla. 220, 40 S 840.

Ga.—Rosser v. Darden, 82 Ga. 219, 7 SE 919, 14 AmSR 152; Peel v. Shepherd, 58 Ga. 365.

Ill.—Clark v. Smith, 88 Ill. 298; Saladin v. Mitchell, 45 Ill. 79; Shine v. Kennealy, 102 Ill. A. 473 (holding that, where a person dealing with another does not know that he is dealing with an agent and has no sufficient reason to know it, he will be justified in treating him as a principal, and a payment to him will avail such person in an action by the principal).

Ind.—American Window Glass Co. v. Indiana Natural Gas, etc., Co., 37 Ind. A. 439, 76 NE 1006.

Iowa.—Griffin v. Erskine, 131 Iowa 444, 109 NW 13, 9 AnnCas 1193; Dilenbeck v. Rehse, 105 Iowa 749, 75 NW 1072; Eclipse Wind Mill Co. v. Thorson, 46 Iowa 181.

Kan.—Meserve v. Hanford, 53 P 835; Thomas v. Arthurs, 8 Kan. A. 126, 54 P 694; National Mortg., etc., Co. v. Lash, 5 Kan. A. 633, 47 P 548.

Me.—Traub v. Milliken, 57 Me. 63, 2 AmR 14.

Md.—Miller v. Lea, 35 Md. 396, 6 AmD 417.

Mass.—Packer v. Hinckley Locomotive Works, 122 Mass. 484; Huntington v. Knox, 7 Cush. 371.

Mich.—Kornemann v. Monaghan, 24 Mich. 36.

Minn.—Lough v. Thornton, 17 Minn. 253.

Nebr.—Cheshire Provident Inst. v. Feusner, 63 Nebr. 682, 88 NW 849; Cheshire Provident Inst. v. Gibson, 2 Nebr. (Unoff.) 392, 89 NW 243 (holding that payment of a mortgage debt to the agent of an undisclosed principal will extinguish the debt).

N. Y.—Maxfield v. Carpenter, 84 Hun 450, 32 NYS 381; Sage v. Burton, 84 Hun 267, 32 NYS 1122; Taintor v. Prendergast, 3 Hill 72, 38 AmD 618.

Or.—Du Bois v. Perkins, 21 Or. 189, 27 P 1044.

Pa.—Schroeder v. Waters, 173 Pa. 422, 34 A 217.

R. I.—Brown v. William Clark Co., 22 R. I. 36, 46 A 239.

Eng.—Coates v. Lewes, 1 Campb. 444; Townsend v. Inglis, Holt N. P. 278; 3 ECL 116; Campbell v. Hassell, 1 Stark. 233, 2 ECL 94 (holding that a payment to a broker is good, where the name of the principal is not disclosed, although the purchaser knows that the broker sold for some unknown principal, and a del credere commission makes no difference). See also Catterall v. Hindle, L. R. 2 C. P. 368, 21 ERC 34 [rev L. R. 1 C. P. 186, 21 ERC 28]; Favenc v. Bennett, 11 East 36, 103 Reprint 917; Thornton v. Meux, M. & M. 43, 22 ECL 467. Compare Drakeford v. Piercy, 14 L. T. Rep. N. S. 403.

Que.—Huard v. Banville, 31 Que. Super. 27 (holding that a sale of goods belonging to a principal, made by the agent in his own name, the agent receiving the price, leaves the principal without recourse against the purchaser, even when the principal himself has made the shipment and delivery of the goods sold).

See Roach v. Turk, 9 Heisk. (Tenn.) 708, 24 AmR 360.

[a] **Payment varying from terms of contract** see Blackburn v. Scholes, 2 Campb. 341 (where such payment was held to be good); Campbell v. Hassell, 1 Stark. 233, 2 ECL 94 (where such payment was held to be bad).

76. Rice, etc., Malting Co. v. International Bank, 86 Ill. A. 136 [aff 185 Ill. 452, 56 NE 1902]; Warder v.

[§ 566] **2. Money or Property Wrongfully Disposed of by Agent; Following Trust Funds or Property—a. In General.** The general rule is that the principal may recover his property or its value from a third person, where it has been wrongfully transferred by his agent contrary to his authority.[77] Thus where an agent without apparent authority uses property of his principal to liquidate his own indebtedness to a third person, or otherwise disposes of it, such property or its value may ordinarily be recovered by the principal by an action of replevin or other appropriate action.[78] It is no defense to the third person that the agent is liable to the principal for his wrongful act,[79] or that the third person has promised to pay the agent for an indebtedness owing to the principal.[80]

[§ 567] **b. Right to Follow Trust Funds or Property.** Money or property intrusted to an agent for a particular purpose is impressed by the law with a trust in favor of the principal until it has been devoted to such purpose; and where it has been wrongfully diverted by the agent such trust generally follows the fund or property in the hands of a third person, and the principal is ordinarily entitled to pursue and recover it as long as it can be traced and identified.[81] Property which

White, 14 Ill. A. 50; Henderson, etc., Co. v. McNally, 48 App. Div. 134, 62 NYS 582 [aff 168 N. Y. 646 mem, 61 NE 1130 mem]; Lancaster v. Knickerbocker Ice Co., 153 Pa. 427, 26 A 251; Tuttle v. Green, 10 Vt. 62. See also Mitchell v. Bristol, 10 Wend. (N. Y.) 492 (holding that if goods are sold by an agent without disclosing his agency, and a promissory note payable to himself or bearer is taken and transferred to his principal before maturity, a payment by the maker of the note to the agent after the transfer will not prevent the principal from bringing an action for the amount).

77. U. S.—Warner v. Martin, 11 How. 209, 13 L. ed. 667; Smith v. Collins, 165 Fed. 148, 91 CCA 182 (holding that a sale after the time limit passed no title).

Ark.—Hill v. Coolidge, 33 Ark. 621.

Cal.—Wilcox-Rose Constr. Co. v. Evans, 9 Cal. A. 118, 98 P 83.

Colo.—Thatcher v. Kaucher, 2 Colo. 698.

Ga.—Harris Loan Co. v. Elliott, etc., Book-Typewriter Co., 110 Ga. 302, 34 SE 1008.

Ill.—Bertholf v. Quinlan, 68 Ill. 297.

Ind. T.—Gentry v. Singleton, 4 Ind. T. 346, 69 SW 898 [rev 3 Ind. T. 516, 61 SW 990].

Mass.—Westheimer v. State Loan Co., 195 Mass. 510, 81 NE 289.

N. H.—Burnham v. Holt, 14 N. H. 367; Holton v. Smith, 7 N. H. 446.

N. Y.—Edwards v. Dooley, 120 N. Y. 540, 24 NE 827 [aff 13 NYSt 596]; Barnard v. Campbell, 55 N. Y. 456, 14 AmR 289; Warner v. Lee, 6 N. Y. 144; Sage v. Shepard, etc., Lumber Co., 4 App. Div. 290, 39 NYS 499 [aff 158 N. Y. 672 mem, 52 NE 1126 mem]; Meiggs v. Meiggs, 15 Hun 453; Western Transp. Co. v. Marshall, 37 Barb. 509 [aff 4 Abb. Dec. 576, 4 Transcr. A. 366, 6 AbbPrNS 280]; Saltus v. Everett, 20 Wend. 267, 32 AmD 541 [aff 15 Wend. 474].

Pa.—McMahon v. Sloan, 12 Pa. 229, 51 AmD 601.

Tex.—Nash v. Noble, 46 Tex. Civ. A. 369, 102 SW 736; Low v. Moore, 31 Tex. Civ. A. 460, 72 SW 421. See also McBrayer v. Smith, (Civ. A.) 145 SW 1053.

Vt.—Bertoli v. Smith, 69 Vt. 425, 38 A 76.

Eng.—Farquharson v. King, [1902] A. C. 325 [rev [1901] 2 K. B. 697]; In re Burge, [1912] 1 K. B. 393.

Can.—Coy v. Pommerenke, 44 Can. S. C. 543 [aff 3 Sask. L. 417, 15 WestLR 542].

Ont.—Moshier v. Keenan, 31 Ont. 658; Morton v. Stone, 30 U. C. Q. B. 158.

[a] **Where an agent perverts his powers to his own personal ends** and purposes, persons who knowingly participate in such acts of perversion, as by purchasing the principal's property with knowledge that the agent intends to convert the proceeds to his own use, are not protected by the authority conferred upon the agent. Merchants', etc., Nat. Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 SE 880, 70 LRA 312.

[b] **A purchaser with notice of the principal's title** to property sold by an agent as his own acquires no title as against the principal. Lowry v. Beckner, 5 B. Mon. (Ky.) 41.

[c] **Replevin.**—A principal's right to rescind a sale, on the ground of fraud or misrepresentation in the purchase, and to maintain an action in replevin for the goods sold through an agent, is not dependent on the agent's right to extend credit or his reliance upon the representations to such agent, where it appears that the same fraudulent or misleading statements were made to a commercial agency, and came to the knowledge of the principal, and were relied upon by him in extending the credit. McCaslin v. McPherson, 19 Oh. Cir. Ct. 203, 10 Oh. Cir. Dec. 265.

78. Md.—Baltimore First Nat. Bank v. Taliaferro, 72 Md. 164, 19 A 364.

Mo.—Benoist v. Siter, 9 Mo. 657; Worthington v. Vette, 77 Mo. A. 445 (where an agent was authorized to transport goods to a storage house and take a receipt therefor in the principal's name, and after the goods had been thus stored the agent retook the goods and pledged them to a third person, exhibiting to the latter, as evidence of title on the part of the agent, a receipt from the depository; and it was held that the third person had no right to the goods as against the principal).

N. J.—Dowden v. Cryder, 55 N. J. L. 329, 26 A 941.

N. Y.—Talmage v. New York Third Nat. Bank, 91 N. Y. 531 (where a bank lent money to M, H's agent, for H, knowing that the stocks pledged as collateral belonged to H; and the bank afterward claimed the right to hold the collateral as security for further loans made to M; and it was held that H was entitled to her collateral on repayment of the amount loaned to her, as the bank was chargeable with notice of M's want of authority to borrow more money for himself); Larbig v. Peck, 69 App. Div. 170, 74 NYS 602 [aff 174 N. Y. 513 mem, 66 NE 1111 mem]; Mikles v. Hawkins, 59 App. Div. 253, 69 NYS 557.

Eng.—Bonzi v. Stewart, 4 M. & G. 295, 43 ECL 158, 134 Reprint 121.

See also infra § 570.

And see Reeves v. Smith, 1 La. Ann. 379 (holding that one who lends to an agent money for his private use, and receives from him as security for its repayment a pledge of a claim against a third person, known by the lender to belong to his principal, will be bound to account to the principal for the amount received on the claim).

Liability of bank for diversion of principal's money by agent see Banks and Banking [5 Cyc 530].

79. Bertholf v. Quinlan, 68 Ill. 297.

80. Farmers', etc., Nat. Bank v. King, 57 Pa. 202, 98 AmD 215.

81. U. S.—Union Stock-Yards Nat. Bank v. Gillespie, 137 U. S. 411, 11 SCt 118, 34 L. ed. 724; Baltimore Cent. Nat. Bank v. Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. ed. 693; U. S. v. Boston State Nat. Bank, 96 U. S. 35, 24 L. ed. 647; May v. Le Claire, 11 Wall. 217, 20 L. ed. 50; Central Stock, etc., Exch. v. Bendinger, 109 Fed. 926, 48 CCA 726, 56 LRA 875; Dow v. Berry, 18 Fed. 121; German Sav. Inst. v. Adae, 8 Fed. 106, 1 McCrary 501; Jaudan v. National City Bank, 13 F. Cas. No. 7,230, 8 Blatchf. 430; Thompson v. Perkins, 23 F. Cas. No. 13,972, 3 Mason 232; Veil v. Mitchel, 28 F. Cas. No. 16,908, 14 Wash. C. C. 105; Yates v. Curtis, 30 F. Cas. No. 18,127, 5 Mason 80.

Ala.—Lehman v. Lewis, 62 Ala. 129; Preston v. McMillan, 58 Ala. 84.

Cal.—Chapman v. Hughes, 134 Cal. 641, 58 P 298, 60 P 974, 66 P 982.

Ill.—Netterstrom v. Kemeys, 187 Ill. 617, 58 NE 609 [rev 86 Ill. A. 590]; Chicago Fifth Nat. Bank v. Hyde Park, 101 Ill. 595, 40 AmR 218; Haines v. Haines, 54 Ill. 74; Drover's Nat. Bank v. O'Hare, 18 Ill. A. 182 [aff 119 Ill. 646, 10 NE 360].

Ind.—Pearce v. Dill, 149 Ind. 136, 48 NE 788; Riehl v. Evansville Fdry. Assoc., 104 Ind. 70, 3 NE 638; Pugh v. Pugh, 9 Ind. 132; Robards v. Hamrick, 39 Ind. A. 134, 79 NE 386.

Iowa.—Gilman Linseed Oil Co. v. Norton, 89 Iowa 434, 56 NW 663, 48 AmSR 400.

Kan.—State Sav. Bank v. Thompson, 88 Kan. 461, 128 P 1120.

Ky.—Louisville Bank v. Gray, 84 Ky. 565, 2 SW 168, 8 KyL 664; Fahnestock v. Bailey, 3 Metc. 48, 77 AmD 161; Cummings v. Gerlick, 6 KyL 509.

La.—Hall v. Sprigg, 7 Mart. 243, 12 AmD 506.

Mass.—Chesterfield Mfg. Co. v. Dehon, 5 Pick. 7, 16 AmD 367; Denston v. Perkins, 2 Pick. 86.

Minn.—St. Paul Third Nat. Bank v. Stillwater Gas. Co., 36 Minn. 75, 30 NW 440.

Mo.—Evans v. Bales, 168 Mo. 673, 69 SW 360; Richardson v. St. Louis Nat. Bank, 10 Mo. A. 246.

N. Y.—Roca v. Byrne, 145 N. Y. 182, 39 NE 812, 45 AmSR 599 [aff 68 Hun 502, 22 NYS 1039]; Gerard v. McCormick, 130 N. Y. 261, 29 NE 115, 14 LRA 234 and note [aff 16 Daly 40, 8 NYS 860]; Importers, etc., Nat. Bank v. Peters, 123 N. Y. 272, 23 NE 319; Baker v. New York Nat. Exch. Bank, 100 N. Y. 31, 2 NE 452, 53 AmR 150; Dows v. Kidder, 84 N. Y. 121; Van Alen v. American Nat. Bank, 52 N. Y. 1; Strickland v. Magoun, 119 App. Div. 113, 104 NYS 425 [aff 190 N. Y. 545 mem, 83 NE 1132 mem]; Harding v. Field, 1 App. Div. 391, 37 NYS 399; Duguid v. Edwards, 50 Barb. 288; Florence Sewing Mach. Co. v. Warford, 31 N. Y. Super. 433; Keutgen v. Parks, 4 N. Y. Super. 60; Clark v. Merchants' Bank, 3 N. Y. Super. 498 [rev on other grounds 2 N. Y. 380]; Phelan v. Downs, 31 Misc. 518, 64 NYS 737 [aff 59 App. Div. 282, 69 NYS 375 (aff 173 N. Y. 619 mem, 66 NE 1115 mem)]; New York, etc., Ferry Co. v. Moore, 18 AbbNCas 106; Dexter v. Stewart, 7 Johns. Ch. 52; Bank of America v. Pollock, 4 Edw. 215; Hutchinson v. Reed, Hoffm. 316. See also American Preservers Co. v. Columbia Inv. Co., 11 Misc. 126, 31 NYS 1025 [rev 7 Misc. 509, 28 NYS 782, and aff 155 N. Y. 639 mem, 49 NE 1093 mem].

N. C.—Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 SE 949; Whitley v. Foy, 59 N. C. 34, 78 AmD 236.

he can identify, the principal can retake even in the hands of an innocent holder, since the agent can give no title when he has none; and this applies whether it is the identical property put into the hands of the agent or other property purchased by the agent with the proceeds, and even when it has been mixed with the mass of other property, if not so as to be incapable of being distinguished,[82] unless it has come into the hands of one who receives it for value, in good faith, and without notice of the trust, so as to acquire an equity therein superior to that of the principal.[83]

Burden of identification. The burden of identification is on the principal. As money has no "earmarks," he must, as against an innocent holder, be able to show that the money is his identical fund and impressed with some notice of that fact.[84] However, earmarks are only indices enabling the beneficial owner to follow his property. They are not indispensable to enable him to assert his right to the property, its product, or substitute. Evidence of substantial identity may be attached to the thing itself, or it may be extraneous.[85]

[§ 568] **c. Indicia of Authority or Ownership.** Where the principal has fraudulently or negligently intrusted property to an agent with all the indicia of authority or ownership, a third person purchasing from such agent for a valuable consideration and in entire good faith will be protected from any claims of the principal, although the agent may have been given possession of the property for a special purpose and without authority to dispose of the same.[86] In such a case redress will be denied, for the reason that where one of two inno-

Or.—Velsian v. Lewis, 15 Or. 539, 16 P 631, 3 AmSR 184.

Pa.—Farmers', etc., Nat. Bank v. King, 57 Pa. 202, 98 AmD 215.

R. I.—Greene v. Haskell, 5 R. I. 447.

Va.—Norfolk Overseers of Poor v. Commonwealth Bank, 2 Gratt. (43 Va.) 544, 44 AmD 399.

W. Va.—Stevenson v. Kyle, 42 W. Va. 229, 24 SE 886, 57 AmSR 854.

Eng.—In re Hallett, 13 Ch. D. 696; Ex p. Oursell, Ambl. 297, 27 Reprint 200; Ex p. Dumas, 1 Atk. 232, 26 Reprint 149, 2 Ves. 582, 28 Reprint 372; Pennell v. Deffell, 4 De G. M. & G. 372, 53 EngCh 292, 43 Reprint 551 [dist In re West of England, etc., Dist. Bank, 11 Ch. D. 772]; Taylor v. Plumer, 3 M. & S. 562, 105 Reprint 721; Godfrey v. Furzo, 3 P. Wms. 185, 24 Reprint 1022; Whitecomb v. Jacob, 1 Salk. 160, 91 Reprint 149; Ex p. Emery, 2 Ves. 674, 28 Reprint 430; Scott v. Surman, Willes 400, 125 Reprint 1235; Jackson v. Clarke, 1 Y. & J. 216.

Can.—Coy v. Pommerenke, 44 Can. S. C. 543 [aff 3 Sask. L. 417, 15 WestLR 542].

[a] **Extent of right.**—"The well settled principles of law entitle a principal, in all cases where he can trace his property, whether it be in the hands of the agent, or of his representatives, or assignees, to reclaim it, unless it has been transferred bona fide to a purchaser of it, or assignee for value, without notice. In such cases, it is wholly immaterial whether the property be in its original state, or has been converted into money, securities, negotiable instruments or other property; if it be distinguishable, and separable from the other property or assets; and has an ear-mark, or other appropriate identity." Norfolk Overseers of Poor v. Commonwealth Bank, 2 Gratt. (43 Va.) 544, 548, 44 AmD 399. See Scott v. Surman, Willes 400, 125 Reprint 1235 (a case where goods were consigned to an agent for sale, and he sold them and received money, and a short time afterward became bankrupt, and the court held that, if the agent did not purchase with the proceeds any specific thing capable of being distinguished from the rest of his property, the principal could not recover the whole proceeds of the sale from the assignees, but must come in with the other creditors pro rata. But if the thing purchased remains in specie in the agent's hands at the time of his bankruptcy the principal could recover the goods in trover from the assignees; or, if the agent who sold the goods for his principal became bankrupt before payment and his assignees afterward received the money for them, the principal could recover it from them in an action for money had and received; or, if the agent on such a sale had taken notes in payment from the vendee, payable to him at a future time, and his assignees afterward received the money due on the notes, the principal could recover it from the assignees in a like action).

[b] **To charge a third person** as a party to the misappropriation of a trust fund, it must be shown that he knowingly partakes in the breach of trust; "that he must know or have proof of facts which in law characterize the transaction as a breach of trust." Chicago Fifth Nat. Bank v. Hyde Park, 101 Ill. 595, 40 AmR 218.

82. U. S.—German Sav. Inst. v. Adae, 8 Fed. 106, 1 McCrary 501; Veil v. Mitchel, 28 F. Cas. No. 16,908, 4 Wash. C. C. 105.

Cal.—Wells v. Robinson, 13 Cal. 133.

Ky.—Fahnestock v. Bailey, 3 Metc. 48, 77 AmD 161.

La.—Boisblanc's Succ., 32 La. Ann. 109.

N. Y.—Edwards v. Schoharie County Nat. Bank, 47 Hun 469; Clark v. Merchants' Bank 3 N. Y. Super. 498.

N. D.—Gussner v. Hawks, 13 N. D. 453, 101 NW 898.

See Harris v. Truman, 9 Q. B. D. 264.

83. Central Stock, etc., Exch. v. Bendinger, 109 Fed. 926, 48 CCA 726, 56 LRA 875; Rio de Janeiro-English Bank v. Barr, 31 AbbNCas (N. Y.) 7. Clark v. Merchants' Bank, 2 N. Y. 380 [rev 3 N. Y. Super. 498] (holding that where the owner of a bill sends it to his correspondent to be collected and with directions to place it to his credit, and at the same time draws at sight against the fund, the title to the bill passes, so that the proceeds cannot be followed into the hands of third persons receiving them in good faith). See also cases supra note 81, and infra § 568.

84. U. S.—Central Stock, etc., Exch. v. Bendinger, 109 Fed. 926, 48 CCA 726, 56 LRA 875; Thurber v. Cecil Nat. Bank, 52 Fed. 513 [rev on other grounds 59 Fed. 913, 8 CCA 365].

Ala.—Mobile, etc., R. Co. Felrath, 67 Ala. 189.

Ga.—Watertown Steam-Engine Co. v. Palmer, 84 Ga. 386, 10 SE 969, 20 AmSR 368.

Ill.—Chicago Fifth Nat. Bank v. Hyde Park, 101 Ill. 595, 40 AmR 218; Kirby v. Wilson, 98 Ill. 240; Montgomery County v. Robinson, 85 Ill. 174; Newman v. Woolfs Clothing Co., 156 Ill. A. 377.

Ind.—Pearce v. Dill, 149 Ind. 136, 48 NE 788.

La.—Boisblanc's Succ., 32 La. Ann. 109; Whatley v. Austin, 1 Rob. 21.

N. Y.—Baker v. New York Nat. Bank, 100 N. Y. 31, 2 NE 452, 53 AmR 150.

N. C.—Whitley v. Foy, 59 N. C. 34, 78 AmD 236.

Pa.—Farmers, etc., Nat. Bank v. King, 57 Pa. 202, 98 AmD 215; Northern Liberties Bank v. Jones, 42 Pa. 536.

Tenn.—Arbuckle v. Kirkpatrick, 98 Tenn. 221, 39 SW 3, 60 AmSR 854, 36 LRA 285.

W. Va.—Perry v. Oerman, 63 W. Va. 566, 60 SE 604, 129 AmSR 1020, 15 LRANS 310 and note (holding that the doctrine that an agent disposing of the property of his principal without authority transfers no title as against the principal does not apply to currency or negotiable instruments without restrictive indorsement, where they have come into the hands of a bona fide purchaser for value without notice).

Eng.—Scott v. Surman, Willes 400, 125 Reprint 1235.

85. Roca v. Byrne, 145 N. Y. 182, 39 NE 812, 45 AmSR 599 [aff 68 Hun 502, 22 NYS 1039]; Farmers, etc., Nat. Bank v. King, 57 Pa. 202, 98 AmD 215. See also Taylor v. Plumer, 3 M. & S. 562, 105 Reprint 721.

86. U. S.—Calais Steamboat Co. v. Scudder, 2 Black 372, 17 L. ed. 282; Chicago Cent. Stock, etc., Exch. v. Bendinger, 109 Fed. 926, 48 CCA 726, 56 LRA 875.

Ark.—Winship v. Merchants' Nat. Bank, 42 Ark. 22.

Cal.—Conklin v. Benson, 159 Cal. 785, 116 P 34, 36 LRANS 537; Brewster v. Sime, 42 Cal. 139.

Ill.—Hemstreet v. Burdick, 90 Ill. 444; Koch v. Willi, 63 Ill. 144.

Iowa.—Chickering-Chase Bros. Co. v. Moulton, 107 NW 434.

Ky.—Continental Tobacco Co. v. Campbell, 76 SW 125, 25 KyL 569; Coats v. Louisville, etc., R. Co., 92 Ky. 263, 17 SW 564, 13 KyL 557.

La.—Fullerton v. Kennedy, 6 La. Ann. 312. See also Loeb v. Selig, 120 La. 192, 45 S 100.

Md.—Levi v. Booth, 58 Md. 305, 42 AmR 332.

Mass.—Dean v. Plunkett, 136 Mass. 195 (holding that if a partnership so intrusts goods belonging to it to an agent as to enable him to deal with them as his own, a person who, in ignorance of his agency, buys such goods of him under an agreement by which they are to be paid for by accounting to a third person is not liable to an action by the partnership for the price of the goods). See also Payne v. Dexter, 211 Mass. 1, 97 NE 77; Lime Rock Bank v. Plimpton, 17 Pick. 159, 28 AmD 286 (holding that, where an agent lends money of his principal as his own to a third person to whom he is indebted, the latter may apply it to the debt and retain it as against the principal, even after notice that it belongs to him).

Mich.—Ball-Barnhart-Putman Co. v. Lane, 135 Mich. 275, 97 NW 727; Walker v. Detroit Transit R. Co., 47 Mich. 338, 11 NW 187.

Miss.—Weathersby v. Pearl River Lumber Co., 88 Miss. 535, 41 S 65.

Mo.—Pacific Express Co. v. Carroll County Bank, 66 Mo. A. 275.

Nebr.—Cooper v. Cooper, 90 Nebr. 209, 133 NW 243.

N. H.—Nixon v. Brown, 57 N. H. 34.

N. Y.—Smith v. Savin, 141 N. Y. 315, 36 NE 388 [aff 69 Hun 311, 23 NYS 568, 30 AbbNCas 192]; Porges v. U. S. Mortgage, etc., Co., 135 App. Div. 484, 120 NYS 487 [rev on other grounds 203 N. Y. 131, 96 NE 424]; Simar v. Shea, 89 App. Div. 34, 85

cent parties must suffer it must be the one who made the commission of the wrong possible.[87]

The mere possession of a chattel, by whatever means acquired, if there is no other evidence of property or authority to sell, will not enable the possessor to give good title;[88] but where the agent, from the nature of his employment as an auctioneer or factor, is invested with the possession of his principal's property, the indicia of authority to sell will be presumed.[89]

When agent can give better title than he has. The general rule that no one can transfer a better title than he himself possesses is subject to certain exceptions: (1) In the case of negotiable instruments transferred by indorsement in the usual form to a bona fide holder;[90] (2) in the case of a transfer by indorsement and delivery of a bill of lading to a bona fide purchaser for value by the agent to whom the consignor and principal has indorsed and delivered it;[91] and (3) where an agent having his principal's money in his possession pays the same to a third person in a bona fide transaction.[92]

[§ 569] **d. Applications of Rules—(1) Property Bartered, Pledged, or Mortgaged.** Where an agent having only the indicia of authority to sell barters,[93] pledges,[94] or mortgages[95] his principal's property to a third person, the principal may usually recover from the third person the property or its value, as an authority to sell means a sale for cash.[96]

[§ 570] **(2) Property Used to Pay or Secure Agent's Debts.** Where an agent, as such, having a general authority to sell, transfers his principal's goods to a third person in payment of or as security for the agent's own debt, the principal may, as a general rule, recover from the third person the goods so transferred, or the value thereof;[97]

NYS 457 [aff 180 N. Y. 558 mem, 73 NE 1132 mem]; Moore v. Miller, 6 Lans. 396; Dows v. Greene, 16 Barb. 72 [aff 24 N. Y. 638]; Gearon v. Kearney, 22 Misc. 285, 50 NYS 26; Saltus v. Everett, 20 Wend. 267, 32 AmD 541; Arnold v. Halenbake, 5 Wend. 33.

Oh.—Bradley v. Fike, 12 Oh. Cir. Ct. 193, 5 Oh. Cir. Dec. 50; Bennett v. Williamson, 9 Oh. Cir. Ct. 107, 6 Oh. Cir. Dec. 59; Curtiss v. Hutchinson, 4 Oh. Dec. (Reprint) 19, 1 ClevL Rep 19.

Pa.—Quinn v. Davis, 78 Pa. 15; Barker v. Dinsmore, 72 Pa. 427, 13 AmR 697; McMahon v. Sloan, 12 Pa. 229, 51 AmD 601; Corbe v. Burkert, 43 Pa. Super. 186; Fees v. Shadel, 20 Pa. Super. 193.

S. C.—Carmichael v. Buck, 44 S. C. L. 332, 70 AmD 226. See also Willson v. Imperial Fertilizer Co., 67 S. C. 467, 46 SE 279.

S. D.—Garvin v. Pettee, 15 S. D. 266, 88 NW 573.

Tex.—Hunter v. Eastham, 95 Tex. 648, 69 SW 66; Low v. Moore, 31 Tex. Civ. A. 460, 72 SW 421; Schleicher v. Armstrong, (Civ. A.) 32 SW 327.

Eng.—Henderson v. Williams. [1895] 1 Q. B. 521, 11 ERC 105; Boyson v. Coles, 6 M. & S. 14, 105 Reprint 1148.

See also supra §§ 562, 565.

[a] **The common-law rule** as to the power of an agent to bind his principal by disposition of his goods is stated in Warner v. Martin, 11 How. (U. S.) 209, 227, 13 L. ed. 667, as follows: "'To acquire a good title to the employer's property by purchasing it from his agent, such purchase must have been, either in market overt and without knowledge of the seller's representative capacity, or from an agent acting according to his instructions, or from one acting in the usual course of his employment, and whom the buyer did not know to be transgressing his instructions,' or that he had not such notice as the law deems equivalent to raise that presumption."

Application of factors acts see Factors [19 Cyc 176 et seq].

Possession of personal property as evidence of authority to sell see supra § 230.

87. Ala.—Voss v. Robertson, 46 Ala. 483.

D. C.—Williams v. Paine, 7 App. 116.

N. H.—Towle v. Leavitt, 23 N. H. 360, 55 AmD 195.

N. Y.—Devlin v. Pike, 5 Daly 85; Root v. French, 13 Wend. 570, 28 AmD 482.

Eng.—Farquharson v. King, [1901] 2 K. B. 697; Lickbarrow v. Mason, 2 T. R. 63, 100 Reprint 35, 4 ERC 756.

88. Harris Loan Co. v. Elliott, etc., Book-Typewriter Co., 110 Ga. 302, 34 SE 1003; Levi v. Booth, 58 Md. 305, 42 AmR 332 (holding that where the owner of a valuable ring placed it in the possession of an agent, a dealer and trader in jewelry, who had no established place of business, to obtain a match for it, or, failing in that, to secure an offer for it, and the agent sold the ring, the principal could recover from the third person the value of the ring, as the principal had not clothed the agent with such indicia of property that he could convey a good title); Ball-Barnhart-Putman Co. v. Lane, 135 Mich. 275, 97 NW 727; Nichols v. Monjeau, 132 Mich. 582, 94 NW 6. See also supra § 230.

[a] **Essentials of estoppel.**—"Two things must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent. . . . 1. The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it; and, 2. The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. . . . It is not every parting with the possession of chattels or the documentary evidence of title that will enable the possessor to make a good title to one who may purchase from him. So far as such a parting with the possession is necessary in the business of life, or authorized by the custom of trade, the owner of the goods will not be affected by a sale by the one having the custody and manual possession. . . . But the owner must go farther, and do some act of a nature to mislead third persons as to the true position of the title." Barnard v. Campbell, 55 N. Y. 456, 463, 14 AmR 289.

89. Nixon v. Brown, 57 N. H. 34. See also supra § 230.

90. Lancaster Nat Bank v. Taylor, 100 Mass. 18, 97 AmD 70, 1 AmR 71; Barnard v. Campbell, 55 N. Y. 456, 14 AmR 289. See also Bills and Notes [7 Cyc 784, 924 et seq].

91. Barnard v. Campbell, 55 N. Y. 456, 14 AmR 289. See also Carriers [6 Cyc 424 et seq].

92. Mason v. Waite, 17 Mass. 560; Burnham v. Holt, 14 N. H. 367; Lang v. Smyth, 7 Bing. 284, 20 ECL 132, 131 Reprint 109.

93. Cal.—Chapman v. Hughes, 134 Cal. 641, 58 P 298, 60 P 974, 66 P 982; Lindow v. Cohn, 5 Cal. A. 388, 90 P 485.

Conn.—Kearns v. Nickse, 80 Conn. 23, 66 A 779, 10 LRANS 1118 and note, 10 AnnCas 420.

Ga.—Susong v. McKenna, 126 Ga. 433, 55 SE 236.

Ill.—Bertholf v. Quinlan, 68 Ill. 297.

Ky.—Lowry v. Beckner, 5 B. Mon. 41

Mo.—Wheeler, etc., Mfg. Co. v. Givan, 65 Mo. 89.

N. H.—Hayes v. Colby, 65 N. H. 192, 18 A 251; Taylor, etc., Organ Co. v. Starkey, 59 N. H. 142; Holton v. Smith, 7 N. H. 446.

N. Y.—Jones v. Richards, 50 Misc. 645, 98 NYS 698.

N. C.—Folb v. Firemen's Ins. Co., 133 N. C. 179, 45 SE 547; Fay, etc., Co. v. Causey, 131 N. C. 350, 42 SE 827.

Wash.—Wees v. Page, 47 Wash. 213, 91 P 766.

Eng.—Guerreiro v. Peile, 3 B. & Ald. 616, 5 ECL 354, 106 Reprint 786; Howard v. Chapman, 4 C. & P. 508, 19 ECL 624.

Ont.—Stewart v. Rounds, 7 Ont. A. 515.

94. U. S.—Warner v. Martin, 11 How. 209, 13 L. ed. 667; Thurber v. Cecil Nat. Bank, 52 Fed. 513 [rev on other grounds 59 Fed. 913, 8 CCA 365]. But see Evans v. Potter, 8 F. Cas. No. 4,569, 2 Gall. 12.

Ala.—Voss v. Robertson, 46 Ala. 483; Bott v. McCoy, 20 Ala. 578, 56 AmD 223.

Cal.—Hawxhurst v. Rathgeb, 119 Cal. 531, 51 P 846, 63 AmSR 142; Akron Cereal Co. v. San Francisco First Nat. Bank, 3 Cal. A. 198, 84 P 778.

Ga.—Macon First Nat. Bank v. Nelson, 38 Ga. 391, 95 AmD 400.

Ill.—Seaman v. Frank's Collateral Loan Bank, 170 Ill. A. 605.

Ind.—Klefer v. Klinsick, 144 Ind. 46, 42 NE 447.

Iowa.—Wycoff v. Davis, 127 Iowa 399, 103 NW 349.

Mass.—Loring v. Brodie, 134 Mass. 453; Kinder v. Shaw, 2 Mass. 398.

Mo.—Wheeler, etc., Mfg. Co. v. Givan, 65 Mo 89; Worthington v. Vette, 77 Mo. A. 445.

N. H.—Holton v. Smith, 7 N. H. 446.

N. Y.—Henry v. Marvin, 3 E. D. Smith 71.

Pa.—Sheffer v. Montgomery, 65 Pa. 329.

Tenn.—Read v. Cumberland Tel., etc., Co., 93 Tenn. 482, 27 SW 660.

Tex.—McCreary v. Gaines, 55 Tex. 485, 40 AmR 818.

Eng.—Fielding v. Kymer, 2 B. & B. 639, 6 ECL 309, 129 Reprint 1112; Fletcher v. Heath, 7 B. & C. 517, 14 ECL 233, 108 Reprint 815; McCombie v. Davies, 6 East 538, 102 Reprint 1393, 7 East 5, 103 Reprint 3; Newsom v. Thornton, 6 East 17, 102 Reprint 1189; Maanss v. Henderson, 1 East 335, 102 Reprint 130; Mehta v. Sutton, 109 L. T. Rep. N. S. 529; Boyson v. Coles, 6 M. & S. 14, 105 Reprint 1148; Paterson v. Tash, Str. 1178, 93 Reprint 1110; De Bouchout v. Goldsmid, 5 Ves. Jr. 211, 31 Reprint 551.

Authority of agent to pledge principal's property see supra § 297.

95. Hawxhurst v. Rathgeb, 119 Cal. 531, 51 P 846, 63 AmSR 142; Macon First Nat. Bank v. Nelson, 38 Ga. 391, 95 AmD 400; Switzer v. Wilvers, 24 Kan. 384, 36 AmR 259; Kempner v. Dillard, 100 Tex. 505, 101 SW 437, 123 AmSR 822.

Authority of agent to mortgage principal's property see supra §§ 295, 296.

96. See supra §§ 234, 253.

97. U. S.—Warner v. Martin, 11

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but where the agent has a lien upon his principal's goods he may secure his debt with the goods to the extent of his lien, and if the third person takes them only to that extent the principal must tender the amount of the lien due the agent before he will be entitled to recover the goods so pledged.[98]

Seizure under execution or attachment. Where property is placed in the possession of a person as agent, and he has no tangible interest in such property, and it is seized under an attachment or execution against the agent for his debt, the principal may recover it from the person making such seizure.[99] Under some statutes, however, where a person transacts business as a trader or otherwise, with the addition of the word "agent," "factor," or other like word, without disclosing the name of the principal, the property used in the business is, as to the creditors of such person, liable for his debts.[1]

[§ 571] **(3) Securities.**[2] Where an agent makes an unauthorized release or transfer of securities belonging to his principal, the latter may recover for the securities so released or transferred unless he has conferred upon the agent the usual indicia of ownership or right of disposal, and the release or transfer is to one who acts on the faith of such indicia, without notice and for a valuable consideration.[3]

[§ 572] **(4) Money Wrongfully Paid to or Appropriated by Third Person.** Where, in violation of his duty, an agent makes a payment or appropriation of his principal's money to a third person, the principal may recover from the third person the money so misapplied, unless the third person is a bona fide holder for value and without notice.[4]

Proceeds of restrictively indorsed paper. Commercial paper in the possession of an agent, as such, bearing a restrictive indorsement, will be

How. 209, 13 L. ed. 667; Merrick v. Bernard, 17 F. Cas. No. 9,464, 1 Wash. C. C. 479.

Ill.—School Trustees v. McCormick, 41 Ill. 323.

Ind. T.—Miller v. Springfield Wagon Co., 6 Ind. T. 115, 89 SW 1011.

Iowa.—Albright v Atchison, etc., R. Co., 137 Iowa 631, 115 NW 219; Wycoff v. Davis, 127 Iowa 399, 103 NW 349; Thompson v. Barnum, 49 Iowa 392; Payne v. Potter, 9 Iowa 549.

Kan.—Grubel v. Busche, 75 Kan. 820, 91 P 78.

Ky.—Renfrow v. Condor, 153 Ky. 701, 156 SW 385; Baldwin v. Tucker, 112 Ky. 282, 65 SW 841, 23 KyL 1538, 57 LRA 451.

Me.—Rodick v. Coburn, 68 Me. 170; Parsons v. Webb, 8 Me. 38, 22 AmD 220.

Mass.—Stanley v. Gaylord, 1 Cush. 536, 48 AmD 643.

Mo.—Platt v. Francis, 247 Mo. 296, 152 SW 332; Benny v. Pegram, 18 Mo. 191, 59 AmD 298; Benny v. Rhodes, 18 Mo. 147, 59 AmD 293.

N. H.—Gould v. Blodgett, 61 N. H. 115; Rice v. Lyndeborough Glass Co., 60 N. H. 195; Holton v. Smith, 7 N. H. 446.

N. J.—Bernshouse v. Abbott, 45 N. J. L. 531, 46 AmR 789.

N. Y.—Conklin v. Raymond, 127 App. Div. 663, 112 NYS 77 [aff 197 N. Y. 509 mem, 90 NE 1158 mem]; Barnett v. Daw, 55 App. Div. 202, 66 NYS 880; Henry v. Marvin, 3 E. D. Smith 71.

N. C.—Hoffman v. Kramer, 128 N. C. 566, 31 SE 828.

Oh.—Murdock v. National Tube Works Co., 7 Oh. Dec. (Reprint) 465, 3 CincLBul 409, 1 ClevLRep 147; National Express Co. v. Hough, 3 OhS& CP 169, 3 OhNP 289.

S. D.—Clow-Schaaf Lumber Co. v. Kass, 30 S. D. 497, 501, 138 NW 1120 [cit Cyc].

Tex.—Low v. Moore, 31 Tex. Civ. A. 460, 72 SW 421.

Vt.—Bertoli v. Smith, 69 Vt. 425, 38 A 76; Stewart v. Woodward, 50 Vt. 78, 28 AmR 488.

W. Va.—Stevenson v. Kyle, 42 W. Va. 229, 24 SE 886, 57 AmSR 854.

Wis.—Roberts v. Francis, 123 Wis. 78, 100 NW 1079; Whitney v. State Bank, 7 Wis. 620.

Eng.—Maanss v. Henderson, 1 East 335, 102 Reprint 130; Martini v. Coles, 1 M. & S. 140, 105 Reprint 53; Paterson v. Tash, Str. 1178, 93 Reprint 1110; De Bouchout v. Goldsmid, 5 Ves. Jr. 211, 31 Reprint 551.

N. S.—Garden v. Neily, 31 N. S. 89. See also Hickman v. Baker, 31 N. S. 208.

See also supra § 234.

[a] **Knowledge of third person necessary.**—To make one liable by reason of participation in the misuse of money of the principal by an agent, upon the ground that it was used to pay the private debt of the agent, it is necessary to show, not only that the party sought to be charged was aware that the money belonged to the principal, but also that he was aware that the debt paid by it was in fact a private debt of the agent, or such a debt that payment thereof could not lawfully be made out of such money. Perry v. Oerman, 68 W. Va. 566, 60 SE 604, 129 AmSR 1020, 15 LRANS 310 and note.

[b] **Fund deposited in agent's name.**—Where a banker with knowledge accepts funds from an agent on deposit in the agent's name, he may not retain the deposit to satisfy a debt of the agent. Robards v. Hamrick, 39 Ind. A. 134, 79 NE 386; Wheeler v. Citizens' Nat. Bank, 107 SW 316, 32 KyL 939; Douglas v. Hastings First Nat. Bank, 17 Minn. 35. See generally Banks and Banking [5 Cyc 550].

98. Warner v. Martin, 11 How. (U. S.) 209, 13 L. ed. 667; Ambrose v. Evans, 66 Cal. 74, 4 P 960; McCombie v. Davies, 7 East 5, 103 Reprint 3; Daubigny v. Duval, 5 T. R. 604, 101 Reprint 338.

99. Cal.—Nicholls v. Mapes, 1 Cal. A. 349, 82 P 265.

Ill.—Loomis v. Barker, 69 Ill. 360; Reed v. Kimsey, 98 Ill. A. 364.

La.—Benner v. Michel, 23 La. Ann. 489.

Mass.—Selkirk v. Cobb, 13 Gray 313.

N. Y.—Jacob v. Watkins, 10 App. Div. 475, 42 NYS 6.

Pa.—Farmers', etc., Nat. Bank v. King, 57 Pa. 202, 98 AmD 215.

Vt.—Hall v. Williams, 27 Vt. 405; Waldo v. Peck, 7 Vt. 434.

See also Attachment [4 Cyc 564]; Executions [17 Cyc 1974].

[a] **Principal estopped by knowledge and acquiescence.**—(1) Where a principal has full knowledge of supplemental proceedings against his agent, where the property of the principal in the hands of the agent is sought to be applied as the property of the agent to the payment of a judgment against him, and such principal fails to intervene or otherwise protect his interests, he will be estopped from complaining if a loss ensues. Murne v. Schwabacher, 2 Wash. T. 191, 3 P 270. (2) In Reed v. McIlroy, 44 Ark. 346, 348, the court said: "In a proper case a creditor may subject what is only apparently the property of an agent to the payment of his debt;" and it was held that such a proper case would arise where the creditor had been misled by appearances or by the conduct of the parties into giving the agent credit upon a false basis. To same effect Benner v. Michel, 23 La. Ann. 489.

[b] **In hands of receiver.**—Goods bought by an agent for his principals, for which he was to be paid a commission, are the property of the principals even when bought in the name of the agent and may be recovered by them from a receiver for the benefit of creditors. In re Lemelin, 22 Que. Super. 87.

1. See statutory provisions. See also Dale v. Harrahan, 85 Miss. 49, 37 S 458; Meridian Land, etc., Co. v. Ormond, 82 Miss. 758, 35 S 179; Willis v. Memphis Grocery Co., (Miss.) 19 S 101 (construing Code [1892] § 4234); Quin v. Myles, 59 Miss. 375 (construing Code § 1300); Gumbel v. Koon, 59 Miss. 264; Hoge v. Turner, 96 Va. 624, 32 SE 291 (construing Code [1887] § 2877); Morris v. Clifton Forge Grocery Co., 46 W. Va. 197, 32 SE 997 (construing Code c 100 § 13); Brown Mfg. Co. v. Deering, 35 W. Va. 255, 13 SE 383 (construing Code p 704 § 13, and holding that this statute does not apply to a licensed auctioneer or to a commission merchant).

2. See generally Bills and Notes [7 Cyc 924].

3. Cal.—Brewster v. Sime, 42 Cal. 139.

Md.—Prichard v. Abbott, 104 Md. 560, 65 A 421.

N. Y.—Crocker v. Crocker, 31 N. Y. 507, 88 AmD 291; Edwards v. Schoharie County Nat. Bank, 47 Hun 469, 13 NYSt 253 [aff 114 N. Y. 620 mem, 21 NE 415 mem]; Gearon v. Kearney, 22 Misc. 285, 50 NYS 26; Buffalo Commercial Bank v. Kortright, 22 Wend. 348, 34 AmD 317.

Pa.—Montgomery v. Pittsburg Lodge No. 336, 31 PittsbLegJNS 295.

S. D.—Garvin v. Pettee, 15 S. D. 266, 88 NW 573.

Authority to release or transfer securities see supra §§ 277, 278, 298–301.

[a] **Transfer by agent of negotiable notes payable to principal.**—In Robinson v. Anderson, 106 Ind. 152, 6 NE 12, it was held that where an agent with mere authority to sell goods and take notes payable to his principal in settlement, and to collect such notes as may be sent to him for collection, surrenders to the maker before they are due, without the consent of his principal, notes belonging and payable to the latter, and receives therefor notes of like amount, maturing at the same dates, and payable to himself, the principal is not bound by the transaction, and may recover on the original notes.

[b] **Negotiable paper in the hands of innocent holders is like money.** It cannot be followed. Clark v. Merchants' Bank, 2 N. Y. 380 [rev 1 Sandf. 498]; Perry v. Oerman, (W. Va. 1908) 60 SE 604; Ex p. Watson, 4 Dear. & C. 45.

4. U. S.—U. S. v. Boston State Nat. Bank, 96 U. S. 30, 24 L. ed. 647; Manhattan Web Co. v. Aquidneck Nat. Bank, 133 Fed. 76; Bills v. Schliep, 127 Fed. 103, 62 CCA 103; Lamson v. Beard, 94 Fed. 30, 36 CCA 56, 45 LRA 822; Bank of Commerce v. Russell, 2 F. Cas. No. 884, 2 Dill. 215; Hourquebie v. Girard, 12 F. Cas. No. 6,732, 2 Wash. C. C. 212; St. Louis v. John-

notice to all persons subsequently dealing with it that it was intended for a special purpose, and, unless it appears to the contrary, that the principal does not intend to transfer the title or ownership of the proceeds thereof; a third person, therefore, who appropriates the proceeds of such paper to another than its designated object, will be liable to the principal for such misappropriation.[5]

[§ 573] **(5) Money Lost on Wager Contracts.** Where an agent as a party to a gambling transaction loses his principal's money therein, the principal may recover from the winner the amount so lost.[6]

[§ 574] **(6) Money Paid under Mistake of Fact.** Where an agent under a mistake of fact makes a payment of his principal's money to a third person, which ought not to have been made, the third person will be liable to the principal for the money so received.[7]

[§ 575] **3. In Tort—a. In General.** As a general rule the principal may recover for injuries committed by a third person to his property or interests while in the hands of his agent, in the same manner and to the same extent as though such agency did not exist, and as if he had individually dealt with such third person,[8] whether such injury is committed by fraud and deceit,[9] negligence,[10] or trespass.[11] Likewise the principal has a cause

son, 21 F. Cas. No. 12,235, 5 Dill. 241.

Ala.—Childers v. Bowen, 68 Ala. 221.

Cal.—California Steam Nav. Co. v. Wright, 8 Cal. 585; Smith v. Farmers', etc., Bank, 2 Cal. A. 377, 84 P 348 (holding that, where an agent, having money due the principal, pays it to a third person, who knows how the agent held the money, he takes it for the use and benefit of the principal who may maintain an action for it against him).

Hawaii.—Ing Choi v. Ung Sing, 8 Hawaii 498.

Ill.—Leigh v. American Brake-Beam Co., 205 Ill. 147, 68 NE 713; Schools of Tp. No. 40 v. McCormick, 41 Ill. 323; Rusk v. Newell, 25 Ill. 226. See also St. Mary's African M. E. Church v. German Lutheran Church, 167 Ill. A. 307.

Ind.—Porter v. Roseman, 165 Ind. 255, 74 NE 1105, 112 AmSR 222, 6 AnnCas 718.

Kan.—Guernsey v. Davis, 67 Kan. 378, 73 P 101; Peak v. Ellicott, 30 Kan. 156, 1 P 499, 46 AmR 90.

La.—Boisblanc's Succ., 32 La. Ann. 109.

Md.—Prichard v. Abbott, 104 Md. 560, 65 A 421.

Mass.—Blum v. Whipple, 194 Mass. 253, 80 NE 501, 13 LRANS 211, 120 AmSR 553; Merrill v. Norfolk Bank, 19 Pick. 32; Mason v. Waite, 17 Mass. 560.

Mich.—Neely v. Rood, 54 Mich. 134, 19 NW 920, 52 AmR 802.

N. J.—Demarest v. New Barbadoes Tp., 40 N. J. L. 604.

N. Y.—Gerard v. McCormick, 16 Daly 40, 8 NYS 860 [aff 130 N. Y. 261, 29 NE 115] (where the third person was put on inquiry as to the agent's authority); Amidon v. Wheeler, 3 Hill 137 (holding that, where an agent pays out his principal's money on a debt of a third person, the creditor knowing the facts when the payment is made to him, the principal may recover the amount from such creditor in an action for money had and received).

Oh.—National Express Co. v. Hough, 3 OhS&CP 169, 3 OhNP 289.

Pa.—Frazier v. Erie Bank, 8 Watts & S. 18; Young, etc., Co. v. Glendenning, 8 Pa. Dist. 57, 22 Pa. Co. 113. See also Farmers', etc., Nat. Bank v. King, 57 Pa. 202, 98 AmD 215 (holding that, where a principal can show that his money has been placed in the hands of another by his agent, it is no objection to his claim that that other has promised to pay it to the agent).

Va.—Norfolk Overseers of Poor v. Com. Bank, 2 Gratt. (43 Va.) 544, 44 AmD 399.

Eng.—Grant v. Gold Exploration, etc., Syndicate, [1900] 1 Q. B. 233; Cohen v. Kuschke, 83 L. T. Rep. N. S. 102; Hovenden v. Millhoff, 83 L. T. Rep. N. S. 41.

Ont.—Peacock v. Crane, 3 DomLR 645, 3 OntWN 1184, 21 OntWR 990.

[a] **Extent of principal's right of recovery.**—(1) The principal must be able to point out his fund or the proceeds derived from it and to trace it through its transformations so as to show that it is not a fund or product to which all other creditors of the delinquent might have an equal right to resort. Illinois Trust, etc., Bank v. Buffalo First Nat. Bank, 15 Fed. 858, 21 Blatchf. 275. (2) And the right of the principal ceases only when the means of ascertainment fail. Van Alen v. American Nat. Bank, 52 N. Y. 1 [rev 3 Lans. 517]; Norfolk Overseers of Poor v. Commonwealth Bank, 2 Gratt. (43 Va.) 544, 44 AmD 399. See also supra § 567.

[b] **Where an agent to collect money lends it to his own creditor** without informing him that it is his principal's money, the principal cannot recover it of the creditor, even after notice that it belonged to him. Lime Rock Bank v. Plimpton, 17 Pick. (34 Mass.) 159, 28 AmD 286.

5. U. S.—Sweeny v. Easter, 1 Wall. 166, 17 L. ed. 681; Circleville First Nat. Bank v. Monroe Bank, 33 Fed. 408; In re Armstrong, 33 Fed. 405; Levi v. Missouri Nat. Bank, 15 F. Cas. No. 8,289, 5 Dill. 104.

Ind.—Crown Point First Nat. Bank v. Richmond First Nat. Bank, 76 Ind. 561, 40 AmR 261.

Md.—Cecil Bank v. Farmers' Bank, 22 Md. 148.

Mich.—McBain v. Seligman, 58 Mich. 294, 25 NW 197.

N. Y.—McBride v. Salem Farmers' Bank, 25 Barb. 657, [aff 26 N. Y. 450].

R. I.—Blaine v. Bourne, 11 R. I. 119, 23 AmR 429.

Tex.—Sherman Bank v. Weiss, 67 Tex. 331, 3 SW 299, 60 AmR 29.

Eng.—Sigourney v. Lloyd, 8 B. & C. 622, 15 ECL 308, 108 Reprint 1174, 4 ERC 853 [aff 5 Bing. 525, 15 ECL 704, 130 Reprint 1164]; Treuttel v. Barandon, 8 Taunt. 100, 4 ECL 59, 129 Reprint 320.

[a] **Indorsement not indicating restriction.**—Where the principal has invested the agent with what appears to the world as an absolute title by an indorsement in blank, with nothing to excite inquiry or suspicion, an innocent third person dealing with such agent as owner will be protected. Morris v. Preston, 93 Ill. 215; Hackett v. Reynolds, 114 Pa. 328, 6 A 689.

6. U. S.—Chicago Central Stock, etc., Exch. v. Bendinger, 109 Fed. 926, 48 CCA 726, 56 LRA 875.

Ariz.—Ramirez v. Main, 11 Ariz. 43, 89 P 508.

Mass.—Mason v. Waite, 17 Mass. 560.

N. Y.—Caussidiere v. Beers, 2 Keyes 198.

S. C.—Allen v. Watson, 20 S. C. L. 319.

Utah.—Thompson v. Hynds, 15 Utah 389, 49 P 293.

See also Gaming [20 Cyc 950].

7. Stevenson v. Mortimer, Cowp. 805, 806, 98 Reprint 1372 (where Lord Mansfield said: "Where a man pays money by his agent, which ought not to have been paid, either the agent, or principal, may bring an action to recover it back. The agent may, from the authority of the principal; and the principal may, as proving it to have been paid by his agent"); Ancher v. Bank of England, 2 Dougl. 637, 99 Reprint 404.

Agent's right to recover money paid under mistake see supra § 506.

[a] **Illegal fees exacted of agent.**—It seems that where illegal fees are exacted from the agent the principal may recover them from the person demanding and receiving the same, as well as a penalty for such exaction where the penalty is imposed by statute. Holman v. Frost, 26 S. C. 290, 2 SE 16.

8. Ala.—Southern R. Co. v. Jones, 132 Ala. 437, 31 S 501.

Me.—Cutter v. Copeland, 18 Me. 127.

Mass.—White v. Dolliver, 113 Mass. 400, 18 AmR 502.

N. Y.—Cary v. Hotailing, 1 Hill 311, 37 AmD 323; Faulkner v. Brown, 13 Wend. 63.

Oh.—Greenfield First Nat. Bank v. Marietta, etc., R. Co., 20 Oh. St. 259, 5 AmR 655.

Eng.—Wilbraham v. Snow, 2 Saund. 47, 85 Reprint 624.

9. U. S.—Glaspie v. Keator, 56 Fed. 203, 5 CCA 474.

Ind.—Pattison v. Barnes, 26 Ind. 209; Cramer v. Wright, 15 Ind. 278.

Mass.—Boston v. Simmons, 150 Mass. 461, 23 NE 210, 15 AmSR 230, 6 LRA 629.

N. Y.—Robertson v. Ketchum, 11 Barb. 652; Culliford v. Gadd, 60 N. Y. Super. 343, 17 NYS 457 [aff 139 N. Y. 618 mem, 35 NE 205 mem]; Raymond v. Howland, 12 Wend. 176.

Wis.—Ward v. Borkenhagen, 50 Wis. 459, 7 NW 340.

Eng.—Grant v. Gold Exploration, etc., Syndicate, [1900] 1 Q. B. 233; Salford v. Lever, [1891] 1 Q. B. 168.

See Perkins v. Evans, 61 Iowa 35, 15 NW 584.

[a] **Principal denying agency.**—It is not competent for the principal to deny the agency, and to deny his responsibility to the agent for the loss, and still take advantage of representations made to the agent and sue the person making such representations for damages. U. S. Mortgage, etc., Co. v. Crutcher, 169 Mo. 444, 69 SW 380.

10. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 344, 12 L. ed. 465; Central Georgia R. Co. v. James, 117 Ga. 832, 45 SE 223 (holding that in an action for tort brought against a railway company to recover damages for failure to safely transport live stock, plaintiff can show that the delivery was made to the carrier by him through an agent; although such agent made the shipment in his own name, without disclosing the fact that he was acting in behalf of plaintiff); Feaver v. Montreal Tel. Co., 24 U. C. C. P. 258.

11. Ill.—Loomis v. Barker, 69 Ill. 360.

Mass.—Holly v. Huggeford, 8 Pick. 73, 19 AmD 303 (holding that trespass by the owner of goods consigned to a factor who has a lien thereon for a balance due him from the owner will lie against the officer who attaches the goods as the property of the factor).

N. Y.—Thorp v. Burling, 11 Johns. 285.

Vt.—Waldo v. Peck, 7 Vt. 434.

Eng.—Manders v. Williams, 4 Exch. 339.

[a] **Owner who has temporarily parted with possession.**—Where the owner of property has by contract parted with the possession for a given

of action against a third person for wrongfully detaining his property, where it has been improperly diverted by his agent, whether the third person knew or was charged with knowledge that the agent was without authority to so act in the premises, or whether he took the property in good faith and for value, and in such action the principal may recover the property or its value.[12]

[§ 576] **b. For Causing Loss of Agent's Service.** A third person who willfully and wrongfully interferes with an agent and entices and induces him to abandon the performance of his duty to his principal is liable in damages in an action by the principal.[13] Likewise, the principal has a right of action against a third person for personal injuries to his agent inflicted by such person, where some loss of service or capacity to fulfill the contract of agency results therefrom.[14] The principal also has a cause of action against a third person for wrongfully interfering with his agent, and thereby preventing him from performing his duty to his principal according to the terms of the contract whereby the principal is damaged.[15]

XIII. ACTIONS[16]

[§ 577] **A. Form of Action; Remedies—1. Actions by Principal against Agent—a. In General; Assumpsit.**[17] Ordinarily assumpsit is a proper form of action for money had and received by an agent for his principal.[18] For a breach or omission of a duty which the agent owes the principal, he may be sued by the latter in assumpsit for breach of the agency contract, or in a special action on the case for the tort,[19] as for money which the agent should have received, but which from neglect of his duty he did not.[20] Thus where an agent is guilty of conversion of the principal's property or money the principal may waive the tort and sue the agent in assumpsit for the value of the property or for money had and received,[21] and, if an agent holds money or property belonging

time, he cannot maintain an action for trespass against one who takes such property from the person who is entitled to it, while the contract is in force. Soper v. Sumner, 5 Vt. 274.

12. Colo.—Thatcher v. Kaucher, 2 Colo. 698.

Ill.—Bertholf v. Quinlan, 68 Ill. 297 (holding that, where an agent exchanges the property of his principal without authority, the fact of his liability to the principal will afford no ground for defeating an action of trover brought by the principal against the party receiving the same from the agent, or release his liability to the owner after his refusal to deliver the same on demand).

Iowa.—Thompson v. Barnum, 49 Iowa 392.

Kan.—Guernsey v. Davis, 67 Kan. 378, 73 P 101 (holding that one who actively participates in an agent's breach of trust, with full knowledge of the agent's duty, and obtains possession of the principal's money, incurs the same liability to the principal as does the agent).

Me.—Galvin v. Bacon, 11 Me. 28, 25 AmD 258.

Md.—Levi v. Booth, 58 Md. 305, 42 AmR 332.

Mass.—Gilmore v. Newton, 9 Allen 171, 85 AmD 749; Peters v. Ballistier, 3 Pick. 495; Kingman v. Pierce, 17 Mass. 247.

Mo.—White Sewing Mach. Co. v. Betting, 46 Mo. A. 417.

N. H.—Holton v. Smith, 7 N. H. 446.

N. Y.—Robertson v. Ketchum, 11 Barb. 652; Armstrong v. Tufts, 1 Edm. Sel. Cas. 367 (holding that where goods in the hands of an agent are fraudulently obtained from him under pretense of a purchase, and he is induced after knowledge of the fraud to take notes for the amount, the owner may rescind the contract and sue for the tort).

Or.—Velsian v. Lewis, 15 Or. 539, 16 P 631, 3 AmSR 184.

Pa.—Quinn v. Davis, 78 Pa. 15; Sheffer v. Montgomery, 65 Pa. 329; McMahon v. Sloan, 12 Pa. 229, 51 AmD 601.

Tenn.—Foster v. Smith, 2 Coldw. 474, 88 AmD 604.

Eng.—Cole v. North Western Bank, L. R. 10 C. P. 354; Taylor v. Plumer, 3 M. & S. 562, 105 Reprint 721.

Can.—Coy v. Pommerenke, 44 Can. S. C. 543 [aff 3 Sask. L. 417, 15 WestLR 542].

See Ft. Worth, etc., R. Co. v. Caruthers, (Tex. Civ. A.) 157 SW 238.

13. See Master and Servant [26 Cyc 1580]; Torts [38 Cyc 501].

14. Ames v. Union R. Co., 117 Mass. 541, 19 AmR 426. See also Master and Servant [26 Cyc 1580].

15. Woodward v. Washburn, 3 Den. (N. Y.) 369.

16. **Abatement of action** see Abatement and Revival, 1 C. J. 15, and cross references thereunder.

Appearance see Appearances [3 Cyc 500].

Discovery and inspection see Discovery [14 Cyc 301].

Joinder of causes of action see Actions §§ 188–307, and cross references thereunder.

Jurisdiction of courts in general see Courts [11 Cyc 633].

Laches see Equity [16 Cyc 150 et seq].

Limitation of actions see Limitations of Actions [25 Cyc 1078 et seq, 1185, 1201, et seq].

Process see Process [32 Cyc 412].

Set-off and counterclaim generally see Recoupment, Set-Off, and Counterclaim [34 Cyc 618]. Right of agent against principal see supra § 405. Right of principal against agent see supra § 448. Right of third person against agent see supra § 508. Right of third person against principal see supra § 561.

Venue see Venue [40 Cyc 1].

17. **Assumpsit** see generally Assumpsit, Action of [4 Cyc 317].

Nature of remedy against agent for violating instructions see supra § 379.

18. Conn.—Pettibone v. Pettibone, 4 Day 175; Wetmore v. Woodbridge, Kirby 164.

D. C.—Harr v. Roome, 28 App. 214.

Ga.—Merchants' Bank v. Rawls, 7 Ga. 191, 50 AmD 394.

Ill.—Larrabee v. Badger, 45 Ill. 440.

Ind.—Ferguson v. Ramsey, 41 Ind. 511; Peyton v. Bowell, 1 Blackf. 244.

Ky.—Ellis v. Henry, 5 J. J. Marsh. 247.

Mass.—Colt v. Clapp, 127 Mass. 476; Clark v. Moody, 17 Mass. 145.

Mich.—Schmemann v. Rothfuss, 46 Mich. 453, 9 NW 489.

Mo.—Houx v. Russell, 10 Mo. 246 (holding that an action for money had and received will lie against an attorney who, having a debt for collection, receives in payment money demands on himself, or on others, without authority from his principal).

Pa.—Richey v. Hathaway, 149 Pa. 207, 24 A 191; Wagner v. Peterson, 83 Pa. 238; Smith v. Austin, 4 Brewst. 89.

Eng.—Poulter v. Cornwall, 1 Salk. 9, 91 Reprint 9.

[a] **A receipt for a note for "collection,"** no more being said, does not ex vi termini imply a covenant to pay over the money; but the law implies an agreement to pay it over in a reasonable time after it is collected, on which indebitatus assumpsit will lie. Atcherson v. Talbot, 5 Dana (Ky.) 324.

19. Sandoval v. Randolph, 232 U. S. 161, 32 SCt 48, 56 L. ed. 142 [aff 11 Ariz. 371, 95 P 119] (holding that a principal betrayed by his agent into paying for property an excess over the price for which the agent obtained it may declare in assumpsit without relying upon fraud and deceit in an action for damages). See Actions § 147.

20. Stewart v. Conner, 9 Ala. 803; Gordon v. Camp, 2 Fla. 422, 426 (where the court said: "It is contended here that case and not assumpsit should have been brought by plaintiffs, because an unpaid agent undertaking to perform anything is only liable to the first action (case) for damages resulting from the manner of his performance, and that there is no contract; that the defendant was a mere bailee without reward, and must have been guilty of gross negligence to render him liable as a mandatary, and then case would have been the remedy. All this is no doubt correct upon the ground that there is no contract, and if in this case there is no contract, express or implied, the action of assumpsit cannot be sustained. Assumpsit will frequently lie, however, where there has been nonfeasance, misfeasance, or malfeasance; for the plaintiff may waive the tort and rely on circumstances as forming a breach of promise"); Allen v. Brown, 44 N. Y. 228 [aff 51 Barb. 86]; Paul v. Grimm, 165 Pa. 139, 30 A 721, 44 AmSR 648.

[a] **A gratuitous agent** cannot be sued for money had and received, if he never received any, although he failed to get it because of his gross negligence or even bad faith. Herrick v. Hodges, 13 Cal. 431. See also supra § 499 as to liability of an agent for nonfeasance.

[b] **Where an agent in possession of goods sells on credit,** when he should have sold for cash only, the proper remedy against him is not trover, but an action on the case for violation of instructions or breach of contract. Loveless v. Fowler, 79 Ga. 134, 4 SE 103, 11 AmSR 407.

21. Ala.—Strickland v. Burns, 14 Ala. 511.

Ind.—Jones v. Gregg, 17 Ind. 84.

Kan.—Challiss v. Wylie, 35 Kan. 506, 11 P 438.

N. J.—Seidel v. Peschkaw, 27 N. J. L. 427.

N. Y.—Greentree v. Rosenstock, 61 N. Y. 583; Colt v. Stewart, 50 N. Y. 17; Conaughty v. Nichols, 42 N. Y. 83; Ridder v. Whitlock, 12 HowPr 208.

Oh.—Isaac Harter Co. v. Pearson, 26 Oh. Cir. Ct. 601.

Pa.—Reeside v. Reeside, 49 Pa. 322, 88 AmD 503.

See also Actions § 147.

[a] **Where an agent sells to him-**

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to his principal, the latter may bring an action of special assumpsit for the recovery thereof, if there is an express contract by the agent to pay; otherwise an action of implied assumpsit will lie.[22] The agent may also be sued in assumpsit for property or money wrongfully received from a third person and for which he is under obligation to account to his principal.[23]

But where the agent receives money from the principal which he is to disburse and account for, assumpsit as upon an implied promise to repay will not lie,[24] except in a case where the agent converts the money to his own use.[25]

Separate actions. Where several claims are in the hands of an agent for collection he is liable to separate actions for each claim as collected;[26] and, although at the time of the commencement of an action for money collected on one claim other claims had also been collected, a recovery in such action is not a bar to subsequent actions for the money received on the other claims.[27]

Fraud and deceit. The relation of principal and agent does not prevent the principal from maintaining an action of tort against the agent for fraud and deceit.[28]

[§ 578] **b. Trover.**[29] Where an agent converts money or property of the principal to his own use, the principal may maintain an action of trover against him in like manner as against a third person.[30]

self the principal's property, the latter may waive the tort, treat the conversion as a purchase, and recover in assumpsit the value of the property at the time of such conversion, with interest from the date thereof. Anderson v. Grand Forks First Nat. Bank, 5 N. D. 80, 64 NW 114.

[b] **Property in agent's hands regarded as money.**—Where one is the agent of another to collect two promissory notes, and he disposes of them to his own use, one in the purchase of land, and the other of personal property, the land and other property may be regarded in his hands as money, and assumpsit maintained for it. Strickland v. Burns, 14 Ala. 511.

22. Del.—Guthrie v. Hyatt, 1 Del. 446.

Ind.—English v. Devarro, 5 Blackf. 588.

Ky.—Coleman v. Cason, 3 J. J. Marsh 234 (holding that indebitatus assumpsit is the appropriate remedy against an agent to recover plaintiff's share of money collected for plaintiff and others).

Mass.—Floyd v. Day, 3 Mass. 403, 3 AmD 171.

Mich.—Tanner v. Page, 106 Mich. 155, 63 NW 993.

Mo.—Houx v. Russell, 10 Mo. 246.

N. Y.—Wright v. Duffie, 23 Misc. 338, 51 NYS 255 (holding that where an agent is authorized to sell property and collect the proceeds, and refuses to pay over such proceeds, an action to hold him upon this liability is an ordinary action on contract, and not one for a conversion).

N. C.—McNair v. McKay, 33 N. C. 602.

Pa.—Paton v. Clark, 156 Pa. 49, 27 A 116; Campbell v. Boggs, 48 Pa. 524; Glenn v. Cuttle, 2 Grant 273.

Vt.—Kellogg v. Griswold, 12 Vt. 291 (holding that assumpsit may be maintained against an agent when he promises to render an account).

[a] **Summary procedure,** under C. P. art 1150 subsections 3, 7, by principal to be reimbursed by salesman for the amount of overpaid commission see Office Specialty Co. v. Muir, 11 Que. Pr. 44.

23. Brown v. Stair, 25 Colo. A. 140, 136 P 1003 (holding that, where an agent to collect a money demand, due to his principal and himself jointly, accepts land in satisfaction thereof without authority, he and his executrix are estopped to object, when sued in assumpsit by the principal for his share, that assumpsit for money had and received would not lie, and that some other remedy should have been adopted); Schick v. Suttle, 94 Minn. 135, 102 NW 217.

[a] **An agent who makes a secret profit** (1) in the execution of his agency may be compelled to pay the same to his principal in an action on an implied promise. Sandoval v. Randolph, 222 U. S. 161, 32 SCt 48, 56 L. ed. 142 [aff 11 Ariz. 371, 95 P 119]. (2) Thus, where a profit made by an agent is the result of a fraudulent violation of his duties to his principal, the fraud may be waived, and a recovery had thereon as on an implied contract or for money had and received. Schick v. Suttle, 94 Minn. 135, 102 NW 217.

[b] **Commission paid agent by other party.**—Morison v. Thompson, L. R. 9 Q. B. 480.

24. Avery v. Kinsman, Kirby (Conn.) 354; Reeside v. Reeside, 49 Pa. 322, 88 AmD 503; Gallagher v. Gallagher, 6 Phila. (Pa.) 528; Hartup v. Wardlove, 2 Show. 301, 89 Reprint 952 (where Justice Jones held that "an indebitatus assumpsit lies not against a man where he has received money of the plaintiff to lay out to a particular use, and he has laid out part thereof accordingly; for then he ought to be called to account for the same by action of account; but if none were laid out, there an indebitatus assumpsit lies to recover back the money again; so if it were expended to another purpose, for there the sum is certain, and may be demanded as a debt").

[a] **Where balance must be ascertained.**—In Reeside v. Reeside, 49 Pa. 322, 332, 88 AmD 503, the court said: "This, I take it, is the true ground of distinction in such cases, by which we determine whether the action should be assumpsit or account render, to wit, the duty to pay, or to account; a distinction inhering in the very nature of the undertaking itself. When the promise, expressed or implied, involves the duty of direct payment to the plaintiff, assumpsit is the proper form of action; as where a coobligee or co-tenant receives the whole sum to which both are entitled: Gillis v. McKinney, 6 Watts & S. (Pa.) 78. But where the duty is not direct, but one of outlay in the performance of a trust or business which from its nature requires an exhibit of the sums expended, before the direct duty can arise, the legal requirement is to render an account, and assumpsit will not lie till the balance be ascertained."

25. Guernsey v. Davis, 67 Kan. 378, 73 P 101 (holding that, where the agent of a loan company violates his instructions and misappropriates money sent to close a loan, the money may be recovered in an action as for money had and received); Seidel v. Peschkaw, 27 N. J. L. 427; McNeilly v. Richardson, 4 Cow. (N. Y.) 607 (holding that, where one advances money to another, to be employed in a particular manner, and he appropriates it to a different object, it may be recovered back as money had and received to the use of him who advances it); Reeside v. Reeside, 49 Pa. 322, 88 AmD 503.

[a] **Where an agent receives money for a particular purpose** and refuses to so apply it or to account for it, or misappropriates it, or applies it after the authority is countermanded, an action for money had and received will lie. Millingar v. Hartupee, 53 Pa. 362.

26. Merchants' Bank v. Rawls, 21 Ga. 289.

27. Merchants' Bank v. Rawls, 21 Ga. 289.

28. Miller v. John, 111 Ill. A. 56 [aff 208 Ill. 173, 70 NE 27].

29. Trover see generally Trover and Conversion [38 Cyc 1997].

30. Cal.—Allsopp v. Joshua Hendy Mach. Works, 5 Cal. A. 228, 90 P 39.

Ga.—Kennesaw Guano Co. v. Wappoo Mills, 119 Ga. 776, 47 SE 205; Loveless v. Fowler, 79 Ga. 184, 4 SE 103, 11 AmSR 407.

Ind.—Rosenzweig v. Frazer, 82 Ind. 342; Lindley v. Downing, 2 Ind. 418; Nading v. Howe, 23 Ind. A. 690, 55 NE 1032.

Iowa.—Haas v. Damon, 9 Iowa 589.

Me.—White v. Wall, 40 Me. 574; McNear v. Atwood, 17 Me. 434.

Md.—Barton v. White, 1 Harr. & J. 579.

Mass.—Brown v. Cushman, 173 Mass. 368, 53 NE 860; Ashley v. Root, 4 Allen 504.

Mich.—Hogue v. Wells, 146 NW 369 (holding that, where an agent to whom a note had been delivered by his principal for collection collected a part of the note and failed to pay over the proceeds, the principal could maintain trover).

Minn.—Coleman v. Pearce, 26 Minn. 123, 1 NW 846.

N. Y.—Greentree v. Rosenstock, 61 N. Y. 583; Michigan Carbon Works v. Schad, 49 Hun 605, 1 NYS 490; Bostwick v. Dry Goods Bank, 67 Barb. 449; Ridder v. Whitlock, 12 HowPr 208; McMorris v. Simpson, 21 Wend. 610; Lockwood v. Bull, 1 Cow. 322, 13 AmD 539; Murray v. Burling, 10 Johns. 172. See also Bogatcka v. Walker, 1 NY CityCt 447.

N. C.—Rowland v. Barnes, 81 N. C. 234.

Oh.—Isaac Harter Co. v. Pearson, 26 Oh. Cir. Ct. 601.

Or.—Salem Traction Co. v. Anson, 41 Or. 562, 67 P 1015, 69 P 675.

Pa.—Etter v. Bailey, 8 Pa. 442.

Vt.—McCrillis v. Allen, 57 Vt. 505.

Wis.—Wells v. Collins, 74 Wis. 341, 43 NW 160, 5 LRA 531 and note; Cotton v. Sharpstein, 14 Wis. 226, 80 AmD 774.

Eng.—Lyeds v. Hay, 47 Rev. Rep. 260; Hogg v. Snaith, 1 Taunt. 347, 127 Reprint 867.

[a] **When trover lies.**—"The most usual remedies of a principal against his agent are the action of assumpsit, and a special action on the case; but there can be no doubt that trover will sometimes be an appropriate remedy. That action may be maintained whenever the agent has wrongfully converted the property of his principal to his own use; and the fact of conversion may be made out, by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tort-feasor. But there must be some act on the part of the agent—a mere omission of duty is not enough, although the property may be lost in consequence of the neglect. Nor will trover lie where the agent, though wanting in good faith, has acted within the general scope of his powers. There must, I think, be an entire departure from his authority before this

[§ 579] **c. Replevin.** The title to property received by an agent for his principal is in the latter, and of course where he is entitled to the possession he may maintain replevin;[31] but where an agent has a lien on the property for his security, the principal cannot maintain replevin against him for it until the lien is discharged.[32]

[§ 580] **d. Accounting—(1) In Equity[33]—(a) In General.** It is a well established rule that the bare relation of principal and agent is not sufficient to entitle the principal to go into equity for an accounting from the agent, where complete and adequate redress may be had at law;[34] and in agencies involving a single transaction, where an action at law would be maintainable, it is generally held that a bill in equity by the principal for an accounting will not lie.[35] But courts of equity have readily assumed jurisdiction to decree an accounting,[36] and generally will do so where the transactions involved are such as to render the remedy at law inadequate.[37]

Jurisdiction on other grounds. Where a court of

action for a conversion of the goods can be maintained." McMorris v. Simpson, 21 Wend. (N. Y.) 610, 614.

31. Terwilliger v. Beals, 6 Lans. (N. Y.) 403; Isaac Harter Co. v. Pearson, 26 Oh. Cir. Ct. 601; Hormann v. Sherin, 6 S. D. 82, 60 NW 145. See generally Replevin [34 Cyc 1342].

32. Newhall v. Dunlap, 14 Me. 180, 31 AmD 45. As to lien of agent see supra §§ 469-474.

33. See also Accounts and Accounting §§ 56-141.

34. U. S.—American Spirits Mfg. Co. v. Easton, 120 Fed. 440 [rev 129 Fed. 1004 mem, 62 CCA 679 mem].

Ala.—Phillips v. Birmingham Industrial Co., 161 Ala. 509, 50 S 77, 135 AmSR 156 (holding that, whatever respondent's liability at law, complainant can have no relief in a suit for an accounting, on the allegation of a fiduciary relationship between principal and agent, and refusal of the agent to account, where respondent proves that he accounted fully as to his agency before complainant, the principal, terminated his agency, and that thereafter he neither dealt, nor attempted to deal, with complainant or the subject matter of the agency); Hall v. McKellar, 155 Ala. 508, 46 S 460; Knotts v. Tarver, 8 Ala. 743; Kirkman v. Vanlier, 7 Ala. 217.

Cal.—Garr v. Redman, 6 Cal. 574.

Ga.—Powers v. Gray, 7 Ga. 206 (where the bill was dismissed, no discovery being sought, and no allegation in the bill going to show that the peculiar remedial process or functions of a court of equity were necessary, and further where there was an adequate and effective remedy at law).

Hawaii.—Herbert v. Henry, 20 Hawaii 186 (holding that, where an agent receives money for his principal for certain mining stock and fails to remit the same, a bill in equity for an accounting is not proper as there is a plain, adequate, and complete remedy by an action at law for money had and received).

Ill.—Mahler v. Sanche, 223 Ill. 136, 79 NE 9; Starrett v. Brosseau, 208 Ill. 408, 70 NE 354.

Ind.—Coquillard v. Suydam, 8 Blackf. 24.

Ky.—Macauley v. Elrod, 28 SW 782, 29 SW 734, 16 KyL 549.

Me.—Webb v. Fuller, 77 Me. 568, 1 A 737.

Mass.—Campbell v. Cook, 193 Mass. 251, 79 NE 261; Warren v. Para Rubber Shoe Co., 166 Mass. 97, 44 NE 112.

Mich.—Nash v. Burchard, 87 Mich. 85, 49 NW 492.

Mo.—Matthews v. Wilson, 27 Mo. 155.

N. Y.—Marvin v. Brooks, 94 N. Y. 71 (where the court said that if the existence of a bare agency were sufficient it would draw into equity every case of bailment in which an account existed); Underhill v. Jordan, 72 App. Div. 71, 76 NYS 266; Conger v. Judson, 69 App. Div. 121, 74 NYS 504; New York L. Ins. Co. v. Hamilton, 52 Misc. 189, 102 NYS 771.

Pa.—Graham v. Cummings, 208 Pa. 516, 57 A 943; Paton v. Clark, 156 Pa. 49, 27 A 116.

Tenn.—Taylor v. Tompkins, 2 Heisk. 89.

Va.—Goddin v. Bland, 87 Va. 706, 13 SE 145, 24 AmSR 678 (holding that where there is no trust or fiduciary element in the agency the relation is rather that of employer and employee, that is, master and servant, and the bill will be dismissed); Vilwig v. Baltimore, etc., R. Co., 79 Va. 449; Coffman v. Sangston, 21 Gratt. (62 Va.) 263; Segar v. Parrish, 20 Gratt. (61 Va.) 672.

Eng.—Great Western Ins. Co. v. Cunliffe, L. R. 9 Ch. 525; Moxon v. Bright, L. R. 4 Ch. 292; Hunter v. Belcher, 2 De G. J. & S. 194, 67 EngCh 152, 46 Reprint 349; Smith v. Leveaux, 2 De G. J. & S. 1, 67 EngCh 1, 46 Reprint 274, 1 ERC 419; Barry v. Stevens, 31 L. J. Ch. 785, 788 (where the court said: "The general right of a principal to bring such a suit against his agent I should be sorry to impeach; but that principle does not apply to a case like the present, where the subject-matter is confined within certain specified limits, and the accounts shew that it is a mere money demand which may perfectly well be tried at law, where the account will be taken before the Master in the same way that it would be taken here"); Foley v. Hill, 1 Phil. 399, 19 EngCh 399, 41 Reprint 683 [app dism 2 H. L. Cas. 28, 9 Reprint 1002] (where the court dismissed a bill because the transaction in question was simple, and there was a simpler and less expensive remedy at law); King v. Rossett, 2 Y. & J. 33. But see Mackenzie v. Johnston, 4 Madd. 373, 56 Reprint 742 (where defendants were agents for the sale of property of plaintiff, and the court held that wherever such relation exists a bill will lie for an account. The circumstances of this case, however, were such that the principal could learn only from the discovery of defendants how the latter had acted in the execution of the agency; and the court held that it would be most unreasonable that the principal should pay them for that discovery, if it turned out that they had abused his confidence, and that that would be the case if a bill for relief would not lie. The necessity of a discovery, however, is itself enough to bring this case within the jurisdiction of equity, and the case, in so far as it intimates that the mere fact of agency warrants equitable interference, is against the great weight of authority).

Man.—Johnson v. Land Corp. of Canada, 6 Man. 527.

Adequate remedy at law, as an objection to equity jurisdiction see Equity [16 Cyc 30 et seq].

[a] **Laches.**—Where an agent made certain purchases and sales under an agreement terminating in a certain year, an objection to such sales by the principal with knowledge of the fact or facts putting him on notice thereof, not made until five years thereafter, was not made within a reasonable time and the principal was not entitled in equity to an accounting. American Mortg. Co. v. Williams, 103 Ark. 484, 145 SW 234. See generally Equity [16 Cyc 150 et seq].

35. Ala.—Halsted v. Rabb, 8 Port. 63 (holding that in agencies of a single transaction, such as a single consignment, or the delivery of money, to be laid out in the purchase of any particular thing, or to be paid over to a third person, by reason of a discovery being wanted, it is perhaps the better opinion that such a case would be cognizable alone at law).

Ind.—Coquillard v. Suydam, 8 Blackf. 24, 30 (where the court said: "In mercantile agencies, and perhaps others, where the nature of the business requires the agent to keep various accounts of purchases and sales, or of receipts and expenditures, with his principal, he may be called upon by his principal, in chancery, for an account. But the present is a different case. The alleged agency was for a single transaction, in which no such accounts as we have mentioned could arise; and the remedy for a breach is exclusively at law").

N. Y.—Porter v. Spencer, 2 Johns. Ch. 169 (holding that there must be a series of transactions).

S. C.—Kerr v. Camden Steamboat Co., 15 S. C. Eq. 189.

Eng.—Moxon v. Bright, L. R. 4 Ch. 292; Navulshaw v. Brownrigg, 1 Sim. N. S. 573, 40 EngCh 573, 61 Reprint 221 [app dism 2 De G. M. & G. 241, 51 EngCh 345, 42 Reprint 943] (holding that a bill for an account is not sustainable where it relates to a single transaction not tainted with fraud, and the principal has a remedy at law).

Que.—O'Brien v. Brodeur, 10 Que. Super. 155.

36. Fischer v. Riehl, 219 Pa. 505, 69 A 70; Yeaney v. Keck, 183 Pa. 532, 38 A 1041 (holding that equity has jurisdiction of a suit brought by tenants in common of land against the executor of their agent, who bought the land for them, for an accounting for the money paid deceased in excess of the amount he actually paid for the land); Gandolfo v. Hood, 1 Pearson (Pa.) 269; Carr v. Raleigh, 2 Phila. (Pa.) 242; Henderson v. Mathews, 1 Lea (Tenn.) 34; Mann v. Bamberger, 4 Heisk. (Tenn.) 486; Coffman v. Sangston, 21 Gratt. (62 Va.) 263; Townes v. Birchett, 12 Leigh (39 Va.) 173.

[a] **A principal cannot deprive an agent of his right to an equitable accounting** by joining a cause of action on the agency contract with a cause of action on a third person's guaranty of the agent's performance. Schultz v. Wise, 93 Nebr. 718, 141 NW 813.

37. U. S.—Northern Pac. R. Co. v. Kindred, 14 Fed. 77, 2 McCrary 627.

Ala.—Firestone v. Firestone, 49 Ala. 123.

Ark.—Charlesworth v. Whitlow, 74 Ark. 277, 85 SW 423.

Cal.—Wells v. Robinson, 13 Cal. 133.

Ga.—Illges v. Dexter, 73 Ga. 362.

Ill.—Smith v. Wright, 49 Ill. 403.

N. Y.—Western R. Co. v. Bayne, 75 N. Y. 1; Prince Line v. John C. Seager Co., 118 App. Div. 697, 103 NYS 677; Duff v. Blair, 74 App. Div. 364, 77 NYS 444.

Pa.—Kentucky Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. 180.

S. C.—Robson v. Sanders, 25 S. C. 116 (holding that, where an agent received fertilisers for sale under instructions to secure final payments by agricultural liens duly filed, which he neglected to do, the principal, instead of suing for this breach of agreement, may bring an action simply for an accounting, in which case the burden is on defendant to account for all the fertilizers received by him for sale).

[a] **When equity appropriate to**

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equity has assumed jurisdiction on other grounds than an accounting it may, in order to afford full relief, decree an accounting,[38] as where a discovery is necessary.[39]

Concurrent jurisdiction of law and equity. The mere fact that there is a remedy at law is not sufficient to deprive the court of equity of jurisdiction, for, although there is a remedy at law, if it is not as adequate or complete as in equity, or if other circumstances exist bringing the matter within the cognizance of the equity court, a suit for accounting may be maintained.[40]

[§ 581] **(b) Where Relation Is Fiduciary.** A suit in equity for an accounting may be maintained by a principal against his agent, where the agency is so fiduciary in its nature as to constitute the agent a trustee or quasi trustee for the principal,[41] and where the agent uses the money or property of his principal or his position as agent to make a profit for himself he may be required to account therefor in equity as for a trust.[42]

[§ 582] **(c) Where Discovery Is Sought.** The principal may maintain a bill in equity for an accounting where equitable discovery is asked, and is material to, and inseparably connected with, the relief sought, and where the facts relating to the execution of the agency are peculiarly within the knowledge of the agent, and not at the command of the principal;[43] and it has been held that the fact that statutes have done away with the necessity of an accounting at law is not sufficient to deprive the court of equity of jurisdiction, where the agency is of such a character that the agent occupies a position of trust, is charged with the duty not only of keeping but also of rendering regular accounts, and is the custodian of most of the vouchers of his receipts and disbursements, the remedy at law is not so plain and easy as in equity, which is the appropriate forum for relief in such cases. Vilwig v. Baltimore, etc., R. Co., 79 Va. 449.

38. Brewer v. Caldwell, 4 F. Cas. No. 1,849; Clark v. Lee, 21 Iowa 274; Segar v. Parrish, 20 Gratt. (61 Va.) 672.

[a] **Agent also principal's administrator.**—Where an agent from whom the principal is entitled to an accounting becomes his administrator upon his decease, he may be called upon to settle his agency accounts at the same time that he settles his administration accounts. Trevelyan v. Lofft, 33 Va. 141, 1 SE 901 [app Carter v. Cutting, 5 Munf. (19 Va.) 223].

39. See infra § 582.

40. Walker v. Spencer, 45 N. Y. Super. 71 (holding that the mere fact that the principal has a remedy at law is no ground of demurrer); Ellas v. Lockwood, Clarke (N. Y.) 311 (holding that, when the accounts between the principal and the agent are complicated, when they are mutual, and when a discovery is sought and is material to relief, the jurisdiction of a court of chancery is undoubted, even though it is conceded that courts of law have jurisdiction of the same matters); Kirkeys v. Crandall, 90 Tenn. 532, 18 SW 246; Williams v. Trye, 18 Beav. 366, 52 Reprint 145; Padwick v. Stanley, 9 Hare 627, 41 EngCh 627, 68 Reprint 664 (holding that there may be cases of complicated accounts which would give concurrent jurisdiction, but that all such cases must depend on their own particular circumstances). See also Warren v. Para Rubber Shoe Co., 166 Mass. 97, 44 NE 112.

41. U. S.—Colonial, etc., Mortg. Co. v. Hutchinson Mortg. Co., 44 Fed. 219 (agency to receive and to dispose of by loan or otherwise large sums of money).

Ala.—Phillipps v. Birmingham Industrial Co., 161 Ala. 509, 50 S 77, 135 AmSR 156.

Cal.—San Pedro Lumber Co. v. Reynolds, 111 Cal. 588, 44 P 309 (agency to manage a manufacturing business, to hire, pay, and discharge employees, and to collect and pay accounts).

Hawaii.—Fowler v. Catton, 13 Hawaii 487.

Ill.—Weaver v. Fisher, 110 Ill. 146 (agency to manage and to conduct the banking and financial business of a mill); Clapp v. Emery, 98 Ill. 523.

Ind.—Holthouse v. Poling, 52 Ind. A. 568, 99 NE 810.

Me.—Auburn First Nat. Bank v. Eastern Trust, etc., Co., 108 Me. 79, 79 A 4.

Minn.—Coffin v. Craig, 89 Minn. 226, 94 NW 680.

Miss.—Decell v. Hazlehurst Oil Mill, etc., Co., 83 Miss. 346, 35 S 761.

N. Y.—Marvin v. Brooks, 94 N. Y. 71 (holding that the bill in such a case proceeds upon the ground that defendant stands in the attitude of dealing to some extent with the money or property of the principal, intrusted in a confidential relation with an interest which makes him a quasi trustee, and by reason of that relation knowing what the other party cannot know, and bound to reveal to him the entire truth); Jordan v. Underhill, 91 App. Div. 124, 86 NYS 620 (holding that where a fiduciary relation existed the fact that the agent from time to time had rendered accounts of his proceedings to the principal, and had transferred all the property and money in his hands belonging to the principal, except an amount which the agent retained to reimburse himself for his services, and had also rendered to the principal's agent subsequently appointed a complete account of all his acts, did not prevent the principal from maintaining a suit against the original agent for an accounting on the ground that a further account would be vexatious); Rogers v. Wheeler, 89 App. Div. 435, 85 NYS 981 (agency to invest the principal's money in lands sold for taxes, transact all business connected therewith, pay over semi-annually a part of the interest, and retain the balance as commission); Underhill v. Jordan, 72 App. Div. 71, 76 NYS 266 (agency to manage a business and to receive and disburse funds therein); Rose v. Durant, 44 App. Div. 381, 61 NYS 15; Frethey v. Durant, 24 App. Div. 58, 48 NYS 839 (agency by a brother appointed by his sister to manage her portion of an estate left to both by the father); West v. Brewster, 8 N. Y. Super. 647.

Pa.—Coursin's App., 79 Pa. 220.

S. C.—McIntyre v. McClenaghan, 12 S. C. 185; Brock v. Lewis, 28 S. C. Eq. 77.

Tenn.—Hale v. Hale, 4 Humphr. 183 (agency to pay off an encumbrance on land and to receive and disburse in regard thereto).

Vt.—Pickett v. Parsons, 17 Vt. 470 (agency to collect accounts).

Va.—Simmons v. Simmons, 33 Gratt. (74 Va.) 451 (general agency to manage personal affairs and collect rents); Zetelle v. Myers, 19 Gratt. (60 Va.) 62 (agency to manage, lease, and sell property, to pay expenses upon, to collect debts, and to pay over the moneys received to the principal).

Wis.—Rippe v. Stogdill, 61 Wis. 38, 20 NW 645 (agency to loan funds on mortgage); Merrill v. Merrill, 53 Wis. 522, 10 NW 684 (agency to manufacture timber into lumber and to sell enough thereof to satisfy a note originally given by the principal to the agent in payment of the timber).

Eng.—Moxon v. Bright, L. R. 4 Ch. 292; Hemings v. Pugh, 4 Giffard 456, 66 Reprint 785; Pearse v. Green, 1 Jac. & W. 135, 37 Reprint 327; Makepeace v. Rogers, 11 Jur. N. S. 215 (holding that, wherever the relation between the person who seeks an account and the person against whom he seeks it partakes of a fiduciary character, a trust is reposed by plaintiff in defendant, and that that trust is not the same as is represented to exist in the ordinary employment of an agent, such as a builder or other tradesman).

[a] **Equity will entertain a suit by a private unchartered company,** associated for the purpose of carrying on business as a bank, against its cashier, for an account of his agency, although such associations are contrary to law. Berkshire v. Evans, 4 Leigh (31 Va.) 223.

[b] **It is not necessary to show that something will be found due** on the accounting, for that fact can never be known with certainty until the account has been taken. Rose v. Durant, 44 App. Div. 381, 61 NYS 15; Frethey v. Durant, 24 App. Div. 58, 48 NYS 839.

[c] **After decease of principal** his legal representatives may maintain a suit in equity for an accounting against an agent. Webb v. Fuller, 77 Me. 568, 1 A 737; Ellas v. Lockwood, Clarke (N. Y.) 311; Schwickerath v. Lohen, 48 Wis. 599, 4 NW 805.

[d] **Statute of limitations.**—An agent who stands in fiduciary relations to his principal cannot plead the statute of limitations in bar of a suit for an accounting. Burdick v. Garrick, L. R. 5 Ch. 233, 14 ERC 565 [dist In re Hindmarsh, 1 Dr. & Sm. 129, 62 Reprint 327]; Power v. Power, L. R. 13 Ir. 281; Hardwicke v. Vernon, 14 Ves. Jr. 504, 33 Reprint 614 [aff 4 Ves. Jr. 411, 31 Reprint 209]. See generally Limitations of Actions [25 Cyc 963].

42. U. S.—Edison v. Gilliland, 42 Fed. 205; Delano v. Winsor, 7 F. Cas. No. 3,754, 1 Cliff. 501.

Ill.—Weaver v. Fisher, 110 Ill. 146.

Me.—Thompson v. Hallet, 26 Me. 141.

Va.—Thornton v. Thornton, 31 Gratt. (72 Va.) 212.

Wash.—Neis v. Farquharson, 9 Wash. 508, 37 P 697.

Wis.—Rippe v. Stogdill, 61 Wis. 38, 20 NW 645.

Eng.—Williams v. Trye, 18 Beav. 366, 52 Reprint 145; Hewart v. Semple, 5 Ves. Jr. 86, 31 Reprint 485; Hardwicke v. Vernon, 4 Ves. Jr. 411, 31 Reprint 209; Massey v. Davies, 2 Ves. Jr. 317, 30 Reprint 651.

43. Ala.—Phillipps v. Birmingham Industrial Co., 161 Ala. 509, 50 S 77; Dallas County v. Timberlake, 54 Ala. 403.

Cal.—San Pedro Lumber Co. v. Reynolds, 111 Cal. 588, 44 P 309.

Fla.—Irvine v. Epstein, 45 Fla. 370, 33 S 1003 (holding that a bill for an accounting, filed against one holding for collection as agent many notes, the property of another, which have been in part collected in farm produce and stock, which the agent was to convert into money, and which he had disposed of in trade in various ways, and as to which discovery is sought, is not wanting in equity).

Ky.—Dunwidie v. Kerley, 6 J. J. Marsh. 501.

Minn.—Coffin v. Craig, 89 Minn. 226, 94 NW 680.

N. Y.—Marvin v. Brooks, 94 N. Y. 71; West v. Brewster, 8 N. Y. Super. 647; Ellas v. Lockwood, Clarke 311.

sity of resorting to a court of equity to obtain a discovery does not take away the jurisdiction of a court of equity in such a case.[44]

[§ 583] **(d) Where Accounts Are Complicated.** Where the accounts between the principal and agent are so involved, complicated, and confused that they could not be accurately, expediently, or adequately settled at law, the principal may maintain a bill in equity for an accounting.[45]

Items all on one side. That equity will not entertain a suit for accounting against an agent by the principal where all the items are on one side has been held in some cases, and is to be implied from the language used in others.[46] By the weight of authority, however, although the account is not mutual, and although the items are all on one side, equity will still take jurisdiction, if the account is so complicated that a bill would lie if it were a mutual account.[47]

[§ 584] **(e) Opening Accounts Stated.**[48] Where an account has been stated between the principal and the agent, the existence of the relation itself is not sufficient to warrant a court of equity in opening the account;[49] but an account stated between

Pa.—Oil Co. v. Adams, 6 Phila. 182.
Tenn.—Taylor v. Tompkins, 2 Heisk. 89.
Va.—Wilson v. Miller, 104 Va. 446, 51 SE 837; Vilwig v. Baltimore, etc., R. Co., 79 Va. 449; Coffman v. Sangston, 21 Gratt. (62 Va.) 263; Segar v. Parrish, 20 Gratt. (61 Va.) 672. See also Goddin v. Bland, 87 Va. 706, 13 SE 145, 24 AmSR 678.
Wis.—Merrill v. Merrill, 53 Wis. 522, 10 NW 684.
Eng.—Mackenzie v. Johnston, 4 Madd. 373, 56 Reprint 742. But see Moxon v. Bright, L. R. 4 Ch. 292; Smith v. Leveaux, 2 De G. J. & S. 1, 67 EngCh 1, 46 Reprint 274, 1 ERC 419 (both holding that the mere fact that the principal sought discovery would not empower the court of equity to act, if an adequate discovery could be had at law, and the agency was not of a fiduciary nature).

[a] **Where a principal asks discovery only as ancillary to relief,** if the ground for the relief fails, he is not entitled to the discovery, and must file another bill for that purpose. King v. Rossett, 2 Y. & J. 33. See generally Discovery [14 Cyc 308]; Equity [16 Cyc 106].

[b] **A bill will lie by an administrator of a principal** against the general agent of his intestate for a discovery and an account of the transactions of the latter with his principal. Brewer v. Caldwell, 4 F. Cas. No. 1,849; Simmons v. Simmons, 33 Gratt. (74 Va.) 451.

44. Segar v. Parrish, 20 Gratt. (61 Va.) 672; Schwickerath v. Loper, 48 Wis. 599, 4 NW 805 (holding that Rev. St. [1858] c 137 § 55; Rev. St. [1878] § 4096, providing that no action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed, does not affect the question of the jurisdiction of a court of equity in any proper case for an accounting between principal and agent, where a discovery is a necessary part of the accounting).

45. U. S.—Fenno v. Primrose, 116 Fed. 49 (factor and principal).
Ala.—Knotts v. Tarver, 8 Ala. 743.
Ill.—Craig v. McKinney, 72 Ill. 305.
Ind.—Coquillard v. Suydam, 8 Blackf. 24 (holding that, in mercantile agencies and perhaps in others where the nature of the business requires the agent to keep various accounts of purchases and sales or of receipts and expenditures with his principal, he may be called upon in chancery by his principal for an account).
Ky.—Dunwidie v. Kerley, 6 J. J. Marsh. 501.
N. J.—Hartshorne v. Thomas, 43 N. J. Eq. 419, 10 A 843.
N. Y.—Rogers v. Wheeler, 89 App. Div. 435, 85 NYS 981 (where a bill in equity was allowed, there being divers purchases, redemptions from mortgages at different times, tax payments, reinvestments and other turning over of money in different amounts, with varying profits, at uncertain periods); Walker v. Spencer, 45 N. Y. Super. 71.
N. C.—McLin v. McNamara, 22 N. C. 82.
S. C.—Kerr v. Camden Steamboat Co., 15 S. C. Eq. 189.
Tenn.—Hale v. Hale, 4 Humphr. 183; Taylor v. Tompkins, 2 Heisk. 89 (holding that a bill in equity lies for an account of goods sold on commission, if complicated, or if there is embarrassment in making proof).
Vt.—Kellogg v. Griswold, 12 Vt. 291.
Va.—Wilson v. Miller, 104 Va. 446, 51 SE 837; Goddin v. Bland, 87 Va. 706, 13 SE 145, 24 AmSR 678 (holding that the mere fact that the figures were large and the account long did not give equity jurisdiction as of a complicated account, the only issue being the quantity of merchandise purchased for and delivered to the principal by his agent); Vilwig v. Baltimore, etc., R. Co., 79 Va. 449 (holding that, where, owing to the intricacy of the account, the remedy at law is not plain, simple, and free from difficulty, the equitable jurisdiction attaches); Thornton v. Thornton, 31 Gratt. (72 Va.) 212 (holding that equity has jurisdiction where the account could not be conveniently and safely adjusted and settled in a court of law).
Wis.—Merrill v. Merrill, 53 Wis. 522, 10 NW 684.
Eng.—Fluker v. Taylor, 3 Drew. 183, 61 Reprint 873 (holding that the jurisdiction of equity depends on whether the account is in its own nature, not merely from the number of items, so complicated that it could not fairly be taken in a court of law).

[a] **Illustrations of accounts so simple as not to justify equity jurisdiction** see Crothers v. Lee, 29 Ala. 337 (where the account consisted of a single item on one side, to which defendant had offsets or credits); Fluker v. Taylor, 3 Drew. 183, 61 Reprint 873 (where the only question was a claim for remuneration which could be determined at law); Foley v. Hill, 1 Phil. 399, 19 EngCh 399, 41 Reprint 683 [app dism 2 H. L. Cas. 28, 9 Reprint 1002] (where the account consisted of three items, one on one side and two on the other, and it was held that such an account was not a proper subject for a bill in equity but was a case for assumpsit for money had and received, as in such action justice could be administered in a more simple way and at less expense).

46. Lynch v. Willard, 6 Johns. Ch. (N. Y.) 342 (holding that an account supposes something mutual); Porter v. Spencer, 2 Johns. Ch. (N. Y.) 169 (holding that there must be mutual demands and not merely payments by way of set-off, and that there must be a series of transactions on one side and of payments on the other); Ellas v. Lockwood, Clarke (N. Y.) 311; Kerr v. Camden Steamboat Co., 15 S. C. Eq. 189; Goddin v. Bland, 87 Va. 706, 13 SE 145, 24 AmSR 678; Vilwig v. Baltimore, etc., R. Co., 79 Va. 449; Smith v. Leveaux, 2 De G. J. & S. 1, 67 EngCh 1, 46 Reprint 274, 1 ERC 419; Padwick v. Stanley, 9 Hare 627, 41 EngCh 627, 68 Reprint 664; Phillips v. Phillips, 9 Hare 471, 41 EngCh 471, 68 Reprint 596; Dinwiddie v. Bailey, 6 Ves. Jr. 136, 31 Reprint 979.

47. Cal.—San Pedro Lumber Co. v. Reynolds, 111 Cal. 588, 44 P 309 (holding that, where the accounts are all on one side but there are great complications or difficulties in the way of adequate relief at law, equity will take jurisdiction).
Minn.—Coffin v. Craig, 89 Minn. 226, 94 NW 680.
S. C.—Kerr v. Camden Steamboat Co., 15 S. C. Eq. 189, 194.
Tenn.—Taylor v. Tompkins, 2 Heisk 89.
Wis.—Rippe v. Stogdill, 61 Wis. 38, 20 NW 645 (holding that, where a fiduciary relation exists, it is immaterial that there are no mutual accounts); Schwickerath v. Lohen, 48 Wis. 599, 4 NW 805.
Eng.—Makepeace v. Rogers, 4 De G. J. & S. 649, 69 EngCh 497, 46 Reprint 1070 [expl Phillips v. Phillips, 9 Hare 471, 41 EngCh 471, 68 Reprint 596]; Fulker v. Taylor, 3 Drew. 183, 191, 61 Reprint 873 (where the court said: "It is difficult to lay down any fixed rule which goes to mark out the line between those cases when an account must be taken in equity, and when it need not. An attempt has been made to lay down such a rule, by saying the accounts must be mutual, that there must be receipts and payments on both sides. . . . But it really appears to me that it would be dangerous to lay down the rule in any such terms"); Hemings v. Pugh, 4 Giffard 456, 66 Reprint 785; Carlisle v. Wilson, 13 Ves. Jr. 276, 33 Reprint 297 (where the demands were all on one side and were all admitted to be of a legal nature, yet the bill was held to lie).

48. See also generally Accounts and Accounting § 335 et seq.

49. Craig v. McKinney, 72 Ill. 305; Pratt v. Grimes, 48 Ill. 378; Warren v. Para Rubber Shoe Co., 166 Mass. 97, 44 NE 112; Raht v. Union Cons. Min. Co., 5 Lea (Tenn.) 1. In Philips v. Belden, 2 Edw. (N. Y.) 1, 17, the court said: "There is a numerous class of cases in the books, where, it is true, the Court of Chancery has gone pretty far in opening accounts, upon the ground of settlements having been made during the existence of a confidential relationship. These are between attorney and client, or solicitor and client. Still, in all the cases of this description to which I have been referred, or which have fallen under my observation, in addition to professional confidence, as a ground for interference, there have existed special circumstances, showing fraud and imposition practiced upon the client, or an undue use made of the power and influence which the relation of attorney and client has given the former over the latter, and of which he had taken an unconscientious advantage. The cases of Wharton v. May, 5 Ves. Jr. 27, 31 Reprint 454, and Vaughan v. Lloyd, 1 Cox Ch. 312, 29 Reprint 1181, before Lord Thurlow, there cited Purcell v. McNamara, 14 Ves. Jr. 91, 33 Reprint 455; Morgan v. Lewes, 4 Dow 29, 3 Reprint 1079 [aff 5 Price 42, 146 Reprint 530 (aff 2 Y. & J. 230)], and Jenkins v. Gould, 3 Russ. 385, 3 EngCh 385, 38 Reprint 620, are all instances of this sort. Even if the court should be called upon, in a case between solicitor and client, to set aside a release and to open accounts in the absence of anything like fraud, I apprehend it would be for reasons of public policy and upon principles peculiar to such cases; and which do not apply as between principal and agent, manager and steward, disconnected with professional calling

principal and agent may, as in other cases, be opened to correct mistakes caused by fraud or misrepresentations.[50]

[§ 585] **(2) At Law.**[51] It was formerly held that the ancient common-law action of account render[52] could be maintained by a principal against his agent, who had received property and money for which he was liable to account,[53] although this form of action has generally fallen into disuse or has been materially altered by statute and the action is now rarely, if ever, brought in the common-law form.[54]

[§ 586] **2. Actions by Agent against Principal—a. In General.** When the compensation of the agent is fixed by an express contract, his proper remedy for the recovery thereof is an action of assumpsit upon the contract.[55] Where, however, the compensation is not so fixed, the proper action is assumpsit upon the implied contract for the value of his services.[56]

Where an agent has been wrongfully discharged, he may rescind the contract and sue immediately on a quantum meruit for services actually rendered,[57] or he may treat the contract of employment as continuing, although broken by the principal, and may sue to recover damages for the breach;[58] or he may sue for compensation actually earned and due by the terms of the contract.[59] Where he resorts to any one of these remedies, a recovery will be a bar to any subsequent action,[60] except that, where the compensation is payable in installments, a recovery of one installment will not bar an action for another installment which subsequently falls due.[61]

Money had and received. Where his compensation is in the form of a commission on a sale, the agent cannot maintain an action for money had and received upon receipt of the purchase price by the principal.[62]

[§ 587] **b. For Reimbursement.** Where an agent sues for advances properly made by him in the execution of his agency and for all loss sustained, while acting bona fide within the scope of his authority,[63] his remedy to recover for advances is an action of assumpsit on the implied promise, and, in case of loss or damage sustained, he may maintain either an action of trespass on the case,[64] or an action of assumpsit on the implied contract for indemnification.[65]

[§ 588] **c. Suits for Accounting.**[66] The principles governing suits for accounting, brought by a principal against his agent,[67] apply to a bill for an accounting brought by an agent against his principal,[68] although it has been held that it does not follow that, because a principal is entitled to have an account taken in equity as against his agent, the agent has a similar right against his principal, for the right of the principal rests on the trust and confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal.[69] Ordinarily an agent cannot maintain a suit in equity against his principal for an accounting to recover commissions, even though he seeks a discovery of

or the character of a legal adviser." See also supra § 406.

50. Delano v. Winsor, 7 F. Cas. No. 3,754, 1 Cliff. 501. See also supra § 406.

51. See also Accounts and Accounting §§ 11–55.

52. See Accounts and Accounting § 11 et seq.

53. Conn.—Pettibone v. Pettibone, 4 Day 175; Avery v. Kinsman, Kirby 354; Wetmore v. Woodbridge, Kirby 164.

Ill.—Kemp v. Merrill, 92 Ill. A. 46.

N. C.—McCaskill v. McBryde, 17 N. C. 265.

Pa.—Persch v. Quiggle, 57 Pa. 247 (holding that, where a person was a general agent for another for the custody and management of stock delivered to him, and for the collection of its dividends, etc., an action of account render might be maintained against him at common law as bailiff, and the act of Oct. 13, 1840, makes it a case for chancery jurisdiction); McLean v. Wade, 53 Pa. 146 (holding that the action of account render is a proper one between principal and trustee or bailiff and receiver, and may be resorted to as between the representatives of the agent and his principal); Reeside v. Reeside, 49 Pa. 322, 88 AmD 503; Gallagher v. Gallagher, 6 Phila. 528.

Vt.—Pickett v. Pearsons, 17 Vt. 470.

Eng.—Lincoln v. Topcliff, Cro. Eliz. 644, 78 Reprint 883; Anonymous, 11 Mod. 92, 88 Reprint 916.

54. See Accounts and Accounting § 11 et seq.

55. Bower v. Jones, 8 Bing. 65, 21 ECL 447, 131 Reprint 325 (special assumpsit). See generally Contracts [9 Cyc 685 et seq].

56. U. S.—Bibb v. Allen, 149 U. S. 481, 13 SCt 950, 37 L. ed. 819.

Ark.—Spearman v. Texarkana, 58 Ark. 348, 24 SW 883, 22 LRA 855.

Ind.—Lockwood v. Robbins, 125 Ind. 398, 25 NE 455.

Iowa.—Wadleigh v. McDowell, 102 Iowa 480, 71 NW 336.

N. J.—Ruckman v. Bergholz, 38 N. J. L. 531.

Pa.—Masterson v. Masterson, 121 Pa. 605, 15 A 652.

Eng.—Solly v. Weiss, 8 Taunt. 371, 4 ECL 189, 129 Reprint 426.

57. Ala.—Beck v. West, 91 Ala. 312, 9 S 199.

Ga.—Britt v. Hays, 21 Ga. 157; Rogers v. Parham, 8 Ga. 190.

Ill.—William Butcher Steel Works v. Atkinson, 68 Ill. 421, 18 AmR 560.

Kan.—George O. Richardson Mach. Co. v. Swartzel, 70 Kan. 773, 79 P 660.

La.—Lanusse v. Pimpienella, 4 Mart. N. S. 439.

Mo.—Glover v. Henderson, 120 Mo. 367, 25 SW 175, 41 AmSR 695; Booge v. Pacific R. Co., 33 Mo. 212, 82 AmD 160.

N. Y.—Howard v. Daly, 61 N. Y. 362, 19 AmR 285; Moody v. Leverich, 4 Daly 401, 14 AbbPrNS 145; Baker v. Angell, 12 NYSt 406.

N. C.—Brinkley v. Swicegood, 65 N. C. 626.

Pa.—Jaekel v. Caldwell, 156 Pa. 266, 26 A 1063.

Vt.—Derby v. Johnson, 21 Vt. 17.

Can.—Aldous v. Swanson, 14 West LR 186 [aff 15 WestLR 292].

See also supra § 423.

[a] **Quantum meruit.**—In an action by a general insurance agent against his principal for services rendered under an express contract, which was wrongfully terminated by the principal, when all the facts are stated in the complaint entitling plaintiff to recover damages as for the violation of the express covenant, a general demurrer will not be sustained, even though plaintiff has asked to have his damages assessed as upon a quantum meruit. Newcomb v. Imperial L. Ins. Co., 51 Fed. 725 [aff 62 Fed. 97, 10 CCA 288].

58. Richardson Mach. Co. v. Swartzel, 70 Kan. 773, 79 P 660. See also supra § 454.

[a] **Where an agent is unable to complete his part of a contract,** and thus entitle himself to commissions thereunder, because of his principal's breach of the contract, his remedy is an action for damages for the breach, and not by suit for the commissions he might otherwise have earned. Greenberg v. American Technical Book Co., 33 Misc. 786, 67 NYS 974.

59. See supra §§ 423, 424.

60. Richardson v. Eagle Mach. Works, 78 Ind. 422, 41 AmR 584; Booge v. Pacific R. Co., 33 Mo. 212, 82 AmD 160; James v. Allen County, 44 Oh. St. 226, 6 NE 246, 58 AmR 821.

Res judicata see generally Judgments [23 Cyc 1215 et seq].

61. Strauss v. Meertief, 64 Ala. 299, 38 AmR 8; Davis v. Preston, 6 Ala. 83; Isaacs v. Davies, 68 Ga. 169; Armfield v. Nash, 31 Miss. 361; Booge v. Pacific R. Co., 33 Mo. 212, 82 AmD 160.

Splitting causes of action and recovery of installments see Actions §§ 285–287.

62. Park v. Mighell, 3 Wash. 737, 29 P 556.

63. **Agent's right to reimbursement and indemnity** see supra §§ 458–468.

64. Moore v. Appleton, 26 Ala. 633; Adamson v. Jarvis, 4 Bing. 66, 13 ECL 403, 130 Reprint 693.

65. Moore v. Appleton, 26 Ala. 633; Gower v. Emery, 18 Me. 79; Huntley v. Sanderson, 1 Cromp. & M. 468.

66. See generally Accounts and Accounting.

67. See supra §§ 580–585.

68. Fenno v. Primrose, 116 Fed. 49; Wilson v. Mallett, 6 N. Y. Super. 112.

[a] **Civil law.**—The remedy of an agent in Lower Canada, where the civil law obtains, to recover sums due him from the principal is an actio mandati contraria, with a tender of his reddition de compte. Hunt v. Taplin, 24 Can. S. C. 36, 50 (where the court said: "Any one who has acted as agent for another has an action to force his principal to receive a reddition de compte. A comptable has the same right to exact from his unwilling principal a settlement of their accounts that a principal has from an unwilling comptable. Bioche, proc. vo. Compte No. 2").

69. Padwick v. Stanley, 9 Hare 627, 41 EngCh 627, 68 Reprint 664 (holding that, although the principal might file a bill against the agent, the agent could not file one against the principal, since there is no such mutuality in the relation of principal and agent, the right of the principal resting upon the trust imposed in the agent, and

facts upon which to base his claim,[70] the mere relation of principal and agent being, as in the case of a bill by the principal against the agent,[71] insufficient to entitle him to this relief.[72] But where the agency is of a fiduciary nature, and a discovery is necessary, and the account is sufficiently complicated to justify an equitable accounting, a bill therefor is sometimes entertained.[73] So also, where the amount to which the agent is entitled is uncertain, as where it depends on the value of profits made by the principal, and the account is too complicated to be gone into at law, the agent may maintain a suit in equity.[74]

A bill by an agent to have his account allowed and himself discharged from the trust has been held maintainable.[75]

[§ 589] **3. Actions by Third Person against Agent.**[76] The proper remedy against an agent by a third party, with whom the agent has dealt, where the agent acts without, or in excess of, his authority, is an action of assumpsit upon his express or implied warranty of authority,[77] or, in a proper case, an action of trespass on the case for fraud and deceit,[78] and in some jurisdictions the latter is held to be the only remedy in such cases.[79]

Replevin may be maintained by a third person

the agent reposing no such trust in the principal). See also James v. Snarr, 15 Grant Ch. (U. C.) 229 (dismissing a bill for an accounting on the ground that there is no duty on the part of the principal, as there is on the part of the agent, to keep an account of the dealings between them, and there is no confidence reposed by the agent in the principal, as there is by the principal in the agent; and holding that the existence of such duty and such confidence are grounds for a bill lying for an account by a principal against his agent, and their absence in the converse relation are reasons for a bill, in such a case as this, not lying, the proper remedy of the agent being a bill for discovery in aid of an action at law). Contra Underhill v. Jordan, 72 App. Div. 71, 76 NYS 266 (holding that, where the facts are such that an equitable action against the agent for an accounting could be maintained by the principal, then it must follow that the agent also has the reciprocal right to maintain an action for the same purpose, as it would clearly be obnoxious to every principle of equity to hold that one party might invoke the aid of equity and that the other could not, although the rights and liabilities of each were governed by and arose out of the same transaction).

70. Arnold v. Angell, 62 N. Y. 508; Gee v. Pendas, 66 App. Div. 566, 73 NYS 247; Bridgman v. Scott, 59 Hun 624, 13 NYS 338; Johnston v. Berlin, 35 Misc. 146, 71 NYS 454; Skilton v. Payne, 18 Misc. 332, 42 NYS 111 (where a sales agent was dismissed); Lynch v. Willard, 6 Johns. Ch. (N. Y.) 342; Davis v. Marshall, 114 Va. 193, 76 SE 316, AnnCas1914B 1025 and note; Padwick v. Hurst, 18 Beav. 575, 52 Reprint 225; Smith v. Leveaux, 2 De G. J. & S. 1, 67 EngCh 1, 46 Reprint 274, 1 ERC 419 (holding that, where a trading firm agreed to give to an agent a commission on orders obtained by him, and a commission at a different rate on orders not obtained by him, but given by persons first introduced by him, the fact that the agent must in general be ignorant of the latter class of orders did not entitle him to file a bill against his principals for an account of what was due to him for commission, but that his remedy was at law, it not appearing that there was such complication as to justify equitable interference); Blyth v. Whimn, 27 L. T. Rep. N. S. 330; Moses v. Lewis, 12 Price 502; Dinwiddie v. Bailey, 6 Ves. Jr. 136, 31 Reprint 979 (where a bill by an insurance agent for a discovery and account of money paid and received by him in that capacity on account of defendants, and money due to him for commissions, etc., and for promissory notes indorsed to him was dismissed); Frietas v. Dos Santos, 1 Y. & J. 574; James v. Snarr, 15 Grant Ch. (U. C.) 229.

[a] **Failure to transfer to law court ground for dismissal.**—Where the agent plaintiff insists that his action is maintainable in equity, proposes no amendment, and does not move that the action be transferred to a law court, the court has no alternative, but must dismiss the complaint. Skilton v. Payne, 18 Misc. 332, 42 NYS 111.

71. See supra § 580.

72. California Raisin Growers' Assoc. v. Abbott, 160 Cal. 601, 117 P 767 (holding that the general rule is that in equity an agent cannot demand an accounting from his principal, where an accounting is the principal purpose of the action); Conger v. Judson, 69 App. Div. 121, 74 NYS 504 (holding that a mere agency to act for another, which involves the receipt of money or property, is not sufficient as a basis of an equitable action by the agent for an accounting of money or property so received); Chaurant v. Maillard, 56 App. Div. 11, 67 NYS 345; Johnston v. Berlin, 35 Misc. 146, 71 NYS 454.

73. U. S.—Hapgood v. Berry, 157 Fed. 807, 85 CCA 171 (holding that a suit to recover on a contract by which complainant was to render services to defendant in buying, renting, and selling lands, and was to receive as part compensation a share of the profits made, in which it was necessary to state an account between the parties covering the transactions during several years, was properly cognizable by a court of equity).

Hawaii.—Fowler v. Catton, 13 Hawaii 487.

Me.—Webb v. Fuller, 77 Me. 568, 1 A 737.

N. Y.—New York Hotel Register Co. v. Osborne, 84 App. Div. 307, 82 NYS 609.

N. C.—Dunn v. Johnson, 115 N. C. 249, 20 SE 390; McCaskill v. McBryde, 37 N. C. 52.

Oh.—Roots v. Nye, 2 Handy 229, 12 Oh. Dec. (Reprint) 417.

Pa.—U. S. Bank v. Biddle, 2 Pars. Eq. Cas. 31.

S. C.—McIntyre v. McClenaghan, 12 S. C. 185.

Va.—Wilson v. Miller, 104 Va. 446, 51 SE 837; Thornton v. Thornton, 31 Gratt. (72 Va.) 212.

Wis.—Rippe v. Stogdill, 61 Wis. 38, 20 NW 645.

Eng.—Hemings v. Pugh, 4 Giffard 456, 66 Reprint 785; Shepard v. Brown, 9 Jur. N. S. 195 (allowing a bill for an accounting where it appeared that the agent was employed to obtain orders for sale of goods on commission, that orders were obtained, the evidence whereof was entirely in the possession of the principal, and the account was long and complicated).

[a] **Agent's lien not necessary.**—Where an agent is acting in a fiduciary capacity in the management of a quasi trust fund, it is not essential to the maintenance by him of an equitable action for an accounting with his principal that there should exist in his favor a lien on the fund. Underhill v. Jordan, 72 App. Div. 71, 76 NYS 266.

[b] **Laches.**—Where a manufacturer gave an agent the exclusive right to sell its automobiles for a commission, and the agent contemplated that taxicabs were included in the word "automobiles," but the manufacturer did not believe, in view of the cordial relations existing, that he would be called on to pay the commissions, the agent never waiving its right thereto, but frequently demanding payment thereof, although making no attempt to collect the same prior to the suit therefor in January, 1912, while the agency terminated in 1908, plaintiff was not guilty of laches, barring relief. Wier v. American Locomotive Co., 215 Mass. 303, 102 NE 481.

74. Fenno v. Primrose, 116 Fed. 49; Badger v. McNamara, 123 Mass. 117; Haskins v. Burr, 106 Mass. 48; Harrington v. Churchward, 6 Jur. N. S. 576 (holding that, where a salary is payable to an agent in proportion to the profits of his employers, the question whether the agent has a right to come into equity for an account and payment, in lieu of suing at law, depends upon whether the accounts are of a too complicated nature to be gone into by a jury); Frietas v. Dos Santos, 1 Y. & J. 574.

75. Kerr v. Camden Steamboat Co., 15 S. C. Eq. 189 (holding that equity has jurisdiction in the case of an agent who has been intrusted with funds of his principal, and has received, in the course of the agency, other funds for which he is accountable, and who comes to render his account and asks to have it allowed and himself discharged from his trust, and if any balance be due to have it decreed him, although it appears that the agent is not without a remedy at law).

76. **Nature of agent's liability for unauthorized contracts** see supra §§ 479, 480.

77. Le Roy v. Jacobosky, 136 N. C. 443, 48 SE 796, 67 LRA 977 (holding that, where an agent, or one acting in a representative capacity, fails to bind his principal, whereby another is misled and parts with something of value or acquires legal rights, the agent, although not liable on the contract as made, may be held liable in a special action on the case under the common-law procedure, or, under the code, in an action upon an implied assumpsit, when he received the consideration, or for damages); Anderson v. Adams, 43 Or. 621, 74 P 215; Haupt v. Vint, 68 W. Va. 657, 70 SE 702, 34 LRANS 518 and note; Oliver v. Morawetz, 97 Wis. 332, 72 NW 877. See also supra § 479.

[a] **In Michigan,** under 3 Comp. Laws (1897) § 10421, providing that in all cases where by the fraudulent representations or conduct of any person an injury is produced for which an action on the case for fraud or deceit may by law be brought, an action of assumpsit shall lie upon an implied promise of the wrongdoer to pay all just damages arising from his conduct, assumpsit may be maintained against an agent who makes fraudulent representations to induce a purchase of his principal's land. Barbour v. Hurlburt, 137 Mich. 534, 100 NW 781; Hallett v. Gordon, 122 Mich. 567, 81 NW 556, 82 NW 827, 128 Mich. 364, 87 NW 261.

78. Le Roy v. Jacobosky, 136 N. C. 443, 48 SE 796, 67 LRA 977; Haupt v. Vint, 68 W. Va. 657, 70 SE 702, 34 LRANS 518 and note; Oliver v. Morawetz, 97 Wis. 332, 72 NW 877. See also supra § 479.

79. See supra § 479.

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against an agent who wrongfully takes and retains possession of the former's property;[80] but not where the agent's possession is in good faith.[81]

[§ 590] **4. Actions by Principal against Third Person.** Where property intrusted to an agent has been wrongfully disposed of by him to a third person, the principal cannot maintain an action of contract against the third person, but must sue in tort;[82] he cannot maintain an action of assumpsit in such a case.[83]

An action on the case may be maintained in the name of the principal for false representations made to his agent.[84]

[§ 591] **B. Conditions Precedent[85]—1. In General.** In the absence of contract[86] or statutory provisions[87] the necessity of the performance of particular acts, as conditions precedent to the bringing of actions against the agent, depends on the facts and circumstances of each case.[88]

In an action for conversion by a principal against one who purchases with notice of the principal's title to property sold by the agent as his own, it is not necessary for the principal to elect, and notify the purchaser of his election, to take the property before instituting suit.[89]

[§ 592] **2. Demand—a. Necessity of Demand.**[90] As a general rule an action against an agent for an accounting or for money or property received by the agent for the principal's benefit cannot be maintained, until the principal has made a demand therefor against the agent, and the demand has been refused or not complied with.[91] Failure of the

80. Kimble v. McDermott, 154 Mo. A. 209, 134 SW 72 (holding, however, that, where defendant's act in seizing the property, as to which there was a contract between plaintiff and defendant's wife, was tortious and unjustifiable, replevin will lie against defendant, although he acted only as agent for his wife). See also Replevin [34 Cyc 1401].

81. Kimble v. McDermott, 154 Mo. A. 209, 212, 134 NW 72 (holding that the possession was not in good faith, because "characterized by a wanton disregard of the rights of the plaintiff, and not within the contemplation of his agency; and as such his possession was not in good faith").

82. Berkshire Glass Co. v. Wolcott, 2 Allen (Mass.) 227, 79 AmD 781 (holding that, where goods have been intrusted to an agent for a special purpose and have been wrongfully sold by him, their owner cannot, by ratifying his act, maintain an action of contract against the purchaser for goods sold and delivered, but must sue in tort). See also Nickerson v. Darrow, 5 Allen (Mass.) 419.

83. McCormick Harvesting Mach. Co. v. Waldo, 128 Mich. 135, 87 NW 55.

84. Raymond v. Howland, 12 Wend. (N. Y.) 176.

85. See generally Actions §§ 72–83.

86. McCormick Harvesting Mach. Co. v. Haug, 88 Ill. A. 674 (holding that, where an agency contract provided that if the agent should take worthless notes in the course of his agency, he should, upon settlement with the principal, replace these notes with money or good commercial paper, the principal could not recover from the agent the value of a worthless note taken by the latter without first tendering him the note).

87. See statutory provisions.

88. See cases infra this note.

[a] **Tender to the agent** by the principal of money or property as not a condition precedent, in an action by the principal against the agent see Laurence v. Kilgore, 154 Cal. 310, 97 P 760 (holding that, where an agent buys land for his principal and fraudulently represents to him that the purchase price is an amount in excess of the sum actually paid by the agent a suit by the principal against the agent for such excess, is not one for a rescission of the contract of purchase, and the purchaser is not required to return the land or do anything else toward placing defendant in statu quo, as a condition precedent to maintaining the suit); Salsbury v. Ware, 183 Ill. 505, 56 NE 149 [rev 80 Ill. A. 485] (holding that a principal, whose agent in buying land for him has deceived him by representing that he has paid therefor more than he has, need not, as a condition to recovery of the excess, tender reconveyance); Shipherd v. Field, 70 Ill. 438 (holding that a principal whose money is lost, owing to his agent's loaning it on inadequate security, is excused for not making an earlier offer to return the securities before bringing an action against the agent to recover such loss, where the latter induced the principal to wait nearly a year in the hope of being able to collect the money); Nading v. Howe, 23 Ind. A. 690, 55 NE 1032 (holding that, where plaintiff's agents agreed to purchase wheat for him, and plaintiff was to furnish money for the purchase whenever called upon to do so, but defendants refused to deliver the wheat purchased, and did not call for the purchase money, plaintiff was not required, in an action against such agents for loss of profits on the wheat purchased, to make a tender of the purchase price, and hence his failure to include interest in an averment of tender of such amount did not render his complaint demurrable); Moore v. Mandlebaum, 8 Mich. 433 (holding that, where an agent by fraud induces his principal to convey land to a third person for much less than its value and really for the benefit of the agent, and such third person conveys to a bona fide purchaser for an advanced price, the principal need not, in an action to recover from the agent the difference between the amount paid to the principal and such advanced price, tender back what he had received, before bringing suit); Chandler v. Fulton, 10 Tex. 2, 60 AmD 188 (holding that a forwarding merchant's peremptory refusal to deliver goods to the holder of the bill of lading dispenses with the necessity of making a formal tender of charges thereon before bringing suit for such refusal).

[b] **Recovery of money paid on settlement before discovery of fraud.**—Where, on settlement with an agent, a principal pays him a sum before notice of the agent's fraud in the transaction concerning which the settlement is made, he may sue to recover such sum without first suing and obtaining a rescission of the settlement. Hindle v. Holcomb, 34 Wash. 336, 75 P 873.

[c] **Exhausting other remedies** as a condition precedent: (1) To an action by a third person against the agent see Merchants,' etc., Bank v. Meyer, 56 Ark. 499, 20 SW 406 (holding that, where an agent sells property of his principal which is subject to a mortgage, the mortgagee is not bound to exhaust all other remedies before proceeding against the agent). (2) To an action by the principal against the agent see Mechanics' Bank v. Merchants' Bank, 6 Metc. (Mass.) 13 (holding that, where the indorser of a note is discharged for lack of due demand on the maker, or of notice of the default of the maker, the legal presumption is that he will avail himself of such discharge; and the holder therefore is not bound to prosecute a fruitless suit against the indorser before he can maintain an action against his own agent for neglecting to make due demand on the maker, or to give due notice of his default).

89. Lowry v. Beckner, 5 B. Mon. (Ky.) 41.

90. **Demand:** As condition precedent see generally Actions §§ 74–83. As affecting action of trover against agent see Trover and Conversion [38 Cyc 2037]. As affecting computation of statutory period of limitation see Limitations of Actions [25 Cyc 1078 et seq; 1201 et seq]. As affecting right to costs see Costs [11 Cyc 82]. Necessity of demand and refusal in action of trover see generally Trover and Conversion [38 Cyc 2032 et seq].

91. Ala.—Kidd v. King, 5 Ala. 84; Sally v. Capps, 1 Ala. 121.

Ark.—Jett v. Hempstead, 25 Ark. 462; Leake v. Sutherland, 25 Ark. 219; Lyon v. Tams, 11 Ark. 189; Denton v. Embury, 10 Ark. 228; Warner v. Bridges, 6 Ark. 385; Taylor v. Spears, 6 Ark. 381, 44 AmD 519; Martin v. Webb, 5 Ark. 72, 39 AmD 363; Palmer v. Ashley, 3 Ark. 75; Sevier v. Holliday, 2 Ark. 512; Cummins v. McLain, 2 Ark. 402.

Cal.—Bushnell v. McCauley, 7 Cal. 421; In re Holdforth, 1 Cal. 438.

Ill.—Tinkham v. Heyworth, 31 Ill. 519; Bedell v. Janney, 9 Ill. 193.

Ind.—Claypool v. Gish, 108 Ind. 424, 9 NE 382; Wilson v. Monticello, 85 Ind. 10; State v. Sims, 76 Ind. 328; Dodds v. Vannoy, 61 Ind. 89; Kyser v. Wells, 60 Ind. 261; Hamilton v. Elkins, 46 Ind. 213; Heddens v. Younglove, 46 Ind. 212; Pierse v. Thornton, 44 Ind. 235; Nutzenholster v. State, 37 Ind. 457; Bougher v. Scobey, 23 Ind. 583; Black v. Hersch, 18 Ind. 342, 81 AmD 362; Jones v. Gregg, 17 Ind. 84; Phillips v. Wills, 2 Ind. 325; English v. Devarro, 5 Blackf. 588; Judah v. Dyott, 3 Blackf. 324, 25 AmD 112; Armstrong v. Smith, 3 Blackf. 251; Peyton v. Bowell, 1 Blackf. 244.

Iowa.—Alexander v. Jones, 64 Iowa 207, 19 NE 913.

Ky.—Roberts v. Armstrong, 1 Bush 263, 89 AmD 624.

Me.—Staples v. Staples, 4 Me. 532.

Mass.—Clark v. Moody, 17 Mass. 145.

Mo.—Cockrill v. Kirkpatrick, 9 Mo. 697; Burton v. Collin, 3 Mo. 315; Benton v. Craig, 2 Mo. 198.

Mont.—Anderson v. Hulme, 5 Mont. 295, 5 P 865.

N. H.—Hutchins v. Gilman, 9 N. H. 359.

N. Y.—Madison v. Gross, 54 App. Div. 129, 66 NYS 412; Albany City F. Ins. Co. v. Devendorf, 43 Barb. 444; Baird v. Walker, 12 Barb. 298; Halden v. Crafts, 4 E. D. Smith 490; Cooley v. Betts, 24 Wend. 203; Rathbun v. Ingals, 7 Wend. 320; Taylor v. Bates, 5 Cow. 376; Williams v. Storrs, 6 Johns. Ch. 353, 10 AmD 340.

N. C.—Wiley v. Logan, 95 N. C. 358; Hyman v. Gray, 49 N. C. 155; Waring v. Richardson, 33 N. C. 77; White v. Miller, 20 N. C. 50; Potter v. Sturges, 12 N. C. 79.

Pa.—Drexel v. Raimond, 23 Pa. 21; Krause v. Dorrance, 10 Pa. 462, 51 AmD 496.

Porto Rico.—Olivieri v. Tomei, 1 Porto Rico Fed. 125.

S. D.—Cole v. Baker, 16 S. D. 1, 91 NW 324.

Vt.—Hall v. Peck, 10 Vt. 474.

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agent to comply with a demand is equivalent to a refusal.[92]

When demand not necessary. No demand is necessary where the agent has denied the agency or the liability,[93] or has converted the money or property to his own use,[94] or by reason of his negligence has lost it;[95] or where to make demand would be impracticable or highly inconvenient.[96]

An unreasonable delay in rendering an account or in notifying the principal of the collection of moneys raises a presumption that the agent has converted the funds to his own use, and the principal may sue without a previous demand.[97] When the agent is under an agreement to make payments

Wis.—Kewaunee County v. Decker, 30 Wis. 624.

Eng.—Topham v. Broddick, 1 Taunt. 572, 127 Reprint 956.

[a] **"The general rule is,** that the principal must make a demand of his agent before he can recover money received by the agent in the course of his agency." Olivieri v. Tomei, 1 Porto Rico Fed. 125, 126.

[b] **"This rule does not apply to a mere collecting agent,** who receives money for his principal, but that it is his duty to pay it over within a reasonable time; and if not so paid, the principal may sue him therefor without any previous demand." Olivieri v. Tomei, 1 Porto Rico Fed. 125, 126.

[c] **Awaiting directions as to manner of remitting.**—A factor or consignee having apprised his principal of the sale of goods consigned to him may await directions as to the manner of remitting the net proceeds, and is not liable for an action until a default on his part in remitting or paying the proceeds according to the order of his principal. Ferris v. Paris, 10 Johns. (N. Y.) 285.

[d] **Where the ground of action is the agent's breach of duty,** by reason of which less money came to his hands for the principal than otherwise would have come, and also the failure of the agent to pay over the money actually received no demand is necessary. Dever v. Branch, 18 Tex. 615.

[e] **Where goods are to be sold at certain prices or returned on demand,** and are sold and the money received, no special demand is necessary to an action against the agent for such money; but otherwise where the action is for a failure to return the goods. Wyman v. Fowler, 30 F. Cas. No. 18,114, 3 McLean 467.

[f] **Petition against agent's executor for discovery and settlement** of the accounts of the agent can be filed without previous affidavits and demand. Fox v. Apperson, 6 Bush (Ky.) 653.

92. Hays v. Smith, 26 N. C. 254.

[a] **The refusal by the agent to account** is not restricted to any particular form of words, but any declaration of the agent to the principal or any act which shows a denial of the principal's rights puts the agent in the wrong and gives to the principal a right of action. Moore v. Hyman, 34 N. C. 38; Safford v. Kinsley, 40 Vt. 506.

[b] **Where a demand for payment is made** upon an agent who has collected money, his failure to pay is in law a refusal to pay so as to entitle the principal to maintain an action against the agent. Hays v. Smith, 26 N. C. 254; Wills v. Sugg, 25 N. C. 96.

93. Ala.—Hammett v. Brown, 60 Ala. 498.

Cal.—Cox v. Delmas, 99 Cal. 104, 33 P 836; Allsopp v. Joshua Hendy Mach. Works, 5 Cal. A. 228, 90 P 39 (holding that where, in an action for an accounting of certain property which defendant had agreed to sell as plaintiff's agent, there was proof that defendant had repudiated the agency and converted the property to its own use, plaintiff was not required to prove a demand for the goods to sustain his right to an accounting).

Kan.—Bogle v. Gordon, 39 Kan. 31, 17 P 857.

Mass.—Hill v. Hunt, 9 Gray 66; Brigham v. Clark, 20 Pick. 43 (holding that, where a demand was made upon defendant, an agent at Havana, when in Boston, to account for plaintiff's share in certain earnings and the proceeds of a ship, and defendant thereupon denied his liability to account with plaintiff or his assignees, defendant by such denial waived his right to object that no demand had been made upon him at Havana); Clark v. Moody, 17 Mass. 145.

Mo.—Bartels v. Kinnenger, 144 Mo. 370, 46 SW 163.

Mont.—Judith Inland Transp. Co. v. Williams, 36 Mont. 25, 91 P 1061 (holding that, where an agent claimed that he had fully paid his principal all moneys collected for it by him, and that, instead of being indebted to it, it was indebted to him, no demand upon him was necessary before suit by the principal to recover the sums due it).

N. Y.—Walradt v. Maynard, 3 Barb. 584.

N. C.—Lamb v. Ward, 114 N. C. 255, 19 SE 230; Wiley v. Logan, 95 N. C. 358; King v. Foscue, 91 N. C. 116; Waddell v. Swann, 91 N. C. 108; Moore v. Hyman, 34 N. C. 38.

Or.—Velsian v. Lewis, 15 Or. 539, 16 P 631, 3 AmSR 184.

Pa.—Irwin v. Harris, 199 Pa. 405, 49 A 218.

Vt.—Tillotson v. McCrillis, 11 Vt. 477.

Wis.—Rogers v. Priest, 74 Wis. 538, 43 NW 510.

[a] **Reason for rule.**—"A demand previous to bringing an action for money collected by an agent, is to enable the latter to pay it over without incurring the cost of suit, for the principal must seek him, and not he the principal. . . . But a demand is not required where the agency is denied, or a claim set up exceeding the amount collected, or the agent's responsibility is disputed in the answer." Wiley v. Logan, 95 N. C. 358, 361. In Hammett v. Brown, 60 Ala. 498, 499, the court said: "The error of the charge, now asserted, is, that a principal cannot sue his agent, for money collected, without having first requested or demanded payment of it, and it entitled the plaintiff to a recovery without evidence of such demand. The principle is correct, and has its foundation in the corresponding duties of the relation of principal and agent. The principal cannot place the agent in default, subject him to an accusation of infidelity, and to the costs and vexation of suit, unless he first demands of the agent a performance of his duty. But, if the agent denies his liability to the principal, or otherwise shows a demand would have been fruitless, the law relieves the principal from the duty of making it."

[b] **In conversion,** where plaintiff alleges that she placed in the hands of defendant, as her agent, a sum of money to be loaned on security, and defendant denies the agency, plaintiff need not allege or prove a demand on him for the money before suit. Becker v. Feigenbaum, 5 Cal. Unrep. Cas. 408, 45 P 837.

94. U. S.—Jackson v. Baker, 13 F. Cas. No. 7,130, 1 Wash. C. C. 445.

Ala.—Ainsworth v. Partillo, 13 Ala. 460; Brazier v. Fortune, 10 Ala. 516 (holding that an agent who receives notes to be deposited with an attorney for collection, but collects the money himself, is not entitled to insist on a demand before suit against him).

Cal.—Wooster v. Nevills, 73 Cal. 58, 14 P 390 (where the agent was guilty of both fraud and conversion); Allsopp v. Joshua Hendy Mach. Works, 5 Cal. A. 228, 90 P 39.

Ill.—Chapman v. Burt, 77 Ill. 377; Bedell v. Janney, 9 Ill. 193.

Ind.—Terrell v. Butterfield, 92 Ind. 1; Bunger v. Roddy, 70 Ind. 26.

Iowa.—Haas v. Damon, 9 Iowa 589.

Mo.—Bartels v. Kinnenger, 144 Mo. 370, 46 SW 163.

N. Y.—Baker v. Moore, 4 App. Div. 234, 38 NYS 559; Clarke v. Meigs, 23 N. Y. Super. 337.

Pa.—Etter v. Bailey, 8 Pa. 442.

See generally Trover and Conversion [38 Cyc 2031 et seq].

[a] **Where an agent exchanges property,** intrusted to him to sell on commission, for other property, he is liable to the owner for the value thereof, and the owner may maintain an action therefor without showing a demand for a return of the property or for an account. Haas v. Damon, 9 Iowa 589; Cutter v. Fanning, 2 Iowa 580.

95. Bronnenburg v. Rinker, 2 Ind. A. 391, 28 NE 568.

96. Dodge v. Perkins, 9 Pick. (Mass.) 368; Clark v. Moody, 17 Mass. 145; Eaton v. Welton, 32 N. H. 352.

[a] **Foreign agent.**—(1) "If a merchant who sends his goods to a foreign country to be sold, can have no right to call for his money, the proceeds of his goods, until he has sent abroad to make a demand, the risk of loss from the failure of factors would be considerably increased, and the disposition to trust them proportionably impaired." Clark v. Moody, 17 Mass. 145, 148. (2) Thus, after a lapse of a reasonable time from the receipt of goods by factors abroad and a neglect to account for them in any way, the fair presumption is that the goods have been sold and the money received for them, and an action for money had and received may be maintained. Eaton v. Welton, 32 N. H. 352. (3) But it has been held that the factor of a foreign principal is not liable in an action for the proceeds of a sale made by him on account of his principal on commission, until demand made by the principal or instructions to remit. Halden v. Crafts, 4 E. D. Smith (N. Y.) 490; Cooley v. Betts, 24 Wend. (N. Y.) 203; Ferris v. Paris, 10 Johns. (N. Y.) 285. (4) And in Topham v. Braddick, 1 Taunt. 572, 127 Reprint 956, which was a case of foreign agency, demand was held necessary.

[b] **"An excuse for the failure to make a demand** is, if a sufficient one, equivalent to a demand." Wilson v. Monticello, 85 Ind. 10, 14 (where the court further said: "The complaint before us shows such an excuse, for it shows that the agent had fled the country, and that the appelle had no knowledge of his tarrying place").

97. Ark.—Jett v. Hempstead, 25 Ark. 462; Denton v. Embury, 10 Ark. 228.

Ill.—Bedell v. Janney, 9 Ill. 193, 201 (holding that as a general rule in cases of delay it may be presumed that payment has been delayed for some good and sufficient cause, and that the agent will pay upon demand. "But, where so long a time has elapsed since the collection of the money, as to rebut any such presumption in favor of the collector, he may well be considered as having appropriated it to his own use, and then, neither law nor reason requires that before he can be sued for his non-feasance, he should be requested to do what his conduct sufficiently indicates his determination not to do"); Paris v. Hunter, 10 Ill. A. 230.

Iowa.—Haas v. Damon, 9 Iowa 589.

Me.—Chapman v. Shaw, 5 Me. 59.

Mass.—Dodge v. Perkins, 9 Pick.

at fixed times, the arrival of the time itself operates under the agreement as sufficient demand.[96]

Trover against a third party who received from the agent property or funds which the latter had converted may be maintained by the principal without a previous demand.[99]

[§ 593] **b. Sufficiency of Demand. By whom made.** The demand must of course be made by the principal or his duly authorized agent,[1] and where the demand is made by another than the principal it seems that the agent has the right to require reasonable evidence of his right to make the demand; but the agent must question the person's right to make the demand at the time the demand is made.[2]

Demand on one partner. Where a partnership acts as agent, a demand upon one partner is sufficient.[3]

Time of demand. In case of money received by an agent for his principal the demand must be made after the receipt of the money by the agent.[4]

[§ 594] **C. Parties[5]—1. Right of Action by Principal or Agent or Both—a. In General.** According to the well settled common-law rule that an action upon a contract must be brought in the name of the party in whom the legal interest in the contract is vested,[6] as a general rule where an agent in making a contract has kept within the scope of his authority, acting and contracting merely as agent for a disclosed principal, an action on such contract must be brought in the name of the principal, in whom the legal interest is vested, and not in the name of the agent.[7] To enable an agent to sue in his own name there must be some-

368; Walt v. Gibbs, 7 Pick. 146; Clark v. Moody, 17 Mass. 145.

Mo.—McMahan v. Franklin, 38 Mo. 548.

N. Y.—Hickok v. Hickok, 13 Barb. 632; Lillie v. Hoyt, 5 Hill 395, 40 AmD 360; Cooley v. Betts, 24 Wend. 203.

Pa.—Glenn v. Cuttle, 48 Pa. 524, 2 Grant 273; Drexel v. Raimond, 23 Pa. 21; Harvey v. Turner, 4 Rawle 223; Witherup v. Hill, 9 Serg. & R. 11.

Tex.—Mitchell v. McLemore, 9 Tex. 151.

Eng.—Hardwicke v. Vernon, 14 Ves. Jr. 504, 33 Reprint 614; Ormond v. Hutchinson, 13 Ves. Jr. 47, 33 Reprint 212 [aff 16 Ves. Jr. 94, 33 Reprint 919].

"If the agent fails to render an account, or to notify his principal of the collection of money within a reasonable time, a demand for payment before suit is not necessary." Olivieri v. Tomei, 1 Porto Rico Fed. 125, 126.

[a] **Where brokers received a draft for collection,** and after a reasonable time for its collection had elapsed a suit was brought against them for the amount of the draft, it was held that a demand previous to instituting suit was not necessary. Drexel v. Raimond, 23 Pa. 21.

[b] **What not unreasonable failure to account** see Torrey v. Bryant, 16 Pick. (Mass.) 528.

96. Mardis v. Shackleford, 4 Ala. 493; Castleman v. Southern Mut. L. Ins. Co., 14 Bush (Ky.) 197; Haebler v. Luttgen, 2 App. Div. 390, 37 NYS 794 [aff 158 N. Y. 693 mem, 53 NE 1125 mem]; Brown v. Arrott, 6 Watts & S. (Pa.) 402.

99. Warner v. Martin, 11 How. (U. S.) 209, 13 L. ed. 667; Rodick v. Coburn, 68 Me. 170; Galvin v. Bacon, 11 Me. 28, 25 AmD 258; Gilmore v. Newton, 9 Allen (Mass.) 171, 85 AmD 749. See also generally Trover and Conversion [38 Cyc 2032 et seq].

1. Taylor v. Spears, 6 Ark. 381, 44 AmD 519 (holding that, to constitute a legal demand on an agent who has received money for his principal which he has failed to turn over, it must appear that the person making the demand was authorized to do so by the principal).

[a] **Insufficient demand.**—Where, by the terms of a written contract, one P constituted T his agent to loan money and take securities for the payment of the same, and expressly provided that the authority could be revoked at the request of P in writing, it was held that a demand for the securities in writing, signed by a party claiming to be an attorney of P, without an order in writing or proof of his authority, was not sufficient to authorize P to maintain an action for the face value of the securities. Tingley v. Parshall, 11 Nebr. 443, 9 NW 571.

2. Baxter v. McKinlay, 16 Cal. 76.

3. Baird v. Walker, 12 Barb. (N. Y.) 298.

4. Taylor v. Spears, 6 Ark. 381, 44 AmD 519.

5. See generally Parties [30 Cyc 52–58].

6. See Contracts [9 Cyc 702].

7. U. S.—Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Atchison, etc., R. Co. v. Tiedt, 196 Fed. 348, 116 CCA 168, 40 LRANS 848; Monticello Bank v. Bostwick, 71 Fed. 641; Neely v. Robinson, 17 F. Cas. No. 10,082a, Hempst. 9; The St. Lawrence, 21 F. Cas. No. 12,232, 1 Gall. 467.

Ala.—Wickard v. State, 109 Ala. 45, 19 S 490; Nabors v. Shippey, 15 Ala. 293; Newbold v. Wilson, Minor 12.

Cal.—Preston v. Knapp, 85 Cal. 559, 24 P 811; Chin Kem You v. Ah Joan, 75 Cal. 124, 16 P 705; Swift v. Swift, 46 Cal. 266; Phillips v. Henshaw, 5 Cal. 509.

Conn.—Sullivan v. Shallor, 70 Conn. 733, 40 A 1054; Sutton v. Mansfield, 47 Conn. 388.

D. C.—Hamburg-Bremen F. Ins. Co. v. Lewis, 4 App. 66.

Ga.—Propeller Tow-Boat Co. v. Western Union Tel. Co., 124 Ga. 478, 52 SE 766; Cunningham v. Elliott, 92 Ga. 159, 18 SE 365.

Hawaii.—U. S. v. Burrill Constr. Co., 3 Hawaii Fed. 332.

Ind.—Sharp v. Jones, 18 Ind. 314, 81 AmD 359; Peirce v. Ruley, 5 Ind. 69; Harper v. Ragan, 2 Blackf. 39.

Kan.—Ward v. Ryba, 58 Kan. 741, 51 P 223.

Ky.—Tharp v. Farquar, 6 B. Mon. 3.

Md.—Noel Constr. Co. v. Atlas Portland Cement Co., 103 Md. 209, 63 A 384.

Mass.—Fay v. Walsh, 190 Mass. 374, 77 NE 44 (holding that an action for the purchase price of goods sold by an agent should be brought in the name of the principal, and not in that of the agent); Terry v. Brightman, 132 Mass. 318; Eastern R. Co. v. Benedict, 5 Gray 561, 66 AmD 384; Taunton, etc., Turnp. Corp. v. Whiting, 10 Mass. 327, 6 AmD 124; Bainbridge v. Downie, 6 Mass. 253; Gilmore v. Pope, 5 Mass. 491.

Mich.—Bullock v. Ueberroth, 121 Mich. 293, 80 NW 39; Bleau v. Wright, 110 Mich. 183, 68 NW 115; Weston v. Card, 96 Mich. 373, 56 NW 26 (holding that, in order to recover in his own name on a contract made by him as agent for another, plaintiff must aver and prove an assignment thereof to himself).

Minn.—J. D. Moran Mfg. Co. v. Clarke, 59 Minn. 456, 61 NW 556; Morton v. Hagerman, 39 Minn. 277, 39 NW 497; Morton v. Stone, 39 Minn. 275, 39 NW 496.

Miss.—Denver Produce, etc., Co. v. Taylor, 73 Miss. 702, 19 S 489.

Mo.—Huston v. Tyler, 140 Mo. 252, 36 SW 654, 41 SW 795; Coggburn v. Simpson, 22 Mo. 351; Devers v. Becknell, 1 Mo. 233; White v. Bennett, 1 Mo. 102.

N. J.—Ward v. Wilkie, 3 N. J. L. 411; Kinsey v. Hollinshead, 2 N. J. L. 380; Todd v. Phifer, 1 N. J. L. 414; Brackney v. Shreve, 1 N. J. L. 33.

N. Y.—Bonynge v. Field, 81 N. Y. 159; Hall v. Lauderdale, 46 N. Y. 70; Martin v. Moore, 3 App. Div. 416, 38 NYS 652; McColl v. Fraser, 40 Hun 111 (holding that an action to enforce an equitable lien on funds misappropriated by an agent cannot be brought by the agent in his individual capacity); Rose v. U. S. Telegraph Co., 29 N. Y. Super. 305, 34 HowPr 308, 3 AbbPrNS 408; Redfield v. Middleton, 20 N. Y. Super. 649; Buckbee v. Brown, 21 Wend. 110; Toland v. Murray, 18 Johns. 24; Gunn v. Cantine, 10 Johns. 387; Bogart v. De Bussy, 6 Johns. 94.

N. C.—Nixon v. Bagby, 52 N. C. 4; Whitehead v. Reddick, 34 N. C. 95; Whitehead v. Potter, 26 N. C. 257; Cox v. Skeen, 24 N. C. 220, 38 AmD 691; Peck v. Gilman, 20 N. C. 391.

Okl.—Rankin v. Blaine County Bank, 20 Okl. 68, 93 P 536, 18 LRANS 512.

Pa.—Gillett v. Ball, 9 Pa. 13; Powell v. Roderick, 1 Pa. Dist. 120, 6 Kulp 400; Root v. Muhr, 19 WklyNC 403.

S. C.—Coggeshall v. Coggeshall, 33 S. C. L. 51.

Tex.—Tinsley v. Dowell, 87 Tex. 23, 26 SW 946; San Jacinto Rice Co. v. Lockett, (Civ. A.) 145 SW 1046; McGrew v. Norris, (Civ. A.) 140 SW 1143; Tinsley v. Anderson, (Civ. A.) 33 SW 266 [foll Tinsley v. Dowell, supra].

Vt.—Binney v. Plumley, 5 Vt. 500, 26 AmD 313.

Va.—Jones v. Hart, 1 Hen. & M. (11 Va.) 470 (holding that a suit cannot be maintained in the name of the attorney in fact, even in a court of equity).

W. Va.—Johnson v. Welch, 42 W. Va. 18, 24 SE 585.

Eng.—Pigott v. Thompson, 3 B. & P. 147, 127 Reprint 80.

See also supra § 553.

"An action cannot be prosecuted for a principal in the name of a 'mere' agent who has no personal interest in the subject matter." Simon v. Trummer, 57 Or. 153, 158, 110 P 786. "In no form of process can a mere servant or agent be permitted to enforce, in his own name, the rights of his principal or master." Bates v. Plymouth Overseers of Poor, 14 Gray (Mass.) 163, 165 [quot Peo. v. Kent County, 38 Mich. 421, 423].

[a] **An agent as a rule may not sue in his own name,** the exception being when he is acting under a del credere commission or is the only owner or the ostensible principal in some instances of special contracts by him. U. S. v. Burrell Constr. Co., 3 Hawaii Fed. 332.

[b] **Illustration.**—Where case was brought for a false representation as to the credit of a house to which goods were shipped by means of which the shipment was lost, the action was properly brought in the name of the owner of the goods shipped, although an agent had made advances to an amount exceeding half the value of the goods, had the con-

thing more than the mere powers of a naked agent.[8] However, where an agent is clothed with the necessary power, he may bring suit in his own name.[9]

To this general rule there are four exceptions generally recognized by the courts and text-writers: (1) Where the agent contracts in his own name;[10] (2) where the agent does not disclose his principal, who is unknown;[11] (3) where by the usages of trade the agent is authorized to act as owner of the property;[12] and (4) where the agent has an interest in the subject matter of the contract, and in this case whether he professed to act as agent or not.[13]

[§ 595] **b. Actions on Agent's Contracts—(1) In General.** An agent may maintain an action in his own name on a simple contract in which his principal is interested where the contract is made in writing expressly with the agent, and purports to be a contract personally with him, although he may be known to act as an agent;[14] in some jurisdictions the agent's right of action in such cases is expressly provided for by statute.[15]

Custom or usage to act as principal party. An agent may also sue in his own name where, by the usage of trade or in the general course of business, he is authorized to act as the owner, or as the principal contracting party, although his character as agent is known.[16]

Negotiable instruments. The party holding the legal title to a bill or note may sue on it, although he is merely an agent and liable to account to another for the proceeds of the recovery, but the suit is open in such case to any defense which exists against the party beneficially interested.[17]

trol of the property, and had shipped it to the consignees, where it appeared that he had apprised the consignees that he acted only as agent, although he did not disclose the name of his principal. Raymond v. Howland, 12 Wend. (N. Y.) 176.

[c] **Code procedure—law and equity.**—(1) This rule that an agent may not generally maintain an action in his own name obtains both at common law and under the code. Redfield v. Middleton, 20 N. Y. Super. 649. (2) And whether the action is one at law or in equity. Jones v. Hart, 1 Hen. & M. (11 Va.) 470. (3) But under N. Y. Code Civ. Proc. § 2235, authorizing an application to dispossess tenants for nonpayment of rent to be made by the landlord or his agent, the proceedings may be entitled and the precept issued in the agent's name. Powers v. De O, 64 App. Div. 373, 72 NYS 103.

[d] **Defense of want of interest.**—Defendant may always show that another, and not plaintiff, is the real party in interest. Willard v. Lugenbuhl, 24 La. Ann. 18; Bronson v. Herbert, 95 Mich. 478, 55 NW 359; Hays v. Hathorn, 74 N. Y. 486.

[e] **In Louisiana** an agent may sue in his own name if he styles himself as agent and discloses in his petition the name and residence of his principal. Willard v. Lugenbuhl, 24 La. Ann. 18.

[f] **Subagent.**—Where an assignee of an agent, who had no power to delegate his authority for the collection of a claim, sues thereon, a contention by plaintiff that defendant cannot suffer injury from a judgment, as it will protect him from a second action by the principal, is unavailable to enable him to continue the suit, since, until the principal ratifies the agent's act, defendant continues liable. Dingley v. McDonald, 124 Cal. 682, 57 P 574.

8. Bell v. Tilden, 16 Hun (N. Y.) 346; Barkley v. Wolfskehl, 25 Misc. 420, 54 NYS 934. See also U. S. v. Burrell Constr. Co., 3 Hawaii Fed. 332; Hays v. Hathorn, 74 N. Y. 486.

9. Frazier v. Willcox, 4 Rob. (La.) 517; Eggleston v. Colfax, 4 Mart. N. S. (La.) 481 (holding that where, under a power of attorney, a plaintiff is appointed for the special purpose of recovering the shares of his principal, of the succession of whom defendant was curator, the action may be maintained in his own name for the use and benefit of those he represents); Varney v. Hawes, 68 Me. 442; Kendall v. Calder, 2 Tex. Unrep. Cas. 732 (where money was raised by a committee for the purpose of building a church, and at their request the money was placed in the hands of defendant's testator for safe-keeping, and it was held that a person subsequently selected by the committee as their depository was entitled to sue the executor therefor as the committee's representative and agent).

[a] **In admiralty proceedings** an agent may libel in his own name, or in the name of his principal, in the absence of the owner. Houseman v. The North Carolina, 15 Pet. (U. S.) 40, 10 L. ed. 653; Thompson v. Jacpin, 23 F. Cas. No. 13,959. See also Admiralty § 148.

10. Tinsley v. Dowell, 87 Tex. 23, 26 SW 946. See also infra § 595.

11. See infra § 597.

12. See infra § 595.

13. Tinsley v. Dowell, 87 Tex. 23, 26 SW 946. See also infra § 600.

14. U. S.—Albany, etc., Iron, etc., Co. v. Lundberg, 121 U. S. 451, 7 SCt 958, 30 L. ed. 982; Leeds v. Marine Ins. Co., 6 Wheat. 565, 5 L. ed. 332.

Ala.—Dawson v. Burrus, 73 Ala. 111; Bryan v. Wilson, 27 Ala. 208; Nabors v. Shippey, 15 Ala. 293.

Cal.—Tustin Fruit Assoc. v. Eagle Fruit Co., 6 Cal. Unrep. Cas. 37, 53 P 693.

Colo.—Rhone v. Powell, 20 Colo. 41, 36 P 899.

D. C.—Hamburg-Bremen F. Ins. Co. v. Lewis, 4 App. 66.

Ga.—Spence v. Wilson, 102 Ga. 762, 29 NE 713; Groover v. Warfield, 50 Ga. 644.

Ill.—Mills v. Jensen, 75 Ill. A. 644; Stockbarger v. Sain, 69 Ill. A. 436.

Ind.—Rowe v. Rand, 111 Ind. 206, 12 NE 377; Sharp v. Jones, 18 Ind. 314, 81 AmD 359.

Iowa.—Fear v. Jones, 6 Iowa 169.

Ky.—Tharp v. Farquar, 6 B. Mon. 3; Neff v. Baden, 3 B. Mon. 468 (holding that a covenant to pay S, agent of B, is a covenant to S, and he alone can sue).

La.—Girault v. Feucht, 120 La. 1070, 46 S 26; Willard v. Lugenbuhl, 24 La. Ann. 18; Brewster v. Saul, 8 La. 296.

Md.—Willson v. Sands, 36 Md. 38.

Mass.—Buffington v. McNally, 192 Mass. 198, 78 NE 309; Pelton v. Baker, 158 Mass. 349, 33 NE 394; Colburn v. Phillips, 13 Gray 64; Tyler v. Freeman, 3 Cush. 261; Buffum v. Chadwick, 8 Mass. 103.

Minn.—Cremer v. Wimmer, 40 Minn. 511, 42 NW 467.

Mo.—Hovey v. Pitcher, 13 Mo. 191; Clubb v. St. Louis, etc., R. Co., 136 Mo. A. 1, 117 SW 110.

N. H.—Chandler v. Coe, 54 N. H. 561; Doe v. Thompson, 22 N. H. 217.

N. Y.—Knapp v. Simon, 96 N. Y. 284; Considerant v. Brisbane, 22 N. Y. 389; Dows v. Cobb, 12 Barb. 310; Newcomb v. Clark, 1 Den. 226 (holding that an action upon an express contract must, except in the case of negotiable paper, be brought in the name of the agent to whom it was made); Beebee v. Robert, 12 Wend. 413, 27 AmD 132.

N. C.—Brown v. Morris, 83 N. C. 251.

Oh.—Evrit v. Bancroft, 22 Oh. St. 172; Potts v. Rider, 3 Oh. 71, 17 AmD 581; Marine Ins. Co. v. Walsh-Upstill Coal Co., 23 Oh. Cir. Ct. 191.

Pa.—Matter of Merrick, 2 Ashm. 485.

S. C.—Depeau v. Hyams, 13 S. C. L. 146.

Tex.—Frazier v. Moore, 11 Tex. 755; Neal v. Andrews, (Civ. A.) 60 SW 459.

Vt.—Holden v. Rutland R. Co., 73 Vt. 317, 50 A 1096; Culver v. Bigelow, 43 Vt. 249; Woodstock Bank v. Downer, 27 Vt. 482, 65 AmD 210; Lapham v. Green, 9 Vt. 407.

Va.—Leterman v. Charlottesville Lumber Co., 110 Va. 769, 67 SE 281; Commonwealth Nat. Bank v. Nolting, 94 Va. 263, 26 SE 826; Hartshorne v. Whittles, 3 Munf. (17 Va.) 357.

W. Va.—Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 SE 777, 7 LRA 572; Deitz v. Providence-Washington Ins. Co., 31 W. Va. 851, 8 SE 616, 13 AmSR 909.

Eng.—Hodgens v. Keon, [1894] 2 Ir. 657; Sims v. Bond, 5 B. & Ad. 389, 27 ECL 168, 110 Reprint 834; Short v. Spackman, 2 B. & Ad. 962, 22 ECL 402, 109 Reprint 1400; Wolff v. Horncastle, 1 B. & P. 316, 126 Reprint 924, 13 ERC 265; Robertson v. Walt, 8 Exch. 299; Rayner v. Grote, 16 L. J. Exch. 79.

N. S.—McDonald v. Smalll, 25 N. S. 440.

Ont.—Allnutt v. Ryland, 11 U. C. C. P. 300; Coquillard v. Hunter, 36 U. C. Q. B. 316; Saxton v. Ridley, 13 U. C. Q. B. 522.

See also supra § 505.

15. See statutory provisions. See also Shelby v. Burrow, 76 Ark. 558, 89 SW 464, 1 LRANS 303, 6 AnnCas 554 (holding that Kirby Dig. § 6002, providing that a person with whom or in whose name a contract is made for the benefit of another, etc., may sue without joining with him the person for whose benefit it is prosecuted, makes no change in the law allowing an agent to sue on a contract made in his own name); Georgia Southern, etc., R. Co. v. Marchman, 121 Ga. 235, 48 SE 961; Spence v. Wilson, 102 Ga. 762, 29 SE 713; Spain v. Beach, 52 Ga. 494.

16. Ala.—Nabors v. Shippey, 15 Ala. 293; Newbold v. Wilson, Minor 12.

Ind.—Rowe v. Rand, 111 Ind. 206, 12 NE 377.

Kan.—Douglas v. Wolf, 6 Kan. 88 (holding that a person buying bonds for another, but in his own name, may maintain an action in his own name for the recovery of the possession of them).

Minn.—Close v. Hodges, 44 Minn. 204, 46 NW 335 (holding that an agent, having taken in his own name a mortgage upon chattels, may sue therefor in trover as the trustee of an express trust).

N. Y.—Meyer v. Fiegel, 30 N. Y. Super. 122; Alsop v. Caines, 10 Johns. 396 [aff 13 Johns. 9].

Tex.—Tinsley v. Dowell, 87 Tex. 23, 26 SW 946; San Jacinto Rice Co. v. Lockett, (Civ. A.) 145 SW 1046.

Eng.—Provincial Ins. Co. v. Leduc, L. R. 6 P. C. 224. See also Drinkwater v. Goodwin, Cowp. 251, 98 Reprint 1070.

Ont.—Ross v. Tyson, 19 U. C. C. P. 294.

17. U. S.—Lum v. Robertson, 6

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[§ 596] **(2) Under Code Provisions.** Under the familiar provision in the codes and practice acts that every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted, a person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of the statute, and it thus gives an agent a right of action in his own name in such a case;[18] and under the Federal Practice Conformity Act the rule thus established by the codes of the several states is applicable to actions at law in a federal court held within a state where such code provision is in force, although such court may have a rule to the contrary.[19] However, an agent who makes a contract for his principal in the principal's name is not a person with whom the contract is made within the statutory provision that a person with whom or in whose name a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted.[20]

[§ 597] **(3) Where Agent Is Ostensible Principal.** Where an agent, in making a contract with a third person, acts in his own name, and does not disclose the name of his principal or the existence of an agency, the third person contracts personally with the agent; and in such case the agent becomes, as to the third person, the real contracting party,

Wall. 277, 18 L. ed. 743; Dugan v. U. S., 3 Wheat. 172, 4 L. ed. 362; Pacific Guano Co. v. Holleman, 12 Fed. 61, 4 Woods 462; Orr v. Lacy, 18 F. Cas. No. 10,589, 4 McLean 243.

Ala.—Goodman v. Walker, 30 Ala. 482, 68 AmD 134; Moore v. Henderson, 18 Ala. 232; Bird v. Daniel, 9 Ala. 302; Moore v. Penn, 5 Ala. 135; Grigsby v. Nance, 3 Ala. 347.

Cal.—Ord v. McKee, 5 Cal. 515.

Ga.—Austell v. Rice, 5 Ga. 472.

Ill.—McConnel v. Thomas, 3 Ill. 313.

Iowa.—Cottle v. Cole, 20 Iowa 481.

La.—Zapata v. Cifero, 26 La. Ann. 87; Ricard v. Harrison, 19 La. Ann. 181; Johnson v. Brashear, 5 Rob. 477; Garland v. Lockett, 5 Mart. N. S. 40.

Mass.—Fairfield v. Adams, 16 Pick. 381; Buffum v. Chadwick, 8 Mass. 103. See also Barker v. Prentiss, 6 Mass. 430 (holding that in an action on a bill of exchange by an indorser who was merely the agent of the payee defendant may show a request from the principal not to pay the bill to such agent).

Nebr.—Stoll v. Sheldon, 13 Nebr. 207, 13 NW 201.

N. Y.—Hollingsworth v. Moulton, 53 Hun 91, 6 NYS 362 [aff 119 N. Y. 612 mem, 23 NE 1143 mem] (note payable to agent for use of principal); Fish v. Jacobsohn, 18 N. Y. Super. 514 [aff 2 Abb. Dec. 132, 1 Keyes 539]; Mauran v. Lamb, 7 Cow. 174.

N. C.—Grist v. Backhouse, 20 N. C. 496 (where bill made payable to A. or order, to the use of B).

Oh.—Smead v. Fay, 1 Disn. 531, 12 Oh. Dec. (Reprint) 777.

Okl.—Routh v. Kostachek, 15 Okl. 234, 81 P 429.

Pa.—Pearce v. Austin, 4 Whart. 489, 34 AmD 523.

Tenn.—Cocke v. Dickens, 4 Yerg. 29, 26 AmD 214; Rutherford v. Mitchell, Mart. & Y. 261.

Tex.—Cochran v. Siegfried, (Civ. A.) 75 SW 542; Mensing v. Ayres, 2 Tex. A. Civ. Cas. § 562.

Vt.—Johnson v. Catlin, 27 Vt. 87, 62 AmD 622; Binney v. Plumley, 5 Vt. 500, 26 AmD 313.

See Ward v. Ryba, 58 Kan. 741, 51 P 228; Hutchinson v. Munroe, 8 U. C. Q. B. 103.

[a] **In North Carolina,** however, an agent designated as the payee of a note is not entitled to sue thereon in his own name, except upon proof that the note was made payable to him with the consent of his principal, the burden of proving such fact being on him. Martin v. Mask, 158 N. C. 436, 74 SE 343, 41 LRANS 641 and note.

[b] **Form of contract immaterial.**—The right of the agent to maintain an action in his own name against the third person when the instrument is made payable to him is the same whether the instrument is a promissory note, check, bill of exchange, bill of lading, or insurance contract. Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 SE 777, 7 LRA 572.

[c] **A mere depository** of a note cannot maintain suit upon it. Woodsum v. Cole, 69 Cal. 142, 10 P 331; Sherwood v. Roys, 14 Pick. (Mass.) 172.

18. U. S.—Albany, etc., Iron, etc., Co. v. Lundberg, 121 U. S. 451, 7 SCt 968, 30 L. ed. 982.

Cal.—West v. Crawford, 80 Cal. 19, 21 P 1123; Winters v. Rush, 34 Cal. 136.

Dak.—McLaughlin v. Deadwood First Nat. Bank, 6 Dak. 406, 43 NW 715.

Ind.—Landwerlen v. Wheeler, 106 Ind. 523, 5 NE 888; Holmes v. Boyd, 90 Ind. 332; Northwestern Conference of Universalists v. Myers, 86 Ind. 375; Heavenridge v. Mondy, 34 Ind. 28; Waddle v. Harbeck, 33 Ind. 231; Sharp v. Jones, 18 Ind. 314, 81 AmD 359. Compare Smock v. Brush, 62 Ind. 176.

Iowa.—Dorr Cattle Co. v. Jewett, 116 Iowa 93, 89 NW 109; Brown v. Sharkey, 93 Iowa 157, 61 NW 864; Abell Note Brokerage, etc., Co. v. Hurd, 85 Iowa 559, 52 NW 488; Cassidy v. Woodward, 77 Iowa 354, 42 NW 319; Rice v. Savery, 22 Iowa 470; Cottle v. Cole, 20 Iowa 481; Fear v. Jones, 6 Iowa 169.

Kan.—West v. Western Union Tel. Co., 39 Kan. 93, 17 P 807, 7 AmSR 530; St. Louis, etc., R. Co. v. Thacher, 13 Kan. 564; Scantlin v. Allison, 12 Kan. 85.

Ky.—Goff v. Boland, 92 SW 575, 29 KyL 172.

Minn.—Close v. Hodges, 44 Minn. 204, 46 NW 335; Cremer v. Wimmer, 40 Minn. 511, 42 NW 467.

Mo.—Wolfe v. Missouri Pac. R. Co., 97 Mo. 473, 11 SW 49, 10 AmSR 331, 3 LRA 539; Snider v. Adams Express Co., 77 Mo. 523; Rogers v. Gosnell, 51 Mo. 466; Simons v. Wittmann, 113 Mo. A. 357, 88 SW 791; Draper v. Farris, 56 Mo. A. 417; Harrigan v. Welch, 49 Mo. A. 496.

N. Y.—Societa Italiana Di Beneficenza v. Sulzer, 138 N. Y. 468, 34 NE 193; Coffin v. Grand Rapids Hydraulic Co., 136 N. Y. 655, 32 NE 1076; Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6 [aff 61 Barb. 335]; Hubbell v. Medbury, 53 N. Y. 98; Noe v. Christie, 51 N. Y. 270 (one who has the authority of several owners to collect a claim in his own name); Considerant v. Brisbane, 22 N. Y. 389, 396 (where the court, in construing the New York statute, said: "It is intended, manifestly, to embrace, not only formal trusts, declared by deed inter partes, but all cases in which a person, acting in behalf of a third party, enters into a written, express contract with another, either in his individual name, without description, or in his own name, expressly in trust for, or on behalf of, or for the benefit of, another, by whatever form of expression such trust may be declared. It includes, not only a person with whom, but one in whose name, a contract is made for the benefit of another"); Minturn v. Main, 7 N. Y. 220; Cummins v. Barkalow, 1 Abb. Dec. 479 (assignee of a claim in trust for a third person); Berry v. Gavin, 38 Hun 1, 34 NYS 505; Hollingsworth v. Moulton, 53 Hun 91, 6 NYS 362 [aff 119 N. Y. 612 mem, 23 NE 1143 mem]; Brown v. Cherry, 56 Barb. 635; Hutchins v. Smith, 46 Barb. 235; Arosemena v. Hinckley, 43 N. Y. Super. 43 (one who makes a sale for another and takes the contract in his own name); Rowland v. Phalen, 14 N. Y. Super. 43; Grinnell v. Schmidt, 4 N. Y. Super. 706, 3 CodeRep 19; Union India Rubber Co. v. Tomlinson, 1 E. D. Smith 364; Walsh v. Reinhart, 20 Misc. 407, 45 NYS 1026 [aff 21 Misc. 22, 46 NYS 866]; Robertson v. National Steamship Co., 14 NYS 313 [rev on other grounds 139 N. Y. 416, 34 NE 1053]; Reilly v. Cook, 13 AbbPr 255, 22 HowPr 93; Morgan v. Reid, 7 AbbPr 215; Davis v. Reynolds, 48 HowPr 210 [aff 5 Hun 651]; Slocum v. Barry, 34 HowPr 320; Erickson v. Compton, 6 HowPr 471. See also Weinfeld v. Bergner, 114 NYS 284.

N. C.—Winders v. Hill, 141 N. C. 694, 54 SE 440.

Oh.—Davis v. Harness, 38 Oh. St. 397; Marine Ins. Co. v. Walsh-Upstill Coal Co., 23 Oh. Cir. Ct. 191; Arcade Hotel Co. v. Wiatt, 1 Oh. Cir. Ct. 55, 1 Oh. Cir. Dec. 34 [rev on other grounds 44 Oh. St. 32, 4 NE 398, 58 AmR 785].

S. D.—Hudson v. Archer, 4 S. D. 128, 55 NW 1099.

See generally Parties [30 Cyc 85-92].

[a] **Purpose and operation of provision.**—(1) This provision of the code is said to have been introduced to preserve the right of action in the agent as it existed at common law (Wolfe v. Missouri Pac. R. Co., 97 Mo. 473, 11 SW 49, 10 AmSR 331, 3 LRA 539; Grinnell v. Schmidt, 4 N. Y. Super. 706, 3 CodeRep 19); (2) but it seems to be more extensive in its operation, for at common law a contract in writing which states on its face that it was made by one as agent for a named principal, or on his account, or on his behalf, has been held to be the contract of the principal only, the agent not being entitled to sue thereon (Southwell v. Bowditch, 1 C. P. D. 374; Davis v. James, 5 Burr. 2680, 98 Reprint 407; Brown v. Hodgson, 2 Campb. 36; Ogden v. Hall, 40 L. T. Rep. N. S. 751 [crit Paice v. Walker, L. R. 5 Exch. 173]. But see Fitzpatrick v. Fain, 3 Coldw. (Tenn.) 15; Cocke v. Dickens, 4 Yerg. (Tenn.) 29, 26 AmD 214).

[b] **Depository distinguished from trustee.**—In Hodge v. Comly, 2 Miles (Pa.) 286, the court made this distinction: If plaintiff holds the note as a trustee, he has the right of action; but if he holds it as a mere depository and agent, the right of action is in the principal.

19. Sawin v. Kenny, 93 U. S. 289, 23 L. ed. 926; U. S. v. Tracy, 28 F. Cas. No. 16,536, 3 Ben. 1 (construing U. S. Rev. St. § 914, 4 Fed. St. Annot. 563); Weed Sewing-Mach. Co. v. Wicks, 29 F. Cas. No. 17,348, 3 Dill. 261.

20. Ferguson v. McMahon, 52 Ark. 433, 12 SW 1070 (holding that an agent who makes a contract for his principal in the principal's name is

and therefore has a right of action on the contract,[21] although the principal may also sue thereon in his own name.[22]

[§ 598] **(4) Where Ostensible Agent Is Principal.** It is a distinctly recognized rule that a professed agent contracting in the name of a person on whose credit and responsibility the other party to the contract relies cannot, when he himself is the real principal and is not known to be such by the other contracting party, maintain an action on the contract.[23] Where, however, a professed agent who is the real principal contracts for an unknown and unnamed principal on whose credit therefore no reliance can be placed, he has as principal a right of action on the contract unless the other contracting party relied on his character as an agent only and would not have contracted with him as principal if he had known him to be such.[24] So where the person contracting with the professed agent of a designated principal knows that the ostensible agent is the real principal and accepts the performance of the contract, the agent as principal may maintain an action on the contract.[25]

[§ 599] **(5) Contracts under Seal.** Applying the well established principle of the common law that only such persons as are parties thereto can sue upon an instrument under seal in those jurisdictions where the distinction between sealed and unsealed instruments is still recognized, the principal cannot sue on a sealed contract which is not executed in his name and under his seal;[26] as where an agent makes a contract in his own name and under his own seal he alone and not the principal can maintain an action thereon.[27] This rule

not in any legal sense a person with whom the contract is made; the contract in such a case is with the principal only, and he alone is authorized to enforce it). See also Ramsdell v. U. S., 2 Ct. Cl. 508 (holding that where a contract is made in the name of the principal, and the principal sues thereon, the joining of the agent as a party plaintiff, although he has no legal interest, will not defeat the action).

21. U. S.—Leeds v. Marine Ins. Co., 6 Wheat. 565, 5 L. ed. 332.

Ala.—Nabors v. Shippey, 15 Ala. 293.

Ga.—Carter v. Southern R. Co., 111 Ga. 38, 36 SE 308, 50 LRA 354 (holding that a person who, having in charge, as agent, the goods of another, makes with a common carrier a contract to ship such goods, in which the agency is not disclosed, may maintain an action in his own name for a breach of such contract).

Ill.—Hewitt v. Torson, 124 Ill. A. 375 (holding that, where the agent is the only known or ostensible principal, he is, in contemplation of law, the real contracting party, and may maintain an action on the contract in his own name).

Ind.—Rowe v. Rand, 111 Ind. 206, 12 NE 377.

Ky.—Atcherson v. Talbot, 5 Dana 324.

Mass.—Terry v. Brightman, 132 Mass. 318; Rhoades v. Blackiston, 106 Mass. 334, 8 AmR 332; Borrowscale v. Bosworth, 99 Mass. 378; Colburn v. Phillips, 13 Gray 64.

Mo.—Kelly v. Thuey, 102 Mo. 522, 15 SW 62; Coggburn v. Simpson, 22 Mo. 351; Simons v. Wittmann, 113 Mo. A. 357, 88 SW 791.

N. C.—Barham v. Bell, 112 N. C. 131, 16 SE 903.

N. D.—Stewart v. Gregory, 9 N. D. 618, 84 NW 553.

Tex.—Tinsley v. Dowell, 87 Tex. 23, 26 SW 946; Texas Overall Co. v. Mummert, (Civ. A.) 157 SW 219; San Jacinto Rice Co. v. Lockett, (Civ. A.) 145 SW 1046.

Vt.—Lapham v. Green, 9 Vt. 407.

Va.—Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp., 109 Va. 513, 64 SE 56 (holding that where an agent contracts not under seal in his own name for an undisclosed principal either may sue on it); Commonwealth Nat. Bank v. Nolting, 94 Va. 263, 26 SE 826.

W. Va.—Coulter v. Blatchley, 51 W. Va. 163, 41 SE 133.

Eng.—Evans v. Evans, 3 A. & E. 132, 30 ECL 80, 111 Reprint 363; Sims v. Bond, 5 B. & Ad. 389, 27 ECL 168, 110 Reprint 834; Fisher v. Marsh, 6 B. & S. 411, 118 ECL 411, 122 Reprint 1247; Rayner v. Grote, 16 L. J. Exch. 79.

[a] **Subagent.**—Where a subagent makes a contract in the name of the agent, without disclosing the principal, the agent may maintain an action in his own name against the other party to the contract for a breach thereof. Shelby v. Burrow, 76 Ark. 558, 89 SW 464, 1 LRANS 303.

22. Ill.—Stockbarger v. Sain, 69 Ill. A. 436.

Md.—Anderson v. Stewart, 108 Md. 340, 348, 70 A 228 (where the court said: "It is too well settled to be disputed, that where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or his principal may sue upon it, the only limitation upon this doctrine being, that if the principal sues upon a contract thus made with an agent in the name of the latter, the defendant is entitled to be placed in the same position at the time of the disclosure of the principal, as if the agent had been the real contracting party"); Oelrichs v. Ford, 21 Md. 489.

Mass.—Winchester v. Howard, 97 Mass. 303, 93 AmD 93; Taylor v. Freeman, 3 Cush. 261.

Mo.—Kelly v. Thuey, 143 Mo. 422, 45 SW 300 [overr Kelly v. Thuey, 102 Mo. 522, 15 SW 62].

N. Y.—Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co., 211 N. Y. 68, 105 NE 88; Indianapolis, etc., R. Co. v. Tyng, 2 Hun 311; Beebee v. Robert, 12 Wend. 413, 27 AmD 132.

N. C.—Nicholson v. Dover, 145 N. C. 18, 58 SE 444, 13 LRANS 167; Barham v. Bell, 112 N. C. 131, 16 SE 903.

Tex.—Hunter v. Adoue, 38 Tex. Civ. A. 542, 86 SW 622.

Wash.—First Nat. L. Assur. Soc. v. Farquhar, 75 Wash. 667, 135 P 619.

Eng.—Bickerton v. Burrell, 5 M. & S. 383, 105 Reprint 1091.

See also infra § 601.

23. Boulton v. Jones, 2 H. & N. 564; Schmalz v. Avery, 15 Jur. 291; Rayner v. Grote, 16 L. J. Exch. 79, 82 (where Alderson, B., said: "In many such cases as, for instance, the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then shew himself to be the real principal, and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule").

[a] **When principal must give notice.**—A person entering into a contract under the assumed character of an agent, either concealing or falsely representing the name of the principal when in fact he is the real principal, cannot maintain an action on such contract as principal without first giving the third party notice of his real character. Foster v. Smith, 2 Coldw. (Tenn.) 474, 88 AmD 604; Bickerton v. Burrell, 5 M. & S. 383, 105 Reprint 1091.

24. Harper v. Vigers, [1909] 2 K. B. 549 (where contract signed by one of the parties "as agent for principal," when in fact there was no principal, was held enforceable by the agent, in his own name, against the other party); Schmalz v. Avery, 15 Jur. 291.

25. Whiting v. William H. Crawford Co., 93 Md. 390, 49 A 615.

26. D. C.—Nichols v. Bealmear, 36 App. 352.

Ill.—Walsh v. Murphy, 167 Ill. 228, 47 NE 354; Harms v. McCormick, 132 Ill. 104, 22 NE 511; Gautzert v. Hoge, 78 Ill. 30; Moore v. House, 64 Ill. 162; Stockbarger v. Sain, 69 Ill. A. 436.

Ky.—Violett v. Powell, 10 B. Mon. 347, 52 AmD 548.

Md.—Baltimore Coal Tar, etc., Co. v. Fletcher, 61 Md. 288.

Mo.—State v. O'Neill, 75 Mo. A. 134.

N. J.—Sheldon v. Dunlap, 16 N. J. L. 245.

N. Y.—Elliott v. Braby, 192 N. Y. 221, 85 NE 69, 127 AmSR 898, 18 LRANS 600 [aff 118 App. Div. 208, 103 NYS 156] (holding that one may not claim that a written contract under seal was executed by a party thereto as his agent, and that he is the real, although unnamed, principal, as a person not a party to a sealed contract cannot show that a party thereto acted as agent for him); Buffalo Catholic Inst. v. Bitter, 87 N. Y. 250; Briggs v. Patridge, 64 N. Y. 357, 21 AmR 617; Williams v. Magee, 76 App. Div. 512, 78 NYS 550 [aff 177 N. Y. 534 mem, 69 NE 1133 mem]; De Remer v. Brown, 86 App. Div. 634, 55 NYS 367 [aff 165 N. Y. 410, 59 NE 129]; Denike v. De Graaf, 87 Hun 61, 33 NYS 1015 [aff 152 N. Y. 650 mem, 47 NE 1106 mem]; Ivy Courts Realty Co. v. Barker, 71 Misc. 460, 128 NYS 715; Anderson v. Conner, 48 Misc. 384, 87 NYS 449; McColgan v. Katz, 29 Misc. 136, 60 NYS 291.

N. C.—Barham v. Bell, 112 N. C. 131, 16 SE 903; U. S. v. Blount, 4 N. C. 181.

Pa.—Seyfert v. Bean, 83 Pa. 450.

R. I.—Providence v. Miller, 11 R. I. 272, 23 AmR 453.

Tex.—Kempner v. Dillard, 100 Tex. 505, 101 SW 437, 123 AmSR 822.

Eng.—Humble v. Hunter, 12 Q. B. 310, 64 ECL 310, 116 Reprint 885; Carnegie v. Waugh, 2 D. & R. 277, 16 ECL 85; Gardner v. Lachlan, 4 Myl. & C. 129, 18 EngCh 129, 41 Reprint 51.

See also supra § 340.

27. U. S.—Clarke v. Courtney, 5 Pet. 319, 8 L. ed. 140; U. S. v. Parmele, 27 F. Cas. No. 15,997, 1 Paine 252; Calvary Cathedral v. U. S., 29 Ct. Cl. 269.

Ark.—Hearshy v. Hichox, 12 Ark. 125.

Ill.—Equitable L. Assur. Soc. v. Smith, 25 Ill. A. 471.

N. J.—Loeb v. Barris, 50 N. J. L. 382, 13 A 602.

N. Y.—Schaefer v. Henkel, 75 N. Y. 378, 7 AbbNCas 1, 57 HowPr 97; Melcher v. Kreiser, 28 App. Div. 362, 51 NYS 249 [rev 22 App. Div. 629 mem, 50 NYS 1130 mem]; Buge v. Newman, 61 Misc. 84, 113 NYS 198 [aff 132 App. Div. 928 mem, 118 NYS 1097 mem]; Cleary v. Heyward, 122

has been held to apply even though the instrument is one not required to be under seal in order to be valid.[28]

Where the agent is bound by his personal covenants, he may sue alone to compel the performance, or to recover for the breach, of the covenants of the other party to the contract;[29] but if the covenant of the other party is made to the principal the agent cannot maintain an action thereon.[30]

[§ 600] **c. Where Agent Has Lien or Beneficial Interest.** The general rule is that where an agent is the nominal promisee and has a beneficial interest in the performance of the contract, or a special property or interest in the subject matter of the agreement, he may support an action in his own name upon the contract,[31] and in some jurisdictions this rule is expressly provided for by statute.[32]

[§ 601] **d. Right of Principal to Control or Supersede Agent's Action.** The right of an agent to bring an action in certain cases in his own name is generally subordinate to the rights of the principal who may control the action or bring suit himself, and thus suspend or extinguish the

NYS 334; Spencer v. Field, 10 Wend. 87.

N. C.—Brown v. Morris, 83 N. C. 251.

Pa.—Lancaster v. Knickerbocker Ice Co., 153 Pa. 427, 26 A 251; Hopkins v. Mehaffy, 11 Serg. & R. 126.

Tenn.—Cocke v. Dickens, 4 Yerg. 29, 26 AmD 214; Rutherford v. Mitchell, Mart. & Y. 261.

Va.—Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp., 109 Va. 513, 64 SE 56.

Eng.—Sims v. Bond, 5 B. & Ad. 389, 27 ECL 168, 110 Reprint 834; Berkeley v. Hardy, 5 B. & C. 355, 11 ECL 495, 108 Reprint 132, 2 ERC 274; Dancer v. Hastings, 4 Bing. 2, 13 ECL 371, 130 Reprint 667; Schack v. Anthony, 1 M. & S. 573, 105 Reprint 214.

See also supra § 340.

[a] **In New York** "the rule has been laid down by the Court of Appeals that no person can sue, or be sued, to enforce covenants contained in an instrument under seal, except those who are named as parties therein and who signed and sealed the same; which rule is not affected by the fact that the word 'agent' is added to the name of one of the parties as it appears in the instrument, or that it appeared upon the trial that in the making of the contract the person, so described as 'agent' in the instrument, was, in fact, acting as agent for the principal seeking to enforce the contract. Henricus v. Englert, 137 N. Y. 488, 494, 33 NE 550. Where it appears from the instrument that the seal affixed is the seal of the person subscribing, who designates himself as agent, and not the seal of the principal, the agent only is the real party in interest who can maintain an action upon the instrument; and, in the absence of proof that the lessee had knowledge that such agent was acting for the owner, or had recognized the latter's rights, and in the absence of an assignment of the lease to the owner, the latter cannot maintain an action on the lease under seal in his own name to recover rent accruing thereunder, as the parties executing the lease under seal are the real parties in interest and alone are bound thereby; and the contract of lease under seal cannot be regarded as a simple contract and the seal rejected as surplusage." Buge v. Newman, 61 Misc. 84, 113 NYS 198 [aff 132 App. Div. 928 mem, 118 NYS 1097 mem].

[b] **Principal sufficiently disclosed to maintain action.**—In J. H. Hayes Woolen Co. v. McKinnon, 114 N. C. 661, 19 SE 761, where a bill of sale stated that the consideration was paid by "W. agent," etc., for plaintiffs named, it was held that the principals could bring an action on the contract, although the contract was under seal and signed simply in the name of the agent.

28. Henricus v. Englert, 137 N. Y. 488, 33 NE 550; Briggs v. Partridge, 64 N. Y. 357, 21 AmR 617; Anderson v. Conner, 43 Misc. 384, 87 NYS 449; Smith v. Pierce, 60 NYS 1011. In Schaefer v. Henkel, 75 N. Y. 378, 7 AbbNCas 1, 57 HowPr 97, it was held that, notwithstanding the seal was not essential to the validity of the contract, the principal could not recover thereon, because the contract was made throughout by the agent who described himself as such but named no principal; and the statute authorizing suit in the name of the real party in interest did not affect the case. This decision was followed in Stanton v. Granger, 125 App. Div. 174, 109 NYS 134 [aff 193 N. Y. 656 mem, 87 NE 1127 mem], where Justice Gaynor strongly dissented, contending that, as the seal was unnecessary, the contract was a simple one, and the undisclosed principal could sue thereon. But see Lancaster v. Knickerbocker Ice Co., 153 Pa. 427, 26 A 251.

29. Henricus v. Englert, 137 N. Y. 488, 33 NE 550; Potts v. Rider, 3 Oh. 70, 17 AmD 581; Holt v. Martin, 51 Pa. 499; Samuel v. Scott, 13 Phila. (Pa.) 64; Steele v. McElroy, 1 Sneed (Tenn.) 341.

[a] **An attorney who covenants in that capacity** to convey and sets his own hand and seal to the covenant is competent to bring an action for the purchase price covenanted to be paid him in his own name. Johnson v. Applegate, 1 N. J. L. 8.

30. Frontin v. Small, 2 Ld. Raym. 1418, 92 Reprint 423, Str. 705, 93 Reprint 797.

31. Ala.—Beyer v. Bush, 50 Ala. 19; Bryan v. Wilson, 27 Ala. 208.

Ark.—Beller v. Block, 19 Ark. 566; Hearshy v. Hichox, 12 Ark. 125.

Conn.—Treat v. Stanton, 14 Conn. 445; Potter v. Yale College, 8 Conn. 52.

Ga.—Field v. Price, 50 Ga. 135. And see Richmond, etc., R. Co. v. Bedell, 88 Ga. 591, 15 SE 676 (holding that, when an agent has made a contract on which he can maintain an action in his own name, he may sue for the use of his principal).

Ill.—Hills v. McMunn, 232 Ill. 488, 83 NE 963; Warder v. White, 14 Ill. A. 50.

Iowa.—Fear v. Jones, 6 Iowa 169; Farwell v. Tyler, 5 Iowa 535.

Ky.—Graham v. Duckwall, 8 Bush 12; Atcherson v. Talbot, 5 Dana 324.

La.—Lacoste v. De Armas, 2 La. 263.

Md.—Harker v. Dement, 9 Gill 7, 52 AmD 670.

Mass.—Thompson v. Kelly, 101 Mass. 291, 3 AmR 353; Borrowscale v. Bosworth, 99 Mass. 378; Kent v. Bornstein, 12 Allen 342; Colburn v. Phillips, 13 Gray 64; Cobb v. New England Mut. Mar. Ins. Co., 6 Gray 192.

Mo.—Johnston v. O'Shea, 118 Mo. A. 287, 94 SW 788; Morrell v. Koerner-Parker Lumber Co., 51 Mo. A. 592.

N. H.—Pinkham v. Benton, 62 N. H. 687; Porter v. Raymond, 53 N. H. 519; Barnes v. Union Mut. F. Ins. Co., 45 N. H. 21; Underhill v. Gibson, 2 N. H. 352, 9 AmD 82.

N. Y.—Noe v. Christie, 51 N. Y. 270; Fitzhugh v. Wiman, 9 N. Y. 559; Minturn v. Main, 7 N. Y. 220; White v. Chouteau, 10 Barb. 202; Ladd v. Arkell, 37 N. Y. Super. 35; DeForest v. Fulton F. Ins. Co., 1 N. Y. Super. 94; Bleecker v. Franklin, 2 E. D. Smith 93; Bogart v. O'Regan, 1 E. D. Smith 590; Nelson v. Nixon, 13 AbbPr 104; Butts v. Collins, 13 Wend. 139; Toland v. Murray, 18 Johns. 24; Hulse v. Young, 16 Johns. 1; Murray v. Toland, 3 Johns. Ch. 569.

N. C.—Whitehead v. Potter, 26 N. C. 257.

Oh.—Evrit v. Bancroft, 22 Oh. St. 172.

Or.—Simon v. Trummer, 57 Or. 153, 110 P 786.

Pa.—Baltimore, etc., Steamboat Co. v. Atkins, 22 Pa. 522; Girard v. Taggart, 5 Serg. & R. 19, 9 AmD 327.

Tex.—Triplett v. Morris, 18 Tex. Civ. A. 50, 44 SW 684 (holding that suit for the value of goods converted while in the possession of an agent may be maintained either by him alone, or with his principals joined). But see Tinsley v. Dowell, 87 Tex. 23, 26 SW 946 (holding that an agent for the sale of land who is to receive a special commission for such sale has not such an interest as will give him a right of action against the third person for its breach).

Vt.—Camp v. Barber, 87 Vt. 235, 88 A 812.

Wis.—Palmer v. Banfield, 86 Wis. 441, 56 NW 1090.

Eng.—Hudson v. Granger, 5 B. & Ald. 27, 7 ECL 27, 106 Reprint 403; Davies v. Wilkinson, 4 Bing. 573, 13 ECL 642, 130 Reprint 889; Anderson v. Martindale, 1 East 497, 102 Reprint 191; Williams v. Millington, 1 H. Bl. 81, 126 Reprint 49, 3 ERC 583; Eccleston v. Clipsham, 1 Saund. 153, 85 Reprint 158.

Where "an agent has a part in the contract to which he is made a party, or has a particular property in the subject-matter of the agreement, the legal interest and the right of action are vested in him." Simon v. Trummer, 57 Or. 153, 158, 110 P 786.

[a] **Where an agent pays money to protect his principal's estate,** he is entitled to the same equities that his principal would have been entitled to had he made the payment. Curry v. Curry, 87 Ky. 667, 9 SW 831, 10 KyL 623, 12 AmSR 504.

[b] **Agent answerable for the price.**—Where an agent for the sale of certain articles is answerable to the seller for the price, he is entitled to maintain an action therefor in his own name. Fuller v. Curtis, 100 Ind. 237, 50 AmR 786.

[c] **Alleging assignment.**—An agent may sue in his own name and recover upon a contract by averring and proving an assignment of it from the principal to him. Weston v. Card, 96 Mich. 373, 56 NW 26.

[d] **Agent a trustee.**—If the agent sustains the character of a trustee solely, he alone is the proper party to bring action on the contract (Treat v. Stanton, 14 Conn. 445); and this for the reason that the legal title is in the agent (Upson v. Swezey, 40 Conn. 470; Sanford v. Nichols, 14 Conn. 324; Potter v. Yale College, 8 Conn. 52).

32. See statutory provisions.

[a] **Georgia code** (1895) § 3037 subd 5 gives an agent a right of action "in cases of agency coupled with interest in the agent, known to the party contracting with him." Georgia Southern, etc., R. Co. v. Marchman, 121 Ga. 235, 48 SE 961; Spence v. Wilson, 102 Ga. 762, 29 SE 713; Spain v. Beach, 52 Ga. 494.

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right of the agent,[33] and if it appears from the contract that the agent can have no direct or beneficial interest therein, the principal alone has a right of action on the contract.[34] But, although the right of the principal to sue takes precedence over that of the agent, the principal will not be permitted to intervene in such a manner as to defeat any lien or vested interest which the agent may have in the subject matter of the contract.[35]

By code provision in many of the states, where a contract is made by an agent for the benefit of his principal, the principal may sue on the contract, even though the agent may also have the right to sue, and even where the contract is made in the name of the agent, and the principal's name is not disclosed.[36]

[§ 602] **e. Actions Relating to Real Estate.** The general rule is that a mere agent, having only the care and oversight of real estate, cannot maintain an action in his own name relating to such property;[37] but he may do so where his power of attorney is sufficient for that purpose,[38] or under the statutes permitting him to sue as the trustee of an express trust.[39]

[§ 603] **f. Actions after Termination of Agency.** An agent cannot maintain an action in his own name to recover the property of his principal after the termination of the agency.[40]

33. U. S.—Ford v. Williams, 21 How. 287, 16 L. ed. 36; Buchanan v. Cleveland Linseed-Oil Co., 91 Fed. 88, 33 CCA 351; Walter v. Ross, 29 F. Cas. No. 17,122, 2 Wash. C. C. 283; Ramsdell v. U. S., 2 Ct. Cl. 508. See also Oelricks v. Ford, 23 How. 49, 16 L. ed. 534; Wilson Case Lumber Co. v. Mountain Timber Co., 202 Fed. 305 (holding that a corporation whose property was sold by another corporation as its agent, together with property owned by the agent, where the agency was disclosed to the purchaser and a separate price agreed on for each property, may maintain an action on the contract to recover its own share of such price).

Ala.—Southern R. Co. v. Jones, 132 Ala. 437, 31 S 501; McFadden v. Henderson, 128 Ala. 221, 29 S 640.

Ark.—Hearshy v. Hichox, 12 Ark. 125.

Dak.—Lloyd v. Powers, 4 Dak. 62, 22 NW 492.

Ill.—Warder v. White, 14 Ill. A. 50.

Ind.—Rowe v. Rand, 111 Ind. 206, 12 NE 377.

Iowa.—Darling v. Noyes, 32 Iowa 96.

Ky.—Ironton Rolling Mills Co. v. Ross, 6 Bush 103; Davies v. Graham, 2 A. K. Marsh. 540.

La.—Braden v. Louisiana State Ins. Co., 1 La. 220, 20 AmD 277. See also McNair v. Thompson, 5 Mart. 525.

Me.—Pitts v. Mower, 18 Me. 361, 36 AmD 727. See also Machias Hotel Co. v. Coyle, 35 Me. 405, 58 AmD 712.

Md.—Baltimore Coal Tar, etc., Co. v. Fletcher, 61 Md. 288.

Mass.—National L. Ins. Co. v. Allen, 116 Mass. 398; Borrowscale v. Bosworth, 99 Mass. 378; Lerned v. Johns, 9 Allen 419; Eastern R. Co. v. Benedict, 5 Gray 561, 61 AmD 384; Huntington v. Knox, 7 Cush. 371; Tuckwell v. Lambert, 5 Cush. 23; Kelley v. Munson, 7 Mass. 319, 5 AmD 47.

Mo.—Clubb v. St. Louis, etc., R. Co., 136 Mo. A. 1, 117 SW 110; Griffin v. Wabash R. Co., 115 Mo. A. 549, 91 SW 1015; Odessa Bank v. Jennings, 18 Mo. A. 651; Turnbull v. Watkins, 2 Mo. A. 235.

N. Y.—Ludwig v. Gillespie, 105 N. Y. 653, 11 NE 835; Nicoll v. Burke, 78 N. Y. 580; Schaefer v. Henkel, 75 N. Y. 378, 7 AbbNCas 1, 57 HowPr 97; McKay v. Draper, 27 N. Y. 256; Considerant v. Brisbane, 22 N. Y. 389; Union India Rubber Co. v. Tomlinson, 1 E. D. Smith 364; Taintor v. Prendergast, 3 Hill 72, 38 AmD 618; Hicks v. Whitmore, 12 Wend. 548; Yates v. Foot, 12 Johns. 1 [rev 11 Johns. 23]; Corlies v. Cumming, 6 Cow. 181.

N. C.—Hayes Woolen Co. v. McKinnon, 114 N. C. 661, 19 SE 761.

Oh.—Hall v. Plaine, 14 Oh. St. 417.

Or.—Kitchen v. Holmes, 42 Or. 252, 70 P 830.

Pa.—Lancaster v. Knickerbocker Ice Co., 153 Pa. 427, 26 A 251 (where plaintiff's husband bought ice as agent for his wife, and sold it to defendant through the agency of C, giving a contract of sale in his own name, and it was held that the facts that the contract made in the name of the husband was in duplicate, and that defendant's copy contained a scroll seal after the husband's name, while the plaintiff's copy was without a seal, did not affect plaintiff's right to sue in her own name, and introduce her copy in evidence, the seal being an unauthorized and unnecessary addition, which could be treated as surplusage); Hubbert v. Borden, 6 Whart. 79.

S. C.—Allen v. Brazier, 18 S. C. L. 55.

Tenn.—Brice v. King, 1 Head 152; Darden v. Oneal, (Ch. A.) 35 SW 1095.

Tex.—Hunter v. Adoue, 38 Tex. Civ. A. 542, 86 SW 622.

Vt.—Edwards v. Golding, 20 Vt. 30; White v. Owen, 12 Vt. 361.

Va.—Leterman v. Charlottesville Lumber Co., 110 Va. 769, 67 SE 281.

W. Va.—Coulter v. Blatchley, 51 W. Va. 163, 41 SE 133.

Eng.—Hudson v. Granger, 5 B. & Ald. 27, 7 ECL 27, 106 Reprint 1103; Sadler v. Leigh, 4 Camph. 195; Rogers v. Hadley, 2 H. & C. 227; Bickerton v. Burrell, 5 M. & S. 383, 105 Reprint 1091; Morris v. Cleasby, 1 M. & S. 576, 105 Reprint 215.

N. S.—Wursburg v. Webb, 19 N. S. 414.

[a] **However,** (1) there are cases holding that, where the contract is made and signed by the agent alone, the principal cannot maintain an action thereon on his own name, although the agent may describe himself therein as the agent of plaintiff (Clark v. Wilson, 5 F. Cas. No. 2,841, 3 Wash. C. C. 560; U. S. v. Parmele, 27 F. Cas. No. 15,997, 1 Paine 252); or (2) although the other party may know that he is acting as agent (U. S. v. Parmele, supra).

34. Fogg v. Sinclair, 5 Cush. (Mass.) 478; Bayley v. Onondaga County Mut. Ins. Co., 6 Hill (N. Y.) 476, 41 AmD 759.

35. Rowe v. Rand, 111 Ind. 206, 12 NE 377; Rhoades v. Blackiston, 106 Mass. 334, 8 AmR 332; Hunter v. Adoue, 38 Tex. Civ. A. 542, 86 SW 622; Hudson v. Granger, 5 B. & Ald. 27, 7 ECL 27, 106 Reprint 1103; Houghton v. Matthews, 3 B. & P. 485, 127 Reprint 263; Drinkwater v. Goodwin, Cowp. 251, 98 Reprint 1070; Morris v. Cleasby, 1 M. & S. 576, 105 Reprint 215. See also supra § 600.

[a] **"The rule of law . . . is,** that the right of the principal to sue is paramount to that of the agent and in cases where either may bring the action, the former, by giving notice to the other contracting party, puts an end to the agent's right of action, except in cases where the agent has a lien upon the subject matter of the action equal to the claim of the principal." Warder v. White, 14 Ill. A. 50, 54.

[b] **Qualified interest.**—But the fact that an agent who sells goods has a qualified title in the goods and their proceeds as pledgee, as against his principal, does not impair the principal's right of action against the purchaser to recover the agreed price, particularly where the purpose of the pledge is accomplished before the action is brought. Moline Malleable Iron Co. v. York Iron Co., 83 Fed. 66, 27 CCA 442.

36. Ark.—Hearshy v. Hichox, 12 Ark. 125.

Cal.—Ruiz v. Norton, 4 Cal. 355, 60 AmD 618; Brooks v. Minturn, 1 Cal. 481.

Colo.—Best v. Rocky Mt. Nat. Bank, 37 Colo. 149, 85 P 1124, 7 LRANS 1035.

Fla.—Little v. Brady, 43 Fla. 402, 31 S 342.

Kan.—St. Louis, etc., R. Co. v. Thacher, 13 Kan. 564 (holding that the principal in every case is "the real party in interest," and under the Kansas code the rule is that "every action must be prosecuted in the name of the real party in interest," and that every action allowed to be prosecuted in any other manner constitutes an exception to the general rule).

N. Y.—Morgan v. Reid, 7 AbbPr 215; Erickson v. Compton, 6 HowPr 471.

Okl.—Schmucker v. Higgins-Roberts Grain Co., 28 Okl. 721, 116 P 184.

37. King v. Gwynn, 14 Fla. 32 (holding that a mere agent of the owner of land cannot maintain in his own name a suit to enjoin the collection of taxes alleged to be illegally imposed upon the land); Chatfield v. Clark, 123 Ga. 867, 51 SE 743; Cunningham v. Elliott, 92 Ga. 159, 18 SE 365 (holding that while an agent, by virtue of Code § 2207, may commence and carry on proceedings in the name of his principal to remove an obstruction from a private way, yet, under Code § 738, he cannot institute a proceeding for that purpose in his own name, either individually or as agent); Laning v. Wilkes-Barre Gas Co., 6 Kulp (Pa.) 328; Holloway v. Holloway, 30 Tex. 164; Galveston, etc., R. Co. v. Stockton, 15 Tex. Civ. A. 145, 38 SW 647.

[a] **A power to sell lands** will not authorize an agent to maintain in his own name an action to disembarrass the title of his principal of clouds and encumbrances which may have supervened to impair their value or prevent their sale, although occasioned by the improvident act of the agent. Robson v. Tait, 13 Tex. 272.

Forcible entry and detainer.—Right of agent to maintain action see Forcible Entry and Detainer [19 Cyc 1108].

38. State v. Banks, 48 Md. 513 (where the agent's power of attorney was held to be sufficiently plenary to authorize him to institute suit to prevent trespass upon his principal's real estate).

39. Goff v. Boland, 92 SW 575, 29 KyL 172 (holding that one holding legal title to land as agent for a principal is a trustee of an express trust, and that he may, under the express provision of Ky. Civ. Code Pr. § 21, maintain a suit in his own name to restrain a third person from cutting timber on the land, and for the value of timber previously cut thereon).

40. Miller v. Duluth State Bank, 57 Minn. 319, 59 NW 309; Hutchins v. Gilman, 9 N. H. 359 (where an attorney to sell lands, with the power of substitution, appointed a substitute who made sale accordingly, and it was held that the former could not recover the money in an action in his own name).

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[§ 604] **2. Proper and Necessary Parties—a. Plaintiffs—(1) In General.**[41] The general rule is that when a contract is entered into with an agent in his own name, the promise being made directly to him, he may maintain an action on such contract in his own name without joining the person beneficially interested;[42] and it has been held that where the contract recites that it is made by an agent for himself and his principal, there being a joint interest, but by inadvertence the principal is not made a party to the contract, he cannot be joined as plaintiff with the agent in an action to recover on the contract.[43] But an agent who has no beneficial interest in the subject matter of the contract is not a necessary or proper party plaintiff to a suit thereon by the principal who is the real party in interest;[44] and as a general rule if an agent institutes a suit under an authority from his principal he must do so in the name of his principal.[45] An action for goods converted while in the possession of an agent may be prosecuted in the name of the agent alone or with his principal joined.[46]

Suit by agent for compensation; reimbursement. In a suit by an agent for his commissions a subagent employed by him to assist him in the work of the agency is not a necessary party.[47] Where several agents employed by a principal pay out money separately in furtherance of the object of the agency, and not out of a joint fund, each agent may sue separately for his proportion of the sum expended, and they are not required to bring a joint action therefor;[48] but where advances are made by them jointly they may join in a suit for reimbursement,[49] and it has been held that when they are not so joined the action is subject to a demurrer on the ground of defect of parties.[50]

[§ 605] **(2) Accounts and Accounting.**[51] In a suit against an agent for an account of his agency, all the principals in the contract should be joined in the action, since an agent cannot be held to render as many accounts of his agency as there are principals in a joint contract.[52]

[§ 606] **b. Defendants—(1) Actions on Contract.** As a general rule where a contract is made by an agent within the scope of his employment for an undisclosed principal, both the agent and his undisclosed principal, when discovered, may be joined as defendants in an action thereon,[53] although it has been held that in such case the principal is not a necessary party defendant.[54] Where the suit is on a contract executed by an agent within the scope of his authority for a disclosed principal, the principal, and not the

41. **General rules as to parties** see Parties [30 Cyc 1].
Joinder of causes of action see Actions §§ 188–274.

42. Dawson v. Burrus, 73 Ala. 111 (holding that where an agent is intrusted with the exclusive control of money of his principal, for the purpose of lending it on interest, the principal, while he may be a proper party, is not a necessary party to an action to foreclose a mortgage negotiated by the agent in his own name without disclosing his principal); Sill v. Ketchum, Harr. (Mich.) 423; Stoll v. Sheldon, 13 Nebr. 207, 13 NW 201. See also Whitney v. Kirtland, 27 N. J. Eq. 333.

[a] **Where an agent is a trustee of an express trust** he may sue without joining the beneficiaries as plaintiffs. Wolcott v. Standley, 62 Ind. 198. See also supra § 596.

Suits to enforce mechanics' liens see Mechanics' Liens [27 Cyc 345].

43. Harms v. McCormick, 132 Ill. 104, 22 NE 511.

44. Churchill v. Woodworth, 143 Cal. 669, 84 P 155, 113 AmSR 324 (holding that an agent to whom a deed absolute in form was executed as security for a debt to the principal was not a necessary party to an action to have the deed declared a mortgage, and foreclosed, under Code Civ. Proc. § 367, providing that every action must be prosecuted in the name of the real party in interest); Powell v. Ross, 4 Cal. 197; Pecos, etc., R. Co. v. Scurlock, (Tex. Civ. A.) 136 SW 1131 (holding that in an action on a check executed by defendants to plaintiff's agent for an indebtedness due plaintiff the agent was not a necessary or proper party).

[a] **Compensation from profits.**—Although an agent who purchases property for his principal and depends for his compensation upon the amount of profits realized by his principal from the transaction is interested in the amount which may be recovered in an action brought by his principal against a subsequent purchaser, to recover damages for a breach of the contract to purchase, not being a part owner of the property, he need not be joined as plaintiff therein. Lewis v. Greider, 49 Barb. 606 [aff 51 N. Y. 231].

45. Oakey v. Bend, 3 Edw. (N. Y.) 482 [aff 4 ChSent 15].

[a] **A mere agent to sue for and collect money** under a power of attorney cannot be a party to a bill for an account in his own name, or be joined as cocomplainant with his principal. Oakey v. Bend, 3 Edw. (N. Y.) 482 [aff 4 ChSent 15].

46. Triplett v. Morris, 18 Tex. Civ. A. 50, 14 SW 684. See Trover and Conversion [38 Cyc 2044 et seq].

47. Flournoy v. Williams, 68 Ga. 707.

48. Finney v. Brant, 19 Mo. 42. See also Conner v. Hutchinson, 12 Cal. 126 (holding that, where two persons are employed as agents to procure from the United States confirmation of a Mexican grant, the employment is not joint, and they can maintain separate suits for their pay).

49. Jewett v. Cornforth, 3 Me. 107 (holding that, where agents for obtaining the laying out of a highway advanced money jointly and took receipts as for money disbursed by them jointly, they rightly joined in a suit for reimbursement).

50. Weinfeld v. Bergner, 114 NYS 284.

51. See generally Accounts and Accounting 1 C. J. 588.

52. Louisiana Bd. of Trustees, etc., v. Dupuy, 31 La. Ann. 305 (holding that where a number of persons constitutes a common agent for a common purpose, no one of them has a right to compel the agent to render a separate account to himself. There should be but one proceeding to which all persons in interest should be made parties, and their rights determined in concursu); Nicholson v. Hennen, 16 La. Ann. 83.

53. Wilson v. Oswego Tp., 151 U. S. 56, 14 SCt 259, 38 L. ed. 70; Scoutt v. Keck, 73 Fed. 900, 20 CCA 103; Stockbarger v. Sain, 69 Ill. A. 436; Tew v. Wolfsohn, 77 App. Div. 454, 79 NYS 286 [aff 38 Misc. 54, 76 NYS 919, and aff 174 N. Y. 272, 66 NE 934]; McLean v. Sexton, 44 App. Div. 520, 60 NYS 871; Mattlage v. Poole, 15 Hun (N. Y.) 556; Nason v. Cockroft, 3 Duer (N. Y.) 366; American Trading Co. v. Wilson, 37 Misc. 76, 74 NYS 718. See also Elliott v. Bodine, 59 N. J. L. 567, 36 A 1038; Mathonican v. Scott, 87 Tex. 396, 28 SW 1063.

Election to hold principal or agent see supra §§ 526–530.

[a] **Illustration.**—Where an owner is liable for material and labor furnished because consenting thereto, and another is liable because they were furnished at his request as an undisclosed agent of the owner, they may be sued jointly. McLean v. Sexton, 44 App. Div. 520, 60 NYS 871.

[b] **A person whose lands are sold by an agent** is a necessary party to a bill for relief against the sale, although the bond for the consideration is payable to the agent. Davis v. Peake, 2 A. K. Marsh. (Ky.) 543.

[c] **Form of action.**—In order that both the principal and the agent may be sued jointly the same form of action must lie against both. This question arises principally in those jurisdictions in which the distinction between trespass on the case and case exists. Campbell v. Portland Sugar Co., 62 Me. 552, 16 AmR 503; Hewett v. Swift, 3 Allen (Mass.) 420; Parsons v. Winchell, 5 Cush. (Mass.) 592, 52 AmD 745; Clark v. Fry, 8 Oh. St. 358, 72 AmD 590; Seelen v. Ryan, 2 Cinc. Super. (Oh.) 158.

[d] **Where money paid to an agent ought in equity to be returned,** the owner of the money may sue either the agent or the principal, or both, for money had and received. Great Southern Acc., etc., Co. v. Guthrie, 13 Ga. A. 288, 79 SE 162.

54. Rushing v. Sebree, 12 Bush (Ky.) 198 (holding that, where realty was sold and conveyed directly to an agent, and the note for the balance of the purchase price was made and executed by him in his individual capacity, in an action on the note his principal was not a necessary party); Ash v. Beck, (Tex. Civ. A.) 68 SW 58 (holding that in an action for breach of warranty on a sale of a chattel, made by the seller for an undisclosed principal, such principal need not be joined as a defendant with his agent). See also Danforth v. Timmerman, 65 S. C. 259, 43 SE 678 (holding that, where a magistrate's summons is addressed to defendant and an itemized account attached is charged to him as agent, a demurrer for defect of parties defendant should not be sustained).

[a] **An action on a sealed instrument** for a breach thereof cannot be maintained against a person not a party thereto on the ground that the person who executed the instrument acted as agent for defendant, where the agency does not appear on the face of the instrument. Mahoney v. McLean, 26 Minn. 415, 4 NW 764.

[b] **An agent trading in his own name** cannot object because his principal is not made a defendant with him in a suit on a note executed by him in his own name. Rushing v. Sebree, 12 Bush (Ky.) 198.

agent, is generally the proper party defendant,[55] and if the agent has no interest in the subject matter of the suit he is not a proper or necessary party defendant.[56] But where the agent is rather a trustee than a mere agent or has a beneficial interest, and relief against him is necessary to a complete determination of the issues, he is properly made a party defendant.[57] An agent who is entitled to sue by virtue of a statutory provision as a trustee of an express trust is also liable to be sued, although no such permission is given in terms.[58]

Where no relief sought against agent. As a general rule an agent against whom no relief is sought, and who has been guilty of no fraud in connection with the transaction concerning which the suit is brought, is not a necessary or proper party thereto.[59] Thus it is erroneous to make a mere agent a party to a suit for the specific performance of a contract;[60] but where the suit is grounded on fraud, in which the agent is charged with participating, he is properly made a defendant as additional security for the costs, even though no other relief can be adjudged against him.[61] The fraud, however, must

55. Ala.—Nabors v. Shippey, 15 Ala. 293.
Cal.—Lander v. Castro, 43 Cal. 497; Shaver v. Ocean Min. Co., 21 Cal. 45; McDonald v. Bear River, etc., Water, etc., Co., 13 Cal. 220; Haskell v. Cornish, 13 Cal. 45.
Conn.—Shelton v. Darling, 2 Conn. 435.
Ind.—McHenry v. Duffield, 7 Blackf. 41.
Iowa.—Sternburg v. Callanan, 14 Iowa 251.
Ky.—Cooper v. Ratliff, 116 SW 748 (holding that, while the principal would be liable on his agent's contract made for him within the scope, real or apparent, of the agency, as to personal property in the agent's charge, if the person with whom the contract is made is obliged to sue on it, he must sue the principal, and not the agent, if the principal or his property is to be bound).
Me.—Batchelder v. McKenney, 36 Me. 555.
Mass.—Cabot v. Shaw, 148 Mass. 459, 20 NE 99; New England Mar. Ins. Co. v. De Wolf, 8 Pick. 56; Gilmore v. Pope, 5 Mass. 491.
Mich.—Banks v. Cramer, 109 Mich. 168, 66 NW 946; Bailey v. Cornell, 66 Mich. 107, 33 NW 50.
Mo.—Klostermann v. Loos, 58 Mo. 290.
N. J.—Stephens v. Bacon, 7 N. J. L. 1.
N. Y.—Whitford v. Laidler, 94 N. Y. 145, 46 AmR 131; Meeker v. Claghorn, 44 N. Y. 349; Langley v. Warner, 3 N. Y. 327 [rev 3 N. Y. Super. 209]; Colvin v. Holbrook, 2 N. Y. 126 [aff 3 Barb. 475]; McDougall v. Travis, 24 Hun 590; Randall v. Snyder, 1 Lans. 163; Cohen v. Barry, 108 NYS 573; Rathbun v. Ingals, 7 Wend. 320; Taylor v. Bates, 5 Cow. 376; Frye v. Lockwood, 4 Cow. 454.
N. C.—Cape Fear Bank v. Wright, 48 N. C. 376; Potts v. Lazarus, 4 N. C. 180.
Tex.—Johnson v. Armstrong, 83 Tex. 325, 18 SW 594, 29 AmSR 648.
Vt.—Proctor v. Webber, 1 D. Chipm. 271.
Va.—Richmond Bd. of Public Works v. Gannt, 76 Va. 455.
Wash.—McKinley v. Mineral Hill Cons. Min. Co., 46 Wash. 162, 89 P 495; Wilson v. Wold, 21 Wash. 398, 58 P 223, 75 AmSR 846.
Wis.—Klaus v. Green Bay, 34 Wis. 628; Charboneau v. Henni, 24 Wis. 250.
Eng.—Bamford v. Shuttleworth, 11 A. & E. 926, 39 ECL 488, 113 Reprint 666; Stephens v. Badcock, 3 B. & Ad. 354, 23 ECL 160, 110 Reprint 133; Sadler v. Evans, 4 Burr. 1984, 98 Reprint 34; Owen v. Gooch, 2 Esp. 567; Johnson v. Ogilby, 3 P. Wms. 278, 24 Reprint 1064; Bowen v. Morris, 2 Taunt. 374, 127 Reprint 1122; Dixon v. Parker, 2 Ves. 219, 28 Reprint 142.
B. C.—Williams v. Wilson, 3 B. C. 613.
See also supra §§ 486, 514.
[a] **Action against joint principals.**—Where the creditors of an insolvent corporation take charge of its affairs and appoint a common agent to conduct its business for them they are properly sued jointly on the contracts of the agent without any allegations charging them as partners. The question is one of principal and agent, and not of partnership. The insolvent corporation may also be joined on an allegation that it is one of the principals to the contract. Wilson v. Henderson, 123 Cal. 258, 55 P 986.

56. Cal.—Hooper v. Flood, 54 Cal. 218.
Ky.—Dillion v. Crook, 11 Bush 321 (holding that where, in an action against certain firms for damages for having abandoned a contract permitting plaintiff to use certain switch tracks for marketing coal, it appeared that a certain person had no interest in the controversy except as the agent of the firms, and that he had sold coal as agent of the parties who had entered into combination to control the sales, the petition as to him was properly dismissed).
N. Y.—Fitzsimmons v. Baxter, 3 Daly 81; Oxford First Nat. Bank v. Turner, 24 NYS 793.
N. C.—Potts v. Lazarus, 4 N. C. 180.
Pa.—Martin v. Sauder, 18 LancL Rev 357.
S. C.—Goodale v. Page, 92 S. C. 413, 75 SE 700.
Eng.—Priestly v. Fernie, 3 H. & C. 977.
[a] **Where an agent intrusted with money for a specific purpose diverts** it and deposits it in a bank to his personal account, he is not a necessary party defendant in an action by the principal against the bank for money had and received. Walsh v. National Broadway Bank, 13 Misc. 3, 33 NYS 998 [aff 11 Misc. 249, 32 NYS 734].
[b] **Misjoinder waived.**—(1) Objections on the ground that the principal and agent are sued jointly may be waived. Williams v. Uncompahgre Canal Co., 13 Colo. 469, 22 P 806; Bundy v. Bruce, 61 Vt. 619, 17 A 796. (2) While a joint action against an alleged agent and his undisclosed principal may be a misjoinder of causes of action, yet where the alleged agent is dismissed from the case in response to a demurrer, and the action proceeds against the alleged principal alone, with the acquiescence of plaintiff, the error, if any, is cured by the action of the court and parties, and the alleged principal cannot complain of any injury resulting from the misjoinder. Belt v. Washington Water Power Co., 24 Wash. 387, 64 P 525.

57. Wilson v. Oswego Tp., 151 U. S. 56, 14 SCt 259, 38 L. ed. 70; Scoutt v. Keck, 73 Fed. 900, 20 CCA 103.

58. Lawrence v. Schaefer, 19 Misc. 239, 42 NYS 992 [aff 20 App. Div. 80, 46 NYS 719] (where the court, in discussing a provision contained in the New York code of civil procedure, said: "While that section, on its face, is in terms permissive, in allowing actions to be prosecuted, yet a similar provision of the Code was held to warrant suits to be maintained against the trustee. Mead v. Mitchell, 5 AbbPr 92 [aff 17 N. Y. 210, 72 AmD 455]. That is the general doctrine that an executor, administrator, or person expressly authorized by statute to sue can be prosecuted by action in pursuance of the same authority that accords him the privilege of invoking the aid of the courts").

59. U. S.—Donovan v. Campion, 85 Fed. 71, 29 CCA 30.
Ark.—Shaver v. Lawrence County, 44 Ark. 225.
Iowa.—Paton v. Lancaster, 38 Iowa 494; Lyon v. Tevis, 8 Iowa 79.
N. C.—Ayers v. Wright, 48 N. C. 229.
R. I.—Coggeshall v. Griswold, 13 R. I. 642.
Tex.—Stephens v. New Boston First Nat. Bank, (Civ. A.) 146 SW 620.
Eng.—Attwood v. Small, 6 Cl. & F. 232, 7 Reprint 684; Marshall v. Sladden, 4 De G. & Sm. 468, 64 Reprint 916 [aff 7 Hare 428, 27 EngCh 428, 68 Reprint 177].

60. Boyd v. Vanderkemp, 1 Barb. Ch. (N. Y.) 273; Tavenner v. Barrett, 21 W. Va. 656; McNamara v. Williams, 6 Ves. Jr. 143, 31 Reprint 982. See generally Specific Performance [36 Cyc 770]. But see Scoutt v. Keck, 73 Fed. 900, 20 CCA 103.
[a] **Agent as trustee.**—Where an agent to sell makes a sale of land and takes of the purchaser bonds for the purchase money payable to himself, and such bonds are secured by a deed of trust executed by the purchaser conveying other lands, and a suit is brought by the vendor to enforce specifically such contract and to enforce the collection of such purchase-money bond, the agent must be made a party either plaintiff or defendant, for in such case he is not simply an agent, but a trustee holding the legal title to such bonds for the use of the real vendor of said land. Tavenner v. Barrett, 21 W. Va. 656. See also Whitney v. Kirtland, 27 N. J. Eq. 333 (holding that a party who, although not a principal, but an agent merely, holds a deed to a purchaser at a sheriff's sale, and also money equitably belonging to the purchaser under agreement made at the time of the sale, and applicable under that agreement to the payment of the purchase money, is a proper, if not a necessary, party to a suit by the purchaser to compel the delivery of the deed).

61. U. S.—Donovan v. Campion, 85 Fed. 71, 29 CCA 30. See also Smith v. Green, 37 Fed. 424.
Ark.—Shaver v. Lawrence County, 44 Ark. 225; Gartland v. Nunn, 11 Ark. 720, 728 (where the court said: "It is true, as a general rule, that a mere agent, who has no interest in the suit, ought not to be made a party, but if, in such case, there be any charge of fraud connected with the transaction in which the agent participated and it is so charged in the bill, then he may properly be made a party, for even if no other decree would be warranted by the circumstances of the case against him he might be decreed to pay the costs of the suit, if his principal should happen to be or should become insolvent").
Ind.—Roy v. Haviland, 12 Ind. 364.
Iowa.—Springfield v. Graff, 22 Iowa 438; Lyon v. Tevis, 8 Iowa 79.
Kan.—Central Nat. Bank v. Brooke, 71 Kan. 767, 81 P 498.
Mass.—White v. Sawyer, 16 Gray 586.
Mich.—Krolik v. Curry, 148 Mich. 214, 111 NW 761. See also Weber v.

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be such as is cognizable in a court of equity, as the rule does not apply where the agent merely acts erroneously.[62]

In an action by a principal against his agent for damages resulting from an unauthorized contract, the persons with whom the agent contracted cannot, over their objections, be sued jointly with the agent because of the transaction.[63]

[§ 607] **(2) Actions in Tort.** Where an agent and his principal are both liable for the same act of negligence, or the same tort, they may be joined as parties defendant in an action to recover damages for the injuries caused thereby.[64] They may be sued either jointly or severally like other joint tort-feasors.[65]

[§ 608] **3. Amendment.**[66] In some jurisdictions the rule is that if an action is brought in the name of an agent, or the agent is made sole defendant in such action, where his principal is the only necessary or proper party to the suit, no amendment can be allowed substituting such principal as the party plaintiff[67] or defendant.[68] In other jurisdictions, however, such substitution by amendment of principals as parties plaintiff[69] or defendant[70] is allowed. If the agent is improperly joined as plaintiff or defendant his name may be struck out by amendment;[71] and where he is a proper party his name may be added by amendment.[72]

[§ 609] **D. Pleading**[73]**—1. Complaint or Bill—a. In General.** In an action involving the relation of principal and agent, the form and sufficiency of the complaint[74] or bill[75] are in general governed by the

Weber, 47 Mich. 569, 11 NW 389 (holding that an agent, when liable for a fraud committed in behalf of his principal, may as well be sued separately as any joint wrongdoer sued alone in an action of tort).

Eng.—Attwood v. Small, 6 Cl. & F. 232, 7 Reprint 684 [rev Younge 407]; Marshall v. Sladden, 7 Hare 428, 27 EngCh 428, 68 Reprint 177 [aff 4 De G. & Sm. 468, 64 Reprint 916]; Le Texier v. Anspach, 15 Ves. Jr. 159, 33 Reprint 714.

See Messer-Moore Ins., etc., Co. v. Trotwood Park Land Co., (Ala.) 54 S 228; Lee v. Fraternal Mut. Ins. Co., 1 Handy 217, 12 Oh. Dec. (Reprint) 109.

62. Lyon v. Tevis, 8 Iowa 79; Attwood v. Small, 6 Cl. & F. 232, 7 Reprint 684; Marshall v. Sladden, 7 Hare 428, 27 EngCh 428, 68 Reprint 177 [aff 4 De G. & Sm. 468, 64 Reprint 916].

63. Cooper v. Cooper, 90 Nebr. 209, 133 NW 243.

64. Ala.—Mayer v. Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 16 S 620, 53 AmSR 88, 28 LRA 433 and note.

Mass.—Hawkesworth v. Thompson, 98 Mass. 77, 93 AmD 137; Moore v. Fitchburg R. Corp., 4 Gray 465, 64 AmD 83 (holding that a corporation and its agent may be sued jointly for an assault by the agent acting under its authority).

N. Y.—Phelps v. Wait, 30 N. Y. 78; Wright v. Wilcox, 19 Wend. 343, 32 AmD 507.

Tex.—Kirkpatrick v. San Angelo Nat. Bank, (Civ. A.) 148 SW 362 (holding that one injured by the negligence of the agent of a third person may join the agent and the principal in one action to recover damages).

Wis.—Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 63 NW 93, 48 AmSR 911, 28 LRA 439.

See Harriman v. Stowe, 57 Mo. 93.

But see Campbell v. Portland Sugar Co., 62 Me. 552, 16 AmR 503.

[a] **Injunction against trespass.**—In a bill for injunction to restrain trespasses committed by a principal through his agent, both the principal and the agent are properly made parties. United Coal Co. v. Canon City Coal Co., 24 Colo. 116, 48 P 1045.

[b] **Case for deceit in the nature of a conspiracy** cannot be sustained against a principal and his agent jointly for the unauthorized fraudulent acts and representations of the agent alone. Page v. Parker, 40 N. H. 47.

65. Baker v. Davis, 127 Ga. 649, 57 SE 62; Williams v. Inman, 1 Ga. A. 321, 57 SE 1009; Cascarella v. National Grocer Co., 151 Mich. 15, 114 NW 857; Krolik v. Curry, 148 Mich. 214, 111 NW 761; Weber v. Weber, 47 Mich. 569, 11 NW 389; Eastin v. Texas, etc., R. Co., 99 Tex. 654, 92 SW 838 [rev (Civ. A.) 89 SW 440] (holding that, where the agent of a railway company wrongfully refused to ship plaintiff's cattle by the shortest and most expeditious route, and by duress compelled plaintiff to sign a bill of lading under which the cattle were shipped by a longer route, during which they were damaged, the railroad company and the agent were joint tort-feasors, and were suable separately or jointly at plaintiff's election); Mathonican v. Scott, 87 Tex. 396, 28 SW 1063; Parlin, etc., Co. v. Miller, 25 Tex. Civ. A. 190, 193, 60 SW 881 (where the court said: "Where a party is entitled to sue both principal and agent for a tort committed, he may sue both or either, and can not be required to elect which one he shall prosecute his suit against; and he is not, by suing one, precluded thereby from afterwards joining the other"); Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 63 NW 93, 28 LRA 439, 48 AmSR 911. See also supra §§ 498, 532.

[a] **"In torts the relation of principal and agent does not exist;** they are all wrong-doers, and may be sued jointly or separately." Berghoff v. McDonald, 87 Ind. 549 (559 dis. op.).

66. **Amendment as to parties** see generally Parties [30 Cyc 144].

67. Crescent Furniture, etc., Co. v. Raddatz, 28 Mo. A. 210. See also Richmond, etc., R. Co. v. Bedell, 88 Ga. 591, 15 SE 676 (holding that an amendment to the declaration which shows that the legal right of action is not in the nominal plaintiffs, but in the persons for whose use they sue, should not be allowed, without a further amendment striking from the declaration the names of the nominal plaintiffs); Wurzburg v. Webb, 19 N. S. 414 (holding that the principal cannot by amendment be joined with the agent as a party plaintiff, in the absence of the written consent of such principal).

[a] **Agent suing for use of principal.**—Where the action has been brought in the name of the agent, but it is alleged in the declaration that he sues for the use of his principal, it has been held that such an amendment can be made. Richmond, etc., R. Co. v. Bedell, 88 Ga. 591, 15 SE 676; Martin v. Lamb, 77 Ga. 252, 255, 3 SE 10 (where the court said: "An action upon such a note by the agent for the use of the principal is virtually an action by the principal, and the death of the agent, before or pending the action, will not affect the suit. The words importing that the agent sues and that the suit is for the use of the principal are surplusage, and may be stricken from the declaration by amendment, at any time, whether before or after verdict").

68. Gill v. Tison, 61 Ga. 161; Tiller v. Spradley, 39 Ga. 35 (holding that under an act providing that no amendment, adding a new and distinct cause of action, or new and distinct parties, shall be allowed, unless expressly provided for by law, a principal can not, on motion, be made a party defendant to an action against his agent alone, although he may have filed a plea in bar in his own name). See also Burns v. Campbell, 71 Ala. 271 (holding that in an action against an unauthorized agent for trespass the principal cannot be made a party by amendment, where his ratification of the agent's act was after the commencement of the action); Bonta v. Clay, 5 Litt. (Ky.) 129.

69. Fay v. Walsh, 190 Mass. 374, 77 NE 44; Boudreau v. Eastman, 59 N. H. 467; Adams v. Edwards, 115 Pa. 211, 8 A 425; Price v. Wiley, 19 Tex. 142, 70 AmD 323. But see Campbell v. Wasserman, 9 Pa. Co. 381 (holding that, where plaintiff claims in a sheriff's interpleader to be the owner of a stock of goods levied on under defendant's execution, he cannot amend by substituting his principals as plaintiffs, it appearing that he took possession under a bill of sale to them).

70. Bell v. Corbin, 136 Ind. 269, 36 NE 23.

[a] **Answer filed by agent.**—In a case where a principal is substituted for his agent, who had been made defendant in an action to foreclose a mortgage, an answer filed by the agent may stand as the answer of the principal without any change of names or refiling, where no answer is filed by the principal after he is made a party. Bell v. Corbin, 136 Ind. 269, 36 NE 23.

71. Eagle Iron Co. v. Baugh, 147 Ala. 613, 41 S 663. See also Richmond, etc., R. Co. v. Bedell, 88 Ga. 591, 15 SE 676.

[a] **Dismissed with costs.**—Where a mere agent in the transaction has been joined with the principal as a party defendant he should be dismissed from the action with his costs. Paton v. Lancaster, 38 Iowa 494; McNamara v. Williams, 6 Ves. Jr. 143, 31 Reprint 982.

72. Travis v. Forbes, 41 N. S. 226.

73. **Annexation of power of attorney** to execute note to complaint see Bills and Notes [8 Cyc 101 note 45].

Denial of execution of negotiable instrument by agent see Bills and Notes [8 Cyc 156].

Pleading negligence: In general see Negligence [29 Cyc 565]. Negligence of servant see Master and Servant [26 Cyc 941].

Verification of pleas denying agency see Pleading [31 Cyc 528].

74. See generally Pleading [31 Cyc 92].

75. See generally Equity [16 Cyc 216].

[a] **Rebutting laches.**—In an action to set aside a sale made by an agent to a corporation of which he was president, if there are reasons why the principal did not know of the sale or facts excusing the delay in bringing the suit, the same should be specially pleaded. Whitely v. James, 121 Ga. 521, 49 SE 600 (where it was said that the special reasons why the principal did not know of the sale or the facts excusing the delay in bringing the suit should be specially pleaded, so as to prevent defendant from taking advantage by demurrer of the acquiescence implied from nonaction for a long lapse of time).

rules of pleading applicable to other civil actions.

[§ 610] **b. In Actions between Principal and Third Person—(1) Averments as to Agency—(a) In General.** In an action by or against a principal on a contract executed or act done by his agent, the contract or act may be declared on as executed or done by the principal without disclosing the fact of the agency,[76] or it may be pleaded as the act or contract of the agent as such, or as the act or contract of the principal through his agent;[77] and under some statutes and rules of practice this form of allegation is required in all cases.[78] It has been held that where the latter form of allegation is used the fact that the principal made the contract should be expressed, and it will not do to aver merely that the agent made the contract on behalf of the principal or as agent for the principal.[79] The name of the agent by whom defendant was repre-

76. U. S.—Metropolis Bank v. Guttschlick, 14 Pet. 19, 10 L. ed. 335.
Ariz.—Root v. Fay, 5 Ariz. 19, 43 P 527.
Cal.—Goetz v. Goldbaum, 4 Cal. Unrep. Cas. 749, 37 P 646.
Fla.—St. Andrews Bay Land Co. v. Mitchell, 4 Fla. 192, 51 AmD 340.
Ill.—Meers v. Stevens, 106 Ill. 549; Harding v. Parshall, 56 Ill. 219.
Ind.—Day v. Henry, 104 Ind. 324, 4 NE 44; Crowder v. Reed, 80 Ind. 1; Devol v. Halstead, 16 Ind. 287; Colt v. Lawrenceburg Lumber Co., 44 Ind. A. 122, 88 NE 720 (holding that there is no difference in law between a charge that a contract was made directly with a party and a charge that it was made with his agent).
Iowa.—Call v. Hamilton County, 62 Iowa 448, 17 NW 667; Poole v. Hintrage, 60 Iowa 180, 14 NW 223.
Mich.—Regents Univ. v. Detroit Young Men's Assoc., 12 Mich. 138.
Minn.—Stees v. Kranz, 32 Minn. 313, 20 NW 241; Weide v. Porter, 22 Minn. 429.
Nebr.—Hare v. Winterer, 1 Nebr. (Unoff.) 854, 96 NW 179.
N. Y.—Moore v. McClure, 8 Hun 557; Sherman v. New York Cent. R. Co., 22 Barb. 239; Delafield v. Kinney, 24 Wend. 345. See also Dollner v. Gibson, 2 Edm. Sel. Cas. 253. But see St. John v. Griffin, 1 AbbPr 39 (holding that under the code provisions governing pleading the act of an agent should be pleaded as such, and not as the act of the principal).
Or.—Kitchen v. Holmes, 42 Or. 252, 70 P 830.
S. C.—Boulware v. McComb, 16 S. C. L. 416.
Tex.—Baldwin v. Polti, 45 Tex. Civ. A. 638, 101 SW 543.
Wash.—McKinley v. Mineral Hill Cons. Min. Co., 46 Wash. 162, 89 P 495.
W. Va.—Black Lick Lumber Co. v. Camp Constr. Co., 63 W. Va. 477, 60 SE 409.
Wis.—Burnham v. Milwaukee, 69 Wis. 379, 34 NW 389.
Que.—Bisaillon v. Elliott, 13 Que. SE 409.
See McDermott v. Grimm, 4 Colo. A. 39, 34 P 909.

[a] **Fraud of agent.**—In an action by a third person against a principal, fraud committed through the latter's agent is well pleaded in the complaint as that of the principal. Bennett v. Judson, 21 N. Y. 238; Curtis v. Fay, 37 Barb. (N. Y.) 64. See also King v. Fitch, 2 Abb. Dec. (N. Y.) 508, 1 Keyes 432.

[b] **Allegations in petition and exhibits annexed thereto.**—(1) An allegation in a petition that the contract was made by defendant is consistent with an exhibit containing the contract, from which it appears that the contract was made for the principal by an agent. Avery v. Dougherty, 102 Ind. 443, 2 NE 123, 52 AmR 689. (2) So a petition in an action of account in which the goods were alleged as having been sold to defendant is not demurrable because a bill of particulars which it contains is headed "J. H. Sharp, agent for James Wellington . . . in account with" defendant. Wellington v. Howard, 5 Ind. A. 539, 31 NE 852, 853 (where the court said: "The caption of a bill of particulars is not essential or material, and may be rejected as surplusage").

[c] **An undisclosed principal suing** for the breach of an implied warranty as to the quality of goods sold need not allege the agency through which the sale was effected. Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co., 136 App. Div. 22, 120 NYS 163.

[d] **Words importing an agency held to be superfluous.**—An allegation in a complaint that defendant made and executed a promissory note, where the note appears to have been in fact signed by another party, is sufficient, and an averment that the note was made by defendant's agent is unnecessary and superfluous. Moore v. McClure, 8 Hun (N. Y.) 557.

77. U. S.—Childress v. Emory, 8 Wheat. 642, 5 L. ed. 705.
Ala.—Western Union Tel. Co. v. Garthright, 151 Ala. 418, 44 S 212 (holding that a count alleging that a contract to transmit a telegram was made with plaintiff through her agent shows a contract with plaintiff); McGeever v. Harris, 148 Ala. 503, 41 S 930; Montgomery, etc., R. Co. v. Trebles, 44 Ala. 255; Childress v. Miller, 4 Ala. 447. See also Mobile Terminal, etc., Co. v. Gladwell, 7 Ala. A. 374, 62 S 259 (complaint held demurrable for failure to show agent's authority).
Colo.—Burnell v. Morrison, 46 Colo. 533, 105 P 876 (complaint held sufficient); Hoosac Min., etc., Co. v. Donat, 10 Colo. 529, 16 P 157.
Fla.—Duval Inv. Co. v. Stockton, 54 Fla. 296, 45 S 497.
Ga.—Burkhalter v. Perry, 127 Ga. 488, 56 SE 631 (holding that, where a note signed by "B, agent," bears on its face some reference to a principal, and in suit by the payee against the principal on a note thus signed, it is alleged in the petition that the agent was duly authorized to sign the note for the principal, that the consideration of the note was goods sold to the principal, and that it was intended to charge the principal by the signature of the agent as agent, a cause of action is set out).
Ill.—Insurance Co. of North America v. McDowell, 50 Ill. 120, 99 AmD 497; State Bd. of Education v. Greenebaum, 39 Ill. 609; Ohio, etc., R. Co. v. Middleton, 20 Ill. 629.
Kan.—Maier v. Randolph, 33 Kan. 340, 6 P 625.
S. C.—Long v. Schmidt, 18 S. C. 604.
W. Va.—Black Lick Lumber Co. v. Camp Constr. Co., 63 W. Va. 477, 60 SE 409.
Eng.—Nicholson v. Croft, 2 Burr. 1188, 97 Reprint 781.
See Cochran v. Goodman, 3 Cal. 244.

[a] **The better form of allegation** has been said to be that the contract was entered into by defendant through his agent duly authorized by him in that behalf. Childress v. Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705; Nicholson v. Croft, 2 Burr. 1188, 97 Reprint 781.

[b] **Both forms of allegation.**—(1) It is unnecessary to declare both that the contract was executed by defendant and that it was executed by him through his agent. Nicholson v. Croft, 2 Burr. 1188, 97 Reprint 781. (2) Where the petition contains two counts merely stating the same cause of action in different language, it is no misjoinder of causes to use one form of allegation in the first count and the other in the second. Illinois Cent. R. Co. v. Latimer, 128 Ill. 163, 21 NE 7.

[c] **Allegations that defendant committed trespass through his agents,** servants, or employees are sufficient in counts, either for common-law trespass or for the statutory penalty for cutting trees. Cooper v. Slaughter, 175 Ala. 211, 57 S 477.

[d] **An allegation in the complaint that plaintiff bought of one B, acting as defendant's agent,** is sufficient without an averment that B was defendant's agent. Cochran v. Goodman, 3 Cal. 244.

[e] **Manner of constituting agency need not be alleged.**—When the instrument set forth in the complaint asserts the agency, an allegation in the complaint that it is the act of the agent is sufficient, without alleging the particular manner of constituting the agency. Regents Univ. v. Detroit Young Men's Soc., 12 Mich. 138.

78. See statutory provisions and rules of practice. See also Atlanta, etc., R. Co. v. Texas Grate Co., 81 Ga. 602, 9 SE 600 (holding that under the code system of pleading in force in Georgia, which requires plaintiff to fully and distinctly set forth his cause of action, the act of an agent must be pleaded as such); Lewis v. Amorous, 3 Ga. A. 50, 59 SE 338; Arndt v. Boyd, (Tex. Civ. A.) 48 SW 771; Peyton v. Cook, (Tex. Civ. A.) 32 SW 781.

[a] **In Connecticut** this form of allegation is required by the rules of the practice acts which provide that an act or promise by a principal, other than a corporation, if in fact proceeding from an agent known to the pleader should be so stated. Vincent v. S. Alexander Sons Co., 85 Conn. 512, 84 A 84 (corporations excepted); Jacobson v. Hendricks, 83 Conn. 120, 75 A 85 (holding that, where, in an action for specific performance of a contract made by an agent subject to the principal's approval, the complaint alleged that approval of the agent's contract was by the principal, approval by an agent of the principal cannot be relied on; Practice Act [Practice Book (1908) p 244] § 144, requiring that an act by a principal proceeding from an agent known to the pleader should be so stated); Porter v. Ritch, 70 Conn. 235, 39 A 169, 39 LRA 353 (holding that in an action for damages for conspiracy evidence for plaintiff of certain acts done by an alleged agent of one of defendants was inadmissible, where the complaint did not charge defendants with having done anything by their agent); Plumb v. Curtis, 66 Conn. 154, 33 A 998; Santo v. Maynard, 57 Conn. 157, 17 A 700.

[b] **Waiver of defect.**—(1) Advantage of a failure to conform to this rule, however, must be taken seasonably and in a proper manner or it will be deemed to have been waived. Santo v. Maynard, 57 Conn. 157, 17 A 700. (2) An objection on the ground that the petition does not contain such allegation is one to the evidence upon the ground of a variance between pleading and proof. If it is not made in the trial court it is waived. Akers v. Kirke, 91 Ga. 590, 18 SE 366.

79. May v. Kelly, 27 Ala. 497; Brooks v. Harris, 12 Ala. 555; Childress v. Miller, 4 Ala. 447; Oxford First Nat. Bank v. Turner, 24 NYS 793.

[a] **The complaint should charge that the act was done by defendant** whether it was done by himself or by his agent. Slevin v. Reppy,

sented in the transaction pleaded, or, in other words, who did the act constituting the cause of action, need not be alleged.[80]

Written contracts. Where the contract is in writing and appears on its face to be the personal contract of the agent only, it must be declared on as made by the principal through the agent.[81]

For torts. Either form of allegation is generally held to be proper in actions ex delicto against a principal for an act of his agent for which the former is liable to the party injured;[82] and where the action is based upon fraud or misrepresentations made by an agent of defendant, it must also be averred that he had authority from defendant to commit the fraud or make the representations.[83]

Attacking agency. Where relief is sought against the act of one assuming to act as agent, the agency should be directly negatived, or it should be admitted and avoided.[84]

[§ 611] **(b) Sufficiency of Averments of Agency.** In case agency is to be alleged an express averment is not necessary, if the facts constituting the agency are set forth,[85] yet the facts averred must be of such nature and character that agency follows as a conclusion of law.[86] Where it is regarded as only necessary to aver the act of an agent as the act of

46 Mo. 606, 607 (where the court said: "The material fact set forth in the petition is that defendant made the note, not how he made it—whether by his own hand or by that of his agent. The mode of signing it need not have been averred. This material fact would be sustained by evidence either that the signature was in defendant's handwriting, or that it was made by another duly authorized by him. The question of authority is one of evidence, not of pleading").

[b] **Services rendered at request of agent.**—An allegation that the services were rendered at the instance and request of the agent of defendant does not amount to an averment that they were rendered at the instance and request of defendant. Wells v. Pacific R. Co., 35 Mo. 164.

80. Todd v. Minneapolis, etc., R. Co., 37 Minn. 358, 35 NW 5; Lee v. Minneapolis, etc., R. Co., 34 Minn. 225, 25 NW 399; Chandler v. Coe, 54 N. H. 561; Texas, etc., R. Co. v. Ross, 62 Tex. 447; Ft. Worth, etc., R. Co. v. Lindsay, 11 Tex. Civ. A. 244, 32 SW 714.

[a] **Thus,** although the act is alleged to have been done by defendant through his agent, a motion to make the petition more definite and certain will not lie to compel the name of the agent to be stated. Lee v. Minneapolis, etc., R. Co., 34 Minn. 225, 25 NW 399. In a New York case, however, which contained such form of allegation, it appearing that the corporation had a great number of officers and agents in different parts of the country, it was held that the name of the particular agent should be furnished, and that the remedy was by a motion to make the complaint more definite and certain, rather than by a request for a bill of particulars. Schellens v. Equitable L. Assur. Soc., 32 Hun 235.

[b] **Identification of agent.**—Where a corporation is sought to be made liable in a tort action for the conduct of its agent, an allegation that such agent was "the agent in charge of" the office of the corporation sufficiently identifies the agent upon whose conduct plaintiff in part bases his right to recover. Atlanta Ice, etc., Co. v. Reeves, 136 Ga. 294, 296, 71 SE 421, 36 LRANS 1112 (where the court said: "Where a corporation is sued for the tortious acts of its agents or servants, it is entitled to such notice as will serve to identify the person in connection with the transaction out of which the cause of action arises. This does not mean that the name of such agent must be given, or the particular designation of his official relation with the company, if the allegations sufficiently show the person intended. The defendant is a domestic corporation, sued in the county of its residence, and is informed that the agent alleged to have given assurance of the dismissal of the suit was that one in charge of its office. This sufficiently identifies the person referred to").

81. U. S.—Seeber v. Commercial Nat. Bank, 77 Fed. 957.

Ala.—Chapman v. Lee, 47 Ala. 143.

Nebr.—Penn. Mut. L. Ins. Co. v. Conoughy, 54 Nebr. 123, 74 NW 422.

N. H.—Chandler v. Coe, 54 N. H. 561.

N. Y.—Buffalo Catholic Institute v. Bitter, 87 N. Y. 250; Arnold v. Bernard, 8 AbbPrNS 116.

S. C.—Harris v. Richmond, etc., R. Co., 31 S. C. 87, 9 SE 690; Tarver v. Garlington, 27 S. C. 107, 2 SE 846, 13 AmSR 628.

Wash.—Lawson v. Sprague, 51 Wash. 286, 98 P 737.

[a] **Where it appears from an instrument that it forms only part of an agreement,** the complaint in an action on the agreement should allege both the oral and written parts thereof, and therefore in an action on an agreement to subscribe money to improve a road, if the subscription agreement does not show the township trustee's agency to act for the subscribers, so as to require proof by parol, the complaint should allege that fact. Stockwell v. Whitehead, 47 Ind. A. 423, 94 NE 736.

82. U. S.—Metropolis Bank v. Guttschlick, 14 Pet. 19, 10 L. ed. 335.

Ill.—Meers v. Stevens, 106 Ill. 549.

Ind.—Day v. Henry, 104 Ind. 324, 4 NE 44.

N. Y.—King v. Fitch, 2 Abb. Dec. 508, 1 Keyes 432; Peo. v. Lewis, 138 App. Div. 673, 674, 122 NYS 1025 [quot Cyc]; Gaffney v. Colvill, 6 Hill 567. See also Bennett v. Judson, 21 N. Y. 238.

Eng.—Mackay v. Commercial Bank, L. R. 5 P. C. 394; Wheatley v. Patrick, 6 L. J. Exch. 193; Brucker v. Fromont, 6 T. R. 659, 101 Reprint 758.

But see Peyton v. Cook, (Tex. Civ. A.) 32 SW 781, 782 (where the court said: "Whatever may have been the decisions of this court heretofore on this point, the case above cited, in our opinion, fully settles the doctrine that where a wrong is done by an agent, although the principal may be liable therefor, yet, in order to admit proof as against him, it must be alleged that the act was done by his agent. The mere allegation that it was done by the principal is not sufficient to warrant a recovery if the wrong was done by the agent").

[a] **Action for cruelty to animals.**—In an action against a principal for an act of cruelty to animals done by his agent, the complaint must allege that the principal caused or procured it to be done. It is not sufficient to allege that he did it by his servant or agent, but his direct agency must be shown by his presence, order, or direction. Roeber v. Society for Prevention of Cruelty to Animals, 47 N. J. L. 237.

[b] **A complaint for false imprisonment,** (1) which alleges that the acts of the agent who caused plaintiff's arrest and imprisonment were done "at the instigation and procurement of the defendant," sufficiently charges defendant with responsibility for the agent's acts. American Express Co. v. Patterson, 73 Ind. 430. (2) A complaint in an action against a railroad company for false imprisonment by a railroad detective, showing that the detective was employed by defendant with authority to arrest all persons who had stolen its property, and that the detective within the scope of his employment, but without warrant of law, and without any criminal offense being committed by plaintiff in his presence, arrested and imprisoned plaintiff, and that said arrest was caused by appellant through its agents, servants, detectives, and employees, while acting in the scope of their employment, is not defective, in that by its allegations the detective's authority and the scope of his employment are measured and defined by the word "detective." Grand Rapids, etc., R. Co. v. King, 41 Ind. A. 701, 83 NE 778.

83. Baker v. Williams, 31 Ill. 499; Golden v. Knox, 31 Ill. 498; Goodrich v. Reynolds, 31 Ill. 490, 83 AmD 240; Clark v. Lovering, 37 Minn. 126, 33 NW 776; Davies v. Lyon, 36 Minn. 427, 31 NW 688; Kennedy v. McKay, 43 N. J. L. 288, 39 AmR 581; Keefe v. Sholl, 181 Pa. 90, 37 A 116; Pennsylvania Cent. Ins. Co. v. Kniley, 2 Pearson (Pa.) 229.

[a] **Illustration.**—Where, in an action by a purchaser of realty for damages arising from misrepresentations by the vendor's agents, the complaint alleged that the agents represented themselves as agents as to all things relative to the building and the property and particularly as to all matters connected with the sale, and that they had full authority to sell the same and to represent defendants in all things connected therewith, the complaint was not demurrable as showing only authority to sell, and not authority to make the representations as alleged. Samson v. Beale, 27 Wash. 557, 68 P 180.

[b] **Alternative allegation insufficient.**—An allegation that false representations inducing a contract to purchase lands were made by "the defendant or his agent" is not an allegation that they were made by defendant, for an agent may make a representation not binding upon his principal. Kranz v. Lewis, 115 App. Div. 106, 100 NYS 674.

84. Anderson v. Goodwin, 125 Ga. 663, 54 SE 679.

[a] **Attacking power of attorney.**—Where it is sought to attack the action of a person signing a deed as an attorney in fact, it should be alleged either that there was such power of attorney, or that there was not, and if there was such a power it should be described with reasonable certainty, and the grounds of its invalidity should be stated; if this is not done, and no sufficient legal reason is stated for the failure, mere general references to the fact that the person did act under a power do not constitute any sufficient attack upon it. Anderson v. Goodwin, 125 Ga. 663, 54 SE 679.

85. Brown v. Commercial F. Ins. Co., 86 Ala. 189, 5 S 500; Stockwell v. Whitehead, 47 Ind. A. 423, 94 NE 736 (allegations held sufficient).

86. Brown v. Commercial F. Ins. Co., 86 Ala. 189, 5 S 500; Graves v. Horton, 132 Ga. 786, 65 SE 112, 26 LRANS 545 (holding that a mere general allegation that defendant "used" the original debtor for fraudulent purposes does not amount to an allegation of agency); Everett v.

his principal, without alluding to the fact of agency, a general allegation that the act was done by defendant is held to be in effect, among other things, an allegation that the agent had authority to act in the premises.[87] Likewise, where agency is alleged, a general allegation is sufficient,[88] without averring that the agent had authority to act in the premises,[89] that being regarded as an averment of a conclusion of law, or at best an unnecessary repetition of a fact already stated.[90]

Subagent. But one who seeks to hold a principal for the acts of a subagent must expressly set up and prove the power of the agent to make such a delegation of his authority.[91]

[§ 612] **(2) Charging Notice or Knowledge Obtained by Agent.** To charge defendant with his agent's notice or knowledge of matters affecting his principal's business, it is sufficient, in an action by a third person against the principal, to allege in the complaint notice or knowledge obtained by defendant, without averring the fact of agency.[92]

[§ 613] **(3) Alleging Ratification of Agent's Unauthorized Acts.** Ratification by a principal of an unauthorized act of his agent, being equivalent to prior authority,[93] a third party, relying on proof of ratification to maintain his cause of action against the principal, need not, as a general rule, allege it specially in order to take advantage of it,[94]

Drew, 129 Mass. 150 (holding that where there is a general averment of agency, and also an averment of the specific facts which show that there was no agency, the general allegation of agency must be regarded as a mere conclusion of law not sustained by the facts); Bianki v. Greater American Exposition, 3 Nebr. (Unoff.) 656, 92 NE 615 (allegations held to show agency and not independent contractor).

[a] **A mere allegation that one party represented another** without any allegation of his authority to do so is insufficient. Perrin v. Whipple, 64 Misc. 289, 118 NYS 551 [aff 135 App. Div. 127, 132, 119 NYS 990, 994].

[b] **Allegations as to agent's powers held insufficient** to authorize plaintiff to recover, and to subject the petition to a demurrer see Johnson v. American Freehold Land Mortg. Co., 111 Ga. 490, 36 SE 614.

87. Canada v. Yazoo, etc., R. Co., 101 Miss. 274, 282, 57 S 913 [cit Cyc]; Gallatin Nat. Bank v. Nashville, etc., R. Co., 4 NYSt 714; Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp., 109 Va. 513, 64 SE 56 (sufficiency of allegation of agency).

[a] **An allegation that defendant made and delivered his promissory note,** where it appears in fact to have been executed by another party, necessarily includes the allegation that such other party was duly authorized to make the note in his behalf. Moore v. McClure, 8 Hun (N. Y.) 557.

88. U. S.—Sherman v. Comstock, 21 F. Cas. No. 12,764, 2 McLean 19.

Fla.—Duval Inv. Co. v. Stockton, 54 Fla. 296, 45 S 497.

Ga.—Atlanta Steel Co. v. Mynahan, 138 Ga. 668, 75 SE 980.

Iowa.—Call v. Hamilton County, 62 Iowa 448, 17 NW 667.

N. H.—Nicholas v. Oliver, 36 N. H. 218.

N. Y.—Partridge v. Badger, 25 Barb. 146; Beguelin v. Lee, 8 NYSt 798.

Tex.—Lewis v. Alexander, 51 Tex. 578; Jackson-Foxworth Lumber Co. v. Hutchinson County, (Civ. A. 1905) 88 SW 412 (holding that, where, in an action against a county, the petition alleged that plaintiff furnished defendant, at the instance and request of the county, acting through a specified agent, certain materials, for which defendant obligated itself to pay, it stated a cause of action good against a general demurrer, inasmuch as it authorized proof of the agent's authority).

Wash.—McKinley v. Mineral Hill Cons. Min. Co., 46 Wash. 162, 89 P 495.

[a] **Illustrations.**—(1) An averment in the complaint that the instrument sued on was made for defendant by another, as and representing himself to be defendant's agent, is sufficient to charge defendant. Opper v. Hirsh, 33 Misc. 560, 68 NYS 879. (2) An allegation that defendant executed and delivered a note by certain persons named as her attorneys in fact in a petition containing a copy of the note signed in defendant's name by such persons is a sufficient allegation of their authority to sign the note for defendant in the absence of any motion for a more specific statement or of any objection to the petition until after judgment. Abeel v. Harrington, 18 Kan. 243. (3) A petition alleging that a contract of a corporation was made, executed, and delivered by its officer and agent, naming him, is not demurrable on the ground that authority by the agent does not sufficiently appear. Johnson County v. Chamberlain Packing House, 74 Nebr. 549, 104 NW 1061. (4) A declaration setting forth that plaintiff purchased a quantity of goods from W. & P. "then and there acting as the agents for defendant," is only another form of declaring that he purchased from defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer. Cochran v. Goodman, 3 Cal. 244. (5) A complaint in an action to enforce a mechanic's lien, alleging that the sum claimed to be due was for materials furnished, etc., in pursuance of the contract between plaintiff and defendant, through and by her husband, sufficiently alleges that defendant's husband was her authorized agent. McGeever v. Harris, 148 Ala. 503, 41 S 930. (6) A complaint alleging that the contract sued on was executed by a party named therein as principal for and on behalf of defendant, and that the agreements therein contained to be performed by said party were in fact to be performed by defendant who had repeatedly recognized it, and promised to carry out its terms, shows that the party who executed the contract was acting for an undisclosed principal, and is sufficient to charge defendant as principal. Belt v. Washington Water Power Co., 24 Wash. 387, 65 P 525. (7) In an action to recover double the amount of usury paid, an allegation that the payment was made to defendant's agent was sufficient in the absence of a further allegation that he had more than one agent. Cotton v. Thompson, (Tex. Civ. A.) 159 SW 455.

89. U. S.—Sherman v. Comstock, 21 F. Cas. No. 12,764, 2 McLean 19.

Ind.—Singer Sewing Mach. Co. v. Phipps, 49 Ind. A. 116, 94 NE 793 (holding that the complaint need not allege facts peculiarly within defendant's knowledge, such as the extent of the authority of defendant's agent); Brier v. Mankey, 47 Ind. A. 7, 93 NE 672 (holding that allegations that a seller represented animals in advertisements of a public sale, that the seller by his agent made the same representations at the sale, and that the agent had full charge and represented the seller in the business generally connected with the public sale, including the handling and exhibiting of the animals, sufficiently showed that the agent, at the time of making the representations, was engaged in carrying out his principal's business pursuant to his real or apparent agency).

Iowa.—Call v. Hamilton County, 62 Iowa 448, 17 NW 667.

N. Y.—Partridge v. Badger, 25 Barb. 146; Perrin v. Whipple, 64 Misc. 289, 118 NYS 551 [aff 135 App. Div. 132, 119 NYS 994].

N. C.—Wilcox v. Durham, etc., R. Co., 152 N. C. 316, 67 SE 758.

Tex.—Lewis v. Alexander, 51 Tex. 578. But see Morrison v. Hazzard, 99 Tex. 583, 92 SW 33 [mod (Civ. A.) 88 SW 385] (holding that, in an action for specific performance of a contract made by an agent for the sale of property belonging to the estate of a decedent, a petition not showing that the agent had legal authority to sell the property stated no cause of action against the administrator or heirs of the estate).

Compare Mobile Terminal, etc., Co. v. Gladwell, 7 Ala. A. 374, 62 S 259.

[a] **Although it may be technically more accurate** to aver that the principal by his agent, in that behalf duly authorized, committed the act pleaded, yet such an averment is not indispensable. Childress v. Emory, 8 Wheat. (U. S.) 642, 5 L. ed. 705.

90. Partridge v. Badger, 25 Barb. (N. Y.) 146.

91. Johnson v. Cunningham, 1 Ala. 249; Kellogg v. Norris, 10 Ark. 18; Lucas v. Rader, 29 Ind. A. 287, 64 NE 488; McCormick v. Bush, 38 Tex. 314.

92. McDermott v. Grimm, 4 Colo. A. 39, 34 P 909; Marshall v. Gilman, 52 Minn. 88, 53 NW 811; Cassiday Fork Boom, etc., Co. v. Terry, 69 W. Va. 572, 73 SE 278 (holding that a bill against a purchaser of land who has acquired it by an agent, on the theory of a purchase in violation of an equitable right in plaintiff, known to the agent at the time of the purchase, need not aver notice to the principal by or through the agent, but is sufficient if it charges notice of the right generally).

"The repeated allegation that 'the defendant, to wit, the defendant's agent,' knew, or ought to have known, is not a sufficient allegation for any purpose. If the relation between principal and agent was such that actual knowledge by the agent would be imputed by law to the principal, such relation should be set out, or knowledge should be alleged in the principal, and no mention made of the agent." David v. Smith, 26 R. I. 129, 58 A 630, 106 AmSR 691, 66 LRA 478, 3 AnnCas 882.

[a] **An allegation, in an action to recover for money** of plaintiff wrongfully appropriated by an agent for the owners of real estate to pay the taxes thereon, that the agent "used the same to pay said taxes" cannot be construed as an averment that before the institution of the suit the owners knew of the payment. Foote v. Cotting, 195 Mass. 55, 80 NE 600, 15 LRANS 693.

93. See supra § 138.

94. Cal.—Goetz v. Goldbaum, 4 Cal. Unrep. Cas. 749, 37 P 646.

Colo.—Hoosac Min., etc., Co. v. Donat, 10 Colo. 529, 16 P 157; Smyth v. Lynch, 7 Colo. A. 383, 43 P 670 [rev on other grounds 25 Colo. 103, 54 P 634] (holding that, in an action on a bond, it is sufficient to plead the ultimate fact that the bond was executed by defendant, in order that evidence may be admissible to show that it was signed by one purporting

although a contrary rule prevails in some jurisdictions.[95] Where ratification in its technical sense is charged, it may be pleaded in general terms, because it is a fact and not a legal conclusion.[96] But where it is charged in a sense akin to estoppel, it is not proper to plead it in general terms, but the acts done constituting it must be specially set out.[97]

[§ 614] **c. In Actions between Agent and Third Person—(1) In General.** Where a petition or complaint, in an action either by or against an agent, shows on its face that he was a mere agent acting for a known principal in the matter, it discloses no cause of action,[98] unless it also alleges facts which bring him within one of those classes of agents who may sue and be sued.[99] In the latter case the facts must be alleged, and it is not sufficient to allege generally that he is such an agent.[1]

Suing for use of principal. It is no objection to a declaration, petition, or complaint by an agent who is entitled to sue in his own name that he alleges the suit to be for the use of his principal,[2] and the pleading may be so amended after the suit has been commenced by the agent in his own name,[3] although there is no necessity for such an amendment, since the agent is entitled to maintain the action in his own name.[4]

Under code provisions. In an action by an agent against a third person under some code provisions, it must appear from the petition or complaint either that plaintiff is a trustee of an express trust, in the sense in which that expression is used, or that the privity of contract required by the code exists between him and defendant; otherwise the action must be brought by the principal as the real

to act as his agent, and that the act was ratified by him). See also Hale v. Goodell, 49 Colo. 95, 111 P 708 (allegations held insufficient to show ratification).

Conn.—Plumb v. Curtis, 66 Conn. 154, 33 A 998.

Ind.—Ashley v. Henderson, 166 Ind. 147, 76 NE 985.

Iowa.—Higbee v. Trumbauer, 112 Iowa 74, 83 NW 812; Smith v. Des Moines Nat. Bank, 107 Iowa 620, 78 NW 238; Long v. Osborn, 91 Iowa 160, 59 NW 14.

Nebr.—Bigler v. Baker, 40 Nebr. 825, 58 NW 1026, 24 LRA 255.

N. Y.—Hoyt v. Thompson, 19 N. Y. 207; Merritt v. Bissell, 84 Hun 194, 32 NYS 559 [rev on other grounds 155 N. Y. 396, 50 NE 280].

Tex.—Hanover F. Ins. Co. v. Shrader, 11 Tex. Civ. A. 255, 31 SW 1100, 32 SW 844.

Wis.—Hubbard v. Williamstown, 61 Wis. 397, 21 NW 295.

Compare Whitley v. James, 121 Ga. 521, 49 SE 600 (where it was held that ratification will result, by operation of law, from the principal's acquiescence in an unauthorized sale by his agent for an unreasonable length of time after notice of the agent's conduct, and if there are special reasons why the principal did not know of such sale, or if there are facts excusing the delay in bringing the suit, the same should be specially averred in order to prevent the defendant, by demurrer, from taking advantage of the acquiescence implied from the nonaction for a long time).

[a] **Denial of authority.**—Ratification by a principal of an unauthorized act of an agent has a retroactive efficacy, and is equivalent to an original authority; and hence an allegation that there was no authorization is an allegation of absence of authorization in any form, whether previously or subsequently given. Mutual L. Ins. Co. v. Granniss, 57 Misc. 174, 107 NYS 926.

[b] **In trespass to try title,** where plaintiff claims under a deed executed by an agent, he may show ratification by the principal of the agent's act, without pleading such ratification. Kirkpatrick v. Tarlton, 29 Tex. Civ. A. 276, 69 SW 179.

[c] **Suit is upon original contract.**—A suit to enforce the obligation of a party ratifying an unauthorized act is in effect a suit upon the original contract, and not upon the act of ratification. Grant v. Beard, 50 N. H. 129.

[d] **Sufficient averment of ratification.**—In averring that a principal ratified a contract of sale made by his agent, it is not necessary to allege that he did so by the receipt of a portion of the purchase money under the contract; it is enough to aver that he did ratify. Harding v. Parshall, 56 Ill. 219.

95. Lipscomb v. Talbott, 243 Mo. 1, 28, 147 SW 798 (where the court said: "The rule seems to be in this jurisdiction (whatever it may be generally) that if a party relies on ratification, he should tender such issue in his pleading. . . . The soundness of the rule is open to great doubt. Whatever exceptions might arise because of some peculiar phase of the pleadings, it would seem that evidence tending to show ratification ought to be admissible under the issue: Is there or is there not a contract? What difference in principle does it make whether the proof commences at one end or the other? In one event the authority is directly shown, in the other facts are shown which are tantamount to such authority. In both the result is the same").

"Where a plaintiff would rely for his cause of action upon the ratification of an unauthorized contract it would be necessary for such plaintiff to fully plead and set out in his complaint all the facts necessary to constitute such ratification in order that defendant might properly answer thereto." Purkey v. Harding, 23 S. D. 632, 635, 123 NW 69.

96. Minnich v. Darling, 8 Ind. A. 539, 36 NE 173; Mahon v. Rankin, 54 Or. 328, 102 P 608, 103 P 53 (holding that an allegation that the principal, with knowledge of the facts, ratified the agent's unauthorized act is sufficient, without setting out how it was ratified). But see Purkey v. Harding, 23 S. D. 632, 123 NW 69.

97. Minnich v. Darling, 8 Ind. A. 539, 36 NE 173, 175 (where the court said: "If it merely state legal conclusions the pleading will be bad on demurrer").

98. Gill v. Tison, 61 Ga. 161; Freese v. Crary, 29 Ind. 524; Pope v. Harter, 66 S. C. 54, 44 SE 407 (holding that a complaint alleging that defendant, while conducting a business as agent of another, purchased from plaintiff certain goods, without disclosing at the time the name of his principal, states no cause of action for the price against defendant); Charboneau v. Henni, 24 Wis. 250.

99. Richmond, etc., R. Co. v. Bedell, 88 Ga. 591, 15 SE 676 (holding that an agent cannot maintain an action for breach of a contract made by him for his principal, under the code § 2209, where he does not allege that he was a factor, and contracted on his own credit, or that the contract was made in his individual name, or that his agency was coupled with an interest known to the carrier); Tinsley v. Dowell, 87 Tex. 23, 26 SW 946.

[a] **Illustrations.**—(1) Where a petition charged that defendant, as agent and trustee for certain parties, entered into a contract with plaintiff for the furnishing of materials, and that plaintiff furnished the materials in accordance with his contract with defendant, and that defendant agreed to pay plaintiff what the same was reasonably worth, the petition was sufficient to charge the defendant on a personal promise, although open to a special demurrer because it charged both principal and agent, while, under the facts stated, both were not liable; it cannot be held that an erroneous charge of both is equivalent to a charge of neither. Alter v. Frick, 62 Mo. A. 453. (2) An allegation that one defendant made the contract in suit "in his own name, but in fact as agent for and on behalf of" another defendant, does not justify a dismissal of the complaint as to the former, in the absence of any allegation that he disclosed his principal, and assumed to act for him. Petrolia Mfg. Co. v. Jenkins, 29 App. Div. 403, 51 NYS 1028.

[b] **An allegation that defendant's agent "promised and agreed to pay"** is not to be limited as charging such an agreement on behalf of the principal only, but is to be construed as a personal agreement by defendant. Jones v. Gould, 200 N. Y. 18, 92 NE 1071 (holding that, where the complaint alleged an agreement between defendants and others to form a syndicate to purchase a railroad, coal lands, etc., and that defendants, pursuant to the authority given them as the managers of the syndicate, requested plaintiff to buy coal lands and pay the price, which, together with incidental expenses, defendants promised and agreed to pay to plaintiff, and that plaintiffs purchased the land for the amount stated involving expenditures as stated, and prayed a money judgment against defendant for the sum named, the complaint alleged a personal agreement by defendants, and not an agreement as agents of the syndicate).

[c] **Action against agent to rescind sale.**—An action cannot be maintained by a third person against defendant acting as agent in procuring the sale of personalty, to rescind the sale and recover back the purchase price, where there is no averment in the complaint that the moneys remained in the hands, or under the control, of defendant. Cohen v. Ellis, 4 NYSt 721 (holding further that, in the absence of such averment, the presumption is that the moneys are not in defendant's hands).

1. Tinsley v. Dowell, 87 Tex. 23, 26 SW 946.

2. Ramsdell's Case, 2 Ct. Cl. 508; Richmond, etc., R. Co. v. Bedell, 88 Ga. 591, 15 SE 676; Buffington v. Blackwell, 52 Ga. 129.

[a] **Pleading interest of principal.**—An agent without interest in the property, with whom a contract of insurance has been made, may sue upon such contract in his own name; but, in such case, the beneficial interest of the principal must be both averred and proved as the foundation of the right to recover. Hamburg-Bremen F. Ins. Co. v. Lewis, 4 App. (D. C.) 66, 81.

3. Buffington v. Blackwell, 52 Ga. 129. See also supra § 608.

4. Spence v. Wilson, 102 Ga. 762, 29 SE 713.

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party in interest.[5]

Replevin cannot be maintained by an agent in his own name against a third person who has dispossessed him, under a general allegation of ownership in himself, without stating the facts in relation to his special interest and right of possession.[6]

[§ 615] **(2) On Contracts with Words Descriptio Personæ.[7] Agent as plaintiff.** In declaring on a written contract containing words indicative of agency, but which are merely descriptive of plaintiff, it is sufficient if he declares in his own name; and if the words of description are added they will be looked upon as mere surplusage.[8]

Agent as defendant. The rule, that merely descriptive words need not be contained in the pleading, applies in actions against agents as well as in actions by them.[9]

[§ 616] **d. In Actions by Principal against Agent—(1) Equitable Suit for Accounting—(a) In General.**[10] The general rule that a bill for an accounting must show upon its face that complainant is entitled to the relief demanded, and that he is the proper party and vested with the right to maintain the suit,[11] applies to an action by a principal against his agent for an accounting of money or property received by the latter in his capacity of agent.[12] So in order to maintain a suit in equity, on the ground that the account is so complicated that it cannot be taken in an action at law, facts showing the existence of this ground must be alleged in the bill;[13] and the bill must show that a discovery is indispensable to complainant's recovery against defendant,[14] or state facts showing that the relation of principal and agent existing between the parties was of a fiduciary nature,[15] in case such are the grounds relied on to support jurisdiction in equity.

[§ 617] **(b) Prior Demand for an Accounting.** In an ordinary action by a principal against his agent for an accounting of money or property received by the latter in his capacity as agent, a demand for an accounting before suit,[16] or facts

5. Ark.—Ferguson v. McMahon, 52 Ark. 433, 12 SW 1070.
Ind.—Mitchell v. St. Mary, 148 Ind. 111, 47 NE 224; Rawlings v. Fuller, 31 Ind. 255.
Iowa.—McHenry v. Painter, 58 Iowa 365, 12 NW 338.
Mo.—Crescent Furniture, etc., Co. v. Raddatz, 28 Mo. A. 210.
N. Y.—Ralli v. Equitable Mut. F. Ins. Co., 16 Misc. 357, 38 NYS 87; Vestner v. Findlay, 10 Misc. 410, 31 NYS 138; Fargo v. Owen, 79 Hun 181, 29 NYS 611.

6. Ward v. Ryba, 58 Kan. 741, 51 P 223 (applying this rule to an agent who takes in his own name a bill of sale in payment of a debt due to his principal and who, upon taking possession of the property for his principal, is dispossessed by third persons).

7. See supra § 488.

8. Ala.—Castleberry v. Fennell, 4 Ala. 642. But in Newbold v. Wilson, Minor 12, consistent with the more technical rules governing variance between allegations descriptive of written contracts and the proof, it was held necessary for the agent to add the descriptive words in his writ and declaration.
Cal.—Zeigler v. Wells, 28 Cal. 263.
Ga.—McDuffie v. Irvine, 91 Ga. 748, 17 SE 1028; Owsley v. Woolhopter, 14 Ga. 124; Davies v. Byrne, 10 Ga. 329.
Ill.—Mills v. Jensen, 75 Ill. A. 644.
Md.—Graham v. Fahnestock, 5 Gill 215.
Mass.—Buffum v. Chadwick, 8 Mass. 103.
Nebr.—Andres v. Kridler, 47 Nebr. 585, 66 NW 649.
N. J.—Terhune v. Parrott, 59 N. J. L. 16, 35 A 4.
N. Y.—Bennett v. Whitney, 94 N. Y. 302; Davis v. Garr, 6 N. Y. 124, 55 AmD 387; Hallett v. Harrower, 33 Barb. 537; Gould v. Glass, 19 Barb. 179; Ogdensburgh Bank v. Van Rensselaer, 6 Hill 240; Hunt v. Van Alstyne, 25 Wend. 605.
Tenn.—Whiteside v. Button, 2 Coldw. 94; Rutherford v. Mitchell, Mart. & Y. 261.
Va.—Porter v. Nekervis, 4 Rand. (25 Va.) 359; McWilliams v. Willis, 1 Wash. (2 Va.) 199.

9. Penn Mut. L. Ins. Co. v. Conoughy, 54 Nebr. 123, 74 NW 422; Danforth v. Timmerman, 65 S. C. 259, 43 SE 678.

10. **Duty of agent to account** see supra § 401.

11. See Accounts and Accounting §§ 98–101.

12. See Christy v. Libby, 2 Daly (N. Y.) 418, 5 AbbPrNS 192. See also Barton v. Barton, 52 Ind. A. 319, 100 NE 688 (complaint held sufficient on demurrer).
[a] **Instances of bills held to state facts for relief.**—(1) A bill showing a relation of agency of a fiduciary nature and mutual accounts, and distinctly specifying the items of agency, states facts for equitable relief, and the mere omission to state the date of the creation of the agency, although it may be a defect in stating the case, will not justify the dismissal of the bill on motion. Henderson v. Mathews, 1 Lea (Tenn.) 34. (2) A complaint which alleges that defendants, as agents of plaintiff, received certain goods for sale, for a part of which they had failed to pay and refused to account, and praying that plaintiff may recover the value of the goods not accounted for, states a good cause of action. Robson v. Sanders, 25 S. C. 116. (3) Where complainant alleges in its bill that defendant became its agent and as such surreptitiously overissued certificates of complainant's stock, and that the funds derived therefrom are in defendant's possession, and praying that defendant may account to and satisfy complainant for all liabilities which those issues may have occasioned it, a case for equitable relief is disclosed. Kentucky Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180. (4) A petition alleging that defendants were the agents of plaintiff to ship certain goods; that it was their duty to ship in the name of complainant to a commission merchant for immediate sale, but that they made the shipment in their own name, not for immediate sale, but to be stored, and concealed such action from plaintiff for a period of fourteen months, states a cause of action. Buck v. Reed, 27 Nebr. 67, 42 NW 894. (5) A bill brought to compel an agent to account, joins those charged to be his confederates in a scheme of fraud, claiming relief against them, and denying the agent's ability to respond in full, states a cause for equitable relief. Illges v. Dexter, 73 Ga. 362.
[b] **Form of bill held sufficient** see Christy v. Libby, 2 Daly (N. Y.) 418, 5 AbbPrNS 192.
[c] **Specific loss occasioned by negligence.**—To render an agent liable to his principal in an action of accounting, for any specific loss occasioned by his misconduct or neglect, such neglect or misconduct must be alleged in the complaint and substantiated by the proof. Williams v. Gregg, 21 S. C. Eq. 297.
[d] **In a suit for the enforcement of an agreement for an accounting,** brought by the principal against his agent, a breach of the agreement and the necessity for a judicial direction that it be performed must be averred in the bill. New York L. Ins. Co. v. Hamilton, 52 Misc. 189, 102 NYS 771.
[e] **Principal's property purchased by agent; tender.**—A bill in equity that seeks to recover from a respondent the property which the latter bought at an execution sale against complainant, on the ground that the purchaser had been the agent and manager of the property for complainant and therefore had no right, under the general rule and under Porto Rico code (1902) § 1362, to purchase his principal's property at such a sale, but which does not tender the amount of money paid therefor by the agent, is bad on demurrer. Ubarri e Iramategui v. Matienzo, 5 Porto Rico Fed. 562.

13. Halsted v. Rabb, 8 Port. (Ala.) 63.
[a] **Complaint held to state single cause of action.**—A petition which alleges that one of defendants, plaintiff's agent in the collection of a debt secured by mortgage, wrongfully procured the mortgaged premises to be conveyed to another defendant, took possession thereof, collected the rent, etc., and negligently permitted the premises to be sold for delinquent taxes to a third defendant, and failed to account for rents received, praying for the recovery of the legal title and for an accounting, states but a single cause of action. Ross v. Noble, 6 Kan. A. 361, 51 P 792.

14. Coquillard v. Suydam, 8 Blackf. (Ind.) 24.

15. Conger v. Judson, 69 App. Div. 121, 74 NYS 504; New York L. Ins. Co. v. Hamilton, 52 Misc. 189, 102 NYS 771. See also Rippe v. Stogdill, 61 Wis. 38, 20 NW 645; Hemings v. Pugh, 4 Giffard 456, 66 Reprint 785.
[a] **When agency may not have been fiduciary.**—And if, so far as may be gathered from what is alleged, an agency existed which might or might not have been of a fiduciary nature, according to the surrounding circumstances, the relation of the agent toward the principal, in the absence of a statement of those circumstances, will be deemed to have been other than fiduciary for the purposes of demurrer. New York L. Ins. Co. v. Hamilton, 52 Misc. 189, 102 NYS 771. See also Conger v. Judson, 69 App. Div. 121, 74 NYS 504.
[b] **Failure to allege facts showing that moneys, for which an accounting is asked, were received by defendant in a fiduciary capacity, is not cured** by an allegation that defendant gave receipts for such moneys by the terms of which the moneys were to be accounted for, without an allegation that defendant had failed to render an accounting. New York L. Ins. Co. v. Hamilton, 52 Misc. 189, 102 NYS 771.

16. Bushnell v. McCauley, 7 Cal.

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rendering a demand unnecessary,[17] must be alleged in the bill.[18]

[§ 618] **(c) Property or Money in Hands of Defendant.** Conceding that the relation of principal and agent existed between the parties, a complaint which does not charge that defendant ever had in his possession money or property belonging to plaintiff, upon which a demand to account could have been predicated, does not state a cause of action for an accounting.[19] It must be made to appear in the bill, by appropriate averments, that the moneys received by defendant, for which an accounting is sought, are more than sufficient to offset defendant's just claims against plaintiff.[20]

[§ 619] **(2) Actions at Law—(a) Averring Prior Demand of Payment.** Where a demand is necessary to enable the principal to maintain an action against his agent,[21] as in an action against the agent to recover money collected by him and not paid over, the complaint must either aver the fact of a demand having been made on defendant before suit,[22] or set forth circumstances which excuse a demand;[23] and such demand will not be presumed.[24] But of course, where no demand is necessary to entitle the principal to maintain his action, the complaint need not allege a demand.[25]

Aider by answer. A complaint, although originally defective for failure to allege a demand by the principal, may be rendered nondemurrable by an answer setting up defenses that would have dispensed with the necessity of a demand in the first instance.[26] Thus, where the agent interposes the defense that he was not an agent of the principal, he waives the necessity for a prior demand.[27]

Objection how taken. It has been held that the objection to the complaint for failure to allege a demand by the principal should be taken specially by exception, and is not raised by a general demurrer.[28] On the other hand, it has been held that the objection may be made after verdict by motion in arrest of judgment.[29]

[§ 620] **(b) Allegation That Contract Was in Writing.** An action to recover from defendant money received by him on a sale of plaintiff's land, in which he acted as plaintiff's agent, is not an action on a contract for the sale of land, and a complaint therein need not allege a contract in writing.[30]

[§ 621] **(c) Charging Agent with Personal Liability for Advances in Excess of Commissions Earned.** In an action by a principal against his agent to recover a certain sum as advances in excess of commissions earned, made under a contract of employment to advance a given sum per week on account of commissions to be earned, and a further sum for expenses, the complaint should show how much was advanced on account of commissions and how much for expenses.[31]

[§ 622] **(d) Charging Agent with Value of Goods Sold in Violation of Instructions.** To charge defendant as agent with the value of goods sold on credit to insolvent persons contrary to positive instructions, it is sufficient for the principal to allege in his complaint that the sale was made in violation of the agent's instructions, whereby the value of the goods was lost to his principal.[32]

[§ 623] **(e) Charging Agent with Negligence or Misconduct and Consequent Injury.** Although a

421; Haaland v. Miller, 67 Or. 346, 136 P 9.

17. Haaland v. Miller, 67 Or. 346, 136 P 9.

18. **Necessity of demand** as a condition precedent to right of action see generally Accounts and Accounting § 103; Actions §§ 74–83.

19. Runyan v. Russell, 3 Wash. 665, 29 P 348.

20. Peeler v. Lathrop, 48 Fed. 780, 1 CCA 93.

21. **Demand as condition precedent** see supra §§ 592, 593. See also generally Actions §§ 74–83.

22. Wagner v. Wedell, 3 Cal. A. 274, 85 P 126 (holding that a complaint charging defendant, as agent of plaintiff, with having sold plaintiff's note and mortgage for a certain amount for, and on account of, plaintiff, and alleging that, although demand had been made, defendant had not paid plaintiff the said sum, nor any part thereof, stated facts sufficient to constitute a cause of action); Heddens v. Younglove, 46 Ind. 212; Black v. Hersch, 18 Ind. 342, 81 AmD 362; Jones v. Gregg, 17 Ind. 84; Phillips v. Wills, 2 Ind. 325; English v. Devarro, 5 Blackf. (Ind.) 588; Judah v. Dyott, 3 Blackf. (Ind.) 324, 25 AmD 112; Armstrong v. Smith, 3 Blackf. (Ind.) 251; Judith Inland Transp. Co. v. Williams, 36 Mont. 25, 91 P 1061 (holding that a complaint, in an action to recover from plaintiff's agent a balance collected by him and retained after plaintiff "demanded from the defendant the payment of all moneys belonging to this plaintiff," and to recover money collected for, but not paid to, others, which plaintiff was compelled to pay, and which defendant has not paid to plaintiff, "although frequently requested by plaintiff so to do," sufficiently alleges a demand for payment before suit); Anderson v. Hulme, 5 Mont. 295, 5 P 865; Lamb v. Ward, 114 N. C. 255, 19 SE 230.

[a] **Alleging date of demand.**—The allegation of demand need not allege the date upon which it was made. Porter v. Grimsley, 98 N. C. 550, 4 SE 529.

[b] **Claim against deceased agent's estate.**—Where the proceeding is by way of a claim filed against the administrator of a deceased agent, the statement of claim need not contain any averment of demand. Trimble v. Pollock, 77 Ind. 576 [overr Hannum v. Curtis, 13 Ind. 206, and foll Wright v. Jordan, 71 Ind. 1, 4, in which case the court said: "We waive any discussion as to whether a special demand would have been necessary before bringing suit in this case against Farquar [the agent], were he still alive. It is sufficient for the purposes of this case, to say, that, in our opinion, a demand against his administrator would have been a useless ceremony. All claims against an estate, whether contingent or absolute, have to be filed against it in the proper court, and the filing of such a claim as the one before us constitutes a sufficient demand against the administrator"].

23. Black v. Hersch, 18 Ind. 342, 81 AmD 362.

24. Anderson v. Hulme, 5 Mont. 295, 5 P 865.

25. Bunger v. Roddy, 70 Ind. 26; Dever v. Branch, 18 Tex. 615 (holding that it is not necessary to allege a demand and a refusal in action for breach of duty by agent whereby he received less money for his principal than he should have received).

26. Lamb v. Ward, 114 N. C. 255, 19 SE 230 (holding that, where, in an action by a principal against an agent for money due by the latter, the complaint does not allege a demand and refusal, a demurrer on that ground will not lie when in the answer, which contains the demurrer, a general denial of indebtedness is made and the statute of limitations is pleaded).

27. Waddell v. Swann, 91 N. C. 108.

28. Dever v. Branch, 18 Tex. 615.

29. Heddens v. Younglove, 46 Ind. 212 (where the court said: "The complaint alleged that the appellant, as the agent of the appellee, had collected certain sums of money, which had not been paid over, but there was no averment of any demand for the payment of such moneys. This omission made the complaint defective. In Armstrong v. Smith, 3 Blackf. (Ind.) 251, this court said: 'This appears to us to be a plain case. The declaration shows that the defendant collected the money, for which the suit was brought, as the agent of the plaintiff. To entitle a party, under such circumstances, to recover, he should aver and prove a demand of the money previously to the commencement of the suit. It would be unjust, and contrary to the implied contract between the parties, in cases like the present, to subject the agent to a suit for the money collected by him for his principal, without a previous demand'").

30. Ferguson v. Ramsey, 41 Ind. 511.

31. Tausig v. Drucker, 88 NYS 391.

[a] **Petition held sufficient.**—A petition, in an action for money advanced by a principal to his agent, which alleges that the principal advanced money to the agent under his promise to use it to buy ties for the principal, and to turn the same over to the principal in satisfaction thereof, less agreed commissions for ties bought, and that the agent delivered to the principal a designated number of ties of a designated value leaving a balance owing from the agent, is sufficient, without showing what commission the agent was entitled to receive, or what balance was due from the agent on his being credited with his commissions, the same being available by answer. Hildreth v. Ayer, etc., Tie Co., 108 SW 255, 32 KyL 1212.

32. Maloney v. Barr, 27 W. Va. 381 (holding further that it was not necessary to aver that there was an express contract between the parties that the agent should not sell on credit).

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complaint does not contain an express averment of agency,[33] yet it contains all the essential elements of a complaint by a principal against his agent for negligence or misconduct, if it sets forth facts constituting an agency, a negligent or fraudulent failure of defendant to perform the duties thereof, and the consequent damages to plaintiff;[34] and where the complaint is for an unauthorized act, it need not negative a ratification by the principal.[35] In an action based on the negligence of defendant in loaning moneys deposited with him to be loaned on good security for plaintiff, the failure to allege that plaintiff was injured by defendant's negligence in making the loan is of no consequence, when the complaint alleges that the loan was made to an insolvent party and that it is utterly worthless.[36] In an action in the nature of trover and conversion against an agent, allegation of the receipt of the property by defendant from plaintiff takes the place of the allegation of ownership necessary in such actions against parties not sustaining the relation of principal and agent.[37]

[§ 624] **e. In Actions by Agent against Principal.** The declaration or complaint, in an action by an agent against his principal for compensation, or for damages for a breach of contract on the part of the principal, should allege facts showing the contract of employment, and performance thereof on the part of plaintiff,[38] and should also allege either a nonpayment of the money demanded or facts from which its nonpayment can be fairly inferred,[39] or should allege facts showing a breach of the contract on the part of defendant.[40]

33. Shaffer v. Corson, 141 Pa. 256, 21 A 647.

[a] **In an action by a principal against his agent charging him with an abuse of his powers,** it is essential to allege that he acted as agent. Ætna L. Ins. Co. v. Sabine, 1 F. Cas. No. 97, 6 McLean 393.

34. Phares v. Stover, 136 Ga. 843, 72 SE 344; Welch v. Walker, 10 Kan. A. 373, 59 P 1096 (pleadings held insufficient); Pennoyer v. Willis, (Or.) 32 P 57; Shaffern v. Corson, 141 Pa. 256, 21 A 647.

[a] **Alleging agreement to be personally responsible.**—Where the gist of the action is the negligence of defendant in making a loan as the agent of plaintiff, the complaint need not allege that defendant agreed to be responsible personally for the loan. Broanenburg v. Rinker, 2 Ind. A. 391, 28 NE 568.

[b] **Complaint held sufficient:** (1) In an action for damages sustained by the agent's false and fraudulent representations as to the genuineness of a note and the responsibility of the maker see Marbourg v. McCormick, 23 Kan. 38. (2) Counts against agent for fraud held to state cause of action and good on demurrer see Norwich Union F. Ins. Soc. v. McAlister, 35 N. B. 691. (3) A petition alleging that defendant, as agent, fraudulently and with intent to cheat his principal concealed from the latter all facts relative to the money received by defendant as a part consideration for lands sold, states a cause of action against defendant. Wells v. Cochran, 78 Nebr. 612, 111 NW 381 [reh den 78 Nebr. 614, 112 NW 616].

[c] **A complaint in an action for money had and received,** alleging that defendant received, as agent of plaintiff, certain sums belonging to plaintiff, and that plaintiff had demanded payment thereof, is sufficient, in the absence of demurrer or motion to make the pleading more definite and certain, notwithstanding a failure to allege that the money was paid to defendant for use of plaintiff or that he promised to pay it to plaintiff. Keene v. Eldriedge, 47 Or. 179, 82 P 803 (holding this to be true under Ballinger & C. Comp. §§ 64, 67, providing that all forms of pleading in actions at law are abolished and that the complaint should contain a concise statement of the cause of action).

[d] **Alleging demand.**—Where the complaint, in an action for the negligence of defendant in making a loan as agent of plaintiff, avers that the borrower was and is entirely insolvent, and that the loan is entirely worthless, it need not aver a demand of the money either from the borrower or from defendant. Bronnenberg v. Rinker, 2 Ind. A. 391, 28 NE 568. See also supra § 619.

[e] **Alleging knowledge of falsity of representations.**—In an action for negligence of defendant in making a loan as the agent of plaintiff, where the complaint alleges that defendant falsely represented that the loan was secured by mortgage, it need not allege that defendant knew such representations to be false. Bronnenberg v. Rinker, 2 Ind. A. 391, 28 NE 568.

[f] **Surplusage.**—Under N. Y. Code Civ. Proc. § 549 subd 2, providing that defendant may be arrested, where the complaint alleges that the money sued for was received or fraudulently misapplied by an agent or other person in a fiduciary capacity, and that, where such allegation is made, plaintiff cannot recover unless he proves the same on the trial, such an allegation, when made in an action for the conversion of rents collected and received by defendant as plaintiff's agent, cannot be rejected as surplusage. Frick v. Freudenthal, 45 Misc. 348, 90 NYS 344.

[g] **Petition insufficient; conspiracy.**—In an action by a principal against his agent and others for conspiracy to deprive the principal of profits of a business which had been committed to the agent, where it appeared that one of defendants acted only as an agent for a codefendant, and there was no allegation that he participated in the profits arising from the alleged fraudulent scheme or conspiracy, the petition should be dismissed as to him as not setting out any cause of action. Forlaw v. Augusta Naval Stores Co., 124 Ga. 261, 52 SE 898.

35. Westhope First Nat. Bank v. Messner, 25 N. D. 263, 141 NW 999.

36. Bronnenburg v. Rinker, 2 Ind. A. 391, 28 NE 568. See also Marshall v. Ferguson, 78 Mo. A. 645.

37. Buck v. Reed, 27 Nebr. 67, 42 NW 894.

38. Ala.—Union Refining Co. v. Barton, 77 Ala. 148.

Ark.—Stifft v. Stiewel, 91 Ark. 445, 125 SW 1008, 18 AnnCas 597 (complaint in action for commissions held not to state a cause of action).

Ind.—Wheeler, etc., Mfg. Co. v. Worrall, 80 Ind. 297.

Ky.—Tyler v. Woerner, 158 Ky. 710, 166 SW 178 (petition held to sufficiently allege authority).

N. Y.—Gee v. Pendas, 66 App. Div. 566, 73 NYS 247. See also Mitchell v. Follett Time Recording Co., 142 App. Div. 687, 127 NYS 709.

[a] **Description of services.**—In Chesbrough v. New York, etc., R. Co., 26 Barb. (N. Y.) 9, 13 HowPr 557, it was held that the common count for work and labor was insufficient unless it contained a designation or description of the character of the services rendered, but that advantage of the failure to allege such a description could be taken only on motion to make the complaint more definite and certain, and not on demurrer.

[b] **In New York** under Code Civ. Proc. § 533, which provides that, in pleading performance of a condition precedent, the party may state generally that he duly performed all the conditions on his part, he must make such general allegation or set out facts showing in detail the performance of each condition precedent, and hence a complaint, stating that defendant employed plaintiffs for a specified period to sell goods on a stated commission, plaintiffs agreeing to employ a salesman and advance his traveling expenses, etc., that defendant agreed to advance a specified sum to be deducted from commissions when earned, and that plaintiffs entered upon performance of the contract and performed the same fully up to a specified date, when defendant wrongfully discharged them, etc., insufficiently alleges performance by plaintiffs of the conditions precedent. Rosenthal v. Rubin, 148 App. Div. 44, 132 NYS 1053.

39. Wheeler, etc., Mfg. Co. v. Worrall, 80 Ind. 297 (holding that a complaint alleging that on a certain date plaintiff, as defendant's agent, sold a sewing machine for which he took the purchaser's note which note defendant accepted, and plaintiff at the proper time furnished to defendant a certificate signed by the purchaser, as required by a stipulation of the contract, and that the purchasers afterward paid the note to defendant by reason of which plaintiff became entitled to receive from defendant a commission of twenty dollars on the sale, was insufficient for failure to aver inferentially, or otherwise, a nonpayment of such commission).

[a] **Complaint held sufficient.**—A complaint alleging that plaintiff was employed by defendants to sell goods in certain territory, that he was to be paid a certain commission on all sales therein, and that they have not paid the full amount of such commission, and demanding judgment that defendants account to him for the amount due and pay him such amount, although not sufficient to entitle plaintiff to equitable relief, states a cause of action at law, and should not be dismissed. Gee v. Pendas, 66 App. Div. 566, 73 NYS 247.

40. Wheeler, etc., Mfg. Co. v. Worrall, 80 Ind. 297 (holding that a complaint alleging that on a certain date, plaintiff being in defendant's employ, defendant agreed to furnish plaintiff with a horse and wagon suitable for the delivery of sewing machines to be sold by plaintiff, and to deliver machines to plaintiff as fast as he might order the same, that defendant failed, and has ever since failed, to perform its part of the agreement, to the damage of plaintiff in a sum of one thousand dollars, stated sufficient facts to authorize a recovery of nominal damages only).

[a] **Illustrations.**—(1) In an action by an agent against his principal for breach of a contract of agency, where it was provided that he was to have the sole right of selling his principal's goods in a certain locality, an allegation that, after plaintiff had begun to sell in that locality, defendant sent another agent there for that purpose, without the knowledge or consent of plaintiff, is not a sufficient assignment of the breach, without an

For reimbursement.[41] Where the action is in case for indemnity for damages recovered by a third person against the agent for trespass, the complaint or declaration must allege that the agent was without knowledge on his part that his act on behalf of his principal was a trespass,[42] and must also allege a breach on the part of the principal of his duty to indemnify the agent.[43]

[§ 625] **2. Plea or Answer and Cross Bill—a. In General.** As a general rule the facts constituting affirmative defenses must be specially pleaded[44] in accordance with the usual rules governing the use of the general issue or general denial.[45] Thus the defense that the principal is estopped to deny the authority of his agent after having clothed him with apparent authority must be specially pleaded,[46] as also must be the defense, in an action by an agent against his principal for services, that the agent was employed by both parties to the transaction, without the knowledge of defendant, and

additional averment that plaintiff was still performing his duties under the contract. Union Refining Co. v. Barton, 77 Ala. 148. (2) So too, in such an action, an averment in the complaint, as a breach of the contract, that defendant has failed and refused to pay plaintiff a stipulated compensation is not a sufficient assignment, without an additional averment of the sales made and their amount. Union Refining Co. v. Barton, supra. (3) Where a contract between a manufacturer and a selling agent provided that on deferred payments commissions should be paid only on payment of the notes representing such deferred payments, and in proportion as payment should be made, and in an action for commissions, the agent declared solely on the contract, and alleged no breach, except failure to pay, he could not recover commissions on unpaid notes, on the theory that the principal had been negligent in their collection; and an amendment to such a petition, alleging that oral agreements and correspondence had modified the contracts, was insufficient to sustain proof of such damages, where the amendment did not allege what modifications had been made. Westinghouse Co. v. Tilden, 56 Nebr. 129, 76 NW 416.

41. Right to reimbursement and indemnity see supra § 458–468.

42. Moore v. Appleton, 26 Ala. 633, 638 (where the court said: "When the declaration is in case, as it is here, and shows that the losses for which the agent is seeking indemnity from the principal, are certain damages recovered against the agent for taking property by the direction of the principal, in an action of trespass brought against the agent by the true owner of the property, the declaration is defective, if it omits to state that the taking by the agent was without knowledge on his part, at the time of the taking, that it was a trespass.——The agent must, in his declaration, negative the existence of such knowledge on his part, although the onus of proving the existence of such knowledge may be on the principal; for the rule, that the allegata and probata must correspond, is not of universal application"); Hoggan v. Cahoon, 26 Utah 444, 73 P 512, 99 AmSR 837 (holding that, where plaintiff alleged that he was employed by defendant to take possession of certain chattels on which defendant had a chattel mortgage, and transport them to a particular place, and that he performed such direction, and was not aware that his act constituted a tort, but acted in good faith, on defendant's representation that the taking was lawful and proper, and thereafter a third person recovered judgment against him for such act, which he was compelled to pay, together with expenses of litigation, and, although plaintiff had demanded reimbursement from defendant, the latter had refused to comply with such demand, the complaint stated a cause of action, and was not demurrable on the ground that indemnity cannot be recovered between joint tort-feasors).

43. Moore v. Appleton, 26 Ala. 633; Hoggan v. Cahoon, 26 Utah 444, 73 P 512, 99 AmSR 837.

44. Southern Pac. Co. v. Duncan, 16 KyL 119 (holding that, where the petition alleges a general authority on the part of an agent, and the answer admits that there was authority, but claims that it was restricted, the restriction should be pleaded); Beheret v. Myers, 240 Mo. 58, 144 SW 824; Hicks v. National Surety Co., 169 Mo. A. 479, 155 SW 71 (holding that the defense that acts of an agent were ultra vires or beyond his authority must be pleaded); Quick v. Sachsse, 31 Nebr. 312, 47 NW 935 (holding that, in an action for commissions on a sale that defendant employed plaintiff to make and then refused to consummate, the defense that defendant had only an option on the land, as plaintiff knew, and was not the owner, is matter of confession and avoidance which must be pleaded). See generally Pleading [31 Cyc 126 et seq].

[a] **That defendant acted as agent merely.**—(1) Where defendant, in an action brought against him personally, relies on the affirmative defense that he was acting in the transaction as agent for another, he must aver his authority to act in the premises (White v. Skinner, 18 Johns. (N. Y.) 307, 7 AmD 381), (2) and a mere averment that defendant acted in the transaction in the capacity of agent, and not otherwise, is not sufficient (White v. Skinner, supra); nor will a mere traverse of the averment of the complaint suffice (Martin v. Kennedy, 90 SW 975, 28 KyL 966).

[b] **Payment to agent.**—(1) A defense that the agency was not disclosed to defendant and that he in good faith treated and paid the agent as plaintiff, must be pleaded specially to be available. Hutchinson Mfg. Co. v. Henry, 44 Mo. A. 263. (2) A plea in an action on a note, alleging payment to an agent of plaintiff authorized to receive payment of such note, is not insufficient for failure to aver that the alleged agent had the note in his hands at the time of payment. Athens Nat. Bank v. Burt, 98 Ga. 380, 25 SE 502.

[c] **Payment of debt by agent to principal by notes of former purchased by latter.**—In an action by the assignee of the principal against an agent, if defendant alleges that he paid his indebtedness by notes of the principal purchased by him, he must aver how and for what price he obtained the notes. Farnum v. Farrell, 2 Phila. (Pa.) 368.

[d] **Bona fide distribution of property by assignee of agent before notice of principal's claim.**—An answer by an assignee of an agent claiming protection from the claim of the principal, on the ground of having made a bona fide distribution of the proceeds of the property under directions of a trust, must aver that the assignee paid out all the proceeds before he had notice of the claim of the principal. Fahnestock v. Bailey, 3 Metc. (Ky.) 48, 77 AmD 161.

[e] **Breach of contract as counterclaim.**—Where, in an action by a principal against his agent for moneys converted, defendant pleads as a counterclaim a breach of the contract of agency, a general allegation that plaintiff did not keep his promise and guaranty does not sufficiently plead the breach, when not accompanied by the facts supporting such allegation. Picker v. Weiss, 39 Misc. 22, 78 NYS 761.

[f] **Ratification.**—In an action against an administrator of a deceased principal, an answer denying authority in the agent is sufficient unless it also denies a subsequent ratification of the contract by the principal. Clark v. Van Riemsdyk, 9 Cranch (U. S.) 154, 3 L. ed. 688.

[g] **Statutory defense.**—Under a statute which provides that no person shall be bound as a surety for another by the act of an agent unless the authority of the agent is in writing, signed by the principal, a good answer must show that defendant was a stranger to the consideration in order to raise the question whether he is bound by the signing of another who has oral authority only, and he cannot avail himself of the statute under the general plea of non est factum. Young v. Hildreth, 5 KyL 129. ing, signed by the principal, Gen. St. c 22 § 20, a good answer must show that defendant was a stranger to the consideration in order to raise the question whether he is bound by the signing of another who has oral authority only, and he cannot avail himself of the statute under the general plea of non est factum. Young v. Hildreth, 5 KyL 129.

[h] **Where, in an action for breach of a contract to return samples furnished,** defendant alleges that the samples were stolen from him without his negligence, and that no part of them has been recovered, it is not necessary that he also allege that he has used due diligence in attempting to recover the samples from the thief, since, under the allegation that the goods have not been recovered, defendant can prove that all diligence required of him has been exercised. Keystone Watch Case Co. v. Romero, 36 Misc. 381, 73 NYS 638.

[i] **A plea to defendant that plaintiff's agent voluntarily surrendered certain property** claimed by plaintiff to have been wrongfully taken and damaged, is defective for not alleging the authority of plaintiff's agent for so disposing of the property, or that plaintiff afterward ratified his agent's acts with full knowledge thereof. Interstate Lumber Co. v. Duke, (Ala.) 62 S 845.

45. See Pleading [31 Cyc 126 et seq].

46. Deming Inv. Co. v. Shawnee F. Ins. Co., 16 Okl. 1, 83 P 918, 4 LRANS 607; Tres Palacios Rice, etc., Co. v. Eidman, 41 Tex. Civ. A. 542, 93 SW 698; Swayne v. Union Mut. L. Ins. Co., (Tex. Civ. A.) 49 SW 518; Rail v. City Nat. Bank, 3 Tex. Civ. A. 557, 22 SW 865.

[a] **Scope of agent's authority must be shown.**—An answer of estoppel to the conduct of plaintiff's agent, which fails to show the scope of the agent's authority, is insufficient. Porter Lumber Co. v. Hill, 72 Ark. 62, 77 SW 905.

[b] **Knowledge of lack of authority.**—In an action against a principal for the breach of a contract within the apparent scope of the agent's authority, an allegation in the answer that plaintiff might have known by the exercise of ordinary care and prudence that the agent had no authority to execute the contract will be stricken out on motion, as the principal must show that the party with whom the contract was made had actual knowledge of the fact that the agent was unauthorized. Harrison v. Missouri Pac. R. Co., 74 Mo. 364, 41 AmR 318.

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such defense cannot be set up under the general issue or general denial.[47] But where a contract of agency is one affecting the interests of the general public, a defense that it is void as against public policy need not be affirmatively pleaded to be available.[48] As a principal is responsible for the negligent and improvident acts of his agent in the execution of his trust,[49] in order to relieve himself from responsibility, he must deny the whole agency.[50] To a bill by an agent for an accounting respecting his employment, an answer setting up a purely legal demand is not proper.[51]

Sufficiency of allegation. In pleading an act of an agent as a defense to an action, it is sufficient to charge, in the answer, the act as that of the principal, without naming the agent.[52] In any case the plea or answer must respond to the allegations of the declaration or complaint.[53]

[§ 626] **b. Denying Agent's Authority.** Ordinarily the general issue or a general denial in an action against the principal will raise the question of the authority of the agent.[54]

Denial under oath. In many jurisdictions, however, statutes have been passed which provide in effect that the execution of written instruments properly declared on in a pleading is admitted unless a denial of the execution is made by a plea or answer verified by affidavit. Such statutes are generally held to apply as well to instruments executed by an agent as to those executed by a party in person; and authority of the agent in such cases can be put in issue only by filing a statutory denial of the execution;[55] and this rule applies as well where the action is brought against the agent as where it is brought against the principal.[56] The fact that the agent contracted without disclosing his agency will not relieve the principal, when sued, from the necessity of making the statutory denial if he wishes to contest the agent's authority.[57] Some statutes do not confine this rule to written instruments, but provide further that in all actions allegations in a pleading expressive of any appointment or authority

47. MacFee v. Horan, 40 Minn. 30, 41 NW 239; Reese v. Garth, 36 Mo. A. 641; Childs v. Ptomey, 17 Mont. 502, 43 P 714; Smith v. Soosen, 24 Misc. 706, 53 NYS 806; Bonwell v. Auld, 9 Misc. 65, 29 NYS 15. See also Duryee v. Lester, 75 N. Y. 442.

[a] **Waiver.**—A failure to object in the trial court that the defense is not specially pleaded waives the objection. New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85.

48. Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539; Brennan v. Purington Pav. Brick Co., 171 Ill. A. 276; Drake v. Lauer, 93 App. Div. 86, 86 NYS 936 [aff 182 N. Y. 533 mem, 75 NE 1129 mem]; Dunham v. Hastings Pavement Co., 56 App. Div. 244, 67 NYS 632; Pape v. Standard Oil Co., 27 Oh. Cir. Ct. 111. See also Lyon v. Mitchell, 36 N. Y. 235, 93 AmD 502; Russell v. Burton, 66 Barb. (N. Y.) 539.

49. See supra §§ 532–539.

50. Joyce v. Duplessis, 15 La. Ann. 242, 77 AmD 185.

[a] **In an action on an official bond,** an answer alleging that a part payment thereof had been made without defendant's knowledge or consent, does not deny the authority of the agent who made the payment. York County School Dist. No. 27 v. Holmes, 16 Nebr. 486, 20 NW 721.

51. Whittemore v. Patten, 84 Fed. 51 (holding that allegations by defendants that plaintiff, in a bill for an accounting respecting his employment by defendants as agent to sell machinery on commission, violated his contract of agency, by neglecting the business to the damage of defendants, sets out a purely legal demand not pleadable in answer to the bill); Skilton v. Payne, 18 Misc. 332, 42 NYS 111 (holding that the defense to such a bill is not that plaintiffs have an adequate remedy at law, but that they have no remedy in equity; and it is unnecessary, therefore, for an answer to aver that plaintiffs have a legal remedy).

52. Crowder v. Reed, 80 Ind. 1; Higbee v. Trumbauer, 112 Iowa 74, 83 NW 812 (holding that, where a principal brings an action to enforce payment of a note obtained by his agent's false representations, which he ratified, it is sufficient to plead in defense that the fraud was committed by the principal); Davenport v. Ladd, 38 Minn. 545, 38 NW 622 (so holding in conformity with the rule that the answer must aver the facts constituting the defense sought to be pleaded, and holding further that in an action to recover money alleged to have been collected by defendant for plaintiff, an answer by defendant that he had received the claim from a third person, who told him he could retain all moneys collected above a certain sum, cannot be accepted in lieu of an averment that such third person was the agent of plaintiff or authorized to act in his behalf). But in Reeves v. Miller, 48 Ind. A. 339, 95 NE 677 [rev (Ind. A.) 91 NE 812] it was held that, where defendant's answer, in an action on notes given for the price of machinery, alleged that the duly authorized agent of the seller agreed with defendant to take the machinery in satisfaction of the debt and that defendant delivered the machinery to him, as the answer failed to allege that the contract was made with plaintiff through its agent it set up no defense, as the contract might have been made with the agent individually.

As to similar allegations in a bill, declaration, or complaint see supra § 610.

53. See generally Pleading [31 Cyc 157].

[a] **A complaint based on a subscription** made by defendant which averred that another person subscribed, and defendant afterward ratified, is not met by an answer which asserts that defendant did not subscribe. The liability arises from the ratification, not from the making of the subscription, and the allegation in the answer is only a kind of negative pregnant. Wilson v. Evansville, etc., R. Co., 9 Ind. 510.

54. Barriere v. Fortier, 23 La. Ann. 274; Swearingen v. Knox, 10 Mo. 31; Wahrendorff v. Whitaker, 1 Mo. 205.

55. Ala.—Mobile, etc., R. Co. v. Gilmer, 85 Ala. 422, 5 S 138; Oxford Iron Co. v. Spradley, 46 Ala. 98; Montgomery, etc., R. Co. v. Trebles, 44 Ala. 255; Alabama Coal Min. Co. v. Brainard, 35 Ala. 476; Bryan v. Wilson, 27 Ala. 208; Sorelle v. Elmes, 6 Ala. 706.

Colo.—Lee v. Grimes, 4 Colo. 185; Barrett Min. Co. v. Tappan, 2 Colo. 124.

Ga.—Habersham v. Lehman, 63 Ga. 380.

Ill.—Schuyler County v. Missouri Bridge, etc., Co., 256 Ill. 348, 100 NE 239 (holding that the rule that an allegation as to an agent's authority to execute a contract must be denied by a verified plea applies to a municipal corporation executing a contract through an agent); Goodrich v. Reynolds, 31 Ill. 490, 83 AmD 240; McIntire v. Preston, 10 Ill. 48, 48 AmD 321; Delabay v. Clement, 3 Ill. 575.

Ind.—Denney v. Northwestern Christian Univ., 16 Ind. 220; Nimmon v. Worthington, 1 Ind. 376; Allen v. Thaxter, 1 Blackf. 399 (holding that in a covenant in a deed averred in the declaration to have been executed for the obligor by his attorney in fact a plea denying the attorney's authority must be verified by affidavit).

Iowa.—Clark v. Des Moines, 19 Iowa 199, 87 AmD 423.

Miss.—Cook v. Martin, 13 Miss. 379; Ellis v. Planters' Bank, 8 Miss. 235.

Mo.—Patrick v. Boonville Gas-Light Co., 17 Mo. A. 462 [dist Carpenter v. Lathrop, 51 Mo. 483].

Tex.—Brashear v. Martin, 25 Tex. 202; Herndon v. Ennis, 18 Tex. 410; Rein v. Reid, 11 Tex. 585; Austin v. Townes, 10 Tex. 24; Waco Mill, etc., Co. v. Allis-Chalmers Co., 49 Tex. Civ. A. 426, 109 SW 224 (holding that in an action against a principal on an alleged written contract executed by its agent the failure of the principal to deny under oath the agent's authority merely makes conclusive the express stipulations contained in the written instrument, and does not authorize proof of acts and conduct of the agent not covered by it); J. B. Watkins Land Mortg. Co. v. Campbell, (Civ. A.) 81 SW 560; Edinburgh American Land Mortg. Co. v. Briggs, (Civ. A.) 41 SW 1036; Lee v. Crosby, 1 Tex. A. Civ. Cas. § 140.

[a] **What put in issue by sworn plea.**—A plea denying execution properly verified by affidavit under such statute puts in issue not only the signatures of agents but their authority in the premises. Central v. Brown, 2 Colo. 703.

[b] **Action on municipal bonds.**—Where an instrument such as a municipal bond is sued upon and purports to have been issued by delegated power, without which it could not have been issued, it does not require a sworn plea to place upon plaintiff the burden of proving authority to issue it. Carpenter v. Lathrop, 51 Mo. 483 [dist Patrick v. Boonville Gas-Light Co., 17 Mo. A. 462].

[c] **Executors and administrators.**—The rule that the principal cannot deny the authority of the agent in executing the instrument sued on except by a plea verified by oath is applicable where the action is brought against the administrator of a deceased principal as well as where it is brought against the principal in person. Ellis v. Planters' Bank, 8 Miss. 235.

[d] **Trading and municipal corporations.**—Such statutes are applicable to cases in which defendant principals are trading or municipal corporations as well as where they are natural persons. Clark v. Polk County, 19 Iowa 248.

56. Drake v. Flewellen, 33 Ala. 106; McWhorter v. Lewis, 4 Ala. 198; Lazarus v. Shearer, 2 Ala. 718.

57. Alabama Coal Min. Co. v. Brainard, 35 Ala. 476.

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shall be taken as true unless denied under oath;[58] but this rule does not prevail in respect to an allegation of a want of authority.[59]

[§ 627] **c. Admissions.** An answer alleging that defendant, by his agent, demanded that plaintiff should pay the reasonable value of the storage of certain goods admits the agency of the person making the demand.[60] So an allegation in an answer that plaintiff by his legally authorized agent made a new contract clearly admits the agent's authority to make a new contract, although the old contract which was set out in the answer provides that no agent is authorized to add to, abridge, or change the same.[61] Likewise an averment in an answer that an agent had no authority to employ an attorney except in case of vacancy is an admission of authority to employ in case a vacancy occurred.[62] Again, in an action on a contract, the authority of the agent to make the contract is admitted where the answer admits the making of the contract but avers that it was upon a different compensation from that alleged in the complaint,[63] or where the answer admits the contract but alleges terms materially different from the contract set out in the complaint.[64] But where the complaint, in its substantive averments, is for money had and received, defendant, by denying in his answer an allegation in the complaint that he received the money through a certain person, his agent, does not thereby admit that such person was his agent.[65] So where a contract is set out in hæc verba in the complaint, and the answer only denies the authority of the agent to execute it, the execution of the contract is thereby admitted.[66]

[§ 628] **d. Cross Bill.** Where the object of a bill in equity is to secure an accounting of a terminated agency, the agreement for which agency contemplated that the agent should be paid for his services, it is proper for defendant agent by cross bill to demand payment for his services and have such demand adjusted with the accounting, so that by its decree the court may give complete relief between the parties in respect of the agency.[67] But where a person is sued for the purchase price of property, part of which is used and paid for by another for whom he was acting as agent, he has no such interest or cause of action in the part so used as will support a cross action to recover damages to the principal from defects in such property.[68]

[§ 629] **e. Affidavit of Defense.** An affidavit of defense in an action arising out of the relation of agency is governed by the rules applicable to such forms of pleading generally.[69] An affidavit of defense that defendant acted merely as agent for a disclosed principal is sufficient to send the case to a trial in an action against an agent on a parol contract,[70] or upon a written contract which admits of the introduction of parol evidence to discharge the agent from liability.[71] Where suit is brought against one designated as agent, without naming any one as principal, defendant will be answerable in his personal capacity alone, and if he relies on the defense that his agency was disclosed to plaintiff, his affidavit of defense, in order to prevent a judgment, must aver that he made known his agency at the time of the transaction forming the cause of action sued on,[72] or that plaintiff had knowledge of the fact from some other source.[73] Where special authority of an agent to do a given act,[74] or subse-

58. Missouri Pac. R. Co. v. Finley, 38 Kan. 550, 16 P 951; Barnum v. Kennedy, 21 Kan. 181; Moore v. Emmert, 21 Kan. 1; Arkansas City Bank v. McDowell, 7 Kan. A. 568, 52 P 56; Swofford Bros. Dry Goods Co. v. Berkowitz, 7 Kan. A. 24, 51 P 796; Terry v. Anderson, 6 Kan. A. 921, 51 P 800; Hughes v. Carlton, 5 Kan. A. 386, 48 P 444; McCabe, etc., Constr. Co. v. Wilson, 17 Okl. 355, 87 P 320. Compare Texas, etc., R. Co. v. Byers, (Tex. Civ. A.) 73 SW 427 (holding that the mere fact of agency, in the absence of allegations charging the execution of an instrument in writing, need not be denied on oath).

[a] **To bring an allegation of agency within this rule** there must be a specific allegation of the appointment of some person to do the act which is the foundation of the suit. It is not sufficient to say that the other party did the act by its agents and servants duly appointed thereto. Leavenworth Light, etc., Co. v. Waller, 65 Kan. 514, 70 P 365 (where the court, in referring to such an allegation, said: "This is an allegation of action, not of agency. It is nothing more than an averment that the defendant did these things"); Missouri Pac. R. Co. v. Finley, 38 Kan. 550, 16 P 951 (holding that a failure to deny under oath an allegation that a principal through his agents did a certain act is not an admission under such statute that the principal did the act complained of); Swofford Bros. Dry Goods Co. v. Berkowitz, 7 Kan. A. 24, 51 P 796.

[b] **Where the averment of authority and agency is contained in the reply** this provision of the law is superseded by code § 128, which provides that new matter contained in a reply shall be deemed to be controverted by the adverse party without further pleading. Continental Ins. Co. v. Pearce, 39 Kan. 396, 18 P 291, 7 AmSR 557.

59. Winfield Land, etc., Co. v. Burger, 49 Kan. 233, 30 P 476; Atchison, etc., R. Co. v. Walz, 40 Kan. 433, 19 P 787 (holding that a verified allegation of want of authority in an agent is not an allegation of authority, but is a mere negative averment and does not require denial under oath).

60. Murry v. Webber, 103 Iowa 477, 72 NW 759.

61. Esterly Harvesting Mach. Co. v. Bemis, 93 Iowa 398, 61 NW 980.

62. Horn v. Western Land Assoc., 22 Minn. 233.

63. Cross v. Atchison, etc., R. Co., 71 Mo. A. 585; Driver v. Galland, 59 Wash. 201, 109 P 593.

64. Hamill v. Baumhover, 110 Iowa 369, 81 NW 600.

65. Willard v. Williams, 7 Gray (Mass.) 184 (where it was said that the averment setting out the mode of the receipt of the money through an agent was not a substantive fact necessary to constitute the cause of action, but a mere statement of the evidence by which plaintiff proposed to prove his cause of action, and therefore something which defendant was not compelled to deny).

66. St. Louis, etc., Land, etc., Co. v. Tierney, 5 Colo. 582.

67. Clark v. Lee, 21 Iowa 274; Dunwidie v. Kerley, 6 J. J. Marsh. (Ky.) 501; Hutchinson v. Van Voorhis, 54 N. J. Eq. 439, 35 A 371; Sowles v. Hall, 73 Vt. 55, 50 A 550.

[a] **Allegations in cross bill.**—It is proper for such a cross bill to set out the delicacy and difficulty of the services rendered and the effect which the work has had on the physical condition of the agent, as elements in determining the value of such services. But insinuations against the complainant that he has taken advantage of the agent's condition of mind and body and absence from the jurisdiction of the court to commence the suit are both scandalous and impertinent and should be stricken out. Hutchinson v. Van Voorhis, 54 N. J. Eq. 439, 35 A 371.

68. McGrew v. Norris, (Tex. Civ. A.) 140 SW 1143.

69. See generally Pleading [31 Cyc 231].

[a] **Affidavit of defense in action by principal.**—Where plaintiff's statement in a suit on a contract made by his agent avers that defendant knew that the agent was contracting for him, and sets out correspondence which shows it, an affidavit of defense merely stating that defendant contracted with the agent as principal and denying the effect of the correspondence, but not denying knowledge that the agent was contracting for plaintiff, is insufficient. Catasauqua Mfg. Co. v. Roberts, 2 Pa. Dist. 392.

70. Noble v. Kreuzkamp, 111 Pa. 68, 2 A 419; Richardson v. Coal, etc., Co., 39 Legint (Pa.) 99.

71. Avil v. Bush, 19 WklyNC (Pa.) 448.

[a] **In an action by the transferee of notes for the breach of warranty** that they were not forged or fictitious an affidavit of defense that plaintiff was agent for the real maker in taking up the notes entitles defendant to a trial. Strauss v. Hensey, 7 App. (D. C.) 289, 36 LRA 92.

72. Paine v. Berg, 23 Pa. Super. 577; Root v. Kase, 2 WklyNC (Pa.) 446. See also Horstman v. Fox, 2 WklyNC (Pa.) 381.

[a] **There must be an averment, unequivocal and positive,** that defendant disclosed his agency to plaintiff. Gibbons v. Dabney, 2 WklyNC (Pa.) 490.

[b] **An affidavit of defense, in such an action, disclosing a principal but alleging an individual liability,** will not prevent judgment. Nugent v. Schraegan, 4 Pa. Co. 297.

73. Paine v. Berg, 23 Pa. Super. 577.

74. Hannis Distillery Co. v. Rosenbluth, 12 LuzLegReg. (Pa.) 112.

quent ratification of such act by his principal,[75] is regarded as matter of affirmative defense, such authorization or ratification should be averred in the affidavit of defense with all particularity required in plaintiff's statement, as should also other matters of defense set up by the agent in an action against him,[76] or by the principal in an action against him by the agent,[77] or a third person.[78] An affidavit of defense is fatally defective which merely states the conclusion that an agent had authority to do a certain act, instead of averring facts from which the authority is supposed to flow.[79]

[§ 630] **3. Demurrer or Exception.** The general rules of pleading governing a demurrer or exception apply in actions arising out of the relation of agency.[80] Where it appears on the face of the complaint by a principal to set aside a sale of property by his agent that there was an unreasonable delay in bringing suit, advantage of such defect may be taken by demurrer.[81] Equity has jurisdiction of a bill by the principal to compel his agent to account for money or property received by him, and a demurrer on the ground that there is a complete remedy at law will not lie.[82] But a bill for an accounting, which contains an averment of agency and a statement that moneys were received by defendant, is demurrable on the ground that it contains no averment that the agency is fiduciary in its nature.[83] Where an allegation in the answer stating that a certain act was done by a legally authorized agent of plaintiff is demurred to, the demurrer admits that the agent had such authority.[84]

[§ 631] **4. Replication or Reply.** A replication or reply in an action arising out of the relation of agency is governed by the rules relating to that form of pleading generally.[85] Since ratification need not be specially pleaded,[86] a replication or reply setting it up constitutes no departure from the cause of action set up in a petition against a principal based on an act done by his agent;[87] and a defense of ratification in an answer states no new matter calling for a denial by way of reply.[88]

[§ 632] **5. Amendment of Pleadings.** The court may allow a plaintiff suing as an agent to amend his complaint so as to maintain the suit in his own right,[89] the descriptive words of agency being regarded as surplusage,[90] and the amendments striking them from the complaint not being objectionable as introductive of a new and different cause of action.[91] Likewise it is held that a complaint alleging that a contract was made by defendant as agent is amendable by striking from the complaint the words importing agency.[92] And, conversely, it has been held that in a suit by an agent of an un-

75. Hannis Distillery Co. v. Rosenbluth, 12 LuzLegReg (Pa.) 112.

76. Abraham v. Worthington, 43 Pa. Super. 450 (affidavit of defense, in action against real estate agents to recover rents collected by them after alleged revocation of the agency, held sufficient).

77. Hazard v. Exeter Mach. Works, 34 Pa. Super. 111 (affidavit of defense, in an action by a salesman to recover commissions on an order secured by him for defendant held sufficient to prevent judgment).

[a] **An admission in an affidavit of defense** made by an officer of defendant corporation that plaintiff was appointed a subagent of defendant by its general agent, who had authority to make such appointment, is not inconsistent with the defense that under the contract between defendant and its general agent the authority of the latter was limited to the appointment of subagents subordinate to his own agency, and that the subagency was terminated by the termination of the general agency. Union Casualty, etc., Co. v. Gray, 114 Fed. 422, 52 CCA 224.

78. Williams v. Sawyers, 155 Pa. 129, 25 A 1049 (affidavit of defense, in action against principal for the price of goods sold to him through his agent, held insufficient); Watsontown Brick, etc., Co. v. Bernard, 48 Pa. Super. 542 (agents of corporation); Lane v. Nelson, 6 Kulp (Pa.) 502 (holding that where the copy of a lease upon which suit is brought is attached to the statement filed, and shows it to have been executed by an agent but does not set forth the nature of the agency or the manner of its creation, no affidavit of defense is required from defendant).

[a] **In an action against a principal upon a contract** made for him by an agent, an affidavit of defense denying the authority of the agent is sufficient to prevent judgment as on a default. Montour Iron Co. v. Coleman, 31 Pa. 80; Eggler v. Fleischman, 4 WklyNC (Pa.) 574.

79. Hannis Distillery Co. v. Rosenbluth, 12 LuzLegReg (Pa.) 112.

[a] **For instance,** where one seeks to defend an action on a book account on the ground of payment by giving a note therefor to a collection agency, his affidavit of defense is defective in merely averring that the agent had authority to accept a note as payment in lieu of cash, instead of stating whether the authority of the agent so to do was in writing, and if so, appending a copy thereof or stating why it cannot be done. Hannis Distillery Co. v. Rosenbluth, 12 LuzLegReg (Pa.) 112.

80. See generally Pleading [31 Cyc 269 et seq].

[a] **Ground of demurrer under code.**—Where the agent is not authorized to maintain the action, a demurrer to a complaint by him should be based upon the ground that it does not state facts sufficient to constitute a cause of action, and not upon the ground that plaintiff has no legal capacity to sue. Nave v. Hadley, 74 Ind. 155 (holding that the latter ground refers only to legal disabilities like infancy, idiocy, and coverture); Ralli v. Equitable Mut. F. Ins. Co., 16 Misc. 357, 358, 38 NYS 87 (where the court said: "The argument that the objection should have been taken to the capacity to sue is unfounded. As natural persons the plaintiffs, of course, had capacity to sue, in the absence of affirmative allegations to the contrary, and if the demurrer had been placed upon the ground noted, it would have, of necessity, been overruled. Phœnix Bank v. Donnell, 40 N. Y. 410; Fulton F. Ins. Co. v. Baldwin, 37 N. Y. 648").

[b] **Amended petition on contract** by which plaintiff appointed defendant his exclusive agent for the sale of specified articles in specified territory held not subject to general demurrer. Phares v. Stover, 136 Ga. 843, 72 SE 344.

[c] **Contract under seal.**—Where an action is brought against the principal on a contract made by the agent in his own name upon which the former cannot be sued, such as contracts under seal, the petition is demurrable even though it declares upon the contract in this form. Farrar v. Lee, 10 App. Div. 130, 41 NYS 672.

[d] **Demurrer to answer.**—Where a principal sues on a contract made by his agent the court will take notice of the suit as a ratification of the contract and on that ground sustain a demurrer to an answer setting up want of authority in the agent. Walker v. Mobile, etc., R. Co., 34 Miss. 245.

81. Whitley v. James, 121 Ga. 521, 49 SE 600.

Laches see generally Equity [16 Cyc 150 et seq].

82. Decell v. Haslehurst Oil Mill, etc., Co., 83 Miss. 346, 35 S 761. But see supra §§ 580–584. See also Accounts and Accounting § 68.

83. Hemings v. Pugh, 4 Giffard 456, 66 Reprint 785.

84. Esterly Harvesting Mach. Co. v. Bemis, 93 Iowa 398, 61 NW 980.

[a] **However,** a demurrer to a declaration against a principal upon a contract alleged to have been made by A as the agent for defendant, but which also sets forth facts which show that A was not an agent in its execution, does not admit the fact of agency. Everett v. Drew, 129 Mass. 150.

85. See Pleading [31 Cyc 241 et seq].

[a] **Answers in actions against principal.**—Where a complaint against a principal alleges that the contract sued on was executed by defendant, an answer which denies that defendant executed the note, and that the person who signed defendant's name to the note was authorized to do so, merely sets up matter of evidence and not of pleading, and requires no denial by replication. Helena Nat. Bank v. Rocky Mountain Tel. Co., 20 Mont. 379, 51 P 829, 63 AmSR 628.

86. See supra § 613.

87. McLachlin v. Barker, 64 Mo. A. 511.

88. Hoosac Min., etc., Co. v. Donat, 10 Colo. 529, 16 P 157.

[a] **A failure to file a reply** to a plea of ratification cannot be objected to on appeal as an admission of the ratification, where the issue has been tried as if a proper reply was filed. Comer v. Way, 107 Ala. 300, 19 S 966, 54 AmSR 93.

89. Messenger v. Northcutt, 26 Colo. 527, 58 P 1090; Cirwithin v. Mills, 16 Del. 232, 43 A 151; McDuffie v. Irvine, 91 Ga. 748, 17 SE 1028. See also Triplett v. Morris, 18 Tex. Civ. A. 50, 44 SW 684.

Amended and supplemental pleadings see generally Pleading [31 Cyc 359 et seq].

90. McDuffie v. Irvine, 91 Ga. 748, 17 SE 1028.

91. Messenger v. Northcutt, 26 Colo. 527, 58 P 1090; Cirwithin v. Mills, 16 Del. 232, 43 A 151.

92. Atlanta Brewing, etc., Co. v. Bluthenthal, 101 Ga. 541, 543, 28 SE 1003 (where the court said: "We are aware of no good reason why this

disclosed principal the writ may be amended by the substitution of the principal, even after the trial, if not changing the result.[93]

[§ 633] **6. Bill of Particulars.** In conformity with the rule that defendant cannot have a bill of discovery in the shape of an order for particulars,[94] it has been held that, in an action by an agent against his principal for services, the latter cannot insist upon particulars giving credit for moneys received for him; he is only entitled to ask for what balance the action is brought.[95] In an action against a corporation for damages caused by false representations of defendant's agents a bill of particulars giving the names of the agents may be demanded.[96]

[§ 634] **E. Issues, Proof, and Variance—1. Issues.** An issue of fact arises as to the fact or extent of an agent's authority, where there is an averment that the agent acted for his principal in a given transaction and an express denial of such averment.[97] Where the fact of agency is put in issue by the answer it is proper for the court to submit such issue to the jury, if warranted by the evidence, notwithstanding the absence of a specific presentation of such state of the case in the complaint.[98] A plea of non assumpsit to the suit of an agent on the common counts puts in issue the right of plaintiff to maintain an action.[99] Where, in an action by a principal against his agent for money received and not accounted for, the agent claims that he has paid for certain services rendered for and accepted by the principal, the only question in issue is whether the amount paid was reasonable.[1] An allegation which has been abandoned may be disregarded.[2]

[§ 635] **2. Matters to Be Proved—a. Agency.** Whenever it is sought to charge a principal with a wrongful act committed by his agent, it is essential and indispensable to prove the agency, upon the trial, if the fact is denied by the answer.[3] And where plaintiff alleges an agency, the liability of the agent, and a demand upon him to account and pay over, and defendant denies the alleged agency, plaintiff must prove the agency,[4] although it is otherwise of course as to proving the fiduciary nature of the agency, if that relationship stands admitted by the answer.[5] An action on a contract which purports to have been executed by an agent of defendant cannot be maintained without proof that the alleged agent was in fact the agent of defendant,[6] unless defendant has answered generally without putting the agency in issue.[7] In case the agent sues in his own name on such a contract he must prove an assignment.[8]

[§ 636] **b. Demand Before Suit Brought.**[9] Where plaintiff sues defendant as his agent, defendant by denying the agency makes it unnecessary for plaintiff to prove a demand, before suit, for the money sued for,[10] although it is otherwise, it seems, where the agency is admitted.[11]

[§ 637] **3. Evidence Admissible under Pleadings—a. In General.** The general rule that evidence in a case will be considered only on an issue presented by the pleadings and is not admissible if not pertinent to the issues presented by the pleadings is applicable to actions by and against a principal or agent.[12]

[§ 638] **b. Bill or Complaint—(1) In General.** The general rule that plaintiff in his complaint must state the facts constituting his cause of ac-

rule in reference to amendments should not be as applicable to defendants as to plaintiffs. Therefore, as the words stricken were merely descriptio personæ and the action was really against the husband [agent], there was no error in allowing the amendment which did not seek to make a new party, but simply to strike out surplusage"); Hearn v. Gower, 1 Ga. A. 265, 57 SE 916. But in Charboneau v. Henni, 24 Wis. 250, it was held that, where a petition shows that defendant acted as agent and bound his principal, an amendment striking out the objectionable allegation so as to state a cause of action against defendant personally may not be permitted.

93. Boudreau v. Eastman, 59 N. H. 467. See also supra § 608.

94. Penprase v. Crease, 4 Dowl. P. C. 711.

Bill of particulars see generally Pleading [31 Cyc 565 et seq].

95. Penprase v. Crease, 4 Dowl. P. C. 711. But in Barnes v. Gardiner, 133 App. Div. 576, 118 NYS 120, it was held that, where, in an action for an accounting by an agent for the entire time of his agency, plaintiff set forth that an alleged accounting on a date specified was fraudulent and a purported receipt in full was false, and asked that it be set aside, and defendant alleged the validity of the accounting and offered to account from the date of that accounting, defendant was entitled to a bill of particulars as to the alleged fraud in the former accounting, which should contain no items with reference to property transferred by plaintiff to defendant, or that defendant received as her agent or representative, which was not relevant to the issue of fraud in securing the execution of the settlement.

[a] **Filing account.**—Where a demand is made on an agent to account for the rents and revenues of property under his administration, the judgment prayed for being only for the amount as shown by the account, the proper course to pursue, when the answer of defendant denies that he owes an accounting to plaintiff, is to ascertain the fact whether an account is due, and, if so, to order defendant to file an account within a fixed time, to which plaintiff may, if he chooses to do so, file an opposition. Lillie v. Lillie, 48 La. Ann. 726, 19 S 738.

96. Talmadge v. Sanitary Security Co., 2 App. Div. 43, 37 NYS 177 (holding, however, that the moving affidavit, to be sufficient, must allege that defendant is ignorant of their names and also that the making of the false representations is denied by defendant, unless its answer makes such denial and a copy has been furnished to the judge).

97. Nicholson v. Pease, 61 Vt. 534, 17 A 720. In Williams v. Pedigo, 158 Ky. 509, 165 SW 678, it was held that, where the petition alleged that defendant, by his agents, codefendants, negligently operated an automobile, colliding with plaintiff, an answer denying that defendant, by himself or through his agents, codefendants, so negligently operated the automobile as to cause it to collide with plaintiff merely denied negligence and did not raise the issue of the agency.

Issues, proof, and variance see generally Pleading [31 Cyc 670 et seq].

98. McCabe v. Farrell, 34 Tex. Civ. A. 36, 77 SW 1049.

99. Nabors v. Shippey, 15 Ala. 293.

1. Harms v. Wolf, 114 Mo. A. 387, 89 SW 1037.

2. Reis v. Volck, 151 App. Div. 613, 136 NYS 367 (holding that an allegation of a loss of profits in a principal's action against his agent for money received, when abandoned by plaintiff, was properly disregarded).

3. Baldwin v. Siddons, 46 Ind. A. 313, 90 NE 1055, 92 NE 349; Curtis v. Fay, 37 Barb. (N. Y.) 64.

4. Waddell v. Swann, 91 N. C. 108.

5. McQueen v. Lockwood, 79 Hun 612, 29 NYS 370.

6. Manning v. Carberry, 172 Mass. 432, 52 NE 521.

7. Reid v. Reid, 11 Tex. 585. See also supra § 626.

[a] **Where the pleadings contain admissions of the authority of the agent** (1) no evidence of his authority need be introduced as against the party making them. Cross v. Atchison, etc., R. Co., 141 Mo. 132, 42 SW 675 [aff 71 Mo. A. 585]; Sturgis v. New Jersey Steam Nav. Co., 35 N. Y. Super. 251; Merriman v. Fulton, 29 Tex. 97. (2) Thus, where plaintiff alleged that defendant owed him a certain sum as a yearly salary agreed upon for services rendered, and defendant admitted that his agent employed plaintiff on its own behalf to perform such services, but denied the contract to pay a yearly salary, it was not necessary for plaintiff to show that such agent had authority to make the contract as alleged. Cross v. Atchison, etc., R. Co., supra.

8. Bullock v. Ueberroth, 121 Mich. 293, 80 NW 39 (holding that where B sues upon a contract, wherein he appears as agent, under which money is payable to B & Co., he cannot recover without proving that he was doing business under the name of B & Co., or that B & Co. assigned the contract to him).

9. **Necessity of demand** see supra § 592.

10. Waddell v. Swann, 91 N. C. 108.

11. Waddell v. Swann, 91 N. C. 108.

12. Ark.—Arkansas Fertilizer Co. v. Banks, 95 Ark. 86, 128 SW 566.

Ga.—McCommons v. Williams, 131 Ga. 313, 62 SE 230 (holding that where plaintiffs, after buying a stock of goods, claimed that defendant, although authorized to sell from the stock in the ordinary course of busi-

tion, and is not at liberty to make out his case or recover by giving in evidence facts which he has not stated in his complaint, or which do not conform with his theory of the case, applies to actions by or against a principal or agent.[13] Thus, where the complaint in an action by a principal against his agent alleges a demand, the principal must prove a demand and cannot recover on proof of facts excusing the necessity for a demand.[14] Where the cause of action is for misconduct, evidence tending to show only negligence is inadmissible.[15]

[§ 639] **(2) Fact of Agency.** Where pleading the act or contract as the act or contract of the principal, without disclosing the agency, is permissible,[16] evidence is admissible, under an averment in the complaint that an act was done by defendant, to show that such act was done by his authorized agent[17] and to show the authority of the

ness before inventory was taken, was not authorized to pick over the stock, or sell in job lots, and sued for violation of the contract in that regard, the fact that after defendant had testified plaintiffs amended their petition by striking out that portion of it which alleged a parol license or permission to sell, but did not withdraw the evidence already introduced on the subject, or move to rule out that of defendant, did not deprive defendant of the right to introduce the evidence on such issue).

Ind.—Green v. Macy, 36 Ind. A. 560, 76 NE 264.

Iowa.—Providence Jewelry Co. v. Fessler, 145 Iowa 74, 123 NW 957 (holding that, where the issue was whether an agreement had been procured by the fraud of the agent of one of the parties thereto, evidence of the authority of the agent and the business custom of the party was inadmissible); Cooper Wagon, etc., Co. v. Barnt, 123 Iowa 82, 98 NW 356; Sharpless Co. v. Day, 90 NW 814; Greenfield v. Monaghan, 85 Iowa 211, 52 NW 193.

Ky.—Pepper v. Pepper, 74 SW 739, 25 KyL 155.

Md.—McCay Engineering Co. v. Crocker-Wheeler Electric Co., 100 Md. 530, 60 A 443.

Mass.—Hall v. Bates, 216 Mass. 140, 103 NE 285; Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 NE 221.

Mich.—Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 NW 457 (holding that on an issue as to whether defendant's cancellation of an automobile agency contract was bona fide defendant's president was entitled to testify that in so doing he acted in good faith); Dillon v. Pinch, 110 Mich. 149, 67 NW 1113; McKinnon v. Gates, 102 Mich. 618, 61 NW 74.

Minn.—Olson v. Aultman Co., 81 Minn. 11, 83 NW 457.

Tex.—Missouri Glass Co. v. Roberts, (Civ. A.) 137 SW 433.

Wis.—Coolican v. Milwaukee, etc., Impr. Co., 79 Wis. 471, 48 NW 717.

See generally Pleading [31 Cyc 680 et seq].

[a] **Illustrations.**—(1) In an action by an agent against his principal to recover commissions earned, evidence as to the reasonableness of the commissions is inadmissible where the action is on an express contract therefor. McKinnon v. Gates, 102 Mich. 618, 61 NW 74. (2) In an action for agent's commissions where the defense was that the sale was agreed to on condition that plaintiff's commissions should be taken out of secondhand machinery, which was accepted in part payment of the purchase price, evidence as to what was done with the secondhand machinery after the sale was properly admitted. Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 P 849. (3) In an action on a contract made by defendant's agent, evidence as to what communications passed between the agent and his superior officers as to the contract is inadmissible, there being no plea of ratification or estoppel. American Tel., etc., Co. v. Green, 164 Ind. 349, 73 NE 707. (4) In an action by a principal against an agent to recover for goods furnished the agent for sale, evidence that the principal's refusal to carry out the contract of agency was due to the agent's fault or neglect is admissible, although not pleaded, where the agent had pleaded a wrongful discharge. Rosenberger v. Marsh, 108 Iowa 47, 78 NW 837. (5) Where, in an action for services under an alleged express contract to pay ten per cent of the price of certain sales of machinery made by plaintiff, defendant denied the contract as alleged, and averred that the agreement provided for a much smaller compensation, evidence as to the reasonable value of plaintiff's services was admissible as bearing on the question as to which agreement was made. Standard Plunger El. Co. v. Brumley, 149 Fed. 184, 79 CCA 132. (6) Since a company which confirms and assumes as made in its behalf a contract by a commission merchant for goods becomes liable to the purchaser for a breach thereof, it may prove such assumption of the contract in an action for the price. Brookford Mills v. Baldwin, 154 App. Div. 553, 139 NYS 195. (7) Under a claim for a breach of a contract made by the agent of the adverse party, the latter may prove the actual authority given such agent. Rosenberger v. Marsh, supra. (8) In an action for commissions for selling oils, wherein defendant set up a counterclaim for sales and oil not accounted for, evidence as to freight and rent paid by plaintiff for defendant was admissible without being alleged, as bearing on the counterclaim. Whitaker v. Bell Oil Co., (Mo. A.) 167 SW 619.

[b] **When evidence of value of service inadmissible.**—In an action for money had and received plaintiff claimed that defendant collected an insurance policy for him under an express agreement to make no charge for his services, while defendant relied upon an alleged express agreement whereby he was to retain one half of the sum collected; it was held that evidence of the actual value of the services rendered was inadmissible. Dillon v. Pinch, 110 Mich. 149, 67 NW 1113.

[c] **The usage of a trader** to withhold from his agents authority to sell goods on credit is immaterial, and so inadmissible, on the question whether he specially conferred such authority upon an agent who admits that it was not contained in his original contract of agency. Bell v. Smith, 99 Mass. 617.

13. Ark.—Wrought Iron Range Co. v. Young, 85 Ark. 217, 107 SW 674 (holding that, where a contract for the sale of goods on commission provided for services beginning in 1897, but payment was not to be due until 1898, and the accounts not collected until then belonged to the business for the year 1898, a complaint alleging that seven hundred and seventy-four dollars and fifty cents were due on Jan. 1, 1899, did not indicate that a recovery was sought for work done in 1897, and was therefore not in conflict with a contention that the account for that year had been closed and a settlement made).

Colo.—Lowell v. Hessey, 46 Colo. 517, 105 P 870.

Ind.—Green v. Macy, 36 Ind. A. 560, 76 NE 264.

Mass.—Bradlee v. Southern Coast Lumber Co., 193 Mass. 378, 79 NE 777 (holding that, where, in an action for a breach of a contract of agency, plaintiff alleged that, before defendant denied the existence of the contract and notified plaintiff that his services were not required, plaintiff, in reliance on the contract, consumed time and went to great expense in arranging and negotiating for purchasers, and expended large sums of money in placing defendant in a position to comply with the contract, plaintiff could not recover under such complaint for what he did in setting on foot negotiations which resulted in sales and for expenses incurred by him in his agency).

Mich.—McKinnon v. Gates, 102 Mich. 618, 61 NW 74.

Nebr.—Westinghouse Co. v. Tilden, 56 Nebr. 129, 76 NW 416 (holding that where, in an action for commissions, the agent declared solely on the contract and alleged no breach except a failure to pay, he could not under such averment recover commissions on unpaid notes on the theory that the principal had been negligent concerning their collection).

N. Y.—Fish v. Hahn, 124 App. Div. 173, 108 NYS 782; Seeber v. People's Bldg. Loan, etc., Assoc., 36 App. Div. 312, 55 NYS 364.

N. C.—LeRoy v. Jacobosky, 136 N. C. 443, 48 SE 796, 67 LRA 977 (holding that, where an action against an agent proceeds in its pleadings and evidence on the theory that the agent, not having bound his principal, is personally liable on the contract, there can be no recovery on the theory of damages for a false assertion of authority).

Tex.—Overland Auto. Co. v. Buntyn, (Civ. A.) 154 SW 654.

Wis.—Coolican v. Milwaukee, etc., Impr. Co., 79 Wis. 471, 48 NW 717.

[a] **Showing that in pretended payment to agent individual debt of agent was settled as part thereof.**—Where goods are purchased from a salesman of a wholesale house, and it is alleged by the purchasers that the goods were received from, and the price thereof paid to, such agent, without knowledge that he represented such house, plaintiff can show that in the pretended payment an individual debt of the agent was settled as part of the payment. Smith v. Morrill, 39 Kan. 665, 18 P 915.

14. Kyser v. Wells, 60 Ind. 261.

15. Crane Co. v. Columbus State Bank, 3 Nebr. (Unoff.) 339, 91 NW 532.

16. See supra § 610.

17. Iowa.—Poole v. Hintrager, 60 Iowa 180, 14 NW 223.

Minn.—Weide v. Porter, 22 Minn. 429.

N. Y.—Cannon v. Bannon, 151 App. Div. 693, 136 NYS 139 (holding that, in an action for a broker's commissions, plaintiff could show an employment by defendant's agent under allegation of employment by defendant); Sherman v. New York Cent. R. Co., 22 Barb. 239.

Tex.—Guffey v. Mosely, 21 Tex. 408.

Utah.—Child v. Gillis Constr. Co., 42 Utah 120, 129 P 856.

Que.—Bisaillon v. Elliott, 13 Que. Super. 289.

See also supra §§ 610, 611, 626.

Compare Harris v. Richmond, etc., R. Co., 31 S. C. 87, 90, 9 SE,690 (where the court said: "One of the first principles of pleading is, that the facts must be stated as they are, and not according to their legal effect. The allegations must be of naked actual facts, while the rules of law applicable thereto, and the legal rights and duties arising therefrom must be left entirely to the court. It is also as a rule of evidence elementary, that the allegata and probata must correspond. . . . Now, the allegation in the complaint was, that the defendant company contracted with the plaintiff,

agent.[18]

[§ 640] **(3) Ratification of Agent's Acts.** Proof of ratification includes proof of agency and authority,[19] and, although it has been held that ratification must be pleaded in order to be shown,[20] it may be shown under a complaint charging the ratified act to be that of the principal,[21] or under an averment in the pleading that the agent acted by due authority.[22]

[§ 641] **c. Plea or Answer—(1) In General.** In actions by or against a principal or agent the general rule that one cannot establish by evidence a defense not pleaded is applicable.[23]

[§ 642] **(2) As to Act of Agent.** Under an allegation in the answer that an act was done by plaintiff evidence is admissible to show that the act was done by his authorized agent.[24] Evidence of ratification may be admitted under a plea of due execution,[25] or under a plea of payment.[26]

[§ 643] **(3) Evidence Admissible under General Denial.** Under the general issue or a general denial evidence is admissible to prove agency on the part of defendant, in order to disprove his individual liability;[27] to show the terms of the alleged agency,[28] or that the contract laid in the complaint is not the contract of the parties;[29] to prove ratifi-

thereby agreeing to pay him according to the various stipulations stated, while the written agreement offered in evidence was, that the contract was made with a different person . . . not as the agent of the plaintiff or of any other person, but in his own individual name, to whom the money on the contract was to be paid, and the payments made were actually paid. . . . The question is not whether the evidence (received under objection) was or was not sufficient, but whether, under the complaint, without amendment, it was admissible at all. Without now going into the question whether such parol testimony, directly contradicting the express terms of the written agreement, was admissible, we think it is enough to say that in the complaint there was no allegation whatever to support and authorize the introduction of such testimony").

[a] **Illustrations.**—(1) Under an allegation of a purchase of goods by a party, evidence of the purchase by his agent is admissible. Poole v. Hintrager, 60 Iowa 180, 14 NW 223. (2) Where a contract alleged as that of a party is in issue, it is proper to show that the same was executed by a duly authorized agent, although execution by an agent was not averred. Weide v. Porter, 22 Minn. 429. (3) Evidence of fraudulent representations of an agent is admissible under an allegation in the complaint of fraudulent representations by the principal. King v. Fitch, 2 Abb. Dec. (N. Y.) 508, 1 Keyes 432.

[b] **In an action for goods sold and delivered** (1) plaintiff may show that the goods were delivered to an agent of defendant, although there may be no allegation as to agency in his complaint. Wagener v. Kirven, 56 S. C. 126, 34 SE 18. (2) It is competent to show that defendant bought the goods through his agent, whose acts he ratified, and for whose purchases he promised to pay. Morgan v. Moorhead, 90 S. C. 278, 73 SE 189.

[c] **Under an allegation that a note, appearing on its face to have been made by another party,** was made and executed by defendant, evidence is admissible to establish that it was in fact the note of defendant by proving the authority of the person signing to make and deliver it in behalf of defendant. Moore v. McClure, 8 Hun (N. Y.) 557.

[d] **Evidence of either express or ostensible agency.**—Where in an action for breach of contract the complaint states that "the parties hereto entered into a contract," etc., and that "defendant agreed with said plaintiffs to pay them the prices stated," etc., evidence of either an express or ostensible agency in the person who made the contract with plaintiff is admissible. Bibb v. Bancroft, 3 Cal. Unrep. Cas. 151, 22 P 484.

18. Seeber v. Commercial Nat. Bank, 77 Fed. 957 (holding that, under an allegation that defendant, under the name of "O. E. Hill, Cas.," entered into the contract, any appropriate authorization of the agent may be given in evidence. Plaintiff is not limited to proof of usage, and allegations as to usage may be treated as surplusage or stricken out).

19. Aultman Thrashing, etc., Co. v. Knoll, 71 Kan. 109, 79 P 1074.

20. Stenson v. Lancaster, 178 Mo. A. 340, 165 SW 1158.

21. Higbee v. Trumbauer, 112 Iowa 74, 83 NW 812; Long v. Osborn, 91 Iowa 160, 59 NW 14; Aultman Thrashing, etc., Co. v. Knoll, 71 Kan. 109, 79 P 1074. See also supra § 613.

[a] **Under a complaint alleging due execution and delivery of the bond sued on,** it must be shown that the party whose name had been affixed to the bond as surety by another without authority ratified the signature. Smyth v. Lynch, 7 Colo. A. 383, 43 P 670.

[b] **Ratification of agent's extension of time of payment of mortgage, subsequent to institution of suit.**—Where, after an agent without authority from the mortgagee had extended the time of payment of a mortgage, the mortgagee brings detinue to recover the mortgaged property, a plea that the suit is premature, and that the mortgagee had no right of action at the institution thereof on account of the agent's extension of time, is not sustainable by proof of the ratification of such extension subsequent to the institution of the suit. Powell v. Henry, 96 Ala. 412, 11 S 311.

22. Colo.—Hoosac Min., etc., Co. v. Donat, 10 Colo. 529, 16 P 157.

Minn.—Janney v. Boyd, 30 Minn. 319, 15 NW 308.

Nebr.—Bigler v. Baker, 40 Nebr. 325, 58 NW 1026, 24 LRA 255.

N. Y.—Hoyt v. Thompson, 19 N. Y. 207; New York Mut. L. Ins. Co. v. Granniss, 57 Misc. 174, 107 NYS 926.

Wash.—Seal v. Puget Sound Loan, etc., Co., 5 Wash. 422, 32 P 214.

Wis.—Hubbard v. Williamstown, 61 Wis. 397, 21 NW 295.

Compare Lafourche Transp. Co. v. Pugh, 52 La. Ann. 1517, 27 S 958 (holding that, where the sole cause of action stated in a petition is a contract alleged to have been made by the duly authorized agent of defendant, to permit the introduction of evidence of ratification by defendant by acquiescence in what such alleged agent has done is to allow plaintiff to shift his ground, and recover upon a cause of action not alleged).

[a] **Proof of ratification of a payment made to an agent** who had no authority to receive it is admissible under an allegation in the pleading of authority of such agent to receive the payment. Janney v. Boyd, 30 Minn. 319, 15 NW 308.

[b] **A contract by ratification may be proved under a general allegation** that the contract was executed. Seevers v. Cleveland Coal Co., (Iowa) 138 NW 793.

23. Dillon v. Pinch, 110 Mich. 149, 67 NW 1113. See also Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 P 849.

[a] **Admission in answer.**—Where defendants, sued on a contract made in their names by an agent, admit in their answer that the contract was made, and claim that they were not personally liable on it because it was made for the benefit of another, they cannot escape liability on the ground that the terms of the contract are not in accordance with those which the agent was authorized to make for them. De Remer v. Brown, 36 App. Div. 634, 55 NYS 367 [aff 165 N. Y. 410, 59 NE 129].

24. Hare v. Winterer, 1 Nebr. (Unoff.) 854, 96 NW 179. See also supra §§ 610, 611, 625.

[a] **Proof of payment to plaintiff's agent is** admissible under an answer alleging generally payment to plaintiff. Wolf v. Foster, 13 Kan. 116.

25. Blood v. La Serena Land, etc., Co., 113 Cal. 221, 41 P 1017, 45 P 252.

26. Tabor State Bank v. Kelly, 109 Iowa 544, 80 NW 520 (holding that where an agent, authorized only to receive cash in payment of his principal's claim, accepted a note held by the debtor against a third party in payment, the debtor is entitled to show ratification by the principal when sued on the debt under a plea of payment).

27. Gray v. Taylor, 2 Ind. A. 155, 28 NE 220; Scone v. Amos, 38 Minn. 79, 35 NW 575; Koehler v. Adler, 91 N. Y. 657. Contra Mayfield v. Averitt, 11 Tex. 140.

[a] **Defense may be specially pleaded.**—Such a defense may, however, be pleaded specially. Pitman v. Kintner, 5 Blackf. (Ind.) 250, 252, 33 AmD 469 (where the court said: "The character of this plea is very similar to that of a special plea alleging the delivery of a bond as an escrow, and not as a deed, and that the condition on which it was to become a deed has not been performed. Such a plea is allowable, though the special matter of it might be given in evidence under the general issue"); Turner v. Thomas, 10 Mo. A. 338 (where it was thought that evidence of such a defense is admissible under the general issue, but the court held that if it was not defendant should be allowed to amend by pleading it specially, and that a refusal of the trial court to permit such an amendment was an abuse of discretion).

[b] **Written contracts—words descriptio personæ.**—In states where the law permits an agent who has executed a written contract containing words of agency descriptive of the person to relieve himself of personal liability by showing that the contract was entered into for his principal and by his authority, the facts showing that the contract is the contract of the principal must be specially pleaded. Drake v. Flewellen, 33 Ala. 106; Harwood v. Humes, 9 Ala. 659.

[c] **To prove that the contract sued on was made with plaintiff as agent,** and not in his individual capacity, and that the liability on the contract, if any, is to plaintiff's principal, evidence is admissible under a general denial. Stark v. McCoskey, 2 NYS 737.

28. Phœnix L. Ins. Co. v. Walrath, 53 Wis. 669, 10 NW 151 (holding that, where the complaint charges plaintiff with the conversion of money received as defendant's agent, a general denial lets in evidence of the terms of the agency for the purpose of showing that defendant was not bound to pay over the money in question).

29. Acme Harvester Co. v. Curlee, 77 Nebr. 666, 110 NW 660 (holding that, where defendant is sued for an

cation of an alleged agent's act, and thus fix the liability of his principal;[30] to disprove the authority of an alleged agent;[31] to show revocation of an alleged agency and notice thereof,[32] so as to relieve defendant from liability as principal; to show gross misconduct, fraud, negligence, and unskillfulness on the part of plaintiff in the performance of his duties as agent, and thus defeat his right to compensation;[33] or to show, in an action by a principal against his agent to recover the proceeds of a note paid to the latter in settlement of a note after suit brought by him thereon, the expense necessarily incurred by defendant in collecting the note, for the purpose of having the same deducted from the amount collected, in fixing the extent of his liability.[34] But, in an action by an undisclosed principal for the price of goods sold, the right of the purchaser to set off an indebtedness of the agent to him cannot be determined under an answer which consists only of a general denial and a plea of payment.[35]

[§ 644] 4. Variance—a. In General. The general rule of pleading that plaintiff must recover secundum allegata et probata, or not at all,[36] is applicable to actions by or against a principal or agent.[37] Hence any substantial variance between the averments and proof is fatal to a recovery;[38] but the fact that plaintiff's proof is more narrow than his complaint does not necessarily constitute

accounting for goods alleged to have been received under a written contract of agency, he may, under a general denial, show that the goods in controversy were received under another contract from that made in the petition).

[a] **Illustrations.**—(1) Where a principal brought an action against his agent for an accounting under an alleged written contract of agency, by the terms of which defendant was said to have received certain machines, and the contract required certain acts to be done before the machines were delivered, a general denial by the agent put in issue the question as to whether the goods were actually ordered and received under the terms of the contract, so that evidence that certain machines were received by defendant under another contract was admissible. Acme Harvester Co. v. Curlee, 77 Nebr. 666, 110 NW 660. (2) In an action against one for the value of labor alleged to have been performed by him at the request of his agent, defendant is entitled to show under the general issue that the alleged agent was an independent contractor who has already been fully paid. Finkelstein v. Waldo, 21 Misc. 460, 461, 47 NYS 590 [rev 20 Misc. 701, 46 NYS 686 and quot Hebbard v. Haughian, 70 N. Y. 54, 59] (where the court said: "Such proof, although consisting entirely of affirmative proof of a contract different from that alleged, was negative in its character, and admissible under a general denial of the allegations of the complaint, and as showing what the contract as made was, and thus subverting the plaintiff's case").

30. Johnston v. Milwaukee, etc., Inv. Co., 49 Nebr. 68, 68 NW 383; Hanover F. Ins. Co. v. Shrader, 11 Tex. Civ. A. 255, 31 SW 1100, 32 SW 344.

31. Merritt v. Briggs, 57 N. Y. 651.

[a] **Illustrations.**—Where the complaint for a balance due for building material furnished by plaintiff to defendant alleges that the purchase of the material was by defendant, defendant may, under a general denial, introduce evidence tending to show that plaintiff furnished the material to defendant, who was the assignee of a building contract made with defendant, containing a provision that the contractor should furnish all material to be used in the construction of certain houses. Hallock-Sayre-Newton Lumber Co. v. Blake, 4 Colo. A. 486, 36 P 554.

[b] **Under a denial of every allegation but the execution,** evidence is admissible under a general denial, in an action on an instrument made by the person apparently clothed with agency, to prove that the apparent agent was without authority. Chambers County v. Clews, 21 Wall. (U. S.) 317, 22 L. ed. 517.

32. Hier v. Grant, 47 N. Y. 278.

33. Harvey v. Cook, 24 Ill. A. 134.

[a] **Where plaintiff sued on an express contract** to recover compensation, proof of plaintiff's fraud, dishonesty, or unfaithfulness in the performance of his duties was available as a defense to the action, although not pleaded as a counterclaim. Steele v. Crabtree, 130 Iowa 313, 106 NW 753.

34. Dennis v. Graf, 31 Wis. 105.

35. Foster v. Graham, 166 Mass. 202, 44 NE 129.

36. See Pleading [31 Cyc 700 et seq].

37. Ala.—Chambers v. Seay, 73 Ala. 372.

Ind.—Hasselman v. Carroll, 102 Ind. 153, 26 NE 202.

Kan.—Davis v. Lawrence, 52 Kan. 383, 34 P 1051.

Ky.—Robinson v. Morgan, Litt. Sel. Cas. 56.

Mass.—Durgin v. Somers, 117 Mass. 55; Gillespie v. Wilder, 99 Mass. 170.

N. Y.—Bunn v. Bartlett, 5 Silv. Sup. 83, 8 NYS 160; Poirer v. Fisher, 21 N. Y. Super. 258; Campbell v. Sloane, 22 NYS 81.

N. C.—Wills v. Fisher, 112 N. C. 529, 17 SE 73.

Wis.—Engle v. Hardt, 56 Wis. 456, 14 NW 625.

38. U. S.—Merrill v. Rokes, 54 Fed. 450, 4 CCA 433.

Ill.—Webster v. Webster, 55 Ill. 325.

Mass.—Parsons v. Phelan, 134 Mass. 109; Gillespie v. Wilder, 99 Mass. 170.

Mich.—Peppler v. Ratz, 38 Mich. 96.

Mo.—Trimble v. Stewart, 35 Mo. A. 537; Bailey v. McCully, 28 Mo. A. 572.

N. Y.—King v. MacKellar, 94 N. Y. 317; Field v. Syms, 25 N. Y. Super. 35; Taylor v. Pullman Automatic Ventilating Co., 87 NYS 404; Douglass v. Leland, 1 Wend. 490.

N. D.—Maloney v. Geiser Mfg. Co., 17 N. D. 195, 115 NW 669 (variance not material).

Tex.—Thornton v. Stevenson, (Civ. A.) 31 SW 232.

[a] **Instances of fatal variance.**—(1) When the complaint alleges that under a contract of agency defendant was to sell certain cattle for a reasonable price and account for and pay over the proceeds, and the proof shows that defendant as agent was instructed to sell for cash only, there is a fatal variance between the proof and the complaint, entitling defendant to a nonsuit. Douglass v. Leland, 1 Wend. (N. Y.) 490. (2) Where plaintiff sues in his own right on a contract of insurance, and it appears that the policy was issued to him as agent of an undisclosed principal, the variance is fatal. Hamburg-Bremen F. Ins. Co. v. Lewis, 4 App. (D. C.) 66. (3) Where, in an action by a seller of goods individually to recover the price, it appears that the contract was with him as an agent for another, there can be no recovery by him. Messenger v. Woge, 20 Colo. A. 275, 78 P 314. (4) If the complaint charges defendant with receiving lumber as plaintiff's agent to sell, and with collecting and not paying over the proceeds, and the proof is of a sale of the lumber to defendant and a partial nonpayment of the price by him as original purchaser, there is a fatal variance. Peppler v. Ratz, 38 Mich. 96. (5) Where the complaint alleges that plaintiff intrusted defendant with a sum of money on his promise to invest the same for the former, but that he converted it to his own use and refused to pay the same, and the proof is that defendant did in good faith invest the money, but negligently took insufficient security, there is a fatal variance. King v. MacKellar, 94 N. Y. 317. (6) If a declaration alleges that defendant agreed to bid for a parcel of land at a sale by auction, and to buy one undivided half of the land in behalf of, and as agent for, plaintiff, and the evidence is that defendant agreed to buy the land on their joint account, there is a variance fatal to a recovery. Parsons v. Phelan, 134 Mass. 109. (7) Where an agent in an action for commissions on the sale and exchange of property alleges a specific contract of employment, he cannot recover by proving that the owners of the different properties, after the negotiations which he was conducting had fallen through, effected between themselves a sale and exchange on different terms from those he was authorized to make. Thornton v. Stevenson, (Tex. Civ. A.) 31 SW 232. (8) Where an agent sues for commissions earned in effecting a sale of his principal's property, he cannot recover on proof that defendant wrongfully caused the sale to be effected through a third person. Bailey v. McCully, 28 Mo. A. 572.

[b] **Instances of variance held not material.**—(1) Where, in an action by a principal against his agent to recover the difference between what the agent paid for certain stock and the amount which he claimed to have paid, which was repaid to him by the principal, the complaint alleges that the agent purchased the shares of stock, and the proof shows that he purchased certain agreements of a syndicate to furnish the shares of stock, the variance is immaterial. Sommer v. Smith, 90 Cal. 260, 27 P 208. (2) There is no material variance between an allegation of a return of property to defendant because not as warranted and a demand on him to replace it as agreed and evidence of a return to and a demand on his agent who had full charge of his business. Clydesdale Horse Co. v. Bennett, 52 Mo. A. 333. (3) In an action on contract for the recovery of money alleged to have been received by defendant as the agent of plaintiff and not accounted for and paid over, proof that defendant is indebted on a joint adventure is not a fatal variance, and it is immaterial that defendant was arrested in the action on the ground of the alleged agency. Poirer v. Fisher, 21 N. Y. Super. 258. (4) In an action by an agent to recover commissions earned in effecting a sale of realty, where the original contract which was set out in the petition recited that a part of the consideration for the land was to be paid in cash, the admission of evidence that the principal subsequently agreed to accept as cash a secured note offered by the proposed purchaser does not constitute a material variance. Davis v. Lawrence, 52 Kan. 383, 44 P 1051. (5) Under a declaration alleging that plaintiff was employed to procure a purchaser for land which a third person had given bond to convey to defendant, proof that plaintiff was also to procure a deed of the land from such third person to the purchaser is not a material variance. Durgin v. Somers, 117 Mass. 55.

a fatal variance if what he does prove is comprehended by the allegations of the complaint.[39]

[§ 645] **b. As to Acts Done or Knowledge Obtained by Principal.** Where the allegation in the complaint is that certain acts were done[40] or knowledge obtained[41] by the principal, and the proof is that such acts were done or knowledge obtained by his authorized agent, there is no variance.[42] Thus where a contract may be directly charged as that of the principal, evidence that it was made by his duly authorized agent does not constitute variance.[43] But it has been held that an allegation that a contract was made by defendant is not sustained by a contract which shows on its face that he was a mere agent for another in its execution;[44] and that an allegation that the contract was made by defendant through an agent is not sustained by proof of a contract by him in person.[45]

Actions ex delicto. So in actions ex delicto where the charge is that the principal caused the injury, it will be supported by evidence showing that it was done by his agent.[46]

[§ 646] **5. Failure of Proof.** The rule that if the allegation to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance, but a failure of proof, is applicable to actions by or against a principal or agent.[47]

[§ 647] **F. Evidence[48]—1. Presumptions and Burden of Proof—a. Presumptions—(1) Fact of Agency—(a) In General.** Except where a known agent acts in a given transaction, in which case there is of course a presumption, in the absence of evidence to the contrary, that the relation of principal and agent exists as to such transaction and that he is acting therein on behalf of his principal,[49] the law indulges in no presumption that an agency exists,[50] but instead presumes that a person is act-

[c] **Directing verdict.**—In an action by an agent to recover commissions alleged to be due under a contract of employment, the court should direct a verdict for defendant, where a fatal variance exists between the contract alleged and the contract proved. Philip Carey Co. v. Thyson, 39 App. (D. C.) 233.

39. Gibson v. Bailey Co., 114 Mo. A. 350, 89 SW 597.

[a] **Illustrations.**—(1) Where, in an action by an agent against his principal for commissions on goods sold by him, the complaint alleges that plaintiff was employed to sell defendant's goods, generally, on commission, and the proof is that his contract was to sell a particular line of defendant's goods, the variance is not fatal. Gibson v. Bailey Co., 114 Mo. A. 350, 89 SW 597. (2) In an action for services for collecting certain notes, where the proof shows that plaintiff, after endeavoring to make the collection, sold the notes at their face value to a bank by agreeing to secure the bank against loss, there is no material variance sufficient to prevent recovery. Koch v. Lunschen, 22 S. D. 220, 116 NW 1124.

40. Ariz.—Root v. Fay, 5 Ariz. 19, 43 P 527.

Mo.—Hamilton v. Rich Hill Coal Min. Co., 108 Mo. 364, 18 SW 977; Draper v. Fitzgerald, 30 Mo. A. 518.

N. Y.—Sherman v. New York Cent. R. Co., 22 Barb. 239.

S. C.—Boulware v. McComb, 16 S. C. L. 416.

Tex.—Ucovich v. Victoria First Nat. Bank, (Civ. A.) 138 SW 1102.

Eng.—Brucker v. Fromont, 6 T. R. 659, 101 Reprint 758. See also Helmsley v. Loader, 2 Campb. 450.

See McDermott v. Grimm, 4 Colo. A. 39, 34 P 909.

[a] **Illustration.**—In an action by the indorsee of certain notes executed to a partnership and indorsed by one of the partners as agent for the partnership, evidence that the note was indorsed by such partner for himself and as an agent for the partnership will support an averment that the partnership indorsed the note, their own proper hands being to such indorsement subscribed. Rice v. Goodenow, Tapp. (Oh.) 126.

[b] **Where there is no question as to the agency of a person and his authority to act for defendant,** proof of the acts of such person within the scope of his agency supports an allegation that the acts were those of defendant. Baldwin v. Polti, (Tex. Civ. A.) 101 SW 543.

[c] **Under a plea of performance** a plaintiff may show performance through his agent, for performance by the principal personally or by his agent is a mere matter of evidence and not of pleading. Van Fleet v. New Era Constr. Co., 142 App. Div. 517, 129 NYS 19.

[d] **An answer setting up a payment to plaintiff** is supported by proof showing payment to an agent for him. Woloott v. Smith, 15 Gray (Mass.) 537.

[e] **An action upon an account stated** is supported by evidence that the account was stated either with defendant or with an authorized agent. Powell v. Wade, 109 Ala. 95, 19 S 500, 55 AmSR 915; Mink v. Morrison, 42 Mich. 567, 4 NW 302.

41. McDermott v. Grimm, 4 Colo. A. 39, 34 P 909; Marshall v. Gilman, 52 Minn. 88, 53 NW 811; Black v. Childs, 14 S. C. 312.

42. See also supra §§ 610, 611, 625.

43. Cal.—Bibb v. Bancroft, 3 Cal. Unrep. Cas. 151, 22 P 484.

Ill.—Meers v. Stevens, 106 Ill. 549.

Ind.—Fraser v. Spofford, 5 Blackf. 207.

Iowa.—Hancock v. Hintrager, 60 Iowa 374, 14 NW 725; Poole v. Hintrager, 60 Iowa 180, 14 NW 223.

Minn.—Weide v. Porter, 22 Minn. 429.

Mo.—Slevin v. Reppy, 46 Mo. 606; Clydesdale Horse Co. v. Bennett, 52 Mo. A. 333.

Mont.—Helena Nat. Bank v. Rocky Mountain Tel. Co., 20 Mont. 379, 51 P 829, 63 AmSR 628.

N. Y.—Moore v. McClure, 8 Hun 557; Gaffney v. Colvill, 6 Hill 567.

Eng.—Gladwell v. Steggall, 5 Bing. N. Cas. 733, 35 ECL 391, 132 Reprint 1283; Mortimer v. McCalin, 4 Jur. 172.

[a] **In equity.**—The rule is the same whether the action is brought at law or in equity. Meers v. Stevens, 106 Ill. 549.

44. Smelser v. Wayne, etc., Turnp. Co., 82 Ind. 417; Lawton v. Swihart, 10 Ind. 562; Leach v. Blow, 16 Miss. 221.

45. Bigler v. Baker, 40 Nebr. 325, 58 NW 1026, 24 LRA 255.

46. Higbee v. Trumbauer, 112 Iowa 74, 83 NW 812; Hamilton v. Rich Hill Coal Min. Co., 108 Mo. 364, 18 SW 977; Draper v. Fitzgerald, 30 Mo. A. 518; Brucker v. Fromont, 6 T. R. 659, 101 Reprint 758.

47. See Pleading [31 Cyc 714]. See also Hall v. Morrison, 16 N. Y. Super. 520; Strauss v. Russell, 24 Misc. 386, 53 NYS 401.

[a] **Rule applied.**—Under an allegation in a counterclaim that defendant delivered notes to plaintiff for collection and for the return of one half of the proceeds to defendant, proof that defendant delivered notes to plaintiff to pay an insurance premium, and that plaintiff agreed to return to defendant one half of the amount represented by the notes, constitutes, not a variance, but a complete failure of proof. Strauss v. Russell, 24 Misc. 386, 53 NYS 401 (under Code Civ. Proc. § 541).

[b] **No failure of proof.**—(1) Where a plaintiff alleged in his complaint that he left with defendant twenty shares of stock on Sept. 27, 1854, for sale at not less than forty-six per cent, and that plaintiff sold the stock at that rate and refused to pay over the proceeds and plaintiff prayed judgment therefor, and it appeared by the proofs that the proceeds of such sale were, by plaintiff's direction, invested in other twenty shares of stock which by like direction were sold and the proceeds invested in other twenty shares, which by plaintiff's authority were sold and the proceeds received on March 20, 1855, it was held that plaintiff was entitled to recover such last named proceeds, and that the discrepancy between the allegations and the proofs was not a failure to prove the allegations of the complaint in their entire scope and meaning. Hall v. Morrison, 16 N. Y. Super. 520. (2) So also in an action by a tenant against the agent of the landlord for injuries sustained by stepping into a hole left in a walk, a variance between the allegation that defendant was the owner of the premises and as such liable for the injury, and the proof that he was agent of the owner, and as such liable for the injury, is not such a failure of proof as can be taken advantage of under Mo. Rev. St. (1899) § 798 [Annot. St. (1906) p 760] providing that where the allegations of a pleading are unproved, not in some particulars only but in its entire scope and meaning, it is not a variance but a failure of proof. Carson v. Quinn, 127 Mo. A. 525, 105 SW 1088.

48. See generally Evidence [16 Cyc 821].

49. Brett v. Bassett, 63 Iowa 340, 19 NW 210; McCarthy v. Missouri R. Co., 15 Mo. A. 385; Meeker v. Claghorn, 44 N. Y. 349; Stanton v. Camp, 4 Barb. (N. Y.) 274.

[a] **When an act of an agent is within the scope of his authority,** the presumption is that he intends to bind the principal, and not himself. Hall v. Lauderdale, 46 N. Y. 70.

[b] **Where a commercial firm puts a notice in a newspaper that a certain person will act as its agent,** and such person advertises for the purchase of cotton in the name of the firm, it will be presumed that his purchases are made for the firm. Hamilton v. Elmer, 20 La. Ann. 391.

[c] **An agent authorized to indorse notes in the name of his principal and for his use,** having indorsed a note in his own name, is presumed to have done so for the use of the principal. Kock v. Bringier, 19 La. Ann. 183.

[d] **If the principal does not question** the authority of a known agent to do a thing on behalf of his principal, such authority will be presumed until the contrary is made to appear. Strayhorn v. McCall, 78 Ark. 209, 95 SW 455.

50. Good v. Arkin, 147 Ill. A. 390; Equitable Produce, etc., Exch. v. Keyes, 67 Ill. A. 460 (holding that the

ing for himself, and not as agent for another,[51] as where he makes a contract in his own name.[52] Agency is a fact to be proved as any other fact,[53] and if any presumption of agency is indulged it must be indulged from the facts and circumstances of the case.[54]

[§ 648] **(b) Arising from Former Agency.** Unless there is proof either that the agency is a general continuing agency to endure until revoked,[55] or that the agent fills some character from which such a general agency may be presumed,[56] the fact that there has been a separate former agency for a different[57] or even a similar[58] purpose does not raise a presumption of agency as to any subsequent transaction.

[§ 649] **(2) Character of Agency.** If an agency is proved, without showing its extent, it is presumed to be general and not special;[59] not in respect to everything, but only in respect to the business with which the agency is concerned.[60] Third persons dealing with an agent have the right to presume that his agency is general, in the absence of notice to the contrary,[61] even though, as between principal and agent, there may be only a special agency.[62]

[§ 650] **(3) Continuance of Authority of Agent—(a) In Cases of General Agency.** If a general agency for any purpose is shown the presumption as to third persons dealing with the agent is that it continues until notice of revocation.[63]

[§ 651] **(b) In Cases of Special Agency.** In cases of special agency, limited to a particular transaction, where it appears that at the inception of the transaction an agent was authorized with respect thereto, a prima facie presumption arises that such authority continued throughout the subsequent stages of the transaction;[64] but, in the absence of competent evidence of its continuance, the presumption is that the agency ceased at the completion of the particular transaction to which it was limited.[65] It has been held, however, that if the authority of an agent is special, but unlimited

fact that one is "transacting business for" another raises no presumption of agency until it is shown that it was done upon his authority and for his account); Gore v. Canada L. Assur. Co., 119 Mich. 136, 77 NW 650; Clark v. Dillman, 108 Mich. 625, 66 NW 570; Wade v. Boone, (Mo. A.) 168 SW 360 (holding that the fact that one attempted to act as the agent of the payee of a note and to assign it to a third person creates no presumption of his authority); Dixon v. Haslett, 5 S. C. L. 475. See also Eastman v. Burleigh, 2 N. H. 484.

[a] **There is no presumption of fact that one claiming to be a special agent** has been regularly appointed. In re Sobrinos de Armas, 1 Porto Rico Fed. 256.

51. Vawter v. Baker, 23 Ind. 63; Wheeler v. Miller, 2 Handy 149, 12 Oh. Dec. (Reprint) 375; Soutter v. Stoeckle, 6 Oh. Dec. (Reprint) 1054, 10 AmLRec 23; Parker v. Winlow, 7 E. & B. 942, 90 ECL 942, 119 Reprint 1497.

[a] **The legal presumption that a party binds himself by a contract,** and does not act as agent, should turn the scale in an evenly balanced case. Curtis v. Scoles, 1 Iowa 471.

[b] **When legal presumption of personal liability exists.**—The legal presumption, in the absence of evidence, is that the agent is liable only where the principal is not known or where the agent undertakes in his own name or exceeds his power; it is presumed otherwise that he intended to bind his principal since an agent should not be regarded as personally bound unless such intention is expressed in the contract. Laguna Valley Co. v. Fitch, 121 Ill. 607.

52. Young v. Inman, 146 Iowa 492, 125 NW 177 (holding that where one makes a contract in his own name it is presumed that he acts for himself and not for an undisclosed principal).

53. Wrought Iron Range Co. v. Leach, 32 Okl. 706, 123 P 419.

54. Gore v. Canada L. Assur. Co., 119 Mich. 136, 77 NW 650.

[a] **One who answers a telephone call from the place of business of a person** called for, and undertakes to respond as agent, is presumed to speak for him as to matters of general business carried on by such person at that place. Gilliland v. Southern R. Co., 85 S. C. 26, 67 SE 20, 137 AmSR 861, 27 LRANS 1106.

[b] **Surviving husband as agent of wife's estate.**—In the absence of conclusive evidence to the contrary, it will be presumed that the surviving husband who, without legal authority and without taking steps required by law to protect the interests of his legal children, takes possession of the estate of his deceased wife, and conducts the business belonging thereto, and thereafter opens an account in bank as agent, means thereby that he is acting as the agent of the owners of such estate and business. Labat Succ., 110 La. 986, 35 S 257.

55. Pole v. Leask, 9 Jur. N. S. 829. **Agency of partners for each other;** necessity for notice of dissolution see Partnership [30 Cyc 670].

56. Pole v. Leask, 9 Jur. N. S. 829. See also Big Valley Irr. Co. v. Hughes, (Tex. Civ. A.) 146 SW 715 (holding that evidence that one represented another as his agent in negotiations leading up to a contract, and also after the contract, will sustain a finding that the agency existed at the time of the execution).

57. Humphrey v. Havens, 12 Minn. 298; Pole v. Leask, 9 Jur. N. S. 829. See also Rodgers v. Peckham, 120 Cal. 238, 52 P 483; Stratton v. Todd, 82 Me. 149, 19 A 111.

[a] **That one has acted as agent of another in the ordinary transactions of life** is not even presumptive evidence of a power in the former to accept a donation for the latter. Reed v. Baggott, 5 Ill. A. 257; Bush v. Decuir, 11 La. Ann. 503.

58. Pole v. Leask, 9 Jur. N. S. 829.

59. Ark.—American Sales Book Co. v. Whitaker, 100 Ark. 360, 140 SW 132, 37 LRANS 91.

Del.—Maher v. Moore, 42 A 721.

Me.—Methuen Co. v. Hayes, 33 Me. 169.

Mo.—Shark v. Knox, 48 Mo. A. 169.

Tex.—Pullman Palace Car Co. v. Nelson, 22 Tex. Civ. A. 223, 54 SW 624; Missouri Pac. R. Co. v. Simons, 6 Tex. Civ. A. 621, 25 SW 996.

See Lyons v. Donkin, 23 N. S. 258.

See also supra § 221.

Contra Dickinson v. Mississippi Valley Ins. Co., 41 Iowa 286 (holding that an instruction to the jury which in effect announces the doctrine that, when one is shown to be the agent of another, the law will presume him to be a general agent is erroneous, for the law does not presume him to be either a limited or a general agent).

60. Maher v. Moore, (Del.) 42 A 721.

61. Ark.—Chalmers v. Bowen, 164 SW 1131; Keith v. Herschberg Optical Co., 48 Ark. 138, 2 SW 777.

Del.—Maher v. Moore, 42 A 721.

Me.—Wood v. Finson, 89 Me. 459, 36 A 911; Trainor v. Morison, 78 Me. 160, 3 A 185, 57 AmR 790.

Mich.—Austrian, etc., Co. v. Springer, 93 Mich. 343, 54 NW 50, 34 AmSR 350.

N. Y.—Graves v. Miami Steamship Co., 29 Misc. 645, 61 NYS 115.

Okl.—Midland Sav., etc., Co. v. Sutton, 30 Okl. 448, 120 P 1007.

Or.—Hillyard v. Hewitt, 61 Or. 58, 120 P 750; Aerne v. Gostlow, 60 Or. 113, 118 P 277.

Utah.—Smith v. Droubay, 20 Utah 443, 58 P 1112.

See also supra § 221.

62. Keith v. Herschberg Optical Co., 48 Ark. 138, 2 SW 777; Graves v. Miami Steamship Co., 29 Misc. 645, 61 NYS 115.

63. Ind.—Miller v. Miller, 4 Ind. A. 128, 30 NE 535 (holding that, where a person is shown to have been the agent of another in a particular business, and continues to so act within the scope of his authority, it will be presumed that his former authority still continues, and his principal will be bound unless the persons with whom he acts have notice that his agency has ceased).

Iowa.—Whiting v. Western Stage Co., 20 Iowa 554.

La.—Smith v. De Leon, 39 La. Ann. 70, 1 S 304.

Nebr.—Cheshire Provident Inst. v. Feusner, 63 Nebr. 682, 88 NW 849; Columbus County v. Hurford, 1 Nebr. 146 (holding that when the relation of principal and agent has once been established it will be presumed to continue until shown to have been dissolved).

Oh.—Ætna Ins. Co. v. Stambaugh-Thompson Co., 76 Oh. St. 138, 81 NE 173.

Pa.—Bergner v. Bergner, 219 Pa. 113, 67 A 999 (holding that where an agency has been once entered upon the law will presume, in the absence of evidence to the contrary, that whatever was done in furtherance of the original scheme which the agency was created to effect was done under and through the agency); Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396.

Wash.—Parker v. Advance Thresher Co., 75 Wash. 505, 509, 135 P 229 [quot Cyc].

Wyo.—Boswell v. Laramie First Nat. Bank, 16 Wyo. 161, 92 P 624, 93 P 661.

Eng.—Pole v. Leask, 9 Jur. N. S. 829.

Notice of dissolution of partnership see Partnership [30 Cyc 670].

[a] **Presumption of continuance.**—When an implied agency has been established, it is presumed to continue until the contrary is shown. Sibley v. Gilmer, 124 N. C. 631, 32 SE 964.

64. Parker v. Crilly, 113 Ill. A. 309; Hensel v. Maas, 94 Mich. 563, 54 NW 381.

65. Reed v. Baggott, 5 Ill. A. 257; Fullerton v. McLaughlin, 70 Hun 568, 24 NYS 280. See also McLeod v. Despain, 49 Or. 536, 90 P 492, 92 P 1088 (holding that where a person was to take the notes payable to him "as trustee" to sell for the payers he became their agent for that purpose, and that such agency is presumed to continue until shown to have ceased; but that this presumption is overcome

as to time, the presumption, as to third persons previously dealing with him, is that it continues until notice of revocation.[66]

[§ 652] **(4) Extent of Authority—(a) In General.** The presumption is that one known to be an agent is acting within the scope of his authority,[67] at least in the absence of proof as to the purpose or extent of the agency.[68] Thus it is presumed that an agent for the sale of personalty has authority to make a binding contract of sale without the ratification of his principal.[69] Where, however, the act done or the contract made is an illegal one,[70] or is done or made by the agent with himself,[71] the presumption in such a case is that the agent was acting without the scope of his authority.

Payments of the debts of the principal by an agent are presumed to be from the principal's money in the absence of evidence to the contrary.[72]

[§ 653] **(b) Authority to Convey Land.** Undisturbed possession of land for many years under a deed made by an agent raises a presumption of authority on the part of the agent to make a conveyance thereof.[73] The existence of a valid power of attorney will be presumed in favor of an ancient deed purporting to be executed by attorney;[74] but, where the deed is void because of the termination of the agent's authority by the owner's death, his authority to convey cannot be presumed from mere lapse of time.[75]

A power of attorney to acknowledge a deed purporting to be probated under such authority will be presumed regular, if there is nothing to show otherwise.[76]

A power of attorney to execute a building restriction agreement may be presumed from the fact that the owner in a subsequent conveyance to a third person acknowledged that the land was subject to the agreement executed under such power.[77]

[§ 654] **(c) Authority to Receive Payment for Principal—aa. In General.** There is no legal presumption that a third person, not having possession of the written evidence of or the security for, a debt, has, as to the creditor, authority as his agent to receive payment of the debt;[78] but if such person is in the possession of the security for or evidence of the debt at maturity, his authority to receive both principal and interest is presumed,[79] there being no suspicious circumstances surrounding such possession.[80] Such presumption ceases, however, when the security is withdrawn by the creditor,[81] even though the debt has been contracted through the agent.[82]

[§ 655] **bb. In Property Instead of Money.** There is no presumption that an agent to collect a debt has authority to accept property in lieu of money as payment.[83]

[§ 656] **(5) Performance of Duty.** The presumption of law is that an agent has done his duty

when it is established by competent evidence that the sale was made and the purpose of the trust completed).

[a] **A continuing agency is not to be presumed** from the fact that one has occasionally been temporarily employed for special purposes. Campbell v. Sherman, 49 Mich. 534, 14 NW 484.

[b] **Renewal of authority.**—Where the agency was for a special occasion, and the act authorized has been performed, and the agency apparently terminated thereby, there is no presumption as to a renewal of authority. Green v. Hinkley, 52 Iowa 633, 3 NW 688.

66. Whiting v. Western Stage Co., 20 Iowa 554.

67. Ark.—Chalmers v. Bowen, 164 SW 1131.

Ind.—Jordan v. Indianapolis Coal Co., 52 Ind. A. 542, 100 NE 880.

Iowa.—Brett v. Bassett, 63 Iowa 340, 19 NW 210.

Mich.—Austrian, etc., Co. v. Springer, 94 Mich. 343, 54 NW 50, 34 AmSR 350; Inglish v. Ayer, 79 Mich. 516, 44 NW 942.

Minn.—Kilborn v. Prudential Ins. Co., 99 Minn. 176, 108 NW 861.

Okl.—Midland Sav., etc., Co. v. Sutton, 30 Okl. 448, 120 P 1007.

See Aerne v. Gostlow, 60 Or. 113, 118 P 277.

[a] **When no complaint has been made in regard to the manner in which an agent's duties have been performed,** he is presumed to have acted within the scope of his authority. Ford v. Danks, 16 La. Ann. 119.

[b] **Authority commensurate with duties.**—It is presumed that a given agent has deputed to him all the powers and authority necessary to a proper discharge of the duties imposed upon him; in other words, it is presumed that his authority is commensurate with his duties. Bessemer Land, etc., Co. v. Campbell, 121 Ala. 50, 25 S 793, 77 AmSR 17 and note.

[c] **Authority to write letters.**—Where letters signed by defendant by an agent show on their face that they were written as answers to letters which plaintiff had written to defendant, a presumption arises of the authority of the agent to write the letters. Kinder v. Pope, 106 Mo. A. 536, 80 SW 315.

Presumption that act of a meeting of agents is act of the majority see supra § 318.

68. Leake v. Sutherland, 25 Ark. 219; Nebraska Bridge Supply, etc., Co. v. Conway, 127 Iowa 237, 103 NW 122; Balmford v. Peffer, 31 Misc. 715, 65 NYS 271.

[a] **One in charge of goods** for the purpose of tendering them to the buyer for inspection, who declined to do so, presumptively had authority to bind the seller, until the contrary was shown. Pittsburgh Plate Glass Co. v. Kerlin Bros. Co., 122 Fed. 414, 58 CCA 648.

69. Nebraska Bridge Supply, etc., Co. v. Conway, 127 Iowa 237, 103 NW 122.

70. Stover v. Flower, 120 Iowa 514, 94 NW 1100 (holding that the agent of the owner of premises is not to be presumed to have any authority to lease the premises for an illegal purpose); Condit v. Baldwin, 21 N. Y. 219, 78 AmD 137; Arnot v. Pittston, etc., Coal Co., 2 Hun (N. Y.) 591.

71. Park Hotel Co. v. St. Louis Fourth Nat. Bank, 86 Fed. 742, 30 CCA 409 (holding that an act done or a contract made with himself by an agent on behalf of his principal is presumed to be without the scope of his authority, and no one can safely rely or recover thereon without proof that the agent was expressly authorized to make it); Farmers', etc., Bank v. Germania L. Ins. Co., 150 N. C. 770, 64 SE 902 (holding that a bank holding a principal's deposit will be presumed to have notice of the lack of authority of an agent to use a deposit as a basis for "kiting" checks for his own benefit).

72. Woods v. Gummert, 67 Pa. 136.

73. Ky.—Loughridge v. Ball, 118 SW 321 (fifty years); Tarvin v. Walkers Creek Coal, etc., Co., 80 SW 504, 25 KyL 246 (sixty years); Jarboe v. McAtee, 7 B. Mon. 279 (fifty years).

La.—Westerfield v. Cohen, 130 La. 533, 58 S 175 (holding that after the lapse of twenty years the authority of an agent acting under a procuration which has never been denied will be presumed); Bedford v. Urquhart, 8 La. 234, 28 AmD 137 (twenty years); Buhols v. Boudousquie, 6 Mart. N. S. 153 (twenty years).

Mass.—Stockbridge v. West Stockbridge, 14 Mass. 257 (thirty years).

Tex.—Eastham v. Hunter, 102 Tex. 145, 114 SW 97, 132 AmSR 854; Bean v. Bennett, 35 Tex. Civ. A. 398, 80 SW 662; Folto v. Ferguson, (Civ. A.) 24 SW 657 (thirty years).

Va.—Goodwin v. McCluer, 3 Gratt. (44 Va.) 291.

74. Goodhue v. Cameron, 142 App. Div. 470, 127 NYS 120; McCulloch County Land, etc., Co. v. Whitefort, 21 Tex. Civ. A. 314, 50 SW 1042 (holding that, where a grantor of a deed executed by a firm purporting to have a power of attorney does not question the firm's authority for twenty years and executes a deed to other lands in which he admits the execution of the former deed by the firm as his attorney, the existence of the power by the firm will be presumed).

75. Wall v. Lubbock, (Tex. Civ. A.) 118 SW 886.

76. Cochran v. Linville Impr. Co., 127 N. C. 386, 37 SE 496.

77. Goodhue v. Cameron, 142 App. Div. 470, 127 NYS 120.

78. Dixon v. Haslett, 7 S. C. L. 615. See also supra §§ 259–263.

[a] **Where the relation of payee and maker of a note exists** between a principal and his alleged agent, the fact that a surety for the debt has made payments of interest to the maker, and that the maker has forwarded such payments to the payee and received the interest coupons, will not raise the presumption that the maker acted as agent of the payee. Judkins v. Burr, 1 Nebr. (Unoff.) 267, 95 NW 475.

79. Guilford v. Stacer, 53 Ga. 618; Williams v. Walker, 2 Sandf. Ch. (N. Y.) 325. See also supra §§ 259–263.

80. Dwight v. Lenz, 75 Minn. 78, 77 NW 546.

81. Guilford v. Stacer, 53 Ga. 618; Dwight v. Lenz, 75 Minn. 78, 77 NW 546; Williams v. Walker, 2 Sandf. Ch. (N. Y.) 325. See also supra §§ 259–263.

82. Guilford v. Stacer, 53 Ga. 618.

83. Rogers v. Tiedeman, 9 Ga. A. 811, 72 SE 285 (holding that it will not be presumed that an agent had authority to accept a draft on a third person in payment of a debt due the principal); Equitable L. Assur. Soc. v. Cole, 13 Tex. Civ. A. 486, 35 SW 720. See also supra §§ 266–271.

until the contrary appears,[84] as misconduct and negligence will not be presumed in the absence of proof.[85] Thus the legal presumption, in the absence of proof, is that the agent has performed his duty and paid over and accounted to his principal for moneys received by him in his capacity of agent.[86]

Obedience to instructions. The law presumes that an agent obeyed his instructions,[87] and if the contrary is alleged it must be proved.[88]

Presumption of good faith. As to transactions with third persons in behalf of the principal it will be presumed, in the absence of contrary evidence, that the agent acted in good faith, and the burden is on the principal to show the contrary.[89]

Reimbursement of agent. The possession of securities by a principal raises no presumption that he repaid to his agent the amount the latter had paid out on the principal's behalf in purchasing them.[90]

[§ 657] **(6) Ratification—(a) In General.** Ratification of the unauthorized act of an agent is not presumed,[91] the presumption being against ratification of such an act, in the absence of proof of intent to ratify.[92] But in conformity with the rule that the acts of a principal are to be liberally construed in favor of an adoption of the acts of his agent,[93] it is held that, when an unauthorized act of an agent is capable of ratification, evidence of acts or conduct of the principal in apparent approval of such act suffices, in the absence of evidence to the contrary, to raise a presumption of ratification,[94] with all the consequences which follow,[95] as where, with knowledge of the unauthorized act of the agent, there is silence or acquiescence for an unreasonable time, without objection, on the part of the principal,[96] or where the principal receives and holds the fruits of the agent's act.[97] However, the presumption of ratification, raised by evidence of conduct of the principal in apparent approval of the unauthorized act of the agent, is not necessarily conclusive, and may be rebutted by proof,[98] unless the conduct shown on the part of the principal is inconsistent with any hypothesis

84. Gaither v. Myrick, 9 Md. 118, 66 AmD 316; Breed v. Breed, 55 App. Div. 121, 67 NYS 162; Beattie v. Beattie, 83 Hun 295, 31 NYS 936 [aff 153 N. Y. 652 mem, 47 NE 1105 mem]; Leszynsky v. Ross, 35 Misc. 652, 72 NYS 352 (holding that it will be presumed, in an action to set aside a contract entered into by an attorney in fact of plaintiff, that such attorney duly represented to plaintiff the contents of the agreement).

[a] **Collection of interest.**—It should be presumed that an agent to collect a debt collected the interest due on it where this was his duty. Olivieri v. Tomei, 1 Porto Rico Fed. 125.

[b] **Performance of conditions of conveyance.**—The execution of a deed by an attorney authorized by a power of attorney to make a conveyance on the performance of prescribed conditions is prima facie evidence against the grantor in the power of performance of the conditions, although it may be doubted whether a legal presumption that the conditions were performed should be indulged in as against him. Machebeuf v. Clements, 2 Colo. 36.

85. Gaither v. Myrick, 9 Md. 118, 66 AmD 316; Beattie v. Beattie, 83 Hun 295, 31 NYS 936 [aff 153 N. Y. 652 mem, 47 NE 1105 mem].

86. Breed v. Breed, 55 App. Div. 121, 67 NYS 162; Beattie v. Beattie, 83 Hun 295, 31 NYS 936 [aff 153 N. Y. 652 mem, 47 NE 1105 mem]. Compare Shipherd v. Underwood, 55 Ill. 475 (holding that in an action against an agent by one who paid money to him on behalf of his principal, where it was shown that the money was paid to the agent, it will not be presumed, in the absence of proof, that the agent paid the money over to the principal); Carder v. Primm, 52 Mo. A. 102 (holding that an indebtedness once shown to exist is presumed to exist until the contrary is shown, and that accordingly when a collection of money by an agent for a principal is established there is no presumption that he paid or accounted for it to his principal).

87. Bangs v. Hornick, 30 Fed. 97.

88. Bangs v. Hornick, 30 Fed. 97; Merchants' Bank v. Griswold, 72 N. Y. 472, 28 AmR 159.

89. McCarthy v. White, 21 Cal. 495, 82 AmD 754; Gaither v. Myrick, 9 Md. 118, 66 AmD 316; Breed v. Breed, 55 App. Div. 121, 67 NYS 162; Beattie v. Beattie, 83 Hun 295, 31 NYS 936 [aff 153 N. Y. 652 mem, 47 NE 1105 mem]; Vermont Marble Co. v. Mead, 85 Vt. 20, 80 A 852 (holding that in the absence of contrary evidence it will be presumed that an agent acted in good faith in making a contract for the sale of his principal's land).

90. Storz v. Kinzler, 73 App. Div. 372, 77 NYS 64 (holding that, where plaintiff's intestate had been engaged in negotiating, purchasing, loaning, and advancing money on realty, bonds, and mortgages, and defendant had acted as his agent and had procured and sold to intestate several bonds and mortgages, and plaintiff claimed that defendant had received a certain sum of money to be invested and produced a receipt from defendant acknowledging receipt of the money which contained the words "on demand," and that defendant owed this amount, and defendant alleged that he had purchased mortgages for the intestate and that the money was in payment of them, and proved that all the mortgages had been bought in his name and assigned to the intestate, the fact that the mortgages were in intestate's possession and name at his death did not create a presumption that he had paid for them otherwise than by the money represented by the receipt).

91. Moore v. Ensley, 112 Ala. 228, 20 S 744; Iowa State Sav. Bank v. Black, 91 Iowa 490, 59 NW 283.

92. Iowa State Sav. Bank v. Black, 91 Iowa 490, 59 NW 283.

93. Silverman v. Bush, 16 Ill. A. 437; Codwise v. Hacker, 1 Cai. (N. Y.) 526. See also supra § 111.

94. U. S.—Long v. Thayer, 150 U. S. 520, 14 SCt 189, 37 L. ed. 1167; Forrestier v. Bordman, 9 F. Cas. No. 4,945, 1 Story 43; Kingston v. Kincaid, 14 F. Cas. No. 7,822, 1 Wash. C. C. 454.

Colo.—Lynch v. Smyth, 25 Colo. 103, 54 P 634; Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248.

Ga.—Macon City Bank v. Kent, 57 Ga. 283.

Ill.—Ernst v. McChesney, 186 Ill. 617, 58 NE 399; Jensen v. Wells, 177 Ill. A. 79; Silverman v. Bush, 16 Ill. A. 437.

Kan.—Pacific R. Co. v. Thomas, 19 Kan. 256.

La.—James v. Lewis, 26 La. Ann. 664; New Orleans v. Hunter, 12 Mart. 3.

Md.—Maddux v. Bevan, 39 Md. 485; Reynolds v. Davison, 34 Md. 662.

Mass.—Brown v. Henry, 172 Mass. 559, 52 NE 1073; Foster v. Rockwell, 104 Mass. 167; Brigham v. Peters, 1 Gray 139; Thayer v. White, 12 Metc. 343; Amory v. Hamilton, 17 Mass. 103.

Minn.—Wright v. Vineyard M. E. Church, 72 Minn. 78, 74 NW 1015.

Mo.—Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019; Christopher v. National Brewery Co., 72 Mo. A. 121.

Mont.—Carlson v. Stone-Ordean-Wells Co., 40 Mont. 434, 107 P 419.

Nebr.—Oberne v. Burke, 50 Nebr. 764, 70 NW 387.

N. Y.—Meehan v. Forrester, 52 N. Y. 277; Allen v. Corn Exch. Bank, 87 App. Div. 335, 84 NYS 1001; Codwise v. Hacker, 1 Cai. 526; Armstrong v. Gilchrist, 2 Johns. Cas. 424.

Pa.—McCully v. Pittsburg, etc., R. Co., 32 Pa. 25; Sword v. Reformed Cong. Keneseth Israel, 29 Pa. Super. 626; Kentucky Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Wash.—Owens v. Swanton, 25 Wash. 112, 64 P 921.

Eng.—Jackson v. Jacob, 3 Bing. N. Cas. 869, 32 ECL 399, 132 Reprint 645.

[a] **Slight circumstances and small matters will sometimes suffice** to raise a presumption of ratification. Cairo, etc., R. Co. v. Mahoney, 82 Ill. 73, 25 AmR 299; Silverman v. Bush, 16 Ill. A. 437; Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019; Kentucky Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180.

95. Foster v. Rockwell, 104 Mass. 167.

96. U. S.—Kingston v. Kincaid, 14 F. Cas. No. 7,822, 1 Wash. C. C. 454.

Colo.—Lynch v. Smyth, 25 Colo. 103, 54 P 634; Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248.

Kan.—Hartwell v. Equitable Mfg. Co., 78 Kan. 259, 97 P 432; Pacific R. Co. v. Thomas, 19 Kan. 256.

Md.—Maddux v. Bevan, 39 Md. 485.

Mass.—Foster v. Rockwell, 104 Mass. 167; Brigham v. Peters, 1 Gray 139; Thayer v. White, 12 Metc. 343.

N. Y.—Armstrong v. Gilchrist, 2 Johns. Cas. 424.

Okl.—Minneapolis Threshing Mach. Co. v. Humphrey, 27 Okl. 694, 117 P 203.

Pa.—Kentucky Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Tenn.—Southern Oil Works v. Jefferson, 2 Lea 581.

See also supra §§ 124–131.

97. Forrestier v. Bordman, 9 F. Cas. No. 4,945, 1 Story 43; Silverman v. Bush, 16 Ill. A. 437; Southern Oil Works v. Jefferson, 2 Lea (Tenn.) 581. See also supra §§ 114–123. And see Maddux v. Bevan, 39 Md. 485.

[a] **Ground of presumption.**—That the principal had an election either to disavow the unauthorized act of his agent and tender a return of the goods or to keep the goods and pay for them is the ground on which a presumption of ratification is indulged from the retention of goods bought by an agent in excess of his authority. Thrall v. Wilson, 17 Pa. Super. 376.

98. Kingston v. Kincaid, 14 F. Cas. No. 7,822, 1 Wash. C. C. 454; Lynch v. Smyth, 25 Colo. 103, 54 P 634; Amory v. Hamilton, 17 Mass. 103;

other than that he intended to adopt such act as his own,[99] or the silence or acquiescence of the principal, after knowledge of the unauthorized act of the agent, is contrary to his duty,[1] or has a tendency to mislead the agent,[2] or other party affected thereby;[3] and proof of express and seasonable repudiation by the principal will of course overcome any presumption of ratification arising from acts or conduct of his own in apparent approval of the unauthorized act of the agent.[4]

[§ 658] **(b) When Act in Excess or Misuse of Authority.** When the unauthorized act of the agent is done in the execution of a power conferred, but in excess or misuse of the authority given, a presumption of ratification more readily arises from slight acts of confirmation,[5] or from mere silence or acquiescence;[6] and the presumption arising from acquiescence in the unauthorized act of an agent who has exceeded his authority is much stronger than if the act had been that of a mere stranger.[7]

[§ 659] **(7) Estoppel of Principal to Deny Authority of Agent.** There is no presumption of estoppel on the part of the principal to deny the agency.[8]

[§ 660] **(8) Time of Execution of Power of Attorney.** The presumption is, in the absence of evidence to the contrary, that a power of attorney was executed on the day of its date.[9]

[§ 661] **(9) As to Whom Credit Is Extended.** Where an agent enters into an authorized contract for a disclosed principal, it is presumed, in the absence of evidence to the contrary, that the credit was extended by the third person to the principal rather than to the agent, and that therefore the intention was to bind the former and not the latter;[10] and this presumption will prevail until it is made clearly to appear that credit was given to the agent, and that therefore he intended to bind himself.[11]

[§ 662] **b. Burden of Proof[12]—(1) In General—(a) Fact of Agency.** Agency is a fact, the burden of proving which rests upon the party affirming its existence;[13] and the rule is equally applicable to one who would relieve himself from personal liaundertakes in his own name or exceeds his power. It is presumed otherwise that he intended to bind his principal, since an agent should not be regarded as personally bound unless such intention is expressed in the contract." Laguna Valley Co. v. Fitch, 121 Ill. A. 607, 610.

Presumption that agent of foreign principal pledged his own credit see supra § 490.

11. U. S.—Moline Malleable Iron Co. v. York Iron Co., 83 Fed. 66, 27 CCA 442.

Ala.—Humes v. Decatur Land Impr., etc., Co., 98 Ala. 461, 13 S 368.

Colo.—Frambach v. Frank, 33 Colo. 529, 81 P 247.

Fla.—Blount v. Tomlinson, 57 Fla. 35, 48 S 751.

N. Y.—Hall v. Lauderdale, 46 N. Y. 70; Jones v. Gould, 123 App. Div. 236, 108 NYS 31; Underhill v. Smith, 52 Misc. 349, 102 NYS 142; Whiting v. Saunders, 23 Misc. 332, 51 NYS 211.

W. Va.—Johnson v. Welch, 42 W. Va. 18, 24 SE 585.

[a] **When presumed that credit given to agent.**—"From the authorities the rule is deducible that, when a sale is made to one who is acting in the purchase as agent for a principal who is known to the vendor, and only the personal obligation of the agent is taken for the price of the property sold, the prima facie presumption arises that the personal credit is given to the agent alone." Merrell v. Witherby, 120 Ala. 418, 429, 23 S 994, 26 S 974, 74 AmSR 39.

12. See generally Evidence [16 Cyc 926]. Presumptions see supra §§ 647-661.

As to authority of agent to execute commercial paper see Bills and Notes [8 Cyc 218 notes 65, 66].

13. U. S.—Schutz v. Jordan, 141 U. S. 213, 11 SCt 906, 35 L. ed. 705; Russ v. Telfener, 57 Fed. 973 [aff 60 Fed. 228, 8 CCA 585 (rev on other grounds 162 U. S. 170, 16 SCt 695, 40 L. ed. 930)].

Ala.—Ebersole v. Southern Bldg., etc., Assoc., 147 Ala. 177, 41 S 150; Sanders v. Brown, 145 Ala. 665, 39 S 732; Phillips, etc., Mfg. Co. v. Wild, 144 Ala. 545, 39 S 359; George v. Ross, 128 Ala. 666, 29 S 651; Sellers v. Commercial F. Ins. Co., 105 Ala. 282, 16 S 798; Spratt v. Wilson, 94 Ala. 608, 10 S 209; Gillaspie v. Wesson, 7 Port. 454, 31 AmD 715.

Ark.—Bell v. State, 93 Ark. 600, 125 SW 1020.

Cal.—Nofsinger v. Goldman, 122 Cal. 609, 55 P 425; Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 29 P 640, 28 AmSR 122.

Ga.—Hirsh v. Beverly, 125 Ga. 657, 54 SE 678.

Ill.—Schmidt v. Shaver, 196 Ill. 108,

Allen v. Corn Exch. Bank, 87 App. Div. 335, 84 NYS 1001.

99. Ill.—Ernst v. McChesney, 186 Ill. 617, 58 NE 399.

Md.—Maddux v. Bevan, 39 Md. 485.

Minn.—Wright v. Vineyard M. E. Church, 72 Minn. 78, 74 NW 1015.

Mo.—Christopher v. National Brewery Co., 72 Mo. A. 121.

Nebr.—Oberne v. Burke, 50 Nebr. 764, 70 NW 387.

Pa.—Kentucky Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. 180.

See Southern Oil Works v. Jefferson, 2 Lea (Tenn.) 581.

[a] **Long acquiescence, without objection,** will amount to a conclusive presumption of the ratification of an unauthorized act, when such acquiescence is not otherwise accounted for. Maddux v. Bevan, 39 Md. 485; Kentucky Bank v. Schuylkill, Bank, 1 Pars. Eq. Cas. (Pa.) 180. See also supra §§ 124, 126.

1. Hartwell v. Equitable Mfg. Co., 78 Kan. 259, 97 P 432; Maddux v. Bevan, 39 Md. 485; Kentucky Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180. See also Lynch v. Smyth, 25 Colo. 103, 54 P 634.

2. Maddux v. Bevan, 39 Md. 485; Kentucky Bank v. Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180. See also supra § 127.

3. Lynch v. Smyth, 25 Colo. 103, 54 P 634. See also supra § 127.

4. New Orleans v. Hunter, 12 Mart. (La.) 3; Owens v. Swanton, 25 Wash. 112, 64 P 921. See also Reynolds v. Davison, 34 Md. 662; Brown v. Henry, 172 Mass. 559, 52 NE 1073.

5. Reynolds v. Davison, 34 Md. 662; Harrod v. McDaniels, 126 Mass. 413. See also supra § 111.

6. Foster v. Rockwell, 104 Mass. 167. See also Brigham v. Peters, 1 Gray (Mass.) 139. See also supra § 129.

7. Lynch v. Smyth, 25 Colo. 103, 54 P 634; Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248. See also supra § 129.

8. Clark v. Dillman, 108 Mich. 625, 66 NW 570.

Estoppel: See generally Estoppel [16 Cyc 671]. Of principal to deny agency see generally supra §§ 69-74.

9. Mager v. Hutchinson, 7 Ill. 265; Springer v. Orr, 82 Ill. A. 558.

10. U. S.—Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Hodgson v. Dexter, 1 Cranch 345, 2 L. ed. 130; Moline Malleable Iron Co. v. York Iron Co., 83 Fed. 66, 27 CCA 442.

Ala.—Anderson v. Timberlake, 114 Ala. 377, 22 S 431, 62 AmSR 105.

Cal.—Hall v. Crandall, 29 Cal. 567, 89 AmD 64.

Colo.—Frambach v. Frank, 33 Colo. 529, 81 P 247.

Conn.—Johnson v. Smith, 21 Conn. 627. See however dictum in Ogden v. Raymond, 22 Conn. 379, 58 AmD 429, to the effect that there is no presumption for or against liability, and that the agent is or is not liable, according to the language used.

Fla.—Blount v. Tomlinson, 57 Fla. 35, 48 S 751.

Ill.—Laguna Valley Co. v. Fitch, 121 Ill. A. 607; John Spry Lumber Co. v. McMillan, 77 Ill. A. 280.

Iowa.—Baker v. Chambles, 4 Greene 428.

Md.—Key v. Parnham, 6 Harr. & J. 418.

Mass.—Steamship Bulgarian Co. v. Merchants Despatch Transp. Co., 135 Mass. 421.

Mo.—Michael v. Jones, 84 Mo. 578.

Mont.—Roach v. Rutter, 40 Mont. 167, 105 P 555 (holding that an agent is presumed to intend to bind his principal, and not himself).

Nebr.—State v. Cass County, 60 Nebr. 566, 83 NW 738.

N. Y.—Foster v. Persch, 68 N. Y. 400; Butler v. Evening Mail Assoc., 61 N. Y. 634; Ferris v. Kilmer, 48 N. Y. 300; Hall v. Lauderdale, 46 N. Y. 70; Meeker v. Claghorn, 44 N. Y. 349; Genesee Bank v. Patchin Bank, 19 N. Y. 312; Jones v. Gould, 123 App. Div. 236, 108 NYS 31; Anderson v. English, 105 App. Div. 400, 94 NYS 200; Wasserman v. Bacon, 80 App. Div. 505, 81 NYS 193; Commercial Bank v. Waters, 45 App. Div. 441, 60 NYS 981 [aff 167 N. Y. 583 mem, 60 NE 1109 mem]; Stanton v. Camp, 4 Barb. 274; Underhill v. Smith, 52 Misc. 349, 102 NYS 142.

Tenn.—Bailey v. Galbreath, 100 Tenn. 599, 47 SW 84.

Va.—Richmond Union Pass. R. Co. v. New York, etc., R. Co., 95 Va. 386, 28 SE 573.

Wash.—Tripple v. Littlefield, 46 Wash. 156, 89 P 493.

Eng.—Higgins v. Senior, 11 L. J. Exch. 199. See Magee v. Atkinson, 6 L. J. Exch. 115.

[a] **"The legal presumption is,** (1) when a known agent deals or contracts within the scope of his authority, that credit is extended to the principal and not to the agent; and that the dealing is the act, or the contract is the engagement, of the principal alone, as if he were personally present and acting or contracting. This presumption prevails in the absence of evidence that credit was given to the agent exclusively, and the burden of proof rests upon the party seeking to charge him personally." Anderson v. Timberlake, 114 Ala. 377, 386, 22 S 431, 62 AmSR 105. (2) "The legal presumption is, however, in the absence of evidence to the contrary, that the agent is liable only where the principal is not known or where he

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bility on the ground of agency,[14] and to one who would charge another as principal with the act of an alleged agent.[15] Where the maker of a power of attorney is not the same person in whose behalf

63 NE 655, 89 AmSR 250; Rice, etc., Malting Co. v. International Bank, 185 Ill. 422, 56 NE 1062 [aff 86 Ill. A. 136]; Norton v. Richmond, 93 Ill. 367; Proudfoot v. Wightman, 78 Ill. 553; Good v. Arkin, 147 Ill. A. 390; Odell Typewriting Co. v. Sears, 86 Ill. A. 621; Hawley v. Curry, 74 Ill. A. 309; Jahn v. Kelly, 58 Ill. A. 570; Martins v. Green, 3 Ill. A. 626.

Iowa.—Shields v. Coyne, 148 Iowa 313, 127 NW 63, 29 LRANS 472, Ann Cas1912C 905; Darr v. Darrow, 120 Iowa 29, 94 NW 245; Saunders v. King, 119 Iowa 291, 93 NW 272; Moffet v. Moffet, 90 Iowa 442, 57 NW 954; Pray v. Farmers' Incorporated Co-operative Creamery, 89 Iowa 741, 56 NW 443.

Kan.—Dunlap v. Denison, 83 Kan. 757, 112 P 598, 31 LRANS 1071; Wichita Fourth Nat. Bank v. Frost, 70 Kan. 480, 78 P 825.

Ky.—Morgan v. Marshall, 7 J. J. Marsh. 316; Lucille Min. Co. v. Fairbank, etc., Co., 87 SW 1121, 27 KyL 1100; O'Day v. Bennett, 82 SW 442, 26 KyL 702.

La.—St. Landry State Bank v. Meyers, 52 La. Ann. 1769, 28 S 136 (holding that, where a contract is made between persons professing to act for themselves, and not as representatives of others, and one of the contracting parties seeks to fix a liability arising therefrom upon an alleged principal of the other, the burden of proof rests upon the party so seeking to show that the contract was made by the other on behalf of such principal); McCarty v. Straus, 21 La. Ann. 592.

Mass.—Bacon v. Hooper, 173 Mass. 554, 54 NE 253; Price v. Moore, 158 Mass. 524, 33 NE 927; Beals v. Merrian, 11 Metc. 470.

Mich.—Gore v. Canada L. Assur. Co., 119 Mich. 136, 77 NW 650; Clark v. Dillman, 108 Mich. 625, 66 NW 570; Busch v. Wilcox, 82 Mich. 336, 47 NW 328, 21 AmSR 563.

Minn.—Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 448, 124 NW 236 [cit Cyc].

Miss.—Southern Home Bldg., etc., Assoc. v. Butt, 77 Miss. 944, 28 S 725.

Mo.—Alexander v. Rollins, 84 Mo. 657; Wade v. Boone, (A.) 168 SW 360; Mathes v. Switzer Lumber Co., 173 Mo. A. 239, 158 SW 729; Jolly v. Huebler, 132 Mo. A. 675, 112 SW 1013; McGraw v. O'Neil, 123 Mo. A. 691, 101 SW 132; Knoche v. Whiteman, 86 Mo. A. 568.

Mont.—Raas v. Sharp, 46 Mont. 474, 128 P 594.

N. J.—Watertown Agricultural Ins. Co. v. Fritz, 61 N. J. L. 211, 39 A 910; Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728.

N. Y.—Deering v. Starr, 23 NE 125; Booth v. Newton, 46 App. Div. 175, 61 NYS 727 (which holds that where the seller of goods seeks to show that the purchaser acted as the agent of another it is not enough to show that such an agency existed at some other time but it must be shown that the agency existed at the time of the sale); Patten v. Climax Quick Tanning Co., 40 App. Div. 607, 57 NYS 758; Lippincot v. East River Mill, etc., Co., 79 Misc. 559, 141 NYS 220; Turner v. Lane, 47 Misc. 387, 93 NYS 1083; Mensing v. Birnbaum, 5 Misc. 414, 25 NYS 759; Kalina v. Robert Gair Co., 125 NYS 1040; Wood-Barker Co. v. Van Clief, 107 NYS 88; McBride v. Adams, 84 NYS 1060; Oxford First Nat. Bank v. Turner, 24 NYS 793.

N. D.—Corey v. Hunter, 10 N. D. 5, 84 NW 570.

Oh.—Soutter v. Stoeckle, 6 Oh. Dec. (Reprint) 1054, 9 AmLRec 23.

Okl.—Wrought Iron Range Co. v. Leach, 32 Okl. 706, 123 P 419.

Or.—Sears v. Daly, 43 Or. 346, 73 P 5 (holding that, where defendant denies the execution of the note sued on, the question is whether the act of the party signing the note, if not defendant, was binding on her because she authorized it, and the burden of proof is on plaintiff to establish the agency).

Pa.—Kroll v. Philadelphia, 240 Pa. 131, 87 A 292; American Car, etc., Co. v. Alexandria Water Co., 221 Pa. 529, 70 A 867, 128 AmSR 749, 15 AnnCas 641; Baltimore, etc., Relief Assoc. v. Post, 122 Pa. 579, 15 A 885, 9 AmSR 147, 2 LRA 44; Sylvius v. Kosek, 117 Pa. 67, 11 A 392, 2 AmSR 645; Union Refining, etc., Co. v. Bushnell, 88 Pa. 89; American L. Ins., etc., Co. v. Shultz, 82 Pa. 46; Moore v. Patterson, 28 Pa. 505; Hays v. Lynn, 7 Watts 524; Beale v. Com., 11 Serg. & R. 299; Citizens' Nat. Bank v. Marks, 34 Pa. Super. 310; Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396; Slease v. Naysmith, 14 Pa. Super. 134; Beal v. Adams Express Co., 13 Pa. Super. 143; Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. 285.

R. I.—Principe v. White Star Line, 68 A 476; Ward v. New England Southern Conference M. E. Church, 27 R. I. 262, 61 A 651.

Tex.—Connor v. Uvalde Nat. Bank, (Civ. A.) 156 SW 1092.

Vt.—Camp v. Barber, 87 Vt. 235, 88 A 812.

Va.—Wooding v. Bradley, 76 Va. 614.

W. Va.—Day v. Fay, 59 W. Va. 65, 52 SE 1013 (holding that, in a suit to set aside a tax deed on the ground that the vendee was the agent of a former owner to pay the taxes on the land conveyed, the burden is on plaintiff to prove such agency).

Wis.—Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 NW 1099; Kelly v. Strong, 68 Wis. 152, 31 NW 721.

Wyo.—Anderson v. Rasmussen, 5 Wyo. 44, 36 P 820.

Eng.—Byrne v. White, 16 Wkly. Rep. 255.

Presumptions as to fact of agency see supra §§ 647, 648.

[a] **The authority of an agent must be proved** by the party asserting it; there is nothing in the mercantile usage to do away with the necessity of such proof. Dixon v. Haslett, 5 S. C. L. 475.

[b] **Persons dealing with an assumed agent, whether general or special,** have the burden of proving the fact of agency. Baker v. Kellett-Chatham Mach. Co., (Tex. Civ. A.) 84 SW 661.

[c] **One who sues as undisclosed principal** for the breach of a contract made by his alleged agent in the agent's own name has the burden of proving the fact of agency, and that, in the making of the contract, the alleged agent was acting for him. Shields v. Coyne, 148 Iowa 313, 127 NW 63, 29 LRANS 472, AnnCas1912C 905.

[d] **Facts peculiarly within knowledge of principal.**—Where the authority of the agent depends upon facts peculiarly within the knowledge of the alleged principal, the other party need offer only slight evidence of agency in order to shift the burden of proof. Nutting v. Kings County El. R. Co., 21 App. Div. 72, 47 NYS 327.

14. Ala.—Gillaspie v. Wesson, 7 Port. 454, 31 AmD 715.

Ill.—Wheeler v. Reed, 36 Ill. 81.

Mo.—Hodkinson v. McNeal Mach. Co., 161 Mo. A. 87, 142 SW 457.

Oh.—Soutter v. Stoeckle, 6 Oh. Dec. (Reprint) 1054, 10 AmLRec 23.

Or.—McCall v. Elliott, 3 Or. 138.

Vt.—Camp v. Barber, 187 Vt. 235, 88 A 812.

[a] **Disclosing principal.**—Since the mere fact of agency is not sufficient to relieve one from personal liability, he must prove not only the fact of agency, but also that his principal was disclosed at the time of the act or transaction in question. Soutter v. Stoeckle, 6 Oh. Dec. (Reprint) 1054, 10 AmLRec 23; McCall v. Elliott, 3 Or. 138. See also Wheeler v. Miller, 2 Handy 149, 12 Oh. Dec. (Reprint) 375.

[b] **One claiming authority as agent to transfer a registered trademark** has the burden of establishing his agency. Rangeley v. Harris, 165 N. C. 358, 81 SE 346.

15. U. S.—Schutz v. Jordan, 141 U. S. 213, 11 SCt 906, 35 L. ed. 705.

Ala.—Ebersole v. Southern Bldg., etc., Assoc., 147 Ala. 177, 41 S 150; Philips, etc., Mfg. Co. v. Wild, 144 Ala. 545, 39 S 359; George v. Ross, 128 Ala. 666, 29 S 651; Sellers v. Commercial F. Ins. Co., 105 Ala. 282, 16 S 798; Spratt v. Wilson, 94 Ala. 608, 10 S 209.

Cal.—Nofsinger v. Goldman, 122 Cal. 609, 55 P 425.

Colo.—Saul v. Lapidus, 46 Colo. 538, 105 P 863.

Ill.—Schmidt v. Shaver, 196 Ill. 103, 63 NE 655, 89 AmSR 250; Proudfoot v. Wightman, 78 Ill. 553; Chesley v. Woods Motor Vehicle Co., 147 Ill. A. 588.

Iowa.—Moffet v. Moffet, 90 Iowa 442, 57 NW 954.

Ky.—Morgan v. Marshall, 7 J. J. Marsh. 316; O'Day v. Bennett, 82 SW 442, 26 KyL 702.

Mass.—Bacon v. Hooker, 173 Mass. 554, 54 NE 253.

Mich.—Clark v. Dillman, 108 Mich. 625, 66 NW 570.

Mo.—Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019; Knoche v. Whiteman, 86 Mo. A. 568.

Tex.—Bray-Robinson-Curry Woolen Mills v. Walker, (Civ. A.) 165 SW 107 (holding that, in an action for a debt which defendants claimed that they had paid to plaintiff's agent, defendants have the burden of proving the agency of the one to whom they paid the debt); Stember v. Keene, (Civ. A.) 152 SW 661; Wills v. International, etc., R. Co., 41 Tex. Civ. A. 58, 92 SW 272.

Vt.—Camp v. Barber, 87 Vt. 235, 88 A 812.

Eng.—Pole v. Leask, 9 Jur. N. S. 829; Byrne v. White, 16 Wkly. Rep. 255.

Ont.—Prince v. Lewis, 31 U. C. Q. B. 244.

[a] **The burden is upon the party relying upon an agent's authority** (1) as a basis for recovery to establish such authority by competent evidence of a certain and specific character. Cabiness v. Texas Tie, etc., Co., 152 Ill. A. 406. (2) Where a party relies on an instrument purporting to have been executed by an agent, he must prove the agent's authority. Sone v. Palmer, 28 Mo. 539.

[b] **Some proof of agency must be made** in order to charge one as principal with the act of an alleged agent. Rio Grande Extension Co. v. Coby, 7 Colo. 299, 3 P 481.

[c] **In order to bind a person named as agent** in a contract showing on its face that it was executed by an agent, the authority of the agent to act for his principal must be shown. Swaine v. Maryott, 28 N. J. Eq. 589.

[d] **Subagency.**—Where one desires to avail himself of the acts of an alleged subagent, as against the principal, he must prove the appointment of such subagent by an agent and the authority of the agent to make such appointment. American Underwriters' Assoc. v. George, 97 Pa. 238.

[e] **Where the reformation of a contract is sought** to be established under an agreement with the agent of a party to the contract, the burden is upon the person seeking to make the proof to show that said agent was especially authorized by his principal to enter into the agreement of reformation, or that he was the general agent of the principal, and that the agreement of reformation was within the scope of his authority as such agent. George v. Ross, 128 Ala. 666, 29 S 651.

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a contract is made by the agent, although the names are identical, it is incumbent on the party objecting to show that fact.[16]

The burden of proof of the nonexistence of the principal is on the person alleging that the agency is a sham.[17]

[§ 663] **(b) Termination of Relation.** The burden of showing that a general agency, shown to have been established for a given purpose, was terminated before[18] or during[19] the transaction in question is on the party asserting it. To meet the burden of proving the termination of the agency the principal asserting it, as against a third person previously dealing with the agent, must show that, before or during the transaction in question, notice,[20] express or implied,[21] of the revocation of the agency had been conveyed to such person.

[§ 664] **(c) Continuance of Authority.** In cases of special agency, limited to a particular transaction, the agency is deemed to have ceased at the completion of the transaction,[22] and the burden rests with the one asserting it to prove the continuance of the authority.[23]

[§ 665] **(d) Extent of Authority—aa. In General.** Not only does the burden of proof as to the fact of agency rest with one who seeks to charge another as principal with the acts of an alleged agent, but the burden also rests with him to prove the extent of the agency;[24] in other words, the burden is upon him to show that the act or acts of the alleged agent were within the scope of his authority.[25] But where general authority is established that the agent was such in fact, but also that his powers extended to the making of the agreement. Arbesfeld v. Tanenbaum, 96 NYS 424.

[f] **Where a party seeks to avoid an action on a contract** by showing that plaintiff is an agent, the burden of proving the fact of agency, as well as the fact that the principal was disclosed, rests upon the party seeking to relieve himself of liability. Camp v. Barber, 87 Vt. 235, 88 A 812.

16. Springer v. Orr, 82 Ill. A. 558.

17. Fulton v. Sewall, 116 App. Div. 744, 102 NYS 111.

18. Ga.—Foddrill v. Dooley, 131 Ga. 790, 63 SE 350 (holding that the burden of proving revocation of a power of attorney in pursuance of which it is shown that an act has been done is generally on the party asserting revocation).

Ind.—Pursely v. Morrison, 7 Ind. 356, 63 AmD 424 (holding that if the agent, after his authority has been revoked, still continues to act within the scope of the agency, and it is sought to charge the principal for his acts, the burden of proof is upon the principal to show that the agency was terminated before the acts were done); Hathaway v. Edwards, 42 Ind. A. 22, 85 NE 28.

La.—Smith v. De Leon, 39 La. Ann. 70, 1 S 304.

Mass.—Whitaker v. Ballard, 178 Mass. 584, 60 NE 379.

Mo.—Kilpatrick v. Wiley, 197 Mo. 123, 95 SW 218.

Pa.—Bergner v. Bergner, 219 Pa. 113, 67 A 999.

Eng.—Pole v. Leask, 9 Jur. N. S. 829.

See McMurray v. Gage, 19 App. Div. 505, 46 NYS 608.

Compare Tucker v. William Henning Co., 168 Ill. A. 575.

[a] **One asserting that the power of attorney has been revoked by mutual agreement** has the burden of proving such fact. Bell v. Corbin, 136 Ind. 269, 36 NE 23.

19. Bergner v. Bergner, 219 Pa. 113, 67 A 999.

20. Perrine v. Jermyn, 163 Pa. 497, 30 A 202.

21. Burch v. Americus Grocery Co., 125 Ga. 153, 53 SE 1008.

22. See supra § 651.

23. Fullerton v. McLaughlin, 70 Hun 568, 24 NYS 280.

24. Ala.—Wallis Tobacco Co. v. Jackson, 99 Ala. 460, 13 S 120.

Cal.—Brown v. Coffee, 17 Cal. A. 381, 121 P 309, 311 [cit Cyc].

Colo.—Lester v. Snyder, 12 Colo. A. 351, 55 P 613.

Ga.—Collins v. Crews, 3 Ga. A. 238, 59 SE 727.

Ill.—Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 NE 136, 93 AmSR 113; Braun v. Hess, 187 Ill. 283, 58 NE 371, 79 AmSR 221; Cabiness v. Texas Tie, etc., Preserving Co., 152 Ill. A. 406; McAtee v. Perrine, 48 Ill. A. 548.

Mich.—Inglish v. Ayer, 79 Mich. 516, 44 NW 942.

Minn.—Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 NW 236.

Mo.—Hodkinson v. McNeal Mach. Co., 161 Mo. A. 87, 142 SW 457.

Nev.—Jos. Schlitz Brewing Co. v. Grimmon, 28 Nev. 235, 81 P 43.

N. C.—Farmers', etc., Bank v. Germania L. Ins. Co., 150 N. C. 770, 64 SE 902; Floars v. Ætna L. Ins. Co., 144 N. C. 232, 56 SE 915, 11 LRANS 357.

Or.—Rumble v. Cummings, 52 Or. 203, 95 P 1111 (holding that, where a party relies upon a contract made with a person claiming to be an agent of another party, he must prove, where the agency is disputed, that the person claimed to be an agent was expressly empowered by the person for whom he acted to make the agreement for him, and that the terms of the contract made were within the scope of the authority conferred, or that the principal knowingly permitted the agent to assume that he had power to make such contracts, or held the agent out to the public as possessing such power, or that the principal, with full knowledge of the agent's arrogation of power in making the contract, ratified the agreement).

Pa.—Moore v. Patterson, 28 Pa. 505; Hays v. Lynn, 7 Watts 524; O'Toole v. Escher, 47 Pa. Super. 272; Beal v. Adams Express Co., 13 Pa. Super. 143.

S. D.—Shull v. New Birdsall Co., 15 S. D. 8, 86 NW 654; Larpenteur v. Williams, 12 S. D. 373, 81 NW 625; Kirby v. Western Wheeled Scraper Co., 9 S. D. 623, 70 NW 1052; Ellis v. Wait, 4 S. D. 454, 57 NW 229.

Tex.—Connor v. Uvalde Nat. Bank, (Civ. A.) 156 SW 1092 (holding that in an action on a note alleged to have been signed by one under authority from defendant, in which defendant pleads non est factum, the burden is on plaintiff to show the authority of the person to sign the particular note sued on, as well as the fact of signing); Stember v. Keene, (Civ. A.) 152 SW 661; Wills v. International, etc., R. Co., 41 Tex. Civ. A. 58, 92 SW 273.

[a] **Persons dealing with an assumed agent,** whether general or special, have the burden of showing the extent of his authority. Baker v. Kellett-Chatham Mach. Co., (Tex. Civ. A.) 84 SW 661.

[b] **The burden of proving want of authority** is not on the principal. Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 NW 236.

[c] **Enlargement of powers.**—The powers of an agent being prima facie limited to those expressly granted or arising by implication from the character of those granted, the burden of proof lies on him who asserts that the powers have been enlarged by the acts of the principal. Dodge v. Williams, 47 Pa. Super. 302.

[d] **Agreement to share commissions.**—Where, in an action to recover half of a commission received by defendant for procuring a loan, plaintiff claimed that defendant's alleged agent had promised him, for his services in bringing the application to defendant, one half of the commission received by the latter, it was incumbent on plaintiff to prove, not only

25. U. S.—Schutz v. Jordan, 141 U. S. 213, 11 SCt 906, 35 L. ed. 705.

Ala.—Ebersole v. Southern Bldg., etc., Assoc., 147 Ala. 177, 41 S 150; Phillips, etc., Mfg. Co. v. Wild Bros., 144 Ala. 545, 39 S 359; George v. Ross, 128 Ala. 666, 29 S 651.

Ark.—Lee v. Seed Store, 101 Ark. 68, 141 SW 496, 37 LRANS 352.

Colo.—Extension Gold Min., etc., Co. v. Skinner, 28 Colo. 237, 64 P 198.

Ill.—Matthews v. People's F. Ins. Co., 64 Ill. A. 280; Martins v. Green, 3 Ill. A. 626.

Ind.—Hubbard v. Ranje, 52 Ind. A. 611, 98 NE 314; Drimmie v. Hendrickson, 51 Ind. A. 198, 99 NE 436.

Iowa.—Pray v. Farmers' Incorporated Co-op. Creamery Co., 89 Iowa 741, 56 NW 443; Richmond v. Greeley, 38 Iowa 666.

Ky.—Lucille Min. Co. v. Fairbanks, 87 SW 1121, 27 KyL 1100.

La.—Chaffe v. Stubbs, 37 La. Ann. 656; McCarty v. Straus, 21 La. Ann. 592.

Me.—Stratton v. Todd, 82 Me. 149, 19 A 111.

Mich.—Hurley v. Watson, 68 Mich. 531, 36 NW 726.

Miss.—Howze v. Whitehead, 98 Miss. 578, 46 S 401 (holding that defendant, having relied on an agreement with plaintiff's alleged agent, was bound to show the agent's authority to make it).

Mo.—Hicks v. National Surety Co., 169 Mo. A. 479, 155 SW 71; Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019; Scotland County Nat. Bank v. Hohn, 146 Mo. A. 699, 125 SW 539 (holding that to show that plaintiff held title to notes sued on, indorsed, and transferred by one as agent of the payee, it is essential to prove that the indorser had power to dispose of them).

N. J.—Hall v. Passaic Water Co., 83 N. J. L. 771, 776, 85 A 349, 43 LRANS 750 [quot Cyc].

N. Y.—Barber v. Ellingwood, 135 App. Div. 549, 120 NYS 947; Joseph v. Platt, 130 App. Div. 478, 114 NYS 1065; Brigger v. Mutual Fund Life Assoc., 75 App. Div. 149, 77 NYS 362; Kalina v. Robert Gair Co., 125 NYS 1040.

N. C.—Cable Piano Co. v. Strickland, 163 N. C. 250, 79 SE 506; Greensboro Nat. Bank v. Carolina Mut. Ins. Co., 159 N. C. 200, 203, 74 SE 579 [cit Cyc].

Okl.—Midland Sav., etc., Co. v. Sutton, 30 Okl. 448, 120 P 1007.

Or.—Baker v. Seaward, 63 Or. 350, 127 P 961 (holding that a party relying upon a contract made with an alleged agent must prove, where the agency is disputed, that he was expressly empowered to make the contract, and that its terms were within the scope of his authority).

Pa.—Fee v. Adams Express Co., 38 Pa. Super. 83.

Tex.—Simon v. Temple Lumber Co., (Civ. A.) 146 SW 592 (holding that,

lished, and the act of the agent is not shown to be of an unusual or extraordinary character, the presumption is that the agent had authority to do such act,[26] and the burden of proof is then upon the principal to show that he had not such authority.[27] So a principal who asserts knowledge by third persons of limitations upon the power of an agent shown to be acting under a general authority assumes the burden of showing such knowledge.[28]

[§ 666] **bb. Authority to Sell and Convey Land.** Where a deed purports to be made by an agent, one claiming under such deed must prove that the agent had authority[29] in writing,[30] where written authority is necessary,[31] or else show facts serving as an excuse for the absence of written authority.[32] If the power under which the agent acted was limited or contingent, the happening of the contingency must be shown.[33] If the lands intended to be conveyed by the power are not definitely designated, it must be shown by evidence extrinsic of the power that the lands actually conveyed by the agent were those so intended.[34] Where an agent to sell lands under a recorded power sells to himself, in a suit by the owner against a purchaser from the agent, the burden is on the latter to show, aside from the production of title papers, his payment of a consideration and good faith in the purchase.[35]

[§ 667] **cc. Authority to Lease.** Authority on the part of an agent to make a lease must be shown by the party claiming thereunder.[36]

[§ 668] **dd. Authority to Receive Payment—(aa) In General.** A person making payment of a debt to an agent assumes the burden of proving the latter's authority to receive such payment,[37] or that he paid it in good faith, relying on a previous existence of the authority and believing that it remained unrevoked;[38] and notwithstanding it is proved that at one time the agent had authority to receive such payments, the burden is still on the

where, in an action on a draft, a plea of non est factum was filed, the burden was on plaintiff to establish that a person executing it as agent of defendant had authority to do so).

Utah.—Campbell v. Gowans, 35 Utah 268, 100 P 397, 23 LRANS 414, 19 AnnCas 660.

Wash.—O'Daniel v. Streeby, 77 Wash. 414, 137 P 1025.

Wis.—Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 NW 1099 (holding that, in an action on a contract made with defendant's alleged agent, the burden is on plaintiff to prove not only the fact of agency but also that the agent's authority was sufficiently extensive to authorize him to bind defendant by the contract he assumed to make); Ames v. D. J. Murray Mfg. Co., 114 Wis. 85, 89 NW 836.

[a] **If the agency is special,** plaintiff must show the transaction to be within the scope of the agency. Davis v. Robb, 7 F. Cas. No. 3,649, 2 Cranch C. C. 458.

[b] **An agent must be proved to have power** to do the act in question. Grafton, etc., R. Co. v. Davisson, 45 W. Va. 12, 29 SE 1028, 72 AmSR 799.

[c] **In case it is out of the usual course of the business of an agent** to do a certain act, it is incumbent upon the one seeking to make his principal liable for such act to prove that it was within the scope of his authority. Williard v. Mellor, 19 Colo. 534, 36 P 148.

[d] **Where plaintiff admits that an agent had certain authority,** but denies that he had authority to do the act in question, the burden is on defendant to show that the agent had authority to do such act. Nicholson v. Pease, 61 Vt. 534, 17 A 720.

[e] **Waiver by agent.**—Where a contract for the sale of sewing machines provides against the validity of parol agreement with agents, the burden is on a dealer claiming a waiver of such provision to show that the agent making the same had authority to do so. White Sewing Mach. Co. v. Hill, 136 N. C. 128, 48 SE 575.

[f] **Agreement to return goods.**—If a buyer of goods under a written contract could show, in an action against him for the price of the goods, that the seller's agent orally agreed when the order was given that the goods could be returned if not resold within ninety days, the burden was on him to show that the agent had authority to make such agreement. Dr. Shoop Medicine Co. v. Mizell, 148 N. C. 384, 62 SE 511.

[g] **In an action against an insurance company for trespasses** committed by the fire insurance patrol, the burden is on plaintiff to show that the company authorized, countenanced, or ratified the acts. Matthews v. People's F. Ins. Co., 64 Ill. A. 280.

26. See supra § 652.

27. Ala.—Planters', etc., Bank v. King, 9 Ala. 279.

Iowa.—Brett v. Bassett, 68 Iowa 340, 19 NW 210.

Mich.—Austrian v. Springer, 94 Mich. 343, 54 NW 50, 34 AmSR 350; Inglish v. Ayer, 79 Mich. 516, 44 NW 942.

Minn.—Kilborn v. Prudential Ins. Co., 99 Minn. 176, 108 NW 861.

Mo.—Southwest Missouri Electric R. Co. v. Missouri Pac. R. Co., 110 Mo. A. 300, 85 SW 966.

N. Y.—Kirch v. Scheid, 126 NYS 624 (holding that an employer, suing for the amount of his check given by his employee, had the burden of showing that the check was used for an unauthorized purpose).

S. C.—Hiller v. Columbia Bank, 96 S. C. 74, 77, 79 SE 899 [cit Cyc]; Lowry v. Atlantic Coast Line R. Co., 92 S. C. 33, 75 SE 278.

Tex.—Merrill v. Bradley, (Civ. A.) 121 SW 561.

Utah.—Nichols v. Oregon Short Line R. Co., 24 Utah 83, 66 P 768, 91 AmSR 778.

[a] **The burden is upon the party asserting special limitations** of an agency to prove it, and this rule is not changed by affirmative allegations of defendant that the agent has been held out as a general agent or by denial of the limitations or knowledge thereof. J. L. Mott Iron Works v. Metropolitan Bank, 78 Wash. 294, 139 P 36.

28. Chalmers v. Bowen, (Ark.) 164 SW 1131; Oak Leaf Mill Co. v. Cooper, 103 Ark. 79, 146 SW 130, 133 [cit Cyc] (holding that one dealing with an admitted agent has the right to presume, in the absence of notice to the contrary, that he is a general agent, acting within the scope of his authority; and the principal has the burden of showing notice to or knowledge by such person of any limitation of the agent's apparent authority); Routh v. Mississippi Agricultural Bank, 20 Miss. 161; Harrison v. Missouri Pac. R. Co., 74 Mo. 364, 41 AmR 318.

[a] **Power of attorney obtained by fraud.**—In a suit to partition lands, in which plaintiff claimed an undivided half interest through a conveyance by an attorney in fact of defendants, the burden is on defendants to show that the power of attorney under which such attorney acted was obtained by misrepresentations and that plaintiff had notice of that fact. Merrill v. Bradley, 52 Tex. Civ. A. 527, 121 SW 561.

29. Ky.—Herndon v. Bascom, 8 Dana 113; Logan v. Steele, 4 T. B. Mon. 430; Waggener v. Waggener, 3 T. B. Mon. 542; Pope v. Melone, 2 A. K. Marsh. 239.

Mich.—Davenport v. Parsons, 10 Mich. 42, 81 AmD 772.

Nev.—Travers v. Barrett, 30 Nev. 402, 97 P 126 (holding that one claiming under a conveyance, executed by a purported agent, must show that the agent was authorized by the owner, and the mere acting of one under the claim that he is an agent does not prove his authority).

N. C.—Yarborough v. Beard, 1 N. C. 19.

Oh.—Spengler v. Sonnenberg, 102 NE 737 (holding that, in proceedings to enforce specific performance of an agent's written contract for the sale of land, plaintiff must prove that the agent had authority to make the identical contract sued on).

Wash.—Territory v. Klee, 1 Wash. 183, 23 P 417.

W. Va.—Clark v. Gordon, 35 W. Va. 735, 14 SE 255.

[a] **The statute of conveyances** does not dispense with proof of an agent's power to convey land. Telford v. Barney, 1 Greene (Iowa) 575.

30. Videau v. Griffin, 21 Cal. 389.

31. See supra § 53.

32. Videau v. Griffin, 21 Cal. 389 (execution by an attorney in the presence of the principal).

33. McConnell v. Bowdry, 4 T. B. Mon. (Ky.) 392; Deputron v. Young, 134 U. S. 241, 10 SCt. 539, 33 L. ed. 923 [aff 37 Fed. 46].

34. Dunnegan v. Butler, 25 Tex. 501; Blume v. Rice, 12 Tex. Civ. A. 1, 32 SW 1056.

35. Hunter v. Eastham, 95 Tex. 648, 69 SW 66 [rev (Civ. A.) 67 SW 1080].

36. Weil v. Zodiag, 34 La. Ann. 982; Humphreys v. Browne, 19 La. Ann. 158; City, etc., Homes Co. v. Marrow, 133 NYS 968 (holding that in an action for the possession of property occupied under a lease by an agent the burden of proof was on the tenant to show the agent's authority to execute the lease).

37. Ga.—University Bank v. Tuck, 101 Ga. 104, 28 SE 168.

Ill.—Good v. Arkin, 147 Ill. A. 390.

Mass.—Whitaker v. Ballard, 178 Mass. 584, 60 NE 379.

Nebr.—Ketelman v. Chicago Brush Co., 65 Nebr. 429, 91 NW 282.

N. Y.—Frank v. Tuozzo, 26 App. Div. 447, 50 NYS 71.

Okl.—Midland Sav., etc., Co. v. Sutton, 30 Okl. 448, 120 P 1007; Scarritt-Comstock Furniture Co. v. Hudspeth, 19 Okl. 429, 91 P 843, 14 AnnCas 857 and note.

38. Whitaker v. Ballard, 178 Mass. 584, 60 NE 379 (holding that where defendant, in an action to recover money, paid the money to a person formerly authorized by plaintiff to collect the same, but whose authority is shown to have been revoked prior to the payment, the burden of showing that the money was paid in good faith, and in reliance on the continuance of the agency, is on defendant).

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person making the payment to show that the authority remained unrevoked at the time of payment.[39] While authority in an agent to receive payment for his principal may be inferred from his possession of the securities that evidence the debt, yet it is incumbent upon the debtor who makes payment to the agent to show that such securities were in the latter's hands at the time payment was made;[40] and if the debtor pays an agent not in possession of the securities evidencing the debt it is incumbent upon him to show that the person receiving the payment has express authority so to do,[41] or has been held out or represented by the creditor as having such authority.[42]

[§ 669] **(bb) In Anything Other Than Money.** The burden is upon one seeking to establish authority in an agent for the collection of a debt to bind his principal by receiving anything other than money in payment of the debt to show that the receipt thereof was expressly authorized by the principal,[43] or that the latter has done acts from which such authority may be fairly implied.[44]

[§ 670] **ee. Authority to Compromise or Release Claim.** The burden of proving the authority of a mere agent for the collection of a claim of money to make a compromise agreement to accept less than the amount thereof is upon the party asserting it.[45] So also the burden of showing an agent's authority to release his principal's claim is upon the party seeking to take advantage of such release.[46]

[§ 671] **ff. Authority to Employ.** Before a principal can be charged with the services of a person hired by his agent it must be shown that the employment was within the agent's authority,[47] except in some cases of employment by officers of a corporation, where the authority of such officers to employ may be presumed.[48]

[§ 672] **gg. Authority to Purchase.** When a sale is made to an agent, the burden of proof, in an action to recover the purchase price from the principal, is upon the seller to show that the agent had authority to bind the principal;[49] and if the sale is made to an agent who is conducting a certain business for his principal, and is authorized to purchase supplies on credit, the burden is upon the

39. Whitaker v. Ballard, 178 Mass. 584, 60 NE 379.

40. Garrels v. Morton, 26 Ill. A. 433; Cornish v. Woolverton, 32 Mont. 456, 81 P 4, 108 AmSR 598; Smith v. Kidd, 68 N. Y. 130, 23 AmR 157; Williams v. Walker, 2 Sandf. Ch. (N. Y.) 325.

41. Ga.—University Bank v. Tuck, 101 Ga. 104, 28 SE 168; Paris v. Moe, 60 Ga. 90; Guilford v. Stacer, 53 Ga. 618.

Iowa.—Harrison v. Legore, 109 Iowa 618, 80 NW 670 (holding that one paying money due on a mortgage to an agent who has not the mortgage or the notes, or a satisfaction of them, has the burden of proving that such agent has authority to receive such payments); Security Co. v. Graybeal, 85 Iowa 543, 52 NW 497, 39 AmSR 311; Tappan v. Morseman, 18 Iowa 499.

Minn.—Budd v. Broen, 75 Minn. 316, 77 NW 979. See also Thomas v. Swanke, 75 Minn. 326, 77 NW 981.

Mo.—City Nat. Bank v. Goodloe-McClelland Commission Co., 93 Mo. A. 123; Hefferman v. Boteler, 87 Mo. A. 316; Cummings v. Hurd, 49 Mo. A. 139.

Nebr.—Chandler v. Pyott, 53 Nebr. 786, 74 NW 263; City Missionary Soc. v. Reams, 51 Nebr. 225, 70 NW 972; Richards v. Waller, 49 Nebr. 639, 68 NW 1053; Bull v. Mitchell, 47 Nebr. 647, 66 NW 632; Omaha First Nat. Bank v. Chilson, 45 Nebr. 257, 63 NW 362; South Branch Lumber Co. v. Littlejohn, 31 Nebr. 606, 48 NW 476.

Oh.—Hoffmaster v. Black, 78 Oh. St. 1, 84 NE 423, 125 AmSR 679, 21 LRANS 52, 14 AnnCas 877.

Or.—Rhodes v. Belchee, 36 Or. 141, 59 P 117, 1119; Long Creek Bldg. Assoc. v. State Ins. Co., 29 Or. 569, 46 P 366.

Va.—Wooding v. Bradley, 76 Va. 614.

See Terry v. Durand Land Co., 112 Mich. 665, 71 NW 525.

See also supra §§ 260–263, 654, 655.

[a] **In such case the debtor must show that the person receiving payment has authority, express or implied,** so to do, although for some reason not in possession of the security. Harrison v. Le Gore, 109 Iowa 618, 80 NW 670; Long Creek Bldg. Assoc. v. State Ins. Co., 29 Or. 569, 46 P 366.

[b] **A mortgagor paying the principal to the mortgagee's agent,** in absence of the note and mortgage, has the burden of showing authority to receive it. Campbell v. Gowans, 35 Utah 268, 100 P 397, 23 LRANS 414 and note, 19 AnnCas 660 and note.

[c] **Where an agent has received installments of interest** on a mortgage debt, the burden of proof is on the payee to show authority in such agent to receive payment of the principal debt, where such agent did not have possession of the note or mortgage. Dewey v. Bradford, 2 Nebr. (Unoff.) 388, 89 NW 249.

42. Security Co. v. Graybeal, 85 Iowa 543, 52 NW 497; Tappan v. Morseman, 18 Iowa 499; City Nat. Bank v. Goodloe-McClelland Commission Co., 93 Mo. A. 123; Hefferman v. Boteler, 87 Mo. A. 316; Cummings v. Hurd, 49 Mo. A. 139.

[a] **One paying money on a negotiable security** to another as agent for the holder, when such agent has not the paper in possession, assumes the risk of showing the authority of such agent to collect, or that the holder by his conduct led the payer to believe that such authority existed. Hefferman v. Boteler, 87 Mo. A. 316.

43. Ill.—Rush v. Rush, 170 Ill. 623, 48 NE 990 [rev 65 Ill. A. 548] (merchandise).

Mo.—West Pub. Co. v. Corbett, 165 Mo. A. 7, 145 SW 868 (note).

N. Y.—Sage v. Burton, 84 Hun 267, 32 NYS 1122 (check).

Pa.—American Car, etc., Co. v. Alexandria Water Co., 221 Pa. 529, 70 A 867, 128 AmSR 749, 15 AnnCas 641 (note).

S. C.—Columbia Phosphate Co. v. Farmers' Alliance Store, 47 S. C. 358, 25 SE 116 (mortgage).

Tex.—Equitable L. Assur. Soc. v. Cole, 13 Tex. Civ. A. 486, 35 SW 720 (merchandise).

Vt.—Nicholson v. Pease, 61 Vt. 534, 17 A 720 (board and horse hire).

[a] **Where payment is made out of the usual course** it lies on the person who sets up the exceptional mode of payment to show the authority of the agent to bind the principal. Frazer v. Gore Dist. Mut. F. Ins. Co., 2 Ont. 416.

[b] **Depreciated currency.**—The burden of proving authority of an agent for the collection of a debt to accept depreciated currency in payment is upon the party making the payment. Purvis v. Jackson, 69 N. C. 474.

44. West Pub. Co. v. Corbett, 165 Mo. A. 7, 145 SW 868 (note); Equitable L. Assur. Soc. v. Cole, 13 Tex. Civ. A. 486, 35 SW 720 (merchandise); Nicholson v. Pease, 61 Vt. 534, 17 A 720 (board and horse hire).

45. Hunt v. Johnson, etc., Dry Goods Co., (Ind. T.) 104 SW 841; Corbet v. Waller, 27 Wash. 242, 67 P 567 (holding that in an action to foreclose a mortgage, where the defense was an alleged settlement by compromise with the mortgagee's agent, the burden was on defendant to prove the agent's authority to make such settlement). See also Danziger v. Pittsfield Shoe Co., 204 Ill. 145, 68 NE 534.

46. Knoche v. Whiteman, 86 Mo. A. 568 (holding that, where plaintiff claims title under a mortgage and defendant claims that the mortgage was released by the mortgagee's agent, he assumes the burden of showing the agent's authority to release).

[a] **Where plaintiff files a plea of non est factum to the defense of a release** signed by plaintiff's alleged agent, defendant has the burden of proving not only that the release has been executed by the alleged agent but also by plaintiff's authority. St. Louis, etc., R. Co. v. Blocker, (Tex. Civ. A.) 138 SW 156.

[b] **A defendant who pleads a discharge or settlement with an agent** must prove that such act was within the scope of the agent's powers. Chaffe v. Stubbs, 37 La. Ann. 656.

47. Raas v. Sharp, 46 Mont. 474, 128 P 594; Listemann v. Russian Symphony Soc., 125 NYS 1098; Schlapbach v. Richmond, etc., R. Co., 35 S. C. 517, 15 SE 241; Stinson v. Sachs, 8 Wash. 391, 36 P 287.

[a] **Employment of subagent.**—A real estate agent who seeks to recover commissions for a sale effected through a subagent for the principal has the burden of proving that he had authority to appoint a subagent. Southack v. Ireland, 109 App. Div. 45, 95 NYS 621.

[b] **In an action for breach of a contract of employment** the burden of proving authority of an agent to employ plaintiff is on plaintiff, and if he does not offer any evidence thereon, and defendant has given evidence of a custom to employ differently, the court should direct a verdict for defendant. Ames v. D. J. Murray Mfg. Co., 114 Wis. 85, 89 NW 836.

48. Cincinnati, etc., R. Co. v. Davis, 126 Ind. 99, 25 NE 878, 9 LRA 503.

49. Colo.—Saul v. Lapidus, 46 Colo. 538, 105 P 863.

Ill.—Odell Typewriter Co. v. Sears, 86 Ill. A. 621.

N. Y.—Wood-Barker Co. v. Van Clief, 107 NYS 88. See also Cassidy v. Aldhous, 3 Misc. 627, 23 NYS 318 [aff 7 Misc. 543, 27 NYS 991].

Pa.—Kosciusko Oil Mill, etc., Co. v. Jackson, 38 Pa. Super. 237.

Ont.—Prince v. Lewis, 31 U. C. Q. B. 244.

[a] **A person is not liable for goods sold to another as his agent,** where there is no evidence that the latter was his agent or that the goods were delivered to defendant. Mergentine v.

seller to show that the goods sold are of such a character as the nature of the business authorizes the agent to buy.[50]

[§ 673] **hh. Authority to Sell on Credit.** Where an agent authorized to sell goods sells on credit, the vendee has the burden of showing, as against the principal, that the sale was in accordance with the usages of trade, and that the credit was not unreasonable.[51]

[§ 674] **ii. Authority to Make Guaranty or Warranty.** Whenever it is out of the usual course of an agent's business to make a guaranty, the party seeking to hold his principal liable thereon has the burden of showing the agent's authority to make the guaranty, or that the principal subsequently ratified his act.[52]

The burden of proof is on the buyer who sets up a warranty by an agent to show the agent's express authority to warrant or such circumstances as will justify an implication of such authority.[53] In the absence of proof of express authority to make a warranty as to the quality of certain goods, the burden of proving a usage or custom in the sale of such goods to warrant them as to quality must be assumed by the third person who seeks to hold the principal for a breach of the warranty.[54]

[§ 675] **(e) Ratification.**[55] A party relying on a ratification of the unauthorized act of an agent has the burden of proving it.[56] To meet the burden it is necessary to show that the ratification was made under such circumstances as to be binding on the principal,[57] which includes a showing that all material facts were made known to him,[58] or, as is sometimes stated, to see to it that there was an adoption of the act by the principal with full knowledge of what had been done in his name and on his behalf;[59] and it does not suffice to show that the principal omitted to make inquiries, and that the facts might have been learned by diligence on his part, if it appears that he misapprehended or was mistaken as to material facts.[60] But in sustaining the burden of proof cast on one seeking to enforce a liability by ratification, arising from silence or a failure to repudiate an unauthorized

Arverne Hotel Supply Co., 123 NYS 52.

50. Wallis Tobacco Co. v. Jackson, 99 Ala. 460, 13 S 120. Compare Thurber v. Anderson, 88 Ill. 167.

51. Payne v. Potter, 9 Iowa 549.

Authority to sell on credit see generally supra § 234.

52. Ebersole v. Southern Bldg., etc., Assoc., 147 Ala. 177, 41 S 150; Willard v. Mellor, 19 Colo. 534, 36 P 148; Gray v. Gillilan, 15 Ill. 453, 60 AmD 761; Lake Erie, etc., R. Co. v. Faught, 31 Ill. A. 110.

Authority to make guaranty see generally supra § 313.

53. Ind.—Applegate v. Moffitt, 60 Ind. 104.

Iowa.—Wood Mowing Mach. Co. v. Crow, 70 Iowa 340, 30 NW 609.

Ky.—Lucile Min. Co. v. Fairbanks, etc., Co., 87 SW 1121, 27 KyL 1100 (holding that, it not being within the apparent authority of an agent selling a pump to guarantee that a boiler which the purchaser owned and was using would furnish sufficient power to do the work it was then doing and also run the pump, the purchaser, to hold the seller thereon, must show such authority).

Mass.—Churchill v. Palmer, 115 Mass. 310.

Minn.—Melby v. Osborne, 33 Minn. 492, 24 NW 253.

Wis.—Dunham v. Salmon, 130 Wis. 164, 109 NW 959.

Eng.—Brady v. Todd, 9 C. B. N. S. 592, 99 ECL 592, 142 Reprint 233.

Authority to make warranty see generally supra §§ 235–238.

[a] **Authority to vary terms of printed warranty.**—Where an agent was authorized to sell machines which were sold with a written warranty, a party seeking to hold his principal on a contract made by the agent, varying the terms of the printed warranty, has the burden of showing the latter's authority in that regard. Richmond v. Greeley, 38 Iowa 666.

54. Herring v. Skaggs, 62 Ala. 180, 34 AmR 4; Dunham v. Salmon, 130 Wis. 164, 109 NW 959.

55. **Ratification** generally see supra §§ 77–146.

As to ratification of commercial paper executed by agent see Bills and Notes [8 Cyc 219 note 67].

56. U. S.—Pacific Rolling Mill Co. v. Dayton, etc., R. Co., 5 Fed. 852, 7 Sawy. 61.

Ala.—Moore v. Ensley, 112 Ala. 228, 20 S 744.

Ariz.—Phœnix Valley Bank v. Brown, 9 Ariz. 311, 83 P 362.

Ark.—Chicago Cottage Organ Co. v. Stone, 71 Ark. 643, 73 SW 392.

Colo.—Servant v. McCampbell, 46 Colo. 292, 104 P 394; Dean v. Hipp, 16 Colo. A. 537, 66 P 804 (holding that where, in a suit to recover money collected by defendant for plaintiff, the defense was that defendant had loaned the money without authority, but that the loan had been ratified by plaintiff, the burden of proving ratification was on defendant); Smyth v. Lynch, 7 Colo. A. 383, 43 P 670 [rev on other grounds 25 Colo. 103, 54 P 634].

Fla.—Oxford Lake Line v. Pensacola First Nat. Bank, 40 Fla. 349, 24 S 480.

Ill.—Matthews v. People's F. Ins. Co., 64 Ill. A. 280.

Ind.—Davis v. Talbot, 137 Ind. 235, 36 NE 1098; Willison v. McKain, 12 Ind. A. 78, 39 NE 886 (holding that where an agent acts outside of the apparent scope of his authority the burden of proof is upon one dealing with him to prove that his acts were ratified by the principal).

La.—McCarty v. Straus, 21 La. Ann. 592.

Mass.—Brown v. Henry, 172 Mass. 559, 52 NE 1073; Price v. Moore, 158 Mass. 524, 33 NE 927; Combs v. Scott, 12 Allen 493.

Minn.—Allis v. Goldsmith, 22 Minn. 123.

Mo.—Minter v. Cupp, 98 Mo. 26, 10 SW 862; West Pub. Co. v. Corbett, 165 Mo. A. 7, 145 SW 868; Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019.

N. J.—Hall v. Passaic Water Co., 83 N. J. L. 771, 85 A 349, 43 LRANS 750.

N. Y.—Seymour v. Wyckoff, 10 N. Y. 213; Sanford v. Fountain, 49 Misc. 301, 99 NYS 234; Oliver Typewriter Co. v. United Publishers' Assoc., 133 NYS 478 (holding that a buyer, on being sued for a balance due on typewriters, had the burden to show a special arrangement made with the salesman and ratification thereof by plaintiff, whereby he was not to pay the balance in cash as provided in his order).

Or.—Sears v. Daly, 43 Or. 346, 73 P 5 (holding that, where defendant denies the execution of a note sued on, the question is whether the act of the party signing the note, if not defendant, was binding on her because she subsequently ratified it, and the burden of proof is on plaintiff to establish ratification).

Tenn.—Hatton v. Stewart, 2 Lea 233.

Tex.—Lightfoot v. Horst, (Civ. A.) 122 SW 606; Skirvin v. O'Brien, 43 Tex. Civ. A. 1, 95 SW 696.

[a] **"Ratification is not presumed.** It is matter which must be affirmatively alleged and proved by him who relies upon it. The principle that where a party, prima facie chargeable with lapse of time as laches, relies upon ignorance of facts to repel laches, he must clearly allege and explain his ignorance of the facts, and how and when he learned them, cannot apply when the charge is ratification of an unauthorized act, by acquiescence. Until it is alleged and shown against him, that he knew of the unauthorized act done for him, he is not called upon to state or show anything in reference to it." Moore v. Ensley, 112 Ala. 228, 245, 20 S 744.

[b] **Ratification must be proved;** it is not in this respect like a contract obtained by fraud, which stands until rescinded; but a contract made by an agent without authority is no contract unless shown to be ratified, although such ratification may under a variety of circumstances be presumed. Dresden School Dist. No. 6 v. Ætna Ins. Co., 62 Me. 330.

57. Phœnix Valley Bank v. Brown, 9 Ariz. 311, 83 P 362; Combs v. Scott, 12 Allen (Mass.) 493.

58. Moore v. Ensley, 112 Ala. 228, 20 S 744; Phœnix Valley Bank v. Brown, 9 Ariz. 311, 83 P 362; Combs v. Scott, 12 Allen (Mass.) 493.

Necessity and sufficiency of knowledge of facts by principal see supra §§ 93–98.

[a] **Illustrations.**—(1) In an action of replevin against a railroad company to recover cotton represented by bills of lading which had been pledged to plaintiff by an agent of the owners who made the indebtedness in the name of his principals and pledged the collateral therefor without authority to establish a ratification which would sustain the action, it was incumbent on plaintiff to prove that, at the time of the alleged ratification, the principals had knowledge, not only of the indebtedness, but also of the pledge. Chicago, etc., R. Co. v. Chickasha Nat. Bank, 174 Fed. 923, 98 CCA 535. (2) Where a principal has notified dealers not to sell goods beyond a certain amount to his agent, and the dealers disregard this notice and subsequently bring an action against the principal for the whole amount of the goods sold to the agent, on the ground that the principal ratified the act of the agent by retaining the goods, plaintiffs must not only show that the principal knew that the agent had bought goods beyond the limit, but they must also show that the goods had not been so commingled with the stock of similar goods that they could not be identified and returned. Thrall v. Wilson, 17 Pa. Super. 376.

59. Smyth v. Lynch, 7 Colo. A. 383, 43 P 670 [rev on other grounds 25 Colo. 103, 54 P 634]; Skirvin v. O'Brien, 43 Tex. Civ. A. 1, 95 SW 696.

60. Phœnix Valley Bank v. Brown, 9 Ariz. 311, 83 P 362; Combs v. Scott, 12 Allen (Mass.) 493; Henderhen v. Cook, 66 Barb. (N. Y.) 21.

act after knowledge thereof, it is not necessary for him to show that by such silence he has been misled to his prejudice.[61]

[§ 676] **(f) Estoppel.** The burden of proving facts working an estoppel to deny the agency is on the person asserting it as against the principal.[62] To meet the burden of proof cast on a party asserting an estoppel, he must show that the alleged principal's conduct, whether it was so intended or not, did mislead him into believing that the apparent authority was real, and, so believing, to rely on it.[63]

[§ 677] **(g) To Charge Principal with Knowledge Obtained by Agent before Agency Existed.** The burden is on a party seeking to charge a principal with knowledge of his agent acquired in a different transaction, but before the agency existed, to show by clear and satisfactory evidence that the knowledge was present in the agent's mind at the time of the transaction under the agency.[64]

[§ 678] **(h) To Charge Agent Personally.** When one who has professedly acted as an agent is sued, touching the contract so made, the burden lies upon plaintiff to show want of authority in the agent, rather than upon the latter to show the existence of the authority,[65] or is upon plaintiff to show that the agent agreed to be personally responsible.[66] But if one sued on an alleged warranty seeks to avoid personal liability, on the ground that he was acting as agent in making the warranty, the burden is upon him to show that he had authority to bind his principal in that regard.[67]

[§ 679] **(i) To Enable Undisclosed Principal to Sue on Contract Made by Agent.** In an action by an undisclosed principal on a contract made by an agent in his own name, the burden of proof lies on the principal to show the agency, and that in making the contract the agent was acting for him.[68]

[§ 680] **(j) To Exonerate Principal from Liability.** A principal who seeks exemption from liability on a contract made with his agent, on the ground that credit was exclusively given to the latter, has the burden of proving it,[69] and also of proving that the agent exceeded his authority, where that is his defense.[70]

[§ 681] **(k) To exonerate Agent from Liability.** As a general rule where one has entered into a contract solely in his individual capacity,[71] or where the form of the contract imposes, prima facie, a personal obligation on him,[72] the burden of proof is on him, if he is sued on the contract and relies for relief from his personal obligation on the fact that he acted as agent, to show that he disclosed his principal,[73] and had authority to bind him,[74] and that he was in fact an agent.[75] This is also the case where he contracts in a manner which is not legally binding upon his principal,[76] but a mere showing that he assumed to act as agent is not suf-

61. Lynch v. Smyth, 25 Colo. 103, 54 P 634.

Prejudice to third party or agent as element of ratification by acquiescence or silence see supra § 127.

62. Cal.—Harris v. San Diego Flume Co., 87 Cal. 526, 25 P 758.

Mich.—Clark v. Dillman, 108 Mich. 624, 66 NW 570.

Mo.—Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013.

Wis.—Pennsylvania Coal, etc., Co. v. Schmidt, 155 Wis. 242, 144 NW 283.

Eng.—Pole v. Leask, 9 Jur. N. S. 329.

N. S.—Almon v. Law, 26 N. S. 340.

See Hastings First Nat. Bank v. Farmers', etc., Bank, 56 Nebr. 149, 76 NW 430; Walsh v. Howard, 61 Misc. 328, 113 NYS 499.

Elements of estoppel see generally Estoppel [16 Cyc 671].

63. Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013.

64. Brown v. Cranberry Iron, etc., Co., 72 Fed. 96, 18 CCA 444; Constant v. Rochester Univ., 111 N. Y. 604, 19 NE 631, 7 AmSR 769, 2 LRA 734; Badger v. Cook, 117 App. Div. 328, 101 NYS 1067. See also McCutcheon v. Dittman, 164 N. Y. 355, 58 NE 97; Slattery v. Schwannecke, 118 N. Y. 543, 23 NE 922.

Notice to agent as notice to principal see supra §§ 542–552.

[a] **A party seeking to avail himself of the benefit of such knowledge must show all the facts and circumstances,** whatever they may be, that are necessary to make it binding upon the principal. Denton v. Ontario County Nat. Bank, 150 N. Y. 126, 44 NE 781.

65. Trastour v. Fallon, 12 La. Ann. 25; Plumb v. Milk, 19 Barb. (N. Y.) 74.

[a] **In an action against an agent for breach of an implied warranty of authority,** after it appears that defendant assumed to act as agent for a third person, the burden of proof is not thereby cast on defendant to show that he had actual authority to so act, but the burden is upon plaintiff to show that defendant did not have such authority. Noe v. Gregory, 7 Daly (N. Y.) 283.

66. Blount v. Tomlinson, 57 Fla. 35, 48 S 751.

67. Wheeler v. Reed, 36 Ill. 81.

68. Powell v. Wade, 109 Ala. 95, 19 S 500, 55 AmSR 915; Ruiz v. Norton, 4 Cal. 355, 60 AmD 618; McConnell v. East Point Land Co., 100 Ga. 129, 28 SE 80; Sims v. Bond, 5 B. & Ad. 389, 27 ECL 168, 110 Reprint 834. See also Carrere v. Labau, 23 La. Ann. 532 (holding that, where a principal sued his agent to recover certain notes which he alleged the agent had purchased with funds belonging to the principal and transferred the same to a third person, the burden was on plaintiff to show as against such transferee that the notes were purchased by plaintiff's authority with his funds, and that the transferee knew the fact at the time of the transfer).

69. John Spry Lumber Co. v. McMillan, 77 Ill. A. 280; Rochester Distilling Co. v. Traverse City Brewing Co., 174 Mich. 318, 140 NW 649; Butler v. Evening Mail Assoc., 61 N. Y. 634; Meeker v. Claghorn, 44 N. Y. 349.

70. Clements v. Macheboeuf, 92 U. S. 418, 23 L. ed. 504; Canandarqua Academy v. McKechnie, 90 N. Y. 618; Lovett v. Steam Saw Mill Assoc., 6 Paige (N. Y.) 54; Lowry v. Atlantic Coast Line R. Co., 92 S. C. 33, 75 SE 278 (holding that a principal who asserts that his agent, while acting within the scope of his authority, acted outside of his instruction must sustain his assertion by a preponderance of the evidence).

[a] **Performance of conditions.**—A grantor in a power of attorney, authorizing the attorney therein appointed to convey real estate on the performance of prescribed conditions, who sues to set aside a conveyance by the attorney on the ground that the conditions prescribed were not performed, has the burden of proving nonperformance of the conditions, although a negative is involved. Macheboeuf v. Clements, 2 Colo. 36.

[b] **Proving limitation and notice.**—A principal who would escape liability for the acts of his agent done within the apparent scope of the agency, on the ground that the agent's authority was limited, has the burden of proving the limitation and notice thereof to the third party. Hiller v. Bank of Columbia, 96 S. C. 74, 79 SE 899. Where an agent's acts come within the apparent scope of his authority, the principal seeking to avoid liability has the burden of showing not only that the authority to do such acts was not expressly given but was also expressly withheld and that the person dealing with the agent knew that fact. O'Daniel v. Streeby, 77 Wash. 414, 137 P 1025.

71. Vawter v. Baker, 23 Ind. 63; Cullers v. More, 1 Tex. A. Civ. Cas. § 197 (holding that, where a defendant seeks to defend on the ground that he made the contract sued on as agent, and is not liable thereon, the burden is on him to show not only that he was acting as such agent but also that at the time of the making of the contract he informed the other party that he was so acting, and disclosed to him the name of the principal for whom he was acting).

[a] **Where in making an oral contract** language was used by one of the parties which in its ordinary sense would amount to an undertaking to be personally bound, the burden of proof rests on him to show that he meant to be bound as agent for another. Brant v. Gallup, 5 Ill. A. 262 [aff 111 Ill. 487, 53 AmR 638].

72. Drake v. Flewellen, 33 Ala. 106; Harwood v. Humes, 9 Ala. 659; Gillaspie v. Wesson, 7 Port. (Ala.) 454, 31 AmD 715; Blount v. Tomlinson, 57 Fla. 35, 48 S 751; Pratt v. Beaupre, 13 Minn. 187. See also supra § 487.

73. Horan v. Hughes, 129 Fed. 248 [aff 129 Fed. 1005, 64 CCA 581]; Holt v. Ross, 54 N. Y. 472, 13 AmR 615; Cabre v. Sturges, 1 Hilt. (N. Y.) 160; Beidleman v. Kelly, 51 Misc. 51, 99 NYS 907; Arfman v. Hare, 27 Misc. 777, 57 NYS 759; Whitman v. Johnson, 10 Misc. 725, 31 NYS 1009.

Nature of duty to disclose principal see supra § 492.

74. Wheeler v. Reed, 36 Ill. 81, 91; Braun v. Hess, 187 Ill. 283, 58 NE 371, 79 AmSR 221 [aff 86 Ill. A. 544]; Whitman v. Johnson, 10 Misc. 725, 31 NYS 1009; Sydnor v. Hurd, 8 Tex. 98.

75. Peterson v. Homan, 44 Minn. 166, 46 NW 303, 20 AmSR 564; Pratt v. Beaupre, 13 Minn. 187; Beidleman v. Kelly, 51 Misc. 51, 99 NYS 907; Ashner v. Abenheim, 19 Misc. 282, 43 NYS 69; Whitman v. Johnson, 10 Misc. 725, 31 NYS 1009; Sydnor v. Hurd, 8 Tex. 98.

76. Franklin v. Johnson, 147 Ill. 520, 35 NE 480, 37 AmSR 234; Mott

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ficient to put upon him the burden of showing his authority; the proof must go further and show that his assumption of this capacity was unauthorized or in excess of the authority actually granted.[77]

[§ 682] **(1) To Show Fairness of Transaction between Principal and Agent.** In all transactions between principal and agent the burden of proof is upon the latter to show the most entire good faith on his part, a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition.[78] This is a principle of general application to all fiduciary relations.[79]

[§ 683] **(2) In Particular Actions—(a) Actions for Accounting—aa. In General.** Where a principal sues his agent for an accounting, or for money or property received, the burden is upon him to show that the agent has received the money or property, and the amount or quantity thereof;[80] but it is not incumbent upon him to go further and show that the agent has not accounted for it or paid it over.[81] On the contrary the burden is then upon the agent to show either that he has accounted,[82] or some sufficient reason why he has failed to do so.[83]

Where accountings are had from time to time, balances agreed upon, and settlements made, it will be presumed, in the absence of fraud or mistake, that such accountings and settlements were fairly made and that they embraced all prior transactions between the parties, and the burden is on the party asserting otherwise to overthrow such presumption.[84]

v. Hicks, 1 Cow. (N. Y.) 513, 13 AmD 550.

77. Noe v. Gregory, 7 Daly (N. Y.) 283.

78. U. S.—Teakle v. Bailey, 23 F. Cas. No. 13,811, 2 Brock. 43.

Cal.—Paige v. Akins, 112 Cal. 401, 44 P 666; Rubidoex v. Parks, 48 Cal. 215; Hemenway v. Abbott, 8 Cal. A. 450, 97 P 190.

Colo.—Webb v. Marks, 10 Colo. A. 429, 51 P 518.

Ind.—Rochester v. Levering, 104 Ind. 562, 4 NE 203; McCormick v. Malin, 5 Blackf. 509.

Iowa.—Watson v. Clark, 122 NW 913 (holding that, where an agent, having agreed to support and care for his principal during the rest of her life, obtained from her an absolute assignment of a note and mortgage, the burden was on him to show absolute candor and fair dealing with her by a preponderance of the evidence); Drefahl v. Security Sav. Bank, 132 Iowa 563, 107 NW 179; Green v. Peeso, 92 Iowa 261, 60 NW 531.

Ky.—Nelms v. Dougherty, 45 SW 870, 20 KyL 657.

Md.—Kerby v. Kerby, 57 Md. 345.

Mo.—Evans v. Evans, 196 Mo. 1, 93 SW 969 (holding that in a suit by an agent to enforce a contract made with his principal, the relationship having been established, the burden is on the agent to show that the contract was reasonable and just).

Nebr.—Wells v. Cochran, 84 Nebr. 278, 120 NW 1123; Duesman v. Hale, 55 Nebr. 577, 76 NW 205.

N. J.—Porter v. Woodruff, 36 N. J. Eq. 174; Condit v. Blackwell, 22 N. J. Eq. 481.

N. Y.—Nesbit v. Lockman, 84 N. Y. 167; Comstock v. Ames, 1 Abb. Dec. 411, 3 Keyes 357; Brown v. Post, 1 Hun 203 [aff 62 N. Y. 651]; Brock v. Barnes, 40 Barb. 521.

S. C.—Neely v. Anderson, 21 S. C. Eq. 262; Poag v. Poag, 10 S. C. Eq. 285; Butler v. Haskell, 4 S. C. Eq. 561.

Vt.—Hobart v. Vail, 80 Vt. 152, 66 A 820.

Va.—Jackson v. Pleasanton, 95 Va. 654, 29 SE 680.

Wis.—Cook v. Berlin Woolen Mill Co., 43 Wis. 433.

Eng.—Dunne v. English, L. R. 18 Eq. 524; Selsey v. Rhoades, 2 Sim. & St. 41, 1 EngCh 41, 57 Reprint 260.

Duty of good faith and loyalty on the part of the agent to the interests of his principal see supra §§ 353-369.

[a] **Where plaintiff acted in a fiduciary relation to two parties** to a contract, having antagonistic interests to each other, and one of these parties was unaware of plaintiff's fiduciary relation to the other, plaintiff, in seeking to assert an advantage to himself as against the party ignorant of the dual capacity in which he had acted, has the burden on him to show that the advantage claimed was not inequitable to the party against whom the claim is asserted. Duesman v. Hale, 55 Nebr. 577, 76 NW 205.

[b] **An agent hired to give his full time to the purchase of property** for his principal may, with the consent of the principal, purchase property of the same class for himself at the same time he is purchasing for the principal, but he has the burden to show the principal's consent after knowledge of every material fact known to the agent affecting the transaction, and his perfect good faith. Fox v. Simons, 251 Ill. 316, 96 NE 233 [rev 158 Ill. A. 482].

[c] **Family relationships.**—The mere existence of family relations as in the case of parent and child and some others of a similar nature does not shift the burden of proof to the superior party to show the validity of the transaction. Holtzman v. Linton, 27 App. (D. C.) 241.

79. See Corporations [10 Cyc 787]; Partnership [30 Cyc 454]; Trusts and Trustees [39 Cyc 300].

80. Green v. Macy, 36 Ind. A. 560, 76 NE 264 (holding also that in an action against an agent for a balance due for stone sold for his principal, on proof of the sale of the stone and the receipt of the money by the agent it will be presumed that he received the market value of the stone where sold); Lahr v. Kraemer, 91 Minn. 26, 97 NW 418; Anderson v. Grand Forks First Nat. Bank, 4 N. D. 182, 59 NW 1029.

[a] **Where the owner of a note intrusts it to another for collection,** and the latter collects its proceeds, there is such a privity of contract between them as will support an action by the owner for money had and received for plaintiff's use, and the burden of proof is upon plaintiff to show that he was the owner of the note when it came into the possession of defendant, that defendant received the note for collection on plaintiff's account, and that defendant collected the proceeds. Harr v. Roome, 28 App. (D. C.) 214.

[b] **Deposit of money in agent's name.**—The burden of proving that moneys collected by an agent were deposited in his individual name and belong to the principal is on the party asserting the trust. Trought's Est., 12 Pa. Dist. 137, 28 Pa. Co. 302.

[c] **If the principal alleges that the agent** sold goods sent to him for sale on commission but did not account to him, he must prove that a sale actually took place; and it will not be presumed, even at a distance of twelve months after the delivery of the goods. Elbourn v. Upjohn, 1 C. & P. 572, 12 ECL 326.

[d] **Principal not relieved from burden.**—Where, in an action against an agent for a balance due for stone sold for his principal, the undisputed evidence shows that the agent sold the stone to a county, the amounts received are matters of record and not exclusively within the knowledge of the agent, and the principal is not relieved from the obligation of proving the facts in order to recover. Green v. Macy, 36 Ind. A. 560, 76 NE 264.

81. Merchants' Bank v. Rawls, 7 Ga. 191, 50 AmD 394.

82. Cal.—San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 P 410.

Ga.—Dodge v. Hatchett, 118 Ga. 883, 45 SE 667 (holding that, where property has been delivered to an agent to sell and account for the proceeds, in a suit by the principal for an accounting, after evidence that the property delivered to the agent has been sold, the burden of proof is on the agent to show that he has accounted for the proceeds, or some sufficient reason why he has failed so to do).

Ind.—Holthouse v. Poling, 52 Ind. A. 568, 99 NE 810.

Ky.—Hildreth v. Ayer, etc., Tie Co., 108 SW 255, 32 KyL 1212 (holding that, in an action by a principal against his agent for money in his hands, the burden is on him to give an account, where he claims commissions for disbursing the money received).

La.—Laporte v. Laporte, 109 La. 958, 34 S 38.

Mass.—Little v. Phipps, 208 Mass. 331, 94 NE 260, 34 LRANS 1046.

Minn.—Farmers' Warehouse Assoc. v. Montgomery, 92 Minn. 194, 99 NW 776; Lahr v. Kraemer, 91 Minn. 26, 97 NW 418; Greenleaf v. Egan, 30 Minn. 316, 15 NW 254.

Mo.—Young v. Powell, 87 Mo. 128; Carder v. Primm, 52 Mo. A. 102.

N. Y.—Allen v. O'Bryan, 118 App. Div. 213, 103 NYS 125. See also Marvin v. Brooks, 94 N. Y. 71.

N. D.—Anderson v. Grand Forks First Nat. Bank, 4 N. D. 182, 59 NW 1029.

S. C.—Robson v. Sanders, 25 S. C. 116.

Vt.—Rowell v. Fuller, 59 Vt. 688, 10 A 853.

[a] **A general showing of the amount of property delivered to the agent,** and a failure to return or to account for it on demand, are prima facie sufficient to show conversion by the agent, and shift the burden on the agent to make a general accounting. Lahr v. Kraemer, 91 Minn. 26, 97 NW 418.

83. Dodge v. Hatchett, 118 Ga. 883, 45 SE 667; Delpeuch v. Dufart, 7 La. 533 (failure to collect anything without his fault); Wilson v. Pericat, 235 Pa. 412, 84 A 404 (ownership of goods sold).

[a] **Money retained as commissions.**—Where, in an action by a principal against an agent for money he has collected and improperly retained, the answer admits the facts, but claims the money as commissions, the burden of proof is on defendant to establish his right to the commissions. Thomas v. Gwyn, 131 N. C. 460, 42 SE 904. See also Wells v. Cochran, 84 Nebr. 278, 120 NW 1123.

84. Myer v. Abbett, 105 App. Div. 537, 94 NYS 238 [aff 186 N. Y. 519 mem, 78 NE 1107 mem]; Wood v. Pehrsson, 21 N. D. 357, 130 NW 1010 (holding that, where plaintiff had acted for several years as agent for defendants in business transactions, making advancements to them, and receiving proceeds of grain and stock shipments and notes and mortgages to secure loans and advances made by plaintiff, and the parties had account-

Where a demand is necessary the burden of proving the demand is, as a general rule, upon the principal; a demand will not be presumed.[85]

In an action for an accounting by one agent against a coagent for profits arising out of a transaction, the burden is on plaintiff to show that he has a right to the profits.[86]

[§ 684] **bb. Disbursements on Account of Principal.** In a suit of a principal against an agent for a settlement of accounts, and the recovery of the balance found to be due, in which defendant claims reimbursement for certain expenditures, the onus probandi is on the latter, and he must show that such disbursements were made for the account of the principal, and that the same were authorized or accepted by the principal.[87]

[§ 685] **(b) Actions for Negligence or Misconduct of Agent.** Whenever a principal seeks to charge his agent with neglect[88] or misconduct[89] in the performance of duties pertaining to the agency, the burden of proving such neglect or misconduct is on the principal; but when a prima facie case of negligence has been established the burden is on the agent to show facts relieving him from liability.[90]

[§ 686] **(c) Actions for Compensation or Reimbursement.** In an action by an agent for commissions, the burden is upon him to prove an agreement for the commissions sought to be recovered,[91] and that such commissions are due.[92]

Bad faith in rejecting orders. Where the agent's right to commissions on orders is dependent upon the acceptance of the orders by the principal, and the principal refuses to accept an order obtained by the agent, the burden is upon the latter to show that the order was one which the principal should have accepted.[93]

Reimbursement. The burden of proving expenditure by the agent for which he claims reimbursement is upon the agent.[94]

ings at various times, at each of which balances were agreed upon, and notes and mortgages were executed and delivered by defendants to secure the payment thereof, it will be presumed, in the absence of fraud or mistake, that such accountings and settlements were fairly made, and that they embraced all prior transactions between the parties, and the burden, in an action by the agent for a balance due him, is on defendants to overthrow such presumption).

Accounting and settlement between principal and agent see generally supra §§ 451, 452.

[a] **Where payments to plaintiff** or by her direction are established by an accounting from time to time between her and her attorneys, and the accounts are accepted, and thus become in a sense accounts stated, the burden is on plaintiff, in an action for an accounting, of disproving the accuracy thereof. Myer v. Abbett, 105 App. Div. 537, 94 NYS 238 [aff 186 N. Y. 519 mem, 78 NE 1107 mem].

85. Anderson v. Hulme, 5 Mont. 295, 5 P 865.

86. Bruhns v. Seymour, 143 Iowa 464, 121 NW 1016.

87. Western Assur. Co. v. Uhlhorn, 41 La. Ann. 385, 6 S 485. See also Quinn v. Le Duc, (N. J. Ch.) 51 A 199.

88. Brown v. Funck, 89 Kan. 601, 606, 132 P 202 [quot Cyc]; Heinemann v. Heard, 62 N. Y. 448 [rev 2 Hun 324, 4 Thomps. & C. 666]; Rand v. Johns, (Tex. A.) 15 SW 200. See also Burpe v. Van Eman, 11 Minn. 327.

[a] **To render the agent liable for the amount of a claim,** the principal must show that the money could have been collected by the use of such due diligence as was incumbent upon the agent. Sandefur v. Mattingley, 16 Ark. 237.

89. Smith v. Brigham, 106 Minn. 91, 118 NW 150; Lahr v. Kraemer, 91 Minn. 26, 97 NW 418; R. C. Stone Milling Co. v. McWilliams, 121 Mo. A. 319, 98 SW 828 (holding that a principal, averring that his agent, authorized to buy wheat and pay therefor with checks signed by the principal in blank, had embezzled a part of the wheat bought, has the burden of proving, not only a shortage in the quantity of the wheat, but also that the shortage resulted from a felonious conversion of the wheat by the agent); Marshall v. Ferguson, 94 Mo. A. 175, 67 SW 935 (holding that the burden is on the principal whose agent, on being directed to loan money on a deed of trust, includes in the trust deed a note owed by the borrower to the agent to show that the agent included the note in the deed without his knowledge or consent).

[a] **Embezzlement.**—(1) In order to recover, in an action in which defendant is charged to have embezzled and fraudulently misapplied plaintiff's money while acting as its agent, it is necessary for plaintiff to establish, not only the receipt of the money by defendant but also its embezzlement or fraudulent misapplication by him; and the burden of proof during the whole progress of the trial rests upon plaintiff to establish those two propositions. Panama R. Co. v. Johnson, 58 Hun 557, 12 NYS 499. (2) The presumption of the law is in favor of honest rather than dishonest motives and, if it is claimed that an employee has misappropriated money with which he has been intrusted, such misappropriation must be shown before a claim can be established against him on account of it. In re King, 94 Mich. 411, 54 NW 178.

90. Brown v. Funck, 89 Kan. 601, 606, 132 P 202 [quot Cyc]; Collins v. Andrews, 6 Mart. N. S. (La.) 190; Darling v. Younker, 37 Oh. St. 487, 41 AmR 532; Lamb v. Fairbanks, 48 Vt. 519 (permission from principal to do as he did).

[a] **Defense of loss by theft.**—If an agent intermingles money belonging to his principal either with his own or with that of other persons, and defends a suit for the amount on the ground of its loss by theft without fault on his part, the burden is upon him to show that the identical money stolen belonged to the principal. Bartlett v. Hamilton, 46 Me. 435.

[b] **Fact that principal sustained no loss.**—In an action by the holder of a bill or note against the bank, to which he gave it to present for acceptance and to collect, for neglect to give notice to other parties, the burden of proof is on the bank to show that the payee sustained no damage by the neglect. Miranda v. New Orleans City Bank, 6 La. 740, 26 AmD 493; Crawford v. Louisiana State Bank, 1 Mart. N. S. (La.) 214.

[c] **When a collection agent fails to give notice to indorsers** of nonpayment the burden is on the agent to show the ability of the maker to pay or any other facts showing that plaintiff has sustained no damage. Coghlan v. Dinsmore, 22 N. Y. Super. 453 [aff 1 Abb. Dec. 375, 4 Transcr. A. 386, 35 HowPr 416].

91. Ducharme v. St. Peter, 135 Ill. A. 530; Warwick v. North American Inv. Co., 112 Mo. A. 633, 87 SW 78; Kelly v. Hamon, 35 Que. Super. 305.

[a] **An agent suing on an unauthorized contract** for commissions on a sale of property of a defendant corporation bears the burden of proving that such contract was known to and acquiesced in by the directors of the company, Williams v. Ellerslie Planting Co., 132 La. 332, 61 S 392.

92. Wolfson v. Aller Bros. Co., 120 Iowa 455, 94 NW 910 (holding that, where a contract between a manufacturer and his agent provided that the agent should be paid commissions on orders taken by him which the manufacturer should ship, but that a sufficient amount must be sold to fill a car to certain named points, in an action by the agent for commissions on goods sold to responsible parties but not shipped it was for him to show orders to the amount of a car); Chaurant v. Maillard, 56 App. Div. 11, 67 NYS 345; Barkley v. Olcott, 52 Hun 452, 5 NYS 525.

[a] **However,** in an action by a traveling salesman to recover an installment of a drawing account under an agreement that the amount of his commissions should not affect his right to draw monthly installments, but that at the termination of his employment the commissions earned should be checked off against the deposit, and the balance adjusted between the parties, plaintiff need not prove the amount of commissions earned, in the absence of evidence of a termination of the contract. Isaacsen v. Andrews, 64 App. Div. 408, 72 NYS 177.

[b] **Improper procedure.**—Where an agent claiming commissions to be due him from his principal improperly brought proceedings for an accounting instead of an action at law, the burden of proof was nevertheless on plaintiff to show that a sum was due him from defendant. Chaurant v. Maillard, 56 App. Div. 11, 67 NYS 345.

[c] **Bad faith in terminating employment.**—In an action against a county for breach of a contract which employed plaintiff to survey and sell lands but did not specify any definite term for the continuance of the employment, the burden was upon plaintiff to show that the county acted unfairly in terminating his employment without giving him a reasonable opportunity to earn compensation for what he had done under the employment. Hollingsworth v. Young County, 40 Tex. Civ. A. 590, 91 SW 1094.

93. Wolfson v. Allen Bros. Co., 120 Iowa 455, 94 NW 910 (holding that, where a contract provided that an agent should be entitled to certain commissions on orders which were accepted and shipped, the burden is on the agent to show bad faith on the principal's part in rejecting orders); Iselin v. Griffith, 62 Iowa 668, 18 NW 302; Sherman v. Port Huron Engine, etc., Co., 8 S. D. 343, 66 NW 1077.

94. Dillman v. Hastings, 144 U. S. 136, 12 SCt 662, 36 L. ed. 378; Western Assur. Co. v. Uhlhorn, 41 La. Ann. 385, 6 S 485; Ward v. Van Duzer, 2 N. Y. Super. 162; Motley v. Motley, 42 N. C. 211.

[a] **The burden of showing the necessity** for the expenditure is on the agent. Clamagaran v. Sacerdotte, 8 Mart. N. S. (La.) 533.

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The burden of proving matters of defense to an action by an agent for compensation or reimbursement is upon the principal.[95] Thus, where the principal seeks to limit the agent's recovery in case of a wrongful discharge, on the ground that he secured or could have secured other employment, the burden is upon the principal to prove all the necessary facts to make out the defense.[96]

[§ 687] **2. Admissibility—a. In General.** The general rules of evidence governing the competency, relevancy, and materiality of evidence in civil actions[97] control the admissibility of evidence in actions by or against a principal or agent,[98] such as upon the question of the principal's knowledge of the agent's acts,[99] or of the third person's knowledge of the agent's want of authority.[1]

[§ 688] **b. To Prove Agency or Authority—(1) In General.** Any evidence which is otherwise competent that has a tendency to prove or disprove agency or the authority of an agent is admissible, even though it is not full and satisfactory, as it is the province of the jury to pass upon it;[2] and it

[b] **Where the disbursements were caused by the agent's negligence,** the burden is on him to prove that the principal ratified his acts or received the benefits therefrom. Herman v. Leland, 80 Misc. 598, 142 NYS 664.

95. Nicklase v. Griffith, 59 Ark. 641, 26 SW 381; Oberfelder v. J. G. Mattingly Co., (Ky.) 120 SW 352 (holding that, in an action against a principal by his agent for breach of the contract of agency, the burden of proving the defense that the agent practiced fraud on the principal, causing the termination of his agency, is on the principal); Singer Mfg. Co. v. Wood, 1 Tex. A. Civ. Cas. § 1177.

[a] **Conversion by agent.**—(1) The burden of proving misconduct by an agent and a failure to account for the funds of his principal is to the extent of showing the amount of money or the value of property received by the agent on the principal. Lahr v. Kraemer, 91 Minn. 26, 97 NW 418. (2) But a general showing of the amount of property delivered to the agent and a failure to return or account for it on demand is prima facie sufficient, and shifts the burden upon the agent to make a specific accounting. Lahr v. Kraemer, supra.

96. Colo.—Saxonia Min., etc., Co. v. Cook, 7 Colo. 569, 4 P 1111.

Ga.—Ansley v. Jordan, 61 Ga. 482.

Ind.—Ricks v. Yates, 5 Ind. 115.

N. Y.—Howard v. Daly, 61 N. Y. 362, 19 AmR 285; Costigan v. Mohawk, etc., R. Co., 2 Den. 609, 43 AmD 758.

Wis.—Barker v. Knickerbocker L. Ins. Co., 24 Wis. 630.

97. See Evidence [16 Cyc 821].

98. Geraghty v. Randall, 18 Colo. A. 194, 70 P 767 (holding that, where, in an action by the purchaser of mining stock against the seller, on the ground that the stock was worthless and the sale induced by the fraudulent representations of the seller, one who had acted as plaintiff's agent in the purchase testified that, after she learned the truth as to the stock, she had a conversation with defendant, it was proper to permit the witness to be asked whether she relied on defendant's representations, plaintiff having dealt solely through the agent, and having had no knowledge of the situation); Frost v. Fisher, 13 Colo. A. 322, 58 P 872 (holding that, to show that defendant had looked to a certain company for the collection of a note given by plaintiff, a letter by an agent of defendant to plaintiff, telling him that the company was insolvent and that plaintiff will be looked to for payment, is admissible); Eaton v. Littlefield, 147 Mass. 122, 16 NE 771; Morris v. Brightman, 143 Mass. 149, 9 NE 512 (holding letter to agent admissible); Pettinger v. Alpena Cedar Co., 175 Mich. 162, 141 NW 535 (holding that, in an action against a company for merchandise delivered to another on the agreement of defendant's foreman, plaintiff's answer to the question to whom he had extended credit after that time was admissible); Dodge v. Reynolds, 135 Mich. 692, 89 NW 787 (holding that, in an action for breach of a contract to furnish plaintiff fruit baskets for sale, where he showed that defendants had published a notice that they had no agent in their employ, evidence that defendants knew that plaintiff claimed to be their general agent was admissible to show why the notice was published); National Novelty Import Co. v. Griffin, (Tex. Civ. A.) 168 SW 85; Whimple v. Patterson, (Tex. Civ. A.) 117 SW 1034 (holding that, in a suit by the buyer of a machine against the seller and his agents for fraudulent misrepresentations, it was error to refuse to permit one agent to testify that he believed the representations true when he made them; the intent with which they were made being material in determining the agents' liability). See also Alden v. Mayfield, 164 Cal. 6, 127 P 45; Koyukuk Min. Co. v. Van de Vanter, 30 Wash. 385, 70 P 966.

[a] **"Transactions of principal and agent,** are ordinarily governed by the same rules of evidence that apply to transactions between other persons." Swofford v. Gray, 8 Ind. 508, 510.

[b] **Testimony of an agent as to the intention of his principals,** tending to deprive them of their property, is inadmissible if unsupported by facts tending to show that he knew what their intention was, and unaccompanied by any of their declarations and acts. California Nav., etc., Co. v. Union Transp. Co., 126 Cal. 433, 58 P 936, 46 LRA 825.

[c] **Repudiation of agent's acts.**—It is competent for a corporation to show in making defense to paper issued in its name but alleged to be unauthorized, that immediately on its existence becoming known its validity was formally repudiated. New York Iron Mine v. Negaunee First Nat. Bank, 39 Mich. 644.

[d] **A verified account made out against an agent of an undisclosed principal,** and attached as an exhibit to the petition, is evidence only against the agent, and cannot be used against the principal on the disclosure of him by the agent. Pittsburg Plate Glass Co. v. Roquemore, (Tex. Civ. A.) 88 SW 449.

[e] **In a suit to recover a distributive share in an intestate's estate,** it is not necessary to prove that the person paying such share to the agent of the distributee was, at the time, rightful administrator; and evidence to prove that the person paid the distributive share to the agent is admissible. Neighbors v. Jordan, 70 N. C. 406.

99. Packer v. Lockman, 115 Mass. 72 (holding that, in an action by a seller to recover damages sustained by means of a sale of coal, induced by the fraud of the purchaser's agent, evidence of the price at which the purchaser afterward sold the coal is admissible on the ground that it may tend to show knowledge, on the purchaser's part, of the fraud and participation in it); Parr v. Northen Electrical Mfg. Co., 117 Wis. 278, 93 NW 1099 (holding that, where, in an action on a contract made with defendant's agent, plaintiffs offered evidence to show that defendant's officers knew or should have known of the acts of the agent, defendant was entitled to prove the actual powers of such agent, and the fact that its officers had no knowledge of the agent's assumed contract).

[a] **Letters written by an agent to his principal,** in which overdrafts of a bank account of the principal standing in the agent's name were mentioned are admissible to show that the principal knew of the overdrafts. Merchants', etc., Nat. Bank v. Clifton Mfg. Co., 56 S. C. 320, 33 SE 750.

1. Frisch v. Warnke, 85 N. J. L. 456, 89 A 977; Swindell v. Latham, 145 N. C. 144, 58 SE 1010, 122 AmSR 430 (holding that, in an action against a principal for money borrowed by his agent, evidence that the transaction between plaintiff and the agent was usurious, in so far as it affected the principal, was admissible on the question whether plaintiff knew the agent was exceeding his authority).

2. Ala.—Robinson v. Greene, 148 Ala. 434, 43 S 797; Sellers v. Commercial F. Ins. Co., 105 Ala. 282, 16 S 798; South, etc., R. Co. v. Henlein, 52 Ala. 606, 23 AmR 578.

Ark.—Bell v. State, 93 Ark. 600, 125 SW 1020 (holding that agency must be established by direct or circumstantial evidence other than the declarations of the alleged agent, and any evidence tending to establish the agency is admissible).

Cal.—Brown v. Spencer, 163 Cal. 589, 126 P 493.

Conn.—Hyman v. Waas, 79 Conn. 251, 64 A 354.

Fla.—Jacksonville Terminal Co. v. Smith, 64 S 354 (evidence of revocation).

Ill.—Stastney v. Marschall, 37 Ill. A. 137.

Iowa.—Anderson v. Patten, 157 Iowa 28, 137 NW 1050; White v. Elgin Creamery Co., 108 Iowa 522, 79 NW 283.

Md.—Morrison v. Whiteside, 17 Md. 452, 79 AmD 661.

Mich.—Rochester Distilling Co. v. Traverse City Brewing Co., 174 Mich. 318, 140 NW 649.

Mo.—Scotland County Nat. Bank v. Hohn, 146 Mo. A. 699, 125 SW 539; Sharp v. Knox, 48 Mo. A. 169; Gibson v. Zelbig, 24 Mo. A. 65.

N. J.—Black v. McQuaid, 75 N. J. L. 639, 68 A 102; Elliott v. Bodine, 59 N. J. L. 567, 36 A 1038.

N. Y.—Leslie v. Knickerbocker L. Ins. Co., 63 N. Y. 27; Walter Heywood Chair Mfg. Co. v. Burns, 48 Hun 615, 15 NYSt 570; Bickford v. Menier, 36 Hun 446 [rev on other grounds 107 N. Y. 490, 14 NE 438, 27 NYWklyDig 543]; Dickinson v. Salmon, 36 Misc. 169, 73 NYS 196 [aff 35 Misc. 838, 72 NYS 1099]; Tebbetts v. Levy, 11 NYS 684.

Okl.—Wrought Iron Range Co. v. Leach, 32 Okl. 706, 123 P 419.

Pa.—Fee v. Adams Express Co., 38 Pa. Super. 83.

R. I.—Harris v. Santee River Cypress Lumber Co., 72 A 392.

Tex.—Kohlberg v. Awbrey, (Civ. A.) 167 SW 828.

Vt.—Holbrook v. Quinlan, 84 Vt. 411, 80 A 839.

Wash.—Graton, etc., Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 P 879.

[a] **Where the question of the authority of an agent to make a contract is in issue,** all evidence which tends in any way to show such authority or the limitations upon such authority is admissible. Keane v. Pittsburg Lead Min. Co., 17 Ida. 179, 105 P 60.

[b] **The terms of the contract between the principal and the agent** are competent to prove the scope of the agent's authority. Forbes Co. v.

follows from the several ways in which an agency may be created that the evidence of the appointment may be either direct or indirect.[3] But evidence is not admissible, either to prove or disprove an agency, which is entirely consistent with the contention thereby sought to be controverted; such evidence is immaterial, and should be rejected.[4]

Who may testify. Testimony as to the fact of the agency, either for the purpose of proving or disproving it or showing the limitations upon the agent's authority, may be given by the principal,[5] or the alleged agent,[6] or by any other person having knowledge of the relation,[7] such as by another agent who has such knowledge.[8]

Where either the principal or agent may sue on a contract if broken, evidence that there is an undisclosed principal is immaterial in an action on the contract by the agent.[9]

[§ 689] **(2) Testimony of Agent—(a) As to Fact of Agency.** The rule that the declarations of an agent are, as against his principal, inadmissible to prove the fact of his agency[10] does not apply to his testimony as a witness on the trial in which such fact is in issue;[11] and consequently the testimony of the agent, unless he is disqualified for some other reason,[12] is competent to establish the fact of his agency,[13] and the existence of facts from

Leonard, 119 Ill. A. 629; Bonner v. Lisenby, 86 Mo. A. 666; Sharp v. Knox, 48 Mo. A. 169; Gibson v. Zeibig, 24 Mo. A. 65; Himes v. Herr, 3 Pa. Super. 124, 39 WklyNC 568; Quale v. Hazel, 19 S. D. 483, 104 NW 215.

[c] **Parol authority.**—Where the fact of agency or the authority of an agent is in dispute, and is not evidenced by a written instrument but rests in parol, any evidence tending to prove the agency is admissible. Robinson v. Greene, 148 Ala. 434, 43 S 797.

[d] **Authority to indorse notes.**—In view of the Negotiable Instrument Act, providing that the signature of a party may be made by a duly authorized agent, without any particular form of appointment, and his authority may be established as in other cases of agency, an agency with authority to indorse notes may be proved as agency is proved in other cases, and by written authority. Scotland County Nat. Bank v. Hohn, 146 Mo. A. 699, 125 SW 539.

3. U. S.—Foster v. Swasey, 9 F. Cas. No. 4,984, 2 Woodb. & M. 217.

Colo.—Gambrill v. Brown Hotel Co., 11 Colo. A. 529, 54 P 1025.

Del.—State v. Foster, 17 Del. 289, 40 A 939.

Ga.—Florida Midland, etc., R. Co. v. Varnedoe, 81 Ga. 175, 7 SE 129.

Ind.—Fouch v. Wilson, 59 Ind. 93; Barnett v. Gluting, 3 Ind. A. 415, 29 NE 154, 927.

Iowa.—Kaufman v. Farley Mfg. Co., 78 Iowa 679, 43 NW 612, 16 AmSR 462; Milligan v. Davis, 49 Iowa 126.

Mo.—Mitchum v. Dunlap, 98 Mo. 418, 11 SW 989; Hull v. Jones, 69 Mo. 587; Franklin v. Globe Mut. L. Ins. Co., 52 Mo. 461; Cox v. St. Louis, etc., R. Co., 111 Mo. A. 394, 85 SW 989; Crosno v. Bowser Milling Co., 106 Mo. A. 236, 80 SW 275; Bonner v. Lisenby, 86 Mo. A. 666; Watkins v. Edgar, 77 Mo. A. 148; Hoppe v. Saylor, 53 Mo. A. 4.

N. H.—Hatch v. Taylor, 10 N. H. 538.

N. Y.—Nutting v. Kings County El. R. Co., 21 App. Div. 72, 47 NYS 327; Field v. Banker, 22 N. Y. Super. 467; Weed v. Carpenter, 10 Wend. 403.

Pa.—Duncan v. Hartman, 143 Pa. 595, 22 A 1099, 24 AmSR 570.

R. I.—Ward v. New England Southern Conference, 27 R. I. 262, 61 A 651.

W. Va.—Fielder v. Camp Constr. Co., 63 W. Va. 459, 60 SE 402.

Wis.—Hansen v. Flint, etc., R. Co., 73 Wis. 346, 41 NW 529, 9 AmSR 791.

See also supra §§ 29–42; infra §§ 708–719.

[a] **An allegation of agency** may be established by evidence showing the existence of the relation of principal and agent in any of the methods recognized by law as establishing the relation. Turner v. Turner, 123 Ga. 5, 50 SE 969, 107 AmSR 76.

[b] **"When an agency is created and conferred by a written instrument,** the nature and extent of the authority given by it must be ascertained from the instrument itself, and cannot be enlarged by parol evidence of the usage of other agents in like cases, for that would be to contradict or vary the terms of the written instrument." Reese v. Medlock, 27 Tex. 120, 123, 84 AmD 611.

4. Gibson v. Snow Hardware Co., 94 Ala. 346, 10 S 304; Rives v. Jordan, 93 Ga. 323, 20 SE 318 (where evidence of general agency in another person was held inadmissible to disprove that plaintiff was at the same time a special agent of the same principal since there is no inconsistency in the coexistence of the two agencies); Huzzard v. Trego, 35 Pa. 9; Guitar v. McGee, (Tex. Civ. A.) 139 SW 622 (holding that, on the issue of an alleged agent's authority to employ defendant, the fact that such agent had directed another to continue the work under a former contract, and had instructed him that if he would go to another place and prevent the erection of a gin there he would give him one hundred dollars was irrelevant).

5. Ala.—Hackney v. Perry, 152 Ala. 626, 44 S 1029 (holding that where, in conversion for the value of cotton alleged to have been delivered by certain ginners to B, the evidence did not show a general agency of plaintiff's son to authorize such delivery, defendants having undertaken to show that the delivery was made on instructions from the son, it was competent for plaintiff to prove that the son had no authority to give such instructions); Western Union Tel. Co. v. Heathcoat, 149 Ala. 623, 43 S 117.

Conn.—Haywood v. Hamm, 77 Conn. 158, 58 A 695.

Ind. T.—American Express Co. v. Lankford, 1 Ind. T. 233, 39 SW 817 [aff 2 Ind. T. 18, 46 SW 183].

Tex.—Heard v. Clegg, (Civ. A.) 144 SW 1145 (testimony of principal that he had no knowledge of proposition at time he wrote letter claimed to have authorized agreement).

W. Va.—Moundsville, etc., R. Co. v. Wilson, 52 W. Va. 647, 44 SE 169.

6. **Testimony of agent** see infra §§ 689–691.

7. Ruthven v. Clarke, 109 Iowa 25, 79 NW 454; Heusinkveld v. St. Paul, etc., Ins. Co., 106 Iowa 229, 76 NW 696; Blowers v. Southern R. Co., 74 S. C. 221, 54 SE 368; Waco Mill, etc., Co. v. Allis-Chalmers Co., 49 Tex. Civ. A. 426, 109 SW 224.

[a] **Testimony of persons who have dealt with the agent** is competent to show the character of the agency. Austrian v. Springer, 94 Mich. 343, 54 NW 50, 34 AmSR 350; Haughton v. Maurer, 55 Mich. 323, 21 NW 426; Gallinger v. Lake Shore Traffic Co., 67 Wis. 529, 30 NW 790.

8. Rice, etc., Malting Co. v. International Bank, 185 Ill. 422, 56 NE 1062 [aff 86 Ill. A. 136]; Fee v. Adams Express Co., 38 Pa. Super. 83 (holding that where it is sought to hold an express company on a contract made by one of its route agents to pay a sum of money to a constable for securing the arrest of thieves who had stolen packages from the company, it is proper to permit the general agent of the company, who had charge of the route agents and knew the extent of their authority, to testify that the route agent had no authority to make such a contract); Campbell v. Prieto, (Tex. Civ. A.) 143 SW 668 (testimony of agent that he authorized another to act).

9. Buffington v. McNally, 192 Mass. 198, 78 NE 309 (holding also that where in an action on a contract plaintiff describes himself merely as agent without further description, defendant's proof of an undisclosed principal is properly excluded, as such addition to plaintiff's name may be treated as a designation only).

10. See infra § 692.

11. U. S.—Joslyn v. Cadillac Auto. Co., 177 Fed. 863, 101 CCA 77.

Colo.—Wales v. Mower, 44 Colo. 146, 96 P 971.

Minn.—Barnesville First Nat. Bank v. St. Anthony, etc., El. Co., 103 Minn. 82, 114 NW 265.

N. Y.—Norden v. Duke, 106 App. Div. 514, 94 NYS 878. Compare American Box Mach. Co. v. Bolnick, 36 Misc. 765, 74 NYS 846 (holding that, where, in an action to recover an amount agreed to be paid as the difference in value in an exchange of personalty, defendant's husband testified that he represented her in the transaction, and there was no other evidence of his agency, under the rule that agency cannot be proven merely by the declarations of the alleged agent the proof of the agency was insufficient to charge defendant).

Wash.—Bender v. Ragan, 53 Wash. 521, 102 P 427.

[a] **A person's direct testimony** that he is the agent of another is not objectionable, as proving the agency by the declarations of the agent. American Tel., etc., Co. v. Kersh, 27 Tex. Civ. A. 127, 66 SW 74.

12. Griswold v. Haas, 145 Mo. A. 578, 122 SW 781.

13. U. S.—Joslyn v. Cadillac Auto. Co., 177 Fed. 863, 101 CCA 77; Ætna Indemn. Co. v. Ladd, 135 Fed. 636, 68 CCA 274 (holding that an agent may testify that he acted for and in behalf of his principal in borrowing money, but such testimony does not bind his principal or prejudice its rights).

Ala.—Western Union Tel. Co. v. Heathcoat, 149 Ala. 623, 43 S 117; Parker v. Bond, 121 Ala. 529, 25 S 898.

Ark.—Dierks Lumber, etc., Co. v. Coffman, 96 Ark. 505, 132 SW 654; Ayer, etc., Tie Co. v. Young, 90 Ark. 104, 117 SW 1080; Beekman Lumber Co. v. Kittrell, 80 Ark. 228, 96 SW 988.

Cal.—Union Constr. Co. v. Western Union Tel. Co., 163 Cal. 298, 125 P 242; McRae v. Argonaut Land, etc., Co., 6 Cal. Unrep. Cas. 145, 54 P 743.

Colo.—Wales v. Mower, 44 Colo. 146, 96 P 971.

Fla.—Flournoy v. Interstate Electric Co., 61 Fla. 216, 55 S 843.

Ga.—Becker v. Donalson, 138 Ga. 634, 75 SE 1122; Hirsh v. Beverly, 125 Ga. 657, 54 SE 678; Great Southern Acc., etc., Co. v. Guthrie, 13 Ga. A. 288, 79 SE 162. See Abel v. Jarratt, 100 Ga. 732, 28 SE 453.

Ill.—Thayer v. Meeker, 86 Ill. 470; Leonard v. Heavner, 171 Ill. A. 188; Phillips v. Poulter, 111 Ill. A. 330; St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 74 Ill. A. 619 [aff 175 Ill. 557, 51 NE 911, 67 AmSR 238].

which the agency may be inferred,[14] at least where the authority was verbally conferred;[15] and to refuse to allow him to testify and be cross-examined is reversible error.[16]

Ind.—Buttz v. Warren Mach. Co., (A.) 103 NE 812.

Iowa.—Fritz v. Chicago Grain, etc., Co., 136 Iowa 699, 114 NW 193; O'Neill v. Wilcox, 115 Iowa 15, 87 NW 742; Van Sickle v. Keith, 88 Iowa 9, 55 NW 42.

Kan.—Jahren v. Palmer, 71 Kan. 841, 79 P 1081; Aultman Thrashing, etc., Co. v. Knoll, 71 Kan. 109, 79 P 1074; French v. Wade, 35 Kan. 391, 11 P 138.

Mass.—Gould v. Norfolk Lead Co., 9 Cush. 338, 57 AmD 50; Rice v. Gove, 22 Pick. 158, 33 AmD 724.

Mich.—De Witt v. Prescott, 51 Mich. 298, 16 NW 656. See also Cleveland Co-op. Stove Co. v. Mallery, 111 Mich. 43, 69 NW 75.

Minn.—Barnesville First Nat. Bank v. St. Anthony, etc., El. Co., 103 Minn. 82, 114 NW 265 (holding that it is competent to call an alleged agent and prove by him facts within his personal knowledge tending to establish the agency).

Mo.—Oil Well Supply Co. v. Metcalf, 174 Mo. A. 555, 160 SW 897; McCloud v. Western Union Tel. Co., 170 Mo. A. 624, 157 SW 101; Griswold v. Haas, 145 Mo. A. 578, 122 SW 781; State v. Henderson, 86 Mo. A. 482; Christian v. Smith, 85 Mo. A. 117; Cape Girardeau v. Fisher, 61 Mo. A. 509.

Mont.—Nyhart v. Pennington, 20 Mont. 158, 50 P 413.

Nebr.—Nostrum v. Halliday, 39 Nebr. 828, 58 NW 429.

N. H.—Clough v. Rockingham County Light, etc., Co., 75 N. H. 84, 71 A 223; Union Hosiery Co. v. Hodgson, 72 N. H. 427, 57 A 384.

N. J.—Colloty v. Schuman, 75 N. J. L. 97, 66 A 933.

N. Y.—Tiernan v. Havens, 162 App. Div. 656, 147 NYS 786; Steuerwald v. Jackson, 123 App. Div. 569, 108 NYS 41; Norden v. Duke, 106 App. Div. 514, 94 NYS 878; Lefkowitz v. Ira, 114 NYS 29. See also Rider-Ericsson Engine Co. v. Fowler, 37 Misc. 810, 76 NYS 903; Appel v. Lipman, 125 NYS 400.

N. C.—Sutton v. Lyons, 156 N. C. 3, 72 SE 4 (holding that agency may be shown by the testimony of the agent under oath); State v. Yellowday, 152 N. C. 793, 67 SE 480; Hill v. Bean, 150 N. C. 436, 64 SE 212 (holding that testimony of a person that he was the agent of others, and as such had charge of land, paid taxes, and collected rents, was competent to prove the agency, it not being proof of agency by declarations of the alleged agent); New Home Sewing Mach. Co. v. Seago, 128 N. C. 158, 38 SE 805.

Oh.—Cox v. Hill, 3 Oh. 411.

Okl.—Whitcomb v. Oller, 41 Okl. 331, 333, 137 P 709 [cit Cyc].

Or.—Spande v. Western Life Indemn. Co., 61 Or. 220, 117 P 973, 122 P 38.

Pa.—Lawall v. Groman, 180 Pa. 532, 37 A 98, 57 AmSR 662; Brown v. Kirk, 26 Pa. Super. 157 (holding that, where, on the trial of an action, it appears that the authority of an agent to act for plaintiff is a question material to the issue, and the court permits the jury to pass upon the question of the existence of such authority, it is error for the court to refuse to permit defendant to examine the agent as to the instructions which he had received from plaintiff).

S. C.—Chiles v. Southern R. Co., 69 S. C. 327, 48 SE 252; Black v. Goodman, 17 S. C. L. 201; Covington v. Bussey, 15 S. C. L. 412.

Tex.—Autrey v. Linn, (Civ. A.) 138 SW 197; Pittsburg Plate Glass Co. v. Roquemore, (Civ. A.) 88 SW 449; American Tel., etc., Co. v. Kersh, 27 Tex. Civ. A. 127, 66 SW 74; Jones v. Hess, (Civ. A.) 48 SW 46.

Vt.—Taplin v. Marcy, 81 Vt. 428, 71 A 72.

Wash.—Singer v. Guy Inv. Co., 60 Wash. 674, 111 P 886 (holding that an agent may testify as to whom he represented in a transaction in issue); Bender v. Ragan, 53 Wash. 521, 102 P 427.

W. Va.—Garber v. Blatchley, 51 W. Va. 147, 41 SE 222.

Wis.—Somers v. Germania Nat. Bank, 152 Wis. 210, 138 NW 713; Smith v. State, 149 Wis. 63, 134 NW 1123.

Wyo.—Oregon Short Line R. Co. v. Blyth, 19 Wyo. 410, 118 P 649, 119 P 875, AnnCas1913E 288.

Eng.—Snee v. Prescot, 1 Atk. 245, 26 Reprint 157; Ilderton v. Atkinson, 7 T. R. 480, 101 Reprint 1087.

See Allison v. Cash, 143 Ky. 679, 137 SW 245; Poore v. Magruber, 24 Gratt. (65 Va.) 197.

[a] **By the rules of the common law** the testimony of an assumed agent is competent to prove the fact of his being such agent. St. John v. McConnell, 19 Mo. 38.

[b] **Where the agent is under oath and subject to cross examination** the rule that an agency cannot be established by an agent does not prevail. Jos. Schlitz Brewing Co. v. Grimmon, 28 Nev. 235, 81 P 43.

[c] **The principal of the rule** that in an action against the principal the authority of the agent may be proved by the agent himself in this: That in any event the witness is indifferent in point of interest, being liable to account with defendant if he received the money as agent, and to plaintiff if he did not so receive it. Rice v. Gove, 22 Pick. (Mass.) 158, 33 AmD 724.

[d] **Where a reasonable inference of the agency has been created** by the alleged principal by permission, recognition, or acquiescence, the testimony of the agent as to the agency is admissible. Smith v. Delaware, etc., Tel., etc., Co., 64 N. J. Eq. 770, 53 A 818 [aff 63 N. J. Eq. 93, 51 A 464].

[e] **Such testimony may involve only a statement of the fact of agency** without going into details as to how the relation was brought about, or as to particular facts on which it rests. Parker v. Bond, 121 Ala. 529, 25 S 898. But see McCluskey v. Minck, 18 Misc. 565, 42 NYS 462 (holding that the testimony of alleged agents that they "acted as his [defendant's] agents," and "had authority . . . to receive and receipt for the goods," is inadmissible to establish their agency); Parker v. Brown, 131 N. C. 264, 42 SE 605 (holding that, where the agency of a contractor to purchase lumber for the owner was disputed, a question asking the agent if he was the agent of the owner for the purchase of the lumber was properly excluded).

[f] **Where a principal brings action against an agent** on a penal bond given to secure a contract, the general agent of the principal, who executed the contract and took the bond, may testify to his agency, since it is direct evidence thereof, and not a declaration. New Home Sewing-Mach. Co. v. Seago, 128 N. C. 158, 38 SE 805.

14. U. S.—Welch v. Hoover, 29 F. Cas. No. 17,368, 5 Cranch C. C. 444.

Ala.—Western Union Tel. Co. v. Heathcoat, 149 Ala. 623, 43 S 117.

Ark.—Quertermous v. Taylor, 62 Ark. 598, 37 SW 229.

Colo.—Fisher v. Denver Nat. Bank, 22 Colo. 373, 45 P 440.

Ga.—Collins v. Lester, 16 Ga. 410.

Ill.—Cadwell v. Meek, 17 Ill. 220; Currie v. Syndicate des Cultivators, etc., 104 Ill. A. 165; St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 74 Ill. A. 619 [aff 175 Ill. 557, 51 NE 911, 67 AmSR 238] (holding that an agency may be proven by the agent himself if he will testify to his employment, or to such a course of conduct or dealings as will justify the presumption of his authority to act and bind his principal).

Ind.—Indianapolis Chair Mfg. Co. v. Swift, 132 Ind. 197, 31 NE 800.

Ind. T.—American Express Co. v. Lankford, 1 Ind. T. 233, 39 SW 817 [aff reh 2 Ind. T. 18, 46 SW 1831].

Iowa.—Joseph Schlitz Brewing Co. v. Barlow, 107 Iowa 252, 77 NW 1031.

Kan.—St. Louis, etc., R. Co. v. Brown, 3 Kan. A. 260, 45 P 118.

Me.—Methuen Co. v. Hayes, 33 Me. 169.

Mo.—Long v. Martin, 152 Mo. 668, 54 SW 473; Joplin v. Freeman, 125 Mo. A. 717, 103 SW 130; Haubelt v. Rea, etc., Mill Co., 77 Mo. A. 672.

Nev.—Jos. Schlitz Brewing Co. v. Grimmon, 28 Nev. 235, 81 P 43.

N. H.—Goodwin v. Union Screw Co., 34 N. H. 378; Kent v. Tyson, 20 N. H. 121.

N. Y.—Brown v. Cone, 80 App. Div. 413, 81 NYS 89 (holding that the testimony of an alleged agent as to the actual transactions between the parties, tending to establish the relation of principal and agent between himself and the principal, is admissible); Lake Erie Commercial Bank v. Norton, 1 Hill 501; Reed v. Marble, 10 Paige 409.

Pa.—McDowell v. Simpson, 3 Watts 129, 27 AmD 338.

Tex.—Missouri, etc., R. Co. v. Kyser, 38 Tex. Civ. A. 355, 87 SW 389; Cunningham v. Mathews, (Civ. A.) 57 SW 1114.

Vt.—Taplin v. Marcy, 81 Vt. 428, 71 A 72.

Wash.—Williams v. Blumenthal, 27 Wash. 24, 67 P 393.

W. Va.—Moundsville, etc., R. Co. v. Wilson, 52 W. Va. 647, 44 SE 169.

Wis.—O'Conner v. Hartford F. Ins. Co., 31 Wis. 160.

Eng.—Matthews v. Haydon, 2 Esp. 509.

[a] **Contract for purchase of land.** —In an action upon a promissory note given for the purchase of land, it was held that the agency of one H to make the contract was proven by his testimony that he was paid by the estate and that the contract was sent to him to be delivered. Dodge v. Tullock, 110 Mich. 480, 68 NW 239.

15. U. S.—Livingston v. Swanwick, 15 F. Cas. No. 8,419, 2 Dall. (Pa.) 300, 1 L. ed. 389.

Cal.—Kast v. Miller, 159 Cal. 723, 115 P 932 (holding that the fact of agency when it rests in parol may be established by the testimony of the agent himself, and his testimony is admissible and competent to prove the agency and to bind his principal thereby).

Ga.—Armour v. Ross, 110 Ga. 403, 35 SE 787.

Iowa.—O'Leary v. German American Ins. Co., 100 Iowa 390, 69 NW 686; Moffit v. Cressler, 8 Iowa 122.

Kan.—Ream v. McElhone, 50 Kan. 409, 31 P 1075; Howe Mach. Co. v. Clark, 15 Kan. 492.

Mass.—Gould v. Norfolk Lead Co., 9 Cush. 338, 57 AmD 50.

N. Y.—Joseph v. Struller, 25 Misc. 173, 54 NYS 162.

Pa.—Miles v. Cook, 1 Grant 58; McGunnagle v. Thornton, 10 Serg. & R. 251.

S. C.—Kean v. Landrum, 72 S. C. 556, 52 SE 421; Connor v. Johnson, 59 S. C. 115, 37 SE 240.

Utah.—McCornick v. Queen of Sheba Gold Min. Co., 23 Utah 71, 63 P 820.

W. Va.—Piercy v. Hedrick, 2 W. Va. 458, 98 AmD 774.

[a] **Every person who makes a contract for another is an agent** within the meaning of the rule. McGunnagle v. Thornton, 10 Serg. & R. (Pa.) 251.

16. Stone v. Cromin, 72 App. Div. 565, 76 NYS 605 (holding that, where, in an action for goods sold, there was no evidence that defendant personally ordered or promised to pay for any of the goods, but there was evi-

To negative agency. It is held likewise that the testimony of the alleged agent is competent to negative the existence of the agency.[17]

[§ 690] **(b) As to Extent of Authority.** Where the powers and duties of the agent are not reduced to writing, his testimony is competent to prove the facts in reference to the nature and extent of his authority,[18] and also the fact that he had no authority to do the act in question,[19] except where the evidence shows that the agent had been held out as possessing such authority.[20]

[§ 691] **(c) Testimony Must Be as to Facts and Not Conclusions.** In receiving the testimony of the alleged agent to prove or disprove the fact of agency, the general rule that a witness must testify to facts and not to conclusions is applicable, and hence it is not competent for the agent to give his opinion or state his conclusion as to the fact of agency;[21] but he may state the facts and circumstances concerning the various transactions between himself and the alleged principal,[22] leaving the court and the jury to determine, under the facts disclosed, whether or not he was such agent.[23]

[§ 692] **(3) Declarations of Agent—(a) As against Principal—aa. General Rule.**[24] The declarations of an alleged agent made to a third person in the absence of the alleged principal,[25] which were not brought to his knowledge or ratified by him,[26] and not supported by other evidence, are not competent against the alleged principal to prove the fact of his agency;[27] and this rule that denies the

dence that her daughter had ordered some goods, which were delivered, it was error to exclude a question asked the daughter whether her mother ever requested, instructed, or directed her to order any goods of plaintiff); Irvin v. Cohen, 109 NYS 169 (holding that, in an action for rent, defended on the ground of fraudulent misrepresentations made by an employee of agents of the landlord, the exclusion of questions to the employee calling for facts relative to his actual duties, in the employment of the agents and the apparent scope of his employment, is error, since the employee is a competent witness as to the facts from which the extent of his authority would appear); Brown v. Kirk, 26 Pa. Super. 157.

17. McFarland v. Lowry, 40 Iowa 467; St. John v. McConnell, 19 Mo. 38; Rope v. Hess, 118 N. Y. 668, 23 NE 128; Cox v. Hill, 3 Oh. 411.

[a] **To prove for whom the assumed agent acted.**—Where it is sought to bind the principal by the acts of a person alleged to be his agent, the principal has the right to prove by the alleged agent for whom he acted as tending to show that the principal was not responsible for his acts. Dowell v. Williams, 33 Kan. 310, 6 P 600.

18. Ark.—Ayer, etc., Tie Co. v. Young, 90 Ark. 104, 117 SW 1080; Liddell v. Sahline, 55 Ark. 627, 17 SW 705.

Cal.—Kast v. Miller, 159 Cal. 723, 115 P 932.

Ill.—Jones v. Blanks, 178 Ill. A. 196.

Ind.—Buttz v. Warren Mach. Co., (A.) 103 NE 812 (holding that the testimony of an alleged agent that he had authority to purchase goods for his principal is sufficient to sustain a finding of authority to purchase).

Iowa.—O'Leary v. German American Ins. Co., 100 Iowa 390, 69 NW 686.

Kan.—Cowles v. Burns, 28 Kan. 32.

Ky.—Peyton v. Old Woolen Mills Co., 122 Ky. 361, 91 SW 719, 28 KyL 1303.

Mo.—Meux v. Haller, 179 Mo. A. 466, 162 SW 688.

Nev.—Jos. Schlitz Brewing Co. v. Grimmon, 28 Nev. 235, 81 P 43.

N. Y.—Flomerfelt v. Dillon, 88 NYS 132. See also Irvin v. Cohen, 109 NYS 169 (employee of agent).

N. D.—Reeves v. Bruening, 13 N. D. 157, 100 NW 241.

Okl.—Whitcomb v. Oller, 41 Okl. 331, 137 P 709.

Pa.—Empire Impl. Mfg. Co. v. Hench, 219 Pa. 135, 67 A 995.

Tex.—Cannel Coal Co. v. Luna, (Civ. A.) 144 SW 721; Autrey v. Linn, (Civ. A.) 138 SW 197; Bybee v. Embree-McLean Carriage Co., (Civ. A.) 135 SW 203 (holding that, where, in an action for the purchase price, the authority of the seller's agent was not shown to be in writing, the agent could testify as to the extent of the authority conferred upon him by his principal); Rainey v. Kemp, 54 Tex. Civ. A. 486, 118 SW 630.

W. Va.—Union Bank, etc., Co. v. Long Pole Lumber Co., 70 W. Va. 558, 74 SE 674, 41 LRANS 663 (holding that an agent is a competent witness as to his authority, and may testify to acts done on behalf of his principal and the principal's knowledge thereof, although the third person is not shown to have had knowledge thereof).

Wis.—Somers v. Germania Nat. Bank, 152 Wis. 210, 138 NW 713.

[a] **Agent's testimony not conclusive.**—In determining the extent of an agency the jury are not concluded by the testimony of the agent, but may consider other facts contrary to such testimony. Majors v. Goodrich, (Tex. Civ. A.) 54 SW 919.

[b] **Incompetent evidence.**—Limitations on the authority of an agent cannot be proved by showing the agent a blank form of commission containing what purports to be by-laws of the principal, and having him state affirmatively that his commission was on a blank like it. Getchell, etc., Lumber, etc., Co. v. Peterson, 124 Iowa 599, 100 NW 550; Getchell, etc., Lumber, etc., Co. v. National Surety Co., (Iowa) 100 NW 1123.

19. Gilliland v. Dunn, 136 Ala. 327, 34 S 25; Robinson v. Ætna F. Ins. Co., 135 Ala. 650, 34 S 18; Cottondale State Bank v. Borroughs Adding Mach. Co., 61 Fla. 143, 54 S 896 (holding that, in an action against a bank for the price of a machine bought by one said to be the agent, testimony of the alleged agent that the bank had not authorized the purchase, nor had they at any time purchased it, was improperly stricken out on motion of plaintiff); Chicasha Cotton Oil Co. v. Lamb, 28 Okl. 275, 114 P 333; Fee v. Adams Express Co., 33 Pa. Super. 83.

[a] **In an action on the case against a principal** for the deceit of an agent the question of intent being material, the agent may testify that in making the alleged false statement he disobeyed instructions. Wachsmuth v. Martini, 45 Ill. A. 244 [aff 154 Ill. 515, 39 NE 129].

20. Knap v. Sacket, 1 Root (Conn.) 501; Owings v. Nicholson, 4 Harr. & J. (Md.) 66.

21. Powers v. New York Headquarters K. C., 146 NYS 193 (holding that the testimony of an alleged agent that he had authority to act for defendant in employing plaintiff was a mere conclusion and not competent proof of such authorization); New York, etc., R. Co. v. Fieback, 32 Oh. Cir. Ct. 728. See generally Evidence [17 Cyc 219 note 90, 220 note 96].

[a] **Where authority of an agent is called in question** it is error to permit the agent to testify as to his opinion of his authority, as the question is not one of the witness' opinion as to the authority but what the authority in fact was. Keane v. Pittsburg Lead Min. Co., 17 Ida. 179, 105 P 60; New York Cent., etc., R. Co. v. Deer Creek Lumber Co., 49 Pa. Super. 453 (holding that, if an agent's authority to make a contract is disputed by his alleged principal, the latter will not be permitted to ask the agent whether he had authority to make any such contract).

22. De Witt v. Prescott, 51 Mich. 298, 16 NW 656; McCornick v. Queen of Sheba Gold Min., etc., Co., 23 Utah 71, 63 P 820.

23. McCornick v. Queen of Sheba Gold Min., etc., Co., 23 Utah 71, 63 P 820.

24. **Declarations and admissions of agent** as evidence see generally Evidence [16 Cyc 1003 et seq].

25. Ala.—Eubanks v. Anniston Mercantile Co., 171 Ala. 488, 55 S 98.

Cal.—Union Constr. Co. v. Western Union Tel. Co., 163 Cal. 298, 125 P 242.

Fla.—Martin v. Johnson, 54 Fla. 487, 44 S 949.

Ind.—Blair-Baker Horse Co. v. Columbus First Nat. Bank, 164 Ind. 77, 72 NE 1027.

Mo.—Murphy v. Mechanics', etc., Town Mut. F. Ins. Co., 33 Mo. A. 481.

N. Y.—Sanford v. Fountain, 49 Misc. 301, 99 NYS 234; Mitchell v. Gennis, 124 NYS 996.

26. Fla.—Orange Belt R. Co. v. Cox, 44 Fla. 645, 33 S 403.

Iowa.—Joseph Schlitz Brewing Co. v. Barlow, 107 Iowa 252, 77 NW 1031.

Nebr.—Blanke Tea, etc., Co. v. Rees Printing Co., 70 Nebr. 510, 97 NW 627.

N. D.—Q. W. Loverin-Browne Co. v. Buffalo Bank, 7 N. D. 569, 75 NW 923.

Or.—Harding v. Oregon-Idaho Co., 57 Or. 34, 110 P 412 (holding that the authority of an agent cannot be shown by his own statements unless it is shown that the principal knowingly acquiesced therein).

Pa.—Kroll v. Philadelphia, 240 Pa. 131, 87 A 292; Slease v. Naysmith, 14 Pa. Super. 134.

Tex.—Cooper v. Sawyer, 31 Tex. Civ. A. 620, 73 SW 992.

Va.—Hoge v. Turner, 96 Va. 624, 32 SE 291.

[a] **Illustration.**—Where an agent was sent by his principal with certain goods to another city where he represented himself as the general agent of another principal, and a creditor of the latter attached the goods as those of the alleged principal, such representations, in the absence of a showing that the owner of the goods knew of or acquiesced in them, could not be shown to disprove evidence of the true owner that he was entitled to possession of the goods. Spies v. Stein, 70 Nebr. 641, 97 NW 752.

[b] **Declarations of agency made in the presence of other known agents** are admissible to establish the agency. Southern Express Co. v. Platten, 93 Fed. 936, 36 CCA 46.

27. U. S.—W. K. Niver Coal Co. v. Piedmont, etc., Coal Co., 136 Fed. 179, 69 CCA 195; Union Guaranty, etc., Co. v. Robinson, 79 Fed. 420, 24 CCA 650; Empire State Nail Co. v. Faulkner, 55 Fed. 819 [aff 67 Fed. 913, 15 CCA 69].

Ala.—Eubanks v. Anniston Mercantile Co., 171 Ala. 488, 55 S 98; Crone

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competency, as against an alleged principal, of | declarations of the alleged agent made to a

v. Long, 159 Ala. 487, 49 S 227; Cohn, etc., Lumber Co. v. Robbins, 159 Ala. 289, 48 S 853; Union Naval Stores Co. v. Pugh, 156 Ala. 369, 47 S 48; Crone v. Long, 150 Ala. 487, 49 S 227; Gambill v. Fuqua, 148 Ala. 448, 42 S 735; Smiley v. Hooper, 147 Ala. 646, 41 S 660; Gould v. Cates Chair Co., 147 Ala. 629, 41 S 675; Eagle Iron Co. v. Baugh, 147 Ala. 613, 41 S 663; Foxworth v. Brown, 120 Ala. 59, 24 S 1; Learned-Letcher Lumber Co. v. Ohatchie Lumber Co., 111 Ala. 453, 17 S 934; Postal Tel. Cable Co. v. Brantley, 107 Ala. 683, 18 S 321; Postal Tel. Cable Co. v. Lenoir, 107 Ala. 640, 18 S 266; Williamson v. Tyson, 105 Ala. 644, 17 S 336; Gibson v. Snow Hardware Co., 94 Ala. 346, 10 S 304; Espallo v. Richard, 94 Ala. 159, 10 S 137; Tanner, etc., Engine Co. v. Hall, 86 Ala. 305, 5 S 584; Wailes v. Neal, 65 Ala. 59; Galbreath v. Cole, 61 Ala. 139; Rhodes v. Lowry, 54 Ala. 4; Holman v. Norfolk Bank, 12 Ala. 369; Strawbridge v. Spann, 8 Ala. 820; Alexander v. Alabama Western R. Co., 179 Ala. 480, 60 S 295.

Ark.—Bell v. State, 93 Ark. 600, 125 SW 1020; Latham v. Ft. Smith First Nat. Bank, 92 Ark. 315, 122 SW 992; Turner v. Huff, 46 Ark. 222, 55 AmR 580; Howcott v. Kilbourn, 44 Ark. 213; Chrisman v. Carney, 33 Ark. 316; Holland v. Rogers, 33 Ark. 251.

Cal.—Brown v. Spencer, 163 Cal. 589, 126 P 493; Kast v. Miller, 159 Cal. 723, 115 P 932 (holding that declarations in pais by one assuming to act as agent are incompetent to establish the fact of agency); Peterson v. Stockton, etc., R. Co., 134 Cal. 244, 66 P 304; Ferris v. Baker, 127 Cal. 520, 59 P 937; Swinnerton v. Argonaut Land, etc., Co., 112 Cal. 375, 44 P 719; Smith v. Liverpool, etc., Ins. Co., 107 Cal. 432, 40 P 540; Hubback v. Ross, 96 Cal. 426, 31 P 353; Peo. v. Dye, 75 Cal. 108, 16 P 537; Savings, etc., Soc. v. Gerichten, 64 Cal. 520, 2 P 405; Grigsby v. Clear Lake Water Works, 40 Cal. 396; Santa Cruz Butchers' Union v. I. X. L. Lime Co., 5 Cal. Unrep. Cas. 495, 46 P 382; Pease v. Fink, 3 Cal. A. 371, 85 P 657.

Colo.—Mulford v. Rowland, 45 Colo. 172, 100 P 603; Castner v. Rinne, 31 Colo. 256, 72 P 1052; Fisher v. Denver Nat. Bank, 22 Colo. 373, 45 P 440; Robert E. Lee Silver Min. Co. v. Englebach, 18 Colo. 106, 31 P 771; Union Coal Co. v. Edman, 16 Colo. 438, 27 P 1060; Omaha, etc., Smelting, etc., Co. v. Tabor, 13 Colo. 41, 21 P 925, 16 AmSR 185, 5 LRA 236; Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 565; Western Inv., etc., Co. v. Denver First Nat. Bank, 23 Colo. A. 143, 128 P 476; Burson v. Bogart, 18 Colo. A. 449, 72 P 605; Murphy v. Gumaer, 12 Colo. A. 472, 55 P 951.

Conn.—Coe v. Kutinsky, 82 Conn. 685, 74 A 1065; Barlow Bros. Co. v. Parsons, 73 Conn. 696, 49 A 205; Builders' Supply Co. v. Cox, 68 Conn. 380, 36 A 797 (holding that evidence of directions given plaintiff by one whom he had seen in the store of defendant was inadmissible to bind defendant in the absence of any evidence of agency); Fitch v. Chapman, 10 Conn. 8; Plant v. McEwan, 4 Conn. 544.

Del.—Oldham v. Cooper, 5 Del. Ch. 151.

Fla.—Florida East Coast R. Co. v. Lassiter, 58 Fla. 234, 50 S 428, 19 AnnCas 192; Martin v. Johnson, 54 Fla. 487, 44 S 949; Griffin v. Societe Anonyme la Floridienne, 53 Fla. 801, 44 S 342; Orange Belt R. Co. v. Cox, 44 Fla. 645, 33 S 403.

Ga.—Georgia Steel Co. v. White, 136 Ga. 492, 71 SE 890; Southern R. Co. v. Grant, 136 Ga. 303, 71 SE 422, AnnCas1912C 472; Becker v. Donalson, 133 Ga. 864, 67 SE 92; Franklin County Lumber Co. v. Grady County, 133 Ga. 557, 66 SE 264; Indiana Fruit Co. v. Sandlin, 125 Ga. 222, 54 SE 65; Hood v. Hendrickson, 122 Ga. 795, 50 SE 994; Brooke v. Lowe, 122 Ga. 358, 50 SE 146; Patrick v. Cobb, 122 Ga. 80, 49 SE 806; Thomas v. Bagley, 119 Ga. 778, 47 SE 177; Americus Oil Co. v. Gurr, 114 Ga. 624, 40 SE 780; Almand v. Equitable Mortg. Co., 113 Ga. 983, 39 SE 421; Amicalola Marble, etc., Co. v. Coker, 111 Ga. 872, 36 SE 950; Massillon Engine, etc., Co. v. Akerman, 110 Ga. 570, 35 SE 635; Armour v. Ross, 110 Ga. 403, 35 SE 787; Jones v. Harrell, 110 Ga. 373, 35 SE 690; Grand Rapids School-Furniture Co. v. Morel, 110 Ga. 321, 35 SE 312; Harris Loan Co. v. Elliott, etc., Book-Typewriter Co., 110 Ga. 302, 34 SE 1003; Alger v. Turner, 105 Ga. 178, 31 SE 423; Wynne v. Stevens, 101 Ga. 808, 28 SE 1000; Abel v. Jarratt, 100 Ga. 732, 28 SE 453; Holland v. Van Bell, 89 Ga. 223, 15 SE 302; Small v. Williams, 87 Ga. 681, 13 SE 589; Florida, etc., R. Co. v. Varnedoe, 81 Ga. 175, 7 SE 129; Colquitt v. Thomas, 8 Ga. 253; Great Southern Acc., etc., Co. v. Guthrie, 13 Ga. A. 288, 79 SE 162; Carter v. Pembroke Nat. Bank, 11 Ga. A. 479, 75 SE 824; Michigan Mut. L. Ins. Co. v. Parker, 10 Ga. A. 697, 73 SE 1096; Johnson County Sav. Bank v. Richardson, 9 Ga. A. 466, 71 SE 757; Heitmann v. Savannah Commercial Bank, 7 Ga. A. 740, 68 SE 51; Bernstein v. Koken Barber's Supply Co., 1 Ga. A. 445, 57 SE 1017.

Ill.—Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 26 NE 640, 25 AmSR 401; Proctor v. Tows, 115 Ill. 138, 3 NE 569; Erie, etc., Despatch v. Cecil, 112 Ill. 180; Reynolds v. Ferree, 86 Ill. 570; Whiteside v. Margarel, 51 Ill. 507; Maxey v. Heckethorn, 44 Ill. 437; Chicago, etc., R. Co. v. Fox, 41 Ill. 106; Rawson v. Curtiss, 19 Ill. 456; Leonard v. Heavner, 171 Ill. A. 188; Elevator Safety Device Co. v. Brown-Ketcham Iron Works, 153 Ill. A. 313; Sonnenschein v. Max Malter Co., 144 Ill. A. 183; Currie v. Syndicate des Cultivators des Oignons a'Fleur, 104 Ill. A. 165; McClure v. Osborne, 86 Ill. A. 465; Marsh v. French, 82 Ill. A. 76; Cleveland, etc., R. Co. v. Jenkins, 75 Ill. A. 17; Mann v. Sodakat, 66 Ill. A. 393; Schoenhofen Brewing Co. v. Wengler, 57 Ill. A. 184; Miller v. Carithers, 52 Ill. A. 86; Boyd v. Jennings, 46 Ill. A. 290; Fairbank Canning Co. v. Weill, 35 Ill. A. 366; Porter v. Robertson, 34 Ill. A. 74; Osgood v. Pacey, 23 Ill. A. 116.

Ind.—International Bldg., etc., Assoc. v. Watson, 158 Ind. 508, 64 NE 23; Johnston Harvester Co. v. Bartley, 81 Ind. 406; Breckenridge v. McAfee, 54 Ind. 141; Coon v. Curley, 49 Ind. 199; Columbus, etc., R. Co. v. Powell, 40 Ind. 37; Wabash, etc., Canal v. Bledsoe, 5 Ind. 133; Broadstreet v. Hall, 32 Ind. A. 122, 69 NE 415; Foss-Schneider Brewing Co. v. McLaughlin, 5 Ind. A. 415, 31 NE 838.

Iowa.—Grant v. Humerick, 123 Iowa 571, 94 NW 510; Mentzer v. Sargeant, 115 Iowa 527, 88 NW 1068; Heusinkveld v. St. Paul, etc., Ins. Co., 106 Iowa 229, 76 NW 696; Kelley v. Andrews, 102 Iowa 119, 71 NW 251; Whitam v. Dubuque, etc., R. Co., 96 Iowa 737, 65 NW 403; Cottrell v. Wheeler, 89 Iowa 754, 57 NW 433; Butler v. Chicago, etc., R. Co., 87 Iowa 206, 54 NW 208; Sax v. Davis, 71 Iowa 406, 32 NW 403; Wood Mowing Mach. Co. v. Crow, 70 Iowa 340, 30 NW 609; Bigler v. Fay, 68 Iowa 687, 28 NW 17; Clanton v. Des Moines, etc., R. Co., 67 Iowa 350, 25 NW 277; McPherrin v. Jennings, 66 Iowa 622, 24 NE 242; Philp v. Covenant Mut. Ben. Assoc., 62 Iowa 633, 17 NW 903; Renwick v. Bancroft, 56 Iowa 527, 9 NW 367; Graul v. Strutzel, 53 Iowa 712, 6 NW 119, 36 AmR 250; Wiggins v. Leonard, 9 Iowa 194; Moffitt v. Cressler, 8 Iowa 122.

Kan.—Goodyear v. Williams, 73 Kan. 192, 85 P 300; Hutchinson Wholesale Grocery Co. v. McDonald, 71 Kan. 861, 80 P 950; Jahren v. Palmer, 71 Kan. 841, 79 P 1081; Wichita Fourth Nat. Bank v. Frost, 70 Kan. 480, 78 P 825; Richards v. Newstifter, 70 Kan. 350, 78 P 824; Clark v. Folscroft, 67 Kan. 446, 73 P 86; Missouri Pac. R. Co. v. Johnson, 55 Kan. 344, 40 P 641; Leu v. Mayer, 52 Kan. 419, 34 P 969; Donaldson v. Everhardt, 50 Kan. 718, 32 P 405; Ream v. McElhone, 50 Kan. 409, 31 P 1075; St. Louis, etc., R. Co. v. Kinman, 49 Kan. 627, 31 P 126; McCormick v. Roberts, 36 Kan. 552, 13 P 827; French v. Wade, 35 Kan. 391, 11 P 138; Missouri Pac. R. Co. v. Stults, 31 Kan. 752, 3 P 522; Howe Mach. Co. v. Clark, 15 Kan. 492; Streeter v. Poor, 4 Kan. 412; Swofford Bros. Dry Goods Co. v. Berkowitz, 7 Kan. A. 24, 51 P 796; St. Louis, etc., R. Co. v. Brown, 3 Kan. A. 260, 45 P 118.

Ky.—Conley v. Mayo, 157 Ky. 445, 163 SW 243; Louisville, etc., R. Co. v. White, 152 Ky. 463, 153 SW 1199; Louisville, etc., R. Co. v. Byrley, 152 Ky. 35, 153 SW 36; Crenshaw v. Ware, 148 Ky. 196, 146 SW 426; Baltimore, etc., R. Co. v. Clift, 142 Ky. 573, 134 SW 917; Hensley v. McDonald, 108 SW 362, 32 KyL 1333; Gragg v. Home Ins. Co., 107 SW 321, 32 KyL 988; Edmiston v. Hurley, 99 SW 259, 30 KyL 557; Payton v. Old Woolen Mills Co., 91 SW 719, 28 KyL 1303; Dieckman v. Weirich, 73 SW 1119, 24 KyL 2340.

La.—Lafourche Transp. Co. v. Pugh, 52 La. Ann. 1517, 27 S 958; State v. Harris, 51 La. Ann. 1105, 26 S 64; Dawson v. Landreaux, 29 La. Ann. 363.

Me.—Bennett v. Talbot, 90 Me. 229, 38 A 112; Eaton v. Granite State Provident Assoc., 89 Me. 58, 35 A 1015.

Md.—Wilson v. Kelso, 115 Md. 162, 80 A 895.

Mass.—Sylvester v. New York, etc., R. Co., 217 Mass. 148, 104 NE 437; Ennis v. Wright, 217 Mass. 40, 104 NE 430; Rolfe v. Tufts, 216 Mass. 563, 104 NE 341; Nowell v. Chipman, 170 Mass. 340, 49 NE 631; Bowker v. Delong, 141 Mass. 315, 4 NE 834; Richmond Iron Works v. Hayden, 132 Mass. 190; Baker v. Gerrish, 14 Allen 201; Haney v. Donnelly, 12 Gray 361; McGregor v. Wait, 10 Gray 72, 69 AmD 305; Mussey v. Beecher, 3 Cush. 511; Hart v. Waterhouse, 1 Mass. 433.

Mich.—Logan v. Lenawee County Agricultural Soc., 156 Mich. 537, 121 NW 485; Superior Drill Co. v. Carpenter, 150 Mich. 262, 114 NW 67; McPherson v. Pinch, 119 Mich. 36, 77 NW 321; Fontaine Crossing, etc., Co. v. Rauch, 117 Mich. 401, 75 SW 1063; Coldwater Nat. Bank v. Buggie, 117 Mich. 416, 75 NW 1057; Somerville v. Wabash R. Co., 109 Mich. 294, 67 NW 320; Hirschmann v. Iron Range, etc., R. Co., 97 Mich. 384, 56 NW 842; Davis v. Kneale, 97 Mich. 72, 56 NW 220; Swanstrom v. Muskegon Impr. Co., 91 Mich. 367, 51 NW 941; Henneberger v. Matter, 88 Mich. 396, 50 NW 369; Three Rivers Nat. Bank v. Gilchrist, 83 Mich. 253, 47 NW 104; Ironwood Store Co. v. Harrison, 75 Mich. 197, 42 NW 808; McCammon v. Detroit, etc., R. Co., 66 Mich. 442, 33 NW 728; Bacon v. Johnson, 56 Mich. 182, 22 NW 276; Kornemann v. Monaghan, 24 Mich. 36; Hatch v. Squires, 11 Mich. 185.

Minn.—Heffernan v. Whittlesey, 148 NW 63; Halverson v. Chicago, etc., R. Co., 57 Minn. 142, 58 NW 871; Larson v. Lombard Inv. Co., 51 Minn. 141, 53 NW 179; Lowry v. Harris, 12 Minn. 255; Sencerbox v. McGrade, 6 Minn. 484; Woodbury v. Larned, 5 Minn. 339.

Miss.—Sumrall v. Kitselman, 101 Miss. 783, 58 S 594 (holding that the statement of an agent has no probative value as establishing his agency); Therrell v. Ellis, 83 Miss. 494, 35 S 826; Memphis, etc., R. Co. v. Cocke, 64 Miss. 713, 2 S 495; Kinnare v. Gregory, 55 Miss. 612.

Mo.—National Bank of Commerce v. Morris, 125 Mo. 343, 28 SW 602; Salmon Falls Bank v. Leyser, 116 Mo. 51, 22 SW 504; Waverly Timber, etc.,

third person in the absence of the alleged principal is particularly applicable where the alleged

Co. v. St. Louis Cooperage Co., 112 Mo. 383, 20 SW 566; Mitchum v. Dunlap, 98 Mo. 418, 11 SW 989; Caldwell v. Henry, 76 Mo. 254; Peck v. Ritchey, 66 Mo. 114; Sumner v. Saunders, 51 Mo. 89; Craighead v. Wells, 21 Mo. 404; Meux v. Haller, 179 Mo. A. 466, 162 SW 688; Oil Well Supply Co. v. Metcalf, 174 Mo. A. 555, 160 SW 897; Mitchell v. Samford, 149 Mo. A. 72, 130 SW 99; Griswold v. Haas, 145 Mo. A. 578, 122 SW 781; Handlan v. Miller, 143 Mo. A. 101, 122 SW 751; Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013; Waters-Pierce Oil Co. v. Jackson Junior Zinc Co., 98 Mo. A. 324, 73 SW 272; State v. Henderson, 86 Mo. A. 482; Christian v. Smith, 85 Mo. A. 117; Murphy v. Mechanics', etc., Town Mut. F. Ins. Co., 83 Mo. A. 481; Lowry v. Farmington Prospecting, etc., Co., 65 Mo. A. 266; Diel v. Missouri Pac. R. Co., 37 Mo. A. 454; Farrar v. Kramer, 5 Mo. A. 167; Lindsay v. Singer Mfg. Co., 4 Mo. A. 571.

Nebr.—Warner v. Sohn, 86 Nebr. 519, 125 NW 1072, 21 AnnCas 427 [aff 85 Nebr. 571, 123 NW 1054]; Fitzgerald v. Kimball Bros. Co., 76 Nebr. 236, 107 NW 227; Spies v. Stein, 70 Nebr. 641, 97 NW 752; C. F. Blanke Tea, etc., Co. v. Rees Printing Co., 70 Nebr. 510, 97 NW 627; Norberg v. Plummer, 58 Nebr. 410, 78 NW 708; Anheuser-Busch Brewing Assoc. v. Murray, 47 Nebr. 627, 66 NW 635; Richardson v. Nuckolls County School Dist. No. 11, 45 Nebr. 777, 64 NW 218; Burke v. Frye, 44 Nebr. 223, 62 NW 476; Nostrum v. Halliday, 39 Nebr. 828, 58 NW 429; Stoll v. Sheldon, 13 Nebr. 207, 13 NW 201.

N. H.—Clough v. Rockingham County Light, etc., Co., 75 N. H. 84, 71 A 223; Wendell v. Abbott, 45 N. H. 349.

N. J.—Schweitzer v. St. Leo's Catholic Church, 78 A 400; Yoshimi v. U. S. Express Co., 78 N. J. L. 281, 73 A 45; Nicholas v. Oram, 77 N. J. L. 220, 71 A 54; Standard Oil Co. v. Linol Co., 75 N. J. L. 294, 68 A 174; Ryle v. Manchester Bldg., etc., Assoc., 74 N. J. L. 840, 67 A 87; Brounfield v. Denton, 72 N. J. L. 235, 61 A 378; Pederson v. Kiensel, 71 N. J. L. 525, 58 A 1088; Smith v. Delaware, etc., Tel. etc., Co., 63 N. J. Eq. 93, 51 A 464 [aff 64 N. J. Eq. 770, 53 A 818]; Gifford v. Landrine, 37 N. J. Eq. 127 [aff 37 N. J. Eq. 628].

N. M.—Kirchner v. Laughlin, 5 N. M. 365, 23 P 175.

N. Y.—Snook v. Lord, 56 N. Y. 605; Marvin v. Wilber, 52 N. Y. 270; Starin v. Genoa, 23 N. Y. 439; Tiernan v. Havens, 162 App. Div. 656, 147 NYS 786; Stone v. U. S. Title Guaranty, etc., Co., 159 App. Div. 679, 144 NYS 849; Berry v. No. 1465 Broadway Co., 148 App. Div. 159, 132 NYS 1050; Joseph v. Platt, 130 App. Div. 478, 114 NYS 1065; Weltman v. Kotlar, 124 App. Div. 494, 108 NYS 952; Steuerwald v. Jackson, 123 App. Div. 569, 108 NYS 41; Shesler v. Patton, 114 App. Div. 846, 100 NYS 286; Wickham v. Lehigh Valley R. Co., 85 App. Div. 182, 83 NYS 146; Legnard v. Standard L., etc., Ins. Co., 81 App. Div. 320, 81 NYS 516; Leary v. Albany Brewing Co., 77 App. Div. 6, 79 NYS 130; Le Valley v. Overacker, 64 App. Div. 612, 72 NYS 12; Buttling v. Hatton, 48 App. Div. 577, 62 NYS 899; Booth v. Newton, 46 App. Div. 175, 61 NYS 727; Patten v. Climax Quick Tanning Co., 40 App. Div. 607, 57 NYS 758; Lyon v. Brown, 31 App. Div. 67, 52 NYS 531; Wakefield Rattan Co. v. Tappen, 80 Hun 219, 30 NYS 38; Bowen v. Powell, 1 Lans. 1; Howard v. Norton, 65 Barb. 161; Williamson Co. v. Cooper, 49 Misc. 551, 98 NYS 842; Sanford v. Fountain, 49 Misc. 301, 99 NYS 234; Wise v. International Soc., 37 Misc. 871, 76 NYS 997; American Box Mach. Co. v. Bolnick, 36 Misc. 765, 74 NYS 846; Moore v. Rankin, 33 Misc. 749, 67 NYS 179; Reid v. Horn, 25 Misc. 523, 54 NYS 1042; Roberge v. Monheimer, 21 Misc. 491, 47 NYS 655; McCluskey v. Minck, 18 Misc. 565, 42 NYS 462; Willis Cab, etc., Co. v. General Acc., etc., Assur. Corp., 136 NYS 100; Van Damm v. New York Cent. Storage Co., 132 NYS 394; Cooper Griffin Co. v. Wiegand, 123 NYS 947; Buskirk v. Talcott, 96 NYS 714; Excelsior Consumers' Cigar Co. v. Stracherjan, 87 NYS 489; Ellis v. Messervie, 11 Paige 467 [aff 5 Den. 640].

N. C.—Sutton v. Lyons, 156 N. C. 3, 72 SE 4; State v. Yellowday, 152 N. C. 793, 67 SE 480; McCormick v. Williams, 152 N. C. 638, 68 SE 138; Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 SE 816, 67 LRA 455; Brittain v. Westhall, 135 N. C. 492, 47 SE 616; Smith v. Browne, 132 N. C. 365, 43 SE 915; Parker v. Brown, 131 N. C. 264, 42 SE 605; Summerrow v. Baruch, 128 N. C. 202, 38 SE 861; Gates v. Max, 125 N. C. 139, 34 SE 266; Taylor v. Hunt, 118 N. C. 168, 24 SE 359; Gilbert v. James, 86 N. C. 244; Francis v. Edwards, 77 N. C. 271; Grandy v. Ferebee, 68 N. C. 356; Royal v. Sprinkle, 46 N. C. 505.

N. D.—Loverin-Browne Co. v. Buffalo Bank, 7 N. D. 569, 75 NW 923; Gordon v. Vermont L. & T. Co., 6 N. D. 454, 71 NW 556; Moore v. Booker, 4 N. D. 543, 62 NW 607; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 NW 924.

Oh.—Williams v. Stearns, 59 Oh. St. 28, 51 NE 439; Day v. Forest City R. Co., 27 Oh. Cir. Ct. 60; Sessions v. Isabel, 14 OhS&CP 491.

Okl.—Whitcomb v. Oller, 41 Okl. 331, 333, 137 P 709 [cit Cyc]; Smith, etc., Co. v. Raines Dry Goods Co., 37 Okl. 39, 130 P 133; Chickasha Cotton Oil Co. v. Lamb, 28 Okl. 275, 114 P 333.

Or.—Aerne v. Gostlow, 60 Or. 113, 118 P 277; Spande v. Western Life Indemn. Co., 61 Or. 220, 117 P 973, 122 P 38; Sloan v. Sloan, 46 Or. 36, 78 P 893; Wicktorwitz v. Farmers' Ins. Co., 31 Or. 569, 51 P 75; Connell v. McLaughlin, 28 Or. 230, 42 P 218.

Pa.—Kroll v. Philadelphia, 240 Pa. 131, 87 A 292 (as against principal's grantee); Singer Mfg. Co. v. Christian, 211 Pa. 534, 60 A 1087; Stewart v. Climax Road Mach. Co., 200 Pa. 611, 50 A 1119; Harvey v. Schuylkill Trust Co., 199 Pa. 421, 49 A 277; Lawall v. Groman, 180 Pa. 532, 37 A 98, 57 AmSR 662; Du Bois Deposit Bank v. Kuntz, 175 Pa. 432, 34 A 797; Long v. North British, etc., Ins. Co., 137 Pa. 335, 20 A 1014, 21 AmSR 879; Pepper v. Cairns, 133 Pa. 114, 19 A 336, 19 AmSR 625, 7 LRA 750; Baltimore, etc., Relief Assoc. v. Post, 122 Pa. 579, 15 A 885, 9 AmSR 147, 2 LRA 44; Central Pennsylvania Tel., etc., Co. v. Thompson, 112 Pa. 118, 3 A 439; Writing v. Lake, 91 Pa. 349; Woodwell v. Brown, 44 Pa. 121; Moore v. Patterson, 28 Pa. 505; Evans v. Owens, 3 Pennyp. 228; Chambers v. Davis, 3 Whart. 40; Dodge v. Williams, 47 Pa. Super. 302; Fee v. Adams Express Co., 38 Pa. Super. 83; Louis Bergdoll Brewing Co. v. Babe, 33 Pa. Super. 490; Bellman v. Pittsburg, etc., R. Co., 31 Pa. Super. 389; Slease v. Naysmith, 14 Pa. Super. 134; Creighton v. Keith, 16 Phila. 130.

S. C.—Seneca Co. v. Crenshaw, 89 S. C. 470, 71 SE 1081; Smith v. Southern R. Co., 89 S. C. 415, 71 SE 989; Woodward v. Cave, 79 S. C. 578, 61 SE 82; Ehrhardt v. Breeland, 57 S. C. 142, 35 SE 537; New England Mortg. Security Co. v. Baxley, 44 S. C. 81, 21 SE 444, 885; Martin v. Suber, 39 S. C. 525, 18 SE 125; Renneker v. Warren, 17 S. C. 139; Smith v. Asbell, 33 S. C. L. 141.

S. D.—J. I. Case Threshing Mach. Co. v. Gidley, 28 S. D. 101, 132 NW 711 (holding that testimony that parties not before the court declared that they were agents of plaintiff is not admissible).

Tenn.—Floyd v. Woods, 4 Yerg. 165; Locke v. Nashville Interurban R. Co., 2 Tenn. Civ. A. 1.

Tex.—Waller v. Leonard, 89 Tex. 507, 35 SW 1045; Noel v. Denman, 76 Tex. 306, 13 SW 318; Coleman v. Colgate, 69 Tex. 88, 6 SW 553; Latham v. Pledger, 11 Tex. 439; Kohlberg v. Awbrey, (Civ. A.) 167 SW 828; Bray-Robinson-Curry Woolen Mills v. Walker, (Civ. A.) 165 SW 107; Sargent v. Barnes, (Civ. A.) 159 SW 366; Sullivan v. Ramsey, (Civ. A.) 155 SW 580; Autrey v. Linn, (Civ. A.) 138 SW 197; Madeley v. Kellam, (Civ. A.) 135 SW 659, 660 [quot Cyc]; Stockton v. Crow, (Civ. A.) 132 SW 952; Higley v. Dennis, 40 Tex. Civ. A. 133, 88 SW 400; St. Louis Southwestern R. Co. v. McIntyre, 36 Tex. Civ. A. 399, 82 SW 346; Aultman, etc., Mach. Co. v. Cappleman, 36 Tex. Civ. A. 523, 81 SW 1243; Eastland v. Maney, 36 Tex. Civ. A. 147, 81 SW 574; Tabet v. Powell, (Civ. A.) 78 SW 997; Dyer v. Winston, 33 Tex. Civ. A. 412, 77 SW 227; Cooper v. Sawyer, 31 Tex. Civ. A. 620, 73 SW 992; McLane v. Maurer, 28 Tex. Civ. A. 75, 66 SW 693, 1108; Ft. Worth Live-Stock Commn. Co. v. Hitson, (Civ. A.) 46 SW 915; Owen v. New York, etc., Land Co., 11 Tex. Civ. A. 284, 32 SW 189; Page v. Cortez, (Civ. A.) 31 SW 1071; Western Industrial Co. v. Chandler, (Civ. A.) 31 SW 314; Brady v. Nagle, (Civ. A.) 29 SW 943; White v. San Antonio Waterworks Co., 9 Tex. Civ. A. 465, 29 SW 252; Mills v. Berla, (Civ. A.) 23 SW 910; Ft. Worth, etc., R. Co. v. Johnson, 2 Tex. A. Civ. Cas. § 232; Conrad v. Walsh, 1 Tex. A. Civ. Cas. § 229.

Utah.—Surbaugh v. Butterfield, 140 P 757; Cronquist v. Smith, 42 Utah 575, 133 P 130; Witherow v. Mystic Toilers, 42 Utah 360, 130 P 58.

Vt.—Taplin v. Harris, 90 A 956; Montpelier First Nat. Bank v. Bertoli, 87 Vt. 297, 89 A 359; Prouty v. Nichols, 82 Vt. 181, 72 A 988, 137 AmSR 996; Sias v. Consolidated Lighting Co., 73 Vt. 35, 50 A 554; Dickerman v. Quincy Mut. F. Ins. Co., 67 Vt. 609, 32 A 489.

Va.—Hoge v. Turner, 96 Va. 624, 32 SE 291; Fisher v. White, 94 Va. 236, 26 SE 573; Poore v. Magruder, 24 Gratt. (63 Va.) 197.

Wash.—Lemcke v. Funk, 78 Wash. 460, 139 P 234; Gregory v. Loose, 19 Wash. 599, 54 P 33; Comegys v. American Lumber Co., 8 Wash. 661, 36 P 1087.

W. Va.—State v. Tygart Valley Brewing Co., 81 SE 974; Thompson v. Laboringman's Mercantile, etc., Co., 60 W. Va. 42, 53 SE 908; Garber v. Blatchley, 51 W. Va. 147, 41 SE 222; Rosendorf v. Poling, 48 W. Va. 621, 37 SE 555; Williamson v. Cline, 40 W. Va. 194, 20 SE 917.

Wis.—Somers v. Germania Nat. Bank, 152 Wis. 210, 138 NW 713; McCune v. Badger, 126 Wis. 186, 105 NW 667; Roebke v. Andrews, 26 Wis. 311; Davis v. Henderson, 20 Wis. 520; McDonell v. Dodge, 10 Wis. 106.

Wyo.—Oregon Short Line R. Co. v. Blyth, 19 Wyo. 410, 118 P 649, 119 P 875, AnnCas1913E 288.

Eng.—Fairlie v. Hastings, 10 Ves. Jr. 123, 32 Reprint 791 (holding that as a general rule what one man has said, not upon oath, cannot be evidence against another man).

"The mere declarations of an alleged agent with respect to his agency are not admissible to prove the fact of agency, unless made in the presence of the principal and without denial by him." Alabama Fuel, etc., Co. v. Rice, (Ala.) 65 S 402, 403.

"It is true, as a general rule, that, until some evidence of agency has been introduced, declarations of an assumed agent, seeking to establish agency, are incompetent." Iowa Dairy Separator Co. v. Sanders, (Okl.) 140 P 406, 407.

[a] **The declarations of a person exercising authority** can never be re-

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principal denies the agency;[28] nor are such declarations competent to disprove the agency,[29] or to prove a renewal thereof.[30]

To prove extent of authority. It is also well established that such declarations of an agent are not admissible against the principal to show the extent of his authority as such agent.[31]

Before the agent's statements can be shown against his principal the agency must be proved by other evidence;[32] as at best such declarations are mere hearsay,[33] and therefore they are not rendered admissible by the fact that the declarant has since died,[34] or that they were made under oath in a former

ceived as evidence of his authority. James v. Stookey, 13 F. Cas. No. 7,184, 1 Wash. C. C. 330.

[b] **It is error to permit a party to testify to statements made by a third person** to the effect that he was acting as agent for the adverse party in the absence of evidence that the third person was the agent for the adverse party, or without evidence connecting the adverse party with the statements of the third person. Snook v. Lord, 56 N. Y. 605.

[c] **Under a statute** declaring that an agent has authority to make representations not including the terms of his authority, the declaration of a person claiming to be the agent of another is insufficient to establish the agency. Pease v. Fink, 3 Cal. A. 371, 85 P 657 (construing Civ. Code § 2319).

[d] **The declarations of an agent as to whom he represented in a transaction** in issue may not be proved by a third person. Singer v. Guy Inv. Co., 60 Wash. 674, 111 P 886.

[e] **Declarations out of court.**—A party cannot, against his objection, be charged with an agency on the statements of the supposed agent made out of court. Taplin v. Harris, (Vt.) 90 A 956.

[f] **Rule relaxed as to corporations.**—The stringency of the general rule that the existence of agency cannot be established by acts and declarations of the agent has been greatly relaxed in its application to corporations which can transact business only through agents. Smith v. Pullman Co., 138 Mo. A. 238, 119 SW 1072.

28. Day v. Forest City R. Co., 27 Oh. Cir. Ct. 60 (holding that, where property was owned in common by brothers and a consent for the construction of a street railway adjacent thereto was signed by one of the brothers, his statement that he had authority from his brother did not establish his agency, especially when his brother denied the agency).

29. Peck v. Ritchey, 66 Mo. 114; Harrington v. Bronson, 161 Pa. 296, 29 A 30; Huzzard v. Trego, 35 Pa. 9. Compare Johnson v. Cole, 178 N. Y. 364, 70 NE 873 [rev 76 App. Div. 606, 78 NYS 489].

30. Van Dusen v. Star Quartz Min. Co., 36 Cal. 571, 95 AmD 209. See also Gragg v. Home Ins. Co., 107 SW 321, 32 KyL 988.

31. U. S.—In re Thomas, 199 Fed. 214; Chicago, etc., R. Co. v. Chickasha Nat. Bank, 174 Fed. 923, 98 CCA 535; Walmsley v. Quigley, 129 Fed. 583, 64 CCA 151.

Ark.—Carter v. Burnham, 31 Ark. 212.

Cal.—Swinnerton v. Argonaut Land, etc., Co., 112 Cal. 375, 44 P 719; Pease v. Fink, 3 Cal. A. 371, 85 P 657.

Colo.—Mulford v. Rowland, 45 Colo. 172, 100 P 603; Extension Gold Min., etc., Co. v. Skinner, 28 Colo. 237, 64 P 198; Western Inv., etc., Co. v. Denver First Nat. Bank, 23 Colo. A. 143, 128 P 476; Burson v. Bogart, 18 Colo. A. 449, 72 P 605.

Fla.—Lakeside Press, etc., Co. v. Campbell, 39 Fla. 523, 22 S 878.

Ga.—Williams v. Roberts, 92 Ga. 291, 18 SE 545; Mapp v. Phillips, 32 Ga. 72; Heitmann v. Savannah Commercial Bank, 7 Ga. A. 740, 68 SE 51.

Ill.—Rawson v. Curtiss, 19 Ill. 456; Currie v. Syndicate des Cultivators des Oignons a'Fleur, 104 Ill. A. 165; Chicago, etc., R. Co. v. Willard, 68 Ill. A. 315.

Ind.—Blair-Baker Horse Co. v. Columbus First Nat. Bank, 164 Ind. 77, 72 NE 1027; Coon v. Gurley, 49 Ind. 199.

Iowa.—McManus v. Chicago Great Western R. Co., 156 Iowa 359, 136 NW 769; Fritz v. Chicago Grain, etc., Co., 136 Iowa 699, 114 NW 193; Osborne v. Ringland, 122 Iowa 329, 98 NW 116; Phillip v. Covenant Mut. Ben. Assoc., 62 Iowa 633, 17 NW 903; Graul v. Strutzel, 53 Iowa 712, 6 NW 119, 36 AmR 250; Williams v. Niagara F. Ins. Co., 50 Iowa 561.

Kan.—Missouri Pac. R. Co. v. Stults, 31 Kan. 752, 3 P 522.

Ky.—Payton v. Old Woolen Mills Co., 122 Ky. 361, 91 SW 719, 28 KyL 1303.

La.—Lafourche Transp. Co. v. Pugh, 52 La. Ann. 1517, 27 S 958.

Mass.—Sylvester v. New York, etc., R. Co., 217 Mass. 148, 104 NE 437; Westheimer v. State Loan Co., 195 Mass. 510, 81 NE 289; Baldwin v. Connecticut Mut. L. Ins. Co., 182 Mass. 389, 65 NE 837; Lohnes v. Insurance Co. of North America, 121 Mass. 439; Stollenwerck v. Thacher, 115 Mass. 224; Brigham v. Peters, 1 Gray 139.

Mich.—Coldwater Nat. Bank v. Buggie, 117 Mich. 416, 75 NW 1057; Swanstrom v. Muskegon Impr. Co., 91 Mich. 367, 51 NW 941; Bacon v. Johnson, 56 Mich. 182, 22 NW 276; McDonough v. Heyman, 38 Mich. 334; Grover, etc., Sewing Mach. Co. v. Polhemus, 34 Mich. 247.

Minn.—Newman v. Springfield F. & M. Ins. Co., 17 Minn. 123.

Miss.—Garvin v. Lowry, 15 Miss. 24.

Mo.—Mitchell v. Samford, 149 Mo. A. 72, 130 SW 99; Groneweg, etc., Co. v. Estes, 144 Mo. A. 418, 128 SW 786; Girard L. Ins., etc., Co. v. Mangold, 94 Mo. A. 125 67 SW 955; Alt v. Grosclose, 61 Mo. A. 409.

Nebr.—Fitzgerald v. Kimball Bros. Co., 76 Nebr. 236, 107 NW 227 (holding that the authority of an agent to execute a contract cannot be established by evidence of his declarations as to the nature of a conversation carried on between him and his alleged principal by telephone during the negotiations); Wilber First Nat. Bank v. Ridpath, 47 Nebr. 96, 66 NW 37.

N. H.—Bohanan v. Boston, etc., R. Co., 70 N. H. 526, 49 A 103.

N. J.—Ryle v. Manchester Bldg., etc., Assoc., 74 N. J. L. 840, 67 A 87; Dowden v. Cryder, 55 N. J. L. 329, 26 A 941.

N. Y.—Bank of New York Nat. Banking Assoc. v. American Dock, etc., Co., 143 N. Y. 559, 38 NE 713; Stringham v. St. Nicholas Ins. Co., 4 Abb. Dec. 315, 3 Keyes 280, 1 Transcr. A. 334, 5 AbbPrNS 80, 37 HowPr 365; Miller v. Barnett, 158 App. Div. 862, 144 NYS 40; Berry v. No. 1465 Broadway Co., 148 App. Div. 159, 132 NYS 1050; Duffus v. Schwinger, 79 Hun 451, 29 NYS 930 [rev 7 Misc. 499, 27 NYS 949]; Fullerton v. McLaughlin, 70 Hun 568, 24 NYS 280; Simmon v. Bloomingdale, 39 Misc. 847, 81 NYS 499; Fleming v. Ryan, 9 Misc. 496, 30 NYS 224; Sier v. Bache, 7 Misc. 165, 27 NYS 255; Harris v. Raskin, 142 NYS 342; Wolfe v. Benedict, 20 NYS 585; Fulton v. Lydecker, 19 NYS 374.

N. C.—Sutton v. Lyons, 156 N. C. 3, 72 SE 4; West v. A. F. Messick Grocery Co., 138 N. C. 166, 50 SE 565.

N. D.—Moore v. Booker, 4 N. D. 543, 62 NW 607; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 NW 924.

Oh.—Bradford Belting Co. v. Gibson, 68 Oh. St. 442, 67 NE 888.

Okl.—Whitcomb v. Oller, 41 Okl. 331, 137 P 709.

Or.—Harding v. Oregon-Idaho Co., 57 Or. 34, 110 P 412.

Pa.—Baltimore, etc., Employees' Relief Assoc. v. Post, 122 Pa. 579, 15 A 885, 9 AmSR 147, 2 LRA 44; Whiting v. Lake, 91 Pa. 349; Vanhorn v. Frick, 3 Serg. & R. 278; Fee v. Adams Express Co., 38 Pa. Super. 83; Bible v. Centre Hall Borough, 19 Pa. Super. 136; Creighton v. Keith, 16 Phila. 130.

R. I.—Paulton v. Keith, 23 R. I. 164, 49 A 635, 91 AmSR 624, 54 LRA 670.

S. D.—Christ v. Garretson State Bank, 13 S. D. 23, 82 NW 89.

Tenn.—Moore v. Davis, 4 Heisk. 540.

Tex.—Fine v. Freeman, 83 Tex. 529, 17 SW 783, 18 SW 963; Cannel Coal Co. v. Luna, (Civ. A.) 144 SW 721; Guitar v. McGee, (Civ. A.) 139 SW 622.

Wash.—Merrill v. O'Bryan, 48 Wash. 415, 93 P 917; Western Security Co. v. Douglass, 14 Wash. 215, 44 P 257.

W. Va.—Thompson v. Murphy, 60 W. Va. 42, 53 SE 908, 6 LRANS 311 (holding that an agent's admission or representation as to the purpose for which he borrowed money as he claimed on behalf of his principal is not evidence against his principal).

Wis.—Harrigan v. Gilchrist, 121 Wis. 127, 99 NW 909 (holding that unsworn statements of an agent outside the scope of his agency are not proofs of matters indicated therein as regards his principal).

Eng.—Allen v. Denstone, 8 C. & P. 760, 34 ECL 1006.

[a] **Under a statute** declaring that an agent has authority to make representations not including the terms of his authority, the declaration of a person claiming to be the agent of another is insufficient to establish the terms of his authority. Pease v. Fink, 3 Cal. A. 371, 85 P 657 (construing Civ. Code § 2319).

[b] **Statements and conduct of others founded on the agent's declarations** also are not competent evidence to show the agent's authority. Westheimer v. State Loan Co., 195 Mass. 510, 81 NE 289.

[c] **The authority of an agent to submit to arbitration** cannot be proved by his acts, declarations, or admissions. Scarborough v. Reynolds, 12 Ala. 252; Michigan Cent. R. Co. v. Gougar, 55 Ill. 503; Cox v. Fay, 54 Vt. 446; Gibbs v. Holcomb, 1 Wis. 23.

32. See infra § 695.

[a] **"It is familiar law,** that unless some proof of agency is offered, the mere declarations of one who assumes to be an agent can not be admitted to bind his alleged principal. A foundation must first be laid from which such a relation can be inferred." Deane v. American Glue Co., 200 Mass. 459, 462, 86 NE 890.

[b] **A letter** written by one selling a horse on his own behalf and as agent of a coöwner, subsequent to the sale, is inadmissible as proving the interest of the coöwner, in the absence of a showing that the letter was written while the writer was acting as the agent of the coöwner. Clark v. Wooster, 79 Conn. 126, 64 A 10.

33. See Evidence [16 Cyc 1005 note 31].

34. Barkley v. Bradford, 100 Ky. 804, 38 SW 432, 18 KyL 725; Schweitzer v. St. Leo's Catholic Church, (N. J. Sup.) 78 A 400 (holding that, where a contract to paint a church was made between plaintiff and the bishop acting as president of the board of trustees, declarations of the priest in charge of the church, since deceased, that he was in authority and qualified to act for the church were inadmissible to show his agency); Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396; De Rutzen v. Farr, 4 A. & E. 53, 31 ECL 43.

suit,[35] or were made in the course of the transaction.[36]

[§ 693] **bb. Form of Declaration Immaterial.** The general rule applies equally to oral statements of the agent, and to written statements contained in letters, letterheads, receipts, or other documents, implying, admitting, or claiming authority to act as agent in the negotiations with the third person.[37]

[§ 694] **cc. Exceptions to Rule in General.** Notwithstanding the general rule excluding the agent's admissions and declarations to prove his agency, they may be admitted for that purpose when offered by the principal;[38] or where the agency is not denied by him,[39] or he confirms the agent's declarations;[40] or to show proper inquiries by and good faith on the part of those dealing with the agent;[41] or to establish an estoppel against the principal.[42]

[§ 695] **dd. In Support of Other Evidence.** While the declarations of an alleged agent are of themselves incompetent to prove agency, if the agency is otherwise prima facie proved, they become admissible in corroboration,[43] where they con-

111 Reprint 707. But in Boone v. Thompson, 17 Tex. 605, it was held that after the death of the agent his declarations made at the time of the transaction were admissible against the principal and in favor of the agent's executor to prove the agent's authority.

35. Evans v. Owens, 3 Pennyp. (Pa.) 228. But in Thompson v. Michigan Mut. L. Ins. Co., (Ind. A.) 105 NE 780, it was held that an affidavit by an insurance agent that he was a general agent, made in verification of an answer by the insurer, is evidence of his authority.

36. Joseph v. Platt, 130 App. Div. 478, 114 NYS 1065.

37. Cal.—Pease v. Fink, 3 Cal. A. 371, 85 P 657.

Ga.—National Bldg. Assoc. v. Quin, 120 Ga. 358, 47 SE 962; Doonan v. Mitchell, 26 Ga. 472.

Ill.—Gaynor v. Pease Furnace Co., 51 Ill. A. 292 (in which the fact that the heading of the paper on which a contract was written stated that H was plaintiff's "general Western agent," the contract being signed by H in his own name, was held not sufficient evidence to show that H was acting as plaintiff's agent).

Iowa.—Joseph Schlitz Brewing Co. v. Barlow, 107 Iowa 252, 77 NW 1031; Sax v. Davis, 81 Iowa 692, 47 NW 990.

Kan.—Goodyear v. Williams, 73 Kan. 192, 85 P 300.

Me.—Coburn v. Paine, 36 Me. 105.

Mass.—Deane v. American Glue Co., 200 Mass. 459, 86 NE 890 (holding that the mere fact that one writes a letter upon the letter paper and under the letterhead of a corporation is no evidence that while so doing he is acting as an agent of the corporation); Rice v. James, 193 Mass. 458, 79 NE 807 (ruling out statements of the agent over the telephone).

Mich.—Ironwood Store Co. v. Harrison, 75 Mich. 197, 42 NW 808.

Mo.—Peninsula Stove Co. v. Adams Hardware, etc., Co., 93 Mo. A. 237 (holding that a soliciting agent carrying with him letterheads, billheads, and samples of goods cannot be held as a sales agent on his mere declaration that he is such).

Nebr.—Blanke Tea, etc., Co. v. Rees Printing Co., 70 Nebr. 510, 97 NW 627.

Nev.—Jos. Schlitz Brewing Co. v. Grimmon, 28 Nev. 235, 81 P 43.

N. H.—Morse v. Bellows, 7 N. H. 549, 28 AmD 372 (holding that where individuals, as assignees of another, attempt to assign a deed for him, a recital in the deed of their authority to act is insufficient; their authority as assignees must be shown).

N. J.—Saxton v. Fuller, 20 N. J. L. 61.

N. Y.—Thiry v. Taylor Brewing, etc., Co., 37 App. Div. 391, 56 NYS 85; Bowen v. Powell, 1 Lans. 1; Howard v. Norton, 65 Barb. 161; Heimerdinger v. Lehigh Valley R. Co., 26 Misc. 374, 56 NYS 188; Klumpp v. American Hardware Mfg. Co., 99 NYS 326.

N. C.—Brittain v. Westhall, 135 N. C. 492, 47 SE 616 (holding that in a suit for a balance due on the price of lumber alleged to have been purchased of plaintiff by T. as agent for defendant, checks given plaintiff by T., bearing an entry on the face, in plaintiff's handwriting, that they were given for lumber bought for defendant, were admissible only in corroboration of plaintiff's testimony that he was told by T. that he was buying for defendant, and were not competent as substantive testimony, although the checks were in defendant's possession).

Or.—Spande v. Western Life Indemn. Co., 61 Or. 220, 117 P 973, 122 P 38.

S. D.—Farrell v. Edwards, 8 S. D. 425, 66 NW 812.

Tex.—Young v. Robinson, (Civ. A.) 135 SW 715 (holding that a letter written by an agent is incompetent to prove the fact of agency, where that fact is not shown by other evidence); Texas Land, etc., Co. v. Watson, 3 Tex. Civ. A. 233, 22 SW 873.

Wis.—Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 NW 1099.

Eng.—Maesters v. Abraham, 1 Esp. 375; Bauerman v. Radenius, 7 T. R. 663, 101 Reprint 1186; Fairlie v. Hastings, 10 Ves. Jr. 123, 32 Reprint 791.

[a] **A bill of lading** issued by an initial carrier for through shipment, which discloses a traffic arrangement between it and the connecting carrier so as to make them agents of each other in the transaction, is inadmissible against the connecting carrier to establish such relation, because the bill is only the declaration of the initial carrier that such relation exists. Smith v. Southern R. Co., 89 S. C. 415, 71 SE 989.

[b] **A newspaper publication** (1) wherein one advertises himself to be the agent of another, is inadmissible to prove agency, unless it appears that the alleged principal caused or knew of such publication. Joseph Schlitz Brewing Co. v. Barlow, 107 Iowa 252, 77 NW 1031. (2) Evidence of an advertisement published in a newspaper by a person acting as the agent of the party against whom it was offered, in a matter to which it is claimed such advertisement referred, is error, where the publication was made in the individual capacity of the person making it and there is no evidence that the party against whom it was offered authorized its publication or adopted it as his own. National Bldg. Assoc. v. Quin, 120 Ga. 358, 47 SE 962.

[c] **The signs and stationery** of an alleged agent are not competent to establish his agency. Buskirk v. Talcott, 96 NYS 714 (holding that an alleged principal cannot be held liable on a contract made by his alleged agent, on the ground that he has made use of signs and letterheads having his name and the agent's thereon, where the party contracting with the agent had no knowledge, at the time of the contract, of such signs and letterheads); Cannel Coal Co. v. Luna, (Tex. Civ. A.) 144 SW 721.

[d] **Tax list.**—Where, in an action for injuries, plaintiff, for the purpose of showing that the person who managed a mill situated on defendant's land was defendant's agent, offered defendant's tax list for a certain year signed by such manager as "agent," the tax list amounted to no more than a declaration, and, as an agency must be proved aliunde, the declarations of the alleged agent both as to the establishment of the agency and the nature and extent of his authority were inadmissible. Sutton v. Lyons, 156 N. C. 3, 72 SE 4.

[e] **A telegram** from defendant to a third person, saying that a certain person named "will draw with certificates attached" is inadmissible to prove that defendant was acting as agent for the latter in contracting with plaintiff to sell him receiver's certificates. Manly v. Sperry, 115 Ala. 534, 22 S 870.

38. Siers v. Wiseman, 58 W. Va. 340, 52 SE 460.

39. Embree's Est., 18 LancLRev (Pa.) 57.

40. Union Constr. Co. v. Western Union Tel. Co., 163 Cal. 298, 125 P 242; Baldwin Coal Co. v. Davis, 15 Colo. A. 371, 62 P 1041.

41. Foss-Schneider Brewing Co. v. McLaughlin, 5 Ind. A. 415, 31 NE 838; Wishard v. McNeill, 85 Iowa 474, 52 NW 484. See also infra § 696.

42. Vanhorn v. Frick, 3 Serg. & R. (Pa.) 278. See also Coe v. Kutinsky, 82 Conn. 685, 74 A 1065.

43. U. S.—Union Guaranty, etc., Co. v. Robinson, 79 Fed. 420, 24 CCA 650.

Ala.—Miller-Brent Lumber Co. v. Stewart, 166 Ala. 657, 51 S 943, 21 AnnCas 1149; Childress v. Smith-Echols-Burnett Hardware Co., 162 Ala. 371, 50 S 322; Union Naval Stores Co. v. Pugh, 156 Ala. 369, 47 S 48; Eagle Iron Co. v. Baugh, 147 Ala. 613, 41 S 663; Birmingham Mineral R. Co. v. Tennessee Coal, etc., R. Co., 127 Ala. 137, 28 S 679; Gibson v. Snow Hardware Co., 94 Ala. 346, 10 S 304; McClung v. Spotswood, 19 Ala. 165; Jones v. Journey, 2 Ala. A. 488, 56 S 850.

Cal.—Kelly v. Ning Yung Benev. Assoc., 2 Cal. A. 460, 84 P 321. See also Kast v. Miller, 159 Cal. 723, 115 P 932.

Ga.—Weiner Bros. Co. v. Tucker, 139 Ga. 596, 77 SE 811; Becker v. Donalson, 138 Ga. 634, 75 SE 1122; Smith v. Johnson, 13 Ga. A. 837, 80 SE 1051; White Sewing Mach. Co. v. Horkan, 7 Ga. A. 283, 66 SE 811; Ham v. Brown, 2 Ga. A. 71, 58 SE 316.

Ill.—Singer, etc., Stone Co. v. Hutchinson, 184 Ill. 169, 56 NE 353 [aff 83 Ill. A. 668]; Kelly v. Shumway, 51 Ill. A. 634.

Ind.—Rowell v. Klein, 44 Ind. 290, 15 AmR 235; Phenix Ins. Co. v. Jacobs, 23 Ind. A. 509, 55 NE 778 (holding that, where the fact of agency is otherwise proved, it is not error to overrule an objection to the admission of a telegram pertaining to the business of the agency, upon the ground that it is a paper prepared by the agent to prove his agency).

Iowa.—Bird v. Phillips, 115 Iowa 703, 87 NW 414 (holding that, where there is evidence that defendant's husband was authorized to act as her agent, his letters written while so acting are admissible in a suit in which she denies his agency); White v. Elgin Creamery Co., 108 Iowa 522, 79 NW 283.

Md.—Wilson v. Kelso, 115 Md. 162, 80 A 895.

Mass.—Tozier v. Crafts, 123 Mass. 480.

Mo.—Stenson v. Lancaster, 178 Mo. A. 340, 165 SW 1158; Hoffman Heading, etc., Co. v. St. Louis, etc., R. Co.,

stitute a part of the res gestæ and were made at the time of the transaction in question.[44] Thus, where the agency has been established by independent evidence, the declarations of the agent are competent to show that he acted as agent and not on his individual account,[45] or to show the nature and extent of his authority.[46] However, the court is under no obligation to limit the evidence to such purpose, unless so requested.[47]

The order of proof in which the agent's declarations may be admitted is within the discretion of the court and it is no objection that they are introduced first in point of time,[48] where there is an offer to prove the agency,[49] although it has been held to be improper practice to admit proof of such declarations or acts before proof of the agency.[50]

[§ 696] **ee. To Prove Belief and Holding Out by Agent.** Although the acts and declarations of the agent are incompetent to establish the agency, they are admissible to prove that the agent believed himself to be the agent of a particular principal and so held himself out, and that the third

119 Mo. A. 495, 94 SW 597 (holding that, where, in an action against a carrier for failure to furnish cars, there was prima facie proof that the authority of the carrier's commercial freight agent included his right to act on demands for cars, the agent's letters to plaintiff and his conversation with him with reference to furnishing cars were competent); Union Bank v. Wheat, 58 Mo. A. 11.

N. Y.—Mullen v. Quinlan, 195 N. Y. 109, 87 NE 1078; Harrington v. Ketcltas, 92 N. Y. 40; Wanamaker v. Megraw, 48 App. Div. 54, 62 NYS 692 [rev on other grounds 168 N. Y. 125, 61 NE 112]; Smith v. Martin Anti-Fire Car Heater Co., 19 NYS 285; Smith v. Dodge, 3 NYS 866.

N. C.—Brittain v. Westhall, 135 N. C. 492, 47 SE 616.

Or.—Foste v. Standard Ins. Co., 34 Or. 125, 54 P 811.

Pa.—Singer Mfg. Co. v. Christian, 211 Pa. 534, 60 A 1087; Stewart v. Climax Road Mach. Co., 200 Pa. 611, 50 A 1119.

S. C.—Watkins v. Atlantic Coast Line R. Co., 97 S. C. 148, 81 SE 426; Robert Buist Co. v. Lancaster Mercantile Co., 73 S. C. 48, 52 SE 789 (holding that the declarations of an agent, when taken in connection with the ratification of his acts by the principal, are competent to show agency).

Tenn.—Willcox v. Hines, 100 Tenn. 524, 45 SW 781, 66 AmSR 761 (holding that where the agency of a person is disputed, it is not error to admit his statements under an instruction submitting to the jury the issues of fact necessary to establish such agency, and charging that unless such facts are found the alleged principal is not bound by such statements).

Tex.—Sargent v. Barnes, (Civ. A.) 159 SW 366; Missouri, etc., R. Co. v. Brown, (Civ. A.) 155 SW 979 (holding that, where alleged agents of railroads were found transacting business where such agents usually are, their statements that they were agents were admissible); Sullivan v. Ramsey, (Civ. A.) 155 SW 580 (including proof of like acts ratified by the principal); Stringfellow v. Brazelton, (Civ. A.) 142 SW 937; Gilliland v. Ellison, (Civ. A.) 137 SW 168; Missouri Valley Bridge, etc., Co. v. Ballard, 53 Tex. Civ. A. 110, 116 SW 93; Gulf, etc., R. Co. v. Cunningham, 51 Tex. Civ. A. 368, 113 SW 767; Sullivan v. Fant, 51 Tex. Civ. A. 6, 110 SW 507 (holding that, where the declarations of an agent are admitted after the admission of proof prima facie establishing the agency, the court should instruct the jury not to consider the declarations as evidence of agency, but to consider them only on finding the existence of the agency by other evidence); Tabet v. Powell, (Civ. A.) 78 SW 997; Jones v. Hess, (Civ. A.) 48 SW 46; Loeb v. Crow, 15 Tex. Civ. A. 537, 40 SW 506; Wheeler, etc., Mfg. Co. v. Crossland, 2 Tex. A. Civ. Cas. § 80.

Wash.—Lemcke v. Funk, 78 Wash. 460, 139 P 234; Graton, etc., Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 P 879.

[a] **Proof of agency sufficient to admit declarations.**—(1) Where an alleged agent was proved to be connected with the principal in some capacity and to have represented it in suits and other matters, the agency was shown sufficiently to admit his declarations that he was manager for the principal. Modoc Gold Min. Co. v. Skiles, 13 Colo. A. 293, 57 P 190. (2) Evidence of an authority substantially different is insufficient. Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396.

[b] **Where the proof is conflicting** as to when the agency of a person representing another actually terminated, evidence of all material and relevant declarations of such person made during the entire period as to which there is evidence tending to show the existence of the agency should be received. Porter v. Adams, 115 Ill. A. 439.

44. Ga.—Rome Ins. Co. v. Thomas, 11 Ga. A. 539, 75 SE 894.

Ill.—Lowden v. Wilson, 233 Ill. 340, 84 NE 245.

Ind.—Miller v. Bank of Advance, 52 Ind. A. 706, 100 NE 121.

Mich.—Mally v. Excelsior Wrapper Co., 148 NW 443 (holding that where there is evidence of ratification, or original authority, or a holding out of the agent as having authority, declarations of the agent accompanying his act for which it is sought to hold the principal are admissible to show in what capacity he acted); Haughton v. Maurer, 55 Mich. 323, 21 NW 426.

Tex.—Sargent v. Barnes, (Civ. A.) 159 SW 366.

See generally supra § 541.

[a] **The agent's declarations become evidence as part of the res gestæ** if made in the conduct of the business intrusted to him, yet other evidence must first establish his authority to speak, before his words shall bind his principal. Fee v. Adams Express Co., 38 Pa. Super. 83.

[b] **Memorandum.**—In an action to set aside a contract for the sale of land for fraud of the agent who negotiated the sale, a memorandum of sale prepared by the agent but never signed was admissible over the objection that there was a subsequent written contract entered into between the parties, where it tended to show the agency and corroborated the testimony of the purchaser. Sargent v. Barnes, (Tex. Civ. A.) 159 SW 366.

45. Cal.—Swinnerton v. Argonaut Land, etc., Co., 112 Cal. 375, 44 P 719.

Colo.—McCreery v. Morrison, 105 P 876.

Ga.—Small v. Williams, 87 Ga. 681, 13 SE 589.

Ind.—Phenix Ins. Co. v. Pickel, 3 Ind. A. 332, 29 NE 432.

Mass.—Nowell v. Chipman, 170 Mass. 340, 49 NE 631.

Mich.—Hirschmann v. Iron Range, etc., R. Co., 97 Mich. 384, 56 NW 842; Jacobs v. Callahan, 57 Mich. 11, 23 NW 454; McDonough v. Heyman, 38 Mich. 334.

Mo.—Werth v. Ollis, 61 Mo. A. 401.

N. Y.—Howard v. Norton, 65 Barb. 161.

Oh.—Williams v. Stearns, 59 Oh. St. 28, 51 NE 439.

Pa.—Fring v. Breymeyer, 2 Phila. 92; Hollingsworth v. Buchanan, 1 Phila. 556.

Tex.—Reserve Loan L. Ins. Co. v. Benson, (Civ. A.) 167 SW 266.

46. Ala.—Childress v. Smith-Echols-Burnett Hardware Co., 162 Ala. 371, 50 S 322; Eagle Iron Co. v. Baugh, 147 Ala. 613, 41 S 663; Avery v. Turner, 3 Ala. A. 627, 57 S 255 (holding that where the question of an agent's authority to accept lumber in payment for machinery was in issue, evidence of his declarations as to the willingness of his principal to accept lumber in payment was admissible).

Mass.—Crawford v. Moran, 168 Mass. 446, 47 NE 132.

Mich.—Harvey v. McAdams, 32 Mich. 472.

Tex.—Latham v. Pledger, 11 Tex. 439; Sullivan v. Fant, 51 Tex. Civ. A. 6, 110 SW 507; Missouri, etc., R. Co. v. Walden, (Civ. A.) 46 SW 87 (holding that testimony as to statements made by men about the station wearing railroad uniforms and claiming to be railroad men, concerning the departure of trains, is competent as going to establish their authority to give the information).

Wash.—Lemcke v. Funk, 78 Wash. 460, 139 P 234 (holding that the acts and declarations of an alleged agent were admissible on the question whether he had authority to make a contract as agent for dividing commissions for procuring an exchange of lands, where there was independent evidence tending to show that his principal knowingly permitted him to hold himself out as manager of its farm lands department and to state that fact on its business cards).

See also cases supra note 43.

Compare Anderson v. Patten, 157 Iowa 23, 137 NW 1050.

47. Howard v. Norton, 65 Barb. (N. Y.) 161.

48. Shepard v. Goben, 142 Ind. 318, 39 NE 506; Rowell v. Klein, 44 Ind. 290, 15 AmR 235; Gage v. Averill, 57 Mo. A. 111; Smith v. Dodge, 3 NYS 866; Central Pennsylvania Tel., etc., Co. v. Thompson, 112 Pa. 118, 3 A 439.

Order of proof see generally Trial [38 Cyc 1349 et seq].

[a] **The declarations of an agent may be received provisionally** as verbal acts indicating that he was acting on another's behalf, leaving it to subsequent proof to establish his connection as agent. Clough v. Rockingham County Light, etc., Co., 75 N. H. 84, 71 A 223.

[b] **This rule obtains in California** notwithstanding the provision of Code Civ. Proc. § 1870, which permits the acts and declarations of agents to be proved "after proof of agency." Bates v. Tower, 103 Cal. 404, 37 P 385. And see Ferguson v. McBean, 4 Cal. Unrep. Cas. 429, 35 P 559.

49. Harris v. Fitzgerald, 75 Conn. 72, 52 A 315 (holding that, in an action for medical services alleged to have been rendered under a request from one of defendant's sons, as his agent, to one of defendant's employees, one of plaintiff's witnesses being unable to state which of the sons instructed the employee to be taken to the doctor, it was not error to allow the question as to what "either" of the sons said, the counsel for plaintiff stating that he expected to show that both were defendant's agents); Ruddy v. Repp, 19 Pa. Super. 437.

50. Peo. v. Courson, 87 Ill. A. 254.

[a] **"The better practice** undoubtedly is, first, to require proof of the agency, or of facts from which agency may be fairly inferred, and if this fail

person dealt with him as such in good faith.[51]

[§ 697] **(b) As against Agent.** The rule that an agency cannot be proved by the acts and declarations of the agent applies only where it is sought to hold the principal for the acts and declarations of an alleged agent, and does not render evidence of such acts and declarations incompetent as against the agent.[52] So also declarations against interest, made by an agent as to the character of the business relations existing between him and the principal, are as competent in an action by a third person against the principal, when the alleged agent is offered as plaintiff's witness, as they would be were the agent himself plaintiff testifying in his own behalf.[53]

[§ 698] **(c) As against Principal Suing upon Contract.** Declarations of a party assuming to act as agent for another are admissible to establish agency where the principal is suing on a contract made by such agent, and thereby ratifying the same.[54]

[§ 699] **(4) Declarations and Admissions of Principal.** Any declaration or admission of the principal which in any way tends to establish the fact of agency, or the extent of authority, is admissible in evidence,[55] although not known to the person dealing with the agent;[56] and such admissions are competent after the principal's death.[57] Thus letters written by the principal expressly or impliedly admitting that a certain person was his agent, or the extent of his authority, are competent evidence against the principal,[58] although not written to the adverse party.[59] So also the admissions of the principal are competent to establish the fact of agency, where they are implied from his conduct, as where he treats another as his

much useless matter may be eliminated from the cause." Central Pennsylvania Tel., etc., Co. v. Thompson, 112 Pa. 118, 3 A 439.

51. Ala.—Parker v. Bond, 121 Ala. 529, 25 S 898 (holding that in an action on a note executed for a life insurance policy and procured by an agent, under a plea that such person held himself out as agent, it is competent to prove the declaration of such person that he was such agent, not to show the agency but to show that he held himself out as such).

Cal.—Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 46 P 738.

Iowa.—White v. Elgin Creamery Co., 108 Iowa 522, 79 NW 283; Le Grand Quarry Co. v. Reichard, 40 Iowa 161.

La.—Labat's Succ., 110 La. 986, 35 S 257.

Mass.—Nowell v. Chipman, 170 Mass. 340, 49 NE 631.

Mich.—Gore v. Canada L. Assur. Co., 119 Mich. 136, 77 NW 650.

N. Y.—Dochtermann Van, etc., Co. v. Fiss, etc., Horse Co., 155 App. Div. 162, 140 NYS 72; Howard v. Norton, 65 Barb. 161; Delmage v. Crow, 23 Misc. 326, 51 NYS 240 [rev 22 Misc. 511, 49 NYS 1004].

S. D.—Christ v. Garretson State Bank, 13 S. D. 23, 82 NW 89.

Eng.—Fagan v. Howard, Wallis 33.

[a] **Declarations to show for what principal the agent acted.**—While the fact of agency cannot be shown by the declarations of an agent, evidence is competent to show that in what the agent said and did he purported to act for defendant and not for someone else. Nowell v. Chipman, 170 Mass. 340, 49 NE 631.

52. Cal.—Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 29 P 640, 28 AmSR 122.

Conn.—Plant v. McEwen, 4 Conn. 544.

Ga.—Johnson v. Johnson, 80 Ga. 260, 5 SE 629.

Kan.—Blake v. Bremyer, 84 Kan. 708, 711, 115 P 538, 35 LRANS 165 and note [cit Cyc] (holding that it is as competent to prove an admission by one that he is agent of another, where that is the fact sought to be established against him, as it is to prove any other admission against interest); Fisher v. Krutz, 9 Kan. 501.

Nebr.—Columbus Co. v. Hurford, 1 Nebr. 146.

N. C.—New Home Sewing Mach. Co. v. Seago, 128 N. C. 158, 38 SE 805.

W. Va.—Siers v. Wiseman, 58 W. Va. 340, 52 SE 460 (holding that agency may be established in favor of the principal by the admissions of the agent, or by acts of the agent from which no inference other than that of the relationship of principal and agent can be consistently deduced).

[a] **The fact that a person acted for himself** and not as agent for another may, as against his claims, be established by his declarations.

Bradley v. Poole, 98 Mass. 169, 93 AmD 144.

53. Niver Coal Co. v. Piedmont, etc., Coal Co., 136 Fed. 179, 69 CCA 195.

54. Williamson v. Tyson, 105 Ala. 644, 17 S 336; Iowa Dairy Separator Co. v. Sanders, 40 Okl. 656, 140 P 406.

55. Del.—Phleger v. Ivins, 5 Del. 118.

Ga.—Columbus Show-Case Co. v. Brinson, 128 Ga. 487, 57 SE 871; Bazemore v. Small, 9 Ga. A. 29, 70 SE 261 (holding that the fact that defendant, who denied that his son was his agent, had frequently stated to persons, other than plaintiff, that his son was his agent as to the matter in dispute, might be corroborative of plaintiff's testimony that defendant informed him that his son was his agent, especially where defendant denied having told any one after a certain date that his son was his agent); Ham v. Brown, 2 Ga. A. 71, 58 SE 316.

Ill.—Thayer v. Meeker, 86 Ill. 470; Jones v. Blanks, 178 Ill. A. 196; Kelly v. Shumway, 51 Ill. A. 634.

Ind. T.—American Express Co. v. Lankford, 2 Ind. T. 18, 46 SW 183.

Iowa.—Worsley v. Ayres, 144 Iowa 676, 123 NW 353; Frank v. Levi, 110 Iowa 267, 81 NW 459 (holding that, where a milliner left the key of her store in possession of her landlord for delivery to a purchaser when the latter should appear and consummate the sale, evidence of what the seller said to her landlord when she gave him possession was competent, as tending to show the character and extent of the landlord's agency).

Md.—Horner v. Beasley, 105 Md. 193, 65 A 820.

Mich.—Haughton v. Maurer, 55 Mich. 323, 21 NW 426.

Mo.—Mitchell v. Samford, 149 Mo. A. 72, 130 SW 99.

Nebr.—Howard v. Omaha Wholesale Grocery Co., 77 Nebr. 116, 108 NW 158.

N. Y.—Wild v. New York, etc., Silver Min. Co., 59 N. Y. 644; Stallo v. Humphreys, 121 App. Div. 641, 106 NYS 456; Fechtman v. Huber, 10 App. Div. 624, 41 NYS 791; Wallace v. Arkell, 28 Misc. 502, 59 NYS 597 [aff 27 Misc. 819, 57 NYS 655]; Beck v. Freund, 117 NYS 193 (telephone conversation).

Or.—Connell v. McLoughlin, 28 Or. 230, 42 P 218.

Pa.—Stewart v. Climax Road Mach. Co., 200 Pa. 611, 50 A 1119; Trego v. Huzzard, 19 Pa. 441 [aff reh 35 Pa. 9].

Utah.—McCornick v. Queen of Sheba Gold Min., etc., Co., 23 Utah 71, 63 P 820.

Wash.—McDonald v. Freed, 3 Wash. 468, 28 P 915.

W. Va.—Moundsville, etc., R. Co. v. Wilson, 52 W. Va. 647, 44 SE 169.

[a] **A power of attorney** to execute a deed is admissible in favor of a party claiming thereunder. Downs v. Stevenson, 56 Tex. Civ. A. 211, 119 SW 315.

[b] **The testimony of an agent that the principal stated to a third party** that he would leave the property in the hands of the agent for disposal has been held to be competent, as tending to prove the agent's authority. Wallace v. Nodine, 57 Hun 239, 10 NYS 919.

[c] **General admissions.**—Admissions of the principal generally as to the agency of a person are not proof of the agency at a particular time. Irvine v. Buckaloe, 12 Serg. & R. (Pa.) 35.

56. Wales v. Mower, 44 Colo. 146, 96 P 971; Worsley v. Ayres, 144 Iowa 676, 123 NW 353; Moffet v. Moffet, 90 Iowa 442, 57 NW 954 (limiting the rule to proof of the fact of agency and holding such evidence inadmissible to establish an agency by holding out); McDonald v. Freed, 3 Wash. 468, 28 P 915.

57. Trego v. Huzzard, 19 Pa. 441 [aff reh 35 Pa. 9].

58. U. S.—Bingham v. Cabbot, 3 Dall. 19, 1 L. ed. 491 (admitting correspondence with the government to establish that one was a public agent).

Ala.—Henderson Law Co. v. Hinson, 157 Ala. 640, 47 S 717; Fulgham v. Carter, 142 Ala. 227, 37 S 932.

Ill.—Crain v. Jacksonville First Nat. Bank, 114 Ill. 516, 2 NE 486; Case v. Lyman, 66 Ill. 229; Freet v. American Electrical Supply Co., 171 Ill. A. 512 [aff 257 Ill. 248, 100 NE 933].

Iowa.—Jenkins v. Dewey, 122 Iowa 530, 98 NW 313; Wood v. Whitton, 66 Iowa 295, 19 NW 907, 23 NW 675.

Mo.—Morse v. Diebold, 2 Mo. A. 163.

N. Y.—Thiry v. Taylor Brewing, etc., Co., 37 App. Div. 391, 56 NYS 85 (holding that a letter of defendant, in which he stated that a certain person was his agent, is admissible against him to show agency, as against third persons, in connection with evidence that the relation was the same at the time of the transaction in suit as when the latter was written).

Or.—Foste v. Standard Ins. Co., 34 Or. 125, 54 P 811.

Pa.—Sober v. Moony, 48 Pa. Super. 92 (holding that, where a case turns on the authority of an agent to make a contract, it is proper to permit defendant's letterhead to be produced in evidence, as showing that the alleged agent was held out as the general manager of defendant, and that plaintiff inquired for the manager, and negotiated with him in regard to the contract because of such holding out).

S. D.—Elfring v. New Birdsall Co., 16 S. D. 252, 92 NW 29.

Wash.—American Copper, etc., Works v. Galland-Burke Brewing, etc., Co., 30 Wash. 178, 70 P 236.

Wis.—Millerd v. Thompson, 95 Wis. 343, 70 NW 470.

59. Morse v. Diebold, 2 Mo. A. 163.

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agent,[60] or admits liability on a contract made by another,[61] or ratifies another's acts and accepts the fruits thereof,[62] or admits payment to another for his use;[63] or where they are implied from his silence or acquiescence, as where he fails to deny the fact of agency when informed that another claims to be or has acted as his agent,[64] although there may be written evidence of the appointment of the agent.[65]

To disprove agency. The principal's declarations repudiating the agency, when informed of a transaction with another in his behalf, are competent in his favor to disprove the agency.[66]

[§ 700] **(5) Declarations of Other Persons—(a) In General.** Declarations of strangers to the suit, tending to prove the alleged agency, are inadmissible, for they have no right to speak for the principal, and facts of which they are cognizant should be proved by their testimony on the witness stand, and not by their statements, oral or written, made outside the court.[67]

[§ 701] **(b) Other Agents.** The declarations or admissions of another agent of the same principal are incompetent to prove the scope of authority of an agent, at least as to a past transaction;[68] or to prove,[69] or disprove,[70] the fact of agency, unless it appears that the agent making the declaration was authorized to do so, or that it was made as a part of the res gestæ in the performance of some duty pertaining to his agency.[71] But declarations of a general agent may be admissible for the purpose of showing the authority of an inferior agent.[72]

[§ 702] **(6) Communications between Principal and Agent.** Communications between principal and agent in which the authority of the latter is expressly or implied admitted are admissible in evidence.[73] Thus a letter from the principal to the agent, bearing upon the fact or scope of his agency, is admissible,[74] but a letter which relates to specific matters with other persons, and of which the other party to the transaction in question has no knowledge, is not competent evidence of the agency.[75] Evidence of conversations between the principal and agent is admissible to show the authority of the latter.[76] But such conversations are not admissible to deny an authority actually conferred upon the agent;[77] nor are they admissible when had before the agency arose and not shown to relate thereto.[78]

[§ 703] **(7) Communications between Third Person and Agent.** A conversation or other communication between an agent and the party dealing with him, while not evidence of the agent's authority, is admissible to show the understanding of such party

60. Farrer v. Caster, 17 Colo. A. 41, 67 P 171.

61. Higgins v. Dellinger, 22 Mo. 397; Domasek v. Kluck, 113 Wis. 336, 89 NW 139.

62. Robert Buist Co. v. Lancaster Mercantile Co., 73 S. C. 48, 52 SE 789; Barbee v. Spivey, (Tex. Civ. A.) 32 SW 345. See also supra §§ 40, 41.

[a] **But a letter written subsequent to the beginning of an action** for rent, which did not by its terms ratify any previous act of one of the lessors, was inadmissible for the purpose of showing authority on his part to make a previous agreement with the lessee on behalf of the other lessors. Landt v. Schneider, 31 Mont. 15, 77 P 307.

63. Doyle v. St. James Church, 7 Wend. (N. Y.) 178.

64. Mix v. Osby, 62 Ill. 193; Baturs v. Sellers, 5 Harr. & J. (Md.) 117, 9 AmD 492; Greenfield Bank v. Crafts, 2 Allen (Mass.) 269. See also supra §§ 40, 41.

65. Curtis v. Ingham, 2 Vt. 287.

66. Charles v. Jacobs, 6 S. C. 69.

67. Ala.—Alabama Fuel, etc., Co. v. Rice, 65 S 402 (holding that the relation of agency cannot be established by statements made to the alleged agent by persons having transactions with them).

Ill.—Erie, etc., Despatch v. Cecil, 112 Ill. 180; Toledo Bridge, etc., Co. v. Oil Belt Tract., Co., 173 Ill. A. 298.

Ky.—Beattyville Coal Co. v. Hoskins, 44 SW 363, 19 KyL 1759.

Me.—Clark v. Peabody, 22 Me. 500.

Mich.—Rothschild v. Sugar Beet Products Co., 174 Mich. 237, 140 NW 553 (holding that a conversation between a third person and an officer of defendant, in the absence of plaintiff, after an agent had bought goods from plaintiff, was not admissible against defendant to prove the agent's authority to buy).

Pa.—Huzzard v. Trego, 35 Pa. 9.

See Rodgers v. Peckham, 120 Cal. 238, 52 P 483.

[a] **Declarations of member of lodge as to agency of another member.**—On the question whether a member of a lodge or secret order was its agent for a particular purpose, as to which he assumed to act, the declarations of another member that he was such agent are incompetent. Castner v. Rinne, 31 Colo. 256, 72 P 1052.

68. Underwood v. Germania L. Ins. Co., 152 N. C. 274, 67 SE 587; Rumbough v. Southern Impr. Co., 112 N. C. 751, 17 SE 536, 34 AmSR 528.

69. Hirsch v. Oliver, 91 Ga. 554, 18 SE 354; Heusinkveld v. St. Paul F. & M. Ins. Co., 106 Iowa 229, 76 NW 696; Louisville, etc., R. Co. v. Byrley, 152 Ky. 35, 153 SW 36 (holding that the fact that a conductor stated that the person who attempted to arrest a railroad passenger had a right to make such arrest was not sufficient to show that the arresting person was an agent of the railroad company); Summerrow v. Baruch, 128 N. C. 202, 38 SE 861.

70. Short Mountain Coal Co. v. Hardy, 114 Mass. 197 (holding that the declarations of an agent cannot be received on behalf of his principal to prove that a third person was not also the principal's agent); Edinburgh American Land Mortg. Co. v. Briggs, (Tex. Civ. A.) 41 SW 1036.

71. Hirsch v. Oliver, 91 Ga. 554, 18 SE 354; Heusinkveld v. St. Paul F. & M. Ins. Co., 106 Iowa 229, 76 NW 696; Summerrow v. Baruch, 128 N. C. 202, 38 SE 861. See also Central Coal, etc., Co. v. Niemeyer Lumber Co., 65 Ark. 106, 44 SW 1122, 53 SW 570.

[a] **The admissions of officers of a corporation** may be sufficient to establish the fact of the agency of another. Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 46 P 738; Flannery v. State Mut. F. Ins. Co., 175 Pa. 387, 34 A 798.

72. Bickford v. Menier, 36 Hun 446 [rev on other grounds 107 N. Y. 490, 14 NE 438]; Elfring v. New Birdsall Co., 16 S. D. 252, 92 NW 29.

73. Arthur v. Gard, 3 Colo. A. 133, 32 P 343.

74. Cal.—Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 46 P 738; Smith v. Jaccard, 20 Cal. A. 280, 128 P 1023, 1026.

Conn.—Rowland v. Huggins, 28 Conn. 122.

Ga.—Columbus Show-Case Co. v. Brinson, 128 Ga. 487, 57 SE 871.

Ill.—Rogers Grain Co. v. Tanton, 136 Ill. A. 533 (holding that persons who deal with an agent, knowing him to be such, are bound, at their peril, to know the extent of his authority, and letters which form the basis and limit the extent of the agent's authority are competent against those who are bound to ascertain and know the extent of the authority of such agent).

Iowa.—Thurston v. Mauro, 1 Greene 231.

Kan.—Bell v. Rankin, 1 Kan. A. 209, 40 P 1094.

Ky.—Limestone Min., etc., Co. v. Lehman, 76 SW 328, 25 KyL 703.

Mass.—Stackpole v. Arnold, 11 Mass. 27, 6 AmD 150.

Nebr.—Peycke v. Shinn, 76 Nebr. 364, 107 NW 386; Barber v. Martin, 67 Nebr. 445, 93 NW 722.

N. Y.—Ettlinger v. Weil, 94 App. Div. 291, 87 NYS 1049 [rev on other grounds 184 N. Y. 179, 77 NE 31].

Pa.—Slonecker v. Garrett, 48 Pa. 415.

S. D.—Farrell v. Edwards, 8 S. D. 425, 66 NW 812.

Utah.—McCornick v. Queen of Sheba Gold Min., etc., Co., 23 Utah 71, 63 P 820.

[a] **A letter is admissible to prove agency to sell real estate.**—Whelage v. Lotz, 44 La. Ann. 600, 10 S 933.

[b] **A letter inconsistent with an agency** has been held admissible to show that there was no agency between two parties. Zoebisch v. Rauch, 133 Pa. 532, 19 A 415. To same effect Adams Oil Co. v. Christmas, 101 Ky. 564, 41 SW 545, 19 KyL 760.

75. Goodyear v. Williams, 73 Kan. 192, 85 P 300.

76. Schilling v. Rosenheim, 30 Ill. A. 81; Frank v. Levi, 110 Iowa 267, 81 NW 459; Badger v. Cook, 117 App. Div. 328, 101 NYS 1067 (holding that, in an action to recover the purchase price of cattle, taken from the purchaser by the federal authorities, in which defendant contended that the sale was to B and not to plaintiff, evidence of a conversation between plaintiff and B immediately prior to the purchase was admissible to prove the agency of B with respect to the transaction); Anderson v. McAleenan, 15 Daly 444, 8 NYS 483; Ryerson v. Ryerson, 8 NYS 738.

77. Manley v. Ackler, 76 Hun 546, 28 NYS 181 (holding that, in an action for breach of warranty of goods sold by defendant's agent, a conversation between defendant and the agent is not admissible to show that defendant did not authorize the agent to warrant the goods, since authority to sell includes an authority to warrant).

78. Irving v. Shethar, 71 Conn. 434, 42 A 258 (holding that, on the issue of agency, testimony of conversations between the alleged principal and

on the subject,[79] his good faith,[80] and that he was justified in treating the agent as such.[81] It has also been held, where an agent seeks to avoid liability on the ground that his agency was disclosed, that a conversation between the party dealt with and the agent's representative may be testified to by the latter, where the party dealt with has testified as to his version of the conversation.[82]

[§ 704] **(8) Instructions to Agent—(a) By Principal.** Since the scope of an agent's authority depends in whole or in part upon the instructions of the principal, such instructions may be given in evidence upon the question of the agent's authority,[83] although they are opposed to the apparent authority of the agent.[84] Furthermore the principal should be permitted to disavow the giving of instructions testified to by the opposite party.[85] But where the principal relies on such instructions to show that the act for which it is sought to hold him liable was outside the agent's authority he must show that they were communicated or known to the party dealing with the agent or they are not admissible.[86]

Where the instructions are in writing the writing should be produced or its loss accounted for.[87]

[§ 705] **(b) By Other Persons.** Evidence that a certain person gave an agent directions is not admissible in favor of the principal and against a third person with whom the agent has dealt, in the absence of evidence that the person who gave the instructions was connected with the principal.[88]

[§ 706] **(9) Documentary Evidence.**[89] In determining the scope of an agent's authority contracts executed and documents used by the agent within his real or ostensible authority may be introduced to establish its limits.[90]

agent on the subject of an arrangement to be entered into, before the agency arose, not shown to be related to the subsequent arrangement, was properly excluded).

79. Hall v. Bates, 216 Mass. 140, 103 NE 285 (holding that where plaintiff was injured by the collapse of a bracket furnished by defendants' agent in connection with certain building operations, and it could not be ruled as a matter of law that the agent had no authority to represent defendants, evidence of conversations with the agent as to the appliances was competent); Gore v. Canada L. Assur. Co., 119 Mich. 136, 77 NW 650 (holding that an agreement by an agent with a third person is not direct evidence of authority to enter into it for his principal in an action thereon against the principal, but it is admissible to show plaintiff's understanding on the subject); Ontario Bank v. Loomis, 189 N. Y. 578, 82 NE 436; Smith v. Columbia Ins. Co., 129 NYS 775 (holding that, on cross-examining one claimed by plaintiff to have been defendant's agent, plaintiff could ask him if he did not tell plaintiff that he was acting for defendant, where such statement was part of the conversation testified to and was not offered or received to prove agency); Kohlberg v. Awbrey, (Tex. Civ. A.) 167 SW 828.

[a] **A letter written by an agent of a party with his knowledge and consent** (1) ordinarily is competent evidence against such party. Haner v. Palmer, 88 Nebr. 438, 129 NW 1001. (2) Letters written by an agent to third persons respecting the cancellation of insurance policies of his principal and the substitution of new policies are admissible in proof of the agent's authority, where it is also shown that the principal knew and acquiesced in his acts. White v. German Alliance Ins. Co., 103 Fed. 260, 43 CCA 216.

[b] **Letter showing termination of agency.**—A letter by an alleged agent to a third person which shows that if any agency had existed it had been terminated before such person made his contract with the alleged agent is not competent to show that he was the agent of a third person. Filbert v. Behney, 45 Pa. Super. 24.

80. Christ v. Garretson State Bank, 13 S. D. 23, 82 NW 89.

81. Curtin v. Ingle, 137 Cal. 95, 69 P 836, 1013; Jordon v. Greig, 33 Colo. 360, 80 P 1045; Fisher v. English Lumber Co., 158 N. C. 61, 73 SE 121 (holding that, where there was some evidence that an agent was authorized to represent the principal in a transaction, and that the principal recognized the agent's authority to make a contract or ratified the contract, evidence of transactions between the agent and the other party to the contract with respect to the contract was admissible).

82. Haskett v. Unsell, (Mo. A.) 164 SW 651 (holding that, where defendant claimed that, in contracting with plaintiffs for certain plastering, he acted only as agent of the owner of the property, and that such agency had been disclosed to plaintiffs by a conversation with defendant's representative, defendant was entitled to have the latter testify to his version of such conversation, the other side of which had been testified to by plaintiff).

83. Cal.—Wanicrek v. United R. Co., 17 Cal. A. 121, 118 P 947 (holding that the proper way to show the extent of an agent's authority is to offer evidence of the orders given him or of the rules adopted for his guidance, and, if such evidence is not available, it is proper to describe the work performed by the agent in his employment with knowledge and implied acquiescence of the principal, or trace it to some word or act of the principal).

Colo.—Thatcher v. Kaucher, 2 Colo. 698.

Minn.—Nininger v. Knox, 8 Minn. 140 (applying the rule to a special agent because the extent of his authority is supposed to depend entirely on his instructions).

Mo.—Gestring v. Fisher, 46 Mo. A. 603; Bensberg v. Harris, 46 Mo. A. 404.

N. H.—Hall v. Brown, 58 N. H. 93.

Oh.—Wellington First Nat. Bank v. Mansfield Sav. Bank, 10 Oh. Cir. Ct. 233, 6 Oh. Cir. Dec. 452 (where it was said that where an agent has had definite instructions not to act for his principal in a matter outside of his duties as an agent, the principal may show such instructions, where he is sought to be held for the act of his agent contrary to such instructions).

Pa.—Brown v. Kirk, 26 Pa. Super. 157.

S. D.—J. I. Case Threshing Mach. Co. v. Eichinger, 15 S. D. 530, 91 NW 82 (holding that, where, in claim and delivery by sellers of a threshing machine against the purchasers, defendants seek to charge plaintiffs with the acts of their agent, it is proper to admit in evidence the agreement under which the agent was authorized to act as agent, and containing his instructions).

Va.—Lunsford v. Smith, 12 Gratt. (53 Va.) 554.

84. Mt. Morris Bank v. Gorham, 169 Mass. 519, 48 NE 341 (holding that a principal sued on a contract made by his agent may put in evidence the agent's written authority, in order to show that this act was outside of it); Clark v. Dillman, 108 Mich. 625, 66 NW 570; Wimp v. Early, 104 Mo. A. 85, 78 SW 343; Gestring v. Fisher, 46 Mo. A. 603. But see Van Dyke v. Wilder, 66 Vt. 579, 29 A 1016.

85. Delmage v. Crow, 23 Misc. 326, 51 NYS 240 [rev 22 Misc. 511, 49 NYS 1004].

86. Ala.—Higman v. Camody, 112 Ala. 267, 20 S 480, 57 AmSR 33.

Iowa.—Hichhorn v. Bradley, 117 Iowa 130, 90 NW 592.

Ky.—Continental Tobacco Co. v. Campbell, 76 SW 125, 25 KyL 569; Givens v. Cord, 44 SW 665.

Mass.—Sanford v. Orient Ins. Co., 174 Mass. 416, 54 NE 883, 75 AmSR 858.

Minn.—Northwestern Fuel Co. v. Central Lumber, etc., Co., 110 Minn. 128, 124 NW 981.

N. Y.—Oderkirk v. Fargo, 61 Hun 418, 16 NYS 220; Favill v. Perkins, 2 Silv. Sup. 513, 6 NYS 169; Meinhold v. Bradley Salt Co., 20 Misc. 608, 46 NYS 346.

Eng.—Smethurst v. Taylor, 14 L. J. Exch. 86 (holding that, where plaintiff through his agent contracted with another for the sale of goods and the question was whether they were sold on the credit of such other or defendant, a letter of instructions from plaintiff to his agent on the subject of the sale, not communicated to such other or to defendant, was not admissible in evidence for plaintiff).

87. Corbet v. Waller, 27 Wash. 242, 67 P 567; National Bolivian Nav. Co. v. Wilson, 5 App. Cas. 176.

88. Merchants', etc., Nat. Bank v. Clifton Mfg. Co., 56 S. C. 320, 33 SE 750.

89. **Letters from principal to agent** see supra § 702.

Letters from principal to other persons see supra § 699.

90. Ala.—Herring v. Skaggs, 62 Ala. 180, 34 AmR 4 (descriptive pamphlet).

Iowa.—Deane v. Everett, 90 Iowa 242, 57 NW 874 (order blank).

Mont.—Mahoney v. Butte Hardware Co., 19 Mont. 377, 48 P 545 (articles of incorporation of company admissible for purpose of showing what business it was authorized to transact, as affecting its agent's authority).

Nebr.—Davis v. Benedict, 49 Nebr. 119, 68 NW 398 (holding that, where a lessee, required by the lease to pay for all necessary repairs and improvements, procured repairs to be made during the term by one who sought to recover against the lessor as principal, on the ground that the lessee acted as agent merely, it was error to exclude the lease from evidence in behalf of defendant).

N. J.—Scull v. Skillton, 70 N. J. L. 792, 59 A 457 (holding that in an action for goods sold and alleged to have been delivered to the manager of a hotel, claimed to be an agent of defendant, the lease of the hotel to the agent, and not to defendant, was admissible).

Pa.—Bates v. Short, 3 Pennyp. 495.

S. D.—Quale v. Hazel, 19 S. D. 483, 104 215 (contract).

Tex.—Sargent v. Barnes, (Civ. A.) 159 SW 366 (unsigned memorandum).

Utah.—McCornick v. Queen of Sheba Gold Min., etc., Co., 23 Utah 71,

[§ 707] **(10) Parol Evidence.**[91] As a general rule the fact of agency or the nature and extent of authority may be established by parol,[92] except where such evidence is inadmissible under the best and secondary evidence rule,[93] or under the parol evidence rule,[94] as where the authority is required to be in writing.[95]

[§ 708] **(11) Circumstantial Evidence—(a) In General.** Circumstantial evidence is ordinarily competent to establish the fact or extent of an agency.[96] Where such evidence is resorted to for the purpose of establishing agency, all the facts and circumstances showing the relation of the parties, and their treatment of each other, and throwing light upon the character of such relation, are admissible in evidence.[97]

63 P 820 (reports and statements of agent).

[a] **Power of attorney.**—In unlawful detainer a power of attorney under seal appointing as agent to manage the property and bring suit one who gave to defendant notice to surrender is admissible, although not recorded. Hobday v. Kane, 114 Va. 398, 76 SE 902.

[b] **Receipt.**—In an action on a subscription contract to buy a factory, a receipt showing the acceptance of the factory, signed by persons other than defendants and not shown to have acted under the authority of defendants, was properly excluded. Chicago Bldg., etc., Co. v. Butler, 139 Ga. 816, 78 SE 244.

91. **Best and secondary evidence of agency** see Evidence [17 Cyc 489].

Evidence of customs and usages to explain written contract made by agent see Customs and Usages [12 Cyc 1087].

92. Cal.—Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 46 P 738.

Ind.—Richardson v. St. Joseph Iron Co., 5 Blackf. 146, 33 AmD 460.

Iowa.—Lyons v. Thompson, 16 Iowa 62; Powesheik County v. Stanley, 9 Iowa 511.

Kan.—Kansas L. & T. Co. v. Love, 45 Kan. 127, 25 P 191.

La.—Cuggy v. Zeller, 132 La. 222, 61 S 209 (although the proof may in the end affect the title to realty).

Me.—Bryer v. Weston, 16 Me. 261.

Md.—Anderson v. Stewart, 108 Md. 340, 70 A 228.

N. Y.—Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co., 136 App. Div. 22, 120 NYS 163 (holding that, in an action by an undisclosed principal in a contract of sale for the breach of the seller's implied warranty, the contract employing the agent may be shown by parol, in the absence of any written contract of employment); Bank of North America v. Embury, 33 Barb. 323; Tebbetts v. Levy, 11 NYS 684.

S. C.—Brown v. Southern R. Co., 83 S. C. 30, 64 SE 961 (holding that, where a third person testified that he was sent by defendant to confer with plaintiff as to an adjustment of plaintiff's claim, plaintiff could testify that the third person had charge of making settlements for defendant).

Tex.—Hamm v. Drew, 33 Tex. 77, 18 SW 434.

Va.—Lunsford v. Smith, 12 Gratt. (53 Va.) 554.

Ont.—Standard Realty Co. v. Nicholson, 24 Ont. L. 46, 2 OntWN 1189, 19 OntWR 373.

[a] **Parol directions** from the principal to the agent are admissible to prove authority in the purchase of certain articles; and an unsigned writing purporting to have come from the principal, directed to the agent in these words, "Buy for me the following articles" (enumerating them), is not such as defines or limits the authority of the agent. Snow v. Warner, 10 Metc. (Mass.) 132, 43 AmD 417.

93. See Evidence [17 Cyc 471 et seq].

94. See generally Evidence [17 Cyc 567 et seq].

Parol evidence: As to parties to instrument or obligation see Evidence [17 Cyc 708-712]. To vary or contradict written contract of employment see Evidence [17 Cyc 604, 628, 719].

95. Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316, 322, 85 NW 1019, 84 AmSR 927 (where the court said: "The idea is advanced that written authority to an agent may be extended by subsequent oral authority. That is so in many cases, but not where the authority is required by law to be in writing. A power to sell and convey real estate can no more be extended or changed by parol than can a conveyance of real estate. That is so elementary that the suggestion of respondents' counsel to the contrary does not require further notice").

When written or sealed authority necessary see supra §§ 53-66.

96. Ala.—Smiley v. Hooper, 147 Ala. 646, 41 S 660.

Ark.—Wolfe v. State, 104 Ark. 140, 148 SW 641.

Cal.—Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 46 P 738; Waniorek v. San Francisco United R. Co., 17 Cal. A. 121, 118 P 947.

Colo.—Silver Mountain Mine Co. v. Anderson, 51 Colo. 298, 117 P 173 (holding that facts which tend to show recognition by the principal of the authority of an alleged agent are admissible in proof of agency); Burnell v. Morrison, 46 Colo. 533, 105 P 876.

Del.—Hansell v. Levy, 10 Del. 407; Geylin v. Villerol, 7 Del. 311.

Ill.—Vrchotka v. Rothschild, 100 Ill. A. 268.

Ind.—Indiana, etc., R. Co. v. Adamson, 114 Ind. 282, 15 NE 5; Broadstreet v. McKamey, 41 Ind. A. 272, 83 NE 773; Fruchy v. Eagleson, 15 Ind. A. 88, 43 NE 146.

Iowa.—Anderson v. Patten, 157 Iowa 23, 137 NW 1050; Markley v. Western Union Tel. Co., 144 Iowa 105, 122 NW 136, 138 AmSR 263 (holding that, on the issue whether C was agent of defendant telegraph company, testimony of plaintiff that he had worked within a block of defendant's office; that he was frequently at the depot where the office was located, and saw C there; that he knew the operator at that place; and that he saw C sending telegrams or delivering them from defendant's office, was admissible); Leasure v. Boie, 142 Iowa 284, 120 NW 643; Fritz v. Chicago Grain, etc., Co., 136 Iowa 699, 114 NW 193.

Kan.—Linscott v. Conner, 85 Kan. 865, 118 P 693.

Ky.—Columbia Land, etc., Co. v. Tinsley, 60 SW 10, 22 KyL 1082.

La.—Moseley v. Keys, 18 La. 46 (holding that the authority of a clerk to sign the name of a mercantile firm to a letter of credit addressed to a particular person, when denied, may be shown by circumstantial evidence when there is no direct proof).

Mass.—Rintamaki v. Cunard Steamship Co., 205 Mass. 115, 91 NE 220.

Minn.—Stewart v. Cowles, 67 Minn. 184, 69 NW 694.

Mo.—Mitchum v. Dunlap, 98 Mo. 418, 11 SW 989; Hull v. Jones, 69 Mo. 587; Meux v. Haller, 179 Mo. A. 466, 162 SW 688; Greenbrier Distillery Co. v. Van Frank, 147 Mo. A. 204, 126 SW 222 (holding that, in an action for liquor purchased by defendant's agent for defendant, the fact that city and federal licenses were in defendant's name was a circumstance for consideration with the other evidence on the issue of agency); Roberson v. Clevenger, 111 Mo. A. 622, 86 SW 512; Nicholson v. Golden, 27 Mo. A. 132.

Nebr.—Holt v. Schneider, 57 Nebr. 523, 77 NW 1086.

Okl.—Midland Sav., etc., Co. v. Sutton, 30 Okl. 448, 120 P 1007; Ricker Nat. Bank v. Stone, 21 Okl. 333, 97 P 577.

Or.—Co-Operative Copper Co. v. Law, 65 Or. 250, 132 P 521.

Pa.—Reel v. Adams Express Co., 27 Pa. Super. 77 (driving wagon and wearing uniform with principal's name thereon).

R. I.—Ward v. New England Southern Conference, etc., 27 R. I. 262, 61 A 651.

S. C.—Fail v. Western Union Tel. Co., 80 S. C. 207, 60 SE 697, 61 SE 258.

S. D.—Reid v. Kellogg, 8 S. D. 596, 67 NW 687.

Tex.—Sargent v. Barnes, (Civ. A.) 159 SW 366, 373 [quot Cyc].

Utah.—Campbell v. Gowans, 35 Utah 268, 100 P 397, 23 LRANS 414, 19 AnnCas 660.

W. Va.—Cassiday Fork Boom, etc., Co. v. Terry, 69 W. Va. 572, 73 SE 278.

Wis.—Bautz v. Adams, 131 Wis. 152, 111 NW 69.

See also supra §§ 32-41, 218-220.

[a] **Evidence inadmissible.**—Evidence that a letter, written and signed in a handwriting other that that of the one whose name was subscribed, came in an envelope containing a deed from the purported writer to another party is not competent to prove that its writing and signing had been authorized. Johnson v. Fecht, 94 Mo. A. 605, 68 SW 615 [aff 185 Mo. 335, 83 SW 1077].

97. U. S.—Turner v. Yates, 16 How. 14, 14 L. ed. 824.

Ala.—Brown v. Prude, 97 Ala. 639, 11 S 838.

Cal.—Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 46 P 738; Wright v. Solomon, 19 Cal. 64, 79 AmD 196; Jones v. Waterman, 7 Cal. Unrep. Cas. 316, 87 P 469.

Colo.—Arthur v. Gard, 3 Colo. A. 133, 32 P 343.

Conn.—Plumb v. Curtis, 66 Conn. 154, 33 A 998.

Ky.—Beattyville Coal Co. v. Hoskins, 44 SW 363, 19 KyL 1759 (holding that, on an issue as to whether L was authorized to conduct business as the agent of defendants, so as to charge them for goods purchased by him on their account, evidence that defendants claimed an account for goods sold by L as their agent is admissible).

Me.—Forsyth v. Day, 41 Me. 382.

Mass.—Holden v. Starks, 159 Mass. 503, 34 NE 1069, 38 AmSR 451.

Minn.—Lindquist v. Dickson, 98 Minn. 369, 107 NW 958, 6 LRANS 729, 8 AnnCas 1024.

Nebr.—Johnston v. Milwaukee, etc., Inv. Co., 46 Nebr. 480, 64 NW 1100.

N. Y.—New York Guaranty, etc., Co. v. Gleason, 78 N. Y. 503, 7 AbbNCas 334; Olcott v. Tioga R. Co., 27 N. Y. 546, 84 AmD 298 [aff 40 Barb. 179]; Matter of Zinke, 90 Hun 127, 35 NYS 645; United Electric Light, etc., Co. v. Blackton, 134 NYS 882.

N. C.—Trollinger v. Fleer, 157 N. C. 81, 72 SE 795; Brittain v. Westhall, 135 N. C. 492, 47 SE 616.

Or.—Foste v. Standard L., etc., Ins. Co., 34 Or. 125, 54 P 811.

Pa.—Theyken v. Howe Mach. Co., 109 Pa. 95; Strimpfler v. Roberts, 18 Pa. 283, 57 AmD 606.

Tex.—Sargent v. Barnes, (Civ. A.) 159 SW 366, 373 [quot Cyc]; Thompson v. Mills, 45 Tex. Civ. A. 642, 101 SW 560; Slaughter v. Coke County, 34 Tex. Civ. A. 598, 79 SW 863.

Wash.—Fox v. Burlington Mfg. Co., 7 Wash. 391, 35 P 126.

See also supra §§ 32-41, 218-220.

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[§ 709] **(b) Acts of Agent—aa. In General.** As a general rule the fact of agency, or the extent and scope thereof, cannot be established by proof of the acts of the pretended agent, in the absence of evidence tending to show the principal's knowledge of such acts, or assent to them.[98] But where there is further evidence that the alleged principal authorized or knew of the acts of the alleged agent and made no objection,[99] or where the acts are of such a character, and so continued, as to justify an

[a] **Great latitude allowed.**—(1) The evidence necessary to establish an implied agency is very different from that required to prove an express agency. In the former case greater latitude must necessarily be allowed in the admission of testimony tending to prove facts and circumstances from which the existence of an agency may be legitimately inferred. Patterson v. Van Loon, 186 Pa. 367, 40 A 495. (2) From the nature of the case evidence that would tend to prove an implied agency would be admissible as proof of an express agency. Patterson v. Van Loon, supra.

[b] **Illustration.**—In Robinson v. Greene, 148 Ala. 434, 43 S 797, it appeared that plaintiff was allowed, against the objections of defendant, to show that while the alleged agent had charge of the property defendant removed cattle and property therefrom. This evidence was held to be admissible as tending to show that the party in charge of the property was the agent of defendant.

[c] **Payment of commissions** by one to another for making a sale is admissible as tending to prove agency. Slaughter v. Coke County, 34 Tex. Civ. A. 598, 79 SW 863.

[d] **Evidence of the motives or conditions of the parties is immaterial,** unless it is shown that such motives or conditions explain appearances that seem to contradict the actual fact as to the agency as such fact has been proved by other evidence. It is the fact of agency, not the motives or conditions of the parties that is in question. Fitzgerald v. Pendergast, 114 Mass. 368.

[e] **Evidence of the pecuniary circumstances of an alleged agent** (1) is irrelevant to establish agency. North v. Metz, 57 Mich. 612, 24 NW 759. (2) Thus evidence that the agent to whom a payment was made was insolvent at the time is inadmissible to prove that he did not have authority to receive such payment. Hare v. Bailey, 73 Minn. 409, 76 NW 213. See also National Shoe, etc., Bank's App., 55 Conn. 469, 12 A 646.

[f] **Purchase on credit.**—On the question whether a purchase of goods on credit was not within the scope of the agent's authority, evidence is admissible to show that the agent was always in funds, either from the business itself which was the subject of the agency, or from his principal, sufficient to pay cash for all his purchases. Taft v. Baker, 100 Mass. 68.

98. U. S.—Chicago, etc., R. Co. v. Chickasha Nat. Bank, 174 Fed. 923, 98 CCA 535; Manhattan Web Co. v. Aquidneck Nat. Bank, 133 Fed. 76.

Ala.—Gambill v. Fuqua, 148 Ala. 448, 42 S 735; Huntsville Belt Line, etc., R. Co. v. Corpening, 97 Ala. 681, 12 S 295; Louisville, etc., R. Co. v. Gilmer, 89 Ala. 534, 7 S 654; Gimon v. Terrell, 38 Ala. 208; McDougald v. Dawson, 30 Ala. 553; McDonnell v. Montgomery Branch Bank, 20 Ala. 313.

Ark.—Wales-Riggs Plantations v. Dye, 105 Ark. 446, 151 SW 998; City Electric St. R. Co. v. First Nat. Exch. Bank, 62 Ark. 33, 34, SW 89, 54 AmSR 282, 31 LRA 535; Nicklase v. Griffith, 59 Ark. 641, 26 SW 381.

Cal.—Lambert v. Gerner, 142 Cal. 399, 76 P 53.

Conn.—Scott v. Crane, 1 Conn. 255.

Ga.—Brinson v. Exley, 122 Ga. 8, 49 SE 810; Americus Oil Co. v. Gurr, 114 Ga. 624, 40 SE 780; Doonan v. Mitchell, 26 Ga. 472.

Ill.—Schmidt v. Shaver, 196 Ill. 108, 63 NE 655, 89 AmSR 250; Fleishman v. Ballou, 131 Ill. A. 564; Peter Schoenhofen Brewing Co. v. Wengler, 57 Ill. A. 184.

Ind.—International Bldg., etc., Assoc. v. Watson, 158 Ind. 508, 64 NE 23; Lucas v. Rader, 29 Ind. A. 287, 64 NE 488.

Iowa.—Fritz v. Chicago Grain, etc., Co., 136 Iowa 699, 114 NW 193; John Gund Brewing Co. v. Peterson, 130 Iowa 301, 106 NW 741.

Kan.—Hutchinson Wholesale Grocery Co. v. McDonald, 71 Kan. 861, 80 P 950; Richards v. Newstifter, 70 Kan. 350, 78 P 824; Leu v. Mayer, 52 Kan. 419, 34 P 969; Streeter v. Poor, 4 Kan. 412; St. Louis, etc., R. Co. v. Brown, 3 Kan. A. 260, 45 P 118.

Ky.—Hensley v. McDonald, 108 SW 862, 32 KyL 1333.

Me.—Eaton v. Granite State Provident Assoc., 89 Me. 58, 35 A 1015; Coburn v. Paine, 36 Me. 105.

Mass.—Rice v. James, 193 Mass. 458, 79 NE 807 (holding that, on an issue as to whether one who purchased lumber from plaintiff acted as defendant's agent, there being no evidence tending to show that defendant knew that the alleged agent was using letterheads showing him to be a manager for defendant, such letterheads were properly excluded); Fletcher v. Willis, 180 Mass. 243, 62 NE 2.

Mich.—Jones v. Bloomgarden, 143 Mich. 326, 106 NW 891; Gore v. Canada L. Assur. Co., 119 Mich. 136, 77 NW 650; Davis v. Kneale, 97 Mich. 72, 56 NW 220; North v. Metz, 57 Mich. 612, 24 NW 759 (acts expressly repudiated); Reynolds v. Continental Ins. Co., 36 Mich. 131.

Minn.—Jackson v. Mutual Ben. L. Ins. Co., 79 Minn. 43, 81 NW 545, 82 NW 366; Fowlds v. Evans, 52 Minn. 551, 54 NW 743; Walsh v. St. Paul Trust Co., 39 Minn. 23, 38 NW 631; Lawrence v. Winona, etc., R. Co., 15 Minn. 390, 2 AmR 130; Sencerbox v. McGrade, 6 Minn. 484.

Miss.—Therrell v. Ellis, 83 Miss. 494, 35 S 826; Petrie v. Wright, 14 Miss. 647.

Mo.—Mathes v. Switzer Lumber Co., 173 Mo. A. 239, 158 SW 729; Groneweg, etc., Co. v. Estes, 144 Mo. A. 418, 128 SW 786; McGraw v. O'Neil, 123 Mo. A. 691, 101 SW 132; State v. Henderson, 86 Mo. A. 482; Lowry v. Farmington Prospecting, etc., Co., 65 Mo. A. 266; Alt v. Grosclose, 61 Mo. A. 409. See also Smith v. Pullman Co., 138 Mo. A. 238, 119 SW 1072 (application of rule to corporate principals).

Nebr.—Warner v. Sohn, 86 Nebr. 519, 125 NW 1072; Blanke Tea, etc., Co. v. Rees Printing Co., 70 Nebr. 510, 97 NW 627; Richardson, etc., Co. v. Nuckolls County School Dist. No. 11, 45 Nebr. 777, 64 NW 218.

Nev.—Schlitz Brewing Co. v. Grimmon, 28 Nev. 235, 81 P 43.

N. H.—Union Hosiery Co. v. Hodgson, 72 N. H. 427, 57 A 384.

N. Y.—Edwards v. Dooley, 120 N. Y. 540, 24 NE 827 (which holds that, where a principal does nothing himself to lead others to believe that the agent has authority to act outside of his agency, his rights are not affected by acts of the agent which misled third persons as to his relations); Droste v. Wabash R. Co., 153 App. Div. 160, 138 NYS 203; Leary v. Albany Brewing Co., 77 App. Div. 6, 79 NYS 130; Lawrence v. Gebhard, 41 Barb. 575; Wise v. International Soc., 37 Misc. 871, 76 NYS 997.

N. C.—McCormick v. Williams, 152 N. C. 638, 68 SE 138; Jackson v. American Tel., etc., Co., 139 N. C. 347, 51 SE 1015, 70 LRA 738; Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 SE 816, 67 LRA 455, 1 AnnCas 718.

N. D.—Q. W. Loverin-Browne Co. v. Buffalo Bank, 7 N. D. 569, 75 NW 923.

Or.—Sloan v. Sloan, 46 Or. 36, 78 P 893.

Pa.—Whiting v. Lake, 91 Pa. 349; Kaufman v. National Transit Co., 2 Mon. 36; Slease v. Naysmith, 14 Pa. Super. 134.

S. C.—Martin v. Suber, 39 S. C. 525, 18 SE 125. See also Ft. Mill Sav. Bank v. Sprunt, 86 S. C. 8, 67 SE 955.

Tex.—International, etc., R. Co. v. Prince, 77 Tex. 560, 14 SW 171, 19 AmSR 795; Madeley v. Kellam, (Civ. A.) 135 SW 659; Stockton v. Crow, (Civ. A.) 132 SW 952; Cooper v. Sawyer, 31 Tex. Civ. A. 620, 73 SW 992.

Vt.—Montpelier First Nat. Bank v. Bertoli, 87 Vt. 297, 89 A 359; Livingston Mfg. Co. v. Rizzi, 86 Vt. 419, 85 A 912; Dickerman v. Quincy Mut. F. Ins. Co., 67 Vt. 609, 32 A 489.

Va.—Poore v. Magruder, 24 Gratt. (65 Va.) 197.

Wash.—Lenicke v. Funk, 78 Wash. 460, 139 P 234; Gregory v. Loose, 19 Wash. 599, 54 P 33.

W. Va.—Garber v. Blatchley, 51 W. Va. 147, 41 SE 222; Rosendorf v. Poling, 48 W. Va. 621, 37 SE 555.

Wis.—Chicago, etc., R. Co. v. James, 22 Wis. 194.

[a] **Reason for rule.**—"The mere acting of one under the claim or belief that he is an agent does not prove that he is clothed with authority." Travers v. Barrett, 30 Nev. 402, 408, 97 P 126.

[b] **The fact that one assumes to act as an agent,** without the knowledge or subsequent ratification of the principal, is not sufficient to prove the agency. Sievert v. Illinois Furniture Co., 178 Ill. A. 574.

[c] **A habit of performing certain acts** is not evidence of authority so to do where the principal was ignorant of such performance. Goodell v. Sinclair, 112 Ill. A. 594.

[d] **Books of account kept by the alleged agent** of which neither plaintiff nor defendant had any knowledge are not admissible as evidence of an agency. Goodyear v. Williams, 73 Kan. 192, 85 P 300.

99. U. S.—Southern Express Co. v. Platten, 93 Fed. 936, 36 CCA 46.

Ala.—Jones v. Journey, 2 Ala. A. 488, 56 S 850.

Cal.—Ballard v. Nye, 138 Cal. 588, 72 P 156 [rev reh 69 P 481].

Colo.—Gambrill v. Brown Hotel Co., 11 Colo. A. 529, 54 P 1025.

Ind.—Barnett v. Gluting, 3 Ind. A. 415, 29 NE 154, 927.

Kan.—Hawkins v. Windhorst, 77 Kan. 674, 96 P 48, 127 AmSR 445, 17 LRANS 219 and note; Richards v. Newstifter, 70 Kan. 350, 78 P 824.

Mass.—Beaucage v. Mercer, 206 Mass. 492, 92 NE 774, 138 AmSR 401.

Mich.—Cronk v. Mulvaney, 168 Mich. 346, 134 NW 9.

Mo.—Stenson v. Lancaster, 178 Mo. A. 340, 165 SW 1158.

Nebr.—Richardson, etc., Co. v. Nuckolls County School Dist. No. 11, 45 Nebr. 777, 64 NW 218.

N. Y.—Mullin v. Sire, 37 Misc. 807, 76 NYS 926; Dickinson v. Salmon, 36 Misc. 169, 73 NYS 196.

N. D.—Q. W. Loverin-Browne Co. v. Buffalo Bank, 7 N. D. 569, 75 NW 923.

Pa.—Bellman v. Pittsburg, etc., R. Co., 31 Pa. Super. 389 (holding that continuous acts performed by the agent in and about the business of his alleged principals, and their recognition of these acts, are evidence from which an agency may be fairly inferred by a jury).

S. C.—Woodward v. Cave, 79 S. C. 578, 61 SE 82. See also America Land Mortg. Inv., etc., Co. v. Gillam, 49 S. C. 345, 26 SE 990, 29 SE 203.

Tex.—International Harvester Co. v. Campbell, 43 Tex. Civ. A. 421, 96 SW 93; Parlin, etc., Co. v. Miller, 25 Tex. Civ. A. 190, 60 SW 881; Pullman

inference that the principal knew of them, and would not have permitted the same if unauthorized, the acts themselves are competent evidence of agency.[1]

As against the agent, his acts may be proved to establish the fact of the agency.[2]

Order of proof. Evidence of an agent's acts cannot ordinarily be permitted before his authority is shown, although it is discretionary with the court to permit it where the authority is to be shown by circumstances.[3]

[§ 710] **bb. For Another Principal.** Acts done by one as the agent of another principal are not admissible to prove agency in the particular case, in the absence of other evidence tending to establish such agency.[4]

[§ 711] **(c) Recognition of Similar Transactions—aa. In General.** Among the several ways of showing the existence and scope of an agency, circumstances tending to show the exercise of authority on the part of the agent and its recognition by the principal are admissible, although they may have no direct connection with the issues tried,[5] but in order to be relevant the alleged principal

Palace Car Co. v. Nelson, 22 Tex. Civ. A. 223, 54 SW 624.

Va.—Hoge v. Turner, 96 Va. 624, 32 SE 291.

Wash.—Lemcke v. Funk, 78 Wash. 460, 139 P 234.

Wis.—Chicago, etc., R. Co. v. James, 22 Wis. 194.

[a] **The payment of taxes** by one claiming to act as the agent of another is not in itself competent evidence of the agency, but the admission of such evidence is not error, where it has been preceded by other evidence tending to show the existence of the agency and recognition of such agency by the principal. Union Naval Stores Co. v. Pugh, 156 Ala. 369, 47 S 48.

[b] **In an action as upon an account stated,** the creditor should be permitted to show that the agent of the debtor had actual or implied authority to settle the account by proving the manner in which he acted, what he was doing and was permitted to do on behalf of defendant, and what actual or apparent authority he had, whether or not any one fact sought to be established in itself showed complete authority. Sariol v. James P. McDonald Co., 127 App. Div. 648, 111 NYS 796.

[c] **Memorandum.**—In an action for breach of a contract to sell goods, a memorandum given to the purchaser by the seller's alleged agent, the proof of whose authority rests in parol, is properly submitted to the jury, with other testimony showing the fact and extent of the agency. Buist v. Eufaula Drug Co., 96 Ala. 292, 11 S 301.

[d] **Receipts given by an alleged agent** are admissible as evidence when the question of agency is left to the jury, otherwise the evidence of his agency would be without final effect. Robinson v. Sresovich, 5 Hawaii 618.

1. U. S.—White v. German Alliance Ins. Co., 103 Fed. 260, 43 CCA 216.

Ala.—Lytle v. Dothan Bank, 121 Ala. 215, 26 S 6; Hill v. Helton, 80 Ala. 528, 1 S 340; Reynolds v. Collins, 78 Ala. 94; Gimon v. Terrell, 38 Ala. 208; McDonnell v. Montgomery Branch Bank, 20 Ala. 313.

Ark.—Arkansas Southwestern R. Co. v. Dickinson, 78 Ark. 483, 95 SW 802, 115 AmSR 54.

Cal.—Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 AmD 623; Minturn v. Burr, 16 Cal. 107.

Ill.—Proctor v. Tows, 115 Ill. 138, 3 NE 569; Doan v. Duncan, 17 Ill. 272.

Ind.—Indiana, etc., R. Co. v. Adamson, 114 Ind. 282, 15 NE 5; Southern R. Co. v. Crone, 51 Ind. A. 300, 99 NE 762, 765 [cit Cyc].

Iowa.—Markley v. Western Union Tel. Co., 144 Iowa 105, 122 NW 136, 138 AmSR 263.

Kan.—Cain Bros. Co. v. Wallace, 46 Kan. 138, 26 P 445.

Mass.—Bragg v. Boston, etc., R. Corp., 9 Allen 54.

Minn.—Best v. Krey, 83 Minn. 32, 85 NW 822; Fowlds v. Evans, 52 Minn. 551, 54 NW 743.

N. H.—Kent v. Tyson, 20 N. H. 121.

N. J.—Dierkes v. Hauxhurst Land Co., 80 N. J. L. 369, 374, 79 A 361, 34 LRANS 693 and note [quot Cyc].

N. Y.—Peche v. Sloane, 16 App. Div. 458, 45 NYS 37.

Pa.—Woodwell v. Brown, 44 Pa. 121; New York Cent., etc., R. Co. v. Deer Creek Lumber Co., 49 Pa. Super. 453; Bellman v. Pittsburgh, etc., R. Co., 31 Pa. Super. 389; In re Embree, 18 Lanc LRev 57.

S. C.—Welch v. Clifton Mfg. Co., 55 S. C. 568, 33 SE 739.

Tex.—International Harvester Co. v. Campbell, 43 Tex. Civ. A. 421, 96 SW 93; Pullman Palace Car Co. v. Nelson, 22 Tex. Civ. A. 223, 54 SW 624.

Vt.—Daggett v. Champlain Mfg. Co., 71 Vt. 370, 45 A 755.

Va.—Hoge v. Turner, 96 Va. 624, 32 SE 291.

W. Va.—Black Lick Lumber Co. v. Camp Constr. Co., 63 W. Va. 477, 60 SE 409.

2. Siers v. Wiseman, 58 W. Va. 340, 52 SE 460.

3. Turner v. Phœnix Ins. Co., 55 Mich. 236, 21 NW 326. See also supra § 695; infra § 728.

Order of proof see generally Trial [38 Cyc 1349].

4. Hill v. Helton, 80 Ala. 528, 1 S 340; Murphy v. Gumaer, 12 Colo. A. 472, 55 P 951.

5. U. S.—Kent v. Addicks, 126 Fed. 112, 60 CCA 660 (holding that, upon an issue as to the authority of an agent to bind his principal by a particular contract, evidence is admissible to show that he had made other similar contracts, which had been accepted and carried out by his principal, and that the principal had referred other persons to him as having authority to make contracts of the same class).

Ala.—Henderson Law Co. v. Hinson, 157 Ala. 640, 47 S 717; Murphy v. St. Louis Coffin Co., 150 Ala. 143, 43 S 212; Birmingham Mineral R. Co. v. Tennessee Coal, etc., Co., 127 Ala. 137, 28 S 679; Lytle v. Dothan Bank, 121 Ala. 215, 26 S 6; Tennessee River Transp. Co. v. Kavanaugh, 101 Ala. 1, 13 S 283; Gibson v. J. Snow Hardware Co., 94 Ala. 346, 10 S 304.

Ark.—Chalmers v. Bowen, 164 SW 1131.

Cal.—Brown v. Spencer, 163 Cal. 589, 126 P 493; Waniorek v. San Francisco United R. Co., 17 Cal. A. 121, 118 P 947.

Del.—Delaware, etc., Tel., etc., Co. v. Jordan, 25 Del. 67, 78 A 401.

Ill.—Griffin v. Spengler, 176 Ill. A. 429 (payment of checks); Marsh v. French, 82 Ill. A. 76; McGillis v. Anderson, 44 Ill. A. 601; Stastney v. Marschall, 37 Ill. A. 137.

Ind.—Morehead v. Murray, 31 Ind. 418 (holding that, as steps in proving the authority of one as an agent in the transaction in controversy, evidence of his similar transactions with different persons and one of his declarations therein was admissible); Hitchens v. Ricketts, 17 Ind. 625 (holding that, where the evidence as to the authority of an agent authorized to receive lands in exchange for certain lands of his principal was conflicting as to the right of the agent to rent the lands so received, it is competent to prove that the agent had acted for his principal in renting other lands taken by him in exchange under the power of attorney); Jewett v. Lawrenceburgh, etc., R. Co., 10 Ind. 539; Barnett v. Gluting, 3 Ind. A. 415, 29 NE 154, 927.

Iowa.—Fishbaugh v. Spunaugle, 118 Iowa 337, 92 NW 58.

Kan.—Cain Bros. Co. v. Wallace, 46 Kan. 138, 26 P 445.

Me.—Forsyth v. Day, 46 Me. 176.

Md.—Philadelphia, etc., R. Co. v. Crawford, 112 Md. 508, 517, 77 A 278 [cit Cyc].

Mass.—Williams v. Mitchell, 17 Mass. 98; Odiorne v. Maxcy, 15 Mass. 39.

Mich.—Haughton v. Maurer, 55 Mich. 328, 21 NW 426; McDonough v. Heyman, 38 Mich. 334. But see Wierman v. Bay City-Michigan Sugar Co., 142 Mich. 422, 106 NW 75 (holding that evidence that defendant, through its agent, paid other claims similar to that of plaintiff is not admissible either to show the agent's authority or to raise an inference that an agreement was made by defendant's agent to pay plaintiff's claim); Davis v. Kneale, 97 Mich. 72, 56 NW 220.

Nebr.—Wilber First Nat. Bank v. Ridpath, 47 Nebr. 96, 66 NW 27.

N. Y.—Beattie v. Delaware, etc., R. Co., 90 N. Y. 643; Thiry v. Taylor Brewing, etc., Co., 37 App. Div. 391, 56 NYS 85; Gieger v. Levin, 113 NYS 1016; American Encaustic Tiling Co. v. Reich, 12 NYS 927 [aff 11 NYS 776].

Pa.—Stevenson v. Hoy, 43 Pa. 191; Beal v. Adams Express Co., 13 Pa. Super. 143.

S. C.—Thomson v. Dillinger, 35 S. C. 608, 14 SE 776.

Tex.—International, etc., R. Co. v. Ragsdale, 67 Tex. 24, 2 SW 515; U. S. Equitable L. Assur. Soc. v. Ellis, (Civ. A.) 137 SW 184; Pecos River R. Co. v. Latham, 40 Tex. Civ. A. 78, 88 SW 392; Clarkson v. Reinhartz, (Civ. A.) 70 SW 111; People's Bldg., etc., Assoc. v. Keller, 20 Tex. Civ. A. 616, 50 SW 183; Mills v. Berla, (Civ. A.) 23 SW 910; Texas Land, etc., Co. v. Watson, 3 Tex. Civ. A. 233, 22 SW 873.

Vt.—Holbrook v. Quinlan, 84 Vt. 411, 80 A 339; Walsh v. Pierce, 12 Vt. 130.

Va.—Bowman v. Broadway First Nat. Bank, 115 Va. 463, 80 SE 95.

Wash.—Cooper v. Farmers', etc., Bank, 68 Wash. 310, 123 P 465; Lough v. Davis, 35 Wash. 449, 77 P 732; H. C. Mahrt Co. v. Hyman-Hall Co., 17 Wash. 416, 49 P 1063.

Wis.—Gallinger v. Lake Shore Traffic Co., 67 Wis. 529, 30 NW 790.

Eng.—Campbell v. Hicks, 28 L. J. Exch. 70.

Ont.—O'Brien v. Credit Valley R. Co., 25 U. C. C. P. 275.

See Keith v. Atkinson, 48 Colo. 480, 111 P 55, 139 AmSR 284.

See also supra §§ 37–41, 213; and infra § 713.

[a] **Materiality of such evidence.**—Where the authority of an agent is in issue, proof of the exercise by him, with the knowledge of the principal, of similar authority in past transactions may be material in two respects. In the first place, where notice is brought home to the person with whom a contract is made, such evidence tends to show that the agent was acting within the scope of his apparent authority, and so tends to bind the principal, even though actual authority in the particular instance be disproved. In the second place, the exercise of such authority in past transactions known to the principal tends to prove that in the particular transaction in question the agent possessed actual authority, there being

must in some way, directly or indirectly, be connected with the circumstances,[6] and it must be shown that the person dealing with the agent had knowledge at the time of such dealing of such previous acts and relied upon them,[7] and dealt with the agent as such.[8]

[§ 712] **bb. Necessity of Similarity of Acts.** The acts from which authority to do a specific act can be implied must be of the same general character and effect.[9] The fact that the principal had allowed one to act as agent in matters of one kind, or at one place, ordinarily raises no inference of authority to act in matters of a different kind, or at a different place, and accordingly is inadmissible for that purpose.[10]

[§ 713] **(d) Course of Dealing.** As proof of agency, a previous course of dealing, sanctioned or ratified by the principal, is competent, as having a tendency to prove agency in the given case, although the jury must determine its weight for such purpose.[11]

[§ 714] **(e) Special Authority for Single Act.**

no special instructions. Because where an agent under certain circumstances has been permitted to exercise a certain authority, the principal knowing the facts, and a similar transaction is entrusted to him under the same circumstances as before, and without special instructions, the presumption is his authority is the same." Wilber First Nat. Bank v. Ridpath, 47 Nebr. 96, 98, 66 NW 37.

[b] **Evidence that an alleged principal adopted similar acts** done by one purporting to act as agent about the time of the transaction in question is admissible upon the issue of authority vel non. Bartley v. Rhodes, (Tex. Civ. A.) 33 SW 604.

[c] **Evidence of previous but not of subsequent similar acts** is admissible. Mills v. Berla, (Tex. Civ. A.) 23 SW 910. But see Blowers v. Southern R. Co., 74 S. C. 221, 54 SE 368 (holding that, in order to determine the extent of the authority of an agent at a certain date evidence of acts of the same nature performed by him after such date was relevant).

[d] **An isolated transaction,** occurring a year subsequent to the one in controversy, unaccompanied by evidence of similar acts in the meantime, is too remote, and should be excluded. Bartley v. Rhodes, (Tex. Civ. A.) 33 SW 604.

[e] **Evidence that an agent did all the principal's business** is competent to show agency in a certain transaction, if the period to which such testimony related covered the time of the transaction. Dows v. Greene, 32 Barb. (N. Y.) 490 [aff 24 N. Y. 638]; Sanborn v. Cole, 63 Vt. 590, 22 A 716, 14 LRA 208.

[f] **Effect of inquiry by third person.**—Prior circumstances are not admissible to prove an agency when it appears that the third person made inquiry of the principal as to the authority. The principal's answer destroys the effect of previous circumstances and they are then admissible only to explain the import of his answer. Norton v. Richmond, 93 Ill. 367.

[g] **Judgments on other claims.**—On an issue as to whether an agent had authority to bind his principal by the purchase of a claim, judgments on other claims purchased for the principal by such agent are admissible. Mahoney v. Butte Hardware Co., 19 Mont. 377, 48 P 545.

6. Hill v. Helton, 80 Ala. 528, 1 S 340; Morse v. Diebold, 2 Mo. A. 163; Everdell v. Carrington, 154 App. Div. 500, 139 NYS 119; Howard v. Norton, 65 Barb. (N. Y.) 161.

7. Pease v. Fink, 3 Cal. A. 371, 85 P 657; Peter Schoenhofen Brewing Co. v. Wengler, 57 Ill. A. 184; Marx v. King, 162 Mich. 258, 127 NW 341 (holding that a customer who relies on the power of a salesman of a wholesaler to allow discounts different from what the invoices show may not show that the salesman dealt in a similar manner with others, where such dealings were unknown to the customer and to the wholesaler at the time). Contra Sharp v. Knox, 48 Mo. A. 169. See also infra § 713 note 11 [c].

8. Delaware, etc., Tel., etc., Co. v. Jordan, 25 Del. 67, 78 A 401 (holding that the general rule does not apply where a third person deals with the alleged agent on his own account and not as agent).

9. See supra §§ 36-41.

[a] **Acting as guarantor to others.**—On an issue as to the authority of an alleged agent to make purchases on account of defendant, evidence that defendant became guarantor to others than plaintiff for the price of similar articles purchased by the alleged agent upon his own account is not competent to show a previous authority. Williams v. Stearns, 59 Oh. St. 28, 51 NE 439.

10. Ala.—Tennessee River Transp. Co. v. Kavanaugh, 101 Ala. 1, 13 S 283.

Colo.—Murphy v. Gumaer, 12 Colo. A. 472, 55 P 951 (holding that an agency cannot be shown by proof of similar transactions between the agent and others in no way connected with the transaction in question, where such agency has not even been partially established by other evidence).

Iowa.—Keegan v. Rock, 128 Iowa 39, 102 NW 805 (holding that, on the issue as to whether one had had authority to borrow money for defendants, evidence that the alleged agent had acted as attorney for defendants in various transactions was not competent).

Md.—Lee v. Tinges, 7 Md. 215.

Mo.—Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013; Watson v. Race, 46 Mo. A. 546.

N. J.—Scull v. Skillton, 70 N. J. L. 792, 59 A 457 (holding that, in an action for the price of goods sold, alleged to have been delivered to an agent of defendant, evidence of such relationship existing at another time, and that defendant paid the debts of such alleged agent, was inadmissible).

N. Y.—Duryea v. Vosburgh, 121 N. Y. 57, 24 NE 308 [rev 1 NYS 833].

Pa.—Meredith v. Macoss, 1 Yeates 200.

11. Ala.—Lytle v. Dothan Bank, 121 Ala. 215, 26 S 6.

Ark.—Little Rock, etc., R. Co. v. Wiggins, 65 Ark. 385, 46 SW 731.

Colo.—Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 565.

Conn.—National Shoe, etc., Bank's App., 55 Conn. 469, 12 A 646.

Ga.—Noble v. Burney, 124 Ga. 960, 53 SE 463 (holding that, where the issue is as to the authority of an agent to renew a lease, and there is evidence that his authority was the same as it was during the lifetime of the predecessor in title of the alleged lessor, evidence as to the transaction of the alleged agent during the lifetime of the predecessor in title of the lessor is admissible); Arnold v. Adams, 4 Ga. A. 56, 60 SE 815 (holding that, on an issue as to whether one was agent for another, evidence of transactions with the alleged agent is admissible and the court may submit it to the jury with appropriate instructions as to its relevancy, being conditioned on their finding that the agency did in fact exist); Fitzgerald Cotton Oil Co. v. Farmers Supply Co., 3 Ga. A. 212, 59 SE 713.

Ill.—Doan v. Duncan, 17 Ill. 272; Haas Lumber Co. v. Harty Bros., etc., Co., 169 Ill. A. 323; Marsh v. French, 82 Ill. A. 76.

Iowa.—Fritz v. Chicago Grain, etc., Co., 136 Iowa 699, 114 NW 193; Grant v. Humerick, 123 Iowa 571, 94 NW 510; McCormick Harvesting Mach. Co. v. Lambert, 120 Iowa 181, 94 NW 497.

Ky.—Continental Tobacco Co. v. Campbell, 76 SW 125, 25 KyL 569.

Me.—Forsyth v. Day, 46 Me. 176; Cobb v. Lunt, 4 Me. 503.

Mass.—Sweetser v. Jordan, 211 Mass. 393, 97 NE 768; Rintamaki v. Cunard Steamship Co., 205 Mass. 115, 91 SE 220; Bucknam v. Chaplin, 1 Allen 70; Williams v. Mitchell, 17 Mass. 98.

Minn.—Dexter v. Berge, 76 Minn. 216, 78 NW 1111.

Mo.—Edwards v. Thomas, 66 Mo. 468; Brooks v. Jameson, 55 Mo. 505; Franklin v. Globe Mut. L. Ins. Co., 52 Mo. 461; Meux v. Haller, 179 Mo. A. 466, 162 SW 688; McCloud v. Western Union Tel. Co., 170 Mo. A. 624, 157 SW 101; Wagaman v. Security Mut. L. Ins. Co., 110 Mo. A. 616, 85 SW 117; Pierce City Nat. Bank v. Hughlett, 84 Mo. A. 268; Haubelt v. Rea, etc., Mill Co., 77 Mo. A. 672; Watkins v. Edgar, 77 Mo. A. 148; Bensberg v. Harris, 46 Mo. A. 404; Gibson v. Zeibig, 24 Mo. A. 65.

Nebr.—Standley v. Clay, 68 Nebr. 832, 94 NW 140.

N. Y.—Young v. Anthony, 119 App. Div. 612, 104 NYS 87.

Pa.—Dodge v. Williams, 47 Pa. Super. 302; Sheetram v. Trexler Stave, etc., Co., 13 Pa. Super. 219; Hines v. Herr, 3 Pa. Super. 124, 39 WklyNC 568.

S. C.—Blowers v. Southern R. Co., 74 S. C. 221, 54 SE 368; Welch v. Clifton Mfg. Co., 55 S. C. 568, 33 SE 739.

Tex.—Brennan v. Dansby, 43 Tex. Civ. A. 7, 95 SW 700; Missouri Pac. R. Co. v. Simons, 6 Tex. Civ. A. 621, 25 SW 996.

Vt.—Holbrook v. Quinlan, 84 Vt. 411, 80 A 339; Walsh v. Pierce, 12 Vt. 130.

W. Va.—Fielder v. Camp Constr. Co., 63 W. Va. 459, 60 SE 402.

Wis.—Batavian Bank v. Minneapolis, etc., R. Co., 123 Wis. 389, 101 NW 687.

Eng.—Pole v. Leask, 28 Beav. 562, 54 Reprint 481 [aff 9 Jur. N. S. 829].

See also supra §§ 37-49.

[a] **Evidence of a business custom** of one person to sign another's name to papers may be admitted as proof of agency. Broadstreet v. McKamey, 41 Ind. A. 272, 83 NE 773.

[b] **Authority to receive payment of judgment.**—On an issue as to whether an agent of a judgment creditor had authority to receive payment of the judgment, evidence that the agent was agent for the judgment creditor at a certain place, and that he took notes in payment for goods sold by the principal, received payment of the same even after maturity, took new notes in payment of old ones, and had dismissed a suit on a note, releasing a part of it and taking a new note for the remainder, with a new party as surety, and granting an extension of time, was admissible. Osborne v. Gatewood, (Tex. Civ. A.) 74 SW 72.

[c] **Knowledge of third person.**—Evidence of a course of dealing by an agent, sanctioned by his principal, is admissible to prove the extent of the agency, whether the party introducing it knew at the time of a transaction in controversy that the

A special authority to make a particular, or single, contract is no ground for inferring an implied authority to make other contracts generally, of the same kind, with other persons, and evidence thereof is not admissible.[12]

[§ 715] **(f) Authority of Similar Agents.** Evidence that a previous agent in the same position had a certain authority is admissible as tending to prove that the agent in question had the same authority.[13]

[§ 716] **(g) Custom of Agent in Transacting Business.**[14] Evidence is admissible to show that one dealt with an agent in the customary way;[15] but when an action is brought under claim of authority in an agent to do a specific act, evidence of the general custom of the agent is immaterial and should be excluded.[16]

[§ 717] **(h) Character of Business.** Where an agent is given authority to perform every act requisite to be done in the transaction of the principal's business, evidence of the character of such business is admissible in order to determine the scope of the agency.[17]

[§ 718] **(i) General Reputation.** An agency cannot be established by evidence that a person was generally reputed to be the agent of the principal,[18] although such evidence may be admitted in connection with other evidence tending to show the agency.[19]

[§ 719] **(j) Opinion of Witness.**[20] A witness, on the issue of agency, must state only the facts and circumstances concerning the various transactions, leaving the court or jury to determine whether or not an agency was created, and hence may not give his opinion or state his conclusions as to the existence of the agency,[21] or the nature and extent of the agent's authority.[22] But it has been held that the rule as to stating legal conclusions is not infringed by the witness testifying that the agent had no authority to do a certain act,[23] or no authority except as stated in his commission.[24]

[§ 720] **c. To Prove Ratification.** The acts and declarations of the principal tending to prove ratification of an agent's acts are admissible for that purpose,[25] and likewise evidence of acts and declarations of the agent tending to prove ratification.[26]

dealings had taken place or not. Bonner v. Lisenby, 86 Mo. A. 666.

12. Stanley v. Sheffield Land, etc., Co., 83 Ala. 260, 4 S 34.

[a] **Evidence of limited authority.**—Where plaintiff made an alleged settlement of his accounts with defendants' bookkeeper, and it was claimed that the bookkeeper's authority was special, and that he was only authorized to settle one particular matter of business, evidence of one of defendants that the bookkeeper's agency was limited and did not extend to a settlement of all the business matters between plaintiff and defendant firm was admissible. Grubbs v. Ferguson, 136 N. C. 60, 48 SE 551.

13. Texas, etc., R. Co. v. Reed, 88 Tex. 439, 31 SW 1058; White v. San Antonio Waterworks Co., 9 Tex. Civ. A. 465, 29 SW 252.

[a] **Evidence of a custom in former years** to make payments for sawing lumber to persons in charge of the mill is competent to show authority of the person in charge to receive payment for sawing lumber. Green v. Clay, 10 Allen (Mass.) 90, 87 AmD 622.

14. **Customs and usages as establishing authority of agent** see Customs and Usages [12 Cyc 1071 et seq].

15. Clarkson v. Reinhartz, (Tex. Civ. A.) 70 SW 111. See also supra §§ 211, 213.

[a] **Usual employment** is evidence of the powers of an agent. Sparks v. Dispatch Transfer Co., 104 Mo. 531, 15 SW 417, 24 AmSR 351, 12 LRA 714.

16. Ames v. First Div. St. Paul, etc., R. Co., 12 Minn. 412.

17. Brantley v. Southern L. Ins. Co., 53 Ala. 564; Grant v. Humerick, 123 Iowa 571, 94 NW 510; Mitchum v. Dunlap, 98 Mo. 418, 11 SW 989; Breckinridge v. American Cent. Ins. Co., 87 Mo. 62; Gentry v. Connecticut Mut. L. Ins. Co., 15 Mo. A. 215; Johnston v. Milwaukee, etc., Inv. Co., 46 Nebr. 480, 64 NW 1100.

[a] **Circumstances not connected with issue.**—Circumstances and transactions which have no direct connection with the issues tried may be considered when they are such as illustrate the general nature of the business intrusted to the agent. Birmingham Mineral R. Co. v. Tennessee Coal, etc., Co., 127 Ala. 137, 28 S 679.

[b] **The custom and usage of a business** may be proved to illustrate the authority of an agent. Hopkins v. Armour, 8 Ga. A. 442, 69 SE 580.

18. Ala.—St. Louis, etc., Packet Co. v. McPeters, 124 Ala. 451, 27 S 518; Central R., etc., Co. v. Smith, 76 Ala. 572, 52 AmR 353; Blevins v. Pope, 7 Ala. 371.

Conn.—Union Trust Co. v. McKeon, 76 Conn. 508, 57 A 109 (holding that, on an issue as to whether the one to whom the maker of a note made payments thereon was the agent of the payee for the purposes of collection, testimony that such person was generally known in the community as the business and financial agent of the payee was irrelevant).

Mass.—Trowbridge v. Wheeler, 1 Allen 162.

Mich.—Gore v. Canada L. Assur. Co., 119 Mich. 136, 77 NW 650.

Minn.—Graves v. Horton, 38 Minn. 66, 35 NW 568.

N. Y.—Perkins v. Stebbins, 29 Barb. 523; Clark v. Farmers' Woolen Mfg. Co., 15 Wend. 256.

Tex.—McGregor v. Hudson, 30 SW 489; Dyer v. Winston, 33 Tex. Civ. A. 412, 77 SW 227.

W. Va.—Thompson v. Laboringman's Mercantile, etc., Co., 60 W. Va. 42, 53 SE 908, 6 LRANS 311.

[a] **Mere rumor** or common belief that an agent has power to do a particular act on behalf of his principal is not of itself evidence of such authority. Thompson v. Laboringman's Mercantile, etc., Co., 60 W. Va. 42, 53 SE 908, 6 LRANS 311.

19. Litchfield Iron Co. v. Bennett, 7 Cow. (N. Y.) 234.

20. **Opinion evidence** see generally Evidence [17 Cyc 25].

21. Ala.—Western Union Tel. Co. v. Heathcoat, 149 Ala. 623, 43 S 117.

Colo.—Stuart v. Asher, 15 Colo. A. 403, 62 P 1051, 1052 (where the court said: "To say that one is the agent of another is to state a legal conclusion. Whether an agency exists, or whether one has authority to act for another, is a question of law, to be determined from the facts, and the mere opinion of a witness that one is an agent or representative of another is of no value. Courts will not accept a witness' construction of the language or the acts by which he supposes the authority to be conferred").

Ind.—American Tel., etc., Co. v. Green, 164 Ind. 349, 73 NE 707.

Mass.—Rice v. James, 193 Mass. 458, 79 NE 807.

Mich.—Gore v. Canada L. Assur. Co., 119 Mich. 136, 77 NW 650; Thompson v. Clay, 60 Mich. 627, 27 NW 699 (holding that, in a case where the agency of a party who had purchased timber of plaintiff, as he claimed, for defendant, was disputed by defendant and his alleged agent, it is error to allow plaintiff to testify that a conversation had with defendant prior to such purchase, which he had detailed to the jury, assisted him in forming an opinion that the party he had contracted with acted as defendant's agent in the purchase, as the jury were the proper judges of the effect such conversation had, or ought to have had, on plaintiff).

N. Y.—McCluskey v. Minck, 18 Misc. 565, 42 NYS 462.

Tex.—Southern Home Bldg., etc., Assoc. v. Winans, 24 Tex. Civ. A. 544, 60 SW 825.

Utah.—McCornick v. Queen of Sheba Gold Min., etc., Co., 23 Utah 71, 63 P 820.

See also Evidence [17 Cyc 220 note 96].

Compare Heusinkveld v. St. Paul F., etc., Ins. Co., 106 Iowa 229, 76 NW 696 (holding that testimony that one person is the agent of another is admissible, although it is in the nature of a conclusion; should cross-examination develop that the conclusion rests on hearsay, or the like, it may be stricken out, on proper objection then made; but when no objection is made, except at a time before cross-examination shows the testimony given in chief to be objectionable, it is proper to allow it to stand and be considered by the jury).

22. American Tel., etc., Co. v. Green, 164 Ind. 349, 73 NE 707; Jos. Schlitz Brewing Co. v. Grimmon, 28 Nev. 235, 81 P 43.

23. Gilliland v. Dunn, 136 Ala. 327, 34 S 25; Robinson v. Ætna F. Ins. Co., 135 Ala. 650, 34 S 18; Jos. Schlitz Brewing Co. v. Grimmon, 28 Nev. 235, 81 P 43 (which holds that, although the word "authority" is too much in the nature of a conclusion to use in a question to a witness as to whether an alleged agent had been authorized, empowered, or instructed to do certain things, he may at least testify that there was no instructing or nothing said or written in regard to the matter by the alleged principal to the alleged agent).

24. Robinson v. Ætna F. Ins. Co., 135 Ala. 650, 34 S 18.

25. Ala.—Alabama, etc., R. Co. v. Kidd, 29 Ala. 221.

Ill.—Erie, etc., Despatch v. Cecil, 112 Ill. 180.

Iowa.—A. A. Cooper Wagon, etc., Co. v. Barnt, 123 Iowa 32, 98 NW 356.

Ky.—Bates v. Best, 18 B. Mon. 215.

Me.—Forsyth v. Day, 41 Me. 382.

Mass.—Pratt v. Putnam, 13 Mass. 361.

Mich.—Dousman v. Peters, 85 Mich. 488, 48 NW 697; Hammond v. Hannin, 21 Mich. 374, 4 AmR 490.

Okl.—Minneapolis Threshing Mach. Co. v. Humphrey, 27 Okl. 694, 117 P 203 (holding that evidence of any conduct on the part of the principal to establish ratification of acts of an agent is admissible).

Pa.—Duncan v. Hartman, 143 Pa. 595, 22 A 1099, 24 AmSR 570, 149 Pa. 114, 24 A 190.

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rations of the principal negativing an intention to ratify is admissible for the purpose of showing that the agent's acts were not ratified.[26] But evidence not in fact tending to show ratification is not admissible for that purpose.[27] Evidence of ratification of previous acts of an agent in no way connected with the act in question is not competent to show ratification of the latter act.[28]

[§ 721] **d. In Particular Actions—(1) Actions for Accounting.** In an action by a principal against his agent for an accounting, any competent evidence tending to show the receipt of money by the agent and a failure to account therefor is admissible.[29] The agent is entitled to the benefit of his own testimony as to the completeness of the accounting,[30] and may be asked whether he has accounted for all moneys collected by him for plaintiff.[31] His books, if the entries are made in the usual course of business, are admissible against the principal;[32] but unless such books purport to contain all the charges and payments to and for his principal, he will not be restricted from proving them in any other way.[33] By way of set-off the agent may introduce in evidence receipts from persons to whom he has paid money on account of his principal.[34] Immaterial and irrelevant testimony is of course inadmissible in an action for an accounting, in the same manner as in other actions.[35]

[§ 722] **(2) Actions for Negligence or Wrongful Acts of Agent.** In an action by a principal against his agent for negligence or misconduct, evidence of all the facts and circumstances surrounding the transaction is admissible,[36] such as for the

Tex.—Grande v. Chaves, 15 Tex. 550; Central Texas Grocery Co. v. Globe Tobacco Co., (Civ. A.) 99 SW 1144; Harmon v. Leberman, 39 Tex. Civ. A. 251, 87 SW 203; Kirkpatrick v. Tarlton, 29 Tex. Civ. A. 276, 69 SW 179; Nacogdoches First Nat. Bank v. Hicks, 24 Tex. Civ. A. 269, 59 SW 842 (holding that, where the grantee in a power of attorney, mortgages certain property described therein without authority, a ratification of such mortgage by the grantor may be shown by parol testimony of acts which would operate as an estoppel in pais); McCulloch County Land, etc., Co. v. Whitfort, 21 Tex. Civ. A. 314, 50 SW 1042.

Eng.—Benham v. Batty, 12 L. T. Rep. N. S. 266.

[a] **Evidence of acquiescence** (1) is admissible to show ratification. Hall v. Vanness, 49 Pa. 457. See also supra §§ 124–131. And (2) in this connection evidence is admissible to show that one whose acts are claimed to have been ratified by defendant was his agent, since the presumption arising from acquiescence in the unauthorized act of an agent who has exceeded his authority is much stronger than where the act is that of a mere stranger. Lynch v. Smyth, 25 Colo. 103, 54 P 634 [rev 7 Colo. A. 383, 43 P 670]. (3) So, also, in determining whether an owner of land knew of its sale by another, as his attorney in fact, and acquiesced in it, so as to make it a valid sale, a lapse of over twenty years from the execution of the sale until the owner's heirs brought suit to recover the land should be considered. Eastham v. Hunter, 102 Tex. 145, 114 SW 97, 132 AmSR 854 [rev (Civ. A.) 109 SW 237].

[b] **Letters** (1) passing between a principal and his salesman with reference to a sale, in one of which the principal directed that if the salesman could not sell the goods to some other jobber at once he had better try to close them out to the retail trade, are admissible to show that the principal had knowledge of the terms of the sale as made by the salesman and had ratified the contract. Central Texas Grocery Co. v. Globe Tobacco Co., (Tex. Civ. A.) 99 SW 1144. (2) Where there is evidence of ratification by a principal of the acts of one whose agency is denied, letters in which the purported agent assumed to act as such agent are admissible. Richmond Union Pass. R. Co. v. New York, etc., R. Co., 95 Va. 386, 28 SE 573.

[c] **Notes taken in the name of the principal** for the purchase price of a machine purchased by an agent without authority and resold are competent evidence on the question of ratification, where the principal was notified that the notes were to be so taken. Russell v. Waterloo Threshing Mach. Co., 17 N. D. 248, 116 NW 611.

[d] **Allegations in previous action.**—Where plaintiff in ejectment sued to recover the land on the ground that the deed had been executed while he was insane, and defendant offered in evidence a complaint in a previous action brought by plaintiff against his agent, appointed by power of attorney executed while he was insane, to recover from the agent the consideration for the property conveyed which he had received, and the action against the agent was pending at the time of the trial of the ejectment action, since plaintiff elected to sue for the money, the allegations of the complaint in the action against the agent were material on the question of ratification. Blinn v. Schwarz, 177 N. Y. 252, 69 NE 542, 101 AmSR 806 [aff 63 App. Div. 25, 71 NYS 343].

26. Burns v. Campbell, 71 Ala. 271; Reid v. Alaska Packing Assoc., 43 Or. 429, 73 P 337 (holding that, where an agent of a seller has exceeded his authority in warranting the goods, declarations of the seller's officers, on receiving a memorandum of the contract, that they would not ratify it because the seller did not deal in the quality of goods specified, is admissible in the buyer's action for a breach, both as part of the res gestæ and to negative express ratification).

27. Langston v. Postal Tel.-Cable Co., 6 Ga. A. 833, 65 SE 1094 (holding that a letter written by a principal, not tending to show a ratification of an alleged contract of his agent, was inadmissible in an action against the principal on such contract); Williams v. Stearns, 59 Oh. St. 28, 51 NE 439 (holding that, on an issue as to the authority of an alleged agent to make purchases on account of defendant, evidence that defendant became guarantor to others than plaintiff for the price of similar articles purchased by the alleged agent upon his own account is not competent to show a ratification).

28. Forsyth v. Day, 41 Me. 382; Loehnberg v. Atherton, 141 Mass. 578, 6 NE 768.

29. Helm v. Jones, 3 Dana (Ky.) 86 (deeds showing the sale and conveyance of several tracts of land).

30. France v. McElhone, 1 Lans. (N. Y.) 7; Meadows Co. v. Wharton, 147 N. C. 178, 60 SE 898.

[a] **Agent's evidence erroneously excluded.**—Where, in an action by a principal against his agent for an accounting for machinery shipped to be sold by the agent, the court permitted plaintiff to show that a portion of the machinery was delivered to defendant under a subsequent oral contract, it was error to prevent defendant from showing how many of the machines were received under such contract. Acme Harvester Co. v. Curlee, 77 Nebr. 666, 110 NW 660.

31. France v. McElhone, 1 Lans. (N. Y.) 7.

32. Lever v. Lever, 11 S. C. Eq. 158.

33. Lever v. Lever, 11 S. C. Eq. 158.

34. Given v. Gould, 39 Me. 410. See also McFatridge v. Carvill, 16 N. S. 286.

35. Holt v. Tennent-Stribbling Shoe Co., 69 Ill. A. 332; Kaffer v. Walters, 9 Kan. A. 291, 61 P 323 (holding that, in an action for the alleged failure of an employee to account for goods sold and profits arising from the sale of goods, it is incompetent for one to testify to the usual profits arising from the sale of similar goods in another store in another city); Beasley v. Downey, 32 N. C. 284 (where it was sought to charge one as agent after a certain period, and the agent offered to prove that prior to that period another person had acted as agent, such evidence was held to be irrelevant).

36. McCommons v. Williams, 131 Ga. 313, 62 SE 230; National Produce Distributing Co. v. Cairo Melon Growers' Assoc., 10 Ga. A. 338, 73 SE 606 (evidence of negligence); Barbar v. Martin, 67 Nebr. 445, 93 NW 722; Norwood v. Alamo F. Ins. Co., 13 Tex. Civ. A. 475, 35 SW 717.

[a] **Custom of trade.**—Where an agent is permitted to testify to a custom of the trade to sell on credit, the principal may show, in rebuttal, sales for cash to be the custom, and sales on credit the exception. Tyler v. O'Reilly, 13 NYS 201.

[b] **The intent** with which an agent commits a breach of trust is immaterial, but where he is permitted to testify that he did not intend to defraud his principal, evidence of other breaches of trust, which the court limited strictly to the question of intent, is harmless. Boykin v. Maddrey, 114 N. C. 89, 19 SE 106.

[c] **Course of dealing.**—Where, in an action to recover damages for the alleged negligence of plaintiff's agent in loaning money for him, the relation existing between the parties at the time the loan was made was at issue, evidence of the general course of dealings between the parties as to prior and similar transactions was admissible. Eisenberg v. Matthews, 84 Minn. 76, 86 NW 870.

[d] **Evidence inadmissible.**—(1) Where an agent defrauded his principal for whom he purchased land, by representing that the price was greater than it actually was, in an action by the principal to recover the excess, evidence of the value of the land was inadmissible. Hindle v. Holcomb, 34 Wash. 336, 75 P 873. (2) In an action for negligence by one member of a firm against one acting as manager for the firm, it is error to admit in evidence a newspaper advertisement of the business of the firm and the contract between the parties over the objection that it is irrelevant. Owens v. Nichols, 139 Ga. 475, 77 SE 635. (3) In an action for damages for misconduct of an agent in the sale of machinery, a written instrument executed by the buyers reciting that they had given a chattel mortgage to secure the debt, and agreeing to turn over the mortgaged

purpose of showing damages,[37] or that the agent acted in good faith.[38] Evidence of what another agent would have done under the circumstances is inadmissible on the issue whether an agent was negligent;[39] nor can the bad reputation of a person whom the agent trusted be shown for this purpose.[40]

[§ 723] **(3) Actions for Compensation—(a) Employment and Performance.** In an action by an agent for his commissions, evidence is admissible to show employment, or nonemployment,[41] and also the nature and extent,[42] object,[43] and conditions[44] of such employment. Evidence of what the agent had or had not done under the employment is admissible.[45] Where in such an action by an agent for services rendered and expenses incurred he avers consent on the part of the principal to a departure from the original contract of agency, such consent may be proved by direct evidence or inferred from facts and circumstances in evidence.[46] Evidence as to the agent's right to a certain commission is admissible, where the claim is admitted in the answer.[47]

[§ 724] **(b) Value of Services.** In an action on an express contract for commissions, evidence of the reasonableness thereof is inadmissible.[48] But where the rate of compensation has not been fixed evidence of the customary commissions for such services as were rendered is admissible,[49] and whether or not the agent employed was a regular broker does not

property without foreclosure, was properly excluded from evidence where none of the property was turned over to plaintiff, and plaintiff realized nothing under it, on the debt. Morris v. Bradley, 26 N. D. 362, 144 NW 711.

37. Anderson v. Adams, 43 Or. 621, 74 P 215 (holding that, in an action against an agent for exceeding his authority in making a contract to irrigate certain land leased to plaintiff for farming purposes, in which plaintiff alleged that a crop which he had planted on the land was destroyed by drought in consequence of the failure to irrigate, evidence showing the condition of crops on the leased land, and the probable yield therefrom if the premises had been irrigated, is admissible to show plaintiff's damage).

38. Dennison v. Aldrich, 114 Mo. A. 700, 91 SW 1024 (holding that, in an action by principals against their agent for an alleged violation of the contract of agency, whereby he succeeded in getting a commission from persons with whom the principals were in contractual relations, evidence to prove the agent's contractual relation with the persons from whom the commission was received is admissible under the agent's contention that he acted in good faith and did nothing on his own account until after his principals' interest had terminated).

[a] **Evidence not tending to establish defense of impossibility of performance** by act of God. See Anderson v. Adams, 43 Or. 621, 74 P 215.

39. Norwood v. Alamo F. Ins. Co., 13 Tex. Civ. A. 475, 35 SW 717.

40. Rand v. Johns, (Tex. A.) 15 SW 200.

41. Dodge v. Weill, 158 N. Y. 346, 53 NE 33 (holding that, where, in an action to recover commissions for the purchase of lands for defendant by plaintiff under an alleged contract of employment under which plaintiff was to work for defendant alone, the contract is denied, evidence that, the day after its making defendant directed plaintiff to buy certain lands, furnishing him with money for the purpose, which plaintiff did, and that defendant afterward brought an action to compel specific performance of the agreement to sell, so procured by plaintiff, is competent to show the contract of employment, where the jury are instructed to consider it on the question of the existence of the contract alone, although the sale was not covered by plaintiff's bill of particulars, and he asked no compensation therefor); Miller v. Irish, 67 Barb. 256 [aff 63 N. Y. 652 mem]; Zaid v. Delicato, 37 Que. Super. 159.

[a] **Declarations of an agent** to prove his own agency are not admissible. Ehrenworth v. Putnam, (Tex. Civ. A.) 55 SW 190. See also supra §§ 692–696.

[b] **Evidence that the agent was acting for the other party alone** (1) is admissible on behalf of the principal to show that such agent was not in his employ. Morehouse v. Remson, 59 Conn. 392, 22 A 427; Miller v. Irish, 67 Barb. 256 [aff 63 N. Y. 652 mem]. (2) So it is competent for the principal to show that the agent was acting for both parties. Lemon v. Little, 21 S. D. 628, 114 NW 1001. (3) But where the agent's undertaking is performed and his commission earned by the production of a purchaser, evidence of his subsequent conduct in the matter is inadmissible. Miller v. Irish, supra.

[c] **To show a contract of employment to purchase land,** (1) evidence that the agent attempted to buy lands, stating that he represented defendant, is competent, although no recovery for such service is sought in the bill of particulars (Dodge v. Weill, 158 N. Y. 346, 53 NE 33); (2) as also is evidence that plaintiff and defendant went together to buy lands not included in the bill of particulars (Dodge v. Weill, 158 N. Y. 346, 53 NE 33).

42. Sullivan v. Crave, 193 Mass. 435, 79 NE 792 (holding that, in a suit to recover commissions for a sale of goods on defendant's account, evidence showing the history of the business relations between the parties, defining the nature and extent of plaintiff's employment, was admissible).

[a] **A commission certificate** issued by a principal to his agent for a sale to a purchaser procured by the agent is admissible in the agent's action for commission to show the construction placed by defendant on the contract of agency in respect to the right of the agent to commission on purchasers procured by him. Woods v. J. I. Case Threshing Mach. Co., 155 Iowa 177, 135 NW 399.

[b] **Upon the question whether the agency was general,** the agent having the exclusive right to make sales of the principal's wares within certain territory so as to entitle him to compensation for sales within the territory made by himself or the principal, or limited, the agent to make such sales as he could, and to receive pay for such as he made, where the direct evidence is conflicting, the acts of the agent known to and acted on by the principal may be shown. Turnbull v. Northwestern Terra Cotta Co., 46 Minn. 513, 49 NW 229.

[c] **Evidence of a previous general employment** for a particular purpose is admissible on the question of the employment in a particular instance. Phillips v. Roberts, 90 Ill. 492.

43. Huntoon v. Lloyd, 8 Mont. 283, 20 P 693.

44. Wolfson v. Allen Bros. Co., 120 Iowa 455, 94 NW 910; Coughlin v. Randall, 153 Mass. 549, 27 NE 767; O'Sullivan v. Roberts, 42 N. Y. Super. 282.

45. Boland v. Kistle, 92 Iowa 369, 60 NW 632; Welsh v. Lemert, 92 Iowa 116, 60 NW 230; McCormick v. Johnson, 31 Mont. 266, 78 P 500 (holding that defendants who, in an action against them for commissions earned by a firm, claim that for a valuable consideration the firm agreed to pay the debt of an insolvent corporation to them may testify that they received nothing from the assignee of the corporation).

[a] **Evidence of time and attention** (1) given by agent in performing services held admissible see Hale El. Co. v. Hale, 201 Ill. 131, 66 NE 249 [aff 98 Ill. A. 430]. (2) But where a contract of employment authorized defendant to cancel orders at its discretion in case it believed that the buyers were irresponsible, evidence that plaintiff always made diligent inquiries as to the responsibility of buyers and never sent in orders unless he thought the parties good is immaterial. Iowa Mfg. Co. v. Taylor, (Tex. Civ. A.) 157 SW 171.

[b] **Contract between principal and third person.**—In a suit by agents to recover commissions on a sale of real estate, they may introduce in evidence the contract between the principal and the purchaser; but the principal cannot introduce evidence of after disputes between himself and the purchaser as to the performance of the contract on the purchaser's part, especially if such disputes have been settled by litigation in favor of the purchaser. Heaton v. Edwards, 90 Mich. 500, 51 NW 544.

[c] **Rejection of orders.**—Where in an action for commissions the principal claimed that he was not liable on certain orders sent in by the salesman, which were rejected because the parties were irresponsible, and the salesman testified that he had not been told that some orders had been rejected, and the reason therefor, and he gave in evidence a statement of all orders he had sent in, testimony of the principal to a conversation between himself and the salesman concerning one whose order had been rejected was relevant. McKiernan v. Ballin, 26 Misc. 826, 56 NYS 949.

[d] **Methods employed by agent.**—In an action by an agent against his principal for breach of a contract by which the agent agreed to use his "best reasonable endeavors to introduce and sell" the principal's medicines throughout the country, the latter may show that the methods employed by the agent were not the best. Perry v. Jensen, 142 Pa. 125, 21 A 866, 12 LRA 393.

[e] **Evidence that a principal had other agents in plaintiff's territory** is inadmissible to show nonperformance by plaintiff. De Loach Mills Mfg. Co. v. Middlebrooks, 95 Ala. 459, 10 S 917.

[f] **Where a waiver of commissions** on a certain contract secured by plaintiff as defendant's agent is unconditional, the exclusion of evidence as to the amount lost under the contract, and the nonproduction of defendant's books to show that the latter sustained a loss, are not objectionable. Flack v. Condict, 66 N. J. L. 351, 49 A 508.

46. Glover v. Henderson, 120 Mo. 367, 25 SW 175, 41 AmSR 695.

47. Whitaker v. Bell Oil Co. (Mo. A.) 167 SW 619.

48. McKinnon v. Gates, 102 Mich. 618, 61 NW 74. See also supra § 446.

49. Elting v. Sturtevant, 41 Conn.

affect the competency of such evidence.[50] So where there is an issue between the parties as to the amount of compensation expressly agreed upon, evidence as to the value of the services rendered is admissible as bearing upon such issue;[51] and where the evidence is conflicting as to what commissions the agent was to receive, it is competent to show the compensation allowed by other parties to their agents engaged in the same business.[52]

Expert testimony as to value of services.[53] It is competent for a witness to testify as to the value of an agent's services where he is acquainted with the value of services similar to those rendered,[54] unless the agent's compensation is expressly fixed by the contract of employment.[55]

A subsequent contract between the agent and his principal, not contemplated at the time the services in question were performed, is not admissible in evidence upon the value of such services.[56]

[§ 725] **(c) Time of Payment.** Where the contract sued on does not provide as to the time when the amount claimed shall be payable, evidence as to the time usually fixed for the payment of similar commissions is admissible.[57]

[§ 726] **3. Weight and Sufficiency—a. In General.** The weight and sufficiency of the evidence in actions arising out of the relation of principal and agent is governed by the rules applicable to the weight and sufficiency of evidence in civil actions in general.[58] In accordance with these rules matters in issue in such actions need not be established with such certainty as to leave no reasonable doubt in the minds of the jury, but it is sufficient if they are established by a preponderance of the evidence.[59] Thus these rules apply in determining the weight and sufficiency of the evidence as to the agent's right to compensation,[60] reimburse-

176; Hollis v. Weston, 156 Mass. 357, 31 NE 483; Levitt v. Miller, 64 Mo. A. 147; Ruckman v. Bergholz, 38 N. J. L. 531. See also supra §§ 447, 448.

50. Hollis v. Weston, 156 Mass. 357, 31 NE 483; Levitt v. Miller, 64 Mo. A. 147.

51. Standard Plunger El. Co. v. Brumley, 149 Fed. 184, 79 CCA 132 (holding that, where, in an action for services under an alleged express contract to pay ten per cent of the price of certain sales of machinery made by plaintiff, defendant denied the contract as alleged and averred that the agreement provided for a much smaller compensation, evidence as to the reasonable value of plaintiff's services was admissible as bearing on the question as to which agreement was made).

52. Glenn v. Sauter, 50 Ga. 170; Rubino v. Scott, 118 N. Y. 662, 22 NE 1103; Kelly v. Phelps, 57 Wis. 425 NW 385.

53. **Expert and opinion evidence as to value** see generally Evidence [17 Cyc 108].

54. Parker v. Parker, 33 Ala. 4459; Marion County v. Chambers, 75 Ind. 409; Bowen v. Bowen, 74 Ind. 470; Johnson v. Thompson, 72 Ind. 167, 37 AmR 152; Levitt v. Miller, 64 Mo. A. 147.

Expert testimony generally see Evidence [17 Cyc 224].

55. Hamilton v. Frothingham, 59 Mich. 253, 26 NW 486 (holding that, where the fact of an alleged agency is in dispute, but it is undisputed that if such relation existed the agent's compensation was a fixed sum, and the agency was limited to the sale of specified property, the opinions of witnesses as to what commission and compensation would be proper in such a case to allow a land broker are irrelevant).

56. Thompson-Houston Electric Co. v. Berg, 10 Tex. Civ. A. 200, 30 SW 454.

57. Standard Plunger El. Co. v. Brumley, 149 Fed. 184, 79 CCA 132.

58. See Evidence [17 Cyc 753 et seq].

59. U. S.—In re Selman Heating, etc., Co., 203 Fed. 777.

Ark.—Barstow v. Pine Bluff, etc., R. Co., 57 Ark. 334, 21 SW 652.

Cal.—Beckett v. Stuart, 23 Cal. A. 373, 138 P 115.

Ida.—Park v. Brandt, 20 Ida. 660, 119 P 877.

Iowa.—Harper v. Buder, 88 Iowa 701, 54 NW 203; Klemme v. McLay, 68 Iowa 158, 26 NW 53.

Kan.—Guernsey v. Davis, 67 Kan. 378, 73 P 101 (holding that, in an action by a principal against his agent for breach of duty, an allegation of a specific direction to the agent is sufficiently established by showing that the agent's duty in all cases covered the transaction in suit).

Ky.—Mutual Mfg. Co. v. Moore, 137 Ky. 130, 125 SW 267 (evidence insufficient to show that a contract of sale to defendant was obtained by fraud of plaintiff's agent); Orr v. Louisville Tobacco Warehouse Co., 99 SW 225, 30 KyL 457 (holding that where, in an action by a tobacco warehouse company to recover for advances made an agent, the latter testified that a certain advancement had been repaid, but did not take the deposition of the person who paid it, and three witnesses testified for the company, the weight of the evidence being with the company, the agent must be charged with the advancement).

La.—Gardes v. Schroeder, 17 La. Ann. 142.

Mich.—Day v. Davey, 132 Mich. 173, 93 NW 256.

Minn.—Dispatch Printing Co. v. National Bank of Commerce, 115 Minn. 157, 132 NW 2 (evidence held insufficient to establish culpable negligence on the part of plaintiff in not discovering and prohibiting the occasional practice of indorsing and collecting its checks by its agent who was expressly forbidden from so doing); Pulliam v. Adamson, 43 Minn. 511, 45 NW 1132 (evidence sufficient to support a finding that a contract sued on was made by a duly authorized agent of defendant).

Nebr.—McCormick Harvesting Mach. Co. v. Carpenter, 1 Nebr. (Unoff.) 273, 95 NW 617 (evidence held not to sustain a verdict for defendant in an action by a principal to recover of his agent under a contract providing that, if the agent sold on credit to parties not entitled thereto at the time of the sale, he should be liable for the debt to the principal).

N. H.—Morse v. Bellows, 7 N. H. 549, 28 AmD 372.

N. Y.—Mullen v. Quinlan, 195 N. Y. 109, 87 NE 1078, 24 LRANS 511; Tooker v. Ackerly, 2 Silv. Sup. 507, 6 NYS 951; Bender-Martin Co. v. Apollo Co., 101 NYS 75 (holding that where, in an action on a contract alleged to have been made by defendant, A. Co., and signed by a third person as manager, there was no evidence showing who the third person was, or whether or not he had acted as manager for the company, and it was not shown that he signed the contract, or that the company ratified its execution, there could be no recovery).

Or.—Barbre v. Goodale, 28 Or. 465, 38 P 67, 43 P 378.

S. C.—Caughman v. Smith, 28 S. C. 605, 5 SE 362.

Utah.—Campbell v. Gowans, 35 Utah 268, 100 P 397, 23 LRANS 414, 19 AnnCas 660.

Wash.—Wilkinson v. Bergquist, 62 Wash. 119, 113 P 255.

Wis.—McGeehan v. Gaar, etc., Co., 122 Wis. 630, 100 NW 1072.

[a] **A party who seeks to enforce an agent's contract** against the principal must show by clear, competent, direct, and satisfactory evidence both the terms of such contract and the authority of such agent, or a ratification of his acts by the principal. Blair v. Sheridan, 86 Va. 527, 10 SE 414.

[b] **Agency to pay the debts of a principal with the resources of the agent** must be clear and convincing, and such an undertaking cannot be established on doubtful and conflicting evidence. Angle v. Manchester, 3 Nebr. (Unoff.) 252, 91 NW 501.

[c] **Exhibits of payment.**—Where plaintiff, an agent, sued defendant on a contract for a balance claimed on the purchase price of a motor car, and defendant offered in evidence as written exhibits a check made to the order of plaintiff's principal and a receipt therefor, and the check was indorsed by the principal and afterward by plaintiff, the exhibits were conclusive of nothing further than that a certain sum of money had been paid to the principal. Middleton v. Wohlgemuth, 141 App. Div. 678, 126 NYS 734.

[d] **Ownership of assigned claim.**—Where, in an action on an assigned claim, plaintiff introduced a written assignment executed and acknowledged by one as attorney in fact of the assignor, such instrument was insufficient to prove plaintiff's ownership of the claim, without proof that the attorney had authority to make the assignment. MacLatchy v. Hannan, 104 App. Div. 70, 93 NYS 282.

[e] **Liability on draft.**—That defendant, on presentation of a draft signed by one as his agent, said that it was his draft, but that he had stopped payment of it, was not sufficient evidence of liability, as against testimony of defendant and his authorized agent that the person signing was without authority. Simon v. Temple Lumber Co., (Tex. Civ. A.) 146 SW 592.

[f] **An action of special assumpsit on stock transactions** at a stock exchange conducted by an agent for defendant is not defeated by mere proof that the book account at the exchange was between the agent and plaintiff, and that the matter was entered on the agent's private ledger, for, although the method of bookkeeping is competent evidence, its weight depends on whether plaintiff knew how the books were being kept, and whether he then knew of defendant's true relation to the business. Holbrook v. Quinlan, 84 Vt. 411, 80 A 339.

60. See cases infra this note.

[a] **Evidence held sufficient** to establish agent's right to compensation see Steinbach v. Montpelier Carriage Co., 37 Fed. 760; Farmer v. Phelps, 18 Colo. 126, 31 P 768; Woods v. J. I. Case Threshing Mach. Co., 155 Iowa 177, 135 NW 399; Cedar Rapids Auto,

ment,[61] or damages from the alleged principal;[62] or as to the principal's right, as against his agent, to an accounting,[63] or to recover from the agent in tort.[64] A preponderance of the evidence is also sufficient to prove any other disputed fact,[65] such as the fact of notice to the principal,[66] or to a third per-

etc., Co. v. Jeffrey, 139 Iowa 7, 116 NW 1054; Albin Co. v. Kuttner, 77 SW 181, 25 KyL 1100; Bornstein v. Lane, 104 Mass. 214; Tompkins v. Hitchcock, 69 Mich. 123, 41 NW 822; Ashworth v. Frost, 43 Minn. 259, 45 NW 431; Bacon v. Rupert, 39 Minn. 512, 40 NW 832; Whitaker v. Bell Oil Co., (Mo. A.) 167 SW 619; Everist v. Mangelsdorf, 94 Nebr. 712, 144 NW 168; Wasmer v. Lean, 32 Nebr. 519, 49 NW 463; Yates v. Appleton, 61 Hun 228, 16 NYS 4; Mahony v. Ungrich, 59 N. Y. Super. 377, 14 NYS 375 [aff 129 N. Y. 632 mem, 29 NE 1030 mem]; Dages v. Melrose Iron Co., 140 NYS 392; Clark v. Chilton Paint Co., 111 NYS 655; Harris v. Santee River Lumber Co., (R. I.) 72 A 393; Lindquist v. Northwestern Port Huron Co., 22 S. D. 298, 117 NW 365; Koch v. Lunschen, 22 S. D. 220, 116 NW 1124; Sharpless v. Warren, (Tenn. Ch. A.) 58 SW 407 (right to twenty-five per cent commissions on sales of machines); Hesselgrave v. Ginnett, 61 Wash. 87, 111 P 1064 (evidence in an action against a copartnership for an accounting and to recover the balance due to plaintiff for services as agent held to sustain a judgment for plaintiff); Schurra v. Buffalo-Pitts Co., 44 Wash. 693, 87 P 945 (evidence held sufficient, in an action by an agent for commissions under a contract whereby a machine company agreed to furnish the agent as many machines as he could sell prior to a certain date, the company reserving the right to restrict the agent to such number of machines as it might be able to supply, to authorize the jury to find that the contract was extended beyond the date named, so as to entitle him to commissions under the contract for sales after that date); McKone v. Metropolitan L. Ins. Co., 131 Wis. 248, 110 NW 472 (evidence in an action by an agent to recover a week's salary after the date of his discharge held sufficient to sustain a verdict for plaintiff).

[b] **Evidence held insufficient** to establish agent's right to compensation see Lowell v. Hessey, 46 Colo. 517, 105 P 870; La Crosse Gold Min. Co. v. Scudder, 4 Colo. 44; Blunt v. Ashurst, 14 Ill. A. 385; Acme Harvester Co. v. Madden, 4 Kan. A. 598, 46 P 319; Pepper v. Pepper, 74 SW 739, 25 KyL 155 (holding that, in an action by a traveling salesman for commissions under a contract allowing commission on all goods sold within his territory, testimony by such salesman that he saw in possession of persons within his territory warehouse receipts issued by his employer is not sufficient to show actual sales and deliveries); Mears v. Adreon, 31 Md. 229; Kennerly v. Sommerville, 64 Mo. A. 75; Ward v. Paul L. Rainey Pier Co., 149 App. Div. 707, 134 NYS 245 (for commissions on sale of bonds); David v. Rick, 57 App. Div. 623, 67 NYS 1052; Gale v. Roll, 75 Hun 14, 26 NYS 1095; Jackson v. Stephens, 83 Misc. 232, 145 NYS 827; Goldberg v. Costuma, 132 NYS 745; Price v. Roth, 130 NYS 169 (holding that, where plaintiff was to receive commission on the net proceeds, that is, after deducting discounts and value of return goods on all sales made by him, evidence of the amount of gross sales, without proof of the value of the return goods, discount, or net amount of sales, is insufficient to support a judgment for commission on the amount of the gross sales, less the sum which plaintiff had been paid); Blumberg v. Sterling Bronze Co., 111 NYS 529; Brafman v. Kohn, 111 NYS 527 (insufficient to show that sales for which commissions were claimed were made by plaintiff).

[c] **Evidence held to show unconditional waiver of right to compensation** see Flack v. Condict, 66 N. J. L. 351, 49 A 508.

61. Veltum v. Koehler, 85 Minn. 125, 88 NW 432 (evidence, in an action to recover money alleged to have been paid out by an agent, held to sustain a finding that the advancement was rendered necessary by the failure of such agent to perform its duty as agent, and that the indebtedness so paid was incurred solely by its failure to discharge the duties of its agency).

62. Oberfelder v. J. G. Mattingly Co., (Ky.) 120 SW 352 (evidence, in an action by agent for breach of contract, held to sustain defense of fraud).

[a] **In an action for damages for the fraudulent interference of a selling agent's principal** whereby the agent was deprived of a commission, it appearing that the principal made a direct bargain with a customer whom the agent had interested, the agent cannot recover his commission, in the absence of a showing that the purchaser would have bought without a reduction made by the principal. J. I. Case Threshing Mach. Co. v. Decatur First Nat. Bank, (Tex. Civ. A.) 160 SW 662.

63. See cases infra this note.

[a] **Evidence held sufficient** to establish principal's right to an accounting see St. Louis, etc., Packet Co. v. McPeters, 124 Ala. 451, 27 S 518 (holding that in an action against a firm for money collected as plaintiff's agent proof of the agency and the correctness of the account would be sufficient to sustain a recovery for the amount due thereon); Charlesworth v. Whitlow, 74 Ark. 277, 85 SW 423; Forlaw v. Augusta Naval Stores Co., 124 Ga. 261, 52 SE 898 (to sustain a verdict for plaintiff in an action to recover profits made by agent in fraud of his principal); Sanford v. Swift, 7 Ind. T. 589, 104 SW 846 (evidence held to justify direction of verdict for plaintiff); Wilt v. Graham, 33 Iowa 599; Chabert v. Beard, 12 Rob. (La.) 397; Farmers' Warehouse Assoc. v. Montgomery, 92 Minn. 194, 99 NW 776 (to sustain findings of a referee as to the amount of moneys received and paid out); Rose v. Durant, 86 App. Div. 623, 83 NYS 503.

[b] **Evidence held insufficient** to establish principal's right to an accounting see Hubbard v. Cook, 153 Fed. 554, 82 CCA 508 (insufficient to entitle a complainant to an accounting from his agents on the ground of their having fraudulently induced him to lease property for less than its fair rental value); Peeler v. Lathrop, 48 Fed. 780, 1 CCA 93; Pratt v. Grimes, 48 Ill. 376; Green v. Macy, 36 Ind. A. 560, 76 NE 264.

[c] **Amount due.**—In an action against an agent for the balance due for goods sold, the amount due must be shown with reasonable certainty. Green v. Macy, 36 Ind. A. 560, 76 NE 264.

[d] **Admission by agent.**—Where an agent, sued for a balance due on stone sold for his principal, admitted that the bill of particulars filed with the complaint showed the correct amount of the shipment of stone, and that on the trial the amounts shown thereby were to be taken as the correct amounts without further proof, the admission did not necessarily go any further than an admission that the bill showed the amount of stone shipped, and was not an admission that it showed the amounts for which the sales were made. Green v. Macy, 36 Ind. A. 560, 76 NE 264.

[e] **Failure of agent to testify.**—Where, in a suit to compel an agent to account for moneys which he is charged with having received and not paid over or accounted for, a large amount of gold, silver, and paper money is found in his possession, including two marked silver dollars which he has taken, and it is within his power to show where he obtained the unmarked money if it does not belong to his employer, his failure to testify in his own behalf must be construed most strongly against him. Warren v. Holbrook, 95 Mich. 185, 54 NW 712, 35 AmSR 554.

64. Holthouse v. Poling, 52 Ind. A. 568, 99 NE 810; Salem Tract. Co. v. Anson, 41 Or. 562, 67 P 1015, 69 P 675 (evidence sufficient to sustain a verdict for plaintiff in trover for the conversion of moneys collected by his agent).

65. Paul E. Wolff Shirt Co. v. Sacks, (Mo. A.) 168 SW 641; Sweeney v. Douglas Copper Co., 149 App. Div. 568, 134 NYS 247 (that the seller of a particular bond was agent of the issuing corporation at date of sale); Freschl v. Molony, 65 App. Div. 516, 72 NYS 819 (evidence insufficient to establish a written lease); La Societe Anonyme de L'Union des Papeteries v. Markes, 21 NYS 706; Texas Co. v. Alamo Cement Co., (Tex. Civ. A.) 168 SW 62; Edwards v. Youngblood, (Tex. Civ. A.) 162 SW 1164; Indiana, etc., Live Stock Ins. Co. v. Bowman, 72 W. Va. 704, 79 SE 651.

[a] **Evidence held sufficient:** (1) In an action by a principal against its agent to support a finding allowing credits to the agent. Gay Oil Co. v. Akins, 100 Ark. 552, 140 SW 739. (2) To sustain a finding that an attorney in fact conveyed land to settle litigation with the grantor's knowledge and approval. Alcorn v. Brandeman, 158 Cal. A. 10, 111 P 104; Alcorn v. Gieseke, 158 Cal. 396, 111 P 98. (3) To show that the principal did not consent to the agent's acquisition of leases in his own name, with full knowledge of the facts. Fox v. Simons, 251 Ill. 316, 96 NE 233 [rev 158 Ill. A. 482]. (4) To show that the contract between principal and agent was shown by correspondence between them, and not by a subsequent oral conversation. Sidway v. American Mortg. Co., 222 Ill. 270, 78 NE 561 [aff 119 Ill. A. 502]. (5) To show that a particular estate fund was held in the capacity of executor, and not in that of agent of the person entitled to the same as her distributive share. Reynolds v. Crawford, 143 Ill. A. 146. (6) To justify a finding that one sold and delivered property to a buyer pursuant to arrangements made with the buyer's agent, making the buyer liable for the price. Pennsylvania El., etc., Co. v. Fosnotte, (Ind. A.) 95 NE 586. (7) To justify a finding of such notice of a revocation of an agency to sell real estate as would put a prudent man on inquiry as to the agent's authority to sell for a certain price. Mosnat v. Berkheimer, 158 Iowa 177, 139 NW 469. (8) In an action by an undisclosed principal for the price of goods sold by his agent, where the purchaser sought to set off a claim against the agent, to show that the claim sought to be set off existed at the time when the sale was completed. Munroe v. Adamo, 136 Ky. 252, 124 SW 296. (9) In an action for commissions for selling coal, to sustain a finding that plaintiff, in consideration of his agency for defendants, agreed to pay a debt owing them by another. McCormick v. Johnson, 31 Mont. 266, 78 P 500. (10) In an action to recover money advanced to an alleged agent of defendant to sustain a finding that defendant obtained the money through an agent who had authority to obtain the advance. Ft. Mill Sav. Bank v. Sprunt, 86 S. C. 8, 67 SE 955.

66. Ark.—American Mortg. Co. v. Williams, 103 Ark. 484, 145 SW 234 (evidence, in a suit against an agent

son;[67] breach of duty by selling agent,[68] breach of contract by principal;[69] negligence of collecting agent;[70] counterclaim by agent against principal,[71] or by principal against agent;[72] credit extended to principal,[73] or to agent;[74] disclosure of agency;[75] payment to agent by third person;[76] sale by purchasing agent of his own property to principal,[77] whether property was purchased by one as agent for others or for himself for resale to them;[78] that the agent acted in the course of his employment,[79] or that he acted or contracted as agent.[80]

Ratification. The general rules relating to the

for an accounting and for other relief, held sufficient to show knowledge, or facts putting complainant upon notice, of the agent's transactions before the beginning of a suit).

Ga.—Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 SE 678 (holding that, where it is sought to charge a party with notice, he is required to offer only the agent to whom the opposite party claims that he gave the notice, and he need not produce all the agents in order to show that each had not received the notice).

Nev.—Frances Mohawk Min., etc., Co. v. McKay, 141 P 456.

N. J.—Brown v. Columbus, (Ch.) 75 A 917.

N. Y.—Monks v. West St. Impr. Co., 149 App. Div. 504, 134 NYS 39; Stevens v. Schroeder, 40 App. Div. 590, 58 NYS 52.

S. D.—McGinty v. Reynolds, 28 S. D. 248, 133 NW 281 (that principal did not know that the agent was acting for the owner of property he was employed to purchase for his principal); Cassill v. Morrow, 13 S. D. 109, 82 NW 418 (insufficient).

Tex.—Weekes v. A. F. Shapleigh Hardware Co., 28 Tex. Civ. A. 577, 67 SW 67 (holding that, where defendant placed an agent in charge of a stock of goods under an agreement that, when its debt due from the agent was paid, it would transfer the goods to him, and the agent executed a note to plaintiffs in defendant's name, the testimony of defendant that he had never been notified by plaintiffs of the note, and had never had any intimation of it until long after the stock was taken from the agent and sold to other parties, supports a finding that defendant did not know at the time that he took back the stock that the agent had borrowed any money from plaintiffs on defendant's responsibility).

67. Me.—Hook v. Crowe, 100 Me. 399, 61 A 1080 (insufficient to warrant a finding that purchasers had knowledge at the time of the sale that the person to whom they gave the order was an agent, and not a principal).

Minn.—Warder-Bushnell, etc., Co. v. Rublee, 42 Minn. 23, 43 NW 569.

Mo.—Hodkinson v. McNeal Mach. Co., 161 Mo. A. 87, 142 SW 457 (evidence in replevin in which defendant claimed to have purchased from an alleged subagent of plaintiff held to show that defendant was not an innocent purchaser without knowledge of the probable want of authority of the alleged subagent to sell for plaintiff); Doman v. Pendleton, 148 Mo. A. 489, 128 SW 516; Carpenter v. Parker, 64 Mo. A. 60.

Nebr.—Meinhardt v. Newman, 71 Nebr. 532, 99 NW 261 (evidence held to show payment of a mortgage to the agent of the mortgagee after his death, without knowledge of the same, in sufficient amounts to satisfy the mortgage).

N. Y.—Renault Frères Selling Branch v. Sewall, 152 App. Div. 23, 136 NYS 800; Bennett Piano Co. v. Scace, 130 App. Div. 281, 114 NYS 324; Cohen v. Barry, 111 NYS 668 (insufficient to sustain a judgment for plaintiff on the theory that he had no knowledge that defendant was acting as agent).

Wis.—Hoskins v. O'Brien, 132 Wis. 453, 112 NW 466 (in an action to remove a cloud on title caused by a contract of sale executed by plaintiff's agent and defendant, evidence held sufficient to sustain the finding of the court that defendant knew when he executed the contract that the agent had been notified by plaintiff that she had decided not to sell to defendant on any terms).

68. Ark.—Alf Bennett Lumber Co. v. Walnut Lake Cypress Co., 105 Ark. 421, 151 SW 275.

Ill.—Kansas City Fidelity Trust Co. v. Poole, 136 Ill. A. 266.

Ind.—Osborn v. Guffin, 76 Ind. 220 (evidence held sufficient, in an action to recover the value of a machine sold by defendant in alleged violation of his contract of agency, to sustain a finding that the sale was made by a general agent of plaintiff, and not by defendant under his contract of agency).

N. C.—Osborne v. Durham, 157 N. C. 262, 72 SE 849 (insufficient to establish fraudulent conduct of agent in selling stock).

Vt.—Vermont Marble Co. v. Mead, 85 Vt. 20, 80 A 852 (sufficient to show that agent was not guilty of misconduct in executing contract of sale of land).

69. Saul v. Lapidus, 46 Colo. 538, 105 P 863; Welch v. Brown, 46 Colo. 129, 103 P 296; Cedar Rapids Auto, etc., Co. v. Jeffrey, 139 Iowa 7, 116 NW 1054; Purkey v. Harding, 23 S. D. 632, 123 NW 69.

70. Wood v. Manufacturers' Commercial Co., 113 NYS 3 (in an action for negligence against an agent to collect accounts due plaintiffs, evidence held to warrant a finding for defendant).

71. New Orleans Coffee Co. v. Cady, 69 Nebr. 412, 95 NW 1017 (counterclaims by the agent in action by principal to recover moneys due under agency); New Orleans Coffee Co. v. Hutchinson, 4 Nebr. (Unoff.) 679, 95 NW 1017 (evidence insufficient to establish counterclaims pleaded by agent).

72. Shubart v. Federated Mines, etc., Co., 143 Mo. A. 574, 128 SW 2 (evidence, in an action for money expended for defendant while employed by him to take options, leases, etc., on mines, in which defendant counterclaimed for a commission alleged to have been paid to plaintiff by the seller of a mine which plaintiff purchased for defendant, held to sustain a finding that the amount paid was not a gratuity but was paid to plaintiff as a commission for inducing defendant to purchase the mine at the price paid); McCormick v. Johnson, 31 Mont. 266, 78 P 500 (evidence in an action for commissions held sufficient to sustain a finding that plaintiff's indebtedness to defendants equaled the amount of the commissions).

73. Engel-Heller Co. v. Dineen, 46 Misc. 111, 91 NYS 336; Snyder v. Gibbons, 3 Phila. (Pa.) 126; Cannon v. Henry, 78 Wis. 167, 47 NW 186, 23 AmSR 399.

74. Boynton v. Brannum, (Ark.) 136 SW 979 (in an action against defendant for breach of a contract for the cutting of timber, evidence held to warrant a finding that the contract was made with defendant in his individual, and not in his representative, capacity); Lowrey v. Scargill, 7 Ind. T. 497, 104 SW 813; McKeen v. Providence County Sav. Bank, 24 R. I. 542, 54 A 49.

75. Steele-Smith Grocery Co. v. Potthast, 109 Iowa 413, 80 NW 517 (holding that, in an action to recover for goods sold and delivered to an undisclosed agent of defendant and charged to the agent, evidence that defendant lived in another state; that the agent was his son and managed the business in his own name; that the goods were sold to him as proprietor; and that neither the father nor son had ever mentioned to whom the stock belonged, will warrant a finding that the agency was unknown by the seller at the time the goods were purchased); Drew v. Caffall, 116 La. 990, 41 S 233; Johnston v. Parrott, 92 Mo. A. 199; Hass v. Kornbluth, 85 Misc. 20, 147 NYS 27; Forrest v. McCarthy, 80 Misc. 125, 61 NYS 853.

76. Russ v. Hansen, 119 Iowa 375, 93 NW 502; Parker v. Leech, 76 Nebr. 135, 107 NW 217 (evidence insufficient to authorize payment to agent of debt due principal); J. A. Fay, etc., Co. v. Causey, 131 N. C. 350, 42 SE 827; Fabian Mfg. Co. v. Newman, (Tenn. Ch. A.) 62 SW 218 (evidence sufficient to show that the payment was not made in the ordinary course of business, and to put the debtor on inquiry, and hence that he was not entitled to credit therefor).

77. Montgomery v. Hundley, 205 Mo. 138, 103 SW 527, 11 LRANS 122 (evidence, in an action to rescind a sale of corporate stock on the ground that defendant was plaintiff's agent to purchase stock and sold his own stock to plaintiff, held to support a finding that defendant held an option on the stock purchased by plaintiff).

78. Knight v. Dolinski, (Tex. Civ. A.) 133 SW 474.

79. Brockman Commn., etc., Co. v. Pound, 77 Ark. 364, 91 SW 183 (purchase of goods); St. Louis, etc., R. Co. v. Grant, 75 Ark. 579, 88 SW 580, 1133 (in an action for an assault on plaintiff by defendant's agent evidence held sufficient to warrant a finding that the agent was acting in the course of his employment for the benefit of his principal, and within the line of his duty).

[a] **Evidence held sufficient:** (1) In an action to recover the price of a machine, the petition declaring solely upon a written contract of agency and charging that defendant, in violation of the conditions of such contract, failed to procure a proper settlement from the purchaser before the machine was delivered, to support a verdict that the attempted sale was not made by defendant under or pursuant to the written contract. Pneumatic Weigher Co. v. Burnquist, 128 Iowa 709, 105 NW 326. (2) In an action for injuries received from falling while inspecting an unoccupied house at the invitation of an employee of a real estate agent, with a view of renting the same, to show that the real estate agent was not an independent contractor, but the owner's agent, and that he was acting within the scope of his employment in advertising the house to let and in engaging the employee to show it to prospective tenants. Marston v. Reynolds, 211 Mass. 590, 98 NE 601. (3) In an action on account for goods sold to defendants by plaintiffs' traveling salesman, to show that defendants, from their course of dealing with plaintiffs through their salesman, had a right to assume that the salesman in question had full authority to bind plaintiffs by the sale without submitting the offer of a purchase to plaintiffs for approval. Brennan v. Dansby, 43 Tex. Civ. A. 7, 95 SW 700.

[b] **A mere showing that a traveling salesman agreed to bind his principal** for advertising expenses will not render the principal liable, where his authority is not shown and there is no proof of ratification. Ewart Lumber Co. v. American Cement Plaster Co., 9 Ala. A. 152, 62 S 560.

80. U. S.—Prineau v. Granfield, 180 Fed. 847 [aff 184 Fed. 480] (that money sent by complainant to defend-

weight and sufficiency of the evidence also apply to evidence of ratification of an agent's unauthorized acts or contracts;[81] and a ratification must be clearly shown, either directly or impliedly, from clear and unequivocal circumstances.[82]

[§ 727] **b. Fact of Agency and Nature and Extent of Authority.** The general rules of evidence apply of course in determining the weight and sufficiency of the evidence to establish the existence of the agency,[83] and these general rules of evidence

ant for purchase of mining stocks was sent to him as agent, and that he so acted).

Cal.—Curry v. King, 6 Cal. A. 568, 92 P 662.

Iowa.—Kruse v. Seiffert, etc., Lumber Co., 108 Iowa 352, 79 NW 118.

Kan.—Hudson v. Herman, 81 Kan. 627, 107 P 35 (that one who took a tax sale certificate and tax deed and continued to pay taxes thereon did so as agent of the insane owner, taking that method of paying the owner's taxes, and protecting his own advancements).

Ky.—Martin v. Kennedy, 90 SW 975, 28 KyL 966 (sufficient to support a finding that stock was purchased for defendant in his individual capacity, and not for a company of which he was manager).

Minn.—Deering v. Thom, 29 Minn. 120, 12 NW 350.

Mo.—Goetz v. Flanders, 118 Mo. 342, 22 SW 945; Cooper v. Commonwealth Trust Co., 142 Mo. A. 610, 122 SW 791; Mitchell v. Chick, 136 Mo. A. 559, 118 SW 517 (evidence held to show that person acted individually and not as agent); Brolaski v. Aal, 55 Mo. A. 196.

Nebr.—Jackson v. McNatt, 4 Nebr. (Unoff.) 55, 93 NW 425 (insufficient to charge defendants as principals).

N. Y.—Von Lengerke v. New York, 150 App. Div. 98, 134 NYS 832; Jones v. Gould, 123 App. Div. 236, 108 NYS 31 [rev on other grounds 200 N. Y. 18, 92 NE 1071]; Chapman v. George R. Read Co., 83 Misc. 16, 144 NYS 412; Falk v. Wolfsohn, 7 Misc. 313, 27 NYS 903.

Pa.—Morgan v. Wilson, 6 Kulp 358.

Tex.—McCabe v. Farrell, 34 Tex. Civ. A. 36, 77 SW 1049.

Wis.—Stark v. Huber Mfg. Co., 145 Wis. 6, 129 NW 666 (evidence held to warrant a finding that plaintiff in purchasing certain notes acted in his individual capacity, and not as defendant's agent).

[a] **In an action against an agent of an undisclosed principal and the principal,** testimony of the agent that he bought the goods on his own account, but really bought them for the principal whom he did not disclose because by buying the goods in his own name he could get them at a lower figure, was competent and sufficient to make a case both against the agent and against the principal. Pittsburg Plate Glass Co. v. Roquemore, (Tex. Civ. A.) 88 SW 449.

81. See Blakely v. Cochran, 117 Mich. 394, 75 NW 940; Finkelstein v. Fabyik, 107 NYS 67; Hatton v. Stewart, 2 Lea (Tenn.) 233; Platt v. Schmitt, 117 Wis. 489, 94 NW 345.

[a] **Evidence held sufficient** to show ratification see Dierks Lumber, etc., Co. v. Coffman, 96 Ark. 505, 132 SW 654; Ladenberg v. Beal-Doyle Dry Goods Co., 83 Ark. 440, 104 SW 145; Union Trust, etc., Co. v. Best, 160 Cal. 263, 116 P 737 (ratification by general agent of act of subagent); Ballard v. Nye, 138 Cal. 588, 72 P 156 [rev reh 6 Cal. Unrep. Cas. 947, 69 P 481] (to warrant a finding that plaintiff, as a matter of law, had ratified the assumed agency, and that a payment thereunder discharged the mortgage debt): Tate v. Aitken, 5 Cal. A. 505, 90 P 836; Mulford v. Rowland, 45 Colo. 172, 100 P 603; Adams v. Gainard, 7 Mart. N. S. (La.) 244; Freeman v. Swett, 11 Me. 79; Johnson v. Ogren, 102 Minn. 8, 112 NW 894 (unauthorized borrowing of money); Lipscomb v. Talbott, 243 Mo. 1, 147 SW 798 (of agent's act in taking a note in payment of a debt); Lowman v. Nye, etc., County Bank, 31 Nev. 306, 102 P 967; Warshawsky v. Bonewur, 130 App. Div. 250, 114 NYS 665 (of agent's act in accepting a composition agreement); Mitchell v. Gennis, 124 NYS 996; Meyers v. Brown-Cochran Co., 91 NYS 72 (of contract of agent agreeing to pay plaintiff a commission on the sale of a gas engine); Robertson v. Plymouth Lumber Co., 165 N. C. 4, 80 SE 894; Trollinger v. Fleer, 157 N. C. 81, 72 SE 795 (of employment of farm manager); Fenn v. Dickey, 178 Pa. 258, 35 A 1108; Schull v. New Birdsall Co., 17 S. D. 39, 95 NW 276; Horst v. Lightfoot, (Tex.) 132 SW 761 [rev (Civ. A.) 122 SW 606] (of sale of land partly on credit); Steger v. Kelley, (Tex. Civ. A.) 136 SW 824; Skirvin v. O'Brien, 43 Tex. Civ. A. 1, 95 SW 696 (of unauthorized conveyance); McLeod v. Morrison, 66 Wash. 683, 120 P 528, 38 LRANS 783 (of contract to sell land).

[b] **Evidence held insufficient** to show ratification see Latham v. Ft. Smith First Nat. Bank, 92 Ark. 315, 122 SW 992; Shepherd-Teague Co. v. Hermann, 12 Cal. A. 394, 107 P 622; Metzger v. Huntington, 139 Ind. 501, 37 NE 1084, 39 NE 235; Welke v. Wackershauser, 143 Iowa 107, 120 NW 77; West Pub. Co. v. Corbett, 165 Mo. A. 7, 145 SW 868; Mott v. Scholes, 147 App. Div. 82, 131 NYS 811 (of unauthorized contract to convey land); Oliver Typewriter Co. v. United Publishers' Assoc., 133 NYS 478; American Silk Label Mfg. Co. v. Wolf, 128 NYS 923; Durkee v. Carr, 38 Or. 189, 63 P 117; Clark, etc., Lumber Co. v. Duncan, (Tex. Civ. A.) 143 SW 644 (of unauthorized transfer of land); Teagarden v. Patten, 48 Tex. Civ. A. 571, 107 SW 909 (of sale of land); Herrick Impr. Co. v. Kelly, 65 Wash. 16, 117 P 705.

[c] **Statement of agent.**—The statement of an agent of a contractor for the construction of a railroad, made to a third person, that the contractor intended to pay for supplies furnished to a subcontractor and alleged to have been furnished to the subcontractor as agent and on account of the contractor, is not evidence of a ratification by the contractor of the authority of the subcontractor to incur the debt for the supplies. Wells v. Martin, 32 Mich. 478.

82. Haswell v. Standring, 152 Iowa 291, 132 NW 417, AnnCas 1913B 1326.

[a] **Unauthorized mortgage.**—Where the only evidence that the grantor in a power of attorney to sell ratified the act of the grantee in mortgaging the premises by accepting a portion of the proceeds was the uncorroborated testimony of a witness as to a conversation between the parties to the power of attorney which occurred six or eight years previous to the trial at which it was given, which conversation as to this point was self-contradictory, the grantor is not estopped from claiming title to his interest in the land. Morris v. Ewing, 8 N. D. 99, 76 NW 1047.

[b] **Slight evidence.**—An agent's act in good faith, from which he derives no personal benefit, and which is apparently necessary and will be to his principal's advantage will be held ratified upon slight evidence. Winston v. Gordon, 115 Va. 899, 80 SE 756.

83. U. S.—Townsend v. Chappell, 12 Wall. 681, 20 L. ed. 486; Whitman v. Namquit Worsted Co., 206 Fed. 549; Paine v. Standard Plunger El. Co., 203 Fed. 242, 121 CCA 440 [aff 192 Fed. 75].

Ala.—Lytle v. Dothan Bank, 121 Ala. 215, 26 S 6; Rovelsky v. Scheuer, 114 Ala. 419, 21 S 785.

Ark.—St. Louis, etc., R. Co. v. Hoover, 53 Ark. 377, 13 SW 1092.

Cal.—Durfee v. Seale, 139 Cal. 603, 73 P 435; Union Pav., etc., Co. v. Mowry, 7 Cal. Unrep. Cas. 6, 70 P 81.

Colo.—Curtis v. McCarthy, 53 Colo. 284, 125 P 109; Witcher v. Gibson, 15 Colo. A. 163, 61 P 192; Gambrill v. Brown Hotel Co., 11 Colo. A. 529, 54 P 1025.

Conn.—C. & C. Electric Motor Co. v. Frisbie, 66 Conn. 67, 33 A 604.

Del.—Geylin v. De Villeroi, 7 Del. 311.

Fla.—International Harvester Co. v. Smith, 51 Fla. 220, 40 S 840.

Ga.—Armour v. Ross, 110 Ga. 403, 35 SE 787.

Ill.—Proudfoot v. Wightman, 78 Ill. 553; Hawley v. Curry, 74 Ill. A. 309.

Ind.—Fruchey v. Eagleson, 15 Ind. A. 88, 43 NE 146.

Iowa.—McCormick Harvester Mach. Co. v. Lambert, 120 Iowa 181, 94 NW 497; Townsend v. Studer, 109 Iowa 103, 80 NW 210; Pray v. Farmer's Incorporated Co-op. Creamery, 89 Iowa 741, 56 NW 443.

Kan.—Cain Bros. Co. v. Wallace, 46 Kan. 138, 26 P 445; Gregg v. Berkshire, (A.) 62 P 550.

Ky.—Columbia Land, etc., Co. v. Tinsley, 60 SW 10, 22 KyL 1082; Talbot v. Sebree, 1 Dana 56.

La.—Mather v. Harrison, 10 La. Ann. 793.

Md.—Darrin v. Whittingham, 107 Md. 46, 68 A 269.

Mass.—Carberry v. Farnsworth, 177 Mass. 398, 59 NE 61; Cobb v. Fogg, 166 Mass. 466, 44 NE 534; Odiorne v. Maxcey, 15 Mass. 39.

Mich.—Dodge v. Tullock, 110 Mich. 480, 68 NW 239; Clark v. Dillman, 108 Mich. 625, 66 NW 570; Wilson v. La Tour, 108 Mich. 547, 66 NW 474; Hitchcock v. Davis, 87 Mich. 629, 49 NW 912.

Minn.—Neibles v. Minneapolis, etc., R. Co., 37 Minn. 151, 33 NW 332.

Mo.—Weber v. Collins, 139 Mo. 501, 41 SW 249; Crosno v. Bowser Milling Co., 106 Mo. A. 236, 80 SW 275.

Nebr.—Booth v. Kessler, 62 Nebr. 704, 87 NW 532.

N. Y.—Dodge v. Weill, 158 N. Y. 346, 53 NE 33 [aff 8 App. Div. 621 mem, 40 NYS 1141 mem]; Warburton v. Camp, 112 N. Y. 683, 20 NE 592, 2 Silv. A. 146; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17; Krasnow v. Singer Mfg. Co., 115 App. Div. 59, 100 NYS 591; Norden v. Duke, 113 App. Div. 99, 99 NYS 30; Allen v. Henry, 81 Hun 241, 30 NYS 773; Dows v. Greene, 16 Barb. 72 [aff 24 N. Y. 638]; Davis v. Valley Electric Light Co., 61 NYS 580.

N. C.—Brittain v. Westhall, 135 N. C. 492, 47 SE 616.

Pa.—Bay State Shoe Co. v. Lesser, 196 Pa. 76, 46 A 259; Hayes' App., 195 Pa. 177, 45 A 1007.

Tex.—Osborne v. Gatewood, (Civ. A.) 74 SW 72; Reddell v. J. B. Watkins Land Mortg. Co., (Civ. A.) 37 SW 608.

Wash.—Moore v. Blackburn, 67 Wash. 117, 120 P 875; Dormitzer v. German Sav., etc., Soc., 23 Wash. 132, 62 P 862.

Ont.—Myles v. Thompson, 23 U. C. Q. B. 553; Passmore v. Nicholls, 1 Grant Ch. (U. C.) 130.

[a] **Evidence held sufficient** to establish the fact of agency see Richards v. Shepherd, 159 Ala. 663, 49 S 251; Fairbanks v. Cawthorn, 93 Ala. 287, 9 S 282; Montgomery Brewing Co. v. Caffee, 93 Ala. 132, 9 S 573; Arizona Power Co. v. Kellam, 13 Ariz. 291, 114 P 561; St. Louis, etc., R. Co. v. Bennett, 53 Ark. 208, 13 SW 742, 22 AmSR 187; Callaway v. Wilson, 141 Cal. 421, 74 P 1035; Rothschild v. Swope, 116 Cal. 670, 48 P 911; Eld-

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ridge v. Mowry, (Cal. A.) 140 P 978; Weill v. Danziger, 22 Cal. A. 688, 136 P 308; Brandt v. Krough, 14 Cal. A. 39, 111 P 275; Brady v. Ranch Min. Co., 7 Cal. A. 182, 94 P 85; Curtis v. McCarthy, 53 Colo. 284, 125 P 109; Silver Mountain Mine Co. v. Anderson, 51 Colo. 298, 117 P 173; Pouppirt v. Greenwood, 48 Colo. 405, 110 P 195; Clamp v. Cutler, 39 Colo. 117, 88 P 854; Arthur v. Gard, 3 Colo. A. 133, 32 P 343; Eagle Bank v. Smith, 5 Conn. 71, 13 AmD 37; Lyons v. Hammond El. Co., 139 Ill. A. 495; Forbes Co. v. Leonard, 119 Ill. A. 629; Richmond v. Brandt, 118 Ill. A. 624 (to establish a contract of agency for five years duration and that its termination prior to that time was illegal); Beach v. Huntsman, (Ind. A.) 83 NE 1033, 85 NE 523; Benton County Sav. Bank v. Lake Mills First Nat. Bank, (Iowa) 140 NW 811; Wicks v. German Loan, etc., Co., 150 Iowa 112, 129 NW 744; Markley v. Western Union Tel. Co., 144 Iowa 105, 122 NW 136, 138 AmSR 263 (holding that proof that C was in charge of defendant's telegraph office is sufficient prima facie proof of C's agency); Leonard v. Omstead, 141 Iowa 485, 119 NW 978; Merrill v. Sax, 141 Iowa 386, 118 NW 434; Iowa Loan, etc., Co. v. McMurray, 129 Iowa 65, 105 NW 361; Frankel v. Hites, 112 Iowa 631, 84 NW 706; Lindt v. Uihlein, 109 Iowa 591, 79 NW 73; Hillebrant v. Green, 93 Iowa 661, 62 NW 32; Hopwood v. Corbin, 63 Iowa 218, 18 NW 911; Hanson v. Atchinson, etc., R. Co., 88 Kan. 313, 128 P 184; Wren v. Cooksey, 147 Ky. 825, 145 SW 1116; Illinois Cent. R. Co. v. Williams, 147 Ky. 52, 143 SW 760; Ford Lumber, etc., Co. v. Cobb, 138 Ky. 174, 127 SW 763; White v. Ballard County Bank, (Ky.) 117 SW 295; Lord v. Smith, 109 Md. 42, 71 A 430; Hogg v. Jackson, etc., Co., (Md.) 26 A 869; Welch v. Corey, 201 Mass. 165, 87 NE 477; Deane v. American Glue Co., 200 Mass. 459, 86 NE 890; Cobb v. Fogg, 166 Mass. 466, 44 NE 534; Barnes v. Boardman, 149 Mass. 106, 21 NE 308, 3 LRA 785; Ayer v. R. W. Bell Mfg. Co., 147 Mass. 46, 16 NE 754; Ely v. James, 123 Mass. 36; Kelley v. Lindsey, 7 Gray (Mass.) 287; Beasore v. Stevens, 155 Mich. 403, 119 NW 431; Peo. v. Lappin, 129 Mich. 172, 88 NW 388; Leffel v. Piatt, 126 Mich. 443, 86 NW 65; Booth v. Majestic Mfg. Co., 105 Mich. 562, 63 NW 524; Hitchcock v. Davis, 87 Mich. 629, 49 NW 912; Verdine v. Olney, 77 Mich. 310, 43 NW 975 (to show that a mortgagee had so held out another as to warrant third persons in dealing with him as an agent authorized to receive principal and interest); Beecher v. Venn, 35 Mich. 466; Jones v. Burgess, 124 Minn. 265, 144 NW 954; Planters' Compress, etc., Co. v. Ireys, (Miss.) 16 386; State v. Dickson, 213 Mo. 66, 111 SW 817; Montgomery v. Hundley, 205 Mo. 138, 103 SW 527, 11 LRANS 122; Handlan v. Miller, 143 Mo. A. 101, 122 SW 751; Walker v. Lewis, 140 Mo. A. 26, 124 SW 567; Jolly v. Huebler, 132 Mo. A. 675, 112 SW 1013 (loan agent); Padley v. Catterlin, 64 Mo. A. 629; Hoppe v. Saylor, 53 Mo. A. 4; Starr v. Gregory Con. Min. Co., 6 Mont. 485, 13 P 195; Howard v. Omaha Wholesale Grocery Co., 77 Nebr. 116, 108 NW 158; Pine v. Mangus, 76 Nebr. 83, 107 NW 222; Allsman v. Richmond, 55 Nebr. 540, 75 NW 1094; Creighton v. Finlayson, 46 Nebr. 457, 64 NW 1103; Gathercole v. Peck, 3 Nebr. (Unoff.) 226, 91 NW 513; Boyd v. Pape, 2 Nebr. (Unoff.) 859, 90 NW 646; Cheshire Provident Inst. v. Vandergrift, 1 Nebr. (Unoff.) 339, 95 NW 615; Smile v. Hobbs, 64 N. H. 75, 5 A 711; Grannis v. Hobby, (N. Y.) 33 NE 486 [aff 17 NYS 618]; Warburton v. Camp, 112 N. Y. 683, 2 Silv. A. 146, 20 NE 592; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17; Sweeney v. Douglas Copper Co., 149 App. Div. 568, 134 NYS 247; Fatta v. Edgerton, 143 App. Div. 658, 128 NYS 181; Lafayette Trust Co. v. Lacher, 139 App. Div. 797, 124 NYS 401 (in an action on a note in which the defense was that there had been a settlement made between defendant and plaintiff's agent, by which the note sued on was supposed to have been surrendered, evidence was held to make a prima facie case of agency on the part of the one who acted for plaintiff in the settlement so as to warrant receipt of evidence of his acts in that connection); Bennett Piano Co. v. Scace, 130 App. Div. 281, 114 NYS 324; Sariol v. James P. McDonald Co., 127 App. Div. 648, 111 NYS 796; Lilley v. Uvalde Asphalt Pav. Co., 127 App. Div. 310, 111 NYS 559; Jacob v. Oyster Bay, 109 App. Div. 630, 96 NYS 626; Dodge v. Manning, 19 App. Div. 29, 46 NYS 1049; Hager v. Henneberger, 83 Misc. 417, 145 NYS 152; Crowe v. Malba Land Co., 76 Misc. 676, 135 NYS 454; Goldstein v. Godfrey Co., 70 Misc. 235, 126 NYS 622; Thomas Robert Stevenson Co. v. Tucker, 14 Misc. 297, 35 NYS 682; Miller v. Loncao, 127 NYS 90; Appel v. Lipman, 125 NYS 400 (holding that the testimony of one claiming to have acted as agent of a landlord, admitted without objection, that he had been the agent of the landlord for about a year sufficiently proved agency); Conabeer v. Bruenn, 121 NYS 207; Tebbetts v. Levy, 11 NYS 684; Currie v. Swindall, 33 N. C. 361; Mitchell v. Knudtson Land Co., 19 N. D. 786, 124 NW 946; Federal Trust Co. v. Coyle, 34 Okl. 635, 126 P 800; Shawnee Nat. Bank v. Purcell Wholesale Grocery Co., 34 Okl. 34, 124 P 603, 41 LRANS 494; Clough v. Dawson, (Or.) 138 P 233; Hewitt v. Huffman, 55 Or. 57, 105 P 98; Millar v. St. Louis State Sav. Assoc., 3 WklyNC (Pa.) 480; Smith v. Hurley, 29 R. I. 489, 72 A 705; Lagrone v. Timmerman, 46 S. C. 372, 24 SE 290; W. W. Kimball Co. v. First Nat. Bank, 1 Tenn. Ch. A. 505 (evidence insufficient to overcome the fact of agency); Gulf, etc., R. Co. v. Jones, 82 Tex. 156, 17 SW 534; Harris v. Nations, 79 Tex. 409, 15 SW 262; Stringfellow v. Brazelton, (Tex. Civ. A.) 142 SW 937 (prima facie showing of agency); Young v. Robinson, (Tex. Civ. A.) 135 SW 715; Sullivan v. Fant, 51 Tex. Civ. A. 6, 110 SW 507 (prima facie); Bowman v. Texas Brewing Co., 17 Tex. Civ. A. 446, 43 SW 808; Grout v. Moulton, 79 Vt. 122, 64 A 458; Guyette v. Bolton, 46 Vt. 228; McIntyre v. Smyth, 108 Va. 736, 62 SE 930; Bevis v. Big Bend Abstract Co., 62 Wash. 513, 114 P 191; Huston v. Harrington, 58 Wash. 51, 107 P 874; Anderson v. Globe Nav. Co., 57 Wash. 502, 107 P 376; Seattle Brewing, etc., Co. v. Donofrio, 34 Wash. 18, 74 P 823; Hein v. Mildebrandt, 134 Wis. 582, 115 NW 121; Roche v. Pennington, 90 Wis. 107, 62 NW 946; Cameron v. White, 74 Wis. 425, 43 NW 155, 5 LRA 493; Oregon Short Line R. Co. v. Blyth, 19 Wyo. 410, 118 P 649, 119 P 875 AnnCas1913E 288; Barton v. McMillan, 20 Can. S. C. 404 [aff 19 Ont. A. 602]; Kitchen v. Dolan, 9 Ont. 432; Ross v. Scott, 22 Grant Ch. (U. C.) 29 [aff reh 21 Grant Ch. 391]; Rosenberger v. Thomas, 4 Grant Ch. (U. C.) 473; Green v. Lewis, 26 U. C. Q. B. 618; Thayer v. Street, 23 U. C. Q. B. 189.

[b] **Evidence held insufficient** to establish the fact of agency see Inverkip Steamship Co. v. Lind, 177 Fed. 798; In re Baxter, 152 Fed. 141, 81 CCA 359; Howard v. Western Union Tel. Co., 161 Ala. 213, 49 S 1036; Crone v. Long, 159 Ala. 487, 49 S 227; Manly v. Sperry, 115 Ala. 524, 22 S 870; Gulf Cooperage Co. v. Poindexter, (Ark.) 163 SW 1145; Jones v. Mansfield Lumber, etc., Co., (Ark.) 132 SW 1004; Chicago Cottage Organ Co. v. Stone, (Ark.) 73 SW 392; Sanguinetti v. Rossen, 12 Cal. A. 623, 107 P 560; Sterling v. Cole, 12 Cal. A. 93, 106 P 602; McKee v. Cunningham, 2 Cal. A. 684, 84 P 260; Tiger v. Lincoln, 1 Colo. 394; Chesebro v. Lockwood, (Conn.) 91 A 188; Edwards v. Law, 46 Fla. 203, 36 S 569; Lester Book, etc., Co. v. Massee, 138 Ga. 213, 75 SE 98; Herrington v. Shumate Razor Co., 6 Ga. A. 861, 65 SE 1064; North Robinson Dean Co. v. Strong, 25 Ida. 721, 139 P 847; Wilson v. Vogeler, 10 Ida. 599, 79 P 508; Schmidt v. Shaver, 196 Ill. 108, 63 NE 655, 89 AmSR 250; Griffin v. Spengler, 176 Ill. A. 429; Fadner v. Hibler, 26 Ill. A. 639; Hayes v. Burkam, 94 Ind. 311; Custer v. Ellingson, 146 Iowa 735, 125 NW 674; Garrett v. Slavens, 129 Iowa 107, 105 NW 369 (between vendees); Darr v. Darrow, 120 Iowa 29, 94 NW 245; Steele v. Watson, 86 Iowa 629, 53 NW 420; Holbrook v. Oberne, 56 Iowa 324, 9 NW 291; Lebanon Lumber Co. v. Clarke, 151 Ky. 543, 152 SW 550; Ryan v. American Steel, etc., Co., 148 Ky. 481, 146 SW 1099; Palmer v. Grand Lodge K. P., (Ky.) 121 SW 678; Bartley v. Redmon, (Ky.) 115 SW 831; Hensley v. McDonald, 108 SW 362, 32 KyL 1333 (to show that person making representations was lender's agent); Jean v. Cawley, (Mass.) 105 NE 1009; Maynard v. Weeks, 181 Mass. 368, 64 NE 78; Shaw v. Hall, 134 Mass. 103; Hillier v. Eldred, 91 Mich. 54, 51 NW 705; Heffernan v. Whittlsey, (Minn.) 148 NW 63; Hornsky v. Hause, 35 Minn. 369, 29 NW 119; Paramore v. Campbell, 245 Mo. 287, 149 SW 6; Wade v. Boone, (Mo. A.) 168 SW 360; Mathes v. Switzer Lumber Co., 173 Mo. A. 239, 158 SW 729; Carpenter v. Parker, 64 Mo. A. 60; Courtney v. Continental Land, etc., Co., 17 Mont. 394, 43 P 185; Cerny v. Paxton, etc., Co., 83 Nebr. 88, 119 NW 14; C. F. Blanke Tea, etc., Co. v. Rees Printing Co., 70 Nebr. 510, 97 NW 627 (that one contracting on behalf of defendant was its authorized agent, or was known by it to be acting as such); Seeley v. Smith, 29 Nebr. 545, 45 NW 922; Nitro Powder Co. v. Marx, 148 App. Div. 571, 133 NYS 151; Swartwout v. McGowan, 141 App. Div. 846, 126 NYS 887; Miller v. Harris, 117 App. Div. 395, 102 NYS 604 [aff 125 App. Div. 922 mem, 110 NYS 1138 mem] (in receiving money and making promises in relation thereto); Le Valley v. Overacker, 64 App. Div. 612, 72 NYS 12; Lippincot v. East River Mill, etc., Co., 79 Misc. 559, 141 NYS 220; Stiefel v. New York Novelty Co., 25 Misc. 221, 55 NYS 90; Mergentine v. Arverne Hotel Supply Co., 123 NYS 52; Howard, etc., Co. v. Conaty, 116 NYS 614; Stark v. Solomon, 114 NYS 133; Gieger v. Levin, 110 NYS 203; Rowan v. Kemp, 103 NYS 775; Held v. Auerbach, 88 NYS 158 (to show that one with whom plaintiff contracted as principal was in fact merely the agent of defendant); Tarpy v. Bernheimer, 16 NYS 870; Page v. Boyd, (N. Y.) 11 HowPr 415; Parker v. Brown, 131 N. C. 264, 42 SE 605 (to show that contractor was agent of owner of house in purchasing lumber); Owings v. Howington, 31 Okl. 651, 124 P 1058; Muckle v. Westinghouse Electric, etc., Co., 230 Pa. 472, 79 A 707; Union Trust Co. v. Branch Mint Operating Co., 28 S. D. 549, 134 NW 65; Walton v. Nichols, etc., Co., 26 S. D. 111, 128 NW 474; Wootiers v. Kaufman, 73 Tex. 395, 11 SW 390; Kohlberg v. Awbrey, (Tex. Civ. A.) 167 SW 828; Cannel Coal Co. v. Luna, (Tex. Civ. A.) 144 SW 721; Davis, etc., Commn. Co. v. Mt. Vernon Bank, (Tex. Civ. A.) 133 SW 448; Hughes v. McFarland, (Tex. Civ. A.) 128 SW 172; Hill Mercantile Co. v. Rotan Grocery Co., (Tex. Civ. A.) 127 SW 1080; Tyler Ice Co. v. Coupland, 44 Tex. Civ. A. 833, 99 SW 133; Cronquist v. Smith, 42 Utah 575, 133 P 130; Campbell v. Gowans, 35 Utah 268, 100 P 397, 23 LRANS 414, 19 AnnCas 660; Garner v. A. Fisher Brewing Co., 6 Utah 332, 23 P 755; Callahan v. Ætna Indemn. Co., 33

or more parties the alleged agent was acting.[84] It has been held that the testimony of an alleged agent alone is insufficient to prove the agency.[85]

Nature and extent of authority. Likewise a preponderance of the evidence, in accordance with these general rules, is sufficient to establish the nature and extent of the agent's authority;[86] thus

Wash. 583, 74 P 693; Fisher v. Lutz, 146 Wis. 664, 132 NW 592; Anderson v. Cameron, 6 Grant Ch. (U. C.) 285; Hope v. Ferris, 30 U. C. C. P. 520; Wood v. Ontario, etc., R. Co., 24 U. C. C. P. 334; Macklem v. Thorne, 30 U. C. Q. B. 464.

[c] **Evidence of agency at the time** must be shown in proving the authority of an agent to bind his principal by the former's transaction. Warner v. Sohn, 86 Nebr. 519, 125 NW 1072, 85 Nebr. 571, 123 NW 1054.

[d] **Proof of agency before and after a contract** sustains a finding of agency at the time of contracting. Big Valley Irr. Co. v. Hughes, (Tex. Civ. A.) 146 SW 715.

[e] **Prima facie proof of agency.**—(1) Testimony of defendant, in an action for injury from the running away of his horse, that his son was in charge of it at the time, and was using it to attend to some of his own business, and probably some of defendant's also, is prima facie proof of agency. Haywood v. Hamm, 77 Conn. 158, 58 A 695. (2) That a power of attorney, dated March 21, 1904, to make live stock shipment contracts remained with the carrier when contracts were made in October and November, 1906, by the donees prima facie shows that it was in force then. Klair v. Philadelphia, etc., R. Co., 25 Del. 274, 78 A 1085.

[f] **An entry on the record of a town** that a payment of a special assessment was made by an agent of the owner of the land assessed does not prove agency, for the entry is the mere act of the collector of the assessment. Palmer v. Chicago, 248 Ill. 201, 93 NE 765.

[g] **Sufficiency of evidence to show termination of agency** see Cripple Creek Tunnel, etc., Co. v. Marshall, 41 Colo. 126, 91 P 1108.

[h] **Payment of checks to which the name of the payer is signed** by a third person tends to prove an agency. Griffin v. Spengler, 176 Ill. A. 429.

84. Ind.—Peru Heating Co. v. Lenhart, 48 Ind. A. 319, 95 NE 680 (evidence held to justify a finding that a corporation supplying hot water heat from its central plant to tenants in a building accepted the landlord's agent as its agent in shutting off the water from the building, and thereby relieved the landlord from liability for injuries caused by negligence in shutting off the water).

Iowa.—Citizens' Nat. Bank v. Western Union Tel. Co., 159 Iowa 720, 139 NW 552.

Mass.—Mulcahy v. Fenwick, 161 Mass. 164, 36 NE 689 (holding that, where upon a bill in equity for the cancellation of a mortgage and a note secured thereby, which were obtained from plaintiff by A and assigned by the mortgagee at A's request, without plaintiff's knowledge, to defendant, the question whether A was defendant's agent, and as such agent received and collected from plaintiff the principal and interest of the mortgage, is raised by the pleadings, and the facts reported by the justice of the superior court who heard the case, without determining it, are as consistent with the theory that A, in making payments of interest to defendant, was acting for plaintiff or for himself as that he was an agent of defendant, plaintiff fails to sustain the burden of proving that the payments to A were in effect payments to defendants).

Mo.—Camren v. Squires, 174 Mo. A. 272, 156 SW 773; Sills v. Burge, 141 Mo. A. 148, 124 SW 605; Poplar Wave Ice Co. v. Missouri Edison Electric Co., 86 Mo. A. 232; Wilson v. Rutherford, 69 Mo. A. 304 (holding that, in a suit on an assigned account for work done on a well, the testimony of the assignor that defendant's brother had employed him to do the work was not sufficient to connect defendant with the employment of the assignor, in the face of a ten-year lease on the land given by defendant to his brother for his accommodation, and to have the land improved, yielding no rent).

Nebr.—Walker v. Stewart, 92 Nebr. 845, 139 NW 665; Walker v. Smith, 92 Nebr. 841, 139 NW 663.

N. Y.—Fatta v. Edgerton, 157 App. Div. 852, 143 NYS 225.

N. C.—Hardy v. Ward, 150 N. C. 385, 64 SE 171 (in suit for specific performance of an option contract to sell timber, evidence held to show that the person who undertook to prepare the deeds was acting for the purchaser, and not for the owner); Yarborough v. Hughes, 139 N. C. 199, 51 SE 904 (evidence sufficient to show that attorney represented only the purchaser of land).

Okl.—Union Cent. L. Ins. Co. v. Pappan, 36 Okl. 344, 128 P 716.

Utah.—Campbell v. Gowans, 35 Utah 268, 100 P 397, 23 LRANS 414, 19 AnnCas 660 (evidence held to show that an agent, in negotiating a mortgage loan and collecting the interest and principal, was acting as agent of the mortgagee and not as agent of the mortgagor).

Wash.—Singer v. Guy Inv. Co., 60 Wash. 674, 111 P 886 (evidence held to justify a finding that a third person was the agent of a purchaser, and not of the vendor, so that the vendor was not liable for representations made by the third person to the purchaser).

[a] **The agency of a person recognized by both parties as agent** in a particular transaction is sufficiently proved when wholly uncontradicted by the adverse party. J. F. Bailey Co. v. West Lumber Co., 1 Ga. A. 398, 58 SE 120.

[b] **For borrower or lender.**—Where a borrower makes the agent through whom a loan is obtained his agent to pay the principal of such loan and interest thereon for him, evidence which is as reconcilable with the theory that the agent is acting as the agent of the borrower in receiving and forwarding such principal and interest as with the theory that such agent is acting as the agent of the lender must be held to show agency under such agreement, and not to disprove such agreement. Detwiler v. Heckenlaible, 63 Kan. 627, 66 P 653.

85. Dennis v. Young, 85 Ark. 252, 107 SW 994; Rolfe v. Tufts, 216 Mass. 563, 104 NE 341 (holding that, in an action by the wife of a sublessee against the original lessor for injuries from a defect in the premises, testimony by the alleged agent of the original lessor that he was "agent for the defendants" at the time of the accident was not sufficient to show that he had authority to waive a provision of the lease exempting the lessor from liability for injury on the premises). But see Buttz v. Warren Mach. Co., (Ind. A.) 103 NE 812.

[a] **Testimony of agent and third person.**—The relation of principal and agent is established by the testimony of the agent that the principal made him an agent for a specified purpose, and by the testimony of a third person who heard the principal's statement that the agent was appointed agent for such purpose. Allison v. Cash, 143 Ky. 679, 137 SW 245.

[b] **One assuming to act as a subagent** cannot establish his right to represent the principal by his own testimony. Lucas v. Rader, 29 Ind. A. 287, 64 NE 488.

86. U. S.—Russ v. Telfener, 57 Fed. 973 [aff 60 Fed. 228 (rev on other grounds 162 U. S. 170, 16 SCt 695, 40 L. ed. 930)].

Ark.—Pacific Mut. L. Ins. Co. v. Carter, 92 Ark. 378, 123 SW 384, 124 SW 764; Latham v. Ft. Smith First Nat. Bank, 92 Ark. 315, 122 SW 992; Kelley, etc., Milling Co. v. Adams, 72 Ark. 557, 78 SW 49 (evidence held to show that agent had authority only to solicit orders subject to principal's approval).

Ill.—McAtee v. Perrine, 48 Ill. A. 548.

Kan.—Hornick v. Union Pac. R. Co., 85 Kan. 568, 118 P 60, 38 LRANS 826, AnnCas1913A 208.

Ky.—Cincinnati, etc., R. Co. v. Ashurst, 124 SW 303.

Mass.—Rintamaki v. Cunard Steamship Co., 205 Mass. 115, 91 NE 220; James v. Lewis, 189 Mass. 134, 75 NE 217.

Mich.—Custard v. Hodges, 155 Mich. 361, 119 NW 583; Newberry v. Chicago Lumbering Co., 154 Mich. 84, 117 NW 592.

Mo.—Mitchell v. Samford, 149 Mo. A. 72, 130 SW 99.

Nebr.—Cooper v. Coad, 91 Nebr. 840, 137 NW 869; A. A. Cooper Wagon, etc., Co. v. Torbert, 86 Nebr. 143, 124 NW 1134.

Nev.—Lowman v. Nye, etc., Bank, 31 Nev. 306, 102 P 967 (evidence sufficient to show that an agent was sufficiently authorized in writing to warrant a bank in acting on his directions in delivering a deed to be recorded).

N. J.—Sadler v. Port-au-peck Realty Co., 78 N. J. L. 635, 76 A 977.

N. Y.—Barber v. Ellingwood, 135 App. Div. 549, 120 NYS 947; Lillian Realty Co. v. Erdurm, 120 NYS 749.

Okl.—Federal Trust Co. v. Coyle, 34 Okl. 635, 126 P 800.

Or.—Spande v. Western Life Indemn. Co., 61 Or. 220, 117 P 973, 122 P 38; Aerne v. Gostlow, 60 Or. 113, 118 P 277.

Tex.—Ellwood v. Stallcup, (Civ. A.) 122 SW 906.

Wash.—Womach v. J. I. Case Threshing Mach. Co., 62 Wash. 661, 114 P 509.

[a] **Evidence held sufficient** to show that the agent's authority extended to the acts in question see Moody v. Eastern Oregon Land Co., 180 Fed. 532 (that the agent of the vendor, under a contract to convey, did not exceed his authority in accepting a payment after the purchaser's default); Ware v. Pearsons, 173 Fed. 878, 98 CCA 364 (that manager of firm of brokers had authority to act for it in agreeing with a customer that there should be no actual delivery or receipt of grain on his contracts); Wooten v. Federal Discount Co., 7 Ala. A. 351, 62 S 263 (to sign acceptances of bills of exchange in principal's name); Robinson, etc., Contracting Co. v. Geyer, 107 Ark. 322, 155 SW 118 (to order supplies); Spencer Lumber Co. v. Marsh, 99 Ark. 358, 138 SW 479 (to employ laborers); Eoff v. Harrison Citizens' Bank, 87 Ark. 641, 112 SW 213 (to sign principal's name to promissory note); Kempher v. Gans, 87 Ark. 221, 111 SW 1123, 112 SW 1087 (authority of brokers to sell); Robinson v. American Fish, etc., Co., 17 Cal. A. 212, 119 P 388 (to warrant a finding, under Civ. Code § 2300, that the agent had ostensible power to make the contract); McDonald v. Kingsbury, 16 Cal. A. 244, 116 P 380 (authority of vendor's general agent to receive payment of unpaid installments); Tate v. Aitken, 5 Cal. A. 505, 90 P 836 (acts of wife as agent of husband with regard to sale of land);

it has been held that a preponderance of the evi- | dence is sufficient to show the agent's authority to

Hyman v. Waas, 79 Conn. 251, 64 A 354 (of clerk to direct hanging of sign, and thereby relieving contractor from liability on showing that the ironwork did not cause its fall); Hedrick v. Donovan, 248 Ill. 479, 94 NE 144 (sale of land); Miller v. Bank of Advance, 52 Ind. A. 706, 100 NE 121 (general authority of son to sign father's name as surety on note); Wagner v. McCool, 52 Ind. A. 124, 100 NE 395 (to receive payment of a mortgage); Clark v. Pett, 150 Iowa 707, 130 NW 791 (sale of land); Fritz v. Chicago Grain, etc., Co., 136 Iowa 699, 114 NW 193 (sale of elevator); Hopwood v. Corbin, 63 Iowa 218, 18 NW 911 (binding principal by letters authorizing sale of land); Gale Sulky Harrow Mfg. Co. v. Stark, 45 Kan. 606, 26 P 8, 23 AmSR 739 (authority of traveling salesman to warrant agricultural implement); Brink v. Walter, 145 Ky. 17, 139 SW 1064 (to employ subcontractor); Baldwin v. Tucker, 75 SW 196, 25 KyL 222 (selling piano and taking therefor note payable to himself); Frost v. Pearson, 2 Rob. (La.) 310 (to draw bill of exchange on principal); Sweetser v. Jordon, 211 Mass. 393, 97 NE 768 (that indorser's son had power to bind him by waiving demand and notice on a note the father had signed as indorser by promising to deliver a note in renewal); Allen v. Fuller, 182 Mass. 202, 65 NE 31 (to enter into illegal contract); Carberry v. Farnsworth, 177 Mass. 398, 59 NE 61 (to order extra work); Hilliard v. Weeks, 173 Mass. 304, 53 NE 818 (agreement for return of rejected goods); Thomas v. Wells, 140 Mass. 517, 5 NE 485 (to write letter admitting contract); Ryerson v. Tourcotte, 121 Mich. 78, 79 NW 933 (to sign orders for payment of money); Sunset Orchard Land Co. v. Sherman Nursery Co., 121 Minn. 5, 140 NW 112 (compromise and settlement); Winter, etc., Co. v. Atlantic El. Co., 88 Minn. 196, 92 NW 955 (to authorize sale of property on which principal had lien); Payne v. Hackney, 84 Minn. 195, 87 NW 608 (to sell land); Springfield Sav. Bank v. Kjaer, 82 Minn. 180, 84 NW 752 (to collect mortgages before maturity, although he did not have possession of the securities); Stewart v. Cowles, 67 Minn. 184, 69 NW 694 (sale of principal's goods by agent in payment of his own debt); Patton-Worsham Drug Co. v. Goddard Grocer Co., 179 Mo. A. 676, 162 SW 288; Acme Harvesting Mach. Co. v. Gasperson, 168 Mo. A. 558, 153 SW 1069 (to contract for repair of machine); Walker v. Hokom, 94 Nebr. 399, 143 NW 456 (to loan money, to receive payment of the same, and to reloan after such payment, but that the agent had no authority, express or implied, to purchase mortgaged property in his own name and require his principal to release the security thereon); Walker v. Hale, 92 Nebr. 829, 139 NW 658 (to receive payment of mortgage indebtedness); Northwestern Thresher Co. v. Kubicek, 82 Nebr. 485, 118 NW 94 (full power to represent plaintiff as its general manager would have had, if present); Day, etc., Lumber Co. v. Bixby, 4 Nebr. (Unoff.) 154, 93 NW 688 (to waive principal's right to a mechanic's lien); Lyle v. Addicks, 62 N. J. Eq. 123, 49 A 1121 (release of notes, except as to interest thereon); Thomas v. Spencer, (N. J. Ch.) 42 A 275 (that attorney was authorized to sign an agreement to pledge a mortgage, notwithstanding his testimony to the contrary); Levis v. Pope Motor Car Co., 202 N. Y. 402, 95 NE 815 (evidence sufficient to go to jury on issue whether an automobile sales agent was authorized to warrant a car sold); Wilcox Silver Plate Co. v. Green, 72 N. Y. 17 (receipt of goods); Oakland Mfg. Co. v. F. C. Linde Co., 162 App. Div. 543, 147 NYS 1045 (to pledge goods); Stitt v. Ward, 142 App. Div. 626, 127 NYS 351 (to agree not to accept similar advertising from another concern); Bennett Piano Co. v. Scace, 130 App. Div. 281, 114 NYS 524 (to make collections on leased piano); Goldsmith v. Schroeder, 93 App. Div. 206, 87 NYS 558 (to modify lease or accept a surrender of property leased); Cassidy v. Taylor Brewing, etc., Co., 79 App. Div. 242, 79 NYS 595 (promise to hold bidder at execution sale harmless); Droste v. Metropolitan Hotel Supply Co., 69 App. Div. 611, 74 NYS 613 (purchase of personal property); Benton v. Moss, 47 Misc. 376, 93 NYS 1113 (to contract with sellers for extra work done); Horowitz v. Hines, 47 Misc. 158, 93 NYS 469 (insufficient to show that purchase was without authority); New York Nat. Park Bank v. American Exch. Nat. Bank, 40 Misc. 672, 83 NYS 249 (indorsements of checks); Mullin v. Sire, 37 Misc. 807, 76 NYS 926 (contract by hotel manager); Lippitt v. St. Louis Dressed Beef, etc., Co., 27 Misc. 222, 57 NYS 747 (contract for architect's services); Fatta v. Edgerton, 137 NYS 226 (receipt of payments on a mortgage of the principal); Coles v. International Bank Note Co., 100 NYS 1060 (to make contract); Trollinger v. Fleer, 157 N. C. 81, 72 SE 795 (to employ farm manager); Kolp v. Brazer, (Tex. Civ. A.) 161 SW 899; Sargent v. Barnes, (Tex. Civ. A.) 159 SW 366; Steger v. Kelley, (Tex. Civ. A.) 136 SW 824 (to receive payment of certain notes, in part cash, and for the balance accept insurance policies); Donnell v. Currie, (Tex. Civ. A.) 131 SW 88 (executory contract to convey land); McKay v. McKinnon, (Tex. Civ. A.) 122 SW 440 (that agent unauthorized to sell land for part cash and deferred payments); Birge-Forbes Co. v. St. Louis, etc., R. Co., 53 Tex. Civ. A. 55, 115 SW 333 (contract with station agent for storage of cotton at principal's risk of fire); Osborne v. Gatewood, (Tex. Civ. A.) 74 SW 72 (receipt of payment of judgment in form of principal); Campbell v. Gowans, 35 Utah 268, 100 P 397, 23 LRANS 414, 19 AnnCas 660 (authority of mortgagee's agent to receive principal of mortgage debt, although mortgagee had possession of the securities); Taplin v. Harris, (Vt.) 90 A 956 (purchase of lumber); Vermont Marble Co. v. Mead, 85 Vt. 20, 80 A 852 (to sign a written contract for sale of interest in land); Citizens' Nat. Bank v. Ariss, 68 Wash. 448, 123 P 593 (to execute draft); Adams County Mercantile Co. v. Walla Walla Live Stock Co., 64 Wash. 285, 116 P 669 (to buy); Driver v. Galland, 59 Wash. 201, 109 P 593 (to show authority to abrogate contract); Galbraith v. Weber, 58 Wash. 132, 107 P 1050, 28 LRANS 341 (to sell horse at certain price and to receive payment in notes payable to himself); Keenan v. Lauritzen Malt Co., 57 Wash. 367, 106 P 1122 (to employ attorney); North American Commercial Co. v. North American Transp., etc., Co., 52 Wash. 502, 100 P 985 (to warrant unencumbered coal); Iona Warehouse Co. v. Van Buren, 50 Wash. 375, 97 P 291 (holding wheat some time after purchasing before selling it); Lough v. Davis, 35 Wash. 449, 77 P 732 (to repair veranda railing); Associated Artists v. Clement, 142 Wis. 490, 125 NW 923 (to order certain goods of plaintiff); Bleser v. Stedl, 135 Wis. 124, 115 NW 337 (receipt of payments on a mortgage to principal); Miller v. Lawton, 15 C. B. N. S. 834, 109 ECL 834, 143 Reprint 1013 (letters between plaintiff's attorney and defendant sufficient to justify finding that agent had authority to warrant horse).

[b] **Evidence held insufficient** to show that the agent's authority extended to the acts in question see Hinde, etc., Paper Co. v. Attebury, 185 Fed. 76, 107 CCA 296 (to show authority of superintendent of branch paper mill to buy pulp for another mill); Wales-Riggs Plantations v. Dye, 105 Ark. 446, 151 SW 998 (purchase of goods); Jonesboro, etc., R. Co. v. McClelland, 104 Ark. 150, 148 SW 523 (to settle claim); American Bldg., etc., Assoc. v. Warren, 101 Ark. 163, 141 SW 765 (to give mortgage); Earle v. Kelly, 21 Cal. A. 480, 132 P 262 (to show authority to make contract permitting tenant to remove fixtures); Jerman v. Neef Bros. Brewing Co., 46 Colo. 33, 102 P 743 (to lease); Martin v. Johnson, 54 Fla. 487, 44 S 949 (holding that evidence that a subagent had authority from the agent for the sale of land to find a purchaser and report to the agent for confirmation justified the finding that the subagent had no authority without ratification to bind the principal to a sale); Morgan v. Coleman, 141 Ga. 329, 80 SE 996; Strawn Farmers' El. Co. v. Bennett, 168 Ill. A. 428; Scheftels v. Heine, 139 Ill. A. 632 (to show authority of employee of brokerage firm to purchase stock); Hillert v. Harned, 143 Ky. 3, 135 SW 764 (to show authority of salesman of commission firm to purchase cattle on behalf of firm); Dispatch Printing Co. v. National Bank of Commerce, 115 Minn. 157, 132 NW 2 (to show that defendant was justified in accepting indorsements by plaintiff's agent of checks payable to plaintiff and presented for payment by the agent); Plummer v. Knight, 156 Mo. A. 321, 137 SW 1019 (that sale made by a person assuming to act as agent was expressly authorized); Craver v. House, 138 Mo. A. 251, 120 SW 686 (to procure a purchaser); Loy v. McClure, 124 Mo. A. 689, 101 SW 1148 (taking back consideration for a note in settlement of the note); Leavenworth First Nat. Bank v. Wright, 104 Mo. A. 242, 78 SW 686 (to settle or compromise); Fitzgerald v. Kimball Bros. Co., 76 Nebr. 236, 107 NW 227 (contract in suit); Hare v. Winterer, 1 Nebr. (Unoff.) 854, 96 NW 179 (to make loan, or participation in usurious agreement); In re James, 146 N. Y. 78, 40 NE 876, 48 AmSR 774 [aff 78 Hun 121, 28 NYS 992] (cashing of checks and deposit of proceeds); Taylor v. Bowen, 52 App. Div. 126, 65 NYS 36 (transfer of insurance policy); Frank Presbrey Co. v. Miller, 65 Misc. 52, 119 NYS 192 (change in advertisement in newspaper); Naughton Co. v. American Horse Exch., 49 Misc. 227, 97 NYS 387 (to make out a prima facie case that agent had authority to make the contract in question); Seely Office Appliance Co. v. Encyclopædia Brittannica Co., 119 NYS 213 (holding that the fact that an employee used an instrument delivered to him in doing work for his employer is not evidence that the instrument was purchased for the employer, or of authority from the employer to purchase it); Dowdall v. Borgfeldt, 113 NYS 1069 [aff 118 NYS 1103 mem, 134 App. Div. 954 mem] (to indorse checks); Baker v. Seaweard, 63 Or. 350, 127 P 961 (purchase of horses); Miles v. Columbia Packers' Assoc., 41 Or. 617, 69 P 827 (to employ labor); Durkee v. Carr, 38 Or. 189, 63 P 117 (covenant in lease); Simmons v. Okeetee Club, 86 S. C. 73, 68 SE 131 (to show that agent was acting within apparent scope of his authority); J. B. Watkins Land Mortg. Co. v. Campbell, 100 Tex. 542, 101 SW 1078 [rev (Civ. A.) 98 SW 227] (contract for sale of land); Connor v. Uvalde Nat. Bank, (Tex. Civ. A.) 156 SW 1092 (to sign principal's name to note); Heard v. Clegg, (Tex. Civ. A.) 144 SW 1145 (to agree to arbitration); Valentine v. Carter, 49 Wash. 141, 94 P 932 (contract to convey); Sherlock v. Van Asselt, 34 Wash. 14, 75 P 639 (to sell land); Corbet v. Waller, 27 Wash. 242, 67 P 567 (com-

employ a subagent.[87]

Where the agent's authority has to do with real estate, it is generally held that the proof of agency must be clear and specific.[88]

[§ 728] **G. Trial—1. In General.** The course and conduct of trials in actions arising out of the relation of principal and agent are governed by the rules of trial applicable to civil actions in general.[89]

Order of proof. Where the liability of the principal is sought to be established through the acts of an alleged authorized agent, the order of proof is in the discretion of the court, which may allow proof of the execution of the acts in question before proof of the authority.[90]

[§ 729] **2. Questions of Law and Fact—a. General Rules.**[91] Questions of law in actions relating to principal and agent are, as in other civil actions, for the determination of the court, and it is error to submit them to the jury.[92] Issues of fact, upon which there is evidence, are ordinarily for the de-

promise and settlement of claim); Heath v. Paul, 81 Wis. 532, 51 NW 876 (loan of money); Gordon v. Leary, 17 Man. 383 (purchase of goods on credit).

[c] **Authority to sign orders for payment of money.**—Where certain orders were signed by defendant's bookkeeper, the evidence of one witness that the bookkeeper had signed other orders and that they were paid is sufficient, in the absence of contradiction, to establish the bookkeeper's authority to sign the orders in question. Ryerson v. Tourcotte, 121 Mich. 78, 79 NW 933.

[d] **Proof of lost power of attorney.**—(1) Where a grantee in a power of attorney testified that he had mislaid the instrument and that he had made a thorough search of all the places where he customarily kept important documents without finding the writing, and that the power gave him authority to transact all kinds of business in the name of the grantor, and his testimony was not contradicted, there was evidence of the execution of the power of attorney authorizing the grantee therein to transact any and all business for the grantor therein. Culver v. Newhart, 18 Cal. A. 614, 123 P 975. (2) So also prima facie evidence of an agent's authority to convey is shown by a recital in the deed, and in letters, that he was attorney in fact, supported by testimony of one who saw the lost power. Mulford v. Rowland, 45 Colo. 172, 100 P 603.

[e] **Agent's testimony.**—(1) A jury's finding that the landlord's agent was a general agent for the management of the property, and therefore had authority to waive the landlord's lien on the crops, is supported by the agent's own evidence that he was renting the farm, was the landlord's agent to control it, transacted all the business in relation to the collection of the rent, instructed the tenant to sell part of the crop to pay taxes, and had general supervision of the property, although the agent also says that he had no authority to do anything detrimental to the landlord's interest, and was not authorized to release the lien. Fishbaugh v. Spunaugle, 118 Iowa 337, 92 NW 58. (2) So also testimony of one to whom defendant had sold his business that the latter authorized him to buy goods in his name, together with evidence that goods were shipped by plaintiff to defendant, and invoices mailed to him, sustains verdict against defendant for the price. Cleveland Co-op. Stove Co. v. Mallery, 111 Mich. 43, 69 NW 75.

87. Colo.—Penn Mut. L. Ins. Co. v. Ornauer, 39 Colo. 498, 90 P 846 (evidence, in an action on a contract for commissions, held sufficient to sustain a verdict on the theory that plaintiff had not been informed of limitations on the power of defendant's general agent with whom the contract was made, or of a requirement that appointments of subagents must be approved by defendant).

Iowa.—Fritz v. Chicago Grain, etc., Co., 136 Iowa 699, 114 NW 193; Bigham v. Chicago, etc., R. Co., 79 Iowa 534, 44 NW 805.

Md.—Carroll v. Manganese Steel Safe Co., 111 Md. 252, 73 A 665.

Mich.—Bissell v. Moore, 119 Mich. 222, 77 NW 931.

Mo.—Phillips v. Geiser Mfg. Co., 129 Mo. A. 396, 107 SW 47; Raike v. Manhattan Rubber Mfg. Co., 127 Mo. A. 480, 105 SW 1100.

Mont.—Uihlein v. Caplice Commercial Co., 39 Mont. 327, 102 P 564.

Nebr.—Cooper v. Hall, 91 Nebr. 844, 137 NW 871; Cooper v. Coad, 91 Nebr. 840, 137 NW 869; C. F. Blanke Tea, etc., Co. v. Graham, 5 Nebr. (Unoff.) 534, 99 NW 257.

Tex.—Lufkin Land, etc., Co. v. Miller, (Civ. A.) 136 SW 276 (evidence held insufficient to warrant a finding that S, in employing defendant to haul certain ties, acted for complainant within the scope of his authority, so as to render complainant liable for defendant's services).

[a] **Authority to employ attorney.**—Where, on an issue as to whether the brother of a person injured in a railroad collision had authority to make a contract with an attorney for services, a witness testified that the person injured stated to him that the brother had full charge of the matter, and referred witness to him to make a settlement, the court was justified in finding that the brother had "full charge of the claim," and that his authority was not limited to the matter of settlement. Tabet v. Powell, (Tex. Civ. A.) 78 SW 997.

88. Union Mut. L. Ins. Co. v. Masten, 3 Fed. 881; Booker v. Booker, 208 Ill. 529, 70 NE 709, 100 AmSR 250; Proudfoot v. Wightman, 78 Ill. 553; Taylor v. Merrill, 55 Ill. 52; Stadleman v. Fitzgerald, 14 Nebr. 290, 15 NW 234; McCune v. Badger, 126 Wis. 186, 105 NW 667; Challoner v. Bouck, 56 Wis. 652, 14 NW 810.

[a] **Where an agent's authority for the sale of land rests in parol,** the proof must be clear and convincing not only of the parol authority but also that the authority permitted the inclusion of all the material terms of the contract. Spengler v. Sonnenberg, 88 Oh. St. 192, 102 NE 737.

89. See Trial [38 Cyc 1238].

[a] **Where the basis of an agent's commissions is in issue,** in an equitable action between him and the principal, and the facts of a fiduciary relation, an obligation to account, and that a balance is owing to the agent are all admitted, a trial of the main issue should first be had before the court, and then, if an accounting is necessary, it may be provided for in the interlocutory decree. Prince Line v. John C. Seager Co., 118 App. Div. 697, 103 NYS 677.

[b] **Permitting witnesses to erroneously refer to party.**—Where, in an action on a contract, the agency of the person making the contract for defendant is in issue, it is erroneous for the court to permit witnesses to refer repeatedly to defendant as the party dealt with, against the objection of defendant, as the court thereby places the jury in a position where they are liable to be misled by making them overlook the necessity of proof of the agent's authority to make the contract. Bond v. Pontiac, etc., R. Co., 62 Mich. 643, 29 NW 482, 4 AmSR 885.

90. Colo.—Robert E. Lee Silver Min. Co. v. Englebach, 18 Colo. 106, 31 P 771.

Conn.—C. & C. Electric Motor Co. v. Frisbie, 66 Conn. 67, 33 A 604; Stirling v. Buckingham, 46 Conn. 461.

Ill.—Erie, etc., Despatch v. Cecil, 112 Ill. 180 (holding proof of acts before proving authority the most convenient and natural course); Mix v. Osby, 62 Ill. 193 (holding that a party may introduce evidence in the order preferred, provided he connects it). But see People v. Courson, 87 Ill. A. 254 (holding that, where the acts of an agent are relied upon to make a case, proof of his authority must be made before evidence of his acts will be admissible).

Ind.—Shepard v. Goben, 142 Ind. 318, 39 NE 506.

Iowa.—Firts v. Chicago Grain, etc., Co., 136 Iowa 699, 114 NW 193 (holding that, where, in an action for broker's commissions, the main question is the authority of defendant's agent to employ plaintiff, plaintiff's testimony regarding the contract with the agent, and what was done thereunder, is admissible, although the authority of the agent to hire plaintiff has not yet been shown, the order of testimony being in the discretion of the court).

La.—Miller v. New Orleans Canal, etc., Co., 8 Rob. 236.

Minn.—Woodbury v. Larned, 5 Minn. 339.

Mo.—Taylor v. Penquite, 35 Mo. A. 389.

Mont.—Starr v. Gregory Cons. Min. Co., 6 Mont. 485, 13 P 195, 6 Mont. 491, 13 P 198 [aff 141 U. S. 222, 11 SCt 914, 35 L. ed. 715].

N. Y.—Platner v. Platner, 78 N. Y. 90.

Pa.—American Car, etc., Co., v. Alexandria Water Co., 218 Pa. 542, 67 A 861 (holding that, on an issue whether notes delivered to plaintiff's manager were taken in payment of plaintiff's claim, it was in the discretion of the court to permit proof of the execution and delivery of the notes and matters incidental thereto, before proving the agency and scope of the authority of plaintiff's manager to receive them); Beal v. Adams Express Co., 13 Pa. Super. 143.

Tex.—St. Louis, etc., R. Co. v. Jones, 14 SW 309.

Vt.—Chamberlin v. Fuller, 59 Vt. 247, 9 A 832.

Va.—McIntyre v. Smyth, 108 Va. 736, 63 SE 930 (holding that, while it is more regular first to establish the agency and then to introduce proof as to the liability of the principal by reason of the agent's acts, a different order of proof is not reversible error); Virginia F., etc., Ins. Co. v. Buck, 88 Va. 517, 13 SE 973 (denying the right of defendant to inquire into acts of plaintiff's agent without first proving authority or satisfying the court that it would be done).

See also supra §§ 695, 709. See generally Trial [38 Cyc 1349].

[a] **Before a sealed instrument** executed by an agent can be submitted to the jury the authority of the agent must be shown. Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 AmD 66.

91. **Province of court and jury** see generally Trial [38 Cyc 1511 et seq].

92. Ark.—Milwaukee Harvester Co. v. Tymich, 68 Ark. 225, 58 SW 252 (holding that in an action to recover from an agent for sales made in violation of a contract, where such violation was undisputed, it was not error to direct a verdict for the principal for any amount the jury might find due, since whether there was an undisputed liability was a question

termination of the jury under proper instructions from the court.[93] Where either party presents evidence which, although slight, would justify a finding in his favor, and the evidence is conflicting, he is entitled to go to the jury, and it is error to withdraw the case from the jury by nonsuit, direction of verdict, instructions, or by sustaining a demurrer to the evidence.[94] But if there is no legally sufficient evidence on an issue of fact,[95] or if the facts are not in dispute,[96] the question becomes one of law for the court.

[§ 730] **b. Particular Questions—(1) In General.** Subject to the above general rules, whether or not an agent exercised the proper degree of care, diligence, skill, and good faith in the execution of his agency is ordinarily a question for the jury,[97] as is

for the court in the construction of the contract).

Del.—Coe v. Johnson, 11 Del. 9 (holding that what will constitute agency is a question of law for the court, and, if in its opinion the evidence is insufficient to establish it, it is in its power to instruct the jury to return a verdict for defendant).

Ky.—Asher v. Beckner, 41 SW 35, 19 KyL 521 (holding that, where defendant resists plaintiff's claim to compensation for services as agent on the ground that plaintiff subsequently accepted inconsistent employment, it is for the court to determine as matter of law what were the objects of the subsequent employment).

Or.—Long Creek Bldg. Assoc. v. State Ins. Co., 29 Or. 569, 46 P 366.

Pa.—Stockwell v. Loecher, 9 Pa. Super. 241 (holding construction of agent's letter as to rescission of contract for the court).

93. Ga.—Cotton States L. Ins. Co. v. Mallard, 57 Ga. 64 (whether a subagent faithfully discharged his duties).

Ill.—Hale El. Co. v. Hale, 201 Ill. 131, 66 NE 249 [aff 98 Ill. A. 430]; Williams v. Chicago Coal Co., 60 Ill. 149 (whether plaintiff should recover interest, in an action by a principal against an agent to recover money retained by the agent to recoup damages sustained by reason of having been discharged from his employment); Schneider v. Seely, 40 Ill. 257 (whether goods were delivered to an agent in such a manner as to render the principal liable).

Iowa.—Minnesota Linseed Oil Co. v. Montague, 65 Iowa 67, 21 NW 184 (holding that what constitutes a reasonable time within which to examine and approve or disapprove the agent's account is ordinarily a question for the jury).

Mass.—Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 NE 221.

Mich.—Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 NW 457 (good faith of principal in canceling contract); Haas v. Malto-Grapo Co., 148 Mich. 358, 111 NW 1059 (whether goods shipped to a sales agent pursuant to a contract of agency were inferior and were overcharged for); Mail, etc., Co. v. Wood, 140 Mich. 505, 103 NW 864; Lorimer v. Boylan, 98 Mich. 18, 56 NW 1043 (question whether an agent sold within a reasonable time, his directions being to sell "right away").

Minn.—Dayton v. Buford, 18 Minn. 126 (question of the nature, effect, and interpretation of correspondence between the owner of land and his agent in relation to the sale of the land).

Mo.—St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737 (whether advertising contracted for by agent was necessary).

Nebr.—Walker v. Carlson, 92 Nebr. 850, 139 NW 663; Walker v. Rudd, 92 Nebr. 839, 139 NW 662.

N. H.—Lamoreaux v. Rolfe, 36 N. H. 33 (whether an agreement was signed by an agent before or after the delivery of the power authorizing its execution).

N. Y.—Colgan v. Aymar, Lalor 27 (whether agents for a principal who had become insane were personally liable for wages of employees whose employment they had directed); Cape Fear Bank v. Gomez, 6 Cow. 435 (whether a note described in a power and that actually seized were the same).

S. C.—Robert Buist Co. v. Lancaster Mercantile Co., 73 S. C. 48, 52 SE 789 (whether a salesman sold goods under an agreement that his principal should pay the freight).

Tex.—Merrill v. Bradley, 52 Tex. Civ. A. 527, 121 SW 561 (whether power of attorney was induced by misrepresentations).

[a] **Whether a transaction was a sale or a consignment for sale** is a question for the jury. Rauber v. Sundback, 1 S. D. 238, 46 NW 927; Conrad v. Kelley, 106 Wis. 252, 82 NW 141.

[b] **While the interpretation of a contract** claimed to have been made by an agent is for the court, it is generally for the jury to determine whether it was made for a principal or was the alleged agent's personal contract. Meyers v. Kilgen, 177 Mo. A. 724, 160 SW 569.

94. U. S.—Stoll v. Loving, 112 Fed. 885, 50 CCA 173.

Ala.—Montgomery Bank v. Plannett, 37 Ala. 222.

Ga.—Cave v. Lougee, 134 Ga. 135, 67 SE 667; Jackson v. Gallagher, 128 Ga. 321, 57 SE 750; Pyle v. Booz, 10 Ga. A. 760, 73 SE 1085.

Mass.—Kinsman v. Kershaw, 119 Mass. 140.

Mich.—Lesher v. Loudon, 85 Mich. 52, 48 NW 278; Saginaw, etc., R. Co. v. Chappell, 56 Mich. 190, 22 NW 278.

Mo.—Smith v. Stokes, 76 Mo. 178.

N. J.—Sandford v. Miller, 80 N. J. L. 411, 78 A 177.

N. Y.—Isaacsen v. Andrews, 64 App. Div. 408, 72 NYS 177; Bostwick v. Mutual Redemption Bank, 25 HowPr 314.

N. C.—Latham v. Field, 163 N. C. 356, 79 SE 865; Sneed v. Smith, 61 N. C. 595.

N. D.—Morris v. Bradley, 20 N. D. 646, 128 NW 118 (holding that, in an action by a principal against his agent for breach of the agent's contract in failing to exercise care in procuring security for the price of personalty sold by him under the agency contract, where plaintiff's evidence relative to the agent's negligent performance of duty not only showed negligence but also bad faith of the agent, it was error to direct a verdict for defendant).

Pa.—Bergner v. Thompson, 74 Pa. 168.

S. D.—Sherman v. Port Huron Engine, etc., Co., 13 S. D. 95, 82 NW 413.

Tex.—Campbell v. Crowley, (Civ. A.) 56 SW 373.

[a] **If there is more than a mere scintilla of evidence** the question should be submitted to the jury. Gates v. Max, 125 N. C. 139, 34 SE 266; Bellman v. Pittsburg, etc., R. Co., 31 Pa. Super. 389.

Taking case from jury see generally Trial [38 Cyc 1532 et seq].

95. Mouton v. Thibodeaux, 16 La. 131 (holding that where it did not appear that a person suing as agent was really such, and that there was really a debt due and existing in favor of plaintiff, he was properly nonsuited); Holcomb v. McCutchen, (Miss.) 30 S 754; Covington v. Newberger, 99 N. C. 523, 6 SE 205 (holding that in an action by an innkeeper against a merchant for his traveler's board, in the absence of evidence to justify an inference that plaintiff notified defendant of the traveler's failure to pay cash, according to custom, or that the case is an exception to such general custom, the issue should not be submitted to the jury, but verdict should be directed against plaintiff); Fee v. Adams Express Co., 38 Pa. Super. 83 (holding that, in an action against an express company to recover on a contract alleged to have been made by the route agent of the company to pay plaintiff, a constable, a stated sum for procuring the arrest of a thief, binding instructions should be given for defendant, where plaintiff produces no evidence to show the functions of a route agent, the nature of his duties, the extent of his powers, or that the company had even held him out as having authority to make such a contract, or that he had ever made similar contracts with plaintiff, or anyone else).

96. Ripley v. Case, 86 Mich. 261, 49 NW 46 (holding that where it was admitted that plaintiff purchased a bond in reliance on the false representations of defendant's agent, and that defendant had received the amount paid for the bond, the court should direct a verdict for plaintiff for that amount); Claflin v. Lenheim, 66 N. Y. 301 (holding that, the facts bearing upon a question of constructive notice being undisputed, that question was one of law for the court).

[a] **Illustration.**—Where, in an action against an agent based on his wrongful act in taking to himself a conveyance of land which he had sold for his principal, on nonpayment by the vendee of the notes given for the purchase price the agent conceded in his answer his principal's right to the land, and prayed merely for an accounting with his principal, judgment for a specific sum claimed against her, and a lien on the lands for that sum, it was not error to direct a conveyance of the land to the principal and retain the questions of settlement of accounts and liens for further adjudication. Hoskins v. Morton, 77 SW 195, 25 KyL 1089.

97. U. S.—Milwaukee Nat. Bank v. City Bank, 103 U. S. 668, 26 L. ed. 417 (whether selling agent used reasonable diligence in discharging his duties to his principal).

Ga.—Southern Express Co. v. Frink, 67 Ga. 201; Brown v. Clayton, 12 Ga. 564 (whether the agent was guilty of negligence in not instituting a suit for the benefit of his principal).

Ill.—Munford v. Miller, 7 Ill. A. 62 (whether principal was guilty of contributory negligence in not discovering a mistake, which was patent upon the face of a mortgage procured in his favor by his agent, in which the land was wrongly described).

Mass.—Harlow v. Bartlett, 170 Mass. 584, 49 NE 1014; Buell v. Chapin, 99 Mass. 594, 97 AmD 58.

Mich.—Kaempfer v. Lindsay, 121 Mich. 425, 80 NW 107.

Mo.—Eddy v. Livingston, 35 Mo. 487, 88 AmD 122; Clinkscales v. Clark, 137 Mo. A. 12, 118 SW 1182.

N. D.—Morris v. Bradley, 20 N. D. 646, 128 NW 118.

Oh.—Darling v. Younker, 37 Oh. St. 487, 41 AmR 532 (negligence of collection agent in dealing with funds of principal).

Pa.—Perry v. Jensen, 142 Pa. 125, 21 A 866, 12 LRA 393 (whether an agent used "his best reasonable endeavors" as agreed).

Va.—Blosser v. Harshbarger, 21 Gratt. (62 Va.) 214.

[a] **Question of mixed law and fact.**—Where an action is brought against an agent who, having received money to be carried to his principal, claims that the money is lost, the bur-

also the question whether a gratuitous agent was guilty of gross negligence.[98]

Custom and usage of trade. The existence and applicability of a custom or usage of trade are ordinarily questions for the jury,[99] such as the existence or nonexistence of a custom that selling agents may warrant the quality of what they sell.[1]

The right of an agent to compensation and the amount thereof are usually questions for the jury,[2] such as whether he was the procuring cause of a sale or purchase so as to entitle him to a commission thereon,[3] or whether he was guilty of fraud which precluded him from recovering compensation.[4]

Whether the third party has elected to hold either the principal or agent, where the latter has entered into an unauthorized contract,[5] or whether he has elected to hold the agent or the undisclosed principal when discovered,[6] is usually a question of fact for the jury.

[§ 731] **(2) As to Existence of Agency—(a) In General.** When any evidence is adduced tending to prove the existence of a disputed agency its existence or nonexistence is as a general rule a question of fact for the jury, aided by proper instructions from the court,[7] even though the evidence is not

den is on the agent to show that there was no breach of duty on his part, and this is to be determined upon consideration of all the circumstances; and ordinarily the question is one of mixed law and fact, and not merely of law. Darling v. Younker, 37 Oh. St. 487, 41 AmR 532.

[b] **Whether an agent's retention of funds** to cover a disputed commission was fraudulent or dishonest held under the evidence a jury question in an action on the agent's bond see National Surety Co. v. Empire State Surety Co., 143 App. Div. 241, 128 NYS 10.

98. Preston v. Prather, 137 U. S. 604, 11 SCt 162, 34 L. ed. 788; Gray v. Merriam, 148 Ill. 179, 35 NE 810, 39 AmSR 172, 32 LRA 769; Doorman v. Jenkins, 2 A. & E. 256, 29 ECL 132, 111 Reprint 99.

99. Forrester v. Bordman, 9 F. Cas. No. 4,945, 1 Story 43 (question whether the usage of trade allows an agent to sell on credit); Hickborn v. Bradley, 117 Iowa 130, 90 NW 592 (question of existence of a custom as to length of time during which a jobber should endeavor to introduce a brand of goods).

[a] **What is usual for an agent to do** in carrying out the object of his agency, where he has a general authority to sell, is a question for the jury. Reese v. Bates, 94 Va. 321, 26 SE 865.

1. Herring v. Skaggs, 62 Ala. 180, 34 AmR 4 (warranty of a safe); Hayner v. Churchill, 29 Mo. A. 676 (warranty of a reaper); Reese v. Bates, 94 Va. 321, 26 SE 865 (warranty of fertilizer); Westurn v. Page, 94 Wis. 251, 68 NW 1003 (warranty of a horse); Pickert v. Marston, 68 Wis. 465, 32 NW 550, 60 AmR 876 (warranty of foodstuffs).

[a] **But** it has been held that in some instances, such as the sale of a slave or a horse, power given to sell carries with it, as a matter of law, power to warrant soundness. Herring v. Skaggs, 62 Ala. 180, 34 AmR 4; Cocke v. Campbell, 13 Ala. 286; Skinner v. Gunn, 9 Port. (Ala.) 305. But see Westurn v. Page, 94 Wis. 251, 68 NW 1003. It has been suggested, as a reason for this distinction, that "perhaps the custom of such warranties is so general, and has prevailed so long, that it has come to be treated as judicial knowledge." Herring v. Skaggs, 62 Ala. 180, 184, 34 AmR 4.

2. Cal.—Mattingly v. Roach, 84 Cal. 207, 23 P 1117.

Colo.—Miles v. Mays, 15 Colo. 133, 25 P 312 (whether agent personally liable to subagent for commission upon sale of land).

N. J.—Ruckman v. Bergholz, 38 N. J. L. 531 (measure of compensation for selling land, no rate being fixed between principal and agent).

N. Y.—Darling v. Howe, 14 NYS 561 (whether services were gratuitous or rendered in expectation of compensation).

S. D.—Sherman v. Port Huron Engine, etc., Co., 8 S. D. 343, 66 NW 1077 (whether order obtained by agent was rejected for such cause as to deprive agent of right to commission).

Tex.—Missouria Glass Co. v. Roberts, (Civ. A.) 137 SW 433 (evidence sufficient to make question for jury).

Wis.—Coolican v. Milwaukee, etc., Impr. Co., 79 Wis. 471, 48 NW 717 (whether contract for commission on sales of real estate included both auction and private sales); Best v. Sinz, 73 Wis. 243, 41 NW 169 (holding that, where the contract of employment was silent as to the compensation the agent should receive, he is entitled to a reasonable compensation, which is for the jury to fix, and, the jury having been told several times that they were to fix the amount, a hypothetical allusion by the court to ten per cent is not erroneous).

3. Ark.—Addressograph Co. v. Office Appliance Co., 106 Ark. 536, 153 SW 804.

Conn.—Huntington v. Wolcott, 5 Day 390.

Mich.—Kelso v. Woodruff, 88 Mich. 299, 50 NW 249.

Minn.—Ferguson v. Glaspie, 38 Minn. 418, 38 NW 352 (whether agent had procured purchaser under such circumstances as to entitle him to commission).

Mo.—Merton v. J. I. Case Threshing Mach. Co., 99 Mo. A. 630, 74 SW 434.

N. Y.—Ransom v. Wheelwright, 17 Misc. 141, 39 NYS 342.

Pa.—Brodhead v. Pullman Ventilator Co., 29 Pa. Super. 19.

Wis.—Coolican v. Milwaukee, etc., Imp. Co., 79 Wis. 471, 48 NW 717.

Eng.—Bayley v. Chadwick, 39 L. T. Rep. N. S. 429; Kynaston v. Nicholson, 8 L. T. Rep. N. S. 671.

4. Redwine v. Continental Realty Co., 184 Fed. 851, 107 CCA 175; Doss v. Bd. Long Prairie Levee Dist., 96 Ark. 451, 132 SW 443 (holding that in an agent's action for compensation, defended on the ground that the agent had been guilty of fraud in discharging his agency, so as to damage the principal, the agent's fraudulent conduct in the discharge of his duties was a question for the jury, where he testified that he had not done anything wrongful in the discharge of his agency).

5. Ferry v. Moore, 18 Ill. A. 135; Cobb v. Knapp, 71 N. Y. 348, 27 AmR 51; Calder v. Dobell, L. R. 6 C. P. 486, 2 ERC 457. But see Curtis v. Williamson, L. R. 10 Q. B. 57, 59 (where the court said: "In general, the question of election can only be properly dealt with as a question of fact for the jury, subject to the direction of the presiding judge . . . there may no doubt be cases in which the act of the contractee in regard to his dealings with or proceeding against the agent, with full knowledge of the facts and freedom of choice, may be such as to preclude him in point of law from afterwards resorting to the principal").

6. Gay v. Kelley, 109 Minn. 101, 123 NW 295, 26 LRANS 742.

[a] **Question of law.**—Where the answer in an action on a contract pleads as a defense that plaintiffs elected to hold defendant's agent who made the contract in his own name as principal, and sets out the facts relied on which in law constitute such election, the issue may be determined by the court on a demurrer to the answer. Barrell v. Newby, 127 Fed. 656, 62 CCA 382.

7. U. S.—Quinlan v. Holbrook, 162 Fed. 272, 89 CCA 252; New England Mortg. Security Co. v. Gay, 32 Fed. 636.

Ala.—Merchants' Bank v. Acme Lumber, etc., Co., 170 Ala. 443, 54 S 58; Mobile, etc., R. Co. v. Odom, 169 Ala. 507, 53 S 765; Home Tel. Co. v. Robertson, 167 Ala. 179, 52 S 655; Miller-Brent Lumber Co. v. Stewart, 166 Ala. 657, 51 S 943, 21 AnnCas 1149; Boswell v. Thompson, 160 Ala. 306, 49 S 73; Henderson Law Co. v. Hinson, 157 Ala. 640, 47 S 717; Union Naval Stores Co. v. Pugh, 156 Ala. 369, 47 S 48; Merrill v. Worthington, 155 Ala. 281, 46 S 477; Thomasville First Nat. Bank v. Gobey, 152 Ala. 517, 44 S 535; Robinson v. Green, 43 S 797; Shields v. Sheffield, 79 Ala. 91; South Alabama, etc., R. Co. v. Henlein, 52 Ala. 606, 23 AmR 578; Gimon v. Terrell, 38 Ala. 208; Montgomery Bank v. Plannett, 37 Ala. 222; McDonnell v. Montgomery Branch Bank, 20 Ala. 313; McClurg v. Spottswood, 19 Ala. 165.

Ark.—Short v. Johnson, 89 Ark. 279, 116 SW 658; Vahlberg v. Keaton, 51 Ark. 534, 11 SW 878, 14 AmSR 73, 4 LRA 462.

Colo.—Schoelkopf v. Leonard, 8 Colo. 159, 6 P 209.

Conn.—Bloch v. De Lucia, 80 Conn. 716, 66 A 769.

Del.—State v. Foster, 17 Del. 289, 40 A 939.

Ga.—Terry v. International Cotton Co., 138 Ga. 656, 75 SE 1044; Palmour v. Roper, 119 Ga. 10, 45 SE 790; Whitman v. Bolling, 47 Ga. 125; White Sewing Mach. Co. v. Horkan, 7 Ga. A. 283, 66 SE 811.

Hawaii.—Robinson v. Sresovich, 5 Hawaii 618.

Ida.—Morgan v. Neal, 7 Ida. 629, 65 P 66, 97 AmSR 264.

Ill.—Freet v. American Electrical Supply Co., 257 Ill. 248, 100 NE 933 [aff 171 Ill. A. 512]; Hankinson v. Lombard, 25 Ill. 572, 79 AmD 348; Lyons v. Hammond El. Co., 139 Ill. A. 495; Iroquois Furnace Co. v. Ross, 76 Ill. A. 549; St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 74 Ill. A. 619 [aff 175 Ill. 557, 51 NE 911, 67 AmSR 238]; Cook v. Smith, 73 Ill. A. 483.

Ind.—Indiana Ins. Co. v. Hartwell, 100 Ind. 566; Barton v. Barton, 52 Ind. A. 537, 100 NE 870; American Car, etc., Co. v. Smock, 48 Ind. A. 359, 91 NE 749, 751, 93 NE 78 [clt Cyc].

Iowa.—Hoger v. Hart, 159 Iowa 234, 140 NW 356; Moyers v. Fogarty, 140 Iowa 701, 119 NW 159; Gough v. Loomis, 123 Iowa 642, 99 NW 295; Jewell v. Posey, 119 Iowa 412, 93 NW 379; Hughbanks v. Boston Inv. Co., 92 Iowa 267, 60 NW 640; Patton v. Bond, 50 Iowa 508.

Kan.—Warren Mortg. Co. v. Schick, 107 P 536.

Ky.—Loughridge v. Ball, 118 SW 321.

Me.—Copeland v. Hall, 29 Me. 93.

Md.—Darrin v. Whittingham, 107 Md. 46, 68 A 269; Fifer v. Clearfield, etc., Coal, etc., Co., 103 Md. 1, 62 A 1122; Morrison v. Whiteside, 17 Md. 452, 79 AmD 661; Rogers v. Severson, 2 Gill 385.

Mass.—Whittier v. Child, 174 Mass. 36, 54 NE 344; Ayer v. R. W. Bell Mfg. Co., 147 Mass. 46, 16 NE 754; Lovell v. Williams, 125 Mass. 439.

Mich.—Reelman v. Grosfend, 140 Mich. 681, 104 NW 331; Mail, etc., Co. v. Wood, 140 Mich. 505, 103 NW 864; Wilhelm v. Voss, 118 Mich. 106,

full and satisfactory;[8] and in such cases it is error for the court to take the question from the jury by directing a verdict, by instruction, by nonsuit, or by sustaining a demurrer to the evidence.[9] But whether or not there is any evidence tending to prove the existence of an agency is for the court to determine, and if there is none, or if it is so slight that a finding thereon of the existence of the agency would not be sustained, the question should be disposed of by the court alone, and should not be submitted to the jury;[10] nor should the question be submitted to them where the facts relating to the existence of the agency are undisputed and are such that only one reasonable conclusion can be drawn therefrom.[11] But even where the facts are undisputed, if different conclusions can reasonably

76 NW 308; Montaine Crossing, etc., Co. v. Rauch, 117 Mich. 401, 75 NW 1063 (holding that the question whether certain correspondence and subsequent dealings show agency is for the jury where reasonable minds might differ in regard thereto); Shaw v. Gilmore, 76 Mich. 127, 42 NW 1082; Saginaw, etc., R. Co. v. Chappell, 56 Mich. 190, 22 NW 278; Roberts v. Pepple, 55 Mich. 367, 21 NW 319; Haughton v. Maurer, 55 Mich. 323, 21 NW 426.

Minn.—Bartleson v. Vanderhoff, 96 Minn. 184, 104 NW 820; Jensen v. Weide, 42 Minn. 59, 43 NW 688.

Mo.—Berkson v. Kansas City Cable R. Co., 144 Mo. 211, 45 SW 1119; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 SW 210; Hull v. Jones, 69 Mo. 587; Rice v. Groffmann, 56 Mo. 434; Brooks v. Jameson, 55 Mo. 505; Handlan-Buck Mfg. Co. v. Stave Electrical Co., (A.) 168 SW 785; Meux v. Haller, 179 Mo. A. 466, 162 SW 688; Clinkscales v. Clark, 137 Mo. A. 12, 118 SW 1182; Mosby v. McKee, etc., Commn. Co., 91 Mo. A. 500; Trimble v. Keer, etc., Mercantile Co., 56 Mo. A. 683; Barrett v. Indianapolis, etc., R. Co., 9 Mo. A. 226.

Nebr.—Crilly v. Ruyle, 87 Nebr. 367, 127 NW 251; Walsh v. Peterson, 59 Nebr. 645, 81 NW 853; New England Mortg. Security Co. v. Addison, 15 Nebr. 335, 18 NW 76; Nichols v. Hail, 4 Nebr. 210; C. F. Blanke Tea, etc., Co. v. Trade Exhibit Co., 5 Nebr. (Unoff.) 358, 98 NW 714; Southern Pine Lumber Co. v. Fries, 1 Nebr. (Unoff.) 691, 96 NW 71.

N. J.—Manchester Bldg., etc., Assoc. v. Allee, 81 N. J. L. 605, 80 A 466 [rev 80 N. J. L. 185, 76 A 1012]; Scull v. Skillton, 70 N. J. L. 792, 59 A 457; Longstreth v. Korb, 64 N. J. L. 112, 44 A 934; Elliott v. Bodine, 59 N. J. L. 567, 36 A 1038; Columbia Delaware Bridge Co. v. Geisse, 38 N. J. L. 39; Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728.

N. Y.—Greenwood v. Schumacker, 82 N. Y. 614; Delafield v. J. K. Amsby Co., 99 App. Div. 622, 90 NYS 998; Leinkauf v. Lombard, etc., Co., 12 App. Div. 302, 41 NYS 391; Brand v. Newton, 82 Hun 550, 31 NYS 700; Howard v. Norton, 65 Barb. 161; Wallace v. Arkell, 28 Misc. 502, 59 NYS 597 [aff 27 Misc. 819, 57 NYS 655]; De Bavier v. Funk, 21 NYS 410 [aff 142 N. Y. 633 mem, 37 NE 566 mem]; Tebbetts v. Levy, 11 NYS 684; Conklin v. Tuthill, 10 NYSt 624; Bruce v. Welch, 6 NYSt 617.

N. D.—Knox First Nat. Bank v. Bakken, 17 N. D. 224, 116 NW 92.

Okl.—Iowa Dairy Separator Co. v. Sanders, 40 Okl. 656, 140 P 406; Yukon Mills, etc., Co. v. Imperial Roller Mills Co., 34 Okl. 817, 127 P 422; Midland Sav., etc., Co. v. Sutton, 30 Okl. 448, 120 P 1007; McNabb v Hunt, 28 Okl. 43, 119 P 210; Ricker Nat. Bank v. Stone, 21 Okl. 833, 97 P 577.

Or.—Neppach v. Oregon, etc., R. Co., 46 Or. 374, 80 P 482; Connell v. McLoughlin, 28 Or. 230, 42 P 218; Glenn v. Savage, 14 Or. 567, 13 P 442.

Pa.—Carter v. Moss, 210 Pa. 612, 60 A 310; East Birmingham Farmers', etc., Bank v. Pittsburg Third Nat. Bank, 165 Pa. 500, 30 A 1008; Union Refining, etc., Co. v. Bushnell, 88 Pa. 89; Commercial Union Assur. Co. v. Elliott, 10 Pa. Cas. 331, 13 A 970; Birkle v. Coleman, 50 Pa. Super. 105; Bellman v. Pittsburg, etc., R. Co., 31 Pa. Super. 389; Spanogle v. Doane, 15 WklyNC 156. See also Merritt v. Poll, 236 Pa. 170, 84 A 683.

S. C.—Dickert v. Farmers' Mut. Ins. Assoc., 52 S. C. 412, 29 SE 786; Campbell v. Chiles, 9 S. C. L. 251.

Tenn.—Willcox v. Hines, 100 Tenn. 524, 45 SW 781, 66 AmSR 761.

Tex.—Bradstreet Co. v. Gill, 72 Tex. 115, 9 SW 753, 13 AmSR 768, 2 LRA 405; Stringfellow v. Brazelton, (Civ. A.) 142 SW 937 (evidence sufficient to carry question to jury); Ward v. Powell, (Civ. A.) 127 SW 851; Majors v. Goodrich, (Civ. A.) 54 SW 919; Western Union Tel. Co. v. McLeod, (Civ. A.) 25 SW 721.

Utah.—McCormick v. Queen of Sheba Gold Min., etc., Co., 23 Utah 71, 63 P 820.

Vt.—Taplin v. Marcy, 81 Vt. 428, 71 A 72.

Wash.—Moore v. Blackburn, 67 Wash. 117, 120 P 875; Anderson v. Globe Nav. Co., 57 Wash. 502, 107 P 376; Novelty Mill Co. v. Heinzerling, 39 Wash. 244, 81 P 742; Lough v. Davis, 35 Wash. 449, 77 P 732.

Wis.—Garlick v. Morley, 147 Wis. 397, 132 NW 601.

Eng.—Durrell v. Evans, 1 H. & C. 174; Johnston v. Sumner, 3 H. & N. 261.

Ont.—Macaulay v. Proctor, 2 Grant Ch. (U. C.) 390; Waddell v. Gildersleeve, 16 U. C. C. P. 565; De Blaquiere v. Becker, 8 U. C. C. P. 167.

[a] **Illustration.**—Where an agency is denied, but the alleged agent swears that he is in fact an agent, and his testimony is corroborated by a course of dealing with the alleged principal, indicating an agency, and there is evidence of ratification by the alleged principal of the acts of the alleged agent, the question of agency is for the jury. Buchholtz v. Barrie, 36 Pa. Super. 454.

[b] **Whether the relation of principal and agent or of master and servant** exists in any given case is under proper instructions a question of fact for the jury. Wilkinson v. Detroit Steel, etc., Works, 73 Mich. 405, 41 NW 490.

[c] **The question of agency is often a mixed one** of law and fact. Hammons v. Setzer, 72 Wash. 550, 130 P 1141.

8. Ala.—Martin v. Brown, 75 Ala. 442.

Me.—Trundy v. Farrar, 32 Me. 225.

Md.—National Mechanics' Bank v. Baltimore Nat. Bank, 36 Md. 5.

N. Y.—Western Transp. Co. v. Hawley, 1 Daly 327 (holding that very slight evidence that a person assuming to act as defendant's agent was his agent should suffice to carry the question to the jury).

Or.—Glenn v. Savage, 14 Or. 567, 13 P 442.

[a] **Sufficiency of evidence.**—It is not always necessary that the proof of agency should be clear and conclusive to entitle the jury to find its existence, for the agency need not be proved as an independent fact but may be inferred from a variety of facts; and, if the testimony tends to prove the existence of the relation, it is sufficient to warrant its submission to the jury. Darrin v. Whittingham, 107 Md. 46, 68 A 269.

9. Iowa.—Jewell v. Posey, 119 Iowa 412, 93 NW 379 (direction of verdict).

N. Y.—Carlisle v. Norris, 144 App. Div. 690, 129 NYS 585.

N. C.—Brittain v. Westhall, 135 N. C. 492, 47 SE 616.

Or.—Glenn v. Savage, 14 Or. 567, 13 P 442 (instruction).

Pa.—Bellman v. Pittsburg, etc., R. Co., 31 Pa. Super. 389 (nonsuit).

Ont.—Waddell v. Gildersleeve, 16 U. C. C. P. 565 (demurrer to evidence).

See also cases supra note 7.

10. Ala.—McClung v. Spotswood, 19 Ala. 165.

Colo.—Lester v. Snyder, 12 Colo. A. 351, 55 P 613.

Conn.—Griffin v. Kutinsky, 82 Conn. 693, 74 A 1068.

Del.—Coe v. Johnson, 11 Del. 9.

Ill.—St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 74 Ill. A. 619.

Md.—National Mechanics' Bank v. Baltimore Nat. Bank, 36 Md. 5.

Mo.—Trimble v. Keer, etc., Mercantile Co., 56 Mo. A. 683, 686 (where the court said: "While the question of agency is usually a question of fact for the jury, that has reference merely to the sufficiency of the evidence. The question, whether there is any evidence tending to show agency for a certain purpose, is always a question of law for the court").

N. Y.—Sanford v. Fountain, 49 Misc. 301, 99 NYS 234 (holding that, where plaintiff sued to recover on a contract made with defendant's alleged agent for services, and offered testimony of conversations with the brother of the alleged agent when defendant was not present, and the testimony was received under a stipulation that it be stricken out by consent unless plaintiff further showed that the brother was acting at the time as defendant's agent, and there was no evidence of such agency other than as shown from the statements of the brother, the complaint should have been dismissed on the ground that a cause of action had not been proved).

Pa.—Singer Mfg. Co. v. Christian, 211 Pa. 534, 60 A 1087; Lamb v. Irwin, 69 Pa. 436; McElroy v. Glenn Kline Lumber Co., 37 Pa. Super. 393.

See also Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728.

[a] **All the evidence must be in.**—Evidence to establish the fact of agency must necessarily be introduced in successive steps, and it is impossible for the court to determine its sufficiency to warrant submission of the question to the jury until after all the evidence is in. Beal v. Adams Express Co., 13 Pa. Super. 143.

11. Ala.—McClung v. Spotswood, 19 Ala. 165.

Colo.—Lester v. Snyder, 12 Colo. A. 351, 55 P 613.

Ill.—Halladay v. Underwood, 90 Ill. A. 130; St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 74 Ill. A. 619 [aff 175 Ill. 557, 51 NE 911, 67 AmSR 238].

Ind.—Michigan Mut. L. Ins. Co. v. Thompson, (A.) 86 NE 503.

Ky.—Freeport German Ins. Co. v. Goodfriend, 97 SW 1098, 30 KyL 218.

Minn.—State v. Fellows, 98 Minn. 179, 107 NW 542, 108 NW 825; Tarbox v. Cruzen, 68 Minn. 44, 70 NW 860 (holding that the construction of a plain and unambiguous agreement, appointing one a sales agent for a certain district, was for the court and not the jury).

N. J.—Ryle v. Manchester Bldg., etc., Assoc., 74 N. J. L. 840, 67 A 87; Belcher v. Manchester Bldg., etc., Assoc., 74 N. J. L. 833, 67 A 399.

N. Y.—Franklin Bank Note Co. v. Mackey, 158 N. Y. 140, 52 NE 737 [rev 83 Hun 511, 31 NYS 1057]; Leinkauf v. Lombard, 12 App. Div. 302, 42 NYS 391.

Or.—Simonds v. Wrightman, 36 Or. 120, 58 P 1100.

Pa.—Elliott v. Wanamaker, 155 Pa.

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be drawn therefrom, the question should be submitted to the jury.[12]

Whether an agency by estoppel has been created is usually a question for the jury.[13]

Legality of agency contract. Where the contract of agency is doubtful and the evidence conflicting as to its legality, it is for the jury to determine whether the employment was illegal,[14] although it has been held that, if the opening statement of counsel for plaintiff makes it clear that the contract relied upon is illegal, the court will direct a verdict.[15]

[§ 732] **(b) Termination of Agency.** Where the facts as to the termination of an agency are in dispute, the question whether the agency was revoked or otherwise terminated is for the jury;[16] and where notice of revocation is disputed, and the evidence thereon is doubtful or conflicting, it is for the jury to say whether or not sufficient notice was given.[17] Where, however, the facts are undisputed it is for the court to determine as a matter of law whether they constitute sufficient notice.[18]

[§ 733] **(3) As to Nature and Extent of Authority.** Where the nature and extent of an authority orally conferred upon an agent are to be determined upon conflicting evidence, or to be implied from the facts and circumstances, the questions as to the nature and extent of the agent's authority and whether the particular act in controversy was within the scope of his authority are usually questions of fact for the jury, guided by proper instructions from the court,[19] and in such

67, 25 A 826; Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. 285.

Tenn.—Wilcox v. Hines, 100 Tenn. 524, 45 SW 781, 66 AmSR 761.

Utah.—McCornick v. Queen of Sheba Gold Min., etc., Co., 23 Utah 71, 63 P 820.

N. S.—Dominion Coal Co. v. Kingswell Steamship Co., 33 N. S. 499.

[a] **Whether an agency exists, under an ascertained state of facts,** is a question of law to be determined by the court; the province of the jury is to find whether the facts necessary to establish an agency exist. Michigan Mut. L. Ins. Co. v. Thompson, Ind. A., 86 NE 503; Seehorn v. Hall, 130 Mo. 257, 32 SW 643, 51 AmSR 562.

12. Mich.—Fontaine v. Crossing, etc., Co. v. Rauch, 117 Mich. 401, 75 NW 1063.

Nebr.—Thomson v. Shelton, 49 Nebr. 644, 68 NW 1055; Southern Pine Lumber Co. v. Fries, 1 Nebr. (Unoff.) 691, 96 NW 71.

N. Y.—Leinkauf v. Lombard, 12 App. Div. 302, 42 NYS 391.

Or.—Connell v. McLoughlin, 28 Or. 230, 42 P 218.

S. D.—South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co., 3 S. D. 205, 52 NW 866.

Wis.—Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 NW 1099.

13. Conn.—Union Trust Co. v. McKeon, 76 Conn. 508, 57 A 109.

Ida.—Morgan v. Neal, 7 Ida. 629, 65 P 66, 97 AmSR 264.

Mich.—McClure v. Murphey, 126 Mich. 134, 85 NW 462.

Mo.—Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013; Ferneau v. Whitford, 39 Mo. A. 311.

N. Y.—Goodwin v. Sommer, 49 Misc. 552, 97 NYS 960 (held duty of the court, under the evidence, to submit the facts to the jury on a careful charge, explaining the doctrine of agency by estoppel).

N. D.—Fargo First Nat. Bank of Minneapolis, etc., El. Co., 11 N. D. 280, 91 NW 436 (holding that under Rev. Codes § 4308, which provides that an agency is ostensible where the principal intentionally or by want of ordinary care caused a third person to believe another person his agent who was not really employed by him, where an agent had for some years represented the interest of a mortgagee in crops raised on a certain farm, the question whether in a subsequent year the same person was the ostensible agent of the mortgagee in reference to the crop grown, no notice of an interruption in the old arrangement having been given, was properly submitted to the jury).

Pa.—Fisher v. O'Donnell, 153 Pa. 619, 26 A 293.

Wis.—Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 NW 1099 (holding that whether a shop superintendent had apparent authority in a particular case by reason of the way in which the business of the corporation was conducted is a question for the jury unless all the facts are undisputed and the inferences of fact therefrom are such that but one conclusion can be drawn).

14. Mulligan v. Smith, 32 Colo. 404, 76 P 1063 (holding, however, that where the contract is in writing the legality or illegality of the employment is a question for the court); Boehmer v. Foval, 55 Ill. A. 71; Lebus v. Dunlap, 80 SW 803, 26 KyL 147; Chesebrough v. Conover, 140 N. Y. 382, 35 NE 633; Dunham v. Hastings Pav. Co., 56 App. Div. 244, 67 NYS 632; Brown v. Brown, 34 Barb. (N. Y.) 533.

15. Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539; Meguire v. Corwine, 101 U. S. 108, 25 L. ed. 899.

Directing verdict on opening statement see generally Trial [38 Cyc 1476].

16. Clamp v. Cutler, 39 Colo. 117, 88 P 854; Johnson v. Doon, 131 Mich. 452, 91 NW 742; Lamothe v. St. Louis Mar. R., etc., Co., 17 Mo. 204; Beard v. Kirk, 11 N. H. 397.

[a] **Abandonment.**—Whether a contract constituting one person the agent of another has been abandoned by both parties is ordinarily a question for the jury. French v. Pullman Motor Car Co., 242 Pa. 136, 88 A 876.

[b] **Where there is testimony of a revocation** of an agency, which revocation, if made, would make defendant liable to plaintiff, it is error to instruct peremptorily for defendant. Mason v. Ward, (Tex. Civ. A.) 166 SW 456.

17. Gragg v. New York Home Ins. Co., 107 SW 321, 32 KyL 988; Claflin v. Lenheim, 66 N. Y. 301 [rev 5 Hun 269]; McNeilly v. Continental L. Ins. Co., 66 N. Y. 23; Perrine v. Jermyn, 163 Pa. 497, 30 A 202; Deford v. Reynolds, 36 Pa. 325; Parker v. Advance Thresher Co., 75 Wash. 505, 135 P 229 (notice or knowledge of termination by expiration of contract).

18. Clark v. Mullenix, 11 Ind. 532; Howe v. Thayer, 17 Pick. (Mass.) 91; Claflin v. Lenheim, 66 N. Y. 301 [rev 5 Hun 269] (question of constructive notice); American Linen Thread Co. v. Wortendyke, 24 N. Y. 550.

19. U. S.—Merchants Nat. Bank v. Boston State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; Lamon v. Speer Hardware Co., 198 Fed. 453 (apparent authority); Ladd v. Ætna Indemn. Co., 128 Fed. 298 [aff 135 Fed 636, 68 CCA 274] (to borrow money); Nicoll v. American Ins. Co., 18 F. Cas. No. 10,259, 3 Woodb. & M. 529.

Ala.—Birmingham Mineral R. Co. v. Tennessee Coal, etc., Co., 127 Ala. 137, 28 S 679; La Fayette R. Co. v. Tucker, 124 Ala. 514, 27 S 447; Lytle v. Dothan Bank, 121 Ala. 215, 26 S 6; Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 S 46; South, etc., Alabama R. Co. v. Henlein, 52 Ala. 606, 23 AmR 578; Carew v. Lillienthall, 50 Ala. 44; Golding v. Merchant, 43 Ala. 705; Montgomery Bank v. Plannett, 37 Ala. 222; McClung v. Spotswood, 19 Ala. 165; Foster v. Johnson, 13 Ala. 379; Western Newspaper Union v. Judson, 1 Ala. A. 615, 55 S 1026.

Ark.—St. Louis, etc., R. Co. v. Clark, 90 Ark. 504, 119 SW 825; Brockman Commn., etc., Co. v. Pound, 77 Ark. 364, 91 SW 183; Jacobson v. Poindexter, 42 Ark. 97.

Conn.—Hyman v. Waas, 79 Conn. 251, 64 A 354; Hough v. City F. Ins. Co., 29 Conn. 10, 76 AmD 581.

Del.—Gray v. Gray, 25 Del. 308, 80 A 233 (authority to sign note).

D. C.—Norfolk, etc., Steamboat Co. v. Davis, 12 App. 306 (libelous letter).

Fla.—Bush Grocery Co. v. Conely, 61 Fla. 131, 55 S 867; Dunwoody v. Saunders, 50 Fla. 202, 39 S 965.

Ga.—Luckie v. Johnston, 89 Ga. 321, 15 SE 459; Century Bldg. Co. v. Lewkowitz, 1 Ga. A. 636, 57 SE 1036.

Ill.—Freet v. American Electrical Supply Co., 257 Ill. 248, 100 NE 933 [aff 171 Ill. A. 512]; Hale El. Co. v. Hale, 201 Ill. 131, 66 NE 249 [aff 98 Ill. A. 430]; Glucose Sugar Refining Co. v. Flinn, 184 Ill. 123, 56 NE 400; Everts v. Lawther, 165 Ill. 487, 46 NE 233; Schmoldt v. Langston, 106 Ill. A. 385; Morris v. Dixon Nat. Bank, 55 Ill. A. 298.

Ind.—American Car., etc., Co. v. Smock, 48 Ind. A. 359, 91 NE 749, 751, 93 NE 78 [cit Cyc]; Grand Rapids, etc., R. Co. v. King, (A.) 83 NE 778 (illegal arrest by railroad detective).

Iowa.—Anderson v. Patten, 157 Iowa 23, 137 NW 1050; Sievertsen v. Paxton-Eckman Chemical Co., 133 NW 744; DeLaval Separator Co. v. Sharpless, 142 Iowa 60, 120 NW 657; Moyers v. Fogarty, 140 Iowa 701, 119 NW 159; C. Shenkberg Co. v. Porter, 137 Iowa 245, 114 NW 890; D. M. Osborne v. Ringland, 122 Iowa 329, 98 NW 116; Holsten v. Wheeler, 78 NW 845; Hughbanks v. Boston Inv. Co., 92 Iowa 267, 60 NW 640; Keenan v. Missouri State Mut. Ins. Co., 12 Iowa 126.

Kan.—Cain Bros. Co. v. Wallace, 46 Kan. 138, 26 P 445.

Ky.—Baskett v. Ohio Valley Banking, etc., Co., 125 SW 1066; Baldwin v. Tucker, 112 Ky. 282, 65 SW 841, 23 KyL 1538, 57 LRA 451; Barker Cedar Co. v. Roberts, 65 SW 123, 23 KyL 1345; Cartmel v. Unversaught, 54 SW 965, 21 KyL 1282; Meagher v. Bowling, 107 Ky. 412, 54 SW 170, 21 KyL 1149; Booth v. Bethel, 78 SW 868, 25 KyL 1747.

Me.—Davies v. Eastern Steamboat Co., 94 Me. 379, 47 A 896, 53 LRA 239.

Md.—Brager v. Levy, 122 Md. 554, 90 A 102; Goodman v. Saperstein, 115 Md. 678, 81 A 695 (to sign letters); Groscup v. Downey, 105 Md. 273, 65 A 930.

Mass.—Hawks v. Davis, 185 Mass. 119, 69 NE 1072; Heath v. New Bedford Safe Deposit, etc., Co., 184 Mass. 481, 69 NE 215; Baker v. Tibbetts, 162 Mass. 468, 39 NE 350; Sturtevant v. Wallack, 141 Mass. 119, 4 NE 615; Thomas v. Wells, 140 Mass. 517, 5 NE 485; Twombly v. Monroe, 136 Mass. 464; Lawrence v. Lewis, 133 Mass. 561; Lovejoy v. Middlesex R. Co., 128 Mass. 480.

Mich.—Pettinger v. Alpena Cedar Co., 175 Mich. 162, 141 NW 535; Ed-

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cases it is error to take the question from them by nonsuit, instruction, or direction of verdict.[20] Thus it is ordinarily a question for the jury as to what is usual and necessary for an agent to do in connection with the business in question,[21] or whether the necessities of the case gave him implied au-

erer v. Kavanaugh, 178 Mich. 663, 139 NW 1025; Superior Drill Co. v. Carpenter, 150 Mich. 262, 114 NW 67; Grand Rapids Electric Co. v. Walsh Mfg. Co., 142 Mich. 4, 105 NW 1; Schaub v. Welded-Barrel Co., 125 Mich. 591, 84 NW 1095; Flattery v. Cunningham, 125 Mich. 467, 84 NW 625; Scheibeck v. Van Derbeck, 122 Mich. 29, 80 NW 880; Griffin v. McKnight, 116 Mich. 468, 74 NW 650; Hodges v. Detroit Electric Light, etc., Co., 109 Mich. 547, 67 NW 564; Clark v. Dillman, 108 Mich. 625, 66 NW 570 (holding that the question of the actual authority of an agent of plaintiffs to make a contract for the sale of a piano for a special price is properly left to the jury, where there is some testimony showing an admission by plaintiffs of such authority); Hurley v. Watson, 92 Mich. 121, 52 NW 457; White v. King, 87 Mich. 107, 49 NW 518; Partridge v. Sterling, 79 Mich. 302, 44 NW 614; Van Vranken v. Union News Co., 78 Mich. 217, 44 NW 337; O'Connor v. Le Roux, 78 Mich. 48, 43 NW 1084; Shaw v. Gilmore, 76 Mich. 127, 42 NW 1082; Tunison v. Detroit, etc., Copper Co., 73 Mich. 452, 41 NW 502; Buhl v. Smith, 69 Mich. 552, 37 NW 554.

Minn.—Sinclair v. Investors' Syndicate, 125 Minn. 311, 146 NW 1109.

Miss.—Wilkins v. Natchez Commercial Bank, 7 Miss. 217.

Mo.—Corder v. O'Neill, 176 Mo. 401, 75 SW 764; St. Louis State Bank v. Frame, 112 Mo. 502, 20 SW 620; Wade v. Boone, (A.) 168 SW 360; Meux v. Haller, 179 Mo. A. 466, 162 SW 688; Murphy v. Knights of Columbus Bldg. Co., 155 Mo. A. 649, 135 SW 446 (whether act was necessary to accomplishment of purpose); Heading, etc., Co. v. St. Louis, etc., R. Co., 119 Mo. A. 495, 94 SW 597; Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013; Johnson v. Briscoe, 104 Mo. A. 493, 79 SW 498; Stone v. Gilliam Exch. Bank, 81 Mo. A. 9; Nicholson v. Golden, 27 Mo. A. 132.

Nebr.—Walker v. Hale, 92 Nebr. 829, 139 NW 658; New Orleans Coffee Co. v. Cady, 69 Nebr. 412, 95 NW 1017 (holding that it is not error to submit to a jury the question of the extent of a selling agent's authority to accept payment in something besides money, when there is evidence of statements by the principal's general manager tending to show such authority); Walsh v. Peterson, 59 Nebr. 645, 81 NW 853; Houghton v. Todd, 58 Nebr. 360, 78 NW 634; Holt v. Schneider, 57 Nebr. 523, 77 NW 1086; Johnston v. Milwaukee, etc., Inv. Co., 46 Nebr. 480, 64 NW 1100.

N. H.—Great Falls Co. v. Worster, 15 N. H. 412.

N. J.—Rodman v. Weinberger, 81 N. J. L. 441, 79 A 338; Dierkes v. Hauxhurst Land Co., 80 N. J. L. 369, 79 A 361, 34 LRANS 693; Crossley v. Kenny, 71 N. J. L. 124, 58 A 395 (to rent).

N. Y.—Mott v. Consumers' Ice Co., 73 N. Y. 543; Lilienthal v. German American Brewing Co., 121 App. Div. 628, 106 NYS 402; McCrea v. McClenahan, 114 App. Div. 70, 99 NYS 689; Merkel v. Lazard, 114 App. Div. 25, 99 NYS 686; Delafield v. Armsby Co., 99 App. Div. 622, 90 NYS 998; Williams v. Brandt, 90 App. Div. 607, 86 NYS 389; Fitch v. Metropolitan Hotel Supply Co., 69 App. Div. 611, 74 NYS 616; Mikles v. Hawkins, 59 App. Div. 253, 69 NYS 557; Murgatroyd v. Hempstead Gas, etc., Co., 52 App. Div. 625, 66 NYS 56; Conant v. American Rubber-Tire Co., 48 App. Div. 327, 62 NYS 972; Wanamaker v. Megraw, 48 App. Div. 54, 62 NYS 692 [rev on other grounds 168 N. Y. 125, 61 NE 112]; Allen v. Tarrant, 7 App. Div. 172, 40 NYS 114; Bickford v. Menier, 36 Hun 446 [rev on other grounds 107 N. Y. 490, 14 NE 438]; Bingham v. Harris, 10 Daly 532 [aff 97 N. Y. 626]; Goldstein v. Godfrey Co., 70 Misc. 235, 126 NYS 622; Walton v. Mather, 4 Misc. 261, 24 NYS 307 [aff 15 Misc. 453, 37 NYS 26 (aff 16 Misc. 546, 38 NYS 782)]; De Bautte v. Curiel, 2 Misc. 170, 21 NYS 617 [aff 142 N. Y. 635 mem, 37 NE 566 mem]; Lamb v. Hirschberg, 1 Misc. 108, 20 NYS 678; Beck v. Freund, 117 NYS 193; La Cagnina v. Ahearn, 110 NYS 200; Lake Erie Commercial Bank v. Norton, 1 Hill 501; McMorris v. Simpson, 21 Wend. 610.

N. C.—Lovick v. Atlantic Coast Line R. Co., 129 N. C. 427, 40 SE 191.

N. D.—Fargo First Nat. Bank v. Minneapolis, etc., El. Co., 11 N. D. 280, 91 NW 436.

Oh.—Oliver v. Sterling, 20 Oh. St. 391.

Okl.—Horton v. Early, 39 Okl. 99, 134 P 436, 47 LRANS 314; Wrought Iron Range Co. v. Leach, 32 Okl. 706, 123 P 419; Allen v. Kenyon, 30 Okl. 536, 119 P 960; Midland Sav., etc., Co. v. Sutton, 30 Okl. 448, 120 P 1007; Port Huron Engine, etc., Co. v. Ball, 30 Okl. 11, 118 P 393; Minneapolis Mach. Co. v. Humphrey, 27 Okl. 694, 117 P 203; Mullen v. Thaxton, 24 Okl. 643, 104 P 359; Ricker Nat. Bank v. Stone, 21 Okl. 833, 97 P 577.

Or.—Roane v. Union Pac. L. Ins. Co., 67 Or. 264, 135 P 892; Leonard v. Howard, 67 Or. 203, 135 P 549 (authority to sign contract); Mahon v. Rankin, 54 Or. 328, 102 P 608, 103 P 53; Neppach v. Oregon, etc., R. Co., 46 Or. 374, 80 P 482; Glenn v. Savage, 14 Or. 567, 13 P 442.

Pa.—American Car, etc., Co. v. Alexandria Water Co., 218 Pa. 542, 67 A 861; Singer Mfg. Co. v. Christian, 211 Pa. 534, 60 A 1087; Lininger v. Latshaw, 169 Pa. 398, 32 A 440; Louchheim v. Davies, 148 Pa. 499, 24 A 72; Union Refining, etc., Co. v. Bushnell, 88 Pa. 89; Klingensmith v. Klingensmith, 31 Pa. 460; Allegheny Valley R. Co. v. Steele, 1 Pennyp. 312, 11 WklyNC 113; Birkle v. Coleman, 50 Pa. Super. 105; Dodge v. Williams, 47 Pa. Super. 302; Swing v. Bates Mach. Co., 32 Pa. Super. 403; Cockran v. Patterson, 32 Pa. Super. 399; Stockwell v. Loecher, 9 Pa. Super. 241; Kollock v. Ridley Park Assoc., 2 WklyNC 408.

S. C.—Blowers v. Southern R. Co., 74 S. C. 221, 54 SE 368.

S. D.—Reid v. Kellogg, 8 S. D. 596, 67 NW 687; McLaughlin v. Wheeler, 1 S. D. 497, 47 NW 816.

Tex.—Ft. Worth, etc., R. Co. v. Caruthers, (Civ. A.) 157 SW 238; Ward v. Powell, (Civ. A.) 127 SW 851; Wall v. Lubbock, 52 Tex. Civ. A. 405, 118 SW 886; International Harvester Co. v. Campbell, 43 Tex. Civ. A. 421, 96 SW 93; Majors v. Goodrich, (Civ. A.) 54 SW 919; Gulf, etc., R. Co. v. White, (Civ. A.) 32 SW 322.

Vt.—Keyes v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201; Riley v. Wheeler, 42 Vt. 528 (continuation of agent's authority).

Wash.—Lemcke v. Funk, 78 Wash. 460, 139 P 234; Brace v. Northern Pac. R. Co., 63 Wash. 417, 115 P 841, 38 LRANS 1135; Galbraith v. Weber, 58 Wash. 132, 107 P 1050, 28 LRANS 341; Campbell v. Order of Washington, 53 Wash. 398, 102 P 410; Harvey v. Sparks, 45 Wash. 578, 88 P 1103; Lough v. Davis, 35 Wash. 449, 77 P 732; American Copper, etc., Works v. Galland-Burke Brewing, etc., Co., 30 Wash. 178, 70 P 236.

Wis.—Stumm v. Western Union Tel. Co., 140 Wis. 528, 122 NW 1032; Domasek v. Kluck, 113 Wis. 336, 89 NW 139; McDermott v. Jackson, 97 Wis. 64, 72 NW 375.

Ont.—De Blaquire v. Becker, 8 U. C. C. P. 167; Patterson v. Fuller, 32 U. C. Q. B. 240; Workman v. McKinstry, 21 U. C. Q. B. 623.

[a] **Whether the employment of a subagent** was within the scope of the agent's authority is ordinarily a question of fact for the jury. Bissell v. Moore, 119 Mich. 222, 77 NW 931; International Harvester Co. v. Campbell, 43 Tex. Civ. A. 421, 96 SW 93. Compare Carroll v. Manganese Steel Safe Co., 111 Md. 252, 73 A 665 (evidence insufficient).

[b] **Employment of physician.**—The question as to the authority of a general manager or superintendent to bind his principal for medical services to an injured employee is ordinarily for the jury. Swasey v. Union Mfg. Co., 42 Conn. 556; Meisenbach v. Southern Cooperage Co., 45 Mo. A. 232; Gray v. Lumpkin, (Tex. Civ. A.) 159 SW 880.

[c] **Extra services by agent.**—Where, in an action for agents' services in the sale of certain machinery, plaintiffs claimed for additional services rendered to defendants in the performance of certain contracts outside their general oral contract of agency, whether such extra services were incident to such contract or were independent thereof was for the jury. Standard Plunger El. Co. v. Brumley, 149 Fed. 184, 79 CCA 132.

[d] **The question of excess of the authority of an agent** should be left to the jury under such general instructions from the court as will give them sufficient latitude to weigh properly the facts of the case. Taylor v. Labeaume, 14 Mo. 572.

[e] **Clerk having general management of business.**—Where a clerk has general management of a business with authority to purchase of other dealers when necessary, it is a question for the jury whether he has apparent authority to indorse checks of the corporation in payment for the goods purchased. Graton, etc., Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 P 879.

[f] **In Oregon** it is held that the question of whether or not an agent is duly authorized to manage some affair for his principal is a matter devolving upon the court. Rumble v. Cummings, 52 Or. 203, 95 P 1111; Neppach v. Oregon, etc., R. Co., 46 Or. 374, 80 P 482, 7 AnnCas 1035; Anderson v. Adams, 43 Or. 621, 74 P 215; Long Creek Bldg. Assoc. v. State Ins. Co., 29 Or. 569, 46 P 366; Glenn v. Savage, 14 Or. 567, 13 P 442.

20. D. C.—Held v. Walker, 25 App. 486.

Iowa.—Kaufman v. Farley Mfg. Co., 78 Iowa 679, 43 NW 612, 16 AmSR 462.

Kan.—Leu v. Mayer, 52 Kan. 419, 34 P 969.

Me.—Cloran v. Houlehan, 88 Me. 221, 33 A 986.

Mass.—Beston v. Amadon, 172 Mass. 84, 51 NE 452.

Mo.—Bartlett v. Sparkman, 95 Mo. 136, 8 SW 406, 6 AmSR 35.

N. J.—Rodman v. Weinberger, 81 N. J. L. 441, 79 A 338.

N. Y.—Waters' Patent Heater Co. v. Tompkins, 14 Hun 219; Hannon v. Moore, 3 Misc. 358, 23 NYS 120; Hegedorn v. O'Rourke, 134 NYS 528; Kirch v. Scheid, 126 NYS 624; Schneider v. Finkelstein, 107 NYS 126.

Pa.—Slonecker v. Garrett, 48 Pa. 415.

S. C.—Robert Buist Co. v. Lancaster Mercantile Co., 73 S. C. 48, 52 SE 789 (holding that on conflicting evidence as to the limitation of an agent's authority, it is not proper to charge that the agent was without authority in the premises).

Wis.—Ames v. D. J. Murray Mfg. Co., 114 Wis. 85, 89 NW 836; Conroe v. Case, 74 Wis. 85, 41 NW 1064.

21. U. S.—Hartford, etc., Transp.

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thority to do a particular act.[22] But whether there is any competent evidence to establish the extent of the authority is a question of law for the court, and it has been held that such question should be disposed of by the court alone and should not be submitted to the jury where there is no competent evidence, or where it is clear and undisputed, or manifestly insufficient to prove the authority,[23] or where the facts relating to the authority are undisputed and are such that reasonable minds could draw only one conclusion therefrom;[24] but even where the evidence is not conflicting, the question should be given to the jury if reasonable minds could draw different conclusions therefrom.[25]

Where the authority is conferred in writing, the nature and extent thereof are questions of law for the court and should not be submitted to the jury.[26] It has been held, however, not to be prejudicial error to submit the question of the extent of the authority to the jury, where the writing creating the agency is obscure and ambiguous,[27] or where the authority rests partly in parol and partly in writing.[28]

Whether an agency was general or special is ordinarily a question of fact for the jury.[29]

Whether the third person had notice, actual or constructive, of the agent's want of authority in the transaction in question is ordinarily a question for the jury.[30]

[§ 734] **(4) As to Whom Agent Acted for.** Where the facts are in dispute the question as to

Co. v. Plymer, 120 Fed. 624, 57 CCA 288.

Ala.—Herring v. Skaggs, 62 Ala. 180, 34 AmR 4.

Ark.—Keith v. Herschberg Optical Co., 48 Ark. 138, 2 SW 777.

Mich.—Austrian v. Springer, 94 Mich. 343, 54 NW 50, 34 AmSR 350.

Mo.—St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. A. 270, 90 SW 737; Hayner v. Churchill, 29 Mo. A. 676.

Va.—Reese v. Bates, 94 Va. 321, 26 SE 865.

Wis.—Pickert v. Marston, 68 Wis. 465, 32 NW 550, 60 AmR 876.

22. Baines v. Coos Bay Nav. Co., 45 Or. 307, 77 P 400.

23. Ida.—Wilson v. Vogeler, 10 Ida. 599, 79 P 508.

Ill.—Illinois Moulding Co. v. Page, etc., Mfg. Co., 104 Ill. A. 1.

Ind. T.—Hunt v. Johnson, etc., Dry Goods Co., 104 SW 841; Gentry v. Singleton, 4 Ind. T. 346, 69 SW 898 [aff 128 Fed. 679, 63 CCA 231].

Md.—Carroll v. Manganese Steel Safe Co., 111 Md. 252, 73 A 665.

Mich.—Rothschild v. Sugar Beet Products Co., 174 Mich. 237, 140 NW 553; Weed v. Construction News Co., 160 Mich. 644, 125 NW 695; Wierman v. Bay City-Michigan Sugar Co., 142 Mich. 422, 106 NW 75; Bond v. Pontiac, etc., R. Co., 62 Mich. 643, 29 NW 482, 4 AmSR 885.

Minn.—Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 NW 236.

N. J.—Sadler v. Port-au-peck Realty Co., 78 N. J. L. 635, 76 A 977 (holding that, in an action against an alleged principal on a contract made with his agent, where the evidence did not justify an inference that defendant had authorized or ratified the contract, it was not error to direct a nonsuit); Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728.

N. Y.—Franklin Bank Note Co. v. Mackey, 158 N. Y. 140, 52 NE 737; Dows v. Perrin, 16 N. Y. 325.

Or.—Baker v. Seaweard, 63 Or. 350, 127 P 961.

Pa.—O'Toole v. Escher, 47 Pa. Super. 272.

S. D.—Quale v. Hazel, 19 S. D. 483, 104 NW 215.

Utah.—Tyng v. Constant-Loraine Inv. Co., 37 Utah 304, 108 P 1109.

Wis.—Heath v. Paul, 81 Wis. 532, 51 NW 876.

24. Ala.—Witcher v. Brewer, 49 Ala. 119.

Ga.—Langston v. Postal Tel.-Cable Co., 6 Ga. A. 833, 65 SE 1094 (holding that, where, in an action on an alleged contract for the hiring of certain teams by defendant, the evidence showed that the foreman with whom the alleged contract was made was a special agent as the contract was beyond the scope of his authority, there was no error in awarding a nonsuit).

Ill.—Doggett v. Greene, 254 Ill. 134, 98 NW 219, AnnCas1913B 1166 [rev 163 Ill. A. 369] (existence of implied authority from a certain state of facts, a question of law); Halladay v. Underwood, 90 Ill. A. 130.

Mont.—Herbert v. King, 1 Mont. 475.

N. J.—Ryle v. Manchester Bldg., etc., Assoc., 74 N. J. L. 840, 67 A 87; Belcher v. Manchester Bldg., etc., Assoc., 74 N. J. L. 833, 67 A 399; Gulick v. Grover, 33 N. J. L. 463, 97 AmD 728.

N. Y.—Arbesfeld v. Tanenbaum, 96 NYS 424.

Pa.—Elliott v. Wanamaker, 155 Pa. 67, 25 A 826; Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. 285, 38 WklyNC 505.

S. D.—South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co., 3 S. D. 205, 52 NW 866 (holding, however, that the power to take the case from the jury under these circumstances should be exercised only in a very clear case).

Tex.—Trammell v. Turner, (Civ. A.) 82 SW 325.

See Long Creek Bldg. Assoc. v. State Ins. Co., 29 Or. 569, 46 P 366.

[a] **Admission in answer.**—Where plaintiff sues for breach of a contract made with defendant's roadmaster for loading dirt, and defendant by its answer admits a contract for the loading of dirt by plaintiff made by such roadmaster, but claims its terms are different from those alleged by plaintiff, and gives evidence thereof, it cannot complain that the question of authority to make the contract alleged by plaintiff was not submitted to the jury. Chicago, etc., R. Co. v. Delaney, 86 Ark. 167, 110 SW 595.

25. Reid v. Kellogg, 8 S. D. 596, 67 NW 687; Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 NW 1099.

26. U. S.—Thiel Detective Service Co. v. McClure, 142 Fed. 952, 74 CCA 122, 4 LRANS 843.

Ga.—Claflin v. Continental Jersey Works, 85 Ga. 27, 11 SE 721; Dobbins v. Etowa Mfg., etc., Co., 75 Ga. 238.

Ill.—Glucose Sugar Refining Co. v. Flinn, 184 Ill. 123, 56 NE 400.

Kan.—Sullivant v. Jahren, 71 Kan. 127, 79 P 1071; Philadelphia Mortg., etc., Co. v. Hardesty, 68 Kan. 683, 75 P 1115; Cain Bros. Co. v. Wallace, 46 Kan. 138, 26 P 445.

Ky.—Hackworth v. Hastings Industrial Co., 146 Ky. 387, 142 SW 681; Baldwin v. Tucker, 112 Ky. 282, 65 SW 841, 23 KyL 1538, 57 LRA 451.

Me.—Millay v. Whitney, 63 Me. 522.

Md.—Groscup v. Downey, 105 Md. 273, 65 A 930; Equitable L. Assur. Soc. v. Poe, 53 Md. 28.

Mo.—Nofsinger v. Ring, 4 Mo. A. 576 [rev on other grounds 71 Mo. 149, 36 AmR 456].

N. Y.—Forman v. Berry, 163 App. Div. 594, 148 NYS 959; Russell v. McSweegan, 84 NYS 614.

Oh.—Pollock v. Cohen, 32 Oh. St. 514.

Okl.—Atwood v. Rose, 32 Okl. 855, 122 P 929 (holding that where a transaction and the authority of an agent in relation thereto consist entirely of writings, letters, and telegrams, it is a question of law whether they constitute a contract or show authority in the agent).

Or.—Sharp v. Kilborn, 64 Or. 371, 130 P 735 (holding that where the only evidence of agency was a letter from the principal to the agent, which was established, the scope of the agency was a question for the court); Anderson v. Adams, 43 Or. 621, 74 P 215; Williamson v. North Pac. Lumber Co., 38 Or. 560, 63 P 16, 64 P 854 (holding that where a conversation between the parties, so far as it related to the authority of plaintiffs to act for defendant in settling a controversy, was merged in a letter from defendant to plaintiffs so that the authority must be determined therefrom, its construction is for the court, although it is to be construed in connection not only with a prior letter but also with defendant's testimony as to how a clause happened to be added to the letter, and with the surrounding circumstances).

Pa.—American Car, etc., Co. v. Alexandria Water Co., 218 Pa. 542, 67 A 861; Singer Mfg. Co. v. Christian, 211 Pa. 534, 60 A 1087; Loudon Sav. Fund Assoc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 AmD 390; Fisher v. Moyer, 17 WklyNC 500.

S. C.—McCreery v. Garvin, 39 S. C. 375, 17 SE 828.

Tex.—Berry v. Harnage, 39 Tex. 638; De Cordova v. Knowles, 37 Tex. 19.

Eng.—Berwick v. Horsfall, 4 C. B. N. S. 450, 93 ECL 450, 140 Reprint 1160 (where the court construed a power of attorney which was lost, upon oral proof of its contents); Collen v. Wright, 7 E. & B. 301, 90 ECL 301, 119 Reprint 1259 [aff 8 E. & B. 647, 92 ECL 647, 120 Reprint 241, 2 ERC 484].

Can.—Churchill v. McKay, 20 Can. S. C. 472.

Construction of power of attorney see generally supra §§ 199–201.

[a] **Where instructions to an agent are in writing** and are clear and specific, it is for the court and not the jury to construe them. Queen City F. Ins. Co. v. Hannaford First Nat. Bank, 18 N. D. 603, 120 NW 545, 22 LRANS 509.

27. Berry v. Haldeman, 111 Mich. 667, 70 NW 325. See also Mitchell v. McLaren, (Tex. Civ. A.) 51 SW 269.

28. McLaughlin v. Wheeler, 1 S. D. 497, 47 NW 816 (holding that where an agent's authority rests partly in parol and partly in writing, if the parol evidence is conflicting or the written instructions ambiguous, it is for the jury to find the scope and extent of his authority).

29. Dickinson County v. Mississippi Valley Ins. Co., 41 Iowa 286; Lough v. Davis, 35 Wash. 449, 77 P 732. Compare Gregg v. Wooliscroft, 52 Ill. A. 214 (held question of law from facts proved).

30. Kops Bros. Co. v. Smith, 137 Mich. 28, 100 NW 169 (whether the circumstances were sufficient to put

which of two parties to a transaction an agent represented is a question of fact for the jury,[31] as is also the question whether a person acted in a transaction as principal or as agent for another.[32] But where the evidence is such that the only inference that can be drawn therefrom is that he acted as agent and not as principal, it is error to submit the question to the jury;[33] and where a contract is in writing, it is also generally a question for the court whether it was intended to bind the agent or the principal.[34]

[§ 735] **(5) As to Whom Credit Was Given.** Where a contract between an agent and a third person is made orally, the question whether the credit was given to the agent or to the principal is ordinarily one of fact for the jury;[35] but where the evidence is clear and undisputed[36] or the contract or promise is in writing, its construction and effect as regards the agent's or principal's liability are ordinarily questions of law for the court.[37]

[§ 736] **(6) As to Ratification.** Where competent evidence adduced is such that reasonable men could draw different conclusions as to whether or not there has been a ratification of unauthorized acts or contracts, the question is one of fact to be determined by the jury under proper instructions from the court,[38] and it is error to withdraw the

the third person upon inquiry); Huston v. Tyler, 140 Mo. 252, 36 SW 654, 41 SW 795; Merrill v. Bradley, 52 Tex. Civ. A. 527, 121 SW 561 (whether the third person had notice that the agent's power of attorney was procured by misrepresentations). See also supra §§ 203–207.

31. New England Mortg. Security Co. v. Gay, 33 Fed. 636; State v. Bristol Sav. Bank, 108 Ala. 3, 18 S 533, 54 AmSR 141; Schlesinger v. Texas, etc., R. Co., 87 Mo. 146 [aff 13 Mo. A. 471]; Carlisle v. Norris, 144 App. Div. 690, 129 NYS 585.

32. Ala.—Lewis v. Smith, 150 Ala. 161, 43 S 717.

Ark.—Boyington v. Van Etten, 62 Ark. 63, 35 SW 622 (holding that where there was conflicting evidence on this question it was error to instruct a verdict).

Ill.—Morris v. Dixon Nat. Bank, 55 Ill. A. 298.

Iowa.—Leasure v. Boie, 142 Iowa 284, 120 NW 643.

Mass.—Marston v. Reynolds, 211 Mass. 590, 98 NE 601; Shattuck v. Eastman, 12 Allen 369; Delano v. Curtis, 7 Allen 470.

Mont.—McGowan Commercial Co. v. Midland Coal, etc., Co., 41 Mont. 211, 219, 108 P 655 [cit Cyc].

Nebr.—Equitable L. Assur. Co. v. Brobst, 18 Nebr. 526, 26 NW 204.

N. H.—Whitney v. Swett, 22 N. H. 10, 53 AmD 228.

N. J.—Stewart v. Johnson, 1 N. J. L. 27.

N. Y.—Badger v. Cook, 117 App. Div. 328, 101 NYS 1067; Hill v. Granat, 134 NYS 529; De Bavier v. Funke, 21 NYS 410 [aff 142 N. Y. 638 mem, 37 NE 566 mem]; Cunningham v. Soules, 7 Wend. 106.

Pa.—Dunlap v. Potts, 1 LancLRev 171.

S. C.—Ohio Pottery, etc., Co. v. Talbert, 87 S. C. 194, 69 SE 211.

Tex.—Knight v. Dolinski, (Civ. A.) 133 SW 474.

Wash.—Heinzerling v. Agen, 4§ Wash. 390, 90 P 262.

Wis.—Conroe v. Case, 79 Wis. 338, 48 NW 480; Northern Nat. Bank v. Lewis, 78 Wis. 475, 47 NW 834.

33. Schick v. Warren Mortg. Co., 86 Kan. 812, 122 P 872, AnnCas1913C 466 (where facts are undisputed or agreed upon); New Orleans Coffee Co. v. Cady, 68 Nebr. 412, 95 NW 1017; La Societe Anonyme De L'Union Des Papeteries v. Marks, 21 NYS 706; Johnson v. Cate, 77 Vt. 218, 59 A 830.

34. Peck v. Gardner, 9 Hun (N. Y.) 704; Fowle v. Kerchner, 87 N. C. 49; Roberts v. Button, 14 Vt. 195.

35. Ala.—Anderson v. Timberlake, 114 Ala. 377, 22 S 431. 62 AmSR 105.

Ga.—Raleigh, etc., R. Co. v. Pullman Co., 122 Ga. 700, 50 SE 1008. See also Stubbs v. Waddell, 4 Ga. A. 264, 61 SE 145. In this state Civ. Code (1895) § 3039 provides that "where the agency is known, and the credit is not expressly given to the agent, he is not personally responsible upon the contract. The question to whom the credit is given is a question of fact to be decided by the jury under the circumstances in each case." Under this provision, while the declaration of intention and agreement in writing on the part of the agent to bind himself personally may be so explicit as to admit of no denial by parol, usually, where the principal is disclosed, the question is one of fact. Phinizy v. Bush, 129 Ga. 479, 492, 59 SE 259.

Ind. T.—Lowrey v. Scargill, 7 Ind. T. 497, 104 SW 818.

Mo.—Hovey v. Pitcher, 13 Mo. 191.

N. H.—Brown v. Rundlett, 15 N. H. 360.

N. J.—Kean v. Davis, 20 N. J. L. 425.

N. Y.—Wasserman v. Bacon, 80 App. Div. 505, 81 NYS 193; Maryland Coal Co. v. Edwards, 4 Hun 432; Pentz v. Stanton, 10 Wend. 271, 25 AmD 558.

R. I.—McKeen v. Providence County Sav. Bank, 24 R. I. 542, 54 A 49.

S. C.—Miller v. Ford, 35 S. C. L. 213.

Tenn.—Ahrens v. Cobb, 9 Humphr. 643.

Eng.—Edwards v. Smith, 5 L. J. C. P. O. S. 11.

36. Rathbun v. Allen, 135 Mich. 699, 98 NW 735 (holding that in an action for the price of lumber sold, evidence that it was consigned to defendant and charged to him on the books, and that a statement of the account was made out in his name and presented to him, warranted a charge that it was not disputed that the credit was extended to defendant rather than to the company for which he claimed to act as agent).

37. Anderson v. Timberlake, 114 Ala. 377, 22 S 341, 62 AmSR 105; Brown v. Rundlett, 15 N. H. 360; Kean v. Davis, 20 N. J. L. 425; Ahrens v. Cobb, 9 Humphr. (Tenn.) 643.

38. U. S.—Hansen v. Boyd, 161 U. S. 397, 16 SCt 571, 40 L. ed. 746; Bell v. Cunningham, 3 Pet. 69, 7 L. ed. 606; Edison Phonograph Works v. Goodwin Mfg. Co., 191 Fed. 560, 112 CCA 170; Ætna Indemn. Co. v. Ladd, 135 Fed. 636, 68 CCA 274; Findlay v. Pertz, 74 Fed. 681, 20 CCA 662.

Ala.—Harris, etc., Co. v. Oneonta Trust, etc., Co., 65 S 68; Gambill v. Fuqua, 148 Ala. 448, 42 S 735; Lytle v. Dothan Bank, 121 Ala. 215, 26 S 6; Abbott v. May, 50 Ala. 97.

Cal.—Kraft v. Wilson, 4 Cal. Unrep. Cas. 794, 37 P 790.

Ga.—Noble v. Burney, 124 Ga. 960, 53 SE 463; Burr v. Howard, 58 Ga. 564; Byrne v. Doughty, 13 Ga. 46.

Ill.—Chicago Edison Co. v. Fay, 164 Ill. 323, 45 NE 534; Fisher v. Stevens, 16 Ill. 397; Iroquois Furnace Co. v. Ross, 76 Ill. A. 549; Pohl v. Davenport Malt, etc., Co., 46 Ill. A. 513.

Iowa.—Argus v. Ware, 155 Iowa 583, 136 NW 774; Robinson v. Chapline, 9 Iowa 91.

Kan.—Hartwell v. Equitable Mfg. Co., 78 Kan. 259, 97 P 432 (holding that, whether a principal has disavowed an unauthorized contract with his agent within a reasonable time, is a question of fact for the jury).

Me.—Bryant v. Moore, 26 Me. 84, 45 AmD 96.

Mass.—American Min., etc., Co. v. Converse, 175 Mass. 449, 56 NE 594; Fogg v. Boston, etc., R. Corp., 148 Mass. 513, 20 NE 109, 12 AmSR 583; Lawrence v. Lewis, 133 Mass. 561; Remick v. Sandford, 118 Mass. 102 (holding that, where the testimony is conflicting upon the issue whether a written contract made by a special agent was orally accepted and adopted by the principal, it should be submitted to the jury).

Mich.—Heffron v. Armsby, 61 Mich. 505, 28 NW 672.

Mo.—Butts v. Ajax-Grieb Rubber Co., 169 Mo. A. 657, 155 SW 837; Hackett v. Van Frank, 105 Mo. A. 384, 79 SW 1013; Hesse v. Travelers' Protective Assoc., 72 Mo. A. 598; Hance v. Wabash, etc., R. Co., 62 Mo. A. 60.

Mont.—Carlson v. Stone-Ordean-Wells Co., 40 Mont. 434, 107 P 419; Trent v. Sherlock, 26 Mont. 85, 66 P 700.

N. Y.—Ramsay v. Miller, 202 N. Y. 72, 95 NE 35 [rev 135 App. Div. 503, 120 NYS 523]; Stokes v. Mackay, 140 N. Y. 640, 35 NE 786; Lilienthal v. German American Brewing Co., 121 App. Div. 628, 106 NYS 402; Allen v. Corn Exch. Bank, 87 App. Div. 335, 84 NYS 1001; Krause v. J. H. Mohlman Co., 17 Misc. 288, 40 NYS 367 [aff 18 Misc. 430, 42 NYS 23].

Or.—Baker v. Seaweard, 63 Or. 350, 127 P 961.

Pa.—Fenn v. Dickey, 178 Pa. 258, 35 A 1108; Farmers', etc., Bank v. Pittsburg Third Nat. Bank, 165 Pa. 500, 30 A 1008; Garrett v. Gonter, 42 Pa. 143.

S. D.—Quale v. Hazel, 19 S. D. 843, 104 NW 215; Shull v. New Birdsall Co., 15 S. D. 8, 86 NW 654.

Tex.—San Antonio Fifth Nat. Bank v. Iron City Nat. Bank, 92 Tex. 436, 49 SW 368 [mod (Civ. A.) 47 SW 533]; Commercial, etc., Bank v. Jones, 18 Tex. 811; Texas Co. v. Alamo Cement Co., (Civ. A.) 168 SW 62; Hill v. Bess, (Civ. A.) 40 SW 202; Campbell v. Jenkins, (Civ. A.) 34 SW 673.

Vt.—Corliss v. Smith, 58 Vt. 532.

Va.—Hortons v. Townes, 6 Leigh (33 Va.) 47.

W. Va.—Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 69 SE 845, AnnCas1912B 148.

Wis.—Mygatt v. Tarbell, 78 Wis. 351, 47 NW 618; Saveland v. Green, 40 Wis. 431.

Eng.—Lewis v. Read, 14 L. J. Exch. 295.

[a] **"Some confusion has arisen** in the minds of text writers as to whether the question of ratification is a question of law or fact, because courts have decided in some instances as a matter of law that there was no evidence of any ratification. But in that respect, ratification is like any other fact sought to be proved. Whether there is any evidence legally sufficient tending to establish it, must always be a question of law, but whether in case there is such evidence, the evidence does prove it must always remain a question of fact." Bank of Commerce v. Bernero, 17 Mo. A. 313, 318.

[b] **Whether mere silence** of the principal and failure to repudiate his agent's acts within reasonable time after knowledge thereof amounts to ratification is ordinarily a question

case from them by instruction or by direction of verdict.[39] But if there is not sufficient evidence of ratification or if the evidence is such that only one conclusion could be drawn therefrom by reasonable men, the question becomes one of law for the court and should not be submitted to the jury.[40]

What is a reasonable time within which a principal must object to the acts of his agent or be held to have ratified them is ordinarily a question of fact for the jury.[41]

[§ 737] **3. Instructions.** The rules applying to instructions in civil actions in general[42] apply in actions arising out of the relation of principal and agent.[43] In accordance with these rules the parties are entitled to instructions, when properly requested, which fully and correctly state the law applicable to the matters in issue.[44] Such instructions must not be misleading or ambiguous,[45] ab-

for the jury. De Land v. Dixon Nat. Bank, 111 Ill. 323; Hurley v. Watson, 68 Mich. 531, 36 NW 726; San Antonio Fifth Nat. Bank v. Iron City Nat. Bank, 92 Tex. 436, 49 SW 368 [mod (Civ. A.) 47 SW 533]. See also supra §§ 124-131.

[c] **Whether acceptance by a principal of benefits** arising out of an unauthorized transaction by his agent amounts to ratification is ordinarily a question of fact for the jury. Chase v. Baskerville, 93 Minn. 402, 101 NW 950. See also supra §§ 114-123. Thus, where, in an action on a note signed by one as agent of defendant, there was evidence that defendant had accepted knowingly the consideration for which the note was given, the court must submit the case to the jury under a charge as to the effect of defendant's act should they believe he accepted knowingly the consideration for which the note was given. Gilbert v. Dent, 46 Ga. 238.

39. Hutchinson v. Smith, 86 Mich. 145, 49 NW 1090; Palmer v. Seligman, 77 Mich. 305, 43 NW 974; Stokes v. Mackay, 140 N. Y. 640, 35 NE 786; Schull v. New Birdsall Co., 15 S. D. 8, 86 NW 654; Gano v. Chicago, etc., R. Co., 49 Wis. 57, 5 NW 45 [aff 60 Wis. 12, 17 NW 15]; Cooper v. Schwartz, 40 Wis. 54.

40. Ala.—Simon v. Johnson, 105 Ala. 344, 16 S 884, 53 AmSR 125.

Mich.—Leonardson v. Troy Tp. School Dist. No. 3, 125 Mich. 209, 84 NW 63; Rapid Hook, etc., Co. v. De Ruyter, 117 Mich. 547, 76 NW 76 (holding that where the only testimony on the question of a ratification of an agent's act was the agent's answer, "Yes," to a question asking if such ratification had taken place, the evidence was insufficient to submit that issue to the jury); Wells v. Martin, 32 Mich. 478.

Minn.—Wright v. Vineyard M. E. Church, 72 Minn. 78, 74 NW 1015.

Nebr.—Nebraska Wesleyan Univ. v. Parker, 52 Nebr. 453, 72 NW 470.

N. Y.—Kane v. Belknap, 70 Hun 211, 24 NYS 167 [aff 144 N. Y. 702 mem, 39 NE 857 mem]; Piper v. Herrick, 26 Misc. 649, 56 NYS 386.

Pa.—Moore v. Patterson, 28 Pa. 505; Sword v. Reformed Cong. Keneseth Israel, 29 Pa. Super. 626.

S. D.—Elfring v. New Birdsall Co., 16 S. D. 252, 92 NW 29; Larpenteur v. Williams, 12 S. D. 373, 81 NW 625.

Tex.—Suderman-Dolson Co. v. Rodgers, 47 Tex. Civ. A. 67, 104 SW 193; Meyer Bros. Drug Co. v. Tucker, (Civ. A.) 34 SW 786.

Utah.—Tyng v. Constant-Loraine Inv. Co., 37 Utah 304, 108 P 1109.

Wis.—Twentieth Century Co. v. Quilling, 136 Wis. 481, 117 NW 1007; Heath v. Paul, 81 Wis. 532, 51 NW 876.

[a] **"Ratification implies knowledge of the material facts,** and to be effective must be made by persons having the power to perform the act which is the subject of ratification. In the absence of evidence that the facts were communicated to the party, or that he had knowledge of them and assented to the acts alleged to have been done for him, the question of ratification should not be submitted to the jury. . . . Ratification, it is true, may be shown by proof of facts from which it may be lawfully presumed, but the facts must be such as are inconsistent with another hypothesis than that the person whose ratification is sought to be established approved and intended to adopt what had been done in his name. . . . The question ought not to be submitted for the determination of a jury upon evidence which does not logically lead to the conclusion sought to be established." Sword v. Reform Cong. Keneseth Israel, 29 Pa. Super. 626, 630.

41. Ga.—Whitley v. James, 121 Ga. 521, 49 SE 600.

Ill.—Jones v. Consolidated Portrait, etc., Co., 100 Ill. A. 89 (whether principal delayed an unreasonable time before disaffirming agent's acts).

Iowa.—Minnesota Linseed Oil Co. v. Montague, 65 Iowa 67, 21 NW 184 [rev reh 59 Iowa 418, 13 NW 438].

Kan.—Hartwell v. Equitable Mfg. Co., 78 Kan. 259, 97 P 432.

N. Y.—Ketchem v. Marsland, 18 Misc. 450, 42 NYS 7.

Pa.—Birkle v. Coleman, 50 Pa. Super. 105.

Tex.—San Antonio Fifth Nat. Bank v. Iron City Nat. Bank, 92 Tex. 436, 49 SW 368; Reese v. Medlock, 27 Tex. 120, 84 AmD 611.

Wis.—Cooper v. Schwartz, 40 Wis. 54.

[a] **In Massachusetts,** whether the disavowal has been within a reasonable time is held to be a question of law for the court, to be decided upon all the circumstances of the case, unless something equivocal in those circumstances or material facts in dispute require a submission to the jury with instructions. Haskins v. Hamilton Mut. Ins. Co., 5 Gray 432; Holbrook v. Burt, 22 Pick. 546; Kupfer v. South Parish, 12 Mass. 185.

42. See Trial [38 Cyc 1594 et seq].

43. Ala.—Powell v. Wade, 109 Ala. 95, 19 S 500, 55 AmSR 915; Vaughan v. Williamson, 78 Ala. 194.

Ill.—Stewart v. Butts, 45 Ill. A. 512.

Md.—Pennsylvania, etc., Steam Nav. Co. v. Dandridge, 8 Gill & J. 248, 29 AmD 543.

Mich.—Rathbun v. Allen, 135 Mich. 699, 98 NW 735; Ockenfells v. Moeller, 79 Mich. 314, 44 NW 790.

Minn.—Lahr v. Kraemer, 91 Minn. 26, 97 NW 418.

Nebr.—Walker v. Haggerty, 30 Nebr. 120, 46 NW 221.

N. C.—Taylor v. Albemarle Steam Nav. Co., 105 N. C. 484, 10 SE 897.

S. C.—Lowry v. Atlantic Coast Line R. Co., 92 S. C. 33, 75 SE 278 (modification).

44. U. S.—Merchants' Coal Co. v. Leonard, 184 Fed. 295, 106 CCA 437 (evidence, in an action to recover commissions on coal sales, held to require the granting of a request to charge that if the jury from the evidence believed, at the time a certain contract for the sale of coal was made, that plaintiff's employment contract covering the territory in question had been terminated they should find for defendant).

Ala.—Lawrence v. Randall, 47 Ala. 240.

Ga.—Florida, etc., R. Co. v. Varnedoe, 81 Ga. 175, 7 SE 129.

Iowa.—Steele v. Crabtree, 130 Iowa 313, 106 NW 753 (failure to submit an issue erroneous); Bigham v. Chicago, etc., R. Co., 79 Iowa 534, 44 NW 805.

Kan.—Watt v. Missouri, etc., R. Co., 82 Kan. 458, 108 P 811.

Ky.—Hutcheson v. Blakeman, 3 Metc. 80.

Mass.—Flint v. Gloucester Gaslight Co., 9 Allen 552.

Mo.—Thompson v. Joseph W. Moon Buggy Co., 155 Mo. A. 597, 134 SW 1088; Gooch v. J. I. Case Threshing Mach. Co., 119 Mo. A. 397, 96 SW 431 (holding that where, in an action by agents for commissions for the sale of a machine, it appeared that the contract of sale concluded by the agents had been altered by the principal in some immaterial respects, and a new contract executed for the purpose of depriving the agents of their commissions, an instruction to find for defendant if it did not accept the sale made by plaintiffs was sufficiently favorable to defendant).

Nebr.—Norberg v. Plummer, 58 Nebr. 410, 78 NW 708.

N. C.—Pittsburg Lumber Co. v. Rowe, 151 N. C. 130, 65 SE 750; Brittain v. Westall, 137 N. C. 30, 49 SE 54 (holding that where, in an action for goods sold defendant's agent on credit, the goods having been received by defendant, the defense was that the agent had been given cash to make the purchase and that he had no express authority to buy on credit, and it appeared from the written contract of agency that the agent could buy only for cash, it was error to refuse an instruction that the contract did not authorize a purchase on credit).

Pa.—Wolff v. Wilson, 28 Pa. Super. 511.

Tex.—Prather v. Wilkens, 68 Tex. 187, 4 SW 252; Bargman v. Brown, (Civ. A.) 95 SW 39 (instruction, in action against agent by principal to recover overpayment, held not erroneous as misplacing the burden of proof on defendant).

Vt.—Johnson v. Cate, 77 Vt. 218, 59 A 830.

Va.—McIntyre v. Smyth, 108 Va. 736, 62 SE 930 (instruction on the issue of agency held to state the law sufficiently as applied to the evidence).

Wis.—Lachner v. Salomon, 9 Wis. 129.

45. U. S.—Ætna Indemn. Co. v. Ladd, 135 Fed. 636, 68 CCA 274 (holding that, on the issue of the authority of the general state agent of a surety company, a charge defining a general agent as one empowered to transact all his principal's business was not misleading, as the jury must have understood it to refer only to the kind of business which the surety company was authorized to transact).

Ala.—Birmingham Mineral R. Co. v. Tennessee Coal, etc., R. Co., 127 Ala. 137, 28 S 679; Singer Mfg. Co. v. Belgart, 84 Ala. 519, 4 S 400.

Ark.—Quinn v. Sewell, 50 Ark. 380, 8 SW 132.

Cal.—Mitrovich v. Fresno Fruit Packing Co., 123 Cal. 379, 55 P 1064 (holding that, if an instruction that if D represented defendant in dealing with plaintiff, and did not disclose any limitation on his authority, the jury should find for plaintiff was designed to convey information as to the "holding out" of D as an agent with authority to purchase, it was misleading, since the jury could infer that he possessed any power whatever which he might assume to exercise).

Colo.—Fisk v. Greeley Electric Light Co., 3 Colo. A. 319, 33 P 70.

Conn.—Harris v. Fitzgerald, 75 Conn. 72, 52 A 815 (misleading as to authority to employ medical services).

stract,[46] or inconsistent and contradictory,[47] but must be definite and complete.[48] They must be considered as a whole;[49] hence it is not error to refuse an instruction adequately covered by other instructions.[50]

Conformity to issues and evidence. The instructions given, or which the court should give when properly requested, must be applicable to the issues,[51] such as the issue of agency,[52] or nature and

Ga.—Kidd v. Huff, 105 Ga. 209, 216, 31 SE 430 (holding that it was error, after charging as follows: "Neither an attorney nor other agent can represent two persons having conflicting interests, and an agreement made by a person having such double interest is not binding," to add: "This is not true with this issue in question; that is, where one acts in a representative capacity and the other in an individual capacity. This is not applicable where one acts for both parties in a representative capacity").

Ill.—James v. Conklin, 158 Ill. A. 640; Yetter v. Van Patten, 103 Ill. A. 59.

Iowa.—Anderson v. Patten, 157 Iowa 23, 137 NW 1050.

Ky.—White v. Ballard County Bank, 117 SW 294 (holding that in a suit against an alleged principal, where the issue was the agency of one who contracted the debt sued for, an instruction to find for plaintiff if the alleged agent worked for defendants on a "commission or salary" is not misleading because of the use of the word "salary," although no witness used it in his evidence, as the word "salary" was used as a synonym of "commission").

Mass.—Wilder v. Cowles, 100 Mass. 487.

Mich.—Hensel v. Maas, 94 Mich. 563, 54 NW 381.

Mo.—Meux v. Haller, 179 Mo. A. 466, 162 SW 688; Greenbrier Distillery Co. v. Van Frank, 147 Mo. A. 204, 126 SW 222.

N. M.—Kirchner v. Laughlin, 6 N. M. 300, 28 P 505.

N. D.—Linton v. Minneapolis, etc., El. Co., 2 N. D. 232, 50 NW 357.

Or.—Williamson v. North Pac. Lumber Co., 43 Or. 337, 73 P 7 (instruction as to fraudulent settlement held not misleading); Minard v. Stillman, 35 Or. 259, 57 P 1022.

Pa.—Perry v. Jensen, 142 Pa. 125, 21 A 866, 12 LRA 393.

Va.—Lambert v. Phillips, 109 Va. 632, 64 SE 945.

Wis.—Chase v. Dodge, 111 Wis. 70, 86 NW 548; Bouck v. Enos, 61 Wis. 660, 21 NW 825; McDonell v. Dodge, 10 Wis. 106.

46. Tutwilder v. McCarty, 121 Ala. 356, 25 S 828 (holding that, under evidence that a certain person was the superintendent of two persons jointly engaged in mining, a charge that it was necessary to show that the superintendent had authority to do the particular act complained of, but that it was binding on the principals if within the scope of the general authority conferred on him, was not abstract).

47. U. S.—Ætna Indemn. Co. v. Ladd, 135 Fed. 636, 68 CCA 274 (qualification of instruction on issue of authority not inconsistent with instruction qualified).

Ark.—Chalmers v. Bowen, 164 SW 1131 (holding that an instruction that plaintiffs in replevin could not recover if the property was purchased by defendants from an agent acting within the scope or apparent scope of his authority, and an instruction that plaintiffs should recover if such agent had no authority to make the sale and defendants had knowledge thereof, did not conflict with each other).

Iowa.—Smith v. Chicago, etc., R. Co., 104 Iowa 147, 73 NW 581 (holding that, where the jury were instructed, as to the authority of F to bind defendant by employing plaintiff, that if plaintiff, when he was employed by F, was told by him that defendant would pay him for his services, that he was only to assist F, and that he was to report to F daily, using defendant's telegraph, it was for them to say whether or not plaintiff was led to believe that F had authority to employ him and bind defendant thereby; and they were also instructed that none of the statements of F to plaintiff could be considered by them as evidence that he had authority to employ plaintiff as an assistant, the two instructions were contradictory and irreconcilable).

Mich.—Hensel v. Maas, 94 Mich. 563, 54 NW 381.

Mo.—Butts v. Ajax-Grieb Rubber Co., 169 Mo. A. 657, 155 S 837.

Mont.—Kipp v. Silverman, 25 Mont. 296, 64 P 884 (holding that, where plaintiff sought to recover damages for conversion of a stock of goods, apparently in the exclusive possession of his agent, and an instruction was given that the burden of proof was on plaintiff to show his ownership, a further instruction that the burden was on defendants to show that, at the time of the levy and sale constituting the alleged conversion, the property was owned by the agent was erroneous, as conflicting with the previous instruction, and incorrectly stating the law).

Tex.—Burnett v. Lambach, (Civ. A.) 39 SW 1015.

48. Alexander v. Emmett, 169 Ill. 523, 48 NE 427 [aff 68 Ill. A. 261] (instruction as to burden of proof on agent to show knowledge by principal held indefinite and incomplete).

49. Ark.—Brooks v. Perry, 23 Ark. 32.

Colo.—Hewes v. Andrews, 12 Colo. 161, 20 P 838.

Ill.—Ducharme v. St. Peter, 135 Ill. A. 530.

Mass.—Haskell v. Starbird, 152 Mass. 117, 25 NE 14, 23 AmSR 809.

Vt.—Cushman v. Somers, 62 Vt. 132, 20 A 320, 22 AmSR 92.

50. Rice v. James, 193 Mass. 458, 79 NE 807 (holding that, where plaintiff sought to recover for goods sold to a third person on the ground that he had acted in purchasing them as defendant's agent, the court was not required to instruct that there was no evidence that defendant had ever notified plaintiff prior to the sale in question of any limitation on the agent's authority to purchase, where it was an undisputed fact in the case, testified to by both parties, and the court referred to it repeatedly in his charge as a fact that the jury might find); Lilley v. Uvalde Asphalt Pav. Co., 127 App. Div. 310, 111 NYS 559 (instruction, in action for services rendered, held to embrace in effect all that had been requested, and not erroneous in not charging in the language of the request); Hume v. George C. Flint Co., 16 Daly 360, 11 NYS 431 [aff 132 N. Y. 588 mem. 30 NE 868 mem]; Waters-Pierce Oil Co. v. Davis, 24 Tex. Civ. A. 508, 60 SW 453.

51. U. S.—Great Western El. Co. v. White, 118 Fed. 406, 56 CCA 388.

Ala.—Williamson v. Tyson, 105 Ala. 644, 17 S 336.

Fla.—Fridenberg v. Robinson, 14 Fla. 130.

Ga.—Terry v. International Cotton Co., 138 Ga. 656, 75 SE 1044 (holding that, it being in issue whether a person was bound by the acts of one claimed to have been his agent, either under original authority or by ratification, it was not error to explain to the jury the rule of law as to the extent of the agent's authority); Irby v. Lawshe, 62 Ga. 216; Crockett v. Sibley, 3 Ga. A. 554, 60 SE 326 (holding that, where a trespass committed by an agent for his principal is not denied but is claimed to have been unintentional, it is proper to give in charge Civ. Code [1895] § 3029, providing that the principal is bound for the care, diligence, and fidelity of his agent in his business, and hence is bound for the neglect and fraud of his agent in the transaction of such business).

Ill.—Booksellers', etc., Assoc. v. Swartwout, 83 Ill. A. 504 (holding that, in an action for the withdrawal value of shares of stock, on an issue whether plaintiff had authorized an agent to receive such value, an instruction to find for plaintiff if he did not authorize the withdrawal, "or" if he had not ratified the withdrawal, is erroneous).

Iowa.—Durward v. Hubbell, 149 Iowa 722, 128 NW 953 (instruction, in action against agent for damages for misrepresentations, held erroneous as not presenting the issue of misrepresentation); Lozier v. Graves, 91 Iowa 482, 59 NW 285.

Ky.—Bannon v. Patrick Bannon Sewer Pipe Co., 136 Ky. 556, 119 SW 1170, 124 SW 843 (instructions held sufficient on question of mental capacity of principal).

Mich.—Schofield v. Conley, 126 Mich. 712, 86 NW 129.

Mo.—Minter v. Cupp, 98 Mo. 26, 10 SW 862; Haskett v. Unsell, (A.) 164 SW 651.

Nebr.—Marshall v. Goble, 32 Nebr. 9, 48 NW 898; Harrison v. Baker, 15 Nebr. 43, 14 NW 541.

N. Y.—Fulton v. Sewall, 116 App. Div. 744, 102 NYS 109 (instruction on question not in issue erroneous).

Pa.—Ferrell v. Reed, 14 Pa. Super. 27 (holding that, where an issue was whether an express contract provided that defendant should pay plaintiff a certain commission for the sale of a threshing machine, or a certain per cent of such sums as defendant might receive in payment at the times he received them, it was error to instruct the jury that they might state the account between the parties, there being nothing to justify a recovery on mutual account on a quantum meruit).

Tex.—Texas Loan, etc., Co. v. Allen, (Civ. A.) 46 SW 883; Bernheim v. Lyon, 5 Tex. Civ. A. 716, 25 SW 57.

Utah.—Shafer v. Russell, 28 Utah 444, 79 P 559.

Wis.—West v. Wells, 54 Wis. 525, 11 NW 677.

[a] **Instructions on question of ratification** see Iowa State Sav. Bank v. Black, 91 Iowa 490, 59 NW 283; Garlick v. Morley, 147 Wis. 397, 132 NW 601 (held sufficient).

52. Ga.—Brinson v. Exley, 122 Ga. 8, 49 SE 810 (held erroneous).

Ky.—White v. Ballard County Bank, 117 SW 294 (holding that where agency was the issue it was not error to refuse an instruction based on evidence of the agent's independent business).

Mass.—Southard v. Sturtevant, 109 Mass. 390.

Mich.—Kendrick v. Hochradel, 167 Mich. 179, 132 NW 521 (instructions held, under the evidence, properly to submit question of agency).

Mo.—Coggburn v. Simpson, 22 Mo. 351.

N. H.—Union Hosiery Co. v. Hodgson, 72 N. H. 427, 57 A 384 (holding that an instruction that it was a question for the jury whether one with whom defendant transacted business was an agent of plaintiffs, and, if so, that they were bound by his representations, was erroneous in failing to state what was essential to give him authority to bind them).

Okl.—Fish v. Bloodworth, 129 P 32 (instruction held erroneous).

Tex.—Lemond v. Smith, (Civ. A.)

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extent of authority;[53] and to the facts which are admitted or which there is evidence tending to prove.[54] Such instructions must not disregard or ignore competent evidence which has been introduced,[55] or omit to charge on material elements of the case.[56]

Invading province of jury. The instructions must not invade the province of the jury, as by charging on the weight of the evidence, where by a constitutional or statutory provision that practice is not permitted,[57] or by charging that there is no evidence of a certain fact in issue,[58] or by charging that an act was as a matter of law within the agent's authority, where there is room for conflicting inferences,[59] or by assuming a given state of

149 SW 751; Root v. Baldwin, (Civ. A.) 52 SW 586 (holding that, where the issue was as to whether the grantor in a deed was the agent of the grantee in the purchase of the land, instructions defining agency and specially submitting the issue of the grantor's agency in such purchase are not objectionable, as not properly limiting the agency to the time of the transaction, particularly where the submission of additional issues was not requested).

Wis.—Kliegel v. Aitken, 94 Wis. 432, 69 NW 67, 59 AmSR 901, 35 LRA 249 (instruction sufficient).

[a] **Instruction defining "agent."** —An instruction that an agent is one authorized, empowered, and directed by another to transact business, which the agent undertakes and agrees to do, does not require that the authorization constituting the agency should be in express words. Crane Co. v. Columbus State Bank, 3 Nebr. (Unoff.) 339, 91 NW 532.

53. Ala.—Davis v. Davis, 93 Ala. 173, 9 S 736; Knapp v. McBride, 7 Ala. 19.

Ill.—Watson v. Roth, 191 Ill. 382, 61 NE 65 [aff 91 Ill. A. 111] (holding that, in an action to recover a sum loaned by defendant as an agent of plaintiff's decedent, an instruction that if decedent authorized or instructed defendant to loan the money and did not require sureties on the note he would have the right to lend money without security and would not be responsible if it was lost sufficiently presents a defense that decedent authorized or instructed defendant to make the loan).

Mass.—Rice v. James, 193 Mass. 458, 79 NE 807 (holding that, on an issue as to whether one who purchased lumber from plaintiff had acted in so doing as defendant's agent, it was proper to refuse a requested instruction that if the alleged agent claimed to plaintiff to be the agent of defendant, and bought goods in his behalf prior to the date of the sale in question for which defendant had paid, it made no difference what limits defendant might have placed on such agent's authority to buy, unless he notified plaintiff of such limitations prior to the sale in question, as the instruction failed to recognize any difference as to the effect of purchases made at different times under a special authority for each time and purchases made as a general agent, in reference to inferring authority to make like purchases afterward); Daly v. Boston, etc., R. Co., 147 Mass. 101, 16 NE 690.

Mich.—Hitchcock v. Davis, 87 Mich. 629, 49 NW 912.

Mo.—Harms v. Wolf, 114 Mo. A. 387, 89 SW 1037.

Pa.—McCracken v. Hamburger, 139 Pa. 326, 20 A 1051; Clark v. Lehigh Valley R. Co., 24 Pa. Super. 609 (evidence held insufficient to warrant instruction as to actual or apparent authority).

Tex.—Heard v. Clegg, (Civ. A.) 144 SW 1145 (instruction defining the term "agency" held not improper).

54. Ala.—De Loach Mills Mfg. Co. v. Middlebrooks, 95 Ala. 459, 10 S 917; Knowles v. Street, 87 Ala. 357, 6 S 273.

Ark.—Arkansas Fertilizer Co. v. Banks, 95 Ark. 86, 128 SW 566; Frazier v. Poindexter, 78 Ark. 241, 95 SW 464, 115 AmSR 33, 8 AnnCas 552.

Cal.—Bibb v. Bancroft, 22 P 484.

Conn.—Morehouse v. Remson, 59 Conn. 392, 22 A 427.

Ga.—Noble v. Burney, 124 Ga. 960, 53 SE 463 (evidence held sufficient to authorize instruction as to ratification); Thompson v. Douglass, 64 Ga. 57.

Ill.—Fox River Distilling Co. v. Andrichik, 175 Ill. A. 305; Swannell v. Byers, 123 Ill. A. 545 (instruction as to estoppel of principal held proper under the evidence); Bensley v. Brockway, 27 Ill. A. 410.

Iowa.—National L., etc., Co. v. Bleasdale, 140 Iowa 695, 119 NW 77 (instruction as to principal being bound by the acts and declarations of his agent not authorized by the evidence); Wendel v. Mallory Commn. Co., 122 Iowa 712, 98 NW 612.

Ky.—Eagle Distillery Co. v. McFarland, 11 KyL 905.

Mass.—American Min., etc., Co. v. Converse, 175 Mass. 449, 56 NE 594; Fletcher v. Sibley, 124 Mass. 220; Taft v. Baker, 100 Mass. 68.

Mich.—Scribner v. Hazeltine, 79 Mich. 370, 44 NW 618.

Mo.—Thompson v. Joseph W. Moon Buggy Co., 155 Mo. A. 597, 134 SW 1088; Waters-Pierce Oil Co. v. Jackson Junior Zinc Co., 98 Mo. A. 324, 73 SW 272 (holding that, in an action for goods alleged to have been sold to defendant's agent for it, an objection to an instruction stating three different ways of showing the agency, on the ground that such agency might be shown in more ways than were included in the instruction, will not be held good, where there was no evidence tending to establish the agency in some other manner than that pointed out in said instruction).

N. Y.—Dupre v. Childs, 169 N. Y. 585 mem, 62 NE 1095 mem [aff 52 App. Div. 306, 65 NYS 179].

N. C.—Yarborough v. Hughes, 139 N. C. 199, 51 SE 904 (holding that where, in a suit to set aside a sale under a power in a contract on the ground that the holder of the power and the purchaser were jointly interested, there was evidence showing that they were jointly interested, and defendants failed to produce writings relating to the transaction or to explain away any inference drawn from such failure, the refusal to charge that such failure raised an inference against them was reversible error).

Pa.—Perry v. Jensen, 142 Pa. 125, 21 A 866, 12 LRA 393; Heffner v. Chambers, 121 Pa. 84, 15 A 492; Malickson v. Louis J. Bergdoll Motor Co., 53 Pa. Super. 185.

Tex.—Phelps, etc., Co. v. Miller, (Civ. A.) 83 SW 218 (as to principal's knowledge of facts); San Antonio, etc., R. Co. v. Griffin, 20 Tex. Civ. A. 91, 48 SW 542 (holding that in an action for malicious prosecution it was not error to refuse to instruct that defendant was not liable for acts of its agent in arresting and prosecuting plaintiff if such acts were beyond the agent's authority, where there is no evidence that any of his acts were beyond his authority); Mayer Bros. Drug Co. v. Tucker, (Civ. A.) 34 SW 786; Bowie Lumber Co. v. Lyon, 2 Tex. Civ. A. 659, 21 SW 778.

55. Ala.—Holloway v. Harper, 108 Ala. 647, 18 S 663.

Colo.—Hewes v. Andrews, 12 Colo. 161, 20 P 338.

D. C.—Tyler v. Mutual Dist. Messenger Co., 17 App. 85.

Ill.—James v. Conklin, 158 Ill. A. 640 (holding that an instruction on the question of the authority of a representative of the owner of a debt to collect the same is erroneous if it ignores the evidence which tends to show the apparent or implied authority of such representative to make the collection and is calculated to lead the jury to believe that they must look solely to a written contract to determine the extent of the authority of such representative).

Minn.—Rice v. Longfellow Bros Co., 82 Minn. 154, 84 NW 660.

Mo.—Veitinger v. Winkler, 6 Mo. A. 12.

Mont.—Nixon v. Cutting Fruit Packing Co., 17 Mont. 90, 42 P 108.

N. Y.—Fulton v. Sewall, 116 App. Div. 744, 102 NYS 109. See Ludlow v. Dole, 1 Hun 715 mem, 4 Thomps. & C. 655 mem [aff 62 N. Y. 617 mem].

Pa.—Herrington v. Guernsey, 177 Pa. 175, 35 A 603; Plucker v. Miller, 26 Pa. Super. 495 (holding that where, in an action to recover commissions for procuring a contract under plaintiff's employment as a solicitor of contracts on a commission basis, the evidence is conflicting as to the date when plaintiff left the employment of a competitor of defendant and entered the employment of defendant, it is error for the court to use language which will tend to minimize the importance of the date of the execution of the contract, for, if the contract was executed at the time alleged by defendant, plaintiff was at that time working for defendant's competitor, and could not have procured the contract for defendant).

Tex.—Gulf, etc., R. Co. v. Jacobs, 3 Tex. Civ. A. 485, 23 SW 145.

56. Rice v. James, 193 Mass. 458, 79 NE 807; Ogilvie v. Lee, 158 Mo. A. 493, 138 SW 926 (holding that an instruction, in an action for the contract price of wheat, that if defendant offered plaintiff's son a lesser sum than that claimed to be due, stating that it was in full compensation for the amount due, and that if such sum was accepted defendant was not liable, is properly refused for omitting to require the jury to find that the agent was authorized to accept the tender of the lesser amount, or that his act in so doing was thereafter ratified by his principal); Clark, etc., Lumber Co. v. Duncan, (Tex. Civ. A.) 143 SW 644 (instruction on ratification erroneous if it omits element of knowledge of facts); Gibson v. Trow, 105 Wis. 288, 81 NW 411 (holding that, where defendant had never seen plaintiff's son before negotiations for an alleged settlement of plaintiff's claim were conducted by him, made no inquiry as to his authority, and had no knowledge as to its scope, a charge that, if the son had authority to collect only, the alleged compromise was ineffectual to bind the father was not erroneous, as eliminating the question of apparent authority, since the son's previous acts were unknown to defendant).

[a] **An instruction ignoring the distinction** between agents for reward and gratuitous agents is fatally defective where there is a conflict in the evidence as to whether or not the agency was for reward or gratuitous. Stewart v. Butts, 45 Ill. A. 513.

57. Kirkpatrick v. Tarlton, 29 Tex. Civ. A. 276, 69 SW 179 (holding that, where a deed is executed by one purporting to act as agent for the owners of the land, the jury, in determining the ratification of his acts by such owners, may consider the recitals in such deed, and it would be improper to charge that the deed should have any particular effect).

58. Stoll v. Loving, 112 Fed. 885, 50 CCA 576; Schofield v. Conley, 126 Mich. 712, 86 NW 139.

59. Ames v. D. J. Murray Mfg. Co., 114 Wis. 85, 89 NW 836.

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facts to exist,[60] unless the evidence is legally insufficient or clear and undisputed.[61]

[§ 738] **4. Verdict and Findings.** The rules governing verdicts and findings in actions arising out of the relation of principal and agent are the same as those that apply to civil actions generally.[62] Thus the verdict or finding must be specific and certain,[63] must be pertinent to the issues,[64] and in accord with the weight of the evidence.[65] A special verdict controls a general verdict which is inconsistent with it.[66]

[§ 739] **H. Judgment.**[67] The rules applicable to judgments in civil actions generally[68] apply to judgments in actions arising out of the relation of principal and agent.[69] The judgment must conform to and be warranted by the pleadings and proof.[70] The judgment in an action against an agent to compel an accounting may include sums

60. Earl Fruit Co. v. Curtis, 116 Cal. 632, 48 P 793 (holding that it is error in instructing the jury to assume that a certain person was not authorized to act as agent for defendant, where there is testimony tending to show that defendant herself referred plaintiff to such person as authorized to act for her); Barker Cedar Co. v. Roberts, 65 SW 123, 23 KyL 1345; Miller v. Early, 58 SW 789, 22 KyL 825 (holding that it was proper to instruct the jury that defendants were liable for the value of plaintiff's services in negotiating a purchase, if they were of such character and rendered under such circumstances as would indicate to a reasonably intelligent business man that they were not performed gratuitously, and that compensation was expected, the instruction not assuming that plaintiff had rendered all the services for which he asked compensation); Novelty Mill Co. v. Heinzerling, 39 Wash. 244, 81 P 742.

61. Tutwiler v. McCarty, 121 Ala. 356, 25 S 828 (instruction that a certain person was superintendent for two persons jointly engaged in mining held warranted by the evidence); Quale v. Hazel, 19 S. D. 483, 104 NW 215 (holding that, where, in an action against a principal to recover on an alleged contract made with his agent, there is no evidence tending to prove that the alleged agent had authority to enter into the contract, it is proper for the court to assume in its charge that the agent had no authority to bind defendant).

62. See Trial [38 Cyc 1868 et seq].

[a] **Construction of verdict or findings** see Young v. De Putron, 37 Fed. 46 [aff 134 U. S. 241, 10 SCt 539, 33 L. ed. 923]; Baker v. Byerly, 40 Minn. 489, 42 NW 395; Ritchie v. Albion Mfg. Co., 173 Pa. 447, 34 A 450; Kilby v. Erwin, 84 Vt. 266, 78 A 1021; Hobart v. Vail, 80 Vt. 152, 66 A 820; Brown v. Griswold, 109 Wis. 275, 85 NW 363.

[b] **Where an agent sues his principal for commissions** on certain sales and the contract between the parties is such that as a matter of law plaintiff is entitled to the whole of every commission or to none of it, it is not within the power of the jury to divide one of the commissions just because defendant may have taken some part in the sale. In such a case a new trial will be granted, unless plaintiff remits as to the portion of such commissions which it is manifest the jury found in his favor. Cole v. Dietrich, 5 Porto Rico Fed. 87.

63. Hibernia Sav., etc., Soc. v. Moore, 68 Cal. 156, 8 P 824 (holding that, where the issue joined is whether an agent had authority to execute the contract in suit, a finding by the court that he assumed and claimed to act is an equivocal finding and insufficient); McDermott v. Jackson, 102 Wis. 419, 78 NW 598 (holding that, in an action to recover money loaned to defendant's agent for use in defendant's business, where there has been no ratification, no recovery can be had on a special verdict which merely finds that the agent had authority to make the loan, and that plaintiff believed him to have such authority, because such verdict leaves it uncertain whether the agent's authority was real or only apparent; and, if it was the latter, plaintiff was not justified in relying thereon, unless, in the exercise of reasonable prudence, he was justified in believing that the agent had such authority).

64. Taylor v. Bowen, 52 App. Div. 126, 65 NYS 36 (holding that, where a complaint in an action by a receiver of an ice company against an agent who had procured insurance policies for the company before the receivership, which became void by reason thereof, alleged that such agent "did collect and receive unlawfully, wrongfully and illegally apply all moneys belonging to this plaintiff . . . for rebates upon said policies, to his own use," a finding that the agent had converted the old policies was erroneous, since the action was not for conversion of the policies, but for conversion of the rebates).

65. Renault Freres Selling Branch v. Sewall, 152 App. Div. 23, 136 NYS 800; Felt v. Rhoads, 33 Misc. 794, 67 NYS 586 (holding that, where in an action for services performed for defendant the testimony showed that defendant acted as agent for an association of underwriters, and that this was known to plaintiff, that the services rendered were for their benefit, and that plaintiff sent in a bill therefor, and, not being paid, wrote the various underwriters, not including defendant, asking payment, and stating that he had been employed for the association by defendant, its managing agent, it appeared therefrom that the services were rendered for the association, and not for defendant, and hence a verdict for plaintiff was against the weight of evidence); Weinberg v. Steel, 146 NYS 1012; Miller v. Eichberg, 41 Pa. Super. 435 (verdict and judgment for plaintiff, in an action by a salesman for compensation, held sustained by the evidence).

66. Stewart v. Perkins, 3 Or. 508 (holding that, where in an action for rent, defendant answers that he is in possession only as agent for a named principal, if the jury find a general verdict for plaintiff and also a special verdict that defendant is in possession merely as agent, the latter controls and he cannot be held personally liable).

[a] **Failure to answer special interrogatories** as not being inconsistent with general verdict see Kilby v. Erwin, 84 Vt. 266, 78 A 1021.

67. Exemptions see Exemptions [18 Cyc 1369]; Homesteads [21 Cyc 448].

Res judicata see Judgments [23 Cyc 1106 et seq, 1215 et seq].

68. See Judgments [23 Cyc 623].

69. Hoskins v. Morton, 77 SW 195, 25 KyL 1089 (holding that in an action against an agent based on his wrongful act in taking to himself a conveyance of land which he had sold for his principal, on nonpayment by the vendee of the notes given for the purchase price, where the agent conceded in his answer his principal's right to the land, and prayed merely for an accounting with his principal, judgment for a specific sum claimed against the principal, and a lien on the lands for that sum, it was not error to direct a conveyance of the land to the principal, and retain the questions of settlement of accounts and liens for further adjudication); Greenleaf v. Egan, 30 Minn. 316, 15 NW 254; Brown v. Mechanics', etc., Bank, 43 App. Div. 173, 59 NYS 354; Gilman v. Gilby Tp., 8 N. D. 627, 80 NW 889, 73 AmSR 791; Vivian v. Scoble, 1 Man. 192.

[a] **Where an agent binds himself individually,** a decree may be made against both agent and principal. McAlexander v. Lee, 3 A. K. Marsh. (Ky.) 483.

[b] **Decree in supplemental suit must conform to decree** in original suit. Connor v. Reeves, 16 Ir. Ch. 398.

[c] **Where suit is brought against the agent of an undisclosed principal,** and the agent discloses his principal who is thereupon brought in as a party, and plaintiff establishes a case both against the agent and against the principal, he must elect which of the two he will ask judgment against. Pittsburg Plate Glass Co. v. Roquemore, (Tex. Civ. A.) 88 SW 449. See also supra § 526.

[d] **Judgment against agent binding on principal.**—A judgment against an agent requiring a ditch to be filled binds the principal, so that upon the reversal of the judgment he cannot recover damages against plaintiffs for injury to his property resulting from the filling of the ditch in obedience to the judgment while it was in force. Bridges v. McAlister, 106 Ky. 791, 51 SW 603, 21 KyL 428, 90 AmSR 267, 45 LRA 800.

[e] **A judgment against one as agent for an estate** is proper, as execution thereon will not go against his individual property, but will be levied on assets in his hands as agent. Rudd v. Owensboro Deposit Bank, 105 Ky. 443, 49 SW 207, 20 KyL 1276.

[f] **Where the judgment, in an action for commissions** of selling agents, credits the employer with the amount of notes taken by the agents in payment of articles sold, the notes having been guaranteed by the agents and unpaid, it properly awards possession thereof to the agents, they being entitled to anything that they can collect thereon. Walton v. Nichols, etc., Co., 26 S. D. 111, 128 NW 474.

70. Iowa.—Pneumatic Weigher Co. v. Burnquist, 128 Iowa 709, 105 NW 336 (holding that where the petition in an action to recover the price of goods declared solely on a written contract of agency, and charged that defendant, in violation of the conditions of the contract, failed to procure a proper settlement from the purchaser before the goods were delivered, and failed to return the goods upon demand therefor by plaintiff, and neglected to properly store and care for them after their return by the purchaser, it did not authorize a judgment for the conversion of the goods).

Nebr.—Westinghouse Co. v. Tilden, 56 Nebr. 129, 76 NW 416 (holding that where a contract between a manufacturer and a selling agent provided that on deferred payments commission should be paid only on payment of the notes representing such deferred payments, and in proportion as payment should be made, in an action for commissions where the agent declared solely on the contract, and alleged no breach, except failure to pay, he could not recover judgment for commissions on unpaid notes, on the theory that the principal had been negligent in their collection).

N. Y.—Butler v. Livermore, 52 Barb. 570.

N. C.—Le Roy v. Jacobsky, 136 N. C. 443, 48 SE 796, 67 LRA 977 (holding that where an action against an agent proceeds in its pleadings and evidence on the theory that the agent, not having bound his principal, is personally liable on the contract, there can be no judgment on the theory of damages for a false assertion of authority).

Pa.—Ferrell v. Reed, 14 Pa. Super. 27 (holding that where an issue was whether an express contract provided

received by him subsequently to the commencement of the action.[71] Where in such an action a third person to whom the agent has wrongfully transferred the principal's property is made a party defendant, the principal is not obliged to take a money judgment, but may recover the property;[72] and, where a money judgment is rendered in favor of the principal against the agent and is unpaid, it does not give the agent title to property which was the subject matter of the action.[73]

[§ 740] **I. Appeal and Error.**[74] Questions not urged in the lower court and not properly preserved for review will not be noticed on appeal.[75] Errors in the trial, to work a reversal upon review, must have been prejudicial to the complaining party.[76] Ordinarily, upon a question as to the existence of an agency or as to the scope of an authority conferred, where there is any evidence which, if believed, is legally sufficient, or may reasonably tend to support the verdict or findings of fact, the appellate court will not disturb such verdict or findings,[77] and the same rule applies

that defendant should pay plaintiff a certain commission on a sale, or a certain per cent of such sums as defendant might receive in payment at the times he received them, there was nothing to justify the recovery of a judgment on mutual account on a quantum meruit).

Tex.—Wall v. Lubbock, 52 Tex. Civ. A. 405, 118 SW 886 (holding that, where parties claimed land under deed of an agent who they contended had an interest, so that authority to convey was not revoked by the principal's death, and existence of the interest, which was a question of fact, was not found by the jury, they were not entitled as matter of law to judgment on facts found that the deed was executed after the principal's death); Tabet v. Powell, (Civ. A.) 78 SW 997 (holding that, where an agent executed a contract sued on, on behalf of his principal, and as his principal's surety, and, in an action thereon, there was evidence that the principal had given the agent full control of the subject matter of the contract, the fact that both the principal and the agent testified that the agent was not authorized to make the contract did not constitute an abandonment of the agent's plea of suretyship, so as to justify a judgment against the agent on the theory that, having exceeded his authority, he was personally liable).

Va.—Segar v. Parrish, 20 Gratt. (61 Va.) 672.

Eng.—Jolliffe v. Hector, 12 Sim. 398, 35 EngCh 337, 59 Reprint 1185.

[a] **Where the court correctly finds that defendant's agent had no authority** to bind him by the giving of a note to plaintiffs, and that defendant is not liable thereon, it is not error to render judgment for defendant for sums collected by plaintiffs, and credited on the note, from securities belonging to defendant and pledged by the agent to secure the note. Weekes v. A. F. Shapleigh Hardware Co., 23 Tex. Civ. A. 577, 57 SW 67.

71. Crosbie v. Leary, 19 N. Y. Super. 312.

72. Chapman v. Hughes, 134 Cal. 641, 58 P 298, 916, 60 P 974, 61 P 76, 66 P 982.

73. Gilman v. Gilby Tp., 8 N. D. 627, 80 NW 889, 73 AmSR 791 (holding that the rendition of a money judgment in favor of a principal against his agent for the value of machines delivered to the latter to be sold on commission does not clothe the agent with the title to said machines, or to a warrant issued in payment of the same, the judgment not being paid).

74. See generally Appeal and Error [2 Cyc 474 et seq].

75. Ruppel v. Adrian Mfg. Co., 96 Mich. 455, 55 NW 995 (holding that where defendant, in trover, claimed on the trial that it had a lien on the property for lumber and machine work, and that plaintiff agreed that it might remain until the bill was paid, it cannot be heard to say, on appeal, that the detention of the property by its agent was without its authority); Rawls v. Wall, 26 S. C. Eq. 143. See also Monnet v. Merz, 127 N. Y. 151, 27 NE 827.

[a] **Waiver of plea.**—In an action on a contract made by an agent, against both the agent and his principal, the principal does not, by failure to object to the admission of the contract in evidence, waive a plea of non est factum based on the ground that the agent exceeded his authority in making the contract, the contract being admissible as against the agent. Tabet v. Powell, (Tex. Civ. A.) 78 SW 997.

[b] **Objecting to form of action.**—An objection that the form of action in which the agent was sued is improper cannot be made for the first time on appeal. Taylor v. Nostrand, 134 N. Y. 108, 31 NE 246; Campbell v. Muller, 19 Misc. 189, 43 NYS 233.

76. Cal.—Swinnerton v. Argonaut Land, etc., Co., 112 Cal. 375, 41 P 719 (holding that in an action by an agent for compensation a finding of an express promise to pay for services rendered, unsupported by the evidence, is without prejudice where there is an implied promise to pay and the value of the services is shown).

Iowa.—Miller v. Root, 77 Iowa 545, 42 NW 502 (holding that, where in an action on notes defendant alleged that the time of payment had been extended by an agreement entered into by him with a third person as agent of plaintiff, the payee, "with her knowledge and consent," while it was error, under the pleadings, to submit to the jury the question whether plaintiff ratified the agreement after it had been made, such error was not prejudical to defendant, where there was some evidence of ratification).

N. Y.—New York Smelting, etc., Co. v. Lieb, 56 N. Y. Super. 308, 4 NYS 545 [aff 121 N. Y. 674 mem, 24 NE 1095 mem].

N. C.—Petteway v. McIntyre, 131 N. C. 432, 42 SE 851.

Pa.—Elkins v. Morgan, 190 Pa. 430, 42 A 1108 (judgment unsupported by evidence reversed).

Can.—Dunsmuir v. Lowenberg, etc., Co., 34 Can. S. C. 228, 24 CanLTOcc Notes 117 (new trial granted as real issue had not been passed on).

[a] **The admission at a trial of evidence** which is admissible for a limited purpose and otherwise is immaterial, if the purpose for which it is admitted is pointed out carefully by the judge in his instructions to the jury, is no ground for exception. Sullivan v. Crave, etc., Co., 193 Mass. 435, 79 NE 792.

[b] **Error cured.**—Error in the admission of evidence of an agent in proof of his authority is cured by proof of statements of his principal that he had such authority. Chase v. Nichols, 9 NYS 878.

[c] **Prejudicial instruction.**—Where an agent had no authority to collect for goods sold by his principal, an instruction that the purchaser should be given credit for all payments made to such agent, unless he knew that the agent had no such authority, is prejudicial error, and where judgment is rendered charging such payments to the seller a new trial should be granted. Scarritt-Comstock Furniture Co. v. Hudspeth, 19 Okl. 429, 91 P 843, 14 AnnCas 857.

77. Cal.—Robinson v. Nevada Bank, 81 Cal. 106, 22 P 478.

Conn.—National Shoe, etc., Bank's App., 55 Conn. 469, 12 A 646.

Ill.—Stastney v. Marschall, 37 Ill. A. 137.

Ind.—Horne v. Western Refrigerating Co., 16 Ind. A. 695, 43 NE 571 (holding that the fact that there was evidence in the record, in an action for goods sold, supporting defendant's theory that he did not buy said goods on his individual credit, but that they were sold by plaintiff to defendant's alleged principal, and that defendant was acting as the manager of said principal, will not of itself justify the appellate court in reversing a judgment for plaintiff).

Iowa.—Renkin v. Frank, 88 Iowa 719, 54 NW 467.

Mass.—James v. Lewis, 189 Mass. 134, 75 NE 217; America Tube Works v. Tucker, 185 Mass. 236, 70 NE 59; Ayer v. R. W. Bell Mfg. Co., 147 Mass. 46, 16 NE 754.

Mich.—Wilhelm v. Voss, 118 Mich. 106, 76 NW 308; Booth v. Majestic Mfg. Co., 105 Mich. 562, 63 NW 524; Aultman, etc., Co. v. Dodson, 104 Mich. 507, 62 NW 708; Hitchcock v. Davis, 87 Mich. 629, 49 NW 912.

Minn.—Lahr v. Kraemer, 91 Minn. 26, 97 NW 418; Dennis v. Knight, 39 Minn. 149, 39 NW 304.

Mo.—Carr v. Ubsdell, 97 Mo. A. 326, 71 SW 112 (holding that where the evidence shows, and the trial court finds as a fact, that plaintiff was employed by defendant at an agreed commission to sell land, and that he executed the sale, a verdict in his favor for a commission will be affirmed); White City State Bank v. St. Joseph Stock Yards Bank, 90 Mo. A. 395; Holton v. Stroud, 88 Mo. A. 112; Poplar Wave Ice Co. v. Missouri Edison Electric Co., 86 Mo. A. 232.

N. J.—Elliott v. Bodine, 59 N. J. L. 567, 36 A 1038.

N. Y.—New York Guaranty, etc., Co. v. Gleason, 78 N. Y. 503, 7 AbbNCas 334; Badger v. Cook, 117 App. Div. 328, 101 NYS 1067; Horowitz v. Hines, 47 Misc. 158, 92 NYS 469; Coles v. International Bank Note Co., 100 NYS 1060; Bank of North America v. Embury, 21 HowPr 14.

Pa.—Martin v. Zahniser, 10 Pa. Super. 582; Still v. Bowers, 5 Phila. 363.

Tex.—McCabe v. Farrell, 34 Tex. Civ. A. 36, 77 SW 1049.

Utah.—Garner v. A. Fisher Brewing Co., 6 Utah 332, 23 P 755.

Wash.—Sherlock v. Van Asselt, 34 Wash. 141, 75 P 639.

Wis.—Abrahams v. Freres, 129 Wis. 235, 107 NW 656; Cameron v. White, 74 Wis. 425, 43 NW 155, 5 LRA 493.

Can.—McDermott v. Ireson, 38 U. C. Q. B. 1.

See generally Appeal and Error [1 Cyc 345–383].

[a] **Findings of fact by a trial court** are entitled to the same weight and presumption of correctness as the verdict of a jury, and where reasonable minds may differ as to whether an agency has been established, the higher court is not justified in disturbing the finding below even though it may think a different conclusion more proper. Booth v. Kessler, 62 Nebr. 704, 87 NW 532.

[b] **On accounting with an agent,** where it appears that he acted in good faith, and that his reports to his principal were approved by the principal, a judgment allowing him the amount claimed therein for his services and advancements will not be disturbed. Warner v. Cuckow, 90 Wis. 291, 63 NW 238.

[c] **In Illinois** a decision of the appellate court as to whether the act of an agent in taking a note payable

to a verdict or finding based upon evidence of ratification.[78]

[§ 741] **J. Costs.** The question of costs in an action by or against a principal or agent is governed by the rules applicable to costs in civil actions generally.[79] Thus where the rendition of accounts is demanded of an agent prior to the institution of the suit, and he neglects or refuses to comply with the demand, he is chargeable with costs;[80] and it has also been held that he is chargeable with costs where he does not render his accounts within a reasonable time.[81]

AGENT. See Agency §§ 4, 5.

AGENTES ET CONSENTIENTES PARI PŒNA PLECTENTUR.[1]

AGER. Land or soil in the abstract, without regard to any idea of property or to any particular form, size, or shape.[2] In the civil law a field; land generally; a portion of land inclosed by definite boundaries. In old English law an acre.[3]

Ager limitatus. A field limited by fixed and arbitrary boundaries.[4]

AGGRAVATE. To increase.[5]

AGGRAVATED. Increased in severity or enormity.[6]

to himself in payment of an obligation due to his principal was or was not binding on the principal depends on the existence of facts which, under the rules of law, would confer the power on the agent; such decision is conclusive as to the facts, but the application of the law is reviewable. Everts v. Lawther, 165 Ill. 487, 46 NE 233.

78. U. S.—Oshkosh Nat. Bank v. Munger, 95 Fed. 87, 36 CCA 659.

Ill.—Erie, etc., Dispatch Co. v. Cecil, 112 Ill. 180; Cario, etc., R. Co. v. Mahoney, 82 Ill. 73, 25 AmR 299; Goodell v. Woodruff, 20 Ill. 191; Burns v. Lane, 23 Ill. A. 504.

Md.—Reynolds v. Davison, 34 Md. 662.

Mass.—American Min., etc., Co. v. Converse, 175 Mass. 449, 56 NE 594.

Mo.—Hesse v. Travelers' Protective Assoc., 72 Mo. A. 598.

N. J.—Strauss v. American Talcum Co., 63 N. J. L. 613, 44 A 631.

N. Y.—Thomas Roberts Stevenson Co. v. Tucker, 14 Misc. 297, 35 NYS 682; Meyers v. Brown-Cochran Co., 91 NYS 72.

Tex.—Bexar Bldg., etc., Assoc. v. Newman, (Civ. A.) 25 SW 461.

[a] **Where there is no statement of facts,** a finding of the trial court as to whether there has been a ratification of an agent's acts is conclusive. Greer v. Marble Falls First Nat. Bank, (Tex. Civ. A.) 47 SW 1045.

79. See generally Costs [11 Cyc 1].

[a] **Agent's liability for costs.**—Agents for anything, properly done, while acting for their principals, ought not to be charged with costs for vindicating their action; but when they put themselves in a position of hostility and litigate with their former principals they become subject to all the liabilities of parties litigant, one of which is the payment of costs. Burke v. Teller, 11 Pa. Co. 59.

[b] **Costs up to hearing.**—In a suit against an agent, the court will not, at the hearing, except in an extreme case, direct payment of the costs up to the hearing, but will reserve the question of costs until further directions. Jellicoe v. Price, 1 Y. & Coll. 74, 20 EngCh 74, 62 Reprint 796.

[c] **Expense of legal proceedings.**—In North Dakota, under Rev. Codes (1899) § 4995, one injured by breach of an agent's warranty of authority may recover the reasonable expenses of legal proceedings taken to enforce the act of the agent against his principal. Kennedy v. Stonehouse, 13 N. D. 232, 100 NW 258, 3 AnnCas 217.

80. Carlson v. Beckman, 35 Nebr. 392, 53 NW 203.

[a] **Where demand unnecessary.**—No demand for an accounting is necessary in order that the successful principal may recover costs where the agent denies any liability on his part and contests the case throughout on that theory. Carlson v. Beckman, 35 Nebr. 392, 53 NW 203.

[b] **Amount in controversy.**—Since a suit for an accounting cannot be brought before a justice of the peace, but only in courts having equity jurisdiction, the fact that the amount in controversy is less than two hundred dollars will have no bearing on the question of costs. Carlson v. Beckman, 35 Nebr. 392, 53 NW 203.

81. Collyer v. Dudley, Turn. & R. 421, 12 EngCh 421, 37 Reprint 1163 (holding that where an agent does not render his accounts within a reasonable time he must bear the costs of a suit instituted to have the accounts taken; and it will not be an excuse for him that he offered to pay on account a gross sum which, it turns out, would have covered all that was due from him).

1. A maxim meaning "Acting and consenting parties are liable to the same punishment." Morgan Leg. Max.

2. In Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 215, 36 AmD 624, upon the question of the right to alluvion, the supreme court laid stress upon the meaning of the term "ager" as used in the Roman codes defining this right. The court said: "The Roman legislator, instead of giving the more exact and scientific definition of our modern Codes, announces with oracular brevity, a great rule of natural equity: 'Præterea, quod per alluvionem agro tuo flumen adjecit jure gentium tibi acquiritur,' which I translate as follows: 'moreover, whatever the river has added to your land becomes yours by the law of nature (or nations).' I use the English word land instead of field, because it appears to me that the word ager in the text is employed in its primitive sense to signify land or soil in the abstract, without regard to any idea of property or to any particular form or size, or shape, precisely as it is in the Greek, from which it is derived (agros), and as it is the compounds into which it enters both in Latin and several modern languages, such as 'agricultura, agricola, agrarius, and agrimensor.' It will not be pretended that agriculture is confined in any language to the culture of a field without a house or other building upon it, as the word ager signified according to Rodrigues and even the Roman Digest. The language itself furnishes internal evidence that such was its primitive meaning, for the earliest as well as the most useful of human arts, that which in a great measure feeds and clothes the great family of man, derives its name from that word in combination with another which signifies to cultivate. Again, alluvion is a right founded on natural law, in which the maxim certainly applies with all its force, that where the reason is the same, the law is the same, and would that law distinguish between two contiguous estates or tracts of land fronting on a watercourse, and equally liable to be wasted by its encroachments, deny to that which should have a building upon it, the natural chances of accretion, while it gives it to the other? I think not, any more than agriculture should be taken to mean the tilling of a field on which no edifice exists. That the word ager was sometimes employed to signify something different there is no doubt, and so is land in English; its primitive signification is soil, ground; but it sometimes means a country or territory, as 'the land of my fathers,' 'the land of Canaan.'"

3. Black L. D. See also Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 149, 36 AmD 624.

[a] **Origin of word.**—In Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 167, 36 AmD 624, in speaking of the word "ager," the court said: "We find it first in the Digest, book 50, tit. 16, law 27, de Verborum Significatione. 'Ager est locus qui sine villa est;' ager is a place without buildings. See Cujas, vol. 8, p. 481. Calvin's Dictionary is likewise quoted, verbo Ager. For the definitions of the words fundus and prædium, see Dig. book 50, tit. 16, law 211, 215. According to all these definitions it is clear that ager means a piece of land without any buildings; fundus is applied to land on which buildings are erected; and the word prædium (to use the language of the judge a quo) 'in its restricted sense means perhaps only a rural property, to wit, a farm, an estate, a manor; in its more extended sense it includes ager, or any other real property, and the possession of it.' These words according to the authorities cited, it is contended, show us 'that in the text of the Roman law, the alluvion is given only to the ager.' That heredad in Spanish means the same; the translation of the Institutes into Spanish by Bemi, using this word for the Latin word ager. It is admitted the two words are the same in the different languages. But the word ager in the Institutes and Digest is simply used to express the idea of land, ground, or soil; and how can this advance the pretensions of the plaintiffs?"

[b] **Ager est locus qui sine villa est**—ager, is a place without a country house. Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 139, 36 AmD 624.

[c] **"Ager," est, si species fundi ad usum hominis comparatur**—ager is a portion of land prepared (cultivated) for the support of man. Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 139, 36 AmD 624.

4. Smith v. St. Louis Public Schools, 30 Mo. 290, 301 [quot Frank v. Goddin, 193 Mo. 390, 397, 91 SW 1057, 112 AmSR 493] (where the question arose whether a lot of ground which is bounded or limited by streets can with any propriety be said to be bounded by a river, and it was held that such a lot was not ager limitatus, within the definition of that term as understood by the civilians).

5. Mathew v. Wabash R. Co., 115 Mo. A. 468, 474, 78 SW 271, 81 SW 646.

6. Anderson L. D.

[a] **Aggravated offense.**—"Appellant's counsel in his reply brief says: 'It may be admitted that the prior conviction constitutes the subsequent violation of the law an "aggravated offense," for that, we may admit, is the meaning and intent and the force and effect of section 666, with which we have no quarrel.' But he claims that this matter of aggravation is for the information of the court alone, and with which the jury has

(Cross references.[7])

AGGRAVATION. Something connected with a crime or wrong, additional to its essential elements and enhancing its guilt or injurious consequences;[8] any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself.[9]

In pleading the introduction of matter into the declaration which tends to increase the amount of damages, but does not affect the right of action itself.[10]

(Cross references.[11])

AGGREGATE.[12] A sum, mass, or assemblage of particulars; a total or gross amount; any combined whole, considered with reference to its constituent parts.[13] The term implies a plurality of units whose total amount it represents.[14]

Phrases in which the word has been used have received judicial interpretation, such as "in the aggregate,"[15] "aggregate amount,"[16] "aggregate

no concern and nothing to do. It may be replied to this that the former conviction is a fact, and a very important one, which constitutes or goes to make up this aggravated offense, and being a material fact in the case, necessarily it must be pleaded, and if issue be joined in reference thereto, either by plea of not guilty or by standing mute, which amounts to the same thing under the Penal Code, that material fact must be proven as any other material fact in the trial of the cause." Peo. v. Coleman, 145 Cal. 609, 611, 79 P 283.

7. **Aggravated:**
Assault:
Generally see Assault and Battery [3 Cyc 1026, 1029, 1034, 1056].
Conviction for, under indictment charging:
Mayhem see Indictments and Informations [22 Cyc 479].
Rape see Indictments and Informations [22 Cyc 480].
Robbery see Indictments and Informations [22 Cyc 481].
Simple assault see Assault and Battery [3 Cyc 472].
Joinder of, with simple assault see Indictments and Informations [22 Cyc 886].
With intent to:
Kill see Homicide [21 Cyc 778].
Ravish see Rape [33 Cyc 1429].
Rob see Robbery [34 Cyc 1812].
Larceny:
Generally see Larceny [25 Cyc 63, 84, 85, 154].
Conviction of simple larceny under indictment charging see Indictments and Informations [22 Cyc 478].

8. Abbott L. D.

[a] **"Aggravation or mitigation."**—"The legislature made it the duty of the judge to examine witnesses as to the aggravation and mitigation of the offense, as a protection to society, as well as to the defendant. The character of the defendant, his habits, his social standing, his intelligence, his motive for the commission of the offense, are all subjects pertinent to the inquiry required by the statute as to the aggravation or mitigation of the offense." Smith v. Peo., 32 Colo. 251, 258, 75 P 914.

[b] **Aggravation in contradistinction to mitigation.**—Where matter in aggravation of damages is proper, then matter in mitigation may be shown. These terms are properly applied only where evidence is presented to the jury for the purpose of affecting its estimate of damages. Sedgwick Dam. (8th ed) § 51 [quot Swank v. Elwert, 55 Or. 487, 501, 105 P 901].

9. Black L. D.

[a] **Acts beyond principal act.**—Matter of aggravation, correctly understood, does not consist in acts of the same kind and description as those constituting the gist of the action, but in something done by defendant, on the occasion of committing the trespass, which is, to some extent, of a different legal character from the principal act complained of, as where plaintiff declares in trespass for breaking and entering his dwelling house, and alleges, in addition, that defendant also destroyed his goods in the house, assaulted and beat his domestics, or debauched his daughter or servant. Hathaway v. Rice, 19 Vt. 102, 107.

[b] **"Aggravation 'in the act.'"**—In Holman v. Brown, 8 Ga. A. 551, 69 SE 1084, it was held that the unlawful breaking of one's house, the scattering of household goods, and the leaving of the doors unlocked, constitute such a tort as carries aggravation "in the act," and, therefore, authorize the assessment of damages additional to the actual property loss, irrespective of the intent with which the tort is committed.

10. Black L. D. [cit Stephen Pl. 257]. See also Wetherell v. Clerkson, 12 Mod. 597, 88 Reprint 1544.

Pleading matter in aggravation generally see Damages [13 Cyc 180].

[a] **Proof of "matter of aggravation."**—In Southern R. Co. v. O'Bryan, 119 Ga. 147, 150, 45 SE 1000, the court said: "Nothing was said in the opinion in this case when it was first before the court to indicate that a recovery of exemplary damages would be warranted. It was said that certain facts might be proved 'as matter of aggravation;' but from the context it is clear that this language was intended to convey only the idea that such proof would authorize an increase of actual damages."

11. **Aggravation:**
Of crime:
Allegation of matter in, in indictment:
Generally see Indictments and Informations [22 Cyc 356].
For assault and battery as rendering indictment double see Indictments and Informations [22 Cyc 386].
Amendment of indictment as to matters in see Indictments and Informations [22 Cyc 444].
Burglary, pleading matter in an indictment see Burglary [6 Cyc 221].
By former offenses or convictions, necessity of pleading see Indictments and Informations [22 Cyc 356].
Conviction for first offense under indictment charging second or third offense see Indictments and Informations [22 Cyc 481].
Successive offenses and habitual criminals see Criminal Law [12 Cyc 949].
Variance by failure to prove matters alleged in general see Indictments and Informations [22 Cyc 456].
Of damages:
Generally see Damages [13 Cyc 66].
Admissibility of evidence in see Damages [13 Cyc 211].
For:
Assault and battery see Assault and Battery [3 Cyc 1082, 1091, 1107, 1108].
Breach of promise to marry see Breach of Promise to Marry [5 Cyc 1014, 1018, 1020].
Expulsion of passenger by carrier see Carriers [6 Cyc 568].
False Imprisonment see False Imprisonment [19 Cyc 320, 360, 370].
Fraud see Frauds [20 Cyc 142].
Infringement of:
Patent see Patents [30 Cyc 1023].
Trade-mark see Trade-Marks and Trade-Names [38 Cyc 893].
Of damages:—Continued
For:—Continued
Libel or slander see Libel and Slander [25 Cyc 416, 475, 508, 536, 546].
Malicious prosecution see Malicious Prosecution [26 Cyc 78, 103].
Seduction see Seduction [35 Cyc 1321].
Trespass see Trespass [38 Cyc 1114, 1142].
Trover and conversion see Trover and Conversion [38 Cyc 2104].
Of injury:
As:
Affecting liability for death see Homicide [21 Cyc 700].
Element of damages in action for assault and battery see Assault and Battery [3 Cyc 1107].
Negligent by person injured see Negligence [29 Cyc 641].

12. **Aggregate:**
Admissibility in evidence of amount of damages in see Damages [13 Cyc 211].
Corporation see Corporations [10 Cyc 143].
Of claims as affecting jurisdiction:
Of court generally see Courts [11 Cyc 778, 779].
Of justice of peace see Justices of the Peace [24 Cyc 464].
On appeal see Appeal and Error [2 Cyc 566].

13. Century D. [quot Chapin v. Wilcox, 114 Cal. 498, 501, 46 P 457].

14. Chapin v. Wilcox, 114 Cal. 498, 500, 501, 46 P 457. In this case the statute fixed the compensation of county supervisors in counties of a certain class at a per diem and mileage, "all of which compensation in the aggregate shall not exceed four hundred dollars per annum each." The court, after giving the definition set out in the text, said: "In the above section these units are the per diems and the number of miles traveled, the total amount of which shall not exceed four hundred dollars per annum."

15. St. John v. Masters, 19 N. B. 585, 586, 587.

St. 34 Vict. c 33 § 1, declares that "no person shall have, keep, or sell in any place or building, within the limits of the City of Saint John, . . . any crude or refined petroleum, earth or rock oil, &c., in any larger quantity than two hundred gallons in the aggregate, to be contained in not more than five barrels." The court, in construing this statute, said: "It was contended that the words 'in the aggregate' shewed that the intention of the Act was to prohibit persons having more than two hundred gallons in the whole, at any one time. But we think the meaning of these words is, that the whole contents of the five barrels which a person is authorized to keep in one place shall not exceed two hundred gallons." St. John v. Masters, supra.

16. See cases infra this note.

[a] **Taxes.**—(1) "Aggregate amount of tax" in a statute providing that the aggregate amount of the tax to be voted or levied in aid of railroads in any township shall not exceed five per cent of the assessed value of the property therein, means the sum of the taxes—the whole amount voted and levied, as made by the addition of the several taxes. Dumphy v. Hum-

market value,"[17] "aggregate payments,"[18] "aggregate population,"[19] "aggregate value."[20]

AGGREGATIO MENTIUM. Literally "The meeting of minds." The moment when a contract is complete.[21]

AGGREGATION.[22]

AGGRESSION. An unprovoked attack; unwarranted inroad or encroachment upon the rights of another.[23] (Cross references.[24])

AGGRESSOR. One who begins a quarrel or dispute;[25] one who brings on a conflict or affray by some overt act or demonstration calculated to precipitate the difficulty or conflict.[26] (Cross references.[27])

AGGRIEVED. Having suffered loss or injury; damnified; injured.[28]

An aggrieved party or person is one who is injured in a legal sense;[29] one who has suffered an

boldt County, 58 Iowa 273, 275, 12 NW 306. (2) A constitutional provision prohibiting counties from assessing taxes the "aggregate" of which shall exceed a certain amount was construed as a limitation upon the power to levy taxes and not to require the county board in levying a tax to specify the particular purpose for which it is levied. Peo. v. Wisconsin Cent. R. Co., 219 Ill. 94, 96, 76 NE 80. (3) The word "aggregate," in a statute providing that county authorities shall never assess taxes "the aggregate of which shall exceed ninety five cents per one hundred dollars valuation," means "that more than one kind or species of taxes must be added together for the purposes of the limit of taxation here prescribed. What shall be added? Not charges for the many objects of expenditure which a county may incur, but classes or kinds of taxes." Brannon v. County Ct., 33 W. Va. 789, 792, 11 SE 34, 8 LRA 304. To same effect Neale v. Wood County Ct., 43 W. Va. 90, 100, 27 SE 370.

17. Western Union Tel. Co. v. Poe, 61 Fed. 449, 456 (where it was said: "The aggregate market value of the stock of any business corporation therefore approximates an amount reached by capitalizing the aggregate annual dividends, on a basis of something higher than the usual rate of interest for money loaned, the rate varying, as interest of money loaned varies, with the risk of the investment and the certainty of the annual payments").

18. Seibert v. Cavender, 3 Mo. A. 421, 422, 424 (where, in construing a city charter providing that every ordinance requiring work to be done "shall contain a specific appropriation from the proper revenue or fund, based upon an estimate of cost, to be indorsed by the engineer on said ordinance, for the whole of the cost of each street, part of street, or other object, respectively; and every contract shall contain a clause to the effect that it is subject to the provisions of the Charter that the aggregate payments thereon shall be limited by the amount of such work, specific appropriation," etc., the court said: "It might be argued that the 'aggregate payments on the contract' would necessarily include the sums paid to the contractor by the property-owners. But these aggregate payments, it is commanded, must not exceed 'the amount of such specific appropriation.' Hence it is impossible to suppose that the words, although capable of a larger signification, are here used with reference to anything more than the aggregate payments on contract, to be made from the City Treasury").

19. Atty.-Gen. v. Atty.-Gen., [1905] A. C. 37, 48.

[a] **"Aggregate population of Canada"** in the British North America Act which prohibits a reduction of the number of representatives of any province unless the proportion which the number of its population bore to the number of the aggregate population of Canada at the last preceding adjustment is ascertained at the then latest census to have been diminished by one-twentieth part or upward, mean the whole population of Canada, including that of the provinces which have been admitted to the federation subsequent to the passage of the British North America Act. Atty.-Gen. v. Atty.-Gen., [1905] A. C. 37, 48.

20. See cases infra this note.

[a] **Enterprises for profit.**—In construing the statute providing in effect that the combined property of enterprises for profit shall be assessed as a whole on its fair and reasonable aggregate value the court said: "The word 'aggregate' as here used in the expression 'aggregate value' does not mean merely 'sum' or 'total.' That is not necessarily its only meaning in common usage, and in this statute the words 'as a whole' used in the same clause show that the word 'aggregate' was intended to qualify the word 'value' so as to make it mean the value of the property as a unit and not merely as a collection of separate items." Inter-Island Steam Nav. Co. v. Shaw, 10 Hawaii 624, 631 [quot In re Tax Assessment, 15 Hawaii 29, 40, where it was held that in ascertaining the aggregate value of the property owned by a corporation the amount of the debts, if any, of the corporation should be added to the selling price of the shares of its capital stock].

[b] **Property of decedent.**—(1) "In estimating the aggregate value of the property of a deceased person within the meaning of the Succession Duty Act, Ont. Rev. St. (1897) c 24, as amended by the Act respecting Succession Duties, 62 Vict. (2) c 9, and the Act to amend the Succession Duty Act, 1 Edw. VII c 8, the value of the land of the deceased, where such land is incumbered or mortgaged, is to be taken, and not merely the value of the deceased's equity of redemption therein." Atty.-Gen. v. Lee, 9 Ont. L. 9, 13 [aff 10 Ont. L. 79]. (2) In order to arrive at the aggregate value of the property of a deceased person under 59 Vict. c 42 § 4, The Succession Duty Act of 1896, the debts owed by the estate should be deducted. The word "aggregate" signifies no more than if the section had said "the whole value." Receiver Gen. v. Hayward, 35 N. B. 453, 456.

21. Black L. D. See Contracts [9 Cyc 245]. See Agreement text and note 10.

22. **Of separate elements** as patentable see Patents [30 Cyc 860].

23. Standard D.

[a] **The aggression depends upon its character and intent.**—"If it is an assault, or the menace of one by an overt act, or the provocation of a difficulty within intent to inflict death or great bodily harm in the event it is resisted, made of malice to bring about that result and enable the provoking party to wreak his vengeance upon the assailant, that is an 'aggression' or 'fault' and a 'provoking of a difficulty' within the legal sense and meaning of the terms." Foutch v. State, 95 Tenn. 711, 717, 34 SW 423, 45 LRA 687.

24. **Aggression:**
Affecting right of self-defense see Homicide [21 Cyc 805].
Against:
Officer executing process see Assault and Battery [3 Cyc 1045].
Passenger see Assault and Battery [3 Cyc 1048].
Trespasser see Assault and Battery [3 Cyc 1045]; Homicide [21 Cyc 809].
In defense of:
Property or possession see Assault and Battery [3 Cyc 1045].
In defense of:—Continued
Self see Assault and Battery [3 Cyc 1046]; Homicide [21 Cyc 805].
Third person see Assault and Battery [3 Cyc 1048]; Homicide [21 Cyc 809, 810].

25. Wharton L. Lex. In Foutch v. State, 95 Tenn. 711, 34 SW 423, 45 LRA 687, it is said that within the law of self-defense it is not intended that every one shall be held an aggressor who causes a difficulty.

26. State v. Gray, 46 Or. 24, 27, 79 P 53. Compare State v. Ryan, 56 Or. 524, 537, 108 P 1009.

[a] **"Aggressor," in the rule that the aggressor cannot kill his opponent** in self-defense, necessarily imports that the aggressor must provoke the difficulty with the intent to kill his adversary, or do him great bodily harm, or to afford him a pretext for wreaking his malice upon his adversary. The use of opprobrious language to another does not render the person using the language an aggressor. State v. Foutch, 95 Tenn. 711, 717, 34 SW 423, 45 LRA 687.

27. **Aggressor:**
Good faith in withdrawing from combat by see Homicide [21 Cyc 805].
In:
Affray see Affray [2 Cyc 40].
Assault and battery see Assault and Battery [3 Cyc 1014].
Homicide see Homicide [21 Cyc 646].
Intent of see Homicide [21 Cyc 807, 808].
Right of self-defense as affected by age of see Assault and Battery [3 Cyc 1046].
Withdrawal of see Homicide [21 Cyc 811].

28. Black L. D. [quot Cunningham v. Porchet, 23 Tex. Civ. A. 80, 83, 56 SW 574]. See also Cottrell's App., 10 R. I. 615, 616.

29. State v. Central Vermont R. Co., 81 Vt. 459, 462, 71 A 193, 21 LRANS 949.

[a] **In a legal sense** a person is aggrieved by an act when a legal right is invaded by the act complained of. Peavy v. Goss, 90 Tex. 89, 92, 37 SW 317 [quot Choate v. Viha, 40 Tex. Civ. A. 566, 567, 89 SW 1082]; Daniels v. Grayson College, 20 Tex. Civ. A. 562, 564, 50 SW 205.

[b] **"Person aggrieved"** is (1) a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something (Ex p. Official Receiver, 19 Q. B. D. 174, 177, 180; Ex p. Sidebotham, 14 Ch. D. 458, 465); (2) a person who has sustained a legal loss or liability by an act done in respect of which the penalty is given (Rex v. Frankforth, 8 CanCrCas 57, 58); (3) one whose pecuniary interests are or may be adversely affected (Hough v. North Adams, 196 Mass. 290, 291, 82 NE 46).

[c] **The person injured.**—"A person aggrieved, by an act or an omission, is one injured thereby." In re Walter, 75 N. Y. 354, 357. See also Cottrell's App., 10 R. I. 615, 616.

[d] **Those who suffer from aggression.**—The term "party aggrieved" is emphatically applicable to those who suffer from the aggressions of others, but is inappropriate and rarely applies to plaintiffs and parties who prosecute on contracts and liabilities

injury to person or property.[30] The question as to who is aggrieved under certain circumstances, and who has a right of action as such, has been judicially determined in actions for money had and received,[31] in actions to recover excessive fees exacted by an officer,[32] in actions upon bonds,[33] in actions to recover damages,[34] in actions of trespass,[35] in actions under the civil damage acts,[36] in actions to recover penalties,[37] in actions for the

for debts and damages. Corning v. McCullough, 1 N. Y. 47, 69, 49 AmD 287.

[e] **Expression not technical.**—(1) "The expression 'aggrieved party' is not a technical one, and the words are to be given their natural meaning. Robinson v. Currey, 7 Q. B. D. 465, 470. But, when used with reference to legal remedies, they must be taken to mean one who is injured in a legal sense. Green v. Blackwell, 32 N. J. Eq. 768, 772. The cases are generally those involving the right of appeal. It is said with reference to this right that a person aggrieved is one whose pecuniary interest is directly affected by the adjudication. Wiggin v. Swett, 6 Metc. (Mass.) 194, 39 AmD 716; Andress v. Andress, 46 N. J. Eq. 528, 22 A 124. It is said in this State, with reference to probate proceedings, that the persons entitled to appeal as aggrieved or interested persons are those who have some legal interest that may be enlarged or diminished by the decree. Hemmenway v. Corey, 16 Vt. 225; Woodward v. Spear, 10 Vt. 420. There are a few cases where the term has been construed as used in statutes providing for the recovery of penalties or damages." State v. Central Vermont R. Co., 81 Vt. 459, 461, 71 A 193. (2) "The expression 'party aggrieved' is not a technical expression; the words are ordinary English words, which are to have the ordinary meaning put upon them. . . . A party grieved is not brought into existence by the statute which gives him a penalty, he is a person who is supposed to exist, and the statute is passed on account of his grievance, and the action for penalty is given to him." Robinson v. Currey, 7 Q. B. D. 465, 470.

[f] **Term not limited to mental affliction.**—In Daniels v. Grayson College, 20 Tex. Civ. A. 562, 564, 50 SW 205, the court said: "The term aggrieved has been held sufficiently definite of the legislative intent to authorize the mother, father, or other persons standing in loco parentis to sue for the statutory penalty in case of sale of intoxicants to a minor. Peavy v. Goss, 90 Tex. 89, 37 SW 317. In the discussion of the term the court clearly indicates that its meaning should not be limited to mere mental affliction, but should be given its broader and usual signification. In the discussion Mr. Chief Justice Gaines says: 'The words, "any person aggrieved," are of not infrequent use in statutes. Articles 2789 of our Revised Statutes gives a right of appeal to "any person who may consider himself aggrieved by any decision, etc.," of the county court in matters relating to a guardianship. Similar statutes are found in other States; and the words in question have usually been construed to mean any person having an interest recognized by law in the subject matter of the judgment which he considers injuriously affected by the action of the court. Adams v. Woods, 8 Cal. 306; Labar v. Nichols, 23 Mich. 310; Green v. Blackwell, 32 N. J. Eq. 768; Swackhamer v. Kline, 25 N. J. Eq. 503; Betts v. Shotton, 27 Wis. 667.'"

30. Veon v. Creaton, 138 Pa. 48, 56, 20 A 865, 9 LRA 814.

[a] **Incorporeal right.**—In Rex v. Williamson, 7 T. R. 32, 101 Reprint 841, the prosecutor of an indictment for stopping a common footway, who had used it for many years, was held to be the "party aggrieved" within the meaning of the statute.

31. State v. Central Vermont R. Co., 81 Vt. 463, 71 A 194, 130 AmSR 1065; State v. Central Vermont R. Co., 81 Vt. 459, 71 A 193, 21 LRANS 949 (overcharges by carrier of goods).

32. Hale v. McDermott, 78 Misc. 52, 137 NYS 975.

33. See cases infra this note.

[a] **Administrator's bond.**—A general creditor of an estate is a party grieved within the statute providing in effect that if an administration bond becomes forfeited the ordinary may cause it to be prosecuted at the request of any party grieved by such forfeiture. It is not necessary that the creditor should have established his claim by judgment. In re Honnass, 14 N J. Eq. 493, 495.

[b] **Breach of official bond.**—Under a statute providing that for breach of any official bond the person aggrieved may sue in his own name, assigning the appropriate breach, it was held that the county superintendent of education was a person aggrieved by the failure of the county treasurer to pay over the poll tax and other moneys received from the tax collector for the school fund. Morrow v. Wood, 56 Ala. 1.

Liquor dealer's bond see infra note 36 [b].

34. State v. Rutland R. Co., 81 Vt. 508, 71 A 197.

[a] **Discrimination in rates.**—Under a statute giving damages to a party aggrieved by the action of a railroad in failing to give equal benefits, facilities, etc., to all, it was held that a person who has suffered a loss because of a preferential rate of fifty cents a ton on coal given by a railroad to another person is a party aggrieved within the statute. State v. Central Vermont R. Co., 81 Vt. 463, 470, 71 A 194, 130 AmSR 1065.

35. See cases infra this note.

[a] **Assessment of damages.**—The statute provides: "The jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass upon his property." The court said: "The words 'party aggrieved' clearly refer only to the plaintiff in the action." Dale v. Southern R. Co., 132 N. C. 705, 707, 708, 44 SE 399.

[b] **Forcible entry and detainer.**—By the phrase "party agrieved" in a statute giving an action of trespass for forcible entry and detainer to such party, the person forcibly ejected is intended. Bliss v. Bange, 6 Conn. 78, 80.

36. See cases infra this note; and generally Intoxicating Liquors [23 Cyc 318].

[a] **In Pennsylvania.**—(1) Under the statute providing that any person aggrieved may recover damages for an injury to person or property in consequence of furnishing liquor to a person of known intemperate habits, it was held that a widow was a person aggrieved by the injury and death of her husband, within the meaning of the statute. Fink v. Garman, 40 Pa. 95, 105. (2) But under a like statute it was held that where liquors were sold to a major son, in consequence of which injuries resulted to him, his father was not an "aggrieved" person within the meaning of the statute, where neither a subsisting family relation nor that of master and servant was shown to exist between the father and the son. Veon v. Creaton, 138 Pa. 48, 56, 20 A 865, 9 LRA 814.

[b] **In Texas.**—(1) In construing a statute giving to persons aggrieved a right of action for a penalty for the breach of a liquor dealer's bond to keep a quiet and orderly house, the court said: "The appellant, residing in the vicinity of the house, comes directly within a class named in the statute as an 'agrieved' person, since he would have an action at common law for damages and the abatement of the saloon as a nuisance as a disorderly house, as well as for the acts that violated the conditions of a quiet house, he would also be entitled to sue on the bond for the penalty as an 'aggrieved' person." Cunningham v. Porchet, 23 Tex. Civ. A. 80, 83, 56 SW 574. (2) In construing the same statute in another case the court said: "It is the duty of the parent to look after the moral training of his minor children, and it is his legal right to keep them away from temptation. This legal right of the parent is infringed when one, in violation of law, sells intoxicating liquor to his minor child, or permits such child to enter or remain upon the premises, where such liquor is retailed. In this case the father being dead, the mother had the right to sue upon the bond." Peavy v. Goss, 90 Tex. 89, 93, 37 SW 317 [quot Daniels v. Grayson College, 20 Tex. Civ. A. 562, 564, 50 SW 205]. See also Coughtry v. Haupt, 47 Tex. Civ. A. 452, 105 SW 516; White v. Manning, 46 Tex. Civ. A. 298, 102 SW 1160. (3) In another case it was held that a sister who had taken charge of and raised a minor, his father being a drunkard and his mother dead, was a person aggrieved within the statute. Saunders v. Alvido, 52 Tex. Civ. A. 356, 113 SW 992.

37. St. Louis, etc., R. Co. v. Freeman, 95 Ark. 218, 128 SW 1024; McPhail v. Delaney, 48 Colo. 411, 110 P 64; Farmers' Tobacco Warehouse Co. v. Minor, 107 Ky. 287, 53 SW 641, 21 KyL 990; Phillips v. Bevans, 23 N. J. L. 373; Myers v. Brooklyn Heights R. Co., 10 App. Div. 335, 41 NYS 798; State v. Rutland R. Co., 81 Vt. 508, 71 A 197.

[a] **Delay in transporting freight.**—Elliott v. Southern R. Co., 155 N. C. 235, 71 SE 339; Cardwell v. Southern R. Co., 146 N. C. 218, 59 SE 673; Rollins v. Seaboard Air Line R. Co., 146 N. C. 153, 59 SE 671; Stone v. Atlantic Coast Line R. Co., 144 N. C. 220, 56 SE 932.

[b] **Failure to construct suitable stock guards.**—The statute provides a penalty to the aggrieved party for the failure of a railroad company to construct suitable stock guards. In construing this statute the court said: "The appellant insists that the word 'aggrieved' in the statute allowing the penalty 'shows that before any person is entitled to recover he must prove that he is damaged.' But we do not so understand it. The statute makes it the duty of any railroad company, which has constructed a railroad through or upon any enclosed lands of another, upon receiving ten days' notice in writing from the owner of the land, to construct suitable and safe stock guards on either side of the enclosure and keep the same in repair. Upon giving the notice the owner is entitled to the guards, and he is aggrieved if the railroad company fails to construct them, and is entitled to the penalty." Kansas City, etc., R. Co. v. Pirtle, 68 Ark. 548, 551, 60 SW 657.

[c] **Failure to issue transfers.**—(1) Under the Railroad Act providing for penalties to a party aggrieved by the refusal of a transfer from one line of railroad operated by a corporation to another line also operated by it, it has been held that the aggrieved party was a passenger paying one single fare, as described by a previous section of the act. McLaughlin v. New York City R. Co., 106 App. Div. 1, 94 NYS 653 [foll Van Zandt v. New York City R. Co., 106 App. Div. 614 mem, 94 NYS 660 mem; Fox v. Interurban St. R. Co., 42 Misc. 538, 86 NYS 64; Carpenter v. New York City R. Co., 93 NYS 600]. (2) "In the cases of Myers v. Brooklyn Heights R. Co.,

reformation of instruments[38] and in actions to vacate a grant.[39] The word has also been defined in connection with proceedings relating to elections,[40] elections of directors of corporations,[41] executions,[42] injunctions,[43] lunacy,[44] local assessments,[45] motions on pleadings,[46]

10 App. Div. 335, 41 NYS 798, and Nicholson v. New York City R. Co., 118 App. Div. 858, 103 NYS 695, decided respectively by the Second and First Appellate Divisions, it was held in effect that a person traveling over a street railroad simply for the purpose of being denied a transfer in order that he might bring a suit for a penalty under the statute quoted does not come within the protection and benefits thereof and cannot recover such penalty. We agree with the results reached in those cases." Per Hiscock, J., in Bull v. New York City R. Co., 192 N. Y. 361, 366, 85 NE 385, 19 LRANS 778.

[d] **Failure to receive and transmit messages.**—(1) The aggrieved party under a statute providing penalty for the failure of telegraph companies to receive and transmit messages as in the statute provided is the person whose message the telegraph company has refused to receive or failed to transmit on the terms or in the manner prescribed by the statute. Western Union Tel. Co. v. Ferguson, 157 Ind. 37, 40, 60 NE 679; Hadley v. Western Union Tel. Co., 115 Ind. 191, 15 NE 845. (2) In Western Union Tel. Co. v. Troth, 43 Ind. A. 7, 84 NE 727, 729, the court said: "The party aggrieved is the real party in interest; the party with whom the contract was entered into and for whose benefit the service was to be rendered, and not merely the person whose name is signed to the message." See generally Telegraphs and Telephones [37 Cyc 1706].

[e] **Failure to satisfy mortgage.**—(1) A "party aggrieved," within the meaning of a statute giving a right of action for a penalty by a party aggrieved by the refusal of a mortgagee to enter the fact of payment on the margin of the record upon request, if within two months he fails to do so, means one who had himself made the request. Jowers v. Brown, 137 Ala. 581, 583, 34 S 827. (2) In construing a statute providing a penalty to the aggrieved party for the failure of a mortgagee to enter satisfaction of a mortgage upon the record, within three months after payment of the mortgage debt and after request in writing to make such entry, the court said: "No one could be regarded as a 'party aggrieved' within the meaning of the statute, unless he had himself made the request, and there had been an unlawful neglect of the mortgagee to comply with it. It is clear that a verbal request, or one made before payment or satisfaction of the mortgage, would avail nothing. It must be in writing, and in the name of all the parties who are interested in the recovery of the penalty." Jarratt v. McCabe, 75 Ala. 325, 326.

[f] **Running trains at excessive speed through city.**—In construing a statute providing that a person aggrieved may recover the statutory penalty against a railroad company for running a train through a city at a greater rate of speed than is permitted by the ordinance, the court said "that 'the person aggrieved' is the person who has sustained an injury clearly traceable and attributable to the violation of the law, by running faster than permitted by the ordinance, and that it is not material whether he could maintain an action for damages under the first clause of the section or not." Chicago, etc., R. Co. v. Peo., 24 Ill. A. 562, 564 [aff 120 Ill. 667, 12 NE 207].

[g] **Refusing to receive freight.**—McRackan v. Atlantic Coast Line R. Co., 150 N. C. 331, 63 SE 1042.

[h] **Violation of liquor law.**—A college has a direct interest in the enforcement of the law against the sale of intoxicants to students, and has the right to its enforcement, as, in addition to the moral responsibility resting upon the authorities of the institution, its financial success depends in a large measure on the influences which affect the characters of its students and which are manifested in their deportment, and a college may recover a statutory penalty for violation of a law prohibiting the sale of liquor to students. Daniels v. Grayson College, 20 Tex. Civ. A. 562, 50 SW 205. See generally Intoxicating Liquors [23 Cyc 168, 169].

[i] **Fraudulent conveyance.**—"Aggrieved," as used in a statute providing that the party "aggrieved" by a fraudulent conveyance has the right to recover a penalty therefor, should be construed to include a surety for the grantor, he being an "aggrieved" party from the date of his suretyship and before he pays any portion of the debt, and his right to recover the penalty is perfected by paying the debt and dates from the time he became surety. He is more within the requisites of a prior creditor than even the primary creditor was, who may be supposed, as is commonly the fact, to look more to the surety for his indemnity than to the property of the debtor, and under these circumstances the surety is, far more obviously than the principal creditor, a party "aggrieved." He is, if responsible, the only party aggrieved in the general and popular sense. The grantor must be understood to have intended to defraud the surety by depriving him of all redress or indemnity for his undertaking. The party "aggrieved" must be the party and all the parties whose right, debt, or duty is attempted to be avoided. In popular language, and within the evil intended to be remedied by the statute, the surety has a right, and the principal owes him a duty, which is of the nature of a debt, to save him harmless. Beach v. Boynton, 26 Vt. 725, 733, 734.

[j] **"Consignee aggrieved."**—In Brown v. Atlantic Coast Line R. Co., 91 S. C. 377, 378, 74 SE 754, the seller of goods consigned them to his own order at the town in which plaintiff did business, upon a bill of lading reading "order notify" plaintiff, and plaintiff paid for the goods, obtained the bill of lading, and presented it to the railroad company's agent and demanded the goods, which were not delivered to him. It was held that plaintiff was the "consignee aggrieved," within a statute giving such party a right to recover a penalty for failure to adjust, within the statutory period, a claim for nondelivery of goods.

38. Hart v. Walton, 9 Cal. A. 502, 99 P 719 (holding that a person who has succeeded to all the rights of a grantee of a deed of property is a party aggrieved so as to apply for its reformation on the ground of mistake in the description of the premises). See generally Reformation of Instruments [34 Cyc 950].

39. Jones v. Riggs, 154 N. C. 281, 70 SE 465.

40. Vail v. Elfer, 121 La. 148, 46 S 134; Triche v. Labicke, 121 La. 138, 46 S 130; In re Clark, 137 NYS 218, 220.

[a] **Failure of secretary of state to count votes.**—A statute provides that if the secretary of state shall at any time neglect or refuse to perform any of the duties enjoined on him by law he shall forfeit to the person aggrieved a certain sum. In construing this statute, the court said: "It cannot be said that a person is not aggrieved by the refusal of the secretary to cast up the votes returned for him because he is not legally elected to the office in reference to which he has received the votes." Switzler v. Rodman, 48 Mo. 197, 200.

41. In re Syracuse, etc., R. Co., 91 N. Y. 1, 2 (holding that, under a statute authorizing any person who may "be aggrieved by, or complain of," any election of directors of a corporation to make application to the supreme court to compel a new election, only some person whose rights have been infringed and who is justly entitled to complain may institute the proceedings).

42. Humphries v. Lawson, 7 Ark. 344.

[a] **Failure to pay over proceeds.**—Under a statute providing in effect that if an officer sells property at execution sale and fails to pay over the money a party aggrieved may proceed against such officer by motion before the court, it was held that defendant in the execution was not a party aggrieved within the meaning of the statute. Humphries v. Lawson, 7 Ark. 344, 347.

43. Æolian Co. v. Royal Music Roll Co., 196 Fed. 926, 928.

44. See cases infra this note; and generally Insane Persons [22 Cyc 1132].

[a] **The lunatic.**—In In re Kane, 12 Mont. 197, 29 P 424, it was held that a person who was adjudged insane and for whose person and estate a guardian had been appointed was a person aggrieved by the order.

[b] **A wife,** the validity of whose marriage is affected by an inquisition in lunacy, is a "person aggrieved" within a statute giving such person a right to traverse the finding. Com. v. Pitcairn, 204 Pa. 514, 516, 54 A 328.

[c] **Relatives of lunatic.**—In In re Wolf, 195 Pa. 488, 46 A 72, it was held that the right to traverse an inquisition of lunacy, which by statute was confined to persons aggrieved, belonged only to persons related to the lunatic by blood or marriage and persons having an interest in his estate.

45. See Municipal Corporations [28 Cyc 1170]; Highways [37 Cyc 160].

[a] **Owner.**—Prima facie, and in the absence of modifying facts, it is the owner of land who is aggrieved by the imposition of an unlawful assessment. Consequently one who purchased land after the confirmation thereon of an assessment for a local improvement, and who took, by the terms of his deed, "subject to any and all assessments," is a party aggrieved within the meaning of the act of 1858, entitling the "party aggrieved" to move to vacate the assessment. In re Gantz, 85 N. Y. 536, 538.

[b] **Mortgagee.**—In In re Walter, 75 N. Y. 354, 357, it was held that a mortgagee of the property who has foreclosed his mortgage and purchased the property for a sum less than the assessments and less than the mortgaged debt is "a person aggrieved" within the meaning of a statute relating to local assessments.

[c] **Payment of assessment as part consideration.**—In a proceeding to vacate an assessment for a street improvement it appeared that the petitioner purchased the land assessed after the work had been begun and before the assessment had been laid. The land was conveyed to him subject to any assessment to be made for the work, and the payment of the assessment was made the principal consideration for the conveyance. It was held that it could not be said, as matter of law, that the petitioner was not a party aggrieved. In re Pennie, 108 N. Y. 364, 15 NE 611.

46. Kolb v. Mortimer, 135 App. Div. 542, 120 NYS 543; North River Sav. Bank v. Buckley, 130 NYS 787, 788.

"It is quite true that the mere presence of irrevelant or redundant matter in a pleading does not justify a motion to strike such matter from the pleading, under section 545 of the Code of Civil Procedure. It must also appear that the moving party is 'aggrieved thereby.' The tendency of recent decisions, however, is to the

taxation,[47] and trade-marks;[48] also in connection with probate proceedings,[49] certiorari proceedings,[50] and in connection with the right of appeal.[51]

AGIST.[52] To take to graze or pasture at a certain sum.[53]

AGISTMENT. The taking and feeding of other men's cattle in the king's forest, or on one's own land, at a certain rate;[54] where a person takes in and feeds or depastures horses, cattle, or similar animals upon the land for reward.[55]

AGISTOR or AGISTER.[56] One who agists;[57] one who takes the cattle of another into his own ground to be fed for a consideration to be paid by the owner;[58] a person who takes horses or cattle into his fields to graze during the summer, or into his barn and stockyards to feed during the winter.[59]

AGNACION. In Spanish law, relationship through males (agnados) only.[60]

AGNOSTIC.[61]

AGONY. Violent pain of body or mind.[62]

AGREE.[63] To promise;[64] to contract;[65] to grant;[66] to assent;[67] to engage;[68] to find.[69] The

effect that a party is aggrieved, within the meaning of said section 545, when such irrelevant or redundant matter appears in a pleading which requires an answer or reply. Chittenden v. San Domingo Impr. Co., 125 App. Div. 855, 110 NYS 148; Hamilton v. Hamilton, 124 App. Div. 619, 109 NYS 221; Schroeder v. Post, 3 App. Div. 411, 38 NYS 677; Schroeder v. Young, 49 App. Div. 640, 63 NYS 110. As stated in the case last cited, when a plaintiff pleads his evidence, the defendant is 'a person aggrieved' by such statements of evidence when he is required to admit, deny, or ignore them in an action at law. It may be that he cannot deny them, and a plaintiff is not at liberty to thus embarrass his adversary, or to place him in the dilemma of determining for himself, at his peril, whether he should deny allegations which are clearly immaterial as matter of pleading, or whether he may safely ignore them; and when such is the case the defendant is aggrieved, and may require such immaterial allegations to be stricken from the complaint." Cleminshaw v. Coon, 136 App. Div. 160, 162, 120 NYS 181.

[a] **Motion to strike out irrelevant matter.**—Under the code provision that any person aggrieved by irrelevant or scandalous matter may have it stricken out on motion, plaintiff's attorney who was the person injured was aggrieved within the meaning of the statute, and could properly make such motion. Wehle v. Loewy, 2 Misc. 345, 347, 21 NYS 1027.

47. See cases infra this note; and generally Taxation [37 Cyc 1083].

[a] **Corporation.**—Where it appears that a corporation has no personalty subject to taxes, it sufficiently appears that it was aggrieved, so as to entitle it to a cancellation of a tax. Peo. v. Feitner, 92 App. Div. 518, 522, 87 NYS 304.

[b] **One adversely affected.**—In construing a statute providing that a person aggrieved by the taxes assessed upon him may maintain a petition for the abatement of taxes the court said: "As used in this statute, the words 'a person aggrieved' mean one whose pecuniary interests are or may be adversely affected." Hough v. North Adams, 196 Mass. 290, 291, 82 NE 46.

48. Powell v. Birmingham Vinegar Brewery Co., [1894] A. C. 8. See generally Trade-Marks and Trade-Names [38 Cyc 860].

[a] **Any trader.**—The Patents, Designs, and Trade Marks Act of 1883 provides that a court may, on the application of any "persons aggrieved" by the entry of a trade-mark made without sufficient cause, make an order for expunging the entry. The court held that any trader is, in the sense of the statute, aggrieved whenever the registration of a particular trade-mark operates in restraint of what would otherwise have been his legal rights. In Powell v. Birmingham Vinegar Brewery Co., [1894] A. C. 8, 10, 12.

49. See cases infra this note; and generally Wills [40 Cyc 1351].

[a] **Illustrations.**—(1) In Betts v. Shotton, 27 Wis. 667, it was held that any person who had acquired an interest in land under an administrator's sale by order of the probate court was aggrieved by an order of the probate court vacating the proceeding. (2) And in O'Rourke v. Elsbree, 11 R. I. 430, it was held that the assignee of a fractional part of a residuary interest under a will was a person aggrieved and might appeal from a decree of the probate court.

50. Peo. v. Willcox, 207 N. Y. 86, 100 NE 705, 45 LRANS 629; Peo. v. Raymond, 131 App. Div. 160, 115 NYS 275.

51. See Appeal and Error [2 Cyc 627].

52. See Agister; Agistment.

53. Webster D. [quot Williams v. Miller, 68 Cal. 290, 293, 9 P 166].

54. Webster D. [quot Williams v. Miller, 68 Cal. 290, 293, 9 P 166].

55. Auld v. Travis, 5 Colo. A. 535, 39 P 357, 358. See Animals § 53.

56. **Agistor or Agister:**
Generally see Animals § 53.
Allegation of ownership in indictment for larceny from see Larceny [25 Cyc 90].
Lien of see Animals § 57; Chattel Mortgages [7 Cyc 37].
Trover by see Trover and Conversion [38 Cyc 2053].

57. Williams v. Miller, (Cal.) 6 P 14.

58. Bass v. Pierce, 16 Barb. (N. Y.) 595, 596 [cit Bouvier L. D.].

[a] **Not an insurer.**—See Bass v. Pierce, 16 Barb. (N. Y.) 595, 596.

59. Pearce v. Sheppard, 24 Ont. 167, 170. See also Skinner v. Caughey, 64 Minn. 375, 377, 67 NW 203; Rooth v. Wilson, 1 B. & Ald. 59, 61, 106 Reprint 22.

[a] **Test of care by.**—Pearce v. Sheppard, 24 Ont. 167, 170.

60. Escriche Diccionario. See Relationship [34 Cyc 1036].

61. **Agnostic:**
Competency as witness see Witnesses [40 Cyc 2202].
Constitutional rights see Constitutional Law [8 Cyc 884].
Credibility as witness see Witnesses [40 Cyc 2555].
Oath of see Oaths and Affirmations [29 Cyc 1299].
Test for officer see Officers [29 Cyc 1378].

62. Chicago v. McLean, 133 Ill. 148, 153, 24 NE 527, 8 LRA 765 (an action for personal injuries, where, in the declaration averring that plaintiff "suffered great pain and agony," it was held that under this declaration evidence was admissible that plaintiff's mind was affected by the injury, since agony is violent pain of mind as well as of body).

63. See Agreement post.

64. Bodley v. Roop, 6 Blackf. (Ind.) 158, 159; Packard v. Richardson, 17 Mass. 122, 131, 9 AmD 123; Avery v. Tyringham, 3 Mass. 160, 176, 3 AmD 105; Newcomb v. Clark, 1 Den. (N. Y.) 226, 229; Merchants' Nat. Bank v. Columbia Spinning Co., 21 App. Div. 383, 386, 47 NYS 442; Corbett v. Packington, 6 B. & C. 268, 273, 13 ECL 131, 108 Reprint 451; Mountford v. Horton, 2 B. & P. N. R. 62, 127 Reprint 545; Century D. [quot Merchants' Nat. Bank v. Columbia Spinning Co., supra.

[a] **In a contract of guaranty** the word "agree" does not import a consideration within the statute of frauds. The word "agree" implies nothing more than a promise. Newcomb v. Clark, 1 Den. (N. Y.) 226, 229.

[b] **"Bargain" distinguished.**— "A man may agree to pay money, or to perform some other act; and the word is then used synonymously with promise or engage. But the word bargain is seldom used, unless to express a mutual contract or undertaking." Packard v. Richardson, 17 Mass. 122, 131, 9 AmD 123.

65. Mott v. Jackson, 172 Ala. 443, 457, 55 S 528; McKisick v. McKisick, Meigs (Tenn.) 427, 433.

[a] **Importing covenant.**—(1) The word "agree" in a deed will make a covenant, and, although in the connection it is applicable to both parties, it may be referred to that party upon whom the doing or not doing the thing agreed upon devolved. Randel v. Chesapeake, etc., Canal Co., 1 Del. 151, 172. See also Hinkley v. Fowler, 15 Me. 285, 290. (2) The word "covenant" is not more powerful than the word "agree" as used in a deed of settlement of marriage. Monypenny v. Monypenny, 9 H. L. Cas. 114, 137, 11 Reprint 671.

[b] **Not synonymous with covenant.**—See Providence Telegram Pub. Co. v. Crahan Engraving Co., 24 R. I. 175, 52 A 804.

"It is hereby agreed" see infra text and note 94.

66. Bailey v. Agawam Nat. Bank, 190 Mass. 20, 23, 76 NE 449, 112 AmSR 296, 3 LRANS 98; Hogan v. Barry, 143 Mass. 538, 539, 10 NE 253. See also Seibert v. Grace, 138 Ill. A. 361; McGrath v. Boston, 103 Mass. 369; Kabley v. Worcester Gas Light Co., 102 Mass. 392, 394; Ver Steeg v. Becker-Moore Paint Co., 106 Mo. A. 257, 80 SW 346; Western Boat, etc., Co. v. Gannon, 50 Mo. A. 642, 646; Doe v. Benjamin, 9 H. & E. 644, 36 ECL 341, 112 Reprint 1356; Doe v. Ries, 8 Bing. 178, 21 ECL 496, 131 Reprint 369; Chapman v. Bluck, 4 Bing. N. Cas. 187, 192, 33 ECL 662, 132 Reprint 760.

[a] **As affected by position with reference to other clauses in deed.**—"Agree," as used in a deed providing that the "grantors agree that no building shall be erected on said lot next east of said granted premises nearer to the west line of said lot than four feet," means the same as the word "grant," and therefore where such clause is inserted after the description, and before the habendum clause, an easement attached to the land conveyed. Hogan v. Barry, 143 Mass. 538, 539, 10 NE 253.

67. Thornton v. Kelly, 11 R. I. 498, 499. See also Bruder v. Gusler, 47 Misc. 370, 371, 94 NYS 2.

[a] **Stipulations on railway tickets.**—In Wells v. New York Cent. R. Co., 24 N. Y. 181, 183, plaintiff accepted a free ticket from a railroad, on which was indorsed: "The person accepting this free ticket assumes all risks, &c., and expressly agrees," etc. In an action for personal injuries, it was held that plaintiff could not recover. The court, by Gould, J., said: "There being made some question whether the indorsement on the ticket ('the person accepting this free ticket assumes all risks, &c., and expressly agrees,' &c.) is a contract, on the part of the passenger, with the company; it seems necessary to say that the word 'agreed' means the concurrence of two parties; and that the act of acceptance binds the acceptor as fully as his hand and seal would."

68. Packard v. Richardson, 17 Mass. 122, 131, 9 AmD 123.

69. Benedict v. State, 14 Wis. 423.

word "agree" is sometimes used to signify an offer merely;[70] but, properly speaking, it imports concurrence or assent,[71] and a consideration.[72]

In the past tense—"agreed"—the term means brought into harmony; united in opinion; settled by consent;[73] in a technical sense it is sometimes used as synonymous with "promised,"[74] or "contracted."[75] It imports mutuality.[76]

In its participial form, "agreeing," the word means promising; assenting.[77]

Phrases in which these words have been used have received judicial interpretation such as "agrees to cancel,"[78] "agree to forward,"[79]

428. See also San Francisco Sav. Union v. Myers, 76 Cal. 624, 18 P 686.

[a] **Use in verdict.**—A verdict that the jury, after deliberation, agree that the said defendant is guilty was held sufficient. The court said: "The word 'find' is more commonly used, but the word 'agree,' where employed with reference to the verdict of a jury, particularly in criminal cases, means precisely the same thing. Both signify that the jury, upon consideration of the evidence, have determined that the accused is guilty or not guilty of the crime charged. The word 'agree' is almost invariably used when the jury are addressed upon the subject of their verdict. Mr. Chitty says (1 Chitty Cr. L. 635), that when the jury have come to a unanimous determination with respect to their verdict and return to the box to deliver it, the clerk then calls them over by their names and asks them whether they agree on their verdict; and it certainly cannot be a bad answer, if they reply that they do agree, and state what that agreement is." Benedict v. State, 14 Wis. 423, 428.

70. Marshall v. Old, 14 Colo. A. 32, 59 P 217, 218; Riner v. Husted, 13 Colo. A. 523, 58 P 793, 794; Chicago, etc., R. Co. v. Dane, 43 N. Y. 240, 242; Thornton v. Kelly, 11 R. I. 498, 499.

[a] **For example,** where carriers wrote to defendants: "We hereby agree to receive in this port (New York), either from yard or vessel, and transport . . . not exceeding six thousand tons gross (2,240 lbs.) in and during the months of . . . upon the terms and for the price herein after specified," referring to railroad iron, and plaintiff answered, "I assent to your agreement, and will be bound by its terms," it was manifest that the word "agree" in the letter was used as synonymous with the word "offer," the letter being a mere proposition to transport for plaintiff any quantity of iron on the terms specified, not exceeding six thousand tons. Chicago, etc., R. Co. v. Dane, 43 N. Y. 240, 242.

[b] **"Agree," when employed unilaterally,** is equivalent to the word "offer," so that the assent of the other party is necessary in order to make a contract. Marshall v. Old, 14 Colo. A. 32, 59 P 217, 218 [cit Chicago, etc., R. Co. v. Dane, 43 N. Y. 240].

[c] **Withdrawal of offer.**—"Agree," as used in a letter stating that I hereby "agree" to purchase certain bonds, subject to approval by some lawyer, will be held to have been used in the sense of "offer," which might be withdrawn any time before acceptance, and not as constituting a contract to purchase absolutely. Riner v. Husted, 13 Colo. A. 523, 58 P 793, 794.

71. Thornton v. Kelly, 11 R. I. 493, 499; Ives v. Hazard, 4 R. I. 14, 67 AmD 500. See also Martin v. Adams, 104 Mass. 262, 263.

[a] **Illustrations.**—(1) "Agree," as used in a contract wherein one party agrees to pay the expenses of a specified improvement, is to be deemed the word of both, and implies an undertaking by the other party to make the improvement. Baldwin v. Humphrey, 44 N. Y. 609, 615. (2) It means an agreement by both parties, and when used in a contract for services imports that the employer agreed to employ the servant in consideration that the servant would serve the master. Payne v. New South Wales Coal, etc., Co., 10 Exch. 283, 291.

[b] **The Election Law** provides that if the board of supervisors cannot agree upon the appointment of ballot clerks, then the names of three persons who are eligible shall be submitted, etc. "The word 'agree,' as thus used, means a concurrence or agreement of each supervisor and does not mean that a mere majority shall have the power to appoint without regard to the minority supervisor." Sudler v. Lankford, 82 Md. 142, 147, 33 A 455.

72. Schneider v. Turner, 27 Ill. A. 220; Andrews v. Pontue, 24 Wend. (N. Y.) 285; Newcomb v. Clark, 1 Den. (N. Y.) 226, 228; Davies v. Wilkinson, 3 Jur. 405. But see Payne v. New South Wales Coal, etc., Co., 10 Exch. 283 (where it was held that "agreed" did not show consideration, but merely a promise).

73. Standard D. [quot Mott v. Jackson, 172 Ala. 448, 457, 55 S 528].

74. Pierson v. Springfield F. & M. Ins. Co., 12 Del. 307, 325, 31 A 966; North v. Kizer, 72 Ill. 172, 175; Bodley v. Roop, 6 Blackf. (Ind.) 158, 159; Merchants' Nat. Bank v. Columbia Spinning Co., 21 App. Div. 383, 386, 47 NYS 442; Jenkinson v. Vermillion, 3 S. D. 238, 241, 52 NW 1066; Payne v. New South Wales Coal, etc., Co., 10 Exch. 283, 290; Corbett v. Packington, 6 B. & C. 268, 273, 13 ECL 131, 108 Reprint 451.

[a] **In actions of assumpsit.**—In Corbett v. Packington, 6 B. & C. 268, 273, 13 ECL 131, 108 Reprint 451, it was held that the word "agreed" was equivalent to the word "promised." In that case it was argued that a count could not be in assumpsit because the word "promised" did not appear, but the court held that the word "agreed" implied this. To same effect Pierson v. Springfield F. & M. Ins. Co., 12 Del. 307, 325, 31 A 966; North v. Kizer, 72 Ill. 172, 175; Hinkley v. Fowler, 15 Me. 285, 288; Packard v. Richardson, 17 Mass. 122, 131, 9 AmD 123; Avery v. Tyringham, 3 Mass. 160, 176, 3 AmD 105.

[b] **Affidavits.**—The word "agreed" as used in an affidavit made by the cashier of a bank to secure an attachment against corporation, in which he alleged that he had been informed that the corporation had executed and delivered to the bank a written instrument by which it was agreed that in case of its failure all the claims of the bank should immediately become payable, was held not to state a legal conclusion. The court said: "But one meaning of the verb 'to agree' is 'to promise,' and the two words are given as synonyms by the Century Dictionary. It seems to us, therefore, that the use of the word 'agreed,' in the connection in which it is employed, should not be held to characterize the language which follows as the legal conclusions of the affiant, instead of the context of the writing or its purport." Merchants' Nat Bank v. Columbia Spinning Co., 21 App. Div. 383, 386, 47 NYS 442.

[c] **"Promised" and "undertook" synonymous.**—(1) "Agreed," as used in a complaint alleging that a party "agreed" to do a certain thing, must be taken as synonymous with "promised" or "undertook," signifying that he agreed in a valid and legal manner, so that if under the circumstances an oral promise cannot constitute an enforceable agreement the effect of the allegation is to plead a written promise, since otherwise defendant would not have "agreed" for the purpose of the complaint. Jenkinson v. Vermillion, 3 S. D. 238, 241, 52 NW 1066. (2) Where a declaration in an action of assumpsit for hogs sold averred that after making the contract it was "agreed" between the parties that the delivery should be extended to a certain day, it was held that the use of the word "agreed" in such count did not make the declaration one in "debt," since the count may show notwithstanding defendant "undertook and promised" to accept and pay for the hogs. North v. Kizer, 72 Ill. 172, 175.

[d] **"Understood" synonymous.**—See Mount v. Montgomery County, 168 Ind. 661, 666, 80 NE 629, 14 LRANS 483.

75. See McKisick v. McKisick, Meigs (Tenn.) 427, 433 [quot Mott v. Jackson, 172 Ala. 448, 457, 55 S 528] (holding that "agreed," as used in a bill averring that defendant agreed that his daughter was to have certain slaves at her majority, has a technical meaning, and is synonymous with "contracted," and hence evidence that defendant gave the slaves to his daughter did not support the allegation).

76. Greene v. Creighton, 7 R. I. 1, 8.

[a] **Concurrence of parties.**—(1) If, in a written contract signed by two, it is said that it is agreed that one shall furnish the other with certain property at a specified price, this imports a promise by the latter to accept and pay for, "agreed" is to be deemed the word of both parties. Barton v. McLean, 5 Hill (N. Y.) 256, 258; Richards v. Edick, 17 Barb. (N. Y.) 260. (2) "Agreed" means the concurrence of both parties. Wells v. New York Cent. R. Co., 24 N. Y. 181, 183; Thornton v. Kelly, 11 R. I. 498, 499. (3) "'Agreed,' ex vi termini, means that it is the agreement of both parties, (whether both sign it or not,) each and both consenting to it." Aikin v. Albany, etc., R. Co., 26 Barb. (N. Y.) 289, 298; Pordage v. Cole, 1 Saund. 319, 320, 85 Reprint 449, 18 ERC 601. (4) Where one party to a contract agrees to pay the expense of a specified improvement, "agree" is to be deemed the word of both and implies an undertaking by the other party to make the improvement. Baldwin v. Humphrey, 44 N. Y. 609.

77. Tanner v. Moore, 9 Q. B. 1, 6, 58 ECL 1, 115 Reprint 1176.

[a] **No variance.**—A declaration in assumpsit stated that T had commenced an action against M for £165, and that, in consideration of T's "agreeing to stay the said action," defendant promised to pay T the £165 within six months next after the decease of A. The promise, as proved, was to pay as above, in consideration of T's "having agreed" to stay the action. It was held no variance, and that a valid consideration was proved. Tanner v. Moore, 9 Q. B. 1, 6, 58 ECL 1, 115 Reprint 1176.

78. Bruder v. Geisler, 47 Misc. 370, 371, 94 NYS 2.

[a] **"Agrees to cancel said lease."**—A provision in a lease that the tenant "agrees to cancel said lease" upon a certain contingency is equivalent to saying that the tenant "agrees that the lease shall be thereby canceled," and does not contemplate any act by the tenant to complete the cancellation. Bruder v. Geisler, 47 Misc. 370, 371, 94 NYS 2.

79. Standard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258, 272, 26 SW 704 (holding that, under a stipulation in a bill of lading that the company "agree to forward" and deliver the freight to the consignee,

"agree to lease" or "agree to let,"[80] "agree to pay,"[81] "agree to sell,"[82] "agreed abstract,"[83] "agreed case,"[84] "agreed judgment,"[85] "agreed order,"[86] "agreed to,"[87] "agreed to give,"[88] "agreed upon by both powers,"[89] "dismissed agreed,"[90] "agreed and undertook,"[91] "hath agreed to sell and has sold" and "hath agreed to purchase and has purchased,"[92] "assumes and agrees to pay,"[93] "it is hereby agreed,"[94] "it is mutually

"the damages incident to railroad transportation, loss or damage by fire, or the elements, while at depots excepted," the company is not liable for damages from those causes at depots where the cars containing the freight stop while in transit).

80. See cases infra this note.

[a] **Apt words of a present demise.**—The words "agree to let" and "agree to lease" have been held to be apt words of a present demise, and to mean the same thing as the word "let," unless there is something in the instrument to show that a present demise could not have been in the contemplation of the parties. Seibert v. Grace, 138 Ill. A. 361, 363; McGrath v. Boston, 103 Mass. 369, 371; Kabley v. Worcester Gas Light Co., 102 Mass. 392, 394; Ver Steeg v. Becker-Moore Paint Co., 106 Mo. A. 257, 279, 80 SW 346; Western Boot, etc., Co. v. Gannon, 50 Mo. A. 642, 646; Doe v. Benjamin, 9 A. & E. 644, 650, 36 ECL 341, 112 Reprint 1356; Doe v. Ries, 8 Bing. 178, 183, 21 ECL 496, 131 Reprint 369; Chapman v. Bluck, 4 Bing. N. Cas. 187, 192, 33 ECL 662, 132 Reprint 760.

[b] **Executory contract for lease.**—(1) "Agreed to let," as used in an instrument which contained no mention of any length of term except that in the stipulation "to make a lease," where no agreement for entry before the lease is made, or that the proposed tenant shall commence his occupation before the landlord shall have made certain repairs, is an executory contract for lease to be begun hereafter, and not as a present demise. McGrath v. Boston, 103 Mass. 369, 371. (2) The words "I hereby agree to give a lease" have been construed to be an agreement to give a lease, and not to be a lease, where the facts showed this to be the intention of the parties. St. Louis Brewing Assoc. v. Niederluecke, 102 Mo. A. 303, 307, 76 SW 645.

81. See cases infra this note.

[a] **In deed.**—(1) The words "agree to pay," in a deed of land subject to mortgage, which contains a covenant against encumbrances except mortgages, which mortgages the said second party shall accept and agree to pay, do not show an assumption of the mortgages by the grantee in the absence of other evidence explaining the language. Hopper v. Calhoun, 52 Kan. 703, 704, 35 P 816, 39 AmSR 368. (2) But the words "agrees to pay," in a deed which recites that the grantee expressly agrees to pay a certain mortgage on the land, render the grantee personally liable for the mortgage debt. Bay v. Williams, 112 Ill. 91, 93, 1 NE 340, 54 AmR 209; Lappen v. Gill, 129 Mass. 349, 350; Saunders v. McClintock, 46 Mo. A. 216, 223; Davis v. Hulett, 58 Vt. 90, 4 A 139.

"Assumes and agrees to pay" see infra text and note 93.

82. Thornton v. Kelly, 11 R. I. 498, 499.

[a] **Chattels.**—A writing, in which A "agrees to sell" to B chattels of A then being, and described as being, in B's possession, for a sum payable on or before a certain day, and B "agrees to purchase the above named articles as above stated, and pay for the same as fast as he can," and pay the sum before the specified day or return the chattels in good condition, free from any debts contracted by him, is an agreement for a present sale. Martin v. Adams, 104 Mass. 262, 263.

[b] **Real property.**—The words "I agree to sell," etc., in a contract for the sale of land have been held to import a concluded agreement, and not a mere offer to sell. The court said: "We think the language imports an agreement to sell. The language is, 'I agree to sell;' the consideration is expressed, and the time when possession is to be given is fixed by the memorandum. The mention of the time when possession is to be given, and when the price of the land is payable, indicates that the parties deemed the agreement a concluded one." Ives v. Hazard, 4 R. I. 14, 27, 67 AmD 500. To same effect Brodack v. Morsbach, 38 Wash. 72, 80 P 275.

[c] **Within statute of frauds.**—A memorandum of contract containing the phrase "I hereby agree to sell" is a complete contract within the statute of frauds. Thornton v. Kelly, 11 R. I. 498, 499.

83. See Appeal and Error [3 Cyc 88].

84. **Agreed case:**
Generally see Submission of Controversy [37 Cyc 346].
Appeal from or writ of error upon judgment rendered on see Appeal and Error [2 Cyc 622].
On appeal see Appeal and Error [3 Cyc 74].
Submission to arbitrators see Appeal and Error [3 Cyc 598].

85. See Judgments [23 Cyc 699].

86. H. B. Claflin Co. v. Gibson, (Ky.) 51 SW 439, 440.

[a] **Order made in due course distinguished.**—The only difference between an "agreed order" and one which is made in the due course of the proceedings in an action is that in the one case it is agreed to, and in the other it is made as authorized by law. A receiver who acts under an agreed order is acting as an officer of the court, as much as he would be in acting under an order made without agreement, in the due course of proceedings in the case, and his sureties on the official bond which he gives are as much bound in the one case as in the other, because he is acting under an order of the court. H. B. Claflin Co. v. Gibson, (Ky.) 51 SW 439, 440.

87. San Francisco Sav. Union v. Myers, 76 Cal. 624, 18 P 686; Crawford v. Gilchrist, 64 Fla. 41, 56, 59 S 963, AnnCas1914B 916 ("agreed to" by the senate).

[a] **Use in judgment.**—A judgment which recited a hearing and purported to have been rendered upon the evidence was indorsed "agreed to." It was held that this did not constitute a consent judgment, especially as the alleged stipulation of consent was not made a part of the bill of exceptions. The words "agreed to" might mean nothing more than that the judge agreed to the judgment as properly expressing the judgment ordered by the court. San Francisco Sav. Union v. Myers, 76 Cal. 624, 625, 18 P 686.

88. Shirley v. Shirley, 59 Pa. 267, 272.

[a] **Not a present transfer.**—Where a father and sons executed an agreement whereby the father "agreed to give" his sons his plantation to farm, etc., and in consideration the sons agreed to bind themselves to keep the father and his wife in everything they needed for their comfort, etc., during their lives, and pay the father's debts, it was held that the phrase "agreed to give" did not indicate an intention that the agreement should operate as a present transfer of the land, but that it was merely a contract to allow the sons to farm the land and maintain the parents, being compensated by what they could make. Shirley v. Shirley, 59 Pa. 267, 272.

89. Ponce v. Porto Rico Roman Catholic Apostolic Church, 210 U. S. 296, 309, 28 SCt 737, 52 L. ed. 1068.

[a] **The civil code in force in Cuba, Porto Rico, and the Philippines** at the time of the Treaty of Paris (30 U. S. St. at L. 1754) contains this provision: "Art. 38. Judicial persons may acquire and possess property of all kinds as well as contract obligations and institute civil or criminal actions in accordance with the laws and rules of their establishment. The church shall be governed in this particular by what has been agreed upon by both powers and educational and charitable institutions by the provisions of special laws." The court, per Fuller, C. J., said: "The phrase 'agreed upon by both powers' refers to the 'concordats,' or treaties between the Holy See and the Spanish crown, which recognize the right of the church to possess and acquire property." Ponce v. Roman Catholic Apostolic Church, 210 U. S. 296, 309, 28 SCt 737, 52 L. ed. 1068.

90. Haldeman v. U. S., 91 U. S. 584, 586, 23 L. ed. 433.

[a] **As entry of judgment.**—The words "dismissed agreed," entered as the judgment of a court, do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment. The court said: "But the general entry of the dismissal of a suit by agreement is evidence of an intention, not to abandon the claim on which it is founded, but to preserve the right to bring a new suit thereon, if it becomes necessary. It is a withdrawal of a suit on terms, which may be more or less important." Haldeman v. U. S., 91 U. S. 584, 586, 23 L. ed. 433.

91. See cases infra this note.

[a] **Meaning "promised."**—Bodley v. Roop, 6 Blackf. (Ind.) 158, 159; Mountford v. Horton, 2 B. & P. N. R. 62, 63, 127 Reprint 545.

92. Jackson v. Moncrief, 5 Wend. (N. Y.) 26, 29 (where a contract reciting that S "hath agreed to sell and has sold" to F and that F "hath agreed to purchase and has purchased" the lease of certain property, and providing that the consideration for such lease was certain property for which F was to give a "good and sufficient warrantee deed" on or before the first day of May next, at which time or before conveyance was "to be made by both parties of the property hereby agreed to be conveyed," was held an agreement to convey, and not a conveyance).

93. See cases infra this note.

[a] **Mortgage or other encumbrance.**—(1) Where a purchaser accepts and holds a conveyance of real estate wherein it is recited that said purchaser assumes and agrees to pay an encumbrance thereon, he thereby subjects himself to a liability to the holder thereof which may be enforced by a personal action. Saunders v. McClintock, 46 Mo. A. 216. To same effect Davis v. Hulett, 58 Vt. 90, 4 A 139. (2) An allegation in the complaint in an action to foreclose a mortgage, that the grantees of the mortgagor, who were made defendants, "assumed and agreed" to pay the mortgage debt, is not the statement of two distinct propositions, but the word "assumed" as used in the allegation is synonymous with the word "agreed;" and a denial in the answer by such grantees that they "assumed and agreed" to pay the mortgage debt is not a conjunctive or evasive denial, but is sufficient to raise an issue as to such allegations; and a finding of fact, based upon a supposed admission of the pleadings as to their assumption and agreement to pay the debt, is erroneous. Jones v. Eddy, 90 Cal. 147, 149, 27 P 190.

94. See cases infra this note.

agreed,'"[95] "terms of peace are agreed upon,'"[96] "agreeing to work claim,'"[97] "agreeing to give or receive bribe.'"[98]

Agreed statement of facts.[99] A substitute for evidence of the facts.[1]

AGREEABLE. Suitable; conformable; correspondent.[2]

AGREEABLY. In an agreeable manner.[3]

AGREEMENT.[4] In its broad and comprehensive sense, demonstrated by general usage,[5] a coming or knitting together of minds;[6] a coming together in opinion or determination;[7] the coming together in accord, of two minds, on a given proposition,[8] the union of two or more minds, or a concurrence of views and intention;[9] the union of two or more minds in a thing done or to be done;[10] the concord of two or more minds;[11] an assent of two minds to the same thing;[12] a mutual assent[13] to do a thing;[14] understanding.[15] In short, everything done or committed by the compact of two minds is universally and familiarly called an agreement.[16] The term may also refer to an act done;[17] the

[a] **The words in a deed,** "it is hereby agreed," make of the words that follow a covenant. Blood v. Crew Levick Co., 171 Pa. 328, 334, 33 A 344. To same effect Randel v. Chesapeake, etc., Co., 1 Del. 151, 172; Hinkley v. Fowler, 15 Me. 285.

95. Mosher v. Southern Express Co., 38 Ga. 37, 42.

[a] **In connecting carrier's receipt.**—Where a printed receipt containing the words "it is mutually agreed" was given by a common carrier to a shipper on the taking of goods to be sent to a certain place, it was held that a loss of the goods beyond the line of the company which gave the receipt must be paid for, as the shipper did not know that the company's line extended only to a certain point; there could be no mutual agreement in such a case. Mosher v. Southern Express Co., 38 Ga. 37, 42.

96. Hylton v. Brown, 12 F. Cas. No. 6,982, 1 Wash. C. C. 343 (where it is said that terms of peace are agreed upon when the ministers have come to an understanding as to the terms of the treaty and have reduced them to writing, and that they are concluded when the agreement thus understood has received its last form by being signed and duly executed by the ministers).

97. Caley v. Portland, 18 Colo. A. 390, 71 P 892, 893.

[a] **Continuous work not implied.**—"A reasonable construction must be put upon the contract of August 20th between appellant and appellees, and it was so construed at the former hearing in Caley v. Portland, 12 Colo. A. 397, 56 P 350, the court saying: 'The words, "The said F. T. Caley agreeing to work said claim," do not call for continuous working. All that they did require was a reasonable amount of work with reference to the object to be attained, to wit, the extraction at a profit of ores from the territory.'" Caley v. Portland, 18 Colo. A. 390, 71 P 892, 893.

98. Chadwick v. U. S., 141 Fed. 225, 236, 72 CCA 343.

[a] **Two distinct offenses.**—The act of agreeing to receive a bribe is, under the United States statute, a substantive offense and the act of agreeing to give such a bribe is another. Chadwick v. U. S., 141 Fed. 225, 236, 72 CCA 343 [foll U. S. v. Deitrich, 126 Fed. 664].

99. **Agreed statement of facts:**
Affecting:
Admissibility of evidence see Trial [38 Cyc 1328].
Conclusiveness between bill of exceptions and conflicting subsequent statement of facts see Appeal and Error [3 Cyc 155].
As to contents of transcript of record on appeal see Appeal and Error [3 Cyc 103].
Fly garnishee, effect of see Garnishment [20 Cyc 1084].
Nature and effect of see Stipulations [36 Cyc 1288].
Necessity of exception to decision of trial court for purpose of appeal see Appeal and Error [2 Cyc 731].
Presentation of different question on appeal by see Appeal and Error [3 Cyc 180].
Prosecution of appeal on see Appeal and Error [3 Cyc 74].
Trial by court on see Trial [38 Cyc 1934].
See also Stipulations [36 Cyc 1279].

1. U. S. Trust Co. v. New Mexico, 183 U. S. 535, 22 SCt 172, 46 L. ed. 315; Towle v. Sweeney, 2 Cal. A. 29, 83 P 74.

[a] **"Agreed case" compared and distinguished.**—(1) "An agreed statement of facts is but a substitute for evidence of those facts, and in this respect differs from an 'agreed case,' which, under section 1138 of the Code of Civil Procedure, may be submitted for decision without any pleadings." Towle v. Sweeney, 2 Cal. A. 29, 31, 83 P 74. (2) "An agreed statement of facts may be the equivalent of a special verdict or a finding of facts upon which a reviewing court may declare the applicable law if such agreed statement is of the ultimate facts [technically an "agreed case"] but if it be merely a recital of testimony or evidential facts, it brings nothing before an appellate court for consideration." U. S. Trust Co. v. New Mexico, 183 U. S. 535, 540, 22 SCt 172, 46 L. ed. 315.

2. Century D.

[a] **"Agreeable to my wishes."**—The testatrix gave the residue of her personal estate "in trust for such of my nieces A. and B. as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes." Jessel, M. R., observed: "What is that but to make them judges of the mode of distribution, and place the residue at their absolute disposal?" Stead v. Mellor, 5 Ch. D. 225, 228.

3. Century D.

[a] **"Agreeably to law,"** as used in a statute providing that a person, to be eligible to election or appointment to office in the military forces of the state, must be a resident of the proper military district, city, or village, implies the existence of other legal provisions on the subject, and refers the question of eligibility entirely to such other provisions. Peo. v. Smith, 23 N. Y. 53, 59.

[b] **"Agreeably to the usual mode of process."**—(1) The Federal Judiciary Act provides that the preliminary proceedings against persons accused of a violation of the criminal enactment shall be "agreeable to the usual mode of process against offenders in such state." In construing this section the court said: "My opinion is, that it was the intention of congress by these words, 'agreeably to the usual mode of process against offenders in such state,' to assimilate all the proceedings for holding accused persons to answer before a court of the United States, to the proceedings had for similar purposes by the laws of the state where the proceedings should take place; and, as a necessary consequence, that the commissioners have power to order a recognizance to be given to appear before them in those states where justices of the peace, or other examining magistrates, acting under the laws of the state, have such power." U. S. v. Rundlett, 27 F. Cas. No. 16,208, 2 Curt. 41, 43 [quot U. S. v. Horton, 26 F. Cas. No. 15,393, 2 Dill. 94, 97]. (2) The term must be construed so as to include all the regulations and steps incident to the proceeding before the officer from its commencement to its termination, as prescribed by the state laws, so far as they may be applicable to the federal courts, so that the authority of a commissioner to take bail for the appearance of an accused person depends on the laws of the state. U. S. v. Sauer, 73 Fed. 671, 674.

4. **Agreement:**
Stipulation see Stipulations [36 Cyc 1279].
Treaty so termed see Treaties [38 Cyc 936].
See also Agree ante p 976; Contracts [9 Cyc 1, 213].

5. See Sage v. Wilcox, 6 Conn. 81, 86.

6. Webster D. [quot Woodworth v. State, 20 Tex. A. 375, 382].

7. Bouvier L. D. [quot Woodworth v. State, 20 Tex. A. 375, 382].

8. Leonard v. Marshall, 82 Fed. 396, 399; Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1, 130. See also U. S. v. Richards, 149 Fed. 443, 450.

[a] **Minds must meet upon subject of agreement.**—(1) "To constitute an agreement the minds of both parties must meet. That means . . . that one cannot make an agreement alone; that both must understand the agreement alike, and must assent to that agreement; or, to use the term the law uses in such a case, the minds of the parties must meet upon the subject of the agreement." Bingham v. Insurance Co. of North America, 74 Wis. 498, 502, 43 NW 494. (2) An agreement "consists of two persons being of the same mind, intention, or meaning, concerning the matter agreed upon." Bouvier L. D. [quot Woodworth v. State, 20 Tex. A. 375, 382].

9. Sage v. Wilcox, 6 Conn. 81, 84.

10. Webster D.; Bouvier L. D. [quot Woodworth v. State, 20 Tex. A. 375, 382].

[a] **An agreement is aggregatio mentium;** that is, where two or more minds are united in a thing done or to be done, or where a mutual assent is given to do or not to do a particular act. Mactier v. Frith, 6 Wend. (N. Y.) 103, 133, 21 AmD 262.

Executed or executory agreement see infra text and note 32.

11. Sage v. Wilcox, 6 Conn. 81, 86.

12. Richardson v. Clements, 89 Pa. 503, 505, 33 AmR 784.

13. Sage v. Wilcox, 6 Conn. 81, 86; Rohr v. Baker, 13 Or. 350, 351, 10 P 627 [cit Reniger v. Fogossa, Plowd. 1, 5, 75 Reprint 1].

14. Bouvier L. D. [quot Woodworth v. State, 20 Tex. A. 375, 382].

15. Barkow v. Sanger, 47 Mis. 500, 507, 3 NW 16.

[a] **"Understanding" synonymous.**—(1) The terms are synonymous, at least to such an extent that where a special query was propounded to a jury as to the existence of an understanding, and they answer that there was no such agreement, the answer was responsive. Barkow v. Sanger, 47 Wis. 500, 507, 3 NW 16. (2) Either word, when used in a question relating to an understanding or agreement, cannot be said to call for a conclusion of the witness. Garrett v. Western Union Tel. Co., 92 Iowa 449, 452, 58 NW 1064, 60 NW 644.

[b] **"Understood" synonymous.**—See Holman v. Clark, 148 Ala. 286, 290, 41 S 765.

16. Sage v. Wilcox, 6 Conn. 81, 84.

17. See Smith v. Schanck, 18 Barb.

result of the mutual assent of two parties to certain terms.[18]

In law, a concord of understanding and intention, between two or more parties, with respect to the effect upon their relative rights and duties, of certain past or future facts or performances;[19] the consent of two or more persons concurring respecting the transmission of some property, right, or benefits, with the view of contracting an obligation,[20] a mutual obligation.[21] Like many other words, the term is sometimes restricted or limited by the subject of its application,[22] and hence may or may not, as the case may be, raise the implication of the existence of a consideration.[23] Accordingly the term may be employed as synonymous with "engagement," "promise," or "undertaking,"[24] or with "compact,"[25] "contract,"[26] "stipula-

(N. Y.) 344, 346 [quot Holcomb v. Campbell, 118 N. Y. 46, 52, 22 NE 1107] (holding that an "agreement" is an act done, and thereby differs from a simple declaration).

18. Chinnock v. Ely, 4 De Gex J. & S. 638, 643, 69 EngCh 488, 46 Reprint 1066 [quot Jones v. Williams, 139 Mo. 1, 84, 40 SW 353, 61 AmSR 436, 37 LRA 682].

19. Black L. D. (2d ed).

20. Bouvier L. D. [quot Hodson v. Carter, 3 Pinn. (Wis.) 212, 216, 3 Chandl. 234].

21. Smith v. Ide, 3 Vt. 290, 299.

22. Sage v. Wilcox, 6 Conn. 81, 85, 87.

If the inquiry be made whether there exists an agreement which the law will enforce, the subject matter limits the signification of the term "agreement," and gives it a new and peculiar meaning. The question does not regard the broad and comprehensive intendment of the term, nor its usual and popular meaning, but the object of inquiry is an agreement of a special nature, distinguished by a legal consideration, and enforceable in the court of justice. The mind, influenced by the popular and most familiar use of the term "agreement," considers the law as pointing to promises only; but if, from any source, it appears that the consideration was meant to be embraced, the peculiar and technical sense of the legal and sufficient contract is intended. The word "agreement," if there be nothing to limit its meaning, regards promises only, and not their consideration. Sage v. Wilcox, supra.

[a] **In intoxicating liquor act.**—The word "agreements" in a statute rendering void agreements to secure charges for intoxicating liquors sold in quantities less than one gallon has been held not to include an account stated. Smyth v. McNeil, 6 N. S. 75.

[b] **In set-off statute.**—In construing the statute, providing that "a defendant may plead set-off or give notice thereof under the general issue, in any action brought upon any contract or agreement, either express or implied," the court said: "This suit is one to recover a penalty for an alleged violation of a statute, and is not for a breach of a contract or agreement. In cases where our courts have held that judgment is not a contract within the meaning of the statute in relation to what may be matters of set-off, they have said that the words 'contract' and 'agreement' are used in their ordinary sense, and not with the intention of embracing every imaginable litigation upon every cause of action." Ambler v. Whipple, 139 Ill. 311, 318, 28 NE 841, 32 AmSR 202; Rae v. Hulbert, 17 Ill. 572, 580; Spurgin v. Kruse, 125 Ill. A. 507, 508.

[c] **In stamp acts.**—(1) A receipt given by an express company for goods delivered to it to be carried by express is not an agreement within the meaning of a stamp act. De Barre v. Livingston, 48 Barb. (N. Y.) 511, 521. (2) The Stamp Act of 1876 provided, among other things, as follows: "When divers letters are offered in evidence to prove agreement between the writers, it shall be sufficient to stamp one of such letters." In construing this act the court said: "Upon the last point, the words of any statute are to be taken in their ordinary and usual signification, and although a promissory note is an agreement to pay money, yet, no one in reading this statute, would consider the word 'agreement' as used therein to have such a signification as would include either of the instruments which are the subjects of our consideration." Minister of Finance v. Bishop, 3 Hawaii 793, 795. (3) An agreement to act as stoker aboard a steamer is within the exemption "memorandum or agreement for the hire of any laborer" in 55 Geo. III c 184, schedule pt I tit Agreement, and does not require a stamp. Wilson v. Zulueta, 14 Q. B. 405, 410, 68 ECL 405, 117 Reprint 159.

[d] **In statute of limitations.**—(1) As used in the statute of limitations defining the time in which an action on a specialty, or any agreement, contract, or promise in writing, must be brought, it is construed not to include a judgment. Kimball v. Whitney, 15 Ind. 280, 282. (2) A tax sale certificate is not an agreement, contract, or promise in writing within the statute of limitations. Richards v. Wyandotte County, 28 Kan. 326, 334. (3) In Lewis v. Norris, 80 Kan. 620, 623, 103 P 134, it was held that a writing acknowledging the receipt of money as belonging to a person named, but which contains no statement of any fact from which the law implies an obligation or promise, is not an "agreement, contract or promise in writing" within the saving clause of the statute of limitations.

[e] **Under a statute requiring lenders of money to employees on salary** on an assignment or note to file a copy of the agreement, assignment, or note with the employer, it was held, where the employee executed a power of attorney to make the note, which was done, that such power of attorney and the note should be construed together and were an agreement within the meaning of the statute. Thompson v. Gimbel, 71 Misc. 126, 129, 128 NYS 210.

23. Sage v. Wilcox, 6 Conn. 81, 86, 86 (where it was said: "Whether a consideration exists, is a distinct idea, and enters not into the popular meaning of the term"); Smith v. Ide, 3 Vt. 290, 299.

In Sage v. Wilcox, 6 Conn. 81, 86, the court said: "In Wain v. Warlters, 5 East 10, 17, 102 Reprint 972, 6 ERC 231, it was said, by Lord Ellenborough, that the word 'agreement,' in a loose and incorrect sense, is sometimes used as synonymous with promise and undertaking, but in its more proper and correct sense, as signifying a mutual contract or consideration between two or more parties. But the word 'agreement,' with much deference to the learned and able jurist, I affirm, is, beyond all comparison, used more frequently to denote a mutual assent of minds without legal consideration, (such as his Lordship intended,) than it is to denote the promise or undertaking of one; and for the truth of this assertion, I appeal to every mind. This is a subject as level to the capacity of an ignorant, as of a learned man, and presents this sole enquiry; in what manner do mankind promulge that operation of minds, denominated mutual assent? Is it not by the term 'agreement?' Are there not hundreds of instances, in which persons are said to agree, where no legal consideration exists, to one, where there is such consideration? Most unquestionably. This fact conclusively shews the broad error of Lord Ellenborough's remark. With the usual felicity of discrimination, for which that learned judge was distinguished, his mind would have perceived, that he blended together two distinct subjects; that is, an agreement, and the cause or consideration inducing it." In Arnold v. Scharbauer, 116 Fed. 492, 497, the court said: "'The very terms 'agreement' or 'contract' signify a mutual agreement 'on consideration between two or more parties.'"

24. Sage v. Wilcox, 6 Conn. 81, 90; Stratford v. Ames, 8 Allen (Mass.) 577, 579; Packard v. Richardson, 17 Mass. 122, 131, 9 AmD 123; Smith v. Ide, 3 Vt. 290, 299; Wain v. Warlters, 5 East 10, 15, 102 Reprint 972, 6 ERC 231 (where it is said that this is a loose and incorrect use of the word).

[a] **"A man may agree to pay money,** or to perform some other act; and the word is then used synonymously with promise or engage." Packard v. Richardson, 17 Mass. 122, 131, 9 AmD 123.

[b] **As used in the statute of frauds,** (1) providing that no suit, in law or equity, shall be maintained upon any agreement to answer for the debt, default, or miscarriage of another, unless the agreement or a memorandum thereof shall be made in writing and signed by the person to be charged therewith, "agreement" should be construed not to be used in its technical sense as being synonymous with "contract" or "mutual obligation," but only to require a written promise. Smith v. Ide, 3 Vt. 290, 300. (2) As used in a statute providing that no action shall be brought on any agreement not to be performed within one year unless the promise, contract, or agreement on which such action shall be brought is in writing, it is synonymous with special promise or undertaking. Sheehy v. Adarene, 41 Vt. 541, 545, 98 AmD 623.

[c] **"Promise" or "undertaking" distinguished.**—Wain v. Warlters, 5 East 10, 17, 102 Reprint 972, 6 ERC 231 [quot Wilcox v. Sage, 6 Conn. 81, 86].

25. Virginia v. Tennessee, 148 U. S. 503, 519, 13 SCt 728, 37 L. ed. 537. **"Compact or agreement"** see infra text and note 41.

26. Durham v. Taylor, 29 Ga. 166, 176; Michael v. Kennedy, 166 Mo. A. 462, 466, 148 SW 983; Sherburne v. Shaw, 1 N. H. 157, 159, 8 AmD 47; Mactier v. Frith, 6 Wend. (N. Y.) 103, 133, 21 AmD 262; Broadwell v. Getman, 2 Den. (N. Y.) 87, 89; Sease v. Dobson, 33 S. C. 234, 236, 11 SE 728; Smith v. Ide, 3 Vt. 290, 299 (not always synonymous).

[a] **An agreement of appraisal** is a contract. An appraiser who makes his award under such agreement is presumed to have acted in accordance with the law and the terms of the contract. Barnard v. Lancashire Ins. Co., 101 Fed. 36, 37, 41 CCA 170.

[b] **Agreements for labor or service.**—As used in act of Febr. 26, 1885 (23 U. S. St. at L. 332), making it unlawful to prepay the transportation of an alien when he is known to be under contract or agreement to perform labor or service in the United States, it means a contract or agreement which lacks none of the elements of a valid agreement, and is an enforceable contract, either express or implied. U. S. v. Edgar, 45 Fed. 44, 46.

[c] **In the statute of frauds,** pro-

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tion,"[27] or "warrant."[28] Furthermore, the term is sometimes employed to designate the writing or instrument that is the evidence of an agreement.[29]

Agreements have been classified as being express or implied;[30] as being parol, written, or under seal;[31] as being executed or executory;[32] as being conditional or unconditional;[33] as being bilateral or unilateral;[34] as being original or collateral,[35] and as being lawful or unlawful.[36]

Phrases in which the word has been used have received judicial interpretation, such as "agreement for the hire of any labourers,"[37] "agreement for the purchase and sale of an interest in lands,"[38] "agreement limiting the carrier's liability for its own negligence,"[39] "agreement . . . in writing,"[40] "agreement or compact,"[41] "agree-

viding that no suit shall be brought on any contract or "agreement" whereby to charge defendant on any special promise unless in writing "agreement" is synonymous with "contract." Sage v. Wilcox, 6 Conn. 81, 84.

[d] **"Memorandum or note of agreement" distinguished.**—"There must be a difference between agreement and memorandum or note of agreement. And what must that be? I take it, the difference between completeness and incompleteness. Agreement is the contract complete; memorandum or note of agreement is the contract incomplete, imperfect, even, it may be, somewhat inaccurate, but which may aid us in getting at the complete contract." Durham v. Taylor, 29 Ga. 166, 176.

27. Heidbrink v. Schaffner, 147 Mo. A. 632, 641, 127 SW 418.

28. Stratford v. Ames, 8 Allen (Mass.) 577, 579 (holding that, where a witness was asked if certain services performed by him were under any agreement, warrant, or promise with defendant or any one, and he answered that he did not make an agreement with any one, the word, "agreement," as used in the answer, was intended to cover the three synonyms of "agreement, warrant or promise," as used in the question).

29. Black L. D. (2d ed).

30. See Contracts [9 Cyc 240, 242]; Bixby v. Moor, 51 N. H. 402, 403; Richards v. Edick, (N. Y.) 17 Barb. 260, 263. See also Cuneo v. De Cuneo, 24 Tex. Civ. A. 436, 59 SW 284.

Quasi or constructive agreement see Contracts [9 Cyc 243].

[a] **An agreement may arise by positive expression or necessary implication,** and the coming together of the minds upon any given proposition may be shown by evidence direct and indirect, as any other fact may be satisfactorily established in court. Leonard v. Marshall, 82 Fed. 396, 399.

[b] **Term inaccurate.**—"It is sometimes said that 'the law implies an agreement.' . . . Strictly speaking, this is inaccurate. The agreement, though not fully expressed in words, is, nevertheless, a genuine agreement of the parties; it is 'implied' only in this, that it is to be inferred from the acts or conduct of the parties instead of from their spoken words; 'The engagement is signified by conduct instead of words.' But acts intended to lead to a certain inference may 'express a promise as well as words would have done.'" Bixby v. Moor, 51 N. H. 402, 403 [quot Rohr v. Baker, 13 Or. 350, 351, 10 P 627].

[c] "'An agreement concerning things personal is a mutual assent of the parties.' Reinger v. Fogossa, Plowd. 1, 5, 75 Reprint 1. There may be circumstances from which a tacit assent may be inferred, but in every case this assent is a fact which must be proved." Rohr v. Baker, 13 Or. 350, 351, 10 P 627.

31. U. S. v. Richards, 149 Fed. 443, 450. See Contracts [9 Cyc 298]; Specialty [36 Cyc 524].

[a] **The term is sufficiently comprehensive** to embrace all forms of stipulations (1) written or verbal (Wharton v. Wise, 153 U. S. 155, 168, 14 SCt 788, 38 L. ed. 669; Holmes v. Jennison, 14 Pet. (U. S.) 540, 572, 10 L. ed. 579), (2) and is usually held to include deeds and wills as well as contracts (Bogk v. Gassert, 149 U. S. 17, 24, 13 SCt 738, 37 L. ed. 631; Daw v. Niles, 104 Cal. 106, 123, 37 P 876; Sathre v. Rolfe, 31 Mont. 85, 77 P 431; Riddell v. Peck-Williamson Heating, etc., Co., 27 Mont. 44, 69 P 241; Hicklin v. McClear, 18 Or. 126, 22 P 1057; Testagorda v. Commanding Gen., 6 Philippine 573, 576), (3) including bank checks, promissory notes, and certificates of deposit (Minister of Finance v. Bishop, 3 Hawaii 796 (construing Hawaiian Stamp Act of 1876). (4) So it may include an account (Cunniff v. McDonnell, 196 Mass. 7, 81 NE 879), or (5) a note and power of attorney (Thompson v. Gimbel, 71 Misc. 126, 128 NYS 210), (6) but not a mere receipt (Kurdy v. Rogers, 10 Ida. 416, 79 P 195; Lewis v. Norris, 80 Kan. 620, 103 P 134; De Barre v. Livingston, 48 Barb. (N. Y.) 511, 521).

[b] **Verbal understanding.**—"The word 'agreement,' does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an 'agreement.'" Holmes v. Jennison, 14 Pet. (U. S.) 540, 572, 10 L. ed. 579 [quot Vattel p 192 §§152-154; p 218 §§ 206, 218].

[c] **Preliminary parol agreement.**—"Agreement," as used in the charter of a fire insurance company authorizing the execution of such contracts, bargains, agreements, policies, or other instruments as might be necessary, but requiring them to be in writing and under the seal of a corporation, and signed by the president and attested by the secretary or other officer appointed for that purpose, was held not to include a preliminary parol contract for insurance which is to be consummated by the execution of a written policy, and hence such oral contract is valid. Franklin F. Ins. Co. v. Colt, 20 Wall. (U. S.) 560, 566, 22 L. ed. 423.

[d] **Written agreements.**—Bogk v. Gassert, 149 U. S. 17, 13 SCt 738, 37 L. ed. 631; Sathre v. Rolfe, 31 Mont. 85, 77 P 431. In Sease v. Dobson, 33 S. C. 234, 236, 11 SE 728, the court said: "It requires two or more parties to make an agreement, and while an agreement may be made in some cases orally or verbally and without any writing by either party, yet we do not see how one could be made in writing unless all of the parties signed it."

[e] **In sense of formal written contract.**—The word "agreement" as used in a letter reading in part, "of course there was no agreement," was held to mean a formal contract in writing between the parties. The writer of the letter in this case explained on the stand that he meant no formal written agreement. Bradley v. Glenmary Co., 64 N. J. Eq. 77, 83, 53 A 49.

[f] **Agreements under seal.**—Bailey v. Agawam Nat. Bank, 190 Mass. 20, 23, 76 NE 449, 112 AmSR 296, 3 LRANS 98; Hogan v. Barry, 143 Mass. 538, 10 NE 253.

32. See Contracts [9 Cyc 244].

[a] **An agreement respects something done, or to be done;** in other words, executed or executory. As defined by Plowden, Aggegatio mentium in re aliqua facta vel facienda. Talbot v. Bedford, Cooke (Tenn.) 454.

[b] **Agreement to convey.**—Although there be words of conveyance in præsenti in a contract of purchase and sale of lands, still, if from the whole instrument it is manifest that further conveyances were contemplated by the parties, it will be considered an agreement to convey and not a conveyance. Jackson v. Moncrief, 5 Wend. (N. Y.) 26.

[c] **"The agreement to marry** partakes of the nature of a civil contract, as upon its violation the injured party may recover damages. But the contract or agreement to marry, and the marriage relation itself, are by no means one and the same. When the agreement to marry has been executed in a legal marriage, the relation thus formed becomes much more than a mere civil contract. The rights and duties incident to this relation are from a source much higher than any contract of which the parties are capable, and can neither be restricted nor enlarged nor in any way controlled by any contract which the parties can make." Per Robinson, J., in Elkenbury v. Elkenbury, 33 Ind. A. 69, 70 NE 837, 838.

"Agreement to sell" see infra text and note 45.

33. See Contracts [9 Cyc 615].

34. See Contracts [9 Cyc 244].

35. Frank v. Williams, 36 Fla. 136, 142, 18 S 351; Robinson v. Holmes, 82 Ill. A. 307, 308; Patton v. Mills, 21 Kan. 163, 169; Elder v. Warfield, 7 Harr. & J. (Md.) 391, 395; Nelson v. Boynton, 3 Metc. (Mass.) 396, 400, 37 AmD 148; Fish v. Hutchinson, 2 Ld. Ken. 537, 96 Reprint 1271, 2 Wils. C. P. 94, 95 Reprint 704.

"Whether an engagement is a collateral agreement, or an original undertaking, is sometimes a question of difficulty, but when the promise is to do a particular thing which another person is bound to do in the event he does not do it, the obligation is regarded as an original undertaking, and not a strict or collateral guaranty." Herman v. Williams, 36 Fla. 136, 142, 18 S 351.

36. Sage v. Wilcox, 6 Conn. 81, 84. See Contracts [9 Cyc 465].

37. Wilson v. Zulueta, 14 Q. B. 405, 414, 68 ECL 405, 117 Reprint 159 (where a statute exempting any "agreement for the hire of any labourer" from stamp duty was construed to include an agreement of employment for the purpose of discharging the duty and doing the work of firemen and stokers on board a ship under the direction of engineers).

38. Burgwyn v. Jones, 113 Va. 511, 514, 75 SE 188, 41 LRANS 120, AnnCas1913E 564.

39. Homer v. Oregon Short Line R. Co., 42 Utah 15, 33, 128 P 525. See Carriers.

40. Kurdy v. Rogers, 10 Ida. 416, 421, 79 P 195; Lewis v. Norris, 80 Kan. 620, 623, 103 P 134; Sease v. Dobson, 33 S. C. 234, 236, 11 SE 728; Chamberlain v. Abrams, 36 Wash. 587, 590, 79 P 204.

[a] **Where a statute gives a lien for agricultural supplies** advanced under an "agreement in writing" and provides an extraordinary remedy for enforcement, it was held that no lien existed where the agreement was signed only by the party to whom the advances were to be made. Sease v. Dobson, 33 S. C. 234, 235, 236, 11 SE 728.

41. See cases infra this note.

[a] **Agreement or compact between states.**—(1) In construing U. S. Const. art 1 § 10, providing that no state shall, without the consent of congress, enter into any agreement or compact with another state, etc., the court said: "The word 'agreement,' does not necessarily import any direct and express stipula-

ment . . . to . . . answer for the debt of another,"[42] "agreement to convey,"[43] "agreement to marry,"[44] "agreement to sell,"[45] "agreement to sell and buy,"[46] "agreement to sell . . . land,"[47] "agreement to sell stock,"[48] "agreement under seal,"[49] "contract or agreement,"[50] "new agreement."[51]

AGRICULTURAL. Pertaining to, connected with, or engaged in agriculture.[52]

Phrases in which the word has been used have received judicial interpretation, such as "agricultural advances,"[53] "agricultural crops,"[54] "agri-

tion; nor is it necessary that it should be in writing. If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an 'agreement.' And the use of all of these terms, 'treaty,' 'agreement,' 'compact,' shows that it was the intention of the framers of the constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a state and a foreign power; and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties." Holmes v. Jennison, 14 Pet. (U. S.) 540, 572, 10 L. ed. 579. (2) In a later United States case the court said: "The terms 'agreement' or 'compact,' taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control. . . . Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." Wharton v. Wise, 153 U. S. 155, 168, 169, 14 SCt 783, 38 L. ed. 669. (3) And in construing the same section this court said: "Compacts or agreements—and we do not perceive any difference in the meaning, except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'—cover all stipulations affecting the conduct or claims of the parties. The mere selection of parties to run and designate the boundary line between two States, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such action of itself does not come within the prohibition." Virginia v. Tennessee, 148 U. S. 503, 520, 13 SCt 728, 37 L. ed. 537. To same effect Stearns v. Minnesota, 179 U. S. 223, 21 SCt 73, 45 L. ed. 162.

42. Van Winkle v. King, 145 Ky. 691, 694, 141 SW 46. See Frauds, Statute of [20 Cyc 160].

43. Jackson v. Moncrief, 5 Wend. (N. Y.) 26, 29; McKisick v. McKisick, Meigs (Tenn.) 427, 433.

[a] **Executory agreement.**—(1) An agreement "to convey . . . to Thomas S. Ridgway . . . or to his heirs and assigns," etc., is of an executory character, only binding the grantor to convey the interest described at a future day, and does not vest in the grantee immediately any right or title, nor put him in the constructive possession of the land, although the lands may not at the time have been in the actual possession and occupation of the grantor. Seitzinger v. Ridgway, 4 Watts & S. (Pa.) 472, 487. (2) An agreement reciting a power of attorney to convey after the prosecution of an action under such power was held an agreement to convey rather than a conveyance. Maus v. Montgomery, 11 Serg. & R. (Pa.) 329, 331.

44. Elkenbury v. Elkenbury, 33 Ind. A. 69, 70 NE 837, 838. See Breach of Promise to Marry [5 Cyc 998].

45. Ward Land, etc., Co. v. Mapes, 147 Cal. 747, 749, 82 P 426 (holding that an "agreement to sell" is a contract by which one engages, for a price, to transfer to another the title to a certain thing).

[a] **As connoting agreement to buy.**—"It was said in the Court of Appeal that there was an agreement by the appellant to sell, and that an agreement to sell connotes an agreement to buy. This is undoubtedly true if the words 'agreement to sell' be used in their strict legal sense; but when a person has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer, he may, in popular language, be said to have agreed to sell, though an agreement to sell in this sense, which is in truth merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy, and it is only in this sense that there can be said to have been an agreement to sell in the present case." Helby v. Matthews, [1895] A. C. 471, 477 [rev [1894] 2 Q. B. 262, and dist Lee v. Butler, [1893] 2 Q. B. 318].

[b] **"Call" upon Stock Exchange.**—(1) Under the act of congress requiring revenue stamps to be affixed on all sales or agreements to sell, it was held that a "call," as understood in the language of the Stock Exchange, was an agreement to sell within the meaning of the statute. Treat v. White, 181 U. S. 264, 266, 21 SCt 611, 45 L. ed. 853. (2) Inasmuch as a sale is a contract or agreement, it is frequently spoken of as a "contract of sale" or "an agreement of sale"—two phrases which in law mean no more and no less than the word "sale." No amount of offering to sell will make a contract of sale, until someone accepts the offer by agreeing to buy; so that a call or memorandum or writing executed for a valuable consideration, giving the bearer a right to call upon the subscriber for a certain share of stock therein, within a stated time and at a given price, is not a contract or agreement to sell. White v. Treat, 100 Fed. 290, 291.

[c] **An agreement to sell land** (1) is a contract to be performed in the future, and if fulfilled results in a sale. It is preliminary to a sale and is not the sale. Ide v. Leiser, 10 Mont. 5, 11, 24 P 695, 24 AmSR 17. (2) "If a party agrees to sell land, it is in legal effect an agreement to sell a title to the land. In the absence of a stipulation to the contrary, the law implies an undertaking on the part of the vendor to make a good title. 29 A&EEncL 606; Ankeny v. Clark, 1 Wash. 549, 20 P 583; 2 Warvelle Vendors (2d ed) 836. The form of conveyance is a secondary consideration. There may be reasons for giving or receiving a quit-claim deed. These will not be inquired into so long as that form of deed will convey the title agreed to be conveyed, in the contract itself." Davis v. Lee, 52 Wash. 330, 337, 100 P 752, 132 AmSR 973. (3) An agreement to sell land "is a contract to be performed in the future, and, if fulfilled, results in a sale. It is a preliminary to a sale, and is not the sale. Breaches, rescission, or release may occur, by which the contemplated sale never takes place." Ide v. Leiser, supra. (4) "There is a broad distinction between a license and a contract or agreement for the sale of land. A license is but an authority to do an act or series of acts on the land of the licensor. It needs no consideration to support it, and transfers no interest in the land, and is, from its nature, revocable at the will of the licensor. A contract, on the other hand, requires a consideration to support it, and confers rights which may be enforced at law." Baltimore, etc., R. Co. v. Algire, 63 Md. 319, 322.

[d] **Agreement to sell personal property.**—There is a difference between a sale of personal property and an "agreement to sell." Under an agreement to sell no title passes; but whenever parties have agreed upon the terms of sale, and the property sold is identified, and nothing remains but to deliver it, and if it appears from the evidence that the parties understood and intended the title to pass without actual delivery at the time of said sale, then the title would pass without such delivery. Baker v. Guinn, 4 Tex. Civ. A. 539, 542, 23 SW 604.

46. Stum v. Hadrich, 7 Cal. A. 241, 243, 94 P 82 (holding that "an agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor").

47. Davis v. Lee, 52 Wash. 330, 337, 100 P 752, 132 AmSR 973.

48. Phillips v. Grossman, 76 Misc. 497, 499, 135 NYS 567.

49. Bailey v. Agawam Nat. Bank, 190 Mass. 20, 24, 76 NE 449, 112 AmSR 296, 3 LRANS 98.

50. U. S. v. Edgar, 45 Fed. 44, 46 [aff 48 Fed. 91, 1 CCA 49] (where, in construing a federal statute prohibiting prepaying the transportation or otherwise assisting the importation or migration of an alien when such alien is known to be under a contract or agreement to perform labor in the United States, the court said: "The words 'contract or agreement,' as used in the statute, must be held to mean a complete contract; that is to say, an agreement entered into for a sufficient consideration to perform some kind of labor or service, to the terms of which the parties have mutually assented").

51. Parker v. Cartwright, 7 Hawaii 596, 608 (where, in construing a privilege of renewal in a lease coupled with the condition "subject, however, to a new agreement," the court said: "The plain and usual definition of the word 'agreement' is 'the consent of two or more persons concurring respecting the transmission of some property, right or benefit, with a view of contracting an obligation.' Bouvier L. D. And the words 'new agreement' must mean a new consent of the contracting parties as to the terms of the lease").

52. Century D.

53. Smith v. Smith, 33 S. C. 210, 213, 11 SE 761. See Agriculture § 63

54. Reeves v. Hyde, 77 Cal. 397, 398, 19 P 685 (holding that the phrase, as used in a statute authorizing the entry of lands suitable for raising "ordinary agricultural crops," includes fruits, and hence that the statute authorizes the entry of lands only useful for the cultivation of fruits).

cultural employment,"[55] "agricultural fair,"[56] "agricultural holding,"[57] "agricultural laborer,"[58] "agricultural lands,"[59] "agricultural products,"[60] "agricultural property,"[61] "agricultural purposes,"[62]

55. Bachelder v. Bickford, 62 Me. 526, 528 (holding that work in a gristmill is not "agricultural employment" within a statute regulating laborers' hours of work).

[a] **Dual employment.**—One employed partly as a gamekeeper and partly as a carpenter and assistant farmer is held to be employed in agriculture within the meaning of that term in the Workmen's Compensation Act. Smith v. Coles, [1905] 2 K. B. 827.

56. See Agriculture § 10.

57. Doyne v. Campbell, Tr. R. 9 C. L. 95 (holding that, under a statute entitling an agricultural tenant to a reduction in rent, where the land owned consisted of twenty-five acres, ten of which consisted of a residence, outbuildings, and ornamental grounds, and the other fifteen of pasture lands, the holding was not "agricultural or pastural, or partly agricultural and partly pastural," within the meaning of the act).

58. Isbell v. Dunlap, 17 S. C. 581, 583 (where it was held that this term, as used in a statute giving agricultural laborers a lien on crops made by them, and as used in homestead acts exempting the products of such laborers from levy and sale, does not include an overseer). See Agriculture § 69.

59. Reeves v. Hyde, 77 Cal. 397, 398, 19 P 685 (holding that lands suitable for the cultivation of the ordinary fruit crops grown in California are agricultural lands within a statute providing for the purchase of such as public land).

[a] **Glass houses** in or on a market garden, if buildings, must, under the Agricultural Rates Act, 1896, be rated as buildings, and not as agricultural land. Smith v. Richmond, [1899] A. C. 448 [aff [1898] 1 Q. B. 683].

[b] **"City lots" distinguished.**—In construing the several sections of a statute providing for the lease of property it was held that the term "city lot" means a lot within the limits of a city, regardless of its other characteristics, while the term "agricultural lands" is descriptive of the nature of the land itself, and does not necessarily mean acre property. Lerch v. Missoula Brick, etc., Co., 45 Mont. 314, 325, 123 P 25, AnnCas1914A 346.

[c] **In the Philippine Islands** (1) the phrase "agricultural public lands" as defined by the act of congress of July 1, 1902, which phrase is also to be found in several sections of the Public Land Act No. 926, means those public lands acquired from Spain which are neither mineral nor timber lands. Mapa v. Insular Government, 10 Philippine 175, 177, 182 (the court, per Willard, J., said: "The question is an important one because the phrase 'agricultural public lands' as defined by said act of Congress of July 1 is found not only in section 54 above quoted but in other parts of Act No. 926, and it seems that the same construction must be given to the phrase wherever it occurs in any part of that law. . . . We hold that there is to be found in the act of Congress a definition of the phrase 'agricultural public lands,' and after a careful consideration of the question we are satisfied that the only definition which exists in said act is the definition adopted by the court below. Section 13 says that the Government shall 'make rules and regulations for the lease, sale, or other disposition of the public lands other than timber or mineral lands.' To our minds that is the only definition that can be said to be given to agricultural lands. In other words, that the phrase 'agricultural land' as used in Act No. 926 means those public lands acquired from Spain which are not timber or mineral lands"). (2) In the Philippine legislation, fish ponds are included under "agricultural lands." Philippine Act 926; Santiago v. Insular Government, 7 Off. Gaz. 275.

Agricultural land:
Annexation to municipal corporation see Municipal Corporations [28 Cyc 191].
Entry on see Public Lands [32 Cyc 807].
Suitable for cultivation, as used in connection with public lands see Public Lands [32 Cyc 1110].

60. Davis v. Macon, 64 Ga. 128, 134, 37 AmR 60; Getty v. C. R. Barnes Milling Co., 40 Kan. 281, 286, 19 P 617; Terry v. State, 25 Tex. A. 714, 715, 8 SW 934.

[a] **The product of agriculture** is that which is the direct result of husbandry and culture of the soil. It embraces the product in its natural; unmanufactured condition. Getty v. C. R. Barnes Milling Co., 40 Kan. 281, 19 P 617.

[b] **Dairy and poultry yard products.**—"The common parlance of the country, and the common practice of the country, have been to consider all those things as farming products or agricultural products which had the situs of their production upon the farm, and which were brought into condition for the uses of society by the labor of those engaged in agricultural pursuits, as contradistinguished from manufacturing or other industrial pursuits. The product of the dairy or the product of the poultry yard, while it does not come directly out of the soil, is necessarily connected with the soil and those who are engaged in the culture of the soil." District of Columbia v. Oyster, 15 D. C. 285, 286, 54 AmR 275.

[c] **Flour.**—In Getty v. C. R. Barnes Milling Co., 40 Kan. 281, 284, 19 P 617, it was held that flour was not within the meaning of the term "agricultural products" as used in the charter of a company specifying the purposes of its incorporation to be for the conversion and disposal of agricultural products. The court said: "In one sense it may be said that flour is a product of agriculture, but in the common application of the term we think this is not true. The product of agriculture is that which is the direct result of husbandry and culture of the soil. It embraces the product in its natural, unmanufactured condition. As cotton is a product of agriculture, yet cotton cloth, or other fabrics made from cotton, can hardly be termed agricultural products. If the products resulting from the manufacture of agricultural products are not to be determined by the common acceptation of the phrase 'agricultural products,' then this charter would embrace an innumerable variety of manufactures and their products. Flour, being the product of manufacture, is not strictly within the purview of this charter."

[d] **Meat.**—In Davis v. Macon, 64 Ga. 128, 134, 37 AmR 60, it was held that a city, authorized by charter to tax all persons exercising within its bounds any profession or trade, might impose a license tax upon persons selling butcher's meat therein, although municipal corporations were prohibited by general statute from imposing taxation upon agricultural products. The court said: "The cattle were bought from farmers, but there is no express allegation that they were 'agricultural products.' And when it is thought of closely, would it not be rather an unusual application of the phrase 'agricultural products' to make it comprehend beef cattle? In ordinary usage, is not that phrase confined to the yield of the soil, as corn, wheat, rye, oats, hay, etc., in its primary form? When there has been conversion of the fruits of the soil into animal tissues, are we still to apply the phrase? And suppose we are to disregard the change in its first stage, and call a cow or a steer agricultural product, must we carry the name forward to the steak or roast which the butcher sells us from the slaughtered animal? If cattle fall under the denomination, so do hogs; and if beef, so does bacon. Passing from this verbal difficulty, and turning to an argument of altogether another class, it is to be noted that the tax we are considering is not laid upon the beef sold, nor upon the sale thereof, nor is the amount of the tax measured by the amount of sales. The tax is upon business and upon the vehicle used therein, and to conduct such business by such means has no necessary relation to 'agricultural products raised in this state,' granting that fresh beef is to be classed as an agricultural product. It would be possible to conduct a like business by like means with beef raised elsewhere; and if the complainants chose to deal in Georgia raised beef, as a business, are they to be therefore exempted from all business tax?"

Agricultural products:
License for sale of see Licenses [25 Cyc 620].
Matter included under phrase in customs law see Customs Duties [12 Cyc 1122].

61. Terry v. State, 25 Tex. A. 714, 715, 8 SW 934 (where it was held that this term, within the meaning of a statute providing a penalty for the willful and malicious injury or destruction of any growing fruit, corn, grain, or other agricultural product or property, does not include a buggy and harness, even though the buggy and harness, necessary for the use of the family, are exempt under the general exemption laws).

62. Binzel v. Grogan, 67 Wis. 147, 150, 29 NW 895 (holding that the phrase, as used in a statute authorizing the selection of a homestead not exceeding forty acres used for "agricultural purposes," means the using of the soil for planting seeds and raising and harvesting the crops, the rearing, feeding, and management of live stock, and hence, where defendant kept and fed his horse on land claimed as a homestead, he used it for at least one agricultural purpose). See also U. S. v. United Verde Copper Co., 196 U. S. 207, 213, 25 SCt 222, 49 L. ed. 449.

[a] **A locomotive** which is sometimes let out by its owner to farmers for the purpose of carrying straw and manure for use in farming operations, and which is sometimes used by the owner himself for the purpose of carrying for hire straw and manure to be used exclusively on farms, and is not used for any other purpose, is within the exemption of the Highways and Locomotives (Amendment) Act (1878) § 32, as being a "locomotive used solely for agricultural purposes," and may be so used without a license from the county authority. Ellis v. Hulse, 23 Q. B. D. 24, 27.

[b] **Hauling wheat to a mill** to be ground or to market to be sold is not an agricultural purpose. Hoddell v. Parker, [1910] 2 K. B. 323.

[c] **A close was used for agricultural purposes** when used in connection with a pasture for a cow lot, the business of the occupant of the premises being farming. McNeely v. State, 50 Tex. Cr. 279, 280, 96 SW 1083.

Materiality or fitness of public land for agricultural purposes see Public Lands [32 Cyc 1110].

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and "agricultural pursuit."[63]

(Cross references.[64])

63. State v. Cendo, 38 La. Ann. 828, 829 (holding that the business of a vegetable dealer in the markets is not such an agricultural pursuit as exempts the dealer from a license, under Const. art 206, the provisions of which exempt agricultural pursuits from license acts).

64. **Agricultural:**
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College see Colleges and Universities [7 Cyc 291].
Implements, exemption of see Exemptions [18 Cyc 1422].
Laborer as servant see Servant [35 Cyc 1431].
Lien:
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Validity as against chattel mortgage of crop see Chattel Mortgages [7 Cyc 40].
Public land see Public Lands [32 Cyc 807].
Society see Agriculture § 4.
See also Horticultural.

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AGRICULTURE

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[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 987]

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I. DEFINITION

[§ 1] The term "agriculture" has been defined to be the "art or science of cultivating the ground, especially in fields or large quantities, including the preparation of the soil, the planting of seeds, the raising and harvesting, of crops, and the rearing, feeding, and management of live stock; tillage, husbandry, and farming."[1] In its general sense the word also includes gardening or horticulture.[2]

II. AGRICULTURAL BOARDS AND OFFICERS

[§ 2] Under the statutes of the several states, there have been commonly created departments,[3] or bureaus,[4] or boards[5] of agriculture, the members of which are in some cases elected,[6] and in others appointed.[7] These boards are charged with the general duty of promoting agriculture within their respective jurisdictions,[8] and usually with the enforcement of certain laws in regard to farm products, animals, fertilizers, etc.[9] Sometimes also they are invested with authority over state fairs for the exhibition of farm products.[10] Such boards are usually departments of the state government;[11] but in some cases they have been held to be separate corporations, with the power of suing and being sued.[12]

The principal executive officer is usually styled the secretary, commissioner,[13] or inspector,[14] of agriculture, or of horticulture, as the case may be, and his powers and duties and those of his subordinates[15] are defined by statute. The salaries of such officers are usually fixed by law, and paid out of the state treasury;[16] but in some cases they are dependent upon the receipt of fees or forfeitures.[17]

1. Dillard v. Webb, 55 Ala. 468, 474; Simons v. Lovell, 7 Heisk. (Tenn.) 510, 515; Binzel v. Grogan, 67 Wis. 147, 150, 29 NW 895 [quot Webster D.].
[a] **Comprehensiveness of term.**—"The variety of products of the earth, of agricultural implements, and of domestic animals, invited and put on exhibition at agricultural fairs, attests the comprehensiveness of the term 'agriculture.' It refers to the field, or farm, with all its wants, appointments, and products, as horticulture refers to the garden, with its less important, though varied products." Dillard v. Webb, 55 Ala. 468, 474.
[b] **"It is equivalent to husbandry,** and husbandry, Webster defines to be the business of a farmer, comprehending agriculture or tillage of the ground, the raising, managing, and fattening of cattle and other domestic animals, the management of the dairy and whatever the land produces." Per Sneed, J., in Simons v. Lovell, 7 Heisk. (Tenn.) 510, 516.
[c] **"But in a more common and appropriate** sense it is used to signify that species of cultivation which is intended to raise grain and other field crops for man and beast." Simons v. Lovell, 7 Heisk. (Tenn.) 510, 516 (per Sneed, J.).
[d] **"A person is 'actually engaged in the science of agriculture'** when he derives the support of himself and family in whole, or in part, from the tillage and cultivation of fields. He must cultivate something more than a garden, though it may be much less than a farm. If the area cultivated can be called a field, it is agriculture, as well in contemplation of law, as in the etymology of the word. And if this condition be fulfilled, the uniting of any other business, not inconsistent with the pursuit of agriculture, does not take away the protection of the Act." Per Woodward J., in Springer v. Lewis, 22 Pa. 191, 193.
[e] **Timber.**—The term may include "timber used for houses, barns, tools, furniture and fences." Per Brown, J., in U. S. v. United Verde Copper Co., 196 U. S. 207, (216 dis. op.) 25 SCt 222, 49 L. ed. 449.
2. Simons v. Lovell, 7 Heisk. (Tenn.) 510, 515 (where Sneed, J., said: "According to this authority [Webster D.] agriculture is in its general sense the cultivation of the ground for the purpose of procuring vegetables and fruits for the use of man and beast; or the act of preparing the soil, sowing and planting seeds, dressing the plants, and removing the crops. In this sense the word includes gardening or horticulture").
3. Com. v. Warren, 217 Pa. 163, 66 A. 322.
4. See Statutory provisions.
5. Benson v. Peo., 10 Colo. A. 175, 50 P 212; Minear v. State Bd. of Agriculture, 259 Ill. 549, 102 NE 1082, Ann Cas1914B 1290; Farra v. State Bd. of Agriculture, 138 Ky. 346, 128 SW 79; Syndicate Printing Co. v. Cashman, 115 Minn. 446, 132 NW 915.
6. Benson v. Peo., 10 Colo. A. 175, 50 P 212; Farra v. State Bd. of Agriculture, 138 Ky. 346, 128 SW 79.
[a] **In Colorado,** under the act establishing a state board of agriculture, Gen. St. (1883) p 124, consisting "of eight members besides the governor . . . and the president of the State Agricultural College," and authorizing a "majority of the members" to fill vacancies in the board, the election of a member at a meeting where only five members are present is invalid. Benson v. Peo., 10 Colo. A. 175, 50 P 212.
[b] **In Kentucky,** under Acts (1906) c 90, providing for the annual election of the members of the board of agriculture—one for each appellate judicial district—by delegates to the state industrial institute for farmers, the institute has the right to determine who are properly accredited delegates and entitled to vote for members of the board, and the decision of the institute is not subject to review by the courts. Farra v. State Bd. of Agriculture, 138 Ky. 346, 128 SW 79.
7. Tongue v. State Bd. of Agriculture, 55 Or. 61, 105 P 250.
8. See Syndicate Printing Co. v. Cashman, 115 Minn. 446, 132 NW 915.
[a] **The duty and power to publish the "Farmers' Institute Annual,"** and to contract for the printing thereof, rests with the board of administration of farmers' institutes, and not with the state printing commission. Syndicate Printing Co. v. Cashman, 115 Minn. 446, 132 NW 915.
9. Com. v. Warren, 217 Pa. 163, 66 A 322.
[a] **The conferring of illegal powers upon a dairy and food commissioner** by a statute passed subsequently to that by which such office was created and under which the commissioner had been appointed, was not sufficient ground for the ousting of the commissioner in quo warranto proceedings. Com. v. Warren, 217 Pa. 163, 66 A 322.
10. Tongue v. State Bd. of Agriculture, 55 Or. 61, 105 P 250.
11. Farra v. State Bd. of Agriculture, 138 Ky. 346, 128 SW 79. See also Minear v. State Bd. of Agriculture, 259 Ill. 549, 102 NE 1082, Ann Cas1914B 1290 and note (holding that the state board of agriculture is a public board and not subject to liabilities of a private or quasi public corporation).
12. Tongue v. State Bd. of Agriculture, 55 Or. 61, 105 P 250 (holding that the board of agriculture, created by L. [1899] 208, Ballinger & C. Comp. §§ 4135-4147, is a "corporation," and not a branch of the state government, nor for the administration of state affairs, it not being accountable to the state for money received by it, except for the legislative appropriation, and it having the power to make contracts, and, as a necessary incident thereto, the right to appeal to the courts for the enforcement of them, it may be sued for a like purpose).
13. Farra v. State Bd. of Agriculture, 138 Ky. 346, 128 SW 79; Marye v. Board of Agriculture, 96 Va. 538, 32 SE 44; State v. Asotin County, 79 Wash. 634, 140 P 914.
14. Welch v. Dean, (Mont.) 141 P 548.
15. State v. Standford, 24 Utah 148, 66 P 1061.
[a] **The state horticulturist** being a creature of statute, the measure of his authority must be found in the statute. Welch v. Dean, (Mont.) 141 P 548.
[b] **Unconstitutional statute.**—Rev. St. (1898) § 1176, as amended by L. (1899) c 47, was held unconstitutional, because it enacted that certain fruit tree inspectors and their deputies should perform their duties under the direction of the state board, but should be paid by the counties, thus interfering with the powers of local self-government conferred on the counties by the constitution. State v. Standford, 24 Utah 148, 66 P 1061.
16. See statutory provisions.
17. Marye v. Board of Agriculture,

III. PUBLIC AID TO AGRICULTURE[18]

[§ 3] A statute appropriating money for seed-grain loans to farmers whose crops have been destroyed is unconstitutional and void because it is appropriating public money for a private purpose;[19] but money loaned by the state under such a statute may nevertheless be recovered.[20] Statutes providing for county appropriations for county agents to educate the people in agriculture,[21] and for the assessment and levy of county taxes to meet the expenses of county horticultural inspection,[22] have been upheld as constitutional.

IV. AGRICULTURAL SOCIETIES[23]

[§ 4] **A. Definition, Nature, and Object.** An agricultural society has been defined as "a society for promoting agricultural interests, such as the improvement of land, of implements, of the breeds of cattle, etc."[24] Agricultural societies are created for public and educational purposes, to improve agricultural and kindred industries, and to furnish the people with harmless amusement and entertainment.[25] The nature of agricultural societies depends entirely upon the statutes under which they are created.[26] They have been held variously to be private,[27] pub-

96 Va. 588, 32 SE 44 (holding that, under Acts [1897-1898] p 717, appropriating for the fiscal years of 1898 and 1899, for the "Commissioner of Agriculture, a salary of twelve hundred dollars. His clerk, salary of five hundred dollars, which, with all other salaries and expenses of the Bureau of Agriculture," shall be paid from collections on forfeitures, if sufficient, and, if not, pro rata; "but in no event shall such salaries and expenses, or any part thereof, be paid out of the public treasury," the salaries of the commissioner and other officers and the other expenses of the bureau were all payable out of collections from forfeitures, and not out of the treasury).

18. **Bounty for production of sugar** see Bounties [5 Cyc 993].

19. Deering v. Peterson, 75 Minn. 118, 77 NW 568. See Taxation [37 Cyc 719].

20. Deering v. Peterson, 75 Minn. 118, 77 NW 568.

21. State v. Meeker, (Ind.) 105 NE 906.

22. State v. Asotin County, 79 Wash. 634, 140 P 914.

[a] **Horticultural inspection.**—L. (1909) c 135 §§ 63, 64, requires county commissioners to levy a tax to meet the expenses of horticultural inspection therein, and L. (1911) c 43 § 4, directs the attorney general to bring action against any county failing to pay the amount "assessed or levied" against it for horticultural purposes. State v. Asotin County, 79 Wash. 634, 140 P 914.

23. **Corporation generally** see Corporations [10 Cyc 1].

Unincorporated society generally see Associations [4 Cyc 299].

24. Downing v. Indiana State Bd. of Agriculture, 129 Ind. 443, 451, 28 NE 123, 614, 12 LRA 664 [quot Century D.]; Brown v. South Kennebec Agriculture Soc., 47 Me. 275, 74 AmD 484; Dunn v. Brown County Agricultural Soc., 46 Oh. St. 93, 18 NE 496, 15 AmSR 556, 1 LRA 754.

25. Melvin v. State, 121 Cal. 16, 53 P 416; State v. Reynolds, 77 Conn. 131, 58 A 755; Toledo Exposition Co. v. Kerr, 28 Oh. Cir. Ct. 547; Stewart v. Agriculture Soc., 6 Oh. Dec. (Reprint) 751, 7 AmLRec 668.

"The improvement of agriculture, horticulture, mechanic arts, rural and domestic economy" is stated as the object of the agricultural society whose powers were called in question in Thompson v. Lambert, 44 Iowa 239.

[a] **An agricultural society "is in a sense an educational institution.** It seeks to bring together people engaged in agricultural pursuits, as well as those engaged in manufacturing farm machinery and other articles adapted to use in the cultivation of the soil and harvesting of crops, and other articles used by the public, as well as those engaged in raising stock, and to exhibit to those in attendance the crops resulting from the various methods of farming, and the various machinery manufactured for the use of those engaged in agricultural pursuits, as well as the various breeds of stock, and give to the people of the State, and particularly those engaged in agricultural pursuits, an opportunity of discussing the various methods of farming and farm implements used, and the different breeds of stock raised, and to educate the people in this way in the pursuits of agriculture, and to educate and improve the condition of the agriculturist, that they may gain a knowledge of the best methods of farming, best machinery to use, and the best breeds of stock." Downing v. Indiana State Bd. of Agriculture, 129 Ind. 443, 451, 28 NE 123, 614, 12 LRA 664.

[b] **Promote agricultural interests.**—(1) In Bathe v. Decatur County Agricultural Soc., 73 Iowa 11, 12, 34 NW 484, 5 AmSR 651, it was held that an agricultural society was "a corporation, organized to further the interest of agriculture, to improve and encourage the breeding of fine stock, to hold expositions of agricultural products and stock, to hold and give annual fairs, and to do and perform everything necessary and incident thereto." To same effect Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 425, 74 SW 979. (2) Under 1 Ind. Rev. St. (1876) p 923 § 2, concerning voluntary associations, an association is properly organized for the purpose of purchasing suitable grounds for a driving park, for the promotion of agriculture, for the improvement of horses in speed, style, action, and blood, and for the health and recreation of its members. Mullen v. Beech Grove Driving Park, 64 Ind. 202. (3) "It was not a money-making corporation. It was above the aim of pecuniary individual enterprise. Its field of influence was in a farming community. Its object was the promotion of agriculture, stock-raising, horticulture, and the mechanical arts." Per Rose, J., in Owen v. Main, 92 Nebr. 258, 268, 138 NW 154 dis. op.

[c] **Furnish amusement and entertainment.**—(1) County agricultural societies are created and exist, not only for educational purposes, but to furnish the people with harmless amusement and entertainment. Recreation and relaxation are quite as important sociologically as education and instruction. Williams v. Dean, 134 Iowa 216, 111 NW 931, 11 LRANS 410. (2) Under the Ohio statute, agricultural societies are permitted to give such displays as will conduce to the interest and entertainment of the community for profit. State v. Long, 48 Oh. St. 509, 28 NE 1038.

26. See cases infra notes 27-31.

[a] **In Nova Scotia, under Rev. St. c 56,** a number of persons purported to organize themselves as a corporate body, under the name of the "Brooklyn Agricultural Society." No special act of incorporation was sought or obtained. It was held that the legislature did not intend to confer corporate powers upon agricultural societies by the provisions of the enactment in question, and, furthermore, that c 127 of such Revised Statutes only defines the powers and privileges of incorporated companies and does not provide for their creation. Brooklyn Agricultural Soc. v. Reagh, 10 EastLR 295.

27. Ind.—Downing v. Indiana State Bd. of Agriculture, 129 Ind. 443, 28 NE 123, 614, 12 LRA 664; Warren County Agricultural Joint Stock Co. v. Barr, 55 Ind. 30.

Iowa.—Thompson v. Lambert, 44 Iowa 239. But see infra note 31 [a].

Ky.—Com. v. Bacon, 13 Bush 210, 26 AmR 189.

Me.—Brown v. South Kennebec Agricultural Soc., 47 Me. 275, 74 AmD 484.

Mich.—Ismon v. Loder, 135 Mich. 345, 97 NW 769.

Minn.—Lane v. Minnesota State Agricultural Soc., 62 Minn. 175, 64 NW 382, 29 LRA 708. But see infra note 30.

Oh.—State v. Long, 48 Oh. St. 509, 28 NE 1038; Dunn v. Brown County Agricultural Soc., 46 Oh. St. 93, 18 NE 496, 15 AmSR 556, 1 LRA 754.

See also State v. Anthony Fair Assoc., 89 Kan. 238, 131 P 626.

[a] **Nature affected by articles of incorporation.**—The question as to the public or private nature of agricultural societies may be somewhat affected by the peculiarities of their individual articles of incorporation. Although the purpose of agricultural societies may be considered public in the sense that their establishment conduces to the public welfare by promoting agricultural and manufacturing interests, such public benefit is but the consideration and justification for the special privileges and franchises conferred on them, and does not make them agencies of the state, or otherwise distinguish them from other private corporations. Dunn v. Brown County Agricultural Soc., 46 Oh. St. 93, 18 NE 496, 15 AmSR 556, 1 LRA 754.

[b] **Distinguished from quasi corporations.**—In an action on the case to recover damages for injuries occasioned by the fall of a portion of a building on the fair grounds belonging to an agricultural society, Cutting, J., in a discussion of the nature and liabilities of such societies, thus distinguishes them from quasi corporations: "First. They were invested with particular powers, not without, but with their consent and on their application. Second. They are not territorial; a voluntary subscription only entitles them to membership. Third. They are authorized to hold a corporate fund, viz.: real and personal estate, limited only by the annual income; and, although the income is specifically appropriated, yet the capital is not, but may be subject to attachment and execution. Fourth. The action must be brought against the corporation, eo nomine, and not against the corporators. Fifth. The members in their individual capacity are not responsible. Sixth. They are not intrusted with any of the ordinary attributes of sovereignty for the purpose of local government. . . . They [the defendants] are not a quasi, but an aggregate corporation, which, as defined, consists of several persons, united in one society, continued by a succession of members, and, being the mere creature of the law, possesses only those properties conferred by

lic,[28] and quasi public corporations;[29] and in some cases they are said to be departments[30] or agencies[31] of the state.

[§ 5] **B. Organization—1. State Societies.** The statutes authorizing the formation of agricultural societies generally prescribe the conditions and particulars of their organization. These associations, having the general supervision of the agricultural interests of the state, are incorporated by statute, and are usually composed of delegates from the county and district societies, and other persons specially mentioned in the act of incorporation or elected by the society.[32]

[§ 6] **2. County and District Societies.** The method of incorporation of these societies varies somewhat with the provisions of the several statutes, and the rules of the courts within whose jurisdiction the societies are organized, the requirements being similar to those providing for the formation of other private corporations.[33]

[§ 7] **C. Public Aid.** Under some of the statutes, agricultural societies upon compliance with certain conditions are entitled to receive appropriations from the public treasury for their support and advancement;[34] and acts authorizing appropria-

charter either expressly, or as incidental to its existence, and best calculated to effect the object of its creation." Brown v. South Kennebec Agricultural Soc., 47 Me. 275, 282, 74 AmD 484.

[c] **Objects may be public.**—With reference to the Scott County Iowa Agricultural Society, organized under Rev. Code § 1187, relating to the organization of associations other than those for pecuniary profit, it was held that while the objects of the society were public, it was essentially a private corporation. Its character was not affected by the fact that it was organized for another object than pecuniary profit. Its property was the private property of the corporation. The use and enjoyment of this property by the public were regulated solely by the corporation, and upon its dissolution the stockholders became entitled to the property. The public authorities could in no way control or derive any pecuniary benefit from the use of the property. Thompson v. Lambert, 44 Iowa 239.

[d] **State recognizes private nature of society by loaning money.**—In an action brought by the Indiana state board of agriculture, organized under the act of Febr. 14, 1851, it was held that the loaning of money by the state to the society was a legislative construction of its charter as a private corporation, for otherwise it would be a case of the state loaning money to itself. Downing v. Indiana State Bd. of Agriculture, 129 Ind. 443, 28 NE 123, 614, 21 LRA 664.

28. Dillard v. Webb, 55 Ala. 468; Livingston County Agricultural Soc. v. Hunter, 110 Ill. 155; State v. Stovall, 103 N. C. 416, 8 SE 900; Stewart v. Hardin County Agricultural Soc., 6 Oh. Dec. (Reprint) 751, 7 AmLRec 668.

[a] **Reorganization on joint stock plan** does not render the corporation one for private gain or profit, or change the public character of the institution. Its property can still be applied only to the payment of its debts and the promotion of the general objects of the association as expressed in its constitution. Livingston County Agricultural Soc. v. Hunter, 110 Ill. 155.

29. Dillard v. Webb, 55 Ala. 468; In re Rockwood Electoral Div. Agricultural Soc., 12 Man. 655.

[a] **Not organized for private purpose.**—In Kent County Agricultural Soc. v. Houseman, 81 Mich. 609, 46 NW 15, it was held that the complainant had none of the elements of on ordinary body politic and corporate, organized for private gain or pleasure, or any private purpose whatever. To same effect Melvin v. State, 121 Cal. 16, 53 P 416. See also Owen v. Main, 92 Nebr. 258, 268, 138 NW 154 dis. op. supra note 25 [b].

30. Berman v. Minnesota State Agricultural Soc., 93 Minn. 125, 128, 100 NW 732 (where the court said: "Subsequent to the decision of Lane v. Minnesota State Agricultural Soc., supra, chapter 126, p. 170, Laws 1903, was enacted, wherein it was provided that the existing rights of the former society were confirmed. It was declared to be a public corporation, and one of the departments of the state; its membership and constituency was continued; the management and control of its affairs was vested in certain executive officers, known as a 'board of managers,' who were to determine upon an executive officer or agent, who was required to submit his report annually to the governor, to be printed and distributed at public expense; the title to all moneys and property of the State Agricultural Society was thereafter vested in the state of Minnesota").

31. Sixth Dist. Agricultural Assoc. v. Wright, 154 Cal. 119, 97 P 144; Peo. v. San Joaquin Valley Agricultural Assoc., 151 Cal. 797, 91 P 740; Melvin v. State, 121 Cal. 16, 53 P 416; State v. Robinson, 35 Nebr. 401, 53 NW 213, 17 LRA 383.

[a] **In Iowa,** under an earlier statute, agricultural societies were private corporations. Thompson v. Lambert, 44 Iowa 239. But under a later statute, they were made agencies of the state. Hern v. Iowa State Agricultural Soc., 91 Iowa 97, 98, 58 NW 1092, 24 LRA 655 (where the court said: "The society is in no sense a corporation for pecuniary profit. It is an agency of the state. It exists for the sole purpose of promoting the public interest in the business of agriculture. Its public character more fully appears when we consider that its organization is provided for by statute; that it has no stockholders; that by law the president of each county agricultural society in the state, or other delegate therefrom, duly authorized, is made a member of the board of directors; that said board is required to make annual reports to the governor, which are to be distributed throughout the state; that the powers of the board are prescribed by statute").

32. Downing v. Indiana State Bd. of Agriculture, 129 Ind. 443, 28 NE 123, 614, 12 LRA 664; Sixth Dist. Agricultural Assoc. v. Wright, 154 Cal. 119, 97 P 144.

[a] **Qualification of director.**—Where one who was commissioned as a director of the "state board of agriculture" qualified as a "director of the state agricultural society," it was held that such qualification was equivalent to a qualification as a member of the board of directors and also a member of the society. Peo. v. Perkins, 85 Cal. 509, 26 P 245.

[b] **Constitutionality cannot be attacked in private action.**—The constitutionality of a law organizing a state agricultural society is not open to attack in a private action for damages. Berman v. Cosgrove, 95 Minn. 353, 104 NW 534.

33. See statutory provisions; and generally Corporations.

[a] **The statutes generally provide** that whenever a certain number of the inhabitants of a state who desire to form a town, county, or district agricultural society, shall file before the proper authorities duplicate copies of their articles of association, setting forth the legal title of the society, its business and objects, the number and character of its officers, etc., the persons signing such articles, and their associates and successors, shall become a body corporate under the name and for the purpose stated in the articles. In some of the states the regulations for forming county and district societies are furnished by the state board of agriculture. As a general rule, only one county or town society may be organized in any one town or county, though two or more contiguous towns or counties may unite in forming district societies. In some states this rule is not observed. See statutory provisions. And see Sixth Dist. Agricultural Assoc. v. Wright, 154 Cal. 119, 97 P 144.

[b] **An unincorporated society may be a continuing society,** although by its constitution the payment of the membership fee "shall entitle such person to membership for one year" ending "at the annual meeting." Johnson v. Paine, (Vt.) 78 A 732.

[c] **Rights of members to vote by proxy.**—Where the charter of an agricultural society gives to life members the right to vote by proxy at all elections of officers thereof, this right cannot be limited by a resolution that no proxy shall be voted on at any meeting unless it shows within itself that it was specifically intended to be used at such meeting. If the name of the proxy is left blank by the maker of the power, and the blank is filled by the holder immediately before the election, the maker may challenge the completeness of the proxy. In the absence of any challenge by the maker of the power, the presumption is that the name was written in the blank by his authority. White v. State Agricultural Soc., 45 Hun 580, 10 NYSt 594.

[d] **Officers holding over.**—In the absence of an election, the directors and officers of a county agricultural society, organized under Howell St. §§ 2303–2312, hold over. Kent County Agricultural Soc. v. Houseman, 81 Mich. 609, 46 NW 15.

[e] **In Quebec** it was held that such a society was duly organized under 32 Vict. c 15 § 41, when the declaration prescribed by the statute has been signed by forty persons, and that persons becoming members subsequently need not sign such declaration, and that it is unnecessary to designate the particular site for the permanent buildings of the society; a designation in the words "Lachute, in the parish of St. Jerusalem d' Argenteuil," being sufficient. Martin v. Argenteuil Corp., 7 Montr. Leg. N. 139.

34. Cal.—Sixth Dist. Agricultural Assoc. v. Wright, 154 Cal. 119, 97 P 144.

Kan.—Nemaha Fair Assoc. v. Thummel, 47 Kan. 182, 27 P 832; Nemaha Fair Assoc. v. Myers, 44 Kan. 132, 24 P 71.

Md.—Maryland Jockey Club v. State, 106 Md. 415, 67 A 239.

Mich.—Harding v. Bader, 75 Mich. 316, 42 NW 942; Hogelskamp v. Weeks, 37 Mich. 422; Hall v. Kellogg, 16 Mich. 135.

Mo.—Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 425, 74 SW 979.

Nebr.—Sheldon v. Gage County Soc. of Agriculture, 75 Nebr. 485, 106 NW 474; State v. Robinson, 35 Nebr. 401, 53 NW 213, 17 LRA 383.

Oh.—Dunn v. Brown County Agricultural Soc., 46 Oh. St. 93, 18 NE 496, 15 AmSR 556, 1 LRA 754.

Pa.—Indiana County v. Indiana County Agricultural Soc., 85 Pa. 357; Com. v. Crawford County, 1 Pennyp. 403.

Wis.—State v. Timme, 56 Wis. 422, 14 NW 604.

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tions of public money in their behalf are not unconstitutional, although such appropriations to private corporations are forbidden.[35] Under some statutes the number of societies in each state or county entitled to aid is not limited,[36] while under others only one in each year is entitled to aid,[37] and under others only the society first duly organized.[38] The power to aid must be strictly construed;[39] the society must have been duly organized,[40] and must have performed all the conditions prescribed by the statute.[41]

Dissolution of the society, or a failure to carry out the purpose of its organization, will, under some statutes, have the effect of vesting title in the county to "real estate and improvements"[42] purchased and made for fair purposes, with money donated therefor by the county board,[43] or, as the case may be, of permitting the county, under similar circumstances, to recover back the amount of money contributed by it to be expended by the society "in fitting up such fair grounds, but for no other purpose."[44]

[§ 8] **D. Exemption of Property from Taxation.** Under the statutes of some jurisdictions, the property of agricultural societies is exempt from taxation;[45] but it has been held that such exemption does not apply to taxation for local improvements.[46]

35. Nemaha Fair Assoc. v. Myers, 44 Kan. 132, 24 P 71 (holding that Gen. St. [1889] § 6256, which authorizes the chairman of the board of county commissioners, under certain conditions, to issue an order on the county treasurer in favor of the county or district agricultural society, is not unconstitutional as being in contravention of a constitutional provision that no tax shall be levied except in pursuance of a law which shall distinctly state the object of the same, to which object only such tax shall be applied, the court holding that the amount permitted to be drawn from the county treasury will be paid out of the general county fund, levied and collected for the payment of current expenses of the county).

36. Poweshiek County Cent. Agricultural Soc. v. Shaffer, 86 Iowa 377, 53 NW 304.

[a] **Where society entitled makes no claim to fund.**—Upon an application for a mandamus to compel the county board of supervisors to include in their estimate of expenses for the year a certain sum allowed by law to an agricultural society, it was held to be no answer to the application that another society was also entitled to the fund, when it did not appear that such society had made any claim for a contribution from the county treasury. State v. Robinson, 35 Nebr. 401, 53 NW 213, 17 LRA 383.

[b] **The failure of one fair association** to manage the state fair strictly in accordance with law, or to use the appropriations and make reports strictly within the terms of L. (1905) p 71 c 46, is not available to the other association as a ground for payment to it of all the appropriations made for state fairs. State v. Holmes, 17 N. D. 32, 112 NW 144.

[c] **Rights of rival state fair associations** see State v. Holmes, 17 N. D. 32, 112 NW 144.

37. Com. v. Crawford County, 1 Pennyp. (Pa.) 403.

[a] **Where a county has paid annually to one** of several societies the authorized amount, it will not be compelled to pay the amount for these years to another society, although the latter was prior in organization, and it seems that the act contemplates the possible existence of more than one such organization in a county, and it is within the discretion of the county commissioners to divide the annual appropriation equally among several societies or to make equitable alternate payments of the specified sum to them. Com. v. Crawford County, 1 Pennyp. (Pa.) 403.

38. Iroquois Agricultural Soc. v. Bates, 61 Ill. 490.

[a] **The fact that another society in the same county has complied with the conditions** necessary to entitle it to demand payment from the county will not justify the board of supervisors in failing to include in the estimate of expenses for the current year the amount payable to an agricultural society under a provision of the statute, it not appearing that such society is making any claim upon the county for funds. State v. Robinson, 35 Nebr. 401, 53 NW 213, 17 LRA 383.

[b] **In Minnesota,** under L. (1911) c 381, an incorporated county agricultural association is entitled to state aid in preference to another county association subsequently incorporated, succeeding a street fair association. State v. Iverson, 120 Minn. 247, 139 NW 498.

39. Moses v. Summersett, 58 Wash. 403, 108 P 943; In re Rockwood Electoral Div. Agricultural Soc., 12 Man. 655.

[a] **No appropriation unless clearly authorized.**—In Moses v. Summersett, 58 Wash. 403, 108 P 943, it was held that laws granting aid to agricultural societies should be strictly construed, and that no appropriation of public funds may be made for their benefit unless clearly authorized.

[b] **An appropriation of public money to pay debts** of the society is not authorized by an act conferring power upon the county commissioners to purchase land for fair purposes. Warren County Agricultural Joint Stock Co. v. Barr, 55 Ind. 30.

[c] **Appeal from allowance of appropriation.**—The application of an agricultural society for assistance from the county funds is a claim, and an appeal from its allowance by a taxpayer will lie to reëxamine the facts as to the organization and competency of the society. No reëxamination as to the public interest in assisting such a society is permissible. Sheldon v. Gage County Agricultural Soc., 71 Nebr. 411, 98 NW 1045 [aff reh 75 Nebr. 485, 106 NW 474].

40. Dutchess, etc., County Agricultural Soc. v. McIntyre, 17 Johns. (N. Y.) 87 (holding that the society must be formed after due public notice to all the inhabitants of the county to meet for that purpose).

41. Harding v. Bader, 75 Mich. 316, 42 NW 942.

[a] **Contribution of a certain amount by members** may be made a condition precedent to public aid. Sheldon v. Gage County Agricultural Soc., 75 Nebr. 485, 106 NW 474.

[b] **Certificate of society's officers.**—(1) Under Comp. L. § 1687, a tax to be raised for agricultural societies can be raised only by order of the supervisors, when they have been informed, by the sworn certificate of the proper officers of the society, that the society has raised at least one hundred dollars. Hall v. Kellogg, 16 Mich. 135. (2) This certificate must be signed by both the president and secretary of the society. Hogelskamp v. Weeks, 37 Mich. 422. (3) But a tax having been levied, and the county clerk testifying that he could not find such a certificate in his office, it will be presumed to have been made and presented, and the testimony of a member of the board to the effect that he did not recollect whether it was presented or not will not rebut such presumption. Silsbee v. Stockle, 44 Mich. 561, 7 NW 160, 367.

[c] **Time of holding fair.**—Where, by separate enactments, money was appropriated to two agricultural societies, it being provided in each enactment that their fairs should not be held at the same time, neither was entitled to the appropriation, where their fairs were held at the same time. State v. Timme, 56 Wis. 423, 14 NW 604.

[d] **Where monthly reports** of the condition of crops, etc., in the county or district are necessary to entitle a county or district agricultural society to representation in the state board of agriculture, and to share in the fund provided for the encouragement of agriculture, the fact that the secretary of the state board of agriculture notified the county society that its reports were sufficient to entitle it to representation in the state board, and failed to require it to comply with the statute, is no excuse for such noncompliance. Nemaha Fair Assoc. v. Thummel, 47 Kan. 182, 27 P 832.

[e] **A forfeiture of the appropriation** made to state fairs under L. (1905) p 71 c 46, should not be decreed, for failure to comply with the provisions of the statute, unless the act under which it is claimed clearly shows such to be the legislative intent. State v. Holmes, 17 N. D. 32, 112 NW 144.

42. Owen v. Main, 92 Nebr. 258, 138 NW 154 (holding that, under L. [1858] pp 220, 221, 1 Compl. Sess. L. 530 §§ 8-11, relating to county aid to agricultural societies in improving sites for fair grounds, the words "all such real estate and improvements" refer only to real estate purchased and improved by money paid from the county treasury).

43. Owen v. Main, 92 Nebr. 258, 138 NW 154.

44. Owen v. Main, 92 Nebr. 258, 138 NW 154 (holding that L. [1879] p 400 § 14, amending the act of 1858, L. [1858] p 219, providing that a county board may pay to a county agricultural society owning a certain quantity of real estate for fair grounds money to be expended by such society in fitting up the fair grounds, made no change with respect to the right of the county to recover the amount of its contribution in case of default).

[a] **The purpose of the statute** (L. [1858] p 221, 1 Compl. Sess. L. p 530 § 11) was to allow an agricultural society the use of the funds of the county to a limited extent, in trust, and to prevent the diversion of public funds to private use, if the society failed to carry out the purpose of its organization. Owen v. Main, 92 Nebr. 258, 138 NW 154.

45. See statutory provisions; and Taxation [37 Cyc 884].

[a] **Corporation for private gain not exempt.**—Under a statute which provided that "the real estate and personal property which may be used exclusively for agricultural or horticultural societies . . . shall be exempted from taxation," it was held that a corporation organized for the purpose of encouraging agricultural and horticultural pursuits and "to establish and maintain a race course, and promote athletic and other sports and amusements," was not exempt from taxation. Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 425, 74 SW 879.

46. Worcester Agricultural Soc. v.

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[§ 9] **E. Powers and Liabilities—1. In General.** Agricultural societies, being created by law, possess only those powers conferred by their charters, either expressly or as incidental to their existence, and calculated to effect the objects of their creation.[47] Among the powers usually possessed by such societies are those of holding fairs or exhibitions,[48] acquiring real estate[49] and other property[50] for that purpose,[51] borrowing money,[52] and executing mortgages[53] and conveyances[54] of its property. But, under the statutes of some jurisdictions, agricultural societies are without authority to borrow money[55] or to execute mortgages on their property.[56]

A national society is not liable for services rendered to a subordinate local society, although benefited thereby, in the absence of facts or circumstances from which an implied promise to pay may be inferred.[57]

[§ 10] **2. Holding Exhibitions and Fairs—a. Right to Hold.** In order better to effect the purposes of their organization, agricultural societies are authorized to hold annual fairs or other exhibitions, and to offer rewards and premiums for such articles, productions, and improvements as they may deem best calculated to promote the agricultural and household manufacturing interests of

Worcester, 116 Mass. 189; Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 425, 74 SW 979.

47. Ala.—Dillard v. Webb, 55 Ala. 468.

Ill.—Aurora Agricultural, etc., Soc. v. Paddock, 80 Ill. 263.

Ind.—Downing v. Indiana State Bd. of Agriculture, 129 Ind. 443, 28 NE 123, 164, 12 LRA 664.

Iowa.—Williams v. Dean, 134 Iowa 216, 111 NW 931, 11 LRANS 410; Bathe v. Decatur County Agricultural Soc., 73 Iowa 11, 34 NW 484, 5 AmSR 651; Thompson v. Lambert, 44 Iowa 239.

Me.—Brown v. South Kennebec Agricultural Soc., 47 Me. 275, 74 AmD 484.

Mass.—Com. v. Ruggles, 6 Allen 588.

Mich.—Ismon v. Loder, 135 Mich. 345, 97 NW 769; Kent County Agricultural Soc. v. Houseman, 81 Mich. 609, 46 NW 15.

N. H.—In re Opinion of Justices, 73 N. H. 625, 63 A 505, 6 AnnCas 689.

N. Y.—Preston v. Loughran, 58 Hun 210, 12 NYS 313; White v. New York State Agricultural Soc., 45 Hun 580, 10 NYSt 594.

Oh.—Dunn v. Brown County Agricultural Soc., 46 Oh. St. 93, 18 NE 496, 15 AmSR 556, 1 LRA 754; Stewart v. Agricultural Soc., 6 Oh. Dec. (Reprint) 751, 7 AmLRec 668.

Man.—In re Rockwood Electoral Div. Agricultural Soc., 12 Man. 655.

[a] **"For the purpose of effecting the objects of the corporation** its powers are as broad and comprehensive as those of an individual, unless the exercise of the asserted power is expressly prohibited." Per Seevers, C. J., in Thompson v. Lambert, 44 Iowa 239, 244.

48. See infra § 10.

49. Sixth Dist. Agricultural Assoc. v. Wright, 154 Cal. 119, 97 P 144 (holding that a slight misnomer of the society in a conveyance to it will not invalidate the conveyance). See also Owen v. Main, 92 Nebr. 258, 138 NW 154.

[a] **Claim of adverse possession unavailable against agricultural association.**—In California property held by an agricultural association is held in trust by a state institution or public agency for a public use. Whether the title is held by the state at large, or by a county, or by some municipal department, or other official body, there can be no adverse holding of such land which will deprive the public of the right thereto, or give title to an adverse claimant, or create a title by virtue of the statute of limitations. The rule is universal in its application to all property set apart or reserved to the public use, and the public use for which it is appropriated is immaterial. Sixth Dist. Agricultural Assoc. v. Wright, 154 Cal. 119, 97 P 144. See generally Adverse Possession § 459 et seq.

50. See statutory provisions.

51. See cases supra note 49, and infra this note.

[a] **Legislative control of property belonging to agricultural societies.**—Where the society is considered a private corporation the legislature cannot control its property. Thompson v. Lambert, 44 Iowa 239.

[b] **Gift of society's property by state unconstitutional.**—Where the effect of a statute was to authorize the formation of a private corporation consisting of the members of an agricultural association which was a public corporation, and to transfer, without consideration, to such newly formed private corporation, the property of the agricultural association, to be managed and disposed of by it for its own use and benefit, subject to certain limitations, such statute was held to be unconstitutional, as a gift of property, under a provision of the state constitution which provided that the legislature should have no power "to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever." Sixth Dist. Agricultural Assoc. v. Wright, 154 Cal. 119, 97 P 144.

52. See cases infra note 53.

53. Thompson v. Lambert, 44 Iowa 239, 243; Ismon v. Loder, 135 Mich. 345, 97 NW 769; Preston v. Loughran, 58 Hun 210, 12 NYS 313.

"In the absence of any such prohibitory provision the power to borrow money, execute notes and mortgages, as evidences of and security for indebtedness created for the necessary and proper purpose of carrying out the objects of the corporation impliedly exists." Per Seevers, C. J., in Thompson v. Lambert, supra.

[a] **The power to mortgage lands,** where not expressly prohibited, is incident to the power to purchase and hold real estate and make contracts. Aurora Agricultural, etc., Soc. v. Paddock, 80 Ill. 263.

[b] **Execution by society; seal.**—As the law does not require agricultural societies to have seals, Comp. L. (1897) § 9005, giving to a scroll or device used as a seal upon a deed the same effect as a seal attached thereto or impressed thereon, gives to the character, "[Seal]," set opposite the signatures of the president and secretary of the corporation, the same effect as a corporate seal, especially in view of the tenor of the mortgage, which purported to be of the association, "party of the first part," and concluded: "In witness whereof, said party of the first part has hereunto set —— hand and seal." Ismon v. Loder, 135 Mich. 345, 97 NW 769.

[c] **Manner of execution prescribed by statute.**—An agricultural society incorporated under N. Y. L. (1855) c 425, was reorganized under a special act into a joint-stock company. The original statute authorized the society to sell its land by permission of the court, but the new act provided that the society might dispose of its property by a vote of the holders of two thirds of its stock. It was held that the requirements of the original statute were superseded, as to this society, by the provisions of the special act, and a mortgage by the officers of the society in accordance with the required vote of the stockholders was valid. Preston v. Loughran, 58 Hun 210, 12 NYS 313.

[d] **Misapplication of borrowed funds** by the officers of the society does not affect the validity of the loan or mortgage as against either the corporation or a stockholder, where the lender does not participate in the fraud. Thompson v. Lambert, 44 Iowa 239.

[e] **Action of the directors in authorizing a mortgage** to secure a loan cannot be questioned by the stockholders after they have ratified the action, and the association has received the benefit of the loan. Aurora Agricultural, etc., Soc. v. Paddock, 80 Ill. 263.

[f] **What constitutes sufficient authorization of mortgage** by directors and stockholders of society see Ismon v. Loder, 135 Mich. 345, 97 NW 769.

54. See cases infra this note.

[a] **Sale of property.**—In Michigan agricultural societies may be authorized by special legislation to dispose of their property and invest the proceeds. Kent County Agricultural Soc. v. Houseman, 81 Mich. 609, 46 NW 15.

[b] **Sale under execution.**—The lands of an agricultural association may be sold on execution. Denike v. Santa Clara Valley Agricultural Soc., 9 Cal. A. 228, 98 P 687.

[c] **President liable for unauthorized sale of building.**—The president of an agricultural society, who without authority sells a building of the society, and with the purchaser enters the premises to tear it down, is liable as a trespasser. The fact that individual directors took no steps to disaffirm the act does not amount to a ratification. Kent County Agricultural Soc. v. Ide, 128 Mich. 423, 87 NW 369.

[d] **Legality of transfer of property to state.**—Where an agricultural society, in pursuance of statute, transferred the control of its funds and emoluments to the state, it was held that such transfer could not be attacked, in an action for damages brought against the society. Berman v. Minnesota State Agricultural Soc., 93 Minn. 125, 100 NW 732.

[e] **President and secretary voting upon sale of lands.**—Under the Michigan statute (Local Acts [1885] No. 378), authorizing the sale of land belonging to an agricultural society, by a vote of the "directors," the president and secretary, who are ex-officio directors, are entitled to vote the same as those who are specifically so called. Kent County Agricultural Soc. v. Houseman, 81 Mich. 609, 46 NW 15.

[f] **Who may attack sale.**—Sale of entire property can be attacked only by society or state and not in private action. Berman v. Minnesota State Agricultural Soc., 93 Minn. 125, 100 NW 732.

55. In re Rockwood Electoral Div. Agricultural Soc., 12 Man. 655.

56. Stewart v. Hardin County Agricultural Soc., 6 Oh. Dec. (Reprint) 751, 7 AmLRec 668; In re Rockwood Electoral Div. Agricultural Soc., 12 Man. 655.

57. Crawley v. American Soc. of Equity, 153 Wis. 13, 139 NW 734. See Beneficial Association.

the district and state in which they are located.[58]

[§ 11] **b. Incidental Powers.** As incident to the power to hold fairs, the society may arrange for exhibits[59] and award premiums therefor,[60] conduct games and other amusements along proper lines,[61] employ musicians,[62] charge an admission fee,[63] erect seats on the grounds and charge for their use,[64] grant concessions or privileges on the grounds;[65] and under some statutes may conduct horse races,[66] but it may not conduct or authorize gambling,[67] nor employ hackmen to convey visitors to the grounds, at least where it does not appear that attendance depends upon conveyance provided by the society.[68] A statute prohibiting the sale of provisions from any temporary stand within a certain distance of the fair grounds, except with the consent of the officers of the society, has been upheld as a valid exercise of the police power;[69] but a statute prohibiting the sale of any article whatsoever within a certain distance of the fair grounds, without the permission of the board of directors,[70] and a statute prohibiting the opening, without the consent of the society, of stables within a certain distance of the fair grounds for the purpose of receiving horses or vehicles for pay,[71] have been declared unconstitutional.

[§ 12] **c. Horse Racing.** Under the statutes of some jurisdictions such societies have the power to offer premiums to the winners at a horse race or trial of speed to be held at their annual fairs;[72]

58. Ill.—Livingston County Agricultural Soc. v. Hunter, 110 Ill. 155.
Ind.—Downing v. Indiana State Bd. of Agriculture, 129 Ind. 443, 28 NE 123, 614, 12 LRA 664.
Iowa.—Bathe v. Decatur County Agricultural Soc., 73 Iowa 11, 34 NW 484, 5 AmSR 651; Delier v. Plymouth Agricultural Soc., 57 Iowa 481, 10 NW 872; Thompson v. Lambert, 44 Iowa 229.
Mich.—Bronson Agricultural, etc., Assoc. v. Ramsdell, 24 Mich. 441.
Nebr.—State v. Robinson, 35 Nebr. 401, 53 NW 213, 17 LRA 383.
Oh.—Dunn v. Brown County Agricultural Soc., 46 Oh. St. 93, 18 NE 496, 15 AmSR 556, 1 LRA 754.
[a] **An agricultural fair** is a place where the industrial products of a people, in agriculture, manufacturing, and the arts, are received and placed on exhibition for the purpose of displaying them and awarding premiums as a reward for excellence, even though such organization may exist for the sake of profit. State v. Long, 48 Oh. St. 509, 28 NE 1038.
[b] **Even where no express authority is given by statute,** agricultural societies are authorized to hold a fair under the statutory authority to "perform all such acts as they deem best calculated to promote the agricultural and household manufacturing interests of the county." Dunn v. Brown County Agricultural Soc., 46 Oh. St. 93, 18 NE 496, 15 AmSR 556, 1 LRA 754.

59. Vigo Agricultural Soc. v. Brumfiel, 102 Ind. 146, 1 NE 382, 52 AmR 657. And see infra § 18.

60. Williams v. Dean, 134 Iowa 216, 111 NW 931, 11 LRANS 410. And see infra § 27.
[a] **Time exhibitor required to keep goods on exhibition.**—Where a state society is required to hold a fair and has extended the time during which it shall be kept open, exhibitors are not bound to keep their goods on exhibition during such additional time; but persons making entries for the exhibition of the speed of horses, subject to a rule especially applicable thereto, which allows such exhibition to be continued, in case of storms, to the next fair day, and, if necessary, beyond the time fixed for the regular fair, are bound by such extension. Farrier v. State Agricultural Soc., 36 Minn. 473, 32 NW 554.
[b] **The winner may maintain an action** (1) to recover premium (Delier v. Plymouth County Agricultural Soc., 57 Iowa 481, 10 NW 872; Moshier v. La Crosse County Agricultural Soc., 90 Wis. 37, 62 NW 932), (2) unless the offer is illegal (Bronson Agricultural, etc., Assoc. v. Ramsdell, 24 Mich. 441).
[c] **Form of petition** to recover premium see Delier v. Plymouth County Agricultural Soc., 57 Iowa 481, 10 NW 872.
[d] **Effect of agreement to scale premium.**—Where, in an action to recover a premium, it appeared that a rule of defendant association permitted its officers to scale down the premiums in case of bad weather, and the court charged that if the conditions authorizing them to scale down existed there would be a liability only for the reduced amount, it was held proper to further charge that no agreement by any of the exhibitors to accept a less sum than the whole premium earned would be binding if made without other consideration than the payment of such reduced sum. Murray v. Walker, 83 Iowa 202, 48 NW 1075.

61. Williams v. Dean, 134 Iowa 216, 111 NW 931, 11 LRANS 410.

62. Augusta Amateur Musical Club v. Cotton States Mechanics', etc., Assoc., 50 Ga. 436 (holding that it is within the scope of the authority of a committee of an agricultural society to employ musicians for its fair).

63. Melvin v. State, 121 Cal. 16, 53 P 416.
[a] **The society has no power to fix bonds** within which no person may enter without their consent, except so far as duly authorized by statute, and especially it may not exclude persons from any portion of the public highway. Com. v. Ruggles, 6 Allen (Mass.) 588.

64. Magoverning v. Staples, 7 Lans. (N. Y.) 145 (holding that before the society can exclude from such seats a person who had the right to enter on the grounds it must be shown that compensation for their use had been exacted, and that the occupant knew of the requirement, and, with knowledge thereof and after demand of it, he refused to pay).

65. Robinson v. Clark, 53 Ill. A. 368. And see infra § 13.

66. See infra § 12.

67. See infra § 15.

68. Bathe v. Decatur County Agricultural Soc., 73 Iowa 11, 34 NW 484, 5 AmSR 651.

69. State v. Reynolds, 77 Conn. 131, 135, 58 A 755 (where the court said: "It has long been the policy of this State to protect and aid financially public societies of the kind contemplated by the statute here in question, for the 'encouragement or improvement of agriculture.' To this end the State encourages them to hold such 'exhibitions' and 'fairs' as the statute in question contemplates, and delegates to them certain powers for the purpose of enabling them more effectually to carry out the objects for which they exist. . . . Societies of this kind are justly considered to be of public benefit. The Act in question was ostensibly enacted for the protection of the fairs and exhibitions of such societies. . . . It was not enacted for the benefit of any particular society but is general in its operation. It deprives the individual of no vested rights, and does not interfere with him in the pursuit of his usual and ordinary lawful business").
[a] **Statute applies only while fair is being held.**—State v. Reynolds, 77 Conn. 131, 58 A 755.
[b] **Ordinary business of merchants** at permanent stands is not forbidden by such statutes. State v. Reynolds, 77 Conn. 131, 58 A 755.

70. Markley v. State, 31 Oh. Cir. Ct. 225, 230 (where the court said: "The effect of the act in question is to restrict or abridge the right of the plaintiffs in error to use and enjoy their property in a particular manner, so that the fair company may use its property in the same manner to greater profit than it could if each was left to the free use of its or their own as it or they should see fit. It is inimical to Art. 14, Sec. 1, of the federal consitution above quoted, because it therefore abridges the privileges and immunities of citizens, deprives them of their property without due process of law and denies to each the equal protection of the law. The act in question gives to the board of trustees of the fair company the right to say who shall do the forbidden act; and restrains a lawful trade and occupation, and gives it the power to destroy competition, and, therefore, create a monopoly. It takes away from the plaintiffs in error the right guaranteed them by Art. 1, Sec. 1, of our bill of rights, the privilege of enjoying and possessing their property. It gives to the fair association an absolute and arbitrary power over the property of others").

71. Com. v. Bacon, 13 Bush (Ky.) 210, 213, 26 AmR 189 (where the court said: "The effect of the act then is to restrict the right of one person to use and enjoy his property in a particular manner that another may use his in that manner to greater profit than he could if each was left free to use his own as he pleased. In this country, where the right of the citizen to acquire, hold, and enjoy property is guaranteed by the fundamental law, it would seem that the statement of the proposition is enough to refute it").

72. West v. Carter, 129 Ill. 249, 21 NE 782; Delier v. Plymouth Agricultural Soc., 57 Iowa 481, 10 NW 872.
[a] **Right of owner to premium.**—The owner of two race horses, through one P, entered them in races held by defendant, an agricultural society, the races to be conducted "under the rules of the American Trotting Association," which provided that members could withhold the premium of any horse if the entry was fraudulent or ineligible, and submit the case to the decision of the association. Defendant was a member of the association, and withheld the prizes won by the said horses on the ground that the horses belonged to P, and that he was barred by some rule of the society from participating in the races. It was held that, unless for the purpose of the races the horses were under the control or management of P for his own advantage, the owner was entitled to the prize money, and was not bound by the agreement to submit to the decision of the association, the advertisement that the races would be held under their rules not being notification to him that defendant was a member thereof. Moshier v. LaCrosse County Agricultural Soc., 90 Wis. 37, 62 NW 932.

but in certain states horse racing at fairs for premiums or stakes is prohibited.[73]

[§ 13] **d. Granting Concessions or Licenses.** Where a society has, for a consideration, granted an exclusive privilege or concession, it is bound to protect the purchaser against its infringement by others,[74] or by the society itself,[75] and is liable for any loss resulting from its failure to do so;[76] and this is true even though the concessioner under protest submitted to the act that infringed his concession.[77] However, the society may by its conduct estop itself from interfering with the performance of contracts existing at the time of granting such privileges.[78]

Nature of concession. Such a concessioner, however, does not acquire any interest in the real estate designated in the contract as the location of his business or performance,[79] but only a license which may be revoked by the society upon a breach by the licensee of the terms upon which it was granted;[80] but the society cannot arbitrarily abrogate a license when no law has been violated by the licensee.[81]

Reasonable construction must be given to contracts by a society granting privileges or concessions.[82]

[§ 14] **e. Sale of Intoxicants.**[83] The statutes generally prohibit the sale of intoxicating liquor of any kind, either inside the inclosure or within a specified distance from the grounds where an agricultural fair is being held.[84] In some states an exception is made in favor of liquor dealers exercising their calling at their usual places of business within the prohibited districts.[85]

[b] **Right to premium as affected by residence.**—A had charge of a trotting mare owned by B, and entered the same for a race in which she won second place. The winner of the race was from another county, and so was not entitled to contest for the premium offered. A entered a protest with the officers of the society against the payment of the award to the owner of the winning horse but without preventing the payment. It was held, in an action brought by A to recover the award, that the notice and protest brought by him as to the disqualification of the winning horse were sufficient to estop the society from paying the money to the owner, and that A, having paid the entry fee and entered the mare for the race, was entitled to the premium offered, although he was not the owner of the animal. Delier v. Plymouth Agricultural Soc., 57 Iowa 481, 10 NW 872.

[c] **Races may be postponed.**—A reasonable discretion must be allowed those in charge of a county fair to determine when races shall terminate for a given day, and it will be presumed that the judges of the races acted fairly and within the exercise of a sound discretion when they declared a race postponed till the following day. Molk v. Daviess County Agricultural, etc., Assoc., 12 Ind. A. 542, 40 NE 927.

[d] **Effect of postponement on right to premium.**—Where the judges have postponed a race and, notwithstanding such postponement, the riders, believing that the signal has been given to start, or yielding to the request of the bystanders, ride the race, the winner cannot recover if he knew of the postponement, even though he protested against it. Molk v. Daviess County Agricultural, etc., Assoc., 12 Ind. A. 542, 40 NE 927.

[e] **Recovery of entry fees on postponement of race.**—Under L. (1885) c 174 § 2, the state agricultural society is required to hold an annual fair upon the state grounds at such times and for such periods as the society may direct. When, in accordance with this provision, the society has fixed the dates and advertised the same exhibitors cannot be required to keep their stock and wares on exhibition for a longer period, although the executive officers assume to extend the time and continue the fair beyond the dates originally named. But where persons have made entries for an exhibition of the speed of horses under the rules allowing such exhibitions, at the option of the society, to be postponed on account of rain, these exhibitions being no regular part of the fair, persons making such entries are bound by the regulations of the society, and cannot recover their entrance fees for races that have been so postponed and in which they refuse to participate. Farrier v. State Agricultural Soc., 36 Minn. 478, 32 NW 554.

[f] **Conditions of offer must be complied with.**—Under a premium offered the winner of a race open to hackmen, entries to be made in the name of the bona fide owner three months previously, the winner of the race was not entitled to the premium where he had not been the bona fide owner of the horse at the time required for making the entry, and the horse was not used in the ordinary course of the hack business. Robinson v. Provincial Exhibition Commn., 32 N. S. 216.

[g] **Decision of judges in awarding a premium** is conclusive if honestly given. Wellington v. Monroe Trotting Park Co., 90 Me. 495, 38 A 543.

[h] **Fraudulent awarding of premium** by the judges to one horse does not prevent the recovery of the premium from the society by the person properly entitled to it. Wellington v. Monroe Trotting Park Co., 90 Me. 495, 38A 543.

73. See cases infra this note.

[a] **Premium cannot be recovered where racing is unlawful.**—Bronson Agricultural, etc., Assoc. v. Ramsdell, 24 Mich. 441.

[b] **Racing impliedly discouraged.**—The state has made no provision for horse races, or contests of speed, at the state agricultural fair, but has impliedly discouraged them by forbidding appropriations to be used therefor. Melvin v. State, 121 Cal. 16, 53 P 416.

74. Robinson v. Clark, 53 Ill. A. 368.

75. Virginia State Fair Assoc. v. Virginia Amusement Concession Corp., (Va.) 82 SE 176.

76. Mason v. Dewis, 71 SW 434, 24 KyL 1312.

[a] **Plaintiff being harassed, annoyed, and disturbed in mind** by defendant's invasion of his exclusive privilege of selling refreshments on fair grounds is not a proximate result for which he may recover damages. Mason v. Dewis, 71 SW 434, 24 KyL 1312.

[b] **Damages recoverable.**—Where a fair association granting to an amusement company the privilege of conducting upright and flat wheels and other devices of like character, wrongfully prohibited the company from operating through buyers of the privilege a reasonable number of wheels, the company could recover the actual damages sustained. Virginia State Fair Assoc. v. Virginia Amusement Concession Corp., (Va.) 82 SE 176.

77. Virginia State Fair Assoc. v. Virginia Amusement Concession Corp., (Va.) 82 SE 176.

78. Harford Agricultural, etc., Assoc. v. Somerville, 120 Md. 572, 87 A 937.

[a] **Injunction.**—An agricultural association, although having sold to another, as it had the right, the privilege of selling feed on its grounds, and although having passed a resolution prohibiting anyone else delivering feed thereon, having by the conduct of itself and officers led another to believe that he would be permitted to deliver feed on its grounds, that he should be allowed by it to carry out his contracts, previously made, to deliver feed to persons having horses on the grounds, and it should be enjoined from preventing it. Harford Agricultural, etc., Assoc. v. Somerville, 120 Md. 572, 87 A 937.

79. Mackay v. Minnesota State Agricultural Soc., 88 Minn. 154, 92 NW 539.

80. Mackay v. Minnesota State Agricultural Soc., 88 Minn. 154, 92 NW 539.

[a] **No part of the consideration** paid by the licensee may be recovered by him upon the revocation of his license for good cause. Mackay v. Minnesota State Agricultural Soc., 88 Minn. 154, 92 NW 539.

[b] **Partial forfeiture of privilege.**—Where an amusement company, obtaining the privilege from a fair association of conducting upright and flat wheels and other devices, sold privileges to buyers, some of whom violated the contract, while others acted in conformity to it, the association could not forfeit the entire privilege. Virginia State Fair Assoc. v. Virginia Amusement Concession Corp., (Va.) 82 SE 176.

81. Virginia State Fair Assoc. v. Virginia Amusement Concession Corp., (Va.) 82 SE 176.

[a] **Illustration.**—A fair association which grants to an amusement company the privilege of conducting upright and flat wheels and other devices of like character, subject to the right of the association to determine the meaning of the term "other devices of like character," may not arbitrarily abrogate the privilege when no law has been violated. Virginia State Fair Assoc. v. Virginia Amusement Concession Corp., (Va.) 82 SE 176.

82. Virginia State Fair Assoc. v. Virginia Amusement Concession Corp., (Va.) 82 SE 176 (holding that a contract whereby a fair association granted to an amusement company the privilege of conducting upright and flat wheels and other devices, not in violation of law, gave to the company the right to operate a reasonable number of wheels, and that the act of the association in limiting the number of the wheels which can be operated was a breach of the contract). See Contracts [9 Cyc 587].

83. **Sale of liquors at prohibited places generally** see Intoxicating Liquors [23 Cyc 198].

84. Delier v. Plymouth Agricultural Soc., 57 Iowa 481, 10 NW 872; State v. Long, 48 Oh. St. 509, 28 NE 1038; Heck v. State, 44 Oh. St. 536, 9 NE 305.

85. State v. Stovall, 103 N. C. 416, 8 SE 900.

[a] **This is not the case in Ohio.**—It was held in that state that the

[§ 15] **f. Gambling.**[86] Agricultural societies have no authority to license gambling on their premises,[87] and in some of the states they are expressly forbidden by statute to rent, lease, let, or donate any portion of the grounds or building owned or occupied by them, to be used for the purpose of carrying on games of chance or skill, or any scheme, lottery, or drawing with dice, cards, wheels, or other device, for the purpose of wagering money on the result.[88]

[§ 16] **g. Duty and Liability to Public—(1) Care of Buildings and Grounds.** Although they are not insurers of the safety of their patrons,[89] agricultural societies, having invited the public to their fairs, are bound to use reasonable care to keep all parts of the grounds and the approaches thereto, to which patrons are invited, free from dangers.[90] The fact that various attractions are conducted and managed by licensees, independent contractors, or lessees, with the permission of the fair association, does not relieve the association from liability.[91]

Race track. In the conduct of races a fair association owes to contestants the duty of exercising reasonable care to keep the track safe and free from obstructions,[92] and likewise owes a similar duty to patrons and spectators whenever they

prohibition was general, and included the case of sales made by a saloon keeper whose business was permanently located within two miles of the fair grounds. Heck v. State, 44 Oh. St. 536, 9 NE 305.

86. Gambling in prohibited places generally see Gaming [20 Cyc 890].

87. Cope v. Flora Dist. Fair Assoc., 99 Ill. 489, 492, 39 AmR 30 (where the court said: "The licensing of gambling tables by the officers of the company can not, in any sense, be regarded the act of the company. It is foreign to the objects and purposes of the association, and is clearly ultra vires, and the officers alone are responsible unless authorized by the stockholders, in which case it would doubtless be such an abuse of the company's franchises as would warrant the State in reclaiming them").

88. West v. Carter, 129 Ill. 249, 21 NE 782; State v. Johnson, 115 Ind. 467, 17 NE 910; State v. Darroch, 12 Ind. A. 527, 40 NE 639; Delier v. Plymouth Agricultural Soc., 57 Iowa 481, 10 NW 872.

[a] **What constitutes gambling.**—The acting superintendent of a county fair was indicted for leasing a portion of the grounds "to be used and occupied with apparatus, books, and other devices for the purpose of recording, registering bets and wagers, and selling pools, upon the results of races." It was held that such a purpose constituted a gambling scheme and came within the provisions of the statute which forbids the officers and managers of agricultural societies to rent, lease, or donate their grounds to be used for gambling purposes. State v. Howard, 9 Ind. A. 635, 37 NE 27. See generally Gaming [20 Cyc 873].

[b] **The law will not tolerate any shift or device** upon the part of such an association whereby, under pretense of bettering the condition or developing and improving stock, gambling is intended or permitted. West v. Carter, 129 Ill. 249, 21 NE 782.

[c] **Bookmaking and pool selling.**—The New England Breeders' Club, incorporated under Acts (1905) 648 c 232, and authorized to hold races and contests of speed, skill, and endurance, and to offer purses, prizes, and sweepstakes, is not empowered to permit bookmaking and pool selling. In re Opinion of Justices, 73 N. H. 625, 63 A 505, 6 AnnCas 689.

[d] **What officers liable.**—The words "officer" and "officers," used in the statute making it unlawful for any officer or officers of an agricultural society to rent any portion of its grounds for gambling purposes, are not employed in a strictly technical sense, but are intended to designate any person or persons duly authorized by the society to grant to other persons privileges upon its grounds or premises. State v. Johnson, 115 Ind. 467, 17 NE 910.

[e] **Injunction to restrain gambling.**—An injunction to restrain an agricultural society or its officers from permitting gamblers to congregate and ply their vocation upon the grounds of the society during its annual exhibitions will not lie at the suit of a stockholder unless it appears that the complainant or the company has sustained some pecuniary loss thereby. Cope v. Flora Dist. Fair Assoc., 99 Ill. 489, 39 AmR 30. See generally Injunctions [22 Cyc 902].

89. Smith v. Cumberland County Agricultural Soc., 163 N. C. 346, 79 SE 632 (holding that, while a fair association is bound to know that the premises are safe for public use, and to furnish adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance, it is not an insurer of patrons, although it must warn the public against dangers which can readily be foreseen).

90. Me.—Higgins v. Franklin County Agricultural Soc., 100 Me. 565, 62 A 708, 3 LRANS 1132 and note; Thornton v. Maine State Agricultural Soc., 97 Me. 108, 53 A 979, 94 AmSR 488; Brown v. South Kennebec Agricultural Soc., 47 Me. 275, 74 AmD 484.

Md.—Washington County Agricultural, etc., Assoc. v. Gray, 118 Md. 600, 85 A 291.

N. Y.—Roper v. Ulster County Agricultural Soc., 136 App. Div. 97, 120 NYS 644.

N. C.—Smith v. Cumberland County Agricultural Soc., 163 N. C. 346, 79 SE 632.

Oh.—Dunn v. Brown County Agricultural Soc., 46 Oh. St. 93, 18 NE 496, 15 AmSR 556, 1 LRA 754.

Vt.—Selinas v. Vermont State Agricultural Soc., 60 Vt. 249, 15 A 117, 6 AmSR 114.

[a] **Liable in corporate capacity.**—In an action against an agricultural society to recover damages for injuries received by one of its patrons, in consequence of the fall of seats erected on the fair grounds for the use of visitors, the society was held liable in its corporate capacity, it having been shown to be guilty of negligence in the construction of the seats. Dunn v. Brown County Agricultural Soc., 46 Oh. St. 93, 18 NE 496, 15 AmSR 556, 1 LRA 754. Compare Williams v. Dean, 134 Iowa 216, 111 NW 931, 11 LRANS 410 infra § 20 note 5 [a]; Brown v. South Kennebec Agricultural Soc., 47 Me. 275, 74 AmD 484 infra § 21 note 11.

[b] **Liability of state.**—In Melvin v. State, 121 Cal. 16, 53 P 416, it was held that, where a ticket holder of the state fair attended horse races upon a day when there was no other exhibit, and was injured by reason of the fall of defective and unsafe seats placed therein by the officers of the state agricultural society, the state was not liable upon contract for the resulting injury, nor was it liable in tort for neglect of public duty on the part of the state board of agriculture.

[c] **Duty of inspection.**—It is the duty of a society to its patrons not only to employ competent inspectors to examine the premises to which it invites its patrons, but also to see that such inspectors do their duty. Logan v. Lenawee County Agricultural Soc., 156 Mich. 537, 121 NW 485.

[d] **Proximate cause of injury.**—Where a fair association maintaining an inclosed race track in its fair grounds negligently makes an opening into the track, and a runaway horse escapes through such opening and injures plaintiff, who is in the main part of the grounds, the negligent opening of the fence, and not the runaway, is the proximate cause of the injury. Windeler v. Rush County Fair Assoc., 27 Ind. A. 92, 59 NE 209, 60 NE 954.

[e] **Defective railing near grandstand.**—Where a railing, supported by posts imbedded only one and three-fourths inches in loose rock at the top of a stone wall ten or twelve feet high in front of the grand stand on the fair grounds gave way when the usual crowd pressed against it, the mere collapse of the railing was sufficient in itself to raise an inference of negligence. Washington County Agricultural, etc., Assoc. v. Gray, 118 Md. 600, 85 A 291.

91. Thornton v. Maine State Agricultural Soc., 97 Me. 108, 53 A 979, 94 AmSR 488; Washington County Agricultural, etc., Assoc. v. Gray, 118 Md. 600, 85 A 291.

[a] **Erroneous instruction.**—A request to charge, susceptible of the inference that, if the jury found that those who erected the guard rail in front of the grand stand on fair grounds were independent contractors, defendant was not liable for plaintiff's injuries from collapse of such rail, was properly refused. Washington County Agricultural, etc., Assoc. v. Gray, 118 Md. 600, 85 A 291.

[b] **Injury from falling of seats erected by licensee.**—Texas State Fair v. Brittain, 118 Fed. 713, 56 CCA 499; Texas State Fair v. Marti, 30 Tex. Civ. A. 132, 69 SW 432.

[c] **Shooting gallery.**—(1) A society is liable for injury caused by the negligent discharge of a bullet in a shooting gallery conducted by a licensee (Plaskett v. Benton-Warren Agricultural Soc., 45 Ind. A. 358, 89 NE 968, 90 NE 908), (2) even though the person injured is without the grounds on a platform constituting an approach thereto (Thornton v. Maine State Agricultural Soc., 97 Me. 108, 53 A 979, 94 AmSR 488).

[d] **Striking machine.**—The question as to whether a state agricultural society was guilty of negligence in allowing a striking machine to be used on its grounds without a guard around it, whereby plaintiff was injured is for the jury. Selinas v. Vermont State Agricultural Soc., 60 Vt. 249, 15 A 117, 6 AmSR 114.

[e] **Machinery.**—A visitor to a fair was injured while stepping over a revolving line of shafting used for transmitting power to machinery. It appeared that his clothing had been caught in an uncovered coupling in the shaft. In an action brought to recover damages for the injury it was held that the society was required to use only ordinary care in setting up and managing its machinery, and in the absence of special negligence on its part plaintiff could not recover. Phillips v. Wisconsin State Agricultural Soc., 60 Wis. 401, 19 NW 377.

92. Fairmount Union Joint Stock Agricultural Assoc. v. Downey, 146 Ind. 503, 45 NE 696; Benedict v. Union Agricultural Soc., 74 Vt. 91, 52 A 110.

[a] **Reasonably safe track may be assumed** (1) by parties exhibiting horses on race tracks (Warren County Agricultural Soc. v. McKinley, 94 Ill.

are either expressly or impliedly invited to enter upon or cross the track.[93] But the association is not liable to one whose own negligence contributed to the injury.[94]

[§ 17] **(2) Care of Property on Exhibition.** An agricultural society which promises to take care of the articles placed in its charge is a bailee for hire and is responsible for loss caused by its negligence in not providing such care.[95]

[§ 18] **(3) Preservation of Order.** An agricultural society has the right, in the interest of the public and for the protection of its own rights, on reasonable complaints or from its own knowledge, to exclude from its grounds persons guilty of dishonest conduct and corrupt methods in dealing with patrons.[96]

Appointment of police. Since agricultural fairs are of public benefit and attract large numbers of people, their officers are usually authorized to appoint special police and make such regulations as are necessary to preserve order and promote the interests of the patrons.[97]

Powers of special officers are usually the same as those of constables. They may enforce the rules of the association, and may eject all persons who shall be improperly within the grounds, or who shall be guilty of disorderly conduct.[98]

[§ 19] **(4) Liability for Torts.** In those jurisdictions in which agricultural societies are departments or agencies of the state they are not liable for torts committed by their officers, agents, or servants;[99] but in the great majority of jurisdictions they are liable for such injuries in accordance with the principles governing the liability of other private corporations.[1] Thus an agricultural society is generally liable for an injury committed by an authorized servant while acting in the course of his employment,[2] but is not liable for the acts of servants employed by the officers without any express or implied authority in the articles of incorporation.[3]

[§ 20] **(5) Liability of Officers.** An officer of an

A. 664), or (2) by a cyclist riding in a race (Benedict v. Union Agricultural Soc., 74 Vt. 91, 52 A 110).

[b] **Proximate cause.**—Failure to keep a race track clear of horses other than those of the contestants, resulting in injury by collision, is the proximate cause of such injury. Fairmount Union Joint Stock Agricultural Assoc. v. Downey, 146 Ind. 503, 45 NE 696.

[c] **Injury to employee.**—Where an agricultural society employed plaintiff to ride in a running race of horses, which was promoted and controlled by the society, and negligently permitted a horse, known to it to be dangerous, to run in the race without warning plaintiff of the dangerous character of the horse, of which she was ignorant, and the horse bolted the track during the race, and plaintiff was thereby injured, it was held, in an action for personal injuries, that plaintiff's complaint showed a cause of action against the society. Lane v. Minnesota State Agricultural Soc., 62 Minn. 175, 64 NW 382, 29 LRA 708.

[d] **Degree of care required.**—It is not enough for plaintiff to show that there was an obstruction on the track, but he must show that defendants have failed in their duty, which is to use every effort that reasonable men can be expected to use to keep the track clear. It is not enough to order men off the track; they must have a force sufficient to keep them off, and the care must be the highest that could reasonably be exercised in order to prevent those injuries that human foresight could avert. Goodale v. Worcester Agricultural Soc., 102 Mass. 401.

Questions of law and fact see infra § 22.

93. Higgins v. Franklin County Agricultural Soc., 100 Me. 565, 62 A 708, 3 LRANS 1132.

[a] **Injuries proximately caused by another.**—The society, however, would not be responsible if the injury complained of was proximately caused by another person. Thus, where a fair association allowed private teams to drive over the race course after the races were over, and the driver of a team whipped his horses so that they ran away and left the track and injured a visitor to the fair, it was held that the society was not liable. Barton v. Pepin County Agricultural Soc., 83 Wis. 19, 52 NW 1129.

[b] **No liability when reasonable care used.**—An association which has provided reasonably safe and suitable means for the protection and comfort of visitors at its fair grounds is not liable for injuries to a spectator by reason of a horse bolting the track. Hallyburton v. Burke County Fair Assoc., 119 N. C. 526, 26 SE 114, 38 LRA 156.

94. See cases infra this note.

[a] **What constitutes contributory negligence.**—(1) A spectator at a horse race who stands at the railing around the track after being warned by an officer to move back, and where he could see the race from suitable places provided for the purpose, is guilty of negligence preventing recovery for injuries from a horse which bolts the track. Hallyburton v. Burke County Fair Assoc., 119 N. C. 526, 26 SE 114, 38 LRA 156. (2) But when a spectator is invited to cross the track, he is not guilty of contributory negligence in not seeing a team approaching along the track. Higgins v. Franklin County Agricultural Soc., 100 Me. 565, 62 A 708, 3 LRANS 1132. (3) In Washington County Agricultural, etc., Assoc. v. Gray, 118 Md. 600, 85 A 291, plaintiff was held not to have been negligent in occupying the place provided by defendant for its patrons to witness races.

Evidence as to contributory negligence see infra § 22.

95. Vigo Agricultural Soc. v. Brumfiel, 102 Ind. 146, 1 NE 382, 52 AmR 657.

[a] **The designation of a person to receive exhibits,** where such person is the local secretary of the society, and, as such, aids in the preparations for the fair, is to be understood as meaning that no charge would be made to owners or exhibitors for their services. O'Neil v. New York State Agricultural Soc., 19 Barb. (N. Y.) 162.

96. Harford Agricultural, etc., Assoc. v. Somerville, 120 Md. 572, 87 A 937.

97. State v. Stovall, 103 N. C. 416, 8 SE 900.

98. Bower v. Robinson, 53 Ill. A. 370; Robinson v. Clark, 53 Ill. A. 368; Com. v. Ruggles, 6 Allen (Mass.) 588; Magoverning v. Staples, 7 Lans. (N. Y.) 145.

[a] **Right to eject persons infringing upon privilege.**—An agricultural society which has sold a certain privilege has the right through its officers to eject from the grounds, after ordering them to desist, all persons infringing upon such privilege. Bower v. Robinson, 53 Ill. A. 370; Robinson v. Clark, 53 Ill. A. 368.

Unlawful arrest see infra § 20.

99. Hern v. Iowa State Agricultural Soc., 91 Iowa 97, 100, 58 NW 1092, 24 LRA 655; Berman v. Cosgrove, 95 Minn. 353, 104 NW 534; Berman v. Minnesota State Agricultural Soc., 93 Minn. 125, 100 NW 732.

"Not being a corporation for pecuniary profit, the defendant society's liability is not controlled by the rules of law applicable to such. The society is an arm or agency of the state, organized for the promotion of the public good, and for the advancement of the agricultural interests of the state. It would be manifestly wrong to permit its funds to be used to pay damages arising out of the commission of wrongful acts by its officers and servants, and which are in no wise connected with the object and purpose of the society's creation." Hern v. Iowa State Agricultural Soc., supra. But compare Lane v. Minnesota State Agricultural Soc., 62 Minn. 175, 64 NW 382, 29 LRA 708 (holding a society liable for tort, but decided before the adoption of the statute in Minnesota making such societies agencies of the state).

1. Fairmount Union Joint Stock Agricultural Assoc. v. Downey, 146 Ind. 503, 45 NE 696; Brown v. South Kennebec Agricultural Soc., 47 Me. 275, 74 AmD 484; Smith v. Cumberland County Agricultural Soc., 163 N. C. 346, 79 SE 632 (holding that a county agricultural association which gives a fair cannot exonerate itself from liability for damages to one injured by its negligence, on the theory that it is a public service company). And see infra notes 2, 3. See also Lane v. Minnesota State Agricultural Soc., 62 Minn. 175, 64 NW 382, 29 LRA 708 supra note 99.

"The defendant is not a charitable or eleemosynary institution. While its apparent purpose is the advancement of agriculture, and it is not designed to make money for its stockholders, its purpose is to make money for carrying on its business; and, when it invites the public to seats upon platforms which it has constructed to enable its patrons to witness games, sports, and races, it is under the same obligation to exercise due care in the erection and maintenance of such places as though it were a private corporation." Per Grant, J., in Logan v. Lenawee County Agricultural Soc., 156 Mich. 537, 541, 121 NW 485.

2. Oakland City Agricultural, etc., Soc. v. Bingham, 4 Ind. A. 545, 31 NE 383; Dunn v. Brown County Agricultural Soc., 46 Oh. St. 93, 18 NE 496, 15 AmSR 556, 1 LRA 754; Selinas v. Vermont State Agricultural Soc., 60 Vt. 249, 15 A 117, 6 AmSR 114.

[a] **Where a gatekeeper** employed by an agricultural society to preserve good order at its fair, having authority to exclude persons not entitled to admission and to eject such as were disorderly, wrongfully ejected a visitor, and in so doing inflicted malicious injury on him, it was held that, while the act might have been ill-advised, malicious, or even against express orders, it was within the general scope of the gatekeeper's employment, and the society was liable. Oakland City Agricultural, etc., Soc. v. Bingham, 4 Ind. A. 545, 31 NE 383.

3. Bathe v. Decatur County Agricultural Soc., 73 Iowa 11, 34 NW 484.

agricultural society has the right to eject from its fair grounds, without an order from the board of directors, or express provisions contained in its by-laws, all persons found therein exercising privileges not paid for by them.[4] The directors of an agricultural society are not personally liable for mere nonfeasance in not providing a safe place in which spectators may witness amusements,[5] but an officer or employee is personally liable for all damages which are the proximate result of his negligence.[6]

Criminal liability. Officers of an agricultural society who have unlawfully fixed and defined bounds for the purpose of exhibiting horses in a public highway may be convicted of assault and battery if, without legal process, they arrest a person within such bounds.[7]

An indictment charging the officers of an association with leasing a portion of its grounds for gambling purposes need not allege that the society is a county fair agricultural society, or joint stock association,[8] and charging defendants as "officers, managers, and directors" is sufficient under a statute inflicting a penalty upon any "officer or officers."[9]

[§ 21] **(6) Liability of Members.** The members of an unincorporated agricultural society are liable on contracts in the name of the society which they have authorized or have subsequently ratified.[10] But they are not liable individually for negligence in the care of buildings, grounds, etc.[11]

[§ 22] **F. Actions.** An agricultural society whose status is that of a private corporation may sue and be sued in the same manner as other private corporations.[12] Where, however, the society constitutes a department or agency of the state government its liability to suit is dependent upon whether statutory authority has been given therefor.[13]

Pleading. A declaration or petition in an action against a society for damages for personal injury must allege the duty of the society, its failure to perform its duty, and that the injury complained of resulted therefrom.[14]

Evidence. The general rules of evidence are applicable in suits against agricultural societies or their officers or servants.[15] Thus, in an action for ejecting plaintiff from defendant society's grounds for failure to pay an additional charge for a seat, evidence of a custom of the society to make such charge is inadmissible in the absence of evidence that plaintiff knew of such custom or was chargeable with such knowledge.[16]

Trial. It is for the court to define the duty of a society in providing safe grounds, buildings and race tracks;[17] but it is for the jury to determine whether the society has been negligent in the performance of its duty,[18] and also whether a plain-

5 AmSR 651 (holding that the society is not liable for an injury due to the careless driving of a hackman employed by the officers without authority from the articles of incorporation). See generally Master and Servant [26 Cyc 1518].

4. Bower v. Robinson, 53 Ill. A. 370; Robinson v. Clark, 53 Ill. A. 368. Compare Harford Agricultural, etc., Assoc. v. Somerville, 120 Md. 572, 87 A 937 supra § 18 note 96.

5. Williams v. Dean, 134 Iowa 216, 111 NW 931.

[a] **Wild ball.**—The directors of an agricultural society are not personally responsible to a patron of a ball game conducted by the society, who is injured by a wild ball, unless there is proof of malfeasance, and then only those who participated in the wrongful act are liable. Williams v. Dean, 134 Iowa 216, 111 NW 931, 11 LRANS 410.

6. Stevens v. Dudley, 56 Vt. 158.

[a] **The marshal of a county fair** is liable for an injury which resulted from his turning a horse off the track in a negligent manner, causing it to break loose. Stevens v. Dudley, 56 Vt. 158.

7. Com. v. Ruggles, 6 Allen (Mass.) 588.

[a] **Unlawful arrest.**—The officers of an agricultural society have no right to obstruct travel by unlawfully fixing bounds in the public highway for the purpose of exhibiting horses therein, and the question is not affected by the fact that there may be sufficient room for the public on that part of the highway outside of their bounds. They may be convicted for assault and battery for arresting without a warrant a person within such bounds, who, when ordered to stand back, refused to do so, and struck, although without malicious intent, the horse of one of the officers. The fact that the person arrested was within the bounds for the purpose of obstructing the exhibition does not justify the arrest without legal process. Com. v. Ruggles, 6 Allen (Mass.) 588.

8. State v. Johnson, 115 Ind. 467, 17 NE 910.

9. State v. Johnson, 115 Ind. 467, 17 NE 910.

[a] **Forms of indictments** in substance against officers of a fair association for leasing grants for gambling purposes see State v. Johnson, 115 Ind. 467, 17 NE 910; State v. Darroch, 12 Ind. A. 527, 40 NE 639; State v. Howard, 9 Ind. A. 635, 37 NE 27.

10. Johnson v. Paine, 84 Vt. 84, 78 A 732.

11. Brown v. South Kennebec Agricultural Soc., 47 Me. 275, 74 AmD 484 (holding that, where a visitor to a fair was injured by the fall of a portion of a building owned and used by an agricultural society, on its grounds, the society was liable for want of ordinary care in the construction of the building, and that the property of the corporation should respond in damages, but that the liability did not extend to the individual incorporators).

For negligence; not individually liable see supra § 20 text and note 5.

12. See supra § 4; and generally Corporations [10 Cyc 1331].

13. Peo. v. San Joaquin Valley Agricultural Assoc., 151 Cal. 797, 91 P 740.

[a] **Liability of property to execution.**—The property of such an association, used to carry on the purposes for which it was formed, is so far public property that it cannot be taken in execution and sold thereon to enforce payment of a judgment, unless the state has manifested its assent thereto by a law permitting it to be done; and such assent will not be inferred from a statute authorizing the society to sue and be sued. Peo. v. San Joaquin Valley Agricultural Assoc., 151 Cal. 797, 91 P 740.

14. See cases infra this note.

[a] **What constitute sufficient allegations** see Logan v. Lenawee County Agricultural Soc., 156 Mich. 537, 121 NW 485; Lane v. Minnesota State Agricultural Soc., 62 Minn. 175, 64 NW 382, 29 LRA 708.

[b] **Form of petition** for personal injuries from fall of seats see Dunn v. Brown County Agricultural Soc., 46 Oh. St. 93, 18 NE 496, 15 AmSR 556, 1 LRA 754.

15. Magoverning v. Staples, 7 Lans. (N. Y.) 145; Benedict v. Union Agricultural Soc., 74 Vt. 91, 52 A 110.

[a] **Evidence as to the usual mode of riding** a bicycle in a race is admissible upon a question as to whether a particular rider was negligent in riding with his head and body lowered over the handlebars. Benedict v. Union Agricultural Soc., 74 Vt. 91, 52 A 110.

[b] **Unsafe railing.**—Evidence of the condition of a stay rod attached to the rail, when the witness examined it about a month after the accident, was admissible. Washington County Agricultural, etc., Assoc. v. Gray, 118 Md. 600, 85 A 291.

[c] **Sufficiency.**—In an action by a spectator at a fair, who was carried up by a hot air balloon, a rope catching around his foot, evidence of the negligence of the fair association was held sufficient to go to the jury. Smith v. Cumberland County Agricultural Soc., 163 N. C. 346, 79 SE 632.

16. Magoverning v. Staples, 7 Lans. (N. Y.) 145.

17. Benedict v. Union Agricultural Soc., 74 Vt. 91, 52 A 110.

[a] **Question of law.**—The question what duty, if any, an agricultural society owes to one lawfully using its track is one of law for the court. Benedict v. Union Agricultural Soc., 74 Vt. 91, 52 A 110.

18. Higgins v. Franklin County Agricultural Soc., 100 Me. 565, 62 A 708, 3 LRANS 1132; Benedict v. Union Agricultural Soc., 74 Vt. 91, 52 A 110; Selinas v. Vermont State Agricultural Soc., 60 Vt. 249, 15 A 117, 6 AmSR 114.

[a] **Whether a boy, injured at a fair, was a trespasser,** or merely a licensee, or was there by invitation of the company is for the jury. Plasket v. Benton-Warren Agricultural Soc., 45 Ind. A. 358, 89 NE 968, 90 NE 908.

[b] **Whether leaving a revolving shaft uncovered** constituted negligence is for the jury to determine. Phillips v. Wisconsin State Agricultural Soc., 60 Wis. 401, 19 NW 377.

[c] **Whether permitting a striking machine to be used on the grounds** without a guard around it constitutes negligence is for the jury. Selinas v. Vermont State Agricultural Soc., 60 Vt. 249, 15 A 117, 6 AmSR 114.

[d] **Whether there has been sufficiently careful inspection** of grounds and buildings is for the jury. Logan v. Lenawee County Agricultural Soc., 156 Mich. 537, 121 NW 485.

tiff in a personal injury suit has been guilty of contributory negligence.[19]

[§ 23] **G. Forfeiture of Charter.** An agricultural society may forfeit its charter if it fails to fulfill the design and purpose of its organization;[20] or for willful misuser, nonuser, or usurpation.[21] But an act of the legislature abolishing one agricultural society and transferring its assets, liabilities, and credits to another society is unconstitutional, as impairing the obligation of contracts, and taking private property without due process of law.[22]

[§ 24] **H. Dissolution.**[23] An agricultural society may be dissolved by action of its stockholders,[24] and upon such dissolution the rights of stockholders and creditors will be governed by the provisions of the statutes and of its charter relating thereto.[25]

[§ 25] **I. Failure to Hold Exhibitions.** The failure to hold annual fairs does not work a forfeiture of title to the fairgrounds by nonuser, where such fairs are held by a lessee of the society,[26] nor does a statute providing for the sale of the grounds in the event of dissolution authorize a sale because of the failure of the society to hold exhibitions.[27]

[§ 26] **J. Reorganization.** The reorganization of a voluntary agricultural society on the joint-stock plan may constitute such association a distinct organization,[28] or not, according to circumstances.[29] If the society remains substantially the same, it succeeds to all the rights and liabilities of the society as they existed at the time of the change;[30] but if a new society is created it does not succeed to the property rights of the old society.[31]

V. ILLEGAL TRADING IN FARM PRODUCTS

[§ 27] **A. In General.** Some states, in the exercise of the police power, have enacted statutes prohibiting traffic under specified conditions, in certain agricultural products, the larceny of which is especially easy, but difficult to detect,[32] or which are subject to adulteration.[33]

19. Higgins v. Franklin County Agricultural Soc., 100 Me. 565, 62 A 708, 3 LRANS 1132; Benedict v. Union Agricultural Soc., 74 Vt. 91, 52 A 110.

[a] **Question of fact.**—(1) It is a question of fact for the jury, under all the circumstances of the case, whether or not a person is negligent in crossing a race track (Higgins v. Franklin County Agricultural Soc., 100 Me. 565, 62 A 708, 3 LRANS 1132), or (2) in using the track (Benedict v. Union Agricultural Soc., 74 Vt. 91, 52 A 110).

20. State v. Delmar Jockey Club, 200 Mo. 34, 92 SW 185, 98 SW 539 [writ of error dism 210 U. S. 324, 28 SCt 732, 52 L. ed. 1080].

21. State v. Anthony Fair Assoc., 89 Kan. 238, 131 P 626; State v. Delmar Jockey Club, 200 Mo. 34, 92 SW 185, 98 SW 539 [writ of error dism 210 U. S. 324, 28 SCt 732, 52 L. ed. 1080].

[a] **Using race track for gambling.**—A corporation, organized for the purpose of encouraging and promoting agriculture, which uses its race track for gambling and fails to exercise its other franchises, has not fulfilled the design and purpose of its organization, and its charter may be forfeited. State v. Delmar Jockey Club, 200 Mo. 34, 92 SW 185, 98 SW 539 [writ of error dism 210 U. S. 324, 28 SCt 732, 52 L. ed. 1080].

[b] **Licensing gaming tables.**—In Cope v. Flora Dist. Fair Assoc., 99 Ill. 489, 39 AmR 30, it was said that if the stockholders of a fair association authorized its officers to license a gambling table upon the fair grounds this would be such an abuse of the company's franchise as would warrant the state in reclaiming it.

[c] **Selling privilege for bookmaking, etc.**—Where a fair association, chartered by the state under the statute for encouragement of agriculture and horticulture, sells the privilege of using its buildings for pool selling and bookmaking on horse races, it may be ousted at the suit of the state, regardless of the effect and validity of statutes enacted to suppress gambling. State v. Anthony Fair Assoc., 89 Kan. 238, 131 P 626.

[d] **Criminal responsibility no bar to forfeiture.**—There can be no doubt that a corporation may be proceeded against by quo warranto for a misuse or perversion of the franchises conferred upon it by the state, notwithstanding its officers and agents may at the same time be amenable to the criminal law for offenses committed by them in the perversion of such franchise. State v. Delmar Jockey Club, 200 Mo. 34, 51, 92 SW 185, 98 SW 539.

[e] **Quo warranto.**—An act of an incorporated fair association which constitutes an abuse of its authority and is clearly against good morals, and which ordinarily constitutes a crime, justifies a proceeding in the nature of quo warranto and a judgment of forfeiture of its franchise. State v. Anthony Fair Assoc., 89 Kan. 238, 131 P 626.

22. Downing v. Indiana State Bd. of Agriculture, 129 Ind. 443, 28 NE 123, 614, 12 LRA 664.

23. Public aid funds and property purchased therewith, as affected by dissolution see supra § 7.

24. State v. Maryland Agricultural, etc., Assoc., 98 Md. 216, 56 A 484.

[a] **Mere failure to hold fairs** does not amount to a dissolution of the society. State v. Maryland Agricultural, etc., Assoc., 98 Md. 216, 56 A 484.

25. Maryland Jockey Club v. State, 107 Md. 262, 68 A 613; Maryland Jockey Club v. State, 106 Md. 413, 67 A 239.

[a] **Vested rights may not be impaired by statute.**—Where the charter of an association provides that the persons contributing money for the purchase of land for it shall, upon its dissolution, be entitled to share pro rata in the distribution of the proceeds of the sale of the property, these contributors thereby acquire vested rights, and a subsequent statute which provides that, upon dissolution of the association, the proceeds of the sale of its land shall be applied first to the payment of its debts impairs these rights and is unconstitutional. Maryland Jockey Club v. State, 106 Md. 413, 67 A 239.

[b] **What constitutes dissolution.**—Allegations that there has been a nonuse and misuse of its corporate powers by an agricultural association; that it has held no exhibitions for many years, and has permitted another corporation to take unlawful possession of its property for other purposes; and that the purposes for which it was formed have been relinquished and abandoned are insufficient to show its actual dissolution. State v. Maryland Agricultural, etc., Assoc., 98 Md. 216, 56 A 484.

[c] **A donation to a society by the state** does not entitle the state to share in the proceeds of its property upon its dissolution under a statute poviding that contributors to improvements for the association shall share in the proceeds of its property in case of its dissolution. Maryland Jockey Club v. State, 106 Md. 413, 67 A 239.

26. Kent County Agricultural Soc. v. Houseman, 81 Mich. 609, 46 NW 15; Toledo Exposition Co. v. Kerr, 28 Oh. Cir. Ct. 547.

27. State v. Maryland Agricultural, etc., Assoc., 98 Md. 216, 56 A 484.

28. Allen v. Long, 80 Tex. 261, 16 SW 43, 26 AmSR 735. In this case a voluntary agricultural association, organized as a joint-stock company, ceased to act, elect officers, or do any business for eight years, when some of the stockholders in the old association, with others, formed an association in the name of the old one. Many of the stockholders in the old association did not join the new which increased its capital stock and went into partnership with a race-track association, thus introducing a feature unknown to the old association, and it was held that the new association was a distinct organization from the old.

29. Livingston County Agricultural Soc. v. Hunter, 110 Ill. 155. In this case the constitution of an agricultural society declared that its object should be "to improve the condition of agriculture, horticulture, and the mechanic and household arts," and provided for holding annual fairs, and on reorganization as a joint-stock company the new constitution declared that the object should be "to improve the condition of agriculture, horticulture, floriculture, mechanic and household arts," and also provided for holding annual fairs and exhibitions, and the name was changed by substituting the word "board" in place of the word "society." It was held that there was no essential change in the object of the society resulting from its reorganization, and that the new board was not a separate and independent society from the old one, but the same under a slight change in the name.

[a] **Reorganization on joint-stock plan.**—In Livingston County Agricultural Soc. v. Hunter, 110 Ill. 155, it was held that where an agricultural society was reorganized under a different name upon a joint-stock plan, but there was no change in respect to the objects of the society, a separate and independent society was not thereby formed, and the old organization continued to exist under the new name, and creditors of the old were entitled to hold the new society the same as the old, whether their claims accrued before or after reorganization.

30. Livingston County Agricultural Soc. v. Hunter, 110 Ill. 155 (holding that the old creditors of such a society have the same right to sue the society under its new name as they had to sue it as it was originally organized).

31. Allen v. Long, 80 Tex. 261, 16 SW 43, 26 AmSR 735. Compare Sixth Dist. Agricultural Assoc. v. Wright, 154 Cal. 119, 97 P 144 supra § 9 note 51 [b].

32. Bazemore v. State, 121 Ga. 619, 49 SE 701; Jenkins v. State, 119 Ga. 430, 46 SE 629; Smith v. State, 115 Ga. 586, 41 SE 984. See infra §§ 28-30.

33. See infra § 31.

[§ 28] **B. Between Sunset and Sunrise.** A statute forbidding traffic in seed cotton between sunset and sunrise has been sustained as constitutional.[34] In such a statute forbidding any person to engage in the traffic between sunset and sunrise without a license, the words "traffic" and "engaged in traffic" have been construed to mean the same thing.[35]

Intent. One who sells in violation of a statute which simply forbids the sale, without qualification, is liable thereunder, regardless of whether he intended to violate the law.[36]

Liability of agent. Under a statute prohibiting trading in certain farm products after the hour of sunset and before the hour of sunrise of the next day, an agent who does one of the prohibited acts is liable.[37]

Consent of owner. The fact that the owner of the product consented to the sale is no defense to a charge of buying it.[38]

An indictment for this offense should contain the name either of the owner of the product, or of the person from whom the purchase was made,[39] and should state the name of the person to whom the product was disposed of.[40]

Evidence. On the indictment of a principal for the act of his agent, declarations made by the agent at the time of the purchase, that he was buying for his principal, are inadmissible without bringing home to the principal the criminal design of the agent.[41]

Instructions. Where, upon a trial for purchasing seed cotton at night, the evidence showed that the accused admitted that he was in the cotton business, and that he had weighed cotton for tenants of the prosecutor, but not that he admitted purchasing cotton at night, it was error to charge on confession of guilt.[42]

[§ 29] **C. Within Certain Boundaries.** Statutes making it unlawful to sell cotton in the seed within certain counties specified,[43] or to transport such cotton within such counties by night,[44] have been declared not unconstitutional.

An indictment for transporting cotton in the seed by night within a prohibited county should aver that the act was knowingly done in violation of the law.[45]

[§ 30] **D. Without Consent of Owner of Land.** A statute making it unlawful for any person to sell cotton in the seed without the written consent of the owner of the land on which it is grown is valid.[46]

An indictment for purchasing crops without the written consent of the owner of the land on which they are grown need not contain a description of the land nor the name of the owner.[46½]

[§ 31] **E. Without Proper Labels.** Statutes may require sellers of certain farm products to affix thereto labels reciting certain facts,[47] and punish the failure to do so as a misdemeanor.[48]

Defense. Where the statute requires the name of the manufacturer of cottonseed meal to be stated on a label or tag attached to the sack, a letter from the agricultural department to defendant prosecuted for failure to affix the tag, stating that it would not be necessary to state the name of the manufacturer on the tax receipt, is no defense.[49]

Affidavit charging offense. An affidavit charging the selling of farm products without label need not allege that the products sold were not of the kind excepted from the operation of the statute, as the claim that they were within such exceptions is a matter of defense.[50]

VI. SALE OF FERTILIZERS

[§ 32] **A. In General.** In some states the sale of fertilizers is regulated by statutes requiring a license of all persons making such sales;[51-52] or by statutes providing for the inspection and analysis,[53] or for the branding, labeling, marking, or tagging,[54] or for the registration of brands,[55] of all fertilizers sold. These statutes may include all fertilizers, or they may, by implication or express exception, apply only to certain kinds of fertilizers.[56] Although the term "fertilizer" may be defined by statute,[57] it sometimes becomes necessary for the courts, in their interpretation of the statutory provisions, to determine what products are and what are not embraced within the meaning of the term.[58]

34. Jenkins v. State, 119 Ga. 430, 46 SE 629.

35. State v. Parnell, 94 S. C. 21, 77 SE 719 (holding that an instruction that if defendant bought seed once or twice without a license he was not guilty was properly refused). See Engage [15 Cyc 1047]; Traffic [38 Cyc 934].

36. State v. Parnell, 94 S. C. 21, 77 SE 719.

37. Reese v. State, 73 Ala. 18 (holding liable an agent of a mortgagee, who receives from the mortgagor, within the prohibited hours, cotton subject to the mortgage).

38. Gilliam v. State, 71 Ala. 10.

39. Russell v. State, 71 Ala. 348; Grattan v. State, 71 Ala. 344.

40. Russell v. State, 71 Ala. 348.

[a] **Form of an indictment** for buying a farm product after sunset and before sunrise see Gilliam v. State, 71 Ala. 10.

41. Russell v. State, 71 Ala. 348.

42. Smith v. State, 115 Ga. 586, 41 SE 984.

43. Mangan v. State, 76 Ala. 60.

44. Davis v. State, 68 Ala. 58, 44 AmR 128 [foll Mangan v. State, 76 Ala. 60]; Jenkins v. State, 119 Ga. 430, 46 SE 629.

45. Davis v. State, 68 Ala. 58, 44 AmR 128.

[a] **Form of indictment** for buying cotton in the seed in a county where such buying is forbidden see Mangan v. State, 76 Ala. 60.

46. Bazemore v. State, 121 Ga. 619, 49 SE 701.

[a] **Reason of rule.**—Because of its value, the ease with which it is taken from the field, and the difficulty of detecting the thief, the state may regulate the sale of seed cotton and fix a punishment on the person who buys in violation of the statute. Bazemore v. State, 121 Ga. 619, 49 SE 701.

46½. Bazemore v. State, 121 Ga. 619, 49 SE 701.

47. State v. Weller, 171 Ind. 53, 85 NE 761.

[a] **"Concentrated commercial feeding stuff,"** to which sellers are required to affix labels by Ind. Acts (1907) p 355 c 206 § 2, includes wheat middlings but not unmixed meals made directly from the entire grain of the wheat. State v. Weller, 171 Ind. 53, 85 NE 761.

[b] **Title of statute.**—N. C. Revisal (1905) §§ 3814, 3822, 3957, relating to the branding of cottonseed meal and providing a penalty for failure to brand, and authorizing a recovery in a qui tam action and also making it a misdemeanor, is not unconstitutional because combining the two. State v. Southern Cotton Oil Co., 154 N. C. 635, 70 SE 741.

[c] **An exchange** of a ton of cotton seed for one thousand three hundred and thirty-three and one-third pounds of cottonseed meal is a sale within N. C. Revisal (1905) § 3957, requiring a tag on all cottonseed meal offered for "sale." State v. Southern Cotton Oil Co., 154 N. C. 635, 70 SE 741.

48. State v. Weller, 171 Ind. 53, 85 NE 761.

49. State v. Southern Cotton Oil Co., 154 N. C. 635, 70 SE 741.

50. State v. Weller, 171 Ind. 53, 85 NE 761.

51–52. See infra § 34.

53. See infra § 35.

54. See infra § 37.

55. See infra § 36.

56. See statutory provisions.

[a] **The sale of cottonseed meal** as fertilizer is sometimes regulated by statutory provisions other than those regulating the sale of fertilizers in general. State v. Lamar, 178 Ala. 77, 59 S 473 [rev 5 Ala. A. 259, 59 S 737]; Imperial Cotton Seed Oil Co. v. Shanks, 177 Ala. 522, 58 S 390; Gilmore Puckett Grocery Co. v. J. Lindsey Wells Co., (Miss.) 60 S 580; Johnson v. Carson, 161 N. C. 371, 77 SE 307.

57. See statutory provisions.

58. Gilmore Puckett Grocery Co. v. J. Lindsey Wells Co., (Miss.) 60 S 580.

[a] **Cottonseed meal** is a fertilizer,

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Consolidating statute. A statute which undertakes to regulate the registration, sale, inspection, and analysis of fertilizers, and to consolidate all laws relating to such sales, inspection, and analysis, and to repeal all laws in conflict therewith, is exhaustive and supersedes all former regulations excepting those expressly preserved.[59]

A penal statute relating to sales of fertilizers in general has been held neither to repeal an exception in a statute regulating the sale of such fertilizers, nor to supplement a statute specifically regulating the sale of a certain fertilizer excepted from the operation of the statute regulating fertilizers.[60]

One who buys for his own use and not for the purpose of reselling the fertilizer, it has been held, does not violate the provisions in the statute against selling or removing fertilizers.[61]

[§ 33] **B. Constitutionality of Statutes.** Statutes regulating the sale of fertilizers, and providing for a method of inspecting, branding, and tagging the same, have been held to be within the range of legitimate police regulation and are constitutional,[62] even where the seller is a resident of another state.[63]

[§ 34] **C. Licenses to Sell.** One who has obtained a license to sell fertilizers as required by statute[64] may make sales through an agent.[65]

[§ 35] **D. Inspection.** The analysis of commercial fertilizers, required by the various statutes, is for the benefit of purchasers,[66] and there is no warrant for sending to buyers analyses of a mixture of different samples of fertilizers sold at other sales by the same dealer.[67]

Nature and sufficiency. Where the statute provides for the inspection and branding of fertilizers, it contemplates a personal inspection and branding under the immediate supervision of the inspector or subinspector,[68] and the inspection cannot be performed beyond the limits of the state.[69] The official charged with the inspection may analyze any fair sample of fertilizer he may select, and publish the result,[70] and his discretion may not be controlled by the court.[71] Under a statute requiring the seller to take samples for analysis from each lot sold, a seller who himself takes such samples is estopped from claiming that they were not properly taken.[72]

Excuse for failure. That a seller of fertilizers made efforts to obtain inspection of them as required by law is not an excuse for failure to have such inspection made.[73]

[§ 36] **E. Registration of Brands.** In some states manufacturers and dealers in fertilizers are required to file the names of the brands which they desire to sell,[74] but such a statute has been held not to apply to one who makes sales of fertilizers by giving the purchasers orders for them on a manufacturer or dealer who has complied with the law, although the seller pays the manufacturer or dealer and charges the purchaser with the price and is not an agent of such manufacturer or dealer.[75] Requests to register must comply with the statutory requirements as to both the names of the owners and their brands, and the nature and analysis of the fertilizers.[76]

[§ 37] **F. Labeling or Tagging.** There being no common-law duty to brand, label, or tag fertilizers,[77] the duty to do so, if any, must be imposed by statute.[78] The statutes of some states provide for the placing, on packages or sacks of fertilizers sold, of tags or labels showing the analysis of the ingredients of the fertilizer,[79] the name of the manufacturer, the place of manufacture, and the weight and contents of the sack or package,[80] or the fact of the payment of the fertilizer tax.[81] Under a statute providing for the inspection of fertilizers by the department of agriculture, and empowering the commissioner to make all necessary regulations for carrying

within the statutes, notwithstanding the fact that it is an unmixed cottonseed product. Gilmore Puckett Grocery Co. v. J. Lindsey Wells Co., (Miss.) 60 S 580.

[b] **"Unmixed cottonseed products,"** other than cottonseed meal, are fertilizers. Gilmore Puckett Grocery Co. v. J. Lindsey Wells Co., (Miss.) 60 S 580.

[c] **Sales of special mixtures** of fertilizers to clubs of farmers organized for the purpose of buying at wholesale rates are within the provisions of a statute forbidding sales without compliance with the statutes as to licensing brands and statements of analysis. In re Commercial Fertilizers, 12 Pa. Dist. 683, 28 Pa. Co. 182.

[d] **"Artificially prepared article"** in the Fertilizers and Feeding Stuffs Act see Lathom v. Spillers, [1913] W. N. 116 (artificially prepared poultry food).

59. Griner v. Baggs, 4 Ga. A. 232, 61 SE 147.

60. State v. Lamar, 178 Ala. 77, 59 S 473 [rev 5 Ala. A. 259, 59 S 737].

[a] **In Alabama** it was held under the act of August 26 (L. [1909] p 174), that the act of November 22 (L. Sp. Sess. [1907] p 20), which regulated the sale of cottonseed meal, was not repealed by Code (1907) § 10.

61. Johnson v. Carson, 161 N. C. 371, 77 SE 307 (holding that, under Revisal [1905] § 3956, making it unlawful to sell or remove untagged fertilizer, etc., and under § 3960, prescribing a penalty for unlawful sales of cottonseed meal, a farmer is not subject to such penalty for buying and removing fertilizers not intended for resale but for use on his own crop).

62. Steiner v. Ray, 84 Ala. 93, 4 S 172.

63. Brown v. Adair, 104 Ala. 652, 16 S 439.

64. Furman Farm Impr. Co. v. Long, 113 Ala. 203, 21 S 339; Talladega Fertilizer, etc., Co. v. Farmers' Union Warehouse Co., 2 Ala. A. 307, 56 S 595; In re Commercial Fertilizers, 12 Pa. Dist. 683, 28 Pa. Co. 182.

65. Furman Farm-Impr. Co. v. Long, 117 Ala. 581, 23 S 527.

66. Consumers' Fertilizer Co. v. State Bd. of Agriculture, etc., 127 La. 48, 53 S 379.

67. Consumers' Fertilizer Co. v. State Bd. of Agriculture, etc., 127 La. 48, 53 S 379.

68. Pacific Guano Co. v. Dawkins, 57 Ala. 115 (holding that an analysis of a few samples, and a branding with the inspector's stamp by the guano-dealer, constitute no compliance therewith).

69. Hammond v. Wilcher, 79 Ga. 421, 5 SE 113.

70. Consumers' Fertilizer Co. v. State Bd. of Agriculture, etc., 127 La. 48, 53 S 379.

71. Consumers' Fertilizer Co. v. State Bd. of Agriculture, etc., 127 La. 48, 53 S 379.

72. Morgan v. Coweta Fertilizer Co., 110 Ga. 787, 36 SE 219.

73. Gaulding Fertilizer Co. v. Driver, 99 Ga. 623, 25 SE 922.

74. Gadsden Fertilizer Co. v. Wiles, 178 Ala. 459, 59 S 582; Zipperer v. Doyle, 7 Ga. A. 319, 66 SE 806; In re Commercial Fertilizers, 12 Pa. Dist. 683, 28 Pa. Co. 182.

75. Zipperer v. Doyle, 7 Ga. A. 319, 66 SE 806.

76. Gadsden Fertilizer Co. v. Wiles, 178 Ala. 459, 59 S 582.

[a] **"Name and address of the manufacturer or manipulator."**—Under Code (1907) § 24, which provides that manufacturers and manipulators of commercial fertilizers and fertilizer materials shall furnish to the commissioner of agriculture and industries a yearly report on the name of each brand sold, the name and address of the manufacturer or manipulator, and a guaranteed analysis thereof, stating the sources from which the phosphoric acid, nitrogen, and potash are derived, a request to register was insufficient, where the person purporting to make it was neither a corporate nor a partnership entity, but merely a branch of a corporation with a different name and address, and its business was transacted by an officer or employee of such company. Gadsden Fertilizer Co. v. Wiles, 178 Ala. 459, 59 S 582.

[b] **Brands and sources.**—Under Code (1907) § 24, a request to register fertilizers which did not state the names of the brands and the sources of phosphoric acid, nitrogen, and potash is insufficient. Gadsden Fertilizer Co. v. Wiles, 178 Ala. 459, 59 S 582.

77. Cooper v. National Fertilizer Co., 132 Ga. 529, 64 SE 650.

78. See statutory provisions.

[a] **In Alabama,** under Code (1907) §§ 6881, 6887, and in view of § 45 and the chapter on agriculture, cottonseed meal may be sold without the tax tags required to be attached to other fertilizers. State v. Lamar, 178 Ala. 77, 59 S 473 [rev 5 Ala. A. 259, 59 S 737].

79. See statutory provisions.

80. In re Commercial Fertilizers, 12 Pa. Dist. 683, 28 Pa. Co. 182.

81. State v. Malony, 81 S. C. 226, 62 SE 215. And see statutory provisions.

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out the intentions of the act, the commissioner has power to enforce the use of a tag to be attached to each package, showing a compliance with the statute.[82] The provisions of the statutes requiring tags to be placed on the sacks, stating the weight and quality, etc., of the contents, that a tax shall be paid and a certificate of its payment attached, are merely incidental to the main purpose of the statutes in providing a means for executing the law by proper inspection.[83]

Requisites and sufficiency. Where the statute requires the label to state the name of the manufacturer and seller with their places of business, and the constituent elements of the fertilizer, a label bearing simply the name, location, and trademark of the manufacturer is insufficient.[84] But under a statute requiring a guaranteed analysis to be branded on or attached to each bag, such analysis may be stamped or printed on the reverse side of the tag furnished by the agricultural department to indicate payment of the inspection fee, and attached to the sacks.[85]

Must be attached to each package. Under a statute requiring labels to be attached to packages of fertilizer, stating the ingredients, etc., a label must be attached to each package,[86] and it is not sufficient that a sample of the fertilizer has been analyzed by the experiment station.[87]

Must be attached before delivery. The tags should be attached at the time of the sale.[88] Where the statute requires the payment of an inspection tax and the attaching of a tag as evidence that it has been paid, not only must the tax be paid, but also the tag must be attached before the sale is completed by delivery, in order to escape the penalty for violation of the act.[89]

[§ 38] **G. Effect of Noncompliance with Statutes—1. On Contract of Sale—a. Made within State.** Where the statute expressly so provides, or where it makes it a penal offense to neglect to register, inspect, analyze, brand, or tag fertilizer, or to sell the same without having first obtained a license to do so, there can be no recovery of the price of fertilizer sold within the state, when the fertilizer was not registered, inspected, analyzed, branded, tagged, or sold under a license, as required by the statute;[90] and no waiver or undertaking in the contract for purchase will bar or estop a purchaser from pleading such defense.[91] The subsequent repeal of a statute directing inspection of fertilizers will not vitalize a contract made in violation of provisions during the time it was in force,[92] and the fact that the seller is a nonresident, or that the fertilizer was manufactured without the state, has no effect on the validity of a sale,[93] nor will the fact that the purchaser complies with the statutory requirements prevent the sale to him from being void.[94] On the other hand, a failure to comply with the statutory requirements will not prevent a recovery of the price of fertilizer sold, when such failure is not made a penal offense, in the absence of an express provision denying the right to recover.[95]

What constitutes noncompliance. Compliance

82. Blanton v. Southern Fertilizing Co., 77 Va. 335.

[a] **Tax on tags.**—In Blanton v. Southern Fertilizing Co., 77 Va. 335, it was held that the act establishing the department of agriculture and empowering the commissioner to make all necessary rules and regulations for carrying out the intentions of the act did not authorize him to levy a tax on fertilizer sold within the state, for the purposes of his department.

83. State v. Southern Cotton Oil Co., 154 N. C. 635, 70 SE 741.

84. McConnell v. Kitchens, 20 S. C. 430, 47 AmR 845.

[a] **The component parts are sufficiently stated** in a label on bags containing a fertilizer, in the words "Ammoniated Bone Superphosphate of Lime." Atlantic, etc., Fertilizing Co. v. Kishpaugh, 32 Gratt. (73 Va.) 578.

85. Griner v. Baggs, 4 Ga. A. 232, 61 SE 147.

86. Vanmeter v. Spurrier, 94 Ky. 22, 21 SW 337, 14 KyL 684.

87. Vanmeter v. Spurrier, 94 Ky. 22, 21 SW 337, 14 KyL 684.

88. Alabama Nat. Bank v. Parker, 153 Ala. 597, 45 S 161.

Attachment by purchaser see infra § 38.

89. State v. Malony, 81 S. C. 226, 62 SE 215.

90. Ala.—Alabama Nat. Bank v. Parker, 153 Ala. 597, 45 S 161; Furman Farm Impr. Co. v. Long, 117 Ala. 581, 23 S 527; Kirby v. Huntsville Fertilizer, etc., Co., 105 Ala. 529, 17 S 38; Brown v. Adair, 104 Ala. 652, 16 S 439; Merriman v. Knox, 99 Ala. 93, 11 S 741; Johnson v. Hanover Nat. Bank, 88 Ala. 271, 6 S 909; Campbell v. Segars, 81 Ala. 259, 1 S 714; Pacific Guano Co. v. Mullen, 66 Ala. 582; Renfro v. Loyd, 64 Ala. 94; Woods v. Armstrong, 54 Ala. 150, 25 AmR 671; Talladega Fertilizer, etc., Co. v. Farmers' Union, etc., Warehouse Co., 2 Ala. A. 307, 56 S 595.

Ark.—Florence Cotton Oil Co. v. Anglin, 105 Ark. 672, 152 SW 295, 43 LRANS 1109 and note.

Fla.—Braxton v. Liddon, 55 Fla. 785, 46 S 324.

Ga.—Zipperer v. Doyle, 124 Ga. 895, 53 SE 505; Gaulding Fertilizer Co. v. Driver, 99 Ga. 623, 25 SE 922; Faircloth v. De Leon, 81 Ga. 158, 7 SE 640; Allen v. Pearce, 80 Ga. 417, 7 SE 82; Hammond v. Wilcher, 79 Ga. 421, 5 SE 113; Leman v. Saunders, 72 Ga. 202; Conley v. Sims, 71 Ga. 161; Johnston v. McConnell, 65 Ga. 129; Kleckley v. Leyden, 63 Ga. 215; Gossett v. Bishop, 11 Ga. A. 487, 75 SE 816.

Ky.—Vanmeter v. Spurrier, 94 Ky. 22, 21 SW 337, 14 KyL 684.

S. C.—McConnell v. Kitchens, 20 S. C. 430, 47 AmR 845.

Tenn.—Harris v. Parker, 108 Tenn. 29, 64 SW 1087.

[a] **In the hands of the payee** a note given for the price of fertilizer is void if he had no license to sell, as required by law. Talladega Fertilizer, etc., Co. v. Farmers' Union Warehouse Co., 2 Ala. 307, 56 S 595.

[b] **Penalty implies prohibition.**—The imposition of a penalty for a sale in violation of statute implies a prohibition. Vanmeter v. Spurrier, 94 Ky. 22, 21 SW 337, 14 KyL 684. See also Woods v. Armstrong, 54 Ala. 150, 25 AmR 671; Lindsey v. Rutherford, 17 B. Mon. (Ky.) 245; and Contracts [9 Cyc 546].

[c] **Mere promise of inspection insufficient.**—The fact that the seller procured a subinspector to visit a warehouse where the guano was deposited, gave him samples, and was promised an inspection, stamping, and certificate, if no inspection was in fact made, will not validate a contract. Woods v. Armstrong, 54 Ala. 150, 25 AmR 671.

91. Braxton v. Liddon, 49 Fla. 280, 38 S 717; Faircloth v. De Leon, 81 Ga. 158, 7 SE 640; Harris v. Parker, 108 Tenn. 29, 64 SW 1087.

[a] **Reason of rule.**—An admission in the contract that the statute has been complied with or a waiver of such compliance does not operate as an estoppel on the buyer because to give such provisions this effect would put it in the power of manufacturers and dealers to require purchasers to sign contracts that would practically nullify the statute. Braxton v. Liddon, 49 Fla. 280, 38 S 717.

[b] **Agreement relieving vendor from liability as to the effects of the fertilizer** upon the crops or otherwise is valid to the extent that it does not seek to relieve the vendor of liability for damage resulting from failure of the fertilizer to contain the ingredients stated in the analysis under which it is sold. Braxton v. Liddon, 55 Fla. 785, 46 S 324.

92. Pacific Guano Co. v. Dawkins, 57 Ala. 115 [foll Woods v. Armstrong, 54 Ala. 150, 25 AmR 671].

93. Merriman v. Knox, 99 Ala. 93, 11 S 741.

94. Brown v. Raisin Fertilizer Co., 124 Ala. 221, 26 S 891.

95. Imperial Cotton Seed Oil Co. v. Shanks, 177 Ala. 522, 58 S 390; Arlington Oil, etc., Co. v. Swann, 13 Ga. A. 562, 79 SE 476; Hillis v. Comer, 13 Ga. A. 214, 78 SE 1107.

[a] **In Alabama.**—Code (1907) §§ 24-48 does not govern the sale of cottonseed meal fertilizer, which is regulated by §§ 49, 50, so that a defense to an action for the price that the bags were not tagged as required by § 28, making the sale an offense under § 6881, was bad. Imperial Cotton Seed Oil Co. v. Shanks, 177 Ala. 522, 58 S 390.

[b] **In Georgia.**—(1) A seller's failure to tag commercial fertilizer is not a good defense to an action for the price of such fertilizer, Civ. Code (1910) § 1794, requiring commercial fertilizers to be registered and analyzed, but not requiring any tags to be attached, § 1793, relative to the procurement of tax tags, being purely a revenue measure. Hillis v. Comer, 13 Ga. A. 214, 78 SE 1107. (2) A note for the price of fertilizer, executed after the act of Dec. 18, 1901 (Civ. Code [1910] § 1771 et seq), went into effect, is not void merely because the tax tags required by law were not attached to the packages. Arlington Oil, etc., Co. v. Swann, 13 Ga. A. 562, 79 SE 476, 477 (where the court said: "We have already held that a note given for fertilizer is not void merely because the tax tags were not attached to the packages containing the fertilizer. Hillis v. Comer, 13 Ga. A. 214, 78 SE 1107. That decision was based upon the construction of the act of December

with the statute usually requires the tags to be attached at the time of sale,[96] and no recovery may be had on the contract of sale where the package has been properly tagged, but the tags have been lost or destroyed before the property in the goods passed to the vendee,[97] even though such loss or destruction of the tags has been without fault on the part of the vendor.[98] But a mere loss of a portion of the tags in transit does not prevent a recovery of the price of the fertilizer,[99] and a recovery has also been allowed where the tags were omitted from some bags at the request of the purchaser, who received the tags for the remainder and promised to affix them,[1] and, upon a sale of fertilizers to be shipped from another state, a delivery of the tags to the purchaser after the arrival of the fertilizer has been held a sufficient compliance with the statute where the purchaser expresses his satisfaction and retains and uses the fertilizer.[2]

Variance between analyses. It has been held that an immaterial variance between a guaranteed analysis of a fertilizer and an analysis made by the state chemist of samples of such fertilizer does not render the contract of sale illegal,[3] and in some states the statutes declare such contracts void only in case there is a variance of a certain per cent between the guaranteed and the official analysis.[4]

Sale not within license. A license to sell fertilizers stated to be manufactured in a certain city does not authorize the sale of fertilizers manufactured at a distinct, incorporated municipality a short distance from the city, even though the principal office of the manufacturer is in the city named in the license.[5]

[§ 39] **b. Made Without State.** Statutes relating to inspection of fertilizers have no extraterritorial effect, and noncompliance with their provisions does not affect the validity of a sale made in another state.[6] But a contract made outside the state to ship fertilizer to a dealer within the state for sale without complying with the statutes of such state as to analysis and tagging is illegal and void.[7]

[§ 40] **c. Of Worthless, Adulterated, or Inferior Product.** Under some statutes, when the fertilizer is spurious or adulterated,[8] deficient or worthless,[9] or falls short of the guaranteed commercial value,[10] the seller can recover only the actual value of the inferior product sold,[11] or a certain percentage of the note given therefor,[12] and may be compelled to respond in damages to the purchaser in the nature of a penalty recoverable in a separate action therefor[13] or counterclaimed in the action by the seller for the purchase price.[14] The inspector's brand upon sacks of fertilizer will not preclude the purchaser thereof from showing that it was worthless, unless he has expressly stipulated in his contract that it should have that effect.[15]

18, 1901 (Civil Code, § 1771 et seq.). The decision in Zipperer v. Doyle, 124 Ga. 895, 53 SE 505, holding that no recovery could be had for the purchase price of fertilizer which was not tagged as required by law, dealt with a sale made prior to the date upon which the act of 1901 went into effect. Under the law as it stood prior to the passage of that act, an obligation for the purchase price of fertilizer could not be collected if it appeared that the fertilizer had not been tagged as required by law. This is not true, however, under the act of 1901, nor is there anything in the act of August 22, 1911 (Acts 1911, p. 172), rendering uncollectible an obligation for fertilizer merely because it has not been tagged as required by law").

96. Alabama Nat. Bank v. Parker, 153 Ala. 597, 45 S 161 (holding that where a sale is complete on the fertilizer being properly consigned, freight paid, and its arrival at a certain town, it is to the time of such arrival that the absence of the tags must be referred). See also supra § 37.

Attachment by purchaser not sufficient see supra note 94.

97. Kirby v. Huntsville Fertilizer, etc., Co., 105 Ala. 529, 17 S 38; Brown v. Adair, 104 Ala. 652, 16 S 439; Clark's Cove Guano Co. v. Dowling, 85 Ala. 142, 4 S 604.

98. Kirby v. Huntsville Fertilizer, etc., Co., 105 Ala. 529, 17 S 38.

99. Holt v. Navassa Guano Co., 114 Ga. 666, 40 SE 735.

1. Steiner v. Ray, 84 Ala. 93, 4 S 172, 5 AmSR 332.

2. Beard v. Goodman, 117 Ky. 474, 78 SW 191, 25 KyL 1566.

3. Spinks v. Rome Guano Co., 108 Ga. 614, 33 SE 906.

4. Cooper v. National Fertilizer Co., 132 Ga. 529, 64 SE 650 (construing Acts [1901] p 65, allowing a variance of less than three per cent in the commercial value).

5. Furman Farm-Impr. Co. v. Long, 117 Ala. 581, 23 S 527.

6. Johnson v. Hanover Nat. Bank, 82 Ala. 271, 6 S 909; Renfro v. Loyd, 64 Ala. 94; Stokes v. Culver, 57 Ala. 412; Atlantic Phosphate Co. v. Ely, 82 Ga. 433, 9 SE 170; Martin v. Upshur Guano Co., 77 Ga. 257.

[a] **Illustration.**—Where guano is sold by a dealer in another state to a purchaser in Georgia, and the delivery is made without the state, and the title is in the purchaser when the property is brought into the state, the sale is not illegal, because the guano is not branded and tagged, as required by Code § 1553, for all fertilizers offered for sale or distribution in the state. Martin v. Upshur Guano Co., 77 Ga. 257.

7. Coweta Fertilizer Co. v. Brown, 163 Fed. 162, 89 CCA 612.

[a] **Seller's knowledge of buyer's intention to resell.**—Where plaintiff, residing in Georgia, delivered fertilizers at a point in Virginia under a contract of sale with the purchaser who, to the knowledge of plaintiff, intended to resell them in Tennessee, it could not be assumed that plaintiff contracted with the purpose of evading the laws of Tennessee as to analysis and tagging. Atlanta Guano Co. v. Phipps, (Tenn. Ch. A.) 41 SW 1087.

8. Gillmore Puckett Grocery Co. v. J. Lindsey Wells Co., (Miss.) 60 S 580.

9. Goulding Fertilizer Co. v. Johnson, 65 Fla. 195, 61 S 441.

10. Keaton v. Birmingham Fertilizer Co., 13 Ga. A. 645, 79 SE 754; Arlington Oil, etc., Co. v. Swann, 13 Ga. A. 562, 79 SE 476.

11. Arlington Oil, etc., Co. v. Swann, 13 Ga. A. 562, 79 SE 476 (holding that, under the act of Aug. 22, L. [1911] p 172, where the actual value of fertilizer sold falls more than three per cent below the guaranteed commercial value, the seller can recover only the actual value).

12. Chilton Warehouse, etc., Co. v. Lewis, 3 Ala. A. 464, 57 S 100 (where it is said that Code [1907] § 37 provides that when the deficiency in fertilizer amounts to more than five per cent of the guaranteed commercial value thereof any note given in payment of the fertilizer shall be collectable only for one half of the note).

13. Gillmore Puckett Grocery Co. v. J. Lindsey Wells Co., (Miss.) 60 S 580 (quadruple the price received or agreed upon).

[a] **Adulterated cottonseed meal.**—Under Code (1906) §§ 1579, 2244, cottonseed meal is a fertilizer, but other unmixed cottonseed products are not fertilizers, within § 2256, giving a right of action for the sale of adulterated fertilizers. Gillmore Puckett Grocery v. J. Lindsey Wells Co., (Miss.) 60 S 580.

14. Goulding Fertilizer Co. v. Johnson, 65 Fla. 195, 61 S 441 (twice the amount paid or demanded); Arlington Oil, etc., Co. v. Swann, 13 Ga. A. 562, 79 SE 476 (twenty-five per cent of the purchase price).

[a] **Action on note.**—The branding of the words "High Grade" on packages of inferior fertilizer does not render a note for the price absolutely void; but the buyer's remedy in such case is to recover the damages prescribed in the act of Aug. 22 (L. [1911] p 172), and to reduce the amount of the seller's recovery to the actual value of the fertilizer, if it falls more than three per cent below the guaranteed commercial value. Arlington Oil, etc., Co. v. Swann, 13 Ga. A. 562, 79 SE 476.

[b] **Where an answer in foreclosure of a chattel mortgage** for the price of a commercial fertilizer alleges that defendant had a sample chemically analyzed in compliance with Gen. St. (1906) § 1271, which showed that the fertilizer was worthless, and offers in set-off the statutory penalty prescribed by § 1272, it states a legal defense. Goulding Fertilizer Co. v. Johnson, 65 Fla. 195, 61 S 441.

[c] **Damages when limited to statutory amount.**—Where the seller of fertilizer expressly declines, in the purchase-money note, to warrant its quality, and states merely that the laws of the state have been complied with, the buyer cannot, because of inferior fertilizer, recover any damages other than those provided by the act of Aug. 27 (L. [1911] p 172). Arlington Oil, etc., Co. v. Swann, 13 Ga. A. 562, 79 SE 476.

15. Wiggins v. Cleghorn, 61 Ga. 364.

[a] **Statements in a note** (1) that "the inspector is hereby constituted and recognized as ——— agent, and ——— agree to be bound by his inspection" (Wiggins v. Cleghorn, 61 Ga. 364), (2) and that "this fertilizer is sold under the inspection and analysis of Dr. A. Means, inspector at Savannah, and the Department of Agriculture at Atlanta" (Austin v. Cox, 60 Ga. 520), do not cut off any defense depending upon warranty of quality, express or implied; (3) but where the fertilizer was

[§ 41] **2. Criminal Liability.** In addition to the provisions regulating the manufacture and sale of commercial fertilizers[16] and prescribing certain penalties for failure to comply therewith,[17] in some states the failure to comply with the statutory requirements is also made a penal offense.[18] Being penal, such statutes must be strictly construed,[19] and must be confined in their operation to such fertilizers or products, and to such failures or omissions with respect thereto, as are clearly within their intendment.[20] Under a statute making the omission from a package of fertilizer of a statement of its contents a criminal offense the attaching of a false certificate does not constitute an offense.[21]

An indictment for failure to attach to packages of fertilizer the required certificate must allege the name of the person to whom an offer of sale was made or allege that his name was unknown,[22] and under a statute permitting a statement of the contents of a package of fertilizer to be made in either of two ways the indictment must clearly allege a failure to make the statement in either way.[23]

[§ 42] **H. Actions for Price—1. Pleading.** An answer, in an action to recover the purchase price of fertilizer, that it was not inspected by the state inspector, without alleging that it was not properly branded, is insufficient;[24] and in an action on notes given for carload consignments of fertilizer, a plea that when the fertilizer was delivered the sacks or "some of them," in which it was contained, were not tagged as required by law was insufficient, since it did not appear that untagged sacks were contained in each of the several cars;[25] but a plea alleging that the fertilizer has not been inspected, stamped, or branded, as required by the statute, is not objectionable for vagueness or indefiniteness, nor as averring legal conclusions instead of facts.[26]

[§ 43] **2. Counterclaim.** As already seen, counterclaim is a proper method of availing himself of the statutory penalty or damages for the sale of worthless or inferior fertilizer, where a purchaser is sued for the purchase price.[27]

Where the contract is void and unenforceable for reasons hereinbefore stated,[28] in an action for the price, defendant is not allowed to recover on a counterclaim, where he successfully defended on the ground of illegality of the contract and showed no special damages.[29]

[§ 44] **3. Issues, Proof, and Variance.** Where the petition in an action to recover the price of fertilizer sold under a warranty does not allege compliance with the statute as to the analysis and that approved grade was furnished, defendant, upon setting up the breach of warranty, may prove the worthlessness of the fertilizer by any competent evidence,[30] such as that of other farmers who have used it;[31] but evidence is not admissible as to issues not raised by the pleadings.[32]

[§ 45] **4. Evidence. Burden of Proof.** Where defendant attempts to show that a note is void because the fertilizer has been sold without complying with the requirements of the law, the burden of proof is on him to show that the law was not complied with as to such requirements;[33] and the burden is on him also to prove a deficiency below the guaranteed commercial value of the fertilizer when he relies upon the same in his defense;[34] but where defendant alleges that plaintiff did not have a license to deal in fertilizer as required by law, the burden of proof is on plaintiff to show that he had such license.[35]

Admissibility. Upon the issue as to whether the statute requiring tags to be affixed to fertilizer sold has been complied with, evidence is admissible to the effect that the tags were properly attached at the shipping point and the cars sealed;[36] and on the other hand, evidence is also admissible of the absence of the proper tags when the seals of the cars were first rightfully broken;[37] but a letter from the manufacturer to his agent stating that he was out of tax tags for the moment, and that he could tag the fertilizer on arrival, is not admissible when the agent has testified to that fact.[38] Where, in an action to foreclose a mortgage securing payments for fertilizer, the defense was that the fer-

accepted with warranty "as to its effect on crops only as to the analysis of the state inspector as evidenced by his brand on each and every package," the purchaser cannot avoid paying therefor if the packages were actually branded in the way contemplated by the contract (Jackson v. Langston, 61 Ga. 392).

16. See supra §§ 32–40.

17. See supra §§ 33–40.

18. See statutory provisions; and supra § 38. See also State v. Long, 94 Md. 637, 51 A 827; Peo. v. Stone, 85 Hun 130, 32 NYS 519.

[a] **Obstructing official sampler.**—The words "or the person intrusted for the time being with the charge or the custody of any article sold or intended to be sold" include a carrier. Department of Agriculture v. Cork Steam Packet Co., [1909] 2 Ir. 479.

[b] **Consent of board of agriculture to prosecution.**—By the Fertilizers and Feeding Stuffs Act of 1906, 6 Edw. 7 c 27 §§ 6 (3), 12, prosecutions under the act must, in England, be sanctioned by the board of agriculture and fisheries, and in Ireland by the department of agriculture and technical instruction. Where goods are sold in England to a purchaser in Ireland, a prosecution in England in respect of the sale must be sanctioned by the board of agriculture and fisheries, and not by the Irish department. Hill v. Phœnix Veterinary Supplies, [1911] 2 K. B. 217.

[c] **Mens rea** as an element of the offenses under the English statutes see Laird v. Dobell, [1906] 1 K. B. 131; Korten v. West Sussex County Council, 20 Cox C. C. 402; Needham v. Worcestershire County Council, 100 L. T. Rep. N. S. 901.

19. See Statutes [36 Cyc 1183].

20. State v. Lamar, 178 Ala. 77, 59 S 473 [rev 5 Ala. A. 259, 59 S 737] (holding that the act of Nov. 22 [L. Sp. Sess. (1907) p 22] § 5, which provided that cottonseed meal, sold as fertilizer, must be registered as other fertilizers, did not by implication include the criminal provisions of the Fertilizer Law, including only the provisions of Code [1907] § 24).

21. Peo. v. Stone, 85 Hun 130, 32 NYS 519.

22. Peo. v. Stone, 85 Hun 130, 32 NYS 519.

23. State v. Long, 94 Md. 637, 51 A 827.

24. Martin v. Moore, 63 Ga. 531.

25. Alabama Nat. Bank v. Parker, 153 Ala. 597, 45 S 161.

26. Campbell v. Segars, 81 Ala. 259, 1 S 714; Renfro v. Loyd, 64 Ala. 94.

[a] **Forms of pleas** that the statute relating to fertilizers has not been complied with see Johnson v. Hanover Nat. Bank, 88 Ala. 271, 6 S 909; Campbell v. Segars, 81 Ala. 259, 1 S 714.

27. See supra § 40 note 14.

28. See supra § 38.

29. Vanmeter v. Spurrier, 94 Ky. 22, 21 SW 337, 14 KyL 684 (holding that the purchaser of fertilizer not labeled as required by statute may not recover damages by way of counterclaim in an action for the price where he has used the fertilizer without paying for it and no special damages are shown).

30. Hardy Packing Co. v. Sprigg, 84 SW 532, 27 KyL 133.

31. Hardy Packing Co. v. Sprigg, 84 SW 532, 27 KyL 133.

32. State v. Malony, 81 S. C. 226, 62 SE 215.

33. Lorentz v. Conner, 69 Ga. 761; Griner v. Baggs, 4 Ga. A. 232, 61 SE 147; Young v. Murray, 3 Ga. A. 204, 59 SE 717.

34. Keaton v. Birmingham Fertilizer Co., 13 Ga. A. 645, 79 SE 754.

[a] **Where, in an action on a note** given for fertilizer, the defense, relying on Civ. Code (1910) § 1774, alleged a deficiency in the fertilizer as marked and guaranteed, the burden was on defendant to prove a deficiency of three per cent below the total commercial value by a comparison with the official analysis of the state chemist. Keaton v. Birmingham Fertilizer Co., 13 Ga. A. 645, 79 SE 754.

35. Brown v. Raisin Fertilizer Co., 124 Ala. 221, 26 S 891; Talladega Fertilizer, etc., Co. v. Farmers' Union Warehouse Co., 2 Ala. A. 307, 56 S 595.

36. Alabama Nat. Bank v. Parker, 153 Ala. 597, 45 S 161.

37. Alabama Nat. Bank v. Parker, 153 Ala. 597, 45 S 161.

38. State v. Malony, 81 S. C. 226, 62 SE 215.

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tilizer was inferior, certificates of analysis, not verified as required by law, are not admissible.[39]

Deficiency in guaranteed value. Where, in an action for the price of fertilizer, the defense was that the fertilizer was not of the guaranteed commercial value, a certificate of the official analysis was admissible in evidence, although it did not appear that the analysis was made from a sample taken from the particular lot of fertilizer for the purchase price of which recovery was sought;[40] but such deficiency cannot be shown or ascertained by averaging the results of two or more tests.[41]

Weight and sufficiency. Evidence that when the packages of fertilizer were received by the buyer some had tags and others had wire indicating that they had been tagged is sufficient to sustain an inference that the law was complied with by the manufacturer as to all the packages.[42]

[§ 46] **5. Trial. Questions of Law and Fact.** Where fertilizer is sold under a written contract, it is for the court to construe the contract so as to determine at what time the title passes to the purchaser;[43] but at what time of the year or stage in the growth of a crop a purchaser of fertilizer can properly determine the effect of the fertilizer so as to give notice of dissatisfaction is a question for the jury.[44]

Instructions. Where the evidence does not show that the tags required by statute were not detached after sale and delivery, and there is evidence that the sacks were tagged before sale, an instruction that if the jury believe that the fertilizer did not have inspection tags on the sacks at the time of sale plaintiffs cannot recover is properly refused;[45] but an instruction excluding from the consideration of the jury evidence tending to show that packages were not properly tagged is reversible error.[46]

VII. WEEDS AND OTHER NOXIOUS PLANTS[47]

[§ 47] **A. Common-Law Liability for.** At common law adjoining landowners owe each other no active duty with respect to weeds or other noxious plants accidentally or naturally growing upon their lands;[48] and they are liable to each other by reason of such plants being purposely propagated by them only upon its being shown that under all the circumstances of the case such use of their land was unreasonable.[49]

[§ 48] **B. Statutory Provisions—1. In General.** Statutes have been enacted in some jurisdictions subjecting persons who permit certain noxious grasses or other plants to grow on their lands to the payment of a penalty,[50] or to the payment of damages to the persons injured by the spread of such plants.[51] These statutes should be strictly construed;[52] and the remedies provided by such statutes, imposing new duties upon the landowner and creating a new right of action against him, are exclusive.[53]

Growing on abutting highways. Some statutes impose a duty upon a landowner to cut noxious weeds growing upon highways in front of his lands,[54] and declare his failure to comply with the statutory requirements to be a misdemeanor,[55] although this may constitute merely a cumulative and not an exclusive remedy against the abutting owner.[56]

[§ 49] **2. Constitutionality.** Statutes declaring certain weeds nuisances, requiring private owners to destroy them, and imposing a penalty for their failure to do so, have been sustained as a reasonable exercise of the police power by the state.[57] In Washington such a statute, requiring such owners to remove such weeds, and providing, upon their neglect or refusal to do so, for the destruc-

39. Kimbro v. Bradshaw, (Fla.) 65 S 868.

[a] **Certificates verified by affidavits of an assistant state chemist,** instead of by the commissioner of agriculture, as required by Gen. St. (1906) §§ 1271, 1272, were properly excluded. Kimbro v. Bradshaw, (Fla.) 65 S 868.

40. Arlington Oil, etc., Co. v. Swann, 13 Ga. A. 562, 79 SE 476.

41. Chilton Warehouse, etc., Co. v. Lewis, 3 Ala. A. 464, 57 S 100 (holding that, where the agricultural department, pursuant to Code [1907] § 43, had two lots of the brand of fertilizer purchased by defendant analyzed, one lot from samples taken from sacks in plaintiff's warehouse showing eleven per cent below guaranteed value, and the other lot from sacks sold a consumer showing two and one-half per cent below guaranteed commercial value, the deficiency in the fertilizer sold defendant could not be ascertained by averaging the result of the two tests).

42. Young v. Murray, 3 Ga. A. 204, 59 SE 717.

43. State v. Malony, 81 S. C. 226, 62 SE 215.

44. Morgan v. Coweta Fertilizer Co., 110 Ga. 787, 36 SE 219.

45. Hamlin v. Rogers, 78 Ga. 631, 3 SE 259.

46. Zipperer v. Doyle, 124 Ga. 895, 53 SE 505.

47. **Expenses in removing noxious weeds** see Damages.

Fire from weeds on right of way see Railroads [33 Cyc 1340].

48. Harndon v. Stultz, 124 Iowa 734, 736, 100 NW 851; Gulf, etc., R. Co. v. Oakes, 94 Tex. 162, 58 SW 999, 86 AmSR 835, 52 LRA 293 and note; Varfce v. Southern Kansas R. Co., (Tex. Civ. A.) 152 SW 743; Bangle v. Missouri, etc., R. Co., (Tex. Civ. A.) 140 SW 374; Gulf, etc., R. Co. v. Stokes, (Tex. Civ. A.) 91 SW 328; San Antonio, etc., R. Co. v. Burns, 39 Tex. Civ. A. 32, 89 SW 21; St. Louis, etc., R. Co. v. Terhune, (Tex. Civ. A.) 81 SW 74; Giles v. Walker, 24 Q. B. D. 656, 657.

"I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil." Per Coleridge, C. J., in Giles v. Walker, supra. "It is not suggested that the growing by one upon his own land of cocklebur and weeds is without legal right, or that in law the field of defendant constituted a nuisance. Counsel does not cite any authority for the granting of an injunction in a case such as plaintiff presents, and we know of none." Harndon v. Stultz, supra.

49. Gulf, etc., R. Co. v. Oakes, 94 Tex. 162, 58 SW 999, 86 AmSR 835, 52 LRA 293; San Antonio, etc., R. Co. v. Burns, 39 Tex. Civ. A. 32, 89 SW 21; St. Louis, etc., R. Co. v. Terhune, (Tex. Civ. A.) 81 SW 74.

[a] **Noxious character must be shown.**—An injunction against the planting by an adjoining landowner of grass alleged to be pernicious will not be sustained if the testimony is conflicting as to the character and effects of the grass and leaves in doubt the result of its introduction into agriculture. McCutcheon v. Blanton, 59 Miss. 116.

50. Missouri, etc., R. Co. v. Forrest, (Tex. Civ. A.) 148 SW 1176; Missouri, etc., R. Co. v. Tolbert, (Tex. Civ. A.) 134 SW 280; Gulf, etc., R. Co. v. Stokes, (Tex. Civ. A.) 91 SW 328.

51. San Antonio, etc., R. Co. v. Burns, (Tex.) 87 SW 1144.

[a] **"Contiguous" to right of way.**—Land which was separated from a railroad right of way only by a parallel public road, which was condemned from the owner, was "contiguous" to the right of way within Rev. Civ. St. (1911) art 6602, permitting one owning land contiguous to the right of way of a railroad company which has permitted Johnson grass to mature on its land to recover a certain sum and actual damages. International, etc., R. Co. v. Boles, (Tex. Civ. A.) 161 SW 914.

52. International, etc., R. Co. v. Boles, (Tex. Civ. A.) 161 SW 914 (holding that Rev. Civ. St. [1911] arts 6601, 6602, prohibiting railroad companies from permitting Johnson grass to mature on the right of way, and imposing a penalty in favor of contiguous landowners for its violation, is penal, and should be strictly construed).

53. Vance v. Southern Kansas R. Co., (Tex. Civ. A.) 152 SW 743.

54. See statutory provisions.

55. See statutory provisions.

56. Northern Pac. R. Co. v. Adams County, 78 Wash. 53, 138 P 307.

[a] **Cumulative not an exclusive remedy.**—It was held that Remington & B. Code §§ 3038, 3040, 3041 contemplates the taxation of the cost of cutting weeds on highways on abutting land if the work is done by the county, § 3039 making a failure to cut a misdemeanor, being a cumulative and not an exclusive remedy. Northern Pac. Ry. Co. v. Adams County, 138 P 307.

57. State v. Boehm, 92 Minn. 374, 100 NW 95; Missouri, etc., R. Co. v. Forrest, (Tex. Civ. A.) 148 SW 1176.

tion by public authorities and for taxation of the land for such destruction, has been upheld as constitutional,[58] as a proper exercise of the police power,[59] and is not in violation of the constitutional provision that taxes must be uniform.[60] But in Illinois a statute authorizing the levy of assessments on the owners of lands from which weeds have been removed by the public authorities upon the failure of such owners to do so has been held to violate the constitutional provision requiring taxation to be uniform and in proportion to the value of taxable property;[61] nor is it to be regarded as a local improvement within the meaning of the constitution.[62]

[§ 50] **3. What Constitutes Compliance.** Where a landowner has done all that can reasonably be expected of him in compliance with a statute requiring the destruction of weeds or preventing their going to seed, he is not criminally liable because a few stray weeds are found growing here and there.[63]

[§ 51] **4. Notice.** Under some statutes notice to a landowner is required before a penalty may be incurred by him for failure to destroy weeds on his premises,[64] or before he may become liable for damages by reason of such failure;[65] but no official notice is necessary under a statute imposing a penalty upon any person who shall knowingly allow such weeds to grow.[66]

[§ 52] **5. Actions—a. Pleading.** In drafting a petition[67] or affidavit[68] for the recovery of a penalty,[69] or damages[70] for failure to destroy noxious weeds, it is necessary[71] and sufficient[72] to follow the language of the statute, and under such statutes averment and proof of negligence by defendant,[73] is not, as a rule, necessary to a recovery; although one seeking to recover under the common law and the statutes governing the construction of railroads, with reference to the natural drainage of land, must allege and prove negligence in diverting the water from its natural course and along its right of way, and emptying it upon the land of another, causing damage by the water carrying with it noxious weeds, seeds, and roots.[74] A complaint for the statutory penalty need not allege that plaintiff has sustained any actual damages.[75]

[§ 53] **b. Defenses.** If no duty is imposed upon a landowner to destroy weeds on his lands until the receipt of notice,[76] the fact that no notice has been received by him is a good defense to an action against him for his failure to destroy such weeds.[77] Under some statutes a recovery against a defendant for permitting weeds to grow and go to seed on his premises may be defeated by showing that plaintiff also permitted such weeds to grow on his land during the time complained of,[78] even though the grass was communicated to his land from defendant's land;[79] but that plaintiff had been in like fault one year does not prevent a recovery by him during subsequent years when defendant does, and he does not, permit such condition,[80] nor does such a statutory provision constitute a defense to an action based upon defendant's negligence in permitting seed of noxious grasses to be carried upon plaintiff's premises by the drainage of surface water,[81] although such an act will prevent a recovery of the statutory penalty or damages.[82]

[§ 54] **6. Amount Recoverable as Penalty or Damages.** Each time defendant permits the noxious weeds or plants to mature subjects him to a separate penalty;[83] but only one penalty can be recovered by a single owner for injury to adjoining tracts of land,[84] even though leased to different tenants;[85] but if the tracts are separated by some distance he may recover a penalty for each tract.[86] When seeking to recover under the common law and statutes governing the construction of railroads,

58. Wedemeyer v. Crouch, 68 Wash. 14, 122 P 366, 43 LRANS 1090 and note.
59. Northern Pac. R. Co. v. Adams County, 78 Wash. 53, 138 P 807.
60. Wedemeyer v. Crouch, 68 Wash. 14, 122 P 366, 43 LRANS 1090 and note.
61. Peo. v. Cook County, 221 Ill. 493, 77 NE 914.
62. Peo. v. Cook County, 221 Ill. 493, 77 NE 914.
63. Chicago, etc., R. Co. v. Peo., 132 Ill. A. 531; Story v. Peo., 79 Ill. A. 562.
Defenses to actions see infra § 53.
64. State v. Dawson, 38 Ind. A. 483, 78 NE 352.
65. Langer v. Goode, 21 N. D. 462, 131 NW 258, AnnCas1913D 429. And see infra § 53.
66. State v. Dawson, 38 Ind. A. 483, 78 NE 352.
67. Doeppenschmidt v. International, etc., R. Co., (Tex. Civ. A.) 102 SW 950.
68. State v. Dawson, 38 Ind. A. 483, 78 NE 352.
69. State v. Dawson, 38 Ind. A. 483, 78 NE 352.
70. Doeppenschmidt v. International, etc., R. Co., (Tex. Civ. A.) 102 SW 950.
71. Los Angeles County v. Spencer, 126 Cal. 670, 59 P 202, 77 AmSR 217.
72. State v. Dawson, 38 Ind. A. 483, 78 NE 352; Doeppenschmidt v. International, etc., R. Co., (Tex. Civ. A.) 102 SW 950.
73. Missouri, etc., R. Co. v. Tolbert, (Tex. Civ. A.) 134 SW 280; San Antonio, etc., R. Co. v. Burns, 39 Tex. Civ. A. 32, 89 SW 21; International, etc., R. Co. v. Shelton, (Tex. Civ. A.) 81 SW 794; St. Louis Southwestern R. Co. v. Terhune, (Tex. Civ. A.) 81 SW 74.
[a] **Instruction assuming existence of negligence.**—In an action against a railroad company for penalties and damages, under the statutes making it unlawful for a railroad company to permit noxious weeds to mature on its right of way, the court may in its charge assume that the act of the company in permitting the weeds to mature was negligence. Missouri, etc., R. Co. v. Tolbert, (Tex. Civ. A.) 134 SW 280.
74. Missouri, etc., R. Co. v. Tolbert, (Tex. Civ. A.) 134 SW 280.
75. Chicago, etc., R. Co. v. Anderson, (Ind.) 105 NE 49 (a complaint for the statutory penalty for the failure of a railroad to cut noxious weeds on its property, as required by Burns Annot. St. [1908] §§ 5524, 5525).
76. See supra § 51.
77. Langer v. Goode, 21 N. D. 462, 131 NW 258, AnnCas1913D 429.
78. Vance v. Southern Kansas R. Co., (Tex.) 152 SW 743; San Antonio, etc., R. Co. v. Burns, 99 Tex. 154, 87 SW 1144; Missouri, etc., R. Co. v. Tolbert, (Tex. Civ. A.) 134 SW 280; San Antonio, etc., R. Co. v. Burns, 39 Tex. Civ. A. 32, 89 SW 21.
[a] **In Texas,** under L. (1901) p 283 c 117, one who himself permits the weeds named to mature and go to seed upon his own land is not entitled to sue. Thus, a landowner who has permitted Russian thistles to mature on his own land after they had blown from an adjoining railroad right of way cannot recover from the railroad company the damage sustained to his land by the thistles from the right of way before those matured on his own land. Vance v. Southern Kansas R. Co., (Civ. A.) 152 SW 743.
[b] **Permitting to mature.**—An adjoining landowner, upon whose property Johnson grass has spread from a railroad right of way, does not permit it to mature, within Acts (1909) p 102 § 2, denying the landowner damages if he allows the grass to mature on his land, where it either matures before it is discovered or it matures despite his efforts to destroy it. St. Louis Southwestern R. Co. v. Russell, (Ark.) 168 SW 1083.
79. St. Louis Southwestern R. Co. v. Russell, (Ark.) 168 SW 1083 (holding that, under Acts [1909], p 102 § 2 an owner of land adjoining a railroad right of way, who permits Johnson grass to mature upon his land, cannot recover from the railroad company, although the grass was communicated to his land from the right of way).
80. International, etc., R. Co. v. Voss, 49 Tex. Civ. A. 566, 109 SW 984.
81. Missouri, etc., R. Co. v. Tolbert, (Tex. Civ. A.) 134 SW 280.
82. Missouri, etc., R. Co. v. Tolbert, (Tex. Civ. A.) 134 SW 280.
83. Missouri, etc., R. Co. v. Tolbert, (Tex. Civ. A.) 134 SW 280; International, etc., R. Co. v. Voss, 49 Tex. Civ. A. 566, 109 SW 984; Gulf, etc., R. Co. v. Henderson, 38 Tex. Civ. A. 419, 86 SW 371.
84. Missouri, etc., R. Co. v. Forrest, (Tex. Civ. A.) 148 SW 1176.
85. Missouri, etc., R. Co. v. Forrest, (Tex. Civ. A.) 148 SW 1176.
86. Missouri, etc., R. Co. v. Forrest, (Tex. Civ. A.) 148 SW 1176.
[a] **An instruction,** in such a case, requiring the jury to assess the damage separately is not erroneous. Missouri, etc., R. Co. v. Forrest, (Tex. Civ. A.) 148 SW 1176.

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with reference to natural drainage of land, the owner may recover the difference in the value of the land with the noxious weeds thereon and the value of the land without them.[87]

VIII. DESTRUCTIVE INSECTS AND OTHER PESTS

[§ 55] **A. Validity of Statutes Authorizing Destruction.** It is within the police power of a state to authorize the destruction by public officers of insects injurious to fruit trees found upon private property,[88] and to impose a lien upon the land upon which they are found in favor of the county at whose expense the work is performed.[89]

[§ 56] **B. Notice of Lien for Cost of Destruction—1. Contents.** A notice of lien required by statute to be filed is sufficient, where it contains a description of the premises, the name of the owner, and the amount claimed, and states that it is for labor performed in killing insects in the owner's orchard;[90] and it is not vitiated by a claim of the benefit of the law relative to liens of mechanics and others on real property.[91]

[§ 57] **2. Filing.** Where the statute requires notice of the lien to be filed within a certain time after it accrues, such filing must be within the time named after the payment of the claim by the county.[92]

[§ 58] **C. Pleading.** A petition in an action to foreclose a lien on land for killing insects on defendant's fruit trees is sufficient, where it follows substantially the language of the statute,[93] and it is not vitiated by a prayer for a personal judgment, where it also contains a prayer that the amount may be declared a lien.[94]

[§ 59] **D. Compensation for Injury to Property in Destroying.** Where the destruction of fruit infected with insects is necessary to avoid injury to the fruit and the fruit interests of the state, the owner may not maintain an action for damages by reason of the destruction of such fruit by the proper state official[95] and, under a statute providing that "the owner of any land" entered upon in prosecuting the work of destroying insects may recover damages suffered by such entry and acts done thereon, damages may not be recovered for the loss of personal property by fire set while prosecuting such work.[96]

IX. AGRICULTURAL LIENS[97]

[§ 60] **A. Definition and Nature.** An agricultural lien is a lien given by statute in some states in favor of one who makes advances to, or performs services for, another, for the purpose of enabling the latter to raise a crop.[98] An agricultural lien differs from a common-law lien in that it is not dependent upon the possession of the crop by the creditor.[99] The debtor remains in possession and control of the property, subject to the creditor's right to have it applied as far as may be necessary to the payment of the debt secured by the lien.[1]

[§ 61] **B. Right to Lien—1. In General.** While it is necessary that there must be some privity between the parties, under a contract either express or implied,[2] whether or not such a lien exists in a particular case depends, not upon the agreement of the parties, but upon compliance with the terms of the statute.[3] The advance of any article mentioned in the statute will be sufficient to create a

87. Missouri, etc., R. Co. v. Tolbert, (Tex. Civ. A.) 134 SW 280.

88. Riverside County v. Butcher, 133 Cal. 324, 65 P 745; Balch v. Glenn, 85 Kan. 735, 119 P 67.

89. Riverside County v. Butcher, 133 Cal. 324, 65 P 745; Los Angeles County v. Spencer, 126 Cal. 670, 59 P 202, 77 AmSR 217; Balch v. Glenn, 85 Kan. 735, 119 P 67.

[a] **Reason of rule.**—The lien given by Gen. St. (1909) §§ 8727–8739, on premises for the expense of abating orchard nuisances, is not for a delinquent tax, but for an indebtedness due the county, and the provision authorizing such expense to be collected as other taxes are collected is not obnoxious to any constitutional inhibition. Balch v. Glenn, 85 Kan. 735, 119 P 67.

90. Riverside County v. Butcher, 133 Cal. 324, 65 P 745.

91. Riverside County v. Butcher, 133 Cal. 324, 65 P 745.

92. Riverside County v. Butcher, 133 Cal. 324, 65 P 745.

93. Riverside County v. Butcher, 133 Cal. 324, 65 P 745.

94. Riverside County v. Butcher, 133 Cal. 324, 65 P 745.

95. Shafford v. Brown, 49 Wash. 307, 95 P 270.

96. Globe F. Ins. Co. v. Lexington, 173 Mass. 6, 52 NE 1086.

97. **Lien for clearing land** see infra § 140 et seq.

Lien of laborer against threshing machine see Master and Servant [26 Cyc 1066 et seq].

Thresher's lien see infra § 130 et seq.

98. Clark v. Farrar, 74 N. C. 686.

99. Black v. Minneapolis, etc., El. Co., 7 N. D. 129, 73 NW 90.

1. Black v. Minneapolis, etc., El. Co., 7 N. D. 129, 131, 73 NW 90 (where the court said: "It is clear that the lien is given without reference to the possession by the holder of such lien of the crop on which it is filed. The owner is to remain in possession of the land on which the crop is growing, and harvest and thresh the same. All this is contemplated. Unlike a common law lien, it is independent of possession by the one claiming the lien. Nor can we discover in the statute any provision that the holder of the lien may ever take possession thereof preliminary to a foreclosure of his lien thereon").

2. Wilson v. Taylor, 89 Ala. 368, 8 S 149 (construing Civ. Code § 3078); Adler v. Haas, 134 La. 622, 64 S 490 (construing Civ. Code art 3217, and Act [1874] No. 66).

"The statute does not require that the contract shall be express. Its words, any contract, are comprehensive enough to include implied, as well as express contracts. Giving to the words of statute their fair and plain import and scope, any contract is sufficient to originate the lien, which, if the labor is rendered, is sufficient to create a debt or liability. The lien may be based on an implied contract." Wilson v. Taylor, 89 Ala. 368, 370, 8 S 149 [cit Neilson v. Iowa Eastern R. Co., 51 Iowa 184, 1 NW 434, 33 AmR 124; 2 Jones Liens § 1236]. "If A without a contract express or implied could, in invitum, enter the field of B, harvest his hay and appropriate to his own use so much of it as was necessary to pay for his services, it would constitute a direct violation of B's constitutional right that no person shall be deprived of his life, liberty, property or privileges, but by judgment of his peers, or by the law of the land." Edgecomb v. Jenney, 108 Me. 538, 540, 81 A 1091.

[a] **The right to a lien for cutting or harvesting hay,** under Rev. St. c 93 § 54, must rest upon a contract, express or implied, with the owner of the hay. Edgecomb v. Jenney, 108 Me. 538, 81 A 1091.

[b] **Contract made with a third person** (1) who is known to have no legal or equitable title to the premises, cannot be relied on to establish a lien for farm labor or services. Edgecomb v. Jenney, 108 Me. 538, 81 A 1091. (2) Civ. Code art 3217, entitling a merchant to a privilege upon a crop for money and supplies furnished, and Act No. 66 of 1874, entitling him to a pledge upon a crop for advances required for making same, does not give the merchant any right, by a contract to which the planter is not a party, to create a privilege or pledge on the crop for the security of his debt to the person from whom he obtains the money advanced by him to the planter. Adler v. Haas, 134 La. 622, 64 S 490.

[c] **One who is forbidden by the owner** of land to cut and harvest hay thereon cannot rely upon a contract made with another for such cutting and harvesting. Edgecomb v. Jenney, 108 Me. 538, 81 A 1091 (construing Rev. St. c 93 § 54).

3. Watson v. Auerbach, 57 Ala. 353; Parks v. Simpson, 124 Ga. 523, 52 SE 616.

Methods of perfecting lien see infra §§ 70–82.

[a] **Lien may not be created by estoppel.**—Parks v. Simpson, 124 Ga. 523, 524, 52 SE 616 (where the court said: "It is urged that the tenant is estopped from denying the landlord's right to proceed summarily to foreclose a lien for the entire amount. A person may estop himself from asserting a lien, but estoppel can not create a special lien, where by the terms of the statute none exists. The operation of an estoppel is negative, not creative").

[b] **In North Carolina.**—In order

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lien;[4] but no matter how essential the supplies or services advanced are to the raising of a crop,[5] no lien for them exists, unless they are such as are contemplated by the statute.[6]

Wrongful discharge will not prevent the accrual of a lien for wages which would have been earned if the contract had not been broken.[7]

[§ 62] **2. Construction of Statutes.**[8] In some jurisdictions, it is said that the lien being unknown to the common law, the statutes creating it should be strictly construed;[9] but in others, the statutes have been regarded as of a remedial nature and have been liberally construed with a view to affording the protection intended by the legislature.[10]

[§ 63] **3. For Advances—a. What Constitutes—(1) Supplies.** Where the statute provides for a lien for those who have "furnished necessary supplies;" the term includes only such supplies as are essential to the subsistence and management of the plantation,[11] and the question of what is necessary depends upon the customs or usages of agricultural pursuits, taking into account the system of agriculture as it exists at the time.[12]

To defeat the lien, evidence should be adduced that the things were not needed for farm purposes or that they are of themselves of such a nature as to be unfit for such purposes.[13]

The expectation that the supplies furnished will be paid for in cash or at short time does not prevent the person furnishing them from being entitled to a lien on the crop.[14]

[§ 64] **(2) Money.** Where the statute expressly provides therefor a lien may be had for advances of money,[15] but money is not included in the term "provisions" or "supplies."[16]

[§ 65] **b. By and to Whom Made.** The advances

to create a valid "agricultural lien" under Battle Revisal c 65 § 19, relating to agricultural liens, it must appear that: (1) The advances were in money or supplies; (2) they were made to the person engaged or about to engage in the cultivation of the soil; (3) they were made after the agreement was perfected; (4) they were made to be expended in the cultivation of the crop during that year; (5) the lien must be on the crop of that year made by reason of the advances so made. Clark v. Farrar, 74 N. C. 686, 690.

4. Schuessler v. Gains, 68 Ala. 556.

5. Boyett v. Potter, 80 Ala. 476, 2 S 534.

6. Boyett v. Potter, 80 Ala. 476, 2 S 534; Bell v. Hurst, 75 Ala. 44; Comer v. Daniel, 69 Ala. 434; Schuessler v. Gains, 68 Ala. 556; Evans v. English, 61 Ala. 416; Watson v. Auerbach, 57 Ala. 353; Tison v. People's Sav., etc., Assoc., 57 Ala. 323; McLester v. Somerville, 54 Ala. 670; Saulsbury v. Eason, 47 Ga. 617; Stewart v. Hollins, 47 Miss. 708; Clark v. Farrar, 74 N. C. 686.

[a] **Rent for lands is not included** by the terms or intendment of the Lien Law of 1867, which was intended to secure, by a prior lien on the crops, animals, and implements, payment of all debts for advances of money for stock or implements used in the cultivation of crops. Stewart v. Hollins, 47 Miss. 708.

[b] **No lien exists for "expenses"** incurred in raising a crop under Sayles' Civ. St. (1897) art 3339a giving a lien to a servant for wages. Mudgett v. Texas Tobacco Growing, etc., Co., (Tex. Civ. A.) 61 SW 149.

7. Langford v. Leggett, 99 Miss. 266, 54 S 856.

8. See also infra §§ 63, 69.

9. Boyett v. Potter, 80 Ala. 476, 2 S 534; Parks v. Simpson, 124 Ga. 523, 52 SE 616. To same effect Thornton v. Hallam, 64 Or. 233, 129 P 1046.

10. Lowe v. Abrahamson, 18 N. D. 182, 183, 119 NW 241, 19 LRANS 1039 and note, 20 AnnCas 355 and note.

"The statute was passed to secure farm laborers against irresponsible landlords, and against the liens of implement dealers, which often covered the whole crop. We must look to the terms of the statute to ascertain who are entitled to avail themselves of its provisions. It should be liberally construed to give effect to the intent of the Legislature in enacting it. Its provisions should not be restricted or added to, as it is the sole function of the Legislature to say to whom this special lien shall be given." Lowe v. Abrahamson, supra.

11. Weill v. Kent, 107 La. 322, 31 S 761; Shaw v. Knox, 12 La. Ann. 41.

[a] **Neither by statute or common law** has a merchant any lien for supplies and advances to make a crop. Franklin v. Meyer, 36 Ark. 96.

[b] **"Supplies,"** in code of 1871, are synonymous with "necessaries" in code of 1867. Wright v. Walton, 56 Miss. 1.

12. Wright v. Walton, 56 Miss. 1; Herman v. Perkins, 52 Miss. 813.

In Brown v. Brown, 109 N. C. 124, 13 SE 797 [quot Windsor Bargain House v. Watson, 148 N. C. 295, 298, 62 SE 305], it was held: "1. The 'advancements' for which a lien is created in favor of a landlord by section 1754 of The Code embraces anything of value supplied by the landlord to the tenant or cropper in good faith, directly or indirectly, for the purpose of making and saving the crop. 2. When such advancements are of such things as in their nature are appropriate and necessary to the cultivation of the crop, e. g., farming implements and work animals, they will be presumed to create the lien; but where they are of articles not in themselves so appropriate and necessary, e. g., dry goods and groceries, whether they will constitute a lien depends upon the purpose for which they were furnished, and it must affirmatively appear that they were made in aid of the crop."

[a] **What groceries necessary.**—In Henry Lochte Co., Limited v. Lefebvre, 128 La. 108, 109, 54 S 578, the court says, per Land, J.: "The evidence shows that the groceries furnished included cigars, tobacco, whisky, preserves, jellies, pickles, and canned goods, none of which are necessary supplies."

[b] **Goods, edibles, or necessaries for the household** of the planter are not included in the Louisiana statute giving a lien for necessary supplies for the cultivation of a plantation. Jurey v. Williamson, Mann. Unrep. Cas. (La.) 277.

[c] **Coal** is a necessary supply for making a sugar crop. Laloire v. Wiltz, 31 La. Ann. 436.

[d] **Dry goods** sold to laborers on a plantation give no privilege to the vendor on the crops of that year grown on the place. Wallace v. Urquhart, 23 La. Ann. 469.

[e] **Fertilizers** (1) are not included under the term in Civ. Code § 3286 Boyett v. Potter, 80 Ala. 476, 2 S 534; (2) but a lien for advances of fertilizers is especially provided for by Code § 1978. Hardwick v. Burts, 59 Ga. 773.

[f] **Molasses barrels** are a "necessary supply" within Civ. Code art 3184. McRae v. His Creditors, 16 La. Ann. 305.

[g] **Mules** have been held to be necessary supplies. Trimble v. Durham, 70 Miss. 295, 12 S 207; McCaslan v. Nance, 46 S. C. 568, 24 SE 812. This was denied, however, in Hankinson v. Hankinson, 61 S. C. 193, 39 SE 385; Ex p. Kibler, 53 S. C. 461, 31 SE 274; McCullough v. Kibler, 5 S. C. 468. Compare Branch v. Galloway, 105 N. C. 193, 10 SE 911. See also Farrar v. Rowley, 3 La. Ann. 276 (where it was held that where the price of mules purchased for the use of a plantation, and paid for by a third person, is reimbursed by a draft on the factors of the planter, the advances will be a privileged claim under Civ. Code art 3184, the mules being necessary supplies). But in Shaw v. Grant, 13 La. Ann. 52, 53, the court, speaking of this case, said: "Whether the court would now feel disposed to go as far as it did in that case, it is not necessary to determine. Certain it is, we do not think the doctrine can be extended beyond the very case the court then had before it."

[h] **A team** used in raising crops gives rise to no claim for a lien unless the labor of such team is included in a contract for the labor of a person. Essency v. Essency, 10 Wash. 375, 38 P 1130.

[i] **Whisky and tobacco** are not necessary supplies. Marcus v. Robinson, 76 Ala. 550.

Money see infra § 64.

13. Herman v. Perkins, 52 Miss. 813.

14. Southern Grocer Co. v. Adams, 112 La. 60, 36 S 226 (construing Civ. Code art 3217).

15. Airey v. Weinstein, 54 Ark. 443, 16 SW 123; Viguerie v. Viguerie, 133 La. 406, 63 S 89; Weill v. Kent, 107 La. 322, 31 S 761; Laloire v. Wiltz, 31 La. Ann. 436; Benton v. Mahan, 30 La. Ann. 1401; Bank of America v. Fortier, 27 La. Ann. 243; Moore v. Gray, 22 La. Ann. 289; Smith v. Williams, 22 La. Ann. 268; The Steamer General Quitman v. Packard, 22 La. Ann. 70; Reese v. Cole, 93 N. C. 87; Clark v. Farrar, 74 N. C. 686.

[a] **Goods deemed equivalent of money.**—In Herman v. Perkins, 52 Miss. 813, it was held that where a planter indebted to laborers for wages pays them off in goods obtained from a merchant, the purchase will be protected by the agricultural lien provided for by the act of Febr. 18, 1867, whether the goods be of the class embraced in the provisions of that act or not, the payment and purchase in such case being equivalent to advancing the money to pay off the hands. See also Benton v. Mahan, 30 La. Ann. 1401 (to the effect that advances by a factor to a planter, whether of money or of goods, if used in paying the laborers who make the crop, constitute privileged debts on the crop).

[b] **Indorsing note.**—The indorser of a note whose payee has made advances to an agriculturist on the strength of the indorsement is entitled to the benefits of Rev. St. § 2514, creating a lien on the crop in favor of one who has made advances "in money or supplies" for the purpose of raising such crop. Lockhart v. Smith, 50 S. C. 112, 27 SE 567.

[c] **Mere banker's loan** to a sugar corporation is not within the Porto Rican statute giving preferences to persons making agricultural loans. Fritze v. Esperanza Cent. Sugar Co., 5 Porto Rico Fed. 1.

16. McLester v. Somerville, 54 Ala.

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must be made by[17] and to[18] persons within the contemplation of the statute.

[§ 66] **c. Must Be Actually Furnished.** The advances must be actually furnished to the debtor,[19] and the creation of an agricultural lien to secure an antecedent indebtedness[20] or contemplated future advances[21] is not authorized.

Parol evidence may be introduced to show that the supplies were furnished after the agreement.[22]

[§ 67] **d. Must Be to Promote Crops—(1) In General.** The particular advances must be made for the purpose of raising and perfecting the particular crop.[23] Furthermore, in some jurisdictions, no lien attaches to a crop unless the money or supplies furnished have actually been used in producing it,[24] although, in other jurisdictions, the person furnishing the supplies is not bound to see to their application.[25]

Evidence that money was actually advanced, that a crop was actually made, and that no sufficient amount for the making was obtained from any other source is sufficient to establish the right to a lien.[26]

Unpaid balance of previous year. In the absence of an agreement to that effect,[27] merely allowing the debtor to retain a portion of the crop upon which a lien exists does not constitute an advancement which will give a lien upon the crop of the

670; Saulsbury v. Eason, 47 Ga. 617; Howe v. Whited, 21 La. Ann. 495; Wood v. Calloway, 21 La. Ann. 471; Shaw v. Grant, 13 La. Ann. 52 [foll Shaw v. Knox, 12 La. Ann. 41].

[a] **Payment by a factor of debts** due by his principal are considered as money advanced and are not "necessary supplies" within Civ. Code art 3184, providing for a lien for advances. Shaw v. Knox, 12 La. Ann. 41.

[b] **Neither money furnished for a planter's personal use** nor that for payment of insurance on his house or his life is within the Louisiana statute giving a lien for supplies for the cultivation of a plantation. Jurey v. Williamson, Mann. Unrep. Cas. (La.) 277. Compare Hewitt v. Williams, 47 La. Ann. 742, 17 S 269 infra note 23 [b].

17. Shields v. Kimbrough, 64 Ala. 504; Viguerie v. Viguerie, 133 La. 406, 63 S 89; Whitmore v. Poindexter, 7 Baxt. (Tenn.) 248; Dunlap v. Aycock, 10 Heisk. (Tenn.) 561.

[a] **Advances by third person on credit of tenant alone** are not entitled to protection under a statute giving a landlord a lien on the tenant's crop "for advances . . . whether made directly by him, or at his instance and request by any other person, or for which he has assumed the legal responsibility." Bell v. Hurst, 75 Ala. 44, 46.

[b] **Agreement to raise crop on shares.**—Neither party to an agreement to raise a crop on shares has a lien for advances made by him. Dunlap v. Aycock, 10 Heisk. (Tenn.) 561. See also Shields v. Kimbrough, 64 Ala. 504 (to the effect that, prior to the act of Febr. 9, 1877, the contract between the lessee of lands and his laborers, for the cultivation of land on shares, did not give the lessee any lien on the crops for advances made by him to the laborers during the year). See Crops [12 Cyc 979].

[c] **The indorser of a note whose payee has made advances** to an agriculturist on the strength of the indorsement is entitled to the benefits of Rev. St. § 2514, creating a lien on the crop in favor of one who has made advances "in money or supplies" for the purpose of raising such crop. Lockhart v. Smith, 50 S. C. 112, 27 SE 567.

18. Clark v. Farrar, 74 N. C. 686; Richey v. Du Pre, 20 S. C. 6; Carpenter v. Strickland, 20 S. C. 1.

[a] **"Planter."**—A merchant doing a general business in the country, including the advancing of money and supplies to planters and farmers, and also owning a plantation that he lets at so much per acre, does not become a planter within the meaning of Act (1874) No. 66, by making advances to his renters. Adler v. Haas, 134 La. 622, 64 S 490.

[b] **A mortgagor in possession after condition broken** cannot, as against the mortgagee, create a lien in favor of the person advancing supplies. Brewer v. Chappell, 101 N. C. 251, 7 SE 670.

[c] **An agreement to take part of crop for services** constitutes one a laborer for hire, and such a one cannot give a lien for advances. McCutchen v. Crenshaw, 40 S. C. 511, 19 SE 140; Richey v. Du Pre, 20 S. C. 6; Carpenter v. Strickland, 20 S. C. 1. See Crops [12 Cyc 979].

[d] **Premises in possession of receiver.**—Pending a real action, a receiver of the rents and profits was appointed, but up to the time of such appointment plaintiffs were in possession under claim of title, and had executed an agricultural lien to A for advances. A was entitled to recover for advances made to plaintiffs up to the time the receiver entered, but the advances made after such entry would depend upon the circumstances under which they were made. McNair v. Pope, 104 N. C. 350, 10 SE 252.

19. Warder v. Bushnell, etc., Co. v. Minnesota, etc., El. Co., 44 Minn. 390, 46 NW 773.

[a] **What constitutes "furnishing."**—A mortgagee of wheat, entitled to the immediate possession of the same for the purpose of foreclosure, who in good faith permits the mortgagor to retain a portion of the mortgaged wheat for seed and takes a "seed-grain" note therefor, may avail himself of Gen. St. (1894) § 4155, providing that a party who furnishes seed to another and takes a note therefor may have a lien for such note on the crop raised from such seed. O'Brien v. Findelsen, 48 Minn. 213, 50 NW 1035; Warder-Bushnell, etc., Co. v. Minnesota, etc., El. Co., 44 Minn. 390, 46 NW 773.

[b] **Manual delivery by creditor to debtor not necessary.**—"But, by requiring that the grain must be furnished by the one and received by the other party to the note or contract, it should not be understood that he who furnishes must in every instance have actual, visible possession of the grain, or that he must carefully measure it out, and make a manual delivery thereof to the purchaser or borrower." Warder-Bushnell, etc., Co. v. Minnesota, etc., El. Co., 44 Minn. 390, 391, 46 NW 773 [appr Endreson v. Larson, 101 Minn. 417, 422, 112 NW 628].

20. Carter v. Wilson, 61 Ala. 434; Boswell v. Carlisle, 55 Ala. 554; National Bank of Commerce v. Sullivan, 117 La. 163, 41 S 480; Knight v. Rountree, 99 N. C. 389, 6 SE 762; Clark v. Farrar, 74 N. C. 686. Compare Parks v. Simpson, 124 Ga. 523, 52 SE 616 infra note 29. But see Stallings v. Harrold, 60 Ga. 478 (where the court held that the lien, although not created when the supplies were furnished, which was in the spring, nor until the middle of the succeeding November, was, notwithstanding, operative as a lien upon the crops of that year, and took precedence of a general judgment rendered in March); Barrett v. Chaler, 2 La. Ann. 874 (holding that the privilege granted by the act of March 23, 1843, amending Civ. Code art 3184, attaches to the crop of the current year for supplies furnished during that and the preceding year).

21. Boyett v. Potter, 80 Ala. 476, 2 S 534; Meekins v. Walker, 119 N. C. 46, 25 SE 706.

22. Meekins v. Walker, 119 N. C. 46, 25 SE 706.

23. Ala.—Marcus v. Robinson, 76 Ala. 550; Watson v. Auerbach, 57 Ala. 353.

Ga.—Saulsbury v. Eason, 47 Ga. 617; Speer v. Hart, 45 Ga. 113.

La.—Hewitt v. Williams, 47 La. Ann. 742, 17 S 269; Waddell's Succ., 44 La. Ann. 361, 10 S 808; Bank of America v. Fortier, 27 La. Ann. 243; Wallace v. Urquhart, 23 La. Ann. 469; Howe v. Whited, 21 La. Ann. 495; Wood v. Calloway, 21 La. Ann. 471.

Minn.—Wallace v. Palmer, 36 Minn. 126, 30 NW 445.

N. C.—Woodlief v. Harris, 95 N. C. 211; Clark v. Farrar, 74 N. C. 686.

[a] **What constitutes promotion.**—(1) Money advanced for necessary repairs on the farm (Airey v. Weinstein, 54 Ark. 443, 16 SW 123), or (2) to machinery (Laloire v. Wiltz, 31 La. Ann. 436) is considered money advanced to make a crop.

[b] **Payment of premiums on life insurance policy.**—No lien on crops exists for money paid by a borrower as premiums on a life insurance policy, under an agreement with the lender, out of a sum advanced for supplies of a plantation. Hewitt v. Williams, 47 La. Ann. 742, 17 S 269. Compare Jurey v. Williamson, Mann. Unrep. Cas. (La.) 277 supra note 16 [b].

24. National Bank of Commerce v. Sullivan, 119 La. 935, 44 S 734; National Bank of Commerce v. Sullivan, 117 La. 163, 41 S 480; Osborn's Succ., 40 La. Ann. 615, 4 S 580. But see Laloire v. Wiltz, 31 La. Ann. 436 (to the effect that a factor's pledge under the act of 1874 covers all advances of money and necessary supplies that may be required by the planter, unless it be shown that the factor knowingly advanced money or supplies for other purposes than making the crop).

[a] **Where only part of seed furnished is sown,** (1) it has been held that a lien exists on the crop for the entire price of the seed furnished (Schlosser v. Moores, 16 N. D. 185, 112 NW 78), and also (2) that a lien exists only for the price of that portion of the seed which was actually sown (see Nash v. Brewster, 39 Minn. 530, 41 NW 105, 2 LRA 409; Wallace v. Palmer, 36 Minn. 126, 30 NW 445. Compare Kelly v. Seely, 27 Minn. 385, 7 NW 821 [dist Nash v. Brewster, supra]).

25. Watson v. Auerbach, 57 Ala. 353; Boswell v. Carlisle, 55 Ala. 554; Nichols v. Speller, 120 N. C. 75, 26 SE 632.

26. National Bank of Commerce v. Sullivan, 119 La. 935, 44 S 734.

27. Windsor Bargain House v. Watson, 148 N. C. 295, 62 SE 305 (holding that, where a lien exists upon a balance of a crop left at the end of a year and upon a mule and cart furnished for the purpose of raising the crop, the parties may agree that these shall be retained by the debtor as an advancement on the crop to be raised the next year so as to give the creditor a lien upon that crop). To same effect Thigpen v. Maget, 107 N. C. 39, 12 SE 272.

ensuing year.[28] It has also been held that an unpaid balance for supplies furnished the previous year may not be included in a landlord's special lien, even by agreement of parties.[29]

Where seed for two separate crops, one of wheat and one of flax, is furnished and only one lien statement is filed, which, however, states the number of bushels of each kind of grain and the price, two separate liens are created, one on the wheat for the value of the wheat seed and the other on the flax for the value of the flaxseed.[30]

Instrument good as chattel mortgage. Where the instrument by which the lien is created is also good as a chattel mortgage it may give a valid lien for the value of dry goods, shoes, tobacco, powder, snuff, and candy, without a showing that such articles were used in making the crop.[31]

[§ 68] **(2) To Prevent Waste.** One who has a lien on a growing crop may advance what is necessary to preserve it from waste and destruction, and may retain the advances thus made out of the proceeds of sale before crediting any portion of his debt.[32]

[§ 69] **4. For Services.** In the absence of statute no lien exists for labor and services performed,[33] but by statutes in some states persons performing labor or services in raising a crop are given a lien thereon for the amount due them for such labor.[34] Where the statute expressly provides for a lien for services performed, the services must be rendered by one of the class enumerated therein.[35] In some cases also farm laborers have been held entitled to a preference under general statutes providing for the protection of mechanics, clerks, laborers, and others;[36] but in other cases such statutes have been held not to apply to farm laborers.[37]

Covers what services. Where the statute provides for a lien in favor of any person who shall do labor, etc.,[38] this does not give one a lien for the labor of other persons than himself,[39] although some statutes have been held to give him a lien for his wages for all services performed by him, including such as had no reference to the crop;[40] but an independent contractor has been held not

28. Lowdermilk v. Bostick, 98 N. C. 299, 3 SE 844.

29. Parks v. Simpson, 124 Ga. 523, 52 SE 616 (holding that the special lien for money or supplies in making a crop exists and can be enforced as a lien only on crops of the year in which the advances are made, and that the balance of indebtedness for a prior year cannot be included in the foreclosure of such lien, even by agreement of the parties that said balance shall be included with the advances of that year). See also supra § 66 note 20.

30. Schlosser v. Moores, 16 N. D. 185, 112 NW 78.

31. Nichols v. Speller, 120 N. C. 75, 26 SE 632.

32. Caldwell v. Hall, 49 Ark. 508, 1 SW 62, 4 AmSR 64; Fry v. Ford, 38 Ark. 246.

[a] **Disbursements made through the sheriff** by order of court, to gather, manufacture, and ship the crops on a plantation in the keeping of the sheriff, are debts incurred for the preservation of the crops, and therefore privileged. Benton v. Mahan, 30 La. Ann. 1401.

33. Hunt v. Wing, 10 Heisk. (Tenn.) 139. See Young v. Shockey, 80 Kan. 78, 101 P 631 (where it was held that a complaint of day laborers, who worked in threshing for which the grain owner was indebted to the thresher, not showing who employed them, but alleging that both the grain owner and the thresher were indebted to them for their services, showed no right to a lien on the money owing by the grain owner to the thresher); Moore v. Gray, 22 La. Ann. 289 (holding that, since before the passage of the act of 1867 the laborers on the plantation had no privilege on the crop to secure their wages when the crop was made in the year 1866, no lien or privilege could be set up on the crop or its proceeds by the laborers who made it).

[a] **Agreement between lessor and lessee does not create laborer's lien.**—In a state where there is no statutory laborer's lien, a provision in a lease reserving to the lessor the title to the crop until the payment of all laborer's claims and liens does not create a lien in favor of a farm laborer, who was not a party to the lease, for work done by him. Lawrence v. Phy, 27 Or. 506, 41 P 671.

34. See cases infra note 35.

[a] **In construing the Idaho statute,** Sess. L. (1903) p 94, it was said: "It appears from the foregoing section of the statute that it was the intention of the legislature to protect the man who performs labor in producing a crop of hay or other agricultural crop in reasonable wages due him for such labor or services rendered in raising the crop, harvesting or threshing it; in fact, it seems to us that he is entitled to his lien no matter what the work, labor or services may have been, so long as it is shown it was for a useful purpose, the charges reasonable, and that he has not been paid, and that his lien takes precedence over all other liens no difference of what nature or character." Per Stockslager, C. J., in Beckstead v. Griffith, 11 Ida. 738, 745, 83 P 764.

35. Saloy v. Dragon, 37 La. Ann. 71; Hester v. Allen, 52 Miss. 162; Mudgett v. Texas Tobacco Growing, etc., Co., (Tex. Civ. A.) 61 SW 149.

[a] **The primary and principal purpose of the statute** is to afford security to agricultural laborers. Langford v. Leggett, 99 Miss. 266, 54 S 856; Lumbley v. Thomas, 65 Miss. 97, 5 S 823.

[b] **Laborers held entitled to lien.**—(1) A farm laborer whose wages are to be part of the crop. Betts v. Ratliff, 50 Miss. 561. (2) One who cuts and gathers grass. Emerson v. Hedrick, 42 Ark. 263. (3) One who gins cotton. Irwin v. Miller, 72 Miss. 174, 16 S 678. (4) One who performs general farm work. Grissom v. Pickett, 98 N. C. 54, 3 SE 921.

[c] **Laborers held not entitled to lien.**—(1) Laborer for money wages has no right to lien. Betts v. Ratliff, 50 Miss. 561. (2) A blacksmith who shoes horses and repairs implements for a farmer is not a farm laborer and is not entitled to a preference. Baldwin v. Baldwin, 10 Pa. Co. 194. (3) A repairer of carts, wagons, etc., has no privilege on the proceeds of the sale of a plantation on which they were used. McRae v. His Creditors, 16 La. Ann. 305.

[d] **A woman employed in a family living on a farm,** who assists in the cooking for the family and for laborers doing the farm work is not a "farm laborer," within the meaning of Rev. Codes (1905) § 6277, giving a lien for the wages of farm laborers. Lowe v. Abrahamson, 18 N. D. 182, 184, 119 NW 241, 19 LRANS 1039 and note, 20 AnnCas 355 and note (where the court said: "As ordinarily understood, a farm laborer is one who labors upon a farm in raising crops, or doing general farm work. As commonly accepted, we think the words do not include those engaged in domestic work. They refer to work performed directly in connection with the crops raised on the farm").

[e] **Place of service.**—The fact that a person, in service on one place, for a few days supervises laborers sent therefrom to another place does not entitle him to the character of a laborer on the latter place, and, as such, to a lien on the crops thereon. Terry v. Groves, 71 Miss. 539, 14 S 451. See also Mohr v. Clark, 3 Wash. T. 440, 19 P 28, infra note 41 [b].

[f] **The necessary relation of debtor and creditor** does not exist where plaintiff agrees to work on defendant's farm, the latter to furnish the mules and implements necessary therefor, the profits, after paying expenses, to be divided equally. Grissom v. Pickett, 98 N. C. 54, 3 SE 921. But see Burgie v. Davis, 34 Ark. 179 (to the effect that one who raises a crop on land of another under contract for a particular part of it is a mere cropper and not a tenant, and has a lien upon the crop for whatever is due him).

Right of contractor to lien see infra text and note 41.

36. Dano v. M. O. & R. R. Co., 27 Ark. 564; Purefoy v. Brown, 13 Pa. Co. 281; Wiand v. Himmelwright, 8 Pa. Co. 663; Buckwalter's Est., 3 Pa. Co. 315; Alderfer v. Beyer, 2 Pa. Co. 425; Topper v. Krise, 1 Pa. Co. 300; John's Est., 2 Chest. Co. (Pa.) 458; Hogue v. Sheriff, 1 Wash. T. 172.

37. Schilling v. Carter, 35 Minn. 287, 28 NW 658; Hohman v. Carter, 35 Minn. 287 note; Schwartz v. Rhoades, 6 Pa. Co. 385; Fendrick v. Henry, 5 Pa. Co. 265; Jacobs v. Woods, 14 WklyNC (Pa.) 237.

[a] **Applications of rule.**—(1) In the absence of a special contract creating it, to be followed by an actual and physical change of possession in the nature of a pledge, a laborer who has been employed by a farmer to harvest a crop is not entitled to a lien upon it for the value of his work and services under such a general statute. McDearmid v. Foster, 14 Or. 417, 12 P 813. (2) And a provision in a lease that the crop should remain the property of the lessor till payment of all expenses necessary to care for the crop, and to put the third thereof, reserved as rent, in sacks, and to cover any liens incurred in caring for, harvesting, or threshing the crop, does not create a lien on the crop in favor of a harvest hand. Lawrence v. Phy, 27 Or. 506, 41 P 671.

38. See supra text and note 34.

39. Mohr v. Clark, 3 Wash. T. 440, 19 P 28. See also Terry v. Grones, 71 Miss. 539, 14 S 451 supra note 35 [e].

40. Lumbley v. Thomas, 65 Miss. 97, 5 S 823.

[a] **Entitled to general lien in Georgia.**—A farm laborer, who is hired to cultivate a growing crop, and who performs in person the services required of him, may assert not only a special lien on the product of his labor, but also a general lien upon all other property belonging to his employer. Faircloth v. Webb, 125 Ga. 230, 53 SE 592. See also infra § 83 note 98.

entitled to a laborer's lien under such statutes;[41] nor can a lien be claimed for work performed by a team alone,[42] although it has been held that a lien can be obtained for the labor of a person and his team, where there is no separate specification of contract price for each.[43]

An overseer has a lien under a statute giving "every employe, laborer, cropper, part owner or other person" such a lien,[44] but the word "laborer" does not embrace an overseer,[45] and an overseer who has ceased to act as such has no lien for services rendered by him as agent.[46]

Period of service covered. Upon complying with a statute requiring a laborer to present and file his account within thirty days after the debt shall have accrued, he is entitled to a lien for the whole amount of wages due him and not merely to a lien for the last thirty days' labor.[47] An overseer who has served for one year and part of a second has a lien for the whole amount due him.[48]

[§ 70] **C. Proceedings to Perfect—1. In General.** Agricultural liens may be dependent upon their being reserved by agreement of the parties executed in the manner prescribed by statute,[49] or upon the filing for record of an ex parte statement by the lienor.[50]

[§ 71] **2. Contract—a. In General.** In order that a contract may create an agricultural lien it is necessary that it comply with the statutes of the particular state, both as to contents[51] and manner of execution.[52]

[§ 72] **b. Time for Making Contract.** The instrument by which the lien is created must be made prior to[53] or contemporaneously with the advance made.[54]

[§ 73] **c. Necessity for Writing.** In some jurisdictions an agricultural lien for advances or services may be created only by an instrument in writing;[55] but in other jurisdictions it has been variously held that a valid lien may be created by parol,[56] or that a parol contract for a lien is valid between the parties,[57] or is valid if witnessed by disinterested persons.[58]

[§ 74] **d. Contents—(1) In General.** To constitute a valid statutory agricultural lien the contract must strictly pursue the language of the statute.[59] An instrument may be so framed, however, as to operate in one part as a mortgage and in

41. Fortier v. Delgado, 122 Fed. 604, 59 CCA 180.

[a] **Contractor distinguished from laborer.**—"It was intended to secure and protect personal earnings of laborers beyond question, and whether a man, because he may be doing labor, yet in the same labor is employing other laborers, and is thus also an employer or contractor, can come within the scope of this act, is a very important question. So far as he may actually labor, he may come within the beneficent provisions of this law; but so far as his labor consists in looking after his laborers and supervising his contract, this comes more in the line of a business employment or speculation than of personal labor. There is a clearly defined line between the contractor, the employer, and the laborer, and although each may labor in his own way, the class to which the 'laborer' belongs is plain, and the contractor or employer certainly does not come within it." Per Allen, J., in Mohr v. Clark, 3 Wash. T. 440, 443, 19 P 28.

[b] **Persons having contracts with a sugar refinery** to weigh and load cane on cars for shipment to the refinery at an agreed price per ton, and who hire and pay the laborers to do the work, are independent contractors, and not workmen or laborers on a plantation, whose wages have a special privilege on the crop under the laws of Louisiana. Fortier v. Delgado, 122 Fed. 604, 59 CCA 180.

[c] **Persons hiring a hay press** and threshing machine, and operating them wherever they can find employment, are contractors and not farm laborers, within the act of 1872, entitling the latter to a lien for wages. Wilson v. Gibson, 10 Pa. Co. 191.

42. Tuckey v. Lovell, 8 Ida. 731, 71 P 122; Essency v. Essency, 10 Wash. 375, 38 P 1130.

[a] **Where a minor, with teams belonging to his father,** plows the land of a creditor of his father for the purpose of cultivating a crop thereon, although he may be entitled to a lien for his own services, he is not entitled to a lien for the services of the team. Tuckey v. Lovell, 8 Ida. 731, 71 P 122.

43. Essency v. Essency, 10 Wash. 375, 38 P 1130 (construing L. [1891] c 75).

44. Weise v. Rutland, 71 Miss. 933, 15 S 38 [dist Hester v. Allen, 52 Miss. 162] (under Code [1880] § 1360). See also Powell v. Smith, 74 Miss. 142, 20 S 872.

45. Whitaker v. Smith, 81 N. C. 340, 31 AmR 503; Isbell v. Dunlap, 17 S. C. 581. See Wickham v. Nalty, 42 La. Ann. 438, 7 S 609 (holding that a party claiming a privilege for salary due him as overseer cannot recover under proof that he was merely a laborer).

46. Johnson's Succ., 3 Rob. (La.) 216.

47. Cash v. McGregor First Nat. Bank, 26 Tex. Civ. A. 109, 61 SW 723.

[a] **In Texas,** under L. (1897) p 218, providing that a farm hand shall have a first lien, subject to the landlord's lien, on all the products of the farm, and he shall make duplicate accounts, one to be presented to his employer within thirty days after the debt shall have accrued, and the other to be filed within the same time with the county clerk, plaintiff, who was employed as a farm laborer from January 1 to September 1, and on September 6, filed a laborer's lien on the crop, was entitled to a lien for the entire amount of wages due him, and not merely to a lien for the last thirty days' labor. Cash v. McGregor First Nat. Bank, 26 Tex. Civ. A. 109, 61 SW 723.

48. Farrar v. Rowley, 3 La. Ann. 276; Welsh v. Shields, 6 Rob. (La.) 484; Johnson's Succ., 3 Rob. (La.) 216.

49. See infra § 71 et seq.

50. See infra § 82.

51. Meekins v. Walker, 119 N. C. 46, 25 SE 706. And see infra §§ 74–79.

[a] **Contract may be in form of chattel mortgage** where it embodies the requisites prescribed by statute and the intent to create a lien is clear. Meekins v. Walker, 119 N. C. 46, 25 SE 706.

52. See infra § 80.

[a] **An agreement to execute an agricultural lien** cannot be construed as an equitable mortgage, nor can it be made the basis of an equitable right. Creech v. Long, 72 S. C. 25, 51 SE 614.

[b] **That the contract for supplies was made in another state** does not affect the validity of the lien where the requirements of the statutes of the state in which they are furnished are complied with. Iberville Planting, etc., Co. v. Monongahela Coal Co., 168 Fed. 12, 93 CCA 404.

53. Bank of Commerce v. Sullivan, 117 La. 163, 41 S 480; Lowdenmilk v. Bostick, 98 N. C. 299, 3 SE 844; Clark v. Farrar, 74 N. C. 686.

[a] **Advances made prior to execution** of the agreement (1) are not protected. Lowdermilk v. Bostick, 98 N. C. 299, 3 SE 844. See supra § 66. (2) But a recital in the contract that it is made to secure advances heretofore made, where no advances in fact have been made before the execution of the lien, will not affect its validity. Wooten v. Hill, 98 N. C. 48, 3 SE 846.

54. Smith v. Roberts, 42 Minn. 342, 46 NW 236; Kelly v. Seely, 27 Minn. 385, 7 NW 321.

[a] **Transaction a single one.**—Under Code § 1799, relating to liens for advances in making a crop, which provides that an agreement in writing shall be entered into before an advance is made, if the transaction is a single one it is immaterial which act is done first. Reese v. Cole, 93 N. C. 87.

55. Tison v. People's Sav., etc., Assoc., 57 Ala. 323; Powell v. Weaver, 56 Ga. 288; Ware v. Simmons, 55 Ga. 94; Seago v. Freeman, 54 Ga. 102; Bain v. Brooks, 46 Miss. 537; Hair v. Blease, 3 S. C. 63; Cureton v. Gilmore, 3 S. C. 46.

56. Leak v. Cook, 52 Miss. 799; Buck v. Payne, 52 Miss. 271; Lewis v. Mahon, 9 Baxt. (Tenn.) 374.

57. Gafford v. Stearns, 51 Ala. 434 (holding that a parol lien is valid and operative against all except bona fide purchasers); Odom v. Clark, 146 N. C. 544, 60 SE 513.

58. State v. Lanier, 79 S. C. 103, 60 SE 225; Huff v. Watkins, 18 S. C. 510 [overr Hair v. Bleare, 3 S. C. 63].

59. Ala.—Boyett v. Potter, 80 Ala. 476, 2 S 534; Tison v. People's Sav., etc., Assoc., 57 Ala. 323; McLester v. Somerville, 54 Ala. 670; Dawson v. Higgins, 50 Ala. 49.

La.—Payne v. Spiller, 23 La. Ann. 248.

Minn.—Wallace v. Palmer, 26 Minn. 126, 30 NW 445; Kelly v. Seely, 27 Minn. 385, 7 NW 321.

Miss.—Newman v. Greenville Bank, 66 Miss. 323, 5 S 753 [foll Allen v. Montgomery, 48 Miss. 101] (holding that a mere contract by one indebted to a merchant, to deliver to such merchant all cotton grown by him, does not create a lien on the cotton in favor of the merchant).

N. C.—Rawlings v. Hunt, 90 N. C. 270.

S. D.—Anderson v. Alseth, 6 S. D. 566, 62 NW 435.

Tenn.—Dunlap v. Aycock, 10 Heisk. 561.

[a] **Where the intent to create an agricultural lien is obvious,** the fact that the instrument contains words purporting to convey the crop will not alter its character as such. Evington v. Smith, 66 Ala. 398; Alexander v. Glenn, 39 Ga. 1; Townsend v. McKinnon, 98 N. C. 103, 3 SE 836.

[b] **The erasure of printed provisions,** in an agricultural lien for rent, for advances in money or supplies to be used in the cultivation of the leased land, and the addition of a covenant that the lienor should return in kind all of the cotton seed used, the lienee being given, in printed words, a lien for rent and advances, show an intent not to create a lien for advances and

another as an agricultural lien;[60] and an instrument totally insufficient to create a valid crop lien may be valid as a chattel mortgage.[61]

[§ 75] **(2) Statement of Advances or Services.** It must appear on the face of the instrument that the consideration therefor was the advances,[62] and that these were of the character,[63] and for the purpose,[64] mentioned in the statute.

That advance was not made before the agreement was made need not be stated in the contract.[65]

[§ 76] **(3) Stipulation for Lien.** The agreement under some statutes must stipulate for a lien.[66]

[§ 77] **(4) Amount to Be Secured.** The instrument by which the lien is created must stipulate the amount to be secured thereby,[67] and no further sum can be covered[68] without a specific provision therefor.[69]

[§ 78] **(5) Description of Land.** The instrument should describe the land on which the crop is to be grown,[70] although this has been held not to be necessary under the provisions of some statutes.[71]

[§ 79] **(6) Description of Crop.** In some jurisdictions the contract should contain a description of the crop to which the lien is to attach.[72]

[§ 80] **e. Signature, Seal, and Attestation.** Under some statutes the agreement must be signed both by the one who is to make the advances and by the borrower;[73] but it is not necessary that it be under seal,[74] nor is it necessary, in the absence of statute, that it be attested by witnesses.[75]

[§ 81] **f. Recordation.** The recordation of an agricultural lien is usually not necessary to its validity,[76]

the lien created does not cover the cotton seed. Segler v. Coward, 24 S. C. 119.

[c] **Forms of instruments** held sufficient to create a statutory lien see Connor v. Jackson, 74 Ala. 464; Evington v. Smith, 66 Ala. 398; Grady v. Hall, 59 Ala. 341; Watson v. Auerbach, 57 Ala. 353; Boswell v. Carlisle, 55 Ala. 554; McKinney v. Benagh, 48 Ala. 358; Sentell v. Moore, 34 Ark. 687; Usry v. Saulsbury, 62 Ga. 179; Alexander v. Glenn, 39 Ga. 1; Lowdermilk v. Bostick, 98 N. C. 299, 3 SE 844; Townsend v. McKinnon, 98 N. C. 103, 3 SE 886; Wooten v. Hill, 98 N. C. 48, 3 SE 846; Reese v. Cole, 93 N. C. 87; Sternberger v. McSween, 14 S. C. 35.

[d] **Forms set out in substance** which were held insufficient to create an agricultural lien see Haden v. Lindsay, 34 SW 1065, 17 KyL 1409; Whilden v. Pearce, 27 S. C. 44, 2 SE 709; Northwestern Grain Co. v. Kerr Gifford Warehouse Co., 76 Wash. 689, 136 P 1154.

60. Levystein v. Whitman, 59 Ala. 345; Stewart v. Hollins, 47 Miss. 708; Weil v. Flowers, 109 N. C. 212, 13 SE 761; Wooten v. Hill, 98 N. C. 48, 3 SE 846; Rawlings v. Hunt, 90 N. C. 270.

[a] **An instrument including supplies and rent** will be held valid as a lien to the extent of the supplies, and as a mortgage subject to priorities to the extent of the rent. Stewart v. Hollins, 47 Miss. 708.

61. Boyett v. Potter, 80 Ala. 476, 2 S 534; Hamilton v. Maas, 77 Ala. 283; Evans v. English, 61 Ala. 416; Tison v. People's Sav., etc., Assoc., 57 Ala. 323; McLester v. Somerville, 54 Ala. 670; Gafford v. Stearns, 51 Ala. 434; Dawson v. Higgins, 50 Ala. 49; Brown v. Miller, 108 N. C. 395, 13 SE 167 [foll Rawlings v. Hunt, 90 N. C. 270]. But see Clark v. Farrar, 74 N. C. 686 (to the effect that an agreement in writing, or a deed which purports on its face to be an agricultural lien for advances, cannot be supported as a mortgage for a different purpose, and founded on a consideration not expressed but concealed or disguised in the deed).

[a] **Forms of instruments held insufficient** to create statutory liens, but valid as chattel mortgages see Boyett v. Potter, 80 Ala. 476, 2 S 534; Tison v. People's Sav., etc., Assoc., 57 Ala. 323; McLester v. Somerville, 54 Ala. 670; Gafford v. Stearns, 51 Ala. 434; Dawson v. Higgins, 50 Ala. 49.

62. Saulsbury v. Eason, 47 Ga. 617 (holding that a note given for money which upon its face recites that the money is to be used to purchase provisions does not create a debt securable by the lien given by the act of 1866 to merchants and factors upon growing crops for provisions and commercial supplies furnished); Cooper v. Kimball, 123 N. C. 120, 31 SE 346.

[a] **Erasures.**—An agricultural lien for rent, with a printed provision for advances erased, contained a covenant that the lienor should return all the cotton seed used by him, and gave to the lienee, in printed words, a lien for rent and advances. It was held that the lien did not cover the cotton seed which was to be returned in kind. Segler v. Coward, 24 S. C. 119.

63. Boyett v. Potter, 80 Ala. 476, 2 So. 534; Comer v. Daniel, 69 Ala. 434; Schuessler v. Gains, 68 Ala. 556.

[a] **A crop lien is vitiated as a** statutory crop lien for advances by including in the items of the claim articles for which the statute gives no lien, where such articles are knowingly and intentionally included and constitute a material portion of the consideration. Comer v. Daniel, 69 Ala. 434.

64. McLester v. Somerville, 54 Ala. 670; Dawson v. Higgins, 50 Ala. 49; Speer v. Hart, 45 Ga. 113.

[a] **It is insufficient,** under a statute requiring a note to recite that the advances were obtained "bona fide, for the purpose of making a crop" to use the words, "which advances were made me to enable me to make a crop the present year." Dawson v. Higgins, 50 Ala. 49.

[b] **The consideration is properly expressed,** under Civ. Code (1876) § 3286, as "necessary advances in horses, mules, oxen, and necessary provisions, farming tools and implements, and money to procure the same, obtained by me bona fide for the purpose of making a crop the present year," and declaring that "without such advancements, it would not be in my power to procure the necessary teams," etc., "to make a crop the present year." Connor v. Jackson, 74 Ala. 464.

65. Meekins v. Walker, 119 N. C. 46, 25 SE 706.

[a] **Parol evidence** is admissible to show that the supplies were furnished after the agreement. Meekins v. Walker, 119 N. C. 46, 25 SE 706.

66. Bain v. Brooks, 46 Miss. 537; Dunlap v. Aycock, 10 Heisk. (Tenn.) 561.

67. Beard v. Woodard, 78 Ala. 317; Schuessler v. Gains, 68 Ala. 556; Gay v. Pike, 30 La. Ann. 1382; Gwathney v. Etheridge, 99 N. C. 571, 6 SE 411; Lavin v. Bradley, 1 N. D. 291, 47 NW 384; Carpenter v. Strickland, 20 S. C. 1.

68. Iberville Planting, etc., Co. v. Monongahela Coal Co., 168 Fed. 12, 93 CCA 404; Gay v. Pike, 30 La. Ann. 1332. See also Franklin v. Meyer, 36 Ark. 96 (holding that, if one who has a first mortgage on a crop for a specified amount of supplies furnished to make it exceeds in his advances the amount specified, he has no lien for such excess).

[a] **Stipulation that lien shall cover additional advances** over and above the amount specified is void. Collier v. Faulk, 69 Ala. 58.

69. Thurman v. Jenkins, 2 Baxt. (Tenn.) 426. But see Bell v. Radcliff, 32 Ark. 645 (where a deed of trust recited that it was executed to secure a given sum for supplies furnished and to be advanced during the year to raise a crop on certain premises, and it was held that equity, if necessary, would protect and uphold additional advances over and above the sum named in the deed).

70. Perry v. Bragg, 109 N. C. 303, 14 SE 97; Gwathney v. Etheridge, 99 N. C. 571, 6 SE 411; Martin v. Hawthorn, 3 N. D. 412, 57 NW 87; Parker v. Lisbon First Nat. Bank, 3 N. D. 87, 54 NW 313; Lavin v. Bradley, 1 N. D. 291, 47 NW 384.

[a] **Sufficiency of description.**—(1) It is sufficient to describe the land as "a tract of land in Granville County, known as the C. H. Dement, deceased," as this description may be aided by parol proof. Perry v. Bragg, 109 N. C. 303, 14 SE 97. (2) But describing the land as "any other lands he . . . may cultivate during the year" is insufficient. Perry v. Bragg, supra; Weil v. Flowers, 109 N. C. 212, 13 SE 761; Gwathney v. Etheridge, 99 N. C. 571, 6 SE 411. (3) In Parker First Nat. Bank v. Peavy El. Co., 10 S. D. 167, 171, 72 NW 402, the following description was held sufficient: "Lands owned, occupied, rented, or used by me [the person to whom the seed was furnished], and lying and being in the county of McCook, state of South Dakota, to wit, the N. E. ¼ (quarter) of section 9, in township 104 north, of range 56 west, and N. E. ¼ 18—104—56."

71. Griel v. Lehman, 59 Ala. 419 (under Civ. Code (1876) §§ 3286–3288).

72. See cases infra this note.

[a] **Sufficient description.**—A statement that the lien is intended to cover the entire crop of hay produced for the year has been held sufficient. Hardwick v. Griffith, 11 Ida. 751, 83 P 768; Beckstead v. Griffith, 11 Ida. 738, 83 P 764.

[b] **Liens filed against wheat,** which had been delivered to a warehouse company describing the subject matter of the lien in one case as the east half of a section of land and in another case as a certain crop situated upon such land, were void for indefiniteness of description. Northwestern Grain Co. v. Kerr Gifford Warehouse Co., 76 Wash. 689, 136 P 1154.

73. Sease v. Dobson, 33 S. C. 234, 11 SE 728.

74. Brown v. Young, 55 S. C. 309, 33 SE 357.

75. Brown v. Young, 55 S. C. 309, 33 SE 357.

76. Weill v. Kent, 52 La. Ann. 2139, 28 S 295; Flower v. Skipwith, 45 La. Ann. 895, 13 S 152 [fol Hewitt v. Williams, 47 La. Ann. 742, 17 S 269]; Welsh v. Shields, 6 Rob. (La.) 484; Tedford v. Wilson, 3 Head (Tenn.) 311.

[a] **When made for less than one year,** as in case of a contract to make a crop, the laborer's lien need not be recorded. Watson v. May, 62 Ark. 435, 35 SW 1108.

[b] **Employer and laborer tenants in common.**—An employer is required by the Arkansas act of March 6, 1875, to file a copy of the contract in the recorder's office, in order to secure his lien for advances and supplies, only when the laborer is a ten-

at least as between the parties;[77] but the statutes usually prescribe that it shall not be valid as against third persons unless recorded.[78]

Time for recording. The instrument should be recorded within the time prescribed by the statute,[79] although it will be good between the parties if not recorded within such time.[80]

Place of recording. The instrument must be recorded in the county or other prescribed division where the property lies.[81]

Manner of recording. A record of an agricultural lien must be made in the proper book[82] in the form and manner[83] prescribed by statute. And where the statute contemplates that the record shall consist of the original contract in which the lien is reserved, its withdrawal from the files by the lienor renders the lien invalid as against a bona fide purchaser, although a reference to it appears on the index.[84]

[§ 82] **3. Filing Statement of Claim.** Where the statute provides for filing a notice of lien claim such notice must be certain to a reasonable intent and be sufficient to guide an intelligent investigation.[85] It must also be filed in the county in which the property is situated,[86] and within the time allowed by statute.[87] It may include one or more tracts of land in the same county.[88] Several claimants, however, may join in one claim.[89] If duly filed the failure of the register to properly index the statement does not affect its validity.[90]

A defective statement may neither be amended[91] nor cured by allegations in the complaint for the enforcement of the lien.[92]

[§ 83] **D. Property Affected.—1. In General.** As a general rule the lien which the statute authorizes does not attach to the land,[93] nor to property owned before advances were made and not procured therewith,[94] but extends only to the crop of the year produced by reason of the advances[95] or

ant in common with the employer in the crop raised by him. Sentell v. Moore, 34 Ark. 687.

77. Gay v. Nash, 78 N. C. 100. See cases supra note 76.

78. Adams v. Adams, 27 La. Ann. 275; Fargason v. Johnson, 26 La. Ann. 501; Beard v. Chappell, 23 La. Ann. 694; White v. Bird, 23 La. Ann. 270; Howard v. Simmons, 43 Miss. 75; Martin v. Hawthorn, 3 N. D. 412, 57 NW 87; Whaley v. Jacobson, 21 S. C. 51.

79. Gafford v. Stearns, 51 Ala. 434; Gay v. Daigre, 30 La. Ann. 1007; Gay v. Bovard, 27 La. Ann. 290; Adams v. Adams, 27 La. Ann. 275; Bank of America v. Fortier, 27 La. Ann. 243; Beard v. Chappell, 23 La. Ann. 694; Cooper v. Kimball, 123 N. C. 120, 31 SE 346.

[a] **Recording one day late.**—Recording an account current for advances made by a factor to a planter, running through several months, the day after the date of the closing of the account is not recording the evidence of the debt on the day on which a contract for making the advances was entered into. Gay v. Daigre, 30 La. Ann. 1007.

80. Gay v. Nash, 78 N. C. 100; Loyns v. Tedder, 7 S. C. 69.

81. Griel v. Lehman, 59 Ala. 419; Gay v. Bovard, 27 La. Ann. 290; Adams v. Adams, 27 La. Ann. 275; Fargason v. Johnson, 26 La. Ann. 501; White v. Bird, 23 La. Ann. 270.

82. Lochte v. Lefebvre, 124 La. 244, 50 S 26 (holding a lien not valid if recorded in the book of mortgages instead of in the book of liens and privileges).

83. See cases infra this note.

[a] **Sufficient record of character of debt.**—A requirement of the statute that the record shall contain a description of the character of the debt is sufficiently complied with by the use of the letters "L. & M," to show that the debt was a lien and mortgage debt. Bryant v. Thigpen, 73 S. C. 223, 51 SE 535, 53 SE 368.

[b] **Proof of execution.**—The privilege acquired by one who furnishes supplies to a planter is not affected by the failure of the recorder of mortgages to register, with the contract for the supplies, the proof of its execution, under La. Civ. Code art 3367, providing that mortgages under private signature may be registered, without previous acknowledgment by the party or proof by subscribing witnesses, where the recorder, on his own responsibility and knowledge, is willing to do so. Elliott v. Elliott, 31 La. Ann. 31.

84. Sternberger v. McSween, 14 S. C. 35.

85. Brown v. McFadden, 5 Pa. Co. 9; Alderfer v. Beyer, 2 Pa. Co. 425; Schouweiler v. McCaull, 18 S. D. 70, 99 NW 95.

[a] **Forms of lien claims** see Mitchell v. Monarch El. Co., 15 N. D. 495, 107 NW 1085, 11 AnnCas 1001; Brown v. McFadden, 5 Pa. Co. 9; Alderfer v. Beyer, 2 Pa. Co. 425.

[b] **Insufficient claim.**—(1) Plaintiff filed a laborer's lien, specifying as follows:

"William Cook to James W. Cook, Dr.

"1886.

"Dec. 8. For labor on farm for 8 months and 4 days, at $10 per month	$81 46
Cr. by cash	5 00
	$76 46"

This was held insufficient in that it did not show where the labor was performed, nor on what farm, nor that the claimant labored on the crop of his employer on which he intended to obtain a lien. Cook v. Cobb, 101 N. C. 68, 7 SE 700. (2) A description was also held insufficient which described a crop as "that certain crop of wheat, being about 450 acres in quantity, being about 850 sacks of wheat," which was raised by a certain person on described premises. Dexter v. Olsen, 40 Wash. 199, 82 P 286.

[c] **Statement of crop raised.**—Laborer's account filed under Texas statute need not state the crop raised. Allen v. Glover, 27 Tex. Civ. A. 488, 66 SW 379.

86. Murphy v. Jarvis, 15 N. D. 509, 108 NW 59 (holding that where the property is situated in two counties, the lien statement must be filed in both).

87. Neblett v. Barron, (Tex. Civ. A.) 160 SW 1167; Pain v. Isaacs, 10 Wash. 173, 38 P 1038.

[a] **Illustrations.**—(1) Under Rev. St. (1895) art 3339c, indebtedness for farm labor performed by the day accrues weekly, regardless of an agreement that payment shall not be made until crop is sold, and hence to protect the lien given by art 3339a, 3339b, the laborer must file his account within thirty days after the expiration of the week in which services were rendered. Neblett v. Barron, (Tex. Civ. A.) 160 SW 1167. (2) Where the lien claim filed by farm laborers on October 14 recited that claimants commenced work on August 10 and finished September 16, one of the claimants testified merely that he had worked fifteen and a half days. It was held that since the presumption was that he worked continuously from August 10, thereby making August 28 his last day, his claim was not filed within forty days after the labor had been performed, as required by statute. Pain v. Isaacs, 10 Wash. 173, 38 P 1038.

88. Schouweiler v. McCaull, 18 S D. 70, 99 NW 95.

89. Pain v. Isaacs, 10 Wash. 173, 38 P 1038 (holding that a lien claim for services rendered by several farm laborers is good, although not signed by all the claimants, provided the body of the instrument shows who the claimants are). See also Wiand v. Himmelwright, 8 Pa. Co. 663 (holding that a claim for a farm laborer's lien by husband and wife, under the acts of April 9, 1872, and June 13, 1883, is not rendered invalid by the fact that only one notice of such claim was given, signed by the husband alone).

90. Schouweiler v. McCaull, 18 S. D. 70, 99 NW 95.

91. Dexter v. Olsen, 40 Wash. 199, 82 P 286.

92. Cook v. Cobb, 101 N. C. 68, 7 SE 700.

93. Taylor v. Hathaway, 29 Ark. 597.

94. Evans v. English, 61 Ala. 416; Howe v. Whited, 21 La. Ann. 495.

[a] **In Louisiana** the laborer's privilege is given by Civ. Code art 3217 par 3, "on everything which serves to the working of the farm." This is construed to apply only to such things as serve to the working of the farm, but do not constitute a part of the farm itself; that is, to movables by nature and destination—movables serving to the making of the farm, but not belonging to the owner. Rogers v. Walker, 24 Fed. 344 (where it was further held that, since the services of laborers on a plantation inure directly to the benefit of those having liens or privileges upon the crop in preserving the thing on which their mortgage and privilege rested, they are entitled to an equitable as well as a statutory lien on the proceeds of the crop, but they in no wise benefit the owner of the land, and their wages have no equitable lien whatever against him and a very doubtful statutory privilege).

95. Ala.—Evans v. English, 61 Ala. 416.

Ga.—Dubose v. McDonald, 46 Ga. 471; Speer v. Hart, 45 Ga. 113.

La.—Waddell's Succ., 44 La. Ann. 361, 10 S 808; Bank of America v. Fortier, 27 La. Ann. 243; Given v. Alexander, 25 La. Ann. 71; Wallace v. Urquhart, 23 La. Ann. 469; Martin v. Lastrapes, 22 La. Ann. 380; Shaw v. Grant, 13 La. Ann. 52; McCutchon v. Wilkinson, 12 La. Ann. 483; Carter v. Baker, 7 La. Ann. 547.

Minn.—Wallace v. Palmer, 36 Minn. 126, 30 NW 445.

N. C.—Wooten v. Hill, 98 N. C. 48, 3 SE 846; Clark v. Farrar, 74 N. C. 686.

[a] **Partnership plantation.**—Where a plantation has been worked in partnership a commission merchant who has made advances and furnished supplies to one of the partners has no privilege on the portion of the crop which belongs to the other partner. Smith v. Williams, 22 La. Ann. 268.

[b] **Remainder of debt for one year**

services,[96] or to property bought with the money advanced.[97] Under the statutes of some states, however, one who advances supplies or renders services may assert a lien not only on the crop produced with their assistance, but also on all the property of the debtor.[98] And where a lien has been foreclosed, and levy made upon the crop, and, by reason of an injunction and appointment of a receiver, the crop has been exhausted and used by the receiver in making subsequent crops, equity will enforce such crop lien upon the subsequent rents, issues, and profits of the plantation.[99]

[§ 84] **2. Effect of Sale or Other Distribution—a. Right to Follow Crop.** Except to a purchaser for value without notice,[1] a sale or other disposition of the crop[2] or plantation[3] will not defeat the lien, which adheres to the thing and may be enforced by the creditor against any third person having the property in his possession;[4] but it has been held that where one who buys farm products from a planter resells the same the subsequent purchaser does not take subject to the lien.[5]

Where property is sold on execution, with notice of the existence of the lien, the lien holder has no cause of action against the officer, his remedy being to prevent the sale or to follow the cotton into the hands of the purchaser and subject it to his lien.[6]

[§ 85] **b. Right to Follow Proceeds.** The lien may in some cases be executed on the proceeds of the crop after it has been sold.[7]

[§ 86] **E. Rights of Lien Holder—1. In General.** A crop lien gives no right of property in the products covered, but only a privilege to pursue the things and subject them to the payment of the debts secured,[8] and the claimant cannot support trespass, trover, or detinue.[9]

cannot be satisfied out of the proceeds of the next year's crop to the prejudice of another commercial firm who made all their advances in that year, and in whose possession part of the crop has been put by consignment, and under a regular bill of lading, before the issuing of a writ of sequestration. Given v. Alexander, 25 La. Ann. 71.

[c] **Wife's liability for advances to husband.**—Where a wife, with her husband's consent, rents land, hires a man to cultivate it, and furnishes and feeds the horses out of her own separate estate, the crop is not subject to a factor's lien given by her husband on his crop made the same year for provisions furnished, none of the provisions being used by the wife in making her crop. Dubose v. McDonald, 46 Ga. 471.

[d] **Portion of sugar-cane crop covered.**—The privilege of the furnisher of supplies on the growing sugar-cane crop, under the act of 1874, covers only that portion of the crop which was, in the ordinary sense of the word, to become "merchantable"—not the seed reservation, nor the corn grown for the next sugar crop. Citizens' Bank v. Wiltz, 31 La. Ann. 244.

[e] **Portion of crop needed for seed not covered.**—"We are decidedly of the opinion that the privilege for advances will not have the effect of a pledge on that part of the crop needed for seed. The holder of the privilege has no right to interfere with the seed put aside in good faith, and when there is not the least ground upon which to base the allegation of fraud. Civ. Code, art. 524. The purpose of the statute cited was to enable the planter to obtain advances, and sustain his credit by pledging the future crop. The statute would not be of much of an assistance in the way of enabling the planter to cultivate and save his crop if the one advancing had the right to apply the seed of the place to the payment of his advances." Per Breaux, C. J., in Dunlap v. Berthelot, 122 La. 531, 535, 47 S 882.

96. Dano v. Mississippi, etc., R. Co., 27 Ark. 564; McRae v. His Creditors, 16 La. Ann. 305; Hunt v. Wing, 10 Heisk. (Tenn.) 139. See also Welsh v. Shields, 12 Rob. (La.) 527 (holding that where the owner sells the plantation, and the overseer is employed by the purchaser for the rest of the year, receiving his wages for that period from the latter, and continues with him for the succeeding year, he has no privilege on the crop of the second year, made by the purchaser, for wages due by the former owner for the preceding year).

[a] **Entire crop** is covered by lien of laborer under Sess. L. (1903) p 94. Hardwick v. Griffith, 11 Ida. 751, 83 P 768; Beckstead v. Griffith, 11 Ida. 738, 83 P 764.

[b] **A laborer employed by a cropper** has a lien on the crop only to the extent of the latter's claim against the landowner. Burgie v. Davis, 34 Ark. 179.

97. Evans v. English, 61 Ala. 416.

98. Faircloth v. Webb, 125 Ga. 230, 53 SE 592. See also supra § 69 note 40.

99. Ball v. Vason, 56 Ga. 264.

1. Townsend v. Brooks, 76 Ala. 308; Sternberger v. McSween, 14 S. C. 35.

[a] **One is not a bona fide purchaser,** but is charged with constructive notice of the existence of a lien, who purchases with knowledge of the relation between the landlord and the superintendent, and of the fact that the crop purchased was raised or grown on the particular premises where such superintendent was employed. Townsend v. Brooks, 76 Ala. 308.

2. Loeb v. Collier, 131 La. 377, 59 S 816; Bank of Commerce v. Sullivan, 117 La. 163, 41 S 480; Weill v. Kent, 107 La. 322, 31 S 761; Weill v. Kent, 52 La. Ann. 2139, 28 S 295; Bank of America v. Fortier, 27 La. Ann. 243; Bres v. Cowan, 22 La. Ann. 438; Scarborough v. Stinson, 15 La. Ann. 665; Garcia v. Garcia, 7 La. Ann. 526; Welsh v. Barrow, 3 La. Ann. 133.

[a] **The debtor's interest in the crop may be transferred,** subject to the lien. Stern v. Simpson, 62 Ala. 194.

3. Flower v. Skipwith, 45 La. Ann. 895, 13 S 152; Farrar v. Rowley, 3 La. Ann. 276; Welsh v. Shields, 6 Rob. (La.) 484.

[a] **Effect of sale of the land.**—Upon sale of the land on which the crop is growing, the crop passes to the purchaser as part of the realty, without personal liability on his part to the furnisher of supplies, but he takes it cum onere. He stands, quoad the privilege, in the shoes of the original owner, and as if the sale had not taken place. Weill v. Kent, 52 La. Ann. 2139, 28 S 295.

[b] **Subsequent lease of premises.**—Where a plantation is held by a party under a conditional agreement of sale, with authority from the owner to cultivate the same, but under no contract of lease or rent, a merchant who makes advances to the vendee and acquires a privilege on the crop under such conditions cannot be affected by a subsequent change of arrangements and the execution of a lease creating a lessor's privilege. Flower v. Skipwith, 45 La. Ann. 895, 13 S 152.

[c] **Only services rendered protected.**—In case of a forced alienation of a plantation, with the crop in the ground, the overseer has not a privilege on such crop for his whole year's salary, but simply for the proportion of the year elapsed at the date of such sale. Scarborough v. Stinson, 15 La. Ann. 665.

4. McLemore v. Cole, 48 Ala. 620; Bank v. Commerce v. Sullivan, 117 La. 163, 41 S 480; Bres v. Cowan, 22 La. Ann. 438; Garcia v. Garcia, 7 La. Ann. 525 [foll Welsh v. Barrow, 3 La. Ann. 133]; Farrar v. Rowley, 3 La. Ann. 276; Welsh v. Shields, 6 Rob. (La.) 484; Cloud v. State, 53 Miss. 662.

5. Loeb v. Collier, 131 La. 377, 379, 59 S 816 (holding that the privilege granted by Civ. Code art 3217, on the crops for supplies, ceases when the things on which it rests cease to be crops and become merchandise by the sale thereof).

"The state of facts presented in the instant case is altogether different from that passed upon in the cases hereinabove quoted and relied upon by the respondent judge, and must lead to different conclusions. It may well be that when Madden bought from Kendrick he bought a portion of the crop and acquired the cotton cum onere, but surely in Madden's hands it was no longer a crop. It has become an article of commerce, had gone into the channels of trade, and was merchandise pure and simple." Loeb v. Collier, supra.

6. Cloud v. State, 53 Miss. 662.

7. Johnson's Succ., 3 Rob. (La.) 216. But see McLemore v. Cole, 48 Ala. 620 (holding that, while the crop can be followed into the hands of third persons, the remedy cannot apply to any other property, debt, or obligation); Branch v. Galloway, 105 N. C. 193, 10 SE 911 (where it was held that the fact that a tenant pays for a mule sold to him by his landlord out of crops on which he had previously executed agricultural liens to plaintiffs does not operate to pass title to the mule to plaintiffs, although the landlord had no lien on the crops for the price of the mule).

[a] **Effect of payment of proceeds to creditor.**—Upon the payment by the debtor to the creditor of the proceeds of the property covered by an agricultural lien, such payment is applied as a matter of law to the lien debt, whether the creditor has knowledge that the money is derived from the proceeds of the sale of the lien property or not. Barfield v. Coker, 73 S. C. 181, 53 SE 170.

[b] **Evidence** must show that the proceeds claimed are derived from the sale of a crop covered by the lien. Letchford v. Duplantis, Mann. Unrep. Cas. (La.) 73.

8. Wilson v. Stewart, 69 Ala. 302; Stern v. Simpson, 62 Ala. 194; Cloud v. State, 53 Miss. 662.

[a] **Interest of lien holder in property is limited** to amount of debt secured by him. Franklin v. Meyer, 36 Ark. 96; Minge v. Barbre, 51 La. Ann. 1285, 26 S 180.

9. Stern v. Simpson, 62 Ala. 194. See also Kennedy v. Reames, 15 S. C. 548 (holding that a lien holder cannot sue for conversion by a creditor of the lienor, who, in good faith, accepted a part of the crop and applied it to the payment of his demand).

[a] **After condition of seed grain note broken,** the statute authorizes the holder of such note to take possession of the crop, and he may enforce his lien as against the holder of a sub-

[§ 87] **2. Assignment.** An agricultural lien is assignable,[10] and the assignment of the debt which is secured by the lien passes the lien with it.[11] The assignee may assert and enforce the lien in the same manner and to the same extent as the assignor.[12]

[§ 88] **3. Priority of Lien—a. For Advances.** The priorities of agricultural liens are fixed by the statutes creating them.[13] While generally inferior to the landlord's lien for rent,[14] they are usually declared superior to all other liens,[15] such as attachment,[16] judgment,[17] execution,[18] and mortgage[19] liens; and may be enforced against even a bona fide purchaser of the crop in the open market without actual notice of the lien.[20] As between several agricultural liens, they take priority in the order of time in which they are created.[21] Such a lien has been held also to be superior to the homestead right of the debtor's wife.[22]

[§ 89] **b. For Services.** An agricultural lien for services usually takes priority over all other liens,[23] being superior to mortgage,[24] and judgment[25] liens, and under some statutes is even superior to the landlord's lien for rent,[26] and to liens for supplies,[27] although under other statutes it is only of equal rank with the landlord's lien,[28] and with that for supplies,[29] and in still others, it is inferior to the landlord's lien,[30] and to that of the furnisher of supplies.[31]

[§ 90] **F. Waiver or Loss of Lien—1. Whether Writing Necessary.** Where a writing is not necessary to the creation of an agricultural lien, it may usually be waived orally,[32] or by such actions on the part of the lienee as amount to an estoppel.[33] In some states, however, it is provided that evidence of the waiver must be in writing by indorsement on the instrument creating the lien.[34]

[§ 91] **2. Bringing Suit and Obtaining Judgment.** The right to enforce a laborer's lien on crops by attachment is not taken away by a previous suit

ordinate lien thereon who has taken possession, and may maintain an action against him for the conversion thereof. Nash v. Brewster, 39 Minn. 530, 41 NW 105, 2 LRA 409.

10. Kerr v. Moore, 54 Miss. 286; Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 SE 949.

11. Duncan v. Hawn, 104 Cal. 10, 37 P 626.

12. Kerr v. Moore, 54 Miss. 286.

13. See cases infra notes 14–31.

14. Flexner v. Dickerson, 65 Ala. 129; Lovelace v. Webb, 62 Ala. 271; Stern v. Simpson, 62 Ala. 194; McLester v. Somerville, 54 Ala. 670; Brewer v. Chappell, 101 N. C. 251, 7 SE 670; Wooten v. Hill, 98 N. C. 48, 3 SE 846.

[a] **Landlord may waive his right to priority** by agreement, on the faith of which the supplies are furnished. Foster v. Napier, 74 Ala. 393.

[b] **In Alabama** a landlord's lien for advances is placed by statute on the same basis of equality as his lien for rent. Thompson v. Powell, 77 Ala. 391.

[c] **In South Carolina,** under Gen. St. p 511 § 55, a lien for advances takes priority over the landlord's rights under a prior contract by which the tenant is to pay him, from the first makings of the crop, one fourth of all that is made. Visanska v. Bradley, 4 S. C. 288.

[d] **In Louisiana** a lien for supplies has been held equal in rank with the landlord's lien. Moore v. Gray, 22 La. Ann. 289; Masson v. Murray, 21 La. Ann. 535. And see Cory v. Eddins, 13 La. Ann. 443 [foll Hollander v. His Creditors, 6 La. Ann. 668] (holding that all the privileges created by Civ. Code [1838] art 3184, as amended by the act of 1843, are equal in rank, except the privilege for the wages of the overseer, which is declared by the act to be superior to that of the furnisher of supplies).

15. See infra notes 16–19.

16. Carter v. Wilson, 61 Ala. 434.

17. Stallings v. Harrold, 60 Ga. 478; Thomason v. Poullain, 54 Ga. 306.

18. Laloire v. Wiltz, 31 La. Ann. 436; Richardson v. Weiner, 5 La. Ann. 646.

19. Ala.—Hamilton v. Maas, 77 Ala. 283; Lovelace v. Webb, 62 Ala. 271.

Ark.—Airey v. Weinstein, 54 Ark. 443, 16 SW 123.

Minn.—Endreson v. Larson, 101 Minn. 417, 112 NW 628; McMahan v. Lundin, 57 Minn. 84, 58 NW 827.

Miss.—Herman v. Perkins, 52 Miss. 813.

N. C.—Carr v. Dail, 114 N. C. 284, 19 SE 235; Wooten v. Hill, 98 N. C. 48, 3 SE 846.

[a] **May be made inferior to prior mortgage lien by agreement** between the owner of the crops and the person furnishing the supplies. Brasfield v. Powell, 117 N. C. 140, 23 SE 106.

20. Powell v. Smith, 74 Miss. 142, 20 S 872.

21. Southern Grocer Co. v. Adams, 112 La. 60, 36 S 226.

[a] **Right of second lienor** cannot be defeated by agreement between the holders of first and third liens. Hankinson v. Hankinson, 61 S. C. 193, 39 SE 385.

[b] **In Louisiana** a lien or privilege for advances perfected by filing a statement thereof is inferior to a lien acquired under a subsequent written contract of pledge and power duly recorded. Levert v. Berthelot, 127 La. 1004, 54 S 329.

[c] **A subsequently recorded lien specifying the amount** will take precedence over an earlier one not so doing. French v. Picard, 49 Miss. 320.

22. Cook v. Roberts, 69 Ga. 742.

23. Duncan v. Jayne, 76 Miss. 133, 23 S 392; Buck v. Paine, 50 Miss. 648, 652. Compare Irwin v. Miller, 72 Miss. 174, 16 S 678.

"The idea is that the crops are produced and made valuable, fit for home consumption or market, by labor; therefore, labor shall be first paid. . . . Whatever interest an individual may have in agricultural products, in 'raising, handling, saving or transporting them,' that person's interest is impressed with a lien for the wages of the laborer employed by or for him; and is a 'first lien,' in the sense that it is a limitation or restriction, upon the power of the employer, to create any other lien which shall be paramount to it." Per Simrall, J., in Buck v. Paine, supra.

24. Watson v. May, 62 Ark. 435, 35 SW 1108; Irwin v. Miller, 72 Miss. 174, 16 S 678; Buck v. Paine, 50 Miss. 648; Sitton v. Dubois, 14 Wash. 624, 45 P 303.

[a] **Defective mortgage.**—Where a mortgage reserving a lien for supplies does not contain a statement of matters prescribed by statute, it does not take priority over an earlier mortgage. Brown v. Miller, 108 N. C. 395, 13 SE 167.

25. Jones' App., 102 Pa. 285.

26. Saloy v. Dragon, 37 La. Ann. 71; Tanner v. Tanner, 6 Rob. (La.) 35; Duncan v. Jayne, 76 Miss. 133, 23 S 392 (ginner's lien); Buck v. Paine, 50 Miss. 648.

[a] **Superiority to landlord's lien limited.**—The superiority of an agricultural lien for labor over the landlord's lien extends only to the crop and, as to other property of the debtor, the two liens are of equal rank. Saloy v. Dragon, 37 La. Ann. 71.

27. Bouligny v. Lacour, 24 La. Ann. 76; Hogue v. Sheriff, 1 Wash. T. 172.

[a] **Lien of overseer** is declared superior to that of furnisher of supplies by Civ. Code (1838) art 3184, as amended by the act of 1843. Cory v. Eddins, 13 La. Ann. 443 [foll Hollander v. His Creditors, 6 La. Ann. 668].

28. See Thompson v. Powell, 77 Ala. 391 supra note 14 [b].

29. See Moore v. Gray, 22 La. Ann. 289; and cases supra note 14 [d].

30. Cash v. McGregor First Nat. Bank, 26 Tex. Civ. A. 109, 61 SW 723. See also Irwin v. Miller, 72 Miss. 174, 16 S 678 (Code [1892] § 2682). See Landlord and Tenant [24 Cyc 1260].

31. Moore v. Gray, 22 La. Ann. 289.

32. Southern Grocer Co. v. Adams, 112 La. 60, 36 S 226; Buck v. Payne, 52 Miss. 271 (holding that a laborer's lien, being created orally, the laborer may waive it in favor of a mortgagee of his employer, thus giving the mortgagee a paramount lien).

33. McCormick v. Blum, 75 Miss. 81, 21 S 707 (holding that a manager of a plantation could not assert a lien for his services on a crop of cotton raised under his management, where he himself shipped it from the plantation to market for sale, and it was accordingly sold, and the plantation was credited with the proceeds).

34. Tinsley v. Craige, 54 Ark. 346, 16 SW 570 [aff reh 15 SW 897] (holding that the act of April 6, 1885, had no effect to repeal Mansfield Dig. § 4452, requiring this).

[a] **Contracts construed.**—(1) Under an agreement between A, a landlord, claiming a lien on his tenants' crops for rent and advances, and B, a merchant, claiming a lien for advances, providing that "J. A. Pennington is to get three bales of cotton (two from Henry Williams, and one from Nathan Austin) to-day, less the rents, and out of the next lot of said Henry and Nathan, Q. P. Siler is to get two-thirds, provided said two-thirds does not exceed their indebtedness to him for the year 1881; and so on, until both claims of said Pennington and Siler are settled," it was held that A's lien for the rent was expressly reserved, and his lien for advances abandoned as to the three bales, but that two thirds of the residue was subject to both liens, although only for 1881. Coleman v. Siler, 74 Ala. 435, 437. (2) But where the factors of a planter keep two separate accounts, one in the name of the plantation, and the other in the name of its owner, and the balance on the latter is in favor of the owner, but the factors are creditors on the plantation account, the balance due the latter, with the privilege attached to it, will not be extinguished by that due the owner on his private account, where there is no fraud or violation on the rights of mortgage creditors on the crop on which the balance against the plantation is a lien. Farrar v. Rowley, 3 La. Ann. 276

and judgment on the debt.[35]

[§ 92] **3. Death and Insolvency of Tenant.** A crop lien created by contract of the parties is not lost by the death of the debtor and the insolvency of his estate.[36]

[§ 93] **4. Failure to Enforce.** A lien may be lost unless the required proceeding to enforce the same is taken within the time allowed by statute.[37]

[§ 94] **5. Taking Additional Security.** A party does not waive his right to a statutory lien by taking other security for the debt,[38] unless the security taken or credit extended is such as to evidence an intent to waive the lien and rely exclusively on the security given.[39]

[§ 95] **6. Payment of Debt Secured.** An agricultural lien is discharged by the payment of the debt secured by it.[40]

[§ 96] **7. When Tenant Abandons Cultivation.** An advancer who, on the tenant's abandoning the cultivation, fails to avail himself of the landlord's permission to enter and finish the same relinquishes his lien on the crops, and cannot afterward have them attached as the property of the tenant.[41]

[§ 97] **8. Effect on Assignee.** Where, prior to assignment, a laborer has waived his lien the assignee cannot disclaim the waiver on the ground that he did not know of it.[42]

[§ 98] **G. Proceedings to Enforce—1. Necessity of Proceedings to Enforce.** An agricultural lien for advances or services exists independently of proceedings to enforce it.[43] Although a debtor is not required to give the lien creditor the sale of his crop,[44] nevertheless by agreement of the parties the lien may be enforced by a delivery of the property to the creditor to be sold by him and the proceeds applied to the payment of the debt secured,[45] subject, however, to the rights of third parties, who have prior liens on the property.[46]

[§ 99] **2. Nature and Form of Proceedings—a. In General.** Since agricultural liens are wholly dependent upon statutes for their existence,[47] the nature and form of proceedings for their enforcement are also prescribed by statutes,[48] and the remedy thus prescribed may[49] or may not be exclusive.[50] These statutes provide a remedy for the enforcement of such lien, and this remedy is usually the same as that given to the landlord for the enforcement of his liens for rent and advances.[51] Among the methods prescribed by the various statutes for the enforcement of such liens are enforcement by action,[52] by attachment,[53] by summary warrant or fieri facias,[54] and by foreclosure as in the case of chattel mortgages.[55]

In case of sale of the property to one who has notice of the lien, the lien may be enforced by attaching the crop in the hands of the purchaser,[56]

35. Wilson v. Taylor, 89 Ala. 368, 8 S 149.

36. McKinney v. Benagh, 48 Ala. 358.

37. Hume v. Simmons, 34 Fla. 584, 16 S 552 (holding that the lien created by Acts [1887] c 3747 § 3, in favor of persons laboring on any farm, etc., is lost by the limit of § 17, unless an action to enforce the same is commenced within six months from the last day on which the labor was performed, although the notice of lien was filed within such time).

38. Grady v. Hall, 59 Ala. 341; Story v. Flournoy, 55 Ga. 56; Laloire v. Wiltz, 31 La. Ann. 436; Joslyn v. Smith, 2 N. D. 53, 49 NW 382.

[a] **Subrogation to the rights of laborers** whose wages a factor has paid does not exclude him from claiming the sum thus paid as an advance embraced by the recorded contract of pledge between him and the planter. Laloire v. Wiltz, 31 La. Ann. 436.

[b] **That same instrument contains a mortgage** on the same property to secure the same debt does not impair a lien for advances. Grady v. Hall, 59 Ala. 341.

[c] **Where the mortgagee took possession of the crop** and harvested it, it was held that his possession under these circumstances was not unlawful or tortious, and did not extinguish his lien. Summerville v. Kelliher, 144 Cal. 155, 77 P 889.

39. Joslyn v. Smith, 2 N. D. 53, 49 NW 382; Brock v. Haley, 88 S. C. 373, 70 SE 1011.

[a] **Evidence of intention as to waiver.**—The question of waiver, being one of fact, is to be determined from all the evidence, including evidence of the person entitled to the lien as to his intention in taking the other security. Powell v. Smith, 74 Miss. 142, 20 S 872.

40. Minge v. Barbre, 51 La. Ann. 1285, 26 S 180.

41. Wheat v. Watson, 57 Ala. 581; Brock v. Haley, 88 S. C. 373, 70 SE 1011.

42. Buck v. Payne, 52 Miss. 271.

43. Carter v. Wilson, 61 Ala. 434; Boswell v. Carlisle, 55 Ala. 554; Schermerhorn v. Gardenier, 107 App. Div. 564, 95 NYS 494 [rev 46 Misc. 280, 94 NYS 253, and aff 184 N. Y. 612 mem, 77 NE 1196 mem]. See also Blair v. Morgan, 59 S. C. 52, 37 SE 45.

[a] **Agricultural and attachment liens distinguished.**—In Carter v. Wilson, 61 Ala. 434, 438, the court said: "As we said in Boswell v. Carlisle, 55 Ala. 554, ordinarily, an attachment lien begins from the time of the seizure, or levy upon the property. But this is not true of a crop-lien which the process of attachment is used only to enforce. This lien began before the writ was issued—it was created by a compliance with the terms of the statute by force of which it exists. Hence, if a claimant of produce attached as subject to a crop-lien, prove a title and right of possession thereto, ante-dating the levy of the attachment, the plaintiff in the action must go back and produce evidence of his crop—lien which will show it to be older than, or superior to the right of the claimant, and a lien which he has a right (in the language of the statute) 'to enforce,' by that writ." See also Blair v. Morgan, 59 S. C. 52, 37 SE 45; Sharp v. Palmer, 31 S. C. 444, 10 SE 98; Monday v. Elmore, 27 S. C. 126, 3 SE 65.

44. Harrod v. Constant, 5 Mart. (La.) 575.

45. Schermerhorn v. Gardenier, 107 App. Div. 564, 95 NYS 494 [rev 46 Misc. 280, 94 NYS 253, and aff 184 N. Y. 612 mem, 77 NE 1196 mem].

[a] **Application of proceeds.**—On a sale of crops covered by a lien, the holder of the lien must apply the proceeds to the lien debt, although he did not know that the funds were the proceeds of such crops. Barfield v. Coker, 73 S. C. 181, 53 SE 170.

46. Stallings v. Harrold, 60 Ga. 478.

47. See supra § 61.

48. Blair v. Morgan, 59 S. C. 52, 56, 37 SE 45 (where the court said: "The agricultural lien and the mode of its enforcement is purely statutory; and no statute which does not purport to amend or affect agricultural liens or their enforcement, can apply").

49. Stern v. Simpson, 62 Ala. 194; Kennedy v. Reames, 15 S. C. 548; Sternberger v. McSween, 14 S. C. 35.

50. Southern Grocer Co. v. Adams, 112 La. 60, 36 S 226.

[a] **In Louisiana** a writ of sequestration is authorized under some circumstances in which a writ of attachmen is not. Southern Grocer Co. v. Adams, 112 La. 60, 36 S 226.

[b] **Choice of remedy.**—A suit brought via ordinaria by the furnisher of supplies, while the crop is still standing by the roots, against the parties to whom the supplies were furnished and the purchaser of the property at the judicial sale, seeking contradictorily with those parties a personal judgment against the former, a recognition of his privilege on the crop and the enforcement of the privilege should not be dismissed on an exception of no cause of action by the purchaser of the property, on the ground that the crop should have been sequestered or attached. Weill v. Kent, 52 La. Ann. 2139, 28 S 295.

[c] **Enforcement in collateral equitable proceeding.**—Where a lien for provisions, etc., to make a crop has been foreclosed and levied upon the crop made, and by reason of an injunction and appointment of a receiver that crop has been exhausted and used by the receiver in making subsequent crops, equity will enforce such crop lien upon the subsequent rents, issues, and profits of the plantation. Having seized the crop on which such creditor had levied and on which his legal grasp was laid, and taken it into the custody of the court's receiver, the court of equity will see to it that such creditor shall not suffer by its process and obedience to its behests. Ball v. Vason, 56 Ga. 264.

51. See statutory provisions; and generally Landlord and Tenant [24 Cyc 1276].

52. See infra §§ 100–105.

53. See infra §§ 106–114.

[a] **In Alabama and Arkansas** a lien for advances may be enforced by attachment as in the case of liens for rent. Flexner v. Dickerson, 65 Ala. 129; Stern v. Simpson, 62 Ala. 194; Grady v. Hall, 59 Ala. 341; McKinney v. Benagh, 48 Ala. 358; Upham v. Dodd, 24 Ark. 545. See also Landlord and Tenant [24 Cyc 127].

54. See infra §§ 116–128.

[a] **In Georgia, North Carolina, and South Carolina** the lien is enforced by a summary seizure and sale. See Cottingham v. McKay, 86 N. C. 241; Thomas v. Campbell, 74 N. C. 787; Kennedy v. Reames, 15 S. C. 548.

55. Black v. Minneapolis, etc., El. Co., 7 N. D. 129, 73 NW 90.

56. Barrett v. Nichols, 85 Ark. 58, 107 SW 171.

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or by suit in equity to subject the proceeds to the payment of the debt,[57] but not by an action at law against the purchaser to recover the proceeds.[58]

[§ 100] **b. By Action—(1) Parties.**—A landlord is not a necessary nor a proper party to a suit to enforce a laborer's lien on crops grown on his land on shares.[59]

[§ 101] **(2) Time to Commence.** After the crop belonging to a tenant has been sequestered and bonded it is too late for a third party to intervene, claiming a privilege for supplies furnished by him to the tenant for the purpose of raising the crop.[60]

[§ 102] **(3) Requisites of Complaint.**[61] The necessary allegations in the complaint will depend on the particular statute involved.[62] It has been held that the absence of proper allegations in the complaint or petition is not cured by recitals in the notice or account;[63] but a defective claim set out in the petition is cured by judgment where no demurrer on the ground of such defect is interposed.[64-65]

[§ 103] **(4) Issues, Proof, and Variance.** It is necessary to the enforcement of a lien that the evidence shall agree with the allegations of the complaint.[66] On an issue between one claiming a lien on crops for labor bestowed thereon, and another claiming the crops by virtue of a sale made before they were raised, evidence that the former was a partner of the person raising the crops, and as such had been fully paid for his labor, has been held admissible.[67] Where the evidence shows that plaintiff has a valid lien and that defendant has converted the property subject to it, it is error to direct a verdict in defendant's favor.[68]

[§ 104] **(5) Evidence.** In an action for the enforcement of an agricultural lien, the evidence must show the amount of the debt secured by the lien,[69] the nature, amount, and price of the articles furnished,[70] and that the crop sought to be subjected to the payment of the lien was grown on the land described in the instrument creating the lien.[71] But, in an action by one claiming a laborer's lien on a crop, against a purchaser of the crop, the burden of proof is not on plaintiff to show that it was sold without his consent.[72]

[§ 105] **(6) Attorneys' Fees.** Attorneys' fees are recoverable in proceedings to enforce the lien.[73]

[§ 106] **c. By Attachment—(1) In General.** A common method of enforcing statutory agricultural liens is by attachment,[74] or by writ of seizure in the nature of an attachment.[75] This remedy being summary in its character, and contrary to the course of the common law, the statute giving it must receive a strict construction, and the claimant must bring himself strictly within its terms.[76]

[§ 107] **(2) Who Entitled to.** The right to enforce the lien by attachment exists only in favor of the parties mentioned in the statute granting this remedy.[77]

An assignee cannot enforce the lien by attachment, where the statute confers the right to that remedy only upon the person making the advances;[78] but it has been held that the assignee may enforce the lien in equity.[79]

[§ 108] **(3) Jurisdiction.** Jurisdiction, in a proceeding to enforce an agricultural lien, is determined by the amount demanded and not by the amount seized under the writ.[80]

57. Barrett v. Nichols, 85 Ark. 58, 107 SW 171. Compare Ball v. Vason, 56 Ga. 264 supra note 50 [c].

[a] **Amount recoverable.**—In an action to recover proceeds of lien cotton after notice, plaintiff could require defendant to account only for the money received from the crop under lien. Rose v. Florence Harness Co., 71 S. C. 127, 50 SE 556.

58. Barrett v. Nichols, 85 Ark. 58, 107 SW 171.

59. Pain v. Isaacs, 10 Wash. 173, 38 P 1038.

60. Phifer v. Maxwell, 28 La. Ann. 862.

[a] **Lessor's bonding property provisionally seized for rent.**—The lien of laborers cannot be defeated by the lessor by his bonding property provisionally seized for rent, where, asserting their privilege, they have intervened in the suit prior to the bonding. Nor need they demand a separate appraisement of the crops seized prior to the bonding or to judgment rendered. Saloy v. Dragon, 37 La. Ann. 71.

61. **Affidavit serving as complaint** see infra § 109.

62. See statutory provisions; and cases infra this note.

[a] **Allegations of actual knowledge of lien** in action for enforcement against a purchaser from the debtor is unnecessary, as the purchaser of growing crops is charged with presumptive knowledge of the existence of a lien by the furnisher of supplies. Weill v. Kent, 107 La. 322, 31 S 761.

[b] **A complaint to enforce a seed-grain lien** (1) is insufficient, where it fails to allege when the grain was furnished, or that the grain in suit was produced from the seed furnished, or that a notice or account was filed in the county where the buyer resided, or, if filed, that the filing was within thirty days after delivery of the seed. Comp. L. §§ 5490–5493. Parker First Nat. Bank v. Peavy El. Co., 10 S. D. 167, 72 NW 402. (2) But it has been held not necessary to allege in the complaint that the seed was sold to be sown on any particular tract of land, it being sufficient if the complaint shows that the seed was sown on land "owned, used, occupied, or rented" by the purchaser. Joslyn v. Smith, 2 N. D. 53, 49 NW 382.

[c] **What allegations sufficient.**—A complaint alleging that plaintiff and his assignors performed labor and rendered services in the production of seven stacks of hay on a ranch, describing it, is sufficient, although the lien includes other hay raised on the same premises and harvested and stacked by others under a different contractor. Hardwick v. Griffith, 11 Ida. 751, 83 P 768; Beckstead v. Griffith, 11 Ida. 738, 83 P 764.

[d] **Form of complaint** in action to enforce lien see Hardwick v. Griffith, 11 Ida. 751, 83 P 768; Beckstead v. Griffith, 11 Ida. 738, 83 P 764; Lavin v. Bradley, 1 N. D. 291, 47 NW 384.

63. Parker First Nat. Bank v. Peavy El. Co., 10 S. D. 167, 72 NW 402.

64-65. Pain v. Isaacs, 10 Wash. 173, 38 P 1038.

66. Faircloth v. Webb, 125 Ga. 230, 53 SE 592.

67. Essency v. Essency, 10 Wash. 375, 38 P 1130.

68. Schlosser v. Moores, 16 N. D. 185, 112 NW 78.

69. Hudson v. Wright, 1 Ala. A. 433, 56 S 258.

[a] **Question of fact for jury.**—In an action to enforce a laborer's lien on a crop grown by defendant's tenants, whether defendant's account for rents and supplies was sufficient to absorb the price of the crop without leaving sufficient to pay plaintiff is for the jury. Brinkley Land, etc., Co. v. Mummel, (Ark.) 165 SW 635.

70. Henry Lochte Co. v. Lefebvre, 128 La. 108, 54 S 578; National Bank of Commerce v. Sullivan, 119 La. 935, 44 S 734.

71. Letchford v. Duplantis, Mann. Unrep. Cas. 78.

72. Powell v. Smith, 74 Miss. 142, 20 S 872.

73. Pain v. Isaacs, 10 Wash. 173, 38 P 1038 (construing Code [1881] § 1978).

74. Wilson v. Taylor, 89 Ala. 368, 8 S 149; Wilson v. Stewart, 69 Ala. 302; Johnston v. Hannah, 66 Ala. 127; Grady v. Hall, 59 Ala. 341; McKinney v. Benagh, 48 Ala. 358; Emerson v. Hedrick, 42 Ark. 263; Burgie v. Davis, 34 Ark. 179.

[a] **Exclusive remedy in Alabama.**—For the enforcement of the lien for advances on crops, the statutory remedy by attachment is exclusive. Stern v. Simpson, 62 Ala. 194.

75. Baldwin v. Morgan, 73 Miss. 276, 18 S 919; Kerr v. Moore, 54 Miss. 286; Hester v. Allen, 52 Miss. 162.

Summary warrant or fieri facias in Georgia, North Carolina, and South Carolina see infra § 115.

76. Flournoy v. Shelton, 43 Ark. 168.

77. Carter v. Wilson, 61 Ala. 434.

78. Carter v. Wilson, 61 Ala. 434 [cit Foster v. Westmoreland, 52 Ala. 223].

79. Abraham v. Carter, 53 Ala. 8, 10 (where the court said: "The operation of the statute, creating liens for advances to make crops, (Rev. Code § 1858–60), is to attach to the mortgage or assignment of the crop not planted, or planted and not matured, made in the form, and on the consideration prescribed, the force and effect of a mortgage or assignment of personal chattels, having an actual or potential existence, and to provide a speedy remedy for the enforcement of the rights of the mortgagee or assignee. The right of the assignee, is certainly equal in dignity to the right of any holder of a mere chose in action. It may not be capable of transfer, so that the transferee can pursue in his own name, the legal remedy for its enforcement, which the assignee or mortgagee is authorized to pursue. The transfer will create an interest in the transferee, which a court of equity will protect").

80. May v. Williams, 61 Miss. 125, 48 AmR 80.

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[§ 109] **(4) Affidavit.** An affidavit, in conformity with the statutory requirements, is a condition precedent to the issuance of an attachment.[81]

Requisites and sufficiency. An affidavit for attachment to enforce an agricultural lien must state the existence of every fact required by the statute as a condition precedent to the issuance of process;[82] but it is sufficient if these facts are set forth with substantial accuracy, either expressly or by necessary implication.[83]

As to advances. The affidavit must state the nature or kind of articles furnished,[84] and, where the statute makes a balance due for advances of the preceding year a new advance toward making the crop of the succeeding year, it is the better practice to state the facts respecting such balance.[85]

Grounds stated disjunctively. An affidavit has been held defective for stating two or more grounds disjunctively.[86]

Signature. Attachment may issue on an affidavit sworn to before an officer authorized to administer it, although it is not subscribed by the party making it.[87]

Amendment. As a general rule, affidavits for the enforcement of agricultural liens may not be amended as to matters of substance,[88] but may be amended in matters of form.[89] Thus where some of the joint owners of the interest claimed are minors, the affidavit may be amended by adding their names by affiant as next friend;[90] and if the justice before whom the affidavit is sworn to has failed to sign the jurat, he may affix his signature in open court after motion to dismiss.[91]

Serving as complaint. In proceedings before a justice of the peace, the affidavit for attachment may also serve as a complaint.[92]

[§ 110] **(5) Filing Statement.** As a general rule a detailed statement of all articles furnished must be presented in order to enable the court to determine the existence and extent of the lien;[93] but where the claim is on a contract for a certain time at a fixed and definite sum no itemized account need be filed,[94] and so where defendant has answered plaintiff's affidavit and concluded to the country, thereby waiving the filing of the statement upon the return day, plaintiff should be allowed to amend by filing the statement.[95]

[§ 111] **(6) Defenses—(a) Defective Affidavit.** Defects in an affidavit of attachment should be taken advantage of by plea in abatement.[96]

[§ 112] **(b) Failure to Furnish Supplies.** The fact that the limit to which supplies might have been required according to contract was not reached does not amount to a violation of, nor a refusal to comply with, the contract where there is no evidence that plaintiff was called on and refused to furnish more than is claimed by him in his suit.[97]

[§ 113] **(7) Dissolving Attachment.** Where the

81. Flexner v. Dickerson, 65 Ala. 129, 130 (where the court said: "An attachment, issuing without an affidavit which shows the existence of the facts declared by law to be a ground for the issue of the writ, is subject to be abated on plea. The affidavit is the initiatory step—the very foundation of the whole proceeding. It alone can call into exercise the extraordinary power of the court, to command the seizure of the estate of the defendant, before he is heard, and before judgment pronounced against him").

82. Emerson v. Hedrick, 42 Ark. 263. See also Taylor v. Hathaway, 29 Ark. 597; Dano v. Mississippi, etc., R. Co., 27 Ark. 564.

[a] **Alabama.**—(1) The matters of substance which must be stated or shown in such affidavit are: That advances were made in horses, mules, oxen, necessary provisions, or farming tools and implements, or in money to purchase the same, the amount being stated, to enable defendant to make a crop; that a written note or obligation was taken, declaring that such advances were made bona fide for the purpose of enabling defendant to make a crop, and that without them it would not be in his power to procure the necessary teams, provisions, etc., to make a crop; also, the registration of the writing, as required by the statute, and the existence of one of the causes for which an attachment may be sued out. Flexner v. Dickerson, 65 Ala. 129. (2) An affidavit for an attachment to enforce a statutory lien for advances to make a crop, Code § 3286, must state the nature or kind of articles advanced, whether mules, horses, oxen, necessary provisions, etc., and a general averment that advances were made to enable defendant to make a crop is insufficient. Beard v. Woodard, 78 Ala. 317.

[b] **In Mississippi** the affidavit need not contain an itemized account, where the employment is by the month. Baldwin v. Morgan, 73 Miss. 276, 18 S 919.

[c] **Defective affidavit.**—An affidavit which states that defendant is indebted to plaintiffs in a specified sum, "for advances made to him . . . to make a crop, in Butler county, Alabama, for the year 1878; and that the said Preston Dickerson has removed a part of the crop made by him on which the lien was given, without paying said advances, and without the consent of said" plaintiffs, does not show a substantial compliance with the requisitions of the statute, and is fatally defective. Flexner v. Dickerson, 65 Ala. 129, 130.

[d] **Affidavit for advances distinguished from affidavit for rent.**—"Section 2961, of the Revised Code, as amended, gives to the landlord the right to sue out attachment for rent, and for advances made, &c., first, 'when the tenant is about to remove the crop from the premises without paying the rent and said advances; second, when he has removed it, or any portion thereof, without the consent of the landlord.' Pamph. Acts 1870–1, p. 19. Section 1860, Revised Code, provides that 'any person having a lien on the crop and stock of another for advances to assist in making the crop, shall have the same rights and remedies to enforce such liens as landlords have in this State for the collection of rents.' In enforcing the right given in section 1860, supra, it is manifest that there must be some change in the phraseology of the affidavit, which is required in sections 2961–2. Instead of the words landlord, and rent, where they occur in said sections, the words advancer, or person making the advance, and advances, must be substituted. Some other verbal changes will also be necessary, which will naturally suggest themselves. The statute is remedial, and some latitude of construction is necessary to give it effect. We must not be understood, however, as holding or intimating that we will give effect to the lien provided for in sections 1858–9, of Revised Code, beyond the terms of the enactment. Advancers, to bring themselves within the statute, must show a case which conforms in every respect to those sections. See Dawson v. Higgins, 50 Ala. 49; McLester v. Somerville, 54 Ala. 670, at last term." Watson v. Auerbach, 57 Ala. 353, 358.

[e] **Form of an affidavit** for attachment to enforce an agricultural lien see Gunter v. Du Bose, 77 Ala. 326.

[f] **Review on appeal.**—Failure of the affidavit to state that the labor was performed under a contract cannot be objected to for the first time on appeal. Johnson v. Hannah, 66 Ala. 127 [cit Dow v. Whitman, 36 Ala. 604; Mahoney v. O'Leary, 34 Ala. 97; Kirkman v. Patton, 19 Ala. 32; Jones v. Pope, 6 Ala. 154].

83. Gunter v. Du Bose, 77 Ala 326.

84. Beard v. Woodard, 78 Ala. 317 (holding that a general averment that plaintiff made advances to enable defendant to make a crop for the current year is insufficient).

[a] **Failure to state for what year furnished.**—Where an attachment is sued out on the last day of December for advances made to enable a tenant to make a crop on lands rented from plaintiff, but not stating for what year, it will be inferred that the advances were made during the year just expired. Gunter v. Du Bose, 77 Ala. 326.

85. Gunter v. Du Bose, 77 Ala. 326.

86. Watson v. Auerbach, 57 Ala. 353 [cit Cannon v. Logan, 5 Port. (Ala.) 77; Johnson v. Hale, 3 Stew. & P. (Ala.) 331] (holding that an affidavit that defendant "has removed, or is about to remove, a portion of the crop from the premises without the consent of the said Auerbach" was bad).

87. Watts v. Womack, 44 Ala. 605.

88. Flexner v. Dickerson, 65 Ala. 129.

89. Flexner v. Dickerson, 65 Ala. 129.

90. May v. Williams, 61 Miss. 125, 48 AmR 80.

91. Hartsell v. Myers, 57 Miss. 135.

92. Emerson v. Hedrick, 42 Ark. 263.

93. Henry Lochte Co. v. Lefebvre, 128 La. 108, 54 S 578; Allen v. Standifer, 57 Miss. 612.

94. Baldwin v. Morgan, 73 Miss. 276, 18 S 919.

95. Allen v. Standifer, 57 Miss. 612.

96. Flexner v. Dickerson, 65 Ala. 129.

[a] **It cannot be assigned for first time on appeal** that the affidavit failed to state that the labor was performed under a contract, or that the attachment was levied on property which was not a part of the crop subject to the lien. Johnston v. Hannah, 66 Ala. 127.

[b] **Effect of levy under defective affidavit.**—Where the affidavit is defective plaintiff ordering the levy and the sheriff making it are liable as trespassers. Gunn v. Pattishal, 48 Ga. 405.

97. Lalanne v. Goodbee, 25 La. Ann. 481.

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attachment is levied on property not subject to the lien, the remedy is by motion to dissolve the attachment.[98]

[§ 114] **(8) Judgment.** Under some statutes the proceeding by attachment is regarded as a proceeding in rem and no personal judgment may be rendered;[99] but under other statutes a general judgment may be rendered against the debtor.[1]

[§ 115] **d. By Summary Warrant or Fieri Facias—(1) In General.** In some jurisdictions a crop lien may be enforced by summary warrant or fieri facias.[2] The right to pursue this method being wholly dependent on the statutes, their provisions must be strictly observed.[3]

[§ 116] **(2) Time for Commencement of Proceedings.** The statutes providing for foreclosure of agricultural liens by summary warrant or fieri facias usually permit such proceedings to be instituted only within a certain time after the debt becomes due.[4]

[§ 117] **(3) Affidavit—(a) Necessity of.** As a general rule an affidavit by the creditors is required as the first step in the summary enforcement of an agricultural lien.[5]

[§ 118] **(b) Requisities of.** The affidavit necessary to enforce a crop lien must state all the facts necessary to constitute a valid lien.[6]

The amount due must be stated in the affidavit.[7]

Supplies furnished. In the case of supplies furnished, the affidavit must allege that articles of the class prescribed by statute have been furnished.[8]

Property grown under contract. An averment that plaintiff made a crop of wheat and corn on the land under the contract is a sufficient allegation that it was raised under the contract and during the time of his employment.[9]

That contract was in writing. Where the existence of a lien is dependent upon a written contract, it must appear from the affidavit that it was created by a special contract in writing.[10]

Performance of contract. Plaintiff must allege in his affidavit that he has performed the contract declared on;[11] but an averment that plaintiff has fully completed and worked out the time is a sufficient allegation that the contract of labor has been completed.[12]

Demand. The affidavit should show a demand by plaintiff after the maturity of his claim;[13] but an affidavit showing demand on the day of maturity is sufficient;[14] and an allegation that defendant has been absent from the county from the time of making the contract until the time of making the affidavit, and that he is likely to be absent for a considerable time, shows a sufficient excuse for the failure to make demand.[15]

Grounds for issuance. The affidavit must state what is about to be done which would defeat the lien;[16] and in doing this it must follow the language of the statute.[17]

Proceeding commenced in time. The affidavit must show that the proceeding has been commenced within the time prescribed by statute;[18] but it will

98. Brown v. Coats, 56 Ala. 439 (holding that such question could not be raised on error in the absence of a motion in the court below to dissolve the attachment).

99. Mitchell v. Drake, 57 Miss. 605. And see Hartsell v. Myers, 57 Miss. 135 (holding that no personal judgment for the debt should be rendered in excess of the property seized). But see infra note 1.

1. May v. Williams, 61 Miss. 125, 48 AmR 80 (holding that under a later statute, Code [1880] c 52, than that construed in the cases cited in the last preceding note a general judgment may be rendered).

2. Lewis v. Owens, 124 Ga. 228, 52 SE 333; Gay v. Nash, 84 N. C. 333; Blair v. Morgan, 59 S. C. 52, 37 SE 45.

Writ of seizure in the nature of attachment in Mississippi see supra § 106.

3. Stallings v. Harrold, 60 Ga. 478; Sternberger v. McSween, 14 S. C. 35.

[a] **Mere delivery of the crop** to the factor, to be applied in part payment of the lien, will not vest title in the lienor as against an older general judgment lien postponed by the statute in favor of the crop lien. Stallings v. Harrold, 60 Ga. 478.

4. Toole v. Jowers, 49 Ga. 299 (one year under Ga. Code § 1977).

5. Moore v. Martin, 58 Ga. 411; Powell v. Weaver, 56 Ga. 288; Gunn v. Pattishal, 48 Ga. 405; Gay v. Nash, 84 N. C. 333; Thomas v. Campbell, 74 N. C. 787; Warren v. Lawton, 14 S. C. 476.

[a] **Marking affidavit "filed."**—A lien warrant will not be set aside on the ground that the affidavit therefor was not filed in the clerk's office, where it does not appear that the paper is not in the possession of the clerk, although not marked "filed." Gaston v. Brandenburg, 42 S. C. 348, 20 SE 157.

6. Faircloth v. Webb, 125 Ga. 230, 53 SE 592; Powell v. Weaver, 56 Ga. 288.

[a] **Form of affidavit** for warrant to enforce a crop lien see Owens v. Gentry, 30 S. C. 490, 9 SE 525.

7. Segler v. Coward, 24 S. C. 119.

8. Toole v. Jowers, 49 Ga. 299 (holding that the affidavit must also state the terms on which the supplies were furnished); Gunn v. Pattishal, 48 Ga. 405.

[a] **Thus** plaintiff must allege in his affidavit that he is either a factor or a merchant, and that as such he has furnished either provisions, or commercial manures, or both, upon such terms as may have been agreed upon by the parties. An execution based upon an affidavit not containing the aforesaid allegations is void. Gunn v. Pattishal, 48 Ga. 405.

9. Lindsay v. Lowe, 64 Ga. 438.

10. Powell v. Weaver, 56 Ga. 288.

11. Faircloth v. Webb, 125 Ga. 230, 53 SE 592.

[a] **That work was done by plaintiff.**—The affidavit must allege that the work for which the lien is claimed was done by plaintiff. Mabry v. Judkins, 66 Ga. 732.

12. Lindsay v. Lowe, 64 Ga. 438.

13. Faircloth v. Webb, 125 Ga. 230, 53 SE 592; Usry v. Saulsbury, 62 Ga. 179; Moore v. Martin, 58 Ga. 411; Callaway v. Walls, 54 Ga. 167 (the last two cases holding that the affidavit should contain an express averment that a demand for the payment of the debt after its maturity has been made on the owner of the property or his agent or lessee, and that he has refused to pay the same); Totten v. Tison, 54 Ga. 139; Anderson v. Beard, 54 Ga. 137.

[a] **That demand was made on owner** sufficiently appears from an averment that payment has been demanded of the said A where the fact of A's ownership appears elsewhere in the affidavit to foreclose the lien. Usry v. Saulsbury, 62 Ga. 179.

14. Favors v. Johnson, 79 Ga. 553, 4 SE 925.

15. Lindsay v. Lowe, 64 Ga. 438.

16. Segler v. Coward, 24 S. C. 119.

[a] **South Carolina.**—(1) The affidavit for a warrant of seizure must aver what steps defendant has taken to defeat the lien. Segler v. Coward, 24 S. C. 119. (2) An allegation in an affidavit that the lienor "has sold a portion of his crop . . . has refused to pay said sum of one hundred dollars, with intent to defeat this lien," is sufficient to support a warrant to enforce an agricultural lien. Mixson v. Holley, 26 S. C. 256, 2 SE 385 [dist Segler v. Coward, supra]. (3) A warrant to enforce an agricultural lien was properly issued on an affidavit by the agent of the lienee, charging that the deponent believed the lienor to be disposing of his crop with intent to defeat the lien, because, as the deponent had been informed and believed, the lienor had sold several bales of cotton, the exact number unknown, and had applied no part of the proceeds to the lien, and after promising to make a payment on the debt on a stated day failed to do so, although he sold a part of the crop in the meantime. Owens v. Gentry, 30 S. C. 490. See also Monday v. Elmore, 27 S. C. 126, 3 SE 65. (4) An affidavit to obtain a warrant to enforce an agricultural lien is fatally defective where it contains no statement that defendant is about to dispose of his crop, or has done, or is about to do, any act which would defeat the lien; also, where it fails to state the amount due. Segler v. Coward, supra.

17. Brogden v. Privett, 67 N. C. 45, 46 (holding that an affidavit which stated that defendant was removing and disposing of his crop without regard to the lien, but failed to state that it was being removed "without the permission, or with intent to defraud the laborer of his lien," was insufficient).

[a] **An affidavit was sufficient to** authorize the issuance of the lien warrant which recited that the affiant was informed and believed that the husband was disposing of his crops in order to defeat the said lien, and which gave as reasons for such belief that the husband had sold a portion of his crop without applying any of the proceeds to the satisfaction of the lien, and that he had failed to keep his promises with reference to payment. Owens v. Gentry, 30 S. C. 490, 9 SE 525.

18. Callaway v. Walls, 54 Ga. 167; Anderson v. Beard, 54 Ga. 137. See also Moore v. Martin, 58 Ga. 411.

be sufficient if this fact appears from all the allegations.[19]

[§ 119] **(c) Filing Affidavit.** In South Carolina the affidavit upon which the warrant of seizure is issued must be filed in the clerk's office or with the magistrate within ten days after the issue of the warrant;[20] but it need not be filed within the time prescribed for the filing of an attachment warrant,[21] and the mere fact that the affidavit is not marked "filed" is not sufficient ground for vacating the warrant where it does not appear that the affidavit is not in the possession of the clerk.[22]

[§ 120] **(4) Issuance and Execution of Warrant.** Under some statutes bond must be given by plaintiff before the warrant may be issued,[23] and the warrant may be issued and executed only by the officers designated by statute.[24] Where execution is issued before the crops are sufficiently mature for a legal levy, the execution is not void, but will be construed as directing a levy when it can be legally made;[25] and where part of the property levied on is not subject to levy, the levy will be good as to the remainder of the property included.[26] An execution based upon an affidavit not containing the essential allegations is void.[27]

Release of levy. A levy made upon property which is left upon defendant's premises may be released by notice to defendant by the officer making such levy.[28]

[§ 121] **(5) Summons or Notice to Defendant.** It is not necessary to the regularity of a summary proceeding for the enforcement of an agricultural lien, under the statute, that either a notice or summons should be issued to defendant.[29] In some jurisdictions it is the practice to serve a copy of the affidavit on defendant together with the warrant,[30] but service of a copy of the affidavit is not necessary.[31]

[§ 122] **(6) Replevy by Debtor.** The property levied on may be replevied by the debtor by giving bond with security.[32]

[§ 123] **(7) Vacating Warrant.** A warrant to enforce an agricultural lien, if issued unlawfully, may be vacated on motion;[33] but, on a motion to vacate the warrant, only the regularity of its issue and not matters that go to the merits of the case may be considered.[34]

Jurisdiction. The clerk has power to revoke and supersede a warrant issued by him, where it was improvidently or irregularly issued,[35] and a circuit judge has jurisdiction on motion to vacate, whether the warrant was issued by the clerk or by a magistrate.[36]

Waiver of right. A lienor does not waive his right to move to vacate the warrant by commencing proceedings in claim and delivery against the sheriff.[37] The giving by defendant of bond and security for satisfaction of order of the court does not deprive him of his legal right to make a motion to dismiss the lien proceedings on the ground that they are void.[38]

Evidence. On the question whether the clerk was justified by the affidavit in issuing the warrant to enforce an agricultural lien, a supplementary affidavit made at the hearing before the judge cannot be considered.[39]

[§ 124] **(8) Issues, Proof, and Variance. Raising issue.** In Georgia the issue is made and brought into court for trial by the filing of a counter affidavit by defendant.[40] Where an issue is formed in

19. Moore v. Martin, 58 Ga. 411. In this case an affidavit made Nov. 25, 1874, to foreclose a merchant's lien for fertilizers, showed that the contract was made Febr. 27, 1874, for fertilizers furnished that year, and that it fell due Nov. 1, 1874, and the affidavit was held sufficient to show that the prosecution of the lien began within one year from the time the debt fell due.

20. Blair v. Morgan, 59 S. C. 52, 37 SE 45 (holding that the act of 1899 requiring affidavits in attachments to be filed within forty-eight hours did not apply to attachments for the enforcement of agricultural liens nor reduce the time for their filing from ten days to forty-eight hours); Townsend v. Sparks, 50 S. C. 380, 27 SE 801 (holding that, under Code Civ. Proc. § 250, such an attachment may be vacated for not filing the affidavits on which it was granted within ten days after its issuance); Doty v. Boyd, 46 S. C. 39, 24 SE 59.

21. Blair v. Morgan, 59 S. C. 52, 37 SE 45.

22. Gaston v. Brandenburg, 42 S. C. 348, 20 SE 157.

23. Gaston v. Brandenburg, 42 S. C. 348, 20 SE 157.

[a] **Bond need not be witnessed or probated.**—Gaston v. Brandenburg, 42 S. C. 348, 20 SE 157.

24. Jones v. Clarkson, 16 S. C. 628.

25. Faircloth v. Webb, 125 Ga. 230, 53 SE 592.

26. Faircloth v. Webb, 125 Ga. 230, 53 SE 592.

27. Gunn v. Pattishal, 48 Ga. 405.

28. Lockhart v. Smith, 50 S. C. 112, 27 SE 567.

29. Thomas v. Campbell, 74 N. C. 787, 790 (where the court said: "To require notice of the application, would defeat the purpose of the act, which is to give a summary remedy in order to prevent fraud upon the lien or statutory mortgage").

30. Lightsey v. Rentz, 85 S. C. 401, 67 SE 456.

31. Blair v. Morgan, 59 S. C. 52, 37 SE 45.

32. Toole v. Jowers, 49 Ga. 299; Dicks v. Nimmons, 88 S. C. 428, 71 SE 47.

[a] **Remedy by giving bond exclusive.**—In South Carolina Civ. Code (1902) § 3067, giving the tenant the right to possession by giving bond, excludes any remedy by claim and delivery in which action the affidavit must state that the property was not seized under execution or attachment against the property of plaintiff. Dicks v. Nimmons, 88 S. C. 428, 71 SE 47.

33. Segler v. Coward, 24 S. C. 119.

[a] **Such motion is analogous** to one to vacate an attachment, and the time within which it may be filed is not limited by § 2518 of the Revised Statutes of South Carolina, which provides for an application to the trial justice, within ten days after the seizure, to have tried the single question of the amount justly due under the lien, the remedy under § 2519 being broader, and permitting the lienor to attack both the lien and the issuance of the warrant. Kennedy v. Dunbar, 46 S. C. 517, 24 SE 383.

[b] **Exclusiveness of remedy.**—In South Carolina a motion to vacate a warrant to enforce a lien is not the exclusive mode of contesting its validity, but defendant may proceed under Gen. St. (1882) § 2398, providing that, on notice that the amount claimed is not justly due, an issue shall be made and set down for trial. Sease v. Dobson, 33 S. C. 234, 11 SE 728. See also Kennedy v. Dunbar, 46 S. C. 517, 24 SE 383.

34. Moore v. Rountree, 57 S. C. 75, 35 SE 386.

[a] **Whether an infant may give a valid lien** on his crops involves a decision on the merits of the case. Moore v. Rountree, 57 S. C. 25, 35 SE 386.

35. Cottingham v. McKay, 86 N. C. 241.

[a] **Improvidence and irregularity distinguished.**—In Sease v. Dobson, 33 S. C. 234, 236, 11 SE 728, the court said: "A warrant of seizure may be vacated or discharged by the officer issuing it upon one of two grounds where they exist: 1st, for irregularity; and 2nd, for improvidence. The difference between these causes, as we said in Monday v. Elmore, 27 S. C. 126, 3 SE 65, is 'that an attachment is irregularly issued when it appears upon the face of the proceedings that there is no ground for the attachment; in other words, where the affidavit fails to contain the conditions upon which the law authorizes such a proceeding.' . . . It is improvidently issued when the conditions necessary are stated, but they are untrue, which fact being shown by the defendant, the attachment may be dissolved. Ivy v. Caston, 21 S. C. 583. Each of these causes presupposes, in the case of an agricultural lien, a valid contract to that end, and the motion to discharge is based upon something dehors said contract, and not upon the contract itself."

36. Kennedy v. Dunbar, 46 S. C. 517, 24 SE 383.

[a] **At chambers.**—A circuit judge has jurisdiction at chambers to hear and determine a motion to vacate a warrant of seizure issued by the clerk of court to enforce an agricultural lien. Segler v. Coward, 24 S. C. 119.

37. Townsend v. Sparks, 50 S. C. 380, 27 SE 801.

38. Toole v. Jowers, 49 Ga. 299.

39. Segler v. Coward, 24 S. C. 119.

[a] **Affidavits containing matters cumulative or additional** to those submitted to the clerk, when he issues a warrant of attachment upon an agricultural lien, cannot be used by lienee on motion to vacate. Lockhart v. Smith, 50 S. C. 112, 27 SE 567.

40. Moore v. Martin, 58 Ga. 411; Wicker v. Woods, 55 Ga. 647; Story v. Flournoy, 55 Ga. 56; Anderson v. Beard, 54 Ga. 137.

this class of cases by the counter affidavit of defendant, that, together with the affidavit of plaintiff, constitutes the pleadings in the case, and it is to be tried and a verdict rendered thereon as in other cases.[41]

In North Carolina and South Carolina the issue is raised by the party to whom the advances were made, filing with the sheriff, within thirty days, after the sale and seizure of the property, a notice accompanied with an affidavit that the amount claimed is not justly due, whereupon it becomes the duty of the sheriff to hold the proceeds of sale subject to the decision of the court upon an issue made up to try that question.[42] Time for filing notice and counter affidavit may not be extended beyond the thirty days allowed by statute.[43]

[§ 125] **(9) Verdict and Judgment.** The judgment must, of course, be supported by the verdict.[44] Mere irregularities, however, in proceedings to enforce a crop lien constitute no ground for setting aside a verdict rendered therein.[45] Failure to assess damages, after a general verdict for plaintiff, is no ground for denying judgment.[46]

Judgment against sureties on bond for discharge. Where defendant has given bond with sureties in order to recover possession of the property upon which levy has been made, but has failed to serve written notice and affidavit that the amount claimed is not justly due, judgment may be entered against the sureties on the bond, although they are not before the court.[47]

[§ 126] **(10) Property Returned on Dismissal.** On dismissal of the proceeding the property or proceeds thereof should be returned to defendant.[48]

[§ 127] **(11) Appeal and Error.** A verdict on conflicting evidence, where the trial judge has refused a new trial, will not be disturbed on appeal.[49] The supreme court has no jurisdiction to review facts necessarily found by the circuit court on a question as to whether an affidavit required to be filed under the Agricultural Lien Law has been delivered and received for filing.[50]

[§ 128] **(12) Damages for Wrongful Seizure.** An instruction that the measure of damages for the wrongful seizure of a crop under an agricultural lien is the difference in the price of the cotton when it was taken from plaintiffs' possession and when it was returned to them, and that, if the price rose in the meantime, then the actual damage is the difference between what they could have gotten for it and what they received for it, has been held substantially correct.[51]

[§ 129] **e. Criminal Proceedings.** In some jurisdictions the sale of property subject to an agricultural lien in violation of the rights of the creditor is a criminal offense.[52]

X. THRESHER'S LIEN

[§ 130] **A. Right to Lien.**[53] Statutes have been enacted in some jurisdictions giving the owner of a threshing machine a lien on grain threshed by him for the amount due him for such threshing.[54] The lien being of purely statutory origin, one who claims it must bring himself clearly within the terms of the statute authorizing it.[55] Thus, under one statute, the lien for threshing any particular grain may extend to all grain threshed under the same contract,[56] while under another it may attach only to grain the threshing of which is not paid for.[57]

[§ 131] **B. Proceedings to Perfect.** Where the thresher retains possession of the grain threshed as security for the payment of his charges, he has a common-law lien thereon without further pro-

[a] **Amendment of counter affidavit.**—The counter affidavit, being the foundation of the proceeding in court, cannot be amended after it has been returned into court, either by the filing of a new affidavit or otherwise, so as to change the issue thereby presented. Story v. Flournoy, 55 Ga. 56.

[b] **A second counter affidavit** to an execution based on the foreclosure of a factor's lien cannot be filed without the allegation that the facts therein set forth were unknown to defendant at the time the first was filed. Story v. Flournoy, 55 Ga. 56.

[c] **Demand and refusal to pay may be put in issue** by a counter affidavit. Moore v. Martin, 58 Ga. 411. But in this case Bleckley, J., in a concurring opinion, said: "Demand for payment does not affect the amount of the justice of the claim, or the existence of the lien. It is a step in the remedy, and is not in order until after the right has become perfect. When demand is duly averred in the creditor's affidavit, the law treats it as established, and has made no provision for traversing or contesting the averment. The defenses which may be urged by counter-affidavit are such as bar the proceeding, in whole or in part, and not such as merely abate it."

41. Wicker v. Woods, 55 Ga. 647 [cit McConnell v. Bryant, 38 Ga. 639].

42. Cottingham v. McKay, 86 N. C. 241; Thomas v. Campbell, 74 N. C. 787; Sease v. Dobson, 83 S. C. 234, 11 SE 728; Warren v. Lawton, 14 S. C. 476; Johnstone v. Manigault, 13 S. C. 403.

[a] **Issue raised by notice and counter affidavit.**—(1) "If the debt is disputed, and notice thereof given to the officer accompanied with the defendant's affidavit denying the indebtedness claimed, he is required to hold the proceeds of sale until the issue of the controverted indebtedness can be tried in the superior court. If the warrant is revoked, the goods or the proceeds of sale must be returned, as must be the excess when they are more than sufficient to meet the plaintiffs demand and costs, as stated by himself, or as reduced by the verdict of the jury. The statute in direct terms makes no other provision for the intervention of the debtor to stop the progress of the proceeding." Cottingham v. McKay, 86 N. C. 241, 243 [cit Gay v. Nash, 84 N. C. 333]. (2) In Sease v. Dobson, 83 S. C. 234, 11 SE 728, it was held that the validity of the lien might be contested upon the issue raised by the notice and affidavit that the amount claimed was not due, although defendant had failed to move to vacate the warrant of seizure. (3) The counter affidavit is sufficient if it denies indebtedness under the lien. Warren v. Lawton, 14 S. C. 476.

43. Lightsey v. Rentz, 85 S. C. 401, 67 SE 456.

44. See cases infra this note.

[a] **Sufficiency of verdict.**—(1) In Gay v. Nash, 84 N. C. 333, the crop was sold by the sheriff, and on the trial before a jury defendant admitted the execution of the lien, but denied that anything was due for advances thereunder. There was a general verdict for plaintiff, and the court refused judgment because the jury failed to assess damages. Upon appeal it was held that this was erroneous, and that the verdict established the "lien debt" in excess of the proceeds of sale entitling plaintiff to judgment. (2) In Wicker v. Woods, 55 Ga. 647, a counter affidavit was filed to a proceeding to foreclose a crop lien, and a replevy bond was given. Upon the trial of this issue the jury simply found that defendant was entitled to a certain credit. The case stood thus until the second term of the court thereafter, when a nunc pro tunc judgment was entered against defendant and his sureties on the bond. Upon appeal this was held to be error, especially as it did not appear that the sureties had ever had their day in court.

45. Wicker v. Woods, 55 Ga. 647.

46. Gay v. Nash, 84 N. C. 333.

47. Lightsey v. Rentz, 85 S. C. 401, 67 SE 456.

48. Cottingham v. McKay, 86 N. C. 241 (holding that, where the money arising from the sale of the crop has been paid into court and the proceeding dismissed, the court has no power to order a return of the money to defendant, although plaintiff has instituted another action and files an affidavit that defendant is insolvent).

49. Eubanks v. Brunson, 77 Ga. 498, 2 SE 685.

50. Townsend v. Sparks, 50 S. C. 380, 27 SE 801.

51. Brock v. Haley, 88 S. C. 373, 70 SE 1011.

52. State v. Pinckney, 74 S. C. 445, 54 SE 606.

53. **Lien of laborer against threshing machine** see Master and Servant [26 Cyc 1066 et seq].

54. Holt Mfg. Co. v. Collins, 154 Cal. 265, 97 P 516; Gordon v. Freeman, 112 Minn. 482, 128 NW 834, 1118; Hollingsworth v. Lacharite, 19 Mann. 379; Fox v. Allen, 14 Man. 358; Conn v. Fitzgerald, 5 Terr. L. 346.

55. Moher v. Rasmusson, 12 N. D. 71, 95 NW 152.

56. Mitchell v. Monarch El. Co., 15 N. D. 495, 107 NW 1085, 11 AnnCas 1001.

57. Simpson v. Oakes, 14 Man. 262.

ceedings;[58] but in order to perfect a lien under the statute it is usually necessary to file a statement of the lien in the county in which the grain is grown.[59] This statement must contain everything required by the statute to be included therein,[60] and in particular must usually contain a description of the land on which the grain was grown,[61] the quantity threshed,[62] and the amount due.[63]

[§ 132] **C. Rights of Lien Holder.** A thresher's lien exists from the commencement of the threshing,[64] and where a certain time is allowed by statute for the filing of a thresher's lien, the owner of a thresher who files such notice within the time prescribed is entitled to priority over one who has purchased the grain before the filing of the lien,[65] even though such purchase is made in good faith and in ignorance of the existence of the lien.[66]

[§ 133] **D. Waiver or Loss of Lien.** Where the existence of a lien for threshing is dependent upon possession of the grain by the lienee, the lien is not waived by depositing the grain in an elevator,[67] nor even by leaving it on the premises of the owner in charge of a third person;[68] nor is a lien, once acquired, lost by the lienee's measuring the grain in a manner not authorized by law.[69] But the filing of a lien for threshing grain is not the institution of an action, and such claim for a lien may be abandoned and an action at law brought to recover the amount claimed.[70] It has been held that the mere failure of a thresher to thresh all the grain under a threshing contract did not deprive him of his right to enforce his lien as against the grain he had actually threshed.[71]

[§ 134] **E. Proceedings to Enforce—1. Nature and Form of Proceedings.** A thresher's lien is usually foreclosed in the same manner as a chattel mortgage,[72] and the rules and principles of law applicable to the foreclosure of chattel mortgages apply to proceedings to foreclose a thresher's lien.[73]

[§ 135] **2. Pleading.** The complaint in an action to foreclose a thresher's lien must of course state facts sufficient to constitute a cause of action under the statute,[74] and in particular must usually allege that plaintiff owned and operated the threshing machine,[75] and must state the quantity of grain threshed,[76] the amount due,[77] and the town or county in which the threshing was done;[78] and where the lien covers only part of a mass, the complaint must state the kind and quantity of grain subject to the lien.[79]

[§ 136] **3. Defenses.** In a suit for the conversion of grain upon which plaintiff had a thresher's lien, it is no defense that plaintiff's name was stated differently in the bond given by him to pay all damages from fire caused by his threshing outfit, and in the statement of lien filed.[80]

[§ 137] **4. Evidence.** The general rules of evidence are applicable, and it has been held that a party seizing grain under a thresher's lien must establish that the grain was grown on the land described in the statement of lien.[81]

[§ 138] **5. Verdict and Findings.** The findings, as in other cases, must be sufficient to support the judgment.[82]

[§ 139] **6. Filing Record of Sale.** While, under the North Dakota statutes,[83] an officer making the sale on foreclosure of a thresher's lien should file a record of the same with the register of deeds, failure to do so within the prescribed time will not invalidate the sale.[84]

XI. LIEN FOR CLEARING LAND

[§ 140] **A. Right to Lien.** In some states statutes have been enacted conferring a lien upon land for services in clearing and improving land, at the request of the owner or person in lawful posses-

Compare Hollingsworth v. Lacharite, 19 Man. 379.

58. Gordon v. Freeman, 112 Minn. 482, 128 NW 834, 1118.

59. Gorthy v. Jarvis, 15 N. D. 509, 108 NW 39.

[a] **If grain is grown in two counties,** the lien statement should be executed in duplicate and filed in both counties. Gorthy v. Jarvis, 15 N. D. 509, 108 NW 39.

60. Mitchell v. Monarch El. Co., 15 N. D. 495, 107 NW 1085, 11 AnnCas 1001 and note.

61. Mitchell v. Monarch El. Co., 15 N. D. 495, 107 NW 1085, 11 AnnCas 1001 and note.

62. Mitchell v. Monarch El. Co., 15 N. D. 495, 107 NW 1085, 11 AnnCas 1001 and note; Moher v. Rasmusson, 12 N. D. 71, 95 NW 152.

[a] **Number of bushels of each kind need not be shown** if total quantity is stated. Mitchell v. Monarch El. Co., 15 N. D. 495, 107 NW 1085, 11 AnnCas 1001 and note.

63. Mitchell v. Monarch El. Co., 15 N. D. 495, 107 NW 1085, 11 AnnCas 1001 and note; Moher v. Rasmusson, 12 N. D. 71, 95 NW 152.

64. Mitchell v. Monarch El. Co., 15 N. D. 495, 107 NW 1085, 11 AnnCas 1001 and note.

65. Mitchell v. Monarch El. Co., 15 N. D. 495, 107 NW 1085, 11 AnnCas 1001 and note; Hahn v. Sleepy Eye Milling Co., 21 S. D. 324, 112 NW 843.

66. Hahn v. Sleepy Eye Milling Co., 21 S. D. 324, 112 NW 843.

67. Gordon v. Freeman, 112 Minn. 482, 128 NW 834, 1118.

68. Hogue v. Sheriff, 1 Wash. T. 172.

69. Conn v. Fitzgerald, 5 Terr. L. 346.

70. Brown v. Smith, 24 S. D. 231, 123 NW 689.

71. Hollingsworth v. Lacharite, 19 Man. 379.

72. Martin v. Hawthorne, 5 N. D. 66, 63 NW 895; Parker v. Lisbon First Nat. Bank, 3 N. D. 87, 54 NW 313.

73. Phelan v. Terry, 101 Minn. 454, 112 NW 872.

74. See cases infra this note, and notes 75–79.

[a] **Sufficiency of complaint.**—An allegation in a complaint for a threshing lien, under the provisions of L. [1889] c 88, that "the said S. J. Flynn [plaintiff's assignor] duly executed his claim for a lien upon the said grain hereinbefore described, for threshing the same . . . and caused the said claim to be filed in the office of the register of deeds of Kingsbury county," is sufficient, as against an objection taken at the trial that the complaint does not state facts sufficient to constitute a cause of action. When such an objection to the complaint is taken at the trial after an issue of fact has been raised by the answer, greater latitude of presumption may be indulged in to sustain the complaint than when the objection is taken by demurrer interposed at the proper time; and if there is not an entire absence of a necessary allegation, but simply a defective statement of the facts required to be stated, the complaint will ordinarily be held sufficient, as against an objection to it taken at the trial. Anderson v. Alseth, 6 S. D. 566, 568, 62 NW 435.

[b] **Defects cured by judgment.**—Where a claim of lien for services in harvesting and threshing wheat is set out in the complaint for foreclosure, and no objection is made by way of demurrer to the sufficiency of the description in the lien notice, the defect is cured by the judgment of foreclosure. Pain v. Isaacs, 10 Wash. 173, 38 P 1038.

75. Parker v. Lisbon First Nat. Bank, 3 N. D. 87, 54 NW 313 (holding an allegation that plaintiff was "running and operating a threshing machine" demurrable).

76. Moher v. Rasmusson, 12 N. D. 71, 95 NW 152.

77. Phelan v. Terry, 101 Minn. 454, 112 NW 872.

[a] **What sufficient.**—An allegation that the threshing was done on an express contract by which plaintiff's compensation was fixed at a certain amount per day for the time employed is a sufficient compliance with a statute requiring a statement of the rate per bushel plaintiff was to receive as compensation. Phelan v. Terry, 101 Minn. 454, 112 NW 872.

78. Phelan v. Terry, 101 Minn. 454, 112 NW 872.

79. Gorthy v. Jarvis, 15 N. D. 509, 108 NW 39.

80. Hahn v. Sleepy Eye Milling Co., 21 S. D. 324, 112 NW 843.

81. Martin v. Hawthorne, 5 N. D. 66, 63 NW 895.

82. Anderson v. Alseth, 6 S. D. 566 62 NW 435 (holding that where, in an action under the provisions of L. [1889] c 88, the court failed to find that plaintiff's assignor owned and operated the threshing machine with which the grain was threshed, either in terms or in substance, and that the lien filed contained the statement of facts required by § 3 of the act, such findings are insufficient to sustain the judgment).

83. N. D. Laws (1889) c 26 § 7; c 88.

84. Martin v. Hawthorne, 5 N. D.

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sion.[85] Such statutes being in derogation of the common law must be strictly construed.[86] Accordingly one seeking to charge with such a lien the property of another must show a strict compliance with the statute conferring the lien.[87]

Lien confined to land cleared. Under a statute creating a lien on land for services rendered in clearing land, no lien can be imposed on a particular tract for services rendered in clearing a different tract.[88]

[§ 141] **B. Proceedings to Perfect.** The notice of lien required to be filed in such cases must be certain to a reasonable intent,[89] especially as regards the description of the land cleared.[90]

[§ 142] **C. Proceedings to Enforce. Pleading.** The complaint to enforce the lien must sufficiently describe the land upon which the lien is claimed;[91] the description must not be inconsistent with that given in the notice of the lien,[92] and is insufficient if vague and unintelligible.[93]

Issues, proof, and variance. The well settled rules as to issues, proof, and variance[94] must be observed.

Evidence. Complying with the rules obtaining in civil actions generally,[95] the evidence must be sufficient to sustain the verdict or findings.[96]

Judgment or decree. A decree for a lien for clearing land cannot be sustained, where the descriptions of the property in the complaint, notice of lien, and decree are inconsistent each with the others.[97]

AGRICULTURIST. A student of the science of agriculture.[1]

AGRI LIMITATI. Literally "Fields limited."[2] Lands whose boundaries are strictly limited by the lines of government surveys, so that when they border on streams or other waters they are not entitled to accretion or alluvion or to the islands in the stream.[3]

AGROUND. A nautical term signifying that the bottom of a ship rests on the ground for want of sufficient depth of water.[4]

AGTS. An abbreviation for the word "agents."[5]

AGUAS. Waters.[6]

AID. To help; to support; to sustain; to succor or to relieve;[7] to assist; to supplement the efforts of another;[8] to help or assist or strengthen;[9] to support by furnishing either strength or means to help to success;[10] the doing of some act whereby

66, 63 NW 895; Johnson v. Day, 2 N. D. 295, 50 NW 701.

85. See statutory provisions. See also Ivanhoff v. Teale, 47 Mont. 115, 130 P 972; Yasui v. Hallam, 64 Or. 366, 130 P 638; Thornton v. Hallam, 64 Or. 233, 129 P 1046; Zizich v. Holman Security Inv. Co., 77 Wash. 392, 137 P 1028, 139 P 57.

[a] **Contractor not "person in lawful possession."**—Lord L. Or. § 7439 provides that any person who shall clear any land at the request of the owner or "person in lawful possession" shall have a lien for his wages and charges which shall be preferred, etc. It was held that a mere contractor who goes on land to perform services thereon for the owner does not thereby acquire possession within such section, so as to confer on his servants the right to a lien for wages and charges for clearing the land. Yasui v. Hallam, 64 Or. 366, 130 P 638; Thornton v. Hallam, 64 Or. 233, 129 P 1046.

86. Thornton v. Hallam, 64 Or. 233, 129 P 1046.

87. Thornton v. Hallam, 64 Or. 233, 129 P 1046.

88. Thornton v. Hallam, 64 Or. 233, 129 P 1046.

89. Ivanhoff v. Teale, 47 Mont. 115, 130 P 972; Thornton v. Hallam, 64 Or. 233, 129 P 1046.

90. Ivanhoff v. Teale, 47 Mont. 115, 130 P 972; Thornton v. Hallam, 64 Or. 233, 129 P 1046.

[a] **Description of land cleared.**—(1) It is a prerequisite to validity of a lien for clearing land that, as required by Rev. Code § 7291, the description of the property in the notice of lien be such that the property can be identified therefrom. Ivanhoff v. Teale, 47 Mont. 115, 130 P 972. (2) Where a description of a tract of land on which it was sought to impose a lien for clearing services did not close, and was therefore vague and unintelligible, it did not constitute a description of the land by metes and bounds or by legal subdivisions, as required by Lord L. Or. § 7440, and was insufficient. Thornton v. Hallam, 64 Or. 233, 129 P 1046.

91. Thornton v. Hallam, 64 Or. 233, 129 P 1046.

92. Ivanhoff v. Teale, 47 Mont. 115, 130 P 972.

93. Thornton v. Hallam, 64 Or. 233, 129 P 1046.

94. See Pleading [31 Cyc 670].

[a] **Illustration.**—Where the complaint in an action to foreclose a laborer's lien for clearing land was drawn on the theory that plaintiff had performed his contract and demanded a deed to lots which were to be taken in part payment, and that defendant's title to such lots was defective, a finding that defendant had directed plaintiff to quit work was not within the issues. Zizich v. Holman Security Inv. Co., 77 Wash. 392, 137 P 1028, 139 P 57.

95. See Evidence [17 Cyc 753]; New Trial [29 Cyc 820]; Trial [38 Cyc 1532].

96. Zizich v. Holman Security Inv. Co., 77 Wash. 392, 137 P 1028, 139 P 57.

[a] **Evidence sufficient to show.**—(1) That plaintiff had been paid in full for his work in money and credits upon the several contracts. Zizich v. Holman Security Inv. Co., 77 Wash. 392, 137 P 1028, 139 P 57. (2) That the contract was breached by plaintiff and not by defendant. Zizich v. Holman Security Inv. Co., supra.

[b] **Evidence insufficient** to sustain a finding that defendant had directed plaintiff to quit work. Zizich v. Holman Security Inv. Co., 77 Wash. 392, 137 P 1028, 139 P 57.

97. Ivanhoff v. Teale, 47 Mont. 115, 130 P 972.

1. Downing v. Indiana State Bd. of Agriculture, 129 Ind. 443, 452, 28 NE 123, 614 [cit New English D.].

Agriculture defined see Agriculture § 1.

2. Smith v. St. Louis Public Schools, 30 Mo. 290, 300 [quot Frank v. Goddin, 193 Mo. 390, 397, 91 SW 1057, 112 AmSR 493].

3. Hardin v. Jordan, 140 U. S. 371, 380, 11 SCt 808, 838, 35 L. ed. 428.

[a] **In Roman law** they consisted of territory acquired by conquest and assigned to the veteran soldiers. "The method of surveying such a territory was to draw lines towards the four quarters of the heavens, parallel and crosswise, in order to effect a uniform division of the lots, and to fix immutable boundaries between them. These boundaries, called limites, were marked by a slip of land left for the purpose untouched by cultivation, as balks or highways. The squares of land contained either thirty-three or a hundred and thirty-three acres; that is, they were either ten or twenty actus square. Lands thus surveyed and appropriated were called limited lands—agri limitati—and when they bordered on streams or other waters they were not entitled, as other riparian lands were, to any accretion or alluvion, or to islands in the stream, but were strictly confined to the lines by which they were actually or theoretically limited." Hardin v. Jordan, 140 U. S. 371, 399, 11 SCt 808, 35 L. ed. 428.

4. Century D.

[a] **Aground near fairway.**—A vessel slowly dragging through the mud at about one mile per hour and assisting her progress, from time to time, by putting her engines full speed astern—the last occasion being for the first three out of the eight minutes preceding the collision—is not bound to exhibit two red lights, not being aground within the Regulations for Preventing Collisions at Sea (1897) art 11, providing that "a vessel aground in or near a fairway shall carry the above light or lights and the two red light prescribed by article 4." The Bellanoch, [1907] P. 170, 174 [aff [1907] A. C. 269].

5. Reid v. McChesney, 8 U. C. C. P. 50, 53.

Agent defined see Agency § 4.

6. Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 247, 39 P 762. See Waters [40 Cyc 542].

[a] **In Philippines and in Porto Rico.**—The subject of water rights and irrigation was a theme of legislation in Spain as early as the Forum Judicum. Book VIII. (IV) 29, 31. A Ley de Aguas was enacted in Spain in 1866 and extended to the Philippines in 1871, since when it has been continuously in force there. Montano v. Insular Govt., 12 Philippine 572, 584; Ker v. Cauden, 6 Philippine 732, 735, 4 Off. Gaz. 732. In 1879 a new and elaborate Ley de Aguas was adopted for the peninsula. It consists of fifteen chapters with some general provisions and is regarded as a very complete piece of legislation. In 1886 it was extended to Porto Rico and is (or was recently) still in force there but it was never extended to the Philippines. The sovereign rights in the beds of nonnavigable rivers in Porto Rico passed by cession to the United States and are not limited by the federal laws of riparian ownership. Arpin v. Porto Rico Power, etc., Co., 2 Porto Rico Fed. 314.

7. Burke v. Snively, 208 Ill. 328, 340, 70 NE 327 [cit Webster D.].

8. Rapalje & L. L. D. [quot State v. Tally, 102 Ala. 25, 65, 15 S 722; Raiford v. State, 59 Ala. 106, 108; Peo. v. Bond, 13 Cal. A. 175, 185, 109 P 150].

9. State v. Snell, 5 OhS&CP 670, 673, 2 OhNP 55.

10. Synod of Dakota v. State, 2 S.

the party is enabled, or by which it is made easier for him, to do the principal act or effect some primary purpose.[11]

Phrases in which the word has been used have received judicial interpretation, such as "aid, abet or assist,"[12] "aid and abet,"[13] "aid and assist,"[14] "aid and comfort,"[15] "aid and relief,"[16] "aid and support,"[17] "aid of any such [joint stock] company, corporation, or association,"[18] "aid any negro or other slave to run away,"[19] "aid . . . any prisoner to escape,"[20] "aid in the building of," or "in the completion of," or "in the construction of,"[21]

D. 366, 374, 50 NW 632, 14 LRA 418 [cit Webster D.].

11. Wiley v. McRee, 47 N. C. 349, 351.

[a] **"Aid" and "abet" compared and distinguished.**—(1) The words "aid" and "abet," in legal phrase, are much the synonyms of each other. They comprehend all assistance rendered by acts, or words of encouragement or support, or presence, actual or constructive, to render assistance should it become necessary. Jones v. State, 174 Ala. 53, 57, 57 S 31; Raiford v. State, 59 Ala. 106, 108 [quot Morris v. State, 146 Ala. 66, 96, 41 S 274; State v. Tally, 102 Ala. 25, 65, 67, 15 S 722]; Loeb v. State, 6 Ga. A. 23, 30, 64 SE 338. (2) But while "aid" means to help or assist or strengthen, to assist, to supplement the efforts of another (see supra notes 7–10), (3) "abet" means to incite or encourage a person to commit a crime (Rapalje & L. L. D. [quot State v. Tally, supra; Peo. v. Bond, 13 Cal. A. 175, 185, 109 P 150]), to encourage, counsel, incite, or assist in a criminal act (State v. Snell, 5 OhS&CP 670, 673, 2 OhNP 55; Black L. D. [quot State v. Davenport, 156 N. C. 596, 614, 72 SE 7]). (4) By the amalgamation of the two words in meaning, "abet" has come to mean to aid by presence, actual or constructive, and incitement and aid means not only actual assistance, the supplementing of another's efforts, but also presence for the purpose of such actual assistance as the circumstances may demand or admit of, and the incitement and encouragement which the fact of such presence for such purposes naturally imparts or implies. State v. Tally, supra; Black L. D. [quot State v. Davenport, supra]. See also Peo. v. Dole, 122 Cal. 486, 55 P 581, 68 AmSR 50 [quot Loeb v. State, supra; State v. Corcoran, 7 Ida. 220, 244, 61 P 1034]; Peo. v. Lewis, 9 Cal. A. 279, 281, 98 P 1078; State v. Allen, 34 Mont. 403, 416, 87 P 177.

[b] **"Procure" may be used as synonymous** with "aid" or "abet." Vogel v. State, 138 Wis. 315, 332, 119 NW 190.

12. White v. Peo., 81 Ill. 333, 337; State v. Douglass, 44 Kan. 618, 627, 26 P 476; State v. Flynn, 76 N. J. L. 473, 475, 72 A 296.

[a] **"Consent" distinguished.**—White v. Peo., 81 Ill. 333, 337; State v. Douglass, 44 Kan. 618, 26 P 476.

13. U. S. v. Gooding, 12 Wheat. (U. S.) 460, 475, 6 L. ed. 693; Jones v. State, 174 Ala. 53, 57, 57 S 31; Loeb v. State, 6 Ga. A. 23, 30, 64 SE 338; State v. Jones, 115 Iowa 113, 119, 88 NW 196; Kuney v. Dutcher, 56 Mich. 308, 312, 22 NW 866; Shannon v. Peo., 5 Mich. 71, 84; Peo. v. Moss, 113 App. Div. 329, 337, 99 NYS 138; State v. Davenport, 156 N. C. 596, 614, 72 SE 7 [quot Black L. D. 54 (cit 4 Blackstone Comm. 34)]; State v. Lingafelter, 77 Oh. St. 523, 527, 83 NE 897. See generally Criminal Law [12 Cyc 185 et seq].

[a] **In civil cases** the term implies an intentional participation in an illegal act with knowledge of the object to be attained. Lomita Land, etc., Co. v. Robinson, 154 Cal. 36, 47, 97 P 10, 18 LRANS 1106. In Hunt v. Di Bacco, 69 W. Va. 449, 455, 71 SE 584, the court said: "'Proof that a person is present at the commission of a trespass without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance, and approved it, and was thereby aiding and abetting the same.' The same rule was announced by the Supreme Court of Missouri in McMannus v. Lee, 43 Mo. 206, 96 AmD 386. The following authorities are also in point: Gillon v. Wilson, 3 T. B. Mon. (Ky.) 216; State v. Moeninger, 108 Mo. 166, 18 SW 990; Bishop v. Ely, 9 Johns. (N. Y.) 294; Daingerfield v. Thompson, 33 Gratt. (74 Va.) 136, 36 AmR 783; 3 Greenleaf on Evidence, sec. 41."

[b] **"Conspiracy" distinguished.**—In Peo. v. Bond, 13 Cal. A. 175, 187, 109 P 150, the court said: "'Conspiracy' implies an agreement to commit the crime, while to 'aid and abet' requires actual participation in the act constituting the offense. It is therefore manifest that one may 'aid and abet' without having previously entered into a conspiracy to commit the crime." See also Jones v. State, 174 Ala. 53, 57 S 31.

14. See cases infra this note.

[a] **Absconding debtor.**—(1) Simply advising a debtor to run away is not equivalent to "aiding, or assisting," and will not sustain an action under the statute, now Revisal (1905) c 43 § 1939, making a person who shall aid, or assist in removing, a debtor out of the county in which he resides, with intent to delay, hinder, and defraud creditors, liable for the debts of the debtor in the county. "Most persons are willing to give advice: some do it officiously; but if called on to give aid or assistance, the subject is looked at in a different point of view. Advice costs nothing: it is but words. Aid or assistance, is the doing of some act whereby the party is enabled, or it is made easier for him, to do the principal act, or effect some primary purpose." Wiley v. McRee, 47 N. C. 349, 351. (2) "Aiding" an absconding debtor is the doing of some act whereby he is enabled, or it is made easier for him, to do the particular act. Going with the debtor to the depot and bringing back his horse, thereby making it easier for him to abscond and leave the country secretly so as not to attract the attention of his creditors, by giving to the movement the appearance of an ordinary act of a gentleman going to market to sell his cotton, is "aiding" within the meaning of the law. Moss v. Peoples, 51 N. C. 140, 141. (3) Where a party persuades a debtor who is temporarily absent from the county of his residence not to go back into that county but to go to distant parts, and promises, if he will do so, to send his property from his residence to him, and afterward he does send such property to him, and aids him with money to abscond from where he then is, and goes part of the way with him, for the purpose of defrauding his creditors, he is liable under the statute. Moore v. Rogers, 48 N. C. 90, 94. (4) It includes helping him by carrying him or his property a part of the way, and this, although the person who helped him did not convey the debtor or his goods entirely out of the one county into the other. Godsey v. Bason, 30 N. C. 260, 264.

15. U. S. v. Greathouse, 26 F. Cas. No. 15,254, 4 Sawy. 457, 472 [cit Young v. U. S., 97 U. S. 39, 24 L. ed. 992]. See Treason [38 Cyc 956].

[a] **Munitions of war to the Confederacy.**—The words "aid and comfort," as used in the act of March 12, 1863, 12 St. 820, providing that the owner of property captured or abandoned in the war of the rebellion may bring suit for the proceeds thereof, on proof of his ownership and right for such proceeds, and that he had never given "aid or comfort" to the rebellion, are used in the same sense as they are in the clause of the constitution defining treason; that is, in their hostile sense. The acts of aid and comfort which will defeat a suit must be of the same general character as those necessary to convict of treason, where the offense consists in giving "aid and comfort" to the enemies of the United States. But there may be "aid and comfort" without treason, for "treason is a breach of allegiance, and can be committed by him only who owes allegiance, either perpetual or temporary." The benefits of the statute are withheld, not for treason only, but for giving "aid and comfort" as well. The claimant, to be included, need not have been guilty of treason. It is sufficient if he has done that which would have made him a traitor if he had owed allegiance to the United States. A nonresident alien was not a traitor, but by entering into and confirming a contract of copartnership with the state of North Carolina in 1863 to provide the country with its chief requirements from abroad, warlike supplies, and to assist in running out through the blockade a quantity of cotton for the state, to enable it to obtain the benefit of the high price in Great Britain, and supplying the government of the Confederacy with all kinds of munitions of war, and acting as agent of North Carolina for the sale in England of its obligations for the delivery of cotton, was guilty of acts which would have made him guilty of treason had he been a citizen of the United States, and therefore gave "aid and comfort" to the rebellion. Young v. U. S., 97 U. S. 39, 62, 24 L. ed. 992.

[b] **"Some aid and comfort."**—In Trott v. Wheaton, 5 R. I. 353, 355, where a testator made a legacy in the nature of an annuity to his sister with the view of rendering her "some aid and comfort . . . in her decline of years," it was held that these words indicated that the provision he made in her favor was to take effect at once, and not; as contended by the executors, that it was not to take effect until ten years after the death of the testator.

16. Russell v. Providence, 7 R. I. 566, 574 (holding that the term "aid and relief," in an appropriation by a city council for the aid and relief of families of volunteers in the Civil War, implies want, need, or necessity on the part of the applicant; hence a volunteer has no contract right to a share of the appropriation on behalf of his family).

17. Grimm v. Taylor, 96 Mich. 5, 7, 55 NW 447 (holding that the words "aiding and supporting Ann Grimm and children," in a claim against a decedent's estate, are broad enough to include aid and support by contribution of money).

18. Walker v. Cincinnati, 21 Oh. St. 14, 54, 8 AmR 24 (holding that the constitutional provision providing that the general assembly shall never authorize any city, etc., to aid any joint stock company, corporation, or association whatever, cannot be construed to preclude the legislature from authorizing a city to build a steam railroad).

19. Crosby v. Hawthorn, 25 Ala. 221, 223.

20. Robinson v. State, 82 Ga. 535, 544, 9 SE 528; Brannan v. State, 44 Tex. Cr. 399, 401, 72 SW 184. See Escape [16 Cyc 542].

21. See cases infra this note.

[a] **Bridge.**—Under a statute authorizing counties to aid in the construction of bridges, the word "aid"

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"aid in the illegal admission of imports,"[22] "aid in the maintaining of a nuisance,"[23] "aids or abets,"[24] "any other aid" to an offender,[25] "encourage, aid or abet," and "counsel, advise or assist,"[26] "in aid of,"[27] "in aid of any individual, association, or corporation,"[28] "in his aid,"[29] "receiving aid, advice, or assistance."[30]

(Cross references.[31])

AIDER.[32]

AIDER AND ABETTOR. One who advises,

means that the county may contribute toward the cost of the improvement by issuing its bonds, a portion of the fund necessary to make the improvement to be contributed in some other manner, as by grant from the state, donations, by two counties bordering on the river uniting in the enterprise, etc., but does not necessarily repel the conclusion that the county may construct the desired improvement for the benefit of the public. Union Pac. R. Co. v. Colfax County, 4 Nebr. 450, 455.

[b] **Railroad.**—(1) A statute entitled, "An act to limit and determine the time for which counties, cities, townships, towns and precincts in the state shall be liable and holden to issue 'aid' for the building of any railroad in pursuance of any vote taken in conformity to the laws of the state," should be construed to cover and embrace subscriptions to capital stock of a railroad company in "aid" of it, for subscription to stock is one form of "aid," and hence the act may determine the time within which such municipality shall be liable and holden to make subscriptions to capital stock of a railroad company in pursuance of a vote, although no mention of subscriptions is made in the title of the act. Peo. v. Granville, 104 Ill. 285, 291. (2) The words "aid in the completion of," as used in a statute authorizing counties to subscribe to the stock of a railroad when necessary to aid in its completion, must be taken in their ordinary colloquial sense. In its narrow significations the word "completion" means to carry out something already begun, to fill out something already outlined, and, as used in the statute, the term means to come to the assistance of a railroad begun and contemplated and aid in accomplishing its end; that is, to complete it to its terminus. Coler v. Stanly County, 89 Fed. 257, 265, 266. (3) The word "aid," as used in a statute authorizing any county or city to issue bonds to "aid" in the construction of any railroad or any other work of internal improvement, may include the donation of a bond. State v. Babcock, 19 Nebr. 230, 237, 27 NW 98.

22. U. S. v. Mescall, 164 Fed. 584, 586 (as including aid given either before or after the fact).

23. State v. Frazier, 79 Me. 95, 98, 8 A 847 (where, upon an indictment for aiding in the maintaining of a nuisance under the statute, it was held that one who knowingly consents to the illegal use of a tenement for a house of ill fame is liable, but the mere fact that one has control of a tenement does not make him liable; he must be proved to consent to the illegal use).

24. Kelliher v. U. S., 193 Fed. 8, 13, 114 CCA 128 (holding that the words "aids or abets," as used in Rev. St. § 5209, U. S. Comp. St. [1901] p 3497, providing that every person who, with intent to deprive a national banking association of its funds, aids or abets any clerk or agent in any violation of such section shall be guilty of a misdemeanor, are to be construed according to their natural import, and are satisfied by proof that accused actually participated in such misappropriation, and of concurring acts performed by him to that end).

25. State v. Doty, 57 Kan. 835, 838, 48 P 145; State v. Fry, 40 Kan. 311, 318, 19 P 742.

26. Omer v. Com., 95 Ky. 353, 361, 25 SW 594, 15 KyL 694; True v. Com., 90 Ky. 651, 653, 654, 14 SW 684, 12 KyL 594.

27. In re Newmarch, 9 Ch. D. 12, 18 (where a testator charged his general realty "in aid of my personal estate and in exoneration of my other real estate" with the payment of just debts and testamentary expenses. It was held that debts in this provision did not include a mortgage debt on realty specifically devised). See also Buckley v. Buckley, L. R. 19 Ir. 544.

[a] **Canals.**—"The inhibition against making appropriations from the treasury of the State in 'aid' of canals, if the word 'aid' be given its natural and ordinary meaning, would deny to the legislature the power to appropriate money from the treasury for any of the purposes of the Illinois and Michigan canal here asked to be enjoined, if the word 'canals,' used in the body of the sentence, includes the Illinois and Michigan canal." Burke v. Snively, 208 Ill. 328, 340, 70 NE 327.

[b] **Judge.**—In McDowell v. U. S., 74 Fed. 403, 405, 20 CCA 476, in construing a statute providing that it shall be the duty of every circuit judge, whenever in his judgment the public interest requires, to designate and appoint the district judge of any judicial district within his circuit to hold a district or circuit court in the place of or "in aid of" any other district judge within the same circuit, it was held that "in aid of" naturally implied some existing judge to be aided, so that such a circuit judge had no power to make such an appointment when the office is vacant.

[c] **Schools.**—(1) Under the constitution of a state providing that no money or property of the state shall be appropriated to aid any sectarian school, society, etc., it has been held that this prohibition applies to all appropriations to such schools, whether made as a donation or in payment for services rendered the state by such schools. Synod of Dakota v. State, 2 S. D. 366, 50 NW 632, 14 LRA 418. (2) And in Cook County v. Chicago Industrial School, 125 Ill. 540, 570, 18 NE 183, 8 AmSR 386, 1 LRA 437, it was said: "It can not be said that a contribution is no aid to an institution because such contribution is made in return for services rendered or work done. A school is aided by the patronage of its pupils even if they do pay for their tuition." It was contended in that case that as these institutions furnish tuition, clothing, care, etc., in return for the money received by them, and as they earn what they receive and are not the recipients of any gift or donation, nothing was paid in aid of or to help to support or sustain them. This contention was not allowed. (3) The phrase "aid of common schools," in a constitutional provision providing that the school fund, etc., may be appropriated in aid of common schools, but for no other purpose, "has not in itself a certain and definite meaning. . . . And being capable of covering more or less ground, according to the intention of the framers of the constitution, we are to adopt that sense which, without departing from the import of the words, best harmonizes with the scope, object, and design of the provision." The term in such connection is limited to mean that such fund shall be used exclusively in aid of common schools in the same manner in which the school fund has been previously appropriated, and therefore an act directing the purchase of Collins' Historical Sketches of Kentucky for each school district is unconstitutional in so far as it provides for the appropriation of any part of the school fund for that purpose. Collins v. Henderson, 11 Bush (Ky.) 74, 84.

28. See cases infra this note.

[a] **Counties.**—An act authorizing certain counties to erect a bridge which might be either a free foot and wagon bridge for the traveling public, or a railroad bridge, or both combined, was an act in aid of an individual, association, or corporation within the meaning of the constitutional prohibition. Garland v. Montgomery County, 87 Ala. 223, 6 S 402.

[b] **Policemen.**—An act requiring a city to pension policemen who were injured in the service, or the family of policemen killed in the service, or of patrolmen who served in the force for twenty years or more, etc., was a grant of money in aid of an individual, within the meaning of that phrase as used in the constitution, and hence was void. State v. Ziegenheim, 144 Mo. 283, 45 SW 1099, 66 AmSR 420.

29. Harvey v. Brevard, 98 N. C. 93, 94, 3 SE 911 (where in construing the statute providing in effect that actions against a public officer should be tried in the county where the cause arose, and embracing within this provision actions against all who by his command or in his aid should do anything touching the duties of such office, the court said: "The words, 'in his aid,' immediately following the words, 'by his command,' were meant to extend the immunity to all who assisted and took part in the act with his assent, though not by his direct orders, for all such stand upon the same footing").

30. Hubbard v. Mutual Reserve Fund L. Assoc., 100 Fed. 719, 724, 40 CCA 665 (where it was said: "If the insured, being, as he supposed, in need of a physician, went to one for the purpose of consulting him as to what was the matter with him, and had an interview, answering such inquiries as the physician deemed pertinent, receiving aid, advice, or assistance from him, the insured consulted a physician, within the meaning of the interrogatory").

31. **Aid:**
Association or society see Beneficial Associations and cross references there given.
Bonds:
Generally see Municipal Corporations [28 Cyc 1575 et seq].
In favor of railroad see Municipal Corporations [28 Cyc 1579].
In:
Crime see Criminal Law [12 Cyc 186].
Escape of:
Apprentice see Apprentices [3 Cyc 556].
Prisoner see Escape [16 Cyc 542].
Suicide see Suicide [37 Cyc 521].
Of internal improvement see Public Lands [32 Cyc 929].
To:
Charitable corporation see Charities [6 Cyc 974].
Corporation by:
County see Counties [11 Cyc 518].
Municipal corporation see Municipal Corporations [28 Cyc. 1553].
School district see Schools and School Districts [35 Cyc 976].
Town see Towns [38 Cyc 643, 649].
Railroad by:
Land grant see Public Lands [32 Cyc 931].
Taxation see Taxation [37 Cyc 968].
See also Aider and Abettor post.

32. **Aider:**
By verdict:
In replevin see Replevin [34 Cyc 1467, 1484].
Of:
Indictment see Indictments and Informations [22 Cyc 485].
Instruction see Trial [38 Cyc 1815].

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counsels, procures, or encourages another to commit a crime, whether personally present or not at the time and place of the commission of the offense;[33] any person who is present at the commision of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances and approves the same.[34] (Cross references.[35])

AIDOIOMANIA. A form of insanity where a man longs for every woman he sees, married or unmarried.[36]

AID SOCIETY or AID ASSOCIATION.[37]

AIL. To affect with pain or uneasiness, either physical or mental; to trouble; to be the matter with; to affect in any way; used to express some uneasiness or affection, the cause of which is unknown.[38]

AILMENT.[39] Disease; indisposition; morbid affection of the body; not ordinarily applied to acute diseases;[40] pain; illness.[41]

AIM. To direct or point anything, as a weapon or missile, toward an object;[42] to point intentionally with a deliberate purpose.[43]

AIR. The respirable fluid which surrounds the earth and forms its atmosphere.[44]

Air brush. A combination device whereby liquid colors may be atomized by a blare of compressed air and blown upon a suitable surface so as to form any desired representation, such as a picture, according to the will or skill of the manipulator.[45]

By verdict:—Continued
Of:—Continued
Pleading see Pleading [31 Cyc 715].
In crime see Criminal Law [12 Cyc 186].
To:
Indictment see Indictments and Informations [22 Cyc 218].
Pleading:
Incomplete count see Pleading [31 Cyc 123].
Insufficient plea see Pleading [31 Cyc 145].

33. Flickinger v. U. S., 150 Fed. 1, 8, 79 CCA 515; Pearce v. Terr., 11 Okl. 438, 445, 68 P 504. See also Landrum v. Com., 123 Ky. 472, 96 SW 587, 29 KyL 924; Wheeler v. Com., 120 Ky. 697, 87 SW 1106, 27 KyL 1090; Hunt v. Di Bacco, 69 W. Va. 449, 71 SE 584; Vogel v. State, 138 Wis. 315, 119 NW 190. And see generally Criminal Law [12 Cyc 186].

[a] **"Aider or abettor."**—See Brinegar v. State, 82 Nebr. 558, 561, 118 NW 475.

34. Brown v. Perkins, 1 Allen (Mass.) 89, 98 [quot Hunt v. Di Bacco, 69 W. Va. 449, 455, 71 SE 584].

35. **Aider and abettor:**
Criminal responsibility of, generally see Criminal Law [12 Cyc 186].
In:
Assault with intent to kill see Homicide [21 Cyc 788].
Embezzlement see Embezzlement [15 Cyc 510].
Homicide see Homicide [21 Cyc 683].
Larceny see Larceny [25 Cyc 56, 59].
Rape see Rape [33 Cyc 1436].
Robbery see Robbery [34 Cyc 1806].
Unlawful search see Searches and Seizures [35 Cyc 1275].
Indictment of see Indictments and Informations [22 Cyc 360].
Trial of, generally see Criminal Law [12 Cyc 508].
See also Accessory 1 C. J. 390; Accomplice 1 C. J. 519.

36. Ekin v. McCracken, 11 Phila. (Pa.) 534, 539.

37. See Beneficial Associations and cross references there given.

38. Webster D. [quot Modern Woodmen of America v. Miles, 178 Ind. 105, 109, 97 NE 1009].

[a] **The word is generally used** in interrogatories in which inquiry is made as to the unknown cause of some restlessness or trouble. Universal D. [quot Modern Woodmen of America v. Miles, 178 Ind. 105, 109, 97 NE 1009].

39. See also Disease [14 Cyc 385]; Illness [21 Cyc 1728].

40. Century D. [quot McDermott v. Modern Woodmen of America, 97 Mo. A. 636, 640, 71 SW 833. In this case the applicant for insurance in a beneficiary society was asked, "Have you within the last seven years been treated by or consulted a physician or physicians in regard to personal ailment? . . . If so, give dates, ailment, and physician or physicians name and address," and answered "No." It appeared that he had not only consulted a physician but had also been treated by him for a personal ailment within a few weeks of his application. It was held that this was a breach of the warranty, and that no recovery on the policy could be had].

[a] **What constitutes treatment.**—(1) A person does not "consult" a physician and is not "treated" for an "ailment" within the meaning of a question in an insurance application by merely stating to a physician that he has a headache and receiving medicine therefor, without asking or receiving any professional advice. Modern Woodmen of America v. Miles, 178 Ind. 105, 109, 110, 97 NE 1009. (2) In Hubbard v. Mutual Reserve Fund L. Assoc., 100 Fed. 719, 720, 726, 40 CCA 665, the question, "How long since you consulted or were attended by a physician?" was answered by an applicant for life insurance, "Not since childhood," and because of such answer no answer was recorded to the question, "For what disease or ailment?" In an action upon the policy the evidence showed that within five years preceding the application the applicant had complained to a physician of having suffered from priapism for a number of years, and that he had been treated for such supposed difficulty continuously for over six months, when he was sent to another physician who pronounced his trouble dyspepsia, and prescribed for him accordingly. It was held that, conceding that the applicant as a matter of fact was free from each disease, the evidence showed a breach of the warranty given in the application, that the applicant had not "consulted" physicians for a supposed persistent ailment nor been "attended" nor "prescribed for" by them.

41. Webster D. [quot McDermott v. Modern Woodmen of America, 97 Mo. A. 636, 654, 71 SW 833].

[a] **Pregnancy and confinement** have been held not to be ailments. Rasicot v. Royal Neighbors of America, 18 Ida. 85, 100, 108 P 1048, 138 AmSR 180, 29 LRANS 433.

42. Century D.

[a] **"Point" synonymous.**—(1) The statute declares it to be an unlawful act for anyone over the age of ten years "purposely to point or aim any pistol," etc. The court in construing this statute said: "The word 'aim' is used in the disjunctive, and under such circumstances the statute may be violated by doing either or both of the forbidden acts. The person accused thereunder may be charged (a) with having purposely pointed the pistol at and towards another; (b) with having purposely aimed the weapon at and towards another; (c) with having purposely pointed and aimed the weapon at and towards another." Eaton v. State, 162 Ind. 554, 556, 557, 70 NE 814. (2) Where the statute made it an offense to "point or aim" a gun, etc., and defendant was indicted and convicted for that he "pointed and aimed" a pistol, etc., it was held that the words "point" and "aim" were synonymous and that defendant was charged and convicted of but a single offense. Coleman v. State, 94 Miss. 860, 862, 48 S 181.

43. Livingston v. State, 6 Ga. A. 805, 806, 65 SE 812.

[a] **"Point" not synonymous.**—Livingston v. State, 6 Ga. A. 805, 806, 65 SE 812 (where the court said: "The judge, in the charge excepted to, used the expression, 'pointed and aimed.' The word 'aim' is more specific than the word 'point.' Intention is one of the connotations of the word 'aim,' but not of the word 'point.' To aim is to point intentionally, with a deliberate purpose. Crabbe, in his 'English Synonyms,' distinguishes the words 'aim,' 'point,' and 'level,' thus: 'Aim expresses more than the other two words, inasmuch as it denotes a direction towards some minute point in an object, and the others imply direction towards the whole objects themselves. We aim at a bird; we point a cannon against a wall; we level a cannon at a wall. Pointing is of course used with most propriety in reference to instruments that have points; it is likewise a less decisive action than either aiming or leveling. A stick or a finger may be pointed at a person, merely out of derision; but a blow is levelled or aimed with an express intent of committing an act of violence.' The standard dictionaries, in their definitions of the word 'aim,' show that purpose or intention is an element in its meaning. The Supreme Court of Indiana apparently held the contrary view in the case of Eaton v. State, 162 Ind. 554, 70 NE 814 [supra note 42], but that case rests upon its particular facts; and the reasoning of it, so far as it tends to militate against the proposition here ruled, is not valid").

[b] **Georgia statute.**—(1) It is only the intentional pointing or aiming of a gun or pistol that is punishable under the statute. Herrington v. State, 121 Ga. 141, 48 SE 908; Livingston v. State, 6 Ga. A. 805, 65 SE 812; Livingston v. State, 6 Ga. A. 208, 64 SE 709. (2) So an indictment which merely alleges that defendant pointed or aimed a pistol at another, without charging that it was intentional, is fatally defective. Herrington v. State, supra.

44. Century D.

[a] **In construing a covenant for air** from and over a certain alleyway the court said: "By 'air' is meant the atmosphere at its outdoor temperature; air as pleasant and refreshing as the weather permits; not air raised to a supernormal temperature by artificial heat and radiated into the neighboring buildings in hot currents, which instead of cooling and purifying the confined atmosphere of a room, render it less comfortable and even intolerable." St. Louis Safe Deposit, etc., Bank v. Kennett, 101 Mo. A. 370, 388, 74 SW 474.

45. Thayer v. Wold, 142 Fed. 776, 777 [aff 148 Fed. 227, 78 CCA 350].

Air cell. A term descriptive and not merely arbitrary or fanciful.[46]

Air gun. A gun in which condensed air is used as the propelling agent.[47]

(Cross references.[48])

AIR-TIGHT. So tight or close as to be impermeable to air.[49]

AIRWAY. A passage for the admission of air into a mine.[50]

AISLE.[51] In modern acceptation, a passageway giving access to seats.[52]

AJUTAGE. A conical tube applied to the aperture in a pipe by which the flow of water is enlarged.[53]

ALABAMA CURRENCY.[54]

ALARM. As a noun, an urgent call, summons, or notification;[55] as a verb, to fill with anxiety by the prospect of evil.[56]

ALASKA.[57]

ALBACEA. In Spanish law, corresponds to the Anglo-American executor.[58]

ALBEITAR. In Spanish a veterinarian.[59]

ALBOLENE. A mechanical combination of paraffin, which is a product of petroleum, and of ceresia, which is a fossil wax.[60]

46. New York Asbestos Mfg. Co. v. New York Fireproof Covering Co., 62 NYS 339 (where it was held that, as used in connection with the manufacture and sale of fireproof covering or material, the term is not the subject of a valid trade-mark). See Trade-Marks and Trade-Names [38 Cyc 712].

47. Century D.

[a] **"Fire-arms" distinguished.**—A statute prohibited toy pistols, toy revolvers, or other firearms. It was held that the prohibition did not include an air gun. The court said: "These prohibited pistols or revolvers must be fire-arms,—that is, 'weapons which act by the force of gunpowder.' The air-gun or pistol is not prohibited. This air-gun is not a gun or a weapon in the above signification of the words; but called a 'gun,' imitative only of a real gun, to give it dignity to a boy, or to play soldier with." Harris v. Cameron, 81 Wis. 239, 244, 51 NW 437, 29 AmSR 891. See Weapons [40 Cyc 851].

Placing air gun in hands of small boy as negligence per se see Negligence [29 Cyc 460].

48. **Air:**

Brake see Street Railroads [36 Cyc 1458].

Easement of see Easements [14 Cyc 1157].

Obstruction of:

As:

Element of compensation under law of eminent domain see Eminent Domain [15 Cyc 746].

Nuisance see Nuisances [29 Cyc 1187].

By adjoining landowner see Adjoining Landowners §§ 81–87.

Pollution of, as nuisance see Nuisances [29 Cyc 1188].

Ship passing over land in, as trespass see Aerial Navigation § 2 et seq.

See also Air-Tight post; Airway post.

49. Century D.

[a] **"Water-tight" synonymous.**—In Chicago Fruit House Co. v. Busch, 5 F. Cas. No. 2,669, 2 Biss. 472, 479, in considering the use of the word air-tight in specifications for a patent for the floor of an ice reservoir, the court said: "The term 'air-tight' . . . is to be understood the same as 'water-tight;' or, substantially, a tight floor through which the water would not run into the lower room to injure the articles stored there, nor the air escape into the upper room to melt the ice."

50. Wharton L. Lex. See Mines and Minerals [27 Cyc 516].

51. **Aisle:**

Regulation as to use of, in places of public amusement see Theaters and Shows [38 Cyc 257].

Standing or walking in, by passenger as contributory negligence see Carriers [6 Cyc 650].

52. Century D.

[a] **Aisle of theater.**—Under a statute prohibiting the obstruction of the aisles of a theater, the court, per Gildersleeve, J., said: "An aisle is popularily understood to mean the space between the regularly constructed seats set apart as a passageway for ingress and egress, and an audience is entitled to so consider that space and act accordingly. To hold that an aisle is only that amount of space prescribed by the building law would defeat the plain intention of the law and permit the use of chairs in all passageways, to the extent of not encroaching upon the prescribed limit of space, and render such passageways exceedingly dangerous in case of fire or panic. The aisle of a theater must be said to be the aisle laid down in the plans filed —the aisle accordingly constructed, in use, and observable to all persons entering and occupying a theater. The manager of a theater has the right to utilize, to the fullest extent, the seating capacity of his house, so long as he complies with the law, but the law does not permit him to occupy the portion of the auditorium he has voluntarily set apart for aisles with camp stools or chairs." Sturgis v. Coleman, 38 Misc. 302, 304, 77 NYS 886.

[b] **"Aisles or passageways."**—In Waldo v. Seelig, 70 Misc. 254, 256, 126 NYS 798, it was held that where the only entrance to the main floor of a theater is through a center door, and persons entering such door are compelled to pass behind the rows of seats to gain the aisle on either side of such floor, the space in the rear of the seats between the said aisles is embraced within the term "aisles or passageways" of the charter; and, where the gallery is so arranged that the only way a person can pass from one side to the other without going down the stairs, crossing on the main floor, and ascending the stairs is by passing back of the seats, the space back of the seats is a "passageway" within the charter.

53. Schuylkill Nav. Co. v. Moore, 2 Whart. (Pa.) 477.

54. See Currency [12 Cyc 996].

55. Century D.

[a] **False alarm of fire.**—Where one knowingly meddled with the wires or other parts of the telegraph apparatus, with the intention to cause a "false alarm" of fire, and did cause such false alarm, he may be convicted under the act approved Febr. 25, 1871, of "giving, or causing to be given, a false alarm by the fire-alarm telegraph in the city of Mobile, knowing the same to be such," although, in consequence of the irregular manner in which the bells were rung, the firemen were not deceived and induced to turn out with their engines. Koppersmith v. State, 51 Ala. 6, 7.

56. Century D.

[a] **Conspiracy to alarm.**—A statute providing that, if any two or more persons shall confederate for the purpose of "intimidating, alarming, and disturbing" any person or persons they shall on conviction be fined, implied the use of physical force and menace, and involved a breach of the peace; and hence an allegation of a threat to prosecute for selling whisky without a license was not an intimidation, alarming, or disturbing within the statute. Embry v. Com., 79 Ky. 439, 441.

57. **Alaska:**

As:

Indian country see Indians [22 Cyc 109].

As:—Continued

Territory of the United States see Territories [38 Cyc 194].

Jurisdiction:

Of district courts in see Courts [11 Cyc 956].

On appeal from district court of see Courts [11 Cyc 947].

Occupancy rights to lands in see Public Lands [32 Cyc 824].

Right of way in see Public Lands [32 Cyc 996].

[a] **The phrase "district of Alaska,"** as used in an act of congress and an executive order prohibiting "an 'importation of distilled spirits into and within the district of Alaska' . . . includes that portion of the sea along its coasts, which lies inside of a line drawn from the promontory of Point Hope, to the Cape Prince of Wales. But wherever the schooner appears to have come to anchor east of this line, as at the Grave-yard, Cape Blossom, and Chamisso Isle, she was not to exceed four miles from the shore, and at these points at least, she must be held to have come within the district." The Louisa Simpson, 15 F. Cas. No. 8,533, 2 Sawy. 57, 70.

58. Escriche Diccionario. See Emeric v. Alvarado, 64 Cal. 529, 557, 2 P 418 (where the court in construing an order that a land grant issue to the testamentary executor and heredero, heir, said: "The word translated 'testamentary executor' in the above is albacea, and it is said to be incorrectly rendered. Escriche defines albacea thus: 'He who is charged with fulfilling and executing that which is directed by the testator in his testament or other last disposition': see word albacea in Escriche's Diccionario, etc. In the dictionary of the Spanish academy it is defined testamenti exsequendi curator. In Seoane's, Newman & Barretti's Dictionary the definition is 'testamentary executor.' We think the word is correctly translated"). See generally Executors and Administrators [18 Cyc 1].

[a] **Philippines.**—"Article 907 requires the executor to render accounts to the heir, not to the legatee; and although by article 789 all of the provisions of Chapter II (in which both articles are found) relating to heirs are made applicable to legatees, we can not hold that this requires an executor to submit his accounts to one who has no interest in the estate except to a money legacy when there is no suggestion that it will not be paid when the right to it is established." Per Willard, J., in Del Rosario v. Del Rosario, 2 Philippine 321, 330, 1 Off. Gaz. 614 (325).

59. Escriche Diccionario. See Physicians and Surgeons [30 Cyc 1539].

60. Ropes v. U. S., 123 Fed. 990 (where it was said: "Eighty per cent in weight consists of paraffin, and 20 per cent in weight of ceresia. Seven-elevenths of its value is wax, and four-elevenths is a product of petroleum. Its chief value, therefore, is wax; and, when thus combined with the petroleum product or paraffin, it constitutes a manufacture of wax, which is known and sold as 'albolene.' The substance is imported from St. Petersburg").

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ALBUM. A blank book in which to insert sketches, etc.[61]

ALCABALA. In Spanish law a percentage tax on sales and exchanges of merchandise.[62] It prevails not only in the peninsula, but also in Mexico,[63] to a certain extent in Chili,[64] and formerly in Venezuela.[65] Certain articles like bread, saddle animals, books, pictures, arms, etc., are exempted from the operation of the tax. It must be paid in money by the vendor, and a heavy fine is imposed for evading it.[66]

ALCAHUETE. In Spanish law a pimp or panderer; one who assists in bringing about illicit intercourse between others.[67] The penalty of prison correccional in its minimum and medium degrees. Imprisonment from six months and one day to four years and two months is imposed upon one who habitually, or by taking advantage of his authority or fiducial relation, promotes or facilitates the prostitution or corruption of minors to satisfy the lusts of another.[68] The offense here penalized is not that of prostituting or corrupting minors, but of promoting or facilitating the same.[69] Hence, it is sufficient if the offender merely brings the minor to another for immoral purposes; the former need not actually participate in carrying them out.[70] One may be considered an habitual offender of this kind who is found at the front door of a house of prostitution.[71] A master's relation to his servant is sufficiently fiducial within the meaning of the code.[72] And one who takes advantage of such a relation need not be an habitual offender;[73] but in the absence of such relation a single act of promoting or facilitating the corruption does not constitute a crime.[74]

ALCAIDE. In Spanish law an official having the custody of jails and prisoners.[75]

ALCALDE. In Spanish law the generic name of an official having both judicial and administrative functions,[76] although the former have largely been absorbed by other officials, notably the juez de paz.[77]

ALCOHOL.[78] A limpid colorless liquid;[79] a volatile organic body, constantly formed during the fermentation of vegetable juices containing sugar in solution;[80] a volatile organic body, hot and pungent to the taste, having a slight, but not offensive, odor;[81] an intoxicating liquor.[82] It is the essential element of all spirituous liquors.[83] In popular lan-

61. Webster New Int. D.

[a] **Albums for postal cards** are dutiable as "scrapbooks" under the Tariff Act of 1897. American News Co. v. U. S., 142 Fed. 786, 787 [aff 149 Fed. 1022, 79 CCA 531].

62. Escriche Diccionario.

63. Escriche Diccionario.

64. Law of March 17, 1835, arts 1–7.

65. Abolished by the law of June 13, 1831.

66. Escriche Diccionario.

67. Escriche Diccionario.

68. Spain.—Pen. Code art 459.

Philippine.—Pen. Code art 444.

69. Spain.—Sentence Supr. Trib. Oct. 18, 1894, 53 Jur. Cr. 231; Sentence Supr. Trib. March 29, 1887, 38 Jur. Cr. 517.

Philippine.—U. S. v. Nacion, 8 Philippine 274, 5 Off. Gaz. 461; U. S. v. Tagle, 1 Philippine 626, 1 Off. Gaz. 327 (39).

70. Spain.—Sentence Supr. Trib. Oct. 18, 1894, 53 Jur. Cr. 231.

Philippine.—U. S. v. Tagle, 1 Philippine 626, 1 Off. Gaz. 327 (39).

71. Sentence Supr. Trib. Dec. 17, 1883, 30 Jur. Cr. 385.

72. Spain.—Sentence Supr. Trib. Dec. 17, 1883, 30 Jur. Cr. 385.

Philippine.—U. S. v. Chu Chang, 6 Philippine 74.

73. Sentence Supr. Trib. Dec. 5, 1877, 17 Jur. Cr. 426.

74. U. S. v. Javier, 20 Philippine 337, 9 Off. Gaz. 1892.

75. Escriche Diccionario and Suplemento. See Prisons [32 Cyc 318].

76. Escriche Diccionario.

[a] **Analogous to justice of the peace.**—He is a judicial officer, with functions resembling those of a justice of the peace, known in Spain and in those parts of America which were settled under Spanish authority and adopted Spanish institutions. Abbott L. D.; Strother v. Lucas, 12 Pet. (U. S.) 410, 442 note, 9 L. ed. 1137; Castillero v. U. S., 2 Black (U. S.) 17, 194, 17 L. ed. 360.

Authority to make grant of pueblo land see Public Lands [32 Cyc 1172].

77. Escriche Diccionario Suplemento; Lobinger Philippine Pr. p 5. Compare Philippine Act 1627.

[a] **In Porto Rico** alcaldes no longer have any judicial functions. 1 Op. Atty-Gen. 17, 88.

78. See Intoxicating Liquors [23 Cyc 43]. See also Alcoholic post; Alcoholism post; Beverage [5 Cyc 685].

79. Marks v. State, 159 Ala. 71, 82, 48 S 864, 133 AmSR 20; State v. Giersch, 98 N. C. 720, 724, 4 SE 193.

[a] **Its purity and strength** depend upon the degree of perfection or completeness of the distillation. Marks v. State, 159 Ala. 71, 82, 48 S 864, 133 AmSR 20.

[b] **Amount of alcohol.**—In Peo. v. Crilley, 20 Barb. (N. Y.) 246, 248, the court said: "The strength of liquors and their intoxicating powers depend upon the quantity of alcohol which they contain. Spirituous liquors contain from fifty-three to fifty-six per cent, wines from thirteen (champagne) to twenty-six (port) per cent; currant wine and cherry wine over 10 per cent, metheglen about 7¼ per cent, cider (the average) about 7½ per cent, and ale (the average) about 6¼ per cent. (Brande's Manual of Chemistry, 1645, 1646.) If the rule of interpretation which I have mentioned should be applied to these liquors, ale being so far below the medium, could not be appropriately denominated strong. I am inclined to think that it is not originally so classed." See also Sawyer v. Botti, 147 Iowa 453, 124 NW 787, 27 LRANS 1007.

80. Eureka Vinegar Co. v. Gazette Printing Co., 35 Fed. 570, 571; U. S. v. Cohn, 2 Ind. T. 474, 492, 52 SW 88.

[a] **Fermentation.**—It is exclusively produced by the process of fermentation. Eureka Vinegar Co. v. Gazette Printing Co., 35 Fed. 570, 571; Marks v. State, 159 Ala. 71, 82, 48 S 864, 133 AmSR 20; U. S. v. Cohn, 2 Ind. T. 474, 492, 52 SW 38; Pennell v. State, 141 Wis. 35, 38, 123 NW 115.

[b] **"Malting" distinguished.**—In Pennell v. State, 141 Wis. 35, 38, 123 NW 115, the court said: "Alcohol is a product of fermentation. Malting is a process preliminary to fermentation. Alcohol is separated, not produced, by distillation, and the liquor thus separated containing a percentage of alcohol is called spirituous liquor. Where there is no such separation, but the alcohol produced by fermentation remains in the liquid drawn off from the malt, the product is called malt liquor. Where the production of alcohol by fermentation is preceded by no malting process, as in the case of wine, the product is called vinous liquor."

81. Marks v. State, 159 Ala. 71, 82, 48 S 864, 133 AmSR 20.

82. Marks v. State, 159 Ala. 71, 82, 48 S 864, 133 AmSR 20; Sawyer v. Botti, 147 Iowa 453, 456, 124 NW 787, 27 LRANS 1007; State v. Colvin, 127 Iowa 632, 103 NW 968; State v. Intoxicating Liquors, 76 Iowa 243, 245, 41 NW 6, 2 LRA 408; State v. Yager, 72 Iowa 421, 34 NW 188; State v. Fargo Bottling Works Co., 19 N. D. 396, 403, 124 NW 387, 393, 26 LRANS 872. See also Pennell v. State, 141 Wis. 35, 38, 123 NW 115.

[a] **However much diluted,** alcohol must remain an intoxicant when used as a beverage. State v. Fargo Bottling Works Co., 19 N. D. 396, 403, 124 NW 387, 26 LRANS 666.

[b] **By statute in some states** alcohol, or a certain percentage thereof, in liquids used as a beverage is specifically declared to be an intoxicating liquor. State v. Colvin, 127 Iowa 632, 103 NW 968; State v. Intoxicating Liquors, 76 Iowa 243, 245, 41 NW 6, 2 LRA 408; State v. O'Connell, 99 Me. 61, 63, 58 A 59; Com. v. Brelsford, 161 Mass. 61, 63, 36 NE 677; State v. Fargo Bottling Works Co., 19 N. D. 396, 403, 124 NW 387, 26 LRANS 872; State v. Gravelin, 16 R. I. 407, 408, 16 A 914; Pennell v. State, 141 Wis. 35, 38, 123 NW 115.

[c] **Proof that liquor used as a beverage contains alcohol** is sufficient to establish its character as intoxicating liquor, however much the alcohol may be diluted, or however weak its intoxicating effect as a beverage may be. State v. Colvin, 127 Iowa 632, 103 NW 968; State v. Intoxicating Liquors, 76 Iowa 243, 245, 41 NW 6, 2 LRA 408; State v. Yager, 72 Iowa 421, 34 NW 188.

[d] **"Pure alcohol" and "intoxicating liquors"** are distinguished in State v. Osmers, 21 Ida. 18, 24, 120 P 165. See also Marks v. State, 159 Ala. 71, 83, 48 S 864, 133 AmSR 20 (where the court said: "Whether pure alcohol comes within the phrases 'spirituous' or 'intoxicating' liquors is a question not well settled—some courts holding that it depends upon the language of the particular statute and the facts of each particular case, whether it was sold or purchased purely for medicinal or mechanical purposes, or to be used as an intoxicating beverage; but the weight of the authorities seems to be to the effect that, unless otherwise made by the language or provisions of the statute, it will be included in the terms 'spirituous' and 'intoxicating' liquors. Rabe v. State, 89 Ark. 204; State v. Martin, 34 Ark. 340; Snider v. State, 81 Ga. 753, 7 SE 631, 12 AmSR 350; Bennett v. Peo., 30 Ill. 389; Black Intox. Liq. § 11.").

83. Bennett v. Peo., 30 Ill. 389, 395; Lemly v. State, 70 Miss. 241, 243,

guage, it is the intoxicating principle of fermented liquor.[84]

ALCOHOLIC.[85] Containing or pertaining to alcohol.[86]

Alcoholic beverage.[87] A liquor[88] or drink[89] containing alcohol.

Alcoholic compound. A compound containing or using alcohol.[90]

12 S 22, 20 LRA 645. See also State v. Osmens, 21 Ida. 18, 120 P 165.

[a] **Concerning the production of alcohol,** the court in State v. Giersch, 98 N. C. 720, 723, 4 SE 193, said: "Alcohol, this essential element in all spirituous liquors, is a limpid, colorless liquid. To the taste it is hot and pungent, and it has a slight and not disagreeable scent. It has but one source—the fermentation of sugar and saccharine matter. It comes through fermentation of substances that contain sugar proper, or that contain starch, which may be turned into sugar. All substances that contain either sugar or starch, or both, will produce it by fermentation. It is a mistake to suppose, as many persons do, that it is really produced by distillation. It is produced only by fermentation, and the process of distillation simply serves to separate the spirit—the alcohol from the mixture, whatever it may be, in which it exists."

[b] **As a spirituous liquor.**—(1) Pure alcohol is not in common parlance a spirituous liquor, although it is a basis of all spirituous liquors. Bennett v. Peo., 30 Ill. 389, 395; Lemly v. State, 70 Miss. 241, 242, 12 S 22, 20 LRA 645. In the former case the court said: "We are not prepared to say, however, that selling pure alcohol is not selling spirituous liquor." But see State v. Osmens, 21 Ida. 18, 120 P 165. And compare Marks v. State, 159 Ala. 71, 83, 48 S 864, 133 AmSR 20; (2) A mixture of camphor and alcohol is not a spirituous liquor within the meaning of the statute forbidding their sale. State v. Haymond, 20 W. Va. 18, 20, 43 AmR 787.

[c] **"Vinous or spirituous liquor" distinguished.**—In Lemly v. State, 70 Miss. 241, 242, 12 S 22, 20 LRA 645, the court said: "Alcohol is an ingredient or quality of vinous and spirituous liquor of all kinds, but alcohol, specifically, is neither the one nor the other."

84. Eureka Vinegar Co. v. Gazette Printing Co., 35 Fed. 570. To same effect Marks v. State, 159 Ala. 71, 82, 48 S 864, 133 AmSR 20; Walker v. Dailey, 101 Ill. A. 575, 583; U. S. v. Cohn, 2 Ind. T. 474, 492, 52 SW 38; State v. Fargo Bottling Works Co., 19 N. D. 396, 403, 124 NW 387, 26 LRANS 872.

[a] **It is a matter of common knowledge** that alcohol is the intoxicating element in intoxicating liquor, that pure alcohol is not used as a beverage, and that all intoxicating liquors that are so used contain alcohol mingled with other things, particularly with water. Whisky is alcohol mixed with water and other elements, of which the alcohol alone is intoxicating. Com. v. Morgan, 149 Mass. 314, 21 NE 369. In Intoxicating Liquor Cases, 25 Kan. 751, 762, 37 AmR 284 [quot State v. Fargo Bottling Works Co., 19 N. D. 396, 404, 124 NW 387, 26 LRANS 872] the court said: "Alcohol is the intoxicating principle,—the basis of all intoxicating drinks. Whatever contains alcohol will, if a sufficient quantity be taken, produce intoxication."

85. See generally Alcohol ante.

Alcoholic insanity as defense in prosecution for crime see Criminal Law [12 Cyc 175].

86. Marks v. State, 159 Ala. 71, 82, 48 S 864, 133 AmSR 20.

87. See Alcohol ante; Intoxicating Liquors [22 Cyc 43].

88. Pennell v. State, 141 Wis. 35, 38, 123 NW 115. See also Marks v. State, 159 Ala. 71, 48 S 864, 133 AmSR 20.

89. State v. Oliver, 26 W. Va. 422, 427, 53 AmR 79 [quot Pennell v. State, 141 Wis. 35, 38, 123 NW 115]. See also U. S. v. Cohen, 2 Ind. T. 474, 52 SW 38.

[a] **"Alcohol is a constituent of all alcoholic beverages** just the same as it is of arnica, glycerine, chloroform, but it is an entirely different thing from whisky or chloroform. Pure alcohol is not a beverage but a violent irritant." State v. Osmers, 21 Ida. 18, 25, 120 P 165.

[b] **"Alcoholic principle."**—A statute providing that "any kind of beverage whatsoever, which retaining the alcoholic principle or other intoxicating qualities as a distinctive force, may be used as a beverage and become a substitute for the ordinary intoxicating drinks" is intended to describe a beverage which contains alcohol or other drug having an intoxicating quality, in a quantity reasonably appreciable, and in which such drug has not, by chemical combination with other drugs also contained in the liquor, lost its intoxicating principle, which liquor according to common experience and observation will be resorted to by those accustomed to use intoxicating liquors as a beverage upon a failure to procure the ordinary intoxicating drinks in the usual way. In such a liquor alcohol or other drug of kindred quality preserving its native characteristics must be present but not necessarily in such quantity as to produce intoxication. State v. Fargo Bottling Works Co., 19 N. D. 396, 403, 124 NW 387, 26 LRANS 872.

[c] **Intoxicating character.**—In Intoxicating Liquor Cases, 25 Kan. 751, 37 AmR 284 [quot Pennell v. State, 141 Wis. 35, 39, 123 NW 115] it was held that all alcoholic beverages are intoxicating, if taken in sufficient quantity.

[d] **Pure alcohol as a beverage.**—In Marks v. State, 159 Ala. 71, 82, 85, 48 S 864, 133 AmSR 20, the court said: "While it is the intoxicating principle, the basis of all intoxicating drinks—certainly so within the meaning of ordinary prohibition statutes—yet pure alcohol is rarely used as a beverage. . . . This court in Carson v. State, 69 Ala. 235, 241 [quot Marks v. State, 159 Ala. 71, 82, 48 S 864, 868, 133 AmSR 20; Carl v. State, 87 Ala. 20, 21, 6 S 118, 4 LRA 380] says: 'We are not to be supposed as intimating that physicians or druggists would be prohibited, under a statute such as the one in question, from the bona fide use of spirituous liquors in the necessary compounding of medicines manufactured, mixed, or sold by them. This would not be within the evils intended to be remedied by such prohibitory enactment, nor within the strict letter of the statute.' And in Wall v. State, 78 Ala. 417, which is also quoted in Carl v. State, supra, it was said: 'There may be cases, perhaps, where the bona fide use of a moderate quantity of spirituous liquors in a medical tonic would not alone bring a beverage (or decoction) within the statute.' Wall v. State, supra. The famous 'Kansas prohibition law' (Laws 1881, p 239, c. 128, § 10) prohibited 'all liquors and mixtures by whatsoever name called that will produce intoxication.' This law was construed by Justice Brewer, and has probably become the leading decision of the United States in construing such laws, and has been time and time again quoted by this court and others in construing prohibition laws, and by the text-book writers on the subject, as announcing the fundamental principles which should control in construing these laws. Nearly as much might be said of Carl's Case. Both of these cases announce and affirm the doctrine that 'the mere presence of alcohol does not bring an article within the prohibition.' The influence of the alcohol may be counteracted by other ingredients, and the compound be strictly and fairly only a medicine, or a toilet or culinary article, unfit for use as an intoxicating beverage, against which the statute or law is leveled; yet, if the intoxicant prohibited remains in the compound as a distinctive force, and the compound is reasonably liable to be used as a beverage, it is then within the statute, though it may still be very beneficial as a medicine, or toilet, culinary, or mechanical article. That is to say, it was not the intention of the lawmakers to render a person guilty of violating a prohibition law who disposes of a medicine, or toilet or culinary article, because the purchaser misuses it and becomes intoxicated; but, on the other hand, they have so framed the laws, and they are so intended, that they cannot be evaded by selling articles or compounds as medicines, or toilet or culinary, or soft drinks or beverages, as nonintoxicating, which are as a matter of fact and truth intoxicating beverages." See also Alcohol ante.

90. Century D.

[a] **Druggists' compounds.**—"Pure alcohol is used in nearly all of the tinctures of the druggists such as ammonia, benzine, camphor, glycerine, iodine, and others, all of which are substances dissolved in alcohol. It is also used as a solvent for fats, oils and resins. Most of the liquid antiseptics and fluid extracts and essences and liniments are preparations containing alcohol. It is used in the preparations of chloroform, ether, chloral, bay-rum, and a host of other remedies that are considered very necessary by the medical profession and others. Chloroform is produced from alcohol and sulphuric acid and all the ordinary anesthetics are prepared by the use of alcohol." State v. Osmens, 21 Ida. 18, 25, 120 P 165.

[b] **Use in tariff acts.**—(1) The term "alcoholic compound," as used in the tariff acts, has no commercial meaning different from its ordinary meaning. Smith v. Rheinstrom, 65 Fed. 984, 986, 13 CCA 261. In this case it was held that concentrated cherry juice formed by the evaporation of water from the natural cherry juice and the addition of seventeen per cent of alcohol was properly dutiable as an alcoholic compound within the customs acts. (2) In Mackie v. Erhardt, 77 Fed. 610, 23 CCA 351 [aff 59 Fed. 771] it was held that prune wine made by crushing raisins and prunes in water with a certain amount of alcohol added to prevent fermentation was also an alcoholic compound. (3) But it has been held that "fresh leaves of aconite and belladonna and fresh roots of bryonia, imported immersed in alcohol in kegs," were not dutiable as an alcoholic compound. The court said: "As imported, the merchandise either consists of natural fresh leaves and roots, kept in that condition for transportation and subsequent use as such, the leaves and roots being substantially the thing imported, and the alcohol a mere vehicle, of no more importance than the cask in which they are packed; or else it consists of the leaves and roots and the alcohol as the factors in a loose and temporary association for the purpose, as aforesaid, of maintaining the roots and leaves in their natural condition and fit to subserve their intended use. On either analysis, it is manifest that there is here no combination, no new whole, no compound body, no union, and no elements, ingredients, or parts so put

Alcoholic liquors.[91] Within the meaning of prohibition statutes alcoholic liquors are intoxicating liquors which can be used as a beverage, and which, when drunk to excess, will produce intoxication.[92]

ALCOHOLISM.[93]

ALCOVE. A covered recess; any recessed bay or small room attached to a larger one, having a covered or vaulted ceiling.[94]

ALDERMAN.[95] One of a board of municipal officers next in order to the mayor.[96] (Cross references.[97])

ALE. A liquor made from an infusion of malt by fermentation;[98] an intoxicating beverage produced by the fermentation of barley, wheat, and other farinaceous substances;[99] it differs from beer in having a smaller proportion of hops.[1] It is usually regarded as an "intoxicating liquor,"[2] but, being the product of fermentation and not distil-

together as to produce, by combination or otherwise, anything." Boericke, etc., Co. v. U. S., 126 Fed. 1018, 1019 [foll U. S. v. Stone, 171 Fed. 293, 294 (rev on other grounds 175 Fed. 33, 99 CCA 49), and dist U. S. v. Stone, etc., Co., 175 Fed. 33, 37, 99 CCA 49].

[c] **An infusion.**—Under the tariff acts relating to alcoholic compounds the word "compound" is not limited by any trade, usage, or technical adaptation, but is used in its common, broad sense of being any union or mixture of elements, ingredients, or parts, as fine cut herbs commingled with alcohol and constituting to some degree an infusion. U. S. v. Stone, etc., Co., 175 Fed. 33, 37 [rev 171 Fed. 293].

91. See Intoxicating Liquors [22 Cyc 43].

Sale on Sunday see Sunday [37 Cyc 546].

92. Roberts v. State, 4 Ga. A. 207, 215, 60 SE 1032 (where it was held that, if the liquid manufactured or sold, or kept on hand at a public place, or at a place of business, cannot be used as an intoxicating drink because of other ingredients, or is not intoxicating because it does not contain a sufficient amount of alcohol to cause intoxication when drunk to excess, it is not within the prohibition of the statute, although it does contain as one of its ingredients an appreciable quantity of alcohol or spirituous liquor). See also Bradley v. State, 121 Ga. 201, 48 SE 981; Stoner v. State, 5 Ga. A. 716, 63 SE 602.

[a] **"Vinous or alcoholic liquor,"** in a statute prohibiting the sale of such liquor, includes wine made from grapes and from blackberries, although there is evidence that it is not intoxicating. Reyfelt v. State, 73 Miss. 415, 416, 18 S 925 [quot Marks v. State, 159 Ala. 71, 83, 48 S 864, 133 AmSR 20].

93. **Alcoholism:**
Civil damage acts see Intoxicating Liquors [23 Cyc 309].
Drunkenness see Drunkards [14 Cyc 1089]; Drunkenness.
See also Accident Insurance § 144; Life Insurance [25 Cyc 808, 809, 823, 930, 938].

94. Century D.

[a] **Alcove and alcove room.**—The Tenement House Law requires by one section that "'every room' in a tenement house 'shall have at least one window opening directly upon the street or upon a yard or court'; and by the next section that the 'window area in each room' shall be at least one tenth of the floor area of the room." A subsequent statute provides that "alcove rooms must conform to all the requirements of other rooms." In construing these statutes, Gaynor, J., said: "An 'alcove room' is a room with an alcove. An alcove is not an alcove room, but only part of it. That is the universally accepted meaning of the phrase. An 'alcove room' is not the alcove of a room. The recess or alcove of a room is part of such room. . . . It is not for the courts to follow the commissioner in substituting in the statute a meaning which it does not express for the one which it does, by interpolating the word 'alcoves' for 'alcove rooms.' Nor, if it comes to that, can it be believed that the legislature had the extraordinary intention of requiring that every alcove, however small or narrow, should be treated as a separate room, and required to be on a street, yard or court with a window thereon. This is quite incredible, and it is certainly not expressed by the words used. Rooms with recesses or alcoves are in use everywhere. That such recesses may no longer be built in our large cities except they be on streets, yards or courts, and with windows thereon, is not expressed by the statute. It is useless to say that was the legislative intention." Peo. v. Butler, 120 App. Div. 590, 591, 592, 105 NYS 117.

95. [a] **Aldermannus totius Angliæ** was an officer among the Anglo-Saxons, supposed by Spelman to be the same as the chief justice in later times. Jacob L. D.

96. Crovatt v. Mason, 101 Ga. 246, 28 SE 891 [cit Webster D].

Under a constitutional provision prohibiting the legislature from extending the powers and duties of aldermen or regulating their fees by special law, the aldermen mentioned have never been considered other than municipal officers. Ex p. Anderson, 46 Tex. Cr. 372, 81 SW 973.

[a] **Originally** (1) "ealderman" or "alderman" was the title of a judicial office of the English county courts as well as of the borough and city courts, under the Anglo-Saxon dynasty. People v. New York, 25 Wend. (N. Y.) 9, 36. (2) The term was formerly used to designate an officer having judicial as well as civil power in England, for a period which extended back even before the Norman Conquest; nor were they deprived of judicial powers by the loss of Normandy, when they were extended into England for a similar class of elective, judicial, and municipal officers. They acted in the states of France under the name of "echevins" or "aldermen," from the remotest period of the French history, and their election by the citizens to discharge such duties was recognized in the capitularies or statutes of Charlemagne. Purdy v. Peo., 4 Hill (N. Y.) 384, 388.

[b] **"Councilmen" equivalent to "aldermen."**—Where a statute authorizes the election of a stated number of "aldermen who shall be known as the city council," and that "two-thirds of the 'council may expel a member of the same,'" and an ordinance regulating municipal elections uses the word "councilmen" instead of "aldermen," the meaning of the ordinance is the same as if the latter word had been used. State v. Anderson, 26 Fla. 240, 255, 256, 8 S 1, 4. See also Gostin v. Brooks, 89 Ga. 244, 15 SE 361.

[c] **"Alderman" not equivalent to "mayor."**—The title of a Georgia statute reads: "An act to declare councilmen and aldermen of towns and cities ineligible, during their term of office, to any other municipal office in said towns and cities." It was held that the phrase "councilmen and aldermen" would not embrace a mayor. The court said: "Commonly and colloquially, when we speak of a councilman or alderman, we do not refer to a mayor." Akerman v. Ford, 116 Ga. 473, 474, 42 SE 777.

[d] **Exercise of judicial powers.**—(1) In Purdy v. Peo., 4 Hill (N. Y.) 384, 409, it was held that an act excluding aldermen from sitting as judges of the court of general sessions was an act altering the charter of the city of New York, and void because not receiving the assent of two thirds of the members of each branch of the legislature. The court, per Scott, J., said: "The term alderman does not import legislative more than judicial power. We learn from ancient authorities that comes, ealdorman and earl are equivalent words in the Latin, Saxon, and Danish-Saxon languages. In England this officer sat with the bishop at the trial of causes, and, while the latter expounded the ecclesiastical, it was the duty of the former to declare the common law. Aldermen sat as justices of assize, and exercised such powers of government as were conferred by the charters of the cities or towns where they resided, and, in that character, took cognizance of civil as well as criminal matters; at one time administering the laws which emanated from the British parliament, and at another acting under the code of the corporation laws. (See 1 Hume Hist. Eng. 69; Jacob L. D. tit Alderman.)" (2) In Peo. v. New York, 25 Wend. (N. Y.) 9, it was held by a divided court that the mayor and aldermen of the city of New York may, by virtue of the charter of the city and various acts of the colonial and state legislatures conferring judicial power upon them, exercise the office of judge of the county court of the county of New York.

97. **Alderman:**
As ex officio justice of peace see Justices of the Peace [24 Cyc 406].
Municipal see Municipal Corporations [28 Cyc 316].
Power to:
Administer oath see Perjury [30 Cyc 1415].
Celebrate marriage ceremony see Marriage [26 Cyc 821].
Offer reward see Rewards [34 Cyc 1735].
Take Affidavits see Affidavits § 32.

98. Walker v. Prescott, 44 N. H. 511, 512; Nevin v. Ladue, 3 Den. (N. Y.) 43, 44; State v. Oliver, 26 W. Va. 422, 426, 53 AmR 79.

[a] **Ancient origin.**—In Nevin v. Ladue, 3 Den. (N. Y.) 43, 44 [rev on another point in 3 Den. 437], the court said: "The manufacture of ale was early introduced into England. It is mentioned in the laws of Ina, king of Wessex; and is particularly specified among the liquors provided for a royal banquet in the reign of Edward the Confessor."

[b] **"Distillation" distinguished.**—Ale is produced by fermentation, and not by distillation. Walker v. Prescott, 44 N. H. 511; Nevin v. Ladue, 3 Den. (N. Y.) 43, 44; Peo. v. Crilley, 20 Barb. (N. Y.) 246, 248.

[c] **"Whisky" distinguished.**—An indictment for selling whisky is not supported by proof that defendant sold ale. Lindsay v. State, 19 Ala. 560, 561.

[d] **Cider** is not ale. Donithan v. Com., 109 Va. 845, 846, 64 SE 1050.

99. Nevin v. Ladue, 3 Den. (N. Y.) 437, 438.

[a] **"Hop-Ale" or "Hop-Jack" distinguished.**—Daniel v. State, 149 Ala. 44, 48, 43 S 22.

1. Nevin v. Ladue, 3 Den. (N. Y.) 43, 44; State v. Oliver, 26 W. Va. 422, 426, 53 AmR 79.

[a] **Canadian beer.**—What is called beer in Canada is called ale in the United States, according to a Canadian case. Pabst Brewing Co. v. Ekers, 21 Que. Super. 545.

2. State v. Barron, 37 Vt. 57, 62.

lation, it should not be classed as a "spirituous liquor."[3]

ALEATORY CONTRACT.[4-5]

ALEHOUSE.[6] A place where ale is sold to be drunk on the premises.[7]

ALEVOSIA.[8] [§ 1] **A. Nature—1. Definition.** In Spanish law treachery,[8] which is a qualifying or inherent element of certain crimes and an aggravating circumstance of others. The Spanish penal code[9] declares that there is alevosia when the offender commits any of the crimes against the person, employing means, methods, or forms in the execution thereof which tend directly and specially to insure its execution without risk[10] to himself arising from the defense which the offended person might make.[11]

[§ 2] **2. Illustrations. What constitutes alevosia.** Killing a bound and helpless victim generally shows alevosia.[12] So does attacking a victim

See also Intoxicating Liquors [23 Cyc 80].

[a] **Statutory provisions.**—(1) Ale, by the express provisions of St. (1875) c 99 § 18, is an intoxicating liquor. Com. v. Curran, 119 Mass. 206, 208. (2) Act of Febr. 12, 1853, prohibiting the manufacture of "intoxicating beverages," did not mean merely spirituous liquors or those which are distilled, but included all drinks of an intoxicating nature, and embraced beer and ale. Peo. v. Hawley, 3 Mich. 330, 340. (3) "Ale" as used in L. (1870) p 437, providing that it shall be unlawful for any person to sell "ale" except at a regular licensed inn and tavern, means a certain liquor made from malt, containing a certain percentage of alcohol sufficient to render it intoxicating. Murphy v. Montclair Tp., 39 N. J. L. 673, 675.

2. State v. Moore, 5 Blackf. (Ind.) 118; Com. v. Jordan, 18 Pick. (Mass.) 228; Com. v. Markoe, 17 Pick. (Mass.) 465, 468; Walker v. Prescott, 44 N. H. 511, 512; Peo. v. Crilley, 20 Barb. (N. Y.) 246, 248. See also Com. v. Thayer, 5 Metc. (Mass.) 246, 247.

[a] **For example,** a statute authorizing the granting of licenses to persons to be innholders, with liberty to sell "ale," wine, beer, and other fermented liquors, cannot be construed to authorize such holders to sell brandy, rum, or other spirituous liquors. Com. v. Jordan, 18 Pick. (Mass.) 228.

[b] **Mixed liquor.**—What is sold as ale may be so mixed with spirituous liquor as to fall within the definition of that term as provided in the statute. Walker v. Prescott, 44 N. H. 511, 512. See also Com. v. White, 10 Metc. (Mass.) 14, 16.

[c] **"Strong liquors" distinguished.**—Peo. v. Crilley, 20 Barb. (N. Y.) 246, 248; Nevin v. Ladue, 3 Den. (N. Y.) 43, 44.

Spirits defined see Spirits [36 Cyc 806].

Spirituous liquor defined see Spirituous Liquors [36 Cyc 807].

Wine defined see Wine [40 Cyc 2121].

4-5. See also La. Rev. Civ. Code (1875) art. 2982; Moore v. Johnston, 8 La. Ann. 488, 489; Henderson v. Stone, 1 Mart. N. S. (La.) 639, 641.

[a] **A contract is aleatory or hazardous** when the performance of that which is one of its objects depends on an uncertain event. La. Rev. Civ. Code (1875) art 1776; Losecco v. Gregory, 108 La. 648, 651, 32 S 985.

[b] **"It is of the essence of aleatory contracts** that there should be risk on one side, or on both, and that all risks appertaining to the contract, and not excepted, were assumed by the parties." Moore v. Johnston, 8 La. Ann. 488, 489. In this case it was held that, when the only limitation of risk, contained in an agreement to run a horse race, is the right of either party to withdraw his horse on paying a stipulated forfeit, a party must avail himself of the right in time, or he cannot invoke it afterward to diminish his liability. See also Henderson v. Stone, 1 Mart. N. S. (La.) 639, 641.

[c] **A contract for the purchase of crops** of fruit to be grown in subsequent years is not an aleatory but a certain contract. Losecco v. Gregory, 108 La. 648, 651, 32 S 985.

6. See also Bar [5 Cyc 615]; Saloon [35 Cyc 714]; Tavern [37 Cyc 670].

7. Wharton L. Lex.

8. Escriche Diccionario; U. S. v. Raymundo, 14 Philippine 416, 434; U. S. v. Reyes, 11 Philippine 225, 228; U. S. v. Davis, 11 Philippine 96, 98; U. S. v. Ulat, 7 Philippine 559, 562; U. S. v. Angeles, 6 Philippine 480, 483; U. S. v. Correa, 3 Philippine 81, 87; U. S. v. Babasa, 2 Philippine 102, 103; U. S. v. Villanueva, 2 Philippine 61, 64; U. S. v. Cabe, 1 Philippine 265, 266.

9. Spanish Pen. Code art 10 (2). In the former penal code of Cuba and Porto Rico it was art 10 (3).

10. U. S. v. Lansangan, 12 Off. Gaz. 1327 (where it was said: "The supreme court of Spain has held in numerous decisions, and those decisions have been followed by this court, that the qualifying circumstances of treachery exists whenever one person employs means, methods and forms which insure the execution or commission of the crime without any danger arising or resulting to himself from the acts of the person attacked. (1 Alcubilla, 444). Decision of the supreme court of Spain of July 13, 1897; U. S. v. Alvarez, 3 Philippine 24, 2 Off. Gaz. 199; U. S. v. Santos, 2 Philippine 453, 1 Off. Gaz. 690; U. S. v. Abaigar, 2 Philippine 417, 1 Off. Gaz. 649; U. S. v. Abelinde, 1 Philippine 568, 1 Off. Gaz. 572; U. S. v. Rubeta, 1 Philippine 831, 1 Off. Gaz. 710 (425); U. S. v. Ricafor, 1 Philippine 173; U. S. v. De Leon, 1 Philippine 163"); U. S. v. Lim San, 17 Philippine 273, 276, 8 Off. Gaz. 1754 (where it was said: "The accused, without warning of any kind, careful not to disturb the quiescent attitude in which he found his victim until the very instant of the blow, attacked him with great rapidity and force, driving his bolo straight into his face. On the first blow the point of the knife entered the left eye, penetrating to and slightly cutting the brain, destroying the eye completely and rendering him entirely incapable of protecting himself. As a necessary result, the assaulted had no opportunity whatever to defend himself, to escape the blow, to ward it off, or to mitigate its consequences. He was wholly surprised and incapable of offering the slightest resistance. This means simply that the accused committed the crime maliciously and treacherously by methods which tended, directly and especially, to insure him against risk that might proceed from any defense which his victim might make. In other words, the combination of the conditions, darkness, distracted attention, lack of knowledge of the attack, lack of warning, the suddenness of the assault, the maneuvering of the accused in such way as not to attract attention till the very moment of the blow, keeping him quiescent until the end was accomplished, constitutes alevosia under subdivision 2 of article 10 of the Penal Code").

11. U. S. v. Raymundo, 14 Philippine 416, 434; U. S. v. Reyes, 11 Philippine 225, 228; U. S. v. Ulat, 7 Philippine 559, 561; U. S. v. Angeles, 6 Philippine 480, 483; U. S. v. Devela, 3 Philippine 625, 627; U. S. v. Correa, 3 Philippine 81, 87; U. S. v. Larion, 2 Philippine 476, 479; U. S. v. Torrente, 2 Philippine 1, 5.

In U. S. v. Raymundo, supra, the court said: "It is very clear that all of the accused took 'a direct part in the execution of the act,' and that it was committed with 'alevosia' (treachery), that is to say, that means were employed which tended directly and specially to insure the execution of the crime without risk to the person of the criminals arising from any defense which might be made by the injured party. (Arts. 10, 13 and 403, of the Penal Code); U. S. v. Salgado, 11 Philippine 56; U. S. v. Angeles, 6 Philippine 480, 483; U. S. v. Tomulac, 3 Philippine 728; U. S. v. Punsalan, 3 Philippine 260; U. S. v. Santiago, 3 Philippine 112; U. S. v. Babasa, 2 Philippine 102; U. S. v. Feria, 2 Philippine 54; U. S. v. Rubeta, 1 Philippine 331."

12. Spain.—Sentence Supr. Trib. Febr. 19, 1879, 20 Jur. Cr. 180; Sentence Supr. Trib. April 24, 1876, 14 Jur. Cr. 568. But the mere fact that the victim is seized and held after a struggle and before execution will not necessarily show alevosia. Sentence Supr. Trib. May 6, 1884, 32 Jur. Cr. 179. And where the deceased had entered a room where a monte game was in progress and after seizing money was trying to escape, the fact that one of the players caught and another shot him while held was declared not to constitute alevosia, because of the surprise and consternation caused by the victim's act. Sentence Supr. Trib. Oct. 22, 1887, 39 Jur. Cr. 534.

Philippine.—U. S. v. Lastimosa, 12 Off. Gaz. 1127; U. S. v. Alias, 18 Philippine 453, 455, 9 Off. Gaz. 763; U. S. v. Tupas, 9 Philippine 506, 6 Off. Gaz. 542; U. S. v. Colombro, 8 Philippine 391, 5 Off. Gaz. 535; U. S. v. Doon, 4 Philippine 249, 3 Off. Gaz. 256; U. S. v. Gabriel, 4 Philippine 165, 3 Off. Gaz. 83; U. S. Donoso, 3 Philippine 234, 2 Off. Gaz. 306; U. S. v. Jamino, 3 Philippine 102, 2 Off. Gaz. 90; U. S. v. Alivarez, 3 Philippine 24, 2 Off. Gaz. 199; U. S. v. Santos, 2 Philippine 453, 1 Off. Gaz. 690; U. S. v. Abaigar, 2 Philippine 417, 1 Off. Gaz. 649; U. S. v. Tengco, 2 Philippine 190, 1 Off. Gaz. 546; U. S. v. Abelinde, 1 Philippine 568, 572, 1 Off. Gaz. 456; U. S. v. Cabe, 1 Philippine 265, 266, 1 Off. Gaz. 493; U. S. v. Santos, 1 Philippine 223, 1 Off. Gaz. 473; U. S. v. Ricafor, 1 Philippine 173; U. S. v. Ancheta, 1 Philippine 165; U. S. v. De Leon, 1 Philippine 163. See also U. S. v. Bulfa, 25 Philippine 97, 101, 11 Off. Gaz. 1624; U. S. v. Laguna, 17 Philippine 532, 535, 9 Off. Gaz. 246; U. S. v. Supila, 13 Philippine 671, 674, 7 Off. Gaz. 1483; U. S. v. Torrente, 2 Philippine 1, 5, 1 Off. Gaz. 130.

"It was clearly proven, and so found by the trial judge, that one of the accused seized the Chinaman from behind and bound his hands to his side, while the other struck him with a dagger in the throat, and the evidence further discloses that this

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while asleep,[13] or, usually, attacking from behind,[14] or assaulting a blind person,[15] a defenseless old man,[16] a defenseless female,[17] or a child of tender years.[18] Alevosia is likewise disclosed by attacking an unarmed or unprepared victim,[19] or under cover of darkness,[20] or when otherwise concealed,[21] or by a sudden and unexpected, although frontal, attack,[22] especially where the purpose is disclosed of taking the victim unawares.[23]

What does not constitute alevosia. Alevosia does not exist where there is no premeditation, and the accused makes the attack without considering the risk incurred or seeking to guard against it;[24] nor where the attack is not continuous;[25] nor where

occurred before the general melee arose between the Chinamen and Filipinos who later participated in the fight. Manifestly therefore, the accused employed means in the execution of the crime, which 'tended directly and especially to insure' them 'against risk arising from the defense the injured party might otherwise have made.' This circumstance marks the commission of the offense with the aggravating circumstance of treachery (alevosia), as defined in subdivision 2 of article 10 of the Penal Code." U. S. v. Reyes, 11 Philippine 225, 228, 6 Off. Gaz. 1395.

13. U. S. v. Sanchez, 20 Philippine 427, 428, 9 Off. Gaz. 2002; U. S. v. Jakan Tucko, 20 Philippine 235, 237, 9 Off. Gaz. 1738; U. S. v. Liwakas, 17 Philippine 234, 235, 8 Off. Gaz. 1706; U. S. v. Barbicho, 13 Philippine 616, 619, 7 Off. Gaz. 1210; U. S. v. Matanug, 11 Philippine 188, 192, 6 Off. Gaz. 1343; U. S. v. Lugo, 8 Philippine 80, 82, 5 Off. Gaz. 263; U. S. v. Chu Ning Co., 7 Philippine 710, 5 Off. Gaz. 281; U. S. v. Angeles, 6 Philippine 480, 482; U. S. v. Macalinao, 4 Philippine 407, 3 Off. Gaz. 453; U. S. v. Tomulac, 3 Philippine 728, 2 Off. Gaz. 484; U. S. v. Mijares, 3 Philippine 447, 454, 2 Off. Gaz. 507; U. S. v. Rubeta, 1 Philippine 331, 332, 1 Off. Gaz. 425. See also U. S. v. Fernandez, 17 Philippine 573, 576, 9 Off. Gaz. 382.

14. U. S. v. Bredejo, 21 Philippine 23, 24, 9 Off. Gaz. 2183; U. S. v. Cuison, 20 Philippine 433, 436, 9 Off. Gaz. 2050; U. S. v. Quillo, 15 Philippine 430, 433, 8 Off. Gaz. 784; U. S. v. Castellon, 12 Philippine 160, 164, 6 Off. Gaz. 1986; U. S. v. Pendleton, 7 Philippine 457, 5 Off. Gaz. 198 (shooting another in the back from rear window of carromata at night); U. S. v. Ayao, 4 Philippine 114, 118, 3 Off. Gaz. 113; U. S. v. Larion, 2 Philippine 476, 482, 1 Off. Gaz. 706. Compare U. S. v. Villanueava, 2 Philippine 61, 1 Off. Gaz. 535; Sentence Supr. Trib. Nov. 8, 1893, 51 Jur. Cr. 291 (intimating, however, that such act is not controlling).

15. Sentence Supr. Trib. July 4, 1884, 32 Jur. Cr. 613.

16. U. S. Paraiso, 17 Philippine 142, 146, 8 Off. Gaz. 1587.

17. U. S. v. Angel, 4 Philippine 295, 3 Off. Gaz. 269 (where the accused, while armed, attacked a defenseless female in a boat); U. S. v. Tomines, 4 Philippine 120, 3 Off. Gaz. 49 (where the victim was killed on her knees begging for mercy). But see U. S. v. Gervo, 9 Philippine 159, 5 Off. Gaz. 1014.

18. Spain.—Sentence Supr. Trib. Jan. 26, 1877, 16 Jur. Cr. 109. Compare Sentence Supr. Trib. April 10, 1890, 44 Jur. Cr. 463.

Philippine.—U. S. v. Lansangan, 12 Off. Gaz. 1327 (where the court said: "The defendant, at the time of the trial, was a man of forty years of age. The deceased was a child of seven years of age . . . The supreme court of Spain has also held (and this court has followed said decisions) in considering alevosia as a qualifying circumstance of the crime of assassination, that when an adult person illegally attacks a child of tender years and causes its death, he runs no risk whatever of personal injury to himself from such attack and that therefore in such a case alevosia should be considered as a qualifying circumstance of the crime, and the same should be qualified as assassination. In the present case the child was of tender years, being but seven years old. Whatever method the defendant employed, in causing the death of the deceased, the same was done without any possibility of danger resulting to himself from the child. The crime, therefore, in the present case should be qualified as that of assassination. Decisions of the supreme court of Spain: January 26, 1877 (where the child was 30 months old); October 29, 1879 (where the child was 11 years old); October 10, 1883 (a child of tender years); November 15, 1895 (where the child was 3 years old); July 13, 1897 (a young child). U. S. v. Larion, 2 Philippine 476, Off. Gaz. 706; U. S. v. De Jesus, 14 Philippine 190, 7 Off. Gaz. 1556").

[a] **An attack upon unarmed and defenseless children of tender years** is made without danger or risk and constitutes circumstances of alevosia. U. S. v. Larion, 2 Philippine 476, 479, 480.

19. U. S. v. Canaman, 9 Philippine 123, 5 Off. Gaz. 1013. Compare U. S. v. Angeles, 6 Philippine 480, 484 [dist U. S. v. Cueva, 23 Philippine 553, 556, 11 Off. Gaz. 45] (where accused killed his victim while the latter was lying defenseless in the bottom of a boat).

[a] **The sudden and unexpected attack** upon another has been held treachery by the supreme court of Spain and this ruling has been followed in the territorial courts. U. S. v. Arreglado, 13 Philippine 660, 665; U. S. v. Davis, 11 Philippine 96, 98; U. S. v. Canaman, 9 Philippine 121, 124; U. S. v. Babasa, 2 Philippine 102 [quot U. S. v. Cabiling, 7 Philippine 469, 473].

[b] **Armed victim seized and held.**—Alevosia exists where one defendant seizes and holds the victim, although armed, while the other inflicts mortal wounds upon him. U. S. v. Reyes, 11 Philippine 225, 228. 6 Off. Gaz. 1395; U. S. v. Feria, 2 Philippine 54, 1 Off. Gaz. 533. Compare U. S. v. De la Cruz, 17 Philippine 527, 9 Off. Gaz. 244.

20. Sentence Supr. Trib. March 28, 1874, 10 Jur. Cr. 367; Sentence Supr. Trib. Oct. 20, 1871, 3 Jur. Cr. 403. But compare U. S. v. Amoroso, 5 Philippine 466 (where the mere commission of the crime in a dark place where accused were hiding with weapons was held not to constitute alevosia).

21. Sentence Supr. Trib. June 1, 1882, 26 Jur. Cr. 448. As behind a closed door (Sentence Supr. Trib. Dec. 10, 1884, 33 Jur. Cr. 573), behind a tree (Sentence Supr. Trib. May 8, 1873, 8 Jur. Cr. 530), or behind sheaves of barley, etc. (Sentence Supr. Trib. Jan. 27, 1877, 16 Jur. Cr. 117).

22. U. S. v. Nalua, 23 Philippine 1, 3, 10 Off. Gaz. 1406; U. S. v. Davis, 11 Philippine 96, 98, 6 Off. Gaz. 1276; U. S. v. Cabiling, 7 Philippine 469, 5 Off. Gaz. 483; U. S. v. Punsalan, 3 Philippine 260, 2 Off. Gaz. 205; U. S. v. Babasa, 2 Philippine 103, 1 Off. Gaz. 540.

23. U. S. v. Correa, 3 Philippine 81, 87, 2 Off. Gaz. 88.

[a] **Leading into ambush.**—Leading two unarmed persons, who had employed the accused as guides, into an ambush where they were attacked and killed constitutes alevosia and qualifies the crime as assesinato. U. S. v. Santiago, 3 Philippine 112, 2 Off. Gaz. 131. Compare U. S. v. Ablana, 13 Philippine 103, 7 Off. Gaz. 495.

24. U. S. v. Devela, 3 Philippine 625, 2 Off. Gaz. 482. Compare U. S. v. Idica, 3 Philippine 313, 315, 2 Off. Gaz. 419.

[a] **All of the elements of this definition must concur** in order to constitute alevosia; (1) hence, where the victim was accompanied by another party who might have assisted in the defense, it cannot be said that the accused made the attack without risk to himself. Sentence Supr. Trib. April 12, 1873, 8 Jur. Cr. 420. Compare Sentence Supr. Trib. Oct. 2, 1877, 17 Jur. Cr. 141. (2) The mere fact that an attack was sudden and unexpected does not constitute alevosia if the accused did not deliberately intend to act without risk to himself. U. S. v. Vitug, 17 Philippine 1, 19, 8 Off. Gaz. 1380; U. S. v. Hicks, 14 Philippine 217, 7 Off. Gaz. 1698; U. S. v. Garcia, 10 Philippine 603, 6 Off. Gaz. 948. (3) Alevosia exists only where the accused employs means which have rendered defense impossible. U. S. v. Asilo, 4 Philippine 175, 3 Off. Gaz. 144. See U. S. v. De Jesus, 2 Philippine 514, 523, 1 Off. Gaz. 814 (where it was not shown that the victim was able to attempt a defense).

[b] **No preparation or premeditation.**—Where it appeared that the attack on the deceased was sudden, without premeditation, and was made by defendant, without taking into consideration the risk involved, and without any preparation directly leading to insure him against such risk, it was held error to apply the circumstance of alevosia in aggravation of the penalty. U. S. v. Devela, 3 Philippine 625, 627.

[c] **Alevosia found not to be established.**—U. S. v. Divino, 12 Philippine 175, 187, 190, 7 Off. Gaz. 1; U. S. v. Ulat, 7 Philippine 559, 562, 5 Off. Gaz. 222; U. S. v. Gray, 4 Philippine 479, 3 Off. Gaz. 414; U. S. v. Perdon, 4 Philippine 141, 143, 3 Off. Gaz. 133. See also U. S. v. Barnes, 8 Philippine 59, 60.

25. U. S. v. Balagtas, 19 Philippine 164, 172, 9 Off. Gaz. 966 (where the court said: "It is insisted that the fact that the defendants threw the deceased into the water, face downward, while he was still alive and in a helpless and defenseless condition, constitutes treachery. With this proposition we can not agree. When the body was examined by the doctor, three wounds, each about two and one-half centimeters in length, were found on the lower part of the face. The jaw was fractured in two places. There was also on the back of the neck, just below the hair line, another wound about six centimeters in length which passed through the skin. On cutting through the skin at three places near these wounds a large amount of blood outside of the vessels, was found. The internal organs, except the lungs, were uniform. The doctor was not certain whether the wounds, or the suffocation, or both, was the cause of the death of the deceased. But assuming that the deceased would have of recovered from the effects of the four wounds, if he had not been thrown into the water, yet we still think that the proofs fail to show that there was present treachery, as the knocking down of the deceased, striking him while on the ground, and throwing him into the water were all done in so short a time and one movement followed the other in such rapid succession, constitute one and the same attack. In order that treachery may be considered as a qualifying circumstance to raise the

the fatality results in the course of an affray or quarrel;[26] nor where the accused acted in defense of another.[27]

[§ 3] **B. Application—1. In General.** Where alevosia is found in connection with a crime against the person it must be applied either as an aggravating circumstance[28] or as an inherent element or requisite.[29] Alevosia is not inherent in the crime of parricide,[30] nor of robo con homicidio (robbery with homicide).[31] The circumstance of alevosia is not, however, incompatible with the extenuating circumstances of passion and obfuscation and all may be applied in the same case.[32]

[§ 4] **2. To What Crimes Applicable.** The statutory definition embraces in terms only "crimes against the person."[33] But the circumstance is also held to be applicable to a compound crime which involves an offense against property as well as person, such as robo con homicidio (robbery with homicide).[34]

[§ 5] **3. To Whom Applicable.** One who induces and assists in the crime, although he does not strike the fatal blow, may be guilty of alevosia,[35] and so are all who participate in any feature of a compound crime like robo con homicidio (robbery with homicide) which is marked with said circumstance.[36] That the offender who so attacked was blind,[37] or intoxicated,[38] will not prevent the application of the circumstance of alevosia. Nor will the fact that the aggressor was at a considerable distance from his victim.[39]

[§ 6] **C. Proof.** Alevosia, like any other element of crime, must be clearly and directly proved; it cannot be presumed nor arbitrarily inferred.[40]

[§ 7] **D. Pleading.** Under the Philippine system of pleading alevosia need not be expressly charged.[41]

ALFALFA. A perennial plant,[42] which, when properly cared for, like fruit trees, produces annual crops of hay or pasturage for an indefinite number of years.[43]

ALFOZ TERMINIEGO. In Spanish law a place included within the boundaries of a city or town, and obliged to contribute to its public improvements, but without being otherwise subject to its jurisdiction.[44]

ALGUACIL. An inferior judicial officer in the administration of Spanish law.[45]

ALHONDIJA. In Spanish law, a house set apart for strangers who came there to trade.[46]

ALIAS. Literally "Otherwise," "formerly."[47]

classification of the crime, or as an aggravating circumstance to augment the penalty, it must be shown that the treacherous acts were present at and preceded the commencement of the attack which caused the injury complained of. After the commencement of such an attack and before its termination an accused person may have employed means or methods which were of a treacherous character, and yet such means or methods would not constitute the circumstance of alevosia. One continuous attack, such as the one which resulted in the death of the deceased Flores, can not be broken up into two or more parts and made to constitute separate, distinct, and independent attacks so that treachery may be injected therein and considered as a qualifying or aggravating circumstance").

26. U. S. v. Ferrer, 1 Philippine 56.
[a] **Casual encounter.**—Alevosia is not shown where the death of constabulary soldiers resulted from a casual encounter with the accused, no ambush being shown. U. S. v. Fresnido, 4 Philippine 522, 3 Off. Gaz. 576.

27. Sentence Supr. Trib. Oct. 2, 1877, 17 Jur. Cr. 140 (where the aggressor acted merely in defense of his father); Sentence Supr. Trib. June 13, 1888, 41 Jur. Cr. 104 (defense of prostrate son).

28. [a] **Where not an inherent element** of the crime itself alevosia must be applied in fixing the penalty. U. S. v. Cunanan, 26 Philippine 376, 12 Off. Gaz. 647.

29. [a] **When an inherent element** of the crime it cannot be applied as an aggravating circumstance. Thus where nocturnity, etc., are relied upon as elements of alevosia they cannot be considered as a separate aggravating circumstance. U. S. v. Domingo, 18 Philippine 250, 9 Off. Gaz. 798; U. S. v. Abelinde, 1 Philippine 568, 573, 1 Off. Gaz. 456. See also U. S. v. Salgado, 11 Philippine 56, 58.

[b] **When it is included in some other circumstance,** alevosia cannot be considered as a separate aggravating circumstance. Thus, circumstance of abuse of superior force is held to be included in alevosia. U. S. v. Arreglado, 13 Philippine 660, 665, 7 Off. Gaz. 1264; U. S. v. Larion, 2 Philippine 476, 1 Off. Gaz. 706.

30. U. S. v. Villanueva, 2 Philippine 61, 64.

31. Sentence Supr. Trib. March 14, 1877, 16 Jur. Cr. 317.

32. Sentence Supr. Trib. April 17, 1888, 40 Jur. Cr. 652. But compare U. S. v. Candelaria, 2 Philippine 104, 105, 1 Off. Gaz. 541 infra note 34 [a].

33. Pen. Code art 10 (2).
[a] **This includes** any crime which causes the death of another and renders it assesinato where it might otherwise have been homicidio. Philippine Pen. Code art 403.

34. Sentence Supr. Trib. March 14, 1877, 16 Jur. Cr. 317; Sentence Supr. Trib. Dec. 17, 1875, 13 Jur. Cr. 478.
[a] **There may be alevosia for purpose of ill-treatment** without alevosia for purpose of killing, and such aggravating circumstance qualifies the entire crime and neutralizes the extenuating circumstance that the accused did not intend to commit so grave an injury. U. S. v. Candelaria, 2 Philippine 104, 105, 1 Off. Gaz. 541.

35. U. S. v. Rabor, 7 Philippine 726, 5 Off. Gaz. 249 [dist U. S. v. Mijares, 3 Philippine 447, 2 Off. Gaz. 507].

36. Sentence Supr. Trib. Dec. 17, 1875, 13 Jur. Cr. 478.

37. Sentence Supr. Trib. June 8, 1881, 24 Jur. Cr. 519.

38. Sentence Supr. Trib. Febr. 21, 1883, 28 Jur. Cr. 154.

39. Sentence Supr. Trib. Oct. 5, 1887, 39 Jur. Cr. 410; Sentence Supr. Trib. Oct. 20 1884, 33 Jur. Cr. 198 (where the fatal shots were discharged at a distance of sixteen meters).

40. U. S. v. De Jesus, 14 Philippine 193, 7 Off. Gaz. 1556; U. S. v. Arciga, 2 Philippine 110, 1 Off. Gaz. 541.
"It is not legally proper to qualify an act as treacherous when the details that constitute it and the circumstances that preceded and concurred in its execution do not appear." Per Mapa, J., in U. S. v. Cueva, 23 Philippine 553, 556, 11 Off. Gaz. 45.
[a] **Degree of proof.**—That the crime was committed with alevosia (treachery) must be established beyond a reasonable doubt, and the courts have frequently held that qualifying and aggravating circumstances before being taken into consideration for the purpose of increasing the degree of the penalty to be imposed must be proved with no less certainty than that with which the commission of the principal offense is established. U. S. v. Ulat, 7 Philippine 559, 561 [cit U. S. v. Barbosa, 1 Philippine 741].

41. U. S. v. Campo, 23 Philippine 368, 372, 10 Off. Gaz. 2050.

42. Miller v. Kern County, 137 Cal. 516, 524, 70 P 549; Depew v. Peck Hardware Co., 121 App. Div. 28, 31, 105 NYS 390.
[a] **Nature of plant.**—It produces for many years without reseeding or cultivating. Three crops may ordinarily be cut each year. No crop is expected the year of the seeding. Depew v. Peck Hardware Co., 121 App. Div. 28, 31, 105 NYS 390.

43. Miller v. Kern County, 137 Cal. 516, 525, 70 P 549 (where it was held that alfalfa was not a growing crop exempt from taxation within the constitution. The court said: "As a hay crop, it is unlike wheat or barley, sown for hay, which produces but a single annual crop and no more. It adds value to the land, in a different degree, it may be, but in a similar manner as do fruit and nut-bearing trees").

44. Escriche Diccionario.

45. 12 Off. Gaz. 1125; Alcubilla Diccionario 445.
[a] **There are two classes,** namely, those of ayuntamientos and those of courts. Escriche Diccionario Suplemento.
[b] **Right to vote.**—But the alguacil is not considered to have been a "member of any ayuntamiento" so as to qualify him for the franchise under the Philippine Election Law. U. S. v. Dungga, Philippine, 12 Off. Gaz. 1124 (where the court, per Araullo, J., said: "It being very clear that the most inferior officer of a municipal government cannot be regarded as a member of that municipal government, it is also evident that the defendant Agaton Dungga was not qualified, as alleged by his defense, to be a voter in accordance with the provisions of subsection (a), section 13, of the Election Law," which confers the franchise inter alia upon "those who, prior to the thirteenth of August, eighteen hundred and ninety-eight, held the office of municipal captain, governadorcillo, alcalde, lieutenant, cabeza de barangay, or member of any ayuntamiento." Act [1582] § 13 [a]).

46. Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 247, 39 P 762.

47. Black L. D. (2d ed); State v. Howard, 30 Mont. 518, 521, 77 P 50.
[a] **"Or" and "either" distinguished.**—In Kennedy v. Peo., 39 N. Y. 245, 250, it was held that to give the word "alias" the meaning of "or"

Alias dictus.[48] Literally "Otherwise called." A term used in legal proceedings to denote a second or further description of a person who has gone by two or more names.[49] The single word "alias" is now commonly used.[50]

Alias writ.[51] A second or further writ which is issued after the first writ has expired;[52] a writ issued where one of the same kind has been issued before in the same cause;[53] a second writ issued when the first has failed its purpose;[54] one which is issued when a former writ has not produced its effect.[55]

ALIBI. Elsewhere, in another place;[56] the presence in another place than that described.[57]

In criminal law[58] a defense in which defendant shows that he was at another place at the time the crime charged was committed.[59]

ALIEN.[60] To transfer the property or owner-

or "either" was not according to its well understood meaning as a term in law long used to avoid a variance or misnomer in pleadings.

48. **Alias dictus:**
Fictitious name see Names [29 Cyc. 270].
Name of accused see Criminal Law [12 Cyc 295].
Use of, in:
Indictment see Indictments and Informations [22 Cyc 323].
Pleading see Pleading [31 Cyc 98].

49. Burrill L. D.; State v. Howard, 30 Mont. 518, 521, 77 P 50.
[a] **"The office of an alias dictus** is confined to the purpose of alleging that the defendant has borne two or more names. In other words, its function is solely to identify the person of the defendant. It has no relation to the subject-matter of the indictment, other than this. 2 A&EEncL 52. It is defined to be a description of the defendant by adding to his real name that by which he is known in some writing on which he is charged, or by which he is known. 1 Bouvier D. (14th ed) 111." Per Hammond, J., in U. S. v. Howard, 132 Fed. 325, 360.
[b] **In drawing indictments** it was formerly the custom to charge a defendant under all the names by which he was known, connecting them with the words "alias dictus," or with simply "alias." State v. Howard, 30 Mont. 518, 521, 77 P 50.

50. Kennedy v. Peo., 39 N. Y. 245, 251, (where Woodruff, J., said: "I apprehend that the use of the single word 'alias,' to express the whole meaning, has so long obtained, that it is not uncertain what is the true meaning of the charge. . . . The term has become familiar as equivalent to 'otherwise called,' or 'otherwise known as,' and may properly be treated as having in use in pleading in English acquired that import, as a technical term constantly employed in that sense without its former Latin companion").
[a] **In pleadings** the word alias is used as the equivalent of alias dictus or "otherwise called," and indicates that the person referred to bears both names laid under the alias, but that he is called by one or the other of those names. Ferguson v. State, 134 Ala. 63, 67, 32 S 760, 92 AmSR 17; Turns v. Com., 6 Metc. (Mass.) 224, 235; State v. Howard, 30 Mont. 518, 521, 77 P 50; State v. Barrick, 60 W. Va. 576, 578, 55 SE 652 [cit Cyc]; Packard Mach. Co. v. Laev, 100 Wis. 644, 645, 76 NW 596.
[b] **The true name** (1) is generally given first. Bouvier L. D.; Reid v. Lord, 4 Johns. (N. Y.) 118. (2) But this is not necessarily so (Kennedy v. Peo., 39 N. Y. 245).

51. **Alias writ:**
Generally see Process [32 Cyc 444, 448].
Capias ad respondendum see Arrest [3 Cyc 955].
Ejectment see Ejectment [15 Cyc 185].
Execution see Executions [15 Cyc 185]; Sheriffs and Constables [35 Cyc 1949].
Fieri facias see Executions [17 Cyc 1034].
Mandamus see Mandamus [26 Cyc 494].
Replevin see Replevin [34 Cyc 1451].
Successive writs see Attachments [4 Cyc 583]; Garnishment [20 Cyc 983].
Warrant see Criminal Law [12 Cyc 299].

52. Glenn v. Brush, 3 Colo. 26, 34; Farris v. Walter, 2 Colo. A. 450, 453, 31 P 231; Roberts v. Church, 17 Conn. 142, 145.
[a] **An alias writ is "so called** from the words 'as we have formerly commanded you' (sicut alias præcipimus) being inserted after the usual commencement. 'We command you.' Blackstone, Chap. 19, Book 3." American Trust, etc., Bank v. Pack, 70 Ill. A. 177, 179. To same effect Farris v. Walter, 2 Colo. A. 450, 453, 31 P 231.

53. American Trust, etc., Bank v. Pack, 70 Ill. A. 177, 179.
[a] **"Alias process** means a second writ of the same kind issued in the same cause." McGavock v. Young, 3 Tenn. Ch. 529, 531.

54. Century D. [quot Lawrence v. Bernstein, 46 Misc. 608, 609, 92 NYS 817].
[a] **An alias execution** (1) "issues either upon scire-facias or otherwise, where the original execution has been returned into court, or has been lost, or for some cause has become legally extinguished as a writ. The alias, in such case, is another and different execution, actually issued at a different time." Roberts v. Church, 17 Conn. 142, 145. (2) "It was not a variance between the allegations and the proof, that in the declaration the fieri facias received by the sheriff, is described as an 'execution,' and the proofs showed it to be an alias pluries fi. fa.; the former is a generic term which embraced the latter." Hill v. Fitzpatrick, 6 Ala. 314, 318.
[b] **Alias summons.**—(1) "Section 26 of the Municipal Court Act [Laws (1902) p 1498 c 580] provides that 'an action must be commenced by the service of a summons.' Section 30 [p 1499] provides that if the marshal or other person having the summons to serve cannot find the defendant the clerk shall, at the request of the plaintiff, continue to 'issue another summons to be known and stamped "alias" until the defendant is served.' There is no provision in said act which requires that, with the service of this 'alias' summons, the original summons shall also be served. The 'alias' summons is as much a writ issued to obtain jurisdiction of the defendant as the first summons issued. The provision for the issuance of an 'alias' summons is for the purpose of keeping the cause of action alive, as the same section provides that 'an action shall be deemed commenced at the time the summons is actually delivered for service.'" Lawrence v. Bernstein, 46 Misc. 608, 609, 92 NYS 817. (2) In Mansur v. Pacific Mut. L. Ins. Co., 136 Mo. A. 726, 727, 118 SW 1193, the court said: "It is employed in cases where the original summons is defective in form or manner of service and cannot be held to have performed its function. An order of record that an alias summons be issued necessarily must constitute an abandonment of the original service. [Finley v. Richards, 1 Blackf. (Ind.) 487.] When issued and served, the second writ supersedes the first and defects in the first cannot be pleaded in abatement of the second. [Goodlett v. Hansell, 56 Ala. 346.]"

55. American Trust, etc., Bank v. Pack, 70 Ill. A. 177, 179; Rapalje & L. L. D. [quot Mansur v. Pacific Mut. L. Ins. Co., 136 Mo. A. 726, 727, 118 SW 1093].

56. Black L. D. [quot Peyton v. State, 54 Nebr. 188, 190, 74 NW 597].

57. Henderson v. State, 51 Tex. Cr. A. 193, 194, 101 SW 245.

58. **Alibi:**
Burden of proof see Criminal Law [12 Cyc 383].
Continuance in order to show see Criminal Law [9 Cyc 176].
Drunkenness as tending to prove see Criminal Law [12 Cyc 174, 175].
Evidence of generally see Criminal Law [12 Cyc 404].
Instruction as to see Criminal Law [12 Cyc 619].

59. Albritton v. State, 94 Ala. 76, 77, 10 S 426; Schultz v. Territory, 5 Ariz. 239, 240, 52 P 352; Peo. v. Weber, 149 Cal. 325, 347, 86 P 671; Peo. v. Levine, 85 Cal. 39, 40, 22 P 969, 24 P 631; Wisdom v. Peo., 11 Colo. 170, 174, 17 P 519; State v. Brauneis, 84 Conn. 222, 230, 79 A 70; State v. Massey, 25 Del. 501, 503, 82 A 243; State v. Roberts, 78 A 305, 25 Del. 140, 149; Savage v. State, 18 Fla. 970, 974; Williams v. State, 123 Ga. 138, 141, 51 SE 322; Harris v. State, 120 Ga. 167, 171, 47 SE 520; Simpson v. State, 78 Ga. 91, 98; Ware v. State, 67 Ga. 349, 351; State v. Davis, 6 Ida. 159, 164, 53 P 678; Peo. v. Connors, 246 Ill. 9, 18, 92 NE 567; Peo. v. Lukossus, 242 Ill. 101, 108, 89 NE 749; Briggs v. Peo., 219 Ill. 330, 343, 76 NE 499; Ackerson v. Peo., 124 Ill. 563, 566, 16 NE 847; Creed v. Peo., 81 Ill. 565 568; Miller v. Peo., 39 Ill. 457, 464; Glover v. U. S., 6 Ind. T. 262, 267, 91 SW 41 [rev on other grounds 147 Fed. 426, 77 CCA 450, 8 AnnCas 1184]; State v. Worthen, 124 Iowa 408, 412, 100 NW 330; State v. McGarry, 111 Iowa 709, 710, 83 NW 718; State v. Maher, 74 Iowa 77, 81, 37 NW 2; State v. Fry, 67 Iowa 475, 478, 25 NW 738; State v. Child, 40 Kan. 482, 483, 20 P 275; State v. Caymo, 108 La. 218, 220, 32 S 351; Com. v. Webster, 5 Cush. (Mass.) 295, 319, 52 AmD 711; Peo. v. Resh, 107 Mich. 251, 254, 65 NW 99; Peo. v. Fuhrmann, 103 Mich. 593, 598, 61 NW 865; State v. Barton, 214 Mo. 316, 322, 113 SW 1111; State v. McGinnis, 158 Mo. 105, 122, 59 SW 83; State v. Hale, 156 Mo. 102, 106, 56 SW 881; State v. Taylor, 118 Mo. 153, 164, 24 SW 449; State v. Gordon, 35 Mont. 458, 467, 90 P 173; Peyton v. State, 54 Nebr. 188, 189, 74 NW 597; McLain v. State, 18 Nebr. 154, 159, 24 NW 720; Territory v. Tais, 14 N. M. 399, 401, 94 P 947; Peo. v. McLaughlin, 145 App. Div. 513, 515, 130 NYS 458; Burns v. State, 75 Oh. St. 407, 409, 79 NE 929; Gawn v. State, 13 Oh. Cir. Ct. 116, 121, 7 Oh. Cir. Dec. 19; Briceland v. Com., 74 Pa. 463, 469; Mass v. State, (Tex. Cr. A.) 128 SW 394, 395; O'Hara v. State, 57 Tex. Cr. 577, 579, 124 SW 95; Crowell v. State, 56 Tex. Cr. A. 480, 490, 120 SW 897; Williams v. State, 54 Tex. Cr. 30, 35, 111 SW 1031; Fox v. State, 53 Tex. Cr. 150, 154, 109 SW 370; Tinsley v. State, 52 Tex. Cr. 91, 98, 106 SW 347; Benge v. State, 52 Tex. Cr. 361, 362, 107 SW 831; Colbert v. State, 52 Tex. Cr. 486, 487, 107 SW 1115; State v. Powers, 72 Vt. 168, 174, 47 A 836; State v. King, 50 Wash. 312, 314, 97 P 247, 16 AnnCas 322; Dunn v. State, 118 Wis. 82, 86, 94 NW 646, 648. See Criminal Law.

60. **Alien:** As a noun see Aliens post p 1043. See also Alienation post p 1035.

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ship of anything; to make over to another.[61]

ALIENABLE. Capable of being sold or transferred to another.[62]

ALIENAGE or ALIENISM.[63] The state of an alien.[64]

ALIEN AND SEDITION LAWS. The acts of congress of July 6 and July 14, 1798.[65]

ALIENA NEGOTIA EXACTO OFFICIO GERUNTUR.[66]

ALIENATE.[67] To convey[68] or transfer[69] to another;[70] to convey or transfer to another the title to property;[71] to transfer the property or ownership of anything, to make over to another owner;[72] to pass property from one person to another;[73] to transfer property from one's self to another;[74] to transfer property to another; to make a thing another man's;[75] to divest one's self of property or title;[76] at common law to voluntarily part with the ownership of property either by bargain and sale, or by some conveyance or by gift or will.[77]

ALIENATIO LICET PROHIBEATUR, CONSENSU TAMEN OMNIUM IN QUORUM FAVOREM PROHIBITA EST, POTEST FIERI, ET QUILIBET POTEST RENUNCIARE JURI PRO SE INTRODUCTO.[78]

61. Murray D. [quot Reg v. Smith, 22 Ont. 279, 284].

[a] **Employed in a deed,** the word is not used to designate the quantity of estate intended to be conveyed, but merely for the purpose of passing title to an estate described by other words introduced for that purpose. Krider v. Lafferty, 1 Whart. (Pa.) 303, 314.

[b] **Does not import warranty.**—"Neither the words grant, bargain, sell, alien or confirm, when used in a conveyance of real estate, import a warranty." Burwell v. Jackson, 9 N. Y. 535, 541 [foll Frost v. Raymond, 2 Cai. (N. Y.) 188, 2 AmD 228].

[c] **Including mortgage.**—In the Wills Act § 20, the word "aliened" is not used in any peculiar sense not applied to its use in other connections, and includes a bona fide mortgage. Hetfield v. Jaques, 10 N. J. L. 259, 264; McMahon v. Schoonmaker, 51 N. J. Eq. 95, 97, 25 A 946. See also Alienation text and notes 92–94.

[d] **"Alien or grant" in a deed** will make a good deed of bargain and sale, if made for a pecuniary consideration or one of pecuniary value, and although ever so small, even a barleycorn. Krider v. Lafferty, 1 Whart. (Pa.) 303, 316 [cit Sheppard Touchstone 222].

[e] **"Alien, transfer and dispose," in a charter** granting to a corporation the right to acquire, alien, transfer and dispose of property of every kind, embraces the power to mortgage. McAllister v. Plant, 54 Miss. 106, 119.

62. Century D.

[a] **"'Alienable,' and 'alienation'** are familiar terms, commonly used in relation to the disposition of real estate. In their accustomed sense, and by the great weight of judicial interpretation and definition, they included the disposition of real estate by will, as well as by conveyance, when the acts of Congress and the agreements under consideration were enacted, and it was undoubtedly in that sense that Congress and the Indian Nations used them in these acts and agreements. They intended to restrict, and by the use of these terms they did restrict, the disposition of the property of the Choctaws and Chickasaws by will as well as by deed." Hayes v. Barringer, 168 Fed. 221, 224, 93 CCA 507.

[b] **Disposition by will.**—"Alienable" may be broad enough to include dispositions by will when not otherwise restrained by the context. But where that word was used in the first section with respect to the joint consent of husband and wife, and following this section was another providing for the continuance of the exemption in the heirs of the head of the family from and after his death, it cannot be said that the word "alienable" was intended to embrace testamentary dispositions. The word "alienable" was not used in the sense of "devisable." Caro v. Caro, 45 Fla. 203, 216, 34 S 309. See also Taylor v. Parker, 33 Okl. 199, 200, 126 P 573.

63. **Alienage or alienism:** Pleading see Pleading [31 Cyc 184]. See also Aliens post p 1039.

64. Wharton L. Lex. See also McDonel v. State, 90 Ind. 320, 323.

65. Abbott L. D.

66. A maxim meaning "The business of another is to be conducted with particular attention." Bouvier L. D.

[a] **Applied in:** Carlisle First Nat. Bank v. Graham, 2 WklyNC (Pa.) 141, 144 (where the court said: "The fact that the bailee keeps the property of the bailor with the ordinary care with which he keeps his own, does not fulfill the measure of his legal duty where the contract is one which requires strict diligence and extraordinary care. So, under a contract of bailment in which the benefits are reciprocal, the bailee is not shielded from liability for neglect of ordinary care, by proving that he has been careless, inattentive, and reckless in the management of his own goods as well as those of the bailor. Cases for the application of the maxim of the Emperor Constantine, quoted in Jones on Bailments (83): 'Aliena negotia exacto officio geruntur,' must constantly arise").

67. See Alienation post.

68. Bouvier L. D. [quot Frame v. Bivens, 189 Fed. 785, 789]; U. S. Saving Fund, etc., Co. v. Harris, 142 Ind. 226, 239, 40 NE 1072, 41 NE 451.

69. Bouvier L. D. [quot Frame v. Bivens, 189 Fed. 785, 789].

70. Gould v. Head, 41 Fed. 240, 245; Vining v. Willis, 40 Kan. 609, 613, 20 P 232; Market Nat. Bank v. Belmont, 137 Mass. 407; Union Ins. Co. v. Barwick, 36 Nebr. 223, 235, 54 NW 519; Burbank v. Rockingham Mut. F. Ins. Co., 24 N. H. 550, 557, 57 AmD 300; Harty v. Doyle, 49 Hun 410, 413, 3 NYS 574; Burrill L. D. [quot U. S. Saving Fund, etc., Co. v. Harris, 142 Ind. 226, 239, 40 NE 1072, 41 NE 451].

71. Gould v. Head, 41 Fed. 240, 245 (holding this to be the meaning of the word as used in articles of incorporation prohibiting the trustees of the corporation from alienating any shares of stocks, bonds, cash, or other property which might come into their possession or under their control, except on approval of the board of trustees).

[a] **Technical meaning of term.**—"The term alienate has a technical legal meaning, and any transfer of real estate, short of a conveyance of the title, is not an alienation of the estate. No matter in what form the sale may be made, unless the title is conveyed to the purchaser, the estate is not alienated." Masters v. Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624, 630 [quot Pollard v. Somerset Mut. F. Ins. Co., 42 Me. 221, 225].

[b] **The right to alienate** (1) is a right which the owner has over the real estate to divert it from the heir. Burbank v. Rockingham Mut. F. Ins. Co., 24 N. H. 550, 558, 57 AmD 300. (2) To alienate property signifies its transfer, and implies the right by title to do so. Morris v. Allen, 17 Cal. A. 684, 691, 121 P 690.

72. Reg. v. Smith, 22 Ont. 279, 284.

73. Langston v. Smyley, 38 S. C. 121, 125, 16 SE 771.

74. Harty v. Doyle, 49 Hun 410, 413, 3 NYS 574.

75. Butler v. Fitzgerald, 43 Nebr. 192, 204, 61 NW 640, 47 AmSR 741, 27 LRA 252.

76. Harty v. Doyle, 49 Hun 410, 413, 3 NYS 574.

77. Miller v. German Ins. Co., 54 Ill. A. 53, 56; Butler v. Fitzgerald, 43 Nebr. 192, 204, 61 NW 640, 47 AmSR 741, 27 LRA 252; Burbank v. Rockingham Mut. F. Ins. Co., 24 N. H. 550, 558, 57 AmD 300; Harty v. Doyle, 49 Hun 410, 413, 3 NYS 574.

[a] **Devise and descent.**—(1) The word extends not only to alienations of land in a deed, but also to alienations in law, and includes devise and descent. Lane v. Maine Mut. F. Ins. Co., 12 Me. 44, 48, 28 AmD 150. See also In re Lands of Five Civilized Tribes, 199 Fed. 811, 830. (2) But as used in Const. art 5 § 9, providing that a homestead shall not be alienated without the joint consent of the husband and wife, it means a voluntary parting with or surrendering of some interest in the homestead, and, as a person never parts with or surrenders anything by virtue of a will, but only by reason of his or her subsequent death, and as it never can be supposed without proof that any person will voluntarily bring about his own death, it necessarily follows that the constitutional provision has no application to wills. We know that text-writers have sometimes broadened the word "alienation" so as to make it include the transfer of property by will, death, and the statutes, and perhaps this use of the word is not inaccurate; but, as before stated, the efficient cause of the alienation in such case, indeed the sole cause, is death, and the will and the statutes merely say where the title and estate shall go. Vining v. Willis, 40 Kan. 609, 614, 20 P 232.

[b] **"Alienate, sell or dispose" includes power to mortgage.**—"By section 9 sub-section 2 of the General Railway Act (1), express power is conferred upon the Company to alienate, sell and dispose of lands which they may have acquired for the construction, maintenance, accommodation and use of the railway. This right of alienation includes lands acquired in the exercise of compulsory powers as well as those obtained by conventional purchase. That the words 'alienate, sell or dispose' include a power to mortgage as well as that of absolute disposition, requires no demonstration." Bickford v. Grand Junction R. Co., 1 Can. S. C. 696, 736. To same effect McAllister v. Plant, 54 Miss. 106. See also Alienation text and notes 92–94.

78. A maxim meaning "Although alienation be prohibited, yet, by the consent of all in whose favor it is prohibited, it may take place, for it is in the power of any man to renounce a right introduced for his own benefit." Bouvier L. D.

[a] **Applied in:** Seip's Est., 1 Pa. Dist. 26, 11 Pa. Co. 27 (where the court said: "[It] is a maxim of the

ALIENATION. The passing of a thing from another, or the separation of two things;[79] a transfer by conveyance;[80] a transfer of the title of property;[81] the transfer of the property and possession of lands, tenements, or other things, from one person to another;[82] the voluntary and complete transfer of property from one person to another;[83] the act by which the title to an estate is voluntarily resigned by one person and accepted by another in the forms prescribed by law;[84] the act by which title to real property is voluntarily transferred by one person and accepted by another;[85] a mode of obtaining an estate by purchase, by which it is yielded up by one person and accepted by another.[86]

In its broadest sense, alienation comprises any method wherein estates or property are voluntarily resigned by one man and accepted by another;[87] whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.[88] In other words, the term embraces every mode of passing real estate by the act of the parties, as distinguished from passing it by the operation of law.[89]

common law (Coke Litt. 98. b.), and the principle is no less applicable in equity. Bowditch v. Andrew, 8 Allen (Mass.) 339; Culbertson's App., 76 Pa. 145; Perry Trusts § 920").

79. Vining v. Willis, 40 Kan. 609, 613, 20 P 232 (where the court said: "As generally used [alienation] means the passing of a thing from another, or the separation of two things, and not the conjoining or uniting of things. The passing of an estate or title from a person is an alienation, but the passing of an estate or title to a person is not an alienation. . . . It is only when they are separated from each other in some manner, when they are disjoined, or when they become foreign to each other, that they are alienated. . . . This passing of an estate to a person must be given some other name, as a 'reception' or a 'union,' or an 'association' ").

80. Turner v. Bennett, 70 Ill. 263, 267; Pittsburgh, etc., Iron Co. v. Lake Superior Iron Co., 118 Mich. 109, 130, 76 NW 395. See also Peo. Sav. Bank v. Tripp, 13 R. I. 621, 622.

81. Masters v. Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624, 629. See also Thomas v. Craft, 55 Fla. 842, 846, 46 S 594, 15 AnnCas 1118.

[a] **Attribute of ownership.**—The right of alienation is inherent as an incident to or a tribute of the ownership of property. Thomas v. Craft, 55 Fla. 842, 846, 46 S 594, 15 AnnCas 1118.

82. Dickson v. New York Biscuit Co., 211 Ill. 468, 480, 71 NE 1058; Boyd v. Cudderback, 31 Ill. 113, 119; Miller v. German Ins. Co., 54 Ill. A. 53, 56; Coughlin v. Coughlin, 26 Kan. 116, 118; Orrell v. Bay Mfg. Co., 83 Miss. 800, 819, 36 S 561, 70 LRA 881; Butler v. Fitzgerald, 43 Nebr. 192, 205, 61 NW 640, 47 AmSR 741, 27 LRA 252; Masters v. Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624, 629; Stark v. Duvall, 7 Okl. 213, 217, 54 P 453; Hendrix v. Seaborn, 25 S. C. 481, 484, 60 AmR 520 [quot Bouvier L. D.]; Meek v. Parsons, 31 Ont. 529, 533.

[a] **Usually the term applies** to lands or some interest therein. Miller v. German Ins. Co., 54 Ill. A. 53.

[b] **Alienation in mortmain,** in its primary signification is an alienation of lands or tenements to any corporation, aggregate, ecclesiastical, or temporal, the consequence of which in former time was that, by allowing lands to become vested in objects endued with perpetuity of duration, the lords were deprived of escheats and other feudal profits, and the general policy of the common law, which favored the free circulation of property, was frustrated, although it is true that at common law the power of purchasing lands was incident to every corporation. Perin v. Carey, 24 How. (U. S.) 495, 16 L. ed. 701; Downing v. Marshall, 23 HowPr (N. Y.) 4. To same effect Kierzkowski v. La Compagnie, etc., 10 L. C. Rep. 63.

83. Orrel v. Bay Mfg. Co., 83 Miss. 800, 819, 36 S 561, 70 LRA 881; Stark v. Duvall, 7 Okl. 213, 217, 54 P 453.

84. Masters v. Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624, 629.

85. Burbank v. Rockingham Mut. F. Ins. Co., 24 N. H. 550, 558, 57 AmD 300 [quot Kalyton v. Kalyton, 45 Or. 116, 129, 74 P 491, 78 P 332 (rev on another point 204 U. S. 458, 27 SCt 346, 51 L. ed. 566)].

86. Masters v. Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624, 629.

[a] **Usual forms.**—The act of alienation is usually accomplished by the execution of a deed or of a will. Kalyton v. Kalyton, 45 Or. 116, 74 P 491, 78 P 332.

[b] **Blackstone describes four modes** of alienation or transfer of title to real estate, which he calls common assurance, the first of which is by matter in pais or deed; the second, by matter of record, or an assurance transacted only in the king's public courts of record; the third, by special custom; and the fourth, by devise in a last will or testament. U. S. v. Schurz, 102 U. S. 398, 26 L. ed. 167. "We are next, but principally, to inquire how a man may aliene or convey; which will lead us to consider the several modes of conveyance. In consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there were necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired: which we have more than once observed was that of occupancy or first possession. But this possession, when once gained, was also necessarily to be continued; or else, upon one man's dereliction of the thing he had seised, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose therefore of continuing the possession, the municipal law has established descents and alienations: the former to continue the possession in the heirs of the proprietor, after his involuntary dereliction of it by his death; the latter to continue it in those persons to whom the proprietor, by his own voluntary act, shall choose to relinquish it in his lifetime. A translation, or transfer of property being thus admitted by law, it became necessary that this transfer should be properly evidenced: in order to prevent disputes, either about the fact, as whether there was any transfer at all, or concerning the persons, by whom and to whom it was transferred; or with regard to the subject-matter, as what the thing transferred consisted of; or, lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the common assurances of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed. These common assurances are of four kinds: 1. By matter in pais, or deed; which is an assurance transacted between two or more private persons in pais, in the country; that is (according to the old common law), upon the very spot to be transferred. 2. By matter of record, or an assurance transacted only in the king's public courts of record. 3. By special custom, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect till after his death; and that is by devise contained in his last will and testament." 2 Blackstone Comm. 293.

87. Anderson L. D. [quot Jackson v. Thompson, 38 Wash. 282, 287, 80 P 454]. See also Atty.-Gen. v. Esquimalt, etc., R Co., 19 West. L. Rep. 693.

In Meek v. Parsons, 31 Ont. 529, 533, the court said: "Alienation is as much as to say as to make a thing another man's, or to alter or put the possession of lands or other things from one man to another."

88. Anderson L. D. [quot Jackson v. Thompson, 38 Wash. 282, 287, 80 P 454]; Blackstone Comm. 287; Lane v. Maine Mut. F. Ins. Co., 12 Me. 44, 48, 28 AmD 150; Burbank v. Rockingham Mut. F. Ins. Co., 24 N. H. 550, 558, 57 AmD 300; Muldoon v. Moore, 55 N. J. L. 410, 417, 26 A 892, 21 LRA 89; Taylor v. Parker, 33 Okl. 199, 200, 126 P 573; Hendrix v. Seaborn, 25 S. C. 481, 484, 60 AmR 520; Sands v. Standard, etc., Co., 26 Grant Ch. 113, 118, 27 Grant Ch. 169. To same effect Kalyton v. Kalyton, 45 Or. 116, 74 P 491, 78 P 332; Canadian Pac. R. Co. v. Burnett, 5 Man. 395; Berry v. Berry, 16 N. S. 66.

[a] **"A sale and conveyance** is an alienation that takes effect from the time of the transfer." Burbank v. Rockingham Mut. F. Ins. Co., 24 N. H. 550, 558, 57 AmD 300.

[b] **"A devise** is an alienation that takes effect on the decease of the testator, according to the terms of the will." Burbank v. Rockingham Mut. F. Ins. Co., 24 N. H. 550, 558, 57 AmD 300.

[c] **Alienation of homestead.**—(1) A charge imposed upon a testator's homestead by a will is not an "alienation" in the lifetime of the testator which prevents the operation of the statute passing the homestead to the testator's wife and children on his decease without alienation, for the testamentary provision does not come into existence and take effect until the death of the testator. Macrae v. Macrae, (Tenn.) 57 SW 423, 425. (2) In Hendrix v. Seaborn, 25 S. C. 481, 60 AmR 520, it was held that a devise was not an alienation within the statute providing that no right of homestead shall exist in any property aliened by any person as against the title of the alienee. Bostick v. Chovin, 55 S. C. 427, 33 SE 508.

89. Jenckes v. Smithfield, Probate Ct., 2 R. I. 255, 257. See also Turner v. Bennett, 70 Ill. 263, 267. But see Lane v. Maine Mut. F. Ins. Co., 12 Me. 44, 48, 28 AmD 150 (where it was said: "A transfer of title by . . . descent, or by levy would be as technically an alienation as a transfer by deed").

[a] **"Descent" distinguished.**—"Alienation differs from descent in this, that alienation is effected by the voluntary act of the owner of the property, while descent is the legal consequence of the decease of the

Actual transfer imported. The word "alienation" like the word "sale" imports an actual transfer of title,[90] and does not, as a general rule, include any transfer short of the conveyance of the title.[91]

Whether a mortgage is an alienation within the meaning of that term depends in a measure upon the nature of the property and the restriction against alienation sought to be avoided.[92] Ordinarily a mortgage or other lien upon land is not, technically speaking, an alienation, for the reason that, while it may finally result in an alienation, it is not in itself a complete and absolute transfer of title.[93] In some classes of property, however, the restrictions against alienation are more strictly construed and in such cases a mortgage is within the meaning of the word.[94]

Miscellaneous illustrations. The question as to what will and what will not amount to an alienation, within the meaning of that word, has been considered in many instances by the courts,[95] and

owner, and is not changed by any previous act or volition of the owner." Burbank v. Rockingham Mut. F. Ins. Co., 24 N. H. 550, 558, 57 AmD 300. See also Turner v. Bennett, 70 Ill. 263, 267.

90. Gould v. Head, 41 Fed. 240, 245; Virginia F. & M. Ins. Co. v. Feagin, 62 Ga. 515, 519; U. S. Saving Fund, etc., Co. v. Harris, 142 Ind. 226, 239, 40 NE 1072, 41 NE 451; Pollard v. Somerset Mut. F. Ins. Co., 42 Me. 221, 225; Orrell v. Bay Mfg. Co., 83 Miss. 800, 819, 36 S 561, 70 LRA 881; Union Ins. Co. v. Barwick, 36 Nebr. 223, 225, 54 NW 519; Marts v. Cumberland Mut. F. Ins. Co., 44 N. J. L. 478, 481; Masters v. Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624, 630; Van Deusen v. Charter Oak F. & M. Ins. Co., 24 N. Y. Super. 55, 64, 1 AbbPrNS 349; Barnes v. Stonebraker, 28 Okl. 75, 79, 113 P 903. See also Commercial Union Assur. Co. v. Scammon, (Ill.) 12 NE 324, 339; Lane v. Maine Mut. F. Ins. Co., 12 Me. 44, 28 AmD 150, and infra text and notes 92-96.

[a] **Perfected conveyance inter vivos.**—In Hendrix v. Seaborn, 25 S. C. 481, 484, 60 AmR 520, the court said: "It seems to us that the accurate and specific meaning of the word is to pass an estate from one to another, involving the idea of a perfected conveyance of title inter vivos."

[b] **"Property not transferred or devised is not alienated** according to the principle of the common law.' Burbank v. Rockingham Mut. F. Ins. Co., 24 N. H. 550, 57 AmD 300." Miller v. German Ins. Co., 54 Ill. A. 53, 56.

[c] **Exclusion of interest in alienor.**—If alienation concerns the transfer of property it involves the complete and absolute exclusion, out of him who alienates, of any remaining interest, or particle of interest, in the thing transmitted. It involves the complete transfer of the property and possession of land, tenements, and other things to another. Stark v. Duvall, 7 Okl. 213, 54 P 453 [quot Orrell v. Bay Mfg. Co., 83 Miss. 800, 819, 36 S 561, 70 LRA 881].

91. Pollard v. Somerset Mut. F. Ins. Co., 42 Me. 221, 225; Orrell v. Bay Mfg. Co., 83 Miss. 800, 819, 36 S 561, 70 LRA 881; Union Ins. Co. v. Barwick, 36 Nebr. 223, 235, 54 NW 519; Masters v. Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624, 630; Van Deusen v. Charter Oak F. & M. Ins. Co., 24 N. Y. Super. 55, 64, 1 AbbPrNS 349; People's Sav. Bank v. Tripp, 13 R. I. 621, 622; Warren v. Raymond, 17 S. C. 163; Hammel v. Queen's Ins. Co., 54 Wis. 72, 85, 11 NW 349, 41 AmR 1; Meek v. Parsons, 31 Ont. 529, 533. See also infra text and notes 92-96.

[a] **"Assignment" compared.**—Sands v. Standard Ins. Co., 26 Grant Ch. 113, 118.

[b] **No deed made or delivered.**—(1) Under an insurance policy, providing that, if the insured property should be "alienated" by sale or otherwise, the policy should be void, it was held that a contract for the sale of the property under which no deed was made, and only a part of the purchase money paid, was not an alienation within the meaning of the policy. Hill v. Cumberland Valley Mutl Protection Co., 59 Pa. 474, 478.

(2) Where, at the time of the fire, a decree in chancery for the sale of the property on foreclosure had been entered and the property bid in by the mortgagee, but no deed had been delivered, and because of the fire the mortgagee refused to receive a sheriff's deed, the policy did not become void by "alienation" within the meaning of the term as used in the policy. Marts v. Cumberland Mut. F. Ins. Co., 44 N. J. L. 478, 481.

[c] **A void sale** of property in which no legal title passed is not an alienation within the meaning of the word. Thus "alienation," as used in an insurance policy prohibiting the alienation of property, does not include a void sale of the property under a deed of trust or under foreclosure. Commercial Union Assur. Co. v. Scammon, (Ill.) 12 NE 324, 329; Lane v. Maine Mut. F. Ins. Co., 12 Me. 44, 28 AmD 150; Worthington v. Bearse, 12 Allen (Mass.) 382, 90 AmD 152; Hooper v. Hudson River F. Ins. Co., 17 N. Y. 424; West Branch Ins. Co. v. Helfenstein, 40 Pa. 289, 80 AmD 573.

[d] **Noncompliance with statutory requirements.**—Where the legislature prescribed certain formalities to accompany the alienation of a homestead, it was held that a mortgage unaccompanied by such formalities did not confer upon the mortgagee the right to sell the property. The court said: "Alienation of the homestead, is the transfer of the title and the possession, and can only be made in the mode prescribed by the statute. Any failure to comply with the conditions there imposed fails to affect the right to the homestead. Nor can it become any more operative as a deed of trust, a mortgage with a power of sale, or conveyance of the land, to relinquish the right to insist upon the benefits of the statute, than a want of compliance with the act in simply releasing the right, without attempting to incumber or convey the property." Boyd v. Cudderback, 31 Ill. 113. To same effect Peterson v. Hornblower, 33 Cal. 266, 274; Thomas v. Craft, 55 Fla. 842, 46 S 594, 15 AnnCas 1118. Compare Dunker v. Chedic, 4 Nev. 378.

92. Hart v. Sanderson, 18 Fla. 103, 115; U. S. Saving Fund, etc., Co. v. Harris, 142 Ind. 226, 239, 40 NE 1072, 41 NE 451; Edmands v. Mutual Safety F. Ins. Co., 1 Allen (Mass.) 311, 79 AmD 746; McMahon v. Schoonmaker, (N. J. Ch.) 25 A 946, 947.

93. Rissberger v. Louisville, (Ky.) 118 SW 319, 320; Smith v. Monmouth Mut. F. Ins. Co., 50 Me. 96, 97; Pollard v. Somerset Mut. F. Ins. Co., 42 Me. 221, 225; Bryan v. Traders' Ins. Co., 145 Mass. 389, 392, 14 NE 454; Judge v. N. Y. Bowery F. Ins. Co., 132 Mass. 521, 523; Jackson v. Massachusetts Mut. F. Ins. Co., 23 Pick. (Mass.) 418, 34 AmD 69; Orrell v. Bay Mfg. Co., 83 Miss. 800, 819, 36 S 561, 70 LRA 881; Shepherd v. Union Mut. F. Ins. Co., 38 N. H. 232, 240; Rollins v. Columbian Mut. F. Ins. Co., 25 N. H. 200, 202; Conover v. Albany Mut. Ins. Co., 1 N. Y. 290, 294; Stark v. Duvall, 7 Okl. 213, 54 P 453; Aultman, etc., Co. v. Rush, 26 S. C. 517, 533.

[a] **Mortgagor in possession.**—Gen. St. c 41 § 7 provides: "If any person is taxed for several parcels of real estate, or for personal and real estate in the same tax, the whole of such person's tax may be collected, either out of the real or personal estate, or any part thereof: Provided, that no land aliened shall be sold, if the person taxed have other sufficient property." It was held that a mortgage is not an alienation within the meaning of this section so long as the mortgagor remains in possession. People's Sav. Bank v. Tripp, 13 R. I. 621, where the court said: "The complainant contends that the levy was not authorized by the statute. The statute, Gen. St. c. 41 § 7, however, provides that if any person is taxed in the same tax for several parcels of land, or for land and personalty, the whole tax may be collected either out of the real or personal estate, or any part thereof, provided that no land aliened shall be sold, if the person taxed have other sufficient property; and we are of the opinion that an estate, which is merely mortgaged, is not, so long as the mortgagor remains in possession, 'aliened' within the meaning of the word as used in the statute. The same word is used in § 3 of the same chapter, where it very clearly means more than mortgaged; and in Gen. St. c 39 § 5, it is expressly enacted that 'the mortgagor shall be deemed to be the owner of mortgaged real estate, so long as the same is in his possession.' We think, therefore, that the complainant's first point is not tenable." To same effect Jackson v. Massachusetts Mut. F. Ins. Co., 23 Pick. (Mass.) 418, 34 AmD 69.

[b] **Chattel mortgage.**—Used in a fire insurance policy providing that the policy shall be void if the property be sold or transferred, the term means such a sale, transfer, or alienation of the property as passes the title and carries with it the right of possession, and does not include the execution of a chattel mortgage without change of possession. California Union Ins. Co. v. Barwick, 36 Nebr. 223, 235, 54 NW 519; Van Deusen v. Charter Oak F. & M. Ins. Co., 24 N. Y. Super. 55, 62, 1 AbbPrNS 349, 358.

[c] **Separate property of married women.**—A mortgage of a married woman's separate estate to secure a debt of her husband in no way connected with her separate estate is not an alienation within the meaning of Const. art 14 § 8, allowing married women to alienate their separate estate as fully as if they were single women. Aultman, etc., Co. v. Rush, 26 S. C. 517, 533, 2 SE 402.

94. Frame v. Bivens, 189 Fed. 785; Hart v. Sanderson, 18 Fla. 103, 105; Phillips v. Behn, 19 Ga. 298, 302; Vinnedge v. Shaffer, 35 Ind. 341; Edmands v. Mutual Safety F. Ins. Co., 1 Allen (Mass.) 311, 79 AmD 746. See also U. S. Saving Fund, etc., Co. v. Harris, 142 Ind. 226, 239, 40 NE 1072, 41 NE 451; Stark v. Duvall, 7 Okl. 213, 217, 54 P 453.

[a] **Homestead mortgage.**—"Alienation," as used in statutory provisions concerning homesteads, and in the constitution, includes any agreement or contract by which the title would inure to the benefit of another, and hence includes a mortgage. Brewster v. Madden, 15 Kan. 249, 251. See also Hart v. Sanderson, 18 Fla. 103, 115.

95. Frame v. Bivens, 189 Fed. 785,

its decision is in a great measure dependent upon the form of the transfer, the intention of the parties, and the peculiar circumstances of each particular case.[96]

790; Stacey v. Walter, 125 Ala. 291, 28 S 89, 90, 82 AmSR 235; U. S. Saving Fund, etc., Co., v. Harris, 142 Ind. 226, 239, 40 NE 1072, 41 NE 451; Jackson v. Massachusetts Mut. F. Ins. Co., 23 Pick. (Mass.) 418, 34 AmD 69; Pittsburgh, etc., Iron Co. v. Lake Superior Iron Co., 118 Mich. 109, 130, 76 NW 395; Orrell v. Bay Mfg. Co., 83 Miss. 800, 819, 36 S 561, 70 LRA 881; Butler v. Fitzgerald, 43 Nebr. 192, 204, 61 NW 640, 47 AmSR 741, 27 LRA 252; Van Deusen v. Charter Oak F. & M. Ins. Co., 24 N. Y. Super. 55, 64, 1 AbbPrNS 349; Kalyton v. Kalyton, 45 Or. 116, 74 P 491, 78 P 832; Aultman, etc., Co. v. Rush, 26 S. C. 517, 533, 2 SE 402.

[a] **An adjustment of boundary lines** voluntarily between mining corporations owning property bordering upon a lake, whereby each acquired territory claimed by the other, has been held not to be an alienation, division, or sale of the corporate real estate, so as to enable one of the companies to avoid the adjustment on the ground that it was not authorized by three fifths of the stockholders as required by statute. Pittsburgh, etc., Iron Co. v. Lake Superior Iron Co., 118 Mich. 109, 76 NW 395.

[b] **A contract to sell and convey** is not in the legal or technical sense of the word an alienation of the estate. Masters v. Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624, 630.

[c] **Agreement for sale or contract to convey.**—(1) By 47 Vict. 14 § 22 (E. & N. Ry. Act) it was provided that certain public lands granted by the act to the railway in aid of its construction "shall not be subject to taxation, unless and until the same are used by the Company for other than railroad purposes, or leased, occupied, sold or alienated." It was held that the word "alienated" in this act would cover an agreement for sale. Reg. v. Victoria Lumber, etc., Co., 5 B. C. 288, 299. See also Pollard v. Somerset Mut. F. Ins. Co., 42 Me. 221, 225; Hill v. Cumberland Valley Mut. Protection Co., 59 Pa. 474. But compare Brewster v. Madden, 15 Kan. 249, 251 supra note 94 [a]. (2) Under U. S. Rev. St. §§ 2290, 2291, providing that no patent shall issue without an affidavit that no part of the land has been alienated, a contract to convey, made during the transition period, having for its purpose the execution of a regular conveyance of the title when acquired is an alienation within the spirit and purpose of the statute, and is illegal and void. Anderson v. Carkins, 135 U. S. 483, 10 SCt 905, 907, 34 L. ed. 272. And the undoubted preponderance of the adjudications of the state courts is to the same purpose. Horseman v. Horseman, 43 Or. 83, 72 P 698.

[d] **Bankruptcy.**—(1) It has been said that the term "alienation" extends only to a disposition by the act of the party, and not to a transfer by operation of law, as bankruptcy. Wilkinson v. Wilkinson, Coop. 259, 10 EngCh 259, 35 Reprint 551; Lear v. Leggett, 2 Sim. 479, 2 EngCh 479, 57 Reprint 867; Whitfield v. Prickett, 2 Keen 608, 15 EngCh 608, 48 Reprint 762. (2) Under a will property was given to one for life with a gift over in the event of his "alienating or incumbering, or agreeing to alienate or incumber" his interest. It was held that a voluntary petition in bankruptcy and adjudication consequent thereon constituted an alienation within the meaning of the gift over. In re Cotgrave, [1903] 2 Ch. 705, 709 [foll In re Amherst, L. R. 13 Eq. 464, and dist In re Riggs, [1901] 2 K. B. 16].

[e] **Judgment and levy of execution.**—A statute for the relief of creditors against heirs and devisees provides that where the land has been aliened before action brought the heir or devisee shall be liable for the value of the land so aliened. It was held that a judgment against an heir or devisee upon his individual debt, and levy of an execution issued thereon upon lands descended or devised prior to the commencement of an action against the heir or devisee upon a debt of the ancestor or testator, were not an alienation within the meaning of that act. Muldoon v. Moore, 55 N. J. L. 410, 26 A 892, 21 LRA 89.

[f] **Confession of judgment and sale by the sheriff** in pursuance of that judgment are an alienation. Stansbury v. Patent Cloth Mfg. Co., 5 N. J. L. 508, 441 (where the court said: "The confession of judgment and a sale by the sheriff, in pursuance of that judgment, is in the strictest sense an alienation by the corporation, and, therefore, as against these plaintiffs, is inoperative and leaves the land liable to be sold upon their executions in the same manner as if no such conveyance had ever been made. I say it is in the strictest sense an alienation by the corporation, for it is wholly immaterial whether one actually make the conveyance himself or constitute an agent or trustee to make it for him, or, in order to render the transaction still more solemn, go into a court of justice, and by certain forms of proceeding procure it to be made by the officer of the law; still it is his own act").

[g] **Execution sale.**—(1) An insurance policy provided for an immediate termination of the risk if the property should be sold or transferred, or any alienation or change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance. It was held that the words "sold," "transferred," and "alienated," do not ordinarily include a sale upon execution, and the words "change in the title or possession" do not extend the meaning, and this would be the meaning were it not for the words "by legal process or judicial decree." But since under a sale on execution the owner of the land has full right of possession and occupancy for fifteen months after the sale, and for twelve months of that time he has an absolute right to redeem, so that neither possession nor title passes before the end of fifteen months, such a sale does not violate the provisions of the policy. Hammel v. Queen's Ins. Co., 54 Wis. 72, 85, 11 NW 349, 41 AmR 1. See also Rice v. Tower, 1 Gray (Mass.) 426, 429. (2) But within the statute providing that, when a widow shall be entitled to dower out of any lands which shall have been "aliened" by her husband in his lifetime, and such lands have been enhanced in value after the alienation, such lands shall be estimated in setting out the widow's dower according to their value at the time they were so aliened, the word "alienation" includes sale of the property of the husband on execution against him alone. Butler v. Fitzgerald, 43 Nebr. 192, 204, 61 NW 640, 47 AmSR 741, 27 LRA 252.

[h] **Judicial sale.**—Where personal property, insured against loss by fire in a mutual fire insurance company, was sold by a master in chancery, but before the fire the decree under which the sale was made had been vacated, there was such an alienation as avoided the policy. Mt. Vernon Mfg. Co. v. Summit County Mut. F. Ins. Co., 10 Oh. St. 347.

[i] **An entry to foreclose a mortgage** does not amount to an alienation, whatever might be the effect of a completed foreclosure. Market Nat. Bank v. Belmont, 137 Mass. 407.

[j] **Judgment in foreclosure.**—A fire insurance policy conditioned that the same should be void if the premises were alienated without the consent of the insured, and that a judgment in foreclosure proceedings should be deemed an "alienation" of the property, meant a judgment of strict foreclosure, and did not embrace a decree for sale in the foreclosure suit without any further proceedings. Kane v. Hibernia Mut. F. Ins. Co., 38 N. J. L. 441, 456, 20 AmR 409.

96. Harty v. Doyle, 49 Hun 410, 3 NYS 574; and cases supra note 95.

[a] **Deed of trust.**—(1) A deed of an undivided three fourths of the grantor's homestead, in 1851, to A as trustee for grantor's wife, and X and Y, his two children, and their heirs and assigns, without any duty charged upon the trustee in relation thereto, was not void for want of the wife's signature, not being an alienation of the homestead within the meaning of the statute. Riehl v. Bingenheimer, 28 Wis. 84. (2) A statute which provides that an insurance policy shall be void if, during the life of the policy, there be any "alienation" of the property does not include the execution of a deed of trust by the insured, since the word "alienate," as there used, imports an absolute divestiture of title. Virginia F. & M. Ins. Co. v. Feagin, 62 Ga. 515, 519.

[b] **Lease.**—(1) Within the prohibition against alienating a homestead without the consent of the wife, a lease was held an alienation. Coughlin v. Coughlin, 26 Kan. 116, 119. To same effect Mailhot v. Turner, 157 Mich. 167, 121 NW 804. (2) And a lease has been held an alienation of lands within a statute allowing alienation by the allottees of Indian lands. Barnes v. Stonebraker, 28 Okl. 75, 79, 113 P 903; Sharp v. Lancaster, 23 Okl. 349, 353, 100 P 518; Eldred v. Okmulgee L. & T. Co., 22 Okl. 742, 745, 98 P 929. (3) But a lease was held not to be an alienation within the clause of an insurance policy against alienation. Lane v. Maine Mut. F. Ins. Co., 12 Me. 44, 28 AmD 150.

[c] **Transfer without consideration.**—(1) Although the word "sale," as used in the Alabama statutes empowering a married woman to dispose of her separate property by sale, was used in its legal sense as a transfer of property for a valuable consideration, yet the word "alienation," as used in a subsequent statute giving a married woman power to alienate her separate property the same as a feme sole, authorizes a married woman to convey her land without consideration. Stacey v. Walter, 125 Ala. 291, 295, 28 S 89, 82 AmSR 235. (2) But "alienate," as used in a quitclaim deed reserving to the grantor the power to "alienate" or mortgage, means "to divest oneself of property or title, to transfer property from oneself to another," which is not done by the execution of quitclaim deeds by the grantor without consideration. See Harty v. Doyle, 49 Hun 410, 413, 3 NYS 574.

[d] **Sale in ordinary course of business.**—"Alienated," as used in a fire policy on a stock of goods kept for sale, which provides that if the property be alienated by sale or otherwise it shall avoid the policy, is construed to mean a sale of the whole or a material part of the stock out of the regular course of business, and not a sale of various items of the stock in the ordinary course of business. Lane v. Maine Mut. F. Ins. Co., 12 Me. 44, 48, 28 AmD 150.

[e] **Sale of partner's interest.**—A fire insurance policy, providing that it shall be void by "alienation" of the property by sale or otherwise, is to be construed as including a transfer by one partner, having an interest in the property of his interest to another party. Hartford F. Ins. Co. v.

(Cross references.[97])

ALIENATIO REI PRÆFERTUR JURI ACCRESCENDI.[98]

ALIEN CORPORATION. A nonresident corporation.[99]

ALIEN IMMIGRANT. One who offers to take up his residence in a country, but has not yet carried out his desire.[1]

ALIENISM. See Alienage ante p 1034.

ALIENIST.[2] One who has made mental diseases, those affecting the mind intellectually and the moral or spiritual faculties, his special study.[3]

ALIENO IN LOCO HAUD STABILE REGNUM EST.[4]

Ross, 23 Ind. 179, 183, 85 AmD 452.

[f] **Transfer by one tenant in common to another.**—The charter of an insurance company provided that whenever any building insured by the company should be alienated, by sale or otherwise, the policy should become ipso facto void. The policy was issued to R and W who were tenants in common. While the policy was in force, W sold and transferred his interest in the property to R. This was held not to be such an alienation as was intended by the charter. Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553.

97. **Alienation:**
Of:
Affections see Husband and Wife [21 Cyc 1617].
Land by individual Indian see Indians [22 Cyc 133].
Property:
Insured see Fire Insurance [19 Cyc 742].
Of:—Continued
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Of religious society see Religious Societies [34 Cyc 1160].
Public land see Public Lands [32 Cyc 797].
Power of:
Generally see Public Lands [32 Cyc 677].
Life tenant see Estates [16 Cyc 636].
Married woman as to separate property see Husband and Wife [21 Cyc 1496].
Property subject to:
Personal property see Sales [35 Cyc 44].
Real property see Vendor and Purchaser [39 Cyc 1129].
Restraint of:
Generally see Charities [6 Cyc 905]; Perpetuities [30 Cyc 1464].
Restrictions in deeds as to see Deeds [13 Cyc 687].
Stipulations as to, in insurance policies see Fire Insurance [19 Cyc 742].

98. A maxim meaning "Alienation is favoured by the law rather than accumulation." Broom Leg. Max.

99. Baumgarten v. Alliance Assur. Co., 153 Fed. 301, 304. See also In re Keasbey, etc., Co., 160 U. S. 221, 229, 16 SCt 273, 40 L. ed. 402; Howard v. Georgia Gold Reefs, etc., 102 Fed. 657; Shattuck v. North British, etc., Ins. Co., 58 Fed. 609, 7 CCA 386. See generally Corporations [19 Cyc 1195].

1. In re Buchsbaum, 141 Fed. 221, 222. See generally Aliens §§ 46–127.

2. **Alienist:** Evidence of see Criminal Law [12 Cyc 403]; Evidence [17 Cyc 138].

3. State v. Reidell, 14 Del. 470, 474, 14 A 550.

4. A maxim meaning "The sovereignty which is held over remote territories is precarious." Morgan Leg. Max.

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ALIENS

By Edward C. Ellsbree*

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 1042]

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CROSS REFERENCES

Action or proceeding by or against alien:
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Extradition see **Extradition** [19 Cyc 50].
Insolvency see **Insolvency** [22 Cyc 1346].
Jurisdiction of:
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Limitations of see **Limitations of Actions** [25 Cyc 1230].
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Citizenship see **Citizens** [7 Cyc 132].
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International law see **International Law** [22 Cyc 1697].
Status of Indian see **Indians** [22 Cyc 112].

I. DEFINITIONS

[§ 1] With respect to any country, an alien is a person who is not a citizen or subject of the country;[1] a citizen or subject of a foreign state;[2] a foreigner;[3] one who does not, either by nativity or voluntary adoption, owe allegiance to the government within whose territory he dwells.[4]

In England an alien is one born out of the allegiance of the king.[5]

In the United States an alien is one born out of the jurisdiction of the United States, and who has not been naturalized under the constitution and laws of the United States.[6]

II. CLASSIFICATION OF ALIENS

[§ 2] Aliens are classified as resident and nonresident aliens, and as alien friends and alien enemies.

A resident alien is one who resides in a country to which he is a foreigner; but the term does not include an alien who has become naturalized.[7]

A nonresident alien is one residing out of the country or state, the context showing the territorial limits with reference to which the term "resident" is used.[8]

Alien friends of a country are those foreigners whose country is at peace with it.[9]

Alien enemies[10] of a country are those foreigners whose country is at war with it;[11] those who owe allegiance to an adverse belligerent nation.[12] The mere circumstance of birth, however, is not now held to be of itself sufficient to give the character of an alien enemy. Domicile or residence more

1. Anderson L. D.; Rapalje & L. L. D.; 2 Kent Comm. 50.

[a] **Derivation of term.**—"Alien, alienigena, is derived from the Latin word alienus, and, according to the etymology of the word, it signifieth one born in a strange country, under the obedience of a strange prince or country (and therefore, Bracton saith that this exception propter defectum nationis, should rather be propter defectum subjectionis), or as Littleton saith, (which is the surest), out of the liegeance of the king." Ex p. Dawson, 3 Bradf. Surr. (N. Y.) 130, 136 [cit Calvin's Case, 7 Coke 2a, 16a, 77 Reprint 379, 2 ERC 575; Stanley v. Bernes, 3 Hagg. Eccl. 373; Doe v. Jones, 4 T. R. 300, 100 Reprint 1031; Bacon Abr.; Coke Litt. 128b; Comyns Dig. 552]; Rapalje & L. L. D. [cit Bracton 427b; Coke Litt. 128b].

[b] **Corporations.**—(1) "Person" is construed to include "corporation," in respect to alienage, so that a corporation created by the laws of a foreign country is an alien. Terry v. Imperial F. Ins. Co., 23 F. Cas. No. 13,838, 3 Dill. 408; Barrowcliffe v. La Caisse Generale, etc., 58 HowPr (N. Y.) 131; Janson v. Driefontein Cons. Mines, [1902] A. C. 484. See also State v. Hudson Land Co., 19 Wash. 85, 52 P 574, 40 LRA 430 (construing a constitutional provision prohibiting alien ownership of lands, and declaring that every corporation, a majority of the stock of which is owned by aliens, shall be deemed an alien for the purposes of such prohibition). (2) But the fact that an alien holds stock in a corporation does not necessarily affect the rights of the corporation (Comyns Dig. 426; Princeton Min. Co. v. Butte First Nat. Bank, 7 Mont. 530, 19 P 210; Reg. v. Arnaud, 9 Q. B. 806, 58 ECL 806, 115 Reprint 1485), (3) as these rights are defined by the laws of the sovereignty under which it was created (State v. Hudson Land Co., supra).

[c] **Called "a legal term."**—Burrill L. D. [cit Daubigny v. Davallon, Anstr. 462].

[d] **"Alien" and "alien-born," and "subject" or "citizen."** (1) are in their nature relative terms; and to what else can they have relation—what else is there correlative—but the sovereignty or government where the discussion is? Read v. Read, 5 Call (9 Va.) 160. (2) "Alien-born" is a term sometimes applied to a naturalized citizen or subject. Anderson L. D. (3) But it has been said that the terms "alien" and "alien-born" are used synonymously in the English law books. Read v. Read, supra.

[e] **An alien is distinguished from a denizen** which in its modern English sense denotes a person who is alien born but who has obtained from the crown letters patent, called "letters of denization," to make him an English subject. Rapalje & L. L. D.

[f] **A naturalized person** is one who, being an alien by birth, has received citizenship under the constitution and laws of the United States. Rapalje & L. L. D.; Spratt v. Spratt, 1 Pet. (U. S.) 343, 7 L. ed. 171.

[g] **As distinguished from natural-born subjects** see Jacob L. D.; Rapalje & L. L. D. "Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance of the king; and aliens, such as are born out of it." 1 Blackstone Comm. 366.

2. The word "aliens," as used in 25 U. S. St. at L. 433 c 866, relating to the jurisdiction of federal courts "embraces subjects or citizens of foreign countries, and not merely persons resident in this country, who owe allegiance to another." Hennessy v. Richardson Drug Co., 189 U. S. 25, 34, 23 SCt 532, 47 L. ed. 697; Milne v. Huber, 17 F. Cas. No. 9,617, 3 McLean 212.

3. Black L. D. (2d ed); Bouvier L. D.; Burrill L. D. [cit Spratt v. Spratt, 1 Pet. (U. S.) 343, 7 L. ed. 171].

[a] **The word "foreigner"** (1) is said to be "a person belonging to a foreign country, or without the country or jurisdiction under consideration." Guilford's Est., 67 Cal. 380, 382, 7 P 763. (2) Civ. Code § 71, providing that any person, whether citizen or "alien," may take, hold, and dispose of property, does not mean by the word "alien" a person who was born in another country and has come to this country and is here residing, either permanently or temporarily, in the one case being a resident alien and in the other a nonresident alien, but, according to Webster, the word "alien" means a "foreigner, one born in or belonging to another country . . . in American law, one born out of the jurisdiction of the United States and not naturalized," and the word "foreigner," "a person belonging to a foreign country, or without the country or jurisdiction under consideration." Guilford's Est., supra.

4. Abbott L. D.

5. Black L. D. (2d ed); Bouvier L. D.; McKay v. Campbell, 16 F. Cas. No. 8,840, 2 Sawy. 118 [cit Calvin's Case, 7 Coke 2a, 18a, 77 Reprint 379, 2 ERC 575].

6. Black L. D. (2d ed); Bouvier L. D. [quot. Low Wah Suey v. Backus, 225 U. S. 460, 473, 32 SCt 734, 56 L. ed. 1165; Milne v. Huber, 17 F. Cas. No. 9,617, 3 McLean 212; Buffington v. Grosvenor, 46 Kan. 730, 732, 27 P 137, 13 LRA 282; McGregor v. McGregor, 3 Abb. Dec. (N. Y.) 92, 93, 1 Keyes 133, 33 HowPr 456]; Webster D. [quot Guilford's Est., 67 Cal. 380, 382, 7 P 763].

[a] **Statutory definition.**—(1) "Aliens" are the subjects of foreign governments, not naturalized under the laws of the United States. Ga. Civ. Code (1895) § 1814. (2) A subject of another government; an unnaturalized foreigner. Mass. Pub. St. (1882) p 1288.

7. Luhrs v. Eimer, 80 N. Y. 171; In re Wehlitz, 16 Wis. 443, 84 AmD 700.

8. In re Gill, 79 Iowa 296, 44 NW 553, 9 LRA 126.

[a] **Nonresident of state.**—(1) Under 2 Rev. St. 69 § 3, providing that an "alien" residing out of the state is incompetent to act as an executor, a native of the state, although not an inhabitant thereof, is not an "alien." McGregor v. McGregor, 3 Abb. Dec. (N. Y.) 92, 1 Keys 133, 33 HowPr 456. (2) So under Bill of Rights § 17, requiring that no distinction shall ever be made between citizens and "aliens" in reference to the purchase, enjoyment, or descent of property, a wife of a citizen of Kansas who resided in another state cannot be regarded as an alien. Buffington v. Grosvenor, 46 Kan. 730, 27 P 137, 13 LRA 282.

[b] **In California** the phrase "nonresident aliens," as used in Civ. Code (1897) § 672, has been construed to mean those persons who are neither citizens of the United States nor residents of the state. State v. Smith, 70 Cal. 153, 12 P 121.

9. Abbott L. D.; Anderson L. D.; Black L. D.; 1 Blackstone Comm. 372; Burrill L. D. (where it is said that Lord Bacon defined an alien friend to be "such a one as is born under the obeisance of such a king or state as is confederate with the King of England, or at least not in war with him"); Rapalje & L. L. D. [cit Coke Litt. 129b; Calvin's Case, 7 Coke 2a, 17, 77 Reprint 379, 2 ERC 575]; Wharton L. Lex.

[a] **An alien in league** has been defined to be a subject of one that is in league with the king. Adams Gloss.; Burrill L. D.; Coke Litt. 129b.

10. **Alien enemies** see generally War [40 Cyc 296].

11. Abbott L. D.; Anderson L. D.; Burrill L. D. (where it is said that Lord Bacon defined an alien enemy to be "such a one as is born under the obeisance of such a king or state as is in hostility with the king of England"); Coke Litt. 239b; Rapalje & L. L. D.; Wharton L. Lex.

12. Dorsey v. Brigham, 177 Ill. 250, 52 NE 303, 69 AmSR 228, 42 LRA 809.

[a] **Otherwise defined** (1) as "a person who, by reason of owing a permanent or temporary allegiance to a hostile power, becomes, in time of war, impressed with the character of an enemy." Bell v. Chapman, 10 Johns. (N. Y.) 183; Sparenburgh v. Bannatyne, 1 B. & P. 163, 126 Reprint 837; 2 Kent Comm. 63; Burrill L. D. [cit 1 Kent Comm. 74]; (2) Usually said of one domiciled or residing here pending the war, or seeking relief of

frequently has this effect.[13] Alien enemies are either (1) temporary, or such as may become friends again; or (2) specially permitted, or commorant, in the enemy's country at the time of the suspension of amity; or (3) perpetual enemies, or all savage and barbarian tribes who have no social, commercial, or diplomatic relations with other nations, and who do not recognize the obligations of international law and comity.[14]

III. WHO ARE ALIENS

[§ 3] Alienage may arise in three ways—by birth, by election, and by operation of law.

An alien by birth, alien né, generally speaking, is a foreigner, a person born abroad in a foreign country, as distinguished from a native or natural-born subject or citizen.[15] This definition includes persons born in a country prior to its becoming an independent government.[16]

Alienage by election may take place under various conditions, such as where a country is divided into two independent sovereign countries, or where a dependent country proclaims and establishes its independence, or the like.[17] To this class of aliens belong also those persons who have availed them-

some kind from our courts or the general government. Abbott L. D.; Rapalje & L. L. D.

13. Burrill L. D. [cit 2 Kent Comm. 63]; Fish v. Stoughton, 2 Johns. Cas. (N. Y.) 407.

[a] **Foreign resident for commercial purposes.**—"A man who resides under the allegiance and protection of a hostile state, for commercial purposes, is to be considered, to all civil purposes, as much an alien enemy as if he were born there." Hutchinson v. Brock, 11 Mass. 119, 122; McConnell v. Hector, 3 B. & P. 113, 114, 127 Reprint 61.

14. Heirn v. Bridault, 37 Miss. 209.

[a] **Distinction between permanent and temporary alien enemy.**—A man is said to be permanently an alien enemy when he owes a permanent allegiance to the adverse belligerent and his hostility is commensurate in point of time with his country's quarrel; but he who does not owe a permanent allegiance to the enemy is an enemy only during the existence and continuance of certain circumstances. Burrill L. D. [cit 1 Kent Comm. 73]. And see Bell v. Chapman, 10 Johns. (N. Y.) 183, 184.

15. Abbott L. D.; Black L. D.; Bouvier L. D.; Burrill L. D.; Jacob L. D.; Rapalje & L. L. D.; Wharton L. Lex.; 2 Kent Comm. 50; and the following cases:

U. S.—U. S. v. Wong Kim Ark, 169 U. S. 649, 18 SCt 456, 42 L. ed. 890, Fuller, C. J., and Harlan, J., dissenting (where the subject matter of alienage by birth is elaborately discussed, and where it was held that a child born in the United States of Chinese parents who were then residing permanently in the United States, carrying on business and not being employed in any diplomatic or official capacity by the empress of China, was not an alien, but a citizen by birth).

Md.—Brown v. Shilling, 9 Md. 74.

S. C.—Ex p. Dupont, 5 S. C. Eq. 5 [rev on other grounds Shanks v. Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666].

Vt.—Albany v. Derby, 30 Vt. 718.

Va.—Barzizas v. Hopkins, 2 Rand. (23 Va.) 276.

Eng.—Calvin's Case, 7 Coke 2a, 18a, 77 Reprint 379, 2 ERC 575.

See also cases infra this note.

[a] **In England, at the common law,** (1) an alien by birth was a person born out of the allegiance of the king, and this still remains the law, subject of course, to the English statute upon naturalization. Anderson L. D.; 1 Blackstone Comm. 366, 373; Bouvier L. D.; Burrill L. D.; [cit 2 Stephen Comm. 426]; Coke Litt. 128b, 129a; Comyns Dig. 421; Jacob L. D.; 2 Kent Comm. 50; Lynch v. Clark, 1 Sandf. Ch. (N. Y.) 583; Ex p. Dawson, 2 Bradf. Surr. (N. Y.) 130; Doe v. Acklam, 2 B. & C. 779, 9 ECL 337, 107 Reprint 572, 2 ERC 632; Calvin's Case, 7 Coke 2a, 18a, 77 Reprint 379, 2 ERC 575; Doe v. Davis, 5 U. C. Q. B. O. S. 494. (2) "Every writer on the common law states two circumstances, which must concur, in order to make a man an alien in England:—(1) He must be born out of the allegiance of the crown. (2) He must be born of parents who are not entitled to the privileges of natural born subjects." Den v. Brown, 7 N. J. L. 305, 335 [cit Bacon Abr. 125]. (3) But it has been said that this definition must be understood with some restrictions. 1 Blackstone Comm. 373. For a review of English statutes affecting this definition see Jacob L. D.

[b] **In the United States** an alien by birth is a person who was born out of the jurisdiction and allegiance of the United States, and who has not been made a naturalized citizen. Abbott L. D.; Bouvier L. D.; Burrill L. D.; 2 Kent Comm. 50; Rapalje & L. L. D. And see Blight v. Rochester, 7 Wheat. (U. S.) 535, 5 L. ed. 516; Fairfax v. Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453; Dawson v. Godfrey, 4 Cranch (U. S.) 321, 2 L. ed. 634; Contee v. Godfrey, 6 F. Cas. No. 3,140, 1 Cranch C. C. 479; Milne v. Huber, 17 F. Cas. 9,617, 3 McLean 212; Guilford's Est., 67 Cal. 380, 7 P 763; Buffington v. Grosvenor, 46 Kan. 730, 27 P 137, 13 LRA 282; Ainslie v. Martin, 9 Mass. 454; Ludlam v. Ludlam, 26 N. Y. 356, 84 AmD 193; McGregor v. McGregor, 33 HowPr (N. Y.) 456; Jackson v. Wright, 4 Johns. (N. Y.) 75; Lynch v. Clarke, 1 Sandf. Ch. (N. Y.) 583, 668 [cit 4 Dane Abr. 695; 1 Tucker's Blackstone Comm. Pt. II App. 101]; Read v. Read, 5 Call (9 Va.) 160.

[c] **Children of ambassadors,** however, constitute an exception to the rule. Abbott L. O.; Anderson L. D. [cit New Hartford v. Canaan, 54 Conn. 39, 5 A 860]; Bouvier L. D.; Jacob L. D.; Comyns Dig.; Rapalje & L. L. D.; Calvin's Case, 7 Coke 18a. See Citizens [7 Cyc 140].

[d] **Foreign-born wives of naturalized men** in some cases constitute an exception to the rule of alienage by birth. Abbott L. D.; Rapalje & L. L. D. See also infra § 164.

[e] **Persons born in the United States of alien parents** are citizens and not aliens. See Citizens [7 Cyc 137].

[f] **Citizens of Porto Rico** are not aliens. Gonzales v. Williams, 192 U. S. 1, 24 SCt 177, 48 L. ed. 317 [rev. 118 Fed. 941]. See also Citizens [7 Cyc 142 note 33].

16. Jones v. McMasters, 20 How. (U. S.) 8, 15 L. ed. 805; McKinney v. Saviego, 18 How. (U. S.) 235, 15 L. ed. 365; Hollingsworth v. Duane, 12 F. Cas. No. 6,615, Wall Sr. 51; Manchester v. Boston, 16 Mass. 230; Palmer v. Downer, 2 Mass. 179 note; Den v. Brown, 7 N. J. L. 305; Kelly v. Harrison, 2 Johns. Cas. (N. Y.) 29, 1 AmD 154 [cit Calvin's Case, 7 Coke 2a, 27b, 77 Reprint 379, 2 ERC 575].

17. See Carter v. Territory, 1 N. M. 317; Quintana v. Tompkins, 1 N. M. 29; Moore v. Wilson, 10 Yerg. (Tenn.) 406; Republic v. Skidmore, 2 Tex. 261, and cases infra this note.

[a] **The status of citizenship of the United States** arose with the Declaration of Independence, and those within the jurisdiction of the American states who at that time adhered to them either by an express or implied consent, were absolved from allegiance to the British crown and became citizens of the United States (U. S. v. Wong Kim Ark, 169 U. S. 649, 18 SCt 456, 42 L. ed. 890; Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. ed. 617; McIlvaine v. Coxe, 2 Cranch (U. S.) 280, 2 L. ed. 279, 4 Cranch (U. S.) 209, 2 L. ed. 598; Orser v. Hoag, 3 Hill (N. Y.) 79), and aliens with respect to England (The Providence, Stew. (N. S.) 186). The subjects of Great Britain resident in the colonies had a reasonable opportunity upon the Declaration of Independence, to elect whether they would remain subjects of Great Britain or would become subjects of the new sovereignty then created; and this election would be shown or presumed from some overt act, such as residence in this country, declaration of adherence to its allegiance, or the like. Inglis v. Sailor's Snug Harbor, supra. See also Jackson v. White, 20 Johns. (N. Y.) 313. The period of time which was allowed a person to elect to become a citizen of the United States has been variously limited; thus, in New York, it was held that an English subject, born abroad, who emigrated to the United States in 1779 and lived and died there was an alien. Jackson v. Wright, 4 Johns. (N. Y.) 75. In the United States this change of allegiance and citizenship was held to have taken place at the date of the Declaration of Independence; but in Great Britain this state of facts is treated as having arisen at the date of the treaty of 1783, by the terms of which all those, whether natives or otherwise, who at that time adhered to the United States, were virtually absolved from allegiance to the British crown. See McGregor v. Comstock, 16 Barb. (N. Y.) 427 [aff 17 N. Y. 162]; Brown v. Sprague, 5 Den. (N. Y.) 545 (construing treaty of 1783); and Harden v. Fisher, 1 Wheat. (U. S.) 300, 4 L. ed. 96 (construing the treaty of 1794). Compare Shanks v. Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666. The rule in the United States is, therefore, to take the date of the Declaration of Independence as the time when we ceased to be British subjects; the English rule is to take the date as that of the treaty of peace in 1783; so that, during the interim, a person apparently might have had the property rights of a citizen in both countries. Den v. Brown, 7 N. J. L. 305. Compare Moore v. Wilson, 10 Yerg. (Tenn.) 406, where natives of Scotland who became residents domiciled in the United States before the close of the Revolutionary War, were deemed prima facie not to be aliens under the treaty of 1783.

[b] **Persons, born in colonies, who left before the Revolution.**—The decisions of the courts of the various states, as to the status of those who were born in the American colonies of Great Britain before the Revolution and who, before the Declaration of Independence, removed from them and never returned, are inconsistent. In Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 121, 7 L. ed. 617, 625, it is said: "The settled doctrine of this country is, that a person born

selves of the right to become aliens by expatriation or by being naturalized as citizens of another country.[18]

Alienage by operation of law arises where a person performs some act, or some change of dominion or sovereignty takes place, by which the status of the person is changed without regard to his volition. Thus, when a portion of a country is ceded to another country, the inhabitants of the ceded territory, generally speaking, become aliens to the sovereignty of which they formerly were subjects, and subjects of the sovereignty to which the territory is ceded.[19]

IV. EVIDENCE OF ALIENAGE[20]

[§ 4] **A. Presumptions.** Foreigners by birth are presumed to be aliens.[21] The status of a person as to alienage, when once established, is presumed to continue until the contrary is proved.[22] This presumption, however, may be rebutted by proper evidence.[23]

[§ 5] **B. Burden of Proof.** The burden of proving alienage is upon him who asserts it.[24]

[§ 6] **C. Admissibility.** The best evidence which the nature of the case admits must be produced to show alienage.[25] Documentary evidence may be received to establish the alienage of a person,[26] and it has been held that a person's own declarations are admissible for this purpose.[27]

[§ 7] **D. Weight and Sufficiency.** Evidence of alienage must be clear and satisfactory.[28] The mere fact that a person is a consul of a foreign government and is residing in this country,[29] or that he resided abroad for a number of years,[30] has been held insufficient to establish a prima facie case of alienage. The sufficiency of the evidence in any particular case is to be determined upon the facts of that case.[31]

here, who left the country before the declaration of independence, and never returned here, became thereby an alien." And to same effect see Stringer v. Phillis, 3 N. C. 342; Ex p. Dupont, 5 S. C. Eq. 5; Clifton v. Haig, 4 S. C. Eq. 330; Com. v. Bristow, 6 Call (10 Va.) 60. In Massachusetts the question was first raised in Gardner v. Ward, 2 Mass. 244 note [foll. Kilham v. Ward, 2 Mass. 236], where it was apparently held that a person born here before the Declaration of Independence would not become an alien even had he removed before the Declaration of Independence and never returned. And in Ainslie v. Martin, 9 Mass. 454, this was expressly decided to be the law, although the other two cases were not there referred to. Compare Hollingsworth v. Duane, 12 F. Cas. No. 6,615, Wall. Sr. 51 (where it was held that one who was born within the colony of New York, in the year 1760, and removed to Ireland in 1771, and at the Declaration of Independence was settled as an inhabitant within the British dominions where he remained until 1795 when he returned to America, was to be considered an alien). To the same effect with respect to the Texas declaration of independence see Jones v. McMasters, 20 How. (U. S.) 8, 15 L. ed. 805.

[c] **Persons born abroad, who came to the United States after the Revolution.**—While there is no question as to the alienage of a person who was born in England before the year 1775 and always resided there (Dawson v. Godfrey, 4 Cranch (U. S.) 321, 2 L. ed. 634; Jackson v. Burns, 3 Binn. (Pa.) 75; Clifton v. Haig, 4 S. C. Eq. 330; Abbott L. Dict. [cit Blight v. Rochester, 7 Wheat. (U. S.) 535, 5 L. ed. 516; Fairfax v. Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453; Contee v. Godfrey, 6 Fed. Cas. No. 3,140, 1 Cranch C. C. 479]), in Cummington v. Springfield, 2 Pick. (Mass.) 394, it was held that persons born abroad and coming into Massachusetts after 1776 and before 1783 were citizens. This decision was based upon an act passed in 1777. And the same rule was adopted in Connecticut, without being based upon any statute, and it was held that a British soldier who settled in Connecticut in 1778, having deserted from the British army, was a citizen. Hebron v. Colchester, 5 Day (Conn.) 169.

18. Rapalje & L. L. D.; Lynch v. Clarke, 1 Sandf. Ch. (N. Y.) 583, 668 [cit 4 Dane Abr. 695; 1 Tucker's Blackstone Comm. Pt II App. 101].

Naturalization see infra §§ 128-174.

Expatriation see Citizens [7 Cyc 144].

19. Abbott L. D. But compare State v. Primrose, 3 Ala. 546; Com. v. Bristow, 6 Call (10 Va.) 60.

Alienage by marriage.—For matters relating to the alienage or citizenship of an alien woman who marries a citizen, as well as of a citizen woman who marries an alien see Citizens [7 Cyc 141].

20. **Evidence of citizenship** see Citizens [7 Cyc 147].

21. Behrensmeyer v. Kreitz, 135 Ill. 591, 26 NE 704; White v. White, 2 Metc. (Ky.) 185; State v. Jackson, 79 Vt. 504, 65 A 657, 8 LRANS 1245 and note.

22. Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628 (where it was held that, in the absence of proof that an alien has become a citizen of the United States, his alienage is presumed to continue); Kadlec v. Pavik, 9 N. D. 278, 83 NW 5; Ehrlich v. Weber, 114 Tenn. 711, 88 SW 188.

23. Kadlec v. Pavik, 9 N. D. 278, 93 NW 5.

Effect of voting and holding office see Citizens [7 Cyc 148 note 54].

[a] **The mere fact of long residence in this country** is not sufficient to overcome this presumption. Ehrlich v. Weber, 114 Tenn. 711, 88 SW 188.

24. State v. Haynes, 54 Iowa 109, 6 NW 156; Moore v. Wilson, 10 Yerg. (Tenn.) 406; Richards v. Moore, 60 Vt. 449, 15 A 119; Keenan v. State, 8 Wis. 132. But see White v. White, 2 Metc. (Ky.) 185, 190 (where it was said of certain persons that, "being foreigners by birth, they were prima facie aliens, and the plaintiff was not bound to prove that they were aliens, although it was denied, but it was incumbent on the defendant to show that they were citizens of the United States, and not aliens"). To same effect Behrensmeyer v. Kreitz, 135 Ill. 591, 26 NE 704 [cit Kreitz v. Behrensmeyer, 125 Ill. 141, 17 NE 232, 8 AmSR 349; Beardstown v. Virginia, 81 Ill. 541].

25. Keenan v. State, 8 Wis. 132.

26. Newcomb v. Newcomb, 57 SW 2, 22 KyL 286, 51 LRA 419 (where a certificate of naturalization in a foreign country was admitted in evidence for this purpose); Lacoste v. Odam, 26 Tex. 458 (where it was held that recitals in a deed that the vendees were residents of one of the states of the United States were admissible to establish the fact that they were aliens to the republic of Mexico).

27. Groves v. Gordon, 5 S. C. L. 245 (holding, however, that such is not the best evidence); Reg. v. Lynch, 26 U. C. Q. B. 208; Reg. v. McMahon, 26 U. C. Q. B. 195. But see Schuster v. State, 80 Wis. 107, 49 NW 80 (where such declarations were held to be mere hearsay and inadmissible). Compare infra note 28 [b].

28. Torre v. Jeanin, 76 Miss. 898, 25 S 860; Jones v. McCoy, 3 Tex. 349; Williams v. Myers, 2 N. S. Dec. 157.

[a] **Preponderance of evidence.**—(1) Sufficiency of the evidence by which proof of change of status by naturalization or otherwise is sought to be established depends upon the ordinary rules of evidence, in most cases being dependent upon the presentation of such evidence as constitutes a preponderance for or against the fact of alienage. Thus, in Maloy v. Duden, 25 Fed. 673, it was held that an official passport certifying to the naturalization of a person was amply sufficient to establish prima facie that the requirements of the English naturalization statutes had been complied with; and (2) in Walther v. Rabolt, 30 Cal. 185, it was held that proof that a German person, of German parentage, had lived with his parents in Germany until six years old, that he came to the United States when seventeen or eighteen years old, and did not then speak English, and that his father had died in Germany when he was six or eight years old, is sufficient evidence to raise a presumption that he was alien born.

[b] **A person's own statements are not conclusive** to establish his alienage or citizenship (Groves v. Gordon, 5 S. C. L. 245; Lacoste v. Odam, 26 Tex. 458; Schuster v. State, 80 Wis. 107, 49 NW 30). Compare also State v. Burnett, 9 Tex. 48 (where it was decided that the admission of plaintiff, an impresario, that the parties in interest, for whose use he sued, at that time resided in the state of New York, did not authorize the presumption that they were aliens when the statute authorizing aliens to sue was passed).

[c] **Proof that defendant was naturalized** as a citizen of the United States on a certain date and took the usual oath is sufficient prima facie to establish the fact that he was an alien prior to that time. Peacock v. U. S., 125 Fed. 583, 60 CCA 389.

29. Börs v. Preston, 111 U. S. 252, 4 SCt 407, 28 L. ed. 419.

30. Ferguson v. Johnson, 11 Tex. Civ. A. 413, 33 SW 138; Gilman v. Thompson, 11 Vt. 643, 34 AmD 714. But see Moore v. Tisdale, 5 B. Mon. (Ky.) 352 (where it was held that the removal of a wife with her husband from the United States, and her remaining abroad with her husband who had renounced his citizenship in, and had died out of, the United States, raised the presumption of alienage of the wife, which presumption, however, was rebutted by the fact that within a short time after his death she returned to the United States with no intention of leaving the country).

31. U. S.—Boyd v. Nebraska, 143

V. PRIVILEGES AND DISABILITIES

[§ 8] **A. In General.** While the rights of aliens depend entirely upon the municipal law of the state or nation, or the rights which are given aliens by international law,[32] in the United States, except as to certain political and municipal rights to which citizens only are entitled,[33] resident alien friends have practically all and the same rights and privileges as citizens,[34] and are entitled to the benefit of the provision of the federal constitution that no state shall deprive "any person" of life, liberty, or property without due process of law, or deny to "any person" the equal protection of the law.[35] These rights and privileges include both personal rights—such as the right to dwell safely in the country,[36] the general right to engage in any lawful labor, trade, or business within the state,[37] and the right of protection to person, reputation, and other relative rights[38]—and property rights.[39] In return for the protection given aliens they owe a temporary and local allegiance to the country in which they reside, which continues during the period of their residence.[40]

U. S. 135, 12 SCt 375, 36 L. ed. 103; Börs v. Preston, 111 U. S. 252, 4 SCt 407, 28 L. ed. 419; Trabing v. U. S., 32 Ct. Cl. 440.

Cal.—Walther v. Rabolt, 30 Cal. 185.

Ill.—Ryan v. Egan, 156 Ill. 224, 40 NE 827; Behrensmeyer v. Kreitz, 135 Ill. 591, 26 NE 704.

Ky.—Moore v. Tisdale, 5 B. Mon. 352.

Mass.—Dennis v. Brewster, 7 Gray 351.

Miss.—Torre v. Jeanin, 76 Miss. 898, 25 S 860.

N. J.—Coxe v. Gulick, 10 N. J. L. 328.

N. M.—Carter v. Territory, 1 N. M. 317.

S. C.—Groves v. Gordon, 5 S. C. L. 245.

Tex.—Ferguson v. Johnson, 11 Tex. Civ. A. 413, 33 SW 138.

Vt.—Gilman v. Thompson, 11 Vt. 643, 34 AmD 714.

Wis.—Schuster v. State, 80 Wis. 107, 49 NW 80; Keenan v. State, 8 Wis. 132.

Can.—Brannen v. Williams, 6 N. B. 221; Brannen v. Leavitt, 6 N. B. 220; Iler v. Elliott, 32 U. C. Q. B. 434.

See also generally Citizens [7 Cyc 148].

32. Jacob L. D.; Heirn v. Bridault, 37 Miss. 209.

[a] **Former citizens of the United States** who have by naturalization become British subjects are, while domiciled in the United States, entitled by treaty to all the rights of native-born British subjects. Newcomb v. Newcomb, 57 SW 2, 22 KyL 286, 51 LRA 419.

33. Taylor v. Carpenter, 23 F. Cas. No. 13,785, 2 Woodb. & M. 1. See also Grand Juries [20 Cyc 1296]; Juries [24 Cyc 199].

Right to vote see Elections [15 Cyc 290].

Right to hold office see Officers [29 Cyc 1377].

[a] **Political rights.**—An alien has no political rights except those expressly conferred by the statutes or other laws of the country. Borst v. Beecker, 6 Johns. (N. Y.) 332; In re Opinion of Justices, 122 Mass. 594; In re Opinion of Justices, 7 Mass. 523.

34. Taylor v. Carpenter, 23 F. Cas. No. 13,784, 3 Story 458; Taylor v. Carpenter, 23 F. Cas. No. 13,785, 2 Woodb. & M. 1; Pocahontas Collieries Co. v. Rukas, 104 Va. 278, 282, 51 SE 449 [quot Cyc].

35. Williams v. Fears, 179 U. S. 270, 21 SCt 128, 45 L. ed. 186; Yick Wo v. Hopkins, 118 U. S. 356, 6 SCt 1064, 30 L. ed. 220; In re Yamaska, 95 Fed. 652 [rev on other grounds 100 Fed. 404; 40 CCA 454]; U. S. v. Wong Quong Wong, 94 Fed. 832; Reymann Brewing Co. v. Bristor, 92 Fed. 28 [aff 179 U. S. 445, 21 SCt 201, 45 L. ed. 269]; Fraser v. McConway, etc., Co., 82 Fed. 257; In re Ah Chong, 2 Fed. 733, 6 Sawy. 451; In re Parrott, 1 Fed. 481, 6 Sawy. 349; In re Ah Fong, 1 F. Cas. No. 102, 3 Sawy. 144; Ho Ah Kow v. Nunan, 12 F. Cas. No. 6,546, 5 Sawy. 552; State v. Montgomery, 94 Me. 192, 47 A 165, 80 AmSR 386; Crashley v. Press Pub. Co., 179 N. Y. 27, 71 NE 258, 1 AnnCas 196; Juniata Limestone Co. v. Fagley, 187 Pa. 193, 40 A 977, 67 AmSR 579, 42 LRA 442.

[a] **Alien Chinese.**—The fourteenth amendment of the federal constitution protects resident alien Chinese. Yick Wo v. Hopkins, 118 U. S. 356, 6 SCt 1064, 30 L. ed. 220; In re Ah Chong, 2 Fed. 733, 6 Sawy. 451; Ho Ah Kow v. Nunan, 12 F. Cas. No. 6,546, 5 Sawy. 552 (holding unconstitutional an ordinance which declared that every male person imprisoned in the county jail, under the judgment of any court having jurisdiction in criminal cases in the city and county, should immediately upon his arrival at the jail have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof"); In re Ah Fong, 1 F. Cas. No. 102, 3 Sawy. 144. See also Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905 (where it is said that Chinese laborers residing in the United States are entitled, like all other aliens, so long as they are permitted by the government to remain in the country to all the safeguards of the constitution, and to the protection of the laws in regard to their rights of person and of property, and to their civil and criminal responsibility). See also infra §§ 86–121.

[b] **The state may prohibit aliens from hunting game** and to that end may prohibit possession by them of such long range firearms as shotguns and rifles. Com. v. Cosick, 44 Pa. Super. 109; Com. v. Papsone, 44 Pa. Super. 128, 135 [aff 231 Pa. 46, 79 A 928] (where the court said: "This prohibition against having deadly and long-range firearms does not in any way deprive the alien of property without due process of law, but simply defines and limits his right to use firearms, by restricting such right to the use of short-range firearms,—revolvers, and pistols, and such other weapons, as may be necessary for defense of his person and property").

[c] **A state statute prohibiting the employment of aliens on any public work,** and providing for the forfeiture of contracts if the statute is violated, is not in conflict with treaties and does not infringe the constitutional provisions relating to equal protection of the law, due process of law, and ex post facto laws. Peo. v. Crane, N. Y. Court of Appeals, Febr. 25, 1915, 52 NYLJ 1407 [rev 150 NYS 933]. See also Heim v. McCall, 150 NYS 492 [aff Court of Appeals Dec. 31, 1914].

36. Comyns Dig. 426.

37. U. S.—Fraser v. McConway, etc., Co., 82 Fed. 257; In re Ah Chong, 2 Fed. 733, 6 Sawy. 451; Baker v. Portland, 2 F. Cas. No. 777, 5 Sawy. 566; Chapman v. Toy Long, 5 F. Cas. No. 2,610, 4 Sawy. 28; Ho Ah Kow v. Nunan, 12 F. Cas. No. 6,546, 5 Sawy. 552.

Cal.—Peo. v. Wheeler, 136 Cal. 652, 69 P 435.

Me.—State v. Montgomery, 94 Me. 192, 47 A 165.

Mich.—Templar v. State Bd. of Examiners, 131 Mich. 254, 90 NW 1058, 100 AmSR 610.

N. Y.—Peo. v. Warren, 13 Misc. 615, 34 NYS 942.

Pa.—Juniata Limestone Co. v. Fagley, 187 Pa. 193, 40 A 977, 67 AmSR 579, 42 LRA 442; Fraser v. McConway, etc., Co., 6 Pa. Dist. 555.

[a] **A tax exacted from employers of aliens** is unconstitutional as denying to aliens the equal protection of the laws. See Constitutional Law [8 Cyc 1071 text and note 60].

[b] **Liquor license.**—In Trageser v. Gray, 73 Md. 250, 20 A 905, 25 AmSR 587, 9 LRA 780 and note, a state statute denying to aliens licenses to sell intoxicating liquors was upheld. See Constitutional Law [8 Cyc 1069 text and note 3].

[c] **Peddler's license.**—In Com. v. Hana, 195 Mass. 262, 81 NE 149, 122 AmSR 251, 11 LRANS 799 and note, 11 AnnCas 514 and note, it was held that in the exercise of its police power a state could prohibit the granting of a peddler's license to an alien. But in State v. Montgomery, 94 Me. 192, 207, 47 A 165, 80 AmSR 386, the right to do so was denied, the court saying: "We are compelled to conclude that a statute which forbids peddling except under a license, and which provides that citizens of the United States may be licensed, and that aliens shall not be, is a denial of the 'equal protection of the laws.' It is an unconstitutional discrimination against aliens. It does more than impose unequal burdens and charges upon the alien. It absolutely denies him the privilege of an occupation open to citizens, which is more than a discrimination in burdens. It does not permit the alien within our jurisdiction to pursue a business occupation and to acquire and enjoy property on equal terms with the citizen." See generally Constitutional Law [8 Cyc 1069].

[d] **Working as barbers.**—In Templar v. State Bd. of Examiners, 131 Mich. 254, 90 NW 1058, 100 AmSR 610, a state statute prohibiting aliens from working as barbers was held invalid. See generally Constitutional Law.

38. Anderson L. D.; Com. v. Papsone, 44 Pa. Super. 128 [aff 231 Pa. 46, 79 A 928].

39. Personal property rights of aliens see infra §§ 34–36.

Real property rights of aliens see infra §§ 10–33.

40. Carlisle v. U. S., 16 Wall. (U. S.) 147, 21 L. ed. 426; Ex p. Reynolds, 20 F. Cas. No. 11,719, 5 Dill. 394; Thrasher's Case, 6 Webster's Works 526; Com. v. Papsone, 44 Pa. Super. 128 [aff 231 Pa. 46, 79 A 928]; Homestead Case, 1 Pa. Dist. 785; Pocahontas Collieries Co. v. Rukas, 104 Va. 278, 51 SE 449; 1 East P. C. c 2 § 4; 1 Hale P. C. c 10; Foster Crown Law Discourse 1 § 2; 2 Kent Comm. 63, 64.

[a] **"It is . . . a legal and political axiom,** that 'protection and allegiance are reciprocal.' . . . Aliens resident, or sojourning here, do not owe the full measure of allegiance exacted from the citizen, nor can they enjoy all the rights, privileges, and immunities of citizenship. Yet they owe a qualified, local, temporary allegiance. They are bound to obedience to all general laws for the maintenance of peace and the preservation of order. If guilty of any illegal act,

Nonresident aliens are entitled to such rights and privileges as may be expressly conferred, but no duties can be imposed upon them.[41]

Alien enemies have no rights and no privileges, unless by special favor, during time of war.[42]

[§ 9] **B. General Power over Aliens.** The legislatures of the several states have full power to confer upon aliens rights within their jurisdictions, which they otherwise would not have.[43] This right of the states is not affected by the provision of the federal constitution giving power to congress to establish uniform rules for naturalization,[44] and the fact that a treaty exists between the United States and a foreign country conferring certain rights upon the citizens of the latter does not deprive a state of the power to confer additional rights.[45] So a state constitutional provision conferring upon certain aliens certain privileges does not deprive the legislature of the power to confer additional privileges, but merely deprives the legislature of the power to deny to aliens the privileges granted by the constitution.[46] A statute conferring rights upon aliens generally, applies to all aliens.[47] Statutes conferring rights upon aliens are, unless they otherwise provide, deemed prospective only.[48]

The federal government, under its treaty-making power conferred by the constitution, may confer upon aliens rights as regards the several state governments which they would not otherwise have,[49] and, of course, when such privileges are granted by treaty, the state governments have no power to interfere therewith.[50] Where there are no treaty

or involved in any dispute with our citizens, or with each other, they are amenable to the ordinary tribunals of the country. In return for the qualified allegiance demanded of them, a corresponding protection to life, liberty, and property is extended to them." Luke v. Calhoun County, 52 Ala. 115, 121.

[b] **May be taxed.**—In return for the protection afforded an alien at common law with respect to his person, his property, his relative rights, and his reputation, he is required to pay taxes. Anderson L. D. See also Taxation [37 Cyc 769 text and note 19].

41. Mulhall v. Fallon, 176 Mass. 266, 57 NE 386.

42. 1 Blackstone Comm. 373. See also War.

43. Blythe v. Hinckley, 180 U. S. 333, 21 SCt 390, 45 L. ed. 557; Mulhall v. Fallon, 176 Mass. 266, 57 NE 386, 79 AmSR 309, 54 LRA 934.

[a] **Illustration.**—When the government of the United Kingdom of Great Britain and Ireland passed the act of 1870, such act, to the extent that it conferred benefits on citizens of the United States, became, by virtue of the provisions of the Texas statute of 1854, immediately engrafted upon that statute, and became the law defining the rights of alien citizens of Great Britain and Ireland to real estate in Texas; § 9 of the act of 1848 was, as to such aliens, so far modified as to change their previous defeasible estate thereby given into an indefeasible estate. Hanrick v. Hanrick, 54 Tex. 101.

44. Etheridge v. Doe, 18 Ala. 565.

45. Blythe v. Hinckley, 180 U. S. 333, 21 SCt 390, 45 L. ed. 557; Blythe v. Hinckley, 127 Cal. 431, 59 P 787 [aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557]; Maynard v. Maynard, 36 Hun (N. Y.) 227; Ehrlich v. Weber, 114 Tenn. 711, 88 SW 188.

46. McConville v. Howell, 17 Fed. 104, 5 McCrary 319 (Colorado constitution); Nicrosi v. Phillipi, 91 Ala. 299, 8 S 561; Blythe v. Hinckley, 127 Cal. 431, 59 P 787 [aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557]; State v. Smith, 70 Cal. 153, 12 P 121; Guilford's Est., 67 Cal. 380, 7 P 763; Billings v. Hauver, 65 Cal. 593, 4 P 639; State v. Rogers, 13 Cal. 159; Purczell v. Smidt, 21 Iowa 540. In Nicrosi v. Phillipi, 91 Ala. 299, 307, 8 S 561, the court said: "It is specially provided in our law that aliens, resident or nonresident, may take and hold property by purchase, descent, or devise, as native citizens.—Code, § 1914; Code of 1876, § 2860. And this statute, passed February 25, 1875, was not affected by the subsequent ordination of the Constitution of 1875, in which it is declared that foreigners, who are bona fide residents, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property, as native-born citizens, either standing alone, or in connection with the fact, when applied to this case, that Antoni is a naturalized citizen. The constitutional provision was a limitation merely on the otherwise boundless power of the legislature in the premises, and not a grant of power in any sense. Birmingham v. Klein, 89 Ala. 461, 7 S 386, 8 LRA 369. It forbade the legislature to make any discrimination against resident foreigners; but it leaves the competency of the law-making power quite ample to conferring on nonresident aliens the same property rights as may be enjoyed by such resident foreigners, or by native or naturalized citizens. State v. Rogers, 13 Cal. 159."

47. Purczell v. Smidt, 21 Iowa 540.

[a] **Residents and nonresidents.**—(1) A statute conferring rights upon resident aliens does not affect nonresident aliens. Buchanan v. Deshon, 1 Harr. & G. (Md.) 280. (2) Thus the provision in the treaty between the United States and the kingdom of Italy, stipulating that the citizens of Italy in the United States shall enjoy the same rights in the protection of their persons and property which the citizens of the United States enjoy, applies only to such citizens of Italy, who, as to their persons or property, are within the jurisdiction of the United States. Maiorano v. Baltimore, etc., R. Co., 216 Pa. 402, 65 A 1077, 116 AmSR 778, 21 LRANS 271.

48. Purczell v. Smidt, 21 Iowa 540. See infra § 11.

49. Peo. v. Gerke, 5 Cal. 381. See also generally Treaties [38 Cyc 966 text and note 59].

50. U. S.—Japanese Immigrant Case, 189 U. S. 86, 23 SCt 611, 47 L. ed. 721; Chin Ying v. U. S., 186 U. S. 202, 22 SCt 895, 46 L. ed. 1126; Chin Bak Kan v. U. S., 186 U. S. 193, 22 SCt 891, 46 L. ed. 1121; Fok Young Yo. v. U. S., 185 U. S. 296, 22 SCt 686, 46 L. ed. 917; U. S. v. Lee Yen Tai, 185 U. S. 213, 22 SCt 629, 46 L. ed. 878; Storti v. Massachusetts, 183 U. S. 138, 22 SCt 72, 46 L. ed. 120; Ornelas v. Ruiz, 161 U. S. 502, 16 SCt 689, 40 L. ed. 787; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Cherokee Tobacco v. U. S., 11 Wall. 616, 20 L. ed. 227; Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666; Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415; Orr v. Hodgson, 4 Wheat. 453, 4 L. ed. 613; Fairfax v. Hunter, 7 Cranch 627, 3 L. ed. 453; Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568; In re Lee Gon Yung, 111 Fed. 998; Bahuaud v. Bize, 105 Fed. 485; J. & P. Baltz Brewing Co. v. Kaiserbrauerei, 74 Fed. 222, 20 CCA 402; In re Gee Hop, 71 Fed. 274; In re Parrott, 1 Fed. 481, 6 Sawy. 349; Baker v. Portland, 2 F. Cas. No. 777, 5 Sawy. 566.

Cal.—Blythe v. Hinckley, 127 Cal. 431, 59 P 787 [aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557]; Peo. v. Gerke, 5 Cal. 381.

Del.—Doe v. Roe, 20 Del. 398, 55 A 341.

D. C.—Jost v. Jost, 12 D. C. 487.

Ill.—Scharpf v. Schmidt, 172 Ill. 255, 50 NE 182; Adams v. Akerlund, 168 Ill. 632, 48 NE 454; Schultze v. Schultze, 144 Ill. 290, 33 NE 201, 36 AmSR 432, 19 LRA 90; Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84.

Iowa.—Meier v. Lee, 106 Iowa 303, 76 NW 712; Wilcke v. Wilcke, 102 Iowa 173, 71 NW 201; Doehrel v. Hillmer, 102 Iowa 169, 71 NW 204; Opel v. Shoup, 160 Iowa 407, 69 NW 560, 37 LRA 583.

Ky.—Com. v. Newcomb, 109 Ky. 18, 58 SW 445, 22 KyL 516; Newcomb v. Newcomb, 108 Ky. 582, 57 SW 2, 22 KyL 286, 51 LRA 419; Yeaker v. Yeaker, 4 Metc. 33, 81 AmD 530.

La.—Sala's Succ., 50 La. Ann. 1009, 24 S 674; Rabasse's Succ., 49 La. Ann. 1405, 22 S 767; Rixner's Succ., 48 La. Ann. 552, 19 S 597, 32 LRA 177 and note; Amat's Succ., 18 La. Ann. 403.

Mo.—State v. Neibekler, 184 Mo. 211, 83 SW 523.

N. Y.—Bollerman v. Blake, 94 N. Y. 624; Kull v. Kull, 37 Hun 476; Matter of Logiorato, 34 Misc. 31, 69 NYS 507; Matter of Fattosini, 33 Misc. 18, 67 NYS 1119; Fay v. Taylor, 31 Misc. 32, 63 NYS 572; Jackson v. Wright, 4 Johns. 75; Matter of Beck, 11 NYS 199, 2 Conn. Surr. 355.

[a] **Treaties guaranteeing personal rights** (1) to aliens are paramount to statutes attempting to restrict these rights. In re Quong Woo, 13 Fed. 229, 7 Sawy. 526; In re Ah Chong, 2 Fed. 733, 6 Sawy. 451; In re Parrott, 1 Fed. 481, 6 Sawy. 349; Baker v. Portland, 2 F. Cas. No. 777, 5 Sawy. 566 [cit Chapman v. Toy Long, 5 F. Cas. No. 2,610, 4 Sawy. 28]; Peo. v. Warren, 13 Misc. 615, 34 NYS 942. (2) But treaties securing general rights to aliens, on the same footing as citizens, do not take away from the government the right to make laws giving special rights of action to its own citizens, to the exclusion of aliens against itself (Valk v. U. S., 29 Ct. Cl. 62), (3) or to constitutionally regulate and restrict alike the rights of all persons, alien or citizen (Boldwin v. Goldfrank, 88 Tex. 249, 31 SW 1064).

[b] **Rights of Chinese.**—(1) Under a treaty between the Empire of China and the United States, conferring upon Chinese subjects residing in the United States the rights enjoyed by the most favored nations, Chinese subjects residing in the United States have the right to labor and follow any lawful pursuit or calling not prohibited to subjects of other powers. Chapman v. Toy Long, 5 F. Cas. No. 2,610, 4 Sawy. 28. (2) And a state statute prohibiting private corporations of the state from employing Chinese subjects is invalid. In re Parrott, 1 Fed. 481, 6 Sawy. 349. (3) And the same is true with regard to a statute prohibiting the employment of Chinese laborers, or subjects of any nation with whom there is a similar treaty, upon public works or improvements (Baker v. Portland, 2 F. Cas. No. 777, 5 Sawy. 566). See also People v. Warren, 13 Misc. 615 34 NYS 942 (treaty with Italy); (4) and with regard to the California statute prohibiting Chinese from fishing in the waters of the state, such right being granted other aliens (In re Ah

rights, however, a state may prohibit aliens from owning stock in its corporations or may admit them to that privilege only on such terms as it may provide.[51]

[§ 10] **C. In Relation to Real Property—1. General Right to Take and Hold Real Property—a. In General—(1) At Common Law.** By the common law, while an alien cannot take lands by operation of law,[52] he may take by act of the parties,[53] and hold as against every one but the crown or state.[54]

[§ 11] **(2) Statutory and Treaty Regulations—(a) In General.** Subject to the provisions of the organic law of the state,[55] and the constitution, laws,[56] and treaties of the United States,[57] the state

Chong, 2 Fed. 733, 6 Sawy. 451). (5) The treaty provision that Chinese subjects shall enjoy entire liberty of conscience, and be free from all disabilities or persecution on account of their religious faith or worship, does not prevent the state from requiring a license, for which a fee must be paid, to enable the exhumation of the bodies of dead Chinese for shipment to China, although the return of the bodies of Chinese to China for final burial is a part of the religious belief of the Chinese. In re Wong Yung Quy, 2 Fed. 624, 6 Sawy. 442.

51. State v. Travelers' Ins. Co., 70 Conn. 590, 40 A 465, 66 AmSR 138.

52. See infra § 25 et seq.

53. See infra § 16 et seq.

54. See infra § 16.

55. Lehman v. State, 45 Ind. A. 330, 88 NE 365.

[a] **The constitutional provision** declaring void "all conveyances of land hereafter made to any alien directly, or in trust for such alien," does not apply to cases in which a citizen deeds to an alien mortgaged lands in satisfaction of a bona fide mortgage debt, since another section of the same constitutional provision excepts from the prohibition upon alien ownership lands acquired "under mortgage or in good faith in the ordinary course of justice in the collection of debts." Oregon Mortg. Co. v. Carstens, 16 Wash. 165, 167, 168, 47 P 421, 35 LRA 841 (where the court said: "In this case there is no claim of any bad faith, but the question is whether, in the case of an actual loan made, an alien can take a direct deed from the mortgagor of the land in satisfaction of the mortgage debt, or whether he must proceed to acquire title by a foreclosure in the courts").

56. 29 U. S. St. at L. c 618, U. S. Rev. St. Suppl. (1899) p 573 c 618 [amending 24 U. S. St. at L. 476 c 340, U. S. Rev. St. Suppl. (1891) p 556 c 340] (defining and regulating the rights of aliens to hold and own real estate in the territories). See Beard v. Rowan, 2 F. Cas. No. 1,181, 1 McLean 135, 141 [aff 9 Pet. 301, 9 L. ed. 135] (construing the meaning of the words, "Who shall have actually resided within this commonwealth two years," with reference to the persons benefited by the statute).

57. Lehman v. State, 45 Ind. A. 330, 88 NE 365. See also Treaties [38 Cyc 961].

[a] **Treaties between foreign countries and the United States** have from time to time, been made empowering aliens to take, hold, and dispose of real estate. Much adjudication has arisen as to the rights growing out of the various provisions of these treaties. (1) Under the treaty of 1853 with the French Republic see De Geofroy v. Riggs, 133 U. S. 258, 10 SCt 295, 33 L. ed. 642 [rev 18 D. C. 331]; Bahuaud v. Bize, 105 Fed. 485; Baker v. Shy, 9 Heisk (Tenn.) 85. (2) Under the treaty of 1871 with the German Empire see Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84. (3) Under the treaties of 1857 and 1870 with the Grand Duchy of Baden see Wunderle v. Wunderle, supra. (4) Under the treaty of 1845 with the Grand Duchy of Hesse see Bollermann v. Blake, 94 N. Y. 624 [aff 24 Hun 187]. (5) Under the treaty of 1827 with the Hanseatic Republic of Bremen see Schultze v. Schultze, 144 Ill. 290, 33 NE 201, 36 AmSR 432, 19 LRA 90. (6) Under the treaty with the Hanseatic towns of Lübeck, Bremen, and Hamburg see Siemssen v. Bofer, 6 Cal. 250. (7) Under the treaty with the King of Hanover see Ford v. Husman, 41 S. C. L. 165. (8) Under the treaty of 1845 with the Kingdom of Bavaria see Opel v. Shoup, 100 Iowa 407, 69 NW 560, 37 LRA 583. (9) Under the treaties of 1798 and 1800 with the Kingdom of France see Carneal v. Banks, 10 Wheat. (U. S.) 181, 6 L. ed. 297; Chirac v. Chirac, 2 Wheat. (U. S.) 259, 4 L. ed. 234. See also Foster v. Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415, referring to a treaty of 1803. (10) Under the treaty of 1783 with the Kingdom of Great Britain see Society for Propagation of Gospel v. New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662; Blight v. Rochester, 7 Wheat. (U. S.) 535, 5 L. ed. 516; Orr v. Hodgson, 4 Wheat. (U. S.) 453, 4 L. ed. 613; Fisher v. Harnden, 9 F. Cas. No. 4,819, 1 Paine 55 [rev on other grounds 1 Wheat. 300, 4 L. ed. 96]; Munro v. Merchant, 28 N. Y. 9; Brown v. Sprague, 5 Den. (N. Y.) 545; Moore v. Wilson, 10 Yerg. (Tenn.) 406. (11) Under the treaty of 1794 with the Kingdom of Great Britain, known as Jay's Treaty see Shanks v. Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666 [rev 5 S. C. Eq. 51]; Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142; Craig v. Radford, 3 Wheat. (U. S.) 594, 4 L. ed. 467; Jackson v. Clarke, 3 Wheat (U. S.) 1, 4 L. ed. 319; Harden v. Fisher, 1 Wheat. (U. S.) 300, 4 L. ed. 96; Fairfax v. Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453; Trimbles v. Harrison, 1 B. Mon. (Ky.) 140; Owings v. Norwood, 2 Harr. & J. (Md.) 96; Fox v. Southack, 12 Mass. 143; Com. v. Sheafe, 6 Mass. 441; Crane v. Reeder, 21 Mich. 24, 4 AmR 430; Peo. v. Snyder, 41 N. Y. 397 [aff 51 Barb. 589]; Watson v. Donnelly, 28 Barb. (N. Y.) 653; Munro v. Merchant, 26 Barb. (N. Y.) 383 [rev on other grounds 28 N. Y. 9]; Jackson v. Decker, 11 Johns. (N. Y.) 418; Jackson v. Wright, 4 Johns. (N. Y.) 75; Jackson v. Lunn, 3 Johns. Cas. (N. Y.) 109; Duncan v. Beard, 11 S. C. L. 400; Love v. Hadden, 5 S. C. L. 1; Megrath v. Robertson, 1 S. C. Eq. 445; Fiott v. Com., 12 Gratt. (53 Va.) 564; Com. v. Bristow, 6 Call (10 Va.) 60; Foxwell v. Craddock, 1 Patt. & H. 250. (12) Under the treaty of 1783 with the Kingdom of Prussia see People v. Gerke, 5 Cal. 381; Wilcke v. Wilcke, 102 Iowa 173, 71 NW 201; Doehrel v. Hillmer, 102 Iowa 169, 71 NW 204; Stamm v. Bostwick, 40 Hun (N. Y.) 35 [aff 122 N. Y. 48, 25 NE 233, 9 LRA 597]; Matter of Beck, 11 NYS 199, 2 Conn. Surr. 355; Hart v. Hart, 2 S. C. Eq. 57. (13) Under the treaty of 1783 with the Kingdom of Sweden see Adams v. Akerlund, 168 Ill. 632, 48 NE 454; Meier v. Lee, 106 Iowa 303, 76 NW 712. (14) Under the treaty of 1844 with the Kingdom of Würtemberg see Scharpf v. Schmidt, 172 Ill. 255, 50 NE 182; Kull v. Kull, 37 Hun (N. Y.) 476; Wieland v. Renner, 65 HowPr (N. Y.) 245. (15) Under the treaty of 1848 with the Republic of Mexico, known as the treaty of Guadalupe Hidalgo see De Baca v. U. S., 36 Ct. Cl. 407; Baldwin v. Goldfrank, 88 Tex. 249, 31 SW 1064. (16) Under the treaty of 1832 with the Russian Empire see Maynard v. Maynard, 36 Hun (N. Y.) 227. (17) Under the treaty of 1782 with the States-General of the United Netherlands see University Trustees v. Miller, 14 N. C. 188. (18) Under the treaties of 1848, 1850, and 1855 with the Swiss Confederation see Jost v. Jost, 12 D. C. 487; Yeaker v. Yeaker, 4 Metc. (Ky.) 33, 81 AmD 530; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628 [rev 28 Gratt. (69 Va.) 62]. (19) Under a treaty with Hanover see Ahrens v. Ahrens, 144 Iowa 486, 123 NW 164, AnnCas1912A 1098 and note. (20) Under the treaty of 1870 with China see Territory v. Lee, 2 Mont. 124. And see Lee v. Boise Dev. Co., 21 Ida. 461, 122 P 851. (21) Under the treaty of 1900 with Great Britain see Doe v. Roe, 4 Pennew (Del.) 398, 55 A 341.

[b] **Vested rights** as affected by treaties (1) see Chae Chan Ping v. U. S., 130 U. S. 581, 9 SCt 623, 32 L. ed. 1068; Society for Propagation of Gospel v. New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662; Harden v. Fisher, 1 Wheat. (U. S.) 300, 4 L. ed. 96; McGregor v. Comstock, 16 Barb. 427 [aff 17 N. Y. 162]. (2) If a right has vested under a treaty there can be no doubt but that such right would be maintained notwithstanding the expiration of the treaty (Carneal v. Banks, 10 Wheat. (U. S.) 181, 6 L. ed. 297; Society for Propagation of Gospel v. New Haven, supra; Buchanan v. Deshon, 1 Harr. & G. (Md.) 280; Fiott v. Com., 12 Gratt. (53 Va.) 564); (3) but a treaty cannot affect the rights of an alien which were not vested at the time of the expiration of the treaty (Buchanan v. Deshon, supra, right of alien to dower).

[c] **In case of a conflict between the statutes of a state and the terms of a treaty** the latter prevail. De Geofroy v. Riggs, 133 U. S. 258, 10 SCt 295, 33 L. ed. 642; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Orr v. Hodgson, 4 Wheat. (U. S.) 453, 4 L. ed. 613; Chirac v. Chirac, 2 Wheat. (U. S.) 259, 4 L. ed. 234; Fairfax v. Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453; Ware v. Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568; Fisher v. Harnden, 9 F. Cas. No. 4,819, 1 Paine 55 [rev on other grounds 1 Wheat 300, 4 L. ed. 96]; Blythe v. Hinckley, 127 Cal. 431, 59 P 787; Peo. v. Gerke, 5 Cal. 381; Jost v. Jost, 12 D. C. 487; Scharpf v. Schmidt, 172 Ill. 255, 50 NE 182; Adams v. Akerlund, 168 Ill. 632, 48 NE 454; Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84; Doehrel v. Hillmer, 102 Iowa 169, 71 NW 204; Opel v. Shoup, 100 Iowa 407, 69 NW 560, 37 LRA 583; Yeaker v. Yeaker, 4 Metc. (Ky.) 33, 81 AmD 530; Amat's Succ., 18 La. Ann. 403; Crane v. Reeder, 21 Mich. 24, 4 AmR 430; Peo. v. Snyder, 41 N. Y. 397; Kull v. Kull, 37 Hun (N. Y.) 476; Watson v. Donnelly, 28 Barb. (N. Y.) 653; Matter of Beck, 11 NYS 199, 2 Conn. Surr. 355; Ehrlich v. Weber, 114 Tenn. 711, 88 SW 188; In re Stixrud, 58 Wash. 339, 109 P 343, 33 LRANS 632 and note, AnnCas1912A 850 and note.

"In those cases where there is a conflict between the provisions of the state law and those of the treaty, it is not held that the state laws are void as an unwarranted interference with or encroachment upon the powers of the federal government. It is held merely that such laws, in so far as they conflict with the treaty provisions, are suspended or controlled during the life of the treaty. Thus in De Geofroy v. Riggs, 133 U. S. 258, 10 SCt 295, 33 L. ed. 642, the question being as to the effect of the provisions of a treaty with France upon the laws of Maryland which were in operation in the District of Columbia, it is said: 'The treaty, being part of the supreme law of the land, controls the statute and common law of Maryland whenever it differs from them. . . . The treaty expired by its own limitation in eight years pursuant to an article inserted by the senate. During its continuance citizens of France

has full power to determine whether aliens shall be permitted to take and hold real estate,[58] and, if so, to what extent and under what circumstances.[59]

Statutes expressly conferring power upon aliens to take and hold land have been passed in many jurisdictions,[60] and it is the tendency of the courts, unless the statutes otherwise provide, to construe them as conferring the power upon aliens as a class,[61] and as having a prospective, and not merely

could take property in the District of Columbia by inheritance from citizens of the United States, but after its expiration that right was limited as provided by the statute and common law of Maryland.'" Blythe v. Hinckley, 127 Cal. 431, 436, 59 P 787 [aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557]. In Wunderle v. Wunderle, 144 Ill. 40, 53, 33 NE 195, 19 LRA 84, the court said: "Article 6 of the Federal Constitution provides, that 'all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.' In construing this article it has been held, that provisions in regard to the transfer, devise, or inheritance of property are fitting subjects of negotiation and regulation by the treaty-making power of the United States, and that a treaty will control or suspend the statutes of the individual States whenever it differs from them. Hence, if the citizen or subject of a foreign government is disqualified under the laws of a State from taking, holding or transferring real property, such disqualification will be removed, if a treaty between the United States and such foreign government confers the right to take, hold or transfer real property."

58. Lohmann v. Helmer, 104 Fed. 178; Beard v. Rowan, 2 F. Cas. No. 1,181, 1 McLean 135; Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84; Donaldson v. State, (Ind.) 101 NE 485; Lehman v. State, 45 Ind. A. 330, 88 NE 365; Montgomery v. Dorion, 7 N. H. 475.

[a] **The question of the right of an alien to inherit a mining claim located upon government land** is, as against every person but the United States, determined by the laws of the state in which the mine is located, and under the laws of Oregon an alien may inherit such property. Lohmann v. Helmer, 104 Fed. 178.

59. Lehman v. State, 45 Ind. A. 330, 88 NE 365.

[a] **Conditions,** compliance with which is required to enable the alien to take advantage of its provisions, are often incorporated in the Enabling Act, such as (1) That the alien must appear and claim his inheritance. State v. Smith, 70 Cal. 153, 12 P 121. (2) That the alien must be a resident. Norris v. Hoyt, 18 Cal. 217; Siemssen v. Bofer, 6 Cal. 250; Furenes v. Mickelson, 86 Iowa 508, 53 NW 416; Yeaker v. Yeaker, 4 Metc. (Ky.) 33, 81 AmD 530; Louisville v. Gray, 1 Litt. (Ky.) 146; Utassy v. Giedinghagen, 132 Mo. 53, 33 SW 444; State v. Preble, 18 Nev. 251; Larreau v. Davignon, 5 AbbPrNS (N. Y.) 367; McClenaghan v. McClenaghan, 20 S. C. Eq. 295, 47 AmD 532; Sullivan v. Burnett, 105 U. S. 334, 26 L. ed. 1124. (3) That the alien must become a citizen or dispose of his property within a certain time. McCarty v. Deming, 4 Lans. (N. Y.) 440; Richards v. McDaniel, 9 S. C. L. 18; Wiederanders v. State, 64 Tex. 133; Hanrick v. Hanrick, 61 Tex. 596; Andrews v. Spear, 48 Tex. 567; Barclay v. Cameron, 25 Tex. 232; Hanrick v. Patrick, 119 U. S. 156, 7 SCt 147, 30 L. ed. 396. (4) That the alien must have declared his intention of becoming a naturalized citizen. Sullivan v. Burnett, 105 U. S. 334, 26 L. ed. 1124; State v. Beackmo, 8 Blackf. (Ind.) 246; Hall v. Hall, 81 N. Y. 130; McKellar v. McKellar, 28 S. C. L. 536 [but see Dusenberry v. Dawson, 9 Hun (N. Y.) 511; Smith v. Reilly, 31 Misc. 701, 66 NYS 40]. (5) That the alien must not demise or charge the property with rent. Ellice v. Winn, 12 Wend. (N. Y.) 342; Troup v. Mullender, 9 Johns. (N. Y.) 303 [but see Jackson v. Britton, 4 Wend. (N. Y.) 507]. (6) That the alien must take possession of his property within a certain time. Hornsby v. Bacon, 20 Tex. 556; Blythe v. Easterling, 20 Tex. 565; McKinney v. Saviego, 18 How. (U. S.) 235, 15 L. ed. 365. (7) That the alien's intestate must have left no citizen heirs. Burnett v. Noble, 29 S. C. Eq. (8) That the conveyance to the alien must be made and recorded with a certain time. People v. Snyder, 41 N. Y. 397. (9) That the alien cannot transmit by descent to resident aliens. Branagh v. Smith, 46 Fed. 517; Larreau v. Davignon, 5 AbbPrNS (N. Y.) 367. And see infra § 28.

60. See statutory provisions. And see the following cases:

U. S.—Griffith v. Godey, 113 U. S. 89, 5 SCt 383, 28 L. ed. 934 (California statute); Governeur v. Robertson, 11 Wheat 332, 6 L. ed. 488; Matthew v. Rae, 16 F. Cas. No. 9,284, 3 Cranch C. C. 699 (Maryland act of Dec. 19, 1791).

Ark.—Jones v. Minogue, 29 Ark. 687.

Cal.—In re Pendergast, 143 Cal. 135, 76 P 962; Blythe v. Hinckley, 127 Cal. 431, 59 P 787; State v. Smith, 70 Cal. 153, 12 P 121; Matter of Billings, 65 Cal. 593, 4 P 639; Ferguson v. Neville, 61 Cal. 356.

D. C.—The principal rights of aliens are regulated by the act of congress of March 3, 1887, the act of Maryland of 1791 (see Spratt v. Spratt, 4 Pet. (U. S.) 393, 7 L. ed. 897; Spratt v. Spratt, 1 Pet. (U. S.) 343, 7 L. ed. 171), and by 11 & 12 Wm. III c 6 (see McCreery v. Somerville, 9 Wheat. (U. S.) 354, 6 L. ed. 109; U. S. Rev. St. § 1068). See also 25 U. S. St. at L. c 30, U. S. Rev. St. Suppl. (1891) p 582 c 30; 24 U. S. St. at L. 476 c 340, U. S. Rev. St. Suppl. (1891) p 556 c 340.

Ill.—Adams v. Akerlund, 168 Ill. 632, 48 NE 454.

Ind.—Donaldson v. Stall, 67 NE 1029, 1030 [cit Cyc]; Lehmann v. State, 45 Ind. A. 330, 88 NE 365.

Iowa.—Ahrens v. Ahrens, 144 Iowa 486, 123 NW 164, AnnCas1912A 1098 and note; Greenheld v. Stanforth, 21 Iowa 595; Purczell v. Smidt, 21 Iowa 540.

Kan.—Madden v. State, 68 Kan. 658, 75 P 1023; Smith v. Lynch, 61 Kan. 609, 60 P 329; Wuester v. Folin, 60 Kan. 334, 56 P 490.

Ky.—Com. v. Newcomb, 109 Ky. 18, 58 SW 445, 22 KyL 516; Elmondorff v. Carmichael, 3 Litt. 472, 14 AmD 86.

La.—Sala's Succ., 50 La. Ann. 1009, 24 S 674; Rabasse's Succ., 49 La. Ann. 1405, 22 S 767; Rixner's Succ., 48 La. Ann. 558, 19 S 597, 32 LRA 177 and note.

Mo.—Utassy v. Giedinghagen, 132 Mo. 53, 33 SW 444; Burke v. Adams, 80 Mo. 504, 50 AmR 510.

Nebr.—Dougherty v. Kubat, 67 Nebr. 269, 93 NW 317. See Glynn v. Glynn, 62 Nebr. 872, 87 NW 1052.

Nev.—State v. Preble, 18 Nev. 251, 2 P 754.

N. J.—Yeo v. Mercereau, 18 N. J. L. 387.

N. Y.—Haley v. Sheridan, 190 N. Y. 331, 83 NE 296; McCormack v. Coddington, 184 N. Y. 467, 77 NE 979 [rev 109 App. Div. 741, 96 NYS 571]; Peo. v. Snyder, 41 N. Y. 397 [aff 51 Barb. 589]; Wright v. Saddler, 20 N. Y. 320; Smith v. Smith, 70 App. Div. 286, 74 NYS 967; Maynard v. Maynard, 36 Hun 227; Ettenheimer v. Heffernan, 66 Barb. 374; Augustus v. Graves, 9 Barb. 595 [aff 7 N. Y. 305]; Criswell v. Noble, 61 Misc. 483, 113 NYS 954; Kelly v. Pratt, 41 Misc. 31, 83 NYS 636; Renner v. Muller, 57 HowPr 229; Ellice v. Winn, 12 Wend. 342; Jackson v. Adams, 7 Wend. 367; Jackson v. Decker, 11 Johns. 418; Troup v. Mullender, 9 Johns. 303.

N. C.—Johnson v. Eversole Lumber Co., 144 N. C. 717, 57 SE 518.

Oh.—Pittsburgh, etc., R. Co. v. Naylor, 73 Oh. St. 115, 123, 76 NE 505, 112 AmSR 701, 3 LRANS 473 [cit Cyc].

Or.—Spencer v. Carlson, 36 Or. 364, 59 P 708; Lavery v. Arnold, 36 Or. 84, 57 P 906, 58 P 524.

S. C.—McClenaghan v. McClenaghan, 20 S. C. Eq. 295, 47 AmD 532.

Tenn.—Ehrlich v. Weber, 114 Tenn. 711, 88 SW 188; Baker v. Shy, 9 Heisk. 85.

Wash.—State v. Evans, 46 Wash. 219, 89 P 565, 10 LRANS 1163; State v. Stevens County Super. Ct., 33 Wash. 542, 74 P 686.

Eng.—Sharp v. St. Sauveur, L. R. 7 Ch. 343.

Ont.—Murray v. Heron, 7 Grant Ch. (U. C.) 177; Rumrell v. Henderson, 22 U. C. C. P. 180; Leatherman v. Trow, 15 U. C. C. P. 578; Doe v. Maloney, 9 U. C. Q. B. 251.

See Nicrosi v. Phillipi, 91 Ala. 299, 8 S 561; Etheridge v. Malempre, 18 Ala. 565; Emery v. Cooley, 83 Conn. 235, 76 A 529; Scottish American Mortg. Co. v. Butler, 99 Miss. 56, 54 S 666, AnnCas1913C 1236 and note; Terr v. Lee, 2 Mont. 124; Hanrick v. Hanrick, 63 Tex. 618, 61 Tex. 596, 54 Tex. 101; Sabriego v. White, 30 Tex. 576.

[a] **Interpretation of statutes.**—Exceptions should not be construed so as to include other persons than those specifically designated. Mobile Cong. Church v. Morris, 8 Ala. 182; Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84 [cit Luhrs v. Elmer, 80 N. Y. 171]; Doe v. Lazenby, 1 Ind. 234.

[b] **The act of 1817,** authorizing "alien friends" to purchase and hold lands, and further validating all prior purchases by "aliens," validated a prior purchase by an alien enemy. Yeo v. Mercereau, 18 N. J. L. 387.

[c] **In New York,** (1) the act of 1798 provided "that all and every conveyance, or conveyances, hereafter to be made or executed to any alien or aliens, not being the subject or subjects of some sovereign state or power, which is or shall be at the time of such conveyance at war with the United States of America, shall be deemed valid to vest the estate thereby granted to such alien or aliens; and it shall and may be lawful to and for such alien or aliens to have and to hold the same to his, her, or their heirs and assigns forever, any plea of alienism to the contrary notwithstanding." It was held that an alien could convey to an alien and that the latter could hold. Aldrich v. Manton, 13 Wend. 458. (2) And such act is sufficiently comprehensive to embrace sales, purchases, and conveyances in trust. Augustus v. Graves, 9 Barb. 595 [aff 7 N. Y. 305]. (3) N. Y. L. (1897) c 593 p 706 gives to the citizen of any other country that allows the citizens of the state of New York to take, hold, and transfer real estate similar privileges in New York. Haley v. Sheridan, 107 App. Div. 17, 94 NYS 864.

[d] **In Vermont** no laws have been passed restricting aliens' right to hold real estate; and the state has practically never attempted to enforce any right of escheat, although it may strictly have such a power. State v. Boston, etc., R. Co., 25 Vt. 433.

61. Hall v. Hall, 81 N. Y. 130, 138 (where the court said: "We have as-

a retrospective, effect.[62] But the legislature may give the statute a retroactive effect so as to cure titles in aliens even by descent;[63] and where the terms of the statute are retroactive merely, it will not be given a prospective effect as well.[64]

Acts restricting the rights of aliens have been passed in some states, the interpretation and effect of which have been the subject of adjudication.[65] Such acts are not retroactive.[66]

[§ 12] **(b) Effect of Repeal of Enabling Act.** Where power is conferred upon aliens to take and hold real estate, a repeal of the statute will not be given a retroactive effect so as to affect titles acquired by aliens while the enabling statute was in existence.[67] But a repeal of the enabling statute will revive the common-law rule.[68]

[§ 13] **b. Government Grants.** Although the general law denies to aliens the right to hold land, still an alien may hold under a grant from the crown,[69] or from one of the states.[70] And, where a grant, or a patent held tantamount to a grant, is, by its terms, to an alien, "his heirs and as-

sumed thus far that the Act of 1845 applies to aliens who become residents of this State subsequent to its passage. The only doubt upon this point arises upon the language 'any alien resident of this State who has heretofore purchased and taken, or may hereafter purchase and take,' etc. It was one purpose of the act to legitimate purchases by, and devises to, resident aliens, made before the act was passed, saving the vested rights of third persons. (§ 11). For this reason it was necessary to make the language of the act retrospective. But we think the act was intended in addition to embody the permanent policy of the State, in respect to the acquisition and holding of real property by resident aliens. The legislature had been frequently called upon to relieve resident aliens from the disabilities to which they were subject, and numerous special and limited acts had been passed for this purpose. A general act regulating and defining the rights of resident aliens, in respect to real property in this State, would avoid the necessity of special legislation, and it was important that the legislature should enact a general rule governing the property rights of alien residents, for the protection of the large class of persons of foreign birth who were annually becoming residents of the State. In view of the comprehensive language of the act, and the absence of words of limitation such as are found in the act of 1843, we are of opinion that it applies to alien residents as a class, and includes in its prospective provisions, aliens who should thereafter become residents of the State").

62. Hall v. Hall, 81 N. Y. 130.

[a] **Illustrations.**—(1) On Dec. 18, 1800, the legislature of Kentucky passed a law reciting that by the laws then in force aliens could not hold lands therein, and it was considered to the interest of the state that such prohibition should be done away. It then provided that any alien, other than an alien enemy, who should have actually resided within the commonwealth two years, should, during the continuance of his residence therein after that period, be enabled to hold, receive, and pass any right, title, or interest to any lands or other estate in the same manner and under the same regulations as the citizens of that state. It was held that the full effect and benefit of this act, and the clear intention of the legislature, required a construction which gave to it a prospective as well as a retrospective application, and applied to aliens who after the passage of the act should come to and reside in the state; and under this construction Allen Campbell became qualified to take and hold the title to the land in question, as if he had been a citizen of the state. The devise to Allen Campbell was a good executory devise, depending on the contingency of his becoming a citizen of the United States, or being otherwise qualified to hold real estate. This contingency was not too remote. It must necessarily, not only from the nature of the contingency, but also by express limitation in the devise, happen in the lifetime of the devisee, if ever; and upon the happening of this contingency, there could be no doubt that the devisee took an estate in fee. Beard v. Rowan, 9 Pet. (U. S.) 301, 9 L. ed. 135 [aff 2 F. Cas. No. 1,181, 1 McLean 135]. (2) Where a construction of the language of the statute in its ordinary and natural meaning makes it relate to cases arising after and not before the passage of the statute, it will not be given a retroactive effect. Meadowcroft v. Winnebago County, 181 Ill. 504, 54 NE 949; McCormack v. Coddington, 184 N. Y. 467, 77 NE 979; Brown v. Sprague, 5 Den. 545; Warnell v. Finch, 15 Tex. 163.

63. Wainwright v. Low, 132 N. Y. 313, 30 NE 747; Criswell v. Noble, 61 Misc. 483, 113 NYS 954; Kelly v. Pratt, 41 Misc. 31, 83 NYS 636; Hornsby v. Bacon, 20 Tex. 556.

64. Heeney v. Brooklyn Benev. Soc., 33 Barb. 360 [aff 39 N. Y. 333].

65. See statutory provisions. And see the following cases:

U. S.—Airhart v. Massieu, 98 U. S. 491, 25 L. ed. 213 (construing the constitution of the Republic of Texas); Brigham v. Kenyon, 76 Fed. 30 (construing Washington Const. art 2 § 33; Ware v. Wisner, 50 Fed. 310 (construing an Iowa act prohibiting nonresident aliens from taking lands by descent or devise).

Del.—Doe v. Roe, 20 Del. 398, 55 A 341.

D. C.—Johnson v. Elkins, 1 App. 430 (construing an act prohibiting aliens from acquiring land in the District of Columbia).

Ill.—Scharpf v. Schmidt, 172 Ill. 255, 50 NE 182; DeGraff v. Went, 164 Ill. 485, 43 NE 1075; Ryan v. Egan, 156 Ill. 224, 40 NE 827; Beavan v. Went, 155 Ill. 592, 41 NE 91, 31 LRA 85 and note; Schaefer v. Wunderle, 154 Ill. 577, 39 NE 623; Schultze v. Schultze, 144 Ill. 290, 33 NE 201, 36 AmSR 432, 19 LRA 90; Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84 (all construing an act prohibiting aliens from taking lands by devise, or otherwise, except under certain circumstances).

Iowa.—Mitchell v. Vest, 157 Iowa 336, 136 NW 1054; Opel v. Shoup, 100 Iowa 407, 69 NW 560, 37 LRA 583; Burrow v. Burrow, 98 Iowa 400, 67 NW 287; Easton v. Huott, 95 Iowa 473, 64 NW 408, 31 LRA 177 and note; Furenes v. Mickelson, 86 Iowa 508, 53 NW 416 (all construing an act prohibiting nonresident aliens from holding lands by descent, devise, purchase, or otherwise, except under certain conditions); King v. Ware, 53 Iowa 97, 4 NW 858 (construing an act prohibiting nonresident children from inheriting land).

Kan.—Smith v. Lynch, 61 Kan. 609, 60 P 329 (construing the Kansas Alien Land Act).

Me.—Boies v. Blake, 13 Me. 381 (construing an act prohibiting any alien from purchasing, cutting, or carrying away trees, timber, or grass growing on certain Indian lands).

Mo.—Pembroke v. Huston, 180 Mo. 627, 79 SW 470 (construing an act prohibiting aliens from acquiring or holding real estate); Harney v. Donohoe, 97 Mo. 141, 10 SW 191 (construing an act prohibiting nonresident aliens of the United States from acquiring title by descent or purchase).

Nebr.—Carlow v. Aultman, 28 Nebr. 672, 44 NW 873 (construing an act prohibiting nonresident aliens from holding land within the state).

N. Y.—Marx v. McGlynn, 88 N. Y. 357; Wadsworth v. Wadsworth, 12 N. Y. 376; Van Cortlandt v. Laidley, 59 Hun 161, 11 NYS 148; Beck v. McGillis, 9 Barb. 35; Mick v. Mick, 10 Wend. 379 (all construing an act declaring void devises to aliens).

N. C.—Rutherford v. Wolfe, 10 N. C. 272 (construing an act prohibiting alien relatives from inheriting).

Tex.—Baker v. Westcott, 73 Tex. 129, 11 SW 157; Barclay v. Cameron, 25 Tex. 232 (construing an act of the Republic of Texas providing that no alien shall hold land in Texas, except upon certain conditions). See also Gray v. Kauffman, 82 Tex. 65, 17 SW 513.

Wash.—State v. Hudson Land Co., 19 Wash. 85, 52 P 574, 40 LRA 430; State v. Morrison, 18 Wash. 664, 52 P 228 (construing Const. art 2 § 33, prohibiting ownership of lands by aliens, etc.).

66. Johnson v. Elkins, 1 App. (D. C.) 430.

67. Com. v. Newcomb, 109 Ky. 18, 58 SW 445, 22 KyL 516; McCormack v. Coddington, 109 App. Div. 741, 96 NYS 571 [rev on other grounds 184 N. Y. 467, 77 NE 979]. See also Crane v. Reeder, 21 Mich. 24, 4 AmR 430.

68. Beavan v. Went, 155 Ill. 592, 41 NE 91, 31 LRA 85. But in Pembroke v. Huston, 180 Mo. 627, 640, 79 SW 470, it was said: "As the act of 1872 had repealed the common law on that point, it was at least doubtful, under section 4177, Revised Statutes 1899, if a mere repeal of that act would restore the common law, even if the Legislature had intended to restore it in its original form and effect; it was, therefore, doubtless deemed necessary in order to accomplish its purpose that the Legislature should by affirmative act withdraw from the alien the right that had been conferred on him by the act of 1872."

69. Sulphen v. Norris, 44 Tex. 204 (grant by king of Spain).

70. U. S.—Governeur v. Robertson, 11 Wheat. 332, 6 L. ed. 488 (construing a patent, issued under laws of Virginia, subsequently confirmed by the legislature of Kentucky); Craig v. Radford, 3 Wheat. 594, 4 L. ed. 467.

Ala.—Etheridge v. Malempre, 18 Ala. 565.

Ark.—Wynn v. Morris, 16 Ark. 414.

Iowa.—King v. Ware, 53 Iowa 97, 4 NW 858.

Mass.—Com. v. André, 3 Pick. 224.

N. Y.—Wright v. Saddler, 20 N. Y. 320; Jackson v. Etz, 5 Cow. 314; Goodell v. Jackson, 20 Johns. 693, 11 AmD 351; Jackson v. Beach, 1 Johns. Cas. 399.

S. C.—Meeks v. Richbourgh, 8 S. C. L. 410.

Tex.—Hornsby v. Bacon, 20 Tex. 556.

Eng.—Comyns Dig. 426.

Ont.—Iler v. Elliott, 32 U. C. Q. B. 434.

See Elmondorff v. Carmichael, 3 Litt. (Ky.) 472, 14 AmD 86.

[a] **Lost grant.**—Where plaintiff in ejectment relied upon the presumption of a lost grant from the government to his ancestor, who was an alien, it was held that he must show affirmatively that his ancestor had license to purchase and hold. Sulphen v. Norris, 44 Tex. 204. See also generally as to presumption of lost

signs," with warranty, it enables the alien to transmit the title by descent even to alien nonresident heirs;[71] but where the patent is issued by ministerial officers, upon ordinary purchases by aliens, the title of the alien has been held to be subject to escheat, as in the case of purchase from a citizen.[72]

Federal grants. Where new states were admitted into the Union upon the express condition that the primary disposal of the federal lands should not be interfered with, a primary grantee from the federal government may hold, it seems, as against the state.[73]

[§ 14] **c. Effect of Subsequent Acquisition of Citizenship.** Where an alien who has acquired title to land by purchase acquires citizenship before proceedings have been instituted by the state to defeat his title, his title is thereby rendered perfect as against the state.[74] But the acquisition of citizenship will not be given a retroactive effect so as to give to the alien title by a descent cast before his acquisition of citizenship.[75] And it seems that the fact that an alien has declared his intention of becoming a citizen of the United States does not, before his naturalization, enable him to take or transmit by inheritance.[76] But it has been held to the contrary.[77]

[§ 15] **d. Effect of Subsequent Loss of Citizenship.** One who has acquired title to land does not, by subsequent loss of citizenship either by expatriation or otherwise, ipso facto forfeit his title.[78]

[§ 16] **2. Real Property Acquired by Acts of Parties—a. In General.** At common law an alien may take land by act of the parties,[79] but he cannot hold it against the crown or state.[80] The state alone, however, can question the right of an alien to hold land.[81] Against all the rest of the world, the alien has full capacity to hold, and he can hold even against the state, until it institutes proceedings and obtains a judgment by inquest of office

grant Adverse Possession § 650 et seq.

71. Etheridge v. Malempre, 18 Ala. 565; Com. v. André, 3 Pick. (Mass.) 224; Jackson v. Etz, 5 Cow. (N. Y.) 314; Goodell v. Jackson, 20 Johns. (N. Y.) 693, 11 AmD 351. See Webb v. Kirby Lumber Co., 48 Tex. Civ. A. 543, 107 SW 581 (holding that lands granted by the state of Texas in the Republic of Mexico for colonization purposes escheat as against alien heirs).

72. Governeur v. Robertson, 11 Wheat. (U. S.) 332, 6 L. ed. 488; Etheridge v. Doe, 18 Ala. 565.

73. King v. Ware, 53 Iowa 97, 4 NW 858.

74. U. S.—Manuel v. Wulff, 152 U. S. 505, 14 SCt 651, 38 L. ed. 532; Lone Jack Min. Co. v. Megginson, 82 Fed. 89, 27 CCA 63; Osterman v. Baldwin, 6 Wall. 116, 18 L. ed. 730; Governeur v. Robertson, 11 Wheat. 332, 6 L. ed. 488; Lord v. Perrin, 8 Land Dec. 536; Mann v. Huk, 3 Land Dec. 452.

Ala.—Harley v. State, 40 Ala. 689, 697 (where the court said: "When Harley purchased the land in controversy, and during the period of his alienage thereafter, he was seized of a defeasible estate in the premises, accompanied with all the incidents of ownership of such an estate. During the same period, the only right which the State could have in the premises was the right to have the land escheated, by a judicial proceeding in the nature of an inquest of office. This prerogative right of sovereignty was not asserted during the period of Harley's alienage; but he was permitted to retain his estate, without molestation, until he had been admitted to full citizenship. This result effected an extinguishment of the right of the State to escheat the land, if such right existed, and perfected the title of Harley. As Sir Matthew Hale has said, 'The law is very gentle in the construction of the disability of alienism, and rather contracts than extends its severity'").

Mo.—Pembroke v. Huston, 180 Mo. 627, 79 SW 470.

N. Y.—Jackson v. Beach, 1 Johns. Cas. 399. But see Larreau v. Davignon, 5 AbbPrNS 367 (dictum).

Tex.—Barrett v. Kelly, 31 Tex. 476.

Wash.—Abrams v. State, 45 Wash. 327, 88 P 327, 122 AmSR 914, 9 LRANS 186, 13 AnnCas 527.

[a] **Making homestead claim and filing intention to become citizen.**—Where an alien makes a homestead entry and subsequently files his intention to become a citizen, alienage at the time of entry does not, in the absence of adverse claim, defeat the right of purchase. Matter of Krogstad, 4 Land Dec. (U. S.) 564.

75. Ala.—Donovan v. Pitcher, 53 Ala. 411, 25 AmR 634.

Cal.—Farrell v. Enright, 12 Cal. 450.

Iowa.—Stemple v. Herminghouser, 3 Greene 408.

Ky.—White v. White, 2 Metc. 185.

N. Y.—Heeney v. Brooklyn Benev. Soc., 33 Barb. 360 [aff 39 N. Y. 333]; Redpath v. Rich, 5 N. Y. Super. 79; Leary v. Leary, 50 HowPr 122; Peo. v. Conklin, 2 Hill 67.

N. C.—Harman v. Ferrall, 64 N. C. 474.

S. C.—Keenan v. Keenan, 41 S. C. L. 345; Vaux v. Nesbit, 6 S. C. Eq. 352.

Right of inheritance see generally infra § 26 et seq.

76. White v. White, 2 Metc. (Ky.) 185; Harman v. Ferrall, 64 N. C. 474; McKellor v. McKellor, 28 S. C. L. 536. In White v. White, 2 Metc. (Ky.) 185, 188, the argument in support of the right of the alien under such circumstances to inherit was as follows: "The argument by which this position is attempted to be maintained is, that when a native of any foreign country comes into the United States, and makes, according to the act of congress, a declaration of his intention to become a naturalized citizen, he is no longer an alien; and although he does not thereby become a citizen of the United States, yet having divested himself of the character of an alien, he can take lands by descent, inasmuch as it is only as an alien, and in that character, that he is rendered unable to inherit." See generally as to declaration of intention to become naturalized infra § 143.

77. Settegast v. Schrimpf, 35 Tex. 323 (holding that an alien, upon his declaration of intention to become a citizen, becomes in effect a citizen for all purposes save that alone of voting, and is capable of transmitting by inheritance if he dies before his final naturalization can be had).

78. Airhart v. Massieu, 98 U. S. 491, 25 L. ed. 213; Jones v. McMasters, 20 How. 8, 15 L. ed. 805; Murray v. Fishback, 5 B. Mon. (Ky.) 403; Alsberry v. Hawkins, 9 Dana (Ky.) 177, 33 AmD 546; Brooks v. Clay, 3 A. K. Marsh (Ky.) 545; Roger v. Whitham, 56 Wash. 190, 105 P 628, 134 AmSR 1105, 21 AnnCas 272. But see Yates v. Iams, 10 Tex. 168; Holliman v. Peebles, 1 Tex. 673.

79. Orr v. Hodgson, 4 Wheat. (U. S.) 453, 4 L. ed. 613; Smith v. Zaner, 4 Ala. 99; Gray v. Kauffman, 82 Tex. 65, 17 SW 513. See also infra §§ 17–24.

80. Iowa.—Purczell v. Smidt, 21 Iowa 540.

Md.—Guyer v. Smith, 22 Md. 239, 85 AmD 650.

N. C.—Johnson v. Eversole Lumber Co., 144 N. C. 717, 57 SE 518.

Tex.—Barrett v. Kelly, 31 Tex. 476; Holliman v. Peebles, 1 Tex. 673 (Spanish law).

Va.—Com. v. Bristow, 6 Call (10 Va.) 60.

Ont.—Wallace v. Adamson, 10 U. C. C. P. 338.

But see State v. Boston, etc., R. Co., 25 Vt. 433.

81. U. S.—Manuel v. Wulff, 152 U. S. 505, 14 SCt 651, 38 L. ed. 532; Phillips v. Moore, 100 U. S. 208, 25 L. ed. 603; Airhart v. Massieu, 98 U. S. 491, 25 L. ed. 213. See also Jones v. McMasters, 20 How. 8, 15 L. ed. 805.

Cal.—Norris v. Hoyt, 18 Cal. 217; People v. Folsom, 5 Cal. 373; Ramires v. Kent, 2 Cal. 558.

D. C.—Johnson v. Elkins, 1 App. 430.

Kan.—Madden v. State, 68 Kan. 658, 75 P 1023.

Mont.—Quigley v. Birdseye, 11 Mont. 439, 28 P 741; Territory v. Lee, 2 Mont. 124.

N. Y.—Belden v. Wilkinson, 33 Misc. 659, 68 NYS 205 [cit Munro v. Merchant, 28 N. Y. 9; Wadsworth v. Wadsworth, 12 N. Y. 376; People v. Conklin, 2 Hill 67; Scott v. Thorpe, 1 Edw. 512; Governeur v. Robertson, 11 Wheat. (U. S.) 332, 6 L. ed. 488].

Tex.—Gray v. Kauffman, 82 Tex. 65, 17 SW 513.

Wash.—Goon Gan v. Richardson, 16 Wash. 373, 47 P 762; Oregon Mortg. Co. v. Carstens, 16 Wash. 165, 47 P 421, 35 LRA 841.

Ont.—Iler v. Elliott, 32 U. C. Q. B. 434.

But see State v. Boston, etc., R. Co., 25 Vt. 433 (where it is said that the right to interfere with the holding of land by aliens belongs to the national, and not to the state, sovereignty).

[a] **A territory** had no power to provide for forfeiture to itself of interest in lands held by aliens which were derived from the federal government. Terr. v. Lee, 2 Mont. 124, 134 (where the court said: "Before the passage of this act of the Territorial legislature forfeiting the property of aliens within the Territory, the alien could hold, and did hold and enjoy, the possessory title to mining claims, procuring such title by purchase, which title was an easement therein, the balance of the title belonging to the United States, so that the alien and the government, taken together, owned the complete title. The Territory had no interest whatever in the claims, held by aliens or by any other persons, and no title or shadow of title thereto, but by the operation of this statute the Territory becomes the owner of the possessory title which is or may be the entire equitable interest, and is authorized to sell the same for its own use, so that, by the force of this statute, it becomes the owner of property in which it never had any interest, and which never belonged to it, and it forfeits the property of an alien and calls it its own, while if any forfeiture takes place for any reason whatever, the property thus forfeited

or office found, or by an act equivalent thereto;[82] and this is true, although a statute or constitutional provision expressly prohibits aliens from holding real estate,[83] or requires the taking of certain incip-

necessarily belongs to the United States. The Territory cannot acquire title to property that does not and never did belong to it, so easily as this. There might be reason and plausibility in a statute of this kind, providing the Territory was clothed with sovereign power, and owned the paramount title to the property sought to be confiscated, but in the absence of sovereignty, and in the absence of any title or interest in the property, and while the general government is yet the owner of the legal title, and while, if any interest in the property is forfeited, it naturally and rightfully reverts to the sovereign, the general government, who holds the paramount title to all the property within its limits, it certainly is an unwarranted exercise of power for the temporary government of a Territory, to undertake, by forfeiture, to convert to its own use property, which, if subject to forfeiture at all, should be forfeited to the government of the United States").

[b] **The right of an alien to take a citizen's land under the power of eminent domain** may be questioned by the citizen. State v. Stevens County Super. Ct., 33 Wash. 542, 547, 74 P 686 (where the court, after discussing the general rule that the right of an alien to hold land can be questioned only by the state, said: "Those cases are easily distinguished from the case at bar, where the defendant is not questioning the right of the alien plaintiff to hold real estate, but is questioning its right to take real estate that belongs to the defendant; and, whatever questions of public policy might intervene to prevent alleged aliens from being annoyed at the instance of impertinent or spiteful citizens, such policy could not be applied to a citizen who is defending the title to and possession of his own land. The right of eminent domain is not a right belonging to individuals or corporations, but is only conferred by special enactment; and, before a plaintiff should be allowed to absorb the property of another by condemnation, it is not asking too much of him that he affirmatively show that he is authorized by the law to condemn land at all. It would certainly seem that a citizen has a right to protest against the taking away of his private rights by one without authorization, when such rights are imperiled, without awaiting the action of the state through its special officers. He is invoking the laws of the state in aid of his rights, and it can make no substantial difference whether the machinery of the law is put in operation by himself or by an agent of the government").

82. U. S.—Manuel v. Wulff, 152 U. S. 505, 14 SCt 651, 38 L. ed. 532; Phillips v. Moore, 100 U. S. 208, 25 L. ed. 603; Airhart v. Massieu, 98 U. S. 491, 25 L. ed. 213; Osterman v. Baldwin, 6 Wall. 116, 18 L. ed. 730; Cross v. De Valle, 1 Wall. 1, 17 L. ed. 515; Governeur v. Robertson, 11 Wheat. 332, 6 L. ed. 488; Craig v. Leslie, 3 Wheat. 563, 4 L. ed. 460; In re Palmer Window Glass Co., 183 Fed. 902; Billings v. Aspen Min., etc., Co., 52 Fed. 250, 3 CCA 69; Hammekin v. Clayton, 11 F. Cas. No. 5,996, 2 Woods 336; Randall v. Jaques, 20 F. Cas. No. 11,553; Robertson v. Miller, 20 F. Cas. No. 11,926, 1 Brock. 466.

Ala.—Smith v. Zaner, 4 Ala. 99; Jinkins v. Noel, 3 Stew. 60.

Ark.—Wynn v. Morris, 16 Ark. 414.

Cal.—Racouillat v. Sansevain, 32 Cal. 376; De Merle v. Mathews, 26 Cal. 455; Norris v. Hoyt, 18 Cal. 217; Ramires v. Kent, 2 Cal. 558.

D. C.—Johnson v. Elkins, 1 App. 430.

Ill.—Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84.

Ind.—Donaldson v. State, 101 NE 485, 489 [cit Cyc]; Donaldson v. State, 67 NE 1029; Halstead v. Lake County, 56 Ind. 363.

Kan.—Madden v. State, 68 Kan. 658, 75 P 1023; Omnium Inv. Co. v. North American Trust Co., 65 Kan. 53, 68 P 1089; Wuester v. Folin, 60 Kan. 334, 56 P 490.

Ky.—Dudley v. Grayson, 6 T. B. Mon. 259; Elmondorff v. Carmichael, 3 Litt. 472, 14 AmD 86.

La.—Perry v. Clinton, etc., R. Co., 11 Rob. 412.

Md.—Buchanan v. Deshon, 1 Harr. & G. 280; McCreery v. Wilson, 4 Harr. & M. 412; McCreery v. Allender, 4 Harr. & M. 409; Cunningham v. Browning, 1 Bland 299.

Mass.—Waugh v. Riley, 8 Metc. 290; Scanlan v. Wright, 13 Pick. 523, 25 AmD 344; Sheaffe v. O'Neil, 1 Mass. 256.

Mich.—Crane v. Reeder, 21 Mich. 24, 4 AmR 430.

Mo.—Pembroke v. Huston, 180 Mo. 627, 79 SW 470.

Mont.—Quigley v. Birdseye, 11 Mont. 439, 28 P 741; Territory v. Lee, 2 Mont. 124.

Nebr.—Carlow v. Aultman, 28 Nebr. 672, 44 NW 873.

N. H.—Montgomery v. Dorion, 7 N. H. 475.

N. Y.—Munro v. Merchant, 28 N. Y. 9; Wright v. Saddler, 20 N. Y. 320; Larreau v. Davignon, Sheld. 128, 5 AbbPrNS 367; Belden v. Wilkinson, 33 Misc. 659, 68 NYS 205; Bradstreet v. Oneida County, 13 Wend. 546; Jackson v. Beach, 1 Johns. Cas. 399; Matter of Leefe, 4 Edw. 395. But see Leary v. Leary, 50 HowPr 122.

N. C.—Johnson v. Eversole Lumber Co., 144 N. C. 717, 57 SE 518; Rouche v. Williamson, 25 N. C. 141; Den v. Miller, 14 N. C. 188; Den v. Wolfe, 10 N. C. 272; Doe v. Horniblea, 3 N. C. 197; Blount v. Horniblea, 3 N. C. 36; Bayard v. Singleton, 1 N. C. 42.

Or.—Lavery v. Arnold, 36 Or. 84, 57 P 906, 58 P 524.

S. C.—Kottman v. Ayer, 32 S. C. L. 552; Jenney v. Laurens, 28 S. C. L. 356; Vaux v. Nesbit, 6 S. C. Eq. 352; Groves v. Gordon, 6 S. C. L. 111.

Tenn.—Baker v. Shy, 9 Heisk. 35; Williams v. Wilson, Mart. & Y. 248.

Tex.—Gray v. Kauffman, 82 Tex. 65, 17 SW 513; Baker v. Westcott, 73 Tex. 129, 11 SW 157; Barrett v. Kelly, 31 Tex. 476; Merle v. Andrews, 4 Tex. 200; Williams v. Bennett, 1 Tex. Civ. A. 498, 20 SW 856. But see Clay v. Clay, 26 Tex. 24 (law of republic of Mexico).

Vt.—Lenehan v. Spaulding, 57 Vt. 115; State v. Boston, etc., R. Co., 25 Vt. 433; Gilman v. Thompson, 11 Vt. 643, 34 AmD 714.

Va.—Ferguson v. Franklin, 6 Munf. (20 Va.) 305; Com. v. Selden, 5 Munf. (19 Va.) 160; Marshall v. Conrad, 5 Call (9 Va.) 364.

Wash.—Abrams v. State, 45 Wash. 327, 88 P 327, 122 AmStR 914, 9 LRANS 186, 13 AnnCas 527 and note; Oregon Mortg. Co. v. Carstens, 16 Wash. 165, 47 P 421, 35 LRA 841.

See also Inquest of Office [29 Cyc 1355]; Escheat [16 Cyc 548].

"By the common law, an alien cannot acquire real property by operation of law, but may take it by act of the grantor, and hold it until office found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government. The proceeding which contains the finding of the fact upon the inquest of the officer is technically designated in the books of law as 'office found.'" Phillips v. Moore, 100 U. S. 208, 212, 25 L. ed. 603 [quot (save that "alienation" stands in place of "alienage") in Strickley v. Hill, 22 Utah 257, 266, 62 P 893, 83 AmSR 786].

[a] **Under the civil law,** it seems, the same rule obtains. Racouillat v. Sansevain, 32 Cal. 376.

[b] **Alien enemies.**—At common law there was no difference between alien friends and enemies in respect to their right to purchase and hold real estate, until office found. Yeo v. Mercereau, 18 N. J. L. 387.

[c] **Vested rights in real property** in the United States, acquired by British subjects before the Revolution, may be held by them notwithstanding their alienage. Apthorp v. Backus, Kirby (Conn.) 407, 1 AmD 26; Jackson v. Lunn, 3 Johns. Cas. (N. Y.) 109. But compare U. S. v. De Repentigny, 5 Wall. (U. S.) 211, 18 L. ed. 627.

[d] **Public lands.**—In the possession of the public lands, an alien will be protected the same as a citizen, against mere naked trespassers. Courtney v. Turner, 12 Nev. 345.

[e] **Nature of office found.**—In Baker v. Shy, 9 Heisk. (Tenn.) 85, 89, the court said: "The rule was, that 'if an alien purchase land, the king shall have it upon office found.' 1 Bac. Abr. 203. This 'office found,' or more properly 'inquest of office,' was a summary inquisition by the king's escheator, either by virtue of his office or by special royal writ, to ascertain whether in the particular case the sovereign has a right to the possession of the lands. It was done under the king's officer by a jury of no 'determined number, either twelve or more or less. 3 Shars. Bl. Com. 258. This principle we have inherited from the mother country, and we have our own forms of proceeding in lieu of the ancient inquest of office; and also our escheators, whose duty it is to look after the rights of the State in lands that have escheated: Code, 2138, et seq." See Escheat [16 Cyc 552 et seq].

[f] **Acts similar to office found** (1) may be sufficient to invest title of an alien acquired by purchase. McCreery v. Allender, 4 Harr. & M. (Md.) 409. (2) An act of assembly, passed during a war and confiscating the property of an alien enemy by name, is at least as effectual in vesting the property in the state as any office found, according to the practice in England. Bayard v. Singleton, 1 N. C. 42. See also New York Indians v. U. S., 170 U. S. 1, 18 SCt 531, 42 L. ed. 927 [cit Atlantic, etc., R. Co. v. Mingus, 165 U. S. 413, 17 SCt 348, 41 L. ed. 770] (where a legislative act directly taking lands was held equivalent to an office found). (3) In Maryland the issuance of an escheat patent by the commissioner of the land office had the same effect as the ancient proceeding by office found, in divesting the title of an alien to freehold lands in the state. Guyer v. Smith, 22 Md. 239, 85 AmD 650. (4) In New York proceedings by office found are abolished and ejectment is provided by the code. Renner v. Muller, 44 N. Y. Super. 535, 57 HowPr 229.

[g] **For the procedure** relating to office found see Atty.-Gen. v. Duplessis, 1 Bro. P. C. 415, 1 Reprint 185 [aff 2 Ves. 286, 28 Reprint 185]; Comyns Dig. 427.

83. U. S.—Airhart v. Massieu, 98 U. S. 491, 25 L. ed. 213 (constitution of the republic of Texas); Osterman v. Baldwin, 6 Wall. 116, 18 L. ed. 730; (constitution of the republic of Texas); Cross v. De Valle, 1 Wall. 1, 17 L. ed. 515; Hammekin v. Clayton, 11 F. Cas. No. 5,996, 2 Woods 336 (constitution of republic of Texas).

D. C.—Johnson v. Elkins, 1 App. 430.

Mo.—Pembroke v. Huston, 180 Mo. 627, 79 SW 470.

N. Y.—Stamm v. Bostwick, 122 N. Y. 48, 25 NE 233, 9 LRA 597; Hall v. Hall, 81 N. Y. 130; Goodrich v. Russell, 42 N. Y. 177; Wright v. Saddler, 20 N. Y. 320; Kull v. Kull, 37 Hun 476; Nolan v. Command, 11 NYCivProc 295; Matter of Leefe, 4 Edw. 395.

Tex.—Baker v. Westcott, 73 Tex. 129, 11 SW 157 (constitution of republic of Texas); Andrews v. Spear,

ient measures to enable them to hold land.[84] Until such action is taken by the state, the alien may dispose of his interest either by conveyance,[85] or devise,[86] and his grantees or devisees will thereupon acquire title notwithstanding his alienage. A grant by the state before office found is inoperative.[87]

Effect of death of alien before office found. Under the common law, where an alien who holds land dies, it instantly, and of necessity, without any inquest of office, escheats and vests in the state, because the freehold cannot be kept in abeyance, and an alien is incompetent to transmit by hereditary descent.[88] But where an alien is authorized to inherit, but not to take by purchase, the state loses its right to escheat lands held contrary to law by failing to institute proceedings therefor during the lifetime of the alien owner.[89]

[§ 17] **b. Purchase.** Within the rule just stated the right of an alien to take title to real estate by purchase and to hold until office found is recognized at common law.[90] This rule applies in equity

48 Tex. 567 (constitution of the republic of Texas); Williams v. Bennett, 1 Tex. Civ. A. 498, 20 SW 856 (constitution of the republic of Texas).

Wash.—Abrams v. State, 45 Wash. 327, 88 P 327, 122 AmStR 914, 9 LRANS 186, 13 AnnCas 527; Goon Gan v. Richardson, 16 Wash. 373, 47 P 762.

84. Cross v. De Valle, 1 Wall. 1, 17 L. ed. 515; Stamm v. Bostwick, 122 N. Y. 48, 25 NE 233, 9 LRA 597; Hall v. Hall, 81 N. Y. 130; Goodrich v. Russell, 42 N. Y. 177; Kull v. Kull, 37 Hun (N. Y.) 476; Nolan v. Command, 11 NYCivProc 295; Matter of Leefe, 4 Edw. (N. Y.) 395.

85. U. S.—In re Palmer Window Glass Co., 183 Fed. 902; De Franca v. Howard, 21 Fed. 774; Robertson v. Miller, 20 F. Cas. No. 11,926, 1 Brock. 466.

Ark.—Jones v. Minogue, 29 Ark. 637.

Cal.—Matter of Leopold, 67 Cal. 385, 7 P 766.

Conn.—Whiting v. Stevens, 4 Conn. 44.

Ind.—State v. Witz, 87 Ind. 190; Halstead v. Lake County, 56 Ind. 363.

Mass.—Waugh v. Riley, 8 Metc. 290; Sheaffe v. O'Neil, 1 Mass. 256.

Mont.—Quigley v. Birdseye, 11 Mont. 439, 28 P 741.

N. H.—Montgomery v. Dorion, 7 N. H. 475.

N. Y.—Goodrich v. Russell, 42 N. Y. 177; Jackson v. Adams, 7 Wend. 367.

S. C.—McCaw v. Galbraith, 41 S. C. L. 74; Kottman v. Ayer, 32 S. C. L. 552; Jenney v. Laurens, 28 S. C. L. 356; Groves v. Gordon, 5 S. C. L. 245.

Tenn.—Baker v. Shy, 9 Heisk. 85; Williams v. Wilson, Mart. & Y. 248.

Tex.—Cryer v. Andrews, 11 Tex. 170.

Va.—Stephen v. Swann, 9 Leigh 36 (Va.) 404; Marshall v. Conrad, 5 Call (9 Va.) 364.

Wash.—State v. World Real Est. Commercial Co., 46 Wash. 104, 89 P 471; Abrams v. State, 45 Wash. 327, 88 P 327, 9 LRANS 186, 122 AmSR 914, 13 AnnCas 527; Oregon Mortg. Co. v. Carstens, 16 Wash. 165, 47 P 421, 35 LRA 841.

86. Richmond v. Milne, 17 La. 312, 36 AmD 613 (under the laws of Scotland); Williams v. Wilson, Mart & Y. (Tenn.) 248; Abrams v. State, 45 Wash. 327, 88 P 327, 9 LRANS 186, 122 AmSR 914, 13 AnnCas 527; Wallace v. Hewitt, 20 U. C. Q. B. 87; Wallace v. Adamson, 10 U. C. C. P. 338. See also Iler v. Elliott, 32 U. C. Q. B. 434; Irwin v. McBride, 23 U. C. Q. B. 570.

[a] **Appointment under power.**—Where a use was limited by deed to an alien for life, with a power of appointment, an appointment made by the alien donee by will, before office found, was held good. St. Philip v. Smith, 15 S. C. L. 452.

87. Fairfax v. Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453; Maynard v. Maynard, 36 Hun (N. Y.) 227; Jackson v. Adams, 7 Wend. (N. Y.) 367.

[a] **Profits are not recoverable by the state** either at law or in equity which accrue before office found. Hubbard v. Goodwin, 3 Leigh (30 Va.) 492.

88. McCormack v. Coddington, 46 Misc. 510, 95 NYS 46; Jackson v. Adams, 7 Wend. (N. Y.) 367. See generally Escheat [16 Cyc 548].

89. Abrams v. State, 45 Wash. 327, 88 P 327, 9 LRANS 186, 122 AmSR 914, 13 AnnCas 527 and note.

[a] **Life estate with power of appointment.**—When by deed a use was limited to a person, an alien, for life, with a power of appointment, and in case of failure of appointment to her rightful heirs, it was held that, as she had made an appointment and had died before office found, the estate in the hands of the appointees, citizens, was not subject to escheat, office not having been found during her lifetime. St. Philip v. Smith, 15 S. C. L. 452.

90. U. S.—Manuel v. Wulff, 152 U. S. 505, 14 SCt 651, 38 L. ed. 532; Osterman v. Baldwin, 6 Wall. 116, 18 L. ed. 730; Cross v. Del Valle, 1 Wall. 1, 17 L. ed. 515; Jones v. McMasters, 20 How. 8, 15 L. ed. 805; Governeur v. Robertson, 11 Wheat. 332, 6 L. ed. 488; Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142; Society for Propagation of Gospel v. New Haven, 8 Wheat. 464, 5 L. ed. 662; Orr. v. Hodgson, 4 Wheat. 453, 4 L. ed. 613; Craig v. Radford, 3 Wheat. 594, 4 L. ed. 467; Hepburn v. Dunlop, 1 Wheat. 179, 4 L. ed. 65; Fairfax v. Hunter, 7 Cranch 603, 3 L. ed. 453; In re Palmer Window Glass Co., 183 Fed. 902; Hammekin v. Clayton, 11 F. Cas. No. 5,996, 2 Woods 336; Robertson v. Miller, 20 F. Cas. No. 11,926, 1 Brock. 466; Society for Propagation of Gospel v. Wheeler, 22 F. Cas. No. 13,156, 2 Gall. 105; Stoker v. Dawes, 23 F. Cas. No. 13,477, 4 Mason 268. See also McKinley Creek Min. Co. v. Alaska United Min. Co., 183 U. S. 563, 22 SCt 84, 46 L. ed. 331; Lohmann v. Helmer, 104 Fed. 178; U. S. v. Southern Pac. R. Co., 88 Fed. 832; Farmers' L. & T. Co. v. McKinney, 8 F. Cas. No. 4,667, 6 McLean 1.

Ala.—Donovan v. Pitcher, 53 Ala. 411, 25 AmR 634; Harley v. State, 40 Ala. 689; Smith v. Zaner, 4 Ala. 99; Jinkins v. Noel, 3 Stew. 60.

Cal.—Billings v. Hauver, 65 Cal. 593, 4 P 639; Ferguson v. Neville, 61 Cal. 356; De Merle v. Mathews, 26 Cal. 455; Norris v. Hoyt, 18 Cal. 217; Peo. v. Folsom, 5 Cal. 373.

Ga.—Kerr v. White, 52 Ga. 362; Fitzgerald v. Garvin, T. U. P. Charlt. 281.

Ill.—Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84.

Ind.—Halstead v. Lake County, 56 Ind. 363; Donaldson v. State, 67 NE 1029, 1030 [cit Cyc].

Iowa.—Burrow v. Burrow, 98 Iowa 400, 67 NW 287; Purczell v. Smidt, 21 Iowa 540.

Kan.—Madden v. State, 68 Kan. 658, 75 P 1023; Omnium Inv. Co. v. North American Trust Co., 65 Kan. 50, 68 P 1089; Wuester v. Folin, 60 Kan. 334, 56 P 490.

Ky.—Dudley v. Grayson, 6 T. B. Mon. 259; Murray v. Fishback, 5 B. Mon. 403; Elmondorff v. Carmichael, 3 Litt. 472, 14 AmD 86; Louisville v. Gray, 1 Litt. 146.

La.—Rabasse's Succ., 47 La. Ann. 1452, 17 S 867, 49 AmSR 433; Thompson's Succ., 9 La. Ann. 96.

Me.—Mussey v. Pierre, 24 Me. 559.

Md.—Guyer v. Smith, 22 Md. 239, 85 AmD 650; McCreery v. Wilson, 4 Harr. & M. 412; McCreery v. Allender, 4 Harr. & M. 409; Buchanan v. Deshon, 1 Harr. & G. 280; Cunningham v. Browning, 1 Bland 299.

Mass.—Piper v. Richardson, 9 Metc. 155; Waugh v. Riley, 8 Metc. 290; Foss v. Crisp, 20 Pick. 121; Scanlan v. Wright, 13 Pick. 523, 25 AmD 344; Com. v. André, 3 Pick. 224; Fox v. Southack, 12 Mass. 143; Sheaffe v. O'Neil, 1 Mass. 256. See also Wilbur v. Tobey, 16 Pick. 177.

Mich.—Crane v. Reeder, 21 Mich. 24, 4 AmR 430.

Mo.—Pembroke v. Huston, 180 Mo. 627, 79 SW 470.

Mont.—Quigley v. Birdseye, 11 Mont. 439, 28 P 741; Wulf v. Manuel, 9 Mont. 279, 23 P 723; Tibbitts v. Ah Tong, 4 Mont. 536, 2 P 759; Territory v. Lee, 2 Mont. 124.

Nebr.—Carlow v. Aultman, 28 Nebr. 672, 44 NW 873.

Nev.—Courtney v. Turner, 12 Nev. 345.

N. H.—Montgomery v. Dorion, 7 N. H. 475.

N. Y.—Stamm v. Bostwick, 122 N. Y. 48, 25 NE 233, 9 LRA 597; Marx v. McGlynn, 88 N. Y. 357; Hall v. Hall, 81 N. Y. 130; Goodrich v. Russell, 42 N. Y. 177; Peo. v. Snyder, 41 N. Y. 397; Munro v. Merchant, 28 N. Y. 9; Wright v. Saddler, 20 N. Y. 320; Wadsworth v. Wadsworth, 12 N. Y. 376; Smith v. Smith, 70 App. Div. 286, 74 NYS 967; Heeney v. Brooklyn Benev. Soc., 33 Barb. 360 [aff 39 N. Y. 333]; Overing v. Russell, 32 Barb. 263; Larreau v. Davignon, Sheld. 128, 5 AbbPrNS 367; Belden v. Wilkinson, 33 Misc. 659, 68 NYS 205; Bradstreet v. Oneida County, 13 Wend. 546; Jackson v. Adams, 7 Wend. 367; Goodell v. Jackson, 20 Johns. 693, 11 AmD 351; Jackson v. Lunn, 3 Johns. Cas. 109; Jackson v. Beach, 1 Johns. Cas. 399; Mooers v. White, 6 Johns. Ch. 360; Matter of Leefe, 4 Edw. 395; Matter of Windle, 2 Edw. 585.

N. C.—University Trustees v. Miller, 14 N. C. 188; Doe v. Hornblea, 3 N. C. 197; Barges v. Hogg, 2 N. C. 485; Bayard v. Singleton, 1 N. C. 42.

Or.—Quinn v. Ladd, 37 Or. 261, 59 P 457; Lavery v. Arnold, 36 Or. 84, 57 P 906, 58 P 524.

S. C.—McCaw v. Galbraith, 41 S. C. L. 74; Jenney v. Laurens, 28 S. C. L. 356; Groves v. Gordon, 5 S. C. L. 245; McClenaghan v. McClenaghan, 20 S. C. Eq. 295, 47 AmD 532; Vaux v. Nesbit, 6 S. C. Eq. 352.

Tenn.—Baker v. Shy, 9 Heisk. 85; Williams v. Wilson, Mart. & Y. 248.

Tex.—Baker v. Westcott, 73 Tex. 129, 11 SW 157; Barrett v. Kelly, 31 Tex. 476; Clay v. Clay, 26 Tex. 24; Williams v. Bennett, 1 Tex. Civ. A. 498, 20 SW 856.

Vt.—State v. Boston, etc., R. Co., 25 Vt. 433.

Va.—Sands v. Lynham, 27 Gratt. (68 Va.) 291, 21 AmR 348; Ferguson v. Franklins, 6 Munf. (20 Va.) 305; Marshall v. Conrad, 5 Call (9 Va.) 365.

Wash.—Goon Gan v. Richardson, 16 Wash. 373, 47 P 762; Oregon Mortg. Co. v. Carstens, 16 Wash. 165, 47 P 421, 35 LRA 841.

Eng.—Burk v. Brown, 2 Atk. 397, 26 Reprint 640; Dumoncel v. Dumoncel, 13 Ir. Eq. 92; Theobalds v. Duffoy, 9 Mod. 102, 88 Reprint 342.

Ont.—Murray v. Heron, 7 Grant Ch. (U. C.) 177; Irwin v. McBride, 23 U. C. Q. B. 570; Doe v. Cleveland, 6 U. C. Q. B. O. S. 117; Doe v. Dickson, 2 U. C. Q. B. O. S. 326.

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as well as at law,[91] and it is immaterial that a statute expressly prohibits an alien from holding lands or acquiring lands by purchase.[92]

[§ 18] c. Devise—(1) In General. A devise of land is in the nature of a purchase, that is, the title is passed by act of parties and is not acquired by operation of law; and it is the common-law rule that an alien can take land by devise and that his title will be valid except as against the crown or state, until office found.[93] An alien devisee takes and holds to the exclusion of an heir who would have taken by inheritance.[94]

Escheat to state. Of course, where aliens are incompetent to hold land as against the state, lands devised to an alien are subject to be forfeited to the state;[95] but a devise to an alien may be subject to a conditional limitation that in case he is prevented from enjoying it, it shall pass over to a third person as against the state.[96] The condition of holding the land is a matter between the state and the devisee, and cannot be raised by testator's heirs.[97]

See also Anderson L. D.; Jacob L. D.; 1 Blackstone Comm. 372; Comyns Dig. 427.

[a] **Reasons for the rule.**—In Governeur v. Robertson, 11 Wheat. (U. S.) 332, 355, 6 L. ed. 488, the court said: "That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established, that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard to the peace of society, and a desire to protect the individual from arbitrary aggression. Hence, it is usually said, that it has regard to the solemnity of the livery of seisin, which ought not to be divested without some corresponding solemnity. But there is one reason assigned by a very judicious compiler, which, from its good sense and applicability to the nature of our government, makes it proper to introduce it here. I copy it from Bacon, not having had leisure to examine the authority which he cites for it: 'Every person,' says he, 'is supposed a natural-born subject, that is resident in the kingdom, and that owes a local allegiance to the king, till the contrary be found by office.' This reason, it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold."

[b] **Trust deeds** conveying real estate to aliens for the benefit of others are within the rule. Randall v. Jaques, 20 F. Cas. No. 11,553; Johnson v. Elkins, 1 App. (D. C.) 430; Cumberland v. Graves, 7 N. Y. 305. But compare Kay v. Webb, 5 N. C. 134; Sharp v. St. Sauveur, L. R. 7 Ch. 343; and see Comyns Dig. 547 (where it was said: "So an alien cannot be seised to the use of another; for he cannot be decreed to execute it").

[c] **Under the Mexican law** an alien grantee of land could hold and possess it as his own property, until deprived of it by the sovereign authority or the inquisition of denouncement. De Merle v. Mathews, 26 Cal. 455.

91. Cross v. De Valle, 1 Wall. (U. S.) 1, 17 L. ed. 515 [aff 6 F. Cas. No. 3,430, 1 Cliff. 282]; Hubbard v. Goodwin, 3 Leigh (30 Va.) 492; Barrow v. Wadkin, 24 Beav. 1, 53 Reprint 257.

[a] **Specific performance.**—Purchasers of real estate cannot suggest their own alienism as a bar to specific performance. Scott v. Depeyster, 1 Edw. (N. Y.) 512; Williams v. Myers, 8 N. S. 157.

[b] **Rescission.**—The fact that the vendee of lands is an alien does not entitle the vendor to rescind the contract. Hepburn v. Dunlop, 1 Wheat. (U. S.) 179, 4 L. ed. 65.

92. Phillips v. Moore, 100 U. S. 208, 25 L. ed. 603 (law of Texas); Pembroke v. Huston, 180 Mo. 627, 79 SW 470.

93. U. S.—McKinley Creek Min. Co. v. Alaska United Min. Co., 183 U. S. 563, 22 SCt 84, 46 L. ed. 331; Osterman v. Baldwin, 6 Wall. 116, 18 L. ed. 730; Cross v. De Valle, 1 Wall. 1, 17 L. ed. 515 [aff 6 F. Cas. No. 3,430, 1 Cliff. 282]; Taylor v. Benham, 5 How. 233, 12 L. ed. 130; Orr v. Hodgson, 4 Wheat. 453, 4 L. ed. 613; Craig v. Radford, 3 Wheat. 594, 4 L. ed. 467; Jackson v. Clarke, 3 Wheat. 1, 4 L. ed. 319; Fairfax v. Hunter, 7 Cranch 603, 3 L. ed. 453; Lohmann v. Helmer, 104 Fed. 178; Brigham v. Kenyon, 76 Fed. 30.

Ala.—Harley v. State, 40 Ala. 689; Smith v. Zaner, 4 Ala. 99. See also Jinkins v. Noel, 3 Stew. 60.

Ark.—Jones v. Minogue, 29 Ark. 637.

Cal.—Ferguson v. Neville, 61 Cal. 356; Peo. v. Folsom, 5 Cal. 373.

Ill.—Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84.

Ind.—Donaldson v. State, 67 NE 1029. But see Eldon v. Doe, 6 Blackf. 341 (which seems to be at variance with this rule).

Iowa.—Burrow v. Burrow, 98 Iowa 400, 67 NW 287; Easton v. Huott, 95 Iowa 473, 64 NW 408, 31 LRA 177 and note; Purczell v. Smidt, 21 Iowa 540; Krogan v. Kinney, 15 Iowa 242.

Kan.—Madden v. State, 68 Kan. 658, 75 P 1023; Omnium Inv. Co. v. North American Trust Co., 65 Kan. 50, 68 P 1089.

Md.—Guyer v. Smith, 22 Md. 239, 85 AmD 650.

Mass.—Scanlan v. Wright, 13 Pick. 523, 25 AmD 344; Fox v. Southack, 12 Mass. 143; Sheaffe v. O'Neil, 1 Mass. 256. See also Foss v. Crisp, 20 Pick. 121; Wilbur v. Tobey, 16 Pick. 177.

Mich.—Hopkins v. Crossley, 132 Mich. 612, 96 NW 499.

Mo.—Pembroke v. Huston, 180 Mo. 627, 79 SW 470.

N. Y.—Marx v. McGlynn, 88 N. Y. 357; Hall v. Hall, 81 N. Y. 130; Wadsworth v. Wadsworth, 12 N. Y. 376 [aff 16 Barb. 601]; Smith v. Smith, 70 App. Div. 286, 74 NYS 967; Van Cortlandt v. Laidley, 59 Hun 161, 11 NYS 148; Belden v. Wilkinson, 33 Misc. 659, 68 NYS 205; Smith v. Reilly, 31 Misc. 701, 66 NYS 40; Fay v. Taylor, 31 Misc. 32, 63 NYS 572; Richardson v. Amsdon, 85 NYS 342; Peo. v. Conklin, 2 Hill 67; Jackson v. Adams, 7 Wend. 367; Jackson v. Lunn, 3 Johns. Cas. 109; Mooers v. White, 6 Johns. Ch. 360.

N. C.—Miller v. Harwell, 7 N. C. 194. See also Atkins v. Kron, 37 N. C. 58. Compare Kay v. Webb, 5 N. C. 134; Univ. v. Gilmour, 3 N. C. 294; Gilmour v. Kay, 3 N. C. 265.

Or.—Quinn v. Ladd, 37 Or. 261, 59 P 457.

S. C.—Jenney v. Laurens, 28 S. C. L. 356; Scott v. Cohen, 11 S. C. L. 293; Vaux v. Nesbit, 6 S. C. Eq. 352; Clifton v. Haig, 4 S. C. Eq. 330; Hart v. Hart, 2 S. C. Eq. 57.

Tenn.—Baker v. Shy, 9 Heisk. 85; Williams v. Wilson, Mart. & Y. 248.

Tex.—Gray v. Kauffman, 82 Tex. 65, 17 SW 513.

Utah.—Strickley v. Hill, 22 Utah 257, 62 P 893, 83 AmSR 786; Wilson v. Triumph Cons. Min. Co., 19 Utah 66, 56 P 300, 75 AmSR 718.

Va.—Sands v. Lynham, 27 Gratt. (68 Va.) 291, 21 AmR 348; Stephen v. Swann, 9 Leigh (36 Va.) 404; Marshall v. Conrad, 5 Call (9 Va.) 364; Foxwell v. Craddock, 1 Patt. & H. 250.

Wash.—Goon Gan v. Richardson, 16 Wash. 373, 47 P 762; Oregon Mortg. Co. v. Carstens, 16 Wash. 165, 47 P 421, 35 LRA 841.

Eng.—Sharp v. St. Sauveur, L. R. 7 Ch. 343; Knight v. Duplessis, 2 Ves. 360, 28 Reprint 230. But see Collingwood v. Pace, 1 Vent. 413, 86 Reprint 262.

Ont.—Iler v. Elliott, 32 U. C. Q. B. 434.

See Emery v. Cooley, 83 Conn. 235, 76 A 529.

[a] **An alien, whether friend or enemy,** may take by devise. Craig v. Radford, 3 Wheat. (U. S.) 594, 4 L. ed. 467; Fairfax v. Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453; Stephen v. Swann, 9 Leigh (36 Va.) 404; Marshall v. Conrad, 5 Call (9 Va.) 364.

94. Peo. v. Conklin, 2 Hill (N. Y.) 67. In Vaux v. Nesbit, 6 S. C. Eq. 352, 381, the court, per Nott, J., said: "It is contended, however, that whatever may be the English law upon the subject, it is incompatible with the principles of our government, that an alien devisee should take by purchase, when there is a more remote relation who can take as heir. If that question were now for the first time to be considered in this country, the argument might perhaps have been entitled to great consideration. But in the case of Sheaffe v. O'Neil, 1 Mass. 256, it is held, that an alien cannot only take and hold, but that he may convey. In the case of Fairfax v. Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453, it is held that an alien devisee may take and hold until office found, although there was a nephew who might have taken as heir. That [is] a case of high authority, for it is supported by the unanimous opinion of all the judges of the supreme court of the United States who were then present. Judge Johnson differed in opinion with the court on another ground. But with regard to that question, he expresses his unequivocal approbation of the opinion of his brethren. There are other cases in which the same principle has been recognized. This court therefore does not feel authorized to introduce the innovation which has been contended for."

95. Peo. v. Conklin, 2 Hill (N. Y.) 67. See generally Escheat [16 Cyc 548].

96. Atkins v. Kron, 37 N. C. 58, 64 (where the court said: "Whether a devise to an alien will vest the estate so as to enable the sovereign to claim it against the heir at law or not, or, whether, if it will, the Trustees of the University can, as grantees of the State, claim it as 'property escheated,' are questions, on which, at present, we do not propose to give an opinion. For admitting the affirmative of both propositions to be true, yet we think that the gift to the Krons is of such a character as to prevent the devise to the foreign relations taking effect for the benefit merely of the State or the University, or for any other purpose but for the benefit of those relations themselves. The gift over operates, like a conditional limitation, to make the first estate cease or to prevent it from arising, if it cannot legally be enjoyed by the testator's favorite relations, and vests it immediately in the second class of relations, who are next in his affections, and, in that event, are substituted by him for the former").

Conditional limitations see generally Estates [16 Cyc 607]; Deeds [13 Cyc 667]; Wills [40 Cyc 1584].

97. Smith v. Smith, 70 App. Div. 286, 74 NYS 967.

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Conditional devise. A devise to an alien to take effect in case the devisee is naturalized, or otherwise rendered competent to take and hold land, is valid as an executory devise.[98]

[§ 19] **(2) As Affected by Statute.** The legislatures of the several states may, of course, authorize aliens to acquire lands by devise and hold the same,[99] and a general provision authorizing aliens to take lands by "purchase" includes the power to take and hold by devise,[1] unless other provisions of the statute show that it was the intention of the legislature to limit the word "purchase" to a transaction of bargain and sale.[2] So also the legislature may authorize alien testators to transmit by devise.[3]

A statute requiring alien devisees to take certain incipient steps in order to enable them to hold lands devised does not prevent them from taking a conditional title, absolute as against the heirs of the testator, although defeasible by the state in case of a noncompliance with the requirement of the statute.[4]

Statutory prohibition against devise to aliens. Of course where a statute expressly prohibits aliens from taking by devise, a devise to an alien is inoperative to convey any title to him.[5]

[§ 20] **(3) As Affected by Treaty.** The federal government, under its treaty making power, may empower aliens to take[6] or transmit[7] by devise, and a treaty authorizing aliens to transmit their "effects" by devise has been held to include the power to devise lands.[8]

[§ 21] **d. Mortgages.** In jurisdictions in which a mortgage upon real estate creates only a lien there seems to be no reason why an alien cannot take a mortgage,[9] and, of course, the rule that a

98. Beard v. Rowan, 9 Pet. (U. S.) 301, 9 L. ed. 135; McCaw v. Galbraith, 41 S. C. L. 74.

Executory devises see generally Wills [40 Cyc 1644 et seq].

99. Cal.—Guilford's Est., 67 Cal. 380, 7 P 763; Billings v. Hauver, 65 Cal. 593, 4 P 639.

Ill.—Adams v. Akerlund, 168 Ill. 632, 48 NE 454.

Iowa.—Krogan v. Kinney, 15 Iowa 242.

Ky.—Eustache v. Rodaquest, 11 Bush 42.

N. Y.—Stamm v. Bostwick, 122 N. Y. 48, 25 NE 233, 9 LRA 597; Hall v. Hall, 81 N. Y. 130; Wright v. Saddler, 20 N. Y. 320; Smith v. Smith, 70 App. Div. 286, 74 NYS 967; Dusenberry v. Dawson, 9 Hun 511; Wadsworth v. Murray, 16 Barb. 601 [aff 12 N. Y. 376]; Fay v. Taylor, 31 Misc. 32, 63 NYS 572.

In Fay v. Taylor, 31 Misc. 32, 34, 63 NYS 572, the court, in regard to the late New York statutes, said: "Our statute provides that 'any citizen of a state or nation which, by its laws, confers similar privileges on citizens of the United States, may take, acquire, hold and convey lands or real estate within this state, in the same manner and with like effect as if such person were, at the time, a citizen of the United States.' Chap. 593, Laws of 1897. By reference to the English statute, enacted in 1870, it will be seen that England does confer similar privileges upon our citizens. The English statute provides that 'Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from or in succession to an alien, in the same manner in all respects as through, from or in succession to a natural-born British subject.' 33 Vict. c. 14 p 166. It is clear, therefore, that whether Patrick Finn was a citizen or an alien he was capable of taking and holding lands devised to him by his wife."

[a] **Aliens authorized by statute** to take and hold lands to them, "their heirs and assigns," forever, may devise such lands to aliens. Howard v. Moot, 64 N. Y. 262.

1. Doehrel v. Hillmer, 102 Iowa 169, 71 NW 204; Burrow v. Burrow, 98 Iowa 400, 67 NW 287; Bennett v. Hibbert, 88 Iowa 154, 55 NW 93 [disappr Purczell v. Smidt, 21 Iowa 540]; Greenheld v. Stanforth, 21 Iowa 595; Stamm v. Bostwick, 122 N. Y. 48, 25 NE 233, 9 LRA 597; Smith v. Smith, 70 App. Div. 286, 74 NYS 967.

2. Purczell v. Smidt, 21 Iowa 540.

3. Jackson v. Clarke, 3 Wheat. (U. S.) 1, 4 L. ed. 319; Goodrich v. Russell, 42 N. Y. 177; Dusenberry v. Dawson, 9 Hun (N. Y.) 511; Matter of Barandon, 41 Misc. 380, 84 NYS 937; Richards v. McDaniel, 9 S. C. L. 18.

4. Hall v. Hall, 81 N. Y. 130.

[a] **In New York** (1) under the act of 1875 empowering aliens to take by devise, but requiring them to file a declaration of intention to become citizens to enable them to hold the land, the effect of the failure to file such declaration can be raised only by the state, and not by heirs of the testator. Smith v. Smith, 70 App. Div. 286, 74 NYS 967. See also Hall v. Hall, 81 N. Y. 130. (2) And where an alien devisee died very shortly after the death of the testator and before the probate of the will, leaving female heirs, it was held that, as the devisee had a reasonable time within which to file his declaration, the failure of the devisee to file such declaration did not invalidate the devise and prevent his female heirs from taking. Smith v. Reilly, 31 Misc. 701, 66 NYS 40.

5. De Graff v. Went, 164 Ill. 485, 45 NE 1075; Ryan v. Egan, 156 Ill. 224, 40 NE 827; Hall v. Hall, 81 N. Y. 130; Beekman v. Bonsor, 23 N. Y. 298, 80 AmD 269; Beck v. McGillis, 9 Barb. (N. Y.) 35; Mick v. Mick, 10 Wend. (N. Y.) 379, 381 (statute providing that "every devise of any interest in real property to a person who, at the time of the death of the testator, shall be an alien, not authorized by statute to hold real estate, shall be void"); Matter of Leefe, 4 Edw. (N. Y.) 395.

[a] **Under the Illinois statutes,** acts 1887, 1891, prohibiting aliens from taking by devise, and further providing that, where any deed shall be made to an alien, the alien may convey a good title, an alien devisee has no title which can be conveyed. De Graff v. Went, 164 Ill. 485, 45 NE 1075.

[b] **New York Revised Statutes,** 2 Rev. St. 57 § 4, declaring that every devise of any interest in real estate to a person who, at the death of the testator, shall be an alien not authorized by statute to hold real estate, shall be void, and that the interest so devised shall descend to the heirs of the testator, (1) is confined to a particular class of persons, and relates to their condition at the death of the testator. It does not apply to those who are born aliens, after his death. Therefore where a testator devised lands to his daughter for life and to her issue in fee, and she, after his death, married an alien and died leaving a son, born an alien, it was held that such son took the estate, under the devise, as against the testator's heirs at law, subject to the right of the government by escheat. Van Cortlandt v. Laidley, 59 Hun 161, 11 NYS 148; Wadsworth v. Murray, 16 Barb. 601 [aff 12 N. Y. 376]. (2) In Beekman v. Bonsor, 23 N. Y. 298, 80 AmD 269, a direction in a will that money be laid out in land to be conveyed to or for the benefit of an alien, so as to invest him with the possession and the rents and profits, was held to fall within the provision.

[c] **Washington statute.**—In Brigham v. Kenyon, 76 Fed. 30, 31, it was held that the provision of the Washington constitution that "the ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void" does not render invalid a devise to an alien as between the devisee and the heirs of the testator.

6. See Jackson v. Clarke, 3 Wheat. (U. S.) 1, 4 L. ed. 319; Adams v. Akerlund, 168 Ill. 632, 48 NE 454; Yeaker v. Yeaker, 4 Metc. (Ky.) 33, 81 AmD 530; Stamm v. Bostwick, 40 Hun (N. Y.) 35 [aff 122 N. Y. 48, 25 NE 233, 9 LRA 597]; Stephen v. Swann, 9 Leigh (36 Va.) 404.

7. See Crane v. Reeder, 21 Mich. 24, 4 AmR 430; Watson v. Donnelly, 28 Barb. (N. Y.) 653; Foxwell v. Craddock, 1 Patt. & H. (Va.) 250.

[a] **Treaty with Great Britain, 1794.**—A British subject holding lands within the United States, and who, by the treaty of 1794 with Great Britain, was authorized to continue to hold them, and to grant, sell, or devise the same to whom he pleased, in like manner as if he had been a native-born citizen of the United States, and who was within the terms of the stipulation that neither those so holding the lands nor their heirs or assigns should, so far as respected the said land, and the legal remedies incident thereto, be regarded as aliens, had the right to devise the property to aliens as well as to citizens. The power to devise to whomsoever the owner pleased necessarily implied a corresponding ability, on the part of the devisee, to take and hold. Watson v. Donnelly, 28 Barb. (N. Y.) 653.

8. Univ. v. Miller, 14 N. C. 188 (treaty between the Netherlands and United States, 1782).

9. Goon Gan v. Richardson, 16 Wash. 373, 47 P 762; Oregon Mortg. Co. v. Carstens, 16 Wash. 165, 47 P 421, 35 LRA 841 (where it was held that a constitutional provision declaring void "all conveyances of lands hereafter made to any alien, directly or in trust for such alien," does not apply to cases in which a citizen deeds to an alien mortgaged lands in satisfaction of a bona fide mortgage debt, since another section of the same constitutional provision excepts from the prohibition upon alien ownership lands acquired "under mortgage or in good faith in the ordinary course of justice in the collection of debts").

[a] **An alien may take a mortgage**

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conveyance to an alien is good except as against the state or crown[10] applies to a mortgage to an alien,[11] although the mortgage is considered to convey the legal title.[12] At the present time in practically all jurisdictions aliens are empowered to acquire land by purchase,[13] and where such a rule prevails a mortgage to an alien is valid for all purposes.

[§ 22] **e. Leases.** While it seems that at common law aliens can take and hold, even as against the government, leasehold interests in lands for a reasonable term, still it also seems that an alien has no power as against the state to hold for unreasonably long terms.[14] In England it seems that a lease to an alien prohibited by St. 32 Hen. VII c 16 § 13, is void;[15] but it has also been held that that statute does not render void an assignment of a lease to an alien.[16]

[§ 23] **f. Liens upon Realty.**[17] Liens upon real estate, which do not confer any title, in favor of aliens are valid, as where funds of an alien are wrongfully invested in land by a citizen and the title is taken in the citizen's name.[18]

[§ 24] **g. Uses and Trusts.**[19] At the common law aliens are under the same disabilities as to uses and trusts arising out of real estate as they are in respect to the real estate itself, and the uses and trusts escheat to the state in the same way.[20] While the government cannot, by virtue of office found, oust trustees who are seized of lands in trust for an alien,[21] still a court of equity will enforce such a trust for the benefit of the government.[22]

Trust subject to acquisition of citizenship. A trust for the benefit of an alien in the event that he acquires citizenship is valid.[23]

Who may question trust. The equitable interest of an alien, as beneficiary in a deed of trust of real estate, is valid as against all except the crown or state,[24] and a fortiori such a trust deed is not void as between the grantor and the grantee.[25] So one who purchases from the trustee with knowledge of the trust in favor of the alien takes subject

on realty to secure a debt but cannot purchase at a foreclosure sale of such mortgage and hold the property as against the state. Scottish American Mortg. Co. v. Butler, 99 Miss. 56, 54 S 666, AnnCas1913C 1236.

[b] **Under the laws of England** an alien may be a mortgagee and recover his debt in countries where there is a positive prohibition to hold lands. Richmond v. Milne, 17 La. 312, 36 AmD 613.

10. See supra § 16.

11. Goon Gan v. Richardson, 16 Wash. 373, 47 P 762; Oregon Mortg. Co. v. Carstens, 16 Wash. 165, 47 P 421, 35 LRA 841.

12. Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142.

13. See statutory provisions; and supra § 11.

14. State v. Hudson Land Co., 19 Wash. 85, 52 P 574, 40 LRA 430.

[a] **Ninety-nine year lease.**—Under art 2 § 33 of the state constitution, prohibiting the "ownership of lands by aliens" and declaring void the "conveyance" to them of lands, except such as contain valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof, a lease of lands not falling within such exception for a period of ninety-nine years is for such an unreasonable term as to fall within the meaning and spirit of the constitutional prohibition against alien ownership. State v. Morrison, 18 Wash. 664, 665, 52 P 228 (where the court said: "Respondent contends that it is only absolute ownership of certain kinds of realty which is prohibited; that the word 'conveyance' means the transfer of title to another and the instrument by which this is done. The question for determination is, what is the meaning of the section of the constitution under consideration? We have not been referred to a case at all similar to the one we are now considering. We think that the section must be given a reasonable interpretation. If a lease for a term of ninety-nine years can be sustained, then why not one for nine hundred and ninety-nine years? And it would seem to require little argument to demonstrate that if a lease for such a term can lawfully be made to an alien the constitutional prohibition against ownership of lands in this state by aliens becomes meaningless, and parties may indirectly accomplish a result which they are forbidden to do directly").

15. Lapierre v. McIntosh, 9 A. & E. 857, 36 ECL 447, 112 Reprint 1439 (which was a case in trespass for entering plaintiff's house and expelling him. The plea stated that plaintiff was an alien artificer; that defendant had unlawfully agreed to grant, and plaintiff to take, a lease of the house for twenty-one years; that plaintiff took possession on the faith and terms of such agreement, and with the view and intent to carry the same into execution, and not otherwise; and that therefore defendant entered, etc., the door being open and no person therein of whom he could demand possession. It was held that the plea was good, as showing either a lease void by 32 Hen. VIII c 16, or possession in pursuance of an illegal agreement for such a lease; and that in either case plaintiff could not maintain the action).

16. Wootton v. Steffenoni, 13 L. J. Exch. 72.

17. **Mortgage lien** see supra § 21.

18. Zundell v. Gess, (Tex.) 9 SW 879 [rev reh on other grounds 73 Tex. 144, 10 SW 693]; Merle v. Andrews, 4 Tex. 200. See also Anstice v. Brown, 6 Paige (N. Y.) 448.

19. See generally Trusts [39 Cyc 1].

20. U. S.—Hammekin v. Clayton, 11 F. Cas. No. 5,996, 2 Woods 336.

N. Y.—Leggett v. Dubois, 5 Paige 114, 28 AmD 413.

S. C.—McCaw v. Galbraith, 41 S. C. L. 74.

Va.—Hubbard v. Goodwin, 3 Leigh (30 Va.) 492; Conn. v. Martin, 5 Munf. (19 Va.) 117.

Eng.—Sharp v. St. Sauveur, L. R. 7 Ch. 343; Rex v. Holland, Aleyn 14, 82 Reprint 889; Barrow v. Wadkin, 24 Beav. 1, 53 Reprint 257; Atty.-Gen. v. Sands, Hardres 488, 8 ERC 150; Atty.-Gen. v. Duplessis, Park. 144; Burney v. Macdonald, 15 Sim. 6, 38 EngCh 6, 60 Reprint 518; Comyns Dig. 427.

[a] **Reason for rule.**—In Hubbard v. Goodwin, 3 Leigh (30 Va.) 492, 514, Tucker, P., said: "The policy of that rule which denies to an alien the capacity to hold lands for his own benefit, rests upon the ground, that it is unwise to permit the soil of the country to be in the hands of the subjects of a foreign power, and its revenues to be enjoyed by them; since the state must be impoverished by transporting the revenues of the land into foreign countries, and weakened by putting a part of its territory under subjection to a foreign prince. Now, in a trust of this description, every evil that can flow from the conveyance of the legal title, equally exists; and hence we shall find, that, for centuries past, it has been held that the use of an alien shall go to the king. Had not this principle been adopted, the courts must either have permitted the alien to enforce the trust, which would have been a direct infraction of the policy of the law; or they must have held the trustee entitled to the property for his own use, which would have been to hold out to him the wages of treachery."

[b] **Trust for alien not raised by implication.**—"As a general principle . . . a court of chancery will not raise a use 'by implication,' in an alien, so as to endanger the estate, but will rather pass a title to the executors in trust. . . . So it has been held that, if it can be avoided, a court will not vest the estate in an alien by construction, in order to have it escheat, when otherwise it would not." Taylor v. Benham, 5 How. (U. S.) 233, 270, 12 L. ed. 130.

[c] **Use limited to alien, with power of appointment.**—In St. Philip v. Smith, 15 S. C. L. 452, it was held that when, by deed, a use is limited to a person, an alien, for life, with a power of appointment, and, in case of failure of appointment, to her right heirs, she having made an appointment and died, before office found, the estate in the hands of the appointees, citizens, was not subject to escheat, office not having been found during her lifetime.

21. Rex v. Holland, Aleyn 14, 82 Reprint 889; Atty.-Gen. v. Sands, Hardres 488, 8 ERC 150; Atty.-Gen. v. Duplessis, Park. 144. But see Burney v. Macdonald, 15 Sim. 6, 38 EngCh 6, 60 Reprint 518; Rittson v. Stordy, 3 Smale & G. 230, 65 Reprint 637.

22. Com. v. Martin, 5 Munf. (19 Va.) 117; Sharp v. St. Sauveur, L. R. 7 Ch. 343; Barrow v. Wadkin, 24 Beav. 1, 53 Reprint 257. But see Rittson v. Stordy, 3 Smale & G. 230, 65 Reprint 637 (where it was held that a devise to trustees in trust for a person who is an alien is a trust incapable of taking effect either for the benefit of the alien or of the crown, and that the beneficial interest results to the heir of the testator).

23. McCaw v. Galbraith, 41 S. C. L. 74.

24. Osterman v. Baldwin, 6 Wall. (U. S.) 116, 18 L. ed. 730; Taylor v. Benham, 5 How. (U. S.) 233, 12 L. ed. 130; Craig v. Leslie, 3 Wheat. (U. S.) 563, 4 L. ed. 460; Princeton Min. Co. v. Butte First Nat. Bank, 7 Mont. 530, 19 P 210; Meakings v. Cromwell, 5 N. Y. 136; Marx v. McGlynn, 4 Redf. Surr. 455 [aff 25 Hun 449 (88 N. Y. 357)]; Burgess v. Wheate, 1 Eden 188, 28 Reprint 652, W. Bl. 123, 96 Reprint 67, 10 ERC 614; Atty.-Gen. v. Sands, Hardres 488, 8 ERC 150; Atty.-Gen. v. Duplessis, Park. 144; Burney v. Macdonald, 15 Sim. 6, 38 EngCh 6, 60 Reprint 518; Rex v. Holland, Style 21, 82 Reprint 498. But see Atkins v. Kron, 40 N. C. 207.

25. Hammekin v. Clayton, 11 F. Cas. No. 5,996, 2 Woods 336.

thereto;[26] and it has been held that a statutory provision rendering void a devise of real estate to an alien did not, as between an alien devisee and the heirs of the testator, render invalid a devise to a citizen to hold in trust and pay the rent and profits to an alien.[27]

Equitable conversion. A conveyance or devise of lands in trust in favor of an alien may work a conversion of the land into personalty so as to render the trust valid.[28]

Where the law permits an alien to hold real estate, a trust in his favor is, of course, valid,[29] and he may also hold as trustee.[30]

Implied trusts. Where aliens are prohibited as against the government from holding land, it seems that an implied trust by operation of law will not arise in favor of an alien.[31]

[§ 25] **3. Real Property Acquired by Operation of Law—a. In General.** While an alien can acquire title to real estate by act of parties as already shown, he cannot, at common law, acquire any title by operation of law, as the law will not cast an estate upon one who is incompetent to hold the same.[32]

[§ 26] **b. Right of Inheritance—(1) At Common Law—(a) In General.** At common law an alien cannot acquire any title whatsoever by descent,[33] nor can he cast descent upon his heirs irrespective

26. Osterman v. Baldwin, 6 Wall. (U. S.) 116, 18 L. ed. 730; Princeton Min. Co. v. Butte First Nat. Bank, 7 Mont. 530, 19 P 210.

27. Marx v. McGlynn, 88 N. Y. 357, 376 (where the court said: "At common law an alien could take land by devise, or grant and hold it against the whole world except the sovereign, and even against him until inquest of office found. But our statute provides that a devise to an alien of any interest in land shall be absolutely void and that the land thus devised shall descend to the heirs of the testator (2 Rev. St. 57 § 4). It is simply a devise of land or any interest therein that is condemned. The policy of law which prohibits aliens from holding title to land is to have the title in the hands of citizens, who owe allegiance to the government, and can be called upon to discharge the duties of citizenship. This policy is not violated by this provision of the will. The title vested in a citizen. Bradley [cestui que trust] has no estate whatever in the land. What he gets is a personal right, and the income of the real estate, when it comes to him, will come as personal property").

28. U. S.—Taylor v. Benham, 5 How. 233, 12 L. ed. 130; Craig v. Leslie, 3 Wheat. 563, 4 L. ed. 460; Cross v. De Valle, 6 F. Cas. No. 3,430, 1 Cliff 282 [aff 1 Wall. 1, 17 L. ed. 515].

Conn.—Emery v. Cooley, 83 Conn. 235, 76 A 529.

N. Y.—Marx v. McGlynn, 88 N. Y. 357; Meakings v. Cromwell, 5 N. Y. 136; McCarty v. Deming, 4 Lans. 440; Parish v. Ward, 28 Barb. 328; Ludlow v. Van Ness, 21 N. Y. Super. 178; Anstice v. Brown, 6 Paige; Matter of Windle, 2 Edw. 585; Marx v. McGlynn, 4 Redf. Surr. 455 [aff 25 Hun 449 (aff 88 N. Y. 357)].

N. C.—Atkins v. Kron, 37 N. C. 423.

S. C.—Jenney v. Laurens, 28 S. C. L. 356; Trezevant v. Howard, 3 S. C. Eq. 87.

Tex.—Merle v. Andrews, 4 Tex. 200.

Va.—Com. v. Selden, 5 Munf. (19 Va.) 160; Com. v. Martin, 5 Munf. (19 Va.) 117.

Eng.—Sharp v. St. Sauveur, L. R. 7 Ch. 343; Master v. De Craismar, 11 Beav. 184, 50 Reprint 787; Du Hourmelin v. Sheldon, 1 Beav. 79, 17 EngCh 79, 48 Reprint 868; Fourdrin v. Gowdey, 3 Myl. & K. 383, 10 EngCh 383, 40 Reprint 146.

Ont.—Murray v. Heron, 7 Grant Ch. (U. C.) 177.

See also Conversion [9 Cyc 833 text and note 34].

29. Kalies v. Ewert, 248 Ill. 612, 94 NE 105 (especially where he is the sole beneficiary); Hayden v. Sugden, 48 Misc. 108, 96 NYS 681.

30. Hayden v. Sugden, 48 Misc. 108, 96 NYS 681.

31. Philips v. Crammond, 19 F. Cas. No. 11,092, 2 Wash C. C. 441; Hubbard v. Goodwin, 3 Leigh (30 Va.) 492.

[a] **"Express" distinguished from "implied" trusts.**—(1) Where the trust is an express one there is no uncertainty as to the escheat to the state. Atkins v. Kron, 40 N. C. 207; McCaw v. Galbraith, 41 S. C. L. 74; Hubbard v. Goodwin, 3 Leigh (30 Va.) 492. And see Comyns Dig. 547 (where it is said: "An alien cannot enforce the execution of a use at common law, or of a trust now"), and McCarty v. Deming, 4 Lans. (N. Y.) 440 (where it was held that where executors were given power by will to sell and convey real estate, their authority to sell is not to be construed as a direction to convert the real into personal estate for distribution among testator's next of kin, some of whom were aliens, but that the real estate descends as such to his heirs at law entitled to take as citizens). (2) But when the trust is an implied one, it is not clearly established whether equity will raise a resulting trust in favor of the alien so that it will revert by escheat to the state or not. See Hammekin v. Clayton, 11 F. Cas. No. 5,996, 2 Woods 336, 339 (where a deed was given apparently to evade the Alien Law of Mexico, Wood, C. J., saying: "We think . . . that the most that could be claimed was that the trust was void," but he did not say that it was void); Hubbard v. Goodwin, 3 Leigh (30 Va.) 492 (where there is to the effect an obiter dictum, per President Tucker, that, where there is no intent to evade the Alien Law, equity will not raise a trust to escheat to the state but will simply declare the trust void). (3) The reasonable and equitable view seems to be that set out by Tucker, P., that equity will not raise a trust to the injury of the alien except where there has been an attempt to violate the Alien Law by the creation of an express or secret trust in the purchase of lands. See Zundell v. Gess, 73 Tex. 144, 10 SW 693 (where it was stated as an obiter dictum that a resulting trust will not be raised in favor of an alien whose money may be traced into real estate, purchased therewith without his connivance). (4) It is clear that an agreement between an alien and a citizen to purchase lands for the purpose of evading the Alien Law does not work an escheat or forfeiture until the purchase has actually been made. Merle v. Andrews, 4 Tex. 200; Hubbard v. Goodwin, 3 Leigh (30 Va.) 492. Compare Mussey v. Pierre, 24 Me. 559.

[b] **Payment by alien of purchase money.**—Where an alien, for the purpose of evading the law of the state prohibiting him from taking and holding real property, purchases land and takes a conveyance thereof in the name of a third person without any written declaration of trust a resulting trust will not arise in favor of the purchaser, as equity will never raise a resulting trust in fraud of the rights of the state or of the laws of the land. Leggett v. Dubois, 5 Paige (N. Y.) 114, 118, 28 AmD 413 (where the court said: "The law will never cast the legal or equitable estate upon a person who has no right to hold it, although an estate may, by an express contract or conveyance, be vested in an alien, until office found, for the benefit of the people of the state. Where an alien, therefore, purchases land, and takes an absolute conveyance in the name of a citizen, without any agreement or declaration of a trust, the law will not raise a trust in favor of the alien purchaser, who cannot hold the land, any more than it would cast it by descent upon an alien heir, who cannot hold it against the state").

32. Ala.—Mobile Cong. Church v. Morris, 8 Ala. 132; Smith v. Zaner, 4 Ala. 99.

Cal.—Farrell v. Enright, 12 Cal. 450.

Ga.—Fitzgerald v. Garvin, T. U. P. Charlt. 281.

Me.—Mussey v. Pierre, 24 Me. 559.

N. Y.—Heeney v. Brooklyn Benev. Soc., 33 Barb. 360 [aff 39 N. Y. 333, 7 Transcr. A. 89]; Peo. v. Conklin, 2 Hill 67; Moers v. White, 6 Johns. Ch. 365.

N. C.—Rouche v. Williamson, 25 N. C. 141; Paul v. Ward, 15 N. C. 247.

Tenn.—Emmett v. Emmett, 14 Lea 369.

Eng.—Calvin's Case, 7 Coke 2a, 25a, 77 Reprint 379, 2 ERC 575.

See also Bouvier L. D.; and generally cases infra § 26.

33. U. S.—Blythe v. Hinckley, 180 U. S. 333, 21 SCt 390, 45 L. ed. 557; Middleton v. McGrew, 23 How. 45, 16 L. ed. 403; McKinney v. Saviego, 18 How. 235, 15 L. ed. 365; McLearn v. Wallace, 10 Pet. 625, 9 L. ed. 558; Spratt v. Spratt, 1 Pet. 343, 7 L. ed. 171; Blight v. Rochester, 7 Wheat. 535, 5 L. ed. 516; Orr v. Hodgson, 4 Wheat. 453, 4 L. ed. 613; Dawson v. Godfrey, 4 Cranch 321, 2 L. ed. 634; McIlvaine v. Coxe, 2 Cranch 280, 2 L. ed. 279; Pacific Bank v. Hannah, 90 Fed. 72, 32 CCA 522; Brigham v. Kenyon, 76 Fed. 30; Ware v. Wisner, 50 Fed. 310; Branagh v. Smith, 46 Fed. 517; Pilla v. German School Assoc., 23 Fed. 700; Contee v. Godfrey, 6 F. Cas. No. 3,140, 1 Cranch C. C. 479; Randall v. Jacques, 20 F. Cas. No. 11,553. See also Manuel v. Wulff, 152 U. S. 505, 14 SCt 651, 38 L. ed. 532; Taylor v. Benham, 5 How. 233, 12 L. ed. 130; Fairfax v. Hunter, 7 Cranch 603, 3 L. ed. 453; Lambert v. Paine, 3 Cranch 96, 2 L. ed. 377.

Ala.—Donovan v. Pitcher, 53 Ala. 411, 25 AmR 634; Etheridge v. Malempre, 18 Ala. 565; Mobile Cong. Church v. Morris, 8 Ala. 132; Smith v. Zaner, 4 Ala. 99. See also Jinkins v. Noel, 3 Stew. 60.

Cal.—In re Pendergast, 143 Cal. 135, 76 P 962; McNeil v. Polk, 57 Cal. 323; Norris v. Hoyt, 18 Cal. 217; Farrell v. Enright, 12 Cal. 450; Siemssen v. Bofer, 6 Cal. 250. Compare Peo. v. Folsom, 5 Cal. 373 (where it was held, as regards lands situated in the territories of the United States, that aliens could inherit). But see McNeil v. Polk, 57 Cal. 323 (Mexican law).

Conn.—Crosgrove v. Crosgrove, 69 Conn. 416, 38 A 219.

D. C.—De Geoffroy v. Riggs, 18 D. C. 331; Walker v. Potomac Ferry Co., 10 D. C. 440.

Ida.—Connolly v. Reed, 22 Ida. 29,

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of whether they are aliens or citizens.[34]

Proceedings for escheat unnecessary. Where an alien who holds land dies, or a citizen dies leaving only alien heirs, the land instantly and of necessity, without any inquest of office, escheats and vests in the state,[35] and the government may grant

36, 125 P 213 [cit Cyc]; State v. Stevenson, 6 Ida. 367, 55 P 886.

Ill.—Meadowcroft v. Winnebago County, 181 Ill. 504, 54 NE 949; De Graff v. Went, 164 Ill. 485, 45 NE 1075; Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84.

Ind.—Donaldson v. State, 101 NE 485, 489 [cit Cyc]; Doe v. Lazenby, 1 Ind. 234; Eldon v. Doe, 6 Blackf. 341; Donaldson v. State, (A.) 67 NE 1029, 1030 [cit Cyc]. See also Murray v. Kelly, 27 Ind. 42.

Iowa.—Meier v. Lee, 106 Iowa 303, 76 NW 712; Brown v. Pearson, 41 Iowa 481; Rheim v. Robbins, 20 Iowa 45. See also Ahrens v. Ahrens, 144 Iowa 486, 123 NW 164 AnnCas1912A 1098 and note.

Ky.—Yeaker v. Yeaker, 4 Metc. 33, 81 AmD 530; White v. White, 2 Metc. 185; Trimbles v. Harrison, 1 B. Mon. 140; Fry v. Smith, 2 Dana 38; Stevenson v. Dunlap, 7 T. B. Mon. 134; Elmendorff v. Carmichael, 3 Litt. 472, 14 AmD 86; Louisville v. Gray, 1 Litt. 146; Hunt v. Warnicke, Hard. 66. See also Murray v. Fishback, 5 B. Mon. 403.

La.—De Roffignac's Succ., 21 La. Ann. 364; Richmond v. Milne, 17 La. 312, 36 AmD 613; Phillips v. Rogers, 5 Mart. 700.

Md.—Buchanan v. Deshon, 1 Harr. & G. 280.

Mass.—Scanlan v. Wright, 13 Pick. 523, 25 AmD 344; Sheaffe v. O'Neil, 1 Mass. 256.

Mich.—Crane v. Reeder, 21 Mich. 24, 4 AmD 497.

Miss.—Scottish American Mortg. Co. v. Butler, 99 Miss. 56, 54 S 666, AnnCas1913C 1236.

Mo.—Pembroke v. Huston, 180 Mo. 627, 79 SW 470; Utassy v. Giedinghagen, 132 Mo. 53, 33 SW 444; Harney v. Donohoe, 97 Mo. 141, 10 SW 191; Wacker v. Wacker, 26 Mo. 426.

Mont.—In re Colbert, 44 Mont. 259, 119 P 791.

Nebr.—Dougherty v. Kubat, 67 Nebr. 269, 93 NW 317; Glynn v. Glynn, 62 Nebr. 872, 87 NW 1052.

N. H.—Montgomery v. Dorion, 7 N. H. 475.

N. J.—Colgan v. McKeon, 24 N. J. L. 566.

N. Y.—Luhrs v. Eimer, 80 N. Y. 171; McCarthy v. Marsh, 5 N. Y. 263; Smith v. Smith, 70 App. Div. 286, 74 NYS 967; McCarty v. Denning, 4 Lans. 440; Ettenheimer v. Heffernan, 66 Barb. 374; Henney v. Brooklyn Benev. Soc., 33 Barb. 360 [39 N. Y. 333]; Parish v. Ward, 28 Barb. 328; Douglass v. Douglass, 70 Misc. 412, 128 NYS 912; Haley v. Sheridan, 46 Misc. 506, 95 NYS 42; Larreau v. Davignon, 5 AbbPrNS 367; Bradley v. Dwight, 62 HowPr 300; Renner v. Müller, 57 HowPr 229; Leary v. Leary, 50 HowPr 122; Brown v. Sprague, 5 Den. 545; Orser v. Hoag, 3 Hill 79; Peo. v. Conklin, 2 Hill 67; Kennedy v. Wood, 20 Wend. 230; Bradstreet v. Oneida County, 13 Wend. 546; Jackson v. Fitz Simmons, 10 Wend. 9, 24 AmD 198; Jackson v. White, 20 Johns. 313; Jackson v. Lunn, 3 Johns. Cas. 109; Mooers v. White, 6 Johns. Ch. 360; Lynch v. Clarke, 1 Sandf. Ch. 583.

N. C.—Harman v. Ferrall, 64 N. C. 474; Paul v. Ward, 15 N. C. 247. The contrary perhaps was held in the case of Bayard v. Singleton, 1 N. C. 42, but the decision in that case turned also upon an act of the legislature which was declared to be as effective as an office found to work the forfeiture.

Oh.—Kay v. Watson, 17 Oh. 27.

Or.—Quinn v. Ladd, 37 Or. 261, 59 P 457.

Pa.—Jackson v. Burns, 3 Binn. 75.

S. C.—Keenan v. Keenan, 41 S. C. L. 345; Jenney v. Laurens, 28 S. C. L. 356; Descottes v. Talvande, 27 S. C. L. 300; Scott v. Cohen, 11 S. C. L. 293; Davis v. Hall, 10 S. C. L. 292; Groves v. Gordon, 5 S. C. L. 245; Trezevant v. Osborn, 5 S. C. L. 29; Ennas v. Franklin, 4 S. C. L. 398; McClenaghan v. McClenaghan, 20 S. C. Eq. 295, 47 AmD 532; Vaux v. Nesbit, 6 S. C. Eq. 352; Ex p. Dupont, 5 S. C. Eq. 5; Sebben v. Trezevant, 3 S. C. Eq. 213; Halyburton v. Kershaw, 3 S. C. Eq. 105.

Tenn.—Ehrlich v. Weber, 114 Tenn. 711, 88 SW 188; Baker v. Shy, 9 Heisk. 85.

Tex.—Pettus v. Dawson, 82 Tex. 18, 17 SW 714; McGahan v. Baylor, 32 Tex. 789; Barrett v. Kelly, 31 Tex. 476; Lacoste v. Odam, 26 Tex. 458; Barclay v. Cameron, 25 Tex. 232; Blythe v. Esterling, 20 Tex. 565; Warnell v. Finch, 15 Tex. 163; Cryer v. Andrews, 11 Tex. 170; Yates v. Iams, 10 Tex. 168; Hardy v. De Leon, 5 Tex. 211; Douthit v. Southern, (Civ. A.) 155 SW 315; Williams v. Bennett, 1 Tex. Civ. A. 498, 20 SW 856.

Va.—Hauenstein v. Lynham, 28 Gratt. (69 Va.) 62 [rev on other grounds 100 U. S. 483, 25 L. ed. 628]; Sands v. Lynham, 27 Gratt. (68 Va.) 291, 21 AmR 348; Hubbard v. Goodwin, 3 Leigh (30 Va.) 492; Jackson v. Sanders, 2 Leigh (29 Va.) 109; Barzizas v. Hopkins, 2 Rand. (23 Va.) 276; Read v. Read, 5 Call (9 Va.) 160.

Wash.—Abrams v. State, 45 Wash. 327, 339, 88 P 327, 122 AmSR 914, 9 LRANS 186, 13 Ann Cas 527 [cit Cyc].

Eng.—Doe v. Acklam, 2 B. & C. 779, 9 ECL 337, 107 Reprint 572, 2 ERC 632; Calvin's Case, 7 Coke 2a, 25a, 77 Reprint 379, 2 ERC 575; Doe v. Jones, 4 T. R. 300, 100 Reprint 1031.

Ont.—Iler v. Elliott, 32 U. C. Q. B. 434; Doe v. Clarke, 1 U. C. Q. B. 37. But see Donegani v. Donegani, 1 L. C. Rep. 605.

[a] **In Kansas,** under original provision of bill of rights, aliens could inherit. Sparks v. Bodensick, 72 Kan. 5, 82 P 463. But see Smith v. Lynch, 61 Kan. 609, 60 P 329 (under the Kansas Alien Land Act).

[b] **Taking by descent is not taking by purchase.**—So held in Callahan v. O'Brien, 72 Hun 216, 25 NYS 410.

[c] **British subjects, although born before the Revolution,** were held equally incapable with those born subsequently to that event of inheriting or transmitting the inheritance of lands in this country. Blight v. Rochester, 7 Wheat. (U. S.) 535, 544, 5 L. ed. 516. See supra § 3.

[d] **Denizen or resident alien.**—The fact that an alien is a denizen or resident does not enable him to take by inheritance. McClenaghan v. McClenaghan, 20 S. C. Eq. 295, 47 AmD 532.

[e] **Free negroes.**—Under the constitution and laws of the United States and of the state of Alabama, as existing in the year 1859, free negroes or persons of color residing in Ohio, whose ancestors were slaves, were not citizens of the United States or of that state; they were then incapable of acquiring residence or citizenship in Alabama, and consequently could not take lands in that state by descent. Donovan v. Pitcher, 53 Ala. 411, 25 AmR 634.

34. U. S.—Levy v. McCartee, 6 Pet. 102, 8 L. ed. 334; Blight v. Rochester, 7 Wheat. 535, 5 L. ed. 516.

Ala.—Smith v. Zaner, 4 Ala. 99. See also Bartlett v. Morris, 9 Port. 266.

Ark.—Jones v. Minogue, 29 Ark. 637.

D. C.—Walker v. Potomac Ferry Co., 10 D. C. 440.

Ill.—De Graff v. Went, 164 Ill. 485, 45 NE 1075.

Ind.—Donaldson v. State, 101 NE 485, 489 [cit Cyc]; Donaldson v. State, 67 NE 1029; Murray v. Kelly, 27 Ind. 42; Doe v. Lazenby, 1 Ind. 234.

Iowa.—Purcell v. Smidt, 21 Iowa 540; Stemple v. Herminghouser, 3 Greene 408.

Kan.—Cramer v. McCann, 83 Kan. 719, 112 P 832, 37 LRANS 108 and note.

Ky.—Trimbles v. Harrison, 1 B. Mon. 140; Stevenson v. Dunlap, 7 T. B. Mon. 134.

La.—Richmond v. Milne, 17 La. 312, 36 AmD 613.

Mass.—Slater v. Nason, 15 Pick. 345.

Mich.—Crane v. Reeder, 21 Mich. 24, 4 AmR 430.

Mo.—Farrar v. Dean, 24 Mo. 16.

N. Y.—Haley v. Sheridan, 190 N. Y. 331, 83 NE 296; Larreau v. Davignon, Sheld. 128, 5 AbbPrNS 367; Renner v. Müller, 57 HowPr 229; Peo. v. Conklin, 2 Hill 67.

N. C.—Paul v. Ward, 15 N. C. 247. But see University v. Miller, 14 N. C. 188.

Pa.—Rubeck v. Gardner, 7 Watts 455.

R. I.—De Wolf v. Middleton, 18 R. I. 814, 26 A 44, 31 A 271, 31 LRA 146 and note.

S. C.—Ex p. Dupont, 5 S. C. Eq. 5 [rev on other grounds Shanks v. Dupont, 3 Pet. (U. S.) 242, 7 L. ed. 666].

Tenn.—Hinkle v. Shadden, 2 Swan 46.

Va.—Sands v. Lynham, 27 Gratt. (68 Va.) 291, 21 AmR 348; Jackson v. Sanders, 2 Leigh (29 Va.) 109.

Wash.—Abrams v. State, 45 Wash. 327, 339, 88 P 327, 122 AmSR 914, 9 LRANS 186, 13 AnnCas 527 [cit Cyc].

Ont.—Montgomery v. Graham, 31 U. C. Q. B. 57; Irwin v. McBride, 23 U. C. Q. B. 570.

See also Donegani v. Donegani, 1 L. C. 605; and cases infra note 38.

Compare Lenehan v. Spaulding, 57 Vt. 115 (where the right to transmit was not allowed to be raised in a collateral proceeding for distribution under a special statute).

[a] **Effect of American Revolution on power of British subject.**—Where the title to land in New York was acquired by a British subject prior to the American Revolution, it seems that the right of such British subject to transmit the same by descent to an heir in esse, at the time of the Revolution, continued unaltered and unimpaired, the case of a revolution or division of an empire being an exception to the general rule of law on this subject. The objection of alienism is not to be favored. Jackson v. Lunn, 3 Johns. Cas. (N. Y.) 109.

35. U. S.—McKinney v. Saviego, 18 How. 235, 15 L. ed. 365; Fairfax v. Hunter, 7 Cranch 603, 3 L. ed. 453; Pacific Bank v. Hannah, 90 Fed. 72, 32 CCA 522; Contee v. Godfrey, 6 F. Cas. No. 3,140, 1 Cranch C. C. 479.

Ala.—Etheridge v. Doe, 18 Ala. 565; Bartlett v. Morris, 9 Port. 266.

Ida.—State v. Stevenson, 6 Ida. 367, 55 P 886.

Ill.—Meadowcroft v. Winnebago County, 181 Ill. 504, 54 NE 949; Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84.

Ind.—Donaldson v. State, 101 NE 485, 489 [cit Cyc]; Donaldson v. State, 67 NE 1029, 1030 [cit Cyc].

Iowa.—Purcell v. Smidt, 21 Iowa 540.

Kan.—Madden v. State, 68 Kan. 658, 75 P 1023.

Ky.—White v. White, 2 Metc. 185; Trimbles v. Harrison, 1 B. Mon. 140; Fry v. Smith, 2 Dana 38; Stephenson v. Dunlap, 7 T. B. Mon. 134; Louisville v. Gray, 1 Litt. 146.

Mass.—Wilbur v. Tobey, 16 Pick. 177; Slater v. Nason, 15 Pick 345; Fox v. Southack, 12 Mass. 143.

Mich.—Crane v. Reeder, 21 Mich. 24, 4 AmR 430.

Mo.—Pembroke v. Huston, 180 Mo.

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such lands without proceedings for escheat.[36]

Liability for debts of decedent. Where land has escheated to the state on account of the alienage of the heirs, it is still subject to be charged with the payment of the debts of the deceased owner.[37]

Intermediate alien ancestor. The rule which prohibited an alien from inheriting also prohibited one not an alien from inheriting where he was required to claim through an intermediate ancestor who was an alien, as an alien could not transmit inheritable blood;[38] this is especially true where the alien ancestor through whom the inheritance is claimed is alive.[39]

Descent to others not interrupted. If a citizen dies and his next heir is an alien who cannot take, the alien cannot interrupt the descent to others who do not claim through him, but the inheritance descends to the next heir who is competent to take, in like manner as if no such alien had ever existed.[40]

627, 79 SW 470; Farrar v. Dean, 24 Mo. 16.

N. H.—Montgomery v. Dorion, 7 N. H. 475.

N. J.—Colgan v. McKeon, 24 N. J. L. 566; O'Hanlin v. Den, 20 N. J. L. 31 [aff 21 N. J. L. 582].

N. Y.—McCormack v. Coddington, 184 N. Y. 467, 77 NE 979 [rev on other grounds 46 Misc. 510, 95 NYS 46]; McGillis v. McGillis, 154 N. Y. 532, 49 NE 145; Smith v. Smith, 70 App. Div. 286, 74 NYS 967; Ettenheimer v. Heffernan, 66 Barb. 374; Heeney v. Brooklyn Benev. Soc., 33 Barb. 360 [aff 39 N. Y. 333]; Larreau v. Davignon, Sheld. 128, 5 AbbPrNS 367; Douglass v. Douglass, 70 Misc. 412, 128 NYS 912; Criswell v. Noble, 61 Misc. 483, 113 NYS 954; Haley v. Sheridan, 46 Misc. 506, 95 NYS 42; Kelly v. Pratt, 41 Misc. 31, 83 NYS 636; Richardson v. Amsdon, 85 NYS 342; Mooers v. White, 6 Johns. Ch. 360; Wright v. New York M. E. Church, Hoffm. 201. But see Stewart v. Russell, 184 N. Y. 601, 77 NE 983; Jackson v. Adams, 7 Wend. 367.

N. C.—Paul v. Ward, 15 N. C. 247.

Pa.—Rubeck v. Gardner, 7 Watts 455.

S. C.—McCaw v. Galbraith, 41 S. C. L. 74; Scott v. Cohen, 11 S. C. L. 293; McClenaghan v. McClenaghan, 20 S. C. Eq. 295, 47 AmD 532.

Tenn.—Hinkle v. Shadden, 2 Swan 46.

Tex.—Barrett v. Kelly, 31 Tex. 476; Barclay v. Cameron, 25 Tex. 232.

Vt.—State v. Boston, etc., R. Co., 25 Vt. 433.

Va.—Sands v. Lynham, 27 Gratt. (68 Va.) 291, 21 AmR 348.

Wash.—Abrahams v. State, 45 Wash. 327, 88 P 327, 122 AmSR 914, 9 LRANS 186, 13 AnnCas 527.

Que.—Donegani v. Donegani, 1 L. C. 605.

See also 2 Blackstone Comm. 249; 2 Kent Comm. 55; and Escheat [16 Cyc 552].

[a] "**Upon principle,** it would seem that lands must in such a case vest immediately in the state, without any inquest of office—as they do in England in the crown, when the king's tenant dies without heirs. If no person appears to claim as heir, there is nobody to be made a party to the inquest; and nobody who is not a party, is bound. Stokes v. Dawes, 23 F. Cas. No. 13,477, 4 Mason 268. There may be cases in which an inquest of office might be expedient,—as where some person is found in possession, claiming as heir or otherwise; but we are of opinion that an inquest of office is in no such case essential to vest the title in the state." Montgomery v. Dorion, 7 N. H. 475, 481.

[b] **Inheritance on conditions.**—(1) Where, however, a statute empowers aliens to inherit, but requires them to perform certain conditions in order to hold as against the state, the title vests in the aliens, subject merely to be divested in proceedings by the state for failure to perform the conditions. Maynard v. Maynard, 36 Hun (N. Y.) 227. (2) Under N. Y. L. (1845) c 115 § 4, amended L. (1874) c 261; L. (1875) c 38, an alien inheriting real estate from a citizen could hold it as against the state only by making and filing a deposition or affirmation of his intention to become a citizen, as required by the first section of the act. A failure to file such declaration rendered his title liable to forfeiture during life by the state in proceedings to be taken for that purpose; upon his death without having filed such declaration, the fact that the state failed in his lifetime to take such proceedings did not constitute a waiver or loss of its rights and permit him to transmit his title by inheritance to a citizen heir; but his death ipso facto worked an immediate escheat to the state, no proceedings on its part having been necessary to effect it, and therefore, in the absence of any legislation authorizing it, the title of such heir cannot be successfully maintained as against the state, in a subsequent partition action in which it asserts its rights. McCormick v. Coddington, 184 N. Y. 467, 77 NE 979.

[c] **In Michigan** lands which escheated for want of heirs who could inherit before the admission of Michigan as a state vested in the state upon its admission. Crane v. Reeder, 21 Mich. 24, 4 AmR 430.

36. Colgan v. McKeon, 24 N. J. L. 566; Ettenheimer v. Heffernan, 66 Barb. (N. Y.) 374; Richardson v. Amsdon, 85 NYS 342; Rubeck v. Gardner, 7 Watts (Pa.) 455. But see Jackson v. Adams, 7 Wend. (N. Y.) 367.

37. Mooers v. White, 6 Johns. Ch. (N. Y.) 360.

[a] **Power of administrator to sell.**—In Mobile Cong. Church v. Morris, 8 Ala. 182, 193, the court said: "If it were conceded, that the creditors of an alien, were entitled under the statute, after his personal estate was exhausted, to the payment of their debts out of his lands escheated to the State, it is apprehended the fact of such indebtedness would not prevent the escheat, but would be a charge upon the land to which the State had succeeded; and that the land could not be sold by an administrator of the alien for the payment of the debt, without authority from the Orphans' Court, as in other cases."

[b] **Sale for relief of personalty.**—The court will not permit real estate subject to escheat to be sold to pay debts in order to let the personal estate go over to aliens. Trezevant v. Howard, 3 S. C. Eq 87.

[c] **State as party to proceedings for sale—subrogation.**—A sale of escheated lands to satisfy a debt against an alien in a proceeding to which the state is not a party is void as to the state, but the purchaser at such a sale is to be substituted to the rights of the creditor, and if the claim is just, he is to have the lands subjected to its payment. Sands v. Lynham, 27 Gratt. (Va.) 291, 21 AmR 348.

38. U. S.—Levy v. McCartee, 6 Pet. 102, 8 L. ed. 334; Contee v. Godfrey, 6 F. Cas. No. 3,140, 1 Cranch C. C. 479.

Ala.—Bartlett v. Morris, 9 Port. 266.

D. C.—Walker v. Potomac Ferry Co., 10 D. C. 440.

Ill.—Meadowcroft v. Winnebago County, 181 Ill. 504, 54 NE 949; Beavan v. Went, 155 Ill. 592, 41 NE 91, 31 LRA 85 and note.

Ind.—Donaldson v. State, 67 NE 1029; Murray v. Kelly, 27 Ind. 42; Doe v. Lazenby, 1 Ind. 234; Eldon v. Doe, 6 Blackf. 341.

Iowa.—Meier v. Lee, 106 Iowa 303, 76 NW 712; Wilcke v. Wilcke, 102 Iowa 173, 71 NW 201; Burrow v. Burrow, 98 Iowa 400, 67 NW 287; Furenes v. Mickelson, 86 Iowa 508, 53 NW 416.

Kan.—Cramer v. McCann, 83 Kan. 719, 112 P 832, 37 LRANS 108 and note; Smith v. Lynch, 61 Kan. 609, 60 P 329.

Nebr.—Glynn v. Glynn, 62 Nebr. 872, 87 NW 1052.

N. Y.—McLean v. Swanton, 13 N. Y. 535; McCarthy v. Marsh, 5 N. Y. 263; Redpath v. Rich, 5 N. Y. Super. 79; Larreau v. Davignon, Sheld. 128, 5 AbbPrNS 367; Peo. v. Irvin, 21 Wend. 128; Jackson v. FitzSimmons, 10 Wend. 9, 24 AmD 198; Jackson v. Green, 7 Wend. 333; Banks v. Walker, 2 Barb. Ch. 438; Wright v. Methodist Episcopal Church, Hoffm. 202.

S. C.—Richards v. McDaniel, 12 S. C. L. 187. But see McKellar v. McKellar, 28 S. C. L. 536 (where it was held that a remote collateral kinsman who is a citizen, notwithstanding the fact that his relationship to the intestate is traced through aliens, will take as his heir in exclusion of living nearer kindred).

Va.—Jackson v. Sanders, 2 Leigh 109.

But see Campbell's App., 64 Conn. 277, 292, 29 A 494, 24 LRA 667 (where the court said: "It is therefore our opinion that the common-law rule of the exclusion from inheritance of all tracing their descent through uninheritable blood was never in force in Connecticut, and that there was no error in the decree of distribution to the first cousins of Patrick Sloan, notwithstanding their relationship to him through alien ancestors").

[a] **Statutory adoption of common-law rule.**—The common-law rule that one citizen cannot inherit from another where kinship must be traced through a nonresident alien cannot be rejected as repugnant to Illinois institutions, under a statutory adoption of the common law, so far as applicable, and a statutory provision that an estate shall descend in equal parts to next of kin does not make the descent to collateral kindred immediate so as to avoid the effects of alienage of ancestors through whom kinship is traced. Beavan v. Went, 155 Ill. 592, 41 NE 91, 31 LRA 85.

[b] **Inheritance from bastards.**—The rule applies with regard to the statutory right of collateral heirs of an illegitimate to inherit. Meadowcroft v. Winnebago County, 181 Ill. 564, 54 NE 949.

39. Walker v. Potomac Ferry Co., 10 D. C. 440; Peo. v. Irvin, 21 Wend. (N. Y.) 128.

40. U. S.—Blythe v. Hinckley, 180 U. S. 333, 21 SCt 390, 45 L. ed. 557; M'Learn v. Wallace, 10 Pet. 625, 9 L. ed. 558; Levy v. M'Cartee, 6 Pet. 102, 8 L. ed. 334; Orr v. Hodgson, 4 Wheat. 453, 4 L. ed. 613; Contee v. Godfrey, 6 F. Cas. No. 3,140, 1 Cranch C. C. 479.

Ala.—Mobile Cong. Church v. Morris, 8 Ala. 182; Smith v. Zaner, 4 Ala. 99.

Ark.—Jones v. Minogue, 29 Ark. 637.

D. C.—Walker v. Potomac Ferry Co., 10 D. C. 440.

Ill.—Meadowcroft v. Winnebago County, 181 Ill. 504, 54 NE 949; Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84.

Iowa.—King v. Ware, 53 Iowa 97, 4 NW 858.

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Immediate and mediate descents; brothers and sisters. The descent between brothers, or a brother and sister, is immediate, and is not affected by the alienage of their parent;[41] and this rule is not affected by a statute changing the common-law order of descent and placing parents prior, in the order of descent, to brothers or sisters.[42] So also the rule which enables brothers, sons of an alien father, to inherit from each other, because the descent is immediate, applies between one of the brothers and the representative of the other, and also between the representatives of both.[43]

Grandfather and grandson. Descent from a grandfather to his grandson, however, is mediate, and the alienage of the grandson's parent through whom he must claim will prevent his taking by inheritance.[44]

Uncle and nephew. So also the descent between uncle and nephew is mediate, and the alienage of the nephew's parent, brother or sister of the uncle, will prevent the nephew from inheriting.[45]

First cousins. In case of first cousins, if the father of one claiming as heir of the other was an alien, the inheritance is interrupted;[46] but if their respective fathers were citizens, the alienage of grandparents does not interrupt the descent.[47]

[§ 27] **(b) Lands Granted by Government.** The fact that land is acquired by grant from the government does not enable alien heirs of the grantee to take by inheritance,[48] and lands granted by the federal government to aliens escheat upon their death to the state in which the land is situate, and not to the federal government.[49] But where lands are granted by a state to an alien, his "heirs and assigns," with warranty, alien heirs of the grantee may take by inheritance.[50]

[§ 28] **(2) As Affected by Statute—(a) In General.** Every state or sovereignty has, as a general rule, the power to regulate the right of aliens to inherit.[51] This power of the state is not af-

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Mo.—Harney v. Donohoe, 97 Mo. 141, 10 SW 191.

N. Y.—Luhrs v. Eimer, 80 N. Y. 171; Renner v. Müller, 44 N. Y. Super. 535; Larreau v. Davignon, Sheld. 128, 5 AbbPrNS 367; Douglass v. Douglass, 70 Misc. 412, 128 NYS 912; Leary v. Leary, 50 HowPr 122; Orser v. Hoag, 3 Hill 79; Jackson v. Jackson, 7 Johns. 214; Banks v. Walker, 3 Barb. Ch. 438.

N. C.—Rutherford v. Wolfe, 10 N. C. 272.

S. C.—Keenan v. Keenan, 41 S. C. L. 345; McKellar v. McKellar, 28 S. C. L. 536; Descottes v. Talvande, 27 S. C. L. 300; Scott v. Cohen, 11 S. C. L. 293; McClenaghan v. McClenaghan, 20 S. C. Eq. 295, 47 AmD 532; Vaux v. Nesbit, 6 S. C. Eq. 352; Halyburton v. Kershaw, 3 S. C. Eq. 105.

Tenn.—Ehrlich v. Weber, 114 Tenn. 711, 88 SW 188.

Tex.—Hardy v. De Leon, 5 Tex. 211.

Va.—Jackson v. Sanders, 2 Leigh (29 Va.) 109.

N. S.—Salter v. Hughes, 6 N. S. 409.

Que.—Donegani v. Donegani, 1 L. C. 605 (where it was held that if the alien leaves children, some born in Canada and others not, the former exclude the crown, and then all the children inherit as if they were natural born subjects).

See also Comyns Dig. 425; 2 Kent Comm. 55.

[a] **Under the statute** (Rev. St. c 39 § 1 cl 6) which provides that "if any intestate leaves a widow or surviving husband and no kindred, his or her estate shall descend to such widow or surviving husband," in case a husband dies leaving only alien kindred who are incompetent to inherit, the entire estate descends to the widow. Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84.

41. Wilcke v. Wilcke, 102 Iowa 173, 71 NW 201; State v. Ellis, (Kan.) 79 P 1066; McGregor v. Comstock, 3 N. Y. 408; Luhrs v. Eimer, 15 Hun (N. Y.) 399; Parish v. Ward, 28 Barb. (N. Y.) 328; Renner v. Müller, 44 N. Y. Super. 535, 57 HowPr 229; Smith v. Mulligan, 11 AbbPrNS 438; Bradley v. Dwight, 62 HowPr 300; Jackson v. Green, 7 Wend. 333.

[a] **Leading case.**—The case of Collingwood v. Pace, 1 Vent. 413, 86 Reprint 262, is a celebrated one on the question of the right of one brother to inherit from another, the father being an alien. It was finally decided by a divided court, after an elaborate discussion, that descent between brothers is immediate and therefore one brother can inherit from another notwithstanding the alienage of the father. This case is reviewed at length in Levy v. McCartee, 6 Pet. (U. S.) 102, 8 L. ed. 334, and McGregor v. Comstock, 3 N. Y. 408. See also Beavan v. Went, 155 Ill. 592, 41 NE 91, 31 LRA 85; Slater v. Nason, 15 Pick. (Mass.) 345.

42. Luhrs v. Eimer, 80 N. Y. 171, 179 (where the court said: "That the statute changing the order of descent was not intended to change the rule, that the descent between brothers is immediate, is confirmed by reference to the seventh section of our present statute (1 R. S. 752), which provides that 'if there be no father or mother capable of inheriting the estate, it shall descend, in the cases hereinafter specified, to the collateral relatives of the intestate.' The next section then provides for the descent between brothers and sisters, and is a case specified, in the contingency of there being no father or mother capable of inheriting: (§ 8). We are satisfied that the change in the order of descent was not intended to incapacitate brothers and sisters from inheriting immediately from each other, where the father and mother are dead, or are incompetent from alienage to take the inheritance").

43. McCarthy v. Marsh, 5 N. Y. 263; McGregor v. Comstock, 3 N. Y. 408; Renner v. Müller, 44 N. Y. Super. 535, 57 HowPr 229; Smith v. Mulligan, 11 AbbPrNS (N. Y.) 438.

[a] **Collateral descent from a brother to the representatives of a deceased sister,** the alien mother surviving, is immediate. Such alien mother cannot impede the descent; the pedigree is deduced from the brother last seized by passing by or leaving out the alien mother, she not being a medium hereditatis. Renner v. Müller, 44 N. Y. Super. 535, 57 HowPr 229.

44. Furenes v. Mickelson, 86 Iowa 508, 53 NW 416; Banks v. Walker, 3 Barb. Ch. (N. Y.) 438; Rutherford v. Wolfe, 10 N. C. 272.

[a] **Mediate and immediate descents.**—"A descent may be said to be mediate or immediate, in regard to the mediate or immediate descent of the estate or right; or it may be said to be mediate or immediate, in regard to the mediateness or immediateness of the pedigree, or degrees of consanguinity. Thus, a descent from a grandfather, who dies in possession, to the grandchild (the father being then dead), or from the uncle to the nephew (the brother being dead), is, in the former sense, in law, an immediate descent, although the one is collateral and the other lineal. . . . On the other hand, with reference to the line of pedigree or consanguinity, a descent is often said to be immediate, when the ancestor from whom the party derives his blood, is immediate, and without any intervening link or degrees, and mediate, when the kindred is derived from him mediante altero, another ancestor intervening between them. Thus, a descent in lineals, from father to son, is, in this sense, immediate; but a descent from grandfather to grandson (the father being dead), or from uncle to nephew (the brother being dead), is deemed mediate." Levy v. McCartee, 6 Pet. (U. S.) 102, 112, 8 L. ed. 334.

45. Meier v. Lee, 106 Iowa 303, 76 NW 712; Burrow v. Burrow, 98 Iowa 400, 67 NW 287; Furenes v. Mickelson, 86 Iowa 508, 53 NW 416; Smith v. Lynch, 61 Kan. 609, 60 P 329; Redpath v. Rich, 5 N. Y. Super. 79; Jackson v. FitzSimmons, 10 Wend. (N. Y.) 9, 24 AmD 198.

46. Cramer v. McCann, 83 Kan. 719, 112 P 832, 37 LRANS 108; Jackson v. Green, 7 Wend. (N. Y.) 333.

47. McGregor v. Comstock, 3 N. Y. 408.

48. King v. Ware, 53 Iowa 97, 4 NW 858; Crane v. Reeder, 21 Mich. 24, 4 AmR 430.

[a] **Under the laws of Mexico** land granted in 1835 by the state of Coahuila and Texas, in the republic of Mexico, where the heirs of such grantee at the time of his death were aliens to the republic of Mexico, escheated to the republic on his death. Webb v. Kirby Lumber Co., (Tex. Civ. A.) 107 SW 581.

49. Etheridge v. Doe, 18 Ala. 565.

50. Com. v. André, 3 Pick. (Mass.) 224; Goodell v. Jackson, 20 Johns. (N. Y.) 693, 11 AmD 351. See also supra § 13.

51. U. S.—Clarke v. Clarke, 178 U. S. 186, 20 SCt 873, 44 L. ed. 1028; De Vaughn v. Hutchinson, 165 U. S. 566, 17 SCt 461, 41 L. ed. 827; Lohmann v. Helmer, 104 Fed. 178.

Cal.—Blythe v. Hinckley, 127 Cal. 431, 59 P 787 [aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557].

Ind.—Donaldson v. State, 67 NE 1029.

Mont.—Kolbow v. State, 44 Mont. 259, 119 P 791.

N. H.—Montgomery v. Dorion, 7 N. H. 475.

N. Y.—Lynch v. Clarke, 1 Sandf. Ch. 583.

Tex.—Hanrick v. Hanrick, 61 Tex. 596.

[a] **Right to inherit does not confer citizenship.**—In Montgomery v. Dorion, 7 N. H. 475, 482, the court said: "When a State makes aliens capable of taking lands by descent, within its own territory, this by no means makes them citizens; nor does it give them any capacity to take lands by descent, or any other capacity whatever in any other State. Each State has the undoubted right to regulate the law of descent within its own limits."

[b] **The right of an alien to inherit a mining claim located upon government land** as against every person but the United States, is determined by the laws of the state in which the

fected by the provision of the federal constitution conferring upon the federal government the treaty-making power,[52] and the power to regulate naturalization of aliens;[53] nor does a provision in a state constitution that resident aliens may inherit deprive the legislature of the power to authorize nonresident aliens to inherit.[54]

Extraterritorial operation. Statutes authorizing nonresident aliens to inherit are not invalid as an attempt to give an extraterritorial operation to the statute.[55]

Statutes authorizing aliens to inherit or transmit to heirs. In many jurisdictions statutes have been enacted expressly enabling aliens to take by inheritance;[56] or authorizing aliens to transmit by in-

claim is located. Lohmann v. Helmer, 104 Fed. 178.

52. Blythe v. Hinckley, 127 Cal. 431, 59 P 787 [aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557].

[a] **Treaty silent on subject of inheritance.**—The fact that a treaty exists between the United States and a foreign country, which is silent as to the right of the citizens of the latter to inherit lands in the United States, does not deprive a state of the power to authorize the citizens of such foreign country to inherit lands within the state. Blythe v. Hinckley, 127 Cal. 431, 59 P 787 [aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557].

[b] **Treaty denying right to inherit.**—Since a treaty entered into by the federal government is the supreme law of the land, it would seem that a state government could not authorize an alien to inherit, if a treaty between the United States and the alien's country denied such right to the alien. See Blythe v. Hinckley, 127 Cal. 431, 59 P 787 [aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557].

53. Etheridge v. Doe, 18 Ala. 565; Montgomery v. Dorion, 7 N. H. 475. As to naturalization see generally infra §§ 128–174.

54. McConville v. Howell, 17 Fed. 104, 5 McCrary 319; Nicrosi v. Phillipi, 91 Ala. 299, 8 S 561; State v. Smith, 70 Cal. 153, 12 P 121; State v. Guilford's Est., 67 Cal. 380, 7 P 763; Billings v. Hauver, 65 Cal. 593, 4 P 639; State v. Rogers, 13 Cal. 159; Purczell v. Smidt, 21 Iowa 540.

In Blythe v. Hinckley, 127 Cal. 431, 437, 59 P 787 [aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557], the court said: "The further contention that section 671 of the Civil Code is void because in conflict with section 17 of article I of the constitution of the state of California rests for its support upon the argument that the language of the constitution is a limitation upon the power of the legislature. But to give it such an interpretation would be to do violence to fundamental rules of construction. By section 17 foreigners of the indicated classes may not be deprived of the rights which the constitution secures to them. But there is in this no withdrawal from the legislature of its general powers, nor any limitation upon its right to extend similar privileges to other foreigners or aliens."

55. Blythe v. Hinckley, 127 Cal. 431, 437, 59 P 787 [aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557]. In State v. Smith, 70 Cal. 153, 155, 12 P 121 [quot Blythe v. Hinckley, supra] it was said: "It is suggested that inasmuch as laws can have no extraterritorial operation, the legislature has no power to provide for succession by foreigners who have never been residents. But the section of the code provides a rule with respect to property within the state. It confers a right to be enjoyed within the jurisdiction."

Extraterritorial operation of statutes see Conflict of Laws.

56. U. S.—Blythe v. Hinckley, 180 U. S. 333, 21 SCt 390, 45 L. ed. 557 [aff 127 Cal. 294, 59 P 787]; Hanrick v. Patrick, 119 U. S. 156, 7 SCt 147, 30 L. ed. 396; Sullivan v. Burnett, 105 U. S. 334, 26 L. ed. 1124 (Missouri statutes); Jones v. McMaster, 20 How. 8, 15 L. ed. 805; McKinney v. Saviego, 18 How. 235, 15 L. ed. 365; Levy v. McCartee, 6 Pet. 102, 8 L. ed. 334; Spratt v. Spratt, 4 Pet. 393, 7 L. ed. 897; Spratt v. Spratt, 1 Pet. 343, 7 L. ed. 171 (Md. Act Dec. 19, 1791); McCreery v. Somerville, 9 Wheat. 354, 6 L. ed. 109 (construing 11 & 12 Wm. III c 6); Lohmann v. Helmer, 104 Fed. 178 (Oregon statute); Billings v. Aspen Min., etc., Co., 51 Fed. 338, 2 CCA 252; Braanagh v. Smith, 46 Fed. 517; De Franca v. Howard, 21 Fed. 774 (Missouri statute); McConville v. Howell, 17 Fed. 104, 5 McCrary 319 (Colorado statute); Matthew v. Rae, 16 F. Cas. No. 9,284, 3 Cranch C. C. 699.

Ala.—Nicrosi v. Phillipi, 91 Ala. 299, 8 S 561; Etheridge v. Malempre, 18 Ala. 565; Bartlett v. Morris, 9 Port. 266.

Ark.—Jones v. Minogue 29 Ark. 637.

Cal.—Blythe v. Hinckley, 127 Cal. 431, 59 P 787 [aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557]; Peo. v. Roach, 76 Cal. 294, 18 P 407; State v. Smith, 70 Cal. 153, 12 P 121; Matter of Leopold, 67 Cal. 385, 7 P 766; Guilford's Est., 67 Cal. 380, 7 P 763; Matter of Billings, 65 Cal. 593, 4 P 639; State v. Rogers, 13 Cal. 159; Siemssen v. Bofer, 6 Cal. 250 (construing a provision in the constitution).

D. C.—De Geoffroy v. Riggs, 18 D. C. 331 (Maryland act Dec. 19, 1791).

Ida.—Connolly v. Reed, 22 Ida. 29, 125 P 213; State v. Stevenson, 6 Ida. 367, 55 P 886.

Ill.—Adams v. Akerlund, 168 Ill. 632, 48 NE 454.

Ind.—Donaldson v. State, 67 NE 1029; State v. Witz, 87 Ind. 190; Murray v. Kelly, 27 Ind. 42.

Iowa.—Wilcke v. Wilcke, 102 Iowa 173, 71 NW 201; Easton v. Huott, 95 Iowa 473, 64 NW 408, 31 LRA 177; Furenes v. Mickelson, 86 Iowa 508, 53 NW 416; King v. Ware, 53 Iowa 97, 4 NW 858.

Ky.—Eustache v. Rodaquest, 11 Bush 42; Louisville v. Gray, 1 Litt. 146.

La.—Sala's Succ., 50 La. Ann. 1009, 24 S 674.

Mass.—Lumb v. Jenkins, 100 Mass. 527; Palmer v. Downer, 2 Mass. 179 note (construing 11 & 12 Wm. III c 6).

Mo.—Utassy v. Giedinghagen, 132 Mo. 53, 33 SW 444; Burke v. Adams, 80 Mo. 504, 50 AmR 510.

N. H.—Montgomery v. Dorion. 7 N. H. 475.

N. J.—Colgan v. McKeon, 24 N. J. L. 566; Yeo v. Mercereau, 18 N. J. L. 387.

N. Y.—Wainwright v. Low 132 N. Y. 313, 30 NE 747; Stamm v. Bostwick, 122 N. Y. 48, 25 NE 233, 9 LRA 597 [aff 40 Hun 35]; Goodrich v. Russell 42 N. Y. 177; Wright v. Saddler, 20 N. Y. 320; McCarthy v. Marsh, 5 N. Y. 263; Stewart v. Russell, 91 App. Div. 310, 86 NYS 625; Smith v. Smith, 70 App. Div. 286, 74 NYS 967; Callahan v. O'Brien, 72 Hun 216, 25 NYS 410; Daly v. Beer, 57 Hun 590 10 NYS 893; Maynard v. Maynard, 36 Hun 227; McCarty v. Terry, 7 Lans. 236; Henney v. Brooklyn Benev. Soc., 33 Barb. 360 [aff 39 N. Y. 333, 7 Transcr. A. 89]; Parish v. Ward, 28 Barb. 328; Augustus v. Graves, 9 Barb. 595 [aff 7 N. Y. 305]; Redpath v. Rich, 5 N. Y. Super. 79; Stappenbeck v. Mather, 73 Misc. 434, 133 NYS 482; Kelly v. Pratt, 41 Misc. 31, 33 NYS 636; Smith v. Reilly, 31 Misc. 701, 66 NYS 40; Richardson v. Amsdon, 85 NYS 342; Matter of Beck, 11 NYS 199, 2 Conn. Surr. 335; Nolan v. Command, 11 NYCivProc 295; Larreau v. Davignon, 5 AbbPrNS 367; Peo. v. Irvin, 21 Wend. 128; Jackson v. FitzSimmons, 10 Wend. 9, 24 AmD 198; Jackson v. Adams, 7 Wend. 367; Jackson v. Lyon, 9 Cow. 664; Banks v. Walker, 3 Barb. Ch. 438; Kilfoy v. Powers, 3 Dem. Surr. 198.

Pa.—Cooke v. Doron, 215 Pa. 393, 64 A 595, 7 LRANS 659 and note, 7 AnnCas 502 and note.

R. I.—De Wolf v. Middleton, 18 R. I. 810, 26 A 44, 31 A 271, 31 LRA 146 and note.

S. C.—Keenan v. Keenan, 41 S. C. L. 345; Ford v. Husman, 41 S. C. L. 165; Richards v. McDaniel, 9 S. C. L. 18; Burnett v. Noble, 29 S. C. Eq. 58; McClenaghan v. McClenaghan, 20 S. C. Eq. 295, 47 AmD 532 (act 1799).

Tenn.—Ehrlich v. Weber, 114 Tenn. 711, 88 SW 188; Garretson v. Brien, 3 Heisk. 534.

Tex.—Hanrick v. Gurley, 93 Tex. 458, 54 SW 347, 55 SW 119, 56 SW 330 [foll Hanrick v. Patrick, 119 U. S. 156, 7 SCt 147, 30 L. ed. 396; Hanrick v. Hanrick, 63 Tex. 618; Hanrick v. Hanrick, 61 Tex. 596 (rev reh 54 Tex 101)]; Gray v. Kauffman, 82 Tex. 65, 17 SW 513; Wiederanders v. State, 64 Tex. 133; Ortiz v. De Benavides, 61 Tex. 60; Andrews v. Spear, 48 Tex. 567; Settegast v. Schrimp, 35 Tex. 323; Sabriego v. White, 30 Tex. 576; Portis v. Hill, 30 Tex. 529, 98 AmD 481; Barclay v. Cameron, 25 Tex. 232; Wardrup v. Jones, 23 Tex. 489; Hanrick v. Gurley, (Civ. A.) 48 SW 994; See also Hornsby v. Bacon, 20 Tex. 556 (construing constitution of the republic of Texas).

Va.—Hannon v. Hounihan, 85 Va. 429, 12 SE 157; Jackson v. Sanders, 2 Leigh (29 Va.) 109.

Eng.—Doe v. Jones, 4 T. R. 300, 100 Reprint 1031.

Can.—Rumrell v. Henderson, 22 U. C. C. P. 180; Leatherman v. Trow, 15 U. C. C. P. 578; Doe v. Maloney, 9 U. C. Q. B. 251.

[a] **Operation of Kansas constitutional privilege upon statutes of descent.**—The provision of the original § 17 of the Bill of Rights of the Kansas constitution, that "no distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment or descent of property," made the statute of descents and distributions apply to aliens as well as to citizens, and enabled the former to inherit real estate in Kansas. Sparks v. Bodensick, 72 Kan. 5, 82 P 463.

[b] **Proviso as conferring implied power.**—L. (1889) c 58 providing that nonresident aliens shall not inherit land in this state, is but the reënactment of the common law; and the proviso of the act, that its provisions should not apply to any real estate lying within the corporate limits of cities and towns, is by implication a legislative determination that the common-law doctrine of inheritance should not be applied to lands within the corporate limits of cities and towns. Glynn v. Glynn, 62 Nebr. 872, 87 NW 1052 [foll Dougherty v. Kubat, 67 Nebr. 269, 93 NW 317].

[c] **Term "heirs" as including aliens.**—(1) In Colgan v. McKeon, 24 N. J. L. 566, a statute allowing aliens to purchase and hold lands to themselves and their heirs was confined in its effect to such heirs as might have inherited from a natural-born citizen, and it was held that alien heirs could not take under it. (2) And in Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84, a statute author-

heritance,[57] or permitting an inheritance to be traced through an intermediate alien ancestor.[58] Such a statute is not a recognition or extension of any previously existing right belonging to an alien, but is rather the fresh grant of a right or a statute of grace which the state confers on aliens.[59]

The term "ancestor," as used in statutes permitting an inheritance to be traced through an intermediate alien ancestor, has been held to include collateral as well as lineal ancestors;[60] but a statute permitting an inheritance to be traced through an alien intermediate ancestor does not include a living alien.[61]

Skipping aliens in line of descent. In some jurisdictions statutes have been passed providing that, where the nearest heirs of a decedent are aliens, they shall be skipped over and the next nearest relative who is a citizen shall take the inheritance.[62]

izing "heirs of aliens" (Ill. Act 1887) to inherit was held not to authorize alien heirs of citizens to inherit. (3) But in Jackson v. Adams, 7 Wend. (N. Y.) 367, a statute authorizing an alien to hold land to himself and his heirs has been held to entitle his alien heirs to inherit.

[d] **Heirs of "deceased alien"; Naturalization.**—A statute authorizing a resident alien to hold real estate and authorizing alien heirs of a "deceased alien" to take by inheritance does not authorize the alien heirs of a naturalized citizen to take by inheritance. Luhrs v. Elmer, 80 N. Y. 171; McCarty v. Terry, 7 Lans. (N. Y.) 236; Heeney v. Brooklyn Benev. Soc., 33 Barb. 360 [aff 39 N. Y. 338, 7 Transcr. A. 89]; Larreau v. Davignon, Sheld. (N. Y.) 128, 5 Abb PrNS 367; Wieland v. Renner, 65 How. Pr. (N. Y.) 245.

[e] **Lands acquired by "purchase."**—(1) A statute authorizing alien heirs to take by inheritance land which their decedent took by "purchase" does not authorize them to take by inheritance lands which their decedent acquired by inheritance. McCormack v. Coddington, 184 N. Y. 467, 77 NE 979; Stewart v. Russell, 91 App. Div. 310, 86 NYS 625; Callahan v. O'Brien, 72 Hun 216, 25 NYS 410. See also Branagh v. Smith, 46 Fed. 517 (New York statute). (2) The acquisition of land by devise is, however, taken by "purchase," and alien heirs can take by inheritance lands which their decedent acquired by devise. Stamm v. Bostwick, 122 N. Y. 48, 25 NE 233, 9 LRA 597 [aff 40 Hun 35]; Smith v. Reilly, 31 Misc. 701, 66 NYS 40 [aff 70 App. Div. 286, 74 NYS 967].

[f] **Naturalization of ancestor.**—In Spratt v. Spratt, 1 Pet. (U. S.) 343, 344, 7 L. ed. 171, construing Md. Act Dec. 19, 1791, which provides "that any foreigner may, by deed or will to be hereafter made, take and hold lands within that part of the said territory which lies within this state, in the same manner as if he was a citizen of this state; and the same lands may be conveyed by him, and transmitted to, and be inherited by, his heirs or relations, as if he and they were citizens of this state: provided, that no foreigner shall, in virtue hereof, be entitled to any further or other privilege of a citizen," it was held, as regards land purchased before the alien became naturalized, that the right of his alien heirs to inherit was not affected by his naturalization, but as regards lands acquired after the alien was naturalized, his alien heirs could not inherit.

57. U. S.—Branagh v. Smith, 46 Fed. 517.

Ind.—Donaldson v. State, 101 NE 485.

Nebr.—Glynn v. Glynn, 62 Nebr. 872, 87 NW 1052.

N. Y.—Cumberland v. Graves, 7 N. Y. 305; McCormack v. Coddington, 109 App. Div. 741, 96 NYS 571 [rev on other grounds 184 N. Y. 467, 77 NE 979]; Parish v. Ward, 28 Barb. 328; Richardson v. Amsdon, 85 NYS 342; Larreau v. Davignon, Sheld. 128, 5 AbbPrNS 367.

Wash.—Abrams v. State, 45 Wash. 327, 88 P 327, 122 AmSR 914, 9 LRANS 186, 13 AnnCas 527 (constitutional provision).

[a] **Transmission to heirs.**—The statute of 11 & 12 Wm. III c 6, is in force in Maryland. It provides that any natural-born subject may make his pedigree through an alien ancestor, as fully and effectually as if such alien ancestor was a natural-born subject. Three nieces claimed an estate in Maryland under this statute, as the heirs of a deceased uncle who in his lifetime was a citizen; their father through whom they made pedigree was living and was an alien. The court held that the nieces were not entitled to inherit; its judgment is founded on the ground that the statute, by its terms, was intended solely to remove a disability and not to invest the subject with the capacity to inherit in cases, wherein it was not previously permitted by the law. McCreery v. Somerville, 9 Wheat. (U. S.) 354, 6 L. ed. 109.

[b] **To "convey"**—In Haley v. Sheridan, 107 App. Div. 17, 94 NYS 864 [mod 46 Misc. 506, 95 NYS 42], it was held that Laws (1896) c 547 p 560, authorizing certain aliens to "take, acquire, hold and convey" lands, authorized such aliens to transmit lands by inheritance.

[c] **To take by inheritance as if citizens.**—A statute authorizing aliens to take by inheritance as if they were citizens of the United States authorizes an alien taking by inheritance to transmit by inheritance to heirs who are citizens. McCormack v. Coddington, 109 App. Div. 741, 96 NYS 571 [rev on other grounds 184 N. Y. 467, 77 NE 979].

[d] **Special act.**—The act of the New York legislature, Sess. L. (1807) c 21, enabling David Parish to acquire, hold, and alienate real estate in like manner as a natural-born citizen, invested him with inheritable blood and clothed him with the power of transmitting his estate to his next of kin. Parish v. Ward, 28 Barb. 328.

58. Meadowcroft v. Winnebago County, 181 Ill. 504, 54 NE 949; McCormack v. Coddington, 184 N. Y. 467, 77 NE 979, 18 NYAnnCas 298; Callahan v. O'Brien, 72 Hun 216, 25 NYS 410; Renner v. Muller, 44 N. Y. Super. 535, 57 HowPr 229; Larreau v. Davignon, Sheld. (N. Y.) 128, 5 Abb PrNS 367; Lynch v. Clarke, 1 Sandf. Ch. (N. Y.) 583; Hannon v. Hounihan, 85 Va. 429, 12 SE 157; Jackson v. Sanders, 2 Leigh (29 Va.) 109, 115.

[a] **The early English statute** to this effect was 11 & 12 Wm. III. (1) In some jurisdictions in the United States this statute has been considered in force. McCreery v. Somerville, 9 Wheat. (U. S.) 354, 6 L. ed. 109 (Maryland); McKellar v. McKellar, 28 S. C. L. 536; Descottes v. Talvande, 27 S. C. L. 300; Abrams v. State, 45 Wash. 327, 88 P 327, 122 AmSR 914, 9 LRANS 186, 13 AnnCas 527. (2) The statute was adopted in Massachusetts before the establishment of the constitution. Palmer v. Downer, 2 Mass. 179 note. (3) In New York it has been held that the statute was not in force Levy v. McCartee, 6 Pet. (U. S.) 102, 8 L. ed. 334 (construing New York statute); Redpath v. Rich, 5 N. Y. Super. 79; Jackson v. FitzSimmons, 10 Wend. 9, 24 AmD 198; Jackson v. Green, 7 Wend. 333; Banks v. Walker, 3 Barb. Ch. 438.

[b] **Second cousins of decedent,** otherwise entitled to inherit, who are citizens of the United States, are not precluded from inheriting because their relationship to decedent must be traced through alien ancestors, under Decedent Estate Law, Consol. L. (1909) c 13 § 86, providing that a person capable of inheriting under the provisions of the article shall not be precluded from such inheritance by reason of the alienage of an ancestor. Douglass v. Douglass, 70 Misc. 412, 128 NYS 912.

59. Connolly v. Reed, 22 Ida. 29, 125 P 123.

60. McCarthy v. Marsh, 5 N. Y. 263; Renner v. Müller, 57 HowPr (N. Y.) 229; Jackson v. Sanders, 2 Leigh (29 Va.) 109. But see Banks v. Walker, 3 Barb. Ch. (N. Y.) 438. Thus in Jackson v. Sanders, 2 Leigh (29 Va.) 109, 129, the court said: "'In making title by descent, it shall be no bar to a party, that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien.' 'It shall be no bar that any ancestor;' could words be more extensive than these? Where the law says it shall be no bar, that any ancestor is an alien, how can we suppose that it means lineal ancestor only? Any ancestor includes both lineal and collateral. It removes the bar as to both; and how can we restrain it? 'Through whom he derives his descent from the intestate;' that is, through whom he derives his title by descent: his claim to the estate; the land; not the blood, the genealogy."

61. McCreery v. Somerville, 9 Wheat. (U. S.) 354, 6 L. ed. 109; Walker v. Potomac Ferry Co., 10 D. C. 440; Beavan v. Went, 155 Ill. 592, 41 NE 91, 31 LRA 85 and note; McLean v. Swanton, 13 N. Y. 535; Larreau v. Davignon, Sheld. (N. Y.) 128, 5 AbbPrNS 367; Peo. v. Irvin, 21 Wend. (N. Y.) 128.

[a] **Living alien not an ancestor.**—(1) In McCreery v. Somerville, 9 Wheat. (U. S.) 354, 358, 6 L. ed. 109, the court, in reference to the statute of 11 & 12 Wm. III, said: "If the legislature had intended, not only to create inheritable blood, but also to create absolute heirship, some explanatory language would have been used. The statute would have declared, not only that the party should make title by descent, in the same manner as if his parents were natural-born subjects, but that he should be deemed the heir, whether his parents were living or dead. No such explanation is given or hinted at; and if we are to insert it, it is by expounding the language beyond its obvious meaning and limitations. We do not feel at liberty to adopt this mode of interpretation, in a case where no legislative intention can be fairly inferred, beyond the ordinary import of the words." (2) Accordingly, where the decedent left surviving him a sister and a niece, the sister's daughter, the former an alien and the latter a citizen, it was held that the niece did not take his real estate by inheritance. McLean v. Swanton, 13 N. Y. 535.

62. Sullivan v. Burnett, 105 U. S. 334, 26 L. ed. 1124 (Missouri statute); Harman v. Ferrall, 64 N. C. 474; Campbell v. Campbell, 58 N. C. 246; Hannon v. Hounihan, 85 Va. 429, 12 SE 157; Jackson v. Sanders, 2 Leigh (29 Va.) 109.

[a] **The Tennessee act of 1809 c 53** provides that where any person shall die intestate and without issue, his estate shall descend to the next of kin to the decedent, resident in the United States, to the exclusion of aliens related to the decedent in a nearer degree. It results from this statute that, contrary to the rule of

"Children." A statute providing merely that on the death of any person intestate his land shall descend in equal shares to his children does not confer on an alien child the power to take by inheritance.[63]

"Hold to himself and his heirs." While a statute authorizing an alien to take and hold lands to himself and his heirs has been held to authorize his alien heirs to take the land by inheritance,[64] it has been held otherwise as to a statute authorizing an alien to purchase and hold land to his heirs and assigns, "as fully to all intents and purposes" as any citizen of the United States could do.[65]

"Take"; "acquire." It has been held that a statute, authorizing aliens to "take" property, empowers them to take by inheritance,[66] although it has been held otherwise as to a power to "acquire" real estate.[67]

Residency of aliens and steps for naturalization. Where a statute or a constitutional provision restricts the right to inherit to resident aliens, nonresident aliens, of course, cannot inherit,[68] and the acquisition of residence by a nonresident alien, after descent cast, will not enable him to take by inheritance.[69] So also when the right is given only to aliens who have declared their intention to become citizens, other aliens, although residents, cannot inherit.[70] But where aliens generally are empowered to inherit, nonresident as well as resident aliens may inherit.[71] So where the right to transmit by descent is given to aliens generally, nonresident as well as resident aliens may so transmit.[72]

Concurrence of power to inherit and to transmit. The citizen having, and the alien not having, inheritable blood, to enable a citizen to transmit land by descent upon an alien, it is only necessary to confer upon the alien the power to take by descent,[73] and, to enable an alien to transmit lands by descent to a citizen that power need only be conferred upon the alien.[74] Where, however, both the ancestor and the descendant are aliens, there is a lack of capacity in the one to transmit and in the other to take, and the statute must confer upon the alien ancestor power to transmit and also upon the alien descendant the power to take;[75] and therefore, when the legislature merely confers upon aliens the power to take by descent, without granting to aliens the power to transmit by descent, aliens can take by descent only from ancestors who

the common law, the course of descent is not broken or changed by the alienage of the ancestor of the resident next of kin, but such next of kin shall inherit as if such deceased alien ancestor had been a resident or naturalized citizen. Starks v. Traynor, 11 Humphr. 292.

[b] **The act of 1801,** permitting the nearest descendant or relation, not an alien, to inherit, where there are nearer relations who are aliens, is not repealed by the act of 1808, providing a general system of descents; because the act of 1808 provides a system of descents only as far as regards the question of consanguinity, and therefore leaves untouched the law of alienage. Rutherford v. Wolfe, 10 N. C. 272.

63. Stemple v. Herminghouser, 3 Greene (Iowa) 408, 410 (where the court said: "This evidently means such children as have inheritable blood; for it being an inflexible rule at common law that aliens, resident or non-resident, are not heirs, cannot take by descent, nothing less than a plain and express provision in relation to them will change this rule").

64. McCarty v. Terry, 7 Lans. (N. Y.) 236; Augustus v. Graves, 9 Barb. 595 [aff 7 N. Y. 305]; Aldrich v. Manton, 13 Wend. (N. Y.) 458; Jackson v. Adams, 7 Wend. (N. Y.) 367; Jackson v. Etz, 5 Cow. (N. Y.) 314; Goodell v. Jackson, 20 Johns. (N. Y.) 693, 11 AmD 351. See also Spratt v. Spratt, 1 Pet. (U. S.) 343, 7 L. ed. 171 (Maryland statute).

65. Colgan v. McKeon, 24 N. J. L. 566, 573 (where the court said: "Our statute adds that the alien shall hold, 'as fully to all intents and purposes as any natural born citizen may or can do.' These words show beyond question, I think, the intention of the legislature to give to the alien a capacity to take and hold real estate, precisely as if he was a natural born citizen, and not otherwise. A natural born citizen could not then hold so that aliens could inherit from him. Unless then we discard those words they necessarily restrict the heirs of an alien to such persons as would be his heirs if he was a citizen. There is no plainer principle of construction, than that all the words of a statute ought to be allowed their full natural meaning, unless that would be necessarily repugnant to the plain intention of the legislature, or would lead to manifest absurdity or wrong." The court disapproved a dictum to the contrary in Yeo v. Mercereau, 18 N. J. L. 387). See also to same effect Parish v. Ward, 28 Barb. (N. Y.) 328.

66. Blythe v. Hinckley, 127 Cal. 431, 59 P 787 [aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557]; Billings v. Hauver, 65 Cal. 593, 4 P 639.

67. Burrow v. Burrow, 98 Iowa 400, 67 NW 287.

68. Cal.—Norris v. Hoyt, 18 Cal. 217; Siemssen v. Bofer, 6 Cal. 250.

Ill.—Adams v. Akerlund, 168 Ill. 632, 48 NE 454.

Iowa.—Easton v. Huott, 95 Iowa 473, 64 NW 408, 31 LRA 177 and note; Brown v. Pearson, 41 Iowa 481; Rheim v. Robbins, 20 Iowa 45; Krogan v. Kinney, 15 Iowa 242; Stemple v. Herminghouser, 3 Greene 408.

Ky.—Eustache v. Rodaquest, 11 Bush 42.

Mo.—Utassy v. Giedinghagen, 132 Mo. 53, 33 SW 444; Harney v. Donohoe, 97 Mo. 141, 10 SW 191; Wacker v. Wacker, 26 Mo. 426.

N. Y.—Richardson v. Amsdon, 85 NYS 342.

[a] **Who is "resident alien."**—"Section 25 of the [Nebraska] bill of rights provides as follows: 'No distinction shall ever be made by law between resident aliens and citizens in reference to the possession or descent of property.' The words 'aliens' and 'citizens,' as used in this section of the bill of rights, relate to the political status of persons as respects their relation to the United States, while the word 'resident' immediately preceding the word 'aliens' relates to the status of persons with respect to the state of Nebraska. Thus, a subject of Great Britain who lived in Nebraska would be a 'resident alien,' within the meaning of this phrase in the bill of rights, whilst, had he resided in Illinois, he would not have been a resident alien." Glynn v. Glynn, 62 Nebr. 872, 874, 87 NW 1052.

69. Farrell v. Enright, 12 Cal. 450, 456 (where the court said: "The estate vested immediately upon the death of the intestate in the resident brother, the defendant. It did not remain in abeyance for the possible future residence in the State of alien relatives of the deceased. It would be impossible to estimate the degree of confusion into which numerous titles would be thrown, if alien relatives of an intestate, years after descent cast, could successfully assert claims to the real property of the deceased by simply becoming residents of the country"); Stemple v. Herminghouser, 3 Greene (Iowa) 408.

70. Kennedy v. Wood, 20 Wend. (N. Y.) 230.

71. Blythe v. Hinckley, 127 Cal. 431, 59 P 787 [aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557]; Guilford's Est., 67 Cal. 380, 7 P 763; Connolly v. Kootenai County, 25 Ida. 35, 136 P 205; Connolly v. Reed, 22 Ida. 29, 125 P 213; Easton v. Huott, 95 Iowa 473, 64 NW 408, 31 LRA 177 and note; Eustache v. Rodaquest, 11 Bush (Ky.) 42; Lumb v. Jenkins, 100 Mass. 527.

[a] **In Iowa** 22 G. A. Acts c. 85, provides that "non-resident aliens cannot acquire title to . . . or take land, except that the . . . heirs of aliens . . . who have acquired lands may hold them for ten years." It was held that the heirs of an alien, whether the alien was a resident or not, could hold such lands for ten years even though such heirs were nonresident aliens. Easton v. Huott, 95 Iowa 473, 64 NW 408, 31 LRA 177.

72. Easton v. Huott, 95 Iowa 473, 64 NW 408, 31 LRA 177.

[a] **In Indiana** Burns Annot. St. (1901) § 3389, Acts (1881) c 8, providing that nonresident aliens may acquire, hold, convey, devise, or mortgage and otherwise encumber real property, did not authorize a nonresident alien to transmit title to land in Indiana by descent. Donaldson v. State, 101 NE 485.

73. Donaldson v. State, (Ind.) 67 NE 1029.

74. Donaldson v. State, (Ind.) 67 NE 1029.

75. U. S.—McKinney v. Saviego, 18 How. 235, 15 L. ed. 365.

Ala.—Mobile Cong. Church v. Morris, 8 Ala. 182; Bartlett v. Morris, 9 Port. 266.

Ind.—Donaldson v. State, 67 NE 1029; Doe v. Lazenby, 1 Ind. 234; Eldon v. Doe, 6 Blackf. 341.

Iowa.—Purczell v. Smidt, 21 Iowa 540.

Ky.—Eustache v. Rodaquest, 11 Bush 42.

N. Y.—Parish v. Ward, 28 Barb. 328.

Pa.—Rubeck v. Gardner, 7 Watts 455.

[a] **A statute authorizing an alien to hold lands to himself and his heirs** (1) has been held to empower an alien to transmit by inheritance and his alien heirs to take. Goodell v. Jackson, 20 Johns. (N. Y.) 693, 11 AmD 351; Jackson v. Adams, 7 Wend. (N. Y.) 367. (2) In Colgan v. McKeon, 24 N. J. L. 566, a statute allowing aliens to purchase lands and hold the same to them and their heirs does not re-

have the capacity to transmit by descent, namely, citizens.[76]

Conditions attached to right. The legislature may, except as affected by treaties, attach conditions to the right of aliens to take or transmit by inheritance,[77] even after the right has vested and before it has actually reached the hands of the alien, as long as it does not deny due process of law;[78] but the title would vest in the alien heir subject merely to be defeated at the option of the state for a noncompliance with the conditions.[79] Still it has been held that where an alien heir fails to comply with such conditions during his lifetime, his death ipso facto works an immediate escheat to the state;[80] and the fact that the state omitted, by proceedings instituted during the alien's lifetime, to take advantage of the failure of the alien to file the declaration required by the statute does not work a waiver or loss of its right, and permit the alien to transmit his title by inheritance, although aliens were generally competent to transmit by inheritance.[81] Where before the time has expired for the performance of the conditions the law is changed and the alien is empowered to inherit without condition, his theretofore defeasible estate is rendered indefeasible.[82]

Restrictions on power to inherit. The legislatures of the several states may, except where constitutional provisions or treaties entered into by the federal government provide otherwise, expressly restrict the right of aliens to inherit,[83] and a statute permitting generally nonresident aliens to inherit is not unconstitutional as a local or special act regulating the law of descent, because it is rendered inoperative as to nonresident aliens of a foreign country between whom and the United States there is a treaty authorizing the nonresident subjects or citizens of such foreign country to inherit.[84] The abrogation of a constitutional provision permitting aliens to inherit, without the substitution of any regulation or statute on the subject of inheritance, revives the common law.[85]

[§ 29] **(b) Construction and Operation.** The law existing at the time of descent cast governs the right of aliens to inherit, or to transmit by inheritance,[86] and statutes empowering aliens to transmit

move the disability of alienage from persons who would, without it, have been their heirs.

76. Donaldson v. State, (Ind.) 67 NE 1029. In Bartlett v. Morris, 9 Port. (Ala.) 266, under a private act providing, "Be it enacted, by the Senate and House of Representatives of the State of Alabama, in general assembly convened, that Elizabeth Morris, an alien of Mobile county, be, and she is hereby, authorized to inherit, and have and hold, such of the estates of her late uncle James D. Wilson, as she might have inherited by law, had she not been an alien; and that the same shall not escheat to the State," it was held that Elizabeth Morris could not inherit from Wilson where the latter was an alien and incapable, therefore, of transmitting by inheritance.

77. In re Colbert, 44 Mont. 259, 119 P 791; McCarty v. Deming, 4 Lans. (N. Y.) 440.

[a] **A constitutional provision that aliens shall have the same right as citizens to inherit property** merely places aliens on the same footing as citizens, in granting the right to inherit, but does not limit the power of the legislature to impose conditions on the right to inherit. In re Colbert, 44 Mont. 259, 119 P 791.

[b] **Declaration of intention to become citizen.**—(1) N. Y. L. (1845) p 95 c 115 § 4, as amended by L. (1875) p 32 c 38, require an alien to make or file a declaration of intention to become a citizen, as a condition of holding title to land transmitted by descent. McCormack v. Coddington, 184 N. Y. 467, 77 NE 979, 18 NYAnnCas 298. (2) An alien female is not within such law. Stappenbeck v. Mather, 73 Misc. 434, 133 NYS 482; McCormack v. Coddington, 46 Misc. 510, 95 NYS 46 [mod 109 App. Div. 741, 96 NYS 571 (rev on other grounds 184 N. Y. 467, 77 NE 979, 18 NYAnnCas 298)]; Smith v. Reilly, 31 Misc. 701, 66 NYS 40. (3) L. (1893) c 207 did away with this requirement. Stappenbeck v. Mather, 73 Misc. 434, 133 NYS 482. (4) This act is not retroactive. McCormack v. Coddington, supra; Stewart v. Russell, 91 App. Div. 310, 86 NYS 625; Stappenbeck v. Mather, supra.

[c] **Appearance and claim of succession.**—(1) In some states no nonresident foreigner can take by succession, unless he appears within a specified time (usually five years) and claims such succession. See statutory provisions. (2) In California the five years begin to run from the time of succession. See Cal. Civ. Code § 672. (3) In Idaho the five years run from the death of the decedent. See Ida. Rev. Codes § 5715; Connolly v. Kootenai County Probate Court, 25 Ida. 35, 136 P 205; Connolly v. Reed, 22 Ida. 29, 125 P 213. (4) There is some uncertainty as to what constitutes an appearance and claiming "such succession." (5) In California it has been held that the words "appear and claim such succession" are satisfied by any appearance in person, or by attorney, within the state and asserting a right to the property or asserting a right of succession or contracting with reference to the property. State v. Smith, 70 Cal. 153, 12 P 121; Guilford's Est., 67 Cal. 380, 7 P 763. (6) In Idaho it has been said: "It would seem that where the alien is a nonresident and the property is in the possession and custody either of the state or of a third party who asserts title to the property, as was true in this case, and the alien has never reduced the property to his personal possession, it would be necessary for him to assert some legal claim to the property in an appropriate proceeding in a court of competent jurisdiction to determine and adjudicate his right of succession as prescribed by the probate laws of this state." Connolly v. Reed, 22 Ida. 29, 37, 125 P 213. (7) A demand, through an attorney or agent, on an administrator for possession of property, or a request by an attorney of the judge of the probate court that he be notified of any further proceedings is not an appearance or claim within the statute. Connolly v. Reed, 22 Ida. 29, 125 P 213. (8) A nonresident alien may assign property which he has inherited in California, and the assignee may appear and claim it. Carrasco v. State, 67 Cal. 385, 7 P 766.

78. In re Colbert, 44 Mont. 259, 119 P 791.

79. State v. Smith, 70 Cal. 153, 12 P 121; Guilford's Est., 67 Cal. 380, 7 P 763; Wiederanders v. State, 64 Tex. 133; Hanrick v. Hanrick, 54 Tex. 101; Settegast v. Schrimpf, 35 Tex. 323; Barclay v. Cameron, 25 Tex. 232.

[a] **By express provision of the constitution of the republic of Texas,** aliens could take by inheritance from a citizen, and were given a reasonable time within which to become citizens or to dispose of their estates. The act of Jan. 28, 1840, reënacted March 18, 1848, fixed nine years as a reasonable time, and provided that unless an alien should become a citizen or dispose of the estate within that period, it should be declared forfeited and should escheat to the state. An estate in fee vests in the alien immediately on the death of the ancestor, subject to be defeated by his failure to become a citizen or to dispose of the estate within the period prescribed by the statute. This is not a limitation, but a condition subsequent, and on a failure to comply with it the resumption of the estate must be by entry under judicial process. Wiederanders v. State, 64 Tex. 133.

80. McCormack v. Coddington, 184 N. Y. 467, 77 NE 979, 18 NYAnnCas 298; Stappenbeck v. Mather, 73 Misc. 434, 133 NYS 482.

81. McCormack v. Coddington, 184 N. Y. 467, 77 NE 979, 18 NYAnnCas 298. See also Barclay v. Cameron, 25 Tex. 232.

82. Hanrick v. Patrick, 119 U. S. 156, 7 SCt 147, 30 L. ed. 396; Chirac v. Chirac, 2 Wheat. (U. S.) 259, 4 L. ed. 234; Hanrick v. Hanrick, 61 Tex. 596.

83. In re Anderson, (Iowa) 147 NW 1098 (holding that discrimination between citizens and foreigners is nowhere prohibited). And see supra § 28.

84. Wunderle v. Wunderle, 144 Ill. 40, 57, 33 NE 195, 19 LRA 84 (where the court said: "A limitation of its general application, arising from the exercise of the treaty-making power by the Federal government, does not make it special within the meaning of the State constitution. It is general as applied to all non-resident aliens not protected by treaties. If it had, in express terms, excepted from its operation those citizens or subjects of foreign countries, to whom the right to take and hold lands in the United States had been secured by existing treaties, it would still have been a general law as to the large number of non-resident aliens not embraced within the class so excepted. Laws 'are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation' ").

85. Johnson v. Olson, 92 Kan. 819, 142 P 256.

86. U. S.—Pilla v. German School Assoc., 23 Fed. 700.

Ala.—Donovan v. Pitcher, 53 Ala. 411, 25 AmR 634.

Cal.—Farrell v. Enright, 12 Cal. 450.

Iowa.—Burrow v. Burrow, 98 Iowa 400, 67 NW 287; Stemple v. Hermanhouser, 3 Greene 408.

Kan.—Smith v. Lynch, 61 Kan. 609, 60 P 329.

Ky.—White v. White, 2 Metc. 185.

N. Y.—Stewart v. Russell, 91 App. Div. 310, 86 NYS 625 [aff 184 N. Y.

by inheritance or to take by inheritance are not given a retroactive effect so as to affect descents cast prior to the enactment of the statute.[87]

Vested rights. Neither a landowner nor his heirs have any vested right in either the right to cast descent or to inherit, and the legislature has full power to change, before descent cast, the law as to the rights of aliens to inherit or to cast descent.[88]

Relief statutes after descent cast. Unless restrained by constitutional provision, the state legislature may, by express statutory enactment, empower, after descent cast, aliens to take by inheritance;[89] but of course such a statute cannot be given a retroactive effect so as to injure vested rights of a third person.[90]

[§ 30] **(3) As Affected by Treaty.** Under the treaty-making power conferred upon the federal government, it may regulate by treaty the subject of inheritance by citizens of the other party to the treaty.[91] In so far as a local statute of inheritance conflicts with a treaty, the local statute is suspended.[92] Treaties with regard to the right of aliens to inherit are not given a retroactive effect so as to affect descents cast prior to the making of the treaty,[93] and where the interests of individuals are involved treaties take effect from the time of their ratification, and not from their date.[94] Such treaties sometimes provide that when an alien shall inherit any real property he shall be allowed a reasonable time in which to sell the same and withdraw the proceeds.[95] If this condition is not complied with the title of the alien fails by operation of law and the title vests in the person upon whom it would otherwise have been cast in the first instance.[96] If the treaty does not specify what is to be a reasonable time, the question is left for judicial construction.[97] A treaty securing the right to aliens to succeed to "goods and effects" has been held to apply to real as well as to personal property.[98]

Particular treaties. Of course the right of aliens to inherit under a treaty depends upon the terms of the treaty. Many such treaties have been the subject of judicial construction or consideration.[99]

601, 77 NE 983]; Renner v. Muller, 44 N. Y. Super. 535, 57 HowPr 229; Redpath v. Rich, 5 N. Y. Super. 79; Wieland v. Renner, 65 HowPr 245; Orser v. Hoag, 3 Hill 79; Peo. v. Conklin, 2 Hill 67. But compare Jackson v. Lyon, 9 Cow. 664; Jackson v. Skeels, 19 Johns. 198 (construing a special act).

Pa.—Jackson v. Burns, 3 Binn. 75.

Tenn.—Starks v. Traynor, 11 Humphr. 292.

Tex.—Barclay v. Cameron, 25 Tex. 232.

Va.—Hauensteins v. Lynham, 28 Gratt. (69 Va.) 62.

[a] **Grant to "heirs."**—(1) A patent issued in 1846 to "the heirs" of one who died in 1835 inures to the benefit of those only who were heirs at the time of the descent cast, and not to those who afterward acquired such capacity before the patent by the removal of their alienage. Hornsby v. Bacon, 20 Tex. 556. (2) A grant to the "heirs" of a decedent, made in Texas in 1827, could inure only to such persons as were heirs according to the civil law then in force there; and persons who, although heirs according to the common law, were at that time domiciled in the United States, and therefore incapable of taking land in Texas by inheritance, could acquire no title under such a grant. McGahan v. Baylor, 32 Tex. 789.

[b] **Rights in expectancy.**—The power to transmit by descent, as well as the power to take by inheritance, is a mere right in expectancy that does not vest until the death of the intestate. Donaldson v. State, (Ind.) 101 NE 485.

87. U. S.—Sullivan v. Burnett, 105 U. S. 334, 26 L. ed. 1124 (Missouri statute).

Ala.—Donovan v. Pitcher, 53 Ala. 411, 25 AmR 634.

Ill.—Meadowcroft v. Winnebago County, 181 Ill. 504, 54 NE 949.

Mich.—Crane v. Reeder, 21 Mich. 24, 4 AmR 430.

N. Y.—McCormack v. Coddington, 184 N. Y. 467, 77 NE 979, 18 AnnCas 298 [rev 109 App. Div. 741, 96 NYS 571]; Stewart v. Russell, 91 App. Div. 310, 86 NYS 625 [aff 184 N. Y. 601, 77 NE 983]; Smith v. Smith, 33 Barb. 371 note.

Tex.—Hornsby v. Bacon, 20 Tex. 556 (constitution of republic of Texas); Warnell v. Finch, 15 Tex. 163 (constitution of republic of Texas); Webb v. Kirby Lumber Co., 48 Tex. Civ. A. 543, 107 SW 581.

Ont.—Doe v. Maloney, 9 U. C. Q. B. 251.

88. Wunderle v. Wunderle, 144 Ill. 40, 33 NW 195, 19 LRA 84; Donaldson v. State, (Ind.) 67 NE 1029; Crane v. Reeder, 21 Mich. 24, 4 AmR 430.

89. Mobile Cong. Church v. Morris, 8 Ala. 182; State v. Witz, 87 Ind. 190; Wainright v. Low, 57 Hun 386, 10 NYS 833 [aff 132 N. Y. 313, 30 NE 747]; Kelly v. Pratt, 41 Misc. 31, 83 NYS 636.

[a] **Appropriation of state property.**—Where lands of a deceased alien have ipso facto escheated to the state, a statute conferring title thereto on the heirs of the alien would fall within a constitutional requirement that bills appropriating the public property shall be passed by a two-thirds vote of the members of the legislature. McCormack v. Coddington, 184 N. Y. 467, 77 NE 979, 18 AnnCas 298.

[b] **Private act; title.**—An act passed to enable the heirs of a certain deceased person to take by inheritance is a private act, within a constitutional requirement that the purpose of private acts must be stated in the title. Kelly v. Pratt, 41 Misc. 31, 83 NYS 636.

90. Colgan v. McKeon, 24 N. J. L. 566 (grantee to whom the state had granted the escheated land); Luhrs v. Eimer, 15 Hun (N. Y.) 399; Jackson v. Skeels, 19 Johns. (N. Y.) 198.

91. U. S.—De Geofroy v. Riggs, 133 U. S. 258, 10 SCt 295, 33 L. ed. 642; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Bahuaud v. Bize, 105 Fed. 485.

Cal.—Blythe v. Hinckley, 127 Cal. 431, 59 P 787 [aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557]; Peo. v. Gerke, 5 Cal. 381.

Del.—Doe v. Roe, 20 Del. 398, 55 A 341.

D. C.—Jost v. Jost, 12 D. C. 487.

Ida.—Lee v. Boise Dev. Co., 21 Ida. 461, 122 P 851.

Ill.—Scharpf v. Schmidt, 172 Ill. 255, 50 NE 182; Adams v. Akerlund, 168 Ill. 632, 48 NE 454.

Iowa.—Doehrel v. Hillmer, 102 Iowa 169, 71 NW 204; Opel v. Shoup, 100 Iowa 407, 69 NW 560, 37 LRA 583.

Wash.—In re Stixrud, 58 Wash. 339, 109 P 343, 33 LRANS 632 and note, AnnCas1912A 850 and note. See also Treaties [38 Cyc 966 text and note 59].

[a] **"That the treaty power of the United States** extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries." De Geofroy v. Riggs, 133 U. S. 258, 266, 10 SCt 295, 33 L. ed. 642 [quot Blythe v. Hinckley, 127 Cal. 431, 435, 59 P 787 (aff 180 U. S. 333, 21 SCt 390, 45 L. ed. 557); In re Stixrud, 58 Wash. 339, 343, 109 P 343, 33 LRANS 632, AnnCas1912A 850].

92. Ahrens v. Ahrens, 144 Iowa 486, 123 NW 164, AnnCas1912A 1098 and note. And see generally cases infra this section.

93. Yeaker v. Yeaker, 4 Metc. (Ky.) 33, 81 AmD 530.

94. Yeaker v. Yeaker, 4 Metc. (Ky.) 33, 81 AmD 530.

95. See cases infra notes 96, 97.

96. Ahrens v. Ahrens, 144 Iowa 486, 123 NW 164, AnnCas1912A 1098 and note; Doehrel v. Hillmer, 102 Iowa 169, 71 NW 204.

97. Scharpf v. Schmidt, 172 Ill. 255, 50 NE 182; Ahrens v. Ahrens, 144 Iowa 486, 123 NW 164, AnnCas1912A 1098. In Doehrel v. Hillmer, 102 Iowa 169, 71 NW 204, the treaty with Prussia, which fixes no time within which the land must be sold but allows a "reasonable time" for that purpose, was considered and the court held that the laws of Iowa, giving a nonresident alien the right to hold property to a certain amount, provided he does certain things with it within five years, applied.

98. Adams v. Akerlund, 168 Ill. 632, 48 NE 454; Erickson v. Carlson, 95 Nebr. 182, 145 NW 352; In re Stixrud, 58 Wash. 339, 109 P 343, 33 LRANS 632, AnnCas1912A 850. But see Meier v. Lee, 106 Iowa 303, 76 NW 712; Johnson v. Olson, 92 Kan. 819, 142 P 256 (holding that the phrase "goods and effects" in the treaty with Sweden does not include real estate).

[a] **The words "personal goods"** in the treaty with Spain refer to movable property only. Sala's Succ., 50 La. Ann. 1009, 24 S 674.

99. U. S.—De Geofroy v. Riggs, 133 U. S. 258, 10 SCt 295, 33 L. ed. 642 (convention between France and the United States, 1853); Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628 [rev 28 Gratt. (69 Va.) 62] (treaty between Switzerland and the United States, 1850); McKinney v. Saviego, 18 How. 235, 15 L. ed. 365 (treaty between Mexico and the United States, 1848); Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666 (treaty between England and the United States, 1794); Blight v. Rochester, 7 Wheat. 535, 5 L. ed. 516 (treaties between England and the United States, 1783, 1794); Orr v. Hodgson, 4 Wheat. 453, 4 L. ed. 613 (treaty between Great Britain and the United States); Chirac v. Chirac, 2 Wheat. 259, 4 L. ed. 234 (convention between France and the United States, 1800); Harden v. Fisher, 1 Wheat. 300, 4 L. ed. 96 (treaty between Great Britain and the United States); Bahuaud v. Bize, 105 Fed.

[§ 31] **c. Right to Curtesy.** A husband as regards his title by curtesy becomes seized by act of law, and as the law will not cast seizin upon one who cannot hold it, it is the generally recognized rule at common law that an alien husband cannot be seized of an estate by curtesy in the real estate of his wife.[1] The fact that the husband has filed his preliminary declaration for naturalization does not entitle him to curtesy where the wife dies before he is naturalized.[2]

Statutory provision. A statute conferring in general terms upon husbands estates by curtesy, without reference to aliens, does not entitle an alien husband to an estate by curtesy;[3] nor does a statute authorizing aliens to purchase lands entitle an alien husband to curtesy;[4] but a statute authorizing an alien to take by "descent" has been held to entitle an alien husband to an estate by the curtesy in lands of which the wife dies seized.[5]

[§ 32] **d. Right to Dower.** Dower rights are cast

485 (treaty between France and the United States, 1853).

Del.—Doe v. Roe, 20 Del. 398, 55 A 341 (treaty between Great Britain and the United States, 1900).

D. C.—De Geoffroy v. Riggs, 18 D. C. 331 (treaty between France and the United States, 1853); Jost v. Jost, 12 D. C. 487 (treaty between Switzerland and the United States, 1850).

Ida.—Lee v. Boise Dev. Co., 21 Ida. 461, 122 P 851 (treaty between China and the United States).

Ill.—Scharpf v. Schmidt, 172 Ill. 255, 50 NE 182 (treaty between Wurtemberg and the United States); Adams v. Akerlund, 168 Ill. 632, 48 NE 454 (treaties between Sweden and the United States, 1783, 1827—citizens of Sweden held empowered to inherit); Schultze v. Schultze, 144 Ill. 290, 33 NE 201, 36 AmSR 432, 19 LRA 90 (treaty between Bremen and the United States); Wunderle v. Wunderle, 144 Ill. 40, 33 NE 195, 19 LRA 84 (right of subject of Baden, which forms part of the German Empire, to inherit under the treaty of Sept. 11, 1871, between the German Empire and the United States).

Ind.—Lehman v. State, 45 Ind. A. 330, 88 NE 365 (treaty between the Swiss Confederation and the United States).

Iowa.—Ahrens v. Ahrens, 144 Iowa 486, 23 NW 164, AnnCas1912A 1098 and note (treaty between Hanover and the United States); Meier v. Lee, 106 Iowa 303, 76 NW 712 (treaty between Sweden and the United States, 1783—citizens of Sweden held not empowered to inherit); Wilcke v. Wilcke, 102 Iowa 173, 71 NW 201 (treaty between Prussia and the United States); Doehrel v. Hillmer, 102 Iowa 169, 71 NW 204 (treaty between Prussia and the United States, March 14, 1829); Opel v. Shoup, 100 Iowa 407, 69 NW 560, 37 LRA 583 (treaty between Bavaria and the United States).

Ky.—Yeaker v. Yeaker, 4 Metc. 33, 81 AmD 530 (treaty between Switzerland and the United States, 1848); Trimbles v. Harrison, 1 B. Mon. 140 (treaty between England and the United States, 1794—alien English heirs held not empowered to inherit from an American citizen).

La.—Sala's Succ., 50 La. Ann. 1009, 24 S 674 (treaty between Spain and the United States, 1795); Rixner's Succ., 48 La. Ann. 552, 19 S 597, 32 LRA 177 and note (treaty between Italy and the United States, 1871); Amat's Succ., 18 La. Ann. 403 (treaty between France and the United States, 1853).

N. Y.—Munro v. Merchant, 28 N. Y. 9 [rev 26 Barb. 383] (treaties between England and the United States, 1783, 1794); Kull v. Kull, 37 Hun 476 (treaty between Wurtemberg and the United States); Bollerman v. Blake, 24 Hun 187 [aff 94 N. Y. 624] (treaty between Grand Duchy of Hesse and the United States, 1845); Matter of Beck, 11 NYS 199; 2 Conn. Surr. 355 (treaty between Prussia and the United States, 1828); Wieland v. Renner, 65 HowPr 245 (treaty between Wurtemberg and the United States); Brown v. Sprague, 5 Den. 545 (treaties between England and the United States, 1783, 1794); Orser v. Hoag, 3 Hill 79 (treaties between England and the United States, 1783, 1794); Jackson v. Wright, 4 Johns. 75 (treaty between England and the United States, 1794); Jackson v. Lunn, 3 Johns. Cas. 109 (treaty between England and the United States, 1794).

N. C.—Univ. v. Miller, 14 N. C. 188 (treaty between Netherlands and the United States, 1782—meaning of word "effects").

Pa.—Jackson v. Burns, 3 Binn. 75 (treaty between England and the United States, 1783).

S. C.—Duncan v. Beard, 11 S. C. L. 400 (treaties between England and the United States, 1783, 1794); Trezevant v. Osborn, 5 S. C. L. 29 (treaties between England and the United States, 1783, 1794); Love v. Hadden, 5 S. C. L. 1 (treaties between England and the United States, 1783, 1794); Ex p. Dupont, 5 S. C. Eq. 5 (treaties between England and the United States, 1783, 1794); Megrath v. Robertson, 1 S. C. Eq. 445 (treaty between England and the United States, 1794).

Tenn.—Ehrlich v. Weber, 114 Tenn. 711, 88 SW 188 (treaty between Saxony and the United States, 1845).

Va.—Hauensteins v. Lynham, 28 Gratt. (69 Va.) 62 (treaty between Switzerland and the United States, 1855); Flott v. Com., 12 Gratt. (53 Va.) 564 (treaty between England and the United States, 1794).

Wash.—In re Stixrud, 58 Wash. 339, 109 P 343, 33 LRANS 632, AnnCas 1912A 850 and note (Treaty of Amity and Commerce of 1783, as revived by art 17 of the Treaty of Commerce and Navigation of 1827, between Norway, Sweden, and the United States).

Eng.—Doe v. Acklam, 2 B. & C. 779, 9 ECL 238, 107 Reprint 572, 2 ERC 632 (treaties between England and the United States, 1783, 1794).

1. Conn.—Whiting v. Stevens, 4 Conn. 44.

Me.—Mussey v. Pierre, 24 Me. 559.

Mass.—Foss v. Crisp, 20 Pick. 121. See also Scanlan v. Wright, 13 Pick. 523, 25 AmR 344. But see Gen. St. c 90 § 38.

N. Y.—Overing v. Russell, 32 Barb. 263; Jackson v. Lunn, 3 Johns. Cas. 109.

N. C.—Copeland v. Sauls, 46 N. C. 70; Paul v. Ward, 15 N. C. 247.

Or.—Quinn v. Ladd, 37 Or. 261, 59 P 457.

Pa.—Cooke v. Doron, 215 Pa. 393, 64 A 595, 7 LRANS 659 and note, 7 AnnCas 502 and note; Reese v. Waters, 4 Watts & S. 145.

S. C.—Richards v. McDaniel, 12 S. C. L. 187.

Eng.—Burk v. Brown, 2 Atk. 397, 26 Reprint 640; Calvin's Case, 7 Coke 2a, 25, 77 Reprint 379, 2 ERC 575; Theobalds v. Duffoy, 9 Mod. 102, 88 Reprint 342; Collingwood v. Pace, 1 Vent. 417, 86 Reprint 262.

See Fitzgerald v. Garvin, T. U. P. Charlt. (Ga.) 281 (where the opinion is expressed that the alien husband acquires an estate by curtesy which, he being incapable of holding, is subject to forfeiture to the state).

Right of curtesy see generally Curtesy [12 Cyc 1001].

[a] **Land conveyed to husband and wife.**—The alienage of a husband does not prevent the vesting in him, upon the death of his wife, of the entire estate in land conveyed in fee to himself and wife, subject only to the paramount right of the people, upon office found, for escheat. Wright v. Saddler, 20 N. Y. 320.

2. Foss v. Crisp, 20 Pick. (Mass.) 121, 126 (where the court said: "It has been contended for the tenant, that by the making of his declaration of his intent to become a citizen, he had an inchoate right to citizenship in the life of his wife, and as it was completed after her death, it should relate back, so that the disability of alienage should be removed from the time of making and filing his preliminary declaration. This argument is answered by the statute of the United States, (c 47,) passed on March 26, 1804. The provision is, that where an alien shall die after he has made his preliminary declaration and 'before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States; and shall be entitled to all rights and privileges, as such, upon taking the oaths prescribed by law.' But it is very clear that the alien himself does not become a citizen until he is actually naturalized. Until that time the common law disabilities of alienage continue, except as they are relaxed in favor of his widow and children by the statute of the United States, as is above stated"); Quinn v. Ladd, 37 Or. 261, 59 P 457.

3. Foss v. Crisp, 20 Pick. (Mass.) 121.

[a] **In New Hampshire** under Pub. St. c 195 § 9, giving the husband of a deceased wife curtesy in her lands, and c 176 §§ 8, 9, authorizing a wife whose husband is an alien to acquire realty and convey it as if unmarried, and providing that, if such husband becomes a citizen of the state and cohabits with his wife, the cohabitation shall have the same effect on the wife's contracts as if the marriage had then first been solemnized, an alien husband, subsequently becoming a citizen of the state, has no curtesy in his wife's lands acquired during separate residence. Under this statute his subsequent citizenship and cohabitation affect her prior contracts as if the marriage had then first been solemnized. His right of curtesy would therefore be limited to estate acquired or held by her after the date of such citizenship and cohabitation. Riel v. Press, 70 N. H. 334, 47 A 608.

4. Reese v. Waters, 4 Watts & S. (Pa.) 145.

5. Cooke v. Doron, 215 Pa. 393, 397, 64 A 595, 7 LRANS 659 and note, 7 AnnCas 502 and note (where the decision was based on the act of Febr. 23, 1791, which was held to be still in force, and the case of Reese v. Waters, 4 Watts & S. (Pa.) 145, where curtesy was denied to an alien husband, was explained on the ground that the statute was overlooked. The court said: "We have examined with care the able argument of counsel for appellant relating to this question, but have not been convinced that the word 'descent' in the act of 1791 does not include an estate by the curtesy. We can see no reason why an estate which devolves upon the husband by operation of law at the death of his wife should not be regarded as taken by descent. The trend of our legislation has been to treat alien friends in these respects as citizens. The decision in Reese v. Waters, supra, was followed by the Act of April 16, 1844, P. L. 274, and while we are not prepared to accept as final and conclusive the view of the court below, not without merit, that this act should be construed to be retrospective as to lands acquired by purchase and prospective as to lands taken by descent, it, however, does show that our legis-

upon the widow by operation of law, and it is a well settled common-law rule that an alien cannot cast any dower rights upon his wife, nor can an alien widow of a citizen take by dower any interest in her husband's lands.[6]

Expatriation. The fact that the widow and her husband were at one time citizens does not entitle her to dower where prior to the husband's death their citizenship was lost by expatriation.[7] But after a widow's right of dower has become consummate she would not, it seems, by her mere subsequent loss of citizenship, without office found, lose her dower rights.[8]

An assignment of dower to an alien, whether voluntarily by the heir or by the law itself, would be, it seems, of no effect.[9]

Statutory provisions. The legislature may confer on aliens the right to be endowered or to transmit dower rights,[10] and a statute empowering an alien to transmit by inheritance and to take by inheri-

lature was blazing the way to the open-door policy in dealing with the right of aliens to acquire and hold real property. Our attention has not been called to any case decided by this court, nor have we been able to find any that expressly holds an estate by the curtesy is not one taken by descent. . . . The tendency of our legislation has been to enable aliens to take, hold and purchase real estate and other property in the same manner as other citizens. This is clearly indicated by the Act of May 1, 1861, P. L. 433, which provides that 'aliens may hereafter purchase and hold real estate in this state, not exceeding in quantity 5,000 acres, nor in net annual income $20,000.' The evident intention of this act was to enable aliens to purchase property within the limitations as to quantity and value named, and to hold property within the same limitations. The legislative meaning may be in doubt. It may be that the word 'hold' as used in this act only applies to property actually purchased. It is not necessary, however, to give it this restricted meaning, and we see no reason why it may not apply to any estate which an alien takes or holds from any source, that is to say, an estate by descent, by purchase or in any other way, if, as contended, there is some other way to acquire title. The primary significance of the word 'hold' as it relates to real property is to enjoy and possess, and certainly an estate by the curtesy can be enjoyed and possessed by the tenant. If the word 'descent' in the act of 1791, or the words 'purchase' or 'hold' in the act of 1861 include in either act an estate by the curtesy, the judgment of the court below must be affirmed. If it is an estate by descent, it is included in the act of 1791. If it is an estate by purchase, it is covered by the act of 1861. Then, again, if the word 'hold' as used in the latter act relates to any kind of title, as by descent, or purchase, or otherwise, the contention of appellant cannot prevail. In either view the appellee is entitled as tenant by the curtesy to the enjoyment of the real estate of which his wife died seized. It requires a nicety of refinement, not convincing to the court, to hold that an estate by the curtesy does not come within the meaning of any of these provisions of our statutes").

6. U. S.—Pacific Bank v. Hannah, 90 Fed. 72, 32 CCA 522.
Ala.—Mobile Cong. Church v. Morris, 8 Ala. 182.
Ky.—White v. White, 2 Metc. 185; Moore v. Tisdale, 5 B. Mon. 352; Alsberry v. Hawkins, 9 Dana 177, 33 AmD 546.
Me.—Potter v. Titcomb, 22 Me. 300.
Md.—Buchanan v. Deshon, 1 Harr. & G. 280.
Mass.—Sewall v. Lee, 9 Mass. 363. But see Gen. St. c 90 § 38.
Mo.—Stokes v. O'Fallon, 2 Mo. 32.
N. J.—Coxe v. Gulick, 10 N. J. L. 328.
N. Y.—Burton v. Burton, 1 Abb. Dec. 271, 1 Keyes 359; Larreau v. Davignon, Sheld. 128, 5 AbbPrNS 367; Greer v. Sankston, 26 HowPr 471; Currin v. Finn, 3 Den. 229; Connolly v. Smith, 21 Wend. 59; Priest v. Cummings, 20 Wend. 338; Davis v. Darrow, 12 Wend. 65; Mick v. Mick, 10 Wend. 379; Sutliff v. Forgey, 1 Cow. 89 [aff 5 Cow. 713]; Kelly v. Harrison, 2 Johns. Cas. 29, 1 AmD 154.
N. C.—Paul v. Ward, 15 N. C. 247.
Pa.—Ondis v. Banta, 7 Kulp 390.
S. C.—Keenan v. Keenan, 41 S. C. L. 345; Wells v. Martin, 2 S. C. L. 20; Burnett v. Noble, 29 S. C. Eq. 58.
Tenn.—Emmett v. Emmett, 14 Lea 369.
Wis.—Bennett v. Harms, 51 Wis. 251, 8 NW 222.
Eng.—Collingwood v. Pace, 1 Vent. 417, 86 Reprint 262.

Right of dower see generally Dower [14 Cyc 871].

[a] **The extent and limits of this rule** are discussed in Davis v. Darrow, 12 Wend. (N. Y.) 65 (where it was held that the native-born widow of an alien is entitled to recover dower against a party whose title is derived from her husband, although her husband was not entitled to hold real estate when he took the conveyance, and such conveyance was not afterward confirmed by statute), and in Kelly v. Harrison, 2 Johns. Cas. (N. Y.) 29, 1 AmD 154 (where it was held that, where the wife was a subject of Great Britain prior to the Revolution, and always continued such, but the husband resided in this country both before and after that period, she was entitled to dower out of those lands of which he was seized before the Revolution, but not of those of which he was afterward seized). See also Larreau v. Davignon, Sheld. (N. Y.) 128, 5 AbbPrNS 367.

[b] **The widow of a naturalized foreigner** who lived and died in Connecticut, she ever remaining absent from her husband in a foreign country against his consent, is not entitled to dower in his estate. Sistare v. Sistare, 2 Root (Conn.) 468.

7. Alsberry v. Hawkins, 9 Dana (Ky.) 177, 33 AmD 546 (where the court said: "As it is an undoubted doctrine of the common law of England, in force here, that an alien can not hold or take dower in land in this State, there can be no doubt that, if Mrs. Alsberry had ceased to be a citizen of the United States when her husband died, her bill was properly dismissed; because her initiate right to dower, whilst a citizen of Kentucky, could never become consummate by operation of law, unless at the time of her husband's death, she had a legal capacity to take and hold").

8. Alsberry v. Hawkins, 9 Dana (Ky.) 177, 33 AmD 546.

[a] **Thus,** in Jackson v. Lunn, 3 Johns. Cas. (N. Y.) 109, where a woman was married to a British subject who owned lands in the colonies before the Declaration of Independence, her right of dower in the lands was held not to be defeated even where she remained a subject of Great Britain and the husband resided in the United States.

9. Paul v. Ward, 15 N. C. 247, 249 (where the court said: "Since the law denies to the lessor of the plaintiff [the widow of an alien] dower, upon the ground of a personal incapacity to take in that way, an assignment of dower, whether voluntarily by the heir, or by the law itself, is null. As an alien cannot take an interest in the soil by act of law, it is a fraud on the law, in her to attempt it; which avoids the title set up under it").

10. Goodrich v. Russell, 42 N. Y. 177; Burton v. Burton, 1 Abb. Dec. (N. Y.) 271, 1 Keyes 359; Davis v. Darrow, 12 Wend. (N. Y.) 65; Ondis v. Banta, 7 Kulp (Pa.) 390; Ford v. Husman, 41 S. C. L. 165.

[a] **Under the South Carolina act of 1828** an alien was entitled to dower only where the deceased husband left no heirs capable of inheriting. Keenan v. Keenan, 41 S. C. L. 345; Burnett v. Noble, 29 S. C. Eq. 58.

[b] **Iowa statute—Widow of non-resident alien.**—In Code § 2442, providing that "the widow of a non-resident alien shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser from the decedent," the words "non-resident alien" mean an alien who is not a resident of Iowa, and not one who is also a nonresident of the United States. In re Gill, 79 Iowa 296, 298, 44 NW 553, 9 LRA 126.

[c] **Maryland statute; nonresident widow.**—In Buchanan v. Deshon, 1 Harr. & G. 280, 290, the court said: "The Act of Assembly of 1813, c. 100, which authorizes the endowments of aliens residing after their intermarriage in the United States, does not, it is believed, reach a claim situated as this is. Mrs. Buchanan never resided, as it is admitted, at any time during the coverture, in the United States, and without such residence she was not entitled to any benefit of the provisions of that law. The legislature contemplated a capacity to take dower at the instant of the husband's death, and did not mean that the estate, which should descend to the heirs-at-law, should be liable even for a season, at any distant period to be divested by the contingent removal and residence of the widow within the limits of the State."

[d] **New York statutes.**—(1) Under the act of April 21, 1825, providing that no alien shall be capable of taking or holding real estate unless he has taken certain steps to be naturalized, a widow who had not taken such steps was not entitled to dower in lands conveyed to her husband in 1833. Currin v. Finn, 3 Den. 229. See also Connolly v. Smith, 21 Wend. 59. (2) In Burton v. Burton, 1 Abb. Dec. 271, 273, 1 Keyes 359 [rev 26 HowPr 474], it was held that under the New York statute providing that "any woman being an alien who has heretofore married, or who may hereafter marry a citizen of the United States, shall be entitled to dower in the real estate of her husband within this State, as if she were a citizen of the United States," an alien widow who, before the passage of the act, had married an alien who at the time of the passage of the act had become a naturalized citizen was entitled to dower. See however Greer v. Sankston, 26 HowPr 471. (3) In Sutliff v. Forgey, 1 Cow. 89 [aff 5 Cow. 713], where a statute empowered aliens to purchase lands, acts of 1802, 1804, it was held that a purchase by an alien husband vested at the time an inchoate dower interest in the lien wife as purchaser, and that she was entitled to dower upon her husband's death.

[e] **Wisconsin statute; discrimination between resident and nonresident widows.**—Before the husband's death

tance confers power on an alien to take by dower.[11] Where the statute in general terms confers dower rights upon alien widows, nonresident as well as resident widows are entitled thereto.[12]

Citizenship of husband. A statute allowing dower to the widow of an alien husband has no application where the husband was a citizen and the widow an alien;[13] but under the act of congress of February 10, 1855, an alien woman becomes a citizen by her marriage to a citizen of the United States and of course is entitled to dower in his lands.[14]

The naturalization of the alien wife of a citizen entitles her to dower upon the subsequent death of her husband;[15] but this does not affect conveyances made by the husband while the wife was an alien, and as to such she is not entitled to dower.[16]

Treaty rights. The United States, under its treaty-making power, may regulate with the other party to the treaty the rights of widows, who are citizens of the other country, to dower in lands of their husbands, situate in the United States. The rights in this respect depend of course upon the terms of the treaty.[17]

[§ 33] **4. Conveyances, Mortgages, and Leases by Aliens.** The right of an alien to take real estate by purchase and to hold it as against all persons except the crown or state includes the power of disposal, and therefore he can transfer it by deed,[18] or mortgage,[19] or may lease the same.[20] But a conveyance by an alien, even to a citizen, conveys as against the government only a defeasible title, and the government's right of forfeiture is not barred.[21]

the inchoate right of dower in the wife is under the absolute control of the legislature, subject to the limitation that there can be no distinction "between resident aliens and citizens" in that respect (Const. art 1 § 15). The statute, which provides that "a woman, being an alien, shall not on that account be barred of her dower, but any woman residing out of this state shall be entitled to dower only of lands of her husband, being in this state, of which he died seized" (Rev. St. § 2160), is valid, and not in conflict with that clause of the state constitution above mentioned, nor with the provision of the federal constitution preserving the privileges and immunities of citizens in the several states. The nonresidence intended by this statute is nonresidence at the time of the husband's death, and not at the time of his conveyance of the land. Bennett v. Harms, 51 Wis. 251, 8 NW 222.

[f] **Term "widow" held to include alien.**—In Stokes v. O'Fallon, 2 Mo. 32, 34, in construing the acts of 1817, 1822, which confer dower rights upon widows generally, it was held that an alien widow was entitled to dower. In this case the court said: "When this act, 1817, was passed, the law makers must have known that the common law was adopted, and that by it, all widows could not be endowed; yet they use general words, clearly including all widows, as well aliens as others. This general act is subsequent to the introduction of the common law, and is broad enough to suppress the common law rule. If alien widows are to be excluded from the benefit of the general words so as to be excluded from dower, under the common law rule, it should only take place to answer some great end of State or national policy. I think neither reason nor State policy requires these general words to be narrowed. The state policy of England in refusing aliens to hold land, never did exist in the United States, nor did it ever exist here; at the very time this act of 1817 passed, it could not have been a fact unknown to the Legislature, that there were in the country many alien wives; and I cannot suppose they had any narrowness of feeling on the subject. Furthermore, before the Act of 1817, the Act of 1815 contained, with respect to dower, about the same expressions; so that I think I may safely say, before the common law rule came here, aliens might have dower, and if this be true, then it must be clear that the statute law was not impaired by the introduction of the common law."

11. Yeo v. Mercereau, 18 N. J. L. 387. See also Emmett v. Emmett, 14 Lea (Tenn.) 369.

12. Burton v. Burton, 1 Abb. Dec. (N. Y.) 271, 1 Keyes 359; Emmett v. Emmett, 14 Lea (Tenn.) 369.

13. Larreau v. Davignon, Sheld. (N. Y.) 128, 5 AbbPrNS 367; Greer v. Sankston, 26 HowPr (N. Y.) 471; Curtin v. Finn, 3 Den. (N. Y.) 229; Priest v. Cummings, 20 Wend. (N. Y.) 338. But see Priest v. Cummings, 16 Wend. (N. Y.) 617.

[a] **"Naturalization is a personal privilege,** and the alien wife does not become a naturalized citizen by the naturalization of the husband. The acts of congress do not impart to it that effect, nor are we apprised of any law which, at the time of the decedent's death, conferred upon his wife the right to take real estate by descent, in consequence of his naturalization, although such a right has been since conferred upon an alien wife whose husband is a citizen of the United States, by the Revised Statutes (page 173)." White v. White, 2 Metc. (Ky.) 185, 191. And see infra § 129.

14. 10 U. S. St. at L. 604 c 71 § 2. Kelly v. Owen, 7 Wall. (U. S.) 496, 19 L. ed. 283; Ware v. Wisner, 50 Fed. 310, 4 McCrary 66; Luhrs v. Eimer, 80 N. Y. 171; Burton v. Burton, 1 Abb. Dec. (N. Y.) 271, 1 Keyes 359; Daly v. Beer, 57 Hun 590, 10 NYS 893; Renner v. Müller, 44 N. Y. Super. 535, 57 HowPr 229. See also Halsey v. Beer, 52 Hun 366, 5 NYS 334.

15. Priest v. Cummings, 20 Wend. (N. Y.) 338.

16. Priest v. Cummings, 20 Wend. (N. Y.) 338.

17. Kelly v. Harrison, 2 Johns. Cas. (N. Y.) 29, 1 AmD 154 (holding that the treaties between England and the United States, 1783 and 1794, dealt only with the vested right of citizens of England, and did not confer upon a widow the right to dower where her husband died after the making of the treaties). Generally as to treaty regulations see supra §§ 11, 12.

18. U. S.—Lykins v. McGrath, 184 U. S. 169, 22 SCt 450, 46 L. ed. 485; Sullivan v. Burnett, 105 U. S. 334, 26 L. ed. 1124; Phillips v. Moore, 100 U. S. 208, 25 L. ed. 603; U. S. v. Southern Pac. R. Co., 88 Fed. 832; Lone Jack Min. Co. v. Meggison, 82 Fed. 89, 27 CCA 63; Laughton v. Nadeau, 75 Fed. 789.

Cal.—Ferguson v. Neville, 61 Cal. 356.

Ga.—Kerr v. White, 52 Ga. 362.

Ind.—Donaldson v. State, 67 NE 1029; Halstead v. Lake County, 56 Ind. 363.

Iowa.—Purczell v. Smidt, 21 Iowa 540.

Kan.—Wuester v. Folin, 60 Kan. 334, 56 P 490; Hannon v. Taylor, 57 Kan. 1, 45 P 51; Ingraham v. Ward, 56 Kan. 550, 44 P 14; Blauw v. Love, 9 Kan. A. 55, 57 P 258; Dagenett v. Jenks, 7 Kan. A. 499, 54 P 135.

Ky.—Dudley v. Grayson, 6 T. B. Mon. 259.

Me.—State v. Montgomery, 94 Me. 192, 47 A 165, 80 AmSR 386.

Mass.—Scanlan v. Wright, 13 Pick. 523, 25 AmD 344; Fox v. Southack, 12 Mass. 143; Sheaffe v. O'Neil, 1 Mass. 256.

Mont.—Quigley v. Birdseye, 11 Mont. 439, 28 P 741.

N. H.—Montgomery v. Dorion, 7 N. H. 475.

N. Y.—Aldrich v. Manton, 13 Wend. 458.

S. C.—McCaw v. Galbraith, 41 S. C. L. 74; Groves v. Gordon, 5 S. C. L. 245.

Tenn.—Baker v. Shy, 9 Heisk. 85; Williams v. Wilson, Mart. & Y. 248.

Tex.—Franco-Texan Land Co. v. Bousselet, 70 Tex. 422, 7 SW 761. But see Clay v. Clay, 26 Tex. 24 (law of republic of Mexico).

Utah.—Strickley v. Hill, 22 Utah 257, 62 P 893, 83 AmSR 768; Wilson v. Triumph Cons. Min. Co., 19 Utah 66, 56 P 300, 75 AmSR 718.

Va.—Ferguson v. Franklin, 6 Munf. (20 Va.) 305; Marshall v. Conrad, 5 Call (9 Va.) 365.

Wash.—Abrams v. State, 45 Wash. 327, 88 P 327, 122 AmSR 914, 9 LRANS 186, 13 AnnCas 527; Oregon Mortg. Co. v. Carstens, 16 Wash. 165, 47 P 421, 35 LRA 841.

Ont.—Doe v. Cleveland, 6 U. C. Q. B. O. S. 117.

19. Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142; Halstead v. Lake County, 56 Ind. 363; Waugh v. Riley, 8 Metc. (Mass.) 290; Farmers' L. & T. Co. v. Peo., 1 Sandf. Ch. (N. Y.) 139.

[a] **Alienage of the mortgagor is no defense** to a writ of entry brought by the mortgagee to foreclose the equity of redemption. Waugh v. Riley, 8 Metc. (Mass.) 290.

20. Ellice v. Winn, 12 Wend. (N. Y.) 342; Troup v. Mullender, 9 Johns. (N. Y.) 202.

[a] **A tenant cannot dispute his landlord's title** on the ground that the latter is an alien. Ramires v. Kent, 2 Cal. 558.

[b] **Ejectment; effect of statutory prohibition.**—Aliens authorized by statute to hold lands, but inhibited from leasing or demising the same, are not precluded from making a demise for the purpose of making an ejectment. Jackson v. Britton, 4 Wend. (N. Y.) 507.

21. Iowa.—Purczell v. Smidt, 21 Iowa 540.

Kan.—Madden v. State, 68 Kan. 658, 75 P 1023.

Mass.—Slater v. Nason, 15 Pick. 345; Scanlan v. Wright, 13 Pick. 523, 25 AmD 344.

N. Y.—Peo. v. Conklin, 2 Hill 67.

Tenn.—Williams v. Wilson, Mart. & Y. 248.

Ont.—Wallace v. Adamson, 10 U. C. C. P. 338; Iler v. Elliott, 32 U. C. Q. B. 434; Wallace v. Hewitt, 20 U. C. Q. B. 87.

See Abrams v. State, 45 Wash. 327, 88 P 327, 122 AmSR 914, 9 LRANS 186, 13 AnnCas 527; Oregon Mortg. Co. v. Carstens, 16 Wash. 165, 47 P 421, 35 LRA 841.

[a] **An alien mortgagee has a right** to come into a court of equity, and have the property, which has been pledged for the payment of the debt, sold for the purpose of raising the money. His demand is merely a personal one, the debt being consid-

Some statutes provide, however, that the title of a citizen shall not be questioned by reason of the alienage of any one through whom such title may have been derived.[22]

[§ 34] **D. In Relation to Personal Property—1. In General.** The disability of aliens at common law in respect to the ownership of real estate does not extend to personal property, and aliens are capable of acquiring, holding, and transmitting movable property in like manner as citizens.[23] A statute capacitating aliens to take, recover, and transmit "real estate" has been held to include both real and personal property.[24]

Stockholders in corporations. A state may debar nonresident aliens from holding stock in its corporations, or admit them to that privilege only on such terms as the state may prescribe.[25]

[§ 35] **2. Bequests to and by Aliens.** An alien is fully competent to take and hold personal property by bequest,[26] and an alien testator may pass by will personal property situate outside of the country of his allegiance.[27] But a legacy to be invested in land for the benefit of aliens is void at common law;[28] and as a rule real estate cannot be sold either to enforce the payment of legacies to aliens,[29] or for the purpose of paying debts of the estate so as to preserve the personal property for the benefit of aliens to whom it has been bequeathed.[30] But land may be conveyed or devised in trust to a citizen for the purpose of being sold, and the proceeds paid over to aliens.[31]

Taxation of bequests. The federal constitution does not prohibit a state from imposing a tax upon bequests to aliens.[32]

[§ 36] **3. Succession by Aliens.** Alienage is not at common law any obstacle to the acquisition of title to personal property as next of kin;[33] and, as between next of kin in the same degree, next of kin

ered as the principal, and the land as an incident. Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142.

22. U. S. v. Southern Pac. R. Co., 88 Fed. 832; McCormack v. Coddington, 46 Misc. 510, 95 NYS 46.

23. U. S.—Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142; Craig v. Leslie, 3 Wheat. 563, 4 L. ed. 460; Ruckgaber v. Moore, 104 Fed. 947, 31 NYCivProc 310.

Conn.—Crosgrove v. Crosgrove, 69 Conn. 416, 38 A 219; Evans's App., 51 Conn. 435.

Ga.—Kerr v. White, 52 Ga. 362.

Ind.—Cleveland, etc., R. Co. v. Osgood, 36 Ind. A. 34, 73 NE 285.

Iowa.—Meier v. Lee, 106 Iowa 303, 76 NW 712; Greenheld v. Morrison, 21 Iowa 538.

La.—Sala's Succ., 50 La. Ann. 1009, 24 S 674; Richmond v. Milne, 17 La. 312, 36 AmD 613.

Me.—State v. Montgomery, 94 Me. 192, 47 A 165, 80 AmSR 386.

Md.—Corrie's Case, 2 Bland 488.

Mo.—Harney v. Donohoe, 97 Mo. 141, 10 SW 191; Greenia v. Greenia, 14 Mo. 526.

N. Y.—Tanas v. Municipal Gas Co., 88 App. Div. 251, 84 NYS 1053; Beck v. McGillis, 9 Barb. 35; Ludlow v. Van Ness, 21 N. Y. Super. 178; Matter of Barandon, 41 Misc. 380, 84 NYS 937; Matter of Fattosini, 33 Misc. 18, 67 NYS 1119.

N. C.—Atkins v. Kron, 37 N. C. 423.

Pa.—Com. v. Detwiller, 131 Pa. 614, 18 A 990, 7 LRA 357.

S. C.—Megrath v. Robertson, 1 S. C. Eq. 445.

Tenn.—Polk v. Ralston, 2 Humphr. 537.

Tex.—Franco-Texan Land Co. v. Bousselet, 70 Tex. 422, 7 SW 761; Franco-Texan Land Co. v. Chaptive, 3 SW 31.

Eng.—Calvin's Case, 7 Coke 2, 77 Reprint 379, 2 ERC 575; Fourdrin v. Gowdey, 3 Myl. & K. 383, 10 EngCh 383, 40 Reprint 146.

See also Bouvier L. D.; Jacob L. D.; 1 Blackstone Comm. 372; Comyns Dig. 428.

[a] **The reason for this** (1) has been said to be based upon the fact that "personal estate is of a transitory and movable nature; and besides, this indulgence to strangers is necessary for the advancement of trade." 1 Blackstone Comm. 372. (2) "An alien friend may purchase and hold chattels, real, and all kinds of personal property; and may freely transfer to any place beyond the jurisdiction of the State, his movables, subject however in general to such export duty as the State may think proper to impose, and also subject, in cases of public expediency, or on his becoming an alien enemy, to a total prohibition of removing any of his property out of the State, so as thereby to weaken it and strengthen its antagonist. This permission of removal of personal property is, however granted with a view to the encouragement of commerce and the aggrandizement of the State; and therefore, the exceptions to the rule, as well as the rule itself, are derived from the same source, that of a duty which the State owes to itself, as a whole, and as one which it owes to each of its citizens in the protection of his interests by the general operation of its laws." Per Bland, C., in Corrie's Case, 2 Bland (Md.) 488, 493.

[b] **A chattel mortgage** may be given to an alien. Comstock v. Harris, 13 Ont. 407.

24. Corse v. Corse, 4 L. C. 310.

25. State v. Travelers Ins. Co., 70 Conn. 590, 40 A 465, 66 AmSR 138. See generally Corporations [10 Cyc 376].

26. U. S.—Craig v. Leslie, 3 Wheat. 563, 4 L. ed. 460.

Conn.—Angus v. Noble, 73 Conn. 56, 46 A 278; Crosgrove v. Crosgrove, 69 Conn. 416, 38 A 219.

La.—Mager's Succ., 12 Rob. 584; Richmond v. Milne, 17 La. 312, 36 AmD 613.

N. Y.—Meakings v. Cromwell, 5 N. Y. 136; Beck v. McGillis, 9 Barb. 35.

N. C.—Atkins v. Kron, 37 N. C. 423.

Va.—Com. v. Martin, 5 Munf. (19 Va.) 117.

Eng.—Fourdrin v. Gowdey, 3 Myl. & K. 383, 10 EngCh 383, 40 Reprint 146.

Que.—Corse v. Corse, 4 L. C. 310.

[a] **A donation causa mortis,** under Merrick Civ. Code (1900) art 1477, may be made in favor of a foreigner. Mager's Succ., 12 Rob. (La.) 584; Richmond v. Milne, 17 La. 312, 36 AmD 613.

27. In re Barandon, 41 Misc. 380, 84 NYS 937.

28. Beekman v. Bonsor, 23 N. Y. 298, 80 AmD 269.

29. Atkins v. Kron, 37 N. C. 423.

30. Trezevant v. Howard, 3 S. C. Eq. 87.

31. See supra § 24 note 31 [a].

32. Mager's Succ., 12 Rob. (La.) 584. See Taxation [37 Cyc 768 text and note 19].

33. U. S.—McLearn v. Wallace, 10 Pet. 625, 9 L. ed. 558; Wise v. Resler, 30 F. Cas. No. 17,911, 2 Cranch C. C. 182.

Conn.—Crosgrove v. Crosgrove, 69 Conn. 416, 38 A 219; Evan's App., 51 Conn. 435.

Iowa.—Purczell v. Smidt, 21 Iowa 540; Greenheld v. Morrison, 21 Iowa 538.

Mo.—Harney v. Donohoe, 97 Mo. 141, 10 SW 191; Greenia v. Greenia, 14 Mo. 526.

N. Y.—Bradwell v. Weeks, 1 Johns. Ch. 206 [rev on other grounds 13 Johns. 1].

[a] **Alien enemies during war.**—Where an alien dies in this state, intestate, without issue, during a war with his native country, leaving personal property, his relations abroad, although next of kin, being alien enemies residing in the country of the enemy are not entitled to distributive shares of the property, but the whole will go to his next of kin, resident in this state. Bradwell v. Weeks, 13 Johns. (N. Y.) 1 [rev 1 Johns. Ch. 206].

[b] **Exoneration of realty.**—A tract of land in the state of Georgia was purchased by A. McLearn, on which he established a rice plantation, put slaves upon it, paid part of the purchase money, gave a judgment for the balance, and died, leaving a son, James H. McLearn, his devisee, who, to obtain possession of the estate, mortgaged the land and slaves for the balance of the judgment. A judgment, under the laws of Georgia, binds personal as well as real property. The son died, part of the debt being unsatisfied, leaving as his nearest of kin aliens, and also more remote kindred who were citizens of the United States. The real estate was sold to satisfy, and did satisfy, the mortgage. The personal estate was sold by the executor. The aliens, who were nearest of kin, claimed the proceeds of the personal estate. The kindred of the deceased who were more remote, but who were citizens of the United States, claimed that the personal estate should have been appropriated to pay the mortgage, and that not having been so appropriated they were entitled to the money arising from its sale to reimburse them for the value of the real estate taken by the mortgagor, the aliens nearest of kin not being entitled by the law of Georgia to take real estate by descent. The court held that as both the real and personal estate had been mortgaged by James H. McLearn, and the real estate had been sold to pay a debt for which both real and personal estate were equally liable, the proceeds of the personal estate should be divided between the next of kin, the aliens, and the more remote of kin who were citizens of the United States, who only could have inherited the real estate of the deceased, had it not been sold to satisfy a debt, for which it was, with the personal estate, equally liable. McLearn v. Wallace, 10 Pet. (U. S.) 625, 9 L. ed. 558.

[c] **Statute for distribution of personal estate in same manner as realty.**—"The provision of [the Iowa] statute (Rev., § 2422), which provides that personal property 'shall be distributed to the same persons and in the same proportion as though it were real estate,' does not prevent aliens from taking distributive shares of personal estate, although nonresident aliens might not take real estate by descent." Greenheld v. Morrison, 21 Iowa 538, 539.

who are aliens share equally with those who are citizens.[34]

By statute conditions upon the right of succession are sometimes imposed;[35] and in some states a distinction has been made between resident and nonresident aliens.[36]

[§ 37] **E. Capacity to Sue and Be Sued[37]—1. Capacity to Sue[38]—a. In General.** It may be laid down, as a general rule, that aliens, except alien enemies,[39] who are sui juris, and not otherwise specially disabled by the law of the place where the suit is brought,[40] may there maintain suits in the proper courts[41] to vindicate their rights and redress their wrongs.[42] This right is not affected by the fact that a similar remedy is not afforded to aliens in the country to which plaintiff belongs.[43]

Matter of comity. The right of an alien to sue is a matter of comity as distinguished from a matter of right,[44] and, while the courts will not ordinarily deny the right in the absence of positive legislation taking it away,[45] they should not permit the privilege to be exercised so as to work injury to the interests of citizens of the state.[46]

Foreign sovereigns. The right of an alien to sue has been held applicable to a foreign sovereign.[47]

One alien may sue another alien in the state

34. Greenia v. Greenia, 14 Mo. 526.

35. See In re Pendergast, 143 Cal. 135, 76 P 962.

36. See Polk v. Ralston, 2 Humphr. (Tenn.) 537, 538 (construing act [1809] c 53, which provides that "in all cases where any person within this state shall die intestate, without issue, and possessed of any estate, real or personal, the said estate, and every part thereof, shall descend to such person or persons who are next of kin to the said decedent, and resident within the United States, to the perpetual exclusion of aliens who may be related to the said decedent in a nearer degree." It was held that persons of foreign birth resident in the state of Tennessee, but not naturalized, had capacity to take as distributees personal estate in Tennessee, the term "alien" being intended by the legislature to mean foreigners only, as well by residence as by birth).

37. Admiralty jurisdiction of suits between foreigners see Admiralty § 42.

Contest of will by alien see Wills [40 Cyc 1242 note 22].

38. Right of action for death by wrongful act see Death [13 Cyc 333].

Security for costs to be given by alien suitors see Costs [11 Cyc 170, 171].

39. Taylor v. Carpenter, 23 F. Cas. No. 13,784, 3 Story 458, 23 F. Cas. No. 13,785, 2 Woodb. & M. 1; Cetefonte v. Camden Coke Co., 78 N. J. L. 662, 75 A 913, 27 LRANS 1058; Squilache v. Tidewater Coal, etc., Co., 64 W. Va. 337, 62 SE 446; Pisani v. Lawson, 6 Bing. N. Cas. 90, 37 ECL 524, 133 Reprint 35; Anderson L. D.

40. Cetefonte v. Camden Coke Co., 78 N. J. L. 662, 670, 75 A 913, 27 LRANS 1058 [cit Cyc]; Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 658, 106 NW 821, 115 AmSR 1063, 15 LRANS 1045 and note [quot Cyc].

[a] **Suit against governor.**—See Rose v. Governor, 24 Tex. 496 (where it was held that an alien could not, under the laws of Texas, sue the governor of that state).

41. See Taylor v. Carpenter, 23 F. Cas. No. 13,785, 2 Woodb. & M. 1 (where it is said that aliens may sue in the federal courts as extensively as in the state courts; (Breedlove v. Nicolet, 7 Pet. (U. S.) 413, 8 L. ed. 731) to the effect that an alien does not lose his right to sue in the courts of the United States by residing in one of the states of the Union).

Jurisdiction of courts:

In general see Courts [11 Cyc 667, 668, 865].

Admiralty courts see Admiralty § 16 et seq.

Consular courts see Ambassadors and Consuls §§ 42-46.

Federal courts, see Federal Courts [11 Cyc 866].

[a] **Right to sue in court of claims.**—Under U. S. Rev. St. § 1068, aliens may sue in the court of claims. This right extends to aliens residing in the colonies of foreign governments and to corporate as well as to natural persons. Philippine Sugar Est. Dev. Co. v. U. S., 39 Ct. Cl. 225.

42. U. S.—Taylor v. Carpenter, 23 F. Cas. No. 13,785, 2 Woodb. & M. 1.

N. J.—Cetofonte v. Camden Coke Co., 78 N. J. L. 662, 670, 75 A 913, 27 LRANS 1058 [cit Cyc].

W. Va.—Squilache v. Tidewater Coal, etc., Co., 64 W. Va. 337, 340, 62 SE 446 [cit Cyc].

Wis.—Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 658, 106 NW 821, 115 AmSR 1063, 15 LRANS 1045 [aff 208 U. S. 570, 28 SCt 337, 52 L. ed. 625, and cit Cyc].

Eng.—South Carolina Bank v. Case, 8 B. & C. 427, 15 ECL 213, 108 Reprint 1101; Jesson v. Wright, 2 Bligh 1, 4 Reprint 280, 10 ERC 714; King of Spain v. Hullet, 1 Cl. & F. 333, 6 Reprint 941 [aff 1 Dow & Cl. 169, 6 Reprint 488]; Berne v. Bank of England, 9 Ves. Jr. 347, 32 Reprint 636.

Ont.—Wood v. Campbell, 3 U. C. Q. B. 269.

See also Story Confl. L. § 565; Bouvier L. D. [cit Calvin's Case, 7 Coke 2a, 17, 77 Reprint 379, 2 ERC 575].

[a] **Remedy by injunction** is open to aliens in proper cases. De Laveaga v. Williams, 7 F. Cas. No. 3,759, 5 Sawy. 573.

43. Taylor v. Carpenter, 23 F. Cas. No. 13,785, 2 Woodb. & M. 1.

44. Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 673, 106 NW 821, 115 AmSR 1063, 15 LRANS 1045 [aff 208 U. S. 570, 28 SCt 337, 52 L. ed. 625, and quot Cyc] (per Cassoday, C. J.); Mitchell v. Wells, 37 Miss. 235 (where it was held that, as an alien can sue here only so long as permitted by our laws or policy, the declaration of a prohibiting policy, pending a suit, is a bar to its further prosecution).

45. Taylor v. Carpenter, 23 F. Cas. No. 13,785, 2 Woodb. & M. 1. See also Valk v. U. S., 29 Ct. Cl. 62 (as to application of a treaty upon an alien's right to sue under a special statute giving to citizens only a right to sue).

46. Disconto Gesellschaft v. Umbreit, 208 U. S. 570, 28 SCt 337, 52 L. ed. 625 [aff 127 Wis. 651, 106 NW 821, 115 AmSR 1063, 15 LRANS 1045]. In this case plaintiff, a resident and citizen of Germany, occupied nominally the character of a creditor, but really was the mere agent of a foreign trustee of a debtor's estate, appointed in involuntary bankruptcy proceedings, to whom plaintiff had agreed to hand over all it might recover. Plaintiff had no property in Wisconsin, or contract within or with a resident of that state, and brought action in a court of that state against a nonresident alien, temporarily within the state, to recover on a transitory cause of action arising without the state, and by a process of garnishment sought to impound property of the debtor within the state to satisfy its judgment therefrom. U, another creditor of the debtor, was a resident and citizen of Wisconsin, and had secured by garnishment a lien on the same property, but his proceedings were subsequent in point of time to those initiated by the alien creditor. The domestic creditor having obtained judgment thereafter intervened in the action brought by the alien. On appeal from a judgment in favor of the alien it was held: (1) The main action could not be maintained by the alien as a matter of right, but only on the principles of comity; (2) the auxiliary action of garnishment by the alien was governed by the same principles that applied to its main action, notwithstanding the fact that residents and citizens of Wisconsin were parties to the auxiliary action as stakeholders or claimants of impounded property; (3) comity does not allow an alien creditor to seize and carry away property within the jurisdiction of Wisconsin courts when a resident creditor stands also at the bar of the same court with a judgment and provisional lien, and thus force such resident creditor to go to a foreign court to collect his debt.

[a] **What property may be removed from a state and subjected to the claims of creditors of other states** is a matter of comity between nations and states and not a matter of absolute right in favor of creditors of another sovereignty, when citizens of the local state or country are asserting rights against property within the local jurisdiction. Disconto Gesellschaft v. Umbreit, 208 U. S. 570, 28 SCt 337, 52 L. ed. 625 [aff 127 Wis. 651, 106 NW 821, 115 AmSR 1063, 15 LRANS 1045].

47. King of Prussia v. Kuepper, 22 Mo. 550, 66 AmD 639; Republic v. De Arrangois, 11 HowPr (N. Y.) 1; U. S. v. Wagner, L. R. 2 Ch. 582; Peru v. Weguelin, L. R. 20 Eq. 140; King of Spain v. Hullet, 1 Cl. & F. 333, 6 Reprint 941 [aff 1 Dow & Cl. 169, 6 Reprint 488]; Colombian Govt. v. Rothschild, 1 Sim. 94, 2 EngCh 94, 57 Reprint 514. But compare King of Spain v. Oliver, 14 F. Cas. No. 7,813, Pet. C. C. 276; King of Spain v. Oliver, 14 F. Cas. No. 7,814, 2 Wash. C. C. 429; Berne v. Bank of England, 9 Ves. Jr. 347, 32 Reprint 636 (to the effect that a judicial court cannot take notice of a foreign government not acknowledged by the government of the country in which the court sits). In Rex v. Kuepper, 22 Mo. 550, 557, 66 AmD 639, the court said: "If the subjects of foreign governments will contract obligations or affect themselves with liabilities to their kings or princes, and afterwards migrate to the United States, there is nothing in the nature of our institutions which shields them from their just responsibilities. While our government grants the rights and privileges of citizenship to all foreigners who are naturalized under our laws, there is neither policy nor justice in screening them from the civil liabilities which they have contracted with the government to which they were once subject. Our tribunals afford no assistance in the enforcement of the penal codes of foreign nations, nor would they aid despotic rulers, in the exercise of an arbitrary power, in making special and retrospective laws affecting foreigners residing here, who were once their subjects. But when laws have been made abroad, and debts have been contracted under those laws, there is no reason for refusing our assistance in their collection. Though foreign laws may be enacted by a

courts[48] upon contracts made abroad,[49] or for a tort committed in a foreign country,[50] if defendant is transiently in the state and service is had upon him.[51]

Appearance by attorney. An alien is entitled to appear by attorney for the purpose of claiming his rights.[52]

[§ 38] **b. Real and Mixed Actions.**[53] By the common law of England, although an alien could take and hold land by purchase until office found, he could not maintain a real or a mixed action, such as ejectment, to recover possession;[54] and this was formerly the law in some of the United States;[55] but according to the general current of authority in the United States an alien's title to real estate founded on purchase, although voidable at the instance of the state, is, until it has been avoided, sufficient to enable him to maintain a real action or ejectment with respect thereto.[56] The rule is the same whether the alien holds the legal or the equita-

power and in a way inconsistent with the spirit of our institutions, that is no reason why they should not be enforced against those who have incurred responsibilities in respect of them. Foreign nations have the same right to determine the form of government most conducive to their happiness that we have, and to deny the validity of their laws, because they have not been made in a manner conformable to our notions of government, would be to destroy all comity among nations and introduce endless wars and quarrels."

48. The Jerusalem, 13 F. Cas. No. 7,293, 2 Gall. 191 (where it was held that the court may take jurisdiction of actions between nonresident foreigners, particularly in suits in rem, as in such suits the proper forum is the locus rei sitæ); Lorway v. Lousada, 15 F. Cas. No. 8,517, 1 Lowell 77; Robert v. Knights, 7 Allen (Mass.) 449; Barrell v. Benjamin, 15 Mass. 354; Rea v. Hayden, 3 Mass. 24; Dewitt v. Buchanan, 54 Barb. (N. Y.) 31; Johnson v. Dalton, 1 Cow. (N. Y.) 543, 13 AmD 564; Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 106 NW 821, 115 AmSR 1063, 15 LRANS 1045 [aff 208 U. S. 570, 28 SCt 337, 52 L. ed. 625]. But see Montalet v. Murray, 4 Cranch (U. S.) 46, 2 L. ed. 545 (where it was held that, both parties being aliens, no suit can be instituted in the United States); Brinley v. Avery, Kirby (Conn.) 25 (where it was held that a plea in abatement that both parties are aliens, and that the contract declared on was made in a foreign country and was to have been performed there, is good); Dumoussay v. Delevit, 3 Harr. & M. (Md.) 151 (where it was held replevin could not be maintained when both parties were aliens).

In Lorway v. Lousada, 15 F. Cas. No. 8,517, 1 Lowell 77, 78, the court said: "That foreigners, even transiently here, may sue and be sued by citizens and by each other in our courts of common law and equity, is now the better opinion, and is in accordance with the law of England. Story, Conflict of Laws, § 542; 2 Kent, Com. 64; Westlake, International Law, § 120 et seq. Such actions are constantly brought in our State courts, and this general practice meets the approval of jurists. A late French writer has said, that the other nations have just cause of complaint against France, in that her laws deny to strangers the right to sue each other in France; a privilege which is allowed, he says, in almost all civilized countries. Foelix, Droit. Int. Privé, § 127, &c."

[a] **Reason of rule.**—In Roberts v. Knights, 7 Allen (Mass.) 449, 452, the court said: "On the whole, it is consonant to natural right and justice that the courts of every civilized country should be open to hear the causes of all parties who may be resident for the time being within its limits."

49. Johnson v. Trade Ins. Co., 132 Mass. 432; Roberts v. Knights, 7 Allen (Mass.) 449; Barrell v. Benjamin, 15 Mass. 354; Rea v. Hayden, 3 Mass. 24; Dewitt v. Buchanan, 54 Barb. (N. Y.) 31; Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 106 NW 821, 115 AmSR 1063, 15 LRANS 1045 [aff 208 U. S. 570, 28 SCt 337, 52 L. ed. 625].

50. Dewitt v. Buchanan, 54 Barb. (N. Y.) 31; Johnson v. Dalton, 1 Cow. (N. Y.) 543, 12 AmD 564; Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 106 NW 821, 115 AmSR 1063, 15 LRANS 1045 [aff 208 U. S. 570, 28 SCt 337, 52 L. ed. 625]. See also Lister v. Wright, 2 Hill (N. Y.) 320; Smith v. Bull, 17 Wend. (N. Y.) 323; Glen v. Hodges, 9 Johns. (N. Y.) 67.

51. Roberts v. Knights, 7 Allen (Mass.) 449; Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 106 NW 821, 115 AmSR 1063, 15 LRANS 1045 [aff 208 U. S. 570, 28 SCt 337, 52 L. ed. 625].

Transitory actions see generally Actions § 23.

52. U. S.—King of Spain v. Oliver, 14 F. Cas. No. 7,813, Pet. C. C. 276.

Cal.—Leopold's Est., 67 Cal. 385, 7 P 766; Guilford's Est., 67 Cal. 380, 7 P 763.

La.—Rabasse's Succ., 47 La. Ann. 1452, 17 S 867, 49 AmSR 433.

Mo.—King of Prussia v. Kuepper, 22 Mo. 550, 66 AmD 639.

N. Y.—Republic of Mexico v. De Arrangois, 11 HowPr 1 [aff 12 N. Y. Super. 634, 11 HowPr 576].

53. Mixed actions see Actions § 13.

Real actions defined see Actions § 20; and generally Real Actions [33 Cyc 1541].

54. Coke Litt. 129b; Doe v. Davis, 5 U. C. Q. B. O. S. 494.

55. Barrett v. Kelly, 31 Tex. 476. In White v. Sabariego, 23 Tex. 243, 246, the court said: "The question, therefore, as we have said, must be determined by the rule of the common law. However the law upon this subject may have been modified or changed in some of the states, by their constitutions, statutes and judicial decisions (Rouche v. Williamson, 25 N. C. 141; Bouv. Law Dict., title 'Alien'), there is no doubt, that the well settled doctrine of the common law of England is that an alien cannot maintain a real or mixed action. It is so expressly laid down in books of undoubted authority. Co. Litt. 129; Shep. Touchstone 204. And the plea of alienage is recognized as a good plea, to the disability of the person, by the common-law authorities. Id.; Roscoe, on Real Actions, 197; Lit. sec. 198; Langdon v. Potter, 11 Mass. 313; Dennie v. Harris, 9 Pick. (Mass.) 364; Harvard College v. Amory, 9 Pick. (Mass.) 446. The plea that the plaintiff is an alien, interposed to a real action, goes in general to defeat the right of action altogether, upon the ground of public policy, which denies the right of an alien to inherit or hold lands. Hardy v. De Leon, 5 Tex. 211, and cases cited. The law will not aid him to recover land to which he can acquire only a defeasible title, and which he cannot hold against the government." This case has not, however, been followed in Texas in the later cases. See infra note 56.

[a] **Cause for abatement of action.**—(1) At common law if plaintiff is an alien, named at the commencement of suit, it is a cause for abatement. Levine v. Taylor, 12 Mass. 8; Hutchinson v. Brock, 11 Mass. 119; Ainslie v. Martin, 9 Mass. 454; Martin v. Woods, 9 Mass. 377; Sewall v. Lee, 9 Mass. 363. (2) But such disability occurring after action brought merely suspends the right to prosecute. Levine v. Taylor, 12 Mass. 8; Hutchinson v. Brock, 11 Mass. 119.

56. U. S.—Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Airhart v. Massieu, 98 U. S. 491, 25 L. ed. 213 (law of Texas); Jones v. McMasters, 20 How. 8, 15 L. ed. 805; Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666; Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142; Shea v. Nilima, 133 Fed. 209, 66 CCA 263; Lohmann v. Helmer, 104 Fed. 178; Bonaparte v. Camden, etc., R. Co., 3 F. Cas. No. 1,617, Baldw. 205. Compare Fisher v. Harnden, 9 F. Cas. No. 4,819, 1 Paine 55 [rev 1 Wheat. 300, 4 L. ed. 96].

Ala.—Jinkins v. Noel, 3 Stew. 60.

Cal.—Norris v. Hoyt, 18 Cal. 217; Peo. v. Folsom, 5 Cal. 373; Ramires v. Kent, 2 Cal. 558.

Kan.—Omnium Inv. Co. v. North American Trust Co., 65 Kan. 50, 68 P 1089.

Md.—McCreery v. Allender, 4 Harr. & M. 409. But see Guyer v. Smith, 22 Md. 239, 85 AmD 650 (where this rule was doubted).

Mass.—Scanlon v. Wright, 13 Pick. 523, 25 AmD 344. And see Waugh v. Riley, 8 Metc. 290. But see cases supra note 55.

Mo.—Utassy v. Giedinghagen, 132 Mo. 53, 33 SW 444.

Nev.—Courtney v. Turner, 12 Nev. 345.

N. J.—Den v. Brown, 7 N. J. L. 305.

N. Y.—Ford v. Harrington, 16 N. Y. 285; Overing v. Russell, 32 Barb. 263; Peck v. Young, 26 Wend. 613; Young v. Peck, 21 Wend 389; Bradstreet v. Oneida County, 13 Wend. 546; Jackson v. Britton, 4 Wend. 507; Jackson v. Lunn, 3 Johns. Cas. 109.

N. C.—Rouche v. Williamson, 25 N. C. 141. But see Barges v. Hogg, 2 N. C. 485 (dictum).

Tex.—Gray v. Kauffman, 32 Tex. 65, 17 SW 513; Ortiz v. De Benavides, 61 Tex. 60; Sabriego v. White, 30 Tex. 576; Williams v. Bennett, 1 Tex. Civ. A. 498, 20 SW 856. But see cases supra note 55.

Utah.—Wilson v. Triumph Cons. Min. Co., 19 Utah 66, 56 P 300, 75 AmSR 718.

Va.—Farley v. Shippen, Wythe 135.

N. S.—Williams v. Myers, 2 N. S. Dec. 157.

See also Doe v. Dickson, 2 U. C. Jur. 326.

[a] **Reason of rule.**—In Bradstreet v. Oneida County, 13 Wend. (N. Y.) 546, 548, the court said: "If an alien may take and hold real estate against every person, he may do so because he has a right in the property, which the laws guarantee to him. It is his as against other individuals; if they attempt to turn him out, or disturb his possession, he may defend himself, by virtue of the estate which he has. But suppose some person, by force or fraud, obtains possession; if the plea of alien friend is a bar, the intruder may enjoy the fruits of his improper conduct with impunity. The law cannot be so unjust. . . . If it is the property of the alien, against everybody but the government, he has a right to the use of it; and if necessary to prosecute for it, surely the right to prosecute is necessarily consequent upon his right to its enjoyment."

[b] **Under the Mexican laws** an alien could not maintain an action to recover land in Texas. Holliman v. Peebles, 1 Tex. 673.

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ble title.[57] Since an alien cannot, at common law, take any title by descent, he cannot recover on a title based on descent.[58]

Protection of statutory or treaty rights. Where an alien is permitted by statute or treaty to take and hold land, he may of course maintain actions for its recovery or protection.[59]

Ejectment and trespass distinguished. Even where an alien cannot maintain ejectment to recover land, he may nevertheless sue in trespass quare clausum fregit for a trespass upon land in his possession.[60]

Partition. It seems that the title of an alien as a tenant in common, although not valid as against the state, will enable him to sue for partition.[61]

Ejectment and trespass distinguished. Even an alien mortgagee is entitled in equity to enforce the sale of the mortgaged premises for the payment of the debt secured by the mortgage.[62]

[§ 39] c. **Personal Actions.** At common law aliens are permitted to maintain personal actions,[63] such as actions ex contractu,[64] or for the recovery of money or other personal property,[65] and actions ex delicto, such as actions for libel,[66] or slander,[67] or for personal injuries,[68] or an action on the case for

57. Omnium Inv. Co. v. North American Trust Co., 65 Kan. 50, 54, 68 P 1089 (where the court said: "We are unable to distinguish upon principle between the right of an alien to recover the possession of land when it holds the legal title, and its right to recover the legal title and possession as against a wrong-doer when it holds the equitable title").

58. Siemssen v. Bofer, 6 Cal. 250; Walker v. Potomac Ferry Co., 10 D. C. 440.

As to right of inheritance see supra §§ 26-30.

59. Bonaparte v. Camden, etc., R. Co., 3 F. Cas. No. 1,617, Baldw. 205; Den v. Brown, 7 N. J. L. 305; Ortiz v. De Benavides, 61 Tex. 60; White v. Sabariego, 23 Tex. 243.

60. Barges v. Hogg, 2 N. C. 485.

61. Scharpf v. Schmidt, 172 Ill. 255, 50 NE 182; Schultze v. Schultze, 144 Ill. 290, 33 NE 201, 36 AmSR 432, 19 LRA 90; Roberts v. Knights, 7 Allen (Mass.) 449; Scanlan v. Wright, 13 Pick. (Mass.) 523, 25 AmD 344; Nolan v. Command, 11 NYCivProc 295; Cryer v. Andrews, 11 Tex. 170. See also Partition [30 Cyc 200].

62. Hughes v. Edwards, 9 Wheat. (U. S.) 489, 497, 6 L. ed. 142 (where it was said that in such a foreclosure proceeding "the alienage of the mortgagee, if he be a friend, can, upon no principle of law or equity, be urged against him"); Craig v. Radford, 3 Wheat. (U. S.) 594, 4 L. ed. 467; Richmond v. Milne, 17 La. 312, 36 AmD 613; Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370.

63. U. S.—Airhart v. Massieu, 98 U. S. 491, 25 L. ed. 213; Carlisle v. U. S., 16 Wall. 147, 21 L. ed. 426; U. S v. O'Keefe, 11 Wall. 178, 20 L. ed. 131; Ewing v. St. Louis, 5 Wall. 413, 18 L. ed. 657; Breedlove v. Nicolet, 7 Pet. 413, 8 L. ed. 731; Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142; Hepburn v. Dunlop, 1 Wheat. 179, 4 L. ed. 65; Mason v. The Blaireau, 2 Cranch 240, 2 L. ed. 266; Shea v. Nilima, 133 Fed. 209, 66 CCA 263; Bahuaud v. Bize, 105 Fed. 485; Vetaloro v. Perkins, 101 Fed. 393; Creagh v. Equitable L. Assur. Soc., 88 Fed. 1; Jenns v. Landes, 85 Fed. 801; Creagh v. Equitable L. Assur. Soc., 83 Fed. 849; Stalker v. Pullman's Palace-Car Co., 81 Fed. 989; De Franca v. Howard, 21 Fed. 774; Bonaparte v. Camden, etc., R. Co., 3 F. Cas. No. 1,617, Baldw. 205; Coffeen v. Brunton, 5 F. Cas. No. 2,946, 4 McLean 516; De Laveaga v. Williams, 7 F. Cas. No. 3,759, 5 Sawy. 573; The Jerusalem, 13 F. Cas. No. 7,293, 2 Gall. 191; Lorway v. Lousada, 15 F. Cas. No. 8,517, 1 Lowell 77; Otteridge v. Thompson, 18 F. Cas. No. 10,618, 2 Cranch C. C. 108; St. Luke's Hospital v. Barclay, 21 F. Cas. No. 12,241, 3 Blatchf. 259; Society for Propagation of Gospel v. Wheeler, 22 F. Cas. No. 13,156, 2 Gall. 105; Taylor v. Carpenter, 23 F. Cas. No. 13,785, 2 Woodb. & M. 1, 23 F. Cas. No. 13,784, 3 Story 458; Wise v. Resler, 30 F. Cas. No. 17,911, 2 Cranch C. C. 132; Philippine Sugar Est. Dev. Co. v. U. S., 39 Ct. Cl. 225; Brown's Case, 5 Ct. Cl. 571. See also Montalet v. Murray, 4 Cranch, 46, 2 L. ed. 545.

Ala.—Luke v. Calhoun County, 52 Ala. 115; Sidgreaves v. Myatt, 22 Ala. 617.

Cal.—Pugh v. Gillam, 1 Cal. 485.

Conn.—Apthorp v. Backus, Kirby 407, 1 AmD 26.

D. C.—Johnson v. Elkins, 1 App. 430.

Ga.—Augusta R. Co. v. Glover, 92 Ga. 132, 18 SE 406.

Ill.—Kellyville Coal Co. v. Petraytis, 195 Ill. 215, 63 NE 94, 88 AmSR 191; Zacharie v. Godfrey, 50 Ill. 186, 99 AmD 506.

Iowa.—Romano v. Capital City Brick, etc., Co., 125 Iowa 591, 101 NW 437, 106 AmSR 323, 68 LRA 132, 2 AnnCas 678 and note.

Kan.—Omnium Inv. Co. v. North American Trust Co., 65 Kan. 50, 68 P 1089.

La.—Richmond v. Milne, 17 La. 312, 36 AmD 613 (under the laws of Scotland).

Md.—Dumoussay v. Delevit, 3 Harr. & M. 151.

Mass.—Mulhall v. Fallon, 176 Mass. 266, 57 NE 386; Johnston v. Trade Ins. Co., 132 Mass. 432; Peabody v. Hamilton, 106 Mass. 217; Roberts v. Knights, 7 Allen 449; Waugh v. Riley, 8 Metc. 290; Scanlan v. Wright, 13 Pick. 523, 25 AmD 344; Barrell v. Benjamin, 15 Mass. 354; Levine v. Taylor, 12 Mass. 8; Rea v. Hayden, 3 Mass. 24.

Minn.—Stees v. Leonard, 20 Minn. 494.

Mo.—Greenia v. Greenia, 14 Mo. 526.

N. H.—Emerson v. Shaw, 57 N. H. 223.

N. J.—Den v. Brown, 7 N. J. L. 305.

N. Y.—Crashley v. Press Pub. Co., 179 N. Y. 27, 71 NE 258, 1 AnnCas 196; Dewitt v. Buchanan, 54 Barb. 31; McArthur v. Bloom, 9 N. Y. Super. 151; Lemoine v. Gauton, 2 E. D. Smith 343; Belden v. Wilkinson, 33 Misc. 659, 68 NYS 205; Lister v. Wright, 2 Hill 320; Johnson v. Dalton, 1 Cow. 543, 13 AmD 564; Clarke v. Morey, 10 Johns. 69; Taylor v. Carpenter, 11 Paige 292, 42 AmD 114 [aff 2 Sandf. Ch. 611]; Coats v. Holbrook, 2 Sandf. Ch. 586, 3 NYLegObs 404.

N. C.—Rooker v. Crinkley, 113 N. C. 73, 18 SE 56; Barges v. Hogg, 2 N. C. 485; Cruden v. Neale, 2 N. C. 338; Ray v. McCulloch, 1 N. C. 543; Hamiltons v. Eaton, 1 N. C. 83.

Pa.—Knight v. West Jersey R. Co., 108 Pa. 250, 56 AmR 200.

Tex.—Franco-Texan Land Co. v. Bousselet, 70 Tex. 422, 7 SW 761; Franco-Texan Land Co. v. Chaptive, 3 SW 31. See also Rose v. Governor, 24 Tex. 496; State v. Burnett, 9 Tex. 48.

Wis.—Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 658, 106 NW 821, 115 AmSR 1063, 15 LRANS 1045 [cit Cyc].

Eng.—Ramkissenseat v. Barker, 1 Atk. 51, 26 Reprint 34; Pisani v. Lawson, 6 Bing. N. Cas. 90, 37 ECL 524, 133 Reprint 35; Calvin's Case, 7 Coke 2a, 17, 77 Reprint 379, 2 ERC 575; Openheimer v. Levy, Str. 1082, 93 Reprint 1045; 1 Blackstone Comm. 372; Comyns Dig. 428; Jacob L. D.

Ont.—Wood v. Campbell, 3 U. C. Q. B. 269.

Que.—Pabst Brewing Co. v. Ekers, 21 Que. Super. 545.

See Mitchell v. Wells, 37 Miss. 235.

[a] **Reason of rule.**—(1) Personal actions, being transitory, are not limited to any particular country. Taylor v. Carpenter, 23 F. Cas. No. 13,785, 2 Woodb. & M. 1 [cit Story Confl. L. 450; 3 Blackstone Comm. 249]. (2) Hence an alien, like any other person, may bring suit in personam against any person over whom jurisdiction can be obtained. Sidgreaves v. Myatt, 22 Ala. 617; Peabody v. Hamilton, 106 Mass. 217.

64. Barrell v. Benjamin, 15 Mass. 354; Melan v. Fitzjames, 1 B. & P. 138, 126 Reprint 822; Wells v. Williams, 1 Ld. Raym. 282, 91 Reprint 1086.

[a] **Early case.**—In Bradstreet v. Oneida County, 13 Wend. (N. Y.) 546, 547, the court said: "One of the earliest cases . . . is found in 2 Dyer 2b, in the 6th year of Henry 8. An alien, living in France, brought a writ of debt in the common pleas. The defendant pleaded that the plaintiff was born out of the kingdom. It was held that he might maintain a personal action, if there be no war."

65. La.—Richmond v. Milne, 17 La. 312, 36 AmD 613 (under the laws of Scotland).

Md.—Dumoussay v. Delevit, 3 Harr. & M. 151.

Mo.—Greenia v. Greenia, 14 Mo. 526.

N. Y.—Dewitt v. Buchanan, 54 Barb. 31.

N. C.—Hamiltons v. Eaton, 1 N. C. 83.

Tex.—Franco-Texan Land Co. v. Chaptive, 3 SW 31.

Ont.—Milne v. Moore, 24 Ont. 456.

See also 1 Blackstone Comm. 372; Comyns Dig. 428; Jacob L. D.

[a] **A distributive share of the personal property, to which an alien may be entitled as next of kin,** may be recovered by him. Bradwell v. Weeks, 1 Johns. Ch. (N. Y.) 206 (holding that the right of recovering such property may be suspended during a war, the person in actual possession being constituted a trustee for his benefit until the return of peace); Page v. Pendleton, Wythe (Va.) 127. See also Milne v. Moore, 24 Ont. 456 [foll In re Klœbe, 28 Ch. D. 175] (to the effect that, in the administration of the Ontario estate of a deceased domiciled abroad, foreign creditors are entitled to dividends pari passu with Ontario creditors).

66. Crashley v. Press Pub. Co., 179 N. Y. 27, 71 NE 258, 1 AnnCas 196; Pisani v. Lawson, 6 Bing. N. Cas. 90, 37 ECL 524, 133 Reprint 35.

67. Otteridge v. Thompson, 18 F. Cas. No. 10,618, 2 Cranch C. C. 108; Taylor v. Carpenter, 23 F. Cas. No. 13,785, 2 Woodb. & M. 1; Sidgreaves v. Myatt, 22 Ala. 617; Bacon Abr.; Comyns Dig. 428. But see Lister v. Wright, 2 Hill (N. Y.) 320 (where it was doubted whether an alien could sue an alien for slander spoken in a foreign country).

68. Luke v. Calhoun County, 52 Ala. 115; Dewitt v. Buchanan, 54 Barb. (N. Y.) 31 (holding that one alien may sue another alien in a state court for an assault and battery committed

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imitating and using a trade-mark.[69]

Statutory remedies are likewise open to aliens equally with citizens,[70] unless it is otherwise expressly provided.[71]

[§ 40] **d. Defenses—(1) In General.** A defendant may interpose the same matters of defense against alien plaintiffs as against citizen plaintiffs.[72] Hence it has been held that he may set up a discharge in insolvency;[73] or payment,[74] as a valid defense in an action brought against him by an alien.

[§ 41] **(2) Alienage of Plaintiff.** The defense that plaintiff is an alien, where available, is considered an affirmative defense to be pleaded;[75] and is regarded as a plea in abatement and not in bar.[76]

Form of plea. The plea of alienage should contain a direct averment that the person is an alien and that he was born out of the allegiance of the state and within the allegiance of a foreign state.[77]

[§ 42] **2. Capacity to Be Sued—a. In General.** All persons who are found within the limits of government, whether their residence is permanent or temporary, are to be deemed so far citizens or subjects thereof that the right of jurisdiction, civil and criminal, will attach to them;[78] and, although an alien is not within the territorial limits of a state, still, if he owns property there, the local courts will have jurisdiction as to such property.[79]

[§ 43] **b. Civil Actions.** An alien may be sued in the proper court—federal, state, or territorial[80]—in an action in personam, whenever the court properly obtains jurisdiction of his person,[81] or in a proceeding in rem when the alien's property is within the jurisdiction of the court.[82] Thus an

in a foreign country); Squilache v. Tidewater Coal, etc., Co., 64 W. Va. 337, 62 SE 446. In Gardner v. Thomas, 14 Johns. (N. Y.) 134, 7 AmD 445, the action was for a tort committed on the high seas on board a British vessel, both parties being British subjects; it originated in a justice's court where plaintiff had judgment. The court held that, although it might take cognizance of torts committed on the high seas on board foreign vessels, when both parties were foreigners, yet on principles of policy it would often rest in the sound discretion of the court to afford jurisdiction, or not, according to the circumstances of each case. On this ground the judgment of the justice was reversed.

69. Taylor v. Carpenter, 23 F. Cas. No. 13,785, 2 Woodb. & M. 1; Lemoine v. Gauton, 2 E. D. Smith (N. Y.) 343; Taylor v. Carpenter, 11 Paige (N. Y.) 292, 42 AmD 114 [aff 2 Sandf. Ch. 611]; Coats v. Holbrook, 2 Sandf. Ch. (N. Y.) 586. See also generally Trade-Marks and Trade-Names [38 Cyc 890 text and note 77].

70. Romano v. Capital City Brick, etc., Co., 125 Iowa 591, 593, 101 NW 437, 106 AmSR 323, 68 LRA 132, 2 AnnCas 678 (where the court said: "It would certainly strike the profession in this State as most extraordinary and unprecedented if we should hold that a nonresident alien could not, in the absence of express statutory authority, avail himself of a statutory remedy in our courts, such as that of an attachment or a garnishment proceeding"). But see Bauer v. Dinning, 9 Que. Pr. 335 (qui tam action).

[a] **The right of action for injuries to an employee** given by N. Y. Labor Law § 200, is not limited to citizens, and an alien may sue thereunder in a United States court, in view of Judicial Code §§ 28, 38 (Act March 3, 1911, c 231, 36 U. S. St. at L. 1094, 1098); Lewicki v. Wiardi, 213 Fed. 647.

71. Rose v. Governor, 24 Tex. 496.

72. Milliken v. Barrow, 55 Fed. 148. And see cases infra notes 73, 74. But compare Com. v. Beaumarchais, 3 Call (7 Va.) 122; Page v. Pendleton, Wythe (Va.) 127.

73. Milliken v. Barrow, 55 Fed. 148; Letchford v. Convillon, 20 Fed. 608; Von Glahn v. Varrenne, 28 F. Cas. No. 16,994, 1 Dill. 515. See also Insolvency [22 Cyc 1346 text and note 16]. But see Hobblethwaite v. Batturs, 1 Miles (Pa.) 82 (where it was held that a discharge under the Maryland insolvent law does not bar a recovery on a cause of action existing before the discharge, where at the time of the contract plaintiff was an alien and a foreign subject).

74. Court v. Vanbibber, 3 Harr. & M. (Md.) 140. But see Hamiltons v. Eaton, 1 N. C. 83 (where it was held that debts due to British subjects and paid into the public treasury compulsorily by an act of assembly may notwithstanding be recovered of the debtor by the creditor under the provisions of the treaty of peace with Great Britain in 1783). To same effect Page v. Pendleton, Wythe (Va.) 127.

75. State v. Burnett, 9 Tex. 48.

76. U. S.—The Bee, 3 F. Cas. No. 1,219, 1 Ware 336; Rateau v. Bernard, 20 F. Cas. No. 11,579, 3 Blatchf. 244.

Conn.—Brinley v. Avery, Kirby 25.

Md.—Shivers v. Wilson, 5 Harr. & J. 130, 9 AmD 497; Dumoussay v. Delevit, 3 Harr. & M. 151.

Mass.—Martin v. Woods, 9 Mass. 377; Sewall v. Lee, 9 Mass. 363.

Minn.—McNair v. Toler, 21 Minn. 175.

N. H.—Educational Soc. etc. v. Varney, 54 N. H. 376.

N. J.—Coxe v. Gulick, 10 N. J. L. 328.

N. Y.—Burnside v. Matthews, 54 N. Y. 78. But see Dewitt v. Buchanan, 54 Barb. 31 (where it was held that an objection to the maintenance of an action in which both plaintiffs and defendants were aliens, but in which defendant was served in the jurisdiction, should be interposed by a motion and not by answer, so that any facts warranting the court, in its discretion, to entertain the action might be made to appear by affidavit).

Tex.—Lee v. Salinas, 15 Tex. 495; Hardy v. De Leon, 5 Tex. 211. But see White v. Sabariego, 23 Tex. 243 (holding that, where an action is brought by an alien to recover land, the facts, if any exist, which bring him within the exception to the rule that an alien cannot sue for land must be set forth in his petition to enable him to maintain his action).

Wash.—State v. Spokane County Super. Ct., 55 Wash. 215, 216, 104 P 200 [cit Cyc].

Eng.—Burk v. Brown, 2 Atk. 397, 26 Reprint 640; Comyns Dig. 428.

See also Abatement and Revival § 185.

[a] **Where plaintiff proves himself an alien,** it has been held that the defense may be taken advantage of without a plea in abatement. Ennas v. Franklin, 4 S. C. L. 398.

[b] **Replication setting up naturalization.**—To the general plea of alien friend, made by the tenant, naturalization may be replied by the demandants; so also that, although born within the allegiance of the King of England, and without the allegiance of the commonwealth, they were inhabitants of this state at the ratification of the treaty of peace, or that they are citizens of some other of the United States; or British subjects may confess and avoid the plea of alienage by bringing themselves within the treaty of 1794. Ainslie v. Martin, 9 Mass. 454.

77. Coxe v. Gulick, 10 N. J. L. 328.

78. The Exchange v. McFaddon, 7 Cranch (U. S.) 116, 3 L. ed. 287; Molyneux v. Seymour, 30 Ga. 440, 76 AmD 662 [cit Story Confl. L. §§ 539, 543, 550]; Peabody v. Hamilton, 106 Mass. 217; State v. Bordentown, 32 N. J. L. 193; Johnson v. Dalton, 1 Cow. (N. Y.) 543, 13 AmD 564. See generally Courts [11 Cyc 666].

79. U. S.—Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

Ga.—Molyneux v. Seymour, 30 Ga. 440, 76 AmD 662 [cit Story Confl. L. §§ 539, 543, 550].

Me.—Smith v. Eaton, 36 Me. 298, 58 AmD 746; Lovejoy v. Albee, 33 Me. 414, 54 AmD 630 [cit Story Confl. L. §§ 21, 539, 543, 546, 549, 550, 556].

N. Y.—Olcott v. Maclean, 10 Hun 277 [rev on other grounds 73 N. Y. 223].

Eng.—Anonymous, 1 Atk. 19, 26 Reprint 13; Warrender v. Warrender, 9 Bligh N. S. 89, 5 Reprint 1227.

Ont.—Buffalo, etc., R. Co. v. Hemmingway, 22 U. C. Q. B. 562.

Situs of property as conferring jurisdiction see generally Attachment [4 Cyc 455]; Courts [11 Cyc 667]; Garnishment [20 Cyc 1036]; Judgments [23 Cyc 1366].

[a] **Personal property** has no locality other than that of the person having the same in possession, ownership, custody, or control. Molyneux v. Seymour, 30 Ga. 440, 76 AmD 662 [cit Story Confl. L. §§ 539, 543, 550].

80. See Admiralty; Ambassadors and Consuls; Courts [11 Cyc 666, 865].

81. Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 658, 106 NW 821, 115 AmSR 1063, 15 LRANS 1045 [aff 208 U. S. 570, 28 SCt 337, 52 L. ed. 625, and cit Cyc] (per Cassoday, C. J.).

[a] **Jurisdiction may be acquired** (1) by appearance of alien (Olcott v. Maclean, 73 N. Y. 223), (2) or by personal service of process upon him (Russ v. Mitchell, 11 Fla. 80). (3) But extraterritorial service of process upon alien defendants who have not voluntarily appeared is ineffectual to bring them within the jurisdiction of the court, or to make them parties to the suit. McHenry v. New York, etc., R. Co., 25 Fed. 65. See Process [32 Cyc 471].

82. U. S.—St. Luke's Hospital v. Barclay, 21 F. Cas. No. 12,241, 3 Blatchf. 259.

Fla.—Russ v. Mitchell, 11 Fla. 80.

Ill.—Seymour v. Bailey, 66 Ill. 288.

Md.—Field v. Adreon, 7 Md. 209.

Mass.—Waugh v. Riley, 8 Metc. 290; Barrell v. Benjamin, 15 Mass. 354.

Minn.—McNair v. Toler, 21 Minn. 175.

Mo.—Greenia v. Greenia, 14 Mo. 526.

Nebr.—Peo. v. McClay, 2 Nebr. 7.

N. Y.—Olcott v. Maclean, 73 N. Y. 223; Overing v. Russell, 32 Barb. 263; Clarke v. Morey, 10 Johns. 69; Scott v. Thorpe, 1 Edw. 512.

N. C.—Rooker v. Crinkley, 113 N. C. 73, 18 SE 56.

Tex.—Franco-Texan Land Co. v.

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alien may be sued for assault and battery,[83] and upon his contracts, wherever made;[84] he may also be proceeded against as an absconding debtor,[85] as well as to recover property assigned by him, as a bankrupt, in fraud of the Bankruptcy Act.[86] So it has been held that the alienage of a mortgagor is no defense to a writ of entry brought by the mortgagee to foreclose the equity of redemption.[87] The liability of an alien to be sued carries with it the right to use all the means and appliances of defense permitted to citizens who are sued.[88] He may employ an attorney to conduct his defense;[89] he is also entitled to the benefit of bankruptcy[90] and exemption laws;[91] and he may plead the statute of limitations.[92]

[§ 44] **c. Criminal Prosecution[93]—(1) In General.** Aliens domiciled in a country owe a local and temporary allegiance to the government of that country;[94] they are bound to obey the general laws of the country, and may be prosecuted in criminal proceedings for violations of them.[95] Thus it has been held that they may be prosecuted for homicide,[96] treason,[97] or for disinterring and removing from the place of burial the remains of any deceased person without a permit.[98] If no state of war exists, an alien, it seems, is punishable for crimes committed by him even though he acted under the command of his sovereign or his superior military officers, or his act was subsequently approved by them.[99]

Ambassadors, etc. The rule as to the criminal liability of aliens is of course subject to the exception that foreign sovereigns, members of their suites, ambassadors, and accredited public ministers and diplomatic agents of foreign countries are exempt from criminal prosecutions for acts committed within the countries to which they are credited.[1]

[§ 45] **(2) Criminal Procedure.**[2] Alien criminals may be proceeded against according to the

Chaptive, 3 SW 31. Compare Lee v. Salinas, 15 Tex. 495.

Eng.—Bouvier L. D. [cit Calvin's Case, 7 Coke 2a, 17, 77 Reprint 379, 2 ERC 575].

Ont.—Buffalo, etc., R. Co. v. Hemmingway, 22 U. C. Q. B. 562.

See also Smith v. Eaton, 36 Me. 298, 58 AmD 746 [cit Lovejoy v. Albee, 33 Me. 414, 54 AmD 630]; Courtney v. Turner, 12 Nev. 345.

[a] **An alien enemy** may be sued. Seymour v. Bailey, 66 Ill. 288. See War [40 Cyc 327].

[b] **Arrest proceedings.**—(1) An alien passing through the jurisdiction may be arrested on a capias ad respondendum upon a cause of action arising in a foreign country. In the absence of proof it will be assumed that the foreign law is the same as that here. Macaulay v. O'Brien, 5 B. C. 510. (2) A defendant cannot rely on a change of residence to a foreign country so as to avoid the law of arrest to which he was subject at the time he incurred the debt upon which the action is brought, when that change of residence has been effected by a fraudulent flight to avoid arrest. Kersterman v. McLellan, 10 Ont. Pr. 122. See Arrest [3 Cyc 916].

[c] **Attachment proceedings** are within the rule that aliens may be sued. Field v. Adreon, 7 Md. 209; Olcott v. Maclean, 73 N. Y. 223 (where it was held that an unnaturalized alien, residing and doing business in the state, is, for commercial purposes, a citizen in contemplation of the attachment laws).

83. Dewitt v. Buchanan, 54 Barb. (N. Y.) 31 (where it appeared that the assault had been committed in a foreign country).

84. Barrell v. Benjamin, 15 Mass. 354.

[a] **Specific performance** (1) of a contract to purchase land may be decreed. Milliken v. Barrow, 55 Fed. 148; Scott v. Thorpe, 1 Edw. (N. Y.) 512 (where it was held that alienage of defendant is no defense in such suits). (2) And it is not competent for a party who goes in under a contract to purchase to avail himself of the defense of alienage. Williams v. Myers, 2 N. S. Dec. 157. See also Hepburn v. Dunlop, 1 Wheat. (U. S.) 179, 4 L. ed. 65, 3 Wheat. 231, 4 L. ed. 377; Harney v. Donohoe, 97 Mo. 141, 10 SW 191. But compare Cutten v. McFarlane, 1 N. S. Dec. 468 (where it was held that plaintiff, as an alien, being disqualified from taking a bill of sale or transfer of a British vessel, under 17 & 18 Vict. c 104, and the agreement sued on being an attempt to evade the statute, the agreement could not be enforced).

85. Field v. Adreon, 7 Md. 209.

86. Olcott v. Maclean, 73 N. Y. 223 (holding that alienage of defendant is no defense in such an action, where it appears that the suit was brought and the property attached in the state, and jurisdiction of defendant's person acquired by his personal appearance).

87. Waugh v. Riley, 8 Metc. (Mass.) 290.

88. Seymour v. Bailey, 66 Ill. 288.

[a] **As against a mere naked trespasser** an alien will be protected in the possession of his public lands the same as a citizen. Courtney v. Turner, 12 Nev. 345.

89. Russ v. Mitchell, 11 Fla. 80; McNair v. Toler, 21 Minn. 175.

[a] **The court may appoint counsel** to appear for, and defend a suit against, an alien. Russ v. Mitchell, 11 Fla. 80.

90. In re Boynton, 10 Fed. 277. See also Bankruptcy [5 Cyc 281].

91. People v. McClay, 2 Nebr. 7 (where it was held that a resident alien, whose family is not in this state, is as much entitled to the benefit of the law giving exemption from sale of his personal property, taken upon execution against him, as is a citizen, if he came here with a settled purpose of abandoning his foreign residence, and, on his arrival here, fixed upon this state as his home, and intends to remove his family here). See also generally Exemptions [18 Cyc 1408 text and note 19]; Homesteads [21 Cyc 470 text and note 17].

92. Overing v. Russell, 32 Barb. (N. Y.) 263. See generally Limitations of Actions [25 Cyc 1230, 1231].

93. See generally Criminal Law [12 Cyc 70].

94. Carlisle v. U. S., 16 Wall. (U. S.) 147, 21 L. ed. 426; Homestead Case, 1 Pa. Dist. 785. See supra § 8 text and note 40.

95. U. S.—Barrington v. Missouri, 205 U. S. 483, 27 SCt 582, 51 L. ed. 890; Storti v. Massachusetts, 183 U. S. 138, 22 SCt 72, 46 L. ed. 120; Ornelas v. Ruiz, 161 U. S. 502, 16 SCt 689, 40 L. ed. 787; Mali v. Common Jail, 120 U. S. 1, 7 SCt 385, 30 L. ed. 565; U. S. v. Diekelman, 92 U. S. 520, 23 L. ed. 742; Carlisle v. U. S., 16 Wall. 147, 21 L. ed. 426; Kempe v. Kennedy, 5 Cranch 173, 3 L. ed. 70; U. S. v. Severino, 125 Fed. 949; U. S. v. Ah Won, 97 Fed. 494; In re Breen, 73 Fed. 458; U. S. v. Ah Poing, 69 Fed. 972; In re Wong Yung Quy, 2 Fed. 624, 6 Sawy. 442; U. S. v. Ravara, 27 F. Cas. No. 16,122, 2 Dall. 297.

Cal.—Peo. v. Chin Mook Sow, 51 Cal. 597.

Mo.—State v. Neibekier, 184 Mo. 211, 83 SW 523.

N. Y.—Peo. v. McLeod, 1 Hill 377, 25 Wend. 483, 37 AmD 328.

N. C.—State v. Antonio, 11 N. C. 200.

Pa.—Com. v. Kosloff, 5 Serg. & R. 545.

Tex.—Ex p. Martinez, (Cr. A.) 145 SW 959.

Eng.—In re Burbidge, [1902] 1 Ch. 426; Rex v. Esop, 7 C. & P. 456, 32 ECL 705.

Ont.—In re Sault Ste. Marie Provincial Election, 10 Ont. L. 356, 5 OntWR 782; Reg. v. School, 26 U. C. Q. B. 212; Reg. v. Lynch, 26 U. C. Q. B. 208; Reg. v. McMahon, 26 U. C. Q. B. 195.

See Luke v. Calhoun County, 52 Ala. 115 (per Brickell, C. J.).

In People v. McLeod, 1 Hill (N. Y.) 377, 406, 25 Wend. 483, 37 AmD 328, Cowen, J., said: "An alien, in whatever manner he may have entered our territory, is, if he commit a crime while here, amenable to our criminal law. (Lord Mansfield, in Campbell v. Hall, Cowp. 204, 208, 98 Reprint 1045; Vattel, B. 2, ch. 8, § 101, 2: Story's Confl. of L. 518, 2d ed) Nay, says Locke, though he were an Indian, and never heard of our laws. (Locke on Civ. Gov., B. 2, ch. 2, § 9)."

[a] **Ignorance of law as defense.**—It is no defense on behalf of a foreigner, charged in England with a crime committed there, that he did not know that he was doing wrong, the act not being an offense in his own country. But, although it is not a defense in law, yet it is a matter to be considered in mitigation of punishment. Rex v. Esop, 7 C. & P. 456, 32 ECL 705. To same effect Cambioso v. Maffet, 4 F. Cas. No. 2,330, 2 Wash. C. C. 98.

96. Peo. v. McLeod, 1 Hill (N. Y.) 377, 25 Wend. 483, 37 AmD 328.

97. Carlisle v. U. S., 16 Wall. (U. S.) 147, 21 L. ed. 426; Kempe v. Kennedy, 5 Cranch (U. S.) 173, 3 L. ed. 70; Homestead Case, 1 Pa. Dist. 785. But on this point see U. S. v. Villato, 2 Dall. (U. S.) 370, 1 L. ed. 419, 28 F. Cas. No. 16,622. See also Treason [38 Cyc 953].

98. In re Wong Yung Quy, 2 Fed. 624, 6 Sawy. 442 (under the California statute of April 1, 1878, making such an act a criminal offense).

99. Peo. v. McLeod, 1 Hill (N. Y.) 377, 25 Wend. 483, 37 AmD 328. This case involved a charge of murder committed during the hostilities in 1837 between citizens of New York and the military forces of Canada, arising out of the seizure of Navy Island by the former. The British government did not acquiesce in the decision of the New York court, which was rendered in habeas corpus proceedings, and the matter became a subject of diplomatic consideration between the British government and the federal government. Fortunately, on trial, defendant was acquitted, thereby most probably averting a declaration of war on the part of the British government.

1. See Ambassadors and Consuls § 23.

2. See Criminal Law [12 Cyc 70].

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same forms of procedure as are accorded to citizens. Thus, where procedure by information is authorized against citizens, the same form of procedure may be had against aliens.[3] The constitutional right to a jury trial may be claimed by an alien.[4-5]

VI. EXCLUSION AND EXPULSION

[§ 46] **A. Power to Exclude or Expel Aliens—1. In General.** According to the accepted maxims of international law, every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[6] The right to exercise this power at any time when, in the judgment of the government, the interests of the country require it cannot be granted away or restrained on behalf of anyone.[7] The same reasoning used in respect to the authority to exclude applies to the authority to expel;[8] and as a general proposition this must also be true of the privilege of transit.[9] An alien's right to remain in the territory of a foreign government is purely a political one and may be terminated at the will of such government,[10] and this, too, without notice to such alien of an intention to do so.[11]

[§ 47] **2. Power of Congress.** In the United States, control over aliens belongs exclusively to the political department of the government, and may be exercised either through treaties made by the president and senate, or through statutes enacted by congress.[12] The execution of the laws for

3. State v. Neibekier, 184 Mo. 211, 83 SW 523.

4–5. See Juries [24 Cyc 103].

Jury de medietate linguae see generally Juries [24 Cyc 95].

6. Tiaco v. Forbes, 228 U. S. 549, 33 SCt 585, 57 L. ed. 960; Low Wah Suey v. Backus, 225 U. S. 460, 32 SCt 734, 56 L. ed. 1165; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 SCt 456, 42 L. ed. 890; Wong Wing v. U. S., 163 U. S. 228, 16 SCt 977, 41 L. ed. 140; Lem Moon Sing v. U. S., 158 U. S. 538, 15 SCt 967, 39 L. ed. 1082; Lees v. U. S., 150 U. S. 476, 14 SCt 163, 37 L. ed. 1150; Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905; Ekiu v. U. S., 142 U. S. 651, 12 SCt 336, 35 L. ed. 1146; Chae Chan Ping v. U. S., 130 U. S. 581, 9 SCt 623, 32 L. ed. 1068; Edye v. Robertson, 112 U. S. 580, 5 SCt 247, 28 L. ed. 798; In re Trum, 199 Fed. 361; Ex p. Pouliot, 196 Fed. 437; U. S. v. Chu Hung, 179 Fed. 564; U. S. v. Tuck Lee, 120 Fed. 989; U. S. v. Lee Huen, 118 Fed. 442; In re Way Tai, 96 Fed. 484; In re Florio, 43 Fed. 114; U. S. v. Craig, 28 Fed. 795; In re Day, 27 Fed. 678; In re Wong Tuck, 11 Hawaii 600; Atty.-Gen. v. Cain, [1906] A. C. 542 [allowing app 10 Ont. L. 469, 6 Ont. WR 124]; Musgrove v. Chun Teeong Toy, [1891] A. C. 272; Papageorgiouv v. Turner, 37 N. B. 449, 1 ELR 387. See also 2 Ortolan Diplomatie de la Mer (4th ed) c 14 p 297; 1 Phillimore Int. L. (3d ed) c 10 § 220; 1 Vattel L. Nat. c 19 §§ 230, 231; Wharton Dig. Int. L. § 206.

[a] **In Canada persons of Chinese origin** occupy a peculiar condition respecting the right to enter Canada and to reside on its territory. The entry of a certain class is absolutely prohibited, while in other cases entrance into Canada and residence in or passage through the country is regulated. Wing Toy v. Canadian Pac. R. Co., 13 Que. K. B. 172, 4 Can. R. Cas. 410.

[b] **Delegation of power.**—"The Imperial Government might delegate those powers to the governor or the Government of one of the Colonies, either by royal proclamation which has the force of a statute . . . or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented." Atty.-Gen. v. Cain, [1906] A. C. 542.

7. Chinese Exclusion Case, 130 U. S. 581, 609, 9 SCt 623, 32 L. ed. 1068 (where Field, J., said: "The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract").

8. Bugajewitz v. U. S., 228 U. S. 585, 33 SCt 607, 57 L. ed. 978; Tiaco v. Forbes, 228 U. S. 549, 33 SCt 585, 57 L. ed. 960; Low Wah Suey v. Backus, 225 U. S. 460, 32 SCt 734, 56 L. ed. 1165; Chin Bak Kan v. U. S., 186 U. S. 193, 22 SCt 891, 46 L. ed. 1121; Li Sing v. U. S., 180 U. S. 486, 21 SCt 449, 45 L. ed. 634; Wong Wing v. U. S., 163 U. S. 228, 16 SCt 977, 41 L. ed. 140; Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905; Ex p. Pouliot, 196 Fed. 437; Haw Moy v. North, 183 Fed. 89, 105 CCA 381; Ex p. Hamaguchi, 161 Fed. 185; U. S. v. Foong King, 132 Fed. 107; U. S. v. Williams, 83 Fed. 997; In re Sing Lee, 54 Fed. 334; In re Lifieri, 52 Fed. 293; In re Wong Tuck, 11 Hawaii 600; Forbes v. Chuoco Tiaco, 16 Philippine 534.

Civil rights of alien enemies see War [40 Cyc 320].

[a] **In England** the only question that has ever arisen in regard to the power to expel aliens has been whether it could be exercised by the king without the consent of parliament. It was formerly exercised by the king, but in later times by parliament which passed several acts on the subject between 1792 and 1848. Musgrove v. Chun Teeong Toy, [1891] A. C. 272; In re Adam, 1 Moore P. C. 460, 12 Reprint 889; 1 Blackstone Comm. 260; 1 Chalmer Col. Op. 26; Chitty Prerog. Crown 49; 2 Coke Inst. 57; 34 Hansard Parl. Deb. (first series) 441, 445, 471, 1065–1071.

[b] **Deportation or expulsion is a police measure** having for its object the purging of the state of obnoxious foreigners. It is a sort of national disinfectant. Forbes v. Chuoco Tiaco, 16 Philippine 534.

9. Fok Young Yo v. U. S., 185 U. S. 296, 22 SCt 686, 46 L. ed. 917.

[a] **By the treaty between the United States and China,** 1894, the privilege of transit across the territory of the United States could only be enjoyed subject to such regulations by the government of the United States as might be necessary to prevent the privilege from being abused. Fok Young Yo v. U. S., 185 U. S. 296, 22 SCt 686, 46 L. ed. 917.

10. In re Wong Tuck, 11 Hawaii 600; Forbes v. Chuoco Tiaco, 16 Philippine 534.

11. In re Wong Tuck, 11 Hawaii 600.

12. Schwartz v. Adams, 228 U. S. 592, 33 SCt 609, 57 L. ed. 980; Bugajewitz v. Adams, 228 U. S. 585, 33 SCt 607, 57 L. ed. 978; Zakonaite v. Wolf, 226 U. S. 272, 33 SCt 31, 57 L. ed. 218; Pearson v. Williams, 202 U. S. 281, 26 SCt 608, 50 L. ed. 1029; U. S. v. Ju Toy, 198 U. S. 253, 25 SCt 644, 49 L. ed. 1040; U. S. v. Williams, 194 U. S. 279, 24 SCt 719, 48 L. ed. 979; Japanese Immigration Case, 189 U. S. 86, 23 SCt 611, 47 L. ed. 721; Lee Gon Yung v. U. S., 185 U. S. 306, 22 SCt 690, 46 L. ed. 921; Fok Young Yo v. U. S., 185 U. S. 296, 22 SCt 686, 46 L. ed. 917; Li Sing v. U. S., 180 U. S. 486, 21 SCt 449, 45 L. ed. 634; Wong Wing v. U. S., 163 U. S. 228, 16 SCt 977, 41 L. ed. 140; Lem Moon Sing v. U. S., 158 U. S. 538, 15 SCt 967, 39 L. ed. 1082; Lees v. U. S., 150 U. S. 476, 14 SCt 163, 37 L. ed. 1150; Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905; Nishimura Ekiu v. U. S., 142 U. S. 651, 12 SCt 336, 35 L. ed. 1146; Chae Chan Ping v. U. S., 130 U. S. 581, 9 SCt 623, 32 L. ed. 1068; Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287; U. S. v. Greenawalt, 213 Fed. 901; Prentis v. Cosmas, 196 Fed. 372, 116 CCA 592; U. S. v. Rodgers, 191 Fed. 970, 112 CCA 382; Hoo Choy v. North, 183 Fed. 92, 105 CCA 384; Haw Moy v. North, 183 Fed. 89, 105 CCA 381; Davies v. Manolis, 179 Fed. 818, 103 CCA 310; Ex p. Li Dick, 176 Fed. 998; Ex p. Gouyet, 175 Fed. 230; Ex p. Watchorn, 160 Fed. 1014; U. S. v. Ngum Lun May, 153 Fed. 209; U. S. v. Yeung Chu Keng, 140 Fed. 748; U. S. v. Tuck Lee, 120 Fed. 989; U. S. v. Lee Huen, 118 Fed. 442; In re Florio, 43 Fed. 114; U. S. v. Craig, 28 Fed. 795; Chan Gun v. U. S., 9 App. (D. C.) 290; Berger v. Bishop, 1 Hawaii Fed. 405; Forbes v. Chuoco Tiaco, 16 Philippine 534; Lo Po v. McCoy, 8 Philippine 343; 22 Op. Atty-Gen. 353.

[a] **Congress has an absolute inherent right to exclude and deport aliens** (1) as a part of its sovereign power, and hence the fact that an alien has resided in the United States for a long period and intends to make his residence permanent does not affect the government's right to exclude him, if in the judgment of congress such exclusion is proper. U. S. v. Williams, 183 Fed. 904. (2) "The exclusion of paupers, criminals and persons afflicted with incurable diseases, for which statutes have been passed, is only an application of the same power to particular classes of persons, whose presence is deemed injurious or a source of danger to the country. As applied to them, there has never been any question as to the power to exclude them. The power is constantly exercised; its existence is involved in the right of self-preservation. As to paupers, it makes no difference by whose aid they are brought to the country. As Mr. Fish, when secretary of State, wrote, in a communication under date of Dec. 26, 1872, to Mr. James Moulding, of Liverpool, the government of the United States 'is not willing and will not consent to receive the pauper class of any community who may be sent or may be assisted in their immigration at the expense of govern-

such purposes may be intrusted entirely to executive officers,[13] except so far as the judicial department is authorized by treaty or by statute, or is required by the constitution, to intervene.[14] The authority of congress to prohibit aliens from coming within the United States and to regulate their coming includes authority to impose conditions, upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend.[15] Rules and regulations may be made in order to carry out the statutes and facilitate the exclusion and return of persons belonging to the classes whose immigration congress has forbidden; but no mere rule of the department can operate to exclude persons not belonging to some one of the classes named in the statute.[16] Detention or temporary confinement, as part of the means necessary to give effect to the exclusion or expulsion, is legal,[17] but when congress sees fit to promote such a policy further by subjecting the persons of such aliens to infamous punishment at hard labor or by confiscating their property, such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.[18] Moreover, in order to make exclusion effective, congress has the power to punish those who assist in introducing or attempting to introduce aliens in violation of its prohibition.[19] To this end reasonable penalties may be imposed and their collection committed to executive officers without the necessity of resorting to the judicial power.[20] But the United States cannot usurp the police power of the several states over aliens who are lawfully within the United States.[21]

The government of the Philippine Islands, having all civil and judicial power necessary to govern the Islands, may authorize the summary executive deportation of aliens.[22] The extension of the Chinese exclusion and immigration laws to the Philippine Islands does not deprive the government of the Philippines of this power.[23]

[§ 48] **3. Power of the States** The several states have no power to exclude aliens as such.[24] As the states have no power to regulate interstate or foreign commerce,[25] they have no power to restrict, prohibit, or burden in any way the immigration of aliens.[26] Their power in this respect is limited by the right of self-preservation.[27] Reasonable regu-

ment or of municipal authorities.' As to criminals, the power of exclusion has always been exercised, even in the absence of any statute on the subject." Per Field, J., in Chinese Exclusion Case, 130 U. S. 581, 608, 9 SCt 623, 32 L. ed. 1068. (3) And Mr. Justice Story said in his Commentaries on the Constitution vol 2 p 46 [quot U. S. v. Foong King, 132 Fed. 107, 108]: "If aliens might be admitted indiscriminately to enjoy all the rights of citizens at the will of a single state, the Union might itself be endangered by an influx of foreigners hostile to its institutions, ignorant of its powers, and incapable of a due estimate of its privileges."

13. Tiaco v. Forbes, 228 U. S. 549, 33 SCt 585, 57 L. ed. 960; Zakonaite v. Wolf, 226 U. S. 272, 33 SCt 31, 57 L. ed. 218; Low Wah Suey v. Backus, 225 U. S. 460, 32 SCt 734, 56 L. ed. 1165; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 SCt 671, 53 L. ed. 1013; U. S. v. Ju Toy, 198 U. S. 253, 25 SCt 644, 49 L. ed. 1040; U. S. v. Williams, 194 U. S. 279, 24 SCt 719, 48 L. ed. 979; Fok Young Yo v. U. S., 185 U. S. 296, 22 SCt 686, 46 L. ed. 917; Li Sing v. U. S., 180 U. S. 486, 21 SCt 449, 45 L. ed. 634; Wong Wing v. U. S., 163 U. S. 228, 16 SCt 977, 41 L. ed. 140; U. S. v. Greenawalt, 213 Fed. 901; Ex p. Pouliot, 196 Fed. 437; Prentis v. Cosmas, 196 Fed. 372, 116 CCA 419; U. S. v. Yeung Chu Keng, 140 Fed. 748; U. S. v. Tuck Lee, 120 Fed. 989; U. S. v. Lee Huen, 118 Fed. 442; Chan Gun v. U. S., 9 App. (D. C.) 290; Berger v. Bishop, 1 Hawaii Fed. 405.

[a] **"We regard it as settled by our previous decisions** that the United States can, as a matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials." Wong Wing v. U. S., 163 U. S. 228, 237, 16 SCt 977, 41 L. ed. 140 [dist Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 SCt 671, 53 L. ed. 1013].

14. Fok Young Yo v. U. S., 185 U. S. 296, 22 SCt 686, 46 L. ed. 917; U. S. v. Ngum Lun May, 153 Fed. 209; U. S. v. Yeung Chu Keng, 140 Fed. 748; U. S. v. Tuck Lee, 120 Fed. 989; U. S. v. Lee Huen, 118 Fed. 442; Berger v. Bishop, 1 Hawaii Fed. 405; Chan Gun v. U. S., 9 App. (D. C.) 290.

[a] **Policy of law not a judicial question.**—The judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by congress in the exercise of the powers confided to it by the constitution over this subject. Li Sing v. U. S., 180 U. S. 486, 21 SCt 449, 45 L. ed. 634; Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905.

15. Zakonaite v. Wolf, 226 U. S. 272, 33 SCt 31, 57 L. ed. 218; U. S. v. Greenawalt, 213 Fed. 901.

16. U. S. v. Hemet, 156 Fed. 285; Stratton v. Oceanic Steamship Co., 140 Fed. 829, 72 CCA 241; In re Kornmehl, 87 Fed. 314.

[a] **Rules of the department of commerce and labor** (1) respecting the exclusion of Chinese persons, have the force and effect of law when not inconsistent with it or with the constitution or the treaty with China. Ex p. Chow Chok, 161 Fed. 627 [aff 163 Fed. 1021, 90 CCA 230]. (2) Thus rules of the secretary of commerce and labor, governing deportation of alien inmates of houses of prostitution, are not so arbitrary as to be beyond his power, under act Febr. 20 1907 (34 U. S. St. at L. 898) as amended by act March 26, 1910 (36 U. S. St. at L. 263). Low Wah Suey v. Backus, 225 U. S. 460, 32 SCt 734, 56 L. ed. 1165.

17. U. S. v. Williams, 194 U. S. 279, 24 SCt 719, 48 L. ed. 279. See infra § 99.

18. Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 SCt 671, 53 L. ed. 1013; U. S. v. Williams, 194 U. S. 279, 24 SCt 719, 48 L. ed. 979; Li Sing v. U. S., 180 U. S. 486, 21 SCt 449, 45 L. ed. 634; Wong Wing v. U. S., 163 U. S. 228, 16 SCt 977, 41 L. ed. 140; Chan Gun v. U. S., 9 App. (D. C.) 290.

Due process of law see Constitutional Law [8 Cyc 1080].

19. Lees v. U. S., 150 U. S. 476, 14 SCt 163, 37 L. ed. 1150; Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905; Ex p. Gouyet, 175 Fed. 230; In re Contract Laborers, 8 Hawaii 574. See infra §§ 67, 73, 117.

[a] **Inveigling and kidnapping.**—Act June 23, 1874 (18 U. S. St. at L. 251), provided that whoever should knowingly and willfully bring into the United States any person inveigled or forcibly kidnapped in any other country, with intent to hold such person so inveigled or kidnapped in confinement or to any involuntary service, should be guilty of a felony. It was held that the word "inveigled," as here used, included an arrangement made in Italy which contemplated the delivery of a child to defendant and the bringing of him by defendant to the United States for the purpose of being employed there as a beggar or street musician, the child being induced in Italy to consent to such an arrangement. U. S. v. Ancarola, 1 Fed. 676, 17 Blatchf. 423.

20. Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 SCt 671, 53 L. ed. 1013 [dist Wong Wing v. U. S., 163 U. S. 228, 16 SCt 977, 41 L. ed. 140] (holding that the penalty imposed on transportation companies bringing in alien immigrants afflicted with a loathsome contagious disease is not inflicted as a punishment for a criminal offense but is merely the infliction of a penalty enforceable by civil suit, and that congress may provide for such imposition by executive officers, and the enforcement is not necessarily governed by the rules applicable to the prosecution of criminal offenses).

21. Zakonaite v. Wolf, 226 U. S. 272, 33 SCt 31, 57 L. ed. 218 (holding, however, that the police power of the state is not unconstitutionally interfered with by the act of Febr. 20, 1907, § 3, for deportation of aliens for practicing prostitution within three years after entry, because of giving the federal authorities power to try an immigrant for violation of the penal laws of the state); U. S. v. Sibray, 178 Fed. 144, 150 [rev on other grounds 185 Fed. 401, 107 CCA 483]; Ex p. Lair, 177 Fed. 789. And see infra § 73.

22. Tiaco v. Forbes, 228 U. S. 549, 33 SCt 585, 57 L. ed. 960.

23. Tiaco v. Forbes, 228 U. S. 549, 33 SCt 585, 57 L. ed. 960.

24. In re Ah Fong, 1 F. Cas. No. 102, 3 Sawy. 144; State v. The Constitution, 42 Cal. 578, 10 AmR 303; Lin Sing v. Washburn, 20 Cal. 534. See also New York v. Emigration Comrs., 13 NYS 751.

25. See Commerce [7 Cyc 419 et seq].

26. See Commerce [7 Cyc 435 text and note 5].

27. In re Ah Fong, 1 F. Cas. No. 102, 3 Sawy. 144, 152 (where it was said: "Whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of

lations enacted in the exercise of the police power, for the protection of the public health, safety, and convenience, are valid, so long as congress has not exercised its paramount power upon the same subject.[28] Thus a state may exclude from its limits paupers, vagabonds, and criminals, or sick, diseased, infirm, and disabled persons who are likely to become a public charge, or it may admit them only on such terms as will prevent the state from being burdened with their support.[29] But the state, even in the absence of legislation of congress upon the subject, cannot exclude from its limits, or admit within its limits upon terms, persons in the full possession of their faculties, sound in body, neither paupers nor criminals, and in all respects competent to earn a livelihood.[30]

[§ 49] **4. Operation of Immigration and Exclusion Acts in Insular Possessions.** The present immigration law[31] in its thirty-third section provides for the enforcement of its provisions, as did its predecessor, the act of March 3, 1903, in all waters, territory, and other places subject to the jurisdiction of the United States, except the Isthmian Canal Zone.[32] The act of April 29, 1902,[33] made the Chinese exclusion laws applicable to the island territory under the jurisdiction of the United States.[34] To carry this act into effect, Act No. 702 of the Philippine Commission was passed.[35]

[§ 50] **B. Immigration.**[36]**—1. Definition.** Immigration is the removing into one place from another;[37] the act of immigrating; the entering into a country with the intention of residing in it.[38] The term ordinarily implies a voluntary migration, distinguishing it from "importation," which has reference to goods, or to persons involuntarily brought, such as slaves, prisoners, and insane persons.[39]

An immigrant is a person who removes into a country for the purpose of permanent residence.[40]

[§ 51] **2. Immigration Laws in General—a. Construction.** The immigration laws of the United States, in so far as relates to punishment for their violation, are highly penal, and are to be strictly construed, and their provisions applied only to cases clearly within their terms and their spirit, construed as a whole.[41]

The Canadian act of 1910 has been held not retrospective.[42]

[§ 52] **b. Persons Excluded—(1) In General.** Aliens are entitled to enter the United States, except so far as the right is restricted by statutes defining the excluded classes;[43] the burden being on the immigration authorities to show that any alien denied the right to enter falls within one of the exceptions to the general privilege.[44] The earlier immigration acts merely prohibited the bringing in of contract labor.[45] Later ones prohibited the bringing in of alien immigrants who were likely to become a charge upon the country, or who were unfit, on account of moral character, previous conviction of crime, or disease, to be admitted as citizens.[46] The present act,[47] however, omits the word "immigrant" which followed the word "alien" in the earlier acts, and consequently applies to all aliens, whether immigrants or otherwise, except such as are expressly or impliedly excepted.[48]

Seamen. Thus the act of 1891 being directed against the admission of "alien immigrants" only was held not to include seamen.[49] But since the word "aliens," as used in the acts of 1903 and 1907, is not restricted to alien immigrants, it includes as well aliens who are members of a ship's crew.[50]

the general government, and is not subject to State control or interference").

28. See Commerce [7 Cyc 436 text and note 6].

29. State v. The Constitution, 42 Cal. 578, 10 AmR 303. See also Commerce [7 Cyc 436 note 6].

Power of state to quarantine immigrants see Commerce [7 Cyc 469] Health [21 Cyc 394].

30. State v. The Constitution, 42 Cal. 578, 585, 10 AmR 303 (where the court said: "It is said that police and sanitary regulations can have no just application to persons of this description, and that it is an abuse of terms to say that they are proper subjects for such regulations, because, possibly, they may at some future day become paupers, vagabonds, or criminals, or sick, infirm, or otherwise disabled. This view of the question appears to me to be unanswerable. It is a misnomer to call that a police regulation, in the sense in which that term is here applied, in so far as it operates upon persons of good morals and upright character, and who are not more likely than the average of mankind to become paupers, vagabonds, or criminals; and it is equally a misnomer to term that a sanitary regulation which applies only to persons in good health and of sound mind, and who are not more liable than other people hereafter to become a public charge from sickness or infirmity").

31. Act Febr. 20, 1907 (34 U. S. St. at L. 898), as amended by act March 26, 1910 (36 U. S. St. at L. 263).

32. See Bouvé Exclusion and Expulsion of Aliens, pp 116, 127.

33. 32 U. S. St. at L. 176, as amended and reënacted by act April 27, 1904 (33 U. S. St. at L. 428 § 5).

34. See U. S. v. Lee Chiao, 23 Philippine 543; Bouvé Exclusion and Expulsion of Aliens p 100.

35. See Bouvé Exclusion and Expulsion of Aliens p 117.

36. **Regulation of commerce** see Commerce [7 Cyc 435].

37. Bouvier L. D.

[a] **Deportation distinguished.**—Deportation is the removal of an alien out of the country because his presence is deemed inconsistent with the public welfare, but without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or those of the country to which he is taken. Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905.

[b] **Emigration distinguished.**—Emigration is the act of removing from one place or country to another. One who is called an emigrant at the place of his former residence is styled an immigrant on arrival at his new domicile. Rapalje & L. L. D.

[c] **Expatriation distinguished.**—Expatriation is the voluntary act of abandoning one's country and becoming the citizen or subject of another. Black L. D. See also McIlvaine v. Coxe, 2 Cranch (U. S.) 280, 2 L. ed. 279. See also Citizens [7 Cyc 144–146].

38. Webster D.; Moffit v. U. S., 128 Fed. 375, 380, 63 CCA 117; U. S. v. Burke, 99 Fed. 895, 896; Matter of Nakashima, 3 Hawaii Fed. 168, 174.

[a] **To immigrate** (1) is to come into a country of which one is not a native and in which one has not acquired a residence or domicile. 22 Op. Atty.-Gen. 353. (2) To remove into a country for the purpose of permanent residence. Matter of Nakashima, 3 Hawaii Fed. 168.

39. See Importation [21 Cyc 1740].

[a] **The distinction between "immigration" and "importation"** suggested in the text was made in argument before the United States supreme court in Smith v. Turner, 7 How. (U. S.) 283, 12 L. ed. 702.

40. Webster D.; U. S. v. Atlantic Fruit Co., 212 Fed. 711, 712; Moffitt v. U. S., 128 Fed. 375, 380, 63 CCA 117; U. S. v. Sandrey, 48 Fed. 550; Matter of Nakashima, 3 Hawaii Fed. 168.

41. Redfern v. Halpert, 186 Fed. 150, 108 CCA 262; Moffitt v. U. S., 128 Fed. 375, 63 CCA 117; U. S. v. Gay, 80 Fed. 254 [aff 95 Fed. 226, 37 CCA 46]; Grant Bros. Constr. Co. v. U. S., 13 Ariz. 388, 114 P 955 [aff 213 U. S. 647, 34 SCt 452, 58 L. ed. 776]; U. S. v. Michelana, 1 Porto Rico Fed. 209.

[a] **A sensible construction** should be given to immigration statutes. U. S. v. Burke, 99 Fed. 895.

42. In re Rahim, 16 B. C. 471; In re Rahim, 16 B. C. 469.

43. U. S. v. Williams, 203 Fed. 155; U. S. v. Crouch, 185 Fed. 907.

44. U. S. v. Williams, 203 Fed. 155.

45. See U. S. v. Burke, 99 Fed. 895. See also infra §§ 76–85.

46. See U. S. v. Burke, 99 Fed. 895.

47. Act Febr. 20, 1907 (34 U. S. St. at L. 898, as amended by act March 26, 1910 (36 U. S. St. at L. 263).

48. Low Wah Suey v. Backus, 225 U. S. 460, 32 SCt 734, 56 L. ed. 1165; Taylor v. U. S., 207 U. S. 120, 28 SCt 53, 52 L. ed. 130. And see infra § 53.

49. Moffit v. U. S., 128 Fed. 375, 63 CCA 117; U. S. v. Burke, 99 Fed. 895.

[a] **Stowaways.**—Where a stowaway was regularly enrolled as a member of the crew, it was held that he could not be regarded as an alien immigrant. U. S. v. Sandrey, 48 Fed. 550.

50. U. S. v. Atlantic Transport Co., 188 Fed. 42, 110 CCA 420; Taylor v. U. S., 152 Fed. 1, 81 CCA 197 [rev on other grounds 207 U. S. 120, 28 SCt 53, 52 L. ed. 130].

[a] **Right to shore leave.**—(1) A member of a vessel's crew (unless Chinese), although ineligible for admission to the United States as an

[§ 53] **(2) Alien Residents Returning after Temporary Absence.** The decisions, under the earlier immigration acts, holding that alien residents, who have gone abroad with the intention of returning, are not immigrants within the meaning of the immigration acts,[51] have been nullified by later decisions under the later immigration acts which omit the word "immigrants," and which therefore have been held to apply to all aliens, whether first arriving in the country, or returning to the country after a temporary absence.[52] It is said that the duration of the period of absence or its purpose cannot affect this result.[53]

Native-born children of alien parents are citizens and not aliens,[54] and hence are not subject to exclusion, under the immigration laws, on their return with their alien parents from a temporary visit abroad.[55]

Under the Canadian Immigration Act of 1910 one having a domicile in Canada cannot be excluded therefrom on returning from a visit to the United States, although such person is not a Canadian citizen.[56]

[§ 54] **(3) Anarchists.** The provision in the act of February 20, 1907,[57] excluding alien anarchists is a reënactment of the corresponding provision in the act of 1903,[58] which has been held to be constitutional.[59]

[§ 55] **(4) Convicts.** The present immigration act both excludes aliens who have been convicted of, or admit having committed, a felony or other crime or misdemeanor involving moral turpitude, and au-

alien immigrant, is still entitled to land on shore leave and to remain within the physical boundaries of the United States until his vessel sails, without being sent to the observation quarters of the bureau of immigration for inspection as an immigrant. U. S. v. Crouch, 185 Fed. 907. (2) The right of sailors, under treaty provisions, to shore leave, and to remain within the country, after discharge before the consuls of the various nations and the signing of new articles, applies only as long as the sailors intend to continue in their vocation and to leave the United States on the continuation of the voyage, or to take passage on another vessel, and it immediately terminates on their attempt to enter the United States as immigrants. U. S. v. Crouch, supra.

51. Moffitt v. U. S., 128 Fed. 375, 63 CCA 117; U. S. v. Burke, 99 Fed. 895; In re Ota, 96 Fed. 487; In re Maiola, 67 Fed. 114; In re Martorelli, 63 Fed. 437; In re Panzara, 51 Fed. 275; U. S. v. Sandrey, 48 Fed. 550. See also In re Yamasaka, 95 Fed. 652 [rev on other grounds 100 Fed. 404] (where it was held that neither the act of congress of March 3, 1891, nor any prior act of congress, confers authority on ministerial officers of the United States to arrest and deport an immigrant, who has become domiciled in this country, on the ground that he has become a public charge from causes existing prior to his landing).

52. Lewis v. Frick, 233 U. S. 291, 34 SCt 488, 58 L. ed. 967 [aff 195 Fed. 693, 115 CCA 493 (rev 189 Fed. 146)]; Lapina v. Williams, 232 U. S. 78, 91, 34 SCt 196 (where the court said: "Upon a review of the whole matter, we are satisfied that Congress, in the act of 1903, sufficiently expressed, and in the act of 1907 reiterated, the purpose of applying its prohibition against the admission of aliens, and its mandate for their deportation, to all aliens whose history, condition or characteristics brought them within the descriptive clauses, irrespective of any qualification arising out of a previous residence or domicile in this country"); U. S. v. Czeslicki, 209 Fed. 496; Ex p. Pouliot, 196 Fed. 437; Siniscalchi v. Thomas, 195 Fed. 701, 115 CCA 501; U. S. v. Sprung, 187 Fed. 903, 110 CCA 37; Suzuki v. Higgins, 187 Fed. 603, 109 CCA 433; Matsumura v. Higgins, 187 Fed. 601, 109 CCA 431; U. S. v. Williams, 187 Fed. 470; U. S. v. Williams, 186 Fed. 354; Sibray v. U. S., 185 Fed. 401, 107 CCA 483 [rev 178 Fed. 144, 150]; U. S. v. Williams, 183 Fed. 904; Ex p. Hoffman, 179 Fed. 839, 103 CCA 327; U. S. v. Villet, 173 Fed. 500; Ex p. Petterson, 166 Fed 536; Ex p. Crawford, 165 Fed. 830; U. S. v. Watchorn, 164 Fed. 152; Taylor v. U. S., 152 Fed. 1, 81 CCA 197 [rev on other grounds 207 U. S. 120, 28 SCt 53, 52 L. ed. 130]; In re Kleibs, 128 Fed. 656. Contra U. S. v. Tsuji Suekichi, 199 Fed. 750, 118 CCA 188; U. S. v. Nakashima, 160 Fed. 842, 87 CCA 646; Rodgers v. U. S., 152 Fed. 346, 81 CCA 454; U. S. v. Aultman Co., 143 Fed. 922 [aff 148 Fed. 1022, 79 CCA 457]; In re Buchsbaum, 141 Fed. 221; Matter of Nakashima, 3 Hawaii Fed. 168.

[a] **Effect of omission of word "immigrant."**—"When Congress enacted the immigration law of March 3, 1903, and omitted the word 'immigrant,' which was contained in the immigration act of 1891, as qualifying the word 'alien,' Congress did in clear, plain, and unmistakable language evince an intention to materially broaden the scope of the statute. Such a material and significant change in the law so as to include all aliens, whether immigrants or otherwise, should not in my judgment be disregarded by a refinement of judicial construction. The immigration act of 1903 was certainly intended by Congress to exclude certain classes of aliens who were not excluded by the act of 1891, as the last-named act had been construed by the courts. To hold that the act of 1903 was intended merely to reach aliens belonging to the prohibited classes who should come here for a temporary residence of a few months, and not to exclude aliens belonging to the prohibited classes who had acquired a domicile in the United States, would in effect give the statute an interpretation not justified by the broad and general language employed. The immigration act of 1891 recognized the right of aliens who were not immigrants to come to the United States for temporary purposes, just as much as it recognized the right of aliens who had acquired a domicile in the United States to return here after a temporary visit abroad; and the construction of the act of 1903, which makes it operative against the alien who is not an immigrant and is coming to the United States for merely temporary purposes, and nonoperative against the alien who has acquired a domicile in the United States and is attempting to return here after having voluntarily left the country, is, in my judgment, founded upon considerations of hardship pure and simple, only differing in degree." Per Purdy, J., in Ex p. Petterson, 166 Fed. 536, 541.

[b] **An alien acquires no rights by a domicile in the country** which will relieve her of the effect of a decision of the department of commerce and labor ordering her deportation. Ex p. Crawford, 165 Fed. 830.

[c] **Construction of department rules.**—The language of rule 4 of the regulations of the bureau of immigration and naturalization relating to the admission and exclusion of aliens that "the provisions of the immigration act do not apply to aliens who have once been duly admitted to the United States, or to any waters, territory, or other place subject to the jurisdiction thereof, proceeding to or from the continental territory of the United States," applies only to aliens who have been admitted to the United States or its dependencies, and are proceeding either from the dependencies to the continent, or from the continent to the dependencies, and has no application to an alien arriving from a foreign country, although he has been previously admitted. U. S. v. Watchorn, 164 Fed. 152.

53. Frick v. Lewis, 195 Fed. 693, 115 CCA 493 [rev 189 Fed. 146]; U. S. v. Williams, 187 Fed. 470.

54. See Citizens [7 Cyc 137].

55. In re Giovanna, 93 Fed. 659.

56. Re Margaret Murphy, 15 B. C. 401, 17 CanCrCas 103.

[a] **The word "passengers,"** within the meaning of the statute, does not apply to persons domiciled, or resident, in Canada, who are returning from a visit abroad. In re Chee, 11 B. C. 400.

57. 34 U. S. St. at L. 898 § 2.

58. See Bouvé Exclusion and Expulsion of Aliens p 180.

59. U. S. v. Williams, 194 U. S. 279, 292, 24 SCt 719, 48 L. ed. 979 [aff 126 Fed. 253] (where the court said: "The argument seems to be that, conceding that Congress has the power to shut out any alien, the power, nevertheless, does not extend to some aliens, and that if the act includes all alien anarchists, it is unconstitutional, because some anarchists are merely political philosophers, whose teachings are beneficial rather than otherwise. . . . The language of the act is 'anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law, or the assassination of public officials.' If this should be construed as defining the word 'anarchists' by the words which follow, or as used in the popular sense above given, it would seem that when an alien arrives in this country, who avows himself to be an anarchist, without more, he accepts the definition. And we suppose counsel does not deny that this government has the power to exclude an alien who believes in or advocates the overthrow of the government or of all governments by force or the assassination of officials. To put that question is to answer it. . . . If the word 'anarchists' should be interpreted as including aliens whose anarchistic views are professed as those of political philosophers, innocent of evil intent, it would follow that Congress was of opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population, whether permanently or temporarily, whether many or few; and, in the light of previous decisions, the act, even in this aspect, would not be unconstitutional, as applicable to any alien who is opposed to all organized government"). See also Constitutional Law.

thorizes the deportation of aliens who obtain entry in violation of such provision.[60] In determining whether an offense, of which an alien applying for admission to the United States has been convicted, involves moral turptitude, the authorities must be governed by a determination of the question whether the inherent nature of the particular offense includes it;[61] as they have no jurisdiction to go behind judgments of conviction and to determine whether the acts disclosed by the testimony indicate personal depravity and moral turpitude.[62] The act does not, however, authorize deportation after his admission into the United States, on account of conviction of a crime in the country from which the alien came.[63] And it is expressly provided that nothing therein shall exclude, if otherwise admissible, persons convicted of an offense purely political.[64]

Admission of commission of crime. No amount of proof, however convincing, can be substituted for the requirement that the alien must admit having committed the crime;[65] and the refusal of the alien to testify is not equivalent to such an admission.[66] But evidence of the commission of such an offense may be furnished by admission of the alien subsequent, as well as prior, to entry;[67] and it seems that independent proof of the commission of a crime by an alien may be looked to in determining whether the alien's testimony amounts to an admission.[68]

[§ 56] **(5) Diseased Persons.** The act of March 3, 1903,[69] excluded from admission to the United States those afflicted with loathsome or dangerous contagious diseases.[70] The present law includes also persons afflicted with tuberculosis.[71]

Chinese persons. These provisions are applicable to Chinese immigrants otherwise entitled to admission.[72]

[§ 57] **(6) Paupers or Persons Likely to Become Public Charge.** The act of February 20, 1907, expressly excludes paupers, persons likely to become a public charge, and professional beggars.[73] The provision "likely to become a public charge" is not limited to the likelihood of becoming paupers, but extends to the likelihood of becoming periodically inmates of prisons as the result of crime.[74] Such a construction of the statute does not conflict with the provision for the exclusion of aliens convicted of crime.[75]

Determination of question. In order to debar and return an alien immigrant, on the ground of his being a person likely to become a public charge, there must be a determination by the inspection officer that the immigrant is likely to become a public charge; and such determination must be made upon competent evidence, tending to show such to be the fact.[76] The personal equation of

60. Act Febr. 20, 1907 (34 U. S. St. at L. 898 c 1134 § 2). And see U. S. v. Williams, 203 Fed. 155; Prentis v. Stathakos, 192 Fed. 469, 112 CCA 607.

61. U. S. v. Uhl, 203 Fed. 152.

[a] **An assault with a deadly weapon** (1) has been held not to be a crime involving moral turpitude. U. S. v. Redfern, 180 Fed. 506; U. S. v. Watchorn, 164 Fed. 152. See also Ex p. George, 180 Fed. 785. (2) But an immigrant who has been convicted, in the country from which he came, of an assault with a deadly weapon, and who has served the term of imprisonment imposed, is "a convict" within the meaning of the act of 1882 which was directed against the admission of "any convict." In re Aliano, 43 Fed. 517.

[b] **Disorderly conduct** is not a crime or misdemeanor involving moral turpitude. Lewis v. Frick, 189 Fed. 146 [rev on other grounds 195 Fed. 693, 115 CCA 493].

[c] **An alien convicted of carrying concealed weapons** is not subject to deportation on that ground, since such offense is not one involving moral turpitude. Ex p. Saraceno, 182 Fed. 955.

[d] **Commission of single act of fornication or adultery.**—Proof that an alien, prior to his immigration, committed a single act of fornication or adultery in the country from which he emigrated, is insufficient to justify his deportation as an alien having been convicted of, or having admitted committing, a felony, or other crime or misdemeanor involving moral turpitude. U. S. v. Sibray, 178 Fed. 144 [rev on other grounds 185 Fed. 401, 107 CCA 483].

[e] **Rape** is an offense involving moral turpitude within the statute. Siniscalchi v. Thomas, 195 Fed. 701, 115 CCA 501.

[f] **Criminal libel** does not involve moral turpitude so as to require the exclusion of one convicted of such an offense. U. S. v. Uhl, 210 Fed. 860, 127 CCA 422 [aff 203 Fed. 152].

[g] **Embezzlement of partnership funds.**—The admission of an immigrant from Austria that he had misappropriated partnership funds, and had them with him when he applied for admission, did not show the commission of a crime, under the American law, which, in the absence of proof of the Austrian law, the court was required to apply. U. S. v. Williams, 204 Fed. 828.

62. U. S. v. Uhl, 210 Fed. 860, 127 CCA 422 [aff 203 Fed. 152].

63. Ex p. Koerner, 176 Fed. 478; Ex p. Watchorn, 160 Fed. 1014.

64. U. S. v. Williams, 203 Fed. 155 (holding, however, that this provision has no application, where the alien has not in fact been convicted of the alleged offense, for the commission of which it is sought to exclude him).

65. U. S. v. Williams, 203 Fed. 155. And see U. S. v. Williams, 192 Fed. 536, 537, 113 CCA 410 (per Ward, J., dissenting).

66. U. S. v. Williams, 203 Fed. 155.

67. U. S. v. Williams, 200 Fed. 538, 118 CCA 632.

68. U. S. v. Williams, 192 Fed. 536, 113 CCA 410.

69. 32 U. S. St. at L. 1213 c 1012 § 2.

70. See Oceanic Nav. Co. v. Stranahan, 214 U. S. 320, 29 SCt 671, 53 L. ed. 1013.

71. Act Febr. 20, 1907 (34 U. S. St. at L. 898).

72. Looe Shee v. North, 170 Fed. 566, 95 CCA 646; In re Lee Sher Wing, 164 Fed. 506.

[a] **The question was fully considered by Attorney-General Knox.** See 24 Op. Atty.-Gen. 706 [quot In re Lee Sher Wing, 164 Fed. 506, 508] (where he said: "There is nothing in the laws specially relating to the immigration of Chinese persons providing for the exclusion of a merchant or member of any other excepted class, although he may be suffering from a loathsome or dangerous contagious disease; and, unless the act now under consideration [act March 3, 1903] is applicable to him, such person may enter the United States with impunity, and the public must suffer the consequences. I can see no valid reason for concluding that the Congress intended, by the proviso in question, to imperil the public safety by allowing a diseased person, because of his Chinese descent, to enter, when the very law in which this proviso appears has, as one of its special purposes, the further and more effective protection of the public from the evil consequences to be expected as a result of the presence of one so afflicted, and to this end prescribe his exclusion. . . . To admit a Chinaman known to be suffering from a contagious disease, when another alien not so descended would be excluded because afflicted with the same disease, would to that extent defeat the legislative intent made clear by the terms of the act and apparently lead to unjust and unexpected results").

73. 34 U. S. St. at L. 898.

[a] **Effect of treaty with Japan.**—Japanese subjects, who are "paupers or persons likely to become a public charge," and are therefore forbidden to enter the United States by the Immigration Act of March 3, 1891 (26 U. S. St. at L. 1085 c 551) are not given such right of entry by the provision of the treaty of March 21, 1895, with Japan, that the citizens or subjects of each of the two countries shall have "full liberty to enter, travel, or reside in any part of the territories of the other country," especially since such treaty expressly excepts from its operation any ordinance or regulation relating to "police and public security." Japanese Immigrant Case, 189 U. S. 86, 23 SCt 611, 47 L. ed. 721.

74. U. S. v. Williams, 175 Fed. 274.

[a] **The fact that one was arrested for carrying concealed weapons** is no evidence that he is likely to become a public charge. Ex p. Saraceno, 182 Fed. 955.

75. U. S. v. Williams, 175 Fed. 274.

76. In re Feinknopf, 47 Fed. 447; In re O'Sullivan, 31 Fed. 447, 24 Blatchf. 416. See also In re Bracmadfar, 37 Fed. 774.

[a] **An actress having property and gowns valued at eighteen hundred dollars** cannot be said to be likely to become a public charge. Williams v. U. S., 206 Fed. 460, 124 CCA 366 [aff 189 Fed. 915].

[b] **Possession of money owed to another.**—An alien possessing a large sum of money cannot be excluded, as likely to become a public charge, merely because he owes the money to another. U. S. v. Williams, 204 Fed. 828.

[c] **Orphan minor.**—The secretary of labor may in his discretion order the deportation of an alien immigrant who is under sixteen years of age, an orphan, and without money. U. S. v. Comr. of Immigration, 209 Fed. 137.

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each alien and the conditions which confront him are elements of the problem.[77] For this reason there may be cause for rejecting an alien at mainland ports which would not exist if he was applying for entrance to the Philippines.[78]

[§ 58] **(7) Persons Assisted by Others to Come.** Under the act of February 20, 1907, excluding certain persons assisted by others from coming into the country,[79] a finding by the immigration officers that an immigrant was assisted to come by another warrants his exclusion, unless his disability is removed by affirmative and satisfactory evidence; and unless evidence on that question is offered, no further finding is required.[80]

[§ 59] **(8) Prostitutes and Persons Bringing in Prostitutes.**[81] The act of February 20, 1907, excludes prostitutes and women or girls coming into the United States for the purpose of prostitution or any other immoral purpose, and persons who procure or attempt to bring in such women, or who are employed by, in, and in connection with, any house of prostitution.[82] The act of March 16, 1910, further excludes persons who are supported by, or receive in whole or in part, the proceeds of prostitution,[83] or who assist, protect, or promise to protect any prostitute from arrest.[84] The language of the act of 1907 is specific, and prohibits the importation of any alien woman or girl for any immoral purpose,[85] which has been held to include concubinage.[86] Conviction of the crime of importation is unnecessary to warrant deportation on that ground.[87] The act also applies to women found practicing prostitution within three years after entry,[88] and since the amendment of 1910, alien prostitutes have been subject to deportation without reference to the length of their prior residence in the United States.[89]

[§ 60] **c. Head Tax.** The earlier statutes imposed a head tax "for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States."[90] The act of February 20, 1907,[91] applies to all aliens entering the United States subject to certain exceptions mentioned.[92] The suggestive changes made by the later statute are the imposition of the tax upon all aliens, whether they come here as "passengers" or not, and the substitution for the phrase "come by vessel from a foreign port to any port within the United States" of the phrase "entering the United States."[93]

Seamen. The act applies to seamen who are signed by a vessel for a voyage to a port of the United States, but not for the return voyage, and who, in accordance with the contract and intention of the parties, are discharged on the arrival of the vessel and enter the United States;[94] but it does not apply to seamen who sign articles for the round

77. U. S. v. Uhl, 211 Fed. 236, 128 CCA 560.

[a] **Lack of work.**—Findings of an immigration board that certain alien farm laborers were likely to become public charges because there was no work for them in the United States, and the supply of such labor exceeded the demand, have been held insufficient to justify their exclusion. Ex p. Gregory, 210 Fed. 680.

78. Ex p. Marshall, 213 Fed. 123; In re Rhagat Singh, 209 Fed. 700, 704 (where the court said: "Labor and climatic conditions and standards of living are so diverse that one going to the Philippines who would not there be likely to become a public charge might well be likely to become such if he proceeded thence to the mainland. A more rigid test may therefore well be applied to those seeking admission to the mainland than that applied to those seeking admission to the Philippines").

79. 34 U. S. St. at L. 898 c 1134 § 2 (which provides that any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, shall be excluded, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes and that said ticket or passage was not paid for by any corporation, association, society, municipality, or foreign government, either directly or indirectly).

80. U. S. v. Williams, 193 Fed. 228; U. S. v. Rodgers, 191 Fed. 970, 112 CCA 382.

81. **Effect of prior domicile on right to reënter** see supra § 53.

Importation as criminal offense see infra § 73.

Time for deportation see infra § 63.

82. 34 U. S. St. at L. 898 c 1134 §§ 2, 3.

[a] **An alien employed as a cook** in a house of prostitution is within § 3 of the act. Ex p. Loo Shew Ung, 210 Fed. 990.

[b] **Where petitioner testified that she was an inmate** of, or connected with, a house of prostitution, she was subject to deportation under the act of March 26, 1910 (36 U. S. St. at L. 264 c 128 § 3). Ex p. Cardonnel, 197 Fed. 774.

[c] **Chinese prostitutes.**—The act of 1907, excluding alien prostitutes, applies to Chinese, notwithstanding § 43 declares it shall not be construed to repeal, alter, or amend existing laws as to immigration or exclusion of Chinese persons or persons of Chinese descent. Looe Shee v. North, 170 Fed. 566, 95 CCA 646.

[d] **Prostitutes are excluded under Canadian Chinese Immigration Act** see In re Fong Yuk, 8 B. C. 118.

83. 36 U. S. St. at L. 263 c 128 § 2.

[a] **This act is not unconstitutional** as an infringement on the police power of the states. Siniscalchi v. Thomas, 195 Fed. 701, 115 CCA 501.

84. Ex p. Young, 211 Fed. 370.

[a] **The words "assist . . . a prostitute"** contemplate only assistance to continue the practice of prostitution. Ex p. Young, 211 Fed. 370.

85. U. S. v. Villet, 173 Fed. 500.

[a] **"A married woman may be as objectionable as a single one** in the respects denounced in the law. There is nothing in the terms of the act showing the congressional purpose to exclude from its provisions an alien who had previously married or who might marry an American citizen. Indeed, if this construction were adopted, the marriage of such alien to a countryman of American citizenship who might be ignorant of the conduct of the alien or willing to condone it, would afford an easy means of evading the statute." Low Wah Suey v. Backus, 225 U. S. 460, 476, 32 SCt 734, 56 L. ed. 1165.

86. U. S. v. Bitty, 208 U. S. 393, 28 SCt 396, 52 L. ed. 543; U. S. v. Uhl, 211 Fed. 628.

[a] **An alien woman, who came to this country to marry,** and cohabited with her intended husband on his representation that a contract marriage was sufficient, and who on discovering the deceit left him and obtained judgment for breach of promise of marriage, is not subject to deportation on the ground that she entered the United States for an immoral purpose. U. S. v. Martin, 193 Fed. 795.

87. Lewis v. Frick, 233 U. S. 291, 34 SCt 488, 58 L. ed. 967 [aff 195 Fed. 693, 115 CCA 493 (rev 189 Fed. 146)]; Ex p. Pouliot, 196 Fed. 437.

[a] **Reason of rule.**—"The fact that both of the petitioners had been acquitted in this court by juries on charges involving the same transaction in no way defeats the action taken, or the determination reached by the immigration authorities, for to justify a verdict of guilty by a jury it was necessary that the jury be convinced of petitioners' guilt beyond a reasonable doubt, while no such rule is imposed upon the immigration authorities." Ex p. Young, 211 Fed. 370, 373.

88. Lapina v. Williams, 232 U. S. 78, 34 SCt 196, 58 L. ed. 515; Looe Shee v. North, 170 Fed. 566, 95 CCA 646.

[a] **Temporary practice of prostitution.**—Where complainant and her husband and children came to the United States, were lawfully admitted, and had resided within the country for nearly three years, complainant was not subject to deportation as within the excluded classes because for a short time, during a temporary separation from her husband, she practiced prostitution. Sprung v. Morton, 182 Fed. 330.

[b] **The word "found"** in the phrase "found an inmate of a house of prostitution, or practicing prostitution," in § 3 of the act of Febr. 20, 1907 (34 U. S. St. at L. 899 c 1134) is construed to be covered by the words "ascertained to be." Matter of Umeno, 3 Hawaii Fed. 481.

89. Sire v. Berkshire, 185 Fed. 967; U. S. v. Williams, 183 Fed. 904. And see infra § 63.

90. Act Aug. 3, 1882 (22 U. S. St. at L. 214 c 376); Act Aug. 18, 1894 (28 U. S. St. at L. 391 c 301); Act March 3, 1903 (32 U. S. Stat. at L. 1213 c 1012); U. S. v. Atlantic Transport Co., 188 Fed. 42, 110 CCA 420.

91. 34 U. S. St. at L. 898 c 1134 § 1.

92. U. S. v. Atlantic Transport Co., 188 Fed. 42, 110 CCA 420.

93. U. S. v. Atlantic Transport Co., 188 Fed. 42, 110 CCA 420.

[a] **A person may properly be said to "come to" this port** if he arrives here in a vessel, even though he intends to remain on board and depart with the vessel when she sails; but the phrase "entering the United States" would seem to signify a permanent separation from the vessel. U. S. v. Atlantic Transport Co., 188 Fed. 42.

94. U. S. v. Atlantic Transport Co., 188 Fed. 42, 110 CCA 420.

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voyage, and who desert while the vessel is in port.[95]

[§ 61] **d. Deportation—(1) In General.**[96] The Immigration Act of February 20, 1907,[97] authorizes the deportation of any alien who shall enter or be found in the United States in violation of law or of said act.[98] An alien who enters surreptitiously,[99] or who secures admission by artifice or fraud,[1] is guilty of "entering in violation of law," and is subject to deportation under this act. But one who is innocently brought into the country through the unlawful act of the master of the ship in omitting his name from the manifest is not subject to deportation.[2]

A passport from a foreign government to its citizen is merely written permission from the government to travel, and does not affect the alien's status in the United States, in the absence of treaty provision, and hence is no defense to proceedings to deport him.[3]

Chinese persons. It has been held that this provision of the act of 1907 applies to Chinese as well as to other aliens.[4]

[§ 62] **(2) Time for Deportation—(a) In General.** Under the act of March 3, 1891,[5] an alien was required to be taken into custody for the purpose of deportation within one year next after his last entry into the United States.[6] Under the act of March 3, 1903,[7] the time limit was two years in the case of aliens entering in violation of any prior act, and three years in the case of aliens entering in violation of that act.[8] The act of February 20, 1907, provides for the deportation within three years of aliens unlawfully in the country.[9] According to one decision the government is entitled to the whole of the last day of the three years in which to make the arrest, prescription being interrupted by the arrest, and to a reasonable time in which to carry out the sentence of deportation.[10] But, by the weight of authority, the actual deportation as well as the arrest must be made within the time limited,[11] unless prevented by some legal obstacle such as imprisonment of the alien.[12] It has been held that the three-year period begins to run from the date of the alien's first entrance into the country;[13] but, by the weight of authority, it begins to run from the date of his last entrance.[14]

[§ 63] **(b) Prostitutes.** Under the act of February 20, 1907,[15] an alien prostitute could be deported only within the period of three years from the date of her entry.[16] Under the act of March 26, 1910,[17] however, an alien prostitute is subject to deporta-

[a] **Horsemen, signed for service on a vessel in caring for horses during a voyage,** are "seamen," for the purpose of determining the application to them of the immigration acts. U. S. v. Atlantic Transport Co., 188 Fed. 42, 110 CCA 420.

95. U. S. v. International Mercantile Marr. Co., 171 Fed. 841, 96 CCA 420.

96. **Immigration distinguished** see supra § 50 note 37 [a].

97. 34 U. S. St. at L. 904 c 1134 § 20.

98. Gonzales v. Williams, 192 U. S. 1, 24 SCt 177, 48 L. ed. 317; Ex p. Kaprielian, 188 Fed. 694; Williams v. U. S., 186 Fed. 479, 108 CCA 457; Ex p. Hamaguchi, 161 Fed. 185. See also Kaoru Yamataya v. Fisher, 189 U. S. 86, 23 SCt 611, 47 L. ed. 721; U. S. v. Yamasaka, 100 Fed. 404, 40 CCA 454.

[a] **Act not retroactive.**—In re Lea, 126 Fed. 234.

[b] **What constitutes "entry."**—An "entry" or "entrance" of a Chinese person into the United States within the Chinese exclusion acts means more than the mere act of crossing the border, and consists in his going at large or becoming domiciled in the country. Ex p. Chow Chok, 161 Fed. 627 [aff 163 Fed. 1021, 90 CCA 230].

99. Ex p. Li Dick, 176 Fed. 998; Ex p. Li Dick, 174 Fed. 674; Ex p. Hamaguchi, 161 Fed. 185.

1. Williams v. U. S., 186 Fed. 479, 108 CCA 457.

[a] **False and misleading statements,** which do not of themselves concern the right of admission, are collateral to the right of deportation, and an alien cannot be deported on account of them. U. S. v. Martin, 193 Fed. 795.

[b] **An alien who attempts to enter under an assumed name** for the purpose of concealing his identity and deceiving the immigration officers is properly excluded. U. S. v. Williams, 192 Fed. 536, 113 CCA 410.

2. U. S. v. Williams, 193 Fed. 228.

3. U. S. v. Redfern, 180 Fed. 506.

4. U. S. v. Wong You, 223 U. S. 67, 32 SCt 195, 56 L. ed. 354 [rev 181 Fed. 313, 104 CCA 535]; Prentis v. Seu Leung, 203 Fed. 25, 121 CCA 389; Billings v. Ham, 202 Fed. 914, 121 CCA 272; U. S. v. Prentis, 202 Fed. 65, 120 CCA 381. To same effect Ex p. Li Dick, 176 Fed. 998; Ex p. Wong You, 176 Fed. 933 [rev on other grounds 181 Fed. 313, 104 CCA 535]; Ex p. Li Dick, 174 Fed. 674; Looe Shee v. North, 170 Fed. 566, 95 CCA 646; 24 Op. Atty.-Gen. 706. In U. S. v. Wong You, 223 U. S. 67, 69, 32 SCt 195, 56 L. ed. 354, it was said: "By the language of the act any alien that enters the country unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. It seems to us unwarranted to except the Chinese from this liability because there is an earlier more cumbrous proceeding which this partially overlaps. The existence of the earlier laws only indicates the special solicitude of the Government to limit the entrance of Chinese. It is the very reverse of a reason for denying to the Government a better remedy against them alone of all the world, now that one has been created in general terms. . . . The present act does not contain the clause found in the previous immigration act of March 3, 1893, 27 U. S. St. at L. 569, c 206, that it shall not apply to Chinese persons, and, on the other hand, as it requires deportation to the trans-Pacific ports from which such aliens embarked for the United States, § 35, it is rather hard to say that it has not the Chinese specially in mind."

5. 26 U. S. St. at L. 1086 c 551 § 11.

6. In re Russomanno, 128 Fed. 528.

7. 32 U. S. St. at L. 1213 c 1012 §§ 20, 21.

8. Botis v. Davies, 173 Fed. 996.

[a] **The deportation of an alien who landed March 3, 1907,** is governed by the act of March 3, 1903 (32 U. S. St. at L. 1218 c 1012 § 21), fixing three years as the period within which an alien unlawfully in the country may be deported. U. S. v. Redfern, 180 Fed. 506.

9. 34 U. S. St. at L. 904 c 1134 §§ 20, 21; U. S. v. Redfern, 210 Fed. 548.

10. U. S. v. Redfern, 180 Fed. 506.

11. International Mercantile Mar. Co. v. U. S., 192 Fed. 887, 890, 113 CCA 365 [rev. 186 Fed. 669] (where the court said: "We cannot think that the statute is so elastic that it can be made to cover a case where the alien is not delivered to the deporting ship until after the three years have expired. When Congress says that the alien shall be taken into custody and deported within three years it means what it says. It does not mean that the time for deportation is indefinitely extended if the alien be taken into custody within the three years. We think it was clearly the intention of Congress to give the government officials three years to ascertain whether the alien is entitled to remain in this country, and if they do not so ascertain and deliver him to the deporting ship within that time he is entitled to remain here"); Botis v. Davies, 173 Fed. 996.

12. Matsumura v. Higgins, 187 Fed. 601, 602, 109 CCA 431 (holding that, where, after the issuance of a deportation warrant, the alien is imprisoned for crime, the deportation writ is in abeyance during such period, and on its expiration is subject to immediate execution, although the alien then has been in the United States more than three years, the court saying: "The warrant was issued within the prescribed period, but its execution was, by reason of the imprisonment of the appellant for the crime of which he was convicted, delayed; and, said period having elapsed, it was contended that said warrant has become functus, so that there is now no lawful authority for holding the appellant in custody, and that he is deprived of liberty without due process of law, in violation of the Constitution of the United States. We regard this contention as being unworthy of serious consideration. Domiciliary rights could not grow for the benefit of a convict during the period of his incarceration in prison; and while the writ of deportation was in abeyance the running of time should not be counted, in order to raise a legal objection to its execution which did not exist when it was issued").

13. Redfern v. Halpert, 186 Fed. 150, 108 CCA 262; U. S. v. Nakashima, 160 Fed. 842, 87 CCA 646.

14. U. S. v. Uhl, 211 Fed. 628; Frick v. Lewis, 195 Fed. 693, 115 CCA 493 [rev 189 Fed 146, and aff 233 U. S. 291, 34 SCt 488, 58 L. ed. 967]; Siniscalchi v. Thomas, 195 Fed. 701, 115 CCA 501; U. S. v. Sprung, 187 Fed. 903, 110 CCA 37; U. S. v. Hook, 166 Fed. 1007.

15. 34 U. S. St. at L. 899 c 1134 § 3.

16. Sire v. Berkshire, 185 Fed. 967; Looe Shee v. North, 170 Fed. 566, 95 CCA 646; U. S. v. Hook, 166 Fed. 1007; Ex p. Durand, 160 Fed. 558.

17. 36 U. S. St. at L. 264 c 128 § 2.

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tion without reference to the length of her prior residence in the United States.[18] This act has been held constitutional.[19]

[§ 64] **(3) Place of Deportation.** Deportation is regulated and determined, as to the country to which made, by sections 20, 21, and 35 of the act of February 20, 1907.[20] It has been held that these sections contemplate the deportation of aliens to the country whence they came when they illegally entered the United States, regardless of their nativity,[21] and that the only exception is where an alien, intending to enter the United States, for convenience of his voyage lands first in foreign territory contiguous to the United States.[22] A later decision, on the other hand, holds that the words "to the country whence he came" were intended to refer to the place of his nativity or citizenship, and not to the country from which he may have immediately entered the United States.[23] It seems, however, that neither of these holdings takes into consideration all three of the sections above mentioned, which ought all to be construed together, section 35 limiting and qualifying the two former sections, and it has been so held.[24] So construed the phrase "the country whence he came" means the country in which the alien last had his domicile prior to his unlawful entry.[25] Where aliens come to the United States by sea from transatlantic or transpacific ports, section 35 fixes the place, on their illegal entry, to which they shall be returned, namely, to the transatlantic or transpacific port from which they embarked for the United States or contiguous territory, regardless of their native country or the country of their former residence.[26] Of course the alien may be returned to the land of his nativity when that is in fact "the country whence he came."[27]

A Chinese alien, who is apprehended by the immigration authorities in an attempt to enter the United States from Canada and ordered returned to Canada, but who cannot be so returned by reason of his refusal or inability to pay the head tax required, is unlawfully in the United States, and is subject to arrest and deportation under the Chinese exclusion laws.[28]

[§ 65] **(4) Procedure—(a) In General.** Pro-

18. Bugajewitz v. Adams, 228 U. S. 585, 33 SCt 607, 57 L. ed. 978; U. S. v. Czeslicki, 209 Fed. 496; Ex p. Garcia, 205 Fed. 53; Ex p. Cardonnel, 197 Fed. 774; Siniscalchi v. Thomas, 195 Fed. 701, 115 CCA 501; Chomel v. U. S., 192 Fed. 117, 112 CCA 461; Sire v. Berkshire, 185 Fed. 967; U. S. v. North German Lloyd Steamship Co., 185 Fed. 158; U. S. v. Williams, 183 Fed. 904; U. S. v. Prentis, 182 Fed. 894; U. S. v. Weis, 181 Fed. 860.

[a] **Effect of reference to other sections of earlier act.**—The effect of the act of March 26, 1910, is not changed because the amendatory act still refers to §§ 20, 21, of the earlier act as governing deportation, although those sections provide for taking custody of aliens subject to removal within three years. Schwartz v. Adams, 228 U. S. 592, 33 SCt 609, 57 L. ed. 980; Bugajewitz v. Adams, 228 U. S. 585, 33 SCt 607, 57 L. ed. 978.

19. Zakonaite v. Wolf, 226 U. S. 272, 33 SCt 31, 57 L. ed. 218; Siniscalchi v. Thomas, 195 Fed. 701, 115 CCA 501; U. S. v. North German Lloyd Steamship Co., 185 Fed. 158; U. S. v. Williams, 183 Fed. 904; U. S. v. Weis, 181 Fed. 860.

20. 34 St. at L. 904 c 1134 §§ 20, 21, 35.

[a] **Provisions of act.**—Section 20 of the Immigration Act provides: "That any alien who shall enter the United States in violation of law . . . shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States." Section 21 of the act provides: "That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by Section twenty of this Act," etc. Section 35 of the act provides: That "the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this Act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

[b] **For a case decided under the act of 1891** see Lavin v. Le Fevre, 125 Fed. 693, 60 CCA 425.

21. U. S. v. Redfern, 186 Fed. 603.

22. U. S. v. Redfern, 186 Fed. 603.

23. Frick v. Lewis, 195 Fed. 693, 115 CCA 493 [rev 189 Fed. 146].

24. Lewis v. Frick, 233 U. S. 291, 34 SCt 488, 58 L. ed. 967 [aff 195 Fed. 693, 115 CCA 493 (rev 189 Fed. 146)]; Ex p. Gytl, 210 Fed. 918; Ex p. Wong You, 176 Fed. 933, 939, 941 [rev on other grounds 181 Fed. 813, 104 CCA 535] (where the court said: "I think that where an alien of any nationality, including a Chinese alien, is found in the United States in violation of the immigration laws, and is found to have gained entrance by violating those laws and the rules duly made, which have the force of law, he is to be adjudged to have entered the country unlawfully and deported on the warrant of the Secretary of Commerce and Labor to the country whence he came, viz., Brazil, if he was a resident and domiciled there and came by land; or to France if he came from Switzerland by way of France and then embarked for the United States and landed there, or embarked for Canada and came thence into the United States; or to China, if he embarked at a port in China for the United States and landed in the United States, or embarked at a port in China for any contiguous foreign territory, as Canada or Mexico, and came thence into the United States pursuant to a design to do so formed at or before leaving China or even on the voyage"); Ex p. Hamaguchi, 161 Fed. 185. It was also said in Ex p. Wong You, supra: "If we hold that the words 'the country whence he came' mean, in all cases, the immediate foreign country from which the alien came unlawfully into the United States, we disregard and nullify section 35. If we hold that the words 'the country whence he came' mean, in all cases, the country in which the alien was domiciled, or of which he was a citizen when he formed the intent or purpose of coming to the United States and which country he left for the United States, making a continuous journey, but embarking for the United States at some trans-Atlantic or trans-Pacific port, not in the country of his domicile or of which he was a citizen, we also disregard and nullify the provisions of said section 35."

25. Ex p. Gytl, 210 Fed. 918; U. S. v. Ruiz, 203 Fed. 441, 121 CCA 551.

[a] **Thus** where an alien, held for deportation, was a native of Spain, but a naturalized citizen of the republic of Panama whence he came to the United States, a deportation warrant providing for his return to Spain was illegal. U. S. v. Ruiz, 203 Fed. 441, 121 CCA 551.

26. Lewis v. Frick, 233 U. S. 291, 34 SCt 488, 58 L. ed. 967 [aff 195 Fed. 693, 115 CCA 493]; Ex p. Li Dick, 176 Fed. 998. In Ex p. Wong You, 176 Fed. 933, 939 [rev on other grounds 181 Fed. 813, 104 CCA 535], the court said: "The words 'deported to the country whence he came' and 'returned to the country whence he came,' as found in sections 20 and 21, are to be construed and held as meaning the country in which is situated the trans-Atlantic or trans-Pacific port from which the alien embarked for the United States in all cases where such alien did embark at some trans-Atlantic or trans-Pacific port for the United States, regardless of the country which he left for the purpose of coming to the United States, and also regardless of the countries through which he passed on his way to such port of embarkation, and also regardless of the fact that he embarked for and landed in foreign contiguous territory and then unlawfully entered the United States from such foreign contiguous territory."

27. Lewis v. Frick, 233 U. S. 291, 34 SCt 488, 58 L. ed. 967 [aff 195 Fed. 693, 115 CCA 493 (rev 189 Fed. 146)].

28. U. S. v. Yuen Pak Sune, 183 Fed. 260, 265 [aff 191 Fed. 825, 112 CCA 339] (where the court said: "If the Dominion of Canada will not receive them, do such Chinese gain the right to remain and be in the United States? Must the United States pay the head tax if she would be rid of them? As stated, the United States has neither invited them in, brought them in, nor consented to their being or remaining in the United States. This government has simply given them the right in the first instance to show that they had and have the right to enter. In this they fail. They are in the United States by their own voluntary and wrongful acts, and cannot be turned back into or returned to the Dominion of Canada because of her laws with which such Chinese persons are unable to comply and with which they refuse to comply. Are they rightfully in the United States or entitled to remain here? Clearly not. These Chinese have failed to show before the Commissioner of Immigration a right to enter. He holds they were not born in the United States. Before me the

ceedings for the deportation of an alien under the immigration statutes are in no proper sense a trial for a crime or offense,[29] nor are they governed by the rules of such trials as to pleadings or evidence;[30] and an order of deportation is not a punishment for crime so as to entitle the alien to the constitutional guaranties and safeguards accorded to a citizen accused of crime.[31] But the proceedings, although summary, must afford the alien a fair opportunity to establish his right to enter or remain in the United States;[32] and if such fair opportunity has not been accorded he has not had due process of law, and may, for relief, avail himself of a writ of habeas corpus.[33] The Immigration Act provides, in substance, that the person arrested shall have a hearing before the commissioner or an inspector, but it does not provide for the details of the practice. The rules prescribed by the secretary of commerce and labor in relation to immigration provide for the method of procedure in such cases.[34]

[§ 66] **(b) Warrant of Arrest or Deportation.** A warrant for the arrest or deportation of an alien need only comply substantially with the law and need not conform to all the niceties or technicalities of criminal pleading,[35] although it is necessary that the alien should have sufficient information of the acts, relied on to bring him within the excluded classes, to enable him to offer testimony in refutation at the hearing directed to be had by the warrant of arrest.[36] The name of the

same question has been gone into fully, and these Chinese persons have been given an opportunity to show they are of the exempt classes of Chinese, or that they were born in the United States, which they fail to do. I hold that they have not shown a right to be in the United States, and that they are alien Chinese persons not of the exempt classes, and that they left China with the purpose of coming into the United States by way of the Dominion of Canada, which is contiguous foreign territory, and that they cannot be returned or deported to that country without the payment of a head tax of $500 on each person, and that the United States is under no duty or obligation to pay such tax, and that such persons have refused to pay same, and that by their own wrongful acts and willful violation of the laws of the United States and failure to comply with the laws of Canada they have placed themselves in the United States and are now unlawfully here and not entitled to remain, and are subject to deportation under the provisions of the Chinese exclusion laws."

29. Zakonaite v. Wolf, 226 U. S. 272, 33 SCt 31, 57 L. ed. 218; Siniscalchi v. Thomas, 195 Fed. 701, 115 CCA 501; Ladaux v. Berkshire, 185 Fed. 971; Sire v. Berkshire, 185 Fed. 967. And see infra § 67.

30. Siniscalchi v. Thomas, 195 Fed. 701, 115 CCA 501; U. S. v. Martin, 193 Fed. 795; U. S. v. Rodgers, 191 Fed. 970, 975, 112 CCA 382 (where the court said: "While it is true that the record produced in the court below on habeas corpus proceedings must show a regular procedure by the ministerial officers of the government, in accordance with the requirements of the law, to jusify an order of deportation, it is only a substantial conformity of the procedure to such requirements that is demanded and a technical precision in the exemplification of the record is not to be looked for"); Ex p. Hamaguchi, 161 Fed. 185 (holding that, where the facts developed at the hearing, at which the alien was represented by counsel, from the alien's own testimony showed that he was unlawfully within the United States and was subject to deportation, it was no objection to an order of deportation that he was charged with "having entered United States without inspection," instead of "being unlawfully within the United States").

31. Ladaux v. Berkshire, 185 Fed. 971; Sire v. Berkshire, 185 Fed. 967.

32. Japanese Immigrant Case, 189 U. S. 86, 23 SCt 611, 47 L. ed. 721; U. S. v. Martin, 193 Fed. 795; Ex p. Avakian, 188 Fed. 688; U. S. v. Williams, 185 Fed. 598; De Bruler v. Gallo, 184 Fed. 566, 106 CCA 546; U. S. v. Williams, 183 Fed. 904; Davies v. Manolis, 179 Fed. 818, 103 CCA 310; U. S. v. Sibray, 178 Fed. 144 [rev on other grounds 185 Fed. 401, 107 CCA 483]; U. S. v. Sibray, 178 Fed. 150 [rev on other grounds 185 Fed. 401, 107 CCA 483].

33. U. S. v. Martin, 193 Fed. 795; U. S. v. Williams, 185 Fed. 598; U. S. v. Sibray, 178 Fed. 150 [rev on other grounds 185 Fed. 401, 107 CCA 483]. And see infra § 122.

34. U. S. v. Williams, 185 Fed. 598.

[a] **These rules prescribe** that upon an application to the secretary of commerce and labor for the warrant of arrest, a statement of the facts, supported, if practicable, by affidavits, shall be submitted, and thereupon, if it appears to the secretary that a case is made out, a warrant of arrest shall be issued. Thereupon the person arrested shall be given a hearing before the commissioner of immigration, or any immigration inspector, and, "at such stage thereof as the person before the hearing is held shall deem proper, the alien shall be appraised that he may thereafter be represented by counsel. * * * If counsel be selected, he shall be permitted to be present during the further conduct of the hearing * * * and to offer evidence." Ex p. Avakian, 188 Fed. 688; U. S. v. Williams, 185 Fed. 598; U. S. v. Sibray, 178 Fed. 150 [rev on other grounds 185 Fed. 401, 107 CCA 483]; U. S. v. Sibray, 178 Fed. 144 [rev on other grounds 185 Fed. 401, 107 CCA 483].

[b] **In actual practice the usual procedure is as follows:** "There are a number of officers called inspectors of immigration, connected with the office of the commissioner. Complaint that an alien is in this country in violation of law is usually made by one of these inspectors. The information upon which he bases the charge may have been obtained by himself upon investigation, or may have been furnished to him by others. Frequently such information is furnished by the city police, or by enemies of the person charged, acting through malice or revenge. Affidavits are obtained and are sent by the inspector to the Secretary at Washington, who, if he thinks a proper case is made out, issues a warrant for the arrest of the persons charged. This warrant is usually intrusted for execution to the inspector who has made the charge, and he subsequently usually takes entire charge of the case. After the aliens have been taken to Ellis Island, they are held in seclusion and not permitted to consult counsel until they are first examined by the inspector, under oath, and their answers taken by a stenographer. After this preliminary inquisition has proceeded as far as the inspector wishes, the aliens are then informed that they are entitled to have counsel, and to give any evidence they wish in respect to the charge. Thereafter a further hearing is had before the inspector, at which further evidence may be given by him, and the aliens may appear by counsel and offer evidence in their own behalf. The inspector thereupon reports whether in his opinion guilt has been established, and the evidence taken and the inspector's findings are sent to the Secretary of Commerce and Labor at Washington, who thereupon makes an order either for the deportation or the release of the aliens." Per Holt, J., in U. S. v. Williams, 185 Fed. 589, 599.

[c] **Right to be represented by counsel.**—(1) On the examination of an alien immigrant by the board of inspectors in respect to his qualifications for admission, he is not entitled to be represented by counsel. U. S. v. Williams, 191 Fed. 1001; U. S. v. Williams, 190 Fed. 897. See also Sire v. Berkshire, 185 Fed. 967. (2) Nor is this right secured by the provision in the treaty of commerce and navigation between Italy and the United States, ratified April 29, 1871 (17 St. 856 art 23), giving citizens of either country free access to the courts of justice of the other, with the right to employ counsel in all trials at law. U. S. v. Williams, 190 Fed. 897.

35. U. S. v. Uhl, 211 Fed. 628; Ex p. Pouliot, 196 Fed. 437; U. S. v. Sibray, 178 Fed. 144 [rev on other grounds 185 Fed. 401, 107 CCA 483].

36. U. S. v. Uhl, 211 Fed. 628; Ex p. Young, 211 Fed. 370; Hanges v. Whitfield, 209 Fed. 675; Ex p. Pouliot, 196 Fed. 437 (holding that a warrant of arrest and a deportation warrant, charging that an alien was found unlawfully in the United States, that he was a member of the excluded classes, and that he had imported a girl for the purpose of prostitution, was sufficient); Ex p. Michele, 188 Fed. 449 (holding that a deportation warrant, which charged that the alien was a member of the excluded classes, in that he was a contract laborer and had been induced to migrate by an offer or promise of employment, under an agreement to perform manual labor in the United States, was sufficient); Ex p. George, 180 Fed. 785 (holding that a warrant of arrest of an alien for deportation, charging that he had been induced or solicited to migrate to this country by an offer or promise of employment, or in consequence of an oral agreement to perform unskilled labor in this country, was sufficient); U. S. v. Sibray, 178 Fed. 150 (holding that a warrant for the arrest of an alien charging that she was a member of the excluded classes, in that she entered the United States for an immoral purpose, was not sufficiently specific); U. S. v. Sibray, 178 Fed. 144 [rev on other grounds 185 Fed. 401, 107 CCA 483] (holding a warrant to be fatally defective for failure to specify the specific act or acts which it was claimed brought relator within the excluded classes). Compare U. S. v. Williams, 175 Fed. 274 (holding that neither the Immigration Act nor the promulgated regulations require that a warrant of arrest in deportation proceedings shall state the alleged grounds on which deportation will be demanded).

alien,[37] or the time and place of entry,[38] need not be stated. But the warrant should name the country to which the alien is to be deported,[39] and the particular section of the act of 1907 under which proceedings are being taken.[40] Of course, it must state facts and not conclusions.[41] Irregularities in the order of arrest do not affect the status of an alien held upon a warrant of deportation after a fair hearing.[42] It has been held that the fact that a warrant of deportation is based in part upon a charge not stated in the warrant of arrest is not an objection when the alien has had a fair hearing on the charge.[43]

[§ 67] **e. Offenses against Immigration Laws—(1) Unlawful Landing of Aliens—(a) In General.** The Exclusion Act of March 3, 1903, requires the owners, officers, or agents of vessels bringing aliens to the United States to adopt precautions to prevent their landing at any other time or place than those designated by the immigration officers, and declares that any such owner, officer, or agent who permits any aliens to land contrary to such regulations shall be guilty of a misdemeanor.[44] The words "landing from such vessel" in this statute mean "to go ashore," the landing being complete the moment the vessel is left and the shore reached.[45] This statute was not intended to secure obedience to all rules of the immigration officers at all hazards, but at most to require good faith and full diligence in the effort to comply with them,[46] and no liability exists if due precautions were taken,[47] the burden of proof being upon the United States.[48] The word "aliens" is used in its broad and full meaning and is not restricted to alien immigrants, but includes as well aliens who are members of the ship's crew.[49] The act does not, however, comprehend the ordinary case of a sailor deserting while on shore leave,[50] unless such desertion was permitted or connived at by an officer or an agent of the vessel.[51] Nor does it apply to seamen landed and placed in a hospital because of illness.[52]

Aliens suffering with contagious disease. The immigration statute also makes it unlawful for transportation companies to bring into the United States any alien afflicted with a loathsome or

37. Ex p. Pouliot, 196 Fed. 437. Compare U. S. v. Amor, 68 Fed. 885, 16 CCA 60 (holding that a warrant of deportation should set out the names of the immigrants or otherwise identify such immigrants as the persons to be deported).

38. Ex p. Pouliot, 196 Fed. 437.

[a] **Variance as to place.**—Where an alien prostitute is arrested in deportation proceedings under the Exclusion Act of 1910 (28 U. S. St. at L. 8 c 14 § 3), a variance between the warrant of arrest and the warrant of deportation as to the place of her entry into the United States is not material. Ex p. Pouliot, 196 Fed. 437.

39. Ex p. Gytl, 210 Fed. 918; Ex p. Yabucanin, 199 Fed. 365.

40. Ex p. Yabucanin, 199 Fed. 365.

41. U. S. v. Sibray, 178 Fed. 144 [rev on other grounds 185 Fed. 401, 107 CCA 483].

42. U. S. v. Uhl, 211 Fed. 628; U. S. v. Williams, 200 Fed. 538, 118 CCA 632.

[a] **Warrant signed by wrong person.**—A warrant of arrest is not invalidated by the fact that it is signed by the assistant secretary of commerce and labor instead of by the secretary. U. S. v. Redfern, 180 Fed. 506.

43. U. S. v. Uhl, 211 Fed. 628; Siniscalchi v. Thomas, 195 Fed. 701, 115 CCA 501.

44. 32 U. S. St. at L. 1213, 1217 c 1012 § 18.

[a] **Canadian Immigration Act.** 9 & 10 Edw. VII (1910) c 27, as amended by 1 & 2 Geo. V (1911) c 12, declares any person guilty of an offense who shall knowingly and willfully land, or assist to land, or attempt to land, in Canada any immigrant or any other person whose entry is forbidden by such act. This act applies to one who furnishes false naturalization papers to a person living in the United States to enable him by misrepresentation to enter Canada. Rex v. Palangio, 4 DomLR 611, 19 CanCrCas 372, 3 OntWN 1440, 22 OntWR 540.

45. Taylor v. U. S., 207 U. S. 120, 28 SCt 53, 52 L. ed. 130.

[a] **"Landing from vessel."**—"The phrase which qualifies the whole section is, 'bringing an alien to the United States.' It is only 'such' officers of 'such' vessels that are punished. 'Bringing to the United States,' taken literally and nicely, means, as a similar phrase in § 8 plainly means, transporting with intent to leave in the United States and for the sake of transport—not transporting with intent to carry back, and merely as incident to employment on the instrument of transport. So again, literally, the later words 'to land' mean to go ashore. To avoid certain inconveniences the Government and the courts below say that sailors do not land unless they permanently leave the ship. But the single word is used for all cases and must mean the same thing for all, for sailors and other aliens. It hardly can be supposed that a master would be held justified under this section for allowing a leper to wander through the streets of New York on the ground that, as he expected the passenger to return and his expectations had been fulfilled, he could not be said to have allowed the leper to land. The words must be taken in their literal sense. 'Landing from such a vessel' takes place and is complete the moment the vessel is left and the shore reached. But it is necessary to commerce, as all admit, that sailors should go ashore, and no one believes that the statute intended altogether to prohibit their doing so. The contrary always has been understood of the earlier acts, in judicial decisions and executive practice. If we reject the ambiguous interpretation of 'to land,' as we have, the necessary result can be reached only by saying that the section does not apply to sailors carried to an American port with a bona fide intent to take them out again when the ship goes on, when not only there was no ground for supposing that they were making the voyage a pretext to get here, desert and get in, but there is no evidence that they were doing so in fact. Whether this result is reached by the interpretation of the words 'bringing an alien to the United States,' that has been suggested, or on the ground that the statute cannot have intended its precautions to apply to the ordinary and necessary landing of seamen, even if the words of the section embrace it, as in Holy Trinity Church v. U. S., 143 U. S. 457, 12 SCt 511, 36 L. ed. 226, does not matter for this case." Per Holmes, J., in Taylor v. U. S., 207 U. S. 120, 124, 28 SCt 53, 52 L. ed. 130 [quot Niven v. U. S., 169 Fed. 782, 784, 785, 95 CCA 248].

46. U. S. v. Almond, 6 Philippine 306.

47. Taylor v. U. S., 152 Fed. 1, 81 CCA 197 [aff 207 U. S. 120, 28 SCt 53, 52 L. ed. 130]; U. S. v. Almond, 6 Philippine 306, 310 (where the court said: "If by this requirement it was intended to make the ship owner or master an insurer at all hazards that all aliens aboard would strictly conform with the orders of the immigration officers, it would seem that Congress would have chosen terms more clearly indicative of such intention, and instead of using a word of uncertain meaning, would have affixed the penalty in cases wherein the owner, master, or person in charge had permitted the alien to land in violation of law, either with or without fault on his part. Where the statute permits of a construction which does not require this absolute insurance of the strict compliance by all the alien passengers aboard a vessel with the rules laid down by the immigration officers, but holds the ship's officer to the care and diligence required by the circumstances, we do not feel inclined to adopt the construction least favorable to the accused. This statute imports a duty, and in the absence of a requirement that it shall be performed at all hazards, we think no more ought to be required than a faithful and careful effort to carry out the duty imposed").

[a] **Evidence on question of due precaution.**—The master of a vessel, on trial for permitting an alien member of his crew to leave his vessel in New York, in violation of the act of March 3, 1903 (32 U. S. St. at L. 1217 c 1012 § 18), was properly allowed to be asked, on his cross-examination as a witness, whether a number of other alien members of his crew did not also desert in that port, as material to the question whether or not he took due precautions to prevent aliens from leaving the vessel, as required by the statute. Taylor v. U. S., 152 Fed. 1, 81 CCA 197 [rev on other grounds 207 U. S. 120, 28 SCt 53, 52 L. ed. 130].

48. U. S. v. Spruth, 71 Fed. 678 [dist Warren v. U. S., 58 Fed. 559, 7 CCA 368].

49. Taylor v. U. S., 152 Fed. 1, 81 CCA 197 [rev on other grounds 207 U. S. 120, 28 SCt 53, 52 L. ed. 30].

50. Taylor v. U. S., 207 U. S. 120, 28 SCt 53, 52 L. ed. 130 [rev 152 Fed. 1, 81 CCA 197]; Waterhouse v. U. S., 159 Fed. 876, 87 CCA 56; Schrotter v. U. S., 157 Fed. 1005, 85 CCA 679.

[a] **Stowaway.**—The fact that an alien seaman deserting while on shore leave was a stowaway under order of deportation does not bring the case within the provisions of the Immigration Act of March 3, 1903 (32 U. S. St. at L. 1213, 1217 c 1012 § 18). Taylor v. U. S., 207 U. S. 120, 28 SCt 53, 52 L. ed. 130 [rev 152 Fed. 1, 81 CCA 197]; Schrotter v. U. S., 157 Fed. 1005, 85 CCA 679.

51. Waterhouse v. U. S., 159 Fed. 876, 87 CCA 56.

52. Niven v. U. S., 169 Fed. 782, 95 CCA 248.

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dangerous contagious disease.[53] The act applies only to diseased persons brought in as passengers or voluntarily, and not to stowaways.[54]

[§ 68] **(b) Liability for Expense of Deportation.** An alien who enters the United States in violation of the law is required to be deported at the expense of the carrier by which he unlawfully entered,[55] provided such alien is offered to the carrier for transportation within the time limited by the statute.[56] This provision is prospective, and is applicable only to aliens brought to the United States after its adoption.[57] Moreover, in addition to the strictly deportation expenses, the government may require the payment of such other expenses connected with the removal of the alien to the port of deportation as it may deem proper.[58] In case of immigrants brought to the United States in violation of law, section 19 of the above act requires the steamship company to pay the cost of their maintenance while on land, as well as the expense of their return.[59] Section 16 makes the companies liable for the detention and maintenance of immigrants landed temporarily for examination at places where they remain in the company's charge.[60] But when the government uses a suitable building for detention and examination, the immigration officers are required to take charge of them and the company is thereafter relieved of responsibility for their detention, unless the immigrants are returned for deportation.[61]

[§ 69] **(2) Failure to Deliver List of Aliens on Board.** The act of February 20, 1907, requires the master of a vessel to deliver to the immigration officers at the port of arrival a list, or manifest, made at the time and place of embarkation, stating the name, nationality, etc., and the final destination, as well as the sea port for landing in the United States, of each alien destined to land therein, and a fine is provided for failure to make such a list.[62] This provision is penal in its nature, and must be strictly construed.[63]

[§ 70] **(3) Failure to Detain and Return Aliens.** The immigration acts impose upon one who has brought into the United States aliens not permitted to land here, the duty of returning them to the place whence they came, with a penalty by fine in case the duty is neglected.[64] These statutes do not make shipowners or masters absolute insurers of the return of the aliens to the port from which they came; nothing more is required than a faithful and careful effort to carry out the duty so imposed.[65]

[§ 71] **(4) Failure to Post Immigration Laws in Foreign Ticket Offices.** The act of congress of March 3, 1893,[66] provides that transportation companies regularly engaged in transporting alien immigrants to the United States shall certify to the secretary of the treasury that they have furnished to and kept conspicuously posted in each of their foreign ticket offices a copy of the immigration laws. It also requires agents selling tickets to persons contemplating entering the United States to call attention to such laws, and provides that for a violation of the act, or for a failure to file a

53. Act March 3, 1903 (32 U. S. St. at L. 1215).

54. Cunard Steamship Co. v. Stranahan, 134 Fed. 318.

55. Act of Febr. 20, 1907 (34 U. S. St. at L. 898 c 1134 § 20).

56. U. S. v. Oceanic Steam Nav. Co., 211 Fed. 967, 128 CCA 465; International Mercantile Mar. Co. v. U. S., 192 Fed. 887, 113 CCA 365 [rev 186 Fed. 669].

[a] **Delay caused by imprisonment of alien.**—Where an alien was not tendered for deportation within three years, the transportation line was not bound to deport him without charge to the United States, although the delay was caused by the alien's incarceration in a reformatory. U. S. v. Oceanic Steam Nav. Co., 211 Fed. 967, 128 CCA 465.

57. U. S. v. International Mercantile Mar. Co., 204 Fed. 702; U. S. v. North German Lloyd Steamship Co., 186 Fed. 672; U. S. v. North German Lloyd Steamship Co., 185 Fed. 158.

[a] **Otherwise it would be unconstitutional** as depriving the transportation companies of their property without due process of law. U. S. v. North German Lloyd Steamship Co., 185 Fed. 158.

58. U. S. v. Hamburg American Line, 159 Fed. 104, 86 CCA 294.

[a] **The act of Febr. 20, 1907 § 20** (34 U. S. St. at L. 898), provides that one half of the entire cost of removal to the port of deportation shall be at the expense of the contractor, procurer, or other person by whom the alien was unlawfully induced to enter the United States. "The act of 1903, however, is more limited in scope than the act of 1907. Whatever may be the actual expense of removing the alien to the port of deportation, it provides that only a particular portion of such expense, viz., 'one-half the cost of inland transportation,' shall be collectible. We think that the word 'transportation' as so used should be given its ordinary meaning—carriage from one place to another. The phrase 'cost of inland transportation' means the cost of carrying the alien from the inland place where he is found to the port of deportation. It does not include the cost of carrying some one else; much less the expenses of an officer traveling away from the port of deportation. If Congress desired to include such items, it should have used broader language, as it did in the later act." U. S. v. Hamburg American Line, 159 Fed. 104, 105, 86 CCA 294.

59. See U. S. v. Holland-America Line, 212 Fed. 116, 128 CCA 632 [aff 205 Fed. 943].

60. See U. S. v. Holland-America Line, 212 Fed. 116, 128 CCA 632 [aff 205 Fed. 943].

61. U. S. v. Holland-America Line, 212 Fed. 116, 128 CCA 632 [aff 205 Fed. 943].

[a] **Suitable buildings have been constructed at Ellis Island** in New York harbor for the examination of incoming aliens, which buildings are supported by the immigration head tax, and where aliens are landed at such island and are detained for treatment, either in hospitals there or in private hospitals on shore, pending the determination of their right to enter, and they are subsequently admitted, such aliens during such time are not "in charge" of the steamship companies, which are not liable for their maintenance during such period. U. S. v. Holland-America Line, 212 Fed. 116, 128 CCA 632 [aff 205 Fed. 943].

62. 34 U. S. St. at L. 898 c 434 § 12; U. S. v. Fielding, 175 Fed. 290 (holding that the statute was violated where, by arrangement with the steamship officers, an alien intending to go to New York purchased a ticket to Halifax, upon the understanding that he might continue to New York without extra charge, and was entered on the manifest as destined for Halifax instead of New York).

63. U. S. v. Four Hundred and Twenty Dollars, 162 Fed. 803.

[a] **Incorrect or false information.**—So construed it does not impose such penalty for the giving of incorrect or false information in such list, where it includes all the aliens on board, and purports to give the required information as to each. U. S. v. Four Hundred and Twenty Dollars, 162 Fed. 803.

[b] **The statute is mandatory, in so far as it requires that the manifest be filled up at the port of embarkation,** and a master failing to comply therewith is liable, notwithstanding the blanks are filled after arrival at the port of destination. U. S. v. Coombes, 200 Fed. 400, 118 CCA 552.

64. Act of Febr. 20, 1907 (34 U. S. St. at L. 898 c 1134 § 19); Act of March 3, 1891 (26 U. S. St. at L. 1084 c 551 § 10). And see Hackfeld v. U. S., 197 U. S. 442, 25 SCt 456, 49 L. ed. 826.

65. Hackfeld v. U. S., 197 U. S. 422, 25 SCt 456, 49 L. ed. 826 [rev 125 Fed. 596, 60 CCA 428]; U. S. v. Pavy, 193 Fed. 1006; U. S. v. Hemet, 156 Fed. 285; Contra Warren v. U. S., 58 Fed. 559, 7 CCA 368 (holding that, under the Immigration Act [1891] § 10, the agent of a vessel, who is ordered to detain on board and to return certain immigrants, unlawfully brought to this country, is bound to so detain them at all hazards, and will be relieved therefrom only by vis major, or inevitable accident. The word "neglect," in the provision for a penalty in case of "neglect to detain," is used in the popular sense of "fail" or "omit").

[a] **Escape while detained in custody of inspection officers.**—A shipowner, master, or agent is not an insurer of the safe-keeping of alien immigrants while detained for inspection in the custody of inspection officers at a place on land designated by such officers, and they cannot be convicted of a violation of such provisions, because of the escape of immigrants while so held without their fault or negligence. Hackfeld v. U. S., 141 Fed. 9, 72 CCA 265; U. S. v. Burke, 99 Fed. 895.

66. 27 U. S. St. at L. 570 c 206 § 6.

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certificate of performance, or in case of filing a false certificate, the company shall pay a "fine," not exceeding five hundred dollars, to be recovered in a proper United States court, which fine shall be a lien on any vessel of said company or owner found in the United States. The notice in question is required to be given and the certificate to be filed only by persons regularly engaged in bringing alien immigrants to this country.[67] And an alien immigrant, within the act, is one who comes to this country to stay.[68] The word "fine," as so used, should be treated as the equivalent of the word "penalty," whether the amount is certain or uncertain, and the fine or penalty imposed by the act is recoverable in a civil action by the United States, as the government is not limited to the enforcement of the statute by criminal proceedings.[69]

[§ 72] **(5) Making Charge or Taking Security for Return of Alien.** The act of February 20, 1907,[70] also provides that, if the owner of any vessel bringing an alien not entitled to enter shall make any charge for the return of such alien, or shall take any security from him for the payment of such charge, he shall be guilty of a misdemeanor. Such provision is not aimed at the aliens of the excluded class, but at the owners of vessels unlawfully bringing them into the country.[71] The statute undertakes to punish not only a charge made or a security taken within the territory of the United States,[72] but it is also broad enough to cover, and does cover, the taking of a security for a return charge, made previous to the bringing of the aliens into this country, where an intent to defeat the manifest purpose of the statute exists.[73] The selling of return tickets to aliens, who, although found by a board of special inquiry to be incapable of self-support and likely to become a public charge, are admitted by the secretary of commerce and labor under bond, is not a violation of the act.[74]

Burden of proof. The burden is on the government to prove that the aliens involved were brought to this country in violation of law and were ordered deported by competent authority.[75]

[§ 73] **(6) Importation for Prostitution or Other Immoral Purpose—(a) In General.** The earlier statutes were directed against the importation into this country of alien women for the purpose of prostitution.[76] But the last statute is directed against the importation of an alien woman "for the purpose of prostitution or for any other immoral purpose,"[77] and has been held to include concubinage.[78] The acts complained of must be

67. U. S. v. Atlantic Fruit Co., 212 Fed. 711.

[a] **Question for jury.**—Whether a steamship company is "regularly engaged" in transporting alien immigrants to this country is a question for the jury. U. S. v. Atlantic Fruit Co., 212 Fed. 711.

68. U. S. v. Atlantic Fruit Co., 212 Fed. 711.

69. U. S. v. Atlantic Fruit Co., 206 Fed. 440, 124 CCA 322.

70. 34 U. S. St. at L. 904 c 1134 § 19.

71. U. S. v. Nord Deutscher Lloyd, 223 U. S. 512, 32 SCt 244, 56 L. ed. 531 [rev 186 Fed. 391].

72. U. S. v. Nord Deutscher Lloyd, 223 U. S. 512, 32 SCt 244, 56 L. ed. 531 [rev 186 Fed. 391].

[a] **To so hold would be to nullify the statute** entirely, because no charge need be made for the return passage of an alien until after he had departed from the United States. U. S. v. Nord Deutscher Lloyd, 223 U. S. 512, 32 SCt 244, 56 L. ed. 531 [rev 186 Fed. 391].

73. U. S. v. Nord Deutscher Lloyd, 223 U. S. 512, 516, 32 SCt 244, 56 L. ed. 531 [rev 186 Fed. 391] (where the court said: "Section 19 of the Immigration Act of 1907 (February 20, 1907, 34 U. S. St. at L. 898, 904 c 1134), is not aimed at the aliens of the excluded class, but at the owners of vessels unlawfully bringing them into this country. The Government might in large measure protect itself by inspection, rejection and order of deportation, but it is purposed, also, as far as possible, to protect the alien. He might be ignorant of our laws and ought to be deterred from incurring the expense of making a passage which could only end in his being returned to the country from whence he came. This policy could best be subserved by securing the co-operation of the transportation companies, and to this end the statute required that they should not only maintain the aliens unlawfully brought by them into this country, but should take them back free of charge. In the absence of this last provision the company might well afford to accept as passengers those known or suspected to belong to the excluded class. It would receive from them their passage money from Europe to America. If they passed the inspection the transaction was ended. If they were deported the company would be at the trifling expense of maintaining them while here. But if it could charge and secure payment for the return passage, it would collect two fares instead of one. This would have made the transportation of an excluded alien more profitable than the carrying of one who could lawfully enter. This was so obvious that the statute not only required the cost of their passage to be borne by the transportation company, but prohibited the making of a charge, or the taking of security for the return passage, which might be collected or enforced at the end of the journey").

74. Norddeutscher Lloyd v. U. S., 213 Fed. 10.

75. Norddeutscher Lloyd v. U. S., 213 Fed. 10.

76. Act of March 3, 1875 (18 U. S. St. at L. 477 c 141 § 3); Act of March 3, 1903 (32 U. S. St. at L. 1214 c 1012).

[a] **Elements of offense.**—To warrant the conviction of a defendant charged with a violation of the act of March 3, 1903 c 1012 (32 U. S. St. at L. 1214), which provides that "the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden, and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold, or attempt to hold, any woman or girl for such purposes in pursuance of such illegal importation, shall be deemed guilty of a felony," where the charge is that of holding a woman so imported by defendant and another for the purposes of prostitution, it must be shown that defendant, either alone or in connection with such other, knowingly and willfully imported, or caused to be imported, such woman for the purposes of prostitution, and thereafter, to effect the object of such illegal importation, knowingly and willfully held such woman for such purposes. It is not necessary that defendant should have detained such woman by physical force, but it is sufficient to constitute a holding within the meaning of the statute if such woman was detained for the purpose of prostitution by physical means applied to her either directly or indirectly by defendant, or by threats, express or implied, directly or indirectly made to her by defendant, or by commands made to her directly or indirectly by defendant and calculated and operating to restrain her freedom of action and will. To warrant a conviction for attempting to hold, the same proof is required, except that it is not necessary that the means used should have been successful. U. S. v. Giuliani, 147 Fed. 594.

[b] **An attempt to import** for such purposes was not within the prohibition of the act of 1875. In re Guayde, 112 Fed. 415 (holding that, where a woman brought other women to this country under an agreement to furnish them with legitimate employment, the mere fact that during the voyage she proposed to them that they engage in prostitution after their arrival, which proposal they at once rejected, does not subject her to prosecution under such statute).

[c] **From what countries.**—The act of March 3, 1875 (18 U. S. St. at L. 477), relating to the importation of women into the United States for the purposes of prostitution, is applicable to women imported for that purpose from all countries whatsoever. U. S. v. Johnson, 7 Fed. 453, 19 Blatchf. 257.

77. Act Febr. 20, 1907 (34 U. S. St. at L. 898 c 1134).

[a] **Not retroactive.**—This act is not retroactive, and does not apply to an alien convicted of such offense under the statute before its amendment. U. S. v. Tsuji Suekichi, 199 Fed. 750, 118 CCA 188.

78. U. S. v. Bitty, 208 U. S. 393, 28 SCt 396, 52 L. ed. 543 [rev 155 Fed. 938]; U. S. v. Krsteff, 185 Fed. 201.

[a] **"The addition . . . of the words, 'or for any other immoral purpose,'** after the word 'prostitution,' must have been made for some practical object. Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for purposes of 'prostitution.' In forbidding the importation of alien women 'for any other immoral purpose,' Congress evidently thought that there were purposes in connection with the importations of alien women which, as in the case of importations for prostitution, were to be deemed immoral. It may be admitted that in accordance with the familiar rule of ejusdem generis, the immoral purpose referred to by the words 'any other im-

associated with the act of importation. Mere unlawful cohabitation with an alien woman imported for immoral purpose is not in violation of the act,[79] as congress has no jurisdiction to control the morals of alien women within the United States, unless in some manner connected with unlawful importation.[80]

Filing statement. All persons harboring, for immoral purposes, an alien female are required to file with the commissioner general of immigration a statement, giving certain facts.[81] The requirement of the statute is general, and includes all persons harboring alien women of the prescribed class, and the fact that they are not also guilty of procuration is immaterial.[82] But it applies only to persons harboring women from such countries as are parties to an arrangement for the suppression of the white slave traffic.[83]

[§ 74] **(b) Indictment.** In an indictment for a violation of a statute forbidding the importation into the United States of women for the purpose of prostitution, it is not necessary to set out the acts constituting the importation,[84] nor that the importation was in pursuance of a previous agreement, nor the place in the United States where the prostitution was to be carried on, nor the specific kind of prostitution.[85] And an indictment is not objectionable in alleging that defendants did "import and bring," etc., whereas the statute merely uses "import," for, when used in this connection, the words are synonymous.[86]

[§ 75] **(c) Evidence.** In such a prosecution any legal evidence is admissible to show the occupation of defendants,[87] and also to show their connection with the importation of the women.[88]

[§ 76] **3. Contract Labor Law—a. In General.** The name "Contract Labor Law" is generally applied to the act of February 26, 1885, entitled, "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia."[89] This statute has been supplemented by several subsequent enactments providing, among other things, for the inspection of vessels bringing passengers to the United States, for preventing the landing of aliens included in the prohibition of the act, and for enforcing their return if they have actually landed; forbidding, under the penalty of the original act, the encouragement of immigration by circulating in foreign countries advertisements containing promises of employment, and forbidding owners of vessels, either directly or by their agents, to solicit immigration, except by ordinary commercial advertising; and enlarging the penal provision of the original act so as to render not only masters of vessels, but also all others who assist in bringing prohibited aliens into the country, guilty of a misdemeanor.[90] The present act on the subject is that of February 20, 1907,[91] as amended by the act of March 26, 1910.[92]

[§ 77] **b. Persons Excluded.** The Alien Labor Law of 1885,[93] which makes it unlawful to assist in the importation or migration of any alien or foreigner under any contract or agreement "to perform labor or service of any kind," is intended to prohibit the importation of foreigners under contract to perform unskilled manual labor.[94] In the

moral purpose,' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. . . . But that rule cannot avail the accused in this case; for, the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exists between man and woman in the matter of sexual intercourse." Per Harlan, J., in U. S. v. Bitt, 208 U. S. 393, 401, 28 SCt 396, 52 L. ed. 543 [quot U. S. v. Krsteff, 185 Fed. 201, 206].

79. U. S. v. Krsteff, 185 Fed. 201; U. S. v. Lavoie, 182 Fed. 943.

80. U. S. v. Krsteff, 185 Fed. 201.

[a] **Maintaining woman for purpose of prostitution; constitutionality of statute.**—(1) So much of the act of Febr. 20, 1907 (34 U. S. St. at L. 898 c 1134 § 3), regulating the importation of aliens, as prohibits the keeping, harboring, or maintaining of a female alien for improper purposes within three years after she enters the United States, is unconstitutional. Congress has no authority to make such acts a crime, as they are within the reserved power of the states. Keller v. U. S., 213 U. S. 138, 29 SCt 470, 53 L. ed. 737, 16 AnnCas 1066 and note; Ex p. Gouyet, 175 Fed. 230. (2) This holding is not applicable in the case of a territory which is under the control of congress. Matter of Umeno, 3 Hawaii Fed. 481.

81. Act of June 25, 1910 (35 U. S. St. at L. 826 c 395 § 6).

[a] **Operation of statute.**—This act does not apply to those harboring alien women at the date of the passage of the act, at least where such harboring had already continued for more than thirty days. U. S. v. Davin, 189 Fed. 244.

82. U. S. v. Davin, 189 Fed. 244.

83. U. S. v. Davin, 189 Fed. 244. See also generally White Slavery.

84. U. S. v. Johnson, 7 Fed. 453, 19 Blatchf. 257. And see Ex p. Lair, 177 Fed. 789.

85. U. S. v. Pagliano, 53 Fed. 1001.

86. U. S. v. Pagliano, 53 Fed. 1001.

87. U. S. v. Pagliano, 53 Fed. 1001 (evidence that defendant kept a house of prostitution).

88. U. S. v. Pagliano, 53 Fed. 1001.

[a] **Possession of baggage checks.**—The intent of the importation and the contents of the baggage of the women being material on the question of their character, evidence that one defendant had possession of the checks for all such baggage was competent to show his connection with the importation. U. S. v. Pagliano, 53 Fed. 1001. See also U. S. v. Johnson, 7 Fed. 453, 19 Blatchf. 257.

89. 23 U. S. St. at L. 332.

[a] **"The motives and history of the act** are matters of common knowledge. It had become the practice for large capitalists of this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage." Per Brown, J., in U. S. v. Craig, 28 Fed. 795, 798 [quot U. S. v. Laws, 163 U. S. 258, 263, 16 SCt 998, 41 L. ed. 151; Holy Trinity Church v. U. S., 143 U. S. 457, 12 SCt 511, 36 L. ed. 226]. See also U. S. v. Aultman Co., 143 Fed. 922 [aff 148 Fed. 1022, 79 CCA 457]; U. S. v. Gay, 95 Fed. 226, 37 CCA 46; U. S. v. Gay, 80 Fed. 254 [aff 95 Fed. 226, 37 CCA 46].

90. 24 U. S. St. at L. 414; 25 U. S. St. at L. 565; 26 U. S. St. at L. 1084; 27 U. S. St. at L. 569.

91. 34 U. S. St. at L. 898 c 1134 § 2.

92. 36 U. S. St. at L. 263.

93. 23 U. S. St. at L. 332 c 164.

94. U. S. v. Laws, 163 U. S. 258, 16 SCt 998, 41 L. ed. 151 (where it was held that a contract made with an alien, to come to the United States as a chemist on a sugar plantation, is not a contract to perform labor or service within the meaning of the act); Holy Trinity Church v. U. S., 143 U. S. 457, 12 SCt 511, 36 L. ed. 226 [rev 36 Fed. 303] (where it was held that the act does not apply to one who comes to the United States under contract to enter the service of a church as its rector); U. S. v. Gay, 95 Fed. 226, 37 CCA 46 [aff 80 Fed. 254] (where it was held that an agreement to employ a foreigner as a draper, window dresser, and dry-goods clerk in a store in the United States, and as a part of his compensation to refund to him the cost of his passage to the United States, is not within the spirit of the statute).

[a] **Farm laborer.**—A laborer imported to work in and upon a farm is within the statutes. U. S. v. Parsons, 130 Fed. 681, 684, 66 CCA 129 (where the court said: "The labor of a farm hand is manual, and may be as ignorant and unskilled as that of a workman on a railroad or in a mine or forest. It depends upon the kind of labor to be done. The most ignorant and servile labor ever imported

acts of March 3, 1903, and February 20, 1907, the inhibition is against the importation of aliens "to perform labor or service of any kind skilled or unskilled."[95] Since migration to this country is essential to bring a laborer within the statute, it has been held that it is not a violation of the Alien Contract Labor Law for a corporation to knowingly employ, at its office in the United States near the Canadian border, a person who resides in Canada, and who comes daily to his work in the United States.[96] Nor are the skilled employees of foreign exhibitors at an international exposition within the contract labor laws.[97]

[§ 78] c. Occupations and Persons Excepted. Congress by specific enumeration in the Contract Labor Law and the legislation amendatory thereof has declared that certain classes of persons performing labor or service shall not be affected by the provisions of the statute: thus—

Domestic servants. The act of February 26, 1885, excepts from its provisions persons employed strictly as personal or domestic servants.[98]

Actors, artists, lecturers, and singers. The provisions of the act of February 26, 1885, do not apply to "professional actors, artists, lecturers, and singers."[99]

Ministers, members of any recognized profession, college professors, etc. The acts of March 3, 1891, and March 3, 1893, add a further exception in favor of ministers of any religious denomination, persons belonging to any recognized profession, and professors in colleges and seminaries.[1] This exception has been amended so that it now covers only persons belonging to any "recognized learned profession."[2]

Members of family and relatives of residents. The act of February 26, 1885, contained a proviso that it should not be construed to prohibit any individual from assisting any member of his family, relative, or personal friend to immigrate to the United States.[3] This provision is repealed as to relatives and personal friends by the act of March 3, 1891.[4]

Skilled labor not otherwise obtainable. The act of March 3, 1903, expressly provides that skilled labor may be imported if labor of like kind cannot

into this country was for the plantations. A man imported to handle a hoe and plow is not necessarily more intelligent or desirable than one brought to handle a pick and drill, or a shovel and scraper, or a 'peavy and a crosscut saw.' U. S. v. Gay, 95 Fed. 226, 230, 37 CCA 46. It is as reasonable to credit a section hand with the skill and intelligence of the superintendent of construction, as a farm hand with that of a trained agriculturalist").

[b] **Lacemakers** are within the act. 23 Op. Atty.-Gen. 381.

[c] **Superintendent or manager.**—"Where the nature of the employment is essentially of superintendence or management, he who engages in that employment is not a laborer but a superintendent or manager and is not within the letter or the spirit of the Act." Teerthdass v. Pohoomul, 15 Philippine 605, 623.

95. 32 U. S. St. at L. 1213 c 1012 § 4; 34 U. S. St. at L. 898 c 1134 § 2. And see In re Ellis, 124 Fed. 637; U. S. v. Michelana, 1 Porto Rico Fed. 209; 27 Op. Atty.-Gen. 383.

[a] **Prospective operation of statutes.**—Both the act of 1903 and the act of 1907 are prospective in their operation. Botis v. Davies, 173 Fed. 996.

[b] **Alien held to be contract laborer.**—An alien, upon promise to employ him on arrival at this country at stipulated wages in a definite occupation, made by one who advanced him the money for his passage, secured by a mortgage on his property, and who accompanied him on his journey, came to this country, went to work for such person at the stipulated wages and in the designated occupation, repaid the advance out of his wages, and continued in the employment of the person who made the promise and advances for a year. It was held, that he was a contract laborer, expressly included by the Immigration Act of Febr. 20, 1907 (34 U. S. St. at L. 898 c 1134 § 2); Ex p. George, 180 Fed. 785.

96. U. S. v. Michigan Cent. R. Co., 48 Fed. 365.

97. 20 Op. Atty.-Gen. 89, 91 (where it was said: "To hold that the skilled assistants, the trained experts of foreign exhibitors who come here upon the invitation of the nation, bringing their complicated and expensive machinery to illustrate the manufacture of valuable products, and to aid us in showing the world's progress in the creation of things useful and desirable—are barred and excluded by our contract-labor laws—would be to carry those laws beyond the purpose or intent of those who made them, and would lead to an unreasonable and an absurd conclusion").

98. 23 U. S. St. at L. 332 c 164 § 5.

[a] **An alien employed as an "under coachman,"** whose duties consisted in assisting to keep the stables, horses, and carriages of his employer in good order, in driving the horses when his employer, or any of his employer's family, went out in one of the carriages, and in accompanying on horseback the younger members of the family when horseback riding, was a domestic servant within the exception of the statute. In re Howard, 63 Fed. 263 (where the court said: "Apparently he has no other duties. He produces nothing. He does no work on the farm, or in the garden, or in the dairy, as in In re Cummings, 32 Fed. 75. Under the sole direction of Mr. Morton [his employer] and of Mr. Morton's family, he performs services which minister exclusively to their personal comfort and enjoyment. He lives at his employer's residence in Rhinecliff, boarding with the coachman in a small cottage of Mr. Morton's, immediately adjoining his coach house, and sleeps in a room over the coach house, where two of Mr. Morton's cooks also have their rooms. Upon such proof as this, and there being no dispute here as to the facts, it seems entirely clear that relator is employed 'strictly as a personal or domestic servant'").

[b] **Farm servant or dairyman.**—An alien employed as a farm servant or dairyman, having charge of a herd of cattle, the surplus dairy products of the herd being sold on the market, is not a domestic servant within the exception of the statute. In re Cummings, 32 Fed. 75 (where the court based its opinion upon the ground that his labor was devoted, in part at least, to the production of merchandise which competed with the product of others whose entire attention was given to manufacturing such products). See also U. S. v. Parsons, 130 Fed. 681, 66 CCA 129.

99. 23 U. S. St. at L. 332 c 164 § 5.

[a] **Milliner**——A woman imported from Paris to perform labor or service as a trimmer of hats is not a "professional artist," within the meaning of the statute. U. S. v. Thompson, 41 Fed. 28, 29 (where the court said: "Milliners, dress-makers, tailors, cooks, and barbers (some of whom, no doubt, call themselves 'artists') are not 'artists,' within the popular and received import of that word").

1. 26 U. S. St. at L. 1084 c 551 § 5; 27 U. S. St. at L. 570 c 206 § 6.

[a] **Before the passage of this amendment** it was held that the prohibition of the act of 1885 did not include a minister of a religious society. Holy Trinity Church v. U. S., 143 U. S. 457, 12 SCt 511, 36 L. ed. 226.

[b] **Chemist.**—A contract made with an alien in a foreign country to come to the United States as a chemist on a sugar plantation in Louisiana, in pursuance of which contract such alien did come to this country, and was employed on the sugar plantation, his expenses being paid by defendant, was not a contract to perform labor or service prohibited under the Contract Labor Law. U. S. v. Laws, 163 U. S. 258, 266, 16 SCt 998, 41 L. ed. 151 (where the court, after adverting to the general purposes of the act as not intended to embrace skilled labor, called attention to the fact that by the amendment of 1891 persons belonging to any recognized profession were excepted from its provisions, and said: "We think a chemist would be included in that class. Although the study of chemistry is the study of a science, yet a chemist who occupies himself in the practical use of his knowledge of chemistry as his services may be demanded may certainly at this time be fairly regarded as in the practice of a profession. . . . The fact that the individual in question, by this contract, had agreed to sell his time, labor and skill to one employer, and in one prescribed branch of the science, does not in the least militate against his being a professional chemist, nor does it operate as a bar to the claim that while so employed he is nevertheless practicing a recognized profession").

2. Act March 3, 1903 (32 U. S. St. at L. 1213 c 1012 § 2).

[a] **An expert accountant** is not a member of a learned profession within the exception of the act. In re Ellis, 124 Fed. 637.

3. 23 U. S. St. at L. 332 c 164 § 5.

4. 26 U. S. St. at L. 1084 c 551 § 5.

[a] **Exception in statute.**—In this act it is provided, however, that the sections excluding persons insane or diseased, convicts, paupers, polygamists, and contract laborers, "shall not be held to exclude persons living in the United States from sending for a relative or friend who is not of the excluded classes under such regulations as the secretary of the treasury may prescribe." Act of March 3, 1891 (26 U. S. St. at L. 1084 c 551 § 1).

be found in this country.[5]

[§ 79] **d. Penalties for Assisting Immigration of Contract Laborers—(1) In General.** To give a right of action for a penalty under the Alien Labor Law of 1885, the immigrant must, previous to his becoming a resident of the United States, have entered into a contract to perform labor or services in the United States;[6] he must have actually migrated or entered into the United States in pursuance of such contract;[7] and defendant must have prepaid his transportation, or otherwise assisted, encouraged, or solicited his migration, knowing that the immigrant had entered into the contract.[8] It would seem also that labor must have been performed under the contract.[9] On March 3, 1891, an amendatory act was passed[10] dispensing with the necessity of proving that there had been a contract with the alien "made previous to the importation or migration," or that there had been any other assistance or encouragement to his migration than a promise of employment.[11] It added to the acts penalized by the former statute another, and made it penal to "assist or encourage" the migration "by promise of employment through advertisement."[12] On March 3, 1903, another act was passed following the language of the original Labor Law, but substituting "offer, solicitation, promise" for "contract."[13] The present act

5. 32 U. S. St. at L. 1213 c 1012 § 2. And see 26 Op. Atty.-Gen. 284.

[a] **The Canadian Alien Labour Act.**—Rev. St. (1906) c 97 § 9 (1) contains a similar provision. See Rex v. H. Corby Distillery Co., 9 Ont WR 762. (2) The importation of aliens for employment as waiters in hotels conducted on the European plan is permitted under this exception. Windsor Hotel Co. v. Hinton, 5 DomLR 224. (3) When a manufactory of steel cars is established as a new industry in Canada, riveters may be imported from the United States for the purpose, if, in consequence of an unusual demand, they cannot be otherwise obtained, although riveters are employed in other industries in Canada. Francq v. Disney, 17 Que. K. B. 488, 14 CanCrCas 152.

[b] **A reasonable effort to obtain labor** of the kind desired in this country before importing it is all that is required. Beisner v. Seiboth, 20 Philippine 573, 576 (where it was said: "We do not believe it would be a reasonable interpretation of the law to hold that before a skilled laborer could be imported into the Philippine Islands it would be necessary to search every possession of the United States Government, insular and continental, for an unemployed person qualified to fill the position to which the person imported was intended before such importation could be made. Such construction would make it substantially impossible to comply with the law").

[c] **New industry.**—The act of 1885 excepted labor in any "new industry not previously established in the United States." (1) The manufacture of fine lace curtains, which has been carried on in the United States for only about three years, and is still confined to two or three establishments, and which was brought into existence by the McKinley Tariff Law is a new industry within the exception. U. S. v. Bromiley, 58 Fed. 554. (2) Defendants contracted with a resident of France to come to the United States and work for them in the manufacture of "French silk stockings," which were shown to be articles materially different from ordinary silk stockings. It was shown that there had been manufactured in the United States stockings whereof the feet were the same as those of the "French silk stockings," but that the legs were different, and made by different machines. It was held that the manufacture of the complete "French silk stockings" was a new industry, within the exception. U. S. v. McCallum, 44 Fed. 745.

6. U. S. v. Dwight Mfg. Co., 210 Fed. 74; Botis v. Davies, 173 Fed. 996; U. S. v. Gay, 80 Fed. 254; Moller v. U. S., 57 Fed. 490, 6 CCA 459 (where it was held that neither the prepaying of transportation nor the assisting or encouraging in anywise of the importation of an alien is a violation of the Alien Labor Act, without a contract or agreement made previous to the importation or migration binding the alien to perform labor or services in the United States); U. S. v. Great Falls, etc., R. Co., 53 Fed. 77; U. S. v. Edgar, 48 Fed. 91, 1 CCA 49 [aff 45 Fed. 44]; U. S. v. Bornemann, 41 Fed. 751; U. S. v. Craig, 28 Fed. 795.

7. U. S. v. Gay, 80 Fed. 254 [aff 95 Fed. 226, 37 CCA 46]; U. S. v. Bornemann, 41 Fed. 751; U. S. v. Craig, 28 Fed. 795.

8. U. S. v. Gay, 80 Fed. 254 [aff 95 Fed. 226, 37 CCA 46]; U. S. v. River Spinning Co., 70 Fed. 978; U. S. v. Edgar, 45 Fed. 44 [aff 48 Fed. 91, 1 CCA 49]; U. S. v. Bornemann, 41 Fed. 751; U. S. v. Craig, 28 Fed. 795.

9. U. S. v. River Spinning Co., 70 Fed. 978.

10. 26 U. S. St. at L. 1084 c 551 § 3.

11. U. S. v. Baltic Mills Co., 124 Fed. 38, 59 CCA 558 [rev 117 Fed. 959].

12. U. S. v. Baltic Mills Co., 124 Fed. 38, 59 CCA 558 [rev 117 Fed. 959].

[a] **Under the former statute there could be no antecedent contract by an advertisement,** however explicit the terms of the promise might be, because the promise could not, until the alien entered upon its performance, become a contract. Under the present statute no antecedent contract is necessary, and it would seem to suffice if there is a promise of employment sufficiently explicit to induce those to whom it is addressed to apply to some particular employer in the expectation of receiving employment of a specified kind at a specified compensation. The proviso indicates that congress did not use the word "promise" in its strict legal meaning, but rather in the sense of an assurance or inducement to encourage aliens to migrate. U. S. v. Baltic Mills Co., 124 Fed. 38, 59 CCA 558.

[b] **Advertisements within act.**—(1) An advertisement, in an English newspaper: "Wanted—First-class weavers on fine comb work.... First-class weavers can earn per week 35s. to £2.... Baltic Mills Company... Baltic, Conn., U. S. A.," is within the act of March 3, 1891 (26 U. S. St. at L. 1084). U. S. v. Baltic Mills Co., 124 Fed. 38, 59 CCA 558 [rev 117 Fed. 959]. (2) A substantially similar advertisement is not within the Canadian Alien Labour Act as amended by 1 Edw. VII c 13 § 4. Downie v. Vancouver Engineering Works, 10 B. C. 367, 8 CanCrCas 66, 24 CanLTOcc Notes 284. (3) "A notice, such as the one referred to, does not create, as against the appellants, the presumption that they were offering or promising to engage the waiters in question. To create such a presumption, the notice must be one which would bind the appellants to engage the foreign applicants." Windsor Hotel Co. v. Hinton, 5 DomL 224, 227.

[c] **"It is lawful for a State to advertise** its inducements to immigration and to state, as part of such advertisement, the scale of wages generally prevailing within its territory. The status of immigrants induced to come to this country by reason of such advertisements would be the same as that of any other aliens lawfully admitted to the United States." 26 Op. Atty.-Gen. 199.

[d] **"The words 'promise of employment'** are evidently here used in a broad and somewhat loose sense, meaning, not merely an offer of employment which, by acceptance on the part of any alien coming within its terms, would create a contract enforceable against some definite person or persons, but any form of words which might be reasonably understood as holding out to a possible immigrant the prospect of assured employment, although they might not import any legal responsibility on the part of anyone." 26 Op. Atty.-Gen. 199, 205.

[e] **One acting as agent for another** in procuring the immigration of alien laborers is guilty of the offense and liable for the penalty. Rex v. Disney, 14 CanCrCas 152.

13. 32 U. S. St. at L. 1214 c 1012.

[a] **Purpose of statute of 1903.**—(1) This change was made to meet the rulings of the courts, which held that in every case of alleged violation of the law all the elements of a binding contract must be proved to bring offenders within the meaning of the act. Such rulings have destroyed the efficacy of the act, as under them aliens can be imported with impunity upon the suggestion or assurance that employment in this country awaits them. 27 Op. Atty.-Gen. 383, 395. (2) Referring to § 2 of the bill, the senate committee said: "This section also enlarges the definition of what is known as the 'alien contract labor class' so as to include with those who migrate to this country in pursuance of the terms of an actual enforceable contract such aliens as are induced to come here in response to solicitations or promises of work, the evil to be equally met in the case of all such immigration being not the character of the contract or agreement under which an alien seeks our shores, but the fact that he was induced so to come by some one who proposed to utilize his services to the detriment of native or resident labor, which, though equally competent and accessible, may not be so compliant either as respects compensation or hours of daily work." See 27 Op. Atty.-Gen. 383, 397.

[b] **Immigration must be by reason of offer, etc.**—Under the Immigration Act of March 3, 1903 (32 U. S. St. at L. 1214 c 1012 §§ 4, 5), a person is not liable for the penalty unless, in addition to assisting, encouraging, or soliciting, it is also charged that the immigration is "by reason" of an offer, solicitation, promise, or agreement to or with him, or that the immigration has been that the immigrant may perform labor or service by reason of an offer, solicitation, promise, or agreement to or with him. Darnborough v. Benn, 187 Fed. 580, 109 CCA 270.

[c] **Payment of an alien's transportation** to enable him to come to the United States, although one of the acts declared unlawful by the Immigration Act of March 3, 1903 (32 U. S. St. at L. 1214 c 1012 § 4), is not, in and of itself, an act for which a penalty is incurred under § 5 unless it amounts to

makes one a "contract laborer" or not, according to the moving cause of his coming. Not only an agreement with him to perform labor in this country, but also an offer or promise of employment to perform such labor, make him a "contract laborer," if by such offer or promise he has been induced, or solicited, to migrate.[14] A separate penalty is incurred in respect of each alien whose migration or importation is knowingly assisted, encouraged, or solicited in contravention of the statute,[15] and separate suits may be brought for each alien thus promised labor or service.[16] The act applies exclusively to alien contract laborers; a person or corporation does not become liable to the penalty by assisting or encouraging contract laborers other than aliens to migrate into this country.[17]

Necessity of conscious violation. To warrant recovery of the penalty prescribed by these acts there must have been a conscious violation thereof.[18] Knowledge of all the essential facts constituting the wrongdoing,[19] including knowledge of the essential fact that the contract laborer is an alien,[20] is a necessary condition to liability.

[§ 80] **(2) Actions for Penalties—(a) Nature of Action.** An action to recover the penalty for a violation of the Contract Labor Law, although civil in its form,[21] so that depositions of absent witnesses may be read by the government,[22] and verdict may be directed for the government where the evidence is undisputed that defendant has committed an offense,[23] is so far criminal in its nature that defendant in such an action cannot be compelled to be a witness against himself.[24] In the absence of statutory provisions to the contrary, the penalty may also be enforced by criminal proceedings under an indictment.[25] But in such case defendant is entitled to the benefit of the constitutional guaranties applicable in other criminal cases,[26] such as the right to be confronted by the witnesses against him[27] and to have his guilt determined by the verdict of a jury.[28]

[§ 81] **(b) Jurisdiction and Venue.** The district courts of the United States have jurisdiction of proceedings to recover the prescribed penalties.[29] It seems, however, that the action need not be brought in those courts to the exclusion of all others.[30] Such an action may be brought in the district into which the laborer enters, or in any other district in which defendant may be found.[31]

In Canada a county court judge has no jurisdiction of such an action unless the offense was committed within his territorial jurisdiction.[32]

[§ 82] **(c) Who May Sue; Parties.** Under the act of March 3, 1903, as under the former act of February 26, 1885, the United States as well as any private individual may be a party in suits to recover this penalty;[33] the late law differing in this, that the private individual bringing the action may do so in his own name "and for his own benefit," thereby making a somewhat radical change from the act of 1885,[34] under which act and the amendatory act of 1888 an action to recover the penalty was required to be prosecuted by the district attorney.[35] Under the Canadian Alien

an assistance, encouragement, or solicitation of the alien's immigration with knowledge, etc., or in order that the alien may perform labor or service by reason of an offer, solicitation, promise or agreement to or with him. Darnborough v. Benn, 187 Fed. 580, 109 CCA 270.

[d] **Agreement with father of alien minor.**—Where the immigration of an alien minor was procured by reason of an agreement with him through his father who was the owner of his services, no promises or offers save those made to him "through his father" as the person entitled to his services being shown, his immigration was not obtained by means of any promise or agreement "with him," and was therefore not a violation of the statute. Darnborough v. Benn, 187 Fed. 580, 109 CCA 270.

14. U. S. v. Dwight Mfg. Co., 210 Fed. 74.

15. Grant Bros. Constr. Co. v. U. S., 232 U. S. 647, 34 SCt 452, 58 L. ed. 776 [aff 13 Ariz. 388, 114 P 955].

16. Grant Bros. Constr. Co. v. U. S., 232 U. S. 647, 34 SCt 452, 58 L. ed. 776 [aff 13 Ariz. 388, 114 P 955].

17. U. S. v. Great Northern R. Co., 214 Fed. 46.

18. Grant Bros. Constr. Co. v. U. S., 232 U. S. 647, 34 SCt 452, 58 L. ed. 776 [aff 13 Ariz. 388, 114 P 955]; U. S. v. Great Northern R. Co., 214 Fed. 46. See also Rex v. Hayes, 5 OntL 198, 2 OntWR 123.

19. U. S. v. Great Northern R. Co., 214 Fed. 46.

[a] **Question for jury.**—Whether a construction company for which alien contract laborers were imported had such knowledge of the unlawful acts as to warrant assessment of a penalty is a question for the jury. Grant Bros. Constr. Co. v. U. S., 13 Ariz. 388, 114 P 955 [aff 232 U. S. 647, 34 SCt 452, 58 L. ed. 776].

20. U. S. v. Great Northern R. Co., 214 Fed. 46.

21. Grant Bros. Constr. Co. v. U. S., 232 U. S. 647, 34 SCt 452, 58 L. ed. 776 [aff 13 Ariz. 388, 114 P 955]; U. S. v. Regan, 232 U. S. 37, 34 SCt 213, 58 L. ed. 494; International Mercantile Mar. Co. v. Stranahan, 214 U. S. 344, 29 SCt 678, 53 L. ed. 1024; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 SCt 671, 53 L. ed. 1013 [aff 155 Fed. 428]; Hepner v. U. S., 213 U. S. 103, 29 SCt 474, 53 L. ed. 720, 27 LRANS 739 and note, 16 AnnCas 960; Moller v. U. S., 57 Fed. 490, 6 CCA 459.

[a] **An action of debt** is the proper form of action to recover the penalty provided by this statute not only by the terms of the statute but also on general principles, for while the action, being based on a violation of the statute, sounds in tort, "debt lies for a statutory penalty, because the sum demanded is certain." Hepner v. U. S., 213 U. S. 103, 29 SCt 474, 53 L. ed. 720, 27 LRANS 739, 16 Ann Cas 960; U. S. v. McElroy, 115 Fed. 252.

22. Grant Bros. Constr. Co. v. U. S., 232 U. S. 647, 34 SCt 452, 58 L. ed. 776 [aff 13 Ariz. 388, 114 P 955]; Moller v. U. S., 57 Fed. 490, 6 CCA 459.

23. Grant Bros. Constr. Co. v. U. S., 232 U. S. 647, 34 SCt 452, 58 L. ed. 776 [aff 13 Ariz. 388, 114 P 955]; Hepner v. U. S., 213 U. S. 103, 29 SCt 474, 53 L. ed. 720, 27 LRANS 739, 16 Ann Cas 960 and note.

24. Hepner v. U. S., 213 U. S. 103, 29 SCt 474, 53 L. ed. 720, 27 LRANS 739, 16 AnnCas 960; Lees v. U. S., 150 U. S. 476, 14 SCt 163, 37 L. ed. 1150. See also U. S. v. Whitcomb Metallic Bedstead Co., 45 Fed. 89.

[a] **Founded on tort; arrest.**—An action to recover the penalty provided by the Contract Labor Law is not an action founded on contract, but rests on a tort consisting in the violation of a statute. It is not therefore within a provision exempting defendant from arrest in any action founded "on a contract, express or implied." U. S. v. Banister, 70 Fed. 44.

25. U. S. v. Stevenson, 215 U. S. 190, 30 SCt 35, 54 L. ed. 153.

26. See Criminal Law [12 Cyc 504]

27. U. S. v. Stevenson, 215 U. S. 200, 30 SCt 37, 54 L. ed. 157; U. S. v. Stevenson, 215 U. S. 190, 30 SCt 35, 54 L. ed. 153.

28. U. S. v. Stevenson, 215 U. S. 190, 200, 30 SCt 35, 37, 54 L. ed. 153 (holding that no verdict can be directed against defendant as might be done in a civil action).

Directing verdict in criminal cases see generally Criminal Law [12 Cyc 594].

Right to jury trial see generally Juries [24 Cyc 100].

29. See Lees v. U. S., 150 U. S. 476, 14 SCt 163, 37 L. ed. 1150; U. S. v. McElroy, 115 Fed. 252; Rosenberg v. Union Iron Works, 109 Fed. 844; U. S. v. Gay, 95 Fed. 226, 37 CCA 46 [aff 80 Fed. 254]; U. S. v. Whitcomb Metallic Bedstead Co., 45 Fed. 89; U. S. v. Edgar, 45 Fed. 44 [aff 48 Fed. 91, 1 CCA 49]; U. S. v. Bornemann, 41 Fed. 751; U. S. v. Craig, 28 Fed. 795. And see Berger v. Bishop, 1 Hawaii Fed. 405.

[a] **Circuit courts** of the United States have been abolished, and their former jurisdiction has been conferred upon the district courts. Judicial Code (1911) § 289. See also generally Courts.

[b] **Under the Canadian Alien Labour Act** the penalties in said act may be recovered before the recorders provided consent to the institution of said proceedings is obtained, among others, from a judge of the superior court. Les Commissaires du Havre de Montreal & La Cour du Recorder, 8 Que. Pr. 63.

30. Oehlers v. Hartwig, 5 Philippine 487.

[a] **Courts of first instance in the Philippines** have jurisdiction of an action to recover the penalty. Oehlers v. Hartwig, 5 Philippine 487.

31. U. S. v. Craig, 28 Fed. 795.

32. Rex v. Forbes, 37 N. B. 402.

33. Berger v. Bishop, 1 Hawaii Fed. 405.

34. Berger v. Bishop, 1 Hawaii Fed. 405.

35. Rosenberg v. Union Iron Works, 109 Fed. 844.

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Labour Act,[36] consent of a judge of the court is a prerequisite to the right of a private party to bring the action, and no one, other than the party or parties obtaining the consent, can recover.[37] Plaintiff is also bound to give security for costs.[38]

[§ 83] **(d) Pleading.** In an action to recover the penalty for the importation of a foreign laborer the declaration must aver every particular necessary to bring the case within the purview of the statute.[39] It should show that the alleged labor or service is not of the character therein excepted,[40] and should show the character of labor or service in which the alien immigrant is to be employed so that the court may judge whether it comes within the law.[41] The facts must be alleged from which it appears that the alien is a "contract laborer" within the statutory definition.[42] A mere allegation in terms that the immigrant is an alien contract laborer states a conclusion and is insufficient.[43] Furthermore the acts of assistance or encouragement which constitute the alleged violation of the law, and form the basis of the action, must be set out.[44] And since a conscious violation of the law is required to render one subject to the penalty, it must be alleged that the acts charged were done knowingly.[45]

[§ 84] **(e) Evidence. Admissibility.** The general rules as to admissibility of evidence in civil actions are applicable.[46]

Weight and sufficiency. The violation by defendant of the contract labor provision of the Alien Immigration Act need not be established beyond a reasonable doubt in an action of debt brought by the United States to recover the penalty incurred thereunder for such violation, but a reasonable preponderance of the proof is sufficient, since the action is civil and not criminal, although the act penalized is by the statute denominated a misdemeanor.[47]

[§ 85] **(f) Costs.** Costs may be awarded in favor of the government and against a defeated defendant in an action of debt to recover the statutory penalty.[48]

[§ 86] **C. Chinese Exclusion Acts[49]—1. Origin and History. The first treaty** between the United States and the Empire of China was concluded on July 3, 1844, and ratified in December of the following year.[50] It stipulated, among other things, that there should be a "perfect, permanent, universal peace, and a sincere and cordial amity," between the two nations.

A new treaty was concluded with the Chinese government in June, 1858, and ratified in August of the following year. It reiterated the pledges of peace and friendship between the two nations, renewed the promise of protection to all citizens of the United States in China, and stipulated for security to Christians in the profession of their religion.[51]

Burlingame treaty. In 1868 additional articles to the treaty of 1858 were agreed upon, and were duly ratified in November, 1869.[52] These additional ar-

[a] **"The statute is highly penal,** and it was the evident intention of congress that no prosecutions should be had thereunder unless commenced and conducted by the United States district attorney, acting under the responsibility of his official oath. While it may be true that an action to recover the penalty given by the act may be brought in the name of a private person, still it is the duty of the district attorney to prosecute such action at the expense of the United States, and the proceeds of any judgment recovered therein must be paid into the treasury of the United States." Rosenberg v. Union Iron Works, 109 Fed. 844, 846.

36. Alien Labour Act, Can. Rev. St. (1906) c 97 § 4.

37. Murray v. Henderson, 19 Man. 649, 14 WestLR 170; Rex v. Johnson, etc., Co., 2 OntWN 1011, 18 OntWR 985.

[a] **Requisites of consent.**—The written consent should contain a general statement of the offense alleged to have been committed, mentioning the names of the person in respect to whom the offense is alleged to have been committed, and the time and place, with sufficient certainty to identify the particular offense. Rex v. Breckenridge, 10 Ont. L. 459, 6 OntWR 501; Ririazes v. Langtry, 3 DomLR 824, 21 WestLR 430.

38. Laurin v. Raymond, 29 Que. Super. 101, 7 Que. Pr. 209.

39. U. S. v. Gay, 80 Fed. 254 [aff 95 Fed. 226, 37 CCA 46] (holding that, in an action for the penalty for violation of the acts of Febr. 26, 1885, and March 3, 1891, a declaration is insufficient which fails to show the character of the labor which the immigrant was to perform, or the terms of the contract, at least in substance, under which he came to this country, and which fails to allege definitely that he actually came here pursuant to the contract, or to set forth the acts done by defendant to assist or procure his immigration); U. S. v. River Spinning Co., 70 Fed. 978 (where it was held that, in an action to recover the penalty, the declaration should contain a particular allegation of a contract between defendant and the alien whose migration is alleged to have been assisted, setting forth categorically in what such contract consisted, a distinct statement that labor was performed under such contract, and a distinct statement of the acts by which defendant assisted the alien to migrate); U. S. v. Bornemann, 41 Fed. 751 (where it was held that a declaration in debt for the penalty which fails to allege that the foreign laborer did actually migrate to this country, and that defendant, when he assisted him to migrate, knew that he was under contract, is fatally defective); U. S. v. Michelana, 1 Porto Rico Fed. 209. See also U. S. v. Great Falls, etc., R. Co., 53 Fed. 77.

40. U. S. v. Michelana, 1 Porto Rico Fed. 209.

41. U. S. v. McElroy, 115 Fed. 252 (holding that a declaration alleging that he was "to perform labor and services as a workman in a certain factory or manufacturing plant of said defendant, and not as private secretary," etc., negativing the various specially excepted classes, but not otherwise showing the character of labor or services in which he was to be employed, is insufficient, being too general).

42. U. S. v. Dwight Mfg. Co., 210 Fed. 81.

43. U. S. v. Dwight Mfg. Co., 210 Fed. 81.

44. U. S. v. Dwight Mfg. Co., 210 Fed. 74 (where the declaration was held to sufficiently charge an "offer of employment" to the particular alien in a foreign country so as to make him a "contract laborer," although the offer was not definite as to terms of the promised employment); U. S. v. McElroy, 115 Fed. 252 (holding that a declaration alleging, in the language of the statute, that defendant "assisted, encouraged, and solicited" the immigrant, without showing what acts of assistance, etc., were rendered, is insufficient).

45. Grant Bros. Constr. Co. v. U. S., 232 U. S. 647, 34 SCt 452, 58 L. ed. 776 [aff 13 Ariz. 388, 114 P 955]; U. S. v. Michelana, 1 Porto Rico Fed. 209; Rex v. Hayes, 5 Ont. L. 198, 2 OntWR 123.

46. See Evidence [16 Cyc 821].

[a] **A determination by an immigration board** that certain persons were aliens is admissible in an action of debt to recover prescribed penalty for violating the contract labor provisions of the act of Febr. 20, 1907 (34 U. S. St. at L. 898 § 4). Grant Bros. Constr. Co. v. U. S., 232 U. S. 647, 34 SCt 452, 58 L. ed. 776 [aff 13 Ariz. 388, 114 P 955].

[b] **Declarations of third persons.**—(1) On the trial of an action against a defendant charged with having prepaid the transportation of a contract laborer into the United States in violation of the act of Febr. 20, 1907 (34 U. S. St. at L. 898), a proposed manifest for the immigrant on the form prescribed under § 12 of the act filled out by a third person before sailing of the vessel, and which was not used, but which contained the statement that the immigrant's passage was paid by defendant, was incompetent as evidence against him, as the declaration of a third person not made in his presence. Regan v. U. S., 183 Fed. 293, 105 CCA 505, 31 LRANS 1073. (2) But evidence of statements made by the associates and employees of one with whom defendant contracted was admissible to show the acts done under the contract, although the evidence also tended to show defendant's knowledge of the unlawful acts. Grant Bros. Constr. Co. v. U. S., 13 Ariz. 388, 114 P 955 [aff 232 U. S. 647, 34 SCt 452, 58 L. ed. 776].

47. Grant Bros. Constr. Co. v. U. S., 232 U. S. 647, 34 SCt 452, 58 L. ed. 776 [aff 13 Ariz. 388, 114 P 955]; U. S. v. Regan, 232 U. S. 37, 34 SCt 213, 58 L. ed. 776 [rev 203 Fed. 433, 121 CCA 543].

48. Grant Bros. Constr. Co. v. U. S., 232 U. S. 647, 34 SCt 452, 58 L. ed. 776 [aff 13 Ariz. 388, 114 P 955].

49. Conspiracy to violate Exclusion Act see Conspiracy [8 Cyc 628 note 44].

50. 8 U. S. St. at L. 592.

51. 12 U. S. St. at L. 1023.

52. 16 U. S. St. at L. 739.

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ticles in terms provided for the migration and emigration of the citizens of the two countries.

California convention. In 1878 the convention which framed the present constitution of California, being in session, took up the subject of Chinese exclusion, and memorialized congress upon it, setting forth that the presence of Chinese laborers in such large numbers had a baneful effect upon the material interests of the state, and that the immigration was a menace to civilization; that they retained the habits and customs of their own country, and, in fact, constituted a Chinese settlement within the state without any interest in the country or its institutions.

Commission of 1880. The urgent and constant prayers for relief induced congress to send a commission to China to act with the United States minister there, and, as a result of the negotiation, the supplementary treaty of November 17, 1880, was concluded and ratified.[53] By this treaty the government of China, agreed that, notwithstanding the stipulations of former treaties, the United States might regulate, limit, or suspend the coming of Chinese laborers, or their residence in the United States, without absolutely forbidding it, whenever the interest of the country, or any part of it, might require such action.

Act of 1882. On May 6, 1882, an act of congress to carry the supplementary treaty into effect was approved.[54]

Act of 1884. In 1884, owing to the great embarrassment which attended the enforcement of this act, from the suspicious nature of the testimony offered to establish the residence of the parties, congress passed an amendatory act to restrict the evidence receivable.[55] This act declared that the certificate which the laborer must obtain should be the only evidence permissible to establish his right of reëntry into the United States.

Act of 1888. To prevent evasion of the policy of excluding Chinese laborers a supplementary act was passed in 1888.[56]

Geary Act. On May 5, 1892, another act was passed, which continued for ten years all laws regulating the exclusion of Chinese;[57] and provided, among other things, for the removal of Chinese illegally in the United States,[58] and for arrest on failure to obtain a certificate.[59]

McCreary Act. On November 3, 1893, an act was passed[60] amendatory of the Geary Act.

Acts of 1902 and 1904. All the exclusion laws then in force were further "re-enacted, extended, and continued" by the act of April 29, 1902,[61] as amended by the act of April 27, 1904,[62] which constitutes the existing law on the subject, and was evidently passed in view of the expiration on May 5, 1902, of the act of May 5, 1892.

[§ 87] **2. Persons Excluded—a. In General.**[63] The policy of the law in reference to Chinese immigrants is one of exclusion of all but the few privileged classes.[64] Only Chinese persons declared by the treaty with China and the laws to be admissible may enter the United States or can lawfully remain therein.[65] On the other hand, the other immigration acts are intended to allow the admission of aliens generally, and to exclude only those who come within certain harmful or undesirable classes.[66] The regulations governing the admission of Chinese permit the temporary admission of persons whose physical condition requires immediate hospital treatment,[67] and also permit seamen to be discharged or given short leave,[68] but provide in the latter case that, if a seaman is permitted to go on shore, a bond shall be given conditioned for his departure from the country within thirty days.[69]

[§ 88] **b. Laborers.** The policy of the exclusion acts is to prohibit the entry into the United States of the entire class of Chinese laborers,[70] whether subjects of China or any other foreign power.[71]

53. 22 U. S. St. at L. 826.

54. 22 U. S. St. at L. 58.

[a] **The act provided** that the coming of Chinese laborers to the United States be suspended between the period running from the expiration of ninety days after the passage of the act of Aug. 5, 1882, and the expiration of ten years next succeeding the date of the passage thereof, May 6, 1892. It provided for the issuance of certificates for the purpose of the identification of laborers, these certificates to be given by the collector of customs to such as were in this country Nov. 17, 1880, or who should come here prior to Aug. 5, 1882. It further provided for the identification by the Chinese government of persons other than laborers, Bouvé Exclusion and Expulsion of Aliens p 85.

55. 23 U. S. St. at L. 115 c 220.

56. 25 U. S. St. at L. 504 c 1064.

[a] **This act provided** that it should be unlawful for any Chinese laborer, who had at any time before been or who was then or might thereafter be a resident of the United States and who had departed or should thereafter depart therefrom and had not returned before the passage of the act, to return to or remain in the United States, that no certificate of identity provided for in the fourth or fifth sections of the act of 1882 should thereafter be issued, that every certificate theretofore issued in pursuance of said sections was declared void and of no effect, and that Chinese claiming admission by virtue thereof should not be permitted to enter the United States. Bouvé Exclusion and Expulsion of Aliens p 91.

57. 27 U. S. St. at L. 25.

58. 27 U. S. St. at L. 26.

59. 27 U. S. St. at L. 25.

60. 28 U. S. St. at L. 7.

[a] **This act granted an extension of six months' time** after its passage in which Chinese laborers within the limits of the United States and who were entitled to remain therein before the passage of the act of May 6, 1892, might register as provided in the preceding act, but this privilege was not accorded to Chinese heretofore convicted of felonies under federal or state laws. Bouvé Exclusion and Expulsion of Aliens 96.

61. 32 U. S. St. at L. 176 c 641.

62. 33 U. S. St. at L. 428.

63. **Constitutionality of exclusion acts or provisions therein** see supra § 47. See also Commerce [7 Cyc 435].

64. U. S. v. Crouch, 185 Fed. 907; U. S. v. Chu Hung, 179 Fed. 564; U. S. v. Kut Yong, 1 Hawaii Fed. 104.

[a] **To quote the attorney-general of the United States:** "It may be stated comprehensively that the result of the whole body of these laws and decisions thereon is to determine that the true theory is not that all Chinese persons may enter this country who are not forbidden, but that only those are entitled to enter who are expressly allowed. This view is recognized by the general name under which the laws are known; the Chinese Exclusion Acts." 22 Op. Atty.-Gen. 132.

[b] **The early acts were directed against Chinese laborers,** and it was said that the object of such acts was not to expel Chinese laborers already in the United States, but to prevent the further immigration of Chinese laborers. Lew Quen Wo v. U. S., 184 Fed. 685, 106 CCA 639; Case of Chinese Merchant, 13 Fed. 605, 7 Sawy. 546; Case of Chinese Cabin Waiter, 13 Fed. 286, 7 Sawy. 536.

[c] **The purpose** was to protect American labor against cheap Chinese labor. In re Chu Poy, 81 Fed. 826.

65. U. S. v. Crouch, 185 Fed. 907.

66. See supra § 52.

67. U. S. v. Wong Kee, 192 Fed. 583.

68. U. S. v. Wong Kee, 192 Fed. 583.

69. U. S. v. Wong Kee, 192 Fed. 583.

70. U. S. v. Chu Chee, 93 Fed. 797, 35 CCA 613.

[a] **The act of 1888,** by express provision, operated upon all within its terms from the moment it was approved by the president and became a law, and is applicable to all Chinese laborers who had left the United States and had not returned and arrived in the United States before its passage. In re Chae Chan Ping, 36 Fed. 43.

71. U. S. v. Foong King, 132 Fed. 107; In re Ah Lung, 18 Fed. 28, 9 Sawy. 306. Contra U. S. v. Douglas, 17 Fed. 634.

[a] **Natives of Hongkong.**—The fact that a Chinese person emigrates to the United States from Hongkong, or even that he is a native of that colony, does not prevent his being subject to the provisions of the Chinese Exclusion Act of Sept. 13, 1888 (25 U. S. St. at L. 479 c 1015 § 13). U. S. v. Foong King, 132 Fed. 107; In re Ah Lung, 18 Fed. 28, 9 Sawy. 306.

They operate upon two classes, one consisting of those who come into the country with its consent; the other, of those who have come into the United States without its consent and in disregard of law.[72] Originally the term "laborer" as used in the Chinese exclusion acts included only those whose occupation involved physical toil and who worked for wages,[73] but the later decisions are harmonious in holding that the term should not be so restricted.[74] Thus, as used in the act of November 3, 1893,[75] the words "Chinese laborers" refer not only to those actually engaged in manual labor at the date of the passage of that act, but include all Chinese persons dependent upon their manual labor as a means of securing an honest livelihood and self-support, whether actually employed as laborers or not.[76] They have been held broad enough in their true meaning and intent to include a gambler and "highbinder;"[77] a prostitute;[78] a restaurant and lodging housekeeper,[79] a merchant who worked in a laundry;[80] a Chinese person who during half his time was engaged in cutting and sewing garments for sale by a firm in which he was a member;[81] a Chinese person who owned an interest in a mercantile firm, but who was engaged in operating a laundry and was part owner of a restaurant;[82] or who operated a fruit farm as a tenant.[83] An actor,[84] or a physician,[85] or a seaman[86] is not a laborer. A Chinese seaman, nevertheless, belongs to a class which is not allowed to set foot in the United States, except by giving a bond to depart within thirty days.[87]

Wife of Chinese laborer. A Chinese woman who marries a Chinese laborer takes the status of the husband as to the right of domicile in the United States.[88]

[§ 89] **c. Privileged Classes—(1) In General.** The Chinese exclusion acts do not apply to those who come into the United States for purposes of teaching, study, mercantile transactions, travel, or curiosity.[89] A Chinese person admitted into the United States as a student may remain after ceasing to be a student, and he may earn his living in any lawful manner without subjecting himself to deportation.[90] Executive regulations seeking to restrict the occupation of a person admitted as a student are valid only in so far as they are within the law.[91]

[§ 90] **(2) Merchants.** A Chinese merchant is entitled to admission into the United States under the Chinese exclusion laws.[92] The term "merchant," as employed in the act of November 3, 1893,[93] signifies a person who is engaged in buying and selling merchandise at a fixed place of busi-

72. Wong Wing v. U. S., 163 U. S. 228, 16 SCt 977, 41 L. ed. 140.

73. In re Tung Yeong, 19 Fed. 184, 9 Sawy. 620; In re Ho King, 14 Fed. 724, 8 Sawy. 438.

"Laborer" defined see Laborer [24 Cyc 810 et seq].

74. Lew Quen Wo v. U. S., 184 Fed. 685, 106 CCA 639; U. S. v. Ah Fawn, 57 Fed. 591.

[a] **Reason of rule.**—This is so held in view of the language of the treaty, to give force to which the legislation was enacted, and in view of the more recent enactments of congress. U. S. v. Ah Fawn, 57 Fed. 591.

75. 28 U. S. St. at L. 7 c 14.

76. U. S. v. Yee Gee You, 152 Fed. 157, 81 CCA 409; Lee Ah Yin v. U. S., 116 Fed. 614, 54 CCA 70; U. S. v. Chung Ki Foon, 83 Fed. 143.

[a] **Purpose of amendatory statute.**—"We do not think it was the purpose of this amendatory act to enlarge the limits of the privileged classes or to restrict the meaning of the term 'laborers' as it had been used in the treaty and in the prior acts. We think its purpose was not to remove any of the bars against Chinese immigration, but to remove doubt, and make definite and certain, as included within the designation 'laborers,' certain occupations which were upon the border line between the occupation of laborer and that of merchant, and which in some aspects might be regarded as belonging to the merchant class. The occupation of mining, taking fish for the purpose of selling the same, peddling, operating a laundry, etc., partake of some of the characteristics of the occupation of the merchant, and those engaged therein might in a sense be deemed merchants. Evidently it was to define these specific occupations, and to declare that persons engaged therein are not merchants, that the act was adopted." Lee Ah Yin v. U. S., 116 Fed. 614, 616, 54 CCA 70 [app dism 187 U. S. 655 mem, 23 SCt 856 mem, 47 L. ed. 351 mem, and quot U. S. v. Yee Gee You, 152 Fed. 157, 160, 81 CCA 409].

[b] **Skilled laborers** are within the exclusion acts. Lee Ah Yin v. U. S., 116 Fed. 614, 54 CCA 70 [app dism 187 U. S. 655 mem, 23 SCt 856 mem, 47 L. ed. 351 mem].

[c] **Actual employment as laborer.**—A person may be properly referred to as a laborer, or as belonging to the laboring class, although at the particular time at which such reference is made he may, by reason of inability to obtain work, sickness, or other cause, not be actually employed as a laborer. U. S. v. Chung Ki Foon, 83 Fed. 143.

[d] **Arrest and imprisonment.**—The status of a Chinese "laborer" under the acts relating to deportation was not changed by his arrest upon a criminal charge, and his subsequent enforced idleness in jail. U. S. v. Chung Ki Foon, 83 Fed. 143.

77. U. S. v. Ah Fawn, 57 Fed. 591.

78. Lee Ah Yin v. U. S., 116 Fed. 614, 54 CCA 70 [app dism 187 U. S. 655 mem, 23 SCt 856 mem, 47 L. ed. 351 mem].

79. In re Leung, 86 Fed. 303, 30 CCA 69; U. S. v. Chung Ki Foon, 83 Fed. 143; In re Ah Yow, 59 Fed. 561.

80. In re Leung, 86 Fed. 303, 30 CCA 69; U. S. v. Yong Yew, 83 Fed. 832; U. S. v. Kut Yong, 1 Hawaii Fed. 104.

81. Lai Moy v. U. S., 66 Fed. 955, 14 CCA 283.

82. U. S. v. Yee Gee You, 152 Fed. 157, 81 CCA 409; Mar Bing Guey v. U. S., 97 Fed. 576.

83. Lew Quen Wo v. U. S., 184 Fed. 685, 106 CCA 639.

84. In re Ho King, 14 Fed. 724, 8 Sawy. 438.

85. U. S. v. Chin Fee, 94 Fed. 828.

86. U. S. v. Jamieson, 185 Fed. 165 [app dism 223 U. S. 744, 32 SCt 532, 56 L. ed. 639]; In re Jam, 101 Fed. 989; In re Ah Kee, 22 Fed. 519, 22 Blatchf. 520; In re Moncan, 14 Fed. 44, 8 Sawy. 350. Compare Matter of Fook, 65 HowPr (N. Y.) 404.

87. U. S. v. Crouch, 185 Fed. 907; U. S. v. Jamieson, 185 Fed. 165 [app dism 223 U. S. 744, 32 SCt 532, 56 L. ed. 639]; U. S. v. Ah Fook, 183 Fed. 33, 105 CCA 325; In re Jam, 101 Fed. 989.

[a] **Intent to exclude.**—While a seaman is not specifically mentioned in the excluded classes, the provision that he shall be admitted only under bond shows a plain intent that he was to be excluded by the general provisions of the law. U. S. v. Crouch, 185 Fed. 907.

88. Tsoi Sim v. U. S., 116 Fed. 920, 54 CCA 154; Case of Chinese Wife, 21 Fed. 785; U. S. v. Kut Yong, 1 Hawaii Fed. 104.

[a] **Effect of subsequent marriage.**—(1) The fact that a marriage ceremony according to American or Christian customs is performed after the arrival of a Chinese woman in United States territory does not alter her status so far as her right to enter the country is concerned under the Chinese exclusion laws; her status when she reached the United States is the status which the court must alone take into consideration in deciding upon her right to remain. U. S. v. Kam You, 1 Hawaii Fed. 118. (2) Thus where a Chinese slave girl was brought to the United States, and her entry secured by fraud in violation of the exclusion laws, her subsequent marriage in this country to a Chinese inhabitant registered as a Chinese laborer, and not entitled to have a wife in this country, is not a defense to proceedings for her deportation, especially where the marriage was at her solicitation, for her protection, and was not followed by cohabitation, nor apparently regarded by the parties as more than a formality. U. S. v. Ah Sou, 138 Fed. 775, 71 CCA 141 [rev 132 Fed. 878].

89. Treaty of Nov. 17, 1880 (22 U. S. St. at L. 826); Treaty of March 17, 1894 (28 U. S. St. at L. 1210); U. S. v. Lou Chu, 214 Fed. 463; U. S. v. Sing Lee, 125 Fed. 627; U. S. v. Wong Lung, 103 Fed. 794; In re Chu Poy, 81 Fed. 826; U. S. v. Ah Fawn, 57 Fed. 591; U. S. v. Gin Hing, (Ariz.) 76 P 639. See also U. S. v. Chum Hoy, 111 Fed. 899, 50 CCA 57; U. S. v. Gin Fung, 100 Fed. 389, 40 CCA 439.

90. U. S. v. Lou Chu, 214 Fed. 463; U. S. v. Hom Lim, 214 Fed. 456; U. S. v. Lim Yuen, 211 Fed. 1001.

[a] **A student may live in a laundry** without changing his status as a student. U. S. v. Wong Chung, 92 Fed. 141.

91. U. S. v. Lou Chu, 214 Fed. 463 (holding that a rule of the department of labor that "no applicant admitted as a student shall be permitted to follow in the United States any other occupation than that of studying, unless and until he shall have made application to the immigration officer in charge of the district of his residence for the privilege of changing from that to some other exempt occupation and been granted such privilege" is invalid).

92. In re Lee Sher Wing, 164 Fed. 506.

93. 28 U. S. St. at L. 8 c 14 § 2.

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ness, where the business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor except such as is necessary in the conduct of his business as such merchant.[94] A Chinese person who claims to be a merchant must show a fixed place of business and such frequent sales of merchandise as entitle him to be considered a merchant within the ordinary meaning of the term, or an interest in some firm of such merchants.[95] The interest in the business must be substantial and real,[96] and stand in the name of the person claiming to own it.[97] His name, however, need not appear in the firm designation.[98] It is sufficient if it appears in the articles of copartnership and the partnership accounts.[99]

[§ 91] **(3) Persons Born in United States.**[1] A person born in the United States, of alien Chinese parents permanently domiciled here, is a citizen of the United States and cannot be excluded therefrom or denied the right of entry.[2] Neither of the exclusion acts of 1882, 1884, or 1888 purport to exclude from the United States the descendants of Chinese, born within the jurisdiction thereof.[3]

[§ 92] **(4) Persons Departing from and Returning to United States.** Persons departing from the United States animo revertendi and within the class entitled to reëntry may do so on presenting a proper certificate of identity.[4] The

94. Tom Hong v. U. S., 193 U. S. 517, 24 SCt 517, 48 L. ed. 772; Mar Sing v. U. S., 137 Fed. 875, 70 CCA 213; U. S. v. Pin Kwan, 100 Fed. 609, 40 CCA 618; U. S. v. Gin Hing, (Ariz.) 76 P 639; U. S. v. Tan Sam Tao, 15 Philippine 592; U. S. v. Sy Quiat, 12 Philippine 676; U. S. v. Lim Co., 12 Philippine 703.

[a] **The statute contemplates that a Chinese merchant may do manual labor.**—(1) The restriction is that it shall be such labor as is necessary in the conduct of his business as a merchant. Ow Yang Dean v. U. S., 145 Fed. 801, 76 CCA 365. (2) In Lai Moy v. U. S., 66 Fed. 955, 14 CCA 283, the court held that a Chinese person who, during half of his time, is engaged in cutting and sewing garments for sale by a firm of which he is a member is engaged in manual labor not necessary in the conduct of his business, and is not a merchant within the meaning of the statute. (3) But in U. S. v. Sun, 76 Fed. 450, it was held that a Chinese member of a trading firm, who lives at the store with other members of the firm and does housework for them and in spare time packs goods for shipment, is a merchant and not a laborer. (4) In re Chu Poy, 81 Fed. 826, it was held that a Chinaman engaged as a clerk in an established mercantile business, who does no further manual labor than that which is required to conduct the business of buying and selling merchandise at a fixed place of business, is in every proper sense a merchant and not a laborer.

[b] **Becoming temporarily a laborer** (1) through adversity or other sufficient cause may not render a Chinaman liable to deportation, if he has been a merchant in his own country and enters the United States in good faith intending to continue the business of merchandising here. See U. S. v. Yong Yew, 83 Fed. 832. And see infra § 94. (2) But it has been held that a Chinese person who, during his residence in the United States, was engaged in business as a member of a firm of dealers in fancy goods, but occasionally, during a year previous to his departure for a temporary visit, worked for short periods as a house servant in order to accommodate an old employer at times when he was without a servant, was engaged in manual labor. Lew Jim v. U. S., 66 Fed. 953, 14 CCA 281.

95. U. S. v. Lung Hong, 105 Fed. 188; U. S. v. Wong Hong, 71 Fed. 283 [rev on other grounds 77 Fed. 168].

[a] **Who are not merchants.**—(1) A bookkeeper (U. S. v. Pin Kwan, 100 Fed. 609, 40 CCA 618 [rev 94 Fed. 824]), (2) a cook (Mar Sing v. U. S., 137 Fed. 875, 70 CCA 213; Mar Bing Guey v. U. S., 97 Fed. 576), (3) a deliveryman (Mar Sing v. U. S., 137 Fed. 875, 70 CCA 213), and (4) a salesman (U. S. v. Gin Hing, 8 Ariz. 416, 76 P 639), have been held not to be merchants within the meaning of the above definition.

[b] **A Chinaman serving a term of imprisonment at hard labor** is a "laborer" within the act of May 5, 1892 (27 U. S. St. at L. 25 c 60 § 6), requiring Chinese to register, and not a "merchant" within the exemption of the act of Nov. 3, 1893 (28 U. S. St. at L. 8 c 14 § 2). U. S. v. Wong Ah Hung, 62 Fed. 1005.

96. Tom Hong v. U. S., 193 U. S. 517, 24 SCt 517, 48 L. ed. 772; U. S. v. Lee You Wing, 211 Fed. 939, 128 CCA 437; Lee Kan v. U. S., 62 Fed. 914, 10 CCA 669; In re Chop Tin, 2 Hawaii Fed. 153; U. S. v. Tam Sam Tao, 15 Philippine 592.

[a] **The purpose of the law** is to prevent those who have no real interest in the business from making fraudulent claims to the benefits of the act as merchants. Tom Hong v. U. S., 193 U. S. 517, 24 SCt 517, 48 L. ed. 772.

97. Tom Hong v. U. S., 193 U. S. 517, 24 SCt 517, 48 L. ed. 772; U. S. v. Pin Kwan, 100 Fed. 609, 40 CCA 618; Lee Kan v. U. S., 62 Fed. 914, 10 CCA 669; In re Chop Tin, 2 Hawaii Fed. 153; U. S. v. Tan Sam Tao, 15 Philippine 592.

98. Tom Hong v. U. S., 193 U. S. 517, 24 SCt 517, 48 L. ed. 772; U. S. v. Lee You Wing, 211 Fed. 939, 128 CCA 437; U. S. v. Wong Ah Gah, 94 Fed. 831; U. S. v. Wong Hong, 71 Fed. 283 [rev on other grounds 77 Fed. 168]; Lee Kan v. U. S., 62 Fed. 14, 10 CCA 669; U. S. v. Tan Sam Tao, 15 Philippine 592.

[a] **A mercantile business conducted in the name of a partnership** is conducted in the name of a partner in the firm, within the meaning of § 2 of the Chinese Deportation Act of 1893, although his name does "not appear" in the firm name. U. S. v. Wong Ah Gah, 94 Fed. 831. See also Tom Hong v. U. S., 193 U. S. 517, 24 SCt 517, 48 L. ed. 772.

[b] **Corporate and partnership names.**—"It appears by the proof that this New York firm is composed of a numerous list of what they call, in their testimony, 'partners,' and in the list of this New York firm, produced by the government Chinese inspector, who comes from New York as a witness on behalf of the government, there are some 30 or more names of these partners, from which it is said the name of this young man is absent. It shows that that firm, at least, has too many names to go upon the signs and letterheads, and it would be impracticable for each man's name to thus appear; and I should say that, like all merchants, it is open to the Chinese to conduct their mercantile enterprises by corporations and partnership firms, under the designation of the word 'company,' and that every man who honestly and fairly had an interest as a member of the corporation or the firm would be, in the language of the statute, 'conducting the business in his own name.'" In re Chu Poy, 81 Fed. 826, 829.

99. U. S. v. Pin Kwan, 100 Fed. 609, 40 CCA 618; Wong Fong v. U. S., 77 Fed. 168, 23 CCA 110; Lee Kan v. U. S., 62 Fed. 914, 10 CCA 669. Compare In re Quan Gin, 61 Fed. 395.

1. **Evidence of citizenship** see infra §§ 105–108. See also generally Citizens [7 Cyc 132].

2. Chin Bak Kan v. U. S., 186 U. S. 193, 22 SCt 891, 46 L. ed. 1121; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 SCt 456, 42 L. ed. 890; Quock Ting v. U. S., 140 U. S. 417, 11 SCt 733, 851, 35 L. ed. 501; U. S. v. Hom Lim, 214 Fed. 456; Moy Guey Lum v. U. S., 211 Fed. 91, 127 CCA 515; Mar Poy v. U. S., 189 Fed. 288; U. S. v. Chin Len, 187 Fed. 544, 109 CCA 310; U. S. v. Chu Hung, 179 Fed. 564; Pang Sho Yin v. U. S., 154 Fed. 660, 83 CCA 484; Ho Ngen Jung v. U. S., 153 Fed. 232; U. S. v. Lam Jung Sing, 151 Fed. 715; U. S. v. Loy Too, 147 Fed. 750 [aff 152 Fed. 1022, 81 CCA 682]; Moy Suey v. U. S., 147 Fed. 697, 78 CCA 85; Lee Yuen Sue v. U. S., 146 Fed. 670, 77 CCA 96; Sing Tuck v. U. S., 128 Fed. 592, 63 CCA 199 [rev 126 Fed. 386]; U. S. v. Lee Huen, 118 Fed. 442; U. S. v. Leung Sam, 114 Fed. 702; U. S. v. Jue Wy, 103 Fed. 795; Lee Sing Far v. U. S., 94 Fed. 834, 35 CCA 327; U. S. v. Wong Quong Wong, 94 Fed. 832; U. S. v. Lee Pon, 94 Fed. 827; Gee Fook Sing v. U. S., 49 Fed. 146, 1 CCA 211; Lem Hing Dun v. U. S., 49 Fed. 148, 1 CCA 210; In re Wy Shing, 36 Fed. 553, 13 Sawy. 530; In re Yung Sing Hee, 36 Fed. 437, 13 Sawy. 482; Ex p. Chin King, 35 Fed. 354, 13 Sawy. 333; In re Look Tin Sing, 21 Fed. 905. In U. S. v. Wong Kim Ark, 169 U. S. 649, 18 SCt 456, 42 L. ed. 890, the supreme court of the United States decided that a child born in the United States of parents of Chinese descent who at the time of his birth are subjects of the Emperor of China, have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes, at the time of his birth, a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the constitution.

[a] **"Nativity gives citizenship** and is a right under the Constitution. It is a right that congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the courts in the usual and ordinary way of adjudicating constitutional rights. No rule of evidence may fritter it away. When such right is in court asking for the protection of the law, no question of public policy can affect it. The citizen deported is banished, and banishment is a punishment that can follow only a judicial determination in due process of law." Moy Suey v. U. S., 147 Fed. 697, 698, 78 CCA 85. See also Citizens [7 Cyc 132].

3. In re Yung Sing Hee, 36 Fed. 437, 13 Sawy. 482.

4. Ex p. Ow Cuen, 148 Fed. 926; U. S. v. Wong Lung, 103 Fed. 794; In re Tong Ah Chee, 23 Fed. 441; Case of Former Residence by Chinese Laborer, 21 Fed. 791 [rev on other grounds 112 U. S. 536, 5 SCt 255, 28 L. ed. 770]; Case of Limited Tag, 21 Fed. 789; Case of Unused Tag, 21 Fed.

exclusion acts do not apply to such persons.[5] There is a radical distinction between the case of aliens domiciled in this country, and that of those seeking to enter this country for the first time.[6] But the right to remain in or return to the United States is forfeited where one departs and returns in violation of law.[7]

[§ 93] **(5) Wife and Minor Child of Resident.** The wife and minor children of a Chinese person who is of the privileged class or who is a citizen of the United States may enter the United States, by reason of the right of the husband and father, without a certificate.[8] And one who thus enters as the minor son of a merchant is not subject to deportation because he temporarily engages as a

701; In re Shong Toon, 21 Fed. 386; In re Pong Ah Chee, 18 Fed. 527; Case of Chinese Cabin Waiter, 13 Fed. 286, 7 Sawy. 536; Ang Kah Lian v. Collector of Customs, 23 Philippine 627.

[a] **Departure before passage of exclusion acts.**—(1) Chinese persons who were in the United States at the date of the treaty of 1880 with China and who departed before the Exclusion Act of 1882 took effect are entitled, under such act, to land without producing customhouse certificates. U. S. v. Jung Ah Lung, 124 U. S. 621, 8 SCt 663, 31 L. ed. 591; Chew Heong v. U. S., 112 U. S. 536, 5 SCt 255, 28 L. ed. 770; In re Ah Ping, 23 Fed. 329; In re Shong Toon, 21 Fed. 386; In re Tung Yeong, 19 Fed. 184, 9 Sawy. 620. See also In re Moncan, 14 Fed. 44, 8 Sawy. 350 (where it was held that a person on board a vessel of the United States, or any one of them, is, in contemplation of law, within the territory and jurisdiction of the United States, and therefore a Chinese laborer who shipped on an American vessel at London prior to the passage of the Exclusion Act of 1882, and continued on her until her arrival in the United States, although after the expiration of the ninety days next following the passage of said act, is entitled to reside therein). (2) But under the act of Nov. 3, 1893 (28 U. S. St. at L. 7), Chinese persons who left the United States before its passage cannot return. Lai Moy v. U. S., 66 Fed. 955, 14 CCA 283; Lew Jim v. U. S., 66 Fed. 953, 14 CCA 281. (3) And the right of a Chinese person to readmission to the United States, on the ground that he has already been engaged as a merchant therein is governed by such act, although he departed from the country before that act was passed. U. S. v. Loo Way, 68 Fed. 475 [aff 72 Fed. 688]; In re Yee Lung, 61 Fed. 641.

[b] **What constitutes a departure.**—(1) Chinese subjects purchasing through tickets and embarking in an American vessel bound from one American port to another, who do not leave the vessel when she, having leave to do so, touches at a foreign port, have not departed from the United States within the meaning of the Chinese Exclusion Act. In re Tong Wah Sick, 36 Fed. 440, 13 Sawy. 497. (2) And a Chinese laborer, a resident of the United States, does not lose his residence by going into Mexico and remaining there only one night. U. S. v. Lee Yung, 63 Fed. 520. (3) So a Chinese laborer who has acquired a residence does not lose the same by shipping as one of the crew on an American vessel, at an American port, for a voyage to a foreign port and return, although he may land at such foreign port. In re Jack Sen, 36 Fed. 441, 13 Sawy. 510; Case of Chinese Laborers on Shipboard, 13 Fed. 291, 7 Sawy. 542; Case of Chinese Cabin Waiter, 13 Fed. 286, 7 Sawy. 536.

[c] **Return as member of prohibited class.**—(1) A person who temporarily leaves the country with the intention of returning cannot be excluded on his return because he is not included in one of the classes expressly excepted from the operation of the exclusion acts, and who alone are permitted to enter the United States by rules 1 and 2 of the regulations adopted by the department of commerce and labor, such rules being applicable only to persons seeking to enter for the first time. Ex p. Ng Quong Ming, 135 Fed. 378. (2) Thus it was held in U. S. v. Chin Fee, 94 Fed. 828, that a Chinese physician, not a laborer, who had resided in this country for several years, had registered as permitted by the statute, and afterward went to China temporarily, intending to return, was entitled to remain in the United States after his reëntry, although his occupation was not one of those stated, in terms, in the treaties or the rules. (3) But the fact that during the six months immediately following the passage of the Chinese Exclusion Act of 1893, appellants were merchants, as defined in section 2 of said act, and therefore not required to apply to the collector of internal revenue for a certificate of residence, would not be conclusive of their present right to remain in the United States, where they afterward left the country, disposing of whatever business they had during the six-months period, and without any proven intention of returning, and then returned and engaged in business as laborers. U. S. v. Moy Yim, 115 Fed. 652.

5. Ex p. Ng Quong Ming, 135 Fed. 378; In re Ota, 96 Fed. 487.

6. Ex p. Ng Quong Ming, 135 Fed. 378. In Lau Ow Bew v. U. S., 144 U. S. 47, 61, 12 SCt 517, 36 L. ed. 340 [quot Ng Quong Ming, 135 Fed. 378, 383], it is said: "Chinese merchants domiciled in the United States, and in China only for temporary purposes, animo revertendi, do not appear to us to occupy the predicament of persons 'who shall be about to come to the United States,' when they start on their return to the country of their residence and business. The general terms used should be limited to those persons to whom Congress manifestly intended to apply them, and they would evidently be those who are about to come to the United States for the first time."

7. U. S. v. Tuck Lee, 120 Fed. 989, 992 (where Ray, J., said: "Congress having prescribed the terms and conditions on which the defendant might remain here, or might depart from and return to the United States, and not having transcended its powers in so doing, this alien was bound to observe them, and, not having done so, is illegally within the United States. When he took his labor certificate he entered into a contract with the government of the United States that he would comply with and obey its laws, not only while here, but in departing from and returning to the United States, and the government undertook to guaranty to him, while in this country, the equal protection of the laws; but his right to remain or be in the United States, or to return thereto in case he departed therefrom, was forfeited when he voluntarily left the United States in violation of law, and then returned in violation of such law"). See also Ex p. Chin Fong, 213 Fed. 288.

8. U. S. v. Gue Lim, 176 U. S. 459, 20 SCt 415, 44 L. ed. 544 [aff 83 Fed. 136]; U. S. v. Yee Quong Yuen, 191 Fed. 28, 111 CCA 500; U. S. v. Foo Duck, 172 Fed. 856, 97 CCA 204 [aff 163 Fed. 440]; In re Lee Sher Wing, 164 Fed. 506; U. S. v. Chin Sing, 153 Fed. 590; Tsoi Sim v. U. S., 116 Fed. 920, 54 CCA 154; In re Lee Yee Sing, 85 Fed. 635; In re Lum Lin Ying, 59 Fed. 682; In re Chung Toy Ho, 42 Fed. 398, 9 LRA 204. Contra In re Li Foon, 80 Fed. 881; In re Wo Tai Li, 48 Fed. 668; Case of Chinese Wife, 21 Fed. 785; In re Ah Quan, 21 Fed. 182. Compare U. S. v. Ah Sou, 138 Fed. 775, 71 CCA 141; Tsoi Sim v. U. S., 116 Fed. 920, 54 CCA 154; Mar Bing Guey v. U. S., 97 Fed. 576.

[a] **Reason of rule.**—(1) "It is impossible to believe that parties to this treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission, is found in the fact that the domicile of the wife and children is that of the husband and father, and that the concession to the merchant of the right to enter the United States, and dwell therein at pleasure, fairly construed, does include his wife and minor children; particularly when it is remembered that such concession is accompanied with a declaration to the effect that, in such entry and sojourn in the country, he shall be entitled to all the rights and privileges of a subject of Great Britain or a citizen of France." In re Chung Toy Ho, 42 Fed. 398, 399, 9 LRA 204 [quot Tsoi Sim v. U. S., 116 Fed. 920, 922, 54 CCA 154]. (2) "In the case of minor children, the same result must follow as in that of the wife. All the reasons which favor the construction of the statute as exempting the wife from the necessity of procuring a certificate apply with equal force to the case of minor children of a member or members of the admitted classes. They come in by reason of their relationship to the father, and whether they accompany or follow him, a certificate is not necessary in either case. When the fact is established to the satisfaction of the authorities, that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child of one of the members of a class mentioned in the treaty as entitled to enter, then that person is entitled to admission without the certificate." U. S. v. Gue Lim, 176 U. S. 459, 468, 20 SCt 415, 44 L. ed. 544 [quot U. S. v. Foo Duck, 172 Fed. 856, 857, 97 CCA 204].

[b] **The marriage must have been in good faith** and not a mere sham, for the purpose of evading the deportation laws. Wong Heung v. Elliott, 179 Fed. 110, 102 CCA 408.

[c] **Adopted children.**—(1) A Chinese merchant domiciled in the United States has the right to bring into this country with his wife minor children legally adopted by him in China, where it is shown that the adoption was bona fide and that the children have lived as members of his family and have been supported by him for several years. Ex p. Fong Yim, 134 Fed. 938. (2) The question whether the adoption is a genuine one is a question of fact, open to investigation, and if it were found that the adoption was a sham proceeding for the purpose of evading the exclusion laws, undoubtedly the person claiming such adoption could be excluded. Ex p. Fong Yim, supra. (3) Adoption by a person domiciled in the United States will not change the status of a minor who was not entitled to land at the time he was admitted. Juan Co v. Rafferty, 14 Philippine 235.

[d] **A Chinaman over twenty-one years of age** is not entitled to enter the Philippine Islands in order to be under the care and protection of his father. Go To Sun v. McCoy, 16 Philippine 497.

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laborer.[9] But a minor thus lawfully entering the United States loses such status on the return of his father to China to remain permanently, and his status thereafter is determined by his own occupation.[10] If a minor child can enter without a certificate, he can, of course, remain without it.[11]

[§ 94] **d. Effect of Change of Occupation.** A Chinese person who has been a merchant in his own country, and enters the United States in good faith, intending to continue the business of merchandising here, and who in like good faith enters upon that business, but, through adversity or other sufficient cause, is unable to continue and enters other employment for a time, is not liable to deportation.[12] Likewise a person shown to have been a merchant at the date of the act providing for the registration of Chinese laborers, who continued to be such merchant until after the time within which laborers were permitted to register, is not liable to deportation if after such time he becomes a laborer.[13] But when a Chinese person enters as a merchant, and soon ceases to be one, and becomes a laborer, the facts should be fairly scrutinized, and if he immediately proceeds to, and continues in, employment as a laborer, such fact ought to have a strong bearing on the intent with which he came.[14] Conversely, when domicile has been acquired contrary to, and in violation of, the laws of the United States, and when it is only through an unlawful entry into the United States that Chinese persons secure a residence in this country, they cannot purge themselves of their offense by assuming the occupation of members of the privileged class, nor establish their right to remain by proof of that character.[15]

An unregistered laborer may protect himself against deportation by becoming a merchant before proceedings are taken against him.[16]

[§ 95] **3. Certificate of Identity—a. In General.** Chinese persons, other than laborers, desiring to enter the United States, and not domiciled therein, are required to procure a certificate from the Chinese authorities, viséd by the consular representative of the United States.[17] Such certificate viséd as aforesaid, is made prima facie evidence of the facts set forth therein,[18] and is required to be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward to be produced to the proper authorities of the United States whenever lawfully demanded.[19] It is also provided that the certificate "shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States";[20] but its effect as such

9. U. S. v. Lim Yuen, 211 Fed. 1001; U. S. v. Yee Quong Yuen, 191 Fed. 28, 111 CCA 500.

10. U. S. v. Joe Dick, 134 Fed. 988.

11. U. S. v. Yu Kiao, 20 Philippine 307.

12. U. S. v. Hom Lim, 214 Fed. 456; U. S. v. Lee You Wing, 211 Fed. 939, 128 CCA 437 [aff 208 Fed. 166]; U. S. v. Yee Quong Yuen, 191 Fed. 28, 111 CCA 500; U. S. v. Foo Duck, 172 Fed. 856, 97 CCA 204; In re Yew Bing Hi, 128 Fed. 319; U. S. v. Yong Yew, 83 Fed. 832. See also Ow Yang Dean v. U. S., 145 Fed. 801, 76 CCA 365.

[a] **Bankruptcy.**—"The mere fact that the business of a professional merchant has gone into bankruptcy does not, of itself, change the professional status of such person. He may, by reason of business reverses, be temporarily not engaged in his actual profession; but certainly it can not be contended that bankruptcy of itself would make a merchant a laborer." Ang Kah Lian v. Insular Collector of Customs, 23 Philippine 627, 630.

13. Ex p. Ow Guen, 148 Fed. 926; U. S. v. Seld Bow, 139 Fed. 56; U. S. v. Louie Juen, 128 Fed. 522; In re Yew Bing Hi, 128 Fed. 319; In re Chin Ark Wing, 115 Fed. 412; U. S. v. Sing Lee, 71 Fed. 680; U. S. v. Quong Chee, 11 Ariz. 16, 89 P 525.

14. Chain Chio Fong v. U. S., 133 Fed. 154, 66 CCA 220; Cheung Him Nim v. U. S., 133 Fed. 391, 66 CCA 453; U. S. v. Ng Park Tan, 86 Fed. 605; U. S. v. Yong Yew, 83 Fed. 832.

[a] **Evidence of unlawful entry.**—"Where a Chinese person secures admission into the United States as a merchant and immediately becomes and continues as a laborer, this latter fact is evidence that he came into the United States as a laborer, and the court is justified in holding that his coming was in violation of the statute, and that he is unlawfully within the United States and cannot remain." U. S. v. Foo Duck, 172 Fed. 856, 858, 97 CCA 204.

15. Mar Bing Guey v. U. S., 97 Fed. 576; U. S. v. Chu Chee, 93 Fed. 797, 804, 35 CCA 613 (where the court said: "But it is contended on the part of the defendants that the status of Chinese aliens domiciled in the United States must be determined according to their status at the time of arrest, and not at the time of entry, and that, upon being arrested, it was competent for them to show by affirmative proof that they were students engaged in acquiring an education in our schools, and, being so engaged, they were not members of the prohibited class, and not subject to deportation. When, however, that domicile has been acquired contrary to and in violation of the laws of the United States, and when, as here, it is only through an unlawful entry into the United States that the Chinese persons secured a residence in this country, they can not purge themselves of their offense by assuming the occupation of members of the privileged class, and establish their right to remain by proof of that character"); U. S. v. Chan Sam, 17 Philippine 448.

[a] **For example** a Chinaman who has made an unlawful entry into the Philippine Islands and whose status is that of an unregistered Chinese laborer until long after the period for registration has expired is subject to deportation, although, before the entry of the order of deportation, he changes his occupation to that of a member of one of the privileged classes. U. S. v. Chan Sam, 17 Philippine 448.

16. Ex p. Ow Guen, 148 Fed. 926; U. S. v. Mark Ying, 76 Fed. 450.

17. Wan Shing v. U. S., 140 U. S. 424, 11 SCt 729, 35 L. ed. 503; Chew Heong v. U. S., 112 U. S. 536, 5 SCt 255, 28 L. ed. 770; U. S. v. Chin Chong Pong, 192 Fed. 722.

Necessity of certificate in case of wife or minor child of Chinese person domiciled in the United States, or of child born in the United States of Chinese parentage see supra § 93.

[a] **Domiciled persons.**—(1) The only evidence of the right of a Chinese laborer, who left the United States after the passage of the act of May 6, 1882 (22 U. S. St. at L. 59 c 126 § 4), to reënter is the certificate provided in the act. Case of Limited Tag, 21 Fed. 789; Case of Unused Tag, 21 Fed. 701; In re Shong Toon, 21 Fed. 386; In re Pong Ah Chee, 18 Fed. 527. (2) But the requirements of the Exclusion Act that the viséd certificate of identity therein provided for shall be the sole evidence permissible to establish a right to enter the United States does not apply to a merchant, long domiciled in the United States, who is returning from a temporary visit to China, and he may establish his right by the documentary evidence of identity furnished to him by the customs officers on his departure from the United States. Lau Ow Bew v. U. S., 144 U. S. 47, 12 SCt 517, 36 L. ed. 340 [rev 47 Fed. 578]. See also In re Yee Lung, 61 Fed. 641; U. S. v. Chin Quong Look, 52 Fed. 203; U. S. v. Gee Lee, 50 Fed. 271, 1 CCA 516.

18. U. S. v. Fong Sen, 205 Fed. 398; U. S. v. Chin Chong Pong, 192 Fed. 722; U. S. v. Pin Kwan, 100 Fed. 609, 40 CCA 618; U. S. v. Ng Park Tan, 86 Fed. 605; In re Tung Yeong, 19 Fed. 184 9 Sawy. 620. And see In re Chinese Relators, 58 Fed. 554 (where it was held that where the passport, certificate, and papers of a Chinese immigrant are regular, and such as the statutes declare to be prima facie evidence of the facts therein stated, their effect is not to be overcome by the sworn statement of a special inspector that he was told by an interpreter that the immigrant had made statements inconsistent with the papers). See also Jew Sing v. U. S., 97 Fed. 582 (where it was held that a certificate of residence issued to a Chinese person is prima facie evidence of the right of the holder to remain in the United States, of which right he can only be deprived by the courts upon proof that he has committed some act which would work its forfeiture).

19. U. S. v. Pin Kwan, 100 Fed. 609, 40 CCA 618; U. S. v. Gin Hing, 8 Ariz. 416, 76 P 639.

20. U. S. v. Pin Kwan, 100 Fed. 609, 610, 40 CCA 618; Mar Bing Guey v. U. S., 97 Fed. 576 (where it was held that a Chinese person, erroneously permitted to enter without such certificate, is unlawfully within the United States and may be arrested and deported without regard to his occupation since his entry); In re Wo Tai Li, 48 Fed. 668; U. S. v. Gin Hing, 8 Ariz. 416, 76 P 639.

[a] **The fact that a Chinese person has been permitted to enter the United States does not alter this rule of evidence,** as he can only enter by means of a proper certificate, and the statute expressly provides for its production after entry, whenever lawfully demanded, and also provides that any person unlawfully within the United States shall be removed therefrom. U. S. v. Gin Hing, 8 Ariz. 416, 76 P 639.

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may be overcome by other evidence in the case,[21] as by showing that defendant, immediately after landing in this country, engaged in manual labor.[22] Such certificates are licenses revocable at the pleasure of congress.[23]

[§ 96] **b. Requisities and Sufficiency.** In order to make a certificate of identity prima facie evidence of the holder's right to come into this country, it must conform strictly to the requirements of the statute as to its contents, so as not to permit of evasion or deception.[24]

[§ 97] **4. Registration and Certificate of Residence—a. In General.** By the terms of the act of November 3, 1893, amending section 6 of the act of May 5, 1892, it was made the duty of all Chinese laborers entitled to remain in the United States, before the passage of the act thus amended, to apply to the collector of internal revenue of their respective districts, within six months thereafter, for a certificate of residence,[25] unless prevented by accident, sickness, or other unavoidable cause.[26] These certificates are registered as the solemn act of the government, and are intended to furnish evidence of the right of the holders thereof to remain in the United States,[27] and they are not subject to collateral attack.[28]

Abrogation. A Chinese laborer's certificate of residence is abrogated by his leaving the United States and does not entitle him to return.[29]

Return certificate. The granting of a return cer-

[b] **Loss of certificate.**—A Chinese person, having obtained a certificate on his departure, and having had it stolen from him during his absence, is entitled to land, on his return to the port whence he sailed, no one in the meantime having presented the certificate, on proving these facts and identifying himself as the person to whom the certificate was issued. U. S. v. Jung Ah Lung, 124 U. S. 621, 8 SCt 663, 31 L. ed. 591. See also U. S. v. Lee You Wing, 208 Fed. 166.

[c] **A seaman** need not obtain a certificate in order to go ashore temporarily while his ship is in port. U. S. v. Jamieson, 185 Fed. 165 [app dism 223 U. S. 744, 32 SCt 532, 56 L. ed. 639]. And see supra § 94.

[d] **Under the act of May 6, 1882** (22 U. S. St. at L. 60 c 126 § 6), it has been held that the certicate is not the only competent evidence that a Chinese person is not a laborer, and therefore entitled to come to and reside within the United States, but the fact may be shown by any other pertinent and convincing testimony. In re Ho King, 14 Fed. 724, 8 Sawy. 438. See also In re Ah Quan, 21 Fed. 182.

21. U. S. v. Chin Chong Pong, 192 Fed. 722; U. S. v. Ng Park Tan, 86 Fed. 605.

22. U. S. v. Ng Park Tan, 86 Fed. 605; U. S. v. Yong Yew, 83 Fed. 832. And see supra § 94.

23. Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905; Chae Chan Ping v. U. S., 130 U. S. 581, 9 SCt 623, 32 L. ed. 1068; Forbes v. Chuoco Tiaco, 16 Philippine 535.

24. Cheung Pang v. U. S., 133 Fed. 392, 66 CCA 454; U. S. v. Pin Kwam, 100 Fed. 609, 40 CCA 618 [rev 94 Fed. 824]; U. S. v. Chu Chee, 93 Fed. 797, 35 CCA 613; U. S. v. Yee Mun Sang, 93 Fed. 365; U. S. v. Yong Yew, 83 Fed. 832; U. S. v. Quong Chee, 11 Ariz. 16, 89 P 525; U. S. v. Gin Hing, 8 Ariz. 416, 76 P 639.

[a] **If the applicant claims the right of entry because he is a merchant,** the certificate must, among other things, state the nature, character, and estimated value of the business carried on by him prior to, and at the time of, his application. U. S. v. Pin Kwan, 100 Fed. 609, 40 CCA 618; U. S. v. Yong Yew, 83 Fed. 832; U. S. v. Gin Hing, 8 Ariz. 416, 76 P 639. Under the act of May 6, 1882 (22 U. S. St. at L. 60 c 126 § 6), it was not required that the certificate should state "the nature, character and estimated value of the business carried on by him." But by the act of July 5, 1884 (23 U. S. St. at L. 116 c 220 § 6), amending the former act, these requirements were added to the then existing requirements of the certificate. U. S. v. Gin Hing, 8 Ariz. 416, 76 P 639.

[b] **Authority of United States consul.**—(1) A certificate of a consul of the United States in China, not indorsed on one from the Chinese government, is not evidence tending to establish the right of a Chinese person to entry into the United States, such a document being issued by a United States consul without authority of law. U. S. v. Chu Chee, 93 Fed. 797, 35 CCA 618. (2) Thus a certificate of identification given by a Chinese consul in Japan, and vised by the vice consul general of the United States at Yokohama, is not sufficient, in the absence of evidence other than the certificate itself, that the consul issuing it has authority from the Chinese government to do so. U. S. v. Mock Chew, 54 Fed. 490, 4 CCA 482 [app dism 149 U. S. 789 mem, 13 SCt 1053 mem, 37 L. ed. 966 mem].

25. Geary Act May 5, 1892 (27 U. S. St. at L. 25 c 60 § 6); McCreery Act Nov. 3, 1893 (28 U. S. St. at L. 7 c 14 § 6). And see Lee Joe Yen v. U. S., 148 Fed. 682, 78 CCA 427; Lee Won Jeong v. U. S., 145 Fed. 512, 76 CCA 190; Mar Sing v. U. S., 137 Fed. 875, 70 CCA 213; Cheung Pang v. U. S., 133 Fed. 392, 66 CCA 454; U. S. v. Ah Chung, 130 Fed. 885, 65 CCA 562; U. S. v. Williams, 83 Fed. 997; U. S. v. Chung Ki Foon, 83 Fed. 143; In re Ny Look, 56 Fed. 81.

[a] **If a person has a certificate of residence issued under the act of 1892,** he is entitled to remain in the country, notwithstanding the fact that he has no certificate issued under the later act, and is not allowed to have one. U. S. v. Jung Jow Tow, 110 Fed. 154.

[b] **Contents of certificate.**—The certificate must contain the photograph, name, age, local residence, and occupation of the applicant, and such other description as the secretary of the treasury may from time to time require. 27 U. S. St. at L. 26; 28 U. S. St. at L. 8.

[c] **Duplicate.**—A duplicate certificate must be filed in the office of the collector of internal revenue of the district within which the application is made. 27 U. S. St. at L. 26; 28 U. S. St. at L. 8.

[d] **Arrest on failure to obtain certificate.**—Any Chinese laborer found within the jurisdiction of the United States without a certificate of residence is deemed to be unlawfully within the United States, and may be arrested. 27 U. S. St. at L. 25; 28 U. S. St. at L. 7.

[e] **Who may arrest.**—The arrest may be made by any United States customs official, collector of internal revenue or his deputies, or by a United States marshal or his deputies. 27 U. S. St. at L. 25; 28 U. S. St. at L. 7.

[f] **Lost certificates.**—In cases where it appears that the Chinaman has procured a certificate which has been lost or destroyed, he should be detained and judgment suspended for a reasonable time, to enable him to procure a duplicate from the officer granting the original one. 27 U. S. St. at L. 25; 28 U. S. St. at L. 7.

[g] **Forging certificates.**—Any person who falsely alters or substitutes any name for the name written in a certificate, or knowingly utters any forged or false certificate, or falsely personates any person named in the certificate, is guilty of a misdemeanor. 27 U. S. St. at L. 26.

26. 28 U. S. St. at L. 8. And see Ah How v. U. S., 193 U. S. 65, 24 SCt 357, 48 L. ed. 619 (holding sickness not sufficient as a matter of law); U. S. v. Yee Gee You, 152 Fed. 157, 81 CCA 409; Yee Yuen v. U. S., 133 Fed. 222, 66 CCA 276 (excuse must be clearly shown).

[a] **Imprisonment** pursuant to sentence for crime is not a valid excuse for failure to register within the time limited by exclusion acts of May 5, 1892 (27 U. S. St. at L. 25 c 60 § 6), and Nov. 3, 1893 (28 U. S. St. at L. 7 c 14 § 6), providing for the deportation of Chinese laborers who fail to register within a prescribed time unless prevented by accident, sickness, or other unavoidable cause. U. S. v. Ah Poing, 69 Fed. 972.

[b] **Impossibility.**—Where the complaint in deportation proceedings against a Chinese person duly alleged that he was a Chinese manual laborer within the United States without a certificate of residence, it was not material to the right of the government to deport him that he came into the United States at a time when it was impossible to obtain a certificate of residence. Lew Quen Wo v. U. S., 184 Fed. 685, 106 CCA 639.

[c] **Payment of costs.**—The act of May 5, 1892 (27 U. S. St. at L. 25 c 60 § 6), permitting a Chinese laborer, arrested without a certificate of residence, to show that he was entitled to such a certificate, but was prevented, by reason of accident, sickness, or other unavoidable cause, from procuring it, declares that on such showing a certificate shall be granted to him "upon his paying the cost." It was held that the act does not refer to the costs of the laborer's arrest and trial. U. S. v. Tye, 70 Fed. 318.

27. Lew Quen Wo v. U. S., 184 Fed. 685, 106 CCA 639; Jew Sing v. U. S., 97 Fed. 582. In In re Tom Hon, 149 Fed. 842, 845, it is said: "The issuance of such certificate is the solemn act of the government, of which a permanent record is made, and is intended to furnish evidence of the right of the holder to remain in the United States. The right which the certificate confers is a valuable one, of which the holder can only be deprived by the judgment of a court of equity, in a direct action brought by the United States for the purpose of annulling it, or in a proceeding for deportation, by proof that since its issuance the holder has forfeited his right to remain in the United States by departing therefrom without procuring from the collector of customs of the district from which he departed a certificate entitling him to re-enter the United States, as provided in article 2 of the treaty of March 17, 1894, between the United States and China, and the regulations adopted by the treasury department for the purpose of carrying out the provisions of that article."

28. Lew Quen Wo v. U. S., 184 Fed. 685, 106 CCA 639; In re Tom Hon, 149 Fed. 842.

29. Hom Yuen v. U. S., 214 Fed. 57.

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tificate is not conclusive as to the right to re-enter.[30]

[§ 98] **b. Persons Who May or Must Register. Minor.** The fact that a Chinese laborer is a minor does not exempt him from the duty of registering. The test should be capacity, and not merely age.[31]

A Chinese laborer, convicted of felony, is not entitled to register under the Exclusion Act of November 3, 1893.[32]

Merchants. The acts of 1892 and 1893 do not apply to Chinese merchants;[33] nor do they authorize the deportation of a Chinese person who was then lawfully in this country in business as a merchant, and who continued in such business until after the time for registration had expired, because he subsequently became a laborer, on his failure in business, and is not provided with a certificate of registration under said acts.[34]

Persons not laborers. But any Chinese person who is not a laborer, and who has a right to be and to remain within the United States, is entitled to a certificate as evidence of such right.[35]

[§ 99] **5. Detention or Imprisonment.** Detention or temporary confinement, as a part of the means necessary to give effect to the exclusion or expulsion of Chinese aliens, is valid, such detention not being imprisonment in a legal sense.[36]

Imprisonment at hard labor. But that portion of the Geary Act providing for the imprisonment at hard labor, for a period not exceeding one year, of any Chinese person, or person of Chinese descent, convicted and adjudged by a commissioner to be not lawfully entitled to be or remain in the United States, is clearly violative of the provisions of the federal constitution guaranteeing to persons prosecuted criminally by the federal government the right of trial by jury and certain other rights.[37]

[§ 100] **6. Deportation—a. Nature of Proceeding.** A proceeding for the deportation of a Chinese person under the exclusion acts is special and statutory,[38] summary in character,[39] and administrative rather than judicial.[40] Such a proceeding is civil, and not criminal, in its nature,[41] and therefore the constitutional, statutory, and common-law provi-

30. Hom Yuen v. U. S., 214 Fed. 57, 59 (where it was said: "The proposition that there is any finality about the 'return certificate' is wholly unfounded. In the very nature of things it could not be final; it is concerned only with what is shown to be the situation as to family, property, or debts, at the time when it is issued. But re-entry is to be determined by the status on the day of return. A Chinese person may have a parent or child living here, or may own property here, or there may be money owing to him, when he takes out the return certificate; but if, during his absence, the relatives die or cease to reside here, or the property is sold and the money sent to him in China, or the debt extinguished by payment, he cannot re-enter, certificate or no certificate, because when he applies to re-enter he does not comply with the conditions which section 6 imposes on all Chinese persons seeking re-entry").

31. U. S. v. Joe Dick, 134 Fed. 988. See also Ah How v. U. S., 193 U. S. 65, 24 SCt 357, 48 L. ed. 619.

[a] **"Very young or very old persons,** incapable of 'labor' in the ordinary meaning of that word, are probably not included, although they might be able to do some inconsiderable work with their hands. But when a youth has grown strong enough to do an adult's work, I see no reason why he should not be classed with his companions in labor, although some of them may be his elder by several years." Per McPherson, J., in U. S. v. Joe Dick, 134 Fed. 988, 990.

32. 28 U. S. St. at L. 7 c 14 § 6. And see U. S. v. Chew Cheong, 61 Fed. 200.

33. U. S. v. Leo Won Tong, 132 Fed. 190.

34. U. S. v. Hom Lim, 214 Fed. 456; U. S. v. Lee You Wing, 211 Fed. 939, 128 CCA 437 [aff 208 Fed. 166]; U. S. v. Leo Won Tong, 132 Fed. 190; U. S. v. Louie Juen, 128 Fed. 522; In re Yew Bing Hi, 128 Fed. 319; In re Chin Ark Wing, 115 Fed. 412; U. S. v. Sing Lee, 71 Fed. 680.

35. 27 U. S. St. at L. 26.

[a] **"Just what this provision is intended to cover** is not quite clear, nor have I been able to find any case construing it. Whatever it may mean, or may have been intended to cover, it did not require the appellant, as long as he was a merchant, to apply for any certificate. If it was intended to apply to a merchant at all, it left the matter optional with him as to whether he would apply for it or not; and when he ceased to be a merchant, becoming a laborer, it had no application to him as a laborer, because it only applied 'to any Chinese person other than a Chinese laborer.'" Per Rogers, J., in U. S. v. Leo Won Tong, 132 Fed. 190, 194.

36. Wong Wing v. U. S., 163 U. S. 228, 16 SCt 977, 41 L. ed. 140; Ex p. Jong Jim Hong, 157 Fed. 447. See also In re Sing Lee, 54 Fed. 334; U. S. v. Hing Quong Chow, 53 Fed. 233. And see supra § 47.

[a] **Place of imprisonment.**—Under the act of Sept. 13, 1888 (25 U. S. St. at L. 479, § 13), which provides that any Chinese person found in the United States may be brought before a commissioner, and, when adjudged not entitled to be or remain in the United States, shall be removed to the country whence he came, and U. S. Rev. St. § 787, which authorizes a marshal to execute process in the district wherein he was appointed, a Chinaman cannot be lawfully imprisoned in a county jail in the northern district of the state by a deputy marshal of the southern district on a finding of a United States court commissioner of the latter district, which, after reciting certain facts, declares that "now, therefore, from the foregoing facts I find that the said" Chinaman "was found unlawfully within the United States, and that he is not lawfully entitled to be in or remain" therein. Peo. v. Ah Teung, 92 Cal. 421, 28 P 577, 15 LRA 190.

37. Wong Wing v. U. S., 163 U. S. 228, 16 SCt 977, 41 L. ed. 140; U. S. v. Wong Dep Ken, 57 Fed. 206. And see supra § 47.

38. U. S. v. Lee Ching Goon, 7 Ariz. 2, 60 P 692.

39. U. S. v. Yeung Chu Keng, 140 Fed. 748.

40. Toy Tong v. U. S., 146 Fed. 343, 76 CCA 621.

41. Tiaco v. Forbes, 228 U. S. 549, 33 SCt 585, 57 L. ed. 960; Wong Wing v. U. S., 163 U. S. 228, 16 SCt 977, 41 L. ed. 140; Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905; Ex p. Jim Hong, 211 Fed. 73, 127 CCA 569; In re Jem Yuen, 188 Fed. 350; Chin Wah v. Colwell, 187 Fed. 592, 109 CCA 422; U. S. v. Yuen Pak Sune, 183 Fed. 260 [aff 191 Fed. 825, 112 CCA 339]; In re Chin Wah, 182 Fed. 256 [aff 187 Fed. 592, 109 CCA 422]; Low Foon Yin v. U. S. Immigration Comrs., 145 Fed. 791, 76 CCA 355; Ah Tai v. U. S., 135 Fed. 513, 68 CCA 225; U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93 [rev 126 Fed. 400]; U. S. v. Moy You, 126 Fed. 226; U. S. v. Lee Huen, 118 Fed. 442; The Haytian Republic, 57 Fed. 508 [aff 59 Fed. 476, 8 CCA 182]; U. S. v. Wong Dep Ken, 57 Fed. 206; In re Sing Lee, 54 Fed. 334; In re Ng Loy Hoe, 53 Fed. 914; U. S. v. Hing Quong Chow, 53 Fed. 233; U. S. v. Wong Sing, 51 Fed. 79; In re Chow Goo Pooi, 25 Fed. 77; U. S. v. Wong Lee Foo, 13 Ariz. 252, 108 P 488, 31 LRANS 1088; Chan Gun v. U. S., 9 App. (D. C.) 290; U. S. v. Ching Kim Hee, 3 Hawaii Fed. 556; U. S. v. Yap Kin Co., 22 Philippine 340.

[a] **Referring to the character of the Chinese deportation proceeding,** the supreme court, speaking by Mr. Justice Gray, said in Fong Yue Ting v. U. S., 149 U. S. 698, 730, 13 SCt 1016, 37 L. ed. 905: "The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application." This language was quoted with approval in Wong Wing v. U. S., 163 U. S. 228, 236, 16 SCt 977, 980, 41 L. ed. 140; U. S. v. Ngum Lun May, 153 Fed. 209, 210; Toy Tong v. U. S., 146 Fed. 343, 348, 76 CCA 621; U. S. v. Hung Chang, 134 Fed. 19, 24, 67 CCA 93 [rev 126 Fed. 400]; Chan Gun v. U. S., 9 App. (D. C.) 290, 298.

[b] **"The proceedings for the deportation of Chinese are sui generis.**—(1) They are authoritatively declared not to be criminal, yet in many of their features they closely resemble criminal proceedings. They are initiated by the arrest of the accused. He is restrained of his liberty under a warrant authorizing the seizure of his person and his confinement in prison in advance of a hearing or an opportunity to meet the charge against him in a judicial tribunal prior to his arrest. Unless he can show that he has complied with the law, he is punished by being banished or deported and forcibly removed from the country. In these

sions in respect to criminal prosecutions, concerning trial by jury,[42] bail,[43] and the like, have no application to such a proceeding. Hence, also, it is competent for the government to swear such Chinese person as a witness against himself,[44] and to permit depositions de bene esse to be taken and used.[45] But evidence obtained in violation of the constitutional provisions against unreasonable seizures cannot be used against him.[46]

[§ 101] b. Jurisdiction. Jurisdiction to prevent unlawful entry into the United States is vested in inspectors representing the department of commerce and labor.[47] Jurisdiction to deport alien Chinese persons "found unlawfully in the United States" and held to be illegally therein is vested in United States commissioners and in the district court[48] of the district in which the arrest is made.[49] The provisions of the Chinese exclusion acts authorizing Chinese persons thought to be unlawfully within the United States to be arrested and taken before a commissioner confer jurisdiction upon such commissioner to determine the cases,[50] and no order of a district judge referring such cases to the commissioner for hearing is either required or authorized;[51] but a commissioner cannot be required to entertain such cases in the face of an authoritative declination by the officers of the department to pay his lawful fees and disbursements therein.[52] The provision in the act of 1892 that Chinese laborers without certificates may be "taken before a United States judge" is satisfied by a proceeding before a "justice or commissioner,"[53] while the act of 1901 expressly authorizes the district attorney to designate the commissioner before whom a Chinese person may be brought.[54] Commissioners have the same power and authority that the judge of the district court would have in such an investigation. Their functions are those of judicial officers, aiding to ascertain contested facts on which the alien's right to be in the country has been made by congress to depend.[55] They may issue warrants for the apprehension of Chinese persons accused of being unlawfully within the United States,[56] decide whether such persons are unlawfully in the United States,[57] pass on the evidence presented to estab-

particulars at least the proceedings are quite analogous to a criminal action, and of as great and in many instances greater importance to the defendant." In re Chin Wah, 182 Fed. 256, 257 [aff 187 Fed. 592, 109 CCA 422]. See also In re Ah Tai, 125 Fed. 795. (2) Thus the statutes speak of violation of the provisions of the act, of arrest, conviction, and imprisonment at hard labor. In judicial opinions the courts have spoken of testimony in a deportation case as "incriminating the respondent" (Ex p. Sing, 82 Fed. 22); (3) of "the offense" (using the word only for convenience), and of "punitive provisions" (In re Ng Loy Hoe, 53 Fed. 914); (4) of "verified complaint" and "warrant" (U. S. v. Wong Dep Ken, 57 Fed. 206. See U. S. v. Long Hop, 55 Fed. 58); (5) of "presumption of innocence" (In re Chu Poy, 81 Fed. 826); (6) of "a plea of not guilty" and "a finding of guilty" (In re Gut Lun, 83 Fed. 141; In re Tsu Tse Mee, 81 Fed. 562); and (7) of a respondent as "tried and convicted" (U. S. v. Long Hop, supra).

42. In re Tsu Tse Mee, 81 Fed. 562; In re Sing Lee, 54 Fed. 334; In re Chow Goo Pool, 25 Fed. 77.

[a] **Due process of law.**—The procedure is exceptional and special, and due process of law in the constitutional sense, or as applied in view of the common law, is not a necessary or essential adjunct, or demandable as of right. U. S. v. Ngum Lun May, 153 Fed. 209.

[b] **Proceedings for the deportation of Chinese persons are not "causes,"** within U. S. Rev. St. § 566, declaring that the trial of issues of fact in the United States district courts in all causes except cases in equity and cases of admiralty and maritime jurisdiction, etc., shall be by jury. Toy Tong v. U. S., 146 Fed. 343, 76 CCA 621.

43. See infra § 103.

44. See infra § 108.

45. In re Lam Jung Sing, 150 Fed. 608. See also supra § 106.

46. U. S. v. Wong Quong Wong, 94 Fed. 832. See also generally Searches and Seizures [35 Cyc 1263].

47. Ex p. Chow Chok, 161 Fed. 627 [aff 163 Fed. 1021, 90 CCA 230].

[a] **Reëntry.**—(1) Where a Chinese resident left the country for China, notwithstanding a certificate fixing his status as a merchant was denied him on a preinvestigation, his right to reënter was for the determination of the immigration department, and not for that of justice, judge or commissioner, under the exclusion laws. Ex p. Chin Fong, 213 Fed. 288. (2) Where, however, a Chinese person had established his right to depart from and return to the United States on a preinvestigation, under the exclusion laws, he could not thereafter be lawfully deported on returning to the United States, for alleged violation of the Immigration Act, without a hearing before a justice, judge, or commissioner. Ex p. Wong Tuey Hing, 213 Fed. 112.

48. Ex p. Chow Chok, 161 Fed. 627 [aff 163 Fed. 1021, 90 CCA 230].

49. U. S. v. Chin Tong, 192 Fed. 485, 112 CCA 647 (holding that an arrest without a warrant and transportation from the district in which he lives to another one for arraignment is not authorized).

50. Ex p. Lee Kow, 161 Fed. 592; U. S. v. Lee Lip, 100 Fed. 842.

51. U. S. v. Lee Lip, 100 Fed. 842.

[a] **Reference to commissioner unauthorized.**—In deportation proceedings under the Chinese Exclusion Act of Nov. 3, 1893 (28 U. S. St. at L. 8 c 14 § 2), in which defendant was arrested and brought before a United States district judge, the case could not be referred to a United States commissioner, and judgment of deportation rendered upon the evidence in his report, defendant being entitled to a judgment upon a hearing of the witnesses before the district judge personally. Jung Goon Jow v. U. S., 13 Ariz. 255, 108 P 490, 31 LRANS 1091.

52. U. S. v. Lee Lip, 100 Fed. 842.

53. Chin Ying v. U. S., 186 U. S. 202, 22 SCt 895, 46 L. ed. 1126; Chin Bak Kan v. U. S., 186 U. S. 193, 22 SCt 891, 46 L. ed. 1121; Low Foon Yin v. U. S. Immigration Comr., 145 Fed. 791, 76 CCA 355; In re Chin Ark Wing, 115 Fed. 412; Fong Mey Yuk v. U. S., 113 Fed. 898, 51 CCA 528; In re Tsu Tse Mee, 81 Fed. 562; In re Wong Fock, 81 Fed. 558.

[a] **Concurrent jurisdiction.**—(1) By the terms of the Chinese Exclusion Act of Nov. 3, 1893 (28 U. S. St. at L. 8 c 14), United States district judges and commissioners are vested with coördinate original jurisdiction in this class of cases. Jung Goon Jow v. U. S., 13 Ariz. 255, 108 P 490, 31 LRANS 1091. (2) The powers of the commissioners are in general those of committing magistrates; but, for the purposes of the enforcement of the Chinese exclusion acts, congress has enlarged their jurisdiction, and made it concurrent with that of United States judges. U. S. v. Lee Ching Goon, 7 Ariz. 2, 60 P 692.

[b] **"The expression 'a United States judge,'** found in section 6 of the act of May 5, 1892, is, in my opinion, a general one, and refers to those judicial officers (viz. 'justice, judge, or commissioner') previously and specifically enumerated in sections 2 and 3 of the same act. A United States commissioner is certainly a judicial officer, and exercises—it is true, within very narrow limits—the functions of a United States judge." Per Morrow, J., in In re Wong Fock, 81 Fed. 558, 560.

[c] **A justice of the supreme court of the District of Columbia is** a "United States judge" within the meaning of the Chinese exclusion acts, and hence has jurisdiction to grant orders for deportation as provided by those acts. Chan Gun v. U. S., 9 App. (D. C.) 290.

[d] **Conditions precedent.**—An arrest upon a formal complaint under oath is not a necessary precedent to the jurisdiction of a United States judge to grant an order for deportation of a Chinese laborer. Chan Gun v. U. S., 9 App. (D. C.) 290.

54. Chin Ying v. U. S., 186 U. S. 202, 22 SCt 895, 46 L. ed. 1126; Chin Bak Kan v. U. S., 186 U. S. 193, 22 SCt 891, 46 L. ed. 1121; Lee Kim Fong v. U. S., 13 Ariz. 47, 108 P 237.

[a] **Designation by assistant district attorney.**—If it is necessary to designate a particular commissioner to hear a case of the sort, that designation should be made by the district attorney, and not by the assistant to the district attorney. U. S. v. Kol Lee, 132 Fed. 136.

[b] **The territory of Arizona,** before it became a state, although divided for the administration of law and for the holding of district courts with powers of the district and circuit courts of the United States into five judicial districts, with boundaries as established by the justices, was deemed one "district," within the act of March 3, 1901 (31 U. S. St. at L. c 845), authorizing the district attorney of the district in which any Chinese person might be arrested for being found unlawfully within the United States to designate the commissioner within such district before whom such person should be taken for hearing, and the district attorney of the territory was authorized to designate a commissioner within the first judicial district of the territory as the commissioner before whom a Chinese person arrested in the second judicial district should be taken for hearing. Lee Kim Fong v. U. S., 13 Ariz. 47, 108 P 237.

55. U. S. v. Yeung Chu Keng, 140 Fed. 748. See also generally United States Commissioners [39 Cyc 791].

56. Ex p. Lung Wing Wun, 161 Fed. 211.

57. Ex p. Lung Wing Wun, 161 Fed. 211.

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lish that right,[58] make orders directing those not privileged to remain to be deported,[59] and discharge from arrest those who prove a present right to remain in the United States,[60] such decisions being subject to review on appeal to the district court of the proper district.[61] After a commissioner has made and filed a certified transcript in the case of a Chinaman ordered by him to be deported his authority over the matter ends. There is no statutory right to make up and file additional findings.[62] The mere assertion of citizenship will not deprive a commissioner of his statutory jurisdiction,[63] nor will defects in the complaint or pleadings have this effect.[64] But a proceeding to deport a Chinese person will be dismissed where he appears to have been already ordered deported by the commissioner of another district, the latter having acquired an exclusive jurisdiction of the case.[65]

[§ 102] **c. Arrest.**[66] A Chinese person may not be arrested without a warrant,[67] or on a warrant, unless based on circumstances showing him to be unlawfully within the United States.[68] Where a Chinese person is unlawfully within the United States and subject to arrest, any citizen, including a Chinese inspector, may secure the evidence necessary to cause an arrest,[69] or may at his own risk prevent the Chinese person from escaping by restraining him;[70] but such restraint is not the arrest which will throw on the Chinese person the burden of proof of showing his right to remain in the United States, until some facts appear and a warrant is issued, or until evidence is disclosed on a hearing indicating that his presence is unlawful.[71] The issuance of warrants in Chinese deportation proceedings is regulated by the act of March 3, 1901,[72] and no warrant of arrest may be issued except on the sworn complaint of one of a certain class of officials mentioned therein.[73] Full opportunity to produce the certificate or other evidence must always be accorded, under proper safeguards, before taking a Chinese laborer before a justice, judge, or commissioner of a United States court and swearing out a warrant for his commitment and trial.[74] Therefore it is proper for a Chinese inspector to examine a Chinaman as to his right to remain in the country, through an interpreter, before causing his arrest.[75]

[§ 103] **d. Bail.** Proceedings for the deportation of Chinese aliens not being criminal in character, the general statutory provisions concerning bail in criminal cases do not apply.[76] Nor is there any express statute providing for bail in Chinese exclusion or deportation proceedings.[77] Prior to 1892, it was a common practice, when a Chinese person, seeking admission, but denied the right to land, was brought before a court under a writ of habeas corpus, for the court to admit him to bail pending the hearing.[78] On May 5, 1892, congress enacted a statute providing that Chinese persons seeking to land in the United States could not make application to any judge or court of the United States in the first instance for a writ of habeas corpus for the purpose of being admitted to bail.[79] On November 3, 1893, congress provided that pending the execution of an order of deportation the

[a] **Cancellation of certificate.**—In a proceeding for the deportation of a Chinese person arrested as being unlawfully in the United States, the commissioner has no jurisdiction to cancel a certificate of residence, issued to defendant and regular on its face, on the ground that it was procured by fraud. In re See Ho How, 101 Fed. 115.

58. Lee Lung v. Patterson, 186 U. S. 168, 22 SCt 795, 46 L. ed. 1108 (holding that a commissioner does not lose that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper).

59. Ex p. Lung Wing Wun, 161 Fed. 211; U. S. v. Yeung Chu Keng, 140 Fed. 748.

[a] **Imprisonment at hard labor.**—A United States commissioner, while he has authority, in a summary proceeding under the Chinese exclusion acts, to order the deportation of a Chinaman found to be unlawfully within the United States, has no jurisdiction to order him to be imprisoned at hard labor for thirty days prior to the time fixed for his deportation. In re Ah Yuk, 53 Fed. 781.

60. Ex p. Lung Wing Wun, 161 Fed. 211; U. S. v. Yeung Chu Keng, 140 Fed. 748.

61. Ex p. Lee Kow, 161 Fed. 592; Ex p Lung Wing Wun, 161 Fed. 211. And see infra §§ 112–116.

62. Liu Hop Fong v. U. S., 209 U. S. 453, 28 SCt 576, 56 L. ed. 888.

63. Chin Ying v. U. S., 186 U. S. 202, 22 SCt 895, 46 L. ed. 1126; Chin Bak Kan v. U. S., 186 U. S. 193, 22 SCt 891, 46 L. ed. 1121. And see infra § 122.

64. Chin Ying v. U. S., 186 U. S. 202, 22 SCt 895, 46 L. ed. 1126; Chin Bak Kan v. U. S., 186 U. S. 193, 22 SCt 891, 46 L. ed. 1121.

65. U. S. v. Luey Guey Auck, 115 Fed. 252.

66. See generally Arrest [3 Cyc 867].

67. U. S. v. Hom Lim, 214 Fed. 456.

68. U. S. v. Hom Lim, 214 Fed. 456.

69. U. S. v. Hom Lim, 214 Fed. 456.

70. U. S. v. Hom Lim, 214 Fed. 456.

71. U. S. v. Hom Lim, 214 Fed. 456.

72. 31 U. S. St. at L. 1093 c 845 § 3. Under this act no warrant of arrest for a violation of the Chinese Exclusion Law can be issued, except upon the sworn complaint of the United States district attorney, the assistant United States district attorney, the collector, the deputy collector or inspector of customs, the immigration inspector, the United States marshal or United States deputy marshal of the Chinese inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States district attorney of the district in which the same is issued. See U. S. v. Lee Chiao, 23 Philippine 543.

73. U. S. v. Lee Chiao, 23 Philippine 543.

[a] **The act of 1901 applies in the Philippine Islands,** notwithstanding the passage of Act No. 702 by the Philippine government. U. S. v. Lee Chiao, 23 Philippine 543, 547 (where it was said: "In view of the positive requirements of said Act of Congress (Act of March 3, 1901, sec. 3), relating to the only persons who can make the sworn complaint in cases like the present, and the absence of any provision whatever in said Act No. 702, we are of the opinion that the complaint here must be presented by officers of the Philippine Government bearing the same relation to said Government which the officers mentioned in said Act of Congress bear to the United States Government").

74. Rule 23 par "a" p 54, Regulations Governing the Admission of Chinese, edition of June 22, 1911; Guan Lee v. U. S., 198 Fed. 596, 117 CCA 304.

75. Guan Lee v. U. S., 198 Fed. 596, 117 CCA 304.

76. Chin Wah v. Colwell, 187 Fed. 592, 109 CCA 422 [aff 182 Fed. 256]; In re Ah Tai, 125 Fed. 795; U. S. v. Wong Lee Foo, 13 Ariz. 252, 108 P 488, 31 LRANS. 1088 and note.

77. Chin Wah v. Colwell, 187 Fed. 592, 109 CCA 422 [aff 182 Fed. 256].

78. In re Chow Goo Pool, 25 Fed. 77. In Case of Unused Tag, 21 Fed. 701; Case of Chinese Wife, 21 Fed. 785, 809; and In re Cheen Heong, 21 Fed. 791 [rev on other grounds 112 U. S. 536, 5 SCt 255, 28 L. ed. 770], the question was presented as to the right of a Chinese person to be admitted to bail pending an investigation as to whether he had a right to land from a vessel in a port of the United States. Justice Field, who decided the cases in his capacity of circuit justice assigned to the ninth judicial circuit, entertained the view that there was no such right to be so admitted to bail. Judges Sawyer, Hoffman, and Sabin dissented from this view, and expressed their views in exhaustive opinions filed in these cases. These rulings were made in 1884. See In re Lum Poy, 128 Fed. 974.

79. 27 U. S. St. at L. 26 c 60. And see In re Chin Wah, 182 Fed. 256 [aff 187 Fed. 592, 109 CCA 422]; U. S. v. Fah Chung, 132 Fed. 109; In re Lum Poy, 128 Fed. 974; In re Chin Yuen Sing, 65 Fed. 788.

[a] **Congress thus made a distinction** in this regard between the case of a Chinese seeking to enter this country and one already "domiciled" here, who is arrested for deportation. In the one case bail is to be denied, and in the other the legislation is silent and the practice of the courts is not disturbed at the time. In re Chin Wah, 182 Fed. 256 [aff 187 Fed. 592, 109 CCA 422].

[b] **The act of 1892 was not repealed** by the act of Aug. 18, 1894 (28 U. S. St. at L. 390 c 301) which makes the decision of the immigration officer conclusive unless reversed by the secretary of the treasury, and governs where a Chinese person refused admission by the immigration officers and the secretary applies to

Chinese person shall remain in the custody of the marshal and shall not be admitted to bail.[80] The power to admit to bail thus rests in implication, from the express prohibitions of the acts of 1892 and 1893.[81]

Pending appeal. The practice of the courts in different judicial districts as to allowing bail in cases of appeal from final orders of deportation is marked by some variance.[82] As the statute does not in terms prohibit the taking of bail pending the appeal, it has been held to be within the power of the district judge to grant bail in his discretion.[83] The act of 1893 above mentioned applies only when a final order of deportation has been made, and has no application to the question whether bail may be allowed pending an appeal from the decision of the commissioner.[84] But bail is not a matter of right; it is a discretionary power to be exercised with reference to the facts of each particular case,[85] and regard should be had to the sincerity and good faith of the claim of right to remain in the United States.[86]

Forfeiture of bail. The power to admit to bail implies the power to declare a forfeiture of the penalty, and the power, in a proper case, to remit the same.[87]

[§ 104] **e. Pleadings.** No formal complaint or pleadings are required in a proceeding to deport a Chinese person,[88] and where Chinese persons proceeded against are before the commissioner, and before the district court on appeal, objections to the validity of the process of arrest are not available to oust the court of jurisdiction.[89] Formal pleadings are, however, perfectly proper;[90] but it is not necessary for a complaint to allege anything further than that defendant is a Chinese person and is found within the United States without the certificate of residence required by statute.[91] Facts invalidating the certificate need not be alleged.[92]

Amendment of the complaint may be allowed in order to cure a defect therein.[93]

[§ 105] **f. Evidence—(1) Presumptions and Burden of Proof.** In a proceeding for the deportation of a person under the Chinese Exclusion Act, two questions are in issue: (1) Whether or not he is a Chinese person or person of Chinese descent; and, (2) if so, whether he is entitled to be and remain in the United States.[94] The burden of proof is upon the government to show by affirmative proof that the person arrested is of Chinese descent, and in the absence of such proof the alleged Chinese person is entitled to be discharged without producing any evidence.[95] But, when shown to be a person of Chinese descent, the burden is then placed upon the person arrested to establish by affirmative proof his lawful right to remain in the United States by bringing himself within the statutory exceptions; in the absence of such proof he must be adjudged to be unlawfully within the United States, and deported accordingly.[96] If found

a federal court for a writ of habeas corpus. In re Ong Lung, 125 Fed. 813.

80. 28 U. S. St. at L. 8 c 14 § 2. And see Chan Gun v. U. S., 9 App. (D. C.) 290.

81. Chin Wah v. Colwell, 187 Fed. 592, 109 CCA 422 [aff 182 Fed. 256]. And see U. S. v. Ching Kim Hee, 3 Hawaii Fed. 556.

[a] **The exclusion acts recognize by implication that bail is not altogether excluded** in proceedings thereunder. The act of Nov. 3, 1893 (28 U. S. St. at L. 8 c 14 § 2), by providing that a Chinaman shall not be admitted to bail at one stage of the proceedings, impliedly recognizes that he may be admitted to bail at another stage. In re Ah Tai, 125 Fed. 795.

82. See U. S. v. Fah Chung, 132 Fed. 109.

[a] **In several early cases** it was held that the court would not admit to bail, pending appeal from the denial of a writ of habeas corpus, a Chinese immigrant seeking discharge from detention by the collector. In re Chin Yuen Sing, 65 Fed. 788; Chan Gun v. U. S., 9 App. (D. C.) 290. See also Case of Chinese Wife, 21 Fed. 808 [app dism 113 U. S. 216, 5 SCt 983, 28 L. ed. 983]. Compare Case of Unused Tag, 21 Fed. 701.

[b] **The supreme court has not made a final deliverance on this subject,** although it appears to have been presented by motion in the case of Chin Bak Kan v. U. S., 186 U. S. 193, 22 SCt 891, 46 L. ed. 1121, and urgently asked for in the case of Ah How v. U. S., 193 U. S. 65, 24 SCt 357, 48 L. ed. 619.

83. U. S. v. Yee Yet, 192 Fed. 577; In re Ah Tai, 125 Fed. 795; U. S. v. Wong Lee Foo, 13 Ariz. 252, 108 P 488, 31 LRANS 1088 and note.

[a] **The power to admit to bail in such a case is inherent,** and incident to the power to hear and determine. In re Chin Wah, 182 Fed. 256 [aff 187 Fed. 592, 109 CCA 422]; In re Ah Tai, 125 Fed. 795.

[b] **"To refuse bail would, in some instances, operate as a substantial denial of justice.** Every Chinese person found in this country without the certificate required by law is not liable to deportation. One born here does not come within the terms of the exclusion act, and is not required to have the certificate therein provided. If such a person should be summarily arrested for deportation at a place distant from his birth and among strangers, it would be difficult, if not impossible, for him to produce evidence necessary to establish his right to remain, unless he could be permitted to go on bail pending his hearing. A doctrine which might result in such a manifest hardship to a native-born citizen is so abhorrent to our sense of justice and so contrary to the spirit of our institutions that it should not meet with the approval of, or be enforced by, the courts in the absence of some positive law or authoritative decision requiring it." Per Bean, J., in In re Chin Wah, 182 Fed. 256, 258 [aff 187 Fed. 592, 109 CCA 422].

84. U. S. v. Yee Yet, 192 Fed. 577; Chin Wah v. Colwell, 187 Fed. 592, 109 CCA 422 [aff 182 Fed. 256]; In re Ah Tai, 125 Fed. 795; U. S. v. Wong Lee Foo, 13 Ariz. 252, 108 P 488, 31 LRANS 1088. See also In re Jem Yuen, 188 Fed. 350.

[a] **Pending appeal to territorial supreme court.**—(1) A Chinese person is not entitled to bail pending appeal from an order of deportation of a district judge to a territorial supreme court, the case not being tried de novo on such appeal, so that the order is merely suspended pending appeal, leaving the statutory provision operative. Jung Goon Jow v. U. S., 13 Ariz. 255, 108 P 490, 31 LRANS 1091. (2) But it has been held that a Chinese person who has appealed to the supreme court from a judgment of the court of first instance of the Philippine Islands ordering his deportation in accordance with Act No. 702 may be admitted to bail pending his appeal. U. S. v. Go-Siaco, 12 Philippine 490.

85. Chin Wah v. Colwell, 187 Fed. 592, 109 CCA 422 [aff 182 Fed. 256]; U. S. v. Fah Chung, 132 Fed. 109; U. S. v. Wong Lee Foo, 13 Ariz. 252, 108 P 488, 3 LRANS 1088 and note.

86. U. S. v. Fah Chung, 132 Fed. 109 (holding that, where it does not appear that defendant had any justification for entering the country, but that he entered and remained in plain violation and defiance of the law, bail will not be allowed).

87. U. S. v. Ching Kim Hee, 3 Hawaii Fed. 556.

88. Ah How v. U. S., 193 U. S. 65, 24 SCt 357, 48 L. ed. 619; Chin Ying v. U. S., 186 U. S. 202, 22 SCt 895, 46 L. ed. 1126; Chin Bak Kan v. U. S., 186 U. S. 193, 22 SCt 891, 46 L. ed. 1121; Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905; Ex p. Jim Hong, 211 Fed. 73, 127 CCA 569; In re Jem Yuen, 188 Fed. 350; Toy Tong v. U. S., 146 Fed. 343, 347, 76 CCA 621 (where Gray, C. J., said: "No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge, or the validity of the statute"); Chan Gun v. U. S., 9 App. (D. C.) 290.

89. Toy Tong v. U. S., 146 Fed. 343, 76 CCA 621.

[a] **Return of process.**—In general, process is not returnable to a district other than that of its issuance; but the Chinese Exclusion Act of 1888 alters this rule so far as relates to inquiry into the right of a Chinese person to be in the United States. U. S. v. Long Hop, 55 Fed. 58.

90. U. S. v. Williams, 83 Fed. 997.

91. U. S. v. Williams, 83 Fed. 997. See also Lew Quen Wo v. U. S., 184 Fed. 685, 106 CCA 639.

92. Ex p. Jim Hong, 211 Fed. 73, 127 CCA 569.

93. Ex p. Jim Hong, 211 Fed. 73, 127 CCA 569.

94. U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93.

95. U. S. v. Louie Lee, 184 Fed. 651; U. S. v. Hung Chang, 126 Fed. 400 [app dism 130 Fed. 439, 64 CCA 641, and rev on other grounds 134 Fed. 19, 67 CCA 93].

96. U. S. v. Louie Lee, 184 Fed. 651; U. S. Hung Chang, 134 Fed. 19, 67 CCA 93. But see Ex p. Loung June, 160 Fed. 251, 255 [rev on other grounds 171 Fed. 413, 96 CCA 362] (where, apparently, the burden of negativing membership in the exempt class is placed on the government, the court saying: "In these proceedings, under the provisions of the act, mere accusation is sufficient to warrant deportation when it appears that the de-

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to be a Chinese person or a person of Chinese descent the presumption arises that he was not born in the United States, and is not entitled to remain,[97] and it then becomes his duty under the statute[98] to establish his lawful right so to do;[99] this is true without regard to the particular ground upon which the right is claimed.[1] Even a claim of citizenship by birth within the United States does not alter this rule; the burden of establishing such citizenship is upon the Chinese person.[2] The production of the statutory certificate establishes prima facie the right to remain,[3] and the burden then shifts to the government which must produce some proof to overcome this prima facie evidence or it will be the commissioner's duty to discharge defendant.[4] The proof should be clear and convincing, and until the government has made out such a case the holder of the certificate is not required to make further proof.[5]

[§ 106] (2) **Admissibility.** Where the evidence

fendant is a Chinese person and that he does not belong to the exempt class. When these facts appear the burden is thrown on the defendant to show his right to enter, or to remain if already here").

97. Ex p. Lung Wing Wun, 161 Fed. 211; Ex p. Loung June, 160 Fed. 251 [rev on other grounds 171 Fed. 413, 96 CCA 362]; U. S. v. Kut Yong, 1 Hawaii Fed. 104.

[a] **Every Chinese person found without the prescribed certificate** after the expiration of the time limited by law for registration is presumed, in the absence of satisfactory proof to the contrary, to be a Chinese laborer. U. S. v. Sy Quiat, 12 Philippine 676.

98. Chinese Exclusion Act of May 5, 1892 (27 U. S. St. at L. 25 c 60).

[a] **The power of congress to prescribe a rule of evidence** in proceedings for the deportation of Chinese aliens is included within its general authority to exclude aliens, or to prescribe the conditions upon which they may remain in the United States. Li Sing v. U. S., 180 U. S. 486, 21 SCt 449, 45 L. ed. 634 [aff 86 Fed. 896, 30 CCA 451]; Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905; Bak Kun v. U. S., 195 Fed. 53, 115 CCA 55; Low Foon Yin v. U. S. Immigration Comr., 145 Fed. 791, 76 CCA 355; U. S. v. Chun Hoy, 111 Fed. 899, 50 CCA 57; U. S. v. Williams, 83 Fed. 997; In re Sing Lee, 54 Fed. 334.

[b] **Reason of statutory rule.**—"No one questions the power of Congress to prohibit the coming into this country of any class of foreigners deemed prejudicial to the interests of our people. Against the coming into the country of Chinese laborers, Congress has been legislating for years. The reason for such legislation is an old story, and need not be repeated. But, notwithstanding the enactments upon the subject, the laws have been evaded in many ways. By false testimony and concocted evidence the courts have been imposed upon in cases almost without number, and by sea and land the prohibited class in large numbers have been smuggled into the country in one way or another. To prevent all of this, and give effect to its laws upon the subject, as far as possible, Congress deemed it wise by the provision in question to put the burden of proof of his lawful right to remain in the United States on the Chinese person or person of Chinese descent charged with being unlawfully within their borders. To those not residents of and not familiar with the Pacific slope, and not so much subject to the evils intended to be guarded against by the exclusion acts, 'the lines laid down for their enforcement may,' as appropriately and well said by Judge Severens in the case of Sing Lee, 54 Fed. 334, 'seem hard; and because such summary dealings with the rights of persons are out of the common order to which we are accustomed, and are liable to produce injustice in many cases on account of their summary expedition and the presumption against the prisoners, they may seem severe; but, if the power resides in Congress to enact such provisions, the discretion whether it will do so rests in the law-making power, and the courts must presume it was exercised upon sufficient reasons.' In respect to the provision of the Geary act putting the burden of proof on those coming within the class thus interdicted, I agree with Judge Severens in the case cited, that there is not only nothing in it violative of the provisions of the Constitution of the United States, but, for the reasons given by him, and in view of the circumstances already referred to and of others that may be suggested, that the provision in question is not unreasonable. He says: 'The person brought before the commissioner is one of a class which, by the terms of the statute, is obnoxious to its operation. That must appear before the general jurisdiction can be exercised, and since, generally, that class is interdicted, he can only escape the common lot upon its appearing that he is not within the general condemnation. The means of showing this are presumably in his own control. It would be extremely inconvenient, and probably in most cases impracticable, for the government to bring proof of the negative fact that the respondent is not within the exemption. Such circumstances are the basis of the rule of evidence which devolves the burden on the party who presumably has the best means of proving the fact; but, whatever the rule which by the common law would be applicable to trials, it cannot be affirmed that in such conditions the Legislature cannot prescribe such a rule of evidence.'" Low Foon Yin v. U. S. Immigration Comr., 145 Fed. 791, 797, 76 CCA 355 [quot U. S. v. Wong Dep Ken, 57 Fed. 206, 208].

[c] **Power of department of commerce and labor.**—Under the act of Febr. 14, 1903 (32 U. S. St. at L. 828 c 552 § 7), placing jurisdiction of the admission of aliens in the department of commerce and labor, such department had authority to prescribe rules of evidence relating to presumptions and burden of proof in the determination of an alien's right to admission. In re Moy Quong Shing, 125 Fed. 641.

99. U. S. v. Hom Lim, 214 Fed. 456; U. S. v. Fong Sen, 205 Fed. 398; Lum Bing Wey v. U. S., 201 Fed. 379; U. S. v. Chin Ken, 183 Fed. 332 [aff 191 Fed. 817, 112 CCA 331]; U. S. v. Yuen Pak Sune, 183 Fed. 260 [aff 191 Fed. 825, 112 CCA 339]; U. S. v. Wong Ock Hong, 179 Fed. 1004; Kum Sue v. U. S., 179 Fed. 370, 102 CCA 648; Yee King v. U. S., 179 Fed. 268, 102 CCA 646; Ex p. Lung Wing Wun, 161 Fed. 211; Ex p. Loung June, 160 Fed. 251 [rev on other grounds 171 Fed. 413, 96 CCA 362]; U. S. v. Yee Gee You, 152 Fed. 157, 81 CCA 409; U. S. v. Lam Jung Sing, 151 Fed. 715; Lee Joe Yen v. U. S., 148 Fed. 682, 78 CCA 427; Toy Tong v. U. S., 146 Fed. 343, 76 CCA 621; U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93; Tsoi Yii v. U. S., 133 Fed. 1022, 66 CCA 681; Lee Yue v. U. S., 133 Fed. 45, 66 CCA 178 [app dism 199 U. S. 609 mem, 26 SCt 744 mem, 50 L. ed. 332 mem]; U. S. v. Lung Hong, 105 Fed. 188; U. S. v. Wong Chung, 92 Fed. 141; U. S. v. Wong Dep Ken, 57 Fed. 203; In re Sing Lee, 54 Fed. 334; U. S. v. Kut Yong, 1 Hawaii Fed. 104; U. S. v. Lim Co., 12 Philippine 703. See also U. S. v. Yap Kin Co., 22 Philippine 340.

[a] **Identity.**—Where a Chinese person presented a commissioner's judgment dismissing former similar proceedings because the person described therein was a citizen of the United States, the burden was on him to establish that he was the person named in such judgment. Ex p. Long Lock, 173 Fed. 208.

1. In re Jew Wong Loy, 91 Fed. 240.

2. U. S. v. Chin Tong, 192 Fed. 485, 112 CCA 647; Yee Ging v. U. S., 190 Fed. 270; U. S. v. Too Toy, 185 Fed. 838; U. S. v. Hoy Way, 156 Fed. 247; Lee Yuen Sue v. U. S., 146 Fed. 670, 77 CCA 96; U. S. v. Sing Lee, 125 Fed. 627; Matter of Wong Lin, 1 Hawaii Fed. 44. See also Lim Sam v. U. S., 189 Fed. 534. Compare Gee Cue Beng v. U. S., 184 Fed. 383, 106 CCA 493; Moy Suey v. U. S., 147 Fed. 697, 698, 78 CCA 85 (where Grosscup, C. J., said: "When a person, physically and politically present in the United States at the time he is arrested for deportation, claims that he is an American born citizen, and resists deportation on the basis of his rights of citizenship, the case is an entirely different one. Nativity gives citizenship, and is a right under the Constitution. It is a right that congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the courts, in the usual and ordinary way of adjudicating constitutional rights. No rule of evidence may fritter it away. . . . There is a fundamental distinction between the case of a citizen of the country who has left the country and is asking to re-enter it, and a citizen of the country who has never left it, but whom the government is asking to deport"). The case of Chin Bak Kan v. U. S., 186 U. S. 193, 200, 22 SCt 891, 46 L. ed. 1121 [quot U. S. v. Hoy Way, 156 Fed. 247, 248; Lee Yuen Sue v. U. S., 146 Fed. 670, 673, 77 CCA 96; U. S. v. Sing Lee, 125 Fed. 627, 629] is decisive authority upon this point. Chief Justice Fuller uses this language: "By the law the Chinese person must be adjudged unlawfully within the United States unless he 'shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.' As applied to aliens there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements cannot be avoided by the mere assertion of citizenship. The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed."

[a] **"A mere assertion of citizenship** is not enough to overcome the heavy burden of proof cast upon a Chinaman seeking to remain in the country." Guan Lee v. U. S., 198 Fed. 596, 598, 117 CCA 304.

[b] **Claim to be merchant.**—A Chinaman, relying on the defense, in a deportation proceeding, that he is a merchant, has the burden of proving it. U. S. v. Lee You Wing, 211 Fed. 939, 128 CCA 437.

3. U. S. v. Wong Chung, 92 Fed. 141.

4. U. S. v. Wong Chung, 92 Fed. 141.

5. U. S. v. Hom Lim, 214 Fed. 456; Jew Sing v. U. S., 97 Fed. 582.

admissible to prove a certain issue is prescribed by congress, no other proof of the fact can be received.[6] Accordingly in a proceeding for the deportation of a Chinese person charged with having unlawfully entered the United States, it is error to admit any evidence of the right of defendant to enter, except the certificate issued by his government, which is made by statute the sole evidence of such right.[7] In a case arising after entry, where the issue is as to the right to remain, the obligation to establish such right by affirmative evidence entitles defendant to introduce any competent affirmative evidence necessary to establish such right.[8] The certificate of a United States commissioner certifying that he adjudged the Chinese person to be entitled to remain in the United States, by reason of being a citizen thereof, is inadmissible.[9] The original examination of a Chinese person when arrested is admissible in the absence of an objection and proof that defendant's statement was obtained through duress or improper influence, and was involuntary.[10]

Upon the issue as to race, the appearance of defendant, his color, dress, language, and manner of wearing his hair may properly be taken into consideration.[11]

[§ 107] **(3) Weight and Sufficiency.**[12] A deportation proceeding is civil in its nature, and is therefore to be decided by the preponderance of the evidence.[13] The testimony should be carefully weighed and considered, and there should be no radical departure from the rules of evidence in determining the proper weight to be given to the testimony.[14] The general rule is that uncontradicted evidence, free from inherent improbability, when given by disinterested witnesses, and in no way discredited, is conclusive.[15] Even the statement of the Chinaman himself when uncontradicted by any-

6. U. S. v. Williams, 83 Fed. 997.

7. Chan Tse Cheung v. U. S., 189 Fed. 412; U. S. v. Pin Kwan, 100 Fed. 609, 40 CCA 618 [rev 94 Fed. 824]; Mar Bing Guey, 97 Fed. 576. And see supra § 95.

[a] **In the case of laborers,** this right can be shown only by producing the certificate required by § 6 of the act of May 5, 1892 (27 U. S. St. at L. 25 c 60) as amended by the act of Nov. 3, 1893 (28 U. S. St. at L. 7 c 14). U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93; U. S. v. Yee Gee You, 152 Fed. 157, 81 CCA 409; U. S. v. Williams, 83 Fed. 997; U. S. v. Gin Hing, 8 Ariz. 416, 76 P 639. And see supra § 97.

[b] **In the case of merchants** and others of the excepted classes the right can be shown only by producing the certificate required by § 6 of the act of May 6, 1882 (22 U. S. St. at L. 60), as amended by the act of July 5, 1884 (23 U. S. St. at L. 115 c 220); U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93.

8. U. S. v. Quong Chee, 11 Ariz. 16, 89 P 525. To same effect Li Sing v. U. S., 180 U. S. 486, 21 SCt 449, 45 L. ed. 634.

[a] **Mercantile character.**—(1) Where the right of a Chinese person to remain in the country is challenged after he had been landed as a merchant by the customs officers on his return from a visit to China, and he produces a certificate which states that it was issued under the act of July 5, 1884 (23 U. S. St. at L. 116 c 220 § 6), entitling defendant, a Chinese person other than a laborer, to come into the United States, which certificate is not controverted by the government, such certificate is not by law the only evidence admissible, and he may show by two white witnesses that he had been a merchant in the United States. U. S. v. Quong Chee, 11 Ariz. 16, 89 P 525. (2) The fact that defendant had not produced this evidence before the collectors of customs upon his admission to the United States would not bar its introduction, as, at the time of his admission, the proof was not required by law. U. S. v. Quong Chee, supra.

9. You Fook Hing v. U. S., 214 Fed. 77; Ex p. Mac Fock, 207 Fed. 696; Lum Bing Wey v. U. S., 201 Fed. 379.

10. Prentis v. Seu Leung, 203 Fed. 25, 121 CCA 389; Guan Lee v. U. S., 198 Fed. 596, 117 CCA 304.

[a] **Hence** his statements at that time may be considered in determining the truthfulness of a subsequent conflicting statement as to the place of his birth. Prentis v. Seu Leung, 203 Fed. 25, 121 CCA 389.

11. U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93 [rev 126 Fed. 400].

[a] **Mongolian color and features,** in the total absence of any other evidence, are not sufficient, even if competent for any purpose, to authorize the court to say that the person is a Chinaman or of Chinese descent. U. S. v. Louie Lee, 184 Fed. 651.

[b] **Inspectors and interpreters** employed by the government in the enforcement of the exclusion laws, who state their ability from practical experience to identify persons of the Chinese race from certain characteristics, are competent to testify upon such issue, although they may have no theoretical knowledge of the science of ethnology. U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93 [rev 126 Fed. 400]. See also generally as to expert and opinion evidence Evidence [17 Cyc 25 et seq].

[c] **Ex parte affidavit on which warrant issued.**—"If the burden is upon the government to make it appear to the satisfaction of the court that the party is a Chinese person, then I am of the opinion that the ex parte affidavit made by the inspector is not competent for that purpose. The affidavit performed its function when the warrant of arrest was issued, and it was not evidence tending to prove the truth of the charges made in the warrant." U. S. v. Louie Lee, 184 Fed. 651, 654.

12. See generally Evidence [17 Cyc 753].

13. Woo Jew Dip v. U. S., 192 Fed. 471, 112 CCA 609; U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93 [rev 126 Fed. 400]; U. S. v. Lee Huen, 118 Fed. 442; In re Jew Wong Loy, 91 Fed. 240.

[a] **Evidence that a person is Chinese** need not be such as to satisfy the commissioner beyond any possibility of doubt; a reasonable degree of certainty is sufficient. U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93.

[b] **Evidence held sufficient to show defendant a Chinaman.**—Chu King Foon v. U. S., 191 Fed. 822, 112 CCA 336; Low Foon Yin v. U. S. Immigration Comr., 145 Fed. 791, 76 CCA 355.

[c] **Evidence held insufficient to show defendant a Chinaman.**—U. S. v. Louie Lee, 184 Fed. 651; Edwards v. McCoy, 22 Philippine 598.

[d] **Evidence held sufficient to sustain order of deportation.**—Gong Nom Wood v. U. S., 191 Fed. 830, 112 CCA 344; Yuen Pak Sune v. U. S., 191 Fed. 825, 112 CCA 339; Chin Ken v. U. S., 191 Fed. 817, 112 CCA 331; Lee Joe Yen v. U. S., 148 Fed. 682, 78 CCA 427 [aff 136 Fed. 701]; U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93 [rev 126 Fed. 400]; Tsoi Yii v. U. S., 133 Fed. 1022, 66 CCA 681; Chew Hing v. U. S., 133 Fed. 227, 66 CCA 281; Lee Yue v. U. S., 133 Fed. 45, 66 CCA 178; U. S. v. Sing Lee, 125 Fed. 627; Lee Ah Yin v. U. S., 116 Fed. 614, 54 CCA 70; Yee N'Goy v. U. S., 116 Fed. 333, 54 CCA 205; Quong Sue v. U. S., 116 Fed. 316, 54 CCA 652; U. S. v. Leung Sam, 114 Fed. 702.

[e] **Evidence held insufficient to sustain order of deportation.**—N. Jim Quan v. U. S., 210 Fed. 617, 127 CCA 253; U. S. v. Lee You Wing, 208 Fed. 166 [aff 211 Fed. 939, 128 CCA 437]; U. S. v. Lee Chung, 206 Fed. 867; Lim Sam v. U. S., 189 Fed. 534; Moy Suey v. U. S., 147 Fed. 697, 78 CCA 85; U. S. v. Lee Yin, 136 Fed. 701; U. S. v. Kol Lee, 132 Fed. 136; U. S. v. Louie Juen, 128 Fed. 522.

[f] **Evidence held sufficient to prove defendant merchant.**—U. S. v. Chin Chong Pong, 192 Fed. 722; U. S. v. Lee Wing, 136 Fed. 701; U. S. v. Louie Juen, 128 Fed. 522.

[g] **Evidence held insufficient to show defendant merchant.**—U. S. v. Ngum Lum May, 153 Fed. 209.

[h] **Evidence held sufficient to show citizenship of defendant.**—U. S. v. Leu Jin, 192 Fed. 580; Lim Sam v. U. S., 189 Fed. 534; Mar Poy v. U. S., 189 Fed. 288; Gee Cue Beng v. U. S., 184 Fed. 383, 106 CCA 493; U. S. v. Wong Ock Hong, 179 Fed. 1004; U. S. v. Chu Hung, 179 Fed. 564; In re Tang Tun, 161 Fed. 618 [rev on other grounds 168 Fed. 488, 93 CCA 644]; Pang Sho Yin v. U. S., 154 Fed. 660, 83 CCA 484.

[i] **Evidence held insufficient to show citizenship of defendant.**—Moy Guey Lum v. U. S., 211 Fed. 91, 127 CCA 515; Guan Lee v. U. S., 198 Fed. 596, 117 CCA 304; Ngon Kay v. U. S., 198 Fed. 85, 117 CCA 291; U. S. v. Hom Young, 198 Fed. 577; Bak Kun v. U. S., 195 Fed. 53, 115 CCA 55; Fong Gum Tong v. U. S., 192 Fed. 320, 112 CCA 572; U. S. v. Too Toy, 185 Fed. 838; U. S. v. Chu King Foon, 179 Fed. 995; Eng Choy v. U. S., 175 Fed. 566, 99 CCA 188; Ex p. Lung Wing Wun, 161 Fed. 211; Ho Ngen Jung v. U. S., 153 Fed. 232; Toy Gaup v. U. S., 152 Fed. 1022, 81 CCA 682; U. S. v. Lam Jung Sing, 151 Fed. 715; U. S. v. Loy Too, 147 Fed. 750 [aff 152 Fed. 1022 mem, 81 CCA 682]; Lee Yuen Sue v. U. S., 146 Fed. 670, 77 CCA 96; U. S. v. Wong Du Bow, 133 Fed. 326; U. S. v. Moy You, 126 Fed. 226; U. S. v. Lee Pon, 94 Fed. 827; U. S. v. Yap Kin Co., 22 Philippine 340.

[j] **Evidence held sufficient to prove marriage a sham.**—Wong Heung v. Elliott, 179 Fed. 110, 102 CCA 408.

[k] **Evidence held insufficient to show excuse for failure to obtain certificate.**—Yee Yuen v. U. S., 133 Fed. 222, 66 CCA 276.

[l] **Evidence held insufficient to show Chinese person native of Hawaii.**—U. S. v. Chun Hoy, 111 Fed. 899, 50 CCA 57.

14. Lim Sam v. U. S., 189 Fed. 534.

15. U. S. v. Lee Huen, 118 Fed. 442. In Quock Ting v. U. S., 140 U. S. 417, 420, 11 SCt 733, 851, 35 L. ed. 501 [quot U. S. v. Lee Huen, 118 Fed. 442, 460], the court said: "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted

thing in the case, and when not incredible on its face, is affirmative proof of lawful right to remain.[16] A commissioner may not, arbitrarily, capriciously, or against reasonable, unimpeached, and credible evidence, which is uncontradicted in its material points and susceptible of but one fair construction, refuse to be satisfied;[17] but, on the other hand, he is not bound to believe the testimony of a Chinese witness when he sees him;[18] nor is he bound to be satisfied by the testimony of a single witness as to facts which, if the testimony is true, must necessarily be known to other obtainable witnesses who are not produced.[19] In many cases arising under the exclusion acts, certain facts, such as residence in the United States,[20] or the mercantile character of a Chinese person prior to his departure for China,[21] are required to be established by at least one credible white witness. But these requirements are special and do not apply to other issues, such as the American nativity of defendant, which are left to the usual measure of proof.[22] Therefore Chinese persons are competent witnesses in cases of this character, but their credibility is for the court to determine in each case.[23]

[§ 108] **(4) Testimony of Defendant, Admissions by Him, and Effect of Failure to Testify.** Since a proceeding for the deportation of a Chinese person is not a criminal proceeding,[24] the constitutional provisions which safeguard the rights of persons accused of crime have no application.[25] Voluntary admissions or statements of defendant at the time of his arrest are admissible against him,[26] and the government has the right to call and examine him as a witness against himself,[27] and compel him to answer questions relevant to the pending issue.[28] But refusal or failure to testify is not a sufficient ground for ordering defendant deported.[29] Such silence cannot be taken as proof of any fact, or as an admission, but it is a circumstance which may be considered in determining which of two witnesses contradicting each other has testified correctly;[30] on the other hand, no rights are gained by standing mute.[31]

[§ 109] **g. To What Country.** The exclusion acts of 1882 and 1888 and the Immigration Act of 1907 provide for the deportation "to the country from whence he came" of any Chinese person not entitled to remain in the United States. The words "country from whence he came" are held not to

by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

[a] **As to nativity.**—Unimpeached and uncontradicted testimony that a person of the Chinese race, seeking to enter the United States from China, was born in this country, when direct, positive, and circumstantial, cannot be disregarded, and must be held to overcome the presumption of his Chinese nativity. U. S. v. Jue Wy, 103 Fed. 795.

16. U. S. v. Hom Lim, 214 Fed. 456.

[a] **The testimony of a Chinaman as to his place of birth,** when not preposterous or unnatural, cannot justly be rejected, although it cannot be contradicted if untrue. U. S. v. Yee Mun Sang, 93 Fed. 365.

17. Moy Guey Lum v. U. S., 211 Fed. 91, 127 CCA 515; U. S. v. Lee Huen, 118 Fed. 442.

[a] **Determination held not arbitrary.**—Ex p. Long Lock, 173 Fed. 208.

18. Ah How v. U. S., 193 U. S. 65, 24 SCt 357, 48 L. ed. 619; U. S. v. Chu King Foon, 179 Fed. 995; Lee Ah Yin v. U. S., 116 Fed. 614, 54 CCA 70 [app dism 187 U. S. 655 mem, 23 SCt 856, 47 L. ed. 351]; Jao Igco v. Shuster, 10 Philippine 448.

[a] **The testimony of Chinese witnesses may be regarded as more or less weak;** and, when contradicted or discredited in any of the modes recognized by law, the commissioner is justified in regarding such testimony, standing alone, as insufficient to convince the judicial mind. U. S. v. Lee Huen, 118 Fed. 442.

[b] **Interest.**—The mere fact that a witness for defendant in a proceeding for deportation is himself a Chinese person does not render him an interested witness, within the rule which permits interest to be considered as a discrediting circumstance. U. S. v. Lee Huen, 118 Fed. 442.

[c] **Upon the issue as to the citizenship of a person of Chinese descent,** evidence from a male person, not the father, that defendant was born at a certain time and place in the United States, unaccompanied by any details as to how or why the witness knows such fact, is not conclusive on the commissioner or court. U. S. v. Lee Huen, 118 Fed. 442. See also Ark Foo v. U. S., 128 Fed. 697, 63 CCA 249.

19. U. S. v. Lee Huen, 118 Fed. 442.

20. Under the act of May 5, 1892 (27 U. S. St. at L. 25 c 60 § 6), a Chinese laborer, without the certificate required by law, who claims that, by reason of "accident, sickness or other unavoidable cause," he was unable to procure the certificate within the time prescribed by the statute, is required to clearly establish, "to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act." See U. S. v. Yee Gee You, 152 Fed. 157, 81 CCA 409; In re Jew Wong Loy, 91 Fed. 240; U. S. v. Williams, 83 Fed. 997.

[a] **"The reason** for requiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence here, at the time of the passage of the act, 'by at least one credible white witness,' may have been the experience of Congress, as mentioned by Mr. Justice Field in Chae Chan Ping's Case, that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, 'was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath.'" Fong Yue Ting v. U. S., 149 U. S. 698, 729, 13 SCt 1016 [quot Li Sing v. U. S., 180 U. S. 486, 494, 21 SCt 449, 45 L. ed. 634; In re Jew Wong Loy, 91 Fed. 240, 243].

21. Act Nov. 3, 1893 (28 U. S. St. at L. 7 c 14 § 2) (which declares: "Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States," etc.). See Li Sing v. U. S., 180 U. S. 486, 21 SCt 449, 45 L. ed. 634; U. S. v. Lee Seick, 100 Fed. 398, 40 CCA 448; In re Jew Wong Loy, 91 Fed. 240; In re Chop Tin, 2 Hawaii Fed. 153.

[a] **Prior to this act** the testimony of Chinese witnesses was sufficient for this purpose. U. S. v. Louie Juen, 128 Fed. 522. And see U. S. v. Sing Lee, 71 Fed. 680.

22. U. S. v. Lee Seick, 100 Fed. 398, 40 CCA 448. Compare Matter of Wong Lin, 1 Hawaii Fed. 44.

23. In re Jew Wong Loy, 91 Fed. 240.

24. See supra § 100.

25. U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93.

26. U. S. v. Hom Lim, 214 Fed. 456; U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93 [rev 126 Fed. 400].

27. Low Foon Yin v. U. S. Immigration Comr., 145 Fed. 791, 76 CCA 355; U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93 [rev 126 Fed. 400].

[a] **Where citizenship is in doubt** on the evidence, it is not error for the judge to cause defendant, accompanied by his counsel, to be brought before him, and to further examine defendant concerning the evidence. Lee Yuen Sue v. U. S., 146 Fed. 670, 77 CCA 96.

28. Tom Wah v. U. S., 163 Fed. 1008, 90 CCA 178 [aff 160 Fed. 207].

29. Ark Foo v. U. S., 128 Fed. 697, 63 CCA 249; U. S. v. Leung Shue, 126 Fed. 423; Ex p. Sing, 82 Fed. 22.

30. U. S. v. Lee Huen, 118 Fed. 442, 456 [quot U. S. v. Leung Shue, 126 Fed. 423, 424] (where it is said: "If defendants fail to give testimony in their own behalf, and explain doubtful matters peculiarly within their own knowledge, in these deportation cases, that fact may be commented on, and used to their disadvantage, possibly, for such fact may be considered by the court or commissioner, with all the evidence and circumstances of the case, and justify him in taking testimony they might have explained or denied, strongly against them").

31. U. S. v. Sing Tuck, 194 U. S. 161, 24 SCt 621, 48 L. ed. 917 (where defendant stood mute except in giving name); U. S. v. Chin Kep, 183 Fed. 332 [aff 191 Fed. 817, 112 CCA 331].

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refer exclusively to the empire of China.[32] Accordingly, where a Chinese person is convicted of being unlawfully in the United States, and the evidence shows that he entered the United States from Canada after having been in that country for a time, he is properly returned to Canada;[33] but where it appears that he cannot or will not comply with the Canadian laws relative to admission of Chinese aliens, it is held that he may be deported to China.[34] The act of May 5, 1892,[35] provides that any Chinese person found to be unlawfully in the United States shall be removed to China, unless he shall make it appear that he is a citizen or subject of some other country, in which case the removal shall be to such country.[36] The burden is thus placed on the Chinese person to show that he is entitled to be deported elsewhere than to China.[37]

A Chinese alien denied admission at a land border port of entry is subject only to be turned back, and cannot be deported to China.[38]

[§ 110] **h. Order of Deportation.** An order of deportation is sufficient which shows that the person to be deported has been adjudged to be unlawfully within the United States,[39] and which designates the country to which he is to be returned.[40] It need not explicitly refer to the specific act of congress under which the person to be deported is adjudged to be unlawfully in the United States.[41] A judgment or order in excess of the jurisdiction of the commissioner is void.[42]

Amendment. If an order requires deportation to the wrong country, it may be corrected by amendment.[43]

[§ 111] **i. New Trial.** A motion for a new trial when based upon proper grounds and proof may be entertained and granted.[44] Such a motion should be addressed to the commissioner,[45] and if he denies the application an appeal may be taken, from his order denying the motion, to the federal courts.[46]

[§ 112] **j. Appeal—(1) Right of Appeal.** The act of September 13, 1888, expressly authorizes an appeal by defendant to the "judge of the District Court" in cases of this nature.[47] It contains no provision, however, for any appeal on behalf of the government, and in accordance with the maxim, Expressio unius est exclusio alterius, no appeal lies by the United States.[48] If the order of deportation is affirmed in the district court it is again reviewable on further appeal to the circuit court of appeals,[49] the appeal to the district judge being considered, in effect, an appeal to the district court.[50] If the construction of a treaty is drawn in question, an appeal may be taken to the supreme court which has jurisdiction to dispose of the entire case.[51]

[§ 113] **(2) Mode of Review.** A judgment of the district court on an appeal from an order of commissioners directing the deportation of a Chinese is not subject to review on a writ of error, but only on appeal.[52]

[§ 114] **(3) Procedure.** As the hearing upon deportation proceedings is of an anomalous and summary character, there should be no stricter requirement in regard to procedure than is necessary to make it appear that the party asserted and claimed his right.[53] Notice of appeal must be given within ten days;[54] but when so given, it is not

32. U. S. v. Jim, 47 Fed. 431; In re Leo Hem Bow, 47 Fed. 302. See also Yee Yee Chung v. U. S., 95 Fed. 432.

33. U. S. v. Redfern, 210 Fed. 548; U. S. v. Sisson, 206 Fed. 450, 124 CCA 356; U. S. v. Don On, 49 Fed. 569; U. S. v. Chong Sam, 47 Fed. 878; In re Mah Wong Gee, 47 Fed. 433.

34. U. S. v. Ah Toy, 47 Fed. 305.

35. 27 U. S. St. at L. 25 c 360.

36. U. S. v. Lee Kee, 116 Fed. 612, 54 CCA 68.

37. U. S. v. Yuen Pak Sune, 183 Fed. 260 [aff 191 Fed. 825, 112 CCA 339]; U. S. v. Sing Lee, 125 Fed. 627; U. S. v. Lee Kee, 116 Fed. 612, 54 CCA 68; 20 Op. Atty.-Gen. 171.

38. Ex p. Wong You, 176 Fed. 933 [rev on other grounds 181 Fed. 313, 104 CCA 535]; Lui Lum v. U. S., 166 Fed. 106, 92 CCA 90.

39. In re Tsu Tse Mee, 81 Fed. 562. And see Lee Won Jeong v. U. S., 145 Fed. 512, 76 CCA 190 [aff 136 Fed. 701].

[a] **Forms of orders of deportation** may be found in Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905; Lee Won Jeong v. U. S., 145 Fed. 512, 76 CCA 190; U. S. v. Wong Dep Ken, 57 Fed. 206.

[b] **Surplusage.**—A commissioner having made an order of deportation, a further order, that the person to be deported "be forthwith taken before the nearest United States judge, that a review of these proceedings may be had, and a proper order of deportation made," being unnecessary, may be treated as surplusage. In re Wong Fock, 81 Fed. 558.

40. U. S. v. Sisson, 206 Fed. 450, 124 CCA 356.

41. In re Tsu Tse Mee, 81 Fed. 562.

42. In re See Ho How, 101 Fed. 115.

43. U. S. v. Sisson, 206 Fed. 450, 124 CCA 356.

44. U. S. v. Ng Young, 126 Fed. 425.

[a] **Cumulative evidence.**—(1) Where a Chinese alien was ordered deported after trial, at which he produced a witness who testified that defendant was born in the United States, and at the time of the trial he knew of another witness who would have testified to the same fact, defendant was not entitled to a new trial in order to produce such other witness. U. S. v. Ng Young, 126 Fed. 425. (2) "There must be a final and conclusive determination somewhere, at some time, and it cannot be that a Chinese person is entitled to a rehearing on the question of his place of birth and consequent citizenship on additional or even newly discovered evidence every time he sees fit to raise the question by making a new application for admission." Ex p. Lung Foot, 174 Fed. 70, 71.

45. U. S. v. Ng Young, 126 Fed. 425.

46. U. S. v. Ng Young, 126 Fed. 425.

47. U. S. v. Loy Too, 147 Fed. 750 [aff 152 Fed. 1022 mem, 81 CCA 682]; U. S. v. Mar Ying Yuen, 123 Fed. 159; U. S. v. Lee Ching Goon, 7 Ariz. 2, 60 P 692.

[a] **This right is not taken away** by § 3 of the act of May 5, 1892 (27 U. S. St. at L. 25); U. S. v. Wong Dep Ken, 57 Fed. 203.

[b] **An agreement to waive the right of appeal** may be reconsidered while still executory. Ah Tai v. U. S., 135 Fed. 513, 68 CCA 225.

48. U. S. v. Mar Ying Yuen, 123 Fed. 159; U. S. v. Lee Ching Goon, 7 Ariz. 2, 60 P 692.

49. Tang Tun v. Edsell, 223 U. S. 673, 32 SCt 359, 56 L. ed. 606 [aff 168 Fed. 488, 93 CCA 644]; Woo Jew Dip v. U. S., 192 Fed. 471, 112 CCA 609; Gee Cue Beng v. U. S., 184 Fed. 383, 106 CCA 493; U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93; Tsoi Yii v. U. S., 129 Fed. 585, 64 CCA 153 [aff 133 Fed. 1022, 66 CCA 681].

50. In re U. S., 194 U. S. 194, 24 SCt 629, 48 L. ed. 931; U. S. v. Wong Ock Hong, 179 Fed. 1004. In U. S. v. Gee Lee, 50 Fed. 271, 273, 1 CCA 516, the circuit court of appeals for the ninth circuit was of opinion that the words "the judge of the district court for the district" could and should be held equivalent to the words "the district court for the district," and that, while strictly speaking, they were not convertible terms, they were so in a popular sense. A different view was expressed by the circuit court of appeals of the first circuit in Chow Loy v. U. S., 112 Fed. 354, 50 CCA 279. It was held that an "appeal to the judge of the district court for the district" was to the judge, as a special tribunal, and not to the district court.

[a] **Where the district judge erroneously treated the case as before him as judge,** and not as before the district court over which he presided, by reason of which no final judgment was entered in the district court, and no bill of exceptions was filed there, or transcript of the proceedings certified by the clerk of the district court, the circuit court of appeals acquired no jurisdiction to review the order. U. S. v. Hung Chang, 130 Fed. 439, 64 CCA 641.

51. Chin Ying v. U. S., 186 U. S. 202, 22 SCt 895, 46 L. ed. 1126; Chin Bak Kan v. U. S., 186 U. S. 193, 22 SCt 891, 46 L. ed. 1121.

52. Leo Lung On v. U. S., 159 Fed. 125, 86 CCA 513; U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93 [rev 126 Fed. 400].

53. Chow Loy v. U. S., 112 Fed. 354, 50 CCA 279.

[a] **The appeal is intended as a summary procedure,** and it might thwart the purposes of the statute if the parties were held to strict technical rules. U. S. v. Wong Ock Hong, 179 Fed. 1004.

54. Act of Sept. 13, 1888 (25 U. S. St. at L. 479 c 1015 § 13); U. S. v. Yuen Yee Sum, 153 Fed. 494.

[a] **A notice of appeal served thirteen days after a judgment of conviction** is without force, and gives

necessary that the matter should be presented to the judge within the ten days to preserve the appellant's right to a hearing on review.[55] An allowance of the appeal by the commissioner is not essential,[56] the service of notice of appeal on the commissioner and the district attorney, and the filing of such notice with the clerk, being sufficient.[57] The district judge to whom the appeal is to be made has power not only to hear the case but also to decide whether or not there has been such an abandonment of the appeal as warrants its dismissal.[58]

Hearing de novo. On appeal from a United States commissioner's deportation order in exclusion proceedings, the case is to be heard de novo,[59] and not on a transcript of the proceedings before the commissioner.[60]

[§ 115] **(4) Questions Reviewable.** As a general rule findings of fact made by a commissioner in proceedings against a Chinese person for being unlawfully in the United States, concurred in by the district court, will not be reëxamined by the appellate court upon a further appeal,[61] unless the case clearly shows that an incorrect conclusion has been reached,[62] as where the commissioner's finding ignores altogether the testimony of witnesses who tell a candid and consistent story and who stand unimpeached,[63] or where it appears from the evidence that the person ordered to be deported is a citizen of the United States.[64]

[§ 116] **(5) Effect of Appeal.** An appeal from an order of deportation suspends execution until after determination of the appeal.[65] An order of the judge, however, is necessary to stay the execution of the commissioner's order pending the appeal.[66]

[§ 117] **7. Offenses against Exclusion Acts—a. Aiding Unlawful Entry—(1) Liability in General.** It is provided that the master of any vessel, who knowingly lands, or permits to be landed, within the United States, any Chinese laborer, shall be guilty of a misdemeanor.[67] The acts thus made criminal are: (1) The voluntary act of the master in landing Chinese laborers in the United States with perfect freedom to go at large; and (2) expressly permitting them to leave his vessel without restraint, and with the privilege, as far as he is concerned, to go where they will, or when he has been guilty of such negligence in the matter of detaining them that an intention to let them go at large can be imputed to him.[68] To constitute the crime mentioned in this statute, there must be an intentional violation of its provisions by a defendant, that is, it must appear that he has intentionally done that which the law forbids.[69] The act of April 20, 1902,[70] extends the provisions of the above acts so as to make it a misdemeanor to aid or abet the landing on the mainland of the United States of a Chinese person not lawfully entitled to enter therein from our insular possessions.[71]

[§ 118] **(2) Forfeiture of Vessel.** It is provided by the act of May 6, 1882, as amended by the act of July 5, 1884, "that every vessel whose master shall knowingly violate any of the provisions of

the appellate court no jurisdiction of the case. U. S. v. See Ho How, 100 Fed. 730.

[b] **Notice of appeal may be given orally.**—Chow Loy v. U. S., 112 Fed. 354, 50 CCA 279.

[c] **How entitled.**—Where a notice of appeal in Chinese deportation proceedings, although entitled in the district court, was left with the commissioner and transmitted with the papers in the case, the fact that it was entitled in the district court, and not before the commissioner, was not a jurisdictional defect. U. S. v. Wong Ock Hong, 179 Fed. 1004.

55. Chow Loy v. U. S., 112 Fed. 354, 50 CCA 279.

56. U. S. v. Loy Too, 147 Fed. 750 [aff 152 Fed. 1022, 81 CCA 682]; Chow Loy v. S., 112 Fed. 354, 50 CCA 279.

[a] **Failure of the commissioner to certify the judgment to the district court** on appeal is not a jurisdictional defect. U. S. v. Wong Ock Hong, 179 Fed. 1004.

57. U. S. v. Loy Too, 147 Fed. 750 [aff 152 Fed. 1022, 81 CCA 682].

58. Chow Loy v. U. S., 112 Fed. 354, 50 CCA 279.

59. Liu Hop Fong v. U. S., 209 U. S. 453, 28 SCt 576, 52 L. ed. 888; U. S. v. Louie Lee, 184 Fed. 651; U. S. v. Wong Ock Hong, 179 Fed. 1004; U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93 [rev 126 Fed. 400].

60. Liu Hop Fong v. U. S., 209 U. S. 453, 28 SCt 576, 52 L. ed. 888; U. S. v. Wong Ock Hong, 179 Fed. 1004; U. S. v. Hung Chang, 134 Fed. 19, 67 CCA 93 [rev 126 Fed. 400].

61. You Fook Hing v. U. S., 214 Fed. 77; U. S. v. Lee Chung, 206 Fed. 367; Bak Kun v. U. S., 195 Fed. 53, 115 CCA 55; Fong Gum Tong v. U. S., 192 Fed. 320, 112 CCA 572; Gong Nom Wood v. U. S., 191 Fed. 830, 112 CCA 344; Chu King Foon v. U. S., 191 Fed. 822, 112 CCA 336 [aff 179 Fed. 995]; Kum Sue v. U. S., 179 Fed. 370, 102 CCA 648; Yee King v. U. S., 179 Fed. 368, 102 CCA 646; Yee Yet v. U. S., 175 Fed. 565, 99 CCA 187; Wong Chun v. U. S., 170 Fed. 182, 95 CCA 198; Hong Yon v. U. S., 164 Fed. 330, 90 CCA 542; Chew Hing v. U. S., 133 Fed. 227, 66 CCA 281 [app dism 199 U. S. 609 mem, 26 SCt 744 mem, 50 L. ed. 332 mem]; Ark Foo v. U. S., 128 Fed. 697, 63 CCA 249; U. S. v. Lee Huen, 118 Fed. 442.

[a] **Review in supreme court.**—In Chin Bak Kan v. U. S., 186 U. S. 193, 201, 22 SCt 891, 46 L. ed. 1121, the court said: "We are of opinion that we cannot properly re-examine the facts already determined by two judgments below."

[b] **Frivolous appeal.**—Defendant, charged with being a Chinese person unlawfully within the United States, who made no denial of his nationality and no claim that he was within the exempt classes or that he was born in this country, who stated that he had no counsel and did not want one then, and who, on all other questions, refused to answer, but stood mute, has no ground of appeal from an order of deportation. Yuen Pak Sune v. U. S., 191 Fed. 825, 112 CCA 339 [aff 183 Fed. 260]; Chin Ken v. U. S., 191 Fed. 817, 112 CCA 331 [aff 183 Fed. 332].

62. Tom Hong v. U. S., 193 U. S. 517, 24 SCt 517, 48 L. ed. 772; You Fook Hing v. U. S., 214 Fed. 77; U. S. v. Lee Chung, 206 Fed. 367; Fong Gum Tong v. U. S., 192 Fed. 320, 112 CCA 572; Mar Sing v. U. S., 137 Fed. 875, 70 CCA 213; U. S. v. Leung Sam, 114 Fed. 702.

63. Mar Poy v. U. S., 189 Fed. 288.

64. U. S. v. Leu Jin, 192 Fed. 580; Woo Jew Dip v. U. S., 192 Fed. 471, 112 CCA 609; U. S. v. Jhu Why, 175 Fed. 630.

65. U. S. v. Louie Lee, 184 Fed. 651.

66. U. S. v. Loy Too, 147 Fed. 750 [aff 152 Fed. 1022, 81 CCA 682].

67. Act May 6, 1882 (22 U. S. St. at L. 59 c 126 § 2), as amended by Act July 5, 1884 (23 U. S. St. at L. 115 c 220).

[a] **This act was repealed** by implication by the act of Sept. 13, 1888 (25 U. S. St. at L. 478 c 115 § 9), which covers substantially the same offense but prescribes a different punishment. See U. S. v. Durie, 170 Fed. 624 [app dism 218 U. S. 683 mem, 31 SCt 219 mem, 54 L. ed. 1208 mem]; U. S. v. Wood, 168 Fed. 438.

68. U. S. v. Seabury, 133 Fed. 983.

[a] **What constitutes "landing."**—The transfer of a Chinese person from the vessel in which he was brought to the United States to a detention shed maintained by the owners of the vessel on their dock, where he was detained under guard pending determination of his right to enter the United States, does not constitute a "landing" of such person within the act. U. S. v. Seabury, 133 Fed. 983.

69. U. S. v. Rout, 170 Fed. 201; U. S. v. Walker, 156 Fed. 987; U. S. v. Seabury, 133 Fed. 983.

[a] **The word "knowingly,"** as so used, refers to knowledge of the fact of landing and not to knowledge that the Chinese landed were not legally entitled to enter the United States. Sims v. U. S., 121 Fed. 515, 519, 58 CCA 92 (where the court said: "The word 'knowingly' so used in the statute refers to knowledge of the fact of landing, and was intended to recognize a distinction between a landing knowingly aided or abetted in and one unwittingly or unconsciously aided; such, for instance, as where a Chinaman might effect a landing from a vessel as a stowaway in another vessel").

[b] **Escape after transfer to detention shed.**—Where a Chinese laborer escaped from the custody of the master of the vessel in which he was brought to a port of the United States, after being transferred to a detention shed pending determination of his right to enter, without the permission, connivance, knowledge, or negligence of such master, the latter was not guilty of knowingly permitting such Chinese person to land in the United States. U. S. v. Seabury, 133 Fed. 983.

70. 32 U. S. St. at L. 176 c 641.

71. U. S. v. Wong Kock Yii, 3 Hawaii Fed. 87.

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this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which said vessel may enter or in which she may be found.''[72] The guilt or innocence of the owner of the property is immaterial.[73] Nor is it essential that the absolute title to the articles furnished as a part of the equipment of the vessel should be in the owner of the vessel.[74]

Stolen vessel. The statute is inapplicable where the guilty party is a trespasser and wrongdoer against the owner of the vessel, as, for instance, where the vessel has been stolen from the owner, and employed by the thief in the inhibited enterprise on his own account.[75]

[§ 119] **(3) Indictment.** The offense is sufficiently charged if the indictment follows the language of the statute in setting forth the facts which constitute it.[76] It is essential that the indictment should allege that the master of the vessel ''knowingly'' permitted the person to land.[77] Moreover, since the intent to leave is included in the term ''bringing,'' such intent must also be alleged.[78] The general rules as to negativing exceptions[79] and repugnancy[80] apply.

[§ 120] **(4) Evidence.** The Government is required to establish satisfactorily (1) The status of the Chinese persons who were brought into the United States by defendant, or whose unlawful entry was aided or abetted by him; (2) that the accused knowingly brought, or caused to be brought, such persons into the United States, or knowingly aided or abetted the landing in the United States of Chinese persons not entitled to enter the United States.[81] To establish the status of the person alleged to have been illegally brought in, an adjudication of a United States commissioner declaring the person therein named subject to deportation is competent and relevant evidence.[82] What degree of proof is necessary to establish knowledge on the part of the master is a question which must be determined in each case as it arises.[83]

[§ 121] **b. Presenting False Certificates of Entry.** Presenting to the immigration authorities a certificate of entry belonging to another Chinaman entitled to admission constitutes a violation of the immigration laws.[84]

[§ 122] **D. Judicial Review of Decisions of Immigration Officers[85]—1. As to Right to Enter—a. Adverse Decisions—(1) Right of Review on Habeas Corpus.** Although congress may, if it sees fit, authorize the courts to investigate and ascertain the facts upon which an alien's right to land is made to depend by the statute, yet it may intrust the final determination of these facts to an executive officer, and, if it does so, his order is due process of law, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reëxamine the evidence on which he acted, or to controvert its sufficiency.[86] Previous to the act of August 18, 1894,[87] there was no provision making the decision of the immigration officials final as to the right of aliens to be admitted to the United States. The courts, however, regarding the obvious intention of congress in imposing upon such officers the determination of the facts in such cases, refused to interfere, provided they acted within the scope of their authority and their decisions were based upon competent evidence.[88] If, however, it appeared that the applicant was entitled to enter by virtue

72. 23 U. S. St. at L. 61 c 126 § 10, as amended by 23 U. S. St. at L. 117 c 220 § 10.

[a] **The term "vessel"** is broad enough to include tackle, apparel, furniture, and appurtenances. The Frolic, 148 Fed. 921.

73. The Frolic, 148 Fed. 921.

74. The Frolic, 148 Fed. 921.

75. U. S. v. The Geo. E. Wilton, 43 Fed. 606 (where the court said: "The evidence clearly establishes that Mr. Bertram is the owner of the vessel; that the six Chinese laborers who were brought into the United States were so brought by a person unauthorized by him, who at the time had the possession of the vessel without his knowledge or consent, having in fact stolen it from him. . . . Now this forfeiture takes place only when the master of the vessel knowingly violates the law by bringing Chinese into the United States, and landing or attempting to land them; but in this case the only persons whom it is claimed were guilty of any attempt to violate the law are persons who were trespassers and wrong-doers against the owner of the vessel. They were not put in charge of the vessel by him in the capacity of master. The vessel had no master. It cannot be claimed that a thief in possession of a vessel is the master of it. He may be in full physical, manual possession and control of it, and have power over it, until the law gets hold of him and deprives him of that power, but he is not the master of the vessel in the sense in which that title is applied to an officer of a vessel in the statutes of the United States. This case does not come within the letter or spirit of any law of the United States under which a forfeiture can be claimed, and I think, as counsel has contended here, that if congress had made a law that would apply to this case it would be unconstitutional as depriving a person of his property without compensation, and in a case in which no punishment or penalty could be rightfully inflicted upon him, he having violated no law").

76. Sims v. U. S., 121 Fed. 515, 58 CCA 92. But see U. S. v. Trumbull, 46 Fed. 755 (holding that an indictment under the act of congress of May 6, 1882, making it unlawful for any person to "aid or abet the landing in the United States from any vessel of, any Chinese person not lawfully entitled to enter the United States," must state facts sufficient to show that the Chinese person was one prohibited from landing, and that he was brought on the same vessel from which he landed on a voyage which terminated at the time of the landing. It is demurrable if it merely shows that he was a Chinese laborer, and alleges that he was not lawfully entitled to enter the United States, and that he landed from a certain vessel).

77. U. S. v. Rout, 170 Fed. 201; U. S. v. Walker, 156 Fed. 987.

78. U. S. v. Jamieson, 185 Fed. 165 [app dism 223 U. S. 744 mem, 32 SCt 532 mem, 56 L. ed. 639 mem].

79. See Indictments and Informations [22 Cyc 344].

[a] **What must be negatived.**—(1) Section 9 of the act of 1888 does not in and of itself define a crime, and a valid indictment under that section must negative the exceptions contained in § 10. U. S. v. Wood, 168 Fed. 438; U. S. v. Graham, 164 Fed. 654; U. S. v. Wood, 159 Fed. 187. (2) But only such exceptions need be negatived as are found in the enacting clause of the statute, and in no event need any exception be negatived that is not descriptive of the offense. Sims v. U. S., 121 Fed. 515, 58 CCA 92.

80. See Indictments and Informations [22 Cyc 298].

[a] **"Aiding and abetting" and "landing."**—Under the act of July 5, 1884 (23 U. S. St. at L. 61), prohibiting any person from aiding or abetting the landing of any Chinese person brought into the United States from any vessel, an indictment charging defendants with "aiding and abetting," and immediately thereafter charging them with "landing" Chinese, was not objectionable for repugnancy, since, as defendants were liable as principals for aiding and abetting the commission of the offense, the further charge of "landing the Chinese" was surplusage and not repugnant to the other charge. Sims v. U. S., 121 Fed. 515, 58 CCA 92.

81. U. S. v. Hills, 124 Fed. 831.

[a] **Evidence held sufficient to show landing.**—Gerald v. U. S., 159 Fed. 421, 86 CCA 401.

82. U. S. v. Hills, 124 Fed. 831.

83. U. S. v. Walker, 156 Fed. 987.

84. U. S. v. Ong Chueh, 17 Philippine 649 note.

85. See generally Habeas Corpus [21 Cyc 292].

86. Low Wah Suey v. Backus, 225 U. S. 460, 32 SCt 734, 56 L. ed. 1165; U. S. v. Gue Lim, 176 U. S. 459, 20 SCt 415, 44 L. ed. 544; Lem Moon Sing v. U. S., 158 U. S. 538, 15 SCt 967, 39 L. ed. 1082; Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905; Ekiu v. U. S., 142 U. S. 651, 12 SCt 336, 35 L. ed. 1146; Lim Jew v. U. S., 196 Fed. 736, 116 CCA 364 [aff 192 Fed. 644]; U. S. v. Rodgers, 191 Fed. 970, 112 CCA 382; Rodgers v. U. S., 157 Fed. 381, 85 CCA 79; U. S. v. Burke, 99 Fed. 895; In re Li Foon, 80 Fed. 881; U. S. v. Arteago, 68 Fed. 883, 16 CCA 58; U. S. v. Rogers, 65 Fed. 787; In re Howard, 63 Fed. 263; In re Didfirri, 48 Fed. 168; In re Hirsch Berjanski, 47 Fed. 445; In re Vito Rullo, 43 Fed. 62; In re Cummings, 32 Fed. 75; Chan Gun v. U. S., 9 App. (D. C.) 290.

87. 28 U. S. St. at L. 390 c 301.

88. U. S. v. Jung Ah Lung, 124 U. S. 621, 8 SCt 663, 31 L. ed. 591 [aff 25 Fed. 141]; In re Howard, 63 Fed.

of some law or treaty, then the courts would pass on his right so to enter.[89] By the act of 1894, the decision of the appropriate immigration or customs officers, excluding an alien "from admission into the United States under any law or treaty," is made final in every case, unless reversed on appeal to the secretary of the treasury,[90] whose jurisdiction has now been transferred to the secretary of commerce and labor.[91] There is no distinction between the jurisdiction of the collector of customs in Chinese exclusion cases and that of inspectors of immigration in the case of other aliens.[92] The courts will not interfere by habeas corpus until after the remedy by appeal as provided for has been exhausted.[93] Where an appeal has been taken and the decision of the inspector affirmed, it has been held that the courts have jurisdiction in habeas corpus;[94] but it is now well settled that if a fair, full hearing was given and full opportunity had to present evidence, and a question of fact was presented and decided, and the action was not arbitrary, then the decision of the proper officers affirmed by the department is final,[95] provided there is some evidence to sustain the

263; In re Didfirri, 48 Fed. 168; In re Hirsch Berjanski, 47 Fed. 445; In re Florio, 43 Fed. 114; In re Vito Rullo, 43 Fed. 62; In re Dietze, 40 Fed. 324; In re Palagano, 38 Fed. 580; In re Cummings, 32 Fed. 75; In re Day, 27 Fed. 678; In re Chow Goo Pool, 25 Fed. 77.

89. See Lem Moon Sing, 158 U. S. 538, 15 SCt 967, 39 L. ed. 1082.

90. Tang Tun v. Edsell, 223 U. S. c 73, 32 SCt 359, 56 L. ed. 606 [aff 168 Fed. 488, 93 CCA 644]; U. S. v. Sing Tuck, 194 U. S. 161, 24 SCt 621, 48 L. ed. 917; Gonzales v. Williams, 192 U. S. 1, 24 SCt 177, 48 L. ed. 317; Kaoru Yamataya v. Fisher, 189 U. S. 86, 23 SCt 611, 47 L. ed. 721; Lee Lung v. Patterson, 186 U. S. 168, 22 SCt 795, 46 L. ed. 1108; Lem Moon Sing v. U. S., 158 U. S. 538, 15 SCt 967, 39 L. ed. 1082; Nishimura Ekiu v. U. S., 142 U. S. 651, 12 SCt 336, 35 L. ed. 1146; Toy Tong v. U. S., 146 Fed. 343, 76 CCA 621; Wong Sang v. U. S., 144 Fed. 968, 75 CCA 383 [aff 143 Fed. 147]; U. S. v. Lue Yee, 124 Fed. 303; U. S. v. Wong Soo Bow, 112 Fed. 416; In re Lee Gon Yung, 11 Fed. 998 [aff 185 U. S. 306, 22 SCt 690, 46 L. ed. 921]; U. S. v. Wong Chow, 108 Fed. 376, 47 CCA 406; In re Lee Lung, 102 Fed. 132 [aff 186 U. S. 168, 22 SCt 795, 46 L. ed. 1108]; U. S. v. Gin Fung, 100 Fed. 389, 40 CCA 439 [rev 89 Fed. 153]; In re Ota, 96 Fed. 487; In re Way Tai, 96 Fed. 484; In re Leong Youk Tong, 90 Fed. 648; In re Lee Yee Sing, 85 Fed. 635; In re Moses, 83 Fed. 995; U. S. v. Chung Shee, 71 Fed. 277 [aff 76 Fed. 951, 22 CCA 639]; U. S. v. Arteago, 68 Fed. 883, 16 CCA 58; U. S. v. Rogers, 65 Fed. 787; In re Chin Yuen Sing, 65 Fed. 571. In Lem Moon Sing v. U. S., 158 U. S. 538, 549, 15 SCt 967, 39 L. ed. 1082, the court said: "If the act of 1894 had done nothing more than appropriate money to enforce the Chinese Exclusion Act, the courts would have been authorized to protect any right the appellant had to enter the country, if he was of the class entitled to admission under existing laws or treaties, and was improperly excluded. But when Congress went further, and declared that in every case of an alien excluded by the decision of the appropriate immigration or customs officers 'from admission into the United States under any law or treaty,' such decision should be final, unless reversed by the Secretary of the Treasury, the authority of the courts to review the decision of the executive officers was taken away."

[a] **Assistant secretary.**—The fact that an appeal taken to the secretary of the treasury by an alien from an order of exclusion was determined adversely to the appellant by an assistant secretary does not entitle the appellant to release on habeas corpus. If the assistant secretary had no authority to act on the appeal, it is still pending. In re Way Tai, 96 Fed. 484. See also Tang Tun v. Edsell, 223 U. S. 673, 32 SCt 359, 56 L. ed. 606 [aff 168 Fed. 488, 93 CCA 644].

91. Act Febr. 20, 1907 (34 U. S. St. at L. 904 c 1134 § 25). And see Zakonaite v. Wolf, 226 U. S. 272, 33 SCt 31, 57 L. ed. 218; U. S. v. Sing Tuck, 194 U. S. 161, 24 SCt 621, 48 L. ed. 917; Ex p. Moola Singh, 207 Fed. 780; Lim Jew v. U. S., 196 Fed. 736, 116 CCA 364 [aff 192 Fed. 644]; Ex p. Lung Foot, 174 Fed. 70; Hong Yon v. U. S., 164 Fed. 330, 90 CCA 642; U. S. v. Watchorn, 164 Fed. 152; Pearson v. Williams, 136 Fed. 734, 69 CCA 386 [aff 202 U. S. 281, 26 SCt 608, 50 L. ed. 1029].

[a] **Acting secretary.**—(1) Where an appeal from a deportation order was heard and decided by the acting secretary of commerce and labor, it would be presumed, the contrary not appearing, that the acting secretary was at the time lawfully exercising the secretary's powers, as he was authorized to do by U. S. Rev. St. §§ 177, 178: In re Jem Yuen, 188 Fed. 350. (2) Where an appeal was taken to the secretary of commerce and labor from a deportation order, the fact that a "memorandum for the acting secretary," signed by the commissioner general, was added to the record before it was acted on, and contained remarks on the evidence and a recommendation that the decision be affirmed, was immaterial, and did not indicate that the officer whose duty it was to determine the appeal did not do so himself. In re Jem Yuen, supra. (3) But the power conferred on the secretary of commerce and labor by the Chinese Exclusion Act to finally determine on appeal the right of a person who claims to be a native-born citizen to enter the United States cannot be exercised by an acting secretary, in accordance with a recommendation made by himself as a solicitor of the department adverse to the appellant. In re Tang Tun, 161 Fed. 618 [rev on other grounds 168 Fed. 488, 93 CCA 644 (aff 223 U. S. 673, 682, 32 SCt 359, 56 L. ed. 606, where, however, it was said by the supreme court: "The decision of the appeal was none the less that of the Secretary of Commerce and Labor, because communicated by the telegram of Mr. Murray, the assistant secretary (Hannibal Bridge Co. v. United States, 221 U. S. 194, 206), later verified by letter from the department")].

92. In re Lee Ping, 104 Fed. 678.

93. U. S. v. Sing Tuck, 194 U. S. 161, 24 SCt 621, 48 L. ed. 621 [rev 128 Fed. 592, 63 CCA 199]; Matter of Yim Quock Leon, 1 Hawaii Fed. 66; Jao Igco v. Shuster, 10 Philippine 448; Lo Po v. McCoy, 8 Philippine 343.

[a] **Under the Canadian Chinese Immigration Act** (1906) Rev. St. c 95 § 7, the rule is the same—the alien should appeal from the comptroller's decision to the minister of customs, before asking the intervention of the courts. In re Lee Him, 15 B. C. 390, 17 CanCrCas 19 [dism app 15 B. C. 163, 16 CanCrCas 383].

94. Ex p. Fong Yim, 134 Fed. 938.

95. Zakonaite v. Wolf, 226 U. S. 272, 33 SCt 31, 57 L. ed. 218; Low Wah Suey v. Backus, 225 U. S. 460, 32 SCt 734, 56 L. ed. 1165; Tang Tun v. Edsell, 223 U. S. 673, 32 SCt 359, 56 L. ed. 606; U. S. v. Ju Toy, 198 U. S. 253, 25 SCt 644, 49 L. ed. 1040; Ex p. Petkos, 212 Fed. 275 [rev on other grounds 214 Fed. 978]; U. S. v. Uhl, 211 Fed. 628; U. S. v. Uhl, 211 Fed. 236, 128 CCA 560; Ex p. Mac Fock, 207 Fed. 696; Prentis v. Seu Leung, 203 Fed. 25, 121 CCA 389; U. S. v. Williams, 200 Fed. 538, 118 CCA 632; Lim Jew v. U. S., 196 Fed. 736, 116 CCA 364 [aff 192 Fed. 644]; Prentis v. Di Giacomo, 192 Fed. 467, 112 CCA 605; Prentis v. Stathakos, 192 Fed. 469, 112 CCA 607; U. S. v. Williams, 190 Fed. 686; In re Jem Yeun, 188 Fed 350; U. S. v. Williams, 186 Fed. 354; Edsell v. Mark, 179 Fed. 292, 103 CCA 121; Ex p. Lung Foot, 174 Fed. 70; Ex p. Long Lock, 173 Fed. 208; In re Tang Tun, 168 Fed. 488, 93 CCA 644 [aff 223 U. S. 673, 32 SCt 359, 56 L. ed. 606]; U. S. v. Watchorn, 164 Fed. 152; Ex p. Lee Kow, 161 Fed. 592; Ex p. Watchorn, 160 Fed. 1014; In re Tatsu, 10 Hawaii 701; Matter of Su Yen Hoon, 3 Hawaii Fed. 606; Matter of Koon Ko, 3 Hawaii Fed. 623; Matter of Nakashima, 3 Hawaii Fed. 168; Matter of Chop Tin, 2 Hawaii Fed. 153; Matter of Yim Quock Leong, 1 Hawaii Fed. 66; Ang Eng Chong v. Insular Collector of Customs, 23 Philippine 614; Edwards v. McCoy, 22 Philippine 598; Chieng Ah Sui v. Insular Collector of Customs, 22 Philippine 361; Lorenzo v. McCoy, 15 Philippine 559; Juan Co. v. Rafferty, 14 Philippine 235; Jao Igco v. Shuster, 10 Philippine 448; Ko Poco v. McCoy, 10 Philippine 442; Lo Po v. McCoy, 8 Philippine 343; Ngo-Ti v. Shuster, 7 Philippine 355; Rafferty v. Judge of Ct. of First Instance, 7 Philippine 164. And see infra §§ 123, 124.

In U. S. v. Sing Tuck, 194 U. S. 161, 166, 24 SCt 621, 48 L. ed. 917, the supreme court decided that congress has the power, and has exercised it, to confer upon executive officers and an executive department of the government the determination of questions of fact as to the right of a person of Chinese descent to enter the United States, including the question of fact whether or not he was born in the United States. In that case the court held that in case of adverse decision the applicant for admission must pursue his remedy by appeal to the department of commerce and labor before he can avail himself of the remedy of writ of habeas corpus. It did not decide whether or not a further trial of the question can be had on writ of habeas corpus or other proceedings after adverse decision by the department. In U. S. v. Ju Toy, 198 U. S. 253, 25 SCt 644, 49 L. ed. 1040, the question was squarely up and before the court, and it decided: "Even though the Fifth Amendment does apply to one seeking entrance to this country, and to deny him admission may deprive him of liberty, due process of law does not necessarily require a judicial trial and Congress may intrust the decision of his right to enter to an executive officer. Under the Chinese exclusion, and the immigration, laws, where a person of Chinese descent asks admission to the United States, claiming that he is a native-born citizen thereof and the lawfully designated officers find that he is not, and upon appeal that finding is approved by the Secretary of Commerce and Labor, and it does not appear that there was any abuse of discretion, such finding and action of the executive officers should be treat-

charge upon which the decision is based,[96] even if such evidence is incompetent or inconclusive.[97] This is true whatever may be the ground on which the right to enter the country is claimed, as well when it is citizenship as when it is domicile and the belonging to a class excepted from the exclusion acts.[98]

[§ 123] (2) **Extent of Review—(a) In General.** It is only when the administrative officers do something outside of the act or omit something required by the act, that judicial interference is warranted.[99] In other words, the only foundation for jurisdiction of a federal court to review the proceedings on habeas corpus is denial of a fair hearing before the immigration authorities, or abuse of discretion.[1]

Fair hearing of an alien's right to enter the United States means a hearing before the immigration officers in accordance with the fundamental principles that inhere in due process of law.[2] To constitute a fair hearing, the alien must be given an opportunity to be heard[3] in the district in which the arrest is made.[4] Such hearing, moreover, must

ed by the courts as having been made by a competent tribunal, with due process of law, and as final and conclusive; and in habeas corpus proceedings, commenced thereafter, and based solely on the ground of the applicant's alleged citizenship, the court should dismiss the writ, and not direct new and further evidence as to the question of citizenship. A person whose right to enter the United States is questioned under the immigration laws is to be regarded as if he had stopped at the limit of its jurisdiction, although physically he may be within its boundaries."

96. U. S. v. Uhl, 211 Fed. 628; U. S. v. International Mercantile Mar. Co., 194 Fed. 408, 114 CCA 370; U. S. v. Williams, 190 Fed. 897; Ex p. Saraceno, 182 Fed. 955.

97. Ex p. Joyce, 212 Fed. 282; Ex p. Watchorn, 160 Fed. 1014.

[a] **Questions of evidence not open.**—(1) In Frick v. Lewis, 195 Fed. 693, 696, 115 CCA 493 [rev 189 Fed. 146, and aff 233 U. S. 291, 34 SCt 488, 58 L. ed. 967], it was said: "Where a fair, though summary, hearing has been given, in ascertaining whether there is or is not any proof tending to sustain a charge involved in a case like this, it is not open to courts to consider either admissibility or weight of proof according to the ordinary rules of evidence . . . even if it believe the proof was insufficient and the conclusion wrong. The question is whether anything was offered that tends, though slightly, to sustain the charge." (2) "The court will not in proceedings of this character consider the testimony or the weight thereof, if properly and fairly taken, to determine whether or not it is sufficient to warrant the deportation of an alien. That would be for the proper immigration officials to determine. But the court may, and it is its duty to, consider the manner of procuring the testimony, its competency and legal admissibility against the petitioners, and determine whether or not they have had a fair and impartial hearing or trial." Hanges v. Whitfield, 209 Fed. 675, 677. (3) The district court in In re Lee Lung, 102 Fed. 132, 134 [aff 186 U. S. 168, 22 SCt 795, 46 L. ed. 1108], said: "These cases establish the doctrine that the collector of customs, in determining the right of Chinese persons to land, may act upon his own information and discretion, and that such action, however taken, is conclusive of the matter, subject to the right of appeal to the secretary of the treasury; that his decision, if he decides not to hear testimony, or not to give effect to evidence which the laws of congress have provided shall be sufficient to establish the right to land in the first instance, or decides not to decide, is conclusive." The decision in this case was affirmed by the supreme court (Lee Lung v. Patterson, 186 U. S. 168, 22 SCt 795, 46 L. ed. 1108), upon the ground that a hearing had been had and the determination of the collector was conclusive. But the court said: "The district court, however, in its opinion, seems to imply that, if there had been no hearing by the Secretary, the court, nevertheless would have been without jurisdiction to restrain the deportation of the Chinese persons. On that we do not think it is necessary to express an opinion. There is an intimation to the contrary by the circuit court of appeals of the ninth circuit in the case of U. S. v. Gin Fung, 100 Fed. 389, 40 CCA 439."

98. Tang Tun v. Edsell, 223 U. S. 673, 32 SCt 359, 56 L. ed. 606 [aff 168 Fed. 488, 93 CCA 644]; Chin Yow v. U. S., 208 U. S. 8, 28 SCt 201, 52 L. ed. 369; U. S. v. Ju Toy, 198 U. S. 253, 25 SCt 644, 49 L. ed. 1040; U. S. v. Sing Tuck, 194 U. S. 161, 24 SCt 621, 48 L. ed. 917; Lem Moon Sing v. U. S., 158 U. S. 538, 15 SCt 967, 39 L. ed. 1082; Hoo Choy v. North, 183 Fed. 92, 105 CCA 384; Haw Moy Choy v. North, 183 Fed. 89, 105 CCA 381; In re Tang Tun, 168 Fed. 488, 93 CCA 644 [aff 223 U. S. 673, 32 SCt 359, 56 L. ed. 606]; Ex p. Jong Jim Hong, 157 Fed. 447; Ex p. Wong Sang, 143 Fed. 147 [aff 144 Fed. 968, 75 CCA 383]; U. S. v. Lue Yee, 124 Fed. 303; Matter of Su Yen Hoon, 3 Hawaii Fed. 606; Lorenzo v. McCoy, 15 Philippine 559; Ngo-Ti v. Shuster, 7 Philippine 355. But see Ex p. Lung Wing Wun, 161 Fed. 211 (holding that the rule will not apply so as to prevent a citizen of the United States from invoking the protection of the courts to secure his right to live within the boundaries of his country). To same effect Moy Suey v. U. S., 147 Fed. 697, 78 CCA 85; U. S. v. Yee Mun Sang, 93 Fed. 365.

99. Prentis v. Cosmas, 196 Fed. 372, 116 CCA 419; U. S. v. Williams, 190 Fed. 686.

[a] **"Immigration officers must act within the powers given.** Courts have power to intervene where they exceed their authority." Ex p. Gregory, 210 Fed. 680, 683.

1. Low Wah Suey v. Backus, 225 U. S. 460, 32 SCt 734, 56 L. ed. 1165; U. S. v. Ju Toy, 198 U. S. 253, 25 SCt 644, 49 L. ed. 1040; White v. Gregory, 213 Fed. 768; Ex p. Petkos, 212 Fed. 275 [rev on other grounds 214 Fed. 978]; Ex p. Joyce, 212 Fed. 282; Ex p. Gregory, 210 Fed. 680; Ex p. Moola Singh, 207 Fed. 780; U. S. v. Ruiz, 203 Fed. 441, 121 CCA 551; U. S. v. Williams, 200 Fed. 538, 118 CCA 632; Ex p. Pouliot, 196 Fed. 437; U. S. v. Williams, 193 Fed. 228; Ex p. Wing You, 190 Fed. 294, 111 CCA 194; In re Jem Yuen, 188 Fed. 350; U. S. v. Chin Len, 187 Fed. 544, 109 CCA 310; Haw Moy v. North, 183 Fed. 89, 105 CCA 381; Davies v. Manolis, 179 Fed. 818, 103 CCA 310; Edsell v. Mark, 179 Fed. 292, 103 CCA 121; Ex p. Long Lock, 173 Fed. 208; Ex p. Jong Jim Hong, 157 Fed. 447; Ang Eng Chong v. Insular Collector of Customs, 23 Philippine 614; Jao Igco v. Shuster, 10 Philippine 448; Ko Poco v. McCoy, 10 Philippine 442; Lo Po v. McCoy, 8 Philippine 343; Rafferty v. Judge First Instance, 7 Philippine 164.

[a] **The federal court has jurisdiction to determine on habeas corpus** whether or not an alien seeking to enter the United States had a fair, although summary, hearing, and an opportunity to produce evidence before the immigration authorities; if the alien was denied such hearing, the court has jurisdiction to determine the merits; but if the alien had such a fair hearing, the merits cannot be reviewed on habeas corpus. Chin Yow v. U. S., 208 U. S. 8, 28 SCt 201, 52 L. ed. 369.

[b] **Abuse of discretion.**—(1) The mere refusal to allow an alien to enter territory of the United States is not an abuse of authority. Tang Tun v. Edsell, 223 U. S. 673, 32 SCt 359, 56 L. ed. 606 [aff 168 Fed. 488, 93 CCA 644]; Lo Po v. McCoy, 8 Philippine 343. (2) "An abuse of discretion on the part of the immigration authorities cannot be predicated of the discharge of official duty simply because the government of the country of which the alien is a subject desired and requested his return thereto." Siniscalchi v. Thomas, 195 Fed. 701, 706, 115 CCA 501.

2. Ex p. Petkos, 212 Fed. 275 [rev on other grounds 214 Fed. 978].

3. Chin Yow v. U. S., 208 U. S. 8, 28 SCt 201, 52 L. ed. 369; Yamataya v. Fisher, 189 U. S. 86, 100, 23 SCt 611, 47 L. ed. 721 (where the supreme court of the United States said: "But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury, or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized"); Ex p. Wong Tuey Hing, 213 Fed. 112.

[a] **Want of knowledge of the English language** on the part of the alien constitutes no reason for the intervention of the courts by habeas corpus. Yamataya v. Fisher, 189 U. S. 86, 23 SCt 611, 47 L. ed. 721; Ex p. Joyce, 212 Fed. 282.

[b] **An alien who denies that he is a stowaway** is entitled to a hearing upon that issue. U. S. v. Williams, 193 Fed. 228.

4. U. S. v. Chin Tong, 192 Fed. 485, 489, 112 CCA 647 (where it was said: "It is not competent for a Chinese inspector to arbitrarily ar-

be granted and conducted in good faith,[5] the alien must be advised of his right to be represented by counsel,[6] and he must not only have a fair opportunity to present evidence in his favor[7] but must also be apprised of the evidence against him.[8] Moreover there must be a bona fide decision,[9] the question presented must be actually passed on,[10] and the decision must be based upon some evidence.[11] Likewise an alien given by the law a right of appeal may invoke the powers of a court for the enforcement of such right,[12] and when the proceedings before the immigration officers indisputably show that they are acting without jurisdiction,[13] as where it appears as matter of law that the relator is not an alien or that he is not within the inhibition of the statute,[14] relief may be had by writ of habeas corpus. The same is true where an alien is excluded under a fundamentally erroneous view of the law,[15] or where he is detained under a warrant directing his deportation to the wrong country.[16]

Denial of a fair hearing cannot be established by proving that the decision was wrong,[17] that there were irregularities in the order of arrest,[18] that the rules of evidence as applied in courts of law were violated,[19] that the commissioner and de-

rest an alien without warrant and transport him from the district in which he lives to another state and district, and to there arraign him before a commissioner and cause him to be deported. The accused is entitled to full opportunity to be heard upon the question of his right to remain in the United States. He cannot be said to have had full opportunity to present his case when he is carried from the place of his residence to a distant district and state and tried without an opportunity to consult friends or counsel. And, besides, the statute of March 3, 1901, supra, indicates that it is the intention of Congress that he should be arrested only on a warrant procured by sworn complaint, and that he shall be arraigned before a commissioner of the district in which the arrest is made").

5. In re Can Pon, 168 Fed. 479, 93 CCA 635.

6. Low Wah Suey v. Backus, 225 U. S. 460, 32 SCt 734, 56 L. ed. 1165; Roux v. Commissioner of Immigration at Port of San Francisco, 203 Fed. 413, 121 CCA 523.

[a] **The partial exclusion of counsel from hearings** held by immigration authorities, pursuant to the general regulations of the department, does not present a judicial question justifying the courts in reviewing the acts of the immigration officials in excluding an alien. U. S. v. Greenawald, 213 Fed. 901.

[b] **Refusal to allow counsel to see the recommendation** forwarded to the secretary of commerce and labor will not invalidate the proceedings. Ex p. Garcia, 205 Fed. 53.

7. Chin Yow v. U. S., 208 U. S. 8, 28 SCt 201, 52 L. ed. 369; In re Can Pon, 168 Fed. 479, 93 CCA 635; In re Chop Tin, 2 Hawaii Fed. 153, 155 (where it was said: "If, however, the facts should show in a case like the one before the court, where a Chinaman applies for admission on the ground that he formerly did business as a merchant in this country, that he was not allowed a reasonable opportunity of producing the two non-Chinese witnesses required by the statute in proof of such fact, the courts would have jurisdiction to interfere upon a proper showing").

[a] **The fact that no provision is made to compel the production of witnesses** on behalf of the alien sought to be deported does not deprive him of any constitutional rights. Low Wah Suey v. Backus, 225 U. S. 460, 32 SCt 734, 56 L. ed. 1165; Yeung How v. North, 223 U. S. 705, 32 SCt 517, 56 L. ed. 621.

[b] **Refusal to allow cross-examination.**—A Chinese alien is not accorded a fair hearing before the immigration officers, where her counsel is precluded by the inspector from putting any questions on cross-examination to witnesses produced and examined against her. Ex p. Ung King Ieng, 213 Fed. 119.

[c] **Evidence by affidavit.**—The trial of the right of an alien charged with violation of the immigration laws, to remain in this country, on ex parte affidavits, does not amount to a denial of a fair hearing or of due process of law; and, conceding such practice to be lawful, the fact that affidavits were taken by the government without notice to the accused or his counsel and in the absence of such counsel, or the refusal of the affiants to appear and submit to cross-examination, where not induced by the government officers, are irregularities in procedure only, which do not invalidate the proceedings, although such matters may be considered as affecting the weight of the testimony. Ex p. Garcia, 205 Fed. 53; Ex p. Pouliot, 196 Fed. 437. But see Hanges v. Whitfield, 209 Fed. 675.

8. Ex p. Petkos, 212 Fed. 275 [rev on other grounds 214 Fed. 978].

9. U. S. v. Wong Chung, 92 Fed. 141, 144 (where the court said: "There was no decision such as the law contemplates. The decision, if there was one, was too informal, uncertain and contradictory to be accepted as an estoppel, or as conclusive evidence of any fact").

[a] **"The alien is entitled to the honest decision of the inspecting officers,** wholly untrammeled by any instructions not authorized by the statutes. The return in this case indicated that there has been no such decision in this case. Therefore the finality which the statute accords to a proper decision of the inspection officers is not a bar to inquiry here into the facts." In re Kornmehl, 87 Fed. 314, 315.

10. Ex p. Ow Guen, 148 Fed. 926; In re Di Simone, 108 Fed. 942; U. S. v. Gim Fung, 100 Fed. 389, 40 CCA 439.

[a] **Where the question of citizenship was not passed upon** by the commissioner of immigration, nor certified to the secretary of commerce and labor nor passed upon by him, no question of finality arises. U. S. v. Rodgers, 144 Fed. 711; In re Nakashima, 3 Hawaii Fed. 168.

11. U. S. v. Williams, 200 Fed. 538, 118 CCA 632; U. S. v. Williams, 189 Fed. 915 [aff 206 Fed. 460, 124 CCA 366]; U. S. v. Williams, 175 Fed. 274; Ang Eng Chong v. Collector of Customs, 23 Philippine 614. And see supra § 122.

12. Gonzales v. Williams, 192 U. S. 1, 24 SCt 177, 48 L. ed. 317; In re Can Pon, 168 Fed. 479, 93 CCA 635; U. S. v. Nakashima, 160 Fed. 842, 87 CCA 646; Rodgers v. U. S., 157 Fed. 381, 85 CCA 79; Rodgers v. U. S., 152 Fed. 346, 81 CCA 454; U. S. v. Wong Chung, 92 Fed. 141; In re Monaco, 86 Fed. 117. Contra U. S. v. Gin Fung, 100 Fed. 389, 40 CCA 439 [rev 89 Fed. 153].

[a] **Failure to grant a hearing on the merits on an appeal** entitles an alien to apply to the courts for protection. In re Tang Tun, 161 Fed. 618 [rev on other grounds 168 Fed. 488, 93 CCA 644].

[b] **The speedy disposition of a case** on appeal is not a basis for attack. Tang Tun v. Edsell, 223 U. S. 673, 32 SCt 359, 56 L. ed. 606 [aff 168 Fed. 488, 93 CCA 644].

13. Ex p. Watchorn, 160 Fed. 1014.

[a] **Illegal constitution of board of inquiry.**—Where there were only three immigration inspectors at a port where an alien attempted to land, the inspector who had examined her and had denied her right to enter was not competent to sit on a board of special inquiry, and a board consisting of three inspectors, of which such inspector was one, was illegal and without jurisdiction. U. S. v. Redfern, 180 Fed. 500.

14. U. S. v. Ruiz, 203 Fed. 441, 121 CCA 551; U. S. v. Williams, 190 Fed. 686; U. S. v. Williams, 189 Fed. 915 [aff 206 Fed. 460, 124 CCA 366]; Ex p. Koerner, 176 Fed. 478; Ex p. Petterson, 166 Fed. 536; Ang Eng Chong v. Collector of Customs, 23 Philippine 614.

[a] **Thus** the Chinese Exclusion Law cannot be invoked for the purpose of keeping out of the Philippine Islands actual bona fide citizens of said Islands. Vano v. Collector of Customs, 23 Philippine 480, 483 (where it was said: "It having been decided that Santiago Vaño was a citizen of the Philippine Islands, by virtue of his birth and residence, the Chinese Exclusion Law does not apply to him and an abuse of authority was committed by the executive department of the Government when he was excluded in the manner above indicated, and therefore the courts had a right to take jurisdiction of the cause by the means of an application for the writ of habeas corpus and to examine into and revise the finding of that department of the Government").

15. Ex p. Joyce, 212 Fed. 282. And see infra § 124.

[a] **The assumption by a board of special inquiry that it was absolutely bound by the medical certificate** in determining whether an alien should be excluded as a feeble-minded person was such a fundamental error of law as prevented a fair hearing. Ex p. Sitner, 212 Fed. 572; Ex p. Sitner, 212 Fed. 571; Ex p. Joyce, 212 Fed. 285; Ex p. Joyce, 212 Fed. 282.

16. U. S. v. Redfern, 210 Fed. 548; U. S. v. Ruiz, 203 Fed. 441, 121 CCA 551.

17. Chin Yow v. U. S., 208 U. S. 8, 28 SCt 201, 52 L. ed. 369; Ex p. Joyce, 212 Fed. 282; Ex p. Moola Singh, 207 Fed. 780; Ex p. Lung Foot, 174 Fed. 70; In re Ota, 96 Fed. 487; Lorenzo v. McCoy, 15 Philippine 559.

[a] **The ruling of the commissioner may have been erroneous,** that is, against the evidence or contrary to law; but, in the absence of some showing of fraud or gross irregularity amounting to positive abuse, his judgment must be regarded as a determination of the issue. U. S. v. Yeung Chu Keng, 140 Fed. 748.

[b] **Effect of disregard of statute by collector.**—The fact that the collector disregards the plain provisions of the statute, and refuses the right to land to a person having a certificate of his student character, conforming to the requirements of the law and not controverted by the United States, does not give a court jurisdiction to review his decision. Lee Lung v. Patterson, 186 U. S. 168, 22 SCt 795, 46 L. ed. 1108 [aff 102 Fed. 132]; In re Lee Ping, 104 Fed. 678.

18. U. S. v. Williams, 200 Fed. 538, 118 CCA 632.

19. Ex p. Joyce, 212 Fed. 282.

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partment refused to accept certain sworn statements as true even though no contrary or impeaching testimony was introduced,[20] that additional evidence was admitted after the petitioner had been advised that the case was closed,[21] or that there was no sworn testimony taken nor any record of the testimony or of the decision, no formal complaint or pleadings being required.[22] Nor is every abuse of authority reviewable provided a hearing is given and certain elementary procedural rights are observed.[23]

[§ 124] **(b) Questions of Law and Fact.** While the determination of the immigration authorities on all questions of fact affecting the right of an alien to enter or remain in the United States is final,[24] it is well settled that their decisions on questions of law are not conclusive on the courts which have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by a department officer.[25] Thus the question of whether the law does vest such officers with the power of final decision,[26] and whether they are proceeding according to law,[27] are judicial questions which may be inquired into on habeas corpus. The further question as to whether the accused was granted a hearing in fact upon the charge for which he is held in custody is likewise open to judicial inquiry.[28]

Alienage and citizenship. Whether the person excluded is an alien immigrant has been held to be a question reviewable by the courts.[29] It seems, however, that it is only the question of law involved, upon which the courts can pass; so far as the question is one of fact, the departmental decision is final.[30] Likewise the question of citizenship is one for the determination of the immigration officials, in so far, at least, as such determination depends upon conclusions which may be reached upon disputed questions of fact.[31]

Whether within excluded classes. Similarly the finding of fact that the alien is within the excluded classes,[32] as that he is an anarchist,[33] or is likely to become a public charge,[34] or has imported a woman for immoral purposes,[35] or has been convicted of a crime involving moral turpitude,[36] or is afflicted with idiocy[37] or a loathsome or contagious disease,[38] or was assisted to come by another,[39] is conclusive and cannot be reviewed by the courts if there is any evidence to support it.[40] But of course the facts found must bring the alien within the excluded classes.[41]

[§ 125] **b. Favorable Decisions.** It is only when the decision of the immigration authorities excludes an alien from admission that such decision is final; decisions in favor of the right to enter are not conclusive on the United States.[42]

Not res adjudicata. The finding of the secretary of commerce and labor is not a technical res adjudicata, and there is nothing to prevent him from arresting an alien a second time to try the same question again, if he is satisfied that the alien has entered the United States in violation of law.[43]

[§ 126] **2. As to Right to Remain.** There is no provision in the immigration acts making the decision of the immigration officers conclusive as to the right of an alien domiciled in this country to

20. Chin Yow v. U. S., 208 U. S. 8, 28 SCt 201, 52 L. ed. 369; Jao Igco v. Shuster, 10 Philippine 448.

21. In re Rhagat Singh, 209 Fed. 700.

22. In re Jem Yuen, 188 Fed. 350.

23. U. S. v. Williams, 190 Fed. 686 ("abuse of their powers by the authorities is a matter only of executive discipline provided that the requisite forms are not violated").

24. Ex p. Pouliot, 196 Fed. 437; Lewis v. Frick, 189 Fed. 146 [rev on other grounds 195 Fed. 693, 115 CCA 493]; De Bruler v. Gallo, 184 Fed. 566, 106 CCA 546; Davies v. Manolis, 179 Fed. 818, 103 CCA 310; Ex p. Stancampiano, 161 Fed. 164; Ex p. Watchorn, 160 Fed. 1014. And see supra § 122.

[a] **"The correctness of a finding of fact,** so long as the same is within the bounds of reason, involves no question of law, and cannot be reviewed or disturbed." U. S. v. Rockteschell, 208 Fed. 530, 534, 125 CCA 532.

25. U. S. v. Williams, 200 Fed. 538, 118 CCA 632; Lewis v. Frick, 189 Fed. 146 [rev on other grounds 195 Fed. 693, 115 CCA 493 (aff 233 U. S. 291, 34 SCt 488, 58 L. ed. 967)]; De Bruler v. Gallo, 184 Fed. 566, 106 CCA 546; Davies v. Manolis, 179 Fed. 818, 103 CCA 310; Ex p. Koerner, 176 Fed. 478; Botis v. Davies, 173 Fed. 996.

26. Rodgers v. U. S., 157 Fed. 381, 85 CCA 79.

[a] **The final determination of the statute applicable to the case,** and the interpretation of the grant of power therein, cannot rest with the executive officers under our system of government; the ultimate decision of such questions must remain with the courts. Davies v. Manolis, 179 Fed. 818, 103 CCA 310; Botis v. Davis, 173 Fed. 996.

27. Lavin v. Le Fevre, 125 Fed. 693, 60 CCA 425; In re Chop Tin, 2 Hawaii Fed. 153.

28. Davies v. Manolis, 179 Fed. 818, 103 CCA 310.

29. In re Neuwirth, 123 Fed. 347; In re Di Simone, 108 Fed. 942; U. S. v. Burke, 99 Fed. 895.

30. See Bouvé Exclusion and Expulsion of Aliens pp 531–533.

31. Fong Gum Tong v. U. S., 192 Fed. 320, 112 CCA 572 (holding that where a Chinese person in deportation proceedings claims to be a native-born citizen, he is entitled to a judicial determination of such question); U. S. v. Sprung, 187 Fed. 903, 110 CCA 87; Edsell v. Mark, 179 Fed. 292, 103 CCA 121; Matter of Su Yen Hoon, 3 Hawaii Fed. 606.

32. Prentis v. Cosmas, 196 Fed. 372, 116 CCA 419.

33. U. S. v. Williams, 194 U. S. 279, 24 SCt 719, 48 L. ed. 979.

34. White v. Gregory, 213 Fed. 768; In re Rhagat Singh, 209 Fed. 700; U. S. v. Williams, 204 Fed. 848; U. S. v. International Mercantile Mar. Co., 194 Fed. 408, 114 CCA 370; U. S. v. Rodgers, 191 Fed. 970, 112 CCA 382; U. S. v. Williams, 190 Fed. 897; U. S. v. Williams, 186 Fed. 354; U. S. v. Rodgers, 191 Fed. 970, 112 CCA 315.

35. Lewis v. Frick, 233 U. S. 291, 34 SCt 488, 58 L. ed. 967.

36. Prentis v. Stathakos, 192 Fed. 469, 112 CCA 607.

37. U. S. v. Rodgers, 182 Fed. 274 [aff 185 Fed. 334, 107 CCA 452].

38. Rodgers v. U. S., 157 Fed. 381, 85 CCA 79; In re Neuwirth, 123 Fed. 347.

39. U. S. v. Rodgers, 191 Fed. 970, 112 CCA 382.

40. See supra §§ 122, 124.

41. Ex p. Gregory, 210 Fed. 680.

42. Li Sing v. U. S., 180 U. S. 486, 21 SCt 449, 45 L. ed. 634 [aff 86 Fed. 896, 30 CCA 451]; Lim Jew v. U. S., 196 Fed. 736, 116 CCA 364 [aff 192 Fed. 644]; Lew Quen Wo v. U. S., 184 Fed. 685, 106 CCA 639; Hoo Choy v. North, 183 Fed. 92, 105 CCA 384 [certiorari den 223 U. S. 718 mem, 32 SCt 522 mem, 56 L. ed. 628 mem]; Haw Moy v. North, 183 Fed. 89, 105 CCA 381 [certiorari den 223 U. S. 717 mem, 32 SCt 522 mem, 56 L. ed. 628 mem]; In re Li Foon, 80 Fed. 881 [app dism 96 Fed. 1005, 37 CCA 664]. See also U. S. v. Lau Sun Ho, 85 Fed. 422 (where it was held that the action of the collector of a port, in permitting a Chinese laborer to land upon representations that he was born in the United States, is not in any sense judicial; and in a proceeding for the laborer's deportation does not constitute even prima facie evidence of his right to remain in the United States).

[a] **"When his decision admits the alien,** then the provisions of the act of July 5, 1884, are still applicable, which provide that, notwithstanding the contents of the certificate exhibited to the collector of customs, and their prima facie effect, 'said certificate may be controverted and the facts therein stated disproved by the United States authorities.'" Li Sing v. U. S., 180 U. S. 486, 490, 21 SCt 449, 45 L. ed. 634.

43. Pearson v. Williams, 202 U. S. 281, 26 SCt 608, 50 L. ed. 1029 [aff 136 Fed. 734, 69 CCA 386]; U. S. v. Commissioner of Immigration, 209 Fed. 137; Lim Jew v. U. S., 196 Fed. 736, 116 CCA 364 [aff 192 Fed. 644]; Ladaux v. Berkshire, 185 Fed. 971; Sire v. Berkshire, 185 Fed. 967; Ex p. Stancampiano, 161 Fed. 164. In Pearson v. Williams, 136 Fed. 734, 735, 69 CCA 386 [aff 202 U. S. 281, 26 SCt 608, 50 L. ed. 1029], the court said: "We are of the opinion that the decision of the board has no other effect than a determination that the alien shall be permitted to land; that its functions are confined to this initial inquiry; and that it is competent for the Secretary of Commerce and Labor at any subsequent time during the three years, upon becoming satisfied that the alien who has been allowed to enter is notwithstanding here in violation of law, to exercise the power of deportation. The board is a subordinate tribunal whose powers extend merely to the decision of the particular inquiry committed to it, and any adjudication beyond this, even if it were to be regarded as a judicial decision, would be coram non judice."

remain, and it has been held that such a decision may be reviewed by the courts on habeas corpus,[44] at least where such decision involves a question of law as well as of fact.[45] But the fact that the decision in such matter is not made conclusive, as in the case of decisions denying the right to enter, does not affect its validity or force, so long as it remains unreversed.[46] On the other hand, it has been held that deportation proceedings stand upon the same ground as exclusion proceedings, with reference to the finality of the decision of the immigration authorities, and that the courts have no jurisdiction except in the case of denial of a fair hearing or of abuse of discretion.[47]

[§ 127] **3. As to Privilege of Transit.** The privilege of transit, although it is one that should not be withheld without good cause, is nevertheless conceded only on such terms as the government prescribes in view of the well being of its own people.[48] The final decision as to permitting transit devolves upon the collector of customs and no appeal to the secretary is provided for. Consequently the decision of the collector in refusing transit cannot be interfered with by the courts.[49]

VII. NATURALIZATION

[§ 128] **A. Definition.** Naturalization is the act or proceeding by which an alien becomes a citizen,[50] the act of adopting a foreigner and clothing him with the privileges of a native citizen;[51] the admission of a foreign subject or citizen into the political body of the nation, and the bestowal upon him of the qualities of a citizen or subject.[52]

[§ 129] **B. Nature of Right; Statutory Privilege.** Aliens cannot demand admission to citizenship as a right. They can only claim the privilege of becoming adopted citizens under the provisions of laws enacted by congress.[53] Such laws are not in derogation of common right, and an applicant for admission must strictly comply with the conditions imposed.[54]

[§ 130] **C. Power to Naturalize.**[55] Every independent nation has power to prescribe terms on which it will admit aliens to citizenship.[56] By the constitution the power to provide for the naturalization of aliens is vested in congress.[57] The power thus conferred is exclusive and cannot be exercised by any of the states,[58] although provision may be

[a] **This is no violation of the alien's rights,** because he was admitted into the United States subject to the condition that he might be deported within three years thereafter if he entered in violation of the act. Ex p. Stancampiano, 161 Fed. 164.

44. Redfern v. Halpert, 186 Fed. 150, 108 CCA 262; U. S. v. Chin Fee, 94 Fed. 828. To same effect Chan Gun v. U. S., 9 App. (D. C.) 290.

[a] **Distinction between right to enter and right to remain.**—"There is a fundamental distinction between the case of a citizen of the country who has left the country and is asking to re-enter it, and a citizen of the country who has never left it, but whom the government is asking to deport; and while it is true, now that the supreme court has so decided, that the political power of the government may say whether a citizen of the country who has gone away shall be allowed to return or not, it seems to us uncontrovertable that a citizen of the country, who has not gone out, may not be deported or banished until the right of the government to deport or banish has been judicially determined. . . . When a person physically and politically present in the United States at the time he is arrested for deportation, claims that he is an American born citizen, and resists deportation on the basis of his rights of citizenship, the case is an entirely different one. Nativity gives citizenship, and is a right under the Constitution. It is a right that congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the courts, in the usual and ordinary way of adjudicating constitutional rights. No rule of evidence may fritter it away." Moy Suey v. U. S., 147 Fed. 697, 698, 699, 78 CCA 85.

45. Botis v. Davies, 173 Fed. 996.

46. U. S. v. Yamasaka, 100 Fed. 404, 40 CCA 454.

47. Ex p. Moola Singh, 207 Fed. 780; Lim Jew v. U. S., 196 Fed. 736, 116 CCA 364 [aff 192 Fed. 644]; Prentis v Stathakos, 192 Fed. 469, 112 CCA 607; Prentis v. Di Giacomo, 192 Fed. 467, 468, 112 CCA 605; U. S. v. Sprung, 187 Fed. 903, 110 CCA 37; Hoo Choy v. North, 183 Fed. 92, 105 CCA 384 [certiorari den 223 U. S. 718 mem, 32 SCt 522 mem, 56 L. ed. 628 mem]; Haw Moy v. North, 183 Fed. 89, 105 CCA 381 [certiorari den 223 U. S. 717 mem, 32 SCt 522 mem, 56 L. ed. 628 mem]; U. S. v. Lue Yee, 124 Fed. 303; U. S. v. Wong Soo Bow, 112 Fed. 416; U. S. v. Arteago, 68 Fed. 883, 16 CCA 58. In Brentis v. Di Giacomo, supra, the court said: "We believe the rule to be settled, however, under these congressional enactments, that their enforcement against aliens is vested exclusively in the designated executive department, for hearing, ascertainment of the facts, and rulings thereupon, 'without judicial intervention;' that Congress has so provided, within its powers, not only in respect of control over the alien at the time of landing for entry, but of like control during the probation period fixed by the act for ascertaining whether the entry was lawful, to direct and enforce deportation when the entry is found to be unlawful; and that the executive finding and order thereupon is not subject to judicial review or intervention, through the writ of habeas corpus or otherwise, except for failure or denial of the administrative hearing intended by the act."

48. See supra § 46.

49. Lee Gon Yung v. U. S., 185 U. S. 306, 22 SCt 690, 46 L. ed. 921; Fok Young Yo v. U. S., 185 U. S. 296, 22 SCt 686, 46 L. ed. 917.

50. Anderson L. D.; Bouvier L. D.

51. Per Fuller, C. J., in Boyd v. Nebraska, 143 U. S. 135, 162, 12 SCt 375, 36 L. ed. 103; 9 Op. Atty.-Gen. 359; Black L. D.

52. Minneapolis v. Reum, 56 Fed. 576, 6 CCA 31.

[a] **Other definitions.**—(1) Naturalization is the removal of the disabilities of alienage. State v. Manuel, 20 N. C. 122. (2) A nation, or the sovereign who represents it, may grant to a stranger the quality of a citizen by admitting him into the body of the political society. This is called naturalization. Vattel L. Nat. bk I c 19 §§ 212–214.

[b] **Denizenation distinguished.**—(1) In England a denizen is an alien-born who has obtained, ex donatione regis, letters patent to make him a subject. Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905 (dis. op. of Brewer, J.); Levy v. McCartee, 6 Pet. (U. S.) 102, 8 L. ed. 334; White v. White, 2 Metc. (Ky.) 185; Craw v. Ramsey, Vaugh. 274, 124 Reprint 1072; 1 Blackstone Comm. 374; Coke Litt. 8a; Comyns Dig. tit Aliens (D). (2) The crown may denizenize but cannot naturalize, the latter requiring the consent of parliament. Calvin's Case, 7 Coke 2a, 25b, 77 Reprint 397, 2 ERC 575; 2 Rolle 93; Comyns Dig. 430. (3) In the primary but obsolete sense of the word a denizen is a natural-born subject of a country. Coke Litt. 129a. (4) A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. 1 Blackstone Comm. 375. (5) In South Carolina the status seems to have been created by statute. Vaux v. Nesbit, 6 S. C. Eq. 352. (6) Denizenation has no retrospective operation. Priest v. Cummings, 20 Wend. (N. Y.) 338; Vaux v. Nesbit, supra.

53. In re Buntaro Kumagai, 163 Fed. 922.

[a] **Naturalization is a matter of statute,** which is of uniform application and should receive uniform construction throughout all the states. In re Rousos, 119 NYS 34.

54. U. S. v. Rodgers, 185 Fed. 334, 107 CCA 452 [aff 182 Fed. 274]. And see infra § 130.

55. Courts possessing power to naturalize see infra § 140.

56. In re Trum, 199 Fed. 361.

57. U. S. Const. art 1 § 8 cl 4. And see In re Young, 198 Fed. 715 [aff reh 195 Fed. 645]; In re Buntaro Kumagai, 163 Fed. 922; Levin v. U. S., 128 Fed. 826, 63 CCA 476; U. S. v. Severino, 125 Fed. 949; Minneapolis v. Reum, 56 Fed. 576, 6 CCA 31; Hampden County v. Morris, 207 Mass. 167, 93 NE 579, AnnCas1912A 815.

[a] **In England.**—(1) Formerly an act of parliament was required in each particular case to naturalize an alien. U. S. v. Rhodes, 27 F. Cas. No. 16,151, 1 Abb. 28; White v. White, 2 Metc. (Ky.) 185. (2) But by 7 & 8 Vict. c 66, which was a general act, it was enacted that aliens of friendly states might become naturalized British subjects upon complying with the requisites of the act. By 33 & 34 Vict. c 14, further facilities of naturalization are afforded.

[b] **In Canada,** § 91 of the British North America Act reserves to the exclusive jurisdiction of the dominion parliament the subject of naturalization. Cunningham v. Homma, [1903] A. C. 151 [rev 8 B. C. 76, 21 CanLTOccNotes 424].

58. U. S.—Ex p. Clarke, 100 U. S. 399, 25 L. ed. 715; Scott v. Sandford, 19 How. 393, 15 L. ed. 691; Smith v. Turner, 7 How. 283, 12 L. ed. 702; Thurlow v. Massachusetts, 5 How. 504, 12 L. ed. 256; Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19; Chirac v. Chirac, 2 Wheat. 259, 4 L. ed. 234; U. S. v. Villato, 2 Dall. 370, 1 L. ed. 419, 28 F. Cas. No. 16,622; In re Buntaro Kumagai, 163 Fed. 922; In re Gee Hop, 71 Fed. 274; Minneapolis v. Reum, 56 Fed. 576, 6 CCA 31; Day v.

made by and through state courts for naturalization to be acquired.[59]

Limit of power of states.[60] Each state, being sovereign except as to matters referred to the general government, may, as a result of that sovereignty, confer such rights of citizenship as it pleases, so far as relates to itself only; but no state can confer such rights of citizenship upon an alien who has not complied with the laws of congress, so as to make him a citizen of the United States and entitled to the rights and privileges guaranteed to citizens by the federal constitution.[61]

[§ 131] **D. Who May Be Naturalized—1. In General.** The naturalization laws of the United States apply only to aliens,[62] within the limits and under the jurisdiction of the United States,[63] who contemplate the continuance of a residence already established therein.[64] The right is limited to "aliens [being free white persons, and to aliens] of African nativity and to persons of African descent."[65] Hence the right to become a naturalized citizen of the United States depends upon parentage and blood, and not upon nationality or status.[66] The term "white person" must be given its common or popular meaning. As commonly understood the expression includes all European races and those Caucasians belonging to the races around the Mediterranean sea, whether they are considered as "fair whites" or "dark whites," and notwithstanding that certain of the southern and eastern European races are technically classified as of Mongolian or Tartar origin,[67] and, as

Buffinton, 7 F. Cas. No. 3,675, 3 Cliff. 376; Golden v. Prince, 9 F. Cas. No. 5,509, 3 Wash. C. C. 313; Lanz v. Randall, 14 F. Cas. No. 8,080, 4 Dill. 425; Matthew v. Rae, 16 F. Cas. No. 9,284, 3 Cranch C. C. 699; U. S. v. Rhodes, 27 F. Cas. No. 16,151, 1 Abb. 28. Compare Collet v. Collet, 2 Dall. 294, 1 L. ed. 387 (where it was held that, although the states have concurrent authority with the United States to naturalize aliens, such authority cannot be exercised so as to contravene the acts of congress).

Ala.—Gardina v. Jefferson County, 160 Ala. 155, 48 S 788; Etheridge v. Malempre, 18 Ala. 565.

Cal.—Ex p. Knowles, 5 Cal. 300.

Mass.—Hampden County v. Morris, 207 Mass. 167, 93 NE 579, AnnCas1912A 815; Stephens, Petitioner, 4 Gray 559; Gladhill, Petitioner, 8 Metc. 168.

Mich.—Andres v. Arnold, 77 Mich. 85, 43 NW 857, 6 LRA 238.

N. H.—Beavins' Pet., 33 N. H. 89.

N. J.—Rushworth v. Judges Hudson County Inferior Ct. C. Pl., 58 N. J. L. 97.

N. Y.—Matter of Ramsden, 13 HowPr 429; Lynch v. Clarke, 1 Sandf. Ch. 583; Peo. v. Sweetman, 3 Park. Cr. 358.

N. C.—Rouche v. Williamson, 25 N. C. 141; State v. Manuel, 20 N. C. 122.

S. C.—Davis v. Hall, 10 S. C. L. 292.

Tex.—Peterson v. State, 40 Tex. Civ. A. 175, 89 SW 81.

Va.—Com. v. Towles, 5 Leigh (32 Va.) 743; Barzizas v. Hopkins, 2 Rand. (23 Va.) 276.

Wis.—In re Wehlitz, 16 Wis. 443, 84 AmD 700.

See Behrensmeyer v. Kreitz, 135 Ill. 591, 26 NE 704.

[a] **Expressions as to exclusive power of congress.**—(1) Some judges have said obiter, on the strength of adjudications upon the constitutional power of congress to regulate proceedings in bankruptcy, that the mere existence of the power without its exercise would not prohibit the states from acting. Holmes v. Jennison, 14 Pet. (U. S.) 597, 10 L. ed. 579, 618; Matter of Ramsden, 13 HowPr (N. Y.) 429. (2) Others have noted distinctions between the admission of aliens to citizenship, and bankruptcy, and hold that the former was vested exclusively in congress by the constitutional provision. Ogden v. Saunders, 12 Wheat. (U. S.) 277, 6 L. ed. 606; Golden v. Prince, 10 F. Cas. No. 5,509, 3 Wash. C. C. 313.

[b] **Naturalization is a national right and privilege** rather than a state right. Gardina v. Jefferson County, 160 Ala. 155, 48 S 788.

[c] **The English Naturalization Act** of 1870 provides for the naturalization of aliens as British subjects, upon petition to a secretary of state in accordance with the provisions of the act.

[d] **In Canada** the dominion parliament, in the exercise of its exclusive jurisdiction over the subject of naturalization, may determine what privileges shall be attached to it. Cunningham v. Homma, [1903] A. C. 151.

59. Gardina v. Jefferson County, 160 Ala. 155, 48 S 788. See infra § 140.

60. **Privileges granted to aliens by legislation in the several states** see supra §§ 8–36.

61. Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; Minneapolis v. Reum, 56 Fed. 576, 6 CCA 344 (holding that it is not in the power of a state to denationalize a foreign subject who has not complied with the federal naturalization laws, and to constitute him a citizen of the United States or the state, so as to deprive the federal courts of a jurisdiction over a controversy between him and a citizen of a state, conferred upon them by the constitution of the United States); Barzizas v. Hopkins, 2 Rand. (23 Va.) 276; State v. Cole, 17 Wis. 674; In re Wehlitz, 16 Wis. 443, 84 AmD 700. See also Mayer v. U. S., 38 Ct. Cl. 553.

62. Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; In re Buck, 204 Fed. 701; In re Alverto, 198 Fed. 688; U. S. v. Rhodes, 27 F. Cas. No. 16,151, 1 Abb. 28.

[a] **A person who has once been naturalized** cannot be again naturalized, although the certificate of the naturalization has been lost and the record of naturalization proceedings destroyed, his remedy being, if he desires evidence of his citizenship to appear of record, to proceed under the state statute for the purpose of restoring the record. In re Buck, 204 Fed. 701.

[b] **"Citizens of the Philippine Islands or of Porto Rico,** while not citizens of the United States, are not aliens, and, prior to the passage of the Act of 1906, were not capable of becoming naturalized for two reasons: First, the naturalization laws of the United States applied only to aliens; and, second, they required a renunciation of former allegiance. Gonzales v. Williams, 192 U. S. 1, 24 SCt 177, 48 L. ed. 317. The effect of section 30 was to make applicable to citizens of the Philippine Islands and Porto Rico those provisions which had theretofore applied only to aliens." In re Alverto, 198 Fed. 688, 690.

63. Zartarian v. Billings, 204 U. S. 170, 27 SCt 182, 51 L. ed. 428; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 SCt 456, 42 L. ed. 890; In re Rustigian, 165 Fed. 980. And see infra § 138.

64. Luria v. U. S., 231 U. S. 9, 34 SCt 10, 58 L. ed. 101 [aff 184 Fed. 643].

65. U. S. Rev. St. (1878) § 2169; In re Young, 198 Fed. 715 [aff 195 Fed. 645]; North Noonday Min. Co. v. Orient Min. Co., 1 Fed. 522, 6 Sawy. 299; Schutz's Petition, 64 N. H. 241, 8 A 827; In re Kanaka Nian, 6 Utah 259, 21 P 993, 4 LRA 726.

[a] **Section 2169 of Rev. St. was not repealed by the Naturalization Act of June 29, 1906** (34 U. S. St. at L. 596). In re Alverto, 198 Fed. 688; U. S. v. Balsara, 180 Fed. 694, 103 CCA 660 [aff 171 Fed. 294].

[b] **The expression "free white persons"** (1) is found in all our naturalization acts since 1790, except for the brief period between 1873 and 1875, when they were omitted from the Revised Statutes. U. S. v. Balsara, 180 Fed. 694, 103 CCA 660 [aff 171 Fed. 294]. (2) The phrase "aliens of African nativity and to persons of African descent" was incorporated in the amendatory statute approved July 14, 1870 (16 U. S. St. at L. 254 c 254). Ex p. Shahid, 205 Fed. 812.

66. In re Young, 195 Fed. 645 [aff 198 Fed. 715].

67. In re Akhay Kumar Mozumdar, 207 Fed. 115; In re Young, 198 Fed. 715 [aff 195 Fed. 645]; In re Alverto, 198 Fed. 688; U. S. v. Balsara, 180 Fed. 694, 103 CCA 660 [aff 171 Fed. 294]; In re Halladjian, 174 Fed. 834; In re Ellis, 170 Fed. 1002; In re Buntaro Kumagai, 163 Fed. 922. Compare Ex p. Shahid, 205 Fed. 812, 814, 816 (where the court, after considering the above decisions in an attempt to evolve some definite rule arrived at the following conclusion: "That the meaning of free white persons is to be such as would naturally have been given to it when used in the first naturalization act of 1790. Under such interpretation it would mean by the term 'free white persons' all persons belonging to the European races, then commonly counted as white, and their descendants. It would not mean a 'Caucasian' race; a term generally employed only after the date of the statute and in a loose and indefinite way. . . . The geographical interpretation that 'free white persons' mean persons of European habitancy and descent is at least capable of uniform application, and gives to the statute a construction that avoids the uncertainties of shades of color and invidious discriminations as to the race of individuals. Under the construction of the statute above fixed, a modern Syrian of Asiatic birth and descent would not be entitled under the statute of Congress to be naturalized as a citizen of the United States." To same effect In re Dow, 213 Fed. 355; Ex p. Dow, 211 Fed. 486.

[a] **"This expression . . . refers to race, rather than to color,** and (1) fair or dark complexion should not be allowed to control, provided the person seeking naturalization comes within the classification of the white or Caucausian race." In re Najour, 174 Fed. 735. (2) "We think that the words refer to race and include all persons of the white race, as distinguished from the black, red, yellow, or brown races, which differ in so many respects from it. Whether there is any pure white race and what peoples belong to it may involve nice discriminations, but for practical purposes there is no difficulty in saying that the Chinese, Japanese, and Malays and the American Indians do not belong to the white race. Diffi-

thus construed, has been held to include Syrians,[68] Armenians,[69] high caste Hindus,[70] and Parsees.[71] But it is not enough that the applicant for naturalization comes within this classification. He must also be a person not within the classes excluded by the immigration laws.[72]

A person of the Mongolian race, either Chinese,[73] Japanese,[74] or Burmese,[75] cannot be naturalized, even in view of honorable service in the army or navy.[76]

An alien Indian cannot become a citizen by naturalization.[77]

But native citizens of Mexico, whatever may be their status from the standpoint of the ethnologist, are eligible to American citizenship, and may be individually naturalized by complying with the provisions of the United States naturalization laws.[78]

Collective naturalization. Congress has several times collectively conferred citizenship upon bodies of people without reference to race, but the reasons therefor in each instance were special, and such acts cannot be extended beyond the particular instances.[79]

[§ 132] **2. Alien Enemies.** No alien who is a citizen, denizen, or subject of any country, state, or sovereign with whom the United States may be at war at the time of his application can be admitted to citizenship in the United States.[80]

[§ 133] **3. Aliens Honorably Discharged from Military Service.**[81] Naturalization of aliens who have been honorably discharged from the military service of the United States is expressly authorized by statute.[82] Such an alien will not be debarred of his right to become a citizen by returning to his native country and holding an elective office there.[83] This provision will not, however, extend the right of naturalization to a person of the Mongolian race, or any other person not within section 2169 of the Revised Statutes.[84]

[§ 134] **4. Minors.**[85] An alien, although a minor, may be admitted to citizenship.[86] Under the Naturalization Act of June 29, 1906, a minor may declare his intention to become a citizen after reaching the age of eighteen years.[87]

[§ 135] **5. Seamen.** Every foreign seaman who

cult questions may arise and Congress may have to settle them by more specific legislation, but in our opinion the Parsees do belong to the white race and the Circuit Court properly admitted Balsara to citizenship." U. S. v. Balsara, 180 Fed. 694, 696, 103 CCA 660 [aff 171 Fed. 294].

[b] **The term "race"** primarily means an ethnical stock, a great division of mankind having in common certain distinguished physical peculiarities constituting a comprehensive class appearing to be derived from a distinct primitive source. A second definition is a tribal or national stock, a division or subdivision of one of the great racial stocks of mankind distinguished by minor peculiarities. The word "race" connotes descent. In re Halladjian, 174 Fed. 834.

[c] **Half white.**—(1) A person of half white and half Indian blood is not a white person within the meaning of the naturalization laws, and therefore he is not entitled to be admitted to citizenship thereunder. In re Camille, 6 Fed. 256, 6 Sawy. 541. This case is based upon a number of decisions in Ohio, where the question of the mixture of white and red, or white and black, races has been considered; and there seems to be nothing in the present naturalization statute, or any of the acts of congress, which would lead to a different conclusion. A person, one half white and one half of some other race, belongs to neither of those races, but is literally a half-breed. (2) The son of a German father and a Japanese mother is not a "white person" and hence is not eligible to naturalization. In re Young, 198 Fed. 715 [aff reh 195 Fed. 645]. See also In re Knight, 171 Fed. 299.

[d] **One-fourth white.**—A citizen of the Philippine Islands, who is one-fourth white and three-fourths brown or Malay, cannot be naturalized. In re Alverto, 198 Fed. 688.

68. In re Ellis, 179 Fed. 1002; In re Mudarri, 176 Fed. 465; In re Najour, 174 Fed. 735. See also Ex p. Shahid, 205 Fed. 812. Contra In re Dow, 213 Fed. 355; Ex p. Dow, 211 Fed. 486.

69. In re Halladjian, 174 Fed. 834.

70. In re Akhay Kumar Mozumdar, 207 Fed. 115.

71. U. S. v. Balsara, 180 Fed. 694, 103 CCA 660 [aff 171 Fed. 294].

72. Zartarian v. Billings, 204 U. S. 170, 27 SCt 182, 51 L. ed. 428; U. S. v. Rodgers, 185 Fed. 334, 107 CCA 452 [aff 182 Fed. 274]; In re Rustigian, 165 Fed. 980.

73. Low Wah Suey v. Backus, 225 U. S. 460, 32 SCt 734, 56 L. ed. 1165; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 SCt 456, 42 L. ed. 890; Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905; In re Gee Hop, 71 Fed. 274; In re Ah Yup, 1 F. Cas. No. 104, 5 Sawy. 155; In re Hong Yen Chang, 84 Cal. 163, 24 P 156.

[a] **Mongolian not a "white person."**—In the case of In re Ah Yup, 1 Fed. Cas. No. 104, 5 Sawy. 155, 157, upon a petition by a native Chinaman for naturalization, the question as to the admissibility of Mongolians to become United States citizens under the naturalization laws is much discussed. The question presented was whether a Mongolian was a "white person" within the statute. Sawyer, Circuit Judge, after a learned examination, concluded that "neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words 'white person' used in a sense so comprehensive as to include an individual of the Mongolian race," and declared that he was not aware that the same term, as used in the statutes as they stood from 1802 until the passage of the Revised Statutes, was ever supposed to include a Mongolian. He showed, from the reports of the debates in the United States senate at the time of the adoption of the Revised Statutes, that it was entirely clear that congress intended, by the use of the words "white person," to exclude Mongolians from the right of naturalization, and he concluded: "I am, therefore, of the opinion that a native of China, of the Mongolian race, is not a white person within the meaning of the act of Congress."

74. In re Young, 198 Fed. 715 [aff 195 Fed. 645]; Bessho v. U. S., 178 Fed. 245, 101 CCA 605; In re Buntaro Kumagai, 163 Fed. 922; In re Saito, 62 Fed. 126; In re Takuji Yamashita, 30 Wash. 234, 70 P 482, 94 AmSR 860, 59 LRA 671.

75. Matter of Po, 7 Misc. 471, 28 NYS 383.

76. See infra § 133.

77. In re Burton, 1 Alaska 111.

Right of native Indians see Indians [22 Cyc 114].

78. In re Rodriguez, 81 Fed. 337. This decision was largely controlled by the various treaties with Mexico and the fact that thousands of Mexicans, without regard to race or color, had been collectively naturalized as citizens of the United States.

79. In re Takuji Yamashita, 30 Wash. 234, 70 P 482, 94 AmSR 860, 59 LRA 671.

80. U. S. Rev. St. § 2171; Ex p. Newman, 18 F. Cas. No. 10,174, 2 Gall. 11. See also Ex p. Overington, 5 Binn. (Pa.) 371. Compare Ex p. Little, 2 Browne (Pa.) 218.

81. **Necessity of declaration of intention** see infra § 143.

82. U. S. Rev. St. § 2166; In re McNabb, 175 Fed. 511. See Strickley v. Hill, 22 Utah 257, 268, 62 P 893, 83 AmSR 786 (where the court said: "The fact that Jackson served in the army of his country and was honorably discharged therefrom, has a strong bearing tending to show a declaration of intention to become a citizen, as well as a strong circumstance tending to show naturalization, and in connection with other facts and circumstances may be sufficient to establish the fact itself").

[a] **Rev. St. § 2166 was not repealed** by the Naturalization Act of June 29, 1906 (34 U. S. St. at L. 596 c 3592). In re Leichtag, 211 Fed. 681; U. S. v. Meyer, 170 Fed. 983.

[b] **England.**—An alien who has served for four years in the British navy, in time of war, is held to be a natural-born subject under 13 Geo. II c 3. Re Giraud, 32 Beav. 335, 55 Reprint 151.

83. In re Wildberger, 214 Fed. 508 (so held because Expatriation Act of 1907 applies only to citizens).

84. In re Alverto, 198 Fed. 688; Bessho v. U. S., 178 Fed. 245, 247, 101 CCA 605 (where the court said: "Must not the courts, under the usual rules of construction, hold that section 2169 of the Revised Statutes restricts the provisions of the enactments authorizing aliens who have enlisted in the navy, and in the army, to be admitted as citizens of the United States? If it appears from the petitions they file, from the applications they make to become citizens, or from the evidence offered, that they are not free white persons, or of African nativity, then such aliens, even though they so enlisted and were thereafter honorably discharged, are not entitled to naturalization, as they are excluded from that privilege by the laws pertaining thereto"); In re Knight, 171 Fed. 299; In re Buntaro Kumagai, 163 Fed. 922.

85. **Effect of naturalization of parent on child** see infra § 163.

86. Priest v. Cummings, 20 Wend. (N. Y.) 338; In re Rousos, 119 NYS 34; In re Merry, 9 WklyNC (Pa.) 169.

87. 34 U. S. St. at L. 596 c 3592 § 4; In re Symanowsski, 168 Fed. 978; In re Rousos, 119 NYS 34.

[a] **The law in force prior to the act of 1906** was embodied in U. S. Rev. St. §§ 2165, 2167. Under these sections it was held to be competent for an alien minor over eighteen years

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declares his intention of becoming a citizen, and shall thereafter serve three years on board of a merchant vessel of the United States, on his application to any competent court and the production of a certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention, may be admitted as a citizen.[88] This right extends to every seaman who has served the required time on an American merchant vessel, coastwise or other;[89] but it does not extend to seamen in the naval service.[90] The "certificate of discharge and good conduct" required may be made by either a master or shipping commissioner.[91]

[§ 136] **6. Widow and Children of Declarants.** When any alien who has declared his intention to become a citizen dies before he is actually naturalized, his widow and children may, by complying with the other provisions of the statute, be naturalized without any declaration of intention.[92]

[§ 137] **7. Women.**[93] Women, either single,[94] or married,[95] may be naturalized, and in the latter case, it seems, without the concurrence of the husband.[96] But the alien wife of an alien husband, although residing in this country and otherwise qualified, cannot become a naturalized citizen of the United States.[97]

[§ 138] **E. Qualifications.**[98] To entitle an alien to be admitted to citizenship by naturalization, he must possess all the qualifications made requisite by statute.[99] Thus the Naturalization Act of June 29, 1906, provides that to authorize the naturalization of an alien it must be shown that "he has resided continuously within the United States five years at least, and within the state, territory, or district where the court is held one year at least, before his application,"[1] and that during that time "he has behaved as a man of good moral character,[2] attached to the principles of the Consti-

of age to make a declaration of intention to become a citizen of the United States, and such a declaration is sufficient basis for a final application for citizenship under the proviso to the Naturalization Act of June 29, 1906 (34 U. S. St. at L. 596). In re Shapiro, 186 Fed. 606; In re Symanowski, 168 Fed. 978; U. S. v. George, 164 Fed. 45, 90 CCA 463; In re Gross, 160 Fed. 739; In re Polsson, 159 Fed. 283. Contra In re Spitzer, 160 Fed. 137.

88. U. S. Rev. St. § 2174.

89. In re Sutherland, 197 Fed. 841; In re Lind, 192 Fed. 209.

[a] **Service part in American and part in foreign vessels.**—Where an alien, after declaration of intention to become a citizen, served over three years on merchant vessels, one of such vessels being of foreign register, leaving a period of service of two years and six months in American merchant vessels, naturalization was refused. In re Peterson, 2 Hawaii Fed. 53.

90. In re Gormly, 14 Phila. (Pa.) 211, 9 WklyNC 96.

91. In re Lind, 192 Fed. 209.

92. See infra § 143.

93. **Effect of naturalization of husband on alien wife** see infra § 164.

94. Brown v. Shilling, 9 Md. 74.

95. Ex p. Pic, 19 F. Cas. No. 11,-118, 1 Cranch C. C. 372.

96. Priest v. Cummings, 16 Wend. (N. Y.) 617 [aff 20 Wend. 338].

97. U. S. v. Cohen, 179 Fed. 834, 103 CCA 28, 29 LRANS 829; In re Rionda, 164 Fed. 368.

[a] **Reason for rule.**—In re Langtry, 31 Fed. 879, 880 note, 12 Sawy. 467, Mr. Justice Field remarked of a report that the applicant was a married woman whose husband was living in England as a British subject: "If this be so, the question will arise, on her application for final naturalization papers, whether she can be naturalized in this country. No person can be a citizen of two countries; and a wife is by law a citizen of her husband's country."

98. **Evidence of qualifications** see infra § 148.

99. Matter of Stewart, 30 N. Y. Super. 635; Northumberland County Naturalizations, 18 Pa. Co. 270; In re Kanaka Nian, 6 Utah 259, 21 P 993, 4 LRA 726.

1. 34 U. S. St. at L. 596 c 3592 § 4.

[a] **For cases construing the earlier statutes** containing a similar provision see U. S. v. Aakervik, 180 Fed. 137; In re An Alien, 1 F. Cas. No. 201a; Anonymous, 1 F. Cas. No. 465, 4 NYLegObs 98; Ex p. Pasqualt, 18 F. Cas. No. 10,788, 1 Cranch C. C. 243; Ex p. Saunderson, 21 F. Cas. No. 12,378, 1 Cranch C. C. 219; Ex p. Walton, 29 F. Cas. No. 17,127, 1 Cranch C. C. 186; State v. Macdonald, 24 Minn. 48; Schutz's Pet., 64 N. H. 241, 8 A 827; Matter of Clark, 18 Barb. (N. Y.) 444; Matter of Stewart, 30 N. Y. Super. 635; Matter of Rice, 7 Daly (N. Y.) 22; Matter of Bye, 2 Daly (N. Y.) 525; Matter of Scott, 1 Daly (N. Y.) 534; Matter of Hawley, 1 Daly (N. Y.) 531; Ex p. Paul, 7 Hill (N. Y.) 56.

[b] **Residence depends largely on intention** gathered from acts rather than from declarations. U. S. v. Aakervik, 180 Fed. 137. See Residence [34 Cyc 1647 et seq].

[c] **The word "continuously" is not used literally** as requiring the applicant to remain at all times physically within such jurisdictions, but applies to changes of domicile only; a sailor, by going to sea, does not abandon his residence. U. S. v. Rockteschell, 208 Fed. 530, 125 CCA 532; In re Schneider, 164 Fed. 335, 336 (where Ward, J., said: "The word 'continuously,' which is not found in the act of 1802, cannot be construed literally; else a resident of New York would lose his right if he paid a visit to Europe at any time during the first four years of his residence, or spent a day in Jersey City within the year immediately preceding the day of filing his petition. The use of the word may be to prevent any intermediate change of domicile during the five years. If Congress had meant that the alien must remain actually within the territory of the United States uninterruptedly during the five years, it would have used language like that of Act March 3, 1813, c. 42, § 12, 2 Stat. 811: 'For the continued term of five years next preceding his admission as aforesaid have resided within the United States without being at any time during the said five years out of the territory of the United States'").

[d] **The same construction** was given the act of April 14, 1802 (2 U. S. St. at L. 153 c 28 § 1); In re An Alien, 1 F. Cas. No. 201a.

[e] **Question of fact.**—The question whether there has been continuous residence is one of fact for determination under all the circumstances of the case. U. S. v. Cantini, 212 Fed. 925 [rev on the facts 199 Fed. 857].

[f] **Temporary return to native land.**—(1) The fact that an alien within that time returned temporarily to his native country on a visit, without any intention of remaining there or of abandoning his residence in this country, did not defeat his right to naturalization, and the length of his absence is material only as evidence on the question of intention. In re Deans, 208 Fed. 1018; U. S. v. Cantini, 199 Fed. 857 [rev on the facts 212 Fed. 925]. (2) But an alien who returned to and remained in his native country for more than four years, where his family had always lived, resuming his regular occupation there, cannot claim residence in the United States during that period. U. S. v. Aakervik, 180 Fed. 137. To same effect U. S. v. Cantini, 212 Fed. 925 [rev. on the facts 199 Fed. 857].

[g] **The word "district,"** as thus used in the phrase "state, territory, or district," refers to the District of Columbia, and not to the judicial district in which a petition for naturalization is filed. U. S. v. Kolodner, 204 Fed. 240, 124 CCA 1.

2. Naturalization Act June 29, 1906 (34 U. S. St. at L. 596 c 3592 § 4).

[a] **For cases under the earlier statutes** see In re Bodek, 63 Fed. 813; Matter of Stewart, 30 N. Y. Super. 635.

[b] **The highest degree of moral excellence is not required.**—(1) "Good moral character" is such character as measures up to the standard of the average citizen of the community in which the applicant resides. In re Hopp, 179 Fed. 561. See also In re Camaras, 202 Fed. 1019. (2) The term means more than "good reputation," however, and requires that his conduct be such as is authorized by law. U. S. v. Hrasky, 240 Ill. 560, 564, 88 NE 1031, 130 AmSR 288, 16 AnnCas 279 [quot In re Spenser, 22 F. Cas. No. 13,234, 5 Sawy. 195, 196] (where the court said: "The applicant must not simply have sustained a good reputation, but his conduct must have been such as comports with a good character. In other words, he must have behaved—conducted himself—as a man of good moral character ordinarily would, should or does. Character consists of the qualities which constitute the individual; reputation the sum of opinions entertained concerning him. The former is interior; the latter external. The one is substance; the other the shadow").

[c] **Some crimes are such an index of bad moral character** as to forever prevent the criminal from enjoying the benefits of citizenship. (1) Thus one who has pleaded guilty to or been convicted of murder (In re Ross, 188 Fed. 685), or (2) perjury (In re Spenser, 22 F. Cas. No. 13,234, 5 Sawy. 195. See also In re Talarico, 197 Fed. 1019; In re Di Clerico, 158 Fed. 905), will not be admitted to citizenship.

[d] **Habitual or isolated acts.**—In re Spenser, 22 F. Cas. No. 13,234, 5 Sawy. 195, 198 [quot U. S. v. Hrasky, 240 Ill. 560, 564, 88 NE 1031, 130 AmSR 288, 16 AnnCas 279 and note] (where the court said: "It may be said that an alien who has otherwise behaved as a man of good moral character during a residence in the country of at least five years, ought not to be denied admission to citizenship on account of the commission in that time of a single illegal or immoral act. This suggestion is

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tution of the United States, and well disposed to the good order and happiness of the same."[3] The naturalization laws do not require any educational qualification except that the applicant must be able to speak the English language and sign his petition in his own handwriting.[4] But the adjudged cases, as to the character of the evidence necessary to be produced to establish that an applicant for citizenship is "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same," are in conflict. One class of cases takes a severely logical view of the question, and holds that a person cannot be attached to the principles of the constitution and intelligently make oath to support it unless he has some general knowledge of what the constitution is and the principles which it affirms.[5] Another class of cases takes a more practical and more just view of the question, and holds that such knowledge of the constitution and laws of the United States by the applicant is not necessarily the only sufficient evidence of his attachment to the principles thereof; but that evidence that he has behaved as a man should behave who is attached to the principles of the constitution is sufficient, if satisfactory to the trial judge, to support in this respect a judgment admitting him to citizenship.[6]

Honorably discharged soldiers. The Naturalization Law, in so far as it provides for proof of residence as therein required, is inapplicable to the petition of an honorably discharged soldier applying under section 2166 of the Revised Statutes on proof of one year's residence within the United States.[7]

[§ 139] **F. How Effected—1. In General. Individual naturalization** may be effected (1) by special laws which confer the privilege of citizenship on the individuals named in the laws, or (2) by proceedings under general laws, whereby individuals severally renounce any foreign allegiance, and take upon themselves the obligations of citizenship.[8]

Collective naturalization is effected where the government, by treaty or cession, acquires the whole or a part of the territory of another nation, and takes to itself the inhabitants thereof.[9]

[§ 140] **2. Under General Laws—a. Jurisdiction—(1) What Courts Have Jurisdiction—(a) In General.** Under the present law exclusive jurisdic-

based upon the idea that it is sufficient if the behavior of the applicant was generally good—that the good preponderated over the evil. In some senses this may be correct. For instance, the law of the state prohibits gaming and the unlicensed sale of spirituous liquors. These acts thereby become immoral. But their criminality consists in their being prohibited and not because they are deemed to be intrinsically wrong—mala in se. Now, if an applicant for naturalization, whose behavior, during a period of five or more years, was otherwise good, was shown to have committed during that time either of those or similar crimes, I am not prepared to say that his application ought to be denied on account of his behavior. And yet it is clear that anything like habitual gaming or vending of liquors under such circumstances would constitute bad behavior—immoral behavior—and be a bar under the statute to admission to citizenship").

[e] **Illegal sale of liquor.**—(1) An alien who within five years has been convicted of illegally selling liquor in Kansas on premises covered by a liquor injunction, and who has been sentenced to imprisonment and has paid a fine therefor, is not a person of good moral character, within the Naturalization Act § 4, and therefore is not entitled to citizenship. In re Trum, 199 Fed. 361. (2) A person has not behaved as a man of good moral character if he has habitually, knowingly, and willfully violated the Sunday Closing Law. U. S. v. Hrasky, 240 Ill. 560, 88 NE 1031, 130 AmSR 288, 16 AnnCas 279. But see In re Hopp, 179 Fed. 561 (holding that the fact that an applicant for citizenship keeps his saloon open in violation of the state Sunday Closing Act does not show want of the good moral character essential under the Naturalization Act, where the law has never been enforced in his city on account of adverse public sentiment, and where he is willing to obey the law if insisted upon by the proper authorities).

[f] **Improper use of citizen papers.**—(1) "A man cannot behave as a person of good moral character, with respect to the rights of citizenship, when knowingly and willfully making a fraudulent or criminal use of his citizen papers." In re Di Clerico, 158 Fed. 905, 907. (2) But the fact that an alien imperfectly acquainted with the English language obtained a certificate of naturalization under the prior law on a false statement that he was less than eighteen years old when he came to this country, which certificate he afterward voluntarily surrendered, does not necessarily reflect on his moral character to such extent as to preclude him from making a new application. In re Argento, 159 Fed. 498.

[g] **Period of good conduct.**—The statute provides that the applicant must have behaved as a man of good moral character for five years previous to his application. But "if it is made to appear that an alien, applying for admission to citizenship, has not behaved as a man of good moral character while residing in the United States, the court, in the exercise of a sound discretion, may refuse his petition, notwithstanding the applicant's good behavior during the five years preceding his application. It is the duty of the court to determine, taking into account the whole career and conduct of the applicant, in so far as it is made to appear, whether such a one possesses the necessary qualifications, moral and otherwise, to entitle him to the rights of citizenship." In re Ross, 188 Fed. 685.

3. Naturalization Act June 29, 1906 (34 U. S. St. at L. 596 c 3592 § 4).

[a] **Naturalization denied to socialist.**—In Ex p. Sauer, 81 Fed. 355, the court refused to naturalize a German socialist whose doctrines as explained by himself the court held to be directly antagonistic to the principles of the constitution of the United States.

[b] **An alien who habitually violated the election laws** by voting, with knowledge that he was not qualified, was not "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." In re Centi, 211 Fed. 559, 560.

4. State v. Seventeenth Judicial Dist. Ct., 107 Minn. 444, 120 NW 898, 22 LRANS 1041 and note. See Act June 29, 1906 (34 U. S. St. at L. 596 c 3592 § 8).

5. In re Meakins, 164 Fed. 334 (where Whitson, J., said: "While it may not be impossible for one to be attached to the principles of the Constitution of the United States who is without definite knowledge of the workings of the government in detail, he must have sufficient general information concerning it as to enable him to give a reason for his faith; and where, as in this case, an applicant does not know how the laws are made, who makes them, nor how they are enforced, he is illy prepared to participate in the selection of the persons who shall perform those duties. He cannot be attached to principles of which he is entirely ignorant"); In re Bodek, 63 Fed. 813; In re Kanaka Nian, 6 Utah 259, 21 P 993, 4 LRA 726. See also Ex p. Shahid, 205 Fed. 812.

6. In re Rodriguez, 81 Fed. 337; State v. Seventeenth Judicial Dist. Ct., 107 Minn. 444, 120 NW 898, 22 LRANS 1041 and note; Ex p. Johnson, 79 Miss. 637, 31 S 208, 89 AmSR 665.

[a] **The practical test.**—"We are of the opinion, upon principle and authority, that while great caution should be exercised in the examination of applicants for citizenship, yet no hard and fast rule can be laid down, for each case must depend largely upon its special facts; that the practical test is whether the evidence, considered as a whole, justifies the conclusion that the applicant will make a good citizen; and, further, that an applicant, otherwise entitled to naturalization, should not necessarily be denied the right because the evidence shows that he has no accurate knowledge of the federal constitution and form of government." State v. Seventeenth Judicial Dist. Ct., 107 Minn. 444, 448, 120 NW 898, 22 LRANS 1041 and note.

7. In re Leichtag, 211 Fed. 681; In re McNabb, 175 Fed. 511.

8. Cooley Principles of Constitutional Law (3d ed) pp 270, 271.

9. Black L. D.: In re Opinions of Justices, 68 Me. 589; State v. Boyd, 31 Nebr. 682, 48 NW 739, 51 NW 602; Peo. v. Twenty-fourth Election Dist., 32 Misc. 584, 67 NYS 236. See also Citizens [7 Cyc 143].

[a] **Admission of territory as state.**—Congress having the power to deal with the people of the territories in view of the future states to be formed from them, there can be no doubt that in the admission of a state a collective naturalization may be effected, in accordance with the intention of congress and the people applying for admission. Admission on an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot thereafter be controlled, and it also involves the adoption as citizens of the United States of those whom congress makes members of the political community,

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tion to naturalize aliens is conferred upon the federal district courts, the supreme court for the District of Columbia, and all courts of record in any state or territory having jurisdiction in actions at law or in equity, or law and equity, in which the amount in controversy is unlimited.[10] The former statute on the subject provided that the proceedings might be had before a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the states having common-law jurisdiction and a seal or clerk.[11] To constitute a court one of common-law jurisdiction within the meaning of this statute it is not necessary that it should be one possessing a general common-law jurisdiction, but if any part of its jurisdiction answers that designation the requirement of the statute is fulfilled.[12] Courts with this jurisdiction are those which have the power to punish offenses, enforce rights, or redress wrongs recognized by the common law, or which, in the determination of the causes they decide, are governed by the principles, rules, and usages of that law.[13] The common-law jurisdiction even of such courts may be so restrained by the fundamental law of the state as not to include

and who are recognized as such in the formation of the new state with the consent of congress. Boyd v. Nebraska, 143 U. S. 135, 12 SCt 375, 36 L. ed. 103.

[b] **Treaty with Great Britain—territory of Michigan.**—Under the second article of the Jay Treaty with Great Britain, British subjects who resided at Detroit before and at the time of the evacuation of the territory of Michigan, and who continued to reside there afterward without, at any time prior to the expiration of one year from such evacuation, declaring their intention of becoming British subjects, became ipso facto, to all intents, American citizens. Crane v. Reeder, 25 Mich. 303.

[c] **The treaty with Spain by which Florida was ceded to the United States** admitted the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. They did not thereby, however, become possessed of political power nor entitled to share in the government until Florida became a state. In the meantime Florida continued to be a territory of the United States, governed by virtue of that clause in the constitution which empowers congress "to make all needful rules and regulations, respecting the territory, or other property, belonging to the United States." American Ins. Co. v. 356 Bales of Cotton, 1 Pet. (U. S.) 511, 542, 7 L. ed. 242.

[d] **By the annexation of Texas,** under a joint resolution of congress of March 1, 1845, and its admission into the Union on an equal footing with the original states, Dec. 29, 1845, all citizens of the former republic became, without any express declaration, citizens of the United States. McKinney v. Saviego, 18 How. (U. S.) 235, 15 L. ed. 365; Carter v. Terr., 1 N. M. 317; Barrett v. Kelly, 31 Tex. 476; Cryer v. Andrews, 11 Tex. 170; Citizenship Passports, 13 Op.-Atty.-Gen. 397.

[e] **Acquisition of Louisiana and California.**—The purchase of Louisiana and the acquisition of California by the United States present familiar illustrations of collective naturalization. 1 Phillim. Int. L. 382. See as to Louisiana Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691 (per Catron, J.); U. S. v. Laverty, 3 Mart. 733; Desbois' Case, 2 Mart. 184. As to California see Tobin v. Walkinshaw, 23 F. Cas. No. 14,068. 1 McAll. 186.

[f] **Indians.**—(1) By the treaty of Sept. 27, 1830, provision was made for such heads of families of the Choctaws as desired to remain and become citizens of the United States. U. S. St. at L. 335. (2) By the treaty of Dec. 29, 1835, such individuals and families of the Cherokees as were averse to a removal west of the Mississippi, and desirous to become citizens of the states where they resided, were allowed to do so. 7 U. S. St. at L. 483. (3) By the act of March 3, 1843, it was provided that, on the completion of certain arrangements for the partition of the lands of the tribe among its members, "the said Stockbridge tribe of Indians, and each and every of them, shall then be deemed to be, and from that time forth are hereby declared to be, citizens of the United States, to all intents and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens." 5 U. S. St. at L. 647 c 101 § 7. (4) And such was the act of March 3, 1839, relating to the Brothertown Indians of Wisconsin. 5 U. S. St. at L. c 83 pp 349, 351. (5) The act of congress approved Febr. 8, 1887, was much broader, and by its terms made every Indian situated as therein referred to a citizen of the United States. 24 U. S. St. at L. 388 c 119.

10. Act June 29, 1906 (34 U. S. St. at L. 596 c 3592).

11. U. S. Rev. St. § 2165, since superseded by the act of June 29, 1906 (34 U. S. St. at L. 596 c 3592).

12. U. S.—In re Wolf, 188 Fed. 519; U. S. v. Nechman, 183 Fed. 788; U. S. v. Stoller, 180 Fed. 910; U. S. v. Aakervik, 180 Fed. 137; Levin v. U. S., 128 Fed. 826, 63 CCA 476; U. S. v. Lehman, 39 Fed. 49, 768; Ex p. Tweedy, 22 Fed. 84; Ex p. Cregg, 6 F. Cas. No. 3,380, 2 Curt. 98; Ex p. Smith, 22 F. Cas. No. 12,969; U. S. v. Power, 27 F. Cas. No. 16,080, 14 Blatchf. 223.

Cal.—Matter of Conner, 39 Cal. 98, 2 AmR 427 [disappr Ex p. Knowles, 5 Cal. 300].

Ill.—U. S. v. Hrasky, 240 Ill. 560, 88 NE 1031, 130 AmSR 288, 16 AnnCas 279; Beardstown v. Virginia, 81 Ill. 541 [aff reh 76 Ill. 34]; Dale v. Irwin, 78 Ill. 170; Peo. v. McGowan, 77 Ill. 644, 20 AmR 254 [overr Knox County v. Davis, 63 Ill. 405; Mills v. McCabe, 44 Ill. 194].

Ky.—Morgan v. Dudley, 18 B. Mon. 693, 68 AmD 735.

Me.—Gilroy, Petitioner, 88 Me. 109, 33 A 979, 51 AmSR 392; Dean, Petitioner, 83 Me. 489, 22 A 385, 13 LRA 229 and note.

Mass.—Gladhill, Petitioner, 8 Metc. 168.

Minn.—State v. Weber, 96 Minn. 422, 105 NW 490, 113 AmSR 630.

N. Y.—Peo. v. Pease, 30 Barb. 588 [aff 27 N. Y. 45, 84 AmD 242]; Matter of Christern, 43 N. Y. Super. 523, 56 HowPr 5; Matter of Harstrom, 7 AbbNCas 391; Peo. v. Sweetman, 3 Park. Cr. 358.

Oh.—Ex p. Wingard, 3 Oh. Dec. (Reprint) 174, 4 WklyLGaz 169, 1 WestLMonth 453; Anonymous, 3 Oh. Dec. (Reprint) 47, 2 WklyLGaz 278.

Pa.—Moran v. Rennard, 3 Brewst. 601; Com. v. Lee, 1 Brewst. 273.

Porto Rico.—In re Bonnet y Jaspard, 2 Porto Rico Fed. 70.

Tex.—Ex p. Burkhardt, 16 Tex. 470.

[a] **Limited jurisdiction sufficient.**—"We apprehend the State courts mentioned in the act of Congress as having common law jurisdiction, are such as exercise their powers according to the course of the common law. It was not meant they should have all common law jurisdiction over every class of subjects, including all civil and criminal matters. If this were so, it is apprehended but few courts could be found in any of the States that would possess the requisite 'common law jurisdiction.'" Peo. v. McGowan, 77 Ill. 644, 648, 20 AmR 254.

13. In re Wolf, 188 Fed. 519; Levin v. U. S., 128 Fed. 826, 63 CCA 476.

[a] **Distinguished from other courts.**—(1) "The term 'having common-law jurisdiction' is used to distinguish these courts from those which have no jurisdiction save in equity, in admiralty, or in matters not involving offenses or rights under the common law." Levin v. U. S., 128 Fed. 826, 832, 63 CCA 476 [quot In re Wolf, 188 Fed. 519, 520]. (2) "When it speaks of Courts having 'common law jurisdiction,' it refers to such Courts as had been or might be established in the several States to administer justice under that system of jurisprudence, as contradistinguished from merely local, municipal or Police Courts, intended for purely local government." In re Conner, 39 Cal. 98, 101, 2 AmR 427 [overr Ex p. Knowles, 5 Cal. 300].

[b] **County courts.**—(1) In some states county courts may naturalize. In re Conner, 39 Cal. 98, 2 AmR 427; Beardstown v. Virginia, 81 Ill. 541; Dale v. Irwin, 78 Ill. 170 [overr Knox County v. Davis, 63 Ill. 405]; Peo. v. McGowan, 77 Ill. 644, 20 AmR 254; Peo. v. Pease, 30 Barb. 588 [aff 27 N. Y. 45, 84 AmD 242]; Peo. v. Sweetman, 3 Park. Cr. (N. Y.) 358; Ex p. Burkhardt, 16 Tex. 470. (2) It is otherwise in Tennessee. In re Wolf, 188 Fed. 519.

[c] **The common pleas court of Meigs county, Ohio,** is a court of record exercising common-law jurisdiction with full power to admit aliens to citizenship. State v. Weber, 96 Minn. 422, 105 NW 490, 113 AmSR 630.

[d] **City and police courts.**—In various states, city and police courts, when courts of record, have been held to have jurisdiction to take declarations of intent to become citizens. Ex p. Cregg, 6 F. Cas. No. 3,380, 2 Curt. 98; U. S. v. Power, 27 F. Cas. No. 16,080, 14 Blatchf. 223; U. S. v. Hrasky, 240 Ill. 560, 88 NE 1031, 130 AmSR 288, 16 AnnCas 279; Morgan v. Dudley, 18 B. Mon. (Ky.) 693, 68 AmD 735; Ex p. Gladhill, 8 Metc. (Mass.) 168; State v. Webster, 7 Nebr. 469; State v. Whittemore, 50 N. H. 245, 9 AmR 196; Levy's Case, 14 Op. Atty.-Gen. 509.

[e] **A probate court** (1) having no common-law jurisdiction cannot entertain an application for naturalization. Ex p. Tweedy, 22 Fed. 84. (2) Otherwise if it has common-law jurisdiction. Ex p. Smith, 22 F. Cas. No. 12,969; Matter of Harstrom, 7 AbbNCas (N. Y.) 391.

[f] **The jurisdiction of appellate courts over naturalization** (1) is as ample as that of any other courts. (In re Guliano, 156 Fed. 420), (2) unless restricted by constitutional provisions (see infra note 14). (3) The St. Louis court of appeals has common-law jurisdiction, and, under Mo. Rev. St. (1899) § 465 can admit qualified aliens to citizenship. Levin v. U. S., 128 Fed. 826, 63 CCA 476.

[g] **The circuit courts of Hawaii** have power to naturalize aliens. Terr. v. Kaizo, 17 Hawaii 295.

[h] **The district court of the**

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jurisdiction in naturalization proceedings.[14]

Court must have clerk and seal. The court must have a clerk distinct from the judge, not necessarily an officer denominated clerk, but a permanent "recording officer charged with the duty of keeping a true record of its doings and afterwards of authenticating them,"[15] and the court must possess a seal.[16]

[§ 141] **(b) Control of Congress over State Courts.** Whatever may have been the theory of some courts regarding the power of congress to confer such authority upon the state courts in the past, the question is now settled that congress has such power and that state courts may constitutionally exercise the same when authorized by congress to do so,[17] without legislative authority from the states which created them,[18] provided the exercise of such jurisdiction is not prohibited by state legislation.[19] A state is under no constitutional obligation to furnish tribunals to aid in the administration of the naturalization laws of congress,[20]

United States for the district of Porto Rico has jurisdiction to naturalize aliens. In re Bonnet y Jaspard, 2 Porto Rico Fed. 70. See also 29 Op. Atty.-Gen. 521.

[1] **In Washington** (1) Const. art 4 § 6 expressly confers the power of naturalization upon superior courts. This provision is in harmony with the federal statutes (U. S. v. Stoller, 180 Fed. 910; State v. Libby, 47 Wash. 431, 92 P 350), and (2) is an expression of the consent of the state that its courts may exercise that power rather than a conferring of jurisdiction upon them (State v. King County Super. Ct., 75 Wash. 239, 134 P 916).

14. State v. Baker, 51 La. Ann. 1243, 1246, 26 S 102 (where the court said: "Clearly, it is within the competency of a sovereign State to declare in its organic law what jurisdiction the courts established by it shall possess and exercise; and, unless a court of the State is clothed with civil jurisdiction to entertain and decide questions of naturalization, it certainly could not do so, notwithstanding such court, in general terms, is a court of record, and possessed, in a certain sense, of common-law jurisdiction. That common-law jurisdiction must be restrained within the limits fixed in the delegation of authority conferred by the constitution of the State").

[a] **In Louisiana** under Const. art 39, providing that the criminal district court shall have general and supervisory jurisdiction over all inferior state and municipal criminal courts in the parish of New Orleans, and shall have authority to issue writs of habeas corpus in criminal and quasi criminal cases and such other writs and orders as may be necessary or proper in aid of the jurisdiction conferred on it, etc., such court is without jurisdiction to entertain and pass on an application for naturalization, notwithstanding it is, in a certain sense, a court of record which is possessed of common-law jurisdiction, so as to have, under the act of congress, jurisdiction in regard to naturalization. State v. Baker, 51 La. Ann. 1243, 26 S 102.

[b] **In South Carolina** Const. art 5 § 4 defines the jurisdiction of the supreme court as follows: (1) To issue certain specified writs, as well as other original and remedial writs; (2) to hear and determine appeals in cases of chancery; (3) to correct "errors at law." Consequently the supreme court has no jurisdiction of a petition for naturalization. Ex p. McKenzie, 51 S. C. 244, 28 SE 468.

15. U. S.—Ex p. Cregg, 6 F. Cas. No. 3,380, 2 Curt. 98.

Me.—Dean, Petitioner, 83 Me. 489, 22 A 385, 13 LRA 229.

Mass.—Ex p. Gladhill, 8 Metc. 168.

Minn.—State v. Weber, 96 Minn. 422, 105 NW 490, 113 AmSR 630.

Nebr.—State v. Webster, 7 Nebr. 469.

N. H.—State v. Whittemore, 50 N. H. 245, 9 AmR 196.

Pa.—Moran v. Rennard, 3 Brewst. 601; Com. v. Lee, 1 Brewst. 273.

[a] **A court whose judge acts as its only clerk** is not a court having a clerk, within the meaning of U. S. Rev. St. § 2165, providing for the naturalization of aliens, and is not competent to naturalize. Ex p. Cregg, 6 F. Cas. No. 3,380, 2 Curt. 98; State v. Webster, 7 Nebr. 469; State v. Whittemore, 50 N. H. 245, 9 AmR 196. See also Dean, Petitioner, 83 Me. 489, 22 A 385, 13 LRA 229 (where it was held that a court in which the judge thereof is charged with the duty of keeping its records, which must be authenticated by him, although having a recorder charged with the duty of keeping such records when requested so to do by the judge, is not a court having a clerk, within the federal statutes regulating naturalization).

16. U. S. Rev. St. § 2165 subd 1; State v. Weber, 96 Minn. 422, 105 NW 490, 113 AmSR 630; Com. v. Sheriff, 1 Brewst. (Pa.) 183.

17. U. S.—Holmgren v. U. S., 217 U. S. 509, 517, 30 SCt 588, 54 L. ed. 861, 19 AnnCas 778 [aff 156 Fed. 439, 84 CCA 301] (where Day, J., said: "It is undoubtedly true that the right to create courts for the States does not exist in Congress. The Constitution provides (Art. III, § 1) that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. But it does not follow that Congress may not constitutionally authorize the magistrates or courts of a State to enforce a statute providing for a uniform system of naturalization, and defining certain proceedings which, when complied with, shall make the applicant a citizen of the United States. This Congress had undertaken to do in making provision for the naturalization of aliens to become citizens of the United States in a certain class of state courts—those of record having common law jurisdiction, a clerk and a seal"); Levin v. U. S., 128 Fed. 826, 63 CCA 476; Croesus Min., etc., Co. v. Colorado Land, etc., Co., 19 Fed. 78.

Ark.—State v. Penney, 10 Ark. 621.

Cal.—Ex p. Knowles, 5 Cal. 300.

Mass.—Hampden County v. Morris, 207 Mass. 167, 93 NE 579, AnnCas1912A 815.

N. Y.—Matter of Christern, 43 N. Y. Super. 523, 56 HowPr 5; Peo. v. Sweetman, 3 Park. Cr. 358. In Matter of Ramsden, 13 HowPr 429, 435, Hoffman, J., summed up his conclusions upon this question as follows: "The power of legislation upon this subject existed in the states prior to the constitution. The legislation would have been executed in the ordinary tribunals of justice. The power has been superseded by an act of congress passed under the constitution. Congress adopt the state tribunals as the agents to exercise the power, as they would have performed it before. The concurrence of the state legislatures, expressed or fairly implied, adds the sanction of the state to this delegation of power. Whether such tribunals are bound to act may admit of controversy. That their acts are lawful, if they do so, seems undeniable."

Pa.—Rump v. Com., 30 Pa. 475.

Utah.—Eldredge v. Salt Lake County, 37 Utah 188, 106 P 939.

Wash.—State v. Libby, 47 Wash. 431, 92 P 350.

[a] **Source of power.**—The congressional power to make such a grant, and to vest judicial authority in state courts and officers, in such cases, exists by virtue of the established rule that the grant of a power to accomplish an object is a grant of the authority to select and use the appropriate means to attain it. Levin v. U. S., 128 Fed. 826, 63 CCA 476.

18. Levin v. U. S., 128 Fed. 826, 831, 63 CCA 476 (where Sanborn, J., said: "Nor does the contention that the courts of the state of Missouri having common-law jurisdiction are without authority to accept or to exercise the judicial power to naturalize aliens conferred upon them by Congress, because the state which established them has never by any legislative action empowered or permitted them to do so, commend itself to our judgment. . . . The resistless conclusion is that the Congress of the United States was by section 8, art. 1, of the Constitution, granted the necessary authority to vest in the courts of the states having common-law jurisdiction the judicial power to admit qualified aliens to citizenship; that, in the absence of legislative authority or permission from the states which created them, such courts may lawfully exercise this power, and that section 2165 of the Revised Statutes is neither unconstitutional nor invalid").

19. Holmgren v. U. S., 217 U. S. 509, 30 SCt 588, 54 L. ed. 861, 19 AnnCas 778 [aff 156 Fed. 439, 84 CCA 301].

[a] **State courts quoad hoc courts of the United States.**—State courts, in hearing and determining applications for naturalization, are exclusively under the laws of the United States, and should be deemed quoad hoc courts of the United States. Matter of Christern, 43 N. Y. Super. 523, 56 HowPr 5; Peo. v. Sweetman, 3 Park. Cr. 358.

20. U. S.—Levin v. U. S., 128 Fed. 826, 63 CCA 476; U. S. v. Severino, 125 Fed. 949.

Ala.—Scott v. Strobach, 49 Ala. 477.

Ark.—State v. Penney, 10 Ark. 621.

Cal.—Matter of Conner, 39 Cal. 98, 2 AmR 427; Ex p. Knowles, 5 Cal. 300.

Ky.—Morgan v. Dudley, 18 B. Mon. 693, 68 AmD 735.

Me.—In re Gilroy, 88 Me. 199, 33 A 979, 51 AmSR 392.

Mass.—Hampden County v. Morris, 207 Mass. 167, 93 NE 579, AnnCas1912A 815; Stephens, Petitioner, 4 Gray 559.

N. H.—State v. Whittemore, 50 N. H. 245; Beavins' Pet., 33 N. H. 89.

N. J.—Passaic v. Slater, 90 A 377; Rushworth v. Judges Hudson County Inferior Ct. C. Pl., 58 N. J. L. 97, 32 A 743, 30 LRA 761.

N. Y.—Matter of Christian, 43 N. Y. Super. 523, 56 HowPr 5; Matter of Ramsden, 13 HowPr 429; Peo. v. Sweetman, 3 Park. Cr. 358.

Pa.—Rump v. Com., 30 Pa. 475; In re Naturalization, 5 Pa. Dist. 597; Lab's Pet., 3 Pa. Dist. 728.

S. C.—Ex p. McKenzie, 51 S. C. 244, 28 SE 468.

[a] **Power rather than obligation of state courts.**—(1) "There is no provision of the federal constitution which requires the courts or judges of a State to perform any duties respecting the admission of aliens to citizenship. It is well established that such courts and magistrates may, if they choose, exercise the power conferred upon them by Congress, unless prohibited by state legislation.

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and hence may prescribe limitations upon the exercise, by its courts, of jurisdiction in such matters.[21] This right of the state to limit the exercise of the jurisdiction involves the right to select the court which may act,[22] or to forbid any to act.[23]

[§ 142] **(2) Territorial Jurisdiction.** Under the Naturalization Act of June 29, 1906,[24] providing that the naturalization jurisdiction of the courts specified "shall extend only to aliens resident within the respective judicial districts of such courts," such jurisdiction extends only to aliens resident within the territorial jurisdiction of the court;[25] and a court which has jurisdiction only within the county in which it sits cannot admit to citizenship an alien resident in another county, although within the same judicial district throughout which the same judge presides.[26] But where the court has general jurisdiction throughout its judicial district comprised of several counties, an alien residing in one county may be naturalized by the decree of a district court sitting in another county of the same judicial district.[27]

A change of residence of the alien, after filing the petition and before the hearing thereof, from one judicial district to another will not affect the jurisdiction.[28]

[§ 143] **b. Declaration of Intention—(1) Necessity.** With the exceptions hereafter mentioned,[29] an applicant for citizenship under the present law[30] must declare upon oath before a competent court, at least two years prior to his admission to citizenship, and after he has reached the age of eighteen years, that it is his bona fide intention to become a citizen,[31] and to renounce his allegiance to any prince, potentate, or state, and particularly by name to the prince or state whereof he is at the time a subject or citizen.[32] A declaration of intention, once abandoned, will not support an application for admission to citizenship.[33]

Exceptions to rule. Three classes of persons are provided for who may become citizens without declaring their intention: (1) An honorably discharged soldier having the necessary qualifications as to residence;[34] this exception now applies also to aliens honorably discharged from the navy or marine corps;[35] (2) the widow or minor children of one who has declared his intention to become a citizen, but who dies before he is actually natural-

Prigg v. Pennsylvania, 16 Pet. (U. S.) 622, 10 L. ed. 1060. (2) But this is a naked power, and imposes no legal obligations on the courts to assume and exercise them, and such exercise is not within their official duty, or their oath to support the constitution of the United States." In re Gilroy, 88 Me. 199, 201, 33 A 979, 51 AmSR 392. (3) "No law imposes upon state courts the duty of passing upon applications for naturalization. This belongs legitimately to the Federal courts. It is only where the latter are inconvenient that the state courts act, and then only as an accommodation." In re Naturalization, 5 Pa. Dist. 597.

21. Rushworth v. Judges, 58 N. J. L. 97, 101, 32 A 743, 30 LRA 761 and note (where Van Syckel, J., said: "My conclusion therefore is, that it is competent for the state legislature to forbid state courts altogether to entertain or act upon applications for naturalization, and therefore it could lay any restraint, regulation, limitation or condition upon the practice in such cases which it might deem expedient or proper. No right is claimed or could be conceded, on behalf of the state, to interfere in any respect with the subject of naturalization in federal courts." See also Lab's Pet., 3 Pa. Dist. 728.

22. Passaic v. Slater, (N. J.) 90 A 377.

23. Gilroy, Petitioner, 88 Me. 199, 33 A 979, 51 AmSR 392 (where it was held that L. [1893] c 310, which prohibits any court, other than the supreme judicial and superior courts, from entertaining any jurisdiction over the naturalization of aliens, is not in violation of any provision of the constitution of the United States); Stephens, Petitioner, 4 Gray (Mass.) 559; Beavins Pet., 33 N. H. 89; Passaic v. Slater, (N. J.) 90 A 377; Rushworth v. Judges Hudson County Inferior Ct. C. Pl., 58 N. J. L. 97, 32 A 743, 30 LRA 761.

24. 34 U. S. St. at L. 596 c 3592 § 3.

25. U. S. v. Schurr, 163 Fed. 648.

26. U. S. v. Johnson, 181 Fed. 429 (district court of Kansas); U. S. v. Wayer, 163 Fed. 650 (circuit court of Michigan); U. S. v. Schurr, 163 Fed. 648 (circuit court of Michigan).

27. U. S. v. Stoller, 180 Fed. 910 (superior court of Washington).

28. U. S. v. Breen, 135 App. Div. 824, 120 NYS 304 (holding this to be true even if § 3, conferring jurisdiction on certain courts, and providing that the naturalization jurisdiction of all such courts shall extend only to aliens residing in the respective judicial districts of such courts, contemplates the judicial districts of the supreme court, and not the entire territory of the jurisdiction of such court); Matter of Burke, 58 Misc. 3, 110 NYS 36.

29. See infra this section note 34.

30. Act June 2, 1906 (34 U. S. St. at L. 596 c 3592 § 4).

31. In re Poirot, 168 Fed. 456.

Operation and effect of declaration of intention see infra § 166.

[a] **U. S. Rev. St. § 2167** provided that an alien who had resided in the United States three years before attaining his majority, might, under specified conditions, be naturalized after reaching his majority, without previous declaration of intention. See State v. Macdonald, 24 Minn. 48; Schutz's Pet., 64 N. H. 241, 8 A 827. This section was repealed by the act of June 29, 1906 (34 U. S. St. at L. 596). And see supra § 166.

[b] **The provision of § 100 of the Organic Act of Hawaii** of April 30, 1900 (31 U. S. St. at L. 161 c 339), which authorized the naturalization as citizens of the United States of persons who had resided in Hawaii for five years prior to its taking effect without a previous declaration of intention, was repealed by the Naturalization Act of June 29, 1906 (34 U. S. St. at L. 596 c 3592), which establishes a uniform rule of naturalization throughout the United States, repealing all inconsistent acts, and requires a declaration of intention in all cases except as above stated (notes 34–37). U. S. v. Rodiek, 162 Fed. 469, 89 CCA 389.

[c] **For cases construing the earlier statutes** see Ex p. Brownlee, 9 Ark. 191; McCarty v. Hodges, 2 Edm. Sel. Cas. (N. Y.) 433. See also Banks v. Walker, 3 Barb. Ch. (N. Y.) 438 (where it is held that, where it is clearly inferable from a record of naturalization that the alien had not, at least three years previous to the date thereof, declared on oath his intention to become a citizen of the United States and to renounce all allegiance to any foreign prince or sovereignty, and particularly to the king of the country of which he was a subject, but that the court has mistaken the registry of the arrival of the alien in the United States for such a declaration of intention, the naturalization is invalid).

32. U. S. Rev. St. § 2165; In re Stack, 200 Fed. 330; Ex p. Lange, 197 Fed. 769; In re Poirot, 168 Fed. 456.

[a] **Necessity of particular renunciation.**—(1) An alien's declaration, containing a general renunciation, but failing to renounce allegiance particularly, by name, to the prince, potentate, state, or sovereignty to which he owed allegiance, is fatally defective. In re Stack, 200 Fed. 330. (2) So a declaration of intention to become a citizen, which contains neither a renunciation, by name, of allegiance to the sovereign of whom declarant is a subject, nor a renunciation, particularly, of allegiance to the state of which he is a subject does not comply with the statute. Ex p. Lange, 197 Fed. 769. (3) But in Ex p. Smith, 8 Blackf. (Ind.) 395, a declaration of intention omitting the name of the sovereign, being described particularly as "the queen of Great Britain and Ireland," was held to be a sufficient compliance with the act of congress.

33. In re Cameron, 165 Fed. 112 (where, after it had been made, the applicant returned to his native country with the intention of remaining there, and voted and otherwise participated in its local affairs).

34. U. S. Rev. St. § 2166; In re McNabb, 175 Fed. 511; Scott v. Strobach, 49 Ala. 477; Berry v. Hull, 6 N. M. 643, 30 P 936.

[a] **U. S. Rev. St. § 2166 is not repealed by act of 1906.**—U. S. v. Meyer, 170 Fed. 983. In re Loftus, 165 Fed. 1002.

35. Act July 26, 1894 (28 U. S. St. at L. 124 c 165).

[a] **U. S. Rev. St. § 2166** did not apply to aliens who had served in the navy or marine corps. In re Bailey, 2 F. Cas. No. 728, 2 Sawy. 200; In re Chamavas, 21 NYS 104 [disappr Matter of Stewart, 30 N. Y. Super. 635].

[b] **Service of an entire term of enlistment** is a jurisdictional prerequisite to citizenship by an alien who enlisted in the marine corps and applied for citizenship without first having declared his intention to become a citizen, and he having been discharged for a physical disability before the term of his enlistment expired, cannot become a citizen by proving his good moral character and his honorable discharge. U. S. v. Plaistow, 189 Fed. 1006.

[c] **Effect of change in enlistment term.**—"When the Naturalization Act was passed, the statutes fixed a maximum term of enlistment in the navy and a minimum term of enlistment in the marine corps, each at five years—thus making it possible at that time to produce the evidence with respect to those who were in the naval service, in the form of a certificate of honorable discharge covering a full five-year term of enlistment; or it

ized;[36] and (3) any person qualified to become a citizen, who has resided in the United States for five years next preceding May 1, 1910, and who, because of misinformation, has acted under the impression that he was or could become a citizen, and has exercised the rights of a citizen or an intended citizen.[37] This last provision is remedial legislation, and is designed to aid only those who on the specific date mentioned in the statute were in a position to invoke its provisions.[38]

[§ 144] **(2) Requisites and Sufficiency.** A declaration of intention must be made by the alien himself in conformity with the law.[39] It must show that it is the present intention of the declarant to become a citizen, and his present intention to renounce allegiance to his foreign sovereign at some future time;[40] it must be made under oath,[41] and it must be recorded.[42] Such declaration of intention must be made before the clerk of a court authorized to naturalize aliens,[43] or his authorized deputy.[44]

Amendment. The filing of the required declaration not being a judicial proceeding, a defect cannot be cured by amendment nunc pro tunc.[45]

[§ 145] **c. Proceedings—(1) Nature of Proceedings.** The jurisdiction of the courts to naturalize aliens is conferred by special statute, and is to be exercised in a special and summary manner, and not according to the rules governing courts in plenary proceedings.[46] Usually these proceedings are ex parte, and the declarations of intention are almost invariably ex parte.[47] Although the naturalization laws must be liberally construed to enable those aliens who under the law are entitled to citizenship to acquire it,[48] the procedure necessary to perfect this status should be strictly followed.[49] The power to naturalize aliens is judicial, and not ministerial or clerical,[50] and consequently cannot be delegated to clerks, but must be exercised by the court.[51]

[§ 146] **(2) Petition.** The first step in the judicial proceeding for admission to citizenship is

was possible at that time to offer proof of a shorter term of enlistment covered by an honorable discharge and proof of continued service under a further enlistment. . . . The change in the enlistment term in the navy from that of a maximum of five years to a term of four years and no less, brings with it . . . a corresponding modification in the requirements of the naturalization statute. . . . [consequently] proof of an honorable discharge after serving one enlistment of four years, with proof of re-enlistment and continued honorable service for the full five-year period, satisfies the statute." In re Brykczynski, 207 Fed. 813, 814.

36. Act June 29, 1906 (34 U. S. St. at L. 596 c 3592 § 4 cl 6); In re Robertson, 179 Fed. 131; In re Schmidt, 161 Fed. 231.

[a] **This provision is precisely the same in effect as U. S. Rev. St. § 2168,** which is repealed by the later act, and, being a reënactment, the words "any alien who has declared his intention" must be construed to include persons who made their declarations under the old statute and subsequently died, whose minor children may be naturalized under the new act without making any declaration of intention. In re Shearer, 158 Fed. 839.

[b] **The widow of an honorably discharged soldier** who never declared his intention is not entitled to become naturalized without making any declaration of intention, as such a case does not fall within act (1906) § 4 subd 6. U. S. v. Meyer, 170 Fed. 983.

37. Act June 25, 1910 (36 U. S. St. at L. 831 c 401 § 3).

38. In re Urdang, 212 Fed. 557.

[a] **An alien who was not twenty-one years of age on May 1, 1905,** is not entitled to avail himself of the above act, as he was not entitled to naturalization for five years prior to May 1, 1910. In re Peters, 213 Fed. 541; In re Urdang, 212 Fed. 557.

39. In re Poirot, 168 Fed. 456.

[a] **Substantial compliance.**—"The making of a preliminary declaratory statement of an intention to become a citizen of the United States has never been considered, by Congress at least, of prime importance, and wherever a substantial compliance with law has existed in that regard, and only technical failures or omissions occur, and complete qualification of the applicant was shown on his final admission by a competent court, Congress has corrected in every instance, by special act, all previous informalities." In re Bonnet, 2 Porto Rico Fed. 70, 77.

40. In re Symanowsski, 168 Fed. 978.

[a] **The declaration need not contain an actual renunciation of allegiance** to foreign sovereign; only intention to renounce need be expressed. In re Symanowsski, 168 Fed. 978.

[b] **Time of forming intention.**—The intention must be declared in such form as to show the time it was actually formed. In re Randall, 14 Phila. (Pa.) 224, 9 WklyNC 159.

41. In re Fronascone, 99 Fed. 48; U. S. v. Walsh, 22 Fed. 644.

42. State v. Barrett, 40 Minn. 65, 41 NW 459; Matter of Christern, 43 N. Y. Super. 523, 56 HowPr 5.

43. Act June 29, 1906 (34 U. S. St. at L. 596 c 3592).

[a] **Presumptions.**—The declaration by an alien of his intention to become a citizen, made before a person not authorized to receive the same, constitutes no ground for presuming that a subsequent valid declaration has been made before an officer who was authorized. State v. Olin, 23 Wis. 309.

[b] **Place of making declaration.**—(1) It has been generally held that a declaration of intention to become a citizen must be made at the regular office of the clerk, or in open court. In re Langtry, 31 Fed. 879, 12 Sawy. 467 (where Mr. Justice Field expressed great doubt as to the legality of a declaration of intention to become a citizen of the United States, taken, not at the clerk's office, but at the residence of the applicant, to which the records of the court in which such declarations were entered had been carried for that purpose by the deputy clerk. The learned judge declared that he did not think that the statutes furnished any authority for the clerk of the court to take a declaration of one to become a citizen out of the clerk's office, except in open court, and for that purpose to carry the records of the court to the private residence of the party); Butterworth's Case, 4 F. Cas. No. 2,251, 1 Woodb. & M. 323; Peo. v. Sweetman, 3 Park. Cr. (N. Y.) 358; Santo Scola's Case, 8 Pa. Co. 344. (2) But in Andres v. Ottawa Cir. Judge, 77 Mich. 85, 91, 43 NW 857, 6 LRA 238, the court, Morse, J., dissenting, held that a declaration of intention to become a citizen need not be made before the clerk in his office, or in open court. It was declared that the validity and effect of such a declaration depended not upon the place where it was made but upon the person before whom it was made, namely, the clerk, and that there was no reason why the declaration might not be taken before him at any place where he happened to be. See also In re Boso, 6 Kulp (Pa.) 83, and Pawling v. Rykert, HodgEl (U. C.) 500, the latter being a similar holding as to administering the oaths required by the Alien Act, 34 Vict. c 22 § 2.

[c] **The municipal courts of Porto Rico** during the time of the military government of Porto Rico were courts of record within the provisions of U. S. Rev. St. § 2165, and as such had jurisdiction to accept the affidavit and oath of the intention of an alien to become a citizen of the United States. In re Bonnet, 2 Porto Rico Fed. 70.

44. U. S. v. Lehman, 39 Fed. 768; U. S. v. Lehman, 39 Fed. 49; Andres v. Ottawa Cir. Judge, 77 Mich. 85, 43 NW 857, 6 LRA 238; State v. Hœflinger, 35 Wis. 393.

[a] **Before justices of the peace.**—Authority cannot be conferred by the clerk of a court upon a justice of the peace to receive such declarations. State v. Stumpf, 23 Wis. 630.

45. In re Stack, 200 Fed. 330.

[a] **Error in name of country.**—A declaration cannot be amended nunc pro tunc so as to correct an alleged error with respect to the name of the country, allegiance to which it is desired to renounce. In re Friedl, 202 Fed. 300; In re Lewkowicz, 169 Fed. 927.

[b] **Where an alien has declared under a fictitious or assumed** name he will not, in order to obtain judgment on a subsequent petition for naturalization, be allowed to amend the declaration but must file a new declaration. In re Boorvis, 205 Fed. 401.

46. Ex p. Lange, 197 Fed. 769.

47. Ex p. Lange, 197 Fed. 769.

48. Ex p. Lange, 197 Fed. 769.

49. In re Hollo, 206 Fed. 852; Ex p. Lange, 197 Fed. 769; In re Liberman, 193 Fed. 301; State v. King County Super. Ct., 75 Wash. 239, 134 P 916.

50. U. S.—Spratt v. Spratt, 4 Pet. 393, 7 L. ed. 171; In re Symanowsski, 168 Fed. 978; Dolan v. U. S., 133 Fed. 440, 69 CCA 274; Pintsch Compressing Co. v. Bergin, 84 Fed. 140; In re Bodek, 63 Fed. 813; Green v. Salas, 31 Fed. 106; The Acorn, 1 F. Cas. No. 29, 2 Abb. 434; In re Coleman, 6 F. Cas. No. 2,980, 15 Blatchf. 406; U. S. v. Makins, 26 F. Cas. No. 15,710.

Ala.—Scott v. Strobach, 49 Ala. 477.

Cal.—Prentice v. Miller, 82 Cal. 570, 23 P 189; Bode v. Trimmer, 82 Cal. 513, 23 P 187; Ex p. Knowles, 5 Cal. 300.

Ky.—Morgan v. Dudley, 18 B. Mon. 693, 68 AmD 735.

Nebr.—State v. Boyd, 31 Nebr. 682, 48 NW 739, 51 NW 602.

N. Y.—McCarthy v. Marsh, 5 N. Y. 263; In re Clark, 18 Barb. 444, 1 AbbPr 90, 10 HowPr 246; Matter of Christern, 43 N. Y. Super. 523, 56 HowPr 5; In re ——, 7 Hill 137.

Pa.—In re Macoluso, 237 Pa. 132, 85 A 149; Rump v. Com., 30 Pa. 475.

51. Matter of Clark, 18 Barb. (N. Y.) 444. See also Behrensmeyer v.

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the petition. This must be made and filed not less than two nor more than seven years after the declaration of intent to become a citizen.[52] This time limit has been held to be inapplicable to cases where the preliminary declaration had been made in accordance with the existing law at the time the act of 1906 took effect, and the petition in such cases may be filed at any time.[53] But the view has been taken that the effect of the act of 1906 was to give aliens who had made their declarations of intention under prior laws seven years from that date in which to file their petitions.[54] The petition must allege the existence of all facts and the fulfillment of all conditions upon the existence and fulfillment of which the statutes have made the right dependent;[55] its contents are specifically prescribed by the statute;[56] it must be filed in duplicate;[57] and there must be filed with it the applicant's preliminary declaration of intention;[58] and if his immigration into the United States shall have been subsequent to June 29, 1906, there must also be filed the certificate from the department of commerce and labor stating the date, place, and manner of the applicant's arrival.[59] Such certificate and declaration must be filed at the time of filing the petition, and both must be attached to and made part of the petition.[60] The petition must be signed by the applicant in his own handwriting,[61] and must be verified by the affidavits of at least two credible witnesses who are citizens of the United States,[62] disclosing that he has resided continuously within the United States for at least five years immediately preceding the time of the filing of the petition, and that he has also resided for at least one year within the state in which the application is made.[63] Where an applicant has not resided within the state for five years, he may, under the Naturalization Act of June 29,

Kreitz, 135 Ill. 591, 26 NE 704 (where it was held that naturalization papers issued to an alien by the clerk of a court, without any order of court, are void).

52. Naturalization Act June 29, 1906 (34 U. S. St. at L. 596 c 3592 § 4 cl 2).

[a] **This provision is mandatory** (1) and the right of an applicant must be complete when his petition is filed. U. S. v. Van der Molen, 163 Fed. 650. (2) A petition filed within less than two years after the declaration of intention gives the court no jurisdiction, although the hearing thereon is not until after the two years have expired. U. S. v. Van der Molen, supra.

53. In re Anderson, 214 Fed. 662; Eichhorst v. Lindsey, 209 Fed. 708.

54. In re Goldstein, 211 Fed. 163; In re Yunghauss, 210 Fed. 545; In re Wehrli, 157 Fed. 938.

55. In re Liberman, 193 Fed. 301; In re Bodek, 63 Fed. 813; Green v. Salas, 31 Fed. 106; Cummings' Pet., 41 N. H. 270; Matter of Christern, 43 N. Y. Super. 528, 56 HowPr 5; In re ——, 7 Hill (N. Y.) 137; Lab's Pet., 3 Pa. Dist. 728. In In re Bodek, 63 Fed. 813, 814, 3 Pa. Dist. 725, Dallas, J., said: "An applicant for naturalization, then, is a suitor, who, by his petition, institutes a proceeding in a court of justice for the judicial determination of an asserted right. Every such petition must, of course, allege the existence of all facts, and the fulfillment of all conditions, upon the existence and fulfillment of which the statutes which confer the right asserted have made it dependent, and I believe that the petitions usually presented conform to this rule." See Re Cabulak, 19 WestLR 171, as to requirements under Canadian law.

56. Act June 29, 1906 (34 U. S. St. at L. 597 c 3592).

[a] **Statutory requisites.**—Subd. 2 of § 4 of the Naturalization Act of June 29, 1906 (34 U. S. St at L. 597 c 3592), defining what a petition for naturalization shall contain, provides that not less than two nor more than seven years afer an alien has made his declaration of intent to become a citizen he shall make and file in duplicate a petition in writing duly verified, in which he shall state his full name, his place of residence, his occupation, and if possible the date and place of his birth; the place from which he emigrated, the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place of the court where he declared his intention to become a citizen; the name of his wife, if married, and if possible the country of her nativity and her place of residence at the time of filing his petition; the name, place of birth, and residence of each child, if he has any living at the time of filing his petition; that he is not a disbeliever in, or opposed to, organized government, or a member of, or affiliated with, any organization or body of persons teaching disbelief in, or opposition to, organized government; a polygamist, or a believer in the practice of polygamy; that it is his intention to become a citizen of the United States, and to renounce absolutely and forever all allegiance or fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he, at the time of filing his petition, may be a citizen or subject, and that it is his intention to reside permanently within the United States; whether or not he has been denied admission as a citizen, and, if denied, the ground or grounds of such denial; the court or courts in which such decision was rendered, and that the cause for such denial has been cured or removed, and "every fact material to his naturalization, and required to be proved upon the final hearing of his application." See U. S. v. Dupont, 176 Fed. 823; In re Di Clerico, 158 Fed. 905.

[b] **Date of arrival in United States.**—The requirement of the Naturalization Act of June 29, 1906 (34 U. S. St. at L. 596 c 3592 § 4), that an applicant for naturalization shall state in his petition the date of his arrival in the United States and the name of the vessel on which he came, must be given practical effect, and, where such statement is disproved prima facie by proof that the applicant's name does not appear among the passengers on the vessel named, the burden of proof is shifted to him to explain such fact to the satisfaction of the court, and his testimony that he came under a fictitious name which he cannot remember will not be accepted as satisfactory. In re Kestelman, 165 Fed. 265.

[c] **Residents in state or territory where proceedings are had.**—The petition need not show that the applicant resided in the state or territory where the final proceedings are had for the year immediately preceding his application. It is sufficient for him to allege his residence therein for any one of the five years of his residence in the United States. In re Cummings, 41 N. H. 270; In re Randall, 9 WklyNC (Pa.) 159.

[d] **On a second application** prior grounds of denial must be shown to have "since been cured or removed." In re Guliano, 156 Fed. 420.

57. Act June 29, 1906 (34 U. S. St. at L. 596 c 3592 § 4).

[a] **Requirement directory only.**—The provisions of the Naturalization Act of June 29, 1906, (34 U. S. St. at L. 596 c 3592 § 4 subd 2), requiring a naturalization petition to be filed in duplicate, are directory only, so that a failure to comply therewith will not render the proceedings void. U. S. v. Stoller, 180 Fed. 910.

58. In re Liberman, 193 Fed. 301.

59. In re Schmidt, 207 Fed. 678; In re Page, 206 Fed. 1004; In re Hollo, 206 Fed. 852; In re Liberman, 193 Fed. 301; In re Kolbel, 84 Misc. 475, 146 NYS 885.

[a] **Nature of certificate required.**—The certificate from the department of commerce and labor, which an applicant for naturalization is required to file with his petition showing the date, place, and manner of his arrival, is not necessarily the same certificate which it is provided shall be issued to an immigrant on his registry by the commissioner of immigration, nor need it be made up from the record of his registry, since he may be admitted to citizenship on proof of the requisite facts, although he did not come into the United States through a regular port of entry. In re McPhee, 209 Fed. 143; In re Schmidt, 207 Fed. 678; In re Page, 206 Fed. 1004. Contra In re Hollo, 206 Fed. 852.

[b] **Lost certificate; substitution of copy.**—(1) Where it appeared that the required certificate had been issued but had been mislaid, the applicant was entitled to substitute a copy and have the copy added to the record in lieu of the original. In re Pick, 209 Fed. 999. (2) And, where such copy was a sufficient compliance with the Naturalization Law, it was not material that it was not in the particular form required by rule 5 of the regulations of the department of naturalization. In re Pick, supra.

60. In re Liberman, 193 Fed. 301.

61. Act June 29, 1906 (34 U. S. St. at L. 596 c 3592 § 4).

[a] **An alien who declared his intention to become a citizen on Sept. 8, 1906,** was required to sign his petition in his own handwriting. In re Martinovsky, 171 Fed. 601.

62. Act June 29, 1906 (34 U. S. St. at L. 596 c 3592 § 4); In re Liberman, 193 Fed. 301; In re Aprea, 158 Fed. 702; U. S. v. Breen, 135 App. Div. 824, 120 NYS 304.

[a] **If not so verified** (1) the petition is void and cannot be amended (U. S. v. Martorana, 171 Fed. 397, 96 CCA 353 [rev 159 Fed. 1010]), and (2) will be dismissed with costs, but without prejudice to the right of the petitioner to file a new application (In re Wolf, 188 Fed. 519).

63. U. S. v. Janke, 183 Fed. 277; In re Godlover, 181 Fed. 731; In re Welsh, 159 Fed. 1014 (holding that a voucher was disqualified who had not known the petitioner continuously for five years immediately preceding the filing of the petition, although he had known the petitioner for such

1906,[64] establish by two witnesses the time of his residence within the state, and the remaining portion of his residence within the United States by deposition, but the affidavit of the witnesses in his petition must cover the full period of his residence within the state, it is not sufficient to show merely that such residence was for more than a year.[65] Such showing need not, however, be made by the same witnesses as to the entire period;[66] nor is it necessary that all the witnesses should verify on the same day.[67] The petition and affidavits must also show that the party is such a person as is entitled to citizenship.[68] The petition must be filed with the clerk of the court,[69, 70] who is bound to receive and docket it,[71] and to give notice thereof by posting it in a prescribed place ninety days prior to the hearing.[72] Such petitions may be filed either in term time or during vacation.[73] A copy of the petition and of the affidavits supporting it must also be filed in the department at Washington.[74] As a further precaution it is required that the names of the witnesses whom the applicant expects to summon in his behalf at the final hearing of his petition together with other information shall be posted in a conspicuous place in the clerk's office.[75] Notice is then given, as in the case of a judicial proceeding, setting forth that the application has been made, and that the hearing will be had before a court of record at a specified time.[76]

New petition. One who has been improperly naturalized may surrender his certificate and present a new petition.[77]

Motion for leave to file petition. Where the right of an alien to naturalization is doubtful he may properly have the matter determined by means of a motion for leave to file a petition setting out the facts.[78]

[§ 147] **(3) Oath of Allegiance.** A foreigner cannot become a citizen of the United States simply by taking the preliminary oath that it is his bona fide intention to become a citizen and to renounce forever all allegiance and fidelity to any foreign state, sovereignty, etc., and receiving a certificate of the taking of such oath; it is essential that, at the time of his application to be admitted, he also take an oath that he will support the constitution of the United States, and that he absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign state, sovereignty, etc.[79]

[§ 148] **(4) Evidence of Qualifications.** The hearing of a naturalization petition must be in open court and the applicant and his witnesses must be examined on oath before and in the presence of the court.[80] The application must be supported by legal proof of the facts on which it rests.[81] Two credible witnesses are required to testify as to the residence and good character of the

period at the time of the hearing); U. S. v. Daly, 32 App. (D. C.) 525.

[a] **Witnesses who have personally known the applicant for only two years** are incompetent to verify a petition, although they have acquired information, through correspondence with the applicant and others, as to his residence in the United States for five years. Information thus acquired does not meet the intent of the statute. In re Toomey, 111 NYS 600.

64. 34 U. S. St. at L. 599 c 3592 § 10.

65. In re Manning, 209 Fed. 499.

66. In re Godlover, 181 Fed. 731 (holding that as long as there are two credible witnesses for each fraction of such period so as to cover the whole, the requirement of the statute is satisfied).

67. In re Freeze, 189 Fed. 1022 (where the court said: "It is no doubt the better practice for both witnesses to sign and verify at the same time, and such should ordinarily be required; but circumstances may arise where it is impossible or impracticable to do so").

68. U. S. v. Janke, 183 Fed. 277.

69–70. In re Bodek, 63 Fed. 813; U. S. v. Breen, 135 App. Div. 824, 120 NYS 304.

71. In re Halladjian, 174 Fed. 834 (holding that clerks of the federal courts are not subject to instruction by federal district attorneys or by the United States itself as a party to a judicial proceeding, but they are required to file naturalization petitions which contain all proper allegations, although in their judgment the applicant, because of his color, race, or other disqualification, may not be entitled to citizenship); Marvin v. U. S., 45 Ct. Cl. 528; U. S. v. Breen, 135 App. Div. 824, 120 NYS 304.

[a] **The absence of a filing indorsement,** or of a calendar entry by a clerk concerning a naturalization petition actually filed, is immaterial if the fact of filing sufficiently appears. U. S. v. Erickson, 188 Fed. 747.

72. U. S. v. Peterson, 182 Fed. 289, 104 CCA 571 (holding that the provision of such act requiring notice of the petition to be posted for ninety days prior to the hearing was applicable to an alien applying for citizenship under the act of July 26, 1894 [28 U. S. St. at L. 124 c 165], providing that service in the navy or marine corps for a specified term, with honorable discharge, shall be counted as residence, and shall entitle an alien, having other necessary requisites, to citizenship).

[a] **Under the old law,** U. S. Rev. St. § 2165 et seq, an alien could present his petition for naturalization to the court and have it heard forthwith, without notice to the government, and ex parte. To correct these abuses the act of 1906 was enacted. This required great particularity in allegations of the petition disclosing the right to naturalization, publication of notice for ninety days of the filing of the petition and of the time when it would be heard in court, and a public trial with a representative of the government present and participating. U. S. v. Peterson, 182 Fed. 289, 104 CCA 571.

73. Jaynes v. U. S., 47 Ct. Cl. 523 (holding that petitions for naturalization may be filed during term time or vacation and may be docketed on the same day that they are filed, "but final action thereon shall be had only on stated days to be fixed by rule"). Act June 29, 1906 (34 U. S. St. at L. 596 c 3592 § 6).

74. U. S. v. Janke, 183 Fed. 277.

75. In re Martorana, 159 Fed. 1010 [rev on other grounds 171 Fed. 397, 96 CCA 353]; U. S. v. Daly, 32 App. (D. C.) 525.

[a] **This requirement applies only to the original witnesses,** and if, upon hearing, one or both of the original witnesses should fail to qualify, other witnesses may be substituted, without notice, to testify as to the applicant's qualifications for admission to citizenship. See infra § 148.

[b] **Presumption of posting.**—In the absence of a contrary showing, names of witnesses for an applicant for naturalization are presumed to have been posted for the required time. U. S. v. Erickson, 188 Fed. 747.

76. U. S. v. Janke, 183 Fed. 277.

77. Com. v. Paper, 1 Brewst. (Pa.) 263.

78. In re Guliano, 156 Fed. 420.

79. Act June 29, 1906 (34 U. S. St. at L. 596 c 3592); State v. Collister, 27 Oh. Cir. Ct. 529.

80. Act June 29, 1906 (34 U. S. St. at L. 599 c 3592 § 9).

[a] **Oath required.**—The only oath required to be taken by an alien on his becoming a citizen is that prescribed by the act of congress. An alien cannot be required to take an oath of allegiance to any particular state. Ex p. Granstein, 19 S. C. L. 141.

81. Spratt v. Spratt, 1 Pet. (U. S.) 343, 7 L. ed. 171; U. S. v. Nesbit, 168 Fed. 1005; In re Lipshitz, 97 Fed. 584; In re Bodek, 63 Fed. 813; U. S. v. Grottkau, 30 Fed. 672; Anonymous, 1 F. Cas. No. 468, Pet. C. C. 457; In re Coleman, 6 F. Cas. No. 2,980, 15 Blatch. 406; In re Tucker, 24 F. Cas. No. 14,214, 1 Cranch C. C. 89; U. S. v. Hrasky, 240 Ill. 560, 88 NE 1031, 130 AmSR 288, 16 AnnCas 279; Cummings' Pet., 41 N. H. 270; Matter of Clark, 18 Barb. (N. Y.) 444; In re ——, 7 Hill (N. Y.) 137.

[a] **The court must be "satisfied" that all conditions have been complied with;** that the residence of the applicant and his behavior have been such as the law requires; and that his attachment to our form of government is firm and sincere. These are imperative duties resting upon the court which cannot be evaded or overlooked. Judgment in these cases cannot pass by default, or as a matter of course. There is no one to be defaulted, and the judgment of the court should be the result of an honest conviction, wrought in the mind by the evidence given and by the declarations of the applicant. If the applicant thus establishes his case, he has proved a right to which he is entitled; but if he fails to establish the requisite facts, he has no honest claim to a judgment in his favor. In re ——, 7 Hill (N. Y.) 137.

[b] **Use of depositions.**—(1) Except as provided in § 10, of the act of June 29, 1906 (34 U. S. St. at L. 599 c 3592), permitting depositions only where the applicant's residence has been for a period less than five years, a court in hearing a naturalization petition has no authority to receive or consider evidence taken by depositions without its presence. U. S. v. Nisbet, 168 Fed. 1005. (2) Section

applicant,[82] except in the case of an honorably discharged soldier.[83] Such witnesses must be citizens,[84] and must have a personal knowledge as to the residence and character of the applicant.[85] The witnesses at the final hearing are not required to be the same as those who verified the petition;[86] nor is the applicant limited to those witnesses whose names are given in the posted notice, but in case they cannot be produced, he may summon others,[87] subject to the right of the court to make whatever orders may be deemed necessary to enable the government to investigate as to their qualifications, character, and credibility.[88] Substitutes can be called only when all the statutory provisions have been strictly observed as to the qualification of the vouchers and notice to be given.[89] The United States has the right to cross-examine the petitioner and his witnesses concerning any relevant matter, and may call witnesses, produce evidence, and be heard in opposition to the petition.[90]

[§ 149] **(5) Judgment and Record—(a) Nature and Form.** An order admitting an alien to citizenship is a judgment of the same dignity as any other judgment of a court having jurisdiction.[91] It is an adjudication on personal status, and is in the nature of a judgment in rem.[92]

Entry and record of judgment. Such a judgment, whether favorable or adverse to the petitioner, should be formally entered[93] and recorded.[94] This has not been strictly required, however, as essential to the validity of the naturalization. Where it can be gathered from the record that the applicant was in fact admitted, not only is the absence of the formal judgment immaterial, but it little matters what else the record shows or omits to show.[95]

Form of judgment. The form of the judgment

10 is sufficiently broad to permit depositions to be taken without the state whenever it is essential to prove residence beyond the state. Therefore on application by an honorably discharged soldier for naturalization, as authorized by U. S. Rev. St. § 2166, his proof of residence within the United States for one year prior to his application may be made by depositions. In re McNabb, 175 Fed. 511. (3) Where the applicant has not resided for the required five-year period within the federal judicial district where application is made depositions are not admissible to show that he has resided for the required time in the state in which the district is situated, the word "district" in § 10 of the Naturalization Act meaning District of Columbia and not "judicial district." U. S. v. Kolodner, 204 Fed. 240, 124 CCA 1.

[c] **Evidence of intention.**—Substantial evidence of the existence of an intention to become a citizen for the required time, in addition to the oath of the applicant, is necessary. In re Fronascone, 99 Fed. 48; Cummings' Pet., 41 N. H. 270.

82. Act June 29, 1906 (34 U. S. St. at L. 596 c 3592 § 4). See also In re ——, 7 Hill (N. Y.) 137.

[a] **Professional voucher.**—An applicant for naturalization should produce a voucher other than one who habitually, and for compensation, appears as such. In re Lipshitz, 97 Fed. 584.

[b] **Oath of applicant.**—(1) The oath of the applicant as to his residence is not receivable as cumulative testimony; the statute is a prohibition to the court to receive the applicant's oath on this point. U. S. v. Grottkau, 30 Fed. 672. (2) His oath is, however, admissible to prove his good moral character and attachment to the principles of the constitution, but it should be corroborated by other evidence. Affidavits are not admissible upon these points. In re ——, 7 Hill (N. Y.) 137.

[c] **Under the British Columbia Naturalization Act** the same is true. In re Fukuichi Aho, 9 WestLR 652.

83. In re McNabb, 175 Fed. 511; In re Loftus, 165 Fed. 1002.

84. Com. v. Paper, 1 Brewst. (Pa.) 263.

[a] **An American woman becomes an alien by marrying an alien,** although she continues to reside in the United States, and hence is incompetent to act as a witness in support of the petition of her alien husband for naturalization, since the act of June 29, 1906 (34 U. S. St. at L. c 3592 § 4) relating to naturalization, expressly requires such vouchers to be citizens. In re Martorana, 159 Fed. 1010 [rev on other grounds 171 Fed. 397, 96 CCA 353].

85. In re Schneider, 164 Fed. 335 (holding, however, that the knowledge of witnesses need be only such as is compatible with the applicant's employment).

[a] **In case of a person who has been in the navy for a portion of the time,** the testimony of witnesses that he resided in a certain place before his enlistment, and returned there from time to time at the termination of his voyages and after his discharge, is sufficient. In re Schneider, 164 Fed. 335.

86. U. S. v. Doyle, 179 Fed. 687, 103 CCA 233; In re Schatz, 161 Fed. 237.

87. U. S. v. Ojala, 182 Fed. 51, 53, 104 CCA 491 (where the court said: "We thus find, not only no express requirement that witnesses whose names had not been posted by the clerk should not be summoned for the final hearing, but, on the contrary, the intendment of the statute appears to us to be clearly otherwise"). U. S. v. Doyle, 179 Fed. 687, 103 CCA 233; In re Neugebauer, 172 Fed. 943; In re Schatz, 161 Fed. 237. Contra In re O'Dea, 158 Fed. 703, 704 (where it was said: "The very object of posting the names of the witnesses is to give the government opportunity for a full investigation conducted by its own officers, without having to depend solely on the cross-examination of persons of whom it never heard until the cause comes up for final disposition"); U. S. v. Daly, 32 App. (D. C.) 525.

[a] **If the applicant is able to produce the witnesses** for the final hearing whose names he gave ninety days before to the clerk, it is his duty to do so. A reasonable and conscientious effort to do this must be made. It is only when the witnesses whose names are posted "cannot be produced" that other witnesses may be summoned. U. S. v. Ojala, 182 Fed. 51, 104 CCA 491.

88. U. S. v. Doyle, 179 Fed. 687, 103 CCA 233.

89. In re Martorana, 159 Fed. 1010 [rev on other grounds 171 Fed. 397, 96 CCA 353].

90. Act June 29, 1906 (34 U. S. St. at L. 599 c 3592 § 11); In re Mudarri, 176 Fed. 465 (holding that it is the duty of the United States attorney to specify his objections and support the same by argument).

91. U. S.—Spratt v. Spratt, 4 Pet. 393, 7 L. ed. 897; Stark v. Chesapeake Ins. Co., 7 Cranch 420, 3 L. ed. 391; U. S. v. Aakervik, 180 Fed. 137; U. S. v. Norsch, 42 Fed. 417; In re McCoppin, 15 F. Cas. No. 8,713, 5 Sawy. 630.

Cal.—Tinn v. U. S. District Atty., 148 Cal. 773, 84 P 152, 113 AmSR 354.

Ill.—Peo. v. McGowan, 77 Ill. 644, 20 AmR 254.

Mo.—In re O'Sullivan, 137 Mo. A. 214, 117 SW 651.

Pa.—Com. v. Paper, 1 Brewst. 263.

92. U. S. v. Gleason, 78 Fed. 396 [aff 90 Fed. 778, 33 CCA 272]; In re O'Sullivan, 137 Mo. A. 214, 117 SW 651; Esker v. McCoy, 5 Oh. Dec. (Reprint) 573, 6 AmLRec 694. In Scott v. Strobach, 49 Ala. 477, 490, the court said: "A judgment admitting an alien to citizenship, has none of the properties or qualities of a judicial proceeding in personam. It is rather in rem. It simply ascertains and defines the status of the individual, and of itself and in itself works no public or private injury. It is designed to be the indisputable muniment of the title to citizenship. The alien must, and it is intended he should, confidently rely on its inviolability. If, whenever his right or duty as a citizen is involved in any of the courts of the United States, or of the several states, the judgment of naturalization can be assailed, and he be put on proof of all the facts proved, or which were involved when the judgment was rendered, its value and dignity is [are] lessened; and that which our constitutions and laws teach him to regard as inestimable, would degenerate into a fruitful source of vexation and litigation."

93. In re Bodek, 63 Fed. 813; Green v. Salas, 31 Fed. 106; Prentice v. Miller, 82 Cal. 570, 23 P 189; Bode v. Trimmer, 82 Cal. 513, 23 P 187. See also In re Coleman, 6 F. Cas. No. 2,980, 15 Blatchf. 406.

94. State v. Boyd, 143 U. S. 135, 12 SCt 375, 36 L. ed. 103 [rev 31 Nebr. 682, 48 NW 739, 51 NW 602]; Green v. Salas, 31 Fed. 106; Bode v. Trimmer, 82 Cal. 513, 23 P 187; Miller v. Reinhart, 18 Ga. 239; Rockland v. Hurricane Isle, 106 Me. 169, 76 A 286.

95. U. S.—Spratt v. Spratt, 4 Pet. 393, 7 L. ed. 897; Stark v. Chesapeake Ins. Co., 7 Cranch 420, 3 L. ed. 391; Campbell v. Gordon, 6 Cranch 176, 3 L. ed. 190; Raymond v. Raymond, 83 Fed. 721, 28 CCA 38 [rev 1 Ind. T. 334, 37 SW 202]; U. S. v. Gleason, 78 Fed. 396 [aff 90 Fed. 778, 33 CCA 272]; Green v. Salas, 31 Fed. 106; U. S. v. Walsh, 22 Fed. 644; The Acorn, 1 F. Cas. No. 29, 2 Abb. 434; In re Coleman, 6 F. Cas. No. 2,980, 15 Blatchf. 406; Ex p. Cregg, 6 F. Cas. No. 3,380, 2 Curt. 98; In re McCoppin, 15 F. Cas. No. 8,713, 5 Sawy. 630.

Ala.—Scott v. Strobach, 49 Ala. 477; Harley v. State, 40 Ala. 689.

Ark.—State v. Penney, 10 Ark. 621.

Cal.—Bode v. Trimmer, 82 Cal. 513, 23 P 187.

Ill.—Peo. v. McGowan, 77 Ill. 644, 20 AmR 254.

Ky.—Morgan v. Dudley, 18 B. Mon. 693, 68 AmD 735.

Minn.—State v. Barrett, 40 Minn. 65, 41 NW 459; State v. Macdonald, 24 Minn. 48.

N. Y.—McCarthy v. Marsh, 5 N. Y. 263; Peo. v. Pease, 30 Barb. 588 [aff 27 N. Y. 45, 84 AmD 242]; Matter of Christern, 43 N. Y. Super. 523, 56 HowPr 5; Matter of Ramsden, 13

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record showing the admission of an alien to citizenship, so far as no express provision for it is made by act of congress, is utterly immaterial. As long as it constitutes a memorial or remembrance of the adjudication made it is sufficient.[96]

Construction. A record of naturalization must be given the same reasonable intendment of construction that is given records in ordinary cases.[97] Consequently a naturalization record need not show jurisdiction, or that all the legal requisites have been complied with,[98] nor need it contain the requisite previous declaration of intention to become a citizen,[99] in order to import validity.

[§ 150] **(b) Conclusiveness.** An order admitting to citizenship, having the force and effect of a judgment, is conclusive as to all matters necessarily before the court and involved in the issue.[1] It is not open to collateral attack even upon allegations charging fraud in its procurement,[2] unless the judgment is void,[3] as for want of jurisdiction;[4] and it can be annulled or set aside only in some recognized lawful mode.[5]

[§ 151] **(c) Amendment and Correction.** The record of naturalization proceedings may be amended as in other cases, nunc pro tunc, to make the record conform to the truth.[6]

Where there is no record of the admission one cannot be supplied in this way, based on parol evidence that the applicant was in fact naturalized.[7]

Direct proceeding necessary. An erroneous or defective record of naturalization can be corrected only in a proceeding brought for that purpose.[8]

[§ 152] **(d) Vacation.** Courts generally have jurisdiction to reverse or vacate their own judgments and decrees during the term at which they are rendered.[9] In pursuance of such authority the court before whom proceedings to naturalize an alien take place may, on the ground of fraud or mistake,[10] or any irregularity that may seem to

HowPr 429; Priest v. Cummings, 16 Wend. 617 [rev on other grounds 20 Wend. 338]; Ritchie v. Putnam, 13 Wend. 524; Lynch v. Clarke, 1 Sandf. Ch. 583.

Pa.—Com. v. Paper, 1 Brewst. 263.

S. C.—Richards v. McDaniel, 12 S. C. L. 187 [aff 11 S. C. L. 351]; McCall v. Oliver, 6 S. C. Eq. 371 note a.

Va.—Com v. Towles, 5 Leigh (32 Va.) 743.

Wis.—State v. Hœflinger, 35 Wis. 393.

[a] **In several of the early cases,** however, it was held that the judgment and record should show compliance with the conditions of the Naturalization Act in all particulars, otherwise they were merely prima facie evidence of a valid admission to citizenship. McCarty v. Hodges, 2 Edm. Sel. Cas. (N. Y.) 433; Banks v. Walker, 3 Barb. Ch. (N. Y.) 438; Com. v. Leary, 1 Brewst. (Pa.) 270; Vaux v. Nesbitt, 6 S. C. Eq. 352.

[b] **Minutes.**—The minutes of naturalization proceedings need not be entered upon the general minute docket, but may be kept in a separate book. Matter of Christern, 43 N. Y. Super. 523, 56 HowPr 5.

96. State v. Webber, 96 Minn. 422, 105 NW 490, 113 AmSR 630; In re O'Sullivan, 137 Mo. A. 214, 117 SW 651; Matter of Christern, 43 N. Y. Super. 523, 56 HowPr 5. To same effect In re Coleman, 6 F. Cas. No. 2,980, 15 Blatchf. 406.

[a] **For approved form of judgment** see Pintsch Compressing Co. v. Bergin, 84 Fed. 140.

[b] **If the oath is administered** and nothing appears to the contrary, it must be presumed that the court before whom the oath was taken was satisfied as to the character of the applicant. The oath when taken confers upon him the rights of a citizen, and amounts to a judgment of the court for his admission to those rights. Campbell v. Gordon, 6 Cranch (U. S.) 176, 3 L. ed. 190. See also Com. v. Towles, 5 Leigh (32 Va.) 743.

97. In re Symanowsski, 168 Fed. 978; Rockland v. Hurricane Isle, 106 Me. 169, 76 A 286.

98. In re Symanowsski, 168 Fed. 978; U. S. v. Walsh, 22 Fed. 644; In re Coleman, 6 F. Cas. No. 2,980, 15 Blatchf. 406; In re McCoppin, 15 F. Cas. No. 8,713, 5 Sawy. 630; Harley v. State, 40 Ala. 689; Rockland v. Hurricane Isle, 106 Me. 169, 76 A 286; Richards v. McDaniels, 12 S. C. L. 187. See also Com. v. Towles, 5 Leigh (32 Va.) 743. Contra Ex p. Lange, 197 Fed. 769.

[a] **Residence of applicants.**—The particular residence of the applicant need not be made a matter of record. But the record should show a residence in the United States, and in the state or territory where the proceedings are had, for the length of time required by the law. Priest v. Cummings, 16 Wend. (N. Y.) 617 [rev on other grounds 20 Wend. 338]; Com. v. Paper, 1 Brewst. (Pa.) 263.

99. In re Symanowsski, 168 Fed. 978.

1. Spratt v. Spratt, 4 Pet. (U. S.) 393, 7 L. ed. 897; Stark v. Chesapeake Ins. Co., 7 Cranch (U. S.) 420, 3 L. ed. 391; U. S. v. Nechman, 183 Fed. 788; U. S. v. Aakervik, 180 Fed. 137; In re Symanowsski, 168 Fed. 978; Pintsch Compressing Co. v. Bergin, 84 Fed. 140; U. S. v. Gleason, 78 Fed. 396 [aff 90 Fed. 778, 33 CCA 272]; The Acorn, 1 F. Cas. No. 29, 2 Abb. 434; Tinn v. U. S. District Atty., 148 Cal. 773, 84 P 152, 113 AmSR 354; State v. Weber, 96 Minn. 422, 105 NW 490, 113 AmSR 630; In re O'Sullivan, 137 Mo. A. 214, 117 SW 651.

2. U. S.—Spratt v. Spratt, 1 Pet. 343, 7 L. ed. 171; Stark v. Chesapeake Ins. Co., 7 Cranch 420, 3 L. ed. 391; Campbell v. Gordon, 6 Cranch 176, 3 L. ed. 190; U. S. v. Stoller, 180 Fed. 910; U. S. v. Aakervik, 180 Fed. 137; U. S. v. Hamilton, 157 Fed. 569; Pintsch Compressing Co. v. Bergin, 84 Fed. 140; U. S. v. Gleason, 78 Fed. 396 [aff 90 Fed. 778, 33 CCA 272]; U. S. v. Ragazzini, 50 Fed. 923; U. S. v. Walsh, 22 Fed. 644; The Acorn, 1 F. Cas. No. 29, 2 Abb. 434.

Ala.—Scott v. Strobach, 49 Ala. 477. See also Harley v. State, 40 Ala. 689.

Ark.—State v. Penney, 10 Ark. 621.

Ill.—Ackerman v. Haenck, 147 Ill. 514, 35 NE 381; Behrensmeyer v. Kreitz, 135 Ill. 591, 26 NE 704; Peo. v. McGowan, 77 Ill. 644, 20 AmR 254.

Ind. T.—Raymond v. Raymond, 1 Ind. T. 334, 37 SW 202.

Me.—Rockland v. Hurricane Isle, 106 Me. 169, 76 A 286.

Mich.—Andres v. Ottawa County Cir. Judge, 77 Mich. 85, 43 NW 857, 6 LRA 238.

Minn.—State v. Weber, 96 Minn. 422, 105 NW 490, 113 AmSR 630; State v. Macdonald, 24 Minn. 48. See also State v. Barrett, 40 Minn. 65, 41 NW 459.

Mo.—State v. Brandhorst, 156 Mo. 457, 56 SW 1094, 79 AmSR 538.

N. Y.—McCarthy v. Marsh, 5 N. Y. 263 [rev 2 Edm. Sel. Cas. 433]; Peo. v. Pease, 30 Barb. 588 [aff 27 N. Y. 45, 84 AmD 242]; Matter of Wagner, 75 Misc. 419, 135 NYS 678; Matter of McCarran, 8 Misc. 482, 29 NYS 582, 31 AbbNCas 416, 23 LRA 835; Ritchie v. Putnam, 13 Wend. 524; Banks v. Walker, 3 Barb. Ch. 438.

Pa.—In re Contested Elections, 2 Brewst. 1; Com. v. Leary, 1 Brewst. 270; Com. v. Sheriff, 1 Brewst. 183; In re Contested Election, 10 Kulp 367; Anonymous, 1 LackLegRec 481; In re Conroy, 1 LegRec 57.

Wis.—State v. Hœflinger, 35 Wis. 393.

See McDaniel v. Richards, 12 S. C. L. 187; Com. v. Towles, 5 Leigh (32 Va.) 743.

And see generally Judgments [23 Cyc 1055].

Compare Vaux v. Nesbit, 6 S. C. Eq. 352.

3. Banks v. Walker, 3 Barb. Ch. (N. Y.) 438.

[a] **Certificate void on its face.**—A certificate of naturalization void on its face—for example, a certificate of the naturalization of a Chinaman—is subject to collateral attack. In re Gee Hop, 71 Fed. 274; In re Takuji Yamashita, 30 Wash. 234, 70 P 482, 94 AmSR 860, 59 LRA 671.

[b] **Inaccurate recital immaterial.**—The validity and efficacy of a judgment of naturalization are not impaired by an inaccurate statement in the recitals therein. Such recitals constitute no part of the judgment, and whether they are correct or otherwise is immaterial. In re McCoppin, 15 F. Cas. No. 8,713, 5 Sawy. 630.

4. Mills v. McCabe, 44 Ill. 194. But see Com. v. Sheriff, 1 Brewst. (Pa.) 183.

5. Tinn v. U. S. Dist. Atty., 148 Cal. 773, 84 P 152, 113 AmSR 354; State v. Brandhorst, 156 Mo. 457, 56 SW 1094, 79 AmSR 538; In re O'Sullivan, 137 Mo. A. 214, 117 SW 651.

6. U. S. v. Stoller, 180 Fed. 910; State v. Macdonald, 24 Minn. 48; Matter of Christern, 43 N. Y. Super. 523, 56 HowPr 5. See generally Judgments [23 Cyc 859 et seq].

[a] **A clerical error** in a record admitting an alien to citizenship may be corrected. State v. Macdonald, 24 Minn. 48; Priest v. Cummings, 16 Wend. (N. Y.) 617 [rev on other grounds 20 Wend. 338].

7. Gagnon v. U. S., 193 U. S. 451, 24 SCt 510, 48 L. ed. 745 [aff 38 Ct Cl. 10]; Matter of Desty, 8 AbbNCas (N. Y.) 250; Dryden v. Swinburne, 20 W. Va. 89.

[a] **In the absence of any entry or memorandum among the files of the court** or in the office of the clerk establishing the alleged record, a naturalization record is not subject to correction as to the alien's name claimed to be erroneous. In re O'Sullivan, 137 Mo. A. 214, 117 SW 651.

[b] **Subsequent change of name.**—A naturalized alien who subsequently obtains an order of court changing his name is not entitled to have his naturalization certificate amended to conform to the change. In re Perkins, 204 Fed. 350; Matter of Nigri, 32 Misc. 392, 66 NYS 182.

8. Green v. Salas, 31 Fed. 106; U. S. v. Walsh, 22 Fed. 644; Matter of Christern, 43 N. Y. Super. 523, 56 HowPr 5.

9. See Judgments [23 Cyc 889 et seq].

10. U. S. v. Kornmehl, 89 Fed. 10 (where certificates of naturalization

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have affected either of the parties to the controversy injuriously,[11] vacate its order or decree made in that behalf, provided such court is one having an inherent power to correct or annul its judgments or decrees.[12] After the term has ended, however, the authority of the courts as to this purpose ceases, unless extended by statute, or by motion, or by some appropriate procedure taken within the time.[13]

[§ 153] **(c) Direct Action to Impeach—aa. In General—(aa) Right and Grounds.** There are many causes for which a new and independent suit will lie to set aside or annul a judgment or decree.[14] This doctrine has been applied in cases to annul citizenship papers.[15] The grounds upon which such a judgment may be set aside must, however, be extrinsic or collateral to the matter tried by the first court.[16]

[§ 154] **(bb) Who May Sue.** The cases all agree that a private person cannot sue to set aside an order admitting an alien to citizenship.[17] It seems, according to some of the authorities, that such a suit should be brought by the civil authorities, either state or federal.[18] On the other hand it has been held that no one but the United States, or some person proceeding by its authority, can institute suit to annul a judgment of naturalization,[19] and that the state has no standing to procure the vacation of such a judgment.[20]

[§ 155] **bb. Under Act of 1906—(aa) In General.** Whatever may be the rule under the general equity procedure and practice, the present statute has enlarged the remedy as it pertains to the granting of naturalization papers,[21] and the proper court is empowered to cancel a certificate of citizenship on the ground of fraud or illegality in its procurement,[22] whether the same was issued prior or subsequent to the enactment of the statute.[23] This act has been held constitutional,[24] notwithstanding it authorizes a court to cancel a certificate issued by another court.[25] It does not prevent a state court from controlling its own records

were revoked for fraud in their procurement); U. S. v. Norsch, 42 Fed. 417 (holding, however, that a state of facts must be disclosed from which the court can see that the judgment was fraudulently procured); In re Macoluso, 237 Pa. 132, 136, 85 A 149, AnnCas1914B 226 and note [cit Cyc]; Com. v. McHale, 11 Pa. Dist. 607; Vaux v. Nesbit, 6 S. C. Eq. 352.

11. U. S. v. Aakervik, 180 Fed. 137; Matter of Christern, 43 N. Y. Super. 523, 56 HowPr 5; Richards v. McDaniel, 11 S. C. L. 351.

12. U. S. v. Norsch, 42 Fed. 417.

13. U. S. v. Aakervik, 180 Fed. 137; In re O'Sullivan, 137 Mo. A. 214, 117 SW 651. See generally Judgments [23 Cyc 902].

[a] **Laches.**—Neglect for more than twenty-five years to make an application for the setting aside of an order of naturalization is fatal to the application. Matter of McCarran, 8 Misc. 482, 29 NYS 582, 31 AbbNCas 416, 23 LRA 835.

14. See Judgments [23 Cyc 991 et seq].

15. U. S. v. Norsch, 42 Fed. 417 (holding that a bill in equity would be entertained in the federal courts for relief against the judgment of a state court admitting an alien to citizenship. The bill, however, was dismissed because it alleged only errors and irregularities, and set up no ground for equitable relief. The court, per Thayer, J., said: "The right of the United States to sue for the cancellation of a certificate of decree of naturalization that has been obtained by fraud is probably co-extensive with the right now accorded the United States to sue for the cancellation of patents that have been fraudulently procured"). See also the following cases for dicta to the effect that judgments in naturalization proceedings may be thus impeached: U. S. v. Ragazzini, 50 Fed. 923; In re McCoppin, 15 F. Cas. No. 8,713, 5 Sawy. 630; McCarran v. Cooper, 16 App. Div. 311, 44 NYS 695 [aff 162 N. Y. 654 mem, 57 NE 1116 mem, and app dism 156 N. Y. 679 mem, 50 NE 1119 mem]; Matter of McCarran, 8 Misc. 482, 29 NYS 582, 31 AbbNCas 416, 23 LRA 835; Com. v. Paper, 1 Brewst. (Pa.) 263.

16. U. S. v. Gleeson, 90 Fed. 778, 33 CCA 272 [aff 78 Fed. 396] (holding that a certificate of naturalization cannot be set aside solely on the ground that it was obtained by the perjured testimony of the applicant). See generally Judgments [23 Cyc 1017, 1027, 1028].

17. Pintsch Compressing Co. v. Bergin, 84 Fed. 140; Raymond v. Raymond, 1 Ind. T. 334, 37 SW 202; McCarran v. Cooper, 16 App. Div. 311, 44 NYS 695 [aff 162 N. Y. 654 mem, 57 NE 1116 mem]; In re Shaw, 2 Pa. Dist. 250; Com. v. Paper, 1 Brewst. (Pa.) 263.

18. McCarran v. Cooper, 16 App. Div. 311, 44 NYS 695 [aff 162 N. Y. 654 mem, 57 NE 1116 mem]; Matter of McCarran, 8 Misc. 482, 29 NYS 582, 31 AbbNCas 416, 23 LRA 835; In re Shaw, 2 Pa. Dist. 250; Com. v. Paper, 1 Brewst. (Pa.) 263.

19. Pintsch Compressing Co. v. Bergin, 84 Fed. 140.

[a] **In behalf of all persons interested.**—An allegation that the action is brought in behalf of all persons interested will not sustain a petition where the party bringing it was not authorized to do so by the United States. Pintsch Compressing Co. v. Bergin, 84 Fed. 140.

20. Petersen v. State, 40 Tex. Civ. A. 175, 89 SW 81.

21. Act June 29, 1906 (34 U. S. St. at L. 601 c 3592 § 15) (which authorizes the bringing of a suit on the part of the United States district attorney, in any court having jurisdiction to naturalize aliens, in the judicial district in which the naturalized citizen may reside, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud, or because illegally procured).

[a] **A brief history of the causes which led to the passage of the act of 1906** may be found in U. S. v. Lenore, 207 Fed. 865.

[b] **The mischievous practices which the statute was intended to correct** fall into two general classes: (1) The obtaining of certificates of naturalization through the deception of the court by means of perjury and subornation of perjury; (2) the obtaining of false and spurious certificates without any judicial proceeding whatever, or by a proceeding in court which was itself sham and spurious. U. S. v. Lenore, 207 Fed. 865.

22. See Johannessen v. U. S., 225 U. S. 227, 32 SCt 613, 56 L. ed. 1066; U. S. v. Olsson, 196 Fed. 562 [rev on stipulation 201 Fed. 1022 mem, 119 CCA 667 mem]; U. S. v. Plaistow, 189 Fed. 1006; U. S. v. Erickson, 188 Fed. 747; U. S. v. Aaakervik, 180 Fed. 137; U. S. v. Dwyer, 170 Fed. 686; U. S. v. Simon, 170 Fed. 680. In U. S. v. Spohrer, 175 Fed. 440, 442, 446 [quot Johannessen v. U. S., 225 U. S. 227, 240, 241, 32 SCt 613, 56 L. ed. 1066], the court used the following pertinent language (p 442): "An alien friend is offered under certain conditions the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not he takes nothing by his paper grant. Fraud cannot be substituted for facts." And again, at p 446: "That the government, especially when thereunto authorized by Congress, has the right to recall whatever of property has been taken from it by fraud, is, in my judgment, well settled; and, if that be true of property, then by analogy and with greater reason it would seem to be true where it has conferred a privilege in answer to the prayer of an ex parte petitioner."

[a] **Perjury.**—A certificate of citizenship, issued to an alien on his petition, in which he states that he is unmarried, when in fact he has a wife and children whom he deserted and left in his native country, is subject to cancellation for fraud. U. S. v. Albertini, 206 Fed. 133.

[b] **Lack of good faith.**—(1) A certificate granted to an alien who had not been a bona fide resident for the next preceding five years, and who did not intend to become such, but desired citizenship for protection in a foreign country, will be canceled for fraud. U. S. v. Mansour, 170 Fed. 671. (2) So where one did not in good faith intend to become a permanent citizen, and made his oath with a mental reservation to that effect, he was guilty of fraud in procuring the decree. U. S. v. Ellis, 185 Fed. 546.

[c] **Subsequent departure from country.**—It is provided by the act of June 29, 1906 (34 U. S. St. at L. 601 c 3592 § 15), that taking up a permanent residence in a foreign country within five years after the issuance of a certificate of citizenship shall be prima facie evidence of lack of intent to become a permanent citizen, which shall be sufficient to warrant the cancellation of the certificate as fraudulent. Luria v. U. S., 231 U. S. 9, 34 SCt 10, 58 L. ed. 101 [aff 184 Fed. 643].

23. Johannessen v. U. S., 225 U. S. 227, 32 SCt 613, 56 L. ed. 1066.

24. Luria v. U. S., 231 U. S. 9, 34 SCt 10, 58 L. ed. 101 [aff 184 Fed. 643]; Johannessen v. U. S., 225 U. S. 227, 32 SCt 613, 56 L. ed. 1066; U. S. v. Ellis, 185 Fed. 546; U. S. v. Spohrer, 175 Fed. 440.

25. U. S. v. Luria, 184 Fed. 643 [aff 231 U. S. 9, 34 SCt 10, 58 L. ed. 101]; U. S. v. Aakervik, 180 Fed. 137; U. S. v. Spohrer, 175 Fed. 440, 447 (where it was said: "The legislation of 1906 simply permits to be done by different courts and somewhat differ-

in any case in which it has jurisdiction to act.[26]

"Illegally procured." While there is some difference of opinion as to the meaning of the term "illegally procured," the better rule seems to be that it imports a certificate issued without authority of law, and, in effect, false and spurious;[27] not an error of law, but subornation or some other illegal means to impose on the court.[28] When a certificate is issued as the result of a judicial hearing in a good faith attempt to exercise the jurisdiction conferred by the act of congress, it is not open to attack in another court of coördinate jurisdiction simply by reason of alleged errors which may have occurred in the court pursuant to whose judgment the certificate was issued.[29] Errors of that kind can properly be reached only by appeal or writ of error.[30]

[§ 156] **(bb) Procedure.** A suit for the cancellation of a certificate of naturalization under the act of June 29, 1906, is a special proceeding,[31] and, while the proof must be of the kind and force required to set aside a judgment, the pleadings and procedure may be molded in any way best calculated to meet the ends of justice.[32] It is the duty of the United States district attorney, and not of the bureau of immigration and naturalization, to prosecute such proceedings.[33] The bill may be presented in any court "having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit."[34] For the purpose of the naturalization acts all courts having jurisdiction under the acts are federal courts, and a federal court can vacate a judgment of a state court or vice versa.[35] The bill must allege the facts relied upon to show that defendant procured the same fraudulently or illegally; an averment of the legal conclusion is insufficient.[36] The bill must be supported by affidavit showing good cause therefor, and, if not so supported, is demurrable.[37] This supporting affidavit, being essential, should appear in the record, either by reference and contemporaneous filing with the petition, or by allegations therein sufficient to show compliance with the statute and to warrant its production if denied.[38] If the holder of a certificate shall be absent from the United States or from the district in which he last had his residence, notice by publication in the manner provided for the service of summons by publication by the laws of the state of the place where the suit is brought is sufficient.[39]

[§ 157] **(6) Appeal.** Errors of courts committed in the exercise of their jurisdiction under the naturalization laws must be corrected the same as in other cases, by appeal or writ of error.[40] Such a method of review has been recognized and exercised in circuit courts of appeal of most of the circuits,[41] and in the District of Columbia.[42] A contrary view, however, has been taken by the circuit court of appeals for the fifth circuit, upon the ground that the proceeding for the naturalization of an alien does not constitute "a case" within the meaning of the Circuit Court of Appeals Act conferring appellate jurisdiction.[43] In the state

ent procedure what before could, under like conditions, in my judgment, have been done by a bill in equity"); U. S. v. Meyer, 170 Fed. 983; U. S. v. Simon, 170 Fed. 680; U. S. v. Mansour, 170 Fed. 671; U. S. v. Nisbet, 168 Fed. 1005.

26. In re Macoluso's Naturalization, 237 Pa. 132, 85 A 149, AnnCas1914B 226 and note (holding that the act of 1906 does not deprive a state court of authority to annul a forged certificate of citizenship upon a private petition joined in by the district attorney of the county).

27. U. S. v. Lenore, 207 Fed. 865; U. S. v. Albertini, 206 Fed. 133.

28. U. S. v. Lenore, 207 Fed. 865, 868 (where the court said: "To say that a certificate which is issued pursuant to a full hearing in court is 'illegally procured,' if any error occurs in the proceeding, would be a wide departure from the language which courts have been accustomed to use in referring to judicial error"); U. S. v. Luria, 184 Fed. 643 [aff 231 U. S. 9, 34 SCt 10, 58 L. ed. 101].

29. U. S. v. Lenore, 207 Fed. 865; U. S. v. Luria, 184 Fed. 643 [aff 231 U. S. 9, 34 SCt 10, 58 L. ed. 101]. See also U. S. v. Andersen, 169 Fed. 201 (holding that, where, in naturalization proceedings in a state court, that court reached a conclusion favorable to its jurisdiction and adverse to the government's contention, and no steps were taken for a review by the supreme court of the state which alone could give an authoritative construction of the local law on which the jurisdiction depended, a federal district court would not take jurisdiction of an application by the government to set aside the certificate of naturalization granted in the state court proceedings, having only concurrent and not revisory jurisdiction). But see U. S. v. Plaistow, 189 Fed. 1006 (where it was held that the term "illegally procured" is not limited to irregularity of procedure but denotes the determination by the court contrary to law of the matter submitted to it). To same effect U. S. v. Aakervik, 180 Fed. 137; U. S. v. Meyer, 170 Fed. 983; U. S. v. Simon, 170 Fed. 680; U. S. v. Schurr, 163 Fed. 648.

[a] **Failure to strictly comply with directory provisions of the statute** is not such illegality as is meant. U. S. v. Stoller, 180 Fed. 910.

30. U. S. v. Lenore, 207 Fed. 865.

31. U. S. v. Mansour, 170 Fed. 676.

[a] **It is not a suit at law, but a suit in equity,** similar to a suit to cancel a patent for public land or for an invention. Luria v. U. S., 231 U. S. 9, 34 SCt 10, 58 L. ed. 101 [aff 184 Fed. 643].

32. U. S. v. Mansour, 170 Fed. 676.

[a] **Evidence of residence abroad.**—In proceedings to cancel a naturalization certificate for fraud, statements of consular agents abroad that defendant had established a permanent residence abroad, etc., were admissible. U. S. v. Luria, 184 Fed. 643 [aff 231 U. S. 9, 34 SCt 10, 58 L. ed. 101].

33. U. S. v. Andersen, 169 Fed. 201.

34. U. S. v. Lenore, 207 Fed. 865, 867.

35. U. S. v. Aakervik, 180 Fed. 137.

36. U. S. v. Luria, 184 Fed. 643 [aff 231 U. S. 9, 34 SCt 10, 58 L. ed. 101] (holding that a complaint by the United States to cancel an alien's naturalization certificate for fraud was insufficient, where it failed to tender the material issue of fraud, alleging merely a change of residence, which by statute is only prima facie evidence on that issue); U. S. v. Rose, 166 Fed. 999.

37. Cohen v. U. S., 38 App. (D. C.) 123.

38. Cohen v. U. S., 38 App. (D. C.) 123.

39. Act June 29, 1906 (34 U. S. St. at L. 601 c 3592 § 15).

[a] **Service on curator ad hoc.**—Under the act of June 29, 1906 (34 U. S. St. at L. 601 c 3592 § 15), authorizing proceedings to cancel certificates of citizenship, and providing that, if the holder thereof shall be absent from the United States or from the district in which he last had his residence, the notice shall be by publication as provided for service of summons by publication, or on absentees as provided by the laws of the state where the suit is brought, the notice must be given in the manner provided by the law of the state for service on absentees, and, where the law of a state provides for the appointment of an attorney at law as curator ad hoc to represent an absentee, service on him is sufficient. U. S. v. Ellis, 185 Fed. 546.

40. U. S. v. Lenore, 207 Fed. 865.

41. U. S. v. Ojala, 182 Fed. 51, 104 CCA 491 (writ of error); U. S. v. Balsara, 180 Fed. 694, 103 CCA 660 (appeal); U. S. v. Poslusny, 179 Fed. 836, 103 CCA 324 (appeal); U. S. v. Cohen, 179 Fed. 834, 103 CCA 28, 29 LRANS 829 (appeal); U. S. v. Doyle, 179 Fed. 687, 103 CCA 333 (appeal); Bessho v. U. S., 178 Fed. 245, 101 CCA 605 (appeal); U. S. v. Martorana, 171 Fed. 397, 96 CCA 353 (appeal); U. S. v. George, 164 Fed. 45, 90 CCA 463 (appeal); U. S. v. Rodiek, 162 Fed. 469, 89 CCA 389 (writ of error).

42. U. S. v. Daly, 32 App. (D. C.) 525 (appeal).

43. U. S. v. Dolla, 177 Fed. 101, 100 CCA 521, 21 AnnCas 665 [disappr U. S. v. Lenore, 207 Fed. 865, 869, where the court said: "This decision has never been cited, and seems to be out of accord with the practice in other circuits. In my judgment it proceeds upon an erroneous interpretation of the statute"]. In State v. King County Super. Ct., 75 Wash. 239, 242, 134 P 916, the court said: "Naturalization has always been an act or judgment of a court, but never until the act of 1906 has it been suggested that the special proceedings authorized constituted a case, action, or cause that could be reviewed on writ of error, under any judiciary act, state or federal. . . . We may say, further, if naturalization proceedings under the act of 1906 constitute a 'case' it is a case at law, not in equity nor in admiralty; and if such a case is reviewable under present laws it can only be on writ of error, and only errors of law appearing of record can be reviewed. It is unnecessary to point out that such review would be fruitless in all

courts the right to a review on appeal is governed by the federal law.[44]

[§ 158] **(7) Certificate.** Informalities in a certificate of naturalization do not invalidate it.[45]

[§ 159] **(8) Fees of Clerks.** Formerly the question of the amount and disposition of fees in naturalization proceedings conducted in state courts was left to the states.[46] By the act of 1906, however, congress has deprived the states of this power, and has regulated the whole subject of fees, as incidental to the establishment of a uniform naturalization system.[47] The fees thus provided for control to the exclusion of state legislation on the subject.[48]

[§ 160] **G. Evidence of Naturalization[49]—1. Presumptions and Burden of Proof.** The burden of establishing naturalization is on the party affirming it and to whose case it is material.[50] It is not sufficient to support it by merely negative presumptions.[51]

Presumption from exercise of privileges of citizenship. Where no record can be produced showing the naturalization of an alien possessing the requisite qualifications to become a citizen, naturalization may be inferred from the fact that for a long time he voted, held office, and exercised all the rights and privileges of a citizen.[52] The presumption is not similarly raised merely by showing that a person on his own responsibility assumed to perform acts for the legality of which citizenship would be requisite, but which, as matter of fact, never were submitted to any legal test.[53] Even after death and the lapse of many years courts will not presume in favor of the former existence of a record of naturalization where the establishment of such a record would defeat rights long exercised and acknowledged, and where there is no evidence that the person claimed to have been a

cases where the forms provided by the law are followed. Any review of naturalization proceedings in an appellate court, to be worth while, must be a review of the facts as well as law, and this can only be on appeal, and an appeal must be provided by statute").

[a] **"The same conclusion may be reached on another line.** The admission of an alien to citizenship is not only a political act of grace, but the power vested in the court to grant or order the same is on proof to the satisfaction of the court, with the petitioner and witness as necessary exhibits—that is to say, the question of admission is committed to the discretion of the courts—and discretionary rulings of courts are not reviewable on error or appeal, except, perhaps, when the discretion is shown to have been abused, and abuse of discretion in naturalization cases is provided for in section 15 of the act of 1906, not by error or appeal, but by a direct suit to annul and cancel." U. S. v. Dolla, 177 Fed. 101, 105, 100 CCA 521, 21 AnnCas 665.

[b] **Case or controversy defined.**—(1) "Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy" within the meaning of those terms as used in the federal constitution. Smith v. Adams, 130 U. S. 167, 173, 9 SCt 566, 32 L. ed. 895 [quot U. S. v. Lenore, 207 Fed. 865, 870]. Generally as to what constitutes a case or controversy, within the federal judicial power see Courts [11 Cyc 857]. (2) "The term 'case,' in the Court of Appeals Act, clearly has the same significance as in the federal Constitution. Under the statute of 1906 the naturalization of an alien has all the qualities of a case. It proceeds upon petition and notice. The government is entitled to be present, by its counsel, and examine the petitioner and his witnesses, and to produce other witnesses. The Supreme Court in the case of Johannessen v. U. S., 225 U. S. 227, 237, 32 SCt 613, 56 L. ed. 1066, clearly indicates that the proceeding under this statute has the qualities of a case." U. S. v. Lenore, supra. (3) Proceedings for the deportation of a Chinaman under the Immigration Law constitute a case within the federal judicial power. Fong Yue Ting v. U. S., 149 U. S. 698, 13 SCt 1016, 37 L. ed. 905 [appl U. S. v. Lenore, 207 Fed. 865].

44. State v. King County Super. Ct., 75 Wash. 239, 134 P 916 (where appellate jurisdiction was denied on the authority of U. S. v. Dolla, 177 Fed. 101, 100 CCA 521, 21 AnnCas 665, which was approved).

[a] **Other state courts have entertained appeals.**—See U. S. v. Breen, 135 App. Div. 824, 120 NYS 304.

45. Behrensmeyer v. Kreitz, 135 Ill. 591, 26 NE 704 (where it was held that a misnomer in a certificate of naturalization does not vitiate it). See also Com. v. Towles, 5 Leigh (32 Va.) 743 (where it was held that a certificate, stating that the party took "the oath in such case required by the act or congress," imports that he took the oath required in the very words prescribed by the statute, and that the act of naturalization is good).

[a] **Attestation.**—A certificate of naturalization must be attested by a prothonotary or clerk. In re Questions on Election, etc., 2 Brewst. (Pa.) 138.

[b] **Sufficiency of certificate.**—A certificate of naturalization was to this effect: "I, J F G, Clerk, &c., certify, that at a Superior Court held at Savannah, J M R, an alien, &c., petitioned the Court to be admitted a citizen and, having in all things complied with the law in such case made and provided, the said J M R was accordingly admitted a citizen of the U. S., having first taken and subscribed, in open Court, the oath of naturalization." It was held that this certificate was not sufficient to show J M R naturalized. Miller v. Reinhart, 18 Ga. 239.

[c] **In Canada** the certificate required by the act of 31 Vict. c 66 § 5 must be both filed and openly read in court on the first day of the term. Ex p. Dow, 18 N. B. 302.

46. Matter of Palmer, 21 App. Div. 180, 47 NYS 433 [aff 154 N. Y. 776 mem, 49 NE 1101 mem]; Peo. v. Seabury, 23 HowPr (N. Y.) 121 (both cases holding that the city clerk of Brooklyn was required to account to the city comptroller for fees collected by him in naturalization proceedings).

[a] **The amount of fees** in naturalization cases which may be charged by prothonotaries outside the city of Philadelphia was considered in Naturalization Fees, 15 Pa. Co. 225.

47. See Hampden County v. Morris, 207 Mass. 167, 93 NE 579, AnnCas1912A 815 and note.

[a] **Under this federal statute** the clerks of the courts are required to account to the bureau of immigration and naturalization for one half of the fees collected by them, and to pay them over to the disbursing clerk of the department of commerce and labor; the other half the clerks may retain for themselves, first paying from these fees all the additional clerical force that may be required in performing the duties imposed by the act. Hampden County v. Morris, 207 Mass. 167, 93 NE 579, AnnCas1912A 815.

48. Hampden County v. Morris, 207 Mass. 167, 93 NE 579, AnnCas1912A 815; Eldredge v. Salt Lake County, 37 Utah 188, 106 P 939; State v. Libby, 47 Wash. 481, 92 P 350. Compare Passaic v. Slater, 85 N. J. L. 621, 90 A 377.

[a] **A state legislature cannot nullify the statute** by enacting that the clerk shall pay all the money to the county treasurer. Hampden County v. Morris, 207 Mass. 167, 93 NE 579, AnnCas1912A 815.

[b] **Services rendered by the clerk are not services forming a part of the duties of his office,** and the fees therefor are no part of the emoluments of that office. Eldredge v. Salt Lake County, 37 Utah 188, 106 P 939.

49. Evidence of alienage see supra §§ 4–7.

50. Fay v. Taylor, 31 Misc. 32, 63 NYS 572 (partition); Richardson v. Amsdon, 85 NYS 342 (partition).

51. Richardson v. Amsdon, 85 NYS 342.

52. Boyd v. Nebraska, 143 U. S. 135, 12 SCt 375, 36 L. ed. 103 [rev 31 Nebr. 682, 48 NW 739, 51 NW 602]; Conover v. Old, 80 N. J. L. 535, 77 A 1070.

[a] **Illustrations.**—(1) In Peo. v. Pease, 27 N. Y. 45, 63, 84 AmD 242, the court of appeals of New York, in reviewing a charge of the trial judge in quo warranto case, held that in the absence of evidence tending to show that a man had ever been naturalized, and upon evidence that he was born in France and had voted, it was proper to charge that the legal presumption was that he had been naturalized, since the presumption was that he had voted legally, and not that he had committed a crime. (2) It was subsequently held in Fay v. Taylor, 31 Misc. 32, 63 NYS 572, that proof that decedent, who was an alien by birth, came to this country in 1865, lived here until his death in 1897, participated in elections, and held a liquor tax certificate which could lawfully be issued only to a citizen, was sufficient to show prima facie that he had been naturalized. (3) But if it is claimed that an alien was naturalized in a certain court, and it is shown that, if naturalized, he was naturalized in that court, and the records thereof, upon examination, show no judgment admitting him to citizenship, it cannot be proved by parol that he was admitted in such court, and that no entry was made of his admission; and in such a case citizenship cannot be presumed from the fact that the alien has held real estate, or has voted or held office. Dryden v. Swinburne, 20 W. Va. 89.

53. Richardson v. Amsdon, 85 NYS 342 (holding that the fact that an alien assumed to make leases and perform other acts which only a citizen might do was of no probative force in establishing the fact of naturalization, in an action for partition).

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citizen exercised any rights of a citizen beyond that of holding land.[54]

Presumption from declaration of intention. The fact that three years have expired since an alien declared his intention to become a citizen does not raise a presumption that he has actually become a citizen.[55]

[§ 161] **2. Admissibility.** The naturalization laws expressly require the proceedings to be recorded,[56] and in the absence of proof of the loss or destruction of the record, it can be proved only by itself or by an extract therefrom.[57] Parol evidence is ordinarily inadmissible for this purpose.[58]

Record destroyed or impossible of production. But in cases where the record has been lost or destroyed, or by reason of lapse of time and the death of the person naturalized the record cannot be produced, secondary evidence is admissible to prove naturalization.[59] Before such proof outside of the record can be resorted to, some excuse must appear for the substitution of the secondary evidence for the documentary proof.[60]

[§ 162] **H. Operation and Effect—1. Naturalization—a. In General.** Naturalization constitutes the person naturalized a citizen,[61] and entitles him to all the rights of a native-born citizen,[62] save only such as are withheld by the constitution of the United States.[63] The rights conferred are, however, only civil rights, such as liberty of person and conscience, the right to acquire, hold, and transfer property, to sue and defend, and security in person, estate, and reputation.[64] The right to vote is not a right belonging to citizenship.[65]

[§ 163] **b. On Minor Children.**[66] The naturalization of a father operates to confer the right of citizenship upon his minor child, who, although born abroad, is dwelling at the time of the father's naturalization within the jurisdiction of the United States.[67] The view has been taken that

54. Blight v. Rochester, 7 Wheat. (U. S.) 535, 5 L. ed. 516.

55. State v. Olin, 23 Wis. 309.

56. See supra § 149.

57. Boyd v. Nebraska, 143 U. S. 135, 12 SCt 375, 36 L. ed. 103; Green v. Salas, 31 Fed. 106; Conover v. Old, 80 N. J. L. 535, 77 A 1070.

[a] **An exemplified copy of the record** is the best evidence of naturalization and is of course competent to show it. The Acorn, 1 F. Cas. No. 29, 2 Abb. 434; U. S. v. Makins, 26 F. Cas. No. 15,710; Belcher v. Farren, 89 Cal. 73, 26 P 791; Prentice v. Miller, 82 Cal. 570, 23 P 189; Bode v. Trimmer, 82 Cal. 513, 23 P 187; Newcomb v. Newcomb, 57 SW 2, 22 KyL 286, 51 LRA 419; State v. Barrett, 40 Minn. 65, 41 NW 459; Berry v. Hull, 6 N. M. 643, 30 P 936; People v. McNally, 59 HowPr (N. Y.) 500. See Harley v. State, 40 Ala. 689.

Proof of record see Evidence [17 Cyc 296 et seq, 497 et seq].

58. U. S.—Green v. Salas, 31 Fed. 106; Slade v. Minor, 22 F. Cas. No. 12,937, 2 Cranch C. C. 139.

Cal.—Belcher v. Farren, 89 Cal. 73, 26 P 791; Prentice v. Miller, 82 Cal. 570, 23 P 189; Bode v. Trimmer, 82 Cal. 513, 23 P 187; Miller v. Prentice, 82 Cal. 104, 23 P 8.

N. M.—Berry v. Hull, 6 N. M. 643, 30 P 936.

Vt.—State v. O'Hearn, 58 Vt. 718, 6 A 606.

W. Va.—Dryden v. Swinburne, 20 W. Va. 89.

[a] **Inadmissibility of clerk's certificate in absence of record.**—(1) The certificate of the clerk of the district court reciting that the applicant has been duly admitted to citizenship, but failing to show or verify any extract from the record or minutes of the action of the court, is not competent evidence to show naturalization. The record, if not correctly made up, or if lost or destroyed, should be perfected or replaced by appropriate proceedings in the court where the judgment was pronounced, and it is not competent to supply alleged deficiencies in the record by parol evidence. Green v. Salas, 31 Fed. 106. See also Miller v. Reinhart, 18 Ga. 239. (2) Conversely the certificate of the clerk of a court, to the effect that there is no evidence on the records of the court that certain persons had been naturalized therein as testified to by them, is not competent evidence to disapprove the fact of naturalization, as it is secondary. Beardstown v. Virginia, 81 Ill. 541.

[b] **Record cannot be contradicted by parol.**—A court has no power to enter an order admitting an alien to citizenship nunc pro tunc where the records of the court for the period which should show the naturalization contain no record thereof, or of the antecedent steps requisite under the statute, and show only that the petitioner declared his intention to become a citizen. The court will not admit the supposition that things may have been done in respect to the naturalization of persons which do not appear of record. Matter of Desty, 8 AbbNCas (N. Y.) 250. See also Slade v. Minor, 22 F. Cas. No. 12,937, 2 Cranch C. C. 139.

[c] **Identification of person.**—Where a certificate of naturalization recites the person as Patrick W. Doran, and his real name is Patrick Peter William Doran, he may prove by his own oath that it was issued to him, and that he is the person naturalized thereby. Beardstown v. Virginia, 81 Ill. 541.

59. U. S.—Hogan v. Kurtz, 94 U. S. 773, 24 L. ed. 317.

Ill.—Ryan v. Egan, 156 Ill. 224, 40 NE 827. See also Behrensmeyer v. Kreitz, 135 Ill. 591, 26 NE 704.

N. J.—Conover v. Old, 80 N. J. L. 535, 77 A 1070.

N. Y.—Peo. v. Pease, 27 N. Y. 45, 84 AmD 242; Peo. v. McNally, 59 HowPr 500.

N. D.—Kadlec v. Pavik, 9 N. D. 278, 83 NW 5.

S. C.—Sasportas v. De la Motta, 31 S. C. Eq. 38.

Utah.—Strickley v. Hill, 22 Utah 257, 62 P 893, 83 AmSR 786.

Va.—Nalle v. Fenwick, 4 Rand. (25 Va.) 585.

See generally Evidence [17 Cyc 497 et seq].

60. Dennis v. Brewster, 7 Gray (Mass.) 351. See also supra note 57.

61. Dorsey v. Brigham, 177 Ill. 250, 52 NE 303, 69 AmSR 228, 42 LRA 809. See also Citizens [7 Cyc 136 note 14].

62. Luria v. U. S., 231 U. S. 9, 34 SCt 10, 58 L. ed. 101 [aff 184 Fed. 643]; Osborn v. U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; U. S. v. Rhodes, 27 F. Cas. No. 16,151, 1 Abb. 28; Bulwinkle v. U. S., 4 Ct. Cl. 395; Scott v. Strobach, 49 Ala. 477; Heney v. Brooklyn Benev. Soc., 39 N. Y. 333; Bacon Abr. tit Aliens b.

[a] **The protection of naturalized citizens while in foreign countries** is especially provided for by U. S. Rev. St. § 2000.

[b] **England; Naturalization Act.**—Under the Naturalization Act, 1870, an alien who becomes by naturalization a British subject is entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled, and is subject to the same obligations. But when in the limits of the country of which he was previously a citizen he is not deemed a British subject unless he has ceased to be a subject of such state in pursuance of its laws or a treaty. See Reg. v. Manning, 2 C. & K. 887, 61 ECL 887; Mette v. Mette, 28 L. J. P. & M. 117.

63. U. S. Const. arts 1, 2.

[a] **President of the United States.**—No person is eligible to the office of president of the United States except a natural-born citizen, or a citizen of the United States at the time of the adoption of constitution. Art 2 § 1 par 4. Luria v. U. S., 231 U. S. 9, 34 SCt 10, 58 L. ed. 101 [aff 184 Fed. 643].

[b] **United States senate.**—No person is eligible to the office of senator who has not been nine years a citizen of the United States. Art 1 § 3 par 3.

[c] **Representative in congress.**—No person can be a representative who has not been seven years a citizen of the United States. Art 1 § 2 par 2.

64. Dorsey v. Brigham, 177 Ill. 250, 52 NE 303, 69 AmSR 228, 42 LRA 809.

[a] **Acquiring and holding land.**—The naturalization of an alien places him upon the footing, in respect of acquiring and holding real estate, of a natural-born citizen. People v. Conklin, 2 Hill (N. Y.) 67; Priest v. Cummings, 16 Wend. (N. Y.) 617 [rev 20 Wend. 338]; Manuel v. Wulff, 152 U. S. 505, 14 SCt 651, 38 L. ed. 532. See also Harley v. State, 40 Ala. 689 (where it was held that the defeasible estate of an alien, in lands purchased by him, is perfected by his becoming a naturalized citizen before office found). But see Sutliff v. Forgey, 1 Cow. (N. Y.) 89 [aff 5 Cow. 713] (where it was held that naturalization merely removes the disability of the alien to hold lands, leaving the state a right to enter if he dies without heirs, or leaving alien heirs only).

65. See Elections [15 Cyc 280].

66. **Capacity of minor to be naturalized** see supra § 134.

67. U. S.—Campbell v. Gordon, 6 Cranch 176, 3 L. ed. 190; Gribble v. Pioneer Press Co., 15 Fed. 689, 5 McCrary 73; North Noonday Min. Co. v. Orient Min. Co., 1 Fed. 522, 6 Sawy. 299; Vint v. King, 28 F. Cas. No. 16,950.

Ark.—State v. Penney, 10 Ark. 621.

Fla.—O'Connor v. State, 9 Fla. 215.

Ill.—Rexroth v. Schein, 206 Ill. 80, 69 NE 240; Dorsey v. Brigham, 177 Ill. 250, 52 NE 303, 69 AmSR 228, 42 LRA 809; Behrensmeyer v. Kreitz, 135 Ill. 591, 26 NE 704; Kreitz v. Behrensmeyer, 125 Ill. 141, 17 NE 232, 8 AmSR 349.

Md.—Brown v. Shilling, 9 Md. 74.

Minn.—State v. Mims, 26 Minn. 183, 2 NW 494, 683.

Mo.—Gumm v. Hubbard, 97 Mo. 311, 11 SW 61, 10 AmSR 312; State v. Andriano, 92 Mo. 70, 4 SW 263.

N. J.—Conover v. Old, 80 N. J. L. 535, 77 A 1070.

N. M.—Berry v. Hull, 6 N. M. 643, 30 P 936.

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such will be the effect of the father's naturalization, although the child did not come to the United States until after his father had been naturalized.[68] But this is a mooted point,[69] and it has been decided to the contrary.[70] Such a child is, however, an alien subject to the immigration laws, and may be excluded if he comes within the prohibited classes.[71]

Naturalization after majority of child. A father's naturalization after his child has attained majority does not make such child a citizen.[72] It has also been held that if an alien father takes the oath declaring his intention to become a citizen, his minor child thereby acquires an inchoate status as a citizen, and, if he attains majority before the father completes his naturalization, that status is capable of being converted into complete citizenship by other means than the direct application provided for by the naturalization laws.[73]

[§ 164] **c. On Wife.**[74] An alien woman whose husband becomes a naturalized citizen of the United States is thereby made a citizen,[75] even though she has not attained her majority,[76] or does not come to the United States until after his death.[77] But the rule applies only in case the wife herself may be lawfully naturalized.[78] Moreover the marriage must be a bona fide one,[79] and legal under the laws of the United States.[80]

[§ 165] **d. Retroactive Effect.** Numerous authorities support the doctrine that naturalization, of itself, has no retroactive effect;[81] naturalization, however, has been held to relate back and confirm a title to land purchased during alienage,[82] although it does not confirm a title claimed by descent.[83]

[§ 166] **2. Of Declaration of Intention.**[84] A declaration of intention to become a citizen does not make the alien a citizen. An alien remains such until naturalization is complete.[85] Conse-

N. Y.—Matter of Morrison, 22 HowPr 99; Young v. Peck, 21 Wend. 389; Sutliff v. Forgey, 1 Cow. 89 [aff 5 Cow. 713]; West v. West, 8 Paige 433.

S. C.—North v. Valk, 13 S. C. Eq. 212.

Tex.—Franks v. Hancock, 1 Tex. Unrep. Cas. 554. See also Warnell v. Finch, 15 Tex. 163.

W. Va.—Dryden v. Swinburne, 20 W. Va. 89.

See Calais v. Marshfield, 30 Me. 511.

[a] **An illegitimate minor child** living as a member of his reputed father's family becomes a citizen on the naturalization of his reputed father. Dale v. Irwin, 78 Ill. 170. But see Guyer v. Smith, 22 Md. 239, 85 AmD 650.

[b] **Naturalization of stepfather.**— The minor child of an alien widow becomes a citizen upon the naturalization of his mother's second husband. U. S. v. Kellar, 13 Fed. 82, 11 Biss. 314; Behrensmeyer v. Kreitz, 135 Ill. 591, 26 NE 704; Peo. v. Newell, 38 Hun (N. Y.) 78.

[c] **Children detained at Ellis Island** by the immigration authorities are not "dwelling in the United States" within the meaning of the law. U. S. v. Williams, 132 Fed. 894.

[d] **Naturalization by treaty.**— The minor child of one who became a citizen under a treaty, if residing in the United States at the time, would thereby become a citizen. Crane v. Reeder, 25 Mich. 303.

68. Conover v. Old, 80 N. J. L. 535, 77 A 1070 (where Swayze, J., said: "The language of the statute is not such as to require us to hold that the child must dwell within the United States at the time of the father's naturalization. The language is that the children 'shall, if dwelling in the United States, be considered as citizens thereof'; and the words 'if dwelling in the United States' may be referred with as great propriety to the period covering the non-age of the child or to the time when privileges of citizenship are claimed, or both, as to the time when the father is naturalized").

[a] **This view and the grounds upon which it rests** are stated in a carefully formulated instruction sent by Mr. Blaine as secretary of state to Minister Phelps at Berlin, and quoted at length in a dispatch from Secretary Hay to Minister Harris at Vienna, to be found in 3 Moore Int. L. Dig. 471. See also Conover v. Old, 80 N. J. L. 535, 77 A 1070.

69. See Conover v. Old, 80 N. J. L. 535, 77 A 1070.

[a] **This question was not decided by the supreme court of the United States** in the early case of Campbell v. Gordon, 6 Cranch 176, 3 L. ed. 190, for in that case the child was dwelling in the United States at the time the act of April 14, 1802 (2 U. S. St. at L. 155 c 30 § 4) was passed; nor was it decided in the recent case of Zartarian v. Billings, 204 U. S. 170, 27 SCt 182, 51 L. ed. 428, for in that case the child, while actually in the port of Boston, was detained there as an alien under our Immigration Act.

70. Behrensmeyer v. Kreitz, 135 Ill. 591, 26 NE 704.

71. Zartarian v. Billings, 204 U. S. 170, 27 SCt 182, 51 L. ed. 428; In re Camaras, 202 Fed. 1019; U. S. v. Rodgers, 185 Fed. 334, 107 CCA 452 [aff 182 Fed. 274]; U. S. v. Williams, 132 Fed. 894. See supra §§ 52–59.

72. Dorsey v. Brigham, 177 Ill. 250, 52 NE 303, 69 AmSR 228, 42 LRA 809; State v. Boyd, 31 Nebr. 682, 48 NW 739, 51 NW 602; Dryden v. Swinburne, 20 W. Va. 89.

73. Boyd v. Nebraska, 143 U. S. 135, 12 SCt 375, 36 L. ed. 103 [rev 31 Nebr. 682, 48 NW 739, 51 NW 602]. See also In re Shearer, 158 Fed. 839; Schrimpf v. Settegast, 38 Tex. 96.

74. Capacity of married woman to be naturalized see supra § 137.

75. U. S.—Kelly v. Owen, 7 Wall. 496, 19 L. ed. 283; In re Nicola, 184 Fed. 322, 106 CCA 464; Hopkins v. Fachant, 130 Fed. 839, 65 CCA 1; U. S. v. Kellar, 13 Fed. 82, 11 Biss. 314; Leonard v. Grant, 5 Fed. 11, 6 Sawy. 603.

Ga.—Headman v. Rose, 63 Ga. 458.

Ill.—Dorsey v. Brigham, 177 Ill. 250, 52 NE 303, 69 AmSR 228, 42 LRA 809.

N. Y.—Burton v. Burton, 1 Keyes 359; Peo. v. Newell, 38 Hun 78; Renner v. Müller, 44 N. Y. Super. 535; Criswell v. Noble, 61 Misc. 483, 113 NYS 954.

N. C.—Kane v. McCarthy, 63 N. C. 299.

See also Citizens [7 Cyc 141 text and note 30].

Contra White v. White, 2 Metc. (Ky.) 185, 191 (where it was said that "naturalization is a personal privilege, and the alien wife does not become a naturalized citizen by the naturalization of the husband").

76. Renner v. Müller, 44 N. Y. Super. 535.

77. Headman v. Rose, 63 Ga. 458; Burton v. Burton, 1 Keyes (N. Y.) 359; 19 Op. Atty.-Gen. 402. See also Kircher v. Murray, 54 Fed. 617 (where it was held that, under the declaration adopted by the convention of Texas, Nov. 7, 1835, promising citizenship and donations of land to all volunteers in her war for independence, a citizen of Illinois who afterward entered her army as a volunteer, and died in her service, became a citizen of Texas, and his wife's citizenship followed his, although she never came to Texas).

78. Ex p. Kaprielian, 188 Fed. 694; In re Rustigian, 165 Fed. 980 (holding that where an alien married woman was not entitled to enter the country under the immigration regulations, because of a contagious disease, the naturalization of her husband would not make her a citizen entitled to enter).

79. U. S. v. Sprung, 187 Fed. 903, 110 CCA 37; Wong Heung v. Elliott, 179 Fed. 110, 102 CCA 408; Looe Shee v. North, 170 Fed. 566, 95 CCA 646.

80. U. S. v. Rodgers, 109 Fed. 886 (holding that the wife of a naturalized citizen whose marriage is illegal under the laws of the United States, although legal in the country where it was contracted, is an alien immigrant, as is also a child of the marriage).

81. Ky.—White v. White, 2 Metc. 185.

Nebr.—State v. Boyd, 31 Nebr. 682, 48 NW 739, 51 NW 602.

N. Y.—Heney v. Brooklyn Benev. Soc., 39 N. Y. 333, 7 Transcr. A. 89 [aff 33 Barb. 360]; Smith v. Smith, 33 Barb. 371 note; Priest v. Cummings, 20 Wend. 338 [aff 16 Wend. 617]. Compare Jackson v. Beach, 1 Johns. Cas. 399.

S. C.—Vaux v. Nesbit, 6 S. C. Eq. 352.

W. Va.—Dryden v. Swinburne, 20 W. Va. 89 (where it was held that no court has power, in naturalizing an alien, to declare in its order that such alien shall be held to be a citizen from a time preceding the making of the order).

See Collingswood v. Pace, 1 Vent. 413, 86 Reprint 262.

[a] **On alien wife.**—(1) Marriage of an alien wife to a citizen has no retrospective effect (Dorsey v. Brigham, 177 Ill. 250, 52 NE 303, 69 AmSR 228, 42 LRA 809), (2) and will not entitle her to dower in lands of which her husband was seized during coverture, and which he had aliened previous to her naturalization (Priest v. Cummings, 20 Wend. (N. Y.) 338 [aff 16 Wend. 617]; Labatut v. Schmidt, 17 S. C. Eq. 421).

82. Jackson v. Beach, 1 Johns. Cas. (N. Y.) 399.

83. Jackson v. Green, 7 Wend. (N. Y.) 333; Vaux v. Nesbit, 6 S. C. Eq. 352.

[a] **The New York statute of 1843,** providing that any naturalized citizen, to whom an estate would have descended if he had been a citizen at the time of the death of the person last seized, might hold the same as though he had been a citizen at the time of the descent cast, applied only to persons already naturalized at the time the act was passed, and had no reference to the future. Heney v. Brooklyn Benev. Soc., 39 N. Y. 333, 7 Transcr. A. 89 [33 Barb. 360].

84. Necessity and requisites of declaration of intention see supra § —.

85. U. S. v. Uhl, 211 Fed. 628; In re Polsson, 159 Fed. 283; Wallenburg

quently an alien cannot take by descent, in the absence of enabling statutes, where the ancestor dies after the alien has filed a declaration of intention, but before actual naturalization.[86]

[§ 167] **I. Offenses against Naturalization Laws —1. In General.** In order to prevent the abuse of the United States naturalization laws, congress has created several criminal offenses connected with the fraudulent procurement or use of certificates of naturalization.[87]

[§ 168] **2. False Swearing[88]—a. In General.** Perjury in the oaths or affidavits required of applicants for citizenship is punishable by fine and imprisonment.[89] An indictment is sufficient if it states facts constituting an offense under the statute and concludes "contrary to the form of the statute," etc.[90] It is necessary, in order to warrant conviction, that defendant should knowingly and willfully testify falsely,[91] but it is not necessary that his act should also be corrupt or malicious.[92] Of course this enactment extends only to oaths or affidavits authorized or required to be made.[93]

[§ 169] **b. Jurisdiction.** Perjury, committed in a state court, relative to an application for naturalization under the laws of the United States is indictable in the courts of the state.[94] The federal

v. Missouri Pac. R. Co., 159 Fed. 217; Creagh v. Equitable L. Ins. Soc., 88 Fed. 1; In re Moses, 83 Fed. 995 (where it was held that an immigrant does not cease to be an alien merely by declaring his intention of becoming a citizen, so as to relieve his wife and minor children from the operation of the law governing the admission of aliens); Minneapolis v. Reum, 56 Fed. 576, 6 CCA 31 (where it was held that a foreign-born resident of the United States, who has merely declared his intention to become a citizen, but has never complied with any other provision of the naturalization laws, is none the less an alien, because of the facts that the constitution and laws of the state wherein he resides have conferred the elective franchise and other privileges of citizenship on foreign subjects who have declared their intention to be naturalized, and that he has actually voted for a member of congress and state and county officers); Maloy v. Duden, 25 Fed. 673; Gardina v. Bd. of Registrars, 160 Ala. 155, 48 S 788; Dorsey v. Brigham, 177 Ill. 250, 52 NE 303, 69 AmSR 228, 42 LRA 809; Berry v. Hull, 6 N. M. 643, 30 P 936. See also Valk v. U. S., 28 Ct. Cl. 241 (where it was held that a claimant under the Indian Depredation Act is not a citizen, within the meaning of that statute, merely because he has taken the primary declaration).

[a] **In Indiana** aliens who have declared their intention, according to law, to become citizens may hold land in fee simple. State v. Beackmo, 8 Blackf. 246; Eldon v. Doe, 6 Blackf. 341.

[b] **In Louisiana** (1) a person who has declared his intention to become a citizen of the state, and has qualified as an elector under Const. art 185, is a citizen of the state and eligible to the office of coroner (State v. Fowler, 41 La. Ann. 380, 6 S 602), (2) or inspector of weights and measures (State v. Abbott, 41 La. Ann. 1096, 6 S 805).

[c] **Under the constitution of Nebraska,** a declaration of intention to become a citizen constitutes a resident alien an elector. Haywood v. Marshall, 53 Nebr. 220, 73 NW 449.

[d] **In Texas,** after a foreigner by birth has duly declared his intention of being naturalized as a citizen, he is invested with all the rights of citizenship except the elective franchise; and therefore he can acquire real estate by purchase, and, on his death, can transmit by descent to his children. Schrimpf v. Settegast, 38 Tex. 96, 35 Tex. 323.

86. White v. White, 2 Metc. (Ky.) 185; Foss v. Crisp, 20 Pick. (Mass.) 121; Harman v. Ferrall, 64 N. C. 474. See also McDaniel v. Richards, 12 S. C. L. 187 (where it appeared that an alien female had given notice of her intention to become a citizen, and had taken the oath, but died before she was duly naturalized, and it was held that her husband could not inherit through her).

87. See U. S. v. Tynen, 11 Wall. (U. S.) 88, 20 L. ed. 153.

88. As perjury see Perjury [30 Cyc 1409].

89. Act March 4, 1909 (35 U. S. St. at L. 1103 c 321 § 80). See also U. S. Rev. St. § 5395; U. S. v. Walsh, 22 Fed. 644; U. S. v. Jones, 26 F. Cas. No. 15,491, 14 Blatchf. 90.

[a] **The statute describes two distinct offenses,** at least to the extent that the circumstances under which an offense may be committed may present it in two different ways. The first offense relates to oaths or affidavits, "made or taken under or by virtue of any law relating to the naturalization of aliens," without the expression of any limitation as to the place where or time when they may be made or taken; and the second extends to "any proceedings under such laws," and may well be understood to include every one who testifies falsely in any such proceedings, whether by affidavit "taken under or by virtue of any law relating to naturalization," or orally in open court, or otherwise in accordance with the usual practice. Moore v. U. S., 144 Fed. 962, 963, 75 CCA 670.

[b] **The Naturalization Act of June 29, 1906** (34 U. S. St. at L. 603 c 3592 § 23), providing a punishment for knowingly making a false affidavit as to any material fact required to be proved in a naturalization proceeding, is to be regarded as an amendment of U. S. Rev. St. § 5395, providing that in all cases where any oath or affidavit is made or taken, under or by virtue of any law relating to the naturalization of aliens, any person who knowingly swears falsely shall be punished by imprisonment, etc. U. S. v. Dupont, 176 Fed. 823.

90. See generally Indictments and Informations [22 Cyc 157].

[a] **Sufficiency of indictment.**— (1) An indictment under U. S. Rev. St. § 5395, which punishes false swearing in naturalization proceedings, but in which the crime is not denominated perjury, is good if it states facts constituting an offense under that section and concludes "contrary to the form of the statutes," although it describes the crime as perjury. U. S. v. Lehman, 39 Fed. 768. (2) Such an indictment need not aver that the deputy clerk of the state court who administered the oath taken was duly appointed, or that he was authorized to administer the oath. U. S. v. Lehman, 39 Fed. 49. (3) Nor is it necessary to allege that the oath taken was "required" by the naturalization laws. It is sufficient to allege that it was "authorized." U. S. v. Lehman, 39 Fed. 49. (4) An indictment for perjury alleging the making of a false affidavit relative to an application for naturalization thereafter to be made, and that the affiant at the time of making the affidavit was sworn as a witness in support of said application, is sufficient. It is unnecessary to aver that such application was afterward made, or that the affidavit was used. State v. Whittemore, 50 N. H. 245. (5) An indictment for perjury alleged to have been committed by respondent in his declaration of intention to become a citizen of the United States need not set forth the declaration; an allegation in such indictment which states that the application of respondent to become a citizen was before "the district court of the said United States then and there holden for the said district of Massachusetts," and that said respondent "did then and there, in the said matter and proceeding, knowingly swear falsely and make oath before said court," is a sufficient designation of the court, and a distinct averment that the oath was made before it. U. S. v. Walsh, 22 Fed. 644.

[b] **Variance.**—An indictment under U. S. Rev. St. § 5395, charging that defendant made a false affidavit before a notary public "in a proceeding for naturalization" then and there pending in a stated court "touching the matters in issue and material in said proceedings," cannot be construed to charge the making of the affidavit "under or by virtue of any law relating to the naturalization of aliens," within the first clause of said section, but clearly charges the offense under the second clause, and is not sustained by evidence showing that the affidavit was made before the proceeding was instituted. Moore v. U. S., 144 Fed. 962, 75 CCA 670.

[c] **Evidence.**—Where the indictment alleges the perjury to have been committed by respondent in his application for naturalization, the record of the court before which the application was made, signed, and sworn to by him is the best and only evidence that can be produced. U. S. v. Walsh, 22 Fed. 644. As to secondary evidence of records see Evidence [17 Cyc 497].

91. U. S. v. Janke, 183 Fed. 277; Holmgren v. U. S., 156 Fed. 439, 84 CCA 301 [aff 217 U. S. 509, 30 SCt 588, 54 L. ed. 861, 19 AnnCas 778].

92. Holmgren v. U. S., 156 Fed. 439, 444, 84 CCA 301 [aff 217 U. S. 509, 30 SCt 588, 54 L. ed. 861, 19 AnnCas 778] (where it was held proper to refuse to charge the jury that the perjury must be corrupt and malicious as well as knowing and willful. The court said: "The court in charging the jury instructed them that they must be satisfied beyond all reasonable doubt, not only that the testimony alleged to be given was false, but that it was willfully and knowingly false, 'that he willfully and knowingly testified falsely.' This was clearly sufficient").

93. See Perjury [30 Cyc 1411].

[a] **Residence within the state** (1) for at least one year prior to the date of the application is a material fact to be proved on final hearing, and is to be stated in the petition, and a knowingly false statement in reference thereto would be perjury. U. S. v. Dupont, 176 Fed. 823. (2) The rule was otherwise under the former law, no oath as to residence being authorized or required on the part of the applicant. U. S. v. Grottkau, 30 Fed. 672; State v. Helle 20 S. C. L. 290.

94. U. S. v. Severino, 125 Fed. 949; State v. Whittemore, 50 N. H. 245, 247, 9 AmR 196 (where the court said: "False swearing in a State court, if allowed to go unpunished, has a tendency to impair the general usefulness of the tribunal and the dignity of the State. If it is to be

courts cannot entertain jurisdiction in the absence of a statute conferring it.[95] Such a statute now exists,[96] and a person who knowingly swears falsely to a material fact in naturalization proceedings in a state court may be indicted and punished therefor in a federal court.[97]

[§ 170] **3. False Representation of Citizenship.** It is made a criminal offense for any person to falsely represent himself to be a citizen of the United States for any fraudulent purpose without having been duly admitted to citizenship.[98]

[§ 171] **4. Procuring Certificate by Fraud.** Procuring, or attempting to procure, admission to citizenship by fraud in various specified methods, as by assuming a fictitious name, or identity, or by falsely making, forging, or counterfeiting any oath, affidavit, or certificate, etc., is made punishable by fine or imprisonment, or both.[99] This section applies to written oaths, and not to false swearing in open court which is punishable under another section.[1] Whether this section includes acts by a person other than the person applying to be admitted as a citizen or appearing as a witness for such person is not definitely settled.[2]

Alleging fraud. The acts which constitute the fraud must be alleged in the indictment, general statements that fraud was perpetrated being insufficient.[3]

[§ 172] **5. Use or Possession of False or Forged Certificate of Citizenship.** It is made a crime to knowingly use, or aid and abet another in using, a false, forged, or counterfeit certificate of citizenship purporting to have been issued under any law of the United States.[4]

Unlawfully using certificate to procure registration. So also any person who, knowing that a certificate has been unlawfully issued, uses it to procure, or in attempting to procure, his registration as a voter, or who so uses a certificate issued to another person, is liable to fine or imprisonment, or to both.[5]

Unlawful possession of false certificate. It is likewise made an offense to have in one's possession a false, forged, or counterfeit certificate, without lawful excuse and with knowledge of its true character, with intent unlawfully to use the same.[6] Its actual use for an unlawful purpose is not necessary.[7]

[§ 173] **6. Sale of Certificate.** The sale of a certificate of naturalization to a person other than him to whom it was originally issued is a criminal offense under the statutes of the United States;[8] and it is immaterial that such certificate was procured by fraud, or that it was forged, if it is apparently valid.[9]

optional with the prosecuting officers of the general government whether perjury in the State court is to be punished, we have the extraordinary spectacle of a State unable to punish an offence committed in its own courts. It would certainly seem almost as proper that the State courts should have power to punish a witness who has testified falsely before them in a naturalization case, as that they should have the power to punish contempt of court committed during the pendency of such a case"); Rump v. Com., 30 Pa. 475. See also State v. Kirkpatrick, 32 Ark. 117. Contra Peo. v. Sweetman, 3 Park. Cr. (N. Y.) 358.

95. U. S. v. Severino, 125 Fed. 949, 954 (where it was said: "It is concluded that state courts, while entertaining jurisdiction in naturalization proceedings, remain state courts, and that perjury committed by a witness in such a proceeding is punishable by the sovereignty whose justice it offends (that is, the state court); and that the federal court cannot entertain jurisdiction in the absence of a federal statute conferring it").

96. U. S. Rev. St. § 5395.

97. Holmgren v. U. S., 217 U. S. 509, 30 SCt 588, 54 L. ed. 861, 19 AnnCas 778; U. S. v. Dupont, 176 Fed. 823; Schmidt v. U. S., 133 Fed. 257, 66 CCA 389.

98. Act March 4, 1909 (35 U. S. St. at L. 1103 c 321 § 79). See also U. S. Rev. St. § 5428; Green v. U. S., 150 Fed. 560, 80 CCA 362 (to procure registration as voter).

[a] **The word "duly"** applies to regularity and compliance with requirements rather than to the truth of the facts involved in the admission, and where the person charged was granted a certificate of citizenship by an order of court, both of which are regular in form and have not been vacated, it is impossible to charge "unlawful use" based solely upon a further allegation of knowledge that the certificate had not been "duly" made. U. S. v. Hamilton, 157 Fed. 569.

99. Act March 4, 1909 (35 U. S. St. at L. 1102 c 321 §§ 74–76). See also Act June 29, 1906 (34 U. S. St. at L. 602 c 3592, §§ 16,17); U. S. v. Raisch, 144 Fed. 486; U. S. v. York, 131 Fed. 323.

[a] **Offense a misdemeanor and not a felony.**—U. S. v. York, 131 Fed. 323; Berkowitz v. U. S., 93 Fed. 452, 35 CCA 379.

1. U. S. v. Lehman, 39 Fed. 768. See supra § 168.

2. See U. S. v. Raisch, 144 Fed. 486 (holding that the statute includes also the acts of persons other than those above mentioned); U. S. v. York, 131 Fed. 323 (holding that the statute is directed only against the acts of applicants for naturalization and witnesses in such proceedings).

[a] **As used in the act of March 2, 1813** (2 U. S. St. at L. 811 c 43 § 13), the words "if any person shall falsely make, forge," etc., a certificate of naturalization are intended to be general in their operation, and are not confined to seamen. U. S. v. Randolph, 27 F. Cas. No. 16,120, 1 Pittsb. (Pa.) 24.

3. U. S. v. Lehman, 39 Fed. 768, 772 (where the court said: "If the fraud consisted in making a false oath or statement whereby the court was deceived, the indictment ought to say so, and aver what the statement was. It will not do to say that the fraud in the procurement of the certificate of citizenship consisted in the fact that a person obtained citizens papers who was not legally entitled to them, but that the means by which they were so obtained is unknown, because the means resorted to—the acts done to obtain the certificate—are the very things which the law requires to be alleged and proven; and furthermore, the certificate, although unlawfully issued, may not have been issued under such circumstances as amounted to a fraud").

4. Act March 4, 1909 (35 U. S. St. at L. 1102 c 321 § 77). See also Act June 29, 1906 (34 St. at L. 602 c 3592 § 19).

[a] **A certified copy of the record of a court** showing the admission of an alien to citizenship constitutes a "certificate of citizenship," within the meaning of the statute. Dolan v. U. S., 133 Fed. 440, 69 CCA 274. See U. S. Rev. St. §§ 5425, 5427.

[b] **The clause "purporting to have been issued under the provisions of any law of the United States relating to naturalization"** refers to certificates which purport upon their face to have been issued after a compliance on the part of the alien named therein with the naturalization laws and as evidence of that fact, and a certificate to sustain an indictment based on such statute need not recite that it is issued under a law of the United States, there being, in fact, no statute authorizing or requiring the issuance of such certificates. Dolan v. U. S., 133 Fed. 440, 69 CCA 274.

[c] **A "false" certificate of citizenship,** within the meaning of the statute, is not limited to one which is forged, but includes one which is false in its recital of facts. Dolan v. U. S., 133 Fed. 440, 451, 69 CCA 274 (where the court said: "It is manifest that the term 'false' cannot be restricted to the meaning of 'forged' without rendering the term entirely nugatory, for the statute itself employs both the term 'forged' and 'counterfeit,' in addition to the term 'false.' It is the duty of the court to give some effect, if possible, to every word which the legislature employs. There is nothing in the context, or the mischief to be corrected, or the consequences entailed by giving to every word of the statute its full force, to justify the striking out of one of its terms. A certificate which is false in respect of those facts which alone would justify its issuance is as much within the mischief of the statute as a forged or counterfeit instrument").

5. Act March 4, 1909 (35 U. S. St. at L. 1103 c 321 § 78). See also U. S. Rev. St. § 5426; In re Coleman, 6 F. Cas. No. 2,980, 15 Blatchf. 406; U. S. v. Burley, 25 F. Cas. No. 14,686, 14 Blatchf. 91.

6. Act March 4, 1909 (35 U. S. St. at L. 1102 c 321 § 77). See also U. S. Rev. St. § 5425.

7. Green v. U. S., 150 Fed. 560, 80 CCA 362.

8. Act March 4, 1909 (35 U. S. St. at L. 1102 c 321 § 76). See also U. S. Rev. St. § 5424.

[a] **Nature of offense.**—U. S. Rev. St. § 5424, providing that any person who utters, sells, etc., any false naturalization certificate shall be punished, etc., not having declared such offense a felony, and having repealed the former acts making it such, the offense was reduced to a misdemeanor. Berkowitz v. U. S., 93 Fed. 452, 35 CCA 379.

9. U. S. v. Ragazzini, 50 Fed. 923.

[a] **The certificate, the sale of**

[§ 174] 7. **Unlawful Issuance of Certificate.** The present law[10] makes it a felony for any clerk or other person to issue or be a party to the issuance of a certificate of citizenship contrary to law, except on a final order under the hand of the proper court.[11]

ALIGHT. To get down from or descend.[1]

ALIGNMENT. The act of adjusting a line; the state of being so adjusted; and, in terms of engineering, "the ground plan of a road or other work as distinguished from its profile."[2]

ALIKE. Equally.[3]

ALIMENTOS. In Spanish law support and maintenance.[4] The code provisions[5] governing liability for alimentos have been thus epitomized:[6] "The right to support [alimentos] is granted (1) to spouses[7] inter se; (2) to legitimate descendants and ascendants[8] inter se; (3) to parents[9] and certain legitimated and acknowledged natural children;[10] (4) to other illegitimate children;[11] and (5) to brothers and sisters."[12] The right to support cannot be renounced, assigned, nor set off against a debt due from the recipient.[13] Under the codes of civil law countries the liability for support ceases with the claimant's death, attainment of self-support, or bad conduct in certain cases, or with financial inability on the part of one charged.[14]

ALIMONY.[15]

ALINDAMIENTO. In Spanish law the act of delimiting the boundaries of land.[16]

ALIO INTUITU. With another view or object.[17]

ALIQUID CONCEDITUR NE INJURIA REMANEAT IMPUNITA, QUOD ALIAS NON CONCEDERETUR.[18]

ALIQUIS NON DEBET ESSE JUDEX IN PROPRIA CAUSA, QUIA NON POTEST ESSE JUDEX ET PARS.[19]

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which is made criminal by the act of March 3, 1813 (2 U. S. St. at L. 811 c 43 § 13), is a certified copy of the act by which one was naturalized, and does not include a certificate signed by the clerk, and under the court's seal, to the effect that one, on the day named therein, was admitted to citizenship. U. S. v. Makins, 26 F. Cas. No. 15,710.

10. Act June 29, 1906 (34 U. S. St. at L. 599 c 3592 § 18).

11. U. S. v. Stoller, 180 Fed. 910 (holding that this section does not make it a felony to issue a naturalization certificate without final order under the hand of the court, but that the felony consists in issuing it contrary to the provisions of the act, unless it is on a final order under the hand of the court).

1. Miller v. Cleveland, etc., R. Co., 145 Ill. A. 431, 433.

2. Chester v. Leonard, 68 Conn. 495, 507, 37 A 397 [cit Webster Int. D.].

[a] **Intent and context.**—"While the word 'alignment' means the ground plan of a work, yet, when used in a contract for the construction of such work, to determine the meaning as used and understood by the parties, resort must be had to the entire terms and parts of the agreement. The agreement in question was to construct a levee along the front of the Arkansas river, as shown on maps and profiles, prepared by the defendant. The alignment thus shown was subject to changes within such reasonable limits as might be found desirable as the work progressed, and which would not materially change the character and cost of the work. It did not, however, contemplate a radical change from dry ground, as the evidence established that was where the line was located, as shown on the profile, to a place 2,600 feet distant, where the character of the ground was wet, the earth placed in the embankment retaining the moisture, and the cost of construction increased nearly double." Plum Bayou Levee Dist. v. Roach, 174 Fed. 949, 953, 99 CCA 453.

[b] **Alignment in engineering.**—A contract for the construction of a village waterworks provided inter alia that "the engineer could make such changes in the 'forms, dimensions, and alignment of the work' as might in his opinion and that of the Board of Water Commissioners be necessary for its proper fulfillment." The court, in construing the contract, said: "It is contended by the defendants that 'alignment' means simply an 'adjusting to a line,' and that a change in alignment cannot be construed to cover a change of line. The word in question carries a wider meaning than that thus assigned to it. It signifies not only the act of adjusting to a line, but the state of being so adjusted, and in terms of engineering is used to denote the ground plan of a road or other work as distinguished from its profile." Chester v. Leonard, 68 Conn. 495, 507, 37 A 397.

3. Loveacres v. Blight, Cowp. 352, 357, 98 Reprint 1125 (holding that a testamentary gift to two or more alike, or to be enjoyed alike, creates a tenancy in common). See also Bunch v. Hurst, 3 S. C. Eq. 273, 288, 5 AmD 551 (where it was held that the words "share and share alike" in a will created a joint tenancy).

4. Escriche Diccionario. See Maintenance [25 Cyc 1664]; Support [37 Cyc 608].

[a] **The amount of alimentos** is proportioned "to the capital or means of the persons giving it and to the requirements of the recipient." Spain: Civ. Code art 146; Philippine: Civ. Code art 146. Award of fifty dollars monthly upheld. Lerma v. Mamaril, 9 Philippine 118, 119, 5 Off. Gaz. 912.

5. Spain.—Civ. Code art 143.
Philippine.—Civ. Code art 143.

6. Yangco v. Rohde, 1 Philippine 404, 407, 1 Off. Gaz. 412 (123) (per Arellano, C. J.).

7. Civ. Code art 143 (1).

[a] **Wife.**—Pelayo v. Lauron, 12 Philippine 453, 456, 7 Off. Gaz. 213; Lerma v. Mamaril, 9 Philippine 118, 5 Off. Gaz. 912; Mendoza v. Ibanez, 4 Philippine 666, 669, 4 Off Gaz. 567.

8. [a] **Children.**—(1) A child may sue for support where the father has abandoned it and is about to leave the country, notwithstanding a local statute fixing the manner in which support shall be furnished. Rodriguez v. Cuell, 1 Porto Rico Fed. 272, 273. (2) The parent is liable for support of all children even natural and illegitimate. Davila v. San Juan Light, etc., Co., 1 Porto Rico Fed. 87, 89.

[b] **A daughter-in-law** is not entitled to medical assistance from her husband's parents, and a physician who renders her such services, although at their request, cannot recover from the parents in the absence of an express promise to pay. Pelayo v. Lauron, 12 Philippine 453, 455, 7 Off. Gaz. 213; Sentence Supr. Trib. May 11, 1897.

[c] **Parents.**—Children are bound to support parents, regardless of their age. Borrero v. Compania Anonyma, De la Luz Electrica de Ponce, 1 Porto Rico Fed. 144, 145.

9. See Sentence Supr. Trib. Nov. 19, 1885, 58 Jur. Civ. 736. Compare Civ. Code art 1894.

10. Civ. Code art 143.
11. Civ. Code art 143.
12. Civ. Code art 143.
13. Spain.—Civ. Code art 151.
Philippine.—Civ. Code art 151.
14. Spain.—Civ. Code art 152.
Philippine.—Civ. Code art 152.

[a] **Adultery.**—In the Philippines there has been added to the grounds, by judicial construction, that of adultery. Quintana v. Lerma, 24 Philippine 285, 286, 11 Off. Gaz. 503.

15. **Alimony:** Generally see Divorce [14 Cyc 742].
Acceptance, as precluding new trial see New Trial [29 Cyc 734].
Commitment for refusal to pay, as imprisonment for debt see Constitutional Law [8 Cyc 883].
Continuance of motion for see Continuances [9 Cyc 105].
Contract in settlement of claim for see Contracts [9 Cyc 520].
Decree for, provable against bankrupt see Bankruptcy [5 Cyc 326].
Enforcement of payment by contempt proceedings see Divorce [14 Cyc 799].
In action for annulment of marriage see Marriage [26 Cyc 917].
Ne exeat to prevent husband's departure to avoid payment see Ne Exeat [29 Cyc 387].
Removal of cause see Removal of Causes [34 Cyc 1231].
Scire facias to enforce payment see Scire Facias [35 Cyc 1150].
Separate maintenance of wife see Husband and Wife [21 Cyc 1610].

16. Escriche Diccionario. See Boundaries [5 Cyc 930].

17. Burrill L. D.

[a] **Used as in the expression,** "The act . . . did not, as it seems to me, contemplate a case like the present, but was passed alio intuitu." Per Ellenborough, C. J., in Payne v. Spencer, 6 M. & S. 231, 234, 105 Reprint 1229.

18. A maxim meaning "Something is conceded lest a wrong should remain unpunished which otherwise would not be conceded." Bouvier L. D. [cit Coke Litt. 197].

19. A maxim meaning "No man can be at once judge and suitor." Broom Leg. Max.: Coke Litt. 141a.

[a] **Applied in:** Donovan v. Van De Mark, 78 N. Y. 244, 247; Downing v. Charlottetown, 2 Pr. Edw. Isl. 4.

[b] **In the leading case** of Dimes v. Grand Junction Canal, 3 H. L. Cas. 759, 793, 10 Reprint 301, Lord Campbell said: "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an in-

ALIQUOT. A particular fraction of a whole.[20]

ALITER. Otherwise.[21]

ALIUD EST CELARE, ALIUD TACERE.[22]

ALIUD EST DISTINCTIO, ALIUD SEPARATIO.[23]

ALIUD EST POSSIDERE, ALIUD ESSE IN POSSESSIONE.[24]

ALIUD EST VENDERE, ALIUD VENDENTI CONSENTIRE.[25]

ALIUNDE.[26] From another source or quarter.[27]

ALIVE.[28] In life; living; in the state in which the organs of the body perform their functions.[29]

ALIZARIN. A red coloring matter, of the character of Turkish reds, extracted from madder root or made from anthracene, and extensively used as a dyestuff.[30]

ALJAMA. In Spanish law one of the names for the Jewry or ghetto and also for the tribute exacted from the Jews by the kings of Spain.[31]

ALKALOID. "The term 'alkaloid,' as used

terest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interests, but to avoid the appearance of labouring under such an influence."

20. Skehill v. Abbott, 184 Mass. 145, 146, 68 NE 37 (where Loring, J., said: "The defendants contend that unless a plaintiff has stipulated for such a fraction as is contained in the whole without a remainder no resulting trust can be created, that is to say, if one person contributes $500 where the purchase money is $2,500, stipulating for an undivided fifth interest, a resulting trust is raised in his favor, but if he has parted with $1,000 for the same purchase, stipulating for an undivided two fifths interest, he would not be entitled to anything by way of a resulting trust. They arrive at this extraordinary conclusion by finding first that the court in some of the cases cited above has said that it is not enough for a plaintiff to have contributed to the purchase money, but he must have stipulated for an aliquot interest in the property; and then by finding that it is laid down in the dictionaries that the word 'aliquot' means something contained in another a certain number of times without leaving a remainder. Whatever definition may be given in the dictionaries, the word 'aliquot' was used in these opinions to mean a 'particular fraction of the whole,' as distinguished from a general contribution to the purchase money"). To same effect McGowan v. McGowan, 14 Gray (Mass.) 119, 121, 74 AmD 668.

21. Burrill L. D.

[a] **Used in the reports** to introduce a converse proposition or exception to a rule stated, as in the expression, "It has been held aliter ever since," in Copley v. Hepworth, 12 Mod. 1, 88 Reprint 1124.

22. A maxim meaning "To conceal is one thing; to be silent is another thing." Burrill L. D. [cit Carter v. Boehm, 3 Burr. 1905, 1910, 97 Reprint 1162, 13 ERC 501].

[a] **Applied in:** Roseman v. Canovan, 43 Cal. 110, 118; Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 425, 59 AmD 192; Matthews v. Bliss, 22 Pick. (Mass.) 48, 53; Fletcher v. Commonwealth Ins. Co., 18 Pick. (Mass.) 419, 420; Graeme v. Cullen, 23 Gratt. (64 Va.) 266, 302 [cit 1 Story Eq. Jur. 385].

[b] **Mr. Justice Gray,** in Stewart v. Wyoming Cattle Ranche Co., 128 U. S. 383, 388, 9 SCt 101, 32 L. ed. 439, said: "In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; aliud est tacere, aliud celare; a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

[c] **Lord Mansfield,** in the leading case of Carter v. Boehm, 3 Burr. 1905, 1910, 97 Reprint 1162, 13 ECR 501, 1 Smith Lead. Cas. (8th ed) 550 [quot Herbert v. Mercantile F. Ins. Co., 43 U. C. Q. B. 384], upon the question of what concealment will vitiate a policy of marine insurance, said: "Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon. Aliud est celare; aliud, tacere: neque enim id est celare quicquid reticeas; sed cum quod tu scias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire. This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed."

23. A maxim meaning "Distinction is one thing; separation is another." Black L. D.

24. A maxim meaning "It is one thing to possess; it is another to be in possession." Black L. D.

[a] **Applied in:** Colt v. Coventry, Hob. 140, 80 Reprint 290.

25. A maxim meaning "To sell is one thing; to consent to a sale [seller] is another thing." Burrill L. D.

26. Aliunde evidence see Evidence [17 Cyc 567].

27. Burrill L. D.

[a] **Used in the expression,** "And it appeared aliunde that the name of the vicar was," etc., in 1 Greenleaf Ev. § 291.

[b] **For an illustration of the use of this word** see Sherwood v. Waller, 20 Conn. 262, 271, where it is said: "Nothing is said in the deed itself, nor proved aliunde, about the conveyance of a lien for money."

28. Alive:

Birth of issue, as requisite of curtesy see Curtesy [12 Cyc 1007].

Evidence that child was born see Homicide [21 Cyc 1001].

29. Century D.

[a] **In construing a will,** (1) providing "if any of my children should die without issue alive," the court said: "If 'dying without issue' imports an indefinite failure; and dying without issue alive imports the same; the word 'alive' has no operation assigned to it; and to give a word no operation when it is capable of one is no less than to strike it out and alter the testator's will: yet who does not see that the word 'alive' refers to the devisee's death as the antecedent, and describes the state or condition of issue at that precise time. The meaning naturally and grammatically, and accordingly to the analogy of language is, 'if he die, without issue alive when he dies.' It cannot mean, if he die without issue a century hence alive, unless a liberty be taken of interpolating an antecedent in lieu of that in the will." Den v. Schenck, 8 N. J. L. 29, 40. (2) In construing a bequest, providing that "at the death or marriage of my said wife, it is my will, that all my estate, heretofore bequeathed, shall be equally divided between my children that are alive, or their bodily children," Sherwood, C. J., said: "The question at once arises, to what period of time do the words 'that are alive' refer? Obviously I think, to the death or marriage of the wife. . . . If these views are correct, if the words 'that are alive' refer to the future, refer to the time when the particular estate was to cease, and the estate in remainder was to take effect, then it must needs follow that those words are the legal equivalents of 'then living;' in which case they come within the rule of the authorities already quoted, and the remainder created by the will must be held a contingent, and not a vested one; for until the death or marriage of the tenant of the particular estate it was impossible to ascertain who of the children of the testator, or their bodily children, would be alive to take in remainder." De Lassus v. Gatewood, 71 Mo. 371, 380.

[b] **In an indictment for the larceny** of two calves the words "'the same being living animals,' may be rejected as surplusage. When animals are stolen alive, it is unnecessary to state them to be alive. The law presumes this, unless the contrary is stated." Kollenberger v. Peo., 9 Colo. 233, 236, 11 P 101.

30. In re Schaeffer, 2 App. (D. C.) 1, 4.

[a] **Other definitions.**—(1) "In Watts' Dictionary of Chemistry, volume 1, page 113, published in 1866, Alizarin is stated to be a red coloring matter obtained from madder, first prepared by Robiquet and Colin. This was in 1826. The correct formula of Alizarine, $C_{14}H_8O_4$, was first arrived at by Strecker, in 1866. It means that there are 14 atoms of carbon, 8 atoms of hydrogen, and 4 atoms of oxygen, in each molecule." Per Blatchford, J., in Cochrane v. Badische Anilin, etc., Fabrik, 111 U. S. 293, 299, 4 SCt 455, 28 L. ed. 433 [rev 2 F. Cas. No. 719, 16 Blatchf. 155] (patent case). (2) "Alizarin, whether natural or artificial, is a color for dyeing fabrics, and, though originally used for producing 'Turkey red,' was early used for producing a variety of colors, according to the nature of the mordant which was employed." Farbenfabriken v. U. S., 102 Fed. 603, 605, 42 CCA 525.

[b] **"The name has its origin** in the trade name—Alizari—applied to madder in the countries bordering on the Mediterranean Sea." In re Schaeffer, 2 App. (D. C.) 1, 4.

[c] **Alizarin color.**—One of the class of pigments long known in commerce as "lakes," shown by the government chemist to be a characteristic alizarin color, is properly on the free list as an alizarin color within the customs acts. Keppelmann v. U. S., 116 Fed. 777, 779.

31. Escriche Diccionario.

among chemists, has a definite meaning and is applied to a class of compounds found in plants which have the properties of an alkali in their capacity, or tendency to neutralize acids."[32]

ALL.[33] [§ 1] **A. In General—1. Definition.** Any;[34] every;[35] every one;[36] every one of;[37] every one of which;[38] every part;[39] each;[40] each and every;[41] each or every one of;[42] the whole;[43] the whole amount;[44] the whole number;[45] the whole number of;[46] the whole number of particulars;[47] the whole time; the whole extent;[48] the whole quantity, extent, duration, amount, quality, or degree of,[49] the entire number of, each individual or member being taken separately;[50] the entire quantity.[51] The word "all" is a very comprehensive one.[52] It does not necessarily mean absolutely all, but is frequently used to signify all of a particular class,[53] being used in this respect as a word ejusdem generis.[54] While it is primarily a term of number,[55] it has a distributive as well as a collective meaning,[56] and is sometimes used as a mere word of emphasis.[57]

[§ 2] **2. Context, Intent, and Demand of Sound Reason.** In statutes, as well as in common parlance, the word is a general rather than a universal term, and it is used in one sense or the other according to the demands of sound reason.[58] The generality of the word is frequently restrained by the

32. In re Mallinckrodt Chemical Works, 66 Fed. 746, 747 (where it was held that hydrochlorate or muriate of cocaine, known to chemists as an alkaloid salt "which is prepared for use by treating crude cocaine with hydrochloric acid to form the salt, and by washing it with alcohol to remove certain impurities found in crude cocaine," is properly dutiable as an alkaloid salt and not as a "medicinal preparation in the preparation of which alcohol is used," within the tariff acts).

[a] **Crude cocaine.**—In Hirzel v. U. S., 58 Fed. 772, 7 CCA 491 [aff 53 Fed. 1006], it was held that crude cocaine is dutiable as an alkaloid salt.

33. Distinguished from: Each see Each [14 Cyc 1130]; Either see Either [14 Cyc 1232].

34. Chicot County v. Lewis, 103 U. S. 164, 167, 26 L. ed. 495; Matz v. Chicago, etc., R. Co., 85 Fed. 180, 184; Erie Wringer, etc., Co. v. National Wringer Co., 63 Fed. 248, 249; Harris v. Allen, 15 Fed. 106, 108; Sussex County v. Jacobs, 11 Del. 330, 336; Moore v. Miller, 5 App. (D. C.) 413, 431; Indiana, etc., Co. v. Neal, 166 Ind. 458, 464, 77 NE 850, 9 AnnCas 424; Ludwig v. Cory, 158 Ind. 582, 595, 64 NE 14; U. S. v. Cohen, 2 Ind. T. 474, 52 SW 38, 45; State v. Haug, 95 Iowa 413, 415, 64 NW 398, 29 LRA 390; Dubuque County v. Dubuque, etc., R. Co., 4 Greene (Iowa) 1, 4; Covington v. Cincinnati, etc., R. Co., 144 Ky. 646, 648, 139 SW 854; Thomas v. Thomas, 110 SW 853, 855, 33 KyL 700; Livermore v. Swasey, 7 Mass. 213, 227; Burbon v. Tuite, 78 Mich. 363, 375, 44 NW 282, 7 LRA 73; Mills v. State, 53 Nebr. 263, 274, 73 NW 761; Virginia, etc., R. Co. v. Ormsby County, 5 Nev. 341, 348; Montclair v. New York, etc., R. Co., 45 N. J. Eq. 436, 442, 18 A 242; Agawam Bank v. Strever, 18 N. Y. 502, 510; Peo v. Clark, 7 N. Y. 385, 390, 2 Edm. Sel. Cas. 280, 11 NYLegObs 4; Weinstein v. Sinel, 133 App. Div. 441, 444, 117 NYS 346; Cox v. Island Min. Co., 65 App. Div. 508, 515, 73 NYS 69; Heaton v. Wright, 10 HowPr (N. Y.) 79, 83; Purdy v. Peo., 4 Hill (N. Y.) 384, 394; Hines v. Wilmington, etc., R. Co., 95 N. C. 434, 440, 59 AmR 250; Buckwalter v. Black Rock Bridge Co., 38 Pa. 281, 287; Heyler v. Watertown, 16 S. D. 25, 27, 91 NW 334; Jones v. Whitworth, 94 Tenn. 602, 609, 30 SW 736; McCuistion v. Fenet, (Tex Civ. A.) 144 SW 1155, 1157; Cooper v. Utah Light, etc., Co., 35 Utah 570, 584, 102 P 202, 136 AmSR 1075; Tarbell v. Gifford, 79 Vt. 369, 371, 65 A 80; Moore v. Virginia F. & M. Ins. Co., 28 Gratt. (69 Va.) 508, 516, 26 AmR 373; Powell v. Howells, L. R. 3 Q. B. 654; Gilmore v. Lockhart, (Hil. T. 6 Vict.) R. & J. Dig. 2075; Bourgon v. Cumberland, 22 Ont. L. 256, 261, 16 OntWR 583, 1 OntWN 1012, 17 OntWR 438, 2 OntWN 244; Re Brewer, 19 Ont. L. 411, 416, 13 OntWR 954, 1087; McBean v. Kinnear, 23 Ont. 313, 319; Bouvier L. D. [quot Peo. v. Van Cleave, 187 Ill. 125, 134, 58 NE 422; Peo. v. Fidelity, etc., Co., 153 Ill. 25, 36, 38 NE 752, 26 LRA 295].

35. Posey v. Pressley, 60 Ala. 243, 246; Swindell v. State, 143 Ind. 153, 170, 42 NE 528, 35 LRA 50; Field v. Thistle, 58 N. J. Eq. 339, 43 A 1072; Young v. Du Bois, 60 Misc. 381, 382, 113 NYS 456; Campbell v. Cincinnati, 49 Oh. St. 463, 472, 31 NE 606; Bloom v. Xenia, 32 Oh. St. 461, 467; Stone v. Elliott, 11 Oh. St. 252, 258.

36. Heitmann v. Savannah Commercial Bank, 6 Ga. A. 584, 598, 65 SE 590; State v. Maine Cent. R. Co., 66 Me. 488, 510; Craig Univ. D. [quot State v. Cummings, 17 Nebr. 311, 316, 22 NW 545].

37. Encyclopædic D. [quot Pittsburgh, etc., R. Co. v. Lightheiser, 163 Ind. 247, 259, 71 NE 218].

38. Field v. Thistle, 58 N. J. Eq. 339, 341, 43 A 1072.

39. Craig Univ. D. [quot State v. Cummings, 17 Nebr. 311, 316, 22 NW 545].

40. Shaver v. Ewald, 142 Ky. 472, 475, 134 SW 906; Towle v. Delane, 144 Mass. 95, 100, 10 NE 769; Sherburne v. Sischo, 143 Mass. 439, 442, 9 NE 797; McGee v. Dillon, 103 Pa. 433, 435; Burnett v. Great North of Scotland R. Co., 10 App. Cas. 147, 170.

41. Burnett v. Great North of Scotland R. Co., 10 App. Cas. 147, 170; Stroud Jud. D.

42. Sherburne v. Sische, 143 Mass. 439, 442, 9 NE 797; McGee v. Dillon, 103 Pa. 433, 435. See also The Distilled Spirits, 11 Wall. (U. S.) 356, 364, 20 L. ed. 167; Donahue v. Coleman, 49 Conn. 464, 465.

43. Joslin v. Williams, 76 Nebr. 594, 600, 107 NW 837, 112 NW 343; State v. Babcock, 22 Nebr. 33, 37, 33 NW 709; Sweeney v. Warren, 127 N. Y. 426, 437, 28 NE 413, 24 AmSR 468. See also Guest v. Opdyke, 31 N. J. L. 552, 555.

44. Beckstead v. Griffith, 11 Ida. 738, 748, 83 P 764.

45. State v. Maine Cent. R. Co., 66 Me. 488, 510; Craig Univ. D. [quot State v. Cummings, 17 Nebr. 311, 316, 22 NW 545].

46. Encyclopædic D. [quot Pittsburgh, etc., R. Co. v. Lightheiser, 163 Ind. 247, 259, 71 NE 218]; Webster D. [quot State v. Cummings, 17 Nebr. 311, 316, 22 NW 545].

[a] **"The word 'all,' as an adjective of number,** means the whole number of; every one of. . . . We would not be understood, however, as asserting that the word, as used in legislation, is always to be understood as an all inclusive one. As so used, it is a general term, which is to be understood as comprehending whatever is within the outmost circle of the meaning of the word, unless, after subjecting the statute to interpretation and construction, there is sufficient reason for holding that the term was not used in so broad a sense." Pittsburg, etc., R. Co. v. Lightheiser, 163 Ind. 247, 259, 71 NE 218.

47. Heitmann v. Commercial Bank, 6 Ga. A. 584, 65 SE 590, 597; State v. Maine Cent. R. Co., 66 Me. 488, 510. See also Frazier v. Warfield, 13 Md. 279, 290, 291.

48. Craig Univ. D. [quot State v. Cummings, 17 Nebr. 311, 316, 22 NW 545].

49. Webster D. [quot State v. Cummings, 17 Nebr. 311, 316, 22 NW 545]. See also Olson v. Cook, 57 Minn. 552, 59 NW 635.

50. Standard D. [quot Young v. DuBois, 60 Misc. 381, 382, 113 NYS 456].

51. Beckstead v. Griffith, 11 Ida. 738, 748, 83 P 764.

52. Superior v. Norton, 63 Fed. 357, 12 CCA 469; Cousins v. Paxton, etc., Co., 122 Iowa 465, 98 NW 277; Battertons v. Porter, 2 Litt. (Ky.) 388, 389; Murray v. Spencer, 24 Md. 520, 524; Howe Sewing Mach. Co. v. Lorimer, 5 Pa. Co. 660; Kellett v. Kellett, 94 Tex. 206, 59 SW 809; Willis v. Kalmbach, 109 Va. 475, 64 SE 342, 21 LRANS 1009.

[a] **A more comprehensive word cannot be found** in the English language. Moore v. Virginia F. & M. Ins. Co., 28 Gratt. (69 Va.) 508, 516, 26 AmR 373.

53. U. S. v. Herron, 20 Wall. (U. S.) 251, 260, 22 L. ed. 275; Bellamy v. Bellamy, 6 Fla. 62, 107; Phillips v. State, 15 Ga. 518, 521; McCoy v. Fahrney, 182 Ill. 60, 68, 55 NE 61; State v. Morgan, etc., Co., 111 La. 120, 35 S 482; Grumley v. Webb, 44 Mo. 444, 456, 100 AmD 304; Fatchell v. St. Louis, etc., R. Co., 28 Mo. 178, 179; Perkins v. Guy, 2 Mont. 15, 22; State v. Townley, 18 N. J. L. 311, 324; Terr. v. Pinney, 15 N. M. 625, 633, 114 P 367; Morgan v. Taylor, 15 Daly 304, 306, 5 NYS 920; Kunzler v. Kohaus, 5 Hill (N. Y.) 317, 320; McIntyre v. Williamson, 1 Edw. (N. Y.) 34, 39; Com. v. Standard Oil Co., 101 Pa. 119, 146; Willis v. Kalmbach, 109 Va. 475, 64 SE 342, 21 LRANS 1009.

54. Bellamy v. Bellamy, 6 Fla. 62, 107; Stephens v. Duffy, 41 Ind. A. 385, 81 NE 1154, 82 NE 268; State v. Townley, 18 N. J. L. 311, 324; Peaslee v. Fletcher, 60 Vt. 188, 14 A 1, 5, 6 AmSR 103. But see Fry v. Shipley, 94 Tenn. 252, 259, 29 SW 6 (where the ejusdem generis rule did not apply).

55. Chapin v. Wilcox, 114 Cal. 498, 501, 46 P 457; Pittsburgh, etc., R. Co. v. Lightheiser, 163 Ind. 247, 259, 71 NE 218, 660.

56. Young v. Du Bois, 60 Misc. 381, 113 NYS 456.

57. Peo. v. McDonald, 2 Ida. (Hasb.) 10, 11, 1 P 345; Donald v. Dendy, 27 S. C. L. 122 (as merely an expletive).

58. The Distilled Spirits, 11 Wall. (U. S.) 356, 364, 20 L. ed. 167; Rothschild v. Adler, etc., Co., 130 Fed. 866, 867, 65 CCA 350; Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118 Fed. 239, 55 CCA 93; Saunders v. U. S., 73 Fed. 782, 790; U. S. v. Richardson, 9 Fed. 804, 807; Peo. v. McCreery, 34 Cal. 432, 456; Austin v. Berlin, 13 Colo. 198, 22 P 433; Nat. Cash, etc., Co. v. Lesko, 77 Conn. 276, 58 A 967; Donahue v. Coleman, 49 Conn. 464, 465; Macon v. Jones, 67 Ga. 489, 492; Peo. v. McDonald, 2 Ida. (Hasb.) 10, 12, 1 P 345; Blevings v. Peo., 2 Ill. 172, 173; New Bedford R. Co. v. Old Colony R. Co., 120 Mass. 397, 400; Fatchell v. St. Louis, etc., R. Co., 28 Mo. 178, 179; Joslin v. Williams, 76 Nebr. 594, 107 NW 837, 112 NW 343; Ordinary

context.[59] Moreover the meaning of the word may also in some measure depend upon the intention of the parties,[60] or be controlled by long-established usage.[61]

[§ 3] **3. Phrases in Which the Word Has Been Used.** The following phrases have received judicial interpretation: "All aboard,"[62] "all necessary accommodation,"[63] "all accounts, disputes, controversies and reckonings,"[64] "all . . . actions,"[65] "all acts and parts of acts,"[66] "all the advances,"[67] "all the amounts received and distributed,"[68] "all appropriations,"[69] "all arrears,"[70] "all assessments made or levied,"[71] "all banks,"[72] "all bills or notes,"[73] "all bills payable,"[74] "all borrowed money,"[75] "all bridge structures,"[76] "all buildings,"[77]

v. Heishon, 42 N. J. L. 15, 18; Terr. v. Pinney, 15 N. M. 625, 114 P 367; Knight v. Campbell, 62 Barb. (N. Y.) 16; Erskine v. Nelson County, 4 N. D. 66, 58 NW 318, 27 LRA 696; Spiedel Grocery Co. v. Armstrong, 8 Oh. Cir. Ct. 489, 4 Oh. Dec. 498; Kieffer v. Ehler, 18 Pa. 388, 391 [quot Stone v. Elliott, 11 Oh. St. 252, 258]; Lobach v. Riegel, 11 Pa. Dist. 533, 26 Pa. Co. 145; Cape v. Plymouth Cong. Church, 130 Wis. 174, 109 NW 928. See also Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118 Fed. 239, 55 CCA 93.

Language, however general in its form, when used in connection with a particular subject matter is to be presumed to be used in subordination to that matter, and construed and limited accordingly. Grumley v. Webb, 44 Mo. 444, 456, 100 AmD 304.

59. Rothschild v. Adler, etc., Co., 130 Fed. 866, 867, 65 CCA 350; Dickinson v. Saunders, 129 Fed. 16, 21, 63 CCA 666; Superior v. Norton, 63 Fed. 357, 362, 12 CCA 469; Marlborough v. Hebron, 2 Conn. 20, 22; Phillips v. State, 15 Ga. 518, 521; Blevings v. Peo., 2 Ill. 172, 173; Jackson v. Reeves, 53 Ind. 231, 233; Stephens v. Duffy, 41 Ind. A. 385, 81 NE 1154, 83 NE 268; Battertons v. Porter, 2 Litt. (Ky.) 388, 389; Hare v. McIntire, 82 Me. 240, 19 A 453, 17 AmSR 476, 8 LRA 450; State v. Townley, 18 N. J. L. 311, 324; Gilbert v. North American F. Ins. Co., 23 Wend. (N. Y.) 43, 35 AmD 543; Knight v. Campbell, 62 Barb. (N. Y.) 16, 25, 26; Rounds v. Waymart Borough, 81 Pa. St. 395, 397; Lauman v. Young, 31 Pa. 306, 309; Belding etc., Co. v. Frankland, 8 Lea (Tenn.) 67, 70, 41 AmR 630; Witt v. Harlan, 66 Tex. 660, 2 SW 41; Peaslee v. Fletcher, 60 Vt. 188, 14 A 1, 6 AmSR 103; Bowen v. Jenkin, 6 A. & E. 911, 33 ECL 474, 112 Reprint 348; Pearce v. Cowie, Holt N. P. 69, 70, 3 ECL 37; Naylor v. Collinge, 1 Taunt. 19, 127 Reprint 736.

In Willis v. Kalmbach, 109 Va. 475, 485, 64 SE 342, 21 LRANS 1009, the court said: "The meaning to be given to it in any particular case must be determined by its context. It may have its broadest signification, or it may be limited in its meaning to all of a particular kind or class."

60. Gibbs v. Diekma, (U. S.) 26 L. ed. 177, 178; Phillips v. State, 15 Ga. 518, 521; McCoy v. Fahrney, 182 Ill. 60, 55 NE 61; Cousins v. Paxton, etc., Co., 122 Iowa 465, 98 N. W. 277; Grumley v. Webb, 44 Mo. 444, 100 AmD 304; McIntyre v. Williamson, 1 Edw. (N. Y.) 34, 39; McGee v. Dillon, 103 Pa. 433; Fry v. Shipley, 94 Tenn. 252, 29 SW 6; Peaslee v. Fletcher, 60 Vt. 188, 14 A 1, 6 AmSR 103.

61. Frazier v. Warfield, 13 Md. 279, 290, 291.

62. McFadden v. Hall, Cam. Cas. 589, 591 [aff 21 N. B. 586] (where the call "all aboard" given by a railroad conductor to passengers boarding his train was said to be a notice to the passengers to get on the cars).

63. Bickford v. Chatham, 16 Can. S. C. 235, 283 (where it was held that the words in an agreement by a railroad company to construct a freight and passenger station with all necessary accommodation required that grounds and yards sufficient for freight and passenger traffic in case the station was used should be provided).

64. Wooden v. Little, 14 S. C. L. 487, 489 (holding that the words "all accounts, disputes, controversies and reckonings of whatsoever nature now existing between the same parties," in a submission to arbitrators, are broad enough to cover matters of a partnership composed of the parties to the submission and a deceased partner).

65. Crawford v. Swearingen, 15 Oh. 264, 280 (holding that a release of all actions and causes of action, given to the acceptor of a bill of exchange on a composition with creditors, does not embrace money afterward paid as indorser, when the bill had been negotiated before due, and, at the date of the release, was bona fide held by a third party).

[a] **"All actions hereafter brought,"** in the Employers Liability Act providing in effect that in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, "is broad enough to include actions for injuries suffered prior to the enactment; but although within the letter of the law, such cases must be deemed to be not within its purview, if the retroactive effect would defeat the law by making it unconstitutional." Plummer v. Northern Pac. R. Co., 152 Fed. 206, 210. To same effect Winfree v. Northern Pac. R. Co., 164 Fed. 698 [aff 173 Fed. 65, 97 CCA 392].

[b] **All actions for damages.**—A statute regulating "the pleading and proof in all actions for damages brought on account of the alleged negligence of any person, copartnership, or corporation for causing personal injuries or the death of any person'" applies to a complaint for personal injuries under the Employers Liability Act of that state. Pittsburgh, etc., R. Co. v. Lightheiser, 163 Ind. 247, 259, 71 NE 218, 660.

[c] **"All actions of libel and slander"** in a practice act providing for the pleading in such actions is broad enough to include an action for slander of title. Andrew v. Deshler, 43 N. J. L. 16, 19.

[d] **In an agreement of attorneys** under which a rule of court was made providing for the confession of judgment at certain periods, unless the clients would swear that they had a just defense, "all actions" does not extend to torts, nor to matters in which plaintiff has no certain demand, nor to executors or administrators, nor to infants. Read v. Bush, 5 Binn. (Pa.) 455, 457.

[e] **"All actions and proceedings."**—A statute providing that in "all actions and proceedings" the party entitled to recover costs may include therein such reasonable sum as may have been paid for execution bonds is not limited to fiduciary bonds which have been allowed by the court but the words "all actions and proceedings" are sufficiently broad to justify an allowance as part of the costs on appeal of the premium paid for the appeal bond. Church v. Wilkeson-Tripp Co., 58 Wash. 262, 275, 108 P 596, 109 P 113, 137 AmSR 1059.

[f] **"All civil actions and proceedings at law and in equity,"** in L. [1905] c 295, is used in an extensive and general rather than in a restrictive or particular sense. Wisconsin River Impr. Co. v. Pier, 137 Wis. 325, 329, 118 NW 857, 21 LRANS 538 infra note 84.

66. State v. Stinson, 17 Me. 154, 158 (as meaning "all other acts").

67. Shores v. Doherty, 65 Wis. 153, 157, 26 NW 577 (holding that, where a bond is conditioned to pay "all the advances" which may be made under an agreement at the times, in the manner, and with the interest stipulated in such agreement, such bond is a continuing security for all advances finally unpaid to the amount of the penalty of the bond).

68. Renick v. Renick, 92 Ky. 335, 338, 17 SW 1018, 13 KyL 600 [foll Reed v. Reed, 66 SW 819, 820, 23 KyL 2186] (where the words in a statute giving an allowance to executors on such amounts were held to include the entire estate that the fiduciary is required to receive and pay over or divide among the persons entitled to it).

69. See State v. Babcock, 22 Nebr. 38, 44, 33 NW 711.

70. St.-Henri v. Coursol, 15 Que. Super. 417, 419 (holding that, in Municipal Code art 950, "all arrears of municipal taxes," embraces everything in the way of taxes, no matter for what purpose or in what manner they are imposed).

71. Smith v. St. Paul, 116 Minn. 44, 46, 133 NW 74 (holding that the words are equivalent to the expression "assessments which have been or may be levied").

72. Columbus Exch. Bank v. Hines, 3 Oh. St. 1, 32 (as meaning only those banks which exercise the functions of issuing paper money, and not including private bankers and exchange brokers who conduct their business without any special statutory authority).

73. Battertons v. Porter, 2 Litt. (Ky.) 388, 389 (as including "bills of exchange").

[a] **"All notes"** in a statute making all notes assignable and indorsable over in the same way as inland bills of exchange will include foreign as well as inland notes. Milne v. Graham, 1 B. & C. 192, 8 ECL 82, 107 Reprint 72.

74. Klosterman v. United Electric, etc., Co., 101 Md. 29, 33, 60 A 251 (where the phrase "the payment of all bills payable by this contract" was held to include a balance of the total amount remaining unpaid).

75. Murray v. Spencer, 24 Md. 520, 524 (holding that "all borrowed money" in a deed of composition of creditors providing that the proceeds arising from the sale of the debtor's property should be used in paying "all borrowed money," etc., includes all sums of money loaned to the debtors, without regard to the mode or the existence of any security or evidence of indebtedness).

76. Anderson v. Chicago, etc., R. Co., 117 Ill. 26, 28, 7 NE 129 (as not including a railroad bridge for taxation purposes).

77. See Atascosa County v. Angus, 83 Tex. 202, 203, 18 SW 563, 29 AmSR 637; Naylor v. Collinge, 1 Taunt. 19, 127 Reprint 736.

[a] **Including public buildings.** Atascosa County v. Angus, 83 Tex. 202, 18 SW 563, 29 AmSR 637 [appr Dallas v. Loonie, 83 Tex. 291, 18 SW 726].

[b] **"All the buildings thereon,"** as used in deeds, have in fact no legal operation in the ascertainment of the particular premises conveyed, but are

"all business,"[78] "all by-laws,"[79] "all cases,"[80] "all the said cattle,"[81] "all her children,"[82] "all the circumstances,"[83] "all civil actions and proceedings at law and in equity,"[84] "all the claimants,"[85] "all claiming under him,"[86] "all claims,"[87] "all claims and demands,"[88] "all of which compensation,"[89] "all my concerns,"[90] "all consequences of . . . hostilities,"[91] "all contracts,"[92] often inserted without any particular meaning. Crosby v. Parker, 4 Mass. 110, 114.

78. Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 498, 24 AmD 62.

[a] **"Transact all business"** in a power of attorney have been held not to authorize the attorneys in fact to indorse a bill received by them. Hogg v. Snaith, 1 Taunt. 347, 127 Reprint 867. To same effect Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 498, 24 AmD 62.

[b] **"All manner of business,"** when included in an authority of an agent by which the principal appointed the agent as his general and special agent to transact "all manner of business," did not necessarily authorize the agent to sell stocks or other property of the principal. Hodge v. Combs, 1 Black (U. S.) 192, 194, 17 L. ed. 157.

79. See Bloom v. Xenia, 32 Oh. St. 461, 466, 467 [foll Campbell v. Cincinnati, 49 Oh. St. 463, 31 NE 606].

80. Saunders v. U. S., 78 Fed. 782, 790 (for purpose of charging mileage, "in all cases" not equivalent to "upon any process, warrant, attachment, or writ"); Phillips v. State, 15 Ga. 518, 521 ("in all cases," referring to all of a particular class of cases only); Lower Salt Fork Drainage Dist. v. Smith, 257 Ill. 52, 55, 100 NE 179 (construing Hurd Rev. St. [1911] c 79 § 115); Blevings v. Peo., 2 Ill. 172, 173 ("in all cases," as referring only to cases tried by a jury); Jackson v. Reeves, 53 Ind. 231, 233 ("all cases" meaning criminal cases only); State v. Judge First Dist. Ct., 113 La. 654, 662, 37 S 546 (as including both civil and criminal cases); Flake v. Van Wagenen, 54 N. Y. 25, 28 (construing Code [1851] § 348, providing for an appeal to the general term from a judgment entered upon the direction of a single judge "in all cases"); Knight v. Campbell, 62 Barb. (N. Y.) 16, 27 (construing constitutional right to jury trial "in all cases"); McGee v. Dillon, 103 Pa. 433, 435 ("in all cases" meaning each case in allowing a constable his traveling expenses); Kellett v. Kellett, 94 Tex. 206, 208, 59 SW 809; Bennett v. State, 57 Wis. 69, 74, 14 NW 912, 46 AmR 26. See also The Koeningen Luise, 184 Fed. 170, 173 (construing Const. art 3 § 2, referring to "all cases of admiralty and maritime jurisdiction").

[a] **All cases of trust.**—The statute giving the supreme court equity jurisdiction in "all cases of trust arising under deeds, wills, or in the settlement of estates," is applicable only to express trusts arising from the written contracts of the deceased, and not to those implied by law, or growing out of the official character or situation of the executor or administrator. Given v. Simpson, 5 Me. 303, 305.

[b] **All divorce cases.**—"The words, 'all cases of . . . divorce,' are as comprehensive as language can be made; and if this be a divorce case, our jurisdiction is excluded. . . . Though it involves rights of property, it is none the less a divorce case. The action is for a dissolution of the bonds of matrimony existing between the parties. Incidental thereto is the determination of the rights of property held in the name of either or both of them. If the Legislature had desired to except such a case from the rule which excludes our jurisdiction over divorce cases, it seems that they would have said so in plain terms. On the contrary, the use of the word 'all' is significant that no exception was intended." Kellett v. Kellett, 94 Tex. 206, 208, 59 SW 809.

[c] **All cases at law.**—(1) In construing Const. art 1 § 5, providing that the right to jury trial shall "extend to all cases at law, without regard to the amount in controversy," the court said: "It is evident that sec. 5, referred to, was intended to secure the right of trial by jury in civil and not in criminal actions." Bennett v. State, 57 Wis. 69, 74, 14 NW 912, 46 AmR 26. (2) Const. art 6 § 6, giving the district courts original jurisdiction "in all cases at law which involve the title or the right of possession to, or the possession of, real property," does not embrace criminal cases. State v. Rising, 10 Nev. 97, 101.

[d] **All cases in law or equity.**—(1) The provision in the constitution of the United States declaring that the judicial power of the United States extends "to all cases in law and equity arising under the Constitution, the laws of the United States," etc., embraces alike civil and criminal cases. Tennessee v. Davis, 100 U. S. 257, 264, 25 L. ed. 648; Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97. (2) "The power here under consideration is given in general terms. No limitation is imposed. The broadest language is used. 'All cases' so arising are embraced." Per Swayne, J., in Nashville v. Cooper, 6 Wall. (U. S.) 247, 251, 18 L. ed. 851. (3) The words "all cases at law or in equity" in a statute giving jurisdiction to a city court are broad enough to include an action at law over which justices of the peace also had jurisdiction. Loomis v. Bourn, 63 Conn. 445, 450, 28 A 569.

[e] **In all criminal cases.**—The constitution provides: "In all criminal cases prosecuted in the name of the State when the defendant is insolvent or discharged the legal costs and expenses, including the fees of officers shall be paid by the counties where the crime is committed, under such regulations as shall be prescribed by law." The court, in construing this section, said: "We therefore, do not think that section 9, Article XVI., constitution, supra, imposes upon the counties the duty of paying the per diem and mileage of witnesses before grand juries." State v. Croom, 48 Fla. 176, 183, 185, 37 S 303.

81. Bowen v. Jenkin, 6 A. & E. 911, 924, 33 ECL 474, 112 Reprint 348 (which was an action on the case by a commoner for disturbing his common by putting on cattle, where the plea was a right of common appurtenant for cattle levant and couchant, and a replication was filed, with conclusion to the country, that "all the said cattle in the said declaration mentioned" were not defendant's own commonable cattle levant and couchant. The word "all" was interpreted to mean that the levancy and couchancy was untruly alleged as to all the cattle, not that it was truly alleged of some and falsely of others. For, if the latter, it should have been expressly averred, and the word "all," being in the replication quite ambiguous, must be taken most strongly against the party pleading; and, as plaintiff's opening showed that defendant had a right to some commonable cattle, the court directed a verdict for defendant).

82. McCoy v. Fahrney, 182 Ill. 60, 67, 55 NE 61 (as referring only to all of the class of children intended to be benefited); Ottawa v. Tinnon, 26 Kan. 1, 20 ("free to all children" as not excluding colored children).

83. Peo. v. McDonald, 2 Ida. (Hasb.) 10, 12, 1 P 345 supra note 57.

84. Wisconsin River Impr. Co. v. Pier, 137 Wis. 325, 329, 118 NW 857, 21 LRANS 538 (comparing the superior and circuit courts as to jurisdiction in eminent domain proceedings).

85. Morgan v. Taylor, 15 Daly (N. Y.) 304, 306, 24 NYSt 60 (as referring only to such as are interested in any particular claim).

86. Clore v. Graham, 64 Mo. 249, 252 (holding that the words in a covenant against encumbrances refer only to persons holding in subordination to the right or title of the grantor, and not to those holding adversely to him).

87. U. S. v. Richardson, 9 Fed. 804, 807 (as meaning all known claims).

[a] **"All claims"** means just what the words import. It does not mean all claims except a class not specified. Yniestra v. Tarleton, 67 Ala. 126, 129.

88. Grumley v. Webb, 44 Mo. 444, 456, 100 AmD 304 (holding that a receipt given in full satisfaction of a certain judgment therein specified and also of "all claims and demands" will not include another suit then pending between the same parties).

[a] **A release of all claims and demands** whatsoever has been restricted to the subject matter under consideration at the time the release was given. McIntyre v. Williamson, 1 Edw. (N. Y.) 34. To same effect Jackson v. Stackhouse, 1 Cow. (N. Y.) 122, 13 AmD 514.

89. Chapin v. Wilcox, 114 Cal. 498, 500, 46 P 457 (as including both per diem compensation and mileage fees).

90. Rossiter v. Rossiter, 8 Wend. (N. Y.) 494, 500, 24 AmD 62 (where the court said: "The letter of attorney specifies two subjects upon which authority is given, and it is added, to accomplish a complete adjustment of all my concerns in said state. According to the case in Taunton, this only extends to the collection of money, and the disposition of the real estate. It seems to me it is going too far to say that the power given authorized the giving a note for $600, or any other sum").

91. Nickels v. London, etc., Mar., etc., Ins. Co., 70 L. J. Q. B. 29 (as used in an insurance policy).

92. Rothschild v. Adler-Weinberger Steamship Co., 130 Fed. 866, 867, 65 CCA 350 ("all contracts of insurance," in a statute imposing an extraordinary and penal liability); Oakland Sugar Mill Co. v. Fred Wolf Co., 118 Fed. 239, 243, 55 CCA 93; Superior v. Norton, 63 Fed. 357, 362, 12 CCA 469 (used in a comprehensive sense in a charter requiring the comptroller to countersign "all contracts" made with the city, etc.); National Cash Register Co. v. Lesko, 77 Conn. 276, 278, 58 A 967.

[a] **Conditional sales.**—In construing a statute, prescribing the formalities necessary for all contracts for the conditional sales of personal property, the court said: "The words 'all contracts' are not used in the statute for the purpose of naming the particular form of instrument by which conditional sales must be made, but as embracing the different kinds of instruments by which such sales may be made." National Cash Register Co. v. Lesko, 77 Conn. 276, 278, 58 A 967.

[b] **Contracts of foreign corporations.**—A state statute prescribing a franchise fee to be paid by foreign corporations provides that "all contracts made in this state by any corporation . . . which has not complied with this law shall be wholly void." The court, in construing the act, said: "These words, 'all contracts,' are not to be construed literally; for this would include contracts in respect of purely interstate commerce, and make the act repugnant to the interstate commerce clause of the federal constitution."

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"all costs,"[93] "all courts,"[94] "all of the creditors,"[95] "all crop returns now in hand,"[96] "all the crops,"[97] | "all damages,"[98] "all debts,"[99] "all debts and liabilities,"[1] "all delinquent taxes,"[2] "all demands,"[3]

Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118 Fed. 239, 243, 55 CCA 93.

[c] **Confession of judgment.**—(1) In construing a statute providing that "all contracts made by married women in the purchase of sewing machines for their own use shall be valid and binding, without the necessity of the husband joining in the same," the court said: "The language of the statute is very comprehensive—'all contracts.' This, of course, would include parol contracts and written contracts and contracts under seal, and it goes for the saying that any paper may be given to secure the contract price." It was held that the act authorized a confession of judgment by a married woman. Howe Sewing-Mach. Co. v. Larimer, 5 Pa. Co. 660. (2) But see Richel v. Munn, 2 Pa. Co. 267 (where such a confession of judgment was held not binding).

93. See Sutorius v. Dunstan, 59 N. Y. Super. 166, 167, 13 NYS 601; Williams v. Northumberland County, 110 Pa. 48, 20 A 405.

[a] **In an undertaking on appeal** "all costs" has been held to be sufficiently comprehensive to cover costs on appeal. Johnson v. Glaspey, 16 N. D. 335, 338, 113 NW 602.

[b] **Costs incidental to arbitration.**—An agreement by a railroad in expropriation proceedings was to "pay all costs incidental to the arbitration." The court said: "The words used in this case do not extend, therefore, to costs as between solicitor and client—nor do they extend to costs preliminary to the arbitration: Lipscombe v. Turner, 4 D. & L. 125." Bronson v. Canada Atlantic R. Co., 13 Ont. Pr. 440, 442, 443.

[c] **Costs of prosecution.**—A statute provided that "in all cases of conviction of any felony, all costs shall be paid forthwith by the county, unless the party convicted shall pay the same," etc. The court said: "The words 'all costs' must be held to mean the costs of prosecution only and not those of the defendant: Williams v. Northumberland County, 110 Pa. 48, 20 A 405." Hamlin v. Berks County, 8 Pa. Co. 462, 463.

[d] **"All costs of suit"** generally includes such charges as the successful party is permitted to make against his adversary, composing the attorney's fee bill in ordinary actions and which are prescribed at ten dollars without any itemization, in cases appealed from justices' court. Chalutz v. Wisconsin Cent. R. Co., 143 Wis. 623, 630, 128 NW 425.

[e] **"'All legal costs'** in a suit clearly include charges for travel and attendance and other items that enure to the benefit of the attorney, as well as clerk's, officer's and witnesses' fees." Per Gray, J., in James v. Bligh, 11 Allen (Mass.) 4, 5.

[f] **"All costs herein expended,"** as used in a judgment reciting, "It is therefore considered and adjudged by the court that this cause be dismissed, and that the defendant recover from the plaintiff all costs herein expended," meant "only such costs as were authorized by law and could be properly taxed in favor of the defendant below." Castro v. Eigeman, 162 Ind. 506, 507, 508, 70 NE 807.

[g] **All costs and damages.**—In construing an undertaking by a surety following Code Civ. Proc. § 559, providing that "the undertaking of the surety is 'that if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to the order of arrest, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum of $250,'" the court said: "The section intends that all costs and all damages shall be taken in conjunction, and that to them together shall be applied the words 'not exceeding the sum specified in the undertaking.'" Sutorius v. Dunstan, 59 N. Y. Super. 166, 167, 168, 13 NYS 601. See also infra note 98 [a].

94. Fatchell v. St. Louis, etc., R. Co., 28 Mo. 178, 179 (as referring only to courts having competent jurisdiction); Tichenor v. Allen, 13 Gratt. (54 Va.) 15, 34 (as including both state and federal courts).

95. Kinsing v. Bartholomew, 14 F. Cas. No. 7,831, 1 Dill. 156, 157 (applying to secured as well as unsecured creditors).

96. Clyne v. Easton, 148 Cal. 287, 290, 301, 83 P 36, 113 AmSR 253, 2 LRANS 683 (where, under an agreement of sale providing in part that "all crop returns now in hand or due on account of crops growing on the land for the year 1893, shall belong to the said Easton, Eldridge & Company," the court said: "We construe the words 'all crop returns now in hand' to mean the balance of rents theretofore collected by defendant over and above its expenditures to that date").

97. Beckstead v. Griffith, 11 Ida. 738, 748, 83 P 764 (construing a statute giving a farm laborer a lien). See also Eggert v. White, 59 Iowa 464, 13 NW 426.

98. MacVeagh v. Wild, 95 Fed. 84, 86 (as including unliquidated damages as well as liquidated); Cousins v. Paxton, 122 Iowa 465, 466, 98 NW 277 ("all damages which he might sustain in consequence of the seizure or sale of the property levied upon" in an indemnity undertaking); Joslin v. Williams, 76 Nebr. 594, 600, 107 NW 837, 112 NW 343 ("all damages which she might sustain by reason of the appointing of such receiver," in a bond); Gran v. Houston, 45 Nebr. 813, 822, 64 NW 245 (in a liquor dealer's bond, as including the loss of means of support of a wife and children of a husband, as well as his death); Jones v. McCreery Land, etc., Co., 82 S. C. 456, 460, 64 SE 225 ("all damages" sustained by the tenant, as including punitive as well as compensatory damages).

[a] **"All damages and costs,"** within the meaning of the Judiciary Act of 1789, requiring plaintiff in error to give security to prosecute the writ of error to effect and answer for damages and costs if he fails to make his plea good, when applied to an ordinary foreclosure suit in the courts of the United States does not operate as security for the amount of the original decree, nor for interest accruing thereon pending the plea, nor for the balance due after applying the proceeds of the mortgaged premises, nor for the rents and profits, or use or detention, of the property pending the appeal, but only for the costs of the appeal and the deterioration or waste of the property, and, perhaps, the burden accruing on it by nonpayment of taxes and loss by fire, if not properly insured. It is very doubtful whether a mere depreciation in the market value is any cause of recovery on the bond. According to the English law the terms "all damages and costs" would only cover all damages for delay, security for the original judgment being expressly provided for by separate words. Omaha Hotel Co. v. Kountze, 107 U. S. 378, 385, 2 SCt 911, 27 L. ed. 609. See also supra note 93 [g].

[b] **Loss of franchise included.**—Under a statute providing that after the lapse of a certain number of years the act of incorporation of a railroad might be repealed, provided the company should be compensated for all damages by reason of the repeal, it was held that the phrase "all damages" meant all and not part of the damages and that compensation for the loss of the franchise should be included. Michigan Cent. R. Co. v. State, 148 Mich. 151, 156, 111 NW 735.

99. U. S. v. Herron, 87 U. S. 251, 260, 22 L. ed. 275 (in a bankruptcy act, as not including debts due to the United States); Plymouth County v. Moore, 114 Iowa 700, 87 NW 662; Marshall County v. Knoll, 102 Iowa 573, 69 NW 1146, 71 NW 571; Olson v. Cook, 57 Minn. 552, 561, 59 NW 635 ("all the debts of such bank," as including all debts, without regard to when incurred, in a statute relating to stockholders' individual liability); Perkins v. Guy, 2 Mont. 15, 22 (as including judgments and promissory notes); Kieffer v. Ehler, 18 Pa. 388, 391 [quot Stone v. Elliott, 11 Oh. St. 252, 258] (as including negotiable paper); Griffin v. Macaulay, 7 Gratt. (48 Va.) 476, 477 ("all debts due the grantor," as including the indebtedness of a partner of the grantor to the partnership and also a claim which the grantor has on a foreign government for damages for the detention of his ship).

[a] **Taxes not included.**—The code provides that in making up the amount of moneys and credits which any person is required to list he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him, etc. The court, in construing this provision, said: "Have the words 'all debts' a technical meaning, or have they acquired such a peculiar and appropriate meaning in law as to give us help in the construction thereof? We think they have, and that they do not, when used in the ordinary accepted sense, include taxes. Grunewald v. Cedar Rapids, 118 Iowa 222, 91 NW 1059; Plymouth County v. Moore, 114 Iowa 700, 87 NW 662; Marshall County v. Knoll, 102 Iowa 573, 69 NW 1146, 71 NW 571." Bailles v. Des Moines, 127 Iowa 124, 125, 102 NW 813.

[b] **Construction of guaranty.**—In Union Nat. Bank v. Rockefeller, 132 Mo. A 252, 256, 111 SW 883, it was held that the term "all debts" included not only debts which the commission company might contract, but also debts of other persons to plaintiff, which the commission company might thereafter "become liable for," and therefore included the commission company's liability as indorser on the note in controversy.

1. Matter of Ives, 11 NYS 650, 653, 25 AbbNCas 63 (in an assignment for the benefit of creditors, as including a claim for a breach of contract, although the breach occurred eleven days after the assignment); Thackara v. Mintzer, 100 Pa. 151, 155 (in a will, as including all legal, equitable, and moral liabilities, and hence such income could not be subject to the payment of alimony awarded to the divorced wife of one of the children).

2. Terr. v. Pinney, 15 N. M. 625, 630, 114 P 367 (as not including taxes levied for city purposes).

3. See Henry v. Henry, 11 Ind. 236, 237, 71 AmD 354; Cheshire Bank v. Robinson, 2 N. H. 126, 129; New York v. Lord, 18 Wend. (N. Y.) 126, 137 [aff 17 Wend. 285, 294]; Sellick v. Addams, 15 Johns. (N. Y.) 197, 199.

[a] **"A submission of all demands** (1) includes questions concerning real as well as personal property. Marks v. Marriot, 1 Ld. Raym. 114, 91 Reprint 972. The law does not now require a specific submission as to one kind of property more than as to the other." Per Kent, Ch. J., in Munro v. Alaire, 2 Cal. (N. Y.) 320, 327 [foll Sellick v. Addams, 15 Johns. (N. Y.) 197, 199]. (2) And under a like submission it has been held that the parties and referees may or may not investigate and settle the damages, which will afterward probably accrue on an indemnifying bond. Cheshire Bank v. Robinson, 2 N. H. 126, 129.

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"all the directors or trustees,"[4] "all disputes,"[5] "all the duties, liabilities, obligations and restrictions,"[6] "all duties payable by law out of my estate,"[7] "all or either,"[8] "all employees,"[9] "all the estate,"[10] "all estates,"[11] "all the evidence,"[12] "all executions,"[13] "all expenses,"[14] "all expenses incurred,"[15] "all faults,"[16] "all females,"[17] "all . . . fishing,"[18] "all fraud,"[19] "all future erections

[b] **Including judgments.**—(1) The term "all demands" in a receipt in full of all demands will cover a judgment which is a demand. "The term 'all demands' is recognized in the books as being one of the most comprehensive that can be used." Henry v. Henry, 11 Ind. 236, 237, 71 AmD 354. (2) By the statute for the presentation of claims against a deceased person's estate "the fourth class is made to include 'all judgments rendered against the deceased in his lifetime,' without reservation; the fifth class embraces 'all demands, without regard to quality,' exhibited within one year; while in the sixth class are included 'all demands thus exhibited after the end of one year,' etc." The court, in construing this statute, said: "We can only harmonize this section with the other requirements of the statute by holding that the term 'all demands,' spoken of as belonging to the fifth class, means 'all demands except judgments;' and the same term, when it refers to those embraced in the sixth class, means 'all demands, including judgments,' and, perhaps, also those named as belonging to the first and second classes." State Bank v. Tutt, 44 Mo. 366, 367.

[c] **"In full satisfaction of all demands."**—In construing a statute providing that the mayor of New York may in case of a conflagration direct buildings which he "may deem hazardous and likely to take fire, or to convey the fire to other buildings to be pulled down," and that "damages assessed by the jury are to be paid by the corporation, 'in full satisfaction of all demands of such persons respectively by reason of the pulling down or destroying such building,'" the court said: "'All demands,' here, obviously signify all the loss or injury which the party has sustained by the destruction of his building, within the judgment of the law. As was pertinently remarked by one of the learned judges below, the very terms used, 'by reason of such destruction,' embrace all direct consequential damages; and the extensive signification of the words, 'all demands,' must include every loss that is sustained by the person who was intended to be relieved.'" New York v. Lord, 17 Wend. (N. Y.) 285, 289, 293 [aff 18 Wend. 126].

4. Austin v. Berlin, 13 Colo. 198, 201, 22 P 433 (as not meaning absolutely all).

5. Lauman v. Young, 31 Pa. 306, 390 (in a contract to submit same to an engineer for determination).

6. New Bedford R. Co. v. Old Colony R. Co., 120 Mass. 397, 400 (construing a statute relating to the assumption of obligations by one corporation purchasing another).

7. In re Lewis, [1900] 2 Ch. 176, 180 (where in a will these words were held not to include the duty payable in respect of the settled legacy, but that duty was payable out of the settled fund).

8. Com. v. Hide, etc., Ins. Co., 112 Mass. 136, 141, 17 AmR 72 (holding that, under a policy of fire insurance which insures a certain sum "on all or either" of certain specified buildings, the insurers are liable for the full amount of a loss, not exceeding the sum insured, occasioned by the burning of a single one of the buildings).

9. See 24 Op. Atty.-Gen. 78, 81 (where it was said that the words "all employees of the Census Office" in an act cannot be held to apply to special agents or other field employees who may be temporarily assigned to service in the census office).

10. Ordinary v. Heeshon, 42 N. J. L. 15, 18 (as being confined to the estate of certain minors).

[a] **"All the estate, both real and personal,"** in a deed describing the property conveyed as "all the estate, both real and personal," to which the grantor is entitled in law or in equity, in possession, remainder, or reversion, is sufficient, as between the parties, to pass all real estate owned by the grantor, but it is not a sufficient description to impart record notice to a subsequent purchaser from the grantor of a conveyance affecting the land. Actual notice of the deed and its contents would not affect such purchaser, unless he had notice that the land purchased by him was embraced in the deed. Mundy v. Vawter, 3 Gratt. (44 Va.) 518, 519.

[b] **"'All the estate, real and personal, of every nature and description,** in law or equity,' are broad enough to cover every description of vested right and interest, attached to and growing out of property. Under such words, the whole property of a testator would pass to his devisee. Whatever the administrator would take, in case of intestacy, would seem capable of passing by such words." Comegys v. Vasse, 1 Pet. (U. S.) 193, 218, 7 L. ed. 108. To same effect Williams v. Heard, 140 U. S. 529, 11 SCt 885, 35 L. ed. 550.

[c] **A contract to convey a third of all one's estate,** of whatever nature, acquired by him under his mother's will, or otherwise acquired and now owned by him, sufficiently describes the property as it may be identified by parol evidence to satisfy the statute of frauds. Moayon v. Moayon, 114 Ky. 855, 72 SW 33, 102 AmSR 303, 60 LRA 415.

11. Howell's Est., 147 Pa. 164, 166, 23 A 403 [quot Dixon v. Ricketts, 26 Utah 215, 72 P 947] (as including property real and personal, when used in the Collateral Inheritance Act).

12. Hickey v. Anaconda Copper Min. Co., 33 Mont. 46, 56, 81 P 806 (as meaning all the necessary evidence); Cape v. Plymouth Cong. Church, 130 Wis. 174, 187, 109 NW 928 (same). See infra text and note 13.

[a] **"All evidence in the case."**—In passing upon an instruction as to the weight of evidence the court said: "The phrase 'all the other circumstances appearing on the trial,' is of very doubtful propriety; it should be 'all evidence in the case;' many things might occur on the trial which should not be considered by the jury." Ames v. Thren, 136 Ill. A. 568, 571. To same effect Ryan v. Peo., 122 Ill. A. 461.

13. Lobach v. Riegel, 11 Pa. Dist. 533 (as applying only to certain executions).

14. Seymour v. Warren, 179 N. Y. 1, 5, 71 NE 260 (as including the annual taxes and such other expenses or payments as an agent in full charge of property of such a character for a term of years would reasonably be required to pay out of the income in the process of good management).

15. Overmeyer v. Cass County, 43 Ind. A. 403, 86 NE 77, 78 (as meaning the expenses incurred in the performance of the work required by the act).

16. See Smith v. Richards, 13 Pet. (U. S.) 26, 41, 10 L. ed. 42; Taylor v. Bullen, 5 Exch. 779, 789.

[a] **"The meaning of selling 'with all faults,'** (1) is, that the purchaser shall make use of his eyes and understanding to discover what defects there are. But the vendor is not to make use of any artifice or practice to conceal faults, or to prevent the purchaser from discovering a fault, which he, the vendor, knew to exist. When the vendee takes the article at his own risk, or with all faults and defects, the vendor is relieved from disclosing any faults he may know to exist in the thing sold; the maxim caveat emptor, then applies." Smith v. Andrews, 30 N. C. 3, 6. To same effect Pickering v. Dowson, 4 Taunt. 779, 128 Reprint 537. (2) In Schneider v. Heath, 3 Campb. 506, 508, Mansfield, C. J., said: "'The words ['with all faults as they now lie'] are very large to exclude the buyer from calling upon the seller for any defect in the thing sold; but if the seller was guilty of any positive fraud in the sale, these words will not protect him. There might be such fraud, either in a false representation, or in using means to conceal some defect. I think the particular is evidence here by way of representation; that states the hull to be nearly as good as when launched, and that the vessel required a most trifling outfit. Now, is this true or false? If false, it is a fraud which vitiates the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent tells us, he framed this particular without knowing any thing of the matter. But it signifies nothing, whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false." To same effect Smith v. Richards, 13 Pet. 26, 10 L. ed. 42. (3) The phrase cannot be limited to all such faults or defects as the thing described ordinarily has. That would be to deprive it of force entirely. Its meaning is, such faults or defects as the article sold might have, retaining still its character and identity as the article described. Whitney v. Boardman, 118 Mass. 242.

[b] **Sale of vessel.**—(1) It has been held that in the sale of a copper-fastened vessel "with all faults," the term meant such faults as a copper-fastened vessel might have, but would not cover the sale of a vessel not copper-fastened. Shepherd v. Kain, 5 B. & Ald. 240, 241, 7 ECL 137, 106 Reprint 1180 [cit Henshaw v. Robins, 9 Metc. (Mass.) 83, 43 AmD 367]. (2) But under a contract of sale of a "vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatever," it was held that there was no warranty which was broken when the vessel proved not to be teak-built, nor of class A 1, nor adapted as a passenger ship as described. Taylor v. Bullen, 5 Exch. 779, 785.

17. Gillett v. Gillett, 207 Ill. 144, 69 NE 942 (as meaning all, without any qualification, females without reference to what their ages might be).

18. Peo. v. Moses, 65 Hun 161, 20 NYS 9 [aff 140 N. Y. 214, 35 N 499] (as limited to only such fishing as might constitute a disturbance of the peace).

19. Moore v. Virginia F. & M. Ins. Co., 28 Gratt. (69 Va.) 508, 516, 26 AmR 373 (where a policy provided that "all fraud," etc., on the part of the assured, "shall cause a forfeiture of all claim under this policy." It was contended that, where there were several subject matters embraced in the policy, the forfeiture should apply only to the subject matter to which the fraud related. The court refused to sustain the contention saying: "A more comprehensive word than 'all' cannot be found in the English language; and it certainly has in this case the comprehensive

or additions,"[20] "all goods, wares, merchandise, articles or objects,"[21] "all grain,"[22] "all horses,"[23] "all improvements,"[24] "all in,"[25] "all incumbrances,"[26] "all indictments,"[27] "all indifferent freeholders,"[28] "all the inhabitants,"[29] "all insurance companies,"[30] "all the interest,"[31] "all inventions of like nature or similar thereto,"[32] "all items,"[33] "all Judges,"[34] all judgment creditors,"[35] "all judgments and decrees,"[36] "all judgments and all executions,"[37] "all judicial decisions,"[38] "all labor,"[39] "all laborers,"[40] "all of my land,"[41] "all lands,"[42] "all laws,"[43] "all laws or usages,"[44] "all the legatees,"[45] "all levies,"[46] "all liabilities,"[47] "all loss,"[48] "all manufactures,"[49] "all matters,"[50] "all

meaning contended for by the counsel of the defendants, instead of the restricted meaning contended for by the counsel for the plaintiff, unless very strong reasons can be furnished for construing it in the latter sense").

20. Holbrook v. Chamberlin, 116 Mass. 155, 162, 17 AmR 146 (where it was said: "We are of opinion that the covenant to deliver up in good order 'all future erections or additions' to or upon the premises is limited, in purpose and effect, to new buildings erected or old buildings added to . . . and cannot be extended so as to deprive the tenants of the right to remove trade fixtures, much less personal property, put by them upon the premises during the term").

21. Harrington v. U. S., 11 Wall. (U. S.) 356, 364, 20 L. ed. 167 (in a tax statute, as including distilled spirits, although they are provided for in a different part of the act by a distinct series of sections, the terms used being of a most general nature, so used as not to admit of any possible escape or evasion, and which necessarily include most of the cases before specifically provided for).

22. Guest v. Opdyke, 31 N. J. L. 552, 556 (in its popular sense, including all grain grown on the premises by whomsoever it might be owned).

23. Commonwealth v. Standard Oil Co., 101 Pa. 119, 146 (not applying to horses in another state).

24. Marshall Engine Co. v. New Marshall Engine Co., 199 Mass. 546, 549, 85 NE 741 (in an assignment of original letters patent for an improvement in pulp beating engines, as including all improvements on the improvement in engines for which the original letters patent were granted).

[a] **"All improvements, betterments, and changes or alterations,"** in a lease of a saloon has been held to include tile and drain put into the floor, also a partition, but not fixtures and furnishings. Wright v. La May, 155 Mich. 119, 124, 118 NW 964.

25. State v. Hennessy, 29 Nev. 320, 334, 90 P 221, 13 AnnCas 1122 (a slang expression frequently made use of in this western country as indicating that the user considers himself in extremis).

26. Carter v. Cemansky, 126 Iowa 506, 510, 102 NW 438 (holding that the recital in a deed that it is "subject to all incumbrances of record" means subject to valid encumbrances).

27. State v. Townley, 18 N. J. L. 311, 323 (as referring only to indictments of a certain class).

28. Donahue v. Coleman, 49 Conn. 464, 465 (as naturally including more than two).

29. Marlborough v. Hebron, 2 Conn. 20, 22 (as not including persons having a settlement outside the particular town); Carpenter v. Cornish, 8 N. J. L. 254, 83 A 31 (as limited to those having the right to vote before the adoption of the constitution and not including females).

30. Word v. Southern Mut. Ins. Co., 2 Ga. 585, 587, 37 SE 897 (as broad enough to cover a mutual insurance company, no exception being made in favor of such companies).

31. Dow v. Whitney, 147 Mass. 1, 16 NE 722 (holding that a deed of "all the interest" of the grantor in a tract of land conveys the same title as a deed of the land).

[a] **The assignment of "all the interest"** of a member of a special partnership to buy lands was held not to pass any collateral benefit which he derived as agent of the partnership, such as the expenses and costs in securing the land bought by the partnership. Stewart v. Stebbins, 30 Miss. 66, 83.

[b] **In construing a decree in chancery** "conferring full authority to sell and to convey 'all the interest' of the parties" the court said: "These words, 'all the interest,' should not be construed as a limitation of the estate conveyed in the deed executed by virtue of the decree." Harpham v. Little, 59 Ill. 509, 513.

[c] **In construing a trust deed** reading, "the grantors convey and warrant all interest in the following described premises," the court said: "'All interest' has a broader signification than the language 'their right, title and interest' or 'all our right, title and interest.' Giving the words used their common and obvious meaning, the language is broad enough to convey the premises described in the deed." Glos v. Furman, 164 Ill. 585, 590, 45 NE 1019.

32. Davis, etc., Temperature Controlling Co. v. Tagliabue, 150 Fed. 372, 373 (holding that the words as used in the assignment of a patent "are much broader than the words merely assigning 'improvements'").

33. Walnut Hill Bank v. National Reserve Bank, 65 Misc. 315, 319, 121 NYS 892 (holding that a clause on a postal card to a bank, acknowledging receipt of a draft drawn on the bank, that "all items sent to us are credited subject to payment," applies only to items drawn upon banks other than the one giving the notice).

34. In re Parker, 19 Ont. 612 (holding that the term "all judges . . . of the County Courts" in an extradition act includes a junior judge of the county court).

35. Posey v. Pressley, 60 Ala. 243, 249 (in its popular meaning as meaning every judgment creditor, except those expressly excepted).

36. Josselyn v. Stone, 28 Miss. 753, 765 (as including judgments in favor of the state).

37. Abraham v. Abraham, 19 Ont. 256, 260 (as not applying to judgments for alimony under Ont. Rev. St. c 44 § 30).

38. Little v. Gould, 15 F. Cas. No. 8,394, 2 Blatchf. 165, 171, 172 (where, in construing the New York constitution of 1846 providing that "all laws and judicial decisions shall be free for publication by any person," the court said: "The words 'all judicial decisions' must be held to mean what they naturally import—not all such judicial decisions only as the Legislature should direct to be published, which is what they do not import").

39. Holden v. O'Brien, 86 Minn. 297, 299, 90 NW 531 (as equivalent to "labor, business or work," as used in a Sunday law).

40. Mann v. Corrigan, 28 Kan. 194, 197 (as limited to railroad laborers).

41. Moayon v. Moayon, 114 Ky. 855, 875, 72 SW 33, 102 AmSR 303, 60 LRA 415 (as "referring to such lands as I may own, evidenced by the public records where land titles are required to be recorded, or to my actual and continuous possession for such time as under the law constitutes a title"). See also Witt v. Harlan, 66 Tex. 660, 2 SW 41.

42. Atwater v. Woodbridge, 6 Conn. 223, 230, 16 AmD 46 (as not all inclusive and not including lands exempted from taxation by prior acts).

[a] **"All the lands still belonging to" grantor,** in a contract for the sale of lands which were specifically described, could not be construed literally as intending to convey all the grantor's lands. Gibbs v. Diekma, (U. S.) 26 L. ed. 177, 178.

[b] **Where an award of arbitrators** was to the effect that plaintiffs should execute a good authentic deed of conveyance to "all the lands" which plaintiff held by a deed of conveyance from M, but there was no statement as to how much of said land he held, the phrase "deed of conveyance of all the lands which the plaintiff held by a deed of conveyance from Samuel Martin" meant that he should convey all, more or less, which he held by that deed. Whitcomb v. Preston, 13 Vt. 53, 66.

43. Ingalls v. Campbell, 18 Or. 461, 465, 24 P 904 (where it was said: "'All laws' would include both the statutory and common law").

44. Beatty v. Rankin, 139 Pa. 358, 362, 21 A 74 (holding that the phrase in a lease in which the lessee waives the benefit of "all laws or usages," exempting any property from distress or execution for rent, includes a landlord's warrant as well as an execution for rent).

45. Shaver v. Ewald, 142 Ky. 472, 476, 134 SW 906 (as including each of them).

46. In re Hymes Buggy, etc., Co., 130 Fed. 977, 980 (in a bankruptcy act declaring certain levies void).

47. Joslin v. New Jersey Car Spring Co., 36 N. J. L. 141, 145 (holding that a promise to pay "all liabilities" of a manufacturer, in consideration of a sale and transfer of all the property and assets, will include a disputed claim for the salary of the foreman of the factory); Binyon v. Smith, 50 Tex. Civ. A. 398, 402, 112 SW 138 ("all liabilities" of a firm, as including the liability of the firm in favor of an employee injured through its negligence, especially where there was evidence that the employee's suit was contemplated and discussed as a possible liability, although the copartner then insisted that there was no liability, but without falsely representing to the partner any of the facts).

[a] **"All liabilities incurred"** may include liabilities to be incurred. Aqawam Bank v. Strever, 18 N. Y. 502, 510.

[b] **"All liabilities whatever"** may include all liabilities, legal, equitable, and moral. Thackara v. Mintzer, 100 Pa. 151, 155.

48. The Leitrim, [1902] P. 256, 266 [cit Berkley v. Presgrave, 1 East 220, 228, 102 Reprint 86] (to the effect that the words ought not to be extended to include losses which are the result of "accidental circumstances" affecting the loser, and are not losses with which the other persons interested ought, in ordinary course, to be treated as concerned).

49. Hartranft v. Meyer, 135 U. S. 237, 239, 10 SCt 751, 34 L. ed. 110 (in the Tariff Act of 1883); U. S. v. Scruggs, 156 Fed. 940, 941, 84 CCA 440 (in the Tariff Act of 1897).

50. Shackelford v. Purket, 2 A. K. Marsh. (Ky.) 435, 440, 12 AmD 422 ("all matters in dispute," in a submission to arbitration); Jiggitts v. Bennett, 31 Miss. 610, 612 ("all matters of the allotment of dower," in constitution vesting jurisdiction in the probate court); Bryant v. Fisher, 85 N. C. 69, 72 ("all matters between the said parties," in a reference to arbitrators).

means within its power,"[51] "all moneys,"[52] "all necessary repairs,"[53] "all off,"[54] "all officers,"[55] "all the oil,"[56] "all orders . . . made and entered in the . . . actions,"[57] "all ordinances,"[58] "all outstanding warrants,"[59] "all passenger trains,"[60] "all payments,"[61] "all his personal effects,"[62] "all my personal goods and chattels,"[63] "all persons,"[64] "all persons concerned,"[65] "all persons interested,"[66] "all pipes,"[67] "all policies,"[68] "all policies concurrent,"[69] "all my entire possessions,"[70] "all possible care,"[71] "all possible

51. St. Louis, etc., R. Co. v. Vincent, 36 Ark. 451, 455 (referring to the duty of a railroad company and imposing upon it excessive precautions).

52. Harrington v. Smith, 28 Wis. 43, 59 (holding that the words "all moneys," in a statute providing that "all moneys paid on account of school and university lands, whether for principal or interest, shall be paid to the state treasurer who shall give his receipt therefor, and every such receipt or writing shall be countersigned by the secretary of state," are broad enough to include sales for cash as well as for credit).

[a] **"All moneys divisible."**—In a voluntary liquidation of a company whose memorandum of association provided that "all moneys divisible amongst the holders of any class of shares shall be divided amongst the holders of such class of shares pro rata according to the amount paid up thereon for the time being," it was held that the words "all moneys divisible" extended to not merely those assets which were actually in the hands of the liquidator, but also to the calls which could be made and which, for the purpose of winding up, must be considered as having been made upon and paid by the holders of all shares not fully paid up. In re Welsh Whisky Distillery Co., 16 T. L. R. 246, 247.

[b] **"All moneys received."**—The decree of a court in an accounting provided that each party should be allowed interest on all his proper expenditures, and be charged with interest on "all moneys received;" and the question arose whether "all moneys received" should be taken literally, or whether the party should be entitled to deduct his expenditures from the moneys received, and that the interest should be charged on the remainder; and it was held that the language should be so construed as being intended to be subject to any legal right which either had, to apply such moneys first to the extinguishment of interest due himself; and hence "all" will not be held to include the interest on the expenditures, which may be deducted from the moneys received. Reed v. Jones, 15 Wis. 40, 48.

[c] **"All moneys belonging to me** and uninvested at the time of my death," in a will devising such moneys, being thus distinguished by the testator from the rest of his estate, operates to render the devise specific. Fow's Est., 12 Pa. Co. 133, 134.

53. Armstrong v. Maybee, 17 Wash. 24, 27, 48 P 737, 61 AmSR 898 (in a covenant in a lease to repair, etc.). See also May v. Gillis, 169 N. Y. 330, 62 NE 385.

54. Malloy v. Kelly-Atkinson Constr. Co., 144 Ill. A. 226, 229 (in which the phrase "all off" was used as a signal to let timber fall instantaneously).

55. Griffith v. Manning, 67 Kan. 559, 561, 73 P 75 (as limited to county and township officers only); Houseman v. Com., 100 Pa. 222, 230 (including municipal officers); Com. v. Sanderson, 1 Pa. Dist. 714, 717, 11 Pa. Co. 593 (as applying to municipal as much as to other officers).

[a] **An act requiring all public officers and employees** "to give new bonds does not include guardians' bonds." Kaspar v. Peo., 132 Ill. A. 1, 6.

56. Willetts v. Brown, 42 Hun 140, 143 ("all the oil" produced on the premises, as including oil in store in tanks on the premises).

57. Genella v. Relyea, 32 Cal. 159, 160 (used in a notice of appeal).

58. Gilham v. Wells, 64 Ga. 192, 199 (as not including ordinances which the town authorities had no power to pass); Swindell v. State, 143 Ind. 153, 169, 42 NE 528, 35 LRA 50 (meaning every ordinance).

59. Erskine v. Nelson County, 4 N. D. 66, 75, 58 NW 348, 27 LRA 696 (in an act requiring the county treasurer to call in such warrants).

60. Burnett v. Great North of Scotland R. Co., 10 App. Cas. 147, 170 (as including each and every train advertised to take passengers generally).

61. Waters v. Chase, 142 Pa. 463, 466, 21 A 882 ("all payments thereon at maturity" in a guaranty for collection).

62. Bellamy v. Bellamy, 6 Fla. 62, 107 (as embracing only things of the same kind as those which had been mentioned before, which might not have been supposed to pass under the words there used).

63. Peaslee v. Flecker, 60 Vt. 188, 193, 14 A 1, 6 AmSR 103 (as meaning only chattels ejusdem generis with the household furniture specifically enumerated, so as to mean only other articles of the same kind belonging to the house, and not as including, in its broad sense, all property other than realty).

64. Ex p. McCabe, 46 Fed. 363, 374, 12 LRA 589 (as embracing citizens and aliens alike); McCabe v. Grey, 20 Cal. 509, 516 (as not embracing all the world, but only all persons of a certain class); Stephens v. Duffy, 41 Ind. A. 385, 81 NE 1154, 1155, 83 NE 268 (in a mechanics' lien act, as including all persons coming within the spirit of the act); Hare v. McIntire, 82 Me. 240, 19 A 453, 454, 17 AmSR 476, 8 LRA 450 (as not including workmen near a quarry, under a requirement to give notice of an explosion); Milo v. Kilmarnock, 11 Me. 455, 457 ("all persons" legally capable of gaining a settlement); Hallowell v. Gardiner, 1 Me. 93, 101 (as not including married women or slaves among persons legally capable of gaining a settlement); State v. Cummings, 17 Nebr. 311, 316, 22 NW 545 (as embracing both wholesale and retail liquor dealers); Wooster v. Van Vechten, 10 Johns. (N. Y.) 467, 468 (exempting from payment of bridge tolls); Behny v. Bassler, 4 Pa. Co. 496, 498 (all applying to tavern and restaurant keepers alike in a statute requiring liquor licenses); Ex p. Erwin, 7 Tex. A. 288, 295 (persons entitled to bail).

[a] **Inspection of records.**—A statute providing that officers in custody of any county, city, or town records shall furnish proper and reasonable facilities for the inspection and examination of the records, to "all persons" having occasion to make such examination, is not confined to persons owning or interested in land, but applies to "all persons" who may desire to inspect the records and make memoranda, and includes an abstractor seeking information for private gain. Burton v. Tuite, 78 Mich. 363, 365, 48 NW 282, 7 LRA 73.

[b] **"All persons having any claims against the estate"** in a notice directing the presentation of such claims is of a character comprehensive enough to embrace and include creditors, legatees, and persons entitled to distribution. Fillyau v. Laverty, 3 Fla. 72, 106.

65. In re Myers, 69 N. J. Eq. 793, 796, 64 A 138 (with respect to persons upon whom a citation should be served in case of the probate of a will).

66. Santa Fe Drainage Dist. Comrs. v. Waeltz, 41 Ill. A. 575, 577 (drainage proceedings); Barry v. Baker, 93 SW 1061, 1062, 29 KyL 573 (in land sought to be partitioned).

67. Atlantic City Gas, etc., Co. v. Consumers' Gas, etc., Co., 70 N. J. Eq. 536, 539, 61 A 750. In this case the statute provided in effect that all pipes that may be laid by any corporation organized under the act shall be placed at the greatest practicable distance from the nearest part of any other gas pipe then laid. The court said: "The complainant, however, insists that the words 'all pipes,' at the beginning of section 21, apply to every character of pipe, whether distributing conduits or service pipes, and that both classes fall under the condition requiring pipes to be laid at least four feet apart, horizontally, except in cases where that is impracticable. I do not so interpret this section. On the contrary, my understanding of the legislative will, as gathered from the act, is that main or distributing pipes should be laid at a horizontal distance of four feet apart, and that wherever it becomes necessary to cross the main or distributing pipe of another company, the crossing must be made under that pipe and twelve inches therefrom, and that the legislative intent with regard to service pipes is expressed in the clause—'and in no case shall any pipe be laid or apparatus used that will interfere in any way either with the present or future supply of pipes of any water or gas company, or that may interfere with or increase the expense of replacing, removing or repairing the supply pipes or apparatus of any water or gas company,' and, in my opinion, the proximity of a main or distributing pipe to a service pipe is not limited or controlled beyond the restriction not to interfere with it in the manner described in the act."

68. Miller v. Hartford F. Ins. Co., 70 Iowa 704, 706, 29 NW 411 (as meaning all policies except the one in question).

69. Butterworth v. Western Assur. Co., 132 Mass. 489, 494 (where, in construing a permission in a policy of fire insurance to erect an addition to the insured premises which concluded with the words "all policies concurrent," the court said: "The only reasonable conclusion seems to us to be, that the parties intended by the words 'all policies concurrent,' to agree that the policy to which this permission was attached and made part should concur with the other policies in the terms of the permission; and therefore that the property in the addition at the time of the loss was covered by all the policies").

70. McAlpine v. Foley, 34 Minn. 251, 252, 25 NW 452 (as not including a stock of liquors).

71. International, etc., R. Co. v. Welch, 86 Tex. 203, 206, 24 SW 390, 40 AmSR 829 (where it was said that the term "all possible care" might be understood by one man to mean all that the party could foresee, while it might mean to another all that might have been done as viewed after the occurrence, and the law does not require everything to be done which might be foreseen, but only such as might appear to be necessary).

[a] **"All possible skill and care."** as applied to the operation of a street railway, means every reasonable precaution in the management and operation of the cars to prevent injury to passengers, that is, good tracks, safe cars, experienced drivers, careful management, and judicious operation in every respect. Topeka City R. Co. v. Higgs, 38 Kan. 375, 383, 16 P 667, 5 AmSR 754. See Street Railroads [36 Cyc 1398 et seq].

[b] **"Utmost care" distinguished.**—"All possible care" has a broader and more unlimited meaning than "utmost care." Houston, etc., R. Co. v. George,

foresight,"[72] "all prisoners,"[73] "all probate matters,"[74] "all proceedings,"[75] "all process,"[76] "all the property,"[77] "all purposes,"[78] "all the qualified voters,"[79] "all rail,"[80] "all the real estate,"[81] "all my real estate,"[82] "all reasonable care and caution,"[83] "all the rents and profits,"[84] "all the rest and residue,"[85] "all right,"[86] "all right and title,"[87] "all the right, title and interest,"[88] "all of the rights and privileges,"[89] "all rights of the parties,"[90] "all risks,"[91] "all road crossings,"[92]

(Tex. Civ. A.) 60 SW 313, 314.

72. Topeka City R. Co. v. Higgs, 38 Kan. 375, 384, 16 P 667, 5 AmSR 754 (as meaning "all possible skill and care").

73. Ex p. Ezell, 40 Tex. 451, 453, 19 AmR 32 (as meaning only prisoners who have not been tried and convicted). To same effect State v. Ward, 9 N. C. 443; Ex p. Erwin, 7 Tex. A. 288. But see Ford v. State, 42 Nebr. 418, 420, 422, 60 NW 960 (where the court said: "The question was before the supreme court of California in Ex parte Voll, 41 Cal., 29, and the conclusion announced . . . that the right to bail, after conviction, was not absolute, but was a matter within the discretion of the court." However, the court said: "We are impressed with the thought that the use of the words therein, 'all persons,' instead of 'all persons before conviction,' was for a purpose and not accidental," and that therefore it should be held that the right to bail after conviction was within the discretion of the court).

74. Winch v. Tobin, 107 Ill. 212, 216 (as including proceedings by guardians for sale of real estate of their wards).

75. Alexander v. Com., 105 Pa. 1, 11 (in a statute providing for the removal of "all proceedings" in a criminal case to the supreme court); Uhe v. Chicago, etc., R. Co., 4 S. D. 505, 507, 57 NW 484 (as including an entry of judgment).

[a] **"All prior proceedings"** in a statute providing that a tax certificate "shall be presumptive evidence of the regularity of all prior proceedings," "includes every step leading up to the tax sale, including the levy and assessment." Alling v. Woodard, 2 Nebr. (Unoff.) 235, 96 NW 127.

76. Brinsfield v. Austin, 39 Ala. 227, 228 (limiting the meaning to such process as constables may lawfully execute).

77. West v. Randle, 79 Ga. 28, 34, 3 SE 454; Blain v. Bailey, 25 Ind. 165, 166 (as not applying to exempt property); State Bd. of Assessors v. Central R. Co., 48 N. J. L. 146, 309, 4 A 578; Santa Fe County v. New Mexico, etc., R. Co., 3 N. M. 116, 123, 2 P 376; Thomas v. Phelps, 4 Russ. 348, 351, 4 EngCh 348, 38 Reprint 836 (in a will passes not only real estate but all the interest of testator in the estate).

[a] **"All the property I possess,"** where there was no apparent motive for making an exception, was held to mean all that the party owned, as well that in remainder as that in his immediate occupation. Brantly v. Kee, 58 N. C. 332, 337.

[b] **"All property of every description"** may be limited by subsequent words in the instrument, such as, "the same being embraced in a schedule annexed." Belding, etc., Co. v. Frankland, 8 Lea (Tenn.) 67, 68, 41 AmR 630.

[c] **"All property, real and personal,** within the corporate limits of the city," will not be construed to include the city's own bonds, in the absence of express authority for that purpose. Macon v. Jones, 67 Ga. 489, 492.

[d] **"All property subject to taxation"** does not mean all the legislature may designate, or all except such as the legislature may exempt. If this were so the whole burden of taxation might be thrown upon land, or upon any one species of property. It means all private property, of every possible description, or all property other than that belonging to the state, or the general government. Little Rock, etc., R. Co. v. Worthen, 46 Ark. 312, 326, 327. To same effect People v. McCreery, 34 Cal. 432, 456 (construing "all property in this State").

[e] **"All property . . . within the corporate limits"** is not open to a broader construction than the phrase "all taxable property" of the state. Macon v. Jones, 67 Ga. 489, 492.

[f] **All railroad property.**—(1) "Where words of general description are used in reference to taxation, such as 'all property,' they include everything of that kind not expressly, or by necessary implication, excepted. [State v. Keokuk, etc., R. Co., 153 Mo. 157, 54 SW 559, 77 AmSR 704.] So that there can be no doubt that the words 'all property,' as used in the city charter, include all railroad property." Per Burgess, J., in Heman Constr. Co. v. Wabash R. Co., 206 Mo. 172, 180, 104 SW 67, 121 AmSR 649, 12 LRANS 112, 12 AnnCas 630. (2) In construing a statute which provided that "all the property of every kind and description of every corporation formed under this act shall be exempt from taxation of every kind and description until the expiration of six years from and after the completion of its road or roads," the court said: "All the property of a railway corporation, and all the capital stock of the same corporation, for the purposes of taxation, may be considered as convertible terms." Santa Fe County v. New Mexico, etc., R. Co., 3 N. M. 116, 119, 123, 2 P 376.

[g] **From which income is derived.**—"All property," real and personal, from which an income or revenue is derived, includes the waterworks of the city, from which a revenue is derived. Erie County v. Waterworks Comrs., 113 Pa. 368, 372, 6 A 138.

[h] **"Property" and "all property" are not interchangeable terms,** and one cannot be substituted for the other. State Bd. of Assessors v. Central R. Co., 48 N. J. L. 146, 309, 4 A 578.

78. Peo. v. May, 9 Colo. 404, 407, 12 P 838 (indebtedness "for all purposes," as including all debts, without regard to the method of their contraction).

79. Glenn v. Wray, 126 N. C. 730, 734, 36 SE 167 (as equivalent to "the qualified voters" or "the voters").

80. Maghee v. Camden, etc., Transp. Co., 45 N. Y. 514, 523, 6 AmR 124 (in a contract to carry goods, as meaning "the transportation by rail so far as was practicable").

81. Drew v. Carroll, 154 Mass. 181, 183, 28 NE 148 (in a deed, as including the grantor's rights as tenant in common of undivided lands). Compare Gilbert v. North American F. Ins. Co., 23 Wend. (N. Y.) 43, 35 AmD 543 (restricted meaning in a trust deed); State v. Trisler, 49 Oh. St. 583, 31 NE 881 (as a false representation); Rounds v. Waymart, 81 Pa. 395, 397 (in a statute, as not applying to exempt property).

82. Gilbert v. North American F. Ins. Co., 23 Wend. (N. Y.) 43, 45, 35 AmD 543 (as being restricted and qualified in its operation by the reference to a schedule).

83. St. Louis Southwestern R. Co. v. Crabb, (Tex. Civ. A.) 80 SW 408, 409 (as requiring "a higher degree of care than ordinary care"). To same effect St. Louis Southwestern R. Co. v. Gentry, (Tex. Civ. A.) 74 SW 607, 608.

84. Tissen v. Tissen, 1 P. Wms. 500, 501, 24 Reprint 490 (as referring only to the rents and profits accruing from and after the testator's death).

85. Carrol v. Connet, 2 J. J. Marsh. (Ky.) 195, 201 (in an administration bond, as meaning "what is left after payment of debts").

86. Palmer v. St. Paul F. & M. Ins. Co., 44 Wis. 201, 207 (as implying a waiver of a condition in a policy of insurance); Smith v. Justice, 13 Wis. 600, 602 (as amounting to a warranty that a horse is reasonably fit for the use for which it is desired by the purchaser).

[a] **"All right . . . for livery purposes"** is not a warranty that a span of ponies are not with foal. Whitney v. Taylor, 54 Barb. (N. Y.) 536, 539.

[b] **Punctual payment** may be implied by the use of these words. Birdsall v. Heacock, 32 Oh. St. 177, 181, 30 AmR 572.

[c] **"All right. Sell."**—A telegram from a firm of cotton brokers read "All right. Sell," the balance of the message being in cipher. The court said: "The words 'all right' indicate that this was a reply to some previous message. Knowing that the corporation Birge-Forbes Company was dealing in cotton and that all their messages were 'rush' messages, the word 'sell,' which was not in cipher, in connection with the other facts, was sufficient to indicate to the defendant's agents that the message related to a cotton transaction and was important." Western Union Tel. Co. v. Birges-Forbes Co., 29 Tex. Civ. A. 526, 527, 69 SW 181.

87. Hartman v. Schultz, 101 Ill. 437, 441 [quot Hartwell v. McDonald, 69 Ill. 293] (construing the Homestead Act).

88. Millett v. Blake, 81 Me. 531, 536, 18 A 293, 10 AmSR 275 (in attachment writ); Dow v. Whitney, 147 Mass. 1, 6, 16 NE 722 (in a deed); Snyder v. Grandstaff, 96 Va. 473, 483, 31 SE 647, 70 AmSR 863 (in a deed); O'Neil v. Carey, 8 U. C. C. P. 339, 346 (in a deed).

89. Filkins v. Blackman, 9 F. Cas. No. 4,786, 13 Blatchf. 440, 445 (where B, the inventor of a patent medicine, conveyed to F the exclusive right to use B's name in making and in selling such medicine for ten years, in return for a sum to be paid every three months; and further granted to F, if he performed his contract for the full ten years, "all of the rights and privileges" to use B's name in making and selling such medicine, without fee or reward to B, for fifty years. It was held that F had the same exclusive right as against B for the fifty years as for the ten years. The court said: "The terms 'an exclusive privilege,' and 'all of the rights and privileges,' as used in this contract, are synonymous, and, by the words 'all of the rights and privileges' are meant all the rights, or the entire right, which the grantor had at the expiration of the term of ten years. Each word in the phrase 'all of the rights' is to have the force which naturally belongs to such word, and, by construing the words to mean a conveyance of a bare right, the same effect is given to the language as if it had been 'I convey the right, or a right, to use my name,' which construction leaves the word 'all' without any significance. If the grantor retained the right in common with Filkins to use the name of the inventor, he did not convey all of his rights, but retained as much as he granted").

90. Swarts v. Narragansett Electric Lighting Co., 26 R. I. 436, 437, 59 A 111 (holding that a contract providing for the abrogation of a former contract, and that "all rights of the parties . . . shall cease and terminate," is not deprived of its effect as a release of rights under the former contract by a further clause stating that the contract is abrogated "in consequence of the notice heretofore given," although such notice was of itself ineffectual to terminate the contract).

91. [a] **In marine insurance policy** see Marcy v. Sun Mut. Ins. Co., 11 La. Ann. 748, 749; Goix v. Knox, 1 Johns. Cas. (N. Y.) 337, 340; Schloss v. Stevens, [1906] 2 K. B. 665; Jacob v. Gavilier, 87 L. T. Rep. N. S. 26. See Marine Insurance [26 Cyc 650].

92. Illinois Cent. R. Co. v. Davidson, 225 Ill. 618, 621, 80 NE 250 [aff

"all sailing,"[93] "all seminaries of learning,"[94] "all services,"[95] "all and singular,"[96] "all situations,"[97] "all sorts of wool,"[98] "all spawls and rubbish,"[99] "all stations,"[1] "all stockholders,"[2] "all such,"[3] "all summer,"[4] "all sums due,"[5] "all sums of money collected,"[6] "all sums of principal,"[7] "all taxation,"[8] "all taxes,"[9] "all taxes and assessments whatsoever,"[10] "all unpaid taxes,"[11] "all . . . [testator's] debts,"[12] "all the testimony,"[13] "all things,"[14] "all of the timber,"[15] "all valid liens,"[16] "all legal voters,"[17] "all the water,"[18] "all ways thereunto appertaining,"[19] "all wheat,"[20] "all of which one may die possessed,"[21] "all who may feel interested,"[22] "all

125 Ill. A. 424] (as including railroad as well as other crossings); Weaver v. Dawson County Mut. Tel. Co., 82 Nebr. 696, 699, 118 NW 650, 22 LRANS 1 (as applying to private as well as public roads); Bradley v. Buffalo, etc., R. Co., 34 N. Y. 427, 428 (as including road crossings adjacent to a station of a railroad company).

[a] **Crossings traversed by tracks.**—Where town authorities are conceding to a railroad the right to lay a switch track on certain streets, and the contract obligates the railroad to maintain all the crossings traversed by "its tracks," it will be understood that not all the crossings throughout the town are meant, but only those of the particular streets on which the switch tracks were to be laid. State v. Morgan's Louisiana, etc., Steamship Co., 111 La. 120, 123, 35 S 482.

93. Morris v. Chesapeake, etc., Steamship Co., 125 Fed. 62, 67 (in a cattle transportation contract, as importing a warranty that all the vessels named will sail during such month).

94. Ramsey County v. Stryker, 52 Minn. 144, 146, 53 NW 1133 (as including seminaries for young ladies, erected by private persons and supported by their patrons, and all seminaries of learning open for the instruction of the young and the dissemination of knowledge).

95. State v. Trousdale, 16 Nev. 357, 359 (including mileage).

96. McClasky v. Barr, 54 Fed. 781, 798 (used in a will as including all after-acquired property, and certain real property which came to the testator thereafter by a will and from an estate of which he was ignorant when his own will was made).

Phrase "all and singular other" see infra § 11.

97. Ardan Steamship Co. v. Theband, 35 Fed. 620, 622 (as referring to all situations that might be met with in the ordinary course of the voyage of a vessel).

98. Pearce v. Cowie, Holt N. P. 69, 71, 3 ECL 37 (as not including "cotton wool").

99. Coppinger v. Armstrong, 8 Ill. A. 210, 213 (where in construing a covenant in a lease of a quarry that the lessee will remove all spawls and rubbish, the court said: "We are satisfied, that under this covenant, the lessee and his assignees are bound to remove only such spawls and rubbish, as result from the operations under this lease, and if this is done and premises are otherwise in as good condition as when the lease was made, the 'usual wear and inevitable accidents excepted,' and so surrendered at the expiration of the lease, this covenant is sufficiently performed").

1. State v. Baltimore, etc., R. Co., 61 W. Va. 367, 368, 56 SE 518 (as not including "flag stations").

2. Brown v. Hitchcock, 36 Oh. St. 667, 681 (construing a statute providing for liability for corporate debts holding that "all stockholders" in the absence of any legislative intent to the contrary, must be regarded as including not only those who were such as the time the indebtedness was incurred, but all those who successively stand in their shoes in respect to the stock).

3. Lent v. Portland, 42 Or. 488, 492, 71 P 645 (referring to businesses, etc., to be licensed, considered as broad enough to include a license to practice law).

4. Smith v. Moore, 74 Vt. 81, 90, 52 A 320 (not equivalent to "every day").

5. Dickinson v. Saunders, 129 Fed. 16, 21, 63 CCA 666 (as referring only to sums due at a certain time).

6. Austin v. Johns, 62 Tex. 179, 183 (as including all sums collected in both civil suits and criminal suits).

7. Robertson v. De Brulatour, 111 App. Div. 882, 901, 98 NYS 15 (in construing a statute providing that an executor or trustee is entitled to compensation "for receiving and paying out all sums of principal," etc., the court said: "'All sums of principal' would apply as well to securities in bulk as it would to money received. The principal of the trust consists of the securities in which the trust is invested and, whether they are turned over to the trustees in specie or money, it seems to me that in either case the trustees have received principal of the estate, and, as the section gives to a trustee commissions based upon the sum of principal, it would seem that he is entitled to one-half commissions for receiving the securities in which the estate is to remain invested immediately upon their receipt").

8. Winona, etc., R. Co. v. Watertown, 1 SD 46, 55, 44 NW 1072 (holding that under a statute exempting the property of a railroad from "all taxation," the real estate of the company was not thereby exempted from an assessment for local municipal improvement, and that such an assessment was not taxation within the meaning of the grant).

9. Ittner v. Robinson, 35 Nebr. 133, 138, 52 NW 846 (as meaning merely general taxes and not special sewer assessments); Montreal v. Christ Church Cathedral, 5 Mont. Q. B. 20 (as including special assessments for local improvements).

10. Sion College v. London, [1901] 1 K. B. 617, 621 (holding that a statute providing that property should be free from "all taxes and assessments whatsoever" only created an exemption from taxes and assessments then in existence, and did not apply to those coming into existence at a later date).

[a] **"All taxes, rates, duties and assessments."**—A tenant covenanted with his landlord that he would pay and discharge "all taxes, rates, duties and assessments whatsoever, which now are, or hereafter shall become, payable for or in respect of the premises hereby demised, or any part thereof, whether parliamentary, parochial or otherwise, except the landlord's property tax." It was held that under this covenant the tenant was liable to pay the cost of drainage works, the execution of which was required by the local authority under the Metropolis Management Act (1855) § 85. Farlow v. Stevenson, [1900] 1 Ch. 128, 138 [appr Brett v. Rogers, [1897] 1 Q. B. 525].

11. Savles v. Davis, 22 Wis. 225, 230 ("subject, however, to all unpaid taxes and charges," in a statute regulating tax deeds, as referring only to such unpaid taxes and charges as may have accrued subsequently to the sale on which the deed is issued).

12. Sweeney v. Warren, 127 N. Y. 426, 437, 28 NE 413, 24 AmSR 468 (as not applying to a certain remainder).

13. Craggs v. Bohart, 4 Ind. T. 443, 452, 69 SW 931 (not equivalent to "all the evidence"). Compare Jordan v. Vehon, 44 Ill. A. 177, 178 (where the court considered but did not pass on the question whether the phrase "all the testimony offered or received" in a bill of exceptions was equivalent to the words "all the evidence"). See supra text and note 12.

14. Allardice v. Disten, 11 U. C. C. P. 278, 280 (in a covenant in a lease to keep in repair "all things," etc.).

15. Hughes v. Adams, 55 Tex. Civ. A. 197, 202, 119 SW 134 (holding that the words "all of the timber on our lands" in a certain county and state, in a contract of sale, include the timber on all of the lands so owned by the vendors).

16. Wender Blue Gem Coal Co. v. Louisville Property Co., 137 Ky. 339, 348, 125 SW 732 ("all valid liens" in St. § 2316; Russell St. § 4573, providing that all valid liens on the personalty of a lessee created before the property was carried on the premises, shall prevail against a distress warrant for rent).

17. White v. Furgeson, 29 Ind. A. 144, 64 NE 49, 53 (as including every legal voter).

18. Furner v. Seabury, 135 N. Y. 50, 62, 31 NE 1004 (as applying only to the water of a certain spring and not of neighboring springs).

[a] **"Maximum quantity of."**—In construing a grant of a right of way for a flume across a ditch which "provided that the crossing should 'be made in such a way as not to stop or impede the flow of all the water which the canal, or ditch, may or can carry, or any future enlargement of said canal, or ditch,'" the court said: "It is contended that the evidence does not show that 'all' the water flowing in the ditch is stopped or impeded, that an obstruction such as the posts admittedly were, placed in the current of a stream, may impede the flow of some of the water, but does not and cannot impede the flow of all. We think, however, that a wrong interpretation is put upon the meaning of the word 'all' as employed in the contract. It is used to signify 'maximum quantity of.' It was not in contemplation that every drop of running water should be absolutely stopped or absolutely impeded, but that there should be no stoppage or impediment to the maximum quantity of water which the ditch then, or in the future, was capable of carrying, and thus further to impede the natural flow." Centerville, etc., Irr. Ditch Co. v. Sanger Lumber Co., 140 Cal. 385, 387, 73 P 1079.

19. Harding v. Wilson, 2 B. & C. 96, 100, 9 ECL 50, 107 Reprint 319 (holding that where an underlease was of premises together with "all ways thereunto appertaining," a right of way over the original lessor's soil would not pass by such words).

20. Frazier v. Warfield, 13 Md. 279, 302 (holding that the weight of wheat may be ascertained by weighing one bushel in every sixty, according to the long-established usage in the city of Baltimore, notwithstanding the fact that a particular section of the Maryland Act of 1858, c 256, says the inspectors "shall also carefully weigh and determine the weight of all wheat that shall be inspected by them").

[a] **Under distress statutes.**—Under a statutory provision concerning distresses that a landlord may "seize all or any wheat, rye, &c., or any other product whatever growing or being on the premises," the power of distress, as to such articles, is not limited to grain growing or being on the premises, belonging exclusively to the tenant. Guest v. Opdyke, 31 N. J. L. 552, 556.

21. Blakeslee v. Pardee, 76 Conn. 263, 267, 56 A 503 (holding that a gift of "all of which one may die possessed" carries only the net amount of the estate).

22. Heirn v. McCaughan, 32 Miss. 17, 45, 66 AmD 588 (with respect to persons interested in the stopping of vessels to receive mail and passengers).

wills,"[23] "all words,"[24] "all work."[25]

[§ 4] **B. All Other—1. Definition.** It is difficult to fix the precise meaning of this phrase,[26] which depends wholly on the intention with which it is used.[27] The few definitions found are very unsatisfactory, and the construction put on the words in other cases afford little help, and are of slight instructive value, dissociated from the facts of the particular case.[28] By construction wholly, with reference to the particular facts, the phrase has received such definition as, all different from those which have been specified;[29] all others ejusdem generis;[30-31] all except;[32] all other like;[33] all not hereinbefore devised;[34] all not theretofore provided for;[35] all others not otherwise pointed out or specifically provided for;[36] others of the like kind with those specially enumerated, and occasioned by similar causes.[37]

[§ 5] **2. Scope of Phrase in General.** The phrase has received much judicial construction and its sweeping words[38] have been held to be material and operative words[39] of comprehensive import,[40] and to be words of enlargement, and not of restriction.[41] Where the intention is clear, it will be given effect, although technical words of well settled legal meaning be used, which of themselves would negative such an intention,[42] and where the phrase was used by Chancellor Kent in his will, it was said that an intention to use language according to its strict meaning, and with great exactness, could not be inferred from the fact that the testator was a distinguished judge and legal commentator.[43] Its meaning is a mere question of language and construction,[44] and the test is, therefore, what is the fair[45] and obvious meaning of the phrase,[46] as expressed in, or plainly implied from, the language used, either in the immediate connection where the phrase is found,[47] or in the other parts of the instrument.[48] Standing alone, and unrestricted by other language, the phrase is as broad and comprehensive as can be used.[49] The words have even been held so broad as to preclude any limitation,[50] and, taken in their broadest latitude, they cover everything.[51] They must not be restricted unless such restriction is necessary to carry out the plain intention of the maker of the instrument,[52] but where the phrase is so used as to be referable to two different things, that construction will be given which will make all parts of the instrument consistent.[53] The courts will not, from the mere use of this phrase, impute to a testator a superfluous exclusion, where the alternative construction is at best only conjectural, and in such cases the word "other" may be read so as to prevent the exclusion.[54] Where the phrase has for many years received a particular construction, either by the courts,[55] or by the revenue officers of the government,[56] or by the common understanding of those engaged in a business, such as insurance,[57] provided it is so well settled and of so long a continuance as to warrant the presumption that it was known to the parties,[58] or where in the particular case, the business in which one of the parties is engaged, such as that of a common carrier, imports a particular understanding of the meaning of the phrase, that will, in the absence of words showing a different intention, be taken to be the sense intended.[59]

23. In re Clark, 148 Cal. 108, 111, 82 P 760, 113 AmSR 197, 1 LRANS 996, 7 AnnCas 306 (as referring to foreign wills).

24. Chaffin v. Lynch, 83 Va. 106, 113, 1 SE 803 (as including written or printed words).

25. Hunter v. Bamberg County, 63 S. C. 149, 152, 41 SE 26 (as meaning all work of a certain officer within the county).

26. Astor v. Union, etc., Co., 7 Cow. (N. Y.) 202, 216.

27. Waters v. Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 213, 221, 9 L. ed. 91; Martin v. Hunter, 1 Wheat. (U. S.) 304, 328, 4 L. ed. 97; Benson v. U. S., 159 Fed. 118, 119, 86 CCA 308; U. S. v. Smith, 11 Fed. 487, 491, 8 Sawy. 100; Sixty-Five Terra Cotta Vases, 10 Fed. 880, 882; Gauss v. Clarksville, 10 F. Cas. No. 5,276, 5 Dill. 165, 169; Hyatt v. Allen, 54 Cal. 353, 358; Taubenhan v. Dunz, 20 Ill. A. 262, 265 [aff 125 Ill. 524, 17 NE 456]; Wicker v. Hushaw, 159 Ind. 1, 6, 64 NE 460; Knefler v. Shreve, 78 Ky. 297, 307; Hickman v. Holliday, 6 T. B. Mon. (Ky.) 582, 587; Andrews v. Schoppe, 84 Me. 170, 176, 24 A 805; Harmon v. Jennings, 22 Me. 240, 241; Hays v. Wright, 43 Md. 122, 126; Dunn v. Framingham, 132 Mass. 436, 437; St. Louis v. Laughlin, 49 Mo. 559, 564; St. Joseph v. Porter, 29 Mo. A. 605, 608; Burks v. Bosso, 180 N. Y. 341, 344, 73 NE 58, 105 AmSR 762 [rev 81 App. Div. 530, 81 NYS 384]; Grannan v. Westchester Racing Assoc., 153 N. Y. 449, 464, 47 NE 896; Moffett v. Elmendorf, 152 N. Y. 475, 488, 46 NE 845, 57 AmSR 529; Matter of Whiting, 2 Barb. (N. Y.) 513, 517; Kellar v. Koerber, 61 Oh. St. 388, 391, 55 NE 1002; In re Woodside, 188 Pa. 45, 50, 41 A 475; Chestnut, etc., Bank v. Fidelity, etc., Co., 186 Pa. 333, 341, 40 A 486, 65 AmSR 860; Dallas, etc., Co. v. State, 102 Tex. 570, 575, 120 SW 997; Koss v. Kastelberg, 98 Va. 278, 279, 36 SE 377; Waring v. Bosher, 91 Va. 286, 287, 21 SE 464; Mitchell v. Plover, 53 Wis. 548, 555, 11 SW 27; Thames, etc., Mar. Ins. Co. v. Hamilton, 12 App. Cas. 484, 490 [rev 17 Q. B. D. 195]; Wrench v. Jutting, 3 Beav. 521, 523, 43 EngCh 521, 49 Reprint 205; Cullen v. Butler, 5 M. & S. 461, 465, 105 Reprint 1119; Walsh v. Fleming, 10 Ont. L. 226, 231, 5 OntWR 693.

28. Osterhout v. Osterhout, 8 Ont. L. 685, 686 [aff 7 Ont. L. 402, 3 OntWR 249].

29. Hyatt v. Allen, 54 Cal. 353, 357.

30-31. Babbitt v. Sun, etc., Co., 23 La. Ann. 314, 316.

32. Chestnut, etc., Bank v. Fidelity, etc., Co., 186 Pa. 333, 341, 40 A 486, 65 AmSR 860.

33. Baker v. Shinkle, 249 Ill. 154, 159, 94 NE 58; Miller v. Demory, 64 Kan. 584, 586, 67 P 1105.

34. Moffett v. Elmendorf, 152 N. Y. 475, 488, 46 NE 845, 57 AmSR 529.

35. Mitchell v. Plover, 53 Wis. 548, 555, 11 NW 27.

36. U. S. v. Benjamin, 21 Fed. 285, 286.

37. Cullen v. Butler, 4 M. & S. 461, 465, 105 Reprint 1119.

38. Cullen v. Butler, 5 M. & S. 461, 465, 105 Reprint 1119; Murray v. Nova Scotia Mar. Ins. Co., 10 N. S. 24, 27.

39. Anthony v. Aetna, etc., Co., 1 F. Cas. No. 486, 1 Abb. 343, 348; Cullen v. Butler, 5 M. & S. 461, 465, 105 Reprint 1119.

40. Taubenhan v. Dunz, 125 Ill. 524, 533, 17 NE 456 [aff 20 Ill. A. 262].

41. Burks v. Bosso, 81 App. Div. 530, 533, 81 NYS 384 [rev 180 N. Y. 341, 73 NE 58, 105 AmSR 762].

42. Aveling v. Northwestern, etc., Assoc., 72 Mich. 7, 8, 40 NW 28, 1 LRA 528.

43. Hone v. Kent, 11 Barb. 315, 328.

44. Russell v. Niemann, 17 C. B. N. S. 163, 177, 112 ECL 163, 144 Reprint 66.

45. Martin v. Hunter, 1 Wheat. (U. S.) 304, 328, 4 L. ed. 97; Mills v. Tompkins, 110 App. Div. 212, 214, 97 NYS 9; Gray v. Carr, L. R. 6 Q. B. 522, 532.

46. Martin v. Hunter, 1 Wheat. (U. S.) 304, 328, 4 L. ed. 97; Mills v. Tompkins, 110 App. Div. 212, 214, 97 NYS 9; Marks v. Solomons, 2 Hall & T. 323, 326, 47 Reprint 1706.

47. Colt v. Colt, 32 Conn. 422, 446; Graves v. Mitchell, 90 Wis. 306, 315, 63 NW 271.

48. Gray v. Carr, L. R. 6 Q. B. 522, 532; Marks v. Solomons, 2 Hall & T. 323, 326, 47 Reprint 1706.

49. Colt v. Colt, 32 Conn. 422, 445; Taubenhan v. Dunz, 20 Ill. A. 262, 272 [aff 125 Ill. 524, 17 NE 456]; St. Joseph v. Porter, 29 Mo. A. 605, 608; Starbuck v. Phenix, etc., Co., 10 App. Div. 198, 199, 41 NYS 901; Moses v. Sun Mut. Ins. Co., 8 N. Y. Super. 159, 172; Perrin v. Protection Ins. Co., 11 Oh. 147, 170, 38 AmD 728; Thames, etc., Mar. Ins. Co. v. Hamilton, 12 App. Cas. 484, 489 [rev 17 Q. B. D. 195]; Worts v. Cubitt, 19 Beav. 421, 422, 52 Reprint 413; Devaux v. J'Anson, 5 Bing. N. Cas. 519, 35 ECL 280, 132 Reprint 1200; Bennet v. Batchelor, 3 Bro. Ch. 28, 29, 29 Reprint 389; Hearne v. Wigginton, 6 Madd. 119, 122, 56 Reprint 1037.

50. Boving v. Lawrence, 3 F. Cas. No. 1,712, 1 Blatchf. 616, 617.

51. Astor v. Union Ins. Co., 7 Cow. (N. Y.) 202, 216.

52. Taubenhan v. Dunz, 20 Ill. A. 262, 272 [aff 125 Ill. 524, 17 NE 456].

53. Marks v. Solomons, 2 Hall & T. 323, 326, 47 Reprint 1706.

54. Leidlich v. Leidlich, 8 Watts & S. (Pa.) 363, 364.

55. Thames, etc., Mar. Ins. Co. v. Hamilton, 12 App. Cas. 484, 490 [rev 17 Q. B. D. 195].

56. Boving v. Lawrence, 3 F. Cas. No. 1,712, 1 Blatchf. 616, 617.

57. Miller v. California Ins. Co., 76 Cal. 145, 147, 18 P 155, 9 AmSR 184; Colt v. Commercial Ins. Co., 7 Johns. (N. Y.) 385, 389, 5 AmD 282; Taylor v. Dunbar, L. R. 4 C. P. 206, 211.

58. Eager v. Atlas Ins. Co., 14 Pick. (Mass.) 141, 143, 25 AmD 363.

59. Savage v. Corn Exch. F., etc., Ins. Co., 17 N. Y. Super. 1, 14.

[§ 6] **3. When Meaning Will Not Be Restricted.** Where the words are specific and uncontrolled, they may be taken to indicate an intention not to restrict the sense in which they are used,[60] and if the text in which the words are found is clear and distinct, the phrase will be given the utmost latitude of which, in its own nature, it is susceptible.[61] The position of a clause containing the phrase, with reference to the rest of the instrument, such as the last clause in a will, the usual place for a residuary clause, may have a controlling effect in determining an intention not to restrict its meaning,[62] and it may be said that its meaning will never be limited, where by so doing a clear intention will be defeated;[63] or where the effect of a limitation will be to make a partial intestacy, if the plain intention of the testator is to devise all his estate;[64] or where a limitation will render other important words superfluous and meaningless.[65]

[§ 7] **4. When Meaning Will Be Restricted in General.** It is well settled, however, that the scope of the phrase may be limited with respect to the subject matter in relation to which it is used,[66] but that no restriction upon its plain and obvious import can be admitted, unless the inference is irresistible,[67] and some very distinct ground can be collected from the context, indicating an intention to use the words in a special or restricted sense;[68] and in such cases, where the thing in question is within the express words, it is incumbent on those who seek to make an exception to show that it is not within the intent.[69] So the courts will restrict the scope of the phrase in many cases, such as when an unrestricted use of the term will create an ambiguity;[70] or where without such limitation a restriction stated in,[71] or plainly implied by, other clauses in the instrument will be broken down, and the spirit of the whole instrument subordinated to the letter of some part of it;[72] or where, although the limited meaning given is not the most obvious, the court may thereby avoid the necessity of declaring a statute unconstitutional;[73] or where an unrestricted meaning would tend to nullify, in whole or in part, plain, precise, and unambiguous language in another part of the instrument, in which case the general doctrine that, in construing an instrument, the general must yield to the specific is applicable, where the two are inconsistent;[74] or where, without such restriction, the limitations of powers of municipal corporations, well settled in the law, would be removed,[75] because such a construction would remove the limitations inseparable from the existence of such a corporation.[76]

[§ 8] **5. When Meaning Restricted by Doctrine of Ejusdem Generis.** This well known canon of construction[77] is but an illustration, or specific application, of the broader maxim, Noscitur a sociis, and when it is applicable general and specific words which are capable of analogous meaning, when associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general.[78] The doctrine may apply to the phrase as used in both statutes and private instruments,[79] and when applied its effect is to limit the scope of the phrase to persons or things of the same genus as that of the specific words which precede it,[80] but not to those of an analogous genus.[81] A general clause containing this phrase, following an enumeration, will include, but be limited to, all other persons or things of the same nature,[82] class,[83] category,[84] or of the same or similar sort, character, or kind[85] as those which are particularly enumerated,[86] for the phrase cannot, in the absence of clear intention, be severed

60. Spindle v. Shreve, 111 U. S. 542, 545, 4 SCt 522, 28 L. ed. 512; Ex p. Bollman, 4 Cranch (U. S.) 75, 94, 2 L. ed. 554; James v. Brophy, 71 Fed. 310, 312, 18 CCA 49; Sullivan v. Larkin, 60 Kan. 545, 546, 57 P 105; Rasure v. Hart, 18 Kan. 340, 344, 26 AmR 772; Knefler v. Shreve, 78 Ky. 297, 307; Moffett v. Elmendorf, 152 N. Y. 475, 488, 46 NE 845, 57 AmSR 529; Mills v. Tompkins, 110 App. Div. 212, 214, 97 NYS 9; Peo. v. Lane, 41 Misc. 1, 2, 83 NYS 606; Jones v. Gordon, 55 N. C. 352, 355; Dallas Cons. Electric St. R. Co. v. State, 102 Tex. 570, 575, 120 SW 997; Cogswell v. Armstrong, 2 Kay & J. 227, 231, 69 Reprint, 764. See also Leonard v. Middleborough, 198 Mass. 221, 223, 94 NE 323.

61. Martin v. Hunter, 1 Wheat. (U. S.) 304, 328, 4 L. ed. 97.

62. Taubenhan v. Dunz, 20 Ill. A. 262, 269 [aff 125 Ill. 524, 17 NE 456]; In re Woodside, 188 Pa. 45, 50, 41 A 475.

63. Mitchell v. Plover, 53 Wis. 548, 555, 11 NW 27. Compare U. S. v. Smith, 11 Fed. 487, 491, 8 Sawy. 100.

64. Walsh v. Fleming, 10 Ont. L. 226, 231, 5 OntWR 693.

65. Smith v. McIntyre, 95 Fed. 585, 588, 37 CCA 177.

66. Thames, etc., Mar. Ins. Co. v. Hamilton, 12 App. Cas. 484, 490 [rev 17 Q. B. D. 195]; Serraino v. Campbell, 25 Q. B. D. 501, 503; Gullischen v. Stewart, 11 Q. B. D. 186, 189 [aff 13 Q. B. D. 317].

67. Martin v. Hunter, 1 Wheat. (U. S.) 304, 328, 4 L. ed. 97.

68. Taubenhan v. Dunz, 125 Ill. 524, 533, 17 NE 456 [aff 20 Ill. A. 262].

69. Waters v. Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 213, 221, 9 L. ed. 691.

70. Mitchell v. Plover, 53 Wis. 548, 555, 11 NW 27.

71. Grannan v. Westchester Racing Assoc., 153 N. Y. 449, 464, 47 NE 896.

72. Whicker v. Hushaw, 159 Ind. 1, 6, 64 NE 460; Wrench v. Jutting, 3 Beav. 521, 522, 43 EngCh 521, 49 Reprint 205.

[a] **Intent of whole instrument governs phrase.**—In Whicker v. Hushaw, 159 Ind. 1, 6, 64 NE 460, the court said: "Where the covenants [in an agreement for the sale of real estate] are so closely knit together that it may be said that one intent pervades the whole, proper interpretation often requires the courts to treat general expressions as restrained."

73. Townsend Gas, etc., Co. v. Hill, 24 Wash. 469, 473, 64 P 778.

74. Waring v. Bosher, 91 Va. 286, 287, 21 SE 464. See also Hickman v. Holliday, 6 T. B. Mon. (Ky.) 582, 587.

75. Erwin v. St. Joseph Public Schools, 12 Fed. 680, 682, 2 McCrary 608; Gause v. Clarksville, 10 F. Cas. No. 5,276, 5 Dill. 165, 169.

76. Gause v. Clarksville, 10 F. Cas. No. 5,276, 5 Dill. 165, 169.

77. Brush v. Lemma, 77 Ill. 496, 498.

78. Misch v. Russell, 136 Ill. 22, 25, 26 NE 528, 12 LRA 125.

[a] **Lord Ellenborough's statement of the rule.**—In Cullen v. Butler, 5 M. & S. 461, 464, 465, 105 Reprint 1119, Lord Ellenborough, C. J., after stating that the clause and "all other perils, losses, and misfortunes," had only recently been added in marine insurance policies, and that its meaning had never been passed upon, said: "As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to . . . have the due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." See also Moses v. Sun Mut. Ins. Co., 8 N. Y. Super. 159, 172.

79. St. Joseph v. Porter, 29 Mo. A. 605, 608.

80. Brown v. J. H. Bell & Co., 146 Iowa 89, 98, 123 NW 231, 124 NW 901, 27 LRANS 407, AnnCas1912B 852; Thames, etc., Mar. Ins. Co. v. Hamilton, 12 App. Cas. 484, 490 [rev 17 Q. B. D. 195].

81. Thames, etc., Mar. Ins. Co. v. Hamilton, 12 App. Cas. 484, 490 [rev 17 Q. B. D. 195].

82. Babbitt v. Sun Mut. Ins. Co., 23 La. Ann. 314, 316; Salt Lake City v. Howe, 37 Utah 170, 173, 106 P 705, AnnCas1912C 189; Butler v. Wildman, 3 B. & Ald. 398, 402, 5 ECL 233, 106 Reprint 708.

83. Campbell's Succ., 115 La. 1035, 1037, 40 S 449; Andrews v. Schoppe, 84 Me. 170, 176, 24 A 805; Banyer v. Albany Ins. Co., 85 App. Div. 122, 124, 83 NYS 55 [aff 179 N. Y. 554, 71 NE 1140].

84. Whicker v. Hushaw, 159 Ind. 1, 6, 64 NE 460; Burks v. Bosso, 180 N. Y. 341, 344, 73 NE 58, 105 AmSR 752 [rev 81 App. Div. 530, 81 NYS 384].

85. Alabama v. Montague, 117 U. S. 602, 609, 6 SCt 911, 29 L. ed. 1000; Cecil v. Green, 161 Ill. 265, 268, 43 NE 1105, 36 LRA 566 [aff 60 Ill. A. 61]; Misch v. Russell, 136 Ill. 22, 25, 26 NE 528, 12 LRA 125; St. Joseph v. Porter, 29 Mo. A. 605, 608; Davidson v. Burnand, L. R. 4 C. P. 117, 120; Cullen v. Butler, 5 M. & S. 461, 465, 105 Reprint 1119; O'Connor v. Merchants' Mar. Ins. Co., 20 N. S. 514, 515 [aff 16 Can. S. C. 331].

86. Astor v. Union Ins. Co., 7 Cow.

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from the important qualifying words of the clause, and be given a separate construction.[87] The doctrine when applied has never been held to require the rejection of the general terms,[88] but merely to limit the phrase to explaining the words in the immediate connection where it is found,[89] as well as to enlarging the meaning of the specific terms enumerated, so as to include persons or things coming very near, but not precisely within, the terms[90] or the proper scope of the enumeration.[91] The doctrine will always be applied in cases where, without it, the words of an instrument will be rendered meaningless,[92] or where the enumeration which it follows would otherwise be useless verbiage, and entirely superfluous;[93] but where, for example, the phrase, "all other retailers," follows an enumeration not containing any reference to retail businesses, although the doctrine would usually be applied in such cases, it cannot be applied, and the portion of the statute containing the phrase must be rejected as too vague, indefinite, and uncertain to be administered.[94] Mere enumeration, however, followed by a general clause containing the phrase, is not enough of itself to cause the application of the doctrine, if a contrary intention clearly appears elsewhere.[95] It has been said that where the doctrine was applied, the reason for so doing was not wholly, or even mainly, the fact of the conjunction of the enumeration with the general clause, but that other words in the instrument indicated a restrictive intention.[96] So an intention which the doctrine would defeat has been inferred from the supposed unfavorable attitude of the legislature toward the liquor traffic,[97] or from a settled legislative policy to prevent race discrimination,[98] or from its purpose to raise additional state revenue,[99] or to clothe towns with ample powers to raise money,[1] or from a policy of congress to encourage the importation of works of art.[2] Similar inferences have been drawn where the language used has no well known meaning in the law, and does not describe with reasonable certainty the things in question,[3] and where a constitutional convention, in revising a state constitution, expressly refused to include the persons in question in the category in which they are sought to be included;[4] or where the application of the doctrine would work a result inharmonious with the known purpose of,[5] or nullify another clause in, a statute,[6] particularly where the general terms are loose and of doubtful import, and the particular phrases which show the real intention are clear and specific, and admit of but one construction.[7] The same rule will obtain where an application of the doctrine will defeat a subsequent residuary clause in a will,[8] or other special clauses in an instrument;[9] or where a contrary intention is to be gathered from the language of the enumeration;[10] or where it will do violence to the plain and obvious import of the whole instrument.[11] The same rule was applied where the restrictive intention was held to be shown in a codicil,[12] and in one case extrinsic evidence was admitted to show an intention which would have been defeated by the doctrine.[13] And where the phrase precedes, and is connected with, an enumeration by the conjunction "and," it has been held to be such an indication of a contrary intention as will preclude the application of the doctrine;[14] but in one case where the instrument was inartificially drawn, so that the phrase appeared in the middle of an enumeration, the doctrine seems to have been substantially applied, and effect given to the phrase as if it followed the enumeration.[15] The doctrine has, however, been applied eo nomine in many cases,[16] and in many others it has been applied in effect, although not in terms.[17]

(N. Y.) 202, 216; O'Connor v. Merchants' Mar. Ins. Co., 20 N. S. 514, 515.

87. Andrews v. Schoppe, 84 Me. 170, 176, 24 A 805.

88. Misch v. Russell, 136 Ill. 22, 25, 26 NE 528, 12 LRA 125.

89. Alabama v. Montague, 117 U. S. 602, 609, 6 SCt 911, 29 L. ed. 1000; In re Whiting, 2 Barb. (N. Y.) 513, 517.

90. Butler v. Wildman, 3 B. & Ald. 406, 407, 5 ECL 233, 106 Reprint 708 [quot The Knight of St. Michael, [1898] P. 30, 34].

91. Cullen v. Butler, 5 M. & S. 461, 465, 105 Reprint 1119.

92. Baker v. Shinkle, 249 Ill. 154, 159, 94 NE 58; Andrews v. Schoppe, 84 Me. 170, 176, 24 A 805.

93. Andrews v. Schoppe, 84 Me. 170, 176, 24 A 805.

[a] **Where the words "all other articles of personal property** in the house at the time of my death," following a detailed enumeration of household goods, were used in a will, the court held that not much force could be given to the words "in the house," and that the term could not include notes. Andrews v. Schoppe, 84 Me. 170, 176, 24 A 805. See also Rogers v. Bayley, 84 Md. 30, 31, 35 A 58.

94. Miller v. Demory, 64 Kan. 584, 586, 67 P 1105.

95. Erwin v. St. Joseph Public Schools, 12 Fed. 680, 682, 2 McCrary 608.

96. Taubenhan v. Dunz, 20 Ill. A. 262, 269 [aff 125 Ill. 524, 17 NE 456].

97. Keller v. Koerber, 61 Oh. St. 388, 391, 55 NE 1002.

98. Burks v. Bosso, 81 App. Div. 530, 533, 81 NYS 384 [rev on other grounds 180 N. Y. 341, 73 NE 58, 105 AmSR 762].

99. Dallas Cons. Electric St. R. Co. v. State, 102 Tex. 570, 575, 120 SW 997.

1. Dunn v. Framingham, 132 Mass. 436, 437.

2. Sixty-Five Terra Cotta Vases, 10 Fed. 880, 882.

3. U. S. v. Smith, 11 Fed. 487, 491, 8 Sawy. 100.

4. Peo. v. Luce, 74 Misc. 551, 558, 133 NYS 9.

5. English v. U. S., 116 Fed. 625, 626, 54 CCA 81.

6. Warwick v. Bettman, 102 Fed. 127, 128 [aff 108 Fed. 46, 47 CCA 185].

7. U. S. v. Benjamin, 21 Fed. 285, 286.

8. Wolf v. Shaefner, 51 Wis. 53, 60, 8 NW 8.

9. Lane v. Patterson, 138 Ga. 710, 76 SE 47; Frichette v. State Mut. F. & M. Ins. Co., 16 N. Y. Super. 190, 197.

10. Baker v. Ludlow, 2 Johns. Cas. (N. Y.) 289, 290.

[a] **Maxim, Expressio unius exclusio est alterius, applied.**—In Baker v. Ludlow, 2 Johns. Cas. (N. Y.) 289, 290, the words "all other articles perishable in their own nature" were used in an insurance policy on goods, following an enumeration containing, among other things, "dried fish." The court applied the maxim, Expressio unius exclusio est alterius, and held that the general phrase did not include pickled herrings.

11. Harmon v. Jennings, 22 Me. 240, 241; Mills v. Tompkins, 110 App. Div. 212, 214, 97 NYS 9; Peo. v. Lane, 41 Misc. 1, 2, 83 NYS 606.

12. Rogers v. Bayley, 84 Md. 30, 31, 35 A 58.

13. Phetteplace v. British, etc., Mar. Ins. Co., 23 R. I. 26, 29, 49 A 33.

14. Harmon v. Jennings, 22 Me. 240, 241; Wrench v. Jutting, 3 Beav. 521, 523, 43 EngCh 521, 49 Reprint 205.

15. Gray v. Carr, L. R. 6 Q. B. 522, 532.

16. Baker v. Shinkle, 249 Ill. 154, 159, 94 NE 58; Whicker v. Hushaw, 159 Ind. 1, 6, 64 NE 460; Brown v. J. H. Bell Co., 146 Iowa 89, 99, 123 NW 231, 124 NW 901, 27 LRANS 407, Ann Cas1912B 852; Miller v. Demory, 64 Kan. 584, 586, 67 P 1105; Campbell's Succ., 115 La. 1035, 1037, 40 S 449; Babbitt v. Sun Mut. Ins. Co., 23 La. Ann. 314, 316; Andrews v. Schoppe, 84 Me. 170, 176, 24 A 805; Swift v. Union Mut. Mar. Ins. Co., 122 Mass. 574, 575; Ellery v. New England Ins. Co., 8 Pick. (Mass.) 14, 20; Ex p. Smith, 231 Mo. 111, 119, 132 SW 607; St. Louis v. Laughlin, 49 Mo. 559, 564; St. Joseph v. Porter, 29 Mo. A. 605, 608; Moses v. Sun Mut. Ins. Co., 8 N. Y. Super. 159, 172; Thames, etc., Mar. Ins. Co. v. Hamilton, 12 App. Cas. 484, 493 [rev 17 Q. B. D. 195]; Serraino v. Campbell, 25 Q. B. D. 501, 503 [aff [1891] 1 Q. B. 283]; West India, etc., Tel. Co. v. Home, etc., Mar. Ins. Co., 6 Q. B. D. 51, 56; Casher v. Holmes, 2 B. & Ad. 592, 596, 22 ECL 249, 109 Reprint 1263; Butler v. Wildman, 3 B. & Ald. 398, 402, 5 ECL 233, 106 Reprint 708; Phillips v. Barber, 2 B. & Ald. 161, 164, 106 Reprint 1151; Russell v. Niemann, 17 C. B. N. S. 163, 177, 112 ECL 163, 144 Reprint 66; Lamphier v. Despard, 2 Dr. & War. 59, 62; Naylor v. Palmer, 8 Exch. 739, 748 [aff 10 Exch. 382]; Marks v. Solomons, 2 Hall & T. 323, 326, 47 Reprint 1706; O'Connor v. Merchants' Mar. Ins. Co., 20 N. S. 514, 515.

17. Pennock v. Coe, 23 How. (U. S.) 117, 126, 16 L. ed. 436; Wilson v. Sandford, 10 How. (U. S.) 99, 101, 13 L. ed. 344; The Satellite, 188 Fed. 717, 718; Benson v. U. S., 159 Fed. 118,

[§ 9] **6. Phrases in Which the Words Have Been Used.** The following phrases have received judicial interpretation: "All other accidents of navigation,"[118] "all other acts as natural persons,"[119] "all other allowances,"[120] "all other . . . antiquities,"[121] "all other articles of personal property in the house,"[122] "all other articles perishable in their own nature,"[123] "all other bonds,"[124] "all other business, trades, avocations or professions whatever,"[125] "all other cases,"[126] "all other causes,"[127] "all other charges whatsoever,"[128] "all other charges whatsoever, except those before stated,"[129] "all other charges whatsoever not appertaining to the working . . . of the steamer,"[130] "all other chattel property,"[131] "all my other children,"[132] "all . . . other circumstances,"[133] "all other clauses and conditions in the policies of the company,"[134] "all other conditions,"[135] "all other conditions, as per charter party,"[136] "all other conditions or demurrage,"[137] "all other creditors,"[138] "all other dangers peculiar to the sea,"[139] "all other debts,"[140] "all other demands,"[141] "all my other effects,"[142] "all other expenses,"[143] "all other . . . fish in tin packages,"[144] "all other goods,"[145] "all other goods kept by them for sale, manufactured and in process,"[146] "all other goods now on hand,"[147] "all other grants, gifts, and devises,"[148] "all other household furnitures,"[149] "all other household implements of industry,"[150] "all . . . other items not particularly mentioned and otherwise disposed of,"[151] "all other judicial officers,"[152] "all 'other lands,'"[153] "all other lands and estates . . . not particularly pointed out,"[154] "all other legacies,"[155] "all other legal consequences and incidents of the natural relation of parents and children,"[156] "all other liens,"[157] "all other losses and misfortunes,"[158] "all such other matters or things,"[159] "all other metals not enumerated,"[160] "all other mineral dis-

119, 86 CCA 308; St. Paul F. & M. Ins. Co. v. Pacific Cold Storage Co., 157 Fed. 625, 631, 87 CCA 14, 14 LRANS 1161; Dennis v. Home Ins. Co., 136 Fed. 481, 482; U. S. v. Austin, etc., Co., 121 Fed. 729, 731, 58 CCA 149; Erwin v. St. Joseph Public Schools, 12 Fed. 680, 682, 2 McCrary 608; Anthony v. Aetna Ins. Co., 1 F. Cas. No. 486, 1 Abb. 343, 348; Taylor v. Hutchinson, 145 Ala. 202, 208, 40 S 108; Warden v. Broome, 9 Cal. A. 172, 175, 98 P 252; In re Maddox, 111 Ga. 647, 648, 36 SE 859; In re Kenan, 109 Ga. 819, 820, 35 SE 312; Chicago v. Drogasawacz, 256 Ill. 34, 36, 99 NE 869; Cecil v. Green, 161 Ill. 265, 268, 43 NE 1105, 36 LRA 566 [aff 60 Ill. A. 61]; Winter v. Thistlewood 101 Ill. 450, 452; Linegar v. Rittenhouse, 94 Ill. 208, 211; Brush v. Lemma, 77 Ill. 496, 498; Humburd v. Crawford, 128 Iowa 743, 744, 105 NW 330; Chapin v. Garretson, 85 Iowa 377, 380, 52 NW 104; Rogers v. Bayley, 84 Md. 30, 31, 35 A 58; Gratiot County v. Munson, 157 Mich. 505, 508, 122 NW 117; Cleveland v. Amy, 88 Mich. 374, 50 NW 293; McMurtry v. Engelhardt, 5 Nebr. (Unoff.) 271, 98 NW 40, 42; Burks v. Bosso, 180 N. Y. 341, 344, 73 NE 58, 105 AmSR 762 [rev 81 App. Div. 530, 81 NYS 384]; Petrie v. Phenix Ins. Co., 132 N. Y. 137, 144, 30 NE 380; Banyer v. Albany Ins. Co., 85 App. Div. 122, 123, 83 NYS 65 [aff 179 N. Y. 554, 71 NE 1140]; Starbuck v. Phenix Ins. Co., 19 App. Div. 139, 142, 45 NYS 995; Hone v. Kent, 11 Barb. 315, 328 [rev 6 N. Y. 390]; In re Whiting, 2 Barb. (N. Y.) 513, 517; Astor v. Union Ins. Co., 7 Cow. (N. Y.) 202, 216; Johnson v. Humphrey Pop Corn Co., 24 Oh. Cir. Ct. 135, 137; In re Schneider, 11 Or. 288, 302, 8 P 289; De Peau v. Russel, 3 S. C. L. 441, 447, 2 AmD 676; Salt Lake City v. Howe, 37 Utah 170, 173, 106 P 705, AnnCas 1912C 189; Koss v. Kastelberg, 98 Va. 278, 279, 36 SE 377; Townsend Gas, etc., Co. v. Hill, 24 Wash. 469, 473, 64 P 778; Miller v. Law Acc. Ins. Co., [1902] 2 K. B. 694, 700; Porteus v. Watney, 3 Q. B. D. 534, 538; Gray v. Carr, L. R. 6 Q. B. 522, 532; Davidson v. Burnand, L. R. 4 C. P. 117, 120; The Durham City, 14 P. D. 85, 87; Walpole v. Boughton, 12 Beav. 622, 624, 50 Reprint 1198; Devaux v. J'Anson, 5 Bing. N. Cas. 519, 35 ECL 280, 132 Reprint 1200; Laveroni v. Drury, 8 Exch. 166, 170; Lewis v. Standard Mut. F. Ins. Co., 44 Can. S. C. 40, 61 [rev 19 Man. 720].

18. The Southgate, [1893] P. 329, 335; Glengoil Steamship Co. v. Pilkington, 28 Can. S. C. 146, 155.

19. Erwin v. St. Joseph Public Schools, 12 Fed. 680, 682, 2 McCrary 608; Gause v. Clarksville, 10 F. Cas. No. 5,276, 5 Dill. 165, 169.

20. Graves v. Mitchell, 90 Wis. 306, 315, 63 NW 271.

21. Sixty-Five Terra Cotta Vases, 10 Fed. 880, 882.

22. Andrews v. Schoppe, 84 Me. 170, 176, 24 A 805.

23. Astor v. Union Ins. Co., 7 Cow. (N. Y.) 202, 214, 216; Colt v. Commercial Ins. Co., 7 Johns. (N. Y.) 385, 389, 5 AmD 282; Baker v. Ludlow, 2 Johns. Cas. (N. Y.) 289, 290.

24. Warwick v. Bettman, 102 Fed. 127, 128 [aff 108 Fed. 46, 47 CCA 185].

25. Ex p. Smith, 281 Mo. 111, 119, 132 SW 607; St. Louis v. Laughlin, 49 Mo. 559, 564; St. Joseph v. Porter, 29 Mo. A. 605, 608.

26. Wilson v. Sandford, 10 How. (U. S.) 99, 100, 13 L. ed. 344; Martin v. Hunter, 1 Wheat. (U. S.) 304, 328, 4 L. ed. 97; In re Maddox, 111 Ga. 647, 648, 36 SE 859; In re Kenan, 109 Ga. 819, 820, 35 SE 312.

27. French v. New York Fidelity, etc., Co., 135 Wis. 259, 270, 115 NW 869, 17 LRANS 1011 (where this phrase was construed as meaning "sole proximate cause").

28. The Peer of the Realm, 19 Fed. 216; Timperley Steam Shipping Co. v. Smyth, [1905] 2 K. B. 791, 800; The Steamship County of Lancaster v. Sharp, 24 Q. B. D. 158, 161.

29. Morgan v. The Steamship Castlegate, [1893] App. Cas. 38, 47.

30. The Durham City, 14 P. D. 85, 87.

31. Lamphier v. Despard, 2 Dr. & War. 59, 61.

32. Leidlich v. Leidlich, 8 Watts & S. (Pa.) 363, 364.

33. Ames v. Thren, 136 Ill. A. 568, 571.

34. Weinberger v. Merchants' Ins. Co., 41 La. Ann. 31, 34, 5 S 728.

35. James v. Brophy, 71 Fed. 310, 312, 18 CCA 49.

36. Serraino v. Campbell, [1891] 1 Q. B. 283, 297 [aff 25 Q. B. D. 501]; Gullischen v. Stewart, 11 Q. B. D. 186, 189 [aff 13 Q. B. D. 317]; Porteus v. Watney, 3 Q. B. D. 534, 541; Gray v. Carr, L. R. 6 Q. B. 522, 532; Russell v. Niemann, 17 C. B. N. S. 163, 174, 112 ECL 163, 144 Reprint 66; Forsyth v. Sutherland, 31 N. S. 391, 400.

In Serraino v. Campbell, supra, the court held this phrase, occurring in an exception in a bill of lading, to mean all those conditions in the charter party which were to be performed by the consignee, that is, all conditions which operated against the consignee. See also Russell v. Niemann, supra (giving a substantially similar construction). In Gray v. Carr, supra, the same phrase, under substantially similar circumstances, was defined as meaning "all the conditions in the charter party upon the performance of which the cargo is to be delivered, viz., payment of freight, demurrage, dead freight, and average."

37. Gray v. Carr, L. R. 6 Q. B. 522, 531.

38. Taylor v. Hutchinson, 145 Ala. 202, 208, 40 S 108.

39. Cal. Civ. Code § 2199 [quot Miller v. California Ins. Co., 76 Cal. 145, 147, 18 P 155, 9 AmSR 184].

40. Campbell's Succ., 115 La. 1035, 1037, 40 S 449.

41. Harmon v. Jennings, 22 Me. 240, 241.

42. Hearne v. Wigginton, 6 Mad. 119, 122, 56 Reprint 1037.

43. Hone v. Kent, 11 Barb. 315, 330 [rev on other grounds 6 N. Y. 390].

44. Benson v. U. S., 159 Fed. 118, 119, 86 CCA 308.

45. Wrench v. Jutting, 3 Beav. 521, 523, 43 EngCh 521, 49 Reprint 205.

46. Lewis v. Standard Mut. F. Ins. Co., 44 Can. S. C. 40, 61 [rev 19 Man. 720].

47. Chapin v. Garretson, 85 Iowa 377, 380, 52 NW 104.

48. McMurtry v. Englehardt, 5 Nebr. (Unoff.) 271, 98 NW 40, 42.

49. Rasure v. Hart, 18 Kan. 340, 344, 26 AmR 772.

50. Rasure v. Hart, 18 Kan. 340, 344, 26 AmR 772.

51. Smith v. McIntyre, 95 Fed. 585, 588, 37 CCA 177.

52. Peo. v. Luce, 74 Misc. 551, 557, 133 NYS 9.

53. Lane v. Patterson, 138 Ga. 710, 76 SE 47; Moffett v. Elmendorf, 152 N. Y. 475, 488, 46 NE 845, 57 AmSR 529; In re Woodside, 188 Pa. 45, 50, 41 A 475.

54. Hickman v. Holliday, 6 T. B. Mon. (Ky.) 582, 586.

55. Colt v. Colt, 111 U. S. 566, 568, 4 SCt 553, 28 L. ed. 520; Colt v. Colt, 19 Blatchf. (U. S.) 399, 405; Colt v. Colt, 32 Conn. 422, 445.

56. In re Olney, 27 R. I. 495, 497, 63 A 956; Hartwell v. Tefft, 19 R. I. 644, 645, 35 A 882, 34 LRA 500.

57. The Satellite, 188 Fed. 717, 718; Whicker v. Hushaw, 159 Ind. 1, 6, 64 NE 460.

In Whicker v. Hushaw, supra, where the suit was on an agreement to buy real estate, and the vendee contracted to assume "all other liens," the court held that the phrase did not serve to expand the liability of the vendee into one of the utmost obligation.

58. Waters v. Merchants Louisville Ins. Co., 11 Pet. (U. S.) 213, 221, 9 L. ed. 691; Miller v. California Ins. Co., 76 Cal. 145, 147, 18 P 155, 9 AmSR 184; Williams v. Cole, 16 Me. 207, 208; Swift v. Union Mut. Mar. Ins. Co., 122 Mass. 573, 575; Eager v. Atlas Ins. Co., 14 Pick. (Mass.) 141, 143, 25 AmD 363; Ellery v. New England Ins. Co., 8 Pick. (Mass.) 14, 20; Perrin v. Protection Ins. Co., 11 Oh. 147, 170, 38 AmD 728.

59. Prairie City Oil Co. v. Standard Mut. F. Ins. Co., 19 Man. 720, 722 [rev 44 Can. S. C. 40].

60. Casher v. Holmes, 2 B. & Ad. 592, 595, 22 ECL 249, 109 Reprint 1263.

[a] **Not including gold and silver.** —In Casher v. Holmes, 2 B. & Ad. 592, 596, 22 ECL 249, 109 Reprint 1263, the court drew a distinction between "metals" in the ordinary sense

tricts,"[61] "all other his monies, securities for money, effects and things,"[62] "all other my real and personal estates whatsoever and wheresoever,"[63] "all other necessary charges arising in such town,"[64] "all other necessary outgoings,"[65] "all my other negro slaves,"[66] "all other, not before bequeathed, goods and chattels,"[67] "all other obligations and indebtedness,"[68] "all other officers,"[69] "all other ordinances of said city,"[70] "all other paper,"[71] "all other perils and misfortunes,"[72] "all other perils, losses, and misfortunes,"[73] "all other permanent fixtures,"[74] "all my other personal and real estate whatsoever,"[75] "all other personal property,"[76] "all other personal property of every kind and description."[77] "all other personal property used in my butchering business,"[78] "all other personalty of which I shall dies possessed,"[79] "all other places of public accommodation,"[80] "all other places of accommodation and amusement,"[81] "all other places of public accommodation or amusement,"[82] "all other places where refreshments are served,"[83] "all other plain, green . . . and lime glassware,"[84] "all other proceedings,"[85] "all other property,"[86] "all other property . . . belonging to said company,"[87] "all other property of every nature and kind whatsoever,"[88] "all other property of which I shall die seized,[89] "all other property remaining at her decease,"[90] "all other provisions,"[91] "all other purposes,"[92] "all other real and personal estate,"[93] "all my other residuary estate,"[94] "all other respects,"[95] "all other retailers,"[96] "all other rights and privileges appertaining to the copyright,"[97] "all other school officers,"[98] "all other sea-perils, losses and misfortunes,"[99] "all other seeds, not otherwise provided for,"[1] "all other soaps, not provided for in this act,"[2] "all other societies,"[3] "all other sources,"[4] "all . . . other surrounding circumstances,"[5] "all other taxes now

of the term, and a peculiar sense which was said by common understanding to attach to "precious metals," by which was understood gold and silver. So, in a suit to recover duty as "metals," the court held that gold and silver, which were the metals in issue, were not ejusdem generis.

61. English v. U. S., 116 Fed. 625, 626, 54 CCA 81; U. S. v. Benjamin, 21 Fed. 285, 286; U. S. v. Smith, 11 Fed. 487, 491, 8 Sawy. 100.

62. Worts v. Cubitt, 19 Beav. 421, 52 Reprint 413.

63. Osterhout v. Osterhout, 8 Ont. L. 685, 686 [aff 7 Ont. L. 402, 3 Ont WR 249].

64. Leonard v. Middleborough, 198 Mass. 221, 223, 84 NE 323; Dunn v. Framingham, 132 Mass. 436, 437; Minot v. Thompson, 106 Mass. 583, 584.

In Leonard v. Middleborough, supra, where this phrase occurred in a statute, the court held that it included all matters where the town had a corporate duty imposed on it, or a right to protect.

65. Walpole v. Boughton, 12 Beav. 622, 624, 50 Reprint 1198.

66. Jones v. Gordon, 55 N. C. 352, 355.

67. Bennet v. Batchelor, 3 Bro. Ch. 28, 29, 29 Reprint 389.

68. Townsend Gas, etc., Co. v. Hill, 24 Wash. 469, 473, 64 P 778.

69. Baker v. Shinkle, 249 Ill. 154, 159, 94 NE 58; Winter v. Thistlewood, 101 Ill. 450, 452; Linegar v. Rittenhouse, 94 Ill. 208, 211; Brush v. Lemma, 77 Ill. 496, 498; Gratiot County v. Munson, 157 Mich. 505, 508, 122 NW 117; In re Whiting, 2 Barb. (N. Y.) 513, 517.

70. In re Schneider, 11 Or. 288, 302, 8 P 289.

71. Dennison Mfg. Co. v. U. S., 66 Fed. 728, 729.

72. Anthony v. Ætna Ins. Co., 1 F. Cas. No. 486, 1 Abb. 343, 348.

73. American-Hawaiian Steamship Co. v. Bennett, 207 Fed. 510, 512, 125 CCA 172; St. Paul F. & M. Ins. Co. v. Pacific Coal Storage Co., 157 Fed. 625, 631, 87 CCA 14, 14 LRANS 1161; Dennis v. Home Ins. Co., 136 Fed. 481, 482; Earnmoor Steamship Co. v. Union Ins. Co., 44 Fed. 374, 377; Moores v. Louisville Underwriters, 14 Fed. 226, 232; Babbitt v. Sun Mut. Ins. Co., 23 La. Ann. 314, 316; Crescent Ins. Co. v. Vicksburg, etc., R. Co., 69 Miss. 208, 210, 13 S 254, 30 AmSR 537; Citizens Ins. Co. v. Glasgow, 9 Mo. 411, 417; Petrie v. Phenix Ins. Co., 132 N. Y. 137, 144, 30 NE 380; Starbuck v. Phenix Ins. Co., 19 App. Div. 139, 142, 45 NYS 995; Strong v. Sun Mut. Ins. Co., 31 N. Y. 103, 109, 88 AmD 242; Starbuck v. Phenix Ins. Co., 10 App. Div. 198, 199, 41 NYS 901; Savage v. Corn Exch. F., etc., Ins. Co., 17 N. Y. Super. 1, 14; Moses v. Sun Mut. Ins. Co., 8 N. Y. Super. 159, 172; Phetteplace v. British, etc., Ins. Co., 23 R. I. 26, 29, 49 A 33; Thames, etc., Mar. Ins. Co. v. Hamilton, 12 App. Cas. 484, 493 [rev 17 Q. B. D. 195]; Miller v. Law Acc. Ins. Co., [1902] 2 K. B. 694, 700; West India, etc., Tel. Co. v. Home, etc., Mar. Ins. Co., 6 Q. B. D. 51, 56; Taylor v. Dunbar, L. R. 4 C. P. 206, 211; Davidson v. Burnand, L. R. 4 C. P. 117, 120; Butler v. Wildman, 3 B. & Ald. 398, 402, 5 ECL 233, 106 Reprint 708; Phillips v. Barber, 2 B. & Ald. 161, 164, 106 Reprint 1151; Devaux v. J'Anson, 5 Bing. N. Cas. 519, 35 ECL 280, 132 Reprint 1200; Hunter v. Potts, 4 Campb. 203, 204; Naylor v. Palmer, 8 Exch. 739, 748 [aff 10 Exch. 382]; Cullen v. Butler, 5 M. & S. 461, 465, 105 Reprint 1119; O'Connor v. Merchants' Mar. Ins. Co., 20 N. S. 514, 515 [aff 16 Can. S. C. 331]; Murray v. Nova Scotia Mar. Ins. Co., 10 N. S. 24, 27.

[a] **This phrase was defined by Lord Bramwell** in Thames, etc., Mar. Ins. Co. v. Hamilton, 12 App. Cas. 484, 492 [rev 17 Q. B. D. 195] as meaning "All perils, losses and misfortunes of a marine character, or of a character incident to a ship as such."

74. Banyer v. Albany Ins. Co., 85 App. Div. 122, 123, 83 NYS 65 [aff 179 N. Y. 554, 71 NE 1140].

75. Knapp v. King, 15 N. B. 309, 314.

76. Pennock v. Coe, 23 How. (U. S.) 117, 126, 16 L. ed. 436; Skinner v. Spann, 175 Ind. 672, 696, 93 NE 1061, 95 NE 243; Mitchell v. Plover, 53 Wis. 548, 555, 11 NW 27; Wolf v. Schoeffner, 51 Wis. 53, 60, 8 NW 8.

77. Hays v. Wright, 43 Md. 122, 125.

78. Koss v. Kastelberg, 98 Va. 278, 279, 36 SE 377.

79. Rogers v. Bayley, 84 Md. 30, 31, 35 A 58.

80. Brown v. J. H. Bell Co., 146 Iowa 89, 99, 123 NW 231, 124 NW 901, 27 LRANS 407, AnnCas1912B 852; Burks v. Bosso, 180 N. Y. 341, 344, 73 NE 58, 105 AmSR 762 [rev 81 App. Div. 530, 81 NYS 384].

81. Cecil v. Green, 161 Ill. 265, 269, 43 NE 1105, 32 LRA 566 [aff 60 Ill. A. 61].

82. Grannan v. Westchester Racing Assoc., 153 N. Y. 449, 464, 47 NE 896; Kellar v. Koerber, 61 Oh. St. 388, 391, 55 NE 1002; Johnson v. Humphrey Pop Corn Co., 24 Oh. Cir. Ct. 135, 137.

83. Brown v. J. H. Bell Co., 146 Iowa 89, 99, 123 NW 231, 124 NW 901, 27 LRANS 407, AnnCas1912B 852; Humburd v. Crawford, 128 Iowa 743, 744, 105 NW 330.

84. U. S. v. Austin, etc., Co., 121 Fed. 729, 731, 58 CCA 149.

85. Warden v. Broome, 9 Cal. A. 172, 175, 98 P 252 (where the phrase was used in a statute prescribing the procedure for tax sales, and the court held that the words used applied only to nonessentials, other than those facts which gave the court jurisdiction).

86. Spindle v. Shreve, 111 U. S. 542, 544, 4 SCt 522, 28 L. ed. 512; Taubenhan v. Dunz, 20 Ill. A. 262, 269 [aff 125 Ill. 524, 17 NE 456]; Sullivan v. Larkin, 60 Kan. 545, 546, 57 P 105; Knefler v. Shreve, 78 Ky. 297, 307; Babbitt v. Sun Mut. Ins. Co., 23 La. Ann. 314, 316; Mills v. Tompkins, 110 App. Div. 212, 213, 97 NYS 9, 11 [rev 47 Misc. 455, 95 NYS 962]; Philadelphia v. Barber, 160 Pa. 123, 127, 28 A 644; General Assembly v. Gratz, 139 Pa. 497, 502, 20 A 1041; Sewickley Borough v. Sholes, 118 Pa. 165, 169, 12 A 302; Johnson v. Simcock, 7 H. & N. 344, 348 [aff 6 H. & N. 6].

87. Alabama v. Montague, 117 U. S. 602, 609, 6 SCt. 911, 29 L. ed. 1000.

88. Marks v. Solomons, 2 Hall & T. 323, 324, 47 Reprint 1706.

89. Aveling v. Northwestern Masonic Aid Assoc., 72 Mich. 7, 8, 40 NW 28, 1 LRA 528 (where a will used the words "all other property of which I shall die seized," and the court substantially ignored the technical meaning of the words "die seized," and held that the intention of the testator was plainly to pass all his property, including a certificate of insurance).

90. Dunbar v. Woodcock, 10 Leigh (37 Va.) 628.

91. Chicago v. Drogasawacz, 256 Ill. 34, 36, 99 NE 869; Salt Lake City v. Howe, 37 Utah 170, 172, 106 P 705, AnnCas1912C 189.

92. Peo. v. Lane, 41 Misc. 1, 2, 83 NYS 606.

93. Cogswell v. Armstrong, 2 Kay & J. 227, 231, 69 Reprint 764.

94. Colt v. Colt, 111 U. S. 566, 568, 4 SCt 553, 28 L. ed. 520; Colt v. Colt, 32 Conn. 422, 445.

95. Chestnut St. Nat. Bank v. Fidelity Ins. Trust, etc., Co., 186 Pa. 333, 341, 40 A 486, 65 AmSR 860; Re Hunter, 24 Ont. L. 5, 12, 2 OntWN 1166, 19 OntWR 338, 2 OntWN 540, 18 OntWR 299.

96. Miller v. Demory, 64 Kan. 584, 586, 67 P 1105.

97. Hone v. Kent, 11 Barb. 315, 331 [rev 6 N. Y. 390].

98. Cleveland v. Amy, 88 Mich. 374, 377, 50 NW 293.

99. Frichette v. State Mut. F. & M. Ins. Co., 16 N. Y. Super. 190, 197.

1. Boving v. Lawrence, 3 F. Cas. No. 1,712, 1 Blatchf. 616, 617.

2. Park v. U. S., 66 Fed. 731.

3. Marks v. Solomons, 2 Hall & T. 323, 325, 326, 47 Reprint 1706 (where the words "and all other societies" followed a devise of money of the testator in "the friendly society called the Lodge of Friends Society," and the court construed the words "all other societies" as meaning "all other friendly societies").

4. Waring v. Bosher, 91 Va. 286, 287, 21 SE 464.

5. North Chicago, etc., R. Co. v.

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levied by law,"[6] "all the other children . . . which he, the testator, might have, or be reputed to have, by the said Margaret Lewis, then born, or thereafter to be born,"[7] "all other things and means necessary and proper for safe navigation,"[8] "all [other] unavoidable perils, losses and misfortunes,"[9] "all other unseaworthiness,"[10] "all other usual conditions,"[11] "all other writs."[12]

[§ 10] **C. All and Every Other.** Phrases in which the words have been used have received judicial interpretation, such as "all and every other children and child which may be born of the said M. previous to and of which she may be pregnant at the time of my death,"[13] "all and every other dangers and accidents of the seas, rivers, and steam navigation,"[14] "all and every other my lands, tenements, and hereditaments,"[15] "all and every other the issue of my body,"[16] "all and every other the son or sons."[17]

[§ 11] **D. All and Singular Other.** Phrases in which the words have been used have received judicial interpretation, such as "all and singular other my messuages, lands, tenements, hereditaments, and real estate,"[18] "all and singular other my property and estate,"[19] "all and singular the other policies of life insurance which I have effected in any other office or offices."[20]

ALLANAMIENTO DE MORADA. In Spanish law unlawful entry of, or trespass to, a dwelling,[21] one of the crimes against liberty and security.

ALLEGANS CONTRARIA NON EST AUDIENDUS.[22]

ALLEGANS SUAM TURPITUDINEM NON EST AUDIENDUS.[23]

ALLEGARI NON DEBUIT QUOD PROBATUM NON RELEVAT.[24]

ALLEGATA ET PROBATA. Things alleged, and things proved.[25]

ALLEGATIO CONTRA FACTUM NON EST ADMITTENDUM.[26]

Wellner, 206 Ill. 272, 277, 69 NE 6.

6. Dallas, etc., R. Co. v. State, 102 Tex. 570, 575, 120 SW 997.

7. Occleston v. Fullalove, L. R. 9 Ch. 147, 151.

8. Lewis v. Aetna, etc., Co., 123 Fed. 157, 158 [aff 129 Fed. 1006].

9. Depeau v. Russell, 3 S. C. L. 441, 448, 2 AmD 676.

10. The Ontario, 37 Fed. 220, 228 [rev 41 Fed. 793].

11. Galgate, etc., Co., v. Starr, 58 Fed. 894, 903 [aff 68 Fed. 235].

12. Ex parte Bollman, 4 Cranch (U. S.) 75, 93, 2 L. ed. 554; Hyatt v. Allen, 54 Cal. 353, 357.

13. In re Hastie, 35 Ch. D. 728, 731.

14. Hamilton v. Pandorf, 12 App. Cas. 518, 525 [rev 17 Q. B. D. 670 (allowing app 16 Q. B. D. 629)]; The Xantho, 12 App. Cas. 503, 508 [rev 11 P. D. 170]; Kay v. Wheeler, L. R. 2 C. P. 302, 304; Laveroni v. Drury, 8 Exch. 166, 170.

[a] **Of equally broad scope with "all other perils of the sea,"** and by implication substantially equivalent to that phrase see The Xantho, 12 App. Cas. 503, 508 [rev 11 P. D. 170]. See also Pandorf v. Hamilton, 16 Q. B. D. 629, 633 [app allowed 17 Q. B. D. 670 (rev on other grounds 12 App. Cas. 518)]. Compare Citizens, etc., Co. v. Glasgow, 9 Mo. 411, 417. But see Sailing Ship "Garston" Co. v. Hickie, 18 Q. B. D. 17, 24 (distinguishing the expressions, on the ground that "perils of the sea" are merely those dangers due to the elements and beyond human control, while "dangers of navigation" are those of a process subject to human control).

[b] **Similar phrases.**—"All and every other danger and accidents of the seas, rivers and navigations of whatsoever nature and kind." Southerland, etc., Co. v. Thynas, 128 Fed. 42, 43, 64 CCA 116; Serraino v. Campbell, [1891] 1 Q. B. 283, 288 [aff 25 Q. B. D. 501]; Geipel v. Smith, L. R. 7 Q. B. 404, 412; Spence v. Chodwick, 10 Q. B. 517, 528, 59 ECL 517, 116 Reprint 197; Barker v. McAndrew, 18 C. B. N. S. 759, 772, 114 ECL 759, 144 Reprint 643; Russell v. Niemann, 17 C. B. N. S. 163, 173, 112 ECL 163, 144 Reprint 66. "All and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, save risk of boats." Johnston v. Benson, 4 Moore C. P. 90, 96.

15. Atty.-Gen. v. Vigor, 8 Ves. Jr. 256, 294, 32 Reprint 352.

16. Allgood v. Blake, L. R. 7 Exch. 339, 347 [aff L. R. 8 Exch. 160].

[a] **When synonymous with all.**—In Allgood v. Blake, L. R. 7 Exch. 339, 347, 358 [aff L. R. 8 Exch. 160] in construing a will creating a remainder by the use of the words "all and every other issue of my body," the court said: "It may appear a paradox to say that 'all my other issue' has the same meaning as 'all my issue,' but in reality the two things are the same when there is no issue existing except the other issue, and in that event both expressions have the same meaning."

17. Cradock v. Cradock, 4 Jur. N. S. 626, 628.

18. Burton v. Newbery, 1 Ch. D. 234, 241.

19. Bernard v. Minshull, Johns. 276, 298, 70 Reprint 427 (where this phrase was used in a clause in a will, and the court held that no distinction could be drawn between the words used and "all and singular my residuary property").

20. Waters v. Wood, 5 De G. & Sm. 717, 721, 64 Reprint 1313.

21. Escriche Diccionario. See Trespass [38 Cyc 1175].

[a] **Punishment and penalty.**—U. S. v. Paray, 17 Philippine 378, 8 Off. Gaz. 1840.

[b] **Evidence found sufficient to convict.**—U. S. v. Nubla, 4 Philippine 456, 2 Off. Gaz. 499; U. S. v. Samson, 4 Philippine 123, 3 Off. Gaz. 115.

[c] **Extinction of liability.**—Where the offense of allanamiento de morada is accompanied by that of violación (rape), a pardon for the latter will not extinguish liability for the former. Sentence Supr. Trib. Dec. 16, 1872, 7 Jur. Cr. 641.

22. A maxim meaning "He is not to be heard who alleges things contradictory to each other." Broom Leg. Max.

[a] **Applied in:** State v. Clinton County, 166 Ind. 162, 209, 76 NE 986; Royster v. Heck, (Ky.) 94 SW 8, 11; Com. v. Pejepscut Proprietors, 10 Mass. 155, 163; White v. St. Louis, etc., R. Co., 202 Mo. 539, 558, 101 SW 14; Hazewell v. Coursen, 45 N. Y. Super. 22, 28; Miller v. Springer, 70 Pa. 269, 274; Hidell's App., 9 WklyNC (Pa.) 212, 213; McGinity v. McGinity, 19 R. I. 510, 512, 34 A 1114; Hollehan v. Roughan, 62 Wis. 64, 67, 22 NW 163.

[b] **Estoppel.**—This maxim has been most frequently applied in cases involving the doctrine of estoppel. See Horn v. Cole, 51 N. H. 287, 12 AmR 111; Richardson's Est., 6 Pa. Co. 653; Chloupek v. Perotka, 89 Wis. 551, 62 NW 537, 46 AmSR 858; Cribb v. Morse, 79 Wis. 193, 48 NW 489; Leonard v. Yohnk, 68 Wis. 587, 32 NW 702, 60 AmR 884; Green Bay, etc., Canal Co. v. Hewitt, 62 Wis. 316, 21 NW 216, 22 NW 588; Kaehler v. Dobberpuhl, 60 Wis. 256, 18 NW 841.

[c] **"Blow hot and cold."**—(1) "A man who has his option whether he will affirm a particular act or contract must elect either to affirm or disaffirm it altogether. He cannot adopt that part which is for his own benefit, and reject the rest. One cannot blow hot and cold. This is a trite expression of the maxim, 'Allegans contraria non est audiendus.' He is not to be heard who alleges things contrary to each other. This fundamental principle is of wide application in the law of equitable estoppel. He cannot treat a contract as subsisting, and afterwards avoid it. Herman on Estoppel, 1039–1049." Per Settle, J., in Royster v. Heck, (Ky.) 94 SW 8, 11. (2) "A man shall not be allowed to blow hot and cold—to affirm at one time and deny at another—making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion. Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by any other name, it is one which Courts of law have in modern times most usefully adopted." Per Wilde, B., in Cave v. Mills, 7 H. & N. 913, 927.

23. A maxim meaning "A person alleging his own infamy is not to be heard." Wharton L. Lex.

[a] **Applied in:** Lowery v. Erskine, 113 N. Y. 52, 59, 20 NE 588; Underhill v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 339, 350; Sickman v. Lapsley, 13 Serg. & R. (Pa.) 224, 225, 15 AmD 596; Midland Ins. Co. v. Smith, 6 Q. B. D. 561, 571; In re Hallett, 13 Ch. D. 696; Stone v. Marsh, 6 B. & C. 551, 13 ECL 252, 108 Reprint 554; Gibson v. Minet, 1 H. Bl. 569, 126 Reprint 326; Peppet v. McDonald, 38 N. S. 540, 545; Gugy v. Larkin, 8 L. C. 11.

24. A maxim meaning "That ought not to be alleged, which if proved is not relevant." Burrill L. D.

25. Burrill L. D.

[a] **Variance.**—A phrase frequently used to express the rule that the evidence and allegations in the pleadings must correspond, as in the sentence, "The allegata and probata must agree; the latter must support the former," in Boone v. Chiles, 10 Pet. (U. S.) 177, 209, 9 L. ed. 388. See Pleading [31 Cyc 670].

26. A maxim meaning "An allegation contrary to fact will not be conceded." 3 A&EEncL&Pr 242.

[a] **Applied in:** Updegraph v. Com., 11 Serg. & R. (Pa.) 394, 400 (where it was said: "In the case of Rex v. Woolston, 1 Barn. 162, 94 Reprint 112, Fitzg. 64, 94 Reprint 655, Str. 834, 93 Reprint 881, the defendant had been convicted of publishing five libels, ridiculing the miracles of Jesus Christ, his life and conversation; and it was moved in arrest of judgment, that this offense was not punishable in the temporal courts, but the court said, they would not suffer it to be debated, 'whether to write against Christianity generally was not an offence of temporal cognisance.' It was further contended, that it was merely

ALLEGATION.[27] An "allegation," as that term is used in pleading, is the statement of what one can prove;[27½] the positive assertion of a fact;[28] a statement of fact in pleading, affirmed on one side and denied on the other;[29] the formal averment of a party setting forth the issue, and what he proposes to prove.[30]

Allegation of faculties.[31] An allegation of the means at the disposal of the husband, where, in a suit for divorce, alimony is demanded.[32]

ALLEGE. To state, recite, assert, or charge; to make an allegation.[33]

Alleged. Charged; stated;[34] claimed.[35]

Phrases in which the word has been used have received judicial interpretation such as "'alleged' codicil,"[36] "alleged fact,"[37] "alleged negligence,"[38] "alleged to have been committed."[39]

ALLEGIANCE.[40] Fealty or fidelity to the government of which the person is either a citizen or subject;[41] the duty which is due from every citizen to the state; a political duty, binding on him who enjoys the protection of the commonwealth, to render

to show that those miracles were not to be taken in a literal but allegorical sense: and therefore, the book could not be aimed at Christianity in general, but merely attacking one proof of the divine mission: but the court said, the main design of the book, though professing to establish Christianity upon a true bottom, considers the narrations of scripture as explanative and prophetical, yet that these professions could not be credited, and the rule is allegatio contra factum non est admittendum").

27. Allegation:
In affidavit see Affidavits § 68 et seq.
In indictment or information see Indictments and Informations [22 Cyc 157 et seq].
In pleading:
In general see Pleading [31 Cyc 1 et seq].
Admiralty see Admiralty § 184 et seq.
Equity see Equity [16 Cyc 227 et seq].

27½. Merrill v. Pepperdine, 9 Ind. A. 416, 36 NE 921, 922; Neiderer v. Bender, 15 Pa. Dist. 309, 310 [cit Webster D.].

[a] **Not contained in demurrers.**—It is not the office of a demurrer to allege facts, and hence a statute providing that "allegations" in pleadings "shall be liberally construed" does not mean that demurrers shall be liberally construed. Merrill v. Pepperdine, 9 Ind. A. 416, 36 NE 921, 922.

[b] **Not a term in evidence.**—In Thompson v. Dyer, 100 Me. 421, 425, 62 A 76, the court said: "The term 'allegation' has a fixed technical meaning in law. It is a term in pleading, not a term in evidence. Allegation is not contained in the evidence, but precedes it."

28. Merrill v. Pepperdine, 9 Ind. A. 416, 36 NE 921, 922.

[a] **Allegation of an ultimate fact.**—In Moser v. Talman, 114 App. Div. 850, 854, 100 NYS 231, the court said: "There is a settled and familiar rule of pleading that an allegation of a conclusion of law in a pleading goes for nothing; is a nullity. But an allegation of a conclusion of fact is another thing; the rule has nothing to do with it. An allegation of an ultimate fact to be proved has always sufficed in pleading although it be a mere conclusion from other facts which have to be proved. To plead such other facts is not permissible, for that would be pleading the evidence, of which only a novice would be guilty. . . . It is only necessary (if even that be necessary) to turn to any standard encyclopedia or textbook on pleading to find that an allegation of an ultimate fact to be proved, although it be necessarily an allegation of a conclusion of fact, is good pleading; it is not an allegation of a conclusion of law. The dictum to the contrary in the case of Henriques v. Yale Univ., 28 App. Div. 354, 51 NYS 284, is evidently inadvertent and certainly does not control us."

29. Nash v. Towne, 5 Wall. (U. S.) 689, 699, 18 L. ed. 527.

30. Thompson v. Dyer, 100 Me. 421, 425, 62 A 76; Schneider v. Rochester, 160 N. Y. 165, 172, 54 NE 721.

"'Allegations' are but the statements of a party of what he can prove (Webster), and as long as they are heard as mere allegations and not as proof, they do not necessarily imply that they are made under the obligation of an oath or affirmation." Neiderer v. Bender, 15 Pa. Dist. 309, 310.

31. See Divorce [14 Cyc 747].

32. Lovett v. Lovett, 11 Ala. 763, 771; Wright v. Wright, 3 Tex. 168, 179.

[a] **Mode of proceeding in ecclesiastical court.**—An "allegation of faculties," as it is called, is the mode of proceeding in the ecclesiastical courts to obtain alimony. "This allegation is made whilst the suit is in progress, for alimony pending the suit, or after the decree is pronounced, for a permanent allowance." Lovett v. Lovett, 11 Ala. 763, 771. To same effect Wright v. Wright, 3 Tex. 168.

33. Black L. D.

[a] **Word of prayer.**—An election petition set forth certain corrupt practices and concluded as follows: "Your petitioner alleges that by reason of one or more of such acts or practices, the election of said C. E. H. was void." It was held that these words constituted a sufficient prayer for relief, the court saying: "Although the word 'allege' is not a word of prayer, yet in this case I think it is so." Re Shoal Lake Election, 5 Man. 57, 61.

[b] **"Setting forth" synonymous.**—A statute provided "for citing the insolvent 'when any creditor . . . alleges by complaint . . . that such insolvent has,' etc." The amended statute provided: "When any creditor . . . shall petition to the court or judge . . . setting forth that such debtor has," etc. The court in construing these statutes said: "There may be a difference in meaning between the word 'alleges,' in the original section, and the words 'setting forth,' in the amended section. But, whatever the difference may be, it is too slight to indicate an intent to change the rule on so important a matter as what the creditor must state in order to be allowed to search the conscience of the insolvent. Manifestly, the main, if not the only, purpose of the amendment was to add several grounds for denying the insolvent a release. It is not necessary to conclude, as it might have been had the only change been in the phraseology we have cited, or had it been clear that one of the purposes of the amendment was to make the change, that the words 'setting forth' were used otherwise than as synonymous with 'alleges.' And it is of some significance that in the amendment the charge of false swearing must specify the material fact, while in respect to no other charge is it expressly required that any fact or circumstance of detail shall be specified. We conclude, therefore, that the rule remains as before the amendment." In re Harrison, 46 Minn. 331, 332, 333, 334, 48 NW 1132.

34. Scholfield, J., in Watt v. Peo., 126 Ill. 9, 33, 18 NE 340, 1 LRA 403.

[a] **Meaning "alleged in the bill."**—The answer in a suit for infringement of a patent admitted that a portion of the goods sold by defendant was "fabric alleged by the complainant to be such as is described and claimed in said letters patent." The court said: "The word 'alleged' we think may be fairly construed to mean 'alleged in the bill.'" Chase v. Fillebrown, 58 Fed. 374, 376. See also Saunders v. Saunders, [1897] P. 89, 92 ("alleged adulterer").

35. U. S. v. Milner, 36 Fed. 890, 891.

36. Smith v. Henline, 174 Ill. 184, 200, 51 NE 227 (where it was said: "It is said, that the use of the words 'allege' and 'supposed' was equivalent to telling the jury, that the codicil was not the real codicil of the testator. We do not think so. The proponents of the will allege that the codicil was valid. To speak of it as an 'alleged' codicil was no more casting discredit upon its validity, than to speak of it as the 'codicil' without the use of the word 'alleged' would have been to make an announcement in favor of its validity").

37. Day v. Mill-Owners' Mut. F. Ins. Co., 75 Iowa 694, 701, 38 NW 113 (where these words, "alleged fact," in a reply, referring to an allegation of defendant in the answer as an alleged fact, cannot be considered as an admission of the truth of such fact).

38. West Chicago St. R. Co. v. Petters, 196 Ill. 298, 303, 63 NE 662 (where it was said: "We cannot see how, by any possible means, the jury could have been misled by the use of the word 'alleged.' It simply meant that the court was non-committal upon the question of whether there was or was not negligence, and it referred back to the declaration. The plaintiff could recover only for the negligence that was by her alleged, and if the proof showed other or different negligence she would have to amend her declaration and allege it").

39. State v. Sexton, 141 Mo. A. 694, 699, 125 SW 519 (used in a statute providing that all prosecutions before justices of the peace for misdemeanors shall be commenced and prosecuted in the township wherein the offense is alleged to have been committed).

40. Allegiance: Citizens [7 Cyc 132]; Treason [38 Cyc 951]. Consent of state to which pledged see Citizens [7 Cyc. 141]. See also Aliens post p 1039.

41. Murray v. Charming Betsy, 2 Cranch (U. S.) 64, 120, 2 L. ed. 208.

[a] **"'Allegiance'" [as defined by Blackstone],** "'is the tie, or ligamen, which binds the subject to the king, in return for that protection which the king affords the subject.' Allegiance, both express and implied, is of two sorts; the one natural, the other local; the former being perpetual, the latter temporary." Jackson v. Goodell, 20 Johns. (N. Y.) 188, 191.

[b] **Mr. Justice Story** said that "allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is." U. S. v. Wong Kim Ark, 169 U. S. 649, 659, 18 SCt 456, 42 L. ed. 890.

[c] **May be absolute or qualified.**—"It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and per-

service and fealty to the federal government;[42] the obligation of fidelity and obedience which the individual owes to the government or to the sovereign under which he lives in return for the protection he receives;[43] that duty which is reciprocal to the right of protection, arising from the political relations between the government and the citizen.[44]

Several kinds. Allegiance is of four kinds, namely: (1) Natural allegiance—that which arises by nature and birth; (2) acquired allegiance—that arising through some circumstance or act other than birth, namely, by denization or naturalization; (3) local allegiance—that arising from residence simply within the country, for however short a time; and (4) legal allegiance—that arising from oath, taken usually at the town or leet, for, by the common law, the oath of allegiance might be tendered to every one upon attaining the age of twelve years.[45]

Change or renunciation. At common law allegiance due to the state of one's birth could not be renounced without the consent of the sovereign.[46] But now, by statute in the United States and in England, the subject may change his allegiance at will.[47]

ALLENARLY. Only;[48] a technical term used in Scotch conveyancing.[49]

ALLEY. A narrow passageway;[50] a narrow way, less in size than a street;[51] a bordered

manent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence. This obligation of temporary allegiance by an alien resident in a friendly country is everywhere recognized by publicists and statesmen." Carlisle v. U. S., 16 Wall. (U. S.) 147, 154, 21 L. ed. 426.

[d] **Not dependent on ownership of land.**—"As to allegiance, it is indeed due from every citizen to the state, but it is a political obligation, and is as binding on him who enjoys the protection of the Commonwealth, without owning a foot of soil, as on him who counts his acres by hundreds and thousands. So also it is due to the Federal Government, through which none of our titles have been derived. The truth is, that this obligation, which is reciprocal to the right of protection, results out of the political relations between the government and the citizen, and bears no relation whatever to his land titles any more than to his personal property." Wallace v. Harmstad, 44 Pa. 492, 501.

[e] **Binds to observance of what laws.**—"Allegiance binds the citizen to the observance of all laws which are promulgated by his own sovereign, not inconsistent with the laws of nature. The laws of nature as they are denominated also rightfully require obedience, not by reason of allegiance, but because they emanate from a higher authority than any human government. They are written upon the hearts of all men; exist before governments are organized; anterior of course to allegiance, 'and are binding all over the globe, in all countries and at all times.' . . . Allegiance itself is modified and controlled by them." Adams v. Peo., 1 N. Y. 173, 175.

42. Wallace v. Harmstad, 44 Pa. 492, 501.

43. Carlisle v. U. S., 16 Wall. (U. S.) 147, 154, 21 L. ed. 426; Inglis v. Sailors' Snug Harbor, 3 Pet. (U. S.) 99, 155, 7 L. ed. 617; Jackson v. Goodell, 20 Johns. (N. Y.) 188, 191; State v. Hunt, 20 S. C. L. 1, 219; Calvin's Case, 7 Coke 1, 4b, 77 Reprint 377, 2 ERC 575.

44. Wallace v. Harmstad, 44 Pa. 492, 501.

45. Brown L. D. (Sprague ed); U. S. v. Wong Kim Ark, 169 U. S. 649, 18 SCt 456, 42 L. ed. 890; 8 Op. Atty.-Gen. 139; 9 Op. Atty.-Gen. 356; Dakota Lumber Co. v. Rinderknecht, 6 NW 210.

[a] **"Allegiance, both express and implied,** is of two sorts; the one natural, the other local; the former being perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions, immediately upon their birth; for, immediately upon their birth, they are under the king's protection. Natural allegiance, he [Blackstone] says, is perpetual, and for this reason, evidently founded on the nature of government; that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. Natural born subjects have a great variety of rights, which they acquire by being born within the king's ligeance, which can never be forfeited, but by their own misbehavior; but the rights of aliens are much more circumscribed, being acquired only by residence, and lost whenever they remove. 'If an alien,' he [Blackstone] says, 'could acquire a permanent property in lands, he must owe an allegiance equally permanent to the king, which would probably be inconsistent with that which he owes his natural liege lord; besides, that thereby the nation might, in time, be subject to foreign influence, and feel many other inconveniences. It is on these principles that an alien, when he purchases lands, cannot hold them, if the government see fit to proceed for an escheat, and that he is absolutely precluded from taking by descent, having no heritable blood.'" Per Spencer, C. J., in Jackson v. Goodell, 20 Johns. (N. Y.) 188, 191.

[b] **"Allegiance by birth,** (1) is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship; first, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or, in other words, within the ligeance of the sovereign. That is, the party must be born within a place where the sovereign is, at the time, in full possession and exercise of his power, and the party must also, at his birth, derive protection from, and consequently, owe obedience or allegiance to the sovereign, as such, de facto. . . . There are some exceptions, which are founded upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean, is a subject of the prince to whom his parents then owe allegiance; for he is still deemed under the protection of his sovereign, and born in a place where he has dominion in common with all other sovereigns. So, the children of an ambassador are held to be subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince." Inglis v. Sailor's Snug Harbor, 3 Pet. 99, 155, 7 L. ed. 617. (2) "The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called 'ligealty,' 'obedience,' 'faith' or 'power,' of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual—as expressed in the maxim, protectio trahit subjectionem, et subjectio protectionem—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the king." Per Gray, J., in U. S. v. Wong Kim Ark, 169 U. S. 649, 655, 18 SCt 456, 42 L. ed. 890.

46. 1 Blackstone Comm. 369; 2 Kent Comm. 449; 8 Op. Atty.-Gen. 139; 9 Op. Atty.-Gen. 356.

47. U. S. Rev. St. § 1909; 33 Vict. c 14, May 10, 1870.

In Murray v. Charming Betsy, 2 Cranch (U. S.) 64, 120, 2 L. ed. 208, the court said: "Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can divest himself absolutely of that character, otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide. . . . The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American government in his favor, would be considered as a justifiable interposition. But his situation is completely changed, where, by his own act, he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the United States, a point not intended to be decided, yet it certainly places him out of the protection of the United States, while within the territory of the sovereign to whom he has sworn allegiance, and consequently takes him out of the description of the act."

48. Balmerino's Case, 3 How. St. Tr. 591, 699.

49. Century D.; Macintosh v. Gordon, 4 Bell App. Cas. 105, 119, 124.

50. Oberheim v. Reeside, 116 Md. 265, 81 A 590; Webster D. [quot Milliken v. Denny, 135 N. C. 19, 22, 47 SE 132].

[a] **"Alley way" synonymous.**—Flaherty v. Fleming, 58 W. Va. 669, 673, 53 SE 857, 3 LRANS 461.

51. Kalteyer v. Sullivan, 18 Tex. Civ. A. 488, 493, 46 SW 288 [cit Talbert v. Mason, 136 Iowa 373, 113 NW 918, 125 AmSR 259, 14 LRANS 878].

[a] **Doors and gates.**—"Alley," as used in an order directing defendants

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way;[52] a narrow passage, especially a walk or passage in a garden or park bordered by rows of trees or bushes; a bordered way.[53]

An alley may be public or private, and the term, when used in a plat or statute concerning towns or cities, will be taken to mean a public alley, unless the word "private" is prefixed or the context requires a different meaning.[54]

In municipalities. The word has reference more particularly to the ways or thoroughfares of towns and cities,[55] and, when not qualified by the term "private," is conventionally understood in its relation to towns or cities as a narrow street in common use.[56] And in this connection an alley has been defined as a narrow passage or way in a city,[57] not meant primarily as a substitute for a street, but to serve as a means of accommodation to a limited neighborhood for chiefly local convenience, and not for general passage or travel like streets.[58]

As a street or highway. An alley is not a street or highway in the proper sense of the term;[59] and a

to restore a certain "alley," so as to allow plaintiff free and common use thereof by opening an "alley" of a certain width over the rear of defendant's lot, means an open and unobstructed way of less than the usual width of a street, and the order to open and provide an alley is not fulfilled by providing a passageway through which a person may pass by opening and closing doors and gates; such means of passage are not within the reasonable and natural understanding of an "alleyway." Hacke's App., 31 PittsbLegJNS (Pa.) 315, 316.

52. Webster D. [quot Milliken v. Denny, 135 N. C. 19, 23, 47 SE 132].

53. Webster D. [quot Talbert v. Mason, 136 Iowa 373, 380, 113 NW 918, 125 AmSR 259, 14 LRANS 878; Milliken v. Denny, 135 N. C. 19, 22, 47 SE 132].

54. Shultz v. Redondo Impr. Co., 156 Cal. 439, 442, 105 P 118; Chicago v. Borden, 190 Ill. 430, 440, 60 NE 915; Talbert v. Mason, 136 Iowa 373, 380, 113 NW 918, 125 AmSR 259, 14 LRANS 878; Bailey v. Culver, 12 Mo. A. 175, 183; Fleetwood Streets, 8 Pa. Co. 210, 212; Flaherty v. Fleming, 58 W. Va. 669, 673, 52 SE 857, 3 LRANS 461.

[a] **"Ordinarily, they are laid out and dedicated to the public use,** (1) and especially for the use and convenience of the property holders of the town or city, by the proprietor thereof, or are laid out and established for the same purposes by the corporate authorities." Debolt v. Carter, 31 Ind. 355, 367. (2) "Of course, alleys may be private and these are ordinarily such as have not been dedicated to the public use, and to which the general public is denied access or which are set apart for some particular purpose. A private passage or way is sometimes referred to as a private alley, especially when bordered by trees or otherwise defined or inclosed. But alleys in cities and towns usually are public, and the private alley therein is exceptional. Density of population render them necessary for easy access to abutting properties, and, though sometimes confused with streets in attempts to define them, they are readily distinguishable." Per Ladd, J., in Talbert v. Mason, 136 Iowa 373, 380, 113 NW 918, 125 AmSR 259, 14 LRANS 878.

[b] **As a private way.**—Where the term "alley" is used in a deed or in a plat, it will be taken to mean a private alley where the term "private" is prefixed, or where the context requires that a different meaning than that of a public alley is to be assigned to the term. Chicago v. Borden, 190 Ill. 430, 440, 60 NE 915.

55. Debolt v. Carter, 31 Ind. 355, 367; Talbert v. Mason, 136 Iowa 373, 113 NW 918, 921, 125 AmSR 259, 14 LRANS 878; In re Woolsey, 95 N. Y. 135.

[a] **Thus,** in construing a statute providing that "if any person shall be found drunk in any street, alley, or other public place, he shall be punished," etc., the court said: "The use of the words 'street' and 'alley,' excluding the more general term 'highway,' indicates that the public roads throughout the country were not intended, but the avenues of the compact part of the town." State v. Stevens, 36 N. H. 59, 62, 63.

56. Bailey v. Culver, 12 Mo. A. 175, 183 [quot Talbert v. Mason, 136 Iowa 373, 381, 113 NW 918, 125 AmSR 259, 14 LRANS 878].

[a] **Conventional meaning.**—An "alley" "is conventionally understood, in its relation to towns and cities, to mean a narrow street in common use." Bailey v. Culver, 12 Mo. A. 175, 183.

57. Winston v. Johnson, 42 Minn. 398, 401, 45 NW 958; Bailey v. Culver, 12 Mo. A. 175, 183; Matter of Woolsey, 95 N. Y. 135, 140. See also Asbury v. Kansas City, 161 Mo. A. 496, 144 SW 127.

58. Carpenter v. Capital Electric Co., 178 Ill. 29, 52 NE 973, 69 AmSR 286, 43 LRA 645; State v. Harrison, 162 Ind. 542, 70 NE 877; Talbert v. Mason, 136 Iowa 373, 113 NW 918, 125 AmSR 259, 14 LRANS 878; Horton v. Williams, 99 Mich. 423, 427, 58 NW 369; Beecher v. Peo., 38 Mich. 289, 291, 31 AmR 316; Paul v. Detroit, 32 Mich. 108, 111.

[a] **"The principal purpose of a public alley** is to furnish the owners of the abutting lots and those dealing with them convenient access thereto. The main lines of travel are in the streets." Talbert v. Mason, 136 Iowa 373, 381, 113 NW 918, 125 AmSR 259, 14 LRANS 878; Dodge v. Hart, 113 Iowa 685, 688, 83 NW 1063.

[b] **By the grant of an alleyway** the grantee takes only "the right of ingress and egress upon the surface of the soil; not beneath the surface, not above the surface at such elevation as he may elect. He could not construct an underground way, nor a drain, nor other openings. He could not construct an elevated way in order to reach his lot or dwelling or any part thereof. His rights are confined to and upon the surface of the soil." Per Bird, V. C., in Sutton v. Groll, 42 N. J. Eq. 213, 214, 5 A 901.

[c] **Easements in alleys.**—(1) An alley may exist without any work of construction being done upon its bed; and an easement in an "alley ten foot wide" may undoubtedly be granted and be operative, even though it be described as extending over ground not previously used for that purpose. Oberheim v. Reeside, 116 Md. 265, 272, 81 A 590. (2) "The easement granted was 'a right of way of an alley;' and this ex vi termini implies, we think, a passage-way leading away from the land conveyed. It would be a misnomer to call a mere open space ten feet wide in the rear of this land, shut in on all other sides by lands over which the grantee had no right to pass, either a right of way or an alley. It might be a convenient space to use for some purposes, but certainly not for a right of way. The suggestion that the passage-way intended was merely a rear passage from one of the stores McConnell intended to erect to the other has no plausibility. An alley for such a purpose would be of little or no value: the alley is needed for access to and from the street with teams." McConnell v. Rathbun, 46 Mich. 303, 306, 9 NW 426.

[d] **Private alley for private purposes.**—"One may well use a portion of his private lot as an alley for domestic purposes or a manufacturing establishment or, as in this case, an electric light plant, for uses connected with his or its business, without subjecting it to a public use." Briscoe v. Henderson Lighting, etc., Co., 148 N. C. 396, 402, 62 SE 600, 19 LRANS 1116.

59. Burton Co. v. Chicago, 236 Ill. 383, 389, 86 NE 93, 15 AnnCas 965 and note; Chicago v. J. Burton Co., 140 Ill. A. 344, 358; State v. Harrison, 162 Ind. 542, 545, 70 NE 877; Debolt v. Carter, 31 Ind. 355, 367; Krause v. Lewis, 144 Mich. 549, 108 NW 417; Horton v. Williams, 99 Mich. 423, 58 NW 369; Face v. Ionia, 90 Mich. 104, 111, 51 NW 184; Bagley v. Peo., 43 Mich. 355, 5 NW 415, 38 AmSR 192; Peul v. Detroit, 32 Mich. 108, 111; Peo. v. Jackson, 7 Mich. 442, 447, 74 AmD 729; In re Woolsey, 95 N. Y. 135, 140; Briscoe v. Henderson Lighting, etc., Co., 148 N. C. 396, 402, 62 SE 600, 19 LRANS 1116; Milliken v. Denny, 135 N. C. 19, 22, 47 SE 132; Flaherty v. Flemming, 58 W. Va. 669, 678, 52 SE 857, 3 LRANS 461. Compare Kalteyer v. Sullivan, 18 Tex. Civ. A. 488, 46 SW 288.

[a] **Statutory creation.**—In construing a special statute, providing that certain streets, roads, and alleys in a particular village "should be deemed highways, in case they came within the terms of the act," the court said: "The character of these streets, roads and alleys is to be determined, not as is urged by discussing the common law or general statute provisions, but by inquiring simply whether as a matter of fact, any particular street or alley comes within the special provisions of the fourth section of the act of 1848." Hickok v. Plattsburgh, 41 Barb. (N. Y.) 130, 131.

[b] **Obstruction of.**—An alley is not a public highway so that an obstruction thereof can be regarded as a public wrong. Bagley v. Peo., 43 Mich. 355, 5 NW 415, 38 AmR 192.

[c] **"Highway" distinguished.**—In Debolt v. Carter, 31 Ind. 355, 367, the court, speaking of alleys, said: "Ordinarily, they are laid out and dedicated to the public use, and especially for the use and convenience of the property holders of the town or city, by the proprietor thereof, or are laid out and established for the same purposes by the corporate authorities. 'Highway' is a word of much broader signification; it includes every species of ways over which the public at large have a right of passage, whether they be roads, navigable rivers, or streets and alleys"; and in Bagley v. Peo., 43 Mich. 355, 5 NW 415, 38 AmR 192: "An alley can in no proper or legal sense be considered as a public highway, or be governed by rules relating thereto. While the city may have and undoubtedly has, certain limited rights therein for municipal purposes, yet the public have no general right of way over or through the same. It is designed more especially for the use and accommodation of the owners of property abutting thereon, and to give the public the same unqualified rights therein that they have in and to the use of the public streets would defeat the very end and object intended"; but an alley was held to be a road in In re Sharett, 8 Pa. 89, 92. Compare Kalteyer v. Sullivan, 18 Tex. Civ. A. 488, 46 SW 288.

[d] **"Road" synonymous.**—In re Sharett, 8 Pa. 89, 92 [quot Talbert v.

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private alley will never be so considered.[60] It has been said to be a narrow passage or way in a city as distinct from a public street.[61] In some instances, however, a public alley has been considered as a highway and governed by the rules applicable thereto.[62]

(Cross references.[63])

ALLEYWAY. The word "alleyway" has the same meaning as the word "alley."[64]

ALL FAULTS. Words used in contracts of sale, which, in the absence of fraud on the part of the vendor, cover all such faults and defects as are not inconsistent with the identity of the goods as described.[65]

ALL FOURS. A metaphorical expression used to describe cases which are alike in all the circumstances which affect their determination, and which are said to be, or run, upon all fours.[66]

ALLIANCE. The union or connection of two persons or families by marriage.[67] In international law, a union between two or more nations, contracted by compact, treaty, or league.[68]

ALLISION. The running of one vessel into another.[69]

ALLOCATIONE FACIENDA. Literally "Making allowance." A writ for allowing to an accountant such sums of money as he hath lawfully expended in his office; directed to the lord treasurer and barons of the exchequer, upon application made.[70]

ALLOCATUR. Literally "It is allowed." A term used to express the allowance of a thing or proceeding by a court, judge, or judicial officer, and now applied in England to the certificate given by the master, on taxing a bill of costs, showing the amount taxed or allowed.[71]

ALLOCUTION or ALLOCUTUS. The formal address of the judge to the prisoner, asking him why sentence should not be pronounced.[72]

ALLODIAL. Free; held in free and absolute ownership;[73] not subject to the burdens and restric-

Mason, 136 Iowa 373, 381, 113 NW 918, 125 AmSR 259, 14 LRANS 878]; Pennsylvania R. Co. v. Montgomery County Pass. R. Co., 3 Pa. Dist. 58, 60, 14 Pa. Co. 88.

60. Chicago v. Borden, 190 Ill. 430, 440, 60 NE 915. See also Talbert v. Mason, 136 Iowa 373, 113 NW 918, 125 AmSR 259, 14 LRANS 878.

61. Praigg v. Western Pav., etc., Co., 143 Ind. 358, 362, 42 NE 750; Talbert v. Mason, 136 Iowa 373, 380, 113 NW 918, 125 AmSR 259, 14 LRANS 878; Dodge v. Hart, 113 Iowa 685, 688, 83 NW 1063; Winston v. Johnson, 42 Minn. 398, 401, 45 NW 958; Milliken v. Denny, 135 N. C. 19, 22, 47 SE 132; Kalteyer v. Sullivan, 18 Tex. Civ. A. 488, 493, 46 SW 288; Flaherty v. Fleming, 58 W. Va. 669, 673, 52 SE 857, 3 LRANS 460.

An alley is "no more than a way subject to a modified supervision, and liable to be used for drainage and other urban services, under municipal regulations." Paul v. Detroit, 32 Mich. 108, 111. In Talbert v. Mason, supra, the court said: "An alley may be so extensively used for public travel as to justify designating it a 'narrow street in common use,' as was done in Bailey v. Culver, 12 Mo. A. 175, or referring to it as a road, as In re Sharett, 8 Pa. 89. See, also, Kalteyer v. Sullivan, 18 Tex. Civ. A. 488, 46 SW 288. Their principal purpose is to furnish the owners of abutting lots and those dealing with such owners convenient access thereto. Dodge v. Hart, 113 Iowa 685, 83 NW 1063. See, also, Chicago v. Borden, 190 Ill. 430, 60 NE 915; Milliken v. Denny, 135 N. C. 19, 47 SE 132. Alleys are not a substitute for streets, but serve as means of accommodation to a limited neighborhood for chiefly local convenience. Beecher v. Peo., 38 Mich. 289, 31 AmR 316."

62. Kansas City Southern R. Co. v. Boles, 88 Ark. 533, 115 SW 375 [foll Hope v. Shiver, 77 Ark. 177, 90 SW 1003]; Asbury v. Kansas City, 161 Mo. A. 496, 498, 144 SW 127; Oliver Schlemmer Co. v. Steinman-Meyer Furniture Co., 28 Oh. Cir. Ct. 474 [aff 15 OhS&CP 92]; Kalteyer v. Sullivan, 18 Tex. Civ. A. 488, 493, 46 SW 288.

[a] **Thus in an Illinois** case the court said: "Alleys usually have no sidewalks, but we do not take notice that all alleys have or any particular alley has none. The power and jurisdiction of the city over the public alleys of the city are identical with its power and jurisdiction over the streets of the city. In this State there is no distinction, in law, between a public street and a public alley. The only popular distinction between them is the difference in width, and that distinction is as indefinite as the difference between a narrow-tired wheel and a broad-tired wheel. There is no certain width on one side of which a public highway is a street while on the other side it is an alley. Nor can it be said that a public way having a sidewalk on one or both sides is a street, while another public highway, identical in every other respect but without a sidewalk, is an alley. The words 'streets and alleys' are constantly used in collocation, and in the legislation of the State are nearly always met with together. The method of establishment and vacation, the character of the title acquired and the trust upon which it is held, the kind of use, the manner of improvement, the jurisdiction and power of the municipality as well as its liabilities, are identical in the case of streets and of alleys." Burton Co. v. Chicago, 236 Ill. 383, 388, 86 NE 93, 15 AnnCas 965 and note [rev 140 Ill. A. 344].

[b] **In Maryland** it has been said: "Whatever be the law on the subject of alleys elsewhere, those that are obtained by dedication or condemnation in the city of Baltimore are public highways, Van Witsen v. Gutman, 79 Md. 405, 29 A 608, 24 LRA 403, Local Code, Art. 4, sec. 832, and of course one conveyed to the city by deed would be, unless there be restrictions in it to the contrary." Baltimore v. Rosenthal, 102 Md. 298, 303, 62 A 579.

[c] **"Public alley"** has not, like "highway," any fixed and legal meaning. Peo. v. Jackson, 7 Mich. 432, 447, 74 AmD 729.

63. Alley:

As boundary see Boundaries [5 Cyc 909].

Conveyance of, by trustee of townsite see Public Lands [32 Cyc 852].

Dedication of see Dedication [13 Cyc 447].

Duties, liabilities, and powers of municipality concerning see Municipal Corporations [28 Cyc 832].

Term "highway" includes see Highways [37 Cyc 17].

64. Flaherty v. Fleming, 58 W. Va. 669, 673, 52 SE 857, 3 LRANS 461. See Alley ante.

[a] **Mere use of term does not imply dedication.**—Briscoe v. Henderson Lighting, etc., Co., 148 N. C. 396, 402, 62 SE 600, 19 LRANS 1116. See also Milliken v. Denny, 135 N. C. 19, 23, 47 SE 132.

[b] **As easement in surface only.**—An "alleyway," as the term is used to denote an easement to lots bordering on an alley, means simply the right to use the same for ingress and egress to and from the lots, and does not include any right to the land beneath or above the surface. Sutton v. Groll, 42 N. J. Eq. 213, 5 A 901.

65. Whitney v. Boardman, 118 Mass. 242; Henshaw v. Robins, 9 Metc. (Mass.) 83, 90, 43 AmD 367; Shepherd v. Kain, 5 B. & Ald. 240, 7 ECL 137, 106 Reprint 1180 [quot Smith v. Richards, 13 Pet. (U. S.) 26, 43, 10 L. ed. 42; Cornelius v. Molloy, 7 Pa. 293, 298; Taylor v. Bullen, 5 Exch. 779, 784]; Schneider v. Heath, 3 Campb. 506, 508; Pickering v. Dowson, 4 Taunt. 779, 128 Reprint 537 [quot Smith v. Andrews, 30 N. C. 3, 6]. See also ante p 1138 text and note 16.

66. Abbott L. D.

67. Bouvier L. D.

68. Burrill L. D. See Treaties [38 Cyc 961].

69. Burrill L. D.

[a] **Distinguished from "collision,"** which is a running of two vessels against each other. Burrill L. D. See Collision [7 Cyc 299].

70. Jacob L. D.

71. Burrill L. D.; Archbold Pr. 129. See Damages [13 Cyc 79].

[a] **Allocatur of costs.**—"In Mansel on Costs, at p 54, this passage occurs: 'As soon as the taxation is complete, and the amount of it, by deducting the charges struck off from the gross amount, ascertained, the taxing officer adds thereto his fee for taxing, and the whole is added up and a total found, and then if upon a postea, or writ of trial, an allocatur is made out thus.' Then follows the form used in the Queen's Bench, that used in the Common Pleas, and that used in the Exchequer Court. These forms are simply figures under the expressions, 'for increased costs,' 'damages on the whole,' and the like. The author then proceeds: 'This minute is termed the "allocatur" of costs; and when signed by the Master and dated, is delivered by him to the attorney for the plaintiff or party in whose favor it is made, and it then becomes the property of the plaintiff. Final judgment is now considered as signed, and the costs so taxed now form part thereof.'" Per Ferguson, J., in Cuerrier v. White, 12 Ont. Pr. 571, 581. See Costs [11 Cyc 1, 204].

[b] **Special term order not allocatur.**—Elwood v. Roof, 82 N. Y. 428.

[c] **At chambers.**—State v. Vanderveer, 7 N. J. L. 38, 39.

[d] **On writ of certiorari.**—State v. Vanderveer, 7 N. J. L. 38, 39; Mairs v. Sparks, 4 N. J. L. 429. See Certiorari [6 Cyc 792].

72. State v. Ball, 27 Mo. 324, 326; Cayotte v. Reg., 18 Que. 214, 219 (where the court said: "The Court has come to the conclusion that the allocutus is imperatively required in all felonies punishable by death, whether this be the only punishment that can be inflicted, or whether there is alternative punishment left to the discretion of the Court"). See generally Criminal Law [12 Cyc 777].

73. Wallace v. Harmstad, 44 Pa. 492, 499; Barker v. Dayton, 28 Wis. 367, 384.

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tions on alienation, connected with feudal tenures.[74]

"Allodial lands," at common law, were those in which the owner had a complete and absolute property, free from all services to any particular lord.[75]

ALLODIUM. Land possessed by one in his own right, without owing any rent or service to any superior.[76]

ALLOGRAPH. A document not written by any of the parties thereto.[77]

ALLONGE. Derived from the French, and used commercially to designate a slip of paper annexed to a written instrument when necessary or convenient, on which subsequent indorsements may be written, which will have the same effect as if written upon the instrument itself, such paper being deemed a part thereof.[78]

ALLOPATHIC.[79] As applied to the practice of medicine, the ordinary method of practicing medicine as adopted, accepted, and taught by the great body of the profession.[80]

ALLOT.[81] To set apart a thing to a person as his share;[82] to set apart a portion of a particular thing or things to some particular person;[83] to divide or distribute, as by lot; to distribute or parcel out in parts or portions, or to distribute to each individual concerned; hence, to grant, as a portion; to give, assign, or appoint in general.[84]

ALLOTMENT. The act of allotting; that which

74. Wallace v. Harmstad, 44 Pa. 492, 499; Barker v. Dayton, 28 Wis. 367, 384.

75. Wallace v. Harmstad, 44 Pa. 492, 499.

[a] **Allodial lands, or boc-lands** as they were called, were alienable at the will of the owner, by sale, gift, or last will. They were liable for his debts, and descended, if undevised, to his heirs without respect to primogeniture. They might be granted absolutely, or for a limited interest, on any conditions or services the grantor thought proper, and for any estate, to take effect at once, or at a future time, or on the happening of some event. They were frequently entailed, and marriage settlements thereof were also common. They were conveyed by the delivery of a symbol of possession, as a twig or turf; or by a writing or charter, called a land-boc, which was generally deposited in a monastery for safekeeping. See 1 Spence Eq. Juris. 19–25; Digby Real Prop. c 1 § 1.

[b] **Historical review.**—(1) The tenures existing throughout civilized Europe before the introduction of the feudal system were allodial. In England they were not abolished entirely until the time of the Conqueror who introduced the system of feuds in its rigor. By 12 Car. II, most of the existing feudal tenures, and the services incident thereto, were swept away, and free and common socage became, and continues to be to this day, the principal kind of tenure, the whole system being thus feudal, at least in theory. 2 Blackstone Comm. 47, 77–79. (2) The charters of the early colonies, among them Massachusetts, Rhode Island, Connecticut, Pennsylvania, Maryland, Virginia, the Carolinas, and Georgia, generally prescribed that lands should be held of the crown, "in free and common socage, and not in capite by knight-service," and in them this tenure differed from allodial only in recognizing in theory the doctrine of fealty. Williams Real Prop. (6th ed) 6 note. (3) Since the Revolution, however, the tenures in most of the states have been rendered by statute or declared by the courts allodial. Conn. Rev. L. (1849) p 454; Xiques v. Bujac, 7 La. Ann. 498; Matthews v. Ward, 10 Gill & J. (Md.) 443; N. J. Rev. St. (1877) p 166 § 73; N. Y. Const. (1846) art 1 §§ 12, 13; Van Rensselaer v. Hays, 19 N. Y. 68, 75 AmD 278; McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 AmD 516; Cornell v. Lamb, 2 Cow. (N. Y.) 652; Wallace v. Harmstad, 44 Pa. 492; In re Desilver, 5 Rawle (Pa.) 111, 28 AmD 645; Va. Acts of 1785; Wis. Const. art 1 § 14, construed in Barker v. Dayton, 28 Wis. 367 (where it was held that the section does not prohibit the legislature from regulating conveyances, or dower, or other rights growing out of the domestic relations). See Public Lands [32 Cyc 676]. (4) Nevertheless many names and even rules of purely feudal origin still exist, principally in the forms and methods of conveyance. See 2 Sharswood's Blackstone Comm. 77 note; 1 Smith Land & T. (Morris ed) 6 note.

76. McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 513, 18 AmD 516 [cit 2 Blackstone Comm. 104]. See Allodial ante.

77. Wharton L. Lex.

Holographic wills see Wills [40 Cyc 1300].

78. Osgood v. Artt, 17 Fed. 575, 577; Crutchfield v. Easton, 13 Ala. 337, 338; Haug v. Riley, 101 Ga. 372, 29 SE 44, 40 LRA 244; Fountain v. Bookstaver, 141 Ill. 461, 466, 31 NE 17 [cit Daniel Neg. Instr.]; French v. Turner, 15 Ind. 59, 62 [cit Story Bills § 204]; Bishop v. Chase, 156 Mo. 158, 171, 56 SW 1080, 79 AmSR 515; Doll v. Hollenbeck, 19 Nebr. 639, 643, 28 NW 286 [cit Webster D.; Daniel Neg. Instr. 690]; Crosby v. Roub, 16 Wis. 616, 626, 84 AmD 720. See generally Bills and Notes [7 Cyc 793].

"The indorsement is made on a piece of paper, so attached to the original instrument as, in effect, to become part thereof, or be incorporated into it. This addition is called, in the adjudged cases and elementary treatises, an allonge." Per Harlan, J., in Osgood v. Artt, 17 Fed. 575, 577.

[a] **"That device had its origin** in cases where the back of the instrument had been covered with indorsements, or writing, leaving no room for further indorsements thereon." Per Harlan, J., in Osgood v. Artt. 17 Fed. 575, 577 [quot Bishop v. Chase, 156 Mo. 158, 171, 56 SW 1080, 1083, 79 AmSR 515].

79. See Homeopathic [21 Cyc 447]; Physicians and Surgeons [30 Cyc 1539].

80. Bradbury v. Bardin, 34 Conn. 452, 453, 35 Conn. 577.

[a] **"Eclectic practice" distinguished.**—"Allopathic practice and legitimate business, in the connection in which they are used, mean the ordinary method commonly adopted by the great body of learned and eminent physicians, which is taught in their institutions, established by their highest authorities, and accepted by the larger and more respectable portion of the community. By eclectic practice, without imputing to it, as the counsel for the plaintiff seem inclined to, an odor of illegality, we presume is intended another and different system, unusual and eccentric, not countenanced by the classes before referred to, but characterized by them as spurious and denounced as dangerous. It is sufficient to say that the two modes of treating human maladies are essentially distinct, and based upon different views of the nature and causes of diseases, their appropriate remedies, and the modes of applying them." Bradbury v. Bardin, 34 Conn. 452, 453, 35 Conn. 577.

81. See also Allotment post.

82. Fort v. Allen, 110 N. C. 183, 190, 14 SE 685 [cit Anderson L. D.].

[a] **"Allow" compared.**—It was provided by statute that if a widow's separate estate should be less than her dower interest in, and distributive share of, her husband's estate, so much "must be allowed her" as, with her separate estate, would be equal to her dower and distributive share. It was held that "allowed" is an appropriate word where an allowance of money is made in lieu of dower, or as compensation, and that if allotted had been used it would have meant that she should have had the balance due her in land. "To 'allot' is usually understood as meaning to set apart a portion of a particular thing or things to some person," while "'allowed' . . . means something substituted by way of compensation for another thing." Glenn v. Glenn, 41 Ala. 571, 584, 586.

[b] **"Allot, and award."**—(1) By an inclosure act the commissioners were required to "set out, allot, and award" to the impropriate rectors and curate, in lieu of tithes, etc., certain plots out of the commons, and to distinguish and separate the several allotments; and "the same allotments" were declared to be in full discharge of all tithes. It was held that this latter phrase referred to and included the award, and that the tithes were not extinguished by setting out and allotting the lands without an award. Ellis v. Arnison, 5 B. & Ald. 47, 51, 7 ECL 37, 106 Reprint 1111. (2) But where there was a provision that the portions which, by the act, were to be "allotted and awarded," immediately after such allotments were made, should "be, remain, and enure to the several persons to whom the same shall be respectively allotted . . . who shall from thenceforth stand and be seised and possessed thereof to such and the same uses" as the lands in lieu of which such allotments were made, it was held that one who was seized in fee of this latter land became so of the former immediately after the allotment and before execution of the award. Doe v. Saunder, 5 A. & E. 664, 674, 31 ECL 774, 111 Reprint 1316.

83. Glenn v. Glenn, 41 Ala. 571, 586 [quot Meehan v. Jones, 70 Fed. 453, 454 (aff 175 U. S. 1, 20 SCt 1, 44 L. ed. 49)].

[a] **Indian lands.**—(1) Under the United States statutes relating to the allotment of Indian lands, the word "allot" is not a term of sale or grant but of appointment of that to which the parties are entitled as of right. Parr v. U. S., 153 Fed. 462, 468. (2) "To contend, that the word 'allotted,' in reference to the land guarantied to the Indian, in certain treaties, indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." Per McLean, J., in Worcester v. Georgia, 6 Pet. (U. S.) 515, 582, 8 L. ed. 483 [quot Minnesota v. Hitchcock, 185 U. S. 373, 22 SCt 650, 46 L. ed. 954]; Jones v. Meehan, 175 U. S. 1, 20 SCt 1, 44 L. ed. 49; Conway v. U. S., 149 Fed. 266.

84. Parr v. U. S., 153 Fed. 462, 467 [quot Webster D.].

[a] **In sense of decreed by court.**—By an irrigation act it is made the duty of the state engineer, as soon as may be after the passage of said act, to make an examination of the streams of the state and the works

is allotted;[85] the setting apart and apportioning of the property held formerly by joint owners, so that each one may hold in severalty his own specific share.[86]

Allotment note. A note made by a seaman stipulating for the payment of his wages by his employers to certain persons, in fixed installments, at particular times.[87]

Allotment system. The practice of dividing land into small portions for cultivation by agricultural laborers and other cottagers at their leisure, and after they have performed their ordinary day's work.[88]

(Cross references.[89])

ALLOTTEE.[90] One to whom something is allotted, as a plat of ground, shares of stock, or the like.[91]

ALLOW.[92] To accept;[93] to acquiesce in;[94] to admit;[95] to adopt;[96] to afford;[97] to approve;[98] to assent;[99] to award or order;[1] to concede;[2] to consent to;[3]

diverting water therefrom, beginning with those streams the waters of which have not been allotted. The court said: "The term 'allotted' as there used means decreed by the proper court." Boise Irr., etc., Co. v. Stewart, 10 Ida. 38, 53, 77 P 25, 321.

[b] **As implying partition.**—In construing a deed declaring that "the said forty-four acres was 'that portion of the David Fort land allotted to N. D. Allen,' the feme defendant," the court said: "The use of the word 'allotted' in itself implies a full partition of the land. To allot means 'to set apart a thing to a person as his share, as to allot a fund or land.' Anderson L. D. 51." Fort v. Allen, 110 N. C. 183, 190, 14 SE 685.

[c] **In sense of "issued or paid."**—"Allotted," as used in a contract declaring that the shares of stockholders were "allotted" to them on the distribution, etc., means "issued" or "paid." Anthony v. American Glucose Co., 146 N. Y. 407, 414, 41 NE 23.

[d] **"Shall be allotted for, and given to."** In a statute for the relief of the officers and soldiers in the continental line, it was contended, gave nothing; that they were in the future and not in the present tense, and indicated an intention to give in the future, but created no present obligation on the state nor present interest in the grantees. It was held, however, that as the act was to be performed in the future the words directing it were necessarily in the future tense, and that, although the land was undefined, the survey afterward made in pursuance of the act gave precision to the title and attached it to the land surveyed. Rutherford v. Greene, 2 Wheat. (U. S.) 196, 197, 4 L. ed. 218.

85. Century D.

86. Rapalje & L. L. D.; Glenn v. Glenn, 41 Ala. 571, 577.

[a] **Allotment of dower.**—Where the constitution gave the probate court jurisdiction in "all matters of the allotment of dower," allotment was defined as "an apportionment of the interest of one or more parties entitled to a share of the estate," and the clause was held not to confer jurisdiction over the "rights of strangers claiming title to lands adversely to the deceased and his representatives." Jiggitts v. Bennett, 31 Miss. 610, 612, 613.

[b] **Indian lands.**—(1) "So the purpose and process here was to distribute to each person concerned, in full accord with treaty regulations, that which was understood and conceded to rightfully belong to the Indians themselves, although the fee was held for them by the United States in the capacity of guardian of their property and estate; the allotment being intended as in the nature of a partition among joint owners of realty, whereby there should be set apart to each owner a single portion in severalty as and for his joint interest or property in the whole. The United States in making the allotments was dealing with the fee, and yet conceding that the Indians were entitled to it, and providing that in due time they should have it." Parr v. U. S., 153 Fed. 462, 467. (2) In Johnson v. McGehee, 1 Ala. 186, 193, it was held that the "location" or allotment, in an Indian treaty providing for the location and allotment of lands for the benefit of Indians, is the mode by which the proper executive officer determines that the choice of land made by the tribe is approved, and that the lands are not subject to other claims.

[c] **Covenant to take shares when issued and allotted.**—"As applied to a fixed quantity of anything, or a fixed number of shares, the word 'allotment' can mean nothing more than to give, to assign, to set apart, to appropriate. The word has all these meanings. Nor does the word 'issue' in the present case mean the doing of any particular act, and I think 'issue' and 'allotment' taken together mean no more than some signification by the company of its assent that the defendant now was or had become the owner of the number of shares which he agreed to take." Nelson Coke, etc., Co. v. Pellatt, 4 Ont. L. 481, 489, 1 OntWR 595.

87. Maclachlan Merch. Ship. 207. See generally Seamen [35 Cyc 1214].

88. Black L. D.

[a] **In the Allotments and Cottage Gardens Compensation for Crops Act** (1887) § 4, "allotment" means, inter alia, "any parcel of land of not more than two acres in extent held by a tenant under a landlord and cultivated as a garden." It was held that a piece of land less than two acres in extent, occupied by a seedsman for the purposes of his business, and having in it vegetables, fruit trees, and flowering plants which he sold, was not "cultivated as a garden," and was therefore not an allotment within the definition in § 4. Cooper v. Pearse, [1896] 1 Q. B. 562, 564, 567.

89. Allotment: Of:
Corporate stock see Corporations [10 Cyc 384, 416].
Dower see Dower [14 Cyc 973].
Exempt property:
Generally see Exemptions [18 Cyc 1482].
Homestead see Homesteads [21 Cyc 626].
Indian lands see Indians [22 Cyc 132].
Land on partition see Partition [30 Cyc 154, 157, 260].
Work on drain see Drains [14 Cyc 1055].
See also Allot ante.

90. See also Allot ante; Allotment ante.

91. Century D.

[a] **Descriptive of person, not condition.**—In U. S. v. Zumwalt, 186 Fed. 596, 598, in construing the Nez Perce treaty, providing that the lands ceded by the agreement, those retained, and those allotted to the Nez Perce Indians, should be subject for twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, should for a like period be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians; it was held that the term "allottee," as used in such provision, was descriptive of the person and not of the condition, and that a Nez Perce Indian to whom lands had been allotted was not removed from the class described in the treaty as "Nez Perce Indian allottees" by the issuance to him of a patent conveying the absolute title to his allotment, prior to the expiration of the specified twenty-five years, so that it was no defense to a prosecution for furnishing liquor to such an Indian that he was an allottee to whom the United States had conveyed by patent the absolute title to his allotment.

92. See also Allowance post.

93. Peo. v. Gilroy, 82 Hun 500, 507, 31 NYS 776.

[a] **"Allot" distinguished.**—Glenn v. Glenn, 41 Ala. 571, 586.

94. Sawyer v. Mould, 144 Iowa 185, 186, 122 NW 813, 25 LRANS 602.

95. Doty v. Lawson, 14 Fed. 892, 893; Webster D. [quot Thurman v. Adams, 82 Miss. 204, 209, 33 S 944]; Peo. v. Gilroy, 82 Hun 500, 507, 31 NYS 776.

96. Chamberlain v. Putnam, 10 S. D. 360, 362, 73 NW 201.

97. Doty v. Lawson, 14 Fed. 892, 893.

98. Anderson L. D. [quot Thurman v. Adams, 82 Miss. 204, 209, 33 S 944].

[a] **A verdict is not "allowed"** and recorded, within a statute, giving complainant in an action for assessment of damages for flooding lands the right to elect to take damages in gross within three months after the verdict is "allowed," until the exceptions have been overruled by the supreme court, and complainant was entitled to judgment and execution upon the verdict of the sheriff's jury. Hamilton v. Farrar, 131 Mass. 572, 573.

[b] **Not a distinct and affirmative approval.**—In reviewing a motion for a new trial the court said: "It will be noticed that the amended ground of the motion for new trial is only 'allowed' by the presiding judge, which is not equivalent to that distinct and affirmative approval which is essential for the verification by the court of the statements of fact therein contained." Soell v. State, 4 Ga. A. 337, 338, 61 SE 514. To same effect Gay v. Peak, 5 Ga. A. 583, 63 SE 650.

[c] **"Approves" distinguished.**—Long v. Miami County, 75 Oh. St. 539, 546, 80 NE 188. And see Approve [3 Cyc 565].

99. Richardson D. [quot Mangam v. Brooklyn, 98 N. Y. 585, 598, 50 AmR 705].

1. Re Murphy, 28 N. S. 196, 200 (where, in construing a local act authorizing judges "in matters over which the jurisdiction of the local legislature extends, to make rules 'to allow and regulate' the costs in relation thereto," the court said: "Two words are used which differ materially in their signification—one is 'allow,' which, clearly, is comprehensive enough to enable the court to allow, that is to award, or order the payment of costs, where such power did not previously exist").

2. Webster D. [quot Thurman v. Adams, 82 Miss. 204, 209, 33 S 944]; Richardson D. [quot Mangam v. Brooklyn, 98 N. Y. 585, 598, 50 AmR 705].

3. Webster D. [quot Thurman v. Adams, 82 Miss. 204, 209, 33 S 944]; Marshall v. Franklin F. Ins. Co., 176 Pa. 628, 636, 35 A 204, 34 LRA 159.

[a] **Entering allowance.**—In a statute providing that the commissioners shall, upon actual view of the premises sought to be taken for public use for the construction of a ditch, fix and "allow" compensation for the lands appropriated to each person or corporation making ap-

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to direct;[4] to fix;[5] to give;[6] to grant;[7] to grant license to;[8] to intend;[9] to pay;[10] to permit;[11] to sanction;[12] to suffer;[13] to tolerate;[14] to yield;[15] to will;[16] to substitute by way of compensation some-

plication, the word "allow" relates to the entering upon their journal of an order fixing and allowing the amount of compensation to a landowner who has made application therefor, which act exhausts their power. Zimmerman v. Canfield, 42 Oh. St. 463, 468.

4. Cabeen v. Gordon, 1 Hill Eq. (S. C.) 51, 55.

[a] **For example** in a will devising testator's real estate to his wife for life, and providing that "after the death of my said wife, I allow all my estate to be disposed of at public sale," the proceeds to be equally divided between certain beneficiaries, "allow" is "used in the sense of positive direction, for without the sale the testator's expressed intention in respect to distribution could not be carried out." Ramsey v. Hanlon, 33 Fed. 425, 426.

5. Daggs v. Phoenix Nat. Bank, 5 Ariz. 409, 419, 53 P 201; Hinds v. Marmolejo, 60 Cal. 229, 231; Polk v. Minnehaha County, 5 Dak. 129, 135, 37 NW 93; Thurman v. Adams, 82 Miss. 204, 209, 33 S 944 [quot Cyc]; Guild v. First Nat. Bank, 4 S. D. 566, 573, 57 NW 499; Wolverton Nat. Bank v. Exch. Nat. Bank, 11 Wash. 94, 39 P 247.

[a] **In National Banking Act.**—A territorial law in force in certain counties of the late territory of Dakota, which provided that in those counties "it shall be lawful to take, receive, retain and contract for any rate [of interest] agreed on between the parties," allowed and fixed the rate of interest by law in such counties or district, within the meaning of U. S. Rev. St. § 5197, which provides that "any association may take . . . interest at the rate allowed by the laws of the state, territory or district where the bank is located." Guild v. Deadwood First Nat. Bank, 4 S. D. 566, 573, 574, 57 NW 499. The court said: "The term 'fixed,' as used in that section, evidently means 'provided by law,' 'allowed by law,' 'settled or established by law,' and the term 'allowed,' in the first clause, and the term 'fixed' in the second clause, were used in the national banking act in substantially the same sense. This seems to be the view taken by the supreme court of California. In Hinds v. Marmolejo, 60 Cal. 229, that court says: 'Reading the entire section, and considering the two clauses together, as they must be considered, we are of the opinion that the word 'fixed,' used in the last clause, is used in the same sense as the word 'allowed,' in the first clause, and that by the words, 'the laws of the state or territory,' is meant statute laws.' To same effect Daggs v. Phœnix Nat. Bank, 5 Ariz. 409, 53 P 201; Wolverton v. Exchange Nat. Bank, 11 Wash. 94, 39 P 247.

6. Thurman v. Adams, 82 Miss. 204, 33 S 944, 945 [quot Cyc]; Cabeen v. Gordon, 10 S. C. Eq. 51, 55.

[a] **Give or pay.**—In construing a clause in a contract that one of the parties thereto shall allow the other a certain bonus the court said: "'Allow' is here used in the sense of 'give' or 'pay,' and while this sense, though uncommon, is not entirely unknown; the chief importance of the fact here is to note that the parties to these agreements use the words 'allow' and 'give' synonymously." Straus v. Wanamaker, 175 Pa. 213, 225, 34 A 648.

7. Doty v. Lawson, 14 Fed. 892, 893; Thurman v. Adams, 82 Miss. 204, 209, 33 S 944, 945. See Grant [20 Cyc 1359].

[a] **Implying something to allow from.**—In a statute authorizing the chancellor to "allow" the commissioners, upon a commission in the nature of a writ de lunatico inquirendo, reasonable compensation, and the jurors fixed fees out of the estate of the person subject to the inquisition, the word "allow" impliedly premises a fund in court. In re Farrell, 51 N. J. Eq. 353, 361, 27 A 813.

8. Doty v. Lawson, 14 Fed. 892, 893; Thurman v. Adams, 82 Miss. 204, 209, 33 S 944.

9. Hunter v. Stembridge, 12 Ga. 192, 194; Harmon v. James, 7 Ind. 263, 264.

[a] **Use of word among illiterate people.**—A will providing that "I also allow my son Henry to give her [his mother] a support off the plantation during her lifetime," expresses an intention that his son should support his wife, during her life, off the plantation, the testator being an illiterate man, and it not being uncommon for that class of persons to use the word "allow" as synonymous with that of intention—"I allow to go to town to-morrow," "I allow for my wife to have a support off my plantation when I die," etc. The testator used the word "allow" in this clause of the will as expressive of his intention that his son to whom he had given his homestead should support his mother off the same during her life. Hunter v. Stembridge, 12 Ga. 192, 194.

10. Straus v. Wanamaker, 175 Pa. 213, 225, 34 A 648.

11. Anderson L. D.; Webster L. D. [quot Thurman v. Adams, 82 Miss. 204, 209, 33 S 944]; Richardson D. [quot Mangam v. Brooklyn, 98 N. Y. 585, 598, 50 AmR 705]; Doty v. Lawson, 14 Fed. 892, 901; Gregory v. U. S., 10 F. Cas. No. 5,803, 17 Blackf. 325, 330; Louisville, etc., R. Co. v. Smith, 163 Ala. 141, 149, 50 S 241; Sawyer v. Mould, 144 Iowa 185, 186, 122 NW 813, 25 LRANS 602; Bd. of Education v. Bd. of Education, 5 Oh. Cir. Dec. 96, 98; Marshall v. Franklin F. Ins. Co., 176 Pa. 628, 636, 35 A 204, 34 LRA 159; Kearns v. Kearns, 107 Pa. 575, 578; Huxham v. Wheeler, 3 H. & C. 75, 84. See also Permit [30 Cyc 1462].

[a] **Illustrations.**—(1) "The clause in the contract, 'to be allowed 130 pounds of steam working pressure by United States inspectors,' was not an assurance that the boiler contracted for would produce and maintain a working pressure to that amount. It has no reference to the capacity of the boiler, and plainly refers to the government inspection of boilers under U. S. Rev. St. § 4418, and that it would be such a boiler that they would permit a working pressure of 130 pounds, and set the safety valve accordingly." Milwaukee Boiler Co. v. Duncan, 87 Wis. 120, 124, 58 NW 232, 41 AmSR 33. (2) A covenant by the vendors that they would not construct, or allow to be constructed, a dam or other improvement below the water power conveyed, is not violated where the land was sold at foreclosure and a dam erected thereon by the government, the latter having acquired such land. The court said: "In defining the word 'allow,' as it is used in that contract, we must take it in its ordinary and popular sense, and there is quite clearly implied in the use of that word the understanding or expectation of the parties at the time that the improvement company would continue in such relation to the property that it might, if so disposed, by some affirmative act on its part, facilitate or permit the construction of a dam below the rapids, and this it was intended by the contract to prevent." Doty v. Lawson, 14 Fed. 892, 901. (3) "Allowed," as used in an insurance policy providing that it shall be void if gasoline is kept, used, or "allowed" on the premises, means "allowed to be kept or used" by some third person, and will be so construed even though such meaning is covered by the words "kept or used," so that the condition is not violated by merely permitting gasoline to be carried through the building on the premises. London, etc., F. Ins. Co. v. Fischer, 92 Fed. 500, 502, 34 CCA 503.

[b] **Assent implied.**—"The statute is in the disjunctive and it declares that if the husband shall 'allow' his wife to remain in a house of prostitution he is guilty of a felony. The word 'allow' here means more than mere 'abstinence from prevention,' as the court below defined it in an instruction given to the jury. It has almost the identical meaning of the word 'permit,' also used in the statute. It implies some sort of assent on the part of the husband. There must be some active wish, or at least willingness, in his mind, after he has knowledge of her presence in the house, that she should continue there; something more than mere indifference to her whereabouts or passive sufferance in a case where the circumstances do not call upon him to interfere with her conduct." Per Shaw, J., in Peo. v. Conness, 150 Cal. 114, 121, 88 P 821.

[c] **Presupposes absence of right.**—In construing the phrase "allowing all people to pass and repass," in a reservation in a deed, the court said: "The very term allowing presupposes the absence of a right to pass and repass, &c., without the permission of the grantee." Parsons v. Miller, 15 Wend. (N. Y.) 561, 564.

[d] **"Permit" distinguished.**—The word "allow" is not as positive as the word "permit," being more of a synonym with the word "suffer," while the word "permit" denotes a decided assent. Wilson v. State, 19 Ind. A. 389, 46 NE 1050, 1051. And see Permit [30 Cyc 1462].

[e] **"Approved" distinguished.**—(1) To allow grounds of motion for a new trial is not equivalent to approving them. Thornton v. Cordell, 8 Ga. A. 588, 70 SE 17; Gay v. Peak, 5 Ga. A. 583, 63 SE 650; Wilson v. Cobb, 4 Ga. A. 272, 61 SE 133; Soell v. State, 4 Ga. A. 337, 61 SE 514. (2) In Wilson v. Cobb, 4 Ga. A. 272, 61 SE 133, the court said: "The following endorsement, signed by the judge, is not equivalent to an approval: 'Read, considered, and allowed.' Williams v. State, 120 Ga. 488, 48 SE 149; Sindy v. State, 120 Ga. 202, 47 SE 554; Jackson v. State, 116 Ga. 834, 43 SE 255."

[f] **"Shall be prevented"** as not equivalent to "shall not be allowed" see Crabtree v. Fern Spinning Co., 85 L. T. Rep. N. S. 549, 551, 552 (construing the English Factory and Workshop Act providing that "A person employed in a factory shall not be allowed to be in the space between the fixed and the traversing portions of a self-acting machine, unless the machine is stopped," etc.).

12. Anderson L. D. [quot Thurman v. Adams, 82 Miss. 204, 209, 33 S 944]; Gildart v. Starke, 2 Miss. 450, 457 (accounts of executors, administrators, and guardians).

13. Gregory v. U. S., 10 F. Cas. No. 5,803, 17 Blatchf. 325, 330; Wilson v. State, 19 Ind. A. 389, 46 NE 1050, 1051; Thurman v. Adams, 82 Miss. 204, 209, 33 S 944; Richardson D. [quot Mangam v. Brooklyn, 98 N. Y. 585, 598, 50 AmR 705]; Bd. of Education v. Bd. of Education, 5 Oh. Cir. Dec. 96, 98.

14. Gregory v. U. S., 10 F. Cas. No. 5,803, 17 Blatchf. 325, 330; Sawyer v. Mould, 144 Iowa 185, 186, 122 NW 813, 25 LRANS 602; Thurman v. Adams, 82 Miss. 204, 209, 33 S 944.

15. Doty v. Lawson, 14 Fed. 892, 893; Thurman v. Adams, 82 Miss. 204, 209, 33 S 944; Richardson D. [quot Mangam v. Brooklyn, 98 N. Y. 585, 598, 50 AmR 705].

16. Ramsey v. Hanlon, 33 Fed. 425, 426.

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thing else for another thing.[17] In the past tense the word is sometimes used in the sense of claimed,[18] or proved.[19] The word "allow" has many meanings and they are often controlled by the context.[20] The word always implies knowledge or consent[21] and usually involves discretion in granting or refusing.[22]

Phrases in which the word has been used have received judicial interpretation, such as "allow an appeal,"[23] "allow or permit,"[24] "allowed and approved,"[25] "allowed and recorded,"[26] "allowed by law,"[27]

[a] **Word of direction in will.**—(1) The testator, after providing for his wife for life, made the following provision: "After the death of my said wife, I allow all my estate to be disposed of at public sale, and as soon as the proceeds of the sale is collected, it is my will that the amount be equally divided among my daughters." It was held that the words "I allow," were used in the sense of "I will," and amounted to a positive direction, which worked an equitable conversion of the real estate. Ramsey v. Hanlon, 33 Fed. 425, 426. (2) A will reading; "My will is that my wife shall be allowed to live on the said property during the term of her natural life," was held to give the wife a life estate in the land. "So also she 'shall be allowed to live on the property' is an expression not only stronger than those words of recommendation, wish, or expectation, which are addressed to devisees and legatees with respect to other persons, and which are held to constitute a trust in favor of such persons, but it is an expression of a different character—it is a direct devise" (per Wilson, J.). "I am of opinion that this is not a mere expression of the wish of the testator, but a devise in favor of the widow" (per Blake, V. C.). Fulton v. Cummings, 34 U. C. Q. B. 331, 332, 339, 342. See also White v. Com., 110 Pa. 90, 1 A 33; Cabeen v. Gordon, 10 S. C. Eq. 51.

17. Glenn v. Glenn, 41 Ala. 571, 586.

18. See Dell Rapids v. Irving, 9 S. D. 222, 68 NW 313 infra note 20 [a]. Compare Sammons v. Higbie, 103 Minn. 448, 115 NW 265.

19. Burtt v. Barnes, 87 Wis. 519, 523, 58 NW 790 (under a statute providing that an assignee may be removed upon the application of a majority of the creditors, who shall also represent a majority in value of the debts allowed, it was held that by "debts allowed" were meant those allowed by the assignor or assignee, or proved, not those established by judgment or order of court. The court said: "The statute requires that the majority of the creditors should represent a majority in value of the debts allowed against said estate. The learned counsel of the respondent contends that this proceeding is premature, because such debts have not been allowed. There is no proceeding by our statute for the allowance of any of the debts or claims, except when they are contested. The word 'allowed' was evidently an oversight, on the mistaken supposition that the statute provided for it. It must have a reasonable construction, and means allowed by the assignor or assignee, or proved, as in the New York and Michigan statutes. In such sense, all these debts have been allowed").

20. Louisville, etc., R. Co. v. Smith, 163 Ala. 141, 149, 50 S. 241.

[a] **Illustration.**—In construing a statute allowing an appeal from an award by supervisors laying out a highway, provided the amount of damages allowed in such appeal does not exceed one hundred dollars, the court said: "Without substituting some other word for 'allowed,' the proviso to Sec. 1324, that 'the amount of damages allowed in such appeal does not exceed one hundred dollars,' seems to be meaningless. 'Allowed in such appeal' by whom or how? But taking all the sections of the statute together, it seems quite clear the term 'allowed' was intended to mean 'claimed,' in the sense that term is used in Sec. 1327." Dell Rapids v. Irving, 9 S. D. 222, 225, 68 NW 313.

21. Gregory v. U. S., 10 F. Cas. No. 5,803, 17 Blatchf. 325, 330; Sawyer v. Mould, 144 Iowa 185, 186, 122 NW 813, 25 LRANS 602; Thurman v. Adams, 82 Miss. 204, 209, 33 S 944; Houston, etc., R. Co. v. Haberlin, (Tex.) 125 SW 107, 108.

[a] **Illustrations.**—(1) The word "allow," as used in a statute punishing any person who may allow intoxicating liquors to be unlawfully sold or given away at his place of business, implies the knowledge or consent of the owner of the place of business. Thurman v. Adams, 82 Miss. 204, 207, 33 S 944. (2) "'To allow one's name to be used improperly,' may, if the word 'allow' is used with precision, mean nothing more than to 'knowingly allow one's name to be used improperly.'" Churchill v. Thompson Electric Co., 119 Ill. A. 430, 435. (3) Under a statute providing that "any owner or master who allows the ship to be so loaded as to submerge in salt water the center of the disc," etc., it was held that the owner of a British ship which, without his knowledge or assent, is overloaded by the master in breach of this provision, is not responsible for the act of the master so as to be liable to the penalty created by the act. Massey v. Morriss, [1894] 2 Q. B. 412, 413. (4) But in construing a statute providing a penalty if a surveyor of a highway allows a heap of stone, etc., to remain on a highway at night without taking reasonable precautions to guard against injury to persons passing thereon, the court said: "The word 'allow' seems to admit the consideration whether or not the offence can be committed where negligence on the part of the surveyor has been proved, although he may not have been proved to have any personal knowledge that the acts which have caused the injury have taken place." Hardcastle v. Bielby, [1892] 1 Q. B. 709, 712.

22. See Marshall v. Franklin F. Ins. Co., 176 Pa. 628, 35 A 204, 34 LRA 159 (holding that the use of the word in any given case assumes the existence of a power to refuse to allow, permit, or consent to, and the right to elect whether to grant or withhold the allowance or permission asked for). See also Mangam v. Brooklyn, 98 N. Y. 585, 596, 50 AmR 705.

[a] **Illustrations.**—(1) "The authority to audit and allow an account primarily implies the right to determine whether it is an accurate and just claim." Per Follett, J., in Peo. v. Gilroy, 82 Hun 500, 507, 31 NYS 776. (2) The power given to the board of supervisors of a county to "examine, settle, and allow" all accounts chargeable against such county involves also the right to reject if sufficient reasons for allowing are not presented. Peo. v. Dutchess County, 9 Wend. (N. Y.) 508, 509. (3) "The language of the act is, 'appoint or allow any person as next friend,' etc., thus clearly showing the court is clothed with a discretion in appointing or allowing one other than the guardian to institute or defend a suit on behalf of an infant." Patterson v. Pullman, 104 Ill. 80, 87. (4) In construing the statute providing: "The whole number of deputies allowed the sheriff is one undersheriff, and in addition not to exceed the following number of deputies" and "The number of deputies allowed to county officers and their compensation must not exceed for maximum limits prescribed in this chapter," the court said: "Much argument has been devoted to the meaning of the word 'allowed,' as used in Sections 4597 and 4603, appellant contending that it is employed in the sense of a power granted to the sheriff to exercise his uncontrolled discretion in making appointments within the maximum limits. We think otherwise. In the acts of 1891 and 1893 the same word is used to express the exercise of authority or discretion by the board of commissioners, or to confide to the board the determination of the number and compensation of deputies within the maximum limits permitted by law; and from this as well as for other reasons apparent upon consideration of the legislation as a whole, we believe it was intended to receive a like interpretation when found in the later act." Jobb v. Meagher County, 20 Mont. 424, 430, 435, 51 P 1034.

23. Vaughan v. Richardson, 17 Can. S. C. 703, 707 (holding that the expression "allow an appeal" in a statute "providing that under special circumstances the court appealed from or a judge thereof may 'allow an appeal' although the time limited therefor by previous sections has expired . . . means only that the court or judge may settle the case and approve the security").

24. Towson v. Green, 2 C. & P. 110, 12 ECL 477 (holding that to support a plea that the trustees under a private act of parliament did not "allow or permit" defendant to exercise a certain exclusive right, it is necessary to prove some positive act of obstruction on their part, and it is not enough to prove that a third party took it away, he having a right to it).

25. In re McDougald, 146 Cal. 191, 194, 79 P 878 (holding that "the words . . . must be taken to refer to the claim on which they were indorsed, and, as it purported on its face to be a secured claim, it must be deemed to have been allowed as a secured claim").

26. Hamilton v. Farrar, 131 Mass. 572, 573 (holding that where a statute gave the right to take damages in gross "at any time within three months after the verdict is allowed and recorded," the verdict was not "allowed and recorded" until exceptions taken at the time of trial had been overruled by the supreme court, and that an election made within three months of that time, although more than three months after the acceptance of the verdict in the lower court, was not too late).

27. Brinckerhoff v. Bostwick, 99 N. Y. 185, 190, 1 NE 663, 665 [quot Peo. v. Knapp, 147 App. Div. 436, 441, 132 NYS 747] (holding that the expression is of frequent occurrence in the codes and other legislative enactments, and is always used as referring to statutory provisions only).

[a] **Compensation allowed by law.**—In construing the act of congress providing "that no civil officer of the government shall hereafter receive any compensation and perquisites, directly or indirectly, from the Treasury or property of the United States, beyond his salary or compensation allowed by law," act of June 20, 1874 (18 U. S. St. at L. 101 c 328 § 3), the court said: "The inquiry under this act is, therefore, narrowed to this: whether a compensation from fees, to an amount to be prescribed by the Commissioner of Internal Revenue, not to exceed six dollars a day, is a compensation allowed by law. We have no doubt that it is. The amount (within the limit) is to be 'fixed' by the Commissioner, but the Commissioner's authority to fix it, the Comptroller's

and "kept, used, or allowed."[28]

ALLOWABLE. Proper to be or capable of being allowed or permitted; not forbidden; legitimate; permissible.[29]

ALLOWANCE. That which is allowed;[30] something conceded as a compensation, abatement, or deduction;[31] a share or portion allotted or granted; a sum granted as a reimbursement; a bounty; an appropriation for any purpose;[32] emolument;[33] a gift or gratuity to a child or other dependent;[34] a limited quantity of meat and drink when provisions fall short;[35] the act of allowing; granting or admitting; permission or license;[36] the sanction or approbation of the court to certain acts;[37] settlement;[38] a customary deduction from the gross weight of goods.[39]

Gratuitous or discretionary. An allowance is gratuitous and ceases at the pleasure of the donor.[40] It always imports the voluntary act of a party in doing something which is in his discretion to perform or withhold at pleasure.[41]

To wife after divorce. The word is frequently used to denote the sum or sums paid to a woman after a decree of divorce.[42]

To fiduciaries, attorneys, and officers. The word is often employed as referring to payments to executors, administrators, and trustees upon an accounting;[43] to attorneys upon undertaking an extraordinary or difficult case;[44] to public officers,[45]

authority to pass it, and the treasurer's authority to pay it are 'allowed by law.'" Hedrick v. U. S., 16 Ct. Cl. 88, 102, 103.

28. London, etc., F. Ins. Co. v. Fischer, 92 Fed. 500, 502, 34 CCA 503 (holding that the word in an insurance policy providing that the policy should be void "if there be kept, used, or allowed" on the premises gasoline, means "allowed to be kept or used").

29. Century D.

[a] **"Provable" distinguished.**—"That 'provable,' as used in the bankruptcy act, is to be considered as the equivalent of 'allowable,' as used in the same act, is a contention that ought not to prevail. Those words are not used in the act as equivalents, or as expressing the same meaning. Nor are the acts of, or proceedings for, 'proving a claim,' and of 'allowing a claim,' the same. As before stated, they are, and were intended to be, independent acts and proceedings in the court of bankruptcy. This contention finds support in In re Norcross, 1 AmBankr 644." In re Hornstein, 122 Fed. 266, 275.

30. De Roche v. De Roche, 12 N. D. 17, 25, 94 NW 767, 1 AnnCas 221; Webster D. [quot Mangam v. Brooklyn, 98 N. Y. 585, 597, 50 AmR 705].

31. Carroll County v. Richardson, 54 Ind. 153, 159 [cit Worcester D.].

[a] **Allowance of road.**—Plaintiff held under a lease reserving forty pounds per annum in the body thereof but, before the lease was executed, the following words were added, between which and the body of the lease the signatures were written: "The allowance of the road . . . to be made as usual." It had been usual for the lessor to allow the lessee five pounds per annum for so much annually paid by the lessee to a third person for the use of such road to the demised premises. It was held that this did not reduce the reservation to thirty-five pounds per annum. Davies v. Stacey, 12 A. & E. 506, 510, 40 ECL 254, 113 Reprint 904.

[b] **With allowance.**—The acceptance of a conveyance and patent of land described in the articles of agreement as containing a certain number of acres "with allowance" was considered an agreement on both sides to abide by the estimated quantity in the official survey and patent, "be the same more or less." McLelland v. Creswell, 13 Serg. & R. (Pa.) 143.

[c] **Cabin or other allowances.**—A master agreed to accept from the shipowner a certain sum "for all cabin or other allowances." "Other allowances" was held rather to refer to allowances like cabin and shore money than to those of a different description, and not to prohibit the master from taking primage from the consignee. Best v. Saunders, M. & M. 208, 22 ECL 511.

32. De Roche v. De Roche, 12 N. D. 17, 25, 94 NW 767, 1 AnnCas 221.

33. Sherburne v. U. S., 16 Ct. Cl. 491, 496 (where it was said that the word is sometimes used synonymously with "emolument," as "indirect or contingent remuneration, which may or may not be earned, and which is sometimes in the nature of compensation, and sometimes in the nature of reimbursement").

34. Taylor v. Staples, 8 R. I. 170, 179, 5 AmR 556. See Executors and Administrators [18 Cyc 373, 387]; Parent and Child [29 Cyc 1617]; Partnership [30 Cyc 632].

[a] **For example** (1) "Allowances are made by husband to wife, parents to children, the head of a family to its members, superannuated dependents and servants, from the benevolent to the poor, and in cases where the act is discretionary with the donor, as a reward for benefits conferred, or services voluntarily rendered by one to another." Mangam v. Brooklyn, 98 N. Y. 585, 596, 50 AmR 705. (2) "The word 'allowance,' if considered with reference to the personalty only, would undoubtedly be regarded as the equivalent of 'bequest' or 'gift.' Why then should it not have the same significance when applied to the aggregate of the estate defined as 'property?' The words 'the allowance of one third of my property to the widow,' are a designation of the proportion of the estate which the widow is to have. There are no words in the will which limit the estate or interest she is to take, and as the property is principally real estate, the ninth section of the Act of 8th April, 1833 (Purdon 1475, pl. 10) becomes applicable and clothes her with a fee." Per Green, J., in White v. Com., 110 Pa. 90, 93, 1 A 33.

35. Webster D. [quot Mangam v. Brooklyn, 98 N. Y. 585, 597, 50 AmR 705; De Roche v. De Roche, 12 N. D. 17, 25, 94 NW 767, 1 AnnCas 221]. To same effect Feagin v. Comptroller, 42 Ala. 516, 522 [cit Webster D.].

36. Webster D. [quot Mangam v. Brooklyn, 98 N. Y. 585, 597, 50 AmR 705].

37. Gildart v. Starke, 2 Miss. 450, 457.

38. Atchison, etc., R. Co. v. Cone, 37 Kan. 567, 569, 15 P 499 (holding that when used in a judge's certificate to a case made, the term is equivalent to the word "settlement").

39. Webster D. [quot Mangam v. Brooklyn, 98 N. Y. 585, 597, 50 AmR 705].

40. Mangam v. Brooklyn, 98 N. Y. 585, 597, 50 AmR 705.

41. Marion County v. Reissner, 58 Ind. 260, 263; Mangam v. Brooklyn, 98 N. Y. 585, 596, 50 AmR 705 (where the court said: "Whether we consider the ordinary and popular signification of the word, or the more accurate and technical meaning attached to it by lexicographers, it is entirely inappropriate to express the idea of a fixed compensation adopted for the payment of services rendered by one person to another. The word 'allowance' imports the voluntary act of one party in doing something which is in his discretion to perform or withhold at pleasure. To allow implies the right, to determine, and is the act of a superior toward a dependent granting a privilege which he has authority to confer or deny. It does not express the relations existing between co-contractors, vendor and vendee, or employer and employe where there is a right secured by contract on one side, and no power of voluntary action on the other").

42. See Jeter v. Jeter, 36 Ala. 391, 408. To same effect Robinson v. Robinson, 79 Cal. 511, 21 P 1095; De Roche v. De Roche, 12 N. D. 17, 94 NW 767, 1 AnnCas 221; Platt v. Platt, 9 Oh. 37; Williams v. Williams, 6 S. D. 284, 61 NW 38. See also In re Spencer, 83 Cal. 460, 23 P 395, 17 AmSR 266.

[a] **Not necessarily payable in installments.**—(1) While "allowance" is often used in the sense of a stated sum paid from time to time, it is susceptible of a much more enlarged signification, and is often used to denote a sum or thing granted or permitted by the law. Jeter v. Jeter, 36 Ala. 391, 408. (2) The use of the word "allowance" in statutes under which courts may award property to the wife after divorce does not negative the idea that in so doing they may award a gross sum. De Roche v. De Roche, 12 N. D. 17, 25, 94 NW 767, 1 AnnCas 221 [cit Robinson v. Robinson, 79 Cal. 511, 21 P 1095; Williams v. Williams, 6 S. D. 284, 61 NW 38]. See also Platt v. Platt, 9 Oh. 37.

[b] **Not alimony.**—Smith v. Smith, 45 Ala. 264, 268. See Divorce [14 Cyc 759, 769].

43. See State Bank v. Marsh, 1 N. J. Eq. 288; Downing v. Marshall, 37 N. Y. 380, 390. See Executors and Administrators [18 Cyc 502, 506]; Trusts [38 Cyc 486].

[a] **Expenses and charges of trustee.**—(1) In the English cases the expenses and the charges to which the trustee may be entitled outside of the ordinary fee bill are designated as allowances. Downing v. Marshall, 37 N. Y. 380, 390. (2) Under a statute allowing trustees "just allowances," it has been held that they are not entitled to compensation for services rendered in the performance of their trusts, but only to charges and expenses. State Bank v. Marsh, 1 N. J. Eq. 288, 296.

44. See Costs [11 Cyc 134].

45. Ohio County Ct. v. Newton, 79 Ky. 267; Reg. v. Ramsgate, 23 Q. B. D. 66. See Counties [11 Cyc 428]; Officers [29 Cyc 1428]; Prisons [32 Cyc 855]; Prosecuting and District Attorneys [32 Cyc 705, 726]; Sheriffs and Constables [35 Cyc 1579, 1590]; States [36 Cyc 864].

[a] **To county judge.**—Ohio County Ct. v. Newton, 79 Ky. 267; Butler County v. Gardner, 96 SW 582, 29 KyL 922.

[b] **To sheriff.**—Marion County v. Reissner, 58 Ind. 260, 263.

[c] **To contractor on public buildings.**—Carroll County v. Richardson, 54 Ind. 153 [dist Fordyce v. Montgomery County, 28 Ind. 454].

[d] **What word includes.**—(1) Under the Public Health Act (1875) §§ 189, 193, prohibiting a local officer from receiving any fee or re-

·or to officers or enlisted men in the army and navy.[46] | (Cross references.[47])

wards other than his proper salary, wages, and allowances, it has been held that the word "allowances" includes extra payments for extra work and is not limited to allowances in respect of lodgings, coals, gas, and other like matters. Edwards v. Salmon, 23 Q. B. D. 531. (2) A percentage on the outlay for drainage work, paid to a surveyor acting for a local board, was held an allowance within the statute. Whiteley v. Barley, 21 Q. B. D. 154. (3) To same effect Reg. v. Ramsgate, 23 Q. B. D. 66, 70 (where the court said: "An authority was cited giving a definition of the word allowance as being 'a payment beyond the agreed salary of the officer for additional services rendered by him.' But I think that that definition is too large. To my mind an 'allowance' means an allowance of something other than money, and does not include pecuniary payment"). (4) But the rent for rooms paid to an officer cannot be considered as such an allowance. Burgess v. Clark, 14 Q. B. D. 735.

[e] **Other than money.**—In Burgess v. Clark, 14 Q. B. D. 735, 738, Brett, M. R., defined the word "allowance" as "a payment beyond the agreed salary of the officer for additional services rendered by him," but in the same case Cotton, L. J., confined the meaning of the word to "the use of a room, or coals, or candles, or articles of the like kind," or an allowance for the payment of them, while in Reg. v. Ramsgate, 23 Q. B. D. 66, Field, J., expressed a preference for the latter view and defined the word as an allowance of something other than money. This decision was followed in Edwards v. Salmon, 23 Q. B. D. 531.

[f] **"Fees" distinguished.**—A statute increased the fees of certain officers "now allowed by law," fifty per cent. The law then prescribed fees and allowances to which sheriffs were entitled in criminal cases. It was held that the compensation for victualing prisoners in jail in criminal cases fell under the head of allowances, and therefore was not increased. The court said: "Under the head of 'fees and allowances' to sheriffs in criminal cases, many items are specified in the statute which we deem it unnecessary to mention in detail. After enumerating them all with particularity, the Code specifies in what manner they shall be collected and paid; and in providing for their collection and payment, certain of them are specified as fees only, viz: 'the fees which accrue against defaulting persons, witnesses and bail;' 'the fees which accrue on the removal of a convict to the penitentiary;' 'the fees for services rendered in each criminal case,' &c; but the claims of sheriffs for victualing prisoners are not called fees; they are designated as accounts; and a mode is provided for the proof and payment of 'the accounts due to sheriffs which are payable by the State.' Thus we have a fair exposition in the act itself of the legislative intent in the use of the phrase 'fees and allowances,' by which it appears to be reasonably clear and certain that sheriff's accounts for victualing prisoners do not come under the denomination of fees, but fall under the head of allowances." Feagin v. Comptroller, 42 Ala. 516, 520, 521. See also Nease v. Smith, 70 W. Va. 325, 73 SE 910.

[g] **"Salary" distinguished.**—(1) In Brandon v. Askew, 172 Ala. 160, 167, 54 S 605, in construing Const. § 96, providing that "the Legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, fees, commissions or allowances of public officers," and subdivision 24 of section 104 providing that no special, private, or local law shall be passed "creating, increasing or decreasing fees, percentages or allowances of public officers," the court said: "In view of the use of the word 'salary' at other places in the Constitution, its omission from the two sections just quoted is significant. In section 281 the language is as follows: 'The salary, fees or compensation of any officer holding any civil office of profit under this state, or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed.' And in section 167, which provides that there shall be a solicitor for each judicial circuit, the language is that 'he shall receive no other compensation than a salary, to be prescribed by law.' A salary is a fixed compensation 'decreed by authority, and for permanence,' is paid at stated intervals, and depends upon the time, and not the amount of services rendered. Benedict v. U. S., 176 U. S. 357, 20 SCt 458, 44 L. ed. 503; Dane v. Smith, 54 Ala. 47. During the last 50 years at least sheriffs have been compensated for services in criminal cases by 'fees and allowances.' In Dane v. Smith, supra, it was said that an allowance per diem for victualing prisoners in jail could in no sense be called 'compensation established by law, to be paid at stated times.' Solicitors are certainly not compensated by fees, costs, commissions, or percentages. Can their salaries be said to be allowances within the meaning of that term as used in sections 96 and 104? Allowances are of the same nature with fees, costs, commissions, and percentages. They are uncertain and variable in amount. They depend upon the rendition of services which may or may not be required or performed, and sometimes upon the discretion of the court ordering their payment." (2) The constitution prohibits the legislature from passing a private or local bill "creating, increasing or decreasing fees, percentage or allowances of public officers during the term for which said officers are elected or appointed." It was held that this prohibition applied only to those irregular and uncertain modes of compensating public servants indicated by words of like meaning with fees, percentage, etc., and did not include the fixed salaries of officers. Mangam v. Brooklyn, 98 N. Y. 585, 588, 597, 50 AmR. 705. The court in that case said: "To the uses of the words shown by these citations, others of the same character could be made indefinitely, and we have yet to discover any employment of the word 'allowance' by law-makers or others which is the exact equivalent of either of the words 'salary' or 'compensation.' . . . Stipends and salaries are the requital of some supposed service, and are paid yearly or at even portions of a year, and are the subject of contract between the parties. Worcester gives a definition similar to that of Crabbe, but refers to the word 'salary' as one of the synonyms of 'allowance,' distinguishing them, however, by stating that the latter is gratuitous and the former a stated compensation, payable under a contract. . . . Other lexicographers give definitions similar to those of Worcester and Crabbe, and seem to exclude the idea that the terms are analogous, except, perhaps, in a very loose and imperfect sense. It would seem from the foregoing illustrations that the word 'allowance' has a plain, definite and precise meaning attached to it by authors and law-makers, and the duty of the court to enforce it as it reads, is clear and unmistakable. We have no power, and it is not our office to stretch the meaning of words used, for the purpose of covering an object which we have no other means of determining to have been within the contemplation of the authors of the Constitution, than that of the language employed by them. It, therefore, seems to us, not only a reasonable, but a necessary inference from the invariable use by the authors of the Constitution of the words 'salary' and 'compensation' when referring to that kind of payment made to public officers by way of salary, and their deliberate exclusion from the clause in question, that they did not intend to include salaried officers within its meaning." See also Nease v. Smith, 70 W. Va. 325, 73 SE 910.

46. Lander v. U. S., 30 Ct. Cl. 311, 318; Sherburne v. U. S., 16 Ct. Cl. 491, 494, 500. See Army and Navy [3 Cyc 825, 840].

[a] **Forfeiture of the allowances** of a soldier for desertion was held to include bounty, he having been restored to duty and afterward honorably discharged. "Under the term 'allowances,' every thing was embraced which could be recovered from the government by the soldier in consideration of his enlistment and services, except the stipulated monthly compensation designated as pay." U. S. v. Landers, 92 U. S. 77, 80, 23 L. ed. 603.

[b] **"Pay" distinguished.**—"Pay" is a fixed and direct amount given by law to persons in the military service; allowances, or emoluments, are indirect or contingent remuneration; both are compensation for services while in service. The traveling expenses assured to officers and soldiers upon their discharge from service by various acts of congress are not allowances, nor of the nature of wages for service, but are of the nature of indemnity against the contingency of discharge at another place than that of enlistment. Sherburne v. U. S., 16 Ct. Cl. 491, 496.

[c] **What term includes.**—Under the acts of Febr. 14, 1885 (23 U. S. St. at L. 305), and Sept. 30, 1890 (26 U. S. St. at L. 504), a hospital steward after being retired is entitled to "seventy-five per centum of the pay and allowances of the rank upon which he was retired," but the term allowances does not include commutation for fuel and quarters. Lander v. U. S., 30 Ct. Cl. 311, 315. To same effect McKenna v. U. S., 23 Ct. Cl. 308.

47. **Allowance:**
Accounting for, by receiver see Receivers [34 Cyc 461].
Extra see Costs [11 Cyc 134].
Of:
Alimony see Divorce [14 Cyc 759, 769].
Appeal:
Generally see Appeal and Error [2 Cyc 806].
In:
Admiralty see Admiralty §§ 295–324.
Court of justice of the peace see Justices of the Peace [24 Cyc 661].
Mandamus to compel see Appeal and Error [2 Cyc 816]; Mandamus [26 Cyc 216].
Necessity for record to show see Appeal and Error [2 Cyc 1026].
Claim:
Against:
Bankrupt's estate see Bankruptcy [5 Cyc 323].
County see Counties [11 Cyc 585].
Decedent's estate see Executors and Administrators [18 Cyc 405].
Estate assigned for benefit of creditors see Assignments for Benefit of Creditors [4 Cyc 266].
Insolvent's estate see Insolvency [22 Cyc 1319].
Municipal corporation see Municipal Corporations [28 Cyc 1750].

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ALLUDE.[48] To refer to something not directly mentioned; to have reference; to hint at by remote suggestions.[49]

ALLUREMENT. The act of alluring or attracting; that which allures; a temptation; an enticement.[50]

ALLUSIONS.[51] Passing, casual, slight, or incidental references, hints, suggestions, or insinuations.[52]

ALLUVIAL ACCRETIONS. Earthy deposits made to a tract of land situated along a river which become incorporated with the soil of the tract.[53]

ALLUVIAL LAND. Accumulations of sand, earth, and loose stones or gravel brought down by rivers and spread out to any extent.[54]

ALLUVION.[55]

ALLUVIUM. A deposit, usually of mingled sand and mud, resulting from the action of fluviatile currents, and is applied by geologists to the most recent sedimentary deposits, especially such as occur in the valleys of large rivers.[56]

ALMACENAJE. In Spanish law the fee for keeping articles in a depository or warehouse.[57]

ALMANAC.[58]

ALMIRANTAZGO. In Spanish law the chief court or council of the admiralty.[59] The word is also used to designate certain export and import duties formerly levied for the support of the admiralty;[60] also the dignity or office of an admiral, his court, and territorial jurisdiction.[61]

ALMOCATRACIA. In ancient Spanish law a tax or impost on wool manufactured and sold in the kingdom.[62]

ALMOJARIFAZGO. In ancient Spanish law port fees at first collected by the Moors and continued after the christian reconquest.[63]

ALMONEDA.[64] One of the terms in Spanish law for a judicial sale of chattels.[65]

ALMOST.[66] Nearly all; for the most part; mostly.[67] The word implies uncertainty and want of precision.[68]

ALMOTACEN. In Spanish law an official who has charge of the inspection of eatables, including quality, weights, and measures.[69]

Of:—Continued
Claim:—Continued
Against:—Continued
Receiver see Receivers [34 Cyc 340, 345].
School district see Schools and School Districts [35 Cyc 1052].
State see States [36 Cyc 900].
Town see Towns [38 Cyc 658].
United States see United States [39 Cyc 759].
Vessel see Shipping [36 Cyc 132].
In partnership accounting see Partnership [30 Cyc 746].
Of creditor in creditor's suit see Creditors' Suits [12 Cyc 56].
Compensation:
For maintenance of prisoner see Officers [29 Cyc 1428]; Prisons [32 Cyc 355].
Of:
County officer see Counties [11 Cyc 428].
Prosecuting attorney by judge or county board see Prosecuting and District Attorneys [32 Cyc 705, 709, 726].
Sheriff see Sheriffs and Constables [35 Cyc 1579].
State officer see States [36 Cyc 864].
Costs see Costs [11 Cyc 100, 134].
Counsel fees and expenses see Divorce [14 Cyc 761]; Partition [30 Cyc 299].
Damages for frivolous appeal or delay see Costs [11 Cyc 236].
Fees of tax collector see Taxation [37 Cyc 1198].
New trial see New Trial [29 Cyc 1005, 1043].
Patent see Patents [30 Cyc 892].
Pay in army:
For distinguished service see Army and Navy [3 Cyc 841].
Of:
Drafted soldier see Army and Navy [3 Cyc 840].
Officer see Army and Navy [3 Cyc 825].
Request for instructions see Trial [38 Cyc 1703].
Sheriff's fees by court see Sheriffs and Constables [35 Cyc 1603].
Supersedeas or stay:
Generally see Supersedeas [37 Cyc 601].
Pending appeal see Appeal and Error [2 Cyc 891].
Writ see Certiorari [6 Cyc 792]; Habeas Corpus [21 Cyc 314]; Injunctions [22 Cyc 957]; Mandamus [26 Cyc 483]; Prohibition [32 Cyc 628, 630]; Review [34 Cyc 1714].

To:
Father for maintenance of child see Parent and Child [29 Cyc 1617].
To:—Continued
Surviving spouse or child see Executors and Administrators [18 Cyc 373 et seq].

48. See Allusions post.

49. State v. Pearce, 56 Minn. 226, 236, 57 NW 652, 1065 (where it was held that the trial court has no right to allude to the neglect of the accused to testify for himself).

50. Century D.

[a] **Allurement or inducement.**—"It is not easy to give an exhaustive definition within reasonable limits, of exactly what is meant by the words 'allurement, or inducement' that legally operate to constitute an invitation to enter the premises of another, but as we have seen that mere temptation does not form such an inducement, a single illustration of what would form such an inducement will be sufficient for our purpose. Sweeny v. Old Colony, etc., R. Co., 10 Allen (Mass.) 368, 87 AmD 644. . . . In that case a railroad company that had made a private crossing over its track, at grade, in a city, and allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there was danger, was held liable to damages to one, who, using due care, was induced to cross by a signal from the flagman that it was safe, and was injured by a collision which occurred through the flagman's carelessness." Paolino v. McKendall, 24 R. I. 432, 443, 53 A 268, 96 AmSR 736, 60 LRA 133.

51. See also Allude ante.

52. Atchison, etc., R. Co. v. Vanordstrand, 67 Kan. 386, 390, 73 P 113.

53. Welch v. Browning, 115 Iowa 690, 694, 87 NW 430. See Alluvion post.

54. Freeland v. Pennsylvania R. Co., 197 Pa. 529, 539, 47 A 745, 80 AmSR 850, 58 LRA 206. See Alluvion post.

55. **Alluvion:**
Deposited by:
Navigable waters see Navigable Waters [29 Cyc 348].
Unnavigable waters see Waters [40 Cyc 621, 637].
See also Accretion 1 C. J. 730; Avulsion [29 Cyc 349]; Batture [29 Cyc 348]; Reliction [29 Cyc 349].

56. Wilson v. Watson, 144 Ky. 352, 353, 138 SW 283, AnnCas1913A 774.

[a] **In mining law** a word used to designate that superficial deposit on the earth's surface which is movable, as contrasted with the immovable mass that lies below. Stevens v. Williams, 23 F. Cas. No. 13,414.

[b] **"Reliction" distinguished.**—In Wilson v. Watson, 144 Ky. 352, 353, 138 SW 283, AnnCas1913A 774, the court said: "Reliction differs from alluvium in this; that the former term is applied to land made by the withdrawal of the waters by which it is covered. The withdrawal of the waters must be slow, gradual and imperceptible. The same general rules apply to it as to alluvium. Warren v. Chambers, 25 Ark. 120, 91 AmD 538, 4 AmR 23; Murry v. Sermon, 8 N. C. 56; Boorman v. Sunnucks, 42 Wis. 233." See also Alluvion ante.

57. Escriche Diccionario. See Warehousmen [40 Cyc 396].

58. **Almanac:** In evidence see Evidence [16 Cyc 856]. See also Calendar [6 Cyc 264]; Time [38 Cyc 306].

59. It was formally established, or rather recognized by royal decree, in 1814, and consists of two salas or chambers, one administrative and the other judicial. The latter exercises jurisdiction over all "contentious" causes and matters relating to the Spanish naval service. Escriche Diccionario. See generally Admiralty 1 C. J. 1241.

60. Escriche Diccionario.

61. Escriche Diccionario.

62. Escriche Diccionario.

63. Escriche Diccionario.

64. See also Subasta.

65. Escriche Diccionario. See Judicial Sales [24 Cyc 1].

66. See Approximately; Nearly [29 Cyc 376].

67. Century D.

68. Hotchkiss v. Bon Air Coal, etc., Co., 108 Me. 34, 45, 78 A 1108 (where the court said: "The word 'almost' implies uncertainty,—want of precision. One using it within certain limits does not commit himself to exactness or positiveness. But the word 'almost' also implies that the limits are narrow. When those limits are transcended, the expression may, and sometimes must, cease to be regarded as an opinion, and become the representation of a fact. If, for instance, the interferences on the North American and Steger lands amounted, as it is claimed, to one-fifth or more of the entire area, can it be any longer said that the expression 'almost unbroken tract' must necessarily be regarded as an opinion? We think not. Even the qualifying statement that the interferences were not of sufficient importance to interfere with the general operation of the property might not properly be regarded, under all the circumstances, as a mere expression of opinion").

69. Escriche Diccionario. See Inspection [19 Cyc 1084]; Weights and Measures [40 Cyc 879].

ALMS.[70] That which is given to the poor or needy.[71]

ALMSHOUSE.[72] A house appropriated for the poor,[73] a home provided for the reception or relief of poor persons;[74] a house appropriated for the use of the poor, who are supported by the public or by a revenue derived from private endowment;[75] a place where the poor are maintained at the public expense;[76] an institution supported by charity, which makes no charge whatever for the benefits rendered;[77] any institution whose inmates are supported wholly by charity.[78]

ALOJAMIENTO. In Spanish law the right of quartering troops in private houses, and the place where they are quartered.[79]

ALONE. Solely.[80]

ALONG.[81] By;[82] by the side of;[83] by the length of,[84] as distinguished from across;[85] adjacent to;[86]

70. See generally Charities [6 Cyc 895].

71. Century D.

[a] **Parochial alms.**—(1) The word "alms," in a statute disqualifying persons from holding office who have received "parochial relief or other alms," means parochial alms. Reg. v. Lichfield, 2 Q. B. 693, 701, 42 ECL 870, 114 Reprint 271. (2) But under a statute, disqualifying from voting those who have received "parochial relief or other alms which by the law of Parliament now disqualify from voting," it was held that the word "alms" was not confined to parochial alms, but the receipt of any alms will be sufficient. Edwards v. Lloyd, 20 Q. B. D. 302; Harrison v. Carter, 2 C. P. D. 26, 34, 35. Compare Smith v. Hall, 15 C. B. N. S. 485, 109 ECL 485, 143 Reprint 874.

[b] **"Charity" distinguished.**—(1) "In many instances where the words 'alms' and 'charity' are both used, we are to consider it as mere tautology." Bedford's Case, 2 Dougl. El. Cas. 69, 106. (2) But in Taunton's Case, 1 Dougl. El. Cas. 367, 370, the court said: "'Alms' means parochial collection, or parish relief. 'Charity' signifies sums arising from the revenue of certain specific funds which have been established or bequeathed for the purpose of assisting the poor."

72. See generally Paupers [30 Cyc 1075, 1146]. See also Asylums [4 Cyc 362]; Charities [6 Cyc 895]; Hospitals [21 Cyc 1105]; Poorhouse [30 Cyc 1075].

73. Colored Orphans' Ben. Assoc. v. New York City, 104 N. Y. 581, 586, 12 NE 279; Peo. v. Tax, etc., Comrs., 36 Hun (N. Y.) 311, 312 [cit Webster D]; In re Keech, 7 NYS 331, 332; Matter of Curtis, 7 NYS 207, 208, 1 Conn. Surr. 471.

[a] **"Poorhouse" distinguished.**—"In England it seems that the only difference between an almshouse and a poorhouse is that 'almshouses' are generally a number of small dwellings built together, supported by private endowment, for the use of respectable persons reduced to poverty, while poorhouses, or workhouses, are 'buildings for public purposes.'" Halifax v. Sisters of Charity, 40 N. S. 481, 486.

74. Mary Clark Home v. Anderson, [1904] 2 K. B. 645, 651.

75. Halifax v. Sisters of Charity, 40 N. S. 481, 486.

[a] **For example,** a charitable institution depending wholly on voluntary contributions, and performing a work of pure charity in taking care of sick and disabled indigent persons, is an "almshouse" within a statute, exempting devises to the same from the collateral inheritance tax. Matter of Curtis, 7 NYS 207, 208, 1 Conn. Surr. 471.

[b] **The term includes:** (1) Any place, and not merely a county poorhouse or a place specially provided. Matter of McCutcheon, 25 Misc. 650, 652, 56 NYS 370. (2) A hospital for the gratuitous medical and surgical relief of the poor and used as a hospital for indigent sick, and as a dispensary to relieve the poor, for which no charge or return is exacted. Western Dispensary v. New York, 56 N. Y. Super. 361, 364, 4 NYS 547. (3) Buildings owned by the Church Charity Foundation, and used for the care, maintenance, education, and support of aged and indigent persons, and indigent orphans and half-orphan children, and other children left in a destitute and unprotected state or condition. Church Charity Foundation v. Peo., 6 Dem. Surr. (N. Y.) 154, 157. (4) A house devoted to the purpose of affording pecuniary relief to persons of Swiss origin in need of assistance. Peo. v. New York, 36 Hun (N. Y.) 311, 312. (5) An institution incorporated as a colored orphan asylum, for the purpose of maintaining a place of refuge for the colored orphans, where they should be boarded and suitably educated, where it is appropriated wholly for the poor, where they have a place of refuge, and are clothed, boarded, and suitably educated gratuitously; and the fact that it is a private corporation is immaterial. Colored Orphans Ben. Assoc. v. New York, 104 N. Y. 581, 583, 12 NE 279. (6) The Vassar Brothers' Home for Aged Men, incorporated under the general law for charitable purposes, although applicants for admission are required to pay a certain fee and to turn over their property, if they have any, to the home. In re Vassar, 127 N. Y. 1, 27 NE 394 [overr In re Keech, 7 NYS 331]. (7) An association to improve the condition of the poor, which dispenses its benefits without any charge whatever, and keeps a place where money is disbursed to the needy, although it has no house where the poor are lodged. In re Lenox, 9 NYS 895, 896.

76. Peo. v. Lyke, 159 N. Y. 149, 153, 53 NE 802; Matter of McCutcheon, 25 Misc. 650, 652, 56 NYS 370.

77. Matter of Vanderbilt, 10 NYS 239, 2 Conn. Surr. 319 [overr In re Vassar, 127 N. Y. 1, 27 NE 394].

78. Matter of Herr, 10 NYS 680.

[a] **Exemption from taxation.**—What institutions are almshouses within statutes exempting the same from taxation see In re Vassar, 127 N. Y. 1, 12, 27 NE 394 [rev 58 Hun 378, 12 NYS 203, and overr Matter of Keech, 7 NYS 331 [aff 11 NYS 265)]; Colored Orphans Ben. Assoc. v. New York, 104 N. Y. 581, 586, 12 NE 279; Peo. v. New York Tax, etc., Comrs., 36 Hun (N. Y.) 311, 312; New York Infant Asylum v. Westchester County, 31 Hun (N. Y.) 116, 118; Western Dispensary v. N. Y., 56 N. Y. Super. 361, 364, 4 NYS 547; In re Lenox, 9 NYS 895, 896; Matter of Curtis, 7 NYS 207, 1 Conn. Surr. 471; Church Charity Foundation v. Peo., 6 Dem. Surr. (N. Y.) 154, 157; Mary Clark Home v. Anderson, [1904] 2 K. B. 645, 649; Halifax v. Sisters of Charity, 40 N. S. 481, 486.

[b] **Under statutes imposing inheritance taxes** see In re Herr, 55 Hun 167, 7 NYS 852 [aff 10 NYS 680]; Matter of Vanderbilt, 10 NYS 239, 2 Conn. Surr. 319.

79. Escriche Diccionario.

80. Salem Capital Flour Mills Co. v. Stayton Water Ditch, etc., Co., 33 Fed. 146, 13 Sawy. 99, 110.

[a] **A deed conveying an easement of a water right,** after stating the consideration, provided that the grantors did "'release and quitclaim' to the trustees therein named the easement in question, to the use of the woolen company 'alone.'" The court said: "The necessity of using the word 'alone' in this connection is not apparent. But the only effect that can be given to it, with any show of sense or reason, is that the trustees named in the deed took the right and privilege thereby granted, not for themselves, but solely for the use and benefit of the woolen company; and this is no restraint on the disposing power of the latter. And a voluntary sale of the right and privilege by the company, or one made on legal process, to satisfy its debts, would so far be a disposition to the 'alone' or sole use of the company." Salem Capital Flour Mills Co. v. Stayton Water-Ditch, etc., Co., 33 Fed. 146, 154, 13 Sawy. 99.

[b] **Instruction.**—"Counsel for the defendant requested the court to instruct the jury, 'that if they had any reasonable doubt as to whether or not the confession was obtained by threats or promises, they should not convict on such confession.' The court added the word 'alone,' and gave it thus modified. It is insisted this was prejudicial error. We do not think so. The additional word in no way changed the force or meaning of the instruction." Per Wilkin, C. J., in Bartley v. Peo., 156 Ill. 234, 240, 40 NE 831.

81. **Used in statutes** see Statutes [36 Cyc 1124].

[a] **Derivation of word.**—Under the word "along," and as an adverb, in Webster's Dictionary, is the following: "Sax. and-lang or ond-lang; Fr. aulong, le-long. See Long. The Saxons always prefixed and or ond, and the sense seems to be, by the length, or opposite the length, or in the direction of the length." Pratt v. Atlantic, etc., R. Co., 42 Me. 579, 585.

82. Church v. Meeker, 34 Conn. 421, 425.

83. Standard D. [quot Williams v. Routt County, 37 Colo. 55, 60, 84 P 1109]; Coyle v. Chicago, etc., R. Co., 27 Mo. A. 584, 593; O'Donnell v. Preston, 74 App. Div. 86, 87, 77 NYS 305.

[a] **Not necessary meaning.**—It may be construed as being synonymous with "on" or "over." Heath v. Des Moines, etc., R. Co., 61 Iowa 11, 14, 15 NW 573. See infra notes 3–5.

84. Webster D. [quot Scott v. State, 152 Ala. 63, 65, 44 S 544; Pratt v. Atlantic, etc., R. Co., 42 Me. 579, 585]; Cook County v. Great Western R. Co., 119 Ill. 218, 225, 10 NE 564 [cit Webster D]; Zimmerman v. American Tel., etc., Co., 71 S. C. 528, 530, 51 SE 243, 110 AmSR 589; Postal Tel. Cable Co. v. Norfolk, etc., R. Co., 88 Va. 920, 926, 14 SE 803.

85. Webster D. [quot Scott v. State, 152 Ala. 63, 65, 44 S 544]; Pratt v. Atlantic, etc., R. Co., 42 Me. 579, 585]; Cook County v. Great Western R. Co., 119 Ill. 218, 225, 10 NE 564; Zimmerman v. American Tel., etc., Co., 71 S. C. 528, 530, 51 SE 243, 110 AmSR 589; Postal Tel. Cable Co. v. Norfolk, etc., R. Co., 88 Va. 920, 923, 14 SE 803.

[a] **"Across" distinguished.**—A barbed wire fence running diagonally from the corner of a house across the grass, to the corner of the streets, the house being at the corner of two streets at right angles to each other, and the sides of the house parallel to and at a distance from the streets, is not a fence maintained along a highway within the statute. Quigley v. Clough, 173 Mass. 429, 53 NE 884, 73 AmSR 303, 45 LRA 500.

86. Davis v. Port Arthur Channel, etc., Co., 87 Fed. 512, 515, 31 CCA 99; Hart v. Western R. Corp., 13 Metc.

adjoining;[87] beside;[88] close to;[89] in the neighborhood of;[90] in proximity to;[91] in the vicinity of;[92] near to;[93] extending to; reaching to;[94] up to;[95] alongside;[96] extended, drawn out in a line;[97] lengthwise;[98] in a line with;[99] in a line with the length;[1] in the direction of the length;[2] on;[3] upon;[4] over;[5] in connection with.[6] The word has a somewhat elastic meaning, even when employed in its most technical sense;[7] and its meaning must in a great measure be controlled by the subject matter, the context, and the spirit and intent of its use.[8]

Phrases in which the word has been used have received judicial interpretation, such as "across, along, or upon,"[9] "along a bay,"[10] "along and

(Mass.) 99, 104, 46 AmD 719; Crary v. Port Arthur Channel, etc., Co., 92 Tex. 275, 281, 47 SW 967.

[a] **Extended meaning of word.**—In construing an agreement for the sale of the good will of a fishing business, which contained a covenant not to engage in catching fish, etc., "upon, along, or off the Atlantic seaboard;" for the period of twenty years, the court said: "'Upon' and 'along' clearly refer to the waters adjacent to and easily reached from the coast line; 'upon' relating to any given spot or place, and 'along' extending the suggestion from the very northern to the very southernmost point of that coast line." American Fisheries Co. v. Lennen, 118 Fed. 869, 873.

87. Barker v. Southern Pac. R. Co., 9 Cal. A. 457, 460, 99 P 541; Walton v. St. Louis, etc., R. Co., 67 Mo. 56, 58. See also Adjoining [1 Cyc 765].

[a] **Implying contiguity and contact.**—In the Fence Law requiring railroads to maintain fences on the sides of the road where the same passes through, "along," or "adjoining" inclosed or cultivated fields, etc., "both words as used in this section of the statute, imply contiguity, contact." Walton v. St. Louis, etc., R. Co., 67 Mo. 56, 58. To same effect Barbee v. Southern Pac. Co., 9 Cal. A. 457, 99 P 541. But compare Hart v. Western R. Corp., 13 Metc. (Mass.) 99, 104, 46 AmD 719.

88. Stevens v. Erie R. Co., 21 N. J. Eq. 259, 261; O'Donnell v. Preston, 74 App. Div. 86, 87, 77 NYS 305.

89. Blue v. Red Mountain R. Co., 12 B. C. 460, 464.

90. Blue v. Red Mountain R. Co., 12 B. C. 460, 464.

91. See Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 472, 23 L. ed. 356 infra note 17 [a].

92. Stahr v. Carter, 116 Iowa 380, 382, 90 NW 64.

[a] **Reasonable distance.**—In construing a statute authorizing a board of county supervisors to establish a highway along a stream to avoid bridging, the court said: "It should be liberally construed, to carry out its clearly expressed purpose of avoiding expensive bridging; and it is evident that if a highway cannot be established close to the stream, and avoid this difficulty, it may be established within reasonable distance thereof, if in the vicinity of the stream, and still be within the spirit and intent of the statute. Pratt v. Atlantic, etc., R. Co., 42 Me. 579, 585; Dunkirk, etc., R. Co. v. Mead, 90 Pa. 454." Stahr v. Carter, 116 Iowa 380, 382, 90 NW 64.

93. Standard D. [quot Williams v. Routt County, 37 Colo. 55, 60, 84 P 1109]; Pratt v. Atlantic, etc., R. Co., 42 Me. 579, 585; Hart v. Western R. Corp., 13 Metc. (Mass.) 99, 104, 46 AmD 719; Coyle v. Chicago, etc., R. Co., 27 Mo. A. 584, 593; Blue v. Red Mountain R. Co., 12 B. C. 460, 464.

[a] **"A notice posted more than one mile** from the nearest point of the line of the proposed road, is certainly not a compliance with the statutory requirements, that the notices should be posted along the proposed new road. We think the adverb 'along,' as used in this connection, means 'by the side of,' 'near' (Standard Dictionary), rather than 'through' or 'by the length of' as contended by counsel for appellee." Per Maxwell, J., in Williams v. Routt County, 37 Colo. 55, 60, 84 P 1109.

94. Benton v. Horsley, 71 Ga. 619, 626 (where the court said: "'Along' a line does not signify that an object must be on the line, but rather the reverse; along, in this sense, is used as the equivalent of up to, extending to, reaching to, and in this sense it is entirely consistent with the description contained in the deed from Pou to plaintiff and Newton").

95. Benton v. Horsley, 71 Ga. 619, 626; Cornes v. Minot, 42 Barb. (N. Y.) 60, 65.

[a] **Outer surface of wall.**—Where the description in a deed said "along the south side of the brick wall," it was held that the outer surface of the brick wall was intended. Cornes v. Minot, 42 Barb. (N. Y.) 60, 65.

96. Stevens v. Erie R. Co., 21 N. J. Eq. 259, 261. See Alongside post.

[a] **Illustrations.**—(1) An act authorizing a railroad company to construct their road along a river does not authorize them to construct it in or upon the river, but alongside of it. Stevens v. Erie R. Co., 21 N. J. Eq. 259, 261. (2) The phrase "along the waters of any bay" does not necessarily mean over, in, or through the waters, and may well mean along the borders of any bay; in the statutes under consideration it seems to mean that or nothing. Davis v. Port Arthur Channel, etc., Co., 87 Fed. 512, 515, 31 CCA 99. (3) In construing the same statute the court said: "'Along a bay' may mean along the waters of the bay. If such was the meaning of the word, it might have been dropped out of the statute in question without in any manner affecting its sense. But it does not follow that because one word in a statute or other writing may be omitted, without changing the sense, another should be omitted, which is one of its meanings adds nothing to the construction, while in another it enlarges the scope of the language. A statute which authorizes the construction of a railroad along a river means that the road is to be constructed on the land near to and in the general direction of the river. A statute giving a right to construct a channel for navigation along a body of water may mean either that it is to be dug under the water lengthwise of the lake, bay, or stream, as the case may be, or upon the land alongside of it. The meaning must be determined in every case by the context and the general purpose of the enactment. Unless we give the word 'along' the latter construction in the statute in question, we must say that the Legislature has employed a term which is mere sound and signifies nothing." Crary v. Port Arthur Channel, etc., Co., 92 Tex. 275, 281, 47 SW 967.

[b] **"Alongside" distinguished.**—Blue v. Red Mountain R. Co., 12 B. C. 460, 464; Atty.-Gen. v. Pope, Truem. Eq. Cas. (N. B.) 272, 281.

97. Webster D. [quot Pratt v. Atlantic, etc., R. Co., 42 Me. 579, 585].

98. Webster D. [quot Scott v. State, 152 Ala. 63, 65, 44 S 544; Pratt v. Atlantic, etc., R. Co., 42 Me. 579, 585].

99. Coyle v. Chicago, etc., R. Co., 27 Mo. A. 584, 493; O'Donnell v. Preston, 74 App. Div. 86, 87, 77 NYS 305.

1. Webster D. [quot Scott v. State, 152 Ala. 63, 65, 44 S 544; Pratt v. Atlantic, etc., R. Co., 42 Me. 579, 585].

2. Webster D. [quot Pratt v. Atlantic, etc., R. Co., 42 Me. 579, 585].

3. Church v. Meeker, 34 Conn. 421, 425; Nappanee v. Ruckman, 7 Ind. A. 361, 34 NE 609, 610; Heath v. Des Moines, etc., R. Co., 61 Iowa 11, 14, 15 NW 573; Postal Tel. Cable Co. v. Norfolk, etc., R. Co., 88 Va. 920, 924, 14 SE 803.

[a] **For example** (1) where a city ordinance authorized a railroad company to construct a switch "on, over and along" certain alleys, and along the alley in question, it was held that the word "along" was used synonymously with "on" and "over." Heath v. Des Moines, etc., R. Co., 61 Iowa 11, 14, 15 NW 573. (2) In a description in a deed, as, along the shore, "along" means "on" and includes the shore. Church v. Meeker, 34 Conn. 421, 425.

[b] **Along sidewalk.**—An allegation that a person was walking along the sidewalk has been held equivalent to a statement that he was on the sidewalk when he was injured. Nappanee v. Ruckman, 7 Ind. A. 361, 34 NE 609, 610.

Distinguished from "on" or "upon" see On [29 Cyc 1484].

4. Davis v. Port Arthur Channel, etc., Co., 87 Fed. 512, 515, 31 CCA 99; Ryan v. Preston, 32 Misc. 92, 93, 66 NYS 162 [aff 59 App. Div. 97, 69 NYS 100]; Crary v. Port Arthur Channel, etc., Co., 92 Tex. 275, 282, 47 SW 967; Postal Tel. Cable Co. v. Norfolk, etc., R. Co., 88 Va. 920, 927, 14 SE 803.

[a] **"Along" does not mean "upon"** unless the context shows that it is used in the sense of "upon and along." Stevens v. Paterson, etc., R. Co., 34 N. J. L. 532, 537, 3 AmR 269; Stevens v. Erie R. Co., 21 N. J. Eq. 259, 261.

5. Church v. Meeker, 34 Conn. 421, 425; Heath v. Des Moines, etc., R. Co., 61 Iowa 11, 14, 15 NW 573.

"It was urged by the Attorney-General that the words 'the railway shall not be carried along an existing highway,' used in this section, meant and were intended to mean alongside of the highway. I cannot think that such is the meaning of the word 'along.' I think that word, as used in the section, means over and along the surface of the highway, and not alongside of it." Per Fraser, J., in Atty.-Gen. v. Pope, Truem. Eq. Cas. (N. B.) 272, 281.

6. O'Donnell v. Preston, 74 App. Div. 86, 87, 77 NYS 305.

7. Stahr v. Carter, 116 Iowa 380, 382, 90 NW 64. See also American Fisheries Co. v. Lennen, 118 Fed. 869; Pratt v. Atlantic, etc., R. Co., 42 Me. 579.

8. Davis v. Port Arthur Channel, etc., Co., 87 Fed. 512, 31 CCA 99; Williams v. Routt County, 37 Colo. 55, 84 P 1109; Church v. Meeker, 34 Conn. 421, 425; Stahr v. Carter, 116 Iowa 380, 90 NW 64; Stevens v. Paterson, etc., R. Co., 34 N. J. L. 532, 537, 3 AmR 269; Stevens v. Erie R. Co., 21 N. J. Eq. 259, 261; Crary v. Port Arthur Channel, etc., Co., 92 Tex. 275, 47 SW 967; Arbenz v. Wheeling, etc., R. Co., 33 W. Va. 1, 10 SE 14, 5 LRA 371.

"Such occupation and use of the highways as was contemplated by this statute is only a casual or incidental matter, and does not, I think, authorize a railroad company so organized to project and build its entire railway along the lines of the highways of this state." Burt v. Lima, etc., R. Co., 21 NYS 482, 484. To same effect Rex v. Morris, 1 B. & Ad. 441, 20 ECL 551, 109 Reprint 851.

9. Cook County v. Great Western R. Co., 119 Ill. 218, 224, 10 NE 564 (street or highway); Burt v. Lima, etc., R. Co., 21 NYS 482, 483 (any highway).

10. See supra note 96 [a].

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across,"[11] "along . . . at the edge thereof,"[12] "along and parallel to,"[13] "along and upon,"[14] "along or upon,"[15] "along the line of,"[16] "along the route of,"[17] "along with,"[18] "in or

11. Davis v. Port Arthur Channel, etc., Co., 87 Fed. 512, 515, 31 CCA 99 ("along and across" any of the bays on the coast to the mainland, etc.); Crary v. Port Arthur Channel, etc., Co., 92 Tex. 275, 281, 47 SW 967.

[a] **Shooting "along and across" road.**—In construing a statute providing that "any person, who discharges a gun, or any other kind of firearms, along or across any public road, must, on conviction be fined," the court said: "The words 'along and across' must have been used in the statute in their ordinary sense. Webster's definition of the word 'along' is: 'By the length; in a line with the length; lengthwise . . . by the length of, as distinguished from across.' And of the word 'across': 'From side to side, or in a direction opposed to the length.' . . . It must follow that the words 'along and across' relate to the direction in which the gun is fired, and not to the position of the person firing it. The discharge of a gun by a person standing five feet from the margin of a public highway, in a line directly away from the highway, obviously does not fall within the mischief sought to be guarded against." Scott v. State, 152 Ala. 63, 65, 44 S 544.

12. Vincennes v. Spees, 35 Ind. A. 389, 74 NE 277, 280 (holding that a complaint alleging that an obstruction was along and on the "edge" of a sidewalk cannot be construed to mean that such obstruction was "in" or "upon" such sidewalk).

13. Southwestern Tel. Co. v. Kansas City, etc., R. Co., 109 La. 892, 893, 33 S 910 (holding that "along and parallel to any railroads in the state," as used in a statute, does not confer upon the telephone companies the right to construct their lines upon the railroads, but it does authorize them to construct such lines upon the right of way of the railroads in the state).

[a] **In Virginia** by Code § 1287 (1) telegraph companies are permitted to construct their lines along and parallel to any of the railroads of the state. It was held that this did not authorize the condemnation of the right of way of a railroad company by a telegraph company. The court drew a distinction between the terms "along" and "along and parallel," the former term having been used as to county roads. The court said: "The lexicographers' definition of 'along' is 'by the length of,' as distinguished from 'across;' it is not ambiguous. 'The kine . . . went along the highway.' I Sam. vi. 12. 'And parallel to,' alone, without the word 'alone,' would bear a signification dependent on the context or subject-matter,—(1) 'extended in the same direction, and in all parts equidistant;' (2) 'having the same direction or tendency;' or (3) 'like,' 'similar.' But here the words are used with 'along,' which plainly means 'by the length of,' not 'across.' And it is said of two lines, one line (the telegraph line) is to be run 'along and parallel to' another line (the railroad line.) 'By the length of the railroad line,' and 'parallel to' it. Does this mean in or upon the railroad line? Or is it intended to give the right to run the line lengthwise alongside, and not contiguous, but equidistant throughout? . . . If the first, the language as to the county roads would seem to have been quite sufficient, 'along the railroad,' and the words 'and parallel to' were unnecessary, and without significance, however they are employed, and must have their sense and signification accorded to them. They are not used at random, but appear to make a distinction of some sort. What is it? Where is this line to run, as to the already-ascertained line of the railroad strip of land? We think it is to run in the direction lengthwise of the first line, alongside of and equidistant, from it throughout all its parts, so that neither shall meet or touch; not in nor upon the railroad strip." Postal Tel. Cable Co. v. Norfolk, etc., R. Co., 88 Va. 920, 926, 14 SE 803. (2) In a later case in the same jurisdiction the court said: "It will be observed that a telegraph company is authorized by the first section quoted to construct its line along any of the State or county roads, and the case just cited concedes that 'along,' in that connection, is equivalent to 'along and upon' or 'on it.' In the last clause of this section they are given the right to go along or over streets of any city or town, with the consent of the council thereof. Here, too, 'along' has the signification just given it of 'along and upon.' Of this, there can be no doubt. Here, then, we have in this section the word 'along' appearing three times; and the sense in which it is used in the first and third instance is clear and unquestioned. The same meaning, therefore, will be attributed to it elsewhere unless there be something in the context which clearly indicates that the Legislature intended some other and different meaning to attach to it. It is claimed that this intention is to be found in the phrase 'along and parallel to,' and that by the use of the words 'parallel to,' the Legislature intended to restrict the meaning theretofore and thereafter given to the word 'along,' and to confine the telegraph company to a line following the length of the railway's right of way, but never encroaching upon it. Or, in the language of the court in Postal Tel. Cable Co. v. Norfolk, etc., R. Co., 88 Va. 920, 927, 14 SE 803, it is to run in the direction of the railroad line, 'alongside of and equidistant from it throughout all its parts, so that neither shall meet or touch; not in nor upon the railroad strip.' . . . The Legislature merely intended to say that the telegraph line should be 'along and parallel to,' in the sense of 'conforming to,' 'having the same direction of, tendency with' the railroad, in order to guard against any undue interference with or hinderance of the railroad company in the enjoyment of its property." Postal Tel. Cable Co. v. Farmville, etc., R. Co., 96 Va. 661, 664, 32 SE 468 [disappr Postal Tel. Cable Co. v. Norfolk, etc., R. Co., 88 Va. 929, 14 SE 691].

14. Osborne v. Jersey City, etc., R. Co., 27 Hun (N. Y.) 589, 590 (where the court said: "We think that wherever the railroad is constructed upon the surface of the highway, it is 'along and upon' so much of the highway as is occupied by it"). To same effect New York, etc., R. Co. v. Roll, 32 Misc. 321, 66 NYS 748.

15. Arbenz v. Wheeling, etc., R. Co., 33 W. Va. 1, 9, 10 SE 14, 5 LRA 871 (where Snyder, P., said: "I am of opinion that the words 'along or upon' employed in the statute must be construed with reference to the context and the subject in controversy, and when so fairly construed in respect to a case such as the one now under consideration, they mean along in the street, at, above, or below the common level of the existing or changed surface of the street, as the particular facts and circumstances may require").

[a] **"Upon or along."**—(1) "The use of the word 'along' in the phrase 'upon or along' is to complete the idea of superimposition. For 'upon' means 'on,' and a sidewalk presents the feature of length or extension, and I think that 'along' is used in complement to that idea, as it means literally 'in line with, in connection with.' . . . To give 'along' as used in this statute the full force of 'alongside of' is not to make it a synonym of another word, but is to disregard the force of a compound with the very same word, although such compound itself expresses the idea of locality, namely, beside, by the side of." O'Donnell v. Preston, 74 App. Div. 86, 87, 77 NYS 305. (2) In Ryan v. Preston, 32 Misc. 92, 93, 66 NYS 162 [aff 59 App. Div. 97, 69 NYS 100] in construing the same statute the court said: "Taking the whole section together it is clear that the words 'upon' or 'along' are synonymous, and that the provision was intended to prevent the appropriation of any portion of a regularly constructed sidewalk for a bicycle path, and was not intended to forbid the construction of a bicycle path beside of or adjoining any such side wall."

16. Com. v. Franklin, 133 Mass. 569, 570 (construction of sidewalks along the line of adjoining lands); Coyle v. Chicago, etc., R. Co., 27 Mo. A. 584, 589 (communicating disease to "animal or cattle, in the neighborhood, or along the line of such transportation or removal"); Dunkirk, etc., R. Co. v. Mead, 90 Pa. 454, 458 (liability for killing cattle along the line of a railroad).

[a] **Fronting distinguished.**—The words, in a notice to property owners, "'property owners along the line of said street' . . . are not the equivalents of the words 'owners of property fronting on said street.' . . . For one purpose, no doubt, the notice was effective only as to owners of frontage; that is, to set the time running in which the owners of frontage might have stopped the proceedings; for it seems that only such persons could act in the matter. But it was also a notice to all persons interested that the proceedings were then pending, and that the board, unless proceedings were arrested by the veto of the owners of frontage, would proceed with their labors." Lent v. Tillson, 72 Cal. 404, 417, 14 P 71.

17. Blue v. Red Mountain R. Co., 12 B. C. 460, 464.

[a] **Route of railroad.**—(1) "It is obvious to us that the phrase 'along its route' means in proximity to the rails upon which the locomotive-engines run." Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 472, 23 L. ed. 356. To same effect Martin v. Grand Trunk R. Co., 87 Me. 411, 32 A 976; Pratt v. Atlantic, etc., R. Co., 42 Me. 579; Ingersoll v. Stockbridge, etc., R. Co., 8 Allen (Mass.) 438; Hart v. Western R. Corp., 13 Metc. (Mass.) 99, 46 AmD 719; Blue v. Red Mountain R. Co., 12 B. C. 460. (2) "The Court will take judicial notice of the geographical fact, that it is impossible to proceed from the county of Orleans, through the county of Niagara, to the village of Lewiston, without passing through the town of Lewiston. The town of Lewiston was, therefore, necessarily, a town 'along the route' of the railroad." Phelps v. Lewiston, 19 F. Cas. No. 11,076, 15 Blatchf. 131, 157.

18. Pilkington v. Myers, 8 L. T. Rep. N. S. 720, 721 (holding that "in addition to," not as "including," is the meaning of the phrase "along with the other sums").

[a] **Together with.**—A rule of court providing that no dilatory plea shall be received unless the party offering it shall file, along with the plea, an affidavit proving the truth thereof, means that the affidavit shall be filed at the time the plea is filed, and the filing of an affidavit after demurrer, and not until the time of argument, is insufficient, since the plea and the evidence to support it must be put in together. Trenton Bank v. Wallace, 9 N. J. L. 83, 84.

upon,"[19] "in, upon or along,"[20] "on, over and along."[21]

ALONGSIDE. Along;[22] at or to the side of anything, as a ship.[23]

ALOOF. Standing off, at a distance.[24]

ALPHABETICAL. In the order of the alphabet.[25]

ALQUILER. In Spanish law the act of leasing personal property (muebles) in contradistinction to arrendamiento which relates to real property (inmuebles).[26]

ALREADY. At this time or now;[27] before a certain time;[28] previously to some specified time; beforehand;[29] prior to some specified time, either past, present or future.[30] The word usually has reference to past time,[31] or to existing conditions,[32] but may be used for a future past.[33] As used in statutes, it refers to the time the act took effect rather than the date of its passage.[34]

Phrases in which the word has been used have received judicial interpretation, such as "already accrued,"[35] "already authorized,"[36] "already" commenced,[37] "already constructed,"[38] "already done,"[39]

Used in will see Wills [40 Cyc 1405].

19. See Vincennes v. Spees, 35 Ind. A. 389, 74 NE 277, 280 supra note 12.

20. People's Rapid Transit Co. v. Dash, 125 N. Y. 93, 96, 97, 26 NE 25, 10 LRA 728 (where the court said: "If the road were built through the length of the street, its location might be fairly described by the use of either one of the three words contained in the statute, 'in, upon or along' such street. But to describe a road which simply crossed a street would be using language neither appropriate nor exact").

21. Heath v. Des Moines, etc., R. Co., 61 Iowa 11, 14, 15 NW 573 supra note 83 [a].

22. Stevens v. Erie R. Co., 21 N. J. Eq. 259, 261.

[a] **"Along" distinguished.**—Blue v. Red Mountain R. Co., 12 B. C. 460, 464; Atty.-Gen. v. Pope, Truem. Eq. Cas. (N. B.) 272, 281.

23. Century D. See Shipping [36 Cyc 61].

[a] **In charter parties and contracts of affreightment.**—(1) "The contract in this case was that the consignees should take the iron 'from along-side.' That undoubtedly and plainly means that they were to take it from where the ordinary appliances of the ship would leave it in discharging,—'at the end of the ship's tackle,' on the wharf, if the ship was discharging at a wharf; on a lighter, if the ship could not reach a wharf and was discharging in the stream." Turnbull v. Citizens' Bank, 16 Fed. 145, 147, 4 Woods 193. (2) Meaning of the word in charter parties, etc. see Kilroy v. Delaware, etc., Canal Co., 121 N. Y. 22, 27, 24 NE 192; McCandlish v. Newman, 22 Pa. 460, 466; Brenda Steamship Co. v. Green, [1900] 1 Q. B. 518; Northmoor Steamship Co. v. Harland, [1903] 2 Ir. 657; Fletcher v. Gillespie, 3 Bing. 635, 11 E. C. L. 310, 130 Reprint 659; Stephens v. Wintringham, 3 Com. Cas. 169; Trindade v. Levy, 2 F. & F. 441; Holman v. Dasnieres, 2 T. L. R. 607.

[b] **The custom of the port** should be considered in each instance, in construing the meaning of the term. Brenda Steamship Co. v. Green, [1900] 1 Q. B. 518; Stephens v. Wintringham, 3 Com. Cas. 169. To same effect Kilroy v. Delaware, etc., Canal Co., 121 N. Y. 22, 24 NE 192.

24. Downey v. State, 115 Ala. 108, 110, 112, 22 S 479 (where in passing on the refusal of the trial court to give the following requested charge, "A house to be an outhouse within the statute is a house standing aloof from other houses unoccupied," the supreme court said: "The word 'aloof' used in the charges requested by the defendant, were [was] calculated to mislead the jury. . . . Although 'aloof' may mean 'separate' or 'apart' from other houses, it also carries with it the meaning of 'standing off,' 'at a distance,' which is not necessary to constitute an outhouse where people resort").

25. Century D.

[a] **Alphabetical voting.**—In Scholl v. Bell, 125 Ky. 750, 794, 102 SW 248, the court said: "In order to fully understand what is meant by 'alphabetical voting,' it must be recalled that the registration of the voters is kept in alphabetical order; that is, all the voters whose names commence with A are on the first page; all those commencing with B are on the second page, and so on down the alphabet. When the fraudulent elections were held, those in charge of them commenced at A, and voted the names in the order in which they were registered; overlooking the fact that the voters would not come to the polls in the order in which their names were registered, and that a man whose name commenced with Z would just as likely apply for the first ballot on the morning of the election as a man whose name commenced with A. They seemed to be oblivious of the fact that, on the doctrine of chance, the voters would be no more likely to come to the polls in the order of registration than (as was aptly said in argument at bar) if one should throw the Greek letters into the air they would by chance fall so as to spell out the Iliad."

26. Escriche Diccionario. See Ballments [5 Cyc 157].

27. Godden v. Hythe Burial Bd., [1906] 2 Ch. 270, 274.

28. Apothecaries' Co. v. Roby, 5 B. & Ald. 949, 953, 7 ECL 516, 106 Reprint 1439 ("already" in practice of a profession).

29. Standard D. [quot Harrison v. Masonic Mut. Ben. Soc., 61 Kan. 134, 138, 59 P 266].

30. Webster D. [quot Evenson v. Demann, 109 Minn. 328, 330, 123 NW 930].

31. Webster D. [quot Evenson v. Demann, 109 Minn. 328, 330, 123 NW 930]; Manufacturers' Natural Gas Co. v. Douglass, 130 Pa. 283, 294, 18 A 630 (suits already commenced).

32. In re Burmeister, 6 NYWkly Dig 197.

33. Webster D. [quot Evenson v. Demann, 109 Minn. 328, 330, 123 NW 930].

[a] **For example** in Evenson v. Demann, 109 Minn. 328, 331, 123 NW 930, in construing a statute authorizing the board of county commissioners of any county which does not already have a courthouse to issue bonds, etc., it was held that the word "already" does not limit the operation of the act to counties that had no courthouse at the time of its passage, but refers also to any future time, and that when at any time a courthouse is destroyed by fire, or other cause, the county commissioners may issue the bonds of such county in an amount not in excess of one per cent of the assessed valuation of its real and personal property for the purpose of building a new courthouse.

34. Jackman v. Garland, 64 Me. 133, 135; Com. v. Bennett, 108 Mass. 30, 32, 11 AmR 304; Apothecaries' Co. v. Roby, 5 B. & Ald. 949, 951, 7 ECL 516, 106 Reprint 1439. See also Evenson v. Demann, 109 Minn. 328, 123 NW 930. But see Godden v. Hythe Burial Bd., [1906] 2 Ch. 270, 278 [aff 70 J. P. 285] (holding that the words of the Burial Act [1855] § 9, "no ground not already used as or appropriated for a cemetery," mean "used as or appropriated" at the date of the passing of the act).

[a] **Construction upholding statute.**—"Already," as used in a statute providing that any mutual insurance companies already chartered by the legislature, or already organized under the general laws of the state, may, after giving ninety days' notice in three of the public papers in the state, change to joint stock companies by proceeding in accordance with the provisions of the act, is fairly susceptible of two interpretations—one as applying to the date of the passage of the act, and the other to the date of the application for change; and, inasmuch as the first construction would make the act unconstitutional, it must be construed as referring to the time when the change was desired to be made. Schwarzwalder v. Tegen, 58 N. J. Eq. 319, 323, 43 A 587 [quot Evenson v. Demann, 109 Minn. 328, 331, 123 NW 930].

[b] **As used in a constitutional provision** it has reference to the time at which the constitution acquired life and force by its adoption. List v. Wheeling, 7 W. Va. 501, 522.

35. Goillotel v. New York, 87 N. Y. 441, 445 (holding that the phrase "already accrued," in a statute changing the operation of the statute of limitations, but relieving from the effect of such changes causes of action "already accrued," and providing that the statutes "now in force" should be applicable to them, should be construed as applying not merely at the date of the original enactment, but to any subsequent amendment as of the date of such amendment. Causes of action "already accrued" are intended and saved as well as the date of the change affected by the amendment as at the date of the change accomplished by the original law).

36. List v. Wheeling, 7 W. Va. 501, 509, 522 (where, in construing the constitution providing that "no county, city, school district or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted," etc., the court said: "So much of the eighth section of said tenth article of the Constitution, as is drawn in question here, speaks from, and including, the 22d of August, 1872, the day of its adoption by the qualified voters of the state. The words 'already' and 'hereafter,' as used in the section, plainly have reference to that time").

37. Manufacturers' Natural Gas Co. v. Douglass, 130 Pa. 283, 295, 18 A 630 (suits "already" commenced).

38. Macon, etc., R. Co. v. Macon, etc., R. Co., 86 Ga. 83, 84, 13 SE 157 (holding the words "already constructed" and "now constructed" to be synonymous as used in a statute providing that "where a railroad or branch railroad is intended to be built under this section, between two points where a railroad is now constructed, the general direction and location of such new railroad shall be at least ten miles from the railroad already constructed").

39. In re Burmeister, 6 NYWkly Dig 197 (where it was held that "already done," in an ordinance providing for the setting of curb and gutter stones, and for the flagging of the sidewalks, "where not already done," has no other signification "than to exclude its application to

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"already enumerated,"[40] "already incurred,"[41] "already prescribed,"[42] "already sustained,"[43] and "already under lease."[44]

ALSO. As well;[45] besides;[46] in addition;[47] some other thing;[48] including;[49] further;[50] furthermore;[51] likewise;[52] in like manner;[53] in the same manner;[54] moreover;[55] too.[56]

As a copulative conjunction "also" is used as denoting nearly the same as the word "and" or "likewise."[57] The words "also," or "and also,"

parts of the line where the work contemplated had been done, and continued to be in such state that further attention was unnecessary. It applied to the existing and not to the prior condition of the subject-matter").

40. Cutting v. Cutting, 86 N. Y. 522, 532, 533 (holding that the phrase, in a statute which provides "that no beneficial power . . . thereafter to be created, other than such as are already enumerated," etc., shall be valid means "already counted off").

41. Com. v. Bennett, 108 Mass. 30, 32, 11 AmR 304 (holding that a clause that nothing contained in the statute shall affect any penalty, etc., "already incurred" saves from the operation of the statute any penalty incurred before it took effect, although after it was approved by the governor).

42. Harrison v. Masonic Mut. Ben. Soc., 61 Kan. 134, 138, 59 P 266 (holding that "already" as used in a statute providing that the clerk of the supreme court shall have, in addition to the fees "already prescribed," such per diem, etc., has the effect of continuing the right to charge the fees which had theretofore been prescribed by statute, although the statutes which have prescribed them have been repealed).

43. Jackman v. Garland, 64 Me. 133, 136 (holding that the words in a statute providing for notice of injuries caused by defective highways excepting in the cases of injuries "already sustained" must be referred to the time when the act took effect and not to its date).

44. Biddeford v. Yates, 104 Me. 506, 510, 72 A 335, 15 AnnCas 1091 (holding that a second lease of property given to take effect after the expiration of the first lease cannot be construed to cover property "already under lease" within the prohibition of an ordinance regulating the renting of municipal property under municipal authority).

45. Hill v. Terrell, 123 Ga. 49, 61, 51 SE 81; Reynolds v. Washington Real Est. Co., 23 R. I. 197, 203, 49 A 707.

46. Webster D. [quot Platt v. Brannan, 34 Colo. 125, 133, 81 P 755, 114 AmSR 147]; Hill v. Terrell, 123 Ga. 49, 61, 51 SE 81; Loring v. Hayes, 86 Me. 351, 356, 29 A 1093; Rawlings v. Hunt, 90 N. C. 270, 273; Williamson v. Williamson, 57 N. C. 281, 286; Reynolds v. Washington Real Est. Co., 23 R. I. 197, 203, 49 A 707; Doe v. Snelling, 5 East 87, 102 Reprint 1002; Fenny v. Ewestace, 4 M. & S. 58, 105 Reprint 756; Hopewell v. Ackland, 1 Salk. 239, 91 Reprint 212.

[a] **"Besides" distinguished.**—Philadelphia, etc., R. Co. v. Philadelphia, etc., R. Co., 6 Pa. Dist. 269, 281.

47. Webster D. [quot Platt v. Brannan, 34 Colo. 125, 133, 81 P 766, 114 AmSR 147; Du Pont v. Du Bos, 52 S. C. 244, 260, 29 SE 665]; Overland Mach. Co. v. Alpenfels, 30 Colo. 163, 174, 69 P 574; Van Dusen v. Fridley, 6 Dak. 322, 43 NW 703 [cit Webster D.]; Hill v. Terrell, 123 Ga. 49, 61, 51 SE 81; Morrison v. Schoor, 197 Ill. 554, 565, 64 NE 545; Panton v. Tefft, 22 Ill. 367, 376; Mace v. Mace, 95 Me. 283, 286, 49 A 1038; Loring v. Hayes, 86 Me. 351, 356, 29 A 1093; Cantwell v. Crawley, 188 Mo. 44, 55, 86 SW 251; State v. Camp Sing, 18 Mont. 123, 141, 44 P 516, 56 AmSR 551, 32 LRA 635; Dalton v. Bowker, 8 Nev. 190, 201; McCurdy v. Alpha Gold, etc., Min. Co., 3 Nev. 27, 37; Kinkele v. Wilson, 9 Misc. 139, 141, 29 NYS 27; Wall v. Wall, 126 N. C. 405, 407, 35 SE 811; Rawlings v. Hunt, 90 N. C. 270, 273; Howell v. Com., 97 Pa. 332, 335 [cit Worcester D.]; German Newspaper Advertisements, 28 Pa. Co. 142, 143; Reynolds v. Washington Real Est. Co., 23 R. I. 197, 203, 49 A 707; Doe v. Snelling, 5 East 87, 94, 102 Reprint 1002; Fenny v. Ewestace, 4 M. & S. 58, 105 Reprint 756; Hopewell v. Ackland, 1 Salk. 239, 91 Reprint 212.

[a] **In construing a patent specification** for a water-closet, reading: "I also provide means for getting one or more small streams into the space near the center of the bowl, for the purpose of more rapidly wetting down the paper or other material there," the court said: "I think there is much force in the word 'also,' above quoted, as indicating that the inventor had on his mind, not only the combination of the first claim, which in itself produced the more perfect wash, but also an additional contrivance that could be embodied in a second claim as auxiliary and helpful, although not necessary, to the efficiency of the first." Stockton v. Maddock, 10 Fed. 132, 134.

48. Panton v. Tefft, 22 Ill. 367, 376.

49. State v. Montello Salt Co., 34 Utah 458, 464, 98 P 549.

50. Webster D. [quot Van Dusen v. Fridley, 6 Dak. 322, 328, 43 NW 703; Du Pont v. Du Bos, 52 S. C. 244, 260, 29 SE 665]; Hill v. Terrell, 123 Ga. 49, 61, 51 SE 81; Kinkele v. Wilson, 9 Misc. 139, 141, 29 NYS 27; Reynolds v. Washington Real Est. Co., 23 R. I. 197, 203, 49 A. 707; Anderson v. O'Donnell, 29 S. C. 355, 365, 7 SE 523, 13 AmSR 728, 1 LRA 632.

51. State v. Camp Sing, 18 Mont. 128, 141, 44 P 516, 56 AmSR 551, 32 LRA 635. See also Henne v. Summers, 16 Cal. A. 67, 71, 116 P 86.

52. Hill v. Terrell, 123 Ga. 49, 61, 51 SE 81; Panton v. Tefft, 22 Ill. 367; Allison v. Bates, 6 B. Mon. (Ky.) 78, 80; State v. Camp Sing, 18 Mont. 128, 141, 44 P 516, 56 AmSR 551, 32 LRA 635; Rawlings v. Hunt, 90 N. C. 270, 273; Howell v. Com., 97 Pa. 332, 335; Webster D. [quot Com. v. Keenan, 67 Pa. 203, 210; Du Pont v. Du Bos, 52 S. C. 244, 260, 29 SE 665]; Doe v. Snelling, 5 East 87, 102 Reprint 1002; Fenny v. Ewestace, 4 M. & S. 58, 105 Reprint 756; Hopewell v. Ackland, 1 Salk. 239, 91 Reprint 212.

53. Webster D.; Platt v. Brannan, 34 Colo. 125, 130, 81 P 755, 114 AmSR 147; Van Dusen v. Fridley, 6 Dak. 322, 328, 43 NW 703; Hill v. Terrell, 123 Ga. 49, 61, 51 SE 81; Morrison v. Schorr, 197 Ill. 554, 565, 64 NE 545; Kratz v. Kratz, 189 Ill. 276, 280, 59 NE 519; Panton v. Tefft, 22 Ill. 367, 375; State v. Camp Sing, 18 Mont. 128, 141, 44 P 516, 56 AmSR 551, 32 LRA 635; Dalton v. Bowker, 8 Nev. 190, 201; Morgan v. Morgan, 41 N. J. Eq. 235, 237, 3 A 63; Kinkele v. Wilson, 9 Misc. 139, 141, 29 NYS 27; Rawlings v. Hunt, 90 N. C. 270, 273; Hyman v. Williams, 34 N. C. 92, 94; Sherrill v. Echard, 29 N. C. 161, 164; Noble v. Ayers, 61 Oh. St. 491, 493, 56 NE 199; Com. v. Keenan, 67 Pa. 203, 210; Du Pont v. Du Bos, 52 S. C. 244, 260, 29 SE 665; State v. Parler, 52 S. C. 207, 215, 29 SE 651; Doe v. Snelling, 5 East 87, 102 Reprint 1002; Fenny v. Ewestace, 4 M. & S. 58, 105 Reprint 756; Hopewell v. Ackland, 1 Salk. 239, 91 Reprint 212.

54. Platt v. Brannan, 34 Colo. 125, 130, 81 P 755, 114 AmSR 147; Allison v. Bates, 6 B. Mon. (Ky.) 78, 80; Howell v. Com., 97 Pa. 332, 335.

55. Evans v. Knorr, 4 Rawle (Pa.) 66, 68 (prefixed to a clause or sentence in a will).

56. Webster D. [quot Platt v. Brannan, 34 Colo. 125, 130, 81 P 755, 114 AmSR 147; Du Pont v. Du Bos, 52 S. C. 244, 260, 29 SE 665]; Hill v. Terrell, 123 Ga. 49, 61, 51 SE 81; Kinkele v. Wilson, 9 Misc. 139, 141, 29 NYS 27; Howell v. Com., 97 Pa. 332, 335 [cit Worcester D.]; Reynolds v. Washington Real Est. Co., 23 R. I. 197, 203, 49 A 707.

57. Farrish v. Cook, 6 Mo. A. 328, 332; Evans v. Knorr, 4 Rawle (Pa.) 66, 69; Garland v. Harrison, 8 Leigh (35 Va.) 368, 384.

[a] **Illustrations.**—(1) The constitution provides that "the legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state." In construing the provision the court said: "He [defendant] contends that the word carries over into the sentence where it occurs the idea expressed in the sentence which precedes it. That is to say, that when the section says that the legislative assembly may also impose a license tax, etc., it means that it may also impose such license tax for the support and maintenance of the state; and therefore that it cannot be imposed by the legislature partly for the support and maintenance of a county. But we do not think that the word 'also' necessarily or reasonably has such meaning. It appears to us to be nothing more than a conjunctive, perhaps connecting the two sentences. It has about the same significance as 'furthermore.' . . . The use of the word 'also' is to simply connect the ideas of the two systems of revenue mentioned in the section." State v. Camp Sing, 18 Mont. 128, 140, 147, 44 P 516, 56 AmSR 551, 32 LRA 635. (2) In construing a deed conveying "one bay horse; to have and to hold to the use of the party of the second part, his heirs and assigns forever; also, a lien upon each and every of said crops to be cultivated and made during the said year," the court said: "At the end of the word 'forever' is a semicolon, denoting a succeeding clause upon the same subject, then comes the word 'also.' This latter word, as here employed, is a copulative conjunction connecting the two clauses, and it implies likewise, in like manner, in addition to, besides—noting addition or conjunction. See Burrill L. D.; Webster D.; Worcester D.; Doe v. Snelling, 5 East 87, 102 Reprint 1002; Fenny v. Ewestace, 4 M. & S. 58, 105 Reprint 756; Hopewell v. Ackland, 1 Salk. 239, 91 Reprint 212. The word is significant and important; it cannot be treated as meaningless or mere surplusage; it must be treated as doing its complete office in connecting two important clauses of the instrument, and having effect in that way." Rawlings v. Hunt, 90 N. C. 270, 272, 273. (3) In construing a statute declaring the actions in which "the separate property of the wife shall be also liable to be taken for any judgment rendered therein," the court said: "By the word 'also,' in the phrase 'also liable,' in the third section of the act, we do not understand that any liability of the husband, or of his property, is implied. No such liability had been declared in the preceding part of the statute. But we understand this word 'also,' in the third section, as referring to the ownership of the wife, declared in the preceding sections. The legislature intended to say, not that the husband should be liable, and the property of the wife should be 'also liable,' but that the property of the wife should be separately owned by her, and should be 'also liable' for the judgments recovered in the three cases named." Westerman v. Westerman, 25 Oh. St. 500, 508, 509. (4) In construing a statute declaring

are usually read in wills as copulative, carrying on the sense of the preceding words, and are equivalent to "in like manner" or "in the same manner," and in this sense the conditions attaching to the preceding disposition of property attach also to the succeeding, or vice versa;[58] but "also" may be the beginning of a new sentence; in such case, no such construction would obtain.[59]

Context. The sense in which the word is used depends upon the context.[60]

ALTA VIA. The highway.[61]

ALTENHEIM. A German word meaning "home for old people."[62]

ALTER.[63] To change,[64] to change the nature or form of;[65] to change in some respect, either partially or wholly;[66] to change in form without destroying identity;[67] to change or modify the form or character of a thing, without changing its identity;[68] to cause to be different in some respect;[69] to make a change in;[70] to make different;[71] to make a thing different from what it was;[72] to make different without destroying the identity;[73] to make some change

that "in making title by descent, it shall be no bar to a party, that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien. Bastards also shall be capable of inheriting or transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother," the court said: "Nor can the active capacity conferred on him to transmit inheritance be restrained by the use of the word also. It is true that it is in general an adverb, and means in like manner; but Dr. Johnson tells us truly, that it is sometimes nearly the same with the word and, only conjoining the members of the sentence. In the clause under consideration, it seems to me to be a mere word of connection; it conjoins dissimilar provisions, and is superfluous." Garland v. Harrison, 8 Leigh (35 Va.) 368, 379, 384.

58. Platt v. Brannan, 34 Colo. 125, 130, 81 P 755, 114 AmSR 147; Morrison v. Schorr, 197 Ill. 554, 565, 64 NE 545; Kratz v. Kratz, 189 Ill. 276, 280, 59 NE 519; Allison v. Bates, 6 B. Mon. (Ky.) 78, 80; Montgomery v. McPherson, 86 Miss. 4, 5, 38 S 196; Farish v. Cook, 6 Mo. A. 328, 332; Morgan v. Morgan, 41 N. J. Eq. 235, 236, 3 A 63 [expl Van Houten v. Post, 39 N. J. Eq. 51]; Kinkele v. Wilson, 151 N. Y. 269, 276, 45 NE 869 [rev 9 Misc. 139, 29 NYS 27]; Hyman v. Williams, 34 N. C. 92, 94; Sherrill v. Echard, 29 N. C. 161; Anonymous, 3 N. C. 346, 347; Noble v. Ayers, 61 Oh. St. 491, 493, 56 NE 199; Silk v. Merry, 23 Oh. Cir. Ct. 218, 223; Du Pont v. Du Bos, 52 S. C. 244, 260, 29 SE 665; Child v. Elsworth, 2 De G. M. & G. 679, 51 EngCh 532, 42 Reprint 1038; Fenny v. Ewestace, 4 M. & S. 58, 60, 105 Reprint 756; Cole v. Rawlinson, 1 Salk. 234, 91 Reprint 207.

But in Sherman v. Wooster, 26 Iowa 272, 275, the testator said: "The residue of my estate, real and personal I give, bequeath and dispose of as follows, to wit: To my wife, one-half of my real estate also all my personal property during her natural life and at her decease to be equally divided between my two daughters, the one-half of my real estate I bequeath to my two daughters and their heirs." It was held that the fee in the land passed by the devise, and that the words "during her natural life" were limited to the personal property. From this view, Dillon, C. J., dissented, and said that the wife took only a life estate in the land. The holding of the court in this case was criticized in both Montgomery v. McPherson, 86 Miss. 4, 38 S 196, and Morgan v. Morgan, 41 N. J. Eq. 235, 3 A 63.

59. Gower v. Towers, 26 Beav. 81, 53 Reprint 827; Doe v. Westley, 4 B. & C. 667, 10 ECL 749, 107 Reprint 1209. To same effect Hill v. Terrell, 123 Ga. 49, 61, 51 SE 81.

[a] **For example.**—(1) A testator bequeathed and devised certain specific articles of personal property and a pew in a meeting house to his wife for life, and in the same clause he made a further bequest, using the following language: "I also give and bequeath to my said wife, Betsey Loring forty-five hundred dollars (4500) to be paid to her in cash or in such personal securities as she may select from my estate." It was held that by this language the testator made an absolute gift to his wife of the sum of forty-five hundred dollars, and that the meaning of the word "also" in this connection was "in addition" rather than "in like manner." Loring v. Hayes, 86 Me. 351, 355, 356, 29 A 1093. To same effect Mace v. Mace, 95 Me. 283, 286, 49 A 1038. (2) In construing a bequest by a testator to his daughter of "one negro girl named Mary, now in her possession, and her increase, if any, also one negro girl named Bethany, to her heirs forever," the court said: "The term 'also' means only some other subject of gift besides what has been already mentioned, and can include only what is specified by name or description. If one subject only be named, or described, it cannot be extended to embrace two entirely distinct subjects, without the hazard of making the testator much more liberal than he intended to be. The mention of one subject without the other, when he has just before shown that he knew the difference between the two, leads more justly to the conclusion that he did not intend to embrace the latter. The children of the girl, Bethany, do not, therefore, in our opinion, pass with their mother, but fall into the residue to be sold and the proceeds divided according to the last clause of the will." Williamson v. Williamson, 57 N. C. 281, 284, 286.

[b] **Beginning of new devise.**—In an early case the testator devised to his executor a certain tract of land in trust "only to and for the sole and separate use of Ann Evans, the wife of the said William Savery Evans," and "I also give and bequeath unto the said George Knorr [the executor], the sum of one thousand dollars in trust for the use of her the said Ann Evans." It was held that the bequest of the one thousand dollars was not for the sole and separate use of the wife, but went to the husband. The court said: "The word, 'also,' which is prefixed to the sentence, serves, as it most frequently does in wills, to point out the beginning of a new devise or a new bequest. It imports no more than, 'Item,' and is of the same signification in this place as 'moreover,' and cannot be construed to mean 'in like manner.'" Evans v. Knorr, 4 Rawle (Pa.) 66, 67, 69.

60. Platt v. Brannan, 34 Colo. 125, 130, 81 P 755, 114 AmSR 147.

[a] **In some connections** it may indicate the intention to include something not heretofore included. Henne v. Summers, 16 Cal. A. 67, 71, 116 P 86.

61. Bouvier L. D. Used in Primer v. Philips, 1 Salk. 222, 91 Reprint 197.

62. German Pioneer Verein v. Meyer, 70 N. J. Eq. 192, 193, 63 A 835.

63. See Alteration post.

64. Century D. [quot Chicago Lumber, etc., Co. v. Garmer, 132 Iowa 282, 289, 109 NW 780]; Peo. v. Sassovich, 29 Cal. 480, 484; Jaqui v. Johnson, 26 N. J. Eq. 321, 327; Waddell v. New York, 8 Barb. (N. Y.) 95, 96; Haynes v. State, 15 Oh. St. 455, 457; Heiple v. Clackamas County, 20 Or. 147, 149, 25 P 291; Wallace v. Blair, 1 Grant (Pa.) 75, 79.

65. Davenport v. Magoon, 13 Or. 3, 7, 4 P 299, 57 AmR 1 [quot Chicago Lumber, etc., Co. v. Garmer, 132 Iowa 282, 289, 109 NW 780].

66. Sessions v. State, 115 Ga. 18, 20, 41 SE 259.

67. Century D. [quot Chicago Lumber, etc., Co. v. Garmer, 132 Iowa 282, 289, 109 NW 780]; Heiple v. Clackamas County, 20 Or. 147, 149, 25 P 291.

[a] **"Nothing which ceases to exist,** can in any proper sense be said to be altered. If it is altered, it has merely changed its form or nature, but still has an existence." Haynes v. State, 15 Oh. St. 455, 458; Davenport v. Magoon, 13 Or. 3, 7, 4 P 299, 57 AmR 1.

[b] **The power to alter or modify a charter** (1) is restrained to the powers and franchises granted by the charter. It does not authorize the legislature to change the object of the incorporation, or to substitute another for it. An alteration or modification is necessarily of the grant or thing to be altered or modified, and cannot be done by substituting a different thing; that would be a change. Zabriskie v. Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 AmD 617. To same effect Sage v. Dillard, 15 B. Mon. (Ky.) 340. (2) Under a statute allowing corporations under certain conditions to improve, amend, or alter their charters it was held that a company chartered for a certain term for the purpose of mining coal in a certain county could not amend its charter by making the term thereof perpetual, and by removing the limitations upon the territory in which it may carry on its operations. In re Victor Coal Co., 13 Pa. Dist. 616, 29 Pa. Co. 209.

68. Hannibal v. Winchell, 54 Mo. 172, 177; Waddell v. New York, 8 Barb. (N. Y.) 95, 96; Haynes v. State, 15 Oh. St. 455, 458; Heiple v. Clackamas County, 20 Or. 147, 149, 25 P 291; Davenport v. Magoon, 13 Or. 3, 7, 4 P 299, 57 AmR 1; Black River Impr. Co. v. Holway, 87 Wis. 584, 590, 59 NW 126.

[a] **For example,** a power to alter a wharf authorizes an extension or diminishing of it. Hannibal v. Winchell, 54 Mo. 172, 177.

69. Standard D. [quot Chicago Lumber, etc., Co. v. Garmer, 132 Iowa 282, 289, 109 NW 780]; Loyalsock Tp. Road, 26 Pa. Super. 219, 227.

70. Standard D. [quot Chicago Lumber, etc., Co. v. Garmer, 132 Iowa 282, 289, 109 NW 780]; Sessions v. State, 115 Ga. 18, 20, 41 SE 259.

71. Black River Impr. Co. v. Holway, 87 Wis. 584, 590, 59 NW 126.

72. Sessions v. State, 115 Ga. 18, 20, 41 SE 259; Chicago Lumber, etc., Co. v. Garmer, 132 Iowa 282, 289, 109 NW 780; Smith v. Brown, 1 Wend. (N. Y.) 231, 236.

[a] **The power to alter bridges** was held to mean that the location could be altered, and that the old bridge might be discontinued. State v. Wood County Cir. Ct., 33 W. Va. 589, 597, 11 SE 72.

73. Butler v. Lewiston, 11 Ida. 393, 398, 83 P 234; Heiple v. Clackamas County, 20 Or. 147, 149, 25 P 291; Davenport v. Magoon, 13 Or. 3, 7, 4 P 299, 57 AmR 1; Black River Impr. Co. v. Holway, 87 Wis. 584, 590, 59 NW 126; Atty.-Gen. v. Chicago, etc., R. Co., 35 Wis. 425, 577 [cit Crabb, and quot Black River Impr. Co. v. Holway, 87 Wis. 584, 590, 59 NW 126].

in character, shape, condition, position, quantity, value, etc.;[74] to make otherwise;[75] to modify;[76] to make otherwise;[77] to add to;[78] to increase or diminish;[79] to become different in some respects or to some extent;[80] to vary in some degree;[81] to vary in some degree without making the entire change.[82]

Phrases in which the word has been used have received judicial interpretation, such as "alter or amend,"[83] "alter and regulate,"[84] and "alter, repair, or renew."[85]

ALTERATION. A change or substitution of one thing for another;[86] a change effected; a change of form or state, especially one which does not affect the identity of the subject;[87] an addition or subtraction.[88]

As applied to buildings a change or substitution in a substantial particular of one part of a building for a building different in that particular;[89] a change or changes within the superficial limits of an existing structure.[90]

As applied to streets and highways the word generally refers to a change in the source thereof, and therefore necessarily involves, to some extent, the establishment of a new street or highway for which the substitution is made.[91]

As applied to wills[92] a change in the words of a will by addition, or erasure, or both, made by the testator or some one acting under his authority, af-

74. Murray D. [quot Atty.-Gen. v. Atty.-Gen., 20 Ont. 222, 247].

75. Webster Int. D. [quot Adams v. Shelbyville, 154 Ind. 467, 486, 57 NE 114, 77 AmSR 484, 49 LRA 797]; Sessions v. State, 115 Ga. 18, 20, 41 SE 259.

76. Century D. [quot Chicago Lumber, etc., Co. v. Garmer, 132 Iowa 282, 289, 109 NW 780]; Peo. v. Sassovich, 29 Cal. 480; Sessions v. State, 115 Ga. 18, 20, 41 SE 259; Heiple v. Clackamas County, 20 Or. 147, 149, 25 P 291; Wallace v. Blair, 1 Grant (Pa.) 75, 79.

77. Adams v. Shelbyville, 154 Ind. 467, 486, 57 NE 114, 77 AmSR 484, 49 LRA 797.

78. Adams v. Shelbyville, 154 Ind. 467, 486, 57 NE 114, 77 AmSR 484, 49 LRA 797; Atty.-Gen. v. Atty.-Gen., 20 Ont. 222, 247.

[a] **"Altering" and "defacing" are not synonymous** terms as applied to a brand on cattle. The putting of an additional brand to one already on is an alteration of the brand, although it may not interfere with or change the figure of the first brand. Linney v. State, 6 Tex. 1, 2, 55 AmR 756.

79. Peo. v. Sassovich, 29 Cal. 480, 484; Adams v. Shelbyville, 154 Ind. 467, 486, 57 NE 114, 77 AmSR 484, 49 LRA 797.

[a] **Alter assessments.**—In construing a statute, providing in effect that a common council in passing on assessments for local improvements "may adopt the report as made by the engineer, distributing the total cost equally per front foot, or it may alter the report and the assessments therein," the court said: "The council may alter the assessments, that is, as indicated by the engineer's report on the front-foot rule. . . . From the power to alter is necessarily implied the power to add to or diminish. The absence of an express rule for guidance in the exercise of the power to alter does not impair it. It is sufficient if the power to change the assessment from the frontage rule exists." Adams v. Shelbyville, 154 Ind. 467, 486, 57 NE 114, 77 AmSR 484, 49 LRA 797.

80. In re Loyalsock Tp. Road, 26 Pa. Super. 219, 227.

81. Black L. D. [quot Chicago, etc., Co. v. Garmer, 132 Iowa 282, 289, 109 NW 780]; Sessions v. State, 115 Ga. 18, 20, 41 SE 259.

82. Sessions v. State, 115 Ga. 18, 20, 41 SE 259; Butler v. Lewiston, 11 Ida. 393, 398, 83 P 234; Chicago, etc., Co. v. Garmer, 132 Iowa 282, 289, 109 NW 780; Loyalsock Tp. Road, 26 Pa. Super. 219, 227; Atty.-Gen. v. Chicago, etc., R. Co., 35 Wis. 425, 577 [cit Webster D., and quot Black River, etc., Co. v. Holway, 87 Wis. 584, 590, 59 NW 126].

83. Sage v. Dillard, 15 B. Mon. (Ky.) 340, 359 (where it was said that the power to alter or amend a contract is to change it between the original parties and such others as are by mutual consent admitted into it. It does not give the power to compel one of the parties to operate in conjunction with others and share with them the privileges and benefits of the contract).

84. Peo. v. Coughtry, 58 Hun 245, 246, 12 NYS 259 [aff 125 N. Y. 723, 26 NE 756] (where, in construing Const. art 6 § 8, providing that "except as herein otherwise provided, the legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and equity that they have heretofore exercised," the court said: "The power 'to alter and regulate' implies that the old jurisdiction shall in some degree continue in an altered or regulated form").

85. Jaqui v. Johnson, 27 N. J. Eq. 526, 530 (where, in construing a deed giving power to grantees to enter upon the lands of the grantor to alter, repair, or renew a wooden leader used to convey water, it was held that the word "alter," used in connection with the right to repair and renew, did not confer authority to remove the easement to such other part of complainant's lands as the appellant might desire).

86. Grosse v. Barman, 9 Cal. A. 650, 658, 100 P 348; Johnson v. Wyman, 9 Gray (Mass.) 186, 189.

[a] **Alteration implies the existence of that which is altered.**—It does not contemplate initial construction or installation of that which has no existence, but a modification or change of that already constructed or installed. Grosse v. Barman, 9 Cal. A. 650, 658, 100 P 349.

[b] **Bank of river.**—The word "alteration" in a statute providing a penalty for making any alteration to any bank of the river Thames so as to affect the security of adjoining premises from flooding, without the previous sanction in writing of the London county council, was held not to include "repairs . . . done to a bank which has been previously authorized." London County Council v. London, etc., R. Co., [1906] 2 K. B. 72, 76.

[c] **Engineering work.**—The Workmen's Compensation Act (1897) § 7 subs 2, defines "engineering work" as meaning, among other things, any work of alteration of a railroad, and it has been said that if a contract for the work of carrying electric wires across a tramway involves an alteration of the physical condition of the surface between the lines of rails, it will involve an alteration of a railroad, and therefore will be engineering work within the meaning of the act. Adams v. Shaddock, [1905] 2 K. B. 859, 863.

87. Chicago Lumber, etc., Co. v. Garmer, 132 Iowa 282, 289, 109 NW 780; Brill v. Miller, 140 App. Div. 602, 605, 125 NYS 865 [both cases cit Century D.].

88. Atty.-Gen. v. Atty.-Gen., 20 Ont. 222, 247.

[a] **In sense of increase or diminish.**—The constitution provided that the state should be divided into fourteen judicial districts "subject to . . . alteration" by a two-thirds vote of the legislature. It was held that the legislature had power to increase or diminish the number of judicial districts, although it was contended that this was giving the verb "to alter" the sense of "to create," but the court said that the word "alter" was equivalent to "increase" or "diminish." Peo. v. Sassovich, 29 Cal. 480, 483, 484. See also Adams v. Shelbyville, 154 Ind. 467, 57 NE 114, 77 AmSR 484, 49 LRA 797.

[b] **"Repair" distinguished.**—See Com. v. Hayden, 211 Mass. 296, 297, 97 NE 783; London County Council v. London, etc., R. Co., [1906] 2 K. B. 72.

89. Com. v. Hayden, 211 Mass. 296, 297, 97 NE 783 [cit Bigelow v. Worcester, 169 Mass. 390, 48 NE 1].

90. Brill v. Miller, 140 App. Div. 602, 605, 125 NYS 865.

91. Rogers v. Attica, 113 App. Div. 603, 605, 98 NYS 665; Matter of Grab, 31 App. Div. 610, 52 NYS 395. See also Buchholz v. New York, etc., R. Co., 71 App. Div. 452, 75 NYS 824 [aff 177 N. Y. 550 mem, 69 NE 1121 mem].

[a] **Adjudicated significance of word.**—In Manufacturer's Land, etc., Co. v. Camden, 71 N. J. L. 490, 493, 59 A 1, the court said: "The counsel for the city insists that a power to alter grades is included in the word 'altered,' so that the power to cause a street to be altered includes an alteration of grade. Doubtless a street may be said to be altered when its surface is raised or depressed. The question, however, is what the legislature meant by the use of this word in the charter. In my judgment, it meant change of location, and not of grade. This is the natural and adjudicated significance of the word when used in connection with roads or streets. Com. v. Cambridge, 7 Mass. 158; Com. v. Westborough, 3 Mass. 406. The word 'alteration' was employed in Judge Patterson's act, passed in 1799 (Pat. L., p 387), entitled 'An act relative to the laying out, vacating and altering roads.' The word has been employed in all the later acts. The present statute (Gen. St. p. 2829, § 119) provides for an application for the appointment of surveyors where a road is proposed 'to be laid out, vacated or altered.' The meaning always attributed to the word 'alteration' was change of route. Where it is effected by vacating a part of an old road and retaining a part, it is done in a single application. Green v. Loudenslager, 54 N. J. L. 478, 24 A 367; State v. Bergen, 21 N. J. L. 342."

[b] **"Location" distinguished.**—Ford v. Erskine, 109 Me. 164, 166, 83 A 455.

[c] **"Relocation" distinguished.**—Bennett v. Wellesley, 189 Mass. 308, 310, 75 NE 717.

92. **As forgery** see Forgery [19 Cyc 1385].

By codicil see Wills [40 Cyc 1219].

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ter the execution of the will.[93]

93. In re Diener, 79 Nebr. 569, 572, 113 NW 149 [quot Page Wills § 298].

[a] **"Revocation" distinguished.**—"The difference between revocation and alteration seems to me to be this: if what is done simply takes away what was given before or a part of what was given before, then it is revocation, but if it gives something in addition, or gives something else, then it is more than revocation and cannot be done by mere obliteration." Miles' App., 68 Conn. 237, 245, 36 A 39, 36 LRA 176 [quot Swinton v. Bailey, 45 L. J. Exch. 427].

[b] **"Spoliation" distinguished.**—Cochran v. Nebeker, 48 Ind. 459, 462; Bridges v. Winters, 42 Miss. 135, 143, 97 AmD 443, 2 AmR 598; Medlin v. Platte County, 8 Mo. 235, 239, 40 AmD 135; In re Diener, 79 Nebr. 569, 572, 113 NW 149; Oliver v. Hawley, 5 Nebr. 439, 444.

94. **Alteration:**

Forgery see Forgery [19 Cyc 1375].

In:
- Contract affecting liability of surety see Principal and Surety [32 Cyc 177].
- Members or business of firm see Partnership [30 Cyc 761].

Of:
- Articles of seaman see Seamen [35 Cyc 1185].
- Assessment roll see Forgery [19 Cyc 1385].
- Boundaries see Boundaries [5 Cyc 930, 974].
- Brand or mark on animal see Animals [2 Cyc 826].
- Bridge over navigable waters see Navigable Waters [29 Cyc 318].
- Building, mechanic's lien for see Mechanics' Liens [27 Cyc 34].

(Cross references.[94])

Of:—Continued
- Church edifice see Religious Societies [34 Cyc 1177].
- Commitment to reformatory see Reformatories [34 Cyc 1007].
- Court record as contempt see Contempt [9 Cyc 7].
- Document on file see Clerks of Courts [7 Cyc 245].
- Easement see Easements [14 Cyc 1211].
- Election district:
  - Generally see Elections [15 Cyc 310].
  - By legislature see Statutes [36 Cyc 847].
- Existing instrument see Alteration of Instruments post p 1168; Forgery [19 Cyc 1374].
- Firm:
  - Contract see Partnership [30 Cyc 491].
  - Negotiable instrument see Partnership [30 Cyc 511].
- Grade of street or highway as ground for compensation see Eminent Domain [15 Cyc 703].
- Grant see Public Lands [32 Cyc 1183].
- Guaranty see Guaranty [20 Cyc 1443, 1471].
- Highway see Highways [37 Cyc 157, 211].
- Instrument generally see Alteration of Instruments post p 1168.
- Insured buildings see Fire Insurance [19 Cyc 717].
- Leased premises see Landlord and Tenant [24 Cyc 1094].
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Of:—Continued
- Plans of building see Architects.
- Political division see Counties [11 Cyc 349]; Municipal Corporations [28 Cyc 183]; Schools and School Districts [35 Cyc 831]; Towns [38 Cyc 604].
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- Process:
  - Generally see Process [32 Cyc 444].
  - Return of see Process [32 Cyc 506].
- Public officer's bond see Officers [29 Cyc 1461].
- Recognizance see Recognizances [34 Cyc 553].
- Records:
  - Generally see Records [34 Cyc 590, 616].
  - As:
    - Contempt see Contempt [9 Cyc 7].
    - Criminal offense generally see Records [34 Cyc 616].
    - Forgery see Forgery [19 Cyc 1385].
  - Minutes of clerk of court see Clerks of Courts [7 Cyc 223].
- Street:
  - Generally see Municipal Corporations [28 Cyc 838].
  - Location or width see Municipal Corporations [28 Cyc 947, 1069].
- Subscription paper see Subscriptions [37 Cyc 484].
- Territory affecting settlement of pauper see Paupers [30 Cyc 1129].

With intent to defraud see Forgery [19 Cyc 1376].

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ALTERATION OF INSTRUMENTS

By Henry H. Skyles*

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra page 1172]

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CROSS REFERENCES

Alteration of:
Appeal bond see **Appeal and Error** [2 Cyc 842].
Bill or note as affecting the rights of bona fide purchaser see **Bills and Notes** [7 Cyc 799; 8 Cyc 29].
Instrument as discharge of:
Guarantor see **Guaranty** [20 Cyc 1443, 1477].
Surety see **Principal and Surety** [32 Cyc 177].
Notice of mining location see **Mines and Minerals** [27 Cyc 566].
Process see **Process** [32 Cyc 444].
Records see **Records** [34 Cyc 590, 616].
Wills by testator see **Wills** [40 Cyc 1097, 1196].
Cancellation of instruments see **Cancellation of Instruments** [6 Cyc 282].
Effect of alteration or destruction of deed on title of grantee see **Deeds** [13 Cyc 721].
Erasures and interlineations in indictments and informations see **Indictments and Informations** [22 Cyc 290].
Forgery as a crime see **Forgery** [19 Cyc 1367].
Payment of altered paper by bank see **Banks and Banking** [5 Cyc 544].
Reformation of instruments see **Reformation of Instruments** [34 Cyc 899].

I. DEFINITION

[§ 1] An alteration is an act done upon an instrument by which its meaning or language is changed. If what is written upon or erased from an instrument has no tendency to produce this result or to mislead any person, it is not an alteration.[1] Technically, it is a change in an instrument by a party thereto, or one entitled thereunder, or one in privity with such person, after the instrument has been signed or fully executed, without the consent of the other party to it, by an erasure, interlineation, addition, or substitution of material matter affecting the identity of the instrument or contract, or the rights and obligations of the parties.[2] Where the act is done by a stranger

1. Black L. D.; 1 Greenleaf Ev. § 566 [quot Oliver v. Hawley, 5 Nebr. 439, 444]; Cockran v. Nebeker, 48 Ind. 459, 462; Holland v. Hatch, 11 Ind. 497, 502, 71 AmD 363; Bridges v. Winters, 42 Miss. 135, 141, 97 AmD 443, 2 AmR 598; Moore v. Macon Sav. Bank, 22 Mo. A. 684, 690; Morrill v. Otis, 12 N. H. 466, 472; Canfield v. Orange, 13 N. D. 622, 629, 102 NW 313 [cit Cyc]; Kountz v. Kennedy, 63 Pa. 187, 191, 3 AmR 541. In Davis v. Campbell, 93 Iowa 524, 530, 61 NW 1053 [cit Black L. D.], an alteration is defined to be an act done upon a written instrument which, without destroying its identity, changes its language and meaning. This seems to be inaccurate, because, in a legal sense, what is an alteration must be considered with respect to the effect of the particular change, and to change the meaning of an instrument is, in legal contemplation, to destroy its identity which is, at least in part, fixed by its meaning.
[a] **Similar definition.**—"An alteration of an instrument is something by which its meaning or language is changed, either in a material or an immaterial particular. If what is written upon, or erased from the paper containing the instrument, have no tendency to produce this result, or to mislead any person, it cannot be said to be an alteration." Morrill v. Otis, 12 N. H. 466, 472 [quot Moore v. Macon Sav. Bank, 22 Mo. A. 684, 690]. See also Bridges v. Winters, 42 Miss. 135, 143, 97 AmD 443, 2 AmR 598 (where almost identical language is used).
[b] **Ex vi termini** an alteration imports a change in some particular. Williams v. Jensen, 75 Mo. 681.
[c] **"Erasure" and "interlineation" synonymous.**—Tharp v. Jamison, 154 Iowa 77, 134 NW 583, 584, 39 LRANS 100.

2. U. S.—Bingham v. Reddy, 3 F. Cas. No. 1,414, 5 Ben. 266.
Ga.—Jackson v. Johnson, 67 Ga. 167; Thrasher v. Anderson, 45 Ga. 538.
Ill.—Ryan v. Springfield First Nat. Bank, 148 Ill. 349, 35 NE 1120; White v. Alward, 35 Ill. A. 195.
Iowa.—Shepard v. Whetstone, 51 Iowa 457, 1 NW 753, 33 AmR 142.
Ky.—Cason v. Wallace, 4 Bush 388; Commonwealth Bank v. McChord, 4 Dana 191, 29 AmD 398.
Mass.—Church v. Fowle, 142 Mass. 12, 6 NE 764; Com. v. Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 AmD 126; Granite R. Co. v. Bacon, 15 Pick. 239; Smith v. Dunham, 8 Pick. 246.
Miss.—Bridges v. Winters, 42 Miss. 135, 97 AmD 443, 2 AmR 598.
N. H.—Morrill v. Otis, 12 N. H. 466.
N. Y.—Troy City Bank v. Lauman, 19 N. Y. 477.
N. C.—Cheek v. Nall, 112 N. C. 276, 17 SE 80.

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to the instrument, it is usually termed "a spoliation."[3] The writing of words calculated to change the legal effect of the instrument is, to all intents, as fully an alteration as an erasure and substitution.[4] The drawing of crosslines over a written instrument, or any part thereof, is a common mode of expressing an intent to erase or cancel it;[5] but it has been held that merely drawing a line in pencil over words in an instrument, without actually erasing or canceling such words, leaves them still as an operative part of the instrument.[6]

II. EFFECT AS DEPENDENT ON MATERIALITY

[§ 2] **A. Material Changes—1. What Constitutes—a. In General.** A material change or alteration of an instrument is one which causes it to speak a language different in legal effect from that which it originally spoke.[7] Accordingly any act which changes the legal effect of the instrument, that is, which changes the legal identity or character of the instrument, either in its terms or in the relation of the parties to it, is a material change or technical alteration.[8]

It is the effect of the act upon the instrument, and not the particular manner in which it is done, that is material,[9] and hence an alteration, to be material, must be an actual alteration, must be in a material part of the instrument, and must affect the rights and liabilities of the parties.[10] Unless the alteration is in a material part of the writing, that is, in the writing proper, it cannot change the legal effect of the instrument, and therefore is not material.[11]

[§ 3] **b. Extent of Change Generally.** Upon the question as to what extent the identity of the instrument must be changed in order that its legal effect will be altered so as to bring the case within the rule that a material alteration will vitiate the instrument, the adjudications are not always in accord.[12] If the change is one by which the party

Oh.—Holland v. Hatch, 15 Oh. St. 464.

Pa.—Wessell v. Glenn, 108 Pa. 104; Kountz v. Kennedy, 63 Pa. 187, 3 AmR 541.

Tenn.—Waldron v. Young, 9 Heisk. 777; Farnsworth v. Sharp, 4 Sneed 54.

Tex.—Morris v. Cude, 57 Tex. 337; Chamberlain v. Wright, (Civ. A.) 35 SW 707.

Eng.—Downes v. Richardson, 5 B. & Ald. 674, 7 ECL 367, 106 Reprint 1337.

2. Ind.—Cochran v. Nebeker, 48 Ind. 459.

Miss.—Bridges v. Winters, 42 Miss. 135, 97 AmD 443, 2 AmR 598.

Mo.—Medlin v. Platte County, 8 Mo. 235, 40 AmD 135; McMurtrey v. Sparks, 71 Mo. A. 126.

Tenn.—Crockett v. Thomason, 5 Sneed 342.

Tex.—First Nat. Bank v. Pritchard, 2 Tex. A. Civ. Cas. § 130.

Effect of such spoliation by strangers to the instrument see infra §§ 104-107.

4. Holland v. Hatch, 11 Ind. 497, 71 AmD 363.

5. O. N. Bull Remedy Co. v. Clark, 109 Minn. 396, 124 NW 20, 32 LRANS 519, 18 AnnCas 413.

6. Cochran v. Nebeker, 48 Ind. 459; Rosenkrans v. Snover, 19 N. J. Eq. 420, 97 AmD 668 (holding that where words in a deed have a crooked line drawn in pencil over them as if for cancellation or erasure, but the words are not actually erased or canceled, they still form a part of the deed; and if the purchaser accepts the deed in this condition he is bound by such acceptance, although he insisted that the words should not be in the deed and was told by the grantor that they had been canceled. His proper remedy is by a suit to reform the instrument).

7. Ala.—Baker v. Lehman, etc., Co., 65 S 321.

Conn.—Murray v. Klinzing, 64 Conn. 78, 29 A 244.

Mass.—Wheelock v. Freeman, 13 Pick. 165, 23 AmD 674.

Miss.—Bridges v. Winters, 42 Miss. 135, 97 AmD 443, 2 AmR 598.

Nebr.—Foxworthy v. Colby, 64 Nebr. 216, 89 NW 800, 62 LRA 393; Oliver v. Hawley, 5 Nebr. 439.

N. H.—Morrill v. Otis, 12 N. H. 466.

N. Y.—Reeves v. Pierson, 23 Hun 185.

Tex.—Park v. Glover, 23 Tex. 469; First Nat. Bank v. Pritchard, 2 Tex. A. Civ. Cas. § 130.

Vt.—Barton Sav. Bank, etc., Co. v. Stephenson, 87 Vt. 433, 89 A 639, 51 LRANS 346, 350.

8. Ala.—Carroll v. Warren, 142 Ala. 397, 37 S 687.

Ill.—Soaps v. Eichberg, 42 Ill. A. 375.

Ind.—Brannum Lumber Co. v. Pickard, 33 Ind. A. 484, 71 NE 676.

Mo.—Law v. Crawford, 67 Mo. A. 150.

N. Y.—Booth v. Powers, 56 N. Y. 22 [rev 59 Barb. 319].

Oh.—Sturges v. Williams, 9 Oh. St. 443, 75 AmD 473; Marshall v. Wilhite, 4 Oh. Cir. Ct. 203, 2 Oh. Cir. Dec. 500.

Okl.—Richardson v. Fellner, 9 Okl. 513, 60 P 270.

Pa.—Saunders v. Baldwin, 23 Pa. Co. 10.

S. C.—White v. Harris, 69 S. C. 65, 48 SE 41, 104 AmSR 791.

Tenn.—Organ v. Allison, 9 Baxt. 459.

Va.—Dobyns v. Rawley, 76 Va. 537.

Eng.—Burchfield v. Moore, 3 E. & B. 683, 77 ECL 683, 25 EngL&Eq 123, 118 Reprint 1297.

[a] **Other definitions.**—(1) "A material alteration is one which makes the instrument speak a language different in legal effect from that which it originally spoke; an alteration which produces some change in the rights, interests, or obligations of the parties to the instrument." Barton Sav. Bank, etc., Co. v. Stephenson, 87 Vt. 433, 89 A 639, 641, 51 LRANS 346. (2) "Any alteration is material if it affects the identity of the instrument or the rights and obligations of the parties to it." Wicker v. Jones, 159 N. C. 102, 108, 74 SE 801, 803, 40 LRANS 69, AnnCas1914B 1083. (3) "An alteration of a written contract, such as to destroy it as a legal obligation, is any change in its terms, made by any party thereto without the express or implied consent of all the other parties, which varies its original legal effect and operation, whether in respect to the obligation it imparts, or its force as a matter of evidence." Chamberlain v. Wright, (Tex. Civ. A.) 35 SW 707. (4) "A material alteration of a written instrument is an intentional act done upon it, after it has been fully executed by one of the parties thereto, without the consent of the other, which changes the legal effect of the instrument in any respect." Per Start, C. J., in O. N. Bull Remedy Co. v. Clark, 109 Minn. 396, 399, 124 NW 20, 32 LRANS 519 and note, 18 AnnCas 413 and note [cit Cyc].

[b] **If interposed matter gives the instrument a different effect** from that which it originally had, carrying with it some change in the rights, interests, or obligations of the parties, such alteration is material. Benton v. Clemmons, 157 Ala. 658, 47 S 582.

[c] **To constitute a material alteration** "it is enough that, if the instrument were genuine, it would operate differently from the original; or as otherwise expressed, avoidance will result, if the alteration is one which causes the paper to speak a language different in legal effect from that which it originally spoke." Per Haralson, J., in Payne v. Long, 121 Ala. 385, 390, 25 S 780 [quot Montgomery v. Crossthwait, 90 Ala. 553, 570, 8 S 498, 24 AmSR 832, 12 LRA 140].

9. O. N. Bull Remedy Co. v. Clark, 109 Minn. 396, 399, 124 NW 20, 32 LRANS 519, 18 AnnCas 413.

10. Ark.—Lemay v. Williams, 32 Ark. 166; Inglish v. Breneman, 5 Ark. 377, 41 AmD 96.

Cal.—Humphreys v. Crane, 5 Cal. 173.

Ind.—Coburn v. Webb, 56 Ind. 96, 26 AmR 15; Schnewind v. Hacket, 54 Ind. 248.

Mass.—Draper v. Wood, 112 Mass. 315, 17 AmR 92; Fay v. Smith, 1 Allen 477, 79 AmD 752; Wheelock v. Freeman, 13 Pick. 165, 23 AmD 674.

Mich.—White Sewing Mach. Co. v. Dakin, 86 Mich. 581, 49 NW 583, 13 LRA 313.

Nebr.—State Sav. Bank v. Shaffer, 9 Nebr. 1, 1 NW 980, 31 AmR 394.

N. Y.—Booth v. Powers, 56 N. Y. 22.

Tenn.—Kincannon v. Carroll, 9 Yerg. 11, 30 AmD 391; Blair v. State Bank, 11 Humphr. 84.

Va.—Newell v. Mayberry, 3 Leigh 250, 23 AmD 261.

[a] **In Georgia** in order to render a written contract void because of an alteration therein, it must appear that the writing has been intentionally altered in a material part by a person claiming a benefit under it, with intent to defraud the other party. Shirley v. Swafford, 119 Ga. 43, 45 SE 722.

11. Iowa.—Robinson v. Phœnix Ins. Co., 25 Iowa 430.

Mass.—Whitaker v. Salisbury, 15 Pick. 534.

Mich.—White Sewing Mach. Co. v. Dakin, 86 Mich. 581, 49 NW 583, 13 LRA 313.

N. C.—Nunnery v. Cotton, 8 N. C. 222.

S. C.—Heath v. Blake, 28 S. C. 406, 5 SE 842.

Nature and effect of immaterial changes generally see infra §§ 33-36.

12. Evans v. Foreman, 60 Mo. 449, 450 (where Sherwood, J., said: "It would be a hopeless task to endeavor to reconcile, and a fruitless one to even compare the numerous conflicting decisions, and oftentimes fine-spun distinctions, of which the alteration of promissory notes and the legal consequences flowing therefrom, have been the prolific theme"). For similar expressions see Taylor v. Acom, 1 Ind. T. 436, 45 SW 130; Horton v. Hor-

not consenting thereto would be prejudiced,[13] or which would enlarge or increase the liability of such party,[14] or is to the advantage of the party making it, it is unquestionably material in the sense of a vitiating alteration.[15]

[§ 4] **c. Rule Not Dependent on Prejudice or Increased Liability.** It has been held that changes may be considered immaterial where they are not prejudicial or where the liability of the party complaining is not increased or enlarged by them;[16] but the rule supported by the weight of authority is, that if the legal import and effect of the instrument is in fact changed, it does not matter how trivial the change may be,[17] or whether it may be beneficial or detrimental to the party sought to be charged on the contract,[18] as where it changes the evidence or mode of proof.[19] That is material

ton, 71 Iowa 448, 32 NW 452; Craighead v. McLoney, 99 Pa. 211.

13. Glover v. Robbins, 49 Ala. 219, 20 AmR 272; Gillett v. Sweat, 6 Ill. 475; Pankey v. Mitchell, 1 Ill. 383; Booth v. Powers, 56 N. Y. 22.

14. U. S.—Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189 (holding that, where the instrument of appointment of a deputy collector of direct taxes is extended to another township, it is a material alteration).

Ill.—Rudesill v. Jefferson County Court, 85 Ill. 446; Black v. Bowman, 15 Ill. A. 166.

Ind.—Weir Plow Co. v. Walmsley, 110 Ind. 242, 11 NE 282; Schnewind v. Hacket, 54 Ind. 248.

Kan.—Johnson v. Moore, 33 Kan. 90, 5 P 406.

Ky.—Locknane v. Emmerson, 11 Bush 69; Smith v. Lockridge, 8 Bush 423.

Mass.—Osgood v. Stevenson, 143 Mass. 399, 9 NE 825.

Minn.—Coles v. Yorks, 28 Minn. 464, 10 NW 775 (holding that it is not necessary that the liability should be a personal one, but it is sufficient if it be in respect to or on account of any of the property, rights, or interests of the party affected); White v. Johns, 24 Minn. 387.

Mo.—Law v. Crawford, 67 Mo. A. 150.

Tenn.—Morgan v. Cooper, 1 Head 430.

15. Warren v. Fant, 79 Ky. 1; Arnold v. Jones, 2 R. I. 345.

16. Major v. Hansen, 16 F. Cas. No. 8,982, 2 Biss. 195; Montgomery R. Co. v. Hurst, 9 Ala. 513; State v. Miller, 3 Gill (Md.) 335; Com. v. Beary, 9 Pa. Super. 246. See also Knapp v. Wilks, 105 Ark. 243, 151 SW 280.

17. Little Rock Trust Co. v. Martin, 57 Ark. 277, 21 SW 468 (holding that in such cases the maxim, de minimis non curat lex, is not applicable); Winkles v. Guenther, 98 Ga. 472, 25 SE 527; Broughton v. West, 8 Ga. 248; Gardiner v. Harback, 21 Ill. 129; American Pub. Co. v. Fisher, 10 Utah 147, 37 P 259. Compare Sayre v. Reynolds, 5 N. J. L. 862.

18. U. S.—Wood v. Steele, 6 Wall. 80, 18 L. ed. 725; Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189, 17 F. Cas. No. 9,591, 4 Wash. C. C. 26. But see Union Bank v. Cook, 24 F. Cas. No. 14,349, 2 Cranch C. C. 218.

Ala.—Prim v. Hammel, 134 Ala. 652, 32 S 1006, 92 AmSR 52; Lesser v. Scholtze, 93 Ala. 338, 9 S 273; Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140.

Ark.—Chism v. Toomer, 27 Ark. 108; Inglish v. Breneman, 5 Ark. 377, 41 AmD 96.

Conn.—Mahaiwe Bank v. Douglass, 31 Conn. 181.

Ga.—Heard v. Tappan, 116 Ga. 930, 43 SE 375 (insertion of specific amount in note for amount as shown by payee's books).

Ill.—Soaps v. Eichberg, 42 Ill. A. 375.

Ind.—Johnston v. May, 76 Ind. 293; Bowers v. Briggs, 20 Ind. 139. But see Holthouse v. State, 49 Ind. A. 178, 97 NE 130.

Iowa.—Dickerman v. Miner, 43 Iowa 508.

Kan.—New York L. Ins. Co. v. Martindale, 75 Kan. 142, 88 P 559, 121 AmSR 362, 21 LRANS 1045, 12 Ann Cas 677; McCormick Harvesting Mach. Co. v. Lauber, 7 Kan. A. 730, 52 P 577.

Me.—Hewins v. Cargill, 67 Me. 554.

Mass.—Doane v. Eldridge, 16 Gray 254; Wheelock v. Freeman, 13 Pick. 165, 23 AmD 674.

Minn.—Dawson Commercial Bank v. Maguire, 89 Minn. 394, 95 NW 212; Renville County v. Gray, 61 Minn. 242, 63 NW 635; Coles v. York, 28 Minn. 464, 10 NW 775; Herrick v. Baldwin, 17 Minn. 209, 10 AmR 161.

Mo.—Moore v. Hutchinson, 69 Mo. 429; St. Louis Nat. Bank v. Naughton, 88 Mo. A. 117.

Nebr.—St. Joseph State Sav. Bank v. Shaffer, 9 Nebr. 1, 1 NW 980, 31 AmR 394; Brown v. Straw, 6 Nebr. 536, 29 AmR 369.

N. H.—Humphreys v. Guillow, 13 N. H. 385, 38 AmD 499.

N. J.—Schmidt v. Quinzel, 55 N. J. Eq. 792, 38 A 665.

N. Y.—McCaughey v. Smith, 27 N. Y. 39; Church v. Howard, 17 Hun 5 [rev on other grounds 79 N. Y. 415]; McVean v. Scott, 46 Barb. 379; Mt. Morris Bank v. Lawson, 10 Misc. 359, 31 NYS 18 [rev 7 Misc. 228, 27 NYS 272]; Woodworth v. Bank of America, 19 Johns. 391, 10 AmD 239.

Oh.—Sturges v. Williams, 9 Oh. St. 443, 75 AmD 473.

Okl.—Dallas Commonwealth Nat. Bank v. Baughman, 27 Okl. 175, 111 P 332.

Pa.—Craighead v. McLoney, 99 Pa. 211; Heffner v. Wenrich, 32 Pa. 423; Smith v. Weld, 2 Pa. 54. But see Burkholder v. Lapp, 31 Pa. 322.

R. I.—Keene v. Weeks, 19 R. I. 309, 33 A 446.

S. C.—White v. Harris, 69 S. C. 65, 48 SE 41, 104 AmSR 791.

Tenn.—Organ v. Allison, 9 Baxt. 459 (notwithstanding the holding in Blair v. State Bank, 11 Humphr. 83, that the alteration of a note which does not affect the rights or responsibilities of the parties will not render the instrument void in the absence of a fraudulent intent).

Tex.—Kalteyer v. Mitchell, (Civ. A.) 110 SW 462; Ford v. Cameron First Nat. Bank, 34 SW 684.

Vt.—Barton Sav. Bank, etc., Co. v. Stephenson, 87 Vt. 433, 89 A 639.

Wash.—Washington Finance Corp. v. Glass, 74 Wash. 653, 134 P 480, 46 LRANS 1043.

Wis.—Hecht v. Shenners, 126 Wis. 27, 31, 105 NW 309 (where Dodge, J., said: "Any alteration which changes the legal effect of the instrument upon the rights of the parties is a material alteration, whether such change be prejudicial or favorable to the maker").

Eng.—Gardner v. Walsh, 5 E. & B. 83, 85 ECL 83, 119 Reprint 412.

[a] **Test of materiality.**—(1) "Whether an alteration is material does not depend upon whether it increases or reduces the maker's liability. The test is whether the instrument, after the alteration, expresses the same contract: whether it will have the same operation and effect after the alteration as before. If the change enlarges or lessens the liability, it is material, and vitiates the contract." Per Hayes, J., in Commonwealth Nat. Bank v. Baughman, 27 Okl. 175, 177, 111 P 332. (2) It depends upon whether the alteration makes the "instrument speak a language different in legal effect from that which it originally spoke, which carries with it some change in the rights, interests, or obligations of the parties." Per McClellan, J., in Benton v. Clemmons, 157 Ala. 658, 660, 47 S 582.

[b] **Reason for rule.**—It is immaterial that "the alteration is apparently or presumably to the benefit or detriment of the parties objecting. Courts can not undertake to say that a party would have made the contract as altered, and thus make it for him, merely because its terms are more favorable to him than those embodied in the original instrument, any more than a like conclusion could be justified where the alteration imports additional liability. In the one case, no less than in the other, the altered paper is not the contract which the party has made; and in neither case can the courts declare it to be his contract, or enforce it as such. The law proceeds on the idea, that the identity of the contract has been destroyed—that the contract made is not the contract before the court—that the party did not make the contract which is before the court; and so adjudging, it can not go further and hold him bound by it, on speculations, however probable and plausible, that he would or ought to have entered into the altered agreement, because it involved less liability than the original and only paper executed by him. There are some expressions in the books to the contrary. They will, for the most part, and certainly so far as the adjudications of this court are concerned, be found in cases where the change was prejudicial to the party complaining; and this fact is made one of the reasons for the decision against liability, though it might as well have been rested entirely on the abstract fact of alteration. Thus, in the case of Toomer v. Rutland, 57 Ala. 379, 29 AmR 722, reference is made to the prejudicial character of the alteration; but the conclusion there reached might better have been based solely on the change in the legal identity of the contract—a doctrine there fully recognized arguendo—entirely regardless of the effect upon the promisor. It was not decided in that case that an alteration favorable to the party seeking to avoid the instrument would not release him. The sounder doctrine, and certainly the one supported by the overwhelming weight of authority, is that stated in Anderson v. Bellenger, 87 Ala. 334, 6 S 82, 13 AmSR 46, 4 LRA 680, and there applied to a surety: that any material alteration, by one not a stranger to the paper, whether injurious or not, avoids the contract as to all parties not consenting." Per McClellan, J., in Montgomery v. Crossthwait, 90 Ala. 553, 570, 8 S 498, 24 AmSR 832, 12 LRA 140.

[c] **Materiality of date in check.**—In Vance v. Lowther, 1 Ex. D. 176, it was said that one of the tests of materiality is, does the change materially alter the obligation of the party, and where the change is the date of a check to a later date; another test is that if the drawer of the check has money at the bank at the time of drawing it, and the bank fails before the check is presented for payment, the question of liability turns on the diligence used in presenting the check, which conclusively shows that the date is a material part of the check.

19. Brady v. Berwind-White Coal Min. Co., 106 Fed. 824, 45 CCA 662 [aff 94 Fed. 28] (holding that an alteration of a written contract for the sale of goods which is silent concerning the

which may become material.[20] More particularly is this so when the objection is urged by a surety, for when a person occupies the position of a surety, the rule is especially strict that he may insist on the very terms of his contract.[21] Hence an alteration may be material even though it may have the effect of reducing the liability of the party bound by the instrument.[22]

[§ 5] **2. Rule as to Effect of Material Changes.** As a general rule any material alteration of a written instrument made after its execution by a party claiming thereunder or with his privity, without the authority or consent of the other party or parties to the instrument, invalidates the instrument in the hands of the party responsible for the alteration, and his assigns, as to all nonconsenting parties,[23] unless the latter subsequently ratify the

place of delivery, by adding a provision that the delivery shall be to a carrier, is material when it prevents the vendee from proving a parol agreement that he should not be chargeable for the goods until he had actually received them); Chadwick v. Eastman, 53 Me. 12; Schmidt v. Quinzel, 55 N. J. Eq. 792, 38 A 665 (holding that an alteration is material if it enlarges the scope of the instrument as a means of evidence); Craighead v. McLoney, 99 Pa. 211. See also infra §§ 197, 198.

[a] **Change furnishing evidence of material facts.**—An alteration is material if it has the effect of furnishing evidence of a material fact, and whether the added matter states the truth is wholly unimportant. Low v. Argrove, 30 Ga. 129.

[b] **Consideration of married woman's note.**—The interlineation of the words "for indebtedness incurred in the management of my separate estate, and in connection with the separate business in which I am engaged," in a note with confession of judgment given by a married woman, is a material alteration which will avoid the note, even though a judgment note given by her for the consideration mentioned in the alleged interlineation would have been valid and binding upon her without these words, for the reason that whatever changes the evidence or mode of proof is material. Wiseman v. Fleischer, 10 Pa. Co. 300.

20. Townsend v. Star Wagon Co., 10 Nebr. 615, 7 NW 274, 35 AmR 493; Barton Sav. Bank, etc., Co. v. Stephenson, 87 Vt. 433, 89 A 639, 51 LRANS 346 (holding that any alteration which may in any event alter the rights, duties, or obligations of the party sought to be charged is material).

21. Anderson v. Bellenger, 87 Ala. 334, 6 S 82, 13 AmSR 46, 4 LRA 680; Sturges v. Williams, 9 Oh. St. 443, 75 AmD 473; Organ v. Allison, 9 Baxt. (Tenn.) 459. See generally Principal and Surety [32 Cyc 177 et seq].

22. Ind.—Franklin L. Ins. Co. v. Courtney, 60 Ind. 134; Coburn v. Webb, 56 Ind. 96, 26 AmR 15.

Kan.—New York L. Ins. Co. v. Martindale, 75 Kan. 142, 88 P 559, 121 AmSR 362, 21 LRANS 1045, 12 Ann Cas 677.

Ky.—Phœnix Ins. Co. v. McKernan, 100 Ky. 97, 37 SW 490, 18 KyL 617.

Tex.—Adams v. Faircloth, (Civ. A.) 97 SW 507.

Wash.—Washington Finance Corp. v. Glass, 74 Wash. 653, 134 P 480, 46 LRANS 1043.

Wis.—Hecht v. Shenners, 126 Wis. 27, 105 NW 309.

23. U. S.—Mersman v. Werges, 112 U. S. 139, 5 SCt 65, 28 L. ed. 641; Angle v. Northwestern L. Ins. Co., 92 U. S. 330, 23 L. ed. 556; Pew v. Laughlin, 3 Fed. 39.

Ala.—Bryan v. Carter, 169 Ala. 515, 51 S 999; Benton v. Clemmons, 157 Ala. 658, 661, 47 S 582 [cit Cyc]; White Sewing Mach. Co. v. Saxton, 121 Ala. 399, 25 S 784; Payne v. Long, 121 Ala. 385, 25 S 780; Jordan v. Long, 109 Ala. 414, 19 S 843; Alabama State Land Co. v. Thompson, 104 Ala. 570, 16 S 440, 53 AmSR 80 [cit Saint v. Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 S 539, 36 AmSR 210; Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140; Anderson v. Bellenger, 87 Ala. 334, 6 S 82, 13 AmSR 46, 4 LRA 680; Hill v. Nelms, 86 Ala. 442, 5 S 796; Sharpe v. Orme, 61 Ala. 263]; Green v. Sneed, 101 Ala. 205, 13 S 277, 46 AmSR 119; Lesser v. Scholze, 93 Ala. 338, 9 S 273; Toomer v. Rutland, 57 Ala. 379, 29 AmR 722.

Ark.—Little Rock Trust Co. v. Martin, 57 Ark. 277, 21 SW 468; Overton v. Matthews, 35 Ark. 146, 37 AmR 9; Chism v. Toomer, 27 Ark. 108; Inglish v. Breneman, 5 Ark. 377, 41 AmD 96.

Cal.—Pelton v. San Jacinto Lumber Co., 113 Cal. 21, 45 P 12.

Conn.—Murray v. Klinzing, 64 Conn. 78, 29 A 244; Ætna Nat. Bank v. Winchester, 43 Conn. 391.

Del.—Sudler v. Collins, 7 Del. 538; Newark Bank v. Crawford, 7 Del. 282.

Ga.—Bedgood-Howell Co. v. Moore, 123 Ga. 336, 51 SE 420; Scott v. Walker, Dudl. 243.

Ill.—Hayes v. Wagner, 220 Ill. 256, 77 NE 211 [aff 113 Ill. A. 299]; Landt v. McCullough, 206 Ill. 214, 69 NE 107; Merritt v. Boyden, 191 Ill. 136, 60 NE 907, 85 AmSR 246; Ryan v. Springfield First Nat. Bank, 148 Ill. 349, 35 NE 1120; Burwell v. Orr, 84 Ill. 465; Montag v. Linn, 23 Ill. 551; Gardiner v. Harback, 21 Ill. 129; Babcock v. Henckle, 117 Ill. A. 640.

Ind.—Fry v. P. Bannon Sewer Pipe Co., 179 Ind. 309, 101 NE 10; Weir Plow Co. v. Walmsley, 110 Ind. 242, 11 NE 232; Nicholson v. Combs, 90 Ind. 515, 46 AmR 229; Hert v. Oehler, 80 Ind. 83; Bowman v. Mitchell, 79 Ind. 84; Schnewind v. Hacket, 54 Ind. 248; State v. Blair, 32 Ind. 313; Grimes v. Piersol, 25 Ind. 246; Owen Creek Presb. Church v. Taggart, 44 Ind. A. 393, 89 NE 406; Basey v. McKinney, 43 Ind. A. 422, 87 NE 693; Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413.

Ind. T.—Taylor v. Acom, 1 Ind. T. 436, 45 SW 130.

Iowa.—Shea v. Cutler, 147 Iowa 366, 126 NW 366; Woodworth v. Anderson, 63 Iowa 503, 19 NW 296; Charlton v. Reed, 61 Iowa 166, 16 NW 64, 47 AmR 808; Eckert v. Pickel, 59 Iowa 545, 13 NW 708; Adair v. Egland, 58 Iowa 314, 12 NW 277; Knoxville Nat. Bank v. Clark, 51 Iowa 264, 1 NW 491, 33 AmR 129; Dickerman v. Miner, 43 Iowa 508; Marsh v. Griffin, 42 Iowa 403.

Kan.—Johnson v. Moore, 33 Kan. 90, 5 P 406; Horn v. Newton City Bank, 32 Kan. 518, 4 P 1022; Sheley v. Sampson, 5 Kan. A. 465, 46 P 994.

Ky.—Tranter v. Hibbard, 108 Ky. 265, 56 SW 169, 21 KyL 1710; Phœnix Ins. Co. v. McKernan, 100 Ky. 97, 37 SW 490, 18 KyL 617; Singleton v. McQuerry, 85 Ky. 41, 2 SW 652, 8 KyL 710; Warren v. Fant, 79 Ky. 1; Blakey v. Johnson, 13 Bush 197, 26 AmR 254; Jones v. Shelbyville F., etc., Ins. Co., 1 Metc. 58; Shelton v. Deering, 10 B. Mon. 405; Commonwealth Bank v. McChord, 4 Dana 191, 29 AmD 398; Cotton v. Edwards, 2 Dana 106; Miles v. Major, 2 J. J. Marsh. 153; Rucker v. Howard, 2 Bibb 166; Mitchell v. Reed, 106 SW 833, 32 KyL 683.

La.—Louisiana State Bank v. Fuselier, 9 Rob. 26.

Me.—Lee v. Starbird, 55 Me. 491.

Md.—Owen v. Hall, 70 Md. 97, 16 A 376.

Mass.—Osgood v. Stevenson, 143 Mass. 399, 9 NE 825; Cape Ann Nat. Bank v. Burns, 129 Mass. 596; Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 AmR 67; Citizens' Nat. Bank v. Richmond, 121 Mass. 110; Draper v. Wood, 112 Mass. 315, 17 AmR 92; Stoddard v. Penniman, 108 Mass. 366, 11 AmR 363; Boston v. Benson, 12 Cush. 61; Chessman v. Whittemore, 23 Pick. 231; Warring v. Williams, 8 Pick. 322.

Mich.—Osborne v. Van Houten, 45 Mich. 444, 8 NW 77; Aldrich v. Smith, 37 Mich. 468, 26 AmR 536; Bradley v. Mann, 37 Mich. 1; Holmes v. Trumper, 22 Mich. 427, 7 AmR 661; Longwell v. Day, 1 Mich. N. P. 286.

Minn.—Bull Remedy Co. v. Clark, 109 Minn. 396, 124 NW 20, 32 LRANS 519 and note, 18 AnnCas 413 and note.

Miss.—Merchants', etc., Bank v. Dent, 102 Miss. 455, 59 S 805; Henderson v. Wilson, 6 How. 65; Love v. Shoape, Walk. 508.

Mo.—Koons v. St. Louis Car Co., 203 Mo. 227, 101 SW 49; Hord v. Taubman, 79 Mo. 101; Morrison v. Garth, 78 Mo. 434; Moore v. Hutchinson, 69 Mo. 429; Capital Bank v. Armstrong, 62 Mo. 59; Evans v. Foreman, 60 Mo. 449; Presbury v. Michael, 33 Mo. 542; Ivory v. Michael, 33 Mo. 398; Haskell v. Champion, 30 Mo. 136; King v. Hunt, 13 Mo. 97; Taylor v. Sartorious, 130 Mo. A. 23, 108 SW 1089; McMurtrey v. Sparks, 71 Mo. A. 126; Law v. Crawford, 67 Mo. A. 150.

Nebr.—Ball v. Beaumont, 66 Nebr. 56, 92 NW 170; Fisherdick v. Hutton, 44 Nebr. 122, 62 NW 488; Hurlbut v. Hall, 39 Nebr. 889, 58 NW 538; Walton Plow Co. v. Campbell, 35 Nebr. 173, 52 NW 883, 16 LRA 468; Townsend v. Star Wagon Co., 10 Nebr. 615, 7 NW 274, 35 AmR 493; Oliver v. Hawley, 5 Nebr. 439.

N. H.—Gerrish v. Glines, 56 N. H. 9; Burnham v. Ayer, 35 N. H. 351; Haines v. Dennett, 11 N. H. 180; Martendale v. Follett, 1 N. H. 95.

N. J.—Bodine v. Berg, 82 N. J. L. 662, 82 A 901, 40 LRANS 65, AnnCas 1913D 721 and note; Schmidt v. Quinzel, 55 N. J. Eq. 792, 38 A 665.

N. M.—Ruby v. Talbott, 5 N. M. 251, 21 P 72, 3 LRA 724 and note.

N. Y.—Stone v. Lord, 80 N. Y. 60; Colson v. Arnot, 57 N. Y. 253, 15 AmR 496; McGrath v. Clark, 56 N. Y. 34, 15 AmR 372; Booth v. Powers, 56 N. Y. 22; Benedict v. Cowden, 49 N. Y. 396, 10 AmR 382; Brownell v. Winnie, 29 N. Y. 400, 86 AmD 314; Bradford Nat. Bank v. Taylor, 75 Hun 297, 27 NYS 96; Pease v. Barnett, 27 Hun 378; Kennedy v. Crandell, 3 Lans. 1; Bruce v. Westcott, 3 Barb. 374; Mt. Morris Bank v. Lamson, 10 Misc. 359, 31 NYS 18; Flannagan v. National Union Bank, 2 NYS 488.

N. C.—Wicker v. Jones, 159 N. C. 102, 74 SE 801, 40 LRANS 69, AnnCas 1914B 1083; Perry v. Hackney, 142 N. C. 368, 55 SE 289, 115 AmSR 741, 9 AnnCas 244; Sharpe v. Bagwell, 16 N. C. 115; Nunnery v. Cotton, 8 N. C. 222.

N. D.—Porter v. Hardy, 10 N. D. 551, 88 NW 458; Decorah First Nat. Bank v. Laughlin, 4 N. D. 391, 61 NW 473.

Oh.—Newman v. King, 54 Oh. St. 273, 43 NE 683, 56 AmSR 705, 35 LRA 471; Davis v. Bauer, 41 Oh. St. 257; Jones v. Bangs, 40 Oh. St. 139, 48 AmR 664; Harsh v. Klepper, 28 Oh. St. 200; Wallace v. Jewell, 21 Oh. St. 163, 8 AmR 48; Huntington v. Finch, 3 Oh. St. 445; Williams v. Van Tuyl, 2 Oh. St. 336; Carlile v. Lamb, 16 Oh. Cir. Ct. 578; Hayes v. Dumont, 2 Oh. Cir. Ct. 229, 1 Oh. Cir. Dec. 458.

Okl.—Commonwealth Nat. Bank v. Baughman, 27 Okl. 175, 111 P 332; Farmers' Nat. Bank v. McCall, 25 Okl. 600, 106 P 866, 26 LRANS 217; Richardson v. Fellner, 9 Okl. 513, 60 P 270.

Or.—Cline v. Goodale, 23 Or. 406, 31 P 956.

Pa.—Shiffer v. Mosier, 225 Pa. 552, 74 A 426, 24 LRANS 1155 and note, 17 AnnCas 756 and note; Gettysburg Nat. Bank v. Chisolm, 169 Pa. 564, 32 A 730, 47 AmSR 929; Bensinger v. Wren, 100 Pa. St. 500; Neff v. Horner,

alteration;[24] in some jurisdictions this rule is, in effect, expressly prescribed by statute.[25]

As to bona fide holder. Not only will an alteration vitiate the instrument as between the immediate parties, but it will vitiate it even as against a bona fide holder without notice,[26] as the latter can acquire no right or title other than that of the person under whom he claims; and the application of this principle is not affected by the skillfulness with which the alteration is made, or the probability that the closest observer will fail to discover it.[27]

[§ 6] **3. Reasons for Rule.** The rule that a material alteration avoids the instrument is founded upon two reasons: (1) What is said to be the true foundation of the doctrine,[28] that no man shall be permitted, on grounds of public policy, to take the chance of committing a fraud without running any risk of loss by the event when it is detected;[29] and

63 Pa. 327, 3 AmR 555; Sputhwark Bank v. Gross, 35 Pa. 80; Getty v. Shearer, 20 Pa. 12; Kennedy v. Lancaster County Bank, 18 Pa. 347; Simpson v. Stackhouse, 9 Pa. 186, 49 AmD 554; Smith v. Weld, 2 Pa. 54; Williams Typewriter Co. v. Cleaver, 38 Pa. Super. 376; U. S. Bank v. Russel, 3 Yeates 391; Lancaster v. Barrett, 1 Pa. Super. 9, 37 WklyNC 251.

R. I.—Keene v. Weeks, 19 R. I. 309, 33 A 446; Manufacturers', etc., Bank v. Follett, 11 R. I. 92, 23 AmR 418.

S. C.—Powell v. Pearlstine, 43 S. C. 403, 21 SE 328; Plyler v. Elliott, 19 S. C. 257; Vaughan v. Fowler, 14 S. C. 355, 37 AmR 731; Mills v. Starr, 18 S. C. L. 359 (which was a change in a specialty by a party claiming under it); Burton v. Pressly, 15 S. C. Eq. 1.

S. D.—Rochford v. McGee, 16 S. D. 606, 609, 94 NW 695, 102 AmSR 719, 61 LRA 335 [cit Cyc].

Tenn.—Moss v. Maddux, 108 Tenn. 405, 409, 67 SW 855 [cit Cyc]; McDaniel v. Whitsett, 96 Tenn. 10, 33 SW 567; Taylor v. Taylor, 12 Lea 714; McVey v. Ely, 5 Lea 438; Morgan v. Cooper, 1 Head 430; Crockett v. Thomason, 5 Sneed 341; Organ v. Allison, 9 Baxt. 459.

Tex.—Baldwin v. Haskell Nat. Bank, 133 SW 864 [rev (Civ. A.) 124 SW 443, and mod on other grounds 134 SW 1178] (change of date from which interest was to run on bond); Bowser v. Cole, 74 Tex. 222, 11 SW 1131; Bogarth v. Breedlove, 39 Tex. 561; Park v. Glover, 23 Tex. 469; American Copying Co. v. Thompson, (Civ. A.) 110 SW 777; Matson v. Jarvis, (Civ. A.) 133 SW 941; Pope v. Taliaferro, 51 Tex. Civ. A. 217, 115 SW 309; Meade v. Sandidge, 9 Tex. Civ. A. 360, 30 SW 245; Heath v. State, 14 Tex. A. 213; Texas Printing, etc., Co. v. Smith, 4 Tex. A. Civ. Cas. § 4, 14 SW 1074; First Nat. Bank v. Pritchard, 2 Tex. A. Civ. Cas. § 130.

Utah.—American Pub. Co. v. Fisher, 10 Utah 147, 37 P 259.

Vt.—Barton Sav. Bank, etc., Co. v. Stephenson, 87 Vt. 433, 89 A 639, 51 LRANS 346 and note; Holden v. Rutland R. Co., 73 Vt. 317, 50 A 1096.

Va.—Consumers' Ice Co. v. Jennings, 100 Va. 719, 42 SE 879; Batchelder v. White, 80 Va. 103; Dobyns v. Rawley, 76 Va. 537; Newell v. Mayberry, 3 Leigh (30 Va.) 250, 23 AmD 261.

Wash.—Murray v. Peterson, 6 Wash. 418, 33 P 969.

W. Va.—Hershman v. Stafford, 58 W. Va. 459, 52 SE 533; Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 SE 515; Yeager v. Musgrave, 28 W. Va. 90.

Wis.—Kilkelly v. Martin, 34 Wis. 525; Matteson v. Ellsworth, 33 Wis. 488, 14 AmR 766; Low v. Merrill, 1 Pinn. 340.

Eng.—Lowe v. Fox, 12 App. Cas. 206; Suffell v. Bank of England, 9 Q. B. D. 555; Vance v. Lowther, 1 Ex. D. 176; Master v. Miller, Anstr. 225; Cowie v. Halsall, 4 B. & Ald. 197, 6 ECL 449, 106 Reprint 910; Mollett v. Wackerbarth, 5 C. B. 181, 57 ECL 181, 136 Reprint 845; Powell v. Divett, 15 East 29, 104 Reprint 755; Burchfield v. Moore, 3 E. & B. 683, 77 ECL 683. 25 EngL&Eq 123, 118 Reprint 1297; Long v. Moore, 3 Esp. 155 note; Macintosh v. Haydon, R. & M. 362, 21 ECL 767.

N. S.—People's Bank v. Wharton, 27 N. S. 67.

Ont.—Reid v. Humphrey, 6 Ont. A. 403; Swaisland v. Davidson, 3 Ont. 320; Westloh v. Brown, 43 U. C. Q. B. 402.

[a] **"Modern authority in England and in the United States** has further modified the doctrine until it is now generally agreed that when an alteration is established it avoids the instrument, if it is material; that the materiality of the alteration is a question to be decided by the court, without the aid of a jury; that any alteration is material if it affects the identity of the instrument or the rights and obligations of the parties to it, and that the question of the time when the alteration was made is a fact to be determined by the jury." Wicker v. Jones, 159 N. C. 102, 108, 74 SE 801, 40 LRANS 69, AnnCas 1914B 1083.

[b] **Broker's contract.**—Where brokers, without the consent of their customer, alter a written contract so as to give them a greater commission, the alteration renders the entire contract void. Harrison v. Lakenan, 189 Mo. 581, 88 SW 53.

[c] **The alteration of a note by the payee** thereof without the maker's consent avoids the note. Payne v. Long, 121 Ala. 385, 25 S 780; Commonwealth Nat. Bank v. Baughman, 27 Okl. 175, 111 P 332 (holding that the note is so avoided even in the hands of a bona fide holder, without notice of such alteration). See also Bills and Notes [7 Cyc 799; 8 Cyc 29].

[d] **The alteration of a deed of trust by the beneficiary** vitiates the deed. Powell v. Banks, 146 Mo. 620, 48 SW 664 (holding that a deed of trust drawn to secure, among other things, the note of B with his wife and S as sureties thereon, to be given in the place of a matured note by B with Y and S as sureties, is vitiated by the beneficiary, without authority, altering it to make it secure the latter note).

[e] **The alteration of a chattel mortgage by the mortgagee** or his authorized agents, pending a suit for the possession of the mortgaged chattel, renders the mortgage void. Gurley v. Bunch, 130 Mo. A. 665, 108 SW 1109.

[f] **In ascertaining whether an instrument was intended to operate as a deed or will,** words which do not change its legal effect and which are therefore considered as immaterial, supposing its character to have been established, may be necessary in ascertaining its character, and their alteration or erasure, although of no importance in the former point of view, will be material as to the latter. Thus: "I give and bequeath to A B my sorrel horse," signed, sealed, and delivered, is a testamentary instrument. Expunge the word "bequeath" and it becomes a deed of gift. Smith v. Eason, 49 N. C. 34, 40.

24. Van Buren Div., etc., R. Co. v. Lamphear, 54 Mich. 575, 20 NW 590 (holding that parties to a contract are not liable after it has been altered unless they have consented to the new subject matter in the same sense); Consumers' Ice Co. v. Jennings, 100 Va. 719, 42 SE 879. See also infra §§ 145-156.

25. See statutory provisions.

[a] **In Georgia** a rule which differs somewhat from the common-law rule is embodied in Civ. Code (1895) § 3702 which provides as follows: "If a written contract be altered intentionally, and in a material part thereof, by a person claiming a benefit under it, with intent to defraud the other party, such alteration voids the whole contract, at the option of the other party." See Bedgood-Howell Co. v. Moore, 123 Ga. 336, 51 SE 420.

[b] **In Oklahoma** under Comp. L. (1909) § 1141, the material alteration of a written contract intentionally made by a party entitled to benefit thereunder or with his consent extinguishes all executory obligations of the contract in his favor against all persons not consenting to the act. Farmers' Nat. Bank v. McCall, 25 Okl. 600, 106 P 866, 26 LRANS 217.

26. Cal.—Walsh v. Hunt, 120 Cal. 46, 52 P 115, 39 LRA 697.

Ind.—Citizens' Sav. Bank v. Halstead, 42 Ind. A. 79, 84 NE 1098.

N. D.—Porter v. Hardy, 10 N. D. 551, 555, 88 NW 458 [quot Cyc entire paragraph, as containing rule "well stated"].

Okl.—Commonwealth Nat. Bank v. Baughman, 27 Okl. 175, 111 P 332.

Pa.—Shiffer v. Mosier, 225 Pa. 552, 74 A 426, 24 LRANS 1155, 17 AnnCas 756 (holding that a material alteration avoids the contract not only as to the party making it but also as to an innocent transferee, such as a bona fide assignee who is not an indorsee).

S. C.—Central Nat. Bank v. Efird, 91 S. C. 135, 74 SE 136.

S. D.—Searles v. Seipp, 6 S. D. 472, 61 NW 804.

And see cases supra note 23.

See also Bills and Notes [8 Cyc 29].

[a] **Issue joined on defense of bona fide purchaser.**—In Winter v. Pool, 100 Ala. 503, 14 S 411, plaintiff replied to a plea of non est factum that he was a bona fide purchaser, and an issue was joined on this replication. Under this state of the pleadings it was held that whether or not there was a material alteration of the note by the payee after delivery to defeat a recovery was immaterial, that an instruction upon this point would have no application to the issue raised, and that whether the issue was material or not the judgment would be binding unless a repleader should be moved for, as the parties chose to go to trial upon that issue.

[b] **An order in writing by a retail druggist** directing a wholesale dealer to ship certain merchandise through any jobber or direct, and purporting to contain a bill of the goods with prices annexed, not being a negotiable instrument, in a suit thereon by the assignee, who was a jobber, for the price of the goods furnished by him, the defense of fraudulent alteration would avail against the assignee without notice, although the signer might have been negligent in leaving blanks in the instrument, whereby such alteration was made easy. Smith v. Holzhauer, 67 N. J. L. 202, 50 A 683.

27. Trigg v. Taylor, 27 Mo. 245, 72 AmD 263. See also Shiffer v. Mosier, 225 Pa. 552, 74 A 426, 24 LRANS 1155, 17 AnnCas 756. But see Cunnington v. Peterson, 29 Ont. 346 (not where alteration not apparent).

28. Getty v. Shearer, 20 Pa. 12 (where it was said to be a mistaken notion to suppose that the principle rests solely upon the rule in pleading that the instrument after the alteration is no longer the same, and is no longer the deed of the party so as to maintain the issue of non est factum).

29. Ala.—White v. Hass, 32 Ala. 430, 70 AmD 548.

Del.—Sudler v. Collins, 2 Houst. 538.

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(2) because the identity of the instrument is destroyed, and to hold the nonconsenting party under such circumstances would be to make for him a contract to which he never agreed.[30]

[§ 7] **4. Application to Particular Instruments—a. In General.** The rules with regard to the alteration of instruments were first applied to deeds, because anciently most transactions which were reduced to writing were evidenced by instruments under seal.[31] Afterward the law with regard to alterations was considered in connection with changes in written contracts generally, especially commercial paper,[32] and, leaving out of view the particular circumstances which will render a change vitiating, it may be stated that the rules are not now peculiar to deeds, but apply equally to deeds, bills and notes, and other writings containing the evidence of the parties' rights and contracts.[33] Thus the rule that a material alteration of a written instrument renders it invalid as against nonconsenting parties[34] applies to a tax bill,[35] single bill,[36] recognizance,[37] power of attorney,[38] building contract,[39] charter party,[40] bill of lading,[41] agreement between adjoining landowners for a private way,[42] or a petition for a road.[43]

Written assignments of contracts are also within the application of the rule,[44] but it has been said that the question of a material alteration in a

Ga.—McCauley v. Gordon, 64 Ga. 221, 37 AmR 68.
Me.—Chadwick v. Eastman, 53 Me. 12; Waterman v. Vose, 43 Me. 504.
Mass.—Lee v. Butler, 167 Mass. 426, 46 NE 52, 57 AmSR 466; Com. v. Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 AmD 126.
Miss.—Merchants', etc., Bank v. Dent, 102 Miss. 455, 457, 59 S 805 [quot Cyc]; Foote v. Hambrick, 70 Miss. 157, 11 S 567, 35 AmSR 631.
N. H.—Humphreys v. Guillow, 13 N. H. 385, 38 AmD 499.
N. J.—Hunt v. Gray, 35 N. J. L. 227, 10 AmR 232.
N. C.—Sharpe v. Bagwell, 16 N. C. 115.
Pa.—Gettysburg Nat. Bank v. Chisolm, 169 Pa. 564, 32 A 730, 47 AmSR 929; Neff v. Horner, 63 Pa. 327, 3 AmR 555; Getty v. Shearer, 20 Pa. 12.
Tenn.—Moss v. Maddux, 108 Tenn. 405, 67 SW 855; McDaniel v. Whitsett, 96 Tenn. 10, 33 SW 567; Crockett v. Thomason, 5 Sneed 342.
Vt.—Holden v. Rutland R. Co., 73 Vt. 317, 50 A 1096.
Va.—Newell v. Mayberry, 3 Leigh (30 Va.) 250, 23 AmD 261.
Eng.—Suffel v. Bank of England, 9 Q. B. D. 555, 3 ERC 640; Master v. Miller, 4 T. R. 320, 100 Reprint 1042, 2 ERC 669.

30. U. S.—Mersman v. Werges, 112 U. S. 139, 5 SCt 65, 28 L. ed. 641; Wood v. Steele, 6 Wall. 80, 18 L. ed. 725; Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189 [aff 17 F. Cas. No. 9,591, 4 Wash. C. C. 26].
Ark.—Inglish v. Breneman, 5 Ark. 377, 41 AmD 96.
Cal.—Walsh v. Hunt, 120 Cal. 46, 52 P 115, 39 LRA 697.
Del.—Sudler v. Collins, 2 Houst. 538.
Ga.—Broughton v. West, 8 Ga. 248.
Ind.—Brannum Lumber Co. v. Pickard, 33 Ind. A. 484, 71 NE 676.
Ind. T.—Taylor v. Acom, 1 Ind. T. 436, 45 SW 130.
Kan.—New York L. Ins. Co. v. Martindale, 75 Kan. 142, 88 P 559, 121 AmSR 362, 21 LRANS 1045, 12 Ann Cas 677.
Mass.—Lee v. Butler, 167 Mass. 426, 46 NE 52, 57 AmSR 466; Com. v. Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 AmD 126; Wade v. Withington, 1 Allen 561; Doane v. Eldridge, 16 Gray 254.
Mich.—Peo. v. Brown, 2 Dougl. 9.
Miss.—Merchants', etc., Bank v. Dent, 102 Miss. 455, 457, 59 S 805 [quot Cyc].
Mo.—McMurtrey v. Sparks, 71 Mo. A. 126.
N. Y.—Church v. Howard, 17 Hun 5 [rev on other grounds 79 N. Y. 415]; Mt. Morris Bank v. Lawson, 10 Misc. 359, 31 NYS 18 [rev 7 Misc. 228, 27 NYS 272]; Woodworth v. Bank of America, 19 Johns. 391, 10 AmD 239.
Oh.—Newman v. King, 54 Oh. St. 273, 43 NE 683, 56 AmSR 705, 35 LRA 471; Harsh v. Klepper, 28 Oh. St. 200; Bery v. Marietta, etc., R. Co., 26 Oh. St. 673; Patterson v. McNeeley, 16 Oh. St. 348.
S. C.—Sanders v. Bagwell, 32 S. C. 238, 10 SE 946, 7 LRA 743, 37 S. C. 145, 15 SE 714, 16 SE 770.
Tenn.—Moss v. Maddux, 108 Tenn. 405, 67 SW 855.
Va.—Batchelder v. White, 80 Va. 103; Dobyns v. Rawley, 76 Va. 537.
Wis.—Low v. Merrill, 1 Pinn. 340.
Eng.—Gardner v. Walsh, 5 E. & B. 83, 85 ECL 83, 119 Reprint 412.

[a] **"The principle does not rest on the hypothesis that fraud is an indispensable element** of the alteration—but proceeds as well on the necessity of preventing, as punishing of fraud." Per Brickell, C. J., in Toomer v. Rutland, 57 Ala. 379, 385, 29 AmR 722 [quot Brown v. Johnson, 127 Ala. 292, 294, 28 S 579, 85 AmSR 134, 51 LRA 403].

31. Master v. Miller, 4 T. R. 320, 100 Reprint 1042, 2 ERC 669; 1 Greenleaf Ev. § 565.

32. Master v. Miller, 4 T. R. 320, 100 Reprint 1042, 2 ERC 669 (extended the doctrine of Pigot's Case, 11 Coke 26b, 27a, 77 Reprint 1177, as regards material alterations to bills of exchange). See also infra § 8.

33. Ala.—Brown v. Jones, 3 Port. 420.
Conn.—Starr v. Lyon, 5 Conn. 538.
Ky.—Limestone Bank v. Penick, 5 T. B. Mon. 25.
Mass.—Boston v. Benson, 12 Cush. 61 (applicable to any simple contract in writing).
N. J.—Vanauken v. Hornbeck, 14 N. J. L. 178, 25 AmD 509.
N. Y.—Chappell v. Spencer, 23 Barb. 584.
Pa.—U. S. Bank v. Russel, 3 Yeates 391.
R. I.—Arnold v. Jones, 2 R. I. 345, 349 (where Halle, J., said: "There is no substantial reason why this rule should not be applied to notes and to all other written contracts as well as to deeds; for all such instruments are the evidence of the contracts between the parties and whatever alteration therefore changes the legal effect of the instrument makes it another and not the same contract, and it should no longer in law bind the party, because it is not the contract by which he agreed to be bound").
Va.—Newell v. Mayberry, 3 Leigh (30 Va.) 250, 23 AmD 261.
Eng.—Suffell v. Bank of England, 9 Q. B. D. 555, 3 ERC 640; Aldous v. Cornwell, L. R. 3 Q. B. 573; Mollett v. Wackerbarth, 5 C. B. 181, 57 ECL 181, 136 Reprint 845.

Application to: Bonds see infra §§ 64, 65; Deeds see infra §§ 24, 54, 75, 77; Leases see infra § 26; Mortgages see infra § 25.

34. See supra § 5.

35. German-American Bank v. Manning, 133 Mo. A. 294, 113 SW 251 (holding that an alteration of the description in a tax bill, made after delivery, prima facie nullifies the bill, although it describes the same lot described by the original words).

36. McKee v. Hicks, 13 N. C. 379; Marshall v. Gougler, 10 Serg. & R. (Pa.) 164.

37. Grant v. State, 8 Tex. A. 432.

38. Burwell v. Orr, 84 Ill. 465 (holding that the unauthorized material alteration of a power of attorney to confess judgment in a note made by the payee of the note avoids the instrument, and that a judgment entered by confession under it is also void).

39. Mockler v. St. Vincent's Inst., 87 Mo. A. 473 (holding that, in an action by a contractor against the owner of a building, an instruction that if the jury believed that interlineations were made in the specifications by the owner's architect at the contractor's solicitation after the specifications had been approved by the owner, and the architect and such contractor obtained the owner's signature to the contract without communicating the change, such conduct was fraudulent, and that the interlineations would not be binding, unless the owner learned of them and consented thereto, does not contravene the rule that parties to contracts are conclusively presumed to note their contents).

40. Pew v. Laughlin, 3 Fed. 39 (holding that the material alteration of a charter party, after it is signed, by one of the parties without the knowledge or consent of the other is fatal to its validity).

41. Lehman v. Central R., etc., Co., 12 Fed. 595.

[a] **Action in tort.**—Where an action brought against the owner of a vessel for not delivering goods pursuant to the bill of lading is founded on the breach of duty as a carrier, the fact that plaintiff made an alteration in the bill of lading is immaterial, since it cannot affect the question of the wrongful breach of duty. Benbury v. Hathaway, 28 N. C. 303.

42. Hershman v. Stafford, 58 W. Va. 459, 52 SE 533 (holding that where an agreement is prepared between adjoining landowners for a private way, and is signed by all but one of them, and in order to obtain the signature of that one another who signed the agreement procures it to be materially changed as to the route of the road through the lands of the party not signing the agreement, it is of no effect as to one who signed it, but did not know of, or consent to, the change).

43. Jewett v. Cornforth, 3 Me. 107.

[a] **Where a petition for a road is altered, after signature,** in a part not material nor affecting the general object sought by the petitioners, although without the knowledge of one of them, this one is not discharged from his liability to contribute to the expenses for which he would otherwise be liable; but he will be discharged if the alteration is material, so that the party is thereby injuriously affected or his expectations are defeated. Jewett v. Cornforth, 3 Me. 107; Jewett v. Hodgdon, 3 Me. 103; Patridge v. Ballard, 2 Me. 50; Irvin v. Susquehanna, etc., Turnpike Co., 2 Penr. & W. (Pa.) 466, 23 AmD 53.

44. Park v. Glover, 23 Tex. 469.

[a] **Assignment of bond.**—Where an assignment of a bond to convey land appears to have been materially altered after execution and registration, it is inadmissible in evidence to establish title in plaintiff. Park v. Glover, 23 Tex. 469.

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written assignment of a contract more nearly concerns the actual parties to the assignment than the parties to the contract.[45]

Instruments of merely evidential character, such as bills of sale and receipts, which serve only the purpose of standing evidence of a contract or transaction, are also within the application of the rule, although there is this distinction, that in the case of such instruments the question whether the contract as set forth in the writing is avoided by the falsification of the security does not arise, but the only question is as to the effect of the alteration on their evidential character.[46]

[§ 8] **b. Commercial Paper.**[47] With respect to the effect of material alterations of negotiable instruments, the same general rule is applicable as governs in the case of the unauthorized material alteration of other written contracts.[48] Such are the constant and essential uses to which negotiable instruments are put that it has been considered that even more dangerous consequences flow from a leniency toward alterations in bills and notes than in deeds.[49] Accordingly, as a general rule, a material alteration in any negotiable instrument by the promisee or holder, without the consent of the promisors, extinguishes all liability on the instrument as against the nonconsenting promisors;[50] but under the express provisions of the Negotiable Instruments Law a material alteration of a negotiable instrument does not destroy its validity as against a party who has himself made, or authorized, or assented to, the alteration, or as against a holder in due course.[51]

Promissory notes. The material alteration of a promissory note by any of the parties claiming thereunder discharges from liability thereon all the parties bound thereby who do not consent to or authorize the alteration.[52] Thus a material alter-

45. Minert v. Emerick, 6 Wis. 355.

46. Babb v. Clemson, 10 Serg. & R. (Pa.) 419, 13 AmD 684; Davis v. Loftin, 6 Tex. 489. See also infra §§ 28–32.

[a] **Bought and sold notes.**—(1) The principle is applicable to bought and sold notes. A material alteration in a sold note, made by the buyer without the knowledge or consent of the seller, prevents the former from suing on the contract, notwithstanding the duty of the latter may not be varied by the alteration. Mollett v. Wackerbarth, 5 C. B. 181, 57 ECL 181, 136 Reprint 845. (2) And a material alteration in a sold note by the broker, after the bargain had been made, at the instance of the seller, without the consent of the purchaser, was held to annul the instrument so as to preclude the seller from recovering upon the contract evidenced by the instrument so altered by him. Powell v. Divett, 15 East 29, 104 Reprint 755.

47. **Defense as against bona fide purchaser of bill or note** see Bills and Notes [8 Cyc 29].

48. Ind. T.—Taylor v. Acom, 1 Ind. T. 436, 45 SW 130.

Ky.—Letcher v. Bates, 6 J. J. Marsh. 524, 22 AmD 92; Johnson v. U. S. Bank, 2 B. Mon. 310.

N. J.—Vanauken v. Hornbeck, 14 N. J. L. 178, 25 AmD 509.

N. Y.—Meyer v. Huneke, 55 N. Y. 412.

Eng.—Gardner v. Walsh, 5 E. & B. 83, 85 ECL 83, 119 Reprint 412.

49. Davis v. Eppler, 38 Kan. 629, 633, 16 P 793 (where Holt, C., said: "We believe it would be a dangerous rule to allow written contracts, more especially negotiable paper, to be altered without the consent of the maker, or the parties who are bound by the indorsement. It is intended that such instruments shall pass into the hands of those who may become interested in them, without addition or alteration, and without the fear that they may have been altered. The facilities for making alterations are numerous, and the difficulty of proving them great; all means should be employed to impress a sense of their inviolability upon the minds of those who have them in their possession"). U. S. Bank v. Russel, 3 Yeates (Pa.) 391, 392 (where the court said: "More dangerous consequences would result from permitting alterations on bills and notes than on deeds, the former being more readily susceptible of alteration than the latter, to which the names of witnesses are uniformly subscribed").

50. U. S.—Wood v. Steele, 6 Wall. 80, 18 L. ed. 725.

Ill.—Hodge v. Gilman, 20 Ill. 437; Pankey v. Mitchell, 1 Ill. 383.

Ind.—Dietz v. Harder, 72 Ind. 208; Schnewind v. Hacket, 54 Ind. 248; Holland v. Hatch, 11 Ind. 497, 71 AmD 363.

Iowa.—Robinson v. Reed, 46 Iowa 219.

Ky.—Marion Nat. Bank v. Russel, 14 KyL 368.

Me.—Farmer v. Rand, 14 Me. 225.

Md.—Mitchell v. Ringgold, 3 Harr. & J. 159, 5 AmD 433.

Mass.—Wheelock v. Freeman, 13 Pick. 165, 23 AmD 674.

Miss.—Oakey v. Wilcox, 4 Miss. 330.

Mo.—Scotland County Nat. Bank v. O'Connel, 23 Mo. A. 165.

N. H.—Humphreys v. Guillow, 13 N. H. 385, 38 AmD 499.

N. C.—Davis v. Coleman, 29 N. C. 424.

Pa.—Neff v. Horner, 63 Pa. 327, 3 AmR 555; Struthers v. Kendall, 41 Pa. 214, 80 AmD 610; Miller v. Reed, 27 Pa. 244, 67 AmD 459, 3 Grant 51.

51. Bryan v. Harr, 21 App. (D. C.) 190; Mutual Loan Assoc. v. Lesser, 76 App. Div. 614, 78 NYS 629 (holding that, under the direct provisions of the Negotiable Instruments Law § 205, a negotiable instrument which has been materially altered may be enforced according to its original tenor, provided it is in the hands of a holder in due course, not a party to the alteration); Hoffman v. Planters' Nat. Bank, 99 Va. 480, 39 SE 134; Hecht v. Shenners, 126 Wis. 27, 105 NW 309. See also statutory provisions; and Bills and Notes.

[a] **Declaratory of law merchant.**—The Negotiable Instruments Law declaring the effect of material alterations and defining what shall constitute such alteration is merely declaratory of the law merchant, as it has long been recognized by the courts prior to the enactment of that statute. Diamond Distilleries Co. v. Gott, 137 Ky. 585, 126 SW 131, 31 LRANS 643.

[b] **Not retroactive.**—The Negotiable Instruments Law declaring that a materially altered note shall be valid in the hands of a holder in due course not connected with the alteration is inapplicable to an altered note transferred before the act took effect. Hecht v. Shenners, 126 Wis. 27, 105 NW 309.

[c] **An alteration in a note after it was signed by an indorser,** but before its delivery, by or with the consent of the agent of such indorser authorized to act for him in the transaction does not release him from liability. Luckenbach v. McDonald, 164 Fed. 296 [rev on other grounds 170 Fed. 434, 95 CCA 604].

52. U. S.—Sneed v. Sabinal Min., etc., Co., 73 Fed. 925, 20 CCA 230.

Ala.—Carroll v. Warren, 142 Ala. 397, 37 S 687; Montomery v. Crosthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140.

Ark.—Fordyce v. Kosminski, 49 Ark. 40, 3 SW 892, 4 AmSR 18; Overton v. Matthews, 35 Ark. 146, 37 AmR 9.

Del.—Warder, etc., Co. v. Stewart, 16 Del. 275, 36 A 88.

Ill.—Gillett v. Sweat, 6 Ill. 475; Pankey v. Mitchell, 1 Ill. 383; Soaps v. Eichberg, 42 Ill. A. 375.

Ind.—Nicholson v. Combs, 90 Ind. 515, 46 AmR 229; Dietz v. Harder, 72 Ind. 208; Collier v. Waugh, 64 Ind. 456; Cochran v. Nebeker, 48 Ind. 459; La Grange v. Coyle, 50 Ind. A. 140, 98 NE 75 (holding that alterations in an ordinary promissory note so as to provide that the ownership and possession of a horse for which the note was given shall remain in the seller until the note is paid are material and avoid the note); Casto v. Evinger, 17 Ind. A. 298, 46 NE 648; Light v. Killinger, 16 Ind. A. 102, 44 NE 760, 59 AmSR 313.

Kan.—Davis v. Eppler, 38 Kan. 629, 16 P 793.

Ky.—Mitchell v. Reed, 106 SW 833, 32 KyL 683; Elbert v. McClelland, 8 Bush 577; Duker v. Franz, 7 Bush 273, 3 AmR 314.

La.—Louisiana State Bank v. Fuselier, 9 Rob. 26.

Me.—Hewins v. Cargill, 67 Me. 554; Sheridan v. Carpenter, 61 Me. 83; Chadwick v. Eastman, 53 Me. 12; Waterman v. Vose, 43 Me. 504; Smith v. Frye, 14 Me. 457; Buck v. Appleton, 14 Me. 284; Farmer v. Rand, 14 Me. 225.

Mass.—Drum v. Drum, 132 Mass. 566; Cape Ann Nat. Bank v. Burns, 129 Mass. 596.

Mich.—Miller v. Finley, 26 Mich. 249, 12 AmR 306; Wait v. Pomeroy, 20 Mich. 425, 4 AmR 395.

Miss.—Henderson v. Wilson, 7 Miss. 65.

Mo.—Barnett v. Nolte, 55 Mo. A. 184.

Nebr.—Foxworthy v. Colby, 64 Nebr. 216, 89 NW 800, 62 LRA 393; Ball v. Beaumont, 63 Nebr. 215, 88 NW 173 [rev reh on other grounds 66 Nebr. 56, 92 NW 170]; Courcamp v. Weber, 39 Nebr. 533, 58 NW 187; Harnett v. Holdrege, 5 Nebr. (Unoff.) 114, 97 NW 443 [aff reh 73 Nebr. 570, 103 NW 277, 119 AmSR 905].

N. Y.—Meyer v. Huneke, 55 N. Y. 412; Church v. Howard, 17 Hun 5 [rev on another point in 79 N. Y. 415]; Kennedy v. Crandell, 3 Lans. 1; Woodworth v. Bank of America, 19 Johns. 391, 10 AmD 239; Nazro v. Fuller, 24 Wend. 374; Clute v. Small, 17 Wend. 238.

Oh.—Thompson v. Massie, 41 Oh. St. 307; Sturges v. Williams, 9 Oh. St. 443, 75 AmD 473.

Okl.—Albuquerque Bank of Commerce v. Dillon, 37 Okl. 109, 130 P 538.

Pa.—Citizens' Nat. Bank v. Williams, 174 Pa. 66, 34 A 303, 35 LRA 464 and note; Southwark Bank v. Gross, 35 Pa. 30.

S. C.—Central Nat. Bank v. Efird, 91 S. C. 135, 74 SE 136; White v. Harris, 69 S. C. 65, 48 SE 41, 104 AmSR 791; Sanders v. Bagwell, 37 S. C. 145.

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ation of a promissory note by the payee or at his instance, without the authority or consent of the maker, renders it wholly void as against the maker,[53] and his surety.[54]

Bills of exchange. The general rule also applies to bills of exchange,[55] and hence a material alteration of a bill of exchange after acceptance, and while in the hands of the payee, avoids the instrument, so that no action can afterward be brought upon it by the payee,[56] or by a transferee who has knowledge of the alteration.[57] So also a material alteration in the acceptance of a bill of exchange by the holder, without the knowledge or consent of the acceptor, discharges the latter from liability.[58]

The alteration of a check which varies its legal effect is a fraud in law, although no actual fraud is intended, and destroys the remedy against the drawer, drawee, and payee.[59]

[§ 9] **5. Extent of Vitiating Effect and Remedies—a. In General.** The general rule is that when the right of action depends upon the instrument an alteration works a destruction of it to such an extent that no rights can be asserted under or proved by it, and if there can be a recovery at all it must be upon other evidence.[60]

[§ 10] **b. No Right or Title Conferred.** An unauthorized change in an instrument, whether it is a mere spoliation or an alteration, will not deprive the party against whom it is made of any rights or confer upon any other person any title.[61]

[§ 11] **c. No Recovery on Altered or Original Terms of Instrument.** A materially altered instrument is so far vitiated that no recovery can be had either on its original or altered terms, as it cannot be considered as void for the unauthorized change and valid in other respects, but is void altogether,[62] ex-

15 SE 714, 16 SE 770; Sanders v. Bagwell, 32 S. C. 238, 10 SE 946, 7 LRA 743; Kennedy v. Moore, 17 S. C. 464.

S. D.—Searles v. Seipp, 6 S. D. 472, 61 NW 804.

Tenn.—Organ v. Allison, 9 Baxt. 459.

Tex.—Ford v. Cameron First Nat. Bank, (Civ. A.) 34 SW 684.

Wis.—Williams v. Starr, 5 Wis. 534.

Eng.—Fitch v. Jones, 5 E. & B. 238, 85 ECL 238, 119 Reprint 470.

[a] **An accommodation note** is invalidated by a subsequent material alteration thereof by an indorsee and holder, made without the knowledge or consent of the accommodation maker. Fraker v. Cullum, 21 Kan. 555.

53. Ala.—Houston v. Davis, 161 Ala. 122, 49 S 869; White v. Hass, 32 Ala. 430, 70 AmD 548.

Ark.—Lemay v. Williams, 32 Ark. 166.

Ill.—Pankey v. Mitchell, 1 Ill. 383.

Ind.—Nicholson v. Combs, 90 Ind. 515, 46 AmR 229; Shanks v. Albert, 47 Ind. 461; Bowers v. Briggs, 20 Ind. 139; Harper v. State, 7 Blackf. 61; Casto v. Evinger, 17 Ind. A. 298, 46 NE 648.

Me.—Lee v. Starbird, 55 Me. 491.

Mass.—Fay v. Smith, 1 Allen 477, 79 AmD 752.

Miss.—Oakey v. Wilcox, 3 How. 330.

N. Y.—Nazro v. Fuller, 24 Wend. 374.

Okl.—International Bank v. Mullen, 30 Okl. 547, 120 P 257, AnnCas1913C 180 and note.

Tex.—Adams v. Faircloth, (Civ. A.) 97 SW 507.

54. Hart v. Clouser, 30 Ind. 210; Kountz v. Hart, 17 Ind. 329; Locknane v. Emmerson, 11 Bush. (Ky.) 69. See also Principal and Surety [32 Cyc 177].

55. Fontaine v. Gunter, 31 Ala. 258; Mahaiwe Bank v. Douglass, 31 Conn. 170.

56. Alderson v. Langdale, 3 B. & Ad. 660, 23 ECL 291, 109 Reprint 241; Paton v. Winter, 1 Taunt. 420, 127 Reprint 896.

57. Mechanic's Bank v. Valley Packing Co., 4 Mo. A. 200 [aff 70 Mo. 643].

58. Todd v. Commonwealth Bank, 3 Bush (Ky.) 626.

59. Whitsett v. People's Nat. Bank, 138 Mo. A. 81, 119 SW 999 (holding that, where a check signed by a depositor in defendant bank for the amount of his deposit was drawn on another bank, defendant, by altering the check to read as drawn on defendant, after it had been indorsed by the holder, lost all rights under it against the depositor or the bank on which it was drawn, and whether its motive in making the alteration was honest was immaterial, it being a fraud in law); Dove v. Fansler, 132 Mo. A. 669, 112 SW 1009 (holding that where plaintiff accepted defendant's check with the words "in full to date" written thereon, and thereafter erased such words without defendant's consent before cashing the check, the words so erased should be construed most strongly against plaintiff, precluding a recovery for alleged preëxisting items of indebtedness as a matter of law).

60. Ala.—Alabama State Land Co. v. Thompson, 104 Ala. 570, 16 S 440, 53 AmSR 80.

D. C.—Towles v. Tanner, 21 App. 530.

Ga.—Low v. Argrove, 30 Ga. 129.

Ill.—Hayes v. Wagner, 89 Ill. A. 390.

Ind.—Monroe v. Paddock, 75 Ind. 422.

Md.—Merchants' Nat. Bank v. Baltimore, etc., Steamboat Co., 102 Md. 573, 63 A 108.

Mo.—Taylor v. Sartorius, 130 Mo. A. 23, 108 SW 1089.

Nebr.—Erickson v. Oakland First Nat. Bank, 44 Nebr. 622, 62 NW 1078, 48 AmSR 753, 28 LRA 577 (holding that, where a note is vitiated by reason of an alteration, equity has no jurisdiction to enjoin its collection, since the maker has a perfect remedy at law).

N. J.—Schmidt v. Quinzel, 55 N. J. Eq. 792, 38 A 665; York v. Jones, 43 N. J. L. 332.

N. Y.—Tillon v. Clinton, etc., Mut. Ins. Co., 7 Barb. 564; Waring v. Smith, 2 Barb. Ch. 119, 47 AmD 299.

Pa.—Babb v. Clemson, 10 Serg. & R. 419, 13 AmD 684.

S. C.—Edwards v. Sartor, 69 S. C. 540, 543, 48 SE 537 [cit Cyc].

Tex.—Park v. Glover, 23 Tex. 469. See also infra §§ 23–26.

Altered instruments as evidence see generally infra §§ 28–32.

[a] **In tort independently of contract.**—In an action of tort for not delivering cargo, the fact that plaintiff made an alteration in the bill of lading cannot affect the rights of the parties on the question of tort. The action is not on the contract, and plaintiff may recover independently of the bill of lading. Benbury v. Hathaway, 28 N. C. 303.

61. Ala.—Burgess v. Blake, 128 Ala. 105, 28 S 963, 86 AmSR 78 and note; Hollis v. Harris, 96 Ala. 288, 11 S 377.

D. C.—Peugh v. Mitchell, 3 App. 321.

Ida.—Lane v. Pacific, etc., R. Co., 8 Ida. 230, 67 P 656 (holding that he may enforce the contract as originally made notwithstanding he may rescind if he chooses).

Ind.—John v. Hatfield, 84 Ind. 75; Fletcher v. Mansur, 5 Ind. 267.

Mo.—Holladay-Klotz Land, etc., Co. v. Tie Co., 89 Mo. A. 556.

Nebr.—Pereau v. Frederick, 17 Nebr. 117, 22 NW 235.

N. J.—Havens v. Osborn, 36 N. J. Eq. 426.

S. D.—Sommer v. Miller, 32 S. D. 133, 134, 142 NW 174 [quot Cyc].

62. U. S.—Sneed v. Sabinal Min., etc., Co., 73 Fed. 925, 20 CCA 230 (holding that all remedy on an altered instrument is gone notwithstanding the statute of limitation has run against the original cause of action).

Ala.—Green v. Sneed, 101 Ala. 205, 13 S 277, 46 AmSR 119.

D. C.—Ofenstein v. Bryan, 20 App. 1.

Ill.—Hayes v. Wagner, 220 Ill. 256, 77 NE 211 [aff 113 Ill. A. 299].

Ind.—Dietz v. Harder, 72 Ind. 208; Schnewind v. Hacket, 54 Ind. 248; Holland v. Hatch, 11 Ind. 497, 71 AmD 363; Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413. Compare Jones v. Julian, 12 Ind. 274.

Iowa.—Murray v. Graham, 29 Iowa 520.

Ky.—Phoenix Ins. Co. v. McKernan, 100 Ky. 97, 37 SW 490, 18 KyL 617; Locknane v. Emmerson, 11 Bush 69.

Me.—Lee v. Starbird, 55 Me. 491.

Mass.—Fay v. Smith, 1 Allen 477, 79 AmD 752.

Mo.—Cooper Wagon, etc., Co. v. Wooldridge, 98 Mo. A. 648, 73 SW 724.

N. Y.—Flannagan v. National Union Bank, 2 NYS 488.

Oh.—Thompson v. Massie, 41 Oh. St. 307; Harsh v. Klepper, 28 Oh. St. 200. But see McAlpin v. Clark, 11 Oh. Cir. Ct. 524.

Okl.—Commerce of Bank v. Dillon, 37 Okl. 109, 111, 130 P 538 [cit Cyc].

Pa.—Shiffer v. Mosier, 225 Pa. 552, 558, 74 A 426, 24 LRANS 1155, 17 AnnCas 756 [quot Cyc]; Citizens Nat. Bank v. Williams, 174 Pa. 66, 34 A 303, 35 LRA 464 [dist Kountz v. Kennedy, 63 Pa. 187, 3 AmR 541, which seems to be contrary to the text in that the decision was put upon the express ground that the alteration in the first instance was made with perfect innocence and in order to make the contract as it was intended to be, and was quickly restored without the slightest evidence of fraud, and pointing out that the case was not free from doubt, was very close, and was undoubtedly decided on its own peculiar circumstances, as indicated in Fulmer v. Seitz, 68 Pa. 237, 8 AmR 172]; Gettysburg Nat. Bank v. Chisolm, 169 Pa. 564, 32 A 730, 47 AmSR 929; Neff v. Horner, 63 Pa. 327, 3 AmR 555 [dist Worrall v. Green, 39 Pa. 388, which was considered as involving exceptional circumstances]; Arrison v. Harmstead, 2 Pa. 191.

Tenn.—Crockett v. Thomason, 5 Sneed 341.

Tex.—Bowser v. Cole, 74 Tex. 222, 11 SW 1131; Park v. Glover, 23 Tex. 469; Adams v. Faircloth, (Civ. A.) 97 SW 507.

Va.—Newell v. Mayberry, 3 Leigh 250, 23 AmD 261.

W. Va.—Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 SE 515.

Eng.—Powell v. Divett, 15 East 29, 104 Reprint 755; French v. Patton, 9 East 351, 103 Reprint 606 (under the policy of the Stamp Act); Gardner

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cept in so far as the rule has been changed by statute.[63] But this rule applies only to cases where the alteration is made by the payee or party seeking to enforce the instrument, and not where it is made by another, without such payee's or party's authority or consent.[64]

The reason of this rule, so far as it prevents a recovery on the writing as it read before the alteration, is to discountenance the tampering with written instruments.[65]

[§ 12] **d. Restoration of Instrument—(1) General Rule.**[66] As a general rule where an instrument has been altered in a material respect the vitiating effect of the alteration upon the instrument as against nonconsenting parties cannot be obviated by afterward attempting to restore the instrument to its original form, as by erasing words unauthorizedly inserted,[67] especially after an attempt to recover upon the instrument in its altered form.[68] This rule seems especially applicable in favor of one who is subject to no liability but that created by the instrument.[69] It has been held that the rule should not be applied as against an innocent purchaser for value.[70]

[§ 13] **(2) Exceptions to Rule.** There are exceptions to the foregoing rule, however. Thus, where the instrument is changed and afterward restored, both before delivery, especially when it is in the hands of one having authority to deliver only,[71] and the change is made innocently,[72] or is one which would

v. Walsh, 5 E. & B. 83, 85 ECL 83, 119 Reprint 412.

[a] **Where a verbal contract is merged in a new contract in writing**, a material alteration of the latter will prevent a resort to the original contract. Newell v. Mayberry, 3 Leigh (30 Va.) 250, 23 AmD 261.

63. See statutory provisions.

[a] **In Georgia**, under Civ. Code § 3702, an alteration made without fraudulent intent does not prevent a recovery on the instrument in accordance with its original tenor, if the contract as originally executed can be discovered and is still capable of execution. Miller v. Slade, 116 Ga. 772, 43 SE 69; Burch v. Pope, 114 Ga. 334, 40 SE 227; Hotel Lanier Co. v. Johnson, 103 Ga. 604, 30 SE 558; Lowry v. McLain, 75 Ga. 372; Morgan v. Nashville Grain Co., 12 Ga. A. 574, 77 SE 913 (holding that, under Civ. Code [1910] § 4296, where a suit is brought on a contract in an altered form, a recovery may be had on proof of its original form, if the evidence shows that the alteration was immaterial or unintentional, or without intent to defraud).

[b] **In Massachusetts**, under Rev. L. c 73 § 141, where a negotiable instrument has been materially altered while in the hands of the holder in due course, and he is not a party to the alteration, he may enforce payment thereof according to its original tenor. Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 NE 959. See also Bills and Notes.

64. Walsh v. Hunt, 120 Cal. 46, 52 P 115, 39 LRA 697; Lane v. Pacific, etc., R. Co., 8 Ida. 230, 67 P 656; Waterous Engine Works v. McLean, 2 Man. 279. See also cases supra note 62. And see supra § 10.

Changes by stranger to instrument see generally infra §§ 104-107.

Effect as dependent upon by whom made see infra §§ 101-107.

65. Ala.—Toomer v. Rutland, 57 Ala. 379, 29 AmR 722.

Ind.—Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413.

Kan.—Davis v. Eppler, 38 Kan. 629, 16 P 793.

Me.—Waterman v. Vose, 43 Me. 504.

Miss.—Foote v. Hambrick, 70 Miss. 157, 11 S 567, 35 AmSR 631.

Mo.—McMurtrey v. Sparks, 71 Mo. A. 126.

S. C.—Mills v. Starr, 18 S. C. L. 359 (where it was said that the object of the rule is to prevent fraud).

Tenn.—Moss v. Maddux, 108 Tenn. 405, 67 SW 855.

W. Va.—Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 SE 515.

[a] **"To prevent and punish such tampering**, (1) the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument, as to the party sought to be wronged." Per Swayne, J., in Wood v. Steele, 6 Wall. (U. S.) 80, 82, 18 L. ed. 725. (2) The policy of the general rule of the law that an unauthorized material alteration of a written instrument by the holder, or with his consent, vitiates it as to nonconsenting parties is "to preserve the integrity of legal instruments by taking away the temptation of tampering with them." Per White, J., in Wallace v. Jewell, 21 Oh. St. 163, 172, 8 AmR 48.

66. Equitable relief see infra § 19.

Restoration of instrument immaterially altered see infra § 13.

67. Del.—Warpole v. Ellison, 9 Del. 322.

Ill.—Snell v. Davis, 149 Ill. A. 391; Hayes v. Wagner, 89 Ill. A. 390.

Ind.—Schnewind v. Hacket, 54 Ind. 248.

Iowa.—Shepard v. Whetstone, 51 Iowa 457, 1 NW 753, 33 AmR 143.

Ky.—Locknane v. Emmerson, 11 Bush 69 (holding that, where the principal on a note, after its execution, altered it by inserting a provision for legal interest, without the consent of the surety, such alteration discharged the surety, and the note was not restored to vitality, although the alteration was subsequently erased without his knowledge); Cotton v. Edwards, 2 Dana 106.

Mass.—Citizens' Nat. Bank v. Richmond, 121 Mass. 110.

Mo.—McMurtrey v. Sparks, 71 Mo. A. 126.

N. M.—Ruby v. Talbott, 5 N. M. 251, 21 P 72, 3 LRA 724.

Oh.—McAlpin v. Clark, 11 Oh. Cir. Ct. 524, 5 Oh. Cir. Dec. 364 (holding that the restoration of a note to its original form after it has been materially altered without any fraudulent intent does not have the effect of restoring its validity).

Pa.—Shiffer v. Mosier, 225 Pa. 552, 558, 74 A 426, 24 LRANS 1155, 17 Ann Cas 756 [quot Cyc]; Citizens Nat. Bank v. Williams, 174 Pa. 66, 34 A 303, 35 LRA 464 and note; Fulmer v. Seitz, 68 Pa. 237, 8 AmR 172 [dist Kountz v. Kennedy, 63 Pa. 187, 3 AmR 511].

S. C.—Plyler v. Elliott, 19 S. C. 257.

Tenn.—McDaniel v. Whitsett, 96 Tenn. 10, 33 SW 567; Crockett v. Thomason, 5 Sneed 341.

Ont.—Banque Provinciale v. Arnoldi, 2 Ont. L. 624.

68. Shiffer v. Mosier, 225 Pa. 552, 74 A 426, 24 LRANS 1155, 17 AnnCas 756.

[a] **No locus pœnitentiæ.**—"One who makes a voluntary and unauthorized alteration of a written contract, and insists upon it by going to trial to recover upon the altered state of the instrument, has no locus pœnitentiæ, which, on his failure to establish his right to recover, will enable him to undo the wrong at the trial, and to stand as one who has made an innocent mistake, and never has insisted upon his right to enforce it." Per Agnew, J., in Fulmer v. Seitz, 68 Pa. 237, 242, 8 AmR 172.

69. Robinson v. Reed, 46 Iowa 219; Citizens' Nat. Bank v. Richmond, 121 Mass. 110; Shiffer v. Mosier, 225 Pa. 552, 74 A 426, 24 LRANS 1155, 17 AnnCas 756.

70. Shepard v. Whetstone, 51 Iowa 457, 458, 1 NW 753, 33 AmR 143 (where Adams, J., said: "The question presented is as to whether the fact that the words constituting the alteration were erased, and the note transferred to the plaintiff is sufficient to enable him to recover notwithstanding the alteration. Where the note is restored, as in this case, to its original form it expresses the precise contract which the parties entered into, and the objection, if any, to enforcing such contract must rest upon grounds of public policy, and not upon the necessity of protecting the maker in the individual case. That there is upon grounds of public policy a valid objection to enforcing, under some circumstances, a contract which has been altered, notwithstanding its restoration, seems to be well settled. This is so where the alteration was made with intent to defraud, and the instrument remains in the hands of the person making the alteration. Perhaps, indeed, it should be so held in the absence of any intent to defraud. Hall v. McHenry, 19 Iowa 521, 87 AmD 451. See, however, 2 Parsons on Notes and Bills, 270. But conceding that the importance of discouraging the alteration of instruments is such that a court is justified in declaring invalid an instrument which has been altered, and which remains in the hands of the person who made the alteration, notwithstanding the restoration of the instrument, it is evident that it should not be held invalid in the hands of an innocent purchaser for value. The punishment of an innocent person for an act done by another has no tendency to subserve the public interest or promote the public security").

Rights of bona fide holders of negotiable instruments see Bills and Notes [7 Cyc 924].

71. Osborne v. Andrees, 37 Kan. 301, 15 P 153 (holding that, where a note and mortgage assigned by husband and wife were altered in a material part by the husband before delivery to the mortgagee, and the latter, upon discovering the alteration, objected to it, whereupon the husband restored the instruments to their original form, in which shape they were delivered to the mortgagee, the alteration and restoration did not vitiate the instruments).

Effect as dependent on time of making see infra §§ 90-95.

72. Horst v. Wagner, 43 Iowa 373, 22 AmR 255 (holding that where the payee of a note, desiring to transfer it and being ignorant of the appropriate method, erased his own name and inserted that of the transferee, but afterward, and before delivery, restored the instrument to its original form and transferred it by indorsement, the maker was not discharged and the indorsee was permitted to recover). See also Busjahn v. McLean, 3 Ind. A. 281, 29 NE 494 (holding that a surety would not be released, in a court having both law and equity powers, on account of a change by the maker at the request of the payee of a note, by raising the amount thereof to make it conform to the real intention of the parties, as the court

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perhaps not vitiate the instrument in the first instance,[73] as where it is made by a stranger,[74] it is held that the instrument is not destroyed.

Innocent alterations. It has also been held that the validity of an instrument, innocently altered through ignorance or mistake, may be revived by the restoration of it to its original form, where the rights of third persons have not intervened so as to be injuriously affected thereby.[75]

[§ 14] **e. Effect as to Original Consideration—(1) In General.** It has been considered in some cases that where a party by his own act alters an instrument so that it cannot be the foundation of any legal remedy, he will not be permitted to prove the promise contained in it by any other evidence, and this principle prevents, on the ground of presumptive fraud, a resort to the common counts or a recovery on the original consideration.[76] This rule has been held to apply irrespective of actual fraud, on the ground that the debt is merged in the instrument, and hence the destruction of the latter leaves nothing upon which to sue.[77] The common counts are not available where the relation of the parties is not such as to imply any such liability.[78] And where a writing constitutes in itself the only obligation existing against the promisor, all remedies thereon are lost by its material alteration,[79] as in the case of a surety.[80]

[§ 15] **(2) Debt Not Extinguished in the Absence of Fraud—(a) In General.** Where a written instrument is not a satisfaction or extinguishment of the debt for which it is given, an alteration of the instrument without any fraudulent intention as a general rule, avoids the instrument only, and the promisee may still recover upon the original indebtedness,[81] as where the alteration was inno-

would have power to reform the instrument and give judgment upon it as corrected).

Effect of alteration as dependent upon intention see infra §§ 96–100.

73. Acme Harvester Co. v. Butterfield, 12 S. D. 91, 80 NW 170 (which was the erasure of an unauthorized change in a note by the payee's clerk).

74. Deering Harvester Co. v. White, 110 Tenn. 132, 72 SW 962 (holding that where a stranger altered an order for a harvesting machine it could be restored to its original form and recovery had thereon).

Effect of alterations by strangers see infra §§ 104–107.

[a] **Where the draftsman of a note,** after it has been executed and while it is yet in his possession, makes a material alteration therein, without the knowledge or consent of either party, to make the note conform to what he understands to be their intention, and, upon objection being made to the alteration, he restores the note to its original form, the alteration being the act of a stranger, its validity is not destroyed, and it may be sued upon in its original form. Collins v. Makepeace, 13 Ind. 448.

75. Rogers v. Shaw, 59 Cal. 260; James v. Tilton, 183 Mass. 275, 67 NE 326; Skelton v. Tillman, (Tex.) 20 SW 71 (holding that where the payee of a note in good faith adds to his name therein "& Bro.," thinking that a proper way of transferring the note to a firm consisting of himself and his brother, and later restores the note to its original form, such alteration is not prejudicial to the rights of any person, and does not preclude a recovery on the note in its original form). See also Kountz v. Kennedy, 63 Pa. 187, 3 AmR 541 (holding that if the alteration of a note, etc., is made fraudulently or with an illegal intent, or the original words cannot be certainly restored, or any party has become interested in it or affected by it or related to it since the alteration so that the alteration will do him wrong, the party making the alteration must abide by it and its consequences; otherwise he may restore the note to its original form and force).

[a] **Alteration made under mistake of fact.**—On the first trial of a case, the attorney for plaintiff added over the signature of the indorser these words, "And for value received I guarantee the payment of the within note." This addition was made in open court after the introduction of proof supposed to be sufficient to show an intention to guarantee the note, and was supposed by counsel, and also by the court, to be authorized. Subsequently the conclusion was reached that such a view of the matter was erroneous, and the added words were stricken out of the indorsement, leaving it precisely as it was at first. On a second trial of the cause, it was contended that the alteration and restoration vitiated the note, but the court held that, the alteration having been made under mistake of fact, it did not vitiate the note, and that it might be sued on in its original form. Newton v. Bramlett, 55 Ill. A. 661.

Effect of alterations as dependent upon intention with which they are made see infra §§ 96–100.

76. Toomer v. Rutland, 57 Ala. 379, 29 AmR 722; Glover v. Robbins, 49 Ala. 219, 20 AmR 272; White v. Hass, 32 Ala. 430, 70 AmD 548; Whitmer v. Frye, 10 Mo. 348; Bigelow v. Stilphen, 35 Vt. 521; Carey Mfg. Co. v. Watson, 58 W. Va. 189, 196, 52 SE 515 [quot Cyc]. See also supra § 11.

[a] **The reason for this rule** has been said to be "the necessity of guarding against and punishing all tampering with the instrument the parties have entered into, and made the sole memorial and exposition of their contract." Toomer v. Rutland, 57 Ala. 379, 385, 29 AmR 722. To same effect White v. Hass, 32 Ala. 430, 70 AmD 548. "The forfeiture of the debt is one of the penalties that the law imposes upon the party who alters or tampers with the written evidence which he holds of his claim. The rule is based on considerations of policy, the object being to deter the holders of written instruments from attempting to commit frauds upon the signers, by altering them." Bigelow v. Stilphen, 35 Vt. 521, 525.

77. Wheelock v. Freeman, 13 Pick. (Mass.) 165, 23 AmD 674.

78. Gladstone v. Dew, 9 U. C. C. P. 439; Samson v. Yager, 4 U. C. Q. B. O. S. 3 (holding that where a note originally joint was altered to a joint and several note without the consent of one of the makers, who was afterward sued alone upon the note by an indorser, plaintiff could not recover on the note because of the alteration, or on the money counts because there was no privity between the maker and himself).

[a] **Indorser.**—Where a note is avoided as against an indorser by reason of a material alteration there can be no recovery against him on the common counts, because the liability of an indorser does not imply any further liability than that springing from the indorsement by reason of the money that was advanced upon the note. Lewis v. Shepherd, 1 Mackey (D. C.) 46. See also Burchfield v. Moore, 3 E. & B. 683, 77 ECL 683, 25 EngL&Eq 123, 118 Reprint 1297.

[b] **Assignee.**—(1) Where the payee assigns an altered note the assignment transfers to the assignee the assignor's rights to the original consideration. State Sav. Bank v. Shaffer, 9 Nebr. 1, 1 NW 980, 31 AmR 394. But see Cason v. Wallace, 4 Bush (Ky.) 388. (2) But where the original consideration of a note, with which a power of attorney was executed for the purpose of confessing judgment, was money loaned, in a suit by an innocent holder against the maker, his declaring the note and power of attorney vitiated by a material alteration, and therefore the judgment void, does not necessarily extinguish the liability for the borrowed money, and, even if the liability exists, it is to the lender of the money, and not to his assignee, and the relation of the assignee with the matter of the borrowing can be tried only in an action in which the lender is a party. Burwell v. Orr, 84 Ill. 465.

79. Tate v. Fletcher, 77 Ind. 102; Crawford v. West Side Bank, 100 N. Y. 58, 2 NE 881, 53 AmR 152; Ledford v. Vandyke, 44 N. C. 480 (holding that where a guardian settled with his ward by giving a bond for the sum found due, which was afterward rendered void by an alteration, the ward cannot recover on the guardian's bond); State v. Cordon, 30 N. C. 179.

[a] **In the case of a bond,** if there is no precedent liability, then the bond creates the only liability that ever existed, and, that being avoided by a material alteration, there is no original consideration to fall back upon, and therefore there can be no recovery. Whitmer v. Frye, 10 Mo. 348.

80. Miller v. Stark, 148 Pa. 164, 23 A 1058; Moss v. Maddux, 108 Tenn. 405, 67 SW 855. See also Principal and Surety [32 Cyc 177].

[a] **An acceptor** of a bill (1) is liable only by virtue of the instrument, and if that is vitiated by an alteration after acceptance his liability is at an end. Long v. Moore, 3 Esp. 155 note. (2) But an alteration will not, of itself, release an acceptor from the claims of the holders against him, on the common counts, for money received and retained by him, knowing it to have been the proceeds of the draft. Lewis v. Kramer, 3 Md. 265. (3) And as between the drawer and acceptor, although the bill is vitiated by the alteration, yet, as it is still in the drawer's hands, he may recover on the original consideration. Atkinson v. Hawdon, 2 A. & E. 628, 29 ECL 293, 111 Reprint 242.

[b] **"The motive with which the alteration is made** does not change its effect. The alteration, without the authority or acquiescence of the surety, overturns the contract as to him; and the party so making the alteration cannot fall back upon the original contract, because that is destroyed by the alteration." Glover v. Robbins, 49 Ala. 219, 221, 20 AmR 272.

81. Del.—Warren v. Layton, 3 Del. 404 (holding that, if a note given for money loaned is altered so that recovery thereon cannot be had, plaintiff may recover on the common counts the money actually loaned).

Ga.—Hotel Lanier Co. v. Johnson, 103 Ga. 604, 30 SE 558; Gwin v. Anderson, 91 Ga. 827, 18 SE 43; Morgan v.

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cently made under a mistaken belief of right and for the purpose of making the writing conform to the real intention of the parties.[82] This principle is applied to make a mortgage available, although the note which it secures has been destroyed by an alteration,[83] or to permit a recovery upon an unaltered copy of a contract in duplicate, although the other copy has been altered.[84]

Notes. Thus where a note is given for a precedent indebtedness which is not extinguished by, but exists independently of, the note, and the payee innocently makes a material alteration therein, although the note itself is thereby avoided, there may nevertheless be a recovery by the payee against the maker on the original indebtedness.[85]

Bill of exchange. So also if a material alteration in a bill of exchange is made in good faith by the drawer after acceptance, it will not prevent a recovery by him against the acceptor, on the original consideration,[86] unless it was taken in satisfaction of the debt.[87]

[§ 16] **(b) Production of Note.** In order to recover upon the original indebtedness, after the destruction of a note by an alteration, the note must be produced and surrendered,[88] or it must be shown to have been lost.[89]

[§ 17] **(3) Fraudulent Alteration—(a) In General.** The rule permitting a resort to the original

Nashville Grain Co., 12 Ga. A. 574, 77 SE 913.

Ill.—Hayes v. Wagner, 220 Ill. 256, 259, 77 NE 211 [cit Cyc] (holding that alterations innocently made in a written contract by a party thereto do not destroy the right to recover on the obligation which the writing evidences); Hayes v. Wagner, 89 Ill. A. 390; Yost v. Minneapolis Harvester Works, 41 Ill. A. 556.

Ind. T.—Hampton v. Mayes, 3 Ind. T. 65, 53 SW 483.

Iowa.—Sullivan v. Rudisill, 63 Iowa 158, 18 NW 856.

Ky.—Jeffers v. Simpson, 11 KyL 328.

Md.—Morrison v. Welty, 18 Md. 169; Lewis v. Kramer, 3 Md. 265.

Mass.—Jeffrey v. Rosenfeld, 179 Mass. 506, 61 NE 49. But see Wheelock v. Freeman, 13 Pick. 165, 23 AmD 674.

Mich.—Johnson v. Johnson, 66 Mich. 525, 33 NW 413 (holding that an account stated, which is the foundation of the note altered without fraud, will form a new basis of indebtedness, and, if this is all that the court allows, it is a good basis for a recovery).

Minn.—Wilson v. Hayes, 40 Minn. 531, 42 NW 467, 12 AmSR 754, 4 LRA 196.

Mo.—Boulware v. State Bank, 12 Mo. 542 (holding that, where a note executed to a bank is canceled by the cashier by mistake, this will not affect the right of the bank to recover on the original indebtedness).

Nebr.—St. Joseph State Sav. Bank v. Shaffer, 9 Nebr. 1, 1 NW 980, 31 AmR 394.

N. J.—Hunt v. Gray, 35 N. J. L. 227, 10 AmR 232; Lewis v. Schenck, 18 N. J. Eq. 459, 90 AmD 631.

N. Y.—Meyer v. Huneke, 55 N. Y. 412; Trow v. Glen Cove Starch Co., 1 Daly 280.

Oh.—Merrick v. Boury, 4 Oh. St. 60.

Or.—Savage v. Savage, 36 Or. 268, 59 P 461.

Pa.—Miller v. Stark, 148 Pa. 164, 23 A 1058.

R. I.—Keene v. Weeks, 19 R. I. 309, 33 A 446.

S. D.—Wyckoff v. Johnson, 2 S. D. 91, 48 NW 837.

Tex.—Otto v. Halff, (Civ. A.) 32 SW 1052.

Wis.—Gorden v. Robertson, 48 Wis. 493, 4 NW 579; Matteson v. Ellsworth, 33 Wis. 488, 14 AmSR 766.

Eng.—Atkinson v. Hawdon, 2 A. & E. 628, 29 ECL 293, 111 Reprint 242 [dist Alderson v. Langdale, 3 B. & Ad. 660, 23 ECL 291, 109 Reprint 241, in that there defendant was the drawer, and plaintiff, who had altered the bill, was an indorsee, and by such alteration had deprived the drawer of his remedy against the acceptor and could not therefore sue the drawer upon the original consideration]; Sloman v. Cox, 1 C. M. & R. 471 (holding that where a party was liable as the drawer of a bill, and in a suit upon that bill attempted to prove payment by showing a cash payment of a part of the amount and the drawing of another bill for the balance, and the latter bill turned out to have been altered by the acceptor in a material respect so that it was vitiated, defendant remained liable upon the first bill).

"If an alteration is innocently made, without fraudulent intent, it destroys the instrument by changing it into one to which the parties never agreed. But if there is an original debt or obligation which was not satisfied or extinguished by the instrument, a recovery can be had in such a case on such original debt or obligation." Per Cartwright, C. J., in Hayes v. Wagner, 220 Ill. 256, 259, 77 NE 211.

[a] **"There is a strong current of authority** . . . which holds to the doctrine that while an alteration, though material and unauthorized, which was innocently and honestly made, and without any fraudulent or improper motive, avoids the note, nevertheless an action will lie upon the original indebtedness if it is independent of the note, and has not been discharged by its execution." Per Wolverton, J., in Wallace v. Tice, 32 Or. 283, 287, 51 P 733.

[b] **Merger.**—Although money is loaned and a note given therefor at the same time, the loan is not merged in the note so as to prevent recovery on the debt in case of innocent alteration of the note, avoiding it. Savage v. Savage, 36 Or. 268, 59 P 461.

[c] **The material alteration of the date of a written authority,** given by one person to another to draw a draft upon him, will discharge him from liability as acceptor under such authority, but the alteration will not of itself release him on the common counts for money received and retained by him knowing it to have been the proceeds of the draft. Lewis v. Kramer, 3 Md. 265.

82. Murray v. Graham, 29 Iowa 520; Lewis v. Schenck, 18 N. J. Eq. 459, 90 AmD 631; Clute v. Small, 17 Wend. (N. Y.) 238; Baldwin v. Haskell Nat. Bank, (Tex.) 133 SW 864; Otto v. Halff, 89 Tex. 384, 34 SW 910, 59 AmSR 56.

[a] **Where a debtor certifies a balance as owing him,** and then draws a note stating the amount in figures in the margin but inserting an amount less than the true sum in the body, the creditor may, without any express authority, insert the omitted words to make the note conform to the original intent, and at all events he may recover in such a case upon an insimul computassent. Clute v. Small, 17 Wend. (N. Y.) 238.

83. See infra § 88.

84. Hayes v. Wagner, 220 Ill. 256, 77 NE 211 [aff 113 Ill. A. 299]. See also infra § 86. Compare Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 196, 52 SE 515 (where the rule was said to be otherwise in the case of alterations fraudulently made, as to which see generally infra §§ 17, 18).

85. Conn.—Little v. Fowler, 1 Root 94.

Ga.—Shaw v. Probasco, 139 Ga. 481, 77 SE 577.

Ill.—Elliott v. Blair, 47 Ill. 342; Vogle v. Ripper, 34 Ill. 100, 85 AmD 298; Soaps v. Eichberg, 42 Ill. A. 375; Springfield First Nat. Bank v. Ryan, 31 Ill. A. 271 [aff 148 Ill. 349, 35 NE 1120]; Wallace v. Wallace, 8 Ill. A. 69.

Ind. T.—Hampton v. Mayes, 3 Ind. T. 65, 53 SW 483 [app dism 105 Fed. 1002, 44 CCA 683].

Iowa.—Sullivan v. Rudisill, 63 Iowa 158, 18 NW 856; Eckert v. Pickel, 59 Iowa 545, 13 NW 708; Morrison v. Huggins, 53 Iowa 76, 4 NW 854; Clough v. Seay, 49 Iowa 111; Krause v. Meyer, 32 Iowa 566.

Kan.—Hocknell v. Sheley, 66 Kan. 357, 71 P 839.

Ky.—Ramsey v. Utica Deposit Bank, 156 Ky. 263, 160 SW 943 (holding that, although a note is invalid as against some of the parties thereto because of an alteration made after its execution, recovery may be had for the indebtedness which was the original consideration of the note).

Md.—Owen v. Hall, 70 Md. 97, 16 A 376.

Mass.—Jeffrey v. Rosenfeld, 179 Mass. 506, 61 NE 49. But see Wheelock v. Freeman, 13 Pick. 165, 23 AmD 674.

Mich.—Port Huron First Nat. Bank v. Carson, 60 Mich. 432, 27 NW 589.

Mo.—McCormack Harvesting Mach. Co. v. Blair, 146 Mo. A. 374, 124 SW 49 (holding that, unless an alteration of a note given for goods sold was fraudulently made, the seller could sue in assumpsit for the value of the goods, although the alteration invalidated the note so as to prevent an action thereon).

Nebr.—State Sav. Bank v. Shaffer, 9 Nebr. 1, 1 NW 980, 31 AmR 394.

N. J.—York v. Janes, 43 N. J. L. 332; Hunt v. Gray, 35 N. J. L. 227, 10 AmR 232.

N. Y.—Booth v. Powers, 56 N. Y. 22 [rev on another point Flint v. Craig, 59 Barb. 319]; Clute v. Small, 17 Wend. 238.

Oh.—Merrick v. Boury, 4 Oh. St. 60; Tucker v. Hendricks, 25 Oh. Cir. Ct. 426.

Or.—Savage v. Savage, 36 Or. 268, 59 P 461; Wallace v. Tice, 32 Or. 283, 51 P 733; Wills v. Wilson, 3 Or. 308.

Pa.—Miller v. Stark, 148 Pa. 164, 23 A 1058.

R. I.—Keene v. Weeks, 19 R. I. 309, 33 A 446.

S. D.—Wyckoff v. Johnson, 2 S. D. 91, 48 NW 837.

Tex.—Otto v. Halff, 89 Tex. 384, 34 SW 910, 59 AmSR 56.

Utah.—McClure v. Little, 15 Utah 379, 49 P 298, 62 AmSR 938.

Wis.—Gorden v. Robertson, 48 Wis. 493, 4 NW 579; Matteson v. Ellsworth, 33 Wis. 488, 14 AmR 766.

Eng.—Sutton v. Toomer, 7 B. & C. 416, 14 ECL 190, 108 Reprint 778.

86. Hervey v. Harvey, 15 Me. 357; Boulware v. State Bank, 12 Mo. 542.

87. McDowall v. Boyd, 6 D. & L. 149.

88. Eckert v. Pickel, 59 Iowa 545, 13 NW 708; Owen v. Hall, 70 Md. 97, 16 A 376; Morrison v. Welty, 18 Md. 169; Glenn v. Smith, 2 Gill. & J. (Md.) 493, 20 AmD 452; Booth v. Powers, 56 N. Y. 22.

89. Owen v. Hall, 70 Md. 97, 16 A 376.

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indebtedness is confined to cases in which the alterations are made without fraud in fact. If one voluntarily and fraudulently thus destroys the agreed evidence of his debt, he cannot resort to the original consideration, because he will not be allowed to supply the place of the destroyed evidence by other evidence.[90] Hence a fraudulent and material alteration of a promissory note by the payee will prevent him from recovering on either the note or the original consideration.[91]

[§ 18] **(b) Effect of Judgment in Action on Note.** Where the record of a judgment in an action on a note shows that the note was vitiated by a fraudulent alteration, and that it was for that cause that the judgment was for defendant, the question as to the character of the alteration, as fraudulent or otherwise, can never again be raised, and plaintiff cannot go back and maintain his suit for the original debt.[92] But the mere fact that a fraudulent alteration is pleaded to an action on a note in which there is a general verdict for defendant does not sufficiently import an adjudication of the question of fraud when the note itself would be destroyed without regard to any actual fraud in the alteration.[93]

[§ 19] **f. Equitable Relief.** It is within the power of a court of equity to correct a contract so as to make it agree with the intention of the parties,[94] to restore a deed on behalf of one against whom an alteration therein operates,[95] or to annul it at

90. Ill.—Vogle v. Ripper, 34 Ill. 100, 85 AmD 298; Yost v. Minneapolis Harvester Works, 41 Ill. A. 556.

Ind.—Ballard v. Franklin L. Ins. Co., 81 Ind. 239.

Iowa.—Maguire v. Eichmeier, 109 Iowa 301, 80 NW 395; Woodworth v. Anderson, 63 Iowa 503, 19 NW 296 (which was also on the ground that the account was merged in the certificate fraudulently altered).

Kan.—Hocknell v. Sheley, 66 Kan. 357, 71 P 839.

Ky.—Jeffers v. Simpson, 11 KyL 328.

Minn.—Warder, etc., Co. v. Willyard, 46 Minn. 531, 49 NW 300, 24 AmSR 250; Wilson v. Hayes, 40 Minn. 531, 42 NW 467, 12 AmSR 754, 4 LRA 196 and note.

Mo.—Trigg v. Taylor, 27 Mo. 248; Law v. Crawford, 67 Mo. A. 150.

Nebr.—Walton Plow Co. v. Campbell, 35 Nebr. 173, 52 NW 883, 16 LRA 468.

N. H.—Gerrish v. Glines, 56 N. H. 9.

N. Y.—Meyer v. Huneke, 55 N. Y. 412; Trow v. Glen Cove Starch Co., 1 Daly 280.

N. D.—Decorah First Nat. Bank v. Laughlin, 4 N. D. 391, 61 NW 473.

Pa.—Gettysburg Nat. Bank v. Chisolm, 169 Pa. 564, 32 A 730, 47 AmSR 929; Miller v. Stark, 148 Pa. 164, 23 A 1058.

W. Va.—Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 SE 515.

[a] **Reason for rule.**—"This rule may seem harsh, but the reasons for it are said to be that a written agreement in the hands of an adverse party is easily susceptible of alteration to the injury of the party charged thereby. Many written contracts are negotiable and perform important functions in commercial transactions. It is of the highest importance to the commercial world that they be preserved in their original state or condition. Public policy demands this for the prevention of frauds upon innocent persons. The most effective means of preserving the integrity of such agreements is the rule, that a material alteration destroys the agreement so that no recovery can be had upon it, either in its original or its altered condition. The object of the rule is to enjoin the highest care upon the holder of the agreement, and to punish him with loss for his negligent and fraudulent conduct." Per Cox, J., in Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 196, 52 SE 515.

[b] **Contract for advertising.**—In Trow v. Glen Cove Starch Co., 1 Daly (N. Y.) 280, a written order for advertising was altered by raising the price to be paid. The court found that the alteration had been made with a fraudulent intent, and held that plaintiff was not entitled to recover for the work.

[c] **Certificate of deposit.**—The material and fraudulent alteration of a certificate of deposit, made therein by the person to whom it is issued, defeats a recovery by a transferee, either on the certificate or on the claim for the amount deposited. Woodworth v. Anderson, 63 Iowa 503, 19 NW 296.

[d] **Proof by unaltered duplicate original.**—Where the alteration is fraudulent, plaintiff will not be permitted to establish the contract by any other evidence, such as the duplicate retained by defendant. Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 SE 515.

91. Ala.—Green v. Sneed, 101 Ala. 205, 13 S 277, 46 AmSR 119; Toomer v. Rutland, 57 Ala. 379, 29 AmR 722; White v. Hass, 32 Ala. 430, 70 AmD 548.

Ill.—Black v. Bowman, 15 Ill. A. 166; Wallace v. Wallace, 8 Ill. A. 69.

Ind.—Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413.

Iowa.—Maguire v. Eichmeier, 109 Iowa 301, 8 NW 395; Krause v. Meyer, 32 Iowa 566.

Kan.—Hocknell v. Sheley, 66 Kan. 357, 71 P 839.

Mass.—Jeffrey v. Rosenfeld, 179 Mass. 506, 61 NE 49.

Minn.—Warder, etc., Co. v. Willyard, 46 Minn. 531, 49 NW 300, 24 AmSR 250.

N. H.—Smith v. Mace, 44 N. H. 553; Martendale v. Follet, 1 N. H. 95.

N. Y.—Booth v. Powers, 56 N. Y. 22; Meyer v. Huneke, 55 N. Y. 412; Columbia Distilling Co. v. Rech, 151 App. Div. 128, 135 NYS 206; Kennedy v. Crandell, 3 Lans. 1. In Blade v. Noland, 12 Wend. 173, 27 AmD 126, plaintiff sued for work and labor and on a note which had been given therefor, alleging that the note had been lost, but it appeared that he had intentionally destroyed it, and it was held that he was not remitted to the original consideration. Although it has sometimes been supposed that it was held in this case that a payee who materially alters a note cannot recover on the original indebtedness without regard to whether or not the alteration was made for a fraudulent purpose, in the later case of Clute v. Small, 17 Wend. 238, Cowen, J., reviewing this decision, regards it as turning upon the fact that the destruction was made under circumstances from which a fraudulent intent might be inferred.

N. D.—Decorah First Nat. Bank v. Laughlin, 4 N. D. 391, 61 NW 473.

Pa.—Sykes v. Gerber, 98 Pa. 179.

S. C.—Mills v. Starr, 18 S. C. L. 359 (holding that the acceptance of a specialty in satisfaction extinguishes a simple contract debt, and that the latter is not revived if the specialty is rendered void by an alteration).

W. Va.—Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 SE 515.

[a] **"There seems to be no authority allowing recovery** on the original consideration where there has been a material and fraudulent alteration by the plaintiff, or with his privity." Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 196, 52 SE 515.

92. Ballard v. Franklin L. Ins. Co., 81 Ind. 239 (holding that where a note is declared void for a fraudulent alteration, and subsequently suit is brought on the original consideration, a plea setting up the fraudulent alteration and former judgment cannot be answered by a reply alleging the alteration to have been by a stranger, as that is concluded by the former judgment); Sykes v. Gerber, 98 Pa. 179.

Doctrine of res judicata see Judgments [23 Cyc 1215].

93. Eckert v. Pickel, 59 Iowa 545, 13 NW 708.

94. Day v. Ft. Scott Inv., etc., Co., 53 Ill. A. 165 [aff 153 Ill. 293, 38 NE 567] (where the principle seems to be applied on behalf of a complainant in an action for the specific performance of a contract for the purchase of land which had been changed by complainant's attorney merely for the purpose of correction, without fraud and without the complainant's knowledge, the court holding that if the corrective words were essential it had the power to correct the contract).

Reformation of instruments see generally Reformation of Instruments [34 Cyc 899].

[a] **Bill by assignee of lease.**—In Rose Clare Lead Co. v. Madden, 54 Ill. 260, it was held that the assignee of a lease may maintain a bill to correct a mistake in the description of the premises, notwithstanding an alteration has been improperly made in the terms of the lease without his complicity. The court said that defendant could raise the question of fraudulent alteration and that it would be determined upon proof instead of upon uncertain inferences upon the face of the bill.

95. Dickenson v. Ramsey, 115 Va. 521, 79 SE 1025 (holding that, where a deed granting land to a person for life with remainder to her children was altered after its execution and before its recording by striking out the grant of the remainder, a court of equity could grant relief to the remaindermen); Wheeler v. Single, 62 Wis. 380, 22 NW 569 (holding that the erasure of the description of a part of lands conveyed, both from the deed and the record thereof after delivery, does not divest the title of the grantee, and a subsequent voluntary conveyance of the land by the grantor may be annulled, the mutilated deed and record restored, and the land subjected to the payment of claims against the estate of the grantee. These are proper subjects of equitable cognizance, the gravamen of the suit being to remove a cloud upon the title to land and alleged frauds).

[a] **Adequate remedy of law.**—Where a deed has been fraudulently altered by the grantee after delivery, the grantor, sued at law on the deed in its altered form, has an adequate remedy at law, and equity will not permit him to amend his bill in a suit to reform the deed and to restrain the action at law by adding a prayer for the restoration of the deed to its original form. Churchill v. Capen, 84 Vt. 104, 78 A 734.

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the instance of such party so as to defeat it as a conveyance of property fraudulently inserted;[96] or to enjoin a judgment on a note entered upon a fraudulently altered power of attorney.[97] But equity will not aid one who has fraudulently altered a deed to restore the instrument,[98] and where the instrument is destroyed by an alteration, and the party is under no liability except that created by the instrument, equity cannot restore the instrument so as to reinstate the liability which has been discharged.[99] It has also been held that a debtor cannot come into equity for affirmative relief against a just debt merely because the creditor has precluded himself from enforcing his security at law according to its terms,[1] and that when an altered bond is not suable at law, for any cause except complainant's misconduct, equity may give him relief;[2] and on the ground that the maker of a note which has been materially altered without his consent has an adequate remedy at law, it has been held that equity has no jurisdiction to enjoin the transfer or collection of the note.[3]

Innocent alterations. Where an instrument has been altered without fraudulent intent, courts of equity have exercised jurisdiction both to restore the instrument and to enforce its original terms,[4] and to enforce the original debt, assuming the instrument itself to be destroyed,[5] for mistake and discovery are matters peculiarly within the jurisdiction of such courts.[6]

[§ 20] **g. Rescission.** If a party has received benefits under a contract which is subsequently altered he will not be permitted to relieve himself from all liability and at the same time retain the benefits derived. He must rescind the contract in toto and return what he has received if he wishes to be entirely discharged on account of the alteration.[7]

[§ 21] **h. Recovery for Conversion of Altered Instrument.** The fact that a note which plaintiff delivered to a third person as collateral security had been altered will not preclude him from suing in trover for its conversion upon a refusal to surrender it after payment of the debt.[8]

[§ 22] **i. Recovery of Possession of Altered Instrument.** If an instrument is void by reason of an alteration the maker may recover possession of it in replevin,[9] except where it has come into the hands of a bona fide transferee.[10] The right to recover possession of a note pledged as collateral, on payment of the amount secured, is not affected

Restoration of altered deed in a suit for reformation see Reformation of Instruments [34 Cyc 923].

96. Peugh v. Mitchell, 3 App. (D. C.) 321; Pereau v. Frederick, 17 Nebr. 117, 22 NW 235; Havens v. Osborn, 36 N. J. Eq. 426 [aff 38 N. J. Eq. 652]. See also Russell v. Reed, 36 Minn. 376, 31 NW 452; Deem v. Phillips, 5 W. Va. 168.

97. Hodge v. Gilman, 20 Ill. 437.

98. Respass v. Jones, 102 N. C. 5, 8 SE 770. See also Marcy v. Dunlap, 5 Lans. (N. Y.) 365.

99. Ruby v. Talbott, 5 N. M. 251, 21 P 72, 3 LRA 724; Sharp v. Bagwell, 16 N. C. 115 (holding that where the payee of a note tore from it the name of a subscribing witness the note was thereby avoided and could not be enforced in equity).

[a] **Bond of third person received in payment.**—If the vendor of land receives in payment the bond of a third person, made payable to himself, which is afterward altered with his consent by changing the name of the payee, the bond is destroyed, and he cannot recover on the bond or have equitable relief against the obligor. Neither he nor his assignee who purchased the bond with full knowledge of the objection to it can come into equity against the vendee of the land who gave the bond in payment, although such vendee made the alteration in the bond and represented it to be good, because if the demand can be sustained at all it is a plain, legal demand against the purchaser of the land to recover the unpaid purchase price of the land, or for deceit. The fact that an action at law is barred by the statute of limitations is no reason for coming into equity when there is no new equity since the discovery of the fraud. Ryan v. Parker, 36 N. C. 89.

1. Goodenow v. Curtis, 33 Mich. 505.

2. Harrison v. Turbeville, 2 Humphr. (Tenn.) 241 (holding that the words "fraud" and "accident" cover all erasures and alterations except those made by the obligee himself, or with his knowledge or consent).

[a] **Thus** where it is necessary for a party to a bond which by statute has the force and effect of a judgment to resort to a court of chancery for relief against the bond, on the ground that it is not binding on him, the question will be considered in chancery upon the appropriate pleas as if it had arisen at law, and in such a case chancery is the appropriate forum. Gibbs v. Frost, 4 Ala. 720.

3. Erickson v. Oakland First Nat. Bank, 44 Nebr. 622, 62 NW 1078, 48 AmSR 753, 28 LRA 577 and note. See also Nickerson v. Swett, 135 Mass. 514.

Adequate remedy at law as affecting equity jurisdiction see Equity [16 Cyc 30].

4. Wallace v. Tice, 32 Or. 283, 51 P 733 (upon the authority of Lewis v. Schenck, 18 N. J. Eq. 459, 90 AmD 631, holding that a court of equity has jurisdiction to restore the original conditions when the suit involves a discovery which is in some degree necessary to show the agreement and the mistake).

[a] **But, where a mortgage has been fraudulently altered to embrace other land,** it cannot be foreclosed as to such land, and where the suit was not brought upon the theory that the parties intended that the land included in the mortgage was misdescribed by mistake, but was on the ground that the mortgage was actually executed on that land and was incorrectly recorded by mistake, a decree for foreclosure cannot be sustained. Daub v. Englebach, 9 Ill. A. 99.

[b] **Restraining negotiation.**—A court of equity has refused to restrain the payee from negotiating an altered note at the instance of the surety who was not prejudiced; and, on the other hand, it has held it proper to enter a decree ordering the cancellation of the words unauthorizedly inserted. Nickerson v. Swett, 135 Mass. 514.

[c] **Spoliation.**—An alteration by a mere stranger will not prevent its reformation by a court of equity on the ground of mistake. Thus, where a broker negotiated a loan to plaintiff, and, acting as plaintiff's scrivener, drew a mortgage to secure the loan, and a mistake in the description of the property was made in drafting the instrument which was not discovered until after it had been recorded, and which the broker, without the consent or knowledge of any of the parties, corrected, his act was that of a mere stranger, and would not prevent its reformation by the court. Ames v. Brown, 22 Minn. 257.

5. Little v. Fowler, 1 Root (Conn.) 94; Hampton v. Mayes, 3 Ind. T. 65, 53 SW 483 (upon the authority of Lewis v. Schenck, 18 N. J. Eq. 459, 90 AmD 631, in which case the instrument is regarded as avoided).

6. **Equity jurisdiction** see generally Equity [16 Cyc 68].

7. Shaw v. Probasco, 139 Ga. 481, 77 SE 577; Glover v. Green, 96 Ga. 126, 22 SE 664 (holding that, where default was made in the payment of interest on a note given for the price of land, in a suit by the vendor to recover the land defendant could not defeat the action, on the ground that the note was void for an alteration, without offering to pay the amount due on the note as executed); Lowe v. Craig, 36 Ga. 117; Singleton v. McQuerry, 85 Ky. 41, 2 SW 652, 8 KyL 710 (holding that, where a note for the purchase price of land is vitiated by an alteration, the purchaser cannot in equity escape liability for the purchase money because of the alteration and at the same time retain the land, but he is put to his election either to rescind the contract upon equitable terms, or to submit to the enforcement of the lien).

[a] **The alteration of a contract by adding words** thereto without the knowledge or consent of the obligor, after its delivery, is ground for rescission at the option of the obligor. Lane v. Pacific, etc., R. Co., 8 Ida. 230, 67 P 656.

Rescission of contracts generally see Contracts [9 Cyc 433].

8. Booth v. Powers, 56 N. Y. 22 (which was upon the principle that the note was of its face value, because, if innocently altered, a resort could be had to the original consideration, in which event it would be necessary for plaintiff to surrender the note).

9. Smith v. Eals, 81 Iowa 235, 46 NW 1110, 25 AmSR 486; Sigler v. Hidy, 56 Iowa 504, 9 NW 374 (holding that defendant in an action on a note may attack its validity by counterclaim in the nature of a petition in replevin, contemplating that the note shall remain in the hands of plaintiff until rendition of judgment, and that a dismissal of the action by plaintiff will not entitle him to a dismissal of defendant's counterclaim).

10. Smith v. Eals, 81 Iowa 235, 46 NW 1110, 25 AmSR 486.

[a] **Where a note secured by a mortgage is nullified by an alteration** the maker cannot, by an action of replevin, recover such note from an assignee, since the instrument will

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by the fact that the note has been materially altered.[11]

[§ 23] **j. Distinction between Executed and Executory Instruments—(1) In General.** There is a well recognized distinction between the effect of an alteration of an executory contract and an alteration of a contract which is fully executed. In the first case the rights under the instrument are gone; in the latter, as in the case of a deed of conveyance of land or a bill of sale of personalty, the title vested by the executed instrument and delivery of possession remains unaffected by any subsequent alteration.[12]

[§ 24] **(2) Deeds.** An unauthorized material alteration in a deed of conveyance made after its execution by a party claiming a benefit thereunder renders the instrument void.[13] But, while the effect of a material alteration is to invalidate the deed, following the rule that the cancellation or destruction of a deed cannot destroy the title or interest which has passed,[14] it is firmly established that such an alteration does not affect the title or interest which has become vested under the deed, either by divesting the grantee of title or revesting title in the grantor,[15] although it utterly destroys the deed in so far as any new rights may be

be of value to the assignee as evidence in an action against the assignor, and no injury can come to the maker from its remaining in the assignee's possession. Bailey v. Gilman Bank, 99 Mo. A. 571, 74 SW 874.

11. Flint v. Craig, 59 Barb. 319 [rev on other grounds 56 N. Y. 22].

12. Ala.—Alabama State Land Co. v. Thompson, 104 Ala. 570, 16 S 440, 53 AmSR 80.

Ind.—Cochran v. Nebeker, 48 Ind. 459.

Iowa.—Hollingsworth v. Holbrook, 80 Iowa 151, 45 NW 561, 20 AmSR 411.

Mass.—Chessman v. Whittemore, 23 Pick. 231.

N. Y.—Chappell v. Spencer, 23 Barb. 584.

Oh.—Williams v. Van Tuyl, 2 Oh. St. 336 (holding that an alteration in a material part, made by a party beneficially interested in a bond given by a trustee to evidence the interest of his cestui que trust, without the knowledge of the trustee, and subsequently to its execution, will destroy the bond, but will not operate to destroy an estate which existed before and independently of the bond).

W. Va.—Waldron v. Waller, 65 W. Va. 605, 64 SE 964, 32 LRANS 284 and note.

Eng.—Agricultural Cattle Ins. Co. v. Fitzgerald, 16 Q. B. 432, 71 ECL 432, 4 EngL&Eq 211, 117 Reprint 944.

See also infra § 24.

[a] **"There is a manifest distinction** between executory contracts and conveyances of property. When deeds of conveyance of real, or bills of sale of personal property, are completed and possession delivered under them, so far as the change of ownership depends on them they are executed, and the property passes and vests in the grantee. The instruments may become invalid, so that no action can be maintained upon the covenants contained in them, and yet the titles which have been acquired under them, remain unaffected. When a person has become the legal owner of real estate, he cannot transfer it or part with his title, except in some of the forms prescribed by law. The grantee may destroy his deed, but not his estate. He may deprive himself of his remedies upon the covenants, but not of his right to hold the property. This distinction has existed from the earliest times. See Viner's Abr. Fait, X. 2." Per Morton, J., in Chessman v. Whittemore, 23 Pick. (Mass.) 231, 233.

[b] **Where a written instrument is not necessary** to pass title, as in the case of a sale of a slave, an alteration of the bill of sale by the vendor will not affect a subsequent purchaser without notice. Davis v. Loftin, 6 Tex. 489.

[c] **Where a bill of sale is altered** by the insertion of another name as maker, after delivery and after possession of the property taken by the vendee, such alteration will not divest him of the right of possession. Ransier v. Vanorsdol, 50 Iowa 130.

[d] **The alteration of a judgment note** by the parties after the entry of judgment thereon, although an improper act, will not affect the validity of the judgment; the note is functus officio, being merged in the judgment. Kimmel's App., 91 Pa. 471.

13. Vanhorne v. Dorrance, 2 Dall. (U. S.) 304, 1 L. ed. 391, 28 F. Cas. No. 16,857; Deem v. Phillips, 5 W. Va. 168; Leyfield's Case, 10 Coke 88a, 92, 77 Reprint 1057. See generally Deeds [13 Cyc 721].

14. See generally Deeds [13 Cyc 721].

[a] Cancellation of a deed by consent does not revest title in the grantor (see Deeds [13 Cyc 721 et seq]), but "the grantee, having voluntarily, and without any misapprehension or mistake, consented to the destruction of the deed with a view to revest the title, neither he nor any other person claiming by a title subsequently derived from him, is to be permitted to show the contents of the deed so destroyed, by parol evidence". Farrar v. Farrar, 4 N. H. 191, 195, 17 AmD 410.

15. U. S.—Parker v. Kane, 22 How. 1, 16 L. ed. 286.

Ala.—Gulf Red Cedar Lumber Co. v. O'Neal, 131 Ala. 117, 30 S 466, 90 AmSR 22; Alabama State Land Co. v. Thompson, 104 Ala. 570, 16 S 440, 53 AmSR 80; Mallory v. Stodder, 6 Ala. 801.

Ark.—Strawn v. Norris, 21 Ark. 80.

Ind.—Gibbs v. Potter, 166 Ind. 471, 77 NE 942, 9 AnnCas 481; Speer v. Speer, 7 Ind. 178, 179, 63 AmD 418 (holding that the destruction of a deed "by one of the grantees without the consent of the other, did not have the effect to divest the joint title").

Iowa.—Slattery v. Slattery, 120 Iowa 717, 95 NW 201.

Ky.—Phillips v. Big Sandy Co., 149 Ky. 555, 149 SW 957 (holding that a fraudulent or unlawful alteration of a deed after its execution and delivery does not affect the rights of the parties as they existed before the alteration).

Me.—Barrett v. Thorndike, 1 Me. 73 (where it was said that, without determining the effect of a material alteration of a deed by a stranger or an immaterial alteration thereof by a party, and whether such alteration avoids the deed or not, where the deed is one conveying land the case does not depend upon the principle applicable to those cases, but upon another principle—namely, that a vested title cannot be divested by the destruction of the deed).

Md.—Clark v. Creswell, 112 Md. 339, 344, 76 A 579, 21 AnnCas 338 [cit Cyc].

Mass.—Chessman v. Whittemore, 23 Pick. 231.

Mo.—Woods v. McCoy, 46 Mo. 297; Woods v. Hildebrand, 46 Mo. 284, 2 AmR 513; Holladay-Klotz Land, etc., Co. v. T. J. Moss Tie Co., 89 Mo. A. 556.

N. Y.—Parshall v. Shirts, 54 Barb. 99; Fonda v. Sage, 46 Barb. 109 [aff 48 N. Y. 173]; Raynor v. Wilson, 6 Hill 469; Frost v. Peacock, 4 Edw. 678.

S. C.—Booker v. Stivender, 47 S. C. L. 85.

Tenn.—Morgan v. Elam, 4 Yerg. 374.

Vt.—Churchill v. Capen, 84 Vt. 104, 78 A 734.

W. Va.—Waldron v. Waller, 65 W. Va. 605, 64 SE 964, 32 LRANS 284 and note.

Wis.—Wilke v. Wilke, 28 Wis. 296; Parker v. Kane, 4 Wis. 1, 65 AmD 283.

Eng.—Bolton v. Carlisle, 2 H. Bl. 259, 126 Reprint 540; West v. Steward, 14 M. & W. 47.

Ont.—Fraser v. Fralick, 21 U. C. Q. B. 343; Fraser v. Fraser, 14 U. C. C. P. 70.

See generally Deeds [13 Cyc 721].

[a] **"When the title to the land has once vested,** any alteration in the deed, made by the grantee, though material, will not deprive him of his title or re-invest it in the grantor. If anything is destroyed by the alteration it is the deed and not the title. A deed may be altered, mutilated, changed or wholly destroyed so as to be no longer competent evidence, or capable of being introduced in evidence, yet the title vested by the grant is not thereby destroyed." Per Miller, P., in Waldron v. Waller, 65 W. Va. 605, 609, 64 SE 964, 32 LRANS 284.

[b] **Alteration of deed after delivery but before registration.**—(1) Since the recording of the deed is not, under the recording acts which have been adopted in most of the states, necessary to the vesting of the title in the grantee, the general rule is that an erasure or alteration in a deed after delivery, whether recorded or not, does not reinvest the title in the grantor or abrogate or annul the title of the grantee. Stanley v. Epperson, 45 Tex. 644, (2) But in North Carolina it has been held that, where the grantee in a deed, in order to put his property beyond the reach of his creditors, without the knowledge of the grantor erased his own name wherever it appeared in the deed and inserted that of his wife, and as thus altered had the deed registered, inasmuch as before probate and registration or the intervening of other rights, legal or equitable, a deed may be surrendered to the grantor or canceled or changed in any manner agreed upon by the grantor and grantee this deed was inoperative, the title remained in the grantor, and equity would not render the grantee assistance to restore the title. Respass v. Jones, 102 N. C. 5, 8 SE 770. See also McLindon v. Winfree, 14 N. C. 262.

[c] **Where a grantee of land is in possession under an unrecorded deed,** and delivers the deed to the grantor that he may insert additional property, redate, and redeliver it, which the grantor does, such acts constitute a destruction of the original deed by consent of the parties and the substitution of another in place thereof, without an intention to revest the title to the property originally included, which continues in the grantee from the date of the delivery of the original deed. St. Joseph v. Baker, 113 Mo. A. 691, 88 SW 1122.

[d] **Where fraudulent attempts to enlarge the quantity of land granted** in a Mexican grant, by erasures and interlineations were made after California had been ceded to the

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set up thereunder; the executory provisions in the deed are thereby rendered null, and the covenants are discharged,[16] and no affirmative defense can be maintained upon the deed by the party by whom the alteration was made.[17] Therefore it is not proper to say that the altered deed is rendered void from the beginning.[18] And it has been held that where plaintiff may recover the possession of land upon an equitable title, an altered deed, forming a link in the chain of his legal title, will not preclude such recovery.[19]

Where the estate or interest conveyed does not lie wholly in grant, but may exist without a deed, such estate is not divested by a material alteration of the instrument made by the grantee.[20] While a material alteration in a deed conveying the fee simple estate in lands, made by the grantee, will disable him from bringing an action upon its covenants,[21] it will not have the effect of divesting the title.[22]

But where the estate conveyed lies in grant, and cannot have existence but by deed, and the deed creating the estate is materially altered by the grantee, not only is the deed void as to any remedy in favor of the party making the alteration, but the estate which he derived under it is also gone.[23] Hence where the grantor, in a deed conveying land with the reservation of ground rents, materially alters the clause reserving the rents, the alteration not only destroys the instrument, but, as the rent cannot exist independently of the deed, there can be no recovery of the rent.[24]

[§ 25] **(3) Mortgages.** It has been held that where a mortgage is found canceled in the possession of a mortgagee, it amounts to a release, but not to a reconveyance, so as to revest the estate of the mortgagor,[25] and that, upon the principle that a vested title cannot be divested except by deed, the mortgage is not destroyed by an alteration.[26] The better rule, however, even in jurisdictions

United States, it was held that such alterations could not take away from the wife and children of the grantee their claim to the original grant. U. S. v. West, 22 How. (U. S.) 315, 16 L. ed. 317.

16. U. S.—U. S. v. West, 22 How. 315, 16 L. ed. 317 (which was a public grant).

Ala.—Burgess v. Blake, 128 Ala. 105, 28 S 963, 86 AmSR 78 and note.

Del.—Herdman v. Bratten, 2 Del. 396.

D. C.—Fitzgerald v. Wynne, 1 App. 107.

Ind.—Robbins v. Magee, 76 Ind. 381.

Me.—Bird v. Bird, 40 Me. 398.

Mass.—Kendall v. Kendall, 12 Allen 92; Chessman v. Whittemore, 23 Pick. 231; Hatch v. Hatch, 9 Mass. 307, 6 AmD 67.

Mo.—Woods v. Hilderbrand, 46 Mo. 284, 2 AmR 513; Alexander v. Hickox, 34 Mo. 496, 86 AmD 118; Tibeau v. Tibeau, 19 Mo. 78, 59 AmD 329.

N. Y.—Lewis v. Payn, 8 Cow. 71, 18 AmD 427; Waring v. Smyth, 2 Barb. Ch. 119, 47 AmD 299.

Pa.—Rifener v. Bowman, 53 Pa. 313; Withers v. Atkinson, 1 Watts 236.

Tex.—Stanley v. Epperson, 45 Tex. 644; Van Hook v. Simmons, 25 Tex. Suppl. 323, 78 AmD 573.

Vt.—Churchill v. Capen, 84 Vt. 104, 78 A 784.

W. Va.—Waldron v. Waller, 65 W. Va. 605, 64 SE 964, 32 LRANS 284 and note.

Wis.—Wheeler v. Single, 62 Wis. 380, 22 NW 569 (as against creditors of the grantee); North v. Henneberry, 44 Wis. 306.

Eng.—Doe v. Bingham, 4 B. & Ald. 672, 6 ECL 648, 106 Reprint 1082.

Ont.—Fraser v. Fraser, 14 U. C. C. P. 70.

See generally Deeds [13 Cyc 721].

[a] **Alteration not affecting particular land.**—(1) Where an alteration is in the description of one tract it will not affect the validity of the deed as to other tracts embraced therein. Burnett v. McCluey, 78 Mo. 676; Woods v. Hilderbrand, 46 Mo. 284, 2 AmR 513. (2) So a deed in which the words "minerals reserved" were erased has been held to be valid to convey title to the land, exclusive of the minerals. Alabama State Land Co. v. Thompson, 104 Ala. 570, 16 S 440, 53 AmSR 80.

[b] **Change in grantees.**—Where a deed is altered by the substitution of grantees, it cannot support a claim to the land conveyed by the deed asserted by the person whose name is substituted. Hollis v. Harris, 96 Ala. 288, 11 S 377; Hill v. Nisbet, 58 Ga. 586; Abbott v. Abbott, 189 Ill. 488, 59 NE 958, 82 AmSR 470; Wilds v. Bogan, 55 Ind. 331; Fletcher v. Mansur, 5 Ind. 267; Domeier v. Wagner, 4 CincLBul 1036, 6 Oh. Dec. (Reprint) 849, 8 AmLRec 427. In Abbott v. Abbott, supra, it was said, in effect, that if after the delivery of a deed to the grantee an alteration is made therein, with his consent, by substituting the name of another person as grantee, for the purpose of transferring the title to that person, it will be ineffectual for that purpose and render the deed absolutely void as a transfer of the title, but that the original grantee who procures the change to be made cannot afterward repudiate it and claim title in himself notwithstanding the alteration.

[c] **Removal of condition in deed.**—If a deed containing a condition, by the nonperformance of which it has become void, is altered by the destruction of the condition, and then recorded in its altered form, the deed of the grantee can give no title to a third person. Marr v. Hobson, 22 Me. 321.

[d] **Erasure of reddendum clause.**—Where a deed to land contains a clause reserving to the grantor oil and gas on the land, the erasure of the clause by the grantee after the deed is executed, without the consent of the grantor, does not make the deed valid in its altered form in favor of a subsequent grantee who had knowledge of the alteration. Waller v. Ward, 101 SW 341, 31 KyL 40.

17. Robbins v. Magee, 76 Ind. 381.

18. Agricultural Cattle Ins. Co. v. Fitzgerald, 16 Q. B. 432, 71 ECL 432, 4 EngL&Eq 211, 117 Reprint 944.

19. Thorne v. Williams, 13 Ont. 577.

20. Miller v. Gilleland, 19 Pa. 119 (where Gibson, C. J., said: "The conveyance of an estate which lies in livery, and not in grant, is not avoided by an alteration even in a material part of it; for the title, being vested by a deed having by statute the force of livery of seisin, can be revested only by a reconveyance").

21. Woods v. McCoy, 46 Mo. 297; Woods v. Hilderbrand, 46 Mo. 284, 2 AmR 513; Withers v. Atkinson, 1 Watts (Pa.) 236; North v. Henneberry, 44 Wis. 306.

22. Ala.—Burgess v. Blake, 128 Ala. 105, 28 S 963, 86 AmSR 78 and note; Sharpe v. Orme, 61 Ala. 263.

Me.—Goodwin v. Norton, 92 Me. 532, 43 A 111.

Mass.—Hatch v. Hatch, 9 Mass. 307, 6 AmD 67.

Mo.—Donaldson v. Williams, 50 Mo. 407.

N. H.—Chesley v. Frost, 1 N. H. 145.

N. Y.—Smith v. McGowan, 3 Barb. 404; Herrick v. Malin, 22 Wend. 388; Jackson v. Gould, 7 Wend. 364; Jackson v. Jacoby, 9 Cow. 125.

Pa.—Rifener v. Bowman, 53 Pa. 313; Withers v. Atkinson, 1 Watts 236.

Wis.—Wheeler v. Single, 62 Wis. 380, 22 NW 569; North v. Henneberry, 44 Wis. 306.

Eng.—Doe v. Hirst, 3 Stark. 60, 3 ECL 594.

23. Wright v. Kelley, 4 Lans. (N. Y.) 57; Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 AmD 427 [cit Miller v. Manwaring, Cro. Jac. 397, 79 Reprint 947; 1 Nelson Abr. 635]; Flitcraft v. Com. Title Ins., etc., Co., 211 Pa. 114, 60 A 557; Wallace v. Harmstad, 44 Pa. 492. In Bolton v. Carlisle, 2 H. Bl. 259, 126 Reprint 540, it was held that canceling a deed would not divest property which had once vested by transmutation of possession, and that the law was the same with respect to things which lie in grant. But this case supposes the deed lost, not fraudulently altered by a party to be benefited by the alteration.

24. Wallace v. Harmstad, 44 Pa. 492 (holding that the rents could not be recovered by distress); Wallace v. Harmstad, 15 Pa. 462, 53 AmD 603 (holding that by reason of a fraudulent alteration by the grantor of deeds reserving a ground rent, by materially changing the clause reserving the rents, neither an action of debt nor covenant would lie on the deeds for recovery of the rents, nor would they be recoverable in an action on the verbal contract under which possession was obtained, nor in any action for use and occupation of the premises); Arrison v. Harmstead, 2 Pa. 191 (holding that equity will not grant relief by compelling a redelivery of the premises or the payment of the rent, even in favor of a bona fide purchaser without notice; the grantor's title becomes absolutely void, and, as he has nothing to convey, nothing can pass to an assignee).

25. Harrison v. Owen, 1 Atk. 520, 26 Reprint 328, 18 ERC 564. See also Van Riswick v. Goodhue, 50 Md. 57.

26. Kendall v. Kendall, 12 Allen (Mass.) 92 (holding that a mortgage is not rendered invalid by the grantee fraudulently adding the name of the mortgagor's wife in release of dower. There seems to have been a disposition on the part of the court in this case to apply to mortgages the general rule which is applicable to the alteration of deeds, that is, that the material alteration of a deed by the grantee does not divest his title to the land. In the opinion Dewey, J., does not make any distinction between deeds conveying the fee to, and mortgages of, land, but says generally that the title to the property passes and vests in the grantee by the execution of the deed, and the subsequent alteration or destruction of the instrument does not affect his title); Rodriguez v. Haynes, 76 Tex. 225, 13 SW 296 (holding that, although

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where the mortgagee is regarded as holding a legal title, is that, although a mortgage is in form a conveyance of title, it is in reality but a security for the payment of money, and a material alteration of the mortgage by the mortgagee annuls the instrument as a lien upon the property,[27] and likewise prevents proceedings for its foreclosure,[28] even by an innocent assignee.[29]

A material alteration of a chattel mortgage by the mortgagee destroys it as security,[30] and, if such alteration is made before the mortgagee has taken possession of the property, it destroys his right to take possession.[31]

[§ 26] **(4) Lease.** A material alteration of a lease, after its execution, by one of the parties without the consent of the other party renders it unenforceable against the nonconsenting party.[32] Thus a lessor who has altered the lease destroys his right to recover under the executory clauses, or the rents reserved.[33] So a lessee who materially alters a lease thereby loses all his subsequent rights under the lease, either to retain possession or to preclude the lessor from entering upon the premises.[34]

[§ 27] **k. Who May Complain.** If the parties affected by a change in an instrument do not complain thereof, others who are not parties to the instrument or affected by the change cannot, ordinarily, set up the change,[35] unless there is evidence of fraud between the parties, to the injury of

a mortgage had been altered by one of the mortgagees erasing the name of a comortgagee, since the execution of the mortgage vested the title of the mortgagor in the grantees the heirs of the mortgagor could not recover in an action of trespass to try title to the land by virtue of an alleged title in their ancestor).

27. Ga.—Murphy v. Purifoy, 52 Ga. 480 (where the mortgage was set aside and judgment rendered for the debt without foreclosure).

Kan.—Johnson v. Moore, 33 Kan. 90, 5 P 406 (holding that, where the consideration of a mortgage is changed by increasing it, the security is avoided and it is not enforceable for any part of the debt therein described; that where a mortgage is given to secure the payment of money advanced by the mortgagee to pay off and discharge a prior mortgage debt upon the same premises, and the instrument fails by reason of an irregularity in its execution or an alteration inadvertently made by the mortagee without fault, he is entitled to be subrogated to the rights of the prior mortgage discharged and paid off by the money which he had advanced; but that where the second mortgage is materially altered by such mortgagee after its execution, acknowledgment, and delivery, without the consent of the mortgagors, which alteration injuriously affects the liability of the mortgagors, he is not entitled to the application of the equitable doctrine of subrogation).

Minn.—Russell v. Reed, 36 Minn. 376, 31 NW 452.

Mo.—Powell v. Banks, 146 Mo. 620, 48 SW 664 (an alteration of a deed of trust).

N. Y.—Marcy v. Dunlap, 5 Lans. 365.

Pa.—McIntyre v. Velte, 153 Pa. 350, 25 A 739 (where it appeared that defendant had agreed to purchase certain property from plaintiff, and that the suit was instituted to determine whether a mortgage of record against the property was a valid encumbrance or not, and the facts showed that the mortgage, since its execution and delivery, had been altered in a material part by the mortgagee, the court was of the opinion that the law was with plaintiff, for the reason that this alteration avoided the mortgage absolutely).

Tex.—Kalteyer v. Mitchell, (Civ. A.) 110 SW 462.

[a] **Cloud on title.**—An action will lie by a mortgagor to remove the apparently valid lien of a mortgage which has been materially altered, on the ground that the mortgage constitutes a cloud upon the title of the mortgagor. Smith v. Fellows, 41 N. Y. Super. 36.

28. Iowa.—Cutler v. Rose, 35 Iowa 456.

Kan.—Johnson v. Moore, 33 Kan. 90, 5 P 406.

Mass.—Bacon v. Hooker, 177 Mass. 335, 58 NE 1078, 83 AmSR 279.

Minn.—Coles v. Yorks, 28 Minn. 464, 10 NW 775.

Nebr.—Kimes v. Jesse, 52 Nebr. 606, 72 NW 1050 [cit Pereau v. Frederick, 17 Nebr. 117, 22 NW 235].

N. Y.—Waring v. Smyth, 2 Barb. Ch. 119, 47 AmD 299.

S. C.—Powell v. Pearlstine, 43 S. C. 403, 21 SE 328.

Eng.—Harrison v. Owen, 1 Atk. 520, 26 Reprint 328, 1 ERC 564.

29. Coles v. Yorks, 28 Minn. 464, 10 NW 775; Pereau v. Frederick, 17 Nebr. 117, 22 NW 235; Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119, 47 AmD 299.

[a] **Laches.**—The right to object may be lost by laches. Gest v. Flock, 2 N. J. Eq. 108 (holding that it is too late to object to a mortgage, on account of an alteration therein, ten years after a decree of foreclosure has established its validity, and as against a bona fide purchaser).

30. Carlisle v. Peoples Bank, 122 Ala. 446, 26 S 115; Green v. Sneed, 101 Ala. 205, 13 S 277, 46 AmSR 119 (holding that a mortgage altered as to the amount is not good as security even for the true amount); Bowser v. Cole, 74 Tex. 222, 11 SW 1131.

31. Hollingsworth v. Holbrook, 80 Iowa 151, 45 NW 561, 20 AmSR 411 (which was an action by the mortgagor to recover the possession of certain personal property which had been taken by defendant, the mortgagee, under a chattel mortgage which had been materially altered before possession had been delivered to the mortgagee by the latter's agent acting within the line of his authority, it was held that the alteration destroyed the right of the mortgagee to take the property on foreclosure, for the reason that the right to take possession and to sell the property and pay the mortgage debt depended upon the covenants of the mortgage); Bacon v. Hooker, 177 Mass. 335, 58 NE 1078, 83 AmSR 279 (holding that a mortgagee who had materially altered a chattel mortgage which contained a provision authorizing him to enter upon the mortgagor's premises to take the goods in case of default by the mortgagor had no right to enter upon the premises for the purpose of taking the property upon default by the mortgagor, for the provision authorizing that to be done was executory and was destroyed by the alteration).

32. Ala.—Bryan v. Carter, 51 S 999.

Mo.—Ver Steeg v. Becker-Moore Paint Co., 106 Mo. A. 257, 80 SW 346 (holding that alterations in a lease without the consent of the lessor and before its execution by the lessee, giving the privilege of subletting, and binding the lessor to make repairs, were so material that the assent of the lessee to the lease, with the modifications, did not make the contract binding).

N. Y.—Wright v. Kelley, 4 Lans. 57.

Pa.—Burgwin v. Bishop, 91 Pa. 336.

S. D.—Somers v. Miller, 32 S. D. 133, 142 NW 174 (holding that an alteration by a landlord of a lease of a farm for two years by the insertion of a provision that in case of a sale the lease shall terminate does not affect the tenant's legal rights).

[a] **Changing dates.**—A lease which is altered after its execution and without the consent of the lessor by changing the dates of the commencement and termination of the term is void. St. Louis Gunning Adv. Co. v. Baptiste, 135 Mo. A. 503, 116 SW 438.

[b] **Change of agency.**—An alteration in a lease, reciting that it shall be executed through a designated agency of the lessor, made without the consent of the lessee, who has signed the lease, by a third person erasing the name of the designated agency and inserting his name as the agent of the lessor, and then executing the lease for the lessor, by signing the name of the lessor, by the third person as agent, is a material alteration, and vitiates the lease, unless the lessor and lessee both ratify the change. Bryan v. Carter, (Ala.) 51 S 999.

33. Acker v. Ledyard, 8 Barb. (N. Y.) 514. See Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 AmD 427.

34. Bliss v. McIntyre, 18 Vt. 466, 46 AmD 165 (upon the ground that, although such an act by the lessee might not operate upon his acts committed before the alteration, all future rights were destroyed, as he had destroyed all evidence of his title). See also Jones v. Hoard, 59 Ark. 42, 26 SW 193, 43 AmSR 17.

Alteration of one of duplicate copies of lease see infra § 86.

35. Ward v. Cheney, 117 Ala. 238, 22 S 996 (holding that, where interlineations have existed in a deed of assignment, and for six years all parties interested have treated them as properly made, the court during that time having appointed successors to the assignees who had resigned, a party deriving no right or interest in or under the deed cannot question its validity); Hochmark v. Richler, 16 Colo. 263, 26 P 818; Ralston Sav. Bank v. Fisher, (Iowa) 147 NW 162 (holding that, where, after a tenant had absconded, his wife in making an arrangement with the landlord attached her name to the lease, this alteration was not available to a purchaser from the tenant of property subject to the landlord's lien, as a defense to an action for conversion); Wicker v. Jones, 159 N. C. 102, 115, 74 SE 801, 40 LRANS 69, AnnCas1914B 1083 [quot Cyc].

[a] **By subcontractor after performance of contract by original parties.**—Where a builder's contract is changed and the original parties thereto perform the contract in its altered condition, a subcontractor cannot set up the change for the purpose of enlarging his right to a lien. Andrews v. Burdick, 62 Iowa 714, 16 NW 275.

[b] **Holder of collateral security.**—The assignee of a note as collateral security cannot set up, as a defense to an action of trover on the note after the loan secured by the assignment has been paid, that the note was altered by the payee without the knowl-

such third parties.[36] The alteration must relate to the parties to the particular instrument altered.[37]

The alteration of an assignment or indorsement does not affect the claim of the assignee or indorsee on the instrument itself against the maker.[38]

The party who made the alteration cannot complain thereof or question the validity of the instrument on that ground.[39]

[§ 28] **6. Altered Instruments as Evidence—a. In General.**[40] Since an unauthorized and material alteration of a written instrument containing an executory contract has the effect of preventing a recovery thereon in either its altered or original form,[41] and the contract itself is therefore not provable, the written instrument is not admissible to establish the contract,[42] and the fact that it has been admitted in evidence provisionally does not deprive the court of the power to exclude it later.[43] Such an instrument, however, may be received as evidence in establishing some facts, such as the fact of the alteration,[44] or other collateral facts.[45]

Where the execution and delivery of an instrument are admitted its production is unnecessary, and in case it is offered in evidence an unexplained erasure which does not vary or alter its tenor is immaterial and does not affect its admissibility.[46]

[§ 29] **b. Evidence of Title.** In some jurisdictions it is held that since an unauthorized and material alteration in a deed by the grantee does not divest him of the title or interest which it conveyed,[47] such deed may be given in evidence by him to prove such title or interest.[48] In other juris-

edge of the maker. Flint v. Craig, 59 Barb. 319 [rev on other grounds 56 N. Y. 22].

[c] **As between senior and junior mortgagees.**—In Tate v. Fletcher, 77 Ind. 102, a senior mortgagee obtained a judgment of foreclosure in a suit in which the junior mortgagee was a party, and, the mortgagor having filed a complaint for review of the judgment and made the junior mortgagee a party, the latter was allowed to set up by cross complaint a material alteration in the note of the senior mortgagee on which judgment of foreclosure had been obtained. But see otherwise Gunter v. Addy, 58 S. C. 178, 36 SE 553 (where the insertion in the mortgage was made with the consent of the mortgagor, without fraudulent intent, for the purpose of making the mortgage conform to the note which it secured and to make the description of the mortgaged premises more certain, this being done after the execution of the second mortgage).

[d] **Discharge of guarantor.**—The discharge of a joint obligor not having the effect of discharging the others in the absence of a showing that such discharge was without the consent of the latter, an insistence by defendant in a suit to foreclose a mortgage that plaintiff was discharged from liability on his guaranty of the original debt by reason of the erasure of the name of one of the joint obligors, neither of the others claiming to be released, is without merit. Blewett v. Bash, 22 Wash. 536, 61 P 770. See also Guaranty [20 Cyc 1477].

[e] **Creditors** attacking an assignment by a debtor of an insurance policy cannot complain of an alteration of the policy, the insurance company alone having the right to complain of that matter. Steeley v. Steeley, 64 SW 642, 23 KyL 996.

36. Ravisies v. Alston, 5 Ala. 297; Wicker v. Jones, 159 N. C. 102, 115, 74 SE 801, 40 LRANS 69, AnnCas1914B 1083 [quot Cyc].

37. Wicker v. Jones, 159 N. C. 102, 115, 74 SE 801, 40 LRANS 69, AnnCas1914B 1083 [quot Cyc]; Loque v. Smith, Wright (Oh.) 10.

Erasure of name of grantor or prior indorsers see Bills and Notes [7 Cyc 796 et seq].

[a] **Separate contracts—Insurance policy.**—A contract in a policy of insurance will not be avoided by a material alteration of another contract between the company and another party indorsed upon the same policy. Robinson v. Phœnix Ins. Co., 25 Iowa 430.

38. Howe v. Thompson, 11 Me. 152; Griffith v. Cox, 1 Overt. (Tenn.) 210; Minert v. Emerick, 6 Wis. 355 (holding that the question of an alteration in an assignment of a contract concerns the parties to the instrument rather than the parties to the contract, and that, as between the assignee and the contractor, the material question is whether a valid assignment exists to give him a right to enforce the contract assigned).

39. Diamond v. Inter-Ocean Newspaper Co., 29 Okl. 323, 116 P 773. See also infra § 102.

40. Altered ancient documents as evidence see Evidence [17 Cyc 456].

Altered records as evidence see Evidence [17 Cyc 317].

Immaterial changes in instrument as not affecting its value as evidence see infra § 36.

Mutilated account books as evidence see Evidence [17 Cyc 374].

41. See supra § 11.

42. Brady v. Berwind-White Coal-Min. Co., 106 Fed. 824, 45 CCA 662; Powers v. Ware, 2 Pick. (Mass.) 451 (holding that, where an indenture of apprenticeship was made by the selectmen of a town who were ex officio overseers of the poor, and subsequently the master, by permission of only one of the selectmen, cut his signature from the indenture, and it was declared upon as a deed with a profert, it could not be received, on an issue joined upon the plea of non est factum, as the deed of the party at the time of the plea); York v. Janes, 43 N. J. L. 332; Schmidt v. Quinzel, 55 N. J. Eq. 792, 38 A 665; Hecht v. Shenners, 126 Wis. 27, 30, 105 NW 309 (where, in an action on a promissory note claimed to have been materially altered, it was said: "If the note has been altered in a material respect since its delivery, it is receivable in evidence for no purpose except to prove such alteration").

[a] **A deed which has been materially altered** is not competent evidence to prove the continuing existence of the covenants contained therein. North v. Henneberry, 44 Wis. 306.

[b] **A bond to which a writing had been attached** which was torn off by a party cannot be received in evidence after such mutilation. Price v. Tallman, 1 N. J. L. 447.

[c] **Memorandum required by statute of frauds.**—Where the memorandum required by the statute of frauds is materially altered after its execution by the seller without the purchaser's consent, the memorandum is not admissible as evidence of the contract and the statute of frauds prevents any recovery on the contract. Powell v. Divett, 15 East 29, 104 Reprint 755. See generally Frauds, Statute of [20 Cyc 147].

43. Brady v. Berwind-White Coal-Min. Co., 106 Fed. 824, 45 CCA 662.

44. Hecht v. Shenners, 126 Wis. 27, 105 NW 309. See also infra § 188 et seq.

[a] **Intent in making alteration.**—In an action to recover the original indebtedness the altered instrument is admissible for the purpose of throwing light on the question whether the intent with which the change was made was fraudulent or innocent. Hayes v. Wagner, 220 Ill. 256, 77 NE 211 [aff 113 Ill. A. 299]; Savage v. Savage, 36 Or. 268, 59 P 461.

45. Gould v. Coombs, 1 C. B. 543, 50 ECL 543, 135 Reprint 653; Davidson v. Cooper, 12 L. J. Exch. 467 [aff 13 L. J. Exch. 276]; Hutchins v. Scott, 6 L. J. Exch. 186; Agricultural Cattle Ins. Co. v. Fitzgerald, 16 Q. B. 432, 71 ECL 432, 4 EngL&Eq 211, 117 Reprint 944.

[a] **Evidence of facts recited in altered instrument.**—Where an instrument is offered in evidence against the party signing it to prove the facts recited therein, it will not be rendered inadmissible by reason of an erasure upon it, whether material or not, if the suit is not based upon the paper. Parker v. Moore, 29 Mo. 218.

[b] **Use to refresh memory.**—The rule excluding the use, as evidence, of altered instruments does not apply to memoranda and entries in books used by a witness to refresh his memory, and the witness is rightly permitted to testify that such entries are in his handwriting and that he has no doubt the transactions took place as shown by such entries. Adams v. Coulliard, 102 Mass. 167.

[c] **The subsequent alteration of a note without consent** does not render it inadmissible as evidence in an action to recover on the contract of suretyship against one who had signed his name thereto as surety. Dwinnell v. McKibben, 93 Iowa 331, 61 NW 985.

46. Brown v. Feldwert, 46 Or. 363, 80 P 414 (holding that, where defendants admitted the execution of a note sued on and the identity of the instrument which was set out in extenso in the complaint, the fact that an erasure appeared in the note, which did not vary or alter its tenor as alleged, did not render it inadmissible in evidence).

47. See supra § 24.

48. Ala.—Burgess v. Blake, 128 Ala. 105, 28 S 963, 86 AmSR 78 and note; Alabama State Land Co. v. Thompson, 104 Ala. 570, 16 S 440, 53 AmSR 80.

Mass.—Hatch v. Hatch, 9 Mass. 307, 6 AmD 67.

Mo.—Holladay-Klotz Land, etc., Co. v. T. J. Moss Tie Co., 89 Mo. A. 556. In Woods v. Hilderbrand, 46 Mo. 284, 2 AmR 513, which was an action in ejectment, plaintiff relied upon a sheriff's deed, conveying sundry parcels of land, including the one in controversy. After receiving the deed according to defendant's claim, he altered the description of one of the parcels, but not the one which he sought to recover in that action. Without passing on the general question whether an altered deed may be received in evidence of the real grant, the court held that since in the case at bar the alteration, so far as the land in controversy was concerned, could not be considered a material one the deed should have been admitted in evidence. This case was followed, without an opinion, in Woods v. McCoy, 46 Mo. 297, which was its counterpart and involved the same questions. It was held in a

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dictions, however, the courts have taken the view that while a grantee does not divest himself of title to land by an unauthorized alteration in a material respect of the deed by which it was conveyed to him, yet he cannot adduce the altered deed in evidence to prove the conveyance and the existence of title in himself, but must prove the conveyance by other evidence.[49]

[§ 30] **c. Evidence of Original Contract.** There is some authority for the proposition that the altered writing may, in an action to recover on the original consideration, be given in evidence to establish the original contract.[50] But the correctness of this principle has been denied, and it has been held that a materially altered instrument cannot be received in support of the money counts,[51] unless the alterations are made innocently.[52]

But instruments executed in duplicate are both primary evidence, and if one of the duplicates is unaltered there is still original primary evidence of the contract as agreed to by the parties, although the other duplicate has been destroyed by alterations.[53]

[§ 31] **d. Bills of Sale and Receipts.** The material alteration of an instrument which serves only to evidence a fact or transaction has the effect of preventing it from being adduced in proof of the matter which it purports to evidence, as in the case of bills of sale,[54] or receipts.[55]

[§ 32] **e. Necessity of Explanation.**[56] It is generally held that in order that an instrument containing apparent alterations may be admitted in evidence explanation of the alterations must first be made by the party offering the instrument,[57] and in

later case that, if in a deed conveying several tracts of land an alteration is made in the description of one of the tracts, the deed is nevertheless admissible as evidence of title to the tracts thereby conveyed in the description of which no alteration has been made. Burnett v. McCluey, 78 Mo. 676 [rev on other grounds 92 Mo. 230, 4 SW 694].

N. Y.—Jackson v. Gould, 7 Wend. 364; Lewis v. Payn, 8 Cow. 71, 18 AmD 427.

Wis.—North v. Henneberry, 44 Wis. 306.

Eng.—Doe v. Hirst, 3 Stark. 60, 3 ECL 594.

49. Mass.—Newcomb v. Presbrey, 8 Metc. 406 (deed held inadmissible without explanation of erasures).

Miss.—Long v. Stanley, 79 Miss. 298, 30 S 823 (holding that where, in an action to cancel tax deeds for sales made in 1889, as a cloud on title, the only evidence of plaintiff's title was an original conveyance, which was not in fact executed until 1897, but appeared to be altered by writing other figures over the figures denoting the date, so as to make it appear to have been executed in 1885, and it also appeared that the acknowledgment of such deed was taken on Aug. 12, 1897, which appeared to be a month and three days before the actual date of the signing of the deed, such instrument was invalid, and not entitled to consideration in support of plaintiff's right to sue).

N. H.—Chesley v. Frost, 1 N. H. 145.

Pa.—Flitcraft v. Commonwealth Title Ins., etc., Co., 211 Pa. 114, 60 A 557; Withers v. Atkinson, 1 Watts 236.

Vt.—Bliss v. McIntyre, 18 Vt. 466, 46 AmD 165.

Va.—Batchelder v. White, 80 Va. 103.

See Miller v. Luco, 80 Cal. 257, 22 P 195.

50. Pattinson v. Luckley, L. R. 10 Exch. 330; Sutton v. Toomer, 7 B. & C. 416, 14 ECL 190, 108 Reprint 778.

51. Hayes v. Wagner, 89 Ill. A. 390 (holding that, where a party to a written contract made alterations in a material part of it, the admission of the contract as evidence in an action to enforce it against another party to it, who did not consent to the alterations, was erroneous); Low v. Merrill, 1 Pinn. (Wis.) 340.

[a] **Evidence of rate of interest.**—Where a note secured by mortgage has been avoided by a material alteration, it is not admissible in proof of the rate of interest agreed to be paid on the mortgage. Edwards v. Sartor, 69 S. C. 540, 48 SE 537.

52. Hayes v. Wagner, 220 Ill. 256, 77 NE 211 [aff 113 Ill. A. 299] (holding that, as alterations in a written contract innocently made by a party thereto do not destroy the right to recover on the obligation which the writing evidenced, in an action to enforce that obligation the written instrument is admissible in evidence to show the facts in relation to its execution as a basis for the recovery of damages); Morrison v. Huggins, 53 Iowa 76, 4 NW 854 (where it was said that, where a party may legally recover on the original consideration for which the altered instrument was given, he may establish such consideration by any evidence which he may have, either written or oral, which has not been vitiated by the alteration).

53. Hayes v. Wagner, 220 Ill. 256, 77 NE 211 [aff 113 Ill. A. 299]. But see supra § 17 note 90 [d]. See also infra § 86.

54. Babb v. Clemson, 10 Serg. & R. (Pa.) 419, 13 AmD 684 (holding that, where a bill of sale has been willfully altered by the vendee for the purpose of covering property from execution, such altered instrument is not competent evidence of the sale).

55. Johnson v. Cooke, 85 Conn. 679, 84 A 97, AnnCas1913C 275 and note; Rambousek v. Supreme Council M. T., 119 Iowa 263, 93 NW 277 (holding that where a receipt is materially altered by the party holding it, or by the procurement of such party, it is thereby vitiated as an instrument of evidence); Goodfellow v. Inslee, 12 N. J. Eq. 355; Elgin v. Hall, 82 Va. 680.

[a] **But this rule is not applicable** where the only evidence on the point is to the effect that the alleged alteration was made before the execution of the receipt. Nickum v. Gaston, 28 Or. 322, 42 P 130.

[b] **Admissible subject to explanation.**—Where a receipt of payment on a note payable to a bank is sufficiently identified as having been written by the cashier to justify its admission in evidence, the receipt, notwithstanding apparent alterations, is properly admitted subject to such explanations as might be made regarding its appearance. Jamison v. Auxier, 145 Iowa 654, 124 NW 606.

56. **Presumptions and burden of proof in explanation of alterations** as a condition to the admissibility of the instrument in evidence see infra §§ 138–199.

57. Ill.—Peo. v. Foreman, 165 Ill. A. 13.

Iowa.—Rambousek v. Supreme Council M. T., 119 Iowa 263, 93 NW 277.

Kan.—King v. Bellamy, 82 Kan. 301, 108 P 117.

La.—Wheadon v. Turregano, 112 La. 931, 36 S 808.

Mass.—Newcomb v. Presbrey, 8 Metc. 406.

Mo.—Patterson v. Fagan, 38 Mo. 70 (where the alterations are apparent on the face of the instrument); Holladay-Klotz Land, etc., Co. v. J. T. Moss Tie Co., 89 Mo. A. 556.

Nebr.—Stough v. Ogden, 49 Nebr. 291, 68 NW 516 (holding that it was proper to receive in evidence the note sued on, which was alleged to have been altered, upon proof by the payee that the alteration was made previous to its receipt by him on the day of its date from one of the joint makers).

N. Y.—Every v. Merwin, 6 Cow. 360.

Pa.—Cornog v. Wilson, 231 Pa. 281, 80 A 174 (holding a note inadmissible without proof that the alteration in the date had been made before the execution of the note); Helzer v. Helzer, 193 Pa. 217, 44 A 281 (holding that where, in an action on a lost note to show a discharge, defendant offers a note which is altered by a cancellation of the maker's signature, and by indorsements prejudicial to the payee, which is identified as the note on which the suit is brought, it is proper to admit it, without the indorsements, where the cancellation of the signature is fully explained by disinterested testimony); Colonial Trust Co. v. Getz, 28 Pa. Super. 619; Sunday v. Dietrich, 16 Pa. Super. 640.

S. C.—Franklin v. Atlanta, etc., R. Co., 74 S. C. 332, 54 SE 578 (hospital record).

Tenn.—Walker v. Walker, 6 Coldw. 571 (holding that, where a deed offered in evidence by a party bears on its face evidence of alterations, it will not be admissible until such alterations have been properly explained by him); Riseden v. Harrison, (Ch. A.) 42 SW 884.

Tex.—Bullock v. Sprowls, (Civ. A.) 54 SW 657 [aff 93 Tex. 188, 54 SW 661, 77 AmSR 849, 47 LRA 326]; Kansas Mut. L. Ins. Co. v. Coalson, 22 Tex. Civ. A. 64, 54 SW 888.

Wash.—Crowley v. U. S. Fidelity, etc., Co., 29 Wash. 268, 69 P 784 (holding that a contract is not rendered inadmissible as evidence on account of corrections and interlineations which are clearly shown to have been made before it was signed).

Wis.—Bradley v. Dells Lumber Co., 105 Wis. 245, 81 NW 394.

See also infra § 198.

[a] **Sufficient explanation.**—(1) Evidence that a witness had had a deed for more than thirty years since it had been delivered to him, and that the erasures and interlineations were in the deed when it came into his possession, and that no erasures or interlineations had been made since that time, is sufficient to permit the introduction of the deed in evidence, notwithstanding the erasures and interlineations. Bentley v. State, (Ala.) 39 S 649. (2) Testimony that interlineations in a written contract were made before it was signed and delivered is sufficient foundation for the introduction of the writing in evidence. Consumers' Ice Co. v. Jennings, 100 Va. 719, 42 SE 879. (3) Where, in an action on a note alleged to have been materially altered, one witness testifies that the note when signed was in the same condition as it appeared when shown to him on the stand the note is properly admitted in evidence. Wood v. Skelley, 196 Mass. 114, 81 NE 872, 124 AmSR 516. (4) Where an insurance policy appears to be altered, proof that the alteration was made by an agent of the company, who took the insurance and gave the renewal receipt, is suf-

some states this rule is prescribed by statute.[58] But it is only where apparent changes by erasures, interlineations, or other modes excite distrust that the party is called on to show that they are innocent.[59]

An instrument which has been admitted in evidence without objection at a former trial, in an action thereon, is admissible on the second trial, although it has been materially altered, where there is evidence that it is in the same condition as it was at the first trial.[60]

[§ 33] **B. Immaterial Changes—1. Nature and Effect in General.** In an early English case it was said that any change in a deed after execution, even in an immaterial point, if made by the obligee himself avoided the instrument.[61] This case, however, was not authority to the full extent to which it was often cited,[62] and, although the doctrine of this case was afterward recognized both in England[63] and in the United States,[64] it has not met with favor by the more modern decisions and may now be said to be exploded, and to be superseded by the more reasonable doctrine that any change in words or form merely, even if made by an interested party, which leaves the legal effect and identity of the instrument unimpaired and unaltered, which in no manner affects the rights, duties, or obligations of the parties, and which leaves the meaning of the instrument as it originally stood, is not material and will not invalidate

ficient to permit the policy to go to the jury as evidence. German F. Ins. Co. v. Gerber, 4 Ill. A. 222.

[b] **Sufficient explanation of alterations in lease.**—Uncontradicted evidence that the erasures, alterations, and interlineations in a lease were there when the lease was executed by the parties and that the lease was in the same condition when it was offered in evidence as it was when it was signed by the parties, and that the assignees under the lease were given a copy thereof and had paid rent under the lease, justifies the court in admitting the lease in evidence in an action against the assignees for rent. Landt v. McCullough, 218 Ill. 607, 75 NE 1069.

[c] **Insufficient explanation.**—The fact that contracts made between the parties after a material alteration in a prior written contract were the same as the altered instrument is not a sufficient explanation of the alteration, so as to make the paper admissible in evidence. Brady v. Berwind-White Coal-Min. Co., 106 Fed. 824, 45 CCA 662.

[d] **Official documents.**—(1) "The rule which excludes papers on account of an unexplained alteration, applies to papers in possession of the party to be injured or benefited thereby, but not to official documents, not in the custody or under the control of the party." Per Ingraham, J., in Devoy v. New York, 35 Barb. 264, 268 [aff 36 N. Y. 449]. (2) Interlineations in an official certificate, if satisfactorily explained, will not affect the competency of such certificate. Peo. v. Foreman, 165 Ill. A. 13.

[e] **The admission of an assignment is improper** where it appears that it had been executed in blank and that there was a written power of attorney, not produced, supposed to authorize the filling of such blanks. Wabash R. Co. v. Meyer, 119 Ill. A. 104.

[f] **A judgment** is properly admitted in evidence in a suit to enforce it, notwithstanding the names of two defendants who were dismissed out of the case before judgment were erased from the title of the cause where the erasure is explained by the record. Reeves v. Mercer, 155 Ill. A. 57.

[g] **A headright land certificate** is admissible in evidence, although some of the words and parts of words contained in it have been obliterated, where it is offered in connection with testimony of witnesses who had seen and examined it before it was defaced. Pope v. Anthony, 29 Tex. Civ. A. 298, 68 SW 521.

[h] **Alterations in a sheriff's deed,** if proved to have been made before acknowledgment, are no objection to its admissibility in evidence. Grambs v. Lynch, 4 Pennyp. (Pa.) 243, 20 WklyNC 376.

[i] **An erasure in a sheriff's return** does not render the return inadmissible in evidence, where it is shown that the erasure is in the sheriff's handwriting and was made before the return was filed. Crossen v. Oliver, 37 Or. 514, 61 P 885.

[j] **An unexplained alteration in the date of a grant** while in the hands of claimants is cause for its rejection. U. S. v. Galbraith, 2 Black (U. S.) 394, 17 L. ed. 449.

[k] **An erasure of the name of a month in a written agreement** and the substitution of the name of another month do not, of themselves, invalidate the agreement, so as to render it inadmissible in evidence, as such erasure admits of explanation. Sober v. Moony, 48 Pa. Super. 92.

58. See statutory provisions.

[a] **In California** Code Civ. Proc. § 1982 provides that a party producing as genuine a writing which has been altered or appears to have been altered after its execution in a part material to an issue cannot give the writing in evidence without accounting for the alteration; hence in an action on a note where there seemed to have been a change in the last figure in the date, but it did not appear that the alteration was made after the note had been executed, it was not error to admit the note in evidence. Sedgwick v. Sedgwick, 56 Cal. 213.

[b] **In Georgia,** under Civ. Code (1895) § 3704, if a contract is not pleaded as a basis of an action, so as to require a denial under oath, and plaintiff offers it in evidence, a physical alteration appearing in a material part of it requires explanation before it can be admitted. W. H. Howard Piano Co. v. Glover, 7 Ga. A. 548, 67 SE 277.

[c] **In Idaho,** under Rev. St. (1887) § 6030, after evidence by the clerk of the court and prosecuting attorney that no changes were made in a bail bond after it had been delivered to the prosecuting attorney, with further evidence that the alterations in the bond were made for and with the consent of the sureties to the bond, such bond was admissible in evidence. State v. Baird, 13 Ida. 29, 89 P. 233.

59. Holladay-Klotz Land, etc., Co. v. T. J. Moss Tie Co., 87 Mo. A. 167. See also infra §§ 189, 192, 198.

Immaterial or nonsuspicious alterations as not requiring explanation see infra § 36.

[a] **Alterations, interlineations, and erasures in a lease** which change the legal effect and operation of the instrument and the liability of the parties should be explained by the party seeking the benefit of the lease before it is received in evidence. Landt v. McCullough, 206 Ill. 214, 69 NE 107 [rev 103 Ill. A. 668].

60. Graham v. Spang, (Pa.) 16 A 91.

61. Pigot's Case, 11 Coke 26b, 27a, 77 Reprint 1177 (where it was resolved "that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, erasing, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void. . . . So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void"). See also Brown v. Jones, 3 Port. (Ala.) 420; Barrett v. Thorndike, 1 Me. 73 [cit 1 Sheppard Abr. 541; Markham v. Gonaston, Cro. Eliz. 626, 78 Reprint 866, as to change by obligee]; Chessman v. Whittemore, 23 Pick. (Mass.) 231; Fuller v. Green, 64 Wis. 159, 24 NW 907, 54 AmR 600.

62. Aldous v. Cornwell, L. R. 3 Q. B. 573, (where it was said that the fact found in Pigot's Case, 11 Coke 26b, 27a, 77 Reprint 1177, was that the alteration, which was not a material one, was made by a stranger, and that judgment was given for plaintiff, so that the case itself was not a decision upon the point that an immaterial change by the obligee will vitiate the instrument). In Miller v. Stewart, 9 Wheat. (U. S.) 680, 6 L. ed. 189, Mr. Justice Johnson said: "As an adjudication, the value of that case should be limited to the single point, 'that an immaterial interlineation, without the privity or command of the obligee, does not avoid the bond.'"

63. Sanderson v. Symonds, 1 B. & B. 426, 5 ECL 721, 129 Reprint 786 (recognizing the authority of Pigot's Case, 11 Coke 26b, 27a, 77 Reprint 1177, but holding that the case of an insurance policy stands upon its own circumstances); Davidson v. Cooper, 12 L. J. Exch. 467 [aff 13 L. J. Exch. 276].

[a] **Reason for rule.**—In Reid v. Humphrey, 6 Ont. A. 403, 406, Spragge, C. J. O., said: "The strictness of the rule on this subject, as laid down in Pigot's Case, 11 Coke 26b, 27a, 77 Reprint 1177, can only be explained on the principle that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part. To say that Pigot's Case, supra, has been overruled is a mistake; on the contrary, it has been extended; the authorities establishing, as common sense requires, that the alteration of an unsealed paper will vitiate it." To same effect Davidson v. Cooper, 13 L. J. Exch. 276.

64. Del.—Herdman v. Bratten, 2 Del. 396.

N. Y.—Lewis v. Payn, 8 Cow. 71, 18 AmD 427; Jackson v. Malir, 15 Johns. 293; Van Brunt v. Van Brunt, 3 Edw. 14.

N. C.—Pullen v. Shaw, 14 N. C. 238; Nunnery v. Cotton, 3 N. C. 222 (where the doctrine was applied to a change made by the party claiming under the deed, especially if done with fraudulent design).

Pa.—Smith v. Weld, 2 Pa. 54; Morris v. Vanderen, 1 Dall. 64, 1 L. ed. 86.

W. Va.—Piercy v. Piercy, 5 W. Va. 199.

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the instrument or discharge the parties from lia- | bility thereon,[65] in the absence of a statute declar-

65. U. S.—Gordon v. Chattanooga Third Nat. Bank, 144 U. S. 97, 12 SCt 657, 36 L. ed. 360; Butte First Nat. Bank v. Weidenbeck, 97 Fed. 896, 38 CCA 131 [rev 87 Fed. 271]; Crawford v. Dexter, 6 F. Cas. No. 3,368, 5 Sawy. 201 (holding that an immaterial alteration in a bond by the obligee or his authorized agent will not relieve a surety from liability); U. S. v. Hatch, 26 F. Cas. No. 15,325, 1 Paine 336.

Ala.—Nance v. Gray, 143 Ala. 234, 38 S 916, 5 AnnCas 55; Winter v. Pool, 100 Ala. 503, 14 S 411.

Ark.—Knapp v. Wilks, 105 Ark. 243, 151 SW 280.

Cal.—Souza v. Lucas (A.) 100 P 115; Humphreys v. Crane, 5 Cal. 173; Manuel v. Flynn, 5 Cal. A. 319, 90 P 463.

Colo.—Hill v. Fruita Mercantile Co., 42 Colo. 491, 94 P 354, 126 AmSR 172; Whitehead v. Emmerich, 38 Colo. 13, 87 P 790; King v. Rea, 13 Colo. 69, 21 P 1084; Creede First Nat. Bank v. Miner, 9 Colo. A. 361, 48 P 837.

Conn.—Murray v. Klinzing, 64 Conn. 78, 29 A 244 (alteration of a deed); Nichols v. Johnson, 10 Conn. 192.

Del.—Warder v. Stewart, 16 Del. 275, 36 A 88.

Ga.—Brice v. Sheffield, 118 Ga. 128, 44 SE 843; Lowry v. McLain, 75 Ga. 372; Broughton v. West, 8 Ga. 248; Bryant v. Georgia Fertilizer, etc., Co., 13 Ga. A. 448, 79 SE 236.

Ida.—Mulkey v. Long, 5 Ida. 213, 47 P 949.

Ill.—Ryan v. Springfield First Nat. Bank, 148 Ill. 349, 35 NE 1120; Rudesill v. Jefferson County, 85 Ill. 446; McKibben v. Newell, 41 Ill. 461; Vogle v. Ripper, 34 Ill. 100, 85 AmD 298; Gardiner v. Harback, 21 Ill. 129; Reed v. Kemp, 16 Ill. 445; Paterson v. Higgins, 58 Ill. A. 268; Day v. Ft. Scott Inv. Co., 53 Ill. A. 165 [aff 153 Ill. 293, 38 NE 567]; Magers v. Dunlap, 39 Ill. A. 618; Gill v. Hopkins, 19 Ill. A. 74.

Ind.—Fry v. P. Bannon Sewer Pipe Co., 179 Ind. 309, 101 NE 10; Shuck v. State, 136 Ind. 63, 35 NE 993; Kline v. Raymond, 70 Ind. 271; Harris v. State, 54 Ind. 2; State v. Berg, 50 Ind. 496; Cochran v. Nebeker, 48 Ind. 459; Foote v. Bragg, 5 Blackf. 363; Crowe v. Beem, 36 Ind. A. 207, 75 NE 302; Casto v. Evinger, 17 Ind. A. 298, 46 NE 648; Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413.

Ind. T.—Taylor v. Acom, 1 Ind. T. 436, 45 SW 130.

Iowa.—James v. Dalbey, 107 Iowa 463, 78 NW 51; Iowa Valley State Bank v. Sigstad, 96 Iowa 491, 65 NW 407; Davis v. Campbell, 93 Iowa 524, 61 NW 1053; Starr v. Blatner, 76 Iowa 356, 41 NW 41; Horton v. Horton, 71 Iowa 448, 32 NW 452; Jackson v. Boyles, 64 Iowa 428, 20 NW 746; Rowley v. Jewett, 56 Iowa 492, 9 NW 353; Briscoe v. Reynolds, 51 Iowa 673, 2 NW 529.

Kan.—Galva First Nat. Bank v. Nordstrom, 70 Kan. 485, 78 P 804.

Ky.—Stanley v. Davis, 107 SW 773, 32 KyL 1135; Heddrick v. Huffaker, 80 SW 1130, 26 KyL 201; Tranter v. Hibberd, 56 SW 169, 21 KyL 1710; Keene v. Miller, 103 Ky. 628, 45 SW 1041, 20 KyL 279; Phillips v. Breck, 79 Ky. 465; Terry v. Hazelwood, 1 Duv. 104 [overr in effect Johnson v. U. S. Bank, 2 B. Mon. 310]; Jones v. Shelbyville F., etc., Ins. Co., 1 Metc. 58; Shelton v. Deering, 10 B. Mon. 405; Brown v. Warnock, 5 Dana 492; Com. Bank v. McChord, 4 Dana 191, 29 AmD 398; Tandy v. Hatcher, 9 KyL 150.

La.—Provenzano v. Glaesser, 122 La. 378, 47 S 688; Martin v. McMasters, 14 La. 420; Barrabine v. Bradshears, 5 Mart. 190.

Me.—Cushing v. Field, 70 Me. 50, 35 AmR 293; Eddy v. Bond, 19 Me. 461, 36 AmD 767; Hale v. Russ, 1 Me. 334; Barrett v. Thorndike, 1 Me. 73 (especially in the absence of fraud).

Md.—State v. Miller, 3 Gill 335.

Mass.—James v. Tilton, 183 Mass. 275, 67 NE 326; Vose v. Dolan, 108 Mass. 155, 11 AmR 331 [cit Com. v. Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 AmD 126; Chessman v. Whittemore, 23 Pick. 231]; Adams v. Frye, 3 Metc. 103; Brown v. Pinkham, 18 Pick. 172; Homer v. Wallis, 11 Mass. 309, 6 AmD 169; Hatch v. Hatch, 9 Mass. 307, 6 AmD 67; Smith v. Crooker, 5 Mass. 538.

Mich.—Ensign v. Fogg, 177 Mich. 317, 143 NW 82; Prudden v. Nester, 103 Mich. 540, 61 NW 777; White Sewing Mach. Co. v. Dakin, 86 Mich. 581, 49 NW 583, 13 LRA 313; Weaver v. Bromley, 65 Mich. 212, 31 NW 839; Port Huron First Nat. Bank v. Carson, 60 Mich. 432, 27 NW 589; Leonard v. Phillips, 39 Mich. 182, 33 AmR 370; Gano v. Heath, 36 Mich. 441; Goodenow v. Curtis, 33 Mich. 505; Miller v. Finley, 26 Mich. 249, 12 AmR 306.

Minn.—Minnesota, etc., Cattle Co. v. Chicago, etc., R. Co., 108 Minn. 470, 122 NW 493; Renville County v. Gray, 61 Minn. 242, 63 NW 635; Herrick v. Baldwin, 17 Minn. 209, 10 AmR 161.

Miss.—McRaven v. Crisler, 53 Miss. 542; Bridges v. Winters, 42 Miss. 135, 97 AmD 443, 2 AmR 598; Gordon v. Sizer, 39 Miss. 805; Moye v. Herndon, 30 Miss. 110.

Nebr.—Blenkiron v. Rogers, 87 Nebr. 716, 127 NW 1062, 31 LRANS 127, AnnCas1912A 1043; Fisherdick v. Hutton, 44 Nebr. 122, 62 NW 488; Barnes v. Van Keuren, 31 Nebr. 165, 47 NW 848; Townsend v. Star Wagon Co., 10 Nebr. 615, 7 NW 274, 35 AmR 493; Oliver v. Hawley, 5 Nebr. 439; Palmer v. Largent, 5 Nebr. 223, 25 AmR 479.

N. H.—Cole v. Hills, 44 N. H. 227; Burnham v. Ayer, 35 N. H. 351; Morrill v. Otis, 12 N. H. 466; Pequawket Bridge v. Mathes, 8 N. H. 139; Bowers v. Jewell, 2 N. H. 543; State v. Silley [cit Martendale v. Follet, 1 N. H. 95].

N. Y.—Casoni v. Jerome, 58 N. Y. 315; Polhemus Printing Co. v. Hallenbeck, 46 App. Div. 563, 61 NYS 1056; Ludekens v. Pscherhofer, 76 Hun 548, 28 NYS 230; Kinney v. Schmitt, 12 Hun 521; Flint v. Craig, 59 Barb. 319 [rev on other grounds 56 N. Y. 22]; Peo. v. Kuhne, 57 Misc. 30, 107 NYS 1020 [aff 127 App. Div. 916 mem, 111 NYS 1136 mem]; Knapp v. Maltby, 13 Wend. 587.

N. C.—Wicker v. Jones, 159 N. C. 102, 74 SE 801; 40 LRANS 69, AnnCas1914B 1083; Cheek v. Nall, 112 N. C. 370, 17 SE 80; Smith v. Eason, 49 N. C. 34.

N. D.—J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 466, 92 NW 826.

Oh.—Sturges v. Williams, 9 Oh. St. 443, 75 AmD 473; Huntington v. Finch, 3 Oh. St. 445; Carlile v. Lamb, 16 Oh. Cir. Ct. 578; Hayes v. Dumont, 2 Oh. Cir. Ct. 229, 1 Oh. Cir. Dec. 458.

Pa.—Express Pub. Co. v. Aldine Press, 126 Pa. 347, 17 A 608; Craighead v. McLoney, 99 Pa. 211; Robertson v. Hay, 91 Pa. 242; Kountz v. Kennedy, 63 Pa. 187, 3 AmR 541; Burkholder v. Lapp, 31 Pa. 322; Clark v. Eckstein, 22 Pa. 507, 62 AmD 307 (holding that the mere removal of a blot on a note after execution will not avoid it); Miller v. Gilleland, 19 Pa. 119; Gardinier v. Sisk, 2 Pa. 326; Latshaw v. Hiltebeitel, 2 Pennyp. 257; Hadley Falls Nat. Bank v. Loudenslager, 2 Pa. Dist. 654; Saunders v. Baldwin, 23 Pa. Co. 10.

R. I.—Manufacturers', etc., Bank v. Follett, 11 R. I. 92, 23 AmR 418; Arnold v. Jones, 2 R. I. 345.

S. C.—Pope v. Chafee, 35 S. C. Eq. 69.

Tenn.—State Bank Note Holders v. Funding Board, 16 Lea 46, 57 AmR 211; Blair v. State Bank, 11 Humphr. 84.

Tex.—Tutt v. Thornton, 57 Tex. 35; McShan v. Watlington, (Civ. A.) 133 SW 722; Baldwin v. Haskell Nat. Bank, (Civ. A.) 124 SW 443; Marx v. Luling Co-Operative Assoc., 17 Tex. Civ. A. 408, 45 SW 596; Chamberlain v. Wright (Civ. A.) 35 SW 707; Churchill v. Bielstein, 9 Tex. Civ. A. 445, 29 SW 392; Yost v. Watertown Steam-Engine Co., (Civ. A.) 24 SW 657; First Nat. Bank v. Pritchard, 2 Tex. A. Civ. Cas. § 130.

Vt.—Derby v. Thrall, 44 Vt. 413, 8 AmR 389; Langdon v. Paul, 20 Vt. 217.

Va.—Bashaw v. Wallace, 101 Va. 733, 45 SE 290.

Wash.—Pitt v. Little, 58 Wash. 355, 108 P 941; Lombardo v. Lombardini, 57 Wash. 352, 106 P 907, 32 LRANS 515; Young v. Borzone, 26 Wash. 4, 66 P 135, 421.

W. Va.—Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 194, 52 SE 515 [cit Cyc]; Yeager v. Musgrave, 28 W. Va. 90; Ohio Valley Bank v. Lockwood, 13 W. Va. 392, 31 AmR 768.

Wis.—Fuller v. Green, 64 Wis. 159, 24 NW 907, 54 AmR 600 (holding that in determining the materiality of a particular change the court will be governed entirely by the effect of the change according to the laws of the state where the question is raised); Krouskop v. Shontz, 51 Wis. 204, 8 NW 241, 37 AmR 817; Williams v. Starr, 5 Wis. 534.

Wyo.—McLaughlin v. Venine, 2 Wyo. 1.

Eng.—Lowe v. Fox, 12 App. Cas. 206; Suffell v. Bank of England, 7 Q. B. D. 270 [rev on the ruling as to the materiality of the particular change 9 Q. B. D. 555, 3 ERC 640]; Crediton v. Exeter, [1905] 2 Ch. 455; In re Howgate, [1902] 1 Ch. 451; Catton v. Simpson, 3 A. & E. 136, 35 ECL 518, 112 Reprint 788 [overr Gardner v. Walsh, 5 E. & B. 83, 85 ECL 83, 119 Reprint 412, not, however, on the ground that an immaterial change affected the instrument, but on the ground that the particular change was a material one]; Doe v. Bingham, 4 B. & Ald. 672, 6 ECL 648, 106 Reprint 1082; Marson v. Petit [cit Cardwell v. Martin, 1 Campb. 79, 82 note]; Walter v. Cubley, 2 Cromp. & M. 151; Falmouth v. Roberts, 1 Dowl. P. C. N. S. 633; Trapp v. Spearman, 3 Esp. 57; Farquhar v. Southey, M. & M. 14, 22 ECL 460; Waugh v. Bussell, 5 Taunt. 707, 1 ECL 362, 128 Reprint 868; London, etc., Bank v. Roberts, 22 Wkly. Rep. 402. In Aldous v. Cornwell, L. R. 3 Q. B. 573, which is the leading case opposed to the doctrine above referred to in Pigot's Case, 11 Coke 26b, 27a, 77 Reprint 1177, Lush, J., in delivering the opinion of the court, said that no authority was cited, nor could any be found, in which the doctrine that an immaterial alteration avoided the instrument had been acted upon. He adverted to cases in which the contrary had been held, although they could not be regarded as entirely satisfactory. In Darcy's Case, 1 Leon. 282, 74 Reprint 257, an immaterial alteration in a bond, made by the executor of the obligee, was held not to vitiate the bond, but the court laid stress upon the fact that the alteration was in favor of the obligor. In Sanderson v. Symonds, 1 B. & B. 426, 5 ECL 721, 129 Reprint 786, the court held that the words added to a policy of insurance expressed no more than was already contained in the policy as signed by defendant, and that therefore he was not discharged, the real ground of the decision appearing to be that defendant was not and could not be prejudiced by the alteration, the conclusion of the court apparently limiting the doctrine to policies of insurance; but Lush, J., said that no reason could be discovered for making a distinction between that and any other species of contract.

N. B.—Isaacs v. Grothe, 29 N. B. 420.

[a] "It is well settled that, where

ing such to be the effect,[66] notwithstanding the alteration is made by the payee or holder of the instrument himself.[67] Where the words inserted, when taken with the original words, and as an addition to them, are wholly senseless and inoperative, or where the addition is a mere nullity, it cannot affect the terms or identity of the contract.[68] In case of an immaterial change, recovery may be had on the instrument in its original condition.[69]

An alteration of immaterial recitals in a written instrument does affect the validity of the instrument.[70]

Change of phraseology. An alteration of an instrument which merely changes its phraseology and does not alter the legal effect of the instrument is not material.[71]

An ineffectual attempt to alter an instrument will not avoid it.[72]

the alteration is not such as to change the effect of the instrument, it is an immaterial alteration, and does not preclude recovery." Per Hooker, J., in Prudden v. Nester, 103 Mich. 540, 543, 61 NW 777.

[b] **Alterations held immaterial.**—(1) The removal by the assignee from a written assignment of a claim of a clause negativing any purpose on the assignor's part to guarantee the payment of the claim, where no such intention is deducible from the agreement as altered. Prudden v. Nester, 103 Mich. 540, 61 NW 777. (2) An erasure, in a building contract, of words acknowledging the receipt of payment of the first installment due thereunder. Sullivan v. California Realty Co., 142 Cal. 201, 75 P 767. (3) The insertion in a note of words which may be omitted without affecting its sense. Houghton v. Francis, 29 Ill. 244. (4) The addition to a bill of exchange of the words "without any relief from valuation or appraisement laws." Holland v. Hatch, 15 Oh. St. 464, 466. (5) The erasure of the words "renewed" or "renewed by another note," which it appears were at one time written across the note. Marrow v. Richardson, (Tex.) 6 SW 763. (6) The insertion in the bond of an administratrix with the will annexed, after the word "administratrix," of the words "with the will annexed." Casoni v. Jerome, 58 N. Y. 315. (7) The insertion in the bond of a liquor dealer of a description, by block and lot, of the place where his business is to be conducted. Starr v. Blatner, 76 Iowa 356, 41 NW 41. (8) The insertion of a mere clerical omission by the scrivener of a bond to make it conform to his notion of the requirements of the statute and which in no way varies the meaning of the instrument or its operation. Rudesill v. Jefferson County Ct., 85 Ill. 446. (9) Striking the word "commissioned" from the bond of a county auditor. Shuck v. State, 136 Ind. 63, 35 NE 993. (10) Writing the words "$10. dollars and fifty interest," in a note at the bottom and to the left of the signatures, and following the words "value received" which concluded the body of the note. Gardiner v. Harback, 21 Ill. 129. See also infra §§ 37–89.

[c] **A mere change in the color of the ink,** the addition of a number by plaintiff for convenience, or other immaterial alterations will not vitiate the note if it remains substantially the same. Warder, etc., Co. v. Stewart, 16 Del. 275, 36 A 88.

[d] **A mortgage is not materially altered** (1) by an interlineation which accords with the original agreement of the parties. Bayse v. McKinney, 43 Ind. A. 422, 87 NE 693. But see infra §§ 99, 100. (2) Inserting words in a mortgage intended to express a waiver of the benefits of a specific act of the assembly, which act had been repealed before the mortgage was executed, does not affect the mortgage, and is immaterial. Robertson v. Hay, 91 Pa. 242.

[e] **Deeds.**—(1) The mere fact that alterations or erasures or interlineations are apparent on the face of a deed does not destroy its validity. Harper v. Reaves, 132 Ala. 625, 32 S 721. (2) Thus where a second deed is executed in the place of a quitclaim, and a warranty deed form is used for the purpose, the mere erasure of such words as are necessary in order to make the deed correspond with the original quitclaim deed is immaterial. Wilder v. Aurora, etc., Electric Tract. Co., 216 Ill. 493, 75 NE 194.

[f] **An alteration of a note** (1) which does not change its effect is immaterial, and does not invalidate it. Crowe v. Beem, 36 Ind. A. 207, 75 NE 302; Sanford v. Cairo City Nat. Bank, 15 KyL 607. See also cases supra this note. (2) Thus alterations of a note which make no change in its date, the sum payable either as principal or interest, the time of payment, the number or relation of the parties, or the medium in which payment is to be made, and which do not add the place of payment, where none was specified, or which do not affect the note in any respect, are immaterial, and do not avoid the note. Pitt v. Little, 58 Wash. 355, 108 P 941. (3) So where the matter indorsed on a note is too indefinite to constitute a modification of the note, an alteration of such indorsement which leaves it as indefinite as before is immaterial. Krouskop v. Shontz, 51 Wis. 204, 8 NW 241, 37 AmR 817.

[g] **Affixing revenue stamp to a note as not being a material alteration** see Rowe v. Bowman, 183 Mass. 488, 67 NE 636.

[h] **Failure to insert provision.**—The mere failure to insert in a written agreement a provision which the parties agreed should be inserted is not a fraudulent alteration of the agreement. Bindseil v. Federal Unison Surety Co., 130 App. Div. 775, 115 NYS 447.

[i] **Alteration in affidavit of justification to bond.**—On the ground that the affidavit of justification is no part of a bond, an alteration of such an affidavit made by the surety and principal to a bond of indemnity, which consisted in changing the statement that the principal was worth, in property, the sum of ten thousand dollars to the statement that he was worth five thousand dollars, could not be treated as a material, or any, alteration of the bond. Ludekens v. Pscherhofer, 76 Hun 548, 28 NYS 230.

66. Peo. v. Kuhne, 57 Misc. 30, 107 NYS 1020 [aff 127 App. Div. 916 mem, 111 NYS 1136 mem] (holding that if a change is made by one of the parties to an instrument after its execution, but its legal import remains the same, the alteration is not fatal, in the absence of a statute declaring such to be the effect).

67. Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413. And see cases supra note 65.

[a] **If the alteration of a note is an immaterial one,** the payee or holder may recover, although such alteration is made by himself. Casto v. Evinger, 17 Ind. A. 298, 46 NE 648; Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413.

68. Cole v. Pennington, 33 Md. 476; Granite R. Co. v. Bacon, 15 Pick. (Mass.) 239; McKenzie v. Barrett, 43 Tex. Civ. A. 451, 98 SW 229.

[a] **Idle and unnecessary interlineations** do not affect the contract and are immaterial. Yeager v. Musgrave, 28 W. Va. 90.

69. Fisher v. Dennis, 6 Cal. 577, 65 AmD 534 (holding that a filling up of an interest blank is not such an alteration of a note as to vitiate it and prevent any recovery); Chamberlin v. White, 79 Ill. 549; Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413. See also cases supra note 65.

70. Cragg v. State, 18 Tex. A. 295.

[a] **Change in preliminary recitals in bond.**—An alteration made in the preamble or introductory part of the condition of a bond, wherein are stated the terms of the agreement between the principal and the obligee to secure the performance of which the bond is given, which does not affect the condition of the bond, is an immaterial alteration and does not relieve a surety of liability. Crawford v. Dexter, 6 F. Cas. No. 3,368, 5 Sawy. 201.

[b] **Alteration of immaterial recital in assignment of sheriff's certificate.**—Peo. v. Muzzy, 1 Den. (N. Y.) 239.

[c] **Alteration of description of property in note for purchase money.**—An alteration of a note given for a balance of the purchase price of land which describes the land as the "south quarter" of a certain section, by adding the word "west," thus making the description read "southwest quarter," is immaterial; for the obligation of the instrument would be just as strong without any description of the land, which is put in the note merely to identify it as the note which is given for the balance due on the land. Nance v. Gray, 143 Ala. 234, 38 S 916, 5 AnnCas 55.

71. U. S.—U. S. v. Hatch, 26 F. Cas. No. 15,325, 1 Paine 336.

Ill.—Ryan v. Springfield First Nat. Bank, 148 Ill. 349, 35 NE 1020.

Me.—Cushing v. Field, 70 Me. 50, 35 AmR 293.

Minn.—State v. Riebe, 27 Minn. 315, 7 NW 262.

Oh.—Holland v. Hatch, 15 Oh. St. 464.

[a] **A verbal change** in a contract not essentially varying its meaning or affecting the liability of the party to be charged is an immaterial alteration. Blenkiron v. Rogers, 87 Nebr. 716, 127 NW 1062, 31 LRANS 127 and note, AnnCas1912A 1043 and note.

[b] **Substituting "of" for "to."**—Where the words, "This note is subject to a contract made Nov. 13, 1874," are indorsed across the end of the note, it is an immaterial alteration to substitute the word "of" for "to." Cushing v. Field, 70 Me. 50, 35 AmR 293.

[c] **Substitution of "before" for "by."**—Where a contract for the purchase of goods contained a clause stating that the delivery of the same was "subject to countermand by June 15th, 1886," and after execution the word "by" was erased and the word "before" interlined, the change in no way alters the terms of the contract, and is not a material alteration. Express Pub. Co. v. Aldine Press, 126 Pa. 347, 17 A 608.

[d] **Insertion of words intended to remove ambiguity.**—Where a bond was given to pay the obligee "$100, 'to be paid in $25 a year, . . . with interest . . . on the whole,'" and the holder inserted the last three words, the court said: "The holder imprudently attempted to remove what he supposed to be an ambiguity; but he did not disturb the legal effect of the note, and consequently did not avoid it." Gardinier v. Sisk, 3 Pa. 326, 327.

72. Sullivan v. California Realty Co., 142 Cal. 201, 75 P 767 (holding that an attempted erasure of words in an instrument which is ineffectual and leaves the words still legible is not a material alteration).

[a] **Attempted insertion.**—Where

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Modern rule not followed. In at least two jurisdictions in this country the ancient rule of the common law which was applicable to deeds, and which at one time was extended to bills and notes, is still applied to all instruments—namely, that even an immaterial change by the holder of, or party claiming under, the instrument will vitiate it as against nonconsenting parties.[73] A qualification of this rule has been recognized, however, and it has been held that the principle cannot be applied to an executory contract which is not for the payment of money nor to affect title to real estate.[74]

[§ 34] **2. Supplying What the Law Implies.** Any change, made in an instrument after its execution, which merely expresses what would otherwise be supplied by intendment is immaterial even as to parties not assenting to the change, for they would be liable to the same extent without the change, and the contract is not altered by it.[75]

an attempt is made to change a note by inserting the words "or order," but the words are inserted in the wrong place and spelled "or oder," there is no such change in the note as to make it negotiable, and, therefore, it is not invalidated by the attempted alteration. Carlile v. Lamb, 16 Oh. Cir. Ct. 578, 9 Oh. Cir. Dec. 70.

73. See cases infra this note.

[a] **"The doctrine in Missouri** (1) seems to be different from that which obtains generally throughout other jurisdictions. There was at one time a considerable conflict in this jurisdiction on the question of the effect of immaterial alterations. But this no longer obtains. The courts have in a number of cases expressed their approval of the rule that even an immaterial alteration of a writing made therein without authority by the person claiming thereunder avoids the instrument." Per Nortoni, J., in McCormack Harvesting Mach. Co. v. Blair, 146 Mo. A. 374, 382, 124 SW 49. (2) This rule is well supported by other cases in this state. Powell v. Banks, 146 Mo. 620, 48 SW 664; Kelly v. Thuey, 143 Mo. 422, 45 SW 300; Hord v. Taubman, 79 Mo. 101; Bailey v. Gilman Bank, 99 Mo. A. 571, 74 SW 874; Girdner v. Gibbons, 91 Mo. A. 412; Allen v. Dornan, 57 Mo. A. 288; Kingston Sav. Bank v. Bosserman, 52 Mo. A. 269; Farmers' Bank v. Meyers, 50 Mo. A. 157; Burnham v. Gosnell, 47 Mo. A. 637; Moore v. Macon Sav. Bank, 22 Mo. A. 684. (3) In this state, however, the court has not been consistent with itself on all occasions, and, aside from its arbitrary adoption of the common-law rule which applied originally to deeds only, seems without strong support. Side by side with Springfield First Nat. Bank v. Fricke, supra [referred to in Morrison v. Garth, supra, as putting the question at rest], stands Williams v. Jensen, 75 Mo. 681, which holds that the particular change under consideration does not constitute an alteration because it does not change the legal liabilities of the parties to the instrument, or, in other words, because the legal effect of the instrument is not altered, which is the very distinguishing feature between a material and an immaterial change which will or will not vitiate an instrument, according to the modern rule. Haskell v. Champion, 80 Mo. 136, is taken as the controlling adjudication on this subject, but it is apprehended that the decision in this case does not turn on the point that the change was made by the holder of the instrument any more than upon the point that the change was of an immaterial character. The court cites 1 Greenleaf Ev. § 565 upon the reason of the rule that an alteration of an instrument vitiates it. The last sentence of this section would seem to indicate that the author refers to the effect of a material change. Furthermore, in § 568 of the same work the vitiating effect accorded to an immaterial change is confined to cases in which the change is made fraudulently, whereas, in Missouri, the intent with which an alteration is made is altogether an immaterial consideration. See infra § 98. In Evans v. Foreman, 60 Mo. 449, the court relies upon several authorities from Pennsylvania which do not seem to support the view contended for. In addition to this, as pointed out by Barclay, J., in Kelly v. Thuey, (Mo.) 37 SW 516 [cit Morrison v. Garth, 78 Mo. 434; Springfield First Nat. Bank v. Fricke, 75 Mo. 178, 42 AmR 397; Moore v. Hutchinson, 69 Mo. 429; German Bank v. Dunn, 62 Mo. 79; Evans v. Foreman, supra], in a number of decisions in that state the changes before the court were distinctly of a material character and were held so to be, so that any observations in those cases of wider reach should not be properly considered as overturning the rule that an immaterial change will not vitiate the instrument. He further points out that in many other cases in this state the materiality of the change entered into the consideration of its effect [Woods v. Hilderbrand, 46 Mo. 284, 2 AmR 513; State v. Dean, 40 Mo. 464; Patterson v. Fagan, 38 Mo. 70; Owings v. Arnot, 33 Mo. 406; Ivory v. Michael, 33 Mo. 398; Trigg v. Taylor, 27 Mo. 245, 72 AmD 263; Whitmer v. Frye, 10 Mo. 348; Aubuchon v. McKnight, 1 Mo. 312, 13 AmD 502]. When this case was referred to the court in banc, however (Kelly v. Thuey, 143 Mo. 422, 45 SW 300), Judge Barclay's opinion was not adhered to.

[b] **In New Jersey** (1) this doctrine is at least applicable to immaterial alterations in deeds. It is the settled law of this state that if a deed is altered by the party to whom it belongs, even though in an immaterial part, such alteration avoids the deed as a consequence. Jones v. Crowley, 57 N. J. L. 222, 30 A 871; Den v. Wright, 7 N. J. L. 175, 11 AmD 546. (2) But the principle upon which a deed is avoided, if changed by the party to whom it belongs, even in an immaterial particular, applies with equal force to all written contracts, and with greater propriety to bills of exchange and promissory notes. Vanauken v. Hornbeck, 14 N. J. L. 178, 25 AmD 509. See also York v. Janes, 43 N. J. L. 332. In Hunt v. Gray, 35 N. J. L. 227, 231, 10 AmR 232, Beasley, C. J., said: "The reasons for this rule are obvious and of the most solid character. In its absence the inducement to fraud would be very strong, and public policy requires that, in the language of Lord Kenyon, 'no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected.' Even immaterial alterations are fatal, as the rule, to be efficacious, cannot permit a person to tamper, in any degree, with the written contract of another in his possession." (3) And in this state, too, it has been held in a late case that the alteration in question considerably enlarges the scope of the instrument as a means of evidence, and therefore is a material one, and that, having been made by the other party to the instrument, it is annulled as a contract, or as evidence of a contract, in his favor. The instrument involved was a memorandum of sale of land. Quinzel v. Schmidt, 38 A 665 [cit Jones v. Crowley, supra; Hunt v. Gray, supra; the former, however, involving a change in a deed by the party to whom it belonged, and in which case it was held that, even though the change is in an immaterial part of the instrument, it will be avoided as a conveyance].

74. New England L. & T. Co. v. Brown, 59 Mo. A. 461.

75. Ala.—Crawford v. Simonton, 163 Ala. 609, 50 S 1024; Anderson v. Bellenger, 87 Ala. 334, 6 S 82, 13 AmSR 46, 4 LRA 680.

Ill.—Kelly v. Trumble, 74 Ill. 428; Swigart v. Weare, 37 Ill. A. 258.

Ind.—Harris v. State, 54 Ind. 2 (holding that the interlineation of the words "and abide the judgment of said court" in a recognizance was an immaterial alteration); State v. Berg, 50 Ind. 496.

Iowa.—James v. Dalbey, 107 Iowa 463, 78 NW 51; Briscoe v. Reynolds, 51 Iowa 673, 2 NW 529.

Kan.—Galva First Nat. Bank v. Nordstrom, 70 Kan. 485, 78 P 804.

La.—Martin v. McMasters, 14 La. 420 (holding that the words "without recourse" written at the end of a transfer of a note have no effect because, under the code, a transferee has no recourse on the transferor when the debt exists at the time of the transfer).

Mass.—Whitaker v. Salisbury, 15 Pick. 534; Hunt v. Adams, 6 Mass. 519.

Miss.—Bridges v. Winters, 42 Miss. 135, 97 AmD 443, 2 AmR 598.

Mo.—Western Bldg., etc., Assoc. v. Fitzmaurice, 7 Mo. A. 283. But see supra § 33 note 73 [a].

Nebr.—Fisherdick v. Hutton, 44 Nebr. 122, 62 NW 488 (holding that an alteration which only expresses what the law implies is regarded as immaterial); Consaul v. Sheldon, 35 Nebr. 247, 52 NW 1104.

N. H.—Cole v. Hills, 44 N. H. 227; Burnham v. Ayer, 35 N. H. 351; State v. Cilley [cit Martendale v. Follet, 1 N. H. 95].

N. Y.—Kinney v. Schmitt, 12 Hun 521.

N. C.—Houston v. Potts, 64 N. C. 33.

Tenn.—Crockett v. Thomason, 5 Sneed 342; Blair v. State Bank, 11 Humphr. 83.

Wash.—Kleeb v. Bard, 12 Wash. 140, 40 P 733.

Eng.—Aldous v. Cornwell, L. R. 3 Q. B. 573 (holding that a promissory note which originally did not express any time of payment, but which, while it was in possession of the payee, was altered by him without the assent of the maker by the addition of the words "on demand," was not thereby vitiated, inasmuch as the alteration expressed only the legal effect of the note as originally framed, and was therefore immaterial); Sanderson v. Symonds, 1 B. & B. 426, 5 ECL 721, 129 Reprint 786; Waugh v. Bussell, 5 Taunt. 707, 1 ECL 362, 128 Reprint 868.

Can.—McLaren v. Miller, 36 CanLJ 680.

[a] **Where a note is payable at a place different from where it is executed,** the insertion therein by the payee, without the knowledge or consent of the maker, of the words "with exchange" is not a material alteration, as such insertion is merely a statement of what the note implied. Galva First Nat. Bank v. Nordstrom, 70 Kan. 485, 487, 75 P 804 (where Greene, J., said: "It was a part of the contract of the maker to pay any expense, either of exchange or express, necessary to make the payment at the place mentioned in the note, and the insertion of the words 'with exchange' was only a statement of what the contract itself im-

[§ 35] **3. Intent.** In many cases, the vitiating effect of an immaterial change is made to depend in part upon the intent with which the act is done, at least to the extent of holding that such a change will not vitiate in the absence of a fraudulent design;[76] but the better rule, especially in view of the doctrine generally announced that the intent with which an alteration is made is immaterial,[77] would seem to be that if the change is immaterial the motive, even though fraudulent, will be immaterial, as the motive becomes a pertinent inquiry only when the act itself affects the rights of the parties.[78] Certainly, if the immaterial alteration is innocently made, it will not have the effect of invalidating the instrument.[79]

[§ 36] **4. Effect on Instrument as Evidence.**[80] An immaterial alteration does not preclude the instrument from being received in evidence,[81] as where the alteration is made in good faith to correct an error in the instrument.[82] Thus an immaterial or doubtful alteration in a deed does not render it inadmissible in evidence.[83]

Necessity of explanation. Where the alterations are immaterial, or do not appear from the face of the instrument to be of a suspicious character, the instrument is competent as evidence, on proof of its execution, without any explanation by the party offering it.[84]

plied. It did not render the note invalid, or discharge the maker from his liability thereon").

[b] **Interlineation in one part of words occurring elsewhere in instrument.**—(1) Interlining in a deed an important clause, which is also found in another part of the deed, is an immaterial alteration. Gordon v. Sizer, 39 Miss. 805. (2) Where in a bond the words "are held and firmly bound" are inserted, when there are words to the same effect already in the bond, it is not a material alteration. Western Bldg., etc., Assoc. v. Fitzmaurice, 7 Mo. A. 283. (3) Where the specifications for a building call for glazed doors, and the contract requires the building to be constructed according to the specifications, it is not a material alteration of the contract to write the word "glazed" after the word "doors" on the plans. Consaul v. Sheldon, 35 Nebr. 247, 52 NW 1104.

76. U. S.—Crawford v. Dexter, 6 F. Cas. No. 3,368, 5 Sawy. 201.

Cal.—Oakland First Nat. Bank v. Wolff, 79 Cal. 69, 21 P 551, 748; Turner v. Billagram, 2 Cal. 520.

Mo.—Lubbering v. Kohlbercher, 22 Mo. 596.

N. C.—Dunn v. Clements, 52 N. C. 58.

R. I.—Arnold v. Jones, 2 R. I. 345.

Tenn.—McDaniel v. Whitsett, 96 Tenn. 10, 33 SW 567; Crockett v. Thomason, 5 Sneed 342; Blair v. State Bank, 11 Humphr. 83.

Va.—Keen v. Monroe, 75 Va. 424.

77. See infra § 98.

78. Ill.—Vogle v. Ripper, 34 Ill. 100, 85 AmD 298; Magers v. Dunlap, 39 Ill. A. 618.

Iowa.—Sawyers v. Campbell, 107 Iowa 397, 78 NW 56; Robinson v. Phoenix Ins. Co., 25 Iowa 430.

Ky.—Tranter v. Hibbard, 108 Ky. 265, 56 SW 169, 21 KyL 1710.

Mass.—Com. v. Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 AmD 126.

Minn.—Theopold v. Deike, 76 Minn. 121, 78 NW 977, 77 AmSR 607.

Miss.—Moye v. Herndon, 30 Miss. 110.

Pa.—Miller v. Reed, 27 Pa. 244, 67 AmD 459.

Wis.—Fuller v. Green, 64 Wis. 159, 24 NW 907, 54 AmR 600.

Wyo.—McLaughlin v. Venine, 2 Wyo. 1.

[a] **An immaterial alteration of a note** does not render the note void, whatever may have been the purpose with which the alteration was made. Tranter v. Hibbard, 108 Ky. 265, 56 SW 169, 21 KyL 1710.

79. Ala.—Montgomery R. Co. v. Hurst, 9 Ala. 513.

Iowa.—Rowley v. Jewett, 56 Iowa 492, 9 NW 353.

Mass.—Rhoades v. Castner, 12 Allen 130; Ford v. Ford, 17 Pick. 418; Granite R. Co. v. Bacon, 15 Pick. 239.

N. C.—Dunn v. Clements, 52 N. C. 58.

Pa.—Hadley Falls Nat. Bank v. Loudenslager, 2 Pa. Dist. 654.

S. C.—Gunter v. Addy, 58 S. C. 178, 36 SE 553.

Tex.—Tutt v. Thornton, 57 Tex. 35.

80. Materially altered instruments as evidence see supra §§ 28–32.

81. Benton v. Clemmons, 157 Ala. 658, 47 S 582; Hipp v. Fidelity Mut. L. Ins. Co., 128 Ga. 491, 57 SE 892; State v. Schaeffer, 74 Kan. 390, 86 P 477 (holding that, where an application for gas to be used at a particular place, signed by defendant, was offered in evidence to prove that he was in charge of the place, the fact that a word had been erased and another written over it did not render the application inadmissible); Brown v. Feldwert, 46 Or. 363, 80 P 414.

[a] **The affixing of an internal revenue stamp to a note** executed in Massachusetts, and apparently payable there by the payee after its execution, is not a material alteration, under the holding of the Massachusetts courts that the act of June 13, 1898 (30 U. S. St. at L. 452, 455 c 448 §§ 7, 14), prohibiting the admission in evidence of such documents when not stamped, applied only in the federal courts. Rowe v. Bowman, 183 Mass. 488, 67 NE 636.

[b] **A plat,** otherwise admissible in evidence, is properly received in evidence, notwithstanding a mutilation thereof, consisting in cutting off some figures on the edge thereof, which formed no part of it and which had been placed there after the plat was made. Adams v. Lorraine Mfg. Co., 29 R. I. 333, 71 A 180. See also Evidence [17 Cyc 412].

[c] **A conductor's reports** of the movements of his train, separated from the attached stub by a perforated line, are not mutilated so as to make their admission in evidence improper. Minnesota, etc., Cattle Co. v. Chicago, etc., R. Co., 108 Minn. 470, 122 NW 493.

82. Campbell v. Bates, 143 Ala. 338, 39 S 144.

[a] **Where one of several papers constituting the memorandum of a contract** guaranteeing payment of a loan erroneously states the amount of the loan, as shown by the other papers, and, with a view to correct the error, the guaranty alters the figures but the correction is also erroneous, in the absence of proof of bad faith, such alteration does not affect the competency of the paper to prove the contract of guaranty, as the contract is not changed by the alteration. Lee v. Butler, 167 Mass. 426, 46 NE 52, 57 AmSR 466.

[b] **Ancient document.**—Where the handwriting and color of the ink in an interlineation in an instrument forty-two years old correspond with other parts of it, and the nature of the interlineation indicates that the words interlined were probably written at the time the draft of the instrument was prepared and before execution, the instrument is admissible. Russell v. Peyton, 4 Ill. A. 473.

[c] **Where defendant admits the genuineness of his signature to a note** but contends that it has been materially altered after delivery, the note, being regular on its face, is admissible in evidence. Cavitt v. Robertson, (Okl.) 142 P 299.

83. Campbell v. Bates, 143 Ala. 338, 39 S 144 (holding that the interlineation of the word "fourth" after the words "North East" and over some other word probably "quarter," in the descriptive part of a deed is not such an evident mark of suspicion as to authorize the court to exclude the deed from evidence); Brice v. Sheffield, 118 Ga. 128, 44 SE 843; Woods v. McCoy, 46 Mo. 297; Woods v. Hilderbrand, 46 Mo. 284, 2 AmR 513; Virginia, etc., Coal, etc., Co. v. Fields, 94 Va. 102, 26 SE 426 (holding that it is not error, in ejectment, to admit a deed containing immaterial interlineations and defacements).

[a] **A doubtful alteration in a deed** does not warrant its exclusion from evidence. Davis v. Fuller, 12 Vt. 178, 36 AmD 334.

[b] **Pen scratches** through a writing transferring real estate, which remains intelligible, and is not questioned by the pleadings or the evidence, do not, alone, raise an inference that it has been annulled, and make it inadmissible to prove title. Tutt v. Morgan, 18 Tex. Civ. A. 627, 42 SW 578, 46 SW 122.

84. Ark.—Klein v. German Nat. Bank, 69 Ark. 140, 61 SW 572, 86 AmSR 183 (holding that, where the indorsee of a note showing alterations on its face proved the signatures of the defendants, the instrument was admissible in evidence without explanation of the alterations, since the latter raised no presumption for or against the note's validity).

Ill.—Conkling v. Olmstead, 63 Ill. A. 649 (holding that, while proof that an instrument has been altered is competent, under a plea denying the execution thereof, if the alteration is not so apparent on the face of the instrument as to demand an explanation, it may, upon proof of its execution, be admitted as evidence, leaving defendant to show wherein such alteration consists).

Mo.—Carterville v. Luscombe, 165 Mo. A. 518, 148 SW 966 (holding that, in an action on local improvement tax bills, on account of alterations on their face, they were not inadmissible in describing the property, the ordinances under which they were issued, etc., where nothing appeared on the face of the bills to create a suspicion of improper motive in making the alterations); Holladay-Klatz Land, etc., Co. v. T. J. Moss Tie Co., 87 Mo. A. 167.

Okl.—Cavitt v. Robertson, 142 P 299.

Tex.—Behrens v. Kirkgard, (Civ. A.) 143 SW 698.

Vt.—Kimball v. Lamson, 2 Vt. 138 (holding that, in an action on a promissory note on which a small payment had been indorsed but afterward erased, the note may be read in evidence without any previous explanation of the reason why the indorsement had been canceled).

Wis.—Rollins v. Humphrey, 98 Wis. 66, 73 NW 331 (holding that, where an assignee's bond was otherwise sufficient under Rev. St. § 1694, the fact that the signature of one of the sureties, and his name in the body of the bond, had been erased by some unknown and unauthorized person, after the bond had been filed in the clerk's office, did not call for explanation before the bond could be admitted in evidence).

[a] **Interlineations noted in the attestation clause of a deed** do not require further explanation as a prerequisite to its admissibility. Thompson v. Thompson, 12 Tex. 327, 331 (where

[§ 37] **C. Particular Changes, Their Character and Effect—1. Adding, Changing, or Destroying Covenants and Conditions in General.** Any change in a written instrument is material, which makes a new stipulation or condition in the contract of the parties,[85] as where a stipulation is inserted which waives the benefit of a legal defense or exemption,[86] or which changes the terms of the contract relative to its performance,[87] or, in a note, which retains a lien upon land.[88] So also the erasure by a covenantor of one of his covenants is a material change,[89] as is also the erasure of a condition affecting the operation of the instrument,[90] or an erasure or insertion which changes a conditional into an absolute liability.[91]

[§ 38] **2. Character or Quality of Goods.** The addition to a contract for the delivery of goods of words qualifying the character or quality thereof, is material,[92] unless the words inserted convey no meaning other than that which the original terms

Hemphill, C. J., said: "If this was the only interlineation on the face of the deed, it was not sufficient to vitiate the instrument or to require any explanation as a prerequisite to its admission in evidence. The fact of its being noted in the attestation clause relieves the deed from suspicion, and raises the presumption that the alteration was made contemporaneously with the execution of the instrument").

85. Ala.—Carlisle v. People's Bank, 122 Ala. 446, 26 S 115 (holding that the alteration of a chattel mortgage, given to secure a note, by inserting a recital that it was given to secure other notes also, is material); Payne v. Long, 121 Ala. 385, 25 S 780 (incorporation into a note of the words "subject to settlement between us").

Ga.—Johnson v. Brown, 51 Ga. 498 (extending the terms of a letter of credit guaranteeing the payment of purchases by the holder in a certain state so as to authorize purchases in another and different place).

Ill.—Landt v. McCullough, 206 Ill. 214, 69 NE 107 [rev 103 Ill. A. 668]; Kelly v. Trumble, 74 Ill. 428 (interlining, in a bond for title, a provision granting and surrendering immediate possession to the purchaser).

Ind.—Weir Plow Co. v. Walmsley, 110 Ind. 242, 11 NE 232 (extending guaranty of the performance of a contract); La Grange v. Coyle, 50 Ind. A. 140, 98 NE 75, 76 [quot Cyc]. But see State v. Berg, 50 Ind. 496 (holding that where the conditions of a bond of a township trustee recited that the officer should account to the board of commissioners at its March term in 1868 the insertion of the figures "1869" and "1870" after the figures "1868" was immaterial, because without them it was still the officer's duty to account for those years).

Iowa.—Hessig-Ellis Drug Co. v. Todd-Baker Drug Co., 143 NW 569.

Mass.—Osgood v. Stevenson, 143 Mass. 399, 9 NE 825 (holding that the insertion into a book subscription of the word "cloth," indicating the binding, and the figures "$6.25," indicating the price for each volume, is material, where the subscriber understood that the whole work was sold to him for six dollars and twenty-five cents).

Pa.—McIntyre v. Velte, 153 Pa. 350, 25 A. 739 (insertion into a mortgage, by the mortgagee, of a clause to the effect that scire facias may issue in case of twenty days' default in payment).

S. C.—Kansas City Cent. Nat. Bank v. Efird, 91 S. C. 135, 74 SE 136.

S. D.—Somers v. Miller, 32 S. D. 133, 142 NW 174.

Tex.—Chicago, etc., R. Co. v. Floyd, (Civ. A.) 161 SW 954 (holding that, if, after signing, a bill of lading was altered by adding the words "charges guaranteed," the alteration was material and would not bind the consignor).

Utah.—American Pub. Co. v. Fisher, 10 Utah 147, 37 P 259 [rev on other grounds 166 U. S. 464, 17 SCt 618, 41 L. ed. 1079].

Va.—Consumers' Ice Co. v. Jennings, 100 Va. 719, 42 SE 879 (insertion of "his" before "wagons" in a stipulation not to sell from wagons on the street).

Eng.—Powell v. Divett, 15 East 29, 104 Reprint 755 (where a sale note in its original form read "Sold for your account to Messrs. Divett & Co., the following parcels of Spanish wool, (a few bags more or less,) of each mark, viz. (specifying them and the rates of price) customary tear and allowance. To be paid for by acceptances at two, four, six, and eight months," and was changed by the broker by inserting a memorandum: "such part as may be damaged to be taken at such allowance as shall be settled by two experienced brokers").

[a] **Addition of condition to contract of guaranty.**—It is a material alteration to insert in a contract of guaranty a condition that it shall attach only when a certain contract is performed. Hemming v. Trenery, 9 A. & E. 926, 36 ECL 480, 112 Reprint 1465.

[b] **Acceptance interlined in written offer.**—Where plaintiff, by its salesman, had submitted a written offer to manufacture certain goods for defendant, who signed it merely to show that the salesman of plaintiff had called on his firm and made the offer contained in the writing, as a basis for future orders, and thereafter the words, "All terms and conditions included in above, approved, read and agreed," were interlined above the name of defendant's firm, without defendant's knowledge, the alteration was material, and a suit could not be maintained on the instrument. American Pub. Co. v. Fisher, 10 Utah 147, 37 P 259 [rev on another point 166 U. S. 464, 17 SCt 618, 41 L. ed. 1079].

[c] **An anomalous indorser upon a note** cannot be held liable on a contract written above his indorsement, reciting an agreement by such indorser to pay the note according to the terms of another agreement, which adds several terms to the note. Columbia Finance, etc., Co. v. Purcell, 146 Fed. 85.

86. Jordan v. Long, 109 Ala. 414, 19 S 843 (the unauthorized insertion of a waiver of exemption); Davis v. Carlisle, 6 Ala. 707 (the addition of the words "without defalcation or set-off").

[a] **Immaterial waiver.**—The addition to a mortgage of a clause waiving the benefit of a specific act of assembly which had been repealed prior to the execution of the mortgage is immaterial, as the legal effect of the mortgage remains the same. Robertson v. Hay, 91 Pa. 242.

[b] **Writing the words "protest waived" on a note** before indorsement is a material alteration. Schwartz v. Wilmer, 90 Md. 136, 44 A 1059.

87. Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 SE 515 (agreement to "sell" changed to one to "help sell").

[a] **An alteration of a contract to sell land for a commission** which authorizes the sale of the land at a price different from that fixed in the original contract, and materially increases the amount of commission, is a material alteration. Harrison v. Lakenan, 189 Mo. 581, 88 SW 53.

[b] **Contract of agency to sell goods.**—One who guarantees the performance of a contract of agency to sell goods is released from liability by an alteration of the contract of agency by which the agent becomes liable for the sale of goods which are different from those mentioned in the contract as it was originally written. Osborne v. Van Houten, 45 Mich. 444, 8 NW 77.

[c] **Changing a contract from a consignment of goods for sale** to a sale of goods is a material alteration. Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 SE 515.

88. McDaniel v. Whitsett, 96 Tenn. 10, 33 SW 567.

89. Burgwin v. Bishop, 91 Pa. 336.

90. Cochran v. Nebeker, 48 Ind. 459; Johnson v. Heagan, 23 Me. 329; Marr v. Hobson, 22 Me. 321 (an alteration by erasing a condition in a deed which had become void by reason of the nonperformance of the condition erased); Campbell v. McKinnon, 18 U. C. Q. B. 612.

[a] **Condition as to notice erased.**—Where a note provides that, if default shall be made in the payment of the interest or in the performance of the conditions or agreements of the mortgage collateral, the whole principal shall, at the option of the mortgagee or his representatives or assigns, "notice of such option being hereby expressly waived," become due and payable "without any notice whatever," the erasure of the words quoted, before execution and delivery, constitutes a material alteration. Hecht v. Shenners, 126 Wis. 27, 105 NW 309.

[b] **The cross-marking of a material provision** of a written instrument, after its execution by one of the parties, without the consent of the other, with intent of erasing it, is a material alteration. O. N. Bull Remedy Co. v. Clark, 109 Minn. 396, 124 NW 20, 32 LRANS 519 and note, 18 AnnCas 413 and note.

91. Tate v. Fletcher, 77 Ind. 102.

[a] **The detachment of a promissory note from a writing which qualifies it** and makes it payable only upon certain contingencies is a material alteration. Rochford v. McGee, 16 S. D. 606, 94 NW 695, 102 AmSR 719, 61 LRA 235.

[b] **Change from conditional sale to consignment for sale.**—Where an order for goods is altered by the seller, without the knowledge of the purchaser, so as to change its nature from that of a conditional sale to a consignment for sale on commission, the seller is precluded from recovering on the contract, either on the ground that the sale was a conditional one, or that the contract was one for sale on commission. A. A. Cooper Wagon, etc., Co. v. Wooldridge, 98 Mo. A. 648, 73 SW 724.

[c] **Removal of condition attached to bond.**—Where a party signs a bond with a condition, and the condition is afterward detached without the knowledge or consent of the obligor, so as to make his undertaking to pay appear absolute, it is a material alteration which avoids the bond, even in the hands of a bona fide holder. Longwell v. Day, 1 Mich. N. P. 286.

92. Martendale v. Follet, 1 N. H. 95 (the insertion of the word "young" before the word "merchantable" in a note payable in "merchantable neat stock"); Schwalm v. McIntyre, 17 Wis. 232 (adding "it is to be good, hard wood" in a contract for the delivery of a certain quantity of wood); Mollett v. Wackerbarth, 5 C. B. 181, 57 ECL 181, 136 Reprint 845 (where a sold-note in the following form: "Sold for Messrs. Wackerbarths & Coling, one hundred tons of crushed sugar (as per sample), in hogsheads," was changed by the buyer, without the privity of the seller, by adding at the foot of the paper "of their own manufacture," with an asterisk as a mark of reference and a corresponding asterisk in the body of the note after the word "sample," and it was held that the words inserted purported that the sample was of the manufacture of Wackerbarths & Col-

of the contract import.[93]

[§ 39] **3. As to Separate Estate.** Where the separate estate of a married woman can be bound only by express authority, a change in a note, executed by a married woman, by adding a clause charging her separate estate, is material and vitiates the instrument.[94]

[§ 40] **4. Change in Insurance Policy.** A material alteration in a policy of insurance made by the insured or by his authority, without the consent or authority of the insurer, invalidates the policy;[95] but the insertion in a policy of words which do not vary its legal effect is immaterial, and will not affect the validity of the instrument.[96] It has been held that where an insurance policy has indorsed upon it a contract with a third party, a material alteration of that contract by the insured does not destroy the policy.[97]

Material alterations. Within the meaning of this rule any alteration is material, and vitiates the policy, which has the effect of changing the terms or conditions of the contract,[98] or which changes the identity of the insured,[99] or which makes more than merely a formal change in relation to the subject of the insurance, such as supplying an omission of the policy to specify the thing insured.[1]

A policy of marine insurance is materially altered by a change of the terms stating the course of the voyage,[2] the destination,[3] or the time of sailing.[4]

[§ 41] **5. Consideration.** If an instrument is changed in respect of the consideration, which appears only as a recital to show the basis of the instrument, it would seem to be immaterial;[5] but where the statement of the consideration is a constituent part of the contract, and such change relates to the liability of the party, as by enlarging

ing and constituted a material change, avoiding the contract as against the buyer).

[a] **Where a written contract of purchase of typewriters** is altered, after the purchaser signs it, by the insertion of the serial numbers of the typewriters, the seller cannot enforce the agreement, as in such a case the insertion of the serial numbers in the contract, without the knowledge or consent of the purchaser, changes it from a general to a specific contract, and the change is very material, because it gives the seller the right to sue for and recover the contract price of the typewriters if the purchaser refuses to take them, whereas, without such insertion the recovery is limited to the difference between the price agreed upon and the market value on the day fixed for delivery. Williams Typewriter Co. v. Cleaver, 88 Pa. Super. 376.

[b] **Insertion of price per volume and kind of binding in subscription for book.**—The insertion, in a subscription for books issued in parts, of the word "cloth" in the blank space after the words "bound in," and the figures "$6.25" in the blank space before the printed words "per volume" is a material alteration which will avoid the contract. Osgood v. Stevenson, 143 Mass. 399, 9 NE 825.

93. State v. Cilley [cit Martendale v. Follet, 1 N. H. 95, 97] (writing the word "good" before "merchantable" in a contract for "merchantable wool").

94. Taddiken v. Cantrell, 69 N. Y. 597, 25 AmR 253; Pease v. Barnett, 27 Hun (N. Y.) 378; Reeves v. Pierson, 23 Hun (N. Y.) 185.

[a] **But under a statute,** providing that a separate estate of a married woman shall be liable for her contracts without expressly charging such estate, it is held that the insertion of a stipulation over a married woman's indorsement charging her separate estate is not material. Clapp v. Collins, 7 NYS 98.

[b] **In Missouri,** however, it has been held, over the objection that the addition of a stipulation charging the separate estate of the signer of the note could in no way be a material modification of the contract, unless the instrument was executed by a married woman, that the note was avoided, without reference to the material or immaterial character of the change. Kingston Sav. Bank v. Bosserman, 52 Mo. A. 269.

95. U. S.—U. S. v. West, 22 How. 315, 16 L. ed. 317.

Ill.—Daub v. Englebach, 9 Ill. A. 99 [aff 109 Ill. 267].

Ky.—Phœnix Ins. Co. v. McKernan, 100 Ky. 97, 37 SW 490, 18 KyL 617.

Minn.—Fletcher v. Minneapolis F. & M. Mut. Ins. Co., 80 Minn. 152, 83 NW 29.

N. Y.—Tillou v. Clinton, etc., Mut. Ins. Co., 7 Barb. 564.

Eng.—Forshaw v. Chabert, 3 B. & B. 158, 7 ECL 659, 129 Reprint 1243; French v. Patton, 9 East 351, 103 Reprint 606 (material alteration of marine insurance policy); Campbell v. Christie, 2 Stark. 64, 3 ECL 318.

96. Sanderson v. Symonds, 1 B. & B. 426, 5 ECL 721, 129 Reprint 786.

[a] **Alteration in copy of application.**—Where an application for a policy directs that it be made payable to the "estate" of insured and the policy is issued payable to his executors, administrators, and assigns, the fact that insured alters the copy of application returned with the policy, by erasing the word "estate," and substituting the words "wife and children," does not affect the validity of the policy. Steeley v. Steeley, 64 SW 642, 23 KyL 996.

97. Robinson v. Phœnix Ins. Co., 25 Iowa 430.

98. Fletcher v. Minneapolis F. & M. Mut. Ins. Co., 80 Minn. 152, 83 NW 29 (holding that if a fire insurance policy issued by a mutual insurance company is changed by the striking out of a clause by which the insured agrees to assessments, the alteration is material).

99. Fletcher v. Minneapolis F. & M. Mut. Ins. Co., 80 Minn. 152, 83 NW 29.

1. Langhorn v. Cologan, 4 Taunt. 330, 128 Reprint 357 (holding that the insertion in a marine insurance policy, which does not specify the subject of insurance, of words stating the subject-matter is a material alteration).

[a] **Including additional property.**—The insertion of words in an insurance policy making it cover additional property is material. Phœnix Ins. Co. v. McKernan, 100 Ky. 97, 37 SW 490, 18 KyL 617.

2. Forshaw v. Chabert, 3 B. & B. 158, 7 ECL 659, 129 Reprint 1243 [dist Sanderson v. Symonds, 1 B. & B. 426, 5 ECL 721, 129 Reprint 786] (holding that where a policy of insurance on a ship and cargo from Cuba to Liverpool was altered by the assured by interlining the words "with leave to call off Jamaica," and all of the underwriters except one, who being out of the way, was not applied to, assented to the interpolation without increase of premium, the policy was void as to the nonconsenting underwriter).

3. Laird v. Robertson, 4 Bro. P. C. 488, 2 Reprint 333; Mannheim Ins. Co. v. Atlantic, etc., R. Co., 11 Que. K. B. 200.

[a] **Alternative destination.**—A policy of insurance from Colmar to Portsmouth was altered by inserting the words "or Weymouth" after Portsmouth. Some of the underwriters gave their consent to the alteration, but, in an action against one of the nonconsenting underwriters, it was held that the policy was void as to him. Campbell v. Christie, 2 Stark. 64, 3 ECL 318.

4. Fairlie v. Christie, Holt N. P. 331, 3 ECL 135, 7 Taunt. 416, 2 ECL 425, 129 Reprint 166 (holding that if the insured, after subscription by the underwriter, strikes out with a pen the time of warranty of sailing, which stood in the body of the policy, and inserts in a memorandum in the margin a different time for sailing, which the underwriter does not sign, the insured thereby destroys the policy, and the underwriter is discharged from the original contract).

5. Westmoreland v. Westmoreland, 92 Ga. 233, 17 SE 1033; Gardiner v. Harback, 21 Ill. 129 (holding that the addition of "$10 dollars and fifty interest" after the words "value received" in a note does not change the legal import of the instrument, but may be considered to mean that the portion of the value received by the makers consists of ten dollars and fifty cents interest); Reed v. Kemp, 16 Ill. 445 (a change in the amount expressed as the consideration inducing one to enter into a bond to secure the faithful performance of a particular act); Magers v. Dunlap, 39 Ill. A. 618 (holding that the insertion of the words "for labor" into a note executed for physician's services does not import wages due as a laborer, or services within the meaning of the Exemption Act); Bridges v. Winters, 42 Miss. 135, 97 AmD 443, 2 AmR 598 (where a note was executed for "loaned money" and afterward the words "in gold" were inserted after the words above mentioned, and it was held that the legal liability of the maker was not changed, and therefore the insertion was immaterial); Kelly v. Thuey, (Mo.) 37 SW 516 (holding that the insertion in a contract for the sale of land of the agreed price is an immaterial alteration).

[a] **Indorsement of basis of credit.**—Where a statement as a basis of credit is indorsed upon a note of a husband and wife, which statement shows that the wife owns a farm worth four thousand dollars and personalty worth six hundred dollars, a subsequent unauthorized change of the last amount to one thousand dollars is held to be immaterial, because the farm and six hundred dollars are as good as a basis of credit as the farm and one thousand dollars. Krouskop v. Shontz, 51 Wis. 204, 8 NW 241, 37 AmR 817.

[b] **Insertion of words "value received" in note.**—The insertion of the words "value received" in a note after its indorsement is held to be immaterial and does not avoid the note unless the alteration is made with the privity of the subsequent transferee and holder. Riggs v. St. Clair, 20 F. Cas. No. 11,829, 1 Cranch C. C. 606.

[c] **Alteration of consideration in deed.**—Where a deed of land is executed leaving the consideration blank except the word "dollars," and subsequently the amount of the consideration is inserted, it is not a material alteration. Murray v. Klinzing, 64 Conn. 78, 85, 29 A 244 (where Andrews, C. J., said: "Every deed which is effectual to convey land must be upon consideration. . . . 'A deed also, or other grant, made without any consideration, is, as it were, of no effect; for it is construed to enure, or to be effectual only to the use of the grantor himself.' But the

the security, changing the penalty of a bond, or otherwise altering his ultimate responsibility,[6] or the instrument, as evidence of a fact, it is material and constitutes an alteration of the contract.[7]

[§ 42] **6. Amount.** The amount representing the pecuniary liability, as expressed in a bill, note, or other written instrument, is a material part thereof, the changing of which will constitute an alteration so as to discharge the party not consenting thereto.[8] It does not matter how trivial the change may be where the amount is increased,[9] nor does it matter that the amount is reduced instead of increased, because the identity of the contract may be effectually destroyed in this manner.[10]

Immaterial changes. The general rule applies, however, that changes in this regard which in no manner alter the identity or legal effect of the instrument are not material, as where the change is in the marginal numerals, which form no part of the instrument, leaving the amount expressed in the body of the instrument intact,[11] or where the insertion merely corrects a mistake, or makes the instrument conform with itself and supplies nothing

deed of April 5th, was upon a consideration sufficient to rebut a resulting trust. The word 'dollars,' without any numbers prefixed is enough for that purpose. An alteration to a deed, to render it void, must be a material one; that is one that causes the deed to speak a language different in legal effect from that which it spoke originally. . . . The necessity of a consideration in a deed is to prevent a trust resulting in favor of the grantor, and one valuable consideration does this as well as another. Changing the amount of the consideration does not cause the deed to speak a language differing in its legal effect. Such an alteration is not a material one").

6. Kalteyer v. Mitchell, (Tex. Civ. A.) 110 SW 462 (holding that placing in a written instrument a consideration not originally embodied in the writing is a material alteration); Knill v. Williams, 10 East 431, 103 Reprint 839.

[a] **Consideration of mortgage.**—(1) Change by increasing it is material. Johnson v. Moore, 33 Kan. 90, 5 P 406; Russell v. Reed, 36 Minn. 376, 31 NW 452. (2) So where a recital is inserted in a mortgage so as to make it secure additional notes. Carlisle v. People's Bank, 122 Ala. 446, 26 S 115. See also supra § 25. (3) Where, however, a mortgage is altered by changing the amount of the recited consideration, but no change whatever is made in the description of the debt to be secured therein, since the recital of the consideration is noncontractual and unnecessary, the alteration is immaterial and does not affect the validity of the mortgage. Cheek v. Nail, 112 N. C. 370, 17 SE 80.

[b] **Consideration of note** (1) changed by inserting a statement that it is for a tract of land, and thus making it apparently a lien on the land, is material. Low v. Argrove, 30 Ga. 129. (2) So also changing a note which recites that it is given for the purchase price of buildings on a certain site so as to make it read that it is given for the purchase price of the buildings and the lot is a material alteration. Richardson v. Fellner, 9 Okl. 513, 60 P 270.

[c] **Change of contract price.**—An alteration in a contract to furnish material and perform labor by changing the contract price is a material alteration. Hayes v. Wagner, 89 Ill. A. 390.

7. Benjamin v. McConnell, 9 Ill. 536, 46 AmD 474.

8. Ala.—Green v. Sneed, 101 Ala. 205, 13 S 277, 46 AmSR 119 (changing the amount secured by mortgage).

Ark.—Outcault Adv. Co. v. Young, 110 Ark. 123, 161 SW 142 (changing amount of weekly payments); Fordyce v. Kosminski, 49 Ark. 40, 3 SW 892, 4 AmSR 18; Chism v. Toomer, 27 Ark. 108.

Cal.—Peo. v. Kneeland, 31 Cal. 288 (increasing the penalty of an official bond).

Conn.—Ætna Nat. Bank v. Winchester, 43 Conn. 391.

Del.—Newark Bank v. Crawford, 7 Del. 282.

Ga.—Heard v. Tappan, 116 Ga. 980, 43 SE 375; W. H. Howard Piano Co. v. Glover, 7 Ga. A. 548, 67 SE 277.

Ida.—Mulkey v. Long, 5 Ida. 213, 47 P 949.

Ill.—Sans v. Peo., 8 Ill. 327 (changing the penalty of a bond); Pankey v. Mitchell, 1 Ill. 383.

Ind.—Fudge v. Marquell, 164 Ind. 447, 72 NE 565, 73 NE 895; Collier v. Waugh, 64 Ind. 456; Schneider v. Rapp, 33 Ind. 270.

Iowa.—Maguire v. Eichmeier, 109 Iowa 301, 80 NW 395; Knoxville Nat. Bank v. Clark, 51 Iowa 264, 1 NW 491, 33 AmR 129.

Kan.—Herrington Bank v. Wangerin, 65 Kan. 428, 70 P 330, 59 LRA 717; Johnson v. Moore, 33 Kan. 90, 5 P 406.

Md.—Burrows v. Klunk, 70 Md. 451, 17 A 378, 14 AmSR 371, 3 LRA 576.

Mass.—Drum v. Drum, 133 Mass. 566; Cape Ann Nat. Bank v. Burns, 129 Mass. 596; Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 AmR 67; Citizens' Nat. Bank v. Richmond, 121 Mass. 110; Wade v. Withington, 1 Allen 561; Agawam Bank v. Sears, 4 Gray 95; Howe v. Peabody, 2 Gray 556 (holding that an alteration increasing the penal sum of a bond is a material alteration).

Minn.—Renville County v. Gray, 61 Minn. 242, 63 NW 635 (changing the penalty of a bond).

Mo.—State v. Chick, 146 Mo. 645, 48 SW 829 (changing the penalty of a bond).

N. H.—Goodman v. Eastman, 4 N. H. 455.

N. M.—Ruby v. Talbott, 5 N. M. 251, 21 P 72, 3 LRA 724 and note.

N. Y.—Flannagan v. National Union Bank, 2 NYS 488.

N. C.—Cheek v. Nail, 112 N. C. 370, 17 SE 80.

Or.—Cline v. Goodale, 23 Or. 406, 31 P 956.

S. C.—Mills v. Starr, 18 S. C. L. 359.

S. D.—Searles v. Selpp, 6 S. D. 472, 61 NW 804.

Tex.—American Copying Co. v. Thompson, (Civ. A.) 110 SW 777.

Va.—Batchelder v. White, 80 Va. 103.

Wis.—Matteson v. Ellsworth, 33 Wis. 488, 14 AmR 766.

Eng.—Taylor v. Mosley, 6 C. & P. 273, 25 ECL 429.

[a] **To change a written promise to pay from one amount to a larger sum,** (1) without the maker's consent, is ordinarily deemed a material and fraudulent altering of the instrument. W. H. Howard Piano Co. v. Glover, 7 Ga. A. 548, 67 SE 277. (2) Where a landlord receives from a tenant a rent note which constitutes the rental contract and alters it so that it calls for the payment of two thousand seven hundred and fifty pounds of cotton instead of one thousand seven hundred and fifty pounds, the alteration is material and discharges the tenant from liability. Houston v. Davis, 162 Ala. 122, 49 S 869. (3) The alteration of a promissory note by increasing the amount for which the maker may be held liable thereunder is a good defense to the note as an entirety. Smith v. Dazey, 124 Ill. A. 299.

[b] **Change increasing amount of bond.**—Where, in an action against the sureties upon a collector's bond, it appears that after the bond had been executed and approved it had been altered without the knowledge or consent of the sureties, but with the knowledge and approval of the selectmen of the town, by changing the penal sum from twenty-five hundred dollars to twenty-five thousand dollars, the alteration is material, and the sureties are released. Dover v. Robinson, 64 Me. 183.

9. Winkles v. Guenther, 98 Ga. 472, 25 SE 527. And see cases supra note 8.

10. Ark.—Chism v. Toomer, 27 Ark. 108.

D. C.—Towles v. Tanner, 21 App. 530.

Ind.—Johnston v. May, 76 Ind. 293 (referring to the identity of contract of surety).

Me.—Hewins v. Cargill, 67 Me. 554 (holding that the indorser or signer is released by such a change).

Mass.—Doane v. Eldridge, 16 Gray 254.

Mich.—Peo. v. Brown, 2 Dougl. 9 (holding that an alteration in a bond decreasing the amount of the penalty is material).

Nebr.—St. Joseph State Sav. Bank v. Shaffer, 9 Nebr. 1, 1 NW 980, 31 AmR 394.

N. M.—Ruby v. Talbott, 5 N. M. 251, 21 P 72, 3 LRA 724 and note.

Oh.—Portage County Branch Bank v. Lane, 8 Oh. St. 405.

Pa.—Stephens v. Graham, 7 Serg. & R. 505, 10 AmD 485.

Tex.—Adams v. Faircloth, (Civ. A.) 97 SW 507; Chamberlain v. Wright, (Civ. A.) 35 SW 707.

Wash.—Washington Finance Corp. v. Glass, 74 Wash. 653, 134 P 480, 46 LRANS 1043 and note.

Eng.—Gardner v. Walsh, 5 E. & B. 83, 85 ECL 83, 119 Reprint 412.

[a] **Alteration in amount of official bond.**—A tax collector gave his bond conditioned for the faithful collection and return of an assessment of taxes, which were to be returned to the county treasurer according to amounts and dates set forth in the bond. The assessors afterward discovering that the assessment was illegal reassessed the tax, reducing the amount of it, and, without notice to the tax collector or his sureties, altered the amounts in the bond to conform to the new assessment. In an action against the sureties on this bond, it was held that these alterations were material, and avoided it. Doane v. Eldridge, 16 Gray (Mass.) 254.

11. Ala.—Prim v. Hammel, 134 Ala. 652, 32 S 1006, 92 AmSR 52.

Colo.—Whitehead v. Emmerich, 38 Colo. 13, 87 P 790.

Ill.—Merritt v. Boyden, 191 Ill. 136, 60 NE 907, 85 AmSR 246.

Iowa.—Horton v. Horton, 71 Iowa 448, 32 NW 452.

Ky.—Woolfolk v. Bank of America, 10 Bush 504.

R. I.—Smith v. Smith, 1 R. I. 398, 53 AmD 652.

Wis.—Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 NW 177, 46 AmR 39.

Eng.—Garrard v. Lewis, 10 Q. B. D. 30.

[a] **The figures in a check** following the words in the body thereof denoting the sum called for are not a material part of the instrument, and hence an alteration of such figures is not a material one. State v. Lotono, 62 W. Va. 310, 312, 58 SE 621 [cit Cyc].

[b] **Erasure of indorsement affecting amount.**—Where during the pending of a suit for the collection of a note, plaintiff made a proposition that, if defendant would agree to pay the note on the first of January next, he would allow him a credit of fifty dollars thereon, and dismiss the suit at his own cost, and defendant accepted the proposition, and the credit of fifty dollars was indorsed on the note and the suit dis-

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further than that which would be implied without it.[12]

[§ 43] **7. Costs and Attorney's Fees.** Increasing the fees in a power of attorney to confess judgment,[13] or inserting a provision in a note, or other instrument, for the payment of attorney's fees, is material and constitutes an alteration.[14] In like manner, erasing such a provision,[15] or a condition annexed to such a provision, will constitute an alteration.[16] But where costs are by operation of law included in the conditions of a bond,[17] or by statute a recovery on a penal bond is limited to the penalty fixed,[18] the insertion of a provision for costs in the first case, or for the payment of attorney's fees in the latter, will be immaterial.

[§ 44] **8. Interest.** An interest clause is a material part of a bill, note, or other instrument, and any change of the instrument which alters the terms of the contract in this regard is material and vitiates it, as where a word or clause is added or inserted to make the instrument bear interest, when originally it did not,[19] unless the addition

missed, and defendant failing to pay the note at the time agreed upon, plaintiff erased the credit, and brought suit for the original amount, the erasure was not a material alteration of the note. Chamberlin v. White, 79 Ill. 549.

[c] **Where no marginal figures.**—It may be otherwise, however, where there are no marginal figures, and an amount in figures is placed in the margin inconsistent with the amount written in the body of the instrument, and an addition made to the latter so as to make it conform to the altered amount in the margin. Searles v. Seipp, 6 S. D. 472, 61 NW 804.

12. Houghton v. Francis, 29 Ill. 244 (where there was an insertion of a dollar mark in the body of the note before the figures corresponding with the written amount); Boyd v. Brotherson, 10 Wend. (N. Y.) 93 (where a note was intended to be made for eight hundred dollars and was indorsed by the payee for the accommodation of the maker and delivered to him, and by mistake the words "hundred dollars" were omitted, so that the note purported to be for "eight ——," and the maker, without the assent of the indorser, inserted the words "hundred dollars," the indorser will not be discharged); Waugh v. Bussell, 5 Taunt. 707, 1 ECL 362, 128 Reprint 868 (where there was a bond to pay one hundred pounds in six equal installments, and the change consisted in inserting the word "hundred" between the word "one" and the word "pounds" and it was held that the sense was sufficiently manifest before the change, and therefore the insertion was immaterial).

[a] **Correction of amount.**—Where the amount of a note is written correctly in the margin, but by mistake it is written a few dollars less in the body of the note, the holder may correct the amount in the body of the note. Busjahn v. McLean, 3 Ind. A. 281, 29 NE 494.

[b] **Correction of mistake in bonds.**—Where a bond, intended to be for the sum of one hundred and fifty thousand dollars, is by mistake written one hundred and fifty dollars, if the sureties sign the bond with the knowledge and understanding that the bond is to be for the larger amount, the adding on the face of the bond the word "thousand" by the principal and payee is not an alteration, since a mere reduction to writing of what is in fact the agreement of both principal and securities will not be a change of the contract. Jackson v. Johnson, 67 Ga. 167.

13. Burwell v. Orr, 84 Ill. 465 (holding that a power of attorney to confess judgment which is materially altered while in the hands of the payee of the indebtedness by increasing the amount of the attorney's fee provided for therein is made void by such alteration, and a judgment entered by confession under it is also void).

14. Smith v. Dazey, 124 Ill. A. 399; Monroe v. Paddock, 75 Ind. 422.

[a] **Insertion in mortgage.**—Where, after a mortgage has been executed by a husband and wife, the words, "and the further sum of fifty (50) dollars solicitor's fees, in case of foreclosure," are inserted in the mortgage by the husband, with the knowledge and consent of the mortgagee, and in his presence, but without the knowledge of the wife, such an insertion is a material alteration of the mortgage, and, as to the wife, it is void. Coles v. Yorks, 28 Minn. 464, 10 NW 775.

[b] **Where a promissory note containing a promise to pay a certain sum as attorney's fee** is altered while in the hands of the payee, the amount of such fee being increased, the alteration will be presumed to have been made by him, and the note becomes thereby utterly void and cannot be collected, even by a subsequent indorsee in good faith without notice. Burwell v. Orr, 84 Ill. 465.

15. Decorah First Nat. Bank v. Laughlin, 4 N. D. 391, 61 NW 473 (holding that the erasure of an agreement to pay the expenses incurred in the collection of a note, including attorney's fees, is an alteration of the instrument, because without those words it is negotiable, and the erasure thus converts a nonnegotiable into a negotiable instrument).

[a] **Where the indorsers of a note alter it after delivery** by striking out a clause providing for the payment of attorney's fees for collection, it is a material alteration, relieving the maker of liability. White v. Harris, 69 S. C. 65, 48 SE 41, 104 AmSR 791.

[b] **But where a stranger** to a note strikes out a clause therein providing for payment of attorney's fees, it is a spoliation, and does not relieve the maker of liability. White v. Harris, 69 S. C. 65, 48 SE 41, 104 AmSR 791. As to effect of spoliation by strangers see infra § 104.

16. Koons v. Davis, 84 Ind. 387 (holding that the erasure of a condition limiting liability for attorney's fees is material, because, under the statute, Rev. St. [1876] p 149, where such a condition is expressly annexed, the provision for the payment of attorney's fees is itself void; and thus the erasure creates a liability which the provision with the condition annexed precludes).

[a] **Changing conditional to absolute promise.**—Where a note provides for the payment of attorney's fees "if suit be instituted," striking out these words, whereby the conditional promise to pay attorney's fees is changed to an absolute promise, constitutes a material alteration of the note. Tate v. Fletcher, 77 Ind. 102.

17. Kleeb v. Bard, 12 Wash. 140, 40 P 733 (holding that the alteration of a bond given to secure the payment of a judgment which might be recovered in a pending suit, by the interlineation of words providing that costs as well as the judgment shall be paid, is immaterial, since costs, being an incident of the judgment, will be included in the condition of the bond without the interlineation).

18. White Sewing Mach. Co. v. Dakin, 86 Mich. 581, 49 NW 583, 13 LRA 313 (holding that the insertion of a provision for attorney's fees in case of suit, in the penalty clause of a bond, is an immaterial alteration, for the reason that, under statutory provisions regulating suits on bonds, no recovery can exceed the amount of the penalty in such actions).

19. Ala.—Lamar v. Brown, 56 Ala. 157; Glover v. Robbins, 49 Ala. 219, 20 AmR 272; Brown v. Jones, 3 Port. 420.

Ark.—Exchange Nat. Bank v. Little, 164 SW 731.

Del.—Warpole v. Ellison, 9 Del. 322 (although the words inserted were erased before maturity).

D. C.—Lewis v. Shepherd, 12 D. C. 46.

Ga.—Baugh v. Anderson, 91 Ga. 331, 18 SE 44; Gwin v. Anderson, 91 Ga. 827, 18 SE 43.

Ill.—Merritt v. Dewey, 218 Ill. 599, 75 NE 1066, 2 LRANS 217 and note [rev 115 Ill. A. 503]; Yost v. Minneapolis Harvester Works, 41 Ill. A. 556.

Ind.—Hart v. Clouser, 80 Ind. 210; Kountz v. Hart, 17 Ind. 329.

Iowa.—Derr v. Keaough, 96 Iowa 397, 65 NW 339; Grand Haven First Nat. Bank v. Hall, 83 Iowa 645, 50 NW 944; Smith v. Eals, 81 Iowa 235, 46 NW 1110, 25 AmSR 486; Woodworth v. Anderson, 63 Iowa 503, 19 NW 296; Shepard v. Whetstone, 51 Iowa 457, 1 NW 753, 33 AmR 143.

Ky.—Locknane v. Emmerson, 11 Bush 69; Neale v. Hays, 15 KyL 784 (holding that the addition to the note sued on of the words "with interest from date" is a material alteration).

Me.—Waterman v. Vose, 43 Me. 504.

Md.—Owen v. Hall, 70 Md. 96, 16 A 376.

Mass.—Fay v. Smith, 1 Allen 477, 79 AmD 752.

Mich.—Bradley v. Mann, 37 Mich. 1; Swift v. Barber, 28 Mich. 503; Holmes v. Trumper, 22 Mich. 427, 7 AmR 661.

Minn.—Dawson Commercial Bank v. Maguire, 89 Minn. 394, 95 NW 212.

Miss.—First Nat. Bank of Commerce v. Merkel, 97 Miss. 824, 53 S 350.

Mo.—Iron Mountain Bank v. Murdock, 62 Mo. 70; Capital Bank v. Armstrong, 62 Mo. 59; Evans v. Foreman, 60 Mo. 449; Washington Sav. Bank v. Ecky, 51 Mo. 272; Lubbering v. Kohlbrecher, 22 Mo. 596.

Nebr.—Hurlbut v. Hall, 39 Nebr. 889, 58 NW 538; Davis v. Henry, 13 Nebr. 497, 14 NW 523.

N. Y.—Weyerhauser v. Dun, 100 N. Y. 150, 2 NE 274; Schmarz v. Oppold, 74 N. Y. 307; McGrath v. Clark, 56 N. Y. 34, 15 AmR 372; Meyer v. Huneke, 55 N. Y. 412; Columbia Distilling Co. v. Rech, 151 App. Div. 128, 135 NYS 206 (holding that the addition to a note by the payee of the words, "with interest 6%," is a material alteration within Negotiable Instruments Law § 206 subd 2); Meise v. Doscher, 33 Hun 580, 31 NYS 1072; Kennedy v. Crandell, 3 Lans. 1; Levy v. Arons, 31 Misc. 165, 142 NYS 312; Usefof v. Herzenstein, 65 Misc. 45, 119 NYS 290 (under authority to fill in blanks, there being no blank for interest); Mt. Morris Bank v. Lawson, 10 Misc. 359, 31 NYS 18.

N. C.—Long v. Mason, 84 N. C. 15.

Oh.—Jones v. Bangs, 40 Oh. St. 139, 48 AmR 664; McAlpin v. Clark, 11 Oh. Cir. Ct. 524, 5 Oh. Cir. Dec. 364.

Pa.—Gettysburg Nat. Bank v. Chisolm, 169 Pa. 564, 32 A 730, 47 AmSR 929; Boustead v. Cuyler, 116 Pa. 551, 8 A 848; Winters v. Mowrer, 1 Pa. Super. 47.

S. C.—Plyler v. Elliott, 19 S. C. 257.

Tenn.—McVey v. Ely, 5 Lea 438.

Tex.—Farmers, etc., Nat. Bank v. Novich, 89 Tex. 381, 34 SW 914.

B. C.—British Columbia Land, etc., Agency v. Ellis, 6 B. C. 82.

Ont.—Halcrow v. Kelly, 28 U. C. C. P. 551.

[a] **Change of interest in certificate of deposit.**—Where a certificate of deposit was given, "payable thirty days after date, with —— per cent per annum," and there was no agreement

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is a mere memorandum of an independent agreement of one of the parties,[20] or the change is made in accordance with the agreement between the parties;[21] or unless the insertion is of such a rate of interest as the instrument would by its terms draw, as where the legal rate is inserted in an interest bearing instrument which expresses no interest.[22]

Thus it is a material alteration to make changes in an instrument which increase,[23] or decrease the rate of interest,[24] or which strike out an interest clause,[25] or which alter the legal rate,[26] as by inserting in an interest bearing security, which expresses no interest, a rate differing from the legal rate of interest.[27]

Changes which affect the time from which the instrument is to begin to bear interest are material, as where they make it bear interest after maturity instead of from date,[28] or make it bear interest from an earlier date,[29] as where the instrument originally bore interest from maturity and that word is stricken out so as to make it bear interest generally or from date;[30] or which add stipulations as to the time of payment, as that interest is to be

to pay ten per cent, and the holder, when about to sell it to plaintiff, and to aid such sale, represented that the agreement was for ten per cent, and that the blank was left by mistake, whereupon, in his presence and that of plaintiff, the latter's agent inserted the figures "10" in the blank, and plaintiff took the certificate, the alteration was held to be fraudulent and to avoid the certificate. Woodworth v. Anderson, 63 Iowa 503, 19 NW 296.

[b] **Joint note.**—The alteration of a note by adding an interest clause after its execution without the consent of one of the joint makers of the note invalidates the instrument, although both joint makers understood that the note was to bear interest. Merritt v. Dewey, 218 Ill. 599, 75 NE 1066, 2 LRANS 217 [rev 115 Ill. A. 503].

[c] **Words without legal effect** to change the meaning of the instrument in regard to its provisions as to interest are immaterial. Thus a bond was given to pay one hundred dollars, twenty-five dollars a year, the first payment to be made seventeen months after date with interest, and it was held that the insertion of "on the whole" after the word "interest" was not material. Gardinier v. Sisk, 3 Pa. 326.

20. See infra § 66.

21. Osborn v. Hall, 160 Ind. 153, 66 NE 457 (holding that the alteration of a promissory note by the payee by changing the rate of interest of eight per cent to seven and a half per cent to make the note conform to the agreement between the parties is not such an alteration as will vitiate the note); Phillips v. Crips, 108 Iowa 605, 79 NW 373 (holding that, where it is expressly agreed that the rate of interest on a note shall be changed from seven to eight per cent, the payee can make the alteration on the note without affecting its validity, although without the knowledge of the payer); Levy v. Arons, 81 Misc. 165, 142 NYS 312.

Change of rate of interest with consent of the parties see infra § 114.

[a] **Correction of mistake.**—Where a wife gave a mortgage on her property, and she and her husband signed the note, and the husband, who conducted the transaction, understood that the rate of interest was to be two per cent a month, but by mistake the rate was made two per cent a year, and before passing the papers the mortgagee's lawyer discovered the mistake and, with the husband's consent, made the correction, the rate was not altered without the consent of the maker. Nichols v. Rosenfeld, 181 Mass. 525, 63 NE 1063.

[b] **Conforming to another instrument.**—Where, three years after a mortgage is executed and recorded, it is altered, at the request of the mortgagor, by inserting the rate and payment of interest to make it conform to the note, such alteration, in the absence of fraud, does not render the mortgage void. Gunter v. Addy, 58 S. C. 178, 36 SE 553.

22. James v. Dalbey, 107 Iowa 463, 78 NW 51; Shepard v. Whetstone, 51 Iowa 457, 1 NW 753, 33 AmR 143; Port Huron First Nat. Bank v. Carson, 60 Mich. 432, 27 NW 589. See also Rainbolt v. Eddy, 34 Iowa 440, 11 AmR 152 (filling blank with rate of interest).

[a] **A note "with interest at — per cent. per annum"** draws interest at the legal rate from the date thereof, so that the subsequent addition in the blank of the legal rate and the word "date" does not change the effect of the note, and the alteration is immaterial. Crawford v. Simonton, 163 Ala. 609, 50 S 1024.

[b] **In California** the unauthorized insertion of a rate of interest avoids the instrument as to the excess over the legal rate which the instrument otherwise would have borne, but not as to the latter if the change was innocently made. Oakland First Nat. Bank v. Wolff, 79 Cal. 69, 21 P 551, 748; Fisher v. Dennis, 6 Cal. 577, 65 AmD 534.

23. Ark.—Waugh v. Cook, 167 SW 103 (holding that the unauthorized alteration of a note by raising the rate of interest is a material alteration and avoids the note).

Ga.—Shaw v. Probasco, 139 Ga. 481, 77 SE 577; Hill v. O'Neill, 101 Ga. 832, 28 SE 996.

Ind.—Palmer v. Poor, 121 Ind. 135, 22 NE 984, 6 LRA 469; Bowman v. Mitchell, 79 Ind. 84; Schnewind v. Hacket, 54 Ind. 248; Shanks v. Albert, 47 Ind. 461.

Me.—Lee v. Starbird, 55 Me. 491.

Mass.—Draper v. Wood, 112 Mass. 315, 17 AmR 92.

Mo.—Presbury v. Michael, 33 Mo. 542; Ivory v. Michael, 33 Mo. 398.

Oh.—Thompson v. Massie, 41 Oh. St. 307; Harsh v. Klepper, 28 Oh. St. 200.

S. C.—Heath v. Blake, 28 S. C. 406, 5 SE 642.

Va.—Dobyns v. Rawley, 76 Va. 537.

Eng.—Warrington v. Early, 2 E. & B. 763, 75 ECL 763, 118 Reprint 953.

[a] **Overdue bond.**—Where the rate of interest in a bond was increased from four and one half per cent to four and three quarters per cent per annum, but when the change was made the bond was overdue and therefore bore six per cent and the first year's interest had been paid, the change was held immaterial. Burkholder v. Lapp, 31 Pa. 322.

24. Conn.—Little v. Fowler, 1 Root 94.

Ind.—Post v. Losey, 111 Ind. 74, 12 NE 121, 60 AmR 677.

Kan.—New York L. Ins. Co. v. Martindale, 75 Kan. 142, 146, 88 P 559, 121 AmSR 362, 21 LRANS 1045, 12 AnnCas 677 [cit Cyc].

Minn.—Fillmore County v. Greenleaf, 80 Minn. 242, 83 NW 157 (as to sureties in bond).

Mo.—Moore v. Hutchinson, 69 Mo. 429; Whitmer v. Frye, 10 Mo. 348.

N. M.—Ruby v. Talbott, 5 N. M. 251, 21 P 72, 3 LRA 724 and note.

Okl.—Commonwealth Nat. Bank v. Baughman, 27 Okl. 175, 111 P 332.

R. I.—Keene v. Weeks, 19 R. I. 309, 33 A 446.

Tex.—Kalteyer v. Mitchell, (Civ. A.) 110 SW 462.

Ont.—Bellamy v. Porter, 28 Ont. L. 572.

25. Hert v. Oehler, 80 Ind. 83 (holding that the erasure of the words, "The interest on this note has been paid to maturity," is material); Moore v. Hutchinson, 69 Mo. 429; Edwards v. Sartor, 69 S. C. 540, 48 SE 537 (holding that, where a mortgage note providing for ten per cent interest is changed by an indorsement by the holder so as to draw eight per cent, and this indorsement is thereafter erased by him, the note is thereby annulled, and, no rate being fixed in the mortgage, the debt draws interest at seven per cent).

26. Hoopes v. Collingwood, 10 Colo. 107, 13 P 909, 3 AmSR 565; Craighead v. McLoney, 99 Pa. 211; Sanders v. Bagwell, 32 S. C. 238, 10 SE 946, 7 LRA 743, 37 S. C. 145, 15 SE 714, 16 SE 770; Kilkelly v. Martin, 34 Wis. 525. But see Keene v. Miller, 103 Ky. 628, 45 SW 1041, 20 KyL 279 (holding that, where a note bore six per cent interest before the change, and was changed to an illegal rate, as the note still bore a legal rate of interest and was void as to the illegal rate, the legal effect of the instrument was not changed).

[a] **Addition of place of execution.**—In Houston v. Potts, 64 N. C. 33, where a note was actually made in South Carolina, it was held that it would have borne the South Carolina rate of interest, and therefore the addition to the note of its place of execution would not constitute a material change, although plaintiff and surety lived in North Carolina where the rate of interest was smaller.

27. Hoopes v. Collingwood, 10 Colo. 107, 13 P 909, 3 AmSR 565; Draper v. Wood, 112 Mass. 315, 17 AmR 92; Holmes v. Trumper, 22 Mich. 427, 7 AmR 661; Warrington v. Early, 2 E. & B. 763, 75 ECL 763, 118 Reprint 953.

28. Coburn v. Webb, 56 Ind. 96, 26 AmR 15 (holding that the instrument is not the one executed by the party under these conditions, and that it does not matter that the change is not, in fact, to his prejudice).

[a] **This is especially true as against a surety,** as where a note is signed by a maker and surety and intrusted by the latter to the former to negotiate. Franklin L. Ins. Co. v. Courtney, 60 Ind. 134.

29. Benedict v. Miner, 58 Ill. 19 (where a note dated March 3, and payable May 1, was changed so as to bear interest after April 1, intervening between the two dates above mentioned); Ruby v. Talbott, 5 N. M. 251, 21 P 72, 3 LRA 724 and note.

[a] **During period of grace.**—It is a material alteration to cause an instrument to bear interest during the period of grace when, by its terms, it would not have borne interest during that time. Little Rock Trust Co. v. Martin, 57 Ark. 277, 21 SW 468.

30. Ill.—Black v. Bowman, 15 Ill. A. 166.

Ind.—Dietz v. Harder, 72 Ind. 208; Brooks v. Allen, 62 Ind. 401; Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413 (striking out "after maturity," and inserting "from date").

Iowa.—Murray v. Graham, 29 Iowa 520 (which case, however, was distinguishable, on account of its peculiar facts, from others holding that a recovery could not be had on the original terms of the instrument).

Kan.—Sheley v. Sampson, 5 Kan. A. 465, 46 P 994 (erasing "from maturity" and inserting "from date").

Ky.—Springfield First Nat. Bank v. Dawson, 2 KyL 230 (holding that, where a note is altered after execution, without the consent of the

paid annually,[31] or semiannually,[32] or quarterly,[33] unless the original terms of the instrument are such that the addition can be considered to mean nothing more than the correction of a mistake in the rate of interest already provided for, and not to change the time of payment.[34]

[§ 45] **9. Exchange.** It is a material alteration to insert, without authority or consent, a fixed rate of exchange in a foreign bill of exchange,[35] or to insert words making a note payable with exchange on another city.[36] But where a note is payable in a city other than the residence of the maker the insertion of the words "with current exchange or express charges" is immaterial as they add nothing to the note which it did not before import, since in any event the maker must remit the money at his expense to the place of payment.[37]

[§ 46] **10. Time of Performance or Payment.**[38] An alteration of an instrument which affects the time for the performance of the contract or the doing of a particular act under stipulations therein is a material alteration,[39] as is also an alteration which changes the time for payment of money under the instrument,[40] whether the time of payment

maker, so as to draw interest "from date" instead of "from date of maturity," the alteration, being material, releases the maker from his obligation, and he can plead non est factum when suit is brought upon it thus altered).

Mich.—Nelson v. Dutton, 51 Mich. 416, 16 NW 791.

Mo.—McCormick Harvesting Mach. Co. v. Blair, 146 Mo. A. 374, 124 SW 49 (holding that the alteration of a note without the maker's knowledge, so as to require the payment of interest from date instead of from maturity, is a material alteration which will prevent its enforcement, even if an alteration must be material to have that effect).

Nebr.—Courcamp v. Weber, 39 Nebr. 533, 58 NW 187 (changing a note bearing interest at ten per cent from maturity to one bearing interest at seven per cent from date).

Tex.—Baldwin v. Haskell Nat. Bank, 104 Tex. 122, 133 SW 864, 134 SW 1178 [rev (Civ. A.) 124 SW 443].

Wis.—Page v. Danaher, 43 Wis. 221.

31. Iowa.—Marsh v. Griffin, 42 Iowa 403.

N. H.—Smith v. Mace, 44 N. H. 553.

Oh.—Patterson v. McNeeley, 16 Oh. St. 348 (holding that, in a clause, "the above to be at ten per cent. interest annually," the word "annually" would be understood as relating to and defining the rate of interest only as so much per annum, but that to insert the word "paid" before the word "annually" was material, and constituted an alteration).

S. C.—Kennedy v. Moore, 17 S. C. 464 (which was the addition of words to a sealed note converting it from a simple interest into an annual interest obligation).

Wis.—Gorden v. Robertson, 48 Wis. 493, 4 NW 579 (where the words added were "payable annually," which enabled a recovery before it became due).

32. Blakey v. Johnson, 13 Bush (Ky.) 197, 26 AmR 254; Dewey v. Reed, 40 Barb. (N. Y.) 16; Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119, 47 AmD 299 (altering "annually" to "semiannually"); Fulmer v. Seitz, 68 Pa. 237, 8 AmR 172; Neff v. Horner, 63 Pa. 327, 3 AmR 555; McClure v. Little, 15 Utah 379, 49 P 298, 62 AmSR 938.

33. Wilson v. Hays, 40 Minn. 531, 42 NW 467, 12 AmSR 754, 4 LRA 196 (altering "annually" to "quarterly").

34. Leonard v. Phillips, 39 Mich. 182, 183, 33 AmR 370 (holding that the addition of the word "annually" to the interest clause of a note payable in less than two years is not a material alteration. In this case Cooley, J., concurring in the decision of the court, said: "I am inclined to think that in a note to run less than two years the words specifying the rate of interest to be paid annually must be understood as naming only the rate to be paid for the yearly period, and not as requiring an instalment to be paid when the first year was completed. If so, the supposed alteration of the note in suit did not at all affect its legal meaning, and might have been innocently added to show that the ten per cent interest was to be earned yearly, and was not all that was to be paid for the whole period the note was to run"); Baldwin v. Haskell Nat. Bank, 104 Tex. 122, 133 SW 864, 134 SW 1178 [rev (Civ. A.) 124 SW 443] (holding that, where the alteration of a note bearing interest from maturity by the addition of the word "date" after the word "maturity" is neither covinous nor fraudulent, but is made with the honest purpose of making it conform to the real agreement of the parties, the alteration does not discharge the maker from his liability on the original indebtedness); McClure v. Little, 15 Utah 379, 49 P 298, 62 AmSR 938 (holding that the insertion in a note by the payee after its delivery of the word "semiannually," in a blank following the words "interest payable," is a material alteration, but where made innocently to correct a mutual oversight, and make the note conform to the actual contract of the parties, and without any intention to defraud, it will not render the note invalid).

But as to effect of changes as dependent upon intent, accident, or fraud see infra §§ 96–100.

35. Hirschfield v. Smith, L. R. 1 C. P. 340.

36. Merrick v. Boury, 4 Oh. St. 60 (holding that, where, in a promissory note payable at Zanesville, Ohio, the payee, without authority from the maker, inserted the words "with difference of exchange, on Baltimore," apprising the maker at the same time that he had done so, the alteration was material and vitiated the note).

37. Bullock v. Taylor, 39 Mich. 137, 139, 33 AmR 356 (where Cooley, J., said: "We quite agree with counsel for the plaintiff that the provision for the payment of exchange or express charges is merely nugatory. By the agreement as well as by the terms of the notes, they were made payable at East Saginaw, and it therefore became the duty of the promisors to be at any expense necessary in the transmission of the money to that place. Whether they sent by draft or by express the expense would equally fall upon them, and an express promise to pay it could add nothing to their liability. The provision on the subject may have been inserted in the notes for a more perfect understanding of the agreement, but the surety could not complain of it, because it could not in any manner add to his liability, or vary his undertaking").

[a] **Thus where a negotiable note is executed at one place and payable at another,** the insertion of the words "with exchange" by the payee, without the knowledge or consent of the maker, is not a material alteration. Galva First Nat. Bank v. Nordstrom, 70 Kan. 485, 487, 78 P 804 (where Greene, J., said: "It was a part of the contract of the maker to pay any expense, either of exchange or express, necessary to make the payment at the place mentioned in the note, and the insertion of the words 'with exchange' was only a statement of what the contract itself implied. It did not render the note invalid, or discharge the maker from his liability thereon").

38. **Alteration of date of instrument** see infra §§ 52, 53.

39. Hodge v. Gilman, 20 Ill. 437 (which involved a change in a power of attorney to enter up judgment at "any time after" the same became due, by inserting the words "before or" between the words "time" and "after").

[a] **Changing date of completion.**—An alteration in a contract to furnish material and perform labor by changing the date of completion is material. Hayes v. Wagner, 89 Ill. A. 390.

[b] **Insertion in mortgage of specific period for default.**—Where the number of days allowed for default in the scire facias clause of a mortgage as originally drawn is left blank, the insertion of a particular period, after the provision as to default, is a material alteration, and absolutely avoids the mortgage and destroys its effect as a lien or encumbrance upon the premises. McIntyre v. Velte, 153 Pa. 350, 25 A 732.

[c] **Where a contract of lease is altered** by the lessee after execution and delivery without the knowledge of the lessor by changing the dates showing the beginning and termination of the term, the lessee cannot recover for a breach of the terms of the contract made by the lessor. St. Louis Gunning Adv. Co. v. Baptiste, 135 Mo. A. 503, 116 SW 438.

[d] **Change not altering sense.**—Where an order for goods was made subject to countermand "by a certain time," the legal effect of the instrument was not changed by adding the word "before" over the word "by," and therefore such a change was immaterial. Express Pub. Co. v. Aldine Press Co., 126 Pa. 347, 17 A 608.

40. Ark.—Gist v. Gans, 30 Ark. 285; Chism v. Toomer, 27 Ark. 108.

Iowa.—Eckert v. Pickel, 59 Iowa 545, 13 NW 708.

Ky.—Lisle v. Rogers, 18 B. Mon. 528.

Mass.—Ives v. Farmers' Bank, 2 Allen 236.

Minn.—Flanigan v. Phelps, 42 Minn. 186, 43 NW 1113.

Miss.—Bay v. Shrader, 50 Miss. 326.

Mo.—King v. Hunt, 13 Mo. 97.

N. Y.—Farmers' Nat. Bank v. Thomas, 79 Hun 595, 29 NYS 837 (making a note payable on demand); Acker v. Ledyard, 8 Barb. 514 (holding that the insertion of the words "in advance," in a lease indicating time of payment of rent, is a material change).

Pa.—Bowers v. Rineard, 209 Pa. 545, 58 A 912 (change of time of payment of note from one year after date until after the death of the maker).

Eng.—Desbrow v. Weatherley, 6 C. & P. 758, 25 ECL 675; Gardner v. Walsh, 5 E. & B. 83, 85 ECL 83, 119 Reprint 412.

Ont.—Westloh v. Brown, 43 U. C. Q. B. 402.

[a] **A mere memorandum** in this connection is not material. Mente v. Townsend, 68 Ark. 391, 59 SW 41.

[b] **Change affecting grace.**—(1) Inserting the word "fixed" to follow the number of days after the date when a note is payable has been held to be a material alteration for the reason that the insertion of the word by the maker would amount to a waiver of his days of grace. Steinau v. Moody, 100 Ga. 136, 28 SE 30. (2) But, where days of grace are allowed

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ment is thereby delayed[41] or accelerated,[42] unless the alteration is merely the correction of an omission or mistake.[43]

The alteration of a bail bond changing the time for the appearance of the principal is a material alteration.[44]

[§ 47] **11. Medium of Payment.** A change in the medium of payment of a note is material and will constitute an alteration, as by inserting a provision for payment in gold,[45] or in specie,[46] or by otherwise changing the mode of payment already specified in the instrument.[47]

[§ 48] **12. Place of Payment—a. General Rules.** A change of the place of payment of a bill, note, check, or other contract is material, and, when not made with the consent of all the parties, constitutes an alteration as against such as do not consent.[48] So a change by fixing a specific place of payment in a note which is made payable generally is material,[49] as where the note is made payable at a

on all bills of exchange or on promissory notes placed on the same footing, the insertion of the word "fixed" in a note is immaterial where the note was never placed on a footing of the bill of exchange. Tranter v. Hibbard, 108 Ky. 265, 56 SW 169, 21 KyL 1710. (3) The erasure of the words "and grace" is not material where, by the law prevailing, the note is entitled to grace without such words. Portsmouth Sav. Bank v. Wilson, 5 App. (D. C.) 8.

41. U. S.—Wood v. Steele, 6 Wall. 80, 18 L. ed. 725; Pensacola State Bank v. Melton, 210 Fed. 57 (holding that, under Ky. Negotiable Instruments Law § 125, a change of the date of maturity of a note from May 15, 1907, to May 15, 1908, without the consent of defendants, was a material alteration which released them from liability).

Ind.—Stayner v. Joice, 82 Ind. 35.

Ky.—Ft. Worth First Nat. Bank v. Payne, 42 SW 736, 19 KyL 839 (holding that a change of the date of maturity of a note from Dec. 1, 1892, to Jan. 1, 1893, without the consent of the maker, is such an alteration as releases him).

Mass.—Davis v. Jenney, 1 Metc. 221.

Minn.—Flanigan v. Phelps, 42 Minn. 186, 43 NW 1113 (insertion of clause granting privilege of extension for a certain number of days).

Miss.—Henderson v. Wilson, 7 Miss. 65.

N. Y.—National Ulster County Bank v. Madden, 114 N. Y. 280, 21 NE 408, 11 AmSR 633 (change of time of payment of check so as to make it payable at a future day, without indorser's consent).

Eng.—Vance v. Lowther, 1 Ex. D. 176 (change in date of check); Paton v. Winter, 1 Taunt. 420, 127 Reprint 896.

[a] **But a note payable on or before a certain date** is not rendered void by an indorsement on the face thereof extending the time of payment. Drexler v. Smith, 30 Fed. 754.

[b] **An alteration in a deed of trust** creating a lien on realty by which the time of payment of the note which the deed was given to secure was delayed is material. Kalteyer v. Mitchell, (Tex. Civ. A.) 110 SW 462.

[c] **The Ohio Negotiable Instruments Act** §§ 3175o, 3175p, relating to the alteration of instruments, apply to the physical alterations of the instrument itself and not to a contract between the holder and the principal maker for an extension of time of payment of the instrument. Richards v. Market Exch. Bank Co., 81 Oh. St. 348, 90 NE 1000, 26 LRANS 99.

42. Ind.—Bell v. State Bank, 7 Blackf. 456.

Minn.—Seebold v. Tatlie, 76 Minn. 131, 78 NW 967.

Miss.—Henderson v. Wilson, 7 Miss. 65.

N. Y.—Waring v. Smyth, 2 Barb. Ch. 119, 47 AmD 299.

Pa.—Hartley v. Corboy, 150 Pa. 23, 24 A 295.

Tenn.—Crockett v. Thomason, 5 Sneed 341.

Eng.—Alderson v. Langdale, 3 B. & Ad. 660, 23 ECL 291, 110 Reprint 241; Clifford v. Parker, 2 M. & G. 909, 40 ECL 917, 133 Reprint 1012.

Ont.—Westloh v. Brown, 43 U. C. Q. B. 402; Meredith v. Culver, 5 U. C. Q. B. 218.

[a] **The contract of an accommodation indorser** of a promissory note is not altered by the insertion in the body of the note, by the maker, of the following words: "Payable before maturity, and interest on unexpired term refunded, if I so elect." Herrick v. Baldwin, 17 Minn. 209, 10 AmR 161.

43. Conner v. Routh, 8 Miss. 176, 40 AmD 59 (holding that, where a word in the clause indicating the time of payment is omitted by mistake, its insertion to show the time intended is held to be immaterial, as the insertion of the word "months" in the clause "twenty-four after date").

Correction of mistake to conform to original intention see generally infra §§ 99, 100.

[a] **The mere insertion of the word "year"** in a clause indicating payment on a particular day and month in "the —— of our Lord" is immaterial. Hunt v. Adams, 6 Mass. 519, 522.

[b] **Where a promissory note as drawn does not express any time of payment** the insertion of the words "on demand" does not alter the legal effect of the instrument and the alteration is immaterial. Aldous v. Cornwell, L. R. 3 Q. B. 573.

[c] **Delivery of machines.**—Where a license for the use of certain machines provided that the licensee might call upon the licensor "for as many additional machines as the licensee deemed expedient," but the time of delivery was not fixed, and the parties inserted in the contract, after it was executed, a provision that "said machines shall be shipped to the licensee within thirty days after written notice is given to the lessor," it was not a material alteration in the contract. U. S. Glass Co. v. West Virginia Flint Bottle Co., 89 Fed. 828, 32 CCA 364 [rev 81 Fed. 993].

44. Butler v. State, 31 Tex. Cr. 63, 19 SW 676 (holding that it is a material alteration of a bail bond, which was executed in 1891, to change the date for the appearance of the principal, originally written at a certain date in 1890, to the same date in 1891); Wegner v. State, 28 Tex. A. 419, 13 SW 608 (holding that, where the terms of a bail bond obligated defendant to appear at a certain date "A. D. 188" and the figure "9" was added after these letters and figures, the alteration was material); Heath v. State, 14 Tex. A. 213 (holding that, where it appeared upon the face of a bail bond that the principal was originally held to appear before the July term, 1881, of the court, a term not provided for by law, and the word "July" appeared to have been erased in the bond and the word "October" substituted, this was a material alteration of the bond which released the sureties).

45. Hanson v. Crawley, 41 Ga. 303; Foxworthy v. Colby, 64 Nebr. 216, 89 NW 800, 62 LRA 393 (holding that the unauthorized insertion of the word "gold" before the word "dollars" in a mortgage bond, after its execution and delivery, is a material alteration); Wills v. Wilson, 3 Or. 308; Bogarth v. Breedlove, 39 Tex. 561.

[a] **But where nothing but gold is legal tender** the insertion of the words "in gold," indicating the medium of payment, is not material. Bridges v. Winters, 42 Miss. 135, 97 AmD 443, 2 AmR 598.

46. Darwin v. Rippey, 63 N. C. 318 (because an instrument payable in dollars generally is payable in legal tender notes).

47. Angle v. North-Western Mut. L. Ins. Co., 92 U. S. 330, 23 L. ed. 556 (which was an alteration of an application for a loan by making the amount payable in "current funds" instead of by "drafts to the order of"); Williams Typewriter Co. v. Cleaver, 38 Pa. Super. 376.

Alteration of payment in merchandise see supra § 38.

[a] **Erasure of gold clause.**—The erasure of a provision for payment "in gold or its equivalent" by the direction of the maker and payee of the note, without the knowledge or consent of the surety thereon, discharges the surety. Church v. Howard, 17 Hun 5 [rev on other grounds 79 N. Y. 415].

[b] **Stipulation to exchange for bonds.**—It is a material alteration of a promissory note to write on the face of it the following words: "This note to be exchanged for consolidated mortgage bonds of Nebraska & Northwestern Irrigation Company when issued at 90." Harnett v. Holdrege, 5 Nebr. (Unoff.) 114, 97 NW 443 [aff reh 73 Nebr. 570, 103 NW 277, 119 AmSR 905].

48. U. S.—Wilkes-Barre First Nat. Bank v. Barnum, 160 Fed. 245.

Ala.—Holmes v. Ft. Gaines Bank, 120 Ala. 493, 24 S 959; White v. Hass, 32 Ala. 430, 70 AmD 548.

Iowa.—Adair v. Egland, 58 Iowa 314, 12 NW 277; Knoxville Nat. Bank v. Clark, 51 Iowa 264, 1 NW 491, 33 AmR 129.

Ky.—Mitchell v. Reed, 106 SW 833, 32 KyL 683 (changing place of payment from a bank in one state to a bank in another state).

N. Y.—Woodworth v. Bank of America, 19 Johns. 391, 10 AmD 239.

Tex.—Morris v. Beaumont Nat. Bank, 37 Tex. Civ. A. 97, 83 SW 36 (altering name of bank on which check is drawn).

W. Va.—Ohio Valley Bank v. Lockwood, 13 W. Va. 392, 31 AmR 768.

Eng.—Rex v. Treble, 2 Taunt. 328, 127 Reprint 1105.

Ont.—McQueen v. McIntyre, 30 U. C. C. P. 426.

Compare Pritchard v. Smith, 77 Ga. 463.

[a] **In a land contract** the place of payment of the purchase money is a material term, and where an intending purchaser, without the knowledge or consent of the vendor, alters the formal contract of sale which had been executed by the vendor by changing the place of the payment of the purchase money, it amounts to a material alteration, and the contract may be avoided by the vendor even after he has cashed the check for the initial payment forwarded by the purchaser with a letter purporting to accept the terms of the informal offer to sell, if he did not know of such alteration of the place of payment named in the contract. Pearson v. O'Brien, 22 Man. 175, 4 DomLR 413, 20 WestLR 510 [dism app 18 WestLR 563].

49. Cal.—Pelton v. San Jacinto Lumber Co., 113 Cal. 21, 45 P 12 (inserting in a note, which did not designate the place of payment, words making it payable at a bank outside of the state in which it was executed).

Del.—Sudler v. Collins, 7 Del. 538.

Ga.—Gwin v. Anderson, 91 Ga. 827, 18 SE 43.

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bank and is thus converted into negotiable paper, subject to the law merchant.[50] So also, changing the place of payment in a bill of exchange, or inserting a particular place of payment in a general acceptance, is material.[51]

Erasure of place of payment. It is a material alteration to erase the place of payment from a note, even though the effect of such alteration is to enlarge the rights of the maker.[52]

[§ 49] **b. Qualification of Rules.** The above rules have been restricted to cases in which the place of payment added, as for instance to the acceptance of a bill, is different from that from which the bill is drawn, and have been held not to apply where the change is merely to make more specific the place named or where the bill is payable,[53] and the same distinction has been applied to the addition of a place of payment in a note made payable generally.[54] Thus where a bill is addressed to a drawee at a particular town or city, without designating any particular place of payment therein, he may in his acceptance name some particular place in the city at which such bill shall be payable, and such acceptance will not be a material alteration of the instrument;[55] but if he accepts the bill so as to make it payable in another city, such an acceptance will be a material departure from the tenor of the bill, and will be treated as a dishonor of it.[56]

[§ 50] **c. Memorandum.** The materiality of the addition of a place of payment further depends upon the question whether a change is made in the contract or is only the addition of a memorandum for convenience. In the former case the addition is material;[57] in the latter it is not.[58]

[§ 51] **13. Place of Execution.** The insertion in

Ill.—Pahlman v. Taylor, 75 Ill. 629.
Ind.—Pope v. Branch County Sav. Bank, 23 Ind. A. 210, 54 NE 835.
Iowa.—Black v. De Camp, 75 Iowa 105, 39 NW 215; Charlton v. Reed, 61 Iowa 166, 16 NW 64, 47 AmR 808.
Ky.—Cason v. Grant County Deposit Bank, 13 KyL 635.
Miss.—Simmons v. Atkinson, 69 Miss. 862, 12 S 263, 23 LRA 599; Oakey v. Wilcox, 4 Miss. 330.
Nebr.—Townsend v. Star Wagon Co., 10 Nebr. 615, 7 NW 274, 35 AmR 493.
N. Y.—Nazro v. Fuller, 24 Wend. 374; Woodworth v. Bank of America, 19 Johns. 391, 10 AmD 239.
Oh.—Sturges v. Williams, 9 Oh. St. 443, 75 AmD 473.
Pa.—Hill v. Cooley, 46 Pa. 259; Southwark Bank v. Gross, 35 Pa. 80; Simpson v. Stackhouse, 9 Pa. 186, 49 AmD 554.

[a] **The addition of a place of payment to a nonnegotiable** instrument is a material alteration. Marion Nat. Bank v. Russell, 14 KyL 868.

[b] **But where the payee of a note becomes the administratrix of the estate of the maker,** and thereafter a place of payment is indorsed on the note, the addition is not material as the integrity of the maker's contract is not affected. Horton v. Horton, 71 Iowa 448, 32 NW 452.

50. Carroll v. Warren, 142 Ala. 397, 37 S 687; Holmes v. Ft. Gaines Bank, 120 Ala. 493, 24 S 959; Winter v. Pool, 100 Ala. 503, 14 S 411; Toomer v. Rutland, 57 Ala. 379, 29 AmR 722; Cronkhite v. Nebeker, 81 Ind. 319, 42 AmR 127; Ballard v. Franklin L. Ins. Co., 81 Ind. 239; McCoy v. Lockwood, 71 Ind. 319; Shanks v. Albert, 47 Ind. 461; Gillaspie v. Kelley, 41 Ind. 158, 13 AmR 318; Young v. Baker, 29 Ind. A. 130, 64 NE 54; Morehead v. Parkersburg Nat. Bank, 5 W. Va. 74, 13 AmR 636.

[a] **Under a statute requiring negotiable notes to contain a designation of a place of payment** the addition of a place of payment to a note containing no such designation, made by one not a stranger to the paper, is sufficient to avoid the contract as to all nonconsenting parties. Carroll v. Warren, 142 Ala. 397, 37 S 687.

51. Woolfolk v. Bank of America, 10 Bush (Ky.) 504 (holding that, where the holder of a bill of exchange changes the acceptance by the addition of a place of payment, the instrument is avoided as to all parties not consenting); Whitesides v. Northern Bank, 10 Bush (Ky.) 501, 19 AmR 74; Cowie v. Halsall, 4 B. & Ald. 197, 6 ECL 449, 106 Reprint 910; Desbrow v. Weatherley, 6 C. & P. 758, 25 ECL 675; Taylor v. Mosely, 6 C. & P. 273, 25 ECL 429; Burchfield v. Moore, 3 E. & B. 683, 77 ECL 683, 25 EngL&Eq 123, 118 Reprint 1297; Tidmarsh v. Grover, 1 M. & S. 735, 105 Reprint 274; Macintosh v. Haydon, R. & M. 362, 21 ECL 767.

52. White v. Hass, 32 Ala. 430, 70 AmD 548; Todd v. Lederach, 4 Pa. Dist. 173, 174 (a case of the erasure of the place of payment in a promissory note made by a party claiming under it, where Weand, J., said: "We think this was a material alteration, for it changed the rights of the defendant in an important particular. The contract or promise, as written, was that the maker should pay the note at a certain bank. This was an advantage to him, for he was not bound to hunt the payee when the note became due. His duty was to have the money at the place of payment when the note became due, when he could demand his note as evidence of payment. If it was not there, and he had deposited the amount to the credit of the note, he was discharged"). But see Major v. Hansen, 16 F. Cas. No. 8,982, 2 Biss. 195 (where it was held that, where a note as originally executed recited that it was payable at a named bank, the erasure of this recital is not a material alteration for the reason that it enlarged and did not in any respect limit the rights of the maker).

53. Melton v. Pensacola Bank, etc., Co., 190 Fed. 126, 111 CCA 166 (correcting name of bank); Myers v. Standart, 11 Oh. St. 29 (where it was said that cases as to the alteration of a note or accepted bill by inserting or striking out words designating a place of payment do not apply to the case of a bill of exchange addressed generally to a drawee in a city and accepted by him payable at a particular bank in the same city, the question in the latter case being whether the contract of the acceptor was so made as to affect the rights of the drawer under the latter's contract with the payee). But see Todd v. State Bank, 3 Bush (Ky.) 626 (where it was held that the acceptor of an accommodation bill had an implied authority to appoint the place of payment if none was fixed in the bill, and this was a case of fixing the place of payment in another town).

54. Etz v. Place, 81 Hun 203, 30 NYS 765 (holding that, where no place of payment was inserted in a note at the time when a guaranty of payment was executed, writing words therein subsequently, making the note payable at a bank which was located in the village where defendant and both makers of the note resided at the time, and was within a short distance of their residence, was not a material alteration and did not discharge the guarantor from liability); Shuler v. Gillette, 12 Hun (N. Y.) 278; Woodworth v. Bank of America, 19 Johns. (N. Y.) 391, 10 AmD 239.

55. Troy City Bank v. Lauman, 19 N. Y. 477; Etz v. Place, 81 Hun 203, 30 NYS 765; Shuler v. Gillette, 12 Hun (N. Y.) 278; Niagara Dist. Bank v. Fairman, etc., Mach. Tool Mfg. Co., 31 Barb. (N. Y.) 403; Rowe v. Young, 2 B. & B. 165, 6 ECL 83, 129 Reprint 921.

[a] **"It will be observed that the rule applies** to cases where the bill is addressed to a drawee in a city generally, and accepted payable at some particular place in the same city. It would not apply when the bill was accepted payable at some other city or place. This might injuriously affect the drawer in the time and mode of forwarding funds to meet the bill, and of receiving notice of dishonor. But where, in the same city, a particular location or agency is designated for the coming together of the parties, to pay and receive, it is difficult to perceive how any injury therefrom can result to the drawer. In a large city, in many cases, such an arrangement would be very convenient, and we see no reason why it should not be allowed." Per Gholson, J., in Myers v. Standart, 11 Oh. St. 29, 38.

56. Niagara Dist. Bank v. Fairman, etc., Mach. Tool Mfg. Co., 31 Barb. (N. Y.) 403; Walker v. State Bank, 13 Barb. 636 [aff 9 N. Y. 582, Seld. 257]; Rowe v. Young, 2 B. & B. 165, 6 ECL 83, 129 Reprint 921. See also supra § 48.

57. Woodworth v. Bank of America, 19 Johns. (N. Y.) 391, 10 AmD 239 [rev 18 Johns. 315] (holding that, where a note was made payable in a particular city, and there was a marginal memorandum signed by the maker that it was payable in another city, which memorandum was made after the indorsement, it was an alteration of the note itself, and discharged the indorser). In Tidmarsh v. Grover, 1 M. & S. 735, 105 Reprint 274 [dist Marson v. Petit (cit Cordwell v. Martin, 1 Campb. 79, 82 note)], it was held that the substitution of one place for another for the payment of a bill of exchange, after acceptance, was material in that probably in the later case the matter was not written immediately under the acceptance, but was only a memorandum as to where to find the money when the bill became due, while the case in hand caused the bill to carry with it the appearance of solvency by being directed to a solvent house instead of to the insolvent house to which it was originally directed.

58. Nugent v. Delhomm, 2 Mart. (La.) 307, 309 (holding that the memorandum at the foot of a note, "payable at the domicile of Dukeilus," is not such an alteration as avoids the note, upon the authority of Trapp v. Spearman, 3 Esp. 57, where it was held that the insertion in a bill, after it was given, of these words, "when due, at the Cross-Keys, Blackfriars road," was not a material change); American Nat. Bank v. Bangs, 42 Mo. 450, 97 AmD 349. So in Jacobs v. Hart, 2 Stark. 45, 3 ECL 310, Lord Ellenborough held that, where the payee changes a general acceptance into a special one by inserting the place of payment, after acceptance and shortly before the draft is due, and with-

a note, as the place of execution, of the place where the contract was actually made and in accordance with the laws of which the note is to be governed is not material, as this does not in any way alter the contract or import to it any effect that it did not before possess;[59] but it is a material alteration of an instrument to change the place of execution expressed therein,[60] or to insert the name of a place other than the true one, when none is expressed, so as to change the legal operation of the instrument.[61]

[§ 52] **14. Date of Instrument—a. General Rule.** The date of an instrument, such as of a deed, bill, or note, is, in various aspects, a material part thereof, and an unauthorized change of such date is an alteration of the instrument;[62] it is material as contributing to the features of the instrument by which the particular contract of the party is identified.[63] A change in the date may alter the apparent liability of a party,[64] or embarrass his remedies under the instrument, whether the time of payment is extended or accelerated, as by affecting the computation of interest, or by retarding or accelerating the operation of the statute of limitations, or the presumption of payment from the lapse of time.[65] It is also material as furnishing prima facie evidence of the time of the execution of the contract and of the relation in which the parties then stood,[66] and as fixing the period from which the parties are entitled to calculate the day of payment or performance, and therefore it is a well recognized rule, that a change in the date, such as of a bill or note, whether it postpones or accelerates the time of payment or performance, is material, and constitutes an alteration which will vitiate the instrument,[67] and in some jurisdictions this rule is ex-

out the knowledge of the acceptor, and then indorses it over, the objection on the ground of the alteration rested upon whether the place of payment was to be considered as a part of the contract, or merely as a direction, and concluded that the objection was without foundation. See also infra § 66.

59. Houston v. Potts, 64 N. C. 33.

60. Mahaiwe Bank v. Douglass, 31 Conn. 170; McQueen v. McIntyre, 30 U. C. C. P. 426.

61. Commercial, etc., Bank v. Patterson, 6 F. Cas. No. 3,056, 2 Cranch C. C. 346 (holding that, where a note was made in Pennsylvania, an addition by plaintiff or the payee of the words "Washington, D. C.," to the signature of the maker, with the intent to use the addition as a part of the date of the note in order to make it negotiable according to the laws of the District of Columbia is material, and discharges the maker).

62. Galland v. Jackman, 26 Cal. 79, 85 AmD 172 (holding that, as between two persons claiming through or under the same grantor, the change in the date of a deed to one of such parties affects its admissibility in evidence); Alkire v. Kahle, 123 Ill. 496, 17 NE 693, 5 AmSR 540; Den v. Wright, 7 N. J. L. 175, 11 AmD 546.

63. Merchants Nat. Bank v. Baltimore, etc., Steamboat Co., 102 Md. 573, 63 A 108; Heffner v. Wenrich, 32 Pa. 423; Lowe v. Merrill, 1 Pinn. (Wis.) 340; Vance v. Lowther, 1 Ex. D. 176.

64. Owings v. Arnott, 33 Mo. 406 (where the date, as altered, showed that defendant was chargeable as an indorser of a negotiable instrument, whereas, as the note originally stood, it was already past due and defendant was chargeable as an assignor of a debt).

[a] **Date of release.**—A change of the date of a general release which purports to discharge the releasee from all claims "to the day of the date" is material. Maybee v. Sniffen, 2 E. D. Smith 1, 10 NYLegObs 18 [aff 16 N. Y. 560].

65. Armstrong v. Penn, 105 Ga. 229, 31 SE 158; Hamilton v. Wood, 70 Ind. 306; Heffner v. Wenrich, 32 Pa. 423; Getty v. Shearer, 20 Pa. 12; Vance v. Lowther, 1 Ex. D. 176 (holding that, where the date of a check is changed to a later date, it is material, upon the ground, in addition to the change in the identity of the obligation, that if the drawer of a check had money in the bank at the time of drawing it, and the bank should fail before the check is presented, the question of liability of the drawer might turn on the diligence used in presenting the check).

66. Getty v. Shearer, 20 Pa. 12 (holding that the legal effect of the change might embarrass a party in respect of payments or settlements made after the original date but before the substituted date).

67. U. S.—Wood v. Steele, 6 Wall. 80, 18 L. ed. 725. But see Union Bank v Cook, 24 F. Cas. No. 14,349, 2 Cranch C. C. 218 (holding that a change extending the time was a change for the advantage of defendant, and was not material).

Ala.—Lesser v. Scholse, 93 Ala. 338, 9 S 273.

Ark.—Lemay v. Williams, 32 Ark. 166; Inglish v. Breneman, 5 Ark. 377, 41 AmD 96, 9 Ark. 122, 47 AmD 735.

Del.—Warren v. Layton, 3 Del. 404.

Ill.—Wyman v. Yeomans, 84 Ill. 403 (where the change of the date in a note and cognovit was held material, at least as to a surety).

Ind.—Brannum Lumber Co. v. Pickard, 33 Ind. A. 484, 71 NE 676 (holding that, where the date of a note is altered after it has been signed by a surety and without his knowledge, so as to postpone the date of payment, the alteration is material and the surety is discharged).

Kan.—Fraker v. Cullum, 21 Kan. 555; McCormick Harvesting Mach. Co. v. Lauber, 7 Kan. A. 730, 52 P 577.

Ky.—Duker v. Franz, 7 Bush 273, 3 AmR 314; Lisle v. Rogers, 18 B. Mon. 528; Hall v. Commonwealth Bank, 5 Dana 258, 30 AmD 685 (where it is said that antedating is especially illegal); Commonwealth Bank v. McChord, 4 Dana 191, 29 AmD 398; Letcher v. Bates, 6 J. J. Marsh. 524, 22 AmD 92; Miles v. Major, 2 J. J. Marsh. 153; Limestone Bank v. Penick, 5 T. B. Mon. 25; Stout v. Cloud, 5 Litt. 205.

Me.—Hervey v. Harvey, 15 Me. 357.

Md.—Merchants' Nat. Bank v. Baltimore, etc., Steamboat Co., 102 Md. 573, 63 A 108 (holding that a change of the date in bills of lading constituted a material alteration invalidating the bills); Lewis v. Kramer, 3 Md. 265; Mitchell v. Ringgold, 3 Harr. & J. 159, 5 AmD 433.

Mo.—Britton v. Dierker, 46 Mo. 591, 2 AmR 553; King v. Hunt, 13 Mo. 97; Aubuchon v. McKnight, 1 Mo. 312, 13 AmD 502; McMurtrey v. Sparks, 71 Mo. A. 126 (holding that the change in the date of a note, made by the payee or party beneficially interested therein, without the consent of the payer or party sought to be charged, is a material alteration which will prevent a recovery).

Mont.—McMillan v. Hefferlin, 18 Mont. 385, 45 P 548.

Nebr.—Brown v. Straw, 6 Nebr. 536, 29 AmR 369.

N. H.—Bowers v. Jewell, 2 N. H. 543.

N. J.—Bodine v. Berg, 82 N. J. L. 662, 82 A 901, 40 LRANS 65, AnnCas1913D 721 and note.

N. M.—Ruby v. Talbott, 5 N. M. 251, 21 P 72, 3 LRA 724.

N. Y.—Crawford v. West Side Bank, 100 N. Y. 50, 2 NE 881, 53 AmR 152; Rogers v. Vosburgh, 87 N. Y. 228; Moskowitz v. Deutsch, 46 Misc. 603, 92 NYS 721 (change in date of check).

Oh.—Newman v. King, 54 Oh. St. 273, 43 NE 683, 56 AmSR 705, 35 LRA 471; Dempsey v. Moran, 9 Oh. Dec. (Reprint) 212, 11 CincLBul 213.

Pa.—Cornog v. Wilson, 231 Pa. 281, 80 A 174; Bowers v. Rineard, 209 Pa. 545, 58 A 112; Nesbit v. Turner, 155 Pa. 429, 26 A 750 (holding that an alteration in the date of a bond is material and avoids it); Miller v. Stark, 148 Pa. 164, 23 A 1058; Heffner v. Wenrich, 32 Pa. 423; Clark v. Eckstein, 22 Pa. 507, 62 AmD 307; Getty v. Shearer, 20 Pa. 12; Paine v. Edsell, 19 Pa. 178; Miller v. Gilleland, 19 Pa. 119; Kennedy v. Lancaster County Bank, 18 Pa. 347; Mechling v. Hartzell, 4 Pennyp. 500; Hocker v. Jamison, 2 Watts & S. 438; Stephens v. Graham, 7 Serg. & R. 505, 10 AmD 485; U. S. Bank v. Russel, 3 Yeates 391; Citizens', etc., Sav. Bank v. Coon, 2 Kulp 134.

Tenn.—Taylor v. Taylor, 12 Lea 714.

Vt.—Barton Sav. Bank, etc., Co. v. Stephenson, 87 Vt. 433, 89 A 639, 51 LRANS 346 and note (holding that, where a maker of a note, after it had been signed and left with him by his comakers to deliver to a bank, crossed out the date and inserted another date, it was an alteration, and not a mere memorandum of the date from which interest should be computed).

Wis.—Low v. Merrill, 1 Pinn. 340.

Eng.—Hirschman v. Budd, L. R. 8 Exch. 171 (holding that the change in the date of a bill of exchange, which change makes the bill payable at a different date, is material and avoids it as to the acceptor, which seems to be opposed to Parry v. Nicholson, 2 D. & L. 640, although the court in the first case thought that the learned judge in the last case did not intend to lay down the principle that the date of a bill is not material, and that the decision in that case must have turned upon the particular facts thereof); Atkinson v. Hawdon, 2 A. & E. 628, 29 ECL 293, 111 Reprint 242; Outhwaite v. Luntley, 4 Campb. 179; Sloman v. Cox, 1 C. M. & R. 471; Bell v. Gardiner, 4 M. & G. 11, 43 ECL 16, 134 Reprint 5; Clifford v. Parker, 2 M. & G. 909, 40 ECL 917, 133 Reprint 1012; Master v. Miller, 4 T. R. 320, 100 Reprint 1042, 2 ERC 669.

Can.—McLaren v. Miller, 36 CanLJ 680.

Ont.—Boulton v. Langmuir, 24 Ont. A. 618; Gladstone v. Dew, 9 U. C. C. P. 439; Meredith v. Culver, 5 U. C. Q. B. 218.

See also supra § 46.

"An alteration in the date of a writing, if it results in altering the legal effect of the instrument, as by changing the day of maturity, is a material alteration." Barton Sav. Bank, etc., Co. v. Stephenson, 87 Vt. 433, 89 A 639, 641, 51 LRANS 346.

[a] **Reason of rule.**—"The date of a note ordinarily evidences the inception of the undertaking, fixes the time

pressly prescribed by the Negotiable Instruments Law.[68]

Immaterial alterations. Changes in the date of an instrument, however, which do not affect the legal operation of the instrument, or the rights of the parties thereunder, are immaterial,[69] as where the change is made in good faith merely for the purpose of correcting a mistake or supplying an omission as to the date.[70]

Date of indorsement. It has been held that, as an indorsement is no part of the original obligation, an addition of, or a change in, a date thereto is not a material alteration of the instrument.[71]

[§ 53] **b. When Time of Performance Is Fixed.** Where the time for performance or payment is fixed, and does not depend upon the lapse of a particular period from the date of the instrument, the change of a day in the date is not material.[72]

[§ 54] **15. Description of Property. As to Identity or Quantity.** A change in the description of property conveyed, so as to give it an entirely different name and thus destroy the identity,[73] or so as to make the instrument cover property different from that originally conveyed, whether or not operating to destroy the validity of the instrument as a conveyance of the property originally described,[74] cannot, in any event, give to the instrument validity as a conveyance of that which is indicated by the changed or added description; in other words, such an act will constitute an alteration of the instrument.[75] So the addition of words increasing

of payment, and determines the period of limitation; and, when this is the case, any change in the date will impart to the note a new legal effect and operation." Barton Sav. Bank, etc., Co. v. Stephenson, 87 Vt. 433, 89 A 639, 641, 51 LRANS 346.

[b] **At common law the alteration of the date of a note** is material and, when made by one not a stranger to the obligation, will avoid it as to parties not consenting thereto. Bodine v. Berg, 82 N. J. L. 662, 82 A 901, 40 LRANS 65, AnnCas1913D 721 and note.

[c] **Change of date in instructions to draw.**—Where a party gave a written authority by letter to draw a draft upon him at ninety days from April 10, an alteration of this letter to read, "ninety days from the 16th of April," without the knowledge or consent of the writer, will discharge him from liability as an acceptor by virtue of such authority. Lewis v. Kramer, 3 Md. 265.

[d] **Where a paper is signed and delivered for the most part in blank,** if at the time of such delivery the date was not blank, there is no implied authority to make the note of any other date than that which was then affixed; and if in such case the date is afterward changed, without the consent of those who had signed the paper, the note, with such substituted date, is not that which they had signed and no action can be maintained against them upon it. Lisle v. Rogers, 18 B. Mon. (Ky.) 528; Commonwealth Bank v. McChord, 4 Dana (Ky.) 191, 29 AmD 398; Mitchell v. Ringgold, 3 Harr. & J. (Md.) 159, 5 AmD 433.

[e] **Changing the date of a note so as to bring it within the statute of limitations** is a material alteration. Schubert v. Schubert, 168 Ill. A. 419.

68. Fry v. Jenkins, 173 Ill. A. 486 (under Negotiable Instruments Act § 124 art 8); Lombardo v. Lombardini, 57 Wash. 352, 106 P 907, 32 LRANS 515 and note (under L. [1899] c 149 §§ 124, 125). See statutory provisions.

69. Reed v. Kemp, 16 Ill. 445 (holding that erasing the number of the day of the month after the name of the month, and putting it before, does not constitute an alteration); San Antonio Brewing Ass'n v. Abbott Oil Co., (Tex. Civ. A.) 129 SW 373 (holding that, where an indemnity bond provided that a contract should be attached, when such contract was attached it became a part and parcel of the bond, that variance in the dates was immaterial, and that a change of the date in the bond was not a material one and did not affect its validity); Bashaw v. Wallace, 101 Va. 733, 45 SE 290 (holding that where, notwithstanding an alleged alteration in the date of a bond attempted to be enforced against the estate of the deceased maker, an action on the bond, if treated as having been executed at the time the consideration therefor arose, would not be barred by limitations, the alleged alteration was immaterial). In Sayre v. Reynolds, 5 N. J. L. 862, where a note was changed so as to make the difference of one day in the time of payment, it was said that the change, so slight in its effect as to save defendant a few cents of interest, might well be considered as insufficient to raise a presumption of forgery.

[a] **Assignee's claim against maker.**—Changing the date of an assignment of a note is held not to affect the assignee's claim against the maker, as the date is not an essential part of the assignment. Griffith v. Cox, 1 Overt. (Tenn.) 210.

[b] **Change of dates in lease.**—Where a lease of land is made, to commence at a future date, to one already in possession thereof, a subsequent alteration by the lessee of certain dates in said lease, referring to the time when the lease was made, will not affect the lessee's right to the possession of said premises. Lee v. Lee, 83 Iowa 565, 50 NW 33.

70. Brice v. Sheffield, 118 Ga. 128, 44 SE 843 (date of deed recorded prior to acquisition of interest in land by another); Gill v. Hopkins, 19 Ill. A. 74 (inserting date in note contemporaneously with its delivery); Crediton v. Exeter, [1905] 2 Ch. 455; Brutt v. Picard, R. & M. 37, 21 ECL 698. In State v. Miller, 3 Gill (Md.) 335, it was held that the change in the date of a guardian's bond after execution from "— day of December, 1823," to the "3d day of May, 1824," was immaterial, as it did not tend to alter or enlarge the liability of defendant. A ruling to the same effect was made in Terry v. Hazlewood, 1 Duv. (Ky.) 104, although this case seems to be distinguished in Smith v. Lockridge, 8 Bush (Ky.) 423, upon the theory that the bond in question was not an instrument for the payment of money.

Correction of mistake see generally infra § 99.

[a] **Where the written and printed dates on a note contradict each other,** the written figures control the printed ones, and hence a change of the printed figures to correspond with the written ones does not constitute a material alteration. Lombardo v. Lombardini, 57 Wash. 352, 106 P 907, 32 LRANS 515.

[b] **Insertion of date in deed.**—Where a deed of conveyance for slaves has been signed, sealed, and delivered, with a blank left for the date, and the donee afterward inserts the date, the insertion does not vitiate the deed, as the date is not a material part thereof. Whiting v. Daniel, 1 Hen. & M. (11 Va.) 390.

[c] **Under the English Stamp Act,** it has been held that the alteration of the date of a bill of exchange, made in furtherance of the original intention of the parties, and to correct a mistake, does not make it a new bill. Jacobs v. Hart, 6 M. & S. 142, 105 Reprint 1196, 2 Stark. 45, 3 ECL 310. And see Byrom v. Thompson, 11 A. & E. 31, 39 ECL 42, 113 Reprint 324; Webber v. Maddocks, 3 Campb. 1; Bathe v. Taylor, 15 East 412, 104 Reprint 900; Cole v. Parkin, 12 East 471, 104 Reprint 184; Robinson v. Touray, 1 M. & S. 217, 105 Reprint 81.

[d] **An alteration in the date of a mortgage,** after execution, to carry out the intent of the parties, will not invalidate it. Styles v. Scotland, 22 N. D. 469, 134 NW 708.

71. Griffith v. Cox, 1 Overt. (Tenn.) 210. See also infra § 69 et seq.

[a] **Addition of date to indorsement of partial payment.**—An indorsement of a partial payment on the back of a note forms no part of the original instrument, and the addition of a date to this indorsement can have no effect upon the legal validity of the instrument. It is not a material alteration of the note, and can neither destroy its efficacy nor give it force. Howe v. Thompson, 11 Me. 152.

72. Prather v. Zulauf, 38 Ind. 155. See also Lee v. Lee, 83 Iowa 565, 50 NW 33 (as to change of date of lease to begin at fixed day in future).

73. Marcy v. Dunlap, 5 Lans. (N. Y.) 365; Collins v. Ball, 82 Tex. 259, 17 SW 614, 27 AmSR 877.

74. **For altered deed as evidence** see supra § 29.

75. U. S.—Moelle v. Sherwood, 148 U. S. 21, 13 SCt 426, 37 L. ed. 350 (holding that the old execution and acknowledgment are not continued in existence as to the property added, and that, even if it could be so between the original parties, such a deed, as to the added property, could not take effect and be enforced as against subsequent purchasers without notice whose deeds had already been recorded).

Ala.—Doe v. McCullough, 155 Ala. 246, 46 S 472 (holding that where the description of land is inserted in a patent after its issuance and delivery, the title to such land is not conveyed by such patent).

Ill.—Montag v. Linn, 23 Ill. 551 (holding that the alteration of the number of a section in a deed is material, and is not rendered immaterial by reference to the land as that patented to a person for certain services during the late Civil War, without proof that there was but one person answering such description; that the grantee has no more right to strike out and alter one part of a description of land than he has to strike out and alter another part of such description, unless the part retained completely fits the subject claimed, and the rejected part does not); Daub v. Englebach, 9 Ill. A. 99 (involving the fraudulent change of a mortgage by causing it to embrace other land).

Iowa.—Cutler v. Rose, 35 Iowa 456 (involving a change in a mortgage so as to give it the force of a lien upon the homestead as well as upon other lands covered by the mortgage).

Mo.—Smith v. Smith, 132 Mo. 681, 34 SW 471 (which was a suit to remove a cloud from the title to land,

or diminishing the quantity of land or other property embraced in a deed or agreement of sale is a material alteration,[76] as is also a change, in the description of property in a chattel mortgage, by inserting property not originally embraced therein.[77]

A change, however, is not material which supplies nothing which would not be intended by law without it, and which does not change the legal effect of the instrument or the identity of the property, or operate to perfect an instrument which otherwise would be invalid, as where the change serves merely to make the description of the property more definite,[78] or in accord with the obvious intention of the parties, as imperfectly expressed therein,[79] although it has been held that, if the property intended to be covered by a mort-

the description of which was thus forged in a deed).

Nebr.—Pereau v. Frederick, 17 Nebr. 117, 22 NW 235.

N. H.—Chesley v. Frost, 1 N. H. 145.

N. J.—Havens v. Osborn, 36 N. J. Eq. 426.

S. C.—Powell v. Perlstine, 43 S. C. 403, 21 SE 328.

W. Va.—Deem v. Phillips, 5 W. Va. 168.

[a] **Alteration of number of lot or section in description of property.**—(1) Where a married woman executed a mortgage to secure a debt of her husband upon property which was described in the mortgage as "lot No. 26," and after delivery plaintiff discovered that the property was described by the wrong number, and applied to defendant's attorney to have it rectified, and, without the knowledge of defendant, but by his attorney, and in the presence of plaintiff's attorney, the alteration was made, it was held in an action brought to reform the mortgage, and for foreclosure thereof, that the alteration was material, and had the effect to vitiate and destroy the mortgage, so as to render it incapable of being enforced by plaintiff. Marcy v. Dunlap, 5 Lans. (N. Y.) 365. (2) Where a mortgage as executed described the property conveyed as "lots 1 and 2," and after it had been acknowledged before a notary the mortgagee discovered that the lots were improperly described, and applied to the notary who changed the numbers to thirteen and fourteen, without the knowledge or consent of the mortgagor, the alteration was material, and avoided the mortgage. Pereau v. Frederick, 17 Nebr. 117, 22 NW 235. (3) Where a deed described the land as "being the south-east quarter of section (25) twenty-five," etc., and upon examination the figures twenty-five appeared to have been written above an erasure of figures denoting twenty-four, and the word "five" made so by changing another word resembling "four" into "five," the alteration was material. Montag v. Linn, 23 Ill. 551.

[b] **Addition of words describing location of property.**—(1) Where a contract for the conveyance of land described the property as "section No. 374, state school land," and the words, "surveyed for B. B. B. & C. R. R. Co. in Franklin County, Texas," were added, the alteration was material. Pope v. Taliaferro, (Tex. Civ. A.) 115 SW 309. (2) Where the description in a mortgage of the articles is "all sugars," etc., it is a material alteration to add words showing their location. McKinney v. Cabell, 24 Ind. A. 676, 57 NE 598.

76. Merchants', etc., Bank v. Dent, 102 Miss. 455, 59 S 805; Sherwood v. Merritt, 83 Wis. 233, 53 NW 512.

[a] **Alteration in deed of quantity of land conveyed.**—(1) Where a deed, when signed and delivered, is a grant of five acres only, and before registry the word "five" is altered to "fifteen," the boundaries being such as would apply equally well to either quantity of land, the alteration is material. Chesley v. Frost, 1 N. H. 145. (2) But in Sharpe v. Orme, 61 Ala. 263, it was held that where the land was accurately described by metes and bounds, so that no mistake could be made, an alteration in the number of acres purported to be conveyed was immaterial.

[b] **Addition of words "more or less" after statement of quantity.**—Where an oral contract for the sale, by defendant to plaintiff, of forty acres of land at three hundred dollars per acre was by agreement reduced to writing by plaintiff who handed it and his check for the earnest money to defendant's agent, with the understanding that when defendant signed the contract the check was to be delivered to him and the contract returned to plaintiff, and without plaintiff's knowledge the agent inserted the words "more or less" after the words "forty acres," the alteration was material, and plaintiff had the right to repudiate the contract and recover the amount paid. Sherwood v. Merritt, 83 Wis. 233, 53 NW 512.

[c] **Where a bill of sale** is altered, after its execution, by interlining other articles of property, the alteration is material and the court may properly refuse to admit the instrument in evidence, in an action against a sheriff for the value of the property seized under execution, where plaintiff, to establish his right to the property seized, tenders such bill of sale in evidence. Babb v. Clemson, 10 Serg. & R. (Pa.) 419, 13 AmD 684.

77. Hollingsworth v. Holbrook, 80 Iowa 151, 45 NW 561, 20 AmSR 411; Bacon v. Hooker, 177 Mass. 335, 58 NE 1078, 83 AmSR 279; Bowser v. Cole, 74 Tex. 222, 11 SW 1131.

[a] **Illustration of material change.**—The interlineation in a chattel mortgage on sheep "and their increase" of the words "and wool" between the words "their" and "increase" has been said to be a material alteration. Willard v. Ostrander, 51 Kan. 481, 32 P 1092, 37 AmSR 294.

[b] **In Georgia** under Civ. Code (1895) § 3702, providing that the alteration of a written contract in a material part with intent to defraud the other party avoids the whole contract, an intentional insertion by the mortgagee of additional property in a chattel mortgage renders the instrument void. Bedgood-Howell Co. v. Moore, 123 Ga. 336, 61 SE 420.

78. Ill.—Chicago Sanitary Dist. v. Allen, 178 Ill. 330, 53 NE 109. See also Day v. Ft. Scott Inv., etc., Co., 53 Ill. A. 165 [aff 153 Ill. 293, 38 NE 567].

Iowa.—Rowley v. Jewett, 56 Iowa 492, 9 NW 353 (holding that an interlineation in a delivery bond, giving a more minute description of the attached property, made in good faith by the officer to whom the bond is presented for acceptance, at the request of the principal in the bond, is not a material alteration, and will not release his surety from liability thereon).

Ky.—Shelton v. Deering, 10 B. Mon. 405 (which involved a change, by describing the number of acres conveyed, in a deed by the husband after it had been acknowledged by the wife).

La.—Barrabine v. Bradshears, 5 Mart. 190 (holding that, where the quantity of land conveyed can be ascertained from a deed as originally drawn, an interlineation which merely makes the description of the quantity more clear is an immaterial alteration).

Me.—Barrett v. Thorndike, 1 Me. 73.

Mass.—Vose v. Dolan, 108 Mass. 155, 11 AmR 331 (inserting additional words of description); Brown v. Pinkham, 18 Pick. 172 (holding that, where a deed of conveyance of land, upon which there were situated a well and pump, was interlined with the words "with the pump and well of water" after the description of the land by metes and bounds, the change was immaterial, because the effect of the deed was not altered).

Miss.—Gordon v. Sizer, 39 Miss. 805.

N. Y.—Domestic Sewing Mach. Co. v. Barry, 2 Misc. 264, 21 NYS 970 (holding that, where a lease of a machine, which contained a clause granting the privilege to purchase, was changed by the insertion of the number of a new machine which was delivered to the lessee in lieu of the first machine delivered under the lease, and returned by the lessee as unsatisfactory, the change is immaterial, because it merely conforms the lease to the facts and goes to the identity of the machine, without changing the terms of the contract); People v. Muzzy, 1 Den. 239.

S. C.—Gunter v. Addy, 58 S. C. 178, 183, 36 SE 553 (adding a description of premises conveyed in a mortgage "containing 165 acres, more or less").

Tex.—San Antonio Brewing Assoc. v. J. M. Abbott Oil Co., (Civ. A.) 129 SW 373; Churchill v. Bielstein, 9 Tex. Civ. A. 445, 29 SW 392 (holding that a contract, by which a party was to erect a dwelling on a lot belonging to another and situated on a designated street, is not altered by the addition of a further description by lot and block).

See Chicago Title, etc., Co. v. O'Marr, 18 Mont. 568, 46 P 809, 47 P 4.

[a] **An alteration of a vendor's lien note** after delivery by writing the word "west" after the word "south," in the description of the land for which the note was given, is not a material alteration. Nance v. Gray, 143 Ala. 234, 38 S 916, 5 AnnCas 55.

[b] **Where a chattel mortgage contains a general description** of the property covered by it, it is not a material alteration to insert a more particular description of the property; and neither the chattel mortgagor nor his privies can object to such alteration merely because it makes available additional testimony on the contest of identity of the mortgaged property. Benton v. Clemmons, 157 Ala. 658, 47 S 582 [quot Cyc].

[c] **Alteration of description of one of several parcels.**—Where a deed conveys several parcels of land an alteration by changing the description of one of the parcels cannot be considered as a material alteration of the deed as to the other parcels. Woods v. Hilderbrand, 46 Mo. 284, 2 AmR 513. See also Woods v. McCoy, 46 Mo. 297 (which was a counterpart of the above case and involved the same questions).

[d] **Where a part of the description of land mentioned in a special tax bill is general,** obscure, and indefinite, and is immediately followed by a particular, definite, and correct description of the lot charged with the tax, the particular description will control, and an attempted alteration of the general description is immaterial. Heman v. Gilliam, 171 Mo. 258, 71 SW 163.

79. Hatch v. Hatch, 9 Mass. 307, 6 AmD 67 (holding that, where a deed of land was left as an escrow to be delivered on the death of the grantor, and at the request of the grantee, the depository, after the death of the grantor, altered the description of the property conveyed, by changing

gage is so imperfectly described as to be practically omitted from the instrument, it is a material alteration to insert a description of the property.[80]

[§ 55] **16. As to Serial Numbers.** The change of the serial numbers of negotiable bonds or bank bills is not material, as such numbers are extrinsic to the contract, and a change in them cannot affect the liability which the instrument represents.[81]

[§ 56] **17. Changes Affecting Negotiability—a. In General.**[82] Changes which affect the negotiability of commercial paper are material, as those which render negotiable that which before was non-negotiable,[83] or which have the effect of destroying the negotiability of an instrument, as, for instance, affixing a seal to a promissory note,[84] or changing a general into a special consideration.[85]

The erasure of a clause or condition which restricts the negotiability of a bill or note is a material alteration,[86] as where by such erasure the bill or note is changed from one payable on condition to one payable unconditionally.[87]

[§ 57] **b. Making Payable to Order or to Bearer.** Where, after execution, the holder of a note, without the consent of a maker, changes its terms so as to make it payable to order instead of to bearer, as by inserting the words "or order" after the payee's name, the evident purpose of the alteration is to add to the negotiability of the note, and therefore the change is material and renders the paper uncollectable.[88] So the insertion of words making a note payable to bearer, or the erasure of the words "or order" and the substitution therefor of the words "or bearer," is material upon the same principle,[89] but it seems that the interlineation of

the given name of the owner of abutting property, therein stated as Joseph, to Joshua, the alteration was immaterial); Burnham v. Ayer, 35 N. H. 351 (involving the changing of the word "southeasterly" to "southwesterly" in the description of land conveyed in a mortgage, and it was held not to vitiate on the ground that an immaterial change will not constitute a vitiating alteration as well as upon the ground that a change which supplies nothing that would not be intended by law will not constitute an alteration, the latter ground being based upon the fact that, in this particular case, the law would have supplied the word introduced, upon the principle of construction that in the description of land in a deed or will fixed monuments govern rather than courses and distances).

[a] **Where a chattel mortgage refers to a prior recorded instrument** for a more specific description of the property, and the mortgagee's attorney is expressly authorized to add such description, his doing so before the mortgage is filed will not invalidate the mortgage, if no rights have intervened between its conditional delivery and its registration. Chicago Title, etc., Co. v. O'Marr, 18 Mont. 568, 46 P 809, 47 P 4.

Changes to conform to original intention see infra §§ 99, 100.

80. Kime v. Jesse, 52 Nebr. 606, 72 NW 1050.

81. U. S.—Wylie v. Missouri Pac. R. Co., 41 Fed. 623; Brown v. U. S., 20 Ct. Cl. 416 (applying to stolen bonds so changed the principle that the innocent holder of a negotiable security payable to bearer does not take his title from that of any previous holder, but under the original contract of the promisor). See also Morgan v. U. S., 113 U. S. 476, 5 SCt 588, 28 L. ed. 1044.

Ala.—State v. Cobb, 64 Ala. 127.

Mass.—Com. v. Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 AmD 126 (which was a bill of interpleader by the attorney-general of the state, under a special statute, to determine whether certain bonds of the commonwealth had become void by reason of the alteration of their numbers. The bonds had been stolen, the numbers thereon changed, and thus they were thereafter purchased in good faith. To the argument that a number on a bond constituted a part of the identity of the instrument, the court said that this was an ambiguous use of the term "instrument," and that the number was a part of the identity of the paper but not of the contract any more than other devices, as a picture or impression, would be).

N. J.—Elizabeth v. Force, 29 N. J. Eq. 587 [rev 28 N. J. Eq. 403] (which was a bill by the original owner to recover money due on bonds which had been stolen from her, the number of one of which had been altered before it was presented for payment to the city, and which had been paid by the city, although a bond bearing the same number had been previously paid. It was held that the change was immaterial and that the city was liable to the innocent holder of the bond).

N. Y.—Birdsall v. Russell, 29 N. Y. 220 (incidentally recognizing the rule stated in the text).

Tenn.—Tennessee Bank Note Holders v. Funding Board, 16 Lea 46, 57 AmR 211 (bank bills).

But see Suffell v. Bank of England, 9 Q. B. D. 555, 3 ERC 640 [rev 7 Q. B. D. 270] (holding that, although the alteration of notes payable to bearer which had been regularly issued by the bank, by erasing the numbers upon them and substituting other numbers with the object of preventing the notes from being traced, did not vary the contract, it was material in the sense of altering the notes in an essential part, and that therefore the notes were vitiated so that a bona fide purchaser thereof could not recover on them against the bank).

82. Changing place of payment as affecting negotiability see supra § 48.

83. Ala.—Winter v. Pool, 100 Ala. 503, 14 S 411.

Ind.—Ballard v. Franklin L. Ins. Co., 81 Ind. 239; Light v. Killinger, 16 Ind. A. 102, 44 NE 706, 59 AmSR 313.

Iowa.—State v. Stratton, 27 Iowa 420, 1 AmR 282.

N. H.—Gerrish v. Glines, 56 N. H. 9.

N. D.—Decorah First Nat. Bank v. Laughlin, 4 N. D. 391, 61 NW 473.

W. Va.—Morehead v. Parkersburg Nat. Bank, 5 W. Va. 74, 13 AmR 636.

Ont.—Swaisland v. Davidson, 3 Ont. 320; Campbell v. McKinnon, 18 U. C. Q. B. 612.

84. Rawson v. Davidson, 49 Mich. 607, 14 NW 565.

Adding or tearing off seal generally see infra §§ 64, 65.

85. Knill v. Williams, 10 East 431, 103 Reprint 839.

86. State v. Stratton, 27 Iowa 420, 1 AmR 282; Davis v. Henry, 13 Nebr. 497, 14 NW 523; Stephens v. Davis, 85 Tenn. 271, 2 SW 382; Campbell v. McKinnon, 18 U. C. Q. B. 612 (erasure or obliteration of a condition in a note so as to render it negotiable).

[a] **Illustrations.**—(1) The erasure from a note of the clause "agreeing to pay all expenses incurred by suit or otherwise in attempting the collection of this note, including reasonable attorney's fees," is material. Decorah First Nat. Bank v. Laughlin, 4 N. D. 391, 61 NW 473. (2) Where, after the execution of a negotiable note by agreement between the maker and the payee, an indorsement is placed on the back of it to the effect "that [said note] should be subject to any defense in the hands of any purchaser that existed against it in the hands of said" payee, and subsequently this indorsement is erased by the payee without the knowledge or consent of the maker, and the note is indorsed to a third person, such erasure avoids the note. Meade v. Sandidge, 9 Tex. Civ. A. 360, 30 SW 245.

[b] **Obliteration of restrictive indorsement.**—The obliteration of a restrictive indorsement, so as to render a bill negotiable, is a material alteration. Mechanics Bank v. Valley Packing Co., 70 Mo. 643.

Erasure of indorsements see generally infra § 66 et seq.

87. Cochran v. Nebeker, 48 Ind. 459 (holding that, where a promissory note, at the time of its execution, had a condition annexed thereto providing, in effect, that the note was not to be paid if sales of certain machines, equal to the amount of the note, were not made within the time limited for its payment, the removal of this condition, thus changing the note from one payable on condition to one payable unconditionally, was a material alteration).

Changing conditional to absolute liability see generally supra § 37.

88. Del.—Hollis v. Vandergrift, 10 Del. 521.

Ky.—Johnson v. U. S. Bank, 2 B. Mon. 310.

N. H.—Haines v. Dennett, 11 N. H. 180 (as against a surety in an action by a bona fide indorsee).

N. Y.—Bruce v. Westcott, 2 Barb. 374.

S. C.—Pepoon v. Stagg, 10 S. C. L. 102.

Tex.—Taylor v. Moore, 20 SW 53. But see Douglass v. Lockhart, (Civ. A.) 168 SW 382 (holding that, under Rev. St. [1911] art 582, the insertion of the words "or bearer" following the name of the payee was not a material alteration).

[a] **But an attempted alteration** of a nonnegotiable note by insertion of the words "or order," thus clumsily done, and inserted in the wrong place, does not render the note invalid. Carlile v. Lamb, 16 Oh. Cir. Ct. 578, 9 Oh. Cir. Dec. 70.

[b] **With consent of parties.**—In Kershaw v. Cox, 3 Esp. 246, the insertion of the words "or order" by the drawer of the bill was by consent of the parties; the instrument having actually passed by indorsement it was held that the indorser could hardly be said not to have consented to the change making the instrument negotiable, because by the indorsement he considered it as negotiable. But in Knill v. Williams, 10 East 431, 103 Reprint 839, Le Blanc, J., said that the opinion in the case above cited could be supported only on the ground that the change had been made by consent to correct a mistake, and that there was strong evidence in that case to show this fact.

89. Cal.—Sherman v. Rollberg, 11 Cal. 38.

Ga.—McCauley v. Gordon, 64 Ga. 221, 37 AmR 68 (holding that the insertion of the words "or bearer" in a promissory note is a material alteration, since without them, or words of similar import, the instrument is negotiable by indorsement only, while with them it is negotiable by bare

the words "or bearer" is not material, if the note is indorsed in blank before the change, and thus is payable to bearer at the time of the change,[90] or if the instrument is from its form or substance nonnegotiable.[91]

[§ 58] **18. As to Attesting Witnesses—a. General Rule.** Where the addition of an attesting witness to an instrument has the effect of extending liability under the statute of limitations, or of facilitating or interfering in any manner with the proof of the execution of the instrument, the procuring of a witness to sign as an attesting witness after the execution of the instrument, without the consent of the maker, is material and constitutes an alteration.[92] An instrument may also be vitiated by tearing or erasing from it the name of a subscribing witness.[93]

Immaterial alteration. Where, however, the attestation of an instrument has no influence upon the operation of the statute of limitations or upon the proof of execution, the addition of a subscribing witness does not change the legal effect of the instrument, and is immaterial,[94] and the fact that such considerations may have weight, in the event of the note or instrument being sued upon in another state, is of no importance.[95] So, if a note is attested by one witness, and this is sufficient to attach to it every incident of an attested paper, the mere signing of another witness, adding nothing to the effect of the first attestation, is immaterial.[96]

[§ 59] **b. Qualifications of Rule—(1) Absence of Fraud.**[97] The rule making the addition of an attesting witness material has been held to be subject to the qualification that if the act is done fraudulently, with design to impair the rights of

delivery as well as by indorsement); Scott v. Walker, Dudl. 243.

Iowa.—Needles v. Shaffer, 60 Iowa 65, 14 NW 129.

Me.—Croswell v. Labree, 81 Me. 44, 16 A 331, 10 AmSR 238 (holding, however, that while the change is material it will not vitiate the note if made without fraudulent intent).

Mass.—Belknap v. National Bank of North America, 100 Mass. 376, 97 AmD 105.

Miss.—Simmons v. Atkinson, 69 Miss. 862, 12 S 263, 23 LRA 599.

Nebr.—Walton Plow Co. v. Campbell, 35 Nebr. 173, 52 NW 883, 16 LRA 468.

N. Y.—Booth v. Powers, 56 N. Y. 22 [rev 59 Barb. 319].

Oh.—Marshall v. Wilhite, 4 Oh. Cir. Ct. 203, 2 Oh. Cir. Dec. 500 (holding that an unauthorized alteration of a note, after its delivery, by erasing therefrom the words "the order of" before the payee's name, and inserting "or bearer" in a space inadvertently left after the payee's name, avoids it, as to prior nonconsenting parties, in the hands of a subsequent bona fide holder for value).

Pa.—Sunday v. Dietrich, 16 Pa. Super. 640.

Tenn.—McDaniel v. Whitsett, 96 Tenn. 10, 33 SW 567 (involving a change in the terms of a note by making it payable to "holder" instead of to "order").

Wis.—Union Nat. Bank v. Roberts, 45 Wis. 373.

Man.—Re Commercial Bank, 10 Man. 171.

But compare McLaughlin v. Venine, 2 Wyo. 1 (holding that the insertion of the words "or bearer" in a bill of exchange does not invalidate the instrument, on the ground that it does not affect the original design of the parties either by enlarging or diminishing the obligation).

[a] **By stranger.**—An interlineation of the words "or bearer" by a stranger will not affect the rights or liabilities of the parties. Andrews v. Calloway, 50 Ark. 358, 7 SW 449. As to alterations by strangers see generally infra §§ 104-107.

90. McCauley v. Gordon, 64 Ga. 221, 37 AmR 68 (holding, however, that an indorsement of the payee's name, by a member of the firm of which the payee was a member, is not sufficient, without special authority, even if the note was partnership property); Weaver v. Bromley, 65 Mich. 212, 31 NW 839 (holding that, where a note is made payable to the order of a certain person, and is indorsed in blank by that person, a subsequent insertion of the words "or bearer" does not affect the manner of negotiability of the instrument, since by the indorsement in blank it is payable to the bearer, and consequently such alteration is immaterial).

91. Goodenow v. Curtis, 33 Mich. 505 (holding that the insertion of the words "or bearer" after the name of the payee of a note which is, by its terms, subject to the conditions of a mortgage, so that the money is not payable absolutely but only on certain contingencies, and the time of payment is also subject to be fixed or changed by the performance of certain acts by the payee, is an immaterial alteration, for such an instrument is not made negotiable by the insertion of the words "or bearer").

92. Ala.—White Sewing Mach. Co. v. Saxon, 121 Ala. 399, 25 S 784 (holding that where an agent of the obligee of a bond, who was not present when the sureties signed their names to it, procured it from the principal obligor, and subscribed his name to it as a witness, it was a material and vitiating alteration).

Me.—Milbery v. Storer, 75 Me. 69, 46 AmR 361; Thornton v. Appleton, 29 Me. 298; Brackett v. Mountfort, 11 Me. 115.

Mass.—Homer v. Wallis, 11 Mass. 309, 6 AmD 169.

Mo.—Girdner v. Gibbons, 91 Mo. A. 412 (holding that the appearance of the name of an attesting witness on the face of a note is a component and a material part thereof, and the adding or erasing of such a name after delivery, without the consent of the maker, is a nullifying alteration).

N. C.—Allen v. Jordan, 3 N. C. 132.

Pa.—Shiffer v. Mosier, 225 Pa. 552, 557, 74 A 426, 24 LRANS 1155, 17 AnnCas 756 and note (where Potter, J., said: "The addition of the name of a witness to the signatures of a paper, after its execution, without the knowledge or consent of the obligors, is a material alteration, which renders the paper inadmissible in evidence"); Henning v. Werkheiser, 8 Pa. 518; Marshall v. Gougler, 10 Serg. & R. 164.

93. Sharpe v. Bagwell, 16 N. C. 115; Nunnery v. Cotton, 8 N. C. 222 (from which case it appears that even if no witnesses' names have been added to the attestation, and that if parts of the letters which formed the word "test" are still remaining, the cutting of this word by the party claiming under the bond will avoid it).

[a] **Erasing and writing at another place.**—Where the execution of a note is witnessed by a person writing his name under that of the maker near the lower right hand corner, and afterward at the request of the holder, and without the knowledge of the maker, such person erases his name and writes it at the lower left hand corner, and such alteration is not honestly made by mistake, the maker is discharged. Girdner v. Gibbons, 91 Mo. A. 412.

94. Canfield v. Orange, 13 N. D. 622, 102 NW 313; Fuller v. Green, 64 Wis. 159, 24 NW 907, 54 AmR 600; McCraw v. Gentry, 3 Campb. 232; Talbot v. Hodson, 7 Taunt. 251, 2 ECL 348, 129 Reprint 101. In Blackwell v. Lane, 20 N. C. 205, 32 AmD 675, it was held that the addition of the name of a subscribing witness to a bond, without the knowledge or consent of the obligor, was immaterial, a subscribing witness not being material to the due making of a bond, upon which point the case was afterward approved in State v. Gherkin, 29 N. C. 206, which, however, was on the question of what constituted forgery of a bond, and the addition seemed to have been made by one of the obligors, who was defendant, before delivery. The first case was decided upon the principle of McCraw v. Gentry, supra, which was an action against the maker of a note purporting to be attested by two witnesses who did not put their names to the instrument in the presence of defendant, and were never called upon by defendant to attest it, but who saw defendant deliver the instrument as his note of hand to the payee, and who afterward put their names thereto without defendant's knowledge, and it was held that the evidence of the witnesses could not be received as that of attesting witnesses, because they were mere volunteers, but that defendant's acknowledgment was considered sufficient to fix his liability.

[a] **The affixing of an attesting witness' name to a chattel mortgage** after delivery without the mortgagor's consent will not invalidate the mortgage. International Harvester Co. v. Davis, 13 Ga. A. 1, 78 SE 770.

95. Fuller v. Green, 64 Wis. 159, 24 NW 907, 54 AmR 600.

[a] **Insufficient objection.**—Where a note made in another state was sued upon in Illinois as an unwitnessed note, and defendant objected to the note only upon the ground that the declaration did not count on a witnessed note, and that by the law of Vermont there was a material difference between a witnessed note and one not witnessed, the objection was properly overruled, because the law of Vermont was not in evidence, and the court could not judicially know that it was as stated in the objection. Richardson v. Mather, 178 Ill. 449, 53 NE 321 [aff 77 Ill. A. 626].

96. Ford v. Ford, 17 Pick. (Mass.) 418 (holding that, where the attestation of a promissory note is sufficient to take it out of the operation of the statute of limitations, the addition of another or second subscribing witness is not a material alteration). But see Allen v. Jordan, 3 N. C. 298 (where it seems to be held otherwise, because the second subscribing witness might know nothing of some condition upon which the note was given and which was known to the first subscribing witness, and therefore, if the second subscription should be held to be immaterial, plaintiff might thus be enabled to prove the note and recover, notwithstanding the condition upon which it was executed).

97. **Effect as dependent upon intent** see generally infra §§ 96-100.

the parties, it is material, but if done innocently it is immaterial.[98]

[§ 60] **(2) Where Witness Saw Execution.** If the attesting witnesses actually see the execution of the instrument, it will not be material if they sign subsequently and in the absence of the makers, and these circumstances seem to be sufficient to overcome any presumption of fraud arising from the act itself.[99]

[§ 61] **(3) Before Delivery to Payee or Obligee.** Assuming the materiality of such a change in general, an attestation made before the completion of the execution of the instrument by delivery to the payee or obligee, and without his procurement, is considered as not constituting an alteration of the contract.[1]

[§ 62] **(4) Signature Placed by Mistake.** If one, through inadvertence or mistake, signs in a place appropriate for the name of a witness, intending, however, to sign for an entirely different purpose, the instrument will not be avoided,[2] and the same is true if the attestation appears to be to all the signatures, instead of being confined to the execution of a particular party.[3]

[§ 63] **19. As to Signature.** A mere change in, or addition to, a signature which in no manner changes the relation or number of the parties, or the character, and hence the signing and sealing of a covenant in a lease was the original execution and delivery, and defendant, who was the surety, having signed it and delivered it to the lessee to deliver to the lessor, gave authority to the lessee to complete the delivery both of the lease and the guaranty).

Pa.—Fritz v. Montgomery County, 17 Pa. 130 (where the addition did not appear to have been made at the request of the obligee, but, on the contrary, it appeared to have been done at the request of at least one of the obligors in the presence of the obligee, in this respect being distinguished from other cases in this state cited above in this section); Beary v. Haines, 4 Whart. 17 (holding that where a joint and several promissory note was signed by the principal and two sureties at different times, and was placed in the hands of the principal to be delivered, and he afterward acknowledged his signature to a witness, who subscribed his name in the presence of the principal and of the payee without stating that he witnessed only the signature of the principal, this was not necessarily such an alteration of the instrument as would discharge the sureties in an action against the three makers).

Effect as dependent upon time of alteration see generally infra §§ 90–95.

2. Fisher v. King, 153 Pa. 3, 25 A 1029 (holding that, where one attempts to indorse a note, and, through ignorance, writes his name as a witness, the act does not come within the reason of the rule against alterations).

[a] **Inadvertence.**—Some time after the execution of a single bill, two persons, not present at the execution, and without any new delivery, put their names to it as witnesses, at the request of the obligee who was about to assign it; it was held that if it was done by mistake, and with the intention of witnessing the assignment and not the bill, it did not avoid the instrument; but if done to authenticate the bill, this was rendered void by such alteration. Marshall v. Gougler, 10 Serg. & R. (Pa.) 164.

Alteration by accident or mistake see generally infra § 97.

3. Richardson v. Mather, 178 Ill. 449, 53 NE 321 [aff 77 Ill. A. 626]; Hilton v. Houghton, 35 Me. 143.

[a] **Where a witness to the signature of one of several joint makers** (1) of a note by inadvertence attests in a manner to make it appear that the signatures of all the makers were witnessed, it does not invalidate the instrument as to a maker whose signature was in fact not witnessed. Rollins v. Bartlett, 20 Me. 319. (2) So where a bond, in the body of which the names of the obligors were written, was executed by one of them without a subscribing witness, and afterward the other executed it in the presence of two witnesses who subscribed their names to a general attestation, as if they had witnessed the execution of the bond by both, if the attestation was purposely made general to import an attestation of execution by both the obligors, it avoided the bond; but if the witnesses subscribed their names to the attestation as it was prepared, without being practiced upon by the obligee, and only intending to attest the signature of the last maker, it did

98. Milbery v. Storer, 75 Me. 69, 46 AmR 361; Thornton v. Appleton, 29 Me. 298; Eddy v. Bond, 19 Me. 461, 36 AmD 767; Ford v. Ford, 17 Pick. (Mass.) 418; Smith v. Dunham, 8 Pick. (Mass.) 246. In Adams v. Frye, 3 Metc. (Mass.) 103, 108, Dewey, J., stated the rule of law applicable to alteration of instruments by the addition of the name of a subscribing witness, as follows: "1. That if the obligee of an unattested bond, after the execution and delivery thereof, shall, without the knowledge and assent of the obligor, fraudulently and with a view to gain some improper advantage thereby, procure a person who was not present at the execution of the bond, to sign his name thereto as an attesting witness, such act will avoid the bond, and discharge the obligor from all liability on the same. 2. That the act of the obligee in procuring the signature of one as a witness who was not present at its execution, and not duly authorized to attest it, will, if unexplained, be prima facie sufficient to authorize the jury to infer the fraudulent intent; but that it is competent for such obligee to rebut such inference; and if the act be shown to have been done without any fraudulent purpose, the bond will not be avoided by such alteration."

[a] **A contract for the conveyance of land** is not avoided by the act of the vendee in allowing a third person to have the instrument attested and acknowledged, where this is done, not with any fraudulent intent, but simply to make it possible to have the instrument recorded. Young v. Wright, 4 Wis. 144, 65 AmD 303.

99. Governor v. Lagow, 43 Ill. 134; Thornton v. Appleton, 29 Me. 298; Rollins v. Bartlett, 20 Me. 319; Brackett v. Mountfort, 11 Me. 115; Smith v. Dunham, 8 Pick. (Mass.) 246 (holding that where the person who signed a note as a witness after its execution was present at its execution and saw what his name purported to attest, and there was no fraudulent intent in adding the signature, there was not a technical alteration of the note); Adams v. Frye, 3 Metc. (Mass.) 103 (where the usual qualification of the rule against the addition of attesting witnesses, that such an act innocently done is immaterial, is applied where the attesting witness procured was one who knew the signature of the obligor, but was not present when the bond was signed).

[a] **Reason for exception to rule.**—In Milbery v. Storer, 75 Me. 69, 71, 46 AmR 361, Peters, J., in commenting upon an instruction given by the trial judge to the effect that if defendant signed the note without it being witnessed, and after he had parted with it, without his knowledge or consent, it was witnessed so as to be or appear to be a witnessed note, this was a material alteration and would relieve him from liability upon it, said: "This enunciation correctly states the general rule, but the rule admits of an exception. The rule does not apply to a case where a person sees the maker sign, and afterwards adds his own name as a witness, behind the back of the maker, without his knowledge and consent, the act having been done, or procured to be done, through honest motives and without any wrongful intent. The law shrinks from applying the severest rule in such a case, but pardons the act upon the grounds of expediency and for the public good. It is a somewhat common belief among the masses of the people that, if a person sees another sign an instrument, or if he knows his hand writing, such person may attest his knowledge of the fact by signing the instrument as a witness without the maker's knowledge or consent. This is often the case with contracts, bonds and deeds, as well as with promissory notes. It is better that a maker or promisor should occasionally and accidentally have such a slight risk or chance of injury imposed upon him, than that many important deeds and notes should become through innocent mistake invalidated and lost."

[b] **Question for jury whether signed in presence of witness.**—When the maker of a note, four years after the time at which he signed it, in pursuance of an agreement made at that time, acknowledged to a person who did not see him sign the note that the signature was his, and requested such person to sign it as a witness in order to prevent the operation of the statute of limitations, it was held that the question whether the note was signed in the presence of an attesting witness was for the jury. Swazey v. Allen, 115 Mass. 594.

1. U. S.—Hall v. Weaver, 34 Fed. 104, 110, 13 Sawy. 188 (holding that the unauthorized attestation of a surety's signature to a bond, made while the bond was in the hands of the principal before delivery, will not vitiate the bond. In delivering the opinion of the court, Deady, J., said: "No alteration of a writing before execution, which includes delivery, affects its character or value as an instrument of evidence. Alterations before delivery are presumed to be made with mutual consent. The very act of delivering and receiving the writing implies so much. This is the doctrine of the common law. . . . Weaver and his co-obligors, who signed this bond and left it with the principal therein to deliver to the plaintiffs, thereby constituted the latter their agent for that purpose. Belloni v. Freeborn, 63 N. Y. 383. Before the delivery was made this alteration took place. It consisted of an attestation which, for aught that appeared, was authorized and genuine. So far as the plaintiffs [the obligees] are concerned, it was the act of Weaver and his cosureties acting through the agent and obligor, Owens, prior to the delivery to them of the writing").

Me.—Eddy v. Bond, 19 Me. 461, 36 AmD 767.

Mass.—Church v. Fowle, 142 Mass. 12, 6 NE 764 (holding that, where an attestation is made before delivery, without the maker's knowledge and without the procurement of either party, and there was no fraudulent intent on the part of the witness, the attestation will be considered as unauthorized and as no part of the contract).

N. Y.—Dusenberry v. O'Shiel, 2 N. Y. Super. 410 (holding that the resigning of an instrument in the presence of attesting witnesses is not a material

ter of their liability, is immaterial.[4] The affixing of a signature in an improper place, by mistake, is not material.[5] So an affix, or the erasure of an affix, which does not affect the liability of the parties is immaterial.[6] Where, however, a change of this kind does affect the character of the liability of the parties, it is material.[7] But in the absence of notice to the payee, a material alteration of the capacity in which one of the makers signs will not affect the liability of other indorsers or makers.[8]

Drawing a line through a signature has the effect of canceling the signature.[9]

[§ 64] **20. As to Seal—a. Addition.**[10] The addition of a seal is a material change, if it converts a bill, note, or other simple contract, into a specialty, thereby making the contract of a different grade and character; and such a change avoids the instrument as to him whose signature is altered as well as to others who have signed with, or as sureties for, him on the simple undertaking.[11] However, if the character of the instrument is such that the affixing of the seal does not alter its legal effect, the seal should be treated as mere surplusage, and not as constituting an alteration.[12]

[§ 65] **b. Tearing Off.** In like manner tearing a seal from a specialty, changes the character of the contract and is material as against nonconsenting parties; it renders the instrument void as to all, and not merely as to the party whose signature is changed,[13] unless the obligation is a several one, in

not vitiate the bond. Foust v. Renno, 8 Pa. 378.

4. Martin v. Good, 14 Md. 398, 74 AmD 545 (holding that the insertion of the word "and" between the signatures of two parties in a sealed note does not change their liability, and is not material). See also Burrows v. Stoddard, 3 Conn. 160.

Change of maker, grantor, etc. see infra § 77.

[a] **The correction of a clerical error** (1) in a note signed by officers of a corporation, by adding to the official signatures the name of the corporation, will not be material. Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577, 58 NE 162. (2) Where the payee of a note signs it as "security," and, on being informed that the note is not in proper form, he erases such signature and indorses the note properly, the instrument is not avoided thereby. Lynch v. Hicks, 80 Ga. 200, 4 SE 255.

[b] **To add a word of description to the name of an indorsee** is not a material alteration of a note or draft, when it is intended by the parties that the paper shall go to the indorsee in the exact capacity or relationship indicated by the title affixed. Birmingham Trust, etc., Co. v. Whitney, 95 App. Div. 280, 88 NYS 578 [aff 183 N. Y. 522 mem, 76 NE 1089 mem].

[c] **Erasure of middle initial.**—The erasure of the middle initial of the grantor's name in a deed is immaterial where there is no conflict as to the identity of the grantor. Banks v. Lee, 73 Ga. 25.

5. Fournier v. Cyr, 64 Me. 32 (holding that a mistake on the part of selectmen in placing their signatures of approval in the wrong place on an officer's bond cannot make the officer a trespasser); Fisher v. King, 158 Pa. 3, 25 A 1029; Marshall v. Gougler, 10 Serg. & R. (Pa.) 164. See also Cason v. Wallace, 4 Bush (Ky.) 388; Wallace v. Jewell, 21 Oh. St. 163, 8 AmR 48.

6. Colo.—King v. Rea, 18 Colo. 69, 21 P 1084 (holding that adding the letter "x" to a signature is an immaterial change).

Ill.—Burlingame v. Brewster, 79 Ill. 515, 22 AmR 177 (where the words following a blank for a signature were torn off by the payee before obtaining the signature of the person for whom the blank was left, but as they were such words as did not change the personal engagement of those who had signed before the instrument was delivered to the payee the validity of the instrument was not affected).

Ind.—Hayes v. Matthews, 63 Ind. 412, 30 AmR 226 (holding that the erasure of the addition of the words "trustees of the . . . Church" is immaterial, because the words themselves did not make the instrument the obligation of the church).

R. I.—Manufacturers', etc., Bank v. Follett, 11 R. I. 92, 23 AmR 418 (holding that the addition of the word "agent" to the signature of the maker of a note is immaterial as against an indorser, because the contract of the indorser was not changed).

Tex.—Marx v. Luling Co-Op. Assoc., 17 Tex. Civ. A. 408, 43 SW 596 (where one of the signers of a contract of guaranty affixed "Mgr." to his signature, and after the signing of the instrument by the other parties this affix was erased without their knowledge, it was held in legal effect that the guaranty was not changed, and that therefore the erasure was immaterial).

7. Frazer v. Decatur State Bank, 101 Ark. 135, 141 SW 941; Sharpe v. Bellis, 61 Pa. 69, 100 AmD 618.

[a] **The addition of "& Co."** to the signature of a maker is material. Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140; Haskell v. Champion, 30 Mo. 136. See also infra § 77.

[b] **"Surety"** erased from the name of a signer of a note by the payee before indorsement is material. Laub v. Paine, 46 Iowa 550, 26 AmR 163; Rogers v. Tapp, 1 Tex. A. Civ. Cas. § 1308. Contra Humphreys v. Crane, 5 Cal. 173 (upon the principle that the liability was the same whether the party signed as principal or surety).

8. Frazer v. Decatur State Bank, 101 Ark. 135, 141 SW 941.

Against whom available see infra § 102.

9. Samberg v. American Express Co., 136 Mich. 639, 641, 99 NW 879 (where Moore, C. J., said: "We may take notice that this is the usual way of erasing or canceling a word. . . . The court has recognized that an erased signature is as though there had been no signature"). Compare Isaacs v. Grothe, 29 N. B. 420 (holding that a pen stroke through the drawer's name on a bill of exchange did not amount to an alteration of the bill so as to affect the liability of the acceptor of the bill).

10. **As affecting negotiability of bill or note** see supra § 56.

11. U. S.—U. S. v. Linn, 1 How. 104, 11 L. ed. 64.

Ala.—Arrington v. Burton, 19 Ala. 114.

Del.—State v. Smith, 14 Del. 143, 31 A. 516 (holding that, where in an action to set aside certain judgments against plaintiffs as sureties on the official bond of a tax collector, it appeared that the tax collector, without the knowledge of the sureties, affixed a seal to his signature after the bond had been signed and sealed by them, the bond was void).

Me.—Thornton v. Appleton, 29 Me. 298.

Md.—Morrison v. Weltv, 18 Md. 169.

Mass.—Warring v. Williams, 8 Pick. 322.

Mich.—Rawson v. Davidson, 49 Mich. 607, 14 NW 565.

Mo.—Fred Heim Brewing Co. v. Hazen, 55 Mo. A. 277 (holding a surety discharged by affixing a seal to the signature of the maker, and referring to what is perhaps the strongest case opposed to this rule [Fullerton v. Sturges, 4 Oh. St. 529], which seems to proceed upon the theory that such a change by a signer intrusted by other signers with the paper to negotiate it is as the act of a stranger).

N. Y.—Farmers' L. & T. Co. v. Siefke, 144 N. Y. 354, 39 NE 358; Metropolitan L. Ins. Co. v. McCoy, 41 Hun 142.

Pa.—Biery v. Haines, 5 Whart. 563 (holding that a note signed by three makers, and afterward changed by affixing a seal by one of the makers to his own signature, in the absence of the others, is void as to the latter because their obligation was no longer the same—that is to say, they were no longer bound jointly and severally with the first maker).

S. C.—Vaughan v. Towler, 14 S. C. 355, 37 AmR 731 (no plea of lack of consideration can be made).

Tex.—Muckleroy v. Bethany, 23 Tex. 163 (a payee cannot impeach the consideration otherwise than by a sworn plea).

Vt.—Barnet v. Abbott, 53 Vt. 120.

Eng.—Davidson v. Cooper, 1 D. & L. 377 [aff 13 L. J. Exch. 276] (holding that, where, in an action of assumpsit on a written guaranty not under seal, defendant pleaded that after the guaranty had been given to plaintiff, and while it was in his hands, it had been altered in a material particular by some person to defendant unknown, and without his consent, by affixing a seal so as to make it appear to be the deed of defendant, the alteration was material and avoided the instrument).

[a] **Effect of sealing clause.**—Where one sued on what purports to be a sealed bond set up that the seal was added to the instrument after its delivery and without his assent, except as implied by the words "sealed with our seals" on the bond before its delivery, it was held that he was entitled to go to the jury on this evidence, and that to direct a verdict for plaintiff was error; that the above clause raised no implication against the intention of defendant that the instrument was to remain unchanged as it left his hands. Metropolitan L. Ins. Co. v. McCoy, 41 Hun (N. Y.) 142. See also Barnet v. Abbott, 53 Vt. 120 (which was similar to the above case except that it seems that the court considered the words above mentioned as indicating the intention that the bond was to be sealed, and the question turned upon the finding and report of the master, which negatived this inference).

12. Truett v. Wainwright, 9 Ill. 411 (holding that, where one signed a blank piece of paper and delivered it to his agent to have it filled in as a power of attorney to confess judgment, and after it was so filled in, the agent affixed a scroll to the maker's signature, it was held that, as a seal was not necessary to the validity of a power of attorney and defendant was properly in court, a judgment under the power of attorney would not be set aside). See also Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122, 21 NE 168.

13. N. C.—Evans v. Williamson, 79 N. C. 86.

Pa.—Rittenhouse v. Levering, 6 Watts & S. 190.

S. C.—Porter v. Doby, 19 S. C. Eq. 49 (holding that, where after his death, a sealed note was found among the papers of the payee with the seal carefully cut out, leaving a mere filament by which it remained attached, to show what the character of the instrument had been, the destruction of the seal must be attributed to the payee, and that such destruction vitiated the instrument).

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which event tearing off a seal of one obligor will not destroy the instrument as to the others.[14]

[§ 66] **21. Indorsements, Memoranda, and Marginal Writings—a. Materiality—(1) In General.** It has been held that words written on the back of a note are prima facie, no part of the body thereof, but are presumed to have been written after the note was completed,[15] and hence any alteration in such a memorandum need not be explained in a suit on the note, unless it is shown that it forms a part thereof.[16] But upon the question of the materiality of matter added to or taken from an instrument, as constituting an alteration, the effect of the contract is to be gathered from all within the four corners—referring to its face;[17] or from all within its eight corners—referring both to its face and its back.[18] While the general rule seems not to be applied alike in all cases, as when the memorandum refers to the place of payment,[19] or the rate of interest,[20] it may be stated generally that if a memorandum, either indorsed on the back of the instrument or written on the face and at the foot thereof, is made before, or contemporaneously with, the execution of the instrument, it is considered as much a part of such instrument as if it had been contained in the body thereof,[21] and if it affects the operation of the terms of the body of the instrument it is material, and the unauthorized addition of such matter, or its erasure or detachment, or the detachment of such matter annexed to the instrument, will constitute an alteration and avoid the instrument.[22]

Tenn.—Organ v. Allison, 9 Baxt. 459 (holding that, without the seal, the six-year statute of limitations would protect the party against a recovery, while with a seal he would have no such protection against his cosureties).

Vt.—Dewey v. Bradbury, 1 Tyler 186.

W. Va.—Piercy v. Piercy, 5 W. Va. 199.

Eng.—Mathewson's Case, 5 Coke 22b, 77 Reprint 84; Seaton v. Henson, 2 Show. 29, 89 Reprint 772.

[a] **Change in position of seal immaterial.**—Where a scroll made below the signature of the obligor to a bond is erased, and another scroll made in juxtaposition to the name, such alteration does not change the legal effect of the instrument, and is immaterial. Keen v. Monroe, 75 Va. 424.

14. Rittenhouse v. Levering, 6 Watts & S. (Pa.) 190.

[a] **Joint, or joint and several, specialty, and one merely several, distinguished.**—The effect of removing a seal from a joint, or a joint and several, specialty, and from one that is merely several, was distinguished in some early English cases, which held that if the bond was joint, or joint and several, the effect of removing any one of the seals would go to the whole instrument and avoid it; but if the specialty was several merely, the effect would go to him only whose seal had been removed, and that the instrument as a whole would not be avoided. Collins v. Prosser, 1 B. & C. 682, 8 ECL 287, 107 Reprint 250; Mathewson's Case, 5 Coke 22b, 77 Reprint 84.

15. Howe v. Thompson, 11 Me. 152; Com. v. Ward, 2 Mass. 397; Bay v. Shrader, 50 Miss. 326; Kimball v. Lamson, 2 Vt. 138; State v. McLearn, 1 Aik. (Vt.) 311.

16. Com. v. Ward, 2 Mass. 397; Bay v. Shrader, 50 Miss. 326; Krouskop v. Shontz, 51 Wis. 204, 8 NW 241, 37 AmR 817.

17. Warrington v. Early, 2 E. & B. 763, 75 ECL 763, 118 Reprint 953.

18. Johnston v. May, 76 Ind. 298; Meade v. Sandidge, 9 Tex. Civ. A. 360, 30 SW 245. See also Farmers' Bank v. Ewing, 78 Ky. 264, 39 AmR 231; Morris v. Cain, 39 La. Ann. 712, 1 S 797, 2 S 418.

19. Light v. Killinger, 16 Ind. A. 102, 44 NE 760 (holding that a memorandum in pencil of the name of a bank, inserted in a blank left for the words "payable at," made by an agent of the holder of the note left for collection, was a mere memorandum to remind the agent where it should be presented); Woodworth v. Bank of America, 19 Johns. (N. Y.) 391, 10 AmD 239 (holding that a marginal memorandum signed by the maker to the effect that a note made payable in a particular city was to be paid in another city, was an alteration of the note and discharged the indorser). But in Missouri it has been held that a statement designating the place of payment, written at the foot of a note and to the left of the signature, was a mere memorandum, although the note, as copied in the reported statement of the case, seems to indicate that the matter complained of was in fact in the body of the instrument and before the signature of the maker. The case seems to turn upon another point, however, namely, that as against the maker of the note such words would be immaterial because the maker's liability is general in any event. American Nat. Bank v. Bangs, 42 Mo. 450, 97 AmD 349. Upon this last doctrine see contra Nazro v. Fuller, 24 Wend. (N. Y.) 374. See also supra § 50.

Place of payment in bills or notes generally see Bills and Notes [7 Cyc 602 et seq].

20. Tremper v. Hemphill, 8 Leigh (35 Va.) 623, 31 AmD 673 (holding that sureties in a bond are not released from liability by the act of the principal in writing at the foot of the bond, without their knowledge or consent, a statement over his signature and seal to the effect that the bond is to bear interest from its date).

[a] **Illustrations.**—It has been held not to be a material alteration of a promissory note for the payee to write on the back of the note words to the effect that a rate of interest less than that stipulated on the face of the instrument will be accepted. Reed v. Culp, 63 Kan. 595, 66 P 616. So an indorsement on a mortgage note by a purchaser of the equity of redemption agreeing to pay a higher rate of interest, made without the knowledge or consent of the maker of the note, does not bind the maker, and is not an alteration of the note. Boutelle v. Carpenter, 182 Mass. 417, 65 NE 799. So also a memorandum upon one of the lower corners on the face of a note, "ten per cent. after due," written in a different colored ink from that of the body of the instrument, has been held to be merely a memorandum and not an alteration. Carr v. Welch, 46 Ill. 88. But, on the other hand, in Warrington v. Early, 2 E. & B. 763, 75 ECL 763, 118 Reprint 953, it was held that, where a note was payable "with lawful interest" an addition of the words "interest at six per cent. per annum" in the corner, the lawful rate of interest being lower, was an alteration of the note. So in Sanders v. Bagwell, 32 S. C. 238, 10 SE 946, 7 LRA 743, 37 S. C. 145, 15 SE 714, 16 SE 770, a note which expressed no rate of interest had a memorandum added reciting that "the above note is to be accounted for with interest at 8 per cent. per annum," signed by the principal alone, and it was held to be an alteration of the original note and to discharge the surety. So also it has been held that where the words "ten per cent. interest if not paid when due" were written, the first three of them in the last line of the printed form for a note after the printed words "value received," and before the signature of the makers, and the residue of them below that line, the alteration was in a material part of the instrument. Kilkelly v. Martin, 34 Wis. 525.

[b] **Change affecting some only of parties.**—Where one of the makers of a joint note which did not state the rate of interest, although it contained the clause "on demand with interest," added, after delivery, the following memorandum: "Interest on above note to be nine per cent. G. W. C.," this was not a material alteration as far as the other maker was concerned; its being signed by G. W. C. only, showing that the parties did not intend to change the joint promise, but to treat it as an independent undertaking by him. Littlefield v. Coombs, 71 Me. 110.

[c] **Reference in conditional contract of sale to interest on amounts of notes.**—Where goods purchased are to be paid for in installments, and notes are given for the amounts of the different installments, the interlineation of the words, "interest at six per cent. on notes remaining over a year," in the contract of sale is merely a descriptive memorandum which does not constitute a material alteration of the contract. Edward Thompson Co. v. Baldwin, 62 Nebr. 530, 87 NW 307.

21. Ala.—Payne v. Long, 121 Ala. 385, 25 S 780.

D. C.—Bowie v. Hume, 13 App. 286.

Kan.—Kurth v. Farmer's, etc., Bank, 77 Kan. 475, 94 P 798, 121 AmSR 423.

Me.—Johnson v. Heagan, 23 Me. 329; Tuckerman v. Hartwell, 3 Me. 147, 14 AmD 225.

Mass.—Wheelock v. Freeman, 13 Pick. 165, 23 AmD 674; Heywood v. Perrin, 10 Pick. 228, 20 AmD 518.

Miss.—Bay v. Shrader, 50 Miss. 326 (holding, however, that, being disconnected from the body of the instrument to which the maker's name is signed, it forms no part of it until shown to have been upon it when executed).

N. Y.—Benedict v. Cowden, 49 N. Y. 396, 10 AmR 382.

Eng.—Fitch v. Jones, 5 E. & B. 238, 85 ECL 238, 119 Reprint 470.

Ont.—Swaisland v. Davidson, 3 Ont. 320.

22. U. S.—Davis v. Shafer, 50 Fed. 764.

Ala.—Payne v. Long, 121 Ala. 385, 25 S 780 (holding that the removal of a memorandum on a note, reading "subject to a settlement between us," written, not in the body of the note, but separate therefrom on the same piece of paper, is a material alteration, as the words clearly indicate that there is something unsettled between the parties not included in the note, which may be brought forward on its settlement, so that they constitute a material part of the note).

Ind.—Cochran v. Nebeker, 48 Ind. 459.

Iowa.—Scofield v. Ford, 56 Iowa 370, 9 NW 309; State v. Stratton, 27 Iowa 420, 1 AmR 282.

Ky.—Warren v. Fant, 79 Ky. 1 (holding that words added upon the margin of a note and above the signature of the promisors, by an arrangement between the payee and principal maker after the delivery of the writing, are to be deemed a part of the instrument, and if added without the consent of the sureties, and their liability is thereby increased, the sureties are released).

Me.—Johnson v. Heagan, 23 Me. 329 (holding that such words will be presumed to be a material part of the instrument, and cannot be taken from it without rendering it void, unless the

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[§ 67] **(2) Immaterial or Collateral Matter.** If the matter written on an instrument is immaterial, tearing it off will be immaterial,[23] and if what is written upon or attached to an instrument is altogether collateral to the body thereof, and does not restrict or alter its operation, it will be considered as a mere memorandum and without effect.[24] In such a case the general rule as to immaterial changes is applied, and the tearing off or erasure of such matter is not an alteration which is material.[25]

holder clearly shows the immateriality thereof).

Mass.—Wheelock v. Freeman, 13 Pick. 165, 23 AmD 674 (holding that, where a bargain is made as to the terms of payment for land, and a note is thereupon written, payable on demand, and the promisor objects that it is not according to the bargain, and a memorandum is then written on the same paper according to the bargain, cutting off this memorandum is a material alteration that avoids the note).

Mich.—Cassopolis First Nat. Bank v. Carter, 138 Mich. 421, 101 NW 585; Walt v. Pomeroy, 20 Mich. 425, 4 AmR 395; Longwell v. Day, 1 Mich. N. P. 286.

Mo.—Law v. Crawford, 67 Mo. A. 150.

Nebr.—Bothell v. Schweitzer, 84 Nebr. 271, 120 NW 1129, 133 AmSR 623, 22 LRANS 263 and note (holding that a written agreement modifying the terms of an accepted bill of exchange and securely glued thereto is a part thereof, and cannot be detached without the maker's consent); Davis v. Henry, 13 Nebr. 497, 14 NW 523; Palmer v. Largent, 5 Nebr. 223, 25 AmR 479.

N. H.—Gerrish v. Glines, 56 N. H. 9.

N. J.—Goodfellow v. Inslee, 12 N. J. Eq. 355 (holding that cutting off a receipt written on the margin of a bond by the obligee is not an alteration of the bond; the strongest presumptions may be raised against the party touching the instrument mutilated or destroyed, but it is no mutilation or alteration of the bond itself, and cannot vitiate that instrument). But see Price v. Tallman, 1 N. J. L. 511 (holding that, where one has mutilated a bond by tearing off a writing attached to it, he cannot prove by parol testimony the nature of the contents of the part torn off. The court divided upon the question whether the bond should be admitted, and the evidence was accordingly rejected).

N. Y.—Benedict v. Cowden, 49 N. Y. 396, 10 AmR 382 (holding that it is in all cases a question to be determined upon the circumstances whether a memorandum or indorsement is intended as a part of the contract and a modification of the instrument, or whether it is merely an earmark for the purposes of identification).

N. D.—Porter v. Hardy, 10 N. D. 551, 88 NW 458.

Tenn.—Stephens v. Davis, 85 Tenn. 271, 2 SW 382.

Tex.—Baldwin v. Haskell Nat. Bank, 104 Tex. 122, 133 SW 864, 134 SW 1178; Smith v. Cooley, (Civ. A.) 164 SW 1050; Meade v. Sandidge, 9 Tex. Civ. A. 360, 30 SW 245.

Eng.—Mollett v. Wackerbarth, 5 C. B. 181, 57 ECL 181, 136 Reprint 845 (where material words were written at the bottom of the paper containing the contract, and an asterisk was inserted in the body of the paper referring to the words at the bottom); Weeks v. Maillardet, 14 East 568, 104 Reprint 719 (holding that where a schedule is material to show what passed by the deed, the deed was held to be avoided by proof that the schedule referred to in the deed was annexed after its execution); Croockewit v. Fletcher, 1 H. & N. 893 (holding that a material change in a charter party, by writing words in the margin, will avoid the contract if done without the consent of the owner after he had executed it); Fairlie v. Christie, 7 Taunt. 416, 2 ECL 425, 129 Reprint 166 (holding that, by striking out with a pen the time of warranty of sailing as it stood in the body of a policy, and inserting in the margin a memorandum of a different time, the policy is destroyed).

Ont.—Swaisland v. Davidson, 3 Ont. 320; Campbell v. McKinnon, 18 U. C. Q. B. 612 (the obliteration of a condition on the back of a note by pasting over it a piece of paper).

[a] **Obliterating or placing memorandum on back of note.**—Technical indorsements on the back of a note, or a memorandum annexing a condition to the payment, which was shown to have been on the instrument when delivered, form a substantial part of it, and an erasure of them will avoid the note. Mechanics Bank v. Valley Packing Co., 70 Mo. 643; McElroy v. Caldwell, 7 Mo. 587; Blake v. Coleman, 22 Wis. 415, 99 AmD 53.

[b] **Where a note is attached to another instrument,** which affects the liability of the maker, detaching it is such an alteration as renders it void. Law v. Crawford, 67 Mo. A. 150; Rochford v. McGee, 16 S. D. 606, 94 NW 695, 102 AmSR 719, 61 LRA 335; Stephens v. Davis, 85 Tenn. 271, 2 SW 382 (holding that, where a condition was written on a stub to which a note was attached in a book of blank notes, tearing off the note from the stub by the payee constituted an alteration).

[c] **Where a note is written at the foot of a settled account** and expresses the settlement as its consideration, to separate the note from the account, strike out the reference to the consideration, and prefix the words "on demand," alters it materially. Benjamin v. McConnell, 9 Ill. 536, 46 AmD 474.

[d] **A change of a purported indorsement on the back of a note,** originally indorsed thereon without authority, would not be an alteration of the contract. Roberts v. Laney, (Tex. Civ. A.) 165 SW 114.

23. Palmer v. Largent, 5 Nebr. 223, 25 AmR 479 (holding that the removal of the words: "This note is given upon condition," does not show what the condition was).

[a] **Tearing off a memorandum of a privilege,** after the time for exercising the privilege granted has expired, does not affect the validity of the note. Mater v. American Nat. Bank, 8 Colo. A. 325, 46 P 221.

24. U. S.—U. S. Glass Co. v. Mathews, 89 Fed. 828, 32 CCA 364 [rev 81 Fed. 993]; Winnipisiogee Paper Co. v. New Hampshire Land Co., 59 Fed. 542 (holding that the addition of a map or plan to a copy of a deed for the purpose of making the claim of the grantee more specific, and without any fraudulent intent to make it appear as a part of the original deed, would not make the grant inoperative).

Ala.—Baker v. Lehman, etc., Co., 65 S 321 (collateral contract of guaranty); Manning v. Maroney, 87 Ala. 563, 6 S 343, 13 AmSR 67 (memorandum indorsed on a bill, by an officer who took depositions in the case, for the purpose of identification).

Ark.—Mente v. Townsend, 68 Ark. 391, 59 SW 41 (holding that the addition, in an assignment of a policy of insurance, of a statement that the loan which was the consideration of the assignment was to be repaid by the assignee upon a certain notice, was nothing more than a memorandum).

Hawaii.—Gay v. Farley, 16 Hawaii 69.

Iowa.—Schafer v. Jackson, 155 Iowa 108, 135 NW 622 (holding that the fact that the name of a subsequent purchaser appears in the left hand corner of a mortgage note does not show an alteration of the note available to the mortgagor; the appearance of the name in such place is consistent with a theory that it is a mere memorandum made by the payee).

Mass.—Bachellor v. Priest, 12 Pick. 399.

Minn.—White v. Johns, 24 Minn. 387.

Mo.—Barnes-Smith Mercantile Co. v. Tate, 156 Mo. A. 236, 137 SW 619.

Nebr.—Oliver v. Hawley, 5 Nebr. 439, 433 (holding that, where after the execution of a written contract for the sale of flaxseed in which the vendee agreed to sow the seed and sell the entire crop, less fifty bushels, at a fixed price to the vendor, the vendor privately added to the contract, below the signature, "$5.00 commission to be charged on the fifty bushels reserved," it was a memorandum and no part of the contract).

N. Y.—Chase v. Washington Mut. Ins. Co., 12 Barb. 595 (pencil memoranda of suggested corrections in an insurance policy).

N. C.—Hubbard v. Williamson, 27 N. C. 397 (holding that a direction at the foot of an accommodation bill, signed by the last indorser, and directing the proceeds to be credited to the drawer, was no more than a memorandum to enable the bank to pay the proper person, as between plaintiff and the drawer, and did not amount to an alteration).

S. C.—Kinard v. Glenn, 29 S. C. 590, 8 SE 203 (a notation to call attention to a mistake).

Tex.—Yost v. Watertown Steam-Engine Co., (Civ. A.) 24 SW 657.

[a] **Attachment of memorandum to writing.**—A memorandum on a separate piece of paper, signed by one of the parties to the contract and attached to the contract after its execution, does not become a part of the contract and is not an alteration thereof. Current v. Fulton, 10 Ind. A. 617, 38 NE 419.

[b] **Explanation of insertions.**—A note or memorandum inserted in a bond immediately after the condition and above the signatures of the makers, to the effect that certain words were inserted in the bond before the signatures were affixed, but which do not in any way enlarge, restrict, qualify, explain, or in any manner or degree affect the meaning of that which preceded it, is not a part of the bond. White v. Johns, 24 Minn. 387.

[c] **Notes on map of real property.**—The indorsement of memoranda upon a plan of real property showing who wished to purchase particular lots and to whom they were sold and the time of sale, but not having the effect of varying in any way the courses and distances of the lines separating the lots, or the relative situations of the lots to each other, if amounting to an alteration is immaterial. Morrill v. Otis, 12 N. H. 466.

[d] **Where on an indenture between two partners** respecting the settlement of affairs there is indorsed before delivery: "It is understood by the parties, that any errors in accounts, found on settlements, shall be rectified," it is no part of the indenture. Whitaker v. Salisbury, 15 Pick. (Mass.) 534.

[e] **Memorandum of order.**—Stamping upon an order for a set of law books the memorandum, "It is understood that during the life of this contract the price paid includes a subscription to 'Law Notes,'" is not a material alteration affecting the rights of the parties in a suit for the balance due. King v. Edward Thompson Co., (Ind. A.) 104 NE 106.

25. Humphreys v. Crane, 5 Cal. 173; Vandervoort v. Rockford Ins. Co., 49 Ill. A. 457 (holding that the application for insurance is no part of the note executed for such insurance at the time of making the application,

Thus a bill or note is not materially altered by writing thereon a memorandum which is purely collateral to, and independent of, the promise or contract which it contains,[26] such as placing a mere reference memorandum thereon,[27] or noting the residence of the parties after their names,[28] or writing in the margin a statement of the fact that the bill or note is secured by a mortgage or other collateral.[29]

[§ 68] **(3) Marginal Figures.** Unless not supplied by words in the body of a bill or note,[30] the marginal notations constitute no part of it, but are simply a memorandum or abridgment for convenience of reference, the contract being perfect without them, and therefore a change in such marginal notations does not constitute a material alteration of the bill or note.[31]

[§ 69] **b. As to Particular Indorsements—(1) Immaterial Changes in General.** A mere verbal change in, or addition to, an indorsement which in no way affects the meaning of the indorsement or the operation of the instrument is not material.[32] Thus the alteration of a statement, indorsed on a note, of the property owned by the obligors, is not a material alteration of the note.[33]

[§ 70] **(2) As to Character or Extent of Liability.** While the holder of a note may fill a blank indorsement with any matter not inconsistent with the liability of the indorser,[34] he cannot change the character or extent of the indorser's liability, or deprive the latter of any defense, and any change made in the indorsement which will have this effect will amount to a material alteration.[35] Thus a vitiating effect has been given to the filling out of a blank indorsement by writing in the consideration therefor,[36] converting the liability into

although written on the same sheet of paper, and the detachment of such application is no defense in an action on the note); Cowee v. Cornell, 75 N. Y. 91, 31 AmR 428. See also Hillsboro First Nat. Bank v. Mack, 35 Or. 122, 57 P 326.

[a] **Schedule.**—Under a statute requiring a bill of sale and every schedule or inventory annexed thereto to be registered, it has been held that where, on account of the emergency of the case, a schedule of a bill of sale was roughly drawn and was afterward disannexed and a fair copy appended, this did not affect the title to the goods which passed under the bill of sale. Green v. Attenborough, 3 H. & C. 468.

26. Culver v. Yocum, 9 KyL 148; Edward Thompson Co. v. Baldwin, 62 Nebr. 530, 87 NW 307.

[a] **Independent writing on note.**—Where the makers of a note, after its indorsement but before negotiation, write at the foot of the note on the same piece of paper, the words, "with privilege of paying all or any portion any time before maturity," the indorser is not thereby discharged from liability, as the memorandum, while inscribed on the same piece of paper at the foot of the note, is entirely separate and distinct from, and should be treated as not forming a part of, the note. Bowie v. Hume, 13 App. (D. C.) 286; Herrick v. Baldwin, 17 Minn. 209, 10 AmR 161 (holding that the addition to the body of a promissory note of the words, "Payable before maturity, and interest on unexpired term refunded, if I so elect." does not change the contract of an indorser, and, although made without his knowledge or consent, will not discharge him).

[b] **Memorandum on note directing credit of proceeds.**—Where the last indorser of an accommodation bill makes a memorandum at the foot of the paper directing the proceeds to be credited to the drawer, the memorandum is no part of the bill, and its removal is of no consequence. Hubbard v. Williamson, 27 N. C. 397.

[c] **An indorsement on a note guaranteeing payment** is a collateral undertaking which does not affect the liability of the original parties. Burnham v. Gosnell, 47 Mo. A. 637; Hutches v. J. I. Case Threshing Mach. Co., (Tex. Civ. A.) 35 SW 60.

[d] **Insertion of number of insurance policy in notes.**—Where notes given in lieu of a cash premium provide that, if any one of them is not paid at maturity, without grace, the policy shall be forfeited, and there is no question as to the identity of the notes, the mere insertion of a pencil memorandum of the number of the policy in a blank left for that purpose in each of the notes, such insertion being made by an agent of the company after the notes are signed, does not prevent them from being introduced in evidence, or the condition for forfeiture from being enforced. Hipp v. Fidelity Mut. L. Ins. Co., 128 Ga. 491, 57 SE 892, 12 LRANS 319.

27. Maness v. Henry, 96 Ala. 454, 11 S 410 (holding that a pencil indorsement on a note, reciting that the note was on an indebtedness of a particular person, was a mere memorandum and did not render the instrument inadmissible in evidence); Oakland First Nat. Bank v. Wolff, 79 Cal. 69, 21 P 551, 748; Carr v. Welch, 46 Ill. 88.

[a] **Illustrations.**—(1) An entry made of the amount of interest and the total in red ink, below the figures in the left hand corner of a note, and a check mark at the bottom of the note, are not material alterations. Yost v. Watertown Steam-Engine Co., (Tex. Civ. A.) 24 SW 657. (2) So where the drawer, who held a bill indorsed in blank by the payees wrote under his signature the words, "Left with Mr. B., (the plaintiff) as collateral," it did not constitute an alteration of the original note. Bachellor v. Priest, 12 Pick. (Mass.) 399.

[b] **A mere lead pencil memorandum of the place of payment,** although written by the holder of a note in a blank space left in the note for designating the place of payment, has been held not a material alteration where no fraud was intended, the note was not negotiated, and the action was on the note in its original form. Light v. Killinger, 16 Ind. A. 102, 44 NE 760, 59 AmSR 313.

28. Johnson v. Parker, 86 Mo. A. 660 (holding that, where on the back of two notes made payable to M. were written, "Demand, Notice and Protest waived," and immediately thereunder, in ink, "H. May, E. O. Parker," and in pencil, "818 Security Bldg. Co-Maker," written by plaintiff when he filed the notes as his cause of action in a justice's court, there was no alteration, since neither the identity of the contracts expressed in the notes nor their legal effect was changed by the pencil additions); Merchants' Bank v. Brown, 86 App. Div. 599, 83 NYS 1037 (holding that the writing of his address done in pencil by the manager of a bank below the name of an indorser on a note held by it for the purpose of directing the bank clerks in keeping their record, is not an alteration of the instrument); Struthers v. Kendall, 41 Pa. 214, 80 AmD 610 (noting the residences of indorsers after their names).

29. Yost v. Watertown Steam-Engine Co., (Tex. Civ. A.) 24 SW 657; First Nat. Bank v. Pritchard, 2 Tex. A. Civ. Cas. § 130 (holding that writing in a promissory note words to the effect that an order on a certain person was left as collateral security did not constitute an alteration of the note).

30. See Bills and Notes [7 Cyc 593].

31. Fisk v. McNeal, 23 Nebr. 726, 37 NW 616, 8 AmSR 162; Schryver v. Hawkes, 22 Oh. St. 308. See Hall v. Commonwealth Bank, 5 Dana (Ky.) 258, 30 AmD 685 (where the date and amount were written on the margin of a note and delivered with authority to fill blanks with such date and amount. The said date and amount were torn off of the note and the blanks were filled with an earlier date and a larger amount. A plea alleging these facts was held a good plea in bar). See also supra § 42.

[a] **In Georgia,** under Civ. Code (1910) § 4296, providing that an alteration will not invalidate a note, where it is in an "immaterial matter," or is not made with intent to defraud, if the original contract can be discovered and enforced, an alteration in the figures written on the corner of a note does not invalidate it, where the amount of the note is written in full on its face. Bryant v. Georgia Fertilizer, etc., Co., 13 Ga. A. 448, 79 SE 236.

32. Cushing v. Field, 70 Me. 50, 35 AmR 293 (changing an indorsement "This note is subject to a contract," to "This note is subject of contract"); Howe v. Thompson, 11 Me. 152 (holding that, in an action by an indorsee against the promisor in a note, the addition of a date to an indorsement of a partial payment on the back of the note is not an alteration of the instrument); Struthers v. Kendall, 41 Pa. 214, 80 AmD 610.

33. Krouskop v. Shontz, 51 Wis. 204, 8 NW 241, 37 AmR 817 (holding that where, on a promissory note of a husband and wife for one hundred and forty dollars, there was an indorsement showing that the wife owned a farm worth four thousand dollars, and personal property worth six hundred dollars, a subsequent and unauthorized change of the last figures to one thousand dollars, made by the holders, was an immaterial alteration).

34. See Bills and Notes [7 Cyc 802].

35. Davis, etc., Co. v. Eppler, 38 Kan. 629, 16 P 793 (holding that any material alteration, although innocently done, in the indorsement of a note, made without the knowledge of the indorser, invalidates the indorsement).

[a] **Writing that the "note [is] to be exchanged for consolidated mortgage bonds"** of a certain railroad, across the face of a note, after indorsements in blank, without the knowledge or consent of the indorsers, releases them from liability thereon. Harnett v. Holdrege, 5 Nebr. (Unoff.) 114, 97 NW 443 [aff reh 73 Nebr. 570, 103 NW 277, 119 AmSR 905].

36. Hood v. Robbins, 98 Ala. 484, 13 S 574.

[a] **But the insertion of "value received"** after an indorsement has been held to be immaterial unless done with the privity of plaintiff. Riggs v.

an absolute one, as by the addition of a waiver of demand, notice, and protest,[37] writing the word "security" over an indorser's name,[38] inserting a waiver of exemptions,[39] erasing the condition "without recourse,"[40] and writing over the indorsement a contract of guaranty.[41] Where, however, such changes as the foregoing do not affect the liability which the indorsement imports in law or by reason of the nature of the instrument, they will not constitute a material alteration.[42]

A guaranty by a third person that one of the parties will carry out his contract, indorsed on the instrument containing the contract, is a mere gratuity, and neither the alteration nor cancellation of the guaranty will affect the rights and liabilities of the parties under the contract.[43]

[§ 71] **(3) Independent Memoranda.** Where the indorsement on the back of a note is merely a memorandum of an independent collateral agreement by one of the parties, it will not be an alteration of the body of the instrument affecting the agreement of other parties thereto.[44] Thus the indorsement of an agreement extending the time of payment made on the back of a promissory note has been held not to be an alteration of the note, but merely the making of a memorandum of the agreement to extend the time.[45]

[§ 72] **(4) Indorsement of Payment or Performance of Condition.** Although the holder of an instrument has no right to defraud the debtor by erasing credits which have been fairly entered, he may erase credits entered by mistake,[46] and if an instrument appears with credits erased it is held that this will not vitiate the whole paper, and the most that the party can claim is that he shall be restored to the benefit of the indorsement as originally made.[47] So indorsements upon a note of an admission of the performance of one of the conditions on the face thereof is not an alteration of the note.[48] But the indorsement on a note of a fictitious credit made under an arrangement between the maker and the payee, for the purpose of reducing the amount and perverting its use, is an alteration which will discharge a surety.[49]

St. Clair, 20 F. Cas. No. 11,829, 1 Cranch C. C. 606.

37. Kan.—Davis v. Eppler, 38 Kan. 629, 16 P 793.
La.—Hill v. Martin, 12 Mart. 177, 13 AmD 372.
Md.—Schwartz v. Wilmer, 90 Md. 136, 44 A 1059.
Nebr.—Harnett v. Holdrege, 5 Nebr. (Unoff.) 114, 97 NW 443 [aff reh 73 Nebr. 570, 103 NW 217, 119 AmSR 905].
N. J.—Clawson v. Gustin, 5 N. J. L. 964.
Tenn.—Comparree v. Brockway, 11 Humphr. 355.
Wis.—Catlin v. Jones, 1 Pinn. 130.

[a] **Not material as to maker.**—Since waiver of notice and protest is not necessary to hold the maker of a note liable, placing the words, "waiving notice and protest," over the maker's indorsement on the back of a note payable to his order is not a material alteration as to him, and does not affect his liability. Gordon v. Chattanooga Third Nat. Bank, 144 U. S. 97, 12 SCt 657, 36 L. ed. 360.

38. Andrews v. Simms, 33 Ark. 771; Robinson v. Reed, 46 Iowa 219; Davis v. Eppler, 38 Kan. 629, 16 P 793; Farmer v. Rand, 16 Me. 453; Buck v. Appleton, 14 Me. 284.

39. Jordan v. Long, 109 Ala. 414, 19 S 843; Harnett v. Holdrege, 5 Nebr. (Unoff.) 114, 97 NW 443 [aff reh 73 Nebr. 570, 103 NW 277, 119 AmSR 905].

40. Howlett v. Bell, 52 Minn. 257, 53 NW 1154.

41. Ill.—Newlan v. Harrington, 24 Ill. 206 (distinguishing between a guaranty of a note and a guaranty of its collection).
Iowa.—Belden v. Hann, 61 Iowa 42, 15 NW 591.
Ky.—Needhams v. Page, 3 B. Mon. 465.
Me.—Smith v. Frye, 14 Me. 457.
Nebr.—Harnett v. Holdrege, 5 Nebr. (Unoff.) 114, 97 NW 443 [aff reh 73 Nebr. 570, 103 NW 277, 119 AmSR 905].
See also Bills and Notes [7 Cyc 803].

42. Iowa Valley State Bank v. Sigstad, 96 Iowa 491, 65 NW 407; Levi v. Mendell, 1 Duv. (Ky.) 77.

43. Baker v. Lehman, etc., Co., (Ala.) 65 S 321.

44. Cambridge Sav. Bank v. Hyde, 131 Mass. 77, 41 AmR 193 (holding that a memorandum made by the holder on the back of a promissory note, to the effect that the rate of interest after a certain day will be less than that stated in the body of the note, is not an alteration of the note and does not discharge a surety of the maker, although written in pursuance of an agreement between the holder and the maker of the note, without knowledge of the surety). To same effect Huff v. Cole, 45 Ind. 300; Reed v. Culp, 63 Kan. 595, 66 P 616. But see Post v. Losey, 111 Ind. 74, 12 NE 121, 60 AmR 677 (holding that the indorsement of an agreement between the payee and the principal debtor, to extend the time upon a different rate of interest, substituted an entirely new agreement for the original one and discharged the surety); Bucklen v. Huff, 53 Ind. 474 (where an indorsement of an agreement by the maker to pay an increased rate of interest after maturity was held not to discharge the surety, the act being considered a mere spoliation, one of the grounds of the decision appearing to be that the indorsement was not such a valid agreement to extend the time of payment as to affect the liability of the surety). See also supra § 66.

45. Moore v. Macon Sav. Bank, 22 Mo. A. 684.
Alteration of time of payment see generally supra § 46.

46. Tubb v. Madding, Minor (Ala.) 129; Burtch v. Dent, 13 Ind. 542 (holding that where the agent of the payee presented a note to the maker, who paid a certain sum thereon and indorsed the credit on the back, and also made another indorsement, crediting thereon a certain sum for services rendered, and the agent protested against the latter indorsement, but was assured by the maker that it was all right, but that if it was not, he would make it right with the payee, and the payee, upon receiving the note back, objected to the indorsement, and obliterated it with his pen, as the credit had been wrongfully made it was properly obliterated by the payee).

[a] **Indorsements of payment on a note entered by mistake** do not become part of the instrument, and their erasure does not avoid the note. Lau v. Blomberg, 3 Nebr. (Unoff.) 124, 91 NW 206.

47. Bryan v. Dyer, 28 Ill. 188; Theopold v. Deike, 76 Minn. 121, 78 NW 977 (holding that a memorandum of a partial payment, indorsed by the holder on a note, is no part of the note or written evidence of the contract, so that its erasure by the holder, although fraudulently made, is not an alteration which will avoid the note); Simms v. Paschall, 27 N. C. 276 (holding that the obliteration by the holder of a bond of a payment indorsed on it does not destroy the validity of the bond, as such an entry is not more than a receipt, and constitutes no part of the bond); Kimball v. Lamson, 2 Vt. 138 (holding that, in an action on a note containing an indorsement of a credit of a small payment which had been erased, the note may be read without explanation of the erasure, one of the grounds being that the indorsement itself is no part of the note, although it further appears in the case that the erasure was fairly made).

[a] **Erasure of unauthorised indorsement.**—Where a sales agent has authority to sell only for a fixed amount, and the purchaser has notice of this limited authority from the printed terms of the contract of sale, an erasure of a credit, entered by the agent on the note executed by the purchaser, to make the note represent a less amount than that at which the agent had authority to sell, is not an alteration. Waldorf v. Simpson, 15 App. Div. 297, 44 NYS 921.

[b] **Where, pending a suit upon a note,** an agreement is entered into that the holder shall credit fifty dollars on the note if the balance is paid at a certain date, and a payment of fifty dollars is indorsed on the note, but the maker fails to pay at the appointed time, and the indorsement of credit is erased, it does not avoid the note. Chamberlin v. White, 79 Ill. 549.

48. Jackson v. Boyles, 64 Iowa 428, 20 NW 746; McShan v. Watlington, (Tex. Civ. A.) 133 SW 722 (indorsement of payment).

[a] **A credit indorsed on a promissory note** by the payee, without the knowledge of the maker, is not in itself a material alteration, which invalidates the instrument as to such maker. Hakes v. Russ, 175 Fed. 751, 99 CCA 327.

[b] **A credit indorsed upon a note is equivalent to an admission** by the party making the indorsement that as much as is credited has been paid; and, although the credit is afterward erased or obliterated, the admission is nevertheless evidence against the person making it and is entitled to all the weight of evidence of that sort, until explained away or disproved by him. Graves v. Moore, 7 T. B. Mon. (Ky.) 341, 18 AmD 181.

49. Johnston v. May, 76 Ind. 293; Washington Finance Corp. v. Glass, 74 Wash. 653, 134 P 480, 46 LRANS 1043 and note (holding that, under Remington & B. Code §§ 3514, 3515, defining material alterations, and providing that they render a note void, a reduction of the amount of a note by indorsing, before delivery, a payment on the back thereof is a material alteration, which relieves the accommodation maker of liability on the note).

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[§ 73] **22. As to Number, Character, and Relation of Parties—a. In General.**[50] Any change in the personality, number, or relations, of the parties to an instrument which gives the instrument a different legal effect is material.[51] Thus where the addition or erasure of words in an instrument changes the capacity in which a party is interested in the contract, it is a material change,[52] as where such addition or erasure has the effect of changing the instrument from the individual contract of the party to the contract of a partnership of which he is a member.[53] Such a change, however, is immaterial, where the words added or erased are merely descriptio personæ,[54] or where the addition merely extends the description and makes it more exact.[55]

[§ 74] **b. Correction of Name without Changing Identity of Person.** As a general rule, however, an addition or change which has only the effect of perfecting the name as it is written in an instrument, without changing the identity of the person is not a material alteration as where the christian name of the person actually intended is wrongly written and is afterward changed to correct the clerical error.[56] So it has been held that changing the name of a payee in a note, without changing the identity of the person intended, or to correct a mere clerical error, is not a material alteration.[57]

50. Change in signature see generally supra § 63.
Filling blank with name of party see infra § 119 et seq.

51. Ala.—Mackay v. Dodge, 5 Ala. 388.
Cal.—Woodard v. Grover, 156 Cal. 581, 105 P 736 (holding that, where one party to a contract agreed to allow the wives of the other parties in interest to be substituted for their husbands in the contract, but the daughter of one of the parties was substituted instead, the alteration was a material one, and, in the absence of ratification, invalidated the contract).
Conn.—Johnson v. Cooke, 85 Conn. 679, 84 A 97, AnnCas1913C 275 (identity of receiptor).
Tex.—Ford v. Cameron First Nat. Bank, (Civ. A.) 34 SW 684; Texas Printing, etc., Co. v. Smith, 4 Tex. A. Civ. Cas. § 4, 14 SW 1074.
Wis.—Donkle v. Milem, 88 Wis. 33, 59 NW 586.
[a] **It is a "general rule** that any change in the personality, number, or relations, of the parties to a contract in writing is a material alteration." Per Talbot, J., in Matson v. Jarvis, (Tex. Civ. A.) 133 SW 941, 943.
[b] **Where the name of an assignee is inserted,** in an assignment of a bond after execution, it is a material alteration, if the assignment is thereby given a different effect. Park v. Glover, 23 Tex. 469.

52. Louisiana State Bank v. Fuselier, 9 Rob. (La.) 26; Springfield First Nat. Bank v. Fricke, 75 Mo. 178, 42 AmR 397; Texas Printing, etc., Co. v. Smith, 4 Tex. A. Civ. Cas. § 4, 14 SW 1074.
[a] **The erasure of the word "trustee"** written in a deed after the name of the grantee is a material alteration. Flitcraft v. Commonwealth Title Ins., etc., Co., 211 Pa. 114, 60 A 557.
[b] **Erasure of "Pres't."**—Where the president of a corporation indorses a note in blank, adding the word "Pres't" to his signature, and the note is afterward filled up and such word erased, the erasure is a material alteration which avoids the note as to one who receives it for a precedent debt with knowledge of the representative character of the indorser. Sharp v. Bellis, 61 Pa. 69, 100 AmD 618.
[c] **Addition of word "collector" after payee's name.**—Where the payee of a promissory note designedly alters it after delivery to him, and without the maker's consent or knowledge, by writing in the body of the note after his own name the word "collector," and this disclosure is made before the note is offered in evidence, it is inadmissible in the case on the ground that it is an altered instrument. York v. Janes, 43 N. J. L. 332. But it is to be observed that this decision is apparently controlled by the case of Hunt v. Gray, 35 N. J. L. 227, 10 AmR 232, where it is said that even immaterial alterations are fatal to the validity of an instrument. This is contrary to the generally prevailing rule as to which see supra § 33.
[d] **Changing indorser to payee.**—Where the maker of a note which has been indorsed for his accommodation by the payee and by another person inserts the name of the second indorser as payee in the body of the note, the alteration releases both indorsers. Aldrich v. Smith, 37 Mich. 468, 26 AmR 536.

53. Chadwick v. Eastman, 53 Me. 12.
[a] **Addition of "& Co."**—The insertion in a written guaranty of payments by a certain person, of the words "& Co." after the name of the person whose payments are guaranteed, constitutes a material alteration of the contract. Wilde v. Armsby, 6 Cush. (Mass.) 314. As to addition of "& Co." to signature see supra § 63 note 7.

54. Colt v. Starkweather, 8 Conn. 289. See also infra § 75.
[a] **Addition of "comaker."**—It has been held in Missouri, where some of the decisions hold that even an immaterial alteration avoids an instrument, that the addition to the name of an indorser on the back of a promissory note of his address and the word "comaker," made at the request of a justice of the peace in whose court suit was brought on the note, did not constitute such an alteration as nullified the obligation of the indorser. Johnson v. Parker, 86 Mo. A. 660.
[b] **"To add a word of description to the name of an indorsee** is not a material alteration of a note or a draft, when it is intended by the parties that the paper shall go to the indor be in the exact capacity or relationship indicated by the title affixed." Per Patterson, J., in Birmingham Trust, etc., Co. v. Whitney, 95 App. Div. 280, 281, 88 NYS 578 [aff 183 N. Y. 522 mem, 76 NE 1089 mem].
[c] **Erasure of "& Co."**—Where a bill is addressed to A., B., & Co., and the acceptance is by A. & B., and the address of the bill is afterward, by striking out the words "& Co.," altered to correspond with the acceptance, as the acceptors will be liable either way, the alteration is immaterial. Farquhar v. Southey, 2 C. & P. 497, 12 ECL 697, M. & M. 14, 22 ECL 460.

55. Casoni v. Jerome, 58 N. Y. 315 (holding that the insertion of the words "with the will annexed" after the word "administratrix" in a bond given by an administratrix is an immaterial alteration).
[a] **Addition of name of bank after word "cashier."**—It is immaterial to add the name of the bank after the word "cashier" on a note which was given to bind the bank. Folger v. Chase, 18 Pick. (Mass.) 63; Genesee Bank v. Patchin Bank, 13 N. Y. 309.

56. Pardee v. Lindley, 31 Ill. 174, 83 AmD 219; Blenkiron v. Rogers, 87 Nebr. 716, 127 NW 1062, 31 LRANS 127 and note, AnnCas1912A 1043 and note ("Blenkiron Grain Co." changed to "Blenkiron Bros., Inc."); In re Howgate, [1912] 1 Ch. 451 (holding that the correction of a mistake in the christian name of a party to a mortgage will not, in the absence of fraud, avoid the mortgage).
[a] **A mere clerical change,** as by scratching out a dot over the letter "i," in the name of the grantee in a patent, is not material. Morgan v. Curtenius, 17 F. Cas. No. 9,799, 4 McLean 366 [aff 20 How. 1, 15 L. ed. 823].
[b] **Correction of immaterial part of instrument.**—Where an award by an umpire mistakenly recites the christian name of one of the original arbitrators, the award is not vitiated, as the mistake is in an immaterial part, and therefore a change subsequent to the publication of the award, by striking out the mistaken name and inserting the correct christian name, does not vitiate the award. Trew v. Burton, 1 Cromp. & M. 533.
[c] **Where the christian name** of the lessor is misspelled in an assignment of rents under a lease and after the institution of suit against the lessee by the assignee to recover such rents, and the assignor corrects the mistake, the assignment is not rendered inadmissible in evidence by reason of the alteration. Outtoun v. Dulin, 72 Md. 536, 20 A 134.
[d] **The correction of an incorrectly spelled name in a bond** does not vitiate it. State v. Dean, 40 Mo. 464.
[e] **An erasure in a deed changing the name of the grantee** from Elizabeth to Eliza may be explained by proof that Elizabeth and Eliza are identical and the same person. Hanrick v. Patrick, 119 U. S. 156, 7 SCt 147, 30 L. ed. 396.
[f] **Addition of individual names of partners to firm name.**—Where a bill, as originally drawn, was signed by the firm name of the partners, the addition, after acceptance of the bill, of the individual names of the partners, constituted an immaterial alteration. Blair v. State Bank, 11 Humphr. (Tenn.) 84.

57. Oakland First Nat. Bank v. Wolff, 79 Cal. 69, 21 P 551, 748 (holding that the insertion in a note payable to the "First National Bank of this city" of the words "of Oak'd" after the words "First National Bank" is immaterial, the note being dated at Oakland).
[a] **Christian or surname.**—(1) Cole v. Hills, 44 N. H. 227 (holding that, where both parties intended a note to be payable to Benjamin Cole, whose name was accidentally written "Benjamin R. Cole," the erasure of the middle initial would not affect the validity of the note); Derby v. Thrall, 44 Vt. 413, 8 AmR 389 (holding that where a note was by mistake drawn payable to Franklin Derby instead of Francis E. Derby, and upon delivery the payee, with the consent of the maker, made the change so as to conform to the fact, the surety on the note was not discharged; and distinguishing Broughton v. Fuller, 9 Vt. 373, where there was an alteration by adding the word "junior" to the name of the payee, thus making the instrument payable to another and different person). (2) The interlineation of the surname of the payee of a note, it being proved that the note was originally given to the person whose name was inserted, is immaterial. Mouchet v. Cason, 3 S. C. L. 307.
[b] **Name of partnership.**—Where a note payable to a partnership was

[§ 75] **c. Change of Name of Payee, Obligee, or Grantee.** The change of a payee by substituting a different payee from the one originally in the instrument is a material change and vitiates the instrument as against the parties not consenting thereto,[58] unless it can be justified on some other principle,[59] as where plaintiff's, the original payee's, name is erased and the name of another inserted for the purpose of furnishing plaintiff with an indorser,[60] where the change is to correct a mistake,[61] or is made before delivery of the instrument,[62] where the words inserted after the name are merely descriptio personæ,[63] or where the words inserted, when taken with the original words, are wholly senseless and inoperative.[64]

To strike out the name of an indorsee in a special indorsement and substitute another without the consent of the indorser is a material change in a contract and releases the indorser,[65] except that where a payee of a note makes a special indorsement of it, and afterward becomes the owner thereof, his erasure of his own indorsement is not such an alteration as to release the maker.[66]

Where the obligee in a bond is changed by the substitution of another obligee, obligors not consenting to the change will not be bound thereby,[67] unless the change is merely the correction of a mistake.[68]

The unauthorized substitution of a grantee in a deed is such a material alteration as to avoid the

indorsed by a surety and afterward altered by the maker and payee, without the knowledge of the surety, by changing the name of the payee so as to make the note payable to the same partnership under a different name, it was held that the surety was not discharged, as the change was immaterial. Arnold v. Jones, 2 R. I. 345.

58. U. S.—Sneed v. Sabinal Min., etc., Co., 71 Fed. 493, 18 CCA 213 [aff 73 Fed. 925, 20 CCA 230].

Ga.—Wilson v. Barnard, 10 Ga. A. 98, 72 SE 943.

Ida.—Mulkey v. Long, 5 Ida. 213, 47 P 949.

Ind.—Casto v. Evinger, 17 Ind. A. 298, 46 NE 648.

Iowa.—Bell v. Mahin, 69 Iowa 408, 29 NW 331.

Kan.—Horn v. Newton City Bank, 32 Kan. 518, 4 P 1022.

Mass.—Stoddard v. Penniman, 108 Mass. 366, 11 AmR 363.

Mo.—German Bank v. Dunn, 62 Mo. 79 (holding, however, in accordance with the general rule in that state, that the change was vitiating, whether material or not, having been made by the payee); Robinson v. Berryman, 22 Mo. A. 509 (holding the change material, but recognizing the same principle announced in the last preceding case).

Nebr.—Erickson v. Oakland First Nat. Bank, 44 Nebr. 622, 62 NW 1078, 48 AmSR 753, 28 LRA 577.

N. Y.—Brooklyn First Nat. Bank v. Gridley, 112 App. Div. 398, 98 NYS 445.

Oh.—Davis v. Bauer, 41 Oh. St. 257.

Okl.—Coalgate International Bank v. Mullen, 30 Okl. 547, 554, 120 P 257 [cit Cyc].

S. D.—Holbart v. Lauritson, 148 NW 19 [cit Cyc].

Vt.—Broughton v. Fuller, 9 Vt. 373 (holding that where the note was originally drawn to Ebenezer Broughton, the father, and was subsequently changed by adding the word "junior" to the name of the payee, thus making it payable to another and different person, it was a material alteration).

[a] **Under the Negotiable Instruments Law** in some states, changing a note by erasing the name of the original payee and inserting that of a different payee, is a material alteration. Hoffman v. Planters' Nat. Bank, 99 Va. 480, 39 SE 134.

[b] **Where one signs a note expressly as agent** for another, makes it payable to his own order, and indorses it in his own name, and thereupon presents it to plaintiff for discount, the latter cannot strike out the words indicating for whom the maker is agent, erase the maker's name as payee and indorser, and substitute a new payee and indorser, without the maker's consent. Louisiana State Bank v. Fuselier, 9 Rob. (La.) 26.

59. James v. Tillon, 183 Mass. 275, 67 NE 326.

60. See Levois v. Burguieres, 10 La. Ann. 111.

[a] **Thus** (1) where a note is payable to a bank, and the bank requires a guaranty of a third person, who signs his name below the signature of the makers, and the note is delivered in that condition to the bank, but thereafter such third person has his name erased as one of the makers and written in the body of the note as the payee, and then assigns the note to the bank with a guaranty of payment, the change does not affect the validity of the note. Ryan v. Springfield First Nat. Bank, 148 Ill. 349, 35 NE 1120. (2) But, where a note payable to the maker's order is indorsed by him and, after its accommodation indorsement, the payee is changed by inserting the name of the person with whom the note is negotiated, the accommodation indorser will be discharged. Stoddard v. Penniman, 108 Mass. 366, 11 AmR 363.

61. Latshaw v. Hiltebeitel, 2 Pennyp. (Pa.) 257 (holding that, where the christian name of the payee of a note was by mistake written Catharine, the substitution of the name Rebecca, which was the name of Catharine's sister, and of the true lender of the money, was an immaterial alteration). But see Ryan v. Parker, 36 N. C. 89 (holding that, where a note was by mistake made payable to Soliman instead of Sullivan, the name of the intended payee, the substitution of the name "Sullivan" constituted a material alteration).

[a] **To make note conform to trust deed.**—After a note and trust deed have been executed and tendered to the officer of a bank, changing the payee in the note by making it payable to the officer upon his demand because the trust deed ran to him, instead of to the bank as trustee, is not material. Cook v. Maulton, 59 Ill. A. 428.

62. Tharp v. Jamison, 154 Iowa 77, 134 NW 583, 39 LRANS 100. See generally infra §§ 91, 102.

63. Casto v. Evinger, 17 Ind. A. 298, 46 NE 648 (holding that the words "Guardian of P. Malcom," written after the name of the payee in a note, are merely words of personal description, not changing the legal effect; and hence their addition after the note is signed is not a material alteration affecting the validity of the note). See also supra § 73. But see Springfield First Nat. Bank v. Fricke, 75 Mo. 178, 42 AmR 397 (holding that, where a note, payable to an individual and signed by him and a comaker, was altered by the former by adding the abbreviation, "Pres'd't. O. F. B. Ass'n," where his name appeared as maker, and "Pres'd't," where his name appeared as payee, the change was material and avoided the note as to the comaker not consenting).

[a] **"Cashier."**—Where it is agreed between the drawer and the indorsee of a draft that it shall be discounted by the indorsee in his capacity as cashier of a trust company, such indorsee is authorized to write an abbreviation of the word "cashier," after his name in the indorsement of the draft, for the purpose of showing the capacity in which he became a party to the paper. Birmingham Trust, etc., Co. v. Whitney, 95 App. Div. 280, 88 NYS 578 [aff 183 N. Y. 522 mem, 76 NE 1089 mem]. But see Hodge v. Frankfort Farmers' Bank, 7 Ind. A. 94, 34 NE 123 (holding that the insertion of the word "cashier" after the name of a payee was material because of previous decisions that, as to banks, the act of a cashier is the act of the bank, and that the bank may sue upon a note payable to its cashier as such).

[b] **"To add a word of description to the name of an indorsee** is not a material alteration of a note or draft, when it is intended by the parties that the paper shall go to the indorsee in the exact capacity or relationship indicated by the title affixed." Birmingham Trust, etc., Co. v. Whitney, 95 App. Div. 280, 281, 88 NYS 578 [aff 183 N. Y. 522 mem, 76 NE 1089 mem].

64. Granite R. Co. v. Bacon, 15 Pick. (Mass.) 239 (holding that, where a note recited "I promise to pay to Quincy Railway Company or order," the insertion of the words "the order of Edward Prescott" over the words "Quincy Railway Company or order," without erasing the latter words, was not material, because the words inserted, if taken with the original words as an addition to them, would be wholly senseless and inoperative).

65. Grimes v. Piersol, 25 Ind. 246 (holding that the change was a material one because, as the assignment purported to be directly to plaintiff, it deprived defendant, the indorser, of any defense he might have under the statute as against the person to whom the assignment was in fact made).

66. Collins v. Panhandle Nat. Bank, 75 Tex. 254, 11 SW 1053; Smalley v. Vinton, (Tex. Civ. A.) 164 SW 918; Gray v. Altman, (Tex. Civ. A.) 149 SW 760 (holding that, where the payee of a negotiable instrument had indorsed it to a third person, and, on the maker's default, had taken up the note, the erasure of the indorsement was not such an alteration as to deprive the payee of his remedy on the note).

67. Dolbier v. Norton, 17 Me. 307; Smith v. Weld, 2 Pa. 54.

68. Turner v. Billagram, 2 Cal. 520 (holding that, where a bond was made by mistake to the acting sheriff instead of to the party who was to be protected by it, the correction of the mistake by erasing the name of the sheriff as obligee and inserting that of the proper officer would not vitiate the bond).

[a] **Consent presumed.**—Where the principal in a bail bond erased the name of the sheriff as obligee and inserted that of the constable who had served the writ, before delivery of the bond and after it had been signed by the surety, the consent of the surety would be presumed, without deciding whether the change was material or immaterial, as the surety when he signed the bond intended to become bail, and it did not appear that he ever knew who was the obligee named in the bond, which was to him a matter of no consequence. Hale v. Russ, 1 Me. 334.

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deed.[69] It can confer no rights upon the inserted grantee as against the original grantee or his creditors,[70] and cannot bind the grantor when made before delivery by one having no authority to make it.[71]

The unauthorized substitution of a different mortgagee in a mortgage is a material alteration.[72]

[§ 76] **d. Changes to Conform Different Parts of Instrument.** The mere insertion into the body of an instrument, such as a bond or deed, of the name of an obligor or maker who has signed as such is not material, as his liability would be the same in the absence of the insertion.[73]

[§ 77] **e. Change of Maker, Grantor, Etc.**[74] A change in the name of the maker, grantor, or obligor of an instrument, whereby a different person is substituted,[75] as by erasing the name of the original obligor in a bond and replacing it with that of another person,[76] is material. But if the change is merely in respect to words describing the person without affecting the legal character of the instrument[77] it is immaterial.

[§ 78] **f. Joint and Several Obligations.** An addition or alteration of words in an instrument which has the effect of changing it from a joint obligation to one joint and several,[78] or from a joint and several obligation to one which is merely joint,[79] is a material change and discharges, or is not binding on, the parties not consenting thereto. It has been held, however, not to be a material alteration to change a note executed by several from "I promise to pay" to "We promise to pay,"[80] or to substitute "we" for "I" in an obligation signed by one maker only,[81] or to substitute "I" for "we" in such a case.[82]

Under statutes abolishing the common-law distinction between instruments joint and those joint and several, the insertion of words into an instrument making it joint and several is not material.[83]

[§ 79] **g. Erasure of Names—(1) In General.** The erasure of names in an instrument, so as to affect its identity or make it speak of a different

69. Steele v. Spencer, 1 Pet. (U. S.) 552, 7 L. ed. 259; Peugh v. Mitchell, 3 App. (D. C.) 321; Simpkins v. Windsor, 21 Or. 382, 28 P 72.

[a] **In New Jersey** it has been held that the erasure, by the owner of a deed, of the middle initial of the name of the grantee therein rendered the deed void; but in this state any change in a deed made by the owner thereof, without the consent of other parties, whether the change is material or immaterial, is vitiating. Jones v. Crowley, 57 N. J. L. 222, 30 A 871.

70. Hollis v. Harris, 96 Ala. 228, 11 S 377; Abbott v. Abbott, 189 Ill. 488, 59 NE 958, 82 AmSR 470; John v. Hatfield, 84 Ind. 75; Goodwin v. Norton, 92 Me. 532, 43 A 111 (holding that, where a grantor in a deed is not present, a change therein by consent of another who joined in the deed, but who is not the owner of the land, by substituting another grantee, does not take the title out of the grantee whose name was originally written in the deed, even if this could be done by consent of the real grantor). See also Deeds [13 Cyc 721].

71. Hollis v. Harris, 96 Ala. 288, 11 S 377; Ayre, etc., Tie Co. v. Baker, 138 Ky. 494, 128 SW 346 (holding that, where, after the execution of a married woman's deed, the name of the grantee is changed, without her knowledge and consent, and there is no re-signing and reacknowledgment by her in the manner required by statute, the deed as to her is void). See also Deeds [13 Cyc 721].

72. Smith v. Fellows, 41 N. Y. Super. 86.

73. U. S.—Davis, etc., Bldg., etc., Co. v. Dix, 64 Fed. 406.

Fla.—Cotten v. Williams, 1 Fla. 37.

Ga.—Dedge v. Branch, 94 Ga. 37, 20 SE 657.

Ill.—Reed v. Kemp, 16 Ill. 445 (which was a change by inserting the name of the obligor in the beginning of an instrument as "I, J. G. Reed," etc).

Ind.—State v. Pepper, 31 Ind. 76.

Iowa.—Briscoe v. Reynolds, 51 Iowa 673, 2 NW 529.

Me.—Fournier v. Cyr, 64 Me. 32; Bird v. Bird, 40 Me. 398 (insertion in the body of the deed of names of grantors who had executed it).

Mass.—Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577, 58 NE 162; Smith v. Crooker, 5 Mass. 538.

N. H.—Pequawket Bridge v. Mathes, 8 N. H. 139.

[a] **Address of bill to conform to acceptance.**—If the bill is addressed to "A and B" by the name of "A B & Co.," and they accept it by the name of "A and B," and the address of the bill is afterward altered to "A and B," the change is immaterial and will not discharge the acceptor. Farquhar v. Southey, 2 C. & P. 497, 12 ECL 697, M. & M. 14, 22 ECL 460.

74. Change of signature see supra § 63.

75. Ill.—Babcock v. Henkle, 117 Ill. A. 640.

Me.—Sheridan v. Carpenter, 61 Me. 83 (involving the change of a maker's signature by altering the affix "Treasurer of St. Paul's Parish," which made the signer personally liable, so as to make it read "Treasurer for St. Paul's Parish," so as to bind the parish); Chadwick v. Eastman, 53 Me. 12 (holding that even though a note for a partnership debt began: "We, or either of us, promise jointly and severally to pay," and was signed by one of the partners alone, a subsequent change by the payee, without the knowledge of either defendant, by inserting immediately above the signature the words "For Enos & Wm. Eastman," the name of the firm, was material and available as a defense to both defendants).

Mo.—Springfield First Nat. Bank v. Fricke, 75 Mo. 178.

N. C.—Davis v. Coleman, 29 N. C. 424.

Tex.—Texas Printing, etc., Co. v. Smith, 4 Tex. A. Civ. Cas. § 4, 14 SW 1074.

Wis.—North v. Henneberry, 44 Wis. 306.

[a] **Substituting grantor in deed.**—It is a material alteration of a deed which was originally signed by an attorney in fact so as to make it the deed of the attorney personally to change the execution of the deed so as to make it the deed of the principal. North v. Henneberry, 44 Wis. 306.

[b] **An alteration of a check** by the holder, consisting in a change of the name of the bank on which the check is drawn, is a material alteration. Morris v. Beaumont Nat. Bank, 37 Tex. Civ. A. 97, 83 SW 36.

76. Smith v. Weld, 2 Pa. 54.

[a] **Principal in recognizance.**—A change in a recognizance by a justice before it is taken, by striking out the principal's name and substituting the name of another, will release the cognizor. Vincent v. Peo., 25 Ill. 500.

77. Hayes v. Brubaker, 65 Ind. 27. See also supra § 63.

78. Warring v. Williams, 8 Pick. (Mass.) 322; Perring v. Hone, 4 Bing. 28, 13 ECL 384, 130 Reprint 678, 2 C. & P. 401, 12 ECL 639; Banque Provinciale v. Arnoldi, 2 Ont. L. 624; Samson v. Yager, 4 U. C. Q. B. O. S. 3. See also Landauer v. Sioux Falls Impr. Co., 10 S. D. 205, 72 NW 467.

[a] **Recovery on joint obligation.**—Although, before delivery of the bond, one of the sureties, without the knowledge of the obligee or other sureties, changes it, so as to make it joint and several in form, instead of joint, as it was before, recovery can be had on it as a joint bond where the obligee is without fault in acting on the belief that the change was authorized. Union Oil Co. v. Mercantile Refining Co., 8 Cal. A. 768, 97 P 919.

79. Humphreys v. Guillow, 13 N. H. 385, 38 AmD 499 [cit Hemmenway v. Stone, 7 Mass. 58, 5 AmD 27; Clerk v. Blackstock, Holt. N. P. 474, 3 ECL 188; March v. Ward, 1 Peake N. P. 177].

[a] **Changing "I promise" to "We promise."**—Converting a joint and several note into one which is merely joint, as by changing the words "I promise" to "We promise," is a material alteration. Eckert v. Louis, 84 Ind. 99; Humphreys v. Guillow, 13 N. H. 385, 38 AmD 499.

[b] **Changing several to joint indorsement.**—The holder of a negotiable note, severally indorsed in blank by two or more persons, has no right to fill up one indorsement over the signatures, so as to make the assignment to him the joint act of all those whose names are thus written upon it. Morrison v. Smith, 13 Mo. 234, 53 AmD 145.

80. Stanley v. Davis, 107 SW 773, 32 KyL 1135 (holding that where defendant signed a writing in blank as surety for his codefendant, and, after the paper left defendant's hands reading, "I" promise to pay, it was changed to read, "we" promise, his liability was not altered, and the change was immaterial); Eddy v. Bond, 19 Me. 461, 464, 36 AmD 767 (where it was held that such a change in a note is not material, but the grounds for the decision are not clear. Shepley, J., said: "As first drawn the signers were jointly and severally bound. . . . The alteration limited their liability to the holder; and did not change their legal rights in relation to each other. It was not made by the holder, but by a party to the note before it was negotiated").

81. Morey v. Dotter, 4 Phila. (Pa.) 136.

82. Kline v. Raymond, 70 Ind. 271 (holding that where a written guaranty which read, "We hereby guarantee," etc., was signed by one person only, the striking out of the word "we" and the inserting of the word "I" in lieu thereof, so as to make the instrument read, "I hereby guarantee," is not a material alteration).

83. Miller v. Reed, 27 Pa. 244, 67 AmD 459, 3 Grant 51 (holding that, since the common-law distinctions between instruments joint and those joint and several have been extinguished by the Pennsylvania statutes,

character or liability, is material,[84] as where the instrument is thus converted into one with different parties.[85] Where a bill or note is executed by several, erasing or cutting off the name of one, without the consent of the other, is material, and discharges the latter.[86] The erasure of the name of one of the obligors on a bond is a material alteration which will avoid it as to other obligors not consenting thereto.[87]

Maker's liability not affected. But it has been held that, as the release of a surety on a note or bond, by the erasure of a cosurety's name does not affect the maker's liability or the identity of his contract, it will not invalidate the note or bond as against the principal.[88]

[§ 80] **(2) Of Minor Who Repudiates Contract.** Where one of the makers of a note is a minor and, after arriving at majority, he repudiates the contract, an erasure of his name is not material.[89]

[§ 81] **(3) Several Undertakings in One Instrument.** If the signing of an instrument by more than one party evidences entirely separate and several undertakings, the erasure of the name of one does not affect the liability of the other, as in the case of contracts for the subscription of corporate stock,[90] and in such cases a change in the separate contract of one, aside from questions of fraud, will not affect the liabilities of the others.[91]

[§ 82] **h. Adding Parties, Makers, Obligors, Etc.—(1) Rule against Addition.** There is much confusion among the authorities upon the effect of the addition of new makers or obligors to an instrument, such as a promissory note, after its original execution. In the first place, especially after the complete execution and delivery of an instrument,

the insertion of the words "or either of us" in a note executed by two persons is not such a material alteration as will avoid the instrument, as the terms of the statute, although limited to undertakings that are joint and several, are applicable to contracts that are joint and not several).

84. Samberg v. American Express Co., 136 Mich. 639, 99 NW 879 (holding that plaintiff could not recover from an express company on an order issued by it where it appeared that when he received it from the payee the signature of the payee, countersigning it as required in order to authorize payment, had been erased); Matson v. Jarvis, (Tex. Civ. A.) 133 SW 941, 943 (holding that the erasure of the name of the obligee in a contract is a material alteration); Hindostan, etc., Bank v. Smith, 36 L. J. C. P. 241 (holding that it is a material alteration of an instrument of guaranty executed by several parties, where the party guaranteed strikes out the name of each on payment by him of his proportion).

"The erasure of the name of one of two or more obligors in a contract, or makers or drawers or payees of a bill or note who have indorsed the paper, or one of several co-sureties, is likewise a material alteration." Per Talbot, J., in Matson v. Jarvis, supra.

[a] **Changes not affecting validity.**—(1) The partial erasure of the name of a payee in a note so as to make it illegible was held not to release the maker where it appeared that the note was executed by him and was payable and delivered to plaintiff, that the latter had possession of the note when the suit was begun, and that his name had been erased under circumstances showing the validity of the note not to be affected by the erasure. Justus v. Cooper, 7 Blackf. (Ind.) 7. (2) Where, in a blank intended for the period of maturity of a note dated Aug. 26, 1901, the name of the maker is inserted, and later in the instrument occur the words "due May 1, 1902," an alteration consisting in the erasure of the maker's name from such blank, and the insertion of the words "May 1st after" date, do not change the legal effect of the instrument. Bailey v. Gilman Bank, 99 Mo. A. 571, 74 SW 874.

85. See supra §§ 63, 75, 77.

86. Gillett v. Sweat, 6 Ill. 475; Snell v. Davis, 149 Ill. A. 391; Citizens' Sav. Bank v. Halstead, 42 Ind. A. 79, 84 NE 1098; Davis v. Coleman, 29 N. C. 424.

[a] **Where a note is signed by three persons,** payable to one of them, and the latter's signature as maker is afterward erased, and he indorses the note, the other two makers are discharged. Morrison v. Grath, 78 Mo. 434.

[b] **The erasure of the signature of one of several indorsers** on a note, without the knowledge or consent of the others, while the note is in the possession of the payee, is such an alteration as avoids the liability of the nonconsenting parties to the contract. St. Louis International Bank v. Parker, 88 Mo. A. 117.

[c] **The erasure of a signature with intent to release** from a joint obligation will, as to the party released, have the same effect as the destruction of the instrument in toto. Nashville First Nat. Bank v. Shook, 100 Tenn. 436, 45 SW 338.

[d] **Custom of erasing names upon taking up draft.**—Where it is shown to be the custom to erase all names upon a draft after it is taken up by the acceptors, the erasure of the name of a drawer on the bill paid by the acceptor for the drawer's accommodation will not destroy the acceptor's right of recovery. Matter of O'Flaherty, 7 La. Ann. 640.

87. U. S.—Smith v. U. S., 2 Wall. 219, 17 L. ed. 788.

Ind.—State v. Blair, 32 Ind. 313.

Iowa.—State v. Craig, 58 Iowa 238, 12 NW 301.

Ky.—Bracken County v. Daum, 80 Ky. 888.

Miss.—Love v. Shoape, 1 Miss. 508.

Mo.—State v. Findley, 101 Mo. 217, 14 SW 185; Briggs v. Glenn, 7 Mo. 572.

Pa.—Rittenhouse v. Levering, 6 Watts & S. 190; Barrington v. Washington Bank, 14 Serg. & R. 405.

Tex.—Collins v. State, 16 Tex. A. 274; Kiser v. State, 13 Tex. A. 201 (bail bond).

Vt.—Dewey v. Bradbury, 1 Tyler 186.

W. Va.—Piercy v. Piercy, 5 W. Va. 199.

[a] **Suit by obligor after discharge of coöbligors.**—But, since a discharge of one joint obligor does not discharge the others, in the absence of a showing that such discharge was without their consent, defendant's contention, in a suit to foreclose a mortgage, brought by a guarantor who has paid the debt and become subrogated to the rights of the guarantee, that plaintiff was discharged from liability on his guaranty of the original debt by reason of the erasure of the name of one of his coöbligors, is not tenable. Blewett v. Bash, 22 Wash. 536, 61 P 770.

88. Lynch v. Hicks, 80 Ga. 200, 4 SE 255 (holding that where the payee of notes, intending to negotiate them, signed the notes as security, but, upon being informed that they were not in proper form for negotiation, erased his signature and indorsed them, this was not a material alteration affecting the liability of the maker, which rendered them void in the hands of the indorsee); Broughton v. West, 8 Ga. 248; Peo. v. Call, 1 Den. (N. Y.) 120, 43 AmD 655 (holding that the instrument was one of value so as to be the subject of larceny); Huntington v. Finch, 3 Oh. St. 445; Tutt v. Thornton, 57 Tex. 35 (holding that the erasure of the name of one who had indorsed a note at its inception, as surety for the maker, and who afterward took up the note and sued the maker upon it, was not material). See also Bills and Notes [7 Cyc 1048].

[a] **The erasure of the name of a guarantor from a bond** while it is in the hands of the guarantee does not affect the liability of the principal. Logue v. Smith, Wright (Oh.) 10.

89. Young v. Currier, 63 N. H. 419 (holding that where one of the joint makers of a promissory note is an infant, and he refuses to be held liable upon the note within a reasonable time after arriving at the age of twenty-one, the erasure of his name from the note is an immaterial alteration).

90. Rensselaer, etc., Plank Road Co. v. Wetsel, 21 Barb. (N. Y.) 56.

[a] **Erasing from a subscription paper** the name of a previous subscriber to the stock of a corporation does not affect the liability of a subsequent subscriber. Such alteration of the subscription list is deemed immaterial, as each subscription forms a separate contract with the company, and, in the absence of proof, there could be no presumption that the party was induced to subscribe because previous subscribers had done so. Whittlesey v. Frants, 74 N. Y. 456. But see Texas Printing, etc., Co. v. Smith, 4 Tex. A. Civ. Cas. § 4, 14 SW 1074 (holding that, where a subscription was signed by "The Fort Worth Printing House. J. K. Millican, Manager," and when the corporation was formed the contract was so changed as to make it the personal subscription of Millican, the change was material as making the contract speak a different language, although the liabilities of the parties were several).

[b] **Attaching signatures of different papers.**—Where one signs a subscription paper and others sign another subscription paper for the same purpose, the papers being identical except that the one signed by the latter contains the words "the amount set opposite our names," and the signatures to the latter are detached and appended to the first, it is not an alteration. Defendant, who signed the first subscription paper to which the latter signatures were appended, is not discharged by such act. The contracts were identical, therefore there was no alteration. Davis v. Campbell, 93 Iowa 524, 61 NW 1053. See also Sodus Bay, etc., R. Co. v. Hamlin, 24 Hun (N. Y.) 390.

91. Jewett v. Valley R. Co., 34 Oh. St. 601 (holding that where a person who has been appointed to obtain subscriptions to the stock of a corporation, and is intrusted with the subscription book for that purpose, after subscribing for a certain number of shares in good faith induces others to subscribe, but on returning the book to the secretary of the cor-

but not always so, such a change is material as rendering all the promisors apparently jointly and equally liable to the holder as well as between themselves, and tending thus far to lessen the ultimate liability of the original maker or obligors, as well as affecting the remedy on the instrument.[92] It has been held that this will be a material alteration as to the original maker, notwithstanding the person who thus signed ostensibly as maker, in fact signed only as surety;[93] but by other authorities

poration, who is also a director, with his knowledge but without the knowledge of the other subscribers reduces the number of shares placed opposite his name, the alteration will not affect the liability of those whom he induced to subscribe, for the alteration is a nullity, and he should be held to the purchase of the whole number of shares to which he originally subscribed).

92. Ala.—Baker v. Lehman, etc., Co., 65 S 321; Brown v. Johnson, 127 Ala. 292, 28 S 579, 85 AmSR 134, 51 LRA 403; Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140 (which involved the change by a maker of his signature by adding "& Co." after indorsement, the court holding that the indorser was discharged, upon the principle that the addition of a maker as such discharges parties already bound by the paper. The change was made by the maker before negotiating the note, at the instance of plaintiff).

Ill.—Soaps v. Eichberg, 42 Ill. A. 375.

Ind.—Houck v. Graham, 106 Ind. 195, 6 NE 594, 55 AmR 727; Nicholson v. Combs, 90 Ind. 515, 46 AmR 229; Bowers v. Briggs, 20 Ind. 139 (which was the addition of a maker living in another county, thus affecting the venue of the action on the note); Henry v. Coats, 17 Ind. 161 (discharge of indorser by addition of maker); Emerson v. Opp, 9 Ind. A. 581, 34 NE 840, 37 NE 24 (holding that the maker will be discharged by the addition of other makers without the former's knowledge).

Iowa.—Beem v. Farrell, 108 NW 1044 (fraudulent addition of a maker renders the instrument void); Browning v. Gosnell, 91 Iowa 448, 59 NW 340 (holding that, if a second signature is added by the payee, the original maker is discharged and the additional parties are liable, and that if another signature is subsequently procured then the first and the additional signer are released and the last is liable); Sullivan v. Rudisill, 63 Iowa 158, 18 NW 856; Berryman v. Manker, 56 Iowa 150, 9 NW 103; Hamilton v. Hooper, 46 Iowa 515, 26 AmR 161; Dickerman v. Miner, 43 Iowa 508; Hall v. McHenry, 19 Iowa 521, 87 AmD 451.

Ky.—Singleton v. McQuerry, 85 Ky. 41, 2 SW 652, 8 KyL 710; Shipp v. Suggett, 9 B. Mon. 5; Limestone Bank v. Penick, 5 T. B. Mon. 25. In Pulliam v. Withers, 8 Dana 98, 33 AmD 479, the note, after issuance by the principal, was signed by a surety at the instance of the obligee but without the knowledge of the principal, and the doctrine of Limestone Bank v. Penick, supra, was reaffirmed; but, it being unnecessary to do so, the court declined to decide whether the mere addition of another obligor would vitiate the paper in the absence of any change in the body of it.

Mo.—Allen v. Dornan, 57 Mo. A. 288; Farmers' Bank v. Myers, 50 Mo. A. 157 (where it was held that the addition of a forged signature as maker to a note after its execution and delivery was material); Lunt v. Silver, 5 Mo. A. 186. But see Williams v. Jensen, 75 Mo. 681 (where it was held, inconsistently with the general doctrine in this state, that any change by the party holding the instrument will vitiate it, as well as with the subsequent holding in Farmers' Bank v. Myers, supra, which was consistent with the doctrine referred to, that the addition of the signature of a married woman to a note will not constitute an alteration unless it appears that she had a separate estate).

N. Y.—Chappell v. Spencer, 23 Barb. 584 (holding that where the holder of a note, upon negotiating and obtaining money on it, instead of indorsing it signs his name to the note under the names of the makers, adding to his name the word "surety," it is a material alteration). This case was followed to the effect that the addition of two names to a promissory note as makers, after its execution and delivery, without the knowledge or consent of a person who has previously signed it as surety for the original maker, is a material alteration of the instrument, as against such surety, and furnishes him, at his election, with a valid defense to the note. McVean v. Scott, 46 Barb. 379 [dist Brownell v. Winnie, 29 N. Y. 400, 86 AmD 314; McCaughey v. Smith, 27 N. Y. 39]. So, on the authority of Chappell v. Spencer, supra, it was held that, where a lease is so changed by the landlord as to make other parties to it without the consent of those who are already parties, they are discharged. Wright v. Kelley, 4 Lans. 57.

Oh.—Wallace v. Jewell, 21 Oh. St. 163, 8 AmR 48 (recognizing the rule where the maker is added as such, but not where he is intended merely as a surety or guarantor, as where the new party so signed through inadvertence or mistake).

Tex.—Harper v. Stroud, 41 Tex. 367; Ford v. Cameron First Nat. Bank, (Civ. A.) 34 SW 684.

Wash.—Handsaker v. Pedersen, 71 Wash. 218, 128 P 230 (under Remington & B. Code §§ 3514, 3515).

Eng.—Gardner v. Walsh, 5 E. & B. 83, 85 ECL 83, 119 Reprint 412 [overr Catton v. Simpson, 8 A. & E. 136, 35 ECL 518, 112 Reprint 788]; Clerk v. Blackstock, Holt N. P. 474, 3 ECL 188 (holding that the signing of a surety as maker, after execution and delivery of a simple promissory note, without the assent of the maker and not in accordance with the original agreement, made a new contract, and as such required a new stamp under the Stamp Act).

Ont.—Carrique v. Beaty, 24 Ont. A. 302 [rev 28 Ont. 175] (holding that the addition of another maker to a note which was made by two originally, one for the accommodation of the other, discharged the original accommodation maker where the additional maker was not added as surety); Reid v. Humphrey, 6 Ont. A. 403 (from which it appears that the added signature was not genuine).

[a] **"The very decided weight of authority** (1) is that the adding the name of another maker to a bill or note is a material alteration, such as will discharge the original parties not consenting thereto, without inquiry as to whether the alteration is injurious or beneficial to them." Per Day, J., in Dickerman v. Miner, 43 Iowa 508, 509. (2) "It is the law that if one party to a written contract procures a third person to become a joint obligor therein, or makes any change on the face of the paper which varies its legal operation and effect, such alteration invalidates the contract in toto." Baker v. Lehman, etc., Co., (Ala.) 65 S 321, 324.

[b] **Reason for rule.**—(1) The reason for the rule is that the identity of the instrument is altered and its integrity affected by the change. Singleton v. McQuerry, 85 Ky. 41, 2 SW 652, 8 KyL 710. (2) "One of the effects of the alteration is to destroy the identity of the note, and this, if another maker be a security and have indemnity, may greatly embarrass or possibly entirely defeat its enforcement. If the original makers have a demand against the payee which they could lawfully set off against the note, the addition of another maker would destroy that right. The place of residence of an additional maker may be such as to permit the payee or holder to institute suit upon the note in another county from which he otherwise could have done, and thus some of the makers may be required to go to a foreign county to present any defenses that may exist to the note, or if the name of the additional maker be so placed upon the note as to indicate him as the principal maker, as it is claimed it does in this case, then all makers who are merely sureties may be greatly prejudiced and damaged and doubtless such an alteration in a note might prejudice the makers in other ways which cannot be anticipated and suggested in advance." Per Boggs, J., in Soaps v. Eichberg, 42 Ill. A. 375, 382.

[c] **Mere silence** on the part of the makers of a note vests no authority in the payee to procure an additional signature to the note, and his action in doing so avoids it. Nicholson v. Combs, 90 Ind. 515, 46 AmR 229.

[d] **Inserting the name of an additional vendor** in an auctioneer's memorandum of sale annuls the instrument. Schmidt v. Quinzel, 55 N. J. Eq. 792, 38 A 665.

[e] **Inserting another name in mileage book.**—The alteration of a contract contained in a mileage book restricting its use to persons named therein, by inserting the name of another person, is material and renders the ticket invalid. Holden v. Rutland R. Co., 73 Vt. 317, 50 A 1096.

[f] **Addition of signature of wife to mortgage.**—(1) Where a mortgage is executed and delivered as a complete and perfect instrument by the husband alone, with the intention and understanding that his wife shall not sign it, and the mortgagee fraudulently procures the wife to sign and acknowledge it, and, having thus obtained her signature, without the knowledge or consent and against the will and wish of the husband, so alters the mortgage and acknowledgment as to make it a mortgage by two persons instead of by one, whereby it will become a lien upon the homestead as well as the other land described in it, the alteration is material. Cutler v. Rose, 35 Iowa 456. (2) But a mortgage is not materially altered by the addition by the grantee of the name of the grantor's wife as a party signing the same for the purpose of releasing dower (Kendall v. Kendall, 12 Allen (Mass.) 92); (3) or by the act of the widow of a mortgagor in signing her name at the bottom of a mortgage and having another person sign as witness (Heath v. Blake, 28 S. C. 406, 5 SE 842).

[g] **An accommodation indorser of a note is discharged,** where other parties, without his knowledge or consent, afterward sign as makers. Handsaker v. Pedersen, 71 Wash. 218, 128 P 230.

93. Sullivan v. Rudisill, 63 Iowa 158, 18 NW 856; Chappell v. Spencer, 23 Barb. (N. Y.) 584; Ford v. Cameron First Nat. Bank, (Tex. Civ. A.) 34 SW 684, 686 (where Browne, C. J., referring to the cause of Mersman v. Werges, 112 U. S. 139, 5 SCt 565, 28 L. ed. 641, a leading case on the opposite side of this question, said: "To follow it, however, would virtually do away with the rule established in this state and the great majority of the others to which we have referred, because in almost every case it could be shown that the additional signer meant only to secure or guar-

ties the addition of the name of a surety to a promissory note is not regarded as such an alteration as will discharge the maker.[94]

[§ 83] **(2) Rule Permitting Addition.** On the other hand, the question is controlled by considerations of the character of the change, as whether it is in the body of the instrument or otherwise;[95] of the extent to which the instrument has been completed in its execution;[96] and of authority to be implied from the condition of the instrument, as to its state of completeness,[97] in connection with the relation of the parties.[98]

The addition of a principal promisor is generally held not to be a material change which will discharge the original maker;[99] but the general current of authorities which permit such a change tends to this conclusion: That, although the addition of a maker is in the form of a joint promisor, whether made before or after the negotiation of the instrument, it is not an alteration which will discharge the maker where the addition is in fact that of a surety or guarantor only.[1]

anty the payment of the note. The case at bar furnishes an apt illustration of this fact. Of course, if the additional signature is placed upon the note as a surety or as a warrantor, this does not alter the instrument; it remains intact. The reason why the addition of a name to a note, as a joint maker, after its issuance, materially alters it, is because it changes the number of parties and their relative rights; it changes the rate of contribution; and it changes the character and description of the instrument. The original obligor may thereby be subjected to a suit in a county other than that of his residence, and suffer inconvenience and injury, as was done in this very case. If it is deemed expedient to obtain an additional name to a note to make it more secure, and not for the purpose of obtaining some undue advantage, the holder could easily obtain the consent of the maker. We believe that the rule which requires that the integrity and identity of this class of paper shall be maintained presents no hardship, and is founded on sound policy"); Clerk v. Blackstock, Holt N. P. 474, 3 ECL 188. See also cases supra note 92.

94. See infra § 83.

95. Indorsements, memoranda, and marginal writings see generally supra §§ 66–72.

96. Time of alteration see generally infra §§ 90–95.

97. Authority and consent generally see infra §§ 103–118.

98. U. S.—Mersman v. Werges, 112 U. S. 139, 141, 5 SCt 65, 28 L. ed. 641, 642 (where Gray, J., speaking of the character of a change involving the effect of the addition of signatures, said: "The present case is not one of a change in the terms of the contract, as to amount or time of payment, but simply of the effect of adding another signature, without otherwise altering or defacing the note. An erasure of the name of one of several obligors is a material alteration of the contract of the others, because it increases the amount which each of them may be held to contribute" [referring to Smith v. U. S., 2 Wall. 219, 17 L. ed. 788; Martin v. Thomas, 24 How. 315, 16 L. ed. 689]).

Ill.—Trainor v. Adams, 54 Ill. A. 523.

Ind.—Hoffman v. Butler, 105 Ind. 371, 4 NE 681 (holding that a note is not a completed instrument until delivery, and that the possession of it by one joint maker impliedly authorizes him to secure an additional indorser before completing it by delivery); Bowser v. Rendell, 31 Ind. 128; State v. Pepper, 31 Ind. 76 (holding that where a surety signs a bond before the names of other sureties have been inserted in the body thereof, and in this condition delivers it to the principal obligor, he will be held as agreeing that the names of additional sureties may be filled in and added to the bond, the court saying that other cases seem to rest upon the fact that a perfect instrument had been executed by the original surety, and thereafter the names of other sureties were inserted into the body of the instrument in disregard of the technical rule at common law concerning the alteration of sealed instruments, and that Harper v. State, 7 Blackf. (Ind.) 61, and Oneale v. Long, 4 Cranch (U. S.) 60, 2 L. ed. 550, if to be sustained, must rest upon this latter hypothesis).

Iowa.—Epperly v. Ferguson, 118 Iowa 47, 91 NW 816 (holding that the subsequent signature of a wife to a contract to convey, not at first considered necessary, is no alteration).

Ky.—Edwards v. Mattingly, 107 Ky. 332, 53 SW 1032, 21 KyL 1045 (holding that the addition of another name to a promissory note before its delivery does not release those previously signing it, although done without their knowledge); Jones v. Shelbyville F., etc., Ins. Co., 1 Metc. 58 (which involved the erasure of the name of a surety from the body of a note and the procurement of the signature of another surety, after signing by one also named in the body of the note as surety, without his consent, and although the payee of the note, which was in renewal of another note, knew of the original arrangement for the execution thereof with the parties first written in the note as sureties); Commonwealth Bank v. McChord, 4 Dana 191, 29 AmD 398; Evans v. Partin, 56 SW 648, 22 KyL 20.

Minn.—Ward v. Hackett, 30 Minn. 150, 14 NW 578, 44 AmR 187.

Ont.—Halcrow v. Kelly, 28 U. C. C. P. 551.

[a] **Addition of acceptor.**—After a bill has been accepted by the parties to whom it is addressed, and the bill is perfected, the writing of an additional name across the face of the paper as acceptor, even with the knowledge of the party, and the discounting of it, without the consent of the indorser, do not vitiate the paper. Smith v. Lockridge, 8 Bush (Ky.) 423.

[b] **Addition of signatures to subscription contract.**—Since the liability of the different signers of a contract of subscription to stock in a corporation is several and not joint, the addition of signatures thereto is not a material alteration. Sodus Bay, etc., R. Co. v. Hamlin, 24 Hun (N. Y.) 390.

[c] **The addition of the names of persons having no title to the land described in a deed** does not affect the validity of the deed as transferring the title and estate of the persons properly named in it. Holladay-Klotz Land, etc., Co. v. Moss Tie Co., 89 Mo. A. 556.

99. Rudulph v. Brewer, 96 Ala. 189, 11 S 314; Montgomery R. Co. v. Hurst, 9 Ala. 513. The last case has been criticized by the observation that the court admitted therein that the identity of the instrument might have been destroyed by the change (Chappell v. Spencer, 23 Barb. (N. Y.) 584; Harper v. Stoud, 41 Tex. 367); but both the first cases cited may be reconciled with those infra note 1, because it appears from them that the change was probably made to enable the holder to negotiate the paper by adding sureties thereto, and not by adding makers as such, although if not they may be said not to state the law in Alabama. See Brown v. Johnson, (Ala. 1900) 28 S 579. In Dart v. Quaid, 9 OntWR 714, 716, Anglin, J., said: "The addition of the names of 2 makers to the note after it was signed by the other 4, even if the latter did not contemplate that this should be done, is not . . . a material alteration which would vitiate the note or affect the liability of the 4 original makers."

1. U. S.—Mersman v. Werges, 112 U. S. 139, 141, 5 SCt 65, 28 L. ed. 641 (where Gray, J., said: "The addition of a new person as a principal maker of a promissory note, rendering all the promisors apparently jointly and equally liable, not only to the holder, but also as between themselves, and so far tending to lessen the ultimate liability of the original maker or makers, has been held in the courts of some of the States to be a material alteration. . . . However that may be, yet where the signature added, although in form that of a joint promisor, is in fact that of a surety or guarantor only, the original maker is, as between himself and the surety, exclusively liable for the whole amount, and his ultimate liability to pay that amount is neither increased nor diminished; and, according to the general current of the American authorities, the addition of the name of a surety, whether before or after the first negotiation of the note, is not such an alteration as discharges the maker"); Butte First Nat. Bank v. Weidenbeck, 97 Fed. 896, 38 CCA 131 [rev 87 Fed. 271].

Ala.—Rudulph v. Brewer, 96 Ala. 189, 11 S 314; Montgomery R. Co. v. Hurst, 9 Ala. 513.

Ill.—Ryan v. Springfield First Nat. Bank, 148 Ill. 349, 35 NE 1120; Ives v. McHard, 2 Ill. A. 176 [aff 103 Ill. 97] (where the additional signature was a surety, although the court expressed the opinion that the addition of a maker would not discharge the original maker).

Ind. T.—Taylor v. Acom, 1 Ind. T. 436, 45 SW 130 (holding that the addition of the name of another maker to a note, at the instance of the payee, without the consent of the maker already bound, is an immaterial alteration which does not vitiate the instrument, since it does not change the original maker's liability).

Ky.—Casson v. Wallace, 4 Bush 388 (where the payee, with the intention of becoming a guarantor, signed a note by mistake, subscribing his name under that of the maker).

Mass.—Stone v. White, 8 Gray 589 (holding that the signature by a third party added to a note payable on demand, after its execution and delivery by the original makers and for a new consideration, is an independent contract not requiring the consent of the original promisors).

Mich.—Union Banking Co. v. Martin, 113 Mich. 521, 71 NW 867 (holding that, where one executes and delivers a note for the purpose of procuring an extension of time on the obligation of another, the fact that the other subsequently signs it is no material alteration); Miller v. Finley, 26 Mich. 249, 12 AmR 306 (holding that the addition of a maker after delivery would not discharge the original maker). Upon the authority of this case it was held in Gano v. Heath, 36 Mich. 441, that the procuring of an additional maker at the instance of one of two joint makers, without knowledge on the

The indorsement of a bill of exchange by the individual members of the firm which drew it, after acceptance and without knowledge on the part of the acceptor, is not material.[2]

Under the Negotiable Instruments Law, in some jurisdictions, the indorsement of a note, after its indorsement in blank by the payee, by a person in no way interested in it, without the knowledge of the maker, does not change the relations of the original parties, and hence is not a material alteration.[3]

[§ 84] **(3) Liability of Added Promisor.** The general rule is that the person who thus signs a note as an additional maker or surety will be bound as upon a new contract.[4] So, while the addition of a maker or surety may discharge prior makers or sureties not assenting to the change, the subsequent signers will nevertheless be liable, as the rule that the addition of a party will discharge those previously signing applies only to nonconsenting parties.[5]

[§ 85] **23. Retracing Original Writing.** To retrace words already written is not of itself sufficient to vary the legal effect of the instrument, as where pencil writing is retraced with ink, and constitutes no alteration.[6]

[§ 86] **24. Instruments in Duplicate.** Where an instrument is executed in duplicate, the material alteration by one of the parties of the copy in his possession renders it unenforceable by him,[7] but does not affect the estate or rights under the con-

part of the payee, would not discharge the other original maker.

Nebr.—Royse v. St. Joseph State Nat. Bank, 50 Nebr. 16, 69 NW 301; Barnes v. Van Keuren, 31 Nebr. 165, 47 NW 848 (holding that, where additional signatures were procured after the execution and delivery of the note, the original maker was not discharged because his liability was neither increased nor lessened and, being added after the execution of the note, plaintiff could not insist that the release of the original maker was sufficient consideration to support the action against the additional signers).

N. Y.—Brownell v. Winnie, 29 N. Y. 400, 408, 86 AmD 314 (involving the addition by a payee of his own name as original maker, and distinguishing Gardner v. Walsh, 5 E. & B. 83, 85 ECL 83, 119 Reprint 412, in that the question in that case involved the addition of a name to a joint and several note signed by two makers, Mullin, J., saying: "I have found no case, and none has been cited, holding that a name added to a several note is such a material alteration as avoids it"); McCaughey v. Smith, 27 N. Y. 39 (which recognizes as the result of later authorities that the addition of another maker to a note made by one or more is an alteration of the contract, because, instead of being the several or the joint obligation of the original party or parties, it becomes the joint or joint and several undertaking of different contractors, but distinguishes the principle from that involved in this case, which was a note transferred to plaintiff for goods sold, and afterward, at the request of plaintiff, for the purpose of adding the security of the name of a particular person, that person was procured to sign his name to the note, and it was held that this was not adding a joint maker because the note had already been negotiated, but was subscribing to become surety upon the note already made and negotiated); Denick v. Hubbard, 27 Hun 347 (involving the addition of the name of a payee under that of the two original makers upon transferring it to another person as well as the addition of the name of the last holder above the signatures of all the other parties upon his transferring it to still another person); Card v. Miller, 1 Hun 504; Burton v. Baker, 31 Barb. 241; Partridge v. Colby, 19 Barb. 248; Cobb v. Titus, 13 Barb. 45 [aff 10 N. Y. 198, Seld. 225].

Oh.—Wallace v. Jewell, 21 Oh. St. 163, 8 AmR 48 (holding that the addition of a maker to a joint and several promissory note discharged the original signers; but the court was of the opinion that, if the object of the signature had been to guarantee payment or furnish additional security otherwise than by becoming or assuming to become a joint maker, there could be no objection to the accomplishment of such an object in this manner. The court refused to assent to the proposition that because the pronoun "I" was used in the body of the note it was the several note of each signer, and not the joint note of all).

Eng.—Ex p. Yates, 2 De G. & J. 191, 59 EngCh 152, 44 Reprint 961 (which case has been understood as based upon some evidence that the name was in fact added as an indorser).

See Reid v. Humphrey, 6 Ont. App. 403.

[a] **Where a third person places his name on a note as guarantor,** by agreement with the payee, and without the privity of the maker, it is not a material alteration which affects the validity of the note as against the maker, nor is the erasure of such name by a subsequent agreement between the same parties material. Butte First Nat. Bank v. Weidenbeck, 97 Fed. 896, 38 CCA 131 [rev 87 Fed. 271].

[b] **Payee signing note as security.**—Where the payee of a promissory note signs his name as security on the face of it and also indorses it by writing his name on the back, it is not a material alteration; the signature by the payee as security has merely the legal effect of binding him as indorser, and does not alter or change the legal import of the note. Morgan v. Vandermark, 1 Tex. A. Civ. Cas. § 511.

2. Blair v. State Bank, 11 Humphr. (Tenn.) 83.

3. Ensign v. Fogg, 177 Mich. 317, 143 NW 82 (holding that, under the Negotiable Instruments Law §§ 126, 127, making an instrument void for a material alteration, §§ 65, 69, 70, making an indorser in blank below the indorsement of the payee liable only as a subsequent indorser, and § 50, permitting the holder to strike out indorsements not necessary to his title, such indorsement by a subsequent indorser was not a material alteration, defeating recovery). See also statutory provisions.

4. Favorite v. Stidham, 84 Ind. 423; Crandall v. Auburn First Nat. Bank, 61 Ind. 349; Rhoades v. Leach, 93 Iowa 337, 61 NW 988, 57 AmSR 281; Browning v. Gosnell, 91 Iowa 448, 59 NW 340; Sullivan v. Rudisill, 63 Iowa 158, 18 NW 856; Hamilton v. Hooper, 46 Iowa 515, 26 AmR 161; Dickerman v. Miner, 43 Iowa 508; Evans v. Partin, 56 SW 648, 22 KyL 20; Partridge v. Colby, 19 Barb. (N. Y.) 248. See also Bills and Notes [7 Cyc 655].

5. Hochmark v. Richler, 16 Colo. 263, 26 P 818; Thompson v. Williams, 1 Fla. 56; Cotten v. Williams, 1 Fla. 37; Houck v. Graham, 106 Ind. 195, 6 NE 594, 55 AmR 727; Crandall v. Auburn First Nat. Bank, 61 Ind. 349; Rhoades v. Leach, 93 Iowa 337, 61 NW 988, 57 AmSR 281; Browning v. Gosnell, 91 Iowa 448, 59 NW 340; Hamilton v. Hooper, 46 Iowa 515, 26 AmR 161; Dickerman v. Miner, 43 Iowa 508.

[a] **Who may object.**—(1) If the surety who might have been released by such a change does not take advantage of it, those who subsequently signed with knowledge of the change cannot escape liability to contribute to him by objecting that the change discharged him from liability. Houck v. Graham, 106 Ind. 195, 6 NE 594, 55 AmR 727. (2) So a surety cannot set up that he signed without the knowledge or consent of the principal, as the principal's relations or liabilities are not altered thereby. Hughes v. Littlefield, 18 Me. 400.

[b] **Consideration.**—(1) If, after the complete execution and delivery of a note, the payee procures the signature of an additional promisor as surety only, the last signer is not bound in the absence of a new consideration. Favorite v. Stidham, 84 Ind. 423; Stone v. White, 8 Gray (Mass.) 589; Barnes v. Van Keuren, 31 Nebr. 165, 47 NW 848. (2) But in Hughes v. Littlefield, 18 Me. 400, it was held that, where a note was signed, after its original execution and delivery, by another as surety, the contract between the original parties was a good consideration, and the last signer was liable as a joint promisor. In Stack v. Dowd, 15 Ont. L. 331, 10 OntWR 633, it was held that where a promissory note made by two persons was signed after maturity by defendant at the payee's request, without any agreement or understanding for an extension of time or for forbearance, that even if the original makers were released by the execution of the note by defendant, such release would not be sufficient consideration to support the promise of defendant, inasmuch as there was no evidence of a desire, request, or consent on defendant's part that the other parties to the note should be released.

6. Reed v. Roark, 14 Tex. 329, 65 AmD 127.

[a] **Retracing name of party.**—Where, in attempting to retrace a part of the obligor's name in a bond which has been blotted in ink, the obligee misspells the name, but no fraud is imputed to him, and the sound of the name is not changed, the act is immaterial and does not avoid the instrument. Dunn v. Clements, 52 N. C. 58.

[b] **Retracing in ink pencil figures** in a contract is not a material alteration thereof. Tutwilder v. Burns, 160 Ala. 386, 49 S 455.

7. Jones v. Hoard, 59 Ark. 42, 26 SW 193, 43 AmSR 17 (holding that the unauthorized change by a lessee in his counterpart of duplicate leases, although it annuls his counterpart, does not affect his rights under the contract).

[a] **Immaterial change.**—Where a contract for the conveyance of land was executed in duplicate, and the vendor's wife was present at its execution and offered to do anything necessary to the legal execution of the contract, but did not sign it for the reason that her signature was deemed unnecessary, and later, and before the time specified for the conveyance, she signed the copy of the contract in the possession of her husband and notified the vendee that she had done so, and offered to sign the copy held by him, the addition

tract or the duplicate instrument which remains intact.[8] If the alteration consists of an innocent alteration made in one of the duplicates so that there may be a recovery upon the original consideration, the engagement of the parties may be established and recovery had by the unaltered duplicate,[9] but it has been held that this cannot be done if the alteration by plaintiff was fraudulent.[10]

[§ 87] **25. Alteration of One of Several Instruments—a. In General.** The alteration of any one of several writings, all of which are material to show the actual agreement of the parties, will invalidate all of the papers;[11] but changes in one of such instruments may be authorized by the terms of the other.[12]

Where, however, the instruments are independent of each other, although constituting a part of the same transaction, an alteration of one of them does not vitiate the other,[13] as where the alteration is of one or more of a series of notes given in a transaction.[14]

[§ 88] **b. Note and Mortgage.** The authorities

of the wife's signature was merely carrying out the intention of all of the parties to execute a valid contract, and did not avoid the contract. Epperly v. Ferguson, 118 Iowa 47, 91 NW 816.

8. Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 AmD 427.

[a] **Alteration of mere copy.**—In Miller v. Yockey, 49 Colo. 303, 112 P 772, where defendant made a written contract with plaintiff to furnish material and make repairs on plaintiff's ranch, and to enable defendant to purchase the materials plaintiff loaned to defendant three hundred dollars, taking defendant's note to which there was a reference in the contract, and plaintiff kept the original contract, which was silent as to the time of completion, and also the original note, and sent defendant a copy of the note, across the top of which was written, "This agreement to be completed within 90 days," it was held that the original note was defendant's contract, and hence that the insertion of the words on the copy was not an alteration of the contract, as such copy was not a duplicate original of the contract.

[b] **Alteration of duplicate of lease.**—(1) Where, in an action by a lessor to cancel a lease which had been executed in duplicate, it appears that the duplicate retained by the lessee was altered by him, without the consent or knowledge of the lessor, the alteration does not affect the rights of the lessee under the contract actually made by the parties, for, the lease being executed in duplicate, there are two leases, and both are originals; and, although the alteration of the lease held by the lessee annuls that, the lease retained by the lessor is sufficient to sustain the contract of the parties. Jones v. Hoard, 59 Ark. 42, 26 SW 193, 43 AmSR 17. (2) So also where a lease is executed in duplicate, and each party retains one of the duplicates, an alteration by the grantee of the rent in the lease retained by him does not destroy the estate granted to him, for that is secured to him by the valid lease in the possession of the other party. Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 AmD 427.

[c] **Attaching all names on duplicate subscription lists to one paper.**—(1) Where subscriptions to stock are signed on different printed papers, and the names on all the papers are cut off and pasted together on one of them, such mutilation is not a material alteration which will release the subscribers from their liability. Sodus Bay, etc., R. Co. v. Hamlin, 24 Hun (N. Y.) 390. (2) In Davis v. Campbell, 93 Iowa 524, 61 NW 1053, it was held that a subscription contract was not invalidated by the attachment thereto of certain names subscribed to a contract precisely similar, with the exception that it contained the words "the amount set opposite our names."

[d] **In Missouri** where one party to a contract alters his duplicate copy of the contract without the knowledge or consent of the other party, he thereby nullifies the whole contract, regardless of his intent in doing so. Koons v. St. Louis Car Co., 208 Mo. 227, 101 SW 49. As to effect of intent see infra § 96.

9. Hayes v. Wagner, 220 Ill. 256, 77 NE 211 [aff 113 Ill. A. 299]; Hayes v. Wagner, 89 Ill. A. 390 (holding that proof by a duplicate seems to be confined to cases where the alteration in the other copy is innocently made). See also Day v. Ft. Scott Inv., etc., Co., 53 Ill. A. 165 [aff 153 Ill. 293, 38 NE 567] (which was an action for specific performance of a contract to purchase land, the complainant's copy having been changed by his attorney without any fraudulent intent and under a misapprehension, the court holding that, as the matter added was not necessary to the efficiency of the instrument, it would not affect the validity of the original instrument, and that if material, then, under the circumstances, equity could correct the contract); Rhodes v. Castner, 12 Allen (Mass.) 130 (where it was held that where a memorandum of a contract of sale was in duplicate, one only signed by the buyer and in possession of the seller, and the other accepted by the seller and given to the buyer, the subsequent addition by the latter of his own signature to his part, without fraudulent intention, was not a material alteration affecting the character of the memorandum). And see Young v. Cohen, 42 S. C. 328, 20 SE 62.

[a] **"If one of the duplicates is unaltered there is original primary evidence** of the contract as agreed to by the parties, although the other duplicate has been destroyed, by alterations or otherwise. We see no good reason why the same principle upon which a recovery is allowed on the original consideration in case of an alteration without fraudulent intent, should not be applied in a case where one of the duplicates has been innocently changed without fraudulent intent." Per Cartwright, C. J., in Hayes v. Wagner, 220 Ill. 256, 260, 77 NE 211 [aff 113 Ill. A. 299].

[b] **Where a contract in writing for the sale of land is made in two parts,** between the vendor by his agent and the vendee, without being witnessed and acknowledged, and after the power of attorney authorizing the agent to make the contract is revoked the agent, for the purpose of entitling the contract to be recorded, without the privity of the vendee, and without fraudulent intent, causes the copy of such contract retained by him to be attested by witnesses, and then acknowledges the execution thereof as the agent of the vendor, such attestation and acknowledgment are not such an alteration as makes the contract void, and are no defense on the part of the vendor to a bill for specific performance. Young v. Wright, 4 Wis. 163, 65 AmD 303.

10. Webster Realty Co. v. Thomas, 46 Misc. 139, 93 NYS 1077 [aff 107 App. Div. 612, 94 NYS 916] (holding that where plaintiff, in an action to recover the amount of its deposit on a contract for the purchase of real estate and expenses incurred in searching the title, was shown to have altered the counterpart of the contract delivered to it for execution as to encroachments by erasing the "s" in the words "walls" and "buildings," and to have delivered the counterpart to the vendor, so changed, and to have taken the vendor's copy of the contract in exchange therefor, without informing the vendor of the erasure, it could not recover); Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 SE 515.

11. Miller v. Stewart, 9 Wheat. (U. S.) 680, 6 L. ed. 189; Meyer v. Huncke, 55 N. Y. 412; French v. Graves, 50 App. Div. 522, 64 NYS 74.

[a] **Collateral note.**—Where the holder of a note erases the names of the indorsers on a collateral note the maker on the principal note is released. Burgess v. Brooklyn Clock Co., 2 NYCityCt 168.

12. Consaul v. Sheldon, 35 Nebr. 247, 52 NW 1104 (holding that, where specifications calling for glazed doors are expressly made a part of a building contract, the insertion of the word "glazed" in the contract as descriptive of the doors is immaterial).

[a] **Where a building contract** contains a clause by which the owner reserves the right to alter or modify the design, and the owner and architect are at liberty to make any alterations in the plan, form, construction, or details described in the drawings and specifications without making void the contract, changes made in the plan of the building and in the specifications do not vitiate the contract and hence do not release contractor's bondsmen. McLennan v. Wellington, 48 Kan. 756, 30 P 183; Kretschmar v. Bruss, 108 Wis. 396, 84 NW 429 (holding that, where a building contract contains a provision that alterations may be made in the plans and specifications and that such alterations should not vacate the contract, the sureties on a contractor's bond are not relieved by reason of alterations in the plans which do not change the character of the building).

[b] **Where an order for merchandise stipulates that a note attached thereto,** but separated therefrom by a perforated line, may be detached, the detaching of the note for the purpose of negotiating it is not a material alteration of the contract. Harrison v. Hunter, (Tex. Civ. A.) 168 SW 1036.

13. Steeley v. Steeley, 64 SW 642, 23 KyL 996 (holding that, where an application for a life insurance policy directed that it be made payable to the "estate" of the insured, and the policy was issued payable to his executor and administrator and signed, the fact that the insured altered the copy of the application returned with the policy by erasing the word "estate" and substituting the words "wife and children" does not affect the validity of the policy on the ground that the change was not in the policy but was in the copy of the application returned therewith, and this change will not affect the validity of the policy in any way as it was written by the company).

14. Edward Thompson Co. v. Baldwin, 62 Nebr. 530, 534, 87 NW 307 (holding that where a series of notes were given in payment of books sold conditionally, and proof was tendered showing that a part of the notes had been materially altered, such alteration did not vitiate the contract of conditional sale or the unpaid notes regarding which no alteration was claimed. In this case Holcomb, J.,

are not in accord as to the effect on a mortgage of the alteration of a note or bond secured thereby. In some cases it is broadly stated that an alteration of a mortgage note or bond does not affect the validity of the mortgage;[15] and these cases have been assimilated to those which hold that a mortgage given to secure the same debt represented by a note remains an available security notwithstanding the note has become barred by the statute of limitations.[16]

By the weight of authority, however, the effect of such an alteration depends upon whether the alteration was fraudulently or innocently made. If the note is materially altered, but the alteration is made without any fraudulent design, so that there may be a recovery on the original indebtedness, such alteration does not have the effect of defeating the mortgage given to secure the note[17] unless the

said: "It is contended that, there being evidence of a material alteration of the notes maturing more than twelve months after date, this not only avoids the notes altered but also the entire contract of which they formed a part and that plaintiff cannot therefore recover. We do not so regard it. It is true that the alteration as to these notes was material and would prevent any recovery on any contract resting for enforcement on their non-payment. The material alteration of a part only of a series of notes forming a part of an entire contract can have the legal effect of vitiating such contract only to the extent that it must rest on the altered instruments for enforcement. Had the defendant satisfied the notes whose validity is unquestioned, then perhaps the plaintiff would have no legal demand against him and there would be no default in any of the terms of the legal contract existing between them or any part thereof. But having a valid and legal demand for the part of the consideration represented by the unpaid notes regarding which there is no claims of alteration, the plaintiff is in as favorable position to enforce its contract as though the whole sum remained unpaid and against which there existed no valid defense").

15. Goodenow v. Curtis, 33 Mich. 505; Cheek v. Nall, 112 N. C. 370, 17 SE 80 (upon the ground that a mortgage is not regarded as merely subsidiary to the debt, but is a direct appropriation of property to its security and payment, that the remedies on a note or bond and on a mortgage are different and either may be resorted to, and that the loss of one does not cut off a resort to the other. This holding is apparently without reference to the doctrine that a fraudulent alteration destroys the original indebtedness).

[a] **In South Carolina,** in Plyler v. Elliott, 19 S. C. 257, 267, where a material alteration had been fraudulently made in a note by plaintiff, the payee, it was held by the majority of the court that the alteration did not avoid a contemporaneous mortgage executed by the principal debtor to plaintiff to secure the payment of the note. Mr. Justice McIver, however, in a dissenting opinion, contended for what appears to be the better rule. He said: "It appears to me that the question as to what effect the alteration of a note, secured by a mortgage, has upon the right to foreclose a mortgage, depends altogether upon whether such alteration was fraudulently made by the plaintiff. If it was, then the plaintiff not only loses his right of action on the note, but also his right to the aid of the court in enforcing the collection of his debt in any form. This is the penalty which he incurs for his fraud. The court withholds the use of its process to enforce the collection of a debt which may be due to a person who has, for the purpose of committing a fraud upon his debtor, made an alteration in any one of the evidences of such debt. If, however, the alteration is not shown to have been done fraudulently by the plaintiff, then the only effect is to deprive the plaintiff of the right of action upon the note or other evidence of debt which has been altered, but does not affect his right of action for the debt, if he can establish it by any other evidence. He cannot sue upon the altered note, because that is not the contract into which the defendant entered, but he still may sue for the debt and will be permitted to establish such debt by any other evidence than that afforded by the altered note, which it may be in his power to produce. . . . It seems to me that any other rule would destroy the distinction between a fraudulent and an innocent alteration of a note. The latter destroys the right of action on the note, but does not impair the right of action on the original consideration for which such note was given . . . and if the former did no more it would be placing the guilty in no worse position than the innocent. Upon the same principle, it seems to me that where a note secured by a mortgage has been fraudulently altered by the plaintiff, he not only loses his right of action on the note, but also on the mortgage." But the decision in Plyler v. Elliott, supra, was approved and followed in Smith v. Smith, 27 S. C. 166, 169, 3 SE 78, 13 AmSR 633 (where McGowan, J., said: "There seems to be an idea that there must of necessity be a difference when the note is made void by an alteration—that in such case, the act being fraudulent reaches beyond the security altered, and as a sort of penalty avoids the debt itself and all other securities. The rule as to the alteration of written securities, as announced by Mr. Greenleaf, is that, 'written instruments which are altered in the legal sense of that term, are thereby made void'—that is, the instrument altered is made void—nothing is said as to the effect on the debt itself or other securities. Gillett v. Powell, 17 S. C. Eq. 142, is our leading case on the subject, and it is suggested that, though a case of alteration, the alteration there was 'innocent,' and therefore the punishment of avoiding the debt was not applied. I do not clearly see how it can be assumed that the alteration in that case was 'innocent' "),

16. Cheek v. Nall, 112 N. C. 370, 17 SE 80; Smith v. Smith, 27 S. C. 166, 3 SE 78, 13 AmSR 633; Plyler v. Elliott, 19 S. C. 257. See also Gillette v. Smith, 18 Hun (N. Y.) 10 (where the change does not appear to have been made fraudulently).

[a] **This position is combated** upon the ground that the statute of limitations takes away only the remedy, while the fraudulent alteration of a note goes further and reaches to the debt itself and extinguishes it. Walton Plow Co. v. Campbell, 35 Nebr. 173, 52 NW 883, 16 LRA 468 and note.

Effect as dependent upon intent see generally infra § 96.

17. Cal.—Souza v. Lucas, (A.) 100 P 115 (holding that the fact that a note secured by mortgage was, after execution of the mortgage, altered by adding the name of the wife of the mortgagor did not affect the lien of the mortgage, or the right of the mortgagee to proceed only against the mortgagor, on the ground that the alteration was not material).

Ill.—Elliott v. Blair, 47 Ill. 342; Vogle v. Ripper, 34 Ill. 100, 85 AmD 298. In Brock v. Brock, 29 Ill. A. 334, it was held that the wife of the maker of a note, who, for the purpose of releasing her interest, joins in a mortgage of the lands of the husband given to secure the payment of the note cannot be heard to complain of an alteration in the mortgage note made with the consent of the husband in order to have it conform to the contract and to the condition of the mortgage.

Ind.—Bowman v. Mitchell, 97 Ind. 155 (holding that, the change in the note complained of having been made with the consent of the husband who was the sole maker of the note, the note was not destroyed thereby, and therefore the change complained of by the wife who had joined with her husband in the mortgage to secure the note could not affect the validity of the mortgage as against the wife). But see Crawford v. Hazelrigg, 117 Ind. 63, 18 NE 603, 2 LRA 139 (where, after the execution by man and wife of a mortgage to secure a note indorsed by the mortgagee for the husband and wife, the note was altered with the husband's consent, but without the consent of the wife, and it was held that the wife's inchoate interest in the land was fully discharged from the lien of the mortgage).

Iowa.—Clough v. Seay, 49 Iowa 111.

Kan.—Edington v. McLeod, 87 Kan. 426, 124 P 163, 41 LRANS 230 and note, AnnCas1913E 315 and note (holding that a note altered by the payee by increasing the rate of interest to conform to the contract is avoided, but that a mortgage given to secure it is not vitiated by such alteration); Simpson v. Sheley, 9 Kan. A. 512, 60 P 1098 (holding that a lien created by a chattel mortgage upon personal property may be enforced by replevin notwithstanding a material alteration has been made of the note evidencing the debt which the mortgage was given to secure, if such alteration is made innocently, and without any intention to defraud or injure the payer, and the debt intended to be secured still exists and can be established independently of the altered note).

Mass.—Jeffrey v. Rosenfeld, 179 Mass. 506, 61 NE 49 (semble, that under St. [1898] c 533 § 124, where a loan of money is secured by a note and mortgage, a material alteration of the note without fraud may not cancel the debt or avoid the mortgage).

Minn.—Wilson v. Hayes, 40 Minn. 531, 42 NW 467, 12 AmSR 754, 4 LRA 196 and note.

Mo.—Hoffman v. Molloy, 91 Mo. A. 367; Baskin v. Wayne, 62 Mo. A. 515 (holding that, where a note secured by a mortgage on horses was altered by the addition of the names of sureties who signed the note without the consent of the mortgagor to secure an extension of the time of payment of the note, the mortgage was not rendered invalid thereby).

N. Y.—Gillette v. Smith, 18 Hun 10.

Wis.—Gorden v. Robertson, 48 Wis. 493, 4 NW 579 (holding that the mortgage is security for the debt and not merely for the note, and that as an alteration of the note, not fraudulent, does not destroy the debt the mortgage may be foreclosed in such a case).

[a] **In replevin** by a chattel mortgagee against the purchaser of the mortgaged property with notice of the mortgage, the fact that the note secured by the mortgage was altered by decreasing it is no defense, as the action is not on the note. Van Eps v. Newald, 139 Wis. 129, 120 NW 853. To same effect Simpson v. Sheley, 9 Kan. A. 512, 60 P 1098.

[b] **Alteration of one of two contracts secured by mortgage.**—Where a mortgage is given to secure money due and to become due under two in-

note operates as payment of the indebtedness;[18] but if the alteration of the note is made with a fraudulent intent it discharges the mortgage,[19] unless the alteration is an immaterial one.[20]

But a material alteration of a mortgage, and its consequent annulment, does not render the debt, the payment of which is secured by it, incapable of collection, or any instrument by which the debt is evidenced void.[21]

[§ 89] **26. Certificate of Acknowledgment.** Where an acknowledgment is not essential to the validity of a conveyance,[22] but merely dispenses with other proof of execution and delivery, an alteration in the acknowledgment does not affect the validity of the deed or its admissibility in evidence.[23]

Attaching a false certificate of acknowledgment to an instrument without the owner's knowledge sometime after its execution by him is not a material alteration.[24]

III. TIME OF ALTERATION

[§ 90] **A. In General.** As a general rule the alteration of a written instrument does not affect its validity upon the technical and strict grounds of alteration unless it is made after the instrument has had its legal existence and inception.[25]

[§ 91] **B. Before Complete Execution—1. In General.** If the instrument is in the same state in which the party complaining caused it to be made or delivered—that is, if the change was made before the instrument was executed, and the contract in its ultimate form is that upon which the minds of the parties met—there is no alteration, in contemplation of law, which will avoid the instrument,[26]

dependent contracts, for example, a promissory note and a lease reserving rent, a material alteration of the lease exonerates the mortgaged property from liability for the rent, but does not affect the mortgage security as to the promissory note. Parke, etc., Co. v. White River Lumber Co., 110 Cal. 658, 43 P 202.

18. Tate v. Fletcher, 77 Ind. 102 (holding that if the giving of the promissory note has the effect of extinguishing the original indebtedness, so that the only liability which exists is on the note, a material alteration of the note by the promisee, without the consent of the promisor, whether fraudulent of not, since it has the effect of invalidating the note for all purposes must also discharge the mortgage by which it is secured). See also Simpson v. Sheley, 9 Kan. A. 512, 60 P 1098.

19. Bowman v. Mitchell, 79 Ind. 84; Hocknell v. Sheley, 66 Kan. 357, 71 P 839 (holding that the fraudulent alteration of a note in a material part destroys the note as a cause of action, and will defeat a recovery on the original consideration, and will discharge the mortgage security); Walton Plow Co. v. Campbell, 35 Nebr. 173, 52 NW 883, 16 LRA 468 and note (upon the ground that the fraudulent alteration of the note destroyed the right of action on the note as well as for the original consideration).

Effect of fraudulent intent see generally infra § 98.

20. Osborne v. Andres, 37 Kan. 301, 15 P 153 (holding, where a note signed by husband and wife was secured by a mortgage upon the homestead, and the husband, when about to deliver the note and mortgage to the mortgagee, changed "date" to "due" in the note and mortgage, but upon being detected in his act by the mortgagee corrected the note so as to read "with interest from date," as originally signed, and the mortgagee accepted the note and mortgage, with the understanding that both read "with interest from date," and loaned his money thereon, that, as the note was corrected before delivery, so as to read as originally signed, and as the mortgage was intended to secure said note and the word "date" was changed to due" fraudulently, without the knowledge of the mortgagee or the wife, the mortgagee was entitled to recover thereon, as there was no material alteration in the note, and that the fraud of the husband, in attempting to change the mortgage, could not defeat the foreclosure thereof).

21. Kime v. Jesse, 52 Nebr. 606, 72 NW 1050 (holding that the material alteration of a mortgage by which it is avoided does not avoid a note or evidence of the debt for the payment of which it is the security); Powell v. Pearlstine, 43 S. C. 403, 409, 21 SE 328 (where McIver, C. J., said: "It does not follow necessarily that because the mortgage is not a nullity that the debt intended to be secured thereby is extinguished").

[a] **Reason for rule.**—"A mortgage is but an incident to the note or debt,—a security for its payment. And while it is true that if the note, the payment of which is secured by a mortgage, is materially altered and thereby avoided, the mortgage is rendered unenforceable, it does not follow that a material alteration of a mortgage and its consequent annulment also renders the debt, the payment of which is secured by it, incapable of collection or any instrument by which the debt is evidenced void. The indebtedness or instrument evidencing its existence is or testifies to a personal obligation of the debtor for the enforcement of which the creditor may proceed against the debtor in a personal action, or the mortgage may be foreclosed and the property described therein subjected to the payment of the debt. These are existing, different, and concurrent remedies, and subject to some restrictions; either may be resorted to at any time for the enforcement of the payment of the debt, the restrictions not going to the validity or existence of the debt, or the substance of an action for enforcement, but to the prosecution of both remedies at the same time. The destruction or avoiding of the mortgage, the incident to the debt, or evidence of it, does not carry with it the principal obligation, if it remains unaltered." Per Harrison, J., in Kime v. Jesse, 52 Nebr. 606, 613, 72 NW 1050.

[b] **Sureties entitled to benefit of mortgage.**—Where, by agreement between the principal and the holder of a note, the description of a part of land conveyed in a mortgage to secure the note was erased in order to enable the mortgagor to sell the land to an innocent purchaser, and the surety and indorser on the note defend on the ground of such erasure, it is error to say that because the land was sold by the mortgagor before the mortgage was recorded the consent of the indorser and surety to the erasure became immaterial. These parties had the right to expect the mortgage to be held for their protection, as well as for the protection of its holder. Williams v. Barrett, 52 Iowa 637, 3 NW 690.

22. See Acknowledgments §§ 4, 41, 43.

23. Arn v. Matthews, 39 Kan. 272, 18 P 65; Devinney v. Reynolds, 1 Watts & S. (Pa.) 328, 332 (where Rogers, J., in speaking of an interlineation in an acknowledgment, said: "This, to make the most of it, goes to the proof of the execution and cannot avoid the deed itself").

24. Canfield v. Orange, 13 N. D. 622, 102 NW 313 (holding that the attaching of a false certificate of acknowledgment to a paper on which a contract employing a broker to sell land was written, and the signing of the agreement by the broker and a witness without the owner's knowledge some time after execution, are not material alterations).

25. U. S.—Bingham v. Reddy, 3 F. Cas. No. 1,414, 5 Ben. 266.

Cal.—Roberts v. Unger, 30 Cal. 676.

Colo.—Hochmark v. Richler, 16 Colo. 263, 26 P 818.

D. C.—Ofenstein v. Bryan, 20 App. 1.

Fla.—Stewart v. Preston, 1 Fla. 10, 44 AmD 621.

Ga.—Winkles v. Guenther, 98 Ga. 472, 25 SE 527.

Iowa.—Tharp v. Jamison, 154 Iowa 77, 134 NW 583, 39 LRANS 100 (holding that an erasure on the face of an instrument is not an alteration unless made after delivery).

Md.—Wickes v. Caulk, 5 Harr. & J. 36.

Mich.—Lockwood v. Bassett, 49 Mich. 546, 14 NW 492.

N. Y.—Fanning v. Vrooman, 12 NYS 393; Sodus Bay, etc., R. Co. v. Hamlin, 24 Hun 390.

N. C.—Wicker v. Jones, 159 N. C. 102, 74 SE 801, 40 LRANS 69.

Pa.—Xander v. Com., 102 Pa. 434; Com. v. Beary, 9 Pa. Super. 246.

S. C.—Pope v. Chafee, 35 S. C. Eq. 69.

Tex.—American Copying Co. v. Thompson, (Civ. A.) 110 SW 777.

See also Provenzano v. Glaesser, 122 La. 378, 47 S 688; Boalt v. Brown, 13 Oh. St. 364.

And see infra §§ 95, 102.

"That an interlineation, erasure or other material alteration in a written contract cannot, as a general rule, affect its validity unless the alteration was made after execution and delivery, is sustained by the decisions of many of the higher courts of the United States, and generally, it seems, by the weight of authority." Per Talbot, J., in Matson v. Jarvis, (Tex. Civ. A.) 133 SW 941, 943.

[a] **The mere interlineation of a bond** given by an interpleaded claimant to chattels taken in execution does not invalidate the bond unless it appears that the interlineation was made after its execution. Com. v. Beary, 9 Pa. Super. 246.

26. U. S.—De Malarin v. U. S. 1 Wall. 282, 17 L. ed. 594.

Ala.—Webb v. Mullins, 78 Ala. 111; Davis v. Carlisle, 6 Ala. 707; Ravisies v. Alston, 5 Ala. 297.

Ark.—Fraser v. Decatur State Bank, 101 Ark. 135, 141 SW 941.

Colo.—Chapman v. Sargent, 6 Colo. A. 438, 40 P 849.

Del.—Warder v. Stewart, 16 Del. 275, 36 A 88; Hollis v. Vandergrift, 10 Del. 521.

D. C.—Towles v Tanner, 21 App. 530.

Ga.—Winkles v. Guenther, 98 Ga. 472, 25 SE 527.

Ida.—People v. Bugbee, 1 Ida. 88.

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as where sureties execute an instrument after it has been altered by striking out the names of the other sureties who had previously signed, so as to discharge others who had signed before the alteration.[27] But where an instrument has been signed by one party with the understanding that the other party is also to sign it, and it is materially altered and signed by the latter in its altered form, it does not become binding on the one who first signed it unless he learns of and ratifies the change,[28] nor will it be binding on subsequent signers who sign without knowledge of the fact of an alteration which has discharged prior signers.[29] This class of cases, however, involves merely an application of the general law of contracts, requiring mutual assent to all its terms as a requisite of a binding contract. Such cases do not involve the doctrine of alteration of instruments which deals with the effect of changes in a completed instrument or contract.[30] A like principle applies to alterations made

Ill.—Sargent v. Evanston, 154 Ill. 268, 40 NE 440; Cairo, etc., R. Co. v. Parrott, 92 Ill. 194; McNab v. Young, 81 Ill. 11.

Ind.—Harris v. State, 54 Ind. 2; Prather v. Zulauf, 38 Ind. 155.

Iowa.—Shepard v. Whetstone, 51 Iowa 457, 1 NW 753, 33 AmR 143.

Me.—Hilton v. Houghton, 35 Me. 143.

Mass.—Ward v. Allen, 2 Metc. 53, 35 AmD 387.

Mich.—People v. Brown, 2 Dougl. 9 (holding that, where a joint and several bond for the faithful performance of the duties of a public officer was changed by the judge of the circuit court by reducing the penal sum therein after the officer and six cobligors as sureties had signed, and thereafter the instrument was executed by a number of other sureties, and approved and filed according to the statute, the bond was void as to the sureties who signed before the change, but good as to those who signed after).

Mo.—Coney v. Laird, 153 Mo. 408, 55 SW 96; Fowles v. Bebee, 59 Mo. A. 401.

N. H.—Hills v. Barnes, 11 N. H. 395.

N. J.—Thorpe v. Keeler, 18 N. J. L. 251; White v. Williams, 3 N. J. Eq. 376.

N. C.—Wicker v. Jones, 159 N. C. 102, 107, 74 SE 801, 40 LRANS 69 (where the court said: "When we speak of an alteration in a writing, we refer to the legal acceptation of the term, which implies a change made after its execution, and, while an erasure or interlineation may be an alteration, it is not such if made before the final execution of the writing"); Wetherington v. Williams, 134 N. C. 276, 46 SE 728.

Oh.—Hayes v. Dumont, 2 Oh. Cir. Ct. 229, 1 Oh. Cir. Dec. 458.

Or.—Nickum v. Gaston, 28 Or. 322, 42 P 130.

Pa.—Britton v. Stanley, 4 Whart. 114; Grambs v. Lynch, 4 Pennyp. 243, 20 WklyNC 376.

Tex.—Bell v. Boyd, 76 Tex. 133, 13 SW 232; Jacoby v. Brigman, 7 SW 366; Hess v. Schaffner, (Civ. A.) 139 SW 1024.

Vt.—Batchelder v. Blake, 70 Vt. 197, 40 A 34.

Wash.—Crowley v. U. S. Fidelity, etc., Co., 29 Wash. 268, 69 P 784.

Wis.—Williams v. Starr, 5 Wis. 534.

Eng.—Downes v. Richardson, 5 B. & Ald. 674, 7 ECL 367, 106 Reprint 1337; Fitch v. Jones, 5 E. & B. 238, 85 ECL 238, 119 Reprint 470; Stevens v. Lloyd, M. & M. 292, 22 ECL 524; Coke v. Brummell, 8 Taunt. 439, 4 ECL 220, 129 Reprint 453; Paton v. Winter, 1 Taunt. 420, 127 Reprint 896.

Ont.—Fitch v. Kelly, 44 U. C. Q. B. 578; Fraser v. Fraser, 14 U. C. C. P. 70.

[a] **A mortgage prior to its delivery** is under the control of the maker, and any alteration made on it before signing and delivery cannot amount to a forgery. Hotchkiss v. Olmstead, 37 Ind. 74.

[b] **Changes in a deed of trust, before it is signed,** such as the erasure of the name of the county and the writing of the name of another county over it, are not such alterations as will invalidate the deed. Coney v. Laird, 153 Mo. 408, 55 SW 96.

27. State v. Van Pelt, 1 Ind. 304 (holding that the fact that the substituted surety did not know, or believe, or suspect that the striking out of the particular surety's name was without the knowledge or consent of the other sureties would not affect his liability, because if he did not wish to be bound unless as cobligor with the other sureties he should have ascertained before he executed the bond whether or not they had agreed to the alteration).

28. Smith v. U. S., 2 Wall. (U. S.) 219, 17 L. ed. 788; The Hero, 6 Fed. 526; Pew v. Laughlin, 3 Fed. 39 (holding that a change made under the circumstances stated in the text could not be considered as a mere spoliation, because not made after the instrument had been fully executed); Flanigan v. Phelps, 42 Minn. 186, 43 NW 1113 (holding that an essential alteration by one comaker, although before the delivery of a note, if after the other maker has signed it is fatal to an action against him, if made without his consent or authority); McGavock v. Morton, 57 Nebr. 385, 77 NW 785; Langhorn v. Cologan, 4 Taunt. 330, 128 Reprint 357 (holding that where a marine policy of insurance as drawn and originally executed by the underwriters did not contain any statement of the subject of insurance but afterward words specifying the subject matter were added and the addition was signed by some of the underwriters, the policy could not be enforced against the underwriters who did not assent to the addition).

[a] **Where an agreement for the construction of a private way** is signed by a number of neighboring landowners, but an owner whose concurrence in the agreement is necessary refuses to sign unless the course of the way is changed so that it will run along the line of, instead of through, his land, and the agreement is changed accordingly, and his signature obtained, the agreement does not bind one of the landowners who signed the agreement before the alteration, and who had no knowledge of, and had not consented to, the alteration. Hershman v. Stafford, 58 W. Va. 459, 52 SE 533 [quot Cyc].

[b] **Where a contract contains a provision requiring it to be countersigned** and approved by the officers of a corporation, which is one of the parties thereto, before it shall be binding on either party, and after it has been signed on behalf of the corporation it is materially altered by its agent before it is signed by the other party, and is never thereafter submitted to the officers of the corporation for their approval, it does not become effective, in the absence of proof that such requirement was waived. Keene Mach. Co. v. Barratt, 100 Fed. 590, 40 CCA 571.

29. Howe v. Peabody, 2 Gray (Mass.) 556; State v. McGonigle, 101 Mo. 353, 13 SW 758, 20 AmSR 609, 8 LRA 735.

30. U. S.—Pew v. Laughlin, 3 Fed. 39, 44 (where a charter party, signed by the captain, was forwarded to the charterers who signed it and sent it to their agent for delivery to the captain's brokers. The agent, without the consent or knowledge of the charterers, the captain, or the owners, made a material alteration. It was held that the charterers could not enforce the charter party. The court said: "The alteration was not made after the instrument was fully executed; . . . it is not a case of spoliation, such as is referred to by the authorities cited; but, on the contrary . . . the parties did not execute the same instrument, did not agree to the same thing, and consequently had no contract to which they were mutually bound").

Mich.—Jenkinson v. Monroe, 61 Mich. 454, 28 NW 663 (holding that where a written agreement is interlined by one of the parties before signing it, but after execution by the other party, the question upon the disputed point of whether the clause was a part of the written contract as executed by the parties is not one as to the vitiating effect of an alteration, but is simply as to what was or was not included in the contract); Osborne v. Van Houten, 45 Mich. 444, 8 NW 77 (discharge of guarantor by change before approval of contract).

Nebr.—McGavock v. Morton, 57 Nebr. 385, 387, 77 NW 785 (where Irvine, C., said: "All the discussion in the briefs as to materiality, and a further discussion as to whether the change was an alteration or a spoliation, are beside the issue, because the theory is not that the contract was altered after it was made, but that the change was made after execution by one side and before execution by the other,—in other words, that because of the change at that time, regardless of who made it, there was never a consensus").

N. H.—Goodman v. Eastman, 4 N. H. 455 (holding that an alteration in the amount of a note after signing by the surety and before delivering amounts to forgery).

Oh.—Carlile v. Lamb, 16 Oh. Cir. Ct. 578, 9 Oh. Cir. Dec. 70; Hayes v. Dumont, 2 Oh. Cir. Ct. 229, 235, 1 Oh. Cir. Dec. 458 (holding that a contract, executed by one party and delivered to his agent for the purpose of procuring the signature of the other party, is not rendered wholly void by reason of a material change made by such agent before the execution by the other party, but to be enforceable against the party first executing it in its original condition. The court said: "Manifestly a person who signs a written instrument, which is afterwards altered, either fraudulently or by mistake, without his authority, is not bound by the instrument as thus altered. He has a right to say, this is not the contract which I made. Thus, if he has given his note for $1,000; and delivers it to another to have discounted for him, and he alters it to a note for $2,000, and transfers it to third person who in good faith pays him the $2,000, and he delivers but the $1,000 to the maker of the note, if there has been no negligence on the part of the maker he can not be held for the $2,000; but a recovery may be had upon it as a note for $1,000").

Utah.—American Pub. Co. v. Fisher, 10 Utah 147, 37 P 259 (holding that if the writing in question had been a contract debt the alteration would have had the effect to destroy it, and, consequently, if it was not a contract debt an unauthorized addition could not make it one).

Wis.—Sherwood v. Merritt, 83 Wis. 233, 53 NW 512 (where plaintiff and defendant entered into an oral agreement for the sale and purchase of

in negotiable instruments before delivery.[31]

[§ 92] **2. Under Circumstances Importing Authority.** An instrument will not be vitiated by a change after it is signed by one party and turned over to another for delivery under circumstances which import authority to perfect it for the purpose of rendering it available to the person to whom it is to be finally delivered.[32]

[§ 93] **3. Before Issue of Bill or Note.** In this connection a bill or note is not generally considered as issued before it comes into the hands of someone entitled to make a claim upon it.[33] Accordingly a material alteration of a promissory note by the maker after its indorsement or signature by a co-maker, without the authority and consent of the indorser or comaker, but before its delivery to the payee, discharges such indorser or comaker so as to prevent a recovery on the note against him by the payee,[34] and it cannot be said that such act of

land, which agreement was reduced to writing by plaintiff and handed by him to defendant's agent with a check for the earnest money provided for in the contract, which check was to be delivered by defendant's agent to defendant upon the execution of the contract by the latter. The contract was changed by the agent, before delivery of the check to defendant, without the knowledge or consent of plaintiff, and defendant signed the contract in the changed form and afterward insisted upon its fulfillment in that form. It was held that plaintiff was entitled to recover back his check and had a right to repudiate the contract which defendant was attempting to enforce as not being the contract which plaintiff had entered into).

See also generally Contracts [9 Cyc 245].

[a] **Where an instrument in the form of a joint and several guaranty to a number of creditors** is altered after the signature of one of the guarantors by inserting the name of an additional creditor without the knowledge or consent of such guarantor, such alteration vitiates the instrument not only as against him but also as against all the others who have signed, although such others signed after the alteration and without knowledge of it. Canada Furniture Co. v. Stephenson, 19 Man. 618.

31. See infra § 93.

32. Hilton v. Houghton, 35 Me. 143; Whitmore v. Nickerson, 125 Mass. 496, 28 AmR 257 (holding that the indorsement of a note payable to the order of the indorser, with a blank for the signature of the maker, and delivery to the clerk of the indorser, who is authorized to deliver it to a member of a firm for the firm's signature, are binding upon the indorser, although the clerk acts in excess of his authority and has the note signed by the maker in his individual capacity). See also Dusenberry v. O'Shiel, 2 Hill (N. Y.) 410; Beary v. Haines, 4 Whart. (Pa.) 17. And see supra §§ 82, 83; infra §§ 119–144.

33. Eddy v. Bond, 19 Me. 461, 36 AmD 767; Church v. Fowle, 142 Mass. 12, 6 NE 764 (holding that, if a promissory note is attested by one not a party to it, and without the procurement and knowledge of either of the parties to it, and the note is accepted by the payee without any knowledge that it has been attested, it is not an alteration of an existing contract); Portage County Branch Bank v. Lane, 8 Oh. St. 405 (holding that where a surety signed a note for the accommodation of the principal, who changed the amount before negotiating it, the surety was discharged, not because of an alteration, but because the note executed by him was not an available obligation until discounted by the payee named therein, and because the note actually discounted was a different note from the one executed by the surety); Douglass v. Scott, 8 Leigh (35 Va.) 43 (holding that, where a negotiable note is signed and indorsed in blank by several persons, and delivered to another to raise money for his own accommodation, it is not available to the person for whose benefit it is made until it has been discounted); Waterous Engine Works Co. v. McLean, 2 Man. 279. See also Thorpe v. White, 188 Mass. 333, 74 NE 592.

[a] **Acceptance.**—(1) Until acceptance or negotiation a bill drawn for a debt due from the drawee to the drawer, and while in the hands of the drawee and before acceptance, does not become an available security. Ratcliff v. Planters' Bank, 2 Sneed (Tenn.) 424. (2) But if, upon presentment of a bill for acceptance, the payee alters it, and it is accepted as altered, it is vitiated as against the drawer and indorser because before acceptance, the bill was a perfect instrument on which the drawers might have been sued. Walton v. Hastings, 4 Campb. 223; Outhwaite v. Luntley, 4 Campb. 179; Paton v. Winter, 1 Taunt. 420, 127 Reprint 896.

[b] **Under the stamp laws** (1) the mere correction of an error by consent before delivery will not require a restamping. Hill v. McLeod, 17 N. S. 280. See also Downes v. Richardson, 5 B. & Ald. 674, 7 ECL 367, 106 Reprint 1337; Sherrington v. Jermyn, 3 C. & P. 374, 14 ECL 617; Merchants' Bank v. Stirling, 13 N. S. 439 (holding that, where three persons joined as drawer, acceptor, and first indorser in an accommodation bill, and it was afterward issued to another person, but, previous to the issuance, its date had been altered, a fresh stamp was not necessary, because the bill, in point of law, had not been issued before it was altered). (2) In Catton v. Simpson, 8 A. & E. 136, 35 ECL 518, 112 Reprint 788, where defendant had signed a joint and several promissory note as surety with the principal debtor, and afterward the payee, without the surety's knowledge, induced another person to sign the instrument with the view of strengthening the security, the court held that defendant was liable, because the new surety could not be liable on the note by reason of the stamp laws, and therefore the alteration operated nothing. (3) But this case has not been accepted as announcing the correct rule. Gardner v. Walsh, 5 E. & B. 83, 85 ECL 83, 119 Reprint 412. Where the alteration is a distinct transaction, although made with the consent of the acceptor before the bill is negotiated, it is held that a new stamp is necessary. Bowman v. Nichol, 5 T. R. 537, 101 Reprint 302.

34. U. S.—Wood v. Steele, 6 Wall. 80, 18 L. ed. 725.

Ala.—Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140 (holding that the alteration of a note by the maker, before delivery and with the consent of the payee, by substituting a firm for an individual signing as maker, discharges a prior accommodation indorser).

Cal.—Pelton v. San Jacinto Lumber Co., 113 Cal. 21, 45 P 12.

Conn.—Ætna Nat. Bank v. Winchester, 43 Conn. 391.

Del.—Newark Bank v. Crawford, 7 Del. 282.

D. C.—Towles v. Tanner, 21 App. 530; Ofenstein v. Bryan, 20 App. 1.

Ga.—Hill v. O'Neill, 101 Ga. 832, 28 SE 996.

Ind.—Hert v. Oehler, 80 Ind. 83; Schnewind v. Hacket, 54 Ind. 248; Bell v. State Bank, 7 Blackf. 456.

Iowa.—Bell v. Mahin, 69 Iowa 408, 29 NW 331.

Ky.—Blakey v. Johnson, 13 Bush 197, 202, 26 AmR 254 (where the court said: "'To the extent and in the manner and under the circumstances pointed out in his obligation he is bound, but no further. If he does not assent to an alteration of the terms of his undertaking it ceases, when materially altered, to be his contract, and has thenceforward no more force as to him than if the whole writing had been a forgery from the beginning, unless it had previously become effectual by delivery, and the alteration be made by a stranger"); Lisle v. Rogers, 18 B. Mon. 528.

Me.—Waterman v. Vose, 43 Me. 504.

Md.—Burrows v. Klunk, 70 Md. 451, 17 A 378, 14 AmSR 371, 3 LRA 576.

Mass.—Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 AmR 67; Citizens' Nat. Bank v. Richmond, 121 Mass. 110; Draper v. Wood, 112 Mass. 315, 17 AmR 92; Stoddard v. Penniman, 108 Mass. 366, 11 AmR 363; Agawam Bank v. Sears, 4 Gray 95; Fay v. Smith, 1 Allen 477, 79 AmD 752.

Mich.—Aldrich v. Smith, 37 Mich. 468, 26 AmR 536; Bradley v. Mann, 37 Mich. 1.

Mo.—Capital Bank v. Armstrong, 62 Mo. 59; Britton v. Dierker, 46 Mo. 591, 2 AmR 553; Trigg v. Taylor, 27 Mo. 245, 72 AmD 263; Fred Heim Brewing Co. v. Hazen, 55 Mo. A. 277; Robinson v. Berryman, 22 Mo. A. 509.

Mont.—McMillan v. Hefferlin, 18 Mont. 385, 45 P 548.

Nebr.—Brown v. Straw, 6 Nebr. 536, 29 AmR 369.

N. H.—Goodman v. Eastman, 4 N. H. 455.

N. Y.—Woodworth v. Bank of America, 19 Johns. 391, 10 AmD 239.

Oh.—Jones v. Bangs, 40 Oh. St. 139, 48 AmR 664; Boalt v. Brown, 13 Oh. St. 364; Sturgis v. Williams, 9 Oh. St. 443, 75 AmD 473; Portage County Branch Bank v. Lane, 8 Oh. St. 405; McAlpin v. Clark, 5 Oh. Cir. Dec. 364, 11 Oh. Cir. Ct. 524.

Tenn.—Moss v. Maddux, 108 Tenn. 405, 67 SW 855.

Tex.—Farmers, etc., Nat. Bank v. Novich, 89 Tex. 381, 34 SW 914. See also Butler v. State, 31 Tex. Cr. 63, 19 SW 676.

W. Va.—Ohio Valley Bank v. Lockwood, 13 W. Va. 392, 31 AmR 768.

Ont.—Halcrow v. Kelly, 28 U. C. C. P. 551.

Bona fide holders as affected by prior alterations see Bills and Notes [7 Cyc 938 et seq].

Discharge of surety by alteration of instrument generally see Principal and Surety [32 Cyc 177].

[a] **Reason for rule.**—"The alteration destroyed the identity of the defendant's contract. He never made the only contract which the plaintiff accepted. In the words of the opinion in the case cited, 'the note used he did not execute; the note which he executed was never used, but was destroyed by the alteration, and another substituted for it.'" Draper v. Wood, 112 Mass. 315, 319, 17 AmR 92 [foll Fay v. Smith, 1 Allen (Mass.) 477, 79 AmD 752].

[b] **Change made before indorsement.**—The indorser is not so discharged if the alteration of the note was made before his indorsement. Towles v. Tanner, 21 App. (D. C.) 530; Prather v. Zulauf, 38 Ind. 155.

[c] **Alteration by principal maker and one of several joint payees.**—A material alteration of a note by the principal and one of several joint payees who is the custodian of the

the coöbligor is the act of a stranger.[35] Thus if a maker is added, whether as such or as surety only, before the note is fairly launched so as to become an available security for the purposes for which it was intended, as instanced by such a change while the instrument is in the hands of a principal in order to discount it, it is not considered an alteration.[36] Liability is defeated, however, not upon the technical ground of alteration, but because defendant did not make the contract sought to be enforced.[37] The rule that, when one of two innocent persons must suffer for the fraud of a third, the loss must fall on the one who enabled the commission of the fraud, has no application to this class of cases.[38]

[§ 94] **4. Before Delivery or Approval of Bond.** Where a bond is altered by a coöbligor before delivery it is avoided as against the nonassenting obligor,[39] as where an obligor is added to the bond.[40] So the alteration of a bond before approval or acceptance will discharge the sureties,[41] and where a recognizance is altered by the justice before whom it is taken the cognizor will be released;[42] and, after delivery of a bond to an officer, an alteration by the principal obligor, with the consent of the officer, may discharge the other obligors.[43]

note, avoids it as to sureties who had signed the same for the accommodation of the principal maker. Thompson v. Massie, 41 Oh. St. 307.

[d] **Where the name of one of several signers of a note was erased** before delivery by drawing marks through his name, the effect of the erasure was to take such name off the note to the same extent as if it had never been signed thereto. Hess v. Schaffner, (Tex. Civ. A.) 139 SW 1024.

35. Lisle v. Rogers, 18 B. Mon. (Ky.) 528 (alteration by maker after indorsement for his accommodation); Barton Sav. Bank, etc., Co. v. Stephenson, (Vt.) 89 A 639. See also infra § 105.

36. U. S.—Bingham v. Reddy, 3 F. Cas. No. 1,414, 5 Ben. 266.

Ind.—Bowser v. Rendell, 31 Ind. 128 (holding that a signing by the party into whose hands the instrument was placed to have it discounted, at the instance of the bank, before the latter would discount it, and with the understanding that the signing was as guarantor for both the original maker and his surety and not as a joint maker with them, was not a material alteration).

Iowa.—Graham v. Rush, 73 Iowa 451, 35 NW 518.

Minn.—Babcock v. Murray, 58 Minn. 385, 59 NW 1038; Ward v. Hackett, 30 Minn. 150, 14 NW 578, 44 AmR 187.

Oh.—Tarbill v. Richmond City Mill Works, 2 Oh. Cir. Ct. 564 (holding that the forging of the name of a cosurety to a note by the principal, without the knowledge of the first surety, was immaterial as to the latter).

Vt.—Keith v. Goodwin, 31 Vt. 268, 73 AmD 345; Peake v. Dorwin, 25 Vt. 28.

Va.—Stout v. Vause, 1 Rob. (40 Va.) 179.

Eng.—Deering v. Winchelsea, 2 B. & P. 270, 126 Reprint 1276, 1 Cox Ch. 318, 29 Reprint 1184.

See Norton v. Coons, 3 Den. (N. Y.) 130 [aff 6 N. Y. 33]; Warner v. Price, 3 Wend (N. Y.) 397.

[a] **Knowledge of payee.**—Sometimes it seems that the fact that the payee had no knowledge of the change has been given some effect. See Hall v. McHenry, 19 Iowa 521, 87 AmD 451; Gano v. Heath, 36 Mich. 441; Ward v. Hackett, 30 Minn. 150, 14 NW 578, 44 AmR 187. But from the other cases cited in this note it may be said that this consideration is not material under the conditions stated in the text.

37. See cases supra note 34. See also infra § 95.

38. Knoxville Bank v. Clarke, 51 Iowa 264, 272, 33 AmR 129 (where the court said: "It seems to us the proximate cause of the loss is the forgery, and this the maker had no reason to anticipate. In some of the cases following Young v. Grote, 4 Bing. 253, 13 ECL 491, 130 Reprint 764, the rule has been invoked that, when one of two innocent persons must suffer by the wrongful act of another, he must suffer who placed it in the power of such third person to do the wrong. It seems to us such rule can have no application to this class of cases. It has never, we think, been carried to the extent of making one person civilly liable for the crime of another, and, on principle, we think it cannot be"); Goodman v. Eastman, 4 N. H. 455; Wallace v. Harmstad, 15 Pa. 462, 467, 53 AmD 603 (where Gibson, C. J., distinguished deeds from commercial instruments in this respect, and said: "A decision in the case of a commercial instrument, therefore, cannot be a precedent for a case like the present. A fraudulent alteration of a deed makes every part of it a forgery").

"The rules, that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong, must bear the loss, and that the holder of commercial paper taken in good faith and in the ordinary course of business, is unaffected by any latent infirmities of the security, have no application in this class of cases. The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as little reason to anticipate one as the other. The law regards the security, after it is altered, as an entire forgery with respect to the parties who have not consented, and so far as they are concerned, deals with it accordingly." Wood v. Steele, 6 Wall. (U. S.) 80, 82, 18 L. ed. 725.

[a] **Reason for rule.**—"This is upon the principle that a party is not bound in transactions of this character either to anticipate or take precaution against the commission of a crime by which another may be deceived; that where it is through the instrumentality of a criminal act that the wrong is accomplished, it is the crime and not the negligent act which is the proximate cause of injury; and in such a case the maxim that where one of two innocent persons must suffer from the wrongful act of another, the loss must fall upon the one making the act possible, has no application." Walsh v. Hunt, 120 Cal. 46, 52, 52 P 115, 39 LRA 697 (holding that the unauthorized and fraudulent alteration of a note and mortgage by an agent intrusted with them for the purpose of delivery amounts to a forgery).

Negligent execution of commercial paper see Bills and Notes [8 Cyc 30].

39. State v. Blair, 32 Ind. 313; State v. Craig, 58 Iowa 238, 12 NW 301; Renville County v. Gray, 61 Minn. 242, 63 NW 635 (holding that a material alteration of a bond by one of the obligors before delivery, without the consent of his coöbligors and without the privity of the obligee, although it does not affect the liability of the party making the change, discharges the other obligors); Cheek v. Nall, 112 N. C. 370, 17 SE 80.

40. Governor v. Lagow, 43 Ill. 134; State v. Pepper, 31 Ind. 76; Rocky Mountain L. & T. Co. v. Price, 103 Va. 298, 49 SE 73; Matson v. Booth, 5 M. & S. 223, 105 Reprint 1033 (holding that, where a bond for release from arrest on mesne process was presented by one of the attesting witnesses, containing a blank for another obligor, and before acceptance by the sheriff another obligor is added, the addition is made with the concurrence of the obligors at a time when the bond could be considered in no other light than as in the nature of an escrow, and is thus brought within the authority of Zouch v. Clay, 2 Lev. 35, 83 Reprint 441, 1 Vent. 185, 86 Reprint 126).

41. U. S.—Smith v. U. S., 2 Wall. 219, 17 L. ed. 788. See also Oneale v. Long, 4 Cranch 60, 2 L. ed. 550.

Ark.—State v. Churchill, 48 Ark. 426, 3 SW 352, 880.

Cal.—Peo. v. Kneeland, 31 Cal. 288 (holding that the liability of the sureties depends upon the bond itself, which must be delivered before liability is proved, and that therefore the bond which they executed was not delivered because the one approved was not the one signed; that no recovery could be had against the sureties on the original bond because it had never been delivered and approved, nor on the altered bond because it was not their deed).

Ga.—Taylor v. Johnson, 17 Ga. 521.

Ind.—State v. Polke, 7 Blackf. 27.

Ky.—Bracken County v. Daum, 80 Ky. 388 (where several persons signed a power of attorney authorizing the clerk of a court to sign their names to the sheriff's levy bond and, before the power was delivered to the clerk, the sheriff erased the name of one of the signers and the clerk affixed the names of the others as sureties upon the bond, it was held that the change was material and discharged the sureties).

Mass.—Howe v. Peabody, 2 Gray 556 (change by probate judge of penal sum in bond).

Mich.—Peo. v. Brown, 2 Dougl. 9.

Mo.—State v. Findley, 101 Mo. 368, 14 SW 185; State v. McGonigle, 101 Mo. 353, 13 SW 758, 20 AmSR 609, 8 LRA 735.

Wash.—Fairhaven v. Cowgill, 8 Wash. 686, 36 P 1093.

See generally Principal and Surety [32 Cyc 177].

[a] **Where a bond subject to approval is changed after signature by some of the sureties** and before approval, by erasing the name of a surety, the other sureties are thereby discharged because they signed on the faith of the liability of the one whose name was erased, and a surety signing subsequently to the erasure does not become bound because he relied on the liability of the sureties whose names remained. Smith v. U. S., 2 Wall. (U. S.) 219, 17 L. ed. 788; State v. McGonigle, 101 Mo. 353, 13 SW 758, 20 AmSR 609, 8 LRA 735; Bingham v. Shadle, 45 Nebr. 82, 63 NW 143.

42. Vincent v. Peo., 25 Ill. 500.

43. Martin v. Thomas, 24 How. (U. S.) 315, 16 L. ed. 689 (alteration of replevin bond by principal obligor, with the consent of the marshal).

[a] **Collector's bond.**—In Dover v. Robinson, 64 Me. 183, it was held that where an official bond of a collector was changed by the principal, with consent of the selectmen of the town, after delivery and approval and without the knowledge or consent of the sureties, the latter were discharged, as the act could not be deemed a spoliation.

[b] **Alteration of bail bond.**—(1) A material alteration in an obligation of record—as a bail bond—without

[§ 95] **C. Changes Not Affecting Parties Who Have Signed.** Where an instrument is to be considered as an entire transaction, operating, as to different parties, from the time of the execution by each, but not perfect until the execution by all, a change in the instrument, in a part thereof affecting only the particular party at the time executing it, will not avoid the instrument as to the parties who had previously executed it, the instrument being complete as to the latter and the change in no way affecting their interest.[44]

IV. INTENTION

[§ 96] **A. In General.** The term "alteration" implies intention,[45] and in order that an alteration may have the effect of avoiding an instrument it must have been made intentionally in the sense of willfully.[46]

[§ 97] **B. Accident or Mistake.** Whenever it is clear that an instrument once perfect has become mutiliated or effaced by accident or the effect of time such mutiliation or effacement operates nothing against its validity.[47] So a physical change made by a party interested will not vitiate the instrument where such a change is the result of a mistake of fact or mere inadvertence, made without any purpose to change the terms of the instrument.[48]

the consent of the obligors, at the instance of the officer of the state, will discharge the obligors. Wegner v. State, 28 Tex. A. 419, 13 SW 608; Gragg v. State, 18 Tex. A. 295; Collins v. State, 16 Tex. A. 274; Heath v. State, 14 Tex. A. 213; Grant v. State, 8 Tex. A. 432; Butler v. State, 31 Tex. Cr. 63, 19 SW 676. (2) But the alteration must be a material one. Gragg v. State, supra.

44. U. S.—Davis v. Shafer, 50 Fed. 764 (holding that, where there are several parties to an instrument, some of whom have executed it, and in the progress of the transaction it is altered as to some who have not signed it, without the knowledge of the first signers, but not in a part affecting the liability of the latter, and is then executed by the others, the contract is good as to the first signers according to the terms agreed upon by them, and is good as to the subsequent signers in its altered terms).

Ill.—Burlingame v. Brewster, 79 Ill. 515, 22 AmR 177 (holding that, where the alteration of a promissory note, executed by several makers, is such as to discharge the prior signers, it would also discharge subsequent signers who signed without knowledge of such alteration, because they signed it upon the assumption of the coliability of all the signers; otherwise the subsequent signers are not affected by the alteration, and it constitutes no defense. In this case the alteration consisted in tearing off the words "as trustees" following the signatures, and was held immaterial, the note being in the form of a personal obligation).

Iowa.—Van Horn v. Bell, 11 Iowa 465, 79 AmD 506 [quot 1 Greenleaf Ev. § 568] (holding that, where a mortgagor altered a mortgage after it was signed by his comortgagor, by inserting therein, without the knowledge or consent of such comortgagor, the description of additional property, the mortgage is valid as to both mortgagors as to the property originally described therein, and that as to the party who made the alteration it is also valid as to the additional property described in the inserted additional description).

N. Y.—Dusenberry v. O'Shiel, 2 N. Y. Super. 379.

Eng.—Doe v. Bingham, 4 B. & Ald. 672, 6 ECL 648, 106 Reprint 1082; Hall v. Chandless, 4 Bing. 123, 13 ECL 430, 130 Reprint 714; Davidson v. Cooper, 1 D. & L. 377 [aff 13 L. J. Exch. 276].

45. Carrique v. Beaty, 24 Ont. A. 302.

"The term is usually applied to the act of the party entitled under the instrument, and imports some fraud or improper design to change its effect and therefore an alteration made by accident or mistake could not have the effect to avoid the instrument." Cochran v. Nebeker, 48 Ind. 459, 462.

46. Hayes v. Dumont, 2 Oh. Cir. Ct. 229, 1 Oh. Cir. Dec. 458; Cline v. Goodale, 23 Or. 406, 414, 31 P 956 (where Moore, J., said: "To defeat a contract, the alteration must be material, made without authority or consent of the other party, and wilful"); Carrique v. Beaty, 24 Ont. A. 302.

47. Ga.—Wheat v. Arnold, 36 Ga. 479.

Ind.—Frazer v. Boss, 66 Ind. 1; Cochran v. Nebeker, 48 Ind. 459.

Iowa.—Murray v. Graham, 29 Iowa 520.

Oh.—Hayes v. Dumont, 2 Oh. Cir. Ct. 229, 1 Oh. Cir. Dec. 458.

Pa.—Rhoads v. Frederick, 8 Watts 448.

S. C.—Burton v. Pressly, 15 S. C. Eq. 1.

Ont.—Doe v. McGill, 8 U. C. Q. B. 224.

[a] **Mutilation by accident.**—Where a deed or patent once perfect, has its seal or signature torn off, or is otherwise mutilated, by accident or the effects of time, such mutilation will not render it invalid. Frazer v. Boss, 66 Ind. 1; Van Riswick v. Goodhue, 50 Md. 57; Bolton v. Carlisle, 2 H. Bl. 259, 126 Reprint 540; Argoll v. Cheney, Palm. 402, 81 Reprint 1143; Todd v. Cain, 16 U. C. Q. B. 516; Doe v. McGill, 8 U. C. Q. B. 224.

[b] **Mutilation destroying identity,** caused by accident, amounts merely to the destruction of the primary evidence, "as in the case of the loss of a paper, compelling the party to resort to secondary evidence." Crockett v. Thomason, 5 Sneed (Tenn.) 342, 345.

[c] **Mutilation and attempted restoration.**—Where a bond with three sureties, while in the hands of one of them, is accidentally mutilated by a child, by tearing off the name and seal of one of the sureties and the seal of another, and the payee afterward attempts to restore the instrument by having the surety whose name had been torn off sign it, which he does, but neither of the seals is restored, the mutilation, being accidental, does not avoid the bond, and the attempted restoration cannot have this effect. Rhoads v. Frederick, 8 Watts (Pa.) 448.

[d] **Accidental mutilation of bank bills.**—The mutilation to a greater or less degree of bank bills, by time or accident, will not affect a holder's right to recovery if the particular bills are shown to be genuine and to have been actually issued by the bank, and if enough remains of the bills to identify them. State Bank Note Holders v. Funding Bd., 16 Lea (Tenn.) 46, 57 AmR 211.

48. Ala.—Lowremore v. Berry, 19 Ala. 130, 54 AmD 188.

Ga.—Shaw v. Probasco, 139 Ga. 481, 77 SE 577; Gwin v. Anderson, 91 Ga. 827, 18 SE 43; Lowry v. McLain, 75 Ga. 372; Morgan v. Nashville Grain Co., 12 Ga. A. 574, 77 SE 913.

Ind.—Cochran v. Nebeker, 48 Ind. 459.

La.—Garnier v. Peychaud, 9 La. 182 (erasure of debtor's signature to note, through error or inadvertence).

Me.—Milberry v. Storer, 75 Me. 69, 46 AmR 361; Brett v. Marston, 45 Me. 401 (an erasure by mistake of the name of one who at the inception of the note had signed it on the back under the words "Holden on the within," was held not to discharge such person from liability).

Mo.—Boulware v. State Bank, 12 Mo. 542.

Nebr.—Russell v. Longmoor, 29 Nebr. 209, 45 NW 624 (holding that, where the owner of a chattel mortgage, in the form of a bill of sale with a defeasance clause, innocently, and without any intention to alter the contract, tore the instrument into two parts, separating the granting from the defeasance clause, the validity of the instrument as a whole was not affected and the rules as to alteration of instruments did not apply).

Oh.—Fullerton v. Sturges, 4 Oh. St. 529; Hayes v. Dumont, 2 Oh. Cir. Ct. 229, 1 Oh. Cir. Dec. 458.

Pa.—Fisher v. King, 153 Pa. 3, 25 A 1029 (which involved the signature by indorser as a witness in the place of the signature of a witness, by mistake); Marshall v. Gougler, 10 Serg. & R. 164 (where witnesses to an assignment inadvertently signed as witnesses to the original execution of the instrument instead of as witnesses to the assignment).

Tex.—Henrietta Nat. Bank v. State Nat. Bank, 80 Tex. 648, 16 SW 321, 26 AmSR 773.

Eng.—Novelli v. Rossi, 2 B. & Ad. 757, 22 ECL 317, 109 Reprint 1326; Wilkinson v. Johnson, 3 B. & C. 428, 10 ECL 198, 107 Reprint 792 (striking out indorsement by mistake); Raper v. Birkbeck, 15 East 17, 104 Reprint 750.

"If the alteration is unintentional, or made by mistake, or in an immaterial matter, and without intent to defraud, the court will enforce it, if the original contract can be discovered and is capable of execution." Gwin v. Anderson, 91 Ga. 827, 830, 18 SE 43 (applying Code § 2852). To same effect Shaw v. Probasco, 139 Ga. 481, 77 SE 577.

[a] **Only a mistake of fact,** and not a mistake of law, as to the legal effect of the instrument, will deprive a material alteration of its ordinary effect as a discharge of the instrument. Hindostan, etc., Bank v. Smith, 36 L. J. C. P. 241 (where it appeared that several directors of a bank signed a document whereby they severally undertook to pay a stated sum to the bank, their intention being that each should be bound only for a proportionate part of such sum, and that defendant and some of the other directors paid such proportionate part and the bank's secretary struck out their names, acting under the mistake of law that the legal effect of the document was what had been intended; this alteration was held to render the agreement unenforceable by the bank, and to discharge defendant).

[b] **Qualifying indorsement by mistake.**—Where two promissory notes, payable to the order of the maker, are indorsed by him and delivered to another for his accommodation, and the latter indorses them, and upon the back stamps the words, "Demand, protest and notice of protest waived and payment guaranteed within five days from date of ma-

[§ 98] **C. Fraudulent Purpose.** The term "alteration," being usually applied to the act of a party to the instrument, imports some fraud or improper design to change its effect; the fraudulent purpose is a conclusion of law from the fact that the change is willfully made.[49] Upon the question of how far the effect of a change is to be controlled by the fraudulent intention of the party making the change the cases are not in entire harmony. On the one hand, the rule that fraud is implied from the mere fact of a material change means that when one party, without the consent of another, changes the terms of the instrument in a material respect it is immaterial that he had no actually fraudulent design,[50] the intention being of no moment save as it affects the right to resort to the original indebtedness.[51] On the other hand, the presence or absence of a fraudulent intent is distinctly recognized in many cases as a controlling element upon the effect of an act set up as an alteration,[52] although in some of the cases not to such an extent that they may be said to be entirely opposed to those which lay down the rule that the intent is of no moment.[53]

turity," and by mistake this stamp on one of the notes is placed above the indorsement of the maker, as the stamped words are placed above the maker's indorsement by mistake, and have no effect upon the maker's rights, the notes are not vitiated. Gordon v. Chattanooga Third Nat. Bank, 144 U. S. 97, 12 SCt 657, 36 L. ed. 360.

[c] **Canceling note by mistake.**—(1) Where the word "paid" by mistake is written across the face of a promissory note, the validity thereof is not destroyed. Lowremore v. Berry, 19 Ala. 130, 54 AmD 188. (2) Where the cashier of a bank, through mistake, cancels a note executed to the bank, it does not affect the right of the bank to recover the debt. Boulware v. State Bank, 12 Mo. 542.

[d] **Cancellation of deed** by tearing off seal, induced by fraud or mistake see U. S. v. Spalding, 27 F. Cas. No. 16,365, 2 Mason 478; U. S. v. Williams, 28 F. Cas. No. 16,724, 1 Ware 173.

[e] **Restoration after ignorant alteration.**—A payee of a note, wishing to transfer it to the firm of which he was a member, inserted after his name the words "& Bro.," believing that to be the proper way to do it. In an action on the note in its altered form, the suit was dismissed. Afterward the inserted words were erased, and the note sued upon in its original form. In this action it was held that the alteration, having been ignorantly made, did not vitiate the note. Skelton v. Tillman, (Tex.) 20 SW 71.

[f] **"A failure to insert in a written agreement** a provision which the parties agreed should be inserted has never been held to be a fraudulent alteration of an agreement which discharged all the parties to it from any obligation under it." Bindseil v. Federal Union Surety Co., 130 App. Div. 775, 781, 115 NYS 447.

49. Ind.—Cochran v. Nebeker, 48 Ind. 459.

Mass.—Wheelock v. Freeman, 13 Pick. 165, 23 AmD 674.

Mo.—McCormack Harvesting Mach. Co. v. Blair, 146 Mo. A. 374, 124 SW 49; Law v. Crawford, 67 Mo. A. 150.

Nebr.—Oliver v. Hawley, 5 Nebr. 439.

Oh.—Fullerton v. Sturges, 4 Oh. St. 529, 536 (where the court said: "Fraud in the interested party lies at the foundation of the rule; and as a punishment for his fraud, the law deprives him and all claiming under him of all remedy upon it." It was held that the unauthorized affixing of a seal was immaterial under the circumstances).

Or.—Cline v. Goodale, 23 Or. 406, 31 P 956.

S. C.—Heath v. Blake, 28 S. C. 406, 5 SE 842.

Tenn.—McDaniel v. Whitsett, 96 Tenn. 10, 33 SW 567; Taylor v. Taylor, 12 Lea 714; McVey v. Ely, 5 Lea 438; Blair v. State Bank, 11 Humphr. 83.

An alteration "imports a fraud in law, whether so intended or not and even if no injury is done, and the change abandoned by the party, in whose favor it was intended to operate, the consequence, upon strong grounds of policy and settled rules of law, is the same." Crockett v. Thomason, 5 Sneed 342, 345 [quot Organ v. Allison, 9 Baxt. 459, 462].

[a] **Every material alteration of a promissory note** is prima facie fraudulent. McCormack Harvesting Mach. Co. v. Blair, 146 Mo. A. 374, 124 SW 49.

50. Ala.—Green v. Sneed, 101 Ala. 205, 13 S 277, 46 AmSR 119; Toomer v. Rutland, 57 Ala. 379, 29 AmR 722; Glover v. Robbins, 49 Ala. 219, 20 AmR 272.

Del.—Warpole v. Ellison, 9 Del. 322.

Ill.—Soaps v. Eichberg, 42 Ill. A. 375. See also Vogle v. Ripper, 34 Ill. 100, 85 AmD 298 (where the intention with which the alteration was made was held not to be in issue, and hence was not considered).

Ind.—Dietz v. Harder, 72 Ind. 208; Richmond Mfg. Co. v. Davis, 7 Blackf. 412.

Iowa.—Eckert v. Pickel, 59 Iowa 545, 13 NW 708; Murray v. Graham, 29 Iowa 520; Hall v. McHenry, 19 Iowa 521, 87 AmD 451.

Kan.—Davis v. Eppler, 38 Kan. 629, 16 P 793; Sheley v. Sampson, 5 Kan. A. 465, 46 P 994.

Ky.—Phœnix Ins. Co. v. McKernan, 100 Ky. 97, 37 SW 490, 18 KyL 617.

Md.—Owen v. Hall, 70 Md. 97, 16 A 376.

Mass.—Draper v. Wood, 112 Mass. 315, 17 AmR 92; Fay v. Smith, 1 Allen 477, 79 AmD 752; Boston v. Benson, 12 Cush. 61; Wheelock v. Freeman, 13 Pick. 165, 23 AmD 674. But see cases infra notes 52, 53.

Mich.—Aldrich v. Smith, 37 Mich. 468, 26 AmR 536.

Minn.—Renville County v. Gray, 61 Minn. 242, 63 NW 635.

Mo.—Koons v. St. Louis Car Co., 203 Mo. 227, 101 SW 49; Springfield First Nat. Bank v. Fricke, 75 Mo. 178, 42 AmR 397; Moore v. Hutchinson, 69 Mo. 429; German Bank v. Dunn, 62 Mo. 79; Capital Bank v. Armstrong, 62 Mo. 59; Evans v. Foreman, 60 Mo. 449; Washington Sav. Bank v. Ecky, 51 Mo. 272; Law v. Crawford, 67 Mo. A. 150.

Nebr.—Brown v. Straw, 6 Nebr. 536, 29 AmR 369.

N. J.—Vanauken v. Hornbeck, 14 N. J. L. 178, 25 AmD 509; Lewis v. Schenck, 18 N. J. Eq. 459, 90 AmD 631.

N. Y.—Booth v. Powers, 56 N. Y. 22; Meyer v. Huneke, 55 N. Y. 412.

Oh.—Harsh v. Klepper, 28 Oh. St. 200; Boalt v. Brown, 13 Oh. St. 364.

Okl.—Richardson v. Fellner, 9 Okl. 513, 60 P 270.

Pa.—Hartley v. Corboy, 150 Pa. 23, 24 A 295; Craighead v. McLoney, 99 Pa. 211; Marshall v. Gougler, 10 Serg. & R. 164; Moore v. Bickham, 4 Binn. 1.

S. C.—Heath v. Blake, 28 S. C. 406, 5 SE 842; Porter v. Doby, 19 S. C. Eq. 49; Burton v. Pressly, 15 S. C. Eq. 1.

Tenn.—McDaniel v. Whitsett, 96 Tenn. 10, 33 SW 567; Taylor v. Taylor, 12 Lea 714; McVey v. Ely, 5 Lea 438; Crockett v. Thomason, 5 Sneed 341.

Tex.—Ford v. Cameron First Nat. Bank, (Civ. A.) 34 SW 684.

Wis.—Schwalm v. McIntyre, 17 Wis. 232. See also Young v. Wright, 4 Wis. 144, 65 AmD 303.

Eng.—Hirschfield v. Smith, L. R. 1 C. P. 340; Hirschman v. Budd, L. R. 8 Exch. 171; Mollett v. Wackerbarth, 5 C. B. 181, 57 ECL 181, 136 Reprint 845.

51. Booth v. Powers, 56 N. Y. 22. See also supra §§ 14–18.

[a] **This rule leads to the converse** conclusion that an immaterial change will not constitute such an alteration of the instrument as to vitiate it, even though the act was done with fraudulent intent. See supra § 35.

52. Cal.—Oakland First Nat. Bank v. Wolff, 79 Cal. 69, 21 P 551, 748; Rogers v. Shaw, 59 Cal. 260.

Me.—Croswell v. Labree, 81 Me. 44, 16 A 331, 10 AmSR 238; Milbery v. Storer, 75 Me. 69, 46 AmR 361; Thornton v. Appleton, 29 Me. 298; Hale v. Russ, 1 Me. 334 (according to which case the rule has been adopted in this state that if a material alteration in a writing, although unauthorized, was made innocently, without any fraudulent or improper motive, it will not vitiate the instrument).

Mass.—Lee v. Butler, 167 Mass. 426, 46 NE 52, 57 AmSR 466; Adams v. Frye, 3 Metc. 103; Ford v. Ford, 17 Pick. 418; Smith v. Dunham, 8 Pick. 246.

Miss.—Foote v. Hambrick, 70 Miss. 157, 11 S 567, 35 AmSR 631.

N. H.—Bowers v. Jewell, 2 N. H. 543.

Or.—Wallace v. Tice, 32 Or. 283, 51 P. 733.

Va.—Keen v. Monroe, 75 Va. 424.

[a] **In Georgia** (1) under Civ. Code § 3702, in order for an alteration in a promissory note to vitiate the note the alteration must be not only intentional, material, and made by one claiming the benefit under the note, but it must also be made with an intention to defraud. Miller v. Slade, 116 Ga. 772, 43 SE 69; Burch v. Pope, 114 Ga. 334, 40 SE 227; Hotel Lanier Co. v. Johnson, 108 Ga. 604, 30 SE 558; Gwin v. Anderson, 91 Ga. 827, 18 SE 43. (2) And under Civ. Code (1910) § 4296, if such an alteration is made by a person claiming a benefit under it, or by his agent authorized to represent him in the transaction, with intent to defraud the other party, such alteration avoids the whole contract at the option of such other party. Shaw v. Probasco, 139 Ga. 481, 77 SE 577. (3) Under such statutes if the alteration of a contract is unintentional, or by mistake, or in an immaterial matter, or not with intent to defraud, if the contract as originally executed can be discovered and is still capable of execution, it will be enforced. Shaw v. Probasco, supra; Burch v. Pope, supra.

53. See Lee v. Butler, 167 Mass. 426, 46 NE 52, 57 AmSR 466 (where one of several papers constituting a memorandum in a contract guaranteeing payment of a loan erroneously stated the amount of the loan, as shown by other papers. With a view to correct the error, the grantee altered the figures, but the correction was also erroneous, and it was held that, although the change was not altogether immaterial, yet the figures originally inserted in it were not necessary to give the instrument effect; that the contract actually existing between the parties was not changed by the change in the figures; that the memorandum, with the other competent evidence in the case, proved the

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[§ 99] **D. Correction of Mistake to Conform to Original Intention. 1. Rule Permitting.** Where there is a mistake in an instrument whereby the real intention of the parties is left imperfectly expressed, many of the courts consider that a change made by one of the parties to the instrument without the consent of the other party, so as to make it conform to the original intention of the parties and to correct the mistake, is not such an alteration as will avoid the instrument.[54] The reason usually given for the application of this rule is that under the circumstances the change is immaterial and not fraudulent,[55] and

same contract after the change as before it; that the rule applied in Adams v. Frye, 3 Metc. (Mass.) 103, should be applied in this case, but that the court did not find circumstances to show a prima facie fraudulent intent. This case does not seem to be inconsistent with Fay v. Smith, infra); Fay v. Smith, 1 Allen (Mass.) 477, 478, 79 AmD 752 (holding that no case had gone so far in that state as to hold that, where a material alteration in a contract had been made by the payee or obligee "with the express intention of changing the operation of the contract itself," it could afterward be enforced even in the absence of any fraudulent intent); Foote v. Hambrick, 70 Miss. 157, 11 S 567, 35 AmSR 631; Wallace v. Tice, 32 Or. 283, 51 P 733 (in both of which cases the change was for the purpose of correcting a mistake to conform to the original intention of the parties, and while this may be said to come under the distinction in Fay v. Smith, supra, the court in the first case recognizes that it is opposed to the general principle that a material alteration vitiates the instrument without reference to the motive of the person making the alteration). See also infra § 98.

54. Ark.—Frazer v. Decatur State Bank, 101 Ark. 135, 142, 141 SW 941 [cit Cyc]; Inglish v. Breneman, 5 Ark. 377, 41 AmD 96.

Cal.—Sill v. Reese, 47 Cal. 294 (holding that such a change need not be noted at the bottom of the instrument before it is signed, in order to make it available as evidence). See also Turner v. Billagram, 2 Cal. 520.

Conn.—Murray v. Klinzing, 64 Conn. 78, 29 A 244.

Ga.—Hadden v. Larned, 87 Ga. 634, 13 SE 806 (where it appeared that a commissioner of deeds for Georgia in another state, in attesting a deed executed in the latter state, erased the printed words describing him, which by mistake were opposite the name of another attesting witness, and interlined such words in their proper place, but without explanation of the erasure, and attached his seal as commissioner, and it was held that as the erasure was plainly to correct an error it did not vitiate the attestation). See also Hanson v. Crawley, 41 Ga. 303.

Ill.—Ryan v. Springfield First Nat. Bank, 148 Ill. 349, 35 NE 1120; Pardee v. Lindley, 31 Ill. 174, 83 AmD 219; Reed v. Kemp, 16 Ill. 445.

Ind.—Osborn v. Hall, 160 Ind. 153, 159, 66 NE 457 (where Jordan, J., said: "An alteration for such purpose and to such extent the great weight of authorities sanction, and hold that it may be made without destroying the legal effect of the note or instrument").

Ky.—Mattingly v. Riley, 49 SW 799, 20 KyL 1621; Duker v. Franz, 7 Bush 273, 3 AmR 314.

Md.—Outtoun v. Dulin, 72 Md. 536, 20 A 134.

Mass.—Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577, 58 NE 162; Lee v. Butler, 167 Mass. 426, 46 NE 52, 57 AmSR 466; Ames v. Colburn, 11 Gray 390, 71 AmD 723.

Miss.—Foote v. Hambrick, 70 Miss. 157, 11 S 567, 35 AmSR 631 [appr McRaven v. Crisler, 53 Miss. 542] (holding that the alteration of a trust deed in a material matter by one of the grantors, after its execution and delivery, without the knowledge or consent of another grantor, whereby an advantage was conferred upon the beneficiary, would not render the deed absolutely void where the alteration was made in good faith in an honest effort to correct a mistake and to conform the instrument to the real intention of the parties at the time it was executed, although the ruling was said to be in conflict with the cases in England and the United States which hold that any alteration of a deed or other instrument made by the voluntary act of the grantor, etc., destroys the instrument altogether); Conner v. Routh, 8 Miss. 176, 40 AmD 59 (to same effect).

N. H.—Cole v. Hills, 44 N. H. 227. But see Bowers v. Jewell, 2 N. H. 543.

N. Y.—Levy v. Arons, 81 Misc. 165, 142 NYS 312; Clute v. Small, 17 Wend. 238, 241 (where Cowen, J., said: "The cases allowing an alteration of express words, without the authority of the party to be affected, even to correct a mistake, are very scant, while they are quite numerous that a mere omission may be supplied. No distinction, however, appears to be expressly established by the cases. Mr. Chitty seems to consider them all as standing on the same principle, and that those cases which authorize the ex parte filling up of a mistake in blank, equally authorize a correction of any plain mistake in the same way. Chitty on Bills, ed. of 1836, p. 206, 207. Both are certainly carrying out the original intent of the parties").

N. D.—Styles v. Theo. P. Scatland, 22 N. D. 469, 134 NW 708.

Oh.—Jessup v. Dennison, 2 Disn. 150.

Or.—Wallace v. Tice, 32 Or. 283, 51 P 733.

Pa.—Latshaw v. Hiltebeitel, 2 Pennyp. 257.

Utah.—McClure v. Little, 15 Utah 379, 49 P 298, 62 AmSR 938.

Vt.—Derby v. Thrall, 44 Vt. 413, 8 AmR 389.

Eng.—Byrom v. Thompson, 11 A. & E. 31, 39 ECL 42, 113 Reprint 324; Webber v. Maddocks, 3 Campb. 1; Kershaw v. Cox, 3 Esp. 246; Jacob v. Hart, 6 M. & S. 142, 105 Reprint 1196; Brutt v. Picard, R. & M. 37, 21 ECL 698; London, etc., Bank v. Roberts, 22 Wkly. Rep. 402.

Can.—McLaren v. Miller, 36 CanLJ 680.

N. S.—Merchants' Bank v. Stirling, 13 N. S. 439.

Ont.—Sayles v. Brown, 28 Grant Ch. (U. C.) 10; Fitch v. Kelly, 44 U. C. Q. B. 578.

Filling blanks see generally infra §§ 119–144.

[a] **Where a mistake has occurred in the terms of a note** (1) which is in fact different from the purpose and intention of the parties, and a change is made therein in good faith by the holder for the purpose of making the instrument conform to the intention of the parties, the alteration is not fraudulent and will not vitiate the note. Under such circumstances the holder is impliedly authorized to make the correction, but it must clearly appear that the mistake was mutual and extended to all the parties, and that the change was such as was necessary to rectify the mistake and make the instrument speak the exact truth. Busjahn v. McLean, 3 Ind. A. 281, 29 NE 494. (2) Thus where notes were signed by the president and secretary of a corporation, but the name of the corporation was not on the face of the notes when they were originally issued and indorsed, but they were entered in the books of the corporation and were similar, with the exception of such omission, to many other notes issued and paid by the corporation, the subsequent insertion of the name by the treasurer would not be an alteration affecting their validity, for as the name was accidentally omitted, it was proper to correct the mistake by inserting it. Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577, 58 NE 162.

[b] **Erasing credits entered by mistake.**—The holder of a note may erase credits entered on it by mistake. Tubb v. Madding, Minor (Ala.) 129; Chamberlin v. White, 79 Ill. 549.

[c] **Contract of guaranty.**—It has been said that the general rule by which a written instrument is avoided by a material alteration is not applied to a writing such as a contract of guaranty, "where the alteration is made in good faith to correct an error, under circumstances showing an implied authority from the other party to make the correction. The principle underlying this exception to the general rule seems to be, that where no one's rights are injuriously affected, and where it appears that the alteration was made with a view to carry out the intention of the party who signed the paper, the change ought not to render the contract invalid." Per Knowlton, J., in Lee v. Butler, 167 Mass. 426, 431, 46 NE 52, 57 AmSR 466.

[d] **Correction of error in computation.**—Where the footing of assets and liabilities in a report made by a business firm to a commercial agency for the purpose of obtaining credit is incorrect, it may be corrected without affecting the admissibility of the report in evidence. Belleville Pump, etc., Works v. Samuelson, 16 Utah 234, 52 P 282.

[e] **Corrections written in contract with lead pencil.**—Writing correction with a lead pencil in a policy of insurance which is returned to the insurer for correction has been held not to be an alteration. Chase v. Washington Mut. Ins. Co., 12 Barb. (N. Y.) 595.

55. Cal.—Sill v. Reese, 47 Cal. 294 (holding that an alteration made to conform the paper to the intention of the parties is an innocent alteration).

Conn.—Murray v. Klinzing, 64 Conn. 78, 29 A 244 (where the consideration in a deed had been left blank, and the filling of it with the true consideration was held not to be a material alteration).

Ill.—Ryan v. Springfield First Nat. Bank, 148 Ill. 349, 353, 35 NE 1120 (where the court said: "It is also competent, in determining whether a change has materially affected the rights of the parties, to take into consideration their intention when the agreement was executed. Thus, the date of a note may be changed so as to make it correspond with the intention of the parties, without affecting its validity." It was accordingly held that a guarantor, who had signed his name below the signatures of the makers of a promissory note, and subsequently, after delivery, had his name erased and indorsed it upon the back of the note, did not thereby affect its validity, as no change was made in the rights of any of the parties).

Md.—Outtoun v. Dulin, 72 Md. 536, 20 A 134.

Mass.—Ames v. Colburn, 11 Gray 390, 71 AmD 723 (holding that the alteration by the promisee of the date of a note made without the knowledge or consent of the promisor, but without any fraudulent intention, and merely to correct a mistake and make the note such as both parties intended that it should be, and understood that it was, does not avoid the note in the hands of an indorsee).

Miss.—McRaven v. Crisler, 53 Miss. 542; Conner v. Routh, 8 Miss. 176, 40 AmD 59.

N. H.—Cole v. Hills, 44 N. H. 227.

N. Y.—Clute v. Small, 17 Wend. 238; Boyd v. Brotherson, 10 Wend. 93.

Pa.—Latshaw v. Hiltebeitel, 2

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therefore does not affect the validity of the instrument.[56] It is also sometimes said that in such cases the assent of the parties to the change will be presumed or dispensed with.[57]

Correction must conform to intention of all parties. An alteration made to correct a mistake must be such as will make the instrument conform to what all the parties agreed or intended that it should be, and not to what only one party intended.[58]

[§ 100] **2. Rule Prohibiting Reformation by Parties.** On the other hand, the rule is broadly laid down that one party to an instrument has no right to reform its language without the consent of the other party, however inaccurately the real contract beween the parties may be expressed;[59] and that unless the parties mutually consent to such reformation it can be effected only through the aid of a court of equity.[60] The reason assigned for this view is that to hold otherwise would open the door to controversies intended by the law to be closed by the written contract of the parties;[61] that it would in effect convert all contracts into oral contracts, and allow a party to do what even the court cannot do at the trial, that is, resort to extrinsic evidence to ascertain the intention of the parties.[62] It is diffi-

Pennyp. 257 (correction of the name of the payee in a note). But see cases infra § 100.

Tex.—Chamberlain v. Wright, (Civ. A.) 35 SW 707 (holding that the erasure of the marginal figures in a promissory note, leaving the amount stated in the body unchanged, and writing at the top the correct amount in order to rectify a mutual mistake resulting from an error in calculation, is not such an alteration as will render the note void). But see cases infra § 100.

Vt.—Derby v. Thrall, 44 Vt. 413, 8 AmR 389 (where the payee's name in a note was written, by mistake, incorrectly and its correction was held not a material alteration. Broughton v. Fuller, 9 Vt. 373, was distinguished upon the ground that the change of name in that case made the note payable to a different person from the one to whom it was originally made payable, which alteration was held to be material and to invalidate the note).

Eng.—Trew v. Burton, 1 Cromp. & M. 533 (holding that an award by an umpire which mistakenly recites the christian name of one of the original arbitrators is not thereby vitiated, the mistake being in an immaterial part. Hence it follows that the alteration, subsequent to the publication of the award, by striking out the wrong and inserting the right christian name does not vitiate the award, but leaves it as it was before the alteration); London, etc., Bank v. Roberts, 22 Wkly. Rep. 402 (where the alleged alteration consisted in inserting the name of an indorser prior to the indorsement of defendant. Blackburn, J., said: "To vitiate the instrument the alteration must have been a material one. Here the alteration was made solely for the purpose of carrying out the intention of the parties, not for the purpose of varying the instrument in any way. Such an alteration cannot nullify the instrument. On the contrary it is just such an alteration as equity would require to be made in order to give the instrument the effect it was intended to have").

[a] **"Where the alteration is prompted by honest and pure motives,** with a purpose of correcting the instrument to correspond with what the party honestly and in perfect good faith believed to be the true engagement of the parties at the time of the execution, the act does not destroy the legal efficacy of the note, and recovery may be had upon it when restored." Per Wolverton, J., in Wallace v. Tice, 32 Or. 283, 289, 51 P 733.

56. See supra § 33.

57. Busjahn v. McLean, 3 Ind. A. 281, 29 NE 494; Lee v. Butler, 167 Mass. 426, 46 NE 52, 57 AmSR 466; McRaven v. Crisler, 53 Miss. 542; Cole v. Hills, 44 N. H. 227; Bowers v. Jewell, 2 N. H. 543 (where an alteration had been made in the date of a note, and it was said that the circumstance that an alteration had been made with a view to correct a mere mistake or to make a written contract conform to the verbal one may be important in rebutting the presumption which might otherwise arise of a fraudulent intent, and also in raising an implication that the maker of the note assented to the alteration).

"To such an alteration as this, perhaps, the intention of the original parties would be implied by law." Latshaw v. Hiltebeitel, 2 Pennyp. (Pa.) 257, 264 [quot 2 Parsons Notes and Bills 270].

58. Duker v. Franz, 7 Bush (Ky.) 273, 3 AmR 314; Hervey v. Harvey, 15 Me. 357; McRaven v. Crisler, 53 Miss. 542; Dobyns v. Rawley, 76 Va. 537.

59. Ill.—Merritt v. Dewey, 218 Ill. 599, 75 NE 1066, 2 LRANS 217 [rev 115 Ill. A. 503, and reconciling and foll Ryan v. Springfield First Nat. Bank, 148 Ill. 349, 35 NE 1120; Kelly v. Trumble, 74 Ill. 428].

Iowa.—Murray v. Graham, 29 Iowa 520.

Kan.—Edington v. McLeod, 87 Kan. 426, 124 P 163, 41 LRANS 230, AnnCas 1913E 315 (holding that a promissory note altered by the payee by increasing the rate of interest, without fraudulent intent, so to make it conform to the contract in pursuance of which it was given is avoided). See People's Gas Co. v. Fletcher, 81 Kan. 76, 85, 105 P 34, 41 LRANS 1161 [cit Cyc].

Mich.—Aldrich v. Smith, 37 Mich. 468, 26 AmR 536.

Mo.—Koons v. St. Louis Car Co., 203 Mo. 227, 101 SW 49; Capital Bank v. Armstrong, 62 Mo. 59 (to the effect that, if mistakes arise in the preparation of written instruments, aside from consent of all parties to the needed correction the courts of the country alone can furnish adequate redress); Evans v. Foreman, 60 Mo. 449; Barnes-Smith Mercantile Co. v. Tate, 156 Mo. A. 236, 137 SW 619.

Nebr.—Pereau v. Frederick, 17 Nebr. 117, 22 NW 235. In Brown v. Straw, 6 Nebr. 536, 538, 29 AmR 369, Maxwell, J., said: "The law does not permit the payee of a note to change its terms and conditions without the assent of the maker, even if the alteration is in his favor, or to correct a mistake."

N. J.—Hunt v. Gray, 35 N. J. L. 227, 10 AmR 232.

Pa.—Clark v. Eckstein, 22 Pa. 507, 62 AmD 307; Miller v. Gilleland, 19 Pa. 119, 1 AmLReg 672.

S. C.—Smith v. Smith, 27 S. C. 166, 3 SE 78, 13 AmSR 633.

Tenn.—Taylor v. Taylor, 12 Lea 714.

Tex.—Otto v. Halff, 89 Tex. 384, 34 SW 910, 59 AmSR 56.

Utah.—Belleville Pump, etc., Works v. Samuelson, 16 Utah 234, 52 P 282 (holding that the same rigid rule cannot be applied to a report made by a business firm to a commercial agency for the purpose of obtaining credit).

Va.—Dobyns v. Rawley, 76 Va. 537.

In Chadwick v. Eastman, 53 Me. 12, 17, Walton, J., said: "It is said, in Chitty on Bills, 85, that an alteration to correct a mistake does not vitiate a bill of exchange; and this remark seems to have given rise to an erroneous belief in the minds of some. In all the reported cases on this point, it appears that the alterations were made by consent, and the remark, that such an alteration does not invalidate the instrument, had reference to the stamp law, and meant no more than that an alteration, by consent, to correct an error, would not require a new stamp. It is erroneous to suppose that one of the parties may lawfully alter an instrument, even to correct an error, without the consent of the other. The other may deny that there is any error, and the holder of the instrument cannot lawfully take upon himself the decision of that question." See also Bowers v. Jewell, 2 N. H. 543 (where the remark in Chitty was distinguished in the same manner).

[a] **The rule is quite strict** that "a material alteration of a written instrument by one of the parties by adding words to it will release the other party thereto . . . even though the alteration is made in good faith, in order to make it conform to the real agreement of the parties. The instrument is vitiated regardless of the intent of the party making it." Koons v. St. Louis Car Co., 203 Mo., 227, 259, 101 SW 49 [quot and dist Barnes-Smith Mercantile Co. v. Tate, 156 Mo. A. 236, 242, 137 SW 619].

[b] **The alteration of a promissory note in a material respect by one of several makers thereof,** assuming to have authority to do so, and for the honest purpose of making it conform to the original intention of the parties without the express, although with the implied, assent of the holder, will not prevent a recovery by the latter against all the makers in an action declaring upon the note as though in the form originally delivered. Murray v. Graham, 29 Iowa 520.

60. Kelly v. Trumble, 74 Ill. 428; Hunt v. Gray, 35 N. J. L. 227, 10 AmR 232. In Merritt v. Dewey, 218 Ill. 599, 603, 75 NE 1066, 2 LRANS 217 [rev 115 Ill. A. 503] Scott, J., said: "Whether an alteration of a written instrument, after its execution, without the consent of the maker, made for the purpose of making the instrument conform to the actual contract made by the parties, will vitiate the instrument, is a question with reference to which the authorities outside of this State are not unanimous. In Illinois the question arose in the case of Kelly v. Trumble, 74 Ill. 428. There the obligee in a bond for deed inserted therein, after the execution of the instrument and without the knowledge or consent of the obligor, words granting immediate possession of the premises to the obligor. This court there said: 'It is not sufficient to cure this objection to say that the words added expressed the real contract between the parties. This would tend to show that the bond, as drawn, did not truly declare the contract between the parties, but would afford no justification to one of the parties, without the consent of the other, to change its terms. One party to a written instrument has no right, without the consent of the other party to it, to reform its language, however inaccurately it may express the real contract between them.'" See also supra § 19; and cases supra note 59.

61. Taylor v. Taylor, 12 Lea (Tenn.) 714 [crit Duker v. Franz, 7 Bush (Ky.) 273, 3 AmR 314].

62. Hunt v. Gray, 35 N. J. L. 227, 231, 10 AmR 232 (where the note as drawn was payable without "defalcation" merely, but had been mate-

cult, if not impossible, to reconcile all the cases upon this subject. Some of the cases may doubtless, irrespective of the fact that the change was an attempted correction of a mistake, be reconciled upon the ground that the change was inherently immaterial, and therefore did not invalidate the instrument.[63] The distinction has also been suggested that a correction which merely makes the instrument read as the parties intended at the time they executed it does not invalidate the instrument;[64] but that a correction which changes the instrument as agreed upon by the parties, although intended to make the instrument conform to the real intention of the parties, will invalidate it.[65]

V. BY WHOM MADE

[§ 101] **A. By Parties or Privies—1. In General.** In order to have the effect of an alteration avoiding the instrument a material change must be made by a party or privy to the instrument,[66] or with his knowledge or consent.[67] A like change made by a stranger to the instrument is not a technical alteration, but is deemed a mere spoliation.[68]

[§ 102] **2. Against Whom Available—a. In General.** The vitiating effect of an alteration is available only against the person making it or who is in some way a party or a privy to such alteration.[69] On the principle that no one can take advantage of his own wrong a party bound by an instrument cannot destroy it as an operative instrument against himself by making changes or alterations therein without the knowledge or consent of the other parties interested therein;[70] and this rule is held to apply where the alteration is induced by the fraud of the

rially altered by the insertion of the words "or discount." It was contended by counsel that the alteration of the note was in furtherance of the original agreement, and that therefore it was unobjectionable. The rule claimed was that a person holding a written contract could legally alter it so as to make it conform to the real understanding between the contracting parties. Beasley, C. J., in denying the correctness of this rule, said: "This was certainly, in this case, good ground for believing that both of these parties understood that the note to be given for the price of the horse sold, should be one of complete negotiability, and the probability is that the instrument, in its changed form, did, in point of fact, effectuate the real intention. But still such act, on the plainest grounds, was manifestly illegal. . . . To maintain that a party may reform a written instrument by his own act, is, in reality, to convert all contracts into oral contracts; the written instrument would no longer be the depositary of the intention of the parties, but either party could make it accord with the remembrance of the by-standers. This would be to allow the party to do what the court cannot do at the trial—that is, to resort to evidence aliunde to ascertain what was meant. If the writing does not hit the real design of the parties to it, the error must be corrected in a court of equity. The application of these familiar principles at once refutes the proposition that the agent of the plaintiff could lawfully alter this note for the purpose specified. The law prohibits a party from altering a written contract, ex mero motu, whatever his design may be, whether good or bad. The alteration of the note, in this case, destroyed it, if such alteration, in legal intendment, is to be ascribed to the plaintiff").

63. See cases supra §§ 33, 99.

64. Duker v. Franz, 7 Bush (Ky.) 273, 275, 3 AmR 314 (where the court said: "The reason and philosophy of the law demand that a case of this character should be made an exception to the general rule, that every material alteration in a note made after its delivery and without the consent of the payor renders it void, if indeed it comes within that general rule. We agree that the holder of the note has no right to make an alteration to correct a mistake, unless to make the instrument conform to what all parties to it agreed or intended it should have been: but this much he can do without destroying the legal efficacy of the writing"); Hervey v. Harvey, 15 Me. 357, 358 (where the court said: "An alteration made to correct a mistake, must be such as will make the instrument conform to what all parties agreed or intended it should be, not to what one party only intended").

65. See cases supra this section note 59.

[a] **The rule and the reason for it** are well illustrated in Low v. Argrove, 30 Ga. 129, 132, where a promissory note was given which did not express any consideration. It was changed by the holder by inserting the words "For tract of land in 10th district." This was held to vitiate the entire note. The court said: "The whole force and effect of the note itself is only as evidence. It is not the debt, but only the appointed evidence of the debt. If the holder of the note, without the consent of the maker, adds anything which is material to the evidence thus appointed, he makes evidence for himself just as effectually as if he were to forge the whole note. . . . When the holder of a paper tampers with it by putting a material addition to it, he vitiates the whole paper. We do not say that he cancels the debt which is evidenced by the note, but we do say that he must recover it on other evidence than that which was appointed by the parties, but which has been put in disrepute by his own act. The note is cancelled."

66. Alabama State Land Co. v. Thompson, 104 Ala. 570, 16 S 440, 53 AmSR 80; Lesser v. Scholze, 93 Ala. 338, 9 S 273; Brooks v. Allen, 62 Ind. 401, 407 (holding that if plaintiff made the alteration himself it is immaterial whether or not he was the holder at the time he made it. "If he made the alteration when not a holder, and afterward became the holder, the note would be void in his hands"); Carlile v. Lamb, 16 Oh. Cir. Ct. 578, 9 Oh. Cir. Dec. 70 (holding that a material alteration by one maker without the assent of others will release the latter, and approving an instruction that the alteration must be made by or at the instance of, or with the complicity of, the owner or holder of the note); Hayes v. Dumont, 2 Oh. Cir. Ct. 229, 1 Oh. Cir. Dec. 458. See also infra § 104.

[a] **The term "alteration"** is usually applied at this day to the act of a party entitled under the instrument. 1 Greenleaf Ev. § 566. See also Grimes v. Piersol, 25 Ind. 246; Bingham v. Shadle, 45 Nebr. 82, 63 NW 143; Oliver v. Hawley, 5 Nebr. 439; State v. Manhattan Silver Min. Co., 4 Nev. 318; Blair v. State Bank, 11 Humphr. (Tenn.) 83.

[b] **An administrator,** taking a note payable to himself as such, is beneficially interested therein, and hence it is annulled by an alteration made by him. McMurtrey v. Sparks, 71 Mo. A. 126.

[c] **In Georgia,** under Civ. Code (1895) § 3702, an alteration of an instrument does not vitiate it unless made by some one claiming a benefit under it. Shirley v. Swafford, 119 Ga. 43, 45 SE 722; Burch v. Pope, 114 Ga. 334, 40 SE 227; Hotel Lanier Co. v. Johnson, 103 Ga. 604, 30 SE 558.

Immaterial change by party or privy see supra §§ 33–36.

67. Jordan v. Long, 109 Ala. 414, 19 S 843; Mulkey v. Long, 5 Ida. 213, 47 P 949. And see infra § 108 et seq.

"If an alteration is made with the privity of the holder the effect is the same as if made by the holder." Soaps v. Eichberg, 42 Ill. A. 375, 381. To same effect Wallace v. Jewell, 21 Oh. St. 163, 8 AmR 48.

68. See infra §§ 104–107; and supra § 1.

69. Ida.—Mulkey v. Long, 5 Ida. 213, 47 P 949 (under Rev. St. § 6030).

Nebr.—Bingham v. Shadle, 45 Nebr. 82, 63 NW 143 [dist Martin v. Thomas, 24 How. (U. S.) 315, 16 L. ed. 689].

N. Y.—Martin v. Tradesman's Ins. Co., 101 N. Y. 498, 5 NE 338 (holding that an alteration made by defendant or a third person without plaintiff's consent, or while the contract is out of plaintiff's hands, has no effect so long as the original contents of the instrument are ascertainable).

Oh.—Fullerton v. Sturges, 4 Oh. St. 529 (holding that, in order to render a written instrument void on account of an alteration, it must appear, inter alia, that it was made by plaintiff or the party seeking to enforce it and not by a stranger); Carlile v. Lamb, 16 Oh. Cir. Ct. 578, 9 Oh. Cir. Dec. 70; Hayes v. Dumont, 2 Oh. Cir. Ct. 229, 1 Oh. Cir. Dec. 458.

Wis.—Young v. Wright, 4 Wis. 144, 65 AmD 303.

Alterations by strangers afford instances of the application of this rule. See infra §§ 104–107.

Authority and consent to alteration see infra § 108 et seq.

[a] **"The rule is well established** that an alteration of a contract under which a plaintiff claims, made by a defendant or some third party, without the plaintiff's consent, and while the contract is out of plaintiff's hands, has no effect, and the contract will remain as it originally stood, provided the nature and extent of the alteration can be clearly ascertained, and it can be seen what the contract was at the time it was executed." Martin v. Tradesman's Ins. Co., 101 N. Y. 498, 503, 5 NE 338.

70. U. S.—U. S. v. Linn, 1 How. 104, 11 L. ed. 64.

Ind.—Johnson v. Wabash, etc., Plank-Road Co., 16 Ind. 389 (holding that, where defendant erased a subscription made by him to a proposed corporation, action on the subscription may still be maintained, as the terms of the subscription may be shown by parol evidence).

Ky.—Letcher v. Bates, 6 J. J. Marsh. 524, 22 AmD 92.

Me.—Hughes v. Littlefield, 18 Me. 400.

Miss.—Natchez v. Minor, 17 Miss. 544, 48 AmD 727 (holding that a party who has signed and delivered a contract cannot rescind or avoid it by afterward obtaining possession of it and erasing his name therefrom).

obligor;[71] but he may, by such an alteration, invalidate the instrument as an operative instrument in his own favor.[72] Where a material alteration is made in the instrument by some only of the parties bound thereby, without the privity of the others, such alteration cannot, if the grantee or promisee had no hand therein, prevent recovery by him upon the instrument as it originally stood;[73] this rule has been applied to the alteration of bonds by some only of the obligors.[74] A change made in the course of the execution and delivery of an instrument, by reason of which it never becomes a binding contract for want of mutual assent, is governed by other rules, and is not a technical alteration.[75]

A bond which has been materially altered by the obligor, without the assent of the obligee, is still enforceable against the obligor who made the alteration.[76]

A deed of land is not defeated by an alteration therein made by the grantor after its delivery to the grantee,[77] except as respects covenants therein in favor of the grantor.[78]

An alteration in a promissory note by the maker, without the consent of the promisee, does not vitiate the instrument.[79]

[§ 103] **b. Change by Maker and Obligee against Coöbligor.** A change made by the maker or obligor, with the knowledge or at the instance of the payee or obligee, will discharge a comaker, obligor, or surety not consenting to such change.[80]

Commercial paper. Where commercial paper, such as a promissory note, executed by several promisors, is materially altered by one of them by the procurement of the payee, but without the consent of other

N. J.—De Camp v. Crane, 19 N. J. Eq. 166 [rev on other grounds 21 N. J. Eq. 414].

Okl.—Diamond v. Inter-Ocean Newspaper Co., 29 Okl. 323, 116 P 773.

Pa.—Struthers v. Kendall, 41 Pa. 214, 80 AmD 610; Patterson v. Patterson, 2 Penr. & W. 200.

Tex.—Stanley v. Epperson, 45 Tex. 644; Butler v. State, 31 Tex. Cr. 63, 19 SW 676.

W. Va.—Ohio Valley Bank v. Lockwood, 13 W. Va. 392, 31 AmR 768.

[a] **A guardian** cannot, without payment, legally destroy a contract to the prejudice of his wards. Where a maker of a note, with sureties, payable to one as guardian, afterward becomes guardian himself and then cuts the names of the sureties from the note formerly executed by him, this will not extinguish the note. Williams v. Moseley, 2 Fla. 304.

[b] **Assignor of contract.**—The assignment of a contract is not avoided by an alteration of the assignment by the assignor. Block v. Walker, 2 Ark. 4.

[c] **By coöbligor.**—"Authorities are quoted which say that an alteration, to avoid an instrument, must be made by one who is entitled to some right or benefit under it, and that a joint promisor or maker is not such a party. Note 17 AmR 100; Fullerton v. Sturges, 4 Oh. St. 529." Barton Sav. Bank, etc., Co. v. Stephenson, 87 Vt. 433, 89 A 639, 641, 51 LRANS 346. "But the rule is generally taken to apply to any party to the instrument; and it has been specifically held in numerous cases that an alteration by one obligor or principal, without the consent of his co-obligor or surety, discharges the latter." Barton Sav. Bank, etc., Co. v. Stephenson, supra. See also infra § 103.

71. U. S. v. Spalding, 27 F. Cas. No. 16,365, 2 Mason 478 (holding that, if an obligee tears off the seal or cancels a bond in consequence of fraud and imposition practiced by the obligor, he may declare on such mutilated bond as the deed of the party, and set forth the special facts in profert).

[a] **Similar to lost instrument.**—If a bond is canceled by fraud, without being paid or otherwise satisfied, it will support an action under the same circumstances as those in which a recovery can be had on a bond lost or destroyed. U. S. v. Williams, 28 F. Cas. No. 16,724, 1 Ware 173.

72. Wallace v. Harmstad, 15 Pa. 462, 53 AmD 603.

[a] **Grantee.**—Although a deed, changed after delivery by the substitution of another grantee, is ineffectual to pass title, yet, where the original grantee himself procures the substitution to be made, he cannot afterward repudiate it and claim title in himself, notwithstanding the alteration. Abbott v. Abbott, 189 Ill. 488, 59 NE 958, 82 AmSR 470.

73. Burton v. Shotwell, 13 Bush (Ky.) 271 (holding that the erasure of the name of one of six acceptors of a written proposition by the receiptor by himself, without the consent of the other parties thereto, does not affect the validity of the contract or cancel his liability).

74. Union Oil Co. v. Mercantile Refining Co., 8 Cal. A. 768, 97 P 919; Bingham v. Shadle, 45 Nebr. 82, 85, 63 NW 143 (where Irvine, C., said: "If alteration by a stranger, without the consent of the person entitled could not defeat the bond, a fortiori it could not be defeated by the act of the obligors themselves." It was accordingly held that where an appeal bond after approval was altered by some of the sureties who erased their names from the bond, without consent of the obligee, neither such sureties nor their cosureties were released. Martin v. Thomas, 24 How. (U. S.) 315, 16 L. ed. 689, was distinguished on the ground that the signature was erased in that case with the consent of the obligee, and without the consent of the other obligors); Barrington v. Washington Bank, 14 Serg. & R. (Pa.) 405; Rhoads v. Frederick, 8 Watts (Pa.) 448. But see Renville County v. Gray, 61 Minn. 242, 63 NW 635.

[a] **Where an administrator** procured his bond from the clerk's office, and struck out the name of one of the coöbligors and inserted instead the name of another person, it was held that the person whose name was so stricken out was still, in equity, a party to the bond and bound by its obligations, and that the erasure did not affect the liability of the coöbligors. Harrison v. Turbeville, 2 Humphr. (Tenn.) 242.

75. See supra § 91.

76. U. S.—Cutts v. U. S., 6 F. Cas. No. 3,522, 1 Gall. 69.

Ind.—Robinson v. State, 60 Ind. 26.

N. H.—Pequawket Bridge v. Mathes, 8 N. H. 139.

Pa.—Rhoads v. Frederick, 8 Watts 448.

Tenn.—Harrison v. Turbeville, 2 Humphr. 242.

77. Fitzgerald v. Wynne, 1 App. (D. C.) 107 (holding that the erasure of the grantor's signature from a deed made by the grantor after delivery did not invalidate the deed); Owen v. Mercier, 14 Ont. L. 491, 10 OntUR 1, 10 AnnCas 457 (holding that a forfeiture clause inserted in a deed by or with the knowledge of the grantor, after the deed had been signed, sealed, and delivered, and while it was in the possession of the grantor for another purpose, did not render the deed invalid). See also Deeds [13 Cyc 721].

78. Wallace v. Harmstad, 44 Pa. 492 [aff 3 Phila. 227]; Wallace v. Harmstad, 15 Pa. 462, 53 AmD 603 (holding that a fraudulent alteration by the grantor of a deed, after execution and delivery, rendered the deed void as respects covenants for rent in his favor, and that even a subsequent bona fide purchaser of the ground rent reserved could not recover from the grantee); Arrison v. Harmstead, 2 Pa. 191.

[a] **Where a grantor, after delivery of a deed, inserts a forfeiture clause** without the grantee's knowledge or consent, he can derive no right under such clause. Owen v. Mercier, 14 Ont. L. 491, 10 OntUR 1, 10 AnnCas 457 [rev 12 Ont. L. 529].

79. Pelton v. San Jacinto Lumber Co., 113 Cal. 21, 45 P 12; Bucklen v. Huff, 53 Ind. 474 (holding that a change in a note indorsed thereon by the maker after execution and delivery, and without the knowledge and consent of the payee, was a mere spoliation which did not discharge a surety); Green v. Beckner, 3 Ind. A. 39, 29 NE 172.

[a] **Transferor of note.**—In an action by the transferee of a note against his transferor, it was held that an alteration consisting of the addition of the words "without recourse," written at the end of the transfer of the note by the transferor who obtained possession after the transfer, did not alter the rights of the parties. Martin v. McMasters, 14 La. 420.

[b] **Where one of several makers of a note after its execution gets possession** of the note from the payee without the consent and against the remonstrance of the payee, and makes a change therein, there is a mere spoliation which cannot affect the right of the payee to recover on the note as it existed before the spoliation. Green v. Beckner, 3 Ind. A. 39, 29 NE 172.

80. Ala.—White Sewing Mach. Co. v. Saxon, 121 Ala. 399, 25 S 784; Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140.

Del.—Newark Bank v. Crawford, 2 Houst. 282.

Ga.—Hanson v. Crawley, 41 Ga. 303.

Ind.—Fry v. Bannon Sewer Pipe Co., 179 Ind. 309, 101 NE 10 (holding that the alteration of a written instrument after it is signed by some of the parties thereto and before it is signed by others, so as to change its terms, if done with the express or implied knowledge of the obligee, discharges the nonassenting parties, where the contract is perfected, that is, without additional requirements to effectuate it).

Iowa.—Marsh v. Griffin, 42 Iowa 403.

Mo.—King v. Hunt, 13 Mo. 97.

Nebr.—Brown v. Straw, 6 Nebr. 536, 29 AmR 369.

N. H.—Haines v. Dennett, 11 N. H. 180.

N. M.—Ruby v. Talbott, 5 N. M. 251, 21 P 72, 3 LRA 724 and note.

N. C.—Darwin v. Rippey, 63 N. C. 318.

Oh.—Thompson v. Massie, 41 Oh. St. 307; Harsh v. Klepper, 28 Oh. St. 200; Sturges v. Williams, 9 Oh. St. 443, 75 AmD 473.

Pa.—Hartley v. Corboy, 150 Pa. 23, 24 A 295; Neff v. Horner, 63 Pa. 327, 3 AmR 555.

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promisors, the instrument is avoided as to the promisors who did not consent to the alteration;[81] and it is not enforceable against a person who signed as indorser.[82] So if the alteration of a bill of exchange is made with the consent of the drawer and acceptor after indorsement, the indorser will be discharged.[83]

Where a bond is altered by one of several obligors with the assent of the obligee, while the obligor making the change remains bound, the other obligors are discharged by the alteration.[84]

[§ 104] **B. Changes Made by Stranger to Instrument—1. General Rule.** By the law as it once stood a material alteration of a deed by a stranger avoided it,[85] but, although this doctrine was later recognized both in England[86] and in the United States,[87] it has found little favor with the courts in modern times and may now be regarded as entirely abandoned,[88] and the general rule held to be that erasures, interlineations, and changes, however material, made in and upon an instrument by a stranger to it, without

Tenn.—Crockett v. Thomason, 5 Sneed 341.

Ont.—Westloh v. Brown, 43 U. C. Q. B. 402.

81. Ind.—Schnewind v. Hacket, 54 Ind. 248.

Mass.—Fay v. Smith, 1 Allen 477, 79 AmD 752.

Minn.—Flanigan v. Phelps, 42 Minn. 186, 43 NW 1113.

Pa.—Craighead v. McLoney, 99 Pa. 211; Beary v. Haines, 4 Whart. 17; Lancaster v. Barrett, 1 Pa. Super. 9, 37 WklyNC 251.

Tenn.—McVey v. Ely, 5 Lea 438; Crockett v. Thomason, 5 Sneed 342.

Vt.—Broughton v. Fuller, 9 Vt. 373.

Eng.—Perring v. Hone, 4 Bing. 28, 13 ECL 384, 130 Reprint 678, 2 C. & P. 401, 12 ECL 639.

But see Wills v. Wilson, 3 Or. 308 (a suit by the payee of a promissory note against the makers, where it was held that, although the note had been materially altered by one of the makers at plaintiff's request, without the consent of the other, if plaintiff was deceived about the facts, and believed that the alteration had been made with the consent of both defendants, and had no reason to suspect the contrary, his acceptance of the altered note did not amount to entering into a new contract with the maker who made the alteration alone, and did not discharge the nonconsenting maker from liability, but he was entitled to recover against both to the same extent as if the note had not been altered. It was said, however, that if the maker who altered the note acted without the authority of the other, and plaintiff was not deceived, or if the circumstances were such that a reasonable man would have suspected or believed the act to have been done without the consent of one of the makers, he, by accepting the altered note, released the nonconsenting maker).

[a] **In Kansas** the Negotiable Instruments Law § 131, providing that, where a note is materially altered without the assent of all the parties thereto, it is avoided, except as against a party who has himself made or assented to the alteration and subsequent indorsers, means that any one of the parties to certain instruments may assent to a material alteration so as to make himself liable thereon without any new consideration. Holyfield v. Harrington, 84 Kan. 760, 115 P 546.

[b] **The erasure of the payee's name** from a promissory note and the insertion of another name releases such of the joint makers as did not consent thereto. Davis v. Bauer, 41 Oh. St. 257.

82. Ala.—Glover v. Robbins, 49 Ala. 219, 20 AmR 272.

Ind.—Eckert v. Louis, 84 Ind. 99; Bell v. State Bank, 7 Blackf. 456.

Iowa.—Berryman v. Manker, 56 Iowa 150, 9 NW 103.

Pa.—Stephens v. Graham, 7 Serg. & R. 505, 10 AmD 485.

Tenn.—Crockett v. Thomason, 5 Sneed 342; Taylor v. Taylor, 12 Lea 714.

[a] **If the note is altered by the payee with the consent of the maker,** but without the knowledge of the indorser, the latter is discharged by the alteration. Warpole v. Ellison, 9 Del. 322; Pahlman v. Taylor, 75 Ill. 629; Benedict v. Miner, 58 Ill. 19; Bell v. State Bank, 7 Blackf. (Ind.) 456; Owen v. Hall, 70 Md. 97; Fulmer v. Seitz, 68 Pa. 237, 8 AmR 172 [crit Kountz v. Kennedy, 63 Pa. 187, 3 AmR 541].

83. Outhwaite v. Luntley, 4 Campb. 179.

84. State v. Van Pelt, 1 Ind. 304; French v. Graves, 50 App. Div. 522, 64 NYS 74.

[a] **Where a bond, jointly executed by five obligors,** is materially altered with the consent of four of them, the nonconsenting obligor is discharged, while the four consenting obligors remain bound by the instrument; instead of being the joint bond of five, it becomes the joint bond of four. Barrington v. Washington Bank, 14 Serg. & R. (Pa.) 405. But see Smith v. Weld, 2 Pa. 54; Kiser v. State, 13 Tex. A. 201 (holding that the alteration of a bail bond by the erasure of one surety and the substitution of another invalidates the bond even as to those obligors who consented to the change).

85. Pigot's Case, 11 Coke 26b, 77 Reprint 1177.

86. Davidson v. Cooper, 1 D. & L. 377 [aff 13 L. J. Exch. 276]; Croockewit v. Fletcher, 1 H. & N. 893, 912 (where defendants signed a charter party and handed it to plaintiff's agents who forwarded it to plaintiff for signature. Plaintiff signed it and returned it to his agents, one of whom then added the clause "wind and weather permitting with cargo or in ballast for ship's benefit," and took the document back to defendants, telling one of them that he had made the addition, which he said did not affect the contract. Defendant did not agree to this, and said that he did not know whether he would accept the charter. The agent offered to strike out the addition which he had made on his own responsibility, and not by the orders of his principal. Defendant said that he would see a party who was jointly interested with him and let the agent know what was said. Defendants subsequently rejected the contract on the ground of the alteration, and plaintiff sued on the charter party, treating it as unaltered, but the court held that the addition, or alteration, was a fatal objection, and added: "It is, no doubt, apparently a hardship, that where what was the original charter-party is perfectly clear and indisputable, and where the alteration or addition was made without any fraudulent intention, and by a person not a party to the contract, that a perfectly innocent man should thereby be deprived of a beneficial contract; but, on the other hand, it must be borne in mind, that to permit any tampering with written documents would strike at the root of all property, and that it is of most essential importance to the public interest that no alteration whatever should be made in written contracts; but that they should continue to be and remain in exactly the same state and condition as when signed and executed, without addition, alteration, erasure, or obliteration"); Hindostan, etc., Bank v. Smith, 36 L. J. C. P. 241.

87. Pullen v. Shaw, 14 N. C. 238.

88. Powell v. Banks, 146 Mo. 620, 48 SW 664; Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 AmD 427; Rees v. Overbaugh, 6 Cow. (N. Y.) 746, 748; Bigelow v. Stilphen, 35 Vt. 521.

"The ancient doctrine, that an alteration, or spoliation of a deed, by a stranger, or by accident or mistake, without the privity or consent of the party interested, destroys it, has been materially modified, if not substantially exploded, by modern decisions." Rees v. Overbaugh, 6 Cow. (N. Y.) 746, 748. In U. S. v. Spalding, 27 F. Cas. No. 16,365, 2 Mason 478, 482 [quot Waterous Engine Works Co. v. McLean, 2 Man. 279, 286], Justice Story very strongly condemned the old doctrine that every material alteration of a deed, even by a stranger, and without privity of either party, avoided the deed. He considered that "a doctrine so repugnant to common sense and justice, which inflicts on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven, ought to have the unequivocal support of unbroken authority, before a court of law is bound to surrender its judgment to what deserves no better name than a technical quibble." In Chessman v. Whittemore, 23 Pick. (Mass.) 231, 233, Morton, J., said: "These principles were found to be inconsistent with reason and justice, and have been expunged from the law." And in Jackson v. Malin, 15 Johns. (N. Y.) 293, 297, Platt, J., said: "That a material alteration, though made by a stranger, without the privity of the party claiming under it, renders the deed void, is a proposition to which I am not ready to assent." "The rule of the English courts, that a material alteration, made by a stranger, avoids the instrument, has been universally repudiated in this country. To have that effect, the alteration must be material and intentional, not by accident or mistake; and by a party entitled to a benefit under the instrument, and not by a stranger, or one adversely interested." Fullerton v. Sturges, 4 Oh. St. 529, 536.

[a] **"It seems to be difficult to find a sufficient reason for the rule,** founded either in justice or sound policy. Clearly, it is not just that a man should be deprived of an honest debt, or have the evidence of it destroyed for all beneficial purposes, in consequence of the misconduct of a stranger, to whose act he did not assent, and of which he had no knowledge. It is not the fact, that an instrument is altered, that makes it void; if it was, an alteration by accident or mistake, would have that effect. It is the intent, that gives the act its character and avoids the instrument, and it is difficult to understand why a man who has done no wrong, nor consented that any should be done, should be punished to the extent of the amount of his demand by having his claim canceled by operation of law, solely because another has been guilty of an act for which he ought to be punished. Public policy does not require any such rule. Declaring the instrument void in case of alteration, has no tendency to deter a stranger from making such alteration. Punishment inflicted upon the innocent, has no terror for the guilty, and if such a rule was established, it would by no means follow that when an alteration was made by a stranger, it would be made for the benefit of the holder. The sole object in making the alteration might

the privity or consent of the parties interested, constitute a mere spoliation as distinguished from an alteration, and are in legal contemplation wholly immaterial and ineffective to give to the instrument any other or different meaning or operation than that which attached to it before such change;[89] and

be to render the instrument void. It might be from motives of friendship to the maker, or enmity to the holder, or from selfishness on the part of the stranger, he expecting thereby to add to the security, or increase the probability of collecting a debt of his own against the maker. These considerations are quite as likely to lead to an alteration, as a desire to benefit the holder, and the probabilities of success are much greater." Per Pierpont, J., in Bigelow v. Stilphen, 35 Vt. 521, 525.

[b] **New Jersey.**—In Den v. Wright, 7 N. J. L. 175, 11 AmD 546, an instruction to the jury was sustained by the court below to the effect that if a deed "be altered by a stranger, that is, a person to whose custody it may have been committed, or into whose hands it may have come, in a material part, such alteration avoids the deed." And in White v. Williams, 3 N. J. Eq. 376, there is a dictum to the effect that if a deed is altered in a material part, even by a stranger, it will be avoided. But in the later case of Hunt v. Gray, 35 N. J. L. 227, 10 AmR 232, which was an action upon a promissory note, the American rule was adopted as the correct doctrine. And upon the authority of this case the same rule was in Force v. Elizabeth, 28 N. J. Eq. 403 [rev on other grounds 29 N. J. Eq. 587] applied to an alteration of a bond by a person who had stolen it from the owner. See also Jones v. Crowley, 57 N. J. L. 222, 30 A 871.

[c] **Ireland.**—The strict rule of Pigot's Case, 11 Coke 26b, 77 Reprint 1177, as to the effect of alterations of instruments by a stranger, has been rejected by the Irish courts. Swiney v. Barry, 1 Jones Exch. 109 (where it was held that an alteration in a material part of a deed by a stranger does not avoid it, and a court will look at the deed as it was before it was altered; therefore if, upon oyer, the deed is set out as it was before it was altered it is no variance).

[d] **For modern rule embodied in statute** see Hall v. Weaver, 34 Fed. 104, 13 Sawy. 188 (referring to statutes in New York and Oregon).

89. Ala.—Forbes v. Taylor, 139 Ala. 286, 35 S 855; Anderson v. Bellenger, 87 Ala. 334, 6 S 82, 13 AmSR 46, 4 LRA 680. See also Benton v. Clemmons, 157 Ala. 658, 47 S 582; Brown v. Jones, 3 Port. 420.

Ark.—Andrews v. Calloway, 50 Ark. 358, 7 SW 449.

Cal.—Walsh v. Hunt, 120 Cal. 46, 52 P 115, 39 LRA 697; Robinson v. Nevada Bank, 81 Cal. 106, 22 P 478; Langenberger v. Krœger, 48 Cal. 147, 17 AmR 418.

Conn.—Nichols v. Johnson, 10 Conn. 192.

Fla.—Orlando v. Gooding, 34 Fla. 244, 15 S 770.

Ida.—Mulkey v. Long, 5 Ida. 213, 47 P 949.

Ill.—Condict v. Flower, 106 Ill. 105; Fry v. Jenkins, 173 Ill. A. 486; Paterson v. Higgins, 58 Ill. A. 268.

Ind.—Ballard v. Franklin L. Ins. Co., 81 Ind. 239; Nelson v. Johnson, 18 Ind. 329; Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413.

Iowa.—Shenkberg Co. v. Porter, 137 Iowa 245, 114 NW 890; Murray v. Graham, 29 Iowa 520.

Ky.—Terry v. Hazlewood, 1 Duv. 104.

La.—Provenzano v. Glaesser, 122 La. 378, 47 S 688.

Md.—Wickes v. Caulk, 5 Harr. & J. 36.

Mass.—Tulane Univ. v. O'Connor, 192 Mass. 428, 78 NE 494.

Mich.—Young v. Young, 157 Mich. 80, 121 NW 264.

Minn.—Spreng v. Juni, 109 Minn. 85, 122 NW 1015, 18 AnnCas 222 and note; Ames v. Brown, 22 Minn. 257.

Miss.—Bridges v. Winters, 42 Miss. 135, 97 AmD 443, 2 AmR 598.

Mo.—Moore v. Ivers, 83 Mo. 29; McMurtrey v. Sparks, 71 Mo. A. 126.

Nebr.—Bingham v. Shadle, 45 Nebr. 82, 63 NW 143.

Nev.—State v. Manhattan Silver Min. Co., 4 Nev. 318.

N. M.—Lohman v. Reymond, 137 P 375.

N. Y.—Gleason v. Hamilton, 138 N. Y. 353, 34 NE 283, 21 LRA 210; Casoni v. Jerome, 58 N. Y. 315; Waldorf v. Simpson, 15 App. Div. 297, 44 NYS 921; Trow v. Glen Cove Starch Co., 1 Daly 280; Waring v. Smyth, 2 Barb. Ch. 119, 47 AmD 299.

N. C.—Wicker v. Jones, 159 N. C. 102, 108, 74 SE 801, 40 LRANS 69, AnnCas 1914B 1083 [cit Cyc]; Mathis v. Mathis, 20 N. C. 46.

Oh.—Thompson v. Massie, 41 Oh. St. 307; Hayes v. Dumont, 2 Oh. Cir. Ct. 229.

Okl.—Commonwealth Nat. Bank v. Baughman, 27 Okl. 175, 111 P 332.

Or.—Whitlock v. Manciet, 10 Or. 166.

Pa.—Robertson v. Hay, 91 Pa. 242; Neff v. Horner, 63 Pa. 327, 3 AmR 555; Worrall v. Gheen, 39 Pa. 388; Pace v. Yost, 10 Kulp 538.

S. C.—White v. Harris, 69 S. C. 65, 48 SE 41, 104 AmSR 791.

Tenn.—Deering Harvester Co. v. White, 110 Tenn. 132, 72 SW 962; Crockett v. Thomason, 5 Sneed 341.

Tex.—Tutt v. Thornton, 57 Tex. 35; First Nat. Bank v. Pritchard, 2 Tex. A. Civ. Cas. § 130.

Vt.—Equitable Mfg. Co. v. Allen, 76 Vt. 22, 56 A 87, 104 AmSR 915; Bellows v. Weeks, 41 Vt. 590 (holding that alterations in a tax list, after being deposited in the town clerk's office, by persons other than the listers do not make the list void).

Wash.—Murray v. Peterson, 6 Wash. 418, 33 P 969.

W. Va.—Yeager v. Musgrave, 28 W. Va. 90.

Wis.—Fuller v. Green, 64 Wis. 159, 24 NW 907, 54 AmR 600.

Eng.—Henfree v. Bromley, 6 East 309, 102 Reprint 1305, 3 ERC 504; Waugh v. Bussell, 5 Taunt. 707, 1 ECL 362, 128 Reprint 868.

"The decisions of the courts in this country are now unanimous that a material alteration of an instrument by a stranger to the contract without the privity of the grantee or obligee is a mere spoliation, and though made without the consent of the party bound by the writing does not prevent a recovery on the instrument as it read before the alteration, provided only its original tenor can be clearly shown." Fry v. Jenkins, 173 Ill. A. 486, 490.

When agent regarded as stranger see infra § 107.

[a] **Reason of rule.**—The rule stated in the text "is obviously upon the principle that the act of a mere interloper without the privity of the parties should not be permitted to defeat a contract to the extent that it would otherwise be valid and binding." Per Van Fleet, J., in Walsh v. Hunt, 120 Cal. 46, 53, 52 P 115, 39 LRA 697. In Hunt v. Gray, 35 N. J. L. 227, 233, 10 AmR 232, Beasley, C. J., said: "The only ground which I have found suggested in support of the more stringent rule is this: that a paper cannot be altered by a stranger without laches on the part of the holder of it. But this is an assumption which has no foundation in fact. A man is not always remiss who trusts his papers with another; many of them, every one knows, must be constantly passing from hand to hand. Under such circumstances, the imputation of laches is utterly misplaced. Nor does there appear to be any necessity arising from considerations of public policy for the enforcement of so severe a rule. Strangers having no interest in an instrument, are under no great temptation to corrupt it, and it is, therefore, an evil which will not often occur, while the injustice of canceling a written contract without fault in the party holding it, is so flagrant that it should require the strongest reasons for the law to inflict it."

[b] **Change by trespasser** against the will of the holder of the instrument leaves the instrument valid as originally written. Union Nat. Bank v. Roberts, 45 Wis. 373.

[c] **Change by thief** (1) of an indorsement is a mere spoliation, and will not affect the instrument or the rights of the owner thereon. Dinsmore v. Duncan, 57 N. Y. 573, 15 AmR 534; Colson v. Arnot, 57 N. Y. 253, 15 AmR 496; Ledwich v. McKim, 53 N. Y. 307. (2) Conversely, a thief is a stranger as regards securities payable to bearer. Brown v. U. S., 20 Ct. Cl. 416. (3) A thief may be deemed a stranger as to the rightful owner of the instrument, but not a stranger as to one claiming under him as a bona fide holder. Colson v. Arnot, 57 N. Y. 253, 261, 15 AmR 496 (where the court said: "The thief was not in every sense a stranger to the bonds; he was such as to the plaintiff, and whenever she has reclaimed them, she will hold them unaffected by anything which the thief has done to them. But was he a stranger as to the defendant? Assuming that he may be treated as a bona fide purchaser, all the title he claims he got from the thief. As to him, the law treats the thief as the owner; he dealt with him upon the assumption and presumption of his ownership. It is not for him to say that the thief was not the owner, and while he claims that he was competent to give him title, he cannot deny that he was competent to destroy the paper by its mutilation or alteration"). But see Com. v. Emigrant Industrial Sav. Bank, 98 Mass. 12, 18, 93 AmD 126 (where Hoar, J., speaking of negotiable bonds payable to bearer, which had been altered, presumably by the thief, said: "The thief who stole these bonds had no title to them whatever. The innocent holder does not claim under him, in form or substance").

[d] **County officials who have the custody of instruments** in writing are strangers within the meaning of the rule, so that if such officials deface or otherwise change such instruments their acts are mere spoliation, and do not affect the validity of the instruments. State v. McGonigle, 101 Mo. 353, 13 SW 758, 761, 20 AmSR 609, 8 LRA 735; Medlin v. Platte County, 8 Mo. 235, 40 AmD 135.

[e] **Distinction based on possession of deed by obligee.**—"The modern cases all hold that if the alteration is the act of a mere stranger, while the deed is out of the possession of the grantee or mortgagee, and without his knowledge or consent, it does not work a destruction of it. But if an alteration has been made without the consent of the party against whom the instrument is sought to be enforced, either by the plaintiff who brings his action upon it, or by some other person while the instrument was in the possession or custody of the plaintiffs, such alteration will discharge the original instrument, without substituting any new contract or obligation in its place." Marcy v. Dunlap, 5 Lans. (N. Y.) 365, 369.

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this rule is particularly applicable where the changes made in the instrument are immaterial ones.[90] While such a change cannot enlarge the obligations of the grantor or obligor,[91] it does not affect the right to enforce the instrument as it was originally written if its original terms may be ascertained therefrom,[92] and the change will not deprive the party of his right to have the instrument restored and enforced.[93] Of course if the act of an apparent stranger to the instrument is done with the authority and consent of a party or privy thereto, it will have the same effect as if done by such party or privy personally. The existence of an agency and the sufficiency of express or implied authority and consent to an alleged alteration give rise to the most difficult questions in this connection.[94]

[§ 105] **2. Applications of General Rule.** The general rule that an alteration of a written instrument by a stranger is a mere spoliation and does not affect the validity of the instrument,[95] applies not only to all simple contracts in writing,[96] including negotiable instruments,[97] but also to writings under seal of every description,[98] such as deeds,[99]

90. U. S. v. Hatch, 26 F. Cas. No. 15,325, 1 Paine 336; Casoni v. Jerome, 58 N. Y. 315; Van Brunt v. Van Brunt, 3 Edw. (N. Y.) 14; Malin v. Malin, 1 Wend. (N. Y.) 625; Yeager v. Musgrave, 28 W. Va. 90; Pigot's Case, 11 Coke 26b, 27a, 77 Reprint 1177; Waugh v. Bussell, 5 Taunt. 707, 1 ECL 362, 128 Reprint 868.

Immaterial changes generally see supra §§ 33-36.

91. Wicker v. Jones, 159 N. C. 102, 74 SE 801, 40 LRANS 69, AnnCas1914B 1083 [cit Cyc].

92. Ill.—Fry v. Jenkins, 173 Ill. A. 486; Camp v. Shaw, 52 Ill. A. 241.

Ind.—Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413.

Minn.—Spreng v. Juni, 109 Minn. 85, 122 NW 1015, 18 AnnCas 222 and note.

Miss.—Bridges v. Winters, 42 Miss. 135, 97 AmD 443, 2 AmR 598.

Mo.—Medlin v. Platte County, 8 Mo. 235, 40 AmD 135; Christian County Bank v. Goode, 44 Mo. A. 129.

Nebr.—Colby v. Foxworthy, 72 Nebr. 378, 100 NW 798.

N. C.—Wicker v. Jones, 159 N. C. 102, 108, 74 SE 801, 40 LRANS 69, AnnCas1914B 1083 [cit Cyc].

Oh.—Tucker v. Hendricks, 25 Oh. Cir. Ct. 426.

"An alteration by a stranger, without the knowledge of the grantee or obligee, while it cannot enlarge the obligations of the grantor or obligor, does not affect the right to enforce the writing as it was originally executed, and the intent with which the alteration is made is immaterial, unless it is fraudulent, in which event a court will not lend its aid." Wicker v. Jones, 159 N. C. 102, 108, 74 SE 801, 40 LRANS 69, AnnCas1914B 1083.

[a] **A receipt mutilated by a stranger** without the procurement of the party is not deprived of its legal operation as an instrument of evidence so long as it remains legible. Goodfellow v. Inslee, 12 N. J. Eq. 355.

[b] **Where a new mortgage and note are made in substitution for the originals,** and a mistake as to the date is made but relied on by the mortgagor, as part of the consideration for such substitution, an alteration by the attorney on his own initiative, in an endeavor to correct the same, will not prevent a recovery on the instruments as they read before the alteration. Fry v. Jenkins, 173 Ill. A. 486.

[c] **Note altered by pledgee.**—Where plaintiff, in settlement with defendant, took a note which he deposited in a bank as collateral, and the bank, without any fraudulent intent, altered the note by inserting a higher rate of interest, and defendant refused to pay the note, on account of its having been altered, when presented to him for collection by the bank, and plaintiff paid the bank the amount of the note, and took it back, as the note was altered without plaintiff's consent he had a right to bring an action on the original indebtedness. Tucker v. Hendricks, 25 Oh. Cir. Ct. 426.

93. Russell v. Reed, 36 Minn. 376, 31 NW 452; Ames v. Brown, 22 Minn. 257.

94. See infra §§ 108-144.

95. See supra § 104.

96. Conn.—Nichols v. Johnson, 10 Conn. 192.

Ind.—Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413.

Iowa.—Andrews v. Burdick, 62 Iowa 714, 16 NW 275.

Ky.—Lee v. Alexander, 9 B. Mon. 25, 48 AmD 412 [overr Letcher v. Bates, 6 J. J. Marsh. 524, 22 AmD 92].

Nebr.—Consaul v. Sheldon, 35 Nebr. 247, 52 NW 1104.

N. Y.—Martin v. Tradesmen's Ins. Co., 101 N. Y. 498, 5 NE 338; Sodus Bay, etc., R. Co. v. Hamlin, 24 Hun 390.

Tenn.—Deering Harvester Co. v. White, 110 Tenn. 132, 72 SW 962.

[a] **Words inserted in a promise of sale** by neither the promisor nor the promisee, and not shown to have been inserted before the one offering to buy signed it, do not vitiate the contract. Provenzano v. Glaesser, 122 La. 378, 47 S 688.

97. U. S.—Wylie v. Missouri Pac. R. Co., 41 Fed. 623.

Ala.—Forbes v. Taylor, 139 Ala. 286, 35 S 855; Lowremore v. Berry, 19 Ala. 130, 54 AmD 183; Davis v. Carlisle, 6 Ala. 707.

Ark.—Andrews v. Calloway, 50 Ark. 358, 7 SW 449.

Ill.—Vogle v. Ripper, 34 Ill. 100, 85 AmD 298; Bledsoe v. Graves, 5 Ill. 382.

Ind.—Eckert v. Louis, 84 Ind. 99; Brooks v. Allen, 62 Ind. 401; State v. Berg, 50 Ind. 496; Cochran v. Nebeker, 48 Ind. 459; Piersol v. Grimes, 30 Ind. 129, 95 AmD 673; Collins v. Makepeace, 13 Ind. 448.

Ky.—Blakey v. Johnson, 13 Bush 197, 26 AmR 254.

Md.—Schwartz v. Wilmer, 90 Md. 136, 44 A 1059.

Mass.—Jeffrey v. Rosenfeld, 179 Mass. 506, 61 NE 49; Nickerson v. Swett, 135 Mass. 514; Drum v. Drum, 133 Mass. 566.

Miss.—Clopton v. Elkin, 49 Miss. 95; Bridges v. Winters, 42 Miss. 135, 97 AmD 443, 2 AmR 598; Croft v. White, 36 Miss. 455.

Mo.—Lubbering v. Kohlbrecher, 22 Mo. 596.

Nebr.—Colby v. Foxworthy, 72 Nebr. 378, 100 NW 798; Foxworthy v. Colby, 64 Nebr. 216, 89 NW 800, 62 LRA 393; Perkins Windmill, etc., Co. v. Tillman, 55 Nebr. 652, 75 NW 1098.

N. Y.—Dinsmore v. Duncan, 57 N. Y. 579, 15 AmR 534; Van Brunt v. Eoff, 35 Barb. 501.

Oh.—Carlile v. Lamb, 16 Oh. Cir. Ct. 578, 9 Oh. Cir. Dec. 70; Tarbill v. Richmond City Mill Works, 2 Oh. Cir. Ct. 564, 1 Oh. Cir. Dec. 643.

Okl.—Commonwealth Nat. Bank v. Baughman, 27 Okl. 175, 111 P 332.

Or.—Whitlock v. Manciet, 10 Or. 166.

Pa.—Roenig v. Duff, 13 WklyNC 127.

S. C.—White v. Harris, 69 S. C. 65, 48 S. E. 41, 104 AmSR 791.

Vt.—Bigelow v. Stilphen, 35 Vt. 521.

Wash.—Murray v. Peterson, 6 Wash. 418, 33 P 969.

Wis.—Union Nat. Bank v. Roberts, 45 Wis. 373.

[a] **Where a note has taken effect by delivery** it cannot be destroyed by the subsequent alteration by a stranger without the knowledge or consent of the obligee. Blakey v. Johnson, 13 Bush (Ky.) 197, 26 AmR 254.

[b] **Where a note is materially altered in amount,** and the holder who can neither read nor write proves that to his knowledge the note has never been out of his possession, and testifies that the alteration was made neither by himself nor by his agent nor with the knowledge or consent of either of them, he can recover the original amount. Drum v. Drum, 133 Mass. 566.

[c] **The interlineation of words** on the face of a note, if done by a stranger, constitutes a mere spoliation and does not affect the rights of the parties. Paul v. Leeper, 98 Mo. A. 515, 72 SW 715.

[d] **Where a clerk whose duty it is merely to keep a record of notes and bills,** without authority to make any alteration, inserts in a note, merely as a memorandum, the name of a certain bank as a place of payment, without the knowledge of his employer, it is a mere spoliation by a stranger and not an alteration. Port Huron Engine, etc., Co. v. Sherman, 14 S. D. 461, 85 NW 1008 (holding this to be true under Comp. L. § 3595, which provides that the intentional destruction, cancellation, or material alteration of a written contract by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor against parties who did not consent to the act). In Forbes v. Taylor, 139 Ala. 286, 35 S 855, it was held that where, in an action by the seller to recover a chattel sold on conditional sale, plaintiff testified that an alteration in the note given for the price was not made with his knowledge, but that it might have been made by one of his clerks, who had no authority to make any alteration, it was error to exclude the note on the ground of alteration.

[e] **Alteration by transferee of note.**—Where, for the purpose of purchasing stock, the payee of a note delivered it to the maker who transferred it in payment for the stock, after which the note was altered by the transferee and afterward was redelivered to the original payee, it was held, upon a rescission of the transaction for the purchase of the stock, that, the person to whom it had been delivered in payment of the stock being the holder and legal owner of the note at the time of the alteration, he could not be considered a stranger. Keene v. Weeks, 19 R. I. 309, 33 A 446.

98. Ill.—Condict v. Flower, 106 Ill. 105; Rose Clare Lead Co. v. Madden, 54 Ill. 260.

Mo.—Medlin v. Platte County, 8 Mo. 235, 40 AmD 135.

N. Y.—Dinsmore v. Duncan, 57 N. Y. 573, 15 AmR 534; Rees v. Overbaugh, 6 Cow. 746.

Oh.—Fullerton v. Sturges, 4 Oh. St. 529.

Tenn.—Boyd v. McConnell, 10 Humphr. 68.

99. Ala.—Brown v. Jones, 3 Port. 420.

Fla.—Orlando v. Gooding, 34 Fla. 244, 15 S 770.

Ga.—Banks v. Lee, 73 Ga. 25.

Ind.—John v. Hatfield, 84 Ind. 75.

mortgages of land,[1] and bonds.[2] Thus where an officer is the mere custodian of the bond,[3] or the change is made after approval, either by the approving officers or by parties thereto without the knowledge of such officers, the act is regarded as a spoliation by a stranger.[4]

[§ 106] **3. When Identity of Instrument Destroyed.** If the identity of the instrument is destroyed so that it cannot be pleaded with profert, lack of profert may be excused by an allegation of accidental destruction;[5] the law regarding the act, so far as the rights of the parties to the instrument are concerned, merely as the destruction of primary evidence, compelling a resort to that which is secondary.[6]

[§ 107] **4. Agent Regarded as Stranger.** Where the change is made by one who is or was the agent of one of the parties, but without any authority from the principal, either express or implied from the circumstances, to make any change, and the matter is outside the scope of his particular employment, the act is generally considered to be a mere spoliation, and has no effect upon the instrument or the rights and liabilities of the parties thereto,[7] unless the alteration is ratified by the

Ky.—Lee v. Alexander, 9 B. Mon. 25, 48 AmD 412 [overr Letcher v. Bates, 6 J. J. Marsh. 524, 22 AmD 92].
Md.—Wickes v. Caulk, 5 Harr. & J. 36.
Minn.—Ames v. Brown, 22 Minn. 257.
Miss.—Croft v. White, 36 Miss. 455.
N. Y.—Gleason v. Hamilton, 138 N. Y. 353, 34 NE 283, 21 LRA 210; Waring v. Smyth, 2 Barb. Ch. 119, 47 AmD 299.
N. C.—Evans v. Williamson, 79 N. C. 86.

[a] **The intent of a valid deed** cannot be defeated by an unauthorized interlineation by a third person. Young v. Young, 157 Mich. 80, 121 NW 264.

[b] **The alteration of a deed to a married woman** in her own right and as her separate property and estate, made by the husband of the grantee without her knowledge or consent, by causing his name to be inserted in the deed as one of the grantees, has been held to be a spoliation which did not affect the title of the grantee and her heirs, even against a bona fide purchaser, if she and her heirs were guilty of no fraud in connection with the alteration. John v. Hatfield, 84 Ind. 75.

1. Russell v. Reed, 36 Minn. 376, 31 NW 452; Ames v. Brown, 22 Minn. 257; Gleason v. Hamilton, 138 N. Y. 353, 34 NE 283, 21 LRA 210; Robertson v. Hay, 91 Pa. 242.

[a] **An alteration in a mortgage without the mortgagee's procurement** or consent must be deemed as if made by a stranger, and as of no binding force. Smith v. Chadsey, 1 Thomps. & C. (N. Y.) addenda 7.

2. U. S.—U. S. v. Linn, 1 How. 104, 11 L. ed. 64; U. S. v. Hatch, 26 F. Cas. No. 15,325, 1 Paine 336.
Ala.—Anderson v. Bellenger, 87 Ala. 334, 6 S 82, 13 AmSR 46, 4 LRA 680.
Cal.—Turner v. Billagram, 2 Cal. 520.
Ida.—Dangell v. Levy, 1 Ida. 722.
Ill.—Reed v. Kemp, 16 Ill. 445.
Ind.—State v. Berg, 50 Ind. 496.
Iowa.—C. Shenkberg Co. v. Porter, 137 Iowa 245, 114 NW 890.
Ky.—Terry v. Hazlewood, 1 Duv. 104.
Md.—State v. Miller, 3 Gill 335.
Mich.—White Sewing Mach. Co. v. Dakin, 86 Mich. 581, 49 NW 583, 13 LRA 313.
Mo.—State v. Scott, 104 Mo. 26, 15 SW 987, 17 SW 11.
Nebr.—Schlageck v. Widhalm, 59 Nebr. 541, 81 NW 448.
N. J.—Elizabeth v. Force, 29 N. J. Eq. 587 [aff 28 N. J. Eq. 403].
N. Y.—Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122, 21 NE 168.
N. C.—Evans v. Williamson, 79 N. C. 86; Mathis v. Mathis, 20 N. C. 55.
Tex.—Rushing v. Citizens' Nat. Bank, (Civ. A.) 160 SW 337, 340 [cit Cyc] (erasure of the name of a surety from a supersedeas bond by a stranger held not to affect the legality of the instrument).
Va.—Keen v. Monroe, 75 Va. 424.

[a] **A material alteration of a bond after its approval** by a stranger to the instrument, without the consent of the obligee or obligor, will not release the latter. Schlageck v. Widhalm, 59 Nebr. 541, 81 NW 448.

[b] **Time of change.**—Where the name of the surety on a collector's bond is erased before the bond is delivered or accepted, it is not a case of spoliation, and the other sureties are released. State v. McGonigle, 101 Mo. 353, 13 SW 758, 20 AmSR 609, 8 LRA 735; McGonigle v. State, 13 SW 761. See supra § 91.

[c] **Where a bond or other obligation with sureties** is unauthorizedly altered after execution by a stranger to such instrument without the knowledge, sanction, connivance, or procurement of the payee, such alteration, as between the payee and the sureties, will not avoid the instrument and release the sureties, but it remains in full force as it stood in its original form prior to its alteration. Orlando v. Gooding, 34 Fla. 244, 15 S 770.

3. State v. Berg, 50 Ind. 496 (alteration in official bond made by deputy county auditor); Terry v. Hazlewood, 1 Duv. (Ky.) 104.

4. Ala.—Anderson v. Bellenger, 87 Ala. 334, 6 S 82, 13 AmSR 46, 4 LRA 680 (holding that since, after a statutory claim bond has been accepted and approved by the sheriff, it is his duty to return it at once to the court from which the process issued, his acceptance thereafter of the signature of an additional surety is merely the act of a stranger, and does not affect the liability of the original sureties); Harris v. Bradford, 4 Ala. 214 (holding that, where the bond of an executive officer was materially altered, after acceptance, by a judge who was required by law to approve such bonds, it was the act of a stranger).
Ind.—Robinson v. State, 60 Ind. 26 (holding that where defendant, who was a surety on the official bond of a township trustee, was also a member of the board of commissioners which had cognizance of such trustee's bond and reports, and, as a measure of public policy, he erased his name from such bond and procured an additional surety thereon, with the consent of the county auditor, the trustee, and the board of commissioners, such erasure was a mere spoliation, and defendant was not released thereby).
Mo.—State v. Scott, 104 Mo. 26, 15 SW 987, 17 SW 11.
Nebr.—Schlageck v. Widhalm, 59 Nebr. 541, 81 NW 448; Bingham v. Shadle, 45 Nebr. 82, 63 NW 143 [dist Martin v. Thomas, 24 How. (U. S.) 315, 16 L. ed. 689, in that the signature to the bond there in question was erased with the consent of the obligee, and without the consent of the other obligors].
Tenn.—Harrison v. Turbeville, 2 Humphr. 241 (holding that where the administrator procured his bond from the clerk's office, and struck out the name of an obligor and inserted the name of another, the person whose name was so stricken out was not discharged in equity, and that the words "fraud" and "accident," with regard to the jurisdiction of the chancery court to give relief in all cases where a bond has not been satisfied and the obligee is prevented from suing at common law by reason of its loss or defacement, covered all erasures and alterations except those made by the obligee himself, or with his knowledge and consent).
Tex.—Peveler v. Peveler, 54 Tex. 53.
See Gay v. Farley, 16 Hawaii 69.

[a] **Clerk of customhouse.**—Where the taking and the custody of a bond given by the master of a vessel for the exhibition of the list of his ship's company, etc., are intrusted to the collector of customs by a statute, an alteration in such a bond by a customhouse clerk is the act of a stranger. U. S. v. Hatch, 26 F. Cas. No. 15,325, 1 Paine 336.

[b] **Clerk in surrogate's office.**—An alteration by a clerk in the surrogate's office of a bond given by an administrator is a mere spoliation. Casoni v. Jerome, 58 N. Y. 315.

5. See infra § 157.

6. Lee v. Alexander, 9 B. Mon. (Ky.) 25, 48 AmD 412; Medlin v. Platte County, 8 Mo. 235, 40 AmD 135; Crockett v. Thomason, 5 Sneed (Tenn.) 341; Boyd v. McConnel, 10 Humphr. (Tenn.) 68.

7. Cal.—Walsh v. Hunt, 120 Cal. 46, 52 P 115, 39 LRA 697 (holding that where a party employed to obtain a loan and deliver a note and mortgage therefor alters the instruments and obtains a larger sum, the lender can recover the authorized amount); Langenberger v. Kreger, 48 Cal. 147, 17 AmR 418.
Conn.—Ætna Nat. Bank v. Winchester, 43 Conn. 391.
Ill.—Paterson v. Higgins, 58 Ill. A. 268; Day v. Ft. Scott Inv., etc., Co., 53 Ill. A. 165 [aff 153 Ill. 293, 38 NE 567].
Ind.—Ballard v. Franklin L. Ins. Co., 81 Ind. 239; Brooks v. Allen, 62 Ind. 401; Kingan v. Silvers, 13 Ind. A. 80, 37 NE 413.
Iowa.—Shenkberg Co. v. Porter, 137 Iowa 245, 114 NW 890; Mathias v. Leathers, 99 Iowa 18, 68 NW 449.
Kan.—McLennan v. Wellington, 48 Kan. 756, 30 P 183.
Ky.—Vanhoose v. Fairchild, 145 Ky. 700, 141 SW 75; Blakey v. Johnson, 13 Bush 197, 26 AmR 254.
Md.—Vanderford v. Farmers', etc., Nat. Bank, 105 Md. 164, 66 A 47, 10 LRANS 129 (evidence of alteration inadmissible where authority unproved).
Mass.—Tulane Univ. v. O'Connor, 192 Mass. 428, 78 NE 494; Nickerson v. Swett, 135 Mass. 514.
Mich.—White Sewing Mach. Co. v. Dakin, 86 Mich. 581, 49 NW 583, 13 LRA 313.
Minn.—Spreng v. Juni, 109 Minn. 85, 122 NW 1015, 18 AnnCas 222; Ames v. Brown, 22 Minn. 257.
Mo.—Lubbering v. Kohlbrecher, 22 Mo. 596; Russell v. Quincy, etc., R. Co., 177 Mo. A. 186, 164 SW 164; Christian County Bank v. Goode, 44 Mo. A. 129.
Nev.—State v. Manhattan Silver Min. Co., 4 Nev. 318.
N. J.—Hunt v. Gray, 35 N. J. L. 227, 10 AmR 232 (holding that one who is an agent of the owner of property for its sale, and who takes a note in payment in his own name, and who is intrusted with the note by his principal for the purpose of taking it to a bank to have it discounted, is not the agent of the principal for the

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principal.[8] Thus one who procures a writing as an agent and holds it temporarily for transmission to his principal is a stranger within the meaning of the rule that the changing of a written instrument by a stranger is a mere spoliation.[9] But the agent cannot be regarded as a stranger in respect to an alteration which he is authorized to make.[10]

VI. AUTHORITY AND CONSENT

[§ 108] **A. Authority—1. In General.** An alteration need not be made by the hand of the grantee, payee, or obligee; it is enough if it is done with his privity or by his procurement.[11] If a change is made in an instrument by a duly authorized agent the principal will be bound by the act as if done by himself;[12] and this is true to the extent of charging the principal with liability on the instrument which he seeks to avoid,[13] as well as of charging the principal who attempts to enforce such instrument with the consequences of the alteration.[14]

[§ 109] **2. Sufficiency of Agency; Mere Custody of Instrument—a. In General.** There must be an agency in fact to make the alteration, or the rela-

purpose of making an alteration in the note, and if he makes an alteration therein it will be regarded as an act done by a stranger).

N. Y.—Gleason v. Hamilton, 138 N. Y. 353, 34 NE 283, 21 LRA 210; Waldorf v. Simpson, 15 App. Div. 297, 44 NYS 921; Van Brunt v. Eoff, 35 Barb. 501 (where the court said: "The alteration of the date of the note, made by the agent of the maker under the supposition that he had authority to make such an alteration, did not render the note void. If there was no authority to make such an alteration, the note would still be a subsisting obligation, as it was before it was altered"); Smith v. Chadsey, 1 Thomps. & C. addenda 7; Rees v. Overbaugh, 6 Cow. 746.

Oh.—Holland v. Hatch, 15 Oh. St. 464; Fullerton v. Sturges, 4 Oh. St. 529; Hayes v. Dumont, 2 Oh. Cir. Ct. 229, 1 Oh. Cir. Dec. 458.

Pa.—Robertson v. Hay, 91 Pa. 242.

S. C.—Flinn v. Brown, 40 S. C. L. 209.

S. D.—Port Huron Engine, etc., Co. v. Sherman, 14 S. D. 461, 85 NW 1008; Acme Harvester Co. v. Butterfield, 12 S. D. 91, 80 NW 170.

Tenn.—Deering Harvester Co. v. White, 110 Tenn. 132, 72 SW 962 (holding that, where an agent for the seller of a machine, without any authority from the seller, changes the contract between the seller and purchaser so as to make it call for a greater consideration, his act does not impair the validity of the contract as it originally stood).

Vt.—Equitable Mfg. Co. v. Allen, 76 Vt. 22, 56 A 87, 104 AmSR 915; Bigelow v. Stilphen, 35 Vt. 521 (where a note with sureties was altered without authority, after execution, by the addition of the words, "jointly and severally" and "with interest," by the agent of the payee to whom it was delivered for the payee by the makers, and before it came to the hands of the payee, but without the knowledge, sanction, connivance, or procurement of the payee, and it was held that the act of the payee's agent in altering the note was not within the scope of his authority as agent, and did not, therefore, bind the payee, but as to him was the same as the act of a stranger).

Wis.—Jesup v. Racine City Bank, 14 Wis. 331.

[a] **Illustration of rule.**—Where one who is not the payee's agent for that purpose writes across the face of a draft words which restrict the medium of payment, this will not vitiate the instrument. Langenberger v. Krœger, 48 Cal. 147, 17 AmR 418.

[b] **An unauthorized change, by an attorney,** (1) of a contract sent to him for the purpose of bringing an action will not defeat the principal's rights under the original contract, but the instrument will be reformed. Day v. Ft. Scott Inv., etc., Co., 53 Ill. A. 165 [aff 153 Ill. 293, 38 NE 567]. See also Gleason v. Hamilton, 138 N. Y. 353, 34 NE 283, 21 LRA 210. (2) A material alteration of a judgment note by the attorney of plaintiff, made without authority, is a mere spoliation, but does not render the note void. The same remains enforceable according to its original provisions. Lanum v. Patterson, 143 Ill. A. 244.

[c] **A change made by a collecting agent,** without authority, will be regarded as a mere spoliation, and will not bind the holder. Hays v. Odom, 79 Mo. A. 425.

[d] **An alteration of a deed of trust by the trustee** (1) does not divest him of the estate given by the deed, but it remains in him subject to the trusts to be by him executed. Flinn v. Brown, 6 S. C. 209; Morgan v. Elam, 4 Yerg. (Tenn.) 375. (2) But it has been held that equity will not, without notice, establish a mortgage canceled fraudulently by a trustee, to the prejudice of subsequent mortgagees. Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117.

[e] **The cashier of a bank** has no authority to make a material alteration in a note payable to the bank, and the rights of the bank cannot be affected by his act in making such an alteration, unless the cashier in doing the act was acting within the authority conferred upon him by the bank, or in the line of his duty, or unless what he did was sanctioned or ratified by the bank. Vanderford v. Farmers', etc., Nat. Bank, 105 Md. 164, 66 A 47, 10 LRANS 129.

[f] **A justice of the peace** in whose hands a note is put for collection has no power to alter such instrument so as to bind the holder and thereby invalidate the instrument. Hays v. Odom, 79 Mo. A. 425.

[g] **Affixing seals.**—Where defendant signed the guaranty of a lease not under seal, for which there was a good consideration, and thereafter plaintiff's agent affixed seals to the guaranty without plaintiff's knowledge or authority, the affixing of the seals, in the absence of anything to show a ratification by plaintiff, must be regarded as an act of a stranger, and does not invalidate the instrument or prevent plaintiff from enforcing it as an unsealed obligation. Tulane Univ. v. O'Connor, 192 Mass. 428, 78 NE 494.

[h] **The alteration of the date of a promissory note,** made by the agent of the maker in the absence of his principal, under the supposition that he had authority to make the change, does not render the note void, although the alteration was made in the presence of the payees. If there was no authority to make the alteration, the note would still be a subsisting obligation as it was before it was altered. Van Brunt v. Eoff, 35 Barb. (N. Y.) 501.

[i] **Enforcement by payee.**—(1) Where the change thus made is by the agent of the obligor or promisor, the obligee or payee may enforce the original contract. Walsh v. Hunt, 120 Cal. 46, 52 P 115, 39 LRA 697. (2) Or if the change is unauthorizedly made by the agent of the obligee the latter may recover on the original instrument. Kingam v. Silvers, 13 Ind. A. 80, 37 NE 413.

8. Spreng v. Juni, 109 Minn. 85, 122 NW 1015, 18 AnnCas 222; Kelly v. Thuey, 143 Mo. 422, 45 SW 300. See also infra § 145.

9. Equitable Mfg. Co. v. Allen, 76 Vt. 22, 56 A 87, 104 AmSR 915 (holding that, where plaintiff's traveling salesman procures a contract for the sale of goods from defendant, and while holding it temporarily for transmission to defendant he wrongfully alters the date of shipment, such alteration must be treated as the act of a stranger, and will not render the contract invalid as between the parties).

10. Eckert v. Louis, 84 Ind. 99; Allen v. Jordan, 3 N. C. 298.

11. Woodworth v. Anderson, 63 Iowa 503, 19 NW 296; Chicago Title, etc., Co. v. O'Marr, 18 Mont. 568, 46 P 809, 47 P 4. See also infra § 113.

[a] **An alteration of a note by a third person,** with the knowledge, consent, and active participation of the holder, is not the act of a stranger but of the holder. Soaps v. Eichberg, 42 Ill. A. 375.

12. See generally Agency §§ 289, 513.

13. Cal.—Pelton v. San Jacinto Lumber Co., 113 Cal. 21, 45 P 12.

Ky.—Robertson v. Commercial Security Co., 152 Ky. 336, 153 SW 450.

Pa.—Robertson v. Hay, 91 Pa. 242 (holding that, where defendant executes a bond and mortgage, leaving it in the hands of one, as his agent, to raise money on it, and while in the agent's hands the mortgage is altered by adding a clause waiving the benefit of a specific act of assembly, and the bond and mortgage are then negotiated by the agent, the alteration having been made by the agent of the mortgagor, intrusted by him with the papers and authorized to sell the mortgage, the act becomes that of the mortgagor).

Wis.—Bretz v. R. Cannon Co., 140 Wis. 269, 122 NW 717.

Eng.—Whitfield v. Collingwood, 1 C. & K. 325, 47 ECL 325.

[a] **Authority to bind wife's separate estate.**—Where a married woman executes a note and gives to the payee authority to add to the note anything which counsel, if consulted, may suggest to make the note "right, legal and proper," it has been held that this is sufficient to authorize an addition which will make the note legal and binding upon her separate estate. Taddiken v. Cantrell, 69 N. Y. 597, 25 AmR 253.

14. Ala.—White Sewing Mach. Co. v. Saxon, 121 Ala. 399, 25 S 784.

Ill.—Paterson v. Higgins, 58 Ill. A. 268; Yost v. Minneapolis Harvester Works, 41 Ill. A. 556.

Ind.—Eckert v. Louis, 84 Ind. 99 (where the confidential agent of the payee, after delivery to such agent and with the payee's knowledge, changed a note, without the consent of one who had signed as surety).

Iowa.—Shenkberg Co. v. Porter, 137 Iowa 245, 114 NW 890; Hollingsworth v. Holbrook, 80 Iowa 151, 45 NW 561, 20 AmSR 411 [crit Bigelow v. Stilphen, 35 Vt. 521] (holding that an agent's authority to renew and take security for notes owned by his principal, being unrestricted, is sufficient to charge the principal with an alteration in a chattel mortgage made by the agent after delivery, and will avoid the mortgage); Hamilton v. Hooper, 46 Iowa 515, 26 AmR 161.

Mass.—Adams v. Frye, 2 Metc. 103.

N. J.—Bodine v. Berg, 82 N. J. L.

tions of the parties must import authority from the principal. A change by one who is merely the custodian of an instrument is at most a spoliation—the act of a stranger—and will not destroy the validity of the instrument,[15] as in the case of a change in a bond by the officer, or his deputy, who is the mere custodian of it; or a change after approval, either by the approving officer or by a party to the instrument with knowledge of such officer;[16] and this is true, although the custodian was formerly the agent for other purposes of one of the parties to the instrument.[17]

Mere possession does not necessarily import authority to make, or consent to, a material change, unless the relation of the parties may be taken into consideration.[18]

[§ 110] **b. Partners.** If a note is signed by the makers in their individual names, and not as a firm, one of the makers has no right to bind the other to a material change without the latter's consent.[19] But such an alteration of a note, given for money borrowed for the firm's use in its regular business, is held to bind the other parties.[20]

[§ 111] **c. No Inference from Marital Relation.** The mere marital relation, coupled with the possession of the instrument by the husband, does not justify an implication of authority in the husband to make an alteration.[21]

[§ 112] **d. One of Several Parties to Instrument.** One of several obligors, who has possession of a complete written instrument, for the purpose of delivering it to the obligee, has no implied authority to make material alterations therein which will bind his coöbligors.[22] There is no implied agency in such a case, as the principle of implied agency can arise only when the instrument is in an unfinished state,[23] although the surrender of possession of an instrument by one obligor to another has been considered as importing agency sufficiently to protect an innocent third party.[24]

[§ 113] **B. Consent—1. In General.** A change made by the authority, or with the consent of the party, or in his presence and with his privity, must be accorded the same effect as if made with his own hand—that is, he cannot set it up to avoid liability—and if he seeks to enforce the instrument the alteration may be set up against him.[25] The general rule is that a change made with the con-

662, 82 A 901, 40 LRANS 65, AnnCas1913D 721.

N. C.—Allen v. Jordan, 3 N. C. 298 (holding that where an agent, at the request of his principal, subscribes, as a witness, a note which he takes for his principal, this constitutes a material alteration).

Pa.—Gettysburg Nat. Bank v. Chisholm, 169 Pa. 564, 32 A 730, 47 AmSR 929.

S. D.—Wyckoff v. Johnson, 2 S. D. 91, 48 NW 837.

Tex.—Bowser v. Cole, 74 Tex. 222, 11 SW 1131.

Eng.—Powell v. Divett, 15 East 29, 104 Reprint 755; Croockewit v. Fletcher, 1 H. & N. 893; Hindostan, etc., Bank v. Smith, 36 L. J. C. P. 241.

15. Ill.—Lanum v. Patterson, 143 Ill. A. 244.

Mass.—Tulane Univ. v. O'Connor, 192 Mass. 428, 78 NE 494.

N. Y.—Rees v. Overbaugh, 6 Cow. 746.

S. D.—Port Huron Engine, etc., Co. v. Sherman, 14 S. D. 461, 85 NW 1008.

W. Va.—Yeager v. Musgrave, 28 W. Va. 90.

See also supra § 107.

16. See supra §§ 94, 105 notes 3 and 4.

17. Nickerson v. Swett, 135 Mass. 514.

[a] **"No agency to alter will be implied from any other agency,** special in its nature." Barton Sav. Bank, etc., Co. v. Stephenson, 87 Vt. 433, 89 A 639, 641, 51 LRANS 346.

18. The Hero, 6 Fed. 526.

19. Horn v. Newton City Bank, 32 Kan. 518, 4 P 1022; Perring v. Hone, 4 Bing. 28, 13 ECL 384, 130 Reprint 678, 2 C. & P. 401, 12 ECL 639; Hebert v. La Banque Nationale, 40 Can. S. C. 458.

20. Taylor v. Taylor, 12 Lea (Tenn.) 714. See also Partnership [30 Cyc 491].

[a] **Illustrations.**—(1) Where the maker and guarantors of a note were partners and the note was for the use of the firm, the maker was held to have implied authority to bind the guarantors by his consent to a change. Pahlman v. Taylor, 75 Ill. 629. (2) So an erasure, by one of the makers of a firm note, to make the note conform to the original agreement, being within the scope of the partnership business, was held to bind the firm. Mace v. Heath, 30 Nebr. 620, 46 NW 918. (3) And where an alteration was made in a certificate of deposit by a party continuing the business after the dissolution of a firm of bankers, but before notice to the holder, it was held that the retiring partner was not discharged from liability. Howell v. Adams, 68 N. Y. 314.

21. Foote v. Hambrick, 70 Miss. 157, 11 S 567, 35 AmSR 631; Smith v. Fellows, 41 N. Y. Super. 36 (holding that the execution by the wife of a mortgage, and a delivery to the husband for the purpose of negotiating a loan with the mortgagee therein named, confer no authority upon the husband to change the name of the maker and negotiate the mortgage with another person).

22. Schnewind v. Hacket, 54 Ind. 248; Barton Sav. Bank, etc., Co. v. Stephenson, 87 Vt. 433, 89 A 639, 51 LRANS 346 and note (holding that the fact that makers of a note after signing it left it with one of them to deliver to a bank did not authorize such person to change the date before delivering it to the bank); Fairhaven v. Cowkill, 8 Wash. 686, 36 P 1093 (holding that the fact that the bond of a city official is intrusted to him for delivery to the city does not make him the agent of the sureties to such an extent as to bind them for changes made by him, nor charge them with fraud on account thereof). See also supra §§ 91, 93.

"No authority to alter will be presumed from the mere fact that one leaves the note with the other to be delivered." Barton Sav. Bank, etc., Co. v. Stephenson, 87 Vt. 433, 89 A 639, 641, 51 LRANS 346. "No [relation of] agency between several joint makers of a note is implied from their mere relation as co-signers." Flanigan v. Phelps, 42 Minn. 186, 43 NW 1113. "There is nothing in the relation ordinarily existing between the principal makers of a note, or between principal and surety, that authorizes one to change the writing after it has been signed by the other." Barton Sav. Bank, etc., Co. v. Stephenson, 87 Vt. 433, 89 A 639, 641, 51 LRANS 346.

[a] **Where a note, after it is signed by a surety,** is given to the principal to be delivered, the authority which the principal has is to deliver it, and he has no implied authority to alter its terms. Blakey v. Johnson, 13 Bush (Ky.) 197, 26 AmR 254.

23. Agawam Bank v. Sears, 4 Gray (Mass.) 95; Flanigan v. Phelps, 42 Minn. 186, 43 NW 1113. The same may be said to be approved with regard to one whose commission is only to deliver an instrument, although he is one of the joint makers of the contract. Schwalm v. McIntyre, 17 Wis. 232.

[a] **In Indiana** since Burns Annot. St. (1908) § 8959 requires two of the sureties on a sewer contractor's bond to be residents of the county and city, nonresident sureties on such a bond must be held to have impliedly authorized the principal to secure resident sureties, as required by the statute, after they had signed it. Fry v. Bannon Sewer Pipe Co., 179 Ind. 309, 101 NE 10.

24. Orlando v. Gooding, 34 Fla. 244, 15 S 770; Wilmington, etc., R. Co. v. Kitchin, 91 N. C. 39 (where it was considered that where one of several coöbligors in a bond places it unconditionally in the hands of another for delivery, and the latter erases the names of one of the signers and then delivers it, of which change the obligee has no knowledge, the coöbligor acts as the agent of his associates and the bond is not vitiated); Ogle v. Graham, 2 Penr. & W. (Pa.) 132; Douglass v. Scott, 8 Leigh (35 Va.) 43 (holding that the instrument is not available to the person for whose benefit it is made until it is discounted). See Wills v. Wilson, 3 Or. 308 (where the distinction is made between the taking of a note by plaintiff knowing that it has been changed without the consent of one of the makers, or taking it with knowledge of such facts as to put him upon inquiry, and the taking of a note, without fault and being deceived into believing that it was changed by both of the makers, when in fact one of them did not authorize the change).

[a] **The principal in an official bond is the agent of the sureties** to deliver it, and where he erases the name of one surety and substitutes that of another, before delivery, without the knowledge or consent of the other sureties, the bond is nevertheless binding upon all the obligors, provided there is nothing to put the obligee upon notice. King County v. Ferry, 5 Wash. 536, 34 AmSR 880 [disappr Walla Walla County v. Ping, 1 Wash. T. 343].

25. Ida.—State v. Baird, 13 Ida. 126, 132, 89 P 398 [cit Cyc].

Ill.—Babcock v. Hinkle, 117 Ill. A. 640.

Ky.—Locknane v. Emmerson, 11 Bush 69.

Mo.—Evans v. Foreman, 60 Mo. 449.

Nebr.—Holland v. Griffith, 13 Nebr. 472, 14 NW 387.

Oh.—Sturges v. Williams, 9 Oh. St. 443, 75 AmD 473; Reynolds v. Smith, 18 Oh. Cir. Ct. 84, 9 Oh. Cir. Dec. 484; Taylor v. Graves, 4 Oh. Dec. (Reprint) 107, 1 ClevLRec 31.

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sent of the parties to the instrument does not avoid it, but it will be binding on the consenting parties in its altered form.[26]

Alteration according to consent. Where there is consent to make an alteration it must be made according to the specific terms of the consent, and must not be extended beyond it.[27]

Withdrawal of consent. Parties who have given their consent to an alteration will not be permitted to withdraw it after obligations or rights have accrued under the instrument as altered.[28]

[§ 114] **2. Negotiable Paper.** In accordance with the above general rule material alterations of negotiable paper do not invalidate it as against the parties consenting to the alteration,[29] as where the alteration consists in changing the rate of interest on a note with the consent of the parties.[30]

A bill of exchange is not vitiated by a material alteration therein with the consent of all the parties,[31] as before acceptance and with the consent of the previous parties a bill of exchange may be materially altered without vitiating it.[32] So where the acceptance of a bill of exchange is altered with the consent of the acceptor he remains liable thereon.[33]

[§ 115] **3. Sealed Instruments—a. In General.** Aside from the principle that authority to make a deed must be by deed, the parties to an instrument under seal may by consent make a change in it after execution.[34] Complete execution is con-

Pa.—Miller v. Gilleland, 19 Pa. 119.

Ont.—Fitch v. Kelly, 44 U. C. Q. B. 578.

26. U. S.—Speake v. U. S., 9 Cranch 28, 3 L. ed. 645; Eadie v. Chambers, 172 Fed. 73, 96 CCA 561, 24 LRANS 879, 18 AnnCas 1096 [rev on the facts 224 U. S. 564, 32 SCt 597, 56 L. ed. 885, AnnCas1913D 998].

Ala.—Ravisies v. Alston, 5 Ala. 297.

Cal.—Sill v. Reese, 47 Cal. 294.

Colo.—Hochmark v. Richler, 16 Colo. 263, 26 P 818.

Conn.—Burrows v. Stoddard, 3 Conn. 160.

Del.—Warder v. Stewart, 16 Del. 275, 36 A 88.

Ida.—Mulkey v. Long, 5 Ida. 213, 47 P 949.

Ill.—King v. Bush, 36 Ill. 142; Knoebel v. Kircher, 33 Ill. 308.

Ind.—Voiles v. Green, 43 Ind. 374; Richmond Mfg. Co. v. Davis, 7 Blackf. 412.

Iowa.—Grimsted v. Briggs, 4 Iowa 559.

Ky.—Brown v. Warnock, 5 Dana 492.

Mass.—Prouty v. Wilson, 123 Mass. 297; Boston v. Benson, 12 Cush. 61; Hunt v. Adams, 6 Mass. 519; Smith v. Crooker, 5 Mass. 538.

Mich.—Stewart v. Port Huron First Nat. Bank, 40 Mich. 348.

Miss.—Wilson v. Henderson, 17 Miss. 375, 48 AmD 716.

N. H.—Humphreys v. Guillow, 13 N. H. 385, 38 AmD 499.

N. Y.—Vidvard v. Cushman, 35 Hun 18; Woolley v. Constant, 4 Johns. 54, 4 AmD 246.

Oh.—Wardlow v. List, 41 Oh. St. 414; Hayes v. Dumont, 2 Oh. Cir. Ct. 229, 1 Oh. Cir. Dec. 458.

Pa.—Stahl v. Berger, 10 Serg. & R. 170, 13 AmD 666.

Va.—Schmelz v. Rix, 95 Va. 509, 28 SE 890.

Wis.—Kilkelly v. Martin, 34 Wis. 525.

Eng.—Walton v. Hastings, 4 Campb. 223; Outhwaite v. Luntley, 4 Campb. 179; Whitfield v. Collingwood, 1 C. & K. 325, 47 ECL 325; Jacobs v. Hart, 2 Stark 45, 3 ECL 310.

Ont.—Owen v. Mercier, 14 Ont. L. 491, 10 OntWR 1, 10 AnnCas 457 and note.

[a] **Where a lease not under seal** is altered by the insertion of a new provision, with the consent of both parties, such provision becomes a part of the lease, and it is not necessary that it shall be again signed or reëxecuted. Vidvard v. Cushman, 35 Hun (N. Y.) 18.

[b] **A memorandum torn from the foot of an obligation** by the obligee, with the assent of the obligor, does not destroy the obligation. Price v. Cockran, 1 Bibb (Ky.) 570.

27. Toomer v. Rutland, 57 Ala. 379, 29 AmR 722; Coburn v. Webb, 56 Ind. 96, 26 AmR 15; Swift v. Barber, 28 Mich. 503; Ex p. Decker, 6 Cow. (N. Y.) 59.

[a] **Assent to the addition of one subscribing witness** to a deed may cure the objection to that extent, but if there are two witnesses added assent to the addition of only one will not be sufficient. Henning v. Werkheiser, 8 Pa. 518.

28. Lemay v. Johnson, 35 Ark. 225.

29. U. S.—Washington Bank v. Way, 2 F. Cas. No. 957, 2 Cranch C. C. 249.

Ala.—White v. Hass, 32 Ala. 430, 70 AmD 548.

Colo.—Hochmark v. Richler, 16 Colo. 263, 26 P 818 (attaching an additional signature to the note).

Del.—Hollis v. Vandergrift, 10 Del. 521 (erasure, with the consent of all the makers, of the words "& Co." immediately following the name and signature of the principal maker).

Ky.—Robertson v. Commercial Security Co., 152 Ky. 336, 153 SW 450 (holding that, where a payee detached a note from the contract of which it was a part, under authority of a provision of the contract, this was an authorized alteration within the Negotiable Instruments Law § 124, providing that an alteration authorized by a party to an instrument shall not avoid it as against that party); Tyler v. Winslow First Nat. Bank, 150 Ky. 515, 150 SW 665.

Mass.—Willard v. Clarke, 7 Metc. 435 (procuring a person to sign a note as an attesting witness).

Miss.—Wilson v. Henderson, 17 Miss. 375, 48 AmD 716.

Mo.—Evans v. Foreman, 60 Mo. 449.

N. H.—Humphreys v. Guillow, 13 N. H. 385, 38 AmD 499 (making joint and several note joint merely); Hills v. Barnes, 11 N. H. 395.

N. Y.—Peo. v. Call, 1 Den. 120, 43 AmD 655.

Oh.—Carlile v. Lamb, 16 Oh. Cir. Ct. 578, 9 Oh. Cir. Dec. 70.

Pa.—Wilson v. Jamieson, 7 Pa. 126 (where the words "attest this 9th of October, 1846," were added at the end of the note).

Va.—Schmelz v. Rix, 95 Va. 509, 28 SE 890 (change of date).

Wash.—Handsaker v. Pedersen, 71 Wash. 218, 128 P 230.

[a] **Additional promisor.**—Where, without any change in the form of the note, an additional promisor signs it, the jury may still find it to be the act and deed of the first signer upon very slight evidence of even a subsequent assent on his part. Pulliam v. Withers, 8 Dana (Ky.) 98, 33 AmD 479.

[b] **Erasure of surety's signature.**—If the holder of a note signed by the principal debtor and sureties, by an agreement with the principal, suffers the signature of one of the sureties to be erased, the note is still valid as against the principal. Peo. v. Call, 1 Den. (N. Y.) 120, 43 AmD 655.

[c] **Decisions under English stamp acts.**—There are a number of English cases which hold that bills and notes are vitiated by a material alteration, even though made by consent of the parties, but these cases were decided under the English stamp acts. The doctrine of these cases is that as soon as the instrument is issued the stamp has filled its function, and that any change afterward virtually makes it a new contract requiring a new stamp. Downes v. Richardson, 5 B. & Ald. 674, 7 ECL 367, 106 Reprint 1337; Perring v. Hone, 4 Bing. 28, 13 ECL 384, 130 Reprint 678, 2 C. & P. 401, 12 ECL 639; Bathe v. Taylor, 15 East 412, 104 Reprint 900; Bowman v. Nichol, 5 T. R. 537, 101 Reprint 302; Wilson v. Justice, Bayley (6th ed) 118; Bayley on Bills (2d Am. ed) 90.

30. Ill.—Canon v. Grigsby, 116 Ill. 151, 5 NE 362, 56 AmR 769; Brock v. Brock, 29 Ill. A. 334 (where the interest clause in a note secured by a mortgage was changed to correspond with stipulations in the mortgage).

Ind.—Bowman v. Mitchell, 97 Ind. 155; Nelson v. White, 61 Ind. 139.

Iowa.—Phillips v. Crips, 108 Iowa 605, 79 NW 373 (rate of interest changed from seven to eight per cent); Grimsted v. Briggs, 4 Iowa 559.

Mass.—Nichols v. Rosenfeld, 181 Mass. 525, 63 NE 1063 (holding that a correction of a mistake in the interest clause of a mortgage note does not invalidate it as to a consenting party).

Pa.—Myers v. Nell, 84 Pa. 369.

31. Birmingham Trust, etc., Co. v. Whitney, 95 App. Div. 280, 88 NYS 578 [aff 183 N. Y. 522 mem, 76 NE 1089 mem]; Ratcliff v. Planters' Bank, 2 Sneed (Tenn.) 425; Kershaw v. Cox, 3 Esp. 246.

[a] **The acceptor** of a bill of exchange is not discharged by an alteration therein with his consent. Downes v. Richardson, 5 B. & Ald. 674, 7 ECL 367, 106 Reprint 1337; Jacobs v. Hart, 2 Stark 45, 3 ECL 310 (holding that, where a bill is signed by the drawer and taken by the payee to the acceptor for acceptance, and the latter discovers a mistake in the date, which the payee thereupon corrects, the acceptor is liable).

32. Ward v. Allen, 2 Metc. (Mass.) 53, 35 AmD 387; Langton v. Lazarus, 9 L. J. Exch. 89.

[a] **The acceptor of a bill may alter the date before he accepts,** and if this is concurred in by the other parties, it will bind them. Ratcliff v. Planters' Bank, 2 Sneed (Tenn.) 425.

[b] **Under stamp acts.**—Such an alteration does not necessitate a new stamp under the requirements of the stamp acts. Upstone v. Marchant, 2 B. & C. 10, 9 ECL 15, 107 Reprint 286; Peacock v. Murrell, 2 Stark. 558, 3 ECL 529.

33. Stevens v. Lloyd, M. & M. 292, 22 ECL 524.

[a] **Where the drawee, with the consent of the holder,** materially alters a bill of exchange presented to him for acceptance, he vitiates the bill in the hands of the holder as against the drawer and prior indorsers, but it remains a good bill as between the holder and the acceptor. Paton v. Winter, 1 Taunt. 420, 127 Reprint 896.

34. U. S.—Speake v. U. S., 9 Cranch 28, 3 L. ed. 645; Eadie v. Chambers, 172 Fed. 73, 96 CCA 561, 24 LRANS 879, 18 AnnCas 1096 [rev on the facts 224 U. S. 564, 32 SCt 597, 56 L. ed. 885, AnnCas1913D 998]

summated by final delivery,[35] hence the mere signing and sealing of an instrument does not preclude changes before delivery.[36]

Bonds. An alteration of a bond by the obligee, after execution and in a material respect, does not avoid the instrument, if the change is made with the consent of the obligors.[37]

Mortgages. A mortgage of land or a deed of trust is not avoided by a material alteration made therein with the consent of the parties,[38] except in so far as it affects innocent third persons.[39] And it has been held that an alteration in a chattel mortgage, after the instrument has been executed and delivered, does not invalidate it if made by consent of the parties.[40]

[§ 116] **b. After Acknowledgment and Delivery.** If there has been a delivery, still the parties may consent to a change and redelivery, the new delivery constituting a reëxecution,[41] even without a

(reducing the interest conveyed from three fourths to one half of the property).

Ala.—Ravisies v. Alston, 5 Ala. 297.

Hawaii.—Kahai v. Kamai, 8 Hawaii 694.

Ind.—Richmond Mfg. Co. v. Davis, 7 Blackf. 412 (alteration made in a sealed bill).

Ky.—Berry v. Berry, 7 J. J. Marsh. 487.

Mass.—Smith v. Croker, 5 Mass. 538.

Mo.—Coney v. Laird, 153 Mo. 408, 55 SW 96; Martin v. Whites, 128 Mo. A. 117, 122, 106 SW 608 [cit Cyc].

N. J.—Thorpe v. Keeler, 18 N. J. L. 251; Camden Bank v. Hall, 14 N. J. L. 583.

N. Y.—Thompkins v. Corwin, 9 Cow. 255 (holding that the legal effect of altering, by consent of parties, the time limited to do an act under the condition of a bond is to give it effect only from time of alteration); Penny v. Corwithe, 18 Johns. 499.

N. C.—Doe v. McArthur, 9 N. C. 33, 11 AmD 738.

Pa.—Henning v. Werkheiser, 8 Pa. 518.

Tenn.—Bryant v. Charleston Bank, 107 Tenn. 560, 64 SW 895.

Va.—Cleaton v. Chambliss, 6 Rand. (27 Va.) 86.

Eng.—Hudson v. Revett, 5 Bing. 368, 15 ECL 625, 130 Reprint 1103; Paget v. Paget, 2 Ch. Cas. 101, 22 Reprint 866; Zouch v. Claye, 2 Lev. 35, 83 Reprint 441, 1 Vent 185, 86 Reprint 126; Doe v. Houghton, 1 M. & R. 208, 17 ECL 659 (insertion of that which was before implied).

[a] **The consent of the grantor** to an alteration in the deed, by changing the name of the grantee, is essential to vest title in the substituted grantee. Goodwin v. Norton, 92 Me. 532, 43 A 111.

[b] **Filling in the date and consideration of a deed** after execution will not avoid it if the addition is made with the authority and consent of the grantor. Doe v. Roe, 9 N. C. 33, 11 AmD 738.

[c] **Insertion of a provision for a vendor's lien** by consent of all parties after a deed is acknowledged does not invalidate it, especially where such insertion is made with the sole view of making the instrument speak the real contract of the parties thereto. Bryant v. Charleston Bank, 107 Tenn. 560, 64 SW 895.

[d] **Bill of sale of ship.**—In Woolley v. Constant, 4 Johns. (N. Y.) 54, 4 AmD 246, it was contended that a deed may be altered in a material part with the consent of both parties, and it was held that a bill of sale of a ship may be altered by the insertion of a recital of the registry without invalidating the instrument, where it is done with the consent of the parties.

[e] **Agreement for submission to arbitration.**—Where the name of one of the parties to an agreement for the submission of a question to arbitrators, executed under the hands and seals of the parties, is struck out by drawing a line through it, it does not vitiate the instrument if the change is made with the consent of the parties. Penny v. Corwithe, 18 Johns. (N. Y.) 499.

[f] **In Georgia,** under Civ. Code (1895) § 3002, declaring that authority to make a sealed instrument must be under seal, parol consent will not authorize the insertion of the words "witness my hand and seal" into a note, the signature of which is followed by a seal, as the effect of such insertion is to transform an unsealed into a sealed instrument. Thompson v. Wilson, 127 Ga. 141, 56 SE 302.

35. See generally Deeds [13 Cyc 560].

36. Reformed Dutch Church v. Ten Eyck, 25 N. J. L. 40; Duncan v. Hodges, 15 S. C. L. 239, 17 AmD 734. See also Fraser v. Fraser, 14 U. C. C. P. 70. And see supra §§ 61, 92.

[a] **Change in certificate of acknowledgment.**—An alteration, made before delivery and with the consent of the parties, of the date of a notary's certificate of acknowledgment will not affect the validity of the instrument. Miller v. Williams, 27 Colo. 34, 59 P 740.

[b] **Grantor retaining deed.**—Where a deed is written in favor of certain grantees, but retained in the possession of the grantor without delivery to any of the grantees, the grantor has power to change the deed as he may see fit. Wetherington v. Williams, 134 N. C. 276, 46 SE 728.

37. U. S.—Cutts v. U. S., 6 F. Cas. No. 3,522, 1 Gall. 69; U. S. v. Nelson, 27 F. Cas. No. 15,826, 2 Brock. 64.

Ala.—Gibbs v. Frost, 4 Ala. 720.

Fla.—Cotten v. Williams, 1 Fla. 37.

Ida.—State v. Baird, 13 Ida. 126, 89 P 298 (holding that alteration of a bail bond made with the consent of the sureties does not discharge them).

Ky.—Berry v. Berry, 7 J. J. Marsh. 487.

Me.—Hale v. Russ, 1 Me. 334.

Mass.—Howe v. Peabody, 2 Bray 556.

N. Y.—Penny v. Corwithe, 18 Johns. 499.

Oh.—Taylor v. Graves, 4 Oh. Dec. (Reprint) 107, 1 ClevLRep 31 (correction of amount in replevin bond).

Pa.—Barrington v. Washington Bank, 14 Serg. & R. 405; Stahl v. Berger, 10 Serg. & R. 170, 13 AmD 666.

Va.—Cleaton v. Chambliss, 6 Rand. (27 Va.) 86.

Eng.—Coke v. Brummell, 8 Taunt. 439, 4 ECL 220, 129 Reprint 453.

[a] **Instances.**—(1) The name of an obligor may be erased from a bond and that of a new obligor inserted, by consent of all the parties, without making the bond void. Speake v. U. S., 9 Cranch 28, 3 L. ed. 645. (2) So also a several bond of one may be executed by another party, and corresponding alterations be made in the body of the instrument, and, if the change is made by consent of the party who first executed it, the bond becomes the obligation of both. Camden Bank v. Hall, 14 N. J. L. 583.

[b] **The change of an instrument from a bond to a note,** made after its execution, by or with the knowledge or consent of the obligor, does not avoid the instrument. Conner v. Fleshman, 4 W. Va. 693.

38. Stiles v. Probst, 69 Ill. 382; Collins v. Collins, 51 Miss. 311, 24 AmR 632.

[a] **As between immediate parties to notes secured** by a mortgage it is competent for them to change the time and mode of payment, and still retain the mortgage security. Williams v. Starr, 5 Wis. 534.

[b] **Consent by one of joint mortgagors.**—If the mortgage is joint and the change, made with the consent of one of the mortgagors, affects his interest alone, the others cannot complain. Woodbury v. Allegheny, etc., R. Co., 72 Fed. 371.

[c] **After execution of later mortgage.**—Where a mortgage is altered, at the request of the mortgagor three years after it was executed and recorded, and two years after the execution and recording of a later mortgage, so as to make the prior instrument conform to a note, if the alteration is without fraud, it does not vitiate the mortgage, which can be foreclosed for the amount due the mortgagee as disclosed by the record. Gunter v. Addy, 58 S. C. 178, 36 SE 553.

[d] **Trust deed.**—An alteration of the date of the certificate of acknowledgment of a trust deed, if made with the consent of all parties, does not invalidate the instrument. Miller v. Williams, 27 Colo. 34, 59 P 740. In Coney v. Laird, 153 Mo. 408, 55 SW 96, it was held that a deed of trust, where as originally drawn the land was incorrectly described as being in a certain county, was not rendered void by writing in the name of the proper county, if the change was made with the knowledge and consent of the mortgagor.

39. Williams v. Crook, 63 Miss. 9 (holding that there could be no exchange or substitution of other property in lieu of that described in the deed of trust, even by agreement of the parties, so as to render the deed of trust a lien upon the substituted property as against third persons having no actual notice of the agreement and substitution).

40. Chicago Title, etc., Co. v. O'Marr, 18 Mont. 568, 46 P 809, 47 P 4.

[a] **Substitution of property in chattel mortgage.**—(1) Where a chattel mortgage is altered after execution and delivery and before registration by the mortgagee, with the consent of the mortgagor, by erasing the description of the property and writing in the description of other and different property, the instrument is a valid mortgage of the property so added, and will support an action of replevin for the property. Holland v. Griffith, 13 Nebr. 472, 14 NW 387. (2) In Alabama, under Code (1907) § 4288, a mortgage of personalty is not valid "unless in writing and subscribed by the mortgagor," yet if the parties, by subsequent agreement, substitute one animal for another, by interlineation entered in the mortgage, such substitution is valid as between themselves, and an action of detinue will lie by the mortgagee for the substituted animal. Winslow v. Jones, 88 Ala. 496, 7 S 262.

41. De Malarin v. U. S., 1 Wall. (U. S.) 282, 17 L. ed. 594 (holding that, where a grant of land, issued and delivered, is subsequently altered and the quantity granted increased, by direction of the grantor on the application of the grantee, and is then redelivered to the grantee, such redelivery is in legal effect a reëxecution of the grant); Hoffecker v. New Castle County Mut. Ins. Co., 9 Del. 306; Abbott v. Abbott, 189 Ill. 488, 59 NE 958, 82 AmSR 470 (holding that, if a deed is altered after delivery,

reacknowledgment,[42] although it has been held that where the instrument is acknowledged before an officer appointed by law to take and certify the instrument, the parties have no right to make the most trifling change in it,[43] without a redelivery and a reacknowledgment, the latter especially as against third persons.[44]

Where the instrument has actually been delivered it has been held, on the one hand, that a redelivery will be necessary; and mere parol authority, at this stage, to make an alteration, in the absence of the obligor or grantor, is not sufficient.[45] On the other hand, it has been held that actual redelivery is not necessary, but that the circumstances may be sufficient to import the legal equivalent of such delivery,[46] as where the change is made in the presence of the parties,[47] or where the grantor himself carries the instrument to the proper office to be recorded.[48]

Subsequent assent or ratification may be sufficient,[49] and, where the person who makes the change is the agent of the obligor, it is considered that parol authority is sufficient, because the authority thus conferred is not to execute a deed but to make it certain by alteration or addition.[50]

[§ 117] **4. By Some Only of Parties.** In connection with the general proposition that even a material alteration by the obligee or grantee does not avoid the instrument if the change is made by the consent of the obligor or grantor, it is to be observed that this is true only as to the consenting parties; an instrument materially altered by consent of some only of the parties, while enforceable as against the consenting parties,[51] will nevertheless

by consent of both parties, and again delivered after the change, the deed will be valid); Stiles v. Probst, 69 Ill. 382; Fitzpatrick v. Fitzpatrick, 6 R. I. 64, 75 AmD 681 (where it was held that where a deed was so defectively executed, under a power contained in a mortgage, as to be void, and the grantee thereafter executed a quitclaim deed to the mortgagee, who sold under the power, the first deed may be corrected by interlineations by consent of the parties, and, both deeds being reacknowledged and recorded afresh, it will be presumed to have been delivered as of a new date, so as to take effect from redelivery).

[a] **Adoption of deed by grantor.**—Where a grantor, after a change in the deed, duly acknowledged, had been made by the insertion of the name of another grantee in addition to that of the original grantee, obtained possession of the deed, read it, and delivered it to the new grantee, he adopted the deed as then written, and it took effect as a valid conveyance to both grantees. Baker v. Baker, 239 Ill. 82, 87 NE 868.

42. Prettyman v. Goodrich, 23 Ill. 330 (holding that, if a deed is altered after its execution, acknowledgment, and delivery by the insertion of additional tracts of land, with the consent of the grantor, and he, after the alteration, takes the deed and has it recorded as altered, it will amount to a second delivery, and will render it valid as to such grantor); Bassett v. Bassett, 55 Me. 127 (where a deed of an undivided half of certain premises, once completed and delivered, was subsequently surrendered for the purpose of striking out the words "one undivided half of," and again delivered as a conveyance of the whole). To same effect Woodbury v. Allegheny, etc., R. Co., 72 Fed. 371; Walkley v. Clarke, 107 Iowa 451, 78 NW 70 (holding that where, as between the parties to the deed, no deed is necessary, the insertion of additional land into a deed, by consent and after acknowledgment, does not affect its validity).

43. Moore v. Bickham, 4 Binn. (Pa.) 1 (holding that a purchaser of land is not bound to accept a deed in which there is a blank left for the consideration money, notwithstanding the fact that the grantors authorize their agents to fill the blank). See also infra § 125 et seq. But see Hunt v. Nance, 122 Ky. 275, 92 SW 6, 28 KyL 1188 (holding that interlineations made in a deed after acknowledgment and delivery, but before being recorded, and with the consent of the parties and for the purpose of altering the estate conveyed, do not affect its validity as between the parties, nor render it inadmissible in an action of ejectment to show title in the grantee).

44. Coit v. Starkweather, 8 Conn. 289 (holding that, under a positive requirement that all deeds of land should be attested by two witnesses and acknowledged before a magistrate, a material change is fatally defective without a new attestation and acknowledgment; but that, if the change is immaterial, then it will be good without such new acknowledgment and attestation); Collins v. Collins, 51 Miss. 311, 24 AmR 632 (which was a bill by a woman to obtain a decree against her husband for support, in aid of which object she charged a fraudulent disposition of his property by her husband, and sought to set aside or avoid a deed of trust of real estate, and a sale thereof. The husband had executed a deed of trust to secure eighteen hundred dollars, and, after the execution, acknowledgment, and recording of the instrument, he borrowed a further sum from the person secured in the deed, and thereafter attempted to secure the latter sum by interlineation in the trust deed, and it was held that such attempt created no new contract or deed, and that it did not invalidate or change the original deed, or affect the interests of third persons in the property). In Moelle v. Sherwood, 148 U. S. 21, 13 SCt 426, 37 L. ed. 350, it was held that the old execution and acknowledgment are not continued in existence as to new property inserted; that if the deed can be deemed valid as between the parties from the time of the alteration it cannot affect and be in force as to subsequent purchasers without notice whose deeds were already recorded, but that as to them, by the statute of Nebraska, it is void. In Waldron v. Waller, 65 W. Va. 605, 609, 64 SE 964, 32 LRANS 284 and note, which was the case of a deed for land being altered after execution and delivery, with the consent of the grantors, so as to make it describe a larger boundary, Miller, P., said: "The authorities we think make it clear that although such alteration may have been with the consent of the grantors, the deed cannot operate to invest in the grantee land not covered by the original grant, without a redelivery of the deed to them, and if it has been acknowledged before the alteration, the deed should be again acknowledged." See also infra § 135.

[a] **In Alabama** it has been held that an alteration by the grantor or by his authority, after acknowledgment but before delivery, will be inoperative without a new acknowledgment when the effect of the alteration made is to enlarge the estate or premises conveyed; but when its effect is to limit or restrict the estate, and it is made in pursuance of an intention expressed at the time of the signature and acknowledgment, it will take effect from the subsequent delivery of the deed, and another acknowledgment will not be necessary. Burgess v. Blake, 128 Ala. 105, 28 S 963, 86 AmSR 78 and note; Webb v. Mullins, 78 Ala. 111; Sharp v. Orme, 61 Ala. 263.

45. Waldron v. Waller, 65 W. Va. 605, 64 SE 964, 32 LRANS 284 and note; Thorne v. Williams, 13 Ont. 577; Martin v. Hanning, 26 U. C. Q. B. 80.

Parol authority to execute deed see Agency § 50.

46. Hoffecker v. New Castle County Mut., etc., Ins. Co., 9 Del. 306.

47. See infra § 130. Compare like rule as to execution of deeds by agent in presence of parties Agency § 52.

48. Prettyman v. Goodrich, 23 Ill. 330. To same effect Woodbury v. Allegheny, etc., R. Co., 72 Fed. 371.

49. Camden Bank v. Hall, 14 N. J. L. 583; Wester v. Bailey, 118 N. C. 193, 24 SE 89. See also infra § 132. But see Sans v. People, 8 Ill. 327; Cleaton v. Chambliss, 6 Rand. (27 Va.) 86.

[a] **Conveyance of land.**—If a grantor ratifies an insertion in the deed, he and those claiming under him are bound thereby. Chezum v. McBride, 21 Wash. 558, 58 P 1067. See also Mohlis v. Trauffler, 91 Iowa 751, 60 NW 521; Cutler v. Rose, 35 Iowa 456.

50. Knapp v. Maltby, 13 Wend. (N. Y.) 587 (upon the authority of Texira v. Evans [cit Master v. Miller, Anstr. 228], involving the filling of blanks). See also infra § 129.

51. Ill.—Canon v. Grigsby, 116 Ill. 151, 5 NE 362, 56 AmR 769; Prettyman v. Goodrich, 23 Ill. 330 (holding that a deed by husband and wife, altered after execution by the husband's consent, is still good against him, although void as against the wife).

Ky.—Tyler v. Winslow First Nat. Bank, 150 Ky. 515, 150 SW 665.

N. C.—Spivey v. Grant, 96 N. C. 214, 2 SE 45.

Or.—Wills v. Wilson, 3 Or. 308.

Pa.—Myers v. Nell, 84 Pa. 369. But in Smith v. Weld, 2 Pa. 54, the instrument was sued on as a joint bond, and, as the assent of one of the obligors had not been proved, it was held that no recovery could be had in this action against the other obligor, for the discharge of one of the joint and several obligors is the discharge of all.

Vt.—Broughton v. Fuller, 9 Vt. 373.

Eng.—Coke v. Brummell, 8 Taunt. 439, 4 ECL 220, 129 Reprint 453.

[a] **Where an agreement signed by three persons** is afterward altered, by the consent of two of them, by adding seals to the names of the signers and interlining the words "jointly and severally," and is afterward delivered by those two, the alteration does not vitiate the instrument with regard to them, but they are bound by the instrument in its altered form. Warring v. Williams, 8 Pick. (Mass.) 322.

[b] **Where one of the indorsers of a note agreed to a material alteration** therein by the holder, with a view to its immediate discount, with the provision that the consent of another party, then absent, should be

less be void as against the parties who do not give their consent to the alteration.[52]

[§ 118] **5. Sufficiency of Consent.** The consent of the parties to the alteration of an instrument may be express,[53] or it may be implied either from custom,[54] or from the acts of the parties,[55] such as from the leaving of blank spaces in the instrument for the insertion of words,[56] or from the nature of the agreement between the parties.[57] It has even been held that consent may be implied from the nature of the alteration.[58]

Time of consent. The consent may be before or after the change is made,[59] and if the change is pursuant to an agreement between the parties, it is immaterial that it was made by one of them after the agreement and in the absence of the other.[60]

[§ 119] **C. Filling Blanks—1. In General.**[61] Blanks, of any description, left in writings not under seal, may, except so far as prohibited by the statute of frauds, be filled in pursuance of mere parol authority,[62] and it may be laid down generally that if one signs an instrument containing blanks, he must be understood to intrust it to the person to whom it is so delivered to be properly filled in, according to the agreement between the parties, and when so filled the instrument is as good as if originally executed in complete form.[63] Thus where one signs or indorses a note or bill containing blanks to be filled, the delivery of such an instrument is an authority to fill up the blanks in conformity with the original agreement.[64] As has been pointed out, however, the filling of blanks is

obtained afterward, although such consent was not obtained, the alteration did not render the note so negotiated invalid as against the consenting party. Stoddard v. Penniman, 113 Mass. 386.

[c] **Where certain persons sign a power of attorney** authorizing the clerk of the county court to sign their names to a sheriff's levy bond, the county judge cannot permit a surety to withdraw his name from the power unless his cosureties know of his intended act and fail to object or consent thereto. Bracken v. Daum, 80 Ky. 388, 4 KyL 204.

52. Prettyman v. Goodrich, 23 Ill. 330; Shiffer v. Mosier, 225 Pa. 552, 74 A 426, 24 LRANS 1155, 17 AnnCas 756 (holding that any material alteration of a written instrument releases a party who does not consent thereto, no matter how many other parties have consented); Craighead v. McLoney, 99 Pa. 211; Campbell v. Christie, 2 Stark. 64, 3 ECL 318. See also supra §§ 102, 112.

53. U. S. v. Nelson, 27 F. Cas. No. 15,862, 2 Brock. 64; Gibbs v. Frost, 4 Ala. 720.

[a] **It is not necessary that the consent to an alteration in a note shall be in writing;** (1) but if there is sufficient evidence to justify the jury in finding that the alteration was impliedly agreed to it is sufficient. Barnett v. Effenberg, 29 Okl. 679, 119 P 135. (2) An indorser's consent to the alteration of a promissory note need not be in writing. Stewart v. Port Huron First Nat. Bank, 40 Mich. 348.

54. Bowers v. Jewell, 2 N. H. 543; Woodworth v. Bank of America, 19 Johns. (N. Y.) 391, 10 AmD 239.

55. Mundy v. Stevens, 61 Fed. 77, 9 CCA 366; Bowers v. Jewell, 2 N. H. 543; Ratcliff v. Planters' Bank, 2 Sneed (Tenn.) 425. But see U. S. v. Nelson, 27 F. Cas. No. 15,862, 2 Brock. 64 (where Marshall, C. J., reached the conclusion that a bond might be altered by the express authority of the parties to be bound thereby, but that such consent could not be implied).

[a] **Failure to object to proposed alteration.**—(1) Consent may be implied from the failure of a party to the instrument to object when an alteration is proposed. Knoebel v. Kircher, 33 Ill. 308. (2) Where a surety stands by and sees an alteration made in a note and says nothing, but by his silence and conduct induces a lender to part with his money on the faith of the surety's approval of the alteration by the principal of the rate of interest stipulated in the note, the surety's consent is implied, and he cannot afterward rely upon such alteration as a discharge of his liability. Sanders v. Bagwell, 37 S. C. 145, 15 SE 714, 16 SE 770. See also Price v. Cochran, 1 Bibb (Ky.) 570. (3) So where a surety on an appeal bond is present when the clerk refuses to approve it and requires another surety, and the former raises no objection, he will be deemed to have consented to the change. Tiernan v. Fenimore, 17 Oh. 545.

[b] **Admission of correctness of altered instrument.**—Where a note is presented to the maker and he admits it to be correct, this is evidence that the alteration was made previous to its execution, or, if made afterward, that it was done with his consent. King v. Bush, 36 Ill. 142.

[c] **Acts insufficient.**—(1) Authority to alter the amount of a note after its execution, by an accommodation indorser, will not be implied from the previous indorsement by him of a series of renewal notes. Ætna Nat. Bank v. Winchester, 43 Conn. 391. (2) It has been held that a finding that some of the directors of a corporation were present when a material alteration was made in a note given by the corporation, was not a finding that they knew of or consented to the change. Sneed v. Sabinal Min., etc., Co., 73 Fed. 925, 20 CCA 230.

56. See infra § 120.

57. Kane v. Herman, 109 Wis. 33, 85 NW 140 (holding that, where several stockholders were liable as guarantors on notes of the corporation, and had arranged among themselves that certain of them should assume particular debts and be released from liability as to the others, the understanding between them being that the ultimate liability of the whole was to be borne equally by them, this was sufficient authority for erasing the name of one of the parties as guarantor on a particular note).

58. Toomer v. Rutland, 57 Ala. 379, 29 AmR 722 (authority to perfect instrument by filling blanks); Hunt v. Adams, 6 Mass. 519, 521 [quot Bowers v. Jewell, 2 N. H. 543] (where Parsons, C. J., said: "Consent may as well be implied from the nature of the alteration, as be expressed").

[a] **Where the law would have supplied words omitted** and afterward inserted by the party holding an instrument, his own insertion of them will not vitiate the writing, for the assent of the maker, grantor, or obligor to the alteration will, in such cases, be presumed. Burnham v. Ayer, 35 N. H. 351; Doe v. Houghton, 1 M. & R. 208, 17 ECL 659.

59. See supra § 116; infra § 145 et seq. But see Hebert v. La Banque Nationale, 40 Can. S. C. 458 (holding that the assent required to bring an altered bill within the exception provided by the "Bills of Exchange Act," Can. Rev. St. [1906] c 119 § 145, must be given by the party sought to be bound at the time of or before the making of the alteration).

60. Phillips v. Crips, 108 Iowa 605, 79 NW 373; Wardlow v. List, 41 Oh. St. 414 (holding that a material alteration in a note, made in accordance with an agreement between the maker and the payee, does not avoid the note as to the maker, although the change was made some time after the agreement and without knowledge on the part of the maker that the agreement had been made effective by the actual alteration of the note); Kane v. Herman, 109 Wis. 33, 85 NW 140. But see Swift v. Barber, 28 Mich. 503 (holding that a statement made by the maker to the holder of a note during negotiations after maturity for an extension of time for payment, directing him to make the note ten per cent, does not import a continuing authority, which would justify and make valid an alteration written out by the holder several months afterward).

61. **Filling power of attorney executed in blank** see Agency § 56.

Power of holder to fill blanks in bills and notes see generally Bills and Notes [7 Cyc 619 et seq].

Right to fill blanks in contracts see generally Contracts [9 Cyc 302].

62. Yocum v. Barnes, 8 B. Mon. (Ky.) 496 (holding that an unsealed forthcoming bond filled up by the officer in pursuance of parol authority is valid).

63. U. S.—Violett v. Patton, 5 Cranch 142, 3 L. ed. 61.

Ala.—Shows v. Steimer, 175 Ala. 363, 57 S 700.

Ill.—White v. Alward, 35 Ill. A. 195.

Ky.—Yocum v. Barnes, 8 B. Mon. 496.

Mass.—Hunt v. Adams, 6 Mass. 519.

Mo.—Roe v. Town Mut. F. Ins. Co., 78 Mo. A. 452; New England L. & T. Co. v. Brown, 59 Mo. A. 461 (holding that the rule that the alteration of a contract in a material or immaterial particular by a party thereto discharges another party not consenting cannot be applied to every form and kind of written instrument, and that where the contract is executory, and is not for the payment of money or to affect the title to real estate, it has no application).

N. Y.—Ex p. Decker, 6 Cow. 59 (power spent in first filling up blanks).

N. D.—Porter v. Hardy, 10 N. D. 551, 556, 88 NW 458 [quot Cyc].

Pa.—Bugger v. Cresswell, 12 A 829.

Tex.—Baldwin v. Haskell Nat. Bank, (Civ. A.) 124 SW 443.

Eng.—In re Tahiti Cotton Co., L. R. 17 Eq. 273.

"Judge Story says: 'It is very common for persons to sign their names in blank to a paper, for the purpose of having a promissory note written over it; and in such a case, the note, when written, will bind the party, if done by a person properly authorized, in the same manner, and to the same extent, and from the same time, as if it had been originally filled up before the signature was made': Story on Promissory Notes, sec. 10." Henderson v. Bondurant, 39 Mo. 369, 373, 93 AmD 281.

64. Porter v. Hardy, 10 N. D. 551, 556, 88 NW 458 [quot Cyc as containing rule "well stated"]; Cox v. Alexander, 30 Or. 438, 46 P 794; Stahl v. Berger, 10 Serg. & R. (Pa.) 170, 13 AmD 666; Lance v. Calvert, 21 Pa. Super. 102; Fitch v. Kelly, 44 U. C. Q. B. 578. See generally Bills and Notes [7 Cyc 619].

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a question of authority, and not of alteration of a completed instrument.[65]

[§ 120] **2. Implied Authority—a. In General.** If a party to an instrument intrusts it to another for use, with blanks not filled, such instrument so delivered carries on its face an implied authority to fill up the blanks necessary to perfect the same with matter in general conformity to the character of the instrument, and, as between such party and innocent third persons, the person to whom the instrument is so intrusted must be deemed the agent of the party who committed the instrument to his custody.[66]

Applications of rule. While the most common application of this rule arises with reference to the filling of blanks in bills and notes,[67] it is not con-

[a] **The rule that a material alteration of a note renders it void** does not apply to skeleton notes delivered by the makers and subsequently filled, on the ground that by signing in blank they impliedly authorize the holder to fill out the blanks in harmony with the general purpose of the instrument. Porter v. Hardy, 10 N. D. 551, 88 NW 458.

[b] **Making new instrument.**—One with whom another leaves a note, which he has signed, but left blank, may fill up such blanks, and so bind the other, but he may not make a new instrument, by erasing or interlining material words, so as to change the terms of the words written or printed in the blank form; nor may he, after having filled the blanks in such a note and used it, subsequently, on recovering the note, erase material words and substitute and interline others. Ofenstein v. Bryan, 20 App. (D. C.) 1.

[c] **Under the Nebraska Negotiable Instruments Act** § 14, blanks left in a negotiable instrument must be filled up strictly in accordance with the authority given, or the instrument when completed may not be enforced against any person who became a party thereto prior to its completion. Hartington Nat. Bank v. Breslin, 88 Nebr. 47, 128 NW 659, 31 LRANS 130, AnnCas1912B 1008 (where a different name was filled in as payee from that authorized, and the note was held not enforceable).

65. Bolter v. Kozlowski, 112 Ill. A. 13 [aff 211 Ill. 79, 71 NE 858]; White v. Alward, 35 Ill. A. 195; Waldron v. Young, 9 Heisk. (Tenn.) 777. See also supra §§ 91–94.

"The filling in of a blank in a written instrument is not, strictly speaking, an alteration of the instrument. Where a blank is filled in, it is a question of authority to do so." Montgomery v. Dresher, 90 Nebr. 632, 634, 134 NW 251, 38 LRANS 423.

66. U. S.—Angle v. Northwestern L. Ins. Co., 92 U. S. 330, 23 L. ed. 556; Pittsburgh Bank v. Neal, 22 How. 96, 16 L. ed. 328; Goodman v. Simonds, 20 How. 343, 15 L. ed. 934; Violett v. Patton, 5 Cranch 142, 3 L. ed. 61; Wilkes-Barre First Nat. Bank v. Barnum, 160 Fed. 245, 250, 20 AmBankr 439 [cit Cyc].

Ala.—Robertson v. Smith, 18 Ala. 220; Roberts v. Adams, 8 Port. 297, 33 AmD 291; Boardman v. Gore, 1 Stew. 517, 18 AmD 73.

Ark.—Knapp v. Wilks, 105 Ark. 243, 246, 151 SW 280 [quot Cyc].

Colo.—Palocios v. Brasher, 18 Colo. 593, 34 P 251, 36 AmSR 305.

Ill.—Merritt v. Boyden, 191 Ill. 136, 60 NE 907, 85 AmSR 246; Canon v. Grigsby, 116 Ill. 151, 5 NE 362, 56 AmR 769; Yocum v. Smith, 63 Ill. 321, 14 AmR 120; Smith v. Finch, 3 Ill. 321; Leseure v. Weaver, 99 Ill. A. 375; White v. Alward, 35 Ill. A. 195; Loomis v. Freer, 4 Ill. A. 547.

Ind.—De Pauw v. Salem Bank, 126 Ind. 553, 25 NE 705, 26 NE 151; Cronkhite v. Nebeker, 81 Ind. 319, 42 AmR 127; Gothrupt v. Williamson, 61 Ind. 599; Gillaspie v. Kelly, 41 Ind. 158, 13 AmR 318; Spitler v. James, 32 Ind. 202, 2 AmR 334; Johns v. Harrison, 20 Ind. 317.

Iowa.—Johnson v. Hoover, 139 Iowa 143, 117 NW 277; Rainbolt v. Eddy, 34 Iowa 440, 11 AmR 152.

Kan.—Lowden v. Schoharie County Nat. Bank, 38 Kan. 533, 16 P 748.

Ky.—Diamond Distilleries Co. v. Gott, 137 Ky. 585, 126 SW 131, 31 LRANS 643 and note; Smith v. Lockridge, 8 Bush 423; Rogers v. Poston, 1 Metc. 643; Patton v. Shanklin, 14 B. Mon. 13; Commonwealth Bank v. Garey, 6 B. Mon. 626; Commonwealth Bank v. McChord, 4 Dana 191, 29 AmD 398.

Me.—Market, etc., Nat. Bank v. Sargent, 85 Me. 349, 27 A 192, 35 AmSR 376; Breckenridge v. Lewis, 84 Me. 349, 24 A 864, 30 AmSR 353; Abbott v. Rose, 62 Me. 194, 16 AmR 427.

Mass.—Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 AmR 67; Smith v. Crooker, 5 Mass. 538.

Mich.—Weidman v. Symes, 120 Mich. 657, 79 NW 894, 77 AmSR 603.

Miss.—Davis v. Lee, 26 Miss. 505, 59 AmD 267; Torry v. Fisk, 18 Miss. 590; Wilson v. Henderson, 17 Miss. 375, 48 AmR 716; Hemphill v. Alabama Bank, 14 Miss. 44; Barnes v. Reynolds, 5 Miss. 114.

Mo.—Farmers' Bank v. Garten, 84 Mo. 119; Roe v. Town Mut. F. Ins. Co., 78 Mo. A. 452; New England L. & T. Co. v. Brown, 59 Mo. A. 461; Green v. Kennedy, 6 Mo. A. 577.

Nebr.—Montgomery v. Dresher, 90 Nebr. 632, 134 NW 251, 38 LRANS 423 and note.

N. Y.—Weyerhauser v. Dun, 100 N. Y. 150, 2 NE 274; Redlich v. Doll, 54 N. Y. 234, 13 AmR 573; Chemung Canal Bank v. Bradner, 44 N. Y. 680; Van Duzer v. Howe, 21 N. Y. 531; Genesee Bank v. Patchin Bank, 13 N. Y. 309; Page v. Morrell, 3 Keyes 117; Hardy v. Norton, 66 Barb. 527; Harris v. Berger, 15 NYSt 389; Mitchell v. Culver, 7 Cow. 336; Smith v. Wyckoff, 3 Sandf. Ch. 77.

N. C.—Rollins v. Ebbs, 138 N. C. 140, 145, 50 SE 577 [quot Cyc].

Oh.—Jones v. Bangs, 40 Oh. St. 139, 48 AmR 664; Fullerton v. Sturges, 4 Oh. St. 529.

Or.—Cox v. Alexander, 30 Or. 438, 46 P 794.

Pa.—Simpson v. Bovard, 74 Pa. 351; Garrard v. Haddan, 67 Pa. 82, 5 AmR 412; Wiley v. Moor, 17 Serg. & R. 438, 17 AmD 696; Lance v. Calvert, 21 Pa. Super. 102.

S. C.—Aiken v. Cathcart, 37 S. C. L. 133, 45 AmD 764; Duncan v. Hodges, 15 S. C. L. 239, 17 AmD 734.

Tenn.—Waldron v. Young, 9 Heisk. 777; Grissom v. Fite, 1 Head 331.

Tex.—Jones v. Primm, 6 Tex. 170.

Vt.—Michigan Ins. Co. v. Leavenworth, 30 Vt. 11.

Va.—Chestnut v. Chestnut, 104 Va. 539, 52 SE 348, 2 LRANS 879 and note, 7 AnnCas 802; Orrick v. Colston, 7 Gratt. (48 Va.) 189; Jordan v. Neilson, 2 Wash. (2 Va.) 164.

Wis.—Friend v. Yahr, 126 Wis. 291, 104 NW 997, 110 AmSR 924, 1 LRANS 891; Snyder v. Van Doren, 46 Wis. 602, 1 NW 285, 32 AmR 739.

Eng.—Russel v. Langstaffe, 2 Dougl. 514, 99 Reprint 328 (which is the early and leading English case on this subject, cited in many of the cases). See also Schultz v. Astler, 2 Bing. N. Cas. 544, 29 ECL 655, 132 Reprint 212; Collis v. Emett, 1 H. Bl. 313, 126 Reprint 185; Mountague v. Perkins, 17 Jur. 557, 22 EngL&Eq 516; Cruchley v. Clarance, 2 M. & S. 90, 105 Reprint 316; Snaith v. Mingay, 1 M. & S. 87, 105 Reprint 33.

Ont.—Le Banque Nationale v. Sparks, 27 U. C. C. P. 320.

[a] **"The general rule** is that when one delivers an instrument, whether the same be required to be under seal or not, so executed as to, in form, give it full validity upon the filling up of blanks, authority for the holder thereof to do that is implied." Per Marshall, J., in Friend v. Yahr, 126 Wis. 291, 299, 104 NW 997, 110 AmSR 924, 1 LRANS 891.

[b] **Reason for rule; estoppel.**—"Many of these decisions are put upon the doctrine of estoppel in pais, ostensible authority being the equivalent of actual authority. It certainly is consonant with justice and fairness that when a person as a surety signs an incomplete undertaking, and places the same in the hands of another to use for a particular purpose, and with ostensible authority to fill in any needed matter to make the same effective, and the same is accepted in its completed form by the obligee without negligence on his part, that such surety ought to be estopped from controverting its validity to the prejudice of such obligee." Per Goddard, J., in Palacios v. Brasher, 18 Colo. 593, 598, 34 P 251, 36 AmSR 305.

[c] **Indorsement by cashier in behalf of bank.**—Where a bank cashier has power to indorse in behalf of the bank, his indorsement of his own name followed by the word "cashier" authorizes the holder to write the name of the bank above such signature. Genesee Bank v. Patchin Bank, 13 N. Y. 309, 319.

[d] **Filling amount.**—(1) Where a subscription book for corporation stock is signed for the purpose of inducing others to subscribe, leaving the amount of such subscription blank, it raises an implied authority in those taking subscriptions to fill the blank. Jewell v. Rock River Paper Co., 101 Ill. 57. (2) So where persons sign as sureties a bond, from which at the time of signing the penalty is omitted, and intrust it to another for delivery, intending it to be used as a guardianship bond, it gives such other implied authority to fill out the bond and deliver it in its completed form. Rollins v. Ebbs, 138 N. C. 140, 50 SE 577. Filling blanks for amounts in bills and notes see Bills and Notes [7 Cyc 593].

67. Douglass v. Scott, 8 Leigh (35 Va.) 43. See also Bills and Notes [7 Cyc 619].

[a] **Inserting amount of note.**—(1) Where a note is signed and delivered in blank with the intention and expectation that it will be filled with the amount, the law implies an unlimited authority to insert any amount. Hall v. Commonwealth Bank, 5 Dana (Ky.) 258, 30 AmD 685 (holding a plea bad which alleged that the blank was filled with a larger amount than was intended). (2) "An endorsement on a blank note will bind the endorser, for any sum which the person, with whom it is entrusted, thinks proper to insert in it." Lawrence v. Mabry, 13 N. C. 473, 475, 21 AmD 346. (3) "Implied authority is given to the holder to fill up the note, with any amount which he may have advanced on it, in good faith." Herbert v. Huie, 1 Ala. 18, 20, 34 AmD 755. (4) The holder of a note, in which the amount is left blank, may fill the blank with the amount stated in the margin. Williamson v. Smith, 1 Coldw. (Tenn.) 1, 78 AmD 478.

[b] **Inserting name of payee.**—Where a surety executes a note with blank left for the name of the payee, and delivers it to the principal, the principal is authorized to fill the blank by writing in the name of the

fined to such instruments, but is also applicable to all simple contracts in writing,[68] and, in some jurisdictions, to sealed instruments.[69]

[§ 121] **b. Consent as Basis of Rule.** This right to fill blanks left in a writing, without any express authority, rests upon an assumption of consent; it is considered that the fact that blanks are left in an instrument implies an authority to fill them,[70] provided the possession of the incompleted paper has been intrusted under circumstances which permit the inference of authority to perfect it, and where, in view of such apparent authority, it would be a fraud upon innocent parties to permit an assertion to the contrary.[71] Consequently, the rule of implied authority to fill blanks does not apply where the circumstances negative consent,[72] as where a person writes his name on a blank piece of paper with no intent of executing a contract of any kind,[73] or where an incomplete instrument is stolen.[74]

Express agreement negativing authority. There can be no implied power to fill blanks where it is negatived by an express agreement.[75] Thus, where express authority is given to fill the blanks left in an instrument in one respect only, that authority must be pursued, and no other can be exercised.[76]

payee. Armstrong v. Harshman, 61 Ind. 52, 28 AmR 665.

[c] **Inserting place of payment.**—Where a note contained the incomplete sentence, "negotiable and payable at," followed by a blank space, the place of payment may be filled by the holder. Light v. Killinger, 16 Ind. A. 102, 44 NE 760, 59 AmSR 313.

68. Humphreys v. Guillow, 13 N. H. 385, 38 AmD 499; Gary v. State, 11 Tex. A. 527. And see cases supra note 66.

[a] **Applied to chattel mortgage.**—Roe v. Town Mut. F. Ins. Co., 78 Mo. A. 452.

[b] **Bonds not under seal.**—Palacios v. Brasher, 18 Colo. 593, 34 P 251, 36 AmSR 305; Dedge v. Branch, 94 Ga. 37, 20 SE 657.

[c] **Unsealed warrant of attorney to confess judgment.**—White v. Alward, 35 Ill. A. 195.

69. See infra § 125.

70. South Berwick v. Huntress, 53 Me. 89, 87 AmD 535; Smith v. Crooker, 5 Mass. 538; New England L. & T. Co. v. Brown, 59 Mo. A. 461; Montgomery v. Dresher, 90 Nebr. 632, 134 NW 251, 38 LRANS 423 and note.

[a] **Reasons for rule.**—The rule is founded not only upon that principle of general jurisprudence which casts the loss, when one of two equally innocent persons must suffer, upon him who has put it in the power of another to do the injury, but also upon that rule of the law of agency which makes the principal liable for the acts of his agent, notwithstanding the private instructions of the principal have been disregarded, when he has held the agent out as possessing a more enlarged authority. Fisher v. Dennis, 6 Cal. 577, 65 AmD 534; Spitler v. James, 32 Ind. 202, 2 AmR 334; Rollins v. Ebbs, 138 N. C. 140, 145, 50 SE 577 [quot Cyc]; Fullerton v. Sturges, 4 Oh. St. 529; Cox v. Alexander, 30 Or. 438, 446, 46 P 794 (where Moore, C. J., said: "The authority of the holder of a promissory note to supply the omissions therein, and insert his name as payee thereof, rests upon the doctrine of agency. The maker of a note, by omitting to name the payee therein, impliedly invites a bona fide holder thereof to supply the omission and give certainty to the contract; and this implied power renders a bona fide holder the agent of the maker, and confers upon such agent authority to supply any omissions in the instrument that are not inconsistent with the terms of the contract").

[b] **Basis of rule is consent, not agency.**—"The delivery of a negotiable instrument containing a blank space for any of the material elements thereof implies authority to fill up such blank in the hands of any one to whom it may come. Angle v. Northwestern L. Ins. Co., 92 U. S. 330, 23 L. ed. 556; Johnson v. Weed, etc., Mfg. Co., 103 Wis. 291, 79 NW 236; Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 NW 177, 46 AmR 39; Snyder v. Van Doren, 46 Wis. 602, 1 NW 285, 32 AmR 739; Dinsmore v. Duncan, 57 N. Y. 573, 15 AmR 534. This rule is based on implied agreement with any one who may become the owner, and is not to be confused in principle or application with those cases, some of which are cited above, where an incomplete instrument is delivered to one, not as payee, but as agent, with authority to make it complete, and where the agent exceeds his authority." Smith v. Willing, 123 Wis. 377, 382, 101 NW 692, 68 LRA 940.

[c] **Limitation of implied authority.**—(1) "There can be no doubt that a blank signature on a piece of paper authorizes the holder of it to write certain contracts over it. . . . It could not be contended that a mere signature of a name on the back of a blank note would authorize the holder to write over it a warranty of a horse or a receipt in full of all demands. The authority depends in a great measure upon what use it is customary to make of such signatures." Riddle v. Stevens, 32 Conn. 378, 386, 87 AmD 181. (2) The holder of a nonnegotiable note has no implied authority to change the purport of the note by filling blank spaces with matter which is foreign to the apparent purpose for which the blank has been left. Light v. Killinger, 16 Ind. A. 102, 44 NE 760, 59 AmSR 313.

71. Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122, 21 NE 168; Taddiken v. Cantrell, 69 N. Y. 597, 25 AmR 253. See also supra § 92.

72. Smith v. Prosser, [1907] 2 K. B. 735, 11 AnnCas 191.

"The implied authority to fill blanks rests upon the theory of consent, and, where the circumstances shown, negative consent, as they do here, the authority is denied." Spring Garden Ins. Co. v. Lemmon, 117 Iowa 691, 693, 86 NW 35 (where certain persons, supposing they were merely signing a recommendation, signed as sureties a bond containing a blank for the amount of the penalty. It was held that, as they had not read the instrument and did not know its character, there was no implied authority to fill the blank and they could not be held liable on the instrument).

[a] **Where the time for completing work is left blank** in a written contract, the court cannot say that the parties intended to fill the blanks, or if they did so intend, what insertion was intended to be made. Bolter v. Kozlowski, 112 Ill. A. 13 [aff 211 Ill. 79, 71 NE 858].

73. Ala.—Nance v. Lary, 5 Ala. 370 (holding that the mere signing of a blank piece of paper, without any intention that it shall be used for any purpose, does not confer an implied authority upon one who obtains possession thereof to write a note over the name and negotiate it as such, and that the instrument under these circumstances will be void).

Ill.—Wilson v. Miller, 72 Ill. 616.

Ind.—Cline v. Guthrie, 42 Ind. 227, 13 AmR 357.

N. Y.—Harris v. Berger, 15 NYSt 389 (writing an obligation over a signature in an album).

Wis.—Walker v. Ebert, 29 Wis. 194, 9 AmR 548.

Que.—Ford v. Auger, 18 L. C. Jur. 296.

See also infra § 124.

[a] **Writing for identification.**—Where one writes his name on a piece of paper, to be used for the purpose of identifying his signature, and the person to whom it is delivered fills up the paper with a promissory note and negotiates it, the instrument is a forgery and no recovery can be had on it. Grand Haven First Nat. Bank v. Zeims, 93 Iowa 140, 61 NW 483; Caulkins v. Wisler, 29 Iowa 495, 4 AmR 236.

74. Ledwich v. McKim, 53 N. Y. 307 (holding that where bonds conditioned for the payment, in the alternative, of two kinds and amounts of national currency, to be determined by the place to be fixed for payment, contained a clause authorizing the president to fix by indorsement such place of payment, and were indorsed in blank, but while in the possession of the corporation were stolen, a bona fide purchaser from the thief has no authority to fill up the blank); Lenheim v. Wilmarding, 55 Pa. 73, (where A indorsed a note containing blanks and left it with B, who was not a party thereto, to be filled up by him for a particular purpose. Afterward C, whose name appeared on the note as maker, stole it from B's safe, filled up the blanks, and put it into circulation. It was held that A was not liable to a bona fide holder because he had not intended to put the paper in circulation except through the agency of B); Van Amringue v. Morton, 4 Whart. (Pa.) 382, 34 AmD 517 (a deed with a blank for grantee's name); Baxendale v. Bennett, 3 Q. B. D. 525 (blank acceptance).

75. Derr v. Keaough, 96 Iowa 397, 65 NW 339 (holding that the filling up of a blank for the rate of interest, in violation of an express agreement that the note should not bear interest, was a material alteration which avoided the instrument even in the hands of a bona fide holder).

[a] **Agreement that blanks shall remain unfilled.**—If a blank left in a note is filled up, notwithstanding an express agreement that it shall be left unfilled, the note will be avoided as between the original parties or in the hands of a transferee who has knowledge of the agreement. Pope v. Branch County Sav. Bank, 23 Ind. A. 210, 54 NE 835; Conger v. Crabtree, 88 Iowa 536, 55 NW 335, 45 AmSR 249; Charlton v. Reed, 61 Iowa 166, 16 NW 64, 47 AmR 808.

76. Toomer v. Rutland, 57 Ala. 379, 29 AmR 722 (holding that, where a note was delivered with blanks for the time and place of payment, and express authority was given the payees to fill in the date of maturity, their authority was thereby exhausted, and they could not insert a place of payment).

[a] **Express power to fill blanks must be strictly followed** as it gives only such authority as is plainly granted. Simmons Hardware Co. v. Hargate, 122 Ill. A. 287 (holding that a power of attorney authorizing the assignee to fill in blanks on a written assignment of wages is strictly construed, and the filling of such blanks

[§ 122] **c. Time of Filling.** Implied authority to fill blanks in a written instrument must generally be exercised within a reasonable time;[77] but it has been held that it may be exercised after the death of the person conferring it.[78]

[§ 123] **d. Filling by Bona Fide Holder.** Any bona fide holder into whose hands the instrument passes has authority to fill blanks to perfect the instrument.[79]

[§ 124] **e. Authority Confined to Perfecting the Instrument.** The implied authority to fill blanks is confined to such insertions as are necessary to make the instrument perfect according to its nature, frame, and intended use. There is no inference of authority to make any addition to the terms of the instrument, or to make a new instrument by erasing what is written or printed, or by filling blanks with stipulations repugnant to the plainly expressed intention of the paper, as shown by its written or printed terms, and such an addition or alteration will avoid the instrument even in the hands of an innocent holder,[80] unless the person authorized to fill the blanks may be considered as a stranger with reference to any other changes which he may make.[81] But it has been held that where an accommodation note is delivered with a blank to be filled by authority, he to whom it is so delivered may make a change in the matter inserted in the blank before the instrument is negotiated.[82]

by the assignee is without authority, unless plainly granted by the power): Wabash R. Co. v. Papin, 119 Ill. A. 99 (holding that, where a written assignment of certain salary was accompanied with an instrument which limited the right to fill out, date, and file the written assignment of the salary to become due on the first of a certain month, such instrument did not authorize the filling of blanks in the assignment of the salary for a period other than the specific month therein mentioned).

[b] **Where the amount of consideration is left blank** in a written contract for services, and the paper is left in the care of one of the parties with authority to insert the amount agreed upon, such party takes the paper as agent of the other and is authorized to insert only the true amount, and an insertion of a false amount is without effect. Jones v. Pincheon, 6 Ind. A. 460, 32 NE 577.

77. Snyder v. Armstrong, 9 Phila. (Pa.) 146; Mulhall v. Neville, 8 Exch. 391 note; Temple v. Pullen, 8 Exch. 389; Mountague v. Perkins, 17 Jur. 557, 22 EngL&Eq 516. See also Bills and Notes [7 Cyc 622].

78. Cope v. Daniel, 9 Dana (Ky.) 415; Barnes v. Reynolds, 5 Miss. 114; Carter v. White, 20 Ch. D. 225; Dutch v. O'Leary, L. R. 5 Ir. 92.

79. Ky.—Diamond Distilleries Co. v. Gott, 137 Ky. 585, 126 SW 131, 31 LRANS 643.

N. Y.—Redlich v. Doll, 54 N. Y. 234, 13 AmR 573; Page v. Morrell, 3 Keyes 117.

Or.—Cox v. Alexander, 30 Or. 438, 46 P 794.

Pa.—Bechtel's Est. 133 Pa. 369, 19 A 412.

S. C.—Aiken v. Cheeseborough, 19 S. C. L. 172.

Eng.—Cruchley v. Clarance, 2 M. & S. 90, 105 Reprint 316.

[a] **Inserting name of payee.**—(1) A bill or note issued with a blank left for the name of the payee may be filled up by a bona fide holder, either with his own name or with the name of a prior indorser. Lawrence v. Mabry, 13 N. C. 473, 475, 21 AmD 346 (where the court said: "By leaving it blank, the makers of the note authorized any bona fide holder of it to fill it up. I think the defendant is liable upon his endorsement as such, or is liable as the drawer of a new bill"); Cruchley v. Clarence, 2 M. & S. 90, 105 Reprint 316. (2) "It is well settled that a note issued in blank for the payee's name may be filled up at any time, even at the trial, by any bona-fide holder, with his own name as payee, and then it will be treated as a good promissory note to him from its date." Seay v. State Bank, 3 Sneed (Tenn.) 558, 561, 67 AmD 579. See also Crutchly v. Mann, 5 Taunt. 529, 128 Reprint 796. (3) There is no implied authority for the holder of a note to insert the name of a payee where the note is drawn without any payee being named and no blank space is left for the insertion of a name. Smith v. Willing, 123 Wis. 377, 101 NW 692, 68 LRA 940.

80. U. S.—Angle v. Northwestern L. Ins. Co., 92 U. S. 330, 23 L. ed. 556; Davidson v. Lanier, 4 Wall. 447, 18 L. ed. 377; Wilkes-Barre First Nat. Bank v. Barnum, 160 Fed. 245, 250, 20 AmBankr 439 [cit Cyc].

Ala.—Green v. Sneed, 101 Ala. 205, 13 S 277, 46 AmSR 119; Toomer v. Rutland, 57 Ala. 379, 29 AmR 722.

Cal.—Walsh v. Hunt, 120 Cal. 46, 52 P 115, 39 LRA 697.

Conn.—Mahaiwe Bank v. Douglass, 31 Conn. 170 (holding that a custom among banks of regarding erasures of printed matter in negotiable paper as no evidence of an unauthorized alteration when the same erasures of written matter would be so has not existed so long or become so general as to be a part of the law merchant).

D. C.—Ofenstein v. Bryan, 20 App. 1.

Ill.—Merritt v. Boyden, 191 Ill. 136, 60 NE 907, 85 AmSR 246; White v. Alward, 35 Ill. A. 195.

Ind.—De Pauw v. Salem Bank, 126 Ind. 553, 25 NE 705, 26 NE 151, 10 LRA 46; Cronkhite v. Nebeker, 81 Ind. 319, 42 AmR 127; McCoy v. Lockwood, 71 Ind. 319; Franklin L. Ins. Co. v. Courtney, 60 Ind. 134; Coburn v. Webb, 56 Ind. 96, 26 AmR 15; Schnewind v. Hacket, 54 Ind. 248; Hodge v. Farmers' Bank, 7 Ind. A. 94, 34 NE 123.

Iowa.—Smith v. Eals, 81 Iowa 235, 46 NW 1110, 25 AmSR 486; Adair v. Egland, 58 Iowa 314, 12 NW 277.

Ky.—Blakey v. Johnson, 13 Bush 197, 26 AmR 254; Commonwealth Bank v. McChord, 4 Dana 191, 29 AmD 398.

Mass.—Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 AmR 67; Ives v. Farmers' Bank, 2 Allen 236.

Mo.—Ivory v. Michael, 33 Mo. 398.

N. Y.—Weyerhauser v. Dun, 100 N. Y. 150, 2 NE 274; Crawford v. West Side Bank, 100 N. Y. 50, 2 NE 881, 53 AmR 152; McGrath v. Clark, 56 N. Y. 34, 15 AmR 372; Meise v. Docher, 83 Hun 580, 31 NYS 1072; Farmers' Nat. Bank v. Thomas, 79 Hun 595, 29 NYS 837; National Ulster County Bank v. Madden, 41 Hun 113 [rev on other grounds 114 N. Y. 280, 21 NE 408, 23 AbbNCas 118, 11 AmSR 633]; Bruce v. Westcott, 3 Barb. 374.

N. C.—Rollins v. Ebbs, 138 N. C. 140, 145, 50 SE 577 [quot Cyc].

N. D.—Porter v. Hardy, 10 N. D. 551, 556, 88 NW 458 [quot Cyc].

Va.—Hoffman v. Planters' Nat. Bank, 99 Va. 480, 39 SE 134; Frank v. Lilienfeld, 33 Gratt (74 Va.) 377.

Eng.—Crotty v. Hodges, 4 M. & G. 561, 43 ECL 292, 134 Reprint 231.

Ont.—Halcrow v. Kelly, 28 U. C. C. P. 551; Hall v. Merrick, 40 U. C. Q. B. 566.

[a] **Illustrations.**—(1) Signing a piece of paper with the intent that it shall be filled up with a simple promise does not import authority to seal and deliver it as a bond. Manning v. Norwood, 1 Ala. 429. (2) Where one signs a blank form of a bill of exchange as drawer, for the accommodation of another to whom it is delivered, and it is filled up as a promissory note without the knowledge of the drawer, he is discharged upon the instrument in the hands of the person chargeable with the alteration. Luellen v. Hare, 32 Ind. 211. (3) In Holland v. Hatch, 11 Ind. 497, 71 AmD 363, it was held that the insertion of a clause waiving appraisement laws, made by plaintiff, rendered the instrument void, because such clause was in no manner necessary to make a complete instrument, and that it did not matter that there were other blanks to be filled in which were necessary to make the instrument complete. This ruling resulted in a reversal of the judgment of the lower court, after which plaintiff took a nonsuit and subsequently brought suit in Ohio, where it seems a majority of the court did not disagree with the above decision, but held that the added words might be rejected as forming no part of the instrument. Holland v. Hatch, 15 Oh. St. 464.

[b] **Where a part of a contract is in the form of a skeleton note,** detaching such part and subsequently filling the blanks, so as to make a negotiable note, is a material alteration, rendering the same void. Porter v. Hardy, 10 N. D. 551, 88 NW 458.

[c] **A blank indorsement** cannot, in the absence of express authority, be filled up with a contract enlarging the indorser's liability. Comparee v. Brockway, 11 Humphr. (Tenn.) 355; Kimbro v. Lamb, 4 Humphr. (Tenn.) 95, 40 AmD 628; Catlin v. Jones, 1 Pinn. (Wis.) 130. See also Bills and Notes [7 Cyc 802].

[d] **Affixing seal.**—Where a person signs a paper in blank, with the understanding that an agreement of a certain description is to be written thereon, this does not authorize anything beyond a simple contract, and he will not be bound by the contract if a seal is affixed after his name. Arrington v. Burton, 19 Ala. 114; Manning v. Norwood, 1 Ala. 429; Smith v. Carder, 33 Ark. 709; Warring v. Williams, 8 Pick. (Mass.) 326. But see Lambert v. Carroll, Wright (Oh.) 108.

81. Porter v. Hardy, 10 N. D. 551, 555, 556, 88 NW 458 [quot Cyc]; Fullerton v. Sturges, 4 Oh. St. 529 (holding that, although one may be authorized to fill blanks in a note, the unauthorized affixing of seals will be considered as the act of a stranger); Lambert v. Carroll, Wright (Oh.) 108.

82. Michigan Ins. Bank v. Eldred, 9 Wall. (U. S.) 544, 19 L. ed. 763 (change of a date inserted in a blank, before negotiating the instrument). To same effect Hepler v. Mt. Carmel Sav. Bank, 97 Pa. 420, 39 AmR 813 (where one month was inadvertently written for another and was immediately corrected by drawing a pen through it and writing the correct month above that first written). So also as to changing the time of payments once inserted into the blank. Douglass v. Scott, 8 Leigh (35 Va.) 43 (upon the principle, however, that the person with whom the instrument was left had authority to make changes there-

[§ 125] **3. Authority to Fill Blanks in Sealed Instruments[83]—a. Statement of Conflicting Rules.** Upon the question of filling blanks in sealed instruments by parol authority, or under such authority before or after delivery of the instrument, the decisions are in irreconcilable conflict.[84] Although it was formerly otherwise,[85] it is now the generally accepted law in England that authority to fill a blank in an instrument under seal must also be under seal,[86] and this rule has been followed in cases in this country to such an extent that it may be said to be the rule here on the whole weight of authority.[87]

Modern decisions. But it would seem that the weight of the more modern decisions in this country supports the view that the rule requiring authority to make a deed or execute a sealed instrument for another to be under seal should be limited to the execution of a sealed instrument by one person for another, and that the mere completion of an imperfect sealed instrument by the filling of blanks left therein does not come within the inhibition of the rule,[88] and in line with this view there are many decisions which have sustained the sufficiency of parol authority to fill blanks in sealed instruments,[89] such as deeds,[90]

in up to the time it became an available security, and that at the time of its change the instrument had not been issued so as to make it such security).

83. Filling blanks in deeds see generally Deeds [13 Cyc 540, 551, 553].

Necessity of reacknowledgment see Acknowledgments §§ 131, 238.

Parol authority to execute sealed instrument see Agency §§ 48, 61–66.

84. Texira v. Evans [cit Master v. Miller, 1 Anstr. 225, 228] is the leading authority for the proposition that a blank in a bond may be filled in by parol authority, even in the absence of the obligor. In that case, however, the blank was filled in before actual delivery to the obligee, and by the agent of the obligor. This case was overruled in Hibblewhite v. McMorine, 4 Jur. 769, as indicated in Davidson v. Cooper, 1 D. & L. 377 [aff 13 L. J. Exch. 276], the question decided in the overruling case being that a deed executed and delivered with a material blank could not be made a deed by filling in the blank thereafter, as the instrument, when originally executed, was inoperative and could not be perfected by parol authority. See also In re Tahiti Cotton Co., L. R. 17 Eq. 273; Enthoven v. Hoyle, 13 C. B. 373, 76 ECL 373, 9 EngL&Eq 434, 138 Reprint 1243. In a later case, Eagleton v. Gutteridge, 2 Dowl. P. C. N. S. 1053. it was held that where a power of attorney appointing one designated merely by a surname, was executed abroad, and was delivered to a party by that name, the insertion of his christian name in the blank left for that purpose did not invalidate the instrument. This decision was made by the court which overruled Texira v. Evans [cit Master v. Miller, supra] at the term prior to the decision of Davidson v. Cooper, supra, and therefore must have been regarded as consistent with Hibblewhite v. McMorine, supra. Nevertheless it has been considered at a very recent date as an authority for the proposition that a bond made and delivered in blank may be completed by filling in the blanks, under parol authority, as opposed to the doctrine laid down in Hibblewhite v. McMorine, supra. See also Brown v. Colquitt, 73 Ga. 59, 54 AmR 867, wherein it was said that when the decision in Ingram v. Little, 14 Ga. 173, 58 AmD 549, was rendered it was probable that the court had not seen the decision in Eagleton v. Gutteridge, supra. In Ingraham v. Little, supra, the holding was that a deed with blanks for the grantee's name and the consideration could not be filled in by a third person under parol authority before delivery to a purchaser and in the absence of the grantor. But in this case the court expressly indicated that it had no doubt that an immaterial blank in a deed might be filled in by parol authority.

85. See supra note 84.

86. Tayler v. Great Indian Peninsula R. Co., 4 De G. & J. 559, 61 EngCh 442, 45 Reprint 217; Swan v. North British Australasian Co., 2 H. & C. 175, 5 ERC 140 (holding that the execution and delivery of a deed for the transfer of company shares, with material blanks left unfilled, do not confer authority to fill such blanks); Société Generale de Paris v. Walker, 11 App. Cas. 20, 5 ERC 157 (same holding). See also supra note 84.

87. U. S.—U. S. v. Nelson, 27 F. Cas. No. 15,862, 2 Brock. 64.

Ark.—Cross v. State Bank, 5 Ark. 525.

Ga.—Brown v. Colquitt, 73 Ga. 59, 54 AmR 867.

Mass.—Burns v. Lynde, 6 Allen 305.

Miss.—Williams v. Crutcher, 6 Miss. 71, 35 AmD 422; Dickson v. Hamer, Freem. 284.

N. C.—Humphreys v. Finch, 97 N. C. 303, 1 SE 870, 2 AmSR 293; Barden v. Southerland, 70 N. C. 528; Bland v. O'Hagan, 64 N. C. 471. Compare Martin v. Buffaloe, 121 N. C. 84, 27 SE 995. "The notion with us has always been—what we learned from Co. Lit., 52 (a) and the Touchstone 57—that he who executes a deed as agent for another, be it for money or other property, must be armed with authority under seal. The insertion of the sum in the blank space was intended to consummate the deed; it was done without legal authority, and the instrument is void as a bond, citing McKee v. Hicks, 13 N. Car. 379; Davenport v. Sleight, 19 N. Car. 381, 31 AmD 420. The same idea is also strongly expressed by Chief Justice Ruffin in Davenport v. Sleight, supra, as follows: 'The ancient rule is certain, that authority to make a deed cannot be verbally conferred but must be created by an instrument of equal dignity. It is owned that there are modern cases in which it seems to have been relaxed with respect to bonds. This began with the case of Texira v. Evans [cit Master v. Miller, Anstr. 225, 229] on which all the subsequent cases profess to be founded. The Court is not satisfied with the reasons assigned for those opinions, but entertains a strong impression that they lead to dangerous consequences.'" Rollins v. Ebbs, 137 N. C. 355, 358, 49 SE 341, 2 AnnCas 327 (where it is stated that Lord Mansfield's decision in Texira v. Evans, supra, has been twice overruled in North Carolina).

Oh.—State v. Boring, 15 Oh. 507.

Va.—Harrison v. Tiernans, 4 Rand. (25 Va.) 177.

Wash.—Walla Walla County v. Ping, 1 Wash. T. 339.

[a] **In Georgia,** under Civ. Code § 3002, providing that authority to make a sealed instrument must be under seal, "the changing of an ordinary promissory note into a sealed instrument is the making of a sealed instrument, and the authority to make this radical change in the paper must be evidenced in the same way that authority to make a sealed instrument in the first instance would have to be shown." Per Cobb, P. J., in Thomason v. Wilson, 127 Ga. 141, 143, 56 SE 302.

[b] **In Canada** the courts have shown a disposition to favor the view that where a blank left in a specialty has been filled in under express authority, given by the grantor or obligor, the instrument is a valid deed. Leonard v. Merritt, Draper (U. C.) 281; Stuart v. Prentiss, 20 U. C. Q. B. 513.

[c] **Inserting penal sum.**—The sureties on an official bond, such as a guardian's bond, are released by the unauthorized filling of a blank left in the bond in the place where the penalty should have been inserted. Rollins v. Ebbs, 137 N. C. 355, 49 SE 341, 2 AnnCas 327.

88. South Berwick v. Huntress, 53 Me. 89, 96, 87 AmD 535 (where Kent, J., said: "When the instrument is a sealed instrument, when signed by the party, the filling in of the blanks afterwards by another is not, strictly speaking, the execution of a sealed instrument. That has already been done by the party himself. The third party does not make it a specialty by his act. It was one before. The filling up merely perfects an imperfect sealed deed or bond").

89. U. S.—Drury v. Foster, 2 Wall. 24, 17 L. ed. 780.

Ill.—Chicago v. Gage, 95 Ill. 593, 35 AmR 182.

Iowa.—Swartz v. Ballou, 47 Iowa 188, 29 AmR 470 (crit Simms v. Hervey, 19 Iowa 273).

Nebr.—Reed v. Morton, 24 Nebr. 760, 40 NW 282, 8 AmSR 247, 1 LRA 736.

N. Y.—Forster v. Moore, 79 Hun 472, 29 NYS 1032 [aff 156 N. Y. 666 mem, 50 NE 1117 mem]; Wooley v. Constant, 4 Johns. 54, 4 AmD 246.

Wis.—Nelson v. McDonald, 80 Wis. 605, 50 NW 893, 27 AmSR 71.

See also infra §§ 129, 133, 134.

[a] **"Practically, there is no real distinction** in this matter between bonds and simple contracts. There is no more danger of fraud or injury or wrong in allowing insertions in a bond, than there is in allowing them in a promissory note or bill of exchange. Both are agreements or contracts, and in neither can unauthorized alterations be made with impunity. Considering that the assumed difference rests on a mere technical rule of the common law, we do not think that the rule should be extended beyond its necessary limits, viz.,—that a sealed instrument cannot be executed, by another, so far as its distinguishing characteristic as a sealed instrument is in question, unless by an authority under seal." Per Kent, J., in South Berwick v. Huntress, 53 Me. 89, 97, 87 AmD 535.

90. Doe v. Roe, 9 N. C. 33, 11 AmD 738. See also infra §§ 129, 133.

[a] **Filling in name of grantee.**—(1) It has been held that when a deed is regularly executed in other respects, with a blank left therein for the name of the grantee, parol authority is sufficient to authorize the insertion of the name of such grantee. Hall v. Kary, 133 Iowa 465, 468, 110 NW 930, 119 AmSR 639 (where the court said: "That a deed thus left blank as to the grantee, being otherwise fully executed, vests title in the person whose name is subsequently inserted therein by the one to whom it is delivered as a conveyance is well settled in this State: Logan v. Miller, 106 Iowa 511, 76 NW 1005; McCleery v. Wakefield, 76 Iowa 529, 41 NW 210, 2 LRA 529; McClain v. McClain, 52 Iowa 272, 3 NW 60; Swartz v. Ballou, 47 Iowa 188, 29 AmR 470"); Devin v. Himer, 29 Iowa 297; Guthrie v. Field, 85 Kan. 58, 60, 116 P 217, 37 LRANS 326 [cit Cyc]; Field v. Stagg, 52 Mo. 534, 14 AmR 435; Burnside v. Wayman, 49 Mo. 356; Otis v. Browning, 59 Mo. A. 326; Garland v. Wells, 15 Nebr. 298, 18

bonds,[91] mortgages,[92] and powers of attorney under seal.[93]

Where blanks in a sealed instrument are filled in under proper authority or consent, it is not a material alteration of the instrument,[94] and the instrument need not be reëxecuted or acknowledged, to be given full validity.[95]

[§ 126] **b. Character of Blank as Affecting Authority to Fill—(1) Instrument Wholly or Essentially Blank.** It has been held that where a paper which is wholly blank, or so incomplete that there is nothing expressive of the intention of the parties and the filling in of the blanks will create the substantial parts of the instrument, is signed, sealed, and delivered, the writing in of the terms of the contract, in pursuance of either express or implied authority, does not make such writing a valid instrument.[96]

Some of the cases draw a distinction between the filling in of an instrument which is so radically defective that the insertion of the omitted matter will practically amount to the creation of the instrument, and the completion of a merely imperfect instrument by the filling in of matter suggested and called for by the written or printed portion, and apparently intended by the parties to be inserted.[97] This distinction is not always observed, however. It does not seem to influence the decisions of cases which hold that a specialty may be perfected by filling material blanks after delivery,[98] and the blanks to be filled in these cases are generally such that the instrument will not be a good deed with the blank, the filling of such blank being the very thing which comes within the inhibition of the rule against parol authority to make a deed.[99]

[§ 127] **(2) Immaterial Matter.** The existence of blanks which do not impair the validity of the instrument is not material and they may be filled in without authority under seal, as such cases are not within the reason of those cases which hold that blanks in a deed, and constituting a material part

NW 132; Threadgill v. Butler, 60 Tex. 599; Lafferty v. Lafferty, 42 W. Va. 783, 26 SE 262. (2) But the presumption is, with no showing to the contrary, that the grantee's name left blank in a deed when executed, but thereafter inserted, was filled in by the person authorized in writing to do so. Ormsby v. Johnson, 24 S. D. 494, 124 NW 486.

91. Ala.—Gibbs v. Frost, 4 Ala. 720.
Ind.—State v. Pepper, 31 Ind. 76; Richmond Mfg. Co. v. Davis, 7 Blackf. 412.
Iowa.—Wright v. Harris, 31 Iowa 272 (official bond).
La.—Preedlove v. Johnston, 2 Mart. N. S. 517.
N. Y.—Hemmenway v. Mulock, 56 HowPr 38; Knapp v. Maltby, 13 Wend. 587; Ex p. Kerwin, 8 Cow. 118.
S. C.—Gourdin v. Commander, 40 S. C. L. 497.
See also infra §§ 129, 133.

[a] **Inserting penal sum.**—The insertion of the penal sum of a bond in a blank left therein for that purpose will not vitiate the instrument. Brown v. Colquitt, 73 Ga. 59, 54 AmR 867; South Berwick v. Huntress, 53 Me. 89, 87 AmD 535; White v. Duggan, 140 Mass. 18, 2 NE 110, 50 AmR 437; State v. Young, 23 Minn. 551; Gary v. State, 11 Tex. A. 527.

[b] **Inserting name of obligee.**—(1) Where A gives B a bond with a blank for the name of the payee, and agrees that the payee's name may afterward be inserted, B may insert his name accordingly. Boardman v. Gore, 1 Stew. (Ala.) 517, 18 AmD 73. (2) Thus, where a bond is signed in blank with the obligee's name and the penalty not inserted, and the obligor directs an officer, who is authorized to take such bond, to insert the name of the obligee and the penalty in such bond in his absence, and this is done, such obligee's name and the amount of the penalty in the bond being known to the obligor by whom the instructions are given, the instrument is not avoided, but binding on the obligor. Brown v. Colquitt, 73 Ga. 59, 54 AmR 867.

92. Forster v. Moore, 79 Hun 472, 29 NYS 1032 [aff 156 N. Y. 666 mem, 50 NE 1117 mem]; Hemmenway v. Mulock, 56 HowPr (N. Y.) 38; Nelson v. McDonald, 80 Wis. 605, 50 NW 893, 27 AmSR 71.

[a] **Authority to designate payee and mortgagee.**—(1) Where a note and mortgage, otherwise fully executed, but with a blank in each for the name of the payee and mortgagee, were delivered to an agent who was to procure from whomsoever he could a loan of money thereon for the maker, this showed an intention that the agent should fill the blanks, and, when so filled, the instruments were valid without a new execution and delivery. Van Etta v. Evenson, 28 Wis. 33, 9 AmR 486. (2) Where a mortgage is executed with the blanks for the name of the mortgagee unfilled and the mortgage is delivered to the person to whom the indebtedness secured by the mortgage runs, the filling in of his own name by such person will not invalidate the mortgage. Montgomery v. Dresher, 90 Nebr. 632, 134 NW 251, 38 LRANS 423.

93. Bridgeport Bank v. New York, etc., R. Co., 30 Conn. 231; Commercial Bank v. Kortright, 22 Wend. (N. Y.) 348, 34 AmD 317; Eagleton v. Gutteridge, 2 Dowl. P. C. N. S. 1053; Marckham v. Gomaston, Moore K. B. 547, 72 Reprint 749.

[a] **A sealed warrant of attorney to confess judgment** containing blanks which after delivery are filled up without authority under seal is valid, and a judgment rendered thereunder will be upheld. Vliet v. Camp, 13 Wis. 198.

94. Martin v. Buffaloe, 121 N. C. 84, 27 SE 995 (holding that an alteration in a deed to trustees for the benefit of creditors, made after it was signed and delivered, with the consent of the parties, by filling in a blank with the name of the attorney employed to defend the conveyance and discharge the service, does not invalidate the instrument).

95. Friend v. Yahr, 126 Wis. 291, 104 NW 997, 110 AmSR 924, 1 LRANS 891.

96. Ky.—Lockart v. Roberts, 3 Bibb 361.
Md.—Byers v. McClanahan, 6 Gill & J. 250.
Miss.—Dickson v. Hamer, Freem. 284.
Oh.—Ayres v. Harness, 1 Oh. 368, 13 AmD 629.
S. C.—Perminter v. McDaniel, 19 S. C. L. 267, 26 AmD 179; Duncan v. Hodges, 15 S. C. L. 239, 17 AmD 734; Boyd v. Boyd, 11 S. C. L. 125.
Tenn.—Wynne v. Governor, 1 Yerg. 149, 24 AmD 448; Gilbert v. Anthony, 1 Yerg. 69, 24 AmD 439 (holding that a paper signed in blank with verbal authority given at the time to fill it up as a prison-bounds bond, which is afterward done, is void unless redelivered).
Tex.—Southern Pine Lumber Co. v. Arnold, (Civ. A.) 139 SW 917, 923 [cit Cyc].

[a] **Bonds.**—(1) Where a signature and seal are attached to a blank piece of paper for the purpose of having a bond thereafter written upon it, the completed instrument will not constitute a valid bond. Byers v. McClanahan, 6 Gill & J. (Md.) 250; Perminter v. McDaniel, 19 S. C. L. 267, 26 AmD 179. (2) So where a person merely puts his signature on a blank paper, intending to become surety on a note, he is not liable on a bond which is subsequently written by his principal, who adds a seal after the signature. Smith v. Carder, 33 Ark. 709.

97. Simms v. Hervey, 19 Iowa 273 (where, after noting many of the cases which follow or repudiate Texira v. Evans [cit Master v. Miller, Anstr. 225, 228], it is pointed out that, of the former, one class holds that if only certain blanks are left, those may be filled in, in the absence of the obligor, pursuant to parol authority, although the cases which deny the authority of Texira v. Evans, supra, hold otherwise; that substantially all of the cases hold that a specialty cannot be signed and sealed in blank and wholly filled in, in the absence of the obligor, pursuant to parol authority); Ayres v. Harness, 1 Oh. 368, 13 AmD 629 (where the court said that the cases against the rule requiring authority under seal to write a deed over a signature and seal were those in which all the material parts were written at the time of making the signature and seal); Southern Pine Lumber Co. v. Arnold, (Tex. Civ. A.) 139 SW 917, 923 [cit Cyc]. In South Berwick v. Huntress, 53 Me. 89, 94, 87 AmD 535, Kent, J., referring to the decision in Burns v. Lynde, 6 Allen (Mass.) 305, said that it "was a case where, when the seal and signature were affixed to the paper, it was a printed form of a deed, in which none of the blanks had been filled up. As the Court say, 'when the paper was delivered, it had no validity or meaning. The filling of the blanks created the substantial parts of the instrument itself, as much so as the signing or sealing.' The defendant filled the blanks, after it was given to him by the signer, in her absence, by entering the names of the parties, the description of the land, and the agreement of release of dower on her part, and the date, and other words necessary to complete it. The defendant offered to prove that, when she signed it, she authorized him to fill it up as he did, and that, after it was filled up and the husband had executed it, the defendant informed her of the facts, and she thereupon verbally assented to what had been done, and agreed that it should be taken to be her deed, duly executed. This evidence was excluded; and the Court held, that the prior authority did not give a right to make this entire deed, and that the subsequent assent did not amount to a new delivery. That case differs from the one before us in several particulars; especially in the point that the paper or deed, when signed, contained nothing expressive of the intentions of the parties, or a description of the property to be conveyed. Nothing could be gathered from it."

98. Wiley v. Moor, 17 Serg. & R. (Pa.) 438, 17 AmD 696. See also infra § 134.

99. See Cross v. State Bank, 5 Ark. 525. Thus Hibblewhite v. McMorine, 4 Jur. 769, did not hold contrary to Texira v. Evans [cit Master v. Miller, Anstr. 225, 228], on the ground that the instrument involved in the first case was wholly blank, but because the mat-

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of it, cannot, in the absence of the maker, be filled by parol authority.[1]

[§ 128] **c. Filling before Delivery—(1) In General.** The rule that the signing, sealing, and delivery of a blank which is to be filled as a deed can give no authority to make the paper a deed was never intended to prescribe to the grantor the order of time in which the several parts of a deed should be written. The whole act of execution is finally consummated by delivery, and if the grantor should think proper to reverse the usual order in the manner of executing the instrument, but in the end perfect it by delivery, it is a good deed.[2]

[§ 129] **(2) By Agent Acting under Parol Authority.**[3] The statement in the preceding section refers particularly to delivery by the maker. It is not necessary in all cases, however, that the grantor should in person make delivery of the deed,[4] and, upon this principle, a deed executed with blanks, given to an agent and afterward filled and delivered by the agent of the grantor or obligor, is good, according to the weight of the modern authorities,[5] especially where the deed is

ter of the blank to be filled in was necessary to the validity of the deed. And the subsequent case of Eagleton v. Gutteridge, 2 Dowl. P. C. N. S. 1053, is consistent with Hibblewhite v. McMorine, supra, because the blank in the former did not affect the validity of the deed. So the cases which sustain the filling in of blanks by an agent, pursuant to parol authority and in the absence of the maker, proceed upon the principle of a sufficient delivery. See infra § 129. And those cited to the rule against writing a deed over a seal and signature (see supra note 96) involve instruments which have been completely delivered.

1. Conn.—Murray v. Klinzing, 64 Conn. 78, 80, 29 A 244 (holding that, where a deed recites that it is "for the consideration of — dollars," it is not a material alteration to insert the number of dollars so as to express the actual consideration paid).

Mass.—Vose v. Dolan, 108 Mass. 155, 11 AmR 331; Smith v. Crooker, 5 Mass. 538.

N. Y.—Kinney v. Schmitt, 12 Hun 521.

N. C.—Martin v. Buffaloe, 121 N. C. 34, 27 SE 995 (holding that filling a blank in a trust deed with the name of the attorney employed to defend the conveyance, and his charge for services, does not invalidate the instrument).

Va.—Preston v. Hull, 23 Gratt. (64 Va.) 600, 14 AmR 153; Whiting v. Daniel, 1 Hen. & M. (11 Va.) 390; Ross v. Overton, 3 Call (7 Va.) 309, 2 AmD 552.

Eng.—Keane v. Smallbone, 17 C. B. 179, 84 ECL 179, 139 Reprint 1038. See also Hudson v. Revett, 5 Bing. 368, 15 ECL 625, 130 Reprint 1103; Eagleton v. Gutteridge, 2 Dowl. P. C. N. S. 1053.

Ont.—Thorne v. Williams, 13 Ont. 577; Stuart v. Prentiss, 20 U. C. Q. B. 513.

[a] **Where the matter inserted in a blank does not change the legal effect** of the sealed instrument, it is not a case for the application of the rule that blanks in a deed, which constitute a material part of the instrument, cannot, in the absence of the maker, be filled up by parol authority, because authority to make a deed must be given by deed, but it is rather a case for the application of the principle that immaterial alterations do not avoid a writing. Vose v. Dolan, 108 Mass. 155, 11 AmR 331; Keen v. Monroe, 75 Va. 424. See also supra § 33.

[b] **Insertion of date.**—(1) Where a deed is signed, sealed, and delivered, with a blank left for the date, and the grantee afterward inserts the date, the deed is good, as the date is not a material part thereof. Whiting v. Daniel, 1 Hen. & M. (11 Va.) 390. (2) And it has been doubted whether filling a blank in a bond for the date with the date, without the knowledge of the obligor, after its delivery, is such a material alteration as will vitiate and invalidate it. Keen v. Monroe, 75 Va. 424.

2. Ky.—Lockart v. Roberts, 3 Bibb 361.

Me.—Bassett v. Bassett, 55 Me. 127.

Md.—Carr v. McColgan, 100 Md. 462, 476, 60 A 606 [quot Cyc] (where Schmucker, J., said: "Ever since the case of Hibblewhite v. McMorine, 4 Jur. 769, which overruled Texira v. Evans [cit Master v. Miller, Anstr. 225, 228], it has been held in England that authority under seal is required to fill such blanks and this rule has been followed in some of the American Courts, but there are many modern decisions to the contrary in this country especially where the parol authority to fill up the blanks was given before the delivery of the deed and they were so filled"); Byers v. McClanahan, 6 Gill & J. 250.

Mich.—Lockwood v. Bassett, 49 Mich. 546, 14 NW 492.

S. C.—Duncan v. Hodges, 15 S. C. L. 239, 17 AmD 734.

3. See generally Agency §§ 48, 49.

4. Duncan v. Hodges, 15 S. C. L. 239, 17 AmD 734.

5. Ala.—Gibbs v. Frost, 4 Ala. 720 (holding that authority to fill is authority to redeliver). Compare Manning v. Norwood, 1 Ala. 429 (signature to blank paper).

Ga.—Willis v. Rivers, 80 Ga. 556, 7 SE 90.

Iowa.—Lee County v. Welsing, 70 Iowa 198, 30 NW 481.

Ky.—Yocum v. Barnes, 8 B. Mon. 496.

Md.—Carr v. McColgan, 100 Md. 462, 477, 60 A 606.

Mo.—Farmers' Bank v. Worthington, 145 Mo. 91, 104, 46 SW 745 (where it was contended that the name of the grantee and the consideration were written in different ink from the balance of the deeds, and were put in after the deeds had been executed, and that the deeds should be set aside for this reason. But Marshall, J., said: "This contention is not tenable. Where a deed is executed and delivered in blank, with parol authority to fill the blank with the name of the grantee, the grantee whose name is afterward inserted takes a good title"); Field v. Stagg, 52 Mo. 534, 14 AmR 435. See also Otis v. Browning, 59 Mo. A. 326.

Nebr.—Garland v. Wells, 15 Nebr. 298, 18 NW 132. See also Reed v. Morton, 24 Nebr. 760, 40 NW 282, 8 AmSR 247, 1 LRA 736.

N. Y.—Hemmenway v. Mulock, 56 HowPr 38; Knapp v. Maltby, 13 Wend. 587; Ex p. Kerwin, 8 Cow. 118. See also Campbell v. Smith, 71 N. Y. 26, 27 AmR 5; Chauncey v. Arnold, 24 N. Y. 330.

Or.—Cribben v. Deal, 21 Or. 211, 27 P 1046, 28 AmSR 746. But see Shirley v. Burch, 16 Or. 83, 18 P 351, 8 AmSR 273.

Pa.—Sigfried v. Levan, 6 Serg. & R. 308, 9 AmD 427 (holding that, where a bond is signed and witnessed in the form of a printed blank, and entrusted to the attesting witness to fill up and deliver, and it is filled up by him before delivery, it is a binding obligation).

S. C.—Pope v. Chafee, 35 S. C. L. 69 (holding that words which properly should have been inserted in a blank in a conveyance, but which are inserted after the conveyance leaves the grantor's hands, but before delivery to the grantee and while in the hands of the grantor's agent, will not invalidate the deed in equity); Bank v. Hammond, 30 S. C. L. 281; Duncan v. Hodges, 15 S. C. L. 239, 17 AmD 734 (following which case it was held, in Lamar v. Simpson, 19 S. C. L. 71, 42 AmD 345, that, where the legislature authorized the circuit solicitor to convey certain property to A, and the solicitor executed deeds reciting his authority, and containing blanks for the description, which blanks were afterward filled by A, as various parcels of the land were sold by him, these conveyances were sufficient).

Wis.—Friend v. Yahr, 126 Wis. 291, 104 NW 997, 110 AmSR 924, 1 LRANS 891; Schintz v. McManamay, 38 Wis. 299; Van Etta v. Evenson, 28 Wis. 33, 9 AmR 486 [cit Vliet v. Camp, 13 Wis. 198].

Eng.—Texira v. Evans [cit Master v. Miller, Anstr. 225, 228].

But see Fox v. Palmer, 25 N. J. Eq. 416 (holding that a mortgage, signed in blank and given to an agent by whom it is afterward filled in and delivered, is not a legally executed deed; the most that can be claimed for it is that it may create an equitable lien which a court of equity may under proper circumstances enforce).

"It may be conceded, in case a deed, duly executed in other respects with a blank left therein for the name of the grantee, be put in that condition in the hands of a third person with verbal authority to fill up the blank in the absence of the grantor, and to deliver the deed to the person whose name is inserted as grantee, and the deed be so filled and delivered, it becomes a valid deed." Per Mercur, J., in Bell v. Kennedy, 100 Pa. 215, 220.

[a] **Discussion and reasons of rule.**—"Where a man makes a deed, complete in all respects save that it is blank as to the grantee, it evinces clearly an intent to pass the estate; and when he tells his agent to insert the name of the purchaser of such name as he may designate he evinces a full intent to pass it to either the purchaser or such other person; and nothing but the technical rule that an agent to make a deed must be empowered by deed stands in the way. The statute of frauds is satisfied, unless we are so technical as to make it be an instrument to further fraud and defeat intention. The law ought to rule so that solemn acts shall avail and execute the intention and further justice, rather than prove abortive at the bidding of argument which, while plausible, as based on general rules, is yet only technical, as applied in the given instance. I know that the ancient rule required a deed to be complete, and would overthrow this deed; and yet Lord Mansfield, in Texira v. Evans, cited in 1 Anstr. 229, held that a writing made to borrow money, under seal, blank as to sum and payee, when the agent by oral authority filled the blanks, was a valid bond. Later English cases overrule that case, and hold such bond invalid. 2 Rob. Prac. 14. I know, too, that the Virginia court, in Preston v. Hull, 23 Gratt. (64 Va.) 600, 14 AmR 153, holds that a bond, perfect except as to a blank for the payee's name, placed in the hands of M. for borrowing money, who fills up the blank in the absence of the obligor, is not valid. The Court cites former Virginia cases as logically sustaining that holding, but a close analysis of them will disclose they do not, unless very remotely. I admit that there is a very considerable American authority for the position that parol authority to fill such blank would not make the deed valid; but the greater number and the later cases, hold the reverse. Chief Justice Marshall, in the United States Circuit Court for Virginia (U. S. v. Nelson, 26 F. Cas. No. 15,862, 2 Brock. 64) held that an official bond,

reacknowledged after the blanks are filled.[6]

[§ 130] **d. Redelivery or Filling in Presence of Maker—(1) Where Parol Authority Not Sufficient—(a) Filling in Presence of Maker Good Delivery.**[7] As already indicated, the mere order of perfecting a deed before actual delivery is not material.[8] Hence, even where parol authority to fill blanks in a deed is not recognized, if after delivery the blanks are filled in the presence and with the consent of the maker, this is taken to be a good delivery to consummate the execution of the perfected deed.[9]

[§ 131] **(b) Necessity for Redelivery When Filled in the Absence of Maker—aa. In General.** In this connection a distinction is made between acts done in the presence, and by the direction of, the principal, and acts done in his absence. The former are regarded as done by the principal himself, but, when the principal is not present at the filling in of a material blank, there must be a redelivery or the filling in must have been under sealed authority.[10] Thus it has been held that where an instrument containing a blank is signed and sealed and handed to an agent, only verbally authorized to fill up the blank and deliver the writing, it is not the deed of the principal, unless it is afterward delivered or adopted by him.[11]

[§ 132] **bb. Sufficient Adoption of Instrument after Filling.** While, as has been indicated, some of the cases which adhere to the strict rule that parol authority to alter a deed is not sufficient require stronger evidence of redelivery than such as merely signifies absence of objection, when the alteration is not done in the presence of the maker of the instrument,[12] and the same strictness is applied to filling blanks after delivery,[13] yet if, after a blank is filled, an instrument is presented to the maker, and he adopts or ratifies the act, or authorizes its delivery, it will be a valid deed.[14]

[§ 133] **(2) Where Parol Authority Sufficient.** On the other hand, it seems to be the modern rule that parol authority to fill a deed is sufficient, and therefore not only may a deed be delivered to an agent by the maker to be filled and delivered, both

signed by sureties, blank as to date and penalty, and then signed by the principal, and the blanks filed, did not bind the sureties. But the sureties gave no authority to fill the blanks, save as might be implied from their signing. The chief justice admitted the doctrine, doubtful in logic, and if tested by principles of justice administered usually by courts, that the intention of the parties should prevail, and admitted that the supreme court of the United States, in Speake v. U. S., 9 Cranch 28, 3 L. ed. 645, had gone far in deciding that an obligation may be originally created by authority merely implied from sealing and delivery of a paper which, as then, could avail nothing, and he prophesied that the time would come when that court would completely abolish, in this respect, the distinction between sealed and unsealed instruments. That prophecy has been verified in the case of Drury v. Foster, 2 Wall. 24, 17 L. ed. 780, in which Justice Nelson said: 'Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day, is that the power is sufficient.' The same was said by Justice Field, in Allen v. Withrow, 110 U. S. 119, 128, 3 SCt 517, 28 L. ed. 90. The opinion in White v. Vermont, etc., R. Co., 21 How. 575, 16 L. ed. 221, is to the same effect. . . . Judge Redfield condemned the old rule, saying it was technical, rather than substantial, and said the prevailing current of American authority and the practical instincts and business experience and sense of our people are otherwise, undoubtedly. 1 Redf. R. R. 124. . . . An agent can be appointed by parol to deliver a deed, and why not to fill such a blank? Delivery is no less essential than the name of a grantee. We allow blanks in promissory notes to be filled—even notes to be wholly written under parol authority, where one signs his name on blank paper. . . . Is there not as much danger of fraud and perjury in that, as in allowing insertions in bonds and other deeds? So, filling this blank is no warrant for annulling the deed." Per Brannon, J., in Lafferty v. Lafferty, 42 W. Va. 783, 787, 26 SE 262.

6. Farmers' Bank v. Worthington, 145 Mo. 91, 46 SW 745.

7. **As to principle involved** see generally Agency § 62.

8. See supra § 128.

9. Peo. v. Organ, 27 Ill. 27, 79 AmD 391; Burns v. Lynde, 6 Allen (Mass.) 305; Warring v. Williams, 8 Pick. (Mass.) 322; Hudson v. Revett, 5 Bing. 368, 15 ECL 625, 130 Reprint 1103. See also Doe v. McArthur, 9 N. C. 33, 11 AmD 738.

10. Ark.—Cross v. State Bank, 5 Ark. 525. Compare Lemay v. Johnson, 35 Ark. 225.

Ga.—Ingram v. Little, 14 Ga. 173, 58 AmD 549. But see Brown v. Colquitt, 73 Ga. 59, 54 AmR 867.

Ill.—Wilson v. South Park Com'rs, 70 Ill. 46; Chase v. Palmer, 29 Ill. 306; People v. Organ, 27 Ill. 27, 79 AmD 391; Gage v. Chicago, 2 Ill. A. 332 [rev on other grounds 95 Ill. 593, 35 AmR 182].

Mass.—Burns v. Lynde, 6 Allen 305.

Miss.—Williams v. Crutcher, 6 Miss. 71, 35 AmD 422; Dickson v. Hamer, Freem. 284.

N. Y.—Chauncey v. Arnold, 24 N. Y. 330 (holding that a paper intended to operate as a mortgage could not be delivered and put in circulation with blanks to be filled, limiting the doctrine permitting such a practice to mercantile paper).

N. C.—Barden v. Southerland, 70 N. C. 528; Bland v. O'Hagan, 64 N. C. 471; McKee v. Hicks, 13 N. C. 379.

Oh.—Famulener v. Anderson, 15 Oh. St. 478; State v. Boring, 15 Oh. 507 (involving the insertion of the penalty in an official bond); Ayres v. Harness, 1 Oh. 368, 13 AmD 629. See also Spencer v. Buchanan, Wright 583. But see St. Clairsville Bank v. Smith, 5 Oh. 222 (holding that mere money bonds, executed with blanks filled before negotiation and received in good faith, are to be treated as commercial or business paper, and on delivery in blank to a party he has authority to fill in the blank).

Tenn.—McNutt v. McMahan, 1 Head 98; Smith v. Dickinson, 6 Humphr. 261, 44 AmD 306; Gilbert v. Anthony, 1 Yerg. 69, 24 AmD 439.

Tex.—Viser v. Rice, 33 Tex. 139; McCown v. Wheeler, 20 Tex. 372.

Va.—Penn v. Hamlett, 27 Gratt. (68 Va.) 337; Preston v. Hull, 23 Gratt. (64 Va.) 600, 14 AmR 153; Harrison v. Tiernans, 4 Rand. (25 Va.) 177.

Wash.—Walla Walla County v. Ping, 1 Wash. 339.

Eng.—Société Générale de Paris v. Walker, 11 App. Cas. 20, 5 ERC 157 (holding that in the absence of redelivery a blank deed of transfer of company shares is inoperative); Swan v. North British Australasian Co., 2 H. & C. 175, 5 ERC 140 (holding that, after the blanks in a deed are filled, the deed in its completed form must be redelivered by the maker); Hibblewhite v. McMorine, 4 Jur. 769. See also Enthoven v. Hoyle, 13 C. B. 373, 76 ECL 373, 9 EngL&Eq 434, 138 Reprint 1243.

See Ayres v. Probasco, 14 Kan. 175.

[a] **Authority in writing** is held in some cases necessary to enable an agent to fill in blanks in a deed out of his principal's presence. Adamson v. Hartman, 40 Ark. 58; Upton v. Archer, 41 Cal. 85, 10 AmR 266.

[b] **Filling blank in bond with amount.**—Where a blank is left in a bond for money, to be filled up when the sum is ascertained, and, after delivery, the blank is fairly filled up by a stranger, the instrument is void. McKee v. Hicks, 13 N. C. 379. To same effect Dickson v. Hamer, Freem. (Miss.) 284; State v. Boring, 15 Oh. 507; Harrison v. Tiernans, 4 Rand. (25 Va.) 177.

[c] **Blanks in bond filled by principal after signature by sureties.**—Where a blank paper is signed and sealed by a principal and three others, as sureties, and left with the principal to be filled up and signed by him, and he fills it up, and delivers it to the obligee named therein, it does not bind the sureties, but it is the bond of the principal who fills up the blanks and delivers it. Penn v. Hamlett, 27 Gratt. (68 Va.) 337.

11. Basford v. Pearson, 9 Allen (Mass.) 387, 85 AmD 764; Blacknall v. Parish, 59 N. C. 70, 78 AmD 239; Graham v. Holt, 25 N. C. 300, 40 AmD 408; Davenport v. Sleight, 19 N. C. 381, 31 AmD 420; Mosby v. Arkansas, 4 Sneed (Tenn.) 324; Preston v. Hull, 23 Gratt. (64 Va.) 600, 14 AmR 153.

[a] **Under a statute** expressly requiring written authority to enable an agent to transfer any estate in land exceeding one year, oral authority is not sufficient to authorize an agent to fill blanks with the grantee's name and the amount of the consideration. Lund v. Thackery, 18 S. D. 113, 99 NW 856.

12. See supra § 115.

13. Burns v. Lynde, 6 Allen (Mass.) 305 (holding that verbal assent to the grantee by the grantor, upon being informed of what had been done after delivery, and an agreement by the grantor that the instrument should be taken to be her deed, will not make the instrument valid).

14. U. S. v. Turner, 28 F. Cas. No. 16,547, 2 Bond 379; Tucker v. Allen, 16 Kan. 312 (holding that, while a deed executed in blank as to the name of the grantee, with the understanding that it should be filled and delivered to some person as grantee, may be assumed to be void when afterward so filled and delivered, yet, as a deed may be good by constructive delivery, any word or act showing an intention on the part of the grantor after such filling will be considered as completely executing the deed); Byers v. McClanahan, 6 Gill & J. (Md.) 250; Wester v. Bailey, 118 N. C. 193, 24 SE 9 (holding that, if the maker of a note under seal acknowledges the note as his after the filling of blanks, he will be liable); Bland v. O'Hagan, 64 N. C. 471 [cit Davenport v. Sleight, 19 N. C. 381, 31 AmD 420]; Blackwell v. Lane, 20 N. C. 205, 32 AmD 675.

[a] **Where a deed is executed and**

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in the case of specialties and conveyances of land,[15] but also, in the former, parol authority is sufficient to fill after delivery,[16] upon the principle sometimes announced, that after a deed has been executed it may be altered in a material part with the consent of the parties without affecting its validity.[17]

[§ 134] **(3) Actual or Implied Authority.** From the cases cited in the preceding section, it seems that the authority to fill a blank in a specialty may be express, or implied from facts which fairly justify the inference, and this has been expressly held in some cases.[18] And under the doctrine that an agent of the maker may, by parol authority, fill blanks before delivery, such authority to fill a blank with the name of the mortgagee or grantee in a deed will be implied from the fact of the execution of the deed.[19] On the other hand, it has been held that in such cases the consent of the obligor must be established, and that if an agent transcends his authority in filling a blank in a bond the instrument will be avoided;[20] and that to perfect a conveyance of land there must be actual authority.[21]

Authority to fill a blank with the name of a particular grantee is no authority to insert the name of another and different grantee;[22] and the fraudulent filling of such a blank passes no title.[23]

acknowledged without naming a grantee, but the name is inserted before delivery and the deed is delivered by the grantor himself, or by his direction, the deed as completed must be regarded as adopted by him. Lockwood v. Bassett, 49 Mich. 546, 14 NW 492.

15. See supra § 129.

16. Ala.—Boardman v. Gore, 1 Stew. 517, 18 AmD 73.

Conn.—Bridgeport Bank v. New York, etc., R. Co., 30 Conn. 231.

Ga.—Dedge v. Branch, 94 Ga. 37, 20 SE 657; Brown v. Colquitt, 73 Ga. 59, 54 AmR 867.

Kan.—Guthrie v. Field, 85 Kan. 58, 60, 116 P 217 [cit Cyc].

Me.—South Berwick v. Huntress, 53 Me. 89, 87 AmD 535.

Md.—Carr v. McColgan, 100 Md. 462, 477, 60 A 606 [cit Cyc].

Mass.—Smith v. Crooker, 5 Mass. 538. This case was afterward distinguished in Burns v. Lynde, 6 Allen 305, in that the blank was immaterial, the latter case being a deed of conveyance, and the court holding strictly to the view that if the blanks render the instrument invalid they cannot be filled after delivery in the absence of the grantor. But it has also been held in this state that when a bond is intrusted to a principal for his use it is good when filled if the obligee had no notice. White v. Duggan, 140 Mass. 18, 2 NE 110, 54 AmR 437.

Minn.—State v. Young, 23 Minn. 551.

Mo.—State v. Dean, 40 Mo. 464; Greene County v. Wilhite, 29 Mo. A. 459.

N. J.—Camden Bank v. Hall, 14 N. J. L. 583.

N. Y.—Forster v. Moore, 79 Hun 472, 29 NYS 1032 [aff 156 N. Y. 666, 50 NE 1117]. See also Commercial Bank v. Kortright, 22 Wend. 348, 34 AmD 317.

Pa.—Hultz v. Com., 3 Grant 61; Bugger v. Cresswell, 8 Pa. Cas. 555, 12 A 829; Costen's App., 13 Pa. 292; Stahl v. Berger, 10 Serg. & R. 170, 13 AmD 666; Wiley v. Moor, 17 Serg. & R. 438, 17 AmD 696.

S. C.—Gourdin v. Commander, 40 S. C. L. 497. See also Treasury Comrs. v. Ellison, 3 S. C. L. 22.

Wis.—Vliet v. Camp, 13 Wis. 198.

See McClung v. Steen, 32 Fed. 373.

[a] **Discussion of authorities.**—In Drury v. Foster, 2 Wall. (U. S.) 24, 17 L. ed. 780, the rule was recognized that a deed of conveyance might be executed with a material blank to be filled by the agent of the grantor before delivery, such as a blank for the name of the grantee. This case has been relied upon as authority for the rule that a deed thus left blank and delivered to the grantee will be good under parol authority to fill the blank. In Allen v. Withrow, 110 U. S. 119, 3 SCt 517, 28 L. ed. 90, it was held that in order to make a deed operate as a conveyance when the name of the payee is left blank, two conditions are essential: (1) The blank must be filled by the party authorized to fill it; and (2) this must be done before or at the time of the delivery of the deed to the grantee named. In the case of bonds it was held, in U. S. v. Nelson, 27 F. Cas. No. 15,862, 2 Brock. 64, that a blank bond signed and delivered was void as to sureties after the blanks had been filled, Marshall, C. J., hesitating, however, to reach this conclusion. The reason for this, under the English authorities, was that the authority of an agent to make a deed must be by deed, and also that to admit parol authority to fill the blank would in effect make a bond transferable or negotiable like a bill of exchange or exchequer bill. Hibblewhite v. McMorine, 4 Jur. 769. See also Enthoven v. Hoyle, 13 C. B. 373, 76 ECL 373, 9 EngL&Eq 434, 138 Reprint 1243. But the law as otherwise held by Lord Mansfield in Texira v. Evans [cit Master v. Miller, Anstr. 225, 228] has been followed by courts of the highest authority in this country, which met the fear expressed by Park, B., that the effect of parol authority would be to make bonds negotiable, by admitting the consequence. White v. Vermont, etc., R. Co., 21 How. (U. S.) 575, 16 L. ed. 221.

[b] **Mortgage of crop; insertion of date.**—Where a mortgage on a crop to secure supplies is executed with a blank date before the crop is planted, and with an agreement to date and acknowledge it after the crop shall be planted and the supplies furnished by the mortgagee, the insertion of the subsequent date by the mortgagee is not unauthorized, and the mortgage is valid in equity as of its actual date, notwithstanding the subsequent refusal of the mortgagor to date and acknowledge it as agreed. Lemay v. Johnson, 35 Ark. 225.

17. Woolley v. Constant, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246 [cit Marckham v. Gonaston, Moore K. B. 547, 72 Reprint 749, and Zouch v. Claye, 2 Lev. 35, 83 Reprint 441, 1 Vent. 185, 86 Reprint 126, the first of which seems like Eagleton v. Gutteridge, 2 Dowl. P. C. N. S. 1053]. See also Camden Bank v. Hall, 14 N. J. L. 583.

18. Ga.—Dedge v. Branch, 94 Ga. 37, 20 SE 657 (holding that where a tax collector's bond was delivered in blank, the plain inference as to the penalty was that the ordinary was expected to fill the blank, he being authorized to fix the penalty of such bonds).

Ill.—Chicago v. Gage, 95 Ill. 593, 35 AmR 182.

Ind.—State v. Pepper, 31 Ind. 76.

Kan.—Guthrie v. Field, 85 Kan. 58, 60, 116 P 217 [cit Cyc].

Me.—South Berwick v. Huntress, 53 Me. 89, 87 AmD 535.

Minn.—State v. Young, 23 Minn. 551 (upon the broad principle that there is no distinction between sealed and unsealed instruments).

Mo.—Greene County v. Wilhite, 29 Mo. A. 459.

Pa.—Bugger v. Cresswell, 8 Pa. Cas. 555, 12 A 829. But see Wallace v. Harmstad, 15 Pa. 462, 53 AmD 603.

S. C.—Aiken v. Cheeseborough, 19 S. C. L. 172.

Tex.—Gary v. State, 11 Tex. A. 527.

Wis.—Friend v. Yahr, 126 Wis. 291, 104 NW 997, 110 AmSR 924, 1 LRANS 891; Vliet v. Camp, 13 Wis. 198.

[a] **"It seems to be now well settled,** that where a party executes a deed, or bond, or other instrument, and delivers the same to another, in an imperfect state, and gives authority to that person to fill up the blanks, and thus perfect the instrument—and he does so—its validity cannot be controverted. This authority may be by parol. It may be implied from the facts proved, when those facts, fairly considered, justify the inference. When the authority is established, either by evidence of express authority, or by implication, the power will extend as far as such express or implied authority is given." Per Kent, J., in South Berwick v. Huntress, 53 Me. 89, 90, 87 AmD 535.

[b] **The rule that one delivering to another a duly executed instrument** with blanks therein intends to confer on such other authority to complete the instrument applies to instruments required to be executed under seal and to be witnessed and acknowledged. Friend v. Yahr, 126 Wis. 291, 104 NW 997, 110 AmSR 924, 1 LRANS 891.

[c] **But authority to seal and deliver a bond will not be implied** from the mere signing of a blank piece of paper and handing it to another. Manning v. Norwood, 1 Ala. 429.

19. Garland v. Wells, 15 Nebr. 298, 18 NW 132; Van Etta v. Evenson, 28 Wis. 33, 9 AmR 486.

20. Richmond Mfg. Co. v. Davis, 7 Blackf. (Ind.) 412 [dist St. Clairsville Bank v. Smith, 5 Oh. 222, as turning upon the construction of a statute relative to the negotiability of sealed bills]. See also White v. Duggan, 140 Mass. 18, 2 NE 110, 54 AmR 437. In Clendaniel v. Hastings, 5 Del. 408, it was held that the execution of a bond in blank does not import authority to the holder to fill it and deliver it at pleasure.

[a] **Revocation of authority.**—(1) See Gibbs v. Frost, 4 Ala. 720, where it is held that parol authority to fill blanks in a bond may be revoked in the same manner, and if revoked before the bond is perfected the authority to perfect it is at an end. (2) But where a deed of conveyance may be delivered in blank to the grantee, and his name may be filled in by him after delivery, the power, being coupled with an interest, is irrevocable. Threadgill v. Butler, 60 Tex. 599.

21. Allen v. Withrow, 110 U. S. 119, 3 SCt 517, 28 L. ed. 90. See also Lindsley v. Lamb, 34 Mich. 509 (holding that a deed executed in a foreign state, without the name of the grantee and containing other blanks, and sent into Michigan in that condition, and afterward filled by someone not shown to have had authority, in writing or otherwise, is void in the hands of one having notice of these facts).

22. Schintz v. McManamy, 33 Wis. 299. See also Trumby v. Erkenbrack, 8 AlbLJ 10 (where the husband of a mortgagor purposely caused the mortgage to be executed with the space for the name of the mortgagee left blank, and afterward filled in the name of his own father).

23. Cooper v. Page, 62 Me. 192 (where a deed was executed, except as to the name of the grantee, and sent by the grantor to his mother with authority to fill in the blank when the occasion for use of the deed demanded it. The blank was afterward filled by another person than the mother, and without any authority from her or the

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[§ 135] **(4) Formalities in Conveyance of Land.** Notwithstanding the doctrine may be recognized that parol authority to fill a blank in a deed is sufficient, a distinction is made in the case of instruments which purport to convey land,[24] by reason of the statute of frauds or requirements appertaining to the formal execution of such instrument.[25]

[§ 136] **(5) Where Seals are Abolished.** In some cases the sufficiency of parol authority to fill in blanks in deeds in accordance with the intention of the parties is good because of the abolition of seals or of the distinction between sealed and unsealed instruments,[26] and this authority is carried even to the extent of permitting the grantee to insert his own name after delivery.[27]

[§ 137] **4. Effect of Unauthorized Filling of Blanks—a. In General.** As between the original parties to the instrument, sealed or unsealed, the insertion in blanks left therein of material matter in excess of the express or implied authority has the same invalidating effect as any other material alteration.[28] Thus a party who writes his name upon a blank piece of paper does not, except in a case where the doctrine of estoppel applies, become bound on an obligation thereafter written thereon, unless it can be shown that he gave the person who wrote it proper authority to do so;[29] and as between the signer of an instrument and the party to whom the instrument is intrusted, the signer cannot be bound by the unauthorized filling of blanks, or the excessive exercise of authority in filling blanks intentionally left to be filled.[30]

Immaterial insertions in blanks not changing the legal effect of the instrument usually do not avoid it.[31]

grantor, and in the presence of the person whose name was inserted as grantee); Van Amringe v. Morton, 4 Whart. (Pa.) 382, 34 AmD 517 (holding that a bona fide purchaser from the person holding such a deed stands in no better situation than the frauduluent holder, especially if the original grantor remains in possession).

24. Allen v. Withrow, 110 U. S. 119, 3 SCt 517, 28 L. ed. 90 (holding that, while parol authority to alter or add to a sealed instrument is sufficient, there are two essential conditions to make a deed executed in blank operate as a conveyance. The blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee).

[a] **The rule is recognized,** however, that such a deed may be executed with material blanks to be filled by an agent of the grantor before delivery, pursuant to a parol authority. Drury v. Foster, 2 Wall. (U. S.) 24, 17 L. ed. 780.

25. Drury v. Foster, 2 Wall. (U. S.) 24, 17 L. ed. 780 (holding that, in relation to a provision under which a married woman is required by statute to acknowledge a deed separately and apart from her husband, and is not capable of making a power of attorney, there can be no acknowledgment of the deed until the blanks are filled and the instrument is complete).

[a] **In California** it has been held that a delivery of a bond as security for the charter of a steamboat, with blanks for the date, name of steamer, and name of payee, authorized the filling of the blanks. Dalbeer v. Livingston, 100 Cal. 617, 35 P 328 (where the court distinguished two other cases in this state, Upton v. Archer, 41 Cal. 85, 10 AmR 226, holding that where an agent, with whom is left a deed with blanks for the names of the purchasers, fills in the names of other purchasers, the grantor may refuse to recognize the sale and that, under the statute of frauds, the agent has no power to fill the blanks without authority in writing, and De Arguello v. Bours, 67 Cal. 477, 8 P 49, holding that a deed with the name of the grantee left blank, which name is afterward inserted without the grantor's authority, conveys no title, and that the abolition of all distinctions between sealed and unsealed instruments is not material to the question). See also Wunderlin v. Cadogan, 50 Cal. 613.

[b] **In Iowa** (1) it has been held that, notwithstanding sealing was dispensed with by statute as one of the requisites of a conveyance of land, the other essential common-law requisites were not abrogated, and regularly a deed should still, as before, be perfect before delivery, although it was said that Texira v. Evans [cit Master v. Miller, Anstr. 225, 228] would undoubtedly be sound law in a like case or a case not involving the conveyance of land. Simms v. Hervey, 19 Iowa 273. (2) The conclusions reached in this case seem to be of doubtful authority. It has been distinguished in several respects. Swartz v. Ballou, 47 Iowa 188, 29 AmR 470 (where this case is referred to as resting largely, if not entirely, on the common-law doctrine in relation to instruments under seal). See also Devin v. Himer, 29 Iowa 297.

[c] **Alienation of homestead.**—Under a constitutional provision that an alienation of a homestead could not be effected except by the joint consent of the husband and wife, where a mortgage is executed in blank by a husband and wife, with the understanding that the blanks should be filled so as to cover the land owned by the wife, in order to secure one thousand dollars, and the mortgage is filled in the presence and with the consent of the husband so as to secure a larger sum, the mortgage is void as to both the husband and the wife. Ayres v. Probasco, 14 Kan. 175.

26. Swartz v. Ballou, 47 Iowa 188, 29 AmR 470; Owen v. Perry, 25 Iowa 412, 96 AmD 49; Threadgill v. Butler, 60 Tex. 599, 600 (where Watts, J., said: "Formerly, when seals were essential, it was generally held that blanks in deeds, bonds and other specialties could not be supplied, and the instrument perfected by any one acting under parol authority. But more recently, since seals have been generally abolished, and but little importance attached to their use, undoubtedly the weight of authority sustains the proposition that any one acting under parol authority can fill blanks, and perfect such instruments in accordance with the intention of the parties"). See also Lockwood v. Bassett, 49 Mich. 546, 14 NW 492.

[a] **In Louisiana** the addition of a seal only confirmed the signature and added nothing to the obligatory force of the instrument, and therefore it was held that an instrument under seal may be executed in blank. Bell v. Keefe, 13 La. Ann. 524. See also Breedlove v. Johnston, 2 Mart. N. S. 517.

[b] **In Minnesota,** the holding that where sureties sign a bond, intending thereby to bind themselves, and deliver the same with the amount of the bond left blank, this is an implied authority to fill the blank, is upon the theory that at the present day the distinction between sealed and unsealed instruments is arbitrary, meaningless, and unsustained by reason. State v. Young, 23 Minn. 551.

27. McCleery v. Wakefield, 76 Iowa 529, 41 NW 210, 2 LRA 529; McClain v. McClain, 52 Iowa 272, 3 NW 60; Devin v. Himer, 29 Iowa 297 (where the deed was delivered to the grantee with a blank expressly intended to be filled with the name of the grantee, in which the case was distinguished, from Simms v. Hervey, 19 Iowa 273, in that it was indicated in the latter case that no specific grantee was intended and there was no express authority from the owner to fill the blank and deliver the instrument and no subsequent adoption of what had been done); Threadgill v. Butler, 60 Tex. 599. See also Clark v. Allen, 34 Iowa 190.

28. U. S.—Davidson v. Lanier, 4 Wall. 447, 18 L. ed. 377.

Ala.—Green v. Sneed, 101 Ala. 205, 13 S 277, 46 AmSR 119; Toomer v. Rutland, 57 Ala. 379, 29 AmR 722.

Colo.—Hoopes v. Collingwood, 10 Colo. 107, 13 P 909, 3 AmSR 565.

Iowa.—Vander Ploeg v. Van Zuuk, 135 Iowa 350, 112 NW 807, 124 AmSR 275, 13 LRANS 490 and note (under the Negotiable Instruments Law).

La.—Robertson v. Glasscock, 6 La. Ann. 124.

N. Y.—Richards v. Day, 137 N. Y. 183, 33 NE 146, 33 AmSR 704, 23 LRA 101; Van Duzer v. Howe, 21 N. Y. 531; Ogden v. Pope, 18 NYS 140.

Wis.—Schintz v. McManamy, 33 Wis. 299.

Nature and effect of material changes generally see supra §§ 2–32.

[a] **Where the compensation to be paid under a contract of employment** is agreed on and the contract, containing a blank for the amount, is turned over to the employer, who inserts an amount smaller than that agreed on, in an action on the contract by the employer the employee is entitled to show under a plea of non est factum that the contract is not the one agreed on. Jones v. Pincheon, 6 Ind. A. 460, 32 NE 577.

[b] **Inserting the grantee's name.**—Where a deed of conveyance, perfect in form, except that the grantee's name is left blank, is executed and acknowledged, and afterward the blank is filled contrary to the instructions of the grantor, and to his injury, with the name of a person not intended by the grantor to be the grantee, and with full knowledge on the part of such substituted grantee, the deed is void as to such substituted grantee, or as to any one with notice of the fraud. State v. Matthews, 44 Kan. 596, 25 P 36, 10 LRA 308.

29. Richards v. Day, 137 N. Y. 183, 33 NE 146, 33 AmSR 704, 23 LRA 601. See also supra §§ 121, 126.

30. Little Rock Trust Co. v. Martin, 57 Ark. 277, 21 SW 468; Overton v. Matthews, 35 Ark. 146, 37 AmR 9; Luellen v. Hare, 32 Ind. 211; Limestone Bank v. Penick, 2 T. B. Mon. (Ky.) 98, 15 AmD 136; Mackey v. Basil, 50 Mo. A. 190. See also Bills and Notes [7 Cyc 625].

[a] **Where a part of a contract is in the form of a skeleton note,** and the latter is detached and made a negotiable note by filling the blanks, the signers of such contract are not guilty of negligence, so as to estop them from asserting that the note, subsequently detached, was void as not being the contract signed. Porter v. Hardy, 10 N. D. 551, 88 NW 458. As to rights of bona fide holders of negotiable instruments see Bills and Notes [7 Cyc 949].

31. Briscoe v. Reynolds, 51 Iowa

[§ 138] **b. Instrument as Evidence of Contract.**[32] Notwithstanding the doctrine that a deed is considered as void because the name of the grantee is left blank therein and is afterward filled in, and therefore cannot operate as a deed, it may still be a good contract for the sale of land and may be specifically enforced between the parties.[33]

[§ 139] **c. As to Third Persons—(1) With Notice.** The holder of an instrument, whether negotiable or nonnegotiable, sealed or unsealed, who takes it with notice that material blanks therein have been filled without authority cannot recover on it against the maker.[34]

[§ 140] **(2) Without Notice—(a) Simple Contracts—aa. In General.** It is a well settled principle, applicable to both negotiable and nonnegotiable contracts,[35] that where a person, with intent to execute a contract, delivers to another an incomplete instrument, and such other has authority, either expressly given or implied by law, to complete the instrument, such instrument is enforceable in the hands of a holder for value and without notice, notwithstanding the blanks have been filled in a manner violative of the authority conferred.[36] This rule applies to a bill, note, or other contract filled up in excess of the authority conferred over a signature on a blank piece of paper.[37] It does not matter that the party taking such instrument has knowledge of the mere fact that it was executed in blank, so long as there is nothing

673, 2 NW 529 (holding that writing the name of a party in a blank in a printed form of contract is not a material alteration).

Nature and effect of immaterial changes generally see supra §§ 33–36.

32. **Altered instruments as evidence generally** see supra §§ 28–32.

33. Blacknall v. Parish, 59 N. C. 70, 78 AmD 239.

[a] **Specific performance.**—A deed with a blank for the grantee's name, which is filled up after acknowledgment, is admissible as evidence of a contract of sale, and will take the case out of the statute of frauds in a suit for specific performance. Viser v. Rice, 33 Tex. 139; McCown v. Wheeler, 20 Tex. 372.

34. Del.—Clendaniel v. Hastings, 5 Del. 408.

Ind.—Emmons v. Meeker, 55 Ind. 321; Conklin v. Wilson, 5 Ind. 209; Pope v. Branch County Sav. Bank, 23 Ind. A. 210, 54 NE 835.

Iowa.—Smith v. Eals, 81 Iowa 235, 46 NW 1110, 25 AmSR 486.

Kan.—State v. Matthews, 44 Kan. 596, 25 P 36, 10 LRA 308.

Me.—Cooper v. Page, 62 Me. 192.

Mich.—Lindsley v. Lamb, 34 Mich. 509 (holding that a blank deed, executed in another state, which does not contain the name of the grantee, the description of the property, or a statement of the consideration, but which is filled out in these particulars in Michigan by someone not shown to have authority from the grantor, conveys no title to any one who has notice of the facts).

Miss.—Goad v. Hart, 16 Miss. 787; Hemphill v. Alabama Bank, 14 Miss. 44; Johnson v. Blasdale, 9 Miss. 17, 40 AmD 85.

Mo.—Goodman v. Simonds, 19 Mo. 106; State Bank v. Phillips, 17 Mo. 29; Green v. Kennedy, 6 Mo. A. 577. But see Harris v. Enyart, 13 Mo. 108.

N. H.—Hill v. Sweetser, 5 N. H. 168.

N. Y.—Farmers' Nat. Bank v. Thomas, 79 Hun 595, 29 NYS 837.

Oh.—Schryver v. Hawkes, 22 Oh. St. 308; Holland v. Hatch, 15 Oh. St. 464.

Pa.—Snyder v. Armstrong, 9 Phila. 146.

S. D.—Lund v. Thackery, 18 S. D. 113, 99 NW 856; Ellis v. Wait, 4 S. D. 454, 57 NW 229.

Wis.—Snyder v. Van Doren, 46 Wis. 602, 1 NW 285, 32 AmR 739; Schintz v. McManamy, 38 Wis. 299.

Eng.—France v. Clark, 26 Ch. D. 257; Tayler v. Great Indian Peninsula R. Co., 4 De G. & J. 559, 61 EngCh 559, 45 Reprint 217; Hatch v. Searles, 2 Sm. & G. 147, 65 Reprint 342 [aff 24 L. J. Ch. 22, 31 EngL&Eq 219].

See also Bills and Notes [7 Cyc 625].

[a] **Insertion of excessive amount; recovery of true sum.**—It has been held that where a holder for value has notice of the fact that blanks left in the instrument have been filled in by the agent in excess of his authority, by the insertion of an amount larger than that authorized, the instrument will not be void as to him in toto, but only to the extent of the excess. Goss v. Whitehead, 33 Miss. 213; Johnson v. Blasdale, 9 Miss. 17, 40 AmD 85. See also Bills and Notes [7 Cyc 626].

[b] **The indorser of a blank promissory note** is not bound where the blanks are filled contrary to the agreement with him to one who takes the note under circumstances putting him upon inquiry. Riddle v. Stevens, 32 Conn. 378, 87 AmD 181 (holding that a difference in the name of the payee and the name of the indorser is sufficient to put the holder on inquiry).

Notice to holders of bills and notes see Bills and Notes [7 Cyc 938 et seq].

35. Frazier v. Gains, 2 Baxt. (Tenn.) 92; Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 NW 177, 46 AmR 39.

36. U. S.—Angle v. Northwestern L. Ins. Co., 92 U. S. 330, 23 L. ed. 556; Davidson v. Lanier, 4 Wall. 447, 18 L. ed. 377; Pittsburg Bank v. Neal, 22 How. 96, 16 L. ed. 323; Goodman v. Simonds, 20 How. 343, 15 L. ed. 934.

Ala.—Prim v. Hammel, 134 Ala. 652, 32 S 1006, 92 AmSR 52; Winter v. Pool, 104 Ala. 580, 16 S. 553; Decatur First Nat. Bank v. Johnston, 97 Ala. 655, 11 S 690; Montgomery v. Crosthwait, 90 Ala. 553, 8 S 498, 12 LRA 140, 24 AmSR 832; Toomer v. Rutland, 57 Ala. 379, 29 AmR 722; Manning v. Norwood, 1 Ala. 429; Roberts v. Adams, 8 Port. 297, 33 AmD 291.

Ark.—Overton v. Matthews, 35 Ark. 146, 37 AmR 9.

Colo.—Staton v. Stone, 15 Colo. A. 237, 61 P 481.

Conn.—Norwich Bank v. Hyde, 13 Conn. 279.

Ga.—Moody v. Threlkeld, 13 Ga. 55; Wilkes v. Pope, 4 Ga. A. 36, 60 SE 823.

Ill.—Canon v. Grisby, 116 Ill. 151, 5 NE 362, 56 AmR 769; Elliott v. Levings, 54 Ill. 213; Lescure v. Weaver, 99 Ill. A. 375; Trainor v. Adams, 54 Ill. A. 523; White v. Alward, 35 Ill. A. 195.

Ind.—De Pauw v. Salem Bank, 126 Ind. 553, 25 NE 705, 26 NE 151, 10 LRA 46.

Iowa.—Frank v. Hollands, 81 Iowa 164, 46 NW 979; Shepard v. Whetstone, 51 Iowa 457, 1 NW 753, 33 AmR 143; Rainbolt v. Eddy, 34 Iowa 440, 11 AmR 152; McDonald v. Muscatine Nat. Bank, 27 Iowa 319; Iowa College v. Hill, 12 Iowa 462.

Kan.—Lowden v. Schoharie County Nat. Bank, 38 Kan. 532, 16 P 748.

Ky.—Stanley v. Davis, 107 SW 773, 32 KyL 1135; Cason v. Grant County Deposit Bank, 97 Ky. 487, 31 SW 40, 53 AmSR 418; Rogers v. Poston, 1 Metc. 643; Commonwealth Bank v. McChord, 4 Dana 191, 29 AmD 398; Taylor v. Craig, 2 J. J. Marsh. 449.

La.—Battalora v. Erath, 25 La. Ann. 318.

Me.—Market, etc., Nat. Bank v. Sargent, 85 Me. 349, 27 A 192, 35 AmSR 376.

Mass.—Androscoggin Bank v. Kimball, 10 Cush. 373.

Mich.—Breckenridge First State Sav. Bank v. Webster, 121 Mich. 149, 79 NW 1068; Weidman v. Symes, 120 Mich. 657, 79 NW 894, 77 AmSR 603.

Minn.—Freeport First Nat. Bank v. Compo-Board Mfg. Co., 61 Minn. 274, 63 NW 731.

Miss.—Davis v. Lee, 26 Miss. 505, 59 AmR 267; Torrey v. Fisk, 18 Miss. 590; Johnson v. Blasdale, 9 Miss. 17, 40 AmD 85.

Mo.—Farmers' Bank v. Garten, 34 Mo. 119.

Nebr.—Humphrey Hardware Co. v. Herrick, 72 Nebr. 878, 101 NW 1016, 102 NW 1010.

N. Y.—Weyerhauser v. Dun, 100 N. Y. 150, 2 NE 274; Harris v. Berger, 15 NYSt 389; Mechanics', etc., Bank v. Schuyler, 7 Cow. 337 note.

N. C.—McArthur v. McLeod, 51 N. C. 475.

Oh.—Schryver v. Hawkes, 22 Oh. St. 308; Fullerton v. Sturges, 4 Oh. St. 529.

Pa.—Worrall v. Gheen, 39 Pa. 388.

S. C.—Witte v. Williams, 8 S. C. 290, 28 AmR 294.

Tenn.—Grissom v. Fite, 1 Head 332.

Tex.—Jones v. Primm, 6 Tex. 170.

Vt.—Michigan Ins. Co. v. Leavenworth, 30 Vt. 11.

Va.—Frank v. Lilienfeld, 33 Gratt. (74 Va.) 377.

Wis.—Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 NW 177, 46 AmR 39.

Eng.—Lloyd's Bank v. Cooke, [1907] 1 K. B. 794, 8 AnnCas 182; Garrard v. Lewis, 10 Q. B. D. 30; France v. Clark, 26 Ch. D. 257; London, etc., Bank v. Wentworth, 5 Ex. D. 96; Mountague v. Perkins, 17 Jur. 557, 22 EngL&Eq 516.

Ont.—Le Banque Nationale v. Sparks, 27 U. C. C. P. 320; McInnes v. Milton, 30 U. C. Q B. 489.

See also Agency §§ 211, 215; Bills and Notes [7 Cyc 635].

[a] **The indorser of a note in blank,** who intrusts it to another to fill the blanks and discount the same for the indorser's benefit, is liable to a bona fide holder, although the note is fraudulently converted. Mechanics' Bank v. Chardavoyne, 69 N. J. L. 256, 55 A 1080, 101 AmSR 701.

37. U. S.—Violette v. Patton, 5 Cranch 142, 3 L. ed. 61.

Ky.—Limestone Bank v. Penick, 5 T. B. Mon. 25.

Me.—Breckenridge v. Lewis, 84 Me. 349, 24 A 864, 30 AmSR 353.

Mass.—Putnam v. Sullivan, 4 Mass. 45, 3 AmD 206.

Miss.—Hemphill v. Alabama Bank, 14 Miss. 44.

Oh.—Lambert v. Carroll, Wright 108 (holding that, where a principal signs a blank paper and gives it to his agent to fill up with a contract, he is liable to an innocent third person who parts with value on the faith of the instrument, notwithstanding the contract as drawn by the agent is in violation of his instructions).

Tenn.—Ferguson v. Childress, 9 Humphr. 382.

Va.—Orrick v. Colston, 7 Gratt. (48 Va.) 189.

Wis.—Snyder v. Van Doren, 46 Wis. 602, 1 NW 285, 32 AmR 739.

Eng.—Schultz v. Astley, 2 Bing. N. Cas. 544, 29 ECL 414, 132 Reprint 212; Russel v. Langstaffe, 2 Dougl. 514, 99 Reprint 328; Collis v. Emett, 1 H. Bl. 313, 126 Reprint 185.

See also Bills and Notes [7 Cyc 625].

[a] **"It is the settled doctrine,** that if a party signs his name to a blank paper, and delivers it with authority to

to put him on notice that the authority thereby conferred is restricted or has been violated.[38]

[§ 141] **bb. Limitations of Rule.** In order that the foregoing rule may be applicable it is essential that the person to be held liable should, in signing his name, have intended to execute a contract of some kind, and hence where one makes his signature on a piece of blank paper with no intention to execute a contract or to give any person authority to fill in a contract over such signature, he cannot be held liable, in the absence of estoppel by negligence, even to a bona fide holder if a contract is wrongfully written over such signature.[39] It is also essential that the person to be held liable should have delivered the instrument to the person who filled in the blanks[40] with authority, either expressly given or implied by law, to fill the blanks and issue it.[41] In the absence of either of these essentials he can be held liable, if at all, only on the theory of estoppel by negligence.[42]

[§ 142] **cc. Basis of Rule—(aa) Agency.** This doctrine is generally based on principles of agency. The filling of such blanks in a wrongful manner by a person having express or implied authority to fill them in another way is deemed to be a breach of confidence merely, and is held to be within the scope of the principle that, where one of two innocent persons must suffer through the wrongful act of a third person, the loss must fall on that one who has reposed confidence in such third person and has thereby enabled him to perpetrate the wrong.[43]

[§ 143] **(bb) Estoppel.** In some cases, however, where instruments, especially commercial paper, have been issued while blank as to some of their terms and such blanks have been filled up without authority, the courts have held the maker liable to a bona fide holder on the theory of estoppel by negligence in execution.[44]

Complete instruments. As to instruments which are complete as to their terms when issued, but contain blank spaces making it a simple matter to alter the instrument by merely inserting additional words or figures, it is held in some jurisdictions that the maker's carelessness in leaving such spaces estops him to deny liability as against a bona fide holder, if advantage has been taken of the opportunity for alteration.[45] But in other jurisdictions it is held that where the instrument is complete when it leaves the maker's hands and he constitutes no one his agent to make any changes therein, the fact that he leaves spaces sufficient for fraudulent

fill the blank above his signature with a note or bill for a particular amount, or to a specified person, and the person receiving it fills it for a larger amount, or to a different person, and it is passed in the course of business, without notice of the facts, the maker is bound by the instrument." Per Walker, J., in Young v. Ward, 21 Ill. 223, 225.

38. U. S.—Michigan Ins. Bank v. Eldred, 9 Wall. 544, 19 L. ed. 763.
Ala.—Huntington v. Mobile Branch Bank, 3 Ala. 186.
Ind.—Eichelberger v. Old Nat. Bank, 103 Ind. 401, 3 NE 127.
Kan.—Joseph v. Eldorado First Nat. Bank, 17 Kan. 256.
Mass.—Putnam v. Sullivan, 4 Mass. 45, 3 AmD 206.
N. Y.—Redlich v. Doll, 54 N. Y. 234, 13 AmR 573; Chemung Canal Bank v. Bradner, 44 N. Y. 680; Mitchell v. Culver, 7 Cow. 336.
Eng.—Russel v. Langstaffe, 2 Dougl. 514, 99 Reprint 328.

39. Ala.—Nance v. Lary, 5 Ala. 370.
Ill.—Wilson v. Miller, 72 Ill. 616.
Ind.—Cline v. Guthrie, 42 Ind. 227, 13 AmR 357.
Iowa.—Grand Haven First Nat. Bank v. Zeims, 93 Iowa 140, 61 NW 483; Caulkins v. Whisler, 29 Iowa 495, 4 AmR 236.
N. Y.—Richards v. Day, 137 N. Y. 183, 33 NE 146, 33 AmSR 704, 23 LRA 601; Harris v. Berger, 15 NYSt 389.
Wis.—Walker v. Ebert, 29 Wis. 194, 9 AmR 548.
Eng.—Foster v. Mackinnon, L. R. 4 C. P. 704.
Que.—Ford v. Auger, 18 LCJur 296.
See also supra § 121.

40. Ledwich v. McKim, 53 N. Y. 307; Lenheim v. Wilmarding, 55 Pa. 73; Baxendale v. Bennett, 3 Q. B. D. 525.

41. Farmers', etc., Nat. Bank v. Novich, 89 Tex. 381, 34 SW 914; Smith v. Prosser, [1907] 2 K. B. 735, 11 AnnCas 191.

[a] **An unauthorized alteration of a negotiable instrument,** by increasing the amount by inserting words and figures in blank places left in the instrument, avoids it even in the hands of bona fide holders for value. Fordyce v. Kosminski, 49 Ark. 40, 3 SW 892, 4 AmSR 18.
As to implied authority to fill blanks see supra §§ 120–124.

42. See infra § 143.
Estoppel by negligence generally see Estoppel [16 Cyc 772 et seq].

43. Ala.—Robertson v. Smith, 18 Ala. 220.
Ill.—Merritt v. Boyden, 191 Ill. 136, 60 NE 907, 85 AmSR 246.
Ind.—Geddes v. Blackmore, 132 Ind. 551, 32 NE 567.
Miss.—Johnson v. Blasdale, 9 Miss. 17, 40 AmD 85.
N. Y.—Griggs v. Howe, 31 Barb. 100 [aff 2 Abb. Dec. 291, 3 Keyes 166, 2 Keyes 574].
Pa.—Simpson v. Bovard, 74 Pa. 351.
See also Agency §§ 211, 523.

[a] **"Where a party signs his name to a blank paper,** as a means of accommodating another person, he thereby authorizes that person to whom he delivers the paper, and for whose accommodation he signed it, to fill up the instrument, and the conclusion of law is, that the filling up the instrument under those circumstances, inasmuch as it is done by the authority of the party who signed the paper, is his act, and that as between him and innocent holders of the instrument after it is filled up, he is bound by his signature, if the instrument was negotiated for value before it fell due, and in the usual course of business." Michigan Ins. Bank v. Eldred, 9 Wall. (U. S.) 544, 552, 19 L. ed. 763.

[b] **"When blanks are left the party who is so confiding** as to affix his signature to such paper, investing those for whose accommodation it is made with the power to fill blanks as well as the opportunity to practice fraud, must suffer the loss rather than the innocent holder." Per Pryor, J., in Woolfolk v. Bank of America, 10 Bush (Ky.) 504, 517.

[c] **Agency essential.**—The principle, that as between two innocent parties, that one must suffer the loss whose act made it possible, does not apply to the fraudulent alteration of negotiable instruments by third persons who are not agents of the maker. Fordyce v. Kosminski, 49 Ark. 40, 3 SW 892, 4 AmSR 18.

44. Holmes v. Ft. Gaines Bank, 120 Ala. 493, 24 S 959; Winter v. Pool, 104 Ala. 580, 16 S 543; Statton v. Stone, 15 Colo. A. 237, 61 P 481; Breckenridge First State Sav. Bank v. Webster, 121 Mich. 149, 79 NW 1068; Weidman v. Symes, 120 Mich. 657, 79 NW 894, 77 AmSR 603; Humphrey Hardware Co. v. Herrick, 72 Nebr. 878, 101 NW 1016, 102 NW 1010. See also Bills and Notes [7 Cyc 623, 624; 8 Cyc 64].

[a] **Reason for rule.**—"When a blank note is signed and delivered to another, for the purpose of being filled up, authority must, of necessity, be conferred to do the act, without which the note could be of no value; but to deduce from this presumption an argument that the note when filled up and in the hands of a bona fide holder, can be sustained alone on this ground, is not correct. The rule by which a recovery in such a case is allowed, stands on a much broader ground—and may be thus stated. That where one of two innocent persons must sustain a loss, he must bear it who is most in fault. If, by misplaced confidence, one enables another to commit a fraud, it is but just he should pay the penalty of his own indiscretion; and that the loss should not be visited on another who, has vested his money on the faith of the genuineness of his signature, without the means of ascertaining the fraud which had been committed." Herbert v. Huie, 1 Ala. 18, 20, 34 AmD 755.
Estoppel by negligence generally see Estoppel [16 Cyc 772].

45. Ill.—Yocum v. Smith, 63 Ill. 321, 14 AmR 120; Leseure v. Weaver, 99 Ill. A. 375.
Ind.—Bowen v. Laird, 166 Ind. 421, 77 NE 852; Noll v. Smith, 64 Ind. 511, 31 AmR 131 (contract altered by tearing off part so as to leave a complete promissory note). But see Cronkhite v. Nebeker, 81 Ind. 319, 42 AmR 127; Young v. Baker, 29 Ind. A. 130, 64 NE 54.
Ky.—Hackett v. Louisville First Nat. Bank, 114 Ky. 193, 70 SW 664, 24 KyL 1002; Bank of Commerce v. Haldeman, 109 Ky. 222, 58 SW 587, 22 KyL 717.
Mo.—Scotland County Nat. Bank v. O'Connel, 23 Mo. A. 165.
Pa.—Garrard v. Haddan, 67 Pa. 82, 5 AmR 412.
See also Bills and Notes [7 Cyc 623, 624; 8 Cyc 30].

[a] **Insertion must be in natural place.**—In order for this rule to apply the matter inserted in the blank space must be such as would naturally be found there. Thus, where after the printed words "the order of" the name of the payee appears, and the note is altered by running a line through "the order of" and writing "or bearer" after the payee's name, the maker is not liable to a bona fide holder. Marshall v. Wilhite, 4 Oh. Cir. Ct. 203, 2 Oh. Cir. Dec. 500.

[b] **Where the blank spaces are not used** and the forgery is effected by erasure, the doctrine does not ap-

alterations will not render him liable even to a bona fide holder.[46]

[§ 144] **(b) Sealed Instruments.** It has been held by courts which deny the sufficiency of parol authority to fill blanks in specialties, as well as by courts which sustain the sufficiency of such authority, that when a grantor or obligor signs and seals a deed, leaving unfilled blanks, and gives it to an agent with authority to fill the blanks and deliver it, if the agent fills the blanks and delivers it to an innocent grantee or obligee without knowledge, the maker is estopped to deny that the instrument as delivered is his deed,[47] unless the deed or his signature was obtained by fraud.[48]

Claiming benefit of contract. So, even if blanks are filled in a deed after delivery, yet if the grantor or obligor claims the benefit of the contract growing out of it he thereby makes the deed, as completed, his own and precludes himself from objecting to its validity.[49]

ply. Middaugh v. Elliott, 61 Mo. A. 601.

[c] **The maker of a note may be liable on the ground of negligence** (1) where he leaves spaces facilitating alteration. Leas v. Walls, 101 Pa. 57, 47 AmR 699 [foll Brown v. Reed, 79 Pa. 370, 21 AmR 75, and dist Garrard v. Haddan, 67 Pa. 82, 5 AmR 412; Phelan v. Moss, 67 Pa. 59, 5 AmR 402] (holding that the maker's negligence was a question of fact, and that leaving a space small enough to insert only a single letter was not negligence). (2) "If the maker of a bill, note or check issues it in such a condition that it may easily be altered without detection, he is liable to a bona fide holder who takes it in the usual course of business, before maturity." Per Sharswood, J., in Brown v. Reed, 79 Pa. 370, 372, 21 AmR 75 (where a contract was on a printed blank which was converted into a promissory note by cutting off part of it. It was held that the question of negligence was for the jury). (3) "It is the duty of the maker of the note to guard not only himself but the public against frauds and alterations, by refusing to sign negotiable paper made in such a form as to admit of fraudulent practices upon them, with ease and without ready detection." Zimmerman v. Rote, 75 Pa. 188, 191 [quot 79 Pa. 370, 372, 21 AmR 75].

[d] **Where the maker of a note cannot read and signs by mark** after the note is read over to him by his son, which facts are known to the holder, the maker is not liable on the ground of negligence, although blank spaces are left in the instrument which facilitate the forgery. Coyne v. Dooley, 34 Ill. A. 26.

46. U. S.—Exchange Nat. Bank v. Little Rock Bank, 58 Fed. 140, 7 CCA 111, 22 LRA 686 (holding that the maker of a note or draft is not liable upon the ground of negligence, even to a bona fide holder for value, because the instrument is made in such a form as to permit of easy alteration, the reason being that the forgery and not the negligence is the proximate cause of the loss).

Kan.—Herrington Bank v. Wangerin, 65 Kan. 423, 70 P 330, 59 LRA 717.

La.—Dunbar v. Armor, 5 Rob. 1, 39 AmD 528.

Md.—Burrows v. Klunk, 70 Md. 451, 17 A 378, 14 AmSR 371, 3 LRA 576.

N. H.—Goodman v. Eastman, 4 N. H. 455.

N. Y.—National Exch. Bank v. Lester, 194 N. Y. 461, 87 NE 779, 21 LRANS 402 and note, 16 AnnCas 770 and note [rev 119 App. Div. 786, 104 NYS 418].

Can.—Imperial Bank v. Hamilton Bank, 31 Can. S. C. 360 [aff [1903] A. C. 49].

But see Dorwin v. Thompson, 13 L. C. Jur. 262.

See also Bills and Notes [7 Cyc 623, 624; 8 Cyc 64].

[a] **Bill of lading.**—Where a bill of lading is so drawn that the amount of property shipped is easily increased, the carrier is not liable for loss occasioned by the forgery of the shipper in raising the bill of lading. Lehman v. Central R., etc., Co., 12 Fed. 595.

47. U. S.—Butler v. U. S., 21 Wall. 272, 22 L. ed. 614; Dair v. U. S., 16 Wall. 1, 21 L. ed. 491.

Cal.—Dolbeer v. Livingston, 100 Cal. 617, 35 P 328.

Ga.—Willis v. Rivers, 80 Ga. 556, 7 SE 90.

Ill.—Chicago v. Gage, 95 Ill. 593, 35 AmR 182; McNab v. Young, 81 Ill. 11; Donnell Mfg. Co. v. Jones, 49 Ill. A. 327.

Ind.—State v. Pepper, 31 Ind. 76.

Iowa.—McCleery v. Wakefield, 76 Iowa 529, 41 NW 210, 2 LRA 529 and note (holding that, where the deed was executed and delivered to the vendee, and by agreement the name of the grantee was left blank in order that the vendee might insert the name of the person to whom he might sell, and the vendee afterward inserted the name of another and delivered the deed to him as security for a debt, and, upon paying the debt, took the deed back from such person, erased his name, and inserted the name of another person to whom the deed was finally delivered, the title of this last person was good as against the maker of the deed in a suit to set aside the deed on account of the failure on the part of the vendee to perform his contract. In this case Reed, C. J., cited Swartz v. Ballou, 47 Iowa 188, 29 AmR 470; Clark v. Allen, 34 Iowa 190; Owen v. Perry, 25 Iowa 412, 96 AmD 49, and said: "It is true that in each of those cases the defendant was a subsequent grantee, claiming under the one whose name was inserted in the deed after it passed from the hands of the grantor, and he was protected on the ground that he was an innocent purchaser from one who, as a consequence of the plaintiff's act, was apparently clothed with a title. But in a case like the present, where there was an express authority to insert the name of a subsequent purchaser, and deliver the instrument to him for the purpose of passing the title to him, and that authority was unrevoked, the equities in his favor, if he is a purchaser without notice and for value, are equally as strong"). See also Wright v. Harris, 31 Iowa 272.

Mass.—Phelps v. Sullivan, 140 Mass. 36, 2 NE 121, 54 AmR 442; White v. Duggan, 140 Mass. 18, 2 NE 110, 54 AmR 437.

Mich.—McCormick v. Bay City, 23 Mich. 457.

Minn.—Pence v. Arbuckle, 22 Minn. 417.

Nebr.—Garland v. Wells, 15 Nebr. 298, 18 NW 132 (holding that a deed may be executed with a blank for the name of the grantee, the blank to be filled by the agent of the grantor pursuant to parol authority, and in such a case, even if the agent so violates his authority that the deed would be voidable, as between the grantor and the person whose name is filled in the blank as grantee, a good title would pass to an innocent purchaser from such grantee).

N. Y.—Russell v. Freer, 56 N. Y. 67.

N. C.—Humphreys v. Finch, 97 N. C. 303, 1 SE 870, 2 AmSR 293 (bond).

Oh.—St. Clairsville Bank v. Smith, 5 Oh. 222.

Tex.—Ragsdale v. Robinson, 48 Tex. 379.

Va.—Gordon v. Jeffery, 2 Leigh (29 Va.) 410.

Wis.—Nelson v. McDonald, 80 Wis. 605, 50 NW 893, 27 AmSR 71.

Eng.—Matter of North British Australasian Co., 7 C. B. N. S. 400, 97 ECL 400, 141 Reprint 871.

See Putnam v. Clark, 29 N. J. Eq. 412 [aff 33 N. J. Eq. 338].

And see generally Estoppel [16 Cyc 699, 772].

48. Vica Valley, etc., R. Co. v. Mansfield, 84 Cal. 560, 24 P 145 (holding that, where the signature of a railroad president together with the corporate seal was procured to a blank deed by false representations, and the deed was subsequently filled out by the grantee with a description of lands not sold, the deed was void, and the mortgagee of the grantee, who took without notice, acquired no interest thereunder, and the company was not estopped from proving the facts by the apparent regularity and validity of the deed).

[a] **Deed obtained by fraud.**—Where a deed which has been executed and acknowledged by the grantor, with a blank for the grantee's name, is surreptitiously and fraudulently taken from the grantor's house and the blank filled up, no title passes thereby, and a bona fide purchaser from the person holding the deed stands in no better situation than such fraudulent holder, especially where the original grantor remains in possession of the property. Van Amringe v. Morton, 4 Whart. (Pa.) 382, 34 AmD 517.

[b] **Fraud by husband.**—Where a husband and wife join in a blank form of a deed designed to be thereafter filled so as to convey a certain piece of ground as a site for a schoolhouse, and afterward the husband, without the knowledge or consent of his wife, fills such blank deed so as to make the same a mortgage on a large tract of land in order to secure a person for a loan, such person receiving the deed in good faith, without knowledge of any defect, the husband and all subsequent judgment creditors and lienors under him are estopped from denying the validity of the mortgage, but the wife not being a party to the intended fraud, and not having joined with her husband in the execution of the instrument for the conveyance or encumbrance of her right of dower in the premises ostensibly mortgaged, her inchoate right of dower is unaffected. Conover v. Porter, 14 Oh. St. 450. Compare Quinn v. Brown, 71 Iowa 376, 34 NW 13.

49. Iowa.—Devin v. Himer, 29 Iowa 297.

Mich.—Lockwood v. Bassett, 49 Mich. 546, 14 NW 492.

Nebr.—Reed v. Morton, 24 Nebr. 760, 40 NW 282, 8 AmSR 247, 1 LRA 736 (holding that, where a wife executed a deed in blank as to the name of the grantee and in other respects, and delivered it to her husband for the purpose of selling the land described, and the husband afterward sold the land, filled the blanks, and delivered the deed to the grantee, the wife will be deemed to have ratified the acts of the husband by using the consideration received).

S. C.—Duncan v. Hodges, 15 S. C. L. 239, 17 AmD 734.

S. D.—Ormsby v. Johnson, 24 S. D. 494, 498, 124 NW 436 [cit Cyc].

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VII. RATIFICATION OR WAIVER

[§ 145] **A. In General.**[50] On the principle that a material alteration of a written instrument may be authorized or consented to by the parties bound by the instrument before it is made,[51] such alteration may be ratified after it has been made, and the instrument as altered will be binding upon the parties.[52]

But a ratification by one of several parties to an instrument as originally written binds him only, and not those who do not assent.[53]

Subsequent assent to a material change of a written instrument is a waiver of the right to rely upon the alteration as a defense to an action brought upon the instrument.[54]

Where the alteration amounts to a forgery it has been held that it may nevertheless be ratified by the person affected by it,[55] but on the other hand it has been held that there cannot be a ratification of such an alteration.[56]

[§ 146] **B. New Consideration.** It has been held that where one is discharged by an alteration, his liability cannot be revived except upon a new consideration, as in the case of a surety.[57] But the better rule seems to be that any one of the parties to an instrument who may have become discharged because of an alteration therein may ratify the unauthorized act so as to make himself liable without any new consideration,[58] upon the principle that

50. Ratification by principal of act of agent generally see Agency §§ 77-146.

51. See supra § 108 et seq, 113 et seq.

52. U. S.—Smith v. U. S., 2 Wall. 219, 17 L. ed. 788; De Malarin v. U. S., 1 Wall. 282, 17 L. ed. 594.

Ala.—Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140.

Ark.—Inglish v. Breneman, 9 Ark. 122, 47 AmD 735.

Cal.—Union Oil Co. v. Mercantile Refining Co., 8 Cal. A. 768, 97 P 919.

Colo.—Divide Canal, etc., Co. v. Tenney, 139 P 1110.

D. C.—Towles v. Tanner, 21 App. 530.

Ill.—Linington v. Strong, 107 Ill. 295.

Ind.—Emerson v. Opp, 9 Ind. A. 581, 34 NE 840, 37 NE 24.

Iowa.—Andrews v. Burdick, 62 Iowa 714, 10 NW 275.

Kan.—Holyfield v. Harrington, 84 Kan. 760, 115 P 546, 39 LRANS 131 and note.

Mass.—Prouty v. Wilson, 123 Mass. 297.

Mo.—King v. Hunt, 13 Mo. 97.

Nebr.—State v. Paxton, 65 Nebr. 110, 90 NW 983.

N. Y.—National State Bank v. Rising, 4 Hun 793.

Pa.—Stahl v. Berger, 10 Serg. & R. 170, 13 AmD 666.

Wash.—Hansaker v. Pedersen, 71 Wash. 218, 128 P 230.

Wis.—Marks v. Schram, 109 Wis. 452, 84 NW 830.

[a] **"It cannot be doubted that such alteration may be ratified** by the person affected by it so as to bind him as fully as though he had authorized it in the first instance." Per Porter, J., in Holyfield v. Harrington, 84 Kan. 760, 762, 115 P 546, 39 LRANS 131.

[b] **A material alteration in a note** (1) may be ratified by any person affected, so as to bind him. Holyfield v. Harrington, 84 Kan. 760, 115 P 546, 39 LRANS 131. (2) Thus, where one who had an account at a store agreed to pay interest on the account and to give his note for the amount, and a salesman of the creditor, who was ignorant of the agreement as to interest, prepared a note which did not include accrued interest, and on discovering the omission the secretary of the creditor, a corporation, altered the note so as to bring the amount up to the principal and interest, and the debtor ratified the alteration, he could not escape liability on the note under the principle that a forgery cannot be ratified. Stringfellow v. Petty, 14 N. M. 14, 89 P 258.

[c] **A material alteration in an official bond** may be ratified and adopted. State v. Paxton, 65 Nebr. 110, 90 NW 983.

[d] **Where a grantor ratifies an insertion in the deed,** and on the record thereof, so as to convey land not included in the original description, even if he does not consent thereto, he and those claiming under him are bound thereby. Chezum v. McBride, 21 Wash. 558, 58 P 1067.

53. Inglish v. Breneman, 9 Ark. 122, 47 AmD 735 (surety not bound by ratification of maker of note); Davis v. Bauer, 41 Oh. St. 257 (holding that, where one of several parties to a promissory note, given for the accommodation of the payee, voluntarily pays the same after knowledge of an alteration, he cannot recover on it against another maker who has not consented to or ratified the alteration); Matlock v. Wheeler, 29 Or. 64, 40 P 5, 43 P 867; Shiffer v. Mosier, 225 Pa. 552, 560, 74 A 426, 24 LRANS 1155, 17 AnnCas 756 [quot Cyc].

[a] **Ratification by executor.**—Where a testator authorized his executors to sell his real estate to pay debts, and a contract was entered into between the executors and defendant for the sale of the same, which contract contained interlineations made by one executor in the absence of the other, and afterward one executor died, and the other became sole executor, and ratified the agreement as entered into, in an action of ejectment by the heirs to recover the land it was held that the contract was binding. Shippen v. Clapp, 29 Pa. 265.

54. U. S.—Washington Bank v. Way, 2 F. Cas. No. 957, 2 Cranch C. C. 249.

Colo.—Whitehead v. Emmerich, 38 Colo. 13, 87 P 790.

Del.—Hollis v. Vandergrift, 10 Del. 521.

D. C.—Towles v. Tanner, 21 App. 530.

Ind.—Feeney v. Mazelin, 87 Ind. 226.

Ky.—Pulliam v. Withers, 8 Dana 98, 33 AmD 479.

Mich.—Stewart v. Port Huron First Nat. Bank, 40 Mich. 348.

Minn.—Janney v. Goehringer, 52 Minn. 428, 54 NW 481.

Mo.—Evans v. Foreman, 60 Mo. 449; Workman v. Campbell, 57 Mo. 53; King v. Hunt, 13 Mo. 97.

Nebr.—State v. Paxton, 65 Nebr. 110, 90 NW 983.

N. H.—Humphreys v. Guillow, 13 N. H. 385, 38 AmD 499.

Pa.—Shiffer v. Mosier, 225 Pa. 552, 560, 74 A 426, 24 LRANS 1155, 17 AnnCas 756 [quot Cyc]; Wilson v. Jamieson, 7 Pa. 126.

S. C.—Jacobs v. Gilreath, 45 S. C. 46, 22 SE 757.

Tenn.—Ratcliff v. Planters' Bank, 2 Sneed 425 (holding that, where an acceptor, in writing his name under the word "accept" on the face of a bill, by a stroke or flourish of his pen ran over and nearly obliterated the right hand lower part of the figure "6," the date of the bill, so as to make it look like the figure "1" except upon very close inspection, and the action was by the bank which discounted the bill, being an innocent purchaser, against the drawers, the bank having discounted the bill as of the apparently changed date, the principle will be applied that where the acceptor alters the date before he accepts, and this is concurred in by the other parties, it is a ratification which will bind them).

Wis.—North v. Henneberry, 44 Wis. 306; Kilkelly v. Martin, 34 Wis. 525.

Eng.—Tarleton v. Shingler, 7 C. B. 812, 62 ECL 812, 137 Reprint 322 (assent by acceptor after alteration by treating the bill as one of the time as altered); Paton v. Winter, 1 Taunt. 420, 127 Reprint 896 (which appears to be distinguishable from Campbell v. Christie, 2 Stark. 64, 3 ECL 318, holding otherwise by reason of the Stamp Act).

N. B.—Isaacs v. Grothe, 29 N. B. 420.

Ont.—Fitch v. Kelly, 44 U. C. Q. B. 578.

[a] **Attention not assent.**—Where a maker is discharged by an alteration, and upon application by letter for payment he answers that he will give his earliest attention to the matter, it does not show assent, because giving attention is different from giving an assent. Perring v. Hone, 4 Bing. 28, 13 ECL 384, 130 Reprint 678, 2 C. & P. 401, 12 ECL 639.

55. Ofenstein v. Bryan, 20 App. (D. C.) 1 (holding that a party to an altered or forged negotiable instrument may bind himself by acknowledging it and promising to pay it, without a new consideration, if the instrument is in the hands of one who had no connection with the forgery, and the promise is not involved in an attempt to compound the felony); Marks v. Schram, 109 Wis. 452, 84 NW 830. See generally Agency §§ 87, 88.

56. Wilson v. Hayes, 40 Minn. 531, 42 NW 467, 12 AmSR 754, 4 LRA 196; Hibert v. La Banque Nationale, 40 Can. S. C. 458. See generally Agency § 86.

57. Mulkey v. Long, 5 Ida. 213, 47 P 949 (holding that a promissory note altered in a material particular is rendered void as to one who signs it as a surety merely, where such alteration is made without his knowledge or consent, and that a mere verbal promise without consideration will not sustain an action against him for the amount of the note); Warren v. Fant, 79 Ky. 1 (holding that, where a surety has been discharged from legal liability upon a written obligation by its alteration without his consent, a subsequent promise by him to pay is not binding unless made upon some new consideration).

58. Ala.—Payne v. Long, 121 Ala. 385, 25 S 780; Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140.

D. C.—Ofenstein v. Bryan, 20 App. 1.

Ill.—Goodspeed v. Cutler, 75 Ill. 534; Gardiner v. Harbeck, 21 Ill. 129; Scott v. Bibo, 48 Ill. A. 657.

Iowa.—Pelton v. Prescott, 13 Iowa 567.

Kan.—Holyfield v. Harrington, 84 Kan. 760, 764, 115 P 546, 39 LRANS 131 and note [quot Cyc].

Mass.—Prouty v. Wilson, 123 Mass. 297.

Mich.—Stewart v. Port Huron First Nat. Bank, 40 Mich. 348.

Nebr.—State v. Paxton, 65 Nebr. 110, 90 NW 983.

N. M.—Stringfellow v. Petty, 14 N. M. 14, 16, 89 P 258 [cit Cyc].

N. C.—Wester v. Bailey, 118 N. C. 193, 24 SE 9.

Tex.—Matson v. Jarvis, (Civ. A.) 133 SW 941.

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a ratification of an alteration is equivalent to an original authority to make it, and that he who can authorize it in the beginning can ratify it in the end.[59]

Forgery. Where, however, the alteration is fraudulent, amounting in law to a forgery, it cannot be ratified without a new consideration, so as to create a liability upon it in favor of the party who made the fraudulent alteration.[60]

[§ 147] **C. Sufficiency of Ratification—1. In General.** Where the instrument altered is not under seal, it is not necessary that the consent to, or ratification of, the alteration be in writing,[61] or even that it be in express terms; but any acts or conduct, with full knowledge of the facts, on the part of the person affected, which shows an intention to recognize the validity of the instrument, will be sufficient.[62]

Sealed instruments. In those jurisdictions where the courts, applying the technical rule that authority to execute a sealed instrument must be by deed, hold that authority to insert anything in a sealed instrument can neither be expressly given by parol nor implied,[63] the possibility of parol ratification of alterations in a sealed instrument is necessarily excluded, and nothing but a redelivery will suffice to make the instrument valid and effectual.[64] But in those jurisdictions where the courts sustain the sufficiency of parol authority to alter an instrument under seal,[65] it would seem that an alteration made in a sealed instrument, after its execution, may be subsequently ratified in the same manner as an alteration in any other written instrument,[66] as by, with knowledge of the facts, claiming or accepting benefits under the instrument,[67] or by otherwise acquiescing in, or recognizing its validity.[68]

[§ 148] **2. Acquiescence.** Mere acquiescence,

[a] **"The great weight of authority** is against the necessity for a new consideration." Per Porter, J., in Holyfield v. Harrington, 84 Kan. 760, 763, 764, 115 P 546, 39 LRANS 131 and note [quot Cyc].

59. Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140 and note (adopting the language and conclusions in Trenton First Nat. Bank v. Gay, 63 Mo. 33, 39, 21 AmR 430, where it was said: "No independent consideration is required in the case of an accommodation indorser, surety, etc., in the first instance, and it is difficult to see why anything more should be required on subsequent sanction than on original assent"); Holyfield v. Harrington, 84 Kan. 760, 764, 115 P 546, 39 LRANS 131 [quot Cyc]; Matson v. Jarvis, (Tex. Civ. A.) 133 SW 941.

60. Wilson v. Hays, 40 Minn. 531, 540, 42 NW 467, 12 AmSR 754, 4 LRA 196 (where Mitchell, J., said: "We have found no case where it has been held that a forged instrument can be ratified so as to give the forger himself a right of action upon it. It is legally impossible in such a case that the relation of principal and agent could exist between the parties, for one man cannot be the agent of another to make a contract with himself. Hence it would seem that the doctrine of ratification can have no application to such a case. If the entire instrument was a forgery, in the popular sense, it would require no argument to prove that a mere assent to or ratification of it in the hands of the forger would be a mere nudum pactum. But in law there is no distinction between a forgery in making and a forgery by altering. The altered instrument is not the contract of the maker, and in legal contemplation is as entirely a forgery as the other. If the alteration was not fraudulent, so that it did not destroy the instrument, or at least did not extinguish the debt, we can see how a subsequent assent to it would create a liability on the instrument as altered. Parties can alter their contract by mutual consent, and this requires no new consideration, for it is merely the substitution of a new contract for the old one, and this is of itself a sufficient consideration for the new. And what a party may assent to when done he may assent to afterwards, so as to bind himself, if there be a consideration to support it. But where there has been a fraudulent alteration of a written contract, which not only destroys the instrument but extinguishes the debt, it seems to us clear on principle that a subsequent assent to the alteration, given to the party who made it, without any new consideration, is, in any view of the case, a mere naked promise"). Compare Ofenstein v. Bryan, 20 App. (D. C.) 1. See generally Agency § 86.

61. Stewart v. Port Huron First Nat. Bank, 40 Mich. 348; Barrett v. Effenberg, 29 Okl. 679, 119 P 135; Kilkelly v. Martin, 34 Wis. 525.

62. Divide Canal, etc., Co. v. Tenney, (Colo.) 139 P 1110; Holyfield v. Harrington, 84 Kan. 760, 115 P 546, 39 LRANS 131; Barrett v. Effenberg, 29 Okl. 679, 119 P 135.

[a] **"A recognition of the validity of the instrument,** with knowledge of the alteration, will suffice." Per Pound, C., in State v. Paxton, 65 Nebr. 110, 132, 90 NW 983.

[b] **Recognition of liability.**—(1) If the person to be affected by the alteration, after he has been informed of it, recognizes his unqualified liability upon the instrument, that circumstance will in itself amount to a ratification of it. Prouty v. Wilson, 123 Mass. 297; Stewart v. Port Huron First Nat. Bank, 40 Mich. 348. (2) Where the maker of an altered note, on being shown the note, states that he signed it and that it is all right, it is a ratification of the alteration. Lance v. Calvert, 21 Pa. Super. 102. (3) Where the maker of a note which has been altered, after examining it, tells a prospective purchaser that it is all right and that he will pay it, on the strength of which assurance the note is purchased without notice of the alteration, the maker is estopped to deny his liability on the note. Harrison v. Luce, 64 Ark. 583, 43 SW 970. (4) Where the acceptor of a bill of exchange, upon being informed of an alteration of the date said, "That is right," the alteration does not vitiate the bill. Jacob v. Hart, 6 M. & S. 142, 105 Reprint 1196.

[c] **Taking proof of loss under altered policy.**—A material alteration of an insurance policy by the insured is not waived by reason of the fact that the adjuster of the insurer, who has notice of the alteration, takes proofs of loss. Fletcher v. Minneapolis F. & M. Mut. Ins. Co., 80 Minn. 152, 83 NW 29.

63. See supra §§ 125–136.

64. Davenport v. Sleight, 19 N. C. 381, 31 AmD 420.

[a] **Assent to obligation as altered.**—It has been held that when an alteration has been made in a bond, it cannot be rendered valid by the subsequent bare acknowledgment by the obligor that he is willing to be bound by it. Sans v. Peo., 8 Ill. 327.

65. See supra §§ 125–136.

66. Mohlis v. Trauffler, 91 Iowa 751, 60 NW 521; Tucker v. Allen, 16 Kan. 312; Penny v. Corwithe, 18 Johns. (N. Y.) 499.

[a] **Affirmative acts required.**—"It is often said that the words or acts relied on as amounting to a ratification must be affirmative in character and sufficient to amount to the making of a new contract." Per Ray, C. J., in State v. Findley, 101 Mo. 368, 377, 14 SW 111.

[b] **Where a sealed note is altered after delivery** by the insertion of a payee, and subsequently the maker, with knowledge of the insertion, states that he signed the note and that it is all right, such ratification makes the instrument binding on him. Wester v. Bailey, 118 N. C. 193, 24 SE 9.

[c] **Endeavoring to protect property.**—Where the sureties on an official bond first learn of an alteration after the default of the principal, and then for a few days procure control of certain money to the credit of their principal, but, upon taking legal advice, become satisfied that they are not bound by the bond, whereupon they relinquish all claim to the money and deny their liability, they cannot be taken to have ratified the alteration. Fairhaven v. Cowgill, 8 Wash. 686, 36 P 1093.

67. Lockwood v. Bassett, 49 Mich. 546, 14 NW 492 (holding that, where the grantor, knowing that the deed has been altered since delivery, claims the benefit of accompanying and related contracts, he thereby ratifies the alteration).

[a] **Accepting indemnity.**—Where sureties on an official bond, after notice of an alteration therein, accept indemnity from the principal obligor, they will be held to have ratified the alteration. Hagler v. State, 31 Nebr. 144, 47 NW 692, 28 AmSR 514.

[b] **Trial of appeal.**—A subsequent trial of an appeal at the instance of a part of the obligors on an appeal bond will be taken as a ratification of an alteration of the bond. Oswego v. Kellogg, 99 Ill. 590.

68. Janney v. Goehringer, 52 Minn. 428, 54 NW 481; Styles v. Scotland, 22 N. D. 469, 134 NW 708; Janes v. Ferd Heim Brewing Co., (Tex. Civ. A.) 44 SW 896.

[a] **An alteration made in a deed and in the record thereof will be presumed to have been ratified** by the grantor, when the evidence tends to show that it was done with his consent, and when it appears that he always recognized the title of his grantees to the premises covered by the altered deed, and never himself, or through his successors, exercised any act of ownership over the lands in controversy. Chesum v. McBride, 21 Wash. 558, 58 P 1067.

[b] **Alteration in bond.**—(1) Where a person executes a bond entirely in blank, and it is filled up and afterward shown to him, and he admits his signature and does not deny that he will be bound by it, the bond is valid. Byers v. McClanahan, 6 Gill & J. (Md.) 250. (2) Where the name of an obligor is signed without his authority, if he afterward acknowledges the bond to be his, he will be bound. Hill v. Scales, 7 Yerg. (Tenn.) 410. (3) So also where an obligor in a bond is shown the instrument after a surety's name has been erased therefrom, and he makes no objection on that ground and continues with the

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without objecting until the enforcement of the instrument is sought, and with knowledge of the facts, may constitute sufficient ratification;[69] and, where the character of the obligation is changed before it is signed, and without the knowledge of the party signing it, acquiescence after subsequently acquired knowledge will be deemed a ratification of the contract as changed.[70] It is different, however, as against an indorser, where the holder takes the instrument with knowledge that it was changed without authority.[71] So acquiescence is taken as a ratification when, after knowledge of the change, the party causes or permits action to be taken with reference to the instrument which necessarily imports a recognition by him of the validity of the instrument, or which should estop him from denying such liability.[72]

Retaining property. Where one has received property under a contract at the time his attention is called to an alteration, he must rescind the contract and return the property within a reasonable time, or be held to have ratified the alteration.[73]

[§ 149] **3. New Promise.** Where a promisor or obligor after full knowledge of an alteration unconditionally promises to pay the indebtedness evidenced by the note, bill, or other instrument altered, it is a sufficient ratification.[74] But a conditional promise to pay, which is not accepted, is not sufficient.[75]

[§ 150] **4. Waiver of Protest and Notice.** If, after knowledge of an alteration, an indorser waives protest and notice it will be considered a sufficient ratification.[76]

[§ 151] **5. Obtaining Extension of Time.** Where a party with knowledge of an alteration obtains

transaction of which the bond forms part, he will be held to have ratified the alteration. Janes v. Ferd Heim Brewing Co., (Tex. Civ. A.) 44 SW 896.

[c] **Failing to object for several years to proceedings under altered bond.**—Where the sureties of an administrator's bond are informed of an alteration in it shortly after it is made, and permit the administration to proceed thereunder for a number of years without objection, a ratification of the alteration may be inferred. Jackson v. Johnson, 67 Ga. 167.

[d] **Failure of obligor to inform obligee of alteration.**—Where an obligor on a bond given by a depository of public moneys learns a short time after the bond is delivered, and before deposits which it is given to secure have been made, that a material alteration has been made in the bond in the course of its execution, but does not inform the obligee or its officers of the change, or object thereto, he will be deemed to have ratified the alteration, even though there is no evidence that the conduct of the obligee was influenced by his silence. Renville County v. Gray, 61 Minn. 242, 63 NW 635.

[e] **Ratification of alteration in lease.**—(1) Subsequent recognition of, and acquiescence in, a lease after knowledge that it has been altered constitutes a ratification of the alteration. Janney v. Goehringer, 52 Minn. 428, 54 NW 481. (2) Where after the execution of an oil lease the lessee discovered that certain heirs owned an interest in one of the tracts, and secured their signatures to the lease by making an interlineation therein giving them the right to receive their share of the royalty, and the original lessor had no knowledge of the interlineation at the time, but was shortly thereafter advised of it, and made no objection, but throughout the term insisted on the performance of the contract by the lessee, and accepted the royalties thereunder, he thereby waived the right to insist on the invalidity of the lease because of the alteration. Barnsdall v. Boley, 119 Fed. 191. (3) But where a lessor delivered two copies of a lease to the lessee for execution, and the lessee made certain interlineations before executing them, the fact that the lessor afterward secures possession of one of the altered copies executed by the lessee does not estop him to deny the validity of the lease, where he secures such possession merely to copy the lease. Ver Steeg v. Becker-Moore Paint Co., 106 Mo. A. 257, 80 SW 346.

69. Yocum v. Smith, 63 Ill. 321, 14 AmR 120; Pulliam v. Withers, 8 Dana (Ky.) 98, 33 AmD 479 (holding that, where there is no change in the body of an instrument, and no interlineation or erasure, very slight evidence of the original promisor's assent will be sufficient); Waller v. Ward, 101 SW 341, 31 KyL 40; Stewart v. Port Huron First Nat. Bank, 40 Mich. 348.

[a] **Failure to disavow an alteration** in a note within a reasonable time after his attention is especially called to it amounts to a ratification by the obligee. Matlock v. Wheeler, 29 Or. 64, 40 P 5, 43 P 867.

70. Linington v. Strong, 107 Ill. 295; Tilt v. La Salle Silk Mfg. Co., 5 Daly (N. Y.) 19 (where the contract was retained without objection after the change, and goods, delivered in accordance with the change inserted in the contract, were received by defendant).

71. Conklin v. Wilson, 5 Ind. 209 (holding that under such circumstances an attempt to procure indemnity does not deprive the indorser of his legal defense, and that he is under no obligation to object before suit as between these particular parties).

72. U. S.—Davis, etc., Bldg., etc., Co. v. Dix, 64 Fed. 406; Davis v. Shafer, 50 Fed. 764.

Ill.—Bolter v. Kozlowski, 211 Ill. 79, 71 NE 858 [aff 112 Ill. A. 13] (holding, however, that, where a building contract offered in evidence before the master showed on its face that petitioners were not entitled to a lien, so that there was no reason for objecting thereto, defendant was not precluded, on the hearing of exceptions to the master's report, from orally objecting to the contract on account of fraudulent alterations made after the transcript left the hands of the master, by reason of the fact that he made no objection thereto before the master).

Iowa.—Grimsted v. Briggs, 4 Iowa 559 (where it appeared, in an action by an indorsee against the maker and indorser of a note, that the instrument had been altered, and that after knowledge of the alteration the maker recommended plaintiff to buy it).

S. C.—Sanders v. Bagwell, 37 S. C. 145, 15 SE 714, 16 SE 770.

Tex.—Janes v. Ferd Heim Brewing Co., (Civ. A.) 44 SW 896.

[a] **Permitting discharge of maker by indorser.**—Where the indorser of a note agrees with the maker and holder that the former shall be discharged from all liability on payment of a certain sum, without affecting the indorser's liability, he will be estopped to insist on his own discharge by reason of an alteration, made after indorsement, where the above agreement contained a copy of the note with the alleged alteration. Conable v. Keeney, 16 NYS 719; Conable v. Smith, 61 Hun 185, 15 NYS 924.

73. Canon v. Grigsby, 116 Ill. 151, 5 NE 362, 56 AmR 769; Emerson v. Opp, 9 Ind. A. 581, 34 NE 840, 37 NE 24.

74. Ofenstein v. Bryan, 20 App. (D. C.) 1; Humphreys v. Guillow, 13 N. H. 385, 38 AmD 499; National State Bank v. Rising, 4 Hun (N. Y.) 793; Hébert v. La Banque Nationale, 16 Que. K. B. 191.

[a] **Promise by maker deemed a ratification.**—Goodspeed v. Cutler, 75 Ill. 534; Scott v. Bibo, 48 Ill. A. 557; Emerson v. Opp, 9 Ind. A. 581, 34 NE 840, 37 NE 24 (holding that, where the maker of a note, after its maturity and before commencement of an action thereon, with full knowledge of an alteration, promised to pay the note, it was a ratification of the alteration); Browning v. Gosnell, 94 Iowa 448, 59 NW 340.

[b] **Promise by indorser** (1) deemed a ratification. Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140. (2) Thus, although the payee taking a note was put on inquiry concerning alterations made by the maker, after indorsement amounting to a forgery, yet he can recover against the indorser, who, knowing of the alterations, promised to pay it. Marks v. Schram, 109 Wis. 452, 84 NW 830. (3) So where at the request of the payee, the maker of a note after delivery altered the time of payment from three years to one, and two of the sureties of the note afterward indorsed in writing their agreement to the change of time, they ratified the change, and were liable on the note without any new consideration. Holyfield v. Harrington, 84 Kan. 760, 115 P. 546, 39 LRANS 131.

[c] **Promise by signer of subscription contract.**—Landwerlen v. Wheeler, 106 Ind. 523, 5 NE 888.

[d] **Where an obligor in bonds,** knowing the fact of their alteration by the obligee, promises the transferee of the bonds that he will pay them, the fact of such alteration will not support a plea of non est factum in a suit by the transferee on such promise. Cleaton v. Chambliss, 6 Rand. (27 Va.) 86.

[e] **Promise implied from payment.**—Where, after making a payment within the statutory period, the maker of a note acquiesces in its alteration, the new promise implied from such payment will be regarded as a promise to pay the note as altered. Jacobs v. Gilreath, 45 S. C. 46, 22 SE 757.

75. McDaniel v. Whitsett, 96 Tenn. 10, 33 SW 567 (holding that, where the maker of a note, which had been materially altered, upon its presentation to him for payment saw the alterations, and said that he thought that they made the note void, but proposed that if plaintiff would grant him further indulgence and renew the note, and charge only six per cent interest for the delay, he would pay it in a certain time, and this proposition was declined by the payee, this offer did not constitute a ratification of the alteration).

76. Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140.

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an extension of the time of payment, it will be considered a ratification.[77]

[§ 152] **6. Giving Other Security.** Where an indorser, with full knowledge of an alteration, executes other security for the payment of the debt evidenced by the instrument altered, he will be taken to have assented to the change.[78] But an offer by the maker to renew a note on conditions which the payee will not accept does not constitute a waiver of an alteration of the note.[79]

[§ 153] **7. Payment.** By making payment of principal or interest, with knowledge of an alteration, a party is held to ratify the instrument as altered;[80] but the mere payment of a prior note containing similar alterations will not constitute a ratification of alterations in the particular note in controversy.[81]

[§ 154] **8. Bringing Suit on Altered Instrument.**[82] Ordinarily a plaintiff cannot avoid the effect of an alteration of which he is chargeable with knowledge after he has brought suit upon the instrument in its altered form, since by suing upon the altered instrument he is deemed to have ratified the alteration;[83] but if the suit is brought without knowledge of the alteration,[84] or merely to protect the principal's rights, and not to take any advantage of the alteration,[85] it will not amount to a ratification.

[§ 155] **9. Necessity for Full Knowledge of Facts.** In order that any acts of a party may be construed as a ratification of an alteration, the particular act must be done with full knowledge of the alteration.[86] As a consequence acts which otherwise would amount to ratification of an alteration will not be given such effect, if done without full knowledge of the actual condition of the instrument.[87] Thus if a payment is made upon the instrument without full knowledge of the alteration, it cannot be considered as evidencing a ratification.[88]

The party must have knowledge in fact, and it is not sufficient that he had means of knowledge.[89]

77. Bell v. Mahin, 69 Iowa 408, 29 NW 331.

[a] **Where the obligors in a bond,** with full knowledge of an alteration, offer to pay a part of the bond and ask for an extension of time in which to pay the balance, such offer and request will constitute a sufficient ratification or an assent to the alteration. Dickson v. Bamberger, 107 Ala. 293, 18 S 290.

78. Fanning v. Farmers, etc., Bank, 16 Miss. 139 (execution of trust deed to holder of note to secure its payment, by indorser after full knowledge of the alteration); Wright v. Buck, 62 N. H. 656 (executing a new note); Bradford Nat. Bank v. Taylor, 75 Hun 297, 27 NYS 96 (execution of renewal note by indorser); Ohio Valley Bank v. Lockwood, 13 W. Va. 392, 31 AmR 768.

79. McDaniel v. Whitsett, 96 Tenn. 10, 33 SW 567.

80. Ala.—Payne v. Long, 121 Ala. 385, 25 S 780.

Ill.—Richardson v. Mather, 77 Ill. A. 626 [aff 178 Ill. 449, 53 NE 321].

Mass.—Prouty v. Wilson, 123 Mass. 297.

Mich.—Johnson v. Johnson, 66 Mich. 525, 33 NW 413.

Mo.—Evans v. Foreman, 60 Mo. 449.

[a] **Payment of interest** with knowledge of an alteration amounts to ratification. Prouty v. Wilson, 123 Mass. 297; Wilson v. Hayes, 40 Minn. 531, 42 NW 467, 12 AmSR 754, 4 LRA 196. See also Carlss v. Tattersall, 2 M. & G. 890, 40 ECL 907, 133 Reprint 1004 (holding that, where defendant had paid two years' interest on a note alleged to have been materially altered, it was sufficient evidence from which to infer that the alteration had taken place with defendant's consent).

Payment without knowledge see infra § 155.

81. McDaniel v. Whitsett, 96 Tenn. 10, 33 SW 567.

82. Suit by principal as ratification generally see Agency §§ 132–135.

83. Me.—Dover v. Robinson, 64 Me. 183.

Mo.—Kelly v. Thuey, 143 Mo. 422, 45 SW 300; Springfield First Nat. Bank v. Fricke, 75 Mo. 178, 42 AmR 397; Paul v. Leeper, 98 Mo. A. 515, 72 SW 715; Bremen Bank v. Umrath, 42 Mo. A. 525.

Nebr.—Perkins Windmill, etc., Co. v. Tillman, 55 Nebr. 652, 75 NW 1098 (holding that, where the holder of a note, after notice that it had been altered by changing the amount, sued upon it in its altered condition, he thereby ratified the act of alteration, and the court properly refused to permit him, after the trial, to amend by counting on the note as originally made).

Pa.—Fulmer v. Seitz, 68 Pa. 237, 8 AmR 172.

S. D.—Wyckoff v. Johnson, 2 S. D. 91, 48 NW 837 (holding that, where plaintiff insisted that the act was the unauthorized act of an agent, defendant might show by the books of plaintiff that the note had been carried on the books as a discount for the amount to which it had been so altered, such evidence tending to show an adoption or ratification by plaintiff of the alteration).

Tex.—Bowser v. Cole, 74 Tex. 222, 11 SW 1131.

84. Orlando v. Gooding, 34 Fla. 244, 15 S 770; Paul v. Leeper, 98 Mo. A. 515, 72 SW 715; Port Huron Engine, etc., Co. v. Sherman, 14 S. D. 461, 85 NW 1008; Bigelow v. Stilphen, 35 Vt. 521.

85. Fry v. Jenkins, 173 Ill. A. 486 (holding that where an attorney on his own initiative alters the date of a note after it has been executed by the parties, in an endeavor to correct a mistake, a bill praying for a correction of the mistake and a foreclosure of the mortgage given as security for the note does not amount to a ratification of the attorney's act).

86. U. S.—Washington Bank v. Way, 2 F. Cas. No. 957, 2 Cranch C. C. 249.

D. C.—Ofenstein v. Bryan, 20 App. 1.

Ind.—Koons v. Davis, 84 Ind. 387; Bucklen v. Huff, 53 Ind. 474.

Iowa.—Cutler v. Rose, 35 Iowa 456.

Kan.—Fraker v. Little, 24 Kan. 598, 36 AmR 262.

Mich.—Pearson v. Hardin, 95 Mich. 360, 54 NW 904.

Mo.—State v. McGonigle, 101 Mo. 353, 13 SW 758, 20 AmSR 609, 8 LRA 735; Lammers v. White Sewing Mach. Co., 23 Mo. A. 471.

Mont.—McMillan v. Hefferlin, 18 Mont. 385, 45 P 548.

Nebr.—State v. Paxton, 65 Nebr. 110, 90 NW 983.

Oh.—Boalt v. Brown, 13 Oh. St. 364.

Pa.—Shiffer v. Mosier, 225 Pa. 552, 560, 74 A 426, 24 LRANS 1155, 17 AnnCas 756 [quot Cyc]; Nesbitt v. Turner, 155 Pa. 429, 26 A 750.

Tenn.—McDaniel v. Whitsett, 96 Tenn. 10, 33 SW 567.

Wis.—Kilkelly v. Martin, 34 Wis. 525.

See also generally Agency §§ 93–98.

[a] **Evidence of knowledge.**—The possession of a warehouseman's receipt, corresponding with the entry in his books as altered, is not evidence that the party was cognizant of the alteration. Wilson v. O'Day, 5 Daly (N. Y.) 354.

87. State v. Churchill, 48 Ark. 426, 3 SW 352, 880 (holding that, where the governor of the state approved a bond upon which he was a surety and actually observed the erasure therein, but, his mind being engrossed with other matters at the time, it escaped a closer scrutiny, his official approval was not a ratification of an erasure made without his consent, as he was without full knowledge of the facts); State v. Paxton, 65 Nebr. 110, 90 NW 983; Port Huron Engine, etc., Co. v. Sherman, 14 S. D. 461, 85 NW 1008 (holding that, where a clerk in plaintiff's office inserted in a note executed by defendant the name of a certain bank as place of payment, and plaintiff had no knowledge of the change until after the note was forwarded for collection, and a suit was instituted on it, the evidence was not sufficient to show that plaintiff ratified the action of the clerk); Westloh v. Brown, 43 U. C. Q. B. 402 (holding that, where a note, after execution, is altered by the maker, without the consent of an indorser who subsequently comes to pay it without knowledge of the alteration, the note is void and a subsequent promise does not have the effect of ratifying it). See also supra § 154.

[a] **Offer to renew note without knowledge of alteration.**—The receipt by an indorser of a note of notice of protest and his subsequent offer to renew the note are not of the slightest value to prove a ratification of an alteration therein, unless it appears that he then knew of the alteration. Kennedy v. Lancaster County Bank, 18 Pa. 347.

[b] **Execution of new note.**—Where, without knowledge of the alteration of the note, an accommodation maker executes a new note in lieu of the altered one, it does not amount to a ratification. Fraker v. Cullum, 21 Kan. 555.

[c] **Renewal bill.**—Where a bill is altered so that a man otherwise liable on it is discharged, he is not liable on a bill given in renewal of the altered bill, unless he was actually apprised of the alteration at the time he gave the substituted bill. Bell v. Gardiner, 4 M. & G. 11, 43 ECL 16, 134 Reprint 5.

88. Benedict v. Miner, 58 Ill. 19 (holding that, where a surety makes a payment on a note, which has been so altered as to increase his liability, such payment does not amount to a ratification if, at the time of making it, he knew nothing of the alteration); Sheridan v. Carpenter, 61 Me. 83.

[a] **A promisor who orders past payments to be credited on a note** does not thereby ratify an alteration in the note, unless the payments were made at a time when he had full knowledge or information of the alteration. Payne v. Long, 121 Ala. 385, 25 S 780.

89. Shiffer v. Mosier, 225 Pa. 552, 560, 74 A 426, 24 LRANS 1155, 17 AnnCas 756 [quot Cyc]; Bell v. Gardiner, 4 M. & G. 11, 43 ECL 16, 134 Reprint 5.

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But where a party expressly ratifies and adopts generally any and all alterations that may be required, and expressly agrees to remain bound thereby, his knowledge of the exact condition of the instrument when he so agrees is immaterial.[90]

[§ 156] **10. Necessity of Intention.** The ratification must also be made with an intention to ratify the instrument as altered.[91]

VIII. PLEADING AND ISSUES

[§ 157] **A. Declaration on Altered or Original Instrument—1. On Original Instrument.**[92] Notwithstanding a mere spoliation does not affect the rights of the parties under the instrument, it does not follow that an action can be maintained on the instrument in its altered form.[93] In such a case the declaration should be framed as upon the instrument in its original unaltered form,[94] and, upon showing that the change is a mere spoliation, there will be no variance.[95]

[§ 158] **2. On Altered Instrument.** If the terms of the instrument are changed by consent so that the parties are bound by the new terms of the contract, it is proper to declare upon the instrument as changed,[96] for there is, of course, no variance where an instrument exactly corresponding with that described in the pleading is produced;[97] but if plaintiff alleges facts showing an alteration, without also showing that it was authorized, his pleading will be bad,[98] and if he declares upon the instrument without referring to the alterations, and a vitiating alteration is alleged and proved by defendant, the action must fail.[99]

Erased name. In declaring on a note from which the name of one of the signers has been erased before delivery, the note should be described as the note of the remaining signers with proper allegations explaining the signing of the erased name and its erasure before delivery;[1] or if the note is set out in hæc verba, it should be copied as though it contained the name erased as one of the makers, with the erasure as in the note itself, with proper

[a] **The mere fact that the party affected saw the instrument** (1) but his attention was directed only to some particular part of it, such as to the signature, and not to the part which has been altered, is not sufficient knowledge on which to base a ratification on his part. German Bank v. Dunn, 62 Mo. 79. (2) Thus the fact that an acceptor of an order which has been altered, upon its presentation to him takes it and looks at it and says that it is all right, does not of itself amount to a ratification, his attention not having been called to the alteration, and there being no evidence that he noticed it. Lammers v. White Sewing Mach. Co., 23 Mo. A. 471.

[b] **Newspaper statements.**—Where the only knowledge imputable to the obligors on a bond was that to be derived from reading in a newspaper that the bond was for a smaller amount than that which they had executed, it is not sufficient knowledge on which to base an implied ratification on their part. State v. Chick, 146 Mo. 645, 48 SW 829.

90. State v. Paxton, 65 Nebr. 110, 90 NW 983.

[a] **Sureties on an official bond,** which has been delivered, but not yet approved, who desire to have the bond approved and the principal retained in his office, may ratify all alterations which may be required, and, if they do so, their knowledge of the exact conditions of the bond, when they agree to remain bound notwithstanding the alteration, is immaterial. State v. Paxton, 65 Nebr. 110, 90 NW 983.

91. State v. Churchill, 48 Ark. 426, 3 SW 352, 880; State v. Paxton, 65 Nebr. 110, 90 NW 983 (holding that a ratification of a material alteration in an official bond must be made intentionally with respect to the very alteration relied on); Boalt v. Brown, 13 Oh. St. 364. See generally Agency § 102.

[a] **The ratification of an alteration in a mortgage note** by the maker does not constitute a ratification of an alteration in the mortgage securing the note, where the maker did not have any knowledge of the alteration in the latter instrument, and no intention to ratify is shown. Cutler v. Rose, 35 Iowa 456.

92. Allegations in indictment for forgery see Forgery [19 Cyc 1394].

93. Cochran v. Nebeker, 48 Ind. 459.

94. Fla.—Orlando v. Gooding, 34 Fla. 244, 15 S 770.

Mass.—Drum v. Drum, 133 Mass. 566. See also Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 NE 959.

Nebr.—Colby v. Foxworthy, 72 Nebr. 378, 100 NW 798; Perkins Windmill, etc., Co. v. Tillman, 55 Nebr. 652, 75 NW 1099.

Pa.—Fulmer v. Seitz, 68 Pa. 237, 8 AmR 172.

Wis.—Union Nat. Bank v. Roberts, 45 Wis. 373.

95. Drum v. Drum, 133 Mass. 566.

[a] **Apparent variance cured by proof.**—Where the instrument is declared on according to its original tenor, if it is shown by the evidence that an apparent alteration is merely a spoliation, there is no variance between the pleading and proof. Bledsoe v. Graves, 5 Ill. 382; Drum v. Drum, 133 Mass. 566. In Cantrelle v. Percy, 17 La. 520, where, in an action against an indorser of a note, the instrument was declared on without any reference to the fact that the maker's name had been erased, it was held that testimony that the signature had been erased by mistake was admissible in plaintiff's behalf; and that if any material circumstance existed to show that the erasure operated to discharge defendant, it was his duty to avail himself of it in his answer.

96. Hall v. Foster, 114 Mass. 18 (holding that a note which has been altered by consent of parties may be declared on by setting out a copy of it as altered, without showing how it was originally written); Tarleton v. Shingler, 7 C. B. 812, 62 ECL 812, 137 Reprint 322.

[a] **Recovery against one of two defendants.**—Where, in an action on a note against two defendants, it appears that the note has been altered on the consent of one but not of the other, recovery can be had against the one who consented but not against the other. Broughton v. Fuller, 9 Vt. 373.

[b] **Time of performance of condition.**—A bond for performing an award was dated Sept. 19, 1825, conditioned that the award should be made, etc., on or before the first day of December then next, and afterward the parties extended the time for the award twice, by erasure and interlineation, the last time to Jan. 18, 1826. It was held that plaintiff might declare on the bond as both dated and made on September 19, or as dated that day and made afterward; that, although the legal effect of altering the time limited to do an act in the condition of a bond, leaving the original date to stand, is to destroy the bond as the preëxisting one and to give it effect from the time of the alteration, the bond may be declared on as bearing its original date, with or without averment that it was changed after it was delivered. Tompkins v. Corwin, 9 Cow. (N. Y.) 255.

97. Hall v. Foster, 114 Mass. 18.

[a] **In an action of debt on a bond** where the instrument when offered in evidence shows that an assignment thereof by H. C. to J. F. has been scratched out with a pen, all except the signature of H. C., and that an assignment to plaintiff has been written over such signature in a different handwriting, there is no variance, if there is nothing to show when or by whom such erasure was made. Drummond v. Crutcher, 2 Wash. (2 Va.) 218.

[b] **Where matter in the printed form** of a note is erased by drawing lines through it, it is proper in such a case to declare upon the note in its changed form, and when produced with the erasures it will not constitute a variance. Corcoran v. Doll, 32 Cal. 82.

98. Allen v. Dornan, 57 Mo. A. 288.

[a] **Recovery allowed notwithstanding variance.**—Where plaintiff declared on a note to recover the principal and seven per cent interest, and the note when produced showed that the rate of interest had been altered to eight per cent, but it was also shown that defendant had estopped himself to assert the alteration, the court held that while plaintiff could not, without an amendment of his complaint, recover more than seven per cent interest, yet, under the circumstances, the variance did not defeat his right to recover the principal with seven per cent interest. Sanders v. Bagwell, 37 S. C. 145, 15 SE 714, 16 SE 770.

99. Mathis v. Mathis, 20 N. C. 55.

[a] **Where parties to a contract execute counterparts of the same,** and the papers are exchanged, and plaintiff has altered the language of the one executed by him without the knowledge of defendant, if plaintiff intends to rely upon the contract as changed he is bound to assert such alteration, as his request to defendant to deliver the counterpart signed by him involves a representation by plaintiff that this was the form adopted by the parties in the counterparts to be exchanged. Webster Realty Co. v. Thomas, 46 Misc. 139, 93 NYS 1077 [aff 107 App. Div. 612, 94 NYS 916].

[b] **Fatal variance.**—Where a declaration on a written agreement ignores the following note subjoined to the foot of the agreement, "This agreement to be in force until the 12th July," the variance is fatal in the absence of proof that such note was subsequently added to the agreement without plaintiff's knowledge or consent. Newell v. Mayberry, 3 Leigh (30 Va.) 250, 23 AmD 261.

1. Hess v. Schaffner, (Tex. Civ. A.) 139 SW 1024.

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allegations explanatory thereof;[2] and where the note is declared on as signed by a given number of individuals, while the note introduced in evidence is signed only by some of them, the name of the other having been erased, there is a fatal variance.[3]

By suing on the instrument in its altered form plaintiff will be taken to have ratified the alteration,[4] and his so declaring will be taken as an admission of his consent to the alteration,[5] and there will be no issue as to the fact of the alteration, but only as to its effect.[6] Plaintiff will not be permitted to go to trial in such a case and then fall back upon the original terms of the instrument by amendment,[7] unless at the time of filing his pleading he did not know of the alteration.[8] Where the holder of a note admits that a material alteration was made after delivery, he must allege everything necessary to maintain his right to recover on the altered instrument.[9]

Profert. In an action on a deed or bond,[10] which has been changed so as to destroy the identity of the instrument, as by defendant tearing off the seal,[11] the instrument cannot be declared on with profert, but the facts should be stated as an excuse for not making a profert.[12]

[§ 159] **B. Setting Up Original Consideration.** If the instrument sued on is excluded on the ground of alteration, plaintiff may nevertheless recover on the original consideration, if his pleadings set up this cause of action and the original indebtedness has not become merged in the writing.[13] Thus in cases announcing the rule that an innocent alteration will not preclude a recovery on the original consideration, the pleading is generally framed with that view, as by adding the common counts;[14] but plaintiff should be allowed to amend his declaration by setting up the original consideration, as of a note.[15] In such a case plaintiff should allege the absence of a fraudulent intent,[16] although a failure to do so will be cured by verdict if the answer alleges the intent, and plaintiff denies it in his reply.[17]

[§ 160] **C. Pleading Alteration—1. General Issue or Special Plea.** The general rule, supported by the weight of authority, is that when an instrument is declared on in its altered form, an alteration therein may be shown under a plea of non est factum, non assumpsit, non acceptavit, or that defendant did not indorse, etc., as may be appropriate, and need not be specially pleaded,[18] un-

2. Hess v. Schaffner, (Tex. Civ. A.) 139 SW 1024.

3. Hess v. Schaffner, (Tex. Civ. A.) 139 SW 1024.

4. See supra § 154.

5. Barrington v. Washington, 14 Serg. & R. (Pa.) 405 (holding that, where the name of one of five joint obligors on a bond had been erased, and plaintiff declared on it as the joint bond of the other four, without referring to the one whose name had been erased, this was an admission that the erasure was made with plaintiff's consent, thus throwing on plaintiff the burden of showing that all the other parties also consented).

6. Krause v. Meyer, 32 Iowa 566.

7. Perkins Windmill, etc., Co. v. Tillman, 55 Nebr. 652, 75 NW 1098 (holding that, where at the time of bringing suit plaintiff knew of a spoliation, but nevertheless declared on the instrument in its altered form, it amounted to a ratification, and leave to amend after trial so as to count on the instrument in its original form was properly refused); Fulmer v. Seitz, 68 Pa. 237, 8 AmR 172. See also Murray v. Peterson, 6 Wash. 418, 33 P 969.

8. Tulane Univ. v. O'Connor, 192 Mass. 428, 78 NE 494; Colby v. Foxworthy, 72 Nebr. 378, 100 NW 798; State Sav. Bank v. Shaffer, 9 Nebr. 1, 1 NW 980, 31 AmR 394.

[a] **Where by mistake** plaintiff declares on the instrument in its altered form, he may be allowed to amend, and on appeal from a judgment in his favor the amendment will be considered as made. Union Nat. Bank v. Roberts, 45 Wis. 373 (holding that, where an alteration set up was made by a trespasser, a mere mistake in pleading the note as it was originally written would not be taken for the adoption or ratification of the alteration, as a variance founded on mistake is amendable on the trial, and that the court would consider the pleading as amended where the identity of the note as made was fully established by the findings of the trial court).

9. Anderson v. Hale, 7 KyL 836.

10. State v. Van Pelt, 1 Ind. 304 (form of count on a bond against a substituted surety by which other sureties were released, showing these facts).

11. Powers v. Ware, 2 Pick. (Mass.) 451. See also U. S. v. Spalding, 27 F. Cas. No. 16,365, 2 Mason 478 (holding that if the alteration is made by the obligee himself—as by tearing off a seal or canceling a bond in consequence of fraud or imposition practiced by the obligor—the obligee may still declare on the bond as the deed of the party, and set forth the special facts in the profert).

12. Lee v. Alexander, 9 B. Mon. (Ky.) 25, 48 AmD 412; Medlin v. Platte County, 8 Mo. 235, 40 AmD 135; Mathis v. Mathis, 20 N. C. 46; Waugh v. Bussell, 5 Taunt. 707, 1 ECL 362, 128 Reprint 868 (where plaintiff first declared on the bond and on oyer craved set out the condition as it appeared in the bond as changed, and, upon the plea of non est factum and proof of a change by a stranger, plaintiff was nonsuited. Thereupon he brought another action and upon oyer craved set out the condition as it was originally executed, and there was a verdict for plaintiff on the issue of non est factum).

[a] **The earlier doctrine** that a deed altered in an immaterial point by a party, or by a stranger in a material part, etc., became void (see supra §§ 9, 83, 104) "not without good reason, has been supposed to have been derived from the ancient technical forms of pleading in cases of deeds, and from principles applicable to proferts." Nichols v. Johnson, 10 Conn. 192, 197 (further indicating that, whatever was the origin of the principle, it has been relaxed in modern times, and that in Read v. Brookman, 3 T. R. 151, 100 Reprint 504, it was for the first time settled that the loss or destruction of a deed would excuse a profert).

13. York v. Janes, 43 N. J. L. 332; Atkinson v. Hawdon, 2 A. & E. 628, 29 ECL 293, 111 Reprint 242. Compare Winters v. Mowrer, 163 Pa. 239, 29 A 916 (where it was held that, the action being on the instrument, the question of the right to recover on the original consideration was not before the appellate court).

[a] **Complaint held sufficient** to authorize a recovery on the original consideration see Savage v. Savage, 36 Or. 268, 59 P 461.

[b] **For form of petition setting up innocent change** of note and to recover on original consideration see Krause v. Meyer, 32 Iowa 566.

14. See supra §§ 15, 16.

15. St. Joseph State Sav. Bank. v. Shaffer, 9 Nebr. 1, 1 NW 980, 31 AmR 394.

[a] **Pleadings taken as amended.**— Although plaintiff may recover on the original contract, if the alteration complained of is not shown to be fraudulent, he does not recover on the original contract as alleged in defendant's answer; but, when he abandons the note as a cause of action and proceeds on the original indebtedness, it will be taken as if he had amended the complaint, substituting that cause of action, and to meet this defendant is entitled to amend his answer. Wyckoff v. Johnson, 2 S. D. 91, 48 NW 837. But see Bowser v. Cole, 74 Tex. 222, 11 SW 1131.

16. Savage v. Savage, 36 Or. 268, 59 P 461.

17. Savage v. Savage, 36 Or. 268, 59 P 461.

18. U. S.—Wood v. Steele, 6 Wall. 80, 18 L. ed. 725; Speake v. U. S., 9 Cranch 28, 3 L. ed. 645.

Ala.—Hoobler v. International Harvester Co., 64 S 567 (holding that where, in detinue, plaintiff claimed under chattel mortgage defendant was entitled to show, under a plea of non est factum, that the property sued for was not covered by the mortgage at the time it was executed); McCaskey Register Co. v. Bennett, 6 Ala. A. 185, 60 S 541 (holding that a plea of non est factum is supported by evidence that an alleged written contract was altered without consent after it had been signed).

Conn.—Mahaiwe Bank v. Douglass, 31 Conn. 170 (holding that under the Practice Act the defense of alteration is available under the general issue without notice of defense).

Del.—Herdman v. Bratten, 2 Del. 396 (holding that where a surety signs a bond upon condition that others named in the body thereof should also sign, and the latter never sign, but the bond is presented with their names erased, the proper plea is non est factum).

Ill.—Pankey v. Mitchell, 1 Ill. 383; Conkling v. Olmstead, 63 Ill. A. 649; Soaps v. Eichberg, 42 Ill. A. 375 (where, however, it was said that a special plea would be more appropriate); Yost v. Minneapolis Harvester Works, 41 Ill. A. 556.

Ind.—Fudge v. Marquell, 164 Ind. 447, 72 NE 565, 73 NE 895 (holding that, where the plea is non est factum in general terms, evidence is admissible thereunder to show material subsequent alterations); McKinney v. Cabell, 24 Ind. A. 676, 57 NE 598. See also Emmons v. Meeker, 55 Ind. 321. But see Moorman v. Barton, 16 Ind. 206 (holding that evidence of alteration did not negative what plaintiff was bound to prove and consequently

less a special plea is required by a rule of court, or statute.[19] But where the defense is not that defendant did not in fact make the contract charged in the declaration, but is that, by reason of some unlawful practice, the holder has disabled himself from suing upon the contract, the matter should be specially pleaded, although the authorities are not entirely harmonious on this subject.[20]

[§ 161] **2. Statutory Denials.** Assimilating the statutory general denial to the general issue at common law, the defense of an alteration is available under a general denial of all the allegations of the complaint, as such a defense is not new matter within the rule requiring new matter to be pleaded affirmatively.[21] An answer specifically denying the execution of the instrument sued on is sufficient.[22] But it has been held that where the change affects only the nature and kind of evidence

was not admissible under a general denial).

Md.—Edlen v. Sanders, 8 Md. 118; Union Bank v. Ridgely, 1 Harr. & G. 324.

Miss.—Henderson v. Wilson, 7 Miss. 65.

Mo.—Whitmer v. Frye, 10 Mo. 348. But see Paris Nat. Bank v. Nickell, 34 Mo. A. 295, where a note was signed by a surety and indorsed by him to be delivered to a discounting bank, and was altered by the bank at the time of the delivery, it was held that the alteration could be shown under a general denial, because the change was made before the delivery, the court saying, however, that if the change had been made after delivery to the bank it would have been matter in avoidance, to be specially pleaded.

Nebr.—Gandy v. Bissell, 72 Nebr. 356, 100 NW 803 [rev reh 5 Nebr. (Unoff.) 184, 97 NW 632].

Pa.—Burgwin v. Bishop, 91 Pa. 336 (holding that non est factum puts in issue not only the execution of the instrument but also its continuance as the deed of both parties, without material alteration, to the date of the plea); Smith v. Weld, 2 Pa. 54 (covenant on a bond); Barrington v. Washington Bank, 14 Serg. & R. 405 (covenant on a lease).

Vt.—Churchill v. Capen, 84 Vt. 104, 78 A 734 (holding that where a grantee in a deed, who fraudulently altered it in a material matter after delivery without the consent of the grantor, sues at law on the deed in its altered form, the grantor may plead non est factum and give the matter of alteration in evidence, because at the time of the plea the deed is not the grantor's deed).

Va.—Archer v. Ward, 9 Gratt. (50 Va.) 622.

Eng.—Hirschman v. Budd, L. R. 8 Exch. 171; Knight v. Clements, 8 A. & E. 215, 35 ECL 559, 112 Reprint 819; Calvert v. Baker, 7 Dowl. P. C. 17.

Ont.—Meredith v. Culver, 5 U. C. Q. B. 218. But see Leslie v. Emmons, 25 U. C. Q. B. 243 (where plaintiff declared upon a note as made by defendants jointly and severally, and Hagarty, J., was in doubt as to whether the interlineation of the words "jointly and severally," of which no explanation was offered, could be taken advantage of under non fecit or whether a special plea was requisite).

[a] **Under the Pennsylvania Procedure Act** of May 25, 1887 (P. L. 271), sureties on a bond were authorized to take advantage of a material alteration therein under the general issue. Mundy v. Stevens, 61 Fed. 77, 9 CCA 366.

[b] **Non acceptavit.**—Cock v. Coxwell, 2 C. M. & R. 291; Crotty v. Hodges, 4 M. & G. 561, 43 ECL 292, 134 Reprint 231; Meredith v. Culver, 5 U. C. Q. B. 218. But see Parry v. Nicholson, 2 D. & L. 640.

[c] **A plea of non assumpsit** in an action of assumpsit on a promissory note raises the issue of alteration in the note. Goss v. Whitehead, 33 Miss. 213; Henderson v. Wilson, 7 Miss. 65; Oakey v. Wilcox, 4 Miss. 330; Low v. Merrill, 1 Pinn. (Wis.) 340. But see Davidson v. Cooper, 1 D. & L. 377 [aff 13 L. J. Exch. 276].

[d] **Nil debet** is not a proper plea to raise the question of alteration in an action of debt on a bond. Defendant should plead non est factum. Zeigler v. Sprenkle, 7 Watts & S. (Pa.) 175. But see Crews v. Farmers' Bank, 31 Gratt. (72 Va.) 348 (where, in an action of debt on a note, the plea of nil debet, along with which was filed an affidavit stating the fact of the alteration, appears to have been regarded as a sufficient plea).

[e] **Amended bail bond.**—In Gragg v. State, 18 Tex. A. 295, a proceeding to forfeit a bail bond, the court permitted the district attorney to amend the recital in the bond without the knowledge or consent of the obligor, and upon a plea of non est factum it was held that the plea had reference to the bond only as amended; that as defendant actually executed the identical bond which had been amended, the proper practice was to plead specially. See also Heath v. State, 14 Tex. A. 213.

19. See statutory provisions.

[a] **In Florida** under rules 66 and 67 governing the practice in the circuit courts in common-law actions, and Gen. St. (1906) § 1465, an alleged alteration in a note or other instrument sued on must be specially pleaded, and cannot be shown or proved under a plea of non est factum or under a general plea simply denying the execution, making, and delivery of the instrument sued on. Tedder v. Fraleigh-Lines-Smith Co., 55 Fla. 496, 46 S 419.

[b] **In Kentucky** under a simple plea of non est factum in an action on a promissory note defendant cannot prove that the note sued on has been altered as these facts should be specially pleaded. Wall v. Muster, 63 SW 432, 23 KyL 556.

[c] **Necessity of pleading alteration in affidavit of defense,** under a rule of court that a fact set forth in plaintiff's statement, and not denied in the affidavit of defense, is regarded as established see Sober v. Moony, 48 Pa. Super. 92.

20. Hirschman v. Budd, L. R. 8 Exch. 171 [dist Hemming v. Trenery, 9 A. & E. 926, 36 ECL 480, 112 Reprint 1465] (defense of alteration of date held available under traverse of acceptance); Cock v. Coxwell, 2 C. M. & R. 291 (holding that the defense of alteration is open on non acceptavit, because it may be then said that he has pleaded specially by saying that he did not accept the bill declared on and produced in evidence); Parry v. Nicholson, 2 D. & L. 640; Mason v. Bradley, 1 D. & L. 380; Calvert v. Baker, 7 Dowl. P. C. 17 (holding that in an action by an indorsee against the acceptor of a bill, not stated to be payable at any particular place, it is a good defense, under a plea that he did not accept the bill declared on, that after he had accepted it generally it was altered without his knowledge by the addition of a memorandum making it payable at a banker's); Leslie v. Emmons, 25 U. C. Q. B. 243, 244 (where Hagarty, J., in speaking of an interlineation in a note, said: "Whether the objection as to the interlineation required a special plea is a point involved in much doubt, and the text writers differ in their views"). See also Knight v. Clements, 8 A. & E. 215, 35 ECL 559, 112 Reprint 819.

21. Kan.—J. I. Case Threshing Mach. Co. v. Peterson, 51 Kan. 713, 33 P 470.

Mass.—Cape Ann Nat. Bank v. Burns, 129 Mass. 596.

Nebr.—Gandy v. Bissell, 72 Nebr. 356, 100 NW 803 [rev reh 5 Nebr. (Unoff.) 184, 97 NW 632]; Walton Plow Co. v. Campbell, 35 Nebr. 173, 52 NW 883, 16 LRA 468 (answer, in an action to foreclose a mortgage, denying each and every allegation of the petition).

N. Y.—Farmers' L. & T. Co. v. Siefke, 144 N. Y. 354, 39 NE 358; Schwarz v. Oppold, 7 Daly 121 [aff 74 N. Y. 307].

Wash.—Fairhaven v. Cowgill, 8 Wash. 686, 36 P 1093.

Wis.—Schwalm v. McIntyre, 17 Wis. 232.

[a] **Reason for rule.**—In Boomer v. Koon, 6 Hun 645, 646, Smith, J., said: "It is true that under the Code there is strictly no general issue, but a general denial of each and every allegation of a complaint, or a specific denial of any particular allegation therein, necessarily puts every such allegation in issue. Every fact thus put in issue, must be proved by the party affirming such fact. The making, execution and delivery of the note described in the plaintiff's complaint, he was, under the denial in the answer, bound to prove. Proof of the defendant's signature to such note was, doubtless, prima facie evidence of such facts; but prima facie evidence is never conclusive. It may always be repelled by proof directed and adapted to show the actual facts. Under a general or special denial a defendant must be permitted to disprove the essential facts, relied on to establish the cause of action. The defendant denies in fact and effect, that he ever made the promissory note described in the complaint. The proof that the note produced on the trial had been altered in a material part, was clearly proof that it was not his note; that he did not make and deliver such note. It overcame and repelled the prima facie evidence afforded by proof of his signature, and destroyed the cause of action. Such proof was admissible at common law under a plea of non est factum in an action of debt or covenant. (1 Chitty Pleadings, 482, 483)."

[b] **In Texas** it seems that the issue of alteration is not raised by a general denial. See Marrow v. Richardson, 6 SW 763; Connor v. Thornton, (Civ. A.) 51 SW 354. But see Stephens v. Anderson, (Civ. A.) 36 SW 1000.

22. Fudge v. Marquell, 164 Ind. 447, 72 NE 565, 73 NE 895; Palmer v. Poor, 121 Ind. 135, 22 NE 984, 6 LRA 469; Emmons v. Meeker, 55 Ind. 321; Conner v. Sharpe, 27 Ind. 41; Pope v. Branch County Sav. Bank, 23 Ind. A. 210, 54 NE 835; Lincoln v. Lincoln, 12 Gray (Mass.) 45, 47 (where Metcalf, J., said: "The evidence that the note was altered, after the defendant signed it, was admissible under the defendant's answer, which denied that he ever made or signed the writing called a promissory note in the plaintiff's declaration. Under this answer, the plaintiff was required to prove not only the defendant's signature, but also that he signed the note declared on; that is, a note for five thousand one hundred and eight dollars. On the plaintiff's giving prima facie evidence of what he was required to prove, the defendant might rebut and control that evidence, by showing that the note had been altered after it was signed. And no law, of which we have any knowledge, requires a defendant to give a plaintiff notice, written or oral, of the evidence which he intends to produce by way of rebutting that which the

required to prove the execution of the instrument, evidence of such change is not admissible under a general denial of execution.[22]

[§ 162] **3. Necessity of Pleading—a. In General.** When defendant has notice of an alteration of an instrument which is the foundation of the action, he should raise the issue by appropriate plea or answer,[24] as where the note or bond is set out or annexed, if he wishes to cast the burden of proof upon plaintiff to explain the apparent change.[25] So also if defendant wishes to avoid the effect of an alteration set up against an instrument under which he claims, he cannot do so if his pleadings are framed upon the theory that there is in fact no alteration.[26]

Where, however, the question arises incidentally as one of evidence purely, and not as part of the pleading,[27] or where the matter complained of is no part of the instrument in suit,[28] or where the instrument sued on, when offered in evidence, shows on its face that there has been a material and unauthorized alteration since delivery, it may be excluded from evidence on defendant's objection, although defendant has not pleaded the alteration;[29]

plaintiff must produce in order to support his case"); Paris Nat. Bank v. Nickell, 34 Mo. A. 295 (holding that evidence of alteration was admissible under a denial of execution where the alteration was made before the instrument came into plaintiff's hands. The court further indulged in a dictum to the effect that, if the alteration had been made after the instrument came into plaintiff's possession, the defense must have been specially pleaded, being in such case matter in confession and avoidance; but no such distinction has been recognized in the decisions).

[a] **Parol evidence** is admissible to show that a bond sued on was executed in blank and filled up contrary to authority, under a denial of execution and delivery. Richards v. Day, 137 N. Y. 183, 33 NE 146, 33 AmSR 704, 23 LRA 601.

[b] **Denial of subscription.**—The defense that a subscription for shares was altered by increasing the number of shares may be raised by an answer denying that defendant subscribed or made the contract mentioned in the petition. Bery v. Marietta, etc., R. Co., 26 Oh. St. 673.

[c] **Under a verified denial** of the execution of an instrument sued upon, (1) defendant may introduce evidence that such instrument was altered in a material stipulation since its execution. Coburn v. Webb, 56 Ind. 96, 26 AmR 15. See also infra § 164. (2) A verified denial of the execution of a note puts in issue the alteration of indorsements of credits upon the back thereof, where such indorsements are deemed part of the contract because made at the time of execution. Kurth v. Farmers', etc., State Bank, 77 Kan. 475, 94 P 798, 127 AmSR 428, 15 LRANS 612.

23. Roberts v. Nelson, 65 Minn. 240, 242, 68 NW 14 (holding that in an action by a lessor for the cancellation and forfeiture of the lease, under a simple denial of execution, evidence was not admissible to show that after execution the signature of a second witness and a certificate of acknowledgment were added to the instrument, since such addition did not affect the terms of the instrument or the rights of the parties as between themselves. Mitchell, J., said: "The case therefore resolves itself into the question whether, under a denial of the execution of an instrument, a party can introduce evidence to show that after he executed it it was avoided, not by altering its terms and stipulations, but by adding the name of a witness and a certificate of acknowledgment, which at most only go to the probative force of the instrument when offered in evidence. Our opinion is that the question must be answered in the negative. Under the Code the general rule is that under a denial in an answer no facts can be proved except such as show that plaintiff's statement of facts is untrue. Under a denial a party should not be permitted to show any fact that does not go to disprove the facts alleged. Evidence of facts which admit the act charged, but which avoid its force and effect, or which discharge its obligation, is inadmissible. Now, the position of the defendant in this case was, in effect, that under a denial of the execution of the lease he proposed, while admitting its execution, to prove subsequent alterations which avoided it, and discharged its obligation. It has been held that where the terms and stipulations of a written contract have been altered, and the contract is declared on as altered, the alteration may be proved under a denial. Schwarz v. Oppold, 74 N. Y. 307. This position may be strictly logical, because proof of the alteration shows that the plaintiff's statement of facts is untrue; that is, shows that the defendant never executed any such instrument as alleged. But this is as far as the rule should be extended with due regard to the spirit of the code system of pleading. It is true that the instrument as set out in the complaint contains the name of the second witness, and the certificate of acknowledgment; but these are no part of the contract, and are mere surplusage, and, if they had been entirely omitted, there would have been no variance between the pleading and the proof"). But compare Adams v. Frye, 3 Metc. (Mass.) 103.

24. Warner v. Spencer, 7 J. J. Marsh. (Ky.) 340 (holding that the defense could not be raised by demurrer to the petition); Provenzano v. Glaesser, 122 La. 378, 47 S 688; Cantrelle v. Percy, 17 La. 520 (holding that, where a note was declared on without any reference to the fact that the maker's name had been erased, if any material circumstance existed to show that the erasure operated to discharge defendant it was his duty to avail himself of it in his answer); Marrow v. Richardson, (Tex.) 6 SW 763 (holding that, where in an action on a note non est factum is not pleaded, there is no error in admitting the instrument in evidence, although the word "renewed" written across its face has been erased).

[a] **After admitting the execution** of a bond pleaded in the complaint with the alleged alteration, defendant cannot avail himself of an interlineation appearing in the bond as a defense. Kleeb v. Bard, 12 Wash. 140, 40 P 733.

[b] **On appeal** the question of alteration, although raised in the brief, will not be considered, if it was not raised by defendant's pleading. Heard v. Tappan, 116 Ga. 930, 43 SE 375.

[c] **Affidavit of defense.**—Where a written instrument showing an erasure on its face is set forth in plaintiff's statement, objection to the instrument on account of the erasure cannot be made at the trial, where it has not been made in the affidavit of defense, under a rule of court providing that a fact set forth in plaintiff's statement, and not denied in the affidavit of defense, is regarded as established. Sober v. Moony, 48 Pa. Super. 92.

25. Zeigler v. Sprenkle, 7 Watts & S. (Pa.) 175 (holding that where a suit is on a bond, with the words or interlineations claimed by defendant to be alterations, and defendant wishes to cast upon plaintiff the burden of explaining such alterations, he must plead non est factum; otherwise the bond will be admissible without such explanation, as where defendant pleads nil debet); Matossy v. Frosh, 9 Tex. 610 (where defendant pleaded certain payments in reconvention without attacking the validity of the note sued on, and it was held that the objection could not be taken at the trial, there being no variance).

[a] **Alteration not apparent on copy filed.**—Where there is a manifest alteration on the face of a bond, which alteration does not appear in the copy filed, a rule of court making it unnecessary for plaintiff to prove the execution of a bond unless defendant, at or before the time of filing his plea, shall deny the execution of the instrument does not apply, and the burden of explaining the alteration is on plaintiff. Nesbitt v. Turner, 155 Pa. 429, 26 A 750.

26. Russell v. Reed, 36 Minn. 376, 31 NW 452 (holding that, in an action in equity to restrain the foreclosure of a mortgage on the ground of an alleged fraudulent alteration thereof, where the answer alleges the execution of the notes specifically described in the mortgage, and that they and none others were inserted in the mortgage, and that the mortgage was given to secure them and was not altered in any particular, the theory that defendant altered the mortgage through an honest mistake is not within the issues made by the pleadings).

27. Moorman v. Barton, 16 Ind. 206 (holding, in an action on a note, that a general denial, not verified by affidavit, was insufficient to admit evidence of an alteration; but the court said that, had the alteration arisen upon an instrument offered in evidence which had not been made a part of the pleading, the point might have arisen as to the presumption touching erasures and interlineations). See also Equitable Life Assur. Soc. v. Meuth, 145 Ky. 746, 141 SW 37 [mod 145 Ky. 160, 140 SW 157, AnnCas1912B 661].

[a] **Where a written instrument, not declared on as the basis of the action,** is offered in evidence, defendant may, without formal pleadings, show that it has been materially and fraudulently altered since execution. W. H. Howard Piano Co. v. Glover, 7 Ga. A. 548, 67 SE 277; Coppock v. Lampkin, 114 Iowa 664, 87 NW 665.

28. White v. Johns, 24 Minn. 387 (holding that where there is a note preceding the signatures of the makers of a bond to the effect that certain words have been inserted in the bond before the signature thereto, such note is no part of the bond itself, but is simply a piece of evidence, and in order to set up an alteration of the bond it is not necessary to make any allegation with reference to the note; and the note being available only as an admission or piece of evidence, it is competent for defendant to controvert it by evidence going to show that he never made it, and to do this it is obviously unnecessary to plead that he never made it).

29. Park v. Glover, 23 Tex. 469; Kansas Mut. L. Ins. Co. v. Coalson, 22 Tex. Civ. A. 64, 54 SW 388; Pierce v. Northey, 14 Wis. 9 (holding that where the complaint declared on the instrument in its original, unaltered form, and the instrument when offered in evidence was different from that described in the complaint, de-

and if defendant does not know of the alteration until it is brought out in the evidence, an offer then made to plead so as to raise the issue of an alteration is in time.[30]

[§ 163] **b. Issue on Indorsements Only.** In an action by an indorsee against a prior indorser, alleging the several indorsements before that of plaintiff, if the only issue tendered is on the indorsements the bill is admissible to prove the indorsements, notwithstanding an apparent change on the face of the bill.[31]

[§ 164] **4. Denial of Signature or Execution under oath.**[32] Statutes making proof of execution of an instrument unnecessary, and providing that the genuineness of the signature shall be deemed to be admitted unless such execution or signature shall be denied under oath, are sometimes applied to the defense of an alteration.[33] Under some of these statutes a plea or answer setting up an alteration in the instrument sued on operates as an admission of the genuineness of the signature and of the original execution of the instrument;[34] but it does not prevent defendant from showing that the instrument has been materially altered since he executed it.[35]

[§ 165] **5. Relief in Equity.** If defendant sets up the alteration of an instrument which is the foundation of a bill in equity, he cannot have af-

fendant might show that the discrepancy arose from material alterations therein notwithstanding he had pleaded no denial of execution and his answer admitted execution of the instrument as set out in the complaint).

[a] **Erasure of defendant's name.**—In a suit against three defendants on notes signed by them it appeared, when the notes were produced in evidence, that the name of one of defendants had been erased from the notes. The erasure being apparent on the face of the notes, it was held that this was a cancellation of the contract so far as such defendant was concerned and that he could take advantage of it without pleading non est factum. Daniel v. Daniel, Dudl. (Ga.) 239.

30. Panky v. Mitchell, 1 Ill. 383 (holding that, where an action was brought on a lost note and defendant did not know of an alteration therein until the fact came out in the evidence, he should have been allowed to file his plea notwithstanding the merits had been gone into). See also Runnion v. Crane, 4 Blackf. (Ind.) 466.

[a] **Setting up defense by amendment.**—In McVey v. Ely, 5 Lea (Tenn.) 438, it was held that under the circumstances of the case defendant was properly allowed to amend his answer so as to set up an alteration of the note sued on, where it did not appear that he had knowledge of the alteration when his original answer was filed.

31. Sibley v. Fisher, 7 A. & E. 444, 34 ECL 243, 112 Reprint 537 (because the making of the bill itself was admitted on the record).

32. See statutory provisions. See also Bills and Notes [8 Cyc 186]; Pleading [31 Cyc 529].

33. U. S.—U. S. v. Linn, 1 How. 104, 11 L. ed. 64 (holding that a plea alleging alteration of the instrument sued on should properly conclude with a verification and not to the country).

Ala.—Yancy v. Gordon, 172 Ala. 439, 441, 55 S 239, AnnCas1913E 251 and note [cit Cyc] (holding that a defendant in an action of debt on a specialty, who by a verified plea denies the execution of the instrument declared on in the declaration, setting out the material features of the instrument, may offer evidence to show the materially altered condition of the instrument after signing, and to do so may show the real agreement between defendant and plaintiff's admitted agent within the res gestæ of the transaction); Smith v. Hiles-Carver Co., 107 Ala. 272, 18 S 37; Lesser v. Scholze, 93 Ala. 338, 9 S 273.

Colo.—Thackaray v. Hanson, 1 Colo. 365.

Ill.—Dewey v. Warriner, 71 Ill. 198, 22 AmR 91.

Ind.—Feeney v. Mazelin, 87 Ind. 226; Coen v. Funk, 18 Ind. 345; Moorman v. Barton, 16 Ind. 206 (holding that the code restricts evidence under the general denial to that which tends to negative what the opposite party is bound to prove, and that evidence of an alteration is inadmissible under a plea which amounts merely to a non est factum and is not verified); Riley v. Harkness, 2 Blackf. 34.

Iowa.—Hessig-Ellis Drug Co. v. Todd-Baker Drug Co., 153 Iowa 11, 132 NW 866 (holding that, under Code [1873] § 2730, providing that when a written instrument is referred to in a pleading, and the same or a copy thereof is attached to such pleading, the signature thereto shall be deemed genuine and admitted, unless the person whose signature the same purports to be shall, in a pleading or writing filed within the time allowed for pleading, deny under oath the genuineness of such signature, an answer which denies the genuineness of a signature set out in a petition does not raise any question as to a material alteration of the contract, since such alteration will not destroy the genuineness of the signature); Carle v. Cornell, 11 Iowa 374 (holding that a sworn answer wherein defendant "denies that any promissory note of the description and for the amount claimed in plaintiff's petition was for a valuable consideration assigned and indorsed to the said plaintiff by him the said Cornell or by any other person with his knowledge or consent, at the time and in the manner set forth in plaintiff's petition" is not such a denial of the signature to the assignment of the note as to put it upon plaintiff to prove the signature under a statute making such proof necessary where the signature is denied under oath).

Miss.—Hemphill v. Alabama Bank, 14 Miss. 44 (holding that a defendant cannot, under a plea of non assumpsit, avail himself of the defense that the note on which he is sued has been changed from the note which he authorized to be executed for him; that such a defense is admissible only when the pleadings are under oath, upon the authority of Green v. Robinson, 4 Miss. 105, holding that by pleading in chief defendant admits the execution of the note). But see Goss v. Whitehead, 33 Miss. 213 (where the maker of a promissory note signed the same in blank, restricting his agent as to the amount to be inserted, and it was held that the maker might prove under the general issue a violation of his instructions by the agent and notice of that fact in the holder, in avoidance of the excess so inserted; that in such a case, the note being valid as to some amount inserted and void only as to an excess, its execution could not be denied under oath).

Va.—Archer v. Ward, 9 Gratt. (50 Va.) 622 (holding that under a statute providing in effect that in an action upon an indorsement, in which the indorsement is alleged, such indorsement shall be taken as genuine, without proof of the handwriting unless defendant shall file his affidavit denying the indorsement, without such affidavit an alteration of the indorsement cannot be shown).

[a] **The plea may be rejected on motion,** if not sworn to, but it cannot be treated as a nullity. Riley v. Harkness, 2 Blackf. (Ind.) 34.

[b] **Plea treated as verified on appeal.**—Where a demurrer to the plea is overruled and a trial had which results in a judgment for plaintiff, on an appeal by defendant the plea must be considered and treated as presenting the defense as fully and efficaciously as if duly verified. Lesser v. Scholze, 93 Ala. 338, 9 S 273.

[c] **In an action against two defendants** on a note where the answer setting up an alteration of the note is verified by one defendant only, as against the one who does not verify, plaintiff need only produce the note without proof of execution. Feeney v. Mazelin, 87 Ind. 226.

[d] **Equivocal plea.**—In Ela v. Sprague, 3 Pinn. (Wis.) 323, it was held under such a statute that a denial on oath that defendant had ever signed the instrument as it read above his name was equivocal and not sufficient to put plaintiff to proof of execution.

[e] **Affidavit of fraud in procurement of signature.**—In Longwell v. Day, 1 Mich. N. P. 286, which was a suit on a promissory note, defendant filed an affidavit setting forth circumstances under which he was induced to sign the instrument, amounting to a fraud in the execution of the note, by inducing defendant to sign a paper with a condition, whereas the paper presented was one without a condition; and it was held that the language used in the affidavit must be taken as a denial of the execution of the note declared upon so as to cast upon plaintiff the burden of proving its execution.

34. Ala.—Brown v. Johnston, 135 Ala. 608, 33 S 683; Barclift v. Treece, 77 Ala. 528 (holding that under such a plea proof of the original signature of defendant is not necessary).

Conn.—Mahaiwe Bank v. Douglass, 31 Conn. 170.

Ga.—Gwin v. Anderson, 91 Ga. 827, 18 SE 43.

Iowa.—Graham v. Rush, 73 Iowa 451, 35 NW 518.

Pa.—Winters v. Mowrer, 163 Pa. 239, 29 A 916.

S. D.—Wyckoff v. Johnson, 2 S. D. 91, 48 NW 837.

Tex.—Muckleroy v. Bethany, 27 Tex. 551; Wells v. Moore, 15 Tex. 521; Davis v. Crawford, (Civ. A.) 53 SW 384; Rosenfield v. Rosenthal, (Civ. A.) 39 SW 193.

Va.—Crews v. Farmers Bank, 31 Gratt. (72 Va.) 348.

[a] **Estoppel by admission of execution.**—Where, in an action on a bill of exchange against the acceptor, the answer admits acceptance of the bill "as stated in the complaint," defendant is estopped by such admission from rasing the objection that the instrument has been altered, if the complaint declares on the bill in its altered form. Hunt v. Mitchell, 4 Thomps. & C. (N. Y.) 57. But compare Goldie v. Shuttleworth, 1 Campb. 70 (where an admission of the execution of the instrument was held not to prevent defendant from showing an alteration, he not having admitted executing it "as stated").

35. Del.—Vandergrift v. Hollis, 11 Del. 90.

Me.—Hewins v. Cargill, 67 Me. 554.

Mass.—Cape Ann Nat. Bank v. Burns, 129 Mass. 596.

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firmative relief by cancellation without a cross bill; but if a vitiating alteration is shown, the court will refuse to enforce the instrument and will dismiss the bill.[86]

Where injunctive relief is sought against an instrument on the ground that it has been materially altered, the bill, petition, or complaint should, as a matter of correct pleading, describe specifically the nature of the alleged alteration so that the court may ascertain whether or not it is material.[87]

Ratification or estoppel. An answer in such a proceeding merely denying the alteration does not entitle defendant to prove that plaintiff subsequently ratified the alteration or that he has estopped himself to set up the alteration.[88]

[§ 166] **6. Special Plea—a. In General.** Although an alteration since the execution of an instrument may be shown under a general issue plea, there is no reason why it may not be pleaded specially;[89] and this has been said to be the better practice.[90]

[§ 167] **b. Sufficiency—(1) In General.** A plea or answer specially setting up an alteration in bar of an action on a written instrument must allege, or state facts sufficient to show, that the alteration is material;[91] but it need not allege the legal con-

Miss.—Goss v. Whitehead, 33 Miss. 213; Henderson v. Wilson, 7 Miss. 65.

Mo.—Whitmer v. Frye, 10 Mo. 348.

Tex.—Ruis v. Campbell, 6 Tex. Civ. A. 714, 26 SW 295; Heath v. State, 14 Tex. A. 213. But see Fish Bros. Wagon Co. v. Adams, (Civ. A.) 146 SW 704. As to the sufficiency of the verification under the statute to put plaintiff to proof of execution see Strubling v. Atkinson, 79 Tex. 162, 14 SW 1054; Stephens v. Anderson, (Civ. A.) 86 SW 1000.

Vt.—Hilgelow v. Stilphen, 35 Vt. 521 (holding that a rule, requiring notice that upon the trial defendant would deny the execution of the note, would not apply to a defense of an alteration but only to a denial of the genuineness of the signature).

Wis.—Schwalm v. McIntyre, 17 Wis. 332; Low v. Merrill, 1 Pinn. 340.

[a] **Where the instrument was executed by both parties** the statute does not apply, and in such case an unverified answer is sufficient. Kelly v. Thuey, 143 Mo. 422, 45 SW 300.

[b] **Where the instrument is not the basis of the action** the statute does not apply. Coppock v. Lampkin, 114 Iowa 664, 87 NW 665; Park v. Glover, 23 Tex. 469.

[c] **Must be signature of person to be charged.**—Such a statute does not apply to the case of the signature of an attesting witness to the note sued on, which attestation is relied on to take the case out of the statute of limitations, and defendant may show that such signature was fraudulently affixed after delivery, although he has not specially denied its genuineness. Holden v. Jenkins, 128 Mass. 446.

86. Ray v. Shrader, 50 Miss. 326.

87. Jeffrey v. Rosenfeld, 179 Mass. 506, 61 NE 49.

[a] **Sufficient petition.**—In a proceeding to restrain the enforcement of a judgment on a note on the ground of fraudulent alteration of such note, a petition is sufficiently specific which alleges that plaintiff signed a note for one thousand seven hundred dollars as surety for W; that, after his signature had been placed on it, it was fraudulently altered, either by W or by defendant, so as to make it a note for two thousand and forty-six dollars; and that judgment was taken against him on this altered note. Hamblen v. Knight, 60 Tex. 36.

[b] **Where a bill to restrain foreclosure of a mortgage** because of a material alteration in the note without plaintiff's consent contains no allegation of fraud or of fault of the mortgagee, and fails to allege payment or offer of payment, it does not state a cause for relief. Jeffrey v. Rosenfeld, 179 Mass. 506, 61 NE 49.

[c] **Objection to complaint too late.**—In a proceeding to restrain the foreclosure of a mortgage on the ground that it has been fraudulently altered, it is too late, after the trial, to object that the complaint is insufficient for lack of an offer to pay the original consideration secured by such mortgage. Russell v. Reed, 36 Minn. 376, 31 NW 452.

88. Blackman v. Oakland First Nat. Bank, 44 Nebr. 622, 62 NW 1078, 48 AmSR 753, 28 LRA 577.

89. Daniel v. Daniel, Dudl. (Ga.) 239; Soaps v. Eichberg, 42 Ill. A. 375; Davis v. Cole, 1 Tyler (Vt.) 262 (holding that defendant was not obliged to plead the general issue of non est factum); Langton v. Lazarus, 9 L. J. Exch. 89.

[a] **Answer not frivolous.**—In an action on a promissory note, an answer admitting the execution of the note but alleging that it was materially altered by plaintiff after execution by changing the date thereof is not sham and frivolous, and cannot be stricken out as such. Rogers v. Vosburgh, 57 N. Y. 228.

[b] **Striking out on demurrer** a plea alleging facts which show such an alteration as to avoid the instrument is reversible error. Steinau v. Moody, 100 Ga. 136, 28 SE 30; Benjamin v. McConnel, 9 Ill. 536, 46 AmD 474.

[c] **Rendition of a judgment on the pleadings** in plaintiff's favor while a plea of material alteration remains undisposed of is reversible error. Black v. De Camp, 75 Iowa 105, 39 NW 215.

90. Boomer v. Koon, 6 Hun (N. Y.) 645, 647 (where Smith, J., said: "It, doubtless, would be very proper, and, perhaps, the better practice where the defense in an action upon a promissory note or other written instrument is, that the same had been fraudulently altered after its execution, to set up such defense in the answer to avoid surprise at the trial"). See also Soaps v. Eichberg, 42 Ill. A. 375.

91. U. S.—Speake v. U. S., 9 Cranch 28, 3 L. ed. 645.

Ala.—Jordan v. Long, 109 Ala. 414, 19 S 843; Lesser v. Scholze, 93 Ala. 338, 9 S 273 (where the plea was formally bad for want of verification); Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140; Hill v. Nelms, 86 Ala. 442, 5 S 796.

Ark.—Overton v. Matthews, 35 Ark. 146, 37 AmR 9 (answer good as between maker and payee but not as between maker and innocent purchaser); Gist v. Gans, 30 Ark. 265.

Cal.—Sherman v. Rollberg, 11 Cal. 38 (answer held sufficient, although loosely drawn).

Colo.—Hoopes v. Collingwood, 10 Colo. 107, 13 P 909, 3 AmSR 565.

Ga.—McCauley v. Gordon, 64 Ga. 221, 37 AmR 68; Johnson v. Brown, 51 Ga. 495; Wheat v. Arnold, 36 Ga. 479.

Ill.—Benjamin v. McConnell, 9 Ill. 563, 46 AmD 474.

Ind.—Monroe v. Paddock, 75 Ind. 422 (affidavit setting up alteration as basis for setting aside default judgment on note); Meikel v. State Sav. Inst., 56 Ind 555, Runnion v. Crane, 4 Blackf. 466 (non assumpsit, with affidavit of alteration appended).

Iowa.—Hessig-Ellis Drug Co. v. Todd-Baker Drug Co., 155 Iowa 11, 152 NW 566 (amended answer held insufficient to raise issue of material alteration); Maguire v. Eichmeier, 169 Iowa 511, 151 NW 395 (an answer substantially sufficient in absence of direct attack); Black v. De Camp, 75 Iowa 105, 39 NW 215.

Kan.—Horn v. Newton City Bank, 32 Kan. 518, 4 P 1022.

Ky.—Hall v. Commonwealth Bank, 5 Dana 258, 30 AmD 685 (where a form of special plea setting up an alteration in a note was held sufficient).

Mass.—Draper v. Wood, 112 Mass. 315, 17 AmR 92 (answer by one promisor first denying execution of note, and setting up in the event the signature is proved that a material alteration was made by his co-promisor without defendant's knowledge and before delivery to the payee).

Mo.—Burton v. American Guarantee Fund Mut. F. Ins. Co., 88 Mo. A. 392 (answer); Law v. Crawford, 67 Mo. A. 150 (holding that in an action on a note an answer denying that defendant had at any time executed the instrument sued on in its present form, and alleging that when signed it formed part of an agreement from which it had since been fraudulently detached with intent to cheat and defraud defendant, etc., was sufficient to put in issue the execution of the instrument sued on); Paris Nat. Bank v. Nickell, 34 Mo. A. 295 (answer in nature of non est factum).

Eng.—Atkinson v. Hawdon, 2 A. & E. 628, 29 ECL 293, 111 Reprint 293; Mollett v. Wackerbarth, 5 C. B. 181, 57 ECL 181, 136 Reprint 845; Gardner v. Walsh, 5 E. & B. 83, 85 ECL 83, 119 Reprint 412; Warrington v. Early, 2 E. & B. 763, 75 ECL 763, 118 Reprint 953; Bell v. Gardiner, 4 M. & G. 11, 43 ECL 16, 134 Reprint 5.

Ont.—Campbell v. McKinnon, 18 U. C. Q. B. 612.

[a] **Special plea of non est factum.**—(1) A plea of alteration is in legal effect a special plea of non est factum. Lesser v. Scholze, 93 Ala. 338, 9 S 273; Brown v. Colquitt, 73 Ga. 59, 54 AmR 867; Moorman v. Barton, 16 Ind. 206; Woolfolk v. Bank of America, 10 Bush (Ky.) 504. (2) So an answer admitting the signature but alleging a material alteration since the execution of the instrument without defendant's knowledge or consent, and specifying wherein such alteration consists, is good as a special plea of non est factum and not open to the objection that it both admits and denies the execution of the instrument. Wiltfong v. Schafer, 121 Ind. 264, 23 NE 91.

[b] **Generality and indefiniteness.**—In an action on a note a plea alleging that plaintiff had "erased and changed the same for the purpose of relieving said McFarlin, whereby one of the endorsers, H. F. McFarlin, has been released," was demurrable for its generality and indefiniteness of averment, in that it did not show with any degree of certainty in what respect the alleged release consisted, and also that it failed to aver any consideration for the release. Schatz v. Moore, 102 Ala. 468, 470, 14 S 877.

[c] **How defendant could be injured by the alteration (1) has also been held to be a necessary allegation.** Drexler v. Smith, 30 Fed. 754 (holding that in an action on a note a plea setting up that the payee wrote on the face of it before maturity and without the maker's consent an extension of the time of payment was

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clusion that the alteration rendered the instrument void.[42] Thus a plea or answer which sets up substantially that the instrument relied upon by the opposite party has been altered in particular respects after execution, with the knowledge or consent of the other party and without the knowledge or consent of the pleader, is good.[43]

[§ 168] **(2) Character of Change—(a) In General.** A plea setting up an alteration must aver in what way or manner the instrument has been changed, and not state a mere conclusion of the pleader.[44]

[§ 169] **(b) Denial of Execution and Setting Up Character of Instrument Actually Signed.** Where a defendant denies the execution of the instrument sued on, but admits the execution of an instrument which he sets out, the plea is good.[45]

[§ 170] **(3) Time of Change.**[46] A plea or answer setting up an alteration should allege that it was made after the execution and delivery of the instrument.[47] Thus it is not sufficient to allege merely that the alteration was made after defendant had signed the instrument;[48] but it is sufficient to allege that the alteration was made after the instrument had been executed by defendant, since execution includes signing and delivery.[49]

[§ 171] **(4) Knowledge or Privity of Parties.** On the one hand it is held that a plea or answer setting up an alteration should allege that it was done by plaintiff, or with his privity or consent,[50] although an alternative allegation in this respect

bad on demurrer for not showing how the maker could be injured thereby). (2) But in most cases it is held that injury to the party complaining is not necessary to a material alteration. See supra § 4.

42. Beem v. Farrell, (Iowa) 108 NW 1044 (holding that, where in an action against three joint makers of a note defendants in a joint answer alleged that the instrument had been invalidated by a fraudulent and material alteration, the answer was sufficient to require judgment in favor of all three on proof that the signature of one of them was forged, it not being necessary for the answer to aver the legal conclusion that such an alteration rendered the instrument totally void as to all parties).

43. Collier v. Waugh, 64 Ind. 456.

[a] **Language construed according to ordinary meaning.**—In determining the effect of a plea its language should be taken in its plain and ordinary meaning. Law v. Crawford, 67 Mo. A. 150.

[b] **Affidavit of forgery.**—In Georgia, under a statute providing for an affidavit of forgery in order to require explanatory testimony of apparent alterations in a deed, it does not lie in the mouth of the party producing the instrument to object that he is fully notified by the affidavit of the nature of the forgery. Hill v. Nisbet, 58 Ga. 586.

44. Hart v. Sharpton, 124 Ala. 638, 639, 27 S 450 (holding that a plea "that the mortgage under which the plaintiff claims has been altered as to its conditions and provisions without the knowledge or consent of defendants which said alterations are apparent upon its face" was bad on demurrer for not showing in what way the mortgage had been altered); Riesmeyer v. O'Day, 45 Pa. Super. 67 (holding that in an action for rent an affidavit of defense is insufficient which does not deny defendant's signature, but merely avers that the lease in suit is "another or previously subsisting document of that character, with the numerals 1908, by some one (other than herself and wholly without her consent) substituted for an earlier date-year, before or originally (correctly) written thereon," in that it does not give the date or terms of any "previously subsisting document" or distinctly say in what respect the paper was altered).

[a] **Detachment of memorandum.**—A plea of non est factum, averring that a note was not executed by defendant or by his authority, because plaintiff, without defendant's knowledge or consent, with a fraudulent intent, altered it by "detaching therefrom a material memorandum, which said memorandum was as follows," but not setting out the memorandum, is bad. Payne v. Long, 121 Ala. 385, 25 S 780.

[b] **Alteration of award.**—In an action on an award a plea that the award has been altered since it was made is defective unless it avers that the alteration was made in a material part, or else avers the facts of the alteration so that it may be seen whether the alteration was material or not. Brown v. Warnock, 5 Dana (Ky.) 492.

[c] **An affidavit of defense, in an action on a note against a prior indorser** by an indorsee, who had discounted the note at a bank and paid it after its dishonor, is insufficient, where it states that a prior note for a larger amount, which was of the series of which the note in suit was the last, was fraudulently altered, without showing who was the holder of the note when the alterations were made, or who they were made by, or what was the original tenor of the altered note, what date was changed, or from what smaller amount it was raised. Bryan v. Harr, 21 App. (D. C.) 190.

45. Muckleroy v. Bethany, 23 Tex. 163 (holding that the sustaining of a demurrer to a plea admitting the execution of a note identical with that sued on except for the affixing of seals, but denying the execution of the note sued on, was reversible error).

[a] **Alteration of indorsement.**—In an action on an indorsement of a promissory note, where the answer denies an unqualified indorsement as alleged in the complaint, and alleges that it was without recourse, defendant may prove that an attempted alteration by drawing a pen through the words "without recourse" was made after the indorsement. Howlett v. Bell, 52 Minn. 257, 53 NW 1154.

46. **Effect as dependent on time of change** see supra §§ 90–95.

47. Ill.—Richardson v. Mather, 178 Ill. 449, 53 NE 321 [aff 77 Ill. A. 626] (plea held insufficient).

Ind.—Emmons v. Meeker, 55 Ind. 321; Bowen v. Woodfield, 33 Ind. A. 687, 72 NE 162.

Ky.—Lockart v. Roberts, 3 Bibb 361 (holding that, where in an action on a sealed instrument defendant pleaded that "when he signed and affixed his name to the paper in the declaration mentioned, it was a blank piece of paper without any bond or writing obligatory written thereon, and so the said defendant says the writing aforesaid is not his deed, and of this he puts himself upon the country," the plea was bad on demurrer for not showing that the alteration was made after delivery, as the obligation takes effect from delivery); Neale v. Hays, 15 KyL 784 (holding that, where defendant in an action on a note does not aver in his answer that the alteration of the note by adding the words "with interest from date" was made either after the delivery of the note or without his consent, the answer does not, as to that matter, allege facts sufficient to constitute a defense).

Pa.—Riesmeyer v. O'Day, 45 Pa. Super. 67.

Eng.—Langton v. Lazarus, 9 L. J. Exch. 89 (holding that a plea, in an action of assumpsit by an indorsee against an acceptor, that, before the bill became due and while "it was in full force and effect," the date was materially altered by the drawer, whereby it became void, was bad for want of an allegation that the alteration was made after acceptance; but the court gave opportunity to amend).

[a] **Denial of delivery.**—In an action of debt on a specialty, where defendant files with his plea of non est factum an affidavit stating that he signed a blank paper which had been filled up without his knowledge or consent, it is not necessary for him to allege that he did not deliver the instrument after it had been filled up, as the fact that he did so deliver it is matter for replication. Franklin v. Cox, 4 Rand. (25 Va.) 448.

48. Bowen v. Woodfield, 33 Ind. A. 687, 72 NE 162 (holding that in an action on a note an answer admitting that defendant "signed" the note sued on, but averring that thereafter, without his knowledge or consent, the note was materially altered, is insufficient as a statement of a defense, as the averment of the signature is not equivalent to an allegation of execution, which includes delivery, and, for anything in the answer to the contrary, defendant may have consented to the alteration after signature, but before delivery).

[a] **A verified plea by a codefendant** in an action upon a promissory note, alleging that he executed the same as surety only, and that since he signed the same it was altered by inserting a false date, prior in point of time to the true one, but not alleging that such alteration was made since the delivery of said note, or that it was done with the knowledge of the payee, is insufficient on demurrer. Emmons v. Meeker, 55 Ind. 321.

49. Hill v. Nelms, 86 Ala. 442, 5 S 796; Nicholson v. Combs, 90 Ind. 515, 46 AmR 229 (holding that in an action on a note an answer by one of defendants that after he and his codefendant had "executed and delivered the note" plaintiff, without their knowledge or consent, procured K to subscribe to the note as one of the makers sufficiently averred that the name of K was added after the note was completed, as the word "executed" implied a completed contract).

50. U. S.—U. S. v. Linn, 1 How. 104, 11 L. ed. 64.

Cal.—Humphreys v. Crane, 5 Cal. 173. But see Sherman v. Rollberg, 11 Cal. 38 (holding that where an answer set up an alteration and that defendant paid the note before assignment, and that the assignment was made to plaintiff after maturity, the defense was not that of alteration, over the objection that the answer did not allege the alteration to have been made with knowledge or by authority or direction of plaintiff).

Fla.—Cotten v. Williams, 1 Fla. 37.

Miss.—Bridges v. Winters, 42 Miss. 135, 97 AmD 443, 2 AmR 598.

Oh.—Tarbill v. Richmond City Mill Works, 2 Oh. Cir. Ct. 564, 1 Oh. Cir. Dec. 643 (holding that, where an answer contains an allegation of alteration in a note, it must state that such alteration was made with the knowledge or consent, or by the authority, of plaintiff or of some one beneficially interested in it or entitled under it).

has been held sufficient,[51] as well as that it was done without the authority or consent of the pleader.[52] On the other hand a plea setting up an alteration, after execution and delivery of the instrument, without defendant's knowledge or consent, is deemed sufficient without an allegation of knowledge or privity on the part of plaintiff,[53] on the principle that it will be presumed in the absence of any showing to the contrary that the alteration, made after execution, was made by plaintiff or by some one through or under whom he claims.[54]

[§ 172] **(5) Fraud.**[55] Where a willful change, irrespective of actual fraudulent purpose, is sufficient to defeat an instrument, fraud need not be alleged in the plea or answer setting up the alteration;[56] but where the alteration avoids the instrument only if made with a fraudulent intent, the plea or answer must allege such intent.[57]

[§ 173] **(6) Ratification.**[58] An answer setting up an alteration need not aver that defendant had never ratified it, as this is matter in avoidance to be shown in reply.[59]

[§ 174] **(7) Notice of Alteration or Excess of Authority.** Where the alteration is not of a nature to avoid the instrument as against a holder for value and without notice it seems that the plea should negative the fact that plaintiff is such a holder.[60] Thus a plea by an accommodation indorser of a note left to be filled up by the maker should aver that the indorsee had knowledge at the time he received the note that the maker exceeded his authority in filling the blank.[61]

[§ 175] **7. Joinder of Defenses.**[62] Defendant may at the same time plead that he did not execute the instrument sued on, and that if his signature is in fact genuine it was obtained by fraud, as these defenses are not contradictory.[63] So a plea of non est factum or a general denial is not inconsistent with a special plea showing a subsequent material unauthorized alteration in the instrument.[64]

[§ 176] **D. Reply in Avoidance of Alteration Alleged—1. In General.**[65] Where in an action on a written instrument the plea or answer sets up an alteration therein sufficient to invalidate it as against defendant, plaintiff must by replication or reply assert any matters that he relies on in avoidance of such defense as a foundation for testimony explanatory of such alteration;[66] such as that defendant's negligence in executing the instrument

[a] **In Georgia** (1) by statute an altered instrument may be recovered on according to its original tenor unless the alteration is made by a person claiming a benefit under the contract and with fraudulent intent; and hence, under such provision, a plea seeking to avoid entirely the instrument on the ground of alteration is insufficient and may properly be stricken out unless it alleges that the alteration was made by a person claiming a benefit under the contract and with intent to defraud. Shirley v. Swafford, 119 Ga. 43, 45 SE 722; Burch v. Pope, 114 Ga. 334, 40 SE 227; Mozley v. Reagan, 109 Ga. 182, 34 SE 310; Gwin v. Anderson, 91 Ga. 827, 18 SE 43. (2) But where, in an action on a sealed note, defendant files a plea of the statute of limitations wherein he alleges that the note has been converted into a sealed instrument without authority, such an averment is unnecessary, since the only object of the plea is to assert that the action was not brought in time, and if such alteration is made without authority, it is immaterial who made it or with what intent. Thomason v. Wilson, 127 Ga. 141, 56 SE 302.

[b] **As against a motion for judgment on the pleadings,** an answer in an action on a note is sufficient which alleges that the instrument was materially altered by plaintiff or while in his possession. Maguire v. Eichmeier, 109 Iowa 301, 80 NW 395.

51. Hamblen v. Knight, 60 Tex. 36 (holding that, where in a suit to enjoin judgment on a note the allegation by the surety was that the note had been fraudulently altered "either by the administrator to whom it was executed, or by the principal in the note, and that this was done without the knowledge of the surety," it was sufficiently definite).

52. Cotten v. Williams, 1 Fla. 37 (holding that it does not follow that because such an allegation is of a negative character it is not essential to the validity of the plea); Neale v. Hays, 15 KyL 784; Reed v. Roark, 14 Tex. 329, 65 AmD 127.

[a] **Sufficient averment.**—A plea averring that, after the execution and delivery of the note sued on, the payee without defendant's knowledge or consent inserted the words "or order," thus changing the instrument from a nonnegotiable to a negotiable note, sufficiently imports that the alteration was made without authority from defendant. Johnson v. U. S. Bank, 2 B. Mon. (Ky.) 310.

53. Hill v. Nelms, 86 Ala. 442, 5 S 796; Palmer v. Poor, 121 Ind. 135, 22 NE 984, 6 LRA 469; Bowman v. Mitchell, 79 Ind. 84 [cit Cochran v. Nebeker, 48 Ind. 459]; La Grange v. Coyle, 50 Ind. A. 140, 98 NE 75; Charles v. Bain, 9 KyL 898; McVey v. Ely, 5 Lea (Tenn.) 438 (holding that, where in a creditor's bill by a creditor whose claim consisted of a promissory note, defendant alleged in his answer that the note had been "altered" after its execution "by some one" without his knowledge or consent, the answer was sufficient as against the objection that it did not negative spoliation by a stranger).

54. Bowman v. Mitchell, 79 Ind. 84. See also infra § 189.

55. **Effect as dependent upon intent** with which change is made see supra §§ 96–100.

56. Eckert v. Pickel, 59 Iowa 545, 13 NW 708.

57. See cases infra this note.

[a] **In Georgia by statute** a special plea alleging an alteration in a note sued on is required to set up that the alteration was made with intent to defraud defendant. Shirley v. Swafford, 119 Ga. 43, 45 SE 722; Miller v. Slade, 116 Ga. 772, 43 SE 69; Burch v. Pope, 114 Ga. 334, 40 SE 227; Mozley v. Reagan, 109 Ga. 182, 34 SE 310; Gwin v. Anderson, 91 Ga. 827, 18 SE 43. Compare Thomason v. Wilson, 127 Ga. 141, 56 SE 302.

58. **Ratification and waiver** see supra §§ 145–156.

59. Whitesides v. Northern Bank, 10 Bush (Ky.) 501, 19 AmR 74 (holding that a plea of unauthorized, material alteration need not aver that such alteration was not subsequently ratified by defendant, as he is not bound to anticipate matters which plaintiff may or may not rely on to avoid the effect of his plea). See also infra §§ 177, 178.

60. See Woolfolk v. Bank, 10 Bush (Ky.) 504 (negligent execution facilitating alteration).

61. Grissom v. Fite, 1 Head (Tenn.) 332.

[a] **As to date.**—Should the holder of an instrument containing a blank as to date exceed his implied authority by inserting an inproper date, a plea alleging such matter as a defense against a third person must allege that the note passed to him with notice. Overton v. Matthews, 35 Ark. 146, 37 AmR 9.

62. See generally Pleading [31 Cyc 153].

63. Citizens Bank v. Closson, 29 Oh. St. 78.

64. Fudge v. Marquell, 164 Ind. 447, 455, 72 NE 565, 73 NE 895 (where Montgomery, J., said: "The filing of the general non est factum, and also a particular or special non est factum alleging the forged signature, nondelivery, or material alteration of the instrument to suit, is not a strange or unusual practice. In all civil actions founded upon a particular contract the defendant may answer by general denial, and prove under it a different contract from that sued upon and defeat a recovery; or, if he chooses to do so, he may answer by general denial, and also by a special paragraph of denial setting up the contract which he admits having made in respect to the same subject-matter, but in such different terms as he understands the facts to warrant").

[a] **General denial and special plea.**—Where defendant files both a general denial and a special plea of alteration, the sustaining of a demurrer to the latter, if erroneous, is not prejudical, as the facts pleaded therein are provable under the general denial. McKinney v. Cabell, 24 Ind. A. 676, 57 NE 598.

65. **Necessity of reply or replication to new matter** see generally Pleading [31 Cyc 241 et seq].

66. Bogarth v. Breedlove, 39 Tex. 561. But see Roberds v. Laney, (Tex. Civ. A.) 165 SW 114 (holding that in an action by the payee of a note against the maker and surety, in which the surety claims discharge by an extension of the note, plaintiff need not plead the real conditions as to indorsement of an extension, so as to make it unavailable, but can explain the apparent alterations, therein when he puts the note in evidence).

[a] **A demurrer to a plea of alteration** (1) admits the fact of alteration as alleged. Bridges v. Winters, 42 Miss. 135, 97 AmD 443, 2 AmR 598. (2) So a demurrer to a plea which alleges that by the insertion of the words "or order" the instrument was changed from a nonnegotiable to a negotiable note admits that, under the law of the state where the instrument was executed, such was the legal effect of the alteration. Johnson v. U. S. Bank, 2 B. Mon. (Ky.) 310.

[b] **Legal conclusion.**—"A general replication that the writing is the act or deed of the party, is only a deduction of law, made by the plaintiff or his counsel, and is not a denial of the facts averred in the plea."

facilitated the alteration,[67] or that the alleged alteration was made by a stranger to the instrument,[68] unless, under the local system of pleading, as it exists in some states, new matter may be controverted or avoided without a formal replication.[69]

Admission of alteration. A replication to a plea of non est factum, setting up that the plea is based upon the alleged material alteration, and averring facts in avoidance, is not an admission of an alteration.[70]

Statutory matter. Where the matter relied upon by plaintiff to defeat the defense pleaded is a statutory matter, he is not bound to plead the statute in order to rely upon it.[71]

[§ 177] **2. Consent and Ratification—a. In General.**[72] To a plea setting up an alteration plaintiff may reply consent by all of the parties,[73] although it seems that such a reply would be necessary only where defendant is not required to allege in his plea that the alteration was without his consent;[74] and when the consent is after the alteration, or, in other words, is a ratification or estoppel, it may be replied by plaintiff,[75] and if not pleaded it will not ordinarily be available.[76]

[§ 178] **b. Ratification and Denial of Alteration.**[77] There is no inconsistency in fact or law between a denial of an alleged alteration and an allegation that defendant has waived or ratified the act, or has created an estoppel.[78]

IX. EVIDENCE

[§ 179] **A. Presumptions and Burden of Proof[79]—1. General Burden on Issue of Alteration—a. General Rule.**[80] It is generally stated, although perhaps inaccurately,[81] that as a general rule the burden of establishing an alteration of an instrument is upon the party, usually defendant, setting up such alteration, where the instrument does not appear on its face to have been altered;[82] or where no presumption arises and rests upon the party upon whom it was at the outset, and is not shifted by the course of the trial, and the jury may be properly instructed that all material issues tendered by the plaintiff must be established by him by a preponderance of evidence"). In Klein v. German Nat. Bank, 69 Ark. 140, 144, 61 SW 572, 86 AmSR 183, Riddick, J., said: "The introduction of the note, and proof of the signatures thereto, did not shift the burden of proof, or put it upon the defendants, though, in the absence of rebutting evidence, this might have been sufficient to make out plaintiff's case."

Burden of proof and burden of going forward with evidence distinguished see Evidence [16 Cyc 926 et seq].

82. U. S.—Sturm v. Boker, 150 U. S. 312, 14 SCt 99, 37 L. ed. 1093 (holding that where the signature to a contract is admitted the burden is upon the party attacking it to prove that the matter over the signature is a forgery); Shenandoah First Nat. Bank v. Liewer, 187 Fed. 16, 109 CCA 70 (holding that, where an innocent purchaser for value sold a note giving no indication of any modification, the burden is on the maker to prove any alteration made after its execution).

Ala.—Bouldin v. Barclay, 121 Ala. 427, 25 S 827; Glover v. Gentry, 104 Ala. 222, 16 S 38; Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140; Barclift v. Treece, 77 Ala. 528.

Ark.—Chism v. Toomer, 27 Ark. 108.

Fla.—Calhoun v. McKay, 64 Fla. 226, 60 S 182; Harris v. Jacksonville Bank, 22 Fla. 501, 1 S 140, 1 AmSR 201.

Ga.—Brown v. Colquitt, 73 Ga. 59, 54 AmR 867.

Ill.—Lowman v. Aubery, 72 Ill. 619; Dewey v. Merritt, 106 Ill. A. 156; Conkling v. Olmstead, 63 Ill. A. 649.

Ind.—Fudge v. Marquell, 164 Ind. 447, 453, 72 NE 565, 73 NE 895 [cit Cyc]; Insurance Co. of North America v. Brim, 111 Ind. 281, 12 NE 315; Brooks v. Allen, 62 Ind. 401; Meikel v. State Sav. Inst., 36 Ind. 355; Johns v. Harrison, 20 Ind. 317.

Iowa.—Hessig-Ellis Drug Co. v. Todd-Baker Drug Co., 143 NW 569; Beck v. Heckman, 140 Iowa 351, 118 NW 510, 132 AmSR 277; McGee v. Allison, 94 Iowa 527, 63 NW 322; Farmers' L. & T. Co. v. Olson, 92 Iowa 770, 61 NW 199; In re Brown, 92 Iowa 379, 60 NW 659; Des Moines

Hall v. Commonwealth Bank, 5 Dana (Ky.) 258, 260, 30 AmD 685.

67. Palmer v. Poor, 121 Ind. 135, 22 NE 984, 6 LRA 469; Grand Haven First Nat. Bank v. Zeims, 93 Iowa 140, 61 NW 483; Conger v. Crabtree, 88 Iowa 536, 55 NW 335, 45 AmSR 249; Bank of Commerce v. Haldeman, 109 Ky. 222, 58 SW 587. But see Woolfolk v. Bank of America, 10 Bush (Ky.) 504.

[a] **For a replication of negligent execution** held sufficient on demurrer see Holmes v. Ft. Gaines Bank, 120 Ala. 493, 24 S 959.

68. Murray v. Peterson, 6 Wash. 418, 419, 33 P 969 (holding that where an altered note was declared on in its original, unaltered form, and defendant pleaded alteration discharging him from liability, a reply admitting the alteration but alleging that the note "was not changed by him [plaintiff] or by his authority, but that said change and alteration was made without his authority, knowledge, or consent," was a sufficient reply of spoliation).

69. See statutory provisions.

70. Holmes v. Ft. Gaines Bank, 120 Ala. 493, 24 S 959.

71. Johnston v. Hoover, 139 Iowa 143, 117 NW 277 (holding that, as the Negotiable Instruments Law gives the holder of a negotiable instrument prima facie authority to fill blanks if the instrument is wanting in any material particular, if the maker of a note sets up against a bona fide holder that, after the execution of the note, a place of payment was inserted without authority, plaintiff is not obliged to plead the statute in reply in order to rely on it).

72. See generally supra §§ 113–156.

73. See Speake v. U. S., 9 Cranch (U. S.) 28, 3 L. ed. 645.

[a] **Replication setting up that defendant consented** to the alteration held good on demurrer. See Speake v. U. S., 9 Cranch 28, 3 L. ed. 645; Collins v. Makepeace, 13 Ind. 448.

74. See supra § 171.

[a] **Replication of consent not necessary.**—Where the rule prevails that, when the drawer of a bill or the maker of a note by his own negligence leaves the instrument in such condition that an alteration may be made without defacing the instrument or exciting the suspicion of a careful man, he will be liable to a bona fide holder, a replication to a plea of non est factum need not set up that the alleged and admitted alteration was made with the consent of the promisor, or that it was made by a stranger having no interest. Winter v. Pool, 104 Ala. 580, 16 S 543. See also Bills and Notes [8 Cyc 194].

75. Davis v. Shafer, 50 Fed. 764 (which case see for form of replication in substance); Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140; Henderson v. Vermilyea, 27 U. C. Q. B. 544.

76. Capital Bank v. Armstrong, 62 Mo. 59 (holding that evidence or ratification is not admissible where the reply merely denies the alleged alteration); Erickson v. Oakland First Nat. Bank, 44 Nebr. 622, 62 NW 1078, 48 AmSR 753, 28 LRA 577.

[a] **Sufficient reply of ratification.**—A reply alleging ratification by defendant with full knowledge of the facts and for a valuable consideration is sufficient. Feeney v. Mazelin, 87 Ind. 226.

[b] **As to one defendant not verifying answer.**—In Feeney v. Mazelin, 87 Ind. 226, it was held that, where two defendants answered jointly and alleged a material alteration after the execution of a note, and only one of them swore to the answer, this would put plaintiff to prove only the execution of the note by defendant who swore to the answer; that as to the other defendant the production of the note was sufficient, and a reply as to defendant alone who verified the answer that he ratified the change is good.

77. Pleading inconsistent defenses see generally Pleading [31 Cyc 262].

78. Davis v. Shafer, 50 Fed. 764.

[a] **Consistent paragraphs.**—Where to a plea of alteration in an action on a note plaintiff replies in three paragraphs: (1) denying the alleged alteration; (2) alleging that, if any alteration was made, it was made by an agent of defendant before delivery to plaintiff, without plaintiff's knowledge or consent, and for the purpose of making the note conform to the contract between the parties; (3) alleging ratification by defendant after such alteration was made and the note delivered to plaintiff, a motion to compel plaintiff to elect between the three paragraphs is properly overruled, and the first and third paragraphs are not inconsistent, as the alteration mentioned in the third evidently has reference to that described in the second paragraph. Mattingly v. Riley, 49 SW 799, 20 KyL 1621.

79. See generally Evidence [16 Cyc 926 et seq, 1050 et seq].

80. Altered instrument as evidence see generally supra §§ 28–32.

81. Farmers' L. & T. Co. v. Siefke, 144 N. Y. 354, 359, 39 NE 358 (where it was held that the burden of proof remains upon plaintiff throughout the case, although defendant alleges that the instrument sued on has been materially altered. Andrews, C. J., said: "It is very common to say in such cases that the burden is upon the defendant to establish the fact relied upon. All that this can properly mean is that when the plaintiff has established a prima facie case, the defendant is bound to controvert it by evidence, otherwise he will be cast in judgment. When such evidence is given, and the case upon the whole evidence, that for and that against the fact asserted by the plaintiff, is submitted to court or jury, then the question of the burden of proof as to any fact, in its proper sense, arises and rests upon the party upon whom it was at the outset, and is not shifted by the course of the trial, and the jury may be properly instructed that all material issues tendered by the plaintiff must be established by him by a preponderance of evidence"). In Klein v. German Nat. Bank, 69 Ark. 140, 144, 61 SW 572, 86 AmSR 183, Riddick, J., said: "The introduction of the note, and proof of the signatures thereto, did not shift the burden of proof, or put it upon the defendants, though, in the absence of rebutting evidence, this might have been sufficient to make out plaintiff's case."

Burden of proof and burden of going forward with evidence distinguished see Evidence [16 Cyc 926 et seq].

82. U. S.—Sturm v. Boker, 150 U. S. 312, 14 SCt 99, 37 L. ed. 1093 (holding that where the signature to a contract is admitted the burden is upon the party attacking it to prove that the matter over the signature is a forgery); Shenandoah First Nat. Bank v. Liewer, 187 Fed. 16, 109 CCA 70 (holding that, where an innocent purchaser for value sold a note giving no indication of any modification, the burden is on the maker to prove any alteration made after its execution).

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Ark.—Chism v. Toomer, 27 Ark. 108.

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Ga.—Brown v. Colquitt, 73 Ga. 59, 54 AmR 867.

Ill.—Lowman v. Aubery, 72 Ill. 619; Dewey v. Merritt, 106 Ill. A. 156; Conkling v. Olmstead, 63 Ill. A. 649.

Ind.—Fudge v. Marquell, 164 Ind. 447, 453, 72 NE 565, 73 NE 895 [cit Cyc]; Insurance Co. of North America v. Brim, 111 Ind. 281, 12 NE 315; Brooks v. Allen, 62 Ind. 401; Meikel v. State Sav. Inst., 36 Ind. 355; Johns v. Harrison, 20 Ind. 317.

Iowa.—Hessig-Ellis Drug Co. v. Todd-Baker Drug Co., 143 NW 569; Beck v. Heckman, 140 Iowa 351, 118 NW 510, 132 AmSR 277; McGee v. Allison, 94 Iowa 527, 63 NW 322; Farmers' L. & T. Co. v. Olson, 92 Iowa 770, 61 NW 199; In re Brown, 92 Iowa 379, 60 NW 659; Des Moines

sumption that it has been altered is indulged from the appearance of the instrument, the whole question of the time when, by whom, etc., the change was made being left to the jury;[83] or where the presumption is that a change appearing upon the face of an instrument was made at or before the execution of the instrument.[84]

Where the question is as to the unauthorized filling of a bill signed and indorsed in blank, as between the receiver and the drawer and indorser, the burden of proof that there was an agreement, and that it was violated, is upon defendant;[85] and he must also show that the holder took it with notice of the particular fraud.[86]

[§ 180] **b. When Alteration Is Apparent or Shown—(1) In General.** When an alteration is once made to appear, either by reason of a suspicion raised from the appearance of the instrument,[87] or when such suspicion is raised or the alteration is proved by extraneous evidence, the party producing the instrument then has the burden of explaining the alteration by showing that the change was made under circumstances rendering it lawful, or under circumstances which would not preclude

Nat. Bank v. Harding, 86 Iowa 153, 53 NW 99; Potter v. Kennelly, 81 Iowa 96, 46 NW 856; Wing v. Stewart, 68 Iowa 13, 25 NW 905; Odell v. Gallup, 62 Iowa 253, 17 NW 502.

Kan.—Scott v. Thrall, 77 Kan. 688, 95 P 563, 127 AmSR 449, 17 LRANS 184 and note [cit Cyc]; J. I. Case Threshing Mach. Co. v. Peterson, 51 Kan. 713, 33 P 470.

Ky.—Thacker v. Booth, 6 SW 460, 9 KyL 745.

La.—Oakey v. Hennen, 18 La. 435.

Me.—Stevens v. Odlin, 109 Me. 417, 84 A 899 (holding that in an action by a contract purchaser to recover from the vendor's broker the sum paid as a forfeiture for breach of the contract, which plaintiff alleged was vitiated by a material alteration, the burden was on plaintiff to show that the contract was altered after it left the vendor's hands and without his knowledge or consent); Buck v. Appleton, 14 Me. 284.

Mass.—Simpson v. Davis, 119 Mass. 269, 20 AmR 324. But see Pierce Co. v. Casler, 194 Mass. 423, 427, 80 NE 494 [cit Cyc] (where Sheldon, J., in speaking of the rule that if defendant sets up a material alteration, as by the affixing of a seal to an unsealed instrument, the burden is upon him to make out his defense, said: "There may be some question as to the correctness of this rule. . . . But . . . it is not open to us to consider whether it was or was not correct").

Miss.—Jackson v. Day, 80 Miss. 800, 31 S 536 (holding that where heirs claimed that a note alleged to be a claim against the estate had been altered, and it was not plainly certain on inspection of the note that it had been altered since its execution, the burden of proof was on the heirs to show such alteration); Ellison v. Mobile, etc., R. Co., 36 Miss. 572.

Nebr.—Anderson v. Chicago, etc., R. Co., 88 Nebr. 430, 129 NW 1008 (holding that the burden of proving that a written order for cars, entered in the book kept for that purpose by the carrier, was altered after being signed by the shipper is on the one who asserts it); Ohio Nat. Bank v. Gill, 85 Nebr. 718, 124 NW 152; Colby v. Foxworthy, 80 Nebr. 239, 244, 114 NW 174, 115 NW 1076 (holding that the burden is upon the party alleging the material alteration of an instrument to prove that it was altered by the holder after the execution and delivery of the same); McClintock v. Table Rock State Bank, 52 Nebr. 130, 71 NW 978 (by a preponderance of the evidence).

N. Y.—Farmers' L. & T. Co. v. Siefke, 144 N. Y. 354, 39 NE 358; Conable v. Keeney, 61 Hun 624, 16 NYS 719. See also Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122, 21 NE 168, 28 NYSt 138.

Okl.—Cavitt v. Robertson, 142 P 299.

Or.—Galloway v. Bartholomew, 44 Or. 75, 74 P 467 (burden of proving alteration of a promissory note is on defendant).

Pa.—Feig v. Meyers, 102 Pa. 10; Gettysburg Nat. Bank v. Gage, 4 Pa. Super. 505.

S. C.—Horry Dist. Comrs. of Poor v. Hanion, 10 S. C. L. 554; Wicker v. Pope, 46 S. C. L. 387, 75 AmD 732.

S. D.—Cosgrove v. Fanebust, 10 S. D. 213, 72 NW 469.

Tenn.—Douglas v. Brandon, 6 Baxt. 58; Farnsworth v. Sharp, 4 Sneed 54; Bumpas v. Timms, 3 Sneed 459; Brown v. Phelon, 2 Swan 628.

Tex.—Wells v. Moore, 15 Tex. 521; Wadsworth v. Vinyard, (Civ. A.) 131 SW 1171; Kalteyer v. Mitchell, (Civ. A.) 110 SW 462; McKenzie v. Barrett, 43 Tex. Civ. A. 451, 98 SW 229; First Nat. Bank v. Pritchard, 2 Tex. A. Civ. Cas. § 130.

Wash.—Lawrence v. Meenach, 45 Wash. 632, 88 P 1120 (holding that in an action on a contract alleged to have been fraudulently altered the burden is on plaintiff to prove such fraud); Slyfield v. Willard, 48 Wash. 179, 86 P 392 (holding that where, in a suit to foreclose a chattel mortgage, defendants admit the execution of the mortgage, but allege that it was altered by the insertion of a clause waiving exemptions after delivery, the burden is on defendants to prove such alteration).

Wis.—Gorden v. Robertson, 48 Wis. 493, 4 NW 579.

[a] **Order of proof.**—In a suit for a breach of warranty, while plaintiff is on the stand and before he has rested his case, it is not error to refuse to permit defendant to break in to prove an alteration in the instrument containing the warranty. Huston v. Plato, 3 Colo. 402. As to order of proof see generally Trial [38 Cyc 1349].

[b] **Where the signing and delivery of a note are admitted** but it is claimed that it has been materially altered, the burden is on defendant to prove such alteration. Cochran v. Nebeker, 48 Ind. 459.

83. Hatfield Special School Dist. v. Knight, (Ark.) 164 SW 1137; Hagan v. Merchants', etc., Ins. Co., 81 Iowa 321, 46 NW 1114, 25 AmSR 493. See also Smith v. Weatherford, 92 Ark. 6, 121 SW 943.

84. Colby v. Foxworthy, 80 Nebr. 239, 242, 114 NW 174 [cit Cyc]; Yakima Nat. Bank v. Knipe, 6 Wash. 348, 33 P 834; Wolferman v. Bell, 6 Wash. 84, 32 P 1017, 36 AmSR 126 (holding that an alteration is a fact in a case to be determined by the jury, subject to the same rule of presumption as any other fact to be presented in the case).

[a] **In action on a note and mortgage,** where it is sought to defend on the ground of an alleged alteration, and there is nothing on the face of the instrument to indicate that the change was made after execution and delivery, but the contrary inference is the more readily drawn, the burden is on defendant to establish that the alteration was made without his consent. Hodge v. Scott, 1 Nebr. (Unoff.) 619, 95 NW 837.

85. Davidson v. Lanier, 4 Wall. (U. S.) 447, 18 L. ed. 377.

[a] **But the burden is on the holder** to show that a surety knew that blanks left in the instrument at the time of its execution and delivery had been filled in excess of authority. Limestone Bank v. Penick, 2 T. B. Mon. (Ky.) 98, 15 AmD 136.

86. Torry v. Fisk, 18 Miss. 590.

87. U. S.—Smith v. U. S., 2 Wall. 219, 17 L. ed. 788.

Ala.—Glover v. Gentry, 104 Ala. 222, 16 S 38.

D. C.—Towles v. Tanner, 21 App. 530; Ofenstein v. Bryan, 20 App. 1 (holding that where the alteration of a negotiable instrument is material, and is such as reasonably to excite suspicion, the burden is on the party offering such an instrument in evidence to explain its condition).

Ga.—Wheat v. Arnold, 36 Ga. 479.

Kan.—Scott v. Thrall, 77 Kan. 688, 691, 95 P 563, 127 AmSR 449, 17 LRANS 184 and note [cit Cyc].

La.—Messi v. Frechede, 113 La. 679, 37 S 600.

Mich.—Samberg v. American Express Co., 136 Mich. 639, 99 NW 897.

Miss.—Withers v. Hart, 96 Miss. 453, 51 S 714 (holding that, where a negotiable instrument appears on its face to have been materially altered, one suing thereon must show that such alteration was legally made; and hence proof of the signature of such a note is insufficient to sustain a peremptory instruction against the signer).

Mo.—Kelly v. Thuey, 143 Mo. 422, 45 SW 300; Burton v. American Guarantee Fund Mut. F. Ins. Co., 96 Mo. A. 204, 70 SW 172.

N. Y.—Brinn v. Cohen, 107 NYS 37 (holding that where, in an action for goods sold and delivered, it appeared that receipts in plaintiffs' possession, and offered by them to corroborate their testimony as to a sale and delivery, had been altered, strong evidence was required to rebut any possible presumption that the alterations were made to meet the issue).

Pa.—Cornog v. Wilson, 231 Pa. 281, 80 A 174; Bowers v. Rineard, 209 Pa. 545, 58 A 912; Gettysburg Nat. Bank v. Gage, 4 Pa. Super. 505.

Tenn.—Farnsworth v. Sharp, 4 Sneed 55.

Tex.—Kalteyer v. Mitchell, 102 Tex. 390, 117 SW 792, 132 AmSR 889 [aff (Civ A.) 110 SW 462, and dist Wells v. Moore, 15 Tex. 521, and Muckleroy v. Bethany, 27 Tex. 551, as involving alterations not apparent on the face of the instrument]; Matson v. Jarvis, (Civ. A.) 133 SW 941 (holding that, where a material alteration of a written instrument is apparent on the face thereof, a person claiming rights thereunder must show that the alteration was made under such circumstances that it did not prevent his recovery). But see Parshall v. Clark, (Civ. A.) 77 SW 437 (holding that, in the absence of evidence that an alteration appearing on the face of an appeal bond was made after its execution, a motion on this ground to dismiss the appeal should be overruled).

See also infra § 197.

[a] **When a promissory note "clearly shows upon its face" that it has been altered** in some material part, such as its date or the time or place of payment, it is incumbent on the party producing it and claiming under it to remove the suspicion thus raised as to the genuineness of the instrument by accounting for the alteration. Colonial Trust Co. v. Getz, 28 Pa. Super. 619.

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a recovery by him,[88] as by showing that the alteration was made with the consent of or by the party bound by the writing,[89] or that it was subsequently ratified by him,[90] or that it was made by a stranger to the contract.[91] In such cases the burden may be said to be shifted, or that the opposite party is under the necessity of meeting a prima facie presumption raised against the instrument.[92]

[§ 181] **(2) As to Person Making Alteration.** If a change is shown to have been made after the execution of the instrument, it will be presumed to have been made by the party producing it, or with his privity and fraudulently in so far as legal fraud attaches to a willful change of an instrument by one of the parties thereto, and the burden is upon him to show that the alteration was not made by him, or by those under whom he claims, or with his or their privity or consent.[93]

88. U. S.—Sneed v. Sabinal Min., etc., Co., 73 Fed. 925, 20 CCA 230.

Ala.—Winter v. Pool, 100 Ala. 503, 14 S 411; Fontaine v. Gunter, 31 Ala. 258.

Ark.—Inglish v. Breneman, 9 Ark. 122, 47 AmD 735; Inglish v. Breneman, 5 Ark. 377, 41 AmD 96.

Cal.—Sheils v. West, 17 Cal. 324 (where the testimony showed an alteration of an entry in an account book).

D. C.—Towles v. Tanner, 21 App. 530.

Ill.—Merritt v. Dewey, 218 Ill. 599, 606, 75 NE 1066, 2 LRANS 217 [cit Cyc].

Ind.—Emerson v. Opp, 9 Ind. A. 581, 34 NE 840, 37 NE 24.

Iowa.—Robertson v. Vasey, 125 Iowa 526, 101 NW 271; Maguire v. Eichmeier, 109 Iowa 301, 80 NW 395; Shroeder v. Webster, 88 Iowa 627, 55 NW 569; Conger v. Crabtree, 88 Iowa 536, 55 NW 335, 45 AmSR 249; Robinson v. Reed, 46 Iowa 219; Van Horn v. Bell, 11 Iowa 465, 79 AmD 506. But in Warren v. Chickasaw County, 13 Iowa 588, it seems to be held that if, in a suit against a county upon a warrant, the execution of the instrument not being denied under oath, defendant relies upon alteration, plaintiff has only to introduce the instrument, and that defendant cannot stop by showing a mere change, but must show that the change was made without his consent.

Ky.—Elbert v. McClelland, 8 Bush 577.

La.—Slocomb v. Watkins, 1 Rob. 214.

Me.—Croswell v. Labree, 81 Me. 44, 16 A 331, 10 AmSR 238; Dolbier v. Norton, 17 Me. 307.

Mich.—Von Eherenkrook v. Webber, 100 Mich. 314, 58 NW 665, 60 NW 761; Swift v. Barber, 28 Mich. 503.

Minn.—Fletcher v. Minneapolis F. & M. Mut. Ins. Co., 80 Minn. 152, 83 NW 29.

Miss.—Everman v. Robb, 52 Miss. 653, 24 AmR 682.

Mo.—Capital Bank v. Armstrong, 62 Mo. 59; Burton v. Ins. Co., 96 Mo. A. 204, 70 SW 172.

N. H.—Humphreys v. Guillow, 13 N. H. 385, 38 AmD 499.

N. Y.—Gleason v. Hamilton, 138 N. Y. 353, 34 NE 283, 21 LRA 210; National Ulster County Bank v. Madden, 114 N. Y. 280, 21 NE 408, 11 AmSR 633. See also Herrick v. Malin, 22 Wend. 388.

N. C.—Martin v. Buffaloe, 121 N. C. 34, 27 SE 995.

Oh.—Bery v. Marietta, etc., R. Co., 26 Oh. St. 673.

S. C.—Mouchet v. Cason, 3 S. C. L. 307.

Tex.—Dewees v. Bluntzer, 70 Tex. 406, 7 SW 820; Pope v. Tallaferro, 51 Tex. Civ. A. 217, 115 SW 309; Davis v. State, 5 Tex. A. 48.

Va.—Consumers' Ice Co. v. Jennings, 100 Va. 719, 42 SE 879 (holding that, where in an action on a written contract it is a vital question whether or not a certain interlineation, materially altering the contract in plaintiff's favor, was made before or after signing and delivery, the burden of proof is on plaintiff to show, by a preponderance of the evidence, that the alterations were made before the signing and delivery).

W. Va.—Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 SE 515.

Wis.—Schwalm v. McIntyre, 17 Wis. 233; Low v. Merrill, 1 Pinn. 340.

Eng.—Whitfield v. Collingwood, 1 C. & K. 325, 47 ECL 325.

[a] **All alterations, erasures, or mutilations** of a paper on which a liability is sought to be established against those who were originally bound must be explained by the holder, when the fact of mutilation, erasure, or alteration is raised by the pleading and established by the proof. Frazer v. Frazer, 13 Bush (Ky.) 397.

[b] **In an action on an insurance policy,** where it appears that a clause attached to the policy when delivered has been removed, the burden is on plaintiff to disprove or explain the spoliation. Burton v. American Guaranty Fund Mut. F. Ins. Co., 96 Mo. A. 204, 70 SW 172; Burton v. American Guaranty Fund Mut. F. Ins. Co., 88 Mo. A. 392.

[c] **Cannot contend that part torn off was immaterial.**—A life insurance company, when sued on a policy, cannot insist that the contents of a part of the paper containing the application, which it has torn therefrom, are immaterial. Ames v. Manhattan L. Ins. Co., 31 App. Div. 180, 185, 52 NYS 759 [aff 167 N. Y. 584, 60 NE 1106] (where Rumsey, J., said: "A party cannot thus preclude his opponent from having the judgment of the court upon the whole paper which he presents to his opponent as the basis of a contract. It is for the court to say whether the statements are material or not, and for that purpose the party is bound to have the whole paper, upon which statements are made, presented to it. The case cannot be prejudged by one party who mutilates a paper. If he is at liberty to destroy a portion of the paper because he thinks it is of no importance, he is at liberty to destroy any other portion of it, and compel his opponent to rely upon parol evidence of the portion which he sees fit to destroy, in order to enable the court to say whether or not it is material. Such a rule could never, with safety, be applied. The rule is well settled that when one alters a paper of his opponent, he must explain the alteration before the portion which he alters shall be received in evidence. (Chase's Steph. Ev. art. 89.) Much more is that the rule where, as in this case, the party relying upon the paper has torn it in two, and endeavors to and does suppress a portion of the contents of it upon an allegation that they do not affect the rights of the parties").

[d] **When rule not applicable.**—Where a certificate of corporate stock given by its owner to his wife is discovered after his death in the possession of a bank which claims to hold it as collateral for an indebtedness of the husband, and the assignment has been changed by erasing the name of the wife as assignee, and the original date, and by writing in pencil, in place thereof, the name of the bank and the date, and no evidence is offered showing by whose authority the alterations have been made or the circumstances under which the bank obtained possession, the principle that one seeking to maintain title through an instrument presenting evidence of material alteration assumes the burden of satisfactorily accounting therefor is not applicable, as no written assignment is necessary to enable the bank to hold the certificate as collateral. Matter of Darrow, 64 Misc. 224, 118 NYS 1082.

89. See infra § 182.

90. Eggmann v. Nutter, 155 Ill. A. 390; State v. Findley, 101 Mo. 368, 14 SW 111.

91. Maguire v. Eichmeier, 109 Iowa 301, 80 NW 395.

92. Baxter v. Camp, 71 Conn. 245, 41 A 803, 71 AmSR 169, 42 LRA 514; Towles v. Tanner, 21 App. (D. C.) 530 (holding that where, in an action on a note claimed by the indorsers to have been materially altered after they had signed it, defendants have shown such alteration, the burden of proof is shifted to plaintiff to show that such alteration was made before the indorsement of the note by defendants, or that, if it was made after such indorsement, it was made with the knowledge and consent of defendants, or was ratified by them, or that the note, so altered, was declared by them to be valid, with a view to its negotiation); Merritt v. Dewey, 218 Ill. 599, 606, 75 NE 1066, 2 LRANS 217 [rev 115 Ill. A. 503] (where Scott, J., said: "When the defendant had introduced evidence showing a material alteration the burden of proof then shifted to the plaintiff, and it was for him then (where he did not meet such evidence by denial) to show that such alteration had been made under circumstances rendering it lawful or under circumstances which would not preclude a recovery by him").

[a] **Where plaintiff's claimed under a tax deed** and it was shown that it was altered by interlineation after execution and delivery so as to embrace property in controversy, the burden shifted to them to show that it was authorized and legal. Stockand v. Hall, 54 Wash. 106, 102 P 1037.

93. Ala.—White v. Hass, 32 Ala. 430, 70 AmD 548; Davis v. Carlisle, 6 Ala. 707.

Ark.—Andrews v. Calloway, 50 Ark. 358, 7 SW 449; Inglish v. Breneman, 9 Ark. 122, 47 AmD 735.

Ill.—Burwell v. Orr, 84 Ill. 465; Eggmann v. Nutter, 155 Ill. A. 390.

Ind.—Palmer v. Poor, 121 Ind. 135, 22 NE 984, 6 LRA 469; Koons v. Davis, 84 Ind. 387; Eckert v. Lewis, 84 Ind. 99; Bowman v. Mitchell, 79 Ind. 84; Cochran v. Nebeker, 48 Ind. 459; Casto v. Evinger, 17 Ind. A. 298, 46 NE 648; Green v. Beckner, 3 Ind. A. 39, 29 NE 172.

Iowa.—Maguire v. Eichmeier, 109 Iowa 301, 80 NW 395; Shroeder v. Webster, 88 Iowa 627, 55 NW 569; Robinson v. Reed, 46 Iowa 219.

La.—Martin v. His Creditors, 14 La. Ann. 393.

Minn.—Warder v. Willyard, 46 Minn. 531, 49 NW 300, 24 AmSR 250; Russell v. Reed, 36 Minn. 376, 31 NW 452.

Miss.—Ferguson v. White, 18 S 124.

Mo.—Bremen Bank v. Umrath, 42 Mo. A. 525.

N. H.—Bowers v. Jewell, 2 N. H. 543.

N. Y.—Waring v. Smyth, 2 Barb. Ch. 119, 47 AmD 299.

N. C.—Long v. Mason, 84 N. C. 15; Dunn v. Clements, 52 N. C. 58.

Okl.—Cavitt v. Robertson, 142 P 299.

Pa.—Franklin Trust Co. v. Philadelphia, etc., R. Co., 222 Pa. 96, 70 A 949, 22 LRANS 828 (holding that, where plaintiff sued a carrier to recover for losses sustained by lending money on bills of lading which did not represent goods delivered to the carrier, where palpable alterations appeared on the face of the bills and

Presumption of fraud.[94] An alteration prejudicing the rights of the promisor or obligor will be presumed to have been fraudulently made;[95] and such presumption of fraud prevails until rebutted.[96]

[§ 182] **(3) As to Consent.**[97] Where the alteration has been proved and it appears to be a material one, it is not necessary for the party who relies upon the alteration to defeat a recovery against him, to show also that it was made without his consent; but it is for the party who seeks to enforce the contract notwithstanding the alteration to give evidence of such consent.[98]

[§ 183] **2. Plaintiff's Burden to Prove Execution—a. In General.** When the execution of an instrument is proved generally, this is all that is necessary in the first instance, and the party producing it is not required to proceed further, upon a mere suggestion of an alteration, when there are no indications of alteration upon the paper, and after this general proof of execution the law presumes that the instrument is genuine in all its particulars,[99] although, where the execution is not put in issue, it need not be proved.[1]

[§ 184] **b. Under Verified Pleadings.** Where there is a statute requiring a sworn plea of non est factum, or its equivalent, to raise the question of an alteration,[2] the instrument is admissible in evidence, without explanation, in the absence of such a plea,[3] for the purpose of proving the bare exe-

a witness for the carrier testified that the forgeries and alterations were made after the bills had left his hands, the burden is on plaintiff to explain the same); Hartley v. Corboy, 150 Pa. 23, 24 A 295 (holding that the instrument will be excluded from evidence unless the presumption is rebutted).

Tex.—Bowser v. Cole, 74 Tex. 222, 11 SW 1131.

W. Va.—Carey Mfg. Co. v. Watson, 58 W. Va. 189, 194, 52 SE 515 [cit Cyc].

[a] **Alteration while in custody of holder or grantee.**—Alteration of an instrument after its delivery, and while in the custody of a party asserting a right thereunder, throws upon him the burden of producing explanatory evidence as to the alteration. Everman v. Robb, 52 Miss. 653, 24 AmR 682; Chesley v. Frost, 1 N. H. 145; Porter v. Doby, 19 S. C. Eq. 49; Bowser v. Cole, 74 Tex. 222, 11 SW 1131.

[b] **Erasure of indorsement of payment.**—In debt on a bond, under a plea of payment, the bond contained an indorsement of a payment which appeared to have been erased by drawing a pen through it, and it was held that the burden was on plaintiff to prove to the jury that the indorsement was made without his consent, as the indorsement of payment is prima facie evidence of payment. McElroy v. Caldwell, 7 Mo. 587.

[c] **Correction of mistake.**—In Houston v. Jordan, 82 Tex. 352, 18 SW 702, it appeared that after the execution of a conveyance by a husband and wife, and before the instrument was acknowledged by them, a material mistake in the description of property was discovered and the deed handed back to the husband, who promised to have it corrected, and that, prior to the delivery of the deed by the husband, the correction was made, and it was held that, in the absence of evidence to the contrary, it would be presumed that the correction was made prior to the acknowledgment by the wife rather than that the husband perpetrated, or intended to perpetrate, a fraud upon the wife or the purchaser. See also Gleason v. Hamilton, 64 Hun 96, 19 NYS 103 [aff 138 N. Y. 353, 34 NE 283, 21 LRA 210].

[d] **Lack of motive.**—Where it is clear that no one having any interest under the instrument in question could have had a motive in altering it, but that others who had been in possession of the instrument would have been advanced by its destruction, it is fair to presume that if the alterations were made by any one they were not made by those claiming under the instrument. Coulson v. Walton, 9 Pet. (U. S.) 62, 9 L. ed. 51.

[e] **Agent of payee intrusted with possession of note.**—It has been said that there can, of course, be no presumption that an agent is authorized to make a fraudulent alteration of commercial paper. Paterson v. Higgins, 58 Ill. A. 268 (holding that a person who was employed to negotiate a sale of chattels, and who drew up a chattel mortgage and notes executed to secure part of the purchase price could not, by making alterations in the notes, affect their validity in the hands of the mortgagee).

94. See generally Fraud [20 Cyc 108].

95. Maguire v. Eichmeier, 109 Iowa 301, 80 NW 395 (holding that an alteration of a note increasing the amount for which it is payable is presumed to be fraudulent); Jeffers v. Simpson, 11 KyL 328.

[a] **Alterations in shipping articles.**—In The Eagle, 8 F. Cas. No. 4,233, Olcott 232, it was held that the act of July 20, 1840, c 48 § 4 (5 U. S. St. at L. 395), providing that all interlineations, erasures, or alterations in shipping articles are presumed to be fraudulent, unless satisfactorily explained, applied only to such alterations as would vary the effect of the shipping articles in regard to the seamen, and not to immaterial erasures.

96. Crosswell v. Labree, 81 Me. 44, 16 A 331, 10 AmSR 238; Long v. Mason, 84 N. C. 15.

97. Effect of consent see supra § 113 et seq.

98. Ala.—White v. Hass, 82 Ala. 430, 70 AmD 548.

Fla.—Calhoun v. McKay, 64 Fla. 226, 60 S 182.

Ind.—Emerson v. Opp, 9 Ind. A. 581, 34 NE 840, 37 NE 24.

Iowa.—Robertson v. Vasey, 125 Iowa 526, 101 NW 271; Shroeder v. Webster, 88 Iowa 627, 55 NW 569.

Mo.—State v. Findley, 101 Mo. 368, 14 SW 111 (holding that to raise an estoppel against a surety to claim a discharge by an alteration it devolves on the obligee to prove knowledge on the part of the surety).

N. J.—Havens v. Osborn, 36 N. J. Eq. 426 (holding that, where the grantee in a deed admits that interlineations and alterations therein were made by him, but alleges that he did so with the knowledge and consent of the grantor, the former has the burden of proof).

N. Y.—Gleason v. Hamilton, 138 N. Y. 353, 34 NE 283, 21 LRA 210 [aff 64 Hun 96, 19 NYS 103].

N. C.—Howell v. Cloman, 117 N. C. 77, 23 SE 95.

Or.—Matlock v. Wheeler, 29 Or. 64, 40 P 5, 43 P 867.

S. C.—Dyson v. Jones, 65 S. C. 308, 43 SE 667.

Tex.—Pope v. Taliaferro, 51 Tex. Civ. A. 217, 115 SW 809 (holding that, where defendant pleads an alteration in the contract after its execution and without his consent, and there is evidence that plaintiff has been in possession of the contract since its execution, and that there has been a change in the contract since its execution, plaintiff has the burden of showing either that there is no alteration or that it was made with defendant's consent); Davis v. Crawford, (Civ. A.) 53 SW 384 (holding that where one sues on a note, the face of which, with the evidence, shows that a material alteration has been made in it since its execution, he must prove that the alteration was made with the maker's consent).

[a] **Presumption of assent to immaterial alteration.**—In Hunt v. Adams, 6 Mass. 519, it was said that in the case of an immaterial alteration, such as the insertion of a word omitted by clerical mistake, which the law would supply, "the law will reasonably presume an assent of the promisors to the making of it."

[b] **The burden is on a grantee** to show the grantor's consent to an alteration made in a deed after its execution. Martin v. Buffaloe, 121 N. C. 34, 27 SE 995.

99. Ark.—Klein v. German Nat. Bank, 69 Ark. 140, 61 SW 572, 86 AmSR 183.

Ga.—Gwin v. Anderson, 91 Ga. 827, 18 SE 43 (holding that on a plea of non est factum the note is admissible in evidence on proof of defendant's admission that he signed it without any explanation of its contents which do not appear as alterations on its face).

Ind.—Insurance Co. of North America v. Brien, 111 Ind. 281, 12 NE 315; Brooks v. Allen, 62 Ind. 401; Johns v. Harrison, 20 Ind. 317.

Me.—Pullen v. Hutchinson, 25 Me. 249.

Mass.—Davis v. Jenney, 1 Metc. 221.

N. Y.—Conable v. Keeney, 16 NYS 719.

Pa.—Bunnell v. Kintner, 27 Pa. Super. 605.

S. D.—Cosgrove v. Fanebust, 10 S. D. 213, 72 NW 469; Moddie v. Breiland, 9 S. D. 506, 70 NW 637.

Tex.—Wells v. Moore, 15 Tex. 521; Heath v. State, 14 Tex. A. 213.

See also infra § 185.

1. Crews v. Farmers' Bank, 31 Gratt. (72 Va.) 348.

[a] **Under a statute** providing that, when a copy of a note sued on is filed with the declaration, this will waive the necessity of all proof of execution, the defense of an alteration is still available as a defense, but cannot be raised as a mere matter of objection to the introduction of the instrument in evidence. Mitchell v. Woodward, 16 Del. 311, 43 A 165 (upon the authority of Hollis v. Vandergrift, 10 Del. 521).

2. See supra § 161.

3. Thompson v. Gowen, 79 Ga. 70, 3 SE 910; Tedlie v. Dill, 2 Ga. 128; Warren v. Chickasaw County, 13 Iowa 588; Norton v. Connor, (Tex.) 14 SW 193 (holding that, where a deed which has been recorded for nearly thirty-three years is duly filed in a case under the Texas statutes which makes a recorded deed so filed admissible in evidence without proof of execution, unless its genuineness is attacked by affidavit, it is not necessary for the party offering the deed to explain any alterations in it when no such affidavit has been filed).

[a] **"The bond being declared upon as altered,** and there being no denial of it in any way, there was no occasion to explain the alteration. It ought to have been admitted in evidence, and its rejection was error."

cution of the instrument,[4] and it has been held that a special plea setting up merely an alteration is not such a plea as will cast the burden upon plaintiff to explain alterations which do not appear upon the face of the instrument.[5] A plea of alteration which is so insufficient as to be demurrable does not place the burden of proving execution of the instrument on plaintiff.[6]

Where the instrument shows upon its face evidences of changes therein, and defendant sets up the alteration by a sworn plea, plaintiff has the burden of explaining the appearance of the instrument.[7]

[§ 185] **c. General Burden as in Other Cases.** The burden of proof would seem to rest upon plaintiff in such cases as the foregoing in the same sense that plaintiff has the burden of proving his cause of action in all other cases, and this is true whenever the defense of an alteration puts in issue directly the cause of action, which plaintiff must establish prima facie in order to recover, even though the execution of the instrument is not denied on oath.[8]

Proof of signature as prima facie case. In general plaintiff makes out a prima facie case, in the absence of rebutting evidence, by the proof or admission of the signature of the instrument.[9]

Thompson v. Gowen, 79 Ga. 70, 71, 3 SE 910.

4. Conkling v. Olmstead, 63 Ill. A. 649 (holding that while a general plea denying the execution of an instrument is sufficient to admit proof of an alteration, yet in such a state of the pleading plaintiff may, upon proving the signature, introduce the instrument in evidence if the alteration does not appear upon its face; the burden of proof to sustain the instrument against the charge rests upon the whole evidence with plaintiff and therefore it is proper to allow the introduction of the note).

5. Brown v. Colquitt, 73 Ga. 59, 54 AmR 867.

[a] **As a special plea of non est factum admits the genuineness of the signature,** it would seem that proof of this would be unnecessary and consequently the burden of proving the alteration is upon defendant who files the plea. Muckleroy v. Bethany, 27 Tex. 551; Wells v. Moore, 15 Tex. 521.

6. Mozley v. Reagan, 109 Ga. 182, 34 SE 310.

7. Ala.—Barcliff v. Treece, 77 Ala. 528 (holding that a special plea of non est factum requires no proof of execution, but plaintiff must explain alterations which are disclosed by the face of the instrument).

Ga.—Wheat v. Arnold, 36 Ga. 479. See also infra this note [b].

Ill.—Walters v. Short, 10 Ill. 252.

Kan.—J. I. Case Threshing Mach. Co. v. Peterson, 51 Kan. 713, 33 P 470 (holding that, under a verified general denial, it is incumbent upon plaintiff to prove the execution of just such an instrument as is set out in his pleading); State v. Roberts, 37 Kan. 437, 15 P 593.

Mo.—State v. Chick, 146 Mo. 645, 48 SW 829 (holding that, where the defense to an action on an official bond is non est factum, and it is manifest from an inspection of the bond that the amount of the penalty has been altered, the burden is on plaintiff to show that the alteration was made before the bond was signed); Workman v. Campbell, 57 Mo. 53 (holding that, in a suit on a subscription, an answer denying the execution of the subscription sued for, and setting up the alteration, throws on plaintiff the burden of proving the amount subscribed).

Nebr.—Ohio Nat. Bank v. Gill, 85 Nebr. 718, 124 NW 152 (holding that, where in an action on a note, the answer is a general denial, the burden of showing that the note is unaltered is on plaintiff, although defendant introduces evidence of alteration).

Pa.—Nesbitt v. Turner, 155 Pa. 429, 26 A 750 (holding that where there is a manifest alteration on the face of an instrument sued on which does not appear by the copy filed, a rule making it necessary for plaintiff to prove execution only when defendant denies the execution of the instrument does not apply, and the burden of explaining the alteration is on plaintiff).

[a] **Not denial of execution.**—Where in an action on a note which has been altered, the complaint declares on the instrument in its original, unaltered form, and the answer admits the making of the note as described in the complaint, but alleges material alterations therein after delivery, such answer does not constitute a denial of the making of the note as declared in the complaint, so as to put the burden on plaintiff, and it is upon defendant to prove the new matter set up in his answer. Wyckoff v. Johnson, 2 S. D. 91, 48 NW 837.

[b] **Under the Georgia statute** (1) the presumption of alteration before execution arises unless there is a denial under oath of the execution of the instrument sued on. Thrasher v. Anderson, 45 Ga. 538. (2) Where there is such denial no presumption is indulged, but the whole question is left to the jury on the evidence in the case. Winkles v. Guenther, 98 Ga. 472, 25 SE 527; Planters', etc., Bank v. Erwin, 31 Ga. 371. (3) In the absence of the statutory affidavit to attack the genuineness of a duly registered deed, the presumption is that it was executed as it is when offered in evidence; but if the affidavit is made the burden is shifted upon the other party to show what the law would otherwise presume. Collins v. Boring, 96 Ga. 360, 23 SE 401; Banks v. Lee, 73 Ga. 25; Hill v. Nisbet, 58 Ga. 586 [dist Matthews v. Castleberry, 43 Ga. 346, in that the burden of proof was not shifted in that case, because the deed appeared on its face to be genuine and bore no marks of alteration].

8. Ark.—Klein v. German Nat. Bank, 69 Ark. 140, 61 SW 572, 86 AmSR 183.

Ill.—Merritt v. Dewey, 218 Ill. 599, 605, 75 NE 1066, 2 LRANS 217 [rev 115 Ill. A. 503] (where Scott, J., said: "Upon the whole case, the burden of proof was upon the plaintiff to show such a state of facts as would authorize him to recover").

Me.—Dodge v. Haskell, 69 Me. 429; Belfast Nat. Bank v. Harriman, 68 Me. 522.

Mass.—Cape Ann Nat. Bank v. Burns, 129 Mass. 596; Simpson v. Davis, 119 Mass. 269, 20 AmR 324; Lincoln v. Lincoln, 12 Gray 45; Davis v. Jenney, 1 Metc. 221 (holding that proof or admission of the signature of the party to an instrument is prima facie evidence that the whole of the instrument written over the signature is the act of the party, and this prima facie case will stand, unless defendant can rebut it by showing from the appearance of the instrument itself, or otherwise, that it has been altered).

Mich.—Von Eherenkrook v. Webber, 100 Mich. 314, 58 NW 665, 60 NW 761 (where plaintiff's denial raised an issue respecting a writing which defendant relied upon, and it was held that defendant had the affirmative of the issue. The alteration complained of was not an interlineation, but consisted of the addition of words over plaintiff's blank indorsement, such addition being in the handwriting of defendant, who relied upon the indorsement and the words thus written over it, the existence of which words at the time of her signature plaintiff denied); Willett v. Shepard, 34 Mich. 106 (holding that where the only controversy relates to whether an erasure of certain words was made before or after execution of a note, and there is evidence on both sides relating to the issue, it is error to charge that the burden of proof is upon defendant); Comstock v. Smith, 26 Mich. 306.

N. Y.—Farmers' L. & T. Co. v. Siefke, 144 N. Y. 354, 39 NE 358 (holding that, where plaintiff alleges that defendant executed a sealed instrument, and the defense is that the seal was added after execution of the instrument, as the pleadings stand the fact of the execution of a sealed instrument is issuable, and as it was put in issue plaintiff is bound to establish it as a part of his case).

Wis.—Low v. Merrill, 1 Pinn. 340.

Shifting of burden of proof.—For a full discussion of the principle involved see Evidence [16 Cyc 926–937].

[a] **"The burden is always upon the plaintiff** (when the general issue is pleaded) to make out his case, and to establish by a preponderance of evidence every fact necessary to a recovery by him. The case at bar forms no exception to the general rule. In the case of an altered paper, if objected to on that ground, it cannot be introduced at all until sufficient foundation therefor has been laid to satisfy the court as to the propriety of letting it go before the jury. As already stated, the introduction of the paper is usually allowed upon the statement of the plaintiff that the interlineation was made before it was signed and delivered. But this action of the court in admitting the paper does not affect or shift the burden of proof when the fact is controverted, and there is a contest before the jury. In such case, the burden is upon the party having possession of the instrument, and claiming under it, to satisfy the jury by a preponderance of evidence that the alteration was made under such circumstances as not to affect his right to recover." Per Harrison, J., in Consumers' Ice Co. v. Jennings, 100 Va. 719, 726, 42 SE 879.

[b] **"The burden of proof, so far as regarded the duty of going forward** and establishing the execution of the instrument and its delivery to him bearing the defendant's signature, was on the plaintiff from first to last. Taking the term in this sense, it is true that the burden of proof never shifts. Barber's App., 63 Conn. 393, 403, 27 A 973, 22 LRA 90. A party is always and continuously bound to prove his side of the case, if he is met by a traverse. But he may adduce some evidence to which the law assigns, prima facie, a certain degree of probative effect. In that event, his adversary comes under the burden of meeting the presumption thus raised against him by evidence of greater weight." Per Baldwin, J., in Baxter v. Camp, 71 Conn. 245, 253, 41 A 803, 71 AmSR 169, 42 LRA 514.

[c] **Instrument appearing to be vitiated.**—(1) Where an action is brought on an instrument which, when produced, shows that the name of defendant is erased, such erasure being a complete cancellation of the note, defendant is not under the necessity of pleading non est factum and the burden is still on plaintiff to

mission of the signature of the instrument, since that is prima facie evidence that the whole instrument is the act of the party signing;[9] and while this does not, technically speaking, shift the burden of proof to defendant,[10] and the burden of proof, on the whole evidence, is still on plaintiff to show that the instrument declared on is defendant's act,[11] yet defendant is entitled to introduce evidence to rebut this prima facie case, and thus throw upon the party introducing the instrument the burden of accounting for the alteration;[12] and in such a case an affirmative defense of alteration must be established by a preponderance of the evidence.[13]

Where the issue arises in a suit in which plaintiff is seeking relief against an alleged alteration in an instrument upon which he would otherwise be liable, plaintiff has the burden of proving the alteration.[14]

[§ 186] **3. Presumptions and Burden Arising from Apparent Changes—a. The Ancient Rule.** Anciently it appears that the matter of interlineations and erasures appearing upon the face of a deed was tried by the judges on a view of the deed;[15] and according to the civil law erasures or interlineations in a substantial part of an instrument are presumed to be false or forged, and must be satisfactorily accounted for before the instrument can be received in evidence.[16]

[§ 187] **b. Control of Extrinsic Facts under Modern Views—(1) General Rule.** The practice last stated no longer prevails. The mere fact of a

show that the erasure was effected by fraud or imposition on the part of the promisor. Daniel v. Daniel, Dudley (Ga.) 239. See also Stoner v. Ellis, 6 Ind. 152; Slocum v. Watkins, 1 Rob. (La.) 214; Porter v. Doby, 19 S. C. Eq. 49; Blewett v. Bash, 22 Wash. 536, 61 P 770; Abbe v. Rood, 1 F. Cas. No. 6, 6 McLean 106. (2) But the instrument is admissible in evidence when accompanied by other evidence explaining the erasure. Frazer v. Boss, 66 Ind. 1. See also Robinson v. State, 60 Ind. 26.

[d] **Collateral matter.**—While, if a note appears on its face to have been materially altered, it is incumbent on the party offering it in evidence to offer testimony to explain its condition, such as that it was in the same condition when it came into his hands, and that he was assured by the parties to it that it was all right, it is not necessary for the holder to prove, in the first instance, that he gave value for it, or to prove collateral matter entirely outside of the note. Towles v. Tanner, 21 App. (D. C.) 530.

9. U. S.—Sturm v. Boker, 150 U. S. 312, 14 SCt 99, 37 L. ed. 1093.

Ind.—Stayner v. Joyce, 120 Ind. 99, 22 NE 89; Cochran v. Nebeker, 48 Ind. 459.

Iowa.—Hagan v. Merchants', etc., Ins. Co., 81 Iowa 321, 46 NW 1114, 25 AmSR 493.

Mass.—Simpson v. Davis, 119 Mass. 269, 20 AmR 324; Davis v. Jenney, 1 Metc. 221.

Mich.—Willett v. Shepard, 34 Mich. 106.

Minn.—Wilson v. Hayes, 40 Minn. 531, 42 NW 467, 12 AmSR 754, 4 LRA 196.

S. D.—Moddie v. Breiland, 9 S. D. 506, 70 NW 637.

[a] **"The burden of proof is on the plaintiff** to make out his case, and to do this he must, of course, show that the defendants executed the note sued on; but, when he shows that the signatures to the instrument are those of the defendants, he has the right to introduce the instrument in evidence, and, if there be no further evidence, he has made out a case sufficient to go to the jury." Per Riddick, J., in Klein v. German Nat. Bank, 69 Ark. 140, 144, 61 SW 572, 86 AmSR 183.

10. Klein v. German Nat. Bank, 69 Ark. 140, 61 SW 572, 86 AmSR 183 (holding that the admission of an altered note in evidence, without explanation of the alterations, but on mere proof of the maker's signatures, does not place the burden on defendants to prove that they are not liable thereon, although requiring evidence in rebuttal to overcome plaintiff's case).

11. Belfast Nat. Bank v. Harriman, 68 Me. 522; Simpson v. Davis, 119 Mass. 269, 20 AmR 324; Longwell v. Day, 1 Mich. N. P. 286. In Stoner v. Ellis, 6 Ind. 152, it was said that the often quoted language that plaintiff must prove an alteration to have been made before the instrument was executed means no more than that he must prove his case, and usually has no reference to the burden of proof between the parties as to who made the alteration. In Graham v. Middleby, 185 Mass. 349, 352, 70 NE 416, Braley, J., said: "If the execution of the bond is proved, the burden does not change, but the defendants meet the evidence of the plaintiff by proof that the contract in evidence is not that put in suit, and in such a case the burden of proof remains on the plaintiff throughout the trial to prove the contract upon which he has declared." For full discussion of this doctrine see Evidence [16 Cyc 926-937].

[a] **Plaintiff must sustain allegations.**—Siefke v. Siefke, 3 Misc. 81, 22 NYS 546 (where it was held that where the complaint averred that defendant made the note in suit under his hand and seal, the burden was upon plaintiff to sustain the allegation, which the answer denied, Daly, C. J., said: "The only ground of contention in this case arises from the fact of an additional allegation of the answer that the note was altered by fixing a seal. But this was mere redundancy, and was no more an affirmative defense than would be an allegation that a note was forged, following a denial of the making and delivery. Such an allegation would not cast upon defendant the burden of proving that the note was not signed by him. Execution under defendant's hand and seal was set up by plaintiff, and as he alleged the facts constituting the issue, he was bound to prove them").

12. Conn.—Baxter v. Camp, 71 Conn. 245, 41 A 803, 71 AmSR 169, 42 LRA 514 (holding that, where defendant's signature to the writing in suit had been plainly erased, altered, or canceled, and he testified that he canceled it with his wife's consent, plaintiff was bound to prove either an existing signature of defendant or that the erasure or cancellation was made without the consent of the then owner of the instrument).

Ind.—Eckert v. Louis, 84 Ind. 99.

Iowa.—Smith v. Eals, 81 Iowa 235, 46 NW 1110, 25 AmSR 486.

Minn.—Wilson v. Hayes, 40 Minn. 531, 42 NW 467, 12 AmSR 754, 4 LRA 196.

Nebr.—Courcamp v. Weber, 39 Nebr. 533, 58 NW 187.

Pa.—Franklin Trust Co. v. Philadelphia, etc., R. Co., 222 Pa. 96, 70 A 949, 22 LRANS 828.

Tex.—Richers v. Helmcamp, 1 Tex. A. Civ. Cas. § 682.

[a] **After proof by defendants** tending to show alteration, the burden of proof on the whole case is then upon plaintiff to show that no such alteration was made, or that it was made with the consent of defendants, or that they ratified the same. Eggmann v. Nutter, 155 Ill. A. 390.

13. Towles v. Tanner, 21 App. (D. C.) 530; Truesdell v. Hunter, 28 Ill. A. 292; Fudge v. Marquell, 164 Ind. 447, 72 NE 565, 73 NE 895; Shroeder v. Webster, 88 Iowa 627, 55 NW 569; Wyckoff v. Johnson, 2 S. D. 91, 48 NW 837.

[a] **Proof of the due execution** of an instrument which bears on its face no appearance of alteration is sufficient foundation for its admission in evidence, and casts on defendant the burden of proving an alteration, and that it was made after the note was executed. Cosgrove v. Fanebust, 10 S. D. 213, 72 NW 469.

14. D. C.—Keyser v. Hitz, 13 D. C. 513 [aff 133 U. S. 297, 10 SCt 290, 33 L. ed. 631].

N. J.—Putnam v. Clark, 33 N. J. Eq. 338 (distinguishing the rule as to the burden of proof in cases involving the validity of altered papers where the actor grounds his right of action on the altered instrument, in which cases no presumption arises to invalidate the instrument from a mere inspection of apparent changes, although it is said that it is probably equally true that the appearance of the alteration itself, or slight circumstances connected therewith, may exhibit indicia of unfairness, which, while falling short of proof thereof, would throw upon the propounder of the instrument the burden of showing that the alteration was fairly made, and that the failure of such proof on his part would support a finding against the validity of the instrument).

N. Y.—Barker v. Stroppel, 124 NYS 865.

Tenn.—Smith v. Parker, (Ch. A.) 49 SW 285.

Wash.—Lawrence v. Meenach, 45 Wash. 632, 88 P 1120.

[a] **Appearance of alteration.**—In Harris v. Jacksonville Bank, 22 Fla. 501, 1 S 140, 1 AmSR 201, upon the last point suggested in Putnam v. Clark, 33 N. J. Eq. 338, it was held that if, upon the production of the bill which complainant sought to have canceled and delivered up on the ground of an alteration, the alteration was apparent it would make out complainant's prima facie case, and throw the burden on the holder to explain the alteration; but that if nothing appeared upon the bill to indicate that the change had been made complainant must prove his case by extraneous testimony. See also Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122, 21 NE 168; O'Donnell v. Harmon, 3 Daly (N. Y.) 424.

[b] **In an action to annul a deed** on the ground of material alteration after its execution, the burden to show such alteration rests on plaintiff; and in such cases plaintiff must make out his case by evidence which is clear, strong, and convincing. Riley v. Riley, 9 N. D. 580, 84 NW 347.

15. Ravisies v. Alston, 5 Ala. 297 [cit Sheppard Touch. 69]; Bailey v. Taylor, 11 Conn. 531, 29 AmD 321; Printup v. Mitchell, 17 Ga. 558, 63 AmD 258 [cit Coke Litt. 35 note 7].

16. Wheadon v. Turregano, 112 La. 931, 36 S 808 [cit McMicken v. Beauchamp, 2 La. 290]; Pipes v. Hardesty,

change in an instrument does not of itself constitute a vitiating alteration, nor does the mere fact that the instrument appears to contain interlineations of erasures destroy its evidentiary character,[17] even though such changes are not noted.[18]

[§ 188] **(2) Presumption of Alteration; Burden to Explain Appearance—(a) Conflict of Authority.** While the question always depends upon extrinsic facts, and stronger inferences may be drawn in some jurisdictions than in others from the appearance of the paper, there is much conflict in the decisions as to whether or not on the production of a written instrument which shows an erasure or interlineation or change of words there is, in the absence of all evidence, a presumption for or against the validity of the instrument, and whether or not as a consequence it is incumbent upon the party offering it in evidence to offer an explanation of such erasure, interlineation, or change,[19] although it is believed that an examination will show that in almost all cases the conflict is theoretical and more apparent than practical and real.[20]

[§ 189] **(b) Rule Requiring Explanation—aa. In General.** In many cases the doctrine is recognized that changes apparent on the face of an instrument will raise a presumption that they were made after the execution of the instrument, and will require explanation, or, to the same purpose, that the production of an instrument bearing evidences of such a change throws upon the party producing it the

9 La. Ann. 152, 61 AmD 202 [cit Febrero pt II bk III c 1 No. 341]; Hanrick v. Dodd, 62 Tex. 75.

17. Ala.—Ward v. Cheney, 117 Ala. 238, 22 S 996; Mayer v. Clark, 40 Ala. 259.

Ark.—Hatfield Special School Dist. v. Knight, 164 SW 1137.

Cal.—Roberts v. Unger, 30 Cal. 676.

Iowa.—Harlan v. Berry, 4 Greene 212.

Tex.—Tutt v. Morgan, 18 Tex. Civ. A. 627, 42 SW 578, 46 SW 122.

See also supra §§ 90, 104–118.

Altered instrument as evidence generally see supra §§ 28–32.

[a] **"The mere fact that alterations, or erasures, or interlineations, are apparent** on the face of a deed does not destroy its validity. The effect of them, ordinarily, depends upon extrinsic evidence, and is incapable of determination upon a motion to exclude the deed as an instrument of evidence." Per Brickell, C. J., in Ward v. Cheney, 117 Ala. 238, 241, 22 S 996. To same effect Harper v. Reaves, 132 Ala. 625, 32 S 721.

18. Sill v. Reese, 47 Cal. 294 (holding that a change in a word or words in a document, not noted before the signing, will not render it void as evidence); Cairo, etc., R. Co. v. Parrott, 92 Ill. 194; White v. Williams, 3 N. J. Eq. 376.

[a] **Propriety and effect of noting changes.**—(1) In view of the rules with regard to the necessity for explaining interlineations apparent upon the face of an instrument, a party who receives such an instrument should see that the interlineation is noted in the attestation if he does not wish to assume the burden of explaining it. Hodge v. Gilman, 20 Ill. 437. See also Smith v. U. S., 2 Wall. (U. S.) 219, 17 L. ed. 788; Bailey v. Taylor, 11 Conn. 531, 29 AmD 321 [cit 4 Cruise Dig. 388 tit 32 c 26 §§ 10, 11]. (2) If the alteration is noted in an attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the instrument is relieved of suspicion. Crossman v. Crossman, 95 N. Y. 145; Howell v. Hanrick, 88 Tex. 333, 29 SW 762, 30 SW 856, 31 SW 611.

[b] **Refusal to receive instrument.**—Holding that (1) one cannot refuse to receive a deed because erasures made before execution are not noted. Britton v. Stanley, 4 Whart. (Pa.) 114. See also Graystock v. Barnhart, 26 Ont. A. 545. (2) But on an application for a liquor license under a statute, it was held that a bond might be rejected where the name of one of the sureties had been erased, as the state was entitled to a clear bond such as would not cast upon it the burden of showing how the apparent alteration was made. Nordstrom's Pet., 127 Pa. 542, 18 A 601. See also Thorpe v. Keeler, 18 N. J. L. 251.

19. Neil v. Case, 25 Kan. 510, 516, 37 AmR 259 (where Harton, C. J., said: "This is a vexed question, and the books are full of diverse decisions").

[a] **Judicial comment on conflict of authority.**—(1) In Scott v. Thrall, 77 Kan. 689, 692, 95 P 563, 127 AmSR 449, 17 LRANS 184 and note, Benson, J., said: "Much has been written upon the subject of presumptions in case of altered instruments and the burden of proof in connection therewith. It is difficult to formulate general rules. We must be content to apply settled principles to the particular facts in solving the given case." (2) In Wilson v. Hayes, 40 Minn. 531, 535, 42 NW 467, 12 AmSR 754, 4 LRA 196, Mitchell, J., said: "The question . . . is one upon which there is a wilderness of authorities and much conflict of opinion. Any attempt to cite or consider the innumerable cases on this question would be both impracticable and useless." (3) Among other cases in which such expressions may be encountered see Comstock v. Smith, 26 Mich. 306; Dorsey v. Conrad, 49 Nebr. 443, 68 NW 645; Norfleet v. Edwards, 52 N. C. 455; Cass County v. American Exch. State Bank, 9 N. D. 263, 83 NW 12; Farmers' Nat. Bank v. McCall, 25 Okl. 600, 106 P 866, 26 LRANS 217; Page v. Danaher, 43 Wis. 221.

[b] **"There is a great mass of conflicting opinions** and decisions in respect of the question—in the varying phases of its occurrence: Upon whom lies the duty of explanation, and what is the measure of its discharge, when a negotiable instrument, that has apparently been altered in a material respect, is offered in evidence by one claiming under it? Without spending time in an unnecessary review of these decisions, we think it sufficient to say, that, in our judgment, the weight of authority as well as reason supports the proposition, that, in such case, where the alteration is material, and such as reasonably to excite suspicion, it is incumbent upon the party offering it in support of his claim thereunder, to give some evidence tending to explain its condition. This proposition has the support of Greenleaf and Wharton, and is said by the latter to embody the doctrine of the Roman law. 1 Greenl. Ev. Sec. 564; 1 Whart. Ev. Sec. 621. And in at least two decisions it has been approved by the Supreme Court of the United States. Smith v. U. S., 2 Wall. 219, 232, 233, 17 L. ed. 788; U. S. v. Linn, 1 How. 104, 111, 11 L. ed. 64." Per Shepard, J., in Ofenstein v. Bryan, 20 App. (D. C.) 1, 16.

[c] **"Four different rules are generally stated:** First, that an alteration apparent on the face of the writing raises no presumption either way, but the question is for the jury; second, that it raises a presumption against the writing, and requires, therefore, some explanation to render it admissible; third, that it raises such a presumption when it is suspicious, otherwise not; fourth, that it is presumed, in the absence of explanation, to have been made before delivery, and therefore requires no explanation in the first instance." Per Horton, C. J., in Neil v. Case, 25 Kan. 510, 516, 37 AmR 259. See also Orlando v. Gooding, 34 Fla. 244, 15 S 770, and Hagan v. Merchants', etc., Ins. Co., 81 Iowa 321, 46 NW 1114, 25 AmSR 493 (where the rules are similarly stated). In Wilson v. Hayes, 40 Minn. 531, 535, 42 NW 467, 12 AmSR 754, 4 LRA 196, Mitchell, J., said: "The rule adopted by some authorities is that the presumption, in the absence of evidence to the contrary, is that the alteration was made before execution, and therefore that no explanation is required in the first instance; while others hold . . . that the presumption of law is that the alteration was made after delivery, and therefore the burden is upon the holder to explain it, and show that it was made under circumstances that would not invalidate the instrument. In addition to these two leading and opposing views, different courts have adopted certain intermediate or compromise rules, none of which need be here referred to, except one, seemingly adopted by some very eminent courts, to wit, that the alteration raises a presumption against the instrument when it is suspicious; otherwise, not. But this furnishes no definite rule by which to determine when the burden is upon the holder to explain the alteration and when it is not. . . . It seems to us that the rule just referred to amounts to nothing more than saying that in some cases this intrinsic evidence [furnished by the inspection of the instrument itself] may tend to prove that the alteration was made after delivery, and therefore throw the preponderance on that side, unless the holder of the instrument produces extrinsic rebutting evidence. Thus construed, we would find no special fault with the rule. But it is incorrect to call this a presumption of law, it is simply an inference of fact drawn from evidence in the case."

20. Cox v. Palmer, 3 Fed. 16, 1 McCrary 431 (where McCrary, C. J., said: "Upon this question there is an apparent conflict of authority. I think, however, it is apparent only, and not real. . . . I think that one rule governs in all these cases, and it is this: If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink,—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before execution").

burden of accounting for its appearance,[21] at least, if the appearance is suspicious;[22] but, where a party demands the production of a written contract mentioned by a witness, it is held that it will not be incumbent upon the opposite party, who does not claim under the instrument, to explain its appearance.[23]

[§ 190] **bb. Accounts.** An original entry in an account book will be presumed, in the absence of explanation of an apparent alteration, to be in accordance with the facts at the time of its entry.[24]

[§ 191] **cc. Erasure of Special Indorsement.**[25] The holder of a note, having the right to erase a prior special indorsement, is not under the necessity to explain such erasure.[26]

[§ 192] **(c) Presumption of Change before Execution.** U. S.—Barnsdall v. Boley, 119 Fed. 191; Prevost v. Gratz, 19 F. Cas. No. 11,406, Pet. C. C. 364 [app dism 6 Wheat. 481, 5 L. ed. 311]. See also The Richard Vaux, 20 Fed. 654.

Ark.—Chism v. Toomer, 27 Ark. 108.

Cal.—Miller v. Luco, 80 Cal. 257, 22 P 195; Sedgwick v. Sedgwick, 56 Cal. 213; Roberts v. Unger, 30 Cal. 676 (under statutory provision that, where a deed is produced by a party claiming under it, and it appears on its face to have been altered, the burden of explaining the alteration is on the party producing the instrument); Manuel v. Flynn, 5 Cal. A. 319, 90 P 463. In Galland v. Jackman, 26 Cal. 79, 85 AmD 172, it was held that where a deed is produced in evidence by the party claiming under it, and it presents on its face evidence of having been altered in a material particular to the interest of the party producing it, he must explain the change by satisfactory evidence or the deed will be deemed to read as before the alteration.

Conn.—Baxter v. Camp, 71 Conn. 235, 41 A 803, 71 AmSR 169, 42 LRA 514.

Del.—Herdman v. Bratten, 2 Del. 396.

Hawaii.—Kahai v. Kamai, 8 Hawaii 694.

Ida.—Mulkey v. Long, 5 Ida. 213, 47 P 949 (holding that, under Rev. St. § 6030, relative to the admission of altered instruments in evidence, one offering a note showing upon its face that it has been altered must show that the alteration was made before it came to his hands).

Ill.—Landt v. McCullough, 206 Ill. 214, 69 NE 107 [rev 103 Ill. A. 668]; Merritt v. Boyden, 191 Ill. 136, 60 NE 907, 85 AmSR 246; Catlin Coal Co. v. Lloyd, 180 Ill. 398, 54 NE 214, 72 AmSR 216; Pyle v. Oustatt, 92 Ill. 209; Hodge v. Gilman, 20 Ill. 437; Walters v. Short, 10 Ill. 252; Gillett v. Sweat, 6 Ill. 475; Grand Lodge A. O. U. W. v. Young, 123 Ill. A. 628; Dewey v. Merritt, 106 Ill. A. 156; Sisson v. Pearson, 44 Ill. A. 81; McAllister v. Avery, 17 Ill. A. 568.

Iowa.—Rambousek v. Supreme Council M. T., 119 Iowa 263, 93 NW 277; Maguire v. Eichmeir, 109 Iowa 301, 80 NW 395; Adair v. Egland, 58 Iowa 314, 12 NW 277.

Kan.—State v. Roberts, 37 Kan. 437, 15 P 593.

Ky.—Limestone Bank v. Penick, 2 T. B. Mon. 98, 15 AmD 136.

La.—Messi v. Frechede, 113 La. 679, 37 S 600; Wheadon v. Turregano, 112 La. 931, 36 S 808 (holding that, where a lease was executed in duplicate, and that retained by the lessor showed an erasure of an important clause, which was not erased in the duplicate delivered to the lessee, the burden of proof was on the lessor to show that the erasure was made before the signing or with the consent of the lessee); Pipes v. Hardesty, 9 La. Ann. 152, 61 AmD 202 (where it is said that the presumption is not juris et de jure, that it yields to contrary proof and even to such circumstances as create a strong presumption that the interlineation was made before the execution and delivery of the deed); Fletcher v. Cavelier, 4 La. Ann. 267; Union Bank v. Brewer, 2 La. Ann. 835; McMicken v. Beauchamp, 2 La. 290 (declaring the rule of the civil law to be in conformity with the law merchant).

Me.—Dodge v. Haskell, 69 Me. 429; Ross v. Gould, 5 Me. 204.

Mass.—Graham v. Middleby, 185 Mass. 349, 70 NE 416; Ely v. Ely, 6 Gray 439.

Mich.—Samberg v. American Express Co., 136 Mich. 639, 99 NW 879; Von Eherenkrook v. Webber, 100 Mich. 314, 58 NW 665, 60 NW 761; Comstock v. Smith, 26 Mich. 306.

Miss.—Ellison v. Mobile, etc., R. Co., 36 Miss. 572; Wilson v. Henderson, 17 Miss. 375, 48 AmD 716; Commercial, etc., Bank v. Lum, 8 Miss. 414.

N. H.—Cole v. Hills, 44 N. H. 227; Humphreys v. Guillow, 13 N. H. 385, 38 AmD 499; Hills v. Barnes, 11 N. H. 395.

N. Y.—Kelly v. Indemnity F. Ins. Co., 38 N. Y. 322 (holding that, where testimony is introduced in order to meet a presumption raised by interlineations of entries of purchases in books of accounts, the opposite party cannot complain that it was submitted to the jury to determine whether or not the books were fraudulently altered, especially when he did not object to the admission of the books); Pease v. Barnett, 27 Hun 378; Chappell v. Spencer, 23 Barb. 584; Acker v. Ledyard, 8 Barb. 514; Smith v. McGowan, 3 Barb. 404. In re Pinkerton, 49 Misc. 363, 99 NYS 492 (holding that, where, in a claim against a decedent's estate, the body of the note on which a claim is based was obviously written with a different pencil from that employed to write the words "Value received with interest," it devolves upon claimant to show that the words were written before the note was delivered, and as part of the execution thereof); Taylor v. Crowninshield, 5 NYLegObs 209; Herrick v. Malin, 22 Wend. 388; Jackson v. Osborn, 2 Wend. 555, 20 AmD 649.

Or.—Hillsboro First Nat. Bank v. Mack, 35 Or. 122, 57 P 326 (from which it appears that it was provided by statute that a writing which appears to have been altered after its execution in a part material to the question in dispute is not competent evidence unless the alteration is explained); Simpkins v. Windsor, 21 Or. 382, 28 P 72; Wren v. Fargo, 2 Or. 19. But see Nickum v. Gaston, 28 Or. 322, 42 P 130 (holding that, where, even after the instrument is admitted over objection, it is shown that the alteration was made after execution, the statute referred to does not apply).

Pa.—Cornog v. Wilson, 231 Pa. 281, 80 A 174; Clark v. Eckstein, 22 Pa. 507, 62 AmD 307; Paine v. Edsell, 19 Pa. 178; Barrington v. Washington Bank, 14 Serg. & R. 405; Potter's Est., 16 Pa. Super. 576; Carbondale School Dist. v. Tuttle, 2 Pa. Dist. 33.

S. C.—Kennedy v. Moore, 17 S. C. 464; Vaughan v. Fowler, 14 S. C. 355, 37 AmR 731; Burton v. Pressly, 15 S. C. Eq. 1.

Tenn.—Riseden v. Harrison, (Ch. A.) 42 SW 884.

Tex.—Jacoby v. Brigman, 7 SW 366; Miller v. Alexander, 13 Tex. 497, 65 AmD 73; Kansas Mut. L. Ins. Co. v. Coalson, (Civ. A.) 54 SW 388; Davis v. State, 5 Tex. A. 48.

Va.—Slater v. Moore, 86 Va. 26, 9 SE 419; Hodnett v. Pace, 84 Va. 873, 6 SE 217; Elgin v. Hall, 82 Va. 680 (holding that, on a reference to take an account, one producing receipts which bear patent alterations in dates and amounts on the face thereof must explain such appearances).

Eng.—Falmouth v. Roberts, 1 Dowl. P. C. N. S. 633, 133 Reprint 1004; Cariss v. Tattersall, 2 M. & G. 890, 40 ECL 677; Johnson v. Marlborough, 2 Stark. 313, 3 ECL 424 (where plaintiff was required to prove that the alteration of a bill was made before acceptance, else the bill would be deemed void for want of a new stamp). See also Desbrow v. Weatherley, 6 C. & P. 758, 25 ECL 675; Thompson v. Mosely, 5 C. & P. 501, 24 ECL 676. But see Tomlins v. Lawrence 6 Bing. 376, 19 ECL 175, 130 Reprint 1325 (which was an action by an indorsee against an acceptor on a bill of exchange. Defendant obtained a rule on plaintiff to show why the proceedings should not be stayed on payment of debt and costs, and why the bill should not be delivered up to defendant, and upon an offer to deliver up the bill, which contained extraordinary erasures made upon it while in plaintiff's hands, it was held that the delivery of the paper was a compliance with the requisition of the rule, and that if defendant suffered injury he must resort to ulterior proceedings).

Ont.—Carrique v. Beaty, 24 Ont. A. 302 [rev 28 Ont. 175].

[a] **"It is a general rule** that, where a written instrument shows an alteration by interlineation or erasure upon its face, the presumption, in the absence of evidence, is that it was made after the execution of it, and the burden is upon the party claiming under the instrument to explain the alteration." Per Jackson, J., in Barnsdall v. Boley, 119 Fed. 191, 194.

[b] **Alteration of printed form.**— When an alteration is made only as to printed matter in a general form for the instrument in question, a presumption has been held to arise that it was made prior to the execution of the contract and to suit it to the terms agreed upon between the parties. Corcoran v. Doll, 32 Cal. 82. See Portsmouth Sav. Bank v. Wilson, 5 App. (D. C.) 8 (where it was held that the law will not presume that an erasure of printed words from the face of a note was made after indorsement).

22. See infra §§ 197, 198.

23. Priest v. Whiteacre, 78 Va. 151 (holding that in such a case, in the absence of evidence tending to show that the contract had been altered, the jury are bound to take it as produced).

24. Adams v. Adams, 22 Vt. 50 (holding that, where, on an appeal by the heirs of an estate against the administrators, it appeared that the decedent at the time of his death held a note for one thousand dollars against the administrators, and also had a credit of one thousand dollars on the account books of the administrators, the latter could not avail themselves of an alteration of the words in which the credit was written on their books without evidence of their right to make the alteration). See also Sheils v. West, 17 Cal. 324; Wilson v. O'Day, 5 Daly (N. Y.) 354 (holding that, where the books of a warehouse were altered to show that certain goods were received on a day different from that originally shown by the books, the possession by the person storing the goods of a warehouseman's receipt corresponding with the altered books is no evidence that the holder of the receipt knew of the alteration).

25. **For the right to erase special indorsements** see Bills and Notes [7 Cyc 796].

26. Jones v. Berryhill, 25 Iowa 288; King v. Bellamy, 82 Kan. 301, 302, 108

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cution. In other cases the general rule is adopted that where an instrument presents the appearance of having been changed, in the absence of evidence to the contrary, or suspicious circumstances, the presumption is that the change was made before, or contemporaneously with, the execution and delivery of the instrument, and it is for the party attacking the instrument to show otherwise,[27] for the reason that the presumption of law is always in favor of honesty and upright conduct,[28] and the whole ques-

P 117 [cit Cyc]; Finney v. Turner, 10 Mo. 208.

27. U. S.—Hanrick v. Patrick, 119 U. S. 156, 7 SCt 147, 30 L. ed. 396 (a case involving a deed); Rankin v. Tygard, 198 Fed. 795, 119 CCA 591.

Ala.—Gulf Red Cedar Co. v. Crenshaw, 169 Ala. 606, 53 S 812; Ward v. Cheney, 117 Ala. 238, 22 S 996.

Del.—Welch v. Coulborn, 8 Del. 647.

Fla.—Cross v. Aby, 55 Fla. 311, 45 S 820 (holding that an alteration in a written instrument will be presumed to have been made contemporaneously with its execution, and to have been properly made, in the absence of evidence to the contrary); Orlando v. Gooding, 34 Fla. 244, 15 S 770; Kendrick v. Latham, 25 Fla. 819, 6 S 871; Stewart v. Preston, 1 Fla. 10, 44 AmD 621. But see Calhoun v. McKay, 64 Fla. 226, 60 S 182.

Ga.—McConnell v. Slappey, 134 Ga. 95, 67 SE 440; Westmoreland v. Westmoreland, 92 Ga. 233, 17 SE 1033 (as to effect of an instrument as evidence, the alterations serving to render the instrument consistent with itself); Thrasher v. Anderson, 45 Ga. 538 (holding that it would be absurd to say that prima facie the presumption is one way, but that the jury may treat that presumption as of no weight); Vickery v. Benson, 26 Ga. 582; Printup v. Mitchell, 17 Ga. 558, 63 AmD 258.

Ida.—Dangell v. Levy, 1 Ida. 722 (which, however, in any event was an immaterial change).

Ind.—Runnion v. Crane, 4 Blackf. 466.

Iowa.—Tharp v. Jamison, 154 Iowa 77, 134 NW 583, 39 LRANS 100 and note.

Ky.—Pike County v. Sowards, 147 Ky. 37, 143 SW 745; James v. Holdam, 142 Ky. 450, 134 SW 435; Gunkel v. Seiberth, 85 SW 733, 27 KyL 455; Pogue v. Ross, 74 SW 1101, 25 KyL 187; Marion Nat. Bank v. Russell, 13 KyL 332; Anderson v. French, 10 KyL 816.

Mich.—Ensign v. Fogg, 177 Mich. 317, 143 NW 82; Arnold v. Brechtel, 174 Mich. 147, 140 NW 610; Brand v. Johnrowe, 60 Mich. 210, 26 NW 833; Sirrine v. Briggs, 31 Mich. 443.

Minn.—Wilson v. Hayes, 40 Minn. 531, 42 NW 467, 12 AmSR 754, 4 LRA 196.

Mo.—Kilpatrick v. Wiley, 197 Mo. 123, 95 SW 213 (holding that, where an erasure and interlineation appear in a power of attorney, it will be presumed that the alteration was incident to the making of the contract and was immaterial to its validity, in the absence of proof or other indicia of spoliation or fraudulent intent); Stillwell v. Patton, 108 Mo. 352, 18 SW 1075; Burnett v. McCluey, 78 Mo. 676; Paramore v. Lindsey, 63 Mo. 63; Whitmer v. Frye, 10 Mo. 348; Finney v. Turner, 10 Mo. 207; Matthews v. Coalter, 9 Mo. 705; Carterville v. Luscombe, 165 Mo. A. 513, 148 SW 966; Hatch v. Bayless, 164 Mo. A. 216, 146 SW 839; German-American Bank v. Manning, 133 Mo. A. 294, 113 SW 251; Paul v. Leeper, 98 Mo. A. 515, 72 SW 715; Holladay-Klotz Land, etc., Co. v. T. J. Moss Tie Co., 87 Mo. A. 167.

Nebr.—Colby v. Foxworthy, 80 Nebr. 239, 242, 114 NW 174 [reh den 80 Nebr. 244, 115 NW 1076, and cit Cyc]; Dorsey v. Conrad, 49 Nebr. 443, 68 NW 645 [roll upon same point Goodin v. Plugge, 47 Nebr. 284, 66 NW 407; Cass County Bank v. Morrison, 17 Nebr. 341, 22 NW 782, 52 AmR 417, and overr Courcamp v. Weber, 39 Nebr. 533, 58 NW 187; Johnson v. Plum Creek First Nat. Bank, 28 Nebr. 792, 45 NW 161] (holding that, where an instrument shows a material and obvious alteration, the presumption is that it was made before final execution and delivery); Hodge v. Scott, 1 Nebr. (Unoff.) 619, 95 NW 837. See also Musser v. Musser, 92 Nebr. 387, 138 NW 599 (holding that, where the consideration of a note sued on is the settlement of a claim involving the alteration of a prior note, if the claim is made upon reasonable grounds and in good faith, it is not incumbent upon plaintiff to establish that defendant maker altered the prior note after its execution).

N. J.—North River Meadow Co. v. Christ Church, 22 N. J. L. 424, 53 AmD 258.

N. Y.—Rosenbloom v. Finch, 37 Misc. 818, 76 NYS 902 (holding that no proof need be given that an interlineation in a written instrument was made before its execution, unless the alteration is a suspicious one); Barker v. Stroppel, 124 NYS 865; Jefferson Bank v. Frankenstein, 110 NYS 1104.

N. C.—Wicker v. Jones, 159 N. C. 102, 74 SE 801, 40 LRANS 69, AnnCas 1914B 1083 and note. In Norfleet v. Edwards, 52 N. C. 455, the court distinguished the case in hand from those in which the contrariety of opinion existed as to the burden and presumptions arising from the appearance of changes in an instrument in that the latter generally dealt with deeds, negotiable securities, and instruments the nature and character of which were fixed, while in the instant case the alteration was made for the very purpose of determining and fixing the character of the instrument, and it was held that, where a note was on a paper in a form that had been prepared for a bond, but with the scroll containing the word "seal" scratched and crossmarked with ink, it was error to charge that plaintiff had the burden of showing that the obliteration took place before or at the time the instrument was executed.

N. D.—Cass County v. American Exch. State Bank, 9 N. D. 263, 83 NW 12; Decorah First Nat. Bank v. Laughlin, 4 N. D. 391, 61 NW 473.

Oh.—Newman v. King, 54 Oh. St. 273, 43 NE 683, 56 AmSR 705, 35 LRA 471; Franklin v. Baker, 48 Oh. St. 296, 27 NE 550, 29 AmSR 547 [dist Huntington v. Finch, 3 Oh. St. 445, in that while the observations of the court in that case may indicate an opinion that the burden of explaining what are termed alterations of a suspicious character is on plaintiff, no such question was before the court]; Dempsey v. Moran, 9 Oh. Dec. (Reprint) 212, 11 CincLBul 218.

Okl.—Cavitt v. Robertson, 142 P 299; Richardson v. Fellner, 9 Okl. 513, 60 P 270.

S. D.—Northwestern Mortg. Trust Co. v. Levtzow, 23 S. D. 562, 122 NW 600; Foley-Wadsworth Impl. Co. v. Solomon, 9 S. D. 511, 70 NW 639 (change in name of month to a later month, it not being claimed that plaintiff obtained any advantage by extension of the time of credit).

Tenn.—Farnsworth v. Sharp, 4 Sneed 55.

Tex.—Rodrigues v. Haynes, 76 Tex. 225, 13 SW 296; McKenzie v. Barrett, 43 Tex. Civ. A. 451, 98 SW 229; Parshall v. Clark, (Civ. A.) 77 SW 437; Kansas Mut. L. Ins. Co. v. Coalson, 22 Tex. Civ. A. 64, 54 SW 388.

Wash.—Blewett v. Bash, 22 Wash. 536, 61 P 770; Kleeb v. Bard, 12 Wash. 140, 40 P 733; Fairhaven v. Cowgill, 8 Wash. 686, 36 P 1093; Yakima Nat. Bank v. Knipe, 6 Wash. 348, 33 P 834; Wolferman v. Bell, 6 Wash. 84, 32 P 1017, 36 AmSR 126.

Wis.—Maldaner v. Smith, 102 Wis. 30, 78 NW 140.

Ont.—Graystock v. Barnhart, 26 Ont. A. 545.

[a] **"The weight of reason and of authority** is that the legal presumption is that an alteration apparent on the face of an instrument in writing was made before its execution, and is therefore immaterial, and the burden is not on the party who offers the instrument in evidence to explain the alteration, but it is on him who assails the instrument to prove that the alteration was made after its execution and that it is material." Rankin v. Tygard, 198 Fed. 795, 804, 119 CCA 591 [cit Cyc].

[b] **Where there is nothing suspicious upon the face or in the appearance of a paper** raising any presumption that an alteration appearing therein was made after its execution, it is not incumbent on the party offering the paper in evidence to establish by positive or direct evidence that the alteration or erasure was made before such execution, the presumption of law being the other way. Brand v. Johnrowe, 60 Mich. 210, 26 NW 833.

[c] **Where a contract prepared by the use of a typewriter** appears to have been changed after the first impression was made, the presumption is that such change was made before execution and delivery. Barber v. Stromberg-Carlson Tel. Mfg. Co., 81 Nebr. 517, 116 NW 157, 129 AmSR 703, 18 LRANS 680 and note.

[d] **Where an interlineation exists in a note,** but the entire instrument appears to have been written at the same time, by the same hand, and with the same ink, it will be presumed to have been made before delivery, in the absence of clear and satisfactory proofs to the contrary. Maldaner v. Smith, 102 Wis. 30, 78 NW 140.

[e] **Where a party in giving a mortgage uses printed notes and mortgages,** which he is accustomed to use in making loans to others, and makes necessary and self-explanatory alterations therein, the burden of proving that they were made after the execution of the mortgage rests on the party attacking the mortgage. Hart v. Sharpton, 124 Ala. 638, 27 S 450.

28. Stillwell v. Patton, 108 Mo. 352, 18 SW 1075; Dorsey v. Conrad, 49 Nebr. 443, 68 NW 645; Wolferman v. Bell, 6 Wash. 84, 32 P 1017, 36 AmSR 126. See also cases supra note 27.

Presumption in favor of honesty and regularity see generally Fraud [20 Cyc 108].

[a] **"The law does not presume fraud;** it does not presume in a case like this that a change was made in a written instrument without authority. The presumption in such cases is that all changes made in a written instrument were made before delivery, and the burden of proof to show fraud is on him who charges fraud." Per Hobson, C. J., in James v. Holdam, 142 Ky. 450, 452, 134 SW 435. See also Franklin v. Baker, 48 Oh. St. 296, 304, 27 NE 550, 29 AmSR 547 (where it was claimed in a suit upon a promissory note that the note had been altered since its execution, and it was held that the presumption, in the absence of anything to the contrary, is that any alteration appearing on the face of the paper was made at or before the time of its alteration. Minshall, J., said: "To assume that such change was made after the note was made and delivered, without any extrinsic proof, is to presume, without evidence, that the change was fraudulently made, when, as a matter of fact, the chances are more than equal, that is was made at or before the execution and delivery of the instrument, and to conform it to the intention of

tion in such cases is for the jury, the usual proof of execution being all that is required.[29] Under this rule the mere fact that there are interlineations in the instrument will not relieve defendant of the burden of proving that such interlineations were made after the instrument was executed.[30]

Where the alteration is suspicious in itself this rule does not obtain, and the presumption of alteration before execution will be overcome and the burden will rest upon the party offering the instrument to explain it.[31]

Erasure of obligor's signature. The presumption of alteration before execution does not apply to an erasure of the signature of an obligor, since, in the nature of the case, such erasure must have occurred after execution.[32]

[§ 193] **(d) No Presumption.** Again, it has been held that the mere appearance of a change raises no presumption as to when or by whom the change was made, although it may be that the instrument itself would so tend to sustain the charge of alteration as to require the court to submit the issue to the jury.[33]

[§ 194] **(e) Distinction between Deeds and Other**

the parties. The cases elsewhere are not uniform on the subject. Some hold that alterations apparent on the paper must be explained by the party producing it, and, in the absence of such explanation, it is presumed to have been made after the execution of the instrument, and so fraudulent. This it would seem was the earlier rule at common law as to deeds and similar instruments; but its inconvenience was such as to cause it to be abandoned as early as the time of Lord Coke. And the rule as to such instruments in England, and generally in this country, is, if nothing appears against the alteration, to presume that it was made at the time of making the deed, and not after"); Wilson v. Hayes, 40 Minn. 531, 536, 42 NW 467, 12 AmSR 754, 4 LRA 196 (where Mitchell, J., said: "The doctrine that the presumption of law is that the alteration was made after delivery, and that the burden is on the holder in the first instance to explain it, seems to us to be unsound as well as harsh. Presumptions of law, if indulged in, should be in favor of innocence rather than guilt. . . . Hence such presumptions ought to be conformable to the experience of mankind, and the inferences which, in the light of that experience, men would naturally draw from a given state of facts." After observing that instruments are frequently drawn at the present day by laymen, without much regard to form and with frequent erasures and interlineations, and that the printed blanks which are not in common use have to be adapted to the purposes of the parties by erasures and interlineations, the learned judge proceeded: "Whatever might have been the fact formerly, when but few men could write, and when contracts were usually drawn by skilled conveyancers or scriveners, with great care and wholly in their own proper handwriting, the rule under consideration is wholly unsuited to the business habits or usages of this country at the present day").

[b] **Erasure of surety.**—In an action on a bond with a large number of sureties, where it appears on the face of the instrument that one name that had been signed as surety had subsequently been erased, and other names appear below the erased signature, the bond is primarily admissible in evidence, the legal presumption being that the erasure was innocent, and not fraudulent in fact or in law. Cass County v. American Exch. State Bank, 9 N. D. 263, 83 NW 12.

29. D. C.—Ofenstein v. Bryan, 20 App. 1.

Ga.—Printup v. Mitchell, 17 Ga. 558, 63 AmD 258.

Ind.—Stoner v. Ellis, 6 Ind. 152. See also Stayner v. Joyce, 120 Ind. 99, 22 NE 89.

Minn.—Wilson v. Hayes, 40 Minn. 531, 42 NW 467, 12 AmSR 754, 4 LRA 196.

Mo.—McCormick v. Fitzmorris, 39 Mo. 24; Noah v. German Ins. Co., 69 Mo. A. 332.

Nebr.—Dorsey v. Conrad, 49 Nebr. 443, 68 NW 645.

N. J.—Hoey v. Jarman, 39 N. J. L. 523 (holding that, without reference to the character of the apparent change, the question is entirely one of fact and should be left to the jury); Hunt v. Gray, 35 N. J. L. 227, 10 AmR 232. See also North River Meadow Co. v. Christ Church, 22 N. J. L. 424, 53 AmD 258; Den v. Farlee, 21 N. J. L. 279; Den v. Wright, 7 N. J. L. 175, 11 AmD 546; Cumberland Bank v. Hall, 6 N. J. L. 215; Sayre v. Reynolds, 5 N. J. L. 862.

S. D.—Cosgrove v. Fanebust, 10 S. D. 213, 72 NW 469 (holding that, where an instrument is attacked on the ground of an alteration, proof of due execution is all that is necessary to admit it in evidence, and the question of alteration is then to be determined from the evidence in the case, including the appearance of the instrument); Moddie v. Breiland, 9 S. D. 506, 70 NW 637.

See also supra § 183.

[a] **The appearance of the alteration itself,** or slight circumstances connected therewith, may exhibit indicia of unfairness which, while falling short of proof thereof, would throw upon the propounder of the instrument the burden of showing that the alteration was fairly made, and a failure upon his part to make such proof would support a finding against the validity of the instrument. Putnam v. Clark, 33 N. J. Eq. 338.

30. McKenzie v. Barrett, 43 Tex. Civ. A. 451, 98 SW 229. And see cases cited supra note 27.

31. U. S.—Rogers v. Page, 140 Fed. 596, 72 CCA 164 (holding that any presumption which may exist that an alteration discoverable by inspection and unexplained by the instrument itself was made before delivery is rebutted by any other suspicious circumstance).

Fla.—Cross v. Aby, 55 Fla. 311, 45 S 820.

Mo.—Cox v. Mignery, 126 Mo. A. 669, 105 SW 675; Burton v. American Guaranty Fund Mut. F. Ins. Co., 88 Mo. A. 392; Holladay-Klotz Land, etc., Co. v. T. J. Moss Tie Co., 87 Mo. A. 167. But see Noah v. German Ins. Co., 69 Mo. A. 332.

N. J.—Putnam v. Clark, 33 N. J. Eq. 338.

Oh.—Marshall v. Wilhite, 4 Oh. Cir. Ct. 203, 2 Oh. Cir. Dec. 500.

Tenn.—Farnsworth v. Sharp, 4 Sneed 55.

See also infra §§ 197, 198.

[a] **Thus** if the alteration appears to be contrary to the probable meaning of the instrument as it stood before its insertion, or if it is in different writing from the body of the instrument, or if it destroys the legality of the instrument, no presumption of good faith should be indulged, and the burden should be cast on the party who relies on the interlineation or alteration to show that it was made before the execution of the instrument. Cox v. Mignery, 126 Mo. A. 669, 105 SW 675.

32. Blewett v. Bash, 22 Wash. 536, 61 P 770 (holding that, while, in the absence of evidence to the contrary, interlineations and erasures in written instruments are presumed to have been made before execution, this presumption does not apply to an erasure of the signature of an obligor, since, in the nature of the case, such erasure must have occurred after execution). See also Stoner v. Ellis, 6 Ind. 152.

33. Catlin Coal Co. v. Lloyd, 180 Ill. 398, 54 NE 214, 72 AmSR 216; Grand Lodge A. O. U. W. v. Young, 123 Ill. A. 628 (holding that there is no presumption of law as to whether an instrument has been altered from its condition when executed, but it is a question of fact, and the party producing an instrument which apparently has been altered is required to explain the same); Benton County Sav. Bank v. Strand, 106 Iowa 606, 76 NW 1001; MaGee v. Allison, 94 Iowa 527, 63 NW 322; In re Brown, 92 Iowa 379, 60 NW 659; Hagan v. Merchants', etc., Ins. Co., 81 Iowa 321, 46 NW 1114, 25 AmSR 493; Neil v. Case, 25 Kan. 510, 37 AmR 259. Compare Wing v. Stewart, 68 Iowa 13, 25 NW 905 (where the court held that an objection to the admission in evidence of the contract, which appeared to have been altered or interlined, without first requiring an explanation of the alteration, could not be entertained by the appellate court unless the instrument itself was brought up and the court could thus be enabled to determine from an inspection whether any explanation was required). See also infra § 198.

[a] **"The mere fact of an interlineation or an erasure** appearing in an instrument does not, of itself, raise any presumption of law either for or against the validity of the writing, but that the question when, by whom and with what intent it was made is one of fact to be submitted to the jury." Per Cartwright, C. J., in Catlin Coal Co. v. Lloyd, 180 Ill. 398, 405, 54 NE 214, 72 AmSR 216.

[b] **"Clearly, in ordinary cases, the alteration ought not to raise a presumption** against the instrument, because the law never presumes wrong. The question as to the time of the alteration is, in the last instance, one for the jury. It is, like any other fact in the case, to be settled by the trier or triers of the facts. Generally, the instrument should be given in evidence, and in a jury case should go to the jury, upon ordinary proof of its execution, leaving the parties to such explanatory evidence of the alteration as they may choose to offer. If there is neither intrinsic nor extrinsic evidence as to when the alteration was made, it is to be presumed, if any presumption is said to exist, that the alteration was made before or at the time of the execution of the instrument. Perhaps there might be cases when the alteration is attended with such manifest circumstances of suspicion that the court might refuse to allow the instrument to go before the jury until some explanation; but this case is not of that character. . . . Many of the authorities conflicting with these views, upon examination will be found to have been based upon principles applicable to the alteration of written deeds only, and seem to have been founded upon the solemn character of sealed instruments as evidence. As the deed was the only evidence of a contract under seal, and could not be contradicted, it was highly important that it should declare the true intent of the parties, and that it should speak an unvarying and unequivocal language. Therefore it was deemed necessary to protect it from every possibility of alteration. Hence the reason of many of the decisions holding every alteration as raising a presumption against the instrument." Per Horton,

Instruments. The rule that an apparent alteration in an instrument will be presumed to have been made before execution and delivery was early stated to be applicable in the case of a deed,[34] and this rule is supported by many modern decisions,[35] although it does not apply or the presumption exist where it is admitted or apparent that the alteration was made after the deed was recorded,[36] as in such a case the law will presume that the alteration was made after delivery and the burden will be on the party claiming the benefit thereof to show that the registration was so conditional as not to amount to a delivery.[37]

According to some authorities, however, this rule does not apply to negotiable instruments, but the presumption is that an alteration apparent on the face of such an instrument was made after its execution, and the burden is on the holder of the instrument to explain the alteration;[38] other authorities recognize no such distinction, but consider the

C. J., in Neil v. Case, 25 Kan. 510, 516, 37 AmR 259.

[c] **There is no presumption of law** that a material alteration in a deed was made before or at the time of its execution; it is a question for the jury when the alterations were made. Fairservice v. Norwood, Quincy (Mass.) 193; Norwood v. Fairservice, Quincy (Mass.) 189. See also Newman v. Wallace, 121 Mass. 323; Ely v. Ely, 6 Gray (Mass.) 439, 441 (where Dewey, J., said: "There is no such legal presumption. If it were so, the party setting up the instrument might always introduce the instrument as a genuine one, and it would stand as such if no evidence was introduced by the other party to show that it was in fact altered after the execution"); Agawam Bank v. Sears, 4 Gray (Mass.) 95; Carpenter v. Fairservice, Quincy (Mass.) 239.

[d] **There is no presumption that a payee erased an indorsement** on a note where the indorsement was made against his orders by his agent, and the note was delivered by the maker to the agent to transmit to the payee, and the note was apparently intact after such erasure. Waldorf v. Simpson, 15 App. Div. 297, 44 NYS 921.

34. Fitzgerald v. Fauconberge, Fitzg. 207, 94 Reprint 722; Trowel v. Castle, 1 Keb. 21, 83 Reprint 787 (decided in 1661).

35. U. S.—Hanrick v. Patrick, 119 U. S. 156, 7 SCt 147, 30 L. ed. 396; Little v. Herndon, 10 Wall. 26, 19 L. ed. 878 (holding that, in the absence of proof as to an erasure in a deed, the presumption is that it was made before execution of the deed); Smith v. U. S., 2 Wall. 219, 17 L. ed. 788 (holding that the general rule is that where the suspicion is raised as to the genuineness of an altered instrument, whether by inspection of the instrument or by extraneous evidence, the party producing it is bound to remove the suspicion—the instrument involved in this case was a bond).

Ala.—Lewis v. Watson, 98 Ala. 479, 13 S 570, 39 AmSR 83, 22 LRA 297.

Ga.—McConnell v. Slappey, 134 Ga. 95, 67 SE 440 (holding that there was no error in admitting a deed in evidence over the objection that the name of the county in the caption had been changed, where there was no evidence as to when the change was made, and nothing to show affirmatively that the deed was not recorded, since if the deed was registered the alteration would be presumed to have been made by the parties thereto at or before its execution); Banks v. Lee, 73 Ga. 25 (where it was stated that the presumption that an alteration in a deed was made before execution arises only when its execution is not denied on oath).

Ky.—Gunkel v. Selberth, 85 SW 733, 27 KyL 455 (holding that evidence that a deed of a city lot had been altered by the addition, in different ink, of the words in the description, "100 ft. deep," is inadmissible unless it is shown that the alteration was made after its execution and delivery, as it is presumed that any change made after the deed was drawn was made before its execution).

Md.—Wickes v. Caulk, 5 Harr. & J. 36.

Mich.—Munroe v. Eastman, 31 Mich. 283.

Mo.—McCormick v. Fitzmorris, 39 Mo. 24.

Pa.—Zimmerman v. Camp, 155 Pa. 152, 25 A 1086.

S. D.—Northwestern Mortg. Trust Co. v. Levtzon, 23 S. D. 562, 122 NW 600.

Tex.—Collins v. Ball, 82 Tex. 259, 17 SW 614, 27 AmSR 877.

Eng.—Doe v. Catomore, 16 Q. B. 745, 747, 71 ECL 745, 117 Reprint 1066 (where Lord Campbell, C. J., said: "This doctrine seems to us to rest upon principle. A deed cannot be altered, after it is executed, without fraud or wrong, and the presumption is against fraud or wrong." It is to be observed, however, that in this and other cases where the presumption is commended, the only alternative in the mind of the judge was the presumption that the alteration was subsequent to execution).

But see Sisson v. Pearson, 44 Ill. A. 81.

[a] **Where nothing suspicious appears on the face of a deed** beyond the fact that an erasure is manifest, the presumption commonly is that the alteration was made before the deed was executed. Newland v. Bellevue First Baptist Church Soc., 137 Mich. 335, 100 NW 612.

[b] **Handwriting and ink used.**—(1) This presumption has been held to be strengthened by the nature of the handwriting in which the alteration appears to have been made. Sharpe v. Orme, 61 Ala. 263; Bedgood v. McLain, 89 Ga. 793, 15 SE 670. (2) Thus it has been said that if an interlineation appeared to be written with the same pen and ink as the body of the instrument, the natural inference would be that it was made before the sealing and delivery of the deed. Robinson v. Myers, 67 Pa. 9.

[c] **Where it is admitted that plaintiff's deed was in its altered condition** when delivered to him, and it is not claimed that any alteration was made by him, or with his knowledge or consent, it will be presumed that the alteration was made before delivery of the deed, and hence he is not bound to explain the same before its admission in evidence. Ernester v. Christianson, 24 S. D. 103, 123 NW 711.

36. Gulf Red Cedar Co. v. Crenshaw, 169 Ala. 606, 53 S 812 (holding that the rule that alterations in an instrument made in the same handwriting and with the same ink, or explained by the attesting clause, will be presumed to have been made before delivery does not obtain, where the alteration was made after the registration of the instrument).

37. Gulf Red Cedar Co. v. Crenshaw, 169 Ala. 606, 616, 53 S 812 (where Anderson, J., said: "This is the only safe and salutary rule to adopt or follow in cases of this sort, else registration of instruments, not only resorted to as giving notice to the world of the existence of the conveyance, but often as a memorial for the perpetuation of evidence of title, would be of little value, and the door would be open to fraud and confusion, if courts presumed that alterations were made before delivery notwithstanding they may have been made many days, weeks, months, or years after the registration of the instrument").

38. Smith v. U. S., 2 Wall. (U. S.) 219, 17 L. ed. 788; Citizens' Nat. Bank v. Williams, 174 Pa. 66, 35 A 303, 35 LRA 464; Gettysburg Nat. Bank v. Chisolm, 169 Pa. 564, 32 A 730, 47 AmSR 929; Hartley v. Corboy, 150 Pa. 23, 24 A 295; Nagle's Est., 134 Pa. 31, 19 A 434, 19 AmSR 669; Neff v. Horner, 63 Pa. 327, 3 AmR 555; Hill v. Cooley, 46 Pa. 259; Heffner v. Wenrich, 32 Pa. 423; Miller v. Reed, 27 Pa. 244, 3 Grant 51, 67 AmD 459; Paine v. Edsell, 19 Pa. 178; Kennedy v. Lancaster County Bank, 18 Pa. 347; Simpson v. Stackhouse, 9 Pa. 186, 49 AmD 554; Hood's App., 3 Pa. Cas. 477, 7 A 137; Mechling v. Hartzell, 4 Pennyp. (Pa.) 500; Colonial Trust Co. v. Getz, 28 Pa. Super. 619; Potter's Est., 16 Pa. Super. 576; Todd v. Lederach, 4 Pa. Dist. 173; Johnson v. Marlborough, 2 Stark. 313, 3 ECL 424 (requiring explanation of apparent changes in negotiable paper. But see English cases distinguished infra note 39). See Ellison v. Mobile, etc., R. Co., 36 Miss. 572; Graystock v. Barnhart, 26 Ont. A. 545. But see Morris v. Vanderen, 1 Dall. (Pa.) 64, 1 L. ed. 38. Generally it would seem from these cases that in the instance of commercial paper an apparent interlineation will raise in some degree a presumption against the instrument and require explanation before the instrument can be admitted. But it is also held in this state that the preliminary question, if doubtful, is for the jury. Clark v. Eckstein, 22 Pa. 507, 62 AmD 307.

[a] **"As a general rule,** (1) the law presumes in favor of innocence, but this presumption does not extend to the alteration of negotiable instruments." Per Clark, J., in Nagle's Est., 134 Pa. 31, 44, 19 A 434, 19 AmSR 669. (2) "When it clearly appears on the face of a writing that it has been altered in a material part, it is incumbent on the party producing it to account for the alteration, and until this is done it is not admissible in evidence. This rule is more stringent when applied to negotiable paper than to other written instruments, and in relation to it there is no presumption of innocence and the burden of explaining any apparent material alteration is cast on the holder thereof." Fell, C. J., in Cornog v. Wilson, 231 Pa. 281, 283, 80 A 174.

[b] **Reasons for rule.**—In Simpson v. Stackhouse, 9 Pa. 186, 187, 49 AmD 554, Gibson, C. J., said: "He who takes a blemished bill or note, takes it with its imperfections on its head. He becomes sponsor for them, and though he may act honestly, he acts negligently. But the law presumes against negligence as a degree of culpability; and it presumes that he had not only satisfied himself of the innocence of the transaction, but that he had provided himself with the proofs of it to meet a scrutiny he had reason to expect. It is of no little weight, too, that the altered instrument is found in his hands, and that no person else can be called on to speak of it; for without a presumption to sustain him, the maker would in every case be defenceless. It may be said that the holder, with such a presumption against him, would also be defenceless. But it was his fault to take such a note. As notes and bills are intended for negotiation, and as payees do not usually receive them when clogged with impediments to their circulation, there is a presumption that such an instrument starts fair and untarnished, which stands till it is repelled; and a holder ought, therefore, to explain why he took it branded with marks of suspicion which would probably render it unfit for his purposes." This case contains a

same reasons for the presumption which arises from the appearance of changes upon the face of a deed to apply to other instruments, where the presumption thus raised is in favor of, as well as where it is against, the instrument.[39]

[§ 195] **(f) Changes in Official Documents or Those Coming from Official Custody.** Interlineations or erasures cast less suspicion upon official acts or documents than upon mere private papers.[40] If an interlineation or erasure appears on the face of a public record, such as an officer's return, or an official document, or one coming from proper official custody, and there is no evidence to show when it was done, it will be presumed, in the absence of evidence to the contrary, to have been done when the officer had authority to do it.[41] So papers filed in court will not be presumed to have been fraudulently altered on account of interlineations or erasures.[42]

[§ 196] **(g) Changes by Attesting or Authenticating Officer.** Interlineations in a deed in the handwriting of the officer who attested it will be presumed to have been made at or before the execution of the deed,[43] and where an exemplification of a public record contains interlineations and alterations, marked and verified as such by the initials of the authenticating clerk, they will be presumed to have been noted by him at the time of authentication.[44]

[§ 197] **(h) Suspicious Appearance—aa. In General.**[45] The foregoing general views as to the burden of proof and presumption which attend an apparent alteration are subject, in many, if not most, of the cases, to the qualification as to the appearance of the instrument, as suspicious or otherwise. Thus the rule requiring a party to explain apparent changes is applied where those changes are of such a character as to raise a suspicion against the in-

review of the English and early American cases on this point.

39. Kan.—Neil v. Case, 25 Kan. 510, 37 AmR 259.

Minn.—Wilson v. Hayes, 40 Minn. 531, 538, 42 NW 467, 12 AmSR 754, 4 LRA 196 (where Mitchell, J., said: "We can see no good reason in principle why any distinction in this regard should be made between negotiable paper and other instruments, and the tendency of many of the late American authorities is to repudiate any such distinction").

Mo.—Stillwell v. Patton, 108 Mo. 352, 18 SW 1075 (holding that the principle that it will be presumed that the change was made before the execution of the instrument, where there is nothing suspicious in the appearance of the change, applies to negotiable instruments as well as to deeds). See also Holton v. Kemp, 81 Mo. 661 (where the principle was applied to a deed); Paramore v. Lindsey, 63 Mo. 63 (where the principle was applied to a note).

Nebr.—Stough v. Ogden, 49 Nebr. 291, 68 NW 516; Goodin v. Plugge, 47 Nebr. 284, 66 NW 407.

N. H.—Dow v. Jewell, 18 N. H. 340, 45 AmD 371 [cit Hills v. Barnes, 11 N. H. 395] (presumption of change after execution applied to notes and deeds indiscriminately).

N. J.—Hunt v. Gray, 35 N. J. L. 227, 10 AmR 232 (presumption in favor of notes and deeds indiscriminately). See also Den v. Wright, 7 N. J. L. 175, 11 AmD 546.

N. Y.—Maybee v. Sniffen, 2 E. D. Smith, 1 [aff 16 N. Y. 560] (holding that the rule that no presumption arises but that the whole question is submitted to the jury, applies where the instrument is under seal or otherwise); Jackson v. Osborn, 2 Wend. 555, 20 AmD 649 (where the rule requiring explanation of an apparent change, first applied to the case of a simple contract in Johnson v. Marlborough, 2 Stark. 313, 3 ECL 424, was applied to a deed).

Vt.—Beaman v. Russell, 20 Vt. 205, 49 AmD 775.

[a] **"Whilst it may be conceded that there are stronger reasons** for imposing the burden of explanation upon one who offers a suspiciously altered negotiable instrument in evidence, than in case of a deed, because of essential differences in the purposes and uses of such instruments, and of the usual formal execution of the latter with attesting witnesses, we are not to be understood as expressing the opinion that, in case of the palpable and suspicious alteration of a deed the burden of explanation ought not likewise to be cast upon the one who, claiming under it, offers it in evidence." Per Shepard, J., in Ofenstein v. Bryan, 20 App. (D. C.) 1, 17.

[b] **English cases distinguished.**—In several cases (Bailey v. Taylor, 11 Conn. 531, 29 AmD 321; Franklin v. Baker, 48 Oh. St. 296, 27 NE 550, 29 AmSR 547, and especially in Beaman v. Russell, 20 Vt. 205, 49 AmD 775) the distinction is pointed out between the rule of the early English authorities that an alteration appearing in the face of a deed would be presumed to have been made at the time of its execution, as in Trowel v. Castle, 1 Keb. 21, 83 Reprint 787, and Fitzgerald v. Fauconberge, Fitzg. 207, 94 Reprint 722, and several later English authorities (Knight v. Clements, 8 A. & E. 215, 35 ECL 559, 112 Reprint 819; Sibley v. Fisher, 7 A. & E. 444, 34 ECL 243, 111 Reprint 537; Henman v. Dickenson, 5 Bing. 183, 15 ECL 533, 130 Reprint 1031; Taylor v. Mosely, 6 C. & P. 273, 25 ECL 429; Bishop v. Chambre, 3 C. & P. 55, 14 ECL 448; Clifford v. Parker, 2 M. & G. 909, 40 ECL 917, 133 Reprint 1012; Leykariff v. Ashford, 12 Moore C. P. 281, 22 ECL 643; Johnson v. Marlborough, 2 Stark. 313, 3 ECL 424) requiring explanation of apparent changes in negotiable instruments, in that the latter cases were decided solely with reference to the Stamp Act.

40. Tyree v. Rives, 57 Ala. 173. See also State v. Boisseau, 1 Rob. (La.) 388.

41. Ga.—Collins v. Boring, 96 Ga. 360, 23 SE 401.

Ky.—Welch v. Chandler, 13 B. Mon. 420.

Me.—Boothby v. Stanley, 34 Me. 515.

Mich.—Hommel v. Devinney, 39 Mich. 522 (holding that, in the absence of evidence to the contrary, alterations or interlineations made and appearing in a public record will be presumed to have been made in a proper manner by a person having the care or custody thereof, or by someone in his office having authority so to do).

N. Y.—Peo. v. Minck, 21 N. Y. 539; Devoy v. New York, 35 Barb. 264, 22 HowPr 226 [aff 36 N. Y. 449].

N. C.—Sloan v. Stanly, 33 N. C. 627.

Or.—Crossen v. Oliver, 37 Or. 514, 61 P 885.

Pa.—Xander v. Com., 102 Pa. 434; Stevens v. Martin, 18 Pa. 101 (presumption that interlineation in a patent was made by the clerk of the commonwealth before the patent was issued).

Tex.—Miller v. Alexander, 13 Tex. 497, 65 AmD 73.

[a] **The burden of proving an alteration of the amount of an administrator's bond** is upon defendant sued thereon where the bond was executed on the day of the filing of the inventory and appraisement, and is in the amount required by law, and has remained in official custody from the date of its execution. Peveler v. Peveler, 54 Tex. 53.

[b] **An erasure on the face of an original deed executed by the county treasurer** to the county is presumed to have been made before execution to correct a mistake, where there is no erasure on the record of the deed and no fraud appears. Baylis v. Kerrick, 64 Wash. 410, 116 P 1082.

[c] **Tax deeds.**—(1) A tax title is not affected by an erasure on the face of the original deed executed by the county treasurer to the county where there is no erasure on the record of the deed, and no fraud appears. Baylis v. Kerrick, 64 Wash. 410, 413, 116 P 1032 [cit Cyc]. (2) While the law may presume that an alteration was made prior to execution and delivery, there is no presumption that alterations so made in a tax deed were made by the county treasurer or his successor, and, where the deed is a public record to which all persons have access, no presumption as to time of alterations obtains. Stockand v. Hall, 54 Wash. 106, 102 P 1037. But see Northwestern Mortg. Trust Co. v. Levtzow, 23 S. D. 562, 563, 122 NW 600 (where McCoy, J., in deciding upon an erasure upon the face of a tax deed, said: "In the absence of other evidence to the contrary, such an erasure is presumed to have been made prior to or contemporaneous with the execution of the instrument. . . . And this presumption is stronger where the instrument is the act of the public officer who is presumed to act lawfully and do his duty, and who has no personal interest in the transaction. 2 Cyc. 242").

42. Friedman v. Shamblin, 117 Ala. 454, 23 S 821.

[a] **An indictment** is not bad because it contains interlineations, and, in the absence of anything appearing upon the face thereof, or extrinsic, to show that the interlineations were made after it was completed, it will be presumed to have been made before. French v. State, 12 Ind. 670, 74 AmD 229 (which, however, was upon the general principle that, in the absence of anything appearing upon the face of a written instrument, or extrinsic proof tending to show that the interlineations were made subsequent to the execution of the instrument, the presumption is that they were made before or at the time of its execution).

[b] **An order of sale** directed to "Carl Bradley, Deputy-Sheriff," will not be invalidated by having a pen-stroke through the first three of said words, in the absence of proof of the time of alteration. Parsons First Nat. Bank v. Franklin, 20 Kan. 264.

[c] **Where a deed, on the face of which interlineations appear, is filed** with the papers of a cause after record and three days' notice given of its filing, it is admissible in evidence, notwithstanding interlineations on its face are unexplained, unless an affidavit in the nature of a plea of non est factum has been filed. In the absence of such plea, the due execution of the deed will be conclusively presumed. Fitch v. Boyer, 51 Tex. 336.

43. Bedgood v. McLain, 89 Ga. 793, 15 SE 670.

44. Lazier v. Westcott, 26 N. Y. 146, 82 AmD 404.

45. Alterations and interlineations of ancient documents as suspicious circumstances affecting their admissibility in evidence see Evidence [17 Cyc 456].

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strument.[46] This burden is sometimes considered in the light of a presumption against the validity of the instrument, although the ultimate questions of the time when and by whom the change was made are for the jury.[47]

[§ 198] **bb. Prevailing Rules.** The rule which seems to be best supported by the authorities and reason is that the suspicious appearance of an instrument raises no presumption either for or against it, but the entire question as to when and by whom the change was made is left to the jury upon the evidence introduced, although the party producing the instrument has the burden of explaining the suspicious appearance.[48] On the one hand it is held that whether or not there are suspicious appearances on the face of the instrument sufficient to arouse distrust and require explanatory proof by the party offering, is in the first place a question for the court to determine by inspection,[49] and if the court considers the appearance of the instrument suspicious, the party producing it will be required to explain the appearance before the instrument is admitted, the court determining in the first instance whether the explanation is sufficient;[50] or determining only that explanatory evidence is necessary before admitting the instrument, leaving the whole question to the jury as soon as such explanatory evidence is offered.[51]

46. U. S.—Cox v. Palmer, 3 Fed. 16, 1 McCrary 431.

Ala.—Burgess v. Blake, 128 Ala. 105, 28 S 963, 86 AmSR 78 and note; Hart v. Sharpton, 124 Ala. 638, 27 S 450; Hill v. Nelms, 86 Ala. 442, 5 S 796; Barclift v. Treece, 77 Ala. 528; Martin v. King, 72 Ala. 354; Fontaine v. Gunter, 31 Ala. 258.

Cal.—Miller v. Luco, 80 Cal. 257, 22 P 195 (under statute requiring explanation of apparent alteration).

Del.—Warren v. Layton, 3 Del. 404.

D. C.—Ofenstein v. Bryan, 20 App. 1.

Fla.—Cross v. Aby, 55 Fla. 311, 45 S 820.

N. Y.—Jackson v. Osborn, 2 Wend. 555, 20 AmD 649.

Pa.—Hill v. Cooley, 46 Pa. 259.

S. C.—Wicker v. Pope, 46 S. C. L. 387, 75 AmD 732.

Tex.—Collins v. Ball, 82 Tex. 259, 17 SW 614, 27 AmSR 877.

Wis.—Page v. Danaher, 43 Wis. 221. See also supra §§ 189, 192.

47. Pipes v. Hardesty, 9 La. Ann. 152, 61 AmD 202. See also Scott v. Walker, Dudl. (Ga.) 243; Ellison v. Mobile, etc., R. Co., 36 Miss. 572 (holding, however, that in order to raise the presumption it is not sufficient that it is probable an alteration was made, but it must be made manifest to the inspection of the jury, because if it was determined upon a mere probability it would be founding one presumption upon another, and presuming fraud upon a mere probability); Wilson v. Henderson, 17 Miss. 375, 48 AmD 716; Commercial, etc., Bank v. Lum, 8 Miss. 414; Tillou v. Clinton, etc., Mut. Ins. Co., 7 Barb. (N. Y.) 564.

48. Ark.—Klein v. German Nat. Bank, 69 Ark. 140, 61 SW 572, 86 AmSR 183; Gist v. Gans, 30 Ark. 285.

Conn.—Hayden v. Goodnow, 39 Conn. 164 (holding that the burden of proof to explain an alteration does not necessarily rest upon the party producing the instrument, but that each case depends upon its own circumstances, that the triers must be satisfied that the alteration was fairly made); Bailey v. Taylor, 11 Conn. 531, 29 AmD 321.

Del.—Welch v. Coulborn, 8 Del. 647 [foll Hollis v. Vandergrift, 10 Del. 521].

Fla.—Orlando v. Gooding, 34 Fla. 244, 15 S 770; Harris v. Jacksonville Bank, 22 Fla. 501, 1 S 140, 1 AmSR 201.

Ind.—Stayner v. Joyce, 120 Ind. 99, 22 NE 89.

Iowa.—McGee v. Allison, 94 Iowa 527, 63 NW 322; Hagan v. Merchants', etc., Ins. Co., 81 Iowa 321, 46 NW 1114, 25 AmSR 493; Ault v. Fleming, 7 Iowa 143; Harlan v. Berry, 4 Greene 212.

Kan.—J. I. Case Threshing Mach. Co. v. Peterson, 51 Kan. 713, 33 P 470 (holding that, while it may not be proper as an abstract proposition of law to instruct the jury that the burden is upon plaintiff to satisfactorily explain the alteration, such instruction will not be erroneous where plaintiff has the general burden of proving such an instrument as he sets out in his pleading, as an alteration of an instrument may be so obvious and suspicious as to bring discredit upon it and to require the party offering it to explain the apparent changes, notwithstanding that, in the absence of such suspicious circumstances, no presumption can be indulged against its genuineness). See also State v. Roberts, 37 Kan. 437, 15 P 593; Parsons First Nat. Bank v. Franklin, 20 Kan. 264.

Me.—Martin v. Tuttle, 80 Me. 310, 14 A 207; Dodge v. Haskell, 69 Me. 429; Belfast Nat. Bank v. Harriman, 68 Me. 522; Crabtree v. Clark, 20 Me. 337 (holding that it is a question for the jury when no explanation is offered and that an instruction that the note will be void if the alteration is not accounted for is erroneous); Gooch v. Bryant, 13 Me. 386.

Minn.—Wilson v. Hayes, 40 Minn. 531, 42 NW 467, 12 AmSR 754, 4 LRA 196.

N. Y.—Acker v. Ledyard, 8 Barb. 514; Maybee v. Sniffen, 2 E. D. Smith 1 [aff 16 N. Y. 560].

R. I.—Arnold v. Jones, 2 R. I. 345.

Tex.—Dewees v. Bluntzer, 70 Tex. 406, 7 SW 820.

Vt.—Beaman v. Russell, 20 Vt. 205, 49 AmD 775.

Va.—Ramsey v. McCue, 21 Gratt. (62 Va.) 849.

W. Va.—Connor v. Fleshman, 4 W. Va. 693.

[a] **The rule adopted is** that, in the absence of evidence to the contrary, an alteration will be presumed to have been made contemporaneously with the execution of the instrument. But it is held that nothing in this rule operates against the proposition that evidence necessary to destroy this prima facie presumption may appear on the face of the instrument itself, and thus require the party offering the instrument to explain its appearance in the first instance. Orlando v. Gooding, 34 Fla. 244, 15 S 770.

[b] **Material alteration in deed.—** A material alteration apparent in a deed of which no note was made at the time of execution calls for an explanation, but the question at last is one of fact for the jury, and there is no presumption. Van Buren v. Cockburn, 14 Barb. (N. Y.) 118; Acker v. Ledyard, 8 Barb. (N. Y.) 514.

[c] **A demurrer to the evidence** by defendant cannot withdraw the question of fact from the jury and permit the court to decide it as a presumption of law. Jones v. Ireland, 4 Iowa 63.

49. Ofenstein v. Bryan, 20 App. (D. C.) 1 (holding that whether the alteration of a negotiable instrument is of such a suspicious character as calls for explanatory evidence on the part of the party offering it in evidence is a question of law for the court to determine); Holladay-Klotz Land, etc., Co. v. Moss Tie Co., 87 Mo. A. 167; Wicker v. Pope, 46 S. C. L. 387, 75 AmD 732.

[a] **The admissibility of the instrument** in evidence in the first instance, in the absence of explanatory evidence as to suspicious appearances, is for the court. Merritt v. Boyden, 191 Ill. 136, 60 NE 907, 85 AmSR 246; Russell v. Peyton, 4 Ill. A. 473.

50. U. S.—Brady v. Berwind-White Coal-Min. Co., 106 Fed. 824, 45 CCA 662 [aff 94 Fed. 28].

Ala.—Ward v. Cheney, 117 Ala. 238, 22 S 996. But see Hart v. Sharpton, 124 Ala. 638, 27 S 450 (holding that if the instrument is introduced without explanatory evidence the introduction of such evidence thereafter will cure any error in the original admission).

D. C.—Ofenstein v. Bryan, 20 App. 1.

La.—McMicken v. Beauchamp, 2 La. 290.

Nebr.—Cass County Bank v. Morrison, 17 Nebr. 341, 22 NW 782, 52 AmR 417.

Or.—Nickum v. Gaston, 28 Or. 322, 42 P 130 (holding that, under the statute requiring an apparent change to be explained before the instrument is admitted in evidence, a showing that the alleged change was made before execution of the instrument is sufficient to cure any objection to the admission of the instrument without explanatory evidence).

Va.—Consumers' Ice Co. v. Jennings, 100 Va. 719, 42 SE 879.

Wis.—Austin v. Austin, 45 Wis. 523 [cit Low v. Merrill, 1 Pinn. 340; Schwalm v. McIntyre, 17 Wis. 232] (holding that, where an alteration appears on the face of a note, the question must be raised and the alteration explained when the instrument is offered, and before it is received in evidence); Page v. Danaher, 43 Wis. 221.

[a] **"Where there are manifest circumstances of suspicion,** and no explanation given, it may be the duty of the court to refuse to let the instrument go before the jury." Parsons First Nat. Bank v. Franklin, 20 Kan. 264, 270.

51. U. S.—Cox v. Palmer, 3 Fed. 16, 1 McCrary 431.

Ala.—Alabama State Land Co. v. Thompson, 104 Ala. 570, 16 S 440, 53 AmSR 80; Hill v. Nelms, 86 Ala. 442, 5 S 796; Fontaine v. Gunter, 31 Ala. 258.

Ill.—Landt v. McCullough, 206 Ill. 214, 69 NE 107. In Montag v. Linn, 23 Ill. 551, it was held that material interlineations in a deed were to be presumed to have been made after execution, unless explained by the party taking the benefit of the deed; but in this case the question was for the consideration of the jury, and the instruction was that the deed which had been read in evidence was to be considered by them as worthless unless they believed from the appearance of the instrument that the interlineations were made at the time of the execution, or before.

Mass.—Graham v. Middleby, 185 Mass. 349, 70 NE 416; Ives v. Farmers' Bank, 2 Allen 236; Ely v. Ely, 6 Gray 439; Wilde v. Armsby, 6 Cush. 314. See also Newman v. Wallace, 121 Mass. 323.

Mich.—Pearson v. Harding, 95 Mich. 360, 54 NW 904; Wilson v. Hotchkiss, 81 Mich. 172, 45 NW 838; Brand v. Johnrowe, 60 Mich. 210, 26 NW 883; Willett v. Shepard, 34 Mich. 106; Sirrine v. Briggs, 31 Mich. 443; Munroe v. Eastman, 31 Mich. 283; Sheldon v. Hawes, 15 Mich. 519.

Mo.—Stillwell v. Patton, 108 Mo. 352, 18 SW 1075; Holton v. Kemp, 81 Mo. 661; Smith v. Ferry, 69 Mo. 142; Paramore v. Lindsey, 63 Mo. 63; McCormick v. Fitzmorris, 39 Mo. 24; Lubbering v. Kohlbrecher, 22 Mo. 596; Matthews v. Coalter, 9 Mo. 705; German-American Bank v. Manning, 133 Mo. A. 294, 113 SW 251; Kalbach v. Mathis, 104 Mo. A. 300, 78 SW 684; Holladay-Klotz Land, etc., Co. v. Moss Tie Co., 87 Mo. A. 167. But see Patterson v. Fagan, 38 Mo. 70.

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Changes not suspicious or doubtful. Where the changes on the face of the instrument are not of a suspicious character, the instrument should be admitted in evidence upon proof of its execution without explanation by the party offering it;[52] and so also where it is doubtful from an inspection of the instrument or from the evidence as to the alteration, whether there was or was not an alteration, the instrument should be admitted so that the jury may pass upon this preliminary question;[53] but in such a case the jury should be instructed that in the event of their finding that there was an alteration it is

N. H.—Cole v. Hills, 44 N. H. 227. See also Burnham v. Ayer, 35 N. H. 351; Hills v. Barnes, 11 N. H. 395.

N. Y.—Pringle v. Chambers, 1 AbbPr 53 (holding that the court cannot decide, upon a mere inspection of the instrument, that it is void and cannot be introduced in evidence). The court can only decide, upon an inspection of the instrument, that the party producing it shall be required to explain changes, and as soon as evidence is offered the question at once becomes one for the jury. Tillou v. Clinton, etc., Mut. Ins. Co., 7 Barb. 564; Smith v. McGowan, 3 Barb. 404; Jackson v. Osborn, 2 Wend. 555, 20 AmD 649. See also Pease v. Barnett, 27 Hun 378 (holding that after explanatory evidence is given the question must be left to the jury, and the court cannot direct a verdict); Artisans' Bank v. Backus, 31 HowPr 242 [aff 36 N. Y. 100, 1 Transcr. A. 75; 3 AbbPrNS 273].

Oh.—Marshall v. Wilhite, 4 Oh. Cir. Ct. 203, 2 Oh. Cir. Dec. 500.

Pa.—Clark v. Eckstein, 22 Pa. 507, 62 AmD 307 (error to submit question to jury without explanatory evidence); Stevens v. Martin, 18 Pa. 101; Colonial Trust Co. v. Getz, 28 Pa. Super. 619, 628 (where the court said: "It is well settled in Pennsylvania that when a promissory note 'clearly shows upon its face' that it has been altered in some material part, such as its date or the time or place of payment, it is incumbent on the party producing it and claiming under it to remove the suspicion thus raised as to the genuineness of the instrument by accounting for the alteration. In such a case the note should not be admitted in evidence, except in connection with evidence tending to explain the alteration").

S. C.—Wicker v. Pope, 46 S. C. L. 387, 75 AmD 732 (holding that ordinarily the question is determined by the court in the first instance upon the preliminary objection to the admission of the instrument in evidence, but it is again open to the jury, and is always so when the validity of the instrument is directly involved in the issue, and the party offering the instrument is not bound to offer other evidence in explanation than that furnished by the instrument itself).

[a] **Discretion of court.**—Where, in an action on an instrument in writing, it is apparent on inspection that, either before or after delivery, there was an alteration that may have been material, the trial judge in his discretion may require plaintiff to offer some explanation of the alteration before permitting the instrument to be read, although the signatures of the parties to be bound have been admitted or proved. Graham v. Middleby, 185 Mass. 349, 70 NE 416.

[b] **Where an instrument is offered in evidence in the midst of the trial,** the court is not bound to rule on the materiality of the alterations and to require them to be explained before the instrument can be shown to the jury, but the proper practice is for the court to determine on inspection, in view of the state of the evidence at the time the instrument is offered, whether proof in explanation of the alteration should be required before the instrument is admitted. Wood v. Skelley, 196 Mass. 114, 81 NE 872, 124 AmSR 516.

[c] **In the absence of explanatory evidence** of suspicious appearance by the party producing an instrument (1) suspicion will become the conviction of fact in the mind of the court or jury that such alteration or appearance of alteration was subsequent to the execution and delivery; but the question is one of fact for the jury and not of law for the court. Catlin Coal Co. v. Lloyd, 180 Ill. 398, 54 NE 214, 72 AmSR 216; Milliken v. Marlin, 66 Ill. 13; Reed v. Kemp, 16 Ill. 445. (2) In Cole v. Hills, 44 N. H. 227, 235. Sargent, J., said that if the jury "could not find any preponderance of the evidence as to when the alteration was made, or if there is an entire absence of evidence and of circumstances, both in the instrument and in the evidence aliunde, from which an inference can be legitimately drawn as to the time when it was actually made, then the presumption arises that the alteration was made after the execution of the instrument; and this is a presumption of fact which the jury are to make, under proper instructions from the court, where they shall be unable to find the fact from any evidence or circumstances in the case." (3) But it has been held that if it is evident upon an inspection of the paper that it has been altered in a material part, it must be withheld from the jury in the absence of explanatory testimony. Miller v. Stark, 148 Pa. 164, 23 A 1058; Hudson v. Reel, 5 Pa. 279. See also cases supra this note. (4) Where the party offers a deed which contains an apparent alteration beneficial to him, the instrument should not be admitted in evidence without explanation. Burgwin v. Bishop, 91 Pa. 336; Robinson v. Myers, 67 Pa. 9. (5) Where a negotiable instrument contains a visible and material alteration, it is not receivable in evidence, unless explanation is offered. Hartley v. Corboy, 150 Pa. 23, 24 A 295. (6) So in the case of a bond which the obligee makes a part of his case. Barrington v. Washington Bank, 14 Serg. & R. (Pa.) 405. (7) A note bearing an apparent alteration should not be admitted except in connection with evidence tending to explain it, and then it should be referred to the jury to say whether the alteration, if any, was made before or after the delivery of the note. Hill v. Cooley, 46 Pa. 259; Heffner v. Wenrich, 32 Pa. 423; Winters v. Mowrer, 1 Pa. Super. 47. See also Smith v. Weld, 2 Pa. 54 (holding that the court may either exclude the instrument in the first instance or pronounce upon its effect after it is submitted to the jury). (8) So a book of entries, manifestly altered, has been held not to be admissible to go to the jury, unless the party offering it also offered explanatory evidence of the alteration. Churchman v. Smith, 6 Whart. (Pa.) 146, 36 AmD 211.

[d] **Where there is positive evidence** bearing on the time of the alteration of the instrument, it should be received and the question of alteration referred to the jury for decision. Miller v. Stark, 148 Pa. 164, 23 A 1058.

[e] **Presumptions.**—(1) The court should instruct the jury that no presumption is raised as to when or by whom the apparent change was made, but that these are questions for them to determine. DeLong v. Soucie, 45 Ill. A. 234. (2) There is a presumption of innocence on the face of a deed if the alteration is not of a suspicious character, but if it is of a suspicious character the law presumes nothing, but leaves the whole question to the jury. Jordan v. Stewart, 23 Pa. 244. To same effect Nesbitt v. Turner, 155 Pa. 429, 26 A 750; Stevens v. Martin, 18 Pa. 101 (where it was said to be proper to presume that the interlineation in a patent was made before the patent was issued); Heffelfinger v. Shutz, 16 Serg. & R. (Pa.) 44.

[f] **It is not competent to exclude a deed as evidence** upon the ground that a portion of it appears to have been written over an erasure; the appearance of the instrument is a fact to be considered by the jury in connection with the explanatory evidence as to the erasure and interlineation, in determining whether the instrument itself is genuine. Comstock v. Smith, 26 Mich. 306.

[g] **The rule that in the absence of suspicious circumstances** it will be presumed that the change was made before execution does not mean that when the interlineation or alteration is of a suspicious character the presumption stated is entirely removed or that one to the contrary obtains; but that if the alteration or interlineation is of a suspicious character the chancellor or jury will be authorized to decide against the presumption on the face of the paper, without additional proof. Noah v. German Ins. Co., 69 Mo. A. 332; Grimes v. Whitesides, 65 Mo. A. 1.

[h] **Sufficiency of explanation; question for jury.**—The jury determine, under proper instructions, whether the explanation is sufficient. Burgwin v. Bishop, 91 Pa. 336. But see Robinson v. Myers, 67 Pa. 9; Gettysburg Nat. Bank v. Gage, 4 Pa. Super. 505 (which hold that the question of the sufficiency of such testimony is for the court, the former case holding that, if the instrument is admitted and the explanatory evidence is not sufficient, the opposite party is entitled to an instruction that the jury must reject the instrument).

52. Zimmerman v. Camp, 155 Pa. 152, 25 A 1086; Winters v. Mowrer, 1 Pa. Super. 47. See also supra § 32.

53. Benton County Sav. Bank v. Strand, 106 Iowa 606, 76 NW 1001 (holding that, where the executor of the indorsee of a note defended an action thereon in his representative capacity on the ground that when his testator indorsed the note certain words stamped in red ink were not on the note, and the executor, who was a witness of the indorsement, testified that the words were not there when the indorsement was made, but his conclusion was reached under circumstances that made its correctness doubtful, it was error to refuse to admit the note itself as evidence, since the indorsement thereon a considerable space below the order to pay raised the question for the jury as to the correctness of the executor's statements. In this case Granger, J., said: "The note is before us for inspection, and it is not to be said that the note, as evidence, would not aid to a conclusion of the fact at issue. The manner in which the writing in ink first appears, then the stamp impression followed by the signature, showing the spaces with the indorsements as they now are, and as they would be with the words in dispute omitted, would certainly aid in determining the question of fact. It is to be borne in mind that to admit the note in evidence is not to concede a liability thereon, but to merely make it evidence, so that the manner and appearance of the indorsement may be considered with other evidence to whether it has been changed or not"); Dawson v. Dawson, 7 Rob. (La.) 36 (holding that where the court cannot say whether such erasures, apparent on the face of a note, are such as should authorize its exclusion until explained, the note will be permitted to go to the jury); Miller v. Stark, 148 Pa. 164, 23 A 1058; Clark v. Eckstein, 22 Pa. 507, 62 AmD 307; Hudson v. Reel, 5 Pa. 279; Colonial Trust Co. v. Getz, 28 Pa. Super. 619.

[a] **Wherever a doubt exists** whether an alteration has taken place nothing is to be presumed, but it is for the jury to decide, and for this purpose they may inspect the writing; the extrinsic evidence as to the time and circumstances under which a change was

their duty to find that the instrument was avoided, unless the alteration is shown to have been immaterial.[54]

In other cases, the instrument is admitted in the first instance, but the party producing it is required to offer explanatory evidence before the jury, who are to pass upon the whole question, under proper instructions from the court.[55]

[§ 199] **cc. Different Uses of the Term "Suspicious Appearance."** No definite rule can be deduced from the cases by which to determine the circumstances connected with an apparent alteration which will be regarded as suspicious and will require explanation by the party relying on the altered instrument, under the rules previously stated. On the one hand, the mere fact of an apparent change seems to be contemplated by the expression "suspicious appearance," as is also to be gathered from some of the authorities which lay down a general rule requiring interlineations or erasures to be explained by the party producing the instrument.[56] On the other hand, the mere appearance of a change is not always of itself sufficient, but other intrinsic evidence must appear in order to raise a suspicion.[57]

[§ 200] **B. Admissibility—1. In General.** As a general rule where the existence of an alteration in a written instrument or the time when, the person by whom, or the authority by which, such alteration was made is in issue, evidence bearing in any way upon the nature of the transaction between the parties or tending to prove the fact is admissible,[58] provided of course it comes within the

made is also for the jury. Domville v. Davies, 13 N. S. 159.

54. Colonial Trust Co. v. Getz, 28 Pa. Super. 619 (holding that in such a case the jury should be instructed that in the event of their finding that there was an alteration it would be their duty to find that the note was avoided as against the indorser unless the alteration is shown by the evidence to have been made prior to, or at the time of, the indorsement, or with the indorser's consent it was made subsequent thereto, or the case was brought within the last clause of the act of May 16 (1901) § 124).

55. Del.—In Warren v. Layton, 3 Del. 404 (the note in suit, which was much mutilated, was admitted and the court charged that plaintiff was under the burden of explaining the alteration, else he could not recover).

Tenn.—Organ v. Allison, 9 Baxt. 459; Farnsworth v. Sharp, 4 Sneed 54 (announcing the rule that an apparent change, in the absence of suspicious circumstances, will be presumed to have been made at the time of signing; but if the change is suspicious no presumption is indulged, but the whole question is left to be decided by the jury, the burden being on the party offering the instrument).

Tex.—Rodriguez v. Haynes, 76 Tex. 225, 13 SW 296 (holding that the burden of explaining a suspicious change appearing on the face of an instrument is on the party producing it, but the jury are to determine by whom, when, and the intent with which the change was made). See also Park v. Glover, 23 Tex. 469; Miller v. Alexander, 13 Tex. 497, 65 AmD 73. But see Wadsworth v. Vinyard, (Civ. A.) 131 SW 1171 (holding that in trespass to try title, where defendants objected to the introduction of plaintiff's deed comprehending the land sued for in her petition on the ground that it showed that it had been mutilated and that the date of acknowledgment had been erased and a subsitution of its certificate made, but did not offer any evidence attacking its validity or tending to show any mutilation made after its signature or acknowledgment, it was for the court to decide as to its admissibility).

Vt.—Beaman v. Russell, 20 Vt. 205, 215, 49 AmD 775 (where Hall, J., said: "On the usual proof of the execution of the instrument, it should, without reference to the character of any alteration upon it, be admitted in evidence, leaving all testimony in relation to such alteration to be given to the jury. It will doubtless be the duty of the court to give the jury proper instructions, upon any given state of facts. . . . But generally, the whole inquiry, whether there has been an alteration, and if so, whether in fraud of the defending party, or otherwise, to be determined by the appearance of the instrument itself, or from that and other evidence in the case, is for the jury. The whole is matter of fact, and they must determine it from all the testimony before them").

W. Va.—Connor v. Fleshman, 4 W. Va. 693 (holding that, on a plea of non est factum to avoid an instrument on the ground of an alteration, the question whether the instrument has been mutilated is for the jury, and the paper should be submitted to the jury without first requiring plaintiff to explain its appearance).

But see supra §§ 192, 193.

[a] **A deed bearing an alleged erasure and interlineation** apparent on its face may be admitted in evidence subject to the right of the jury to determine whether it had been altered. Little v. Herndon, 10 Wall. (U. S.) 26, 19 L. ed. 878.

For inspection of instrument by jury see infra § 215.

56. Slater v. Moore, 86 Va. 26, 9 SE 419 (holding that every alteration on the face of a written instrument detracts from its credit and renders it suspicious, and that this suspicion must be removed by the party claiming under it). See also Pipes v. Hardesty, 9 La. Ann. 152, 61 AmD 202; Park v. Glover, 23 Tex. 469; Miller v. Alexander, 13 Tex. 497, 65 AmD 73.

57. U. S.—Cox v. Palmer, 3 Fed. 16, 1 McCrary 431.

Cal.—Sedgwick v. Sedgwick, 56 Cal. 213 (holding that, under the statute requiring a party producing a writing as genuine, which has been altered or appears to have been altered after its execution, etc., to account for the apparent alteration, a note which on its face appears to have been changed in the date thereof from 1871 to 1870, for example, the figure "1" seemed at first to have been written and then changed to "0," the instrument does not indicate that the change was made after execution).

Mass.—Wilde v. Armsby, 6 Cush. 314 (where, referring to the statement in 1 Greenleaf Ev. § 564, the court said that it was not prepared to decide that a material alteration, manifest on the face of an instrument, is in all cases such a suspicious circumstance as to throw the burden on the party claiming under the instrument, because the effect of such a rule would be that, if no evidence were given by the party claiming under the instrument, the issue must always be found against him).

Mo.—Paramore v. Lindsey, 63 Mo. 63.

Pa.—Zimmerman v. Camp, 155 Pa. 152, 25 A 1086.

Tenn.—Organ v. Allison, 9 Baxt. 459.

Tex.—Rodriguez v. Haynes, 76 Tex. 225, 13 SW 296.

Vt.—Langdon v. Paul, 20 Vt. 217 (holding that, where the interlineation consists of words which are entirely immaterial, no explanation as to the time when it was made is necessary).

Wis.—Maldaner v. Smith, 103 Wis. 80, 78 NW 140; Page v. Danaher, 43 Wis. 221.

See also infra § 216.

[a] **Where ambiguity is introduced into a writing by verbal changes,** which either should have been made in additional places or not at all, the presumption in favor of the validity of affirmative action should prevail. In re Peterson, 212 Pa. 453, 61 A 1005.

58. Ala.—Dickson v. Bamberger, 107 Ala. 293, 18 S 290; Connally v. Spragins, 66 Ala. 258 (where plaintiff was permitted to testify that it was his custom to write mortgages for customers, leaving the date blank, and afterward to fill the blanks when the intended mortgagor came in to execute the instrument).

Conn.—Abel v. Fitch, 20 Conn. 90 (holding that the testimony of arbitrators as to their recollection of the contents of a paper submitted to them and of the matters passed upon by them is competent for the purpose of showing that the paper signed by the parties submitting their differences had been altered).

D. C.—Ofenstein v. Bryan, 20 App. 1 (holding that in an action on a materially altered note it is error to refuse to allow a witness to be asked whether he was ever present in the office of the party charged with altering the note when he used acid in altering any notes, where plaintiff states that he expects to prove by the witness that he saw this done in the presence of the other parties to the note, although the truth of the proposed statement may seem improbable under the circumstances).

Ill.—King v. Bush, 36 Ill. 142; Landt v. McCullough, 121 Ill. A. 328 [aff 218 Ill. 607, 75 NE 1069]; W. W. Kimball Co. v. Piper, 111 Ill. A. 82.

Ind.—Johnson v. Wabash, etc., Plank-Road Co., 16 Ind. 389; Cabell v. McKinney, 31 Ind. A. 548, 68 NE 601.

Iowa.—Coppock v. Lampkin, 114 Iowa 664, 87 NW 665.

Mass.—Smith v. Jagoe, 172 Mass. 538, 52 NE 1088 (holding that on the issue whether a chattel mortgage was executed in blank, to be filled by the mortgagee, and whether he exceeded the authority thus impliedly given, the situation of the parties and all that was said when the authority was given are competent evidence, and, although the mortgagor cannot testify as to his "expectation" so as to affect the construction of the language of the mortgage, such evidence is material upon the question whether a fraud had been practiced upon him by the mortgagee in filling the blanks, and whether he had estopped himself to set up the improper filling of the blanks); Newcomb v. Presbrey, 8 Metc. 406.

Mich.—Brand v. Johnrowe, 60 Mich. 210, 26 NW 883; Jourden v. Boyce, 33 Mich. 302.

Mo.—Cox v. Mignery, 126 Mo. A. 669, 105 SW 675.

Nebr.—Gandy v. Bissell, 72 Nebr. 356, 100 NW 803 [rev reh 5 Nebr. (Unoff.) 184, 97 NW 632] (holding that, in an action on a note in which one defense is fraudulent alteration, testimony that no such indebtedness as the one sued on ever existed is competent on the issue of alteration).

N. C.—Wickér v. Jones, 159 N. C. 102, 74 SE 801, 40 LRANS 69, AnnCas1914B 1083 (holding that, in determining when an erasure or interlineation in a deed was made, the jury may consider any difference in ink or handwriting, in the absence of explanation, and may give weight to the fact that the deed may have been withheld from registration,

established rules relating to the relevancy and materiality of evidence in civil cases generally.[59] Thus the inherent nature of the matter set up as an alteration may be admitted as evidence of the probability or improbability of the fact,[60] and even an immaterial alteration may be competent evidence to go to the jury to aid in an investigation of the main fact;[61] but evidence of facts which can in no manner form the basis for a conclusion upon the issue of alteration is inadmissible.[62]

Corroborating circumstances also may generally be considered as competent evidence for the purpose of supporting either the contention that a written instrument has been improperly altered,[63] or the claim that the alleged alteration was part of the writing as executed, or, if subsequently added, was properly made.[64] Thus the circumstance that the party producing the instrument offers no explanation is in itself to be taken into consideration by the jury in connection with the fact that a suspicious alteration exists.[65]

[§ 201] **2. Parol or Extrinsic Evidence in General.** By way of exception to the general rule against parol evidence to vary or contradict a written instrument,[66] parol or extrinsic evidence is admissible, for the purpose of impeaching an instru-

according to the length of time elapsing and any change in the condition of the parties thereto).

Pa.—Winters v. Mowrer, 163 Pa. 239, 29 A 916; Myers v. Nell, 84 Pa. 369; Alexander v. Buckwalter, 17 Pa. Super. 128.

S. D.—Wyckoff v. Johnson, 2 S. D. 91, 48 NW 837.

Wis.—North v. Henneberry, 44 Wis. 306; Ansley v. Peterson, 30 Wis. 653.

[a] **Leaving of blank space.**—Notwithstanding the mere leaving of a blank space in a completed instrument may not be considered such negligence on the part of the maker as to render him liable to an innocent purchaser, yet, upon the issue whether or not the instrument had been altered by raising the amount, evidence showing that such a blank space was left as was sufficient to permit the amount to be raised without leaving traces of the alteration is admissible upon the probability of the genuineness of the instrument. Pearson v. Hardin, 95 Mich. 360, 54 NW 904.

[b] **Intention.**—Where defendant denies that the mortgage sued on which has been altered after its execution by her, by inserting after the description of the goods the words "in her storehouse," has been altered with her consent, it is error to refuse to permit her to be cross-examined as to whether it was not her intention to mortgage the goods in her storehouse. Cabell v. McKinney, 31 Ind. A. 548, 68 NE 601.

[c] **Proving mistake in action on note.**—Where the name of one of several payees is inserted by mistake, the indorsee of the other payees may prove the fact in a suit to recover against his indorsers, in order to show that such payee's indorsement is unnecessary to pass title to him. Pease v. Dwight, 6 How. (U. S.) 190, 12 L. ed. 399.

59. See generally Evidence [16 Cyc 1110 et seq].

[a] **Evidence held inadmissible.**—(1) Where, in an action on a note against indorsers, the common counts are abandoned, leaving only a special count, and the issues are as to whether the note was materially altered by the maker, and whether it was acknowledged by the indorsers, testimony that the maker was the agent of defendants to raise money for a land speculation is irrelevant, and its admission is reversible error. Towles v. Tanner, 21 App. (D. C.) 530. (2) In an action on a promissory note where the sole defense is that the note was altered after it had been indorsed, and no evidence relevant or irrelevant has been given in support of that defense, which brought in question the consideration of a prior original note, or the purpose for which it was given, or the application that was made of its proceeds, evidence that the proceeds of the original note were applied to a payment in which defendant was interested is inadmissible. Colonial Trust Co. v. Getz, 28 Pa. Super. 619. (3) It is a sufficient answer to an exception to the exclusion of evidence that the date of a mortgage of personal property was changed after recording, so as to show, contrary to the fact, that it was recorded in time and was valid, that there was no evidence that the mortgage covered the merchandise in question, and that there was express evidence that it did not cover it. Vandercook v. O'Connor, 172 Mass. 301, 52 NE 444. (4) Such doubtful testimony as will scarcely raise a suspicion of the genuineness of the instrument, as where the witness testified that the signature might be his, did not deny the genuineness of the note, but said that he had a doubt about it, is properly excluded. Austin v. Austin, 45 Wis. 523.

[b] **Evidence of general reputation** is inadmissible on the question of the alleged fraudulent alteration of a note. Martin v. Good, 14 Md. 398, 74 AmD 545.

[c] **Evidence of financial embarrassment.**—The embarrassed circumstances of a debtor furnish no presumption that he will make a fraudulent alteration of a note in his hands, and therefore evidence of his pecuniary embarrassment is inadmissible. Agawam Bank v. Sears, 4 Gray (Mass.) 95. But see Winters v. Mowrer, 163 Pa. 239, 29 A 916 (holding that testimony that plaintiff, at about the time of the alleged writing, was borrowing a large sum from a third person was admissible, the defense being alleged fraud in the alteration of the amount of the note, the court holding that such evidence bore on the probable truthfulness of the loan alleged on the one side and denied on the other).

[d] **In Georgia,** under Civ. Code § 3702, providing that an alteration in a note will not discharge the maker from all liability unless such alteration is material, and is made by one claiming a benefit under the note, with intent to defraud, evidence that the date of a note and the clause, "with interest at six per cent. per annum," were inserted after the note had been signed is inadmissible, where the offer of evidence is unaccompanied by an offer to prove that the alleged alterations were fraudulently made by one claiming a benefit under the note. Hotel Lanier Co. v. Johnson, 103 Ga. 604, 30 SE 558.

[e] **A party who has mutilated a paper** cannot prove the contents of the part thus torn off. Price v. Tallman, 1 N. J. L. 447.

60. Matlock v. Wheeler, 29 Or. 64, 40 P 5, 43 P 867 (holding that, where plaintiff testified that after the execution of the note in suit he indorsed a payment thereon and erased the word "maturity" upon defendant's suggestion that by mistake the note had been given for too large a sum, which testimony was contradicted by defendant, evidence that the amount of the note, after deducting the indorsed payment, included interest from the date of the note to maturity, calculated in advance, was admissible). But see Rankin v. Blackwell, 2 Johns. Cas. (N. Y.) 198 (holding that alterations on the face of a note, unsupported by other proof, will not be competent evidence in support of a claim of fraudulent alteration).

[a] **Instrument bearing impossible date.**—The fact that an instrument which is claimed to have been materially altered bears an impossible date may be evidence to show that the writting was antedated, but not that it was altered after delivery. Davis v. Loftin, 6 Tex. 489.

[b] **Evidence excluded.**—In an action on a policy of insurance a recovery was resisted on the ground that an alteration had been made extending the life of the policy. It was held that the exclusion of evidence of the minimum rate existing in the company at the time was harmless where the policy itself recited a payment of a consideration different from that which would have been payable at such rate for the time that the policy should run as alleged by the company and from that due at such rate for the term stated on the face of the policy. Insurance Co. of North America v. Brim, 111 Ind. 281, 12 NE 315.

61. Moye v. Herndon, 30 Miss. 110.

62. Agawam Bank v. Sears, 4 Gray (Mass.) 95. See also cases supra note 59.

[a] **Cannot establish one inference from another.**—Where, in an action on a note, it is sought to be shown that one of the makers who had altered and negotiated it had authority to alter it from the other parties to the note, testimony of a witness that he had seen blank notes in the possession of the party who had altered and negotiated the note, with what he believed to be the genuine signature of an indorser, is properly excluded as seeking to establish one inference from another. Ofenstein v. Bryan, 20 App. (D. C.) 1.

63. Lamar v. Brown, 56 Ala. 157; Alkire v. Kahle, 123 Ill. 496, 17 NE 693, 5 AmSR 540; Haynes v. Christian, 30 Mo. A. 198.

[a] **Nonproduction of deed and absence of memorandum of alterations from record.**—In a proceeding to try title to real estate, where it was claimed that a deed in defendant's possession and alleged to contain a material clause fraudulently inserted had been purposely suppressed by him, it was held proper for the court to charge the jury that it was the duty of the clerk to record the memorandum of alterations and interlineations in a deed, and that the absence of any such memorandum in the record and the nonproduction of the deed containing evidence bearing strongly on the question of fraudulent insertion were circumstances for their consideration as to the clause in dispute. Hager v. Hager, 38 Barb. (N. Y.) 92.

64. Akridge v. Watertown Steam Engine Co., 77 Ga. 50; Boston Block Co. v. Buffington, 39 Minn. 385, 40 NW 361; Gordon v. Sizer, 39 Miss. 805.

[a] **Illustration.**—Where the question is as to the propriety of an erasure of an indorsement of payment of a certain amount on a bond, the conclusion that the erasure was properly made is supported by the fact that the indorsement immediately following that in question was written by the mortgagor and stated the amount remaining due upon the bond in accordance with the previous indorsement as erased. McCowan v. Westbury, 52 S. C. 421, 29 SE 663, 30 SE 142.

65. Wisdom v. Reeves, 110 Ala. 412, 18 S 13; Davis v. Carlisle, 6 Ala. 707; Reed v. Kemp, 16 Ill. 445; Crabtree v. Clark, 20 Me. 337; Herrick v. Maline, 22 Wend. (N. Y.) 388. See also Comstock v. Smith, 26 Mich. 306.

66. See Evidence [17 Cyc 567 et seq].

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ment, to show the fact that an alteration was made therein, and the person by whom, and the circumstances under which, it was made.[67] So also parol evidence is admissible to explain an alteration or to show that the change was made under such circumstances as not to vitiate the instrument.[68] Thus such evidence may be admitted for the purpose of showing that the instrument fails to express the true contract or agreement of the parties,[69] or to show that the alteration was made without authority,[70] or that blanks were filled contrary to directions.[71]

Erasures. Parol evidence may be received to show the time when and the circumstances under which an erasure was made in a written instrument and to sustain the validity of the instrument notwithstanding the erasure,[72] and, where the instrument is to be enforced as though there had been no erasure, parol evidence may be received to show what the erased words were if they cannot be ascertained from the instrument itself.[73]

Records. It has been held that the alteration of a record may be shown by parol.[74]

[§ 202] **3. Testimony of Witnesses as to Condition of Instrument—a. In General.** The testimony of witnesses who have seen the instrument is ad-

[a] **Reason for exception to parol evidence rule.**—"If that rule were applied to prevent proof of material and fraudulent alterations of instruments, the most flagrant frauds and forgeries could be successfully perpetrated." Central Nat. Bank v. Efird, 91 S. C. 135, 139, 74 SE 136.

67. Colo.—Harris v. McReynolds, 10 Colo. A. 532, 51 P 1016 (where the court held that parol evidence was admissible, in an action for false imprisonment, to show that a complaint and warrant which had been issued against R, and under which McR had been arrested, were altered by correcting the name after the arrest).

Ga.—W. H. Howard Piano Co. v. Glover, 7 Ga. A. 548, 67 SE 277. Compare Bowe v. Dotterer, 80 Ga. 50, 4 SE 253.

Ill.—Johnson v. Pollock, 58 Ill. 181; Schwarz v. Herrenkind, 26 Ill. 208.

Iowa.—Coit v. Churchill, 61 Iowa 296, 16 NW 147.

La.—Perry v. Burton, 31 La. Ann. 262.

Me.—Goodwin v. Norton, 92 Me. 532, 43 A 111; Buck v. Appleton, 14 Me. 284.

Mass.—Heywood v. Perrin, 10 Pick. 228, 20 AmD 518.

Miss.—Everman v. Robb, 52 Miss. 653, 24 AmR 682.

Nebr.—Courcamp v. Weber, 39 Nebr. 533, 58 NW 187.

Or.—Wren v. Fargo, 2 Or. 19.

Pa.—Grambs v. Lynch, 4 Pennyp. 243, 20 WklyNC 376.

S. C.—Central Nat. Bank v. Efird, 91 S. C. 135, 74 SE 136.

Va.—Burnette v. Young, 107 Va. 184, 57 SE 641, 12 AnnCas 982 and note.

Wash.—Price v. Stanbra, 45 Wash. 143, 88 P 115.

[a] **It is not violative of the parol evidence rule** (1) to allow a party against whom a paper is offered to prove by parol evidence that the paper has been altered in a material part. While an unambiguous valid written contract is not ordinarily variable by parol testimony, a dispute as to the existence of the contract, including the question as to alterations, is an inquiry into which parol evidence is ordinarily admissible. W. H. Howard Piano Co. v. Glover, 7 Ga. A. 548, 67 SE 217. (2) "It is not the rule that one person may vary and alter the terms of a written contract and then afterwards enforce it, on the principle that it is a writing that cannot be questioned by parol evidence. The rule contended for applies only to written contracts admitted or duly proved to have been executed in the form in which they are sought to be enforced. It has always been permissible to show by parol evidence that a writing purporting to bind a party has been altered or varied without the consent of that party by another in whose favor it runs." Per Fullerton, J., in Price v. Stanbra, 45 Wash. 143, 146, 88 P 115.

[b] **Affixed seal.**—Parol evidence is admissible to show that after an unsealed paper had been executed, delivered, and recorded, a scroll by way of a seal was affixed to the name of the maker both on the original paper and on the record without the knowledge or consent of the maker. Burnette v. Young, 107 Va. 184, 187, 57 SE 641, 12 AnnCas 982 (where Cardwell, J., said: "It is unquestionably true that parol evidence will not be admitted to vary the terms of a written instrument, but when the parol evidence was offered in this case, it was not for the purpose of varying the terms of the written instrument, but to show that the instrument was absolutely void or that it never had any legal existence, by reason of fraud or by reason of want of due execution. Defendant in error was standing upon the deed in question as conclusive evidence of her right to the possession of the property the instrument purported to convey, and it would be a harsh doctrine indeed that excluded evidence on behalf of plaintiff in error to show that the instrument never had any legal existence, by reason of forgery, alteration or fraud in its procurement, or the want of due execution or other reasons for which the instrument would, in law, be absolutely void").

68. U. S.—Speake v. U. S., 9 Cranch 28, 3 L. ed. 645.

Ga.—Williams v. Waters, 36 Ga. 454; Crawford v. Brady, 35 Ga. 184.

Iowa.—Barlow v. Buckingham, 68 Iowa 169, 26 NW 58.

La.—Bernstien v. Ricks, 20 La. Ann. 409. But compare Labiche v. Jahan, 9 Rob. 30 (holding that, in the absence of any allegation of fraud or error, parol evidence is inadmissible to prove the assent of a party to an alteration, as to the quantity of land, in an act of sale of real estate, made by the notary before recording it).

Md.—Edelin v. Sanders, 8 Md. 118; Burckmyer v. Whiteford, 6 Gill 1.

Mass.—Austin v. Boyd, 24 Pick. 64; Heywood v. Perrin, 10 Pick. 228, 20 AmD 518.

Mich.—Jenkinson v. Monroe, 61 Mich. 454, 28 NW 663.

Mo.—Cox v. Mignery, 126 Mo. A. 669, 105 SW 675.

N. J.—Rape v. Westcott, 18 N. J. L. 244.

S. C.—Mouchet v. Cason, 3 S. C. L. 307.

Tex.—McLane v. Maurer, 28 Tex. Civ. A. 75, 66 SW 693, 1108 (holding that, where a contract by which plaintiffs were authorized to sell defendant's lands within a certain time was renewed, and certain changes were then made by erasures and interlineations, testimony explaining such changes is competent).

Wis.—Stringham v. Oshkosh, 22 Wis. 326; Low v. Merrill, 1 Pinn. 340 (holding that, in an action to annul certificates issued to defendant of tax sales of plaintiff's property for a certain year, where defendant denied that the taxes had been paid, and upon this issue plaintiff offered in evidence a receipt in which there was a column of figures purporting to be the taxes assessed upon the property for the improvements for a particular year, which figures had been erased, the testimony of the officer who gave the receipt was admissible to show that the figures erased represented an official tax and were erased by him because the taxes had not been paid).

[a] **Theory of rule.**—Extrinsic evidence is admissible to explain or account for interlineations in a written instrument, whether a private contract or public record, not on the theory that it may be used to impeach a written instrument or record, but that it may be used to establish the actual record. Cox v. Mignery, 126 Mo. A. 669, 105 SW 675.

69. Curtice v. West, 50 Hun 47, 2 NYS 507 [aff 121 N. Y. 696, 24 NE 1099]; Walker v. Walker, 6 Coldw. (Tenn.) 571; Price v. Stanbra, 45 Wash. 143, 88 P 115 (holding that parol evidence is admissible to show that a written contract for the sale of goods has been changed, and does not correspond with the contract signed or the one actually made).

[a] **Testimony as to the real agreement** between the parties within the res gestæ of the transaction is admissible to show the materially altered condition of the instrument after signing. Yancy v. Gordon, 172 Ala. 439, 55 S 239, AnnCas1913E 251.

[b] **Erasure.**—Where the portion of a written instrument bearing upon a certain matter has been purposely erased by the parties, evidence of a parol agreement with regard to the erased matter is admissible, since it is then not embraced within the contract. Letcher v. Letcher, 50 Mo. 137.

70. Robinson v. Nevada Bank, 81 Cal. 106, 22 P 478.

[a] **A fraudulent alteration of a deed** by the grantee, which avoids it, may, in an action of ejectment, be shown at law without going into a court of equity. Rives v. Thompson, 41 Ga. 68.

[b] **Unauthorized act of employee.**—In an action against an alleged surety on a promissory note, testimony that the cashier of the payee bank altered the note by extending the date of payment without defendant's knowledge or consent is inadmissible in the absence of an offer of evidence showing that in so doing the cashier was acting within the authority conferred upon him by the bank or that his act was subsequently ratified by it. Vanderford v. Farmers', etc., Nat. Bank, 105 Md. 164, 66 A 47, 10 LRANS 129.

71. Graham v. Middleby, 185 Mass. 349, 70 NE 416; Richards v. Day, 137 N. Y. 183, 33 NE 146, 33 AmSR 704, 23 LRA 601.

[a] **Oral evidence of authority conferred by written agreement.**—Where it appears that plaintiff's authority to fill in blanks in an assignment in suit was governed by a written power of attorney, it was improper, without the production of such written authority, to admit the assignment as filled out, or to receive oral evidence of the arrangement between the parties at the time when the instrument was signed in blank. Wabash R. Co. v. Meyer, 119 Ill. A. 104.

72. Bailey v. Boylan, 17 Ind. 478; Johnson v. Wabash, etc., Plank-Road Co., 16 Ind. 389; Justus v. Cooper, 7 Blackf. (Ind.) 7.

73. Thomas v. Thomas, 76 Minn. 237, 79 NW 104, 77 AmSR 639.

74. Brier v. Woodbury, 1 Pick. (Mass.) 362; Sweet v. Maupin, 65 Mo. 65 (holding parol evidence admissible as to the original character of a judgment claimed to have been altered); Cox v. Mignery, 126 Mo. A. 669, 105 SW 675; Despard v. Pleasants County,

missible to show its condition at a particular time with reference to interlineations or erasures;[75] and the alleged or apparent change may in like manner be explained by such witnesses.[76]

A subscribing witness to an instrument may testify as to the changes which have been made therein,[77] although it is not essential that the fact of alteration be proved exclusively by such a witness, but it may be shown by the testimony of any other person having knowledge of the fact.[78]

[§ 203] **b. Testimony as to Appearance of Instrument.** Where an issue is raised as to an alteration, inquiry as to whether the body of the instrument and the signature are written with the same ink and by the same hand, and as to the color of the ink with which the different parts of the instrument are written, etc., is proper;[79] and in this connection expert testimony is competent on the question whether or not an alteration has been made,[80] although it also has been held that a witness, without qualifying as an expert, may testify as to the visibility of marks of an erasure,[81] or as to whether certain words were written in the same ink.[82]

[§ 204] **4. Other Instruments—a. In General.** Upon the issue of an alteration of a particular instrument, evidence of the alteration of other instruments, or in relation to the manner of the execution of instruments other than that in controversy, is inadmissible.[83] But the character of a note in renewal of which the one in controversy

23 W. Va. 318; Herring v. Lee, 22 W. Va. 661. Compare Kerr v. Porter, 1 Overt. (Tenn.) 15 (holding that an erasure or alteration of an entry in the entry book of the surveyor-general could not be shown by parol).

75. Shenandoah First Nat. Bank v. Liewer, 187 Fed. 16, 109 CCA 70 (holding that, where on an issue of alteration of a note after signature there was proof that plaintiff was an innocent purchaser, and defendant testified that the note was materially changed after signature, and the agent of the payee who took the note testified that it was in the same condition when defendant signed it that it was at the trial, testimony of the secretary of the payee that he received the note by mail from the agent a few days after it was dated, and that it was in the same condition at the trial, was material); Hunter v. Parsons, 22 Mich. 96 (holding that, where some of the alleged alterations were printed words, the testimony of the printer is admissible to show that the word was originally printed as it appeared when offered in evidence); Ansley v. Peterson, 30 Wis. 653 (holding that the alteration may be shown by witnesses who saw the instrument prior to the alleged alteration, but who were not present when it was made).

76. Bernstien v. Ricks, 20 La. Ann. 409; Batchelder v. Blake, 70 Vt. 197, 40 A 34 (holding that it is competent to prove by the scrivener that erasures and alterations in a mortgage were made prior to its execution). See also Fisher v. Hoffman, 2 WklyNC (Pa.) 18 (holding that, where one of the figures of the date of an instrument was written over a printed form, the testimony of a witness who saw plaintiff offer a note of similar amount, in the month and year which the note in suit bears date, directly corroborates the instrument).

[a] **If there are suspicious circumstances** apparent on the face of the instrument, the court may let in testimony, to be weighed by the triors of the facts, as to when the alterations were made, and whether they were made by a party beneficially interested subsequently to acknowledgment and delivery. Kalbach v. Mathis, 104 Mo. A. 300, 78 SW 684.

77. St. Joseph v. Baker, 113 Mo. A. 691, 88 SW 1122 (holding that a witness to a deed of a certain date, to whom a deed of a subsequent date is shown, may testify that the latter deed is the same instrument witnessed by her, with the exception that the date has been changed, the consideration raised to a larger amount, and that additional property has been inserted).

[a] **Affidavit by subscribing witnesses.**—The ex parte affidavit of a subscribing witness to a deed, indorsed on the deed after the deed had been recorded, to the effect that an interlineation which did not appear in the record was made by himself before the execution of the deed, is inadmissible, the facts are competent, but the medium of proof is incompetent. Jordan v. Stewart, 23 Pa. 244.

[b] **Declarations of subscribing witness.**—Verbal and written declarations of such a witness, if admissible, are not sufficient to rebut the presumption arising from his signature. Reformed Dutch Church v. Ten Eyck, 25 N. J. L. 40.

78. Penny v. Corwithe, 18 Johns. (N. Y.) 499 (holding that circumstances attending an alteration or erasure in a deed need not be proved exclusively by a subscribing witness but may be shown by the testimony of another having knowledge thereof).

79. Dubois v. Baker, 30 N. Y. 355; National State Bank v. Rising, 4 Hun (N. Y.) 793; Wicker v. Jones, 159 N. C. 102, 74 SE 801, 40 LRANS 69, AnnCas 1914B 1083.

80. D. C.—Ofenstein v. Bryan, 20 App. 1; Keyser v. Hitz, 13 D. C. 513.

Ga.—Thompson v. Kelsey, 8 Ga. A. 23, 68 SE 518 (holding that, where the alteration is alleged to consist in the addition of the word "seal" to the signature of the maker of a note, testimony that the word "seal" was apparently written with an indelible pencil, in a different handwriting from the signature of the note, and appeared to have been freshly written, and that the impression made by an indelible pencil would rapidly fade, given by witnesses claiming to be experts, is properly admitted).

Ill.—Zimmer v. Farr, 225 Ill. 457, 80 NE 261; Rass v. Sebastian, 160 Ill. 602, 43 NE 708.

Ind.—Nelson v. Johnson, 18 Ind. 329 (holding that, where persons testify as to their opinions, but the record does not show whether as experts or not, and no objection is made to the evidence or motion to withdraw it, there is no error on the record).

Ky.—Waller v. Ward, 101 SW 341, 31 KyL 40; Rogers v. Costigan, 78 SW 121, 25 KyL 1349.

Mich.—Pearson v. Hardin, 95 Mich. 360, 54 NW 904; Comstock v. Smith, 26 Mich. 306; Vinton v. Peck, 14 Mich. 287 (holding that witnesses may be allowed to compare the writing in question with an appeal bond in the same case admitted to have been signed by defendant, or with other writings legitimately introduced under the issues, in order to judge of the genuineness of the writing to be proved).

Miss.—Moye v. Herndon, 30 Miss. 110 (saying, however, that such evidence has but little weight and should be received with caution).

Mo.—Kalbach v. Mathis, 104 Mo. A. 300, 78 SW 684.

Pa.—Graham v. Spang, 16 A 91; Fisher v. Hoffman, 2 WklyNC 18.

B. C.—British Columbia Land, etc., Agency v. Ellis, 6 B. C. 82 (holding that, where a promissory note is alleged to have been altered by the insertion of an interest clause, the testimony of a handwriting expert upon the question as to whether such clause was written in before, at the time of, or after, the signature and indorsement of the note is admissible).

Expert and opinion testimony see generally Evidence [17 Cyc 25 et seq].

[a] **Where expert testimony has been offered** tending to show the apparent use of a certain ink eradicator in the alteration, testimony tending to show that bottles of such eradicator had been found in the desk of the party charged with having altered the instrument is admissible. Ofenstein v. Bryan, 20 App. (D. C.) 1.

81. Yates v. Waugh, 46 N. C. 483, 484 (where a witness who had been state treasurer, president of a bank and also of a railroad company, was permitted, over the objection that he was not an expert, to testify that when he first saw the instrument in suit the light was better and he then saw an erasure in it more distinctly than when giving his evidence, Nash, C. J., saying: "The question was not one of skill or science, but simply of vision and as to that the jury might or might not be able to decide as well as the witness. . . . At any rate, it cannot be error in law to prove to a jury that which they might arrive at, unassisted by the witness").

82. Glover v. Gentry, 104 Ala. 222, 16 S 88 (holding that, where a question put to a witness, to give his best judgment whether certain words in a note were written in the same ink as the other parts of the note, was objected to because the witness testified that he "was not an expert, and not an expert in ink," but he testified that for twenty-two years he had been in the timber business, which necessitated the handling of a great many letters, notes, checks, drafts, accounts, etc., and showed qualifications rendering him competent to answer the question propounded, there was no error in allowing him to answer it).

83. Ala.—Winter v. Pool, 100 Ala. 503, 14 S 411 (holding that, in an action against the maker of a like instrument, the alteration alleged being the addition of a place of payment in a blank, similar notes by other makers, on like printed forms and to the same payee as the note in suit, and left blank as to the place of payment, are inadmissible).

D. C.—Cotharin v. Davis, 13 D. C. 230 (holding that evidence of the alteration of other contracts made with defendant is inadmissible for the purpose of showing that the writing in suit had been altered).

Mich.—Pearson v. Hardin, 95 Mich. 360, 54 NW 904 (holding that, where in an action on a promissory note against an idorser and defended on the ground of alteration, defendant testified that at the time he indorsed the note in suit he also indorsed two others, all three being of the same amount, evidence that the other two notes were raised after issue was inadmissible).

Mo.—Paramore v. Lindsey, 63 Mo. 63; Iron Mountain Bank v. Murdock, 62 Mo. 70 (holding that, where in an action against an indorser of a promissory note defendant claimed that an interest clause had been added subsequently to his indorsement, evidence that defendant was the indorser of other promissory notes containing interest clauses was inadmissible).

Eng.—Thompson v. Mosely, 5 C. & P. 501, 24 ECL 676; Viney v. Barss, 1 Esp. 293; Balcetti v. Serani, 1 Peake N. P. 142.

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was executed may be pertinent, and evidence thereof admissible.[84] A note which the payee had drawn in proposed renewal of the note in suit is admissible, on behalf of defendant, to show that the words complained of as alterations in the note in suit were in the proposed renewal note, where the payee testified that he drew the note in suit in his usual manner of drawing such instruments.[85]

[§ 205] **b. Collateral Writings.** Other documents than those alleged to have been altered, but which are connected with some part of the same general transaction, are admissible in evidence to throw light upon the issue of an alteration in the instrument involved,[86] unless the other document is with a different party than the one in suit.[87]

[§ 206] **c. Duplicate.** A duplicate of an instrument in suit is admissible on the issue of alterations in the instrument involved;[88] and where plaintiff's duplicate has been altered without fraudulent intent proof of the contents of defendant's unaltered duplicate may be admitted as a basis for a recovery.[89]

[§ 207] **5. Declarations and Conduct of Parties.** Upon the issue of an alteration, declarations, conversations, and conduct of the parties bearing upon the subject are admissible in evidence.[90] But on

84. Haynes v. Christian, 30 Mo. A. 198 (holding that as a general corroborating circumstance on the question of fraudulent alteration evidence may be admitted of the alteration of other notes drawn and indorsed by the same parties, to take up one for which the note in suit was given); Plattsburgh First Nat. Bank v. Heaton, 6 Thomps. & C. (N. Y.) 37 (holding that in an action on a renewal note, where defendant claimed that the date had been altered, evidence that the date of the original note was such that the date of its maturity would correspond with the date of the note in suit is admissible, and in such a case a question to a witness as to whether he had ever seen, prior to a date after that of the note, any note of the maker in blank did not so plainly refer to notes other than that in suit as to require it to be excluded on a general objection).

[a] **Alteration of renewal note.**—Where such an alteration appears upon the face of a note as to render it suspicious, it may be shown as a circumstance corroborating its appearance that the note for which the one in suit was given in renewal had also been altered. Rankin v. Blackwell, 2 Johns. Cas. (N. Y.) 198.

85. Hellriegel v. Corson, 24 App. Div. 452, 48 NYS 419 (holding that, where in an action by an indorsee of a note, on an issue whether the words "with interest," inserted at an improper place by the payee, had been interlined after execution of the instrument, the payee testified that the note was drawn by him in his usual manner of drawing notes, a note which had been drawn by the payee in proposed renewal of the note in suit was admissible in behalf of defendant, where it bore the written words "with interest" in the proper place).

86. Ala.—Carlisle v. People's Bank, 122 Ala. 446, 26 S 115 (holding that, on an issue as to the alteration of a chattel mortgage by inserting other notes than the one which defendant claims the mortgage was executed to secure, a bond for title, executed on the same day with the mortgage, and signed by the parties, which contains recitals in reference to the mortgage securing the notes, is admissible).

Ill.—Wilder v. Aurora, etc., Tract. Co., 216 Ill. 493, 75 NE 194 (holding that alterations in a deed executed to correct certain defects in a former quitclaim deed, which consist of the erasure of certain words in the warranty deed form used in drawing the second deed in order to make it conform to the original quitclaim deed, are sufficiently explained by introducing the deeds in evidence and comparing them); Cook v. Moulton, 59 Ill. A. 428 (holding that it was competent to refer to the conditions of a proposed deed, in explanation of erasures and alterations in a note secured by such deed, to show that such alterations were made before the note was executed).

Iowa.—Hessig-Ellis Drug Co. v. Todd-Baker Drug Co., 143 NW 569 (holding that, where it was claimed that a contract for the sale of proprietary remedies was altered so as to make it expire only upon the expiration of the seller's general advertising contracts in the state and not at the end of one year as claimed by the purchaser, a letter written by the purchaser to the seller stating the purchaser's refusal to carry out the contract if the seller claimed that the time covered by it was indefinite was admissible in evidence).

La.—Perry v. Burton, 31 La. Ann. 731 (holding that a letter written on the same piece of paper with a receipt is admissible to explain alteration in the receipt).

Miss.—Stein v. Brunswick-Balke-Collender Co., 69 Miss. 277, 13 S 731 (holding that, in determining whether notes sued on were altered after their execution, the contract for the purchase of the goods for which the notes were given is competent and relevant evidence).

N. Y.—Fanning v. Vrooman, 12 NYSt 393 [aff 119 N. Y. 658 mem, 23 NE 1150 mem].

Compare Ofenstein v. Bryan, 20 App. (D. C.) 1.

87. Paramore v. Lindsey, 63 Mo. 63, 65 (where the note in suit was alleged by the defense to have been altered by erasing the words "after maturity" in the printed form, thus making the interest run from date, and other notes given to different parties but arising from the same transaction were offered in evidence and excluded, and Wagner, J., said: "Because other notes given to different parties did not bear interest till after they became due, they did not furnish any necessary or sufficient connection to show that the note in question was made with interest payable at the same time. The agreement might have been wholly different between the respective parties as to the payment of interest").

88. Young v. Cohen, 42 S. C. 328, 20 SE 62 (holding that on the question of the propriety of alterations apparent in an instrument in suit a duplicate copy thereof in the hands of the party sought to be charged is relevant, and it is error for the trial court to refuse to admit it in evidence).

[a] **Proved copy.**—Where a plea of non est factum seeks to avoid a written instrument on the ground of alteration, a copy of the paper as proved to have been originally made may go to the jury to enable them to determine whether or not the original had been altered. Connor v. Fleshman, 4 W. Va. 693.

[b] **A certified copy** of a chattel mortgage is competent for the purpose of proving additions made to the original instrument, already in evidence, since its execution. W. W. Kimball Co. v. Piper, 111 Ill. A. 82.

89. Hayes v. Wagner, 220 Ill. 256, 77 NE 211 (holding this to be true in an action of assumpsit for damages for defendant's refusal to permit plaintiff to perform a contract executed in duplicate). See also supra § 86.

90. Iowa.—Browning v. Gosnell, 91 Iowa 448, 59 NW 340 (which involved the alteration of a note, after it was executed by the maker, by procuring additional signers, and a question to the first maker on cross-examination if, after all the names had been signed to the note, he did not promise to pay it was held to be proper, because while as to the additional signers it was immaterial, it was evidence against the first maker, and the objection being a general one the evidence should be admitted).

Mass.—Smith v. Jagoe, 172 Mass. 538, 52 NE 1088.

N. Y.—Booth v. Powers, 56 N. Y. 22 (evidence of willingness on the part of a maker to ratify an alleged alteration and to admit the note to be a valid obligation); Curtice v. West, 50 Hun 47, 2 NYS 507 [aff 121 N. Y. 696, 24 NE 1099] (admissions of conversations between plaintiff and defendant which took place before the execution of the instrument).

Pa.—Winters v. Mowrer, 163 Pa. 239, 29 A 916 (holding that declarations of plaintiff, before the family of defendant, that nothing was due plaintiff, were admissible on the issue of an alleged fraudulent alteration of the amount of a note).

Wis.—North v. Henneberry, 44 Wis. 306 (holding that, on the question whether the grantor assented to an alteration of the deed, evidence is admissible that he testified in a judicial proceeding after full knowledge of the facts that the grantee was the owner of the land).

[a] **Previous financial transactions.**—In a suit by the holder of a materially altered note against the parties thereto, evidence of previous financial transactions between one of the makers, who is claimed to have altered the note, and the other parties to the note is admissible only as the foundation for other evidence tending to show that authority had been given to such maker by the other parties to alter the note, or that, with knowledge of the alteration, they had admitted its genuineness and promised to pay it to the holder. Ofenstein v. Bryan, 20 App. (D. C.) 1.

[b] **Evidence of a previous agreement** by defendant to execute the note in suit in its altered form is irrelevant and immaterial where the issue is not whether he had agreed to execute such note, but whether he had in fact executed a note of the character sued on. Taylor v. Moore, (Tex.) 20 SW 53.

[c] **Attending meeting of parties.**—In an action by the holder of a materially altered note against the parties thereto, the fact that a meeting had been attended by the parties other than the one whom they claimed had altered it, with a view to arranging for the payment of other notes claimed to have been altered by the same party, is not relevant, unless as a necessary introduction to admissions, made by defendants in the course thereof, of authority to make the alteration, or that such alteration had been made with their knowledge and consent. Ofenstein v. Bryan, 20 App. (D. C.) 1.

[d] **Evidence as to conceded alteration irrelevant.**—Where an unauthorized alteration of a written instrument is conceded by both parties, and the questions at issue are examined and decided upon the contract as originally executed between them, evidence of conversations as to who made

the issue of material alterations after execution evidence of conversations between the parties prior to its execution is inadmissible;[91] and on the issue of an alteration set up by defendant statements made by another who signed before defendant, upon delivery of the instrument in defendant's absence, are inadmissible against defendant;[92] and a defendant testifying that when an instrument was executed it did not contain a particular provision cannot, for the purpose of showing how the fact was impressed upon his mind, testify as to a conversation between himself and another defendant in the absence of plaintiff.[93] So assent cannot be shown by the testimony of an attorney, when such testimony relates to communications received by him as attorney;[94] nor is evidence of a conversation with a party's attorney as to when the party first knew of the alteration admissible where there is no issue of ratification or subsequent acquiescence.[95]

Declarations of a party as to his reasons for making the alterations are inadmissible on the issue as to whether the alterations were in fact made.[96]

An admission by a party that he had altered other notes relating to the same transaction is inadmissible in behalf of other defendants, unless made so by other evidence in the case.[97]

[§ 208] **6. Memoranda Made by Party.** Upon the defense of an unauthorized alteration, a memorandum as to dates, amount, and time of payment, made by the payee at the time of the indorsement, is not admissible unless the witness is unable to testify, from a failure to recollect the facts, without referring to the memorandum.[98]

[§ 209] **7. As to Transactions with Decedents.** Under statutory inhibitions against parties to suits testifying as to personal transactions with decedents in their lifetime, on the issue as to an alteration it is not competent for a party to testify as to the condition of an instrument at the time of its execution, when the other party is dead;[99] but on the other hand questions which do not call for answers as to personal transactions with deceased during his life are competent.[1] Where the burden to explain apparent changes on the face of negoti-

the alterations is entirely irrelevant. Jones v. Julian, 12 Ind. 274.

[e] **Letter having no connection with note in suit.**—On the issue whether one of a series of notes had been altered, as claimed by defendant, plaintiff notified defendant to produce all the notes of the series which had been paid; two of such notes were not produced because they were lost, but two others were produced, and one of these contained the clause which defendant insisted had been inserted in the note in suit as an alteration, and the other did not contain such clause, and plaintiff contended that the latter had been altered by erasure and proved that it had been surrendered to defendant by the cashier of a bank in exchange for one of the notes produced which contained the disputed clause. A letter written by plaintiff to the cashier, directing him to see that the clause should be inserted in the note from which he claimed that it had been erased, was held to be inadmissible because the issue was susceptible of direct proof, and the letter was before the writing of the note and had no connection with the note in suit, and made no reference to it. Capen v. Crowell, 63 Me. 455.

[f] **Disputed clause interlined before signing.**—In Jenkinson v. Monroe, 61 Mich. 454, 28 NW 663, a written agreement in duplicate was interlined, before signing, by one of the parties and after execution by the other party, and, upon the disputed point whether the clause so interlined was a part of the written contract as executed by the parties, parol evidence of the subsequent conduct and conversation of the parties is admissible as tending to show a final settlement and interpretation by the parties of an open and disputed question not settled in the written contract as originally executed by one of the parties.

91. Graham v. Middleby, 185 Mass. 349, 70 NE 416.

92. Hollis v. Vandergrift, 5 Houst. (Del.) 521.

[a] **Representations of payee's agent to show innocence.**—But where the payee of a note altered it by inserting interest, acting upon the false representation of his agent, who had procured the note in payment of goods sold by him, upon the question of the right of the principal to recover on the original consideration, evidence of a conversation between one of plaintiffs and their agent who negotiated the settlement, in which conversation plaintiffs were informed that defendant had authorized the alteration, is admissible to show the good faith and innocence on the part of the principal in making the alteration, as such information came to plaintiffs through the proper channel and the evidence was the direct and accurate way of showing it. Krause v. Meyer, 32 Iowa 566.

93. Dickson v. Bamberger, 107 Ala. 293, 18 S 290.

94. Bowers v. Briggs, 20 Ind. 139 (holding that testimony by an attorney that the party offered to confess judgment on the note in suit if witness thought it could be done with safety was inadmissible).

Privileged communications between attorney and client see generally Witnesses [40 Cyc 2361].

95. Bakke v. Melby, 119 Minn. 504, 138 NW 950 (holding that, where the only issue is whether a note was altered before delivery in 1905, evidence of a conversation with defendant's attorney in 1908 in relation to the alteration is inadmissible to show that defendant was mistaken in saying that he first knew of it in 1910, there being no issue of ratification or subsequent acquiescence).

96. Windham v. Howell, 78 S. C. 187, 59 SE 852 (holding that on the question whether alterations in a deed were made after its execution, where a witness testifies that they were made by a particular person, he should not state the reasons given by such person for the act).

97. Ofenstein v. Bryan, 20 App. (D. C.) 1 (holding that, in an action by the holder of a materially altered note, confessions of one of the parties that he had altered other notes relating to the same transaction for which the note in suit was given are inadmissible on behalf of the other defendants, unless made so by other evidence in the case).

98. National Ulster County Bank v. Madden, 114 N. Y. 280, 21 NE 408, 11 AmSR 633.

99. Gist v. Gans, 30 Ark. 285 (holding that, under non est factum by an administrator, setting up an alteration in a note, plaintiff could not testify that the note was executed by the decedent in the shape in which it was produced at the trial, although the court leaned to the opinion that plaintiff might testify that the note had not been altered by him or with his consent after its execution, the latter not relating to a transaction with deceased during his life); Mitchell v. Woodward, 16 Del. 311, 43 A 165 (in an action by administrator, where the question to defendant, whether the paper produced had the same date as when executed, was excluded); Benton County Sav. Bank v. Strand, 106 Iowa 606, 76 NW 1001 (inadmissibility of testimony that certain words were not in the instrument at a certain time); Williams v. Barrett, 52 Iowa 637, 3 NW 690 (even where the witness has no interest in the particular point upon which the testimony is pertinent); Church v. Howard, 17 Hun 5, 8 [rev on grounds 79 N. Y. 415] (which was an action by the administrator of the payee of a note against the maker and surety. The former, making no defense, was allowed to testify for the surety as to a personal transaction between the maker and decedent in his lifetime. It was held that under a former statute such evidence would have been inadmissible, but that it was admissible under the code provision then prevailing which precluded a party from testifying "in his own behalf or interest, or in behalf of the party succeeding to his title or interest," and that testimony by the surety that he never paid or authorized the payment of any interest on the note was inadmissible, if it had been objected to, because it was the denial of the existence of a fact material to the issue, and to which the deceased might have spoken, if living).

[a] **After death of member of partnership.**—Harris v. Jacksonville Bank, 22 Fla. 501, 1 S 140, 1 AmSR 201 (holding that, where the negotiations between an individual and a member of a firm lead to the acceptance of a bill of exchange by the former, drawn by the firm, which the firm afterward negotiated with a bank, in a suit by the acceptor against the bank to compel the surrender of a draft given by the acceptor in exchange for the bill of exchange, upon the ground that the acceptance was materially altered after he had signed and delivered it, the acceptor cannot testify that the words complained of were added after he had accepted, because the member of the partnership with whom the acceptor had the transaction was dead, and, while he had acted on behalf of the partnership, the transaction was between him and the acceptor, in the sense of the statute).

[b] **Matter on face of paper not testimony of deceased.**—Under a statutory provision against such testimony, except as to a transaction as to which the testimony of the deceased person shall be given in evidence, a recital on the face of a check that it was given for certain purposes is not the testimony of the deceased, and a question to the party: "Examine the face of the check . . . and state what, if any, words in writing, are now on the check that were not there when the check was delivered to you and when you indorsed it," should be excluded. In re Brown, 92 Iowa 379, 388, 60 NW 659.

1. Page v. Danaher, 43 Wis. 221 (holding that questions as to when

able paper is upon the holder it is unimportant that both parties to the original transaction are dead, although an explanation is thereby rendered more difficult.[2]

[§ 210] **C. Weight and Sufficiency—1. In General.** The general rules relating to the weight and sufficiency of evidence in civil cases govern the weight and sufficiency of the evidence on questions relative to the time when, by whom, and the circumstances under which, an alteration of a written instrument was made.[3]

Degree of proof. In accordance with such general rules it is not necessary that the evidence on the issue of an alteration be sufficient to satisfy the jury beyond a reasonable doubt,[4] but it is sufficient to satisfy the jury on such an issue by a mere preponderance of the evidence,[5] even though the alteration contitutes a criminal

and with what ink defendant signed the note, and whether he struck out the words complained of as having been stricken out, are held to be competent). See also Gist v. Gans, 30 Ark. 285.

2. Nagle's Est. 134 Pa. 31, 19 A 434, 19 AmSR 669.

3. See generally Evidence [17 Cyc 753].

[a] **Evidence held sufficient.**—(1) To show that the contract was materially altered after it had been signed. Butterworth v. Bredemeyer, 74 Wash. 524, 133 P 1061. (2) To show that a note was altered after its execution and delivery. Exchange Nat. Bank v. Little, (Ark.) 164 SW 731; Hessig-Ellis Drug Co. v. Todd-Baker Drug Co., (Iowa) 143 NW 569; Hecht v. Shenners, 126 Wis. 27, 105 NW 309. (3) To show that the original note and not a copy thereof was changed. Houston v. Davis, 162 Ala. 122, 49 S 869. (4) To show an alteration in a note by the payee after its delivery and without the knowledge or consent of the makers. Mitchell v. Reed, 106 SW 833, 32 KyL 683. (5) To show that a material alteration of a note by the payee was fraudulently made. Columbia Distilling Co. v. Rech, 151 App. Div. 128, 135 NYS 206. (6) To show that a receipt was altered after execution without the knowledge of the person who gave it. In re Cleary, 139 Wis. 500, 121 NW 146. (7) To show that cross marks were placed on a clause of a written instrument after delivery, without consent of the other party thereto, with intention of canceling the same. Bull Remedy Co. v. Clark, 109 Minn. 396, 124 NW 20, 32 LRANS 519, 18 AnnCas 413. (8) To show that a lease was altered after execution and without the knowledge of the lessor. St. Louis Gunning Adv. Co. v. Baptiste, 135 Mo. A. 503, 116 SW 438. (9) To show a fraudulent alteration of the date of expiration of an oil and gas lease subsequent to its execution. Southern v. South Penn Oil Co., (W. Va.) 81 SE 981. (10) To show that a renewal clause was not fraudulently inserted after execution of a lease. Barker v. Stroppel, 124 NYS 865. (11) To show that a mortgage was not altered after execution and delivery. Conkling v. Levie, 66 Nebr. 132, 94 NW 987, 988. (12) To sustain a finding that there was no alteration of a note after delivery to the payee, so as to release the makers or guarantors. Rush City First Nat. Bank v. Rush City Starch Co., 119 Minn. 51, 137 NW 179. (13) To show that a change in an insurance policy was not made with fraudulent intent. Fletcher v. Minneapolis F. & M. Mut. Ins. Co., 80 Minn. 152, 83 NW 29. (14) To show that an erasure in an indorsement on a bond was made to conform the writing to the facts. McCown v. Westbury, 52 S. C. 421, 29 SE 663, 30 SE 142. (15) To sustain a finding that an alteration of the date of a note was made before delivery and with the knowledge and consent of the maker. Bakke v. Melby, 119 Minn. 504, 138 NW 950. (16) To support a finding that an erasure in a deed was made before delivery, so that the wife of a judgment debtor became a grantee instead of the debtor. Tharp v. Jamison, 154 Iowa 77, 134 NW 583, 39 LRANS 100. (17) To require a finding that a deed had been executed and delivered in blank as to the grantee, and that it had not been altered by erasing the name of the original grantee and inserting another. Augustine v. Schmitz, 145 Iowa 591, 124 NW 607. (18) To sustain a finding of the chancellor that a provision as to the maturity of a vendee's notes on default on any of them was not written therein after their execution as not being against the preponderance of the evidence. Cook v. Sachs, (Ark.) 142 SW 498. (19) To sustain a finding that alterations in the description in a sheriff's deed for taxes were made by the grantee after its execution, acknowledgment, and delivery. Kalbach v. Mathis, 104 Mo. A. 300, 78 SW 684. (20) To support a verdict that checks claimed to have been altered were not altered. Jones v. Horatio Bank, (Ark.) 143 SW 1060. (21) In a suit to set aside a deed, to sustain a finding of the trial court that the name of the grantee in the deed when plaintiff signed it was afterward erased and another name inserted. Guilfoyle v. Hanson, 151 Mich. 114, 114 NW 856. (22) To show that an alteration in the deed was made and executed by the grantee therein in fraud of the creditors of the grantor, authorizing the setting aside of the same. Childers v. Pickenpaugh, 219 Mo. 376, 118 SW 453.

[b] **Evidence held insufficient.**—(1) To show a material alteration of a note. Farmers', etc., Bank v. Carlson, 76 Nebr. 822, 107 NW 1009. (2) To establish an alteration by a change in the rate of interest in a note. Matthews v. De Werff, (Ark.) 83 SW 327; Trainer v. Marine Nat. Bank, 110 Me. 112, 85 A 478. (3) To support a finding that a note had been raised by the unauthorized addition of a figure. Rogers v. Costigan, 78 SW 121, 25 KyL 1349. (4) To show that a mortgage note sued on was altered after execution by defendant. Colby v. Foxworthy, 80 Nebr. 239, 114 NW 174 [reh den 80 Nebr. 244, 115 NW 1076]. (5) To show alteration of a mortgage note so as to change a provision for the payment of annual interest to one requiring payment semiannually. Newton Sav. Bank v. Howerton, (Iowa) 145 NW 292. (6) To show that certain deeds were altered after their execution so as to change the name of the grantee. Zimmer v. Farr, 225 Ill. 457, 80 NE 261. (7) To show a fraudulent substitution of the name of decedent's wife for that of decedent as grantee in a deed. James v. Holdam, 142 Ky. 450, 134 SW 435. (8) To show that the erasure from a deed and record was fraudulent, and not pursuant to the contract between the parties. Jones v. Horatio Bank, 102 Ark. 302, 143 SW 1060. (9) In an action against the sureties on a trust agreement, to show that, after it had been signed by the sureties, a provision to the effect that additional security might be required was interlined in the instrument. Pogue v. Ross, 74 SW 1101, 25 KyL 187. (10) In an action to reform a lease, to sustain an allegation that certain words were interpolated in the lease after its execution and delivery to defendants. Griffin v. Societe, etc., 52 Fla. 801, 44 S 342. (11) In a suit for the cancellation of a contract to sell certain land, to warrant a finding that the contract was altered after it had been signed. Burr v. Nivison, 74 N. J. Eq. 320, 69 A 1094. (12) In an action to recover land, based on a claim that the deed executed to defendant's remote grantor was altered after execution, so that it did not expressly convey a life estate as originally executed, to show that the deed as originally executed gave the grantee a life estate. Phillips v. Big Sandy Co., 149 Ky. 555, 149 SW 957. (13) Where a note presented to an administrator nearly twenty years after its date shows that a seal had been affixed and other changes made, and a witness, who could only have been four or five years old at the time he stated that the changes were made, testifies that the changes were made at the instance of the decedent and before the note was barred by the statute, the court commits no error in holding that the changes had not been satisfactorily accounted for. Potter's Est., 16 Pa. Super. 576.

[c] **That the record of a deed in which the name of the county has been altered** does not show that the alteration had been made when the deed was recorded is insufficient to prove that the alteration has not been made, where the recorder made mistakes in recording other parts of the deed, and it is shown that such occurrences were not unusual with him. Coney v. Laird, 153 Mo. 408, 55 SW 96.

[d] **Erasure of name from bond.**—Where, on the day or the day after a collector's bond was presented to the commissioners' court, one of the sureties erased his name from the bond, whereupon the principal was informed that the bond would require additional sureties, and he was directed to inform the other sureties that one of their number had erased his name, and to ascertain if they were satisfied to remain, after which the principal obtained new sureties, the erasure of the withdrawing surety's name was sufficiently explained. U. S. Fidelity, etc., Co. v. Fossati, (Tex. Civ. A.) 81 SW 1038.

4. Wood v. Skelley, 196 Mass. 114, 81 NE 872, 124 AmSR 516 (holding that in an action on a note alleged to have been altered the request for a ruling that the burden was on plaintiff throughout to satisfy the jury beyond a reasonable doubt that he acted in good faith and without notice of any legal infirmity in the instrument was properly denied as requiring too high a degree of proof). Compare Childers v. Pickenpaugh, 219 Mo. 376, 454, 118 SW 453 (which involved the alteration of a deed and where Woodson, J., said: "The alteration of a deed should be considered as a badge of fraud, and before any court would be justified in finding that an officer had erroneously recorded a deed which had been changed after its recordation, and especially after litigation had arisen regarding the very matter which is involved in the alleged error, the evidence should be clear, convincing and overwhelming, leaving no room for a reasonable doubt as to the existence of the error"); In re Hughes, 3 NYS 201, 202 (holding that, where one of the vouchers filed by an executor shows marks of alteration, in the absence of evidence proving beyond a reasonable doubt that it was fraudulently altered, it will not be taken to have been altered after filing. In this case Ransom, Surr., said: "The testimony, or lack of testimony, on this point alone has created a doubt in my mind which, after considerable hesitation, I am of opinion is a reasonable doubt, of the actual fraudulent intent of this man. I give him the benefit of the rule in criminal cases").

5. Ala.—Glover v. Gentry, 104 Ala. 222, 16 S 88.

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act,[6] and this is all that is required of plaintiff under his burden of proving the execution of an instrument when such execution is denied.[7]

Mere suspicion not sufficient. But the testimony should be stronger than to raise a mere suspicion in order to entitle one to discharge himself from liability, especially when the instrument itself is fair on its face.[8] And it is held that, where the evidence is evenly balanced as to when the change was made, the presumption will then be indulged that it was made before the instrument was executed.[9]

Evidence must be clear and convincing. Where a party seeks to avoid an instrument on the ground of an alteration, he must make out his case by clear and convincing testimony,[10] sufficient to convince the mind of a reasonably prudent and cautious person,[11] especially when the change would amount to a crime;[12] although, on the other hand, where plaintiff seeks relief from an alteration and the rule requiring the party producing the instrument to explain apparent changes is not applied, it has been held that suspicious alterations appearing may furnish prima facie evidence on the part of plaintiff.[13]

A clear probability may arise from internal evi-

Colo.—Bunton v. Ditto, 51 Colo. 178, 117 P 156.

Iowa.—Farmers' L. & T. Co. v. Olson, 92 Iowa 770, 61 NW 199; Harding v. Des Moines Nat. Bank, 81 Iowa 499, 46 NW 1071; Colt v. Churchill, 61 Iowa 296, 16 NW 147; Lewis v. Garretson, 56 Iowa 278, 9 NW 214.

N. Y.—Sweeney v. Van Schaick, 144 NYS 319; Barker v. Stroppel, 124 NYS 865 (fair preponderance not shown).

Okl.—Cavitt v. Robertson, 142 P 299.

[a] **To establish an alteration in the date of the probate of a deed** it is necessary for plaintiff to satisfy the jury only by a preponderance of the evidence. Gaskins v. Allen, 137 N. C. 426, 49 SE 919.

[b] **The testimony of two witnesses** is not necessary to establish an alteration in a lease, where the parties thereto have agreed between themselves to note thereon any alteration of its terms. Yeager v. Cassidy, 12 Pa. Super. 232.

6. Colt v. Churchill, 61 Iowa 296, 16 NW 147; Lewis v. Garretson, 56 Iowa 278, 9 NW 214; New York Guaranty, etc., Co. v. Gleason, 78 N. Y. 503, 7 AbbNCas 334.

7. Longwell v. Day, 1 Mich. N. P. 286. See also Farmers' L. & T. Bank v. Siefke, 144 N. Y. 354, 39 NE 358.

8. Oakey v. Hennen, 18 La. 435.

[a] **Thus** (1) where the testimony on behalf of plaintiff simply shows that the whole note was written in the same handwriting and signed in the presence of the party who wrote it, but that the inserted words were not written at the time the balance of the note was written, without any explanation as to why all the words were not written at the same time, or as to when they were written, it is not sufficient to overcome proof of a material alteration. Lamar v. Brown, 56 Ala. 157 (where the witness was one of the payees, and it was said that the plea of defendant was calculated to reflect upon his integrity and would necessarily stimulate the zeal of the witness to furnish every corroborating circumstance in support of his version of the transaction). (2) Testimony of witnesses tending to show an alteration in the name of the grantee in a conveyance of real property will not affect the validity of the deed when no such alteration appears upon its face, and when it is evident that the witnesses are laboring under an obvious and palpable mistake. Tucker v. Ormes, 8 D. C. 652.

[b] **An impossible** date in a bill of sale may raise a presumption of antedating or postdating, but not of alteration after delivery. Davis v. Loftin, 6 Tex. 489.

[c] **Testimony of a party that he has no remembrance** of a certain provision contained in a contract, which he signed after having read it, is insufficient to show that the provision was added after execution. Busby v. Compton, 112 Mo. A. 569, 87 SW 109.

[d] **Proof of a fraudulent alteration** of a contract after delivery cannot be supplied by a presumption based upon an opportunity to alter the contract. Hessig-Ellis Drug Co. v. Todd-Baker Drug Co., (Iowa) 143 NW 569.

9. Cox v. Palmer, 3 Fed. 16, 1 McCrary 431; Brennan v. Sutherland, 37 N. S. 370. In re Hughes, 3 NYS 201, where the witnesses failed to testify positively, so that the question referred to the referee could not be fairly settled either way, it was held that the alteration of a voucher should not be presumed to have been made after it was filed.

[a] **Presumption in favor of mortgage.**—Where the evidence is conflicting and evenly balanced, it is not sufficient to overcome the presumption in favor of a mortgage where the opposite party claims that property was inserted after execution. Des Moines Nat. Bank v. Harding, 86 Iowa 153, 53 NW 99; Harding v. Des Moines Nat. Bank, 81 Iowa 499, 46 NW 1071; Potter v. Kennelly, 81 Iowa 96, 46 NW 856.

[b] **Presumption from lack of opportunity.**—Where the indorsers of certain notes, sued thereon and defending on the ground of alteration, testify that all the handwriting in the notes, including the alleged alterations, is that of the maker, and the court finds from the evidence that he had no opportunity to make any alteration therein after the notes had been indorsed and before they were given to plaintiff for discount, the alterations must be presumed to have been made before the notes were indorsed. Jefferson Bank v. Frankenstein, 110 NYS 1104.

10. U. S.—Rosenberg v. Jett, 72 Fed. 90.

Colo.—Brunton v. Ditto, 51 Colo. 178, 117 P 156.

Ill.—Tanner v. Newton, 254 Ill. 432, 98 NE 929 (holding that, where a grantee has been in possession for twenty-two years, evidence, to establish that an erasure in the deed and its record was fraudulent, and not in pursuance of the contract, must be clear and satisfactory); Blasey v. Delius, 86 Ill. 558.

N. D.—Riley v. Riley, 9 N. D. 580, 84 NW 347 (evidence held insufficient, in a suit to cancel a deed for alteration, to overcome the deed).

Tenn.—Smith v. Parker, (Ch. A.) 49 SW 285 (evidence held insufficient to warrant a finding that the deed had been altered, in an action by the grantor to recover the lands from third persons).

Va.—Dickenson v. Ramsey, 115 Va. 521, 79 SE 1025.

Wis.—Hecht v. Shenners, 126 Wis. 27, 105 NW 309.

[a] **"Only reasonable certainty** of the existence of the fact [of an alleged fraudulent alteration] is required, the same as in case of any other fact in a civil action. Nevertheless the presumption of innocence and fair dealing among men is so persuasive that a situation which violates it calls for evidence of a more clear and satisfactory character than one that does not involve moral turpitude or the commission of a criminal offense." Per Marshall, J., in Maldaner v. Smith, 102 Wis. 30, 34, 78 NW 140. To same effect Boston Block Co. v. Buffington, 39 Minn. 385, 40 NW 361.

[b] **In an action to remove a cloud from title** on the ground that a deed to the property in suit was a forgery, the grantee in a voluntary deed from plaintiff to other land having, after the execution of the deed, inserted therein the description of the land in suit, plaintiff testified positively that the land in suit was not included in the deed when delivered. The original deed was not produced and there was evidence of admissions of guilt by the grantee when charged with the forgery. Plaintiff, after the delivery of the deed, continued to receive the rents from the property, and the grantee, whenever he collected the same, receipted therefor as agent of plaintiff. The evidence was held sufficient to support a decree for plaintiff. Smith v. Smith, 132 Mo. 681, 34 SW 471.

[c] **A charge of alteration in a deed after signature** must be supported by satisfactory evidence to justify a court in holding the deed void for the alteration. Keyser v. Hitz, 13 D. C. 513.

[d] **A decree canceling certain deeds as forgeries** upon the ground that the name of the original grantee was erased and another name substituted after the deeds had been executed cannot be sustained, where the preponderance of the evidence shows that as to two of the deeds there was no erasure whatever, and that as to the other the erasure and substitution were made after the deed had been prepared but before it was executed, and that the change was explained to the grantors. Zimmer v. Farr, 225 Ill. 457, 80 NE 261.

11. Brunton v. Ditto, 51 Colo. 178, 117 P 156 (holding that, in an action against a decedent's estate to recover on a note alleged by the administrator to have been fraudulently altered after execution, the jury could arrive at a verdict for the estate only from a clear, satisfactory preponderance of the evidence sufficient to convince the mind of a reasonably prudent and cautious person of the alteration of the note).

12. Rosenberg v. Jett, 72 Fed. 90 (holding that on an issue of an alteration in a notary's certificate the denial by the parties on the one side, supported by the testimony of the notary, must be overcome by convincing testimony).

13. See supra § 192. In Putnam v. Clark, 33 N. J. Eq. 338, on the trial below, 29 N. J. Eq. 412, it was held that where complainant relied on the fact that it appeared by the record of the assignment that beneath the signature of a subscribing witness, the commissioner before whom the acknowledgment was taken, there was a note that certain words were written over the erasure before execution, and the commissioner testified that he had never so noted a writing over an erasure, but that his unvarying practice was to make such notation above his own signature, but he did not remember witnessing or taking the acknowledgment of this assignment, the production of the assignment might have shown that the note was in the commissioner's handwriting, and that in the absence of the note, there could be no presumption that the al-

dence of the circumstances sufficiently strong to establish or explain an alleged alteration.[14]

[§ 211] **2. By Whom Made.** Where the only evidence as to an alleged alteration is that of the maker that the words were not in the note when he executed it, and the payee testifies that he did not insert the words, there is no evidence of an alteration to charge the payee;[15] and it has been held that, although plaintiff is unable to prove the circumstances of the alteration, yet if he proves that the note has never been, to his knowledge, in the possession of anyone but himself or his agent, and that the alterations therein were not made by or with the knowledge or consent of either of them, it is sufficient to entitle him to recover.[16] So also proof by plaintiff that he received the note on the day of its date in the same condition in which it was when offered in evidence is sufficient to rebut any prima facie presumption which may arise from the appearance of the note.[17] But the uncontradicted evidence of two witnesses that the instrument does not express the agreement of the parties, and that it was altered by plaintiff or his agent, is sufficient to show such alteration.[18]

[§ 212] **3. Authority or Consent.** The evidence of consent to an alteration should be positive and should not be left to mere uncertain inferences.[19] Testimony by a party to an instrument that the change was made in the presence of the other party and with his consent, corroborated by another in whose presence the change was made, is sufficient to show consent where the opposite party admits that he was present, although he denies his consent.[20]

[§ 213] **4. Ratification.** Ratification of an unauthorized alteration may be shown by circumstantial as well as by direct evidence.[21]

[§ 214] **5. Materiality.** It has been held that an allegation that a written instrument has been altered by tearing a condition from it must be proved by showing the substance of the condition.[22] On the other hand, the refusal of a party complaining of an alteration to produce the instrument in his possession, on the trial, has been held to strengthen the presumption of the immateriality of the change;[23] and, although an alteration appears on the face of the instrument, the court will not nonsuit plaintiff where defendant has a duplicate which he refuses to show.[24]

[§ 215] **6. Inspection of Instrument.**[25] The question being referred to the jury, they may decide from all the evidence in the case as well as from an inspection of the instrument itself,[26] the weight of

teration, if any, was made after execution of the assignment.

14. Burton v. Pressly, 15 S. C. Eq. 1.

[a] **Evidence showing alteration.**—On the foreclosure of a mortgage to secure three notes defendant produced a receipt purporting to have been given for the payment of three hundred and seventy dollars, which plaintiff claimed had been altered from seventy dollars to three hundred and seventy dollars. The note upon which the payment was claimed to have been made bore an indorsement, dated as of the same date as the receipt for seventy dollars. It further appeared that the final balance, including interest paid on the note, was what it would have been if the payment had been only seventy dollars at the time the payment in dispute was made, and that the note was not in fact taken up, although if the payment of three hundred and seventy dollars had been made the note would have been paid in full. It was held that this evidence was sufficient to justify a finding that the receipt had been altered. Wilson v. Fulliam, 50 Iowa 123.

15. Ferguson v. White, (Miss.) 18 S 124 (holding that under such evidence if there was such an alteration it was made by a stranger). See also Cairo, etc., R. Co. v. Parratt, 92 Ill. 194.

16. Drum v. Drum, 133 Mass. 566.

17. Stough v. Ogden, 49 Nebr. 291, 68 NW 516; Miller v. Stark, 148 Pa. 164, 23 A 1058. To same effect Fanning v. Vrooman, 12 NYSt 393 [aff 119 N. Y. 658, 23 NE 1150]; Evans v. Williamson, 79 N. C. 86.

[a] **A statutory requirement** that one offering a note which shows upon its face that it has been altered must prove that the alteration was made before the note came into his hands is complied with when the party presenting the instrument shows that there has been no alteration therein since it came to his hands. Mulkey v. Long, 5 Ida. 213, 47 P 949.

18. Price v. Stanbra, 45 Wash. 143, 88 P 115 (holding that, where, in an action for merchandise sold and delivered pursuant to a written order therefor, the buyer and employee testify that the order sued on does not express the agreement of the parties, and that the order has been altered by the seller or his salesman, and the salesman who took the order does not testify, and none of the seller's witnesses are questioned concerning the matter, it is sufficient to show that the order has been altered by the seller, relieving the buyer from liability).

19. Pew v. Laughlin, 3 Fed. 39 (holding that the assent of the captain or owners to the alteration by the charterer's agent in the charter party was not proved by the shipbrokers' testimony that under the circumstances they must have obtained consent, although they had no recollection of doing so). See also Nelson v. Dutton, 51 Mich. 416, 16 NW 791.

[a] **Evidence held sufficient.**—(1) To show that alterations in a note alleged to have been made after the death of the maker were, as a matter of fact, added by the payee, with the consent and by the direction of the maker, before delivery. Dyson v. Jones, 65 S. C. 308, 43 SE 667. (2) To show alteration of a receipt without the knowledge of the party who gave it. In re Cleary, 139 Wis. 500, 121 NW 146. (3) To show that an alteration in an unrecorded deed, by inserting a new name as grantee, was unauthorized and fraudulent, with intent to deprive the widow and heirs of the original grantee of their interests, so that title did not vest in the new grantee. Vanhoose v. Fairchild, 145 Ky. 700, 141 SW 75. (4) To show that an erasure of a clause in a deed was made subsequently to the execution thereof, and without the knowledge or consent of the grantor. Waller v. Ward, 101 SW 341, 31 KyL 40. (5) In an action on a note in which the words "from due" had been interlined above the interest clause, to support a finding in defendants' favor that such words had been written by the payee at plaintiff's request, just before he purchased the notes. Paul v. Leeper, 98 Mo. A. 515, 72 SW 715. (6) In King v. Bush, 36 Ill. 142, it was held that evidence that a note, in which an alteration of the amount had been made, was presented to the maker for payment after its maturity, and that he admitted its correctness, was sufficient to show that the alteration was made before its execution, or, if afterward, with the maker's consent. (7) And in Price v. Cockran, 1 Bibb (Ky.) 570, evidence that the obligee said: "You may do as you please!" was held sufficient to sustain a judgment, based on assent of the obligee, to the tearing off of a memorandum from the foot of a note.

[b] **Evidence held insufficient.**—(1) To show that erasures and interlineations in the copy of a contract relied on by plaintiff were made by defendant or with his knowledge and consent so as to bind him. Shea v. Cutler, 147 Iowa 366, 126 NW 366. (2) To support a finding that the name of a grantee was inserted without authority in a deed regular on its face. Butler v. Peterson, 79 Nebr. 715, 116 NW 515.

20. Holand v. Griffith, 13 Nebr. 472, 14 NW 887.

21. Matson v. Jarvis, (Tex. Civ. A.) 133 SW 941 (evidence, in an action by one of the signers of a written contract binding them to procure a railroad right of way, against the other signers, for contribution for money advanced to buy a part of the right of way, held to sustain a finding that one of the signers, after acquiring knowledge of the erasure of the name of another signer from the instrument, consented to or ratified such alteration).

Ratification generally see supra §§ 145–156.

22. Hall v. Forqueran, 2 Litt. (Ky.) 329.

[a] **Presumption of materiality.**—Where it appears that a writing on a note, varying its terms, has been taken off by the indorsers, it will be presumed to have been a material and valid part of the contract unless the holder clearly shows that it was immaterial. Johnson v. Heagan, 23 Me. 329.

23. Knapp v. Maltby, 13 Wend. (N. Y.) 587.

Presumption from suppression of evidence see generally Evidence [16 Cyc 1059].

24. Curry v. May, 4 Harr. (Del.) 173.

25. **Inspection of instrument by appellate court** see Appeal and Error [2 Cyc 1046].

26. Ill.—Milliken v. Marlin, 66 Ill. 13; De Long v. Soucie, 45 Ill. A. 234.

Me.—Dodge v. Haskell, 69 Me. 429; Belfast Bank v. Harriman, 68 Me. 522.

Mich.—Pearson v. Hardin, 95 Mich. 360, 54 NW 904; Wilson v. Hotchkiss, 81 Mich. 172, 45 NW 838; Jourden v. Boyce, 33 Mich. 302; Comstock v. Smith, 26 Mich. 306.

W. Va.—Connor v. Fleshman, 4 W. Va. 693.

N. S.—Domville v. Davies, 13 N. S. 159.

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the testimony being matter within their province.[27] But as to whether or not they may decide this question from a mere inspection of the instrument the authorities are not in accord. On the one hand, it seems to be considered that a mere inspection may furnish sufficient evidence to the jury,[28] governed to some extent at least by the consideration of the presumption attending an apparent change; while on the other hand other cases, sometimes influenced by considerations of a like nature, take the opposite view.[29] But the testimony of a witness who has the means of knowledge is of greater weight than that of a number of witnesses who speak merely from an inspection of the paper.[30]

[§ 216] **7. Particular Circumstances as Raising Suspicion.**[31] Apparent changes, which inter alia have been deemed sufficient to raise such a suspicion as to require an explanation, exist where the paper has been cut and a mutiliated figure left;[32] where the instrument appears to be contrary to its probable meaning as it stood before the insertion of interlined words;[33] where the erasure or interlineation is obviously beneficial to, as by enlarging the rights of, the party producing and claiming under the instrument;[34] where the ink in which the interlineation or addition is writ-

27. Lowden v. Schoharie County Nat. Bank, 38 Kan. 533, 16 P 748 (holding that where, in an action on a note by an innocent holder, the note offered in evidence was regular on its face, and the maker testified to an alteration, such evidence would not be conclusive as a matter of law, although there was no other evidence than the note itself to impeach or contradict the witness, as his manner and the improbability of his testimony might justify the jury in wholly rejecting his testimony); Martin v. Tuttle, 80 Me. 310, 14 A 207 (where there was an obvious alteration on the face of the note in suit and defendant testified that it had not been made when he signed the note, and the holder testified that it had been made when he received the note, and upon a verdict for plaintiff it was held, over the contention that the verdict was against the weight of the evidence, that, while the verdict was against the weight of defendant's testimony, how much weight such testimony was entitled to was a question for the jury). But see Dorsey v. Conrad, 49 Nebr. 443, 68 NW 645 (where the presumption is indulged that an apparent interlineation or erasure was made before the execution of the instrument, it was held that where the only evidence introduced on the subject outside of the instrument itself was that of a so-called expert who testified that the alteration or erasure was in a different handwriting from that in the deed, and was made in a different ink from that in which the deed was written several years preceding the trial, but after the execution of the instrument, it could not be said on appeal that the trial court was wrong in concluding that the erasure was made before the delivery of the deed).

28. Ala.—Davis v. Carlisle, 6 Ala. 707 (from which it appears that while the court may not assume, in the absence of all other evidence, that interlineations or erasures were not made by a stranger, the jury may determine the issue from the whole case, although there is no other evidence presented than the note itself).

Me.—Dodge v. Haskell, 69 Me. 429 (holding that under the principle that an apparent alteration raises no presumption, but that the whole question is for the jury, with the general burden of explaining his case upon plaintiff, the paper itself, unaided by other evidence, may or may not satisfy the jury); Belfast Nat. Bank v. Harriman, 68 Me. 522; Crabtree v. Clark, 20 Me. 337.

Mass.—Ely v. Ely, 6 Gray 439 (holding, where the court permits the introduction of an instrument in evidence because there is not enough on the face of it to raise a suspicion, and leaves the question of alteration for the jury, but with the burden on the party introducing the instrument to explain its appearance, that to what extent such explanatory evidence must go will depend upon the peculiar circumstances of the case; that the alterations themselves may be of such a character that the party may safely rely upon the paper itself; that the question is to be determined, however, from the evidence, either on the face of the instrument or extraneous; and that there is no presumption to be indulged). See also Davis v. Jenney, 1 Metc. 221.

Mo.—Price v. Edwards, 11 Mo. 524 (holding that whether there is an erasure in a bond is a question to be decided by an inspection of the bond); Noah v. German Ins. Co., 69 Mo. A. 332; Grimes v. Whitesides, 65 Mo. A. 1.

S. C.—Kennedy v. Moore, 17 S. C. 464 (holding that the instrument itself may furnish sufficient evidence on behalf of the party offering it, upon whom rests the burden of explaining apparent interlineations or changes); Wicker v. Pope, 46 S. C. L. 387, 75 AmD 732.

Vt.—Beaman v. Russell, 20 Vt. 205, 49 AmD 775 (where the jury determine after ordinary proof of execution, and the burden seems not necessarily to be upon either party to explain).

Eng.—Taylor v. Mosely, 6 C. & P. 273, 25 ECL 429; Bishop v. Chambre, 3 C. & P. 55, 14 ECL 448.

See Hayden v. Goodnow, 39 Conn. 164; Bailey v. Taylor, 11 Conn. 531, 29 AmD 321.

29. Ga.—Thrasher v. Anderson, 45 Ga. 538, 544 (holding that, as the prima facie presumption concerning an apparent change in the face of an instrument is that it was made before execution, the jury are not at liberty to treat such presumption as of no weight, at their pleasure, but there must be something to rebut the presumption, either upon the face of the paper or allunde to show that the alteration was made subsequently to the execution of the instrument. McCay, J., went on to say that the paper had undoubtedly been altered, and perhaps in important particulars, but added: "Who can say, from the evidence, that it was done after it was signed? . . . Every mark upon it, showing change, may just as well have been made, with the free consent of the maker, at the time of the signature as afterwards"). But see Akridge v. Watertown Steam Engine Co., 77 Ga. 50 (where it was held that the decision of a jury is not conclusive where the instrument itself bears evidence of the fairness of a change complained of, as where the matter is not interlined, but is written in the middle of the instrument with the same ink as the body of the instrument, and with the same penmanship, so far as the record shows, and in addition to which a contemporaneous writing to the same effect, and on the back of the same paper, shows that the matter complained of was not interlined in the paper after it had been executed).

Ill.—Peterson v. Emery, 154 Ill. A. 294, 299 (where Thompson, J., said: "The question whether there had been in fact an alteration is one for the jury to determine from the instrument in connection with the explanatory evidence introduced by the parties, and it was error to submit the question to the jury to determine from a mere inspection of the paper itself"). See also Montag v. Linn, 23 Ill. 551.

Iowa.—Horton v. Horton, 71 Iowa 448, 32 NW 452 (holding that when there is also other evidence bearing upon the question of alteration, the jury should be instructed to determine it from all the evidence in the case, and an instruction to determine from a mere inspection of the instrument whether it has been materially altered is erroneous).

Mich.—Sheldon v. Hawes, 15 Mich. 519 (holding that, where there is no positive testimony that an alleged alteration was not made by defendant, a finding, upon a mere inspection of the instrument and a comparison of documents by the court, that such alteration was made by defendant himself cannot be justified).

N. H.—Cole v. Hills, 44 N. H. 227.

N. Y.—Rankin v. Blackwell, 2 Johns. Cas. 198.

Wis.—Page v. Danaher, 43 Wis. 221.

Eng.—Knight v. Clements, 8 A. & E. 215, 35 ECL 559, 112 Reprint 819; Clifford v. Parker, 2 M. & G. 909, 40 ECL 917, 133 Reprint 1012.

See Dorsey v. Conrad, 49 Nebr. 443, 68 NW 645.

[a] **Where there is no allegation or evidence** upon such a point counsel cannot call upon the jury to inspect the instrument, for the purpose of determining whether or not interlineations exist, after the case has been closed and is being presented to the jury. Shelton v. Reynolds, 111 N. C. 525, 16 SE 272.

[b] **After default judgment** the jury are not required to disregard a note because of an unexplained alteration or erasure. Runnion v. Crane, 4 Blackf. (Ind.) 466.

[c] **Where the cause is submitted to the court without a jury** the instrument itself cannot show that an alteration was made after the instrument had been signed, or that it was made without the consent of the party, and, in the absence of any extraneous evidence, the court cannot declare the note invalid. Harlan v. Berry, 4 Greene (Iowa) 212.

30. Malin v. Malin, 1 Wend. (N. Y.) 625.

31. See also supra §§ 197-199.

32. Bishop v. Chambre, 3 C. & P. 55, 14 ECL 448.

33. Cox v. Palmer, 3 Fed. 16, 1 McCrary 431.

34. Ala.—Hart v. Sharpton, 124 Ala. 638, 27 S 450; Glover v. Gentry, 104 Ala. 222, 16 S 88; Hill v. Nelms, 86 Ala. 442, 5 S 796.

Cal.—Sheils v. West, 17 Cal. 324.

Ga.—Wheat v. Arnold, 36 Ga. 479.

Ill.—McAllister v. Avery, 17 Ill. A. 568.

Me.—Croswell v. Labree, 81 Me. 44, 16 A 331, 10 AmSR 238.

Mass.—Drum v. Drum, 133 Mass. 566.

Mich.—Wilson v. Hotchkiss, 81 Mich. 172, 45 NW 833.

N. Y.—Gowdey v. Robbins, 3 App. Div. 353, 38 NYS 280; Matter of Pinkerton, 49 Misc. 863, 99 NYS 492.

Pa.—Burgwin v. Bishop, 91 Pa. 336; Robinson v. Myers, 67 Pa. 9; Jordan v. Stewart, 23 Pa. 244.

S. D.—Landauer v. Sioux Falls Imp. Co., 10 S. D. 205, 72 NW 467.

Va.—Hodgnett v. Pace, 84 Va. 873, 6 SE 217; Elgin v. Hall, 32 Va. 630.

ten differs from that of the body of the instrument, and such addition is in a different handwriting from that of the body of the instrument,[35] although there are some cases to the contrary;[36] or where the words written on an erasure are cramped to fit the space.[37] Where, however, an interlineation or erasure is in the same handwriting, and written with the same ink, as the balance of the deed, the presumption, in the absence of any other proof, is that it occurred prior to the execution and delivery, or at least no inference arises to require explanation,[38] especially if it makes clear what was the evident intention of the parties;[39] and, where the change is apparently against the interest of the party claiming under the instrument, the law does not so far presume that it was improperly made as to throw upon him the burden of accounting for it.[40]

If the apparent change indicates that its purpose was to accommodate a printed form to the wants of a particular occasion it will not be sufficient to engender that suspicion which requires a preliminary explanation.[41]

[a] **Rules of decision by inspection.**—In Pullen v. Shaw, 14 N. C. 238, 240, Henderson, C. J., said: "Formerly, the Court judged of an erasure by inspection—latterly, the jury do. In judging by inspection, the Court governed itself as juries do now, by probabilities in the absence of positive proof. If the alteration on the erased part was in the handwriting of the obligee or a stranger, and beneficial to the obligee, the Court adjudged it an erasure, that is, an alteration made after the execution, and avoided the deed. If prejudicial to the obligee, the Court adjudged it no erasure, that is, made before execution, and did not avoid the deed. If in the handwriting of the obligor either way, they adjudged it no erasure, that the alteration was made before execution, and did not avoid the deed. Juries are now governed by the same rules."

[b] **Change of date.**—Where the alteration effects a change in the date of the writing beneficial to the claimant, explanatory evidence has been required. Warren v. Layton, 3 Del. 404; Hodnett v. Pace, 84 Va. 873, 6 SE 217.

[c] **An apparent change in the rate of interest** favorable to plaintiff should be explained by him. Sheldon v. Hawes, 15 Mich. 519.

35. U. S.—Rogers v. Page, 140 Fed. 596, 72 CCA 164; Cox v. Palmer, 3 Fed. 16, 1 McCrary 431.

Ala.—Fontaine v. Gunter, 31 Ala. 258. See also Burgess v. Blake, 128 Ala. 105, 28 S 963, 86 AmSR 78.

D. C.—Ofenstein v. Bryan, 20 App. 1; Peugh v. Mitchell, 3 App. 321.

Ind.—McDowell v. North, 24 Ind. A. 435, 55 NE 789.

La.—McMicken v. Beauchamp, 2 La. 290.

Me.—Crabtree v. Clark, 20 Me. 337.

Mass.—Wilde v. Armsby, 6 Cush. 314.

Mo.—Powell v. Banks, 146 Mo. 620, 48 SW 664; Kelly v. Thuey, 143 Mo. 422, 45 SW 300; Stillwell v. Patton, 108 Mo. 352, 18 SW 1075; Paramore v. Lindsey, 63 Mo. 63; German-American Bank v. Manning, 133 Mo. A. 294, 113 SW 251.

Or.—Simpkins v. Windsor, 21 Or. 382, 28 P 72.

Pa.—Robinson v. Myers, 67 Pa. 9; Hill v. Cooley, 46 Pa. 259; Simpson v. Stackhouse, 9 Pa. 186, 49 AmD 554; Mechling v. Hartzell, 4 Pennyp. 500.

Wis.—Bradley v. Dells Lumber Co., 105 Wis. 245, 81 NW 394.

Eng.—Bishop v. Chambre, 3 C. & P. 55, 14 ECL 448.

See Chase v. Palmer, 29 Ill. 306.

[a] **An erasure in a printed form,** evidently made with different ink from that with which the body of the note was filled up, has been held to require explanation. Page v. Danaher, 43 Wis. 221.

36. Wilson v. Harris, 35 Iowa 507 (holding that the fact that the words claimed to have been inserted were written in different ink and handwriting from the balance of the instrument did not afford sufficient prima facie evidence of a fraudulent alteration to require explanation by plaintiff); Ault v. Fleming, 7 Iowa 143 [foll Jones v. Ireland, 4 Iowa 63] (holding that matter written in different ink from the balance of the instrument furnishes no presumption of a wrongful alteration; that the cases lay more emphasis upon the fact of an interlineation, and especially of an erasure, and that it seems to require at least one of these circumstances to call for a rule which would make a presumption of guilt in a criminal case).

[a] **"There is no principle of the common law** which requires a deed to be written throughout with the same colored ink." Per Willard, J., in Smith v. McGowan, 3 Barb. (N. Y.) 404, 406. Compare Jackson v. Osborn, 2 Wend. (N. Y.) 555, 20 AmD 649; Jackson v. Jacoby, 9 Cow. (N. Y.) 125.

[b] **Where the alteration was not in the handwriting** of the party producing the instrument, nor of the only other person likely to have access to it, and the only other evidence from which it might be inferred that the alteration was made by the party producing the instrument was that the paper was in her custody, the presumption is indulged that the alteration was made by a stranger. Croft v. White, 36 Miss. 455. Compare Coulson v. Walton, 9 Pet. (U. S.) 62, 9 L. ed. 51.

[c] **The mere fact that the body of an instrument or indorsement is not in the handwriting of the signature** is no ground for a presumption or rule of law warranting the inference that it had been altered or that it did not appear in the same form when the signature was made. Small v. Sloan, 14 N. Y. Super. 352.

[d] **Where there is no presumption** and the whole question is one of fact for the jury, it cannot be a question of law to decide whether a note is in two inks or one, or in two handwritings or one, or why it was so written. Dodge v. Haskell, 69 Me. 429.

[e] **When the jury may decide from a mere inspection** of the instrument, they may attend to the circumstance that parts of the instrument are not in the handwriting of defendant, while the balance of the instrument is in his handwriting. Taylor v. Mosely, 6 C. & P. 273, 25 ECL 429.

37. Nagle's Est., 134 Pa. 31, 19 A 434, 19 AmSR 669. See also Taylor v. Mosely, 6 C. & P. 273, 25 ECL 429.

38. U. S.—Cox v. Palmer, 3 Fed. 16, 1 McCrary 431.

D. C.—Peugh v. Mitchell, 3 App. 321.

Fla.—Harris v. Jacksonville Bank, 22 Fla. 501, 1 S 140, 1 AmSR 201 (holding that, where the matter complained of is not an erasure or interlineation, but consists of words indicating a place of payment, written with the same ink and in the same handwriting as the body of the instrument, no alteration or suspicion appears on the face of the instrument).

Ga.—Vickery v. Benson, 26 Ga. 582.

Mass.—Ely v. Ely, 6 Gray 439 (holding that such circumstances have been considered as not sufficient to require explanation before admitting the instrument in evidence, although the burden was cast on the party producing it to explain the interlineations).

Mo.—Paul v. Leeper, 98 Mo. A. 515, 72 SW 715.

N. J.—White v. Williams, 3 N. J. Eq. 376.

N. Y.—People v. Minck, 21 N. Y. 539.

Pa.—Zimmerman v. Camp, 155 Pa. 152, 25 A 1086; Robinson v. Myers, 67 Pa. 9.

Wis.—Maldaner v. Smith, 102 Wis. 30, 78 NW 140.

39. Cox v. Palmer, 3 Fed. 16, 1 McCrary 431. See also Boston Block Co. v. Buffington, 39 Minn. 385, 40 NW 366.

[a] **Change in handwriting of grantor.**—If the change appears to be in the handwriting of the grantor the presumption is that it was made before, or concurrently with, the acknowledgment of the instrument, and if there is any evidence tending to repel this presumption the question of fact must be determined by the jury. Webb v. Mullins, 78 Ala. 111; Sharpe v. Orme, 61 Ala. 263 (such change curing defect in description of land).

40. Conn.—Bailey v. Taylor, 11 Conn. 531, 29 AmD 321.

Miss.—Wilson v. Henderson, 17 Miss. 375, 48 AmD 716 (where it is said that, even assuming that the law presumes an alteration appearing on the face of a note to have been made after delivery, such presumption must be very much weakened, if not destroyed, when the alteration operates prejudicially to the holder).

N. H.—Humphreys v. Guillow, 13 N. H. 385, 38 AmD 499.

N. J.—Den v. Farlee, 21 N. J. L. 279.

N. C.—Pullen v. Shaw, 14 N. C. 238 (holding that where a change of date is prejudicial to the holder no explanation is required).

Pa.—Zimmerman v. Camp, 155 Pa. 152, 25 A 1086.

[a] **Presumption from interest.**—Where the instrument sued on appears to have been altered against the interests of the party claiming under it, and it is proved to have been in the possession of those who claim adversely to it, it is fair to presume that the alteration was made by some one having an interest in destroying it. Coulson v. Watson, 9 Pet. 62, 9 L. ed. 51.

41. Ala.—Tyree v. Rives, 57 Ala. 173.

Cal.—Corcoran v. Doll, 32 Cal. 82.

D. C.—Portsmouth Sav. Bank v. Wilson, 5 App. 8.

La.—State v. Boisseau, 1 Rob. 385.

N. H.—Dow v. Jewell, 18 N. H. 340, 45 AmD 371 (holding that the filling of a blank in a deed which appears to have been originally left in the description of land conveyed, and to have been subsequently filled, will be presumed, in the absence of other proof, to have been made before the execution of the deed when otherwise the deed would have been imperfect).

Pa.—Heffelfinger v. Shutz, 16 Serg. & R. 44 (holding that where the insertion of a crowded line, containing an exception of certain land from the conveyance in a deed, is in a different handwriting from the body of the deed, but in the same handwriting as the covenant of warranty, which has been left open until the execution and delivery of the deed, it is prima facie sufficient to repel any presumption of subsequent alteration).

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X. QUESTIONS OF LAW AND FACT

[§ 217] **A. Materiality of Alteration.**[42] As a general rule the question of the materiality of an alteration in a written instrument, which may be determined from an inspection of the instrument, is one of law for the court,[43] and in some jurisdictions this rule is expressly prescribed by statute;[44] and usually it is reversible error to leave this question to the jury, as by instructing them to find whether a particular change is material, or to find against the validity of an instrument, if they find that it has been materially altered.[45] But it has been held that, where the question of materiality or immateriality depends on facts which are not open to the inspection of the court, but must be proved by witnesses like other facts, the question of materiality may properly be left to the jury.[46]

[§ 218] **B. Fact of Alteration—1. In General.** Where an issue is raised by the evidence as to whether or not an instrument has been improperly altered, it is for the jury to decide whether an alteration has in fact been made, and if so when, by whom, and with what intent,[47] and in some jurisdictions this rule is expressly prescribed by

Wis.—Williams v. Starr, 5 Wis. 534.

42. Suspicious appearance requiring explanation as being a question for the court relative to the admissibility of the instrument in evidence see supra § 198.

43. U. S.—Wood v. Steele, 6 Wall. 80, 18 L. ed. 725; Steele v. Spencer, 1 Pet. 552, 7 L. ed. 259.

Ala.—Payne v. Long, 121 Ala. 385, 25 S 780; Montgomery v. Crossthwait, 90 Ala. 553, 8 S 498, 24 AmSR 832, 12 LRA 140; Kennon v. McRea, 7 Port. 175.

Ark.—Overton v. Matthews, 35 Ark. 146, 37 AmR 9.

Hawaii.—Pahukula v. Parke, 6 Hawaii 210.

Ill.—Milliken v. Marlin, 66 Ill. 13; Schubert v. Schubert, 168 Ill. A. 419; Snell v. Davis, 149 Ill. A. 391.

Ind.—Cochran v. Nebeker, 48 Ind. 459. But see State v. Bodly, 7 Blackf. 355 (holding that it is a question for the jury whether the striking out of a name from an instrument was such an alteration as to destroy its identity).

Iowa.—Hessig-Ellis Drug Co. v. Todd-Baker Drug Co., 143 NW 569; Robinson v. Phœnix Ins. Co., 25 Iowa 430; Jones v. Ireland, 4 Iowa 63.

Kan.—Holyfield v. Harrington, 84 Kan. 760, 115 P 546, 39 LRANS 131; Johnson v. Moore, 33 Kan. 90, 5 P 406.

Ky.—Blades v. Robbins, 9 KyL 197 (holding that whether or not the alteration of the note sued on was material was a question of law for the court, and not a question of fact for the jury).

Me.—Belfast Nat. Bank v. Harriman, 68 Me. 522.

Md.—Merchants' Nat. Bank v. Baltimore, etc., Steamboat Co., 102 Md. 573, 63 A 108; Leppert v. Flaggs, 101 Md. 71, 75, 60 A 450 [cit Cyc].

Mass.—Drum v. Drum, 133 Mass. 566.

Miss.—Hill v. Calvin, 5 Miss. 231; Love v. Shoape, 1 Miss. 508. See also Moye v. Herndon, 30 Miss. 110.

Mo.—State v. Dean, 40 Mo. 464; Western Bldg., etc., Assoc. v. Fitzmaurice, 7 Mo. A. 283.

Nebr.—Fisherdick v. Hutton, 44 Nebr. 122, 62 NW 488; Oliver v. Hawley, 5 Nebr. 439; Palmer v. Largent, 5 Nebr. 223, 25 AmR 479.

N. H.—Burnham v. Ayer, 35 N. H. 351; Bowers v. Jewell, 2 N. H. 543; Martendale v. Follet, 1 N. H. 95.

N. J.—Jones v. Crowley, 57 N. J. L. 222, 30 A 871; Putnam v. Clark, 33 N. J. Eq. 338.

N. Y.—Chappell v. Spencer, 23 Barb. 584; Tillou v. Clinton, etc., Mut. Ins. Co., 7 Barb. 564; Woodworth v. Bank of America, 19 Johns. 391, 10 AmD 239.

N. C.—Wicker v. Jones, 159 N. C. 102, 74 SE 801, 40 LRANS 69, AnnCas1914B 1083.

Okl.—Richardson v. Fellner, 9 Okl. 513, 60 P 270.

Pa.—Robinson v. Myers, 67 Pa. 9; Stephens v. Graham, 7 Serg. & R. 508, 10 AmD 485.

S. C.—Jacobs v. Gilreath, 41 S. C. 143, 19 SE 308, 310; Kinard v. Glenn, 29 S. C. 590, 8 SE 203.

Va.—Keen v. Monroe, 75 Va. 424; Newell v. Mayberry, 3 Leigh (30 Va.) 250, 23 AmD 261.

W. Va.—Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 194, 52 SE 515 [cit Cyc] (holding that the materiality of an alteration of a written agreement is a question of law for the court on the admissibility of the altered agreement in evidence).

Eng.—Vance v. Lowther, 1 Ex. D. 176; Tidmarsh v. Grover, 1 M. & S. 735, 105 Reprint 274.

Man.—Re Commercial Bank, 10 Man. 171 (holding that the question of the materiality of the alteration in a bill is a question of law, and must be considered with reference to the contract itself, and not at all with reference to the surrounding circumstances).

[a] **Where there is a plea of non est factum** based upon an alleged alteration of the note sued on after its execution and delivery, the court may regard the face of the note in connection with the allegation of the answer, and determine from the location of the words alleged to have been added whether the alteration complained of was material, where there is no allegation as to the location of the added words. Culver v. Yocum, 9 KyL 148.

44. See statutory provisions.

[a] **In Georgia** (1) Civ. Code (1895) § 3703 expressly declares that the materiality of an alteration in an instrument is a question to be decided by the court. Bedgood-Howell Co. v. Moore, 123 Ga. 336, 51 SE 420; Heard v. Tappan, 116 Ga. 930, 43 SE 735; Winkles v. Guenther, 98 Ga. 472, 25 SE 527; Pritchard v. Smith, 77 Ga. 463; Howard Piano Co. v. Glover, 7 Ga. A. 548, 67 SE 277. But see Reinhardt v. Miller, 22 Ga. 402, 68 AmD 506. (2) Accordingly where on an issue of non est factum, the signer of a writing admits his signature, but insists that a material alteration has been made, the materiality is for the determination of the court in the first instance. Hill v. Cole Bros. Lightning Rod Co., 7 Ga. A. 64, 66 SE 280.

45. Ala.—Payne v. Long, 121 Ala. 385, 25 S 780 (holding that an instruction that the ratification of a material alteration in a note can only be made by such promise or conduct on the part of the maker as will establish that he has waived the alteration, and that if the jury believe that the note has been materially altered since its execution the burden is on plaintiff to establish a ratification of the alteration by defendant, is erroneous).

Ga.—Heard v. Tappan, 116 Ga. 930, 43 SE 375.

Ill.—Donnell Mfg. Co. v. Jones, 49 Ill. A. 327.

Miss.—Hill v. Calvin, 4 How. 231.

Nebr.—Oliver v. Hawley, 5 Nebr. 439; Palmer v. Largent, 5 Nebr. 223, 25 AmR 479.

Pa.—Stephens v. Graham, 7 Serg. & R. 505, 10 AmD 485.

Tex.—Randall v. Smith, 2 Tex. Unrep. Cas. 397.

[a] **When not ground for new trial.**—That the court, in one portion of its charge, leaves the materiality of an alleged alteration to the jury, is not cause for a new trial, where the alteration, if made, was unquestionably material, and the jury found that it was made. Bedgood-Howell Co. v. Moore, 123 Ga. 336, 51 SE 420.

[b] **Instructions.**—Marginal figures placed above and outside the body of a note are not a part of the note itself (see supra § 68), and hence instructions in an action on a note leaving to the jury to determine on inspection of the face thereof whether there has been an alteration in the marginal figures on the same are improper. Merritt v. Boyden, 191 Ill. 136, 60 NE 907, 85 AmSR 246 [aff 93 Ill. A. 613].

46. Jewett v. Cornforth, 3 Me. 107 (holding that where a petition for a road was altered after its signature, and one of the petitioners, being sued for his proportion of the expense incurred, claimed to be absolved from the contract because of the alteration, whether the alteration was material is for the jury to determine); Patridge v. Ballard, 2 Me. 50 (holding that the effect of the alteration of a petition for a road in a part not affecting the general object sought by the petitioners upon the road prayed for is a question of fact, and not of construction, for the jury to determine). In Bailey v. Taylor, 11 Conn. 531, 541, 29 AmD 321 [quot Hayden v. Goodnow, 39 Conn. 164, 169], Williams, C. J., said: "Where there is an erasure or alteration in an instrument under which a party derives his title, and the adverse party claims, that such erasure or alteration was improperly made, the jury are, from all the circumstances before them, to determine, whether the instrument is thereby rendered invalid."

47. U. S.—Wood v. Steele, 6 Wall. 80, 18 L. ed. 725; Steele v. Spencer, 1 Pet. 552, 7 L. ed. 259.

Ala.—Payne v. Long, 121 Ala. 385, 25 S 780; Ward v. Cheney, 117 Ala. 238, 22 S 996; Capehart v. Granite Mills, 97 Ala. 353, 12 S 44; Mackay v. Dodge, 5 Ala. 388.

Ark.—Jones v. Horatio Bank, 102 Ark. 302, 143 SW 1060; Overton v. Matthews, 35 Ark. 146, 37 AmR 9.

Cal.—Sill v. Reese, 47 Cal. 294.

Colo.—Brunton v. Ditto, 51 Colo. 178, 117 P 156; Miller v. Williams, 27 Colo. 34, 59 P 740; Huston v. Plato, 3 Colo. 402; Schmidt v. Stecker, 3 Colo. 273.

Del.—Welch v. Coulborn, 8 Del. 647.

D. C.—National Capital Bank v. Bryan, 20 App. 26.

Hawaii.—Pahukula v. Parke, 6 Hawaii 210.

Ill.—Hayes v. Wagner, 220 Ill. 256, 77 NE 211 [aff 113 Ill. A. 299]; Milliken v. Marlin, 66 Ill. 13; Schwarz v. Herrenkind, 26 Ill. 208; Peterson v. Emery, 154 Ill. A. 294.

Ind.—Stayner v. Joyce, 120 Ind. 99, 22 NE 89; Cochran v. Nebeker, 48 Ind. 459; State v. Bodly, 7 Blackf. 355 (where it is broadly stated that, where the issue raised by the pleadings was whether an instrument had been altered so as to destroy its identity, it should be submitted to the jury); Citizens' Sav. Bank v. Halstead, 42 Ind. A. 79, 84 NE 1098.

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statute;[48] but where the case is tried by the court without a jury, the question is of course one for the court to decide.[49]

Taking case from jury. Ordinarily it is reversible error for the court to take the case from the jury on the issue of alteration, if there is evidence thereon and it is conflicting or uncertain,[50] and while the issues of fact as to the alteration remain undisposed of it is error to render judgment on the pleadings;[51] but where the evidence on such issue is legally insufficient, or is clear and undisputed, the issue should not be submitted to the jury.[52]

Where the change is immaterial the issue of fact should not be submitted to the jury at all.[53]

[§ 219] **2. Time of Alteration.** Where the court allows the introduction in evidence of an instrument shown to contain a material alteration, it is for the jury to decide whether the alteration was made before or after the execution of the instrument, that is, whether or not a technical alteration was made in the instrument.[54]

Iowa.—Benton County Sav. Bank v. Strand, 106 Iowa 606, 76 NW 1001; Hagan v. Merchants', etc., Ins. Co., 81 Iowa 321, 46 NW 1114, 25 AmSR 493; Ault v. Fleming, 7 Iowa 143.

Kan.—Nell v. Case, 25 Kan. 510, 37 AmR 259; Parsons First Nat. Bank v. Franklin, 20 Kan. 264.

Ky.—Elbert v. McClelland, 8 Bush 577.

Me.—Martin v. Tuttle, 80 Me. 310, 14 A 207; Belfast Nat. Bank v. Harriman, 68 Me. 522.

Md.—Schwartz v. Wilmer, 90 Md. 136, 44 A 1059.

Mich.—Fors v. Fors, 159 Mich. 156, 123 NW 579 (evidence held to raise a question of fact as to whether a deed was originally made to defendant and afterward altered); Jourden v. Boyce, 33 Mich. 302.

Minn.—Bull Remedy Co. v. Clark, 109 Minn. 396, 124 NW 20, 32 LRANS 519, 18 AnnCas 413.

Miss.—Hill v. Calvin, 5 Miss. 231; Love v. Shoape, 1 Miss. 508.

Mo.—State v. Chick, 146 Mo. 645, 48 SW 829; Paramore v. Lindsey, 63 Mo. 63; State v. Dean, 40 Mo. 464; McCormick v. Fitzmorris, 39 Mo. 24; Holladay-Klotz Land, etc., Co. v. T. J. Moss Tie Co., 87 Mo. A. 167; Fowles v. Bebee, 59 Mo. A. 401; Western Bldg., etc., Assoc. v. Fitzmaurice, 7 Mo. A. 283.

Nebr.—McClintock v. Table Rock State Bank, 52 Nebr. 130, 71 NW 978; Fisherdick v. Hutton, 44 Nebr. 122, 62 NW 488; Palmer v. Largent, 5 Nebr. 223, 25 AmR 479.

N. H.—Burnham v. Ayer, 35 N. H. 351; Bowers v. Jewell, 2 N. H. 543.

N. J.—Jones v. Crowley, 57 N. J. L. 222, 30 A 871; Richman v. Richman, 10 N. J. L. 114; Den v. Wright, 7 N. J. L. 175, 11 AmD 546; Cumberland Bank v. Hall, 6 N. J. L. 215.

N. Y.— Rogers v. Vosburgh, 87 N. Y. 228; Kelly v. Indemnity F. Ins. Co., 38 N. Y. 322; Conable v. Smith, 61 Hun 185, 15 NYS 924; Metropolitan L. Ins. Co. v. McCoy, 41 Hun 142, 3 NYSt 781; Jackson v. Osborn, 2 Wend. 555, 20 AmD 649.

Oh.—Franklin v. Baker, 48 Oh. St. 296, 27 NE 550, 29 AmSR 547.

Okl.—Cavitt v. Robertson, 142 P 299; Dunlap v. Stannard, 19 Okl. 232, 91 P 845; Richardson v. Fellmer, 9 Okl. 513, 60 P 270.

Pa.—Miller v. Stark, 148 Pa. 164, 23 A 1058; Farmers' Mut. F. Ins. Co. v. Bair, 82 Pa. 33; Robinson v. Myers, 67 Pa. 9; Foster v. McGraw, 64 Pa. 464; Southwark Bank v. Gross, 35 Pa. 80; Stevens v. Martin, 18 Pa. 101; Stephens v. Graham, 7 Serg. & R. 505, 10 AmD 485; Sahm v. Long, 51 Pa. Super. 428; Colonial Trust Co. v. Getz, 28 Pa. Super. 619; Winters v. Mowrer, 1 Pa. Super. 47; Wiseman v. Fleischer, 10 Pa. Co. 300.

S. C.—Kinard v. Glenn, 29 S. C. 590, 8 SE 203; Kennedy v. Moore, 17 S. C. 464; Horry Dist. Comrs. of Poor v. Hanion, 10 S. C. L. 554.

S. D.—Moddie v. Breiland, 9 S. D. 506, 70 NW 637.

Tex.—Rodriguez v. Haynes, 76 Tex. 225, 13 SW 296; Dewees v. Bluntzer, 70 Tex. 406, 7 SW 820; Randall v. Smith, 2 Tex. Unrep. Cas. 397.

Vt.—Beaman v. Russell, 20 Vt. 205, 49 AmD 775; Bliss v. McIntyre, 18 Vt. 466, 46 AmD 165; Davis v. Fuller, 12 Vt. 178, 36 AmD 334.

Va.—Keen v. Monroe, 75 Va. 424; Newell v. Mayberry, 3 Leigh (30 Va.) 250, 23 AmD 261.

Wash.—Wolferman v. Bell, 6 Wash. 84, 32 P 1017, 36 AmSR 126.

W. Va.—Connor v. Fleshman, 4 W. Va. 693.

Eng.—Suffell v. Bank of England, 7 Q. B. D. 270 [aff 9 Q. B. D. 555, 3 ERC 640]; Vance v. Lowther, 1 Ex. D. 176.

N. S.—Domville v. Davies, 13 N. S. 159.

[a] **Conflicting evidence.**—Where nine of the makers of a note allege that it was altered after delivery and without their knowledge by the erasure of the name of a third person who signed as maker, and testify that it was agreed that the third person should sign as maker, and that they each saw him sign, and the note, although not bearing the signature of the third person, shows an indorsement of a credit of a partial payment made by such third person who testifies that he did not sign as maker, it is for the jury to determine whether the note has been altered by the erasure of the name of the third person. Citizens' Sav. Bank v. Halstead, 42 Ind. A. 79, 84 NE 1098.

48. See statutory provisions.

[a] **In Georgia,** under Civ. Code (1895) § 3703, the fact of an alteration is a question for the jury. Bedgood-Howell Co. v. Moore, 123 Ga. 336, 51 SE 420; Heard v. Tappan, 116 Ga. 930, 43 SE 375 (where the evidence was conflicting); Winkles v. Guenther, 98 Ga. 472, 25 SE 527 (where the genuineness of the instrument was denied under oath); Howard Piano Co. v. Glover, 7 Ga. A. 548, 67 SE 277 (holding that, where a prima facie case of explanation is made out, the fact of the alteration is for the jury); Hill v. Cole Bros. Lightning Rod Co., 7 Ga. A. 64, 66 SE 280).

49. Colo.—Huston v. Plato, 3 Colo. 402.

Ill.—Lowman v. Aubery, 72 Ill. 619.

Ind.—Richmond Mfg. Co. v. Davis, 7 Blackf. 412.

Mo.—Olive Street Bank v. Phillips, 179 Mo. A. 488, 162 SW 721 (in an action on a note evidence on the part of plaintiff to overcome defendant's proof as to alteration is held to be substantial and sufficient to make the alleged alteration of the note after delivery a question for the lower court sitting as a jury); German-American Bank v. Manning, 133 Mo. A. 294, 113 SW 251 (holding that, where an interlineation in a description in a tax bill is in different writing from words erased, and the bill is admitted, it is a question for the court, sitting as a jury, as to whether the erasure and interlineation were made before the issuance and delivery of the bill, and whether, in the absence of evidence of the consent of all parties to the change, it invalidated the bill).

Nebr.—Cass County Bank v. Morrison, 17 Nebr. 341, 22 NW 782, 52 AmR 417.

N. J.—White v. Williams, 3 N. J. Eq. 376.

50. Iowa.—Hagan v. Merchants', etc., Ins. Co., 81 Iowa 321, 46 NW 1114, 25 AmSR 493.

Mich.—Brand v. Johnrowe, 60 Mich. 210, 26 NW 883.

N. Y.—Mosher v. Davis, 41 App. Div. 622, 58 NYS 529; Pease v. Barnett, 27 Hun 378.

Pa.—Winters v. Mowrer, 1 Pa. Super. 47.

Tex.—San Antonio Brewing Assoc. v. J. M. Abbott Oil Co., (Civ. A.) 129 SW 373.

[a] **Illustration.**—Where, in an action on a note which, after proof of its execution, the trial court refuses to admit in evidence until certain alterations of it shall be explained, and plaintiff offers evidence tending to show that the note has not been altered since its receipt by him, it is error for the trial court to direct a verdict in favor of two of the parties to the note, although in view of its condition when exhibited at the trial, and the conceded fact that one of the other parties to the note has criminally altered similar notes relating to the same transaction in which the note in suit was given, plaintiff's evidence is very improbable. National Capital Bank v. Bryan, 20 App. (D. C.) 26; Ofenstein v. Bryan, 20 App. (D. C.) 1.

51. Black v. De Camp, 75 Iowa 105, 39 NW 215.

52. Hagan v. Merchants', etc., Ins. Co., 81 Iowa 321, 329, 46 NW 1114, 25 AmSR 493 (where Given, J., said: "If the appearance of the instrument or other testimony tended to support the charge of alteration, it was the duty of the court to submit the issue to the jury; but if the instrument or other proofs did not so tend, then the issue should be withheld, as in any other case where there is no testimony tending to support the allegation"); Bowers v. Rineard, 209 Pa. 545, 58 A 912 (holding that where in an action on a note, it being apparent that its date had been changed, and that it had been so altered as to become payable after the maker's death, instead of one year after date, and the alterations being made while the note was in the possession of plaintiff, but when they were made, or why, or that the maker had any knowledge of them not being shown, it was not error to direct a verdict for defendant); Port Huron Engine, etc., Co. v. Sherman, 14 S. D. 461, 85 NW 1008 (holding that, where an unimpeached witness testified in a frank, clear, and convincing manner in explanation of an alteration, and such testimony was entirely uncontradicted, the jury were not at liberty to disregard such testimony, and consequently it was not error for the court to direct a verdict). But see McDonald v. Nalle, 41 Tex. Civ. A. 499, 91 SW 632 (where plaintiff testified that an alteration in the note on which he sued was made by his bookkeeper, without his authority, and it was held that, in view of the facts that the witness was the holder of the altered note and that the alteration was in his favor and made while the note was in his possession, the court erred in refusing to submit the question to the jury, notwithstanding such evidence was uncontradicted).

53. Hill v. Cole Bros. Lightning Rod Co., 7 Ga. A. 64, 66 SE 280; Horton v. Horton, 71 Iowa 448, 32 NW 452; Palmer v. Largent, 5 Nebr. 223, 25 AmR 479.

54. Ala.—Burnett Cigar Co. v. Art Wall-Paper Co., 164 Ala. 547, 51 S 263 (whether changes in a typewritten contract were made before or after execution); Ward v. Cheney, 117 Ala. 238, 22 S 996; Sharpe v. Orme, 61 Ala. 263.

Colo.—Chapman v. Sargent, 6 Colo. A. 438, 40 P 849.

D. C.—Ofenstein v. Bryan, 20 App. 1.

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[§ 220] **3. By Whom Made.** Where a material alteration appears to have been made in an instrument after its execution, it is for the jury to decide by whom it was made, or, in other words, whether it is technically an alteration or a spoliation.[55]

[§ 221] **4. Consent or Ratification.** It is ordinarily a question for jury to decide whether or not an alteration made after execution was made with or without the consent of the party to the instrument adversely affected,[56] or was subsequently ratified by him,[57] unless the evidence on such question is clear and undisputed.[58]

[§ 222] **5. Intention.** Where the question of intention with which an alteration was made becomes of importance, whether in connection with the right to resort to the original consideration or otherwise, it is for the jury to determine whether or not the alteration was made with a fraudulent intention,[59] as whether the intention was to vary

Ga.—Winkles v. Guenther, 98 Ga. 472, 25 SE 527; Planters', etc., Bank v. Erwin, 31 Ga. 371.

Ill.—Catlin Coal Co. v. Lloyd, 180 Ill. 398, 54 NE 214, 72 AmSR 216; McWilliams v. Lavell, 175 Ill. A. 165 (holding that, where the evidence is conflicting as to whether an interlineation in a lease was made before or after it was signed by the lessee, the question is for the jury); Grand Lodge A. O. U. W. v. Young, 123 Ill. A. 628.

Ind.—Stoner v. Ellis, 6 Ind. 152.

Iowa.—Berryman v. Manker, 56 Iowa 150, 9 NW 103.

Kan.—Neil v. Case, 25 Kan. 510, 37 AmR 259.

La.—Pipes v. Hardesty, 9 La. Ann. 152, 61 AmD 202.

Me.—Crabtree v. Clark, 20 Me. 337.

Mass.—Newman v. Wallace, 121 Mass. 323; Norwood v. Fairservice, Quincy 189.

Mich.—Wilson v. Hotchkiss, 81 Mich. 172, 45 NW 838; Brand v. Johnrowe, 60 Mich. 210, 26 NW 883; Comstock v. Smith, 26 Mich. 306.

Miss.—Wilson v. Henderson, 17 Miss. 375, 48 AmD 716; Commercial, etc., Bank v. Lum, 8 Miss. 414.

Mo.—Holton v. Kemp, 81 Mo. 661.

Nebr.—Stough v. Ogden, 49 Nebr. 291, 68 NW 516; Goodin v. Plugge, 47 Nebr. 284, 66 NW 407; Lamb v. Briggs, 22 Nebr. 138, 34 NW 217; Cass County Bank v. Morrison, 17 Nebr. 341, 22 NW 782, 52 AmR 417.

N. J.—Jones v. Crowley, 57 N. J. L. 222, 30 A 871; Hunt v. Gray, 35 N. J. L. 227, 10 AmR 232.

N. Y.—Mosher v. Davis, 41 App. Div. 622, 58 NYS 529; Pease v. Barnett, 27 Hun 378; Acker v. Ledyard, 8 Barb. 514; Tuthill v. Hussey, 7 NYS 547; Pringle v. Chambers, 1 AbbPr 58; Artisans' Bank v. Backus, 31 HowPr 242 [aff 36 N. Y. 100, 1 Transc. A. 75, 3 AbbPrNS 273].

N. C.—Wicker v. Jones, 159 N. C. 102, 74 SE 801, 40 LRANS 69, AnnCas 1914B 1083.

Oh.—Haynes v. Haynes, 33 Oh. St. 598, 31 AmR 579.

Okl.—Cavitt v. Robertson, 142 P 299.

Pa.—Xander v. Com., 102 Pa. 434; Heffner v. Wenrich, 32 Pa. 423; Clark v. Eckstein, 22 Pa. 507, 62 AmD 307; Heffelfinger v. Shutz, 16 Serg. & R. 44; Bond v. Cole, 49 Pa. Super. 144.

S. C.—Wicker v. Pope, 46 S. C. L. 387, 75 AmD 732; Horry Dist. Comrs. of Poor v. Hanion, 10 S. C. L. 554.

Va.—Consumers' Ice Co. v. Jennings, 100 Va. 719, 42 SE 879.

[a] **Whether an alteration in a written demand** was made before or after service of the demand is a question for the jury. Beach v. Heck, 54 Mo. A. 599.

[b] **Where the alteration may be prejudicial,** whether it was made after the writing was signed should always be submitted to the jury, for, if the jury find that the alteration was made, plaintiff is obliged to establish his contract by extrinsic evidence, and defendant may then show, even by parol, what the contract was before the alteration, or that the alteration was such as to destroy it, or that without the alteration there was no contract. Hill v. Cole Bros. Lightning Rod Co., 7 Ga. A. 64, 68 SE 280.

[c] **Upon an agreed case** which does not state that the alteration was made after the execution of the bond, the court cannot assume that such was the fact in pronouncing the conclusion of law upon the facts. Ramsey v. McCue, 21 Gratt. (62 Va.) 349.

55. Ala.—Ward v. Cheney, 117 Ala. 238, 22 S 996.

Ill.—Catlin Coal Co. v. Lloyd, 180 Ill. 398, 54 NE 214, 72 AmSR 216; Milliken v. Marlin, 66 Ill. 13; De Long v. Soucie, 45 Ill. A. 234.

Md.—Schwartz v. Wilmer, 90 Md. 136, 44 A 1059.

Minn.—Wilson v. Hayes, 40 Minn. 531, 42 NW 467, 12 AmSR 754, 4 LRA 196.

N. Y.—Artisans' Bank v. Backus, 31 HowPr 242.

Pa.—Martin v. Kline, 157 Pa. 473, 27 A 753.

S. C.—White v. Harris, 69 S. C. 65, 48 SE 41, 104 AmSR 791.

Tex.—San Antonio Brewing Assoc. v. J. M. Abbott Oil Co., (Civ. A.) 129 SW 373; McDonald v. Nalle, 41 Tex. Civ. A. 499, 91 SW 632.

Va.—Ramsey v. McCue, 21 Gratt. (62 Va.) 349.

Wis.—North v. Henneberry, 44 Wis. 306.

Eng.—Whitfield v. Collingwood, 1 C. & K. 325, 47 ECL 325.

[a] **Where a stranger** to a note strikes out a clause providing for payment of attorney's fees, and the evidence is conflicting as to whether it is an alteration or a spoliation, the question is for the jury. White v. Harris, 69 S. C. 65, 48 SE 41, 104 AmSR 791.

56. Ala.—White v. Hass, 32 Ala. 430, 70 AmD 548.

Conn.—Bailey v. Taylor, 11 Conn. 531, 29 AmD 321.

D. C.—Ofenstein v. Bryan, 20 App. 1.

Ill.—Benedict v. Miner, 58 Ill. 19; De Long v. Soucie, 45 Ill. A. 234.

Ind.—Cornell v. Nebeker, 48 Ind. 463; Cochran v. Nebeker, 48 Ind. 459; Richmond Mfg. Co. v. Davis, 7 Blackf. 412.

Kan.—Holyfield v. Harrington, 84 Kan. 760, 115 P 546, 39 LRANS 131.

Ky.—Stout v. Cloud, 5 Litt. 205.

Me.—Belfast Nat. Bank v. Harriman, 68 Me. 522; Chadwick v. Eastman, 53 Me. 12.

Miss.—Wilson v. Henderson, 17 Miss. 375, 48 AmD 716.

Mo.—State v. Dean, 40 Mo. 464; Briggs v. Glenn, 7 Mo. 572.

N. Y.—Taddiken v. Cantrell, 69 N. Y. 597, 25 AmR 253; Smith v. Chadsey, 1 Thomps. & C. addenda 7.

Okl.—Barrett v. Effenberg, 29 Okl. 679, 119 P 135.

Pa.—Nesbitt v. Turner, 155 Pa. 429, 26 A 750; Wilson v. Jamieson, 7 Pa. 126; Stahl v. Berger, 10 Serg. & R. 170, 13 AmD 666.

S. C.—Jacobs v. Gilreath, 45 S. C. 46, 22 SE 757.

Va.—Keen v. Monroe, 75 Va. 424.

Wis.—North v. Henneberry, 44 Wis. 306.

Eng.—Whitfield v. Collingwood, 1 C. & K. 325, 47 ECL 325.

[a] **Whether blanks in an instrument were filled by authority** (1) is a question of fact for the jury. State v. Dean, 40 Mo. 464. (2) Thus where a blank was left in a bill for the date, the jury may decide whether it was intended that the holder should fill it, and whether a particular date was to be inserted. Stout v. Cloud, 5 Litt. (Ky.) 205. (3) So, where there is evidence that there was an understanding between the parties to a single bond that a blank left therein for the amount might be filled in with a sum not to exceed a specified figure, the question of whether the blank was filled with the obligor's consent is for the jury. Richmond Mfg. Co. v. Davis, 7 Blackf. (Ind.) 412.

57. Lammers v. White Sewing Mach. Co., 23 Mo. A. 471.

[a] **Whether particular facts constitute ratification** is a question for the court. Dickson v. Bamberger, 107 Ala. 293, 18 S 290.

58. Port Huron Engine, etc., Co. v. Sherman, 14 S. D. 461, 85 NW 1008 (holding that, where plaintiff's clerk testified that she inserted the name of the bank in a note executed by defendant merely as a memorandum as to where the note was to be sent for collection, and that plaintiff had no knowledge of the alteration, her testimony not being impeached or contradicted, and defendant resisting payment on the ground that the note was rendered void by the alteration, the contention that it was erroneous to direct a verdict for plaintiff, because the jury might have found that the alteration was made with plaintiff's consent, could not be sustained, since the clerk had no interest in testifying falsely, and the jury would not have been justified in disregarding her unimpeached testimony).

[a] **But where an alteration in a note is in favor of the holder** thereof, and is made while in his possession, the question whether or not the alteration was made by him is one for the jury, although the holder testifies without contradiction that it was made by his bookkeeper and without his authority. McDonald v. Nalle, 41 Tex. Civ. A. 499, 91 SW 632.

59. Ala.—Ward v. Cheney, 117 Ala. 238, 22 S. 996.

Colo.—Brunton v. Ditto, 51 Colo. 178, 117 P 156; Huston v. Plato, 3 Colo. 402.

Ga.—Winkles v. Guenther, 98 Ga. 472, 25 SE 527; Printup v. Mitchell, 17 Ga. 558, 63 AmD 258.

Ill.—Hayes v. Wagner, 220 Ill. 256, 77 NE 211 [aff 113 Ill. A. 299]; Catlin Coal Co. v. Lloyd, 180 Ill. 398, 54 NE 214, 72 AmSR 216; Wallace v. Wallace, 8 Ill. A. 69.

Ind.—Cochran v. Nebeker, 48 Ind. 459.

Me.—Belfast Nat. Bank v. Harriman, 68 Me. 522.

Minn.—Wilson v. Hayes, 40 Minn. 531, 52 NW 467, 12 AmSR 754, 4 LRA 196.

N. H.—Cole v. Hills, 44 N. H. 227; Bowers v. Jewell, 2 N. H. 543.

N. Y.—Booth v. Powers, 56 N. Y. 22.

Vt.—Beaman v. Russell, 20 Vt. 205, 49 AmD 775.

Eng.—Brutt v. Picard, R. & M. 37, 21 ECL 698.

[a] **Marginal addition.**—Where it is uncertain whether an addition to a note was put in the margin as a private memorandum or was intended as an alteration of the body of the note, the question should be submitted to the jury. Nelson, C. J., in Nazro v. Fuller, 24 Wend. (N. Y.) 374.

[b] **Amount inserted.**—Where a note was corrected by the maker, without the assent of the indorser, by inserting omitted matter in that part indicating the amount of it, the question as to the amount intended to be inserted by the parties is for the jury. Boyd v. Brotherson, 10 Wend. (N. Y.) 93.

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the contract or merely to correct a mistake,[60] unless there is no controversy as to the facts.[61]

XI. APPEAL AND ERROR

[§ 223] A finding or verdict upon an issue of fact, relative to an alteration of a written instrument, is ordinarily conclusive, like any other finding of fact, and will not be disturbed on appeal on the mere weight of the evidence.[62]

ALTER EGO. Literally "A second self."[1]

ALTERIUS CIRCUMVENTIO ALII NON PRAEBET ACTIONEM.[2]

ALTERNATE. As a noun, one authorized to take the place of another in his absence; a substitute.[3] As a verb, to reverse periodically and rapidly in direction of flow.[4]

ALTERNATIVA PETITIO NON EST AUDIENDA.[5]

ALTERNATIVE. A privilege of choosing one of two things or courses; either of two objects offered to one's choice.[6] (Cross references.[7])

ALTERUM NON LAEDERE.[8]

ALTHOUGH. A word implying a doubt; a concession of something not positively determined,[9] and equivalent to the words "even if."[10]

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60. Boyd v. Brotherson, 10 Wend. (N. Y.) 93; Atwood v. Griffin, 2 C. & P. 368, 12 ECL 622; Brutt v. Picard, R. & M. 37, 21 ECL 698.

[a] **Credits on note.**—Where it appears that credits had been entered on certain notes and were afterward erased it is a question for the jury whether such erasures were made because the credits had been entered by mistake, or were made with fraudulent intent. Tubb v. Madding, Minor (Ala.) 129.

61. Pritchard v. Smith, 77 Ga. 463 (holding that there being no controversy as to the alteration of the note in question, and none as to the facts from which a fraudulent intent in making it was sought to be deduced, the intent with which it was made became a question of law to be decided by the court).

62. Ark.—Klein v. German Nat. Bank, 69 Ark. 140, 61 SW 572, 86 AmSR 183; Andrews v. Calloway, 50 Ark. 358, 7 SW 449 (holding that, where a jury and subsequently a chancellor found that an interlineation in a note was not made by the custodian thereof, who was prima facie responsible for such change, the appellate court would not disturb the judgment).

Colo.—Miller v. Williams, 27 Colo. 34, 59 P 740.

Mass.—Whitmore v. Nickerson, 125 Mass. 496, 28 AmR 257 (holding that, where the form and appearance of a note are not material except as bearing upon the questions of fact of the negotiation and knowledge of plaintiff, both of these questions are concluded by the decision of the court below in plaintiff's favor).

Mo.—Holton v. Kemp, 81 Mo. 661.

Nebr.—Holland v. Griffith, 13 Nebr. 472, 14 NW 387.

N. Y.—Tuthill v. Hussey, 4 Silv. Sup. 489, 7 NYS 547.

N. C.—Howell v. Cloman, 117 N. C. 77, 23 SE 95; Evans v. Williamson, 79 N. C. 86.

Pa.—Hudson v. Reel, 5 Pa. 279.

N. S.—Brennan v. Sutherland, 37 N. S. 370.

See also generally Appeal and Error [3 Cyc 345 et seq].

1. Webster New Int. D. note. See generally Agency ante § 4; Master and Servant [26 Cyc 1307].

[a] **Applied in:** Cobe v. Lovan, 193 Mo. 235, 251, 92 SW 93, 112 AmSR 480, 4 LRANS 439 (where it was held that an officer of a building loan association was its "alter ego" and that he could not conceal or confuse his position by a mere official designation assumed for the nonce).

2. A maxim meaning "A deception practised upon one person does not give a cause of action to another." Bouvier L. D.

3. Century D. [quot State v. Young, 160 Mo. 320, 323, 60 SW 1086] (where it was said that "the alternates of Newton and Duggan had no authority whatever to act as committeemen while their principals were present and acting for themselves in one or the other of these committees").

4. Webster New Int. D.

[a] **"Alternated current"** is a current which is periodically reversed by a commutator which thus breaks the current between the changes in direction and takes off the current in sections. Westinghouse Electric, etc., Co. v. New England Granite Co., 103 Fed. 951, 952.

[b] **An alternated current which has been so reversed that the whole flow is in one direction** becomes known as a continuous current, and when so reversed by commutators as to become continuous the current loses certain characteristics essential to its highest efficiency. Westinghouse Electric, etc., Co. v. New England Granite Co., 103 Fed. 951, 952.

[c] **"Alternating current"** is a current acting upon an armature, which first tends to actuate it in one direction and then reverses the effect and neutralizes such actuation. Westinghouse Electric, etc., Co. v. New England Granite Co., 103 Fed. 951, 952. See also Dayton Fan, etc., Co. v. Westinghouse Electric, etc., Co., 118 Fed. 562, 55 CCA 390.

[d] **Alternated and alternating currents distinguished.**—"The electric current induced by a mechanical generator—a dynamo—is necessarily alternating in character; that is, alternating in direction, so that the current, acting on an armature, first tends to actuate it in one direction and then reverses said effect, and neutralizes such actuation. Such a current flows uninterruptedly and regularly, but rises in intensity from zero to maximum, and falls from maximum to zero, and then repeats said variations in the opposite direction. Its curve of increase or decrease of strength is indicated by a wave line or sine curve. Every mechanically generated current is naturally and originally an alternating current. Formerly it was not considered practicable to use mechanically generated currents until their alternations were straightened out by means of commutators, which reversed the direction of the current so as to make it flow continuously through the conductors. A current which is periodically reversed by a commutator which thus breaks the current between the changes in direction and takes off the current in sections, is known as a 'reversed' or 'alternated' current. This distinction between the alternating and an alternated current should be carefully noted. An alternating current continues to act in opposite directions as originally generated. An alternated current has been so reversed that the whole flows in one direction, and is then known as a 'continuous' current." Per Townsend, J., in Westinghouse Electric, etc., Co. v. New England Granite Co., 103 Fed. 951.

5. A maxim meaning "An alternative petition is not to be heard." Peloubet Leg. Max.

6. Abbott L. D.

[a] **Alternative contracts** are such as by their terms may be performed by doing either of several acts at the election of the party from whom performance is due." Crane v. Peer, 43 N. J. Eq. 553, 568, 4 A 72 [quot 1 Sutherland Dam. 471]. See Contracts [9 Cyc 213].

7. Alternative:
Averment in:
- Affidavit see Affidavits § 75.
- Application for continuance see Criminal Law [9 Cyc 205].
- Indictment see Indictments and Informations [22 Cyc 296].
- Pleading see Pleading [31 Cyc 74].

Bequest see Wills [40 Cyc 1959].
Condition in:
- Bond see Bonds [5 Cyc 765].
- Judgment see Judgments [23 Cyc 794].

Contract, specific performance of see Specific Performance [36 Cyc 571, 575].
Joinder of parties see Parties [30 Cyc 131].
Judgment:
- Generally see Judgments [23 Cyc 794].
- In replevin see Replevin [34 Cyc 1548].

Provisions as to service of process see Process [32 Cyc 566].
Punishment see Criminal Law [12 Cyc 960].
Relief in proceeding for:
- Cancellation of instrument see Cancellation of Instruments [6 Cyc 339].
- Injunction see Injunctions [22 Cyc 967].
- Reformation of instrument see Reformation of Instruments [34 Cyc 994].
- Specific performance see Specific Performance [36 Cyc 747, 752].

Sentence see Criminal Law [12 Cyc 776, 782].
Writ of:
- Mandamus see Mandamus [25 Cyc 470].
- Prohibition see Prohibition [32 Cyc 628].

8. A maxim meaning "Not to injure another." Rapalje & L. L. D.

[a] **One of three fundamental maxims.**—This maxim, and two others, Honeste vivere, and Suum cuique tribuere, are considered by Justinian as fundamental principles upon which all rules of law are based. Rapalje & L. L. D.

[b] **Applied in:** Martin v. The Picayune, 115 La. 979, 986, 40 S 376, 4 LRANS 861.

9. Hogan v. State, 36 Wis. 226, 244 (where the word was given the meaning of the text in the construction of the phrase "although without any premeditated design to effect the death of any particular individual," in the statute defining murder in the second degree).

10. Burnstein v. Cass Ave., etc., R. Co., 56 Mo. A. 45, 51, 54 (where, in an action against a street railway for running over plaintiff, an instruction that if the jury should find that before the accident the driver discovered, or might have discovered by the exercise of reasonable care, the danger of plaintiff, and could have averted the injuries complained of, then the negligence of plaintiff, "even if the jury find he was negligent," would not defeat a recovery, was held no error, and the appellate court said: "We do not

ALTUM MARE. The high sea.[11]

ALUMINA. The oxid of aluminum.[12]

ALUMINOUS CAKE. The crude bauxite simply treated with acid.[13]

ALUVION. In the civil law one of the modes of acquiring real property by accession, in the form of a gradual increase,[14] as opposed to avulsion, which is a sudden and violent process.

ALWAYS. In all cases;[15] in every case;[16] at any time.[17] In its popular signification, usually, commonly, habitually.[18]

ALZAMIENTO. In Spanish law fraudulent acts on the part of a merchant (alzado), including the concealment of his property for the purpose of defeating the just claims of creditors.[19]

A. M.[20] An abbreviation of the words "ante meridian," signifying "forenoon,"[21] as distinguished from "afternoon."[22]

AMALGAMATION.[23]

AMALPHITAN CODE. A collection of sea laws, compiled about the end of the eleventh century by the people of Amalphi, consisting of the law on maritime subjects which were or had been in force in countries bordering on the Mediterranean, and which for a long time was received as authority in those countries.[24]

AMANCEBAMIENTO. In Spanish law concubinage.[25]

see . . . any ground for the contention of appellant, that a controverted fact was therein assumed. We are also satisfied that terms 'even if,' as used in this instruction, signify although, and were not intended to be used in a different sense").

11. Adams Gloss.

[a] **Used in the expression,** "And yet altum mare is out of the jurisdiction of the common law," in Coke Litt. 260a.

12. Century D.

[a] **Under the tariff acts.**—"The fine powder known as 'hydrate of alumina,' and manufactured from the crude mineral known as 'bauxite,' should be classified for tariff purposes" as alumina, and is not entitled to entry on the free list as bauxite. Irwin v. U. S., 67 Fed. 232, 233, 14 CCA 381 [aff 62 Fed. 150].

13. In re Irwin, 62 Fed. 150, 152 (where it is said that such cake contains all the undesirable ingredients of bauxite, namely, iron, silica, and titanic acid).

14. Partidas III, tit XXVIII, ley 26; Escriche Diccionario; Morgan v. Livingston, 6 Mart. (La.) 19, 125. See Alluvion ante.

15. Gyer's Est., 65 Pa. 311, 313.

16. Nicholas v. Kershner, 20 W. Va. 251, 261.

17. Pecks v. Chambers, 8 W. Va. 210, 213.

[a] **Not equivalent to "forever."**—"While the statute declares that the judgment shall be a lien on the real estate of the debtor and that this lien may always be enforced in a court of equity, it was certainly never intended that the lien should exist independent of the judgment, nor that the words 'always' should be taken as equivalent to 'forever.'" Werdenbaugh v. Reid, 20 W. Va. 588, 596.

18. Sheehan v. Philadelphia, etc., R. Co., 3 Pa. Dist. 325, 326, 15 Pa. Co. 209 (which was an action against a railroad for personal injuries sustained at a crossing, Gordon, J., in a dissenting opinion, saying: "The plaintiff worked in a factory on the line of the railroad near the crossing. The use and operation of the crossing gates came under his daily observation. He testified that they were 'always' kept lowered, and were only lifted to allow vehicles to pass. Some criticism is made upon his use of the word 'always,' upon the ground that, as he was not continually present, he could not 'always' see the gates. The word, however, is to be taken in its popular signification, as expressing 'generally,' 'usually,' 'commonly' or 'habitually.' In this sense the plaintiff must be understood as testifying that the customary practice of the railroad, as known to him from daily observation, was to keep the gates continually lowered, and raise them only when a vehicle approached to pass").

[a] **Always upon the lookout.**—A statute provided that every railroad company should keep some person upon the locomotive "always on the lookout ahead." It was held that this was not to be construed as requiring, for the exoneration of the company, that somebody on the locomotive must, throughout the whole trip, have been literally always upon the lookout, but it was sufficient if the precaution was being observed when the accident happened. Louisville, etc., R. Co. v. Stone, 7 Heisk. (Tenn.) 468, 471.

[b] **Always hereafter.**—Stipulation in mortgage that mortgagee shall "always hereafter" act as broker in respect to property mortgaged has no operation after redemption. Bradley v. Carritt, [1903] A. C. 253, 269.

"Always afloat" see Afloat ante p 393.

19. Escriche Diccionario; Commerce Code arts 1010, 1011.

20. **Judicial notice** of meaning see Evidence [16 Cyc 876].

21. Hedderich v. State, 101 Ind. 564, 570, 1 NE 47, 51 AmR 768 (where the court in construing a statute prohibiting the sale of intoxicating liquors on legal holidays between 11 P. M. and 5 A. M. said: "The statute must have a reasonable construction, and a reasonable construction will make the clause, 'between the hours of eleven P. M. and five o'clock A. M.,' mean the period intervening between eleven o'clock night, and five o'clock morning of the succeeding day. . . . Time is not reckoned backward, nor is it divided into separate and fragmentary parts, unless there is something indicating that the ordinary method is not to be pursued. The consecutive hours, reckoning forward in the usual and natural way, are from eleven o'clock post-meridian until five o'clock ante-meridian, and this period necessarily begins in the night and terminates in the morning").

22. Orvik v. Casselman, 15 N. D. 34, 36, 105 NW 1105 (where the court said: "After the general use of solar time became obsolete, the abbreviations 'a. m.' and 'p. m.' in designating time remained in use to distinguish between forenoon and afternoon").

23. **Amalgamation of:** Corporations see Corporations [10 Cyc 288]; Railroads see Railroads [33 Cyc 422].

24. Wharton L. Lex.

25. Escriche Diccionario.

[a] **The married man** who shall keep a mistress "within the conjugal dwelling, or, with scandal, elsewhere" commits this crime. Spain: Pen. Code art 452; Philippine: Pen. Code art 437.

Living together in adultery see Lewdness [25 Cyc 210].

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AMBASSADORS AND CONSULS

By Edward C. Ellsbree*

[Matters not in this Title, treated elsewhere in this Work, see Cross References infra p 1298]

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Of consular courts, as subject of treaties see **Treaties** [38 Cyc 966].

I. DEFINITIONS

[§ 1] **A. Ambassador.** An ambassador is a public minister of the highest rank, sent abroad by a sovereign state or prince, with a legal commission and authority to transact business on behalf of his country with the government to which he is sent.[1]

An ambassador extraordinary is one who is employed on a particular or extraordinary occasion, or whose stay at the court to which he is accredited is indeterminate, as distinguished from an ordinary ambassador whose mission is permanent.[2]

The distinction of ambassadors, ministers plenipotentiary, envoys extraordinary, and resident ministers has reference to diplomatic precedence and etiquette, and not to their essential powers and privileges.[3]

[§ 2] **B. Consul.** A consul is a commercial agent appointed by a government to reside in a foreign country, and permitted by the government of the latter country so to do, to watch over the commercial rights and privileges of the nation deputing him, and to protect the interests of its subjects.[4] The word "consul" has two meanings. In its more limited sense it denotes an officer of a particular grade in the consular service;[5] in its broader generic sense it denotes all consular officers of whatever grade.[6]

A consul is distinguished from a minister or other diplomatic agent or officer by the commercial character of his office.[7]

II. CLASSIFICATION OF CONSULAR OFFICERS

[§ 3] The consular service of the United States consists of consuls general at large, consuls general, vice consuls general, deputy consuls general, consuls, vice consuls, deputy consuls, consular agents, consular clerks, interpreters, marshals, and clerks at consulates.[8]

The principal permanent and full consular officers are consul general, consul, and commercial agent, who are to be distinguished from subordinates and substitutes.[9]

1. Bouvier L. D.
[a] **Other definitions** see Abbott L. D.; 5 Jacob Inst. 153; Century D.
[b] **Before the enactment of 27 U. S. St. at L. 255 c 230,** the United States had no representative of as high diplomatic rank as ambassador, but by that act the president was authorized to designate as ambassadors the representatives of the United States to those countries which were represented in the United States by ambassadors.

2. Bouvier L. D. [cit Vattel L. Nat. bk 4 c 6 § 71].

3. Glenn Int. L. 106; 1 Kent Comm. 39; Wheaton Int. L. (3d Eng. ed) 317; Marten's Précis du Droit des Gen Modernes de l'Europe 201, 207. See also In re Baiz, 135 U. S. 403, 419, 10 SCt 854, 34 L. ed. 222, 7 Op. Atty.-Gen. 186.
[a] **A minister plenipotentiary** is not, according to European authority, of equal rank with an ambassador. Martens Précis du Droit des Gens Modernes de l'Europe 201, 207.
[b] **Ministers.**—Lord Mansfield said: "I should desire to know in what manner this minister was accredited. Certainly, he is not an ambassador: which is the first rank. Envoy, indeed, is a second class: but he is not shewn to be even an envoy. He is called 'minister,' 'tis true: but minister (alone) is an equivocal term." Heathfield v. Chilton, 4 Burr. 2015, 2016, 98 Reprint 50.
[c] **Four classes of diplomatic officers** were established by the great powers at the Congress of Vienna (1815) and the Congress of Aix la Chapelle (1818). (1) Ambassadors, papal legates, or nuncios. (2) Envoys, ministers, and other agents accredited to sovereigns. (3) Ministers resident, accredited to sovereigns. (4) Chargés d'affaires, accredited to the department of foreign relations. 1 Kent Comm. 39; Wheaton Int. L. (3d Eng. ed) 317; Glenn Int. L. 106.

4. Hall Int. L. 330; Abbott L. D.
[a] **Other definitions.**—(1) "A commercial agent appointed by a government to reside in a seaport or other town of a foreign country, and commissioned to watch over the commercial rights and privileges of the nation deputing him." Bouvier L. D. (2) "A commercial agent of a country residing in a foreign seaport, whose duty it is to support commercial intercourse of the State, and especially of the individual citizens." Schunior v. Russell, 83 Tex. 83, 88, 18 SW 484. (3) "An officer of a commercial character, appointed by the different states to watch over the mercantile interests of the appointing state and of its subjects in foreign countries." Black L. D. (2d ed). (4) "A mercantile agent of the sovereignty by which he is appointed to protect the commercial interests of its citizens or subjects in a foreign state." Seidel v. Peschkaw, 27 N. J. L. 427, 429.
[b] **Origin and history.**—(1) Consuls were appointed about the twelfth century in the opulent states of Italy, and since then have been multiplied and extended to every part of the world where navigation and commerce can successfully penetrate. Their origin has been ascribed to the necessity for extraordinary assistance in those branches of commerce formerly carried on with barbarous and uncivilized nations. 1 Kent Comm. 42; 1 Chitty Comm. L. 48, 49. (2) The consular system is said to have been developed chiefly in the Hanseatic League. 1 Lorimer L. Nat. 290.

5. Dainese v. U. S., 15 Ct. Cl. 64, 74.

6. Dainese v. U. S., 15 Ct. Cl. 64, 74. See also Morris v. Linton, 61 Nebr. 537, 539, 85 NW 565.

7. The Anne, 3 Wheat. (U. S.) 435, 445, 4 L. ed. 428 (where it is said: "A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes"); Seidel v. Peschkaw, 27 N. J. L. 427; State v. De la Foret, 11 S. C. L. 217. See infra § 34.

8. 34 U. S. St. at L. 99; U. S. Cons. Reg. (1896) art 1 § 1; Wilson Int. L. § 66. See also Schunior v. Russell, 83 Tex. 83, 88, 18 SW 484.

9. U. S. Rev. St. § 1674; U. S. Cons. Reg. (1896) art 1 § 1; Wilson Int. L. § 66. See also Schunior v. Russell, 83 Tex. 83, 88, 18 SW 484.
[a] **Distinctions.**—(1) It seems that a consul and a commercial agent are invested with the same powers

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The subordinate consular officers are the deputy consular officers who exercise the powers and perform the duties within the limits of their consular or commercial agencies respectively, the former at the same ports and places and the latter at ports or places different from those at which such principals are located respectively.[10]

The substitute and temporary consular officers are the vice consular officers.[11]

III. APPOINTMENT

[§ 4] **A. Authority to Appoint—1. In General.** The president is authorized by the constitution to nominate, and, by and with the advice and consent of the senate, to appoint ambassadors, other public ministers, and consuls.[12] Upon the exercise of this power congress can place no limitation;[13] nor is it necessary, to authorize the appointment of a consul, that there should be statutory provision for establishing the office.[14]

[§ 5] **2. Vice Consuls—a. In General.** During the early periods of the government the office of vice consul was considered as an independent and separate function, requiring confirmation by the senate.[15] Since, however, vice consuls have been classified as subordinate and temporary officers,[16] congress has power under the constitution to vest in the president alone the authority to appoint them,[17] and such power has been exercised.[18]

[§ 6] **b. In Cases of Emergency.** Where an emergency arises necessitating the appointment of some one to perform temporarily the duties of the consulate, the diplomatic representative may make such appointment, with the consent of the foreign government; but, where there are consuls general to whom the nominations of subordinate officers are required to be submitted for approval, the authority to make such appointments is lodged in them.[19]

[§ 7] **3. Consular Clerks.** Consular clerks may, by statute, be appointed by the president.[20]

[§ 8] **B. Who May Be Appointed; Foreigners—1. As Diplomatic Agents.** A citizen of the country of reception is not generally acceptable as the permanent diplomatic representative of a foreign power.[21]

[§ 9] **2. As Consuls.** Consular office may be given to a citizen of the country in which the office is to be exercised.[22]

IV. QUALIFICATION

[§ 10] **A. Bond of Consular Appointee—1. In General.** Every consul general at large, consul general, and consul, before he receives his commission or enters upon the duties of his office, is required to give a bond to the government in a penal sum which is in no case to be less than the compensation allowed such officer.[23] These bonds are to be approved by the secretary of state and take effect from such approval.[24] The surety on the bond may be a corporation.[25]

[§ 11] **2. Liability on Bond.** The sureties on a consul's bond, the condition of which is that he shall faithfully perform his duties and account for and pay over all moneys received by him in his official capacity, are liable for money which the government overpays him for salary and which he fails to return.[26] But such sureties are not liable on account of moneys remitted to him for other

and duties, and that the office of each is substantially the same, the name being determined by the relative importance of the post. Schunior v. Russell, 83 Tex. 83, 18 SW 484. (2) Commercial agents in the consular service of the United States are to be distinguished, however, from certain officers described in international law by the same title, who are not usually regarded by other powers as entitled to the full rank and privileges of a consular officer. U. S. Cons. Reg. (1896) art 1 § 16.

10. U. S. Rev. St. § 1674; U. S. Cons. Reg. (1896) art 1 § 1; Wilson Int. L. § 66. See also Schunior v. Russell, 83 Tex. 83, 88, 18 SW 484.

[a] **A consular agent** is a representative of the consul to whom he is subordinate. Gould v. Staples, 9 Fed. 159.

11. U. S. Rev. St. § 1674; U. S. Cons. Reg. (1896) art 1 § 1; Wilson Int. L. § 66. See also Schunior v. Russell, 83 Tex. 83, 88, 18 SW 484.

[a] **Vice consuls,** when in charge, are acting consuls or commercial agents for the time being, and are principal consular officers. U. S. Rev. St. § 1674; In re Herres, 33 Fed. 165.

12. U. S. Const. art 2 § 2.

[a] **A retiring minister cannot install a consul** in the legation and authorize him to perform diplomatic functions. Otterbourg v. U. S., 5 Ct. Cl. 430.

13. Foote v. U. S., 23 Ct. Cl. 443; Byers v. U. S., 22 Ct. Cl. 59; 7 Op. Atty.-Gen. 186. See also U. S. v. Maurice, 26 F. Cas. No. 15,747, 2 Brock. 96.

14. Mahoney v. U. S., 10 Wall. (U. S.) 62, 19 L. ed. 864 [aff 3 Ct. Cl. 152].

[a] **For what place.**—The president has power to appoint a consul for any place for which a salary for a consul has been appropriated by congress, even though such place has previously been a consular agency merely. Sampson v. U. S., 30 Ct. Cl. 365.

15. U. S. v. Eaton, 169 U. S. 331, 18 SCt 374, 42 L. ed. 767.

[a] **Before the Consular Service Act of 1856** a vice consul could not be appointed legally without the advice and consent of the senate, and one whose appointment was not so made could not be regarded as having been the lawful incumbent, although recognized as such by the department of state. Dainese v. U. S., 15 Ct. Cl. 64.

16. See supra § 3.

17. U. S. v. Eaton, 169 U. S. 331, 343, 18 SCt 374, 42 L. ed. 767 (where White, J., said: "Although article II, section 2, of the Constitution requires consuls to be appointed by the President 'by and with the advice and consent of the Senate,' the word 'consul' therein does not embrace a subordinate and temporary officer like that of vice-consul as defined in the statute. The appointment of such an officer is within the grant of power expressed in the same section, saying 'but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law or in the heads of departments'").

18. U. S. Rev. St. §§ 1695, 1703.

19. U. S. Cons. Reg. (1896) art 7 § 107. In U. S. v. Eaton, 169 U. S. 331, 18 SCt 374, 42 L. ed. 767, it was held that under a similar provision of 1888 a minister resident who was also consul general was authorized, when his health prevented him from discharging the duties of his office, to appoint a vice consul general, his inability to perform such duties not depriving him of the power to make such appointment in his capacity as minister.

20. U. S. Rev. St. § 1704.

21. Matter of Baiz, 135 U. S. 403, 10 SCt 854, 34 L. ed. 222; Wharton Dig. Int. L. § 88a; 2 Phillimore Int. L. 179.

22. Börs v. Preston, 111 U. S. 252, 4 SCt 407, 28 L. ed. 419; Gittings v. Crawford, 10 F. Cas. No. 5,465, Taney 1. See 8 Op. Atty.-Gen. 169; Hall Int. L. 332.

23. U. S. Rev. St. § 1697; Williams v. U. S., 23 Ct. Cl. 46; Dainese v. U. S., 15 Ct. Cl. 64; 19 Op. Atty.-Gen. 219; 18 Op. Atty.-Gen. 157.

[a] **One appointed both minister and consul general.**—In 2 Gould & T. Notes on U. S. Rev. St. 157 § 1723, it is stated that ambassadors must qualify by taking oath and giving bond [cit Williams v. U. S., 23 Ct. Cl. 46]. In this case, however, the claimant was appointed both minister resident and consul general, the statute, U. S. Rev. St. § 1697, as seen above, expressly requiring bond for the latter office, and the decision being, in the main, based on that provision.

[b] **Consular agents** are not required to give bond. Sampson v. U. S., 30 Ct. Cl. 365.

24. 14 Op. Atty.-Gen. 7.

25. 20 Op. Atty.-Gen. 17; 19 Op. Atty.-Gen. 175.

26. U. S. v. Bee, 54 Fed. 112, 4 CCA 219.

[a] **Double payment of salary.**—Where a vice consul in charge of consulate has drawn salary for a period for which the consul whom he replaced has already been paid, the government may, in a suit on his bond, recover the amount so paid him. U. S. v. Mitchell, 26 Fed. 607.

[b] **The neglect of officers of the government to claim or sue for the excess of salary** does not discharge the sureties from liability therefor, even though the neglect has been of sufficiently long duration to be a defense against any but the government. U. S. v. Bee, 54 Fed. 112, 4 CCA 219.

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objects and purposes, not comprehended within his consular duties;[27] nor for money paid for clerk hire, although the statute does not provide therefor;[28] nor for a statutory penalty incurred by their principal.[29]

[§ 12] **B. Oath of Diplomatic Appointee.** The taking of the oath required of a diplomatic appointee by statute is a condition precedent to complete investiture in the office.[30] Such oath must be taken before an officer authorized by the laws of the United States to administer oaths.[31]

V. COMMENCEMENT AND TERMINATION OF MISSION OR OFFICE

[§ 13] **A. Commencement—1. Issuance and Recognition of Letters of Credence.** The mission of an ambassador begins, with reference to the government to which he is accredited, upon the production and recognition of his letters of credence.[32]

Refusal to receive ambassador. As a general rule it is not permissible for a state to refuse to receive an ambassador; but, where there are special reasons, it may always decline to receive an agent who is persona non grata.[33]

[§ 14] **2. Exequatur.** A consul must be recognized by the government to which he is sent, and authorized to exercise his official functions within its territory.[34] This is done through the issue of an exequatur,[35] which is usually in the form of a letter patent, signed by the sovereign and countersigned by the minister of foreign affairs.[36]

[§ 15] **3. Recognition of Diplomatic Tenure.** The reception and recognition, by the government, of a person as a foreign minister is conclusive, and the courts cannot question the legality of his credentials.[37] The best evidence to prove the diplomatic character of a person, accredited as minister to the United States, is a certificate of the secretary of state.[38] Parol evidence is admissible to show the period during which a person was considered a minister by the government to which he is accredited.[39]

[§ 16] **B. Termination.** The mission of a diplomatic officer is terminated by his death; by his recall; by his dismissal by the government to which he is accredited; by his departure on his own account upon a cause of complaint stated; by war; by the interruption of amicable relations between the two governments; by the expiration of his letter of credence, if it is given for a specific time; by the fulfillment of the specific object for which he may have been accredited; by change of form of government through revolution; and, in the case of monarchical countries, by the death of the accrediting sovereign.[40] If a consul is guilty of illegal or improper conduct his exequatur may be revoked, and he may be punished or sent out of the country at the option of the offended government.[41]

VI. COMPENSATION

[§ 17] **A. In General.** The power to provide for the compensation of ambassadors and consuls is, by the constitution of the United States, vested in the legislative branch of the government,[42] and it

27. U. S. v. Bell, 24 F. Cas. No. 14,565, Gilp. 41.

28. U. S. v. Owen, 47 Fed. 797.

[a] **But an agreement by the consul for the services of an interpreter and body servant** at the consulate is the contract of the consul, not of the government. Azogue v. U. S., 26 Ct. Cl. 430.

29. U. S. v. Ballantine, 138 Fed. 312, 70 CCA 602.

30. Williams v. U. S., 23 Ct. Cl. 46.

[a] **Consular agents** are not required to take the oath of office. Sampson v. U. S., 30 Ct. Cl. 365.

31. Otterbourg v. U. S., 5 Ct. Cl. 430.

32. See Wilson Int. L. § 59.

[a] **Letters of credence contain** the general purport of the mission, the name and class of the agent, and request that faith be given to representations made by him in behalf of his government. Hall Int. L. 314; 2 Phillimore Int. L. 256; Glenn Int. L. 108.

[b] **"Full power" to negotiate,** according to modern custom, is embodied in a separate instrument. Wilson Int. L. § 59.

33. 2 Phillimore Int. L. 176; Hall Int. L. 312; Glenn Int. L. 106.

34. Seidel v. Peschkaw, 27 N. J. L. 427.

35. See Scanlan v. Wright, 13 Pick. (Mass.) 523, 25 AmD 344; Leonard v. Premio-Real, 11 Que. L. 128, 129 [quot Fœlix Int. L.]; Manning L. Nat. 113; Bouvier L. D. tit Exequatur.

[a] **This is a confirmation of his commission** which enables him to perform the duties of his office, and guarantees such rights as he possesses in virtue of it. In the United States it is not usual to grant an exequatur to a consular officer of lower grade than vice consul. Hall Int. L. 332; Glenn Int. L. 117; Wharton Dig. Int. L. § 118.

36. Hall Int. L. 332.

37. U. S. v. Benner, 24 F. Cas. No. 14,568, Baldw. 234; U. S. v. Ortega, 27 F. Cas. No. 15,971, 4 Wash. C. C. 531; D'Azambuja v. Pereira, 1 Miles (Pa.) 366.

38. Matter of Baiz, 135 U. S. 403, 431, 10 SCt 854, 34 L. ed. 222 (where the court said: "While we have not cared to dispose of this case upon the mere absence of technical evidence, we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the State Department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof"); U. S. v. Benner, 24 F. Cas. No. 14,568, Baldw. 234; U. S. v. Liddle, 26 F. Cas. No. 15,598, 2 Wash. C. C. 205.

[a] **In England** (1) it has been held that the certificate of a foreign ambassador under the seal of the legation is sufficient evidence of the law of the country by which he is accredited. Goods of Klingemann, 32 L. J. P. & M. 16. (2) It seems that if there is evidence that a certain person is treated at the embassy of a foreign nation in England as a member of the legation, and is employed from time to time by the ambassadors of that nation, it is not for the court to measure the quantum of the services either required from or rendered by him. Parkinson v. Potter, 16 Q. B. D. 152, 2 ERC 696.

39. U. S. v. Liddle, 26 F. Cas. No. 15,598, 2 Wash. C. C. 205.

40. Hall Int. L. 317; Calvo Int. L. § 1363; Glenn Int. L. 109.

[a] **As to the effect of a change of authority in the accrediting government** on the status of its diplomatic agents see Wharton Dig. Int. L. § 87; 7 Op. Atty.-Gen. 582; 2 Op. Atty.-Gen. 290; D'Azambuja v. Pereira, 1 Miles (Pa.) 366.

[b] **Change of possession of country.**—Where the province to which a consul is assigned changes from the possession of a nonchristian power to the possession of a christian power, the statute so assigning him, and fixing his duties and compensation, becomes of no effect. Mahoney v. U. S., 10 Wall. (U. S.) 62, 10 L. ed. 864.

[c] **Overthrow of government by revolution.**—A vice consul of a foreign nation, who possesses an unrevoked exequatur, must still be recognized by the courts as the accredited representative of his country, entitled to all the privileges appertaining to his office, in spite of the fact that the government which sent him has been overthrown, and an apparently successful revolutionary government established in its place. U. S. v. Trumbull, 48 Fed. 94.

41. Hall v. Coppell, 7 Wall. (U. S.) 542, 19 L. ed. 244; 2 Op. Atty.-Gen. 725; Seidel v. Peschkaw, 27 N. J. L. 427.

42. 7 Op. Atty.-Gen. 186; Foote v. U. S., 23 Ct. Cl. 443; Byers v. U. S., 22 Ct. Cl. 59.

[a] **U. S. Rev. St. § 1740** (1) provides that "no ambassador, envoy extraordinary, minister plenipotentiary, minister resident, commissioner, charge d'affaires, secretary of legation, assistant secretary of legation, interpreter to any legation or consulate, or consul-general, consul, or commercial agent, mentioned in Schedules B and C, shall be entitled to compensation for his services, except from the time when he reaches his post and enters upon his official duties to the time when he ceases to hold such office, and for such time as is actually and necessarily occupied in receiving his instructions, not to exceed thirty days, and in making the direct transit between the place of his residence, when appointed, and his post of duty, at the commencement and termination of the period of his official service, for which he shall in all cases be allowed and paid, except as hereinafter mentioned. And no person shall be deemed to hold any such office after his successor is appointed and actually enters upon the duties of his office at his post of duty, nor after his official residence at such post has terminated if not so relieved. But no such al-

may fix or limit the amount, or withhold compensation altogether.[43]

Appointees who are not citizens of the United States are entitled to no compensation.[44]

Medium of payment. The salary must be paid in money of the United States, or its actual market equivalent.[45]

[§ 18] **B. Of Ambassadors.** The salary fixed by law at the time of the representative's appointment is the amount he is entitled to receive, although previous legislation may have provided for a larger salary.[46] But a statute fixing, without limitation as to time, the annual salary of a diplomatic representative should not be deemed abrogated or suspended by subsequent acts appropriating a less amount for such salary for specific years, and containing no words repealing, expressly or by implication, the statute.[47] Neither the president nor the secretary of state can restrict the compensation of a diplomatic officer, by the terms of his appointment, to less than the salary established by law for the office.[48]

[§ 19] **C. Of Consuls.** The compensation of a consul is by salary, paid by the United States, or by fees, according to the rates established by act of congress.[49] Where the statute imposes upon the consul judicial duties, he cannot claim additional compensation therefor,[50] and he cannot receive the pay provided by law for a chargé d'affaires, even though he performs the duties of such office, unless he was expressly authorized by the president to exercise diplomatic functions.[51]

Transfer of consulate; change of salary. The transfer by congress of a consulate from the class in which it had previously stood to a lower class so changes the law in regard to salaries that a consul becomes entitled only to the salary attached to the latter class.[52]

Conditions precedent. An appointee is not entitled to his salary until he has given the bond required by law.[53]

Forfeiture. An absence from his post of more than sixty days during one year works forfeiture of pay for such period.[54]

Claim for salary; jurisdiction. The United States court of claims has jurisdiction of claims for consular salaries.[55]

Limitation. A consul is a person "beyond the seas" within a statutory provision requiring claims against the United States to be presented within six years except in the case of persons beyond the seas.[56]

[§ 20] **D. Of Vice Consuls.** The compensation of a vice consular officer acting during his principal's absence, when alone he can act, is paid out of the compensation of his principal,[57] and continues during the principal's absence, even if that absence exceeds the statutory sixty days.[58] To entitle a vice consul to compensation his appointment must have been legally made, and he must have given the bond required by law;[59] but when this has been done such compensation relates back to

lowance or payment shall be made to any consul-general, consul, or commercial agent, not embraced in Schedules B and C, or to any vice-consul, vice commercial agent, deputy consul, or consular agent, for the time so occupied in receiving instructions, or in such transit as aforesaid; nor shall any such officer as is referred to in this section be allowed compensation for the time so occupied in such transit, at the termination of the period of his official service, if he has resigned or been recalled therefrom for any malfeasance in his office." See U. S. v. Bee, 54 Fed. 112, 113, 4 CCA 219 (holding that a consul is not entitled to salary prior to the time when he enters upon the duties of his office, except for the time occupied in awaiting instructions); 9 Op. Atty.-Gen. 89. (2) The pay allowed for the time occupied in returning home from his post applies only to those cases where the journey is actually performed by the officer. 9 Op. Atty.-Gen. 261.

[b] **Absence from his post of duty.** (1) within U. S. Rev. St. § 1742, providing that "no diplomatic or consular officer shall receive salary for the time during which he may be absent from his post by leave or otherwise, beyond the term of sixty days in any one year," does not mean mere temporary absence from the consular office itself, when at the same time the office is within his district, but means either a willful or inexcusable abstention from the performance of his ordinary duties, or such continued illness, beyond the period of a regular leave of absence, as may wholly disable him from such performance. U. S. v. Day, 27 App. (D. C.) 458. (2) Whether a public officer, such as a consul general, has been absent from his post of duty within the meaning of a statute must, in a great measure, be determined by the character of the office, the nature of the duties, and circumstances and conditions under which they are to be performed. U. S. v. Day, 27 App. (D. C.) 458.

[c] **The incumbent of a consulate created by congress under a treaty** is entitled to his salary, without regard to any diplomatic question as to the construction or validity of the treaty. Dainese v. U. S., 15 Ct. Cl. 64.

43. Foote v. U. S., 23 Ct. Cl. 443; Byers v. U. S., 22 Ct. Cl. 59.

[a] **Salary appropriated for a consul in a nonchristian country ceases** when the country becomes a possession of a christian power, no further appropriation being made for the salary. Mahoney v. U. S., 10 Wall. (U. S.) 62, 19 L. ed. 864 [aff 3 Ct. Cl. 152].

44. U. S. Rev. St. § 1744.

[a] **To whom statute not applicable.**—This statute, however, does not apply to deputy consuls, vice consuls, consular and vice commercial agents. Citizenship of Consuls, 12 Op. Atty.-Gen. 124.

45. Clay v. U. S., 8 Ct. Cl. 209.

[a] **Exchange.**—If the government resorts to the commercial usage of paying a minister abroad by means of bills of exchange drawn on its bankers in London to be negotiated by him at his station, the foreign money in which he is paid should be reckoned at its current commercial value at the time and place of payment, in the coin of the United States. Clay v. U. S., 8 Ct. Cl. 209.

46. Wallace v. U. S., 133 U. S. 180, 10 SCt 251, 33 L. ed. 571; Francis v. U. S., 22 Ct. Cl. 403.

47. U. S. v. Langston, 118 U. S. 389, 6 SCt 1185, 30 L. ed. 164. See also Foote v. U. S., 23 Ct. Cl. 443, 444 (holding that an envoy extraordinary to Corea is entitled to receive the salary which had been previously established by statute for diplomatic officers of that grade, even though, before he was appointed, an appropriation of a smaller amount was made to enable the president "to extend diplomatic relations with the governments of Eastern Asia").

48. Foote v. U. S., 23 Ct. Cl. 443.

49. See U. S. Rev. St. § 1690; Mahoney v. U. S., 10 Wall. (U. S.) 62, 19 L. ed. 864; Seidel v. Peschkaw, 27 N. J. L. 427.

50. Dainese v. U. S., 15 Ct. Cl. 64.

51. Otterbourg v. U. S., 5 Ct. Cl. 430.

[a] **Before the passage of 11 U. S. St. at L. 139,** it was held that a person, acting and treated by his government as its chargé d'affaires in a foreign country, during the absence of the minister, might recover the value of his services, although he received no specific appointment from the government, and the opinion of the secretary of state as to the value of such services is to be received as that of an expert. Savage v. U. S., 1 Ct. Cl. 170.

52. Mathews v. U. S., 123 U. S. 182, 8 SCt 80, 31 L. ed. 127 [aff 22 Ct. Cl. 330]; Byers v. U. S., 22 Ct. Cl. 59; Sawyer v. U. S., 22 Ct. Cl. 326 (holding that where congress, after omitting to make an appropriation for a consular post for a number of years, during which period no consul was appointed, appropriates therefor a smaller salary than the position had previously carried, an appointment made thereafter to such post will be deemed to be at the reduced salary).

53. Williams v. U. S., 23 Ct. Cl. 46; Dainese v. U. S., 15 Ct. Cl. 64. See also supra § 10.

54. Absence of Consular Officers, 12 Op. Atty.-Gen. 410. And see statutory provision supra § 17 note 42 [a].

55. Dainese v. U. S., 15 Ct. Cl. 64.

56. U. S. v. Greathouse, 166 U. S. 601, 17 SCt 701, 41 L. ed. 1130.

57. Boyd v. U. S., 31 Ct. Cl. 158; 12 Op. Atty.-Gen. 410; 7 Op. Atty.-Gen. 714; 2 Op. Atty.-Gen. 521.

[a] **Where a vice consul performs the duties of minister resident and consul general,** which positions are filled by one person, in the absence of the incumbent, he is entitled to be paid at the rate of compensation allowed the two offices, where the salary is not apportioned between them. U. S. v. Eaton, 169 U. S. 331, 18 SCt 374, 42 L. ed. 767.

[b] **The Consular Regulations provide** that if the principal officer shall be absent for sixty days or less the vice consular officer acting in his place is entitled to one half of the compensation of the office unless there is an agreement for a different rate, the principal officer receiving the remainder. Wilbor v. U. S., 38 Ct. Cl. 1.

58. Boyd v. U. S., 31 Ct. Cl. 158.

59. Dainese v. U. S., 15 Ct. Cl. 64.

the time when his duties began.[60]

Waiver, release, estoppel. A vice consul may waive or release his right to the salary provided,[61] or otherwise estop himself to claim the same.[62]

VII. PRIVILEGES AND IMMUNITIES

[§ 21] **A. Of Ambassadors—1. General Rule.** Diplomatic agents are absolutely exempt from allegiance to the state to which they are accredited; they are not subject to its laws, and their persons are inviolable.[63]

Statutory enactments. These immunities have been declared by statute both in England and in the United States.[64] The statutes confer no other privileges than, and are merely declaratory of, those secured by the law of nations, and are not intended to provide a punishment for their infringement.[65]

Duration of privilege. The immunity of an ambassador continues for a reasonable time after his recall, for the purpose of allowing him time to wind up his affairs in the country to which he was accredited.[66] This rule applies even though the ambassador has announced the termination of his

60. U. S. v. Eaton, 169 U. S. 331, 18 SCt 374, 42 L. ed. 767; Boyd v. U. S., 31 Ct. Cl. 158.

61. U. S. v. Day, 27 App. (D. C.) 458 (holding that where a vice consul general waives the right he has, under § 506 of the consular regulations of the state department, to one half of the compensation of the consul general during a sixty-day leave of absence of the latter, he is not entitled, in a subsequent accounting with the United States, to credit for such compensation during that period).

62. U. S. v. Day, 27 App. (D. C.) 458.

[a] **Where a vice consul general made no report to the state department of the absence of his superior,** the consul general, from his post of duty during a certain period, while the latter reported himself present and was paid the full compensation of his office, the vice consul general is thereafter estopped, in an accounting between the United States and himself, to claim the salary of his superior during such period, on the ground that the latter was absent and he performed the duties of the office. U. S. v. Day, 27 App. (D. C.) 458.

[b] **Where the conduct of a vice consul general has been such as to mislead the regular accounting officers** of the state department and to induce them to act under the belief that the consul general was not absent from his post during certain periods, and therefore to settle his accounts, the vice consul general is estopped to claim the salary of the office of the consul general on the ground that the latter was absent from his post of duty during such period. U. S. v. Day, 27 App. (D. C.) 458.

[c] **Where a vice consul fails to present his claim until after the death of his superior,** and the latter received the salary of the office during the time in question, an agreement between the consul and vice consul as to the compensation of the latter will be presumed, and such agreement will operate as effectually as a waiver or release. Wilbor v. U. S., 38 Ct. Cl. 1.

63. Hall Int. L. c 4; 1 Kent Comm. 38 et seq; Holbrook v. Henderson, 6 N. Y. Super. 619; The Charkieh, L. R. 4 A. & E. 59; Magdalena Steam Nav. Co. v. Martin, 2 E. & E. 94, 105 ECL 94, 121 Reprint 36. See also Grotius bk ii c 18; Wicquefort bk i § 27; Vattel L. Nat. bk iv c 7.

[a] **Foundation of privilege.**—(1) The privileges of foreign ministers have their origin and support in the law of nations. They are founded on the right of embassies between nations, and the inviolability of ambassadors is a certain consequence of that right, and is indispensable to its perfect enjoyment. Holbrook v. Henderson, 6 N. Y. Super. 619, 628, where it is said: "Assuming, then, that the privileges of a foreign minister have their origin and support in the law of nations, it becomes necessary to inquire into the reasons on which that law is founded. They are, in substance, as I find them laid down in Vattel, that it is necessary for nations to treat with each other for the good of their affairs—that each has a right of free communication with others for that purpose—that such communication must, of necessity, be carried on by ministers or agents who are the representatives of their sovereign, and that each sovereign state has, therefore, a right to send and receive public ministers; that such being the rights of nations, a sovereign attempting to hinder another from sending or receiving a minister, does him an injury and offends against the law of nations. That, the minister representing the sovereign by whom he is deputed, the respect rendered to the minister is not personal, merely, but is, in truth, the respect due from one sovereign to another; and to withhold it is, therefore, an insult which may justly be resented, and thus the peace of nations may be endangered. It is further laid down that the right of embassies being thus established, the inviolability of ambassadors is a certain consequence of that right, and is indispensable to the perfect enjoyment of it. That such inviolability may be complete, it is necessary that the ambassador should be free from the control or operation of the laws of the country to which he is sent, and from the jurisdiction of its courts, as without such freedom he might not be able to discharge his duty to his own sovereign with firmness and fidelity. It is further laid down that inasmuch as the minister is the representative of the dignity and independence of the sovereign, it is impossible to conceive that such sovereign in sending an ambassador intends to submit or subject him to the authority or jurisdiction of a foreign power." (2) "Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction, suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still, the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of exterritoriality could not be erected and supported against the will of the sovereign of the territory: he is supposed to assent to it. This consent is not expressed. It is true, that in some countries, and in this, among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess. The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations, that, without such exemption, every sovereign would hazard his own dignity, by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform." Per Marshall, C. J., in The Exchange v. McFaddon, 7 Cranch (U. S.) 116, 138, 3 L. ed. 287, 294.

[b] **Ambassador of unrecognized government.**—An ambassador whose government is not recognized by the government to which he is accredited is not extended the privileges of an ambassador. U. S. v. Skinner, 27 F. Cas. No. 16,309, Brunn. Coll. Cas. 446.

[c] **Ambassador passing through intermediate state.**—(1) An ambassador from one sovereign state to another, while traveling through the territories of a state to which he is not accredited, in the execution of the duties of his mission, is privileged from arrest on civil process. Wilson v. Blanco, 56 N. Y. Super. 582, 4 NYS 714; Holbrook v. Henderson, 6 N. Y. Super. 619 (holding that in the United States a foreign ambassador is not required to have a passport nor to have otherwise obtained express permission to secure him safe-conduct, unless in time of war). (2) Sir Robert Phillimore thus sums up the right of an ambassador passing through a third country: "1. That, in time of peace, the ambassador is of right inviolable in his transit through a third country, but cannot claim the privileges of ex-territoriality as a matter of tacit compact, though they would probably be accorded to him by the courts of all nations. . . . 2. That, in time of war, he cannot be secure from imprisonment without a previously obtained permission to pass through the territory; but that his life can in no case be taken, unless, indeed, he actually exercises hostilities in the country through which he passes." 2 Phillimore Int. L. 188.

64. 7 Anne c 12; U. S. Rev. St. §§ 4062–4065.

65. In re Baiz, 135 U. S. 403, 10 SCt 854, 34 L. ed. 222; The Exchange v. McFaddon, 7 Cranch (U. S.) 116, 3 L. ed. 287; Holbrook v. Henderson, 6 N. Y. Super. 619; Novello v. Toogood, 1 B. & C. 554, 8 ECL 234, 107 Reprint 204; Heathfield v. Chilton, 4 Burr. 2015, 98 Reprint 50; Triquet v. Bath, 3 Burr. 1478, 97 Reprint 936, W. Bl. 471, 96 Reprint 273; Magdalena Steam Nav. Co. v. Martin, 2 E. & E. 94, 105 ECL 94, 121 Reprint 36; Hopkins v. De Robeck, 3 T. R. 79, 100 Reprint 465.

66. Dupont v. Pichon, 4 Dall. (Pa.) 321; D'Asambuja v. Pereira, 1 Miles (Pa.) 366; Musurus Bey v. Gadban, [1894] 1 Q. B. 533 [app dism [1894] 2 Q. B. 352] (holding further that such privilege is not lost to the ambassador by the appointment of his successor during that period); Vattel L. Nat. bk iv c 9 § 125. Compare Marshall v. Critico, 9 East 447, 103 Reprint 643 (holding that, where a foreign minister had been dismissed, and a successor had been appointed several months before his arrest, the privilege did not apply, notwithstanding he had not received any official notification of his dismissal).

[a] **Immunity denied.**—On an application, by a person indicted for an

government and has received his passports, and his successor has been recognized.[67]

Waiver and forfeiture of privileges. While a foreign minister cannot, by an act of his own, waive the privileges and immunities which are attached to his office,[68] a prior assault by him deprives him of his privilege, and will excuse a battery committed on him in self-defense, but will not justify an arrest on process.[69] An ambassador does not forfeit his privileges by engaging in trade.[70] But the application of this rule does not prevent the property embarked by him and accruing to him in his capacity of a tradesman from being subject to seizure, at the instance of creditors, where this can be accomplished without personal service on him, without infringing his dignity as an ambassador, and without interference with the proper discharge of his duties.[71]

[§ 22] **2. Civil Process.** Local jurisdiction cannot be exercised in such manner as to interfere in the remotest degree with the ambassador's freedom of diplomatic action, or with the property belonging to him as representative of his sovereign, except that he is subject to such administrative and police regulations as are necessary for the health or the safety of the community.[72]

Limitations. Since an action cannot be brought against an ambassador while in the country to which he is accredited, the statute of limitations will not run in his favor during that time.[73]

[§ 23] **3. Criminal Process.** Diplomatic agents are not subject to the criminal jurisdiction of the state to which they are accredited, nor may they, as a rule, be arrested;[74] and they are exempt, in the United States, from the criminal jurisdiction of the state courts as well as of the federal courts.[75] If the crime affects individuals only, the recall of the ambassador may be demanded, and he may be expelled if his recall is refused.[76] If the crime affects the public safety of the country, its government may, for urgent cause, either seize and hold his person until the danger is passed, or expel him from the country by force.[77]

[§ 24] **4. Exemption from Taxation.** The person and personalty of an ambassador, and the property belonging to him as a representative of his sovereign, are not subject to taxation; otherwise no exemption from taxes or duties is accorded him as a matter of right; by courtesy, however, the free entry of goods intended for his private use is generally allowed.[78] A different rule obtains where the ambassador has acquired a domicile[79] in the country.[80]

[§ 25] **5. Persons and Property Protected—a. Family and Official Household—(1) In General.** The privileges and immunities of an ambassador extend to his family,[81] and to the members of his

offense committed while president of a national bank, for certiorari to bring up the indictment on the ground that when the alleged offense was committed he was a political agent of a foreign government, the application was refused when it appeared that his own government had requested his resignation prior to the finding of the indictment, although it was not actually given until subsequent thereto, and that the political department of the government of the United States had refused to him the privilege of free entry of goods usually accorded to a diplomatic representative. Ex p. Hitz, 111 U. S. 766, 4 SCt 698, 28 L. ed. 592.

67. D'Azambuja v. Pereira, 1 Miles (Pa.) 366 (holding that a suit, by a newly appointed chargé d'affaires, to recover the archives and documents from his predecessor, commenced by service on defendant while he was returning to his native country, did not ipso facto deprive defendant of the privileges attached to him as a returning diplomatic agent, and that it was not evidence that his sovereign had deprived him of his privileges).

68. U. S. v. Benner, 24 F. Cas. No. 14,568, Baldw. 234; Valarino v. Thompson, 7 N. Y. 576; Barbuit's Case, Cas. t. Talb. 281, 25 Reprint 777.

[a] **Effect of voluntary appearance.**—When a minister enters an appearance in an action against him and allows the action to proceed until issue joined, and gets a rule for a special jury, he will be deemed to have attorned to the jurisdiction of the court by his voluntary appearance; and a stay of proceedings, on the ground of his exemption, will not be granted where neither his person nor his goods have been interfered with. Taylor v. Best, 14 C. B. 487, 78 ECL 487, 139 Reprint 201.

[b] **The privilege of the servants** is the privilege of the ambassador, and not of the servants, and may therefore be waived by the ambassador. Taylor v. Best, 14 C. B. 487, 78 ECL 487, 139 Reprint 201; Fisher v. Begrez, 1 Cromp. & M. 117, 2 Cromp. & M. 240. See also infra § 26.

69. U. S. v. Benner, 24 F. Cas. No. 14,568, Baldw. 234; U. S. v. Liddle, 26 F. Cas. No. 15,598, 2 Wash. C. C. 205; U. S. v. Ortega, 27 F. Cas. No. 15,971, 4 Wash. C. C. 531.

70. Taylor v. Best, 14 C. B. 487, 78 ECL 487, 139 Reprint 201; Magdalena Steam Nav. Co. v. Martin, 2 E. & E. 94, 105 ECL 94, 121 Reprint 36.

Rule as to consuls see infra § 30.

71. 2 Phillimore Int. L. 222 [cit The Charkieh, L. R. 4 A. & E. 59; Taylor v. Best, 14 C. B. 487, 78 ECL 487, 139 Reprint 201; The Swift, 1 Dods. 320]; Hall Int. L. 180. Vattel, with whom Wheaton [Int. L. (3d Eng. ed) 317] seems to agree, admits that property employed in commerce by an ambassador is subject to the local jurisdiction, but to the extent only, it would appear, of the merchandise, cash, debts due to him, and other assets, if any, representing the capital which he actually uses in the business. Vattel L. Nat. bk iv c 8 § 114.

72. Glenn Int. L. 70; Hall Int. L. 180; The Schooner Exchange v. McFaddon, 7 Cranch (U. S.) 116, 3 L. ed. 287; State v. De la Foret, 11 S. C. L. 217; The Charkieh, L. R. 4 A. & E. 59; Gladstone v. Musurus Bey, 1 Hem. & M. 495, 71 Reprint 216.

[a] **Exemption from suit.**—(1) A public minister of a foreign state, accredited to and received by the sovereign of England, having no real property in England, and having done nothing to disentitle him to the general privileges of such public minister, cannot, while he remains such public minister, be sued against his will, in England, in a civil action, although such action may arise out of commercial transactions by him in England, and although neither his person nor his goods be touched by the suit. Magdalena Steam Nav. Co. v. Martin, 2 E. & E. 94, 113, 105 ECL 94, 121 Reprint 36 (where the decision was given with express reference to the contention of counsel that "the action could be prosecuted to that stage, with a view to ascertain the amount of the debt, and to enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister"). (2) An action on a firm debt cannot be brought in a state court against a firm in which a foreign minister is a partner. Tracy v. Hernandez, 46 N. Y. Super. 48.

[b] **Injunction against ambassadors.**—Although the English courts cannot make an order against an ambassador who does not submit himself to their jurisdiction, yet the court of chancery will grant an interim injunction restraining a third person from handing over to him a fund which is in dispute, notwithstanding his title to the fund may be absolute at law. Gladstone v. Musurus Bey, 1 Hem. & M. 495, 71 Reprint 216.

[c] **Security for costs.**—(1) The court will not compel a foreign ambassador (Montellano v. Christin, 5 M. & S. 503, 105 Reprint 1135), or (2) the servant of an ambassador (Davies v. Solomon, 1 Tidd Pr. 535 note s) to give security for costs. (3) Contra as to a servant. Goodwin v. Archer, 1 Eq. Cas. Abr. 350, pl. 4, 21 Reprint 1095, 2 P. Wms. 452, 24 Reprint 809; Anonymus, Mosely 175, 25 Reprint 334.

73. Musurus Bey v. Gadban, [1894] 2 Q. B. 352.

74. 2 Phillimore Int. L. 202; Vattel L. Nat. bk iv c 7 §§ 94, 95; Glenn Int. L. p 68; Wharton Comm. § 167; Woolsey Int. L. 135; Pitt-Cobbett Cas. Int. L. 68.

75. Ex p. Cabrera, 4 F. Cas. No. 2, 278, 1 Wash. C. C. 232.

76. 7 Op. Atty.-Gen. 367; Hall Int. L. 178.

77. 7 Op. Atty.-Gen. 367; 2 Phillimore Int. L. 204; 1 Kent Comm. 38; Hall Int. L. 178.

78. 2 Phillimore Int. L. 239; Hall Int. L. 191; Parkinson v. Potter, 16 Q. B. D. 152, 2 ERC 696 (holding that an attaché to an ambassador of a foreign state in England is not liable for rates assessed on his private residence).

[a] **Exemption from parochial rates.**—So it has been held that a British subject, accredited as a member of a foreign embassy, is, in the absence of express stipulation to the contrary by the receiving government, exempt from local jurisdiction, and his furniture cannot be seized for nonpayment of parochial rates. Macartney v. Garbutt, 24 Q. B. D. 368.

79. **Capacity of ambassador to acquire domicile** see Domicile [14 Cyc 850].

80. Atty.-Gen. v. Kent, 1 H. & C. 12 (where an ambassador's estate was held liable for a legacy duty).

81. Glenn Int. L. 71; Hall Int. L. 184; 2 Phillimore Int. L. 226; Vattel L. Nat. bk iv c 9 § 121; Lockwood v. Coysgarne, 3 Burr. 1676.

official household,[82] among the members of which are included attachés, both civil and military,[83] secretaries,[84] and servants.[85]

[§ 26] **(2) Servants.** The servants of an ambassador are protected by his immunities and privileges.[86] This does not, however, of necessity cover the goods of the servant; but it rests with him to show that they are protected.[87]

Actual service required. One who is merely a nominal servant of an ambassador is not protected from arrest.[88] But actual residence in the house of the ambassador is not necessary to constitute bona fide service.[89]

Engaging in trade. Domestic servants cannot retain their exemption when they engage in business.[90] An official list of the ambassador's domestic servants should be communicated to the proper office (generally that of the secretary or minister of foreign affairs) of the government to which he is accredited. This is customary, and in some countries it is required by law.[91]

[§ 27] **b. House and Property.** The equipage, property, and house of the ambassador or minister are entitled to the same immunity and protection as his person.[92]

Right of asylum. Engrafted upon the immunity allowed the ambassador's house is the right of asylum—the right to afford a refuge to offenders against the law of the state to which the ambassador is accredited.[93]

[§ 28] **6. Punishment for Violation of Privilege.** Assaults on ambassadors and other public ministers are punishable by statute,[94] even though the person who committed it was ignorant of the official position of the minister.[95] The punishment of one violating an ambassador's privilege will

[a] **The children of an ambassador** are held to be subjects of the prince whom he represents, although born under the actual protection and in the dominion of a foreign prince. Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. ed. 617. See Citizens [7 Cyc 140].

82. Ex p. Cabrera, 4 F. Cas. No. 2,278, 1 Wash. C. C. 232; U. S. v. Benner, 24 F. Cas. No. 14,568, Baldw. 234; Respublica v. De Longchamps, 1 Dall. (Pa.) 111, 1 L. ed. 59.

[a] **A councilor of legation** of a foreign sovereign, who has charge of the executive affairs of the legation subject to the directions of the minister plenipotentiary, and who acts as chargé d'affaires in the absence of such minister, is entitled as such to the privileges of an ambassador. Taylor v. Best, 14 C. B. 487, 78 ECL 487, 139 Reprint 201.

[b] **A chaplain** to an ambassador is not protected from arrest if he does no duty in the house. Seacomb v. Bowlney, 1 Wils. C. P. 20, 95 Reprint 469.

[c] **Interpreter.**—An ambassador's interpreter who does not live in the house is not protected from arrest. Carolino's Case, 1 Wils. C. P. 78, 95 Reprint 502.

[d] **Natives of country.**—(1) If a government receives one of its own subjects as a member of a foreign embassy, without providing that he shall not be exempt from its local jurisdiction, he is exempt therefrom. Macartney v. Garbutt, 24 Q. B. D. 368. (2) It is otherwise, however, if his appointment is merely an honorary one which has not been recognized by his government, and which was obtained for a fraudulent purpose. Re Cloete, 65 L. T. Rep. N. S. 102; Lockwood v. Coysgarne, 3 Burr. 1676, 97 Reprint 1041; Delvalle v. Plomer, 3 Campb. 47. (3) But a citizen of a country who, while recognized by his government as an agent of a foreign government in the absence of the minister, is not recognized in any diplomatic character is not entitled to the immunities of a diplomatic agent, although he transacted diplomatic business with the government. In re Baiz, 135 U. S. 403, 10 SCt 854, 34 L. ed. 222; Hollander v. Baiz, 41 Fed. 732.

83. U. S. v. Benner, 24 F. Cas. No. 14,568, Baldw. 234; Parkinson v. Potter, 16 Q. B. D. 152, 2 ERC 696. In In re Anfrye, 3 WklyNC (Pa.) 188, it was held that a military attaché of a foreign legation is privileged from arrest on a capias, in an action of malicious prosecution, although he is also, at the time, serving his government in another capacity.

[a] **Registry.**—The attachés of an ambassador are not exempt from criminal or civil prosecution in the United States, unless their names are registered with the secretary of state. U. S. v. Jeffers, 26 F. Cas. No. 15,471, 4 Cranch C. C. 704; U. S. v. Lafontaine, 26 F. Cas. No. 15,550, 4 Cranch C. C. 173.

84. Ex p. Cabrera, 4 F. Cas. No. 2,278, 1 Wash. C. C. 232; Respublica v. De Longchamps, 1 Dall. (Pa.) 111, 1 L. ed. 59.

[a] **A secretary and councilor of legation** having charge of the executive affairs of the legation and acting as chargé d'affaires in the absence of the ambassador is a member of the official household. Taylor v. Best, 14 C. B. 487, 78 ECL 487, 139 Reprint 201.

[b] **Must be bona fide secretary.**—In Darling v. Atkins, 3 Wils. C. P. 33, 95 Reprint 917, protection to the English secretary of an ambassador was disallowed because it appeared that he was purser of a ship of war. But see Triquet v. Bath, 3 Burr. 1478, 97 Reprint 936, W. Bl. 471, 96 Reprint 273 (where protection was allowed, although formerly he had been a trader, and the case arose under very suspicious circumstances).

[c] **Wife of secretary.**—Where the wife of a foreign ambassador's secretary was arrested upon a writ issued against husband and wife, the court refused to quash the writ, although the husband swore that before and at the time of the arrest he was in the actual employment of the ambassador, and in daily attendance upon him, in writing dispatches and other official documents. English v. Caballero, 3 D. & R. 25, 16 ECL 130.

[d] **Registry of secretary not required.**—The secretary of a foreign minister is privileged, although his name is not registered at the office of either of the secretaries of state. Hopkins v. De Robeck, 3 T. R. 79, 100 Reprint 465.

85. See infra § 26.

86. Lockwood v. Coysgarne, 3 Burr. 1676, 97 Reprint 1041; Fisher v. Begrez, 1 Cromp. & M. 117, 2 Cromp. & M. 240.

[a] **Natives of the country** where the embassy is located, employed by the ambassador as his servants, are protected by his privilege. Lockwood v. Coysgarne, 3 Burr. 1676, 97 Reprint 1041. And see supra § 25.

[b] **Landwaiter at customhouse.**—A landwaiter at the customhouse cannot claim protection as a domestic servant. Masters v. Manby, 1 Burr. 401, 97 Reprint 370.

87. Fisher v. Begrez, 1 C. & M. 117, 2 C. & M. 240.

[a] **Servant of ambassador not residing with his master.**—In Novello v. Toogood, 1 B. & C. 554, 8 ECL 234, 107 Reprint 204, it was held that where the servant of a foreign ambassador did not reside at the house with his master, but hired a house in another part of the city, residing in it and letting out lodgings, his goods at the latter house were not entitled to the privilege of exemption from execution.

88. Heathfield v. Chilton, 4 Burr. 2015, 98 Reprint 50; Fontainier v. Heyl, 3 Burr. 1731, 97 Reprint 1070; Triquet v. Bath, 3 Burr. 1478, 97 Reprint 936, W. Bl. 471, 96 Reprint 273; Delvalle v. Plomer, 3 Campb. 47; Fisher v. Begrez, 1 Cromp. & M. 117, 2 Cromp. & M. 240; Evans v. Higgs, 2 Ld. Raym. 1524, 92 Reprint 489, Str. 797, 93 Reprint 854; Crosse v. Talbot, 8 Mod. 288, 88 Reprint 205; Poitier v. Croza, W. Bl. 48, 96 Reprint 26; Darling v. Atkins, 3 Wils. C. P. 33, 95 Reprint 917; Seacomb v. Bowlney, 1 Wils. C. P. 20, 95 Reprint 469.

[a] **Chorister.**—(1) The protection of the ambassador does not extend to a citizen of the country to which the ambassador is accredited, who merely acts as chorister. Novello v. Toogood, 1 B. & C. 554, 8 ECL 234, 107 Reprint 204. (2) But it seems that a chorister whose employment is bona fide is privileged. Fisher v. Begrez, 1 Cromp. & M. 117, 2 Cromp. & M. 240.

89. Novello v. Toogood, 1 B. & C. 554, 8 ECL 234, 107 Reprint 204; Wigmore v. Alvarez, Fitzg. 200, 94 Reprint 719. Compare Carolino's Case, 1 Wils. C. P. 78, 95 Reprint 502 (holding that the ambassador's privilege does not include an interpreter who does not live in the house); Seacomb v. Bowlney, 1 Wils. C. P. 20, 95 Reprint 469 (where an ambassador's immunity was denied to a chaplain who did no duty in the house).

90. Taylor v. Best, 14 C. B. 487, 78 ECL 487, 139 Reprint 201. See 7 Anne c 12.

Rule as to ambassadors see supra § 21.

91. 1 Russell Cr. (Greaves' ed) 754; Wheaton Int. L. (3d Eng. ed) § 226; U. S. Rev. St. § 4065.

92. U. S. v. Hand, 26 F. Cas. No. 15,297, 2 Wash. C. C. 435 (where it was said that an attack upon a minister's house was equivalent to an attack upon his person and was an infraction of the laws of nations); Byrne v. Herran, 1 Daly (N. Y.) 344; Respublica v. De Longchamps, 1 Dall. (Pa.) 111, 1 L. ed. 59; Novello v. Toogood, 1 B. & C. 554, 8 ECL 234, 107 Reprint 204; Hall Int. L. 186; 2 Phillimore Int. L. 241. In U. S. v. Jeffers, 26 F. Cas. No. 15,471, 4 Cranch C. C. 704, it was held to be a breach of diplomatic privilege for an officer to enter the dwelling house of a secretary of legation and seize there a runaway slave.

[a] **Mechanic's lien.**—A foreign ambassador is not exempt from the application of the Mechanic's Lien Law as to any building which is not used for purposes connected with his official character; and where such exemption is claimed it must appear by proof that he is entitled to it. Byrne v. Herran, 1 Daly (N. Y.) 344.

93. Hall Int. L. 189; Glenn Int. L. 73.

94. U. S. Rev. St. § 4062.

95. U. S. v. Liddle, 26 F. Cas. No. 15,598, 2 Wash. C. C. 205; U. S. v. Ortega, 27 F. Cas. No. 15,971, 4 Wash.

be ascertained and administered by the courts of the country in which the offense was committed.[96]

[§ 29] **B. Of Consuls—1. In General.** Although some expressions of Vattel appear to countenance a different opinion,[97] it is well settled that a consul is not entitled, by virtue of his office merely, to the immunities of a foreign minister, but is subject, civilly and criminally like other residents, to the tribunals of the country in which he resides.[98] He is, however, upon principle and according to international usage, entitled to the liberty and safety necessary to the proper discharge of his functions.[99] Thus a consul is generally exempt from personal taxes; from liability to have soldiers quartered in his house; from arrest for political reasons; from jury duty, and from militia duty;[1] and a consul who, by express treaty, is not amenable to the process of the courts cannot be forced, by compulsory process, to attend as a witness.[2]

In exercising judicial functions a consul is entitled to the same privileges and exemptions from liability for such acts as other judicial officers are accorded.[3]

Exceptional privileges are accorded to consuls in the Mohammedan states, China, and generally in those countries which are not within the pale of international law; in these countries consuls have, in a large measure, the character of diplomatic representatives.[4]

C. C. 531. See also U. S. v. Benner, 24 F. Cas. No. 14,568, Baldw. 234.

[a] **Scienter.**—To constitute an offense against a foreign minister by an attack on his house, the offender must have known that the house attacked was the minister's domicile. U. S. v. Hand, 26 F. Cas. No. 15,297, 2 Wash. C. C. 435.

96. Respublica v. De Longchamps, 1 Dall. (Pa.) 111, 1 L. ed. 59.

[a] **Jurisdiction of federal circuit court.**—(1) In U. S. v. Ortega, 11 Wheat. (U. S.) 467, 6 L. ed. 521, it was held that the former circuit court had jurisdiction of a prosecution for assault and battery upon a foreign minister. (2) Such a prosecution is not a case "affecting ambassadors, other public ministers and consuls," within the scope of U. S. Const. art 3 § 2. U. S. v. Ortega, 11 Wheat. (U. S.) 467, 6 L. ed. 521.

[b] **Indictment for serving process on minister.**—By U. S. Rev. St. § 4064, the penalty of imprisonment is provided for executing process on a foreign minister. An indictment under this statute need not allege that the offense was committed by an officer, nor that the minister had been authorized and received as such by the president; nor is knowledge on defendant's part of the official character of the minister requisite to support the indictment. U. S. v. Benner, 24 F. Cas. No. 14,568, Baldw. 234.

[c] **Imprisonment until satisfactory reparation.**—One who has assaulted a foreign minister cannot be sentenced to imprisonment until the foreign sovereign shall declare the reparation satisfactory. Punishments must be certain and definite. Respublica v. De Longchamps, 1 Dall. (Pa.) 111, 1 L. ed. 59.

97. Vattel L. Nat. bk ii c 2 § 34 says that a consul's functions "seem even to require that the consul should be independent of the ordinary criminal justice of the place where he resides, so as not to be molested or imprisoned unless he himself violate the laws of nations by some enormous crime." But Lord Ellenborough, in Viveash v. Becker, 3 M. & S. 284, 295, 105 Reprint 619, after examining this and other passages in Vattel, remarked: "It was so positively averred in argument that Vattel was an authority to shew that consuls were under the protection of the law of nations, that I was desirous of consulting him; and the passage to which I have referred shews that it is otherwise."

98. U. S.—Hall v. Coppell, 7 Wall. 542, 19 L. ed. 244; Davis v. Packard, 7 Pet. 276, 8 L. ed. 684; The Anne, 3 Wheat. 435, 4 L. ed. 428; U. S. v. Ravara, 2 Dall. 297, 1 L. ed. 388; In re Iasigi, 79 Fed. 751; Gittings v. Crawford, 10 F. Cas. No. 5,465, Taney 1; Lorney v. Lonsada, 15 F. Cas. No. 8,517, 1 Lowell 77; St. Luke's Hospital v. Barclay, 21 F. Cas. No. 12,241, 3 Blatchf. 259; Functions of Consuls, 7 Op. Atty.-Gen. 342.

Cal.—Wilcox v. Luco, 118 Cal. 639, 45 P 676, 50 P 758, 62 AmSR 305, 45 LRA 579.

Mass.—Hall v. Young, 3 Pick. 80, 15 AmD 180.

N. J.—Sartori v. Hamilton, 13 N. J. L. 107. See also Seidel v. Peschkaw, 27 N. J. L. 427.

Pa.—Com. v. Kosloff, 5 Serg. & R. 545; Kidderlin v. Meyer, 2 Miles 242; Durand v. Halbach, 1 Miles 46.

S. C.—State v. De la Foret, 10 S. C. L. 217.

Eng.—Heathfield v. Chilton, 4 Burr. 2015, 98 Reprint 50; Barbuit's Case, Cas. t. Talb. 281, 25 Reprint 777; Viveash v. Becker, 3 M. & S. 284, 105 Reprint 619; Clarke v. Cretico, 1 Taunt. 106, 127 Reprint 772.

Que.—Leonard v. Premio-Real, 11 Que. L. 128.

See also Glenn Int. L. 118; Hall Int. L. 334; 1 Kent Comm. 44; 2 Phillimore Int. L. c 2; Wharton Dig. Int. L. § 120; Wheaton Int. L. § 249.

[a] **A consul is not a public minister** so as to make an offense against him punishable under the statute rendering penal any offer of "violence to the person of" a public minister, in violation of the law of nations. Respect Due to Consuls, 1 Op. Atty.-Gen. 41; U. S. Rev. St. § 4062.

[b] **Civil liability.**—(1) The consul of a foreign government is liable to arrest in an action for debt for money received in a fiduciary capacity. McKay v. Garcia, 16 F. Cas. No. 8,844, 6 Ben. 556. (2) He may be summoned as garnishee in foreign attachment. Kidderlin v. Meyer, 2 Miles (Pa.) 242. (3) He may be sued in a federal district court, by one of his countrymen, to recover the amount of official fees illegally exacted. Lorway v. Lousada, 15 F. Cas. No. 8,517, 1 Lowell 77. (4) He may be sued on a contract executed by him jointly with another person. Valerino v. Thompson, 28 Fed. Cas. No. 16,813a.

[c] **Criminal liability.**—(1) It has been held that a foreign consul may be indicted and tried for sending anonymous letters, with the intent of extorting money (U. S. v. Ravara, 2 Dall. (U. S.) 297, 1 L. ed. 388, 27 F. Cas. No. 16,122. And compare Matter of Hitz, 111 U. S. 766, 4 SCt 698, 28 L. ed. 592, where it was held that a person indicted for an offense will not be held exempt because, at the time the indictment was found, he was consul general of a foreign government, where it appears that his resignation had been demanded prior thereto, even though it was not given until after the finding of the indictment), (2) for assault and battery (State v. De la Foret, 11 S. C. L. 217), (3) and for a rape (Com. v. Kosloff, 5 Serg. & R. (Pa.) 545).

99. Viveash v. Becker, 3 M. & S. 284, 297, 105 Reprint 619 (where Lord Ellenborough said: "A consul is entitled to privileges to a certain extent, such as for safe conduct, and if that be violated the Sovereign has a right to complain of such violation"). See also 1 Kent Comm. 44.

[a] **Foundation of rights and privileges.**—The rights and privileges of consuls rest on the general law of nations, as well as on treaty stipulations. Carpigiani v. Hall, 172 Ala. 287, 55 S 248, AnnCas1913D 651, 2 Op. Atty.-Gen. 378.

[b] **Statements of consular rights and privileges in treaties.**—(1) The treaty of 1788 between France and the United States undertook a more specific enumeration of consular privileges, which may be taken as representative of the usages of nations. The treaty provides for the immunity of consular archives; that the consuls shall be exempt from personal services, militia duty, the quartering of soldiers, etc., as well as all duties, taxes, and charges, except that they shall be subject to real estate and personal taxes as other individuals, "and in all other instances they shall be subject to the laws of the land as the natives are." They are entitled to place the national insignia over the doors of their houses, "but this mark of distinction shall not give to the said house any privilege of asylum for any person or property whatsoever." 8 U. S. St. at L. 106, 108. (2) The treaty of 1853 between the same countries (10 U. S. St. at L. 993, 994), contains a very similar enumeration, the right to tax their real and personal property, however, being limited to such property as "they are, or become, owners of . . . there." (3) Like declarations of consular rights and privileges are to be found in United States consular conventions with other countries. See Convention with Austro-Hungary (17 U. S. St. at L. 821); with Germany (17 U. S. St. at L. 921); with Italy (20 U. S. St. at L. 725). (4) In the treaty between the United States and Belgium, negotiated in 1845, it was provided that the consular officers of the two countries respectively "shall continue to enjoy all the privileges, protection, and assistance, usually granted to them, and which may be necessary for the proper discharge of their functions." 8 U. S. St. at L. 612 art 17.

1. Hall Int. L. 335; Glenn Int. L. 118. See also 2 Phillimore Int. L. 275.

[a] **Exemptions from public service** are accorded, as a general rule, only to a consul who is a citizen or subject of the country he represents. Börs v. Preston, 111 U. S. 252, 4 SCt 407, 28 L. ed. 419 (per Harlan, J.). See also 8 Op. Atty.-Gen. 169.

2. In re Dillon, 7 F. Cas. No. 3,914, 7 Sawy. 561; Baiz v. Malo, 27 Misc. 685, 58 NYS 806. See also U. S. v. Trumbull, 48 Fed. 94 (holding that, in a prosecution against private individuals for violating the neutrality laws of the United States by fitting out a warlike vessel to aid a rebellion against a foreign power, the vice consul of that power cannot be compelled, by legal process, to attend as a witness in behalf of the United States when it appears that the insurgent party has been successful, and that the government established by it has been recognized by the United States).

3. Haggard v. Pelicier, [1892] A. C. 61.

4. Mahoney v. U. S., 10 Wall. (U. S.) 62, 19 L. ed. 864; 7 Op. Atty.-Gen. 346; Hall Int. L. 337; 2 Phillimore Int. L. 339; U. S. Const. Reg. (1896)

[§ 30] **2. Engaging in Trade.** Although consuls, especially when stationed in christian nations, are often allowed to engage in trade,[5] their official character affords no protection or immunity to them in their commercial concerns. In such matters the consul is liable in the same way as any other merchant or trader.[6] The consul of a neutral state who resides and is engaged in business in an enemy's country is to be regarded as an enemy,[7] and his property on the high seas is subject to capture and condemnation as prize of war.[8]

[§ 31] **3. Liability on Official Contract.** A consul is not, in general, responsible personally for contracts made in his official capacity on account of the government he represents.[9]

[§ 32] **4. Inviolability of Archives.** The archives and papers in the consulate are deemed inviolable.[10]

VIII. POWER OF AMBASSADOR TO SUE ON BEHALF OF GOVERNMENT

[§ 33] A foreign ambassador, when authorized by his government to prosecute an action in its behalf, may take any legal proceedings which he deems necessary;[11] and the declaration of an ambassador whose official character is established is conclusive proof of his authority to prosecute the suit.[12]

IX. POWERS AND DUTIES OF CONSULS[13]

[§ 34] **A. In General.** The powers and duties of consuls are generally limited and defined in treaties of commerce or by the statutory regulations of the country which they represent.[14] By virtue of his office a consul is clothed with authority only for commercial purposes,[15] and he cannot exercise diplomatic functions, even though placed in charge of the legation by the minister,[16] unless his nation is not

(to which reference is made for the specific provisions of the various treaties affecting consuls).

[a] **"Consular privileges are much less extensive in Christian than in Mahometan countries.** In the latter they cannot be imprisoned for any cause whatever, except by demanding justice against them of the Porte, . . . and they partake very considerably of the character and importance of resident ministers. They are diplomatic agents under the name of consuls, and enjoy the rights and privileges which the Ottoman Porte recognizes in relation to the foreign ministers resident at Constantinople." 1 Kent Comm. 45.

5. Mahoney v. U. S., 10 Wall. (U. S.) 62, 66, 19 L. ed. 864 [cit Halleck Int. L. c 10 §§ 21, 22; 7 Op. Atty.-Gen. 346, 348] (where Mr. Justice Field said: "Whilst, therefore, in Christian countries consuls are little more than mere commercial agents, in Mohammedan countries they are clothed with diplomatic and even with judicial powers. Consuls to Christian countries are often allowed to engage in business; but consuls to Mohammedan countries are restricted to the duties of their offices, are paid a stated salary, and are prohibited from entering into commercial transactions"). In 1 Kent Comm. p 44, it was said: "The French consuls are forbidden to be concerned in commerce, and, by the act of Congress of February 28, 1803, American consuls residing on the Barbary coast are forbidden also; but British and American consuls are generally at liberty to be concerned in trade."

[a] U. S. Rev. St. §§ 1699, 1700, prohibits consuls belonging to certain classifications of the service, and receiving certain salaries, to engage in business.

6. 1 Kent Comm. p 44; Hall v. Coppell, 7 Wall. (U. S.) 542, 19 L. ed. 244; Scott v. Hobe, 108 Wis. 239, 84 NW 181 (liable to ordinary process); The Falcon, 6 C. Rob. 194; The Josephine, 4 C. Rob. 25; The Indian Chief, 3 C. Rob. 12; The Aina, 28 EngL&Eq 600; Sorensen v. Reg, 11 Moore P. C. 141, 14 Reprint 648.

Rule as to ambassadors see supra § 21.

7. Sorensen v. Reg., 11 Moore P. C. 141, 14 Reprint 648.

8. The Pioneer, 19 F. Cas. No. 11,175, Blatchf. Prize Cas. 666; The President, 5 C. Rob. 277. In Arnold v. United Ins. Co., 1 Johns. Cas. (N. Y.) 363, 368, it was held that the American consul to the city of Havana, who there engaged in trade, became, in regard to his transactions as a merchant, and in reference to the enemies of Spain, a Spanish subject, and that his property was liable to be seized and condemned in the same way as that of other Spanish subjects. In this case Kent, J., afterward Chancellor Kent said: "As long as public ministers and consuls confine themselves to the business appertaining to their public characters, their domicil is not changed, but remains in the country from which they are deputed, and they are not subjects of the country in which they reside. (Vattel, 231. Martens, 155, 229.) But if they engage in business inconsistent with, or foreign to their public or diplomatic character, they are thenceforth to be considered as domiciliating themselves abroad, and becoming as subjects, amenable to the ordinary jurisdiction of the state. (Vattel, 711, 714.) As they contribute, by their industry and property, when engaged in trade, to aid the government under which they reside, it is but reasonable, that the enemies of that government should have a right to hold their property responsible, as that of an enemy."

9. Jones v. Le Tombe, 3 Dall. (U. S.) 384, 1 L. ed. 647; Seidel v. Peschkaw, 27 N. J. L. 427.

10. Hall Int. L. 335; Kessler v. Best, 121 Fed. 439 (holding that documents forming a part of the archives of a foreign consulate are privileged, and that a witness cannot be compelled to disclose their contents).

[a] **This privilege does not extend to the consul's personal papers** which must be kept strictly apart from the official archives. Rivier Les Principes du Droit des Gens (Paris 1896) vol. 1 p 549.

[b] **Where a subpœna duces tecum is prayed for,** directed to the consul of a country whose official papers are, by convention between his country and the United States, protected from examination or seizure, it is the duty of the court to require the party praying for it to show that the document desired is not an official paper coming within such protection. In re Dillon, 7 F. Cas. No. 3,914, 7 Sawy. 561.

11. Republic v. De Arangoiz, 12 N. Y. Super. 634. See also Peel v. Elliott, 7 AbbPr (N. Y.) 433.

[a] **To a bill, filed by the chargé d'affaires of a foreign government, in his own name,** to restrain judgment creditors from proceeding against certain furniture upon which a sum of money had been advanced by his government, secured by an unregistered bill of sale, a demurrer on the ground that the minister could not sue in his own name was allowed. Penedo v. Johnson, 29 L. T. Rep. N. S. 452.

12. Republic v. De Arangoiz, 12 N. Y. Super. 634.

13. **In regard to seamen:** Discharge see Seamen [35 Cyc 1191]. Imprisonment see Seamen [35 Cyc 1248 note]. Transportation of destitute seamen see Seamen [35 Cyc 1204].

14. 1 Kent Comm. 42; Potter v. Ocean Ins. Co., 19 F. Cas. No. 11,335, 3 Sumn. 27. See also Treaties [38 Cyc 966 text and note 60].

[a] **General statement of consular duties.**—Prof. Woolsey, in his International Law par 96, says: "Modern consuls generally legalize by their seal for use within their own country acts of judicial or other functionaries. They may authenticate marriages, births, and deaths among their countrymen; they may receive protest of masters of vessels, grant passports, and act as depositors of ship papers. They may reclaim deserters from vessels, provide for destitute sailors, and discharge them and send them home when they have been cruelly treated. They may act in behalf of the owners of stranded vessels, and administer on the personal property left within their consulate where no legal representative is left, and treaty stipulations permit."

[b] **For a specific enumeration of the powers and duties** of consuls see U. S. Const. Reg. (1896), which are issued from time to time for the guidance of United States consuls, and the instructions issued for the guidance of the British consular service.

[c] **Statutory prohibitions.**—(1) The United States Revised Statutes contain various provisions regulating the conduct of consuls among others, provisions prohibiting such officers being absent from their ports for more than ten days (U. S. Rev. St. § 1741); (2) and from corresponding on the public affairs of foreign governments with private persons or newspapers, or asking or accepting presents or emoluments from such governments (U. S. Rev. St. § 1751). (3) It is a contempt of the government for a foreign minister, while a resident in the United States, to give his ideas, on matters pertaining to his trust, to the people through the newspapers. His intercourse and correspondence on such matters must be with the executive department of the government exclusively. 1 Op. Atty.-Gen. 74. See also Hall Int. L. (4th ed) § 98 p 321 note 2.

[d] **President vested with general power to make consular regulations.**—U. S. Rev. St. § 1752.

15. The Anne, 3 Wheat. (U. S.) 435, 4 L. ed. 428; Seidel v. Peschkaw, 27 N. J. L. 427.

[a] **A consul "is not the representative of his nation,** nor is he employed in the management of national concerns. He is no more than a commercial agent attending to individual interests." Huger, J., in State v. De la Foret, 11 S. C. L. 217, 218; Foelix Int. L. [quot Leonard v. Premio-Real 11 Que. L. 128]. And see supra § 2.

16. The Anne, 3 Wheat. (U. S.) 435, 4 L. ed. 428; Robson v. Huntress, 20 F. Cas. No. 11,971, 2 Wall. Jr. 59;

otherwise represented;[17] nor can he, merely by virtue of his office, and without the special authority of his government, interpose a claim for the assertion of violated rights of his sovereign.[18]

Consuls to nonchristian countries. The functions of consuls to other than christian countries are of a different nature from those of other consuls. They are clothed with diplomatic and even with judicial powers, are restricted to the duties of their offices, being prohibited from entering into trade, and are paid a stated salary.[19]

[§ 35] **B. Protection of Rights of Countrymen.** A foreign consul, without specific authority, has the general right to protect the rights and property of persons of his nation within the jurisdiction of his consulate,[20] and he may bring suits for such purpose without any special authority from the parties in interest.[21] He may also interpose claims for the restitution of property belonging to his countrymen;[22] but he cannot receive the actual restitution of the property without specific proof of the individual proprietary interest,[23] and without specific authority from the particular individual who is entitled to it.[24]

[§ 36] **C. Administration of Estates.**[25] It has been held that, under the law of nations, foreign consuls have power to administer upon the estates of their fellow subjects who die within their consular jurisdiction.[26] This power has also been held to exist under a fair interpretation of various treaty provisions.[27] Thus the treaty of 1911 with Sweden,[28] the treaty of 1887 with Peru,[29] the treaty of 1859 with Paraguay,[30] and the treaty of 1902 with Spain,[31] expressly give the right to be "appointed as administrator." Consequently, under the "most favored nation" clause[32] of the Italian treaty the Italian consul is entitled to letters of administration upon the estate of a deceased citi-

Otterbourg v. U. S., 5 Ct. Cl. 430; Seidel v. Peschkaw, 27 N. J. L. 427.

[a] **By U. S. Rev. St. § 1738** consular officers are forbidden to exercise any diplomatic function or to hold any diplomatic correspondence or relation on the part of the United States in, with, or to the government or country to which they are appointed, when there is in such country any officer of the United States authorized to perform diplomatic functions therein. The consul can act in a diplomatic capacity only by express authority from the president.

[b] **His sovereign may sufficiently intrust him with such authority,** but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose domains he assumes to exercise it. The Anne, 3 Wheat. (U. S.) 435, 4 L. ed. 428.

17. Gernon v. Cochran, 10 F. Cas. No. 5,368, Bee Adm. 209.

18. The Anne, 3 Wheat. (U. S.) 435, 4 L. ed. 428; Von Thodorovich v. Franz Joseph Ben. Assoc., 154 Fed. 911. Compare The Vrow Anna Catharina, 5 C. Rob. 161 (where a claim that the territory of his sovereign had been violated was interposed by a consul and entertained by the court).

19. Ross v. McIntyre, 140 U. S. 453, 11 SCt 897, 35 L. ed. 581; Mahoney v. U. S., 10 Wall. (U. S.) 62, 19 L. ed. 864; Dainese's Case, 15 Ct. Cl. 64; 7 Op. Atty.-Gen. 346, 348; Halleck Int. L. c 10 §§ 21, 22. And see supra § 30.

20. The Bello Corrunes, 6 Wheat. (U. S.) 168, 5 L. ed. 229; In re Ghio, 157 Cal. 552, 108 P 516, 137 AmSR 145, 37 LRANS 549 [aff 223 U. S. 317, 32 SCt 207, 56 L. ed. 453]; Matter of Fattosini, 33 Misc. 18, 67 NYS 1119; Matter of Tartaglio, 12 Misc. 245, 33 NYS 1121.

21. Matter of Tartaglio, 12 Misc. 245, 33 NYS 1121.

[a] **Suit to restrain fraudulent use of emperor's name.**—Under the Austrian treaty of June 27, 1871, providing that consuls general, consuls, vice consuls, and consular agents of the two countries, in the exercise of their duties, may apply to the authorities within their district for the protection of the rights of their countrymen, the imperial and royal consul of Austria-Hungary is entitled to maintain a suit in the federal courts to restrain a Pennsylvania beneficial association from using the name of the Austria-Hungarian emperor as a part of its corporate name and his portrait as a part of its advertising literature for the false and fraudulent purpose of inducing subjects of the emperor resident in the United States to believe that the association is conducted under the customs of their home country, and that their emperor is identified with and a patron thereof. Von Thodorovich v. Franz Josef Ben. Assoc., 154 Fed. 911.

[b] **The treaty between the United States and the Kingdom of Italy** provides that consuls general "may have recourse to the authorities of the respective countries within their respective districts, whether federal or local, judicial or executive, in order to defend the rights and interests of their countrymen." The term "defend," as used, is to be given the broadest meaning, and includes the power to maintain affirmatively the rights of the consul's countrymen, and our local as well as federal judiciary must, in obedience to the treaty, recognize such rights. Matter of Tartaglio, 12 Misc. 245, 246, 33 NYS 1121.

22. The Anne, 3 Wheat. (U. S.) 435, 4 L. ed. 428; The Elizabeth, 8 F. Cas. No. 4,350, Blatchf. Prize Cas. 250 [aff 8 F. Cas. No. 4,351, Blatchf. Prize Cas. 642]; The London Packet, 15 F. Cas. No. 8,474, 1 Mason 14 [rev on other grounds 5 Wheat. 132, 5 L. ed. 52]; Robson v. The Huntress, 20 F. Cas. No. 11,971, 2 Wall. Jr. C. C. 59. See also The Conserva, 38 Fed. 431 (where it said that a consul, especially where he is the only representative of his government present, has the right to intervene and claim a vessel belonging to it against which a libel has been filed to secure her forfeiture); Rowe v. The Brig, 20 F. Cas. No. 12,093, 1 Mason 372. In The Bello Corrunes, 6 Wheat. (U. S.) 152, 168, 5 L. ed. 229, Johnson, J., said: "To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in courts only, it would be a mockery, to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States, has sanctioned the exercise of this right, and it is impossible, that any evil or inconvenience can flow from it. Whether the powers of the vice-consul shall, in any instance, extend to the right to receive, in his national character, the proceeds of property libelled and transferred into the registry of a court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognised. Much, in this respect, must ever depend upon the laws of the country from which, and to which, he is deputed."

[a] **Extent of rule.**—A consular representative in court has no privilege or immunity, in respect to questions of irregular practice on the part of the libellants, in the prize commissioner's office or otherwise, in managing a defense to the action, which could not be exercised by the owners of the property seized. The Elizabeth, 8 F. Cas. No. 4,350, Blatchf. Prize Cas. 250 [aff 8 F. Cas. No. 4,351, Blatchf. Prize Cas. 642].

[b] **Petition to pay proceeds of sale of property libeled for salvage.**—In The Ship Adolph, 1 F. Cas. No. 86, 1 Curt. 87, it was held that a foreign consul had authority to petition the court to order the marshal to pay into the registry proceeds of a sale of property libeled for salvage in which the citizens or subjects of his country were interested, they being absent and having no legal representative in the United States.

[c] **Fraudulent sale of vessel.**—A consul in a foreign port, under whose authority a vessel is sold, cannot acquire an interest in it; and in case he does so the sale is conclusively presumed to be fraudulent. Riley v. The Obell Mitchell, 20 F. Cas. No. 11,839.

23. The Antelope, 10 Wheat. (U. S.) 66, 6 L. ed. 268.

24. The Bello Corrunes, 6 Wheat. (U. S.) 152, 5 L. ed. 229. But compare The Adolph, 1 F. Cas. No. 86, 1 Curt. 87 (where it was held that a consul may, where citizens of his country, who are absent and have no other legal representative in the country, are interested, petition the court to order the marshal to pay into the registry proceeds of a sale of property libeled for salvage).

25. See generally Executors and Administrators [18 Cyc 1].

26. The Bello Corrunes, 6 Wheat. (U. S.) 152, 5 L. ed. 229; Carpigiani v. Hall, 172 Ala. 287, 55 S 248, AnnCas 1913D 651; Matter of Lobrasciano, 38 Misc. 415, 77 NYS 1040; Matter of Fattosini, 33 Misc. 18, 67 NYS 1119; Matter of Tartaglio, 12 Misc. 245, 33 NYS 1121; 7 Moore Dig. Int. L. § 722 p 117; Wheaton Int. L. (2d ed) 151; Woolsey Int. L. § 96.

27. In re Fattosini, 33 Misc. 18, 67 NYS 1119; In re Szabo, 143 NYS 678; Ferrie v. Public Administrator, 3 Bradf. Surr. (N. Y.) 249.

[a] **Art eight of the consular convention between Germany and the United States,** of Dec. 11, 1871, authorizing German consuls to act as legal representatives of the German emperor's subjects, does not constitute such consuls administrators of deceased persons, or authorize a consul to recover wages due a deceased seaman who was in life a German subject, unless he represents heirs who are entitled to the money and who are German subjects. The General McPherson, 100 Fed. 860.

28. In re Holmberg, 193 Fed. 260.

29. In re Madaloni, 79 Misc. 653, 141 NYS 323.

30. In re Baglieri, 137 NYS 175.

31. In re Szabo, 143 NYS 678.

32. **"Most favored nation" clause.**—Construction of see Treaties [38 Cyc 971].

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zen of that country in preference to the public administrator;[33] and the same is true under a similar clause in the treaty with Austria-Hungary.[34] On the other hand the Argentine treaty of 1853 conferred only the "right to intervene in the possession, administration and judicial liquidation of the estate of the deceased," and it has been held that this language does not authorize or provide for the appointment of a consular officer as administrator of the estate of any decedent mentioned therein.[35] There are, however, decisions from several jurisdictions to the contrary.[36] Any right thereby conferred upon a foreign consul, under the "favored nation clause," with respect to the administration of the estate of one of his deceased nationals is generally made expressly subject to the conditions imposed by the laws of the state.[37]

The infancy of the party does not affect or limit the right or power of the consul;[38] but the consul cannot appear for an infant party to a proceeding for the probate of a last will, so as to give the court jurisdiction of such party, without the issuance of a citation.[39]

Property affected. The consul's authority relates to personal property only,[40] and to such property only in the foreign country where the decedent died.[41]

[§ 37] **D. Celebration of Marriages.**[42] Consuls of the United States have no authority as such to solemnize marriages in countries comprehended within the pale of international law.[43] But it is provided by statute that marriages contracted in the presence of any consular officer in a foreign country between persons who would be authorized to marry if residing in the District of Columbia shall be valid.[44] And it seems that in nonchristian countries a valid marriage may be performed by a consul,[45] also that a valid marriage may be performed in a city by a United States consul between an American citizen and a foreigner not domiciled there.[46]

[§ 38] **E. Contracts against Public Policy.** A contract, entered into by the consul general of a foreign government, which is contrary to public policy will not be enforced by the courts, even though it may be valid in the officer's country.[47]

[§ 39] **F. Licensing Enemy Vessels.** A consul has not authority, by virtue of his office, to grant a license or permit which could have the legal effect of exempting the vessel of an enemy from capture or confiscation.[48]

[§ 40] **G. Statutory Powers and Duties.** The United States Revised Statutes contain specific provision as to the powers of consuls in many matters. They are empowered to receive protests from masters of vessels and others who are citizens of the United States, or from foreigners, relative to the personal interest of a citizen of the United States.[49] It is the duty of a consul to keep a list of all seamen shipped and discharged by him, and of the number of vessels arrived and departed, with particulars of tonnage, crews, and cargo;[50] where the laws of the country permit, to take charge of and administer upon the estates of citizens of the United States, other than seamen, dying within his consulate and leaving no legal representative, or trustee;[51] and to send reports to the state department containing commercial information as to the country where he is stationed, and to report to the secretary of the treasury the current prices of all articles usually exported to the United States.[52] Consuls are also required to perform many duties connected with commerce and shipping, such as re-

33. In re Madaloni, 79 Misc. 653, 141 NYS 323; Matter of Riccardo, 79 Misc. 371, 140 NYS 606; In re Lombardi, 78 Misc. 689, 138 NYS 1007; In re D'Adamo, 141 NYS 1103; In re Baglieri, 137 NYS 175.

34. In re Nagy, 143 NYS 848; In re Vukelic, 143 NYS 679; In re Jarema, 137 NYS 176.

35. Rocca v. Thompson, 223 U. S. 317, 330, 32 SCt 207, 56 L. ed. 453 [aff 157 Cal. 552, 108 P 516, 137 AmSR 145, 37 LRANS 549]; Lanfear v. Ritchie, 9 La. Ann. 96; Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 NW 300; Matter of Logiorato, 34 Misc. 31, 69 NYS 507. But see New York cases infra note 36.

36. Carpigiani v. Hall, 172 Ala. 287, 55 S 248, AnnCas1913D 651; McEvoy v. Wyman, 191 Mass. 276, 77 NE 379, 114 AmSR 601; In re Sinovcic, 80 N. J. Eq. 260, 86 A 917; Matter of Scutella, 145 App. Div. 156, 129 NYS 20; Matter of Silvetti, 66 Misc. 394, 122 NYS 400; In re Lobrasciano, 38 Misc. 415, 77 NYS 1040; Matter of Fattosini, 33 Misc. 18, 67 NYS 1119. It has been said in New York, however, that since the decision of the United States supreme court, supra, "authority for the right of a consular officer of a foreign government to administration upon the estate of one of his majesty's subjects must be looked for elsewhere than in the treaty with Argentina." In re Vukelic, 143 NYS 679, 681. And see In re D'Adamo, 141 NYS 1103; In re Baglieri, 137 NYS 175.

37. In re Holmberg, 193 Fed. 260; Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 NW 300. As Shaw, J., in In re Ghio, 157 Cal. 552, 557, 108 P 516, 137 AmSR 145, 37 LRANS 549 [aff 223 U. S. 317, 32 SCt 207, 56 L. ed. 453] said: "The question presented would directly affect the right of administration upon the estates of all citizens of all the above named countries residing in this state, of whom there is doubtless a large number. It is also of grave importance because its solution in favor of the appellant necessarily ascribes to the federal government the intent, by means of its treaty-making power, to materially abridge the autonomy of the several states and to interfere with and direct the state tribunals in proceedings affecting private property within their jurisdictions. It is obvious that such intent is not to be lightly imputed to the federal government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it."

38. Matter of Tartaglio, 12 Misc. 245, 33 NYS 1121.

[a] **The Italian consul has the right to represent alien minors,** next of kin of a deceased Italian subject, on the judicial settlement of the accounts of the administrator of the deceased, and the appointment of a special guardian for such minors after the consul has appeared is improvident and should be vacated. Matter of Bristow, 63 Misc. 637, 118 NYS 686.

39. Matter of Peterson, 51 Misc. 367, 101 NYS 285.

Citation on probate of wills see generally Wills [40 Cyc 1263].

40. Matter of Peterson, 51 Misc. 367, 101 NYS 285; 7 Op. Atty.-Gen. 242, 270.

[a] **Distributive shares,** to which persons residing in this country are entitled, from the estate of a person dying in the country where his consulate is located are property which the consul is entitled to receive. Matter of Tartaglio, 12 Misc. 245, 33 NYS 1121.

41. 7 Op. Atty.-Gen. 242, 274.

42. See generally Marriage [26 Cyc 821].

43. 7 Op. Atty.-Gen. 18.

44. U. S. Rev. St. § 4082.

45. 7 Op. Atty.-Gen. 18.

46. Loring v. Thorndike, 5 Allen (Mass.) 257 (where it was held that the civil act of the free city of Frankfort-on-the-Main, requiring marriages to be solemnized in a particular form, did not apply to foreigners temporarily residing there).

47. Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539 (where it appeared that plaintiff, the consul general of Turkey, contracted with defendant to use his influence with a purchasing agent of his government to aid defendant in obtaining a favorable report on its goods from such agent, whereby it could obtain a contract for the sale of such goods to the government, the consideration being a percentage on all sales made to the government); Hall v. Coppell, 7 Wall. (U. S.) 542, 19 L. ed. 244 (where it was held that a contract, made by a consul of a neutral power with a citizen of a belligerent state, that he will protect from capture by the belligerent merchandise which the citizen has in the enemy's lines, is void, as against public policy).

48. The Benito Estenger, 176 U. S. 568, 20 SCt 489, 44 L. ed. 592; Rogers v. The Amado, 20 F. Cas. No. 12,005, Newb. Adm. 400; The Hope, 1 Dods. 226. See also Hall v. Coppell, 7 Wall. (U. S.) 542, 19 L. ed. 244.

49. U. S. Rev. St. § 1707.

50. U. S. Rev. St. § 1708.

51. U. S. Rev. St. §§ 1709 et seq. See supra § 36 note.

52. U. S. Rev. St. §§ 1712, 1713.

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ceiving the deposit of ships' registers,[53] seeing to the return of destitute seamen to the United States,[54] taking measures for the purpose of saving vessels stranded within their consulates and securing the effects and merchandise saved,[55] and the like. The details of the powers of consuls in these and numerous other matters must be sought in the statutes of the United States and in the United States consular regulations.

[§ 41] **H. Notarial Functions.** By the United States Revised Statutes consuls are invested within their districts with the functions of notaries public, such as administering oaths, and taking depositions and acknowledgments.[56]

English statutes contain like provisions.[57]

X. CONSULAR COURTS[58]

[§ 42] **A. Judicial Powers in General.** As a general rule principles of international law afford no warrant for the exercise of judicial powers by consuls; and their rights and duties in that capacity, both as to authority and extent, are dependent upon treaties.[59] Such powers are usually conferred upon consuls of christian nations in nonchristian countries for the decisions of controversies between their fellow citizens or subjects residing or commorant there, and for the punishment of crimes committed by them.[60]

[§ 43] **B. Jurisdiction.** Consular jurisdiction depends on the general law of nations, subsisting treaties between the two governments affected by it,

53. U. S. Rev. St. §§ 4309, 4310. See Shipping [36 Cyc 15].

54. U. S. Rev. St. §§ 4577–4578. See Seamen [35 Cyc 1204].

55. U. S. Rev. St. § 4238.

56. U. S. Rev. St. § 1750. The statute provides also for the punishment of perjury committed in oaths or depositions taken before consuls, and for forgery of consular seals or signatures to such documents.

Power to administer oath see Oaths and Affirmations [29 Cyc 1302 text and note 31].

Power to take acknowledgments see Acknowledgments § 108.

Power to take depositions see Depositions [13 Cyc 846 et seq].

[a] **Certifying to the official character of a foreign notary** is not a notarial act. Notarial Powers of Consuls, 12 Op. Atty.-Gen. 1.

57. St. 18 & 19 Vict. c 42; Taylor Ev. (8th Eng. ed) § 1567.

58. **Consular courts in China.**—For a discussion of the organization and jurisdiction of consular courts in China see 34 AmLRev 826.

59. Ross v. McIntyre, 140 U. S. 453, 11 SCt 897, 35 L. ed. 581 [aff 44 Fed. 185]; Dainese v. Hale, 91 U. S. 13, 23 L. ed. 190; The Nereide, 9 Cranch (U. S.) 388, 3 L. ed. 769; In re Wildenhus, 28 Fed. 924 [aff 120 U. S. 1, 7 SCt 385, 30 L. ed. 565]; U. S. v. Craig, 28 Fed. 795; In re Aubrey, 26 Fed. 848; The William Harris, 29 F. Cas. No. 17,695, 1 Ware 373; 2 Op. Atty.-Gen. 378; Wharton Dig. Int. L. § 124; Wheaton Int. L. (8d Eng. ed) 175.

[a] **Origin and basis of consular jurisdiction.**—In Dainese v. Hale, 91 U. S. 13, 15, 23 L. ed. 190, Bradley, J., said: "It cannot be contended that every consul, by virtue of his office, has power to exercise the judicial functions claimed by the defendant; for it is conceded that this is not the case in Christian countries. And whilst, on the other side, it is also conceded that in Pagan and Mahometan countries it is usual for the ministers and consuls of European States to exercise judicial functions as between their fellow-subjects or citizens, it clearly appears that the extent to which this power is exercised depends upon treaties and laws regulating such jurisdiction. The instructions given by the British Foreign Office to their consuls in the Levant in 1844, as quoted by Mr. Phillimore, do not claim anything more. They say, 'The right of British consular officers to exercise any jurisdiction in Turkey in matters which in other countries come exclusively under the control of the local magistracy depends originally on the extent to which that right has been conceded by the sultans of Turkey to the British crown; and, therefore, the right is strictly limited to the terms in which the concession is made. The right depends, in the next place, on the extent to which the Queen, in the exercise of the power vested in her Majesty by act of Parliament, may be pleased to grant to any of her consular servants authority to exercise jurisdiction over British subjects.' Int. Law, vol. ii, p. 273, sect. 276. Historically, it is undoubtedly true, as shown by numerous authorities quoted by Mr. Warden in his treatise on 'The Origin and Nature of Consular Establishments,' that the consul was originally an officer of large judicial as well as commercial powers, exercising entire municipal authority over his countrymen in the country to which he was accredited. But the changed circumstances of Europe, and the prevalence of civil order in the several Christian States, have had the effect of greatly modifying the powers of the consular office; and it may now be considered as generally true, that, for any judicial powers which may be vested in the consuls accredited to any nation, we must look to the express provisions of the treaties entered into with that nation, and to the laws of the States which the consuls represent."

[b] **Among christian nations** the jurisdiction of consuls is generally confined to the decision of controversies in civil cases arising between the merchants, seamen, and other subjects of the state, in foreign countries; to the registering of wills, contracts, and other instruments executed in the presence of the consul; and to the administration of the estates of their fellow subjects deceased within the territorial limits of the consulate. Wheaton Int. L. (Dana ed) § 110.

[c] **Where treaty stipulations exist** with regard to the right of foreign consuls to adjudge controversies, (1) they should be faithfully observed (The Steamship Belgenland v. Jensen, 114 U. S. 355, 5 SCt 860, 29 L. ed. 152); and (2) where this jurisdiction is in terms only such as is allowed by the laws of the country or by its usage in its intercourse with other nations, those laws or usages must be proved in order to show the precise extent of such jurisdiction (Dainese v. Hale, 91 U. S. 13, 23 L. ed. 190).

60. See for instance the treaties of the United States with Persia (11 U. S. St. at L. 710); with Turkey (8 U. S. St. at L. 409). See also Ross v. McIntyre, 140 U. S. 453, 11 SCt 897, 35 L. ed. 581 [aff 44 Fed. 185]; Dainese v. Hale, 91 U. S. 13, 23 L. ed. 190; Forbes v. Scannell, 13 Cal. 243; Dainese v. Hale, 1 McArthur (D. C.) 86.

[a] **The importance of consular courts in other than christian countries** has been continually recognized, although their powers are more carefully defined now than formerly. Ross v. McIntyre, 140 U. S. 453, 11 SCt 897, 35 L. ed. 581; 2 Phillimore Int. L. 337 et seq.

[b] **Exterritoriality of foreign christians.**—(1) The usage that Franks, while in Turkey, shall be under the jurisdiction of their respective ministers or consuls is a part of the international law of Europe; and it is therefore a part of the public law of the United States, derived from the common law (of which international law is a part), and not dependent upon treaty, that American consuls in Mohammedan countries exercise judicial powers. As used in the further article of the treaty of 1830 with Turkey, which provides for the exercise of judicial powers by consuls, and is silent as to vice consuls, the word "consul" should be understood as embracing all consular officers. Dainese v. U. S., 15 Ct. Cl. 64. (2) In the case of In re Ross, 140 U. S. 453, 462, 11 SCt 897, 35 L. ed. 581, Field, J., said: "The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are termed the Middle Ages. During those ages these commercial magistrates, generally designated as consuls, possessed to some extent a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offenses. After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offense, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people. The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein." (3) "The general doctrine thus in force in the Levant, of the exterritoriality of foreign Christians, has given rise to a complete system of peculiar municipal and legal administration, consisting of,— 1. Turkish tribunals for questions between subjects of the Porte and foreign Christians. 2. Consular courts for the business of each nation of foreign Chris-

and the obligatory force and activity of the rule of reciprocity.[61]

Special treaty stipulations conferring jurisdiction on consuls. Numerous special treaties exist between the United States and nations of Europe giving exclusive jurisdiction over disputes between citizens of the respective parties,[62] especially between masters, officers, and crews of vessels,[63] including questions of wages,[64] to the consuls of the contracting parties. Such a treaty has almost uniformly been held to take away all right of action in the courts of this country by a seaman coming within the scope of the treaty, whether the action is in rem or in personam.[65] Where defendant is a citizen of another country, it has been held that the consular court can exercise no jurisdiction, either civil or criminal.[66] A foreigner may, however, voluntarily submit to the jurisdiction of such

tians. 3. Trial of questions between foreign Christians of different nations in the consular court of the defendant's nation. 4. Mixed tribunals of Turkish magistrates and foreign Christians, at length substituted in part for cases between Turks and foreign Christians. 5. Finally, for causes between foreign Christians, the substitution at length of mixed tribunals in place of the separate courts,—an arrangement introduced first by the legations of Austria, Great Britain, France, and Russia, and then tacitly acceded to by the legations of other foreign Christian nations." Dainese v. Hale, 91 U. S. 13, 19, 23 L. ed. 190 [quot Consuls Manual of December, 1862, §§ 169–171].

[c] **British consular courts in Turkey.**—(1) The Ottoman government allows Great Britain to have jurisdiction between British subjects and subjects of other christian states within Ottoman territory, and this jurisdiction is exercised by consular courts. The Laconia, 2 Moore P. C. N. S. 162, 15 Reprint 862. See also Messina v. Petrococchino, L. R. 4 P. C. 144; Bulkeley v. Schutz, L. R. 3 P. C. 764, 8 Moore P. C. N. S. 170, 17 Reprint 276. (2) The British consular court at Constantinople has jurisdiction in cases of collision within Turkish waters, and can exercise such jurisdiction in rem and in personam. The Laconia, supra. (3) While these consular courts have no compulsory power over any persons except British subjects, yet foreigners may of their own accord submit to the jurisdiction of such courts with the consent of their sovereign. The Laconia, supra. (4) As to the procedure in these courts see Pitts v. La Fontaine, 5 App. Cas. 564.

61. In re Aubrey, 26 Fed. 848. See also Treaties [38 Cyc 966 text and note 61].

[a] **Foreign consuls** have no jurisdiction within the territory of the United States except by force of treaty stipulations. Glass v. The Betsey, 3 Dall. (U. S.) 6, 1 L. ed. 485 (admiralty jurisdiction); In re Aubrey, 26 Fed. 848 (where it was held that while a British consul had authority under British statutes to deal with an offense committed by a British subject on board a British ship in British domains, yet he had no authority to demand that his jurisdiction be effectuated by process from a United States court under U. S. Rev. St. § 728. That section only gives to the courts of the United States power to enforce the judgments and awards of foreign consuls where jurisdiction is vested in them by treaty stipulation).

62. See Convention of 1778 between France and America.

[a] **All disputes between French citizens** (1) must be determined by the French consul. Bertrandt v. Gautier, 1 Yeates (Pa.) 371; Goddard v. Luby, 1 S. C. L. 440. (2) Such jurisdiction, under the convention of 1778, did not extend generally to all matters of differences, but was confined to the description of cases therein enumerated. Villeneuve v. Barrion, 2 Dall. (Pa.) 235 note.

[b] **A French subject who never assented to the republic** but, leaving the French West Indies, settled in the United States was not a French citizen for the purpose of consular jurisdiction. Caignet v. Pettit, 2 Dall. (Pa.) 234, 1 Yeates 546.

63. U. S. Consular Regulations (1888) p 25. See also 7 AmLRev 417.

[a] **Consuls of Norway and Sweden.**—By treaty between the United States and the kingdom of Norway and Sweden (8 U. S. St. at L. 352), all differences arising between the captains and crews of vessels belonging to that kingdom shall be settled by the consuls thereof without the intervention of the local authorities, and an American citizen who ships as a seaman of a foreign vessel is within the purview of this treaty. Ex p. Anderson, 184 Fed. 114; The Marie, 49 Fed. 286. See also The Welhaven, 55 Fed. 80; Norberg v. Hillgreu, 5 NYLegObs 177.

[b] **Belgian consuls—"Internal order of the merchant vessels."**—The treaty between the United States and Belgium, which gives to the consuls of the latter "exclusive charge of the internal order of the merchant vessels of their nation," and declares that they alone shall "take cognizance of differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception, particularly in reference to the adjustment of wages and the execution of contracts," does not confer on said consuls authority to take cognizance of crimes and offenses committed against the local laws of the country. The treaty makes no provision for the creation and organization of a consular court, nor does it even authorize the consul to act as a committing magistrate. In re Wildenhus, 28 Fed. 924 [aff 120 U. S. 1, 7 SCt 385, 30 L. ed. 565].

[c] **Status of consuls of "most favoured nation."**—It seems that consuls to the United States of a foreign nation whose consuls are by treaty upon the footing of those of "the most favoured nation" are not entitled to jurisdiction in cases of this kind, and that for vesting such a jurisdiction a special convention is necessary, the terms of which have been specifically designated and not left to inferences or general construction. Weiberg v. The St. Oloff, 29 F. Cas. No. 17,357, 2 Pet. Adm. 428.

[d] **False imprisonment.**—Where a constable arrested the captain of a Norwegian vessel, acting under process issued from a state court, in a controversy over which, by treaty between the United States and the kingdom of Norway and Sweden, the consul of the latter had exclusive jurisdiction, the constable at the time of making the arrest being fully informed of the provisions of the treaty, it was held that he was liable in an action of tort for false imprisonment. Tellefsen v. Fee, 168 Mass. 188, 46 NE 562, 45 LRA 481, 60 AmSR 379.

[e] **Assault by master upon seaman — No consular jurisdiction.**—Where the master of an Italian vessel in one of the ports of the United States is guilty of a barbarous and malicious assault on a seaman of such vessel he is not protected by the terms of the consular compact between the United States and the kingdom of Italy, and the United States district court may, in its discretion, take jurisdiction of the case for the protection of the seaman and the redress of his wrongs. The Salomoni, 29 Fed. 534. See also Enos v. Sowle, 2 Hawaiian 332 (interpreting the treaty between France and the Hawaiian Islands, and holding that it does not give consuls exclusive jurisdiction over crimes on the high seas).

64. See 7 AmLRev 417 (where many of these treaties are referred to). Later treaties were made with The Netherlands in 1855 (10 U. S. St. at L. 1150, 1155); with Denmark in 1861 (13 U. S. St. at L. 605); with Germany in 1871 (17 U. S. St. at L. 921, 928); and with Italy in 1878 (20 U. S. St. at L. 725, 729).

[a] **Swedish consuls** have exclusive jurisdiction in questions between the masters and crews of Swedish vessels relating to wages. Tellefsen v. Fee, 168 Mass. 188, 46 NE 562, 60 AmSR 379, 45 LRA 481.

[b] **Prussian consuls** were given similar powers under the treaty of 1828, and the decision of such a consul in a case between the captain and crew of a Prussian vessel is not subject to review or interference by the United States district court. The Elwine Kreplin, 8 F. Cas. No. 4,426, 9 Blatchf. 438 [rev 8 F. Cas. No. 4,427, 4 Ben. 413].

[c] **Libel for wages.**—(1) Under the treaty between the United States and Italy by which the consular officers of the contracting parties are given exclusive jurisdiction in cases between masters and crews, especially "those relating to wages," a justice of the peace has no power, under §§ 4546, 4547 of the Revised Statutes of the United States, to compel the clerk of the United States district court to issue admiralty process against an Italian ship for the wages of a seaman thereon. The Salomoni, 29 Fed. 534. (2) In similar cases arising on German ships the German consul has, by treaty, exclusive jurisdiction. The Burchard, 42 Fed. 608. See also The Koenigin Luise, 184 Fed. 170.

65. The Burchard, 42 Fed. 608; The Salomoni, 29 Fed. 534; The Elwine Kreplin, 8 F. Cas. No. 4,426, 9 Blatchf. 438 [rev 8 F. Cas. No. 4,427, 4 Ben. 413]; Tellefsen v. Fee, 168 Mass. 188, 46 NE 562, 60 AmSR 379, 45 LRA 481; Norberg v. Hillgreu, 5 NYLegObs 177; Meyer v. Basson, 10 Phila. (Pa.) 414.

[a] **Seaman never legally member of crew.**—A seaman claiming wages for services rendered is not to be deemed a member of the crew of a ship, and obligated to submit differences respecting his rights to the determination of a representative of a foreign government, if he was never legally bound to serve as a member of its crew for a specified voyage or a definite period of time. The Neck, 138 Fed. 144.

[b] **A subject of a foreign government who enlists as one of the crew of an American ship** becomes, temporarily, a subject of the United States, so as to give the consular tribunal of the United States in a foreign country jurisdiction to try offenses committed by him on board the ship. In re Ross, 44 Fed. 185 [aff 140 U. S. 453, 11 SCt 897, 35 L. ed. 581].

66. 11 Op. Atty.-Gen. 474; Pitts v. La Fontaine, 5 App. Cas. 564 (holding that the fact that a native of Turkey marries a British subject does not give a consular court jurisdiction over her real property so that it can compel a sale by a decree in personam); The Laconia, 2 Moore P. C. N. S. 161, 15 Reprint 862.

[a] **In a suit for the dissolution of a partnership and an accounting,** an English consular court in Turkey has power to order the receiver to sell at auction land owned by the partnership, although the partners have not taken advantage of the protocol authorizing British subjects to hold land in Turkey, and still hold it in the name of a subject of the sultan. Abbott v. Abbott, L. R. 6 P. C. 220.

a court.[67]

Where there is no consular representative within the jurisdiction the federal courts have jurisdiction.[68]

[§ 44] **C. Regulation of Consular Courts and Procedure.** The consular courts of the United States in several eastern countries are, as far as is consistent with treaty provisions, regulated by the statutes of the United States.[69] Rights are administered in accordance with the laws of the United States where possible, or according to the common law and the law of equity and admiralty. Where these fail to furnish an appropriate remedy, the ministers to the countries including the courts may issue decrees having the force of law.[70] The ministers of the United States are also authorized to prescribe the methods of procedure in the consular courts.[71] These latter are courts of limited jurisdiction, and all the jurisdictional facts must be alleged in the libel or petition, otherwise it will not be sufficient.[72]

[§ 45] **D. Appeals from Consular Courts.** Appeals from the judgment of consular courts are provided for to the United States minister to the country where the courts are situated, who also has original jurisdiction in certain grave felonies.[73] Further appeals from the judgments of the consular courts of China and Japan lie in certain cases to the United States circuit court (now the district court) for the district of California.[74] On an appeal in such cases a citation is necessary unless the appeal is allowed in open court;[75] and the record consists of the transcript of the libel, bill, answer, depositions, and all other proceedings in the case.[76] A sum of money deposited in the registry of the consular court in lieu of a bond is sufficient security on an appeal to the court, where the deposit was taken without objection.[77]

[§ 46] **E. Judgment or Sentence.** While the judgments of a consular court are entitled to considerable weight, they are not conclusive of the questions adjudicated.[78] Such judgments cannot be revised by the courts of another nation; but the nature and jurisdiction of the court may be examined,[79] and one relying on its judgment as a bar is required to establish that the tribunal has jurisdiction by treaty, usage, or voluntary submission.[80]

Execution of sentence. In the absence of express legislative authority, a sentence of imprisonment pronounced by a consular court cannot be executed beyond the territorial limits of such court.[81]

XI. CONSULAR FEES

[§ 47] **A. In General.** The president is authorized to prescribe, from time to time, the rates or tariffs of fees to be charged for official services, and to designate what shall be regarded as official services, besides such as are expressly declared by law, in the business of the several consulates and commercial agencies, and to adapt the same, by such changes as may be necessary or proper, to each consulate or commercial agency; and the officers must collect and account for only such fees as are prescribed for respective consulates and agencies.[82] There are but two limitations upon his power—one expressed, which prevents him from declaring a fee to be unofficial which the law declares official, and one implied, which prevents him from prescribing a fee for a service which the law

[b] **Where a railway company is a complete and existing corporation in a foreign country,** a consular court cannot issue a sequestration against members resident in its jurisdiction for failure to comply with an order by it to register the company as one of limited liability under the English acts. Bulkeley v. Schutz, L. R. 3 P. C. 764, 8 Moore P. C. N. S. 170, 17 Reprint 276.

67. The Laconia, 2 Moore P. C. N. S. 161, 15 Reprint 862.

68. The Amalia, 3 Fed. 652 (where the United States district court in Maine entertained a libel against a Swedish vessel on the ground that there was no consular representative of Sweden in the district of Maine).

69. U. S. Rev. St. § 4083 et seq; 1 U. S. Rev. St. Suppl. (2d ed) 180.

[a] **Trial by jury.**—The guaranties of the constitution against accusation of capital or infamous crimes except by indictment by a grand jury, and for a trial by a jury when thus accused, do not apply to cases of which a consular court has jurisdiction, but the trial must be conducted in accordance with the provisions of the treaty by which authority is given for the establishment of the tribunal. Ross v. McIntyre, 140 U. S. 453, 11 SCt 897, 35 L. ed. 581. See also Ex p. Carew, [1897] A. C. 719 (holding that a British subject, on trial before a consular court for murder, was not entitled to demand trial by a jury of twelve). See also generally Juries [24 Cyc 104, 105].

[b] **Distinct causes of action cannot be joined** in an action in a consular court. Peninsular, etc., Steam Nav. Co. v. Tsune Kijima, [1895] A. C. 661. As to joinder and splitting of causes of action generally see Actions §§ 188–207.

70. U. S. Rev. St. § 4086.

71. U. S. Rev. St. § 4117.

72. The Spark v. Lee Choi Chum, 22 F. Cas. Nos. 13,206, 1 Sawy. 713. Compare In re Aubrey, 26 Fed. 848 (where it is said that when a British consul, in a matter of discipline, is dealing with British subjects on board of a British ship courts of the United States are not called upon to look for his jurisdiction further than the instructions issued by the British foreign office).

73. U. S. Rev. St. §§ 4089–4092; The Ping-On v. Blethen, 11 Fed. 607, 7 Sawy. 482.

74. U. S. Rev. St. §§ 4093–4096.

[a] **The appellate jurisdiction of the former circuit court** in cases exceeding two thousand five hundred dollars was not limited by the statutory provision that, when the damages demanded in a consular court exceed five hundred dollars, the consul must summon not less than two nor more than three other citizens of the United States to sit with him, and, if either of such associates differ in opinion from him, either party may appeal to the minister of the United States, but it was merely to prescribe the conditions and limitations under which the consular jurisdiction should be exercised. The Ping-On v. Blethen, 11 Fed. 607, 7 Sawy. 482.

75. The Spark v. Lee Choi Chum, 22 F. Cas. No. 13,206, 1 Sawy. 713; Tazaymon v. Twombley, 23 F. Cas. No. 13,810, 5 Sawy. 79.

Citation on appeal generally see Appeal and Error [2 Cyc 859].

76. Tazaymon v. Twombley, 23 F. Cas. No. 13,810, 5 Sawy. 79.

[a] **The record must show** (1) an allowance of the appeal (Tazaymon v. Twombley, 23 F. Cas. No. 13,810, 5 Sawy. 79; Spark v. Lee Choi Chum, 22 F. Cas. No. 13,206, 1 Sawy. 713), and (2) should be a single document, certified at the end as being a full and correct copy of the proceedings in the case, and authenticated by the official signature and seal of the consul (Tazaymon v. Twombley, supra). Generally as to requisites of record on appeal see Appeal [2 Cyc 1025 et seq].

77. The Ping-On v. Blethen, 11 Fed. 607, 7 Sawy. 482.

78. The Elwin Kreplin, 8 F. Cas. No. 4,427, 4 Ben. 413, 429 (where the court said: "The consul is not a court, and neither his record nor his testimony is conclusive on this court." This case was reversed by the circuit court on the ground that this court was prohibited, under the treaty with Prussia, from exercising jurisdiction. The Elwine Kreplin, 8 Fed. Cas. No. 4,426, 9 Blatchf. 438); Forbes v. Scannell, 13 Cal. 243.

[a] **In England** (1) it has been held that a plea of judgment recovered in an action brought in a consular court in a foreign country, and payment by defendant of the amount, is a bar to an action brought in England for the same cause. Barber v. Lamb, 8 C. B. N. S. 95, 98 ECL 95, 141 Reprint 1100. (2) But proceedings in a British consular court in Egypt do not debar plaintiff in England from recovering from the captain of a ship, plaintiff in the consular court, an amount paid to him in excess of what he was entitled to demand. Tamvaco v. Simpson, 13 L. T. Rep. N. S. 160.

79. Cheriot v. Foussat, 3 Binn. (Pa.) 220. See also Messina v. Petrocochino, L. R. 4 P. C. 144; Dent v. Smith, L. C. 4 Q. B. 414.

80. The Griefswald, Swab. 430.

81. Wharton Dig. Int. L. § 125; 19 Op. Atty.-Gen. 377; 14 Op. Atty.-Gen. 522.

82. U. S. v. Mosby, 133 U. S. 273, 10 S. Ct. 327, 33 L. ed. 625; U. S. v. Badeau, 33 Fed. 572 [aff 31 Fed. 697 (app dism 140 U. S. 701 mem, 11 SCt 1029 mem, 35 L. ed. 597 mem)]; Stahel v. U. S., 26 Ct. Cl. 193; U. S. Rev. St. (1878) §§ 1745, 1747; U. S. Cons. Reg. (1896) § 518.

[a] **The inhibition on consular officers, as to the collection of fees,** (1) is only against the collection, for their official services, of other than the prescribed fees. U. S. v. Mosby,

declares shall be rendered gratuitously.[83] Subject to these limitations the president may at any time transfer a fee from the unofficial to the official schedule or vice versa, or he may increase, diminish, or abolish a fee, and his directions in this regard are binding upon the officers of the consular service.[84]

Official and nonofficial fees. A consul is required to account to the United States for official fees,[85] but nonofficial fees are the personal emoluments of the consul himself.[86] Whether the fees are official or nonofficial is a question of law, where there is no conflict of evidence as to what the acts were for which the fees were received by the consul.[87] Where a consul has retained fees to which he is not entitled, interest may be recovered on the amount so retained from the time he actually received a demand therefor from the government.[88]

In England it has been held that if a consul acts between party and party, although he acts as consul, he may receive fees; but if he acts for his government, he is not entitled to fees.[89]

[§ 48] **B. Of Consular Agents.** A consular agent obtains his compensation from legal fees coming into his custody, and the amount of his compensation is dependent upon his receipts.[90] Such an agent is entitled to deduct from the receipts of any quarter of the fiscal year fees sufficient to equal his full annual compensation allowed by law.[91] He has no direct connection, in the matter of accounting, with the department of state. He is under the control and supervision of the consul, and to him only does he report.[92]

[§ 49] **C. Recovery of Fees Paid Over by Mistake.** Before final settlement of his consular accounts a consul may recover back money belonging to himself which he has paid over to the government by mistake.[93] After final settlement, however, such a payment to the government will be considered voluntary, so as to preclude a recovery, irrespective of the question of his original right to the fees.[94]

133 U. S. 273, 10 S. Ct. 327, 33 L. ed. 625. (2) Thus a consul in a foreign port, before whom a seaman is discharged, is not entitled to a commission on money paid in settlement of such charges. Hathaway v. Jones, 11 F. Cas. No. 6,212, 2 Sprague 56. See also U. S. Rev. St. (1878) § 1719.

83. Stahel v. U. S., 26 Ct. Cl. 193.

84. Stahel v. U. S., 26 Ct. Cl. 193.

[a] **Construction by state department controls.**—The construction by the state department of the regulations issued to consuls by the secretary of state, defining what acts are to be deemed official and what nonofficial, is controlling, in case of doubt, and should conclude the accounting officers of the treasury department. U. S. v. Badeau, 31 Fed. 697 [app dism 140 U. S. 701 mem, 11 SCt 1029 mem, 35 L. ed. 597 mem].

85. U. S. v. Mosby, 133 U. S. 273, 10 SCt 327, 33 L. ed. 625.

[a] **The following fees must be accounted for** to the United States: Fees which a consul collects for certifying extra copies of quadruplicate invoices on goods shipped to the United States; fees for certifying invoices for free goods imported into the United States; and fees collected for certificates of shipment of extra invoices. U. S. v. Mosby, 133 U. S. 273, 10 SCt 327, 33 L. ed. 625.

[b] **Fee for services as administrator.**—Under U. S. Rev. St. § 1709, which makes it the duty of consuls and vice consuls to administer upon the personal estate left by Americans dying within their consulates, and under Consular Regulations (1888) par 508 item 56, the fee of five per cent allowed for such services is an official fee, to be accounted for to the treasury. U. S. v. Eaton, 169 U. S. 331, 18 SCt 374, 42 L. ed. 767.

[c] **Interest on public moneys,** deposited by the consul in bank, cannot be retained by the consul. U. S. v. Mosby, 133 U. S. 273, 10 S. Ct. 327, 33 L. ed. 625.

[d] **Embezzlement by consular agent.**—A consul cannot be held liable for fees embezzled by a consular agent, within the limits of his consulate, where he had been instructed that such agency had been created an independent consulate. Sampson v. U. S., 30 Ct. Cl. 365.

86. Boyd v. U. S., 31 Ct. Cl. 158 (holding that consular fees received for unofficial and notarial services, and for fees and fines collected in the consular courts, belong to the consul).

[a] **The following fees are not moneys which a consul is required to account for** to the United States: Those collected by a consul for the examination of Chinese immigrants going to the United States on foreign vessels; for cattle disease certificates; for shipping and discharging seamen on foreign vessels sailing on the Chinese coast under the United States flag; for settling private estates; for acknowledgments and authentications of instruments certifying the official character and signature of notaries public; for certifying shipments of merchandise in transit through the United States to other countries. U. S. v. Mosby, 133 U. S. 273, 10 SCt 327, 33 L. ed. 625. See also Wilson v. U. S., 32 Ct. Cl. 64; Goldsborough v. U. S., 25 Ct. Cl. 73.

[b] **Fees received by a consul while acting independently of the authority of the government** (1) are not official, and may be retained by him without rendering any account of them. U. S. v. Badeau, 33 Fed. 572 [aff 31 Fed. 697 (app dism 140 U. S. 701 mem, 11 SCt 1029 mem, 35 L. ed. 597)]. (2) Thus fees received by a consular officer for taking affidavits, acknowledgments, and authentications for individuals, in transactions having no relation, direct or remote, to the official business of the government, are for services not required by consular regulations, and are the personal emoluments of the officer, for which he is not required to account to the treasury department. U. S. v. Badeau, 31 Fed. 697 [app dism 140 U. S. 701 mem, 11 SCt 1029 mem, 35 L. ed. 597 mem].

[c] **The fact that there is no legal right to collect a fee** which is listed as official does not entitle the consul to retain it. Stahel v. U. S., 26 Ct. Cl. 193.

87. U. S. v. Badeau, 31 Fed. 697 [aff 140 U. S. 701 mem, 11 SCt 1029 mem, 35 L. ed. 597 mem].

88. Marston v. U. S., 71 Fed. 496, 18 CCA 216.

89. De Lama v. Haldimand, 1 C. & P. 183, 12 ECL 114.

90. Mahin v. U. S., 41 Ct. Cl. 1 (holding that a consular agent cannot, by itemization of his account, change the character of the funds received by him).

[a] **The purpose of U. S. Rev. St. §§ 1702, 1733** (U. S. Comp. St. [1901] pp 1177, 1188), and of Consular Regulations (1896) par 510, providing for compensation of consular agents, is both to provide compensation and to simplify settlements with consular agents and to stimulate their activity by allowing them a specified sum out of the fees of their offices. Mahin v. U. S., 41 Ct. Cl. 1.

91. Marston v. U. S., 71 Fed. 496, 18 CCA 216; Mahin v. U. S., 41 Ct. Cl. 1.

[a] **Prorating fees.**—(1) A consular officer who is entitled to retain fees collected by him or by a consular agent under his supervision during any year, up to a fixed limit, and who retires from office during the course of a fiscal year, is not entitled to retain all the fees then collected up to such limit, but only such part of the total annual allowance as is proportioned to the part of the fiscal year during which he has held office. Marston v. U. S., 71 Fed. 496, 18 CCA 216; Mahin v. U. S., 41 Ct. Cl. 1. See also as bearing on this question Collin's App., 5 Lawr. Compt. Dec. 100; U. S. v. Wendell, 28 F. Cas. No. 16,666, 2 Cliff. 340. (2) Where a consul, knowing that his predecessor has allowed a consular agent to retain the entire maximum compensation of the office for the current fiscal year, allows the agent to retain additional compensation for a portion of the year subsequent to his, the consul's, coming into office, he will be responsible for the overpayment. Mahin v. U. S., supra.

92. Mahin v. U. S., 41 Ct. Cl. 1.

93. U. S. v. Owen, 47 Fed. 797; U. S. Badeau, 33 Fed. 572 [aff 31 Fed. 697 (app dism 140 U. S. 701 mem, 11 SCt 1029 mem, 35 L. ed. 597 mem)]; Goldsborough v. U. S., 25 Ct. Cl. 73 (holding that a consul who desires to recover fees turned over to his government through mistake must show definitely the amount).

[a] **Mistake of law and fact.**—Where a consul, sued for the balance of alleged consular fees claimed by the government, proved that he had always retained a sum in excess of the amount claimed, although this had, in early accounts, been credited to the treasury department, and it apeared that the moneys were not official fees but legally belonged to the consul, it was held that this did not show a voluntary payment to the government of the fees in question so as to preclude defendant from resisting a recovery of the amount erroneously returned in his former accounts; and that the ruling of the state department, and the tabular list of fees promulgated by the president, apparently including the fees in question, until a revision and different ruling by the state department, made the case one of accounting under a mistake of mixed law and fact, and were not conclusive upon defendant. U. S. v. Badeau, 33 Fed. 572 [aff 31 Fed. 697 (app dism 140 U. S. 701 mem, 11 SCt 1029 mem, 35 L. ed. 597 mem)].

94. U. S. v. Wilson, 168 U. S. 273, 18 SCt 85, 42 L. ed. 464 (where it was held that where a consul charges himself with fees received by him as consul for which he is not obliged to account, and pays them to the government with each settlement, and retires, and makes his final settlement on the same basis, he cannot, in an action commenced after his retirement, recover back such payments, but they will be deemed voluntary).

AMBIDEXTER. One who can use the left hand as well as the right.[1]

AMBIGUA RESPONSIO CONTRA PROFERENTEM EST ACCIPIENDA.[2]

AMBIGUIS CASIBUS SEMPER PRÆSUMITUR PRO REGE.[3]

AMBIGUITAS LATENS. That which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity.[4]

AMBIGUITAS PATENS. That which appeareth to be ambiguous upon the deed or instrument.[5]

AMBIGUITAS VERBORUM LATENS VERIFICATIONE SUPPLETUR; NAM QUOD EX FACTO ORITUR AMBIGUUM VERIFICATIONE FACTI TOLLITUR.[6]

AMBIGUITAS VERBORUM PATENS NULLA VERIFICATIONE EXCLUDITUR.[7]

AMBIGUITY. [§ 1] **A. In General.** Doubtfulness;[8] doubtfulness or uncertainty, particularly of signification;[9] difficult to comprehend or distinguish;[10] double meaning;[11] duplicity;[12] indistinctness;[13] uncertainty of meaning of an expression used in a written instrument;[14] of doubtful or uncertain nature; of doubtful purport; to various interpretations;[15] uncertainty;[16] uncertainty of meaning in the terms of a written instrument;[17] uncertainty of meaning or expression used in a written instrument;[18] the quality or state of being ambiguous;[19] wanting clearness or definiteness;[20] in short, the effect of words that have either no definite sense or else a double one.[21]

[§ 2] **Ambiguity is of two kinds,** patent and latent.[22]

A patent ambiguity is one which arises upon the words of the instrument as looked at in themselves, and before any attempt is made to apply them to the object which they describe.[23]

1. Burrill L. D.

[a] **Applied in ancient times** first, to an attorney who took pay from both sides, and, subsequently, to a juror who did the same. Cowell L. D. [cit Bouvier L. D.].

2. A maxim meaning "An ambiguous answer is to be taken against [is not to be construed in favor of] him who offers it." Burrill L. D.

3. A maxim meaning "In doubtful cases the presumption is always in favor of the king." Morgan Leg. Max.

4. Putnam v. Bond, 100 Mass. 58, 60, 1 AmR 82; Carter v. Holman, 60 Mo. 498, 504 [quot Bacon Max. 25]; Hardy v. Matthews, 38 Mo. 121, 124; Aldrich v. Griffith, 66 Vt. 390, 398, 29 A 376. See also Palmer v. Albee, 50 Iowa 429, 430. Ambiguity post.

5. Carter v. Holman, 60 Mo. 498, 504; Hastings' Est., 15 NYSt 420, 427, 6 Dem. Surr. 307. See also Ambiguity post.

6. A maxim meaning "Latent ambiguity may be supplied by evidence; for an ambiguity which arises by proof of an extrinsic fact may, in the same manner, be removed." Broom Leg. Max.

[a] **Applied in:** Howard v. American Peace Soc., 49 Me. 288, 292; Putnam v. Bond, 100 Mass. 58, 60, 1 AmR 82; Packer's Est., 15 WklyNC (Pa.) 486, 487; Aldrich v. Griffith, 66 Vt. 390, 398, 29 A 376; Staak v. Sigelkow, 12 Wis. 234, 267; Miller v. Travers, 8 Bing. 244, 248, 21 ECL 524, 131 Reprint 395; Doe v. Grant, 7 U. C. Q. B. 125, 130. See also Evidence [17 Cyc 662 et seq].

7. A maxim meaning "A patent ambiguity cannot be cleared up by extrinsic evidence." Black L. D. [cit Lofft 249].

8. Johnson D. [quot Fish v. Hubbard, 21 Wend. (N. Y.) 651, 660].

[a] **Where a complaint is neither doubtful, uncertain, nor equivocal** in its meaning, and enough appears to render it easy of apprehension and free from reasonable doubt, it is not demurrable on the ground of "ambiguity." Kraner v. Halsey, 82 Cal. 209, 213, 22 P 1137.

9. Century D. [quot Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 801, 55 SE 923]; Webster D. [quot Kraner v. Halsey, 82 Cal. 209, 211, 22 P 1137].

10. Century D. [quot Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 801, 55 SE 923].

11. Johnson D. [quot Fish v. Hubbard, 21 Wend. (N. Y.) 651, 660].

[a] **In a broad sense** (1) ambiguity signifies doubtfulness, uncertainty, and double meaning. Fish v. Hubbard, 21 Wend. (N. Y.) 651, 660. (2) But in reference to the rule announced by Lord Bacon that a patent "ambiguity" cannot be explained by parol evidence, the word cannot be construed in its broad sense of doubtfulness, uncertainty, and double meaning. Whalen v. Stephens, 193 Ill. 121, 135, 61 NE 921 [cit Doyle v. Teas, 5 Ill. 202]; Fish v. Hubbard, 21 Wend. (N. Y.) 651.

12. Bouvier L. D. [quot Nindle v. State Bank, 13 Nebr. 245, 246, 13 NW 275]; Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 801, 55 SE 923; Barrett v. Kansas, etc., Coal Co., 70 Kan. 649, 654, 79 P 150; Miller's Est., 26 Pa. Super. 443, 449.

13. Bouvier L. D. [quot Nindle v. State Bank, 13 Nebr. 245, 246, 13 NW 275]; Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 801, 55 SE 923; Barrett v. Kansas, etc., Coal Co., 70 Kan. 649, 654, 79 P 150; Miller's Est., 26 Pa. Super. 443, 449.

14. Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 801, 55 SE 923; Barrett v. Kansas, etc., Coal Co., 70 Kan. 649, 654, 79 P 150; Nindle v. State Bank, 13 Nebr. 245, 246, 13 NW 275; Miller's Est., 26 Pa. Super. 443, 449.

[a] **"Indistinctness, obscurity, and uncertainty" distinguished.**—Ambiguity or duplicity is predicable only of language as to which it is needful to make a choice of meanings, while indistinctness, obscurity, and uncertainty include these, and also cases of language devoid of sense, or which does not present any meaning with clearness or precision. Abbott L. D.

15. Century D. [quot Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 801, 55 SE 923].

16. Johnson D. [quot Fish v. Hubbard, 21 Wend. (N. Y.) 651, 660].

17. Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 801, 55 SE 923; Brown v. Guice, 46 Miss. 299, 302.

18. Bouvier L. D. [quot Nindle v. State Bank, 13 Nebr. 245, 246, 13 NW 275].

19. Webster D. [quot Kraner v. Halsey, 82 Cal. 209, 212, 22 P 1137].

20. Century D. [quot Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 801, 55 SE 923].

21. Ellmaker v. Ellmaker, 4 Watts (Pa.) 89, 90 [quot Holcomb v. Mooney, 13 Or. 503, 11 P 274].

22. Peisch v. Dickson, 19 F. Cas. No. 10,911, 1 Mason 9, 11; Chambers v. Ringstaff, 69 Ala. 140, 144; Dorr v. School Dist. No. 26, 40 Ark. 237, 241; Mesick v. Sunderland, 6 Cal. 297, 312; Walker v. Wells, 25 Ga. 141, 142, 71 AmD 164; Craven v. Butterfield, 80 Ind. 503, 510; Grimes v. Harmon, 35 Ind. 198, 208, 9 AmR 690; Eckford v. Eckford, 91 Iowa 54, 64, 58 NW 1093, 26 LRA 370; Palmer v. Albee, 50 Iowa 429, 431 [cit Bouvier L. D.]; Breckenridge v. Duncan, 2 A. K. Marsh. 50, 12 AmD 359; Stokeley v. Gordon, 8 Md. 496, 505; Herring v. Boston Iron Co., 1 Gray (Mass.) 134, 138; Brown v. Guice, 46 Miss. 299, 301; North Carolina Inst. for Education, etc. v. Norwood, 45 N. C. 65, 69; Webster v. Paul, 10 Oh. St. 531, 534. See also infra notes 23–28.

23. Deery v. Cray, 10 Wall. (U. S.) 263, 270, 19 L. ed. 887; Peisch v. Dickson, 19 F. Cas. No. 10,911, 1 Mason 9, 11; Wolff Truck Frame Co. v. American Steel Foundries, 195 Fed. 940, 944, 115 CCA 628; Shannon Copper Co. v. Potter, 13 Ariz. 245, 250, 108 P 486; Dorr v. School Dist. No. 26, 40 Ark. 237, 241; Mesick v. Sunderland, 6 Cal. 297, 312; Oliver v. Henderson, 121 Ga. 836, 838, 49 SE 743, 104 AmSR 185; Walker v. Wells, 25 Ga. 141, 142, 71 AmD 164; Kaehukukona v. Ahuna, 6 Hawaii 192, 193; Craven v. Butterfield, 80 Ind. 503, 510; Grimes v. Harmon, 35 Ind. 198, 208, 9 AmD 690; Palmer v. Albee, 50 Iowa 429, 431 [cit Bouvier L. D.]; Breckenridge v. Duncan, 2 A. K. Marsh. (Ky.) 50, 12 AmD 359; Stokeley v. Gordon, 8 Md. 496, 505; McNair v. Toler, 5 Minn. 435; Selden v. Coffee, 55 Miss. 41, 44; Brown v. Guice, 46 Miss. 299, 301; Carter v. Holman, 60 Mo. 498, 504; Strong v. Waters, 27 App. Div. 299, 301, 50 NYS 257; Fish v. Hubbard, 21 Wend. (N. Y.) 651, 659; North Carolina Inst. v. Norwood, 45 N. C. 65, 69; Webster v. Paul, 10 Oh. St. 531, 534 [cit Smith v. Jeffryes, 15 M. & W. 561]; Jennings v. Talbert, 77 S. C. 454, 456, 58 SE 420; Teague v. Sowder, 121 Tenn. 132, 148, 114 SW 484; Senger v. Senger, 81 Va. 687, 704; Clark v. Bonnycastle, 3 U. C. Q. B. O. S. 528, 548.

[a] **"When a doubt exists as to the intention of the party,** it is called, in law language, a patent ambiguity." Breckenridge v. Duncan, 2 A. K. Marsh. (Ky.) 50, 12 AmD 359.

[b] **Description applicable to two or more.**—"When a contract or conveyance, on its face, or aided by judicial knowledge, equally describes two or more persons, things etc., this is patent ambiguity, or ambiguity apparent." Chambers v. Ringstaff, 69 Ala. 140, 143.

[c] **Blanks in instrument.**—A provision in a covenant in an oil and gas lease, that the lessees in a certain contingency should pay "—— dollars per ——," was held to raise a patent ambiguity rendering the covenant void for uncertainty. Eaton v. Wilcox, 42 Hun 61, 65, 3 NYSt 501. See also Nichols v. Frothingham, 45 Me. 220, 225, 71 AmD 539; Haughton v. Sartor, 71 Miss. 357, 360, 15 S 71; Vandervoort v. Dewey, 42 Hun 68, 71, 3 NYSt 474.

[d] **Omissions.**—(1) A mortgage on certain horses and "seventy, more or less, of corn in field" on a certain farm cannot be helped by extrinsic evidence, as it describes no corn at all. Augustine v. McDowell, 120 Iowa 401, 404, 94 NW 918. (2) So a promissory note to pay "sixteen" was held to be patently ambiguous. Brown v. Bebee, 1 D. Chipm. (Vt.) 227, 228. 6

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A latent ambiguity[24] is one which arises not upon the words of the instrument, as looked at in themselves, but upon those words when applied to the object or subject which they describe.[25] A latent ambiguity therefore exists in a sentence or expression only when the real meaning or intention of the writer is hidden or concealed. It does not appear on the face of the words used, nor is its existence known until these words are brought in contact with collateral facts. It is only when applied to the words, bringing them alongside the facts which existed when used, and read in the exact light in which they were written, that a latent ambiguity, if one, exists.[26] It has been said that in a patent

AmD 728. (3) But a promissory note, reading, "six after date," was considered as raising a patent ambiguity not explainable by parol evidence, but the court in an action on the note construed the blank as intended for months. Nichols v. Frothingham, 45 Me. 220, 225, 71 AmD 539.

[e] **Power of water wheels.**—Where Clark agreed with Cole "to put in a good workmanlike manner, two water wheels, to drive each a run of stone in the flouring mills (the same that are now in the mill of L. A. Cole & Co., called the Rough and Ready Mills, in said town of Watertown), and warrant the same, with two hundred inches of water to each wheel, to be measured at the bottom of the flume, to grind fifteen bushels per hour, in a style suitable to make good flour," etc., it was held that the instrument was void for patent ambiguity, as it was not apparent whether each run of stones or both together were to grind fifteen bushels per hour. Cole v. Clark, 3 Pinn. (Wis.) 303, 304, 305.

[f] **One-horse wagon.**—Where the description of property in a mortgage by defendant to plaintiff included a "one-horse wagon" and defendant at the time of the mortgage had four one-horse wagons, it was held that this was a case of patent ambiguity and that plaintiff could not recover possession. Holman v. Whitaker, 119 N. C. 113, 114, 25 SE 793.

[g] **Land descriptions.**—(1) A deed of all the interest of J. M. Norris in "six hundred and forty acres of land situated in the said county of Burleson, and being part of the league of land originally granted to L. Dickerson," was held void for patent ambiguity. Norris v. Hunt, 51 Tex. 609, 616. (2) But there is no ambiguity in a deed of "an undivided three hundred acres" in a larger tract. Hodge v. Bennett, 78 Miss. 868, 870, 29 S 766, 84 AmSR 652.

[h] **Wills.**—(1) In Clayton v. Nugent, 13 M. & W. 200, 206, 207, it was held that a devise to "M." raised a patent ambiguity, and that, while the will referred to another writing as containing the key to the initials in the will, no key could be admitted in evidence which was not shown to have been in existence at the time of the execution of the will. Rolfe, B., in his opinion distinguished the cases where it was shown that the testator was accustomed to call a person by a peculiar name used in the will. (2) In Doe v. Needs, 6 L. J. Exch. 59, 2 ERC 726, where the testator devised various properties severally to George Gord the son of John Gord, to George Gord the son of George Gord, and to George Gord the son of Gord, it was held that the ambiguity arising from the last devise was not a patent ambiguity, although the fact appeared from the other devises that there were two George Gords.

[i] **Rule of construction; clerical alterations.**—Where a petition and decree in adoption were ambiguous the court said: "Where ambiguity is introduced into a writing by verbal changes which either should have been made in additional places or not made at all, the presumption in favor of the validity of affirmative action should prevail. In other words, as applicable to this case, it is more probable as shown by experience and therefore to be presumed, that the hand that made the alterations in the papers made fewer of them than he should have made to express his full purpose than that those he did make were accidental or unintended." In re Peterson, 212 Pa. 453, 458, 61 A 1005.

[j] **"For value received"** in a note held to be a patent ambiguity. Byrd v. Marietta Fertilizer Co., 127 Ga. 30, 33, 56 SE 86.

24. Generally see Evidence [17 Cyc 676].

25. Patch v. White, 117 U. S. 210, 219, 6 SCt 617, 29 L. ed. 860; Bradley v. Washington, etc., Steam Packet Co., 13 Pet. (U. S.) 89, 104, 10 L. ed. 72; Wolff Truck Frame Co. v. American Steel Foundries, 195 Fed. 940, 944, 115 CCA 628; Chambers v. Ringstaff, 69 Ala. 140, 144; Dorr v. School Dist. No. 26, 40 Ark. 237, 241; Williams v. Ashurst Oil, etc., Co., 144 Cal. 619, 624, 78 P 28; Walker v. Wells, 25 Ga. 141, 142, 71 AmD 164; Kaehukukona v. Ahuna, 6 Hawaii 192, 193; Kaleleonalani v. Smith, 4 Hawaii 82, 85; Whitcomb v. Rodman, 156 Ill. 116, 121, 40 NE 553, 47 AmSR 181, 28 LRA 149; Giger v. Busch, 122 Ill. A. 13, 15; Daugherty v. Rogers, 119 Ind. 254, 259, 20 NE 779, 3 LRA 847; Grimes v. Harmon, 35 Ind. 198, 208, 9 AmR 690; Echford v. Echford, 91 Iowa 54, 63, 58 NW 1093, 26 LRA 370 [quot Black L. D.]; Palmer v. Albee, 50 Iowa 429, 430; Barrett v. Kansas, etc., Coal Co., 70 Kan. 649, 654, 79 P 150; Breckenridge v. Duncan, 2 A. K. Marsh. (Ky.) 50, 51, 12 AmD 359; Stokeley v. Gordon, 8 Md. 496, 505; Hammond v. Ridgely, 5 Harr. & J. (Md.) 245, 274, 9 AmD 522; Pennington v. Bordley, 4 Harr. & J. (Md.) 450, 360; Putnam v. Bond, 100 Mass. 58, 60, 1 AmR 82; American Bible Soc. v. Pratt, 9 Allen (Mass.) 109, 110; Herring v. Boston Iron Co., 1 Gray (Mass.) 134, 138; Ives v. Kimball, 1 Mich. 308, 313; Bruckner v. Lawrence, 1 Dougl. (Mich.) 19, 27; Schlottman v. Hoffman, 73 Miss. 188, 190, 18 S 893, 55 AmSR 527 [cit Bouvier L. D.; Webster D.]; Brown v. Guice, 46 Miss. 299, 302; Hardy v. Matthews, 38 Mo. 121, 124; Kimball v. Waterman, 73 N. H. 348, 349, 61 A 595; Lathrop v. Blake, 23 N. H. 46, 60; South Newmarket Methodist Seminary v. Peaslee, 15 N. H. 317, 327; Bartlett v. Nottingham, 8 N. H. 300, 304; Den v. Cubberly, 12 N. J. L. 308, 311; Hand v. Hoffman, 8 N. J. L. 71, 72; Petrie v. Hamilton College, 158 N. Y. 458, 463, 53 NE 216, 217; Jackson v. Sill, 11 Johns. (N. Y.) 201, 213, 6 AmD 363; Austin v. Southworth, 13 Misc. 45, 47, 34 NYS 88; Hayward Homestead Tract Assoc. v. Miller, 6 Misc. 254, 255, 26 NYS 1091; Sherwood v. Battle, 154 N. C. 345, 352, 70 SE 834; Webster v. Paul, 10 Oh. St. 531, 534; Bingham v. Honeyman, 32 Or. 129, 1344, 51 P 735, 52 P 755; Holcomb v. Mooney, 13 Or. 503, 507, 11 P 274; Pringle v. Rogers, 193 Pa. 94, 97, 44 A 275; Miller's Est., 26 Pa. Super. 443, 449; Jennings v. Talbert, 77 S. C. 454, 456, 58 SE 420; Teague v. Sowder, 121 Tenn. 132, 148, 114 SW 484; Gorham v. Settegast, 44 Tex. Civ. A. 254, 272, 98 SW 665; Myers v. Maverick, (Tex. Civ. A.) 27 SW 1083; Coulam v. Doull, 4 Utah 267, 274, 9 P 568 [aff 133 U. S. 216, 10 SCt 253, 33 L. ed. 596]; Aldrich v. Griffith, 66 Vt. 390, 398, 29 A 376; Senger v. Senger, 81 Va. 687, 703; Hawkins v. Garland, 76 Va. 149, 154, 44 AmR 158; Flood v. Kerwin, 113 Wis. 678, 680, 89 NW 845; Lego v. Medley, 79 Wis. 211, 220, 48 NW 375, 24 AmSR 706; Grant v. Grant, L. R. 5 C. P. 727 [aff L. R. 5 C. P. 380]; Smith v. Jeffryes, 15 M. & W. 561, 562; Borland v. Coote, 10 B. C. 493, 505 (per Martin, J.); Clark v. Bonnycastle, 3 U. C. Q. B. O. S. 528, 548. See In re Dominici, 151 Cal. 181, 183, 90 P 448 (construing Civ. Code §§ 1318, 1340).

[a] **Lord Bacon's definition.**—A latent ambiguity is "that which seemeth certain . . . for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity." Deery v. Cray, 10 Wall. (U. S.) 263, 270, 19 L. ed. 887; Bradley v. Washington, etc., Steam Packet Co., 13 Pet. (U. S.) 89, 97, 10 L. ed. 72; Dorr v. School Dist., 40 Ark. 237, 241; Oliver v. Henderson, 121 Ga. 836, 838, 49 SE 743, 104 AmSR 185; Walker v. Wells, 25 Ga. 141, 142, 71 AmD 164; Daugherty v. Rogers, 119 Ind. 254, 259, 20 NE 779, 3 LRA 847; Craven v. Butterfield, 80 Ind. 503, 510 [cit Mudd v. Dillon, 166 Mo. 110, 120, 65 SW 973]; Eckford v. Eckford, 91 Iowa 54, 64, 58 NW 1093, 26 LRA 370; Hammond v. Ridgely, 5 Harr. & J. (Md.) 245, 255, 9 AmD 522; Putnam v. Bond, 100 Mass. 58, 60, 1 AmR 82; Lathrop v. Blake, 23 N. H. 46, 60; South Newmarket Methodist Seminary v. Peaslee, 15 N. H. 317, 327; Den v. Cubberly, 12 N. J. L. 308, 311; Jackson v. Sill, 11 Johns. (N. Y.) 201, 215, 6 AmD 363; Lycoming Mut. Ins. Co. v. Sailer, 67 Pa. 108, 112; Aldrich v. Griffith, 66 Vt. 390, 398, 29 A 376; Hawkins v. Garland, 76 Va. 149, 152, 44 AmR 158; Cleveland v. Burnham, 64 Wis. 347, 356, 25 NW 407.

[b] **"When the intention of the party is clearly expressed,** and a doubt exists, not as to the intention, but as to the object to which the intention applies, it is, in . . . [law] language, called a latent ambiguity." Breckenridge v. Duncan, 2 A. K. Marsh. (Ky.) 50, 12 AmD 359.

[c] **Where the description in a deed** began at the "north" corner of an adjoining lot instead of the northeast corner, and plaintiff introduced in evidence a diagram showing that the adjoining lot had two "north" corners, the northeast and the northwest, it was held that this raised a latent ambiguity which might be solved by extrinsic evidence. Hereford v. Hereford, 131 Ala. 573, 577, 32 S 620.

26. Hawkins v. Garland, 76 Va. 149, 152, 44 AmR 158 [cit Bacon Max. 23; Brown L. Max. 441; Greenleaf Ev. §§ 297, 298].

[a] **For example,** in Hand v. Hoffman, 8 N. J. L. 71, 72, the court said: "A latent ambiguity is where the words of a written instrument are plain and intelligible, but by reason of extraneous facts, the certain and definite application of those words is found impracticable. In such case to preserve the instrument, to give it operation and effect, to prevent it from being defeated by uncertainty, parol evidence to explain its intent and to fix its application is admissible. Where a devise is to a particular person by name, and there are two or more of that name, Cheyney's Case, 5 Coke 68a, 77 Reprint 158; Jones v. Newman, W. Bl. 60, 96 Reprint 32; where a bequest is made to a person by name and there is no person of that name, Beaumont v. Fell, 2 P. Wms. 141, 24 Reprint 673; Hodgson v. Hitch, Prec. Ch. 229, 24 Reprint 112; where a bequest is to a person by description and there are more persons than one answering that description, Harris v. Lincoln, 2 P. Wms. 135, 24 Reprint 671; where a testator gives a particular chattel and he has two or more of the same

ambiguity the question is one of construction, while in a latent ambiguity it is one of identification.[27]

Ambiguity of intermediate class. There is also an ambiguity recognized in cases involving principles which are scarcely referable to either latent or patent ambiguities. It arises when, on mere inspection, there does not appear to be any uncertainty. It frequently grows out of the careless use of language, and sometimes results from the many shades of meaning that usage and provincial habit accord to the same word or expression. Out of this has grown a seeming modification of the old rule as to patent ambiguities, which has been characterized as an intermediate class of cases, partaking of the nature of both latent and patent ambiguities.[28]

Ambiguity upon the factum has been said to mean not an ambiguity upon the construction, but an ambiguity as to the foundation itself of the instrument, or a particular part of it.[29]

(Cross references.)[30]

description, Mann v. Mann, 1 John. Ch. (N. Y.) 231; where a man levies a fine of the manor of Dale and he has two manors of Dale, Partridge v. Strange, Plowd. 77, 75 Reprint 123; where one grants the manor of S. and it is proved that he has a manor of North S. and a manor of South S., 1 Philips on evidence, 467; where the testator gave a sum, part of his four per cent. bank annuities, and had no such stock, but stock of a different kind called long annuities, Selwood v. Mildmay, 3 Ves. Jr. 306, 30 Reprint 1025; in these and such cases, the facts de hors the will render uncertain the application of the words in themselves plain, and without explanation from parol evidence, which from the necessity of the case is therefore admitted, the devise or bequest must be void and inoperative."

[b] **Application for insurance.**—Where it apeared that there were two hay houses in plaintiff's meadow—one properly a barn, the other a small log building, which might be called a barrack, used for keeping hay—and his application for insurance on a stock of grain and hay read in the "hay-house in his meadow," it was held that the latent ambiguity might be explained by evidence showing which building was intended. Lycoming Mut. Ins. Co. v. Sailer, 67 Pa. 103, 112.

[c] **Note "to be paid for when started."**—Where a promissory note due on its face on Jan. 1, 1842, contained the clause, "To be paid for when started," it was held that this clause in itself was without meaning and neither anticipated nor postponed the time of payment, that it created a latent ambiguity, and that therefore, the declaration having described the note as due Jan. 1, 1842, there was no variance in showing that the clause in question related to a gin which was the consideration for the note. Lockhard v. Avery, 8 Ala. 502, 503. For a learned discussion of the question see North Carolina Inst. for Education, etc. v. Norwood, 45 N. C. 65, 69.

[d] **Omission of date of termination of contract.**—In Buffington v. McNally, 192 Mass. 198, 78 NE 309, the court seems to have taken the view that the omission of the date of termination of a contract raised a latent ambiguity.

[e] **The term "the south-east forty of the north-east quarter"** does not create a latent ambiguity where the common acceptance and meaning of such term is "the south-east forty acres" of the northeast quarter. Evans v. Gerry, 174 Ill. 595, 603, 51 NE 615.

[f] **Wills.**—(1) "A latent ambiguity in a will, which may be removed by extrinsic evidence, may arise (1) either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or (2) when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator." Patch v. White, 117 U. S. 210, 215, 6 SCt 617, 29 L. ed. 860 [quot Wheaton v. Pope, 91 Minn. 299, 306, 97 NW 1046]. (2) Where a testator devised as follows: "I give and bequeath to my son Edward Fleming all that dwelling-house . . . (now in the occupation of my son John), during his natural life, and at his death to descend to my grandson Henry Fleming and his heirs forever," and the testator had two grandsons named Henry Fleming, plaintiff who was the son of the testator's son Edward, and defendant who was the son of the testator's son John, it was held that the proof of that fact raised an ambiguity in the will as to which of his two grandsons the testator meant. Fleming v. Fleming, 1 H. & C. 242.

[g] **"Mistake" distinguished.**—(1) In Tucker v. Seaman's Aid Soc., 7 Metc. (Mass.) 188, 198, 203, a testator gave a legacy to "the Seaman's Aid Society in the city of Boston." The legacy was claimed also by the American Seaman's Friend Society in New York and by the Boston Seaman's Friend Society, said to be affiliated with it. Chief Justice Shaw, in stating the case, said: "It is also, we think, well proved by the circumstances which preceded and attended the execution of the will, as shown by extrinsic evidence, that it was the intention of the testator to make the bequest in question . . . [to the American Seaman's Friend Society] and, at the time of the execution of his will, he believed that he had done so . . . that the testator was led into this mistake by erroneous information, honestly given to him" by the person who drew his will; "that the testator acted on this erroneous information—erroneous as to his real purpose, as it now appears by the evidence—and made the bequest to the Seaman's Aid Society, by their precise name and designation." The court therefore held that there was simply a mistake, and no latent ambiguity, that extrinsic evidence was inadmissible, and that the Seaman's Aid Society was the legatee. (2) In Jackson v. Sill, 11 Johns. (N. Y.) 201, 6 AmD 363, a mistake in narrowing the subject of a devise was distinguished from latent ambiguity, and parol evidence was held to be inadmissible. (3) But it was held that where a surveyor had made a mistake in a boundary, the right to prove the true line to which the deed referred did not depend upon the ambiguity rules, although the case had a strong analogy to latent ambiguities. Kronenberger v. Hoffner, 44 Mo. 185.

[h] **"Error" distinguished.**—Donehoo v. Johnson, 120 Ala. 438, 445, 24 S 888.

27. North Carolina Inst. for Education, etc. v. Norwood, 45 N. C. 65, 69.

28. Peisch v. Dickson, 19 F. Cas. No. 10,911, 1 Mason 9; Moody v. Alabama Great So. R. Co., 124 Ala. 195, 26 S 952; Chambers v. Ringstaff, 69 Ala. 140; Martin v. Bell, 18 N. J. L. 167, 169; Dupree v. McDonald, 4 S. C. Eq. 209. See also Miles v. Miles, 78 Miss. 904, 30 S 2.

[a] **This doctrine has been applied:** (1) In aid of a description in a mortgage or deed by the numbers of section, township, and range, the state, county, etc., being omitted. Webb v. Elyton Land Co., 105 Ala. 471, 18 S 178; De Jarnette v. McDaniel, 93 Ala. 215, 9 S 570; Chambers v. Ringstaff, 69 Ala. 140. (2) In the case of a description by degrees and minutes, in order to show that it was the custom of the vicinity to describe boundary lines by the magnetic instead of the true meridian. Jenny Lind Co. v. Bower, 11 Cal. 194. (3) Where the words on their face were equivocal. Ganson v. Madigan, 15 Wis. 144, 82 AmD 659.

[b] **Surrounding circumstances.**—In ambiguities of the intermediate class, the court, it seems, is entitled to learn the surrounding circumstances. Reynolds v. Lawrence, 147 Ala. 216, 40 S 576.

[c] **Where it was impossible to say from the face of a codicil** whether two legacies expressed in figures were of five dollars or five hundred dollars each, the court seemed to think this an ambiguity of the intermediate class, but that ambiguities of that class should be considered as latent; and parol evidence was held to be admissible in solution. Schlottman v. Hoffman, 73 Miss. 188, 18 S 893, 55 AmSR 527.

[d] **Ambiguity of which court takes judicial notice.**—In Ives v. Kimball, 1 Mich. 308, 311, where a deed described a piece of land as "all that tract or parcel of land situate in the town of Logan, county of Lenawee and territory of Michigan, being known and distinguished as the east half of the northwest quarter of section twenty-one, containing eighty acres, and the northwest quarter of the northwest quarter of section number twenty-one, in township number twenty-six south, of range number three," and it appeared from the act organizing the town that there were two sections numbered twenty-one in the town corresponding with the description in the deed, one in surveyed township number six, and one in surveyed township number seven, both in range three east, the ambiguity thus shown was held not to be a patent ambiguity, although the court was bound judicially to take notice of the act organizing the town, and thus to take notice judicially that there was no township twenty-six in its limits. See Chambers v. Ringstaff, 69 Ala. 140 (where under similar circumstances parol evidence was admitted).

29. Eatherly v. Eatherly, 1 Coldw. (Tenn.) 461, 465, 78 AmD 499 (where McKinney, J., said: "By ambiguity upon the factum is meant not an ambiguity upon the construction, as whether a particular clause shall have a particular effect, but an ambiguity as to the foundation itself of the instrument or a particular part of it, as whether the testator meant a particular clause to be part of the instrument, or whether it was introduced with his knowledge; whether a codicil was meant to republish a former or subsequent will, or whether the residuary clause or any other passage was accidentally omitted. These are all matters of ambiguity upon the factum of the instrument").

30. Ambiguity:
Evidence to explain see Evidence [17 Cyc 675].
In:
- Affidavit for continuance in:
  - Civil case see Continuances [9 Cyc 145].
  - Criminal prosecution see Criminal Law [9 Cyc 206].
- Agreement for sale of:
  - Personal property see Sales [35 Cyc 97].
  - Real property see Vendor and Purchaser [39 Cyc 1296].

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AMBIGUOUS.[31] Doubtful;[32] equivocal;[33] uncertain;[34] doubtful or uncertain, particularly in respect to signification.[35]

AMBIGUUM PACTUM CONTRA VENDITOREM INTERPRETANDUM EST.[36]

AMBIGUUM PLACITUM INTERPRETARI DEBIT CONTRA PROFERENTEM.[37]

AMBIT. A boundary line; an exterior or inclosing line or limit.[38]

AMBROTYPIST. One who makes a picture by applying a dark backing to the face of a thin negative on glass.[39]

AMBULANCE. A wheeled vehicle used for the purpose of conveying sick or wounded persons.[40]

AMBULATORIA EST VOLUNTAS DEFUNCTI USQUE AD VITÆ SUPREMUM EXITUM.[41]

AMBULATORY. That which may be altered or moved, changeable.[42]

AMBUSH. The act of attacking an enemy unexpectedly from a concealed station; a concealed station where troops or enemies lie in wait to attack by surprise; an ambuscade; troops placed in a concealed place, for attacking by surprise; and as a verb "to lie in wait; to surprise; to place in ambush."[43]

AMENABLE. To be liable to answer; responsible; answerable; liable to be called to account, obedient.[44]

AMENAZAS. In Spanish law threats, menaces.[45]

AMEND.[46] A word derived from the French word amender and signifying "to make better, to change from bad to the better,"[47] to alter;[48] to annul or remove that which is faulty and substitute that which will improve;[49] to

In:—Continued
Bond see Bonds [5 Cyc 753].
Contract for suretyship see Principal and Surety [32 Cyc 73].
Description:
In deed see Deeds [13 Cyc 627].
Of boundary see Boundaries [5 Cyc 867].
Indemnity contract see Indemnity [22 Cyc 84].
Instruction:
Of principal to agent see Agency § 374.
To jury see Criminal Law [12 Cyc 648]; Trial [38 Cyc 1599].
Lease see Landlord and Tenant [24 Cyc 914].
Letter or power of attorney see Agency § 201.
Loan contract of building and loan society see Building and Loan Societies [6 Cyc 144].
Mechanic's lien law see Mechanics' Liens [27 Cyc 21].
Mortgage see Mortgages [27 Cyc 1135].
Oil or gas lease see Mines and Minerals [27 Cyc 722].
Patent see Patents [30 Cyc 936].
Pleading see Pleading [31 Cyc 72, 655].
Policy of insurance:
Accident see Accident Insurance § 37.
Fire see Fire Insurance [19 Cyc 657].
Life see Life Insurance [25 Cyc 739].
Marine see Marine Insurance [26 Cyc 580].
Mutual benefit see Mutual Benefit Insurance [29 Cyc 66].
Statute see Statutes [36 Cyc 1118].
Verdict:
Civil action see Trial [38 Cyc 1877].
Criminal proceeding see Criminal Law [12 Cyc 689].
Will see Wills [40 Cyc 1388, 1392, 1398, 1407].
Specific performance as affected by see Specific Performance [36 Cyc 605].
Term "uncertainty" as used in statute as including see Trusts [39 Cyc 668].

31. See Ambiguity ante.

32. Webster D. [quot Kraner v. Halsey, 82 Cal. 209, 213, 22 P 1137]; Osterholm v. Boston, etc., Cons. Copper, etc., Min. Co., 40 Mont. 508, 519, 107 P 499.

[a] **Synonyms** are "indeterminate," "indefinite," "doubtful," "uncertain," "unsettled," "indistinct," "equivocal." Kraner v. Halsey, 82 Cal. 209, 213, 22 P 1137.

33. Webster D. [quot Kraner v. Halsey, 82 Cal. 209, 213, 22 P 1137].

[a] **If a complaint** cannot be considered as either doubtful, uncertain, or equivocal in its meaning, it is not "ambiguous," and the demurrer on such ground cannot be sustained. Kraner v. Halsey, 82 Cal. 209, 213, 22 P 1137.

[b] **Ambiguous descriptions of land** are those requiring construction on account of false, conflicting, or equivocal calls. Miller v. Grunsky, 141 Cal. 441, 66 P 858, 75 P 48.

34. Webster D. [quot Kraner v. Halsey, 82 Cal. 209, 213, 22 P 1137]; Osterholm v. Boston, etc., Cons. Copper, etc., Min. Co., 40 Mont. 508, 519, 107 P 499.

35. Webster D. [quot Kraner v. Halsey, 82 Cal. 209, 213, 22 P 1137].

[a] **Explanation by expert.**—Where entries in themselves might be ambiguous to a person not skilled in bookkeeping, it is held proper to have them explained by an expert in bookkeeping. Rogers v. State, 26 Tex. A. 404, 9 SW 762.

36. A maxim meaning "An ambiguous agreement is to be interpreted against the seller." Morgan Leg. Max.

37. A maxim meaning "An ambiguous pleading ought to be construed against the party offering it." Coke Litt. 303b.

[a] **Applied in:** Ostrom v. O'Connor, 3 U. C. Q. B. O. S. 571, 572.

38. Burrill L. D. See generally Boundaries [5 Cyc 884].

[a] **Used in the sentence** "An entry . . . gives a constructive possession . . . although there may be no fence or inclosure round the ambit of the tract." Per Story, J., in Ellicott v. Pearl, 10 Pet. (U. S.) 412, 442, 9 L. ed. 475.

39. Century D.

[a] **"The ambrotypist or daguerrotypist,** whatever title he may give himself, is rather an artisan, than an artist. His labor is more manual than mental. He works more by rule, than under the inspiration of genius. The process by which he accomplishes his undertaking, is mainly mechanical; and success in his vocation demands, not creative power, but dexterity, contrivance, and the skillful application of fixed rules." Barnes v. Ingalls, 39 Ala. 193, 201.

40. Kendall v. Duluth, 64 Minn. 295, 66 NW 1150.

41. A maxim meaning "The will of a deceased person is ambulatory until the last moment [end] of life." Burrill L. D.

42. Abbott L. D.

[a] **A will is said to be ambulatory** until the death of the testator. Hattersley v. Bissett, 50 N. J. Eq. 577, 25 A 332; Behrens v. Behrens, 47 Oh. 323, 25 NE 209, 21 AmSR 820; Coghlin v. Coghlin, 26 Oh. Cir. Ct. 18. See Wills [40 Cyc 1073].

43. Dale County v. Gunter, 46 Ala. 118, 142 (where it was held that the assassination of a person by one "in ambush, or concealed in the bushes" is not an assassination by a person in disguise within a statute giving an action for a penalty against the county to the next of kin of the person so assassinated. The court, after laying down the definition set out in the text above, said: "This learning I derive from Mr. Webster, and I am satisfied with it. I can hardly conceive of things better distinctly marked and different, than that of a person or persons in ambush, or concealed in the bushes, where a person so concealed lies in wait to attack by surprise; and a person or persons in disguise, or disguised by an unusual dress"). See Alevosia ante.

44. Miller v. Com., 1 Duv. (Ky.) 14, 17 (where it was held that an undertaking in which defendant rendered himself "obedient" to the orders and processes of a court, was equivalent to the statutory form, "shall . . . render himself amenable," etc.).

45. Escriche Diccionario. See Threats [38 Cyc 289].

[a] **"Estafa" distinguished.**—Extorting money from another under threat of perpetrating upon him a criminal act constitutes amenazas and not estafa, the nature and ingredients of which exclude all idea of coercion or violence. Sentence Supr. Trib. May 17, 1893, 50 Jur. Cr. 467. See Estafa.

46. See Amendment post.

47. Little v. State, 137 Ala. 659, 667, 35 S 134 [quot Cyc]; Sessions v. State, 115 Ga. 18, 20, 41 SE 259; McCleary v. Babcock, 169 Ind. 228, 233, 82 NE 453; Diamond v. Williamsburgh Ins. Co., 4 Daly (N. Y.) 494, 500 [quot State v. White, 16 R. I. 591, 594, 18 A 179, 1038].

[a] **To amend a highway** has been held to include: (1) Any alteration or improvement which would tend to make the road or highway better, and hence would include the cutting down of a sharp hill, and carrying the materials to the foot so as to reduce the grade. Callender v. Marsh, 1 Pick. (Mass.) 418, 429. See also Mytton v. Duck, 26 U. C. Q. B. 61, 64 post p 1317, note 69 [a]. (2) The right to change the grade of a street. Waddell v. New York, 8 Barb. (N. Y.) 95, 97.

[b] **"Destroy" distinguished.**—In Ensley v. Simpson, 166 Ala. 366, 376, 52 S 61, the court said: "To destroy is not to amend. A thing amended survives."

[c] **"Repeal" distinguished.**—In Little v. State, 137 Ala. 659, 667, 35 S 134, the court said: "The word, amend, in legal phraseology, does not generally mean the same thing as repeal. But it does not follow that amendments of a statute may not often be accomplished by repeals of some of its parts, and in this way to better the condition, and change from bad to the better." To same effect State v. Hubbard, 148 Ala. 391, 41 S 903; Barron v. Smith, 108 Md. 317, 70 A 225.

48. McCleary v. Babcock, 169 Ind. 228, 233, 82 NE 453; Snider v. International, etc., R. Co., 52 Tex. 306, 321. See Alter ante.

49. Webster D. [quot Atty.-Gen. v. Montcalm County, 141 Mich. 590, 597, 104 NW 792]; McCleary v. Babcock, 169 Ind. 228, 233, 82 NE 453, 455.

[a] **"Improvement" synonymous.**—Within a statute giving a town council the control of the expenditure of moneys for the "making, re-

change;[50] to change in any way for the better;[51] to correct;[52] to correct faults;[53] to cure an error;[54] to cure defects;[55] to free from error or deficiency;[56] to improve;[57] to rectify;[58] to rectify mistakes and better the condition;[59] to reform;[60] to remove errors from;[61] to remove what is erroneous, superfluous, faulty, and the like;[62] to repair;[63] to revise;[64] to substitute something in place of what is removed;[65] to supply deficiencies.[66]

AMENDATORY.[67] Supplying or containing amendment; corrective.[68]

AMENDMENT. A change or alteration for the better;[69] an addition or change within the lines of the original instrument as will affect an improvement or better carry out the purpose for which it was framed;[70] an amendment;[71] a correction of errors;[72] a correction of faults or errors;[73] a correction of some error or mistake;[74] an improvement;[75]

pair and improvement" of the roads, the word "improvement" is evidently used as the synonym of "amend," and these terms include something beyond merely repairing, being in each instance used in addition to the word "repair." Williams v. Portland, 19 Can. S. C. 159, 179.

50. Snider v. International, etc., R. Co., 52 Tex. 306, 321.

[a] **By adding something.**—Polk County Bd. of Public Instructions v. Polk County, 58 Fla. 391, 394, 50 S 574; Henderson v. Galveston, 102 Tex. 163, 169, 114 SW 108; Henderson v. Galveston, (Tex. Civ. A.) 115 SW 1198.

[b] **By taking something from.**—Polk County Bd. of Public Instructions v. Polk County, 58 Fla. 391, 394, 50 S 574.

[c] **"Supplemental" as distinguished from "original" or "amended"** see Chicago, etc., R. Co. v. Halsell, 98 Tex. 244, 246, 83 SW 15.

51. McCleary v. Babcock, 169 Ind. 228, 233, 82 NE 453; Webster D. [quot Atty.-Gen. v. Montcalm County, 141 Mich. 590, 597, 104 NW 792; Diamond v. Williamsburgh Ins. Co., 4 Daly (N. Y.) 494, 500; Billings v. Baker, 6 AbbPr (N. Y.) 213, 216; In re Victor Coal Co., 13 Pa. Dist. 616, 619, 29 Pa. Co. 209; In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131].

52. McCleary v. Babcock, 169 Ind. 228, 233, 82 NE 453; In re Victor Coal Co., 13 Pa. Dist. 616, 619, 29 Pa. Co. 209; In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131; Snider v. International, etc., R. Co., 52 Tex. 306, 321.

[a] **Motion to "correct"** as synonymous with motion to "amend" or modify a judgment see Ryan v. Brown, 51 Misc. 67, 68, 99 NYS 868 (construing the Municipal Court Act [1902] c 580 § 254).

[b] **Amended declaration.**—As a general rule, the very purpose of an "amended declaration" is to state, in a more accurate and legal manner than has been previously stated, the cause of action for which the suit is brought. Chicago City R. Co. v. Hackendahl, 188 Ill. 300, 304, 58 NE 930.

[c] **An "amended demurrer"** is one which adds to or supplements a demurrer already filed in the cause, but which does not add entirely new matter or arrest the progress of the case. Lundbeck v. Pilmair, 78 Iowa 434, 435, 43 NW 271.

[d] **Amended petition.**—A petition containing merely a statement of transactions constituting the cause of action arising before the bringing of the suit is technically an "amended petition," and it was incorrect to designate it as "supplemental petition," since it pleaded no new facts accruing after the filing of the original petition. Scroggin v. Johnston, 45 Nebr. 714, 720, 64 NW 236.

53. Lennox v. Vandalia Coal Co., 158 Mo. 473, 488, 59 SW 242.

[a] **Implies something to be corrected.**—The word "necessarily implies something upon which the correction, alteration, improvement or reformation can operate, something to be reformed, corrected, rectified, altered or improved." In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131 [quot McCleary v. Babcock, 169 Ind. 228, 233, 82 NE 453].

[b] **"Create" distinguished.**—In speaking of the power of a court to amend its records the supreme court, per Brown, J., said: "This power to amend, too, must not be confounded with the power to create. It presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission of some entry which should have been made during the progress of the case, or by the loss of some document originally filed therein. The difference between creating and amending a record is analogous to that between the construction and repair of a piece of personal property. If a house or vessel, for instance, be burned or otherwise lost, it can only be rebuilt, and the word 'repair' is wholly inapplicable to its subsequent reconstruction. The word 'repair,' as the word 'amend,' contemplates an existing structure which has become imperfect by reason of the action of the elements, or otherwise. In the cases of vessels particularly, this distinction is one which cannot be ignored, as it lies at the basis of an important diversity of jurisdiction between the common law and maritime courts." Gagnon v. U. S., 193 U. S. 451, 457, 24 SCt 510, 48 L. ed. 745.

54. Weill v. Metropolitan R. Co., 30 NYS 833, 834, 24 NYCivProc 85.

55. Lennox v. Vandalia Coal Co., 158 Mo. 473, 488, 59 SW 242.

56. Weill v. Metropolitan R. Co., 30 NYS 833, 834, 24 NYCivProc 85.

57. Little v. State, 137 Ala. 659, 666, 35 S 134.

58. Little v. State, 137 Ala. 659, 666, 35 S 134; McCleary v. Babcock, 169 Ind. 228, 233, 82 NE 453; In re Victor Coal Co., 13 Pa. Dist. 616, 619, 29 Pa. Co. 209; In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131.

59. Little v. State, 137 Ala. 659, 666, 35 S 134 [cit Worcester D.].

60. Little v. State, 137 Ala. 659, 666, 35 S 134; McCleary v. Babcock, 169 Ind. 228, 233, 82 NE 453; In re Victor Coal Co., 13 Pa. Dist. 616, 619, 29 Pa. Co. 209; In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131; Snider v. International, etc., R. Co., 52 Tex. 306, 321.

61. Little v. State, 137 Ala. 659, 666, 35 S 134.

62. Webster D. [quot Atty-Gen. v. Montcalm County, 141 Mich. 590, 597, 104 NW 792; In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131]; In re Victor Coal Co., 13 Pa. Dist. 616, 29 Pa. Co. 209.

63. Atty.-Gen v. Montcalm County, 141 Mich. 590, 597, 104 NW 792.

64. State v. Taylor, 22 N. D. 362, 367, 133 NW 1046.

65. Webster D. [quot Atty-Gen. v. Montcalm County, 141 Mich. 590, 597, 104 NW 792; In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131]; In re Victor Coal Co., 13 Pa. Dist. 616, 619, 29 Pa. Co. 209.

66. Webster D. [quot Atty.-Gen. v. Montcalm County, 141 Mich. 590, 597, 104 NW 792; Weill v. Metropolitan R. Co., 30 NYS 833, 834, 24 NYCivProc 85; In re Victor Coal Co., 13 Pa. Dist. 616, 619, 29 Pa. Co. 209; In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131].

67. See Amendment post; Statutes [36 Cyc 929].

68. Century D.

[a] **An amendatory law** in a statute for the amendment, not of what might have been enacted under the title of the original statute, but what was enacted; not of what the original law might have been, but what it was. State v. Smith, 35 Minn. 257, 261, 28 NW 241. Compare Southern Pac. Co. v. Bartine, 170 Fed. 725, 739 (an act declared not to be "amendatory").

[b] **Reference or interpretative statutes** are not amendatory within the meaning of the constitutional provision. State v. Shawnee County, 83 Kan. 199, 110 P 92.

[c] **Compared with supplement.**—"There is a distinction, although perhaps not always clear, between a supplement and an amendment. . . . But, in a broad sense, every amendatory statute is a supplement, and, at least, generally speaking, every supplement is more or less amendatory. Our legislative practice in entitling acts, which have relation to existing legislation and supplement or modify it, is not uniform. Some are called 'supplements;' others 'supplements to amend,' and others still 'acts to amend.' But all belong to the same general class and may be denominated, according to the point of view from which they are considered, either supplements or amendatory acts. The latter appears to be the generic term applied to them in other states, as well as in the text books." Com. v. Atty.-Gen., 13 Pa. Dist. 521, 525. See also McCleary v. Babcock, 169 Ind. 228, 82 NE 453.

69. In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131.

[a] **Highway.**—The words "altered" and "amended," in a Canadian statute providing that "unless otherwise provided for, the soil and freehold of every highway or road altered, amended or laid out, according to law," is in the crown, refer to "alterations and amendments made in the line or course of any existing road, under the authority of law, whereby some land is substituted for a part of an existing highway." Mytton v. Duck, 26 U. C. Q. B. 61, 64. See ante note 47 [a].

70. Livermore v. Waite, 102 Cal. 113, 118, 36 P 424, 25 LRA 312.

[a] **Constitutional amendment.**—The word "amendment" is clearly susceptible of a construction which would make it cover several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject, as well as of the construction that every proposition which effects a change in the constitution, or adds to, or takes from it, is an amendment. Peo. v. Sours, 31 Colo. 369, 74 P 167, 102 AmSR 34.

71. In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131.

72. McCleary v. Babcock, 169 Ind. 228, 233, 82 NE 453.

73. Hardin v. Boyd, 113 U. S. 756, 761, 5 SCt 771, 28 L. ed. 1141; McCleary v. Babcock, 169 Ind. 228, 233, 82 NE 453; Shroyer v. Pittenger, 31 Ind. A. 158, 67 NE 475, 477; Lennox v. Vandalia Coal Co., 158 Mo. 473, 488, 59 SW 242; In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131.

74. Givens v. Wheeler, 6 Colo. 149, 151; Woodruff v. Dickie, 28 N. Y. Super. 619, 622.

75. McCleary v. Babcock, 169 Ind. 228, 233, 82 NE 453; In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131.

[a] **Not necessarily an improvement.**—"In Cushing's Law and Practice of Legislative Assemblies (section 1302), it is said: 'The term amendment is used to denote any alteration which may be proposed or

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a reformation;[76] the supplying of a deficiency.[77]

"**Amendment is a resource against waste.** It proceeds on the principle that it is better to preserve what has been done and improve it than to throw it away."[78]

In practice generally the espying out of some error in the proceedings and the correcting of it before judgment, and after if the error is not in the giving of the judgment.[79]

Amendment by implication. A phrase in common use, because convenient, to indicate the rule of construction by which a later repugnant provision modifies or abrogates an earlier one.[80]

(Cross references.[81])

adopted, with a view to render a motion conformable to the sense or will of the house. According to the etymology of the word, it might be supposed that nothing could be considered as an amendment which did not relate to and purport to improve the original proposition. But this would be far from conveying an adequate idea of what is meant by the term amendment. A proposition may be amended in parliamentary phraseology, not only by an alteration which carries out and effects the purpose of the mover, but also by one which entirely destroys that purpose, or which even makes the proposition express a sense the very reverse of that intended by the mover; and in like manner a motion, which proposes one kind of proceeding, may be turned into a motion for another of a wholly different kind, by means of an amendment; so that, in point of fact, an amendment is equally effectual, and is often used to defeat a proposition as well as to promote the object which the mover of that proposition had in view. The reason is, that in altering or amending a proposition, the form of the words only, and not the sense or meaning of it, is regarded, any of the words moved may be left out; any other words may be inserted or added; and any word may be substituted in the place of other words contained in the motion.'" De Hay v. Berkeley County, 66 S. C. 229, 242, 44 SE 790. See also Brake v. Callison, 122 Fed. 722, 724.

76. McCleary v. Babcock, 169 Ind. 228, 233, 82 NE 453; In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131.

77. Weill v. Metropolitan R. Co., 30 NYS 833, 834, 24 NYCivProc 85.

[a] **Something to amend always implied.**—(1) An amendment necessarily implies something upon which the correction, alteration, improvement, or reformation can operate; something to be reformed, corrected, rectified, altered, or improved. In other words, that which is proposed as an amendment must be germane to or relate to the thing to be amended. In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131. See also Givens v. Wheeler, 6 Colo. 149, 151; Woodruff v. Dickie, 28 N. Y. Super. 619, 622. (2) "In respect to the amendment of a charter of incorporation, the amendment must relate to the charter as originally granted, and if it does not correct, improve, reform, rectify or alter something in the original charter, it is not, properly speaking, an amendment to that charter." Victor Coal Co., 13 Pa. Dist. 616, 618, 29 Pa. Co. 209, 213; In re Pennsylvania Tel. Co., 2 Chest. Co. (Pa.) 129, 131. (3) Under a charter of a theological institute reserving to the legislature the power to alter or amend the charter, the legislature cannot increase the number of trustees, nor add other parties and invest them with the same privileges and franchises conferred on the original parties. Sage v. Dillard, 15 B. Mon. (Ky.) 340, 358.

[b] **New instrument not an amendment.**—"The word 'amendment' must be given its ordinary significance, and when the paper or instrument is so defective and so inapplicable to the requirement that no part of it can be used but that an entirely new instrument of a different purport must be filed, such new instrument cannot be said to be an amendment of the other." Illinois Southern R. Co. v. Peo., 215 Ill. 123, 126, 74 NE 97.

[c] **"Modification" distinguished.**—Black L. D.; 27 Cyc 814.

78. Per Bleckley, C. J., in Ellison v. Georgia R. Co., 87 Ga. 691, 697, 13 SE 809 [quot Atlanta, etc., R. Co. v. Georgia R., etc., Co., 125 Ga. 798, 800, 54 SE 753].

[a] **Amendment does not imply destruction.**—Robinson v. Ensley, (Ala.) 52 S 69; Ensley v. Simpson, 166 Ala. 366, 52 S 61.

79. Diamond v. Williamsburgh Ins. Co., 4 Daly (N. Y.) 494, 500.

80. Peo. v. Sours, 31 Colo. 369, 399, 74 P 167, 102 AmSR 34.

81. **Amendment:**
Generally see [Cyc Index 64].
After changing venue see Indictments and Informations [22 Cyc 439].
As ground for continuance see Continuances [9 Cyc 122].
In or of particular acts, instruments, or proceedings:
Admiralty see Admiralty § 205.
Arbitration and award see Arbitration and Award [3 Cyc 609, 784].
Arrest see Arrest [3 Cyc 949, 958].
Attachment see Attachment.
Audita querela see Audita Querela [4 Cyc 1070].
Bail see Bail [5 Cyc 60].
Bankruptcy see Bankruptcy.
Bastardy proceedings see Bastards [5 Cyc 658].
Before justice of peace see Justices of the Peace.
By or against:
Association see Associations [4 Cyc 306].
County see Counties [11 Cyc 400].
Executor or Administrator see Executors and Administrators [18 Cyc 485, 723].
Guardian or ward see Guardian and Ward [21 Cyc 206].
Landlord and tenant see Landlord and Tenant [24 Cyc 1443].
Municipal corporation see Municipal Corporations.
Railroad see Railroads [33 Cyc 1060, 1267].
Cancellation of instrument see Cancellation of Instruments [6 Cyc 332].
Certiorari see Certiorari [6 Cyc 787, 790, 810].
Commercial paper see Bills and Notes [8 Cyc 195, 197].
Concerning:
Customs duties see Customs Duties [12 Cyc 1180].
Highways see Highways.
Insurance see Fire Insurance [19 Cyc 930]; Life Insurance [25 Cyc 922]; Mutual Benefit Insurance [29 Cyc 20, 228].
Jury see Juries [24 Cyc 225, 228, 240].
Mines and minerals see Mines and Minerals [27 Cyc 575].
Will see Wills [40 Cyc 1171].
Contempt proceeding see Contempt [9 Cyc 39].
Creditor's Suit see Creditors' Suits [12 Cyc 41].
Criminal prosecution see Criminal Law.
Deed by subsequent instrument see Deeds [13 Cyc 572].
Discovery see Discovery [14 Cyc 316].
Divorce suit see Divorce [14 Cyc 675].
Drainage see Drains [14 Cyc 1033, 1047, 1064].
Election see Elections [15 Cyc 379, 412].
Eminent domain see Eminent Domain [15 Cyc 859, 917].
Execution see Executions [17 Cyc 1043, 1373, 1385].
In or of particular acts, instruments or proceedings:—Continued
Forcible entry and detainer see Forcible Entry and Detainer [19 Cyc 1158].
Foreclosure see Chattel Mortgages [7 Cyc 119]; Mortgages [27 Cyc 1608, 1664].
Garnishment see Garnishment [20 Cyc 1043, 1053].
Habeas Corpus see Habeas Corpus [21 Cyc 313, 320].
Indictment or information generally see Indictments and Informations [22 Cyc 432].
Injunction see Injunctions [22 Cyc 932, 935].
Interpleader see Interpleader [23 Cyc 25].
Lis pendens see Lis Pendens [25 Cyc 1468].
Mandamus see Mandamus [26 Cyc 468, 476, 498].
Mechanic's lien proceeding see Mechanics' Liens [27 Cyc 206, 344, 398, 441].
Ne exeat see Ne Exeat [29 Cyc 394].
New trial see New Trial.
Partition see Partition [30 Cyc 220, 224, 229].
Patent generally see Patents [30 Cyc 910].
Penalty see Penalties [30 Cyc 1356].
Pension proceeding see Pensions [30 Cyc 1372].
Prohibition see Prohibition [32 Cyc 621].
Quieting title see Quieting Title [32 Cyc 1364].
Quo warranto see Quo Warranto [32 Cyc 1457].
Receivership see Receivers [34 Cyc 114].
Reference see References [34 Cyc 819, 863].
Reformation of instrument see Reformation of Instruments [34 Cyc 979].
Religious society, proceeding affecting see Religious Societies [34 Cyc 1189].
Removal of cause see Removal of Causes [34 Cyc 1290, 1312].
Replevin generally see Replevin [34 Cyc 1489].
Scire facias see Scire Facias [35 Cyc 1153].
Sequestration see Sequestration [35 Cyc 1402].
Sheriff or constable, action or proceeding concerning see Sheriffs and Constables [35 Cyc 1794, 1821, 1989].
Specific performance see Specific Performance [36 Cyc 786].
Statutory dispossession see Landlord and Tenant [24 Cyc 1443].
Submission of controversy see Submission of Controversy [37 Cyc 355].
Supersedeas see Supersedeas [37 Cyc 601].
Taxation see Taxation [37 Cyc 1018, 1067].
Trial generally see Trial.
In relation to costs see Costs [11 Cyc 59 et seq]; Pleading [31 Cyc 384].
Mandamus to compel see Mandamus [26 Cyc 211, 288].
Necessity of new process after see Process [32 Cyc 424].
Of:
Affidavit see Affidavits § 121 et seq; Attachment [4 Cyc 521]; Arrest [3 Cyc 949]; Continuances [9 Cyc 145]; Garnishment [20 Cyc 1043]; Motions [28 Cyc 12]; Ne Exeat [29 Cyc 393]; New Trial [29 Cyc 979]; Replevin [34 Cyc 1438]; Venue [40 Cyc 159].

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AMENDS. Compensation or satisfaction for an injury or loss.[82]

AMENITY. Restraining the owner from doing that with and on his own property which, but for a grant or covenant, he might lawfully have done.[83]

A MENSA ET THORO.[84] Literally "from bed and board." A limited divorce or separation by judicial decree.[85]

AMERCEMENT.[86] A penalty;[87] a money penalty in the nature of a fine imposed upon an officer for some misconduct or neglect of duty;[88] a pecuniary penalty in the nature of a fine, imposed on a person for some fault or misconduct, he being "in mercy" for his offense.[89]

Of:—Continued
Assessment see Municipal Corporations [28 Cyc 1175]; Taxation [37 Cyc 1018, 1067].
Bill of particulars see Indictments and Informations [22 Cyc 445]; Pleading [31 Cyc 589].
Bond see Appeal and Error [2 Cyc 847]; Attachment [4 Cyc 538]; Bail [5 Cyc 21]; Certiorari [6 Cyc 792]; Ne Exeat [29 Cyc 394]; Removal of Causes [34 Cyc 1293]; Replevin [34 Cyc 1450, 1462]; Sheriffs and Constables [35 Cyc 1512].
By-law see Beneficial Associations [29 Cyc 20]; Building and Loan Associations [6 Cyc 123]; Corporations [10 Cyc 355].
Certificate see Acknowledgments § 234; Aliens [2 Cyc 115]; Elections [15 Cyc 339]; Mines and Minerals [27 Cyc 575].
Charter see Corporations [10 Cyc 206]; Municipal Corporations [28 Cyc 235]; Railroads [33 Cyc 73]; Street Railroads [36 Cyc 1370].
Claim see Attachment [4 Cyc 743]; Executors and Administrators [18 Cyc 485]; Garnishment [20 Cyc 1134]; Mechanics' Liens [27 Cyc 206].
Constitution see Constitutional Law [8 Cyc 719, 774, 846, 889].
Exception or objection see Appeal and Error [3 Cyc 50]; References [34 Cyc 863].
Finding see Trial [38 Cyc 1892, 1931, 1987].
Interrogatories see Trial [38 Cyc 1917].
Judgment or decree see Admiralty § 286; Divorce [14 Cyc 784]; Ejectment [15 Cyc 178]; Equity [16 Cyc 501]; Highways [37 Cyc 124]; Judgments [23 Cyc 859, 882]; Mechanics' Liens [27 Cyc 441]; Mortgages [27 Cyc 1664]; Replevin [34 Cyc 1542]; Taxation [37 Cyc 1315].
Motion see Motions [28 Cyc 12]; New Trial [29 Cyc 958].
Order see Orders [29 Cyc 1518]; References [34 Cyc 799].
Ordinance see Municipal Corporations [28 Cyc 380, 1010].
Pleading:
Generally see Admiralty § 205; Equity [16 Cyc 335]; Indictments and Informations [22 Cyc 157]; Pleading [31 Cyc 359].
Affidavit in support of see Pleading [31 Cyc 374].
Affidavit of defense see Pleading [31 Cyc 456].
Affidavit of verification see Pleading [31 Cyc 546].
Alleging new cause of action see Pleading [31 Cyc 365].
As of course see Costs [11 Cyc 60]; Pleading [31 Cyc 362, 383, 457].
By annexing bill of particulars or exhibits see Pleading [31 Cyc 458].
Changing:
Case or raising new issues see Equity [16 Cyc 338]; Pleading [31 Cyc 425].
Defense see Pleading [31 Cyc 424].
Form of action see Pleading [31 Cyc 429].
Issue of law to issue of fact see Pleading [31 Cyc 366].
Costs of see Admiralty § 205; Costs [11 Cyc 59]; Equity [16 Cyc 349]; Pleading [31 Cyc 379].
Of garnishee see Garnishment [20 Cyc 1088].
Rendering bill multifarious see Equity [16 Cyc 338].

Of:—Continued
Pleading:—Continued
Successive see Pleading [31 Cyc 371].
Technical see Pleading [31 Cyc 371].
Process:
Generally see Arrest [3 Cyc 949]; Executions [17 Cyc 1046, 1373, 1374]; Juries [24 Cyc 225]; Process [32 Cyc 531].
By court see Executions [17 Cyc 1043].
By officer see Process [32 Cyc 537]; Sheriffs and Constables [35 Cyc 1373].
Nunc pro tunc see Process [32 Cyc 536].
Recognizance see Recognizances 34 Cyc 549, 550, 567].
Record:
Generally see Highways [37 Cyc 124]; Indictments and Informations [22 Cyc 219]; Juries [24 Cyc 240]; Records [34 Cyc 590]; Taxation [37 Cyc 1481]; Trial [38 Cyc 1906].
Of:
City council see Municipal Corporations [28 Cyc 346].
County board see Counties [11 Cyc 400].
Court see Courts [11 Cyc 764].
Justice of the peace see Justices of the Peace [24 Cyc 638].
Town meeting see Towns [38 Cyc 617].
On appeal in:
Civil action see Appeal and Error [3 Cyc 134].
Criminal proceedings see Criminal Law [12 Cyc 859].
Report see Highways [37 Cyc 112]; References [34 Cyc 846]; Taxation [37 Cyc 1368].
Return:
Generally see Attachment [4 Cyc 616]; Certiorari [6 Cyc 810]; Elections [15 Cyc 379]; Executions [17 Cyc 1373, 1385]; Garnishment [20 Cyc 1073]; Grand Juries [20 Cyc 1314]; Habeas Corpus [21 Cyc 320]; Juries [24 Cyc 228]; Process [32 Cyc 537]; Scire Facias [35 Cyc 1157]; Sheriffs and Constables [35 Cyc 1539].
On appeal see Appeal and Error [3 Cyc 134]; Equity [16 Cyc 346]; Justices of the Peace [24 Cyc 735].
Rule see Courts [11 Cyc 743].
Schedule see Assignment for Benefit of Creditors [4 Cyc 162]; Bankruptcy [5 Cyc 300, 306]; Exemptions [18 Cyc 1473].
Statute see Statutes [36 Cyc 951, 1053].
Verdict of finding:
In:
Civil action see Trial [38 Cyc 1892].
Criminal proceeding see Criminal Law [12 Cyc 699].
On appeal see Appeal and Error [3 Cyc 257].
On trial by court see Trial [38 Cyc 1987].
Special verdict or finding see Trial [38 Cyc 1931].
Writ see Arrest [3 Cyc 958]; Attachment [4 Cyc 552]; Certiorari [6 Cyc 790]; Executions [17 Cyc 1043]; Garnishment [20 Cyc 1054]; Real Actions [38 Cyc 1546]; Replevin [34 Cyc 1453].
Repeal of amendment to statute as restoring original statute see Statutes [36 Cyc 1101].
See also specific Titles in this Work.

82. Burrill L. D. See generally Damages [13 Cyc 1].

83. Columbia College v. Lynch, 70 N. Y. 440, 447, 26 AmR 615 [quot Equitable L. Assur. Soc. v. Brennan, 24 NYS 784, 788, 30 AbbNCas 260] (where the court said: "The right sought to be enforced here is an easement, or, as it is sometimes called, an amenity, and consists in restraining the owner from doing that with, and upon, his property which, but for the grant or covenant, he might lawfully have done, and hence is called a negative easement, as distinguished from that class of easements which compels the owner to suffer something to be done upon his property by another. Wash. on Easements, 5").

84. **A mensa et thoro:** Divorce: Generally see Divorce [14 Cyc 574, 594, 710].
Liability of husband for necessaries furnished after see Husband and Wife [21 Cyc 1227].
See also A Vinculo.

85. Rapalje & L. L. D.

86. **Amercement of sheriff** see Sheriffs and Constables [35 Cyc 1882].

87. Stansbury v. Patent Cloth Mfg. Co., 5 N. J. L. 433, 441; Taylor v. Rhyne, 65 N. C. 530, 532; Thompson v. Berry, 65 N. C. 484, 485.

[a] **The term is generally used** with reference to a penalty imposed on a sheriff or other executive officer for failure to comply with a duty of his office, and is assessed against the delinquent or imposed arbitrarily by the court at its discretion. Stansbury v. Patent Cloth Mfg. Co., 5 N. J. L. 433, 441.

[b] **Fixed sum.**—"An amercement is a penalty, and is for a fixed sum without regard to the little or much of the plaintiff's damage." Thompson v. Berry, 65 N. C. 484, 485.

88. Stein v. Scanlan, 34 Okl. 801, 802, 127 P 483, 42 LRANS 895.

89. Stansbury v. Patent Cloth, etc., Co., 5 N. J. L. 433, 441.

[a] **Common-law practice.**—(1) "Amercement" was the practice which obtained at the common law of compelling plaintiff who made a false clamor, and either failed to try his case, or, trying it, failed to sustain it, to pay a fine which went to the king as a penalty for the groundless invasion of a court of justice. Goodyear v. Sawyer, 17 Fed. 2, 9. (2) "Now, the word 'amerced' is a very old word in English law. It is to be found again and again in all courts: courts of forest, courts baron, manor courts, in local hundred courts, and others. It really is the same word as that which is used at the end of most of the entries of the proceedings of those courts when a man is said to be amerced—that is to say, that he is to be in mercy as being liable to such a punishment as may be inflicted upon him, mostly by fine, but not necessarily by fine alone." Per Pollock, B., in Matter of Nottingham, [1897] 2 Q. B. 502, 508.

[b] **A judgment of amercement** on due notice is when the officer is sued upon his bond, conclusive against the officer but only prima facie against the sureties. F. Assoc. v. Ruby, 49 Nebr. 584, 588, 68 NW 939 [cit Graves v. Bulkley, 25 Kan. 249, 37 AmR 249].

[c] **A forfeited recognizance** to appear to answer a charge of felony or misdemeanor does not pass to a corporation under charters granting it all amercements, etc. Matter of Nottingham, [1897] 2 Q. B. 502.

[d] **"Fine" distinguished.**—(1) "An amerciament is ordered by the Court, but affeered by the jury, and a fine is not only ordered, but assessed by the Court; and as for these amerciaments, which are ordered and as-

AMERICAN.[90] An adjective descriptive, in the general mind, of the descendants of Europeans born in America, and applied especially to the inhabitants of the United States.[91]

Phrases in which the word has been used have received judicial interpretation, such as "American clause,"[92] "American currency,"[93] "American doctrine,"[94] "American fisheries,"[95] "American gallon,"[96] "American hop ale,"[97] "American plan,"[98] "American seamen,"[99] "American ship,"[1] "American vessels."[2]

AMERICAN TABLE OF MORTALITY.[3] A tabulation of results of the combined and actual experience of American life insurance companies, which is now regarded as the orthodox standard throughout the United States and Canada; a table based on the lives of insurable or healthy persons, known to be now in use generally by modern life insurance companies, for the arithmetical estimate of valuations.[4]

AMIABLES COMPOSITEURS. A species of arbitrators or mediators who are not required to follow

sessed by the Court, upon officers, who are in contempt, or in default of their duty, these seem to be rather fines than amerciaments, though they are commonly so called; and yet it hath been held, that where a pecuniary penalty is assessed by the Court upon an officer, it is properly an amerciament, but when on a stranger, it is a fine." Anonymous, 3 Salk. 33, 91 Reprint 674. To same effect Godfrey's Case, 11 Coke 42, 77 Reprint 1199; Beecher's Case, 8 Coke 58, 77 Reprint 559; Brook v. Hustler, 1 Salk. 56, 91 Reprint 55. (2) The difference between "amercement" and "fines" is that the latter are certain and are created by statute, and can only be imposed by courts of record, while the former are arbitrarily imposed, and may be imposed by courts not of record. Stansbury v. Patent Cloth Mfg. Co., 5 N. J. L. 433, 441.

90. American:
Common law see Common Law [8 Cyc 367].
Eagle see Trade-Marks and Trade-Names [38 Cyc 730].
Girl see Trade-Marks and Trade-Names [38 Cyc 724].
See also United States [39 Cyc 689].

91. Beardsley v. Bridgeport, 53 Conn. 489, 493, 3 A 557, 55 AmR 152.

[a] **In construing a bequest,** for the special benefit of the "worthy, deserving, poor, white, American," the court said: "They must be 'American.' In the general mind this adjective now describes the descendants of Europeans born in America, and is applied especially to the inhabitants of the United States; persons quite as easily distinguished as Indians and Africans." Beardsley v. Selectmen, 53 Conn. 489, 491, 493, 3 A 557, 55 AmR 152.

[b] **Within treaty provisions.**—It has been held that an English subject, an enlisted seaman on an American vessel, which floated the American flag, was an American, under the protection of and subject to the laws of the United States equally with the seaman who was native born, within the meaning of a statute and treaty providing for the jurisdiction of consular courts over Americans committing offenses in Japan. In re Ross, 140 U. S. 453, 11 SCt 897, 35 L. ed. 581.

[c] **Quarantine regulations.**—In Gow v. Gans Steamship Line, 174 Fed. 215, 217, 98 CCA 223, in construing a quarantine regulation, the court said: "The word 'American' in the regulation cannot refer to the United States, which lies entirely above the tropics, but we think must be understood as referring to the continent of America or Western Hemisphere. Havana, the port from which the vessel came, is within the tropics; that is, the space between 23° 27' north and 23° 27' south latitude."

[d] **Use of word as trade-mark.**—"The word 'American' is broadly geographic. Draper v. Skerrett, 116 Fed. 206. I am clear on the proposition that the words 'American Wine Company' are not in themselves a good trade-mark, and cannot be exclusively appropriated as a trade-mark or trade-name." American Wine Co. v. Kohlman, 158 Fed. 830, 831.

92. London Assur. Corp. v. Paterson, 106 Ga. 538, 553, 32 SE 650; American Ins. Co. v. Griswold, 14 Wend. (N. Y.) 399, 500, Tracy, Senator, dissenting (defining this term as applied to insurance as a proviso in a policy of insurance that, in case of any subsequent insurance, the insurer shall nevertheless be answerable for the full extent of the sum subscribed by him, without right to claim contribution from subsequent insurers).

93. Chicago Third Nat. Bank v. Cosby, 41 U. C. Q. B. 402, 413 (where it was said: "The declaration alleges that 'American currency' is 'lawful money of the United States.' The plea denies that fact, shews what American currency is, and tenders issue as to whether it is lawful money of the United States. The issue tendered is a good one, and involves an enquiry into the law of the United States, as to whether American currency, such as described in the plea, is lawful money in the United States. . . . Judicially we have no knowledge of 'American currency.' It may be something which is current for all purposes in one State, and not in the others of the United States. It may be something which is not current for all purposes in any State. It may be something which is not current for any purpose in any State. It may be anything or everything which the people of the United States of America choose to call it").

94. Allen, etc., Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 1114, 37 S 980, 104 AmSR 525, 68 LRA 650, 2 AnnCas 471 (where it was said: "The doctrine that a third person for whose benefit a contract is made may sue upon it is adopted in most of the United States, and is frequently referred to, therefore, as the 'American doctrine'").

[a] **The "trust fund" doctrine** that the capital stock of a corporation is a trust fund for the payment of its debts is commonly called the "American doctrine." Hospes v. Northwestern Mfg., etc., Co., 48 Minn. 174, 192, 50 NW 1117, 31 AmSR 637, 15 LRA 470.

95. Downing v. U. S., 124 Fed. 107, 108 (where it was held that canned turtle meat was a product of American fisheries within that term as used in the Tariff Act, and was entitled to a free entry).

96. Ceballos v. U. S., 139 Fed. 705, 706 (the wine gallon consisting of two hundred and thirty-one cubic inches).

97. Lincoln Center v. Linker, 7 Kan. A. 282, 53 P 787, 788 (where it was said that American hop ale, as sold in Kansas, is an imitation of lager beer, made of malted grain, hops, and water, slightly fermented, and contains a very slight percentage of alcohol).

98. New Galt House Co. v. Louisville, 129 Ky. 341, 343, 111 SW 351 (a plan whereby "meals were provided at regular hours for . . . patrons [of a hotel], who paid a stipulated sum per day, which included both meals and room rent"); McClure v. Krumbholz, 9 Pa. Dist. 544, 545 (a system adopted by innkeepers whereby guests "pay for their lodging and meals [s] in one bill").

[a] **"European plan" distinguished.**—(1) "The guests at a hotel conducted upon the 'American plan' pay for their lodging and meal in one bill, while the guests at a house conducted upon the 'European plan' pay for these charges separately. In all other respects there is no difference in the manner of carrying on their business." McClure v. Krumbholz, 9 Pa. Dist. 544, 545. (2) It has been held that the mere change from the "American plan" to the "European plan" did not authorize a city to impose upon a hotel keeper two licenses, one for keeping a hotel and the other for operating a restaurant. The court said: "Formerly this hotel was conducted on what is called the 'American plan;' that is, meals were provided at regular hours for its patrons, who paid a stipulated sum per day, which included both meals and room rent. Some time prior to this litigation the management of the hotel changed the manner of conducting it from the 'American plan' to what is known as the 'European plan;' the difference being simply in the fact that under the latter the guests patronize the hotel table or not, as they please, and, when they do so, pay for what they order." New Galt House Co. v. Louisville, 129 Ky. 341, 343, 111 SW 351, 17 LRANS 566. To same effect Sleward v. Denechaud, 120 La. 720, 729, 45 S 561.

99. The Laura M. Lunt, 170 Fed. 204, 205 (holding that all sailors on an American vessel regardless of nationality are American seamen within the federal statute providing for the protection of American seamen).

1. U. S. v. Rogers, 27 F. Cas. No. 16,189, 3 Sumn. 342, 343 (holding that, within a statute providing for punishment for the mutiny of the crew of an American ship, a registered ship engaged in a whaling voyage was not an American ship under a statute providing that "no registered ship or vessel can, while she remains registered, engage in the whale fisheries; but she must surrender her register, and be enrolled and licensed for the fisheries").

2. See 18 Op. Atty.-Gen. 99 (holding that the expression "American vessels," in Act June 26, 1884, § 12 [23 U. S. St. at L. p 56], providing that no consular fees shall be charged for official services to American vessels or seamen, includes not only "vessels of the United States" as defined by Rev. St. § 4131, but "foreign-built registered American vessels" as well).

3. See Mortality Tables [27 Cyc 814].

4. Gordon v. Tweedy, 74 Ala. 232, 237, 49 AmR 813.

[a] **History of American table of mortality.**—In Gordon v. Tweedy, 74 Ala. 232, 237, 49 AmR 813, the court said: "More than forty years ago [this case was decided in 1883], the courts were accustomed to resort to the 'Northampton' and the 'Carlisle' Tables of observation, showing the probabilities of human life by actual observation in the towns of Northampton and Carlisle, England. These deaths, however, were not taken from selected lives, but from the population generally. The field was so circumscribed, that they had never been deemed entirely reliable. . . . New fields of observation have been explored, based upon the combined and actual experience of American life-insurance companies."

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the strict rules of law and procedure, but whose decision is based upon equity and good conscience.[5]

AMICABLE. Friendly.[6]

An amicable action or lawsuit[7] is one instituted seriously, but in a friendly spirit, that some matter in controversy may be settled definitely, as cheaply and with as little delay as possible.[8]

5. Richelieu, etc., Co., v. Commercial, etc., Co., 5 Que. Super. 10, 19.

[a] **Latitude allowed.**—In Rolland v. Cassidy, 13 App. Cas. 770, 772 [quot Richelieu, etc., Nav. Co. v. Commercial Union Assur. Co., 5 Que. Super. 10, 20], it was said: "What is the force and meaning of that expression 'amiables compositeurs,' by Canadian law? We find it in the 1346th article of the Code of Civil Procedure: 'Arbitrators must hear the parties, and their respective proofs, or establish default against them, and decide according [to] the Rules of Law, unless they are dispensed from so doing by the terms of the submission, or unless they have been appointed as "amiables compositeurs."' That is to say, if they are amiables compositeurs, they are to be exempt at all events from the strictness of the obligation expressed in the previous words. . . . Their Lordships would, no doubt, hesitate much before they held that to entitle arbitrators named as amiables compositeurs to disregard all law, and to be arbitrary in their dealings with the parties; but the distinction must have some reasonable effect given to it, and the least effect which can reasonably be given to the words is, that they dispense with the strict observance of those rules of law the non-observance of which, as applied to awards, results in no more than irregularity."

[b] **Amicable compounders.**—Civ. Code, art 3076 recognizes two classes of arbitrators: "The arbitrators properly so called," and "the amicable compounders." The following article defines the difference between them, as to the principles by which they are to be guided in the discharge of their duty: "The arbitrators, says article 3077, ought to determine, as judges, agreeably to the strictness of the law. Amicable compounders are authorized to abate something of the strictness of the law in favor of natural equity." Bird v. Laycock, 7 La. Ann. 171, 172. See also St. Patrick's Church v. Dakin, 1 Rob. (La.) 202; Davis v. Leeds, 7 La. 471; Arbitration and Award [3 Cyc 626].

6. Abbott L. D.

7. **Amicable action or lawsuit:** Generally see Submission of Controversy [37 Cyc 346]. See also Arbitration and Award [3 Cyc 626].

For revival of judgment see Judgments [23 Cyc 1462].

8. Thompson v. Moulton, 20 La. Ann. 535, 537.

A brought a suit against B, and then entered into an arrangement with him, by which it was agreed that the suit should be discontinued, and an amicable action against B be brought at the same term. C then covenanted with A, that if A should recover from B in the amicable action, C would be surety for the payment. B was declared bankrupt, and when A applied to the court for leave to discontinue the action and enter an amicable action, B objected. The court, nevertheless, granted permission, and B appeared and pleaded his certificate. It was held that C was answerable under his agreement. Brackenridge, J., said: "I would have taken it that the terms of the agreement of the 15th April 1800 would have been answered by a proceeding under the action as it was originally entered; for the word amicable is not of substance, the meaning being an action to be entered. Whether amicable or adverse could not be material, and was used only as that was the form of action that was then contemplated; but ex majori cautela and to avoid exceptions, it was discontinued, and the term amicable entered in the form of the new action, to which entry of the action it is alleged that the defendant in that action named did not consent. But the court, on hearing, so ordered it, which under the circumstances of the case, they conceived themselves to have the power to do. This I take it cannot now be controverted. But if it could, the appearance of the defendant to the new action is a ratihabitio, and amounts to an assent originally given." Bond v. Gardiner, 4 Binn. (Pa.) 269, 281.

[a] **"Arbitration" distinguished.**—The words "arbitration" and "amicable lawsuit" are not convertible terms; the former carries with it the idea of settlement by disinterested third parties, and the latter by a friendly submission of the points in dispute to a judicial tribunal, to be determined in accordance with the terms of law. Thompson v. Moulton, 20 La. Ann. 535, 537.

[b] **"Collusive or fictitious actions" distinguished.**—In Lord v. Veazie, 8 How. (U. S.) 251, 255, 12 L. ed. 1067, the court said: "The suit is spoken of, in the affidavits filed in support of it, as an amicable action, and the proceeding defended on that ground. But an amicable action, in the sense in which these words are used in courts of justice, presupposes that there is a real dispute between the parties concerning some matter of right. And in a case of that kind it sometimes happens, that, for the purpose of obtaining a decision of the controversy, without incurring needless expense and trouble, they agree to conduct the suit in an amicable manner, that is to say, that they will not embarrass each other with unnecessary forms or technicalities, and will mutually admit facts which they know to be true, and without requiring proof, and will bring the point in dispute before the court for decision, without subjecting each other to unnecessary expense or delay. But there must be an actual controversy, and adverse interests. The amity consists in the manner in which it is brought to issue before the court. And such amicable actions, so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties. The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be."

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AMICUS CURIÆ

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[Matters not in this Title, treated elsewhere in this Work, see Cross References infra this page]

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CROSS REFERENCES

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Office of attorney in general see **Attorney and Client** [4 Cyc 898].

I. DEFINITION

[§ 1] An amicus curiae[1] is a bystander, usually a lawyer, who interposes and volunteers information upon some matter of law in regard to which the judge is doubtful or mistaken, or upon a matter of which the court may take judicial cognizance.[1½] The term is also sometimes applied to persons who have no right to appear in a suit, but who are allowed to introduce evidence to protect their own interests.[2]

The court may act upon the information received in this manner,[3] but it can do no more upon the suggestion of an amicus curiæ than it could do if properly informed in any other manner.[4]

II. POWER OF COURT TO INVOKE AID

[§ 2] The court may request an attorney to appear in a case as an amicus curiæ[5] and to make suggestions and argument as such,[6] or the court may ask information of counsel upon a doubtful point;[7] and, it has been held, the court may appoint an attorney to appear in a case as an amicus curiæ;[8] but the court may not appoint an amicus curiæ to perform judicial functions in its place,[9] nor to repre-

1. Literally "friend of the court" see Little v. Thompson, 24 Ind. 146, 147.

1½. Black L. D. See also Abbott L. D.; Bouvier L. D. [cit 2 Coke Inst. 178; 2 Viner Abr. 475].

[a] **Another definition.**—One who, as a stander by, when a judge is doubtful or mistaken in a matter of law, may inform the court. Birmingham Loan, etc., Co. v. Anniston First Nat. Bank, 100 Ala. 249, 13 S 945, 46 AmSR 45.

[b] **In its ordinary use** the term implies the friendly intervention of counsel to remind the court of some matter of law which has escaped its notice, and in regard to which it is in danger of going wrong. Hamlin v. "Perticuler Baptist Meeting House," 103 Me. 343, 69 A 315; Taft v. Northern Transp. Co., 56 N. H. 414; Com. v. Collum, 1 Pa. Super. 542.

[c] **Any person may act** as amicus curiæ. Tollemache v. Tollemache, 30 L. J. P. & M. 113.

[d] **Member of legislature.**—Viner Abr. 476 [cit Horton v. Ruesby, Comb. 33, 90 Reprint 326] infra note 19 [f].

2. Bass v. Fontleroy, 11 Tex. 698, 701.

[a] **Person interested in the estate of an insane person** may appear as amicus curiæ in a proceeding instituted by the state for the appointment of a conservator. Joost v. Racher, 148 Ill. A. 548.

[b] **Attorney-general.**—Parker v. State, 133 Ind. 178, 32 NE 836, 33 NE 119, 18 LRA 567 infra note 11 [a].

[c] **Attorney-general of the United States.**—Employers' Liability Cases, 207 U. S. 463, 28 SCt 141, 52 L. ed. 297 infra note 37 [a].

[d] **Counsel representing other interests.**—State v. Rost, 49 La. Ann. 1451, 22 S 421 infra note 19 [a].

[e] **Receiver.**—Peo. v. Union Bldg., etc., Assoc., 127 Cal. 400, 59 P 692 infra note 19 [e].

[f] **United States district attorney.**—See infra note 25 [a].

3. E. B. v. E. C. B., 28 Barb. (N. Y.) 299.

4. State v. Jefferson Iron Co., 60 Tex. 312; Moseby v. Burrow, 52 Tex. 396; Andrews v. Beck, 23 Tex. 455.

5. Ex p. Randolph, 20 F. Cas. No. 11,558, 2 Brock. 447.

[a] **Attorney-general.**—Parker v. State, 133 Ind. 178, 32 NE 836, 33 NE 119, 18 LRA 567.

6. In re Ah Yup, 1 F. Cas. No. 104, 5 Sawy. 155.

7. Parker v. State, 133 Ind. 178, 32 NE 836, 33 NE 119, 18 LRA 567; Campbell v. Swasey, 12 Ind. 70; Haley v. Eureka County Bank, 21 Nev. 121, 26 P 64, 12 LRA 815; State v. Jefferson Iron Co., 60 Tex. 312.

8. In re St. Louis Christian Science Inst., 27 Mo. A. 633 (holding that an amicus curiæ appointed by the court to examine an application for incorporation is an officer of the court appointed by authority of law to aid the court by the performance of certain labors and examinations which are necessary to guide the court to a proper conclusion).

9. Com. v. Collum, 1 Pa. Super. 542, 545 (where the court held that a member of the bar cannot be called to the bench as an amicus curiæ to perform the functions of a judge, saying: "No definition of the functions of an amicus curiæ that we have been able to find, or that can be sustained by any authoritative decision that has

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sent it on an appeal, as the court is not a party to an appeal.[10] However, the powers of an amicus curiæ are not enlarged by reason of the request, invitation, or appointment of the court authorizing him to act in that capacity.[11]

To file exceptions to account of fiduciary. The right of a court to appoint an amicus curiæ to file exceptions to the account of a fiduciary has been conceded,[12] and it has also been denied on the ground that it is not the office of an amicus curiæ to become a prosecutor by putting in shape objections dictated by the court.[13]

III. POWERS AND FUNCTIONS OF AMICUS CURIÆ

[§ 3] **A. Nature of Right to Appear.** An amicus curiæ is heard only by the leave,[14] and for the assistance of the court, and upon a case already before it;[15] but such right to be heard is not dependent upon the consent of a party to the suit.[16]

That competent counsel have been employed by the parties to take charge of their interests is a ground upon which the court may refuse an application to be heard as amicus curiæ.[17]

Assumption of the role of amicus curiæ by counsel through whom some of the parties are represented does not affect the proceedings.[18]

[§ 4] **B. When Amicus Curiæ May Appear—1. In General.** One may, as amicus curiæ, suggest the action of the court in any matter in which the court may proceed of its own motion,[19] but not in matters that should be presented by exception or plea.[20]

[§ 5] **2. For Dismissal of Suit, Quashal of Writ, Etc.**[21] On the ground that it is collusive or fictitious, an attorney as an amicus curiæ may move to dismiss the action,[22]

come to our notice, is broad enough to warrant such delegation of judicial power. A judge cannot leave his seat upon the bench and designate a member of the bar, however learned, to take his place; neither can the associates call a member of the bar to the bench to advise them how to conduct the trial and how to decide the questions of law that may arise, and thus virtually take the place of the law judge. To designate such a person as amicus curiæ does not alter the case; it is a misuse of the term. It does not disguise the fact that he was called to the bench to exercise judicial functions; and it makes little difference whether he announced the rulings which he advised the judges to make or whether they announced them").

[a] **A justice of the peace may consult** another justice of the peace, or a lawyer who may act as an amicus curiæ, but it seems that the latter can assume no authority in deciding the case. Bocock v. Cochran, 32 Hun (N. Y.) 521.

10. Pina's Est., 112 Cal. 14, 44 P 332.

Appeal, etc., by amicus curiæ see infra § 10.

[a] **Effect of such appointment.**—The rights or powers of a counsel appearing as amicus curiæ are not enlarged because the court assumed to appoint him in that capacity to represent it on the appeal of a cause which had come before it. Pina's Est., 112 Cal. 14, 44 P 332.

11. Pina's Est., 112 Cal. 14, 44 P 332 supra note 10 [a]; Parker v. State, 133 Ind. 178, 32 NE 836, 33 NE 119, 18 LRA 567.

[a] **If the attorney-general is called into a case** as amicus curiæ, his powers as such are not thereby enlarged. Parker v. State, 133 Ind. 178, 32 NE 836, 33 NE 119, 18 LRA 567.

12. Mumma's Est., 2 Pa. Dist. 592.

13. Stitzel's Est., 221 Pa. 227, 70 A 749, 18 LRANS 284.

14. U. S.—Grey Jacket v. U. S., 5 Wall. 370, 18 L. ed. 646; Robinson v. Lee, 122 Fed. 1010 [aff 196 U. S. 64, 25 SCt 180, 49 L. ed. 388]; In re Columbia Real-Est. Co., 101 Fed. 965.

Ala.—Birmingham Loan, etc., Co. v. Anniston First Nat. Bank, 100 Ala. 249, 13 S 945, 46 AmSR 45.

Cal.—Tomkin v. Harris, 90 Cal. 201, 27 P 202.

Ill.—Charleston v. Cadle, 167 Ill. 647, 49 NE 192; Matter of Guernsey, 21 Ill. 443; Joost v. Racher, 148 Ill. A. 548.

Ind.—Boyd v. Brazil Block Coal Co., 152 Ind. 543, 49 NE 797; Irwin v. Armuth, 129 Ind. 340, 28 NE 702; Little v. Thompson, 24 Ind. 146; Yeager v. Yeager, 43 Ind. A. 313, 87 NE 144.

Me.—Hamlin v. "Perticuler Baptist Meeting House," 103 Me. 343, 69 A 315.

Mass.—Martin v. Tapley, 119 Mass. 116; Nauer v. Thomas, 95 Mass. 572.

Mich.—People v. Gibbs, 70 Mich. 425, 38 NW 257.

N. Y.—E. B. v. E. C. B., 8 AbbPr 44.

Tex.—State v. Jefferson Iron Co., 60 Tex. 312; Hurd v. Inglehart, 140 SW 119.

Eng.—Tollemache v. Tollemache, 30 L. J. P. & M. 113. See also Prince's Case, 8 Coke 13b, 77 Reprint 496.

15. In re Columbia Real-Est. Co., 101 Fed. 965; Birmingham Loan, etc., Co. v. Anniston First Nat. Bank, 100 Ala. 249, 13 S 945, 46 AmSR 45; Martin v. Tapley, 119 Mass. 116.

[a] **He acts for no one.**—Campbell v. Swasey, 12 Ind. 70.

[b] **He simply "seeks to give information** to the Court . . . while a friend may advise, it is difficult to discover his right to compel a Court to an admission of its error in acting upon the advice." Campbell v. Swasey, 12 Ind. 70, 72.

16. Ex p. Brockman, 233 Mo. 135, 154, 134 SW 977 (where Lamm, J., said: "If such appearance was as amicus curiæ, and as a matter of grace, then that grace alone concerns us. Grace doth not abound through consent of one's adversary. It droppeth, withal, like mercy—as the gentle and refreshing dews of Heaven").

17. Nauer v. Thomas, 13 Allen (Mass.) 572.

18. State v. McDonald, 63 Or. 467, 471, 128 P 835 [quot Cyc].

19. Adams Gloss [cit Y. B. 4 Hen. VI 16; Theloall Dig. lib. xiii c 14; Protector v. Geering, Hardres 85; Falmouth v. Strode, 11 Mod. 136, 88 Reprint 949]; Dove v. Martin, Comb. 169, 90 Reprint 410, 1 Show. 56, 89 Reprint 445; 2 Viner Abr. 475, 476 [cit Rex v. Vaux, Comb. 13, 90 Reprint 314]. To same effect U. S. v. Gale, 109 U. S. 65, 68, 3 SCt 1, 27 L. ed. 857 (objections to grand juror); State v. Middleton, 5 Port. (Ala.) 484 (objections to grand juror); Boyington v. State, 2 Port. (Ala.) 100; Croxton v. Renner, 103 Ind. 223, 2 NE 601; Jeffersonville R. Co. v. Swayne, 26 Ind. 477; Childs v. Risk, Morr. (Iowa) 439; Mallory v. Burlington, etc., R. Co., 53 Kan. 557, 36 P 1059; Life Assoc. of America v. Hall, 33 La. Ann. 49; Lesassier v. Board of Liquidation, 30 La. Ann. 611; Chicago, etc., R. Co. v. Anderson, (Tex.) 141 SW 513; Jones v. Jefferson, 66 Tex. 576, 1 SW 903; State v. Jefferson Iron Co., 60 Tex. 312 [cit 2 Coke Inst. 178, 2 Viner Abr. 475]; Andrews v. Beck, 23 Tex. 455; Browne v. Walker, 2 Show. 406, 89 Reprint 1010; Rex v. Buckridge, 2 Show. 297, 89 Reprint 950 (holding, however, that the accused must be present).

[a] **In certiorari proceedings** in the supreme court formal intervention is not allowable, but counsel representing other interests may be permitted to appear as amicus curiæ. State v. Rost, 49 La. Ann. 1451, 22 S 421.

[b] **Judicial notice.**—An amicus curiæ may instruct, inform, or move the court on any matter of which the court takes judicial cognizance. Bouvier L. D. [cit Prince's Case, 8 Coke 13b, 15, 77 Reprint 496].

[c] **Any matters whether of law or fact** may be the subject of suggestions to the court by an amicus curiæ. Com. v. Collom, 1 Pa. Super. 542.

[d] **Proof of will.**—Upon an application to admit to probate an authenticated copy of a foreign will, to throw light on the question of the execution of the will, the court permitted persons to appear as amici curiæ, and to introduce evidence. In re Barr, 11 Oh. Dec. (Reprint) 910, 30 CincLBul 386. But see In re McClellan, 27 S. D. 109, 129 NW 1037, AnnCas1913C 1029 and note (holding that neither the state nor any of its officers can appear as amici curiæ to contest a petition for letters of administration).

[e] **A receiver,** appointed by the final judgment in a cause and who has no interest in the matter except that of retaining his office, may file a brief as amicus curiæ. Peo. v. Union Bldg., etc., Assoc., 127 Cal. 400, 59 P 692.

[f] **One who was a member of the legislature** at the time of the passage of a certain statute may inform the court as to the intention of the legislature in passing the act. Viner Abr. 476 [cit Horton v. Ruesby, Comb. 33, 90 Reprint 326].

20. Moseby v. Burrow, 52 Tex. 396. Compare Stitzel's Est., 221 Pa. 227, 70 A 749, 18 LRANS 284 supra note 13; Mumma's Est., 2 Pa. Dist. 592 supra note 12. See also infra § 10.

21. Dismissal before commissioners see Little v. Thompson, 24 Ind. 146.

22. U. S.—Robinson v. Lee, 122 Fed. 1010 [aff 196 U. S. 64, 25 SCt 180, 49 L. ed. 388].

Ala.—Birmingham Loan, etc., Co. v. Anniston First Nat. Bank, 100 Ala. 249, 13 S 945, 46 AmSR 45.

Ill.—In re Burdick, 162 Ill. 48, 44 NE 413; Matter of Guernsey, 21 Ill. 443; Sampson v. Chestnut Tp. Highway Comrs., 115 Ill. A. 443.

Ind.—Yeager v. Yeager, 43 Ind. A. 313, 87 NE 144, 146 [cit Cyc].

Nev.—Haley v. Eureka County Bank, 21 Nev. 127, 26 P 64, 12 LRA 815.

N. Y.—Steimer v. Steimer, 37 Misc. 26, 74 NYS 714; Judson v. Flushing Jockey Club, 14 Misc. 562, 36 NYS 128; E. B. v. E. C. B., 8 AbbPr 44.

Okl.—Muskogee Gas, etc., Co. v. Haskell, 38 Okl. 358, 132 P 1098.

Tenn.—Ward v. Alsup, 100 Tenn. 619, 46 SW 573; State v. Wilson, 2 Lea 204.

Vt.—Stearns v. Stearns, 10 Vt. 540.

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even on appeal,[23] but not, it seems, when he has theretofore had ample opportunity to intervene;[24] or that the court has no jurisdiction,[25] this being true even as to a motion to dismiss an appeal for want of jurisdiction.[26] He may also move to dismiss an action for want of prosecution.[27] However, it has been held that a suit will not be dismissed upon the application of an amicus curiæ for a mere defect in the complaint.[28]

Quashal and setting aside. So an amicus curiæ may move to quash an unauthorized attachment;[29] to set aside a summons and to dismiss an action where it appears that the summons had been issued before the complaint was filed,[30] or that the summons was not served upon the proper person;[31] or to set aside a verdict taken after the death of a party, where the death of one of the parties abates the action.[32] He cannot, however, move to quash an inquisition of escheat where he has no interest in the proceedings and does not represent anyone who claims an interest.[33]

Discontinuance. It seems that counsel cannot, in the character of an amicus curiæ, move to discontinue an action, and if he does so he will be deemed to be acting for a party to the suit.[34]

[§ 6] **3. On Behalf of Infant or Insane Person.** An amicus curiæ may make application for, and in behalf of, an infant,[35] or insane person.[36]

[§ 7] **4. On Behalf of Public Interests.** In summary proceedings, where formal intervention will not be allowed, one may be heard as amicus curiæ on interests public in their character.[37]

[§ 8] **5. On Death of Party.** The death of a party before[38] or after[39] verdict may be suggested by anyone as an amicus curiæ. Counsel for a deceased party may be heard as an amicus curiæ

Eng.—Coxe v. Phillips, Cas. t. Hard. 237, 95 Reprint 152.

[a] **Reason of rule.**—In In re Guernsey, 21 Ill. 443, 450, where the court held that it might receive and act upon the affidavit of an amicus curiæ pointing to the fact that the proceedings were not in good faith, it was said: "It is not unusual, we believe, for all courts to hear and receive the statements or affidavit of one claiming to speak or act as amicus curiæ—so as to suggest to the court as that it may not be led unconsciously into error, and where there may seem to be collusion between parties, by which another party may be injured, or for any cause, which the court is at liberty to recognize as proper for the interference of such person. In all such cases, if the parties immediately interested are not present, it would be but right that they should be informed of this interference, and time given them to resist or explain, by affidavit or otherwise."

[b] **Feigned and fictitious issues.**—Third persons, as amici curiæ, may intervene and call the court's attention to the fact that the issues are feigned and fictitious, and that the suit is being prosecuted by collusion of the parties. Muskogee Gas, etc., Co. v. Haskell, 38 Okl. 358, 132 P 1098. To same effect Haley v. Eureka County Bank, 21 Nev. 127, 26 P 64, 12 LRA 815 infra this note [c].

[c] **"It is not only the right, but the duty,** of an attorney of the court, if he knows or has reason to believe that the time of the court is being taken up by the trial of a feigned issue, to so inform the judge thereof; and it is discretionary with the court to stay proceedings, make due inquiry, and if the facts warrant the suggestion, then dismiss the case." Haley v. Eureka County Bank, 21 Nev. 127, 141, 26 P 64, 12 LRA 815.

23. Chamberlain v. Cleveland, 1 Black (U. S.) 419, 17 L. ed. 93.

[a] **The affidavit of a third person as amicus curiæ** may be heard upon a proceeding to dismiss an appeal of a suit alleged to be fictitious or not to have been carried on in good faith. Chamberlain v. Cleveland, 1 Black (U. S.) 419, 17 L. ed. 93; Smith v. Junction R. Co., 29 Ind. 546. See also American Wood Paper Co. v. Heft, 8 Wall. (U. S.) 333, 19 L. ed. 379.

24. Kelly v. New York City R. Co., 102 NYS 741 (holding that one may not, as an amicus curiæ, move to dismiss an appeal on the ground that a suit is collusive and brought to obtain in an ex parte manner the determination of a question of utmost gravity and greatest public importance, where the movant had ample opportunity to intervene upon the trial or by brief upon submission).

25. U. S.—In re Columbia Real-Estate Co., 101 Fed. 965. See also Lord v. Veazie, 8 How. 251, 12 L. ed. 1067.

Ill.—McAdam v. Peo., 179 Ill. 316, 53 NE 1102.

Me.—Perry v. Griefen, 99 Me. 420, 59 A 601.

Mass.—Williams v. Blunt, 2 Mass. 207.

Tenn.—Ward v. Alsup, 100 Tenn. 619, 46 SW 573.

Tex.—Jones v. Jefferson, 66 Tex. 576, 1 SW 903. See also State v. Jefferson Iron Co., 60 Tex. 312; Olsen v. California Ins. Co., 11 Tex. Civ. A. 371, 32 SW 446.

Eng.—Browne v. Walker, 2 Show. 406, 89 Reprint 1010.

[a] **The United States district attorney may be heard** as an amicus curiæ for the purpose of calling the attention of the court to its lack of jurisdiction in a certain matter. Hassard v. U. S., 29 Misc. 511, 61 NYS 939 [aff 46 App. Div. 623 mem, 61 NYS 939 mem (aff 173 N. Y. 645 mem, 66 NE 1110 mem)].

[b] **Whenever a court has issued letters of administration not authorized** by, or in contravention of, an express provision of the statute, it may, upon the suggestion of an amicus curiæ, revoke, annul, or set aside such letters. Croxton v. Renner, 103 Ind. 223, 2 NE 601; Jeffersonville R. Co. v. Swayne, 26 Ind. 477; Mallory v. Burlington, etc., R. Co., 53 Kan. 557, 36 P 1059; Gasque v. Moody, 20 Miss. 153.

26. McAdam v. Peo., 179 Ill. 316, 53 NE 1102; Ward v. Alsup, 100 Tenn. 619, 46 SW 573.

27. Tomkin v. Harris, 90 Cal. 201, 27 P 202.

28. Piggott v. Kirkpatrick, 31 Ind. 261.

29. Planters', etc., Bank v. Andrews, 8 Port. (Ala.) 404 (where, however, the court stated that it was unnecessary to discuss the powers of an amicus curiæ as some of the parties presenting themselves to the court in that character had such interest in the controversy as to authorize them to submit a motion to quash).

30. Hust v. Conn, 12 Ind. 257.

31. International, etc., R. Co. v. Moore, (Tex. Civ. A.) 32 SW 379. But compare Jones v. Jefferson, 66 Tex. 576, 1 SW 903; State v. Jefferson Iron Co., 60 Tex. 312 (both relating to defective service of process).

[a] **Effect as appearance.**—The appearance of the regular attorney of a corporation as amicus curiæ to object to the sufficiency of the service of a writ on one whose agency the corporation denies is not an appearance of such corporation. International, etc., R. Co. v. Moore, (Tex. Civ. A.) 32 SW 379.

32. Dove v. Martin, Comb. 169, 90 Reprint 410, 1 Show. 56, 89 Reprint 445.

33. Dunlop v. Com., 2 Call (6 Va.) 284.

34. Taft v. Northern Transp. Co., 56 N. H. 414.

35. Matter of Guernsey, 21 Ill. 443 (wherein a stranger suggested to the court impropriety in the sale of a ward's estate); Steimer v. Steimer, 37 Misc. 26, 74 NYS 714 (holding that the mother of a wife may attack an annulment of marriage as collusive where the wife is an infant); E. B. v. E. C. B., 8 AbbPr (N. Y.) 44; In re Green, 3 Brewst. (Pa.) 427; Beard v. Travers, 1 Ves. 313, 27 Reprint 1052 (a petition relating to the appointment of a guardian). See Jones v. Hudson, 93 Nebr. 561, 141 NW 141, 44 LRANS 1182 and note (holding that, where a party discharges his attorney, and makes a stipulation with his adversary for a decree disregarding the rights of minors not parties to the suit, the attorney as a friend of the court may properly suggest facts necessary to the protection of the minors).

36. Joost v. Rachter, 148 Ill. A. 548 (proceedings to appoint a conservator).

37. U. S.—Robinson v. Lee, 122 Fed. 1010 [aff 196 U. S. 64, 25 SCt 180, 49 L. ed. 388] (on receivability of scrip in payment of taxes). See also Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547.

Ind.—State v. Gorman, 171 Ind. 58, 85 NE 763; In re Arszman, 40 Ind. A. 218, 81 NE 680 (both proceedings for liquor license).

La.—State v. Rost, 49 La. Ann. 1451, 22 S 421 (where the state board of agriculture and the commissioner of agriculture made application to be allowed to intervene).

Oh.—In re Assignment, 34 Oh. St. 431 (on constitutionality of statute).

Va.—Ex p. Yeager, 11 Gratt. (52 Va.) 655 (argument against the issuance of a tavern-keeper's license in proceedings by mandamus).

Compare Mumma's Est., 2 Pa. Dist. 592 (holding that, where it appeared that in accounts presented for compensation illegal fees were allowed to the court officers, a committee of members of the bar should be appointed as amici curiæ to file exceptions to the account).

[a] **The attorney-general of the United States** may be allowed to be heard as a friend of the court and to take part by printed brief and oral argument in the hearing of the case in the United States supreme court, involving the constitutionality of an act of congress, although the right of the department of justice to intervene on behalf of the United States has been denied. Howard v. Illinois Cent. R. Co., 207 U. S. 463, 28 SCt 141, 52 L. ed. 297.

[b] **Laches** may defeat this right, especially after an appeal has been taken. Kelly v. New York City R. Co., 102 NYS 741 supra note 24.

38. Falmouth v. Strode, 11 Mod. 136, 88 Reprint 949.

39. Isley's Case, 1 Leon. 187, 74 Reprint 172.

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on questions relating to exceptions taken in the lifetime of his client,[40] although not allowed or entered until after the client's death;[41] or if the ruling below was in his favor, and questions of law were reserved on the motion of the other party;[42] or if the questions of law had been reserved by the judge himself at the trial or hearing and brought before the full court.[43]

[§ 9] **6. In Criminal Cases.** An amicus curiæ may move to quash an apparently vicious indictment,[44] or an inquisition of outlawry,[45] and it has also been held that an amicus curiæ may act as the challenger of a grand juror.[46] The court may receive the suggestions of an amicus curiæ as to supposed defects in an information in the nature of a quo warranto,[47] and may hear a suggestion that a defendant has not made a plea to an information and that he should be required to make such plea.[48]

[§ 10] **C. When Amicus Curiæ May Not Appear.** The office of a friend of the court is restricted to making suggestions as to questions apparent upon the record,[49] or matters of practice presenting themselves for determination in the course of proceedings in open court.[50] He may not take upon himself the management of the cause as counsel,[51] and he has no control over the suit in any manner.[52]

He has no right to file a demurrer, as this does not come within his authority to make suggestions.[53]

So the suggestion of diminution of the record by counsel, as amicus curiæ, will not be recognized, as he has no authority to interfere with or control the condition of the record as an adversary in litigation.[54]

Exception to ruling of court. As an amicus curiæ can only suggest matters to the court, he will be deemed not to be aggrieved if the court declines to adopt his suggestion, whether brought to the attention of the court by motion or in any other manner; hence he cannot make a valid exception to the ruling of the court, as his friendly offices, conceding them to be disinterested, are at an end when he has informed the court.[55]

Appeal, writ of error, or review. An amicus curiæ, having no control over a suit, has no right to institute any proceeding therein, and he cannot take the case from one court to another by appeal or writ of error;[56] nor may he maintain a bill of review or a bill in the nature of a bill of review.[57]

Application for rehearing. The general rule is that an amicus curiæ has not such standing in a case as will authorize him to apply for a rehear-

40. Martin v. Tapley, 119 Mass. 116; Miles v. Williams, 9 Q. B. 47, 58 ECL 47, 115 Reprint 1193; Bridges v. Smyth, 8 Bing. 29, 21 ECL 431, 131 Reprint 311.

Appeal by amicus curiæ see infra § 10.

41. Tapley v. Martin, 116 Mass. 275; Kelley v. Riley, 106 Mass. 339, 8 AmR 336.

42. Currier v. Lowell, 16 Pick. (Mass.) 170; Isley's Case, 1 Leon. 187, 74 Reprint 172.

43. Springfield v. Worcester, 2 Cush. (Mass.) 52; Freeman v. Rosher, 13 Q. B. 780, 66 ECL 780, 116 Reprint 1462.

44. Rex v. Vaux, Comb. 13, 90 Reprint 314.

45. Protector v. Geering, Hardres 85 (where the court said that Bennet's Case [no citation given], which had been argued to the contrary, went off by agreement of the parties).

46. State v. Lang, 75 N. J. L. 502, 68 A 210. See also U. S. v. Gale, 109 U. S. 65, 3 SCt 1, 27 L. ed. 857 (which discusses at length the English practice).

47. State v. Jefferson Iron Co., 60 Tex. 312.

48. Peo. v. Gibbs, 70 Mich. 425, 38 NW 257.

[a] **Presence of client.**—In Rex v. Buckeridge, 2 Show. 297, 89 Reprint 950, an attorney urged that, as amicus curiæ, he might inform the court of an error in the proceedings to prevent it from giving a false judgment against his client, although the latter, who had been convicted, was not present; but the court held that the client ought to be present.

49. See State v. McDonald, 63 Or. 467, 471, 128 P 835 [quot Cyc]; Jones v. Jefferson, 66 Tex. 576, 1 SW 903; and cases infra notes 51–61.

50. See Little v. Thompson, 24 Ind. 146; Kelly v. New York City R. Co., 102 NYS 741; State v. McDonald, 63 Or. 467, 471, 128 P 835 [quot Cyc]; Stitzel's Est., 221 Pa. 227, 70 A 749, 18 LRANS 284 and note; In re McClellan, 27 S. D. 109, 129 NW 1037, AnnCas1913C 1029; Jones v. Jefferson, 66 Tex. 576, 1 SW 903.

[a] **Highway proceedings before commissioners.**—One who is not a party to the record in a proceeding to establish a highway cannot, upon the report of viewers appointed to view the proposed highway, appear as the friend of the court, and file a written dismissal of one of the petitioners for the way, or an affidavit that another of the petitioners is not a resident of the county. Little v. Thompson, 24 Ind. 146.

51. Ala.—Birmingham Loan, etc., Co. v. Anniston First Nat. Bank, 100 Ala. 249, 13 S 945, 46 AmSR 45.

Cal.—Matter of Pina, 112 Cal. 14, 44 P 332.

Ind.—Boyd v. Brazil Block Coal Co., 152 Ind. 543, 49 NE 797; Parker v. State, 133 Ind. 178, 32 NE 836, 33 NE 119, 18 LRA 567; Knight v. Low, 15 Ind. 374.

Me.—Hamlin v. "Perticuler Baptist Meeting House," 103 Me. 343, 69 A 315.

Mass.—Martin v. Tapley, 119 Mass. 116.

N. H.—Taft v. Northern Transp. Co., 56 N. H. 414.

Or.—State v. McDonald, 63 Or. 467, 471, 128 P 835 [quot Cyc].

Pa.—Com. v. Collom, 1 Pa. Super. 542.

Eng.—Isley's Case, 1 Leon. 187, 74 Reprint 172; Viner Abr. tit Amicus Curiæ.

See also cases infra notes 53–61.

52. Irwin v. Armuth, 129 Ind. 340, 28 NE 702; Martin v. Tapley, 119 Mass. 116; and cases infra notes 53–61.

53. Ex p. Henderson, 84 Ala. 36, 4 S 284; Hamlin v. "Perticuler Baptist Meeting House," 103 Me. 343, 69 A 315. See State v. McDonald, 63 Or. 467, 471, 128 P 835 [quot Cyc].

54. Matter of Pina, 112 Cal. 14, 44 P 332. See State v. McDonald, 63 Or. 467, 471, 128 P 835 [quot Cyc].

55. Ala.—Birmingham Loan, etc., Co. v. Anniston First Nat. Bank, 100 Ala. 249, 13 S 945, 46 AmSR 45.

Ind.—Boyd v. Brazil Block Coal Co., 152 Ind. 543, 49 NE 797; Parker v. State, 133 Ind. 178, 32 NE 836, 33 NE 119, 18 LRA 567; Irwin v. Armuth, 129 Ind. 340, 28 NE 702; Conrad v. Johnson, 20 Ind. 421; Morehouse v. Potter, 15 Ind. 477; Knight v. Low, 15 Ind. 374; Darlington v. Warner, 14 Ind. 449; New Albany, etc., R. Co. v. Combs, 13 Ind. 490; Buchanan v. Beard, 13 Ind. 471; Hust v. Conn, 12 Ind. 257; Campbell v. Swasey, 12 Ind. 70; In re Arszman, 40 Ind. A. 218, 81 NE 680.

Me.—Hamlin v. "Perticuler Baptist Meeting House," 103 Me. 343, 69 A 315.

Mass.—Martin v. Tapley, 119 Mass. 116.

Or.—State v. McDonald, 63 Or. 467, 471, 128 P 835 [quot Cyc].

Tex.—Hurd v. Inglehart, (Civ. A.) 140 SW 119 (court may decline to entertain exceptions filed by an amicus curiæ); Chicago, etc., R. Co. v. Anderson, (Civ. A.) 130 SW 182. And see Andrews v. Beck, 23 Tex. 455.

Eng.—Isley's Case, 1 Leon. 187, 74 Reprint 172; Viner Abr. tit Amicus Curiæ.

[a] **Reason of rule.**—In Campbell v. Swasey, 12 Ind. 70, 71, the court said: "It is doubtful whether a person who appears simply as amicus curiæ, can take an exception to the ruling of the Court upon any motion or suggestion made by him. Indeed we can see no reason why he should be allowed to do so. He acts for no one, but simply seeks to give information to the Court. The Court may, and sometimes does, of its own motion, ask of consul information upon a point of doubt, and while a friend may advise, it is difficult to discover his right to compel a Court to an admission of its error in acting upon the advice."

56. Ala.—Birmingham Loan, etc., Co. v. Anniston First Nat. Bank, 100 Ala. 249, 13 S 945, 46 AmSR 45.

Cal.—Peo. v. Union Bldg., etc., Assoc., 127 Cal. 400, 58 P 822, 59 P 692.

Ind.—Irwin v. Armuth, 129 Ind. 340, 28 NE 702; Knight v. Low, 15 Ind. 374; Hust v. Conn, 12 Ind. 257; Campbell v. Swasey, 12 Ind. 70.

Me.—Hamlin v. "Perticuler Baptist Meeting House," 103 Me. 343, 69 A 315.

Mass.—Martin v. Tapley, 119 Mass. 116.

Miss.—Miller v. Keith, 26 Miss. 166.

N. Y.—E. B. v. E. C., B., 8 AbbPr 44.

Or.—State v. McDonald, 63 Or. 467, 471, 128 P 835 [quot Cyc].

S. D.—In re McClellan, 27 S. D. 109, 129 NW 1037, AnnCas1913C 1029.

Tex.—Choctaw, etc., R. Co. v. Locke, 38 Tex. Civ. A. 191, 84 SW 1069.

Va.—Sayre v. Grymes, 1 Hen. & M. (11 Va.) 404; Dunlop v. Com., 2 Call (6 Va.) 284.

Eng.—Isley's Case, 1 Leon. 187, 74 Reprint 172; Viner Abr. tit Amicus Curiæ.

[a] **Notice of appeal.**—An amicus curiæ has no authority to give notice of an appeal. Choctaw, etc., R. Co. v. Locke, 38 Tex. Civ. A. 191, 84 SW 1069.

[b] **May not raise questions on appeal** not raised by the parties. Farmers' Union Ditch Co. v. Rio Grande Canal Co., 37 Colo. 512, 86 P 1042.

57. In re Columbia Real-Est. Co., 101 Fed. 965.

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ing;[58] and it has been held that he cannot petition for a rehearing except with the assent of the parties.[59] On the other hand, it has been said that a rehearing may be granted by the court on the seasonable "suggestion" of an amicus curiæ;[60] and in California it has been held that a petition for a rehearing may be filed by a receiver as an amicus curiæ, but in that capacity only.[61]

IV. PROCEDURE

[§ 11] **A. In General.** The assistance of an amicus curiæ may be requested by the court of its own motion,[62] or he may interfere voluntarily by statement in open court,[63] or by motion in writing,[64] or by affidavit.[65] With the consent of the court an amicus curiæ may make argument,[66] and may introduce evidence;[67] or the court itself may call witnesses before it and examine them as to the truth of the matters thus brought to its attention.[68]

[§ 12] **B. Filing Brief.** It is within the discretion of the court to allow an amicus curiæ to file a brief in a case,[69] although it has been held that the court will refuse to permit attorneys who are not connected with a case in any capacity to appear as amici curiæ and file briefs unless it is by the request or assent of the attorneys employed in the case.[70] It has been held that a receiver has no power to file a brief in a case except as an amicus curiæ, as he has no standing in the case.[71]

[§ 13] **C. Notice.** In case of a motion or suggestion by an amicus curiæ the parties immediately interested, if not present, should be informed,[72] although it has been held that no such notice need be given of a motion to dismiss an action as fictitious.[73]

V. COMPENSATION

[§ 14] An amicus curiæ, to whom a question has been referred by the court for examination and report, may be allowed a reasonable compensation therefor, to be taxed as costs,[74] although there is no statutory provision for such allowance.[75]

AMILLARAMIENTO. In Spanish law assessment.[1]

AMITY. A word of common use and defined as friendship, in a general sense, between individuals, societies, or nations; harmony; good understanding; as, a treaty of amity and commerce.[2]

AMMUNITION. Military stores or provisions for attack or defense, materials which are used in the discharge of firearms, and ordnance of all kinds.[3]

58. Peo. v. Union Bldg., etc., Assoc., 127 Cal. 400, 59 P 692; Charleston v. Cadle, 167 Ill. 647, 49 NE 192; Boyd v. Brazil Block Coal Co., 152 Ind. 543, 49 NE 797; Parker v. State, 133 Ind. 178, 32 NE 836, 33 NE 119, 18 LRA 567; Apple v. Atkinson, 34 Ind. 518; Bayou Terre aux Bœuf Drainage Dist. v. Baker, 123 La. 75, 48 S 654; Life Assoc. of America v. Hall, 33 La. Ann. 49. See also State v. McDonald, 63 Or. 467, 471, 128 P 835 [quot Cyc]. But see Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547 (where it seems that a motion by an amicus curiæ for a rehearing was granted on the ground that the decision of the question involved would foreclose the rights of persons not parties).

[a] **Effect of filing application.**—Where an application for a rehearing was filed by an amicus curiæ within the prescribed time, but was not called to the attention of the court, and no order was asked or made in relation thereto within the proper time, the court held that it might grant a rehearing on the suggestion of an amicus curiæ, yet the mere filing of an application by such person had not the effect of suspending judgment as in the case of an application made by a party to the suit. Lesassier v. Board of Liquidation, 30 La. Ann. 611.

59. Charleston v. Cadle, 167 Ill. 647, 49 NE 192.

60. See Life Assoc. of America v. Hall, 33 La. Ann. 49, 57 (per Bermudez, C. J.); Lesassier v. Board of Liquidation, 30 La. Ann. 611, 617 (per Manning, C. J.). Compare Breaux v. Negrotto, 43 La. Ann. 426, 9 S 502 (where an amicus curiæ was allowed to file a printed brief on an application for a rehearing on appeal). See infra § 12.

61. Peo. v. Union Bldg., etc., Assoc., 127 Cal. 400, 58 P 822, 59 P 692.

62. See supra § 2.

63. Olsen v. California Ins. Co., 11 Tex. Civ. A. 371, 32 SW 446.

64. Haley v. Eureka County Bank, 21 Nev. 127, 26 P 64, 12 LRA 815.

65. Matter of Guernsey, 21 Ill. 443.

66. Robinson v. Lee, 122 Fed. 1010; In re Arszman, 40 Ind. A. 218, 81 NE 680; Ex p. Yeager, 11 Gratt. (52 Va.) 655 (where the court allowed an attorney having a similar case to argue as amicus curiæ).

67. Irwin v. Armuth, 129 Ind. 340, 28 NE 702; Haley v. Eureka County Bank, 21 Nev. 127, 26 P 64, 12 LRA 815; In re Barr, 11 Oh. Dec. (Reprint) 910, 30 CincLBul 386 (where parties were admitted as amici curiæ to adduce evidence throwing light upon the proof and execution of an alleged will); Bass v. Fontleroy, 11 Tex. 698. See also The David Pratt, 7 F. Cas. No. 3,597, 1 Ware 509.

68. Olsen v. California Ins. Co., 11 Tex. Civ. A. 371, 32 SW 446. See also Jones v. Jefferson, 66 Tex. 576, 1 SW 903.

69. Northern Securities Co. v. U. S., 191 U. S. 555, 24 SCt 119, 48 L. ed. 299 (holding that, as it is discretionary with the court whether an amicus curiæ shall be allowed to file a brief, the application will be denied where the parties to the suit are represented by competent counsel and it does not appear that he is interested in any case which the decision would affect); State v. Rosh, 49 La. Ann. 1451, 22 S 421 (where, upon an application for writs of certiorari and prohibition, it appeared that the interest sought to be heard was public, and the court allowed an amicus curiæ to appear and file a plea, together with briefs in support thereof, although the court stated that in summary proceedings formal intervention should not ordinarily be allowed); Breaux v. Negrotto, 43 La. Ann. 426, 9 S 502 supra note 60.

70. Charleston v. Cadle, 167 Ill. 647, 49 NE 192.

[a] **Where counsel have consented.**—An amicus curiæ may prepare and file briefs and argument in support of an application for rehearing. Breaux v. Negrotto, 43 La. Ann. 426, 9 S 502.

[b] **A question raised in the brief of an amicus curiæ on an appeal** is not "duly presented," and will not be determined. Boyd v. Brazil Block Coal Co., 152 Ind. 543, 49 NE 797 [construing Burns Annot. St. (1894) § 1336].

71. Peo. v. Union Bldg., etc., Assoc., 127 Cal. 400, 59 P 692.

72. Tomkin v. Harris, 90 Cal. 201, 27 P 202; Matter of Guernsey, 21 Ill. 443.

73. Haley v. Eureka County Bank, 21 Nev. 127, 26 P 64, 12 LRA 815.

74. In re St. Louis Inst. of Christian Science, 27 Mo. A. 633.

75. In re St. Louis Christian Science Inst., 27 Mo. A. 633.

1. See Assessment [3 Cyc 1111].

2. Webster D. [quot Marks v. U. S., 161 U. S. 297, 301, 16 SCt 476, 40 L. ed. 706].

[a] **It is not a technical word.**—It is a word of common use, and when found in a statute must be given its ordinary meaning, unless there is something in the context which compels a narrower or different scope. Marks v. U. S., 161 U. S. 297, 301, 16 SCt 476, 40 L. ed. 706.

[b] **A treaty of amity** has been held to be the equivalent of a treaty of peace; and the use of the term "in amity," in a statute which made the killing of an Indian a crime punishable with death, was held to mean nothing more or less than that such an act was a crime as long as peace continued. Love v. U. S., 29 Ct. Cl. 332, 342. See infra this note [c].

[c] **"In amity with the United States."**—In Marks v. U. S., 161 U. S. 297, 301, 16 SCt 476, 40 L. ed. 706, Brewer, J., after quoting the above definition from Webster, said: "The last part of this definition shows that the phrase 'in amity' is not the equivalent of 'under treaty.' A 'treaty' implies political relations; 'amity' signifies friendship, actual peace. The phrase 'in amity with the United States' is one of frequent use in the legislation of Congress in reference to Indians." And see the following cases where the term "in amity with the United States" has been construed. Leighton v. U. S., 161 U. S. 291, 296, 16 SCt 495, 40 L. ed. 703 [aff 29 Ct. Cl. 288, 303]; Luke v. U. S., 35 Ct. Cl. 15, 25; Painter v. U. S., 33 Ct. Cl. 114, 133; Herring v. U. S., 32 Ct. Cl. 536, 537; Duran v. U. S., 32 Ct. Cl. 273, 274; Cox v. U. S., 29 Ct. Cl. 349, 365; Bush v. U. S., 29 Ct. Cl. 144, 146; Valk v. U. S., 29 Ct. Cl. 62, 67; Marks v. U. S., 28 Ct. Cl. 147, 168.

3. Century D.

[a] **The ammunition for a gun** in-

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AMNESIA. Loss of memory.[4]

Retroactive amnesia. A person's loss of memory of an accident causing his injury, or his inability to recall anything happening in a comparatively short period immediately preceding the accident.[5]

AMNESTY. An act of oblivion or forgetfulness;[6] a pardon.[7]

AMNISTIA. In Spanish law amnesty; one of the means of terminating criminal liability. It "completely extinguishes the penalty and all its effects."[8]

AMO. In Spanish law the head of the house or master as opposed to the servant (criado).[9]

AMOJONAMIENTO. In Spanish law the act of marking with monuments the boundaries of lands.[10]

AMONG or AMONGST. Intermingled with;[11] all and every;[12] sometimes used in the sense of "between."[13] The word must not always be given an arbitrary and technical meaning,[14] as its significance may often be controlled by the context[15] or the intent with which it may be used.[16]

Phrases in which the word has been used have received judicial interpretation such as "among my children" and similar phrases employed in wills,[17]

cludes the whole charge. Esher, M. R., in Armstrong v. Hotchkiss Ordnance Co., 13 T. L. R. 188 [quot 1 Stroud Jud. D. (2d ed) 78].

4. Century D.

5. Liabraaten v. Minneapolis, etc., R. Co., 105 Minn. 207, 208, 117 NW 423, 15 AnnCas 1147 and note.

6. U. S. v. Swift, 186 Fed. 1002, 1017; Villa v. Allen, 2 Philippine 436, 439.

7. U. S. v. Swift, 186 Fed. 1002, 1017. See Pardons [29 Cyc 1560].

8. Philippine Pen. Code art 130 (3) [quot Oro v. Pajarillo, 23 Philippine 484, 487, 11 Off. Gaz. 97]. See Pardons [29 Cyc 1558].

9. Escriche Diccionario. See Master and Servant [26 Cyc 941].

[a] **The contract between the two** is analogous to that of lease, the criado hiring his services to the amo. Escriche Diccionario; Spanish Civ. Code arts 1583–1587.

10. Escriche Diccionario. See Boundaries [5 Cyc 861].

[a] **The action of "amojonamiento"** lies to compel such marking and is available to anyone in possession. Expert surveyors are employed to locate the correct boundary line and the expense is taxed to the interested parties. Escriche Diccionario.

[b] **The removal or destruction of such monuments** is a criminal offense and is punishable with a fine. Escriche Diccionario.

[c] **Mountain lands.**—Special regulations have been made regarding the "amojonamiento" of lands in the mountains. Ordenanzas Generales Dec. 22, 1833.

11. Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 194, 6 L. ed. 23; Com. v. Gloucester Ferry Co., 98 Pa. 105, 120; State v. Foreman, 8 Yerg. (Tenn.) 256, 313.

[a] **Indicating tenancy in common.**—(1) "The distributive words 'among,' 'any' and 'each' are used to distinguish estates in common from joint tenancies, and are given controlling effect in determining those estates to be tenancies in common." Sturm v. Sawyer, 2 Pa. Super. 254, 258. To same effect Edwards v. Kelly, 83 Miss. 144, 35 S 418. (2) A devise or bequest to several persons "amongst" them makes the objects tenants in common. Stetson v. Eastman, 84 Me. 366, 371, 24 A 868. (3) Whatever importance may be attached to philological refinements, it is certain that the general rule is that where a bequest is made to several persons, in general terms, indicating that they are to take equally as tenants in common, each individual will take the same share, or, in other words, the legatees will take per capita. Senger v. Senger, 81 Va. 687, 698.

12. Thrasher v. Ballard, 35 W. Va. 524, 526, 14 SE 232.

[a] **Not in this sense.**—The word "among," in a charter of a bank authorizing commissioners, in case of an excess of subscriptions, to distribute the stock among the subscribers in such a manner as a majority of such commissioners shall deem most advantageous to the interest of the institution, does not require that every subscriber shall receive some stock. In order to give such a construction there must be an interference with that power of the commissioners, which, in the event which has occurred, is to be regarded as unlimited. Clarke v. Brooklyn Bank, 1 Edw. (N. Y.) 361, 368. To same effect Haight v. Day, 1 Johns. Ch. (N. Y.) 18, 20.

13. Senger v. Senger, 81 Va. 687, 698.

[a] **"Between" synonymous.**—(1) In Senger v. Senger, 81 Va. 687, 698, the counsel for the appellant suggested a distinction between the prepositions "between" and "among." The court, while recognizing that the prepositions might express different ideas, said: "But when they follow the verb 'divide' [as they did in that case], their general signification is very similar, and in popular use are considered synonymous; though 'among' denotes a collection and is never followed by two of any sort, whilst 'between' may be followed by any plural number, and seems to denote rather the individuals of the class, than the class itself generically." To same effect In re Morrison, 138 Cal. 401, 71 P 453; Rogers v. Morrell, 82 S. C. 402, 64 SE 143, 129 AmSR 899. (2) "Between is often used as synonymous with among, especially when employed to convey the idea of division or separate ownership of property held in common. It is quite as appropriate to say that property is to be divided between A., B. and C., as among A., B. and C." Myres v. Myres, 23 HowPr (N. Y.) 410, 415. (3) And so in Hicks' Est., 25 WklyNC (Pa.) 499, 500, a similar conclusion was reached. In this case there was a direction by the testator that his property should be equally divided between his wife and two daughters. It was held that "between" was used in the sense of "among," and that each legatee should take one third. On appeal, Hicks' Est., 134 Pa. 507, 508, 19 A 705, in supporting this decision the court said: "It is now contended by the widow that her late husband intended his estate to be divided into two equal shares, she being entitled to one share, and that remaining to be equally divided between his two daughters; and that such was his intention is shown by the use of the preposition 'between,' which can only be properly construed by giving it its correct and accurate significance; and, as it applies properly only to the case of two parties, two objects, two points, or two classes, we must conclude that testator's meaning was thus to divide his estate between his wife and daughters, the former taking one share and the latter another share. But we do not think such was his intention. If testator had used the common preposition 'among' or 'amongst,' it is conceded there would be no room for argument. And it needs no illustration to show the frequent and familiar use of the word 'between,' even by well-educated and otherwise accurate linguists, when 'among' is intended."

[b] **"Between" distinguished.**—The prepositions "among" and "between" are often capable of different meanings according to their collocation and connection, as the same are differently used and placed and intended to express different ideas. But when the prepositions "between" and "among" follow the verb "divide," their general signification is very similar, and in popular use they are considered synonymous, although "among" denotes a collection and is never followed by two of any sort, while "between" may be followed by any plural number and seems to denote rather the individuals of the class than the class itself generically. Senger v. Senger, 81 Va. 687, 698.

14. Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 194, 6 L. ed. 23; Kelley v. Vigas, 112 Ill. 242, 245, 54 AmR 235.

15. Kelley v. Vigas, 112 Ill. 242, 245, 54 AmR 235.

16. Kelley v. Vigas, 112 Ill. 242, 245, 54 AmR 235; Hicks' Est., 134 Pa. 507, 508, 19 A 705; Holder's Pet., 21 R. I. 48, 49, 41 A 576.

17. [a] **Among children.**—A direction by a testator to distribute his property among his children would authorize neither the distribution of all the property to one child, nor the entire exclusion of another. Hudson v. Hudson, 6 Munf. (20 Va.) 352, 356. To same effect Hatchett v. Hatchett, 103 Ala. 556, 561, 16 S 550; Den v. Crawford, 8 N. J. L. 90, 103; Knight v. Yarbrough, Gilm. (21 Va.) 27, 31; Thrasher v. Ballard, 35 W. Va. 524, 526, 14 SE 232.

[b] **"Among such of the children."**—A power to appoint "among such of the children of R. & M. and in such proportions as M. shall appoint," has been held an exclusive power; that is to say, M might entirely exclude certain children if she pleased. Ingraham v. Meade, 13 F. Cas. No. 7,045, 3 Wall. Jr. 32. See also In re Veale, 5 Ch. D. 622 infra note 23.

[c] **"Amongst the children of"** in a will prima facie means all the children. Pigott v. Wilder, 26 Beav. 90, 93, 53 Reprint 830.

[d] **"Among my three daughters."**—A bequest of personalty to testatrix's son, to be held in trust by her daughter and her husband for the support and maintenance of the son, with a direction that anything remaining at the latter's decease should be equally divided "among my three daughters," should be construed as equivalent to naming such daughters particularly, and not to indicate that such daughters were to be treated as a class, the survivors only of which should share in the distribution. Bancroft v. Fitch, 164 Mass. 401, 402, 41 NE 661.

[e] **"Among her brothers and sisters."**—The use of the word "among" in a clause of a will providing, "'my will being that my said daughter shall in such case have power to dispose of the same among her brothers and sisters, and their children, in such proportions as she may think fit, but to no other person or persons whatsoever' . . . is inconsistent with an exclusive appointment, standing, as this word does, without any qualifications of its natural import and signification." Lippincott v. Ridgway, 10 N. J. Eq. 164, 170. Compare In re Veale, 5 Ch. D. 622 infra note 23.

[f] **"Among all such issue or children share and share alike"** does not mean that each of such issue shall have an equal share with every other,

"among the files,"[18] "among the several States,"[19] "among the subscribers,"[20] "among the valuable papers,"[21] "equal among" or "equally among,"[22] and "to and amongst."[23]

AMORPHOUS. Without definite form or uncrystallized.[24]

AMORTISEMENT or AMORTIZATION. Formerly an alienation of lands or tenements in mortmain.[25] In its modern sense the operation of paying off bonds, stock, or other indebtedness of a public or private corporation, especially by a sinking fund.[26]

In the case of bonds purchased at a premium, amortization is a plan by which a sufficient tionate sum is deducted from the annual make good at the maturity of the bonds t paid as premium.[27]

AMORTIZACION. From the French extinguish. In the modern civil law th used to signify the extinction of public payment.[28]

AMOTION. The removal of an officer agent of a corporation from his elective o ive office, before the end of the term for was elected or appointed.[29] Excepting the

or with a child. It is satisfied if all such issue share in a division which is equal as between living children and the issue of deceased children, taking per stirpes. Hall v. Hall, 140 Mass. 267, 269, 270, 2 NE 700 [quot Coates v. Burton, 191 Mass. 180, 182, 77 NE 311].

18. State v. Washoe County, 7 Nev. 83, 96 (holding that, where a clerk certified that certain papers were true and correct copies of original papers "among the files" in his office, the language was sufficient to warrant the conclusion that such papers, being among the files, were themselves filed).

19. Lottery Cases, 188 U. S. 321, 346, 23 SCt 321, 47 L. ed. 492 [quot Kelley v. Great Northern R. Co., 152 Fed. 211, 217].

In Mondou v. New York, etc., R. Co., 223 U. S. 1, 46, 32 SCt 169, 56 L. ed. 327, the court said: "The phrase 'among the several States' marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally."

[a] **Marshall, C. J.,** in Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 194, 6 L. ed. 23 [quot Champion v. Ames, 188 U. S. 321, 346, 23 SCt 321, 47 L. ed. 492; U. S. v. Southern R. Co., 164 Fed. 347, 356], in construing the word "among" as used in the provision that congress shall have the power to regulate commerce among the several states, said: "The subject to which the power is next applied, is to commerce, 'among the several states.' Commerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say, that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose." See also State v. Foreman, 8 Yerg. (Tenn.) 256, 316.

20. See Clarke v. Brooklyn Bank, 1 Edw. (N. Y.) 361, 365 supra note 12 [a].

21. Winstead v. Bowman, 68 N. C. 170, 175 (holding that the phrase does not necessarily mean "among the most valuable" papers).

22. Kelley v. Vigas, 112 Ill. 242, 245, 54 AmR 235 (where the court said: "The only doubt as to its correctness arises out of the use of the words, 'equal among,' in the will. It is understood the words, 'equal among,' or 'equally,' or 'share and share alike,' when used in a will, mean a division of the estate per capita; but this meaning of these words may be controlled by the context, and is often so done. That is the case here. The testator, by making a bequest of money to his own daughter and a devise of land to his daughter-in-law, evidently intended to make an equal division of his estate between his daughter and the family of his deceased son, and it is not unreasonable to believe that was all he meant by the use of the words, 'equal among'"); Holder's Pet., 21 R. I. 48, 49, 41 A 576 (where, under a direction in a will that the balance of an estate be equally divided among three named legatees, it was held that the legatees took in equal shares, and the court said: "The use of the word 'among' clearly indicates such an intention"). See also Hicks' Est., 25 WklyNC (Pa.) 499, 500.

23. In re Veale, 5 Ch. D. 622 (holding that, where a testatrix bequeathed a fund to her daughter for life, and after her death to and amongst the other children of the testatrix or their issue, in such parts, shares, and proportions, manner, and form, as her said daughter should by deed or will appoint, the daughter's power was exclusive, and not distributive merely); Doe v. Alchin, 2 B. & Ald. 122, 124, 106 Reprint 311 (where it was said: "The words 'to and amongst' have a strict technical sense, and where those words are used, each child must have some share assigned to him"). See also Ingraham v. Meade, 13 F. Cas. No. 7,045, 3 Wall. Jr. 32. Compare Lippincott v. Ridgway, 10 N. J. Eq. 164, 170 supra note 17 [e].

24. Union Carbide Co. v. American Carbolite Co., 188 Fed. 334, 337.

25. 2 Blackstone Comm. 272; 1 Bouvier L. D. 139; Jacob L. D.; Sweet L. D. 47; Wharton L. Lex. 55.

26. Century D.; Sweet L. D. 47.

27. See In re Stevens, 187 N. Y. 471, 476, 80 NE 358, 12 LRANS 814, 10 AnnCas 511 and note (where Cullen, C. J., said: "The income on a bond having a term of years to run and purchased at a premium is not the sum paid annually on its interest coupons. The interest on a $1,000 ten-year five per cent bond, bought at 120%, is not fifty dollars, but a part thereof only, and the remainder is a return of the principal. All large investors in bonds, such as banks, trust companies and insurance companies, purchase bonds on the basis of the interest the bonds actually return, not the amount they nominally return. Nor is the premium paid on the bond an outlay for the security of the principal. All government bonds have the same security, the faith of the government; yet they vary in price, a variation caused by the difference in the rate of interest and the time they have to run. It is urged that there is often a speculative change in the market value of a bond, and a bond may be worth more at the termination of the trust than at the time of its purchase. This has no bearing on the case. The life tenant should neither be credited with an appreciation nor charged with a loss in the mere market value of the bond. But apart from any speculative change in the market value, there is f of time an inherent and change in the value of th itself as it approaches ma is this, and this only, with life tenant is to be char therefore, adhere to the rul in New York L. Ins., et Baker, 165 N. Y. 484, 59 N LRANS 544, that in the a a clear direction in the w contrary, where investm made by the trustee, the must be maintained intact by payment of premium on having only a definite term while if the bonds are rece the estate of the testator, rule in McLouth v. Hunt. 179, 48 NE 548, 39 LRA 230, and the whole interest s treated as income").

28. Escriche Diccionario. ortisement ante.

[a] **"Amortización civil"** ancient Spanish law corr to the English entail and ployed as a means of perp the ownership of real prope single family or in certain tablishments. Escriche Dic See Estates [16 Cyc 608].

[b] **"Amortización eccle** was the acquisition of real by churches, monasteries, an ecclesiastical institutions. so acquired was said to be d to dead hands (manos muert as in England it was terme main and called forth statute name directed against the Escriche Diccionario. See A ment ante.

[c] **Amortización y sello** phrase applied in Valencia to collected for the king's per to dedicate property to "mano tas." Escriche Diccionario.

29. 2 Kent Comm. 298; Brownell, 2 Daly (N. Y.) 32 AbbPrNS 162; Richards v. burg, 30 W. Va. 491, 497, 4 SE

[a] **"Disfranchisement" guished.**—(1) The terms "a and "disfranchisement" are though erroneously, used mously. The former relates removal from office without membership, while the latter to absolute expulsion from ship in the corporation. Mun. Corp. 270; Evans v. phia Club, 50 Pa. 107, 114; v. Harmony Fire Co., 1 LegG 316; Richards v. Clarksburg Va. 491, 497, 4 SE 774; Rex. ardson, 1 Burr. 517, 97 Repr Rex v. Doncaster, 2 Ld. Ray 92 Reprint 513. See Disfr ment [14 Cyc 385]. (2) "T a distinction between what i amotion, or the right to ren officer, which is a power inh every corporation, and disfr ment. The former may be e without interfering with th chise, as the officer, when r still continues a member; t franchisement is an absolute sion of the member from th and the taking away of his fr which cannot be done unl power is given by the charte ing the corporation, or the has been guilty of crime, a co of which would work a forfe

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nary corporations,[30] at common law every corporation has the inherent power of amotion,[31] and later this power of amotion has been frequently conferred by express provisions of statute or by the corporate charter.[32] (Cross references.[33])

AMOUNT. The effect, substance, or result;[34] the sum or total;[35] the total of two sums;[36] the sum total of two or more aggregate sums or quantities;[37] the whole;[38] the whole quantity;[39] the aggregate;[40] a totality.[41] Sometimes contracted to "amt."[42]

In reference to money the word means value.[43]

all civil rights, including the corporate franchise, or has committed acts which tend to the destruction of the corporation, such as the defacing of its charter, the obliteration or alteration of its records, or other acts tending to impair or destroy its title to its rights or privileges." White v. Brownell, 2 Daly (N. Y.) 329, 357, 4 AbbPrNS 162.

30. [a] **Eleemosynary corporations.**—The right of removal of trustees is not inherent in corporations of an eleemosynary or like nature where a visitorial power is vested in the founder or trustees. Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Fuller v. Plainfield Academic School, 6 Conn. 532; Evans v. Philadelphia Club, 50 Pa. 107; Atty.-Gen. v. Clarendon, 17 Ves. Jr. 491, 34 Reprint 190.

31. Savannah v. Grayson, 104 Ga. 105, 30 SE 693; State v. Vincennes Univ., 5 Ind. 77; State v. Judges, 35 La. Ann. 1075; Bayless v. Orne, Freem. (Miss.) 161; State v. Walbridge, 119 Mo. 383, 24 SW 457, 41 AmSR 663; State v. Adams, 44 Mo. 570; In re Griffing Iron Co., 63 N. J. L. 168, 41 A 931 [aff 63 N. J. L. 357, 46 A 1097]; State v. Jersey City, 25 N. J. L. 536; Fawcett v. Charles, 13 Wend. (N. Y.) 473; Burke v. Jenkins, 148 N. C. 25, 61 SE 608; Ellison v. Raleigh, 89 N. C. 125; State v. Bryce, 7 Oh. Pt. II 82; Evans v. Philadelphia Club, 50 Pa. 107; Com. v. Sanderson, 1 Pa. Dist. 714, 11 Pa. Co. 593; Hayden v. Memphis, 100 Tenn. 582, 47 SW 182; Burr v. McDonald, 3 Gratt. (44 Va.) 215; Richards v. Clarksburg, 30 W. Va. 491, 4 SE 774; Reg v. Newbury, 1 Q. B. 751, 41 ECL 760, 113 Reprint 1319; Rex v. Doncaster, 2 Burr. 738, 97 Reprint 541; Rex. v. Liverpool, 2 Burr. 723, 97 Reprint 533; Rex v. Richardson, 1 Burr. 517, 97 Reprint 426; Rex v. Lyme Regis, 1 Dougl. 149, 153, 99 Reprint 98; Rex v. Taylor, 1 Rolle 409, 81 Reprint 571, 3 Salk. 231, 91 Reprint 795; Le Roy v. Tidderley, 1 Sid. 14, 82 Reprint 941; Bruce's Case, Str. 819, 93 Reprint 870; Rex v. Heaven, 2 T. R. 772, 100 Reprint 416; Jay's Case, 1 Vent. 302, 86 Reprint 195; Rex v. Ponsonby, 1 Ves. Jr. 1, 30 Reprint 201. Compare Imperial Hydropathic Hotel Co. v. Hampson, 23 Ch. D. 1 (denying the existence of the power of amotion as to private corporations, but conceding it as to municipal corporations).

[a] **The celebrated Bagg's Case,** 11 Coke 93, 77 Reprint 1271, often cited on questions involving the right of amotion, is strictly a case of disfranchisement, and therefore affords no authority for the proposition that a corporation does not possess the power of amotion unless it has authority to do so by the express words of the charter or by prescription. Richards v. Clarksburg, 30 W. Va. 491, 4 SE 774; Rex v. Richardson, 1 Burr. 517, 97 Reprint 426.

32. McKannay v. Horton, 151 Cal. 711, 91 P 598, 13 LRANS 661, 121 AmSR 146; Coffey v. Sacramento County Super. Ct., 147 Cal. 525, 82 P 75; Fitch v. San Francisco, 122 Cal. 285, 54 P 901; Chollar Min. Co. v. Wilson, 66 Cal. 374, 5 P 670; Carter v. Durango, 16 Colo. 534, 27 P 1057, 25 AmSR 294; Denver v. Darrow, 13 Colo. 460, 22 P 784, 16 AmSR 215; Hudson v. Denver, 12 Colo. 157, 20 P 329; Morgan v. Denver, 14 Colo. A. 147, 50 P 619; Gillett v. Peo., 13 Colo. A. 553, 59 P 72; State v. Teasdale, 21 Fla. 652; Vason v. Augusta, 38 Ga. 542; Shaw v. Macon, 19 Ga. 468; Macon v. Shaw, 16 Ga. 172; Heffran v. Hutchins, 160 Ill. 550, 43 NE 709, 52 AmSR 353; State v. Noblesville, 157 Ind. 31, 60 NE 704; State v. South Bend, 154 Ind. 693, 56 NE 721; Goodwin v. State, 142 Ind. 699, 41 NE 361; Goodwin v. State, 142 Ind. 117, 41 NE 359; Madison v. Kelso, 32 Ind. 79; Madison v. Korbly, 32 Ind. 74; LeBosquet v. Myers, 7 Ind. T. 75, 103 SW 770; Baxter v. Beacon, 112 Iowa 744, 84 NW 932; Rogers v. Congleton, 84 SW 521, 27 KyL 109; London v. Franklin, 118 Ky. 105, 80 SW 514; O'Neal v. F. A. Neider Co., 118 Ky. 62, 80 SW 451; Com. v. Willis, 42 SW 1118, 19 KyL 962; Todd v. Dunlap, 99 Ky. 449, 36 SW 541; Gibbs v. Louisville, 99 Ky. 490, 36 SW 524; State v. Shakspeare, 43 La. Ann. 92, 8 S 893; Andrews v. King, 77 Me. 224; MacLellan v. Marine, 98 Md. 53, 56 A 359; Field v. Malster, 88 Md. 691, 41 A 1087; Dow v. Casey, 194 Mass. 48, 79 NE 810; Atty.-Gen. v. Donahue, 169 Mass. 18, 47 NE 433; O'Dowd v. Boston, 149 Mass. 443, 21 NE 949; Ham v. Boston Police, 142 Mass. 90, 7 NE 540; Bolger v. Detroit, 153 Mich. 540, 117 NW 171; Atty.-Gen. v. Detroit, 112 Mich. 145, 70 NW 450, 37 LRA 211; State v. Walker, 68 Mo. A. 110; Ayers v. Newark, 49 N. J. L. 170, 6 A 659; Devault v. Camden, 48 N. J. L. 433, 5 A 451; Peo. v. Robb, 126 N. Y. 180, 27 NE 267; Peo. v. Brooklyn Fire, etc., Comrs., 103 N. Y. 370, 8 NE 730; Peo. v. New York, 82 N. Y. 491; Peo. v. Campbell, 82 N. Y. 247; Peo. v. Board of Fire Comrs., 77 N. Y. 153; Peo. v. Board of Fire Comrs., 72 N. Y. 445; Peo. v. Porter, 90 Hun 401, 35 NYS 811; Peo. v. Brooklyn Fire Comrs., 28 Hun (N. Y.) 495; Peo. v. French, 12 Hun (N. Y.) 254; Peo. v. Campbell, 50 N. Y. Super. 82; Peo. v. Baker, 12 Misc. 389, 34 NYS 49; Matter of Nichols, 6 AbbNCas (N. Y.) 474, 57 HowPr 395; Matter of Emmet, 65 HowPr (N. Y.) 266; Peo. v. Public Park Comrs., 60 HowPr (N. Y.) 130; Christy v. Kingfisher, 13 Okl. 585, 76 P 135; Houseman v. Com., 100 Pa. 222; Lemoyne Borough Councilmen, 15 Pa. Dist. 241; Com. v. Sanderson, 1 Pa. Dist. 714, 11 Pa. Co. 593; In re Jenkintown, 16 Montg. Co. (Pa.) 73; Caulfield v. State, 1 S. C. 461; State v. Williams, 6 S. D. 119, 60 NW 410; Peo. v. McAllister, 10 Utah 357, 37 P 578; State v. Horan, 22 Wash. 197, 60 P 135; State v. McQuade, 12 Wash. 554, 41 P 897; Isle of Wight R. Co. v. Tahourdin, 25 Ch. D. 320.

[a] **Acceptance of new charter.**—In Haddock's Case, T. Raym. 435, 439, 83 Reprint 227, it was held that, where a corporation had the power of amotion and subsequently accepted a new charter which made no mention of that power, the right of amotion continued.

33. **Amotion:** Of:
Constable see Sheriffs and Constables [35 Cyc 1514].
Coroner see Coroners [9 Cyc 996].
County officer see Counties [11 Cyc 369].
Director see Corporations [10 Cyc 742].
Ministerial agent of corporation see Corporations [10 Cyc 935].
Municipal officer see Municipal Corporations [28 Cyc 432].
Public officer:
Generally see Officers [29 Cyc 1406].
Mandamus to compel see Mandamus [26 Cyc 255].
Sheriff see Sheriffs and Constables [35 Cyc 1500].
Town officer see Towns [38 Cyc 624].
Trustee of religious society see Religious Societies [34 Cyc 1133].

34. Webster D. [quot Swartley v. McCracken, 7 Montg. Co. (Pa.) 49, 50].

35. Webster D. [quot Swartley v. McCracken, 7 Montg. Co. (Pa.) 49, 50]; Hilburn v. St. Paul, etc., R. Co., 23 Mont. 229, 240, 58 P 551, 811; Smith v. Fears, (Tex. Civ. A.) 122 SW 433, 435.

[a] **"Quantity" synonymous.**—Reg. v. Cunerty, 2 CanCrCas 325, 326.

[b] **"Quantum" synonymous.**—Connelly v. Western Union Tel. Co., 100 Va. 51, 63, 40 SE 618, 56 LRA 663, 93 AmSR 919.

[c] **"Sum" synonymous.**—Swartley v. McCracken, 7 Montg. Co. (Pa.) 49, 50 [cit Anderson L. D.].

[d] **"To the amount of" synonymous.**—Swartley v. McCracken, 7 Montg. Co. (Pa.) 49, 50.

[e] **"Rate" distinguished.**—"Amount" means a sum or total, the aggregate, while "rate" means a fixed measure of estimation, so that a statute providing for the submission to the voters of the question whether school taxes should be levied, which requires a notice stating the "amount" to be raised, is inconsistent with a subsequent section, providing that, when the "rate" of taxation has been determined as provided in the preceding section, the trustees shall certify the same, etc., and hence the statute is inoperative. Hilburn v. St. Paul, etc., R. Co., 23 Mont. 229, 240, 58 P 551, 811.

36. Smith v. Fears, (Tex. Civ. A.) 122 SW 433, 435.

37. Webster D. [quot Smith v. Fears, (Tex. Civ. A.) 122 SW 433, 435; Connelly v. Western Union Tel. Co., 100 Va. 51, 63, 40 SE 618, 93 AmSR 919, 56 LRA 663].

38. Fidelity Trust Co. v. Vogt, 66 N. J. L. 86, 92, 48 A 580.

39. Webster D. [quot Connelly v. Western Union Tel. Co., 100 Va. 51, 63, 40 SE 618, 93 AmSR 919, 56 LRA 663].

40. Anderson L. D. [quot Hilburn v. St. Paul, etc., R. Co., 23 Mont. 229, 240, 58 P 551, 811]; Webster D. [quot Connelly v. Western Union Tel. Co., 100 Va. 51, 63, 40 SE 618, 93 AmSR 919, 56 LRA 663].

41. Webster D. [quot Connelly v. Western Union Tel. Co., 100 Va. 51, 63, 40 SE 618, 93 AmSR 919, 56 LRA 663].

[a] **Interest-bearing obligations.**—In speaking of interest-bearing obligations the word "amount" is ordinarily used to designate the total of principal and interest. Cratty v. Chicago, 217 Ill. 453, 456, 75 NE 343.

42. Century D.

43. Durger v. Colburn, 176 Mass. 110, 112, 57 NE 213; Com. v. Warner, 173 Mass. 541, 544, 54 NE 353; Richburger v. State, 90 Miss. 806, 831, 44 S 772; Bartley v. State, 53 Nebr. 310, 362, 73 NW 744; State v. Knox, 17 Nebr. 683, 685, 24 NW 382. See also State v. Stimson, 24 N. J. L. 9 [quot State v. Barr, 61 N. J. L. 131, 132, 38 A 817].

[a] **For example** (1) a verdict of the jury that defendant embezzled a certain "amount" of money complies with the statute requiring the jury to ascertain and declare the value of the property stolen, embezzled, or falsely obtained. Bartley v. State, 53 Nebr. 310, 362, 73 NW 744. (2) In cases of notes current as money the words "amount" and "value" are ordinarily synonymous terms. Com. v. Warner, 173 Mass. 541, 544, 54 NE 353 [cit Com. v. Hussey, 111 Mass. 432].

[b] **"Value" distinguished.**—The word "amount" can apply only to a

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Phrases in which the word has been used have received judicial interpretation such as "amount of its capital stock, issued and outstanding,"[44] "amount collected,"[45] "amount 'due the county for unpaid county taxes,'"[46] "amount due on the execution,"[47] "amount of insurance,"[48] "amount of judgment,"[49] "amounts received and distributed,"[50] "amount recovered,"[51] "amount sold for,"[52] "on the amount superseded,"[53] "equal in amount."[54] As used in such phrases as "amount given,"[55] "amount in controversy,"[56] "amount in dispute,"[57] "amount in litigation,"[58] "amount involved,"[59] "amount of the demand,"[60] the word has the meaning of damages claimed, relief demanded, or the real amount in dispute in the cause;[61] in other words, that amount or value of which the court, in assuming jurisdic-

judgment for money, while "value" may be applied to judgments for a number of things other than money. Renshaw v. Cook, 129 Ky. 347, 370, 111 SW 377, 33 KyL 860, 895.

44. Fidelity Trust Co. v. Vogt, 66 N. J. L. 86, 92, 48 A 580 (of a trust company for purposes of taxation).

45. Peo. v. Miller, 177 N. Y. 515, 520, 70 NE 10 (by a domestic insurance company as governing the annual tax for carrying on business).

46. Spooner v. Washburn County, 124 Wis. 24, 32, 102 NW 325 (a "sum which equals in amount the county tax, with interest allowed thereon by statute and all the charges fixed by law, and those necessarily incurred in performing" the duty of collecting the taxes).

47. McKenna v. Brown, 29 R. I. 339, 340, 71 A 450 (full amount received on sale under writ without deduction for expenses of sale, etc.).

48. Simpson v. Virginia Ins. Co., 115 N. C. 393, 396, 20 SE 517 (where the phrase, as used in a life insurance policy, which by express provision was incontestable, and which provided that the amount of insurance should be paid immediately upon proof of death, was held to mean the sum for which the life is insured, that is, the sum which under the contract is to be paid to the beneficiary as indemnity for the loss, and the court said: "Those words cannot, we think, be construed to mean 'the net value of the policy,' a sum which, by the terms of the original contract, was to be paid under certain circumstances in lieu of the amount of insurance. . . . This construction is consonant with the preceding provision that the policy should be incontestable.' The quality of incontestability could with no propriety be predicated of this contract of insurance if it was still allowed to the insurer to dispute its liability to the insured for the 'amount of the insurance' upon the ground that the death was caused 'by the use of intoxicating liquor. . . . or any condition or agreement contained in this policy'").

49. In re Boyd, 3 F. Cas. No. 1,746, 4 Sawy. 262, 263 (as employed in a judgment docketed for the purpose of effecting a lien on real property of the judgment debtor).

50. Reed v. Reed, 66 SW 819, 820, 23 KyL 2186 (by an executor or administrator).

51. Atlantic Coast Line R. Co. v. Coachman, 59 Fla. 130, 157, 52 S 377, 20 AnnCas 1047 (where, in construing a statute where the maximum sum allowed as a reasonable attorney's fee, in a suit against a carrier upon a claim for freight or express lost or damaged, where the carrier has failed to pay said claim in sixty days after its presentation, is fifteen per cent on any amount recovered greater than the sum of one hundred dollars, the court said: "We think the amount recovered means the amount of the claim recovered and not that amount plus the fifty per cent interest").

52. Mather v. Darst, 13 S. D. 75, 78, 82 NW 407 (holding that, as used in publication of list of tax sales heading the column as "amount sold for," the term will not be held equivalent to amount of tax due, and hence does not comply with a statute requiring notice of sales to state the amount of taxes due).

53. Popp v. Louisville, etc., R. Co., 101 Ky. 157, 158, 40 SW 254 (as not including interest accruing after the judgment was superseded).

54. Durgin v. Colburn, 176 Mass. 110, 112, 57 NE 213 (holding that the term, used in a statute providing that no renewal or continuation of a limited partnership shall be made unless the capital contributed by the special partners is "equal in amount" or more than the aggregate capital the special partners originally contributed, means equal in value as a resource or asset of the partnership).

55. Henley v. Robb, 86 Tenn. 474, 481, 7 SW 190 (as synonymous with "shares" and with "portion").

56. Udall v. The Ohio, 17 How. (U. S.) 17, 18, 15 L. ed. 42; Green v. Liter, 8 Cranch (U. S.) 229, 242, 3 L. ed. 545; Bradley v. Kent, 22 Cal. 169, 172; Johnson v. Randolph County, 140 Ind. 152, 154, 39 NE 311; Bogt v. Mitchell, 4 Ind. T. 47, 50, 64 SW 610; Davis v. Laughlin, 147 Iowa 478, 480, 124 NW 876; Renshaw v. Cook, 129 Ky 347, 370, 111 SW 377, 33 KyL 860, 895; Orth v. Clutz, 18 B. Mon. (Ky.) 223, 225; Hood v. Wise, 128 La. 731, 732, 55 S 335; Conger v. Nesbitt, 30 Minn. 436, 438, 15 NW 875; Barber v. Kennedy, 18 Minn. 216, 226; Folts v. State, 118 N. Y. 406, 410, 23 NE 567. Howard Iron Works v. Buffalo El. Co., 81 App. Div. 386, 396, 81 NYS 452; Gulf, etc., R. Co., v. Cunnigan, 95 Tex. 439, 441, 67 SW 888; Crosby v. Crosby, 92 Tex. 441, 442, 49 SW 359; Carter Grocer Co. v. Day, (Tex. Civ. A.) 144 SW 365, 366; Western Union Tel. Co. v. Nolan, (Tex. Civ. A.) 77 SW 1031; Smith v. Smith, 15 Vt. 620, 621; Fink v. Denny, 75 Va. 663, 666.

[a] **"Matter in controversy" synonymous.**—Smith v. Giles, 65 Tex. 341, 343.

[b] **"Matter in demand" synonymous.**—Hunt v. Rockwell, 41 Conn. 51, 55.

[c] **"Matter in dispute" synonymous.**—Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 574, 20 SCt 222, 44 L. ed. 276; Lee v. Watson, 1 Wall. (U. S.) 337, 340, 17 L. ed. 557; Kanouse v. Martin, 15 How. (U. S.) 198, 207, 14 L. ed. 660; Von Schroeder v. Brittan, 93 Fed. 9; Dakota Bldg., etc., Assoc. v. Cunningham, 92 Tex. 155, 157, 47 SW 714; Harman v. Lynchburg, 33 Gratt. (74 Va.) 37, 38. In Smith v. Adams, 130 U. S. 167, 175, 9 SCt 566, 32 L. ed. 895 [quot Way v. Clay, 140 Fed. 352, 353], Field, J., in discussing the general question of the amount in controversy for jurisdictional purposes, said: "By matter in dispute is meant the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken. It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment. Thus a suit to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected."

[d] **"Sum demanded" synonymous.**—Zimmerman v. Snyder, 9 Pa. Super. 201, 203; Kuhn v. Eggers, 5 Pa. Dist. 156, 157.

[e] **For an interesting summary of the rules** for determining the amount in controversy in various actions see Withers v. Hopkins Place Sav. Bank, 104 Ga. 89, 30 SE 766.

57. Ross v. Prentiss, 3 How. (U. S.) 771, 772, 11 L. ed. 824; Gordon v. Ogden, 3 Pet. (U. S.) 33, 34, 7 L. ed. 592; Wilson v. Daniel, 3 Dall. (U. S.) 401, 404, 1 L. ed. 655; Decker v. Williams, 73 Fed. 308, 310; Skillman v. Lachman, 23 Cal. 198, 203, 83 AmD 96; Schwyhart v. Barrett, 223 Mo. 497, 499, 122 SW 1049; May v. Jarvis-Conklin Mortg. Trust Co., 138 Mo. 447, 449, 40 SW 122; Addison Tinsley Tobacco Co. v. Rombauer, 113 Mo. 435, 439, 20 SW 1076; Reichenbach v. United Masonic Ben. Assoc., 112 Mo. 22, 24, 20 SW 317; Marsh v. Kansas City So. R. Co., 104 Mo. A. 577, 581, 78 SW 284.

[a] **Colorable amount in dispute.**—In Vanderberg v. Kansas City Gas Co., 199 Mo. 455, 458, 97 SW 908, the court said: "The phrase, 'amount in dispute,' has been before this court and the courts of appeals more than once for interpretation and its intent and application may be said to have been guardedly arrived at (or approached) by a gradual process of judicial exclusion and inclusion, as the cases presented for decision seemed to require. For example, if a plaintiff is cast on demurrer to his petition, it would seem that the amount stated in the petition controls the jurisdiction on appeal; but where, as in this case, the whole case of plaintiff is presented below and becomes a part of the record through a bill of exceptions, this court has hesitated to give to a plaintiff the whimsical and unregulated power to control its jurisdiction by a mere stroke of his pen in his petition, and we have reserved to ourselves the right in emergency to control the question of jurisdiction by looking into the whole record far enough to do so—by seeing to it that jurisdiction is not foisted upon us by a mere paper or colorable amount in dispute, but is regulated by the real amount in dispute on appeal as disclosed by the entire record."

58. Western Union Tel. Co. v. Durham, 17 Tex. Civ. A. 310, 311, 42 SW 792 (holding that the amount in controversy is the amount in litigation, not that which may have been the subject of controversy or dispute in pais).

59. Decker v. Williams, 73 Fed. 308, 309; State v. Judges Fifth Cir. Ct. App., 48 La. Ann. 672, 677, 19 S 617; Gayarre v. Hays, 21 La. Ann. 307; Douglas v. Kansas City, 147 Mo. 428, 431, 48 SW 851; Henk v. Baumann, 100 Wis. 28, 30, 75 NW 313.

60. Georgia, etc., R. Co. v. Andrews, 61 Fla. 246, 248, 54 S 461.

61. Green v. Liter, 8 Cranch (U. S.) 229, 242, 3 L. ed. 545; Boyt v. Mitchell, 4 Ind. T. 47, 50, 64 SW 610; Barber v. Kennedy, 18 Minn. 216, 226; Howard Iron Works v. Buffalo El. Co., 81 App. Div. 386, 396, 81 NYS 452; Gulf, etc., R. Co. v. Cunnigan, 95 Tex. 439, 441, 67 SW 888.

[a] **"Original amount in controversy."**—Where the words of the statute read the "original amount in controversy" the court said: "The 'original amount in controversy' can

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tion, must undertake to dispose, by means of a judgment or decree thereafter to be rendered.[62]

(Cross references.[63])

AMOUNTING.[64] A term implying an aggregate or sum of two or more things.[65]

AMOVE.[66] To remove from a post or station.[67]

AMPARO. An instrument known to the Mexican law which is issued to a claimant of land as a protection to him until a survey can be ordered and the title of possession issued by an authorized commissioner.[68]

AMPARO DE DOTE. A writ issued by the alcaldes of Madrid on the petition of a husband to prevent the sequestration of his wife's dowry (bienes dotales) to satisfy his debts.[69]

AMPERE. The unit of electrical volume is one-tenth unit of the ["centimeter-gram-second] system."[70]

AMPLE. Plentiful, or fully sufficient for the purpose;[71] large in dimensions; of great size, capacity, or bulk.[72]

AMPUTATION OF RIGHT HAND. An ancient punishment for a blow given in a superior court, or for assaulting a judge sitting in court.[73]

AMUSEMENT. A term synonymous with diversion, entertainment, recreation, pastime, sport.[74]

mean nothing more nor less than the amount originally in controversy, or, in other words, the amount sued for." Bleecker v. Satsop R. Co., 3 Wash. 77, 79, 27 P 1073.

62. Riggs v. Clark, 71 Fed. 560, 564, 18 CCA 262; Wegmann v. Wegmann, 52 La. Ann. 947, 27 S 346; Germania Sav. Bank v. Muller, 52 La. Ann. 553, 557, 27 S 81; State v. Judges Fifth Cir. Ct. App., 48 La. Ann. 672, 676, 19 S 617; Ormond v. Sage, 69 Minn. 523, 524, 72 NW 810; Norfolk, etc., R. Co. v. Clark, 92 Va. 118, 121, 22 SE 867.

63. Amount:

Claimed or demanded see Appeal and Error [2 Cyc 565]; Bail [5 Cyc 15]; Costs [11 Cyc 45]; Courts [11 Cyc 776, 777, 779]; Judgments [23 Cyc 795]; Justices of the Peace [24 Cyc 464, 466]; Pleading [31 Cyc 110].

Embezzled or stolen see Embezzlement [15 Cyc 516]; Larceny [25 Cyc 86].

In controversy:

- In general see Appeal and Error [2 Cyc 542]; Costs [11 Cyc 39]; Courts [11 Cyc 776, 781]; Justices of the Peace [24 Cyc 461].
- As affecting:
  - Attachment proceedings see Justices of the Peace [24 Cyc 481].
  - Award of costs see Costs [11 Cyc 39].
  - Garnishment proceedings see Justices of the Peace [24 Cyc 481].
  - Jurisdiction see Courts [11 Cyc 774]; Justices of the Peace [24 Cyc 461]; Prohibition [32 Cyc 606].
  - Removal of cause see Removal of Causes [34 Cyc 1230].
  - Right to trial by jury see Juries [24 Cyc 107].

Of:

- Assets see Executors and Administrators [18 Cyc 132].
- Attorneys' fees see Bills and Notes [8 Cyc 322]; Costs [11 Cyc 104]; Divorce [14 Cyc 739, 764].
- Bail see Bail [5 Cyc 15, 90].
- Bond see Appeal and Error [2 Cyc 834]; Attachment [4 Cyc 531]; Bail [5 Cyc 15, 94]; Bankruptcy [5 Cyc 337]; Executors and Administrators [18 Cyc 121]; Justices of the Peace [24 Cyc 679]; Replevin [34 Cyc 1447].
- Commissions see Executors and Administrators [18 Cyc 1146]; Receivers [34 Cyc 474].
- Compensation see Bankruptcy [5 Cyc 354, 355]; Divorce [14 Cyc 764]; Executors and Administrators [18 Cyc 1154]; Receivers [34 Cyc 470].
- Costs see Costs [11 Cyc 100]; Divorce [14 Cyc 739].
- Damages:
  - In general see Damages [13 Cyc 119, 178]; Judgments [23 Cyc 797].
  - Claimed see Courts [11 Cyc 777]; Damages [13 Cyc 178, 180].
- Exemption from execution see Exemptions [18 Cyc 1386].
- Fine see Fines [19 Cyc 547].
- Homestead exemption see Homesteads [21 Cyc 490].
- Indebtedness as limited by constitution in case of:
  - County see Counties [11 Cyc 502].
  - Municipal corporation see Municipal Corporations [28 Cyc 1538].
  - School district see Schools and School Districts [35 Cyc 972].
  - State see States [36 Cyc 883].
- Judgment see Judgments [23 Cyc 926].
- Permanent alimony see Divorce [14 Cyc 773].
- Recovery:
  - Affecting right:
    - Of appeal see Appeal and Error [2 Cyc 558, 566].
    - To new trial see New Trial [29 Cyc 837].
  - By parent for services of child see Parent and Child [29 Cyc 1636].
- Temporary alimony see Divorce [14 Cyc 756].

Pro rata see Licenses [25 Cyc 627].

Reduction or remission of see Bail [5 Cyc 15, 91]; Courts [11 Cyc 781]; Executors and Administrators [18 Cyc 132]; Judgments [23 Cyc 797, 926]; Justices of the Peace [24 Cyc 474].

Sufficient to carry costs see Costs [11 Cyc 42, 43].

64. See Amount ante.

65. Carr v. Lackland, 112 Mo. 442, 457, 20 SW 624 (where it was held that the words "securities amounting to" a certain sum were not a representation that such securities would be of that value, and the court said: "The word 'amounting' never carries with it a definite idea of value; it implies an aggregate or sum of two or more things,—a quantity or a number. The insolvent notes of a bank may amount to more than those that are solvent. Nothing to the contrary appearing, we must presume that the parties used the word in its ordinary sense, meaning thereby that the express or face value of the securities, when added together, aggregated the sum of $50,250").

66. See Amotion.

67. Wharton L. Lex.

[a] **Proper application.**—The word "amove" is more properly applied to the removal of an officer or servant of a corporation. Marsh v. Huron College, 27 Grant Ch. (U. C.) 605, 623.

68. Trimble v. Smithers, 1 Tex. 790, 792.

69. Escriche Diccionario.

70. Peoria Waterworks Co. v. Peoria R. Co., 181 Fed. 990, 1001.

71. Dorrance v. Dearborn Power Co., 233 Ill. 354, 356, 360, 84 NE 269 (where the court, in construing the warranty, "We hereby guarantee our furnace and gratebars, operated as per our instructions, as follows: Based on ample draft being furnished by your chimney and connections," said: "There was no evidence tending to show that the word 'ample' was used by the parties with any other meaning than its ordinary meaning of plentiful, or fully sufficient for the purpose. There is no reason for saying that the defendant was only to furnish a draft as ample as its chimney and connections were capable of producing, or that such was the measure of the defendant's obligation under the contract. If the parties meant that plaintiff was to furnish a smokeless furnace and produce a certain capacity with the chimney and connections, such as they were and with whatever draft they might furnish, the condition would be meaningless and would never have been inserted in the contract. The term did not mean that the defendant must furnish enough draft to make the furnace smokeless, but it did mean that a failure of the furnace to prove practically smokeless and develop the capacity stated must not result from deficient draft").

[a] **"Sufficient" compared.**—The word "ample" in an instruction as to the time necessary for a person to alight from a train has been considered as so nearly synonymous with "sufficient" as not to vitiate the instruction. St. Louis Southwestern R. Co. v. Haynes, (Tex. Civ. A.) 86 SW 934, 935.

72. Century D.

[a] **"By 'an ample sum of money,'** the testator meant a sum large enough so that the income of it would forever be sufficient to keep his lot in repair, and enlarge it if necessary." Gafney v. Kenison, 64 N. H. 354, 356, 10 A 706.

[b] **Ample fortune.**—A testator conferred a life interest in all his real and personal property upon his widow, and by a clause in his will provided for its revocation in case his wife married again a person of ample fortune who should be able to maintain her in comfort and affluence. The court said: "Without going into particulars I am able to construe the words 'ample fortune.' 'Ample' means sufficient, with a margin over. A man who has ample time to catch a train is able to proceed happily notwithstanding a block in the street. He finds that he has got half an hour to do that distance for which a quarter of an hour or twenty minutes is sufficient. And the illustration is apt. The evidence varies. A man's fortune may be invested in London and North-Western Railway Stock. There may be a doubt whether the dividend paid for the last five years past will be maintained in the future, and whether 6 or 7 per cent. (I do not know what the amount is) will be paid. So in the present case if the fortune is sufficient, allowing for any reasonable reduction which is likely to take place, then in that sense it is ample." Re Moore, 96 L. T. Rep. N. S. 44, 46.

73. Wharton L. Lex.

74. Webster D. [quot Pearson v. Seattle, 14 Wash. 438, 442, 44 P 884].

[a] **"Amusement railway"** includes those devices which have for a number of years been customary at places of popular and cheap amusement, such as Coney Island, and by which a car or other vehicle moves along a track in surprising and startling evolutions or through imitation scenery for the gratification

(Cross references.[75])

AN.[76] Any;[77] in its most absolute sense, any whatsoever;[78] the.[79] The word originally meant "one" and is seldom used to denote plurality.[80]

ANACARDIUM. A genus of tropical trees with a poisonous juice.[81]

ANACOLUTHON. An incomplete proposition.[82]

ANAEROBES.[83] Bacteria (micro-organisms) that are killed by air; they can neither act, multiply, nor even exist in contact with free oxygen. They are also called the germs of putrefaction.[84]

ANÆSTHETIC.[85] That which produces insensibility to pain.[86]

ANALOGOUS. Having analogy; bearing some resemblance or proportion.[87]

of the occupants. Frazer v. Rohr, 180 Fed. 773, 774.

[b] **An aquarium** filled with glass tanks for the exhibition of marine fish and animals has been held to be a place of amusement within the Sunday Law. Terry v. Brighton Aquarium Co., L. R. 10 Q. B. 306; Warner v. Brighton Aquarium Co., L. R. 10 Exch. 291.

[c] **A dance hall** to which the public is admitted upon payment of a small fee is within a statute requiring a license for public amusement. Com. v. Quinn, 164 Mass. 11, 12, 40 NE 1043. To same effect Pearson v. Seattle, 14 Wash. 438, 422, 44 P 884.

[d] **Dancing school.**—A statute prohibiting any public show, amusement, etc., without a license, does not apply to a school for instruction in dancing, although admittance thereto is paid for on each evening. Com. v. Gee, 6 Cush. (Mass.) 174, 179.

[e] **Horse races** are included in the terms "shows" and "amusements" as used in a statute authorizing city councils to license and tax "theatricals and other exhibitions, shows and amusements." Webber v. Chicago, 148 Ill. 313, 320, 36 NE 70.

[f] **The terms "theatre" and "circus"** may both be arranged under the general term "amusements," but differ from each other as one species differs from another under the same genus. Jacko v. State, 22 Ala. 73, 75.

75. Amusement:

Aptness of title of statute relating to see Statutes [36 Cyc 1045].

As nuisance:

- Baseball game see Nuisances [29 Cyc 1166].
- Billiard room see Nuisances [29 Cyc 1167].
- Bowling alley see Nuisances [29 Cyc 1168].
- Dance see Nuisances [29 Cyc 1179].
- Display of fireworks see Nuisances [29 Cyc 1174].
- Fair see Nuisances [29 Cyc 1173].
- Gambling house or device see Nuisances [29 Cyc 1174].
- Merry-go-round see Nuisances [29 Cyc 1176].
- Picnic see Nuisances [29 Cyc 1179].
- Pool:
  - Room see Nuisances [29 Cyc 1167].
  - Selling see Nuisances [29 Cyc 1179].
- Prize fight see Nuisances [29 Cyc 1179].
- Public picnic or dance see Nuisances [29 Cyc 1189].
- Regatta see Nuisances [29 Cyc 1180].
- Roller coaster see Nuisances [29 Cyc 1180].
- Saloon see Nuisances [29 Cyc 1180].
- Skating rink see Nuisances [29 Cyc 1181].
- Theater or show see Nuisances [29 Cyc 1183].

Carrying weapons to place of see Weapons [40 Cyc 856].

On Sunday see Sunday [37 Cyc 550].

Patentability of device for see Patents [30 Cyc 845].

Place of public:

- In general see Theaters and Shows [38 Cyc 254].
- Includes:
  - Dance hall see Theaters and Shows [38 Cyc 254].
  - Horse racing see Theaters and Shows [38 Cyc 254].
  - Music halls see Theaters and Shows [38 Cyc 254].

Place of Public:—Continued

Includes:—Continued

Theater see Theaters and Shows [38 Cyc 254].

See also Pastime [30 Cyc 801]; Recreation [34 Cyc 764]; Sport [36 Cyc 808].

76. See also A 1 C. J. 1; The.

77. Kaufman v. San Francisco County Super. Ct., 115 Cal. 152, 155, 46 P 904 (where, in construing the civil code providing that an action may be dismissed by plaintiff at any time before trial, etc., the court said: "The particle 'an' is equivalent to 'any,' and the provisions of the section are applicable to an action in interpleader such as this, as well as to other forms and causes of action").

78. Ex p. Pratt, 12 Q. B. D. 334, 337 (where Colton, L. J., said: "I am of opinion that the expression, 'an act of bankruptcy,' includes everything which by legislative enactment is made to be an act of bankruptcy, whether by this Act itself or by some other Act passed before it came into operation").

[a] **"Any" distinguished.**—In construing a statute the court said: "As to whether a private person, without a warrant, may break an outer or inner door or window of a dwelling house, there appears to be a distinction taken in the statutes between cases of original arrest, and those in which there is a fresh pursuit immediately upon an escape. In the latter case it is said, the person pursuing may, after proper notice, 'break open any outer or inner door or window of a dwelling house.' Section 7007. . . . In respect of original arrests by private persons the language is: 'If the person to be arrested has committed a felony, and a private person, after notice of his intention to make the arrest, is refused admittance, he may break an outer or inner door or window of a dwelling house, to make the arrest.' Section 7004. The difference in language upon a casual view appears to be slight, being only that between 'an' and 'any;' yet upon a deeper consideration it appears to be a vital distinction, viz., that between the home of the person sought to be arrested, and the home of a stranger. We are of the opinion that under section 7004, a private person seeking to make an arrest for felony may break open an outer or inner door, or window, of the dwelling house of the person sought to be arrested, but not of a stranger; but that having arrested a person for a felony, such private person may, upon an attempted escape from his custody, upon immediate and fresh pursuit, break open the outer or inner door or window of any dwelling house, in which the fleeing criminal has sought refuge, that is, of the person sought to be arrested or of another, under section 7007, on complying with the terms and conditions set forth in that section." McCaslin v. McCord, 116 Tenn. 690, 706, 707, 94 SW 79, 8 AnnCas 245.

79. Ex p. Rogers, L. R. 3 C. P. 490 [foll Reg. v. Judge Oxfordshire County Ct., [1894] 2 Q. B. 440] (where, in construing 15 & 16 Vict. c 54 § 10, which enacts that an attorney of a superior court, being an attorney acting generally in the action for the party, but not retained as advocate by the acting attorney, may appear for a suitor in the county court, upon a motion under 19 & 20 Vict. c 108 § 43, calling upon the judge to show cause why he should not hear a duly qualified attorney, it was held that it was for the judge to determine as a matter of fact whether the applicant was or was not the attorney acting generally in the action for the party).

80. Peo. v. Ogden, 8 App. Div. 464, 467, 40 NYS 827, where, in construing a statute providing in effect that an overseer of the poor must apply to a justice of the peace or police justice in the county to inquire into the facts of a bastardy case (where the court said: "The word 'an,' as used in the section, points out one of a class of officers and does not embrace all of the class. The original meaning of the word was one, and it is seldom used to denote plurality. The term 'an overseer' cannot be construed to embrace all of the overseers of the poor of the town. . . . The term 'an overseer' is the equivalent of either, or of any, of the overseers of the poor of the town. It follows that one overseer of the poor of the town may, without consulting with the other overseer, if there be two, institute such proceedings, and that this proceeding was legally begun").

[a] **Used in a claim for a patent** for "an" artificial slate, "an" fairly implies that the claim is for material having form and dimensions, and not for a new substance in mass. Plastic Fireproof Constr. Co. v. San Francisco, 97 Fed. 620, 624.

81. Dorland Med. D. [quot McDonald v. Triest, 119 App. Div. 75, 78, 103 NYS 1041].

82. Vœgtly v. Alleghany Third Ward School Directors, 1 Pa. 330, 331.

[a] **For example,** the following section of the act of March 25, 1831, an act assessing a tax on personal property, in which personal property made taxable by the provisions of the act is described as "'all ground rents,' 'moneys at interest,' and 'all debts due from solvent debtors, whether by promissory notes, (except bank notes) penal or single bill, bond, judgment, mortgage, stocks,'" etc., is an anacoluthon, as the word "whether," as there used, requires some correlative. Vœgtly v. Alleghany Third Ward School Directors, 1 Pa. 330, 331.

83. See Aërobes ante.

84. Cameron Septic Tank Co. v. Saratoga Springs, 159 Fed. 453, 455, 86 CCA 483.

85. Anæsthetic, care required of physician in use of see Physicians and Surgeons [30 Cyc 1574].

86. State v. Baldwin, 36 Kan. 1, 20, 12 P 318 [cit Webster D.].

[a] **Meaning not technical.**—It is a word in common use in the vernacular of the language, and has a well settled meaning which is not local and cannot be regarded as technical or peculiar. State v. Baldwin, 36 Kan. 1, 20, 12 P 318.

87. Century D.

[a] **Analogous forms.**—Code (1876) § 4824, after declaring that the forms given are sufficient "in all cases in which they are applicable," contains this clause: "Analogous forms may be used in other cases." The court, in Smith v. State, 63 Ala. 55, 58, in construing this section, said: "Analogous to what? Many of the forms, though severely pruned in verbiage, nevertheless contain every constituent element of the offense charged. Others make no mention of material facts, going to make up the offense.

ANALYSIS.[88] A scientific, and therefore accurate, ascertainment of the elements and their proportion contained in the substance submitted for examination.[89]

ANANIAS. The husband of Sapphira; a biblical character notorious for lying.[90]

ANARCHIST.[91] An anarch; one who excites revolt or promotes disorder in a state,[92] one who advocates anarchy or the absence of government as a political ideal; a believer in an anarchic theory of society; especially, an adherent of the social theory of Proudhon.[93]

ANARCHY.[94] Avowed hostility to all governments, and open antagonism to all political parties;[95] the absence or insufficiency of government; a state of society where there is no capable supreme power,[96] and in which the several functions of the state are performed badly or not at all; social and political confusion;[97] specifically, a social theory which regards the union of order with the absence of all direct government of man by man as the political ideal; absolute individual liberty.[98]

ANATHEMA. A punishment, in ecclesiastical law, separating a person from the body of the church and forbidding him all intercourse with the faithful.[99]

ANATOCISM. In civil law repeated or doubled interest; compound interest; usury.[1]

ANCESTOR.[2] One who goes before.[3] The word is an ambiguous one, broad enough to include, but not necessarily including, parents, grandparents, and

Which class shall be followed, or adopted as the basis of the analogy? We think the only safe rule is to require that, when the indictment is not framed on any form given in the Code, it shall aver every material constituent of the offense; always excepting the statement of venue and of time. Code (1876) §§ 4787–8."

88. Analysis:

Adulteration of milk as determined by see Adulteration §§ 8, 21; Food [19 Cyc 1090].

Of patent medicine before sale see Druggists [14 Cyc 1085].

89. Shivers v. Newton, 45 N. J. L. 469, 475.

90. Standard D.

[a] **In an action for libel** the use of the word "Ananias" as applied to a newspaper does not necessarily impute willful and deliberate falsehood to the proprietor of the paper so as to be actionable. Australian Newspaper Co. v. Bennett, [1894] A. C. 284, 287.

91. See Anarchy post.

92. Webster D. [quot Cerveny v. Chicago Daily News Co., 139 Ill. 345, 353, 28 NE 692, 13 LRA 864].

93. Century D. [quot U. S. v. Williams, 194 U. S. 279, 293, 24 SCt 719, 48 L. ed. 979].

[a] **Other definitions.**—(1) "A person who, actuated by mere lust of plunder, seeks to overturn by violence all constituted forms and institutions of society and law and order and all right of property" (Lewis v. Daily News Co., 81 Md. 466, 473, 32 A 246, 29 LRA 59), "with no purpose of establishing any other system of order in place of that destroyed." Century D. [quot U. S. v. Williams, 194 U. S. 279, 293, 24 SCt 719, 48 L. ed. 979]. (2) "An enemy and conspirator against all law and social order, and as one who uses unlawful, violent and felonious means to destroy property and human life, and as one who is treasonable to the government under which he lives, and employs assassination of persons in authority as means of accomplishing his unlawful designs against society." Lewis v. Daily News Co., 81 Md. 466, 473, 32 A 246, 29 LRA 59. (3) In Spies v. Peo., 122 Ill. 1, 254, 12 NE 865, 17 NE 898, 3 AmSR 320, the court said: "If the conspiracy had for its object the destruction of the law and the government, and of the police and militia as the representatives of law and government, it had for its object the bringing about of practical anarchy. Whether or not the defendants were anarchists may have been a proper circumstance to be considered in connection with all the other circumstances in the case, with a view of showing what connection, if any, they had with the conspiracy and what were their purposes in joining it."

[b] **"The point and pith of the offense** of anarchists is that they teach the doctrine that the pistol, the dagger and dynamite may be used to destroy rulers. The teaching of such horrid methods of reaching an end is the offense. It is poor satisfaction when one of their dupes has consummated the results of their teaching to catch him and visit upon him the consequences of his acts. The evil is untouched if we stop there. In this class of cases the courts and the public have too long overlooked the fact that crimes and offenses are committed by written or spoken words. We have been punishing offenders in other lines for words spoken or written without waiting for an overt act of injury to persons or property. The press is restrained by the law of libel from the too free use of words. Individuals can be punished for words spoken or written, even though no overt act of physical injury follow. It is the power of words that is the potent force to commit crimes and offenses in certain cases. No more striking illustration of the criminal power of words could be given, if we are to believe the murderer of our late President, than that event presents. The assassin declares that he was instigated and stimulated to consummate his foul deed by the teachings of Emma Goldman. He is now awaiting execution for the crime, while she is still at large in fancied security. A person may advocate any change in our government by lawful and peaceful means, or may criticise the conduct of its affairs and get as many people to agree with him as he can, so long as he does not advocate the commission of crime as the means through which he is to attain his end. If he advocates stealthy crime as the means of reaching his end he, by that act, commits a crime for which he can be punished. The distinction we have tried to point out has been too long overlooked. If our conclusions are sound, it is the teachers of the doctrine who can and ought to be punished. It is not necessary to trace and establish the connection between the teaching of anarchy and a particular crime of an overt nature. . . . The liberty of conscience, the freedom of speech, the freedom of the press, do not need such concessions to save to the fullest extent unimpaired those sacred rights of a free people." Peo. v. Most, 36 Misc. 139, 141, 73 NYS 220.

[c] **In construing the statute for the exclusion and deportation of "anarchists,** or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law, or the assassination of public officials," the court said: "If this should be construed as defining the word 'anarchists' by the words which follow, or as used in the popular sense above given, it would seem that when an alien arrives in this country, who avows himself to be an anarchist, without more, he accepts the definition. And we suppose counsel does not deny that this Government has the power to exclude an alien who believes in or advocates the overthrow of the Government or of all governments by force or the assassination of officials. To put that question is to answer it." U. S. v. Williams, 194 U. S. 279, 293, 24 SCt 719, 48 L. ed. 979. See also Aliens § 54.

94. See Anarchist ante.

Conspiracy to change government by force see Conspiracy [8 Cyc 628].

95. Lewis v. Daily News Co., 81 Md. 466, 474, 32 A 246, 29 LRA 59 (where the court further said: "It cannot be doubted that all law-abiding, right-thinking men regard with abhorrence the individual who justifies or approves of the bloody and atrocious means to which anarchists resort, the world over, in furtherance of their reckless and revolutionary designs against every form of government and against every right of property").

96. Century D. [quot U. S. v. Williams, 194 U. S. 279, 292, 24 SCt 719, 48 L. ed. 979]; Spies v. Peo., 122 Ill. 1, 253, 12 NE 865, 17 NE 898, 3 AmSR 320.

97. Century D. [quot U. S. v. Williams, 194 U. S. 279, 292, 24 SCt 719, 48 L. ed. 979].

98. Century D. [quot U. S. v. Williams, 194 U. S. 279, 293, 24 SCt 719, 48 L. ed. 979].

[a] **Lawless and dangerous doctrine.**—"'Anarchy' is a term which has been used in recent years to describe a lawless and dangerous doctrine, and its advocates have been looked upon as persons dangerous to society, and some of its more outspoken and unbalanced disciples have become assassins." Von Gerichten v. Seitz, 94 App. Div. 130, 132, 87 NYS 968.

[b] **"Criminal anarchy** is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony." Von Gerichten v. Seitz, 94 App. Div. 130, 132, 87 NYS 968.

[c] **Huxley is quoted as saying:** "Anarchy, as a term of political philosophy, must be taken only in its proper sense, which has nothing to do with disorder or with crime, but denotes a state of society in which the rule of each individual by himself is the only government the legitimacy of which is recognized." U. S. v. Williams, 194 U. S. 279, 293, 24 SCt 719, 48 L. ed. 979.

99. Bouvier L. D.

1. Black L. D. See generally Usury [39 Cyc 876].

2. Descent and distribution of property generally see Descent and Distribution [14 Cyc 11].

Right of inheritance see Descent and Distribution [14 Cyc 41].

3. Roundtree v. Pursell, 11 Ind. A. 522, 39 NE 747, 749.

[a] **Derived from** "antecedere," "to go before." Burrill L. D. [quot McCarthy v. Marsh, 5 N. Y. 263, 276].

all persons in the ascending line as far as relationship can be traced.[4]

The popular meaning of the word is one from whom a person descends;[5] one from whom a person may be descended;[6] one from whom a person lineally descended;[7] a lineal ascendant;[8] one who has preceded another in a direct line of descent;[9] a forefather;[10] a progenitor.[11]

In its technical sense, as used in statutes of descent, the term means any one from whom an estate is inherited;[12] a deceased person from whom another has inherited land;[13] any one from whom an estate is derived by act of law and right of blood;[14] a former possessor; the person last seized.[15] As sometimes employed, it is synonymous with "kindred," and embraces all from whom a title could be derived by descent.[16]

The correlative of ancestor is descendant,[17] or heir.[18]

4. Mitchell v. Thorne, 134 N. Y. 536, 540, 32 NE 10, 30 AmSR 699.

[a] **Context and subject matter.**—The word must be taken in connection with the whole subject matter of the act or instrument in which it is used. Brewster v. Benedict, 14 Oh. 368, 385.

5. McCarthy v. Marsh, 5 N. Y. 263, 275.

[a] **"In most of our English dictionaries** the word ancestor is defined to be 'one from whom a person descends,' and some of the law dictionaries agree substantially in this definition. But this is its popular and not its legal meaning." McCarthy v. Marsh, 5 N. Y. 263, 275.

6. Brewster v. Benedict, 14 Oh. 368, 385.

7. Banks v. Walker, 3 Barb. Ch. (N. Y.) 438, 447; Brewster v. Benedict, 14 Oh. 368, 385; Springer v. Fortune, 2 Handy (Oh.) 52, 55, 12 Oh. Dec. (Reprint) 325.

8. Black L. D. [quot Bowen v. Hackney, 136 N. C. 187, 195, 48 SE 633, 67 LRA 440].

9. Black L. D. [quot Bowen v. Hackney, 136 N. C. 187, 195, 48 SE 633, 67 LRA 440].

[a] **"Predecessor" distinguished.**—The term differs from "predecessor" in that it is applied to a natural person and his progenitors, while the latter is also applied to a corporation and to those who have held offices before those who now fill them. Black L. D. [cit Coke Litt. 78b].

10. Matter of Reeve, 38 Misc. 409, 412, 77 NYS 936.

[a] **Dead parent.**—According to its accurate and legal meaning, the word designates one's forefathers, etc., in a direct line, who are dead, the word not applying to a living parent. Hillen v. Iselin, 144 N. Y. 365, 374, 39 NE 368.

11. Rountree v. Pursell, 11 Ind. A. 522, 39 NE 747, 749; Bailey v. Bailey, 25 Mich. 185, 188; Matter of Reeve, 38 Misc. 409, 412, 77 NYS 936.

12. Clark v. Shailer, 46 Conn. 119, 123; Murphy v. Henry, 35 Ind. 442, 450; Gray v. Swerer, 47 Ind. A. 384, 94 NE 725, 727; Rountree v. Pursell, 11 Ind. A. 522, 39 NE 747, 749; Bailey v. Bailey, 25 Mich. 185, 188; Den v. De Hart, 3 N. J. L. 481, 487; Wheeler v. Clutterbuck, 52 N. Y. 67, 71; McCarthy v. Marsh, 5 N. Y. 263, 276; Conkling v. Brown, 57 Barb. 265, 8 AbbPrNS 345; Righter v. Ludwig, 39 Misc. 416, 420, 80 NYS 16; Matter of Reeve, 38 Misc. 409, 412, 77 NYS 936; Matter of Kene, 8 Misc. 102, 103, 29 NYS 1078; Emanuel v. Ennis, 48 N. Y. Super. 430, 432; Armstrong v. Moran, 1 Bradf. Surr. (N. Y.) 314, 318; Bowen v. Hackney, 136 N. C. 187, 195, 48 SE 633, 67 LRA 440; Brower v. Hunt, 18 Oh. St. 311, 338; Birney v. Wilson, 11 Oh. St. 426, 432; Curren v. Taylor, 19 Oh. 36, 39; Penn v. Cox, 16 Oh. 30; Brewster v. Benedict, 14 Oh. 368, 385; Springer v. Fortune, 2 Handy 52, 56, 12 Oh. Dec. (Reprint) 325; Zetland v. Lord Advocate, 3 App. Cas. 505.

"In Termes De La Ley it is said, that this word, in the forensic sense, is 'more properly applied to the prepossessor of an estate than to the ancestor of a family,' and in this sense it is frequently and indeed most generally used in books which treat of descents of real estate, and in statutes relating to that subject. Mr. Burrill . . . defines it, when used in the law of descents, to be 'one who has gone before or preceded in the seisin or possession of real estate: a deceased person from whom an estate has passed to another by operation of law in consequence of his decease. The person last seised of an estate of inheritance, and from whom such estate is transmitted to the heir.' Blackstone, in his chapter on descents, (2 Comm. 201) uses the words heir and ancestor as correlative terms." McCarthy v. Marsh, 5 N. Y. 263, 275.

[a] **For example** (1) a child may be the "ancestor" of his parent. Lavery v. Egan, 143 Mass. 389, 391, 9 NE 747. (2) A son may be the "ancestor" of his father. Rountree v. Pursell, 11 Ind. A. 522, 39 NE 747, 749. (3) "An infant brother may be ancestor of an adult brother, the former having died, and his estate having come to the latter as his heir." Murphy v. Henry, 35 Ind. 442, 450.

[b] **"In the idea of the term 'ancestor,'** as derived from the legal definition of a descent, two things are to be observed: The character of the estate, and the personal relationship, or the act of law and the right of blood. It was in view of this personal relationship and right of blood that the legislature used the words 'any ancestor.'" Springer v. Fortune, 2 Handy 52, 58, 12 Oh. Dec. (Reprint) 325.

13. Black L. D. [quot Bowen v. Hackney, 136 N. C. 187, 195, 48 SE 633, 67 LRA 440].

14. Brower v. Hunt, 18 Oh. St. 311, 338; Cliver v. Sanders, 8 Oh. St. 501, 504; Prickett v. Parker, 3 Oh. St. 394, 395; Springer v. Fortune, 2 Handy 52, 56, 12 Oh. Dec. (Reprint) 325.

15. Black L. D. [quot Bowen v. Hackney, 136 N. C. 187, 195, 48 SE 633, 67 LRA 440].

[a] **Person last seized.**—(1) In determining from whom the estate came the rule is to trace the title back to the person last seized. Gray v. Swerer, 47 Ind. A. 384, 94 NE 725, 727 [cit Murphy v. Henry, 35 Ind. 442, 450]. (2) The ancestor is he from whom, in contemplation of law, the estate has descended to the person last seized, taking the nearest first, and so proceeding in the ascending line. Den v. De Hart, 3 N. J. L. 481, 487.

[b] **Remote ancestor.**—The ancestor intended by the statute, with regard to the distribution of ancestral estates, is the one from whom the estate immediately, and not the one from whom it remotely, descended. Gardner v. Collins, 2 Pet. (U. S.) 58, 87, 7 L. ed. 347; Clark v. Shailer, 46 Conn. 119, 121; Buckingham v. Jacques, 37 Conn. 402, 403; Wheeler v. Clutterbuck, 52 N. Y. 67, 70; Prickett v. Parker, 3 Oh. St. 394, 396; Curren v. Taylor, 19 Oh. 36.

16. Greenlee v. Davis, 19 Ind. 60, 62.

[a] **Ancestor of same blood.**—(1) No person can be an "ancestor" of an intestate, within the meaning of the statute of descent providing that when any person shall die intestate having title to land which has come to him from any ancestor it shall descend in a certain manner, unless he is of the blood of the intestate, and the decisions in the state enlarging the common-law definition of "ancestor" in its application to our statutes of descent are all consistent with this view, as they are without exception cases in which the person adjudged the ancestor was of the same blood as the person whose ancestor he was held to be. Birney v. Wilson, 11 Oh. St. 426, 431. (2) In a statute, declaring that relatives of the half blood shall inherit equally with them of the whole blood in the same degree, unless the inheritance goes to the intestate by descent, devise, or gift of some one of his "ancestors," in which case all those not of the blood of such ancestor shall be excluded from such inheritance, it is held that the word "ancestor" designates the ancestors of the intestate in the right line, as father and mother, grandfather and grandmother, and does not include collateral relatives as brothers and sisters. The term is not the equivalent of the expression "the parent or other kindred of the intestate." Valentine v. Wetherill, 31 Barb. (N. Y.) 655, 659.

[b] **Collateral kindred included.**—(1) As used in a statute concerning descents, providing that in case an inheritance came to an intestate by devise or descent from one of his "ancestors," when used with reference to the descent of real property, the term embraces collaterals as well as lineals through whom an inheritance is derived. Righter v. Ludwig, 39 Misc. 416, 420, 80 NYS 16 [cit Wheeler v. Clutterbuck, 52 N. Y. 67]. (2) The inference is plain, said Judge Foot in McCarthy v. Marsh, 5 N. Y. 263, 283, that the word "ancestor" as used in the statutes is not limited in its meaning to lineal ancestors or progenitors. "Hence the inference is pretty plain, that our revisors and legislature used the term 'any ancestor,' without the qualifying words 'lineal' or 'collateral,' with the intent of embracing ancestors of both classes." Matter of Reeve, 38 Misc. 409, 412, 77 NYS 936. (3) But see Banks v. Walker, 3 Barb. Ch. (N. Y.) 438, 447 (where it was said: "The word 'ancestors,' in its ordinary import and meaning, only includes those from whom the person spoken of is lineally descended, either on the father's or the mother's side. And whenever this word is intended to be used in a sense which is different from its ordinary import of lineal ascendants, or in such enlarged sense of antecessors, so as to embrace all the blood relatives of the person referred to who have preceded him, it is qualified, or enlarged, by some other term; to show that it is not used in its natural sense merely").

[c] **Maternal ancestor.**—Under a statute providing that every illegitimate child should be considered as heir of his mother and of any maternal ancestor, and that his issue might take by descent from such ancestor, it was held that the word "ancestor" as there used was limited to progenitors or ancestors in the direct ascending line, according to the common meaning in which the word is used in the statutes of descent. Pratt v. Atwood, 108 Mass. 40, 42.

17. Hillen v. Iselin, 144 N. Y. 365, 374, 39 NE 368; Mitchell v. Thorne, 134 N. Y. 536, 540, 32 NE 10, 30 AmSR 699. See also Descendant [13 Cyc 1047].

18. McCarthy v. Marsh, 5 N. Y.

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ANCESTRAL. Relating to, or derived from, ancestors.[19]

ANCESTRY.[20] A series or line of ancestors or progenitors; lineage, or those who compose a preceding line of natural descent.[21]

ANCHOR. A device for securing a vessel to the ground under water by means of a cable;[22] a device for supporting a wall;[23] also, a measure containing ten gallons.[24] (Cross references.[25])

ANCHORAGE. A duty or toll taken of ships for the use of the haven where they cast anchor, and sometimes exacted, although there be no anchor.[26]

ANCHOR WATCH.[27] A small watch kept constantly on deck while in port or riding at single anchor.[28]

ANCIENT. Old; that existed in former times.[29]

263, 275 [cit Blackstone Comm. 201]. See also Heir [21 Cyc 408].

"'Descendant' is an antonym of 'ancestor,' but is not a synonym of 'heir.' It is plain that the allegation that the ancestors of the plaintiffs are buried in this yard is not equivalent to an allegation that the plaintiffs' parents were there buried, or that the plaintiffs are the heirs of the persons there buried. No one is the heir of all of his ancestors." Mitchell v. Thorne, 134 N. Y. 536, 540, 32 NE 10, 30 AmSR 699.

19. Burrill L. D.

[a] **Ancestral estates** (1) are such as are transmitted by descent, and not by purchase. 4 Kent Comm. 404 [quot in Bowen v. Hackney, 136 N. C. 187, 195, 48 SE 633, 67 LRA 440]. (2) In speaking of the question relating to ancestral estates and those by new acquisition the supreme court of Ohio in the case of Brown v. Whaley, 58 Oh. St. 654, 666, 49 NE 479, 65 AmSR 793 [quot Martin v. Martin, 98 Ark. 93, 99, 135 SW 348] said: "How then shall it be solved when the considerations are thus mixed. The title came either by deed of gift or by purchase. It could not come by both; and legally speaking, it could not come partly by deed of gift and partly by purchase. . . . To make ancestral property—title by deed of gift—there must be no other consideration than that of blood." See also Kelley v. McGuire, 15 Ark. 555.

[b] **"Ancestral property** is realty which came to the intestate by descent or devise, from a now dead ancestor, or by deed of actual gift from a living one; there being no other consideration than that of blood. Non-ancestral property is realty which came to the intestate in any other way." Walker Am. L. (10th ed) 392 [quot Martin v. Martin, 98 Ark. 93, 99, 135 SW 348; Brown v. Whaley, 58 Oh. St. 654, 666, 49 NE 479, 65 AmSR 793]. To same effect Gossain v. Gossain, 8 Wkly. Rep. 196.

20. **Ancestry:** Declarations as to see Evidence [16 Cyc 1223]. See also Descent and Distribution [14 Cyc 1]; Pedigree [30 Cyc 1329].

21. Century D.

[a] **Applied to animals.**—The term "ancestry," within the rule that questions of ancestry and pedigree may be proven by general reputation, is not limited to the ancestry or pedigree of the human race, but is equally applicable whether the question concerns horses, cattle, dogs, or men. Citizens' Rapid-Transit Co. v. Dew, 100 Tenn. 317, 324, 45 SW 790, 66 AmSR 754, 40 LRA 518.

22. Century D.

[a] **"At anchor."**—(1) A vessel moored to a wharf in a lawful position is not "at anchor." Bank Shipping Co. v. Seattle, 10 B. C. 513, 516. To same effect The Turquoise, [1908] P. 148; The St. Aubin, [1907] P. 60. (2) A tug while moving up to her anchor a vessel to which she is attached is not "at anchor" but "under way." The Romance, [1901] P. 15, 19.

[b] **"Lying at anchor."**—(1) By a vessel "lying at anchor," it is generally understood that she is floating upon the water, but is held by her cable and anchor. Reid v. Lancaster F. Ins. Co., 19 Hun (N. Y.) 284, 285 (where it was held that a vessel beached cannot be said to be lying at anchor, and her owner cannot recover for her destruction while so beached on a policy of insurance which covers her while lying at anchor. This case was upheld upon appeal in Reid v. Lancaster F. Ins. Co., 90 N. Y. 382, 385, where it was said: "There was no dispute about the facts, relative to the situation and condition of the vessel, but it is argued that the phrase 'lying at anchor' has a technical meaning and is a technical phrase, requiring explanation by evidence, and so subject to the judgment and control of the jury, and evidence was offered to show its meaning, which was objected to and rejected. We see no just reason for holding that the words 'lying at anchor' or 'unoccupied,' as used in the policy, have any other than their ordinary and familiar meaning, or are used in any special sense. The terms of the policy indicate very plainly an intention to limit the insurance to a particular period during the running of the policy. The risk is assumed 'while' the vessel is plying in certain waters, or lying at anchor, or at any bulk-head, dock or pier, and while not unoccupied for more than twenty days. The risk was taken while the vessel was in use, or ready for use and awaiting employment, or if laid up for the want of it, at least occupied. The language certainly did not contemplate a liability when the vessel was beached, when its furniture was removed, when it had no occupant, and practically for the time being was laid up and abandoned"). (2) A vessel fastened to a pier head is not lying at anchor, and therefore is not liable for wharfage under the provision of the act of 1860, L. (1860) c 254, amended by L. (1875) c 405, which authorizes the collection of "half the usual wharfage . . . for every vessel lying at anchor within any slip," although the vessel, attached to an adjacent pier, occupies the greater part of the slip between the piers. Walsh v. New York Floating Dry Dock Co., 77 N. Y. 448, 453.

23. Ryder v. Kinsey, 62 Minn. 85, 87, 64 NW 94, 54 AmSR 623, 34 LRA 557 (where the court said: "The evidence further tends to show that the customary and proper way to support a veneered brick wall is to sheet or board up the frame on the outside of the studding next to the brick, then lay the brick along and outside of the sheeting, and bind the brick wall, during the progress of its construction, to the frame of the building, by driving 20-penny nails every fifth or sixth course of the bricks into the boards of which the sheeting is composed, so that the nail heads will remain in the mortar at about the center of the bricks. This is what is meant by 'anchoring' or 'supporting' a brick or veneered wall").

24. Black L. D.

25. **Anchor:**
Hire of, as extraordinary expense see Shipping [36 Cyc 390].
Light to avoid collision see Collisions [7 Cyc 337].
Service rendered anchored vessel see Seamen [35 Cyc 1182].
Supplying to vessel in distress as salvage service see Salvage [35 Cyc 722].
See also Anchor Watch post.

26. Foreman v. Free Fishers, etc., L. R. 4 H. L. 266, 284; Free Fishers, etc. v. Gann, 13 C. B. N. S. 853, 859, 106 ECL 853, 143 Reprint 337.

[a] **As defined by Lord Hale,** De Portibus Maris 74, Anchorage is "a prestation or toll for every anchor cast there; and sometimes though there be no anchor. And this doth in truth properly and prima facie arise from or in respect of the propriety in the soil, and is an evidence of it: but yet is not so always, but grows due in respect of the franchise." Free Fishers, etc. v. Gann, 13 C. B. N. S. 853, 859, 106 ECL 853, 143 Reprint 337 [rev 11 H. L. Cas. 192, 11 Reprint 1305] (where it was held that a claim of an anchorage due cannot exist merely in respect of the use of the soil; it must be founded on proof that the soil of the claimant was originally within the precincts of a port or harbor, or that some service or aid to navigation was rendered by the owner of the soil who claimed the anchorage due). Lord Hale's definition was approved in Foreman v. Free Fishers, etc., L. R. 4 H. L. 266 [dist Gann v. Free Fishers, etc., super].

[b] **Tolls for anchorage.**—The power given a municipal corporation by statute to regulate the anchorage of vessels means "only the power of making rules to regulate the mode of the anchoring of vessels" and does not authorize the imposition of a toll for anchorage. Reg. v. Dowling, 10 N. B. 378, 379.

27. See Anchor ante.

28. The Lady Franklin, 14 F. Cas. No. 7,984, 2 Lowell 220, 223 [cit Dana D. Sea Terms 129].

[a] **Naval dictionary definition.**—The term "anchor watch" is defined by Totten in the Naval Text-book and Dictionary, p 443, as "a watch of three or four men kept constantly on deck, and stationed at one of the anchors, while riding at single anchor, to see that the stoppers, painters, cables, and buoy ropes are ready for immediate use." The Lady Franklin, 14 F. Cas. No. 7,984, 2 Lowell 220, 223.

[b] **One man always on deck,** without any duty assigned to him, answers the requisites of an anchor watch. The Rival, 20 F. Cas. No. 11,867, 1 Sprague 128.

29. Webster D. [quot Bagley v. Castile, 42 Ark. 77, 87, where the court said: "The Constitution recognizes her 'ancient right of eminent domain and of taxation.' Art. 2, sec. 2. . . . The right to tax implies the power to collect. The use of the word ancient is not rhetorical, for the purpose of conveying the information that such rights always existed here, and in the governments whence ours is derived. It is limiting and qualifying, and alludes to those powers of imposing, and modes of collecting, based upon necessity and immemorial usage, or rather common usage, which had been theretofore employed. It justifies them, and such analogous modes of collection as might rest upon the same principle with the others"].

Ancient boundaries see Boundaries [5 Cyc 958, 959].

[a] **As applied to lights, ways, foundations, etc.,** "ancient" means such lights, ways, etc., as have been used as such more than twenty years with acquiescence. Eno v. Del Vecchio, 11 N. Y. Super. 53, 64. See also infra text and note 41.

[b] **An ancient house** is one which has stood long enough to acquire an easement of support against the adjoining land or building. 3 Kent Comm. 437; 2 Washburn Real Prop. 74, 76. In England this term is applied to houses or buildings erected before the time of legal

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It is a correlative term, and has for its correlate, as standing in the opposition, the term "modern."[30]

Phrases in which the word has been used have received judicial interpretation, such as "ancient feud,"[31] "ancient mode of trial by jury,"[32] "ancient rent,"[33] "ancient usage . . . or practice,"[34] "ancient wall,"[35] "ancient water-course."[36]

An ancient document, as the term is used in the law of evidence, is any writing which is at least thirty years old,[37] the time to be computed from the date of the execution of the instrument.[38]

Ancient demesne. A species of copyhold tenure existing in certain manors, which, although now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor, or William the Conqueror, and so appear to have been by Domesday Book, in which they were entered.[39]

Ancient lights.[40] In England openings in a house for air and light which have been used unobstructed for upward of twenty years acquire a prescriptive right, and may not afterward be obstructed, even by buildings erected by an adjoining landowner upon his own land. Windows thus privileged are technically termed "ancient lights." The doctrine of "ancient lights" has been adopted in a few of the United States; in others, it has been distinctly repudiated, in others again, it is an open question.[41]

ANCIENTS. Gentlemen of the Inns of Court.[42]

ANCILLARY. Auxiliary; that which aids or promotes a proceeding regarded as the principal;[43] subordinate or auxiliary to the principal.[44]

Ancillary bill. An auxiliary bill filed to assist another court in the administration and distribution of assets in a cause properly before it.[45]

Ancillary suit. An action in aid of the execution at law and which is in effect a continuance of the suit at law to obtain the fruit of the judgment or to remove obstacles to its enforcement.[46]

memory (Cooke Incl. Acts 35, 109), that is, before the reign of Richard I, although practically any house is an ancient messuage if it was erected before the time of living memory, and its origin cannot be proved to be modern.

[c] **Ancient readings** are essays on the early English statutes. Coke Litt. 280.

[d] **Ancient serjeant** was, in English law, the eldest of the queen's serjeants. Black L. D.

[e] **Ancient writings** are documents upward of thirty years old. Wharton L. Lex.

30. Garner v. State, 5 Yerg. (Tenn.) 160, 178.

31. Den v. De Hart, 3 N. J. L. 481, 486 (an estate descended to one from his remote ancestors).

32. Garner v. State, 5 Yerg. (Tenn.) 160, 178 (where Whyte, J., said that the words "ancient mode of trial by jury" in the North Carolina constitution meant "the mode of trial by jury as it was at common law before the statute of 22 Henry VIII, ch. 14, sec. 5").

33. Doe v. Lock, 2 A. & E. 705, 736, 29 ECL 325, 111 Reprint 271; Orby v. Mohun, 2 Vern. 542, 23 Reprint 951 (where it was said: "That shall be deemed the ancient rent, which was the rent at the time the power was reserved, or when the last lease before was made, if the estate was not then under lease"). See also Roe v. Rawlings, 7 East 279, 291, 103 Reprint 107.

34. See Atty.-Gen. v. Great Yarmouth, 21 Beav. 625, 632, 52 Reprint 1001; Customs and Usages [12 Cyc 1028].

35. Eno v. Del Vecchio, 11 N. Y. Super. 53, 63 (where it was said: "A party wall built to be used as such, and in fact used as such for more than twenty years, by the express permission and continuous acquiescence of the owners of the land on which it stands, is an ancient wall, within the meaning of the word 'ancient,' as applied to lights, ways, foundations, &c., which are treated in law as being ancient lights, ways and foundations. Wright v. Freeman, 5 Harr. & J. (Md.) 467, 477"). And see Party Walls [30 Cyc 770].

36. Earl v. De Hart, 12 N. J. Eq. 280, 283, 72 AmD 395 (where it was said: "It is an ancient water-course, if the channel through which it naturally runs has existed from time immemorial. Whether it is entitled to be called an ancient water-course, and, as such, legal rights can be acquired and lost in it, does not depend upon the quantity of water it discharges. Many ancient streams of water, which, if dammed off, would inundate a large region of country, are dry for a great portion of the year. If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is regularly discharged through a well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural water-course").

37. Dodge v. Briggs, 27 Fed. 160, 170; White v. Farris, 124 Ala. 461, 465, 27 S 259; Doe v. Eslava, 11 Ala. 1028, 1040; Ford v. Ford, 27 App. (D. C.) 401, 6 LRANS 442, 7 AnnCas 245; Whitman v. Heneberry, 73 Ill. 109, 111; Anderson v. Cole, 234 Mo. 1, 6, 136 SW 395; Davis v. Wood, 161 Mo. 17, 31, 61 SW 695; Havens v. Seashore Land Co., 47 N. J. Eq. 365, 375, 20 A 497; Wright v. Hull, 83 Oh. St. 385, 396, 94 NE 813; Dickinson v. Smith, 134 Wis. 6, 14, 114 NW 133; Roe v. Rawlings, 7 East 279, 291, 103 Reprint 107.

[a] **Contemporaneous papers** possess the character of ancient documents, to be received and considered according to the circumstances attending their execution and the evidence of their genuineness, for whatever they may be worth in determining the matters to which they relate. But papers executed many years after the occurrence of the matters to which they are supposed to relate cannot be considered ancient documents. Brig Maria, 39 Ct. Cl. 39; Brig Juno v. U. S., 36 Ct. Cl. 239.

38. Wright v. Hull, 83 Oh. St. 385, 396, 94 NE 813.

Ancient deed see Deeds [13 Cyc 726].

As evidence see Evidence [17 Cyc 443].

39. Burrill L. D.

[a] **Land registered in Domesday Book.**—It is the land under the title De Terra Regis in Domesday Book, and no other. Hunt v. Burn, 1 Salk. 57, 91 Reprint 55.

[b] **Plea of ancient demesne in ejectment** see Baker v. Wich, 1 Salk. 56, 91 Reprint 55; Doe v. Roe, 2 Burr. 1046, 97 Reprint 699.

[c] **The tenure in ancient demesne** is described in Merttens v. Hill, [1901] 1 Ch. 842. See also Kite v. Laury, 3 Salk. 34, 91 Reprint 675; Hunt v. Burn, 1 Salk. 57, 91 Reprint 55.

40. Ancient lights:
As easement see Easements [14 Cyc 1157].
At common law see Common Law [8 Cyc 380].
Of adjoining landowner see Adjoining Landowners, § 76.

41. Abbott L. D.

42. Jacob L. D.

43. Abbott L. D.

44. Steele v. Connecticut Gen. L. Ins. Co., 31 App. Div. 389, 399, 52 NYS 873.

[a] **Ancillary or incidental to.**—The Workmen's Compensation Act of 1897 does not apply where the work which is being executed is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by the undertakers. As to various works held to fall within these terms see Green v. Britten, [1904] 1 K. B. 350; Bush v. Hawes, [1902] 1 K. B. 216; Wrigley v. Bagley, [1901] 1 K. B. 780 [aff [1902] A. C. 299]; Pearce v. London, etc., R. Co., [1900] 2 Q. B. 100, 101.

Distinguished from "original" see Original [29 Cyc 1529].

45. Coltrane v. Templeton, 106 Fed. 370, 374, 45 CCA 328 (where the court said: "The term 'ancillary bill' is applicable to a proceeding growing out of original proceedings in the same court, dependent on such proceedings, and instituted for the purpose of enforcing the judgment, or of rendering complete justice among all the parties in interest. Instances of a bill of this character can be found in Krippendorf v. Hyde, 110 U. S. 276, 4 SCt 27, 28 L. ed. 145; Milwaukee, etc., R. Co. v. Chamberlain, 6 Wall. (U. S.) 748, 18 L. ed. 859; Minnesota Co. v. St. Paul Co., 2 Wall. (U. S.) 609, 17 L. ed. 886; and Freeman v. Howe, 24 How. (U. S.) 450, 16 L. ed. 749").

[a] **For example,** if one have an action at law pending, he may file a bill of discovery in equity or a bill for some other equitable relief in aid of his action at law, and this bill is auxiliary to his action at law, and in a certain sense ancillary. So, if one have a judgment at law, and his execution thereof be obstructed or hindered, he may file a bill in equity to remove the obstruction, or to subject assets which the execution otherwise will not reach, and this and similar proceedings are "auxiliary," and in a certain sense "ancillary"; and, in the peculiar relation of the jurisdiction of the federal courts to the citizenship of parties, this principle of ancillary jurisdiction is sometimes resorted to for sustaining supplemental litigation involving a jurisdiction which otherwise a federal court could not maintain; as, where the judgment is between a plaintiff and defendant of adverse citizenship, but the subsequent bill in equity involves a controversy between citizens of the same state, of whom the federal courts could have no jurisdiction, the proceeding is treated as a continuation of a suit at law and "ancillary" to it. In re Williams 123 Fed. 321, 322.

46. Claflin v. McDermott, 12 Fed. 375, 20 Blatchf. 522.

(Cross references.[47])

AND.[48] [§ 1] **A. Definition; and Conjunctive Use.** A particle which expresses the relation of addition or connection,[49] and signifies that something is to follow in addition to that which precedes.[50] It is a conjunctive and is used to conjoin a word with a word, a clause with a clause, or a sentence with a sentence,[51] the words or clauses sometimes being[52] and sometimes not being[53] synonymous or of similar meaning or import. While the word is generally used in a conjunctive sense, this is not its invariable use; it is often employed to indicate a connection of what follows with what has gone before in the way of narration or description.[54] The word is sometimes used in the sense of "as well as,"[55] "in addition to,"[56] "together with,"[57] and has been read "in" to correct a clerical error or misprint.[58]

The word is frequently abbreviated "&,"[59] which is well understood and is never mistaken as stand-

[a] **Such suit cannot be maintained** (1) in any court which does not exercise auxiliary jurisdiction over the court in which the original suit was brought. Davis v. Bruns, 23 Hun (N. Y.) 648; Tarbell v. Griggs, 3 Paige (N. Y.) 207, 23 AmD 790. (2) Therefore such an action cannot be maintained in the federal court where the original judgment was recovered in another state, and especially where the fraudulent transfer is to be set aside there also. Claflin v. McDermott, 12 Fed. 375, 376, 20 Blatchf. 522.

47. Ancillary:
Action, removal to federal court see Removal of Causes [34 Cyc 1229].
Administration see Executors and Administrators [18 Cyc 1220].
Guardianship of:
Infant see Guardian and Ward [21 Cyc 270].
Insane person see Insane Persons [22 Cyc 1155].
Jurisdiction of:
Courts generally see Courts [11 Cyc 677].
Federal court see Courts [11 Cyc 847].
Justice of the peace see Justices of the Peace [24 Cyc 486].
Proceeding:
Attachment in aid of action see Attachments [4 Cyc 398].
Certiorari in aid of habeas corpus see Habeas Corpus [21 Cyc 315].
Conclusiveness of judgment see Judgments [23 Cyc 1223].
Process see Process [32 Cyc 44].
Receivership:
Generally see Receivers [34 Cyc 484, 499].
Of railroad see Railroads [33 Cyc 633].

48. And:
Compared with "or" see Or [29 Cyc 1505]; Statutes [36 Cyc 1123].
Construction of term as used in:
Statute see Statutes [36 Cyc 1123].
Will see Wills [40 Cyc 1405].
Omission of word in indictment see Indictments and Informations [22 Cyc 292].
Use of abbreviation "&" in indictment see Indictments and Informations [22 Cyc 289].

49. Lane v. Kolb, 92 Ala. 636, 665, 9 S 873; Hyatt v. Allen, 54 Cal. 353, 367; Tipton v. Peo., 156 Ill. 241, 244, 40 NE 838; Beedy v. Finney, 118 Iowa 276, 280, 91 NW 1069; O'Brien v. Carson, 42 Iowa 553, 554; State Bd. of Assessors v. Central R. Co., 48 N. J. L. 146, 352, 4 A 578; Terr. v. Kimmick, 15 N. M. 178, 185, 106 P 381; Duke v. Caluwaert, 40 Misc. 623, 626, 83 NYS 10; Williams v. U. S., 17 Okl. 28, 31, 87 P 647; Porter v. Moores, 4 Heisk. (Tenn.) 16, 19; Brown v. State, 16 Tex. A. 245, 248; State v. Montello Salt Co., 34 Utah 458, 463, 98 P 549.

[a] **Coördinate conjunction.**—"The conjunction 'and' is a co-ordinate conjunction. It is not explanatory, but signifies and expresses the relation of addition." La Salle v. Kostka, 190 Ill. 130, 137, 60 NE 72.

50. State Bd. of Assessors v. New Jersey, etc., R. Co., 48 N. J. L. 146, 352, 4 A 578; Duke v. Caluwaert, 40 Misc. 623, 626, 83 NYS 10.

[a] **For example,** (1) where a constitution provides that property is to be taxed "under general laws" and "by uniform rules, according to its true value," both the constituent parts of the sentence, "general laws" and "uniform rules," are made essential to a valid act of taxation. State Bd. of Assessors v. New Jersey Cent. R. Co., 48 N. J. L. 146, 309, 310, 4 A 578. (2) In construing a contract to board "said first party and his family, consisting of two adult persons," it was held that the obligation was to board two persons of the lessor's family besides himself. The court said: "By the express terms of the lease defendant agrees to board the first party, and, add, or in addition thereto, two adult persons. Hence defendant undertook to board three adults. The construction contended for by appellant does violence to the language used. If the defendant agreed to board only two persons, then what follows and, in the sentence, includes a part of what precedes, and the word 'and' does not mean something added or in addition to what has gone before. The court, we think, placed the proper construction upon the lease, and did not err in rejecting proof of extrinsic facts, explanatory of it." O'Brien v. Carson, 42 Iowa 553, 554.

51. Beedy v. Finney, 118 Iowa 276, 280, 91 NW 1069. See also Lane v. Kolb, 92 Ala. 636, 665, 9 S 873.

[a] **Words merely or full sentences** (1) may be connected by it. Hyatt v. Allen, 54 Cal. 353, 367. (2) In Lewisohn v. Henry, 179 N. Y. 352, 363, 72 NE 239, the court said: "The grammatical construction of the seventh clause is peculiar, for while it contains over twelve hundred words it consists of but a single sentence. The frequent use of the conjunctive 'and' unites into one sentence what otherwise would extend into many."

[b] **As closing word.**—"The testator's will contains the following clause: 'I give and devise unto the children of my brother William, sister Mary, sister Sarah, sister Margaret, brother John and brother Henry, and Nathan S. Read and his wife, Mary, each of them share and share alike, the residue of my property, both real and personal.' . . . The conjunction 'and' between 'brother John' and 'brother Henry' indicates the closing of the class of persons whose children are to take, and then other persons, Nathan S. Read and Mary, his wife, are designated to take in common with the children before mentioned." Lippincott v. Bechtold, 54 N. J. Eq. 407, 410, 34 A 1079.

52. U. S. v. Corbin, 11 Fed. 238, 239 (holding that the expression "writing and affidavit," standing alone in an indictment alleging the sending of a false "writing and affidavit" to the pension office, might be ambiguous, for it might mean two documents or it might mean one, but that when accompanied by a recital of the writing or affidavit it was clearly shown to be one instrument, and the pleading was not double); Van Dusen v. Fridley, 6 Dak. 322, 329, 43 NW 703 [cit Brown Inst. 201] (where it was said that the copulative "and" generally connects clauses of similar meaning and form of construction, dependent upon the principal sentence or clause, or, as laid down in the books, "where two terms connected refer jointly to a third, they must be adapted to it and to each other both in sense and form. Brown Inst. 201").

53. Masten v. Hunt, 51 Fed. 216, 218 [aff 55 Fed. 78, 5 CCA 42] (where it was said that the use of the conjunction "and" between the words "match, B" and "fuse, C" in a patent specification does not show "that the match and fuse make but one element, and that, therefore, by the terms of the patent, they are the equivalent of a continuous fuse; but the presumption raised by this collocation is too weak to safely guide the court"); State v. Irey, 42 Nebr. 186, 202, 60 NW 601 (holding that the use of the word "and" to unite the words "assessments" and "taxes" in a statute providing for the listing of "'assessments' and 'taxes'" by the proper city officer and the subsequent sale of the land affected thereby shows that the words were not synonymous).

[a] **In construing an agreement to assign all letters patent** "relating to, or connected with the manufacture of pig iron, iron or steel ingots, blooms and billets, and the conversion or treatment of iron or steel into rails, blooms, billets or plates," the court said: "We are clearly of opinion that the conjunction 'and' is used in the cumulative sense and imports an additional and not a vastly restricted class of cases in which assignments were to be made. It is impossible to conceive that the same patent would cover the manufacture of pig iron, iron or steel ingots, blooms, and billets, and also the conversion or treatment of iron or steel into rails, blooms, billets, or plates. They are two entirely distinct subjects, and nothing but the most explicit and unmistakable language, associating them together as the object of a united patent, would justify a court in so holding. But there is no such necessity in the language of this agreement. To our minds the natural reading of the words embraces two distinct subjects of applications and patents, one [of] which relates to the manufacture of pig iron, iron or steel ingots, blooms, and billets, and the other to the conversion or treatment of iron or steel into rails, blooms, billets, or plates." Reese's Appeal, 122 Pa. 392, 416, 15 A 807.

54. Terr. v. Kimmick, 15 N. M. 178, 185, 106 P 381.

[a] **In a description in a deed** "and" may be used to suggest that the description is still continuing. Dudley v. Milton, 176 Mass. 167, 169, 57 NE 355.

55. Williams v. U. S., 17 Okl. 28, 31, 87 P 647 [cit Cyc]; Porter v. Moores, 4 Heisk. (Tenn.) 16, 19.

56. Tipton v. Peo., 156 Ill. 241, 244, 40 NE 838; O'Brien v. Carson, 42 Iowa 553, 554. To same effect La Salle v. Kostka, 190 Ill. 130, 137, 60 NE 72.

57. Shull v. Best, 4 Nebr. (Unoff.) 212, 93 NW 753, 755.

58. Terrill v. Crawford County, 8 Pa. Dist. 169.

59. Beedy v. Finney, 118 Iowa 276, 280, 91 NW 1069. See Abbreviations § 4 text and note 25.

In Brown v. State, 16 Tex. A. 245, 247 [quot Beedy v. Finney, 118 Iowa 276, 280, 91 NW 1069], the court said: "It will be noticed that the pleader used between the names of the defendants the sign or abbreviation '&,' instead of the conjunction or word 'and.' In the appendix to his

ing for any other word than "and" with which it is identical in meaning.[60]

[§ 2] **B. Construed or Used as "Or"—1. General Rule.** Ordinarily these words are in no sense interchangeable terms, but, on the contrary, are used in the structure of language for purposes entirely variant.[61] In order to effectuate the intention of the parties to an instrument, a testator, or a legislature, as the case may be, the word "and" is sometimes construed to mean "or."[62] This construction, however, is never resorted to except for strong reasons and the words should never be so construed unless the context favors the conversion.[63]

[§ 3] **2. In Civil Statutes.** In accordance with

unabridged dictionary, under the title 'Miscellaneous,' Mr. Webster makes the sign or abbreviation '&' mean the same as the word 'and,' and Mr. Richardson in his dictionary gives many illustrations from the old English authors under the word 'and,' showing that the sign '&' was used synonymously with 'and' as an abbreviation for the word 'and.' This style of abbreviation has come down to us sanctioned by age and common use for perhaps centuries, and is used even at this day in written instruments, in daily transactions, with such frequency that it may be said to be a part of our language when it is written."

[a] **"& Co."**—"In a state where there is no statute prohibiting the use of a name or an abbreviation to do business under other than that of the individual . . . there is no necessary presumption that, when '& Co.' is made use of after the dealer's name, he has a partner or partners, or that such title includes more than one person." Brennan v. Pardridge, 67 Mich. 449, 453, 35 NW 85 [quot Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 514, 75 P 106].

[b] **"& int."**—A claim presented to an administrator for a specified sum "& int." allowed by the administrator and approved by the court in the same language is a claim for the specified sum and interest. Raggio v. Palmtag, 155 Cal. 797, 805, 103 P 312.

&c. meaning "and so forth" see Abbreviations § 4 text and note 26; Et Cetera [16 Cyc 816].

60. Stewart v. State, 137 Ala. 33, 40, 34 S 818.

[a] **Ancient use.**—In Brown v. State, 16 Tex. A. 245, 248 [quot Beedy v. Finney, 118 Iowa 276, 280, 91 NW 1069] it was said that "this style of abbreviation has come down to us sanctioned by age and common use for perhaps centuries, and is used even at this day in written instruments, in daily transactions, with such frequency that it may be said to be a part of our language when it is written."

61. Robinson v. Southern Pac. Co., 105 Cal. 526, 543, 38 P 95, 28 LRA 773 [cit State v. Beaucleigh, 92 Mo. 490, 497, 4 SW 666].

[a] **"These words are certainly not ordinarily convertible,** and to change one into the other at will, to suit the mood of the reader, would work wondrous mischief with legal instruments, to say nothing of its singular effects upon the meaning of any English author one may chance to take down from the shelf." Armstrong v. Moran, 1 Bradf. Surr. (N. Y.) 314, 316.

62. Dumont v. U. S., 98 U. S. 142, 143, 25 L. ed. 65; U. S. v. Fisk, 3 Wall. (U. S.) 445, 447, 18 L. ed. 243; Atlantic, etc., Co. v. Mason, etc., Co., 180 Fed. 332, 338, 103 CCA 462; Manson v. Dayton, 153 Fed. 258, 269, 82 CCA 558; Brown v. Grand Rapids Parlor Furniture Co., 58 Fed. 286, 291, 7 CCA 225, 22 LRA 817; Porter v. State, 58 Ala. 66, 68; Hilliard v. Binford, 10 Ala. 977, 996; Williams v. State, (Ark.) 137 SW 927, 928 [cit Brittin v. Mitchell, 4 Ark. 92]; People v. Pool, 27 Cal. 572, 581; Capital City Bank v. Hilson, 59 Fla. 215, 219, 51 S 853; Chapin v. Tisdale, 5 Hawaii 52, 53; Peo. v. Van Cleave, 187 Ill. 125, 58 NE 422; Ayers v. Chicago Title, etc., Co., 187 Ill. 42, 49, 58 NE 318; Sturgeon Bay, etc., Ship Canal, etc., Co. v. Leatham, 164 Ill. 239, 243, 45 NE 422; Chicago, etc., R. Co. v. Bartlett, 120 Ill. 603, 611, 11 NE 867; Streeter v. Peo., 69 Ill. 595; Olcott v. Tope, 115 Ill. A. 121, 126; Smith v. Madison, 7 Ind. 86, 90; Williams v. Poor, 65 Iowa 410, 415, 21 NW 753; Eisfeld v. Kenworth, 50 Iowa 389, 391; State v. Smith, 46 Iowa 670, 672; State v. Brandt, 41 Iowa 593, 614; State v. Myers, 10 Iowa 448, 449; Coleman v. Coleman, 69 Kan. 39, 42, 76 P 439; Hayman v. Hallan, 79 Ky. 389, 392; Wilson Steam Dam Co. v. Boston, etc., Co., 105 Me. 249, 252, 74 A 115; Collins Granite Co. v. Devereux, 72 Me. 422, 425; Sargent v. Simpson, 8 Me. 148, 153; Sayward v. Sayward, 7 Me. 210, 217, 22 AmD 191; Janney v. Sprigg, 7 Gill (Md.) 197, 202, 48 AmD 557; Litchfield v. Cudworth, 15 Pick. (Mass.) 23, 27; Geiger v. Cawley, 146 Mich. 550, 109 NW 1064; Redwing v. Guptil, 72 Minn. 259, 263, 75 NW 234, 71 AmSR 485, 41 LRA 321; Warren County v. Booth, 81 Miss. 267, 272, 32 S 1000; Maguire v. Moore, 108 Mo. 267, 273, 18 SW 897; Missouri Loan Bank v. How, 56 Mo. 53, 58; Bay State Iron Co. v. Goodall, 39 N. H. 223, 234, 75 AmD 219; Price v. Forrest, 54 N. J. Eq. 669, 683, 35 A 1075; Barnes v. Raper, 90 N. C. 189, 191; Hughes v. Smith, 64 N. C. 493, 495; Shimer v. Shimer, 50 N. J. Eq. 300, 302, 24 A 385; Peo. v. Rice, 138 N. Y. 151, 156, 33 NE 846; In re Wells, 113 N. Y. 396, 403, 21 NE 137, 10 AmSR 457; Sonneborn v. Libbey, 102 N. Y. 539, 551, 7 NE 813; Roome v. Phillips, 24 N. Y. 463, 470; O'Hara v. Dever, 3 Abb. Dec. 407, 410, 2 Keyes 558, 2 AbbPrNS 418; Paskusz v. Philadelphia Casualty Co., 146 App. Div. 763, 766, 131 NYS 421; Long Island R. Co. v. Conklin, 32 Barb. (N. Y.) 381, 385; Peo. v. Van Rensselaer, 8 Barb. (N. Y.) 189, 199; Matter of Tallmadge, 60 Misc. 394, 399, 113 NYS 621; Jackson v. Topping, 1 Wend. (N. Y.) 388, 396, 19 AmD 515; In re Jenkins, 157 N. C. 429, 434, 72 SE 1072, 37 LRANS 842; Hughes v. Smith, 64 N. C. 493, 495; Finckh v. Evers, 25 Oh. St. 82, 83; State v. Hooker, 22 Okl. 712, 713, 98 P 964; Williams v. U. S., 17 Okl. 28, 31, 87 P 647 [quot Cyc]; Cookingham v. Lewis, 58 Or. 484, 494, 114 P 88, 115 P 342; Simpson v. Morris, 3 Yeates (Pa.) 104, 117; Englefried v. Woelpart, 1 Yeates (Pa.) 41, 45; Bowen v. Southern R. Co., 58 S. C. 222, 225, 36 SE 590; Duncan v. Harper, 4 S. C. 76, 84; Seabrook v. Mikell, 15 S. C. Eq. 80, 90; Ranson v. Rutherford County, 123 Tenn. 1, 22, 130 SW 1057, AnnCas1912B 1356; Witherspoon v. Jernigan, 97 Tex. 98, 105, 76 SW 445; Robinson v. Brinson, 20 Tex. 438, 440; American Surety Co. v. Koen, 49 Tex. Civ. A. 98, 100, 107 SW 938; East v. Garrett, 84 Va. 523, 535, 9 SE 1112; State v. Tiffany, 44 Wash. 602, 604, 87 P 932; Geiger v. Koblika, 26 Wash. 171, 174, 66 P 423, 90 AmSR 733; Haigh v. Bell, 41 W. Va. 19, 23, 23 SE 666, 31 LRA 131; Jelly v. Dils, 27 W. Va. 267, 274; State v Cain, 9 W. Va. 559, 569; Hall v. Fond du. Lac, 42 Wis. 274, 281; Townsend v. Read, 10 C. B. N. S. 308, 100 ECL 308, 142 Reprint 471; White v. Supple, 2 Dr. & War. 471; Prebble v. Boghurst, 1 Swanst. 309, 330, 36 Reprint 402; Jackson v. Jackson, 1 Ves. 217, 27 Reprint 992; Bell v. Phyn, 7 Ves. Jr. 453, 458, 32 Reprint 183; Maberly v. Strode, 3 Ves. Jr. 450, 30 Reprint 1100; Boag v. Lewis, 1 U. C. Q. B. 357, 359.

[a] **Convertible terms.**—(1) "The words 'and' and 'or' when used in a statute are convertible as the sense may require. The substitution of the one for the other is frequently resorted to in the interpretation of statutes when the evident intention of the lawmakers requires it." Manson v. Dayton, 153 Fed. 258, 269, 82 CCA 588; Williams v. State, 99 Ark. 149, 153, 137 SW 927, AnnCas1913A 1056 and note [quot Endlich Interpr. St.]; Folmsbee v. Amsterdam, 142 N. Y. 118, 123, 36 NE 821; Peo. v. Rice, 138 N. Y. 151, 156, 33 NE 846; Peo. v. Butler, 125 App. Div. 384, 388, 109 NYS 900. (2) "Where sense requires it, there are many cases to shew that we may construe the word or into and, and and into or . . . in order to effectuate the intent of the parties." "I would say, with Lord Hardwicke, that there is no magic in particular words, further than as they shew the intention of the parties." Wright v. Kemp, 3 T. R. 470, 473, 100 Reprint 682.

[b] **"The popular use of 'or' and 'and' is so loose** and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context." 1 Sutherland St. Constr. § 252 [quot Williams v. State, 99 Ark. 149, 153, 137 SW 927, AnnCas 1913A 1056; State v. Hooker, 22 Okl. 712, 730, 98 P 964; Witherspoon v. Jernigan, 97 Tex. 98, 105, 76 SW 445, 447; Geiger v. Koblika, 26 Wash. 171, 174, 99 P 423, 90 AmSR 733].

63. Atlantic Terra Cotta Co. v. Masons' Supply Co., 180 Fed. 332, 338, 103 CCA 462; Thomas v. Perry, 23 F. Cas. No. 13,908, Pet. C. C. 49, 56; Miller v. Jones, 80 Ala. 89, 95; Capital City Bank v. Hilson, 59 Fla. 215, 219, 51 S 853; Marshall v. State, 105 Me. 103, 106, 72 A 873; Fredenburg v. Turner, 37 Mich. 402, 405; Reynolds v. Denman, 20 N. J. Eq. 218, 219; Hale v. Sweet, 40 N. Y. 97, 100; Paskusz v. Philadelphia Casualty Co., 146 App. Div. 763, 766, 131 NYS 421; Peo. v. Monroe County, 105 App. Div. 1, 5, 93 NYS 452; Mayer v. Cook, 26 Misc. 774, 775, 57 NYS 94; Armstrong v. Moran, 1 Bradf. Surr. (N. Y.) 314, 315; Williams v. U. S., 17 Okl. 28, 30, 87 P 647; In re Steinruck, 225 Pa. 461, 464, 74 A 360; Com. v. Kilgore, 82 Pa. 396, 398; Holmes v. Holmes, 5 Binn. (Pa.) 252, 258; Leftwich v. Neal, 7 W. Va. 569, 575.

In State v. Montello Salt Co., 34 Utah 458, 463, 98 P 549, the court said: "It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute. By giving effect to the word 'and' does not render the clause in which it occurs unintelligible nor lead to an absurdity. We therefore are not at liberty to reject it. Nor is the word generally regarded of a flexible character, or of a dubious or varied meaning, permitting it to be enlarged or restricted, or to be greatly varied, in order to give effect to the fundamental purpose of a statute, and to carry out the intent of the lawmaking body." In In re Steinruck, 225 Pa. 461, 464, 74 A 360 the court said: "'And' will be construed 'or' only when it appears from the context of the statute that the intention of the lawmaking power can only be given effect by so construing it. Robinson v. Southern Pac. Co., 105 Cal. 526, 543, 38 P 94, 722, 28 LRA 773."

the general rule just stated, the conjunctive "and" has frequently been read as the disjunctive "or" in the construction of civil statutes,[64] although in many cases the courts have refused to so construe the word.[65]

[a] **Mistake in use.**—(1) "You will find it said in some cases that 'or' means 'and'; but 'or' never does mean 'and'; [so also 'and' never does mean 'or'] unless there is a context which shews it is used for 'and' by mistake. . . . Suppose a testator said, 'I give the black cow on which I usually ride to A. B.,' and he usually rode on a black horse; of course the horse would pass, but I do not think that any annotator of cases would put in the marginal note that 'cow' means 'horse.' You correct the wrong word used by the testator by the context." Jessel, M. R., in Morgan v. Thomas, 9 Q. B. D. 643, 645 [quot Capital City Bank v. Hilson, 59 Fla. 215, 220, 51 S 853]. (2) In Warren County v. Booth, 81 Miss. 267, 272, 32 S 1000 [quot State v. Hooker, 22 Okl. 712, 731, 98 P 964], the court said: "The entire difficulty grows out of the use of the word 'or' instead of 'and.' But it is well settled that, whenever it is clear that either of these words has been mistakenly used for the other, the one intended will be substituted for the one mistakenly used, so as to carry out the legislative intent."

64. U. S. v. Fisk, 3 Wall. (U. S.) 445, 447, 18 L. ed. 243; Manson v. Dayton, 153 Fed. 258, 269, 82 CCA 588; Hensel v. U. S., 126 Fed. 576, 577; Union Cent. L. Ins. v. Skipper, 115 Fed. 69, 72, 52 CCA 663; In re Swift, 112 Fed. 315, 321, 50 CCA 264; Hilliard v. Binford, 10 Ala. 977, 996; Washburn v. Lyons, 97 Cal. 314, 315, 32 P 310; Peo. v. Pool, 27 Cal. 572, 580; Sturgeon Bay, etc., Ship Canal, etc., Co. v. Leatham, 62 Ill. A. 386, 387 [aff 164 Ill. 239, 243, 45 NE 422]; State v. Myers, 146 Ind. 36, 38, 44 NE 801 [quot Pittsburgh, etc., R. Co. v. State, 172 Ind. 147, 158, 87 NE 1034]; Smith v. Madison, 7 Ind. 86, 90; McCall v. Trevor, 4 Blackf. (Ind.) 496, 497; Seaton v. Grimm, 110 Iowa 145, 149, 81 NW 225; Williams v. Poor, 65 Iowa 410, 415, 21 NW 753; Eisfeld v. Kenworth, 50 Iowa 389, 391; Starr v. Flynn, 62 Kan. 845, 849, 62 P 659; James v. U. S. Fidelity, etc., Co., 133 Ky. 299, 308, 117 SW 406; Merchants', etc., Bank v. McKellar, 44 La. Ann. 940, 945, 11 S 592; Marshall v. State, 105 Me. 103, 106, 72 A 873; Collins Granite Co. v. Devereaux, 72 Me. 422, 425; Sargent v. Simpson, 8 Me. 148, 154; Red Wing v. Guptil, 72 Minn. 259, 263, 75 NW 234, 71 AmSR 485, 41 LRA 321; Bay State Iron Co. v. Goodall, 39 N. H. 223, 234, 75 AmD 219; Morris v. Le Bel, 71 N. J. Eq. 43, 48, 63 A 501; Peo. v. Rice, 138 N. Y. 151, 156, 33 NE 846; Peo. v. Butler, 125 App. Div. 384, 387, 109 NYS 900; Peo. v. Lytle, 7 App. Div. 553, 563, 40 NYS 153; Peo. v. Wright, 7 App. Div. 185, 193, 40 NYS 285; Ludlow v. Oswego, 25 Hun (N. Y.) 260, 261; Peo. v. Van Rensselaer, 8 Barb. (N. Y.) 189, 199; Triest v. New York, 55 Misc. 459, 464, 105 NYS 571; In re Jenkins, 157 N. C. 429, 434, 72 SE 1072, 37 LRANS 842; State v. Covington, 29 Oh. St. 102; State v. Hooker, 22 Okl. 712, 730, 98 P 964; Cookinham v. Lewis, 58 Or. 484, 494, 114 P 88, 115 P 342; Banger's App., 109 Pa. 79, 90; Com. v. Green, 58 Pa. 226, 230; Fransen's Will, 26 Pa. 202 [foll Whiteside's Est., 4 Pa. Co. 216, 218]; Willinck v. Morris, 3 Yeates (Pa.) 104, 117; Ransom v. Rutherford County, 123 Tenn. 1, 22, 130 SW 1057, AnnCas1912B 1356; Witherspoon v. Jernigan, 97 Tex. 98, 105, 76 SW 445; Robinson v. Brinson, 20 Tex. 438, 440; Fish v. Field, 19 Vt. 141; Hoyt v. Swift, 13 Vt. 129, 37 AmD 586; Geiger v. Kobilka, 26 Wash. 171, 174, 66 P 423, 90 AmSR 733; Waterhouse v. Keen, 4 B. & C. 200, 10 ECL 542, 107 Reprint 1033; Reg v. Northampton, 6 B. & S. 653, 670, 118 ECL 653, 122 Reprint 1336; Townsend v. Read, 10 C. B. N. S. 308, 100 ECL 308, 142 Reprint 471; Peo. v. Victoria, 2 B. C. 271, 273; Doe v. Guiou, 6 N. B. 6; Boag v. Lewis, 1 U. C. Q. B. 357, 358.

[a] **Illustrations.**—(1) "The language of section 8 does not limit the power to regulate tolls and charges to boats and vessels used for the transportation of both passengers and freight at the same time. The reference is to boats and vessels used for the transportation of either passengers or freight. The meaning is the same as though the qualifying words were repeated before the word 'passengers,' that is to say, as though the clause read: 'boats, etc., used for the transportation of freight, and boats, etc., used for the transportation of passengers.' The word, 'and,' here has the meaning of 'or.'" Sturgeon Bay, etc., Ship Canal, etc., Co. v. Leatham, 164 Ill. 239, 242, 45 NE 422. (2) In construing the following clause in an exemption statute "for the support of himself and family," the court said: "In some instances where the family is mentioned the language is 'for his support or that of his family,' and in each instance where the family is mentioned at all, except in subdivision 6, the disjunctive 'or' is used. It is in those cases too clear to admit of argument that the exemption runs to a person of the designated class when the property is used either for the support of himself or family. . . . We think, therefore, that the words used as applying to a mechanic 'for the support of himself and family' must be read in the light of the context, as meaning the same as similar words used in the same section applying to other persons." Geiger v. Kobilka, 26 Wash. 171, 173, 174, 66 P 423, 90 AmSR 733. (3) Under a statute providing that stockholders should be liable where there was a failure to comply with the requisites of the statute in regard to "organization and publicity" it was held that "and" should be read "or," and that the stockholders were liable where they failed to comply with the provisions, either as to publicity or organization. Eisfeld v. Kenworth, 50 Iowa 389, 390, 391 [foll Seaton v. Grimm, 110 Iowa 145, 149, 81 NW 225].

[b] **When "or" in prior statute.**—(1) In a statute giving to the widow dower in the land of which the husband was seized "and" possessed the word "and" substituted for the word "or" in the former act was held not to affect the meaning of the enactment. Barnes v. Raper, 90 N. C. 189, 191. (2) A statute authorizes the probate of a script as a holograph will, provided the script be found among the valuable papers "and" effects of the testator. As the statute appeared in the Revised Statutes, the disjunctive conjunction "or" was used in the place of "and," and was changed for the conjunction "and" in the Revised Code. It was held that the change did not affect the construction of the statute since, if the word "and" was used in its strict conjunctive sense, the statute would be virtually repealed or its benefits greatly diminished, as but few persons who manage their business with order and system keep their valuable papers and effects together, notes, bonds, etc., being usually kept together in proper files, and currency, coin, jewels, etc., deposited in a more secret place; and hence the statute would be construed as if the disjunctive conjunction was retained. Hughes v. Smith, 64 N. C. 493, 495.

65. Rice v. U. S., 53 Fed. 910, 912, 4 CCA 104; Robinson v. Southern Pac. R. Co., 105 Cal. 526, 543, 38 P 94, 28 LRA 773; Roby v. Newton, 121 Ga. 679, 682, 49 SE 694, 68 LRA 601; Marshall v. State, 105 Me. 103, 106, 72 A 873; Collins Granite Co. v. Devereux, 72 Me. 422, 424; State v. Rat Portage Lumber Co., 106 Minn. 1, 6, 115 NW 164, 117 NW 922; Hale v. Sweet, 40 N. Y. 97, 100; Peo. v. Monroe County, 105 App. Div. 1, 5, 93 NYS 452; Duke v. Caluwaert, 40 Misc. 623, 626, 83 NYS 10; In re Steinruck, 225 Pa. 461, 464, 74 A 360; Com. v. Green, 58 Pa. 226, 230; Washington v. Corinth, 55 Vt. 468, 470; Duckworth v. Stalnaker, 68 W. Va. 197, 207, 69 SE 850; Leftwich v. Neal, 7 W. Va. 569, 575; Woodcock v. Gibson, 4 B. & C. 462, 10 ECL 660, 107 Reprint 1132; Oldfield v. Dodd, 8 Exch. 578.

[a] **Illustrations.**—(1) A statute and the condition in the treasurer's bond requiring him to "account for and pay over" moneys do not create two distinct grounds of liability, but the accounting is merely preliminary to the payment. The court said: "The respondent's counsel attempts to sustain the complaint by dividing the clause of the statute, requiring him to account for and pay over moneys coming to his hands, into two distinct grounds of liability. But this construction cannot prevail. He is required to account merely as preliminary to paying over. The latter is the essential thing. And the words 'to account for and pay over' are used in the section fixing the condition of the treasurer's bond, to describe his duty in respect to paying properly at all times, and to ascertaining and paying over whatever balance may be in his hands whenever called upon lawfully by any person entitled to receive it. So long as there is no default in paying over, it was not the design of that clause to create a distinct ground of action for not accounting." Franklin v. Kirby, 25 Wis. 498, 501, 502. (2) A local option statute required, as a prerequisite to submitting the question to the people, that a petition should be presented to the judge of the probate court, signed by fifty or more persons who were "resident householders and freeholders." It was held that "and" would not be read "or," and that the petitioners must be both householders and freeholders. Miller v. Jones, 80 Ala. 89, 95. (3) So in a revenue law the court refused to construe "and" to mean "or," following the general rule that such a statute is to be construed most strongly against the government. Rice v. U. S., 53 Fed. 910, 911, 4 CCA 104. (4) In construing a statute, providing in part that "every such ticket entitles the holder thereof to ride on their passenger cars to the station or depot of destination, or any intermediate station, and from any intermediate station to the depot of destination designated in the ticket, at any time within six months thereafter," the court said: "Notwithstanding the statute appears to be plain and explicit upon its face, it is insisted that the conjunctions 'and' and 'or' are convertible terms, and that the conjunction 'and,' as it appears in the section should be read 'or'" Robinson v. Southern Pac. R. Co., 105 Cal. 526, 542, 543, 38 P 94, 722, 28 LRA 773. (5) In a statute requiring the examination of a married woman on the acknowledgment of a deed and certificate to declare that she acknowledged "that she had willingly executed the same, and does not wish to retract it" the word "and" does not mean "or," so as to render the two phrases connected by it equivalent expressions, so that the presence of one might be construed as dispensing with that of the other. Leftwich v. Neal, 7 W. Va. 569, 574, 575. (6) "And," as used in the tariff act placing a certain duty on embroidered and hemstitched handkerchiefs is not employed disjunctively or as synonymous with "or," but means handkerchiefs which are both hemstitched and embroidered. Rice v. U. S., 53 Fed. 910, 912, 4 CCA 104.

[§ 4] **3. In Criminal Statutes.** The rule above

stated that "and" is to be read "or," in order to carry out the intention of the legislature, is applicable to criminal statutes as well as civil,[66] notwithstanding the general rule that such statutes are to be strictly construed.[67] In other cases, however, the courts have refused to indulge in such construction,[68] especially where a penal statute would be thus extended by implication, or an offense included which is not strictly within the meaning of the statute or section thereof under consideration.[69]

[§ 5] **4. In Wills.** So too in the construction of wills the courts often have occasion to read "and" as "or" in order to effectuate the intention of a testator,[70] and especially is this the case where the will names a legatee or devisee whose

66. U. S. v. Wight, 38 Fed. 106, 107; Porter v. State, 58 Ala. 66, 68; Williams v. State, 99 Ark. 149, 153, 137 SW 927, AnnCas1913A 1056 and note; Ex p. Chin Yan, 60 Cal. 78, 84; Peo. v. Sweetser, 1 Dak. 308, 314, 46 NW 452; Streeter v. Peo., 69 Ill. 595, 597; Pittsburg, etc., R. Co. v. State, 172 Ind. 147, 158, 87 NE 1034; State v. Myers, 146 Ind. 36, 38, 44 NE 801; Indianapolis v. Huegele, 115 Ind. 581, 589, 18 NE 172; Douglass v. State, 18 Ind. A. 289, 48 NE 9, 10; Williams v. Poor, 65 Iowa 410, 515, 21 NW 753; State v. Smith, 46 Iowa 670, 673; State v. Brandt, 41 Iowa 593, 614; State v. Myers, 10 Iowa 448, 449; Com. v. Griffin, 105 Mass. 185, 186; Peo. v. Lytle, 7 App. Div. 553, 562, 40 NYS 153; Wert v. Clutter, 37 Oh. St. 347, 349; Miller v. State, 3 Oh. St. 475, 479; Williams v. U. S., 17 Okl. 28, 30, 87 P 647; State v. Cain, 9 W. Va. 559, 569.

[a] **Illustrations.**—(1) "And," in a statute making criminal the secret stealing or destroying of a letter "and" stealing the contents of such letter, should be construed to mean "or," and the statute operates to create two separate and distinct offenses. U. S. v. Wight, 38 Fed. 106, 107. (2) A statute authorizing a city to prohibit and suppress "houses of ill-fame, prostitution, and gaming," is not limited to houses devoted to the purposes of both prostitution and gaming, but includes houses used for either purpose. Ex p. Chin Yan, 60 Cal. 78, 81. (3) Where a statute provided that for every violation "of the first and second sections of this act," there should be a certain penalty, it was held that a person was liable for a violation of either section, "and" and "or" being convertible. Peo. v. Sweetser, 1 Dak. 308, 312, 314, 46 NW 452. To same effect Porter v. State, 58 Ala. 66, 68; Streeter v. Peo., 69 Ill. 595, 597. (4) Where a statute provides that any person who shall keep any room or building or occupy any place, etc., for the purpose of recording or registering bets or wagers or of selling pools, "and" any person who shall record or register bets or wagers or sell pools upon the result of any trial or contest of skill, speed, or power of endurance of man or beast, etc., shall be guilty of a misdemeanor it was held that "and" should be construed to mean "or," thus making the statute describe two different offenses. Douglass v. State, 18 Ind. A. 289, 48 NE 9, 10.

[b] **To avoid absurdity.**—(1) In State v. Smith, 46 Iowa 670, 672, 673, where the statute ran, "if the father and mother . . . expose" their child, it was held, in order to avoid an absurdity, that "and" should be read "or," and that the offense may be committed by either parent. (2) In a statute providing punishment for making counterfeit coin and having such counterfeit coin with intent to pass the same "and" should be construed as meaning "or," since it would be absurd and against the obvious intent of the law to construe it so that a man could not be convicted of having counterfeit money in his possession without also showing that he counterfeited the coin. State v. Myers, 10 Iowa 448, 449. (3) Where a statute in one section prohibited the sale of liquor without a license, in the second section prohibited use of screens, frosted windows, etc., in the third section prohibited the sale of liquor to minors, etc., and in the seventh section provided that for every violation of the provisions of first, second, "and" third sections a certain penalty should be inflicted, it was held that the word "and" in the seventh section would be construed "or," since it could not have been intended that a person must violate all three sections before he could be punished. State v. Cain, 9 W. Va. 559, 569.

67. Pittsburg, etc., R. Co. v. State, 172 Ind. 147, 159, 87 NE 1034; Indianapolis v. Huegele, 115 Ind. 581, 589, 18 NE 172 [cit Bishop St. Cr.]; Williams v. Poor, 65 Iowa 410, 415, 21 NW 753.

In Pittsburg, etc., R. Co. v. State, the court said: "While it is true, as a general rule, that penal statutes are to be strictly construed, nevertheless appellant cannot invoke the application of this rule to defeat the intent of the legislature, for the rule is as applicable to penal statutes as it is to others."

[a] **To avoid an absurdity.**—In State v. Smith, 46 Iowa 670, 673 [quot Pittsburg, etc., R. Co. v. State, 172 Ind. 147, 158, 87 NE 1034] the court, in considering whether the word "and" in the statute therein involved should be treated as a disjunctive, used in the sense of "or," said: "Penal statutes are to be construed strictly. By this is meant only that they are not to be so extended by implication, and beyond the legitimate import of the words used, as to embrace cases or acts not clearly described by such words. They are not to be made to involve an absurdity, or frustrate the design of the legislators."

68. U. S. v. Ten Cases of Shawls, 28 F. Cas. No. 16,448, 2 Paine 162, 166; U. S. v. Vickery, 28 F. Cas. No. 16,619, 1 Harr. & J. (Md.) 427, 428; Peo. v. Cregier, 138 Ill. 401, 416, 28 NE 812; State v. Price, 37 La. Ann. 215, 219; Com. v. Griffin, 105 Mass. 185, 186; State v. Beaucleigh, 92 Mo. 490, 497, 4 SW 666; Fagan v. State, 47 N. J. L. 175, 178; Jones v. Com., 80 Va. 18, 20; Koetting v. State, 88 Wis. 502, 510, 60 NW 822.

"And," as used in penal statutes, can never be construed to mean "or." Fagan v. State, 47 N. J. L. 175, 178; Buck v. Danzenbacker, 37 N. J. L. 359, 361. See also Williams v. U. S., 17 Okl. 28, 30, 87 P 647.

[a] **For example,** the word "and," in a statute giving villages the right to license, regulate, "and" prohibit the sale of intoxicating liquors in a village, cannot be construed to mean "or" for the purpose of limiting the village to the alternative of either licensing or prohibiting the traffic, but the traffic may be licensed in one part of the village and prohibited in another. Peo. v. Cregier, 138 Ill. 401, 416, 28 NE 812.

69. Williams v. U. S., 17 Okl. 28, 30, 87 P 647. See Fagan v. State, 47 N. J. L. 175, 178 (where the court said: "But it must be borne in mind that the act in question is penal in its character, and should therefore receive a strict construction. A penal statute can never be extended by implication, and a case which does not come within its words shall not be brought within it by construction. In such a statute the word 'and' cannot be construed to mean 'or'").

[a] **Lascivious cohabitation.**—In Jones v. Com., 80 Va. 18, 20, the court said: "There may be illicit intercourse and even lewd and lascivious intercourse between man and woman, which would be fornication or adultery, as the case might be, and which are punishable by the law as offences against sound morals and good government; but these offences are not charged in the indictment in this case, and cannot be punished under the seventh section of the statute, which forbids persons, not married to each other, lewdly and lasciviously to associate and cohabit together. The conjunction 'and,' in the phrase of the section, is essentially and indispensably copulative; there must be both—lewd and lascivious intercourse, and a living together of the parties as husband and wife live together—to constitute the offence of lewd and lascivious association and cohabitation."

70. Olcott v. Tope, 115 Ill. A. 121, 126; Shaver v. Ewald, 142 Ky. 472, 475, 134 SW 906; Davie v. Davie, (Ky.) 81 SW 246, 247, 26 KyL 312; Truesdell v. Darnall, 73 SW 755, 756, 24 KyL 2164; Keniston v. Adams, 80 Me. 290, 295, 14 A 203; Sayward v. Sayward, 7 Me. 210, 216, 22 AmD 191; Beall v. Deale, 7 Gill & J. (Md.) 216, 224; Janney v. Sprigg, 7 Gill (Md.) 197, 202, 48 AmD 557; Beall v. Deale, 7 Gill & J. (Md.) 216, 224; Ray v. Enslin, 2 Mass. 554, 556; Maguire v. Moore, 108 Mo. 267, 273, 18 SW 897; Hall v. Blodgett, 70 N. H. 437, 439, 48 A 1085; Downing v. Wherrin, 19 N. H. 9, 87, 49 AmD 139; Abrahams v. English, 17 N. J. L. 280, 288; Harris v. Taylor, 5 N. J. L. 413, 420; Zabriskie v. Huyler, 62 N. J. Eq. 697, 700, 51 A 197; Kerrigan v. Tabb, (N. J. Ch.) 39 A 701, 702; Shimer v. Shimer, 50 N. J. Eq. 300, 302, 24 A 385; Courter v. Stagg, 27 N. J. Eq. 305, 307; Roe v. Vingut, 117 N. Y. 204, 216, 22 NE 933; In re Wells, 113 N. Y. 396, 403, 21 NE 137, 10 AmSR 457; Roome v. Phillips, 24 N. Y. 463, 470; O'Hara v. Dever, 3 Abb. Dec. (N. Y.) 407, 410, 2 Keyes 558, 2 AbbPrNS 418; Beers v. Grant, 110 App. Div. 152, 154, 97 NYS 117; Matter of Allison, 53 Misc. 222, 233, 102 NYS 887; Armstrong v. Moran, 1 Bradf. Surr. (N. Y.) 314, 315; In re Tripp, 202 Pa. 260, 265, 51 A 983; In re Gilmour, 154 Pa. 523, 531, 26 A 614, 35 AmSR 855; Simpson v. Morris, 3 Yeates (Pa.) 104, 117; Denn v. Woodward, 1 Yeates (Pa.) 316, 319; Engelfried v. Woelpart, 1 Yeates (Pa.) 41, 45; Gibbs Mach. Co. v. Johnson, 81 S. C. 10, 13, 61 SE 1027; Duncan v. Harper, 4 S. C. 76, 84; Seabrook v. Mikell, 15 S. C. Eq. 80, 90; Goldsborough v. Washington, 112 Va. 104, 70 SE 525, 526; East v. Garrett, 84 Va. 523, 535, 9 SE 1112; State v. Cain, 9 W. Va. 559, 569; In re Merrick, L. R. 1 Eq. 551; Doe v. Rawding, 2 B. & Ald. 441, 106 Reprint 427; Maynard v. Wright, 26 Beav. 285, 53 Reprint 908; Stubbs v. Sargon, 2 Keen 256, 15 EngCh 256, 48 Reprint 626; Stapleton v. Stapleton, 2 Sim. N. S. 212, 221, 41 EngCh 212, 61 Reprint 321; Prebble v. Boghurst, 1 Swanst. 309, 330, 36 Reprint 402; Bell v. Phyn, 7 Ves. Jr. 453, 458, 32 Reprint 183; Maberly v. Strode, 3 Ves. Jr. 450, 454, 30 Reprint 1100; Jackson v. Jackson, 1 Ves. 217, 27 Reprint 992; Hetherington v. Oakman, 2 Y. & Coll. 299, 301, 21 EngCh 299, 63 Reprint 131; Brownsword v. Edwards, 2 Ves. 243, 28 Reprint 157 [crit and overr Grey v. Pearson, 6 H. L. Cas. 61, 10 Reprint 1216, 14 ERC 638.

[a] **Illustrations.**—(1) One devised his estate to his son S, "provided and on condition he lives to the age of twenty-one years, and has issue of his body lawfully begotten; but in case my son Samuel shall die under

beneficial interest may lapse unless such reading is resorted to.[71] In such cases, however, the courts have often refused to read "and" as "or," where the true construction of the will and the intention of the testator did not demand it.[72]

[§ 6] **5. In Various Other Instruments.** Courts

the age of twenty-one years, and without issue as aforesaid," then to his son E and his heirs. The "and" in the first part of the devise was construed to mean "or," in order to carry into effect the intent of the testator. The court said: "We have just stated the reason given in the above cited cases, for substituting the word 'and' for the word 'or,' where the contingencies on which the devise over is to take effect are expressed disjunctively; namely, that if they were construed in that manner, the case might often happen that the first devisee might marry and die under age, leaving issue; the devise over would then take effect, and the issue be thus disinherited; an event, which the testator, surely, could never have intended. Now, to prevent such an undesigned and unwelcome consequence, and to render the law consistent with itself, the word 'and' in the sentence immediately following the devise to Samuel, should be construed 'or,' for if not so construed, then also if Samuel had died under age, leaving issue, they could have derived no benefit from the devise to their father, although the devise over never did or could take effect; and thus the whole devise would be completely frustrated. The same reason operates with equal force in both cases, and the same rule of construction, we apprehend, ought to operate in both." Sayward v. Sayward, 7 Me. 210, 215, 216, 217, 22 AmD 191. (2) In Seabrook v. Mikell, 15 S. C. Eq. 80, 90, where land was devised to a person for life, with remainder to his issue, and if he should die under age without leaving lawful issue living at his death, then over, it was held that the testator meant under age or without issue, so as to give the remainder over, upon the death of the first taker without issue after he became of age. (3) In construing a will reading in part, "but if he 'will not pay the above annuity to Eliza P. Scott, Sr., and what he owes me and' shall die leaving no legitimate child, I then give the above mentioned farm," etc., it was held, in order to effectuate the testator's manifest intention, that the words within the single quotations might be rejected as serving no intelligent purpose; but if they were used for the purpose of emphasis, then the copulative "and" at the end of the quoted words must be construed as the disjunctive "or." East v. Garrett, 84 Va. 523, 531, 535, 9 SE 1112.

71. Shaver v. Ewald, 142 Ky. 472, 475, 134 SW 906; Keniston v. Adams, 80 Me. 290, 295, 14 A 203; Zabriskie v. Huyler, 62 N. J. Eq. 697, 700, 51 A 197.

[a] **Illustrations.**—(1) In a will providing that if all testator's children should die his estate should be equally divided between his wife "and" her heirs, "and" should be construed to mean "or." Maguire v. Moore, 108 Mo. 267, 273, 18 SW 897. (2) In a will authorizing the remainder to be paid in equal portions to testatrix's nieces and nephew, named, "and" the survivors of them, "and" should be construed in the sense of "or." Hall v. Blodgett, 70 N. H. 437, 439, 48 A 1085. (3) In a codicil to a will providing that a legacy should go to the legatee "and" her executors and administrators absolutely, "and" should be read with the same effect as if it were "or." Kerrigan v. Tabb, (N. J. Ch.) 39 A 701, 702. (4) In a will directing the executors, as testatrix's grandchildren shall respectively attain the age of twenty-one years "and" her youngest grandchild and her son-in-law may still be living, to pay over to each grandchild as they arrive at the age of twenty-one years a proportionate share of the rents, issues, and profits of her estate during the lives of the grandchildren and son-in-law, "and" should be construed to mean "or." Roe v. Vingut, 117 N. Y. 204, 216, 22 NE 933. (5) In a will bequeathing money to testator's daughter "and her bodily issue," "and" should be construed to mean "or." Duncan v. Harper, 4 S. C. 76, 84. (6) In a will leaving property in trust to pay the produce to the children of testator's sister Ann, to be divided among them "and" such of them as shall be then living, share and share alike, the word "and" should be construed as "or." Hetherington v. Oakman, 2 Y. & Coll. 299, 301, 21 EngCh 299, 63 Reprint 131.

[b] **To avoid absurdity.**—(1) In a will providing that testator's wife should have his property for life, and that after her decease it should go to the testator's daughter "and" her heirs forever, "and" must be construed "or," since a living person cannot have heirs. Ray v. Enslin, 2 Mass. 554, 556, 563. (2) In Beers v. Grant, 110 App. Div. 152, 154, 97 NYS 117, the court said: "I am not unmindful of the fact that, in order to give the will this construction, it is necessary to change the word 'and' in the language quoted to the word 'or,' but, as said in Roome v. Phillips, 24 N. Y. 463, 470, the rule is settled and should be adhered to that 'in all cases "or" is to be taken for "and" and "and" is to be taken for "or" as may best comport with the intent and meaning of the grant or devise.' See, also, Miller v. Gilbert, 144 N. Y. 68, 74, 38 NE 979. For the reason above stated this in my opinion is one of the cases where such a change should be made. To do so is to carry out the intent of the testator, as I read the will, and unless it is done the phrase quoted is redundant. The words are 'unmarried and without lawful issue.' If the daughter were unmarried, she could not have lawful issue, and the latter words of the phrase are superfluous. When, however, the conjunction is changed so that the phrase reads 'unmarried or without lawful issue' then the meaning becomes plain and the purpose of the testator clear, to wit, to preserve the estate to the children of his daughter, if any survive her, and to give her the power of testamentary disposition in case there should be no surviving children." (3) In Gibbes Mach. Co. v. Johnson, 81 S. C. 10, 13, 61 SE 1027, the court said: "There is great difficulty in many cases in determining whether a disjunctive interpretation shall be imposed on the word 'and,' or a conjunctive interpretation put on the word 'or,' or whether these words should be left to their natural meaning and effect. The decisions are not uniform, and do not appear generally to be governed by principle. This is wrong. 'Where there is nothing in the will to raise a contrary persuasion, the safest as well as the justest course is to assume that testators intend their words to be taken in their common and natural sense. . . . But where there is something to be inferred from the context of the will, something to guide us in the nature of the right, about which the particular clause under consideration treats, or where there is a clear, general intention which a literal construction of the particular clause would contradict or defeat, it would be not only unjust, but a gross violation of the true principles of decision to disregard these indices of intention and execute the will literally, according to its inaccurate terms. This would be little better than entrapping the testator by mere word-catching.' Shands v. Rogers, 28 S. C. Eq. 422, 424; Massey v. Davenport, 23 S. C. 453, 455. For these reasons the word 'and' should be changed to 'or.'"

72. Shepard v. Shepard, 57 Conn. 24, 28, 17 A 173; Shaver v. Ewald, 142 Ky. 472, 475, 134 SW 906 [reh den 143 Ky. 160, 136 SW 130]; Keniston v. Adams, 80 Me. 290, 295, 14 A 203; Butterfield v. Haskins, 33 Me. 392, 393; Reynolds v. Denman, 20 N. J. Eq. 218, 219; Ely v. Ely, 20 N. J. Eq. 43, 48; Lippincott v. Ridgway, 10 N. J. Eq. 164, 170; Beers v. Grant, 110 App. Div. 152, 154, 97 NYS 117; Phyfe v. Phyfe, 3 Bradf. Surr. (N. Y.) 45, 52; Armstrong v. Moran, 1 Bradf. (N. Y.) 314, 315; Chessman v. Wilt, 1 Yeates (Pa.) 411, 412; Denn v. Woodward, 1 Yeates (Pa.) 316, 319; Wood v. Mason, 17 R. I. 99, 102, 20 A 264; In re Best, [1904] 2 Ch. 354; In re Sutton, 28 Ch. D. 464; Wingfield v. Wingfield, 9 Ch. D. 658; Reed v. Braithwaite, L. R. 11 Eq. 514, 517; In re Kirkbridge, L. R. 2 Eq. 400; In re Sanders, L. R. 1 Eq. 675; Doe v. Rawding, 2 B. & Ald. 441, 447, 106 Reprint 427; Barker v. Young, 33 Beav. 353, 55 Reprint 404; Malmesbury v. Malmesbury, 31 Beav. 407, 54 Reprint 1196; Seccombe v. Edwards, 28 Beav. 440, 54 Reprint 435; Losh v. Townley, Coop. t. Brough 372, 47 Reprint 133; Coates v. Hart, 3 De G. J. & S. 504, 68 EngCh 381, 46 Reprint 731; Doe v. Jessep, 12 East 288, 104 Reprint 113; Grey v. Pearson, 6 H. L. Cas. 61, 10 Reprint 1216, 14 ERC 638; Turner v. Moor, 6 Ves. Jr. 559, 31 Reprint 1193; Re Huyck, 10 Ont. L. 480, 484; Forsyth v. Galt, 21 U. C. C. P. 408, 417 [aff 22 U. C. C. P. 115, 119].

[a] **For example,** in a will directing that testator's daughter should be supported out of his estate, when she should be sick and unable to support herself, "and" should be construed in its strict sense conjunctively, therefore she is not entitled to such support if she is not sick, although she is old and very infirm and unable to support herself. Reynolds v. Denman, 20 N. J. Eq. 218, 219.

[b] **"The words of a will are rarely changed,** not even 'and' for 'or,' and then only to effect the evident intent of the testator: never, to gratify the desires or wishes of a legatee, or to effect what might in itself seem more just or reasonable." Ely v. Ely, 20 N. J. Eq. 43, 49. See also Courter v. Stagg, 27 N. J. Eq. 305, 306.

[c] **A court cannot from arbitrary conjecture,** (1) although founded upon the highest degree of probability, add to a will or supply the omissions (Holmes v. Holmes, 5 Binn. 252, 258), or (2) arbitrarily expunge or alter words, as by reading "or" for "and" (Denn v. Woodward, 1 Yeates (Pa.) 316, 319).

[d] **Only in cases of absolute necessity.**—(1) In Denn v. Woodward, 1 Yeates (Pa.) 316, 319, the court said: "In construing a will, no word is to be rejected, which is not repugnant to the general intent. Courts of justice will transpose the clauses of a will, and construe 'or' to be 'and,' and 'and' to be 'or,' only in such cases when it is absolutely necessary so to do, to support the evident meaning of the testator." To same effect In re Tripp, 202 Pa. 260, 265, 51 A 983. (2) In Toothman v. Barrett, 14 W. Va. 301, 310, the court said: "As a general rule, words unambiguous in themselves ought not to be changed on account of the unreasonable disposition of the property, which would result from the plain meaning of the words. If the courts took such liberties with unambiguous language used by the testator, they would in effect be making a will for the testator, because

have applied, or have refused to apply, this construction of "and" as "or" to other instruments besides statutes and wills, in order to carry out the manifest intention of the parties. The question has arisen in numerous cases in connection with the following instruments: Affidavits;[73] bonds;[74] charters;[75] constitutions;[76] contracts of various sorts;[77] court rules and orders;[78] deeds;[79] grants of public land;[80] guaranties;[81] indictments, informations, and complaints;[82] injunction orders;[83] instructions;[84]

the will made by him was unreasonable. But the disjunctive 'or' and the copulative 'and,' are often used in conversation without due regard to their respective meanings; and sometimes they are thus loosely used by respectable authors. The courts have therefore taken the liberty frequently of correcting this blunder, when it has occurred in wills; and this to an extent they would not think of doing in the correction of any other supposed blunder, where the words of the testator, in their ordinary and grammatical sense were unambiguous. If this liberty of changing the words of the testator, when in themselves they are unambiguous, is confined to a few definite words, which like the disjunctive 'or' and the copulative 'and,' are often used improperly, and we can define with tolerable accuracy the cases, in which the court will take such liberty, no great danger will result. But if, on the other hand, there be no fixed and established rules defining, in what case the court will take such liberty, it is obvious, that great uncertainty must result and great mischief be done."

73. Hale v. Sweet, 40 N. Y. 97, 100 (holding that, where an insolvent act required the insolvent debtor to make affidavit that he had not at any time or in any manner whatever disposed of or made over any part of his estate for the future benefit of himself or family, an affidavit reading "for the future benefit of himself and his family" was insufficient).

74. [a] **"And" read "or."**—Chicago, etc., R. Co. v. Bartlett, 120 Ill. 603, 611, 11 NE 867; Olcott v. Tope, 115 Ill. A. 121, 126; McCall v. Trevor, 4 Blackf. (Ind.) 496, 497 (appeal bond); Hayman v. Hallam, 79 Ky. 389, 392 (forthcoming bond); Finckh v. Evers, 25 Oh. St. 82, 83 (execution bond); Robinson v. Brinson, 20 Tex. 438, 440 (appeal bond); American Surety Co. v. Koen, 49 Tex. Civ. A. 98, 100, 107 SW 938 (appeal bond); Molsons Bank v. Cooper, 17 Ont. Pr. 153, 154 (appeal bond).

[b] **For example,** the word "and" in the expression "joint and several bond" is the equivalent of "or." Blagden v. U. S., 18 App. (D. C.) 370, 373.

75. [a] **"And" read "or."**—Smith v. Madison, 7 Ind. 86, 90 (municipal charter); Wilson Stream Dam Co. v. Boston Excelsior Co., 105 Me. 249, 252, 74 A 115 (commercial charter); Triest v. New York, 55 Misc. 459, 464, 105 NYS 571 (municipal charter); Atty.-Gen. v. West Wisconsin R. Co., 36 Wis. 466, 486 (corporate charter).

[b] **For example,** where the charter of a corporation authorized it to loan money upon personal security and the pledge of goods and chattels, it was held that by "and" "or" was meant. Missouri Loan Bank v. How, 56 Mo. 53, 58.

76. [a] **"And" read "or."**—Haigh v. Bell, 41 W. Va. 19, 23, 23 SE 666, 31 LRA 131; State v. Davis, 31 W. Va. 390, 407, 7 SE 24; Jelly v. Dils, 27 W. Va. 267.

[b] **"And" not read "or."**—"And," as used in the twenty-sixth section of the schedule of the constitution, providing that all persons in office at the time of the adoption of the constitution "and" at the first election under it shall hold their offices until their term expires and their successors are qualified, should not be read "or." Com. v. Kilgore, 82 Pa. 396, 398. See also Com. v. Green, 58 Pa. 226, 230.

77. [a] **"And" read "or."**—Manson v. Dayton, 153 Fed. 258, 269, 82 CCA 588; United Engineering, etc., Co. v. Broadnax, 136 Fed. 351, 353, 69 CCA 177; Brittin v. Mitchell, 4 Ark. 92, 94 [quot Williams v. State, 99 Ark. 149, 152, 137 SW 927, AnnCas1913A 1056 and note]; Chapin v. Tisdale, 5 Hawaii 52, 53; Geiger v. Cawley, 146 Mich. 550, 553, 109 NW 1064; Barclay v. Charles Roome Parmele Co., 70 N. J. Eq. 218, 229, 61 A 715; Gibbes Mach. Co. v. Johnson, 81 S. C. 10, 13, 61 S. E. 1027 [quot Central v. Madden, 81 S. C. 7, 61 SE 1028].

[b] **"And" not read "or."**—Fredenburg v. Turner, 37 Mich. 402, 405; Texas Banking, etc., Co. v. Cohen, 47 Tex. 406, 414, 26 AmR 298. See also Atlantic Terra Cotta Co. v. Masons' Supply Co., 180 Fed. 332, 338, 103 CCA 462 infra note 46.

78. [a] **"And" read "or."**—"The order required the bond to be upon the condition that Sonneborn 'should prove that he is not bankrupt and the proceedings against him by the said petitioning creditors shall be dismissed.' Now what was meant by this language? We think the purpose to be accomplished by the bond, and the language of the bond given in pursuance of the order, show that the word 'and' should be read as 'or,' so that Sonneborn would have the indemnity in case he proved that he was not a bankrupt or the proceedings were dismissed." Sonneborn v. Libbey, 102 N. Y. 539, 550, 551, 7 NE 813.

79. [a] **"And" read "or."**—(1) A grantor conveyed all his right, interest, and estate in and to all the estate, real, personal, or mixed, of which J C and J C, Jr., died seized or possessed. It was argued that this would pass only all the joint estate of J C and J C, Jr. The court held that "and" was to be read "or," and that the grantor's interest in the estate passed, whether the interests of J C or J C, Jr., were joint or several. Litchfield v. Cudworth, 15 Pick. (Mass.) 23, 27. See Jackson v. Topping, 1 Wend. (N. Y.) 388, 396, 397, 19 AmD 515 (where it was said: "It is well settled at the present day, although for a long time a vexata questio in England, that the grammatical sense is not to be adhered to, either in a will or deed, where a contrary intent is apparent. . . . Lord Kenyon observed, that in deeds, certain legal phrases must be used, to create certain estates, but beyond that he would say with Lord Hardwicke, that there is no magic in particular words, further than as they show the intention of the parties"). (2) In deeds, "and" may be construed "or" where, from the whole instrument, such appears to have been the intent of the grantor. Jackson v. Topping, supra. To same effect Olcott v. Tope, 115 Ill. A. 121, 126; Long Island R. Co. v. Conklin, 32 Barb. (N. Y.) 381, 385; State v. Cain, 9 W. Va. 559, 569.

[b] **"And" not read "or."**—Thomas v. Perry, 23 F. Cas. No. 13,908, Pet. C. C. 49, 56; Beedy v. Finney, 118 Iowa 276, 280, 91 NW 1069.

80. [a] **"And" read "or."**—Sargent v. Simpson, 8 Me. 148, 154 (to effectuate the intent).

81. [a] **"And" not read "or."**—Mayer v. Cook, 26 Misc. 774, 775, 57 NYS 94.

82. [a] **"And" read "or."**—U. S. v. Delaware, etc., R. Co., 152 Fed. 269, 274; State v. Nicholson, 16 Del. 448, 449, 43 A 251; State v. Philbin, 38 La. Ann. 964, 966; Com. v. Keefe, 7 Gray (Mass.) 332, 335; Com. v. Clapp, 5 Gray (Mass.) 97; Com. v. Murphy, 2 Gray (Mass.) 510; State v. Kerr, 3 N. D. 523, 58 NW 27; State v. Conner, 30 Oh. St. 405, 407. Compare State v. Price, 37 La. Ann. 215, 219 ("willfully and maliciously"). In State v. Smith, 29 R. I. 513, 524, 72 A 710, the court said: "It is true that usually the pleader may use the word 'and' when the word 'or' is used in the statute. But it is worthy of consideration that statutes commonly forbid the commission of specified acts. From time immemorial the phrase, 'thou shalt not,' has been held to contain apt words of prohibition. But the statute in question differs from prohibitory ones in that it commands that certain things shall be done and provides a penalty for the non-performance thereof. Consequently a complaint brought thereunder must charge a defendant with inaction where action is commanded. The reason that the use of the word 'or' is inadmissible in complaints charging a defendant with the violation of prohibitory statutes is because it tends to leave the averment uncertain as to which of two or more things charged is meant; as for instance, to charge that the defendant did sell or suffer to be sold anything prohibited leaves a doubt in the mind of the reader as to which offence is intended; whereas if the charge is that the defendant did sell and suffer to be sold the forbidden things, it is certain that he is charged with both selling and suffering the same to be sold. Therefore certainty is the prime requisite. But in a complaint charging the violation of a statute, in which action is commanded, the use of the conjunctive word 'and' instead of the disjunctive 'or' would not make the allegation more certain."

[b] **"And" not read "or."**—Thomas v. State, 54 Ark. 584, 587, 16 SW 568; State v. Kansas City, etc., R. Co., 54 Ark. 546, 549, 16 SW 567; Burke v. Peo., 23 Ill. A. 36, 38; Com. v. Hadcraft, 6 Bush (Ky.) 91, 93; State v. Smith, 29 R. I. 513, 524, 72 A 710; Rex. v. Marsack, 6 T. R. 771, 101 Reprint 819.

83. [a] **"And" read "or."**—In construing an injunction order enjoining defendant from selling tea put up in packages like in shape or wrappers to the complainant's and from making use, in connection with the sale of tea, of the designation "Black Package Tea," the court said: "It is substantially admitted that the appellant violated the injunction by the use of packages and wrappers of the form enjoined; but, because he did not also put upon the packages the words 'Black Package Tea,' it is urged that he did not violate the injunction upon the ground that all these things must combine in order to constitute such violation. It is perfectly plain from a reading of the order that the word 'and' was used in a disjunctive and not in a conjunctive sense." Fischer v. Blank, 31 Hun 579, 580, 31 NYS 10 [aff 144 N. Y. 700 mem, 39 NE 857 mem].

84. [a] **"And" read "or."**—Heard v. State, 70 Ga. 597, 603; Meyer v. Baird, 120 Iowa 597, 599, 94 NW 1129; Fowler Packing Co. v. Enzenperger, 77 Kan. 406, 413, 94 P 995, 15 LRANS 784; Loewer v. Sedalia, 77 Mo. 431, 447; Hall v. Fond du Lac, 42 Wis. 274, 281.

[b] **"And" not read "or."**—Wilson v. Wheeling, 19 W. Va. 323, 349, 42 AmR 780. See Crow v. Beardsley, 68 Mo. 435 infra note 25.

[c] **Clerical error.**—The use of "and" instead of "or," where it was apparent that it was a clerical error of the trial court, was held immaterial. Heard v. State, 70 Ga. 597, 603.

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leases;[85] marine insurance policies;[86] mortgages;[87] orders;[88] ordinances;[89] and resolutions by directors.[90]

[§ 7] **C. In Connection with Other Words or Phrases.** Phrases in which the word has been used have reecived judicial interpretation, such as A "and to his assigns,"[91] "account for and pay over,"[92] "and after that,"[93] "and all and every such other person," etc.,[94] "and also,"[95] "and being,"[96] "and elsewhere,"[97] "and from any intermediate station,"[98] "and . . . had consented to,"[99] "and in addition to that,"[1] "and including,"[2] "and, in such other courts,"[3] "and my niece . . . and her six children,"[4] "and of this he puts himself upon the country,"[5] to do a certain thing in the performance of his contract after he had notice of a certain arrangement "and" had consented thereto, does not render the instruction erroneous on the ground that such use of the word constituted an assumption that defendant had consented to the arrangement).

1. Hart v. White, 26 Vt. 260, 268 (holding that the words "and in addition to that," at the commencement of a clause in a will, import the introduction of new and distinct matter).

2. Costello's Est., 16 Pa. Dist. 188 (where the court said: "Counsel for the exceptant contended that the use of the conjunction 'and' in the clause 'All the rest residue and remainder of my estate . . . and including the interests remaining after the deaths of Mrs. Hannah McFadden and Mrs. Bessie Shea' indicated the intention of the testatrix to give to her residuary legatees the principal of the fund bequeathed to Mrs. Shea for life, not as part of the residue, but as a bequest over. We cannot accept this view—had testatrix used the word 'including' only it would not have been construed as distinguishing the fund from general residue (Shimp's App., 1 WklyNC 521) and any good reason for a different interpretation of the expression 'and including' does not appear to us").

[a] **In addition.**—In State v. Montello Salt Co., 34 Utah 458, 463, 464, 98 P 549, a statute granted to the state public lands to the extent of two townships to be reserved for the state university, and in addition one hundred and ten thousand acres to be selected and located as provided, and "including" all the saline lands in said state, for the use of the university. It was held that the word "and" before "including" was used to express the relation of addition, and the word "including" was used in the sense of "also," so that the state was entitled to all the saline land, without selection, in addition to the one hundred and ten thousand acres to be selected and located.

3. Com. v. Green, 58 Pa. 226, 229, 230 (where, under a constitutional provision that the judicial power of the state should be vested in certain courts "and in such other courts as the legislature may from time to time establish," the words "and in such other courts" were held only to point to a partition of powers and that the word "and" could not be construed as "or").

4. Matter of Myhill, 149 App. Div. 404, 405, 406, 134 NYS 467 (holding that, where a testator devised all of his property to his wife for life, remainder to be equally divided between four named persons, and his niece and her six children, residing in England, and the condition of the various legatees did not appear but it was shown that the nonresident niece had eight, instead of six, children, the use of the word "and" before the words "my niece . . . and her six children" showed an intention on the part of testator to group the niece and her children together, and so they are entitled to but one share).

5. Bell v. Yates, 33 Barb. (N. Y.) 627, 629 [quot 2 Chitty Pl. 450] (holding that the phrase "and of this he puts himself upon the country" means that the truth of the fact so stated the party desires to have tried by a jury).

85. [a] **"And" read "or."**—Ludden v. Stern, 20 Ill. A. 88, 92; Doe v. White, 4 Bing. 276, 13 ECL 502, 130 Reprint 773; Chapman v. Dalton, Plowd. 284, 75 Reprint 434.

86. Davis v. Boardman, 12 Mass. 80, 82 (where insurance was effected on a ship in the United States. At the foot of the policy was this memorandum: "Should this vessel and cargo be insured in England, this policy is to be canceled." The court said: "It is not uncommon, in papers written without much attention to technical and grammatical rules, to find 'and' used for 'or,' and 'or' for 'and' [Rees v. Abbot, Cowp. 832, 98 Reprint 1386]. In this case neither word alone would have clearly expressed the intent of the parties. They intended, that, if vessel and cargo, or either of them, should be insured in England, this policy should attach only on what should remain uninsured by such policy effected in England").

87. Snow v. Pressey, 85 Me. 408, 416, 27 A 272 (holding that the phrase "claims due said Candee and Pressey," in a mortgage securing all legal claims due said C and P, was held capable of being construed to include individual debts of C, the courts saying that the words are fairly susceptible of more than one interpretation. They may mean claims due to the parties jointly, or they may mean claims due to them severally, or they may mean claims due to them jointly and severally).

88. See Sonneborn v. Libbey, 102 N. Y. 539, 551, 7 NE 813 supra 78 [a].

89. [a] **"And" read "or."**—Kansas City v. Grush, 151 Mo. 128, 132, 52 SW 286.

[b] **"And" not read "or."**—Philadelphia v. Arrott, 8 Phila. (Pa.) 41, 42.

[c] **Context and intent.**—In an ordinance "or" will not be substituted for "and" on mere conjecture as to the motives which induced the repeal of the former enactment. Such a change cannot properly be made in any case unless necessary to give effect to the intent of the legislature as disclosed by the context. Philadelphia v. Arrott, 8 Phila. (Pa.) 41, 42.

90. [a] **"And" read "or."**—A resolution of the directors of a corporation authorized certain officers to secure "any and all other creditors" by mortgages. It was held that this did not require a mortgage to secure all other creditors, as "and" should be read "or." Brown v. Grand Rapids Parlor Furniture Co., 58 Fed. 286, 291, 7 CCA 225, 22 LRA 817.

91. Chapman v. Dalton, Plowd. 284, 289, 75 Reprint 434 (meaning A "or his assigns").

92. Franklin v. Kirby, 25 Wis. 498, 502 supra note 65 [a].

93. Wright v. Georgia R., etc., Co., 216 U. S. 420, 423, 30 SCt 242, 54 L. ed. 544 ("and after that" shall be subject to a tax, etc.).

94. Allan v. Gordon, 1 Man. 132, 134 (where the court said: "The letters patent are issued to the subscribers of the petition, and to 'all and every such person or persons, as now is, are or shall at any time thereafter become shareholders in the said company under the provisions of the said Act, and of the by-laws of the company made under the authority thereof.' The words 'and all and every such other person, as now is and are,' I hold to mean those persons who have subscribed to the memorandum of association if any, but who are not subscribers to the petition").

95. See Noble v. Ayers, 61 Oh. St. 491, 493, 56 NE 199 (where, in construing a devise of a certain number of acres of land to a daughter "and also eighty-three acres of land in Liberty township, Butler county, Ohio, and on which she now lives, for and during her natural life time only," etc., the court said: "The words 'and also' couples the two tracts together as one devise, so that both are affected by the same limitation of title; and there are no circumstances to indicate a contrary intention. This conforms not only to what seems to be the natural, but to the usual construction of devises, so coupled. The words are equivalent to 'in like manner.' Morgan v. Morgan, 41 N. J. Eq. 235, 3 A 63"). To same effect Du Pont v. Du Bos, 52 S. C. 244, 259, 29 SE 665.

[a] **As copulative.**—Du Pont v. Du Bos, 52 S. C. 244, 259, 29 SE 665.

[b] **Connecting similar clauses.**—In a devise of a negro "and also lands for life," the words "and also" continue the clause, and the words "for life" refer to all that precedes, and make a devise of the negro for life as well as the lands synonymous. Anonymous, 3 N. C. 161.

[c] **"And" not equivalent to "and also."**—In construing a clause in a will providing in part, "I give and devise to my beloved husband James Silk my real property fronting on Detroit street in the village aforesaid out of which I direct that no debt legacy or other charge herein provided for shall be paid or taken and the rest and residue of my real property to have and to hold during the term of his natural life," the court said: "We are cited to one authority, and one only,—nor have we found any other after a somewhat diligent search,—where in a will the word 'and' is construed as being equivalent to the words 'and also.' This is Spirt v. Bence, Cro. Car. 368, 79 Reprint 921. The case is an old one, adjudged in the reign of Charles I, and, so far as we have been able to ascertain, has never been followed on this point." Silk v. Merry, 23 Oh. Cir. Ct. 218, 222, 223.

96. Prentice v. Northern Pac. R. Co., 154 U. S. 163, 174, 14 SCt 997, 38 L. ed. 947 (equivalent to "which is" in a description of land; "and being the land").

97. Opinion on the Construction of Maritime Contracts, 1 AmLJ 209. Here, where a seaman's shipping articles specified a voyage to "Curaçoa and elsewhere," it was held that "and" was not disjunctive, and that the master had no election by which he might change the voyage to some other port than Curaçoa. Any other construction would be contrary to the provisions of the act of congress which requires a specification of the voyage. "The terms 'and elsewhere,'" said Judge Winchester, "must therefore be construed as subordinate to the voyage specified, and can only authorize the pursuing such a course as may be necessary to accomplish the principal voyage, or, in other words, to import no more than the law would imply as incidental to the main contract."

98. Robinson v. Southern Pac. Co., 105 Cal. 526, 542, 38 P 94, 722, 28 LRA 773 supra note 65 [a].

99. Wreggitt v. Barnett, 99 Mich. 477, 479, 480, 58 NW 467 (holding that the use of the word "and," in an instruction that defendant had no right

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"and" / "or"[6] "and so,"[7] "and so forth,"[8] "and so on,"[9] "and so to his heirs and assigns,"[10] "any and all other creditors,"[11] "'assessments' and 'taxes,'"[12] "associate and cohabit together,"[13] "belonging to and due,"[14] "commission merchants and produce dealers,"[15] "contractor and all subcontractors,"[16] "death of grandson and granddaughter, if either have children,"[17] "debts due to and taxes assessed by,"[18] "dower and thirds" of his wife,[19] "enclose and secure,"[20] "if the father and mother" expose their child,[21] "fine and imprisonment,"[22] "freight and passengers,"[23] "hemstitched and also embroidered,"[24] "himself and family,"[25] "'hinder,' 'delay' and 'defraud,'"[26] "householders and freeholders,"[27] "house of prostitution and gaming,"[28] "intoxication and negligence,"[29] "lessee and lessor might enter,"[30] "license, regulate and prohibit,"[31] "loose, water soaked, and dangerous condition,"[32] "making and having with intent to pass,"[33] "the manufacture . . . and the conversion,"[34] "match and fuse,"[35] "organization and publicity,"[36] "papers and

6. Cuthbert v. Cumming, 10 Exch. 809, 814 (holding that a charter party to load a full and complete cargo of sugar, molasses, "and" / "or" other lawful produce, is to be construed to mean either a full cargo of sugar and molasses, or a full cargo of other lawful produce, or a full cargo of sugar and molasses and other lawful produce).

7. Com. v. Smith, 166 Mass. 370, 374, 375, 44 NE 503 (where an allegation in an information charged the offense of being present where gaming implements are found, "and so the said Denton . . . doth say that the said room, in manner and form aforesaid, was unlawfully used as and for a common gaming-house," it was held that the words "and so" did not have the effect of limiting the following allegation to the legal conclusion from what precedes, but the allegation is of a distinct substantive fact).

8. Agate v. Lowenbein, 4 Daly 62, 68 (where it was said that "and so forth" meant "of the like kind").

[a] **Patent ambiguity in a will.**—The term "&c." in a will devising property is a patent ambiguity not explainable by parol evidence. Taylor v. Maris, 90 N. C. 619, 624.

[b] **"Et cetera" synonymous.**—Agate v. Lowenbein, 4 Daly (N. Y.) 62, 68.

9. Nix v. Ray, 39 S. C. L. 423, 424, 426. In this case a father, by deed, gave a negro woman and her issue to his three daughters "and the future heirs of their body" to be equally divided between them. "Now, if either of the above-mentioned girls should die without any lawful heirs of their body, her property shall go to the surviving children, and so on." In construing this the court said: "But it is very plain that the words, 'and so, on,' were intended to apply to the succession of the donor's daughters, to each other, by survivorship. . . . It was to prevent uncertainty respecting his intention, that the words, 'and so, on,' were added. 'So' means, in like manner; and 'on' means, forward, in progression, successively. And these words are aptly used to express the intention of the donor, that, as on the death of the first daughter without any lawful heirs of her body, her share should survive to the other two; so, in like manner, on the death of a second daughter, her share should go to her survivor."

10. Keniston v. Adams, 80 Me. 290, 295, 14 A 203 (holding that the words, "and so to his heirs and assigns," clearly declare that the devisee may alienate the estate, or allow it to descend, and as he holds it so may his assigns or successors hold it).

11. Brown v. Grand Rapids Parlor Furniture Co., 58 Fed. 286, 291, 22 LRA 817, 7 CCA 225 supra note 90 [a].

12. State v. Irey, 42 Nebr. 186, 202, 60 NW 601 supra note 53.

13. Jones v. Com., 80 Va. 18, 19 supra note 69 [a].

14. Heffner v. Rice, 129 Mo. A. 667, 669, 670, 108 SW 590 (where, in construing an answer in a garnishment proceeding which admitted that at the time of service of garnishment "it had in its possession belonging to and due W. A. Rice the sum of sixty-eight dollars and ten cents," the court said: "Had the words 'and due' been omitted there would be no room for dispute as to the real meaning. We do not think it means anything definite or that it qualifies in the least the expressive language that of 'belonging to.' It may be considered at most, as a tautological expression").

15. Kansas City v. Grush, 151 Mo. 128, 132, 52 SW 286 (holding that the word "and," in an ordinance requiring commission merchants "and" produce dealers to obtain a license, may be construed to mean "or," there being no such general and prevailing custom of uniting produce dealers and commission merchants to one person, firm, or corporation as to lead to the conclusion that the ordinance was one intended to apply to the combination of both businesses).

16. Friedman v. Hampden County, 204 Mass. 494, 505, 90 NE 851 (holding that, where a statute provided that when public buildings or public works are erected, on which liens might attach for labor or materials if they belonged to private persons, it shall be the duty of the officers or agents contracting on the part of the commonwealth to provide security for payment by the contractors and subcontractors for all labor furnished and all materials used, etc., the word "and" in the phrase "for payment by the contractor and all subcontractors," was not used conjunctively, so as to require that the debts secured should be due from the contractor and a subcontractor jointly, but distributively, so as to require only that it should be due either from the contractor or some one of the subcontractors).

17. In re Tripp, 202 Pa. 260, 265, 51 A 983 ("and" being "or" to effectuate the testator's intention).

18. Bent v. Hubbardston, 138 Mass. 99, 100 (holding that, where a statute provided that debts due to and taxes assessed by the state or any county or town shall be preferred debts in the declaration of dividends on an insolvent estate, the words "'debts due to' and 'taxes assessed by'" being connected conjunctively in the statute, the intention was that each should be a preferred debt).

19. O'Hara v. Dever, 3 Abb. Dec. (N. Y.) 407, 410, 2 Keyes 558, 561, 2 AbbPrNS 418 ("and" being read as "or").

20. Fowler Packing Co. v. Enzenperger, 77 Kan. 406, 414, 94 P 995, 15 LRANS 784 (holding that the statement of the court in an instruction that defendant was required to inclose "and" secure the elevators did not impose a higher duty upon defendant than is prescribed by the statute, which provides that elevators shall "be properly and substantially enclosed or secured, in order to protect the lives and limbs" of employees).

21. State v. Smith, 46 Iowa 670, 672, 673 supra note 66 [b].

22. U. S. v. Vickery, 28 F. Cas. No. 16,610, 1 Harr. & J. (Md.) 427, 429 (holding that where fine and imprisonment are prescribed for an offense the courts are bound to inflict both). Compare Com. v. Griffin, 105 Mass. 185, 186 (where, in construing a statute giving a police court jurisdiction of the offense of keeping a liquor nuisance, with the provision that the fine imposed by them shall not exceed one hundred dollars "and" an imprisonment not exceeding one year, the offense having previously been punishable by the superior court by a fine not exceeding one thousand dollars or imprisonment not exceeding one year, it was held that the word "and" should not be construed as authorizing the police court to add the imprisonment to the fine, but rather as fixing a limit to the fine which may be imposed by that court, and also to limit the imprisonment which that court could impose).

23. Sturgeon Bay, etc., Ship Canal, etc., Co. v. Leatham, 164 Ill. 239, 243, 45 NE 422 supra note 64 [a].

24. Rice v. U. S., 53 Fed. 910, 912, 4 CCA 104 supra note 65 [a].

25. Geiger v. Kobilka, 26 Wash. 171, 66 P 423, 90 AmSR 733 supra note 64 [a].

26. Crow v. Beardsley, 68 Mo. 435, 439 (where, under a statute declaring that conveyances made with intent to hinder, delay, or defraud creditors, should be void, it was held that an instruction that the jury should find for defendant unless the conveyance was made to hinder, delay, and defraud creditors, was erroneous). To same effect Burgert v. Borchert, 59 Mo. 80.

27. Miller v. Jones, 80 Ala. 89, 95 ("and" read as "or").

28. Ex p. Chin Yan, 60 Cal. 78, 84 supra note 66 [a].

29. Loewer v. Sedalia, 77 Mo. 431, 447 (holding that "and," as used in an instruction that the burden of proof rests on defendant to establish the defense that plaintiff's injury resulted from his intoxication "and" negligence, does not mean that defendant must establish both intoxication and contributory negligence, but requires him only to prove such intoxication as culminated in negligence).

30. Doe v. White, 4 Bing. 276, 13 ECL 502, 130 Reprint 773 ("and" read "or").

31. Peo. v. Cregier, 138 Ill. 401, 416, 28 NE 812 supra note 68 [a].

32. La Salle v. Kostka, 190 Ill. 130, 137, 60 NE 72 (holding that, as used in a declaration alleging that a city disregarded its duty by failing to keep the earth, sand, and other substances of the walls or sides of a sewer firmly in place by suffering the earth, sand, and other substances to remain in a loose, water-soaked, "and" dangerous condition, "and" meant that the earth, sand, and other substances of the walls or sides of the ditch were in a condition beyond or in addition to that of a loose and water-soaked condition).

33. State v. Myers, 10 Iowa 448, 449 supra note 66 [b].

34. Reese's App., 122 Pa. 392, 416, 15 A 807 supra note 53 [a].

35. Masten v. Hunt, 51 Fed. 216, 218 supra note 53.

36. Eisfeld v. Kenworth, 50 Iowa

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effects,"[37] party . . . and his family, consisting of two adult persons,"[38] "purposely and carelessly,"[39] "reside upon and improve, in good faith,"[40] "sale and delivery,"[41] "in sawing and lumber,"[42] "secret stealing a letter and stealing the contents of such letter,"[43] "seized and possessed,"[44] "selling . . . and from making use . . . of,"[45] "shown on the drawings and described in specifications,"[46] "under age and without issue,"[47] "under the age of twenty-one years, unmarried, and without lawful issue,"[48] "under general laws and by uniform rules,"[49] "unmarried and without issue,"[50] "vessel and cargo,"[51] violation "of the first and second sections" of a penal statute,[52] "willfully and maliciously,"[53] "willingly executed the deed and does not wish to retract,"[54] "without an appointment, and also without other authority,"[55] without "due process of law and the judgment of his peers,"[56] "written consent and request,"[57] "writing and affidavit."[58]

ANEURISM. A soft pulsating tumor arising from the preternatural dilation or rupture of the coats of an artery.[59]

ANEW.[60] Over again. To hear and try a case anew is to try it over again.[61]

ANGER.[62] A strong passion or emotion of the mind excited by real or supposed injury to or intent to injure one's self or others;[63] a strong passion or

389, 390 [foll Seaton v. Grimm, 110 Iowa 145, 81 NW 225] supra note 64 [a].

37. Hughes v. Smith, 64 N. C. 493, 495 supra note 64 [b].

38. O'Brien v. Carson, 42 Iowa 553, 554 supra note 50 [a].

39. Hall v. Fond du Lac, 42 Wis. 274, 281 ("and" read as "or").

40. McLendon v. Bumpass, 51 Tex. Civ. A. 586, 589, 590, 114 SW 462 (where, in construing a statute providing that, if the purchaser of school land shall fail to reside upon and improve in good faith the land purchased, he shall forfeit the land, etc., it was held that in view of provisions in the preceding article, declaring that persons shall have the option of paying for their lands in full at any time "after they have occupied the same for three consecutive years," and that, when they have made such payment "together with the proof that they have occupied the land for three consecutive years," they shall receive patents, etc., the phrase "and improve in good faith" adds nothing to the requirement that the purchaser shall reside upon the land, and his failure to make improvements to an extent beyond that incident to the required settlement and occupancy is no ground for forfeiture of the sale).

41. State v. Murphy, 15 R. I. 543, 544, 545, 10 A 585 (where it was said: "The words 'and delivery' must be held to have been inserted by way of limitation, so as to make the keeping of the prohibited liquors, for sale within this State to be used as a beverage, criminal only when the keeper intends not only to sell, but also to deliver as well as to sell, within this State").

42. Fredenburg v. Turner, 37 Mich. 402, 405 (holding that a promise to pay in sawing and lumber will not be construed as a promise to pay in lumber or sawing at the option of either party).

43. U. S. v. Wight, 38 Fed. 106, 107 supra note 66 [a].

44. Barnes v. Raper, 90 N. C. 189, 191 supra note 64 [b].

45. Fischer v. Blank, 81 Hun 579, 580, 31 NYS 10 [aff 144 N. Y. 700, 39 NE 857] supra note 83.

46. Atlantic Terra Cotta Co. v. Masons' Supply Co., 180 Fed. 332, 338, 103 CCA 462 (where, under a contract requiring plaintiff to furnish terra cotta for a building "shown on the drawings and described in specifications," plaintiff claimed that the specifications were not furnished at the time it submitted its bid, and that the plans submitted did not include the terra cotta lintels and sills subsequently required, and for which plaintiff sought to charge as extra, it was held that the word "and," in the clause "shown on the drawings and described in specifications," was not necessarily to be construed in its disjunctive sense as "or," so as to require plaintiff to furnish terra cotta shown on either the drawings or described in the specifications, and that plaintiff was not required as a matter of law to furnish terra cotta for such lintels and sills under its contract for the contract price).

47. [a] **"And" read "or."**—(1) Brownsword v. Edwards, 2 Ves. 243, 249, 28 Reprint 157 [crit and overr Grey v. Pearson, 6 H. L. Cas. 61, 10 Reprint 1216, 14 ERC 638]. (2) One devised his estate to his son S, "provided and on condition he lives to the age of twenty-one years, and has issue of his body lawfully begotten; but in case my son Samuel shall die under the age of twenty-one years, and without issue as aforesaid," then to his son E and his heirs. The "and" in the first part of the devise was construed to mean "or," in order to carry into effect the intent of the testator. The court said: "We have just stated the reason given in the above cited cases, for substituting the word 'and' for the word 'or,' where the contingencies on which the devise over is to take effect are expressed disjunctively; namely, that if they were construed in that manner, the case might often happen that the first devisee might marry and die under age, leaving issue; the devise over would then take effect, and the issue be thus disinherited; an event, which the testator, surely, could never have intended. Now, to prevent such an undesigned and unwelcome consequence, and to render the law consistent with itself, the word 'and' in the sentence immediately following the devise to Samuel, should be construed 'or;' for if not so construed, then also if Samuel had died under age, leaving issue, they could have derived no benefit from the devise to their father, although the devise over never did or could take effect; and thus the whole devise would be completely frustrated. The same reason operates with equal force in both cases, and the same rule of construction, we apprehend, ought to operate in both." Sayward v. Sayward, 7 Me. 210, 215, 217, 22 AmD 191. (3) In Seabrook v. Mikell, 15 S. C. Eq. 80, 90, where land was devised to a person for life, with remainder to his issue, and if he should die under age without leaving lawful issue living at his death, then over, it was held that the testator meant under age or without issue, so as to give the remainder over, upon the death of the first taker without issue after he became of age.

[b] **"And" not read "or."**—Butterfield v. Haskins, 33 Me. 392, 394; Cheesman v. Wilt, 1 Yeates (Pa.) 411; Reed v. Braithwaite, L. R. 11 Eq. 514; Losh v. Townley, Coop. t. Brough. 372, 47 Reprint 133; Coates v. Hart, 3 De G. J. & S. 504, 68 EngCh 381, 46 Reprint 731; Doe v. Jessep, 12 East 288, 104 Reprint 113; Grey v. Pearson, 6 H. L. Cas. 61, 10 Reprint 1216, 14 ERC 638.

48. [a] **"And" read "or."**—Doe v. Rawding, 2 B. & Ald. 441, 447, 451, 106 Reprint 427.

49. State Bd. of Assessors v. New Jersey Cent. R. Co., 48 N. J. L. 146, 299, 4 A 578 supra note 50 [a].

50. [a] **"And" read "or."**—Janney v. Sprigg, 7 Gill (Md.) 197, 203, 48 AmD 557; Bell v. Phyn, 7 Ves. Jr. 453, 32 Reprint 183; Maberly v. Strode, 3 Ves. Jr. 450, 30 Reprint 1100.

[b] **"And" not read "or."**—Beers v. Grant, 110 App. Div. 152, 154, 97 NYS 117; In re Sanders, L. R. 1 Eq. 675; Seccombe v. Edwards, 28 Beav. 440, 54 Reprint 435.

51. Davis v. Boardman, 12 Mass. 80, 83 supra note 86.

52. Peo. v. Sweetser, 1 Dak. 308, 313, 46 NW 452 supra note 66 [a].

53. State v. Price, 37 La. Ann. 215, 219 (holding that the use of the copulative in "willfully and maliciously," when the statute has "or," does not vitiate the indictment).

54. Leftwich v. Neal, 7 W. Va. 569, 575 supra note 65 [a].

55. Com. v. Keefe, 7 Gray (Mass.) 332, 335 (complaints for unlawful sale of liquor); Com. v. Clapp, 5 Gray (Mass.) 97, 98; Com. v. Murphy, 2 Gray (Mass.) 510, 513.

56. Jelly v. Dils, 27 W. Va. 267, 274 ("and" read as "or"). To same effect Haigh v. Bell, 41 W. Va. 19, 23, 23 SE 666, 31 LRA 131; State v. Davis, 31 W. Va. 390, 406, 7 SE 24.

57. Com. v. Hadcraft, 6 Bush (Ky.) 91, 92, 93 (holding that, where a statute made it an offense to sell liquor to a minor "without the written consent or request" of the parent, an indictment charging a sale "without then and there having the written consent and request" of the parent was defective in that it required defendant to have not only the written consent, but also the written request).

58. U. S. v. Corbin, 11 Fed. 238, 239 supra note 52.

59. Webster D. [quot Lewis v. New York L. Ins. Co., 4 Hawaii 370, 374 (where it was held that aneurism was a "serious disease" within the meaning of that phrase as used in an application for life insurance)].

60. See De Novo [13 Cyc 786].

61. Neil v. Case, 25 Kan. 510, 514, 37 AmR 259 (where the court gave the above definition in construing a statute relating to appeals from the probate court, which provided that upon the filing of the transcript and papers in the office of the clerk of the district court, the court shall be possessed of the cause, and shall proceed to hear, try, and determine the same anew, without regarding any error, defect, or other imperfection in the proceedings of the probate court).

[a] **A trial anew** is a trial de novo. Ostrom v. Tarver, (Tex. Civ. A.) 29 SW 69, 70.

62. **Anger:**
As affecting degree of homicide see Homicide [21 Cyc 703, 736].
Impulse of, as defense to indictment for cruelty to animals see Animals [2 Cyc 349].
Justification for publication of libel see Libel and Slander [25 Cyc 415]. See also Malice [25 Cyc 1666]; Passion [30 Cyc 801]; Rage [32 Cyc 1470].

63. Chandler v. State, 141 Ind. 106, 115, 39 NE 444 [cit Webster D.].

[a] **"The word 'anger' has no technical meaning,** and it was, therefore, not error for the court to fail

emotion of displeasure or antagonism, excited by a real or supposed injury or insult to one's self or others by the intent to do such injury;[64] a violent passion of the mind excited by a real or supposed injury, or by an injury offered to a relative or friend;[65] passion; ire; gall; choler; indignation; displeasure; vexation; grudge; spleen;[66] a short madness.[67]

ANGINA PECTORIS. A disease of the heart, so named from a sense of suffocating contraction or tightening of the chest over the sternum, which causes anguish and fear of sudden death.[68]

ANGLE. The difference in direction of two intersecting lines; the space included between two intersecting lines.[69]

"**Angle bars**" are pieces of steel bolted in the hollow of the rails and holding ends of two rails together.[70]

ANGLIÆ JURA IN OMNI CASU LIBERTATI DANT FAVOREM.[71]

ANGLING. The act or art of fishing with a rod and line; rod fishing.[72]

ANGLO-INDIAN. An Englishman domiciled in the Indian territory of the British crown.[73]

to define 'anger.'" Robinson v. State, (Tex. Cr. A.) 63 S. W. 869, 870.

[b] **"Anger is not ordinarily classed as mental suffering.**—The Standard Dictionary defines it as, 'violent and vindictive passion or emotion, caused by injury or insult, real or imagined.' . . . It may be that the courts will hereafter offer a premium by way of damages for the cultivation of the emotion of mere anger, but we have been cited to no case where it has thus far been done, and we hardly feel yet prepared to thus further invade the field of speculative damages, at least, not until it is established by the verdict of the jury as just wrath, arising from an adequate cause, and of degree amounting to mental suffering." Ft. Worth, etc., R. Co. v. Jones, 38 Tex. Civ. A. 129, 134, 85 SW 37.

64. Webster D. [quot Morris v. Terr., 1 Okl. Cr. 617, 639, 640, 99 P 760].

[a] **Mere anger not synonymous with heat of passion.**—In passing on an instruction in a homicide case to the effect that "if the defendant was 'angered' at Herzog 'for knocking him down on the floor with his fist, and then killed him, as shown by the evidence,' unintentionally, it was the crime of murder in the third degree," the court said: "While it is true that anger may amount to heat of passion, mere anger is not synonymous with heat of passion. There seems to have been no claim that defendant was in heat of passion. Indeed, there was scarcely room for it. The provocation does not seem to have been sufficient. The quarrel arose out of a mere badinage at a country dance. The court evidently was not using the word 'anger' as a synonym for 'heat of passion,' and was not likely to be so understood. The instruction was not erroneous in that respect." Hoffman v. State, 97 Wis. 571, 575, 576, 73 NW 51.

65. Eanes v. State, 10 Tex. A. 421, 447 [cit Webster D.].

[a] **"Rage" or "resentment" distinguished.**—Where a statute provided that, if the killing of a person who has used insulting words or conduct toward a female relative of the party guilty of the homicide takes place on the first meeting after the party learned of such words or conduct, it is necessary, in order to reduce the offense to manslaughter, that an adequate cause exist to produce "anger," rage, resentment or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection at the time of the commission of the offense. It was held that anger means a violent passion of the mind excited by real or supposed injury offered to a relative or friend, and is not synonymous with "rage" or "sudden resentment." It is not necessarily rage, nor transport of passion, nor delirium, although it may be inflamed into such conditions. These are but higher and more demonstrative and uncontrollable types of its existence. It often happens that the uneducated mind will confound the cause with the higher degrees, and require that the same external exhibitions shall indicate its presence. Such is not the fact; "anger" may exist without any violent ebullition of passion, or even outward expression, and yet to such an extent as to render the mind incapable of cool reflection. It may present all "the torrent's smoothness ere it dash below," and its indicia are as varied as are the varied faces and dispositions of men. Eanes v. State, 10 Tex. A. 421, 446, 447.

66. Webster D. [quot Morris v. Territory, 1 Okl. Cr. 617, 639, 640, 99 P 760].

[a] **The term "malice"** includes all that anger does, and more. Chandler v. State, 141 Ind. 106, 115, 39 NE 444.

[b] **The words "anger" and "passion" are** interchangeable in common use among the people, in the everyday affairs of life, and mean practically the same thing. Morris v. Territory, 1 Okl. Cr. 617, 639, 640, 99 P 760, 101 P 111. In this case it was held that the use of the words "excitement" or "passion" in an instruction, in addition to the statutory word "anger," does not render the instruction more burdensome to defendant or in any manner interfere with any of his substantial rights.

[c] **"Excitement" distinguished.**—Morris v. Territory, 1 Okl. Cr. 617, 639, 640, 99 P 760.

67. Pennsylvania v. Bell, 1 Add. (Pa.) 156, 160, 1 AmD 298.

[a] **Outward aspects.**—In Eanes v. State, 10 Tex. A. 421, 447, the court said: "It is not necessarily rage, nor transport of passion, nor delirium, though it may be inflamed into such conditions. (Webster D.) These are but higher, and more demonstrative and uncontrollable types of its existence. It too often happens that the uneducated mind will confound the cause with the higher degrees, and require that the same external exhibitions shall indicate its presence. Such is not the fact. Anger may exist without any violent ebullition of passion, or even outward expression, and yet to such an extent as to render the mind incapable of cool reflection. It may present all 'the torrent's smoothness ere it dash below,' and its indicia are as varied as are the varied faces and dispositions of men."

68. Lee's Will, 46 N. J. Eq. 193, 199, 18 A 525.

[a] **The disease is marked** by sudden attacks of severe pain and fainting sensations. The paroxysms come on unexpectedly, with irregular intervals. As the disease continues, the respiration in the intervals between the paroxysms becomes labored, and the patient seeks temporary relief, not only in stimulants, but also in various, and at times, ridiculous, postures of the body. Lee's Will, 46 N. J. Eq. 193, 199, 18 A 525.

69. Century D.

[a] **"The angles of a lot** are well known points, determinable in a manner prescribed by law." Forsyth v. Boyle, 28 U. C. C. P. 26, 33.

70. Briley v. Atlantic Coast Line R. Co., 160 N. C. 88, 89, 76 SE 231 (on a railroad track).

71. A maxim meaning "The laws of England are favorable in every case to liberty." Bouvier L. D.

[a] **Applied in:** In re Gip Ah Chan, 6 Hawaii 25.

72. Century D.

[a] **Under an English statute prohibiting angling** between the beginning of the last hour before sunrise and the expiration of the hour after sunset it was held that fishing by night lines, consisting of two small pegs or stakes about six to eight inches long, which were pointed and driven into the bank of the stream with lines and hooks attached and with a stone weight attached to one of the lines to keep the line floating with the stream, was not angling within the statute. Barnard v. Roberts, 21 Cox C. C. 425.

73. Black L. D.

[a] **Anglo-Indian domicile.**—In Mather v. Cunningham, 105 Me. 326, 344, 74 A 809, 29 LRANS 76, 18 Ann Cas 692, the court said: "In its practical application, what does Anglo-Indian mean? It is simply the invention of a name. No new feature, except the name appeared in any of these cases that did not comport with all the general rules of acquiring a domicil in India. In alluding to this compound domicil Baggallay, L. J., in Ex p. Cunningham, 13 Q. B. D. 418, remarks: 'There are some anomalous cases in which a subject of the queen had entered into the service of the Old East India Company, and it was held that he had acquired what was called an Anglo-Indian domicil.' The phrase, 'What was called an Anglo-Indian domicil' is significant and disclosed that, in the mind of the learned Justice, no such domicil could be legally said to exist. It appears, as already stated, that the Anglo-Indian domicil was declared upon the ground that the East India Company was a permanent institution in India, and that those persons who entered its employ were, ipso facto, presumed to have abandoned their domicil of origin and to have become permanently located in India. Cotton, L. J., in the same case, takes emphatic exception to the elements of fact which the old cases declare are capable of constituting an Anglo-Indian domicil. He says: 'It is said that a Scotchman by entering the service of the East India Company acquired an Anglo-Indian domicil. I take exception to the expression 'by entering the service' of the East India Company. The ground of the decision in those cases was that the officer was residing in India under circumstances which showed that he intended to abandon his domicil of origin, under circumstances which rendered it his duty to reside there permanently. It was not the entering the service, but the residence in India under circumstances which required him to remain there, which caused the change of domicil. This is really what was said by Wood, V. C., in Forbes v. Forbes, Kay 341, 356, 69 Reprint 145: 'When an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be animo et facto in India.' In other words the learned Justice eliminates the East India Company.

ANGOSTURA. A bark, valuable as a febrifuge and tonic, the produce of Galipea or Cusparia febrifuga.[74]

ANGRY. Touched with anger; feeling resentment; provoked.[75]

ANGUISH.[76] Extreme pain, either of body or mind; agony; distress; pang; torment;[77] intense pain of body or mind;[78] pain of mind.[79]

ANGUS. The name of a "male person."[80]

ANHYDROUS. The absence of water, and the quality of taking it.[81]

which made whatever domicil was acquired, dependent, not upon the East India Company at all, but upon permanent residence in India. But eliminating the East India Company eliminates the component, 'Anglo,' from Anglo-Indian and leaves the Indian domicil only. The logic of these cases is that Anglo-Indian was a misnomer, as duty cannot be considered superior to volition in power to fix intention."

74. Siegert v. Abbott, 72 Hun 243, 246, 25 NYS 590 [cit Murray New English D.].

[a] **Derivation of word.**—(1) The name is derived from Angustura or Angostura, a town on the Orinoco, now called Ciudad Bolivar. Siegert v. Abbott, 72 Hun 243, 246, 25 NYS 590. (2) "Angostura is a common name in the Spanish language. One meaning is 'narrow' or 'contracted.' At the point where the city of Angostura was and is situated the river narrows. These narrows were known as 'the Angostura.' While there are many places, towns, or cities in old Spain and Spanish territory named 'Angostura,' I have no doubt the city of Angostura on the Orinoco river was given that name because of these narrows. After all, the first settlers there may have been from Angostura, in old Spain, and may have named the place from their home town. Boatmen approaching them say, 'We are coming to the angostura,' meaning the narrows of the river, not the city." Siegert v. Gandolfi, 139 Fed. 917, 919 [rev 149 Fed. 100, 102, 79 CCA 142, and certiorari den 205 U. S. 542, 27 SCt 790, 51 L. ed. 922], (where it was held that the word "angostura," although geographical, was a proper subject of trade-mark). To same effect Bauer v. Siegert, 120 Fed. 81, 84, 56 CCA 487.

"Angostura bitters" as valid trademark see Trade-Marks and Trade-Names [38 Cyc 724].

75. Chandler v. State, 141 Ind. 106, 115, 39 NE 444 [cit Webster D.].

[a] **"Malice" more comprehensive.**—An indictment for assault and battery, charging that the act was done unlawfully, feloniously, purposely, and with premeditated malice, is sufficient under an act making act done in an "angry" manner an assault, the word "malice" comprehending all that "angry" does, and more. Chandler v. State, 141 Ind. 106, 115, 39 NE 444.

76. Anguish:

As element of damage:

Generally see Damages [13 Cyc 39].

In action against telegraph company see Telegraphs and Telephones [37 Cyc 1775].

77. Webster D. [quot Cook v. Missouri Pac. R. Co., 19 Mo. A. 329, 334] (where the court, quoting the definition given in the text, said: "The objection urged against it is, that there was no allegation in the petition to authorize the admission of evidence, nor was there any special proof of mental suffering. Without conceding that such averment is necessary to be made in the petition, it is sufficient to say that the petition does distinctly aver: 'that he (plaintiff) has suffered great pain and anguish from the injuries so sustained.' The word 'anguish' certainly applies inter alia, to an operation of and upon the mind. . . . Mental suffering is so allied to and inseparable from physical injury, of the character in question, that it follows as effect does cause").

[a] **Derivation of word.**—"Anguish is defined to be "intense pain of body or mind' and is derived from anguis, a snake, referring to the writhing or twisting of the animal body." Dissenting opinion of Brown, J., in Dayvis v. Western Union Tel. Co., 139 N. C. 79, 89, 51 SE 898; Hancock v. Western Union Tel. Co., 137 N. C. 497, 501, 49 SE 952, 953, 69 LRA 403.

[b] **Suffering of physical nature.**—Regarding an instruction that "the plaintiff will be entitled to recover for pain and anguish, if any, which she has suffered or will hereafter suffer, so far as the same are shown by the evidence to be the direct result of the injury," the court said: "The objection being, that the word 'anguish' authorized the jury to allow damages for the humiliation or mental annoyance occasioned by the injury. An instruction substantially like this one, using the term 'anguish' in the sense here used, was before this court in the case of Sheridan v. Hibbard, 119 Ill. 307, 9 NE 901, and it was there said: 'The sole purpose of the instruction was to tell the jury what the elements of damages were and which should be taken into consideration by them in the event they found the defendant guilty, and for this purpose we think the instruction was substantially correct.' We do not think the jury could have misunderstood the very apparent meaning of the word in the connection in which it was used in this instruction. It clearly referred to suffering of a physical nature, and is in its terms within the rule laid down in Cicero, etc., St. R. Co. v. Brown, 193 Ill. 274, 276, 61 NE 1093." Evanston v. Richards, 224 Ill. 444, 447, 79 NE 673.

78. Stornmouth D. [quot Hancock v. Western Union Tel. Co., 137 N. C. 497, 501, 49 SE 952, 953, 69 LRA 403].

[a] **"Disappointment" and "regret" distinguished.**—(1) In Hancock v. Western Union Tel. Co., 137 N. C. 497, 500, 49 SE 952, 69 LRA 403, the court said: "The Judge among other things charged the jury that 'upon the question of damages the message upon its face disclosing its urgency and relating to death, the defendant had notice that a failure to deliver might reasonably cause mental anguish to the sender, and in such case the damages for mental anguish are such damages as the jury shall find the plaintiff has suffered from disappointment and regret occasioned by the fault or neglect of the company in its failure to notify the sendee, in order that preparations and arrangements might be made for the reception and interment of the body.' The Court erred in using the words 'disappointment and regret.' There is a very material difference between the significance of those words and that keen and poignant mental suffering signified by the words 'mental anguish.' The right to recover damages for purely mental anguish, not connected with or growing out of a physical injury, is the settled law of this State and it is too late now to question it. Our authorities are up to this time uniform and unanimous as to the general doctrine. Differences of course arise as to its application in particular cases. Young v. Western Union Tel. Co., 107 N. C. 370, 385, 11 S. E. 1044, 22 AmSR 883, 9 LRA 669, to Hunter v. Western Union Tel. Co., 135 N. C. 458, 47 S. E. 745. The language used in nearly all the cases in this and other States where such damages are allowed is 'grief and mental anguish.' We do not find anywhere that damages are allowed for 'disappointment and regret.' The lexicographers define anguish to be 'intense pain of body or mind.' It is derived from the Latin word 'anguis,' a snake, referring to the writhing or twisting of the animal body when in great pain." (2) In Hunter v. Western Union Tel. Co., 135 N. C. 458, 462, 47 SE 745 [quot Hancock v. Western Union Tel. Co., 137 N. E. 497, 501, 49 SE 952, 953, 69 LRA 403], Mr. Justice Douglas, speaking for the court, said: "We use the word 'anguish' as indicating a high degree of mental suffering, without which the plaintiff should not recover substantial damages. Mere disappointment would not amount to mental anguish or entitle the plaintiff to more than nominal damages."

79. Webster D. [quot Tomasi v. Donk Bros. Coal, etc., Co., 257 Ill. 70, 75, 100 NE 353].

[a] **"Pain and anguish."**—Tomasi v. Donk Bros. Coal, etc., Co., 257 Ill. 70, 75, 100 NE 353; Indianapolis, etc., R. Co. v. Stables, 62 Ill. 313, 320.

80. U. S. v. Cannon, 4 Utah 122, 125, 7 P 369 (where it was said: "The name Angus is in this community recognized as that of a 'male person,' the defendant himself, however, being the most public character bearing the name. Outside of this community it is well recognized as a male appellative"). See Names [29 Cyc 272].

81. Jaffe v. Evans, 70 App. Div. 186, 191, 75 NYS 257.

[a] **"Hydrous" compared.**—"'Hydrous' is the scientific term indicating the presence of water; while 'anhydrous' signifies the absence of water and the quality of taking it up. The term 'anhydrous,' therefore, might properly be applied to the plaintiffs' product after the water it contained was driven off; and thus it becomes evident that the use of the words 'hydrous' and 'anhydrous,' in connection with lanoline, would have a definite meaning and be entirely understood by every one familiar with its nature and characteristics. Hence, no one would be misled by the addition of these words, although, strictly speaking, the phrase 'hydrous lanolin' may be tautological and 'anhydrous lanolin' a contradiction of terms." Jaffe v. Evans, 70 App. Div. 186, 191, 75 NYS 257.

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